

2007

Larae Jensen , nka Larae Thorpe v. Raymond Jensen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILLIAM A. JENSEN

Petitioner/Appellee,

vs.

SONJA JENSEN

Respondent/Appellant.

Case No. 20070312

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(h) (1953 as amended)

STATEMENT OF ISSUE ON APPEAL AND STANDARD OF REVIEW

Pursuant to Utah R. App. P. 24(a)(5), Respondent/Appellant is required to provide a statement of each issue for review along with “the standard of appellate review with supporting authority[.]” Appellant’s Statement of the Issues Presented for Review alleges a standard of review but fails to cite any supporting authority for the alleged standard of review.

I. The trial court made adequate findings of fact when awarding Ms. Jensen \$2,581.00 per month alimony for a period of five years.

Standard of Review: “Trial 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”. Davis v. Davis, 2003 UT App. 282, ¶7, 76 P.3d 716 (alterations omitted)(quoting Breinholt v. Breinholt, 905 P.2d 877, 879 (Utah Ct. App. 1995).

II. The trial court did not abuse its discretion in setting aside the stipulation of the parties to sell the home and divide the equity based upon the appraised value.

Standard of Review: “Property settlements are not binding upon trial courts in divorce proceedings.” Nunley v. Nunley, 757 P.2d 473, 475 (Utah Ct. App. 1988), citing Clausen v. Clausen, 675 P.2d 562, 564 (Utah 1988) (“a property settlement agreement is

not binding upon the trial court in a divorce action”). “It is well recognized that the parties’ stipulation as to property rights in a divorce action, although advisory and usually followed unless the court finds it to be unfair or unreasonable, is not necessarily binding on the trial court. It is only a recommendation to be adhered to if the court believes it to be fair and reasonable.” Dayton v. Dayton, 2003 UT App 205, ¶2.

III. The trial court appropriately dealt with the personal property of the parties.

Standard of Review: A trial court’s determination of a property division will only be changed if there was a “misunderstanding or misapplication of the law resulting in a substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion”. Davis v. Davis, 2003 UT App 282 ¶8, 76 P.3d 716 (quoting Bradford v. Bradford, 199 UT App 373, ¶ 25, 993 P.2d 887).

IV. The trial court appropriately adjusted the division of the real property equity to compensate Mr. Jensen for payments on the Arizona mortgage during the pendency of the action.

Standard of Review: A trial court’s determination of a property division will only be changed if there was a “misunderstanding or misapplication of the law resulting in a substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion”. Davis v. Davis, 2003 UT App 282 ¶8, 76 P.3d 716 (quoting Bradford v. Bradford, 199 UT App 373, ¶ 25, 993 P.2d 887).

V. The trial court appropriately denied Ms. Jensen's request for retroactive alimony based upon the lack of evidence to support her claim.

Standard of Review: "Trial 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". Davis v. Davis, 2003 UT App. 282, ¶7, 76 P.3d 716 (alterations omitted)(quoting Breinholt v. Breinholt, 905 P.2d 877, 879 (Utah Ct. App. 1995). "Where an appellant fails to satisfy the marshaling requirement, we are required to assume that the findings of the court are supported by the evidence." Beynon v. Clah, 2004 UT App 268 (citing Johnson v. Higley, 1999 UT App 278, ¶ 37, 989 P.2d 61).

VI. The trial court correctly exercised its broad discretion in denying Ms. Jensen's Rule 60 Motion.

Standard of Review: The trial court is afforded broad discretion in ruling on a motion for relief from judgment under Subdivision (b), and its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Utah Ct. App. 1989).

VII. The trial court had a reasonable basis to deny an award of attorney fees.

Standard of Review: The decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court. Childs v. Childs, 967 P.2d 942, 947 (Utah Ct. App. 1998). A trial 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)

STATEMENT OF THE CASE

Nature of the Case

Ms. Jensen appeals the Decree of Divorce entered in a divorce action that was filed in 2003. The parties had been married approximately 16 years and had two children. At the time of the divorce filing, Mr. Jensen had custody of the parties' two teenage daughters as well as possession of the parties' home in Murray. At that time, Mr. Jensen was employed earning \$10,000.00 per month and Ms. Jensen was receiving disability payments of approximately \$800.00 per month plus some amounts for lump sum settlements. Additionally, at that time the parties had a stock account and cash assets.

