

2008

Sonderborg (Ray) v. Sonderborg : Reply Brief

Utah Court of Appeals

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ARGUMENT I

WIFE ARGUES THAT THE "COURT ERRED IN ITS FINDINGS OF FACT" BUT DOES NOT ENUMERATE WHICH FINDINGS AND DOES NOT MARSHAL THE EVIDENCE. THUS, THIS COURT SHOULD REFUSE TO CONSIDER THE MERITS OF THE ARGUMENTS AND ACCEPT THE FINDINGS AS VALID

RESPONSE

Husband argues that Wife, in her brief in Argument I, referenced that the Findings of Fact were in err, and although Wife referenced that the Findings would be alluded to in individual argument relating to alimony, attorney's fees, and separate property issues, that they never were. In fact, they were, albeit perhaps not in the fashion desired by the Husband.

The Findings of Fact are found annexed to Wife's brief, in the Addendum. They are in err as they failed to (1) award Petitioner alimony, (2) in not finding certain property to be non-marital and (3) in failing to award attorney's fees.

FINDINGS OF FACT:

1. **Alimony.** Paragraph 9 states the following, with respect to alimony:

(A) The Court finds that Petitioner has not received any testimony from any medical doctor that the Petitioner is disabled to the point where she cannot become employed and can contribute to her own earnings.

(B) The Court finds that the Petitioner's current

receipt of disability from a private insurance carrier does not convince the Court that her subsequent employment would disallow her receipt of disability from that private insurance police under the laws of the State of Utah. The Court further finds that the Petitioner has not proved that she is unable to work.

(C) The Court finds the Petitioner's current yearly income from her private insurance disability to be \$17,652 per year, without consideration of any additional income she may derive from her dogs, the sale of puppies, or other ventures that she was engaged in during the marriage.

(D) The Court finds that the Petitioner's net yearly net income is almost equal to the respondent's 2007 income of \$19,321.

(E) The Court finds that any shortfall in earnings as a comparison between the Respondent's earnings and Petitioner's earnings can clearly be compensated to Petitioner by her ability to become employed.

(F) The Court specifically finds that the Petitioner is underemployed by at least the difference between the Respondent's gross monthly income and the Petitioner's gross monthly income.

(G) The Court finds that the Petitioner has not proved a need for support nor an ability on the part of the Respondent to pay alimony and therefore denies the award of any

alimony to the Petitioner.

(H) The Court has reviewed the Petitioner's and Respondent's average living expenses and finds those expenses to be reasonable for each party.

Also, paragraph 10, in pertinent part, states:

(B) The Court finds that the Respondent during the pendency of this matter was forced to acquire a second job to assist in the payment of the alimony that was awarded to Petitioner under the temporary order.

(C) The Court finds that the Respondent does not have the ability to contribute support to the Petitioner in the form of alimony.

(D) The Court finds that the Respondent does not have a need for alimony from the Petitioner nor has he proved an ability for Petitioner to pay him alimony.

(E) The Court denies the award of any alimony to either the Petitioner or the Respondent.

(F) The Court has reviewed the Respondent's average living expenses and finds those expenses to be reasonable.

Findings cited above were referenced in each of the sections of argument in Wife's brief, although not specifically set forth as "marshaling". They were set forth in the Statement of Facts in great detail as citations to the record, i.e., "never sought

employment with any company or employer who would use business degree", T.T. at 20:1-10; "worked as supervisor of security guards for Davis Security", 28-30 hours per week, in 1991-1992, T.T. at 20-11-21, "had broker's license" T.T. at 9:11-13; "occupation in terms of time and income generated was owner and operation rental properties"; etc., on page 11 of Wife's brief, which refer to paragraph 9(G) and 10 (C). Also, Page 18 of Wife's brief, "he had amassed an approximate gross worth of over one million dollars (adding the appraisals of all of the properties without deductions for mortgages)" (appraisals attached as Respondent's Trial Exhibits 1, 2, 3, 4 and 7); that "he had a broker's license", "worked as supervisor of security guards", "worked for the recreation department" and "his employment had been almost uniformly, throughout the marriage, that of managing his properties" (page 19, Brief). In addition, "...by far your primary operation, both in terms of your time and terms of the income it generated, was your occupation as an owner and operator of rental property? " "Yes" (page 19, Brief, also, T.T. 186:23-25; 187:1). And, that Mrs. Soderborg was gainfully employed until stricken with bone cancer, that she was medically disabled, "determined by her insurance carrier to be permanently and totally disabled, correct?" Yes" (page 19, Brief, T.T. 182:9,10).

