

1999

# Louise A. Symes v. Merlin David Symes : Brief of Appellant

Utah Court of Appeals

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Emilie Bean; Bean & Smedley; Attorneys for Appellant.

Steven C. Tycksen; Attorney for Appellant.

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UTAH COURT OF APPEALS  
BRIEF

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

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LOUISE A. SYMES,	)	
	)	
Petitioner/Appellee,	)	Case No. 990234- <sup>CA</sup> SC
	)	
vs	)	Priority 15
	)	
MERLIN DAVID SYMES,	)	
	)	
Respondent/Appellant.)	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM A DECISION FROM THE SECOND JUDICIAL  
DISTRICT COURT, DAVIS COUNTY  
HONORABLE DARWIN C. HANSEN

EMILIE BEAN  
BEAN & SMEDLEY  
Attorneys for Appellant  
190 South Fort Lane, #2  
Layton, Utah 84041  
(801) 544-4221

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

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EMILIE BEAN  
BEAN & SMEDLEY  
Attorneys for Appellant  
190 South Fort Lane, #2  
Layton, Utah 84041  
(801) 544-4221

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

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## ARGUMENT

### **I. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING MERLIN'S INTEREST IN THE BEAR LAKE CABIN WAS ENTIRELY MARITAL.**

The trial court abused its discretion in finding Merlin's premarital family cabin was entirely marital property. Because the portion of the trial court's decision with respect to the cabin is an abuse of discretion, this Court must reverse that portion of the decision. The trial Court entered its Findings of Fact and Conclusions of Law on February 13, 1999. R. 132-144.

The trial court committed an abuse of discretion by finding that the Bear Lake Cabin was marital property. As noted in the Finding of Fact, the trial court found that the property was owned by Merlin prior to the parties marriage. R. 135-136. Further, the court specifically found that all premarital property should be awarded to the party who brought it into the marriage unless an exception to that rule applies as guided by Mortensen v. Mortensen.

In Mortensen, the Court laid out exceptions to the rule the general rule that separate property, together with the appreciation thereof, should be awarded to the party who brought the property into the marriage. Specifically, the Court in Mortensen, stated that separate property may be considered marital property if "the other spouse has contributed to the augmentation, improvement, or operation of the property or has

significantly cared for, protected or preserved it." Id. at 306.

Merlin believes that Louise conduct during the marriage does rise to the level of meeting the exceptions set forth in Mortensen as a matter of law and therefore the court abused its discretion.

Louise testified that Merlin owned the cabin at the time of the parties marriage. TT. Vol. I, p. 43, L.12-13. Louise testified that an addition was made to the cabin after the parties marriage. TT. Vol. I, p. 43, L. 18-19. Louise testified that she did not know how the addition was paid for. TT. Vol. I, p. 47, L. 7-9. The Cabin was titled in the names of Merlin and LaVonne Symes, with LaVonne being Merlin's first wife. TT. Vol. I, p. 53, L. 3-5. Louise testified that during the marriage when the parties went to the cabin she cooked the meals, washed the dishes, cleaned, weeded and planted flowers. TT. Vol. I, p. 56, Line 5-11. On cross examination, Louise testified that she had not been to the cabin since 1996. TT. Vol. I, p. 163, L. 1-2. Louise admitted that title to the cabin and lot had never been in her name. TT. Vol. I, p. 198, L. 20-23. Louise did not know where the money came from to repurchase the adjoining lot at Bear Lake which had been previously sold. TT. Vol. I, p. 205, L. 9-11.

In contrast to Louise testimony about her alleged contributions to the Cabin and Lot, Merlin testified that the

addition to the cabin was paid for by his adult sons. TT. Vol. II, p. 362, L. 20-21. Merlin testified that most of the improvements to the cabin were performed by his sons using salvage materials and that he contributed not more than \$5,000.00 to that effort including the carpeting. TT. Vol. II, page 408, L.5-19.

Merlin believes that the trial court abused its discretion in determining that any portion of the Bear Lake Property was marital under the exceptions found in Mortensen. It is a standard rule of construction that words are to be given their plain meaning. In the present case, Louise's own testimony is that she did nothing significant to augment the value of the property other than to lend some of her premarital property to furnish the cabin and to perform routine chores while at the property. Louise did not make any improvement to the property nor did she contribute to the operation of the property. Louise did not significantly care for the property. She did not protect the property nor did she preserve the property. Rather, when Louise and the family used the property, she did some chores which were related to the care of the family and persons who were there. This is not legally sufficient to meet the standard set forth in Mortensen. As such, the Court erred in determining that any portion of the Bear Lake Cabin and Lot were marital property.