Despite the lack of relationship with her teenage daughters, Ms. Jensen filed numerous motions in regard to parent-time and sought a custody evaluation. Ms. Jensen filed motions to disqualify the custody evaluator whom she had nominated and had appointed by the Court. Ms. Jensen asked the Court for a two week trial to litigate the issue of custody of a 15-year-old and a 17-year-old despite the evaluator's recommendation contrary to Ms. Jensen's position. Subsequently, the parties stipulated that Mr. Jensen would have sole custody of the parties' daughters and that Ms. Jensen would have parent-time as she and the remaining minor child could agree. The trial was

reduced from the two weeks scheduled to two days to deal with the issues of alimony and property division.

Prior to the trial, Mr. Jensen discovered that Ms. Jensen was employed by a company called CRS where she was working under an assumed name. Ms. Jensen's job was to recruit persons who had been defrauded by Ms. Jensen's father into participating in an attempt to bypass the Trustee who had been court-appointed to liquidate the assets of her father's former company. Further, Ms. Jensen previously testified that she had been employed in a multi level marketing company working 40 hours per week.

After hearing and reviewing the evidence over the course of a two day trial as well as closing arguments, the trial court made detailed findings awarding Ms. Jensen alimony in the amount of \$2,581.00 for a period of five years. The court valued the marital real property based upon the appraised value of the properties and divided the equity equally. The trial court adjusted the property division in the form of the equity from the real property by an amount equal to one-half the mortgage payments made by Mr. Jensen for the Arizona condominium during the time that issue was specifically reserved and while Ms. Jensen had exclusive use and possession of the condominium. The trial court determined that insufficient evidence was presented as to the value of the personal property and so ordered the personal property sold. The trial court divided equally the retirement plans of the parties. The trial court found that insufficient evidence had been presented by Ms. Jensen in connection with her claim for retroactive alimony to a time prior to the temporary alimony order and found that there was insufficient evidence to

support an award of attorney fees to either party even though both parties sought an award of fees.

Course of Proceedings and Disposition Below

Petitioner filed a Verified Petition for Divorce on August 21, 2003. R. 1-6. Respondent filed an Answer and Counter-Petition on March 31, 2004. R. 57-61. A Recommendation and Order dealing with custody and parent-time and reserving further financial issues was entered on April 26, 2004. R. 182-185. The court entered a Recommendation and Order on August 24, 2004 requiring Petitioner to pay to Respondent the monthly sum of \$2,859.00 for temporary alimony effective June 11, 2004. R. 661-663. The Court entered a Recommendation and Order on February 7, 2006 requiring Petitioner to pay the mortgage payment on the Arizona condominium and reserving for trial reapportionment of those payments. R. 1374-1376. On June 28 and 29, 2006 the trial court heard testimony and received evidence. On June 29, 2006 the parties stipulated that the Murray home would be immediately sold and the proceeds divided. T. 422-426. On July 18, 2006 Petitioner filed a Motion to Set Aside Stipulation. R. 1444-1446. On July 29, 2006 the trial court heard closing arguments from the parties. On August 21, 2006 the trial court announced its findings of fact and conclusions of law. R. 1456-1457. On the 29th day of September, 2006 the court entered a Minute Entry granting Mr. Jensen's Motion to Set Aside Stipulation. R. 1543-1544. On February 26, 2007 Respondent filed a Motion to Set Aside portions of the Minute Entry. R. 1557-1560. On April 2, 2007 the trial court entered its Findings of Fact and Conclusions of

Law (R. 1575-1590) and a Decree of Divorce. R. 1595-1599. On April 12, 2007 Respondent filed a Notice of Appeal. R. 1600-1601.

Statement of Relevant Facts

1. The parties to this action were married in December, 1987 and separated in June, 2003. R. 1-6.
2. The parties are parents of two daughters, Johanna born the 9th day of August, 1988, and Amanda, born the 1st day of April, 1990. R. 2.
3. The court appointed a custody evaluator to perform a custody evaluation. R 491-494.
4. Based upon the results of the custody evaluation, the parties stipulated that Mr. Jensen would be awarded primary legal and physical custody of the parties' minor child and Ms. Jensen would have parent-time as she and the remaining minor child could agree. R. 1576 ¶9.