It is clear the necessity of marshaling the evidence was satisfied as to the issue of alimony.

2. Attorney's Fees. Paragraph 13 of the Findings states:

13. The Court finds that each party has incurred attorney fees and that each party should assume and pay their own attorney fees and costs. The Court finds that neither Petitioner nor Respondent has the ability to pay one another's attorney fees. The Court further finds that the Petitioner has an outstanding attorney's lien to former counsel Richard S. Nemelka and that said obligation should be assumed and paid by Petitioner and she should hold Respondent harmless therefrom.

The marshaling of the evidence relating to attorney's fees began in Wife's brief with an identification of the preservation in the trial court portion of the brief where the issue is referenced at 144:22 ("Do you want and have any obligation here for-in your opinion, to pay those attorney fees"); 225:6 ("Have you been forced to incur attorney's fees in this case?"); 228:14 ("Is it a request that you be awarded a portion of your attorney's fees?"), 229:3 ("That's it, and an affidavit of attorney's fees, your Honor"); 269:14 ("Ma'am, do you know of any cash or savings accounts that are available by Mr. - or owned by Mr. Soderborg that would be able to pay for your attorney's fees?"); 276:10, 11, 12, 14 ("You have requested an award of attorney's fees in this case. Is it your request that the attorney's fees, and the source of the attorney's fees be some allocation of the property that's available in this case? In other words, that there be a property offset for some of your attorney's fees?"); 277:3 ("...and actually, your Honor, I suppose, technically I have to say with the exception of a proffer of attorney's fees, the petitioner in this case would

rest. Will the Court permit me to proffer at a subsequent time?"); 284:18 ("My client ought to be awarded some attorney's fees for this trial today, because Mr. Soderborg's position has frankly been unreasonable. For example, that he bought into her house, but she didn't ever, through all of this lash up, acquire any interest in his properties"); 289:22, 23, 24, 25 ("Attorney fees. Where is he going to find monies to pay attorney fees....they both have need. Neither one of them have ability to pay...").

Attorney's fees are also set forth in Wife's brief on page 22, where it states, "The Findings of Fact relating to attorney's fees, cited at R. 434-455, specifically paragraph 9, is rife with err".

Page 22 continues with the allusion to Wife's inability to be employed by being medically incapacitated as follows: "her doctor won't release me", "there are spots there, but we haven't actively done anything", "right now there is a spot in my shoulder", "and, then, after that she was determined by her disability insurance carrier to be permanently and totally disabled, correct?" "Yes" (T.T. at 182-7-10).

As with the issue of the Findings relating to alimony, the requirement to marshal the evidence as to the issue of attorney's fees has been satisfied.

3. Finding Certain Property to be Non-Marital. The balance

of the Findings, which include paragraphs 4 (A), (B), (C), (D), (E), (F), (G), 5 (A), (B), (C), (D), (E), (F), (G), (H), (I), 6 (A), (B), (D), (E), (F) (G), (H), (I), (J), (K), (L), (M), (N), (O), (P), (Q), (R), 7 (A), (B) and (C), relate to the real property of the parties.

The Findings, along with the trial exhibits by both the Wife and Husband, together with the argument which cites to the record, on pages 23 through 35, inclusive, of the Wife's brief, and the preservation of the trial record with the extensive record citations, on pages 9 and 10 also of the Wife's brief, amass the exhaustive marshaling of the evidence as required by case law.

The record is replete with "marshaling" of the evidence to such a degree that, although perhaps not as a "magnificent array of supporting evidence" as contemplated by the West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Ut Ct App 1991) cited in Kimball v. Kimball, 2009 UT App 233 at paragraph 21; nevertheless, it was thorough, fastidious and comprehensive and as such meets the standard set forth in the above cases.

