

1999

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

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Symes v. Symes*, No. 990234 (Utah Court of Appeals, 1999).

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IN THE UTAH COURT OF APPEALS A10
DOCKET NO. 990234

IN AND FOR THE STATE OF UTAH

LOUISE A. SYMES,)	
)	
Petitioner/Appellee,)	Case No. 990234-SC ^{CA}
)	
vs)	Priority 15
)	
MERLIN DAVID SYMES,)	
)	
Respondent/Appellant.)	
)	

OPENING BRIEF OF APPELLANT

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

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FILED
Utah Court of Appeals
AUG 17 1999

Julie
Clerk
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Court

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The following are the constitutional and statutory provisions which are addressed in this appeal:

§30-3-5, Utah Code Annotated (1953 as amended).

STATEMENT OF ISSUES PRESENTED

I. Did the Court abuse its discretion by finding Merlin's family cabin to be entirely marital property? The appellant court will not disturb the trial court decision concerning property divisions unless it is clearly unjust or a clear abuse of discretion. Walters v. Walters, 812 P.2d 64, 66 (Utah App. 1991) *cert. denied* 836 P.2d 1383 (Utah 1993).

II. Did the Court abuse its discretion by failing to apportion to Merlin his premarital interest in the cabin and award it to Merlin as separate property? The appellant court will not disturb the trial court decision concerning property divisions unless it is clearly unjust or a clear abuse of discretion. Walters v. Walters, 812 P.2d 64, 66 (Utah App. 1991) *cert. denied* 836 P.2d 1383 (Utah 1993).

III. Did the Court abuse its discretion by failing to charge the marital estate and divide equally the costs of the appraisals used by the Court in determining property values? The standard of review of the apportionment of costs is whether the trial court abused its discretion. Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 512 (Utah App. 1988).

IV. Did the Court abuse its discretion in denying post trial motions to take additional evidence on the monies received from the sale of the St. George condominium? The denial of post trial motions is reviewed under the abuse of discretion standard. Katz v. Peirce, 732 P.2d 92, 93 (Utah 1986).

STATEMENT OF FACTS

A. PROCEDURAL HISTORY

1. Louise filed her complaint for divorce on December 22, 1997. R. 1.
2. Louise immediately sought a Temporary Restraining Order and Order to Show Cause. R. 10.
3. Both parties engaged in discovery in preparation for trial.
4. A bench trial was held on October 8 and 9, 1998. R. 101.
5. The Court issued a Memorandum Decision on October 20, 1998. R. 101-108.
6. Various post trial motions were filed including a Motion to Assess Costs (R. 109) and a Motion to Reconsider Court's Ruling and/or Reopen Trial to Take Additional Testimony and Evidence.
7. On or about February 13, 1999, the Court entered its Findings of Fact and Conclusions of Law and a Decree of Divorce. R. 132-149.

B. FACTUAL HISTORY

1. The parties were married on October 21, 1969. TT. Vol. I, p. 1.

2. The parties separated on November 6, 1997. R.1
3. The parties had no children together but each had children from a prior marriage. R. 1-8.
4. Prior to the marriage, Merlin was the record title owner of property at Bear Lake on which he and his sons had constructed a cabin. TT. Vol. I, p. 43 L. 5-8.
5. The cabin remained in Merlin's name throughout the course of this marriage and was regarded by he and his children by a prior marriage as a family owned cabin. TT. Vol. I, p. 198, L. 20-23.
6. During the marriage, Merlin's adult sons began constructing an addition to the cabin while Merlin was working in California. TT. Vol. II, p. 362 L. 20-21.
7. Merlin helped work on the cabin on weekends when he was in town but his sons did most of the work. TT. Vol II, P. 362.
8. The addition increased the size of the cabin by one bedroom for each of his two sons, one bedroom for Merlin and a garage. TT. Vol. I, p. 43, L. 18-19.
9. The materials for the addition were paid for mostly by the two sons with Merlin contributing approximately \$5,000.00 in cash.
10. Many of the materials used were scavenged and therefore the actual costs of the material were minimal. *Id.*
11. The value of the cabin at the time of the divorce was \$119,000.00. \$50,000.00 for the land, \$40,000.00 for the original A-Frame Cabin, and \$29,000.00 for

the addition. TT. Vol. I, p. 120, L. 1, TT. Vol. I, p.124, L.9-11 and TT. Vol. I p. 125 L. 19-21.

12. The appraised value of the cabin was not challenged at the trial court and no other evidence of the present value of the cabin or improvements was introduced.

See Record generally.

13. The parties also owned a residence in Layton, Utah. TT. Vol. I, p. 132.

14. The Layton home was purchased during the marriage. Id.

15. The mortgage payments on the Layton home were made from marital resources until approximately one year prior to the parties separation and divorce when Merlin received a worker's compensation settlement which was used to pay off the mortgage balance of \$30,661.08. R. 135-138.

16. At trial the Court found the entire value of the addition to be marital and “negative extrapolated” *sua sponte* without evidence the value of the cabin at the time of the marriage.

SUMMARY OF ARGUMENT

The trial court abused its discretion by finding the value supplied by the two sons in improving the cabin to be marital and by “negative extrapolating” a premarital value without supporting evidence. The trial court should have awarded the entire cabin property to Merlin as premarital property or at least segregated his contribution to the value of the improvements and divided that as part of the marital estate. The trial court

abused its discretion by failing to charge the marital estate with the costs of the appraisals used by the Court in determining property values. The Court abused its discretion in denying post trial motions to take additional evidence on the disposition of monies received from the sale of the St. George condominium.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THE APPRECIATION IN THE VALUE OF THE BEAR LAKE CABIN TO BE PART OF THE MARITAL ESTATE.

The trial court abused its discretion in finding the appreciation in Merlin's premarital family cabin to be marital property. The standard of review is that on appeal the decision of the lower court will not be disturbed concerning property divisions unless it is clearly unjust or a clear abuse of discretion. Walters v. Walters, 812 P.2d 64, 66 (Utah App. 1991) *cert. denied* 836 P.2d 1383 (Utah 1993). 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. Finding of Fact No. 11, states the following:

11. One of the central issues in this case is whether certain property is marital or non-marital and the valuation of such property. During the marriage, the parties have maintained individual bank accounts. Some of the property has been titled in both names and some in respondent's name only or in conjunction with third parties. The court concludes that all income of each party whether in a joint account or in separate accounts is marital property and should be accounted for as such. Moreover, the same is true for property titled in one or both parties' names

and in property held in conjunction with third parties as the interests of the parties may occur. On the other hand, property brought into the marriage unless the exceptions cited in *MORTENSEN v. MORTENSEN*, 760 P.2d 304, 308 (Utah 1988) apply. Following are the Court's findings as to valuation and status of the marital estate:

A. Bear Lake Cabin with adjacent Lot: The respondent owned an A-Frame cabin and 50 foot water front adjacent lot on the west shore of Bear Lake at the time of the parties marriage. The lot was sold for \$5,000.00 in 1971 to J. Gordon and Virjean Reynolds when the parties moved to Florida for respondent's work. It was allegedly repurchased by respondent's four children in 1974 for \$20,000.00 although a deed was not signed by the Reynolds until April 18, 1980 and not recorded until September 18, 1997. The lot is considered to have a current value of \$50,000.00. Improvements have been made to the lot including fill dirt, sprinkler system, sod and retaining wall. Most of the labor and costs were borne by respondent's children and some by respondent. Petitioner made no contribution to the adjacent lot. Therefore, the Court finds that the lot is non-marital property.

On the other hand, the cabin, which also has a 50 foot water front frontage, has been in the name of the respondent since the marriage. Moreover, the cabin has been significantly enlarged and remodeled. It has been insured under both parties's name. Taxes and most of the cost associated with the improvements have been paid from marital funds. The remodel has been done by respondent with the aid of his two sons as quid pro quo for respondent's assistance with their improvements of the adjacent lot. Over the years, petitioner has taken care of the domestic chores associated with the cabin and its lot while respondent has handled the physical improvements and financial matters associated with the cabin. The entire family has used both the cabin and adjacent lot for recreational purposes. Household furnishings in the cabin have been contributed to by both petitioner and respondent from premarital property. The court therefore concludes that petitioner has contributed to the enhancement, maintenance, and protection of the cabin and its associated lot throughout the 28 years of the marriage and thus it is marital property.

The court further concludes that the current value of the cabin is \$119,000.00. However, the amount should be decreased by its value at the time of the marriage. Petitioner suggests that its original value should be based on the valuation by the county for property tax purposes which is \$1,900.00. The court rejects this notion. Respondent argues that the value at the time of the parties marriage is irrelevant. The Court also rejects this argument. If the adjacent lot, which is the same size as the cabin lot was

worth \$5,000.00 when initially sold and is now worth \$50,000.00, then by negative extrapolation, the cabin and its lot which is now worth \$119,000.00 would have been valued at approximately \$12,000.00 at the time of the parties marriage. And the Court so concludes. Therefore, the marital property value of the cabin and its lot is \$119,000.00 less \$12,000.00 of [sic] \$107,000.00.

B. Residence: The residence is located in Layton, Utah was purchased during the marriage and has a current value of \$141,000.00. There is no mortgage outstanding. The home is marital property although respondent argues that he should receive a \$30,661.00 credit against the home representing moneys he paid to the mortgagee when the mortgage was paid off. He claims the source of those funds came from a lump sum payment for permanent partial impairment resulting from the industrial accident heretofore referred to. Those funds are non-marital property to which respondent is entitled leaving a balance of \$110,339.00 as marital property. R. 135-138.

The Court included the division of property in its conclusions of law wherein the Court awarded to Merlin the Bear Lake Cabin and the marital residence to Louise. R. 141-142. Any adjustment for the personal injury non-marital portion of Merlin's interest in the marital residence was somehow accounted for in the Court's alimony award. R. 142.

The trial court committed an abuse of discretion by finding that the Bear Lake Cabin was mostly marital property. As noted in the Finding of Fact above, the trial court found that the property was owned by Merlin prior to the parties marriage, that title was held only in his name throughout the marriage and then ignored the only competent expert testimony presented at the trial that the value of the improvements done to the cabin was \$29,000.00, only \$5,000.00 of which had been paid for by Merlin, the balance having been paid for by his two sons. R. 135-136. Despite, the court specifically finding

that all premarital property should be awarded to the party who brought it into the marriage the Court ignored the evidence and invented an approach it referred to as “negative extrapolation” to arrive at a premarital value. This novel approach is inconsistent with the evidence and is an abuse of the trial court’s discretion.

