

1999

Jensen v. Jensen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDA H. JENSEN,

Petitioner/Appellant,

No. 990465-CA

vs.

JAMES T. JENSEN,

Argument Priority 15

Respondent/Appellee.

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court
Salt Lake County, State of Utah
Honorable David S. Young, Presiding

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JD
Court of Appeals

DEC 06 1999

Julia D'Alesandro
Clerk of the Court

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LIST OF PARTIES

All parties are identified in the caption.

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Respondent/Appellee.

BRIEF OF APPELLANT

JURISDICTION

Linda H. Jensen (“Wife”) appeals a final Supplemental Decree of Divorce entered by the district court on January 19, 1999. This court’s jurisdiction is based upon Utah Code Ann. § 78-2a-3(2)(h).

STATEMENT OF ISSUES

1. Husband, a lawyer, transferred certain Zions Bank stock he received as a gift to himself and Wife as joint tenants in 1986. Did the trial court err in nevertheless holding the stock to be husband’s separate property, based upon Husband’s alleged subjective intent that he did not really mean to make Wife an equal owner of the stock? This issue presents a question of law and is reviewed for correctness. *Bingham v. Bingham*, 872 P.2d 1065 (Utah Ct. App. 1994). This issue was preserved at R. 120-21.

2. Did the trial court err in awarding all of the parties' interest in significant ranching operations to Husband, even though the parties both enhanced the value of those operations through marital funds and their joint efforts during the marriage? This issue is reviewed for abuse of discretion. *Cummings v. Cummings*, 821 P.2d 472 (Utah Ct. App. 1991). This issue was preserved at R. 111-19.

GOVERNING LAW

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative or of central importance.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below.

The parties were married July 30, 1970. Wife filed a complaint for divorce on February 16, 1996. (R. 1-4.) The trial was held October 28-30, 1997, and November 12, 1997. Over a year later, the court issued its Memorandum Decision, Supplemental Findings of Fact and Conclusions of Law, and Supplemental Decree of Divorce on January 19, 1999, in which the court determined that, after a twenty-seven year marriage, the bulk of the parties' estate consisted of Husband's separate property. (R. 196-246.) Husband timely filed Objections to Supplemental Findings of Fact, Supplemental Decree of Divorce, Motion to Amend and Request for Oral Argument pursuant to Utah Rule of Civil Procedure 52 on January 29, 1999. (R. 247-52.) This motion was denied by order entered April 14, 1999. (R. 296-99.) The notice of appeal was filed May 13, 1999. (R. 300-02.)

B. *Statement of Facts.*

James T. Jensen (“Husband”) and Linda H. Jensen (“Wife”) were married in 1970 in Utah and had three children during the marriage, two of whom had reached the age of majority at the time of trial, and the other of whom was still in high school. (R. 1-2, R. 323 at pp. 5, 12-13.)

Wife was fifty-one years old at the time of trial. She attended college for three years before the marriage but upon Husband’s request did not work outside the home during most of the parties’ marriage. (R. 323 at pp. 6, 29, 120.) Husband explained that he did not want Wife to work during the marriage so they could spend more time together. (R. 324 at p. 195.) In accord with his wishes, instead of working outside the home, Wife focused on maintaining the parties’ domestic affairs and caring for their children. (R. 109; R. 323 at pp. 44-45.) The only exception to this is that she worked part-time from 1985 to 1990 at Husband’s law office performing clerical work. (R. 323 at pp. 43, 89; R. 324 at pp. 196-97.)

Husband was fifty seven years old at the time of trial. He was admitted to the Utah State Bar in 1969. (R. 323 at p. 136.) He practiced law with his father, Therald Jensen, in Price, Utah, until 1990, when he became in-house counsel for Savage Industries. (R. 323 at pp. 7, 45.) He is currently Executive Vice President and General Counsel of Savage Industries. (R. 221.) Husband was a new attorney when the parties were married, and Wife’s father gave Husband “quite a bit of business” in the early 1980’s by introducing Husband to contacts in the mining industry. (R. 323 at pp. 26, 117.)

Over the course of the twenty-seven-year marriage, the parties acquired substantial assets and maintained a high standard of living. (R. 109; R. 323 at pp. 55-57.) They received property and other assets, through gift or inheritance, from each of their parents. (R. 109.) Wife's father gave the parties the land on which their first home was built,¹ and Husband's father was the source of some of the ranch properties and part of the bank stock that is at issue on appeal. (R. 323 at pp. 37-38). These assets were commingled between the parties. Wife is contesting the court's award of two assets: 58,352 shares of Zions Bank stock, and the ranching operations (consisting of T-N Company, T-N Ranches, and the Moynier Ranch). The court awarded the Zions Bank stock and the ranching operations to Husband as separate property. Wife contends that all of the Zions Bank stock and the parties' interest in the ranching operations was marital property and should have been equally divided.

1. *Zions Bank Stock.*

The parties owned 88,493 shares of Zions Bank stock as joint tenants at the time of trial.² (Defendant's Exhibit 20.) The initial shares of stock were obtained in 1973, when Zions Bank purchased Carbon/Emery Bank in a stock exchange, and Husband's premarital shares of Carbon/Emery Bank were converted to 2,616 shares of Zions stock. After taking

¹ The home was in Spring Glen, Utah, and the parties jointly held title to the land and home. The parties divided the proceeds from the sale of the home equally. (R. 323 at pp. 37-38).

² Husband requested in October 1997 that Zions Bank verify the number of shares held by the parties. Zions Bank confirmed that as of October 9, 1997, there were 86,172 shares held by the parties as joint tenants, and that the parties had recently received an additional 2,321 shares through a dividend reinvestment program that was held in book entry form. (Defendant's Exhibit 20).

into account subsequent sales, those shares eventually grew, through stock splits and dividend reinvestment, to 58,352 shares at the time of trial. Husband conceded that the remaining 30,141 shares of Zions Bank stock were marital property; Husband's mother gifted approximately 10,066 shares to the parties during their marriage, and the parties purchased additional shares, and these shares had grown to 30,141 shares at the time of the divorce. (R. 325 at p. 87.) He contended, and the trial court held, that the remaining 58,352 shares were Husband's separate property. (R. 207-08).

In 1985, Wife asked Husband if he would agree to put both of their names on all shares of stock as joint tenants "and he didn't have a problem with that. It was done. Before I even really realized it. And I felt at that point it wasn't an issue with him, or he wouldn't have done it" (R. 157; R. 323 at p. 64.) She testified that she asked to convert all shares to joint tenancy for two reasons: because she wanted some financial security if he died, and because she felt they "were working for everything together" in their marriage. (R. 323 at pp. 127-28.)

On the other hand, Husband claimed he only put Wife's name on the stock certificates as a joint tenant because he "got tired" of discussing the matter with her. (R. 324 at p. 215.) He contended that he did not intend to give Wife a present interest in the stock, but only intended to avoid probate. He conceded at trial that the stock certificates gave her a present interest in the stock, but contended he did not really intend that they would divide the shares equally if they divorced. (R. 324 at p. 216.) He never informed her of his secret intent not to transfer a present interest, nor did he suggest that she consult with a lawyer when he put

her name on the stock certificates. (R. 325 at pp. 85-87.) Husband admitted that he could have legally put the stock in a trust that would have given all shares to Wife in the event of death but no shares in the event of divorce. (R. 325 at p. 86.) He further admitted that his father had an active probate law practice at the time and would have known how to achieve this. (R. 324 at p. 192.) Finally, the parties treated the stock as a marital asset during the marriage; they jointly paid taxes on dividends that were reinvested (Defendant's Exhibit 4; Plaintiff's Exhibit 5), and received dividends periodically from the stock and used them to pay family expenses. (R. 323 at p. 65.)

The value of the 88,493 shares was \$2,491,090, and Wife proposed that she be awarded half of the shares, or 44,247 shares. (R. 42, 109.) Instead, the court awarded her one-half of the 30,141 shares that Husband conceded were marital property, or 15,071 shares. (R. 207-08.) As for the remaining shares acquired during the marriage, the court stated that there was "no evidence adduced at the trial of any donative intent" in the 1985 transfer, and thus awarded those shares to Husband as his separate property. (R. 231.)

2. The Ranching Operations.

The ranching operations consist of three distinct but inextricably related assets. T-N Ranches and Moynier are essentially land-holding entities. T-N Ranches is a partnership owned by Husband and his three siblings; it owns some 35,000 acres of land in Carbon County, Utah, along with associated water rights and grazing permits. (R. 119; R. 323 at p. 164; Defendant's Exhibit 39; Plaintiff's Exhibit 11.) The Moynier property consists of 21,400 acres of land in Carbon, Duchesne and Utah Counties, together with state and federal

grazing permits covering some 100,000 acres of land, title to which is in the name of Husband and his two brothers. (R. 323 at pp. 157-62; R. 324 at pp. 180-81; Defendant's Exhibits 28 and 30.) T-N Company a partnership also owned by Husband and his two brothers, and it is the operating entity for the ranching property, owning cattle, equipment, and machinery associated with the ranch. (R. 323 at pp. 148-49.) T-N Company leases the entire 35,000 acres T-N Ranches landholding from T-N Ranches and the Moynier property for a nominal sum of \$1,000 per year. (R. 323 at p. 168.)

In support of his claim that Wife was not entitled to any portion of T-N Company or T-N Ranches, Husband offered evidence that Wife has never owned an equity interest in them in her own name and alleged that she only rarely worked on the ranches. (R. 326 at p. 31.) Initially, Judge Young discounted these facts, acknowledging that "there is an overall family environment that is being conducted and created and she's rendering contributions to that, allowing him to render contributions to the other" (R. 326 at p. 32.) The court also noted that the fact Husband worked for free for the ranching operations over a period of several years weighed in Wife's favor, since his contributions to the ranching operations took time away from their marriage but benefited the ranching operations. (R. 326 at pp. 35-36.) Nonetheless, the court ultimately did not award her any interest in the ranch property. (R. 227.)

The trial court determined that T-N Company and T-N Ranches were "inherited property" and awarded the entire interest in T-N Company and T-N Ranches to Husband. (R. 227.) The court based its determination on testimony that Therald Jensen had acquired

the land throughout his lifetime, then gifted it over time to his children in order to fulfill a dream of giving away his estate to his children before he died. (R. 222.) The court additionally expressed concern that if he awarded Wife half of Husband's share in T-N Ranches or T-N Company, it would create too small of a minority interest in a closely-held corporation. (R. 326 at pp. 15-16.)

Regarding the Moynier property, the trial court apparently believed that it was Wife's burden to prove that the property was paid for with marital funds, in the absence of evidence that separate funds were used to acquire it. (R. 223-24.) Even though the court found that part of the down-payment came from marital funds and that the installment payments came from income earned in the ranching operation during the marriage, the court concluded that it was "equitable" that the entire property be considered Husband's separate property. (R. 223-24.)

Although the ranching properties constitute a single enterprise, the ownership and background of each entity is somewhat unique, and so they are discussed separately below. Husband and his two brothers are presently involved in a partition lawsuit regarding all of the ranching properties. (Defendant's Exhibit 44.)

A. *T-N Company.*

T-N Company was formed in 1969 by Husband's father, Therald Jensen, and his three sons James, Butch and Jerry. (R. 78.) It initially owned construction equipment and cattle. (R. 323 at pp. 7, 35.) T-N Company still operates as a cattle business, but in 1997 much of the construction equipment was sold for \$900,000. (R. 323 at p. 149.) Out of the remaining

assets of T-N Company, the remaining equipment is worth approximately \$600,000, and the remaining cattle and other livestock are worth approximately \$1.1 million. (R. 323 at pp. 150-53.) T-N Company also owns several trucks and trailers and a shop building. (R. 325 at 18; Defendant's Exhibit 12.)