SUMMARY OF ARGUMENT

The trial court made adequate findings in regard to the required elements of an alimony analysis. The trial court analyzed Ms. Jensen's needs and ability to meet her needs as well as Mr. Jensen's ability to pay. The trial court made specific findings concerning Ms. Jensen's monthly needs and that Ms. Jensen had overstated and exaggerated certain claims for expenses. The trial court also made specific findings as to Ms. Jensen's ability to meet her needs when imputing income to her. Ms. Jensen fails to

marshal any evidence to show that the factual findings of the trial court are clearly erroneous.

The trial court correctly set aside the stipulation to immediately sell the home where Mr. Jensen and the minor child resided and appropriately valued the home consistent with the appraised value. Trial courts have broad discretion to deal with property in a divorce action. The trial court heard evidence of the value of the home by way of a certified appraisal. The trial court rejected the value claimed by Ms. Jensen and valued the home pursuant to the appraisal. The trial court determined that the best interests of the minor child were served by granting Mr. Jensen's motion to set aside the stipulation to immediately sell the home where he and the minor child resided. Ms. Jensen fails to demonstrate that the trial court abused its broad discretion.

The trial court correctly determined that there was insufficient evidence as to the value of the parties' personal property and ordered that the personal property would be sold and the proceeds divided equally. Ms. Jensen has failed to marshal any evidence to show that the trial court abused its considerable discretion in regard to the property division.

The trial court appropriately considered that Mr. Jensen had made the payments on the Arizona condominium during the pendency of the matter while Ms. Jensen had exclusive use and possession of the property. The issue of the apportionment of those payments was specifically reserved as a trial issue. The trial court adjusted the division of the equity in the marital property to repay Mr. Jensen one-half of those payments. Ms.

Jensen has failed to marshal any evidence to demonstrate that the trial court's findings are clearly erroneous and that the trial court abused its discretion in regard to the property division.

The trial court correctly determined that Ms. Jensen failed to present adequate evidence supporting her claim for retroactive alimony. Ms. Jensen has failed to marshal any evidence to demonstrate that the trial court's finding that there was insufficient evidence was clearly erroneous.

The trial court exercised its broad discretion in denying Ms. Jensen's Rule 60 Motion. Ms. Jensen has failed to establish that the trial court abused its discretion. Additionally, the question is so insubstantial as to warrant no further review.

The trial court correctly determined that no attorney fees were to be awarded to either party. Each party requested fees arguing they were the prevailing party. The trial court denied each party's request for fees, finding that there was insufficient evidence to support an award of fees. Ms. Jensen has failed to marshal any evidence to demonstrate that the trial court's findings were clearly erroneous. Further, Ms. Jensen has failed to establish that the trial court abused its discretion in its failure to award fees.

ARGUMENT

I. THE TRIAL COURT MADE ADEQUATE FINDINGS OF FACT WHEN AWARDING MS. JENSEN \$2,581.00 PER MONTH ALIMONY FOR A PERIOD OF FIVE YEARS

"Trial 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”. Davis v. Davis, 2003 UT App. 282, ¶7, 76 P.3d 716 (alterations omitted)(quoting Breinholt v. Breinholt, 905 P.2d 877, 879 (Utah Ct. App. 1995). “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.” Rehn v. Rehn, 1999 UT App 41, ¶6, 974 P.2d 306. “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.” Kelley v. Kelley, 2000 UT App 236, ¶26, 9 P.3d 171.

In this case, the trial court made specific findings concerning each of the required elements in making an award of alimony. Specifically, the trial court found that Ms. Jensen had reasonable monthly needs of \$4,000.00.

