

1 ISSUES

2 The parties executed a Marital Settlement Agreement (MSA) dated July 9, 2004 that
3 entitles Ms. Furer to receive a number of shares of Washington Mutual stock. The Court
4 issued an Order determining the MSA to be valid on November 14, 2006. Ms. Furer (while
5 represented by former counsel) asked the Court to find that the MSA was effective on the
6 date the Court ruled it to be valid. The Court granted Ms. Furer's request. Ms. Furer now
7 argues that granting her request was an error and that the Court should rule that the MSA
8 was effective on the date it was signed by the parties. At issue are the dividends paid on
9 the Washington Mutual stock between the date the MSA was executed and the date it was
10 ruled to be valid.

11 In response to motions filed by Ms. Furer (while represented by former counsel), the
12 Court issued Orders that granted her interim spousal support and attorney fees. In her
13 pending Motion to Amend, Ms. Furer denies that payments she received under those
14 Orders were interim spousal support and attorney fees. She alleges the payments were a
15 partial distribution of the dividends she claims in her present motions. She protests that
16 "everybody was wrong, the court and the lawyers."

17 Ms. Furer's motion specifically argues the Court should amend or alter its findings
18 and decree because (1) the findings are insufficient to uphold the ruling that Ms. Furer is
19 not entitled to dividends from the date the MSA was executed by the parties and (2) the
20 findings are insufficient to uphold the ruling that Mr. Furer should receive reimbursement
21 for interim spousal support and attorney fees paid to Ms. Furer after the Court ruled the
22 MSA to be valid.

23 In her Motion for New Trial, Ms. Furer alleges that the parties and the Court have
24 failed to address the Washington Mutual stock dividends. This failure, she alleges, is a
25 mutual mistake of fact by the parties that unjustly enriches Mr. Furer. Ms. Furer further
26 contends that the dividends are an omitted asset subject to the post-decree distribution.
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1 In opposition to the Motion to Amend, Andrew Furer contends the doctrine of judicial
2 estoppel prevents Ms. Furer from arguing a legal position that is inconsistent with the legal
3 positions she advocated previously in this litigation.

4 In opposition to the Motion for New Trial, Mr. Furer identifies places in the record
5 where the dividends were addressed by the parties and the Court.

6 The issues to be resolved by the Court are: (1) Is the ruling that Ms. Furer is not
7 entitled to dividends paid between July 9, 2004 and November 14, 2006 supported by
8 findings sufficient to indicate the factual basis for the ruling? (2) Is the ruling that Mr. Furer
9 is entitled to reimbursement for support payments made after November 14, 2006
10 supported by findings sufficient to indicate the factual basis for the ruling? (3) Did the
11 parties fail to address the Washington Mutual stock dividends and thereby make a mutual
12 mistake of fact that unjustly enriched Mr. Furer? (4) Are the Washington Mutual stock
13 dividends an omitted asset that was un-adjudicated during the divorce? (5) Does the
14 doctrine of judicial estoppel preclude Ms. Furer from obtaining the relief she seeks?

15 16 FINDINGS OF FACT

17 The parties executed a Marital Settlement Agreement on or about July 9, 2004.

18 The MSA provides that Ms. Furer will receive a certain number of shares of
19 Washington Mutual stock. The MSA provides that the parties are not entitled to temporary
20 spousal support. The MSA also requires the parties, initially, to bear their own costs of
21 litigation and attorney fees, subject to an award to the prevailing party.

22 Ms. Furer contested the validity of the MSA in this litigation.

23 In this litigation Ms. Furer asked for awards of interim spousal support and attorney
24 fees by motions filed July 25, 2005 and March 16, 2006. Ms. Furer's motions were
25 granted by orders of September 9, 2005 and April 14, 2006. In accordance with these
26 orders, Ms. Furer received monthly payments from Mr. Furer during the pendency of this
27 action for spousal support and attorney fees. The April 14, 2006 Order stated, "These
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1 interim payments do not prejudice the right of either party to argue how these payments
2 should be characterized in relation to the final distribution between the parties."

