

2001

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,	:	
Wife/Appellant,	:	
v.	:	Case No. 20010721-CA
JAMES T. JENSEN,	:	Priority of Argument: 15
Husband/Appellee.	:	

BRIEF OF APPELLEE

Wife/Appellant's Appeal from Judgment of the Third Judicial District Court,
Salt Lake County Honorable David S. Young, Presiding,
Entered June 22, 2001 Civil No. 964900752

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JURISDICTION OF COURT OF APPEALS

The Utah Court of Appeals has jurisdiction over Wife/Appellant's ("Wife") appeal pursuant to Utah Code Ann. § 78-2a-3(2)(h).

STATEMENT OF ISSUES PRESENTED FOR REVIEW BY APPELLANT

Pursuant to U. R. App. P. 24(b)(1) Husband/Appellee ("Husband") contests **certain** of Wife's statement of issues presented for review. Husband does not dispute Wife's right to appeal issue A. Issue B. was not before the trial court on remand as the Court of Appeals affirmed the trial court's characterization of both separate and marital property. Wife failed to preserve issue C. for appeal in the court below. Wife failed to preserve issue D. for appeal in the court below and Husband does not dispute Wife's right to appeal issue E.

Whether the trial court properly complied on remand with this Court's decision in the first Jensen appeal, is a question of law reviewed for correctness. *See Slattery v. Covey & Co., Inc.*, 909 P. 2d 925, 927 (Utah Ct. App. 1995).

In reviewing whether the trial court complied with this Court's ruling on remand, the standard of appellate review of an award of marital property in divorce is "clear and prejudicial abuse of discretion." *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991). "The trial court is allowed considerable discretion in the division of marital property, so long as it exercised this discretion in accordance with the standards set by this state's appellate courts[.]" *Dunn v. Dunn*, 802 P. 2d 1314, 1322 (Utah Ct. App. 1990), and "[c]hanges will be made only if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the finding, or such a serious inequity has resulted as to manifest a clear abuse of discretion." *Naranjo v. Naranjo*, 751 P. 2d 1144, 1146 (Utah Ct. App. 1988).

In reviewing whether the trial court complied with this Court's ruling on remand, the standard of appellate review of a trial court's alimony determination is also "clear and prejudicial abuse of discretion." *Howell*, 806 P.2d at 1211. This Court will not overturn an alimony determination as long as the lower court supports its ruling with adequate findings and exercises its discretion according to the standards set by this Court. *See Willey v. Willey*, 866 P. 2d 547, 550 (Utah Ct. App. 1993).

DETERMINATIVE CONSTITUTIONAL, STATUTORY OR REGULATORY PROVISIONS

Applicable is the interpretation of Utah Code Ann. § 30-3-5(7) (a) as set forth by this Court in its July 7, 2000 Memorandum Decision. This statute is in substantial part the same as the statute set forth by Wife in her brief at pages 2-3, with the addition of the following factors under Subsection (a):

- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
- (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

There are no other constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative of or of central importance to any issue in this appeal.

STATEMENT OF THE CASE

A. Nature of The Case, Course of Proceedings And Disposition Below.

Husband disagrees with certain of Wife's assertions in section A of her "Statement of the Case." To the extent Wife has misrepresented facts and proceedings to this Court in

her Statement of the Case, Husband so states hereafter. In all other respects Husband agrees with Wife's Statement of the Case.

This Court in its July 7, 2000 Memorandum Decision ("Jensen Appeal I") did not determine that marital property was excluded from the marital estate. *See Brief of Appellant*, pp. 3-4 (hereinafter collectively referred to as "App.'s Brief"). This Court affirmed the trial court's characterization of property as either separate or marital property, and affirmed the trial court's award to Husband of all of his separate non-marital property. R. 359-60.

This Court in Jensen Appeal I very specifically reversed only the trial court's division of the *marital estate* and alimony award, and remanded "for consideration of these two awards under the proper legal standards and procedures." R. 361. (emphasis added). Therefore, the only two issues before the trial court on remand were the division of the predetermined marital estate and whether, after dividing the marital estate under *Burt*, Wife was entitled to alimony. R. 360-61.

Wife's descent into the realm of convoluted misstatements of fact becomes glaringly apparent as the trial court did not, contrary to Wife's assertion, characterize any "property acknowledged to be marital property" as Husband's separate property, nor did it find, as claimed by Wife, such to be "one of the reasons the court awarded more than half of the remaining diminished 'marital' estate to Wife." *See App.'s Brief*, p. 4. In its Memorandum Decision, Supplemental Decree of Divorce¹ and Supplemental Findings of Fact and Conclusions of Law, the trial court went into painstaking detail and explained precisely why it found all of Husband's separate non-marital property had maintained its identity as separate property throughout the marriage, and that such property had never been

¹ The parties were divorced pursuant to a bifurcation and Decree of Divorce entered on or about June 22, 1998. R. 219.

commingled, augmented by Wife, or become a part of the marital estate.² R. 199-212; 221-37; 241-46. There was, therefore, no “marital property to restore to the marital estate” before dividing the marital estate. *See App. ’s Brief*, p.4.

On remand following Jensen Appeal I, the trial court followed this Court’s instructions to the letter. In its Second Supplemental Decree of Divorce and Second Supplemental Findings of Fact and Conclusions of Law, the trial court considered in detail each of Wife’s claimed “exceptional circumstances” and specifically found,

[the] various circumstances she deems to be exceptional, they do not singly or in combination justify the division of the marital estate between the parties on other than an equal basis. As such no exceptional circumstances exist which would justify the division of the marital estate between the parties on other than an equal basis.

R. 618; 639:26-28.

Further, the trial court specifically and unequivocally considered each of the “factors and directions from the Utah Court of Appeals in this case and Utah Code Ann. § 30-3-5(7)(a)(i)-(iv) (1998) and the additional factors included in the revision of such statute in 1999,” in determining Wife had no need for alimony. R. 620-24.

The trial court applied a reasonable rate of return to the parties’ income producing assets at 7.5 percent. The trial court’s assumption of a reasonable rate of return was utilized by both parties without objection or modification in their subsequent papers filed with the trial court, thereby waiving any claim that the assumed rate of return was in error.³ R. 264-

² The trial court did find that \$25,000 contributed to the Moynier Ranch may have come from marital assets. The trial court found, however, it was equally possible the money came from separate inherited funds Husband’s father left to each of his children at the time he passed away. R. 201; 323:181-85; 325:16.

³ Husband acknowledges that Wife argued for a lower rate of return, 5.5 percent in a post-trial brief. R. 162-63. However, Wife utilized the 7.5 percent rate of return in later papers, and failed to appeal that issue in the Jensen Appeal I as set forth above.

65; 525-26; 639:1. Neither party appealed the 7.5 percent rate of return in Jensen Appeal I, that issue was not before the trial court on remand and Wife did not object to the 7.5 percent rate of return in the Second Supplemental Findings of Fact and Conclusions of Law. R. 358-61; 571-74; 609-12.

