

2001

Linda H. Jensen, Petitioner/Appellant, vs. James T. Jensen, Respondent/Appellee : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDA H. JENSEN,

Petitioner/Appellant,

vs.

JAMES T. JENSEN,

Respondent/Appellee.

No. 20010721-CA

Argument Priority 15

REPLY BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
HONORABLE DAVID S. YOUNG, PRESIDING

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SUMMARY OF ARGUMENT

This case is before this Court for the second time. When it was here previously Judge Young was directed to explain the basis for his unequal division of the marital estate and justify his award of alimony. On remand, Judge Young simply reversed himself, concluding contrary to his earlier decision that there were no exceptional circumstances and that Wife had no need for alimony. There is no more explanation of this decision than the previous one, and it appears that Judge Young misunderstood this Court's instructions and failed to follow the proper legal analysis.

The function of the trial court in a divorce action is to do equity, and the function of this Court should be to see that equity was indeed done. In this case, Husband does

not attempt to show that the result is equitable. Instead, Husband resorts to invective, hyperbole, and misapplication of legal principles in order to divert attention from a result which the trial court itself characterized as inequitable.

Husband's defense of the trial court's property division is unpersuasive because it fails to justify the unequal distribution in Husband's favor or to justify the lower court's failure to apply the instructions of the Utah Supreme Court concerning the appropriate considerations in division of property in divorce. Moreover, Husband's defense of the lower court's failure to rectify the misallocation of marital and separate assets requires this Court to endorse Husband's description of the transactions involving those properties as shams. This Court should reject Husband's arguments. The property division on remand should be reversed because the lower court failed to apply the appropriate legal standard in considering exceptional circumstances, and failed to remedy the acknowledged award of substantial marital property to husband as part of the separate estate.

The lower court's use of historical average stock market returns to justify its award of no alimony was unsupported by any evidence. Wife objected many times to the use of that figure, but included it in her submissions on the alimony issue because it was the only figure the court would consider. The practice of reliance on historical average stock market returns in setting alimony requires parties to place assets at risk and does not provide an adequately stable source of funds for either payors or recipients of alimony.

After a 28 year marriage in which the parties built a substantial marital estate for themselves and a lucrative career for Husband, Wife was left at age 51 with no realistic

earning ability, no alimony, and only 15 percent of the parties' combined assets, which she was required to expend for her support. Husband's future was unaffected by this division, but Wife's standard of living was drastically altered. The legal reasoning leading to that inequitable result was not consistent with the standards that have been set by this Court, and failed to give proper weight to the burden of proof on the issues of property division and alimony.

ARGUMENT

I. THE TRIAL COURT'S PROPERTY DIVISION WAS BASED ON AN ERRONEOUS LEGAL STANDARD, FAILED TO CLASSIFY ASSETS CORRECTLY, AND WAS INEQUITABLE.

When the lower court initially awarded more than half of the marital estate to Wife, it justified the decision in part on the fact that significant marital assets had been commingled with the ranch and could no longer be separately identified. It thus found sufficient exceptional circumstances to justify, and even require, a variance from the usual one-half division of the identifiable marital estate. This Court reversed and instructed the lower court to explain its property division more clearly in terms of case law.

On appeal, this Court did not decide that the trial court's belief was wrong. It simply asked the court to explain its reasoning process in terms of applicable legal precedent. The lower court's decision on remand errs in two interlocking ways with respect to property division. First, the lower court erred in failing to divide the assets that had been commingled with the ranch; and second, it erred in failing to apply the correct legal standard in considering Wife's argument that exceptional circumstances had been shown. Instead, the trial court reiterated its view that equity required an unequal property division

but decided that, as it defined the term, “exceptional circumstances” did not exist. These inconsistent positions of the trial court are unexplained in the record and are contrary to applicable law.

A. *The Trial Court Erred in Failing to Accurately Construct and Account for the Marital Estate.*

The inclusion of marital property in the separate estate was an express basis for the trial court’s initial decision to award more than 50 percent of the marital estate (excluding those commingled assets) to Wife. The lower court’s inability to separate the commingled assets from Husband’s separate property was an exceptional circumstance that should have been accounted for by an additional award of marital property to Wife. At the time of the initial property division, the trial court expressly relied on the overall equity of the property division to compensate Wife for those commingled assets. (*E.g.*, R. 201.)