Respondent has monthly needs of \$4,000.00. Respondent set forth her needs in her Exhibit 36 at \$4,704.00, not including payment of debt. The Court finds that Respondent failed to demonstrate the existence of much of her claimed debt and failed to demonstrate that she would not be able to satisfy any actual debt from her share of the division of assets. As such, no monthly debt payments are included in Respondent’s monthly needs. The Court reduces Respondent’s claimed needs of \$4,704.00 by \$704.00 finding that claimed expenses for window cleaning, food and household supplies, personal hygiene, health and auto insurance, an automobile lease that she does not have, clothing, psychiatrist, storage, and health club are overstated and exaggerated. As such, the Court finds that Respondent’s reasonable monthly needs are \$4,000.00 and after deduction of \$1,409.00 per month Respondent has a monthly shortfall of \$2,581.00.

R. 1581 ¶35. Ms. Jensen argues that the trial court failed to indicate how it arrived at the \$4,000.00 per month because that amount was not consistent with Ms. Jensen’s argument

at trial as to her monthly needs. However, a review of the trial court's finding clearly shows that, for alimony purposes, the court determined that Ms. Jensen's claimed debt payments would not be included and that her monthly expenses would be reduced by \$704.00 for overstated and exaggerated expenses. Ms. Jensen's argument that the trial court failed to make a specific finding is inaccurate.

To the extent that Ms. Jensen is arguing that the trial court's finding as to her monthly needs is unsupported by the evidence presented, as the party seeking to challenge the finding of fact Ms. Jensen is obligated to marshal the evidence to show that the finding of fact is unsupported by the evidence before the court. "An appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Chen v. Stewart, 2004 UT 82, ¶76, 100 P.3d 1177. An appellant "must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." Id. at ¶77. Additionally, a party cannot just "re-argue the factual case [she] presented in the trial court." Id. In this case, Ms. Jensen merely re-argues her evidence presented at trial and concludes that the trial court should have made a different determination. Ms. Jensen argues that the trial court should have relied on a different exhibit than the one the trial court relied on despite the fact that the exhibit (Exhibit 36) was prepared by Ms. Jensen and offered by Ms. Jensen as illustrative of her testimony as to her current expected expenses. T. 402. The trial court considered the exhibits offered, including the exhibit

that Ms. Jensen argues on appeal it should have relied on, and Ms. Jensen's testimony then made detailed findings of fact as to the calculation of Ms. Jensen's monthly needs. Ms. Jensen has failed to marshal any evidence to show that the finding of fact made by the trial court is clearly erroneous.

Next, Ms. Jensen claims that the trial court erred by imputing income to her in an amount consistent with her most recent employment rather than at just minimum wage. Ms. Jensen's argument is that because the Commissioner imputed only minimum wage to her for purposes of the temporary alimony award, therefore, the trial court erred by imputing income to her in a higher amount. The trial court made detailed findings indicating that Ms. Jensen was underemployed. The trial court considered the testimony of Ms. Jensen's expert witnesses and determined that her claimed disability from depression was insufficient to render Ms. Jensen incapable of work.

Respondent is currently unemployed and/or underemployed. Respondent claims that she suffers from depression which precludes her from working at all. The Court finds that Respondent suffers from a situational depression consistent with the testimony of Dr. Mausberg. Respondent's situation that causes the depression is the current divorce action and by resolution of the divorce action, the depression will be reduced. Additionally, Dr. Mausberg testified, and the Court finds credible, that the depression is not permanent or chronic and that Respondent can obtain counseling and medication that helps to relieve the depression.

The Court further finds that whatever depression Respondent suffers from does not render her unable to work. The Court finds that she has the ability to work and that she has the ability to function. Respondent has the ability to work on her father's affairs, the ability to travel, and the ability to maintain a household. The Court finds that these abilities demonstrate her ability to engage in employment.

R. 1580 ¶¶32 & 33. Further, the trial court considered the evidence before it that during the pendency of the divorce action, Ms. Jensen worked full time as a distributor for a vitamin company, T. 74-76, that she was not seeking employment because of the divorce action and her other lawsuits, T. 79-81, that she previously testified that she did not suffer from depression that rendered her unable to work, T. 82, that she had been working under an assumed name for a company involved in her father's business, T. 105-106, and that she had instructed her mother to keep information as to her working secret so as to not lose her alimony. T. 108. The trial court also considered the direct contradictions between Ms. Jensen's deposition testimony and her trial testimony in regard to her employment and the reasons why she did not have employment. Based upon that evidence, the trial court made detailed findings of fact that Ms. Jensen was in fact capable of employment. R. 1580 ¶¶32 & 33. Ms. Jensen fails to marshal any evidence to demonstrate that the trial court's findings of fact in regard to Ms. Jensen's underemployment are clearly erroneous.

