

1999

Linda H. Jensen v. James T. Jensen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDA H. JENSEN,	:	
Petitioner/Appellant,	:	
v.	:	Case No. 990465-CA
	:	Priority of Argument: 15
JAMES T. JENSEN,	:	
Respondent/Appellee/ Cross-Appellant.	:	

BRIEF OF APPELLEE/CROSS-APPELLANT

Appeal from Supplemental Decree of Divorce entered January 19, 1999,
in the Third Judicial District Court for Salt Lake County,
Honorable David S. Young, Civil No. 964900752

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JURISDICTION OF COURT OF APPEALS

The Utah Court of Appeals has jurisdiction of Husband's cross-appeal pursuant to Utah Code Ann. § 78-2a-3(2)(h) (1996).

STATEMENT OF ISSUES PRESENTED FOR REVIEW BY CROSS-APPEAL

Two issues are presented for review by Husband's cross-appeal:

- 1. Did the District Court Abuse its Discretion in Awarding to Wife a Disproportionate Two-thirds Share of the Marital Property?**

The standard of appellate review of an award of marital property in divorce is "clear and prejudicial abuse of discretion." *See Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991); *Bradford v. DeMita*, 1999 UT App 373, ¶ 12, 384 Utah Adv. 26. This issue was preserved in the District Court by Respondent's Objections to Supplemental Findings of Fact, Supplemental Decree of Divorce, Motion to Amend and Request for Oral Argument filed January 29, 1999. R. 247, 249-250.

- 2. Did the District Court Abuse its Discretion in Awarding Alimony to Wife, in Light of the Court's Finding the She Is Able to Meet Her Reasonable Financial Needs from Income Generated by the Income-producing Marital Assets Awarded to Her?**

The standard of appellate review of a trial court's determination of alimony is also "clear and prejudicial abuse of discretion." *See Howell*, 806 P.2d at 1211. *Bradford*, 1999 UT App, ¶ 12. This issue was also preserved in the District Court by Respondent's Objections to Supplemental Findings of Fact, Supplemental Decree of

Divorce, Motion to Amend and Request for Oral Argument filed January 29, 1999.
R. 247-249.

DETERMINATIVE CONSTITUTIONAL, STATUTORY OR REGULATORY PROVISIONS

The interpretation of Utah Code Ann. § 30-3-5 (1996), as discussed in various cases decided by this Court and by the Utah Supreme Court, is determinative of the first issue raised by this cross-appeal. There are no other constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative of any issue in this cross-appeal or is of central importance to this cross-appeal.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The statement of these matters in the Brief of Appellant appears to be complete and correct.

B. STATEMENT OF FACTS

The Brief of Appellant fails, either in its Statement of Facts or in subsequent argument, to identify and marshal many of the facts supporting the findings and conclusions of the District Court on the issues on which she appeals. Husband therefore supplements the Statement of Facts in the Brief of Appellant for the purpose of rectifying its omissions and of providing the factual predicate for Husband's own cross-appeal.

1. **Facts Relating to Award of Separate Property to Husband**

The District Court awarded to Husband, as his separate property, his partnership interests in the three principal components of the Jensen family ranching business (T-N Company, T-N Ranches and the Moynier Ranch) together with 58,352 shares of Zions Bank stock. Husband initially received essentially all of this separate property by gift or inheritance from his parents. Supplemental Findings of Fact and Conclusions of Law, ¶ 10, R. 223 (as to T-N Company); *Id.* at ¶ 12, R. 223-227 (as to T-N Ranches, Moynier Ranch and miscellaneous associated grazing permits, mineral interests and water rights). With respect to the ranching properties, the Court found that none of them "have ever been titled in the names of spouses of any of TN Jensen's children nor have any of the spouses [including Wife] ever been requested to pledge independent credit or support for the ranching operations." *Id.* at ¶ 13, R. 227.

T-N Company Partnership. T-N Company, the operating entity of the Jensen family ranching business, was owned at the time of trial in this matter by Husband and his two brothers. There was some conflict in the evidence as to whether the brothers' respective shares were equal thirds or held in some other proportion. The Court made no attempt to resolve this issue, as it had no need to do so with respect to separate property awarded to Husband. Supplemental Findings of Fact and Conclusions of Law, ¶ 8, R. 222, R. 323:148, R. 324:77-78.

While both of his brothers worked full-time in the ranching operations as salaried employees of T-N Company, Husband was engaged full-time in the practice

of law and worked on the ranch primarily on weekends, for which he received no compensation. R. 323:35, 324:199-202. The statement in the Brief of Appellant at p. 10 that "[Husband] spent as much time on the ranching operations as [his brothers] did throughout the parties' marriage" is false and unsupported by the references to the Record cited in the brief. *See* Brief of Appellant, p. 10, and citations in the brief to R. 323:126, 148, R. 324:199-202. The relevant evidence on this point, unrebutted but not cited in the Brief of Appellant, is Husband's testimony that he averaged "at least eleven, twelve hours a day" in the practice of law, and that "if I wasn't tied up in my law practice, I typically tried to spend one day a week in the farming-ranching side." R. 324:193-94.

The District Court found that Wife "went very infrequently to the [ranch] properties and there was no evidence that she augmented, maintained or protected the properties." Supplemental Findings of Fact and Conclusions of Law, ¶ 14, R. 227. It is untrue, and unsupported by Wife's references to the Record, that she "often" accompanied Husband to the ranch properties or performed "maintenance duties" while there. *See* Brief of Appellant, p. 9, and citations in the brief to R. 81, and R. 323:119-120. Her actual testimony on the subject was that during the first year of the marriage, 1970, she was on the ranch "quite a few weekends" or "whenever I could be" but that after their first child was born, the summer following the marriage, she was "stuck at home." R. 323:36, 119. In response to a question as to how much time she had spent on the ranch over the entire 27-year course of the marriage, she replied, "I have no idea." When given the opportunity to respond affirmatively to the

question, "[s]o you actually went out and worked on the ranch on a regular basis?," she answered only "[c]ertain occasions we went up." R. 323:120.

It was Husband's testimony that she did not work on the ranch at all during the summer of 1971, while pregnant with her first child, that during the entire course of the marriage her visits to the ranch properties could be counted on "ten fingers", and that those visits were not working visits but social visits with friends. R. 324:196-198.

The ranch was a source of friction between Husband and Wife. She testified that he spent too much time in the ranching operations; and he testified, "[s]he never supported me in the ranching operations. . . . She didn't like me to be involved with it." R. 323:36, 324:198.

T-N Company Note Payable to Malpaso. Wife's argument for treating T-N Company as a marital asset relies in part on a possible loan transaction between T-N Company and Malpaso Corporation.

The Record facts relating to that transaction are as follows: At some point, T-N Company executed a promissory note in the amount of \$85,033 payable to Malpaso Corporation, an entity formed in 1972 by Husband and one of his brothers, in which Wife held no interest. R. 323:51, 174-175; Exhibits D-13, D-35. The Record is silent as to the nature of the transaction by which this obligation was created, nor does it identify the source of the funds, if any, which were transferred by Malpaso to T-N Company. Indeed, it is unclear whether the note reflected an actual transfer of funds or other value by Malpaso to T-N Company. In response to questioning by the Court

as to this note and others executed by T-N company, Wife's expert, Dean Smith, testified as follows:

The Court: Well, that means these [payees of the notes] loaned their money to T-N Company, and T-N . . . then owed the money back to them?

The Witness: That's true, but I don't think there was ever a cash transaction. . . .

The Court: So these were notes carried on the books, for whatever reason, and then were simply washed and forgotten?

The Witness: Correct.

R. 324:91-92. If actual funds or value were transferred, the Record contains no evidence linking them to marital property. In any event, the \$85,033 note was ultimately cancelled. R. 324:51-52.