When this Court reversed the property division, it rejected the trial court’s reasoning process and thus rejected the trial court’s effort to arrive at an “equitable” result by rough accounting. The full identification and division of marital property were thus clearly before the trial court on remand. This Court’s remand following the first appeal instructed the trial court to “consider [the division of the marital estate] under the proper legal standards and procedures.” 2000 UT App 213 at p. 4. That reversal required the trial court to more carefully account for the commingled marital property.

The trial court’s subsequent failure to accurately construct the marital and separate estates resulted in an award of more than 50 percent of the marital estate to Husband.

Under the rule of *Burt v. Burt*, 799 P.2d 1166 (Utah Ct. App. 1990), that failure to account cannot be defended.

Husband's defense of the lower court's decision requires this Court to treat transactions that were constructed for maximum tax benefits as shams. Thus, \$30,000 in specific gifts to Wife from her then-father-in-law, which Husband describes as "facilitating the maximum tax-free disposition, year by year, of his estate" (Brief, p. 9), and which were converted into equity in the ranch properties, simply vanishes. Similarly, debts owed by the ranching operation to the law partnership, also used for tax benefits, disappear from the marital estate.

The \$85,031 note to Malpaso also must be treated as marital property. Husband's only evidence that his interest in Malpaso was not marital property is the bare statement that he formed it in 1972 (after the marriage) with his brother. Husband admits that there is no evidence in the record concerning the creation of the \$85,031 note, but asserts that it was "cancelled" and thus may be excluded from the marital estate (Brief, p. 8). Those arguments ignore Husband's burden to overcome the presumption that property (Malpaso) acquired during the marriage is marital: The fact that Husband's brother was involved in the company does not overcome the presumption. Moreover, the "cancellation" of the obligation benefited the ranch to the detriment of Malpaso, and thus effected a transfer of value from the marital estate to the separate estate.

Similarly, the Moynier property was acquired and maintained in part by marital funds, as described in Wife's opening brief (pp. 28-29). Husband cannot account for \$148,500, or nearly one-fourth, of the purchase price. Accordingly, the trial court should

have applied the presumption that property acquired during the marriage should be included in the marital estate. *See Dunn v. Dunn*, 802 P.2d 1314, 1317-18 (Utah Ct. App. 1990). That conclusion is even more compelling given the blatant subsidy of the ranch with the Moynier property by annual rental charges of only 1.8¢ per year.

Husband's argument that the \$65,000 of Zion's Bank stock that went into the ranch came from separate property is wrong. The evidence offered by Husband clearly showed that he sold the admittedly *marital* stock to fund the investment in the ranch, while preserving his separate shares. Exhibit D-20 is the key document. It shows shares held under three account numbers at Zions Bank.

The first account number, 3000024913 (see Figure 1), is the original stock Hus-

-----ACCOUNT MEMO-----				
-----CERTIFICATE INFORMATION-----				
CERT NUMBER	SHARE/BOND AMOUNT	DATE ISSUED	DATE SURRENDERED	STOP
U 012453	2,431	07/01/1981	06/13/1985	00
U 007964	1,621	09/08/1978	06/13/1985	00
U 007412	162	08/30/1978	06/13/1985	00
U 007005	102	12/16/1977	06/13/1985	00
U 007012	102	12/16/1977	06/13/1985	00
U 004880	260	12/31/1973	06/13/1985	00
U 004604	2,616	08/31/1973	06/13/1985	00

Figure 1 - Account No. 3000024913

band received from his father. That document shows a total of 7,294 shares in 7 certificates surrendered on June 13, 1985, the date the shares were placed in joint tenancy.