The Bear Lake Cabin was and remains separate property and should



be awarded to Merlin, free and clear of any interest in Louise.

**II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO APPORTION TO MERLIN THE PREMARITAL VALUE OF THE CABIN AND THE APPRECIATION THEREOF.**

The trial court abused its discretion by failing to apportion to Merlin his premarital interest in the cabin and award it to Merlin as separate property. Because the decision is an abuse of discretion, this Court should reverse the lower court's decision.

Willard Peterson, a real estate appraiser specializing in appraisals of property surrounding Bear Lake, testified that he performed an appraisal valued the property on which the cabin sits with its improvements at \$119,000.00. TT. Vol. I, p. 120, Line 1. Mr. Peterson stated that the remodeling and addition had added very little value to the cabin because it was not professionally done. TT. Vol. I, p. 120, L. 14-17. Mr. Peterson stated that the value of the addition was \$29,000.00. Of that amount Merlins sums from a prior marriage contribute all but \$5,000 TT. Vol. II, p.408, L. 5-19, Vol. II, p.362, L.20-21. TT. Vol. I, p. 124, L. 9-11. Mr. Peterson testified that the A-Frame Cabin without the addition had a value of \$40,000.00. TT. Vol. I, p. 124, L. 6-8. Mr. Peterson testified that the Lot alone had a value of \$50,000.00. TT. Vol. I, , p. 125, L. 19-21. As stated above, it was undisputed that the original A-Frame cabin and lot was pre-marital and that the only contribution to the

enhancement of the property was cleaning, hard work, and a \$5,000 contribution by Merlin to the work done by Merlin's sons. On those facts it is clearly error not to award the cabin to Merlin free and clear of any interest in Louise.

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. See Mortensen; See Also Burke v. Burke, 733 P. 2d 133, 135 (Utah 1987); Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah App. 1988); Watson v. Watson, 837 P.2d 1, 5 (Utah App. 1992); Walters v. Walters, 812 P.2d 64, 67 (Utah App. 1991); and Dunn v. Dunn, 802 P.2d 1314, 1320 (Utah App. 1990). Because of the relatively minor contributions from the marital estate (as compared to the separate contributions by Merlin's children to a cabin that was held separately as non-marital property), Merlin does not believe that the exceptions to the Rule applies previously argued.

The Court did in fact provide Merlin with some credit for the premarital value of the property. However, this value did not reflect the appreciation of the premarital interest as shown by the only evidence presented to the Court at trial. Specifically, the Court awarded to Merlin a premarital interest in the property in the amount of \$12,000.00. The balance of the value was considered marital property. To ignore the only

credible evidence and so rule was an abuse of discretion. See cases cited in previous paragraph. There was specific testimony from Willard Peterson who stated the aggregate value of the property was \$119,000.00. Further, Mr. Peterson stated that the value of the improvements to the Cabin was \$29,000.00. Therefore, all of the balance of the value of the Bear Lake Cabin was premarital property and the appreciation thereof, in the amount of \$90,000.00. It was a clear abuse of discretion for the trial court to place a higher value of \$29,000.00 to the improvements and ignore that most of those improvements were paid for by Merlin's children.

It was additionally error to award Louise the marital residence in Layton. Specifically, the Court found that the Layton residence was valued at \$141,000.00. The Court found a value for the Layton residence based on the appraisal, reduced that amount by Merlin's separate contribution (proceeds of a Workers Comp claim) and adding in the proceeds of the sale of a condo and arrived at the figure for the marital estate's interest of \$120,674.00. Because the actual improvements to the Bear Lake Property was only \$29,000.00, (all but \$5,000 of which was paid for by Merlin's children), the Court should not have awarded to Louise, more than \$14,500.00. Merlin's one half interest in the net value of the Layton residence was \$60,337.00. Louise's interest in the Bear Lake Cabin should have been offset against

Merlin's interest in the Layton property. Instead the Court awarded her the entire Layton property valued at \$120,674 and awarded Merlin the cabin (having a marital value that could not exceed \$29,000). It was an abuse of discretion to do so.