B. Statement of Facts.

Husband supplements the Statement of Facts in Wife's brief for the purpose of rectifying her omissions, to make necessary corrections and modifications, and to provide the factual basis for the trial court's ruling and direction on remand.

Compellingly, most if not all of the erroneous statements contained in Wife's Statement of Facts are conspicuously bereft of any citations to the Record. The obvious explanation for Wife's failure to cite to the Record in support of her conclusory statements is that there is simply no such support.

Facts Relating to Award of Separate Property to Husband⁴

1. The District Court awarded 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. *See 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).

⁴ Husband maintains his position that the issue of property division in its entirety was not before the trial court on remand. However, Husband refers to specific citations in the Record supporting the trial court's initial property characterization and that the Court of Appeals relied upon in affirming the trial court's properly characterized marital and separate property in Jensen Appeal I.

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.

2. The trial court also found that the award to Husband of his separate property was congruent with the intent of Husband’s mother and father who donated substantially all of the separate property to Husband and his siblings. R. 199.

3. T-N Company Partnership. T-N Company, the operating entity of the Jensen family ranching business, was owned at the time of trial 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 trial court made no attempt to resolve this issue, as it had no need to do so with respect to the separate property awarded to Husband. *See Supplemental Findings of Fact and Conclusions of Law*, ¶ 8; R. 222; 323:148; 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 undisputed evidence at trial and as found by the trial court 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 trial 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. Wife’s testimony on

the subject was that during the first year of the marriage, 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. 119; 323:36. 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 that on “[c]ertain occasions we went up.” R. 323:120.

It was Husband’s testimony that Wife 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. 324:196-98.

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.

The trial court found that, “[w]hile the percentage ownership interests of the three Jensen brothers according to the official records are not equal, it was clear from the testimony that they each deemed their interest to be equal and that the Defendant claims only a one-third interest regardless of what the official records may show or reflect.” R. 222.

4. 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 Malpas Corporation, an entity formed in 1972 by Husband and one of his brothers, in which Wife held no interest. R. 174-75; 323:51; Exhibits D-13, D-35. The Record is completely 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 Malpas to T-N Company. Indeed, it is unclear whether the note reflected an actual transfer of funds or other value by Malpas 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. 324:51-2.

5. T-N Company Notes Given by T.N. Jensen to Wife. 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. 325:87-8; *cf.* R. 324:219-20.⁵ Following T.N. Jensen's death in 1992, those notes were cancelled. The related book entries credited the value of the cancelled notes to the equity accounts of the T-N Company partners equally. R. 324:51-2. Wife's testimony on direct examination by her counsel was vague at best as to the number and amount of the notes. She had 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.

Wife's expert testified that no ownership interest resulted in T-N Company when the notes were wiped off the books, to Wife or to any other party. R. 324:52-3; 324:77-8; 324:90-3.

A variety of other obligations of T-N Company were dealt with similarly upon the death of T.N. Jensen. R. 324:51-2; 324:90-2. 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. There is a total lack of any evidence in the Record 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.

6. *Proceeds of Sale of Zions Bank Stock Transferred to T-N Company.* Wife also relies on a transaction by which \$65,000 in proceeds from the sale of 861 Zions Bank shares nominally held in joint tenancy by Husband and Wife was transferred to T-N Company. Wife fails to note, however, that these shares were not derived in whole or even

⁵ Documentary evidence of only one of those three gifts was offered at trial. *See* Exhibit P-6.

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 trial 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. 325:47-9; Exhibits D-20, D-21; *see also Supplemental Findings of Fact and Conclusions of Law*, ¶¶ 17, 19, R. 231.

7. *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.

8. *Moynier Ranch Properties*. The Moynier Ranch properties are held directly in the names of Husband and his brothers. See Exhibits D-27, D-28. The Moynier Ranch properties were purchased from the Moynier family for \$827,675, \$633,437 of which 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. 323:142-44; 323:181-83; 325:56-61; Exhibits D-27, D-28, D-29, D-34. Husband's testimony was undisputed that none of the consideration provided in the acquisition of the Moynier Ranch properties was derived from marital property. R. 325:59.

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.⁶

Husband testified extensively at trial regarding each of his separate properties, including the Moynier Ranch property. R. 325: 6-77. Husband testified he did not protest the Utah County Assessor's valuation for tax purposes of the Utah County portion of the Moynier Ranch property because, as Husband carefully explained, the Jensen brothers enjoyed a tax advantage as the Moynier Ranch property was taxed as "green belt" land. R. 325:61-3.

9. *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 the ranching operations. *See, e.g.*, R. 324:207-12, R. 325:66, 68, 70, 73, 76.

10. *Zions Bank Shares.* In addition to the ranching properties, Husband held shares of stock in 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; 325:48. 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. 325:44-5.

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. Husband's testimony precisely and

⁶ *See supra* note 2.

unquestionably directly supports the trial court's finding that Husband had no intent to vest a present interest in the stock shares in Wife. This Court affirmed that finding in Jensen Appeal I. Husband testified:

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 unwavering and consistent. He did so to satisfy Wife's desire that in the event of his early death she would 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 during which Wife asked him to put the Zions Bank shares in joint tenancy. R. 324:213-14. 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 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. 324:214-16. The trial 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.

Facts Relating to Division of Marital Property

11. Marital Property. At trial, the court valued the marital estate at \$3,006,536.64, awarding Wife an approximate two-thirds share valued at \$2,004,736.16 and Husband the approximate one-third remainder, valued at \$1,001,800.48. R. 213-214. The trial court's characterization of the property comprising the marital estate included all marital property, and all separate property that had been commingled. There were no marital assets excised from the marital estate. R. 199; 212-13.

The trial court acknowledged that Wife would receive an enhanced share of the marital estate by benefitting from the inclusion of commingled property in the division of the marital estate. R. 199.

The sole basis for awarding the disproportionate amount to Wife was the trial 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. 227-29 (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.

Wife's Brief on Remand From Court of Appeals, specifically argues that "the evidence received by this Court at trial contains all of the information necessary to make the required findings of fact." R. 527. Wife further detailed approximately eighteen (18) "exceptional circumstances" she claimed justified an unequal division of the marital estate. R. 528-31.⁷

The trial court reviewed Wife's brief on remand (R. 639:1) and following *Burt* and exercising its discretion, under applicable law, considered and found Wife's claimed exceptional circumstances were not exceptional at all and were in fact compensated by awarding her approximately \$1,500,000.00 in marital assets essentially debt free. R. 618; 639:58. The marital assets awarded to Wife included substantial income producing assets, i.e. 7,451 shares of Zions Bank stock valued between \$350,000 and \$450,000, proceeds from the sale of the Monica Cove residence of approximately \$200,000,⁸ and total income-producing assets of \$939,557. R. 620.

To suggest that the trial court should have done more is without any foundation or basis in fact or in law.

