

1990

## Jensen v. Jensen : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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900372-CA

IN THE UTAH COURT OF APPEALS

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LARAE JENSEN nka LARAE THORPE,

Plaintiff-Appellant,

vs.

RAYMOND JENSEN,

Defendant-Appellee.

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Case No. 900372-CA  
Argument Priority 4

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REPLY BRIEF OF APPELLANT

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APPEAL FROM A SUPPLEMENTAL ORDER OF THE SIXTH JUDICIAL  
DISTRICT COURT FOR SEVIER COUNTY, HONORABLE DON V. TIBBS,  
DENYING AND REAFFIRMING PLAINTIFF'S PETITION  
TO MODIFY DECREE OF DIVORCE AS TO JAMIE CHRISTINA JENSEN  
AND JOSIE McKELE JENSEN AND THE SUPPLEMENTAL  
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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**FEB 25 1991**

Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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### STATEMENT OF FACTS

Appellant incorporates herein the statement of facts contained in the Brief of Appellant ("Appellant's Brief") and challenges Appellee's factual statement insofar as it contradicts or differs from Appellant's factual statement.

### SUMMARY OF ARGUMENTS

#### I.

The District Court's custody determinations were based on improper factors and its Supplemental Findings of Fact and Conclusions of Law seek to support its unsupportable judgment. The District Court's assessment of fault to the Appellant for the failed marriage, its disdain for women who pursue non-traditional interests, and its overwhelming distaste for marital infidelity by women were the actual, overriding, and improper reasons that Appellant was denied custody of her children.

#### II.

At one point after the divorce, Appellee relinquished custody of one of the minor children to Appellant. The District Court glossed over that fact and gave it no weight in its ruling on Appellant's petition seeking to gain custody of all of her children. The District Court also failed to address the factors upon which Appellant relied to establish changed circumstances. The court's bias against women was again evident in this process.

## ARGUMENT

### POINT I

THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW SEEK TO JUSTIFY ITS ORDERS BY MINIMIZING THE IMPROPER FACTORS UPON WHICH THE ORDERS WERE ACTUALLY BASED.

It is evident upon any examination of the transcript of the original divorce trial and the Supplemental Findings of Fact and Conclusions of Law ("Supplemental Findings") that, while the District Court, on remand, attempted to establish justifiable grounds for its original custody order, the actual reasons for the court's actions were based upon factors which this Court has held are improper for consideration in a custody dispute.

While there may be an evidentiary basis for some of the District Court's Supplemental Findings, it is not sufficient to justify the custody orders on appeal here when the obvious reason for those orders was the District Court's prejudice against women who pursue non-traditional interests.

It is proper for this Court to review the District Court's grounds for its original custody order because, on its first remand of this case, this Court ordered the District Court to supplement its Findings of Fact and Conclusions of Law with regard to its original order. This Court cannot adequately determine the validity and accuracy of the Supplemental Findings without considering the grounds for the original order by examining the trial transcript.

The District Court applied two different sets of standards to the parties in this action. The standards applied to Raymond rewarded him for working long hours in his business (R, T-2, p. 58, 61) while the standards applied to LaRae penalized her for her interests outside of the home. (Supplemental Finding, No.6) The District Court placed the blame for the parties' failed marriage directly and solely on LaRae. (R, 238). It failed to consider that the marriage had, in all likelihood, failed before LaRae developed outside interests. It failed to address Raymond's sexual cruelty to LaRae. (R, T-3, p. 20.) Raymond shares in the responsibility for the marriage's failure.

Contrary to Appellee's assertion that the recent case of Merriam vs. Merriam, 145 Utah Adv. Rep. 33 (1990), addressed the issue of the District Court's bias against women, that issue is not addressed in the Court of Appeals' decision. Merriam, however, when examined in the context of the present case and Marchant v. Marchant, 743 P.2d 199 (Utah App. 1987), reveals that the District Court apparently presents a no-win situation to women involved in custody disputes. In that case, the District Court also granted custody of a minor child to the father. One factor which the court found significant in its custody determination was that:

The Defendant's financial capabilities are greater and more sound than that of the Plaintiff because Plaintiff lacks specific job related skills whereas Defendant has job related skills.



Merriam at 34 (emphasis added). Poor Mrs. Merriam. If she had taken the steps necessary to obtain those "job related skills" she would have, alas, at the same time, "developed interests outside the home" and would have undoubtedly been denied custody for that reason.

