

1996

# Linda Mezenen v. Kelly Mezenen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LINDA MEZENEN,	:	
	:	
Plaintiff/Appellee/	:	
Cross Appellant,	:	REPLY BRIEF OF APPELLANT
	:	
vs.	:	
	:	
KELLY MEZENEN,	:	
	:	
Defendant/Appellant/	:	
Cross Appellee.	:	Case No. 960652
	:	
	:	Priority No. 15
	:	

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APPEAL FROM THE DECREE OF DIVORCE ENTERED BY THE  
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,  
STATE OF UTAH, JUDGE FRANK G. NOEL

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## **ARGUMENT**

### **I.**

#### **THE TRIAL COURT CORRECTLY DENIED MS. MEZENEN'S CLAIM FOR UNDISTRIBUTED PRE-DECREE PROFITS OF THE BUSINESS; THERE WAS ABSOLUTELY NO BASIS FOR SUCH AN AWARD.**

Ms. Mezenen has attacked the trial court's determination regarding pre-decree profits of Kelly's Excavating, LLC despite the court's uncontroverted determination that Ms. Mezenen had no involvement with the business subsequent to the parties' separation. In fact, Mr. Mezenen continued management of the business during the separation pursuant to court order. In light of these undisputed findings, Ms. Mezenen's arguments regarding the trial court's findings of pre-decree profits are unavailing.

The trial court denied Ms. Mezenen's claim for undistributed net profits from Kelly's Excavating, LLC. (Decree of Divorce, ¶ 7). That determination was based upon the court's finding that "since the parties' separation in the fall of 1994, Plaintiff has had virtually no contact with Kelly's Excavating, LLC and that her duties and responsibilities were assumed and discharged during that period by the Defendant based upon Court order . . . ." (Findings of Fact and Conclusions of Law, ¶ 9).

Ms. Mezenen attempts to controvert this express finding by claiming that she "offered" to continue her employment at Kelly's

Excavating, LLC. That assertion is insufficient to sustain her argument, particularly in light of the court's previous order that Mr. Mezenen continue management of the business, which was not only logical but premised on the fact that Ms. Mezenen had never been heavily involved in management of the business<sup>1</sup>.

However, and more importantly, the court found that there was no cash available to effectuate the distribution of the undistributed profits of the business. Specifically, the court found that all undistributed profits of the business accumulated between the date of the parties' separation in September 1994 to the date of the Decree were either (1) accounted for in draws received by Mr. Mezenen as salary; (2) paid to Ms. Mezenen as temporary alimony; or (3) any available cash was included in the calculation of the net worth of the business. (Findings of Fact and Conclusions of Law, ¶ 23).

Ms. Mezenen has advanced no concrete facts in support of her argument that such "phantom" profits should have been distributed. Rather, she asserts merely that defendant's imputed salaries in the amount of \$72,000.00 for 1994 and \$75,000.00 for 1995 were

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<sup>1</sup> In fact, the court found that the \$2,000.00 per month salary received by Ms. Mezenen before the parties' separation was a mere of income shift from Mr. Mezenen in order for Ms. Mezenen to claim her children as exemptions and deductions for income tax purposes. (Findings of Fact and Conclusions of Law, ¶ 13).

excessive, and that there was a sufficient sum in accounts receivable and cash to support a claim for undistributed profits. As more fully discussed below, the imputed salary amounts were fully supported by the record. Furthermore, as explained in the court's findings, such available cash was included in the business net worth calculations. Since Ms. Mezenen was awarded one-half the value of the business, she received her portion of those funds, simply in a different form. Consequently, there is no basis or funds for any pre-decree distribution of profits, and the trial court's finding in this regard should be upheld.

## II.

THE TRIAL COURT CORRECTLY DETERMINED MR. MEZENEN'S IMPUTED SALARY BASED UPON THE EXTENT AND NATURE OF HIS WORK; FURTHERMORE, THE COURT'S VALUATION OF THE BUSINESS IS FULLY SUPPORTED.

Despite the fact that she received one-half of the value of the business, Ms. Mezenen challenges the trial court's marital estate division based upon its valuation of the business and the salary imputed to Mr. Mezenen.

