

2016

**Rick J. Lindsey, Petitioner/ Appellee, vs. Karen M. Lindsey,
Respondent/ Appellant.**

Utah Court of Appeals

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IN THE COURT OF APPEALS, STATE OF UTAH

RICK J. LINDSEY,

Petitioner/Appellee,

vs.

KAREN M. LINDSEY,

Respondent/Appellant.

APPELLANT'S BRIEF

Appellate Case No. 20150769

Civil Case No. 134500010

ON APPEAL FROM THE DECISION OF THE FOURTH DISTRICT COURT,
UTAH COUNTY, HONORABLE FRED HOWARD, DISTRICT COURT JUDGE

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JURISDICTIONAL STATEMENT

This Court's jurisdiction rests upon Utah Code Annotated Section 78A-4-103(2)(j) and Section 78A-3-102(4).

STATEMENT OF THE ISSUES

A. Questions Presented and Standard of Review

ISSUE 1. Whether the trial court erred in finding on summary judgment that during the marriage Ms. Lindsey did not acquire any interest in any appreciation or enhancement of the Mr. Lindsey's business, based on Ms. Lindsey's efforts, time, and separate resources expended during the 19 year marriage to support and care for the family, and grow and enhance the business, when Mr. Lindsey's interest in the business appreciated no less than \$7.299 million during the marriage.

Standard of Review: "In reviewing a grant of summary judgment, we determine only whether the [district] court erred in applying the governing law and whether the [district] court correctly held that there were no disputed issues of material fact."

Cabaness v. Thomas, 2010 UT 23, ¶18, 232 P.3d 486 (citing *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 400 (Utah 1998) (alterations in original)).

Preservation for Appeal. [R. at 989].

ISSUE 2. Whether the trial court erred in finding on summary judgment six weeks before trial, that no portion of Petitioner's separate business interest (including \$7.299 million of appreciation during the marriage) should, for any equitable reason, be

awarded to Ms. Lindsey because Mr. Lindsey's rate of return on his business interest was less than ten percent during the marriage.

Standard of Review: "In reviewing a grant of summary judgment, we determine only whether the [district] court erred in applying the governing law and whether the [district] court correctly held that there were no disputed issues of material fact." *Cabaness v. Thomas*, 2010 UT 23, ¶18, 232 P.3d 486 (citing *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 400 (Utah 1998) (alterations in original)).

Preservation for Appeal. [R. at 987].

CONSTITUTIONAL OR STATUTORY PROVISIONS

There is no constitutional or statutory provision material to this appeal.

STATEMENT OF THE CASE

A. Nature of Case and Procedural History.

This appeal is from final appealable orders and related findings of fact and conclusions of law in the Fourth District Court with case number: 134500010. The orders appealed from are the following: (1) the November 17, 2014 Order Granting Partial Summary Judgment to Petitioner/Appellee and the related Findings of Fact and Conclusions of Law Regarding Order Granting Partial Summary Judgment, and (2) the August 13, 2015 Decree of Divorce and related Amended and Restated Findings of Fact and Conclusions of Law, containing the final appealable order and judgment of the Fourth District Court as to all parties and claims.

STATEMENT OF FACTS

1. This case arises out of a divorce action and the related determining and division of the marital estate. [R. at 6, 1853, 1839]

2. The parties were married in November 1996. [R. at 1237] At the time of their divorce in August 2015, they had been married nearly 19 years. [R. at 1838]

3. The parties have one minor son born as issue of their marriage. [R. at 1237]

4. Both parties had children from prior marriages who were minors during the marriage. [R. at 590, 1882:71-75]

5. In 1997, Mr. Lindsey's business interests in Prime Holdings and its precursors ("Business Interest") were worth between \$3.36 million and \$3.93 million, with an average of \$3.645 million. [R. at 1236]