In Mortensen, the Court laid out exceptions to 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’s conduct does not rise to the level of the exceptions set forth in Mortensen as a matter of law and therefore the court abused its discretion.

Louise testified that she kept a few items of her personal property at the cabin at Bear Lake and that some of her premarital property was used to furnish the cabin. Trial Transcript, Vol. 1, 26 L. 5-8. Louise testified that Merlin owned the Bear Lake property prior to the parties marriage. TT. Vol. I, p. 43, L. 5-8. Louise testified that at the beginning of the marriage the cabin property was two separate lots upon one of which was the A-Frame Cabin. 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. Louise

thereafter contradicted herself by stating that while she did not know where the money came from she was sure it was marital. TT. Vol. I, p. 47, Line 10-12. Counsel for Merlin objected to Louise counsel's attempt to rehabilitate her testimony by asking leading questions on this point and also that she was attempting to impeach her prior testimony that Louise did not know where the money came from which objection was sustained. TT. Vol. I, p. 47, L. 13-17. Louise testified that the utility bills and taxes for the cabin were paid out of household money. TT. Vol. I, p. 47, L. 18-24. Louise testified that Merlin paid for some improvements to the cabin. TT. Vol. I, p. 49, L. 19-21. The cabin was titled throughout the marriage in the name 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, 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 testified 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 lot at Bear Lake which had been earlier 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 cost of the addition to the cabin was borne largely by his adult sons. TT. Vol. II, p. 362, L. 20-21. Merlin testified that Louise never showed any

interest in the Bear Lake property. TT. Vol. II, p. 363, L. 19-21. Merlin testified that most of the improvements to the cabin were done by the boys using salvage materials and that he contributed not more than \$5,000.00 including the carpeting. TT. Vol. II, page 408, L.5-19. The real estate appraiser testified that the present market value of all of the improvements provided by Merlin and his two sons was \$29,000.00. TT. Vol. I, page 124, L.9-11.

Merlin believes that the trial court abused its discretion by determining that any portion of the Bear Lake Property was marital. 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 to augment the value of the property other than to lend some of her premarital property to furnishing the cabin (which she received back in the distribution of personal property) and the performance of routine chores while visiting the property. Louise did not make any improvements 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 cooked and cleaned for them and did some chores which were related to the care of the people but not involved in the improvement of the property. 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 and Lot 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 awarding it to Merlin as separate property. The appellant court will not disturb the trial court decision concerning property divisions unless it is clearly unjust or a clear abuse of discretion. Walters v. Walters, 812 P.2d 64, 66 (Utah App. 1991) *cert. denied* 836 P.2d 1383 (Utah 1993). 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 as to the value of the property including the cabin. Mr. Peterson testified that he performed an appraisal and the value of the property and cabin and that the value of the property was \$119,000.00. TT. Vol. I, p. 120, Line 1. Mr. Peterson stated that the addition to the cabin constructed by Merlin and his sons added very little additional 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. TT. Vol. I, p. 124, L. 9-11. Mr. Peterson testified that the A-Frame Cabin had a present value of \$40,000.00. TT. Vol. I, p. 124, L. 6-8. Mr. Peterson testified that the Lot had a present value of \$50,000.00. TT. Vol. I, , p. 125, L. 19-21. Mr. Peterson testified that he was paid \$275.00 to perform the appraisal. TT Vol. I, p. 122, L. 15. Merlin properly

maintains that the A-Frame Cabin, and the Lot are his separate property, were never marital in nature or commingled assets and that he should have been awarded them free and clear of any interest in Louise. Merlin contributed \$5,000.00 towards the improvements done to the cabin during the marriage the total of which were valued altogether at \$29,000.00. The adult sons contributed most of the labor and materials to build the addition and regarded this as their ownership interest. The Court ignored the contributions of the two sons and found that their contributions were somehow a *quid pro quo* for their interest in the second adjoining lot even though there was no evidence to that effect presented at trial and the children testified that they purchased the lot without any assistance from Merlin.

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). As stated above, Merlin does not believe that the exceptions to this Rule apply as previously argued.

The Court did in fact provide Merlin with some credit for the premarital value of the property. However, this value did not include any appreciation on that premarital interest. 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. This is a clear 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 improvement to the Cabin was \$29,000.00. Therefore, all of the balance of the value of the Bear Lake Cabin and Lot was premarital value and appreciation thereon, in the amount of \$90,000.00. It was an abuse of discretion for the trial court to award a value greater than Merlin's share of the contributions to the \$29,000.00 addition as marital property.

In light of the Court's error in its treatment of the Bear Lake Cabin and Lot, it was additional error to award Louise the marital residence in Layton. Louise testified that the value of the marital residence was \$141,000.00 TT V. I, p. 41, L. 13. Derek Lamb, a professional real estate appraiser valued the Layton residence at \$141,500.00. TT. Vol. I, p. 132, L. 2. Specifically, the Court found that the Layton residence was valued at \$141,000.00. The Court found that Merlin made a separate property contribution of \$30,661.00 which was subtracted from the value. The Court found that Merlin failed to account for the proceeds of the sale of a condominium in St. George and included the unexplained money as a marital asset subject to division even though Merlin testified that he spent all the money supporting Louise and had no money left. The Court thereafter found a value for the Layton residence at the appraised value less Merlin's separate property plus Louise's portion of the proceeds of the condominium sale at \$120,674.00.

This asset was awarded to Louise to offset the award of the Bear Lake Cabin and Lot to Merlin. Merlin's position is that only the value of his contribution to the improvement of the cabin should be marital. Assuming that the actual marital value of the Bear Lake Property was 1/3 of the \$29,000.00 improvements (which is larger than the \$5,000.00 Merlin testified was his actual contribution), the Court should have awarded Louise one half of that amount, or only \$4,833.33 as her interest in the cabin. Merlin's one half interest in the 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 leaving Merlin a lien against the Layton residence in the amount of \$55,503.00. It was a clear abuse of discretion to do otherwise. The Court should reverse that decision and award Merlin a lien on the residence of that amount in addition to the cabin as his separate property.

Alternatively, this Court should adopt a formula for addressing the division of real property in all divorce cases 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 set forth a formula approach to the division of both marital and non-marital assets based on the treatise by Brett R. Turner, entitled *Equitable Distribution of Property*. Judge Lyon's article (a copy of which is attached) sets forth an easily followed explanation of this theory, is well reasoned, and equitable. Pursuant to the theory, called the "Source of

Funds Rule" the initial steps are to determine how and when the property was acquired, give credit for contributions made at the time of acquisition from separate property and throughout the marriage from both separate and marital property and allow appreciation to be accrued on all contributions until you arrive at the present value.

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 and Merlin's premarital ownership of the Bear Lake Cabin and Lot. Under this rule, uniform, easy to follow formula's are used to determine: 1) value or net equity (separate contributions + marital contributions + appreciation); 2) marital interest [$\text{present value}(\text{marital contributions} / \text{total contributions})$]; 3) separate interest [$\text{present value}(\text{separate contributions} / \text{total contributions})$]; 4) separate contributions (FMV at time of marriage - mortgage at time of marriage); and 5) marital contributions (mortgage at time of marriage - mortgage at time of divorce). Using these simple formulas the trial court can plug in numbers which are available to it at trial to effectuate a consistent equitable result in all divorce cases and eliminate the need for the court to "negative extrapolate". This approach is consistent with all of the principles of equitable distribution which have been adopted by this Court in the past and would provide a more uniform standard for trial judges and trial counsel to apply in the future. It is similar in approach to the Woodward formula adopted by the Court to divide retirement and pension benefits and would provide the same type of

overall benefit and direction to the judiciary.

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 his property as well as fairly divide the parties marital contributions and the appreciation thereon equally. Merlin urges this Court to adopt the set of 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 this case with instructions to do so. Doing so will provide a greater degree of certainty for both trial counsel and the bench and a more uniform application of the law throughout the State.

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. The standard of review of the apportionment of costs is whether the trial court abused its discretion. Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 512 (Utah App. 1988). Because the trial court abused its discretion, this Court should reverse that portion of the decision.

Merlin believes the trial court erred in ordering him to shoulder all of the burden associated with the costs of the appraisals which were relied upon by the Court in

determining values for certain property. It is undisputed that the trial court has the discretion to award costs in divorce proceedings. Merlin recognizes that pursuant to current Utah case law, appraisal and accounting fees which are incurred in preparation for a divorce trial are not necessarily 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 accepts the appraised value as evidence, it is the only evidence used to fix value, and the Court then divides equally the entire marital estate. It is inequitable that one party should bear the entire responsibility for producing that appraisal. Dividing equally that cost is consistent with the Courts equal division of all assets and would promote equitable distribution rather than requiring one party to bear all of the costs. The Court made no special findings on why it forced Merlin to bear all of these costs while at the same time purporting to equalize everything else. It was error to do so.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING POST TRIAL MOTIONS FOR THE TAKING OF 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. The denial of post trial motions is reviewed under the abuse of discretion standard. Katz v. Peirce, 732 P.2d 92, 93 (Utah 1986). Merlin filed a motion for reconsideration or alternatively to reopen the divorce proceeding to take additional evidence. 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 the fact that additional evidence which was material to the Court's proper determination of the issues was available, could not have been presented at trial, and could materially affect the Court's ruling. This is especially true where the motion for reconsideration was filed before the entry of a final decree of divorce in this proceeding. The gravamen of Merlin's position is that nothing in the pre-trial discovery or pleadings could have alerted him or his attorney to the fact that money received and spent two years prior to the parties' separation would be an issue at trial and redistributed absent proof that it was spent for marital purposes. The Court should have recognized this from the pleadings and the pre-trial order and allowed Merlin an opportunity to present evidence he could not have anticipated would be needed at trial, especially where the records needed to do so were wholly in the control of the Petitioner since the parties separation and were not made available to Merlin prior to trial.

CONCLUSION

The trial court abused its discretion in its decision that the cabin and lot at Bear Lake were marital property. Even assuming that it was in part marital property, it was an abuse of discretion for the trial court to fail to award to Merlin the reasonable premarital value of such property together with the appreciation thereon. 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. The trial court abused its discretion by denying Merlin's post trial motion for reconsideration or alternatively to reopen the trial for additional evidence. This Court should reverse the decision of the trial court.

Dated and Signed this 17 day of AUGUST, 1999.