Ms. Mezenen cites extensive, although misapplied, authority in support of the proposition that a business considered to be a marital asset is subject to equitable distribution principles. Her reliance upon such authority is clearly misplaced; Ms. Mezenen in fact received one-half the value of the business, as determined by



the court<sup>2</sup>. (Decree of Divorce, ¶ 14). In fact, as Ms. Mezenen herself acknowledges, the heart of her dispute regarding distribution of the business involves its valuation; specifically, the difference in valuation of the business based upon Mr. Mezenen's imputed salary. (See Appellee's Brief, at p. 32).

Ms. Mezenen sets forth absolutely no specific facts which could conceivably support her attack on the imputed salary of \$72,000.00 and \$75,000.00 for 1994 and 1995, respectively, and did not do so at trial. In light of the court's detailed findings, her claim is insufficient. The court specifically found that Mr. Mezenen was responsible for virtually all aspects of the business; negotiating contracts, financing arrangements, securing customers as well as performing the construction work. In fact, the court found that "the business is dependent upon the Defendant and his construction skills and expertise for its successful operations." (Findings of Fact and Conclusions of Law, ¶ 21). The court also found that Mr. Mezenen worked 12 to 14 hours per day, often seven days a week.

The court's Finding is undoubtedly based on the testimony of Mr. Mezenen's accounting expert, Merrill Norman. Mr. Norman

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<sup>2</sup> The cash payment ordered by the court to equalize the property division is exactly the type which was affirmed in the case cited by Ms. Mezenen, Weston v. Weston, 773 P.2d 408 (Utah Ct. App. 1989).

testified that his estimation of a reasonable, market based salary for Mr. Mezenen was based upon (1) his interviews with Mr. Mezenen; (2) a job offer that Mr. Mezenen had in November, 1995; and (3) other reported salaries for heavy equipment operators as set forth in the Utah Heavy and Highwaymaster Agreement (R. at 683-683; 688-691). Furthermore, Ms. Mezenen's unsubstantiated attempt to attack the number of hours of work that the court attributed to Mr. Mezenen is equally unavailing. Mr. Norman testified that his salary figure was based upon a ten to twelve hour work day, 6  $\frac{1}{2}$  days per week, which he then reduced by 15% as an element of conservatism. (R. at 719). Significantly, Mr. Mezenen was not merely an employee of the business; he performed a great deal of the equipment operation, as well as managing all affairs and aspects of the business.

Ms. Mezenen has utterly failed to marshal the evidence in support of the court's Finding, as she is required to do, and then set forth facts sufficient to controvert these Findings. In truth, she does not even attempt to controvert them and on the merits and the evidence can not do so. Instead, she relies solely upon generalized allegations of fraud. Ms. Mezenen cites the testimony of Donna Chatwin, who claimed that Mr. Mezenen was in fact concealing assets from the court. However, Ms. Mezenen fails to show how such alleged concealment of assets impacts the valuation

of the business and the salary imputed to Ms. Mezenen. She appears to be arguing that Mr. Mezenen should somehow be punished by increasing the value of the business, and, consequently, the amount of the distribution to her. Because Ms. Mezenen has failed to point to any evidence in the record sufficient to controvert the court's findings regarding valuation, the distribution as ordered by the court should be upheld and sustained.

### III.

**THE CERTIFICATE OF DEPOSIT AND FUNDS USED TO  
MAKE A DOWN PAYMENT ON THE PARTIES' RESIDENCE  
WERE PRE-MARITAL ASSETS WHICH THE COURT  
PROPERLY CREDITED TO MR. MEZENEN.**

Ms. Mezenen objects to the court's award of certain assets to Mr. Mezenen; specifically, a Certificate of Deposit in the approximate amount of \$13,000.00, and a \$5,800.00 cash down payment on the parties' residence. These assets were properly determined to be the pre-marital property of Mr. Mezenen and, consequently, not subject to equitable distribution. Ms. Mezenen has asserted absolutely no facts whatsoever sufficient to overcome this well-established rule.