Ms. Jensen then argues that the amount the trial court imputed to her is erroneous because her employment with Southwest Airlines was of short duration. Ms. Jensen argues that the short duration of the employment is dispositive of her claim that the trial court erred. Once again, the trial court made a detailed finding with regard to the determination to impute income to Ms. Jensen in that amount.

The Court finds that income should be imputed to Respondent based upon her past employment with Southwest Airlines where she earned \$8.25 per hour. Although during the marriage Respondent was not generally employed outside the home, she was employed at points in time and was

employed by Southwest Airlines. Although the employment with Southwest was of a fairly short duration, the Court finds that employment to be the benchmark of her ability to earn an income and finds that she can earn, and will be imputed with, income of \$8.25 per hour which equals \$1,409.00 per month.

R. 1581 ¶34. Ms. Jensen fails again to marshal the evidence to show that there is no support for the imputation of income at an amount higher than minimum wage. The trial court considered the testimony of Ms. Jensen concerning her full time employment selling vitamins and her testimony that she had been working under an assumed name in conjunction with the evidence that the job, to which Ms. Jensen had admitted, she had earned \$8.25 per hour. Ms. Jensen has failed to demonstrate why the trial court's findings are without evidentiary support and thus are clearly erroneous.

Finally, Ms. Jensen argues that the trial court abused its discretion in setting an alimony award for a period of five years. The trial court made a detailed finding as to the basis for setting the award for a definite time frame.

The Court finds that alimony to Respondent shall be awarded for a period of five years from the date of the Court's oral ruling, August 21, 2006. The Court finds that due to the age of the parties that if the alimony period were longer than five years, Respondent would become older and rely only on the alimony for her support and that such reliance would be a disservice to her. The Court finds that Respondent has the ability to use the period of five years to put her house in order and be able to support herself at that time.

R. 1581-82 ¶36. Ms. Jensen argues that the trial court abused its discretion in setting a definite period for alimony yet fails to marshal any evidence to show that the trial court's findings are clearly erroneous. A trial court's considerable discretion will not be

overturned absent clear and prejudicial abuse of that discretion. Davis, 2003 UT App. 282 at ¶7.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SETTING ASIDE THE STIPULATION OF THE PARTIES TO SELL THE HOME AND DIVIDING THE EQUITY BASED UPON THE APPRAISED VALUE

Ms. Jensen argues that the trial court erred by setting aside the stipulation to immediately sell the Murray home because it failed to articulate justifiable cause for granting the motion to set aside the stipulation. Utah law abounds with support for the proposition that a trial court retains authority to accept or reject the stipulation of parties in any divorce proceeding. “Property settlements are not binding upon trial courts in divorce proceedings.” Nunley v. Nunley, 757 P.2d 473, 475 (Utah Ct. App. 1988), citing Clausen v. Clausen, 675 P.2d 562, 564 (Utah 1988) (“a property settlement agreement is not binding upon the trial court in a divorce action”). “It is well recognized that the parties’ stipulation as to property rights in a divorce action, although advisory and usually followed unless the court finds it to be unfair or unreasonable, is not necessarily binding on the trial court. It is only a recommendation to be adhered to if the court believes it to be fair and reasonable.” Dayton v. Dayton, 2003 UT App 205, ¶2. Trial courts have discretion to invalidate settlement agreements made by divorcing parties on grounds that the property allocation is inequitable. See, e.g., Nunley, 757 P.2d at 475 (affirming trial court’s rejection of divorce settlement agreement where settlement agreement was inequitable); Clausen, 675 P.2d at 565 (affirming trial court’s rejection of divorce settlement agreement that inequitably divided real property acquired during the

marriage); Colman v. Colman, 743 P.2d 782, 789 (Utah 1987) (no abuse of discretion in trial court's decision to disregard property settlement agreement made in anticipation of divorce). "Thus, the general principle derived from our case law is that 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 v. Reese, 1999 UT 75 ¶ 25, 984 P.2d 987, 994-95.