T-N Company Notes Given by T.N. Jensen to Wife. Another set of transactions which Wife relies on to support her claim that marital property was used in the ranching business relates to the assignment to her and subsequent cancellation of certain notes of T-N Company originally payable to Husband's father, T.N. Jensen. In connection with a tax-plan for distribution of his estate prior to his death, T.N. Jensen assigned to Wife his interest in three promissory notes payable to him by T-N Company in the amount of \$10,000 each. R. 325:87-88; cf. R. 324:219-220.¹ Following T.N. Jensen's death in 1992, these notes were cancelled. The related book entries credited the value of the cancelled notes to the equity accounts of the T-N

¹Documentary evidence of only one of these three gifts was offered at trial. See Exhibit P-6.

Company partners equally. R. 324:51-52. Wife's testimony on direct examination by her counsel was vague as to the number and amount of these notes. She displayed no knowledge of the transaction by which the notes were canceled and credited to the partners' equity, nor any knowledge of the purposeful context of that transaction. R. 323:84.

A variety of other obligations of T-N Company were dealt with similarly upon the death of T.N. Jensen. R. 324:51-52, 90-92. There is no evidence that he assigned the T-N Company notes to Wife for any purpose other than that of facilitating the maximum tax-free disposition, year by year, of his estate. The District Court appears not to have considered and to have made no finding, nor is there record evidence to suggest, that the assignment of the notes and their subsequent cancellation was ever intended by T.N. Jensen or his heirs, or understood by Wife, to vest in her any interest in T-N Company.

Proceeds of Sale of Zions Bank Stock Transferred to T-N Company. Wife also relies in argument on a transaction by which \$65,000 in proceeds of the sale of 861 Zions Bank shares nominally held in joint tenancy by Husband and Wife was transferred to T-N Company. Her Statement of Facts fails to note, however, that these shares were not derived in whole or in part from the 750 shares, acquired in January 1988 during the course of the marriage, which were conceded by Husband and found by the District Court to be marital property and divided equally. The 861 shares sold to provide funds for T-N Company, in contrast, had the same pre-marital source as those which the Court awarded to Husband as his separate property.

R. 325:47-49, Exhibits D-20, D-21, Supplemental Findings of Fact and Conclusions of Law, ¶¶ 17, 19, R. 231.

T-N Ranches Partnership. T-N Ranches was owned equally by Husband, his two brothers and his sister. R. 325:75. No interest in the T-N Ranches property was ever held by any of the siblings' spouses, including Wife. R. 325:76. The properties which made up T-N Ranches were acquired in 1962 by Husband's parents, T.N. Jensen and Bonnie Jensen, and subsequently transferred directly to the Jensen siblings or entities in which they held an interest. Exhibit D-39.

The interests of the siblings in T-N Ranches were initially disproportionate, with Husband holding the largest share. In 1988 Wife joined Husband in executing declarations of gift transferring portions of his interest in T-N Company to his siblings. Exhibit P-12; R. 324:49-50. Husband testified that "[Wife] joined with me in making a gift of *my interest*, trying to equalize my two brothers and my sister at the request of my father." R. 325:85 (*emphasis added*). Following the death of T.N. Jensen, his remaining interest was divided equally, which left the four siblings each with a 25% interest in the T-N Ranches partnership.

Moynier Ranch Properties. The Moynier Ranch properties are held directly in the names of Husband and his brothers. Exhibits D-27, D-28. The Moynier properties were purchased from the Moynier family for \$827,675, of which \$633,437 represented credits for lands acquired by the three brothers from Husband's parents and transferred to the Moynier family or sold and the proceeds used for the purchase. The balance either had been paid by the brothers or was outstanding at the date of

trial. R. 323:142-144, 181-183, R. 325:56-61; Exhibits D-27, D-28, D-29, D-34. Husband testified that none of the consideration provided in the acquisition of the Moynier Ranch properties was derived from marital property. R. 325:59.

The Brief of Appellant asserts, without qualification, "[t]he \$25,000 down payment [for the Moynier properties] came from the parties' marital funds." *See* Brief of Appellant, p. 12, citing R. 82, 224. But this contention is without support, either in the cited pages or elsewhere in the Record.

Of the total purchase price of \$827,675 for the Moynier Ranch properties, the ultimate source of only \$148,500 is unaccounted for in the Record. Husband testified that the latter amount was paid by the Jensen brothers. R. 323:182; Exhibit D-29. There is *no* documentary evidence or testimony linking Husband's share of the \$148,500 to marital funds in the amount of \$25,000 or any other amount.

The only evidence as to the source of the Jensen siblings' payments on Moynier, including those made by Husband, is that they were made, at least in part, from "special" checking accounts set up for the siblings by their father and funded from mineral royalties or the proceeds of sale of property originating with Husband's parents. R. 323:75 and 183, R. 324:206-207. Each of the siblings had such an account, in which their spouses had no interest. R. 324:208-210.

Ranching Operations Generally. Respecting the ranching business as a whole, the testimony was undisputed that none of the siblings' spouses, including Wife, ever held an interest of record, ever participated in the making of business decisions, ever signed any document on behalf of the business, ever lent their credit to the business,

or ever otherwise participated in its operation. *See, e.g.*, R. 324:207-212, R. 325:66, 68, 70, 73, 76.

Zions Bank Shares. In addition to the ranching properties, Husband held shares of Carbon-Emery Bank prior to the marriage which, subsequent to the merger of that bank with Zions Bank in 1973, were converted into 2,126 shares of stock in Zions Bank. R. 325:43, 48. At the time of trial these shares had, by virtue of stock splits and dividend re-investments, less sales, grown to 58,352 shares. R. 325:44-45.

At Wife's request in 1985, Husband, who at that point held these Zions Bank shares in his name only, caused all of the shares to be placed in the names of both Husband and Wife in joint tenancy with rights of survivorship. The assertion at page 5 of the Brief of Appellant that Husband "conceded at trial that the stock certificates gave Wife a present interest in the stock" is false. Husband's testimony on the Record page cited in support of this claim is precisely to the contrary:

Q. At the time that these changes were made, Mr. Jensen, did you intend to give Mrs. Jensen a present interest in the Zions Bank Stock?

A. No.

R. 324:216.

The testimony of both Husband and Wife as to why he placed the Zions Bank shares in joint tenancy is consistent that he did so to satisfy Wife's desire that in the event of his early death she have immediate access to the shares. Wife's testimony on direct examination by her own counsel as to why she asked Husband to place the stock in joint tenancy was, "I just feel like isn't that what this marriage is all about.

We're both working in the same direction for the same ends." R. 323:64. But under cross-examination by counsel for Husband the following exchange occurred:

Q. Do you recall in that conversation your telling him why you wanted him to do that?

A. Well, because I felt like we are working for everything together. At that particular time I felt like it was very important, because he was gone a lot.

And I said to Jim, "If something ever happened to you, you know I – I wouldn't want to have to deal with it." And he felt that – I mean, he reassured me and said, "It's something that I should have been done anyway."

Q. Do you recall specifically saying to him, "I'm very concerned, with all of your travel, that if something happens to you –"

A. Yes. I was concerned with everything because at one point we didn't even have a will.

R. 323:128. Husband recalled perhaps five occasions over several months on which Wife asked him to put the Zions Bank shares in joint tenancy. R. 324:213-214. He testified regarding these conversations as follows:

Q. Tell the Court, if you would, please, in substance what was said by her and what was said by you in the course of these discussions?

A. She indicated to me that the stock was all in my name, and she was concerned if something happened to me, and that I was traveling, and away from home a lot, what would happen. To my stock.

Q. What [did] you respond?

A. I told her that she that she knew that we had joint wills, that if something happened to me provisions were made to take care of her and the girls through the probate of my will.

Q. Okay. Did the discussion continue or the discussions continue to the point that changes in fact were made on the names on the respective stock certificates?

A. That's correct.

Q. Will you tell us, please, why those changes were made?

....

A. Well, I just got tired of the discussion with her, and put her name on the shares of stock.

R. 324:214-216. The District Court, on this issue, found as follows:

This change [to joint tenancy] 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.

Supplemental Findings of Fact and Conclusions of Law, ¶ 18, R. 236.