The court specifically found that the Certificate of Deposit and down payment on the parties' residence were the pre-marital assets of Mr. Mezenen. (Findings of Fact and Conclusions of Law, ¶'s 7, 8). This finding is more than adequately supported by the

evidence in the record. Specifically, (1) the house on which Mr. Mezenen made the down payment was purchased before the marriage; (2) Ms. Mezenen was unemployed and receiving public assistance and housing benefits when the parties began their relationship (Findings of Fact and Conclusions of Law, ¶'s 3, 4); and (3) the Certificate of Deposit was an inheritance received by Mr. Mezenen prior to the parties marriage (Findings of Fact and Conclusions of Law, ¶ 7).

Consequently, Mr. Mezenen was properly awarded these assets. As this Court, along with the Utah Supreme Court, has repeatedly held, "premarital property is considered separate property and will be retained by the party who brought it into the marriage." Rappleve v. Rappleve, 855 P.2d 260, 263 (Utah Ct. App. 1993). Ms. Mezenen has failed to demonstrate any evidence in the record which would tend to overcome this presumption. Consequently, the trial court's ruling should be upheld.

#### IV.

**THE TRIAL COURT'S EQUITABLE ALLOCATION OF  
BUSINESS ASSETS AND LIABILITIES, INCLUDING  
THOSE ASSOCIATED WITH THE MARITAL BUSINESS,  
SHOULD BE UPHELD.**

In her Brief, Ms. Mezenen has advanced a frankly unintelligible argument regarding allocation of tax liabilities. This appears to be the same argument which was raised by Ms.

Mezenen's counsel at trial and rejected in its entirety by the trial court. Ms. Mezenen is apparently attempting to argue that Mr. Mezenen's imputed income of \$72,000.00 for 1994 and \$75,000.00 for 1995, combined with the court's equitable allocation of the business' assets and liabilities, including those associated with taxes, has resulted in some prejudice to her. In fact, the approach espoused by Ms. Mezenen is not only unsupported, it is essentially a request that the court enter an order beyond its jurisdiction.

Ms. Mezenen's argument is apparently based on a misunderstanding of the effect of the imputation of a salary to Mr. Mezenen for purposes of valuing the business. The imputation of a salary to Mr. Mezenen most certainly did not represent funds being received by Mr. Mezenen, nor did the business ever have the cash available to make these distributions.

In fact, as recognized by the trial court, Mr. Mezenen was receiving a \$2,000.00 per month salary prior to the parties' separation, which was transferred to Ms. Mezenen in early 1994 to allow her to sufficient earnings to claim her two children from a previous marriage as tax deductions. (Findings of Fact and Conclusions of Law, ¶ 13). During this period, Mr. Mezenen received absolutely no compensation for his full-time management of

the company. This arrangement continued despite the fact that Mr. Mezenen worked exceptionally long hours, often seven days a week, in his active management of every aspect of the business' operations. Ms. Mezenen, on the other hand, had only limited involvement with the company even prior to the separation.

Furthermore, by adopting the business valuation of Mr. Mezenen's expert, Merrill Norman, the trial court rendered an equitable allocation of all of the business assets and liabilities, including tax benefits and detriments. In essence, Ms. Mezenen is asking the court to issue orders regarding the substance of federal income tax returns, something which it has no jurisdiction to do. For Ms. Mezenen to argue that Mr. Mezenen should bear the burden of a tax liability based upon an income which he never received, when the court executed an equitable allocation of all aspects of the business, is patently unjust. The trial court's order regarding equitable distribution of the business and allocation of concurrent assets and liabilities should be upheld.

V.

**THE TRIAL COURT MADE ABSOLUTELY NO FINDINGS SUFFICIENT TO SUPPORT AN AWARD OF ATTORNEY'S FEES TO MS. MEZENEN; FURTHERMORE, AN AWARD OF FEES ON APPEAL IS UNWARRANTED.**

The trial court granted Ms. Mezenen an award of attorney's fees without making any findings regarding the reasonableness of

such fees, her need, or Mr. Mezenen's ability to pay, all of which are required by Utah law. Ms. Mezenen's attempt to support the fee award by reference to Mr. Mezenen's alleged concealing of assets is of no help; there is absolutely no evidence that Mr. Mezenen asserted a claim or defense in "bad faith" as required by Utah Code Ann. § 78-27-56, the section asserted by Ms. Mezenen.

