

2001

Jensen v. Jensen : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Harold G. Christensen; Rodney R. Parker; Snow, Christensen & Martineau; Attorneys for Appellant.
Clark W. Sessions; Clyde Snow Sessions & Swenson; Attorneys for Appellee.

Recommended Citation

Brief of Appellant, *Jensen v. Jensen*, No. 20010721 (Utah Court of Appeals, 2001).
https://digitalcommons.law.byu.edu/byu_ca2/3448

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

LINDA H. JENSEN,

Petitioner/Appellant,

No. 20010721-CA

vs.

JAMES T. JENSEN,

Argument Priority 15

Respondent/Appellee.

BRIEF OF APPELLANT

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

CLARK W. SESSIONS (A2914)
CLYDE, SNOW, SESSIONS & SWENSON
Attorneys for Appellee
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2216
Telephone:(801) 322-2516

Attorney for Appellee

HAROLD G. CHRISTENSEN (A0638)
RODNEY R. PARKER (A4110)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000

Attorneys for Appellant

LIST OF PARTIES

All parties are identified in the caption.

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION.....	1
STATEMENT OF ISSUES	1
GOVERNING LAW	2
STATEMENT OF THE CASE.....	3
A. <i>Nature of the Case, Course of Proceedings and Disposition Below</i>	3
B. <i>Statement of Facts.</i>	4
1. <i>The Marital Estate</i>	5
a. <i>The Moynier Ranch</i>	6
b. <i>T-N Ranches</i>	7
c. <i>T-N Company</i>	7
2. <i>The Trial Court's Property Division</i>	10
3. <i>Alimony</i>	13
SUMMARY OF ARGUMENT	16
ARGUMENT	20
I. THE TRIAL COURT'S PROPERTY DIVISION WAS BASED ON AN ERRONEOUS LEGAL STANDARD, FAILED TO CLASSIFY ASSETS CORRECTLY, AND WAS INEQUITABLE.....	20
A. <i>The Trial Court Applied an Incorrect Standard in Deciding Whether "Exceptional Circumstances" Existed to Justify Its Previous Unequal Division of the Marital Estate</i>	20
B. <i>The Trial Court Erred In Awarding Marital Property to Husband as Separate Property.</i>	26
C. <i>The Trial Court Erred In Assessing 7.5 Interest on the Adjustment Amount.</i>	30

II. THE TRIAL COURT ERRED IN REVERSING THE AWARD OF ALIMONY	30
III. THE TRIAL COURT ERRED IN ORDERING WIFE TO RETURN \$125,000 IN ALIMONY PREVIOUSLY PAID.....	36
CONCLUSION	38

TABLE OF AUTHORITIES

Cases	<u>Page</u>
<i>Bingham v. Bingham</i> , 872 P.2d 1065 (Utah Ct. App. 1994)	2
<i>Burke v. Burke</i> , 733 P.2d 133 (Utah 1987)	17, 20
<i>Burt v. Burt</i> , 799 P.2d 1166 (Utah Ct. App. 1990)	27
<i>Cummings v. Cummings</i> , 821 P.2d 472 (Utah Ct. App. 1991)	2
<i>Dunn v. Dunn</i> , 802 P.2d 1314 (Utah App. 1990)	25, 27
<i>English v. English</i> , 565 P.2d 409 (Utah 1977)	19, 32
<i>Hidden Meadows Dev. Co. v. Mills</i> , 590 P.2d 1244 (Utah 1979)	37
<i>Jones v. Jones</i> , 700 P.2d 1072 (Utah 1985)	16, 35
<i>Mortensen v. Mortensen</i> , 760 P.2d 304 (Utah 1988)	20
<i>Schaumberg v. Schaumberg</i> , 875 P.2d 598 (Utah App. 1994)	29
Statutes	
1997 Utah Laws ch. 232	3
Utah Code Ann. § 30-3-5	2, 31
Utah Code Ann. § 78-2a-3(2)(h)	1

IN THE UTAH COURT OF APPEALS

LINDA H. JENSEN,

Petitioner/Appellant,

No. 20010721-CA

vs.

JAMES T. JENSEN,

Argument Priority 15

Respondent/Appellee.

BRIEF OF APPELLANT

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

JURISDICTION

Linda H. Jensen (“Wife”) appeals the Second Supplemental Decree of Divorce entered June 22, 2001. This Court’s jurisdiction is based upon Utah Code Ann. § 78-2a-3(2)(h).

STATEMENT OF ISSUES

A. Did the trial court err in summarily reversing its decision that an unequal property division was equitable in this case, without applying a correct legal standard as to the existence of “exceptional circumstances” and without making appropriate findings supporting its decision?

B. In failing to consider the issue of property division in its entirety following remand from the Court of Appeals, did the trial court err in treating marital property as Husband's separate property, and thus fail to divide the marital estate in half?

C. Did the trial court err in vacating in its entirety its award of alimony to Wife, and in failing to apply an appropriate legal standard to the issue of alimony?

D. Did the trial court err in attributing investment income to Wife?

E. Did the trial court err in ordering a refund of alimony previously paid?

Issues D and E are reviewed for an abuse of discretion. *Cummings v. Cummings*, 821 P.2d 472 (Utah Ct. App. 1991). Issues A, B, and C present questions of law and are reviewed for correctness. *Bingham v. Bingham*, 872 P.2d 1065 (Utah Ct. App. 1994). The issues were inherently part of the remand instructions from the Court of Appeals; however, they were also preserved at R. 524-40 and 571-75.

GOVERNING LAW

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative or of central importance, except as follows. At the time of trial, Utah Code Ann. § 30-3-5 provided in pertinent part:

(7) (a) 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; and
- (iv) the length of the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (7)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

1997 Utah Laws ch. 232.

STATEMENT OF THE CASE

A. *Nature of the Case, Course of Proceedings and Disposition Below.*

This divorce case was tried to Judge David S. Young of the Third District Court on October 28-30 and November 12, 1997. The court issued its Memorandum Decision, Supplemental Findings of Fact and Conclusions of Law, and Supplemental Decree of Divorce on January 19, 1999. (R. 196-246.) Wife appealed. (R. 300-02.) The Court of Appeals issued its decision July 7, 2000. 2000 UT App. 213 (unpublished). The Court of Appeals affirmed the trial court's exclusion of certain property from the marital estate,

but vacated the final property division and the award of alimony, and remanded those issues to the trial court for further consideration and additional findings.

In the initial decree, the trial court awarded some property acknowledged to be marital to Husband as separate property. This was one of the reasons the court awarded more than half of the remaining diminished “marital” estate to Wife. On remand following appeal, the court changed the property division to 50/50, but failed to restore that marital property to the marital estate before making its calculation. In addition, the court failed to properly consider the issue of “exceptional circumstances” that had been remanded to it by the Court of Appeals, and simply divided the modified marital estate 50/50.

Further, the trial court vacated the award of \$4,000 per month alimony, basing its decision in part on putative investment income of 7.5 percent that the court assumed, without evidence, could be earned on assets awarded to Wife. Those assets included \$125,000 that was paid as alimony under an agreement prior to entry of the final decree of divorce, that the trial court ordered refunded to Husband. The Second Supplemental Decree of Divorce was entered June 22, 2001. (R. 625-27.) Wife filed her Notice of Appeal July 20, 2001. (R. 630.)

B. *Statement of Facts.*

James T. Jensen (“Husband”) and Linda H. Jensen (“Wife”) were married in 1970 in Utah and had three children during the marriage, two of whom had reached the age of majority at the time of trial, and the other of whom was still in high school. (R. 1-2, R. 323 at pp. 5, 12-13.)

Wife was 51 years old at the time of trial. She attended college for three years before the marriage but upon Husband's request did not work outside the home during most of the parties' marriage. (R. 323 at pp. 6, 29, 120; R. 324 at p. 195.) In accord with his wishes, instead of working outside the home, Wife focused on maintaining the parties' domestic affairs and caring for their children. (R. 109; R. 323 at pp. 44-45.) The only exception to this is that she worked part-time from 1985 to 1990 at Husband's law office performing clerical work. (R. 323 at pp. 43, 89; R. 324 at pp. 196-97.)

Husband was 57 years old at the time of trial. He was admitted to the Utah State Bar in 1969, one year before the marriage. (R. 323 at p. 136.) He practiced law with his father, Therald Jensen, in Price, Utah, until 1990, when he became in-house counsel for Savage Industries. (R. 323 at pp. 7, 45.) He is currently Executive Vice President and General Counsel of Savage Industries. (R. 221.)

1. *The Marital Estate.*

Over the course of the twenty-seven year marriage, the parties acquired substantial assets and maintained a high standard of living. (R. 109; R. 323 at pp. 55-57.) They received property and other assets, through gift or inheritance, from each of their parents. (R. 109.) Wife's father gave the parties the land on which their first home was built, and Husband's father was the source of some of the ranch properties and part of the 88,493 shares of Zions Bank stock that was at issue between the parties. (R. 323 at pp. 37-38). These assets were commingled between the parties.

The ranch properties consist of three related assets: T-N Company, T-N Ranches, and Moynier. T-N Company is a partnership owned by Husband and his two brothers,

and it is the operating entity for the ranching property, owning cattle, equipment, and machinery associated with the ranch. (R. 323 at pp. 148-49.) T-N Ranches is a partnership owned by Husband and his three siblings; it owns some 35,000 acres of land in Carbon County, Utah, along with associated water rights and grazing permits. (R. 119; R. 323 at p. 164; Defendant's Exhibit 39; Plaintiff's Exhibit 11.) The Moynier property consists of 21,400 acres of land in Carbon, Duchesne, and Utah Counties, together with state and federal grazing permits covering some 100,000 acres of land, title to which is in the name of Husband and his two brothers. (R. 323 at pp. 157-62; R. 324 at pp. 180-81; Defendant's Exhibits 28 and 30.) T-N Company leases the entire T-N Ranches landholding and the Moynier property plus grazing rights for a nominal sum of \$1,000 per year. (R. 323 at p. 168.)

a. *The Moynier Ranch.*

The Moynier Ranch consists of 21,400 deeded acres of ranch land in Carbon, Duchesne and Utah Counties, as well as over 100,000 acres of federal and state grazing permits. (R. 323 at pp. 157-62; R. 324 at pp. 180-81; Defendant's Exhibit 30) It was acquired in 1976, well into the marriage, for approximately \$827,000. The \$25,000 down payment came from the parties' marital funds. (R. 82; R. 224.) The court found that the installment payments, were "paid for through the ranching operations or T.N. Company." (R. 223.) Husband admitted, however, that \$148,000 of the purchase price did not come from sales or exchanges of separate property. (R. 323 at p. 182.)

Husband would not express an opinion on the value of the Moynier Ranch, but his expert valued the parties' one-third interest at \$333,679. (R. 323 at p. 173; R. 324 at

p. 126.) The expert's opinion was based on an estimate from a real estate appraiser, Sam Sanders, whose wife works for Husband at Savage Industries. (R. 325 at p. 96.) However, the Utah County Assessor valued the Utah County portion of the Moynier property alone at \$3,370,000, and Husband did not protest this valuation. (R. 324 at p. 181; R. 325 at p. 84.) Wife's expert valued the Moynier Ranch at \$5,375,000, and the parties' one-third interest at \$1,791,667. (R. 324 at p. 35.) The trial court did not resolve the valuation dispute.

b. *T-N Ranches.*

T-N Ranches is a corporation formed in 1983. It owns the title to ranch property and grazing permits T-N Company uses at a token rental. (R. 323 at pp. 7, 166, 168.) Husband successfully contended at trial that the parties' 25 percent interest in T-N Ranches was his separate property.

Wife's expert valued the parties' 25% interest in T-N Ranches at \$1,312,500. (R. 323 at pp. 11, 164; R. 324 at pp. 32-33.) Husband's expert valued the parties' interest in T-N Ranches at \$127,208 (which translates to a land value of \$37 per acre), prior to application of an alleged minority interest discount. (R. 324 at pp. 131-32, 152-56.) The trial court did not resolve the valuation issue.

c. *T-N Company.*

T-N Company was formed in 1969 by Husband's father, Therald Jensen, and his three sons James, Butch and Jerry. (R. 78.) It initially owned construction equipment and cattle. (R. 323 at pp. 7, 35.) T-N Company still operates as a cattle business, but in 1997 much of the construction equipment was sold for \$900,000. (R. 323 at p. 149.) Out

of the remaining assets of T-N Company, the remaining equipment is worth approximately \$600,000, and the remaining cattle and other livestock are worth approximately \$1.1 million. (R. 323 at pp. 150-53.) T-N Company also owns several trucks and trailers and a shop building. (R. 325 at 18; Defendant's Exhibit 12.)

T-N Company leases over 35,000 acres of land, plus grazing permits, from T-N Ranches; and the 21,400 Moynier property and 100,000 acres of grazing rights, at the reduced rate of \$1,000 per year for the entire property, which works out to 1.8 cents per acre for the owned property and nothing for the leases and permits. (R. 323 at p. 168.)