2. **Facts Relating to Division of Marital Property**

Marital Property. The Memorandum Decision of the District Court includes a finding in the form of a schedule of distribution of marital property, consisting principally of the family residence, automobiles and investments and retirement accounts acquired during the course of the marriage. The Court valued the marital estate at a total sum of \$3,006,536.64, awarding to Wife an approximate two-thirds

share valued at \$2,004,736.16 and to Husband the one-third remainder, valued at \$1,001,800.48. R. 213-214.

The sole basis for awarding this disproportionate two-thirds of the marital property to Wife, consisted of the District Court's finding 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 [*sic*] estate." The Court's declared purpose in so doing was to "recognize that . . . the Defendant has had the benefit of premarital assets that are now of significant value." Supplemental Findings of Fact, ¶ 36, R. 236; *see also, Id.*, ¶¶ 14, 16; R. 227-229 (Monica Cove residence distributed to wife free of associated mortgage obligation to compensate wife for Husband's absence on ranch business). The Record contains no other finding in support of the disproportionate distribution of marital property.

3. **Facts Relating to Award of Alimony to Wife**

Included by the District Court in the two-thirds share of the marital property awarded to Wife were income-producing assets capable of generating annual income of \$85,110.84 or \$7,092.57 per month. The Court also noted that should she sell the Monica Cove residence and move to a home of value comparable to that occupied by Husband, the resulting difference of \$200,000 "could earn an additional \$15,000 per year or \$1,250 per month." Supplemental Findings of Fact and Conclusions of Law, ¶ 36, R. 326-327.

Although the District Court noted that, at a total of more than \$100,000 per year or \$8,300 per month, "the income potentially generated from the assets awarded to [Wife] would be sufficient to meet her needs," the Court nevertheless ordered Husband to pay alimony to Wife in the amount of \$4,000 per month until Husband reaches age 65, stating as its reason for so doing that "[Wife] should not be required to live off of the yield from her assets when the [Husband] would not be required to do so by reason of his separate earned income." *Id.* at ¶ 37, R. 237.

The Court further found that Husband had annual gross income of \$195,000 but made no finding as to his net income, nor did it make any finding as to Husband's own needs. *See id.*

Expenses of Wife. At trial, Wife presented a schedule of anticipated expenses totaling \$8,572 per month, including \$2,232 of residential mortgage expense and \$520 of high school tuition expense for daughter Jorja, an eighteen year-old who was in her senior year at the time of trial. R. 323:59-60, Exhibit P-2. In the course of cross-examination of Wife, counsel for Husband established that the tuition and other school expense had been paid by Husband for the balance of the year (R. 323:107 and 114), and that other of the listed expenses were inflated. *See generally*, R. 323:108-116. Following trial, but before entry of the Court's findings, Wife presented to the Court an estimate of her "future need" of \$7,652 per month. *See Plaintiff's Post-Trial Brief*, p. 17, R. 124.

During the pendency of the divorce proceeding Husband paid to Wife agreed temporary alimony in the amount of \$6,000 per month, which included funds

sufficient to make the monthly mortgage payments of \$2,207 on the Monica Cove residence, to make a \$700 per month payment on the Spring Glen home and to provide for the needs of daughter Jorja, leaving a net amount used for living expenses of \$2,947 per month.² R. 323:29-30, 100-101. Although she testified that she had borrowed unspecified amounts from her brother, Wife conceded, in effect, that the temporary alimony had been sufficient for her needs. Her testimony was:

Q. . . . Of the \$6,000 you received and then we deducted these [mortgage] payments, the balance of about \$2,900 or \$3,000 a month was what you used to support yourself and Jorja?

A. Yes. That was gone in the rest of the utilities bills and gas bills.

Q. Okay. But you didn't have any funds for the support of Jorja other than those amounts for the last 18 months, have you?

A. No.

R. 323:101-102.

The Record contains no other evidence bearing on Wife's need following the divorce, and the Court made no finding as to wife's need.

Wife's Earning Capacity. Although wife did not work outside the home while the children were small, from 1985-1990 she was employed in Husband's law office

²The Spring Glen home was sold prior to the divorce, and the District Court awarded the Monica Cove residence to Wife but required Husband to assume the mortgage obligations. See Supplemental Findings of Fact, ¶ 37, R. 235-236.

in a clerical capacity, performing word processing, filing and receptionist duties. Husband testified that she was a "very good" employee. R. 324:195-197. Wife testified that she is qualified for part- or full-time employment as a receptionist. R. 323:55. No evidence was offered as to Wife's likely earnings were she to find employment, and the District Court made no finding in that regard.

Income and Expenses of Husband. There was some disagreement as to Husband's disposable annual income. His own calculation, based on actual 1997 data, was \$11,893 per month [or $12 \times \$11,893 = \$142,716$ annually]. R. 324:229-237, R. 325:91; Exhibit D-7. Wife's expert, Dean Smith, calculated that Husband's "cash flow," based on 1995 income and expense as shown in the parties' tax return, was \$181,525 for that year [or $\$181,525 \div 12 = \$15,127$ per month]. R. 324:53-56; Exhibit P-5. Husband's expenses, net of alimony and child support, were shown at trial to be \$10,852. R. 324:239-249, R. 325:91-92; Exhibit D-9.

SUMMARY OF ARGUMENT

First Issue on Cross-Appeal. Utah standards for the exercise of equitable discretion in divorce presume that marital property will be divided equally and require the trial court to justify a departure from that presumption by a finding of exceptional circumstances and needs. The District Court made no such finding in this case. It is clearly possible that the Court was moved by a desire to compensate Wife for the award to Husband of his substantial interest in the Jensen family ranching business as his separate property. If so, that circumstance was improperly considered,

since the distribution to a party of his separate property is required under Utah case law to be determined independent of and prior to the division of marital property. It is also possible that the Court wished to compensate Wife for Husband's failure to spend two full weekend days with his family, rather than spending one or both of them working on the ranch. But that fact, had the Court entered a finding identifying it as the relevant consideration (which it did not), fails to meet the standards established by Utah case law for the required "exceptional circumstances".

Second Issue on Cross-Appeal. Under Utah law, alimony is in its essence remedial, awarded for the purpose of closing the gap between need and earning capacity. It is thus error to award alimony to one capable of meeting individual needs from individual income. The District Court's award of alimony to Wife in the amount of \$4,000 per month cannot therefore be sustained in light of the clear and undisputed evidence that marital property awarded to her included property capable of providing her with an income of \$100,000 per year against her maximum claimed need of only \$92,000 per year. Moreover, the Court failed to make the required findings as to the respective needs of both Wife and Husband and as to his ability to pay. Under these circumstances, the Court's alimony award represents a clear and prejudicial abuse of discretion and must be reversed.

Reply to Appellant's First Issue. Wife asserts a claim to an equal share of 58,532 shares of Zions Bank stock which the Court awarded to Husband as his separate property, finding them to be a gift from his parents antedating the marriage. Wife contends that by placing the shares in joint tenancy at her request, husband

effectively transferred to her a present interest in the shares, and that they thereby became marital property. Neither the evidence nor the law supports her claim. Both Husband and Wife testified that she asked for the shares to be placed in joint tenancy at a time when Husband was engaged in frequent travel, so as to give her orderly and immediate access to the shares in the event of his untimely death. The Record provides no evidence of any other coherent purpose on the part of either spouse. The case law cited by Wife is either inapposite on the facts, dealing with challenges to joint tenancy brought by strangers to its creation, has been rejected by the Utah courts, or stands for the contrary of the position she argues. Moreover, the Brief of Appellant fails to marshal the facts in support of the challenged finding of the District Court awarding the shares to Husband.