The trial court's Findings of Fact & Conclusions of Law are devoid of any reference to Ms. Mezenen's need, Mr. Mezenen's ability to pay, or the reasonableness of the requested fees<sup>3</sup>. All of these factors are undisputably required to be considered by the trial court under Utah law. Bell v. Bell, 810 P.2d 489, 493 (Utah Ct. App. 1991). Ms. Mezenen tries to circumvent this glaring absence of support in the record by claiming that she has "limited income" and that Mr. Mezenen was awarded a "valuable business." Such evidence is not part of the court's Findings, and may not be considered in determining the propriety of the award.

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<sup>3</sup> It is telling that Ms. Mezenen makes absolutely no reference to the fact that she was allowed to amend her complaint, mid-trial, to assert a claim for attorney's fees. Such amendment was improper under Rule 15(a) of the Utah Rules of Civil Procedure, and created significant prejudice for Mr. Mezenen, most importantly because he was afforded no opportunity to investigate the reasonableness of the claimed fees. The trial court's award of fees should be reversed on this ground alone. Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188 (Utah 1983).

Furthermore, Ms. Mezenen's attempt to rely upon Utah Code Ann. § 78-27-56 is equally unavailing. That section allows an award of attorney's fees if an action or defense is without merit and brought in bad faith. There is no such showing here. Assuming, arguendo, that the trial court properly allowed mid-trial amendment of the complaint, there is no showing, nor is there such a finding in the court's Findings of Fact, that Mr. Mezenen raised any claim or defense in bad faith<sup>4</sup>. Consequently, the trial court's award of fees should be reversed.

Nor is there any basis for an award of fees on appeal. Ms. Mezenen merely asserts conclusorily that she should be awarded fees on appeal because of Mr. Mezenen's imputed salary of \$72,000.00, and because she has "insufficient funds." Again, since the trial court made no finding regarding Ms. Mezenen's need<sup>5</sup>, such allegations may not properly be considered. Furthermore, Ms.

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<sup>4</sup> Ms. Mezenen cites Finlayson v. Finlayson, 874 P.2d 843 (Utah Ct. App. 1994) in support of her claim for attorney's fees. However, Finlayson, and the authority cited therein, deals with the specific situation where one party is forced to bring proceedings to compel due to the other party's failure to comply with the provisions of a decree or order. Here, no such proceedings have ever been brought. Consequently, these cases are inapposite.

<sup>5</sup> To the contrary, the trial court found that, at the time of the divorce, Ms. Mezenen was engaged in a training program which would enable her to "provide for her own support and maintenance" and that she expected to receive "a fairly significant pay increase at her new job and position." (Findings of Fact and Conclusions of Law ¶ 15).



Mezenen must show that she "prevailed on the main issues" in order to receive an award of fees on appeal. Rosendahl v. Rosendahl, 876 P.2d 870, 875 (Utah Ct. App. 1994). Based upon the issues raised in the appeal and cross-appeal, there is no basis for such a showing. Consequently, the trial court's decision (1) to allow Ms. Mezenen to amend her complaint mid-trial and (2) to enter an award of fees without any of the requisite findings should be reversed, and the parties ordered to bear their own costs and fees on appeal.

VI.

**THE OVERWHELMING WEIGHT OF THE EVIDENCE  
DEMONSTRATES THAT MS. MEZENEN ENGAGED IN  
COHABITATION; THE EVIDENCE IN THE RECORD  
SPECIFICALLY CONTRADICTS THE TRIAL COURT'S  
DECISION.**

Not surprisingly, Ms. Mezenen fails to point to any evidence in the record sufficient to support the trial court's plainly erroneous finding that she did not engage in cohabitation. This finding is undeniably against the weight of the evidence and in contradiction to well-established Utah law. Ms. Mezenen's attempt to support the finding by claiming that the temporary alimony payments in fact represented a partial distribution of profits is baseless and lends no support whatsoever to the trial court's erroneous finding.