Facts Relating to Alimony

12. The income-producing assets awarded to Wife were capable of generating annual income of \$85,110.84 or \$7,092.57 per month. During trial, the court also found that should Wife sell the Monica Cove residence and move to a home of value comparable

⁷ Had Wife wanted the trial court to take new evidence on remand she could have so requested. She did not. In truth and in fact she strenuously argued that the trial court should take no new evidence. R. 526-7

⁸ The Monica Cove residence actually sold for more than the value determined by the trial court. However, Husband utilized the trial court's findings as set forth in Statement of Fact ¶12, *infra*. R. 639:40.

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*, ¶ 36, R. 326-27.

13. Temporary Alimony. Inexplicably, Wife characterizes Husband’s voluntary payment of support during the pendency of their divorce as the payment of temporary alimony. *See App.’s Brief*, p. 13. Wife fails to candidly and truthfully inform this Court that the \$6,000 Husband paid Wife voluntarily was for the support of Wife and their minor child Jorja. R. 323:53-4; 323:100.

Wife filed a Verified Motion for Order to Show Cause with the trial court claiming Husband must either continue to pay the voluntary support payments he paid *pendente lite* or continue to pay alimony as ordered by the trial court. R. 363-66; 373-77; 481-88. Wife did not request the trial court either in her motion or at the hearing on remand, to determine the validity of any claimed oral “agreement” between the parties regarding the temporary payment of support before the trial occurred. R. 639.⁹

Husband filed a Motion for Affirmative Relief, and an opposition to Wife’s Verified Motion for Order to Show Cause, requesting an accounting and reimbursement for alimony overages paid as a result of this Court’s decision in the Jensen Appeal I reversing and remanding, *inter alia*, the trial court’s alimony award. R. 467-78.

During the pendency of the proceedings before trial, Wife did not make any motion for temporary relief, nor did the parties enter into any stipulation agreement regarding the payment of temporary alimony pending resolution of their divorce action. R. 578. The trial court held no hearing, took no evidence, made no finding and entered no Order regarding

⁹ No hearing was held on Wife’s Verified Motion for Order to Show Cause or Husband’s Motion for Temporary Relief as these matters were considered by the trial court at the hearing on remand, March 8, 2000. R. 639; 489-90; 520-21.

temporary alimony to be paid to Wife by Husband during the pendency of the parties' divorce action.

On March 8, 2001 the trial court considered the issues mandated by this Court at a hearing on remand. R. 639. Following that hearing, finding no exceptional circumstances, the trial court redistributed the parties' marital property equally, and thereafter found Wife had no need for alimony. R. 639:58-61.¹⁰ Again, Wife failed to address or even request the trial court to enter any orders related to temporary alimony, or to determine the validity of any agreement for the payment of temporary support during the pendency of the parties' divorce action. R. 578; 639. Subsequently, the trial court entered its Second Supplemental Findings of Fact and Conclusions of Law and Second Supplemental Decree of Divorce, finding, *inter alia*, that Husband was entitled to repayment for the alimony paid from the time of the trial until the reversal of the trial court's alimony award by this Court in the Jensen Appeal I. R. 617-18; 622-23, 626.

14. Standard of Living. Although Husband made certain that his children and Wife did not "go without," Wife testified the parties did not "really do much traveling. Without the kids. Everything was family trips, and we didn't do an awful lot. We did a few big ones." Wife described those "big ones" as the family taking two trips over a twenty-eight (28) year marriage: 1) a two week trip to Washington, D.C. in a motor home, and 2) flying for a trip with the children to tour the New England states. R. 323:56-7. The parties did not drive fancy cars, and did not buy new cars often. R. 323:58.

¹⁰In sum, the trial Court followed exactly and specifically the mandate of this Court.

Wife did take a post-separation trip to Europe with her daughters, which was funded by her father, not marital assets. R. 323:94

The parties only lived in the Monica Cove home in Salt Lake City for approximately four (4) years of their twenty-eight (28) year marriage. R. 323:23.

15. Wife's Needs and Expenses. 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 their daughter Jorja, an eighteen year-old who was in her senior year of high school. R. 323:59-60; Exhibit P-2. In the course of Wife's cross-examination, Husband's counsel established that the tuition and other school expense had been paid by Husband for the balance of Jorja' senior year (R. 323:107, 114); that Wife's needs and expenses would be further reduced if she were not obligated on the first or second mortgages on the Monica Cove home, that she was no longer obligated to pay the mortgage or any other expenses associated with the Spring Glen home that had been sold and the proceeds divided between the parties, and that certain other of the listed expenses were exaggerated and inflated. *See generally*, R. 323:91-116. Following trial, but before the court entered its findings, Wife presented the Court with 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 voluntarily paid to Wife as support for her and the parties' then minor child Jorja \$6,000 per month. The voluntary payment was sufficient to pay the monthly mortgage payments of \$2,207 on the Monica Cove residence, a \$700 per month payment on the Spring Glen home later sold and to

provide for Jorja's needs, leaving a net amount for living expenses of \$2,947 per month.¹¹

R. 323:29-30; 323:100-01. Wife conceded, in effect, that the temporary support paid had been sufficient for her needs and those of Jorja. 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. 323:101-02.

On remand Wife indicated her monthly needs and expenses approximated \$7,652 (\$6,000 in unmet need) based on her claimed needs and expenses at the time of the trial, when in fact her expenses were significantly less. R. 639:49. For example, Wife was no longer financially responsible for any minor child, had sold the Monica Cove residence,¹² and in any event was not responsible for the first or second mortgages. In short, Wife was virtually debt free. R. 639:36-9.

The trial court meticulously applied each of the alimony factors to be considered under the version of Utah Code in effect at trial and as detailed in Jensen Appeal I. R. 359-

¹¹ 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. 235-36.

¹² *See supra* note 8.

61; 639: 39-45. The trial court found that Wife's living expenses and financial needs and requirements, "after the deletion of voluntary contributions, the outstanding mortgages on the Monica Cove residence previously sold and related property taxes thereon[,] approximate \$4,000 per month." R. 621.

While the trial court admittedly struggled with alimony, Wife's assertions to this Court regarding that struggle are taken completely out of context. *See Appellant's Brief*, p.31. The trial court did not find that the parties enjoyed an extravagant standard of living but merely explained a hypothetical to the parties' in its statement in the Record at 639:44-6.

Based on the evidence, the trial court found that Wife could generate \$5,872 monthly from income producing marital assets awarded to her, that she could earn \$893 monthly as a minimum, if she chose to work, which she would not be ordered to do, and therefore, had no unmet financial need at the time of the trial. The trial court reached this decision by analyzing carefully and succinctly each of the applicable statutory factors. R. 639:39; 639:58-60; R. 620-22. These amounts resulted in expected income to Wife of \$6,765 monthly, to meet her needs.¹³

16. 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 in a clerical capacity, performing word processing, filing and receptionist duties. Husband testified that she was a "very good" employee. R. 324:195-97. Testimony was elicited that Wife worked on a volunteer basis for a Catholic high school and in one instance authored

¹³ Wife claims that her total working assets after deletion of the \$125,000 she was ordered to repay as alimony overage, was \$814,557. *See App.'s Brief*, p. 15 &n1. Even assuming *arguendo*, that amount of income producing assets, Wife would generate \$5,090.98 monthly. Adding \$893 of minimum wage earnings, Wife's total monthly income would be \$5,983.98. Again, Wife has no unmet financial need.

a computer generated brochure for the school utilizing typing, graphics, and computer skills. R. 324:197. Wife testified she had no present health problems that would prevent her from obtaining employment, and that she qualified for part or full time employment as a receptionist. R. 323:55; 323:87.

