

1999

Victor E. Shade v. Delores C. Shade : Reply Brief

Utah Court of Appeals

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Edmund V. Shade; Pro Se Attorney for Appellee.

Steven C. Tycksen; Attorney for Appellant.

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DOCKET NO. 981386

IN THE UTAH COURT OF APPEALS
IN AND FOR THE STATE OF UTAH

VICTOR E. SHADE,

Petitioner/Appellee,

vs

DELORES C. SHADE,

Respondent/Appellant

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Case No. 981386-CA

Priority 15

REPLY BRIEF OF APPELLANT

**APPEAL FROM A DECISION FROM THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY
HONORABLE WILLIAM A. THORNE**

EDMUND V. SHADE, PRO SE
Appellee
2056 W. 1465 N.
St. George, Utah 84770-4135
(435)-656-8393

STEVEN C. TYCKSEN (3300)
Attorney for Appellant
P.O. Box 480
Draper, Utah 84020-0480
(801) 572-2700

FILED

Utah Court of Appeals

MAR 25 1999

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

VICTOR E. SHADE,)	
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Petitioner/Appellee,)	Case No. 981386-CA
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2056 W. 1465 N.
St. George, Utah 84770-4135
(435) 656-8393

STEVEN C. TYCKSEN (3300)
Attorney for Appellant
P.O. Box 480
Draper, Utah 84020-0480
(801) 572-2700

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Argument.....	3
I. THIS COURT SHOULD STRIKE ALL OR PORTIONS OF APPELLEE'S RESPONSIVE BRIEF FOR FAILING TO COMPLY WITH THE UTAH RULES OF APPELLATE PROCEDURE.....	3
II. THE TRIAL COURT ERRED IN FAILING TO AWARD DELORES HER PREMARITAL EQUITY IN THE REAL PROPERTY TOGETHER WITH THE APPRECIATION THEREOF.....	6
III. THIS COURT SHOULD ADOPT A FORMULAIC APPROACH TO THE EQUITABLE DISTRIBUTION OF MARITAL ASSETS.....	8
IV. THE TRIAL COURT ERRED BY FAILING TO MAKE ADEQUATE FINDINGS ON THE ISSUE OF ALIMONY AND BY DENYING DELORES AN AWARD OF ALIMONY.....	8
V. THE TRIAL COURT ERRED IN FAILING TO AWARD DELORES ATTORNEY FEES IN THIS ACTION.....	9
VI. THE TRIAL COURT ERRED IN FAILING TO DIVIDE THE PARTIES RETIREMENT ACCOUNTS.....	9
Conclusion.....	10
Appendix.....	13

TABLE OF AUTHORITIES

UTAH STATUTES AND RULES

Utah Rules of Appellate Procedure, Rule 24(e).....	3
--	---

UTAH CASES

Utah Supreme Court

<u>Heathman v. Hatch</u> , 13 Utah 2d 266,268,372 P.2d 990,991 (1962).....	3
--	---

<u>Uckerman v. Lincoln Natl Life Ins. Co.</u> , 588 P.2d 142 (Utah 1978).....	3
---	---

Utah Court of Appeals

<u>Jefferies v. Jefferies</u> , 895 P.2d 835, 837-38 (Utah App. 1982).....	10
--	----

<u>Koulis v. Standard Oil Co</u> , 746 P.2d 1182 (Utah App. 1987)	3
---	---

Other Courts

<u>Manka v. Martin</u> , 200 Colo. 260, 614 P.2d 875, 880 (1980) (en banc), cert. Denied, 450 U.S. 913 (1981).....	3
---	---

<u>Johnson v. Aetna Casualty & Surety Co.</u> , Wyo., 630 P. 2d 514, 517, cert. Denied, 454 U.S. 1118 (1981).....	3
--	---

<u>Smith v. Rabb</u> , 95 Ariz 49, 53, 386 P. 2d 649, 652 (1963).....	3
---	---

ARGUMENT

I. THIS COURT SHOULD STRIKE ALL OR PORTIONS OF APPELLEE'S RESPONSIVE BRIEF FOR FAILING TO COMPLY WITH THE UTAH RULES OF APPELLATE PROCEDURE.

This Court should strike all or portions of Appellee's responsive brief for failing to comply with the Utah Rules of Appellate Procedure.

