

1988

Gary W. Jense v. Sara J. Jense : Reply Brief

Utah Court of Appeals

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Attorneys for Respondent: David S. Dolowitz; Cohn, Rappaport & Segal.

Attorneys for Appellant: Craig M. Peterson; E. Paul Wood; Littlefield & Peterson.

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BRIEF

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DOCKET NO. 880016-CA IN THE UTAH COURT OF APPEALS

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GARY W. JENSE,)	
)	APPELLANT'S REPLY BRIEF
Plaintiff/Respondent,)	
)	
v.)	
)	
SARA A. JENSE,)	
)	Case No. 880016-CA
Defendant/Appellant.)	Category 14(b)

-----oo0oo-----

Attorneys for Appellant:

CRAIG M. PETERSON
E. PAUL WOOD
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

Attorneys for Respondent:

David S. Dolowitz
Leslie Van Frank
of and for
COHNE, RAPPAPORT & SEGAL
525 East 100 South, Suite 500
Post Office Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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Attorneys for Appellant:

CRAIG M. PETERSON
E. PAUL WOOD
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

Attorneys for Respondent:

David S. Dolowitz
Leslie Van Frank
of and for
COHNE, RAPPAPORT & SEGAL
525 East 100 South, Suite 500
Post Office Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

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CRAIG M. PETERSON - 2579
Attorney for Defendant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

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Respondent Gary W. Jense's Reply Brief concedes Point IV, of the issues presented for appeal, i.e. that the Findings of Fact do not reflect the preponderance of the evidence on the issue of possession and value of the silverware and that the silverware should not have been set off against the judgment received by Mrs. Jense against Mr. Jense. The Respondent's Brief mischaracterizes the events in the August 24, 1987, proceeding as claiming that Mrs. Jense's counsel "waived" objections to proceeding on Respondent's Motions on the basis of proffer of evidence as opposed to the appropriate evidentiary proceeding required by Rule 9 for modification of divorce Decrees. The Reply Brief also attempts to mislead the Court when it states that the home sold in August, 1987, for a profit of

\$19,000. The home sold on July 8, 1988, and the net gain realized from that sale was \$4,417.97. Attached hereto as Exhibit "A" is the closing statement for that sale. The remaining portions of the Brief are no different than arguments made to the Court in support of the "Motion to Amend Decree of Divorce" and contain the same fallacious arguments regarding a "substantial change in circumstances" identified in Appellant's primary Brief. Mr. Jense has recognized the weakness of his position at Trial Court by not even arguing on Appeal that his job loss was a substantial change in circumstances, despite that assertion to the Trial Court.

REPLY TO ARGUMENT

The basic difficulty with Mr. Jense's position relates to the legal principles which he advanced when he "requested the trial court to amend the Decree and to moderate enforcement of the April 1, 1987, Judgment in order to accomplish the Court's original intent to divide the marital estate equally." (Respondent's Brief, p. 5.) Mr. Jense advances the proposition that awards made in divorce Decrees should change based upon fluctuation in value of assets after the divorce Decree and upon a change in circumstance which does not relate to the basis of the initial award. Further, Mr. Jense attempts to justify the Court's unwarranted modification by erroneously asserting that the Court can revolve the assets of the parties, on a continuing post-judgment basis and, based upon the revaluation, redistribute

the assets in order to fulfill "the Court's original intent of equalizing the marital estate." It is absolutely clear from the record that if the Court intended to "equalize" the original award of marital assets in the August 24, 1987 hearing, based upon changed circumstances, that the Court's intent was absolutely frustrated and not fulfilled by its own Order. Further, the attempts of the Court to rearrange the original divorce Decree based upon changing values of property, underscores the difficulty of Respondent's position in showing changed circumstances so compelling as to warrant a complete abrogation of a \$44,314.46 judgment granted Mrs. Jense on the date of entry of the Decree of Divorce.