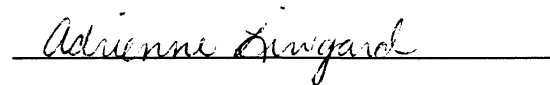


Steven C. Tycksen
Attorney for Appellant

MAILING CERTIFICATE

This is to certify that on this the 17 day of August, 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



APPENDIX

Utah Code § 30-3-5

**WEST'S UTAH CODE
TITLE 30. HUSBAND AND WIFE
CHAPTER 3. DIVORCE**

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

Current through End of 1998 General Sess.

§ 30-3-5. Disposition of property--Maintenance and health care of parties and children--Division of debts--Court to have continuing jurisdiction--Custody and visitation--Determination of alimony--Nonmeritorious petition for modification

(1) 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. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current

addresses; and

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

***8559** (4)(a) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a visitation schedule a provision, among other things, authorizing any peace officer to enforce a court ordered visitation schedule entered under this chapter.

(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court

determines that the petition was without merit and not asserted or defended against in good faith.

(6) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

(7)(a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support; and

(iv) the length of the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves

on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

***8560** (f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g)(i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this subsection.

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

Amended by Laws 1994, c. 284; Laws 1995, c. 330, § 1, eff. May 1, 1995; Laws 1997, c. 232, § 4, eff. July 1, 1997.

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Section 2 of Laws 1995, c. 330 provides:

"It is not the intent of the Legislature that termination of alimony based on cohabitation with another person in accordance with Subsection 30-3-5(9), be interpreted in any way to condone such a relationship for any purpose."

Search this disc for cases citing this section.

Views from the Bench

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. Bushell*, 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 predictabil-

ity 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 *Haumont v. Haumont*, 793 P.2d 421 (Utah App. 1990) (remanded for findings as to the source of the disputed properties); *Rappleye v. Rappleye*, 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-

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

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

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

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

"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."

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.¹ 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.

Acknowledgment

I thank Lindsey P. Gustafson, a law clerk for the Second District Court, for her valuable assistance in preparing this article.

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 598 (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.

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FEB 10 1 31 PM '98

IN THE SECOND JUDICIAL DISTRICT COURT FOR DAVIS COUNTY
FARMINGTON DEPARTMENT, STATE OF UTAH

LOUISE A. SYMES,	:	<u>FINDINGS OF FACT AND</u>
	:	<u>CONCLUSIONS OF LAW</u>
Petitioner,	:	
	:	
vs.	:	
	:	
MERLIN DAVID SYMES,	:	
	:	Civil No. 9747 02275
Respondent.	:	

This matter came on regularly for trial on Thursday and Friday, October 8th and 9th, 1998 at the Layton District Court, the Honorable Darwin C. Hansen, presiding. Petitioner was present and represented by her attorney, Emilie A. Bean. Respondent was also present and represented by Steven C. Tycksen. The Court having heard the testimony of the parties and the witnesses on behalf of each party and received exhibits into evidence, and now being fully informed in the premises, hereby enters the following

FINDINGS OF FACT

1. Both parties were residents of Davis County for more than three months immediately prior to the commencement of this action.
2. The parties were married on the 21st day of October, 1970, Salt Lake City, Salt Lake County, Utah.

3. No children have been born as issue of the marriage and none are expected, however each party has children from a prior marriage.

4. Irreconcilable differences have recently developed causing an irretrievably breakdown in the marriage relationship. Those difference include unilateral control of marital funds, verbal abuse, threats of physical assault directed toward petitioner by respondent. Respondent's past conduct has caused petitioner to be fearful for her physical safety. Consequently, the resolution of the issues in this matter should be with an effort to eliminate any legal obligations running in favor of either party if equity can still be achieved. The Court therefore concludes that petitioner should be granted a Decree of Divorce from respondent with the same to become final immediately upon entry.

5. Petitioner is 62 years of age. She receives Social Security benefits in the sum of \$390.00 per month. She has no other income. Her health is poor. She is receiving medical care for abdominal, colon, bladder and heart problems. It is problematical as to whether she can be meaningfully employed although she testified that most of her problems are stress related and may abate somewhat following the divorce. Monthly medication costs currently approximate \$300.00. She has worked during most of the marriage, primarily for employers with whom her husband also worked. They have lived in Florida, Oregon, California and, for the last 19 years, in Utah, due to respondent's employment.

6. Petitioner's monthly expenses are as follows;

Electricity	\$ 55.00
Gas	70.00
Telephone	60.00
Water and Garbage	50.00
Food	200.00
Clothing	40.00
Gas for Car	60.00
Car Repair	80.00
Medical (Medication)	300.00
Doctor (Not Paid by Ins.)	<u>80.00</u>
TOTAL	\$1,035.00

which the Court finds reasonable in total but not necessarily, reasonable as to each line item.

7. Respondent is 67 years of age and also receives Social Security benefits in the monthly sum of \$893.00. He too is in ill health. He was injured in an industrial accident resulting in a closed head injury and suffered a hip fracture in a recent car accident. His employability is also problematical although he testified that he may find a minimum wage job which he hopes to do in the immediate future.

8. Respondent is currently living with a son pursuant to a Second District Court Order in the matter styled, THE STATE OF UTAH vs. MERLIN SYMES, Case No. 971701418 (see respondent's Ex. #18). It is unknown how long that arrangement will last. However, assuming he may be allowed to live on his own sometime in the future, he estimates that his monthly expenses will be as follows:

Rent	\$ 200.00
Property Tax	60.00
Utilities	50.00
Repairs	50.00
Phone	25.00
Food	150.00
Clothing	25.00
Car Expense	50.00
Entertainment	25.00
Laundry	30.00

Insurance	179.00
Incidentals	50.00
Gifts	60.00
Medical	<u>155.00</u>

TOTAL	\$1,089.00
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which the Court finds reasonable in total but not reasonable necessarily as to each line item.

9. Petitioner is in need of income above her current allotment. Respondent is also in need of more than his allotment.

10. There was no testimony as to indebtedness at trial except as to medical bills.

11. One of the central issues in this case is whether certain property is marital or non-marital and the valuation of such property. During the marriage, the parties have maintained individual bank accounts. Some of the property has been titled in both names and some in respondent's name only or in conjunction with third parties. The Court concludes that all income of each party whether in a joint account or in separate accounts is marital property and should be accounted for as such. Moreover, the same is true for property titled in one or both of the parties' names and in property held in conjunction with third parties as the interests of the parties may occur. On the other hand, property brought into the marriage together with appreciation is non-marital property and is to be returned to the party who brought it into the marriage unless the exceptions cited in *MORTENSEN vs. MORTENSEN*, 760 P.2d 304, 308 (Utah 1988) apply. Following are the Court's findings as to valuation and status of the marital estate:

A. Bear Lake Cabin with adjacent vacant Lot: The

respondent owned an A-frame cabin and a 50 foot water front adjacent lot on the west shore of Bear Lake at the time of the parties' marriage. The lot was sold for \$5,000.00 in 1971 to J. Gordon and Virjean Reynolds when the parties moved to Florida for respondent's work. It was allegedly repurchased by respondent's four children in 1974 for \$20,000.00 although a deed was not signed by the Reynolds until April 18, 1980 and not recorded until September 18, 1997. The lot is considered to have a current value of \$50,000.00. Improvements have been made to the lot including fill dirt, sprinkler system, sod and retaining wall. Most of the labor and costs were borne by respondent's children and some by respondent. Petitioner made no contribution to the adjacent lot. Therefore, the Court finds that the lot is non-marital property.

On the other hand, the cabin, which also has a 50 foot water front frontage, has been in the name of respondent since the marriage. Moreover, the cabin has been significantly enlarged and remodeled. It has been insured under both parties' names. Taxes and most of the cost associated with the improvements have been paid from marital funds. The remodel has been done by respondent with the aid of his two sons as a quid pro quo for respondent's assistance with their improvements of the adjacent lot. Over the years, petitioner has taken care of the domestic chores associated with the cabin and its lot while respondent has handled the physical improvements and financial matters associated with the cabin. The entire family has used both the cabin and the adjacent lot

for recreational purposes. Household furnishings in the cabin have been contributed to by both petitioner and respondent from pre-marital property. The Court therefore concludes that petitioner has contributed to the enhancement, maintenance, and protection of the cabin and its associated lot throughout the 28 years of the marriage and thus it is marital property.

The Court further concludes that the current value of the cabin is \$119,000.00. However, that amount should be decreased by its value at the time of the marriage. Petitioner suggests that its original value should be based on the valuation by the county for property tax purposes which is \$1,900.00. The Court rejects that notion. Respondent argues that the value at the time of the marriage is irrelevant. The Court also rejects that argument. If the adjacent lot, which is the same size as the cabin lot was worth \$5,000.00 when initially sold to the Reynolds and is now worth \$50,000.00, then by negative extrapolation, the cabin and its lot which is now worth \$119,000.00 would have been valued at approximately \$12,000.00 at the time of the parties' marriage. And the Court so concludes. Therefore, the marital property value of the cabin and its lot is \$119,000.00 less \$12,000.00 of \$107,000.00.

B. Residence: The residence located in Layton, Utah, was purchased during the marriage and has a current value of \$141,000.00. There is no mortgage outstanding. The home is marital property although respondent argues that he should receive a \$30,661.00 credit against the home representing

moneys he paid to the mortgagee when the mortgage was paid off. He claims the source of those funds came from a lump sum payment for permanent partial impairment resulting from the industrial accident heretofore referred to. Those funds are non-marital property to which respondent is entitled leaving a balance of \$110,339.00 as marital property in the residence.

C. Vehicles: The following vehicles are marital property worth the values as indicated:

1982 Zimmer	\$21,000.00
1946 Lincoln	3,000.00
1987 Marquis	Unknown
Other miscellaneous cars,	
Jet skis, snowmobiles, boat	Unknown
3 sets Chrome Wheels	1,600.00

The Zimmer was purchased by respondent for \$24,500.00. It was appraised at \$15,000.00 or \$16,000.00 without any road testing or careful examination. The low blue book is \$21,000.00. The Court concludes that the blue book is the best appraisal.

The vintage Lincoln is valued as a source of parts for those who are restoring a like vehicle. No valuation was testified to concerning the Marquis which petitioner is now driving and was a gift from her mother. It is therefore non-marital property. The other miscellaneous vehicles are considered to have only salvage value.