6. By June 30, 2014, Mr. Lindsey's Business Interest was worth \$10.944 million. [R. at 1235]

7. The increase in value from 1997 to June 2014 was \$7.299 million. [R. at 1235-1236]

8. During the marriage Ms. Lindsey cared for the parties' son, and other children from each of the parties' prior marriages, enabling Mr. Lindsey to be free to engage in activities benefitting his business. [R. at 590, 1882:71-75]

9. In addition to caring for children, during the marriage Ms. Lindsey ran and

managed the household, kept a 10,000 square foot home clean, bought groceries, did laundry, made sure repairs and deliveries got done, etc. [R. at 590-591]

10. The trial court specifically found that Ms. Lindsey cared for the parties' one child and did the majority of the household duties, such as cleaning, cooking, washing clothes, and other such activities. A maid was employed to assist with some of the housework. [R. at 1224]

11. Ms. Lindsey claimed she was home for the vast majority of repairs and deliveries at the Heber Residence (which residence was used to house and entertain business associates). She remembered being home without Mr. Lindsey for delivery and installation of two new sound systems, weeks of punch list items when the home was new, delivery and installation of a new front door, updating central vacuum, heating, plumbing, and air conditioning numerous times (there are 13 air conditioners and radiant floor heating, thermostat repairs and vent testing), sealing of the driveway and cement, outdoor furniture delivery, and many weeks of delivery of custom furniture, drapes, window coverings in theater room, pinball machine repair, and delivery of gravel by the pond. [R. at 1223-1224]

12. Ms. Lindsey generally left the financial aspects of the parties' marriage to Mr. Lindsey. [R. at 1223]

13. Ms. Lindsey was involved in the acquisition or development of the parties' real property to the extent that she searched for and visited the lot (and other parcels

during the search), discussed and created goals for the residence with Mr. Lindsey over 10 years prior to building the residence, and approved the final floor plan and selected furnishings of the parties' marital residence located in Heber, Utah. [R. at 1223]

14. Throughout the marriage Ms. Lindsey also entertained Mr. Lindsey's business clients without pay and sometimes without Mr. Lindsey present, cleaned up after clients, fed them, and performed other unpaid services on behalf of the business. [R. at 594, 1227]

15. Ms. Lindsey specifically testified of hosting six business associates and their families on the following occasions:

- a. Mr. Sheehey, an associate from Lloyd's of London that Mr. Lindsey has done business with since prior to the marriage, and his family stayed at the Heber Residence two times. Ms. Lindsey provided a hostess basket that included goodies, maps, event information, and clean sheets. She also cooked meals, cleaned up, and aided with laundry. While Mr. Lindsey worked, Ms. Lindsey entertained Mr. Sheehey's wife and children. She transported them to Salt Lake so the parties and Sheehey family could attend a rodeo, concert, and a soccer game together during the second stay. During one of the stays, the parties took the Sheehey family to vacation at Lake Powell on Prime Holdings' houseboat. Ms. Lindsey testified that the families were

friends. Ms. Lindsey also testified that Mr. Sheehy stayed with the parties on one other occasion.

- b. Charles Smith, another associate from Lloyd's of London that Mr. Lindsey has done business with since prior to the marriage, stayed with the parties "numerous times" at the parties' Draper and Heber Residences. She would cook for Mr. Smith and do his laundry. On one other occasion, Mr. Smith and his wife stayed at the Draper Residence. She testified to cooking for them and taking them skiing with Mr. Lindsey.
- c. Paul Daley, another associate from Lloyd's of London that Mr. Lindsey has done business with since prior to the marriage, and his family stayed at the Heber Residence for a week during their Easter holiday. Mr. Lindsey was out of town during the beginning of their visit but she provided a hostess basket, meals, cleaned up after them and entertained them. She also loaned them her car so they had a vehicle to drive.
- d. A river runner insurance client that Mr. Lindsey has known since prior to the marriage named James (Ms. Lindsey could not remember his last name) and his son stayed with the parties at their Draper Residence on two occasions where Ms. Lindsey provided meals and "other services".