ARGUMENT II

THE TRIAL COURT DID NOT ERR IN FAILING TO AWARD PETITIONER ALIMONY

RESPONSE

The Wife responds to Husband's argument that the trial court did not err in failing to award petitioner alimony, as follows.

Husband argues that Wife raises three arguments, i.e., 1) the mere fact that she is on disability is sufficient proof for the court to conclude that she cannot sustain some type of employment to provide for at least some of her own financial need; 2) Husband was "chronically underemployed" for the entirety of the parties eighteen (18) year marriage, and income should be imputed to him on that basis, and 3) now on appeal, Wife argues that the court should disallow certain deductions taken by Husband on his tax returns, and that after adding in these deductions, Husband's income is really \$50,000 to \$52,000.

Husband misstates Wife's arguments, and they will be addressed in turn.

1. The mere fact that she is on disability is sufficient proof for the court to conclude that she cannot sustain some type of employment to provide for at least some of her own financial need.

The fact is, indeed, that Wife is on disability. The undisputed fact is that this is not a "mere" fact but substantial in nature and longevity. she is on not partial disability, but whole disability. Even Husband, in his testimony acknowledges the disability, as indicated in the following exchange:

Question: Did she remain employed at Utah Power and Light throughout the duration of your marriage until she was placed on disability in the mid 1990's?

Husband: Yes

Question: And Barbara, your former wife, was diagnosed with Cancer in approximately march of 1996, correct?

Husband: Yes.

Question: And after treatment for that cancer, she was then diagnosed again with cancer in her right hip in 1997, correct?

Husband: Yes.

Question: And as a result of the cancer diagnosis and as a result of the treatment for that, she was placed on disability in 1996, true?

Husband: Yes.

...

Question: Okay, and then Barbara has not worked outside of the home since she was placed on disability in 1996, correct?

Husband: Yes.

(Trial Transcript page 7:22-25, 8:1-10;20-22).

This is further driven home by Wife's testimony:

Question: We've heard testimony today that you were diagnosed with cancer in 1996: is that correct?

Wife: Correct.

Question: And that the cancer recurred in - or let me ask you this. Did the cancer recur?

Wife: Yes, it did.

Question: And did it recur in the form of bone cancer?

Wife: Sure, sure.

...

Wife: When you have breast cancer, if it comes to any other part of your body, it's still considered breast cancer. It has just gone to a different part of the body. So it was breast cancer that went into the bones.

Question: Okay, but it had - maybe a better way to say it, then, would be that it had gone into the bone?

Wife: Metastasized into the bones.

Question: And did you receive treatment for that metastasized cancer?

Wife: Yes, I did. I was put on different medications, and I had radiation.

Question: Did - over what course of - period of time did you have treatment for the cancer the first time it appeared?

Wife: I was diagnosed in March or April.

Question: Of '96?

Wife: Of '96. At which time they found out it was a very aggressive cancer. At the time of surgery it was a small tumor, but it had already spread throughout my body; 14 out of 16 lymph nodes was involved in cancer, which at the time - the protocol at that time was to do a stem cell rescue, which is similar to a bone marrow transplant using my own marrow. So I had to do numerous tests to see where it was, and make sure that my heart

could handle this, and everything.

Then at that time I was into the hospital where I had to stay for 30 days. What they did was they gave me four different chemos for four or five days, taking my blood cells down to absolute zero. There's a high time during that time if you were to get a cold or anything that you would die, because you have no immune system. So my white cells were down to zero.

Then they were infused back into me where they would climb up. I was told at the time that we are hitting this cancer with everything possible, because it was such an aggressive cancer; and that if it were to come back in that first year, I would probably die, because we had hit it with everything that we had. It was - nine months later it was in my hips, my femur bones and my pelvic.

Question: As a result of that course of treatment did you have any side effects, and did you suffer any disabilities?

Wife: I did. Fatigue was probably the number one thing. I have pain still in my hip and shoulder that was radiated. The bones, I don't know if they - I'm not a doctor; but the bones have been damaged. So I have constant pain.

Question: And now there's been some talk about you being able to do things, like sit up at a computer or deal with a dog or ...

Wife: Right.