Disregarding the various legal arguments advanced by Respondent in support of the Court's Order, the facts relating to the actual dollar amount awarded Mrs. Jense based upon the Court's attempt at "equalizing the marital estate" on a post loc basis will be reviewed. When ruling on the Motion, the Court stated:

The Court: "Well, I think it's a tough thing to know what to do, because it's true that the property settlement was based upon the presumption that he was going to get a pretty big bonus, because he always had. And I didn't think he would have got a bigger bonus than I anticipated. On the other hand, I don't know that it would have changed the property settlement. I think based upon the equities of the case, I am going to rule as follows: I am going to--

Mr. Peterson: "Before you rule, I would like to make one point. He did get one big bonus which was distributed."

The Court: "That's right, it was distributed, that's right. And as I recall the ruling, that one

was going to be cut in half. That's what happened, but we anticipated that he would get a bonus in 1987 based upon 1986 earnings. And just that there is not as much money as they thought there was going to be and I don't know what to do about it-- what I am going to do is this, though. I think that the equity of the home should be to her. She should get \$19,000.00 or \$20,000.00, whatever it is and the silver should go to her; and that's really all there is. And so, I think if that goes to her, the remainder of the judgment, the other \$24,000.00 will be considered satisfied." (August 27, 1987, Transcript, p. 14-15.)

Based upon the Court's Order, rather than receiving "19,000.00 or \$20,000.00" the amount actually received by Mrs. Jense is \$4,417.97 from the sale of the home located at 4650 West 9200 North, Pleasant Grove, Utah, originally awarded to Mr. Jense. The silverware, which has been conceded to be in her possession one year and three months prior to the entry of the Decree, valued at \$4,417.50 cannot be considered as satisfaction of the judgment.

On a dollars and cents basis, the Court's original award which was reduced to a \$43,000.00 Judgment on February 24, 1986, and to be paid on April 1, 1987, was totally satisfied by payment of \$4,417.97. In no sense was the Court's post-Decree attempt to "equalize the marital estate" accomplished by the Order, which further points out the abuse of discretion by the Court and the significant harm and inequitable treatment occurring to Mrs. Jense.

A. The \$27,750.00 Lump Sum Award in the Decree of Divorce Was Made to Equalize the Property Settlement.

Mr. Jense erroneously asserts that his failure to receive a bonus from his employer during 1987 is a "substantial change in circumstances" warranting setting aside the lump sum payment ordered by the Court to equalize the marital estate.

Finding of Fact 7, Divorce Decree states:

"In order to equalize the marital estate, defendant is awarded Judgment from plaintiff in the sum of \$27,750.00 together with interest thereon at the legal rate of 12 percent from February 24, 1986, until paid in full. This obligation is ordered to be paid by Plaintiff on or before April 1, 1987..."

The \$27,750.00 award gave each party an approximately equal amount of assets or money based upon the value of the estate as it existed on the date of the Decree of Divorce. Placing the award in mathematical terms, Mr. Jense got "X" and Mrs. Jense, on the date of the Decree, got "X - \$27,750.00". To equalize the estate Mrs. Jense was to be paid \$27,750 on or before April 1, 1987. The value of the marital estate was established as of the date of Decree and did not relate to the amount of the bonus which Mr. Jense would receive in the future. Mr. Jense's failure to receive the bonus simply meant that he could not pay the judgment from his anticipated bonus but did not change the actual value of the marital estate as it existed as of the date of the Decree. Therefore, his failure to get a bonus was not a "substantial change in circumstance" relating to the basis upon which the award was made but related only to his

ability to pay the Judgment to "equalize the marital estate," as originally valued on the date of Decree.

The same point can be made with respect to the alimony and attorney's fees award. The Court determined that Mrs. Jense was in need of alimony and financially unable to pay her attorney's fees and, therefore, awarded her \$500.00 per month alimony for a one-year period and attorney's fees and costs in the amount of \$5,670.00. Her needs and the parties' ability to pay and incomes at the time of the Decree of Divorce is the germane point at which the issue needs to be addressed. The date of the Decree is when the facts necessary to support the award are established. The facts established as of that date are not changed by Mr. Jense not receiving his bonus 1½ years afterwards.

B. Fluctuation in Value of the Home is Not a Material Change in Circumstance and Does Not Relate to the Basis for a Property Award, Attorney's Fees or Alimony Award as of the Date of the Decree.