According to the tax returns and equity accounts for T-N Company, Husband owns 49.29% of the company, and his two brothers own the remainder in equal shares. (R. 79; R. 324 at pp. 22-24, 80.) However, Husband claims the brothers made an oral "agreement" at some point that they each really own one-third of the company. (R. 324 at p. 108.) His two brothers receive yearly salaries from T-N Company, yet Husband has never drawn a salary from T-N Company, even though he spent as much time on the ranching operations as they did throughout the parties' marriage. (R. 323 at pp. 126, 148; R. 324 at pp. 199-202.) He also performed free legal work for T-N Company. (R. 324 at p. 202.)

Over the years, T-N Company required major cash subsidy in order to continue operating. In the early years, that subsidy came from Husband's father, who loaned a significant amount to T-N Company in exchange for promissory notes from the company. (R. 325 at pp. 87-88). Husband's father later gifted his interest in the promissory notes separately to Husband and Wife in \$10,000 annual increments each as part of his estate

planning. (R. 325 at pp. 87-88). By 1993, T-N Company owed Husband \$126,931 and Wife \$30,000. (R. 324 at p. 51). It owed Husband's law office \$78,348. (R. 324 at p. 51.) It also owed \$85,031 to Malpaso, a trucking company which was formed during the marriage and which was for that reason clearly a marital asset even though the stock was in Husband's name. (R. 323 at pp. 34-35, 174-75.) The funds Malpaso and Wife lent to T-N Company were used to purchase heavy machinery for T-N Company, which machinery was then used as collateral by the company to secure financing for additional growth and development. (R. 118.) In addition, Malpaso, a marital asset, was completely absorbed into T-N Company.

In 1993, Wife's \$30,000 in notes were converted into equity in T-N Company. (R. 324 at pp. 51-53; R. 325 at pp. 87-88.) The marital estate was never reimbursed for the other debts, which were absorbed as equity in T-N Company as well.

In early 1996, the parties sold \$65,000 of the Zions Bank stock they had acquired during the marriage and transferred the proceeds into T-N Company. (R. 323 at pp. 66, 81-82; R. 325 at p. 48; Plaintiff's Exhibit 7.)

The parties presented different values for T-N Company at trial. According to Wife's expert Deane Smith, T-N Company is worth \$2.2 million, and Husband's 49.29% share is worth \$1,066,000. (R. 323 at p. 132; R. 324 at p. 23.) Husband's expert Derk Rasmussen valued T-N Company at \$1.4 million. (R. 324 at pp. 140- 41.) The trial court did not resolve the valuation issue.

2. *The Trial Court's Property Division*

Depending upon which party's valuation of the ranching properties is accepted, the parties' assets were worth between \$8 and \$10 million at the time of trial. Initially, the trial court recognized that there were significant difficulties in sorting out the separate property from the marital property. Wife contended that all of the parties' property was marital, having either been acquired during the marriage, gifted into joint ownership during the marriage, or commingled with marital property. Husband contended that 58,352 shares of Zions Bank stock, worth \$3,027,010, was his separate property. He also contended that all of the ranch properties, worth between \$1.8 and \$4.2 million, were separate property.

The trial court for the most part agreed with Husband's characterization of the stock and ranch property as separate property. However, the court acknowledged that some marital assets had been commingled with the ranch properties. In part because of that fact, and in part because of the generally unequal financial position of the parties after a 27-year marriage, the trial court divided the parties' property as follows in the initial decree:

	<u>Value</u>	<u>To Husband</u>	<u>To Wife</u>
Marital Residence	\$ 771,000.00	0.00	771,000.00
Mortgage	-203,994.00	-203,994.00	0.00
Furniture	75,000.00	0.00	75,000.00
30,141 shares of Zions Bank stock	1,563,564.00	781,782.00	781,782.00
Price law office building	153,326.00	153,326.00	0.00
Vehicles	77,611.00	35,011.00	42,291.00
Certificate of deposit	28,925.00	0.00	29,500.00
1996 tax refund	21,543.00	21,058.00	0.00
John Hancock life policy	55,546.00	0.00	55,546.00
IRAs	33,085.00	16,543.00	16,543.00
Savage pension	206,774.27	103,387.00	103,387.00
Mantlepiece	10,000.00	10,000.00	0.00

40 acre parcel	45,000.00	0.00	45,000.00
Spring Glen home	<u>169,374.72</u>	<u>84,687.00</u>	<u>84,687.00</u>
Marital property	\$3,006,754.99	\$1,001,800.00	\$2,004,736.00
Separate property	<u>7,227,000.00</u>	<u>7,227,000.00</u>	<u>0.00</u>
TOTAL	<u>\$10,233,754.99</u>	<u>\$8,228,800.00</u>	<u>\$2,004,736.00</u>

Husband challenged the unequal division of marital property on appeal. The trial court's justification for the unequal division was:

Based on the Court's general equitable power, the Court finds that certain of these assets should not be divided equally to 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 marital estate. (R. 213.)

As noted above, there was significant and undisputed evidence that marital property had been commingled with the ranch properties. Rather than sort out the details of those transfers, the trial court relied upon the unequal division of property as rendering the final outcome "equitable." For example, the court found that \$25,000 appeared to have come from marital funds for the purchase of the Moynier Ranch. Rather than allocate that amount to Wife, the court stated:

The Court believes that it remains fair and equitable to allow James to retain the whole of the Jensen Brothers property assets and interests as separate property, and believes that an equitable offset of the \$25,000 which, if it came from marital funds, would be subject to sharing, has been equitably dealt with hereafter in relation to the other assets of the marital estate. (R. 201.)

Similar reasoning caused the court to ultimately ignore substantial evidence of commingling, because the court believed that the final outcome would be equitable.

The Court of Appeals decided that the trial court's explanation for the unequal division of property was insufficient, and remanded the case for additional findings:

The trial court's findings on remand must be "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on [this] factual issue was reached." 2000 UT App 213 at pp. 3-4.

On remand, instead of detailing the reasons for its previous decision, the trial court changed its decision, awarding Husband an additional \$501,468 of property from the diminished marital estate that had previously been found by the court. This equalized the table of property the court had initially generated, but failed to remedy the award of marital property to Husband as part of the ranch properties. The court expressed the view that the Court of Appeals had imposed a mathematical approach which resulted in an unfair outcome. It noted that there was no appellate guidance on the meaning of “exceptional circumstances,” and concluded that exceptional circumstances justifying an unequal division of marital property did not exist. In doing so, it applied a dictionary definition of “exceptional:”

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 Petitioner 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. (R. 618.)

To accomplish the redistribution, the court made several adjustments. In the time between trial and remand, the marital residence had been sold and Wife had paid off the mortgage from the sale proceeds. The mortgage had been placed in Husband’s column in the initial property division, so the equalizing amount of \$501,468 was reduced by the amount of the mortgage payoff of \$182,535. (R. 619.) Husband had made payments to Wife for the mortgage after it was paid off of \$26,488, and that amount was ordered re-

funded to Husband. The resulting amount was \$345,421. The trial court then ordered Wife to pay Husband interest on that amount at 7.5 percent per year, or an additional \$49,833. (R. 619-20.) Thus, the trial court ordered Wife to transfer \$395,254 to Husband. This was accomplished by transfer of 7,619.3542 shares of Zions Bank stock from Wife to Husband, leaving Wife with 7,451 shares of Zions Bank stock. (R. 620.)

3. *Alimony.*

Prior to the entry of the Supplemental Decree in January of 1999, Husband had voluntarily paid Wife \$6,000 per month as temporary alimony pursuant to an agreement that relieved the parties of the necessity of having the issue of temporary alimony resolved by the court. By agreeing to pay \$6,000 in temporary alimony in a form not taxable to Wife, Husband acknowledged that her living expenses were at least \$6,000 per month, and the lower court noted this as a factor supporting alimony. (R. 215.)

Husband's ability to pay alimony was not disputed (R. 621.) The trial court also had specific evidence of Wife's actual past expenses and future need before it. (Ex. P-2, copy incl. in R. 134, p. 2.) Although the court concluded that Wife would have investment income sufficient to meet a need of \$6,000 per month, it awarded her \$4,000 per month alimony anyway. It explained its decision on general equitable grounds rather than on the basis of need:

Thus, the Court could find that the income potentially generated from the assets awarded to the plaintiff would be sufficient to meet her needs. However, this ignores the 27 year term of the marriage, and strikes the Court as fundamentally inequitable when the defendant would not be required to live off of the yield from his assets, but has separate earned income. Assuming defendant's annual gross income to be approximately \$195,000, that gives him a monthly gross income of \$16,250 per month. Defendant has been paying approximately \$6,000

per month in temporary alimony during the parties' separation, but the plaintiff has been required to pay the mortgage on the Monica Cove home in the approximate amount of \$2,200, so requiring the defendant to hold the plaintiff harmless on that mortgage, the Court finds that it is reasonable to require the defendant to pay alimony in the amount of \$4,000 per month from November 1, 1997, until the defendant reaches age 65. The court notes the defendant is now just over 55, having a birthday in February. After age 65, each party should be required to bear their future expenses based upon their earnings generated from assets. (Memorandum Decision, R. 215-16.)

On appeal, the Court of Appeals reversed the award of alimony because the court had not considered the relevant statutory factors, and remanded the case for appropriate analysis of those factors. 2000 UT App 213 at pp. 3-4. Once again, rather than explaining its previous decision, the trial court simply abandoned it, ruling that no alimony was appropriate. To justify its decision, the court, without any evidentiary basis, assumed that Wife could earn a 7.5 percent return on \$939,557.00 of assets she was awarded:

The financial condition of the Petitioner with an award to her of over \$1,500,000.00 and the earnings on \$939,557.00 at .075 percent per annum, which represents the amount of assets awarded to her in the Memorandum Decision plus the proceeds received from the sale of the Monica Cove residence and less \$395,254.00 awarded to Respondent, will produce income to her of \$5,872.00 per month. Further, the Court finds that earnings at the federal minimum wage standard should she desire to accept employment which the Court finds she will not be required to do will produce to the Petitioner \$893.00 per month or a total income of \$6,765.00 per month. The Court also finds that the Petitioner's living expenses and financial needs and requirements after the deletion of Monica Cove residence previously sold and related property taxes thereon approximate \$4,000.00 per month. As such, the Court finds that the Petitioner has not demonstrated a need for alimony from the Respondent. (R. 620-21.)

The \$939,557.00 figure was a total value of all of the property awarded to Wife that the trial court found "could be considered by the plaintiff as working assets, capable of generating a rate of return." (R. 238.) It was based on the following table, which

represents the trial court's initial allocation of assets as "working," adjusted to reflect the later reallocation of property (R. 236-38, 620-21):

	<u>Value</u>
Excess value of marital residence	\$200,000.00
Zions Bank stock	386,528.00 ¹
Certificate of deposit	29,500.00
1990 BMW 750	18,366.00
John Hancock life policy	55,546.00
IRAs	16,543.00
Savage pension	103,387.00
40 acre parcel	45,000.00
Spring Glen home proceeds	84,687.00
TOTAL	<u>\$939,557.00</u>

The trial court assumed that all of the foregoing assets could pay a 7.5 percent rate of return, which the trial court described as "average." (R. 236.) However, no evidence supported the putative 7.5 percent rate of return. Indeed, at the time of trial, the Zions Bank stock was earning only 2.2 percent, and would have had to have been sold at a substantial capital gains tax penalty if it were to be reinvested. As a practical matter, there was no safe investment available to Wife with that yield anywhere. Also, the retirement assets were not available for immediate income production and thus did not offset Wife's need.

The trial court suggested that Wife should get a job and work to earn minimum wage, even though her lifestyle during the marriage had not required employment, and Husband's ability to pay alimony was not disputed. (R. 621.) Husband's post-divorce

¹ At the final hearing, the court reduced this amount by an additional \$125,000 to effectuate the refund of temporary alimony that it ordered. The reduction was accomplished by transfer of 2,212 shares of Zions Bank stock at \$56.50 per share. Thus, the final award of Zions Bank stock was 5,239 shares at \$51.875 per share, or \$271,780. The final total of "working" assets was \$814,557.

lifestyle was substantially higher than Wife's, inasmuch as Husband was awarded some \$8.5 million in separate and marital assets and had an income of over \$200,000 per year. The trial court did not further explain how it concluded that Wife did not need alimony.

Before trial, Husband had voluntarily paid Wife \$6,000 per month in temporary alimony, which included \$2,200 per month for a mortgage payment that became Husband's obligation in the final decree. Thus, the pre- and post-decree alimony amounts were essentially equal. In its decision following remand, the trial court required Wife to refund to Husband \$125,000 of alimony that was paid after January 19, 1999, when the Supplemental Decree was entered, and until July 7, 2000 when the Court of Appeals remanded this case for further findings on both the property division and alimony issues. The court held that Wife could discharge this refund obligation by transferring additional Zions Bank stock to Husband at a value of \$56.50 per share, but in calculating Wife's "working assets" the court failed to adjust for the \$125,000 reduction caused by the court's order to refund temporary alimony.