The trial court has wide latitude in this area and its decision to vacate the terms of divorcing parties' stipulation or settlement agreement will not be disturbed on appeal absent a clear abuse of discretion. See, e.g., Nunley, 757 P.2d at 475; Clausen, 675 P.2d at 565; Colman, 743 P.2d at 789; Dayton, 2003 UT App. 205 at ¶2 ("This court reviews a trial court's decision to modify a stipulated division of property in a divorce action for an abuse of discretion"). In this case, Mr. Jensen moved the Court to reject the parties' stipulation to immediately sell the Murray home due to the best interests of the parties' remaining minor child. Ms. Jensen filed no opposition to the motion and the Court determined that the best interests of the minor child were served by delaying any required sale of the real property. Ms. Jensen has failed to marshal any evidence to support her assertion that the trial court did not have any justifiable basis to set aside the stipulation of the parties.

Ms. Jensen further argues that the trial court erred in valuing the Murray home at \$440,000.00 which was consistent with the appraised value rather than at \$609,000.00

which was the value testified to by Ms. Jensen's real estate agent. When reviewing a finding of fact, any questions going to the credibility of a witness's testimony are resolved in favor of the fact-finder's conclusions unless clearly erroneous. *See* Utah R. Civ. P. 52(a). In this case, the trial court had a stipulated appraisal performed by Jerry Weber, a licensed appraiser, versus the testimony of Ms. Jensen's real estate agent who is not an appraiser. The trial court found that the appraised value represented the appropriate value of the Murray home. Noteworthy is that the Arizona condominium was valued by using a stipulated appraisal. Ms. Jensen fails to marshal any evidence to show that the trial court's determination to value the home based upon the appraisal rather than the real estate agent's testimony is clearly erroneous.

III. THE TRIAL COURT APPROPRIATELY DEALT WITH THE PERSONAL PROPERTY OF THE PARTIES

A trial court's property division will only be changed if there was a misunderstanding or misapplication of the law resulting in a substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion. *Davis*, 2003 UT App. 282 at ¶8.

In this case, the trial court found that "there is insufficient information to place a specific value on the items of personal property, household furniture, and appliances." R. 1578 ¶20. Due to the lack of information as to value of the personal property, the trial court ordered everything to be sold and the proceeds divided equally. R. 1579 ¶24. To support her claim that the trial court abused its discretion by ordering the property to be sold, Ms. Jensen relies solely on her argument that, because she submitted a document

from 2002 wherein the parties had listed a value of household and personal assets at \$100,000.00, all items in Mr. Jensen's possession are therefore worth \$100,000.00. No other evidence was submitted to the trial court in regard to personal property values except Ms. Jensen's testimony that she believed that the personal property in Mr. Jensen's possession was worth \$100,000.00. When reviewing a finding of fact, any questions going to the credibility of a witness's testimony are resolved in favor of the fact-finder's conclusions unless clearly erroneous. *See* Utah R. Civ. P. 52(a). Ms. Jensen argues that the trial court's finding of fact that there was insufficient information as to values was clearly erroneous because the trial court failed to believe her testimony. Ms. Jensen has failed to marshal any facts to show that the trial court's finding that there was insufficient evidence to value the property is clearly erroneous.

Ms. Jensen advances no support for her argument that the trial court's order that the personal property would be sold and the proceeds divided equally is an abuse of its discretion except her argument that the evidence should have been sufficient for the court to value the property and offset those values between the parties. The trial court, however, specifically found that there was insufficient information presented to the court to allow it to value the personal property based upon a determination of Ms. Jensen's credibility. Ms. Jensen advances no other argument to indicate that a trial court ordering personal property to be sold is an abuse of discretion.