When asked at trial if she had sought employment since the parties' separation, Wife responded, "No, I haven't, because my job isn't through with Jorja yet." R. 323:88. Wife further testified that Jorja would be graduating high school in May of 1998. R. 323:88. Her graduation was subsequently confirmed.

At the hearing on remand, Wife did not object to the use of the 7.5 percent rate of return on income-producing assets. R. 639. Further, at the hearing on Wife's objections to the Second Supplemental Findings of Fact and Conclusions of Law, she objected in writing only to the trial court's decision to award Husband a judgment for alimony paid. R. 571-75; 609-13; *see also supra* note 3. At that same hearing Wife argued that the transfer of Zions Bank stock from Wife to Husband should be calculated using a present value of the stock. R. 636:10-14. While she claimed that the Zions Bank stock only yielded a return of 2.2 percent, her claim was lacking in any proof. R. 636:2.

17. Husband's Income and Expenses. 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. 324:229-37; 325:91; Exhibit D-7. Husband's monthly expenses, net of alimony and child support, were \$10,852. R. 324:239-49; 325:91-2; Exhibit D-9.

The trial court determined Husband's income to be approximately \$195,000 yearly. *See Supplemental Findings of Fact and Conclusions of Law*, ¶ 5; R. 220.

Husband's ability to provide for Wife's needs, should any need exist, was not disputed. R. 621.

SUMMARY OF ARGUMENT

Dissatisfied with this Court's denial of her appeal in the Jensen Appeal I, Wife filed a Petition for Writ of Certiorari with the Utah Supreme Court. That Writ was summarily denied. R. 480-80A. This Court's mandate to the trial court on remand in Jensen Appeal I was crystal clear, divide the marital estate according to *Burt*, including the determination of any "exceptional circumstances", and thereafter proceed to determine the viability of an alimony award, if any. Notwithstanding that mandate, Wife in essence would like to start over and have this Court preside over the divorce as if no trial had occurred. That is neither the function nor the proper use of the Utah appellate court system.

The parade of horrors encompassing Wife's brief begins with the five issues she states as the basis for her appeal. While three of those issues are properly before this Court, the other two are not. Wife, however, does not confine herself to the five stated issues but argues some ten issues on appeal within the body of her brief. Those issues are similarly not properly before this Court. Only two issues were before the trial court on remand, i.e., division of the marital estate and alimony. Those are the only two issues before this Court on appeal.

On remand, Wife argued that the trial court should take no new evidence. The trial court agreed with her. Wife at no time during the trial or thereafter, until the filing of her recent appellate brief, objected to the imputation of income to her as a minimum wage, as to income producing assets, or otherwise. Wife continued to utilize the 7.5 percent rate of return applied to the income producing marital assets. Wife objected to only one issue in the Second Supplemental Findings of Fact and Conclusions of Law, the judgement awarded

to Husband for alimony paid. Wife's appeal in this case reflects her attempt to re-litigate everything including the proverbial "kitchen sink" and as such, is grossly in error.

This Court affirmed the trial court's characterization of separate and marital property. Thus, the only issue before the trial court on remand was the division of the already determined marital estate which it correctly divided on an equal basis.

The trial court followed *Burt* and found that no exceptional circumstances existed justifying other than an equal division of the marital estate. Contrary to Wife's assertions, *Burke* is not the bright-line test to determine "exceptional circumstances" and as such the trial court made correct findings and did not abuse its discretion in its ruling on this issue. *See, generally Burke v. Burke*, 733 P.2d 133 (Utah 1987). The trial court followed this Court's mandate on remand and applying Utah Code Ann. § 30-3-5(7) found Wife demonstrated no need for alimony. Thus, the trial court properly awarded no alimony.

Trial courts may properly consider investment income in determining a recipient spouse's need for alimony, if any. The ability to generate income from income producing assets bears directly on a recipient spouse's ability to meet financial needs. Thus, the trial court correctly considered the income to Wife from the income producing assets she was awarded in the division of the marital estate. That notwithstanding, Wife failed to preserve this issue in the court below and is precluded from asserting this issue for the first time on appeal.

Finally, when this Court reversed and remanded the trial court's award of alimony, the case stood in the lower court as if no trial had been had on that issue in the first instance. As such, the trial court correctly determined that Husband was entitled to a judgment for alimony previously paid.

This Court should adhere to and apply its decision in Jensen Appeal I, a decision that if error were to be found would have been considered and decided by the Utah Supreme Court. That Court denied Wife's Petition for Writ of Certiorari. This Court should affirm the trial court's division of the marital estate and award of no alimony and dismiss Wife's appeal outright.

ARGUMENT

I. WIFE HAS FAILED TO MARSHAL THE EVIDENCE.

Wife's recitation of certain of the trial court's findings on remand and her blatant attempt to reargue her case on appeal fall far short of meeting her burden to marshal the evidence. That failure is not a minor "blip" on the radar screen of the appellate process, but a nuclear missile which sinks her appeal. Accordingly, under well-settled Utah law, this Court must assume the record supports the findings of the trial court.

A critical and fundamental requirement when challenging a trial court's findings of fact is to marshal the evidence supporting those findings. *See Moon v. Moon*, 1999 UT App 12, ¶ 24.

The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

Id. (citations omitted). An appellant who merely reargues her position on appeal fails to meet her duty and burden. *See Schaumberg v. Schaumberg*, 875 P. 2d 598, 603 (Utah Ct. App. 1994). An appellant similarly fails to marshal the evidence on appeal when she merely recites the findings on point and highlights the evidence she deems contrary to the findings.

See Marshall v. Marshall, 915 P. 2d 508, 516 (Utah Ct. App. 1996); *see also Thomas v. Thomas*, 987 P. 2d 603, 606 n.3 (Utah Ct. App. 1993).

In the case *sub judice*, Wife does not assume the role of devil's advocate, but rather that of the jilted petitioner listing a multitude of self-serving reasons she disagrees with the trial court's findings. Wife's inability to extricate herself from her own shoes and marshal the evidence serves no purpose other than to divert the Court's attention from the only two issues before the trial court on remand, i.e., division of the marital estate and alimony. Wife has not presented in "comprehensive and fastidious order every scrap of competent evidence introduced at trial which supports the very findings [she] resists[.]" rather Wife fails in certain instances to even recite these findings on the two issues remanded to the trial court. Wife utterly fails to point in the record to the avalanche of evidence in support of the trial court's decision to divide the marital estate equally and to award no alimony. Moreover, Wife's arguments presented in her brief do nothing more than prove the fatal flaws in her argument. Flaws recognized by the trial court to be contrary to fundamental principles governing divorces.