SUMMARY OF ARGUMENT

Although in a divorce case the trial court "may make such orders concerning property distribution and alimony as are equitable," *Jones v. Jones*, 700 P.2d 1072, 1074 (Utah 1985), "the trial court must exercise its discretion in accordance with the standards that have been set by this Court." *Id.* In this case, the trial court has failed to follow those standards in several respects, and has in the process failed to give proper weight to the burden of proof on the issues of property division and alimony.

This Court instructed the trial court to explain the “exceptional circumstances” justifying an unequal division of the marital estate. The trial court, however, applied an erroneous dictionary definition of “exceptional.” Under Utah law, the court is to consider numerous factors in fashioning an equitable property division, including “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.” *Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987). The trial court did not apply those factors, finding instead that “uncommon” or “extraordinary” reasons must be shown.

The court’s analysis was erroneous. The *Burke* factors supported the trial court’s initial decision and the decision should have been analyzed in terms of those factors. There had been significant commingling of marital property with the ranch properties, and marital augmentation of the ranch properties, during the marriage. It was Husband’s burden to prove the separate character of property he was awarded; it was not Wife’s burden to disprove it. At least \$500,000 of marital funds had gone into the ranching operations, and the trial court erred in failing to account for those funds before dividing the marital estate in half. The court also erred in failing to consider the parties respective post-divorce financial conditions and the other factors required by *Burke*.

In equalizing the previous property division, the trial court also used its 7.5 percent income assumption and required Wife to refund \$49,833 of “interest” on the property she had possessed during the interim between the first and final decrees. The theory invoked for requiring a refund was essentially a disgorgement theory. In requiring payment of interest at 7.5 percent, engaged in speculation. The trial court failed to ascertain what, if anything, Wife had actually earned on the assets.

Further, some \$500,000 of marital assets had been incorporated into the ranch properties and awarded to Husband as part of his separate property, even though they were marital in nature. The initial unequal division had attempted to compensate for this failure to sort out the commingling of property by awarding Wife more than half of the remaining diminished marital estate. However, when the court adjusted the property division following remand, it failed to include those assets in the marital estate, which resulted in an award of over half of the marital estate to Husband.

On the issue of alimony, the trial court again believed that a mathematical approach to alimony was mandated, and thus failed to take into account all of the equitable factors that must be considered in determining alimony. It erred in attributing investment income of 7.5 percent to Wife. Investment income, like other forms of income, must be established by evidence in the record. In this case, there was no evidence in the record that such a rate of return was available to Wife. The only evidence in the record was that the one liquid asset Wife had, the Zions Bank stock, yielded only 2.2 percent, or \$506 per month. The trial court also erroneously assumed that funds in retirement accounts would generate income for Wife’s current support, which is not possible in a retirement account.

As a result, the court's decision to award no alimony was erroneous. When the parties were married, they enjoyed the financial security of \$10 million in assets and Husband's income of \$200,000 per year. Following the divorce, Husband continued to enjoy that security but Wife did not. "[T]he most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge." *English v. English*, 565 P.2d 409, 411 (Utah 1977). Even though ability to pay was not an issue in this case, the parties' standards of living were not equalized and Wife's living standard was substantially reduced as a result of the divorce.

Finally, the trial court erred in ordering a refund of \$125,000 in alimony that Wife had previously received from Husband. When this case was remanded following the first appeal, it stood with respect to the alimony issue as it did before the trial court entered its alimony award. That meant that Husband's agreement to pay temporary alimony of \$6,000 per month was reinstated. The trial court's decision was not only erroneous, but it placed Wife in extremely dire financial circumstances, because she did not have prior notice that monies paid as alimony might not be available for consumption.

ARGUMENT

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

A. *The Trial Court Applied an Incorrect Standard in Deciding Whether "Exceptional Circumstances" Existed to Justify Its Previous Unequal Division of the Marital Estate.*

In *Burke v. Burke*, 733 P.2d 133 (Utah 1987), the Utah Supreme Court described the factors to be considered in fashioning an equitable property division in divorce. Although the case involved the circumstances under which equity will permit the inclusion of separate property in the marital estate, the guiding principle applies in all property division decisions:

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).

In *Mortensen v. Mortensen*, 760 P.2d 304 (Utah 1988), the Court noted that even though donated or inherited property is not subject to equitable division it may properly be considered as a factor in determining what constitutes an equitable division of the remaining property. 760 P.2d at 308.

In this case, the court failed to apply the *Burke* standard. Instead, it looked up the word "exceptional" in the dictionary and relied on the dictionary definition. (Supp.

R. 51.²) In its attempt to follow the Court of Appeals' direction, the trial court gave undue emphasis to the meaning of the phrase "exceptional circumstances" and in the process lost sight of the appropriate legal standard, as set forth in *Burke*.

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.)

At several points during the hearing, the trial court described circumstances which clearly supported an unequal division under the *Burke* test, yet the court felt constrained by its mistaken reading of the Court of Appeals' decision to impose an outcome that was in the court's opinion inequitable:

It strikes me that there is a problem if you have an extremely wealthy family or the beginnings of a wealthy family and much of the wealth increased during the course of a 27 year marriage and you take all of that out without any opportunity for some kind of cross-compensation from other sources, it seemed to me, or for the spouse of that person, if alimony or other things are to maintain a certain level of lifestyle, how can one be allowed to have all the growing assets and the other have none of the growing assets. Now, that wasn't exactly the case but that was in part my thinking. (Supp. R. 13.)

* * * *

I mean I just felt like, I just felt like it was equitable for me to, after a 27 year marriage and to recognize that all the life of Ms. Jensen's, let's say productive and asset growing years were essentially allocated to this marriage, that she ought to have a significant asset value at the end because some things that had preexisted the marriage, had I think, grown quite dramatically and if I recall, the sale of the — well, I'm not now recalling exactly how the money went but there was the sale of

² The reference "Supp. R." is to the transcript of the March 8, 2000 hearing, which was not paginated with the original record on appeal but has been included as a supplement to the record by stipulation of the parties.

the mortuary business where there was quite a bit of cash that came into the marriage too. But anyway, that was my feeling, was that it was equitable for her to have at least a certain net worth that would have been, let's say, comparable to that which they enjoyed during the course of their marriage. (Supp. R. 14-15.)

* * * *

MR. SESSIONS: I have not been able to find any direction or case law in this state or elsewhere that defines exceptional circumstances.

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 foregoing comments of the trial court illustrate two things. First, they illustrate that the court clearly had in mind the sort of reasoning that justifies an unequal distribution of property under *Burke*. Second, they illustrate that the trial court misinterpreted the mandate of the Court of Appeals in this case. The court felt that it was required to apply a mathematical formula that precluded the result the trial court felt was fair and equitable.

Contrary to the trial court's conclusion, which was based on a misunderstanding of the nature of "exceptional circumstances," this case clearly satisfied the elements of *Burke* calling for an unequal division of the marital estate. The trial court instinctively recognized the existence of these factors, but misunderstood the legal standard to be applied to their consideration. As they apply to this case, the *Burke* factors are:

The amount and kind of property to be divided. This factor troubled the trial court. The separate property consisted of real estate and business operations. Much mixing of property had occurred, and some operations had subsidized others or had been subsidized from marital funds. There had been significant commingling of marital funds and effort in Husband's separate property, yet it was difficult to assign a current dollar value to the marital contribution or to separate it from the other property. The trial court wanted to keep the ranch properties intact, but in order to do so felt a compelling need to compensate Wife by awarding her a disproportionate share of the remaining property.

Whether the property was acquired before or during the marriage. Part of the ranch operation, particularly Moynier and much of the equipment, was acquired during the marriage with marital funds and other money earned during the marriage, yet had become an integral part of the ranching operation.

The source of the property. Some of the separate property had been gifted to Husband by his father. Much of the remainder had been acquired or augmented during the marriage. This augmentation of property during the marriage, both by direct financial investment and by investment of "sweat equity" by Husband, weighed strongly in favor of the trial court's desire to weigh the division of the diminished marital estate in favor of Wife.

The health of the parties. This factor did not weigh in favor of or against either party.

The parties' standard of living, respective financial conditions, needs, and earning capacity. The trial court expressly noted its view that this factor weighed heavily in Wife's favor:

[W]hen they're married they have the \$3 million plus \$200,000 a year in income and the lifestyle that they're able to live is not just a lifestyle that supports – let's call that even though it's comfortable, relatively spartan living circumstances, but it's one that supports the opportunity to really fund a trip to Europe or a major holiday every year, one for the kids and so on, things like that and maybe even some contributions to their future financial security (Supp. R. 43-44.)

Husband's lifestyle was unaffected by the divorce. He had some \$7 million in separate property, including nearly \$4 million in cash and marketable securities, and earnings of \$200,000 per year. Wife, on the other hand, ultimately received mostly illiquid assets, including a home, two cars, retirement assets of some \$170,000, and approximately ten percent of the Zions Bank stock, worth under \$400,000. She had no earning ability, and did not enjoy the benefits of the \$7 million in separate property that had previously given the parties financial security. After a 27 year marriage and under the circumstances of this case, the trial court found such a result to be inequitable, but imposed it anyway because it thought the Court of Appeals' decision in this case required it to do so.

The duration of the marriage. This was a long term marriage which began when the parties were young and Husband was just beginning his career. This factor weighs heavily in favor of an outcome that leaves the parties in relatively equal financial and lifestyle positions following the dissolution of the marriage.

The children of the marriage. The parties had children but all but one were emancipated by the time of trial, so this factor was of little weight in this case.

The parties' ages at time of marriage and of divorce. The parties married when Husband was just beginning his career as a lawyer and Wife was making career choices of her own. At the time of divorce, both parties were in their fifties and focusing on their retirement years. Their combined assets would have been adequate to support an early and comfortable retirement, and Husband's assets and earning ability continued to be such post-divorce. Wife lacked both the assets and the earning capacity of Husband.

What the parties gave up by the marriage. The parties made a choice early in the marriage that Wife would be a homemaker and Husband would be the primary breadwinner. Wife devoted herself to keeping the household and raising the family, which enabled Husband to maximize his earnings. In doing so, Wife sacrificed her own ability to pursue a career or to otherwise become financially independent, which inextricably and permanently tied her financial future to that of Husband. *See Dunn v. Dunn*, 802 P.2d 1314 (Utah App. 1990).

The necessary relationship the property division has with the amount of alimony and child support to be awarded. The trial court noted that the parties' substantial combined net worth gave them financial security and allowed them to maintain a lifestyle that Husband's earnings alone would not have supported. The final division of the marital estate was initially tilted in favor of Wife in part because Husband came out of the marriage with the bulk of the assets that had supported that lifestyle. The trial court also relied completely on the division of property to justify its award of no alimony, but when Wife's share of the marital estate was reduced by \$500,000 on remand, her ability

to support herself from earnings on assets in a lifestyle comparable to Husband's was reduced by a proportionate amount.

The foregoing discussion amply demonstrates the existence of exceptional circumstances justifying the result the trial court felt was equitable in the first place, which was an award of two-thirds of the diminished marital estate to Wife. The trial court repeatedly expressed an erroneous view of the applicable legal standard. Had it applied the correct standard, it could and would have achieved the result it had found to be fair and equitable in the first place. In applying the incorrect standard, the trial court expressly acknowledged that the result did not seem fair, but said that it believed it was simply implementing the mandate of the Court of Appeals:

I will tell you that I would have preferred this case to have been determined otherwise. I'm just going to tell you and have that simply part of the record. I wrestled with this very hard and I thought it was right and I told you at the time that that was an issue that remained in the case. I can remember having that very conversation in the jury room with both lawyers saying that I know I haven't done this that way, but it just seems fair – done with all the details, but it just seems appropriate, fair, and equitable under the circumstances of the life of these persons. 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. (Supp. R. 58.)

As it stands, the decision of the trial court is, in the trial court's own view, inequitable. Accordingly, a reversal is called for, and reinstatement of the previous property division is appropriate.

B. *The Trial Court Erred In Awarding Marital Property to Husband as Separate Property.*

This court reversed the initial property division because the trial court had not adequately explained its departure from the presumption of *Burt v. Burt*, 799 P.2d 1166

(Utah Ct. App. 1990), that the marital estate must be divided in half absent exceptional circumstances. Yet when the trial court decided the case after remand, it failed to include admittedly marital property that had for convenience been classified in the separate category, and thus awarded more than 50 percent of the marital estate to Husband.

Property acquired during the marriage is presumed to be part of the marital estate in the absence of persuasive contrary evidence. “Marital property is ordinarily all property acquired during the marriage and it encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.” *Dunn v. Dunn*, 802 P.2d 1314, 1317-18 (Utah Ct. App. 1990). In this case, Husband claimed that a large portion of the parties’ assets were his separate property. It was thus his burden to prove that they were separate, and in the absence of such proof it was error for the trial court not to include such assets in the marital estate.

At least \$500,000 (see bullet points below) of marital funds were invested in the ranching operations that were awarded to Husband as separate property. At the time of trial, the value of that investment exceeded \$2 million. In its initial property division, the trial court acknowledged that there were problems with separating the commingled marital property from Husband’s separate property. To compensate, the court awarded more than 50 percent of the marital estate to Wife. When it was required on remand to be more specific about what it had done, the trial court instead let stand the award of marital funds as part of Husband’s separate property, and then divided the remaining *diminished* marital estate in half. That was error.