Throughout the course of the parties' marriage, Husband has maintained the books of T-N Company and T-N Ranches, made most major decisions with regard to the company, and worked most weekends on matters related to T-N Company and/or T-N Ranches. (R. 323 at p. 35; R. 324 at pp. 193-94; R. 325.) Wife testified that Husband "worked five days a week in the office, and . . . most of the weekend was spen[t] working at the ranch." (R. 323 at p. 35). He often participated in construction projects on the land, operating the heavy machinery and doing "whatever needed to be done." (R. 323 at p. 36).

The parties' testimony as to the amount of time Wife spent specifically on the ranching operations differed; Wife testified that she "often" accompanied Husband to the ranch properties on weekends and performed cooking and maintenance duties, and Husband claimed she only worked on the ranches ten times at most toward the end of the marriage. (R. 81; R. 323 at pp. 119-20.) Nonetheless, it is undisputed that while Husband was working on the ranching operations, Wife was tending to the family's needs.³ (R. 109.)

³ Husband argued that Wife is not entitled to any portion of the ranching operations because she did not "support" him in his ranching efforts. (R. 81.) While it is true she was opposed to the fact that he spent so much time on the ranches that he spent little with her and their children, she was "supporting" the family while he was away at the ranches by raising the children, paying bills, etc.

According to the tax returns and equity accounts for T-N Company, Husband owns 49.29% of the company, and his two brothers own the remainder in equal shares. (R. 79; R. 324 at pp. 22-24, 80.) However, Husband claims the brothers made an oral "agreement" at some point that they each really own one-third of the company. (R. 324 at p. 108.) His two brothers receive yearly salaries from T-N Company, yet Husband has never drawn a salary from T-N Company, even though he spent as much time on the ranching operations as they did throughout the parties' marriage. (R. 323 at pp. 126, 148; R. 324 at pp. 199-202.) He also performed free legal work for T-N Company. (R. 324 at p. 202.)

Over the years, T-N Company required major cash subsidy in order to continue operating. In the early years, that subsidy came from Husband's father, who loaned a significant amount to T-N Company in exchange for promissory notes from the company. (R. 325 at pp. 87-88). Husband's father later gifted his interest in the promissory notes separately to Husband and Wife in \$10,000 annual increments each as part of his estate planning. (R. 325 at pp. 87-88). By 1993, T-N Company owed Husband \$126,931 and Wife \$30,000. (R. 324 at p. 51). It owed Husband's law office \$78,348. (R. 324 at p. 51.) It also owed \$85,031 to Malpaso, a trucking company which was formed during the marriage and which was for that reason clearly a marital asset even though the stock was in Husband's name. (R. 323 at pp. 34-35, 174-75.) The funds Malpaso and Wife lent to T-N Company were used to purchase heavy machinery for T-N Company, which machinery was then used as collateral by the company to secure financing for additional growth and development. (R. 118.) In addition, Malpaso, a marital asset, was completely absorbed into T-N Company.

In 1993, the debts described above were converted into equity in T-N Company. (R. 324 at pp. 51-53; R. 325 at pp. 87-88.) This equity was shown as part of Husband's capital in the company although it is undisputed that a portion of that equity came from marital property (Malpaso) and a portion came from Wife's separate interest in the promissory notes.

The trial court failed to account for the \$30,000 owed to Wife directly or for any portion of the \$85,031 owed to Malpaso. Furthermore, in early 1996, the parties sold \$65,000 of the Zions Bank stock they held as joint tenants and transferred the proceeds into T-N Company. (R. 323 at pp. 66, 81-82; R. 325 at p. 48; Plaintiff's Exhibit 7.) Again, the trial court failed to account for Wife's portion of this contribution into T-N Company.

The parties presented different values for T-N Company at trial. According to Wife's expert Deane Smith, T-N Company is worth \$2.2 million, and Husband's 49.29% share is worth \$1,066,000. (R. 323 at p. 132; R. 324 at p. 23.) Husband's expert Derk Rasmussen valued T-N Company at \$1.4 million. (R. 324 at pp. 140- 41.) The trial court did not resolve the valuation issue.

B. *T-N Ranches.*

T-N Ranches is a corporate entity formed in 1983. It owns the title to the ranch property and grazing permits T-N Company uses at a token rental. (R. 323 at pp. 7, 166, 168.) Husband has acted as T-N Ranches' principal attorney since 1992, after his father's death. (R. 325 at p. 82.) In 1988, Husband and Wife jointly gifted an 8.38% ownership interest in T-N Ranches to Husband's two brothers and his sister. (R. 324 at pp. 24, 50;

R. 325 at p. 85; Plaintiff's Exhibit 12.) This left each of the four siblings owning 3.53% of T-N Ranches. T-N Company held the remainder. Upon Therald Jensen's death in 1992, the shares were reallocated, leaving each sibling with 25% of T-N Ranches. (R. 222; R. 324 at p. 50.) Although the 1988 gift to Husband's siblings was made by Husband and Wife as joint owners, Husband contended at trial that the interest was his sole and separate property.

T-N Company leases over 35,000 acres of land, plus grazing permits, from T-N Ranches and the Moynier property at the reduced rate of \$1,000 per year for the entire property, which works out to 1.8 cents per acre for the owned property and nothing for the leases and permits. (R. 323 at p. 168.) Wife's expert valued the parties' 25% interest in T-N Ranches at \$1,312,500. (R. 323 at pp. 11, 164; R. 324 at pp. 32-33.) Husband's expert valued the parties' interest in T-N Ranches at \$127,208, prior to application of an alleged minority interest discount. (R. 324 at pp. 131-32, 152-56.) The trial court did not resolve the valuation issue.

C. *The Moynier Ranch.*

The Moynier Ranch consists of 21,400 deeded acres of ranch land in Carbon, Duchesne and Utah Counties, as well as over 100,000 acres of federal and state grazing permits. (R. 323 at pp. 157-62; R. 324 at pp. 180-81; Defendant's Exhibit 30) It was acquired in 1976, well into the marriage, for approximately \$827,000. The \$25,000 down payment came from the parties' marital funds. (R. 82; R. 224.) The court found that the installment payments, were "paid for through the ranching operations or T.N. Company."

(R. 223.) Husband admitted that \$148,000 of the purchase price did not come from sales or exchanges of separate property. (R. 323 at p. 182.)

Husband would not express an opinion on the value of the Moynier Ranch, but his expert valued the parties' one-third interest at \$333,679. (R. 323 at p. 173; R. 324 at p. 126.) The expert's opinion was based on an estimate from a real estate appraiser, Sam Sanders, whose wife works for Husband at Savage Industries. (R. 325 at p. 96.) However, the Utah County Assessor valued the Utah County portion of the Moynier property alone at \$3,370,000, and Husband did not protest this valuation. (R. 324 at p. 181; R. 325 at p. 84.) Wife's expert valued the Moynier Ranch at \$5,375,000, and the parties' one-third interest at \$1,791,667. (R. 324 at p. 35.) The trial court did not resolve the valuation dispute.

SUMMARY OF ARGUMENT

Under Utah law, separate property becomes part of the marital estate when it has been gifted to the other spouse; or when it has been consumed or commingled with marital property to the extent that its separate character can no longer be identified; or when the other spouse has contributed to its enhancement, maintenance, or protection.

Husband placed his interest in the Zions Bank stock in joint tenancy in 1985. The law presumes a transfer of a present interest, unless there is clear and convincing evidence that both parties intended the transaction to have some other effect. In this case, the court based its decision on Husband's testimony that he did not intend to transfer a present interest to his wife. Wife, however, was not informed of Husband's secret intent. In the light of the fiduciary duty owed by spouses to each other, and given the undisputed evidence that Wife

did not share Husband's secret intent, the legal standard for avoiding the transfer into joint tenancy was not met.

The ranch properties became marital property because of commingling and augmentation during the marriage. Moynier, which was valued between \$333,679 and \$1,791,667, was purchased after the marriage with funds earned by the parties and, in part, by the ranching operation. It subsidized the ranch operation by leasing its landholdings and grazing permits to the ranch operation for a nominal sum for many years. In addition, the ranch converted a \$30,000 promissory note owed to Wife and a \$85,031 note owed to a marital entity into "equity." At least \$78,000 of Husband's earnings from practicing law during the marriage were also invested in the ranch operation, as were the proceeds of sale of 1,837 shares of jointly owned Zions Bank stock. Finally, Husband devoted extraordinary hours without compensation to the ranch operation. That investment of time could not have occurred without Wife's contribution in maintaining the affairs of the family. The trial court erred in failing to account for Wife's substantial financial investment in the ranching operation, and in failing to find that the ranch operation had become marital property.

ARGUMENT

"Marital property is ordinarily all property acquired during marriage and it encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived." *Dunn v. Dunn*, 802 P.2d 1314, 1317-18 (Utah Ct. App. 1990). Marital property includes accounts receivable, tangible assets, and good will of a professional practice, all products of labor of one spouse. *See id.* "[A]ccumulations resulting from a

combination of the use of separate property of a spouse with the labor, skill and industry of one or both of the members of the community should be equitably divided between the two.” *Portillo v. Shappie*, 636 P.2d 878, 879 (N.M. 1981); *see also Barkley v. Barkley*, 119 Ohio App. 3d 155, 694 N.E.2d 989, 995 (1997) (marital property specifically includes “all income and appreciation on separate property due to the labor, monetary, or in-kind contribution of either of the spouses that occurred during the marriage”). The use of marital funds and efforts to maintain and augment an asset support a finding that the appreciation of separate property is marital in character. *See Schaumberg v. Schaumberg*, 875 P.2d 598, 603 (Utah Ct. App. 1994).

In *Mortensen v. Mortensen*, 760 P.2d 304 (Utah 1988), the Utah Supreme Court explained that property acquired by one spouse either by gift or inheritance becomes a part of the marital estate if “(1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse.” 760 P.2d at 308. There is a presumption that property acquired during the marriage is marital property. *Dunn v. Dunn*, 802 P.2d 1314, 1317-18 (Utah Ct. App. 1990). Although Utah case law is not entirely clear or consistent on the point, the characterization of property as marital or separate should be based upon the factors set forth in *Mortensen*, not upon general equitable considerations, and equity should be invoked only in

extraordinary circumstances. *See id.*; *see generally* Dolowitz, *The Conundrum of Gifted, Inherited and Premarital Property in Divorce*, 11 (Apr.) Utah B.J. 16 (1998).

I. THE TRIAL COURT ERRED IN FAILING TO AWARD WIFE ONE-HALF OF THE ZIONS BANK STOCK.

When the sole owner of property creates a joint tenancy in that property, a valid and enforceable interest is created in the new joint owner. In 1985, Husband transferred separately owned shares of stock in Zions Bank to himself and Wife as joint tenants. As a result, each party received a one-half ownership interest in the stock with full rights of survivorship.⁴ *McCoullough v. Wasserback*, 30 Utah 2d 398, 518 P.2d 691, 693 (1974). Husband now claims that his intention in creating joint ownership of the stock was not to transfer a present interest to Wife, but to avoid probate.

In *Neill v. Royce*, 101 Utah 181, 120 P.2d 327 (1941), the Utah Supreme Court adopted the rule that a transfer of property into joint tenancy creates a presumption of present joint ownership that can only be overcome by clear and convincing evidence to the contrary. In that case, the defendant's former wife sued him for past due child support. The defendant had since remarried. His new wife had received \$1,000 from her deceased husband's estate, and she and her new husband had deposited the funds in a joint bank account. Both of them testified that their intent was to avoid probate and that they had no intention of creating a present interest in the husband which would be reachable by his creditors, including his

⁴ Had Husband predeceased this action, Wife would have undeniably received sole title to the stock and to other assets described herein which were owned jointly by Wife and Husband.

former wife. The Supreme Court upheld a judgment in favor of the former wife against the funds, holding that the parties' statements of their intention were insufficient to satisfy the requirement of clear and convincing proof:

The only evidence refuting the implied joint savings account in the instant case was that of the testimony of the codepositors to the effect that their purpose in establishing the joint savings account was to take advantage of the survivorship provision, and that the money was intended to be the sole and separate property of the intervener. Such proof under the circumstances of this case cannot be termed so clear and convincing as to require the trial court to find in favor of appellant. To say that it was sufficient would throw open the door to fraud and collusion as between codepositors and third parties. This equity will not do.