3 On November 14, 2006 the Court issued its "Order After Trial" that ruled the parties'
4 July 9, 2004 MSA is valid.

5 The parties filed a Joint Brief Regarding Issues in Phase III of Litigation on February
6 2, 2007. In pertinent part, that document states: "Mrs. Furer's position is that a marital
7 agreement is not effective until it is approved by the Court." (page 2, lines 9-10); "Mrs.
8 Furer believes that the interim payments were never classified by the Court. Mrs. Furer
9 believes those payments were property settlement." (page 4, lines 12-13); and "Mrs.
10 Furer's position is there could be no breach of the MSA until approved by the Court." (page
11 11, lines 19-20). At pages 25-26 the parties set forth their different positions in relation to
12 the Ms. Furer's claim for dividends, and describe the discovery, briefing and court action
13 necessary to resolve Ms. Furer's claim.

14 Plaintiff's Trial Statement of July 2, 2007, page 7, lines 1-8, states: "Mrs. Furer is
15 entitled to receive 570,000 shares of stock and the dividends on her share of the WAMU
16 stock, subject to offsets and damages. Mrs. Furer claims the contract is not valid until
17 November of 2006, but then inconsistently claims she is entitled to dividends and
18 appreciation from July of 2004. She clearly can't have it both ways."

19 The Court adopted Ms. Furer's position in relation to the effective date of the MSA
20 and that adoption is reflected in the Findings of Fact, Conclusions of Law and Decree of
21 Divorce. Consistent with Ms. Furer's position the Court ruled that Ms. Furer's lack of
22 compliance with the MSA before it was determined to be valid by the Court does not give
23 rise to a claim for contract damages. Also in accordance with Ms. Furer's position the
24 Court ruled that Ms. Furer was entitled to spousal support and attorney fees under law
25 before November 14, 2006 and to dividends and interest under the MSA after that date.

26 Support for the divorce decree's rulings on Ms. Furer's entitlement to dividends and
27 Mr. Furer's entitlement to reimbursement for support payments is found at Findings of Fact
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1 paragraphs 6-11, 14-20, 22-26, 36 and 50 and at Conclusions of Law paragraphs 4-17, 23,
2 28, 29, 33 and 34.

3 Ms. Furer's hired twelve lawyers during the litigation and discharged ten. She
4 interfered with their presentation of her case by her conduct in and out of the courtroom.
5 She failed to comply with multiple court orders regarding briefing of the issues to be
6 decided by the Court. In her pending motions, Ms. Furer's present counsels advance new
7 arguments and authorities related to the dividend issue that were not offered at trial.
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9 PRINCIPLES OF LAW

10 A motion to amend findings is authorized by NRCP 52(b).

11 A motion to alter or amend a judgment is authorized by NRCP 59(e).

12 A court may modify a judgment under NRCP 60(b) for mutual mistake when the
13 party seeking relief is without fault or inexcusable neglect. Nevada Indus. Development,
14 Inc. v. Benedetti, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987).

15 In any suit for divorce the court may require one party to pay monies to the other
16 party for temporary maintenance and to defend the suit. NRS 125.040.

17 Community property left adjudicated in a divorce can be later divided by the
18 court. Amie v. Amie, 106 Nev. 541, 796 P.2d 233 (1990).

19 Judicial estoppel applies when five criteria are met: (1) the same party has taken
20 two positions; (2) the positions were taken in judicial or quasi-judicial administrative
21 proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal
22 adopted the position or accepted it as true); (4) the two positions are totally inconsistent;
23 and (5) the first position was not taken as a result of ignorance, fraud, or mistake. Marcuse
24 v. Del Webb Communities, Inc., 123 Nev. Adv. Op. 30, 163 P.3d 462 (2007).

25 Judicial estoppel applies only when a party's inconsistent position arises from
26 intentional wrongdoing or an attempt to obtain an unfair advantage. The doctrine of judicial
27 estoppel does not preclude changes in position that are not intended to sabotage the
28 judicial process. Id.

1 ANALYSIS

2 Both pending motions ask the court to award Ms. Furer dividends paid for
3 Washington Mutual stock prior to November 14, 2006.