The evidence that marital funds and property had been used to maintain and enhance the ranch properties was undisputed:

- T-N Company owed Wife a \$30,000 note which was converted into equity in T-N Company. (R. 324 at p. 51; R. 325 at pp. 87-88.)
- T-N Company owed \$78,348 to the law office, a clearly marital asset. (R. 324 at p. 51.)
- Wife's one-half interest in Malpaso (the trucking company), including but not limited to the \$85,031 promissory note that funded T-N Company equipment purchases, was also absorbed into T-N Company. (R. 323 at pp. 34-35, 174-75; R. 118.)
- During the marriage, Husband invested at least \$78,000 of his income from the practice of law into T-N Company. (R. 323 at p. 126; R. 324 at p. 51.)
- When \$65,000 was needed for the ranch in 1996, Husband did not sell his allegedly separate stock to get the money. Instead, he sold 1,837 shares from the admittedly marital portion of Zions Bank stock. (Plaintiff's Exhibit 7; Defendant's Exhibit 20; R. 323 at pp. 81-82.) The proceeds from this sale were used to purchase machinery for T-N Company and to finance its operations.
- The Moynier property, worth \$1.8 million, was acquired with marital funds. The evidence established that the \$25,000 down payment came from joint funds. Husband admitted that \$147,000 of the purchase price did not come

from separate property (R. 323 at p. 182), and the court found that the remaining installment payments were paid with income from the ranching operations earned during the marriage. In *Schaumberg v. Schaumberg*, 875 P.2d 598 (Utah App. 1994), the court held that a portion of the husband's business property, which was initially paid for by funds the husband inherited, was properly included as a marital asset. The court explained that "[e]ven though the husband used inherited funds to pay the down payment on the building, he used substantial marital funds to maintain and augment that asset. We find no error in the determination that the appreciated portion of the asset changed its character from a personal asset to a marital asset." 875 P.2d at 602-03.

- Moynier was leased to the ranching operation at a nominal value of less than two cents per acre, and thus was used to subsidize the ranching operation at the expense of income that could have been earned for the marital estate in the marketplace.

By modifying the property division without accounting for the undisputed commingling of marital property in T-N Company over a 27-year period, the trial court erred. The Court of Appeals reversed the property division because it violated the *Burt* 50 percent rule, yet the trial court on remand failed to consider that its initial decision to overlook these clear comminglings was an inseparable part of the overall determination of an "equitable" property division in this case.

C. *The Trial Court Erred In Assessing 7.5 Interest on the Adjustment Amount.*

The trial court's ultimate property division adjustment was \$345,421 to be transferred from Wife to Husband. Because Wife had the use of that property during the period after the decree and before the adjustment, the court ordered Wife to refund it with \$49,833 interest. Even though the refund took the form of a transfer of shares of Zions Bank stock that had yielded a 2.2 percent dividend, the trial court ordered Wife to pay interest of 7.5 percent. That figure represented the putative investment return the court felt Wife should be able to earn on her "working" assets.

There was no evidentiary support for the 7.5 rate of return. Indeed, there was no evidence at all concerning what, if anything, Wife had actually earned on investments during that period. The most that could be said was that the stock had paid a 2.2 percent dividend. The court's use of the 7.5 percent rate of return, which was itself unsupported by any evidence (see Point II below), was a manifest abuse of discretion and should be overturned even if the property division is otherwise allowed to stand.

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

The trial court also committed error in reversing the award of alimony. In its decision, the Court of Appeals held, "In this case, the trial court awarded alimony without considering the relevant statutory factors. . . . Accordingly we remand to the trial court to make an appropriate analysis of the relevant factors before making an alimony award decision." *Jensen v. Jensen*, 2000 UT App 213.

Initially, the trial court had awarded Wife \$4,000 per month in alimony. Following remand, however, the court not only reduced Wife's "working" assets, and thus her putative investment income, by 50 percent, but it then declined to award any alimony at all. Like with the property division, the trial court complained that the Court of Appeals' decision mandated an outcome that the trial court felt was inequitable:

[T]he lifestyle that they're able to attribute and we've excluded now all of the ranch property completely which frankly that's like ignoring a 2,000 pound elephant in the living room. Honestly, when it comes to looking at the estate, because you're looking at that as a source of money for one or the other of them anyway, okay? So you get the \$3 million. You divide that in half but when they're married they have the \$3 million plus \$200,000 a year in income and the lifestyle that they're able to live is not just a lifestyle that supports – let's call that even though it's comfortable, relatively spartan living circumstances, but it's one that supports the opportunity to really fund a trip to Europe or a major holiday every year, one for the kids and so on, things like that and maybe even some contributions to their future financial security and so it's hard for me to ignore alimony completely in a long term marriage when one party is required to live off the yields of the assets but the other party has a substantial income to live off of. There's where I have a bit of a problem.

Now, with the mechanical application of the rules that are applied by the Court of Appeals, maybe I can't look at that but that's where I have some personal heartburn. (Supp. R. 43-44.)

The Court of Appeals' decision did not mandate any result. It only required that the trial court supply an explanation of its decision. Its "mechanical application" of some unspecified rule or formula was error. The trial court was mistaken in assuming that the statutory factors, which emphasize need and ability to pay, are exclusive or that they mandate a mathematical approach to alimony. Indeed, while the statute mandates consideration of the financial circumstances of the parties, it also incorporates the general equitable principles of case law. Utah Code Ann. § 30-3-5(7).

“[T]he most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge.” *English v. English*, 565 P.2d 409, 411 (Utah 1977). During the marriage, the parties had over \$10 million in assets, including \$4.5 million in Zions Bank stock. Their financial future was secure, and they were free to, and did, spend Husband’s entire earned income, and more, to support their lifestyle.

Husband was awarded nearly \$9 million in marital and separate property. Of that amount, \$4 million was in cash or marketable securities. In addition, he had an income of \$200,000 per year. His financial future remained secure, and there is no question that Husband’s post-divorce lifestyle will not be diminished in any way.

The same, however, cannot be said of Wife. It was entirely unrealistic to expect that she could make a meaningful contribution through employment to her own support. Moreover, given the parties’ lifestyle during the marriage, it was unreasonable to require Wife to obtain the type of employment that would be available to a 51-year old woman with no skills. Following the reallocation of property, and excluding the home, the assets which Wife was awarded included an automobile; life insurance and retirement assets of \$175,486.77 which are not available for immediate income production; and \$386,528.00 of Zions Bank stock (further reduced by \$125,000.00 for the refund of alimony discussed below). The stock was acquired at low tax basis and yielded a dividend of 29¢ per share, or 2.2 percent.

Nevertheless, the trial court ignored its initial analysis of the equities and instead followed a strictly mathematical approach on remand. The trial court found (without ex-

planation) that Wife's need was only \$4,000 per month. Wife had submitted a detailed budget (Ex. 2, R. 134, p. 2) showing expenses of \$9,852 including income taxes. It then found that she could meet that need through earnings on the assets she was awarded. In doing so, the court made several errors.

First, the court failed to explain which of Wife's expenses were not reasonable. They were consistent with the past, and none were patently unreasonable or inconsistent with the parties' lifestyle during the marriage. The court also completely ignored the income tax owed on wife's hypothetical investment earnings.

Second, the court determined that Wife could earn 7.5 percent on the "working" assets she was awarded. There was no evidentiary basis for the 7.5 percent figure. The court simply assumed that figure as an average long term rate of return. Even if the figure had been supported by evidence, average rates of return do not pay bills, and basing a decision concerning alimony on hypothetical average future returns is improper.

In the year the court entered its final decision in this case, the Standard & Poors 500 index lost 11.88 percent, on top of a 9.11 percent loss the year before. The assets wife was awarded must be invested risk free if the trial court's hypothesis is accepted that she can rely solely on those assets for her entire remaining life expectancy of 34 years. In the past five years, such returns have been in the two to five percent range.

To earn the returns the trial court expected, Wife would have to take significant risks with her financial future that Husband was not required to take. The relative financial positions of the parties do not include just the ability to meet present expenses. They

also include the parties' financial security and financial future. In that respect, Wife was left completely exposed and Husband was completely protected.

Third, the court ignored the nature of the assets awarded to Wife. It characterized the following assets as "working:"

	<u>Value</u>
Excess value of marital residence	\$200,000.00
Zions Bank stock (net amount)	271,780.00
Certificate of deposit	29,500.00
1990 BMW 750	18,366.00
John Hancock life policy	55,546.00
IRAs	16,543.00
Savage pension	103,387.00
40 acre parcel	45,000.00
Spring Glen home proceeds	<u>84,687.00</u>
TOTAL	<u>\$824,809.00</u>

In order to invest funds as the court directed, Wife would have been required to liquidate substantial property, including stock with very low tax basis, real estate, and vehicles. Retirement funds do not generate current income for people who have not reached retirement age. In order to get current income, the funds would have to be liquidated, triggering income tax and penalties. After payment of taxes and penalties, Wife's net investable proceeds would have been reduced by nearly half of the amount the trial court assumed she had available.

Finally, the court attributed minimum wage income to Wife. After a 27-year marriage in which Wife was not employed, and in which the parties lived in a million dollar home, drove the newest cars, and had no financial concerns, to expect Wife to support herself at a minimum wage job while Husband continues to enjoy the financial success

built by both parties during the previous 27 years is not only inequitable, it is unconscionable. *See Jones v. Jones*, 700 P.2d 1072, 1075-76 (Utah 1985).

The final decree in this case left Wife with 5,239 shares of Zions Bank stock,³ which paid an annual dividend of \$1.16 per share, or \$506 per month. Accepting *arguendo* the improbable proposition that all of the other “working” assets (except the retirement assets which cannot generate current income) could be invested, without any reduction for taxes incurred upon sale, to generate current income of four percent per year, Wife’s additional monthly income is only \$1,259⁴ before income taxes. The conclusion that she could live in the pre-divorce lifestyle for that amount was an abuse of discretion and was without factual basis.

The evidence in this case plainly supported the trial court’s initial award of \$4,000 per month alimony, especially in light of the redistribution of assets that occurred on remand. The only evidence of Wife’s income was the dividends on Zions Bank stock of \$506 per month. All of the other so-called investment income was speculative and without evidentiary support, based on the unsupported guess that a 7.5 percent rate of return was available. In the initial findings of fact, the trial court made no finding concerning Wife’s need. (*See* R. 236-37.) In the findings after remand, the court “backed into” a need figure of \$4,000 per month, without explaining how it was calculated. (R. 621.) The evidence at trial supported need of \$9,852. Thus, applying just the *Jones* or statutory factors, alimony of at least \$4,000 was warranted.

³ See footnote 1 for calculation.

⁴ $(\$824,809 - 271,780 - 55,546 - 16,543 - 103,387) \times .04 = 15,102 \div 12 = \$1,259.$

The other factors set forth in *English* also mandate an award of substantial alimony. After a 27 year marriage, Husband received some \$7 million in separate and marital assets. During the marriage, he had freely made his separate property available for payment of family expenses, and that property had contributed significantly to the family's lifestyle. Even without those assets, Husband's income was more than adequate to support the alimony award. As the trial court observed, under these circumstances it would have been inequitable to require Wife to place assets at risk, and perhaps liquidate assets, in order to support the lifestyle that the parties enjoyed during the marriage and which Husband continued to enjoy thereafter. The court applied its rationale evenhandedly, ordering that alimony should terminate when Husband reaches retirement age and his earned income presumably declines.

The trial court's reluctant formulaic approach, erroneously assumed to have been mandated by the Court of Appeals, was legally wrong. The Court's expressed justification for the initial award of alimony was correct, and its view that it had been instructed on remand to reach a different result was error. Moreover, its ultimate decision to award no alimony, which results in a huge discrepancy in the living standards of the parties after a 27-year marriage, was a manifest abuse of discretion.

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

The trial court required Wife to refund to Husband \$125,000 of alimony that was paid after January 19, 1999, when the Supplemental Decree was entered, and until July 7, 2000 when the Court of Appeals remanded this case for further findings on both the

property division and alimony issues. The court held that Wife could discharge this obligation by transferring additional Zions Bank stock to Husband at \$56.50 per share. (R. 622.)

Before the judgment was entered, there was an agreement in place pursuant to which Husband agreed to pay temporary alimony of \$6,000 per month. When the Supplemental Decree was entered on January 19, 1999, he paid alimony of \$4,000 per month until July 7, 2000 when this case was remanded for further findings on both the property division and alimony issues. Husband paid no further alimony thereafter.

In reversing the alimony award and remanding the case for further findings regarding alimony, the Court of Appeals instructed the trial court to “first divide the marital estate in accordance with our instructions, and then proceed to consider alimony. . . .” *Jensen v. Jensen*, 2000 UT App 213 at n.1 (unpublished decision). Under those circumstances, the status of the case was as it was before the lower court entered the original alimony order. Therefore, the temporary alimony arrangement was still in effect and Wife was entitled to receive the temporary alimony agreed upon by the parties of \$6,000 per month less the \$2,000 per month mortgage payments paid by Husband until the alimony issue was finally concluded.