Mr. Jense's Exhibit P-2 and Mrs. Jense's Exhibit D-14, submitted at trial both show that the parties agreed the value of the home was \$150,000.00 and that Mr. Jense should receive the home located at 4650 West 9200 North, Pleasant Grove, Utah. The award of the home was not an issue at trial and the Court followed the parties' agreed value and distributed the property to Mr. Jense in the divorce Decree. Mr. Jense receive precisely what he wanted and gave it a value of \$150,000.00. He now contends, and

the Court improperly agreed, that the fluctuation in the sale price of the home warrants overturning the original property distribution, contrary to established legal principles that property awards should not be disturbed unless there are circumstances which are "sufficiently radical" to justify a modification. Folger v. Folger, 626 P.2d 412, 414 (Utah, 1981).

"The marital estate is evaluated according to the existing property interests at the time the marriage is terminated by the Decree of Divorce." Fletcher v. Fletcher, 615 P.2d 1218, 1222 (Utah 1980). The fluctuation of the value of a marital asset after the divorce Decree is not a substantial change in circumstances. This is especially true where both parties agreed to the value and Mr. Jense desired the asset. In the event that fluctuation in value of a marital asset awarded by a divorce Decree were allowed to be a "substantial change in circumstance," the Courts would literally be flooded with petitions for modification every time an asset sold for more or less than the value assigned or determined as of the date of the Decree.

Furthermore, the fluctuation in value of the home does not relate to the property award determined as of the date of the Decree, the alimony and attorney's fees awarded Mrs. Jense based upon need and abilities to pay. The Court failed to apply principles of law to the facts and erroneously determined that loss of value in the home was a substantial change in

circumstance warranting modification of the Decree. This is especially true where the modification resulted in Mrs. Jense receiving \$4,417.50 in replacement of a \$43,000.00 judgment.

C. The Court Failed to Comply With Supplementary Rule 9 After Timely Objection by Plaintiff's Counsel.

Mr. Jense's Brief mischaracterizes Mrs. Jense's counsel's statement and appearance at the August 24, 1987, proceeding. This Court should recall that the Plaintiff noticed up two motions for August 24, 1987, i.e. Motion to Set Off and Motion to Amend Decree. During the hearing, the first opportunity that Defendant's counsel had to speak to the Motion to Amend Decree he clearly objected to the Court's consideration of modifying the divorce Decree. (August 27, 1987, Transcript, p. 9 and 10.) It was not "midway through the proceeding" as suggested in Mr. Jense's brief, but during the first opportunity that Defendant's counsel had to speak to that "Motion". At no time did Defendant waive her right to an evidentiary hearing on the issue of modification of the Decree. Further, Defendant's counsel was present for the purposes of considering the "Motion for Setoff" regarding the value of the silverware and did not object to proceeding on that Motion based upon Affidavits submitted and proffers of evidence. The Respondent simply mischaracterizes Mrs. Jense's counsel's statements and appearance. The record speaks for that conclusion.

The Court, upon hearing the objections, should have complied with its own rules and required an evidentiary hearing

rather than proceeding on proffer on the Motion to Amend Decree. Its failure to do so was error and an abuse of discretion. Sperry v. Smith, 694 P.2d 581 (Utah, 1984).

D. Equitable Powers to Stay Enforcement.

Mr. Jense argues that the Court's modification of the divorce Decree was nothing more than an exercise of its equitable powers to stay enforcement under appropriate circumstances. (Respondent's Brief, p. 14-15.) However, that argument is not borne out by the result of the Court's Order. Rather than staying enforcement of the \$44,000.00 Judgment, the award of alimony, attorney's fees and property award was almost totally abrogated and reduced to a net sum of \$4,417.50, which was the proceeds of sale from the home. Rather than an appropriate exercise of equitable powers to stay payment of the Decree amounts, it was an abuse of discretion based upon circumstances which did not justify its invocation.

CONCLUSION

It is apparent that the Court established values of the marital estate, the need for alimony and attorney's fees at the time of the Decree of Divorce and then, one year later, attempted to provide equitable relief to Mr. Jense based upon factors which were not related to the basis of the original awards but only his ability to pay those awards. The Court's revisiting the original divorce Decree and rearranging the monetary awards made to Mrs. Jense resulted in permanently setting aside a \$44,000.00 award

and replacing it with a \$4,417.50 award under the guise of exercising equitable powers. The modification of the divorce Decree without an evidentiary hearing, over objections by Mrs. Jense's counsel, should be reserved by this Court.