At this stage in the litigation the Appellee is representing himself Pro Se. Former counsel, Don Bybee, is under an order of suspension from the practice of law. Although the brief was delivered to counsel in an envelope with a return address from Mr. Bybee it purports to be filed Pro Se by the appellee. Notwithstanding appellee's lay status Pro Se litigants are presumed to know the rules and are held to the same standards as are licensed attorneys. Heathman v. Hatch, 13 Utah 2d 266,268,372 P.2d 990,991 (1962); Manka v. Martin, 200 Colo. 260, 614 P.2d 875, 880 (1980) (en banc), cert. Denied, 450 U.S. 913 (1981); Johnson v. Aetna Casualty & Surety Co., Wyo., 630 P. 2d 514,517, cert. Denied, 454 U.S. 1118 (1981), Smith v. Rabb, 95 Ariz 49, 53, 386 P.2d 649, 652 (1963).

Rule 24(e) makes it mandatory for a party to provide citations to the record for those factual legal matters which they advance and argue in their brief. The Supreme Court has stated that it need not and will not consider any facts not properly cited to or supported by the record. Uckerman v. Lincoln National Life Ins. Co., 588 P.2d 142 (Utah 1978). Further, briefs which put forth legal argument which is not properly documented are also disregarded by the court. Koulis v. Standard Oil Co., 746 P.2d 1182 (Utah App. 1987). In the present case, the Appellee makes a disingenuous and ambiguous general reference to the Trial

Transcript in his statement of facts. However, the facts put forth and the citations thereto do not comport with the record.

The following are examples of factual inaccuracies or conclusory statements contained in Appellee's Statement of Facts:

Fact 3: Appellee stated: The parties were married June 14, 1985 and no children were born of the marriage. The divorce was finally granted May 8, 1998 although Defendant was locked out of the home before, initiated divorce proceedings but was not able to proceed due to disabling depression.

Comment: There is citation to or no support in the record for the conclusory statement that Defendant had disabling depression or that he was locked out of the home. This misstatement of fact is irrelevant to appeal, could be considered as scandalous information and should be stricken as inaccurate, unsupported, and irrelevant.

Fact 6: Appellee stated: Delores was also employed at the Postal Service and made wages equal to or great than Victor (TT117-121) She retired due to election at the same time Victor did.

Comment: This fact accurately states that Delores was employed as a Postal Service worker but inaccurately states that she earned wages which were equal to or greater than those earned by Defendant. The citation to the record supplied in support thereof does not contain any information concerning the amount of income earned by Delores or how that compared with the income of Mr. Shade. However, the record does reflect that in 1996 Mr. Shade earned \$42,476.62 (TT. 107) and Delores earned \$40,261.77 (TT. 50). Appellee's statement of fact is inaccurate and tends to mislead this Court and should be stricken as inaccurate and unsupported.

Fact 7: Appellee stated: Delores admitted \$977.00 per month retirement (TT.135) and with her other investments the Court found she had \$1,460.00 per month income. With his paying off her debts of \$4,902.46 her expenses were reduced by \$395.00 per month leaving her discretionary money.

Comment: Except for Delores retirement income of \$977 the statements contained in this representation of fact are simply not supported by citations to the record.

Fact 8: Appellee stated: Victor admitted \$1,672 civil service retirement and an

application for \$100 social security makes it necessary for him to find part time employment which he has not found in more than 15 months. (Findings #15) Not available to 2000.

Comment: This representation of facts is not supported by any citation to the record.

Fact 9: Appellee stated: Delores **could** work but refuses to do so but Victor is willing to work if he can find some (R 86-87).

Comment: The fact that Delores could work is unsupported by any citation to the record. Appellee's citation to the record reflects a portion of his testimony about his ability to work and efforts to find work. The references to Delores ability to work should be stricken.

Fact 10: Appellee stated: Delores stated she let her first two husbands off on alimony but the next one was going to pay (R 171 15).

Comment: This fact refers only to statements of counsel, was objected to and is not evidence before the Trail Court. Rather, this was an irrelevant and unsupported statement made by counsel during the trial to attempt to cast Delores in a negative light. It should be stricken as unsupported by citation to evidence in the record which was received by the Trial Court.

Fact 12: Appellee stated: Delores brought a home into the marriage worth \$115,000 at marriage and \$140,000 at trial with \$78,000 mortgage (TT 3-4) which was awarded to her and he delivered a deed but she refuses to remove him from the mortgage or a deed to his St. George property now worth less than then stipulated \$60,000.

Comment: The citation to the record correctly reflects the stipulated value of 140,000 on Delores home at the time of trial and the balance of the mortgage of 78,000. The remaining of the statements are unsupported by citation to the record and are improper and should be stricken.

