

1986

# Helen Naranjo v. Jose L. Naranjo : Brief of Respondent

Utah Supreme Court

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Sam King; Attorney for Appellant.

Kathryn Schuler Denholm; Attorney for Resopondant.

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
APPELLANT  
J

IN THE SUPREME COURT  
STATE OF UTAH

ET NO. 860126-CA

HELEN NARANJO,

Plaintiff and  
Respondent,

-vs-

JOSE L. NARANJO,

Defendant and  
Appellant.

\*

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RESPONDENT'S BRIEF

Supreme Court No. 20716

*860126-CA*

District Court No. D83-3755

APPEAL FROM BENCH TRIAL IN  
SALT LAKE COUNTY DISTRICT COURT,  
JUDGE J. DENNIS FREDRICK

KATHRYN SCHULER DENHOLM 0866  
Attorney for Respondant  
660 South 200 East, Suite 100  
Salt Lake City, Utah 84111  
Telephone: 534-1035

SAM KING  
Attorney for Appellant  
301 Gump & Ayers Building  
2120 South 1300 East  
Salt Lake City, Utah 84106  
Telephone: 486-3751

**FILED**

**NOV 19 1985**

IN THE SUPREME COURT  
STATE OF UTAH

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HELEN NARANJO,	*	
Plaintiff and	*	RESPONDENT'S BRIEF
Respondent,	*	
-vs-	*	
JOSE L. NARANJO,	*	Supreme Court No. 20716
Defendant and	*	
Appellant.	*	District Court No. D83-3755

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APPEAL FROM BENCH TRIAL IN  
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KATHRYN SCHULER DENHOLM 0866  
Attorney for Respondant  
660 South 200 East, Suite 100  
Salt Lake City, Utah 84111  
Telephone: 534-1035

SAM KING  
Attorney for Appellant  
301 Gump & Ayers Building  
2120 South 1300 East  
Salt Lake City, Utah 84106  
Telephone: 486-3751

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## FACTS

The Decree awarded the assets of the marriage as set forth in Defendant's statement of Facts, adding only Defendant's retirement account to his side of the ledger (R 238 L.16 - 17).

Plaintiff came to the marriage unskilled and with minor children for whom she received support from Social Security, their natural father being deceased. She concentrated her efforts on homemaking because Defendant preferred that she remain home. When the marriage began to disintegrate, Plaintiff sought employment but was able to find only low paying employment. She terminated several jobs due to health problems and because of Defendant's preference that she remain home (R 174 L.13 to L.21; R 178 L.3 - R 178 A L.8; R 204 L.11 - L.19; R 214 L.9 - L.11).

At the time of trial Plaintiff was not employed, as she could not find suitable work. She is capable of employment, but has difficulty finding a job, due to her age and lack of skills. Defendant's net income was \$2,325.00 per month (R.111 Findings #5).

After the parties married, Plaintiff and Defendant pooled their resources and incomes to purchase equipment so that Defendant could become self employed. Subsequently, they moved to the house in Magna, and, using capital earned from the business during the marriage, their personal labor and the labor of Plaintiff's relatives, they built an oversized garage to house the business equipment and made

other improvements (R 180 L.5 - L.18).

Prior to purchasing the Magna home in December 1975, the parties resided in a home in Kearns. This home was purchased by Defendant prior to the marriage, however, during the marriage, both contributed their incomes to upkeep, improvement and mortgage payments (RP 172 L.19 - P. 174 L.6; RP 174 L.22 R 175 L.21, R 200, L.11 - L.21). Defendant produced no evidence at the time of trial concerning the value of the home at the time of his marriage to Plaintiff.

Defendant produced a letter from his doctor stating that he might require further surgery on his knee in the indefinite future; Defendant testified that he continues to drive truck and even to work overtime (R 221 L.1 - L.10) Defendant's actual disability is questionable. (R 205 L.18 - P.206 L.5; R 209 L.1 - L.6).

Proceeds of Defendant's personal injury award were co-mingled with other assets of the marriage, i.e., a portion was used to pay family expenses and the balance, \$50,000.00, was placed in certificates in the joint names of the parties for their future needs (R 217 L.9 - L.14). The parties continued to live together, share the same living quarters, and operate on joint finances during the pendency of the divorce proceedings. Even after the divorce was filed, Defendant took no action to limit Plaintiff's access to any funds.

## SUMMARY OF ARGUMENT

Plaintiff submits that the trial court properly considered both the law and the equities in its order. Plaintiff, a 49 year old woman, long out of the job market and without marketable skills, was properly awarded possession of the home, approximately half the fixed assets of the marriage, and alimony.