Question: - that kind of thing. I mean, clearly, as you are sitting here now, you are not a vegetable.

Wife: No, I'm not an invalid, I'm not a vegetable. I may suffer later with the pain, but I'm able to do things.

Question: When you say you may suffer later with the pain, you mean sitting here in Court all day in one chair, you may pay a price for that later?

Wife: I will probably have a hard time hurting tonight, sleeping.

Question: Okay. Have there been times, for example, are you on medication?

Wife: Yes, I am.

Question: And have you had any side effects from the medications that you take?

Wife: Yes, I have. Also from the chemos that I was given, it is - in all of the surveys, tests - I'm sorry, I can't think of the word right now, but in all that they did, there are all these side effects, which include recurrence of cancer, which includes arthritis, which now I have. There's a host of other problems that will happen by giving a person chemo.

Question: Okay, and is it that host of problems and sort of this whole fallout from the situation that's left you with the disability rating and benefit that you have?

Wife: Yes.

(Trial Transcript page 192:11-25, 193:1-25, 194:1-25, 195:1-14.

This, of course, is referenced in page 19 of Wife's brief but now, as rebuttal, is further fleshed out with the actual testimony.

Page 19 also references Trial Transcript 182:9, 10, testimony of Husband, which states,

Question: Okay, and then after that, she was determined by her disability insurance carrier to be permanently and totally disabled, correct?

Husband: Yes

It should be suggested that "mere", particularly in the light of "permanently and totally disabled" has a much more far reaching connotation than that it is transitory or almost an afterthought.

However, the "mere" fact that she is on disability is not the only reason, although probably a justification in itself, for alimony on an 18 and one-half year marriage as will be seen below.

(2) Husband is chronically underemployed. The evidence at trial was clear that husband "never sought employment with any company or employer who would use his business degree", [which was undisputed he secured during the marriage to Wife)", that he "worked as supervisor of security guards for Davis Security, 28-30 hours per week, in 1991-1992", "he had a broker's license", but "even his apartments only generated between 15-20 hours per

week", all citations on pages 11 and top of page 12 of Wife's Brief. The Court can take judicial notice that 40 hours per is commonly considered full time employment. Fifteen to twenty hours per week, and even twenty eight to thirty hours per week, are woefully inadequate.

Husband was not full time employed during any time of the 18 and one-half year marriage. He secured a "second" job when ordered to pay alimony in the amount of \$514 per month at a hearing during the divorce proceedings. Two obvious points emerge.

First, if Husband was not full time employed then he ought to become full time employed, and thus has a unused potential financial stream from which to draw for purposes of alimony. This was not considered by the lower Court. At the very least, income should have been imputed since he was not full time employed.

Second, and this is not the "law of the case" because it was in the way of a temporary order for alimony, but the \$514 previously ordered was provided monthly by the Husband until trial.

Further, there are other considerations as to excess income.

For example, the evidence at trial and alluded to by the Husband on page 12 of his Brief, Husband contributed an average per month of \$406 to \$750 to household expenses from July, 1988

to November, 1994. After November, 1994, Husband paid the mortgage payment in full and all utilities every month until the separation of the parties in April, 2006, and he was contributing to other household expenses as well (although Husband references Exhibit 6 this is in error as Respondent's Exhibit 6 is History of Purchase of Property and Zoning Problems at 157 South 800 East; however, TT 87-88 is accurate and also see T.T. at 208).

The mortgage for the Wife and the utilities, according to Wife's Financial Statement (Respondent's Exhibit 18), which totaled \$1,144.66 for the mortgage and \$73 for electricity, \$86 natural gas, and \$41 for water, sewer and garbage, for a total of \$1,344.66, also were not considered by the Court with respect to available "freed up" money from which to draw alimony.

She receives \$1,470.80 per month gross income from her disability insurer, which, deducting health insurance of \$70.16, leaves a net income of \$1,401.64. According to Finding of Fact paragraph 9(H), "The Court has reviewed the Petitioner's and Respondent's average living expenses and finds those expenses to be reasonable for each party.". Those living expenses are set forth in Respondent's Trial Exhibit 18, and Wife's monthly expenses are \$3,243.66. Husband's monthly expenses, as set out in Respondent's Trial Exhibit 12, are \$3,093.73. With expenses that the court has found reasonable, Wife has a substantial need for alimony since she has a monthly shortfall of \$1,842.02 per

month (\$3,243.66 less \$1,401.64 = \$1,842.02).

