

2000

# Tonyia B. Jensen v. Clark Evon Jensen : Brief of Appellant

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

IN THE SUPREME COURT  
OF THE STATE OF UTAH

TONYIA B. JENSEN,  
 Plaintiff and Respondent,  
 -vs-  
 CLARK EVON JENSEN,  
 Defendant and Appellant.

Case No. 14458

BRIEF OF APPELLANT

Appeal from the Judgment of the Fourth Judicial District Court  
for Utah County, Honorable George E. Ballif, Judge

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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TONYIA B. JENSEN, )  
 )  
 Plaintiff and Respondent, )  
 )  
 -vs- ) Case No. 11458  
 )  
 CLARK EVON JENSEN, )  
 )  
 Defendant and Appellant. )

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

This is a divorce proceeding.

DISPOSITION IN THE LOWER COURT

This case was tried before the Honorable George E. Ballif, Judge of the Fourth Judicial District Court, who decreed that both parties were entitled to a decree of divorce, that the defendant was entitled to the care, custody and control of the minor children, subject to plaintiff's visitation rights, and that the property of the parties, both personal and real, be divided equally between them as set forth in the Decree of Divorce.

RELIEF SOUGHT ON APPEAL

Reversal of the lower court's decree of divorce with instructions to award the real and personal property to the

defendant and appellant on a more equitable basis as contended for by the appellant herein. In the alternative, to reverse the decree of divorce of the lower court and grant to defendant and appellant a new trial.

#### STATEMENT OF FACTS

The parties to this divorce action were married in 1954. During the period of their marriage, the parties lived together until the 26th day of May, 1974, at which time the plaintiff left the home of the parties voluntarily. The parties remained separated for approximately 18 months and the divorce was granted on December 3, 1975. During the marriage, the parties were both employed regularly. The plaintiff's income through 1973 was \$60,040.85. (Tr.51). The defendant's income through 1973 was \$174,374.59. (Tr.51). The marriage produced three children, the custody of which was awarded to the defendant, subject to the right of the plaintiff to visit with said children at reasonable times and places.

The assets of the parties were comprised primarily of real estate in the American Fork area, including a home with 7 acres of property valued at a total of approximately \$120,000.00, and a duplex valued at \$32,500.00, the latter property being subject to mortgages. (Tr.41).

The court granted each party a decree of divorce on the following grounds:

"The court finds that the marriage between the parties has deteriorated because of the difference in interests and goals which have developed between the parties over the past years, and that the differences in the plaintiff's seeking work outside the home and the defendant demanding domestic obedience and service from her have caused mental and physical anguish and suffering to both parties entitling each to a decree of divorce from the other."

Further, the court, in the Decree dated December 3, 1975, distributed the property of the parties as follows:

"(a) A home located in Highland, Utah, at Rt. #1, Box 156-9, which is hereby awarded to the plaintiff and defendant in equal interests, subject to the right of the defendant to acquire the plaintiff's one-half interest in the home as set forth hereafter.

"(b) Certain real property consisting of approximately seven (7) acres surrounding the above referenced home and upon which said home is located, which is hereby awarded to the plaintiff and the defendant in equal interests, provided, however, that the defendant shall have the option of acquiring the plaintiff's one-half interest in the home and the 7 acre lot, by paying the sum of \$50,000.00 cash forthwith, or he may pay said sum over a ten (10) year period at an annual rate of not less than \$5000.00, which may be made in monthly installments or a single payment. Said payment or payments shall bear no interest except that in the event the defendant fails to make a yearly payment or any part thereof, the unpaid delinquent sum shall carry interest at a rate of ten (10%) percent per annum. Further, the defendant, if he elects to have payments on a monthly basis, will be entitled to a thirty (30) day grace period, but will be required to have all payments met by the end of each year. The plaintiff is entitled to have a lien against the property for the amount of her interest.

"(c) The plaintiff, TONYIA B. JENSEN, is hereby awarded the following specific property:

1. A 1974 Comet automobile.
2. Beehive Savings Account.

3. That certain duplex located in the City of American Fork, subject to certain mortgages.
4. Food storage and meat of the parties.
5. Savings bonds of the parties.