Fact 13: Appellee stated: Victor contributed \$20,000 (equity from a prior marriage) (for refinancing) to pay down the mortgage. Later he paid \$1,000.00 to put a down payment on the St. George property to fee title to ½ acre so she could sell it and keep the \$14,000 and got \$10,000 home improvement contract both awarded to her. He also constructed a business building she got worth \$10,000 (TT p43 1 20 TT p 47 L 8).

Comment: The statements that Victor contributed 20,000 to the refinance of Delores home and 1,000 as a down payment on the St. George property are properly cited to the record all other statements are not supported by any citation to the record. The statement that she got a building worth \$10,000 is directly contradictory of the finding of the Court (see TT205) and is misleading. These factual statements should be stricken.

Fact 14: Appellee stated: The Court stated its determination not to rearrange the unique history of accounting (TT 205-206) he further stated "I am not going to award fees because I don't find him the ability to pay after I stick him with all of the debt" (TT p207 L1 & 2)

Comment: Appellee has failed to properly cite to the record. This fact should be stricken.

Fact 16: Appellee stated: Victor had a business which showed no profit and in fact cost \$11,000 which business went to her son (TT 37) which was sold for \$9,000 but which never got paid, in full.

Comment: This fact is not properly cited to the record and should be stricken.

Fact 17: Appellee stated: Delores said Victor offered in negotiations to pay \$35,000 which she refused and the Court did not admit that in evidence and she never saw the money, and he did not have it.

Comment: This fact is not properly cited to the record and should be stricken.

In short, Appellee's brief does fall far short of the requirements of Rule 24(e) and as such the entire brief or at least the non complying portions should be stricken

II. THE TRIAL COURT ERRED IN FAILING TO AWARD DELORES HER PREMARITAL EQUITY IN THE REAL PROPERTY TOGETHER WITH THE APPRECIATION THEREOF.

The trial court committed reversible error in failing to award Delores her premarital equity in the real property together with the appreciation thereof. The trial court misapplied the law resulting in a substantial and prejudicial error, the evidence clearly

preponderates against the findings, and a serious inequity has resulted such as to manifest a clear abuse of discretion.

It is the rule of law in this state that premarital property, together with the appreciation thereof, should normally be awarded to the party who brought that property into the marriage. Burke v. Burke, 733 P.2d 133, 135 (Utah 1987). While there are exceptions, such as where one of the spouses has contributed to the assets maintenance or enhancement of value, none of the exceptions to the above stated rule apply in this case.

The Court's ruling was not in accordance with the clear weight of the evidence which was before it and therefore a substantial and prejudicial error occurred. The Court misapplied the law by completely disregarding Delores's premarital interest in the Taylorsville house and made no effort to return this to her with the appreciation thereof before dividing the portion of the equity which was a part of the marital estate. The fact that she had premarital equity was uncontroverted. The Trial Court did award her the residence together with the increased debt thereon (which had been incurred to purchase the St. George property) and awarded to Victor the St. George property free and clear of any encumbrance. The net result was that he received all of the equity built up during the marriage and she received none. The ruling is so obviously inequitable that it manifests a clear abuse of discretion. As such, the trial court committed reversible error and this Court should reverse and remand with instructions on how to divide the marital and pre-marital equity.

III. THIS COURT SHOULD ADOPT A FORMULA APPROACH TO THE EQUITABLE DISTRIBUTION OF PRE-MARITAL AND ASSETS.

In cases where issues of pre-marital equity and marital equity exist, this Court should adopt a formula approach to the equitable distribution of marital and pre-marital assets. Judge Michael D. Lyon of the Second Judicial District Court wrote an article in the Utah Bar Journal, entitled “The Source of Funds Rule-Equitably Classifying Separate and Marital Property” which sets forth a formula approach to the division of both marital and nonmarital assets based on the treatise by Brett R. Turner, entitled “Equitable Distribution of Property.” Judge Lyon's article sets forth an easily followed explanation of this theory. A copy of the article is attached in the appendix to this brief. Delores urges this Court to adopt the formula set forth in the Source of Funds Rule as a method of standardizing the equitable distribution of separate and mixed property in this state. Doing so will provide a greater degree of certainty for domestic practitioners and the bench and more uniformly and equitably administer justice in domestic cases in this State.

IV. THE TRIAL COURT ERRED BY FAILING TO MAKE ADEQUATE FINDINGS ON THE ISSUE OF ALIMONY AND BY DENYING DELORES AN AWARD OF ALIMONY.

The trial court erred by failing to make any findings on the issue of alimony. As such, this Court must remand this action for further findings. While the Court must consider the three factors of: 1) need, 2) ability of the recipient spouse to meet that need, and 3) ability of payor spouse to assist, the failure to make specific findings on these issues is reversible

error.