120 P.2d at 331. *Accord, Greener v. Greener*, 116 Utah 571, 212 P.2d 194, 199 (1949) (in a divorce case, court held that to overcome the presumption, clear and convincing proof must be presented that *both parties* intended that no present interest be created).

More recent cases continue this view. In *Estate of Ashton v. Ashton*, 898 P.2d 824, 826 (Utah Ct. App. 1995), the court explained that when title to property is held in joint tenancy, "a rebuttable presumption arises that the title holders intended to create a valid joint tenancy." This presumption can only be overcome by clear and convincing evidence of either fraud, mistake, incapacity, or other infirmity. *Continental Bank and Trust, Co. v. Kimball*, 21 Utah 2d 152, 442 P.2d 472, 474 (Utah 1968). Absent such evidence, the parties are bound by the joint tenancy and "cannot show that a result was intended contrary to that which the law of joint tenancy relationship imposes." *Id.*; see also *McCullough*, 518 P.2d at 694 (upholding ownership right of surviving joint tenant despite evidence that joint ownership was not intended to create rights in survivor, but was "solely for convenience").

In this case, Husband's evidence utterly fails to establish that both parties intended the transfer to be effective only in the event of Husband's death. Husband's only evidence that no present interest was intended was his own self-serving statement made years after the fact that he intended to avoid probate but did not intend a present transfer. He presented no contemporaneous evidence to corroborate his claim. He testified that his secret intent was not communicated to or shared by Wife, and she testified that her understanding was that it was done because they were both working together in the marriage, with joint tenancy chosen because of the additional advantages of the survivorship rule. That evidence does not satisfy the mutual intent requirement of *Greener* that evidence of intent contrary to the joint ownership presumption must be clear and convincing evidence of mutual intent.

It also is generally accepted in other jurisdictions that a unilateral intent not to convey a present interest does not overcome the presumption.

The well established rule in Arizona is that a presumed gift occurs when one spouse places his separate real property in joint tenancy with the other spouse and that this presumption can only be rebutted by clear and convincing evidence to the contrary. This presumed gift cannot be overcome simply by husband's after-the-fact testimony that the property was placed in joint tenancy only as a means of avoiding probate and not as an intended gift.

Valladee v. Valladee, 149 Ariz. 304, 718 P.2d 206, 209 (Ariz. App. Div. 2 1986).

[T]he presumption created by the [joint tenancy] deed cannot be overcome by testimony of the hidden intentions of one of the parties, but only by evidence tending to prove a common understanding or an agreement that the character of the property was to be other than joint tenancy. Since there was no evidence of a common understanding or an agreement the presumption was not overcome.

Machado v. Machado, 58 Cal.2d 501, 25 Cal. Rptr. 87, 375 P.2d 55, 58 (1962). *Accord*, *Sloane v. Sloane*, 132 Ariz. 414, 646 P.2d 299, 300 (Ariz. App. Div. 2 1982) ("Can the hid-

den intention of one of the parties negate the presumption? We think not.”); *Hart v. Hart*, 377 So.2d 51, 53 (Fla. App. 1979).

Moreover, in this case Husband transferred the shares while keeping his secret intention hidden from his own wife. In dealing with her, Husband owed a fiduciary duty of good faith. *Madsonia Realty Co. v. Zion’s Bank and Trust Co. (In re Madsen’s Estate)*, 123 Utah 2d 327, 259 P.2d 595 (1953) (“[A] husband owes to his wife a high degree of good faith, and . . . husband and wife occupy a relation of special trust and confidence, and when such relationship is abused, equity will intervene to right the wrong”); *Glover v. Glover*, 121 Utah 2d 362, 242 P.2d 298, 300 (1952) (“There is no rule of law more firmly established than that which holds that transactions between persons occupying fiduciary or confidential relations with each other, in which the stronger or superior party obtains an advantage over the other, cannot be upheld”); *Smith v. Smith*, 860 P.2d 634, 643 (Idaho 1993); *In re Marriage of Modnick*, 33 Cal.3d 897, 191 Cal. Rptr. 629, 663 P.2d 187, 191 (1983).

In this case, Husband’s status as an attorney heightens the level of scrutiny appropriately applied to the transaction. In *Marshall v. Marshall*, 166 W. Va. 304, 273 S.E.2d 360 (1980), for example, the husband, who was also a lawyer, pressured his emotionally unstable wife to convey jointly-owned stock to himself prior to a reconciliation which lasted only for a short period of time. The Supreme Court of Appeals of West Virginia held that “the general rule is that where persons occupy a fiduciary or confidential relationship the lack of independent advice on the part of the person who claims to be disadvantaged by the transaction may be a significant factor in court’s evaluation of the overall bona fides of the trans-

action. Here the problem is made more acute by the husband being an attorney.” 273 S.E.2d at 362-63.

Judge Young ignored the transfer into joint tenancy because he found that Husband lacked donative intent in placing the property in joint tenancy. Husband’s subjective intent, however, is irrelevant. The transfer can only be ignored if *both parties* lacked the intent to create a present interest.

Where, however, the parties have entered into and expressed in writing a complete agreement which is clear as to the intent and purpose of the deposit, the intent so expressed will be given effect unless the instrument is successfully attacked for fraud, mistake, incapacity, or other infirmity, or unless it is shown by “clear and convincing proof” that the parties intended the instrument to have a different effect from that expressed.

Greener v. Greener, 116 Utah 571, 212 P.2d 194, 199 (1949). *See also Neill v. Royce*, 101 Utah 181, 120 P.2d 327. In this case, there was no evidence or finding that Wife did not intend to create a present interest, and the record provides no basis for such a finding. Moreover, the trial court applied the wrong legal standard to its analysis. When the correct legal standard is applied, the evidence fails as a matter of law to establish by clear and convincing evidence that the Zion’s Bank stock is not part of the marital estate. *See Bushell v. Bushell*, 649 P.2d 85, 87 (Utah 1982) (including in marital estate fourteen acres of land given to husband by his father); *Dubois v. Dubois*, 29 Utah 2d 75, 504 P.2d 1380, 1381 (Utah 1973) (including in marital estate money resulting from investment of gifts to wife from her relatives); *Weaver v. Weaver*, 21 Utah 2d 166, 442 P.2d 928, 929 (1968) (including in marital estate shares of stock given to husband by his father and sister).

II. THE TRIAL COURT ERRED IN FAILING TO INCLUDE THE PARTIES' INTEREST IN THE RANCH PROPERTIES IN THE MARITAL ESTATE.

A. *All of the Ranch Properties Should Have Been Included in the Marital Estate Because They Were Commingled with Marital Assets and Enhanced by the Parties' Joint Efforts.*

Separate property becomes part of the marital estate when “the property has been consumed or its identity lost through commingling or [other] exchanges,” and where the other spouse has through his or her efforts “contributed to its enhancement, maintenance, or protection.” *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988). Here, not only have commingled marital funds been used to maintain T-N Company, but Husband’s ability to invest time and effort into T-N Company during the marriage came at the expense of time devoted to his family or his law practice, and was made possible by Wife’s domestic contributions in managing household affairs and caring for the parties’ children.

There was undisputed evidence that marital funds and property had been used to maintain and enhance the ranch properties. The \$30,000 promissory note T-N Company owed to Wife was not paid, and was instead converted into equity in T-N Company. Wife’s one-half interest in Malpaso (the trucking company), including but not limited to the \$85,031 promissory note that funded T-N Company equipment purchases, was also absorbed into T-N Company. In addition, over the course of the parties’ marriage, Husband invested significant portions of his income from the practice of law, at least \$78,000 into T-N Company. (R. 323 at p. 126; R. 324 at p. 51.) The Moynier property, which was acquired with marital funds,

was leased to the ranching operation at nominal value, and thus was used to subsidize the ranching operation at the expense of income that could have been earned in the marketplace.

Furthermore, 1,837 shares of stock in Zions Bank, owned jointly by both parties, were sold in 1996. (Plaintiff's Exhibit 7; Defendant's Exhibit 20; R. 323 at pp. 81-82.) The proceeds from this sale were used to purchase machinery for T-N Company and to finance its operations.

In *Schaumberg v. Schaumberg*, 875 P.2d 598 (Utah App. 1994), the court held that a portion of the husband's business property, which was initially paid for by funds the husband inherited, was properly included as a marital asset. The court explained that "[e]ven though the husband used inherited funds to pay the down payment on the building, he used substantial marital funds to maintain and augment that asset. We find no error in the determination that the appreciated portion of the asset changed its character from a personal asset to a marital asset." 875 P.2d at 602-03.

In addition to the extensive commingling of funds, the ranch properties should have been included in the marital estate because Husband's ability to dedicate time and effort in developing these entities was a direct result of Wife's domestic contributions to the family. In *Dunn v. Dunn*, 802 P.2d 1314 (Utah App. 1990), the court held that it was error not to include in the marital estate the husband's professional corporation and royalty rights on surgical instruments developed during the marriage. The court emphasized that although the wife "was not his partner in the business of orthopedic surgery, she was his partner in the

‘business’ of marriage and her efforts were necessary contributions to the growth of his practice and the business.” 802 P.2d at 1318.

Like the wife in *Dunn*, Wife’s efforts in maintaining the household and caring for the children enabled Husband to pursue with vigor his professional career and business enterprises, and he did so at the expense of his family. As described in *Dunn*, T-N Company should have been included in the marital estate because Wife and Husband were in the “business of marriage” together.

By failing to account for the undisputed commingling of marital property in T-N Company over a 27-year period, the trial court abused its discretion. The court’s failure to credit Wife’s contribution to Husband’s ability to enhance those assets was also an abuse of discretion. The evidence plainly satisfied the *Mortensen* tests of commingling and joint contribution to the enhancement of the asset, and Husband’s evidence failed to rebut the strong presumption that in such circumstances the property should be included in the marital estate.

B. *Additional Reasons Why Moynier Ranch Should Have Been Included in the Marital Estate.*

Property which was acquired during the marriage is presumed to be marital property. The party seeking to exclude such property from the marital estate, and claiming it as his or her own separate property, has the burden of proof on that claim. *Dunn v. Dunn*, 802 P.2d 1314, 1317-18 (Utah Ct. App. 1990).

With regard to the Moynier Ranch, the evidence established that the \$25,000 down payment came from joint funds. Husband admitted that \$147,000 of the purchase price did

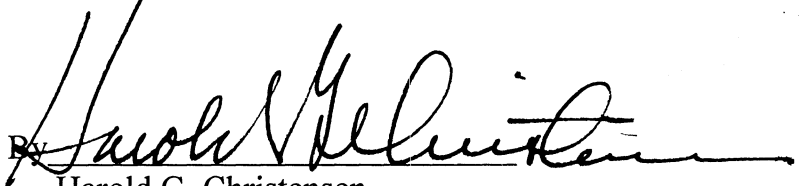
not come from separate property, and the court found that the installment payments were paid with income from the ranching operations earned during the marriage. Income earned on the ranching operations during the marriage is plainly marital property. *Dunn v. Dunn*, 802 P.2d 1314, 1317-18 (Utah Ct. App. 1990). Thus, the Moynier property, having been acquired with marital property, was itself marital property.