In her Brief, Ms. Mezenen relies upon the fact that the cohabitant, Mr. Grumwald, was working out of state while engaging

in a relationship with Ms. Mezenen. Under prevailing Utah law, this fact is, frankly, irrelevant. The record demonstrates the following:

- Mr. Grumwald stayed in Ms. Mezenen's home for overnight periods during 1995 when he was working in the state of Utah (Tr. Vol. I, p. 116);

- the two traveled together outside the State of Utah on numerous trips financed by Mr. Mezenen, went on camping trips within the state, and engaged in sexual intercourse (Exhibit A, ¶ 19; Tr. Vol. I, pp. 118-119, 125);

- while residing with Ms. Mezenen, Mr. Grumwald performed various household tasks, including purchasing groceries, assisting with cooking and household chores, and helping Ms. Mezenen's children with their homework (Exhibit A, ¶ 19, Tr. Vol. I, pp. 123-124, 126-127); and

- he used the utilities at will, and had free access to Ms. Mezenen's residence, where he stored snowmobiles and other vehicles (Exhibit A, ¶ 19).

In light of this express, uncontroverted testimony which became part of the trial court's Findings, the conclusion that Ms. Mezenen did not engage in cohabitation is plainly erroneous and an abuse of discretion. The facts presented are virtually identical to those in Pendleton v. Pendleton, 918 P.2d 159 (Utah Ct. App.

1996) (a finding of cohabitation was warranted where the alleged cohabitant stayed with Ms. Pendleton in her home "ninety percent of the time" while he was in town, despite the fact that his job required substantial travel out of state, he came and went at will, and ate almost all of his meals with Ms. Pendleton while he was in town), and mandate the same result; i.e., a finding of cohabitation requiring a refund of alimony previously paid under the temporary orders.

Furthermore, Ms. Mezenen's attempt to argue that the alimony previously paid was in fact not alimony, but a distribution of profits, is both unsupported and unavailing. The trial court expressly noted that "the Defendant was ordered to pay to the Plaintiff as and for alimony on a temporary basis the sum of \$1,200.00 per month . . . ." (Findings of Fact and Conclusions of Law, ¶ 16). Ms. Mezenen attempts to rely upon another portion of the Findings; specifically, that there were no undistributed profits of the business to be awarded. However, the court was merely explaining what had happened to such profits. The fact that certain alimony payments were made by the business, which was awarded to Mr. Mezenen, has no bearing whatsoever on the cohabitation issue. Mr. Mezenen was ordered to pay temporary alimony. He did so. Ms. Mezenen engaged in cohabitation during

that period. As such the trial court's decision regarding cohabitation should be reversed.

VII.

THE DOCUMENT WHICH THE COURT CORRECTLY  
DECLINED TO ADMIT LACKED FOUNDATION AND  
RELEVANCE.

Ms. Mezenen asserts that a 1995 Partnership tax return which was never filed with the Internal Revenue Service should have been admitted into evidence. Not only did the document lack foundation; Ms. Mezenen has failed to allege or demonstrate that she was prejudiced by the court's refusal to admit the document. Absent such impact on the substantial right of a party, the court's decision to admit or refuse to admit evidence will not be overturned.

It is undisputed that the tax return was never filed with the Internal Revenue Service. Consequently, it is not binding upon Mr. Mezenen or the company, and does not represent any accurate measure of profits or value. More importantly, Ms. Mezenen has failed to show that the non-admission of the tax returns impacted any substantial right which she possessed. This showing is a fundamental prerequisite. As this Court explained in Hardy v. Hardy, 776 P.2d 917 (Utah Ct. App. 1989), "[w]e will not reverse a trial court's determination on the admissibility of evidence absent an abuse of discretion impacting a party's substantial rights."

Id. at 924. See State v. Oliver, 820 P.2d 474, 479 (Utah Ct. App. 1991) cert denied, 843 P.2d 516 (Utah 1992) ("in reviewing a trial court's decision to admit evidence, we will not reverse that ruling unless a substantial right of the party has been affected").