She could not provide any details on the services provided.

- e. J.T. Lemon, another river runner insurance client that Mr. Lindsey has known since prior to the marriage, stayed at the Draper and Heber residence. Ms. Lindsey testified to entertaining him but she could not provide any details.
- f. Frank Lukas, another river runner insurance client that Mr. Lindsey has known since prior to the marriage, stayed at the Heber Residence. She again testified of entertaining him but she could not provide details.

[R. at 1224-1226]

16. In addition, Ms. Lindsey provided Mr. Lindsey with \$54,000 of her separate property. Ms. Lindsey testified that Mr. Lindsey told her he was putting the money into the business because the business needed money at the time. [R. at 1233-1234]

17. Finally, during the marriage Mr. Lindsey acquired an additional 57 shares in the business, which shares Mr. Lindsey elected to receive as shares instead of cash even though he had historically taken cash dividends. [R. at 1230]

18. On January 10, 2013, Mr. Lindsey filed a Petition for Divorce. [R. at 6.]

19. On February 18, 2014, Mr. Lindsey filed a Motion for Partial Summary Judgment, which was ultimately granted, awarding Mr. Lindsey as his separate property his Business Interest and all appreciation or enhancement of the business during the

marriage. [R. at 482, 1239, 1242]

20. As noted above, appreciation of the Business Interest during the marriage was \$7.299 million. [R. at 1235-1236]

21. The Business Interest appreciation was the most valuable asset of the parties by a large margin, particularly when debts on particular assets, such as the marital residence, were taken into account. [R. at 1776-1777]

22. On November 17, 2014 the trial court entered its (1) Order Granting Partial Summary Judgment and (2) Findings of Fact and Conclusions of Law Regarding Order Granting Partial Summary Judgment. [R. at 1239, 1242]

23. This appeal seeks a review and reversal of the District Court's granting partial summary judgment in favor of Mr. Lindsey, which ruling found that (1) Ms. Lindsey acquired no interest in Mr. Lindsey's Business Interest, or in any appreciation thereof, despite her efforts, time and separate resources expended during the marriage to grow the business, and (2) the equity exception only applied after, and to the extent that, Mr. Lindsey should be provided a reasonable rate of return on his business interests.

24. Trial was held in this matter on December 3 and 4, 2014. [R. at 1881-1882]

25. On August 13, 2015 the trial court's (1) Decree of Divorce and (2) Amended and Restated Findings of Fact and Conclusions of Law entered. [R. at 1853, 1839]

26. This appeal also seeks a new trial on the basis that if the granting of summary judgment is reversed, that a new balancing of the equities is necessary, and corresponding new Findings of Fact and Conclusions of Law should enter.

SUMMARY OF THE ARGUMENT

The trial court incorrectly found, on summary judgment based on undisputed facts, that Ms. Lindsey's contributions to Mr. Lindsey's business throughout the marriage were infrequent and immaterial, and were insufficient to augment or enhance the value of Mr. Lindsey's business interests as a matter of law. The trial court misapplied the undisputed facts to governing case law, resulting in the parties' largest asset, \$7.299 million in business growth during the marriage, to be awarded to Mr. Lindsey as his separate property.

Further, the trial court erred in its ruling on summary judgment by taking an overly narrow view of the equity exception when separate property may be awarded to the other spouse. The trial court limited its ruling on the equity exception to first providing Mr. Lindsey a "reasonable return" on his premarital interest instead of considering the equities of the entire matter at the conclusion of trial (after all evidence is heard and testimony taken). As such, the trial court failed to make certain that the "ultimate division" was equitable as required by law. In other words, because of the summary judgment ruling awarding \$7.299 million in business growth during the marriage to Mr. Lindsey, without any regard to Ms. Lindsey's contribution, the overall

equities and amounts awarded at the trial were so out of balance so as not to be able to be corrected at trial.