Reply to Appellant's Second Issue. Finally, Wife's claim to an interest in the Jensen family ranching business rests on the argument that occasional social visits to the ranch during which she prepared meals for friends, together with various paper transactions supposed by her to involve commingling of marital assets with the ranching business, transactions of which neither she nor her counsel appears to have understood the underlying economic reality, somehow converted her Husband's interest in the ranching business into marital property. There is no evidence that any of these transactions involved marital property. The Malpaso loan transaction upon which she relies certainly did not involve marital funds, as she claims, and probably did not involve a transfer of funds of any kind, according to the testimony of her own expert. Similarly, three \$10,000 promissory notes gifted to her by Husband's father

and subsequently canceled were clearly her separate property. Therefore, even if the notes represented a transfer of actual funds, again, her expert thought not, they were obviously not marital funds. Another transaction upon which she relies, the sale by Husband of Zions Bank shares and the contribution of the \$65,000 proceeds to the ranching business, clearly involved a contribution of *his* separate property, not a commingling of marital property as she claims. Nor is there any evidence that Husband used marital funds to acquire any part of the Moynier ranch properties. Moreover, Wife again fails to marshal the evidence in support of the challenged finding that the ranch properties were the separate property of husband. And, in any case, the evidence she cites for her claim falls far short of that “clear and convincing” quantum necessary to justify this Court in setting aside the finding of the District Court.

ARGUMENT

In disregard of the settled practice of Utah trial courts and the rules laid down by Utah appellate courts for the orderly exercise of equitable discretion in divorce proceedings, the District Court, in the absence of supporting findings, awarded Wife a disproportionate two-thirds share of the marital estate. Also without necessary supporting findings as to the parties’ respective needs or Husband’s ability to pay, the Court awarded Wife alimony of \$4,000 per month, contrary to its own determination that receipts from income-producing property awarded to her, even with no earnings imputed to her from employment, were sufficient to meet her needs.

Wife, not satisfied with these windfalls, would now have this Court compound the error below by awarding to her significant property found by the District Court to be the separate property of Husband. In seeking this further advantage, the Brief of Appellant misrepresents the Record, omits to marshal the facts supporting the challenged findings, resorts to exquisite technicalities, eschews the applicable law set forth by the appellate courts of Utah (citing instead cases from other jurisdictions clearly distinguishable on their facts), and ignores the clear weight of the evidence.

General Principles for Awarding Property and Alimony in Divorce. It is perhaps well, before proceeding to the issue-specific arguments which follow, to restate briefly the general principles laid down by the appellate courts of Utah for resolving issues of property and alimony in divorce cases. Often, the cases take the form of commentary on Utah Code Ann. § 30-3-5(1)³, which provides that “[w]hen a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. . . .” Utah Code Ann. § 30-3-5(1) (1999). This statutory language confers “broad discretion upon trial courts in the division of property, regardless of its source or time of acquisition” to be exercised in a manner which “best serves the needs of the parties and best permits them to pursue their separate lives.” *Burke v. Burke*, 733 P.2d 133, 134-35 (Utah 1987) (citations omitted).

³(various revisions. the most current being that of 1999)

In its instructions to the trial court on remand, this Court in *Burt v. Burt*, 799 P.2d 1166, 1172 (Utah Ct. App. 1990), prescribed a “systematic approach” for exercising its discretion in awarding property and fixing alimony in divorce cases:

[T]he court should first properly categorize the parties’ property as part of the marital estate or as the separate property of one or the other. Each party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property. But rather than simply enter such a decree, the court should then consider the existence of exceptional circumstances and, if any be shown, proceed to effect an equitable distribution in light of those circumstances and in conformity with our decision. That having been done, the final step is to consider whether, following appropriate division of the property, one party or the other is entitled to alimony.

Id., n.10; *accord*, *Hall v. Hall*, 858 P.2d 1018, 1022 (Utah Ct. App. 1993).

Once the trial court has rendered its decision on the factual issues relating to property division and alimony, an appellate court will uphold that division “unless a clear and prejudicial abuse of discretion is demonstrated.” *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991); *Bradford v. DeMita*, 1999 UT App. 373, ¶ 12, 384 Utah Adv. 26; *cf. Thomas v. Thomas*, 1999 UT App 239, ¶ 12, 987 P.2d 603. (trial court’s discretion must be exercised within “appropriate” legal standards). Moreover, the trial court abuses its discretion unless it enters specific and detailed findings in support of its decision, which must be “sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” *Hall*, 858 P.2d at 1021 (Ut. Ct. App. 1993) (citations omitted) (quotation marks in original).

An appellate court “is not entitled to substitute its judgment for that of the trial court except in the extraordinary circumstance of a ‘manifest injustice.’” *Reese v.*

Reese, 1999 UT 75, ¶ 10, 984 P.2d 987 (citations omitted) (quotation marks in original). In reviewing a challenge to the trial court's findings of fact, appellate courts give due regard to the opportunity of the trial court to judge the credibility of the witnesses and do not set aside a challenged finding unless it is clearly erroneous. *See Schaumberg v. Schaumberg*, 875 P.2d 598, 603 (Utah Ct App. 1994); *Yelderman v. Yelderman*, 669 P.2d 406, 408 (Utah 1983) (holding the weight and credibility of testimony and other evidence is a matter for the trier of fact).

This Court has stated the obligations of a party seeking review of a trial court's findings of fact as follows:

To successfully challenge a trial court's findings of fact on appeal, [a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence. . . . "[T]he challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists.

Johnson v. Higley, 977 P.2d 1209, *on rehrg. opinion replaced by*, 989 P.2d 61, 366 Utah Adv. 9, 379 Utah Adv. 9 (Utah Ct. App. 1999) (citations omitted) (quotation marks in original); *Schaumberg*, 87 P.2d at 603 (denying husband's appeal of determination that business building was marital property where husband found not to have marshaled evidence supporting challenged finding that marital funds were used to maintain and improve the building).

Virtually every one of the foregoing principles is violated by Appellant in her Brief.

CROSS APPEAL POINT I.

THE DISTRICT COURT ERRED IN AWARDING WIFE A DISPROPORTIONATE TWO-THIRDS SHARE OF THE MARITAL ESTATE.

In its disproportionate award of marital property, the District Court disregarded the orderly procedure mandated by this Court in *Burt*, which requires that property be first classified as separate property or marital property and which then presumes that the parties will be awarded the entirety of their separate property and one-half of the marital property absent some showing of "exceptional circumstances". The District Court made no finding of such exceptional circumstances, nor did it otherwise identify equitable considerations adequate to support its lopsided distribution of the marital property with its punitive impact on Husband.

Findings by the District Court. In its Supplemental Findings of Fact and Conclusions of Law, the District Court, after excluding Husband's partnership interests in the ranching business and those shares of Zions Bank stock which it found to be separate property of the Husband, determined that approximately \$3 million in asset value was appropriately classified as marital property. Of this amount, the Court awarded \$2 million in value to Wife and \$1 million in value to Husband. See Supplemental Findings of Fact and Conclusions of Law, ¶ 36, R. 236. The assets which the Court determined to be marital property consisted principally of the Monica Cove residence, Zions Bank shares acquired during the marriage with marital funds, automobiles, various retirement and pension accounts and miscellaneous personal property. The Court's distribution of these assets was essentially equal with the exception of the Monica Cove residence, which the Court awarded wholly to

wife, and the associated mortgage obligations, which the Court assigned solely to Husband. See Memorandum Decision, 17-19, R. 212-214.⁴

The Court found, without further explanation or specific supporting findings, that "it is fair, just and equitable for [Husband] to hold [Wife] harmless from" the mortgage obligations on the Monica Cove residence. In a separate finding, the Court then awarded the residence itself to Wife with no other finding or reason than the conclusory statement, "pursuant to its general equitable powers . . . certain assets should not be divided equally between the parties even though they [are marital property]," coupled with the observation that "the Court recognizes that in so doing [Husband] had the benefit of premarital assets that are now of significant value." Supplemental Findings of Fact and Conclusions of Law, ¶ 36, R. 236. This finding *may* in turn relate, though the connection is never made explicit, to the Court's earlier finding that Husband "took weekend time away from the family to work on the [ranch] properties" and that the allocation to Wife of "commingled" property (the Monica Cove residence was acquired with the proceeds of sale of a pre-marital business interest of Husband and was the only asset explicitly identified by the Court as commingled) was therefore "equitable." *Id.* at ¶¶ 14, 16, R. 227-228.