D. Jewelry: The following jewelry for each of the parties is valued as follows:

Petitioner	\$14,470.00
Respondent	10,845.00

Respondent claims that certain items of jewelry are

missing but were in the parties' residence when he was arrested on the criminal charges now pending against him. He further asserts that he is entitled to a credit against the marital estate on the grounds that petitioner has occupied the home since that time and should be held responsible for the missing items. Petitioner on the other hand claims that the home has been burglarized and vandalized since respondent's arrest. She implies that either respondent or others under his direction probably are the culprits and that the missing items were taken then. In the alternative, she speculates that before the arrest respondent took many items from the house and has them at some other location which may include the missing jewelry items. Neither party has met their burden of showing responsibility on the other as to the missing items and therefore the court makes no ruling as to those items nor considers them part of the marital estate.

E. Doll Collection: Petitioner has collected dolls since she was a small child. Dolls collected before the marriage are non-marital property. Dolls collected after the marriage are marital property. The value of the collection after marriage is \$8,000.00 and is part of the marital estate.

F. Insurance: The cash value of the following three insurance policies issued by Alexander Hamilton Life are part of the marital estate:

Policy #5094704	\$11,809.00
Policy #343673	2,371.00
Policy #1816086	1,708.00

G. Guns and ammunition: Respondent has acquired an

assortment of hand guns and long barrel guns with a supply of ammunition. It has a value of \$1,100.00 and is a part of the marital estate.

H. Cash: Respondent recently withdrew \$10,000.00 from insurance policy No. 5094704 and deposited the same into a CD. While the transaction may not be in violation of the letter of paragraph 3C of the Order on Order to Show Cause issued by this Court on February 20, 1998, it was inconsistent with the spirit of the Order. The Court does not know whether the transaction resulted in the current cash value of the policy to be less than it might otherwise have been. In any event, the funds in the CD are marital property together with any accrued interest to date.

I. St. George Property: The parties acquired an undivided one-half ($\frac{1}{2}$) interest in a piece of residential property in St. George, Utah, which was recently sold. The buyer paid \$34,716.00 to the parties on or about August 5, 1997, as part of that sale. All of the funds were put into respondent's bank account. \$14,000.00 was divided between the parties pursuant to this Court's Order on Order to Show Cause issued February 20, 1997. The balance has not been accounted for by respondent. The funds are marital property. Petitioner should therefore receive a credit in the amount of \$10,335.00 against the total marital estate before distribution which is one-half ($\frac{1}{2}$) of the unaccounted for balance.

J. Household furnishings: The Court is not going to

value the household furnishings. There is no independent testimony from an appraiser as to their value. To attempt to value the property would be mere speculation. The Court does not find the testimony of respondent as to their value credible and therefore discounts the same. Nevertheless, each parties' suggested division is fairly consistent. Pre-marital property is to go to the party who brought the item into the marriage. The marital property is to be divided as suggested. Specifically, however, respondent is to receive the jukebox. If the parties cannot agree on a distribution as to the balance, either may petition the Court for assistance as to those items on which there is a dispute.

From the foregoing Findings of Fact, the Court does hereby enter the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter in this action.

2. Petitioner should be granted a divorce from respondent on the ground of irreconcilable differences, and the divorce should become final upon entry with the Clerk of the Court.

3. The Court concludes that the following property distribution is equitable and that each party should be granted the following property as identified:

<u>ITEM</u>	<u>PETITIONER</u>	<u>RESPONDENT</u>
Bear Lake Cabin		\$107,000.00
Residence:		
Value -	\$141,000.00	
Less -	30,661.00	

Plus -	10,335.00	
		\$120,674.00
1982 Zimmer		21,000.00
1946 Lincoln		3,000.00
Chrome Wheels & Misc. Vehicles		1,600.00
Jewelry	14,470.00	10,845.00
Doll Collection	8,000.00	
Insurance		
Policy #343673		2,371.00
Policy #3094704	11,809.00	
Policy #1816086	1,708.00	
Cash (CD)		10,000.00
Guns & Ammunition		1,100.00
TOTAL	\$156,661.00	\$156,916.00

4. Respondent's personal injury claim has been reduced from the marital value of the residence and petitioner's share of the unaccounted for proceeds from the sale of the St. George property has been added for a net value of \$120,674.00 leaving a sum of \$20,326.00 (30,661.00-10,335.00) to be adjusted in favor of respondent. That adjustment is accounted for with regard to alimony mentioned below.

5. Respondent's award of the guns and ammunition shall be subject to the Order of Criminal Court or any subsequent amendment.

6. Due to the disparity in income, it is equitable that the parties' incomes be equalized so that they are placed on an even footing though that will still leave each short of meeting their needs. It may be that they will have to find some kind of

employment or sell some of their assets in order to make do. It is equitable for respondent to pay petitioner alimony in the sum of \$251.00 per month. That amount results from the average of the two Social Security payments and adjusting the alimony so that the income of each party is equal. However, the Court concludes that there should be no alimony obligation on the part of respondent the result of which offsets respondent's right to receive payment for the balance of his personal injury funds in the amount of \$20,326.00 which petitioner is taking as part of the equity in the marital residence.

7. Each of the parties are to be responsible for their own indebtedness and to hold the other harmless thereon. Each party is responsible for his or her own medical bills.

8. Petitioner may be restored to her maiden name if she chooses to hereafter be known as A. LOUISE ADKINS.

9. Each of the parties is to be responsible for their own attorney's fees and costs of court.

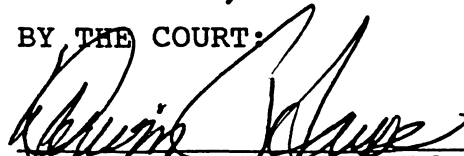
10. Each party is restrained from harassing, abusing or threatening the other. A police officer is to be present when respondent's personal property currently stored at petitioner's residence is picked up. Respondent's designee is to remove all of respondent's property at petitioner's residence within 30 days following the entry of the Decree of Divorce in that respondent has been ordered to stay away from petitioner's home in the Order of the Criminal Court.

11. Each of the parties is to cooperate in the execution of any documents necessary to finalize all aspects of the Decree of

Divorce to be issued in this matter.

DATED this 19 day of Feb, 1998.

BY THE COURT:


DARWIN C. HANSEN, JUDGE

N O T I C E

You will please take notice that the undersigned, attorney for petitioner, will submit the above and foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to the Judge of the above-entitled Court for his signature, upon the expiration of five (5) days from the date this Notice is mailed to you, and after allowing three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504(2), Rules of Judicial Administration.

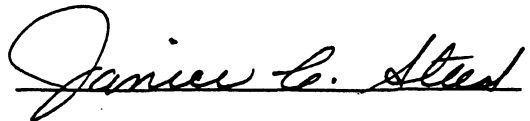
Kindly govern yourself accordingly.

DATED this 16th day of November 1998.


EMILIE A. BEAN
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 16th day of November 1998, I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to Steven C. Tycksen, Attorney at Law, 11519 Nicklaus Road, PO Box 480, Draper UT 84020-0480, postage prepaid.



BEAN & SMEDLEY
Emilie A. Bean (6178)
Attorney for Petitioner
190 South Fort Lane, #2
Layton, Utah 84041
Telephone: (801) 544-4221

FEB 10 1 31 PM '99

KL

IN THE SECOND JUDICIAL DISTRICT COURT FOR DAVIS COUNTY
FARMINGTON DEPARTMENT, STATE OF UTAH

LOUISE A. SYMES,	:	<u>DECREE OF DIVORCE</u>
	:	
Petitioner,	:	
	:	
vs.	:	
	:	
MERLIN DAVID SYMES,	:	
	:	Civil No. 9747 02275
Respondent.	:	

This matter came on regularly for trial on Thursday and Friday, October 8th and 9th, 1998 at the Layton District Court, the Honorable Darwin C. Hansen, presiding. Petitioner was present and represented by her attorney, Emilie A. Bean. Respondent was also present and represented by Steven C. Tycksen. The Court having heard the testimony of the parties and the witnesses on behalf of each party and received exhibits into evidence, and now being fully informed in the premises, and having heretofore made and entered its Findings of Fact and Conclusions of Law, does hereby ORDER, ADJUDGE AND DECREE:

1. Petitioner is granted a divorce from respondent on the ground of irreconcilable differences, and the and the bond of

matrimony now and heretofore existing between petitioner and respondent is hereby dissolved, and the divorce shall become final upon entry with the Clerk of the Court.

2. Each party is awarded the following property as identified below:

<u>ITEM</u>	<u>PETITIONER</u>	<u>RESPONDENT</u>
Bear Lake Cabin		\$107,000.00
Residence:		
Value - \$141,000.00		
Less - 30,661.00		
Plus - 10,335.00		
	\$120,674.00	
1982 Zimmer		21,000.00
1946 Lincoln		3,000.00
Chrome Wheels & Misc. Vehicles		1,600.00
Jewelry	14,470.00	10,845.00
Doll Collection	8,000.00	
Insurance		
Policy #343673		2,371.00
Policy #3094704	11,809.00	
Policy #1816086	1,708.00	
Cash (CD)		10,000.00
Guns & Ammunition (Subject to Court Order in criminal matter)		1,100.00
TOTAL	\$156,661.00	\$156,916.00

3. Respondent's personal injury claim has been reduced from the marital value of the residence and petitioner's share of the unaccounted for proceeds from the sale of the St. George property has been added for a net value of \$120,674.00 leaving a sum of \$20,326.00 (30,661.00-10,335.00) to be adjusted in favor of respondent. That adjustment is accounted for with regard to

alimony mentioned below.

4. The marital property is to be divided by the suggested division of the parties. Specifically, however, respondent is to receive the jukebox. If the parties cannot agree on a distribution as to the balance, either may petition the Court for assistance as to those items on which there is a dispute. Par-marital property is to go to the party who brought the item into the marriage.

5. Respondent is awarded the guns and ammunition subject to the Order of Criminal Court or any subsequent amendment.

6. It is ordered that respondent pay to petitioner alimony in the sum of \$251.00 per month. That amount results from the average of the two Social Security payments and adjusting the alimony so that the income of each party is equal. However, the Court concludes that there should be no alimony obligation on the part of respondent the result of which offsets respondent's right to receive payment for the balance of his personal injury funds in the amount of \$20,326.00 which petitioner is taking as part of the equity in the marital residence.

7. Each of the parties is responsible for their own indebtedness and to hold the other harmless thereon. Each party is responsible for his or her own medical bills.