Ms. Lindsey respectfully requests that the Court reverse the trial court's granting of partial summary judgment, find that Ms. Lindsey is entitled to a portion of the augmentation of Mr. Lindsey's business interest during the marriage, and remand to the trial court for a new trial wherein the amount of appreciation in the business Ms. Lindsey is awarded can be ascertained, and where all other equities may be rebalanced at trial in light of this Court's ruling.

ARGUMENT

- I. The trial court erred in determining on summary judgment that during the marriage Ms. Lindsey did not acquire an interest in any appreciation or enhancement of the Petitioner/Appellee's business, based on Respondent's efforts, time, and separate resources expended during the marriage to grow and enhance the business, when Petitioner's interest in the business appreciated no less than \$7.299 million during the marriage.**

"[T]he trial court's duty to make an equitable division of property in a divorce action encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived" *Epperson v. Utah State Retirement Bd.*, 949 P.2d 779, fn 7 (citing *Dogu v. Dogu*, 652 P.2d 1308, 1310 (Utah 1982) (internal quotation marks and citation omitted).

Separate property can become part of the marital estate and subject to equitable distribution in the following relevant circumstances: (1) the other spouse has contributed

to the enhancement, maintenance, or protection of that property; or (2) the distribution of separate property achieves a fair, just, and equitable result. *See Thompson v. Thompson*, 2009 UT App 101, ¶ 9, 208 P.3d 539. The first prong is discussed in this Section I. The second prong is discussed below in Section II.

Property brought into the marriage by one spouse should generally be awarded to that spouse as his or her separate property unless “the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it.” *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988). [R. at 1229]

As noted above in Facts 8-17, the underlying facts as to Ms. Lindsey’s contributions to the marriage and efforts to grow Mr. Lindsey’s business are undisputed.¹ Given the undisputed facts, the relevant issue is whether the trial court correctly found on summary judgment that as a matter of law, Ms. Lindsey’s efforts to grow Mr. Lindsey’s business failed to materially augment or enhance the value of Mr. Lindsey’s business

¹ Mr. Lindsey does not contest that he received \$54,000 from Ms. Lindsey’s separate property. However he contends and the trial court found that the money was not invested in the business because no new shares were issued. [R. at 1233-1234]. Ms. Lindsey contends that Mr. Lindsey told her he was using the money for the business, and that money could be used for the business without new shares being issued. On summary judgment, the court’s function is not to weigh disputed evidence or to decide which side has the stronger case. Rather, the court’s “sole inquiry should be whether material issues of fact exist.” *Draper City v. Est. of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995). The nonmoving party’s evidence is to be believed for purposes of the motion, and if there is a conflict in the evidence as to a material fact, the motion must be denied. *See, e.g., id.* at 1100-01. As such, given the genuine issue of material fact as to whether Ms. Lindsey enhanced the business through her \$54,000, summary judgment should have been denied.

interest. In granting summary judgment on this issue, the trial court reasoned that Ms. Lindsey's contributions and efforts were "insufficient to rise to the level of contributions of a spouse" such as those who have been awarded an interest in the other spouse's separate property in recent cases. [R. at 1223]

Specifically, the trial court noted the following cases:

- In *Elman*, the wife had not worked in the husband's business but was found to have held unusual responsibilities in the marriage. *Elman v. Elman*, 2002 UT App. 83, ¶ 24, 45 P.3d 176. In that case, the husband had terminated his regular employment during the marriage to focus on developing his family's business. *Id.* Meanwhile, the wife had left her private sector employment to actively manage the household and take on additional responsibilities at home including securing the land for and overseeing the building of the parties' marital residence and assisting in the acquisition of a Montana ranch. *Id.* These real properties significantly increased in value during the marriage due to the wife's ongoing efforts. *Id.* Because the wife had helped grow the marital properties, a value from which the husband would obviously receive benefit in the division of marital property, it was equitable that the wife also shares in the appreciation of his premarital family business. *Id.* [R. at 1228]
- In *Mortensen* and *Dunn*, both wives worked in the husband's premarital businesses during the marriage without compensation. *See Mortensen v.*

