

2008

# Martha I. Thompson v. James A. Thompson : Reply Brief

Utah Court of Appeals

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March 26. 2009

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IN THE UTAH COURT OF APPEALS

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MARTHA I. THOMPSON,

Petitioner and Appellee,

v.

JAMES A. THOMPSON,

Respondent and Appellant.

Appellate Case No: 20080548

Trial Court Civil No: 074500408

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**REPLY BRIEF OF THE APPELLANT**

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Appeal from the Decree of Divorce  
entered on May 21, 2008 by the Fifth Judicial District Court,  
the Honorable G. Rand Beacham, Presiding

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### **STATEMENT OF THE CASE**

By this appeal, Appellant seeks (1) the reversal of the trial court's decision which awards Mrs. Thompson, Appellee, a one-half interest in the monies which had accumulated in Mr. Thompson's 401(k) retirement account during the years of marriage without first backing-out Mr. Thompson's appreciated separate, pre-marital contribution to the same 401(k) retirement account; and (2) the reversal of the decision which awards the Appellee a one-half interest in the entire equity held in the Utah Home without first backing-out the amount necessary to reimburse Mr. Thompson's separate, pre-marital contribution to the subject real property and the appreciation accrued upon that same pre-marital contribution.

### **STATEMENT OF MATERIAL FACTS**

1. The Parties were married in California in February, 2002. (R. at 206).
2. In 1990, approximately twelve (12) years before the parties' marriage, Mr. Thompson initiated a 401(k) plan. (R. at 198).
3. This 401(k) account was derived from and funded through his employment with the same employer in both California and Utah. (Id.)
4. For period of twelve (12) years, Mr. Thompson made pre-marital contributions to this 401(k) account. (Id.)
5. At the time of the marriage in 2002, the 401(k) account held a value of \$68,784. (R. at 198 and 213 ¶5).
6. Mrs. Thompson did not made any financial contributions to this 401(k) account during the years of marriage. (R. at 198).

7. At the time of trial, the value of the account was \$177,352. (R. at 198 and 213).
8. The average rate of growth within the 401(k) account between and during the marriage, 2002 through 2007, varied between a negative eighteen point twenty-two percent (-18.22%) and a positive thirty-one point sixty-five percent (+31.65%). (R. at 158-159, 198; Exhibits 25 & 26 (Addenda)).
9. Mr. Thompson's original separate, pre-marital amount of \$68,784 had appreciated to \$136,385.21 by the time of trial. (R. at 198).
10. The figure of \$136,385.21 represented Mr. Thompson's appreciated value of his separate, pre-marital contribution. (Id.)
11. The Trial Court concluded that the value in the 401(k) account at the time of trial was \$177,352. (R. at 207 and 213).
12. The Trial Court simply deducted the unappreciated, pre-marital value (\$68,784.00) held in the 401(k) account at the time of marriage from the value held in the 401(k) account at the time of trial (\$177,302.00). (Id.)
13. The Trial Court then found that \$108,518 held in the 401(k) plan was the marital value which had accumulated during the marriage. (Id.)
14. The Trial Court did not account for, nor back-out, any portion of the appreciated value which had accrued upon Mr. Thompson's separate, pre-marital value held in this 401(k) account. (*Cf.* R. at 207 and 213 w 198).

15. Several years prior to his marriage to Mrs. Thompson, Mr. Thompson purchased and continuously owned a home in California (“California Home”) as his sole and separate property. (R. at 193, 196 and 213),

16. After the marriage in 2002, the parties resided in the California Home. (R. at 193, 196, 206 and 213).

17. However, Mrs. Thompson did not contribute anything to the California Home, nor was her name ever placed on title or on any indebtedness secured by the California Home. (R. at 193-196).

18. Both before and after the marriage, Mr. Thompson continued to pay all of the expenses, premiums, tax assessments, and all other related costs to the maintenance and retention of the California Home. (Id.)

19. In 2005, Mr. Thompson received an employment offer in the State of Utah and the parties subsequently relocated to Utah. (R. at 194 and 206).

20. In 2005, Mr. Thompson sold his California Home and applied \$86,410.25 derived from the net sale proceeds from his California Home to the purchase of a home located in St. George, Utah (“Utah Home”). (R. at 206-07 ¶9).

21. Mrs. Thompson did not make any financial contribution towards the acquisition of the Utah Home. (R. at 194).

22. However, Mrs. Thompson’s name was added as a joint tenant to the title of the Utah Home and she had signed on the mortgage secured by the Utah Home. (R. at 158, 194 and 206).



23. The present fair market value of the Utah Home at time of trial was \$450,000.00 subject to an existing mortgage of \$326,523. (R. at 207 ¶11).