"(d) The defendant, CLARK EVON JENSEN, is hereby awarded the following specific property:

1. Household furniture, appliances and tools.
2. A 1970 Chevrolet vehicle.
3. A 1975 Volkswagon.
4. Water stock.
5. John Hancock Insurance.
6. Silver coins.
7. Camper for pickup.
8. Boat and motor.
9. Two horses of the parties.
10. The following insurance policies should also be awarded to the defendant: Ideal Insurance Company; Beneficial Life; G.I. Insurance; John Hancock Family Plan; American Western Insurance group plan through defendant's work; American National Family Plan. Defendant should name the minor children as beneficiaries on said policies during the period of their minority." (Tr.18 and 19).

The defendant filed a motion for a new trial pursuant to Rule 59 of the Utah Rules of Civil Procedure seeking to have the court open the judgment filed on December 3, 1975, and take additional testimony of the defendant and the plaintiff for the purpose of modifying the decree of divorce with respect to the property distribution. (Tr.11). The defendant's motion for a new

trial was denied January 26, 1976, after hearing of oral arguments on the motion. From the divorce decree, the defendant appeals.

#### ARGUMENT

#### POINT I

THE TRIAL COURT ERRED IN AWARDING PROPERTY AND CASH TO THE PLAINTIFF IN AN AMOUNT EQUAL TO FIFTY (50%) PERCENT OF THE TOTAL PROPERTY ACQUIRED BY THE PARTIES DURING THEIR MARRIAGE.

It is well settled that the trial court has wide latitude of discretion in adjusting the financial and property rights of the parties; however, this discretion is not without limitations. In the case of Derosé v. Derosé, 19 Utah 2d 77, 426 P2d 221 (1967), the Utah Supreme Court stated:

"We remain cognizant of the prerogatives of the trial court and the latitude of discretion it is properly allowed in divorce cases. But the discretion is not without limit, nor immune from correction on review, if that is warranted. Due to the seriousness of such proceedings and to the vital effect they have on people's lives, it is also the responsibility of this court to carefully survey what is done and while the determinations of the trial court are given deference and not disturbed lightly, changes should be made if that seems essential to the accomplishment of the desired objectives of the decree: that it is to make such an arrangement in property and economic resources of the parties that they will have the best opportunities to reconstruct their lives on a happy and useful basis for themselves and for their children. An important consideration in this regard is the elimination or minimizing of potential frictions or difficulties in the future."  
( Underlining added.)

It is conceded that the division of the marital property is perhaps the most difficult task which the court is required to



perform. To aid in this division, however, courts have devised a "one-third to the wife - two-thirds to the husband" general rule. In the case of Anderson v. Anderson, 18 Utah 2d 286, 422 P2d 192 (1967), the Supreme Court sustained the decree of the lower court which had awarded to the defendant husband two-thirds of the net marital estate and one-third to the plaintiff wife. The factual similarities of the Anderson case are significant. In that case both parties were awarded or had grounds for divorce. The trial judge held a "taut rein" at the trial, concerning himself only with various factors bearing upon the financial situation of the parties in reaching a solution to the property distribution. The parties were married for a long period of time and had raised their children. The court specifically held:

"The court has sustained the one-third, two-thirds property division used by the trial court in the present case, without regard to which party was granted the divorce."

See also Wooley v. Wooley, 113 Utah 391, 195 P2d 743 (1948); Griffen v. Griffen, 18 Utah 98, 55 Pac. 84 (1898).

The very recent case of Cox v. Cox, 532 P2d 994 (1975), involved a divorce action in which the trial court divided the net assets belonging to the parties one-third to the wife and the remaining two-thirds to the husband defendant. This court, in affirming the lower court's award, said:

"Because of the variableness and complexities involved in family troubles there is no firm rule or formula that can be uniformly applied in all cases in legal surgery necessary to severing such relationships which will best serve the desired objectives of allocating the economic

resources so that the parties involved can reconstruct their lives in the most happy and useful manner. However, as an aid in that endeavor, in the past the courts have often resorted to a general "rule of thumb" of one-third to the wife and two-thirds to the husband; and that is what the court appears to have done here. Upon our survey of the circumstances of these parties we see no reason to believe that the application of that general formula is so inequitable or unjust that we should interfere therewith."