Mortensen, 760 P.2d 304, 305; *Dunn v. Dunn*, 802 P.2d 1314, 1316 (Utah Ct. App. 1990). They also had sole responsibility of running the marital household and managing the household accounts, which allowed their husbands to focus solely on their businesses. *Id.* [R. at 1228-1229]

- In *Henshaw v. Henshaw*, 2012 UT App. 56, ¶18, the wife's contributions toward the preservation and maintenance of the husband's separate property were found to adequately support an award of such property to the wife where the wife worked the entire marriage and contributed all of her income toward the marriage while the husband earned limited income to support the family by working on a ranch and renting apartments he had purchased from gifted money. *Id.* [R. at 1228]
- In *Jensen v. Jensen*, 2009 UT App. 1, ¶ 16, the Utah Court of Appeals reversed the trial court and held that the wife's efforts in caring for the parties' one child, maintaining the household, and contributing some income from her own massage therapy business, were inadequate to justify an award of equity in the husband's premarital business. The Utah Supreme Court held that more is required to justify an award of otherwise separate property in cases where the spouse has neither assisted in running the other spouse's business nor contributed in any way to its increased value. *Id.* [R. at 1227-1228]
- In *Kunzler*, the wife's limited role in maintaining the marital household, which enabled the husband to work for longer stretches of time away from the home, was

also held to be insufficient to rise to the level of contributions present in *Elman* and *Dunn*. *Kunzler v. Kunzler*, 2008 UT App 263, ¶19. [R. at 1227]

While Ms. Lindsey's efforts to grow the business may not reach the extreme level of the spouse identified in *Elman* (which spouse left the private sector in property management to focus on building a home and acquiring a ranch), it is not clear as a matter of law that Ms. Lindsey does not meet the standard outlined in *Mortensen*.

"*Mortensen*, *Dunn*, and *Elman* appear to require more active participation and contribution by the nonowner spouse [outside of traditional domestic burdens] in order to qualify under the contribution category of *Mortensen*. As noted in *Mortensen*, the results are different where there is 'effort made by the nondonee or nonheir spouse to preserve or augment the asset,' as compared to situations where there is a 'lack of such efforts.'" *Jensen*, 2009 UT at ¶14 (citing *Mortensen*, 760 P.2d at 306). [R. at 1229]

It is undisputed that Ms. Lindsey's contributions to the marriage and business exceeded washing laundry and preparing family meals. For example, she managed the large family home, was the primary caregiver for the parties' child, and children from both sides' previous marriages while the children were minors. [R. at 590-91, 1882:71-75] She enabled Mr. Lindsey to work long hours without worrying about what clothes he would wear (she laid them out), or what he would eat (she prepared meals and did the shopping). [R. at 1882:74] Throughout the marriage Ms. Lindsey entertained and hosted in the family home and on trips Mr. Lindsey's business associates. [R. at 1224-1226]

Sometimes Mr. Lindsey was not present during these activities. [R. at 1224-1226] She also contributed \$54,000 of her separate money towards what she thought was for the business, based on what Mr. Lindsey told her. [R. at 1233-1234] These actions indicate effort by Ms. Lindsey to preserve or augment Mr. Lindsey's business as required under *Mortensen and Jensen*.

Similarly, the *Elman* court laid out the following factors to consider regarding awarding a wife an interest in the husband's business: (a) the wife's freeing the husband to engage in activities benefitting the premarital business; (b) the wife's performance of services for the company without pay; and, (c) the wife's running the household and managing household accounts. *See Elman v. Elman*, 45 P.3d 176, 180 (Utah Ct. App. 2002).