When an issue is generally reversed, “the case stands in the lower court precisely as it did before the trial court was had in the first instance.” *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244, 1248 (Utah 1979). This necessarily means that the pre-judgment temporary alimony agreement must have been in effect. Husband cannot have it both

ways. Either the alimony award was effective until modified following remand, or it was still in dispute and the pre-judgment alimony agreement was in effect.

The trial court's decision was inequitable. Wife was not previously on notice that monies paid as temporary alimony were not available for consumption. Moreover, the assets she had been awarded had not generated the income presumed by the trial court. Thus, Wife was required to pay both the refund in alimony, and the trial court's interest assessment on the property transfer, using the Zions Bank stock. This further imperiled her financial position and reduced her future ability to support herself from income on the so-called "working" assets she received in the divorce.

Husband agreed before the commencement of this action that the pre-judgment temporary alimony amount should be \$6,000 per month, including the mortgage payments. There is no reason to depart from this amount. Husband's refusal to provide any support, despite his knowledge of Wife's reliance on and need of support, is unjustified. Wife should have judgment for \$6,000 per month until June 22, 2001, when the Second Supplemental Decree of Divorce was entered, less any credit Husband is entitled to for mortgage payments. Further, if the trial court's decision on alimony is reversed, as it should be, temporary alimony should continue until a final determination on alimony is made, either by this Court or the trial court.


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 4 day of March, 2002.

SNOW, CHRISTENSEN & MARTINEAU

By 
Harold G. Christensen
Rodney R. Parker
Attorneys for Appellant

N:\18517\1 RRP BRIEF DOC 3/4/02

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2002, I caused two copies of the foregoing Brief of Appellant to be served by first class mail upon the following:

CLARK W. SESSIONS
CLYDE SNOW SESSIONS & SWENSON
201 S MAIN ST STE 1300
SALT LAKE CITY UT 84111-2216



ADDENDUM

The following addendum is submitted pursuant to the provisions of Rule 24(a)(11).

- A. Supplemental Findings of Fact and Conclusions of Law, January 19, 1999
- B. Supplemental Decree of Divorce, January 19, 1999
- C. *Jensen v. Jensen*, 2000 UT App 213 (unpublished)
- D. Second Supplemental Findings of Fact and Conclusions of Law, June 21, 2001
- E. Second Supplemental Decree of Divorce, June 21, 2001

ADDENDUM A

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2216
Telephone: (801) 322-2516

FILED DISTRICT COURT
Third Judicial District
JAN 19 1999
SALT LAKE COUNTY
By *[Signature]*
Deputy Clerk

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

LINDA H. JENSEN,	:	SUPPLEMENTAL
	:	FINDINGS OF FACT
Plaintiff,	:	AND CONCLUSIONS OF LAW
	:	
v.	:	Civil No. 964900752
	:	
JAMES T. JENSEN,	:	Judge David S. Young
	:	Commissioner Thomas N. Arnett
Defendant.	:	

The above-captioned matter came on regularly for trial before the undersigned, one of the Judges of the above-entitled Court commencing on October 28, 1997 and concluding with closing arguments on November 12, 1997. Thereafter, the Respondent moved the Court to bifurcate the proceedings and to immediately grant a Decree of Divorce to the Petitioner which the Court did by Decree of Divorce entered in the above-captioned action on June 22, 1998. The Court thereafter considered the evidence and testimony adduced, the arguments and statements of counsel, the files and records herein and the law appertaining thereto and having issued its

Memorandum Decision on November 12, 1998, and being fully advised in the premises, now make and enters the following:

SUPPLEMENTAL FINDINGS OF FACT

1. The Court finds that the parties were married each to the other on July 30, 1970, a marriage of some 28 years.

2. The Court finds that the parties were each raised in Carbon County, State of Utah and that the Plaintiff, following graduation from high school, attended two years of College of Eastern Utah and one year at the University of Utah.

3. The Court finds that during the course of the parties' marriage, the Plaintiff engaged in limited work outside of the parties' home, including some work as a secretary/receptionist and bookkeeper in the law offices of her husband and her father-in-law, Therald N. Jensen, ("TN Jensen") who was a prominent attorney in Price, Utah, until his death. Additionally, the Court finds that TN Jensen's financial interests included banking and ranching as well as the practice of law.

4. The Court finds that the Plaintiff is able-bodied and capable of working outside of the home, but that her income from employment would be nominal.

5. The Court finds that the Defendant was admitted to practice law in the State of Utah in 1969 and practiced primarily in Carbon County, State of Utah, with his father until a fairly recent move to Salt Lake City, Utah, where he accepted employment

with and is currently employed by Savage Industries as Executive Vice President and General Counsel with annual earnings of approximately \$195,000, which includes bonuses from time to time. Further, the Court finds that the Defendant is a member of the board of directors of Zions First National Bank from which he receives director's fees and that he has other dividend and interest earnings from investments and other business operations as hereinafter more fully set forth.

6. The Court finds that the Defendant was previously married and had one child born as the issue of that marriage. Further, the Court finds that the parties had three children born as the issue of their marriage, two of whom are emancipated by age and the youngest of whom is currently a senior in high school and will shortly be emancipated.

7. The Court finds that the Defendant has substantial separate property which originated from his parents as well as from gifts and inheritances which the Court further finds were not commingled with marital property and that the Plaintiff did not augment, maintain or protect the same sufficient to lose the identify of such properties as separate properties. With respect to such separate property, the Court finds that such was acquired principally through the TN Jensen family and that much of the property involved in the Defendant's current ranching interest was significantly obtained and had it origins in the 1940's, 1950's and

1960's, prior to the marriage of the parties. Additionally, the Court find that during the period after the initial acquisition of such properties and prior to his death in 1992, TN Jensen acquired considerable ranching interests and inventory. The Court also finds that the testimony is undisputed that it was the primary dream of TN Jensen to provide ranching opportunities for his children and their children consistent with their individual desires and that such dream was well accomplished.

8. The Court finds that T.N. Company is a Utah partnership formed in approximately 1982 or 1983 by TN Jensen and his children, James, Jerry and Butch. The Court also finds that T.N. Company is the successor company to T.N., Inc. In the beginning, TN Jensen owned 84% of the company and at the time of his death, he retained 48.6% of the company. While 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.

9. The Court finds that T.N. Company is the operating company of the livestock operations and has encountered significant losses during recent years. In 1996, such losses were \$340,000. TN Company owns in excess of 1,100 cows, 60 bulls and 30 horses

with miscellaneous tack, vehicles and equipment consistent therewith.

10. The Court finds that T.N. Company is comprised of inherited property and should remain the sole and separate property of the Defendant including any appreciated value thereon.

11. The Court finds that T.N. Ranches is the entity which is the principal owner of the Range Creek Ranch which consists of a coalition of multiple homesteads and was acquired by T.N. Jensen and his wife during the 1950s. Such properties were contributed in whole from TN Jensen and Mrs. Jensen to T.N., Inc. which then transferred the same to T.N. Ranches.

12. The Court finds that much of the property is titled in the name of "Jensen Brothers" or their individual names. Such properties include a substantial interest in deeded real property, state and federal grazing permits and U.S. Forest Service permits. The Court finds that Jensen Brothers is owned one-third by each of the brothers and includes the following:

a. The Moynier Ranch. The Court finds that the Moynier Ranch was purchased through an agreement dated September 1, 1976 by Butch Jensen and thereafter assigned to the three Jensen brothers. The evidence adduced at trial was that the Moynier Ranch was effectively obtained by Butch Jensen but assigned to the three Jensen brothers and paid for through the ranching operations or T.N. Company. The Court finds that there was no evidence of cash

calls from marital estate property from any of the brothers, except for one sum of approximately \$25,000 which apparently was received in cash at the time of the passing of TN Jensen, the second parent of the Defendant to die. Each child received approximately \$25,000 at that time and while it is unclear as to whether the \$25,000 is separate from the testimony in which it was testified that the Defendant put approximately \$25,000 into the purchase price of the Moynier Ranch, arguably from marital property, the Court finds that it remains fair, just and equitable to allow the Defendant to retain the whole of the Jensen Brothers property assets and interests as his sole and separate property and further finds that as an equitable offset of the \$25,000 which, if it came from marital funds would be subject to sharing, has been equitably dealt with in relation to other assets of the marital estate hereinafter described.

b. The Black Dragon (Spotted Wolf) Grazing Permit: The Court finds said permit was obtained by Butch Jensen and a brother-in-law, James D. Wilcox through an option to purchase. Thereafter the interests of Mr. Wilcox was assigned to Butch Jensen and on behalf of Butch the prior owners were notified in September of 1980 of the election to exercise such option. This asset is held in the names of each of the Jensen brothers individually. The purchase price of \$55,000, the Court finds was paid in annual installments of \$11,000 each, with applicable interest and the funds for the

purchase were provided by TN Jensen. As such, the property and successor interests remain the separate property of the Defendant and his brothers.

c. The Coal Creek Farm and Orfanakis Winter Grazing Property was acquired prior to 1970 by TN Jensen and his wife and consists of approximately 360 acres in Wellington, Utah. That property was conveyed from TN Jensen and his wife to T.N. Ranches in 1983 and from T.N. Ranches to the three Jensen brothers in 1989. Thus, the property originated from TN Jensen and his wife and remains the separate property of the Defendant and his brothers. The Court also finds that the Orfanakis Winter Grazing Property had an origin similar to the Coal Creek Farm through TN Jensen and his wife and was conveyed from them through T.N. Ranches to the three Jensen brothers in 1989 and remains the sole and separate property of the Defendant and his brothers.

d. The Cisco Winter Grazing Permit was obtained by TN Jensen for a purchase price of approximately \$100,000 in February of 1987, which purchase price was paid entirely by TN Jensen and placed ultimately in the name of the three Jensen brothers. As such, it was acquired by TN Jensen and remains the sole and separate property of the Defendant and his brothers.

e. The Siaperis Lands were acquired pursuant to an agreement with Nick and Ileen Siaperis in 1977 whereunder a 60 acre field was acquired for \$70,000. Approximately one month later, the

Siaperis' assigned an Earnest Money Receipt and Offer to Purchase they held with Alex and Shirley Tidwell to TN Jensen and the Defendant to purchase their property for \$60,000. The combined purchase price amounted to \$130,000. The Defendant and his mother borrowed \$130,000 from Walker Bank to pay the combined purchase price and mortgaged the law office building, then held exclusively in the name of Mrs. Jensen as security for such loan. After the purchase price was paid, the land was titled in the names of the Defendant and his mother and later was traded for property adjoining the Coal Creek Farm which was titled in the name of the Defendant and his mother as joint tenants with rights of survivorship. Upon the death of Mrs. Jensen, her interest was conveyed to Jerry Jensen and Butch Jensen as tenants in common. While there appears to be an imbalance presently in the ownership from the one-third interest testified to by the Defendant, it does appear that all of the funds giving rise to the purchase of the property came from Mrs. Jensen through her interests in the office building and thus the property should remain the separate property of the Defendant and his brothers.

f. The Court finds that the ranching company has BLM authorization in Rock Creek, Fan Canyon, Columbia, and Icelandier grazing permit allotments. These grazing permit allotments were all obtained by TN Jensen and/or TN Jensen and the three Jensen brothers prior to 1970 and in February of 1983 were transferred to

the three Jensen brothers. These assets, together with a Price River grazing allotment acquired in 1985, similarly, by the three Jensen brothers, for nominal consideration, and to avoid confusion should remain the separate property of the Defendant and his brothers.

g. The Court finds that various water rights and mineral rights used or associated with any of the ranching and/or farming operations are the separate property of the Defendant and where appropriate, the other Jensen children. As such, the water rights and mineral rights remain with the respective properties as awarded by the Court.

13. The Court finds that none of the aforementioned T.N. Ranches or Jensen Brothers Properties have ever been titled in the names of spouses of any of TN Jensen's children nor have any of the spouses ever been requested to pledge independent credit or support for the ranching operations. As such, the Court finds that it is fair, just and equitable that such properties be found to be separate properties from the marital estate, including any appreciated value therein.

14. The Court finds that the testimony at trial was that the Plaintiff went very infrequently to the properties and there was no evidence that she augmented, maintained or protected the properties. Further, the Court finds that while there was evidence

that the Defendant took weekend time away from the family to work on the properties, and that in the property subsequently referred to as "commingled" Plaintiff will receive, the Court finds that she will receive through the distribution of assets herein, an equitable allocation to enhance her share of the marital estate.

15. The Court finds that the Defendant throughout the marriage maintained an active practice of law and thus through that practice generated income to support the Plaintiff and their family and that while the ranching operations represent a significant present value, they have not been a major source of funding for ongoing family activities and operations. Additionally, the Court finds that the Defendant's allocation of time to the ranching properties has been primarily spare time away from the practice of law, but certainly likewise, away from the family, and thus at the expense of family sacrifices.