Defendant, a self employed small businessman with substantial income, was properly awarded approximately half the fixed assets and the means to continue producing income.

As to the Kearns home and personal injury settlement, the Court properly found their values, based upon the evidence, or lack of evidence before it, and the conduct of the parties in relation thereto.

The order is proper, based upon the circumstances of the parties at the time of trial; the Court cannot guess what might happen in the future but retains the power to make such modifications as circumstances require.

## ARGUMENT

### I. THE TRIAL COURT'S DIVISION OF THE PERSONAL INJURY AWARD IS SUPPORTED BY EQUITY AND IS NOT PROHIBITED BY LAW

The Utah Supreme Court has held that the trial court has equity powers to assure that the welfare of the parties is best served. The trial court can take into consideration all the pertinent circumstances, including separate property or property derived from outside the marriage, even if acquired after entry of the decree of divorce, in making its



award. Wilkins -vs- Stout, 588 Pac 2d 145 (1978)

The court's findings in this case support the Decree. The court clearly indicated that it considered the source and existence of the certificates derived from the personal injury award, and took into account the parties' employment histories, current income, and disposition of other assets (R 236 L.13 - R237 L.4)

It is well established that the trial court has broad discretion in adjusting financial and property interests. A party challenging the trial court's distribution has the burden to prove a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, or that the evidence clearly preponderates against the findings, or a serious inequity has occurred. English -vs- English, 565 Pac 2d 409 (1977), Pope -vs- Pope 589 Pac 2d 752 (1978), Jespersion -vs- Jespersen 610 Pac 2d 326 (1980) the Utah Supreme Court, in each of the cases cited, has upheld a trial court's disposition of marital assets awarding one spouse a higher dollar figure in fixed assets, particularly when the other spouse, as in this case, is awarded the means by which to generate additional funds.

The award received in Defendant's personal injury case is not differentiated as to the portion attributable to future (and speculative) surgical expense, which portion is applicable to lost income, and which to general damages for pain and suffering (R 240 L.3 - 17; R 111) the discussion contained in Amato -vs- Amato, 434 A 2d 642 (NJ 1981) is not

dispositive of the applicable burden of proof, which presents as a question of first impression to this court, and is offset by this court's decision in Izatt -vs- Izatt, 627 Pac 2d 49 (1981) recognizing that separate assets are properly considered in dividing the parties' joint assets.

It is appropriate to award Plaintiff an interest in funds applicable to earnings, past, present and future, in this 16 year marriage, particularly as she was awarded alimony for an indefinite term.

In Izatt -vs- Izatt supra, the Court stated,

"Consistent with those statutes (30-2-1 and 30-2-4 UCA), the fact that the \$97,000.00 belongs to Defendant is not to be doubted. Nevertheless, the fact that she possesses that asset is one of the total circumstances the court could consider in making what he regards as a just and practical allocation of the property and finances of the parties." (page 51)

Plaintiff notes that the text of the statutes relied upon in Izatt, supra, are inapposite to the Defendant's claim herein. These statutes speak to liability for debts of the spouse, and the wife's right to bring an action, in her own name, to collect damages.

the trial court in Izatt, supra, did take the personal injury award into consideration in awarding the wife less than half the equity in the home of the parties, and no alimony, even though the parties had been married 16 years and the wife was disabled, and was in fact under guardianship.

Defendant concedes that he contributed \$11,459.45 to the marriage (Appellant's Brief page 8), but asserts that

the balance, approximately \$50,000.00, should be awarded to him as his separate property, in addition to a portion of all other marital assets.

Defendant put those funds in joint certificates. This appears to evidence an intent to share those funds with Plaintiff. Defendant assumes that the court is bound to award each party a fixed percentage of the marital assets. This assumption is contrary to law; and ignores the trial court's distribution, which gives Defendant a greater share of the marital assets, effectively compensating for inclusion of assets traceable to the injury award in the distribution Jespersion, supra, English, supra, Pope, supra (R 240 L.3 - 17)

Defendant was awarded cash assets, consisting of certificates and separate savings having a total value of approximately \$46,000.00. This is more than adequate to meet his speculative "need" for funds to cover prospective medical expenses.

The Court, in short, properly divided the assets of the parties, even allowing for the personal injury award. If there was an error, it was harmless; but in light of the equities, there was no error.

Defendant's contention that he was prejudiced, or that the property division was "punitive" is not supported by the facts of this case. The Court properly distributed the assets of the marriage taking those funds into account, when considered with all other facts and circumstances.