CONCLUSION

Wife requests that this court reverse the trial court's decision that the Zions Bank stock and ranch properties were separate property, and remand the case to the trial court with instructions to divide those properties in kind. *See Savage v. Savage*, 658 P.2d 1201, 1204-05 (Utah 1983).

DATED this 12th day of December, 1999.

SNOW, CHRISTENSEN & MARTINEAU



Harold G. Christensen

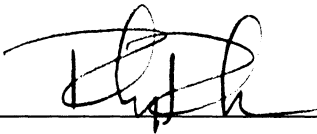
Rodney R. Parker

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 1999, I caused two copies of the foregoing Brief of Appellant to be served by first class mail upon the following:

CLARK W. SESSIONS
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SALT LAKE CITY, UTAH 84111-2216



ADDENDUM

The following addendum is submitted pursuant to the provisions of Rule 24(a)(11).

- A. Memorandum Decision, November 12, 1998
- B. Supplemental Findings of Fact and Conclusions of Law, January 19, 1999
- C. Supplemental Decree of Divorce, January 19, 1999

ADDENDUM A

MEMORANDUM DECISION

FILED DISTRICT COURT
Third Judicial District

NOV 12 1998

SALT LAKE COUNTY

By W. J. [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

LINDA H. JENSEN,

⋮

Plaintiff,

⋮

MEMORANDUM DECISION

vs.

⋮

Case No. 964900752

JAMES T. JENSEN,

●●

Defendant.

:

The above-entitled matter came on for trial October 28-31, 1997, with final oral arguments being scheduled for November 12, 1997. Thereafter the Court met with counsel to further discuss the case informally and see if a stipulated resolution could occur. The discussions were helpful but did not result in a settlement. During trial the plaintiff was present and represented by her attorney Harold G. Christensen. The defendant was present and represented by his attorney Clark W. Sessions. The Court heard the testimony the witnesses presented, received the exhibits, and took the matter under advisement. After further review, the Court hereby renders this its:

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MEMORANDUM DECISION

The parties were married July 30, 1970. They were each raised in Carbon County, Utah. The plaintiff attended two years college at the College of Eastern Utah, and one year at the University of Utah, and through the course of the marriage did limited work outside the home. For some period of time she did work as a secretary/receptionist and bookkeeper in the law offices of her husband and father-in-law. She is able-bodied and capable of working outside the home, but her income would be nominal.

The defendant was admitted to practice law in 1969, and practiced in Carbon County with his father, Therald N. Jensen. The defendant was previously married and had one child. The parties together had three children, all but the youngest of whom are emancipated by age, and the youngest is currently a senior in high school and will shortly be emancipated.

The defendant's father was a prominent attorney in Price, Utah. His financial interests included banking, ranching, and the practice of law. For clarity, throughout this opinion when I refer to Therald N. Jensen, I will refer to him as "TN"; James Jensen as "James"; Jerry Jensen as "Jerry"; Dix Jensen as "Butch"; and Bonnie Lynne as "Bonnie". Therald Jensen's wife was named Bonnie and, if appropriate, she will be distinguished from "Bonnie Lynne" in the contextual reference by "Mrs. Jensen."

As in almost every divorce, the contested issues, excluding custody, are fundamentally two: first, what is an equitable and legally appropriate division of property; and second, what amount should be paid in alimony from the defendant to the plaintiff.

The assets of the marriage are significant. The plaintiff's position is that all of the assets now owned should simply be divided in half. The defendant's position is that virtually all of the significant assets of the marriage are separate property having originated from his parents and should be construed as "separate property". If separate property, the defendant argues that he is entitled to retain the property, as well as the appreciated value thereof. The plaintiff has maintained that though much of the property came originally from gifts and inherited origins, she has either augmented, maintained or protected the inherited property, or that it was sufficiently commingled so that it lost its separate character thus allowing her to share equally in the estate. The Court has sincerely struggled with the challenges of the parties' various positions.

In determining the status of the property, the Court must first determine whether the property is separate property subject to retention with the appreciated value; separate property that has lost its separate identity through being commingled; separate property which has lost its separate identity through being augmented, maintained or protected, sufficient to lose its separate

identity; and/or marital property. In order to determine this, the Court must look at each item of property and find the status of that property. Thus, the Court finds as follows:

SEPARATE, COMMINGLED MARITAL PROPERTY

In regard to each of the various items of property, the Court finds and categorizes the property, as follows.

The Court recognizes that a majority of the assets currently held by the parties have been acquired principally through the T.N. Jensen family. Much of the property involved in the present ranching interests was significantly obtained and had its origins in the 1940's, 1950's, and 1960's, prior to the marriage of the parties. During the period after initial acquisition and prior to his death in 1992, T.N. acquired considerable ranching assets and inventory. There is no dispute in the testimony that it was his primary dream to provide ranching opportunities for his children and their children, consistent with their individual desires. That dream has been accomplished well.

1. **T.N. Company:** The Court finds that T.N. Company is a Utah partnership formed in approximately 1982 or 1983 by "TN", "James", "Jerry", and "Butch". T.N. Company is the successor company to T.N., Inc. In the beginning, TN owned 84% of the company, and at the time of his death he retained 48.6%. While the percentages of the three Jensen brothers, according to the official records are not equal, it was clearly testified to that they each

deem their interest to be equal and that James does not claim any interest other than one-third, even if the records show otherwise. T.N. Company is the operating company of the livestock operation, and has encountered significant losses during recent years. In 1996, the losses were \$340,000. The Company owns in excess of 1,100 cows, 60 bulls, and 30 horses, with miscellaneous tack, vehicles and equipment, etc., consistent therewith. At the present time, the Company owns a shop building that will be discussed separately. It is the Court's belief that T.N. Company is comprised of "inherited property" and should remain the property of James, including any appreciated value thereon. Thus, the Court finds the one-third interest in T.N. Company held by James should remain his separate property.

2. **T.N. Ranches**: T.N. Ranches is the entity which is the principal owner of the following property:

(a) **The Range Creek Ranch**: The Range Creek Ranch, consisting of a coalition of multiple homesteads, was acquired by T.N. and Mrs. Jensen during the 1950's. These properties were contributed in whole from T.N., and Mrs. Jensen to T.N., Inc. which then transferred the same to T.N. Ranches.

3. **Jensen Brothers Properties**: The Court notes that much of the property is owned in the name of "Jensen Brothers" or James, Jerry and Butch. These properties include a substantial interest in deeded real property, state and federal grazing permits, and

U.S. Forest Service permits. Jensen Brothers is owned one-third by each of the brothers, and includes the following:

(a) The Moynier Ranch. As to the obtaining of the Moynier Ranch, the Court notes that it was purchased through an agreement, dated September 1, 1976, by Butch, and thereafter assigned to the three Jensen brothers. The evidence was that the ranch was effectively obtained by Butch, but assigned to the three Jensen brothers and paid for through their ranching operations, or T.N. Company. There is no evidence of cash calls from marital estate property from any of the brothers, except for one sum of approximately \$25,000, which apparently was received in cash at the time of the passing of T.N., the second parent of James to die. Apparently, each child received approximately \$25,000, at that time, and the Court does not recall whether that \$25,000 is separate from the testimony in which it was stated James put approximately \$25,000 into the purchase price of the Moynier Ranch, arguably from marital property. The Court believes that it remains fair and equitable to allow James to retain the whole of the Jensen Brothers property assets and interests as separate property, and believes that an equitable offset of the \$25,000 which, if it came from marital funds, would be subject to sharing, has been equitably dealt with hereafter in relation to the other assets of the marital estate:

(b) The Black Dragon (Spotted Wolf) Grazing Permit: The land subject to this grazing permit was obtained by Butch, and a brother-in-law James D. Wilcox. It was originally granted through an option to purchase. The interest of Mr. Wilcox was assigned to Butch and on behalf of Butch, the prior owners were notified in September of 1980 of the election to exercise the option. This property is held in the names of James, Jerry and Butch. The purchase price of \$55,000 was paid in annual installments of \$11,000 each, with applicable interest, and the funds for the purchase being provided by TN. Thus, the property and successor interests remain the separate property of James and his brothers.

(c) The Coal Creek Farm and Orfanakis Winter Grazing Property: This property was acquired prior to 1970 by Mr. and Mrs. T.N. Jensen, and consists of approximately 360 acres in Wellington, Utah. The property was conveyed from T.N. and Mrs. Jensen to T.N. Ranches in 1983, and from T.N. Ranches to the three Jensen brothers in 1989. Thus, the property originated from T.N. and Mrs. Jensen and remains separate property of James and his brothers.

The Orfanakis Winter Grazing had a similar origin through T.N. and Mrs. Jensen, and was conveyed from them through T.N. Ranches to the three Jensen brothers in 1989, and remains the separate property of James and his brothers.

(d) The Cisco Winter Grazing Permit: This property was obtained by T.N. for a purchase price of approximately \$100,000 in

February of 1987, paid entirely by T.N. and placed ultimately in the name of the three Jensen brothers. Thus, it was acquired by TN and remains the sole and separate property of James and his brothers.

(e) The Siaperis Lands: In 1977, T.N. and James entered into an agreement with Nick and Ileen Siaperis to purchase a 60 acre field for \$70,000. A month later, the Siaperis assigned an Earnest Money Receipt and Offer to Purchase they held with Alex and Shirley Tidwell to T.N. and James, to purchase their property for \$60,000. The combined purchase prices amounted to \$130,000. James and his mother borrowed \$130,000 from Walker Bank to pay each price, and mortgaged the law office building then held exclusively in the name of Mrs. Jensen. After the purchase price was paid, the land was titled in the names of James and his mother, Mrs. Jensen, and later was traded for property adjoining the Coal Creek farm, taken in the name of James and his mother, as joint tenants, with the right of survivorship. Upon the death of Mrs. Jensen, her interest was conveyed to Jerry and Butch, as tenants in common. While there appears to be a present imbalance in the ownership from the one-third interests testified to by James, it does appear that all of the funds giving rise to purchase of the property came from Mrs. Jensen through her interest in the office building, and thus, the present status of the property should remain the separate property

of James and his brothers. The Court will deal with the law office building hereafter.

(f) Other Winter BLM Grazing Permits: The ranching company has BLM authorization in Rock Creek, Fan Canyon, Columbia, and Iceland grazing permit allotments. These were all obtained by T.N. and/or T.N. and his sons prior to 1970, and in February of 1983 were transferred to the three Jensen brothers. This property would remain separate property of James and his brothers. There was also a Price River grazing allotment acquired in 1985, similarly, by the three Jensen brothers, for nominal consideration, and to avoid confusion should remain as the separate property of James and his brothers.

(g) Water Rights and Mineral Rights: Water rights and mineral rights used or associated with any of the ranching and/or farming operations remain the separate property of James and where appropriate the other Jensen children. It is the intention of the Court's award that water rights and mineral rights remain with the respective properties as awarded hereby.

The Court further notes that none of the aforementioned T.N. Ranches or Jensen Brothers Properties have ever been titled in the names of spouses of any of T.N.'s children, nor have any of the spouses ever been asked to pledge independent credit or support for the ranching operations. The Court believes it is just, fair and equitable to consider these properties separate properties from the

marital estate, and thus the properties, with their appreciated value, remain the interest of James.

The Court further notes that the testimony submitted at trial indicated that Linda Jensen went very infrequently to the properties, and there was no evidence that she augmented, maintained or protected the properties. There was evidence that James took weekend time away from the family to work on the properties, and the Court believes that in the property subsequently referred to as "commingled", Linda Jensen receives an equitable allocation to enhance her share of the marital estate.