The trial court failed to make findings on all of the material issues. Specifically, the finding as set forth above only generically addresses the issues of need. It fails to find the reasonable expenses of Delores to establish a level of need. The Court also failed to make any finding as to Delores's ability to meet her level of need. Finally, and without any finding of supporting facts, the Court summarily concluded that Victor did not have the ability to pay. The record in this matter is replete with controverted evidence concerning Victor's reasonable expenses and his income which are both relevant to the issue of alimony. (TT. 19; 63-77). The Court simply failed to make any finding as to what his income and expense was. The facts in the record are capable of supporting a finding in favor of an award of alimony. As such, the Court's findings are inadequate and constitute an abuse of discretion.

V. THE TRIAL COURT ERRED IN FAILING TO AWARD DELORES ATTORNEY FEES IN THIS ACTION.

For the same reasons set forth in Argument Section IV above, the trial court erred in failing to award Delores her attorney fees in this action. The evidence in the record is capable of demonstrating a need by Delores for fees, and the ability of Victor to pay them. However, when the Court made its ruling it failed to make any finding of fact and regarding fees and as such the ruling is inadequately supported and constitutes reversible error.

VI. THE TRIAL COURT ERRED IN FAILING TO DIVIDE THE PARTIES RETIREMENT ACCOUNTS.

The trial court erred in failing to divide the parties retirement accounts. It is axiomatic

that retirement accounts are marital property and that Civil Service retirement accounts are subject to division in a divorce proceeding. Jefferies v. Jefferies, 895 P.2d 835, 837-38 (Utah App. 1995). Not only is it proper for the trial court to consider such assets, "it is required." Id.

In the present case the Court failed to divide the difference between Victor and Delores retirement accounts based on contributions made during the marriage or to make sufficient alternative distributions. The Court failed to make any form of finding or allocation for what portion of the retirement was earned during the marriage and what amount was a marital asset subject to division. The Court failed to make alternative compensatory awards to either equalize the parties incomes by way of an alimony award or to provide Delores with sufficient assets to offset the disparity in income. This is reversible error.

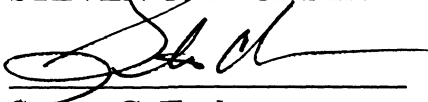
CONCLUSION

The Appellee's brief fails to comply with the Rules of Appellate Procedure and should be stricken. The trial court committed reversible error in failing to award Delores her premarital equity in the real property together with the appreciation thereof. This Court should adopt a formula approach to the equitable distribution of mixed marital/pre-marital assets. The trial court erred by failing to make adequate findings on the issue of alimony. The trial court erred in failing to award Delores her attorney fees in this action. The trial court erred in failing to divide the parties retirement accounts. Based on the foregoing, this Court must remand for additional findings and should reverse on the issues of alimony and

the division of the premarital real property and the appreciation thereof.

RESPECTFULLY submitted this 25th day of March, 1999.

STEVEN C. TYCKSEN

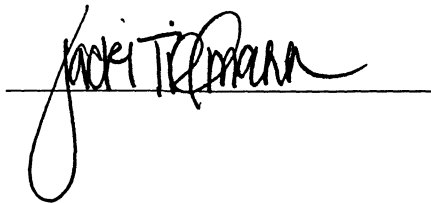
A handwritten signature in black ink, appearing to read 'S. Tycksen', written over a horizontal line.

Steven C. Tycksen
Attorney for Appellant

MAILING CERTIFICATE

This is to certify that I mailed a true and correct copy of the foregoing Appellant's
Reply Brief, first class postage prepaid on this 25 day of March, 1999 to:

Edmund V. Shade
Appellee
2056 W. 1465 N.
St. George, UT 84770-4135

A handwritten signature in black ink, appearing to read "Jacki T. Mann", is written over a horizontal line.

APPENDIX

The Source of Funds Rule – Equitably Classifying Separate and Marital Property

by Judge Michael D. Lyon

Most district court judges and family law lawyers have handled a case similar to the following example: Wife has a house with a mortgage when the parties are married; the title stays in her name and the parties pay on the mortgage with marital funds. How, then, at the time of the divorce is the equity or value in the house divided? More specifically, how is Wife's separate interest protected while assuring that the marital contribution to the value of the home is respected? The salient objective of this article is to share with the bar and bench the source of funds rule, a tool which provides an equitable and systematic method of classifying separate and marital property.¹

1. UTAH LAW ON THE CLASSIFICATION OF PROPERTY

The analysis of a property division incident to a divorce begins with section 30-3-5 of the Utah Code, which ostensibly gives a trial court broad power to equitably divide all property owned by the parties, regardless of when or how it was acquired: "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties." U.C.A. § 30-3-5 (1997). Indeed, facially it creates an *all property system*: namely, that all property owned by the parties may be equitably apportioned between them, regardless of ownership or whenever acquired.