DATED this 5 day of August, 1988.

LITTLEFIELD & PETERSON

By:

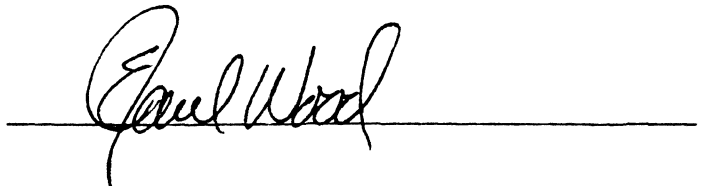


PAUL WOOD

Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered a true and correct copy of the foregoing Appellant's Reply Brief to David S. Dolowitz, Attorney for Plaintiff/Respondent, COHNE, RAPPAPORT & SEGAL, 525 East 100 South, Suite 500, Post Office Box 11008, Salt Lake City, Utah 84147-0008, this 5 day of August, 1988.



28901-28904

A. SETTLEMENT STATEMENT

U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

OMB No. 2502-0266

B. TYPE OF LOAN		6. File Number:	7. Loan Number:	8. Mortgage Insurance Case Number:
1. <input type="checkbox"/> FHA	2. <input type="checkbox"/> FmHA	3. <input type="checkbox"/> CONV. UNINS.	4. <input type="checkbox"/> VA	5. <input type="checkbox"/> CONV. INS.
		F-5898-A		
C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(a.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.				
D. NAME AND ADDRESS OF BORROWER:		E. NAME AND ADDRESS OF SELLER:		F. NAME AND ADDRESS OF LENDER:
JO RAE WOOLLEY HAYNES		GARY W. JENSE LANA JENSE BOWLES		CONCORD MORTGAGE CORPORATION 941 EAST 3300 SOUTH SALT LAKE CITY, UTAH 84106
G. PROPERTY LOCATION:		H. SETTLEMENT AGENT:		
4650 WEST 9200 NORTH PLEASANT GROVE, UTAH 84003		FOUNDERS TITLE COMPANY		
		PLACE OF SETTLEMENT:		I. SETTLEMENT DATE:
		5525 So. 900 East #115 Salt Lake City, Utah 84117		07/08/88
J. SUMMARY OF BORROWER'S TRANSACTION			K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BORROWER			400. GROSS AMOUNT DUE TO SELLER:	
101. Contract sales price	107,500.00	401. Contract sales price	107,500.00	
102. Personal property		402. Personal property		
103. Settlement charges to borrower (line 1400)	2,534.70	403.		
104.		404.		
105.		405.		
Adjustments for items paid by seller in advance			Adjustments for items paid by seller in advance	
106. City/town taxes	to	406. City/town taxes	to	
107. County taxes	to	407. County taxes	to	
108. Assessments	to	408. Assessments	to	
109.		409.		
110.		410.		
111.		411.		
112.		412.		
120. GROSS AMOUNT DUE FROM BORROWER	110,034.70	420. GROSS AMOUNT DUE TO SELLER	107,500.00	
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:			500. REDUCTIONS IN AMOUNT DUE TO SELLER:	
201. Deposit or earnest money	500.00	501. Excess deposit (see instructions)		
202. Principal amount of new loan(s)	80,600.00	502. Settlement charges to seller (line 1400)	610.00	
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to		
204. PREPAID CREDITS	40.00	504. Payoff of first mortgage loan PRUDENTIAL	30,641.22	
205.		505. Payoff of second mortgage loan BENFIC	33,175.23	
206.		506. PAYOFF-BENEFICIAL	37,217.01	
207.		507. UTAH CO. TREASURER-DEI INQ.	466.30	
208.		508. PAYOFF FOR WATER SOFTNER	486.54	
209.		509.		
Adjustments for items unpaid by seller			Adjustments for items unpaid by seller	
210. City/town taxes	to	510. City/town taxes	to	
211. County taxes 01/01/88 to 07/08/88	485.73	511. County taxes 01/01/88 to 07/08/88	485.73	
212. Assessments	to	512. Assessments	to	
213.		513.		
214.		514.		
215.		515.		
216.		516.		
217.		517.		
218.		518.		
219.		519.		
220. TOTAL PAID BY/FOR BORROWER	81,625.73	520. TOTAL REDUCTION AMOUNT DUE SELLER	103,082.03	
300. CASH AT SETTLEMENT FROM/TO BORROWER			600. CASH AT SETTLEMENT TO/FROM SELLER	
301. Gross amount due from borrower (line 120)	110,034.70	601. Gross amount due to seller (line 420)	107,500.00	
302. Less amounts paid by/for borrower (line 220)	81,625.73	602. Less reductions in amount due seller (line 520)	103,082.03	
303. CASH (DFROM) (DTO) BORROWER	28,408.97	603. CASH (QTO) (DFROM) SELLER	4,417.97	