Other facts lending support to an award of alimony are that Husband has a history of borrowing from Wife and repays what he borrows, from his own separate cache. He contracted with Wife to buy into her home on Colene Drive, for \$20,000, and paid the amount off (T.T. 34;1-5, 14-23,35:6-21, Respondent's Trial Exhibit 4 shows pay-off of \$5,000 on December 29, 1989 and \$4,500 on January 21, 1990 with \$500 cash). Husband borrowed another \$6,000 from Wife to purchase a Corvette, and paid this amount off as well, "within six months" (T.T. 278:1, but see 277:24-25, and 278:2-8). Both are substantial amounts and indicate Husband has no problem paying for items he wants.

Although the Husband has additional expenses incurred with his separation from Wife, he has acknowledged he uses his apartments for his office (T.T. 44:20-21); he can use his apartments for his residence, as well. At trial, Husband indicated that all the units are full except one (T.T. 54:5). Husband's expenses, then, lend themselves to being minimized so as to allow a reasonable alimony.

(3). Husband has the ability to pay alimony to Wife from the excessive expenses claimed in operation and managing the properties. Husband had questionable purchases which he claimed as expenses, as reflected in his purchase of a ping pong table and treadmill, addressed in pages 182 through 187 of the Trial

Transcript. Further, in the profit and loss from his business, in the third page of Tab E of the Trial Exhibit Book (referenced at page 173 of the Trial Transcript, lines 12 through 25, and page 174, lines 1-4) in which Husband acknowledged that his gross receipts from his business were \$49,851, yet in his summary of his 2005 income, his income was listed at \$82,000, a \$24,000 discrepancy. In addition, in response to the trial attorney's inquiry that "one of the concerns that she [Wife] expressed on more than one occasion was that she was afraid because you were under-reporting your income - afraid of the legal implications of that, correct?" "She was nervous about it, but that's not why we didn't file jointly" (T.T. 174:25, 175:1-5).

Husband has reported spurious claims as expenses and under reports his income (note that the under reporting was not categorically denied; indeed, there is no denial at all but an acceptance). Twenty-four Thousand Dollars in a year is Two Thousand Dollars a month apparently available for both alimony and attorney fee considerations.

In sum, Husband is a chronically underemployed and essentially a dead-beat Husband as far as his financial attention to Wife is concerned. He did not use the college degree he obtained during his marriage to Wife to any marital benefit; he didn't utilize any of his labor for purposes of enhancing any property other than his own property, the entirety of which he

acquired during the marriage; he didn't work any real job, except on rare occasion, as a security guard, tennis pro, or real estate broker, and even this employment only resulted in a part time effort of 28-30 hours per week; and his attention to his apartment upkeep was also remarkably work free using only fifteen to twenty hours per week.

On the other hand, Wife is disabled. It is curious that Husband makes an issue of Wife being able to work, even at doing occasional buys at Deseret Industries and reselling at garage sales, as well as selling a few dogs a year, yet no physical proof was provided to the Court in the way of a vocational expert to show Wife was capable of working, even in this limited capacity. The only evidence produced at trial was the testimony of the parties and Wife indicated she could not work, and was receiving a whole person disability check from an insurance company. In the light of current events, it is well settled insurance companies don't pay if the need doesn't exist. Yes, they have continued to pay and there was no evidence indicating that the disability payments would be discontinued.

Wife has a need for alimony, Husband has the ability. This is a long term marriage. Husband should have been ordered to pay alimony and for a statutory period of the life of the marriage.