8. Petitioner may be restored to her maiden name if she chooses to hereafter be known as A. LOUISE ADKINS.

9. Each of the parties is to pay his or her own attorney's fees and costs of court.

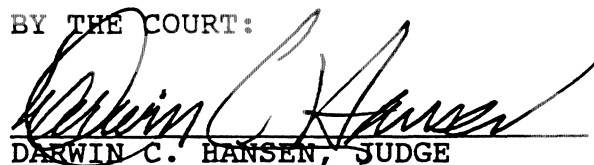
10. Each party is restrained from harassing, abusing or threatening the other. A police officer is to be present when

respondent's personal property currently stored at petitioner's residence is picked up. Respondent's designee is to remove all of respondent's property at petitioner's residence within 30 days following the entry of the Decree of Divorce in that respondent has been ordered to stay away from petitioner's home in the Order of the Criminal Court.

11. Each of the parties is ordered to cooperate in the execution of any documents necessary to finalize all aspects of the Decree of Divorce to be issued in this matter.

DATED this 19 day of Feb, 1998.

BY THE COURT:


DARWIN C. HANSEN, JUDGE

N O T I C E

You will please take notice that the undersigned, attorney for petitioner, will submit the above and foregoing DECREE OF DIVORCE to the Judge of the above-entitled Court for his signature, upon the expiration of five (5) days from the date this Notice is mailed to you, and after allowing three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504(2), Rules of Judicial Administration.

Kindly govern yourself accordingly.

DATED this 16th day of November 1998.


EMILIE A. BEAN
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 16th day of November 1998, I mailed a true and correct copy of the foregoing Decree of Divorce to Steven C. Tycksen, Attorney at Law, 11519 Nicklaus Road, PO Box 480, Draper UT 84020-0480, postage prepaid.

Janice C. Steed

FARMINGTON DEPARTMENT, STATE OF UTAH

Judge: DARWIN C. HANSEN

5. **PETITIONER'S INCOME AND EXPENSES:** Petitioner is 62 years of age. She receives Social Security Benefits in the sum of \$390 per month. She has no other income. Her health is poor. She is receiving medical care for abdominal, colon, bladder and heart problems. It is problematical as to whether she can be meaningfully employed although she testified that most of her problems are stress related and may abate somewhat following the divorce. Monthly medication costs currently approximate \$300. She has worked during most of the marriage, primarily for employers with whom

her husband also worked. They have lived in Florida, Oregon, California and, for the last 19 years, in Utah, due to Respondent's employment.

Petitioner claims her monthly expenses are as follows:

Electricity	\$ 55
Gas	70
Telephone	60
Water and Garbage	50
Food	200
Clothing	40
Gas for Car	60
Car Repair	80
Medical (medication)	300
Doctor (Not pd by ins)	80
TOTAL	\$1035

which the Court finds reasonable in total but not necessarily reasonable as to each line item.

6. **RESPONDENT'S INCOME AND EXPENSES:** Respondent is 67 years of age and also receives Social Security Benefits in the monthly sum of \$893. He too is in ill health. He was injured in an industrial accident resulting in a closed head injury and suffered a hip fracture in a recent car accident. His employability is also problematical although he testified that he may find a minimum wage job which he hopes to do in the immediate future.

Respondent is currently living with a son pursuant to a Second District Court Order in the matter styled, THE STATE OF UTAH vs. MERLYN SYMES, Case No. 971701418 (see Respondent's Ex. #18). It is unknown how long that arrangement will last. However, assuming he may be allowed to live on his own sometime in the future, he estimates that his monthly expenses will be as follows:

Rent	\$ 200
Property Taxes	60
Utilities	50
Repairs	50
Phone	25
Food	150
Clothing	25
Car Expense	50
Entertainment	25
Laundry	30
Insurance	179
Incidentals	50

Gifts	60
Medical	155

TOTAL \$1,089

which the Court finds reasonable and fair under the reasonable necessities of the particular item.

7. **PROPERTY VALUATION AND STATUS:** One of the central issues in this case is whether certain property is marital or non-marital and the valuation of such property. During the marriage, the Parties have maintained individual bank accounts. Some of the property has been titled in both names and some in Respondent's name only or in conjunction with third parties. The Court concludes that all income of each Party whether in a joint account or in separate accounts is marital property and should be accounted for as such. Moreover, the same is true for property titled in one or both of the Parties' names and in property held in conjunction with third parties as the interests of the Parties may occur. On the other hand, property brought into the marriage together with appreciation is non-marital property and is to be returned to the Party who brought it into the marriage unless the exceptions cited in *MORTENSEN v. MORTENSEN*, 760 P.2d 304, 308 (Utah 1988) apply. Following are the Court's findings as to valuation and status of the marital estate:

A. **Bear Lake Cabin with adjacent vacant Lot:** The Respondent owned an A-frame cabin and a 50 foot water front adjacent lot on the west shore of Bear Lake at the time of the Parties' marriage. The lot was sold for \$5000 in 1971 to J. Gordon and Virjean Reynolds when the Parties moved to Florida for Respondent's work. It was allegedly repurchased by Respondent's four children in 1974 for \$20,000 although a deed was not signed by the Reynolds until April 18, 1980 and not recorded until Sept. 18, 1997. The lot is considered to have a current value of \$50,000. Improvements have been made to the lot including fill dirt, sprinkler system, sod and retaining wall. Most of the labor and costs were born by Respondent's children and some by Respondent. Petitioner made no contribution to the adjacent lot. Therefore, the court finds that the lot is non-marital property.

On the other hand, the cabin, which also has a 50 foot water front frontage, has been in the name of Respondent since the marriage. Moreover, the cabin has been significantly enlarged and remodeled. It has been insured under both Parties' names. Taxes and most of the cost associated with the improvements have been paid from marital funds. The remodel has been done by Respondent with the aid of his two sons as a quid pro quo for Respondent's assistance with their improvement of the adjacent lot. Over the years, Petitioner has taken care of the domestic chores associated with the cabin and its lot while Respondent has handled the physical improvements and financial matters associated with the cabin. The entire family has used both the cabin and the adjacent lot for recreational purposes. Household furnishings in the cabin have been contributed to by both Petitioner and Respondent from pre-marital property. The Court therefore concludes that Petitioner has

contributed to the enhancement, maintenance, and protection of the cabin and its associated lot throughout the 28 years of the marriage and thus it is marital property.

The Court further concludes that the current value of the cabin is \$119,000. However, that amount should be decreased by its value at the time of the marriage. Petitioner suggests that its original value should be based on the valuation by the county for property tax purposes which is \$1900. The Court rejects that notion. Respondent argues that the value at the time of the marriage is irrelevant. The Court also rejects that argument. If the adjacent lot, which is the same size as the cabin lot, was worth \$5,000 when initially sold to the Reynolds and is now worth \$50,000, then by negative extrapolation the cabin and its lot which is now worth \$119,000 would have been valued at approximately \$12,000 at the time of the Parties' marriage. And the Court so concludes. Therefore the marital property value of the cabin and its lot is \$119,000 less \$12,000 or \$107,000.

B. Residence: The residence located in Layton, Utah, was purchased during the marriage and has a current value of \$141,000. There is no mortgage outstanding. The home is marital property although Respondent argues that he should receive a \$30,661 credit against the home representing monies he paid to the mortgagee when the mortgage was paid off. He claims the source of those funds came from a lump sum payment for permanent partial impairment resulting from the industrial accident heretofore referred to. Those funds are non-marital property to which Respondent is entitled leaving a balance of \$110,339 as marital property in the residence.

C. Vehicles: The following vehicles are marital property with the values as indicated:

1982 Zimmer	\$21,000
1946 Lincoln	\$ 3,000
1987 Marquis	unk
Other miscellaneous cars, jet skis, snow-mobiles, boat	unk
3 sets chrome Wheels	\$ 1600

The Zimmer was purchased by Respondent for \$24,500. It was appraised at \$15,000 or \$16,000 without any road testing or careful examination. The low blue book is \$21,000. The Court concludes that the blue book is the best appraisal.

The vintage Lincoln is valued as a source of parts for those who are restoring a like vehicle. No valuation was testified to concerning the Marquis which Petitioner is now driving and was a gift from her mother. It is therefore non-marital property. The other miscellaneous vehicles are considered to have only salvage value.

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Respondent	\$10,845

Respondent claims that certain items of jewelry are missing but were in the Parties' residence when he was arrested on the criminal charges now pending against him. He further asserts that he is entitled to a credit against the marital estate on the grounds that Petitioner has occupied the home since that time and should be held responsible for the missing items. Petitioner on the other hand claims that the home has been burglarized and vandalized since Respondent's arrest. She implies that either Respondent or others under his direction probably are the culprits and that the missing items were taken then. In the alternative, she speculates that before the arrest Respondent took many items from the house and has them at some other location which may include the missing jewelry items. Neither Party has met their burden of showing responsibility on the other as to the missing items and therefore the Court makes no ruling as to those items nor considers them part of the marital estate.

E. Doll Collection: Petitioner has collected dolls since she was a small child. Dolls collected before the marriage are non-marital property. Dolls collected after the marriage are marital property. The value of the collection after marriage is \$8,000 and is part of the marital estate.

F. Insurance: The cash value of the following three insurance policies issued by Alexander Hamilton Life are part of the marital estate:

Policy # 5094704	\$11,809
Policy # 343673	\$ 2,371
Policy # 1816086	\$ 1,708

G. Guns and ammunition: Respondent has acquired an assortment of hand guns and long barrel guns with a supply of ammunition. It has a value of \$1,100 and is a part of the marital estate.

H. Cash: Respondent recently withdrew \$10,000 from insurance policy No. 5094704 and deposited the same into a CD. While the transaction may not be in violation of the letter of paragraph 3C. of the Order on Order to Show Cause issued by this Court on Feb. 20, 1998, it was inconsistent with the spirit of the Order. The Court does not know whether the transaction resulted in the current cash value of the policy to be less than it might otherwise have been. In any event, the funds in the CD are marital property together with any accrued interest to date.

I. St. George Property: The Parties acquired an undivided $\frac{1}{2}$ interest in a piece of residential property in St George, Utah, which was recently sold. The buyer paid \$34,716 to the Parties on or about August 5, 1997, as part of that sale. All of the

funds were put into Respondent's bank account. \$14,000 was divided between the Parties pursuant to this Court's Order on Order to Show Cause issued February 20, 1997. The balance has not been accounted for by Respondent. The funds are marital property. Petitioner should therefore receive a credit in the amount of \$10,335 against the total marital estate before distribution which is ½ of the unaccounted for balance.