Alternatively, this Court should adopt a formula for addressing the division of real property in which there are separate property interests. This concept was set forth in Judge Michael D. Lyon's article in the Utah Bar Journal, entitled, *The Source of Funds Rule-Equitably Classifying Separate and Marital Property*, which sets a formulaic approach to the division of both marital and non-marital assets. Pursuant to the theory, called the "Source of Funds Rule" the initial step is to determine how and when the property was acquired. Using the present case as an example, there are two parcels of real property with an aggregate gross value of \$260,000.00. Neither property has a mortgage.

Under the source of funds rule, property may be separate, marital or mixed. For instance, in the present case, the property is both marital and mixed because of the lump sum contribution made to the Layton residence by Merlin and Merlin's premarital ownership of the Bear Lake Cabin and Lot. Under this rule, formulas determine value or net equity (separate contributions + marital contributions + appreciation); marital interest [ $\text{present value}(\text{marital contributions} / \text{total contributions})$ ]; separate interest [ $\text{present value}(\text{separate$

contributions/total contributions)]; separate contributions (FMV at time of marriage -mortgage at time of marriage); and marital contributions (mortgage at time of marriage -mortgage at time of divorce). This approach is consistent with principles of equitable distribution adopted by this Court and provides a uniform standard for trial judges to apply in the future.

Applying the above stated formulas to the numbers in the present case would reach an equitable result which would recognize Merlin's separate property and the appreciation thereon as well as divide the parties marital contributions and the appreciation thereon equally. Merlin urges this Court to adopt the formulas set forth in the Source of Funds Rules as a method of standardizing the achievement of equitable distribution of separate and mixed property in this state and to remand to the trial court with instructions to do so.

**III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DIVIDE THE COSTS OF VALUING PROPERTY BETWEEN THE PARTIES.**

The trial court abused its discretion by failing to charge the marital estate and divide the costs of the appraisals used by the Court in determining property values. It is axiomatic that the trial court has the discretion to award costs in divorce proceedings. Merlin recognizes that pursuant to the current Utah case law, appraisal and accounting fees which are incurred in preparation for a divorce trial cannot be taxed as costs. Morgan

v. Morgan, 795 P.2d 684 (Utah App. 1990). However, Merlin believes that in instances such as the present case, where the Court finds an appraised value consistent with the only appraisal performed, each party should bear responsibility for half of the costs associated therewith. Making such a distribution promotes equity in equitable distribution rather than requiring one party to bear all of the costs of producing that evidence for the Court.

**IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING POST TRIAL MOTIONS FOR TAKING ADDITIONAL EVIDENCE.**


The court abused its discretion in denying post trial motions to take additional evidence on the monies received from the sale of the St. George condominium and the value of the cabin at the time of the marriage. Merlin filed a motion for reconsideration or alternatively to reopen the divorce proceeding to take additional evidence. There were significant discovery failures on the part of Appellee and Merlin's counsel was surprised at trial by Louise's counsels efforts to divide proceeds from the sale of a condo that had occurred three years prior to the parties separation. This Motion was denied by the trial court. Merlin believes it was an abuse of discretion for the trial court to deny his motion when said motion was timely filed and revealed to the Court that additional evidence which could not have reasonably been anticipated as needed would aid the Court in a proper determination of the issues before it. The

Court erred in not allowing that evidence to be introduced.

### **CONCLUSION**

The trial court abused its discretion by deciding that the entire cabin and lot at Bear Lake was marital property. Even assuming that it was marital property, it was an additional abuse of discretion for the trial court to fail to award to Merlin the reasonable premarital value of the cabin together with the appreciation thereon as testified by the appraiser which was the only evidence received at trial on that subject. This Court should adopt the source of funds rule as a formulaic method of dealing with real property values in the context of a divorce proceeding. Finally, the trial court abused its discretion by denying Merlin's post trial motion for reconsideration or alternatively to reopen the trial to take additional evidence on an issue that was not included in the pretrial order and could not have been reasonably anticipated by Merlin's attorney as a trial issue. This Court should reverse the decision of the trial court.

Dated and Signed this 22 day of December, 1999.

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

**Steven C. Tycksen**  
**Attorney for Appellant**

**MAILING CERTIFICATE**

This is to certify that on this the 22 day of December, 1999,  
I caused a true and correct copy of the foregoing document to be  
mailed to the Court and the person named below, first class postage  
prepaid:

EMILIE BEAN  
BEAN & SMEDLEY  
Attorneys for Appellee  
190 South Fort Lane, #2  
Layton, Utah 84041

JOEL THOMAS