ARGUMENT III

**THE LABOR OF A SPOUSE ON HIS OWN SEPARATE AND
INHERITED PROPERTY DOES NOT TRANSFORM THAT**

PROPERTY INTO JOINT PROPERTY

RESPONSE

Husband and Wife were married for over eighteen years. Husband secures separate property during the course of the marriage (primarily from inheritance), and devotes his full time efforts (which amounted to part time for anyone else, including his Wife who, for the first eight years of the marriage worked the typical forty hour week for Utah Power and Light), contributes some mortgage payments and utility payments for awhile, buys and sells classic cars (twelve during the marriage, mostly Corvettes) with the money he makes on managing the properties he has acquired (although did borrow \$6,000 from Wife early in the marriage and paid it back within six months), and walks away from the marriage with the entirety of the property he acquired and developed through his sole efforts. He also walks away with one half of Wife's retirement, and didn't earn any retirement of his own, from which Wife could draw, because his entire efforts were not employment for anyone but himself on his properties. In the meantime, Wife contracts cancer, which was extremely aggressive, resulting in a thirty day stay in the hospital, numerous chemotherapy treatments, has recurrent pain which doesn't go away, and a determination by the insurance company of a whole person disability ("...she was determined by her disability insurance carrier to be permanently and totally

disabled, correct?", "Yes", from Husband's testimony at T.T. 182:7-10). "I have a really hard time sleeping because I'm in pain all the time", Wife complains (T.T. 273:16-17). Wife receives no alimony payments, even with the disability, because Wife can equalize the income from her disability with purchases she makes from Deseret Industries and then re-selling these at a garage sale, and she also has an income from selling Sheltie dogs, which, according to trial transcripts, had a value of, for seven dogs, \$4,500 for the time in which she was separated from Husband, a period of about two years. The lower Court adds that figure into the property distribution, despite Wife's testimony at trial that she doesn't make any money off these dogs (because of the cost in raising them ("..by the time you get the money for all these puppies and you turn around the buy the food, buy the vaccinations, everything else with these dogs, there's not much left over", T.T. 197:10-13). She does have a nice computer room in which she spends six hours a day, according to Husband who has not spent any time in the house two years prior to trial, nor did he ever spend six hours at home during the day, since he was "managing" his own properties.

Husband enters the marriage with zero assets, but because of his inheritance, he ends up owning a number of properties. The properties, when acquired, were dilapidated, virtually un-rentable and were facing numerous zoning and building violations.

Nonetheless Husband, because of his focus and attention on these properties, brought them into compliance and now the properties "never had so few vacancies" (T.T. 126:5). Husband, age 54 with no physical disabilities (T.T. 52:25, 53:1-3) was, at a hearing on temporary orders, ordered to pay \$514 in alimony. This was discontinued by the trial court.

Is there something wrong with this picture?

Contrary to Husband's argument in his Brief, case law does support Wife's position regarding separate property.

Husband relies on the Dunn case for the proposition that "The general rule is that equity requires that each party retain the separate property he or she brought into the marriage, including any appreciation of the separate property". Dunn v. Dunn, 802 P.2d 1314 (Utah Ct. App. 1990). However, the next sentence, which was included in Husband's Brief reference, is monumental. "Exceptions to this include whether the property has been commingled, whether the other party has by his or her efforts augmented, maintained or protected the separate property, *and whether the distribution achieves a fair, just and equitable result*". Id. (Italics mine).

Is it a fair, just and equitable result when Husband, throughout a period exceeding eighteen years, uses his labor, toward the betterment of the properties he acquired "and that's the biggest resource that has existed in this marriage, and that

is an asset to which my client is entitled. His labor is the marital asset that's gone to improve these properties, to maintain them, to preserve them, to improve them over time." (T.T. 280:15-17).

Courts, as in the Dunn case, have recognized that invading separate property is a necessary exception to the general rule, to achieve a fair, just and equitable result. And "even in cases when the inherited property has not lost its identity as such, the court may nevertheless award it to the non-heir spouse in lieu of alimony and in other extraordinary situations when equity so demands". Burt v. Burt, 799 P.2d 1166, 1169 (Utah Ct. App. 1990). In Savage v. Savage, 658 P.2d 1201, 1204 (Utah 1983), the Utah Supreme Court noted that the trial court's property distribution - granting the wife forty percent of the value of the husband's company - was within its allotted discretion, in part, "while it is true that the [wife] took no responsibility for the business, it was her assumption of the domestic burdens which made possible the [husband's] full-time participation in the business". (cited in Jensen v. Jensen, 2009 UT App. 1, 1024).