The Court in making a finding regarding the ranching properties, also notes particularly that James throughout the marriage, maintained an active practice of law, and thus, through that practice, generated income to support the family. The ranching operations, while representing significant present value, have not been a major source of funding for ongoing family activities and operations. James' allocation of time to the ranching properties has been primarily spare time, away from the practice of law, but certainly, likewise, away from the family, and thus at the expense of family sacrifice.

4. **The Monica Cove Home:** The Monica Cove home is now the residence of the plaintiff and two of the parties' children, one of whom is emancipated by age and employed, the other of whom is a senior in high school. The history of the funds from which the

Monica Cove home has been obtained come from an investment of James prior to the marriage in approximately April of 1968, at which time he joined with two others in forming the "Mitchell Funeral Home, Inc., a Utah corporation." Thereafter, in May of 1990, Walmart stores purchased the property of the funeral operation for development of a store. To accomplish the transaction, Walmart purchased a lot on Chula Vista Circle in Salt Lake City, which was traded for the price of the property, generating a tax-free exchange. The purchase included a home, and the purchase price was \$310,000. That home was later sold for approximately \$391,000.

In addition, a separate payment of \$100,000 was made to James by the succeeding owners of the funeral home in order to purchase his entire interest in the ongoing business operation. Those two numbers combined equal \$491,000, and that amount was put into the purchase of the lot and home at Monica Cove. The Court heard testimony, in addition, that the parties had built a home on property owned by Linda Jensen's father in Carbon County. It is to the marital homes that the petitioner, Linda Jensen, has devoted 27 years of marriage, and to that asset it is the Court's opinion that she has augmented, maintained and protected the asset of the home in such a way so as to provide value to the asset and the family's living circumstances. The Court notes further that no effort was made to loan the \$491,000 contribution to the marriage, and James,

the Court believes, did not intend to retain that as separate property.

Thus, the Court believes that all assets associated with obtaining the Monica Cove home, whether they came from the Carbon County home, the contributions personally of the parties to the marriage or the value from the Mitchell funeral home, have been sufficiently commingled so as to negate the defendant's claim to that being separate property.

5. **The Zions Bank Stock:** In August of 1973, three years after the parties were married, Zions Bank purchased Carbon/Emery Bank in a stock exchange. At that time, James received 2,616 shares of Zions Bank stock listed in his sole and separate name, representing his interest prior to the marriage in the Carbon/Emery Bank. In his testimony during the trial, he stated clearly that he did not at any time believe that the Zions Bank stock was anything other than separate property, predating the marriage. Through subsequent stock splits and an additional unknown augmentation of 748 shares, the stock, over time, increased James' portion to 8,042 shares of stock. In June of 1985, James placed all of the stock in joint tenancy, with the right of survivorship, with the petitioner. This change was made, according to the testimony of the parties, at a time in which James was engaged in significant business travel, and the change was made to avoid probate in the event of his untimely death. There is no evidence of any donative intent in

that exchange. Those beginning shares, with stock splits and automatic divided reinvestment purchases, have expanded that portion of the stock to 58,352 shares. That leaves 30,141 shares of stock that the Court believes constitute marital property, and should be divided equally to each.

6. **The Jensen Law office Building:** In early 1974, T.N. and Mrs. Jensen agreed to gift to James and Jerry approximately 4.2 acres of land northwest of Price. The brothers constructed a 50' x 60' shop building, at an approximate cost of \$25,000. At about that same time, Jerry conveyed an interest in American Transport, Inc. to James, who changed the name to Malpaso Corporation. The Court notes parenthetically that Malpaso Corporation is effectively defunct, only owning two trucks with a combined value of approximately \$7,000. The Court finds it is equitable that Malpaso Corporation be awarded as the sole and separate property of James.

The shop so constructed was used by T.N., Inc., T.N. Company and Malpaso, when viable, and those companies provided the funds from which repayment of the bank loan was made.

In January, 1980, James and Linda, the joint tenants in ownership of the shop, conveyed the shop to T.N. who, in return, conveyed the office building to James and Linda. The office building is the same through which both James and T.N. practiced law. No monetary consideration was exchanged, and the office building was of significantly greater value than the shop. The shop

was thereafter conveyed to T.N. Company, and remains an asset of T.N. Company at this time.

The office building was sold to the Sampinos family for a net, after costs and commission, of \$172,731.67. This sum is presently held in Summit Exchange Services, Inc. The Court finds that the value from the office building, the use of the office building during the term of the marriage, and the apparent variations in value of the exchange of the office building for the shop, justified the Court in finding that the office building asset was intended by James and T.N. to be a marital asset, and sufficiently commingled so as to have lost its separate identity. As a marital asset, it is subject to equal division.

7. **Oil, Gas and Mineral Royalties:** The Court finds that the parties separately and during the course of their marriage have acquired certain oil, gas and mineral royalties and that since the trial, certain amounts have been received by James. With respect to such oil, gas and mineral interests, the Court finds that they should be awarded to the party in whose name they are titled and that such interests which are titled jointly should be equally divided between them. The Court finds in addition, that James should pay to Linda from royalties he has received since the trial \$1,314.95 less estimated tax which James shall pay of \$526.00 or a net sum of \$788.95.

8. **Division of other Miscellaneous Assets:** The Court finds that the furniture, fixtures and personal property at the Monica Cove home in the approximate value of \$75,000 should be awarded to the plaintiff. All clothing, jewelry and personal effects of each party is awarded to each, without consideration of value.

The vehicles are awarded as follows: the 1990 BMW to Linda Jensen with an equity of \$18,675; the 1993 Chevrolet truck is an asset of T.N. Company, and otherwise considered there; the 1995 Chevrolet Tahoe, with an equitable value of \$22,575 is an asset of James; the 1984 Coachman Motor Home, with an equitable value of \$12,436, is an asset of James; the 1995 Jeep Cherokee, with an equitable value of \$23,925 is an asset of Linda.

The certificates of deposit at Zions Bank in the amount of \$28,982.49, plus subsequent increases, should be divided in half. Since the trial, Zions Bank has paid and James has received dividends totaling .50 per share on the 30,141 shares determined to be marital property. James shall pay to Linda as her share of such dividends the sum of \$7,535.25 less income taxes attributable thereto which James shall pay in the estimated amount of \$3,014.00 or a net sum payable to Linda from James of \$4,521.25.

The 40 acre parcel of raw ground which abuts the Coal Creek Farm should be awarded to Linda at a value of \$45,000, subject to existing roadways, ditches and easements.

The 1996 federal tax refunds of \$21,543 shall be divided in half.

The John Hancock Life Insurance policy, with a cash value of \$55,546 should be awarded to Linda Jensen.

The IRA of each party should be awarded to each, in the amount of \$16,542.63 each.

The value of the Savage Pension Fund of \$206,774.27 should be divided equally to each according to the Woodward formula.

The mantelpiece from the Spring Glen home in the value of \$10,000 should be awarded to James.

The equity from the sale of the Spring Glen home of \$169,374.72 has been divided equally between the parties.

The TN Jensen Home Place and Big Field shall remain the separate property of the Jensen children, Jim, Jerry, Bonnie and Butch, without claim from Linda.

Charges incurred for the chip seal of the roadway on Linda's father's land which provides access to the Spring Glen home and Linda's father's home and adjoining property of her father in the approximate amount of \$11,000 is determined to be a marital obligation and should be shared and paid equally by the parties.

The Court further finds that it is fair and equitable to each to be responsible for any and all acquired obligations after the separation of the parties.

In addition, it is equitable for James to hold the petitioner harmless on the first mortgage to Far West Bank, and the line of credit to Zions Bank in the combined amount of \$203,000, thus, allowing the plaintiff to continue residing in the home without a mortgage obligation, and thereby allowing her to elect to remain there, so long as she wishes.

The Court having previously categorized the property, now to illustrate the division creates the following schedule:

<u>Description</u>		<u>M/NM</u>	<u>James</u>	<u>Linda</u>
Monica Cove Home		M		
Value	\$ 771,000.00			
Combined mortgages	- 203,993.51			
Net equity	\$ 567,006.49			
	÷ 2			
	\$ 283,503.25	M	\$283,503.25	\$283,503.25
Monica Cove Furniture				
Value	\$ 75,000.00	M	37,500.00	37,500.00
Zions Bank Stock				
30,141 shares @51.875				
Value	\$1,563,564.38			
	÷ 2			
	\$ 781,782.19	M	781,782.19	781,782.19
Price Law Office Building				
Value	\$ 172,731.67	M	86,365.84	86,365.84
1990 BMW	\$ 18,675.00	M	9,337.50	9,337.50
1995 Chevrolet Tahoe	\$ 22,575.00	M	11,287.50	11,287.50
1984 Coachman Motor Home	\$ 12,436.00	M	\$ 6,218.00	\$ 6,218.00
1995 Jeep Cherokee	\$ 23,925.00	M	11,962.50	11,962.50
Certificates of				

Deposit - Zions	\$ 28,925.00	M	14,491.25	14,491.25
1996 tax refund	\$ 21,543.00	M	10,771.50	10,771.50
John Hancock Life Policy	\$ 55,546.00	M	27,773.00	27,773.00
IRA of each party		M	16,542.63	16,542.63
Savage Pension	\$ 206,774.27	M	103,387.14	103,387.14
Mantlepiece	\$ 10,000.00	M	5,000.00	5,000.00
Spring Glen Home equity previously divided between the parties	\$ 169,374.72	M	84,687.36	84,687.36
			\$1,490,609.66	\$1,490,609.66

Based upon the Court's general equitable power, the Court finds that certain of these assets should not be divided equally to the parties, even though they were acquired during the course of the marriage and have been determined by the Court to constitute in part the marital estate. The Court finds that an appropriate equitable distribution of the foregoing assets is as follows:

SUMMARY

<u>DESCRIPTION</u>	<u>AMOUNT TO JIM</u>	<u>AMOUNT TO LINDA</u>
Monica Cove Property		771,000.00
Furniture		75,000.00
Mortgages on Monica Cove	<203,993.51>	
Zions Bank Stock (30141 shares @ \$51.875)	781,782.19	781,782.19*
1990 BMW 750		18,365.84*
1995 Chevrolet Tahoe	22,575.00	

1984 Coachman Motor Home	12,436.00	
1995 Jeep Cherokee		23,925.00
Zions Bank Certificate of Deposit		29,500.00*
Estimated taxes on Interest	<485.00>	
1996 Tax Refund	21,543.00	
John Hancock Life Insurance Cash Value		55,546.00*
IRA of each party	16,542.63	16,542.63*
Savage Pension	103,387.14	103,387.14*
Mantle Piece	10,000.00	
Spring Glen Home Equity	84,687.36	84,687.36*
40 acre parcel		45,000.00*
Net Proceeds from sale of Price Office Building	172,731.67	
Estimated taxes on sales proceeds	<23,293.00>	
Estimated interest earned on Price Office Building Sale Proceeds @ 3% since sale in May 1997	6,477.00	
Estimated taxes on interest earned on Price Office Building sale	<2,590.00>	
TOTAL	<u>\$1,001,800.48</u>	<u>\$2,004,736.16</u>

Next, the Court must turn to the issue of alimony. The Court finds certainly, that with a 27-year marriage, that permanent alimony is appropriate. However, the Court finds that having made an equitable distribution of the assets unequally and granting to

the plaintiff the greater portion of the marital assets, and recognizing in so doing that the defendant had the benefit of premarital assets that are now of significant appreciated value, the Court determines that assets valued at \$1,134,811.16 (noted by "**") could be considered by the plaintiff as working assets, capable of generating a rate of return. Assuming that rate of return to average 7.5% per year, that amount should yield an income of \$85,110.84, or \$7,092.57 per month. In addition, that Court would note that while it is not my desire, nor the expected need of the plaintiff to sell her home and move to a home of comparable value to that occupied by the defendant, the plaintiff could generate an additional \$200,000 differential amount, which could earn an additional \$15,000 per year, or \$1,250 per month.