J. Household furnishings: The Court is not going to value the household furnishings. There is no independent testimony from an appraiser as to their value. To attempt to value the property would be mere speculation. The Court does not find the testimony of Respondent as to their value credible and therefore discounts the same. Nevertheless, each Parties' suggested division is fairly consistent. Pre-marital property is to go to the Party who brought the item into the marriage. The marital property is to be divided as suggested. Specifically, however, Respondent is to receive the jukebox. If the Parties cannot agree on a distribution as to the balance, either may petition the Court for assistance as to those items on which there is a dispute.

8. PROPERTY DISTRIBUTION: The Court concludes that the following property distribution is equitable:

ITEM	PETITIONER	RESPONDENT
Bear Lake Cabin		\$107,000
Residence:		
Value - \$141,000		
Less - \$ 30,661		
Plus - \$ 10,335		
	\$120,674	
"82" Zimmer		\$ 21,000
"46" Lincoln		\$ 3,000
Chrome Wheels & Misc vehicles		\$ 1,600
Jewelry	\$ 14,470	\$ 10,845
Doll Collection	\$ 8,000	
Insurance:		
Policy # 343673		\$ 2,371
Policy # 5094704	\$ 11,809	
Policy # 1816086	\$ 1,708	
Cash (CD)		\$ 10,000

Guns and Ammunition		\$ 1,100
TOTAL	\$156,661	\$ 156,916

Respondent's personal injury claim has been reduced from the marital value of the residence and Petitioner's share of the unaccounted for proceeds from the sale of the St. George property has been added for a net value of \$120,674 leaving a sum of \$20,326 (30,661-10,335) to be adjusted in favor of Respondent. That adjustment is accounted for with regard to alimony mentioned below.

Respondent's award of the guns and ammunition shall be subject to the Order of the Criminal Court or any subsequent amendment.

9. **ALIMONY:** Though both Parties are currently receiving Social Security Benefits, there is still a disparity of income as mentioned above. Petitioner is in need of income above her current allotment. Respondent is also in need of more than his allotment. It is equitable however, for their incomes to be equalized so that they are placed on an even footing though that will still leave each short of meeting their needs. It may be, that they will have to find some kind of employment or sell some of their assets in order to make do. In any event, it is equitable for Respondent to pay Petitioner alimony in the sum of \$251 per month. That amount results from the average of the two SS payments and adjusting the alimony so that the income of each Party is equal. However, the Court concludes that there should be no alimony obligation on the part of Respondent the result of which off-sets Respondent's right to receive payment for the balance of his personal injury funds in the amount of \$20,326 which Petitioner is taking as part of the equity in the marital residence.

10. **DEBTS AND OBLIGATIONS:** Each of the Parties are to be responsible for their own indebtedness and to hold the other harmless thereon. There was no testimony as to indebtedness presented at trial except for each Parties' medical bills which they are to pay.

11. **MAIDEN NAME:** Petitioner may be restored to her maiden name if she chooses. The request was made by her counsel in the opening statement but no testimony as to the maiden name was presented at trial. The name may be inserted in the Findings of Fact, Conclusions of Law and in the Decree of Divorce if appropriate.

12. **ATTORNEY'S FEES AND COSTS:** Each of the Parties are to be responsible for their own Attorney's Fees and Costs of Court.


13. **RESTRAINING ORDER:** Each Party is restrained from harassing, abusing or threatening the other. A Police Officer is to be present when Respondent's personal property currently stored at Petitioner's residence is picked up. Respondent's designee is to remove all of Respondent's property at Petitioner's residence within 30 days following the entry of the Decree of Divorce in that Respondent has been Ordered to stay away from Petitioner's home in the Order of the Criminal Court.

14. COOPERATION: Each of the Parties are to cooperate in the execution of any documents necessary to finalize all aspects of the Decree of Divorce to be issued in this matter.

15. ADMINISTRATIVE MATTERS: The Court requests counsel for Petitioner to prepare final Findings of Fact, Conclusions of Law and Decree of Divorce. The pleadings are to be prepared and reviewed by both counsel in accordance with Rule 4-504, Code of Judicial Administration, and then submitted to the Court for review and signature.

DATED this 20th day of October, 1998.

BY THE COURT


Darwin C. Hansen - Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed the Memorandum Decision, postage pre-paid, first class U.S. mail, to the following:

Emilie A. Bean
Attorney for Petitioner
190 South Fort Lane, #2
Layton, UT 84041

Steven C. Tycksen
Attorney for Respondent
P.O. Box 480
Draper, UT 84020

DATED this 20th day of October, 1998.



Deputy Court Clerk

1 Steven C. Tycksen (3300)
2 Lone Peak Law Offices, P.C.
3 Attorney for Respondent
4 Post Office Box 480
5 Draper, Utah 84020-0480
6 Telephone: (801) 572-2700
7 Facsimile: (801) 553-1618

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

Nov 25 4 33 PM '98

CLERK OF COURT

BY P

8 IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
9 FARMINGTON DEPARTMENT, STATE OF UTAH

10 LOUISE A. SYMES,

11 Petitioner,

12 vs.

13 MERLIN DAVID SYMES,

14 Respondent.

:

:

:

:

:

MOTION TO ASSESS COSTS

9747 02275
Case No. 974902275

Judge: Darwin C. Hansen

15 COMES NOW, Respondent, Merlin David Symes, by and through counsel, Steven C.
16 Tycksen, and hereby moves this Court to Assess Costs incurred by the Respondent for the Appraisals
17 and the expert witnesses as listed in the attached Exhibit 'A' as costs against the Marital Estate.

18 AS GROUNDS THEREFORE, Respondent states and alleges as follows:

19 1. The court relied upon and used this evidence in making its decision, and the costs to
20 produce the same should therefore appropriately be taxed as an expense of the estate prior to the
21 division of assets.

22 DATED and SIGNED this 16 day of November, 1998.

23 
24 Steven C. Tycksen
25 Attorney for Respondent
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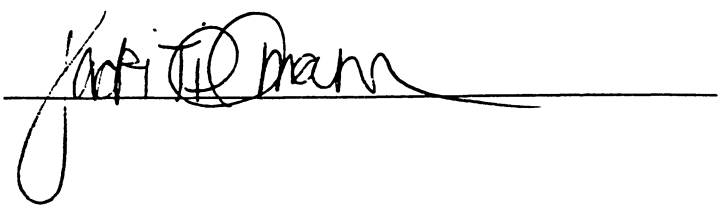
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MAILING CERTIFICATE

I certify that I am employed by the office of Steven C. Tycksen, and that I mailed a true and correct copy of the foregoing, postage pre-paid, to the following:

Emile Bean
BEAN & SMEDLEY
190 South Fort Lane, Suite 2
Layton, UT 84041

on this 7 day of November, 1998.

A handwritten signature in dark ink, appearing to read "Emile Bean", is written over a horizontal line. The signature is stylized with a large loop at the end.

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EXHIBIT 'A'

Colleen Olson (doll Appraisals)	\$750.00
Ardell Brown (Zimmer Appraisal)	\$200.00
Derek Lamb (Layton Home Appraisal)	\$510.00
W.R. Peterson (Bear Lake Appraisal)	\$575.00
Payne Anthony Jewelers (Jewelry Appraisal)	\$350.00
TOTAL	\$2385.00

1 **Steven C. Tycksen (3300)**
2 **Attorney for Defendant**
3 **Lone Peak Law Offices, P.C.**
4 **Post Office Box 480**
5 **Draper, Utah 84020-0480**
6 **Telephone: (801) 572-2700**
7 **Facsimile: (801) 553-1618**

FILED
NOV 30 1 12 PM '98

8 **IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY**

9 **LAYTON DEPARTMENT, STATE OF UTAH**

10 **LOUISE A. SYMES,** : **MOTION TO RE-CONSIDER COURTS**
11 **Plaintiff,** : **RULING AND/OR RE- OPEN TRIAL TO TAKE**
12 : **ADDITIONAL TESTIMONY AND EVIDENCE**
13 **vs.** :
14 **MERLIN DAVID SYMES,** :
15 **Defendant.** : **Civil No. 974702275**
16 : **Judge Rodney S. Page**

17 **COMES NOW**, the Defendant, by and through counsel, Steven C. Tycksen, and does hereby
18 move this Court to re-consider its ruling on a few issues and/or re-open the trial to take additional
19 testimony. The issues that need to be re-addressed are as follows:

20 1. The Court found that there was not an adequate accounting of what happened to the
21 money which the parties received from the sale of the St. George property. The Court assumed and
22 concluded that the money was not spent for marital purposes and still exists. Because of this assumption
23 the Court ordered the unaccounted for money divided equally. In the Defendant's testimony at trial he
24 indicated that he had no hoard or stash of money left over from the sale of the property, that he gave half
25 of the last installment to Plaintiff, and that he had spent the other portion of the money on marital
26 expenses. The Defendant did not anticipate that this issue would require further documentation because
27 it was never raised in the pleadings and was not addressed in the Pre-Trial order as an issue for Trial.

1 He was therefore not prepared to demonstrate with further documentation to the Court at Trial,
2 otherwise he would have produced his banking records. Moreover, the documentation he would have
3 needed to do so was not available to him because all of his financial records were in Plaintiff's possession
4 and still are. The Defendant should not be expected to anticipate this issue and be held to a standard of
5 having failed to document his testimony under these circumstances. The Defendant should therefore be
6 allowed access to his personal financial records in Plaintiff's possession or be given an opportunity to
7 request them from his bank and an opportunity to present this evidence to the Court to show how the
8 funds were distributed. Defendant believes these records will demonstrate to the Court's satisfaction that
9 all of these funds were spent on marital purposes. Defendant asks the Court to be allowed to present this
10 evidence to the Court or, in the alternative, asks the Court to reconsider the testimony of the Defendant
11 and change it's ruling on this issue in view of his statements to the contrary. As a comparative corollary
12 to this the Defendant never knew that his wife had been receiving "Social Security" income during the
13 marriage. He first learned of this in her testimony. Her testimony at trial indicated that she had been
14 receiving it for several years. His testimony was that he used his resources to support the family. He
15 gave her money to live on and paid the family bills. He did not know she had other income. No
16 accounting of her "Social Security" income has been required by the Court nor has the Court required
17 a division of that resource. Following the Court's ruling its logical conclusion would imply that Plaintiff
18 should also be required to be explain and document the disposition of these marital funds or they should
19 be divided equally in fairness to both parties.