The next account number, 3000025158 (see Figure 2), shows **that those shares,** plus an additional 750 shares from an unknown source for a total of 8,042 shares, were

-----ACCOUNT MEMO-----				
-----CERTIFICATE INFORMATION-----				
CERT NUMBER	SHARE/BOND AMOUNT	DATE ISSUED	DATE SURRENDERED	STOP
ZB 032069	56,190	05/14/1997		00
ZB 014099	9,365	01/26/1993		00
ZB 001875	250	01/27/1988	08/05/1992	00
ZB 001853	500	01/21/1988	06/18/1991	00
U 017370	8,042	06/13/1985		00
O 029148	62	08/04/1982		00
U 012454	420	07/01/1981		00
U 007965	280	09/08/1978		00
O 020172	81	12/14/1977		00
U 005365	480	01/09/1975		00

Figure 2 - Account No. 300025158

converted into certificate number U017370 on June 13, 1985, the date of **surrender shown** in the first account. Husband claimed, and the trial court found, that 58,352 shares from **this account** are his separate property. He calculated that figure by multiplying the original 7,294 shares by 8 to adjust for the 1/26/1993 (2 for 1) and 5/14/1997 (4 for 1) stock splits (Exhibit D-20, p. 3).¹

¹ 7,294 X 2 = 14,588. 14,588 X 4 = 58,352.

The \$65,000 could not have come from that account because all 58,352 separate shares mathematically connect to the original 7,294 shares. Rather, the money came

-----ACCOUNT MEMO-----				
-----CERTIFICATE INFORMATION-----				
CERT NUMBER	SHARE/BOND AMOUNT	DATE ISSUED	DATE SURRENDERED	STOP
-----	-----	-----	-----	-----
ZB 032070	8,439	05/14/1997		00
ZB 025227	976	02/09/1996		00
ZB 014100	1,837	01/26/1993	02/09/1996	00
ZB 008236	300	08/22/1991		00
U 012457	512	07/01/1981		00
U 010051	440	02/14/1980		00
U 009517	585	05/14/1979		00

Figure 3 - Account No. 3000025926

from a third account, which Husband admits is marital property. That account is account number 3000025926 (see Figure 3). The sale of the 861 shares (\$65,019) is evidenced in this account by the surrender of certificate number ZB014100 (1837 shares) for certificate number ZB025227 (976 shares) on February 9, 1996. This evidence conclusively establishes the marital account as the source of the \$65,000 investment in TN Company.

Rather than justifying the exclusion of those assets from the marital estate, Husband's arguments demonstrate the extent to which marital and separate property were commingled in the ranching operation. The lower court should have carefully considered the commingling of marital property and either restored the value of the property to the marital estate or, more appropriately, included the entire commingled assets in the marital estate. The one thing the lower court was not permitted to do was give the marital assets to Husband without charging them to his share of the marital estate, yet that is precisely what the trial court ultimately did.

The resulting property division is not just manifestly inequitable; it actually includes admittedly and undisputedly marital property in the separate estate and thus divides only a diminished marital estate. It is thus an abuse of discretion and should be reversed.

B. *The Trial Court Erred in Failing to Correctly Define Exceptional Circumstances and to Explain Its Application of the Principle.*

Burke v. Burke, 733 P.2d 133 (Utah 1987), describes the factors the trial court should have considered in fashioning an equitable property division in this case.

In fashioning an equitable property division, trial courts need consider all of the pertinent circumstances. The factors generally to be considered are the amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties' standard of living, respective financial conditions, needs, and earning capacity; the duration of the marriage; the children of the marriage; the parties' ages at time of marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded.

733 P.2d at 135 (footnotes omitted).

The trial court abdicated its responsibility to consider those factors, which are discussed at pages 23-26 of Wife's opening brief.

THE COURT: I would say that this case still frustrates me greatly because when the Court of Appeals ruled as it did, it seems to me that it's just making the whole thing a very mathematical calculation. . . . [T]he terminology that they've used for me to find an exception is exceptional circumstances and exceptional circumstances, exceptional, I pulled out a dictionary to look at it, means uncommon [T]his is a frustration to me. I'm very troubled with [this] case, I can tell you." (Supp. R. 50-51.)

THE COURT: To me that's a sad circumstance. Let me say it this way, in Mr. Christensen's memorandum and the citation and references to the other cases that have relied on the sound discretion of the trial court for that kind of history,

that's all gone with Burke [*sic* – *Burt*] because there would be, I mean it's just a functionary kind of approach. You don't need a judge anymore, all you need is an accountant. All you need is somebody who can add up the dollars here and there and then just cut them right in half and give half to each and that's where I find a little bit of grief in my own mind because I think you know how I wrestled with this case in terms of trying to create a credible net worth and circumstance for Ms. Jensen that I felt was justified under the course of marriage and the term and duration and so on. (Supp. R. 24-25.)