Marshaled Facts Supporting Findings. The totality of the marshaled evidence which *might* support the disproportionate distribution of marital property therefore comes down to this:

⁴Had the Court equally divided the equity in the Monica Cove residence, the overall division of marital property would then have been approximately equal.

- (i) Husband's weekend work on the ranch took time away from his family, and
- (ii) Wife did not receive any interest in the ranch, which the Court found to be Husband's separate property.

These two facts at most, and these alone, constitute the predicate for the feeble conclusory finding that it was therefore equitable to compensate Wife by giving her two-thirds of the \$3 million marital property.

Argument. Utah law rebuttably presumes that marital property will be divided equally. "Each party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property." *Naranjo v. Naranjo*, 751 P.2d 1144, 1146 (Utah Ct. App. 1988); *accord*, *Hall v. Hall*, 858 P.2d 1018, 1022 (Utah Ct. App. 1993) (explaining once a court makes a finding that a specific item is marital property, the law presumes that it will be shared equally between the parties unless unusual circumstances, memorialized in adequate findings, require otherwise). In the exercise of its "broad equitable powers," however, "[a] trial court may elect to distribute marital property unequally when the circumstances and needs of the parties dictate a departure from the general rule" *Bradford v. DeMita*, 1999 UT App 373 ¶ 12, 384 Utah Adv. 26 (citations omitted).

In *Thomas*, 1999 UT App., ¶¶ 23, 24 "[e]xceptional circumstances, memorialized in commendably detailed findings, justified departure from the general rule that each party is entitled to fifty percent of the marital property" where the trial court found that sale of a marital home would have forced husband to move from the area and lose his employment. *See Thomas*, ¶¶ 23 and 24. In contrast, no such

exceptional circumstances were found in two cases where the relevant facts are much closer to those involved here. In *Finlayson v. Finlayson*, 874 P.2d 843, 849 (Utah Ct. App. 1994), no exceptional circumstances existed where both spouses had the ability to support themselves; and the trial court's award of the predominant share of liquid assets to Husband to permit him to discharge a debt was held to be error in the absence of findings sufficient to establish a valid marital debt. And in *Hall*, this Court found error in the trial court's unequal distribution of equity in the marital home in the absence of any finding that the basis for the inequality was wife's lack of work experience and need to care for two autistic children. "The trial court made no findings as to any exceptional circumstances which took this case out of the presumptive rule of *Burt*." *Hall*, 858 P.2d at 1023. So it is here.

In this case, the District Court's conclusory finding that "pursuant to its general equitable powers . . . certain assets should not be divided equally," even if tenuously coupled with the award of the ranch properties to Husband and the finding that Husband's work on the ranch required "weekend time away from the family", is similarly inadequate to show exceptional "circumstances and needs" of Wife which would "dictate a departure from the general rule" of equal distribution of marital property. See *Bradford*, 1999 UT App 373 ¶ 26, 384 Utah Adv. 26. It is unclear, and the District Court made no attempt to explain, why Husband's weekend work on the ranch could have created some persisting and current exceptional circumstance or need of Wife which could be compensated for with an interest in the ranch properties.

What the Court did here is clearly violative of the foundational principle, embodied in a long line of cases stretching from *Burt* and *Hall* to *Bradford*, that

identification and award of the parties' separate properties must be independent of, and must precede, the division of marital property. This Court cannot allow a trial court to disregard that principle, in the absence of explicit findings of extraordinary circumstance and need, without introducing ongoing doubt and uncertainty into our jurisprudence. To do so would severely limit the ability of the bar to provide reliable advice to clients contemplating divorce. And it would invite a flood of future appeals based upon little more than the desire of a marginally disappointed spouse to obtain at the hands of this Court the advantage he or she was denied at trial.

For the Court to justify the disproportionate division of the Jensen's marital estate on the ground that it had already awarded to Husband separate property, to which he was clearly entitled as a matter of law and that is "now of significant value" is a clear and prejudicial abuse of discretion and should be reversed. See Supplemental Findings of Fact and Conclusions of Law, ¶ 36, R. 236

CROSS-APPEAL POINT II.

THE DISTRICT COURT ERRED IN AWARDING WIFE ALIMONY OF \$4,000 PER MONTH.

Findings by the District Court. After concluding that Wife might expect to realize as much as \$100,000 annually, or \$8,300 per month, from income-producing property awarded to her, the District Court inexplicably then proceeded to award her alimony of \$4,000 per month. The Court did so without entering any findings as to the ongoing needs of either Wife or Husband. Moreover, as to Husband's ability to pay, the Court found only that Husband had been paying \$6,000 per month of temporary alimony, that Wife had been paying from that amount the mortgage

obligations on the Monica Cove residence totaling approximately \$2,200, that Husband would now make the mortgage payments, and that Husband had "gross income" of \$190,000 per year or \$16,250 per month. From these limited and incomplete findings the Court concluded that Husband could pay alimony of \$4,000 per month and that it was "fair, just and equitable" that he do so. See Supplemental Findings of Fact and Conclusions of Law, ¶¶ 36, 37, R. 236-237.

Marshaled Evidence in Support of Finding. The evidence which may be marshaled in support of this conclusory finding consists of the following:

- (i) Although the Court made no determination in this regard, and although Husband's counsel developed evidence suggesting artificial inflation of the claimed expenses, the *maximum* amount of monthly expense which Wife claimed to anticipate following the divorce was \$7,652 per month.⁵ See Plaintiff's Post-Trial Brief, 17, R. 124.
- (ii) Although there was some disagreement as to Husband's disposable annual income, the Court could have concluded from a schedule created by Wife's expert, Dean Smith, that Husband's "after tax cash flow", based on 1995 income and expense as shown in the parties' tax return, was \$181,525 for that year, or \$15,127 per month. The Court's actual finding of \$190,000 may have been based on Husband's \$191,898 of "adjusted gross

⁵It is unclear whether this amount includes income taxes payable by Wife; Exhibit C to the Post-trial Brief, containing the detail, is missing from the Record.

income” taken from the same schedule. R. 324:53-56; Exhibit P-5.

- (iii) Husband’s expenses, net of alimony and child support, were shown at trial to be \$10,852 per month. R. 324:239-249, R. 325:91-92; Exhibit D-9.
- (iv) During the pendency of the divorce proceeding, Husband voluntarily paid Wife temporary alimony of \$6,000 per month, from which Wife paid the mortgage obligations on the Monica Cove and Spring Glen residences. The Spring Glen residence was sold by Husband and Wife during the pendency of the divorce proceedings, thereby relieving Wife from the \$700 per month payment required thereon.
- (v) The District Court stated as its reason for awarding alimony to Wife that “[Wife] should not be required to live off of the yield from her assets when the [Husband] would not be required to do so by reason of his separate earned income.” *Id.* at ¶ 37, R. 237.

From these marshaled facts, and *without taking into account either the wife’s earning capacity or amounts received from income-producing properties* awarded to her, it was *possible* for the Court to conclude that Husband had net income of \$15,127 per month which was sufficient to pay both his expenses of \$10,852 and alimony to wife of \$4,000 with a \$275 margin to spare. The Court, however, entered no finding to that effect.

Argument. Husband recognizes and accepts the general principle, articulated by this Court in *Childs v. Childs*, 967 P.2d 942 (Utah Ct. App. 1998), that

Trial courts have broad discretion in making alimony awards. Therefore, we will not disturb a trial court's alimony award so long as the trial court exercised its discretion within the appropriate legal standards and 'supported its decision with adequate findings and conclusions'

Id. at 946. (citations omitted) (quotations marks in original). In this case, however, the trial court neither applied "appropriate legal standards" nor did it support its decision with the required findings.

