

1999

# Linda H. Jensen v. James T. Jensen : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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

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**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT**

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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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**Utah Court of Appeals**  
JAN 27 2000

SANDRO  
the Court

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## **PRELIMINARY STATEMENT**

As did Wife's original brief, the Reply Brief of Appellant now further magnifies the same or similar shortcomings, while nevertheless showing signs of having been edited with considerably greater care, one is forced to conclude that its continuing pattern of intentional disregard for those boundaries of acceptable argument is deliberate. While adding nothing to the substantial facts of the case, the brief ignores dispositive and settled principles of law, mischaracterizes the holdings of several of the cases which it cites in support of its spurious arguments, further misrepresents the facts of record, and introduces for the first time in these proceedings a poisonous and improper argument based on alleged "fault" of Husband, notwithstanding that the issue of the parties' comparative fault was not before the trial court and was expressly excluded from the court's considerations with the consent of both parties. See, Appendix A.

Wife's reply brief thus fails to meet the requirement of Utah R. App. P. 24(j) that it be "presented with accuracy . . . and free from . . . irrelevant, immaterial or scandalous matters." Nevertheless, the present Reply Brief of Appellant/Cross-Appellee will confine itself to a response on the merits, leaving the imposition of sanctions if any for another day and to the discretion of the Court.

## **SUMMARY OF ARGUMENT**

Wife chooses to ignore the overwhelming weight of authority requiring equal distribution of marital property except where there is a clear and specific showing of exceptional circumstances. She has shown no such exceptional circumstances, and the trial court's grossly disproportionate award to her of two-thirds of the marital estate was therefore error. The trial court's award to Wife of \$4,000 of monthly alimony is entirely without

support in the record, and her casual invocation of alleged wrongdoing by Husband to shore up an otherwise impoverished argument not only violates an understanding reached between the parties and the trial court, but improperly raises for the first time in reply an issue that was untouched in Husband's brief.

### **POINT I.**

#### **WIFE HAS FAILED TO DEMONSTRATE EXCEPTIONAL CIRCUMSTANCES WHICH WOULD OVERCOME THE PRESUMPTION THAT MARITAL PROPERTY IS TO BE DIVIDED EQUALLY**

The use of the make-weight phrase "mathematical precision" in Wife's reply brief on this point will be seen by this Court for what it is, a rhetorical device to divert attention from the poverty of Wife's argument. (Wife's counsel well know that Husband has never used that phrase nor requested any such result.) Wife's brief studiously avoids any reference to or attempt to distinguish the many Utah cases which articulate the presumption that marital property will be divided equally. *See e.g., Burt v. Burt*, 799 P.2d 1166, 1172 (Utah Ct. App. 1990); *Naranjo v. Naranjo*, 751 P.2d 1144, 1146 (Utah Ct. App. 1988); *Hall v. Hall*, 858 P.2d 1018, 1022 (Utah Ct. App. 1993); *Finlayson v. Finlayson*, 874 P.2d 843, 849 (Utah Ct. App. 1994). Nor does the brief address the trial court's failure to make the necessary findings of exceptional circumstances required to overcome that presumption. *See Burt*, 799 P.2d at 1172, n. 10 ("exceptional circumstances"); *Hall*, 858 P.2d at 1022 ("unusual circumstances"); *Thomas v. Thomas*, 1999 UT App 239, ¶¶ 23-24, 987 P.2d (Ut. Ct. App. 1999) ("[e]xceptional circumstances").

Suggesting that a remand for the purpose of making the required findings would be a waste of time, Wife seeks to divert the focus of the argument from the fact that there were no such exceptional circumstances, as appropriate findings would have disclosed. Wife has identified no evidence in the record which might constitute such exceptional circumstances

or provide the basis for the necessary findings. She can do no better than invoke (as did the trial court) the irrelevant and improperly considered fact that husband had significant separate property, to which the brief adds, falsely, that "Wife, on the other hand, had no earning capacity and no separate assets." Wife, in fact, had receptionist and secretarial (including computer word-processing) skills, had recently received an inheritance from her father, and was at the time of trial one of two owners of a townhouse condominium in Mesa, Arizona not included in the marital estate. R: 99; R: 325:33-35 and 98-99. The representation to the contrary is deliberately false.