Wife has no reluctance or hesitation to thoroughly recount her own unsupported testimony and the testimony of her expert at the trial that Husband's separate property was commingled with marital property and therefore, lost its identity as separate property. *See App.'s Brief*, pp. 5-13. Her claim failed in the Jensen Appeal I and must fail now. Wife declares to this Court that the trial court did not resolve the issue of values on Husband's separate property, but refuses to acknowledge that when the trial court identified and awarded separate property, under *Burt* and *Mortensen*, those values are irrelevant. *See App.'s Brief*, pp. 6-7. Wife gratuitously states the "trial court for the most part agreed with Husband's characterization of the stock and ranch property as separate property." *App.'s Brief*, p. 10. Wife, however, chooses to ignore over sixty (60) pages of testimony supporting

the characterization of Husband's property as separate, and over seven (7) pages of detailed findings by the trial court on Husband's separate property. *See Statement of Fact (SOF)* ¶11.

Moreover, Wife asserts that the trial court on remand, rather than making detailed findings in support of its original decision, changed its decision, and applied a dictionary definition of "exceptional circumstances." *See App.'s Brief*, p. 12. Wife again, turns her back on the Record evidence diametrically opposed to her argument to the trial court that *Burke* is in essence the bright line test to determine exceptional circumstances. Wife's statements also fly in the face of the trial court's exacting statements and findings that it considered Wife's arguments, both in writing and at the hearing on remand, and found that no exceptional circumstances existed to warrant other than an equal division of the marital estate. *See SOF*, ¶11.

On the issue of alimony, Wife merely regurgitates the reasons the trial court awarded alimony in the first instance, and claims the trial court changed its mind on remand without an evidentiary basis. *See App.'s Brief*, pp.14-16. Wife once again presents an incomplete picture. Wife herself argued that the trial court should not take new evidence on remand as the evidence presented at the trial in the first instance was sufficient. *See supra note 7*. The truth is that the trial court made detailed findings on the issue of alimony and Wife had no demonstrated unmet financial need. *See SOF*, ¶¶12, 15.

Wife's diversion into the validity of the trial court applying a reasonable rate of return to income producing assets, is belied by the fact that she herself utilized that rate of return in later papers filed with the court and did not specifically appeal that issue to this Court. *See supra page 5 8 n.3*. Wife also fails even to engage in the "mere recitation" of the trial court's Second Supplemental Findings of Fact and Conclusions of Law with the exception of the trial court's findings on Wife's ability to meet her needs. *See App.'s Brief*, p. 14. Wife utterly fails to assume her role as devil's advocate and candidly admit to the Court that

the income produced from Wife's share of the marital estate met any financial need she had to maintain the standard of living she enjoyed during the parties' marriage. *See SOF*, ¶¶ 16.

Clearly, Wife has not met her burden to marshal the evidence on appeal. She did not play "devil's advocate" and in fact she indefatigably continues to reargue not only her case in its entirety, but highlights her arguments on appeal to this Court in Jensen Appeal I, which this Court rejected. R. 358-61. Wife's position is the best example of "if first you don't succeed" Accordingly, Wife's failure to marshal the evidence renders this Court's task to that of determining whether the trial court on remand followed its specific and mandate directions. Once this Court determines the trial court fulfilled its mandate, the trial court's findings of fact are presumed to be correct and its decision must be affirmed.

**II. THE TRIAL COURT PROPERLY DIVIDED THE PARTIES' MARITAL
PROPERTY EQUALLY WHERE NO EXCEPTIONAL CIRCUMSTANCES EXIST
TO DIVIDE THE PROPERTY OTHERWISE.**

Both Husband and Wife made substantial contributions to the marriage: he in working eleven (11) and twelve (12) hour days, five (5) and six (6) days a week at his law practice and later as Vice-President and general counsel at Savage Industries to build the parties' economic coffers and to provide the family with economic stability and a commensurate standard of living; she by helping to run the household and raising the parties' children. Together, over their twenty-eight (28) year marriage, the parties amassed a marital estate approximating \$3,000,000. The parties have been rewarded for each of their contributions to the marriage by receiving one-half the estate they built together. Any division other than on an equal basis does nothing more than devalue Husband's substantial contribution to the marriage and penalize him for owning separate property. Such a result is not and cannot be supported under any equitable or legal principle.

Contrary to Wife's innuendos, Utah does not have a bright line test to determine what constitutes "exceptional circumstances" sufficient to overcome the presumption that the

marital estate must be divided on an equal basis. Although Wife argues the *Burke* factors, which are considered in *any* property division, serve as such a bright line test, such is absolutely not the case.

Husband concedes that no Utah case defines “exceptional circumstances” in the context of divorce. However, several Utah cases provide trial courts with guidance in determining whether and what exceptional circumstances may exist. Perhaps most instructive are the cases of *Mortensen* and *Elman*.

Wife argued in her brief that *Mortensen v. Mortensen*, 760 P. 2d 304 (Utah 1988) allows a court to consider the award of separate property to one spouse when fashioning an equitable division of the marital estate. *Mortensen*, however, holds directly to the contrary. The *Mortenson* Court explained that although it may be appropriate in some instances to award one party’s separate property to the non-donee spouse, *where the non-donee spouse has somehow participated in the enhancement, augmentation, or protection of the separate property*,

in making [the division of the marital estate], *the donee or heir spouse should not lose the benefit of his or her gift or inheritance by the trial court’s automatically or arbitrarily awarding the other spouse an equal amount of the remaining property which was acquired by their joint efforts to offset the gifts or inheritance.* Any significant disparity in the division of the remaining property should be based on an equitable rationale other than on the sole fact that one spouse is awarded his or her gifts or inheritances. . . These rules will preserve and give effect to the right that married persons have always had in this state to separately own and enjoy property. It also accords with the normal intent of donors or deceased persons that their gifts and inheritances should be kept within their family and succession should not be diverted because of divorce.

Id. at 305-08 (affirming property division based on the parties’ stipulation that wife received no interest in husband’s retirement account, a clearly marital asset, in exchange for two-thirds of estate that included certain stock in husband’s separate family property) (emphasis added).

Thus, it defies reason and logic to try to understand how Wife can argue that the trial court was correct in awarding her (and penalizing Husband) a disproportionately greater portion of the marital estate. Awarding one spouse separate property, even significant separate property simply cannot be an “exceptional circumstance” under applicable law. *See Burt v. Burt*, 799 P. 2d 1166, 1168-69 (Utah Ct. App. 1990).

This Court further opined on the types of “exceptional circumstances” that warrant an unequal or disproportionate division of the marital estate in the very recent case of *Elman v. Elman*, 2002 UT App 83. In so doing, this Court implicitly rejected Wife’s claimed exceptional circumstances.