Thus, the Court could find that the income potentially generated from the assets awarded to the plaintiff would be sufficient to meet her needs. However, this ignores the 27 year term of the marriage, and strikes the Court as fundamentally inequitable when the defendant would not be required to live off of the yield from his assets, but has separate earned income. Assuming defendant's annual gross income to be approximately \$195,000, that gives him a monthly gross income of \$16,250 per month. Defendant has been paying approximately \$6,000 per month in temporary alimony during the parties' separation, but the plaintiff has been required to pay the mortgage on the Monica Cove home in the approximate amount of \$2,200, so requiring the defendant to hold the plaintiff

harmless on that mortgage, the Court finds that it is reasonable to require the defendant to pay alimony in the amount of \$4,000 per month from November 1, 1997, until the defendant reaches age 65. The Court notes the defendant is now just over 55, having a birthday in February. After age 65, each party should be required to bear their future expenses based upon their earnings generated from assets. The Court finds that the present value of the alimony award here, based on the assumption of a 10 year term, assuming earning capacity on the fund of 7.5%, is \$336,987.97. Should the defendant elect from his awarded property, he may pay at any time the present value of the remaining alimony payable at a discount rate of 7.5% and terminate the alimony obligations. Otherwise, the Court orders the alimony to continue uninterrupted, unless the defendant should die or reach age 65. No other event should terminate the alimony. Defendant shall be given credit against his alimony obligation of \$2,500 which he paid subsequent to the trial.

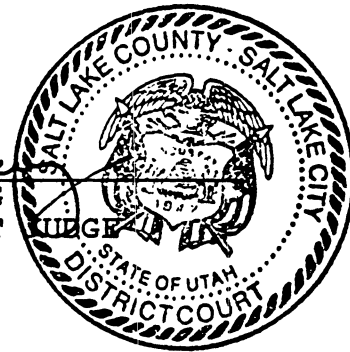
The Court having divided the assets as heretofore stated, finds that the present value of the plaintiff's individual net worth, after marital division is \$2,004,736.16, and the present value of the defendant's individual net worth, after division of marital assets is \$1,001,800.48, not including the significant assets of the ranching operations, properties and bank stock which have been declared separate property.

Each of the parties should be required to execute and deliver to the other such deeds, assignments, conveyances and bills of sale

as each may request from time to time with respect to the assets awarded to the respective parties, including those assets which the Court has found and determined to be separate properties from the marital estate.

Dated this ^{12th}₁ day of November, 1998.


DAVID S. YOUNG
DISTRICT COURT



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this day of _____, 1998:

Harold G. Christensen
Attorney for Plaintiff
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84111

Clark W. Sessions
Attorney for Defendant
201 S. Main, Suite 1300
Salt Lake City, Utah 84111

ADDENDUM B

**SUPPLEMENTAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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FILED DISTRICT COURT
Third Judicial District
JAN 19 1999
SALT LAKE COUNTY
Deputy Clerk

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

LINDA H. JENSEN,	:	SUPPLEMENTAL
	:	FINDINGS OF FACT
Plaintiff,	:	AND CONCLUSIONS OF LAW
	:	
v.	:	Civil No. 964900752
	:	
JAMES T. JENSEN,	:	Judge David S. Young
	:	Commissioner Thomas N. Arnett
Defendant.	:	

The above-captioned matter came on regularly for trial before the undersigned, one of the Judges of the above-entitled Court commencing on October 28, 1997 and concluding with closing arguments on November 12, 1997. Thereafter, the Respondent moved the Court to bifurcate the proceedings and to immediately grant a Decree of Divorce to the Petitioner which the Court did by Decree of Divorce entered in the above-captioned action on June 22, 1998. The Court thereafter considered the evidence and testimony adduced, the arguments and statements of counsel, the files and records herein and the law appertaining thereto and having issued its

Memorandum Decision on November 12, 1998, and being fully advised in the premises, now make and enters the following:

SUPPLEMENTAL FINDINGS OF FACT

1. The Court finds that the parties were married each to the other on July 30, 1970, a marriage of some 28 years.

2. The Court finds that the parties were each raised in Carbon County, State of Utah and that the Plaintiff, following graduation from high school, attended two years of College of Eastern Utah and one year at the University of Utah.

3. The Court finds that during the course of the parties' marriage, the Plaintiff engaged in limited work outside of the parties' home, including some work as a secretary/receptionist and bookkeeper in the law offices of her husband and her father-in-law, Therald N. Jensen, ("TN Jensen") who was a prominent attorney in Price, Utah, until his death. Additionally, the Court finds that TN Jensen's financial interests included banking and ranching as well as the practice of law.

4. The Court finds that the Plaintiff is able-bodied and capable of working outside of the home, but that her income from employment would be nominal.

5. The Court finds that the Defendant was admitted to practice law in the State of Utah in 1969 and practiced primarily in Carbon County, State of Utah, with his father until a fairly recent move to Salt Lake City, Utah, where he accepted employment

with and is currently employed by Savage Industries as Executive Vice President and General Counsel with annual earnings of approximately \$195,000, which includes bonuses from time to time. Further, the Court finds that the Defendant is a member of the board of directors of Zions First National Bank from which he receives director's fees and that he has other dividend and interest earnings from investments and other business operations as hereinafter more fully set forth.

6. The Court finds that the Defendant was previously married and had one child born as the issue of that marriage. Further, the Court finds that the parties had three children born as the issue of their marriage, two of whom are emancipated by age and the youngest of whom is currently a senior in high school and will shortly be emancipated.

7. The Court finds that the Defendant has substantial separate property which originated from his parents as well as from gifts and inheritances which the Court further finds were not commingled with marital property and that the Plaintiff did not augment, maintain or protect the same sufficient to lose the identify of such properties as separate properties. With respect to such separate property, the Court finds that such was acquired principally through the TN Jensen family and that much of the property involved in the Defendant's current ranching interest was significantly obtained and had it origins in the 1940's, 1950's and

1960's, prior to the marriage of the parties. Additionally, the Court find that during the period after the initial acquisition of such properties and prior to his death in 1992, TN Jensen acquired considerable ranching interests and inventory. The Court also finds that the testimony is undisputed that it was the primary dream of TN Jensen to provide ranching opportunities for his children and their children consistent with their individual desires and that such dream was well accomplished.

8. The Court finds that T.N. Company is a Utah partnership formed in approximately 1982 or 1983 by TN Jensen and his children, James, Jerry and Butch. The Court also finds that T.N. Company is the successor company to T.N., Inc. In the beginning, TN Jensen owned 84% of the company and at the time of his death, he retained 48.6% of the company. While the percentage ownership interests of the three Jensen brothers according to the official records are not equal, it was clear from the testimony that they each deemed their interest to be equal and that the Defendant claims only a one-third interest regardless of what the official records may show or reflect.

9. The Court finds that T.N. Company is the operating company of the livestock operations and has encountered significant losses during recent years. In 1996, such losses were \$340,000. TN Company owns in excess of 1,100 cows, 60 bulls and 30 horses

with miscellaneous tack, vehicles and equipment consistent therewith.

10. The Court finds that T.N. Company is comprised of inherited property and should remain the sole and separate property of the Defendant including any appreciated value thereon.

11. The Court finds that T.N. Ranches is the entity which is the principal owner of the Range Creek Ranch which consists of a coalition of multiple homesteads and was acquired by T.N. Jensen and his wife during the 1950s. Such properties were contributed in whole from TN Jensen and Mrs. Jensen to T.N., Inc. which then transferred the same to T.N. Ranches.

12. The Court finds that much of the property is titled in the name of "Jensen Brothers" or their individual names. Such properties include a substantial interest in deeded real property, state and federal grazing permits and U.S. Forest Service permits. The Court finds that Jensen Brothers is owned one-third by each of the brothers and includes the following:

a. The Moynier Ranch. The Court finds that the Moynier Ranch was purchased through an agreement dated September 1, 1976 by Butch Jensen and thereafter assigned to the three Jensen brothers. The evidence adduced at trial was that the Moynier Ranch was effectively obtained by Butch Jensen but assigned to the three Jensen brothers and paid for through the ranching operations or T.N. Company. The Court finds that there was no evidence of cash

calls from marital estate property from any of the brothers, except for one sum of approximately \$25,000 which apparently was received in cash at the time of the passing of TN Jensen, the second parent of the Defendant to die. Each child received approximately \$25,000 at that time and while it is unclear as to whether the \$25,000 is separate from the testimony in which it was testified that the Defendant put approximately \$25,000 into the purchase price of the Moynier Ranch, arguably from marital property, the Court finds that it remains fair, just and equitable to allow the Defendant to retain the whole of the Jensen Brothers property assets and interests as his sole and separate property and further finds that as an equitable offset of the \$25,000 which, if it came from marital funds would be subject to sharing, has been equitably dealt with in relation to other assets of the marital estate hereinafter described.

b. The Black Dragon (Spotted Wolf) Grazing Permit: The Court finds said permit was obtained by Butch Jensen and a brother-in-law, James D. Wilcox through an option to purchase. Thereafter the interests of Mr. Wilcox was assigned to Butch Jensen and on behalf of Butch the prior owners were notified in September of 1980 of the election to exercise such option. This asset is held in the names of each of the Jensen brothers individually. The purchase price of \$55,000, the Court finds was paid in annual installments of \$11,000 each, with applicable interest and the funds for the

purchase were provided by TN Jensen. As such, the property and successor interests remain the separate property of the Defendant and his brothers.

c. The Coal Creek Farm and Orfanakis Winter Grazing Property was acquired prior to 1970 by TN Jensen and his wife and consists of approximately 360 acres in Wellington, Utah. That property was conveyed from TN Jensen and his wife to T.N. Ranches in 1983 and from T.N. Ranches to the three Jensen brothers in 1989. Thus, the property originated from TN Jensen and his wife and remains the separate property of the Defendant and his brothers. The Court also finds that the Orfanakis Winter Grazing Property had an origin similar to the Coal Creek Farm through TN Jensen and his wife and was conveyed from them through T.N. Ranches to the three Jensen brothers in 1989 and remains the sole and separate property of the Defendant and his brothers.

d. The Cisco Winter Grazing Permit was obtained by TN Jensen for a purchase price of approximately \$100,000 in February of 1987, which purchase price was paid entirely by TN Jensen and placed ultimately in the name of the three Jensen brothers. As such, it was acquired by TN Jensen and remains the sole and separate property of the Defendant and his brothers.

e. The Siaperis Lands were acquired pursuant to an agreement with Nick and Ileen Siaperis in 1977 whereunder a 60 acre field was acquired for \$70,000. Approximately one month later, the

Siaperis' assigned an Earnest Money Receipt and Offer to Purchase they held with Alex and Shirley Tidwell to TN Jensen and the Defendant to purchase their property for \$60,000. The combined purchase price amounted to \$130,000. The Defendant and his mother borrowed \$130,000 from Walker Bank to pay the combined purchase price and mortgaged the law office building, then held exclusively in the name of Mrs. Jensen as security for such loan. After the purchase price was paid, the land was titled in the names of the Defendant and his mother and later was traded for property adjoining the Coal Creek Farm which was titled in the name of the Defendant and his mother as joint tenants with rights of survivorship. Upon the death of Mrs. Jensen, her interest was conveyed to Jerry Jensen and Butch Jensen as tenants in common. While there appears to be an imbalance presently in the ownership from the one-third interest testified to by the Defendant, it does appear that all of the funds giving rise to the purchase of the property came from Mrs. Jensen through her interests in the office building and thus the property should remain the separate property of the Defendant and his brothers.

f. The Court finds that the ranching company has BLM authorization in Rock Creek, Fan Canyon, Columbia, and Icelfander grazing permit allotments. These grazing permit allotments were all obtained by TN Jensen and/or TN Jensen and the three Jensen brothers prior to 1970 and in February of 1983 were transferred to

the three Jensen brothers. These assets, together with a Price River grazing allotment acquired in 1985, similarly, by the three Jensen brothers, for nominal consideration, and to avoid confusion should remain the separate property of the Defendant and his brothers.

g. The Court finds that various water rights and mineral rights used or associated with any of the ranching and/or farming operations are the separate property of the Defendant and where appropriate, the other Jensen children. As such, the water rights and mineral rights remain with the respective properties as awarded by the Court.