Historically, the Utah Supreme Court was reluctant to go beyond the broad language of the statute and provide hard and fast rules for property division, holding instead that a grant of broad discretion to the trial court would better ensure an equitable result. Consequently, the Utah high court found no abuse of discretion when premarital property, or separate gifts and inheritance, were liberally divided between the divorcing parties. See *Newmeyer v. Newmeyer*, 745 P.2d 1276 (Utah 1987); *Busbell v. Busbell*, 649 P.2d 85 (Utah 1982); *Dubois v. Dubois*, 504 P.2d 1380 (1973). Likewise, it affirmed trial courts on the other end of the spectrum who concluded that each party should, in general, receive the real and personal

property he or she brought into the marriage. See *Preston v. Preston*, 646 P.2d 705 (Utah 1982); *Georgedes v. Georgedes*, 627 P.2d 44 (Utah 1981); *Jespersion v. Jespersen*, 610 P.2d 326 (Utah 1980); *Humphreys v. Humphreys*, 520 P.2d 193 (Utah 1974).

In the past decade our appellate courts have recognized the value of adopting and consistently applying some general rules and have created an analytical framework for the treatment and division of separate and marital property. In *Mortensen v. Mortensen*, 760 P.2d 304 (Utah 1988), Justice Howe articulated what has become the general rule in the division of separate or inherited property.

[T]rial courts making "equitable" property division pursuant to section 30-3-5 should, in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its value, unless (1) the

Judge Michael D. Lyon was appointed to the Second District Court in July 1992 by Governor Norman H. Bangerter. He serves as chair of the Board of District Judges and he recently served as presiding judge of the Second District Court. He is a member and past president of Rex E. Lee American Inn of Court. Prior to his judicial appointment, he practiced in general litigation with the law firm of Lyon, Helgesen, Waterfall & Jones in Ogden, Utah. Judge Lyon received his B.S. degree, cum laude, from Weber State College and his J.D. degree from the University of Utah College of Law in 1971. He is married and the father of six children.

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.

Id. at 308 (citations omitted).

Mortensen is a seminal decision because it not only provides a more definite statement upon which practitioners and trial courts can rely, it shifts the analysis in Utah from an *all property system* to a *modified dual classification system*, where property is first categorized as either separate or marital and then, presumptively, the separate property is given to the owner spouse and the marital property is divided equitably. The presumption that separate property is given to the owner spouse may be rebutted, however, if there are just and equitable reasons to do otherwise. Thus, the dual classification system that is absolute in some states is a *modified* system in Utah because equity might require the trial court to invade separate property in fashioning an equitable result.

Since *Mortensen*, apparently in the interest of promoting more predictability and encouraging more consistent results, the Utah Court of Appeals has restricted a trial court's ability to divide separate property between the parties to situations involving "extraordinary circumstances," *Burt v. Burt*, 799 P.2d 1166 (Utah App. 1990), or "unique circumstances," *Walters v. Walters*, 812 P.2d 64 (Utah App. 1991). The court of appeals has been more proactive in monitoring the trial court's divisions, emphasizing that property division should be done in a "fair, systematic fashion." *Hall v. Hall*, 858 P.2d 1018 (Utah App. 1993). Specifically, the court of appeals requires detailed findings as to the classification of property before it is divided. See *Hauumont v. Hauumont*, 793 P.2d 421 (Utah App. 1990) (remanded for findings as to the source of the disputed properties); *Rappleys v. Rappleys*, 855 P.2d 260 (Utah App. 1993) (similar result); *Burt v. Burt*, 799 P.2d 1166 (Utah App. 1990) (similar result). Thus, it is critical for trial courts and lawyers representing divorcing litigants to be conversant with a consistent approach for classifying and dividing separate property.