In *Elman*, this Court determined that the trial court had appropriately awarded wife an offset, i.e. a disproportionate share of the marital estate, for three years during the parties’ thirteen year marriage where wife’s sole management of all of the parties’ marital estate freed husband to quit his lucrative job and work full-time to increase the value of his partnerships all to the exclusion of any other work or contribution to the marriage. *See id.* at ¶44. Thus wife’s marital labor *solely* increased the value of the marital estate, and husband’s marital labor *solely* increased the value of his partnerships, his separate property. *See id.* at ¶¶ 8, 20, 26, 29 (affirming lower court’s determination that husband’s partnership interests were separate premarital property, not commingled, enhanced or protected by wife in any meaningful way, but increased in value due to wife’s sole care for marital estate allowing husband to have no job and give sole and maximum efforts to his separate property).

Pointedly, in *Elman* this Court specifically explained that the payment of a legitimate business expense related to the value or use of an inherited or premarital assets does not convert that asset or any portion thereof into a marital asset. *See id.* at ¶25 n.6. The facts of *Elman*, i.e., the “exceptional circumstances” found there, were specifically and

unequivocally distinguished from the types of exceptional circumstances claimed by Wife in the instant case. This Court stated,

[w]e emphasize that this is not the normal circumstance where a spouse reviews premarital stock holdings and makes investment decisions, devoting a few hours to such management, while maintaining a normal occupation. This situation involves the very unique facts as to Husband's time spent managing premarital property and Wife's active efforts increasing the value of the marital property.

Id. at ¶24 n.5 (emphasis added).

The Court in *Elman*, reviewed other cases *Dunn*¹⁴ distinguishing those cases based on the non-donee spouse's augmentation of the donee spouse's separate property, and where the non-donee spouse had an ongoing financial need that could not be met solely by alimony. *See id.* at ¶¶22-29 (citing *Dunn v. Dunn*, 802 P. 2d 1314-18 (Utah Ct. App. 1990) (holding wife not entitled to any pre-marital contributions to or appreciation in husband's retirement account)).

For example, the *Elman* Court explained that in *Schaumberg*¹⁵ the husband augmented his separate property with marital funds thus changing the identity of the property from separate to marital property, thereby justifying the lower court's award to the wife of one-half the appreciation a building claimed to be husband's separate property. *See Schaumberg*, 875 P. 2d at 603. The *Elman* Court was careful to note the distinguishing factors,

we are not suggesting Husband's activities as an interest holder in the partnerships, before he assumed active management of the partnerships after his father's death, would convert the appreciation into a marital asset.

¹⁴ 802 P. 2d 1314 (Utah Ct. App. 1990).

¹⁵ 875 P. 2d 598 (Utah Ct. App. 1994).

Id. at ¶25 n.6. Only when the husband made management of his separate assets his sole and full-time job and Wife became the sole spouse to manage and grow the estate, did wife become entitled to an enhanced share of the marital estate.¹⁶

Perhaps most compelling is the fact that the *Elman* Court did not rely on or cite to *Burke* for the proposition that exceptional circumstances existed justifying an unequal division of the marital estate. *See id.* at ¶¶ 28-29.

This Court in *Hall v. Hall*, 858 P. 2d 1018 (Utah Ct. App. 1993) rejected wife's claimed exceptional circumstances of lack of education, raising an autistic child and two preschool aged children, finding these circumstances were properly dealt with in the court's property and alimony awards. *See id.* at 1022-23.

In *Walters v. Walters*,¹⁷ the Court explained that where wife had a trailer on one piece of husband's separate non-marital property, it may be appropriate on remand to exchange one piece of separate property for marital property to allow her to remain on that separate parcel. *See id.* at 68 n.4. However, the Court announced the exchange would be effected such that husband still retained his separate property in its entirety and the marital estate would be divided equally.

In *Thomas v. Thomas*, 1999 UT App 239 the Court explained, "[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 sale of a marital home would have forced husband to move from the area and lose his employment. *See id.* at ¶¶ 23-24.

¹⁶ The *Elman* Court goes on to cite other cases in support of the lower court's decision. *See id.* at ¶ 27. However, in those cases the courts found the wife had actively participated in the augmentation of husband's separate property. *See id.*

¹⁷ 812 P. 2d 64 (Utah Ct. App. 1991) (reversing and remanding property division to follow property analysis).

In stark contrast, no such exceptional circumstances were found in *Finlayson v. Finlayson*, 874 P.2d 843 (Utah Ct. App. 1994), where both spouses had the ability to support themselves. 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. *See id.* at 849.

These examples and principles guide the courts and counsel in the instant case. Realizing that in its decision at the conclusion of trial, the sole basis for awarding Wife a disproportionate share of the marital estate rested specifically on the award to Husband of his separate property, the trial court in its well reasoned discretion determined,

I don't find that there are, consistent with what I think the Court of Appeals had in mind as the basis for me to conclude that there were exceptional circumstances.

R. 639:58. The trial court then proceeded,

The Court finds that while neither party has cited to the Court precedent defining the terms "exceptional circumstances" in the context of justification for an unequal division of the marital estate, clearly those terms include deviation from the norm, higher than average, atypical, uncommon, extraordinary, or similar meanings and concepts. The Court further finds that while the Wife has detailed in her Memorandum various circumstances she deems to be exceptional, they do not singly or in combination justify the division of the marital estate between the parties on other than an equal basis. As such, no exceptional circumstances exist which would justify the division of the marital estate between the parties on other than an equal basis.

Second Supplemental Findings of Fact and Conclusions of Law, ¶1; R. 618.

Accordingly, the trial court was correct in its determination that anything other than an equal division of the marital estate would work an inequity on Husband, who contributed just as substantially to the augmentation of the marital estate as Wife. The trial court's findings are further supported by the fact that Husband was merely an interest holder in his family's ranching businesses and worked on the family ranch one day a week, if, and only if, he did not have to work at his sole and primary job, his law practice and his later position

at Savage Industries. While the efforts of both parties to the marriage are commendable, they do not fall outside the presumptive rule of *Burt*.

III. CHARACTERIZATION OF PROPERTY AS SEPARATE OR MARITAL WAS NOT BEFORE THE TRIAL COURT ON REMAND.

The trial court followed this Court's mandate on remand, to the letter. In *Cummings v. Cummings*, 1999 UT App 356, this Court explained that on remand the trial court is only to address issues specifically enumerated by the Court. *See id.* at ¶¶ 12-15 (leaving open for further testimony and evidence only the issues of the value of retained earnings separate from a business and the value of the business) (*citing Slattery v. Covey & Co., Inc.*, 909 P. 2d 925, 928 (Utah Ct. App. 1995)).

Similarly, in the Jensen Appeal I, this Court mandated the trial court on remand to consider under *Burt*,

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.