The legal standards applicable to alimony begin with the principle that "[t]he general purpose of alimony is to prevent the receiving spouse from becoming a public charge and to maintain to the extent possible the standard of living enjoyed during the marriage." *Schaumberg v. Schaumberg*, 875 P.2d 598, 601 (Utah Ct. App. 1994) (citations omitted). Alimony is thus remedial, rather than punitive, in character. This, in turn, requires that the trial court make specific findings as to "(1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to support him or herself; and (3) the ability of the payor spouse to provide support." *Breinholt v. Breinholt*, 905 P.2d 877, 880 (Utah Ct. App. 1995) (citations omitted) (matter quoted in original).

The Utah Supreme Court has held that "where the income from the assets awarded to the plaintiff is sufficient to maintain her in the manner to which she is accustomed without periodic payments from the defendant," an award of substantial alimony is error. *See Dubois v. Dubois*, 504 P.2d 1380, 1381 (Utah 1973). Similarly, alimony was held not to be an appropriate means of adjusting a disparity between the

income of the parties where the wife to whom it was awarded had "substantial accumulated wealth and monthly income" which permitted her "a standard of living comparable to what she enjoyed during the marriage." *Burt v. Burt*, 799 P.2d 1166, 1171 (Utah Ct. App. 1990).

The facts developed in the Record of this matter fall into a similar pattern. The Court found, and wife does not appear to dispute, that her receipts from the income-producing property awarded to her are sufficient without more to meet her needs. She did not claim, and the Court made no finding, that such an amount would be insufficient to maintain the standard of living to which she was accustomed. The Court did not even consider her personal earning capacity, although the evidence was that she had developed a useful level of office skills and was a "very good employee." R. 324:195-197.

On these facts, it was supererogatory and a clear and prejudicial abuse of discretion for the Court to award her alimony in any amount, certainly at the level of \$4,000 per month, a punitive imposition on Husband without any demonstration of offsetting need on the part of Wife. The Court's stated reason for so doing, that "[Wife] should not be required to live off of the yield from her assets when the [Husband] would not be required to do so by reason of his separate earned income," is without foundation in relevant Utah case law and is at odds with the concept of alimony as a remedial rather than a punitive device.

Moreover, even if the Record evidence were sufficient to support an award of alimony in some amount to wife, the District Court failed to enter findings sufficient to enable this Court to evaluate the appropriateness of the award. In determining

alimony, Utah trial courts are required to consider and make specific findings regarding the needs of both spouses and the ability of the paying spouse. *See Breinholt*, 905 P.2d at 880. Of the three matters so required to be considered, the District Court entered findings of any degree only with respect to the third, the ability of the payor spouse to make the required payment, and that, mistakenly, a finding of gross income rather than disposable net.

The award of alimony to wife was, therefore, clear and prejudicial error and cannot stand.

REPLY TO APPELLANT'S POINT I.

WIFE IS NOT ENTITLED TO ONE-HALF OF THE ZIONS BANK SHARES AWARDED TO HUSBAND AS HIS SEPARATE PROPERTY.

Separate Property. The principles are well known which govern property brought into a marriage by gift to, or inheritance by, one of the parties. "As a general rule, equity requires that each party retain the separate property he or she brought into the marriage." *Haumont v. Haumont*, 793 P.2d 421, 424 (Utah Ct. App. 1990). Stating the matter more fully, the Utah Supreme Court has said,

[T]rial courts making 'equitable' property division pursuant to section 30-3-5 should . . . generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation in its value, unless (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.

Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988) (citations omitted). In accordance with these principles, the District Court determined that the 2,126 shares

of Zions Bank stock which husband had brought with him into the marriage, and which had thereafter, by virtue of stock splits and dividend re-investments, less sales, grown to 58,352 shares, were the separate property of Husband.

Wife does not dispute that, on these facts alone, the 58,352 shares were Husband's separate property. She contends, however, that Husband's subsequent placing of the shares in joint tenancy at her request had the effect of conveying to her a present interest, thereby rendering the shares marital property.

In support of this contention, the Brief of Appellant somewhat confusingly argues that the creation of the joint tenancy operated to confer upon Wife a present interest as a matter of law, subject to a "correctness" standard of review, but then proceeds to argue the factual issue of the parties' intent in creating the joint tenancy. Without marshaling the evidence in favor of the trial court's finding that the shares remained the separate property of Husband notwithstanding the conveyance into joint tenancy, her brief then further confounds the analysis by failing to make critical distinctions between cases where the joint tenancy is at issue as between the joint tenants and those cases where the action is brought by a third party. A final source of confusion is the use of precedent from other jurisdictions which has been specifically rejected in Utah and citation of Utah cases for their dicta "sound-bites" rather than for their holdings.

Facts. Before examining the case law, it is important to be clear as to the Record facts, including the testimony of Wife which parallels that of Husband as to the purpose of placing the shares in joint tenancy. In support of her claim that Husband placed the 58,352 shares in joint tenancy with the intent of conveying a

present interest, her brief emphasizes Wife's testimony that she asked Husband to place the shares in joint tenancy because, "I just feel like isn't that what this marriage is all about. We're both working in the same direction for the same ends." See Brief of Appellant, p. 5, (*citing* R. 323:64). But the brief fails to quote her further testimony that she raised the issue with Husband because of her concerns about the fate of the shares in the event of his untimely death. "At that particular time I felt like it was very important, because he was gone a lot. And I said to Jim, '[i]f something ever happened to you, you know I - I wouldn't want to have to deal with it.'" R. 323:128.

When that testimony is included, the testimony of both parties as to the limited purpose for which Husband placed the shares in joint tenancy is entirely consistent. It was Husband's corroborating testimony that "[s]he indicated to me that the stock was all in my name, and she was concerned if something happened to me, and that I was traveling, and away from home a lot, what would happen. To my stock." R. 324:214-216. The assertion in the Brief of Appellant that "Husband's only evidence that no present interest was intended was his own self-serving statement made years after the fact" is thus plainly false.

The Brief of Appellant not only omits to note the simple and compelling consistency of the testimony of the two parties, but further obscures the facts by imputing to Husband a desire to conceal from Wife his "secret" intention to convey less than a present interest in the shares, a motive for which there is not a scrap of evidence in the Record, and for which her brief cites none, and by indulging in an irrelevant disquisition on the fiduciary duties owed between spouses. *See Pierce v.*

Pierce, 386 Utah Adv. Rep. 38, ¶¶ 18-22. One might as well conclude that, since Wife communicated to Husband no other reason for requesting that he place the shares in joint tenancy than fear of his untimely death, she thereby concealed *her* secret intention to acquire a present interest in the shares in breach of her fiduciary duty to him!

But none of this artful dodging matters, because **Husband** gave Wife precisely what *she* asked for, a conveyance in joint tenancy for the limited purpose of providing protection against the possibility of Husband's untimely death. That was *her* idea. Even in the course of testimony elicited by her own friendly counsel Wife was unable to identify any other coherent reason for her request than the vague "I just feel like isn't that what this marriage is all about. We're both working in the same direction for the same ends." R. 323:64. Had the Court, hearing this nebulous formulation in its larger context, believed that Wife actually meant to say something like "I wanted a present interest in my husband's shares," the Court could have so found. It did not. Had there been *any* evidence that she sought a present interest in the shares or that Husband engaged in concealment of expert or superior knowledge to prevent that result, the Court could have found that as well, but did not. And the Court did not because there was nothing before it to support either of those extravagant propositions. But the Brief of Appellant asserts them as fact and from them then bootstraps her entire argument.

The District Court, having heard the testimony of both parties, including the inconvenient facts not marshaled by Wife in her brief, and having weighed the credibility of the witnesses, found as follows:

This change [the placing of the shares in joint tenancy] 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.

Supplemental Findings of Fact and Conclusions of Law ¶ 18, R. 230-231. That finding is entitled to the deference owed by an appellate court to the trial court that heard the witnesses, whose determination it will not set aside unless clearly erroneous. *See Schaumberg v. Schaumberg*, 875 P.2d 598 (Ut. Ct. App. 1994); *Yelderman v. Yelderman*, 669 P.2d 406 (Utah 1983).