4 On July 25, 2005 and March 16, 2006 Ms. Furer filed motions for spousal support
5 and attorney fees that were granted by the Court. Ms. Furer now argues that her lawyers
6 were wrong in presenting those motions and the court was wrong in granting them.

7 Ms. Furer is in the awkward position of arguing that the Court made a critical error
8 by adopting her argument as to the effective date of the MSA.

9 The MSA provides that Ms. Furer is not entitled to interim support or attorney fees.
10 Before the effective date of the MSA, Mrs. Furer was entitled to interim support and
11 attorney fees under NRS 125.040. After the effective date of the MSA, Ms. Furer was not
12 entitled to interim support or attorney fees.

13 The MSA provides that Ms. Furer is entitled to certain shares of Washington Mutual
14 stock. Before the effective date of the MSA, the MSA did not entitle Ms. Furer to any
15 shares or dividends. After the date of the MSA, Ms. Furer was entitled by the MSA to
16 shares of Washington Mutual stock and dividends.

17 The Court ruled in the divorce decree that the MSA became effective upon the
18 Court's determination of its validity. Causes of delay in that determination were Ms. Furer's
19 insistence that the MSA is invalid and her litigation conduct. The Court determined the
20 MSA to be valid by Order of November 14, 2006. Hence, the effective date of the MSA is
21 November 14, 2006.

22 Ms. Furer's request for new trial is based upon her allegation that the parties failed
23 to address the dividend issue in the divorce and, thereby, made a mutual mistake of fact.
24 This argument overlooks the record in relation to the dividend issue, perhaps because the
25 record in this case is unusually voluminous. The fact that present counsels have
26 developed new arguments and identified different authorities than their predecessors does
27 not constitute a mutual mistake of fact.

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1 Applying the five-factor test described above to Ms. Furer's conduct, it becomes
2 clear that judicial estoppel is an appropriate basis upon which to deny the motion to alter or
3 amend. Here, Ms. Furer took totally inconsistent positions before and after the decree of
4 divorce was entered. Also, because the district court adopted Ms. Furer's position in the
5 divorce decree, Ms. Furer was successful in asserting her first position. Finally, the record
6 fails to indicate that Ms. Furer took her first position as a result of ignorance, fraud, or
7 mistake.

8 Ms. Furer's conduct in asserting the inconsistent positions satisfies the judicial
9 estoppel test. Ms. Furer benefited from her first position in relation to the Court's resolution
10 of Mr. Furer's claim for contract damages. Ms. Furer does not ask the Court to alter its
11 determination in relation to that claim. The selective nature of Ms. Furer's requested
12 application of her second position, if granted, would result in the simultaneous application
13 of each of her inconsistent positions to Ms. Furer's greatest advantage. This is unfair.

14 15 CONCLUSIONS OF LAW

16 The ruling that Ms. Furer is not entitled to dividends paid between July 9, 2004 and
17 November 14, 2006 is supported by findings sufficient to indicate the factual basis for that
18 ruling.

19 The ruling that Mr. Furer is entitled to reimbursement for support payments made
20 after November 14, 2006 is supported by findings sufficient to indicate the factual basis for
21 that ruling.

22 Ms. Furer's allegation that the parties failed to address the Washington Mutual stock
23 dividends and thereby made a mutual mistake that unjustly enriches Mr. Furer is without
24 merit.

25 The Washington Mutual stock dividends were adjudicated in this case and are not
26 an omitted asset.

27 The relief sought by Ms. Furer is precluded by the doctrine of judicial estoppel.
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1 ORDER

2 Eloisa Furer's Motion to Amend or Alter the Findings of Fact and Judgment
3 Pursuant to NRCP 52(b) and 59(e) and her Motion for New Trial are denied.
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6 IT IS SO ORDERED:

7 Dated this 25 day of April, 2008

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Chuck Welles

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DISTRICT COURT JUDGE

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court, and that on the 25 day of April, 2007, I deposited for mailing, first class postage pre-paid, at Reno, Nevada, a true and correct copy of the foregoing document addressed to:

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