The lower court's treatment of commingled marital property, and the other evidence of the parties' circumstances, required that the lower court analyze the question of exceptional circumstances. That was the mandate of this Court following the first appeal. The court did not do so, and its resulting property division is an abuse of discretion.

Husband cites *Elman v. Elman*, 2002 UT App 83, 45 P.3d 176. In that case, this Court upheld the trial court's treatment of separate and marital assets in a very unusual fact setting, in which the husband had devoted exclusive time to development of separate property during a portion of the marriage. The case does not hold that all cases must parallel the *Elman* facts in order to justify a departure from the 50/50 rule of property division. This case is more like *Schaumberg v. Schaumberg*, 875 P.2d 598 (Utah Ct. App. 1994), in which the husband commingled marital and separate funds and thus changed the character of the separate property to marital.

However, it is worth noting that in this case, by Husband's own admission, he "typically tried to spend one day a week in the farming-ranching side." (Brief, p. 6, citing R. 324:193-94.) The ranch did not pay him for that work. Over the 28 year marriage, that one day per week results in a cumulative total of *four years* spent augmenting the

value of the ranch at the expense of the marriage. This does not include the established commingling of marital assets with the ranch properties.

In the trial court and in the first appeal to this Court, Wife argued that husband's "sweat equity" in the ranching properties was a factor that should have been considered in the property division. Husband enhanced his equity in the ranch and did not draw a salary to reimburse the marital estate for the value of his services. Although the "sweat equity" argument was fully briefed, this Court in its prior memorandum opinion did not address it, presumably because the entire property division was being reversed and the trial court was expected to more carefully separate marital and separate property and to explain in more detail how it constructed and divided the marital estate.

This substantial "sweat equity" at the expense of the marriage was one of the exceptional circumstances justifying an unequal division of the marital estate. There is no logical reason to treat a wife's homemaking efforts differently when they enable a husband to augment the marital estate than when they enable the husband to augment his separate estate. A husband's augmentation of separate property, which is at the expense of time he could devote to the marriage, is made possible in the same way by the same homemaking efforts of the wife. *Elman* implicitly recognizes this. The trial court erred in failing to consider Wife's non-financial support of Husband's augmentation of separate property as an exceptional circumstance calling for deviation from the 50/50 property division requirement.

II. THE TRIAL COURT ERRED IN REVERSING THE AWARD OF ALIMONY

Husband's defense of the trial court's 180 degree reversal on the alimony issue depends entirely upon acceptance of that court's determination that Wife could earn 7.5 percent on the "working" assets she was awarded.

Husband does not attempt to show evidence in the record supporting the 7.5 percent income assumption. Instead, he claims that the use of 7.5 percent was not objected to and therefore the issue was waived. That contention is very mistaken. Wife objected to the use of that figure on numerous occasions, but ultimately was forced to incorporate it in her own presentations to the court because the court refused to consider any other figure.

At the March 26, 1999 hearing on objections to the decree of divorce before the first appeal, the following exchange took place:

MR. CHRISTENSEN: And one—the one final point that I think bears on what has been argued with respect to alimony, your Honor. We've used in the memorandum decision and in—and in the findings an assumed rate on assets that can be invested and seven-and-a-half percent. And a lot of the mathematics would change with respect to the arguments that are made if a—if a rate that is more consistent with current rates, 30-year bonds are a little over five; two-year bonds are under five; money markets are around four; seven-and-a-half is—is—you—your Honor was, of course, correct on that, that historically that is true, but—

THE COURT: Presently it isn't—

MR. CHRISTENSEN: —history is cyclical. (R. 327 at p. 46.)

Similarly, at the hearing following remand, Wife again complained to the court that the use of the 7.5 percent figure was inappropriate:

MR. CHRISTENSEN: . . . I think the reason that the argument was made that there was no unmet need, was largely the result of the way the Court in its ta-

ble, in dividing the property indicated what property was income producing and then suggested a rate of income on those assets based upon historical stock market data of seven and a half percent over time.

THE COURT: They didn't seem to like that too much.

....

MR. CHRISTENSEN: No, and I honestly didn't like that too much myself for these reasons, Your Honor, you can't pay rent on averages and—

THE COURT: That's right.