The brief contends that "[t]he appropriateness of the unequal division becomes . . . apparent when the actual physical distribution of assets is taken into account . . . ." Reply Brief of Appellant, p. 14. But the confusing discussion which follows makes no such point. Indeed, since the trial court distributed more or less equally all the marital assets with the exception of the residence and the related mortgage obligation (the house going to Wife, the mortgage to Husband, a result which Wife seeks to preserve), it is hard to see how the sale of the house and equal distribution of the liquid balance remaining after paying off the mortgage could have *reduced* Wife's liquidity or ability "to provide for her future".

As for the "significant [but unspecified] built-in tax consequences" which she claims, there is not a shred of evidence in the record on that subject, no indication that such issues were considered by the trial court, nor that the tax result to her would have been any different had the house and the mortgage obligation been equally divided. She has in fact since sold the house, with whatever tax consequences that entailed.

In short, Wife cannot overcome the presumption of equal distribution of marital property since she cannot show the required "exceptional circumstances". Accordingly, the appropriate response of this Court is not to remand to the trial court for findings, which it



clearly cannot make, of exceptional circumstances sufficient to sustain its grossly disproportionate division of the marital estate, but rather to direct that the marital property be divided equally in conformity with the well-established rule that, in the absence of such exceptional circumstances, marital property is to be so divided. That requires a simple reformation of the decree to provide that the residence and associated mortgage be divided with rough symmetry, as were the other marital assets and liabilities. "Mathematical precision" is not required.

## **POINT II.**

### **WIFE HAS FAILED TO DEMONSTRATE AN EQUITABLY COGNIZABLE BASIS FOR THE TRIAL COURT'S AWARD OF \$4,000 MONTHLY ALIMONY.**

Wife does not dispute, and the law is clear, that alimony is remedial in nature, awarded in response to "need." *See* cases cited in Brief of Appellee/Cross-Appellant, 30-31. Wife's argument in reply fails to address the material facts of record which bear on the application of that case law to the present matter. They are: (1) She was awarded property with an income-producing capacity of \$7,092.57 per month. Supplemental Findings of Fact and Conclusions of Law, ¶ 36, R. 326-327 (While she may now disagree with the trial court's methodology in determining that figure, Wife made no objection to the finding below, offered no alternative, and is foreclosed from raising the issue at this late date.); (2) She possesses, additionally, earning capacity which is at least that of a reasonably skilled receptionist/typist with computer word-processing skills. R. 324:195-197; and (3) She herself represented her needs to the Trial Court as \$7,652 per month which included \$2,232.00 for a mortgage which Husband has been ordered to pay by the Court. R. 214-216. Plaintiff's Post-Trial Brief, 17, R. 124.

We do not trouble this Court with further argument based on these facts, the implications of which are obvious and the case law relating to which was thoroughly reviewed in Husband's initial brief. Wife has no need of alimony, and in the absence of need, it was error for the Trial Court to award it.

What is deeply troubling in this connection is the attempt of Wife to insert into the issues on appeal poisonous and improper references to, and commentary on, the alleged fault of Husband in relation to his association during the marriage with his present wife and the suggestion that this Court should consider that fact in connection with its review of the issue of alimony. As a part of a proffer by Wife's counsel at the close of trial, the parties understood and were assured by the trial court that the comparative fault of the parties was not an issue in this case and would not be considered. Based on the court's assurance, to which Wife's counsel made no objection, Husband's counsel waived his rights of cross-examination of any witnesses on the subject and his right to call witnesses as to Wife's fault. R. 326: 102-106. In reliance on that understanding, Husband refrained from placing any evidence on the record as to Wife's comparative responsibility for the disintegration of the marriage.