16. That during the marriage of the parties, a residence and real property known as the Monica Cove home, which is now the residence of the Plaintiff and two of the parties' children, one of whom is emancipated by age and employment and the other of whom is a senior in high school was acquired. The Court further finds that the funds used to acquire the Monica Cove residence and real property were obtained from an investment of the Defendant prior to the marriage of the parties in approximately April of 1968. At that time, he joined with two other individuals in forming the

Mitchell Funeral Home, Inc., a Utah corporation. Thereafter, in May of 1990, Walmart stores purchased the property of the funeral operations for development of a store in Price, Utah. To accomplish the transaction, Walmart purchased a lot on Chula Vista Circle in Sale Lake City, Utah, which was traded for the price of the property generating a tax free exchange. The purchase included a home and the purchase price was \$310,000. The home was later sold for approximately \$391,000. Further, the Court finds that a separate payment of \$100,000 was made to the Defendant by the succeeding owners of the funeral home in order to purchase his entire interest in the ongoing business operations. Those two amounts combined, equal \$491,000, which amount was put into the purchase of the lot and home at Monica Cove. Additionally, the evidence was that the parties had built a home on property owned by the Plaintiff's father in Carbon County, Utah and it is to those marital homes that the Plaintiff has devoted 28 years of marriage and as to the Monica Cove residence and real property that the Court finds that the Plaintiff has augmented, maintained and protected the same in such a way so as to provide value to the asset and the family's living circumstances. The Court finds in addition, that no effort was made to loan the \$491,000 contribution to the marriage and the Defendant did not intend to retain that asset as his sole and separate property. As such, the Court finds that all assets associated with obtaining the Monica Cove residence

and real property, whether they came from the Carbon County home, the contribution personally of the parties to the marriage or the value from the Mitchell Funeral Home, have been sufficiently commingled so as to negate a finding that the Monica Cove residence and real property is the sole and separate property of the Defendant.

17. The Court finds that in August of 1973, 3 years after the parties were married, Zions Bank purchased the Carbon Emery Bank in a stock exchange. At that time, the Defendant received 2,616 shares of Zions Bank stock listed in his sole and separate name which represented his interest in the Carbon Emery Bank prior to the parties' marriage. The testimony was clear that the Defendant did not at any time believe that the Zions Bank stock was anything other than separate property pre-dating the marriage. Through subsequent stock splits and an additional unknown augmentation of 748 shares, such stock over time increased the Defendant's portion to 8,042 shares of stock. Those beginning shares with stock splits and automatic dividend reinvestment purchases have expanded that portion of the stock to 58,352 shares.

18. The Court finds that in June of 1985, the Defendant placed all of the stock in joint tenancy with rights of survivorship with the Plaintiff. This change 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.

19. The Court finds that during the course of the parties' marriage, additional shares in Zions Bank were acquired in a total amount after stock splits and dividend reinvestment purchases to an existing total of 30,141 shares of such stock, which the Court finds to be marital property and equally divided between the parties. Since the trial, Zions Bank has paid and the Defendant has received dividends totaling .50 per share on the 30,141 shares determined to be marital property. The Court further finds that the Defendant shall pay to the Plaintiff as her share of such dividends, the sum of \$7,535.25 less income taxes attributable thereto which the Defendant shall pay in the approximate amount of \$3,014, resulting in a net sum payable to the Plaintiff from the Defendant of \$4,521.25.

20. The Court finds that in early 1974, TN Jensen and his wife agreed to gift to the Defendant and Jerry Jensen, approximately 4.2 acres of land northwest of Price, Utah. The two Jensen brothers constructed on that property a 50' x 60' shop building, at an approximate cost of \$25,000. At approximately that same time, Jerry Jensen conveyed an interest in American Transport, Inc. to the Defendant who changed the name of that corporation to Malpaso Corporation which the Court finds is effectively defunct,

owning only two trucks with a combined value of approximately \$7,000. The Court finds that it is fair, just and equitable that Malpaso Corporation be awarded to the Defendant as his sole and separate property.

21. The Court finds that the shop constructed on the land hereinabove described was used by T.N., Inc. and T.N. Company and Malpaso Corporation when viable and those companies provided the funds from which the repayment of the bank loan was made. In January, 1980, the Plaintiff and the Defendant, the joint tenants in ownership of the shop, conveyed the same to TN Jensen who in return conveyed the office building to the Plaintiff and the Defendant. The office building described herein is the same building through which both TN Jensen and the Defendant practiced law. No monetary consideration was exchanged and the office building was of significantly greater value than the shop. The shop was thereafter conveyed to T.N. Company and remains an asset of T.N. Company at this time.

22. The Court finds that the office building was sold to the Sampinos family for a net after costs and commission, of \$172,731.67, which sum is presently held in escrow at Summit Exchange Services, Inc. The Court further finds that the value from the office building, the use of the office building during the term of the marriage and the apparent variations in value of the exchange of the office building for the shop, justifies the finding

that the office building asset was intended by the Defendant and TN Jensen to be a marital asset and was sufficiently commingled so as to have lost its separate identity. As a marital asset, the Court finds it is subject to equal division between the parties.

23. The Court finds that the parties separately and during the course of their marriage, have acquired certain oil, gas and mineral royalties and that since the trial, certain amounts have been received by the Defendant therefrom. With respect to such oil, gas and mineral interests, the Court finds that they should be awarded to the party in whose name they are titled and that such interests which are titled jointly should be equally divided between the parties. Additionally, the Court finds that the Defendant should pay to the Plaintiff from royalties he has received since the trial, a net sum of \$788.95 representing gross receipts of \$1,314.95 less estimated tax which the Court finds the Defendant should pay of \$526.00.

24. The Court finds that the furniture, furnishings and personal property at the Monica Cove home have an approximate value of \$75,000 and should be awarded to the Plaintiff as her sole and separate property, together with all clothing, jewelry and personal effects, without consideration as to value.

25. The Court finds that all clothing, jewelry and personal effects of the Defendant should be awarded to him as his sole and

separate property without consideration of value, together with a mantle piece from the Spring Glen home with a value of \$10,000.

26. The Court finds that the TN Jensen Home Place and Big Field shall remain the separate property of the Jensen children, namely the Defendant, Jerry Jensen, Bonnie Jensen and Butch Jensen, without claim from the Plaintiff and that she has waived any claim thereto in open court.

27. The Court finds that the 40 acre parcel of raw ground which abuts the Coal Creek Farm should be awarded to the Plaintiff as her sole and separate property at a value of \$45,000, subject to existing roadways, ditches and easements.

28. The Court finds that the parties have acquired various vehicles and that the Plaintiff should be awarded the 1990 BMW vehicle with an equity of \$18,675 and the 1995 Jeep Cherokee automobile with an equitable value of \$23,925. The Court further finds that the 1993 Chevrolet truck is an asset of T.N. Company and has otherwise been considered herein and that the Defendant should be awarded as his sole and separate property, the 1995 Chevrolet Tahoe with an equitable value of \$22,575 and the 1985 Coachman motor home with an equitable value of \$12,436.

29. The Court finds that certain certificates of deposit at Zions Bank in the amount of \$28,982.49 plus subsequent increases should be equally divided between the parties.

30. The Court finds that the parties' 1996 federal tax refunds of \$21,543 shall be divided equally between the parties.

31. The Court finds that an existing John Hancock life insurance policy with a cash value of \$55,546 should be awarded to the Plaintiff as her sole and separate property and further finds that each of the parties should be awarded their individual retirement accounts in the amount of \$16,542.63 each.

32. The Court finds that since the parties' marriage and continuing to the date of the trial in this matter, the Defendant has vested benefits in the Savage Pension Fund of \$206,774.27 which should be divided equally to each according to the Woodward formula and that a Qualified Domestic Relations Order should be entered with respect thereto.

33. The Court finds that the equity resulting from the sale of the Spring Glen home of \$169,374.72 has been divided equally between the parties, provided however, charges incurred for the chip seal of the roadway on the Plaintiff's father's land which provided access to the Spring Glen home and Plaintiff's father's home and adjoining property of her father, in the amount of \$11,000, the court finds is a marital obligation and should be shared and paid equally by the parties.

34. The Court finds that it is fair, just and equitable that each of the parties be responsible for any and all acquired obligations after their separation.

35. The Court finds that it is fair, just and equitable for the Defendant to hold the Plaintiff harmless from the first mortgage obligation on the Monica Cove residence and real property to Far West Bank and the line of credit to Zions Bank in the combined amount of \$203,000, thereby allowing the Plaintiff to continue residing in such home without a mortgage obligation for as long as she wishes.

36. The Court finds pursuant to its general equitable powers 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 estate. By awarding the Plaintiff the greater portion of the marital assets, a total of \$2,004,736.16 as compared to the marital assets awarded to the Defendant of \$1,001,800.48, the Court recognizes that in so doing the Defendant has had the benefit of premarital assets that are now of significant value. The Court also finds that certain of the excess assets are working assets which the Court finds to be \$1,134,811.16 which are capable of generating a rate of return and income to the Plaintiff for her support and maintenance. Assuming that rate of return to average 7.5% per annum, which the Court finds is reasonable that amount should yield an income of \$85,110.84 or \$7,092.57 per month to the Plaintiff. Additionally, should the Plaintiff desire to sell the Monica Cove residence and move to a home of comparable value to

that occupied by the Defendant, the Plaintiff could generate an additional \$200,000 which could earn an additional \$15,000 per year or \$1,250 per month.

37. The Court could find that the income potentially generated from the assets awarded to the Plaintiff would be sufficient to meet her needs. The Court finds however, that such findings ignore the 27 year term of the parties' marriage and equity requires that the Plaintiff should not be required to live off of the yield from her assets when the Defendant would not be required to do so by reason of his separate earned income. The Court finds that the Defendant's annual gross income is approximately \$195,000, which provides a monthly gross income of \$16,250 per month. The Defendant has been paying approximately \$6,000 per month in temporary alimony during the parties' separation on a voluntary basis but the Plaintiff has been paying the mortgage on the Monica Cove residence in the approximate amount of \$2,200. The Court therefore finds that the Defendant has the ability to pay and it is fair, just and equitable that the Defendant hold the Plaintiff harmless from that mortgage and that he should be required to pay to the Plaintiff alimony in the amount of \$4,000 per month from November 1, 1997 until he reaches the age of 65 years. After age 65 years, each party should be required to bear their future expenses based upon their earnings generated from their separate assets. The Court finds that the present value of

the alimony award based on the assumption of a ten year term and assuming a return on the fund of 7.5% is \$336,987.97. Should the Defendant elect, from his awarded property, he may pay at any time, the present value of the remaining alimony payable at a discount rate of 7.5% and terminate his alimony obligation. Otherwise, the alimony shall continue uninterrupted until the earlier of the death of the Defendant or his attainment of age 65. No other event should terminate the alimony. The Court finds in addition, that the Defendant should be given credit against his alimony obligation of the sum of \$2,500 which he paid subsequent to the trial.

38. Based upon the foregoing Supplemental Findings of Fact, the Court now concludes as follows:

SUPPLEMENTAL CONCLUSIONS OF LAW

1. To the extent the foregoing Supplemental Findings of Fact are Supplemental Conclusions of Law, the same are adopted herein in all respects.

2. That each of the parties should be required to execute and deliver to the other, such deeds, assignments, conveyances and bills of sale as each may request from time to time with respect to the assets awarded to the respective parties including those assets which the Court has found and determined to be separate properties from the marital estate.

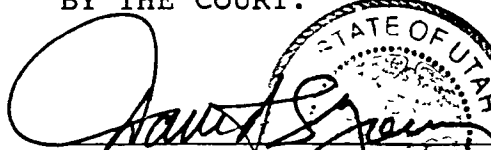
3. That each of the parties should assume, pay, discharge and hold the other harmless from any and all acquired obligations after the separation of the parties.

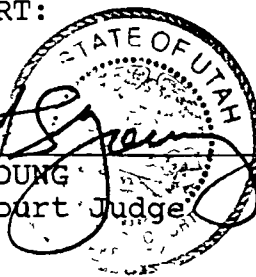
4. That each of the parties should assume, pay, discharge and hold the other harmless from their separate costs and attorneys fees incurred herein.

5. That the Court should make and enter its Supplemental Decree of Divorce accordingly.

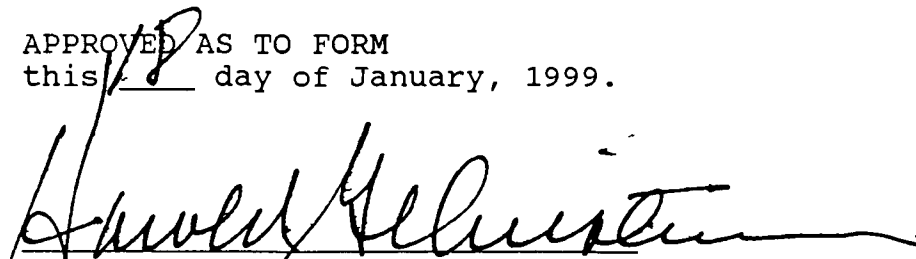
DATED this 19th day of January, 1999.

BY THE COURT:


DAVID S. YOUNG
District Court Judge



APPROVED AS TO FORM
this 19th day of January, 1999.