## II. THE TRIAL COURT'S AWARD OF ALIMONY IS PROPER

Defendant objects to the award of alimony and appears to argue that Plaintiff should be forced to obtain employment. This position fails to take into account the limited employment opportunities available to a woman 49 years of age, with ulcers and minimal skills, or the years she spent away from the job market tending to the needs of the parties and performing the support services necessary to permit Defendant to operate their business.

There is no basis for Defendant's claim that the award of alimony is punitive in any way; the record does not support such a contention. Rather, the Defendant argues that Plaintiff should be penalized for her unemployment at the time of trial. Defendant forgets that it was at his own insistence that Plaintiff was unemployed during the majority of the marriage. If the parties had remained married, Plaintiff would have had no greater incentive to find employment than she does now.

Plaintiff further notes that the alimony awarded is approximately one-third of Defendant's net income, and submits that this is a reasonable allocation of resources.

While it is possible that the Defendant's income may decrease, it is likewise possible that it may increase. Further, it is likely that the Defendant will find other sources of income should his health fail, i.e. leasing out his equipment, or working as a mechanic. (R 222 L.16 - L.25)

Plaintiff submits that it is not reasonable that

Defendant receive a windfall reduction of his support obligation during the period when he clearly has the necessary resources with which to pay the award. He is not in need of those resources now, but the Plaintiff is, and does not have the income or means of producing income available to the Defendant. (R 111, Findings #5 and 6) Additionally, Defendant receives a benefit from his payment of alimony, in that a portion of those funds are used to maintain the mortgage obligation on the home of the parties, and as a tax deduction.

This Court has recognized the disadvantaged position of the older woman, in reviewing an award of alimony in a case with similar facts. Jones v. Jones, 700 Pac 2d 1072 (1985)

It is entirely unrealistic to assume that a woman in her mid 50's with no substantial work experience or training will be able to enter the job market and support herself in anything resembling the style in which the couple had been living. (page 1075)

Additionally, the income available to Plaintiff from the Whiteman-Clark contract is uncertain (R 234 L.18 - R 235 L.3) and the National Military Underwriters stock produces no income. (R 206 L.6 - 7)

The principles enunciated in Frank v. Frank, 585 Pac 2d 453 (1973) are applicable to this case. This is a marriage of long duration, Plaintiff assisted Defendant during the lean years by helping him to begin his trucking business, and there exists a current disparity in the parties' earning potential. These facts and circumstances clearly support the Court's award of alimony. Where there

are sufficient resources to meet both parties' basic living expenses, there is no justification for reducing Plaintiff's income below the level of her expenses.

Defendant's argument that Plaintiff should be forced into the job market so she can later collect social security was made both at the time of trial and at the time of the Defendant's post Decree motion. There is no evidence in the record to shown whether Plaintiff has already accrued sufficient quarters to qualify her to receive social security. The argument might as well be made that Defendant pay no alimony so that his support burden can immediately be borne by the welfare system of this state. Plaintiff's time, efforts and resources during the 16 years of the marriage was invested in the joint enterprises of the parties' marriage, home and business. She is entitled to receive a just return for that investment. It is precisely that investment which now makes her unable to compete effectively in the marketplace.

The trial court properly noted that an award of alimony is subject to change, upon a showing of substantial change in the circumstances of the parties. (R 240 L.12 - 17) The trial court must, however, rely upon the current circumstances of the parties in making it's award.

Defendant largely bases his objection to the award on an event i.e. loss of health, which may occur at any time during an eight year span, or not at all. (Letter of Dr. Horne, Defendant's Exhibit 22) This prognosis does not rise

to a "probability...too great for the court to "content itself with the circumstances as they now exist". (Appellant's Brief p 21) Indeed, by Defendant's own testimony, he chooses to work overtime, and did so before the divorce; the Decree herein does not place that burden upon him. Nor is there any evidence in the record that Defendant's knee would be benefited by shorter working hours.

An alimony award should, as far as possible, equalize the parties' respective standards of living and maintain them at a level as close a possible to the standard of living enjoyed during the marriage. In determining the amount of alimony to be awarded, it is necessary for the trial court to consider the financial condition and needs of the Plaintiff, her ability to produce a sufficient income for herself, and the ability of the Defendant to provide support. Olsen v. Olsen, 15 Utah Adv. Rep. 8 (August 1985). The trial court in this case considered each of these factors before making it's award. (R 111 Findings #5,6,7)

Defendant's claim that he plans to divert additional monies to acquisition of capital assets for the business, i.e. new equipment, is not binding on the Court. Jones v. Jones, 700 Pac 2d 1072