2. THE SOURCE OF FUNDS RULE

A. Importance of Equitable Classification

This current emphasis on property classification highlights a hole in Utah case law. Although Utah law is now fairly clear as to the analysis a trial court and litigants must follow once property has been classified, there have not been any Utah cases that have clearly defined *how* to determine if an asset is marital or separate property. The source of funds rule therefore fits cleanly and logically into the backdrop of existing Utah law because it is purely a rule of classification that provides a definition of marital property. Indeed, as discussed in more detail below, although Utah has not formally adopted the source of funds as a method of classification, many Utah cases apply source of funds principles. I recommend to the reader Brett R. Turner's treatise, *Equitable Distribution of Property*, from which came many of the ideas and formulas used in this article.

Classification of property as either separate or marital must focus on when and how the property was *acquired*. The theory of the source of funds rule begins with the premise that prop-

erty is acquired by the parties when its real economic value is created. For example, a party may hold legal title to a house upon purchase, but will actually only "acquire" equity in the property as the mortgage is reduced or paid off.

Thus, in the opening example, although Wife holds title to the house upon marriage, if the actual value of the home is created during the marriage through marital mortgage payments, the source of funds rule would define the home as marital property because its value was acquired during the marriage.

The above example also illustrates that the acquisition of an asset may be a continuing process of making payments for the acquired property and, at the time of the divorce, there may be both a separate and a marital component in the value of the property. (This example is not to be confused with a situation where a separate asset has been commingled with marital assets or has been gifted to the marital estate such that the asset has lost its separate classification. When a separate asset is commingled, it should be classified as marital property and divided between the parties. *Mortensen*, 760 P.2d at 308.) Consider these further details to the above example: Wife owns a house with a fair market value of \$100,000 at the time of the marriage and at that time the house carries an \$80,000 mortgage. The house remains in her separate name and the parties use marital funds to pay down the mortgage. At the time of the divorce, the

"Classification of property as either separate or marital must focus on when and how the property was acquired."

fair market value is still \$100,000 but the mortgage is now \$60,000. A trial court using the source of funds approach would classify \$20,000 of the \$40,000 of acquired value in the home as separate property and the remaining \$20,000 as marital property.

Obviously, a practitioner or a trial judge will rarely be faced with dividing property that has not either appreciated or depreciated in value. Typically, the trial judge and the litigants are faced with the difficult proposition of classifying appreciation caused by forces outside the parties' control, such as inflation or market forces. I have found in several cases I have decided, that it is in these situations that the source of funds rule and accompanying formulas are most helpful. The source of funds rule dictates that this kind of appreciation be given the same character as the underlying asset. Accordingly, if the asset has been acquired by separate funds, all of the appreciation is separate. Likewise, if the asset has been acquired with separate and marital funds, which is the typical situation, the appreciation is allocated between the marital and separate estates proportionally.

Brett R. Turner, *Equitable Distribution of Property* 163 (2d ed. 1994). Giving appreciation the same classification as the asset that produced the appreciation is supported by a line of Utah cases. See *Mortensen*, 760 P.2d at 308 (holding that separate property should be awarded to the owner spouse "together with any appreciation or enhancement of its value"); *Dunn v. Dunn*, 802 P.2d 1314 (Utah App. 1990) (affirming award to plaintiff of retirement benefits accumulated prior to marriage, together with all interest attributable to those premarital contributions); *Preston v. Preston*, 646 P.2d 705 (Utah 1982) (remanding to the trial court for an award to defendant of separate property together with the proportion of appreciation in value attributable thereto).

Although allocating appreciation proportionally may force members of the bar and bench from their comfort zones to perform mathematical exercises, I believe failure to award a litigant who has separate funds in an asset a proportionate share of the appreciation of the asset is not only inequitable, but constitutes plain error. When a separate interest in property is simply returned at the end of a marriage without any attributable interest, the property has inequitably been used as an interest-free loan. Absent compelling equitable reasons to the contrary, no one could argue persuasively that this approach

"When a separate interest in property is simply returned at the end of a marriage without any attributable interest, the property has inequitably been used as an interest-free loan."

should be adopted, and yet litigants routinely bypass a more complicated analysis by simply backing out the separate interest, giving it to the owner spouse, and then dividing the remaining property equally.

The facts and outcome of *Hall v. Hall*, 858 P.2d 1018 (Utah App. 1993), illustrate the inequities of this routine approach. In *Hall*, the trial court found that the wife had contributed \$21,000 into a marital home, and so it divided the equity in the home equally and then took \$21,000 out of the husband's marital share and gave it to the wife. The court of appeals held that, in order for an allocation of property to be done in "a fair, systematic fashion," the trial court should first classify property as separate or marital, then award the wife her separate contribution (absent "extraordinary circumstances"), and then divide the marital equity in the home equally between the parties.