A spouse's separate property, particularly income-producing property, could be considered in determining alimony or child support, "or utilized in other extraordinary situations where equity so demands". Mortensen v. Mortensen, 760 P.2d 304, (Utah 1988). Premarital property, gifts, and inheritances may be

viewed as separate property, and, in appropriate circumstances, equity will require that each party retain the separate property brought to the marriage. However, the rule is not invariable. In fashioning an equitable property division, trial courts need consider all of the pertinent circumstances. Burke v. Burke, 733 P.2d 133 (Utah 1987) (cited in Bailey v. Bailey, 745 P.2d 830, 833. () ...the trial court did not abuse its discretion by finding all appreciation in equity while the parties lived in the Home to be marital property. See Schaumberg v. Schaumberg, 875 P.2d 598, 603 (also cited in Mackey v. Mackey, 2002 UT APP 349.

This court has also reviewed, in some depth, in the Jensen case previously cited, a background of separate property cases. Included in these are references to Kunzler v. Kunzler, 2008 UT App 263, which provides a summary of contribution cases, and held that the wife was entitled to part of her husband's separate business property because, although "she was not his partner in the business [at issue] she was his partner in the business of marriage". (fn 5), Id., ¶ 10 n. 5; Jensen v. Jensen, 203 P.3d 1020, at 1025, ¶ 12.

It can be concluded from the cases above that, although as a general rule, separate property should remain separate property, there are exceptions to this rule based on equitable principles.

The following are considerations that require an application of equity, which are not inclusive:

1. The parties were married over 18 years.
2. Wife is permanently and wholly disabled.
3. Wife's retirement, to which she solely contributed to, was divided so that Husband, who had not contributed, would receive an equal one-half share.
4. Although wife is permanently and wholly disabled, Husband is in perfect health.
5. Husband, during the entirety of the 18 year marriage, essentially built his own retirement, from which Wife could not participate, but focusing his energies and labors on enhancing his separate property.
6. Husband does not have to pay alimony, although he had paid alimony in the amount of \$514 in accordance with a prior order of the Court, and made these payments consistently.
7. Wife has a need for alimony, and has a shortfall every month as reflected in her trial exhibit Financial Declaration.
8. Husband has the ability to pay alimony as indicated by his prior payments, and his paying, in the past, the mortgage, the utilities, repayment of \$6,000 he borrowed from Wife, payment of \$20,000 to buy into Wife's residence, and his under reporting of income and questionable expense claims.
9. Husband has income properties from which to draw income, which were acquired during his marriage (although by inheritance); Wife has no income properties.

10. Wife's ability to increase her income, by purchasing items at Deseret Industries and selling them at garage sales, and raising Sheltie dogs for resale, is highly problematic and wholly insufficient to warrant any Finding by the lower court that this income could in any fashion equalize the income of the parties.

Based on the preceding, Wife should be entitled to share in the separate property of Husband.

ARGUMENT IV

THE COURT PROPERLY DENIED WIFE'S REQUEST FOR ATTORNEY'S FEES

RESPONSE

It has been shown, in the preceding and in the initial Brief, that Wife has a need for attorney's fees, that Husband has the ability to pay, and that, in the aggregate, it is simple equity for Husband to be required to pay the attorney's fees of Wife. Wife incorporates all of the prior arguments in this Brief and in the initial Brief.

CONCLUSION

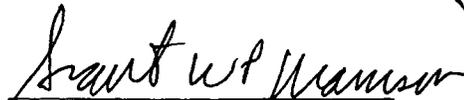
The principle of equity in marriage is center most in the case at bar. Wife was not awarded alimony, attorney's fees nor any interest in Husband's separate property that he spent 18 years of the marriage in acquiring. He has his health, she has recurring pain and is on total disability. He has his property as his retirement, which he did not share with Wife. Wife had her retirement from her sole employment, to which Husband was

awarded one-half.

This court should right the ship.

DATED this 7th day of September, 2009.

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Certificate of Service

I hereby certify that on the 8th day of September, 2009, I hand delivered two true and correct copies of the foregoing Appellant's Reply Brief, to:

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