HAROLD G. CHRISTENSEN
Attorney for Plaintiff

ADDENDUM B

SUPPLEMENTAL DECREE OF DIVORCE

CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2216
Telephone: (801) 322-2516

Attorneys for Defendant

FILED DISTRICT COURT
Third Judicial District

JAN 19 1998
By *[Signature]*
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

LINDA H. JENSEN,

Plaintiff,

v.

JAMES T. JENSEN,

Defendant.

**SUPPLEMENTAL
DECREE OF DIVORCE**

2223859
Civil No. 964900752

Judge David S. Young
Commissioner Thomas N. Arnett

The above-captioned matter came on regularly for trial before the undersigned, one of the Judges of the above-entitled Court commencing on October 28, 1997 and concluding with closing arguments on November 12, 1997. Thereafter, the Respondent moved the Court to bifurcate the proceedings and to immediately grant a Decree of Divorce to the Petitioner which the Court did by Decree of Divorce entered in the above-captioned action on June 22, 1998. The Court thereafter considered the evidence and testimony adduced, the arguments and statements of counsel, the files and records herein and the law appertaining thereto and having issued its

Memorandum Decision on November 12, 1998, and being fully advised in the premises, hereby ORDERS, ADJUDGES and DECREES as follows:

1. That the Plaintiff be and she is hereby awarded and the Defendant be and he is hereby ordered to pay to the Plaintiff as and for alimony, the sum of \$4,000 per month commencing November 1, 1997 and continuing until the attainment by the Defendant of the age of 65 years, or his earlier death. Otherwise, the Court orders that the alimony awarded hereby shall continue uninterrupted and shall not terminate.

2. That the Defendant shall be given credit against his alimony obligation, in the sum of \$2,500 which he paid subsequent to the trial of the case.

3. That the Defendant shall have the right at any time to pay the present value of the remaining alimony due the Plaintiff at a discount rate of 7.5% per annum and should he do so, all remaining alimony obligations from the Defendant to the Plaintiff shall be terminated.

4. That the Plaintiff be and she is hereby awarded as her sole and separate property, without claim from the Defendant, the following:

a. The Monica Cove residence and real property at a value of \$771,000;

b. Furniture, furnishings and personal property located at the Monica Cove residence and real property at a value of \$75,000;

c. 15,070.50 shares of Zions Bank stock at an approximate value of \$781,782.19;

d. 1990 BMW 750 automobile at a value of \$18,365.84;

e. 1995 Jeep Cherokee automobile at a value of \$23,925;

f. Zions Bank Certificate of Deposit at a value of \$29,500;

g. Life insurance cash value - John Hancock Life Insurance Company in the approximate amount of \$55,546;

h. Plaintiff's individual retirement account in the approximate sum of \$16,542.63;

i. One-half of Defendant's retirement plan at Savage Industries in the sum of \$103,387.14, to be divided pursuant to a Qualified Domestic Relations Order;

j. One-half of the proceeds from the sale of a residence and real property located in Carbon County and known as the Spring Glen home in the sum of \$84,687.36;

k. 40 acre parcel of raw ground which abuts the Coal Creek Farm at a value of \$45,000, subject to existing roadways, ditches and easements.

l. All of Plaintiff's clothing, jewelry and personal effects;

m. Any oil, gas and mineral royalties and interests titled solely in the name of the Plaintiff and one-half of any such interests titled in the joint names of the Plaintiff and the Defendant;

n. The sum of \$1,314.95 representing Plaintiff's share of oil and gas royalties received by Defendant since the trial, less income taxes attributable thereto in the estimated amount of \$526.00, for a net sum of \$788.95;

o. The sum of \$7,535.25, representing Plaintiff's share of dividends received by the Defendant since the trial on the parties' joint marital Zions Bank stock less income taxes attributable thereto in the estimated amount of \$3,014.00 for a net sum of \$4,521.25;

5. The Defendant shall be awarded as his sole and separate property, without claim from the Plaintiff, the following:

a. TN Company, a Utah partnership which is the successor to T.N., Inc., which interest equals one-third thereof;

b. T.N. Ranches, which is the principal owner of the Range Creek Ranch which consists of a coalition of multiple homesteads;

c. Jensen Brothers Properties, which includes substantial interests in deeded real property, state and federal grazing permits, and U.S. Forest Service permits,

including the Moynier Ranch, and the Black Dragon (Spotted Wolf) Grazing Permit;

d. The Coal Creek Farm and Orphanakis Winter Grazing Property;

e. The Cisco Winter Grazing Permit;

f. The Siaperis lands and BLM authorizations in Rock Creek, Fan Canyon, Columbia, Icelfander and Price River grazing permit allotments, water rights and mineral rights used or associated with any of the ranching and/or farming operations;

h. 58,352 shares of Zions Bank stock as Defendant's pre-marital property.

i. 15,070.50 shares of Zions Bank stock at an approximate value of \$781,782.19;

j. The sales proceeds of the Jensen Law Office building or \$172,731.67, together with interest thereon since May 1997 in the sum of \$6,477, less income taxes attributable thereto in the estimated sum of \$25,883.00;

k. 1995 Chevrolet Tahoe at a value of \$22,575;

l. 1984 Coachman motor home at a value of \$12,436;

m. The parties' 1996 income tax refund of \$21,543.00;

n. Defendant's individual retirement account in the approximate sum of \$16,542.63;

o. One-half of Defendant's retirement plan at Savage Industries in the sum of \$103,387.14, to be divided pursuant to a Qualified Domestic Relations Order;

p. The mantle piece from the Spring Glen home at a value of \$10,000;

q. One-half of the proceeds from the sale of a residence and real property located in Carbon County and known as the Spring Glen home in the sum of \$84,687.36;

r. All of Respondent's clothing, jewelry and personal effects;

s. The TN Jensen Home Place and Big Field.

6. That the Defendant be and he is hereby ordered to assume, pay, discharge and hold the Plaintiff harmless from the parties' first mortgage obligation on the Monica Cove residence and real property in favor of Far West Bank and the line of credit to Zions Bank in the combined amount of \$203,000, together with the income tax obligations hereinabove set forth;

7. Charges incurred in the amount of \$11,000 for the chip seal of the roadway providing access to the Spring Glen home is a marital obligation and the same is ordered to be shared and paid equally by the parties. That other than as set forth herein, each of the parties be and they are hereby ordered to assume, pay, discharge and hold the other party harmless from obligations incurred since their separation.

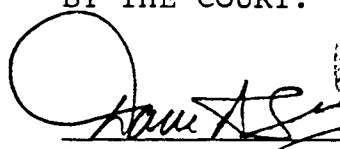
8. That each of the parties be and they are hereby ordered to assume, pay and discharge their own costs and expenses incurred in connection herewith, including costs and attorneys fees, without contribution from the other.

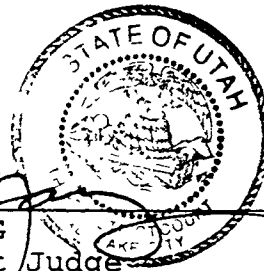
9. That the Plaintiff be and she is hereby awarded the right to continue as an insured under the Defendant's health and medical insurance policy in effect through his employer, provided however, she shall be responsible for any premium charges associated therewith.

10. That each of the parties be and they are hereby ordered to execute and deliver to the other such deeds, assignments, conveyances and bills of sale as each may request from time to time with respect to the assets awarded to the respective parties, including those assets which the Court has found and determined to be separate properties from the marital estate.

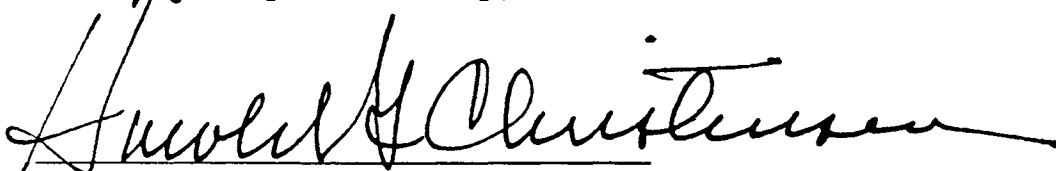
DATED this 19 day of January, 1999.

BY THE COURT:


DAVID S. YOUNG
District Court Judge



APPROVED AS TO FORM
this 19 day of January, 1999.


HAROLD G. CHRISTENSEN
Attorney for Plaintiff

ADDENDUM C

Jensen v. Jensen, 2000 UT App 213 (unpublished)

FILED

Utah Court of Appeals

JUL 07 2000

IN THE UTAH COURT OF APPEALS

Julia D'Alessandro
Clerk of the Court

-----ooOoo-----

Linda H. Jensen,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner, Appellant,)	
and Cross-appellee,)	Case No. 990465-CA
)	
v.)	F I L E D
)	(July 7, 2000)
)	
James T. Jensen,)	
)	
Respondent, Appellee,)	2000 UT App 213
and Cross-appellant.)	

Third District, Salt Lake Department
The Honorable David S. Young

Attorneys: Harold G. Christensen, Julianne Blanch, and Rodney R. Parker, Salt Lake City, for Petitioner
Clark W. Sessions and T. Mickell Jimenez, Salt Lake City, for Respondent

Before Judges Bench, Billings, and Davis.

BENCH, Judge:

Mrs. Jensen (Wife) appeals the trial court's award of the Zions Bank stock and the ranch properties to Mr. Jensen (Husband), arguing that the trial court improperly determined that these were Husband's separate property. Husband cross-appeals, arguing that the trial court abused its discretion when it awarded Wife a two-thirds share of the marital estate, rather than the presumptive equal distribution, and when it awarded alimony to Wife. We affirm in part, and reverse and remand in part.

I. Wife's Appeal

Wife first argues that the Zions Bank stock, which Husband conveyed into joint tenancy in 1985, should have been considered marital property. "A transfer of otherwise separate property to a joint tenancy with the grantor's spouse is generally presumed to be a gift, . . . and, when coupled with an evident intent to do so, effectively changes the nature of that property to marital

property." . Bradford v. Bradford, 1999 UT App 373, ¶22, 993 P.2d 887 (internal citations omitted; emphasis added); see Greener v. Greener, 116 Utah 571, 212 P.2d 194, 199 (1949) (requiring evidence of donative intent before presumption attaches). Wife correctly asserts that the presumption of present joint ownership, once attached, can only be overcome by clear and convincing evidence. See Neill v. Royce, 101 Utah 181, 120 P.2d 327, 331 (1941). We do not agree with Wife, however, that the evidence adduced at trial cannot be viewed as clear and convincing.

The trial court found that, "according to the testimony of the parties," the transfer to joint tenancy "was made to avoid probate in the event of [Husband's] untimely death," and that "[t]here was no evidence adduced at the trial of any donative intent." In reviewing the trial court's factual determinations, we "uphold the [trial] court's findings unless we find them to be 'clearly erroneous,' notwithstanding the 'clear and convincing' standard of proof below." In re R.R.D., 791 P.2d 206, 208 (Utah Ct. App. 1990) (citation omitted).

We think that the evidence and the conclusions which could reasonably have been made therefrom were such to permit the mind of the trial judge to attain as a reasonable man to the state of being clearly convinced of the intent of the parties not to pass a present interest in the [Zions shares].
. . . . Therefore, we think that the lower court must be upheld in his holding that the presumptions arising from the agreement joint in form . . . have been overcome by clear and convincing evidence.

Greener, 212 P.2d at 206. In sum, we cannot say that the trial court clearly erred in determining that the intention of the parties in creating the joint tenancy was to protect Wife in the event of Husband's untimely death rather than a donative intention to create a present interest in Wife.

Wife next challenges the trial court's award of the ranch properties to Husband, arguing that the ranch properties should have been included in the marital estate because they were "commingled with marital assets and enhanced by the parties' joint efforts." The trial court determined that the ranch properties, which Husband largely received by gift or inheritance from his parents, were his separate property. In light of the record evidence before us, we cannot say that the trial court clearly erred in determining that there was no commingling of marital assets with the ranch properties and that Wife "went very

infrequently to the [ranch] properties and there was no evidence that she augmented, maintained[,] or protected the properties."

II. Husband's Cross-Appeal

Husband's first argument in his cross-appeal is that the trial court abused its discretion in awarding a two-thirds share of the marital estate to Wife. In Utah, a specific procedure exists for property division and alimony awards:

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

Burt v. Burt, 799 P.2d 1166, 1172 (Utah Ct. App. 1990).

Despite this equal distribution presumption, the trial court divided the marital estate unequally, determining that "pursuant to its general equitable powers . . . certain assets should not be divided equally between the parties even though they [are marital property]." The procedure set forth in Burt requires the trial court to first determine which property is separate--removing it from further consideration--and then divide the remaining marital estate equally, unless exceptional circumstances are found. See id.

In the instant case, "[t]he trial court made no findings as to any exceptional circumstances which took this case out of the presumptive rule of Burt." Hall v. Hall, 858 P.2d 1018, 1023 (Utah Ct. App. 1993). Hence, we remand to the trial court to either divide the marital estate equally or provide sufficient findings as to the "exceptional circumstances" justifying departure from the presumptive equal distribution of the marital estate. The trial court's findings on remand must be "sufficiently detailed and include enough subsidiary facts to

disclose the steps by which the ultimate conclusion on [this] factual issue was reached.'" Id. at 1021 (citation omitted).