The issue of "fault" was thus not before the trial court and cannot therefore now be raised on appeal. In strict conformity with that limitation, Husband's initial brief on appeal contains not a single word of reference to Wife's contribution to marital discord. Wife's attempt to insert that issue is thus a blatant and uncalled for attempt improperly to influence this Court by reference to emotionally charged matter that is not before the Court. The matter so referred to by Wife is, within the language of Utah R. App. P. 24(j) "scandalous", not for the nature of Husband's conduct, as to which his story has not been told, but for its introduction in this proceeding by Wife. It must therefore be disregarded by the Court.

## CONCLUSION

Husband renews his request that Wife's appeal be denied and his Cross-Appeal be granted, with the result (1) that the division of the marital estate be reformed to divide equally to the parties the award of their former residence and the related mortgage and (2) that the award of alimony to Wife be reversed.

Dated this 25<sup>th</sup> day of April, 2000.

CLYDE SNOW SESSIONS & SWENSON

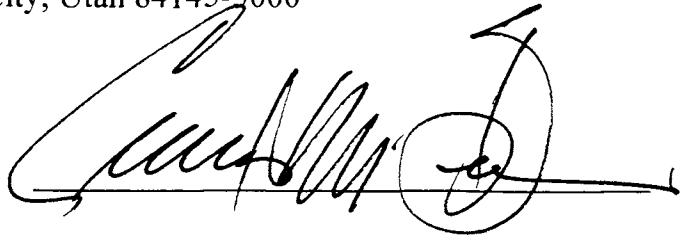
A large, stylized handwritten signature in black ink, likely belonging to Clark W. Sessions, is written over a horizontal line.

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/Cross-Appellant James T. Jensen

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> of April, 2000, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLEE/CROSS-APPELLANT** was mailed via first-class U.S. mail, postage prepaid, to:

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Tab A

1 THE COURT: MR. CHRISTENSEN?

2 MR. CHRISTENSEN: YES.

3 THE COURT: OKAY. ALL RIGHT. THEN WITH  
4 THAT IN MIND, THEN, I WOULD ACCEPT A SIMULTANEOUS  
5 FILING, LET'S SAY, BY MONDAY, THE 10TH.

6 MR. SESSIONS: THAT WOULD BE VERY HELPFUL,  
7 TO GIVE US THAT MUCH TIME. THANK YOU.

8 THE COURT: GIVES YOU BOTH ADEQUATE TIME?

9 MR. SESSIONS: YES.

10 MR. CHRISTENSEN: YES.

11 THE COURT: ALL RIGHT. THANK YOU. PLEASE  
12 BE SEATED. AND MR. CHRISTENSEN, YOU MAY MAKE YOUR  
13 PROFFER.

14 MR. CHRISTENSEN: YOUR HONOR, I SIMPLY  
15 WANTED TO MAKE A BRIEF PROFFER AS IT MAY RELATE TO  
16 THE ISSUE OF ALIMONY. AND THE EVIDENCE WOULD BE  
17 THAT FOLLOWING THE WILBERG MINE AND THE PERIOD OF  
18 TIME THAT THE WITNESS TESTIFIED CONCERNING THE  
19 DEFENDANT'S BEING IN SALT LAKE CITY FOR EXTENDED  
20 PERIODS OF TIME AND AWAY FROM THE FAMILY RESIDENCE,  
21 WHICH AT THAT TIME WAS IN PRICE, THAT THE DEFENDANT  
22 BECAME ACQUAINTED WITH A SECRETARY PARALEGAL  
23 EMPLOYED BY UTAH POWER AND LIGHT, THAT THAT  
24 RELATIONSHIP CONTINUED, AND THAT WHEN THE DEFENDANT  
25 AND PLAINTIFF MOVED TO SALT LAKE CITY IN 1990, THAT

1 THE DEFENDANT HIRED THAT PERSON AS HIS PARALEGAL,  
2 AND THAT THIS CAUSED ARGUMENTS, PERHAPS BEST  
3 DESCRIBED AS FIGHTS.