Burt, 799 P. 2d at 1172 & n.10.¹⁸

Notwithstanding the fact that property division in its entirety was not before the trial court on remand, the Record and the trial court's Supplemental Findings of Fact and Conclusions of Law explicitly supported the trial court's characterization of separate and marital property and this Court's affirmance of that decision.

In the Jensen Appeal I, this Court affirmed the characterization of Zion's Bank stock and the Ranch properties as Husband's separate property. R. 358-61.

At the hearing on remand the trial court specifically indicated to the parties that the recharacterization of property was not before the court. R. 639:8-9. Wife did not object to

¹⁸ *See also Hall v. Hall*, 858 P.2d 1018, 1022 (Utah Ct. App. 1993).

the trial court's decision not to re-examine and re-characterize property in its entirety at that hearing.¹⁹ R. 639. Wife surely cannot resurrect claims on appeal to which no objection was made at trial.

Wife's assertions that Husband was awarded marital property as separate property has no support in the Record and must be dismissed on appeal. Wife claims that the trial court awarded her a disproportionate share of the marital estate due to the trial court's award of marital property to Husband as separate property. However, as Husband has demonstrated *supra*, this claim is not only patently false, but also cannot serve as the basis to divide the marital state on other than an equal basis.

Regardless of Wife's hue and cry to the contrary, the evidence was and is virtually uncontradicted that Wife made no material contribution of time or effort to the ranching business; neither the \$85,000 T-N Company note to Malpaso nor the three \$10,000 notes gifted to Wife by Husband's father involved any commingling of marital property in the ranching business; 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; fractional partnership interests in T-N Ranches given by Husband to his siblings were his separate property, in which Wife held no interest; and no marital property or funds were used by Husband to acquire the Moynier Ranch assets. *See SOF*, ¶¶ 1-10.

In accordance with the review of over one hundred (100) pages of testimony by both parties and their experts, the trial court made exhaustive and detailed findings related to the characterization of separate and marital property. *See id.* The trial court even-handedly

¹⁹ Wife cites to the Record pp. 524-40 and 571-75 in support of her claim that she preserved the issue of property division in its entirety for appeal. Record pp. 524-40 is Wife's Brief on Remand, which was submitted to the trial court before the hearing on remand; Record pp. 571-75 are Objections to Proposed Findings of Fact Conclusions of Law and Decree and Memorandum in Support Thereof, which objected only to the award to Husband of previously paid alimony.

found in every instance where Husband's separate property had been commingled with marital assets such that the asset lost its identity as separate property, the same was correctly included in the marital estate, i.e. certain of the Zions Bank stock and the law office. R. 199-214; 221-35.

In either case Wife's claim that the court failed to consider the issue of property division in its entirety must fail. First and foremost, the only property issue before the trial court on remand was the division of the previously determined marital estate. Equally compelling is the Record evidence that supports the trial court's property characterization, which is the same Record evidence on which the Court based its affirmance of the trial court's decision in the Jensen Appeal I.

IV. THE TRIAL COURT CORRECTLY DETERMINED WIFE HAD NO NEED FOR ALIMONY FULLY SUPPORTING NO ALIMONY AWARD.

The trial court correctly determined that Wife could adequately meet her financial needs, commensurate with the standard of living she enjoyed during the marriage. Under those circumstances, an award of alimony to Wife would be nothing short of a penalty on Husband. As alimony is not to be punitive in nature, the trial court correctly made no alimony award in this case.

It is axiomatic that "[t]rial courts have broad discretion in making alimony awards."

Childs v. Childs, 967 P.2d 942, 946 (Utah Ct. App. 1998) (citations omitted).

The 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.

At the hearing on remand, pursuant to the Court's direction in the Jensen Appeal I, the court applied the facts of this case to Utah Code § 30-3-5(7) in effect in 1999. The substance of Utah Code § 30-3-5(7) directs the court to look at the following factors,

The court shall consider at least the following factors in determining alimony: (i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; (iii) the ability of the payor spouse to provide support; (iv) the length of the marriage; (v) whether the recipient spouse has custody of minor children requiring support; (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

Utah Code Ann. ¶ 30-3-5(7)(a)(i)-(vii) (1997 & Supp. 1999).²⁰

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) (reducing alimony awarded to \$1 where wife could meet needs equal to standard of living enjoyed during the marriage without periodic payments from husband). 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).

Furthermore, courts are entirely within their discretion to impute the federal minimum wage as income to Wife, even though it would not require her to seek and obtain employment. *See Willey v. Willey*, 866 P. 2d 547, 553 (Utah Ct. App. 1993).

In the Jensen Appeal I, the Court mandated the trial court to first divide the marital estate and determine whether any exceptional circumstances exist and thereafter proceed to the alimony determination under the applicable statutory framework. R. 359-61. The trial

²⁰ The full text of Utah Code Ann. § 30-3-5(7) is repeated in Wife's brief, however the actual statute applied by the trial court encompassed not only the factors of the statute in effect at the time of trial but additional factors. *See supra*, pp. See *App. 's Brief*, pp. 2-3. Wife did not request the trial court to consider alimony under Subsections (b) - (f).

court detailed in its Second Supplemental Findings of Fact and Conclusions of Law, each of the statutory factors applicable to this case. *See Second Supplemental Findings of Fact*, ¶¶ 5-6; R. 620-22.

Based on Wife's financial condition and needs submitted at the trial, the trial court found Wife's needs to be approximately \$4,000. *See SOF*, ¶15.

Based on Wife's ability to meet those needs through income producing assets awarded to her in the marital estate division, and through minimum wage earnings,²¹ the trial court found Wife had the ability to generate approximately \$6,765.²² *See SOF*, ¶15.

The parties did not dispute Husband's ability to provide support to Wife, if applicable. *See SOF*, ¶ 17.

The trial court found the parties' twenty-seven (27) year marriage although of long duration could justify but did not require the payment of alimony. *See* R. 639:59.

Although the parties had one minor child at the time of their divorce and trial, there was no dispute Jorja was in her senior year of high school at the time of trial and in fact did graduate at the age of eighteen (18) with her high school graduating class. *See* R. 639:59-60.

While Wife worked for a brief period during the marriage at Husband's law office, her employment was of short duration and Wife was fully compensated for her work. *See* R. 639:60.

Both parties had attained the level of education they had at the time of trial by the time they were married. *See* R. 639:60.

The evidence at trial was crystal clear, Wife demonstrated no need for alimony. The trial court correctly exercised its discretion and made each of the required findings to

²¹ The trial court determined Wife would not be forced to seek employment, but that she could seek employment at least at the minimum wage, and in any event she could likely meet her needs without the minimum wage imputation. *See* R. 639:59.

²² *See supra* note 3.

justify the award of no alimony to Wife. Contrary to Wife's erroneous and unsupported claim that the trial court erred in imputing investment income to her, Utah precedent holds directly to the contrary. Although Wife now takes issue with the trial court's imputation of a reasonable rate of return on her income producing assets, for the reasons set forth *supra*, she did not preserve that issue on appeal, and in fact utilized that rate of return in papers she filed with the trial court. Moreover, the trial court was entirely within its discretion to apply a "reasonable" rate of return on the parties' income producing assets, and applied that rate of return equally to Wife and to Husband.