In this case, Ms. Lindsey took care of the parties' son and other children from the parties' prior marriages. She also took care of the parties' Draper residence alone and the 10,000 square foot Heber Residence with only the help of a maid for four hours per week. She freed Mr. Lindsey to work extensively on the business. In addition, Ms. Lindsey entertained Mr. Lindsey's business contacts at her residence without pay and sometimes without Mr. Lindsey present to help develop the business. She also cleaned up after them, fed them, and performed other unpaid services on behalf of the business. While she did not manage many of the parties' financial accounts, she managed the household, bought

groceries, did laundry, and made sure repairs and deliveries got done. Ms. Lindsey has contributed to the business in numerous ways. [R. at 1223-1226]

Ms. Lindsey's efforts clearly exceed the efforts of the spouse in *Kunzler*, who "testified only as to how her domestic labors enabled Husband to ranch for longer periods of time without having to, for example, return home to launder his clothes." *Kunzler v. Kunzler*, 2008 UT App 263, ¶19. Notably, in *Kunzler* the majority of the Court of Appeals found that even though the wife's efforts were insufficient to support a factual finding of enhancement of the properties, the Court of Appeals remanded to the trial court for consideration of making an equitable award of the separate property to the wife. *See Kunzler*, 2008 UT App at ¶37 (holding that "an equitable distribution of the [husband's p]roperties would be well within the trial court's discretion on remand"). Further discussion of the equity exception is discussed in Section II below.

Similarly, Ms. Lindsey's efforts were also greater than those in other reported cases predating *Mortensen*, *Dunn*, and *Elman* where interests in businesses were awarded to the non-business owning spouse. *See, e.g., Savage v. Savage*, 658 P.2d 1201, 1204 (Utah 1983) (holding that the trial court's property distribution—granting the wife forty percent of the value of the husband's company—was within its allotted discretion, in part, "while it is true that the [wife] took no responsibility for the business, it was her assumption of domestic burdens which made possible the [husband's] full-time participation in the business."). Of course it is clear from the more recent line of cases

that the Utah law has drifted from this more liberal standard. *See Jensen v. Jensen*, 2009 UT 1, ¶ 16 (finding, in reversing the trial court’s award of an interest in husband’s separate property to wife, that the “[w]ife behaved in a very normal and commendable manner by caring for the parties’ child, maintaining the household, and running her own part-time business from their home. More is required, however, to justify an award of Husband’s separate property.”). While *Jensen* notes that “[m]ore is required,” the case does not specifically identify what is required.

On summary judgment, the trial court’s minimization of Ms. Lindsey’s efforts to grow the business, run the household, and raise the family indicates an abuse of discretion because, although Ms. Lindsey may not have matched the criteria at the highest level for an award of an interest in separate property, she did satisfy the stated standards. It also deprived Ms. Lindsey was unfairly denied any portion of the parties’ largest asset at trial. The end result was Mr. Lindsey walked away with over \$10 million in business interests (including the \$7.299 million in appreciation during the marriage, and Ms. Lindsey received less than \$600,000 in property. (Findings of Fact at p. 63.)

Similarly, the trial court’s granting summary judgment awarding Mr. Lindsey his “premarital business together with any appreciation or enhancement thereon” is the trial court effectively removing the parties’ largest asset from the marital pie, leaving such an equitable discrepancy, that even if Ms. Lindsey were awarded the entire marital estate, would not come close to equaling the size of the now missing piece of the pie. So he gets

to spend the entire marriage enhancing his separate property for 19 years and she gets none of it?

Ms. Lindsey respectfully requests that the Court reverse the District Court's granting of summary judgment, find that Ms. Lindsey is entitled to a portion of the augmentation of Mr. Lindsey's business interest during the marriage, and remand to the District Court for a new trial wherein the amount of the business Ms. Lindsey is awarded can be ascertained and where all other equities may be rebalanced in light of this Court's ruling.