IV. THE TRIAL COURT APPROPRIATELY ADJUSTED THE DIVISION OF THE REAL PROPERTY EQUITY TO COMPENSATE MR. JENSEN FOR PAYMENTS ON THE ARIZONA MORTGAGE DURING THE PENDENCY OF THE ACTION

Ms. Jensen argues that the trial court erred by requiring her to reimburse Mr. Jensen for one-half the payments he made on the Arizona condominium during the period of the temporary order. The trial court made a specific finding that

On February 7, 2006 the Court entered a Recommendation and Order that required Petitioner to pay the monthly mortgage on the Arizona condo along with the necessary home owner's fees. The Order specifically reserved for trial the issue of the final apportionment of the payments made by the Petitioner on the condo. During the period when the issue was reserved, Petitioner paid \$26,304.84 in monthly mortgage payments and home owner's association fees. The Court finds that Respondent should repay to Petitioner one-half the payments made by him for the Arizona condo because she had exclusive use and possession of that residence during that time. The Court finds that this sum shall be paid to Petitioner at the time the parties settle the division of the equity in the real property.

R. 1582-83 ¶40.

To support her claim that the trial court erred by requiring her to repay one-half the payments made by Mr. Jensen in the final property division, Ms. Jensen re-argues her claim that she should have been awarded a higher amount of permanent alimony and that she should have been awarded retroactive alimony. (She also argues that the payment was ordered as "temporary alimony" despite the fact that the Order does not so indicate.) She further argues that despite the fact that the issue of the payments was specifically reserved, the trial court could not actually deal with that issue because, if it did, it would have to retroactively modify the temporary order on alimony. However, the real issue is a property division issue. The trial court found that it was appropriate to adjust the

division of the equity in the marital residences to reimburse Mr. Jensen for payments he made toward the Arizona property while Ms. Jensen had exclusive use and possession of the property. The issue of the apportionment of the payments made for the condominium was specifically reserved for trial. R. 1367-68. A trial court's determination of a property division will only be changed if there was a misunderstanding or misapplication of the law resulting in a substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion. Davis, 2003 UT App. 282 at ¶8. The issue of the apportionment of the payments made by Mr. Jensen was clearly reserved for adjudication by the trial court. The trial court adjudicated the issue. Ms. Jensen complains that she does not like the result but fails to demonstrate that the trial court abused its discretion in fashioning an equitable property division.

V. THE TRIAL COURT APPROPRIATELY DENIED MS. JENSEN'S REQUEST FOR RETROACTIVE ALIMONY

Ms. Jensen argues that the trial court abused its discretion in denying her request for retroactive alimony. Specifically, Ms. Jensen argues that the trial court should have required Mr. Jensen to pay to Ms. Jensen temporary alimony prior to the court's temporary alimony award. Ms. Jensen argues that prior to the temporary order for alimony there was no temporary order for alimony and as such the trial court should go back and make the temporary order effective on an earlier date. Ms. Jensen's basis for such a claim is contained in her testimony wherein she testified that she did not receive temporary alimony prior to the entry of the temporary alimony order and that she

calculated how much she should have been paid had the temporary alimony order been effective a year earlier. T. 404-405. The trial court denied Ms. Jensen's request for retroactive alimony by finding that "Respondent has failed to present sufficient evidence to demonstrate a reason why the Court should award retroactive alimony and as such no retroactive alimony will be awarded." R. 1582 ¶39. Ms. Jensen has failed to marshal any facts to show that the trial court's finding that she failed to present sufficient evidence as to a reason is without factual support. "Where an appellant fails to satisfy the marshaling requirement, we are required to assume that the findings of the court are supported by the evidence." Beynon v. Clah, 2004 UT App 268 (citing Johnson v. Higley, 1999 UT App 278, ¶ 37, 989 P.2d 61). Because Ms. Jensen failed to present any evidence as to the issue of retroactive alimony other than her exhibit that merely calculated what the total would have been had the temporary order been effective earlier, the trial court's finding that she had failed to present sufficient evidence as to the issue is supported by the evidence.

VI. THE TRIAL COURT DID NOT ERR IN NOT SETTING ASIDE A PORTION OF THE SEPTEMBER 29, 2006 MINUTE ENTRY

Ms. Jensen argues that pursuant to Utah R. Civ. P. 60 the trial court was required to set aside the portion of the Minute Entry dated September 29, 2006 because the trial court erred in including language that there "is no opposition to the motion in the record." R. 1544. A trial court has broad discretion with regard to a Rule 60 Motion and its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114, 1117 (Utah Ct. App. 1989). Ms. Jensen has failed to present any evidence

that the trial court abused its discretion in denying her Rule 60(b) Motion. Further, the issue of the language in a minute entry subsequent to the trial but prior to the final Decree of Divorce is so insubstantial as to warrant no further review.