24. The Utah Home was purchased for \$399,900.00. (R. at 158). Thus, there was an appreciated value between the purchase price and value at the time of trial of twelve point five percent (12.5%). (R. at 196-197).

25. Petitioner argued at trial that the appreciated value of his separate, pre-marital contribution to the Utah Home was \$97,211.53 (the pre-marital contribution plus the 12.5% appreciation); an increase of \$10,801.28. (Id.)

26. Had the back-out method been used by the trial court, the marital equity would have therefore been \$26,965.46 (i.e., the fair market value of \$450,000 less \$326,523 mortgage, less \$97,211.54 (i.e., Mr. Thompson's appreciated pre-marital contribution)). (Id.) Therefore, one-half of the gross marital equity would have been set at \$13,132.73. (Id.)

27. The Trial Court held that the Utah Home was a marital asset. (R. at 206).

28. The Trial Court found that the sale proceeds from the sale of the California Home had been commingled into the marital estate, that "[d]uring the next two or three years of marriage [between 2002 and 2005], Petitioner [Appellee] acquired some community property interest in Respondent's [Appellant's] California home, but the evidence before the Court does not allow this to be quantified", and title to the Utah Home was held by both parties. (R. at 206, ¶¶6-10).

29. The Trial Court did not award any portion of Mr. Thompson's pre-marital contribution of \$86,410.25 nor any accrued appreciation upon his separate, pre-marital interest. (Cf. R. at 206-207, 213 *with* 196-197).

### **SUMMARY OF THE ARGUMENT**

Under Utah law, equity requires that each party retain the separate property he or she brought into the marriage. Haumont v. Haumont, 793 P.2d 421, 424 (Utah Ct. App. 1990). In order to properly effect an equitable distribution of property, the trial court should have utilized the "back-out method" by subtracting the amount necessary to reimburse Mr. Thompson for his separate, pre-marital property along the the appreciated value of his pre-marital property. Hayes v. Hayes, 20050645 (2006 UT App. 289); Hall v. Hall, 858 P.2d 1018, 1023 (Utah App. 1993); and Burt v. Burt, 799 P.2d 1166, 1172 (UT App. 1990).

It is undisputed that prior to his marriage to Mrs. Thompson, Mr. Thompson opened a distinct 401(k) retirement account through his employer (R. at 198, 207 ¶¶13 and 213); that during the twelve (12) years prior to the parties' marriage, Mr. Thompson's 401(k) had accumulated \$68,784 (Id.); and that at trial, there was not any dispute that Mr. Thompson's 401(k) account held a value of \$177,352. (Id.) Additionally, during the marriage, the 401(k) account had experienced growth and fluctuation between a negative eighteen point twenty-two percent (-18.22%) and a positive thirty-one point sixty-five percent (31.65%). (R. at 159 Exhibits 25 and 26).

The Appellee did not argue at trial nor did the trial court make any findings that the funds held in the 401(k) account had been comingled, nor that she had preserved, maintained or that there was some exception to the general law of awarding separate, pre-marital property to the party who brought the same into the marriage. Therefore, Mr. Thompson should have been awarded his principal along with appreciated value of his pre-marital contributions to his retirement account as his sole and separate property. Hayes v. Hayes, 20050645 (2006 UT App. 289); Hall v. Hall, 858 P.2d 1018, 1023 (Utah App. 1993); Burt v. Burt, 799 P.2d 1166, 1172 (UT App. 1990); and Haumont v. Haumont, 793 P.2d 421, 424 (UT App. 1990).

## ARGUMENT

### I. THE EVIDENCE HAS BEEN SUFFICIENTLY MARSHALLED

The evidence has been sufficiently marshalled to permit the review of the matters raised on this appeal. The dispositive findings of fact made by the Trial Court were stipulated and uncontroverted. There is not any controversy as to the credibility of the witnesses and/or the documentary evidence which established these facts. Therefore, a trial transcript is not helpful for review of this case on appeal. Appellant has adequately and appropriately provided citations to the Record before this court on appeal as to the evidence and findings of facts made by the trial court. The issue on appeal is whether or not the trial court failed to follow the law regarding the allocation of funds held in Mr. Thompson's separate, pre-marital retirement account.

The Trial Court did not make any specific findings which support that the legal conclusion that pre-marital contributions to the 401(k) somehow lost their separate property characteristics (e.g., through commingling of funds by the Appellee, preservation by Appellee, conversion into marital property, etc). The Trial Court made specific findings based upon stipulated and uncontroverted evidence that there was a specific amount held in the 401(k) at the time of the marriage and there was a specific amount held in the same pre-marital account at the time of the divorce. The legal error occurred when the Trial Court failed to award Mr. Thompson the true value of his separate, pre-marital property by employing the simple back-out method to determine the value of the appreciated separate pre-marital property.