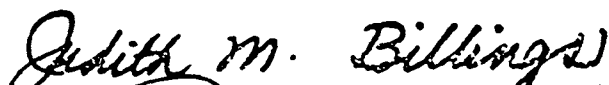
Husband's final argument is that the trial court abused its discretion in awarding alimony. Trial courts are afforded "broad discretion in making alimony awards." Childs v. Childs, 967 P.2d 942, 946 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999). However, we accord deference to the trial court only when it "exercised its discretion within the appropriate legal standards and 'supported its decision with adequate findings and conclusions.'" Id. (citations omitted). In this case, the trial court awarded alimony without considering the relevant statutory factors. See Utah Code Ann. § 30-3-5(7)(a) (Supp. 1999). Instead, the trial court based its decision on a determination that "[Wife] should not be required to live off the yield from her assets when [Husband] would not be required to do so by reason of his separate earned income." Accordingly, we remand to the trial court to make an appropriate analysis of the relevant factors before making an alimony award determination.¹

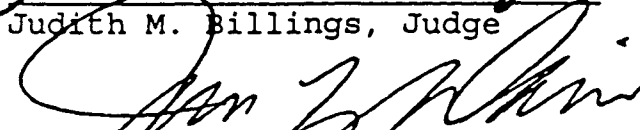
CONCLUSION

We affirm the trial court's award of the Zions Bank stock and the ranch properties to Husband. We reverse the trial court's division of the marital estate and its award of alimony, and remand for consideration of these two awards under the proper legal standards and procedures.


Russell W. Bench, Judge

WE CONCUR:


Judith M. Billings, Judge


James Z. Davis, Judge

1. Under the hierarchy set forth in Burt, the trial court must first divide the marital estate in accordance with our instructions on remand, and then proceed to consider alimony in light of the properly determined property award.

ADDENDUM D

SECOND SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED DISTRICT COURT
Third Judicial District

JUN 21 2001
SALT LAKE COUNTY
By _____ Deputy Clerk

CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2216
Telephone: (801) 322-2516

Attorneys for Respondent

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

LINDA H. JENSEN,	:	SECOND SUPPLEMENTAL
	:	FINDINGS OF FACT
Petitioner,	:	AND CONCLUSIONS OF LAW
	:	
v.	:	Civil No. 964900752
	:	
JAMES T. JENSEN,	:	Judge David S. Young
	:	
Respondent.	:	Commissioner Thomas N. Arnett

The above-captioned matter came on regularly for hearing following a remand from the Utah Court of Appeals on March 8, 2001 and pursuant to Petitioner's objections on file herein on June 8, 2001. The Petitioner was present in person and represented by Harold G. Christensen of Snow Christensen & Martineau, her attorneys. The Respondent was present in person and represented by Clark W. Sessions of Clyde Snow Sessions & Swenson, his attorneys. The Court reviewed the decision by the Utah Court of Appeals and

the direction on remand and after having considered the arguments and statements of counsel, applicable law, Petitioner's memorandum and various illustrative exhibits, and Petitioner's objections and being fully advised in the premises, now makes and enters its Second Supplemental Findings of Fact and Conclusions of Law on remand as follows:

SECOND SUPPLEMENTAL FINDINGS OF FACT

1. 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 Petitioner 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.

2. The Court finds that it is fair, just and equitable that the Respondent be awarded an additional \$501,468.00, thereby

equalizing the distribution of the marital estate based upon non-contested values in the sum of \$1,503,268.00 each.

3. The Court finds that pursuant to a prior order of the Court, the Respondent was to have paid outstanding mortgage loans to Far West Bank and Zions Bank in the total sum of \$203,993.51. The Court finds in addition that the Monica Cove residence, which secured said loans, was previously sold by the Petitioner and from the net sales proceeds was deducted the then balance owing to Far West Bank in the sum of \$142,029.00 and Zions bank in the sum of \$40,506.00, or a total of \$182,535.00. The Court further finds that those sums should be deducted from the amount to be paid by the Petitioner to the Respondent to accomplish an equal distribution of the marital estate. Further, the Court finds that the Respondent has paid to the Petitioner following the sale of the Monica Cove residence, the sum of \$21,388.00 of Far West Bank loan payments and \$5,100.00 of Zions Bank loan payments. The Court also finds that by reason of the prior unequal distribution of the marital estate, the Petitioner had the use of \$318,933.00 of property and assets properly awarded to the Respondent and that the Respondent should be awarded the sum of \$49,833.00 (applying a 7.5%

rate of return per annum) for the 25 month period of time said funds were in the possession of the Petitioner.

4. The Court finds that after the application of the foregoing debits, credits and adjustments, that the Respondent should be awarded \$395,254.00 from the Petitioner and that it is fair, just and equitable that the Petitioner transfer to the Respondent on or before June 18, 2001, 7,619.3542 shares of Zions' Bank stock at an undisputed value of \$51.875 per share as of January 19, 1999 together with any dividend received by the Petitioner on said stock since March 8, 2001. If she fails so to do, the Court finds that the Clerk of the Court should be authorized to effect such transfer.

5. The Court finds that after having reviewed and considered 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, that:

a. The financial condition of the Petitioner with an award to her of over \$1,500,000.00 and the earnings on \$939,557.00 at .075 percent per annum, which represents the amount of assets awarded to her in the Memorandum Decision

plus the proceeds received from the sale of the Monica Cove residence and less \$395,254.00 awarded to Respondent, will produce income to her of \$5,872.00 per month. Further, the Court finds that earnings at the federal minimum wage standard should she desire to accept employment which the Court finds she will not be required to do will produce to the Petitioner \$893.00 per month or a total income of \$6,765.00 per month. The Court also finds that the Petitioner'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 \$4,000.00 per month. As such, the Court finds that the Petitioner has not demonstrated a need for alimony from the Respondent.

b. The financial ability of the Respondent who is employed on a full-time basis to provide support should the need of the Petitioner exist has not been disputed.

c. The length of the parties' marriage of approximately 27 years, the Court finds to be of long duration, but is not a factor that would require the payment of alimony.

d. At the time of the entry of the Supplemental Decree of Divorce herein, there was one minor child of the parties residing with the Petitioner, but said child has now reached the age of majority and is emancipated.

e. While the Petitioner worked for a brief period of time during the parties' marriage at the law offices of the Respondent, her employment was of short duration and she was compensated and paid for her work.

6. The Court finds that following consideration of the factors mandated by the Utah Court of Appeals and by law, that no alimony or other support or maintenance should be awarded to either of the parties hereto and further that each of them are fully capable of providing for their own support and maintenance without financial contribution from the other.

7. The Court finds that pursuant to prior orders of this Court, the Respondent has paid to the Petitioner as and for alimony the total sum of \$125,000.00 for which he should be awarded judgment against the Petitioner based upon the foregoing. Should the Petitioner determine to satisfy said judgment by transferring to the Respondent additional shares of Zions Bank stock, the value thereof shall be determined as of June 8, 2001 and the Petitioner

shall be entitled to retain any dividends paid thereon since March 8, 2001.

8. Based on the foregoing Second Supplemental Findings of Fact, the Court now concludes as follows:

SECOND SUPPLEMENTAL CONCLUSIONS OF LAW

1. That the Petitioner should be ordered to deliver to the Respondent on or before June 18, 2001, 7,619.3542 shares of Zions' Bank stock at \$51.875 per share in order to equalize the distribution between the parties of the marital estate herein together with any dividends received by the Petitioner since March 8, 2001. Should she fail to do so, the Clerk of the Court should be authorized to effect such transfer.

2. That neither of the parties should be awarded alimony or other marital support or maintenance from the other.

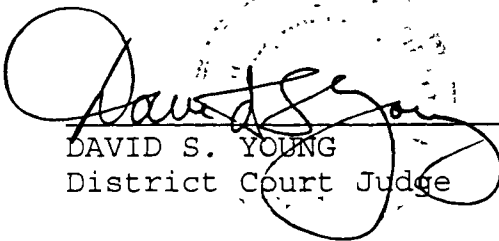
3. That the Respondent should be awarded a judgment against the Petitioner for the sum of \$125,000.00, together with interest thereon from the date of entry hereof and further that should the Petitioner determine to satisfy said judgment by the transfer of additional shares of Zions Bank stock to the Respondent, the value thereof shall be determined as of June 8, 2001. Additionally, the Petitioner shall retain any dividends received on such stock prior to such transfer.

4. That all other terms, provisions, conditions, and limitations of the Decree of Divorce and Supplemental Decree of Divorce previously entered herein should remain in full force and effect to the extent the same are not in conflict herewith.

5. That the Court should make and enter its Second Supplemental Decree of Divorce accordingly.

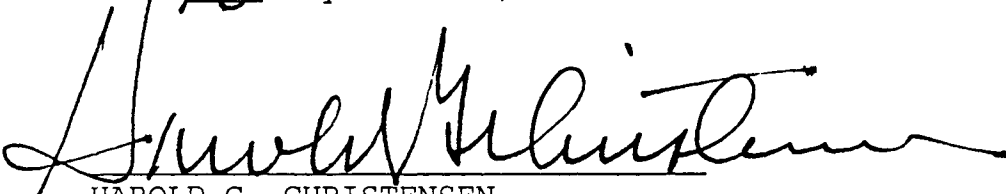
DATED this 13th day of June, 2001.

BY THE COURT:


DAVID S. YOUNG
District Court Judge

6/21/01

APPROVED AS TO FORM
this 13th day of June, 2001.


HAROLD G. CHRISTENSEN
Attorney for Petitioner

ADDENDUM E

SECOND SUPPLEMENTAL DECREE OF DIVORCE

CLARK W. SESSIONS (2914)
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2216
Telephone: (801) 322-2516 EN

ENTERED IN REGISTRY
OF JUDGMENTS

DATE _____

LINDA H. JENSEN, : **SECOND SUPPLEMENTAL**
 : **DECREE OF DIVORCE**
 Petitioner, :
 :
 v. : Civil No. 964900752
 :
 : Judge David S. Young
 JAMES T. JENSEN, :
 :
 : Commissioner Thomas N. Arnett
 Respondent. :

222 3859

Second Supplemental Decree of Divorce 22

and statements of counsel, applicable law, Petitioner's memorandum and various illustrative exhibits, and Petitioner's objections and being fully advised in the premises, and having entered Second Supplemental Findings of Fact and Conclusions of Law, hereby ORDERS, ADJUDGES and DECREES as follows:

1. That the marital estate as valued by the Court in its earlier Memorandum Decision and Supplemental Decree of Divorce entered herein shall be divided equally between the parties.

2. That in order to accomplish an equal division and allocation of the marital estate as of January 19, 1999, the Respondent be and he is hereby awarded 7,619.3542 shares of Zions' Bank stock at the price of \$51.875 per share and the Petitioner be and she is hereby ordered to effectuate such transfer to the Respondent on or before June 18, 2001, together with any dividends received by the Petitioner on said stock since March 8, 2001. If she fails so to do, the Clerk of the Court is hereby authorized and directed to effect such transfer.

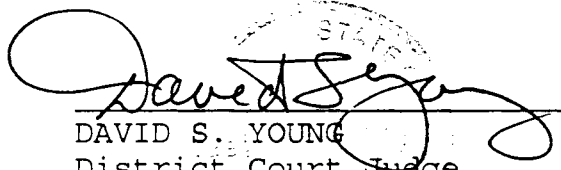
3. That no alimony or other support or maintenance should be awarded to either of the parties hereto and the Respondent be and he is hereby awarded a judgment against the Petitioner for the sum of \$125,000.00 together with interest thereon at the judgment rate

until paid. Should the Petitioner determine to satisfy said judgment by the transfer of additional Zions Bank stock to the Respondent, the value thereof shall be determined as of June 8, 2001, and the Petitioner shall be entitled to retain any dividend paid thereon since March 8, 2001.

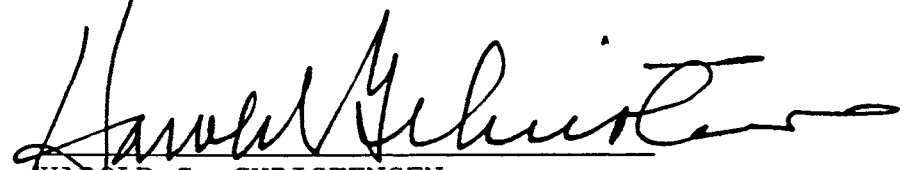
4. That all other terms, provisions, conditions and limitations in the Decree of Divorce and Supplemental Decree of Divorce previously entered herein shall remain in full force and effect to the extent the same are not in conflict herewith.

DATED this 21 day of June, 2001.

BY THE COURT:


DAVID S. YOUNG
District Court Judge

APPROVED th 10 TO FORM
this 10 day of June, 2001.


HAROLD G. CHRISTENSEN
Attorney for Petitioner