The apportionment of income between personal and business uses is quite properly a matter left to the discretion of the husband asowner of the pharmacy and gift shop. However, how he chooses to allocate that profit is not binding on the court in determining his ability to pay alimony to his ex-spouse. The full profit produced by the business, adjusted by the court to take into account legitimate and reasonable needs of

the business for additional capital, should have been used as the basis for assessing the husband's ability to provide for his spouse. In making this analysis, the trial court should not permit all claims of need for capital on the part of the business to take precedence over the support needs of the wife. If these capital needs are a result of discretionary decisions of the husband to expand and improve the business, rather than to maintain it in its present condition, then to permit him to divert income into the business at the expense of his ex-spouse's support needs would be to permit him to enrich himself at her expense. page 1076

The trial court made its determination on the issue of alimony after a full trial of the issues, and further considered the issues and arguments raised herein on Defendant's post decree motion. Its judgment should be given the greatest deference. Dogu v. Dogu 652 Pac 2d 1308 (1982), DeRose v. DeRose, 19 Utah 2d 77, 426 Pac 2d 221 (1967).

The case at bar does not present the type of situation which the Court was compelled to remedy in Dogu, supra. The relief sought by Defendant in this case is not structured to protect Plaintiff's entitlement to future income, and can serve only to place her in a position of hardship contrary to the law's mandate to "equalize the parties' respective standards of living and maintain them at levels as close as possible to the standard of living enjoyed during the marriage". Olsen, supra, DeRose, supra Defendant proposes that he improve his standard of living at the expense of the Plaintiff, by significantly reducing her standard of living, so as to shift the burden of her support from himself to third parties. This position is contrary to the case law produced by this court, common principles of equity and



public policy. English, supra, Frank, supra.

III. THE TRIAL COURT PROPERLY REFUSED TO TRACE THE EQUITY IN  
THE KEARNS HOME

Defendant claims that he should be awarded restitution for the equity in a home purchased by him prior to the marriage.

Defendant produced no evidence of the value of the Kearns home at the time of his marriage to Plaintiff, and the testimony of the parties differed as to their contributions to its value. (R 227 L.11 - R 229 L.16) The trial court declined to speculate as to what that evidence might have been, or to apply the arbitrary computation suggested by the Defendant. It is not possible to compute the equity at the time of the marriage based upon the information in the record. Defendant failed to carry his burden of proof, leaving the trial court with no basis for awarding him a dollar value of equity in the Kearns home.

The cases upon which Defendant relies do not support his contention that it is more desirable to approximate rather than to make no determination at all. The cases cited are based upon contract law, and rely upon principles not responsive to the equities of domestic cases. The trial court recognized this in its statement that the parties had pooled their assets. (R 236 L.20 - R 237 L.9) This finding is supported by the conduct of the parties during the marriage, such as their sharing of resources, holding assets jointly, etc. The record does not show that Defendant made

any attempt to segregate the property.

In this case, the Plaintiff contributed her separate resources, to wit, the social security income she received for her children, and her labor, in improving the property. She also made substantial contributions to the property in Magna, i.e. the labor contributed by herself and her family in improving that property, which should equitably be considered in determining the proper distribution of assets.

The courts of this state have not stated an invariable rule that a party recover the property brought to the marriage; equity may require a different result.

Assuming, arguendo, that the property was validly conveyed to the husband prior to the marriage, it does not follow that it must be awarded solely to him in a property settlement, especially where the wife has used her separate resources to purchase the property from the husband's mother and to clear pending liens. Workman v. Workman, 652 Pac 2d 931 (1982) at 933

The Plaintiff in this case contributed her separate assets to the marriage and contributed to an increase in the value of the Kearns property. It is reasonable, and no abuse of discretion, that the proceeds of that property be deemed to be merged in the marriage.

#### IV. THE COURT PROPERLY DIVIDED THE NATIONAL MILITARY UNDERWRITER'S STOCK BETWEEN THE PARTIES

Defendant submits no case law to support the proposition that all the stock should be awarded to Plaintiff and the property distribution rearranged

accordingly. This distribution is properly founded in the discretion of the trial court and should not be disturbed.

The present distribution equalizes the risk of loss and the hope of profit, thereby insulating both parties and equalizing the values awarded to each. Plaintiff notes that each party received \$16,200.00 worth of stock, not \$32,400.00.

Plaintiff submits that the trial court did not err, nor abuse its discretion in dividing the stock between the parties. The trial court's discretion in adjusting the financial and property interests is not lightly set aside on appeal. English, supra.

#### V. THE MAGNA HOME WAS PROPERLY AWARDED TO THE PLAINTIFF

The Magna home was acquired during the marriage and occupied jointly until the time of the divorce. The parties improved the property, using their joint income and their own labor and that of Plaintiff's relatives.