MR. CHRISTENSEN: —and in order to convert those assets that could be income producing to income producing assets, you have the capital gains factor that reduced what you've got and I rather felt that the appropriate way to look at the earnings on her income—

THE COURT: Her assets?

MR. CHRISTENSEN: —were the actual earnings, like she was awarded half of the (inaudible) [*sic* – Zions] bank—

THE COURT: The dividends on the stock.

MR. CHRISTENSEN: —and the dividend on that bank stock was very low. Actually I put forth in the brief what I believe the evidence was on that. So her need was pretty clear. Her ability to meet that need was due almost entirely on [*sic*] what she might get on the assets and on that analysis, the \$4,000 that the Court ordered was amply justified from an arithmetic standpoint but when you factored in the larger income due to the 7.5 percent on all assets at there [*sic*] before tax liquidated value, it threw that out of wack [*sic*]. Supp. R. 10-11.)

There are numerous other instances in the record where Wife objected to the use of the 7.5 percent figure. (R. 636 at p. 9-12; R. 162-65; R. 534.)²

The use of historical average returns on investment in divorce cases is common in the lower courts. It should not be countenanced, especially when, as here, no witness has

² The lower court chose to conduct several conferences regarding its proposed decision in an off-the-record setting. Although the issue is adequately preserved on the record for appeal and Wife does not rely on the objections made off the record, this Court should note that additional objection was made to the 7.5 percent figure in those conferences.

opined that such returns can be reliably and safely achieved. Recipients of alimony cannot pay bills with average returns, any more than payors of alimony should be charged with average returns in considering their ability to pay.

In an analogous case, *United States Air Tour Ass'n v. Federal Aviation Administration*, 2002 U.S. App. LEXIS 16535 (D.C. Cir. August 16, 2002), the court rejected the use of averages for similar reasons. The FAA, in determining the amount of aircraft noise acceptable in the Grand Canyon, relied on an average obtained by dividing the total noise over a year by the number of days in the year. This procedure failed to take into account the seasonal variation in the noise, meaning that a summer visitor to the park would experience unacceptable noise even though the annual average was within the acceptable range. The court reasoned:

[T]he use of an annual average does not correspond to the experience of the Park's actual visitors. People do not visit the Park on "average" days, nor do they stay long enough to benefit from averaging noise over an entire year. For the typical visitor, who visits the Grand Canyon for just a few days during the peak summer season, the fact that the Park is quiet "on average" is cold comfort.

2002 U.S. App. LEXIS 16535 at *51-52.

In this case, the fact that the stock market may have generated "average" returns of 7.5 percent is cold comfort indeed in a time of back-to-back negative market returns, high risks, and interest rates at historic lows. In equalizing lifestyles of divorcing parties and setting alimony awards upon which alimony recipients must depend for their subsistence, trial courts should be required to rely on actual evidence of returns, not speculative averages.

The use of 7.5 percent infected another portion of the lower court's decision. The lower court clearly erred in charging Wife 7.5 percent interest on the adjustment of property it ordered. The only income producing asset she really had, the Zion's Bank stock, had earned only 2.2 percent during the time in question, not the hypothetical 7.5 percent assumed by the lower court.³

The lower court's assumption that Wife should be charged with minimum wage income was also an abuse of its discretion. While almost anyone can be assumed capable of earning minimum wage, the issue is whether the taking of minimum wage employment is consistent with the lifestyle of the parties and the undisputed ability of Husband to pay alimony. Because of their success over the course of a 28 year marriage, these parties lived an affluent lifestyle that enabled Wife, now that her children are grown, to volunteer her time and engage in other activities. It was an abuse of discretion to expect Wife to exchange that lifestyle for minimum wage employment when Husband had the ability to pay a sufficient amount of alimony to maintain the pre-divorce lifestyle.

Finally, the lower court failed to identify the portions of Wife's evidence of need that it was rejecting. Instead, it backed into a need figure of \$4,000 per month without explaining the calculation. The lower court's failure to explain how it reduced Wife's proffered need of \$9,852 to \$4,000 was an abuse of discretion.