The Appellee also wrongly asserts that the present case is clearly distinguishable from Marchant, supra. In fact, the similarities between Marchant and the present case are glaring. In Marchant, the District Court's custody determination was based upon what it perceived to be the wife's "non-traditional activities" and, in effect, assessed her with the blame for the breakdown of the marriage despite its finding that the husband abused the wife both mentally and physically. The court also overly emphasized the wife's moral indiscretion committed, as in the present case, during the latter part of the marriage when the marriage had already begun to fall apart. This Court found in Marchant that these considerations were improper and reversed the District Court's Judgment. This Court should make the same finding in the present case.

#### POINT II

THE CHANGED CIRCUMSTANCES RELIED UPON BY APPELLANT IN HER PETITION TO MODIFY WERE NEVER GRANTED THE CONSIDERATION WHICH THEY DESERVE AND WHICH UTAH LAW REQUIRES THAT THEY RECEIVE.

LaRae's Petition to modify the District Court's custody award relied, to a great extent, on her changed circumstances. The District Court failed to address in even

the most cursory manner the merit of those changes. In Elmer v. Elmer, 776 P.2d 599 (Utah 1989), the Court stated that:

[W]e have held that a change in the circumstances of the noncustodial parent may bear upon the issue of whether a change of custody may be appropriate. (Citation omitted.)

Elmer at 602. If LaRae's changed circumstances "may bear" on the issue, the District Court committed clear error when it failed to consider or address those circumstances.

The District Court also ignored the implications of Raymond's attempt to permanently relinquish custody of the minor child, Josie, to LaRae's parents after he had already given custody of the child to LaRae. Appellee misstates the circumstances of that event in an effort to minimize its significance. The fact that Raymond was prepared to give up custody of Josie is significant and material to the custody issue. Tuckey v. Tuckey, 649 P.2d 88 (Utah 1982). Appellee would downplay this fact by maintaining, contrary to the evidence, that he gave up custody of Josie only after Savannah's tragic death when, in fact, he relinquished custody of the child prior to the date of the accident. (R, p. 241-242).

The District Court also failed to take heed of the fact that Raymond gave up custody of Josie prior to Savannah's death and granted Raymond the benefit of the excuse which he so desperately needed for his relinquishment of custody, i.e.,

that the time following Savannah's death was so stressful that Raymond could not cope with the young child. It should not be overlooked that LaRae, whose emotional stability Appellee so eagerly calls into doubt, was able to maintain her emotional stability and provide critical emotional support to the children under the very circumstances which Raymond maintains rendered him incapable of caring for the children.

Finally, the significance of LaRae's changed circumstances must be re-emphasized. She has remarried and is enjoying a relationship that is stable both economically and emotionally. Appellee, and the District Court for that matter, downgrade the quality of that relationship by pointing out that LaRae is now married to Randy Thorpe who, the District Court asserts is "the guy she has the situation develop with. . . ." (R, T-2, p. 115). There was never any evidence presented to the Court that LaRae and Randy shared an intimate relationship at any time prior to the divorce. Even if the evidence had established that such a relationship existed, LaRae's subsequent marriage to Randy could only indicate that their relationship was based on much more than a common sexual interest. The marriage is stable and LaRae can provide a stable and nourishing environment for all of the children.

#### CONCLUSION

The District Court presents women a no-win situation. If a woman pursues "outside interests," she will not be granted

custody of her children because she has not followed the traditional path of womanhood. If she does not develop marketable job-related skills outside of the home, she is less capable than her spouse to care for the material needs of her children and loses custody to the father for that reason.

It also appears that all a father desiring custody need do to obtain custody is allege that the mother has been unfaithful (the ambiguous allegation that she was "involved" with another man is sufficient) during the marriage. The District Court will grant overwhelming weight to such an allegation while apparently overlooking, in its child custody determination, physical, emotional and sexual cruelty proven against the father.

The District Court's Order on LaRae's Petition to Modify cannot be upheld because the court did not consider all of the changed circumstances which were relevant to a proper determination of the Petition. It also ignored the undisputed facts in order to find, contrary to law, that Raymond's relinquishment of Josie's custody was not relevant to the custody issue. The court apparently believed that LaRae's alleged emotional instability made her unsuitable to receive custody of the children and, at the same time, made excuses for Raymond's emotional instability. LaRae deserves a fair hearing on her Petition to Modify. She did not receive one below.

While women can no longer expect greater consideration in child custody cases, they certainly deserve equal consideration. The record in this case is clear. LaRae did not receive equal consideration because she faced an insurmountable obstacle, the moral indignation of the court. This court should overrule the District Court and grant the relief requested in Appellant's Brief.

DATED this 25<sup>th</sup> day of February, 1991.

PRINCE, YEATES & GELDZAHLER

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MAILING CERTIFICATE

I hereby certify that, on the 25<sup>th</sup> day of February, 1991, I caused to be mailed, postage prepaid, four true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to the following:

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