Previous edition is obsolete.

HUD-1
RESPA, HB 4306.2

Jo Rae Woolley Haynes
JO RAE WOOLLEY HAYNES

Gary W. Jensen
GARY W. JENSEN
Lana Jensen Bowles
LANA JENSEN BOWLES

EXHIBIT A

used on price \$ 107,500.00		PAID FROM BORROWER'S FUNDS AT SETTLEMENT		PAID FROM BELLEF'S FUNDS AT SETTLEMENT	
Division of Commission (line 700) as follows					
701 \$	to				
702 \$	to				
703	Commission paid at Settlement				
704					
800. ITEMS PAYABLE IN CONNECTION WITH LOAN					
801	Loan Origination Fee	1.00	to CONCORD MORTGAGE	806.00	
802	Loan Discount	1.00	to CONCORD MORTGAGE	806.00	0.00
803	Appraisal Fee to				
804	Credit Report to			40.00	
805	Lenders Inspection Fee				
806	Mortgage Insurance Application Fee to				
807	Assumption Fee				
808	TAX SERVICE FEE			59.00	
809					
810					
811					
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE					
901	Interest from	07/11/88 to 08/01/88	@ \$ 24.290000 /day	0.00	
902	Mortgage Insurance Premium for	months to			
903	Hazard Insurance Premium for	1 years to		427.00	
904	Flood Insurance Premium for	years to			
905					
1000. RESERVES DEPOSITED WITH LENDER					
1001	Hazard insurance	2 months @ \$ 24.84	per month	0.00	
1002	Mortgage insurance	months @ \$	per month		
1003	City property taxes	months @ \$	per month		
1004	County property taxes	11 months @ \$ 78.59	per month	0.00	
1005	Annual assessments	months @ \$	per month		
1006	Flood insurance	months @ \$	per month		
1007		months @ \$	per month		
1008		months @ \$	per month		
1100. TITLE CHARGES					
1101	Settlement or closing fee	to FOUNDERS TITLE CO.		75.00	75.00
1102	Abstract or title search	to			
1103	Title examination	to			
1104	Title insurance binder	to			
1105	Document preparation	to CONCORD MORTGAGE		50.00	
1106	Notary fees	to			
1107	Attorney's fees	to			
	(includes above items numbers,		1		
1108	Title insurance	to FOUNDERS TITLE CO.		251.70	535.00
	(includes above items numbers,		1		
1109	Lender's coverage	\$ 80,600.00	251.70		
1110	Owner's coverage	\$ 107,500.00	535.00		
1111					
1112					
1113					
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES					
1201	Recording fees Deed \$ 8.00	Mortgage \$ 12.00	Releases \$	20.00	
1202	City/county tax/stamps Deed \$		Mortgage \$		
1203	State tax/stamps Deed \$		Mortgage \$		
1204					
1205					
1300. ADDITIONAL SETTLEMENT CHARGES					
1301	Survey to				
1302	Pest inspection to				
1303					
1304					
1305					
1400. TOTAL SETTLEMENT CHARGES (enter on lines 103, Section J and 502, Section K)				2,534.70	610.00

Jo Rae Woolley Haynes
JO RAE WOOLLEY HAYNES

Gary W. Jense
GARY W. JENSE
Lana Jense Bowles
LANA JENSE BOWLES