Because Ms. Mezenen has failed to make any showing of prejudice or substantial impact upon her rights, the trial court's decision not to receive into evidence the 1995 tax return should be upheld.

#### **CONCLUSION**

Essentially, Ms. Mezenen has attacked key elements of the trial court's property distribution while failing to make any showing as to why it should be disturbed. Ms. Mezenen claims that the trial court erred by not making a distribution of pre-decree profits of the parties' business, but fails to demonstrate that there was cash available to effectuate the distribution. The trial court expressly found that such profits were accounted for in salary to Mr. Mezenen and alimony payments to Ms. Mezenen. Although Ms. Mezenen claims that the business enjoyed some available cash, she fails to address the fact that any such cash was included in the valuation of the business. Ms. Mezenen, then, enjoyed the benefit of such cash in the court's allocation of the value of the business.

Ms. Mezenen's attempt to challenge the court's finding of imputed salary to Mr. Mezenen is equally flawed. The record is replete with support for such imputed salary, particularly in light of the fact that Mr. Mezenen was responsible for virtually all aspects of the business' operations, as he was in fact ordered by the court to over see. Ms. Mezenen has not only failed to marshal all of the evidence in support of the specific finding, as she is required to do, she has also failed to demonstrate any reason as to why it should be reversed.

The court's findings regarding premarital assets should also be upheld. It is undisputed that the Certificate of Deposit and approximately \$5,800.00 in funds used to make a down payment on the parties' residence were acquired before the marriage by Mr. Mezenen and, consequently, were properly awarded to him as his separate and premarital property. Ms. Mezenen has asserted no facts whatsoever sufficient to reverse that finding.

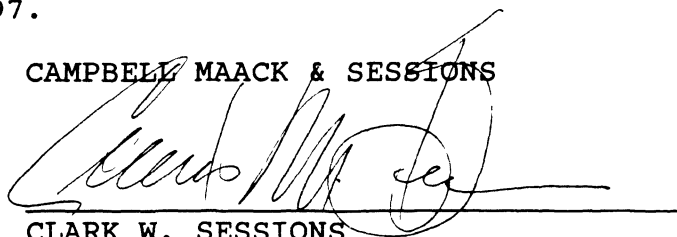
As fully set forth in Mr. Mezenen's opening Brief, both the trial court's award of attorney's fees to Ms. Mezenen and its finding regarding cohabitation should be reversed. The trial court plainly erred by allowing Ms. Mezenen to amend her complaint to add a claim for fees mid-trial, and by awarding such fees without making any of the findings long required by Utah law. Finally, the trial court's finding regarding cohabitation was blatantly

erroneous. It is difficult to imagine a clearer-cut case of cohabitation as these facts *demonstrate*. In light of Ms. Mezenen's own testimony, the trial court's finding regarding cohabitation should be reversed.

In sum, Mr. Mezenen respectfully submits the following: (1) the provisions of the Decree of Divorce regarding distribution of property should be upheld; and (2) the trial court's findings regarding attorney's fees and cohabitation should be reversed.

DATED: September 29, 1997.

CAMPBELL MAACK & SESSIONS

A handwritten signature in black ink, appearing to read "Clark W. Sessions", is written over a horizontal line.

CLARK W. SESSIONS

DEAN C. ANDREASEN

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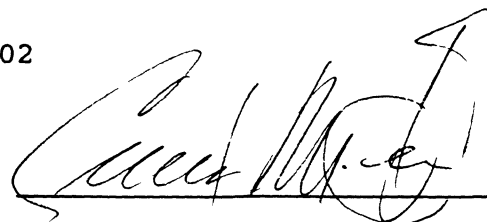
Kelly Mezenen



**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of September, 1997, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** was mailed, postage prepaid, first-class, to:

Randall C. Gaither  
321 South 600 East  
Salt Lake City, Utah 84102

A handwritten signature in cursive script, appearing to read "Randall C. Gaither", written over a horizontal line.