In addition to the general principle of law announced by this court in the Anderson and Cox cases aforesaid, the Supreme Court has set forth certain principles which govern the division of property in the State of Utah in divorce actions. In the case of Pinion v. Pinion, 92 Utah 255, 67 P2d 265, the Supreme Court stated:

"Plaintiff sets out the elements which should be taken into consideration by the court as governing its discretion in coming to a conclusion as to a property settlement: (1) The amount and kind of property owned by each of the parties; (2) whether the property was his before coverture or accumulated jointly; (3) the ability and opportunity of each to earn money; (4) the financial condition and necessities of each party; (5) the health of the parties; (6) the standard of living of the parties; (7) the duration of the marriage; (8) what was given up by each party to the marriage; (9) what age were they when married."

In Wilson v. Wilson, 5 Utah 2d 79, 296 P2d 977 (1956), the Supreme Court further established as a principle to be considered by the trial court in effecting a property distribution, "considerations relative to the children of the parties."

Applying the principles set forth in the Anderson, Cox, Pinion, and Wilson cases to the facts of the present case,

defendant submits that the trial court erred in dividing the property equally between the parties.

The facts of the present case show that the parties were married in 1954. During their marriage, some twenty years before separation, there is no evidence that the parties were having marital difficulties. In May of 1974, the plaintiff left the home of the parties. The testimony indicates that the plaintiff had a gross earnings of \$980.00 per month from the American Fork Hospital and earnings of approximately \$35.00 per month from the Utah State Training School in American Fork. (Tr.18 and 29-30). The plaintiff had lived separately from the defendant during the 18 month period prior to the entry of the decree of divorce and during that time had been able to save an average of \$106.00 per month. (Tr.26). Further, the plaintiff had established a savings account with the Beehive Credit Union and had increased that account by the sum of \$800.00 since the separation of the parties and had also established a savings account at Deseret Federal Savings & Loan Association and had completely funded said savings account with \$4,100.00 during the period of separation. (Tr.27). Further, the plaintiff had invested in a mobile home and was capable of paying for the mobile home and at the time of the divorce was making application for approval of a loan for purchasing a home. (Tr.28). Thus, the testimony is clear that the plaintiff, through her training and employment was capable of supporting herself and was, in fact, self-

supporting and not in need of any assistance from the defendant. The plaintiff's cumulative earnings through 1973 amounted to \$60,040.85. (Tr.51). It is interesting to note that the plaintiff's reported income for the years 1972 and 1973 was in excess of \$10,500.00 each year. (Tr.51). Further, the plaintiff testified that she made a gross earnings of approximately \$980.00 from the American Fork Training School which would give her an annual gross of \$11,760.00, together with an approximate \$35.00 per month earning, or an additional \$420.00, for a total annual earnings of \$12,180.00. On the other hand, the defendant's income for the years 1972 and 1973 was \$14,343.40 and \$16,769.53, respectively. (Tr.51). Defendant's present income is less than the amount he reported in 1973 and he currently makes a net wage of approximately \$900.00 per month. (Tr.16). Defendant's drop in income is occasioned by his having terminated one of the two jobs he was working in order to take care of the children.

The plaintiff testified that from the inception of the marriage she had been employed and had contributed to the income of the parties. On cross examination plaintiff was asked as to her willingness to give up her present employment and return to the family. She stated in essence, that she was not willing to give up her whole life to comply with her husband's and family's wishes. The plaintiff further testified, on cross examination, that for a period of one year and greater,

the divorce action had been pending, during which time she had been invited several times to return to the home, but that she refused to do so and that all efforts by her husband, the defendant, for reconciliation had failed. (Tr.22).

The defendant testified that the plaintiff had voluntarily left him to keep the company of a third female friend, and that in spite of his efforts to have her return to the home and to make the marriage work, she refused, giving numerous excuses, including schooling, and that she would never make an attempt at reconciliation. The defendant further testified that his wife, the plaintiff, had not attended to the duties of the home in respect to cleaning and caring for the home, cooking for the children, and generally taking care of the children. (Tr.47-48). Further, the daughter of the parties, Charlotte, corroborated the testimony of the defendant, that her mother had not attended to the household duties, had ignored her responsibility to cook and care for the home and the children, and was not in her opinion a dutiful mother. Further, the daughter of the parties, Charlotte, testified that she had been attending to the duties of taking care of the household chores, cooking and caring for the children for a period of nine years. (Tr.49-51). The latter testimony is uncontroverted, that the defendant, together with his daughter, Charlotte, had taken all of the responsibility, or substantially all of the responsibility, in caring for the household and the children.