The Brief of Appellant relies in part upon California and Arizona case law to the effect that creation of joint tenancy confers a present interest as a matter of law and that the intention of the parties is irrelevant. But those cases all derive from the same California jurisprudence, a community property state, in particular the California case of *Kennedy v. McMurray*, 169 Cal. 287, 146 P. 647 (Cal. 1915), and its subsequent statutory incarnation, which was expressly rejected by the Utah Supreme Court in *Neill v. Royce*, 120 P.2d 327, 329 (Utah 1941). Those foreign cases may therefore be ignored.

More interesting are the Utah cases cited in the Brief of Appellant, though less for the general and commonly accepted principle espoused, that joint tenancy creates a rebuttable presumption of a present interest, than for what their facts tell us about how that presumption may be overcome in the view of the Utah courts.

The earliest of these cases of interest, *Neill v. Royce*, the case which first adumbrates the subsequently articulated Utah rule that creation of a joint tenancy creates a rebuttable presumption, is inapposite on its facts: the challenge to the joint tenancy was brought by an intervenor not a party to the joint tenancy, after the death

of one of the joint tenants; and the opinion reflects and rests upon the solicitude of the Court that third parties not be exposed to collusive fraud by joint tenants. See *Neill*, 120 P.2d at 328-29. It does not speak to the burden of proof as between the joint tenants themselves. It is thus cited in error by Appellant in the context of this case for the proposition that “the parties’ [i.e., the joint tenants’ own] statements of their intention were insufficient to satisfy the requirement of clear and convincing proof.”

The Brief of Appellant completely misreads the case of *Greener v. Greener*, 212 P.2d 194 (Utah 1949), citing it in support of the same proposition. That case found, notwithstanding diametrically opposing testimony from the joint tenants as to the purpose for which the joint tenancy was created, that *as between the living joint tenants*, the presumption could be overcome even by circumstantial evidence that the wife did not intend to convey a present interest to the husband when she placed her pre-existing separate funds in joint accounts. On that basis, the *Greener* court affirmed a finding by the trial court that is the precise equivalent of the finding of the District Court in this case. See *Greener*, 121 P.2d at 206. The evidence supporting the decision here is, indeed, not circumstantial as it was in *Greener*, but much more compelling, consisting of parallel and reciprocally corroborative testimony of both parties as to the purpose of the joint tenancy.

The “recent” cases cited by Appellant to buttress its arguments are clearly distinguishable on their facts. *In re Estate of Ashton*, 898 P.2d 824 (Utah Ct. App. 1995), was a contest not between the joint tenants, but between one of them and the heirs of the other, and went off on considerations of the propriety of a finding based

on the deceased grantor's intent as expressed in his will rather than his intent at the time of creating the joint tenancy. *See id.* at 826. *Ashton* does not, and could not, address the sufficiency of evidence to overcome the burden of joint tenancy as between the joint tenants themselves. *See Continental Bank & Trust Co. v. Kimball*, 442 P.2d 472 (Utah 1968), also involved a claim asserted by a third party where one of the joint tenants was dead, as did *McCullough v. Wasserback*, 518 P.2d 691 (Utah 1974).

Moreover, Appellant fails in her duty to apprise this Court of a more recent case which significantly weakens the argument in favor of Wife, *Jespersion v. Jespersen*, 610 P.2d 326 (Utah 1980). In that case the husband disputed the award to wife of some \$19,000 which represented the value of a mobile home which she had brought into the marriage and subsequently placed in joint tenancy. In doing so, the Court commented that, "[a]lthough the home was held in joint tenancy, that is not conclusive that a gift has been made" and affirmed the trial court's finding that "there was no intention by Plaintiff to create a one-half property interest in Defendant." *Id.* at 328.

In short, the Brief of Appellant cites *no* Utah case which on its facts supports the arguments advanced. And it misreads one of the two Utah cases which support the finding of the District Court, *Greener*, and ignores the other, *Jespersion*. Appellant's law on this issue is no better than Appellant's facts. The finding of the District Court is supported by competent evidence in the Record, conforms to the requirements of Utah law, and should be affirmed.

REPLY TO APPELLANT'S POINT II.

WIFE IS NOT ENTITLED TO ONE-HALF OF HUSBAND'S INTEREST IN THE RANCHING BUSINESS, AWARDED TO HUSBAND AS HIS SEPARATE PROPERTY.

After an exhaustive review of largely uncontroverted evidence showing that Husband had received essentially all of his interest in the Jensen family ranching business by gift or inheritance from his parents, and consistent with the rules laid down in *Mortensen*, the District Court awarded his interest in the business to Husband, finding 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." Supplemental Findings of Fact and Conclusions of Law, ¶ 13, R. 227. Wife now seeks to have Husband's interest in the ranching business and associated properties included in the marital estate, arguing, again within the framework prescribed by *Mortensen*, that Husband's interest in the ranching business had become commingled with marital property and that she had expended efforts in connection with the business which confer upon her an interest cognizable in equity. The issue is thus one purely of fact: Did she or did she not do significant work on the properties? Was marital property commingled with the ranching business or was it not?

Failure to Marshal Facts. Wife's argument thus goes to the sufficiency of the facts supporting the District Court's findings. Under the rules laid down by the appellate courts of Utah, she is therefore required to marshal the evidence in support of the findings and then to show, notwithstanding that evidence, that the findings are against the clear weight of the evidence. She "must present, in comprehensive and

fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings [she] resists." *Johnson v. Higley*, 1999 UT App. 278, ¶36. This she has completely failed to do.

Wife makes a series of incomplete factual assertions in support of her claim to an interest in the ranching business. For a full statement of the material facts relating to these claims, however, see "Facts Relating to Award of Separate Property to Husband," *supra*, pp. 2-10. A full review of those facts demonstrates the following:

Wife made no material contribution of time or effort to the ranching business.

There is no evidence to support the claim at page 9 of the Brief of Appellant that Wife "often" accompanied Husband to the ranch or that she performed "maintenance duties" while there. Her visits were as few as ten in number over a period of 27 years and her only work identified in the Record was cooking meals for guests on what appear to have been primarily social, rather than working, visits. Such is the entirety of the evidence to support her claim of having devoted significant time and effort to the ranching business.

Thus, by no stretch either of the imagination or of equitable indulgence can Wife's claimed efforts on behalf of the ranching business be deemed sufficient to meet her burden of demonstrating by clear and convincing evidence that the District Court erred in finding that she "went very infrequently to the [ranch] properties and there was no evidence that she augmented, maintained or protected the properties." Supplemental Findings of Fact and Conclusions of Law, ¶ 14, R. 227.

Neither the \$85,000 T-N Company note to Malpaso nor three \$10,000 notes gifted to Wife by Husband's father involved any commingling of marital property in

the ranching business. Wife would have this Court believe that Malpaso Corporation, an entity in which Wife held no interest of record, loaned \$85,000 of *marital* funds to T-N Company, the operating entity of the Jensen family ranching business. Appellant's argument requires that she demonstrate that (i) an actual transfer of marital funds was made from Malpaso to T-N Company and that either (ii) Malpaso itself was marital property or (iii) the funds loaned by Malpaso to T-N Company were marital funds.

But Wife demonstrates none of those three propositions with credible evidence from the Record. The only evidence on the subject of whether Malpaso made an actual fund transfer in the amount of \$85,000 to T-N Company is the testimony to the contrary of Wife's own expert, who said that he didn't think "there ever was a cash transaction." R. 324:91-92. Wife's Statement of Fact leaps to the argumentative conclusion that since Malpaso was formed during the marriage, it was "for that reason clearly a marital asset even though the stock was in Husband's name." Brief of Appellant, p. 10. Again she cites no law in support of that self-proclaimed principle. And the Record contains no evidence, nor does Wife cite any, that marital funds or property were ever provided to Malpaso, either as part of the initial capitalization of Malpaso or in the form of a subsequent transfer.

The claim of Wife that "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" appears to have been confected out of whole cloth, no such evidence appearing in the Record. The citation provided in the Brief of Appellant in support

of this claim refers not to the evidentiary Record at all but to a page in Wife's Post-Trial Brief. The page cited is undocumented and does not, in any case, support the contention made in the Brief of Appellant for which it is cited. See Brief of Appellant, p. 10, R. 118.