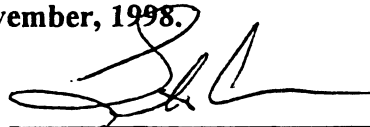
20 2. The Defendant asks the Court to re-open the trial to allow him to provide evidence of the
21 value of the Bear Lake Cabin at the time of the parties marriage. The appraiser who appraised the
22 property and testified at trial was not prepared to give an opinion on the value of the cabin at the time
23 of the marriage because the asset was never held in the parties' joint name and Defendant never regarded
24 it as a marital asset. The only issue Defendant believed was properly before the Court was the value of
25 the additions or modifications and this was the evidence Defendant presented. The Defendant presented
26 evidence that only 1/3 of the cost of the improvements was paid by him with the other 2/3 being paid by
27 the Defendant's sons. The Court chose not to rely on this evidence and instead speculated on the value
28

1 of the Cabin at the time of the parties marriage by assuming that the appreciation of the cabin was the
2 same as the appreciation of the land. There was no evidence provided by either party at trial to support
3 that assumption. Since the Court's ruling the Defendant has requested the appraiser to form that opinion
4 and he further believes that the Plaintiff is in possession of other of his financial records which can
5 demonstrate the value of the Cabin at the time of the parties marriage in a more accurate fashion. This
6 evidence was not available to him at trial because all of his financial records were in Plaintiff's possession
7 and she refused to turn over Defendant's property. The Defendant therefore asks the Court to allow this
8 additional evidence to be provided and considered by the Court in a re-opened trial or evidentiary hearing
9 and/or asks the Court to allow Defendant to submit this information to the Court by Affidavit and have
10 the Court reconsider its ruling on this matter.

11 3. The Court failed to make any division of personal property in its ruling but suggested that
12 the parties should work it out. This ruling ignores the history of this case and the repeated difficulty
13 Defendant has had in obtaining any of his property. Without specific guidance from the Court the present
14 ruling leaves the parties right where they have been, unable to agree on anything. Defendant respectfully
15 requests the Court to reconsider its ruling and make specific awards of property and definite orders for
16 how and when the Defendant may pick up his property.

17 4. The Court specifically ordered that the parties each pay their own attorney fees and costs.
18 However, Defendant incurred substantial costs and witness fees which should appropriately be ordered
19 to be taxed as expenses of the marital estate. The Defendant spent nearly \$4,000.00 in witness fees and
20 appraisals. The Court relied heavily upon and used this evidence in making its ruling. As such, the costs
21 incurred to provide this evidence created a benefit to both parties and the Court should therefore
22 appropriately tax these costs as an expense of the marital estate and not solely to the Defendant.
23 Defendant Respectfully requests the Court to reconsider this part of its ruling.

24 **DATED and SIGNED this 25 day of November, 1998.**

25 
26 **Steven C. Tycksen**
27 **Attorney for Defendant**
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CERTIFICATE OF MAILING

I hereby certify that I am employed by the office of Steven C. Tycksen, and that I mailed a true and correct copy of the foregoing, postage pre-paid to the following:

Emilie Bean
BEAN & SMEDLEY
190 South Fort Lane, Suite 2
Layton, Utah 84041

on this 25 day of November, 1998.

Adrienne Bengard

BEAN & SMEDLEY
Emilie A. Bean (6178)
Attorney for Plaintiff
190 South Fort Lane, Suite 2
Layton, UT 84041
Telephone: (801) 544-4221

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

Dec 9 12 10 PM '98

CLERK COURT

BY *JS* _____

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
FARMINGTON DEPARTMENT, STATE OF UTAH

LOUISE A. SYMES,	:	<u>RESPONSE TO MOTION</u>
	:	<u>TO ASSESS COSTS</u>
Petitioner,	:	
	:	
vs.	:	
	:	Civil No. 9747 02275
MERLIN DAVID SYMES,	:	
	:	
Respondent.	:	

Petitioner, Louise A. Symes, objects to respondent's Motion to Assess Costs on the following grounds:

1. Respondent knew or should have know that he was incurring costs for appraisals and testimony which would not necessarily be divided as part of the marital estate expenses. Presumably, respondent hoped that the Court would rely on his expert witnesses, reports, and testimony.

2. Had petitioner been able to afford appraisals, she would also have had her own expert testimony; however, based on the objection by respondent to cashing out a life insurance policy that was actually loosing value, petitioner was unable to afford her own experts and should not be responsible for any portion of the payments respondent must make to his expert witnesses.

3. The Court's Memorandum Decision did not award respondent his expenses although respondent made the request at trial. The

Judge chose not to award costs as requested by respondent in the Memorandum Decision. Asking again merely wastes petitioner's resources and having to respond to respondent's Motion.

4. Petitioner did not have evidence to the contrary with regard to the appraised values of the martial residence and the Bear Lake cabin property, and petitioner's doll collection, and therefore was unable to argue those specific values. Petitioner believed that respondent's appraisals with regard to the jewelry and vehicles were so grossly inaccurate, a contrary appraisal was not even necessary to refute those claims.

THEREFORE, petitioner objects to any requirement to share costs in the appraisals obtained by respondent for his self-serving purpose and not as universal information to provide to the Court and requests that respondent be ordered to pay petitioner's attorney's fees in the amount of \$132.00 for responding to respondent's frivolous motion.

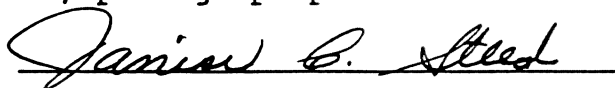
DATED this 3rd day of December, 1998.

BEAN & SMEDLEY


 EMILIE A. BEAN
 Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of December, 1998, I mailed a true and correct copy of the foregoing RESPONSE TO MOTION TO ASSESS COSTS to Steven C. Tycksen, Attorney at Law, PO Box 480, Draper, Utah 84020-0480, postage prepaid.



BEAN & SMEDLEY
Emilie A. Bean (6178)
Attorney for Petitioner
190 South Fort Lane, #2
Layton, Utah 84041
Telephone: (801) 544-4221

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

DEC 21 11 33 AM '98

CLERK

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BY

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IN THE SECOND JUDICIAL DISTRICT COURT FOR DAVIS COUNTY
FARMINGTON DEPARTMENT, STATE OF UTAH

LOUISE A. SYMES,
Petitioner,
vs.
MERLIN DAVID SYMES,
Respondent.

: RESPONSE TO DEFENDANT'S MOTION
: TO RECONSIDER COURT'S RULING
: AND/OR REOPEN TRIAL TO TAKE
: ADDITIONAL TESTIMONY AND
: EVIDENCE
:
:
: Civil No. 9747 02275
:

Petitioner, Louise A. Symes, by and through her counsel of record, hereby responds to respondent's Motion to Reconsider Court's Ruling and/or Reopen Trial to take Additional Testimony and Evidence, and objects to the Motion on the following grounds:

1. The Court had a trial on this matter which exceeded the scheduled time estimated by counsel by one full day, at which time respondent had sufficient opportunity to present any relevant evidence he deemed appropriate. All of the claims made by respondent requesting new evidence are subject matter which respondent could have or should have anticipated would be at issue at trial.

2. Specifically, respondent complains that the Court's decision with regard to the issue of division of the St. George

property did not account for respondent's claim that the funds were spent for marital purposes. Respondent fails to consider that petitioner sent discovery on August 12, 1998 requesting not only information and documentation with regard to the St. George property, but also respondent's bank records. In answer to discovery not only should respondent have recognized the issue of division of the St. George property, but also respondent's documentation could have and should have been prepared in answer to discovery. Petitioner received the answers to discovery after lunch on the first day of trial with no actual production of the documents requested.

3. The Court heard ample evidence as to the lifestyle of the parties and the separation of their assets into entirely different bank accounts during the course of the marriage and therefore had sufficient grounds to conclude as a matter of law that petitioner did not receive her one-half of the proceeds of the sale of the St. George property. In addition, respondent fails to take into account that petitioner was a title holder on the property and was in her own right entitled to one-half of the parties' proceeds from sale to be used as she directed and not at respondent's whim.

4. The Court considered the best evidence possible for valuation of the Bear Lake property at the time of the marriage. Even though detrimental to petitioner's position, the Court took the only logical approach on the valuation of the property as compared to tax notices. The Court used respondent's own appraiser to determine the percentage markup from the tax notice. On that basis, petitioner, who could not afford to do an appraisal, may

have taken any loss in the current market value if the appraiser favored his own client; however, in so figuring the Court then put the onus of any loss for a low appraisal on respondent for valuation at the time of marriage. Respondent's attorney requested that the Court evaluate the property on the percentage basis and respondent is now arguing against the request of his counsel in closing arguments. In addition, the Court determined that the improvements made by the parties during the course of the marriage were improvements made as part of the marriage and the source of the improvements or the funds were irrelevant. The Court's determination is squarely within the law. Respondent's children's testimony was self-serving with regard to improvements of the property and the sale of the adjacent property. The Court gave respondent's children the benefit of the adjacent property even though logically, given the length of time that had passed before the deed was recorded, it was likely held as a "dresser drawer" deed for inheritance purposes by respondent, and the Court would not have been beyond its discretion to consider the adjacent property as marital.

5. The Court did not fail to make a division of personal property. The Court simply indicated that the parties should follow the lists provided as exhibits to the Court which the Court observed were largely consistent. For any inconsistencies, the Court made provision for dispute resolution.

6. Respondent repeats his Motion for appraisal and witness fees in his Motion for Reconsideration which is the subject of respondent's prior Motion to Assess Costs. Petitioner cannot

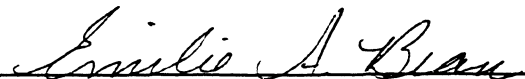
expend attorney's fees in repeatedly answering the same issues and would request that the issue of payment of witness fees and appraisal costs be considered only as part of respondent's previous Motion or that the Court consider petitioner's attached Response to respondent's prior Motion as sufficient answer to this request.

7. Petitioner is without sufficient funds to continually respond to respondent's post trial motions particularly where they are not grounded in law and are merely respondent's attempts to gain position greater than originally granted by the Court. Divorce courts are courts of equity leaving the judge with broad discretion as to accommodation in one area to equalize circumstances in another. Respondent would have the Court maintain its rulings with regard to all matters beneficial to him but deny equity to petitioner for any portion of the Court's ruling which may have benefited petitioner's position.