Trial courts are to make adequate findings on all material issues. The failure to do so constitutes reversible error unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. Lee v. Lee, 744 P.2d 1378, 1380 (Utah Ct. App. 1987). The findings made by a trial court must be sufficiently detailed and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusion on each factual issue presented. Rappleye v. Rappleye, 855 P.2d 260, 263 (Utah Ct. App. 1993). Additionally, in divorce proceedings, any deviation from the general rule of law must be supported by sufficiently detailed findings of fact that explain the trial court's basis for such deviation. Rappleye, 855 P.2d at 262.

In the present case, there was not any competing nor controverted testimony about the factual issues concerning Mr. Thompson's 401(k). The issues of fact were undisputed and uncontroverted both at trial and on this appeal. There are not any findings by the trial court that would indicate that the trial court determined that there were any exceptions to the general legal principles governing the award of separate, pre-marital property. There were not any findings to support the deviation from the general rule of law. Therefore, without such findings there is no support for the court's decision to award Mrs. Thompson of a portion of the appreciated value which had specifically accrued upon Mr. Thompson's pre-marital interest which had accumulated for 12 years prior to his marriage to Mrs. Thompson. *See Child v. Child*, 194 P.3d 205, 2008 UT App 338.

In *Child*, at the time of marriage, the husband owned twenty-five percent (25%) of a rental business. During the course of the marriage, the value of husband's ownership interest had increased in value. The trial court treated the increased value of husband's ownership in the rental business as marital property and the husband appealed. The *Child* case reiterates the general rule that equity requires that each party retain the separate property he or she brought into the marriage, including any appreciation of the separate property. (citing *Dunn v. Dunn*, 802 P.2d 1314, 1320 (Utah Ct. App. 1990).

The *Child* case does note that such separate property can, however, become part of the marital estate if (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property.

thereby acquiring an equitable interest in it, or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse. (citing Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988)). The Court of Appeals stated that “we see no findings by the trial court that would indicate that it found either of these exceptions. Without any such findings, there is no support for the trial court's conclusion that the appreciation of Husband's share of the business is marital property, to be divided equally.” 2008 UT App 338, ¶ 10. Thus, the decision of the trial court was subsequently reversed the decision of the trial court and awarded the husband the full value of his share in the business.

Equity requires that each party retain the separate property he or she brought into the marriage. Haumont v. Haumont, 793 P.2d 421, 424 (UT App. 1990). In determining the value of marital equity, a trial court should have utilized the “back-out method” of “first subtract[ing] the amount necessary to reimburse [a party's] contribution” to the marital property before dividing the marital property equally.” Hall, 858 P.2d at 1023 (UT App. 1993). The trial court committed a legal error when it failed to utilize the “back-out” method and failed to make any findings which supported a deviation from this legal principle. Mr. Thompson did not receive the amount necessary to reimburse him for his separate, pre-marital contributions to the marital interests; both in the pre-marital 401(k) account and his equity from the separate pre-marital California Home. See Hall, 858 P.2d at 1023 (Utah Ct. App. 1993); Preston, 646 P.2d at 706 (Utah 1982); and Hayes.

2006 WL 1917822, 2006 Utah Ct. App. 289. By failing to account for and factor in the appreciated growth upon Mr. Thompson's pre-marital contribution, the trial court actually awarded Mrs. Thompson a portion of the appreciation/growth which had accrued upon Mr. Thompson's separate, pre-marital contribution; thereby awarding her his separate, pre-marital property. The Trial Court did not make any finding as to any justification for awarding Mrs. Thompson more than her portion of the marital portion of Mr. Thompson's 401(k) account.

**II. APPELLEE FAILS IN HER BURDEN OF PROOF AND MARSHALLING.**

The initial burden of proof was upon the Appellant to determine the existence of separate, pre-marital property and the appreciated growth of the same to the time of the divorce. This burden of proof, along with the marshalling requirement on appeal, was met by the Appellant. (R. 198, 213. Exhibits 25 & 26 and as cited in Appellant's Brief). These findings of fact were uncontroverted and undisputed. Therefore, the credibility of witnesses is not at issue on appeal. The misapplication of the law by the trial court and its deviation from the legal principles governing the allocation and distribution of separate, pre-marital property are at issue.