4 THAT THE PLAINTIFF REPEATEDLY ASKED THE  
5 DEFENDANT TO DISCONTINUE THIS RELATIONSHIP, THAT HE  
6 REFUSED TO DO SO, AND THAT THAT RELATIONSHIP HAS  
7 CONTINUED TO THE PRESENT TIME AND THAT THE DEFENDANT  
8 IS PRESENTLY LIVING WITH THAT PERSON IN SALT LAKE  
9 CITY.

10 THE COURT: ALL RIGHT. ANYTHING,  
11 MR. SESSIONS, IN TERMS OF ANY PROFFER OTHERWISE?

12 MR. SESSIONS: YOUR HONOR, I WOULD JUST  
13 REEMPHASIZE THE FACT THAT MR. JENSEN HAS PREVIOUSLY  
14 TESTIFIED HE'S NEVER BEEN SUPPORTED BY HIS WIFE IN  
15 THE RANCHING AND EQUIPMENT OPERATIONS.

16 THAT, AS HE JUST TESTIFIED A MOMENTS AGO,  
17 THAT MARRIAGE, FOR A WHOLE LOT OF REASONS, HAS BEEN  
18 ON THE ROCKS FOR AN AWFULLY LONG TIME, TO USE  
19 COUNSEL'S WORDS.

20 AND WE BELIEVE THAT WHILE IT'S TRUE THAT HE  
21 DID HIRE THIS INDIVIDUAL, AND IT IS TRUE THAT THIS  
22 INDIVIDUAL IS LIVING WITH HIM, LIVING WITH HIM  
23 CURRENTLY, THAT THE MARRIAGE WAS IN A POSITION WHERE  
24 IT COULD NOT BE RESOLVED LONG BEFORE THEN.

25 THE COURT: OKAY. I VIEW THAT AS ARGUMENT.

1 I WAS ASKING REALLY FOR A PROFFER OF THE FACTS.

2 MR. SESSIONS: I'M SORRY. NOTHING IN  
3 ADDITION TO WHAT THE DEFENDANT HAS TESTIFIED TO.

4 THE COURT: ALL RIGHT. NO PROFFER IN  
5 DISPUTE. I MEAN, THERE ARE REASONS EXPLAINING IT,  
6 AS YOU'VE ARGUED. BUT THERE IS NO CONTEST OF THE  
7 SUBSTANCE--

8 MR. SESSIONS: NO, YOUR HONOR.

9 THE COURT: WELL, THIS IS WHY I'M -- I HAVE  
10 A BIT OF A PROBLEM WITH THE PROFFER. LET ME JUST  
11 SAY THAT TO ALL OF YOU, I HAVE GOT ALL THE PARTIES  
12 HERE, EVERYBODY HERE. I THINK WE ALL KNOW THAT FOR  
13 A LONG TIME THAT COURTS AREN'T IN A POSITION OF  
14 DENYING DIVORCES.

15 PEOPLE ARE ENTITLED TO DIVORCES, AND IF  
16 THERE'S A LOSS OF LOVE AND AFFECTION BETWEEN THE  
17 PARTIES, BY ONE OR THE OTHER, THEN I'M NOT GOING TO  
18 BE IN A POSITION WHERE I'M GOING TO SAY, "WELL, I'M  
19 AWFULLY SORRY, I'M GOING TO DENY THE DIVORCE."

20 GROUNDS AND PROPERTY DIVISION ARE  
21 RELATIVELY, IN MY JUDGMENT, MUTUALLY EXCLUSIVE. AND  
22 I KNOW THERE IS A RECENT STATUTE THAT DEALS WITH  
23 FAULT, AND THAT WAS THE PURPOSE OF THE PROFFER. I  
24 THINK I'VE MENTIONED TO COUNSEL THAT FROM MY,  
25 PERSPECTIVE WHILE I'M OBLIGATED TO FOLLOW THE LAW,



1 AND I WILL LOOK AT THAT LAW AGAIN, AND SEE IF I  
2 THINK IT APPLIES IN THIS CASE, THIS CASE IS  
3 PRINCIPALLY A DIVISION OF PROPERTY CASE.