It is quixotic indeed of Wife to allude to the argument that the trial court should have equalized incomes. However, wife cannot, and in fact does not, dispute that she never raised this issue or made this request specifically to the trial court.

Where Wife has no need for alimony and can maintain the standard of living she enjoyed during the marriage from her imputed income and income producing assets, any award of alimony would be punitive in nature to Husband which is strictly forbidden and prohibited under Utah law.

V. THE TRIAL COURT PROPERLY AWARDED HUSBAND A JUDGMENT FOR ALIMONY PREVIOUSLY PAID.

Wife's contention that she is entitled to reinstatement of a fictitious temporary alimony award subsequent to the decision in Jensen Appeal I is unsupported by the facts or law and should be rejected.

The Court's decision in the Jensen Appeal I terminated Wife's right to receive alimony from Husband. Once the trial court on remand determined Wife had no need and therefore awarded no alimony, in fairness and equity Husband was entitled to a judgment for all alimony previously paid from trial until the decision in Jensen Appeal I.

It is generally accepted and Utah courts follow the precept that, the effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or

decree had never been rendered, except as restricted by the opinion of the appellate court.

5B C.J.S. Appeal and Error § 1950; *Hidden Meadows Dev. Co. v. Mills*, 590 P. 2d 1244, 1248 (Utah 1979)(involving an equity action for specific performance of an option to purchase realty); *see also O'Brien v. O'Brien*, 347 So. 2d 1288, 1289-90 (La. Ct. App. 1st Cir. 1977).

Additionally, in *Bailey-Allen Co., Inc. v. Kurzet*, 945 P. 2d 180, 194 (Utah Ct. App. 1997), the court held “any portion of a judgment not appealed from continues in effect, regardless of the reversal of other parts of the judgment.” *Id.* (deciding *inter alia* unjust enrichment and contract claims)(citing *D' Aston v. Aston*, 844 P. 2d 345, 352 (Utah Ct. App. 1992)). Similarly, if those portions of a judgment, untouched by a higher court's reversal remain in effect, clearly the inverse is true, those portions of a judgment which are reversed and remanded must, therefore, be rendered of no force or effect *ab initio*.

O'Brien v. O'Brien is also instructive. In *O'Brien*, the Louisiana Court of Appeals granted retroactive effect to the reversal of an alimony reduction order. *See O'Brien*, 347 So. 2d at 1290.

In *O'Brien*, where a trial court awarded alimony and husband successfully reduced the alimony award, but the court of appeals found the lower court reduced the alimony award in error, the wife was entitled to the difference in the underpayment from the time of the reduced alimony award until the court of appeals' reversal. *See id.* at 1290.

That court aptly reasoned,

[i]f the Trial Court judgment would have increased alimony with the wife receiving the increase until that judgment was reversed on appeal, the husband after the reversal became final would be entitled to recover, in a separate action, the overage paid the wife. The wife certainly could not argue that the retroactive application of the reversal effected a suspensive appeal of the Trial Court increase. . . . Thus, we reason that the reversal by the Court of the reduction of alimony places the parties in the same position as if no reduction had ever been decreed, and the retroactive application of the reversal does not operate as a suspensive appeal.

*Id.*²³ (citations omitted) (emphasis added).

The situation is the same here. The effect of this Court's decision reversing the trial court's award of alimony is as if the trial court's original award of alimony had never been entered.

Prior to the trial in this case, there were no temporary orders in place. Accordingly, there was no temporary alimony award for the trial court to resurrect pending the hearing on remand. The only injustice and inequity would have resulted from the windfall to Wife had the trial court not ordered repayment of previously paid alimony.

The amounts paid by Husband to Wife as and for alimony since the entry of the Supplemental Divorce Decree are an "overage" for which the Husband is entitled to reimbursement. *See O'Brien*, 341 So. 2d at 1290; *see also Wasson v. Wasson*, 439 So. 2d 1208, 1212 (La. Ct. App. 1st Cir. 1983)(following reasoning in *O'Brien* and allowing recovery of child support payments).

The *Wasson* court correctly reasoned,

[a]lthough the paying spouse was also expected to follow the trial court order until the judgment became definitive, once the appellate court reversed the trial and all delays had run, the effect of the appellate court's reversal was to date back to the time of the original trial court judgment. Once the appellate court determined the trial court erred in not awarding the higher amount of alimony it was as though the trial court had ordered the husband to pay the higher amount from the beginning.

Wasson, 439 So. 2d at 1211.

At no time did Wife ever request the trial court to take evidence or render its decision on the enforceability of an oral agreement to pay temporary support. As such, Wife is precluded from arguing this point for the first time on appeal.

²³ The rationale behind the Louisiana law prohibiting suspensive appeals in judgments relating to alimony is to prevent the wife from being deprived of necessary support pending any appeal. *See id.* at 1289. Utah does not appear to adopt a similar suspensive appeal law, however, the rationale is applicable here.

More importantly, Wife is not being deprived of any necessary support. In point of fact, the only party placed at a disadvantage in the instant case is Husband for paying out thousands of dollars in previously awarded alimony specifically reversed and vacated by this Court.

Husband is, accordingly entitled to recover all amounts previously paid as and for alimony.

CONCLUSION


Notwithstanding Wife's flagrant and unending attempts to re-litigate the case in its entirety to this Court in her second appeal, there are three issues properly before this Court. Whether the trial court followed this Court's mandate on remand from the Jensen Appeal I regarding the division of the marital estate under *Burt*, considering whether any exceptional circumstances existed warranting other than an equal division of the marital estate, and the issue of alimony. Whether Husband was entitled to repayment of overpaid alimony.

Notwithstanding Wife's ignoring of her basic obligation to marshal the evidence, the trial court's decisions were reached by exercising the discretion to which it was and is entitled.

Therefore, Wife's appeal should be dismissed in its entirety and the trial court's decision affirmed in all respects.

Dated this 3rd day of June 2002.

CLYDE SNOW SESSIONS & SWENSON

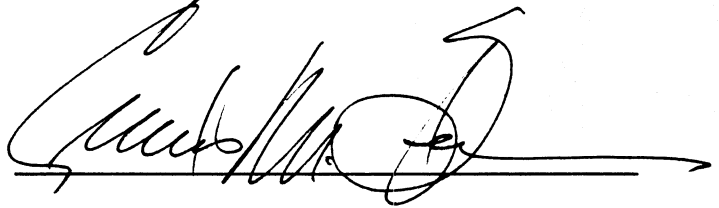


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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd of June 2002, two true and correct copies of the foregoing **BRIEF OF APPELLEE** were hand delivered to:

Harold G. Christensen
Rodney R. Parker
SNOW, CHRISTENSEN & MARTINEAU
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A handwritten signature in black ink, appearing to read "Rodney R. Parker", is written over a horizontal line.