She also claims, long after the fact, that three \$10,000 notes of T-N Company payable to Husband's father, T.N. Jensen, gifted by him to Wife, and (like the Malpaso note) subsequently canceled without any actual cash transaction, somehow required that the District Court award her an interest in the ranching business. Clearly, if the three notes had any real value at all (as distinguished from their value to T.N. Jensen as a means of tax avoidance), they were Wife's *separate* property. The appropriate time for her to assert her claim, if any, was when the notes were not paid according to their terms but canceled and credited to the Jensen brothers equity accounts. If she can find a way around the statute of limitations (the notes were canceled in 1993), she can still bring that claim against T-N Company in a legal proceeding to which it is a party. But she cannot claim that the cancellation of the notes by T-N Company represented a commingling of marital property, because the notes were hers and hers alone.

Thus, upon scrutiny, these note transactions reveal themselves as something other than the characterization urged in the Brief of Appellant. Whatever the reality of these transactions, there is no evidence of commingling of marital property with the ranching business; and the fragmentary facts adduced by Wife for that purpose fail the test of clear and convincing evidence sufficient to overcome the District Court's finding 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.” Supplemental Findings of Fact and Conclusions of Law, ¶ 10, R. 223.

The \$65,000 contributed by Husband to T-N Company represented proceeds of the sale of Zions Bank shares which were the separate property of Husband. We have already seen that Husband held a large block of Zions Bank shares which he originally received by gift from his parents, of which 58,352 shares remained in his hands at the time of the divorce. Husband and Wife acquired with marital funds additional shares which had grown to 30,141 shares at the time of the divorce. Wife’s claim that a sale of 861 shares and the contribution of the \$65,000 proceeds of sale to T-N Company effected a commingling of marital property in the ranching business thus requires her to show that the 861 shares came from the shares which were purchased with marital funds. She has not done so. Indeed, it is apparent that she cannot do so, since the entire 30,141 shares acquired with marital funds remained at the time of the divorce and were divided equally between the parties by the District Court.

There is, in fact, no evidence to support Wife’s claim that \$65,000 of marital property was commingled with the ranching business, much less, clear and convincing evidence sufficient to cast in doubt the District Court’s finding that his interest in T-N Company is the separate property of Husband.

Fractional partnership interests in T-N Ranches given by Husband to his siblings were his separate property, in which Wife held no interest. The evidence is unequivocal that Husband received his partnership interest in T-N Ranches as a gift

caution, perhaps in an excess of husbandly sentimentality — the Record is silent as to his motive) added a signature line for his Wife on the declarations of gift by which he transferred minor fractions of that interest to his siblings for the purpose of equalizing those interests at the request of his father. The claim that to do so somehow gave Wife an interest in the partnership is contrary to the very purpose of the transaction.

Wife does not claim, as she does with respect to the Zions Bank stock, that Husband ever gifted to her any interest in T-N Ranches. Had he intended to do so, he undoubtedly would have used the same form of writing he used to convey such interests to his siblings. Her evidence in this regard again falls far short of that quantum of clear and convincing evidence requisite for this Court to set aside the District Court's finding that "it is fair, just and equitable that [T-N Ranches and other] such properties be found to be separate properties from the marital estate, including any appreciated value therein." Supplemental Findings of Fact and Conclusions of Law, ¶ 14, R. 227.

No marital property or funds were used by Husband to acquire Moynier Ranch assets. Wife's final claim to an interest in the ranching business rests upon a fanciful mixture of unrelated evidence and pure invention to suggest that somehow \$25,000 of marital funds were used in the purchase of the Moynier Ranch properties from the Moynier family. She asserts, without qualification, "The \$25,000 down payment came from the parties' marital funds." Brief of Appellant, p. 12. The claim is utterly without support in the Record. The first of the two citations given in support of the

claim is not to any evidentiary matter but to Husband's Post-Trial Brief, which states that "less than \$25,000 can be traced to marital funds." R. 82 n. 3, citing in turn Exhibits D-27, D-28, D-29, D-34 (while "less than \$25,000" is literally true—nothing is less than something, no evidence, including the cited exhibits, traces *any* amount used in the Moynier purchase to marital funds.) The second citation refers to ¶ 12.b of the Court's Supplemental Findings of Fact and Conclusions of Law, which expressly finds:

[T]here 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. . . . [I]t 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

R. 223-224. The District Court's recollection of the evidence was faulty. There is in fact no evidence in the Record, testimonial or documentary, of a \$25,000 down payment. *Cf.* Exhibits D-27, D-34. The *only* evidence involving an amount of \$25,000 is Husband's testimony that he received a distribution in that amount from his father's estate. R. 325:16. There is no testimony or documentary evidence linking that distribution to any of the funds used to purchase Moynier; and had there been, it would not have changed the result since any such funds received by inheritance were Husband's separate property.

Once again, the evidence adduced by Wife falls short of the "clear and convincing" standard and is woefully insufficient to warrant this Court's setting aside the finding of the District Court that Husband's interests in Moynier and the other properties involved in the ranching business, all of them indisputably received by inheritance or gift from his parents, were his separate property.

CONCLUSION

The District Court, in dealing with a large and complex aggregate of properties and associated transactions, made only two significant mistakes. The mistakes were not, however, those Appellant urges on this Court. Certainly, there is more than sufficient evidence to sustain the District Court's finding that the transfer into joint tenancy of the Zions Bank shares did not operate to convey a present interest to Wife. That was not what she asked for, and that was not what she got. There was clear and convincing testimony from both parties from which the Court could conclude that the purpose of the transaction was to provide for her orderly succession to the shares in the event of Husband's death, not before.

Nor are the bits and pieces Wife tries to pull together to support her claim to an interest in the Jensen family ranching properties, some of them apparently concocted for the occasion, adequate to demonstrate a "clear and prejudicial abuse of discretion" in the award exclusively to Husband of his interest in those separate properties. Wife neither contributed significant effort to the ranching business, nor is there any credible evidence that marital property was commingled with that business.

The mistakes which the District Court did make appear to reflect a desire to somehow compensate Wife for Husband's failure to devote two full days a week exclusively to his family. To a trial judge who has seen many a marriage that has disintegrated through inattention, that is understandable enough. But the good judge, however laudable his intentions, broke the rules. Under the binding standards laid down by this and the Utah Supreme Court for the exercise of his equitable discretion,

he *could not* award alimony in excess of Wife's **demonstrated** needs, as to which he additionally failed to make the necessary findings. Nor could he distribute marital property disproportionately, contrary to the presumption of equal distribution, absent a finding of extraordinary circumstance and need. He found none, there was none.

Accordingly, Wife's appeal must be denied and Husband's cross-appeal must be granted.

Dated this 3rd day of February, 2000.

CLYDE SNOW SESSIONS & SWENSON

A large, stylized handwritten signature in black ink, likely belonging to Clark W. Sessions, is written over a horizontal line.

CLARK W. SESSIONS

T. MICKELL JIMENEZ

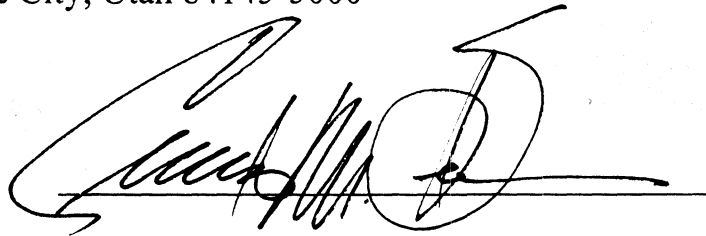
Attorneys for Respondent/Appellee

/Cross-Appellant James T. Jensen

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd of February, 2000, two true and correct copies of the foregoing **BRIEF OF APPELLEE/CROSS-APPELLANT** was mailed via first-class U.S. mail, postage prepaid, to:

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A handwritten signature in black ink, appearing to be "Julianne P. Blanch", written over a horizontal line.