WHEREFORE, petitioner requests that the Court deny respondent's Motion, and further that petitioner be granted \$135.00 in attorney's fees for having to answer a second and partially redundant post trial Motion.

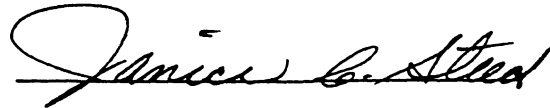
DATED this 16th day of December, 1998.

BEAN & SMEDLEY


EMILIE A. BEAN
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 16th day of December, 1998, I mailed a true and correct copy of the foregoing Response to Motion to Steven C. Tycksen, Attorney at Law, Lone Peak Law Offices, PO Box 480, Draper UT 84020-0480, postage prepaid.

A handwritten signature in cursive script, reading "Janice B. Steed". The signature is written in dark ink and is positioned below the text of the certificate.

BEAN & SMEDLEY
Emilie A. Bean (6178)
Attorney for Plaintiff
190 South Fort Lane, Suite 2
Layton, UT 84041
Telephone: (801) 544-4221

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
FARMINGTON DEPARTMENT, STATE OF UTAH

LOUISE A. SYMES,	:	<u>RESPONSE TO MOTION</u>
	:	<u>TO ASSESS COSTS</u>
Petitioner,	:	
	:	
vs.	:	
	:	Civil No. 9747 02275
MERLIN DAVID SYMES,	:	
	:	
Respondent.	:	

Petitioner, Louise A. Symes, objects to respondent's Motion to Assess Costs on the following grounds:

1. Respondent knew or should have know that he was incurring costs for appraisals and testimony which would not necessarily be divided as part of the marital estate expenses. Presumably, respondent hoped that the Court would rely on his expert witnesses, reports, and testimony.
2. Had petitioner been able to afford appraisals, she would also have had her own expert testimony; however, based on the objection by respondent to cashing out a life insurance policy that was actually loosing value, petitioner was unable to afford her own experts and should not be responsible for any portion of the payments respondent must make to his expert witnesses.
3. The Court's Memorandum Decision did not award respondent his expenses although respondent made the request at trial. The

Judge chose not to award costs as requested by respondent in the Memorandum Decision. Asking again merely wastes petitioner's resources and having to respond to respondent's Motion.

4. Petitioner did not have evidence to the contrary with regard to the appraised values of the martial residence and the Bear Lake cabin property, and petitioner's doll collection, and therefore was unable to argue those specific values. Petitioner believed that respondent's appraisals with regard to the jewelry and vehicles were so grossly inaccurate, a contrary appraisal was not even necessary to refute those claims.

THEREFORE, petitioner objects to any requirement to share costs in the appraisals obtained by respondent for his self-serving purpose and not as universal information to provide to the Court and requests that respondent be ordered to pay petitioner's attorney's fees in the amount of \$132.00 for responding to respondent's frivolous motion.

DATED this ____ day of December, 1998.

BEAN & SMEDLEY

EMILIE A. BEAN
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of December, 1998, I mailed a true and correct copy of the foregoing RESPONSE TO MOTION TO ASSESS COSTS to Steven C. Tycksen, Attorney at Law, PO Box 480, Draper, Utah 84020-0480, postage prepaid.

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

FARMINGTON DEPARTMENT, STATE OF UTAH


<p>LOUISE A. SYMES,</p> <p>Plaintiff,</p> <p>vs.</p> <p>MERLIN DAVID SYMES,</p> <p>Defendant.</p>	<p><i>D</i></p> <p>RULING ON DEFENDANT'S MOTION TO RE-CONSIDER OR RE-OPEN FOR ADDITIONAL EVIDENCE</p> <p>Case No. 974702275 DA</p> <p>Judge Darwin C. Hansen</p>
---	--

The above matter came on for hearing pursuant to Defendant's Motion to Re-Consider or Re-Open for Additional Testimony. After reviewing the Court's Memorandum Decision and notes taken during the trial and the content of Defendant's motion, it is the Ruling of the Court that Defendant's Motion should be denied based upon Peay v. Peay, 607 P.2d 841, 843 (1980), with the exception of the issue regarding the distribution of personal property. As to that issue, the Court will take additional testimony. Counsel are directed to confer and identify those items which are in conflict and those for which there is agreement. The clerk will call counsel and arrange for a hearing date.

Counsel is requested to prepare an order consistent with this ruling and submit the same to the Court for signature and entry.

DATED this 16 day of December, 1998.

BY THE COURT:


DARWIN C. HANSEN
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed the Ruling on Defendant's Motion to Re-Consider or Re-Open For Additional Evidence, postage pre-paid, first-class mail, to the following:

Emilie A. Bean
Attorney for Petitioner
190 South Fort Lane, #2
Layton, UT 84041

Steven C. Tycksen
Attorney for Respondent
P.O. Box 480
Draper, UT 84020-0480

DATED this 16 day of December, 1998.



Deputy Court Clerk

2nd District - Farmington Dept COURT
DAVIS COUNTY, STATE OF UTAH

LOUISE A. SYMES,	:	MINUTES
Plaintiff,	:	HEARING
	:	
	:	
vs.	:	Case No: 974702275 DA
	:	
MERLIN DAVID SYMES,	:	Judge: DARWIN C. HANSEN
Defendant.	:	Date: February 19, 1999

Clerk: glendap
TELEPHONE CONFERENCE

PRESENT

Plaintiff's Attorney(s): EMILIE A BEAN
Defendant's Attorney(s): STEVEN C. TYCKSEN

HEARING

Attorney Tycksen is present by telephone and Attorney Bean is present in chambers. This hearing is continued to 3/23/99 at 4:00 p.m. Counsel agree that Findings of Fact and Conclusions of Law and the Divorce Decree get signed today.

Court signs the Findings and the Decree.

Dated this 22 day of Feb., 1999.


DARWIN C. HANSEN
District Court Judge

1 Steven C. Tycksen (500)
2 Lone Peak Law Offices, P.C.
3 Attorney for Defendant
4 Post Office Box 480
5 Draper, Utah 84020-0480
6 Telephone (801) 572-2700
7 Facsimile (801) 553-1618

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH
MAR 17 4 09 PM '99
CLERK
BY _____ COURT

8 IN THE SECOND JUDICIAL DISTRICT OF DAVIS COUNTY

9 LAYTON DEPARTMENT, STATE OF UTAH

10 LOUISE A. SYMES,

:

11 Plaintiff,

:

NOTICE OF APPEAL

12 vs.

13 MERLIN DAVID SYMES,

:

Civil No. 974702275

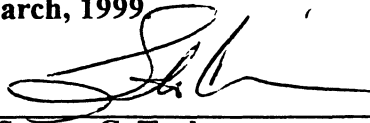
14 Defendant.

:

Judge Darwin C. Hansen

15
16
17 Notice is hereby given that the Defendant/Appellant above named, hereby appeals to the Suprem
18 Court of the State of Utah from those certain judgment of the Second District Court in and for Dav
19 County, Layton Department, State of Utah, dated and entered on February 19, 1999.

20
21 DATED and SIGNED this 15 day of March, 1999

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24 Steven C. Tycksen
25 Attorney for Defendant/Appellant
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CERTIFICATE OF MAILING

I hereby certify that I am employed by the office of Steven C. Tycksen, and that I mailed a true and correct copy of the foregoing, postage pre-paid to the following:

Emilee Bean
BEAN & SMEDLEY
190 S. Fort Lane, Suite 2
Layton, UT 84041

on this 16 day of ^{March}~~February~~, 1999.

Adrienne Lingard

1 Steven C. Tycksen (3300)
2 Lone Peak Law Offices, P.C.
3 Attorney for Defendant
4 Post Office Box 480
5 Draper, Utah 84020-0480
6 Telephone (801) 572-2700
7 Facsimile (801) 553-1618

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

MAR 17 4 09 PM '99

CLERK COURT
BY _____

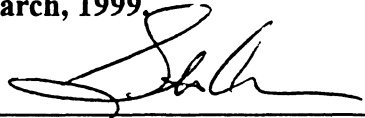
8 IN THE SECOND JUDICIAL DISTRICT OF DAVIS COUNTY

9 LAYTON DEPARTMENT, STATE OF UTAH

10 LOUISE A. SYMES, :
11 Plaintiff, : NOTICE OF FILING COST BOND
12 vs. :
13 MERLIN DAVID SYMES, :
14 Civil No. 974702275
15 Defendant. : Judge Darwin C. Hansen

16
17 Notice is hereby given that the Defendant/Appellant above named, has filed herewith a cost bond
18 of \$300.00 in conjunction with the Notice of Appeal filed concurrently herewith.

19
20 DATED and SIGNED this 15 day of March, 1999.

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22 Steven C. Tycksen
23 Attorney for Defendant/Appellant
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CERTIFICATE OF MAILING

I hereby certify that I am employed by the office of Steven C. Tycksen, and that I mailed a true and correct copy of the foregoing, postage pre-paid to the following:

Emilee Bean
BEAN & SMEDLEY
190 S. Fort Lane, Suite 2
Layton, UT 84041

on this 16 day of ^{March} ~~February~~, 1999.

Adrienne Lenzgard

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH
FARMINGTON DEPARTMENT

FILED IN CLERK'S OFFICE
DAVIS COUNTY UTAH
MAR 18 12 59 PM '99

CLERK COURT
BY _____

LOUISE A. SYMES,
Plaintiff,

vs.

MERLIN DAVID SYMES,
Defendant.

CERTIFICATE OF MAILING

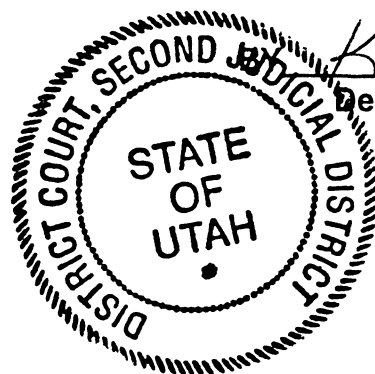
Case No. 974702275

I hereby certify that a true and correct copy of the original Notice of Appeal was sent to:

Utah Supreme Court
450 South State Street
PO Box 140230
Salt Lake City, Utah 84114-0230

Kris Lair/Joanne Pratt
Second District Court
Farmington, Utah 84025

Dated this 18th day of March, 1999.



Kathy Powell
Deputy Clerk