Following these instructions, if the trial court found no extraordinary circumstances on remand, the wife's initial investment of \$21,000 was returned to her without a proportionate share of the interest. Her \$21,000 investment in the home was therefore treated as an interest-free loan to the marriage. Mr. Turner, in commenting on the *Hall* case, points out that had the value of the home dropped, it would clearly have been improper for the court to reimburse petitioner for her separate contributions, leaving the marital estate to bear the entire loss. "If the separate estate must share the loss, however, it is only fair to allow it to share the gain. When marital and separate contributions are made to a single asset, the respective marital and separate interests should be treated as percentages and not as absolute amounts." Turner, *supra*, at 388, app. A.

I believe that given the court of appeals' preference for a systematic, fair approach, had the wife objected to the trial court's failure to provide more than mere reimbursement of the separate investment, the court of appeals would have approved awarding the wife a proportionate share of the interest. However, since the parties did not raise the amount of reimbursement on appeal, the court of appeals appropriately did not address the issue. Clearly, then, to ensure that a spouse's separate property is fully and equitably restored with a proportionate share of the interest, it is essential for practitioners and trial court judges to understand and consistently apply the sometimes difficult source of funds formulas.¹

B. The Source of Funds Formulas

As stated above, when a property's appreciation is caused by forces outside the parties' control, such as inflation or market forces, the appreciation should be given the same classification as the underlying property. If, therefore, the parties have contributed to the property \$10,000 in separate funds and \$20,000 in marital funds, the appreciation should be classified proportionally, or one-third as separate and two-thirds as marital. In Mr. Turner's mathematical formulas, this translates as follows:

Value (or net equity) = separate contributions + marital contributions + appreciation

Marital interest = value(marital contributions/total contributions)

Separate interest = value(separate contributions/total contributions)

Application of the formula is clearer through use of our example, with additional details: Wife owns a house with a fair market value of \$100,000 at the time of the marriage and at the time of the marriage the house carries an \$80,000 mortgage. The house remains in her separate name and the parties use marital funds to pay down the mortgage. At the time of the divorce, the fair market value has increased to \$160,000, due to market forces, and the mortgage is now \$40,000. The numbers would plug into the formulas as follows:

Value (or net equity) = separate contributions + marital contributions + appreciation

separate contributions = FMV at marriage - mortgage at marriage
= \$100,000 - \$80,000 = \$20,000

marital contributions = Mortgage at marriage - mortgage at divorce
= \$80,000 - \$40,000 = \$40,000

Value = \$20,000 + \$40,000 + \$60,000 = \$120,000 in net equity

separate interest = value(sep. contribution/total contribution)

separate interest = \$120,000(\$20,000/\$60,000)
= \$40,000

marital interest = value(mar. contribution/total contribution)

marital interest = \$120,000(\$40,000/\$60,000)
= \$80,000

Therefore, under the source of funds rule, the \$120,000 of equity is classified \$40,000 as Wife's separate interest and \$80,000 as marital interest. Wife would therefore be entitled,

absent extraordinary circumstances, to \$80,000 in equity (\$40,000 separate interest plus one-half of the marital interest). She receives back her separate contribution of \$20,000 plus the portion of appreciation that is attributable thereto; she receives a return on her investment. Typically, if the court determines a division of property should be consistent with this classification, the home is either sold or awarded to the owner spouse, who also assumes responsibility for the mortgage payments and must pay her former spouse his equity. In our example, Wife would receive the home, worth \$160,000, assume payments on the \$40,000 mortgage, and be forced to buy out Husband's \$40,000 of equity. Thus, even though she is awarded the home, she receives no more than her share of the equity.

The above example assumes all of the appreciation on the home is a result of market forces or inflation. When, however, appreciation results from specific contributions of marital funds or efforts, the resulting appreciation assumes the character of the funds or efforts. *Turner, supra*, at 162. This classification of appreciation from capital improvements is in accordance with Utah case law that when a spouse has by his or her efforts and expense contributed to the enhancement, maintenance, or protection of the property, he or she has acquired an equitable interest in it. *Mortensen*, 760 P.2d at 308.