In light of this testimony, and the evidence adduced at the trial, the defendant contends that the court abused its discretion by giving the plaintiff an equal share in the total marriage assets of the parties. The defendant contends that the court did not consider the relative guilt or innocence of the parties and the considerations relative to the children. Nor did the court give consideration to the ability of the parties or earn money to support themselves nor was consideration given to the financial condition and necessities of each party. The ultimate result of the decree as it stands will be to force the defendant to sell the homestead of the parties and move his family to a different location, disrupting their lives to the extent that they will be removed from their friends, environment, and the schools and classes which they are accustomed to and which are important to children of their ages. The defendant's option to purchase plaintiff's interest is a practical impossibility based upon the income which he has demonstrated he makes. His only alternative is to be forced to sell the property inasmuch as the plaintiff, as a co-owner, can insist upon the cash equivalent of her interest. Such a result does not reflect consideration for the needs of the children, either as to their need to stay in the present environment to which they are accustomed, or their need to have adequate support from their father, nor does the decision reflect the consideration that the plaintiff left her husband for pursuits of her own, to satisfy her own interests and is largely at fault in

this case. Nor does the decision reflect the consideration that the plaintiff is capable of supporting herself and has adequate income in excess of her expenses to the extent that she has accumulated over \$6000.00 in savings in a period of 18 months and is fully capable of taking care of herself without fifty percent of the assets or value of the marital estate. Nor does the decision reflect the consideration that the defendant's financial condition and necessities is much greater than that of the plaintiff by reason of his obligation to support and care for the children totally out of his own funds without contribution from the plaintiff.

The defendant testified that his income amounted to a net \$900.00 per month. Of that income, the defendant would have to pay to the plaintiff approximately \$416.00 in satisfaction of the \$5000.00 annual requirement and would be left with less than \$500.00 for his living expenses, including expenses for caring for the children and maintaining the household. The defendant is incapable of making the payment to his wife and satisfying the monthly obligations which he presently has. Thus, his alternative would be to sell the premises, liquidate his estate, and attempt to find other accommodations more comfortable to his family and his income. It is defendant's contention that this works a hardship on the family, upon himself, and represents an injustice and abuse of discretion in light of the factual evidence produced at the trial which would indicate that the plaintiff is not entitled to one-half of the marital estate. As the

court found, the plaintiff is capable of sustaining herself and is not entitled to alimony and her needs are certainly not as great as that of the defendant and plaintiff's family. Thus, the defendant seeks that this court determine a more equitable and fair division of the property of the marriage which would be least allow the defendant to remain in the premises acquired during the marriage and relieve the defendant of his obligation to pay \$5000.00 annually for ten years to the plaintiff. Defendant maintains that it is a more fair and reasonable distribution of the marital assets to allow him to keep the home and three and one-half acres of the real property surrounding the home and would urge the court to modify or instruct that the decree be modified to that extent.

Certainly, in light of the cases cited herein, defendant's contention that he ought to be entitled to the home and three and one-half acres of the real property is not inconsistent. On the basis of the facts of this case established by the evidence adduced at trial, the one-third, two-thirds formula for distribution of the marital estate should have been followed by the trial court and its failure to do so was abusive and not in the interest of justice and fairness to the parties. In fact, defendant maintains that the court took a position contrary to the rule announced in the Anderson and Cox cases in announcing that it had adopted the principle of "equal distribution of the proceeds of acquisitions during the marriage", (Tr.18) and that the court was very reluctant



and resistant to accept any evidence adduced or attempted to be adduced by the defendant or his witnesses to overcome the said adopted principle. Thus, defendant contends and maintains that this court can appropriately sit in review and make the determination that the estate be divided according to the principles announced in the Pinion, Anderson, and Cox cases.

## POINT II

### THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

On the 10th day of December, 1975, the defendant caused to be filed a motion for new trial pursuant to Rule 59 of the Utah Rules of Civil Procedure. Rule 59 states, inter alia:

"(a) Grounds. Subject to the provision of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment: . . . . (6) insufficiency of the evidence to justify the verdict or other decision, or that it is against law, (7) error in law."