13. The Court finds that none of the aforementioned T.N. Ranches or Jensen Brothers Properties have ever been titled in the names of spouses of any of TN Jensen's children nor have any of the spouses ever been requested to pledge independent credit or support for the ranching operations. As such, the Court finds that it is fair, just and equitable that such properties be found to be separate properties from the marital estate, including any appreciated value therein.

14. The Court finds that the testimony at trial was that the Plaintiff went very infrequently to the properties and there was no evidence that she augmented, maintained or protected the properties. Further, the Court finds that while there was evidence

that the Defendant took weekend time away from the family to work on the properties, and that in the property subsequently referred to as "commingled" Plaintiff will receive, the Court finds that she will receive through the distribution of assets herein, an equitable allocation to enhance her share of the marital estate.

15. The Court finds that the Defendant throughout the marriage maintained an active practice of law and thus through that practice generated income to support the Plaintiff and their family and that while the ranching operations represent a significant present value, they have not been a major source of funding for ongoing family activities and operations. Additionally, the Court finds that the Defendant's allocation of time to the ranching properties has been primarily spare time away from the practice of law, but certainly likewise, away from the family, and thus at the expense of family sacrifices.

16. That during the marriage of the parties, a residence and real property known as the Monica Cove home, which is now the residence of the Plaintiff and two of the parties' children, one of whom is emancipated by age and employment and the other of whom is a senior in high school was acquired. The Court further finds that the funds used to acquire the Monica Cove residence and real property were obtained from an investment of the Defendant prior to the marriage of the parties in approximately April of 1968. At that time, he joined with two other individuals in forming the

Mitchell Funeral Home, Inc., a Utah corporation. Thereafter, in May of 1990, Walmart stores purchased the property of the funeral operations for development of a store in Price, Utah. To accomplish the transaction, Walmart purchased a lot on Chula Vista Circle in Sale Lake City, Utah, which was traded for the price of the property generating a tax free exchange. The purchase included a home and the purchase price was \$310,000. The home was later sold for approximately \$391,000. Further, the Court finds that a separate payment of \$100,000 was made to the Defendant by the succeeding owners of the funeral home in order to purchase his entire interest in the ongoing business operations. Those two amounts combined, equal \$491,000, which amount was put into the purchase of the lot and home at Monica Cove. Additionally, the evidence was that the parties had built a home on property owned by the Plaintiff's father in Carbon County, Utah and it is to those marital homes that the Plaintiff has devoted 28 years of marriage and as to the Monica Cove residence and real property that the Court finds that the Plaintiff has augmented, maintained and protected the same in such a way so as to provide value to the asset and the family's living circumstances. The Court finds in addition, that no effort was made to loan the \$491,000 contribution to the marriage and the Defendant did not intend to retain that asset as his sole and separate property. As such, the Court finds that all assets associated with obtaining the Monica Cove residence

and real property, whether they came from the Carbon County home, the contribution personally of the parties to the marriage or the value from the Mitchell Funeral Home, have been sufficiently commingled so as to negate a finding that the Monica Cove residence and real property is the sole and separate property of the Defendant.

17. The Court finds that in August of 1973, 3 years after the parties were married, Zions Bank purchased the Carbon Emery Bank in a stock exchange. At that time, the Defendant received 2,616 shares of Zions Bank stock listed in his sole and separate name which represented his interest in the Carbon Emery Bank prior to the parties' marriage. The testimony was clear that the Defendant did not at any time believe that the Zions Bank stock was anything other than separate property pre-dating the marriage. Through subsequent stock splits and an additional unknown augmentation of 748 shares, such stock over time increased the Defendant's portion to 8,042 shares of stock. Those beginning shares with stock splits and automatic dividend reinvestment purchases have expanded that portion of the stock to 58,352 shares.

18. The Court finds that in June of 1985, the Defendant placed all of the stock in joint tenancy with rights of survivorship with the Plaintiff. This change was made according to the testimony of the parties at a time when the Defendant was engaged in significant business travel, and the change was made to

avoid probate in the event of his untimely death. There was no evidence adduced at the trial of any donative intent with respect to such exchange.

19. The Court finds that during the course of the parties' marriage, additional shares in Zions Bank were acquired in a total amount after stock splits and dividend reinvestment purchases to an existing total of 30,141 shares of such stock, which the Court finds to be marital property and equally divided between the parties. Since the trial, Zions Bank has paid and the Defendant has received dividends totaling .50 per share on the 30,141 shares determined to be marital property. The Court further finds that the Defendant shall pay to the Plaintiff as her share of such dividends, the sum of \$7,535.25 less income taxes attributable thereto which the Defendant shall pay in the approximate amount of \$3,014, resulting in a net sum payable to the Plaintiff from the Defendant of \$4,521.25.

20. The Court finds that in early 1974, TN Jensen and his wife agreed to gift to the Defendant and Jerry Jensen, approximately 4.2 acres of land northwest of Price, Utah. The two Jensen brothers constructed on that property a 50' x 60' shop building, at an approximate cost of \$25,000. At approximately that same time, Jerry Jensen conveyed an interest in American Transport, Inc. to the Defendant who changed the name of that corporation to Malpaso Corporation which the Court finds is effectively defunct,

owning only two trucks with a combined value of approximately \$7,000. The Court finds that it is fair, just and equitable that Malpaso Corporation be awarded to the Defendant as his sole and separate property.

21. The Court finds that the shop constructed on the land hereinabove described was used by T.N., Inc. and T.N. Company and Malpaso Corporation when viable and those companies provided the funds from which the repayment of the bank loan was made. In January, 1980, the Plaintiff and the Defendant, the joint tenants in ownership of the shop, conveyed the same to TN Jensen who in return conveyed the office building to the Plaintiff and the Defendant. The office building described herein is the same building through which both TN Jensen and the Defendant practiced law. No monetary consideration was exchanged and the office building was of significantly greater value than the shop. The shop was thereafter conveyed to T.N. Company and remains an asset of T.N. Company at this time.

22. The Court finds that the office building was sold to the Sampinos family for a net after costs and commission, of \$172,731.67, which sum is presently held in escrow at Summit Exchange Services, Inc. The Court further finds that the value from the office building, the use of the office building during the term of the marriage and the apparent variations in value of the exchange of the office building for the shop, justifies the finding

that the office building asset was intended by the Defendant and TN Jensen to be a marital asset and was sufficiently commingled so as to have lost its separate identity. As a marital asset, the Court finds it is subject to equal division between the parties.

23. The Court finds that the parties separately and during the course of their marriage, have acquired certain oil, gas and mineral royalties and that since the trial, certain amounts have been received by the Defendant therefrom. With respect to such oil, gas and mineral interests, the Court finds that they should be awarded to the party in whose name they are titled and that such interests which are titled jointly should be equally divided between the parties. Additionally, the Court finds that the Defendant should pay to the Plaintiff from royalties he has received since the trial, a net sum of \$788.95 representing gross receipts of \$1,314.95 less estimated tax which the Court finds the Defendant should pay of \$526.00.

24. The Court finds that the furniture, furnishings and personal property at the Monica Cove home have an approximate value of \$75,000 and should be awarded to the Plaintiff as her sole and separate property, together with all clothing, jewelry and personal effects, without consideration as to value.

25. The Court finds that all clothing, jewelry and personal effects of the Defendant should be awarded to him as his sole and

separate property without consideration of value, together with a mantle piece from the Spring Glen home with a value of \$10,000.

26. The Court finds that the TN Jensen Home Place and Big Field shall remain the separate property of the Jensen children, namely the Defendant, Jerry Jensen, Bonnie Jensen and Butch Jensen, without claim from the Plaintiff and that she has waived any claim thereto in open court.

27. The Court finds that the 40 acre parcel of raw ground which abuts the Coal Creek Farm should be awarded to the Plaintiff as her sole and separate property at a value of \$45,000, subject to existing roadways, ditches and easements.

28. The Court finds that the parties have acquired various vehicles and that the Plaintiff should be awarded the 1990 BMW vehicle with an equity of \$18,675 and the 1995 Jeep Cherokee automobile with an equitable value of \$23,925. The Court further finds that the 1993 Chevrolet truck is an asset of T.N. Company and has otherwise been considered herein and that the Defendant should be awarded as his sole and separate property, the 1995 Chevrolet Tahoe with an equitable value of \$22,575 and the 1985 Coachman motor home with an equitable value of \$12,436.

29. The Court finds that certain certificates of deposit at Zions Bank in the amount of \$28,982.49 plus subsequent increases should be equally divided between the parties.

30. The Court finds that the parties' 1996 federal tax refunds of \$21,543 shall be divided equally between the parties.

31. The Court finds that an existing John Hancock life insurance policy with a cash value of \$55,546 should be awarded to the Plaintiff as her sole and separate property and further finds that each of the parties should be awarded their individual retirement accounts in the amount of \$16,542.63 each.

32. The Court finds that since the parties' marriage and continuing to the date of the trial in this matter, the Defendant has vested benefits in the Savage Pension Fund of \$206,774.27 which should be divided equally to each according to the Woodward formula and that a Qualified Domestic Relations Order should be entered with respect thereto.

33. The Court finds that the equity resulting from the sale of the Spring Glen home of \$169,374.72 has been divided equally between the parties, provided however, charges incurred for the chip seal of the roadway on the Plaintiff's father's land which provided access to the Spring Glen home and Plaintiff's father's home and adjoining property of her father, in the amount of \$11,000, the court finds is a marital obligation and should be shared and paid equally by the parties.

34. The Court finds that it is fair, just and equitable that each of the parties be responsible for any and all acquired obligations after their separation.

35. The Court finds that it is fair, just and equitable for the Defendant to hold the Plaintiff harmless from the first mortgage obligation on the Monica Cove residence and real property to Far West Bank and the line of credit to Zions Bank in the combined amount of \$203,000, thereby allowing the Plaintiff to continue residing in such home without a mortgage obligation for as long as she wishes.

36. The Court finds pursuant to its general equitable powers that certain assets should not be divided equally between the parties even though they were acquired during the course of the marriage and have been determined by the Court to constitute in part, the martial estate. By awarding the Plaintiff the greater portion of the marital assets, a total of \$2,004,736.16 as compared to the marital assets awarded to the Defendant of \$1,001,800.48, the Court recognizes that in so doing the Defendant has had the benefit of premarital assets that are now of significant value. The Court also finds that certain of the excess assets are working assets which the Court finds to be \$1,134,811.16 which are capable of generating a rate of return and income to the Plaintiff for her support and maintenance. Assuming that rate of return to average 7.5% per annum, which the Court finds is reasonable that amount should yield an income of \$85,110.84 or \$7,092.57 per month to the Plaintiff. Additionally, should the Plaintiff desire to sell the Monica Cove residence and move to a home of comparable value to

that occupied by the Defendant, the Plaintiff could generate an additional \$200,000 which could earn an additional \$15,000 per year or \$1,250 per month.