To illustrate how a court could classify appreciation that may be in part due to capital improvements, assume this final variation of my example: Wife owns a house with a fair market value of \$100,000 and an \$80,000 mortgage at the time of the marriage. The house remains in her separate name, and the parties pay down the mortgage using marital funds and, using \$20,000 of marital funds, finish off the basement. At the time of the divorce, the fair market value of the house has increased to \$160,000 and the mortgage is \$40,000. I believe that the most equitable approach is to add the value of the marital funds expended on the home, or \$20,000, to the amount of marital contributions and the amount of total contributions, as shown below:

Value (or net equity) = separate contributions + marital contributions + appreciation

separate contributions = FMV at marriage - mortgage at marriage
= \$100,000 - \$80,000 = \$20,000

marital contributions = [Mortgage at marriage - mortgage at divorce] + marital funds spent on capital improvements
= [\$80,000 - \$40,000] + \$20,000
= \$60,000

$Value = \$20,000 + \$60,000 + \$40,000 = \$120,000$ in
net equity

$separate\ interest = value(sep.\ contribution/total$
contribution)

$separate\ interest = \$120,000(\$20,000/\$80,000)$
 $= \$30,000$

$marital\ interest = value(mar.\ contribution/total$
contribution)

$marital\ interest = \$120,000(\$60,000/\$80,000)$
 $= \$90,000$

Therefore Wife would be entitled (absent extraordinary equitable circumstances) to \$30,000 as a separate interest in the home and the \$90,000 marital interest would be divided equally between the parties.³ It should be noted that there may be times when evidence is presented as to the amount of appreciation directly resulting from the improvement. When a trial court is presented with this kind of evidence, it seems equitable that the appreciation resulting directly from the capital improvement be backed out of the total appreciation and classified as marital. The remaining appreciation should then be apportioned between the separate and marital contributions using the formulas and, because the appreciation due to the capital improvement has already been allocated, the marital funds spent on the capital improvement should not be included in either the numerator (marital contributions) or the denominator (total contributions) of the working fractions.

C. Evidence

As is illustrated by *Hall*, appellate courts cannot rule on the appropriateness of allocating appreciation proportionally through the source of funds rule without detailed findings from the trial court judge. Similarly a trial court cannot properly apply the source of funds formulas if the litigants do not present detailed evidence as to the value of the property. To ensure litigants do provide the necessary data, I use a pretrial order, specifically advising the parties that the allocation of separate property seems to be at issue, and that the parties should be prepared to present evidence as to the following:

1. The home's fair market value and mortgage amount at the time of the trial;
2. The amount of the parties' marital contribution to the equity (or the amount the parties have paid on the mortgage during the marriage and, separately, any capital contributions); and

3. The amount of the premarital equity interest in the home.⁴

3. CONCLUSION

David S. Dolowitz, in the April 1998 edition of the *Utah Bar Journal*, criticizes the appellate courts for, among other things, being inconsistent and sometime inequitable in their treatment of appreciation on separate property. David S. Dolowitz, *The Conundrum of Gifted, Inherited and Premarital Property in Divorce*, 11 Utah B. J. 3 at 16 (1998). His comments may well indicate the growing level of frustration among members of the bar who are left without definite, equitable guidance in this area.

I have found the source of funds rule to be practical in its direction as to the classification of separate and marital property, and equitable in its result. By focusing the inquiry narrowly on the value of the property and when that property was acquired and by providing formulas that may be consistently applied, its adoption would help eliminate some of the apparent frustration among members of the bench and bar by providing clear direction, thereby fostering more negotiated settlements and ensuring more uniform, equitable trial court decisions. Members of the bench and bar should move beyond occasional application of source of funds principles to wholesale adoption of the source of funds rule. Mr. Turner notes that, "[e]quitable distribution decisions defining the time at which property is acquired fall into two classes: those which adopt the source of funds rule, and those which avoid the issue." Turner, *supra*, at 354, app. A.

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¹"Property" is not defined in the Utah Code. "Separate property" as used in this article includes all property either owned by one spouse prior to marriage, or received by a spouse individually by gift or inheritance during marriage.

²At least two other recent court of appeals' cases have had similar inequitable results: *Schaumburg v. Schaumburg*, 875 P.2d 998 (Utah App. 1994) (affirming division of appreciation on real property equally when separate funds used as down payment and marital funds used to augment the asset); *Moon v. Moon*, 790 P.2d 52 (Utah App. 1990) (affirming division of value of marital home equally, after value of land given as separate gift to husband is backed out).

³There may be situations, such as when a capital improvement is made right before the divorce, when it is more equitable to apply the source of funds formula annually, thus distributing the yearly appreciation according to the contributions made up to that point. Other jurisdictions applying the formulas have held, however, that in the typical case such an approach is unnecessarily time-consuming and tedious. Turner, *Equitable Distribution of Property* (Supp. 1997).

⁴This amount can be readily ascertained by knowing the fair market value of the property and the mortgage amount at the time of the marriage. If necessary, a qualified appraiser can extrapolate the fair market value of the home on the date of the marriage.