Thereafter, the burden of proof then shifts to the Appellee to demonstrate that there were exceptions to the general legal principles and law which support an exception to the general rule of the award of separate, pre-marital property. The general rule regarding pre-marital contributions to retirement accounts 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, unless one of the exceptions applies. Once the contributing spouse satisfies his/her burden of showing that the contributions were separate and pre-marital, the burden then shifts to the non-contributing spouse to show that one or more of the exceptions applies. In the instant case, the Appellee wife did not argue at trial nor in her brief, that any of the exceptions to the general legal principle apply.

Appellee fails to provide any sufficient evidence or argument that the general legal rule governing separate, pre-marital should not apply. There is not any evidence that the 401(k) funds were commingled with marital assets or that Mrs. Thompson had by her efforts augmented, maintained, or protected the separate property. Ergo, Mr. Thompson was entitled to all of his pre-marital contributions to the retirement fund, plus the interest attributable to those contributions, because the wife did not, through her efforts, augment, maintain, or protect the separate property. *See Oliekan v. Oliekan*, 2006 UT App 405, ¶ 24, 147 P.3d 464 (holding that since the marital and pre-marital funds in a 401(k) account could be separately identified, the trial court correctly divided the funds by awarding the husband his pre-marital interest, plus appreciation on that amount, and equitably dividing the separate marital portion of the account). At trial, an erroneous legal conclusion was made which was not supported by any factual determination to support the deviation from the general law and supporting the



award of separate, pre-marital property held in Mr. Thompson's 401(k) to Mrs. Thompson.

According to Rule 11(e) of the Rules of Appellate Procedure, a trial transcript may be provided on the relevant evidence to a challenged finding or conclusion. Here, however, neither appellant nor appellee on appeals claims that the transcript contains evidence bearing on the determination of the retirement account. Appellee does not provide any portion of the transcript to show that the trial court deviated from legal principles based upon any exceptions to these general principles governing the back-out method and the awarding of separate, pre-marital property. Since there are not any facts which show exceptions to the general legal principles, there is not any need for a transcript in order to resolve the retirement account issue on appeal. *See Smith v. Frandsen*, 94 P.3d 919, 2004 UT 55.

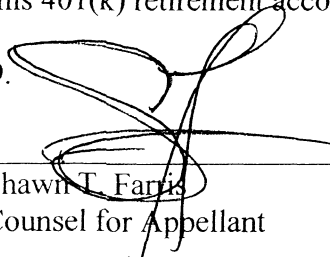
In *Smith*, Appellee urged the appellate court to uphold a summary judgment, asserting that since the appellant failed to provide a copy of the summary judgment hearing transcript the district court's decisions are presumed to be valid. Nevertheless, the appellate court, noting that the appellee misconstrued the meaning of Rule 11(e)(2), stated that "the rule simply requires appellants to include a transcript of all evidence relevant to a challenged finding or conclusion. The *Smith* case notes that neither party claimed that the missing transcript contains evidence bearing on the determination of the case, thus, appellants had no obligation to include the transcript in the record on appeal.

Moreover, Appellee fails to address the numerous cases cited in Appellant's Brief which deal with the issue of separate, pre-marital contributions, along with the accrued interest, to retirement funds. *E.g.*, Burt v. Burt, Dunn v. Dunn, and Oliekan v. Oliekan). Moreover, none of the cases cited by the Appellee deal with the issue of separate, pre-marital contributions and the accrued interest on those contributions. The cases cited by the Appellee merely state that retirement benefits accumulated during a marriage are marital property; a fact which the Appellant has not disputed.

### CONCLUSION

For the foregoing reasons, general accounting principles and upon the legal principles espoused in Utah law, the Decree of Divorce regarding the determination of the marital equity in the 401(k) account and the Utah Home should be reversed. Mr. Thompson should be permitted to recover his separate, pre-marital principal plus the appreciated value of his contributions to the acquisition of the Utah Home and retain the principal and appreciated value of his separate, pre-marital contributions held in his 401(k) retirement account.

Dated this 15<sup>th</sup> day of January, 2009.



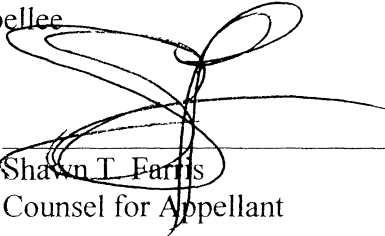
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Shawn T. Faris  
Counsel for Appellant

# CERTIFICATE OF SERVICE

It is hereby certified that on the 15<sup>th</sup> day of January, 2009, a true and correct copy of the foregoing Reply Brief of the Appellant was served by depositing a copy of the same in the U.S. Mail, first class, postage prepaid, and addressed as follows:

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187 North 100 West  
St George, UT 84770



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