The defendant's motion for a new trial was supported by a memorandum of points and authorities wherein he indicated that it was his intention to have the court open the trial for the taking of additional evidence regarding the issues pertinent to distribution of the marital estate such as the relative fault of the parties, the financial needs and conditions of the parties,

the ability of the parties to earn separate livings comfortably, the considerations relative to the children, the money and property they possessed and how it was acquired, etc.

Defendant's motion for a new trial was premised upon subparagraphs 6 and 7 of Rule 59 as quoted hereinabove. Defendant has heretofore in this brief established the general principle followed by this court in the recent case of Cox v. Cox and the earlier case of Anderson v. Anderson. That rule in essence is that a trial court, although granted a generous amount of discretion in determining property distributions in divorce actions, nevertheless is to be limited by the principle that the estate ought to be divided along the lines of two-thirds to the husband and one-third to the wife. The recent case of Leftwich v. Leftwich, \_\_\_\_\_ P2d \_\_\_\_\_ (1976), although not following the principle announced in the Cox and Anderson cases, does not overrule said cases and the principle stands. Defendant maintains that the one-third, two-thirds principle is clearly applicable in his case based upon the facts and the evidence of the case. Thus, defendant contends that the court's discretion was exercised in such manner as to be against law and that the resulting decision was entered upon insufficient evidence to support it. Defendant clearly established the basis for his motion for a new trial and has and did demonstrate that the motion was meritorious and firmly couched in subparagraphs 6 and 7 of Rule 59. Nonetheless, the trial court denied the

motion for new trial and did not permit the defendant to produce the additional evidence which defendant feels could have materially influenced the court's decision and have resulted in a distribution which would have permitted him to keep the homestead of the parties together with the three and one-half acre parcel that he was awarded. In effect, the defendant believed that he would be capable of persuading the court through additional evidence to relieve him of the obligation to buy his wife's equity interest in the home.

#### CONCLUSION

This court has announced the general principle, in the Anderson and Cox cases, that marital assets should be distributed one-third to the wife and two-thirds to the husband. The Supreme Court has also announced that the trial court should consider elements relative to the amount and kind of property owned by each of the parties, whether the property was accumulated jointly, the ability and opportunity of each of the parties to earn money, the financial condition and necessities of each party, the health of the parties, the standard of living of the parties, the duration of the marriage, what was given up by each party by the marriage, considerations relative to the children, and the money and property that the parties possess and how it was acquired. Pinion v. Pinion, 92 Utah 255, 67 P2d 265, and Wilson v. Wilson, 5 Utah 2d 79, 296 P2d 977. Although the trial court is granted a broad discretion in

determining the distribution of marital assets in divorce actions, in the instant case, the discretion was abused for the reason that the court had before it ample evidence which would support its finding and concluding that the plaintiff was not entitled to an equal distribution of the marital estate of the parties but that the defendant should be awarded a greater portion thereof. Particularly, the defendant maintains that it is well within the principles announced by this court in the cases aforesaid that he be relieved of his obligation to purchase his wife's equity interest in the home, and that if he is not relieved of said obligation the decision of the trial court constitutes an injustice to him in that he will be required to sell said home and remove his family to a more affordable accommodation. Defendant maintains that the evidence clearly demonstrates that the parties did not make an equal contribution to the marriage and that the plaintiff made a substantially smaller contribution toward the household, marriage, and acquisition of monies and assets. Thus, defendant urges the court to reverse the decision of the trial judge with respect to the distribution of the marital assets and remand the case with instructions that the distribution be made such as to allow the defendant to retain possession of the home of the parties and be relieved of his obligation to purchase the plaintiff's equity interest.

Further, the defendant maintains that his motion for new trial was well founded on subparagraphs 6 and 7 of Rule 59 of the Utah Rules of Civil Procedure, and that the court's denial of the motion for a new trial was error. Defendant alternatively urges the court to reverse the decision of the trial court with respect to the distribution of the marital assets and remand same to the trial court for the purpose of hearing additional testimony with regard to issues relative to making a determination of an appropriate distribution of the marital assets.

Respectfully submitted,

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