³ Husband argues that there is no evidence in the record as to the actual dividend paid on the Zion's stock. Although that figure was undisputed and can easily be determined from the parties' tax returns or by glancing in the newspaper, any failure of proof on that issue works against Husband's argument. If there is no evidence as to the actual income generated by the stock, then the state of the record is that the stock produces no income, not that the stock produces 7.5 percent.

For the foregoing reasons, the lower court's decision on the issue of alimony is flawed. The lower court's alimony determination was contrary to that court's own opinion as to what was equitable. The lower court did not properly approach the question of alimony, and its decision should be reversed.

III. THE TRIAL COURT ERRED IN ORDERING WIFE TO RETURN \$125,000 IN ALIMONY PREVIOUSLY PAID.

Husband agrees that there was an agreement in place pursuant to which Husband agreed to pay wife \$6,000 per month⁴ until the conclusion of the case, but claims that Wife should have obtained an order of temporary alimony anyway. The suggestion that parties should burden courts with issues that are not in dispute is not reasonable. These parties plainly had the issue of temporary alimony resolved.

Husband's references to the effects of reversal in the case law ignore the fact that in this case the reversal was not conclusive of the issue reversed as it was in the cited cases. In this case, the reversal left the question of alimony precisely as it had been before trial. Husband cites no case presenting that fact scenario. Because the situation regarding the temporary payments was unchanged, the lower court exceeded its discretion in deciding that Husband's obligation, whether contractual or otherwise, had been extinguished.

Temporary alimony payments are not refundable because they are based on the recipient's needs during the pendency of the case. The recipient relies on those payments

⁴ Husband argues that this amount was sufficient to meet Wife's temporary need and thus must also be sufficient for her permanent needs, but in doing so ignores the effects of income tax, which Wife was not required to pay on the funds transferred pursuant to the agreement.

to meet those needs, and budgets accordingly. The recipient cannot know in advance what the court may ultimately find to be reasonable need, and thus is not expected to spend those funds as though the final order has been entered. In this case, if a temporary alimony order had been in place, it would have covered the situation caused by the reversal of the alimony award. Husband's payments, which were obviously in lieu of temporary alimony, should be subject to the same rule. The requirement that \$125,000 be refunded worked a profound inequity on Wife, who had expended that money for the support of herself and the parties' child.

IV. HUSBAND'S ARGUMENTS REGARDING MARSHALING OF THE EVIDENCE ARE WITHOUT MERIT.

Husband's brief begins with an argument that Wife has failed to marshal the evidence. The marshaling requirement applies only in the limited instance where the appellant is challenging the sufficiency of evidence to support the trial court's findings of fact.

In this case, marital property awarded to Husband as separate was initially offset by an award of more than one-half of the marital estate to Wife. On remand, the lower court equalized the division of the marital estate without correcting the award of marital property to Husband as separate property.

With one notable exception Wife challenges the process by which the trial court reached its property division and alimony decisions on remand and the fundamental inequity of those decisions. The process and the resulting decisions are reviewed for abuse of discretion, not for sufficiency of the evidence. *Hall v. Hall*, 858 P.2d 1018, 1021 (Utah Ct. App. 1993). The lower court was rigidly mathematical, candidly admitting that it was

ignoring all principles of equity and its own prior conclusions regarding the characterization of the parties' property as marital or separate. It failed to explain the process used in reaching those conclusions any more than it had the first time around, thus repeating the same error that had resulted in the first reversal in this case.

The notable exception is the attribution of 7.5 percent investment income to Wife, which even Husband concedes was without any evidentiary support.

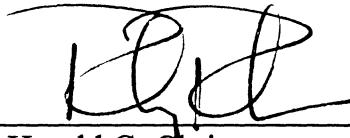
The marshaling requirement is all too often raised by appellees as a mask for serious weaknesses in their cases. Such is the case here. This Court should reject Husband's assertion and rectify the fundamental inequity that resulted from the trial court's flawed legal analysis.

CONCLUSION

Wife requests that this court reverse the trial court's Second Supplemental Decree of Divorce and, utilizing the initial evidence before the court, combined with the additional findings made by the court following remand, reinstate the property division and alimony awards contained in the initial decree. Alternatively, Wife requests that this court remand the case to the lower court for application of the correct legal standards in determining property division and alimony.

DATED this 3 day of September, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2002, I caused two copies of the foregoing Reply Brief of Appellant to be served by first class mail upon the following:

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