4 AND I DOUBT THAT ANY PROFFER OTHERWISE IN  
5 WITH REGARD TO FAULT IS GOING TO IMPACT THE  
6 DIVISION.

7 MR. SESSIONS: AND, YOUR HONOR, I  
8 UNDERSTAND THAT. BUT IN THE INTEREST OF PROTECTING  
9 MY CLIENT, THE PROBLEM I HAVE WITH THE PROFFER IS,  
10 THAT I DON'T HAVE AN OPPORTUNITY TO CROSS-EXAMINE  
11 THE WITNESS WITH RESPECT TO THE PROFFER.

12 I DON'T HAVE THE OPPORTUNITY -- I GUESS THE  
13 COURT WOULD GIVE IT TO US, TO PERMIT ME TO PUT MR.  
14 JENSEN BACK ON AND EXPLAIN WHY THE SITUATION  
15 HAPPENED AS IT HAPPENED. AND HE HAS A NUMBER OF  
16 REASONS. BUT I THINK THAT IT IS APPROPRIATE TO DO  
17 THAT WITH TESTIMONY, UNDER OATH, SUBJECT TO  
18 CROSS-EXAMINATION, AS OPPOSED TO A PROFFER OF  
19 EVIDENCE.

20 I WOULD THEREFORE MAKE THIS REQUEST: THAT  
21 IF YOUR HONOR, AFTER REVIEWING THE LAW, DETERMINES  
22 TO DO ANYTHING WITH ANY ISSUE IN THIS CASE BASED  
23 UPON FAULT, THAT WE BE GIVEN THE RIGHT, THEN, TO PUT  
24 ON EVIDENCE WITH RESPECT TO THAT.

25 THE COURT: THAT'S AN INTERESTING

1        PRESERVATION. I WOULD SUGGEST TO YOU THAT I HAVE  
2        ALREADY MADE MY STATEMENT AS TO HOW I FEEL ABOUT THE  
3        EXCLUSIVITY OF FAULT AND DIVISION OF PROPERTY. I  
4        VIEW THEM AS MUTUALLY EXCLUSIVE. NOW, I DON'T  
5        SUGGEST THAT I HAVE THE DIVINE CAPACITY TO SAY  
6        WHETHER ANY OF THE THESE THINGS HAVE AFFECTED ME IN  
7        TERMS OF THE DIVISION OF PROPERTY.

8                I WILL JUST TELL YOU THAT I DON'T THINK  
9        THEY ARE GOING TO HAVE ANY BEARING. BUT WHAT I  
10       WOULD WANT FROM YOU IN TERMS OF A COUNTER PROFFER IS  
11       NOT ARGUMENT, BUT DENIAL THAT IT OCCURRED. AND IF  
12       THERE IS A DENIAL, THEN I HAVE A DISPUTE IN  
13       EVIDENCE. BUT IF THERE IS NO DENIAL, THEN IT JUST  
14       SIMPLY STANDS AS PART OF THE RECORD.

15               MR. SESSIONS: I UNDERSTAND THAT, YOUR  
16       HONOR. I DIDN'T KNOW THAT PROFFER WAS COMING UNTIL  
17       A FES MINUTES AGO. MAY I HAVE JUST THIRTY SECONDS  
18       WITH MR. JENSEN?

19               THE COURT: CERTAINLY, YES.

20               (MR. SESSIONS CONFERS WITH CLIENT OFF THE  
21       RECORD.)

22               MR. SESSIONS: YOUR HONOR, WE'LL NOT OFFER  
23       ANYTHING BY WAY OF PROFFER IN REBUTTAL TO THE  
24       EVIDENCE THAT HAS BEEN PROFFERED.

25               THE COURT: ALL RIGHT. THANK YOU. I