VII. THE TRIAL COURT HAD A REASONABLE BASIS TO DENY AN AWARD OF ATTORNEY FEES

The decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court. Childs v. Childs, 967 P.2d 942, 947 (Utah Ct. App. 1998). A trial 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). Ms. Jensen argues that she should have been awarded attorney fees on the issues of alimony and property division because she was the prevailing party. Ms. Jensen's argument that she was the prevailing party is made in the same brief as her appeal of the court's decision concerning those very issues of alimony and property division. The trial court found that there was insufficient evidence to determine the reasonableness and necessity of the fees and therefore no fees were awarded. R. 1584 ¶48. Each party requested an award of fees for the litigation that culminated in the trial. The trial court denied each party's request for fees. Ms. Jensen appeals the trial court's decision to deny her request for fees. A trial court may award attorney fees in a domestic matter. Utah Code Ann. § 30-3-3. The decision to award fees is within the trial court's sound discretion. See Childs, at 947. The trial court declined to award either party any fees. Ms. Jensen has failed to marshal any facts to demonstrate that there was no reasonable basis for the decision. "Where an appellant fails to satisfy the marshaling requirement, we are required to assume that the

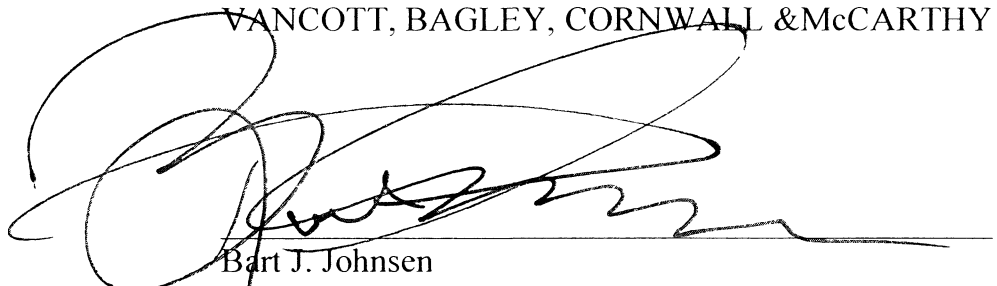
findings of the court are supported by the evidence.” Beynon v. Clah, 2004 UT App 268 (citing Johnson v. Higley, 1999 UT App 278, ¶ 37, 989 P.2d 61) As such, the finding of the trial court that there was insufficient evidence to award attorney fees to either party is supported by the evidence. By finding that there was insufficient evidence to award attorney fees, the trial court articulated a reasonable basis for the denial of the request for fees. Ms. Jensen has failed to demonstrate that the trial court did not have a reasonable basis for its determination and thus has failed to demonstrate that the trial court abused its discretion.

CONCLUSION

Accordingly, the order of the trial court should be affirmed.

Respectfully submitted this 20th day of March, 2008.

VANCOTT, BAGLEY, CORNWALL & McCARTHY



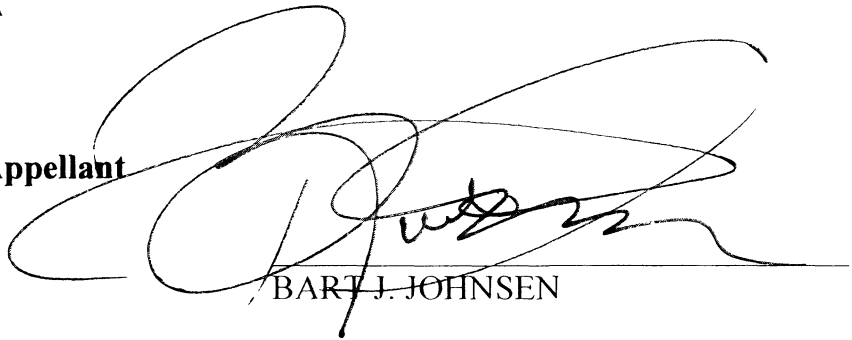
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2008, two true and correct copies of the foregoing BRIEF OF THE APPELLEES was mailed, first class postage affixed to:

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