37. The Court could find that the income potentially generated from the assets awarded to the Plaintiff would be sufficient to meet her needs. The Court finds however, that such findings ignore the 27 year term of the parties' marriage and equity requires that the Plaintiff should not be required to live off of the yield from her assets when the Defendant would not be required to do so by reason of his separate earned income. The Court finds that the Defendant's annual gross income is approximately \$195,000, which provides a monthly gross income of \$16,250 per month. The Defendant has been paying approximately \$6,000 per month in temporary alimony during the parties' separation on a voluntary basis but the Plaintiff has been paying the mortgage on the Monica Cove residence in the approximate amount of \$2,200. The Court therefore finds that the Defendant has the ability to pay and it is fair, just and equitable that the Defendant hold the Plaintiff harmless from that mortgage and that he should be required to pay to the Plaintiff alimony in the amount of \$4,000 per month from November 1, 1997 until he reaches the age of 65 years. After age 65 years, each party should be required to bear their future expenses based upon their earnings generated from their separate assets. The Court finds that the present value of

the alimony award based on the assumption of a ten year term and assuming a return on the fund of 7.5% is \$336,987.97. Should the Defendant elect, from his awarded property, he may pay at any time, the present value of the remaining alimony payable at a discount rate of 7.5% and terminate his alimony obligation. Otherwise, the alimony shall continue uninterrupted until the earlier of the death of the Defendant or his attainment of age 65. No other event should terminate the alimony. The Court finds in addition, that the Defendant should be given credit against his alimony obligation of the sum of \$2,500 which he paid subsequent to the trial.

38. Based upon the foregoing Supplemental Findings of Fact, the Court now concludes as follows:

SUPPLEMENTAL CONCLUSIONS OF LAW

1. To the extent the foregoing Supplemental Findings of Fact are Supplemental Conclusions of Law, the same are adopted herein in all respects.

2. That each of the parties should be required to execute and deliver to the other, such deeds, assignments, conveyances and bills of sale as each may request from time to time with respect to the assets awarded to the respective parties including those assets which the Court has found and determined to be separate properties from the marital estate.


3. That each of the parties should assume, pay, discharge and hold the other harmless from any and all acquired obligations after the separation of the parties.

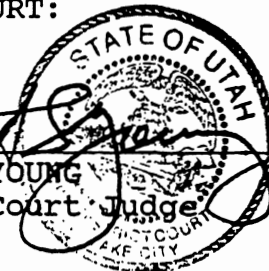
4. That each of the parties should assume, pay, discharge and hold the other harmless from their separate costs and attorneys fees incurred herein.

5. That the Court should make and enter its Supplemental Decree of Divorce accordingly.

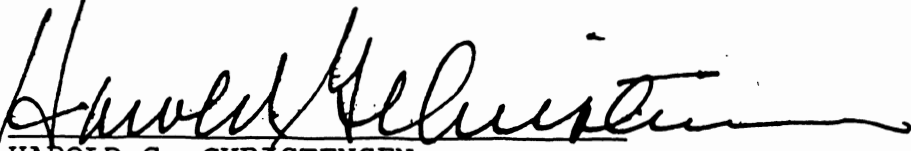
DATED this 19th day of January, 1999.

BY THE COURT:


DAVID S. YOUNG
District Court Judge



APPROVED AS TO FORM
this 19th day of January, 1999.


HAROLD G. CHRISTENSEN
Attorney for Plaintiff

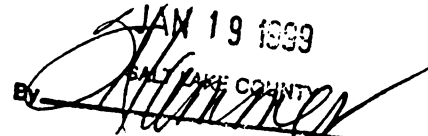
ADDENDUM C

SUPPLEMENTAL DECREE OF DIVORCE

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Attorneys for Defendant

FILED DISTRICT COURT
Third Judicial District

JAN 19 1999
By 
SALT LAKE COUNTY
Deputy Clerk

IMAGED

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

LINDA H. JENSEN,
Plaintiff,

v.

JAMES T. JENSEN,
Defendant.

**SUPPLEMENTAL
DECREE OF DIVORCE**

2223859
Civil No. 964900752

Judge David S. Young
Commissioner Thomas N. Arnett

The above-captioned matter came on regularly for trial before the undersigned, one of the Judges of the above-entitled Court commencing on October 28, 1997 and concluding with closing arguments on November 12, 1997. Thereafter, the Respondent moved the Court to bifurcate the proceedings and to immediately grant a Decree of Divorce to the Petitioner which the Court did by Decree of Divorce entered in the above-captioned action on June 22, 1998. The Court thereafter considered the evidence and testimony adduced, the arguments and statements of counsel, the files and records herein and the law appertaining thereto and having issued its

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Memorandum Decision on November 12, 1998, and being fully advised in the premises, hereby ORDERS, ADJUDGES and DECREES as follows:

1. That the Plaintiff be and she is hereby awarded and the Defendant be and he is hereby ordered to pay to the Plaintiff as and for alimony, the sum of \$4,000 per month commencing November 1, 1997 and continuing until the attainment by the Defendant of the age of 65 years, or his earlier death. Otherwise, the Court orders that the alimony awarded hereby shall continue uninterrupted and shall not terminate.

2. That the Defendant shall be given credit against his alimony obligation, in the sum of \$2,500 which he paid subsequent to the trial of the case.

3. That the Defendant shall have the right at any time to pay the present value of the remaining alimony due the Plaintiff at a discount rate of 7.5% per annum and should he do so, all remaining alimony obligations from the Defendant to the Plaintiff shall be terminated.

4. That the Plaintiff be and she is hereby awarded as her sole and separate property, without claim from the Defendant, the following:

a. The Monica Cove residence and real property at a value of \$771,000;

b. Furniture, furnishings and personal property located at the Monica Cove residence and real property at a value of \$75,000;

c. 15,070.50 shares of Zions Bank stock at an approximate value of \$781,782.19;

d. 1990 BMW 750 automobile at a value of \$18,365.84;

e. 1995 Jeep Cherokee automobile at a value of \$23,925;

f. Zions Bank Certificate of Deposit at a value of \$29,500;

g. Life insurance cash value - John Hancock Life Insurance Company in the approximate amount of \$55,546;

h. Plaintiff's individual retirement account in the approximate sum of \$16,542.63;

i. One-half of Defendant's retirement plan at Savage Industries in the sum of \$103,387.14, to be divided pursuant to a Qualified Domestic Relations Order;

j. One-half of the proceeds from the sale of a residence and real property located in Carbon County and known as the Spring Glen home in the sum of \$84,687.36;

k. 40 acre parcel of raw ground which abuts the Coal Creek Farm at a value of \$45,000, subject to existing roadways, ditches and easements.

l. All of Plaintiff's clothing, jewelry and personal effects;

m. Any oil, gas and mineral royalties and interests titled solely in the name of the Plaintiff and one-half of any such interests titled in the joint names of the Plaintiff and the Defendant;

n. The sum of \$1,314.95 representing Plaintiff's share of oil and gas royalties received by Defendant since the trial, less income taxes attributable thereto in the estimated amount of \$526.00, for a net sum of \$788.95;

o. The sum of \$7,535.25, representing Plaintiff's share of dividends received by the Defendant since the trial on the parties' joint marital Zions Bank stock less income taxes attributable thereto in the estimated amount of \$3,014.00 for a net sum of \$4,521.25;

5. The Defendant shall be awarded as his sole and separate property, without claim from the Plaintiff, the following:

a. TN Company, a Utah partnership which is the successor to T.N., Inc., which interest equals one-third thereof;

b. T.N. Ranches, which is the principal owner of the Range Creek Ranch which consists of a coalition of multiple homesteads;

c. Jensen Brothers Properties, which includes substantial interests in deeded real property, state and federal grazing permits, and U.S. Forest Service permits,

including the Moynier Ranch, and the Black Dragon (Spotted Wolf) Grazing Permit;

d. The Coal Creek Farm and Orphanakis Winter Grazing Property;

e. The Cisco Winter Grazing Permit;

f. The Siaperis lands and BLM authorizations in Rock Creek, Fan Canyon, Columbia, Icelfander and Price River grazing permit allotments, water rights and mineral rights used or associated with any of the ranching and/or farming operations;

h. 58,352 shares of Zions Bank stock as Defendant's pre-marital property.

i. 15,070.50 shares of Zions Bank stock at an approximate value of \$781,782.19;

j. The sales proceeds of the Jensen Law Office building or \$172,731.67, together with interest thereon since May 1997 in the sum of \$6,477, less income taxes attributable thereto in the estimated sum of \$25,883.00;

k. 1995 Chevrolet Tahoe at a value of \$22,575;

l. 1984 Coachman motor home at a value of \$12,436;

m. The parties' 1996 income tax refund of \$21,543.00;

n. Defendant's individual retirement account in the approximate sum of \$16,542.63;

o. One-half of Defendant's retirement plan at Savage Industries in the sum of \$103,387.14, to be divided pursuant to a Qualified Domestic Relations Order;

p. The mantle piece from the Spring Glen home at a value of \$10,000;

q. One-half of the proceeds from the sale of a residence and real property located in Carbon County and known as the Spring Glen home in the sum of \$84,687.36;

r. All of Respondent's clothing, jewelry and personal effects;

s. The TN Jensen Home Place and Big Field.

6. That the Defendant be and he is hereby ordered to assume, pay, discharge and hold the Plaintiff harmless from the parties' first mortgage obligation on the Monica Cove residence and real property in favor of Far West Bank and the line of credit to Zions Bank in the combined amount of \$203,000, together with the income tax obligations hereinabove set forth;

7. Charges incurred in the amount of \$11,000 for the chip seal of the roadway providing access to the Spring Glen home is a marital obligation and the same is ordered to be shared and paid equally by the parties. That other than as set forth herein, each of the parties be and they are hereby ordered to assume, pay, discharge and hold the other party harmless from obligations incurred since their separation.

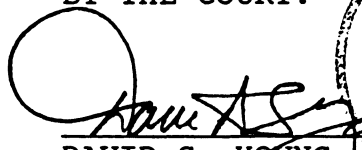
8. That each of the parties be and they are hereby ordered to assume, pay and discharge their own costs and expenses incurred in connection herewith, including costs and attorneys fees, without contribution from the other.

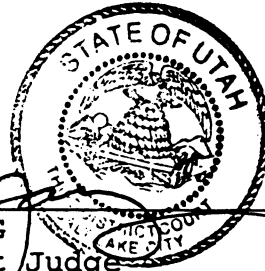
9. That the Plaintiff be and she is hereby awarded the right to continue as an insured under the Defendant's health and medical insurance policy in effect through his employer, provided however, she shall be responsible for any premium charges associated therewith.

10. That each of the parties be and they are hereby ordered to execute and deliver to the other such deeds, assignments, conveyances and bills of sale as each may request from time to time with respect to the assets awarded to the respective parties, including those assets which the Court has found and determined to be separate properties from the marital estate.

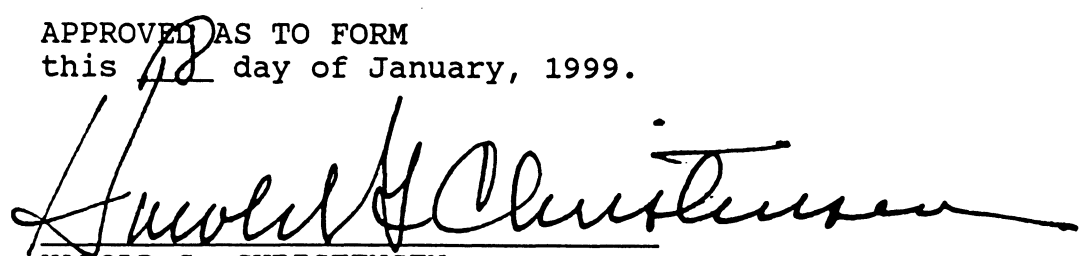
DATED this 19 day of January, 1999.

BY THE COURT:


DAVID S. YOUNG
District Court Judge



APPROVED AS TO FORM
this 18 day of January, 1999.


HAROLD G. CHRISTENSEN
Attorney for Plaintiff