Defendant, with a net income of \$2300+ per month, is well able to obtain other lodgings for himself, as well as shop space. Defendant produced no testimony concerning the cost of replacement shop space, nor is there evidence concerning availability of such space.(Findings #9)

So long as Plaintiff remains in the home and is obligated to pay the mortgage obligation, Defendant has an incentive to pay the alimony award; that incentive would

disappear if Defendant were awarded the home.

Plaintiff occupies the home full time; Defendant is frequently absent for extended periods while driving out of town and out of state. It is not efficient for the home to stand empty during those periods of time.

Defendant argues that he should be awarded immediate use and possession of the home, speculating that Plaintiff will be required to sell when Defendant's equity becomes due. Sale of the home is not inevitable. Plaintiff may elect to purchase Defendant's interest, which would result in no net loss to her, only a change in the form of her assets.

Defendant also asserts that it may be difficult to sell the home, because of the presence of the garage facility on the property. Plaintiff submits that this facility may, in fact, make the home uniquely attractive to other self employed truckers. Again, Defendant's argument assumes that the home must be sold.

Defendant also asserts that his equity in the home is greater than Plaintiff's, but fails to support this assertion.

Plaintiff submits that the trial court's decision to award her possession of the Magna home is responsive to her emotional investment in the home, as a housewife, her lesser income and earning potential and her fulltime use of the premises, as opposed to Defendant's parttime occupancy. Plaintiff's occupancy of the home also acts as an incentive to payment of alimony. Though this is not a reason expressed

by the trial court, it is a relevant consideration.

VI. THE TRIAL COURT'S DISTRIBUTION OF ASSETS SHOULD NOT BE  
DISTURBED

The trial court's ruling is adequately and appropriately supported by the Findings and record in this case. When a specific Finding is not made, the reviewing court turns to the record to determine whether there is an adequate basis for the order. Pennington v. Pennington, 16 Utah Adv. Rep. 5 (August 1985)

The trial court in this case carefully tailored the property division to the needs of the parties, taking into account their personal and financial resources (R 240 L.3 - L.17).

Defendant seeks to substitute his judgment for that of the trial court, suggesting a distribution which is far more advantageous to him than to Plaintiff. He would award her only fixed assets consisting of personal loans to family members largely unable to repay (R P.184 L.15 - P.185 L.5; R 215 L.2 - L.14), proceeds of a contract already in default (R 234 L.18 - R235 L.14), non-income producing stock (R 206 L.6 - L.7) and no cash. Defendant proposes to reserve for himself all the cash assets of the parties, the income producing business assets and all the equity in the home. Defendant, in other words, proposes to provide himself with a reliable means of producing income, but to strip Plaintiff

of the resources she will need to establish an income and provide for her own security. He proposes to pay no, or token, alimony after a marriage of 16 years in which the joint efforts of the parties produced substantial assets, retaining all of the fruit so their joint labors and requiring Plaintiff to seek assistance from third parties for her basic needs.

The authority cited by Defendant to support his assertion that the trial court must build provisions for the future into the decree is colorful, it does not support Defendant's theory. Defendant must bring an action for modification at the proper time, and only after a change has occurred.

#### CONCLUSION

Plaintiff submits that the Decree herein is proper, based upon the evidence before the trial court and the circumstances of the parties.

The trial court, nor this Court, is bound to strictly divide the assets acquired during the marriage according to any fixed rules; the division must be responsive to equity and the needs of the parties. The Decree in this case reflects the trial court's careful consideration of all relevant factors, and should be given great deference. Graziano -vs- Graziano. 321 Pac 2d 931 (1958)

Defendant has failed to produce any persuasive authority to support his arguments that he should receive

sole credit for the personal injury award and the entire equity in the homes. The property division he proposes is inequitable and unjust.

Plaintiff respectfully requests that the order below be affirmed and that she be awarded her costs and a reasonable attorney fee.

DATED this 19 day of November, 1985.

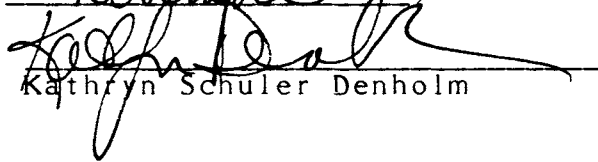


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Kathryn Schuler Denholm

MAILING CERTIFICATE

I hereby certify that I mailed four copies of the above entitled Brief to Sam King at 301 Gump & Ayers Building, 2120 South 1300 East, Salt Lake City, Utah 84106, postage prepaid on this 19 day of November, 1985.

  
Kathryn Schuler Denholm