II. The trial court erred in determining on summary judgment six weeks before trial that no portion of Mr. Lindsey's separate business interest (including \$7.299 million of appreciation during the marriage) should, for any equitable reason, be awarded to Ms. Lindsey because Mr. Lindsey's rate of return on his business interest was less than ten percent.

It is undisputed that in any property division, "[t]he overriding consideration is that the *ultimate division be equitable*—that property be fairly divided between the parties, given their contributions during the marriage and their circumstances at the time of the divorce." *Henshaw v. Henshaw*, 2012 UT App 56, ¶15 (emphasis added). [R. at 1222] It is also undisputed that "[t]he court must consider whether there are any extraordinary circumstances that warrant a departure from the presumptive rule." *Id.* [R. at 1222].

It is well within the trial court's powers to award an interest in separate property, such as appreciation of a business during a marriage, when equity requires. "[S]eparate

property is not ‘totally beyond [a] court’s reach in an equitable property division.’”

Elman v. Elman, 2002 UT App 83, ¶19, 45 P.3d 176 (second alteration in original)

(quoting *Burt v. Burt*, 799 P.3d 1166, 1169 (Utah App 1990)). Under Utah law, a trial court “may award the separate property of one spouse to the other spouse in extraordinary situations where equity so demands.” *Id.* (internal quotation marks omitted).

In fashioning an equitable property division, trial courts must consider all of the pertinent circumstances, including the amount and kind of property to be divided, the source of the property, the parties’ health, the parties’ standard of living and respective financial conditions, their needs and earning capacities, the duration of the marriage, what the parties gave up by the marriage, and the relationship the property division has with the amount of alimony awarded. *Naranjo v. Naranjo*, 751 P.2d 1144, 1147-48 (Utah App. 1988).

Moreover, trial courts “need be guided by the general purpose to be achieved by a property division, which is to allocate the property in a manner which best serves the needs of the parties and best permits them to pursue their separate lives.” *Id.*; *see also Jensen v. Jensen*, 2008 UT App 392, 197 P.3d 117 (stating that because of the “the equitable power of trial courts in divorce actions, trial courts should not be prevented ‘from doing that which justice and equity require for the interest and welfare of the parties involved.’” (internal citation omitted)).

However, in its ruling on summary judgment the trial court limited the application of the equity exception to making providing Mr. Lindsey a “reasonable return” on his premarital interest, rather than applying the equity exception to the equities of the entire matter at the conclusion of the matter. The trial court specifically curtailed its analysis of the equity exception to determining how Mr. Lindsey’s rate of return compared to the rate of return in *Elman v. Elman*. [R. 1221-1222] In *Elman*, the court allowed a ten percent rate of return based on real property investments in California. *Elman*, 2002 UT App 83, ¶34. Because Mr. Lindsey’s rate of return was 6.93%, the trial court found that the growth in his business interests was a result of his equity investment and not based on his work effort during the marriage. [R. 1221-1222]

While the rate of return is one factor the trial court may consider in determining whether the equity exception should apply, it is only one factor to consider of “all pertinent circumstances.” *Naranjo v. Naranjo*, 751 P.2d 1144, 1147-48 (Utah App. 1988). In fact, the trial court made no findings on the *Naranjo* factors other than the amount and kind of property to be divided, and the source of the property. The trial court did not make findings relative to the equity exception related to the parties’ health, the parties’ standard of living and respective financial conditions, their needs and earning capacities, the duration of the marriage, what the parties gave up by the marriage, and the relationship the property division has with the amount of alimony awarded. *Naranjo v. Naranjo*, 751 P.2d 1144, 1147-48 (Utah App. 1988).

Moreover, the ruling on summary judgment prohibited the possibility that any portion of the business appreciation during the marriage could be awarded to Ms. Lindsey at trial once all equities were weighed, even if doing so was required to make certain that the “ultimate division” was equitable based on the unique circumstances of the case.

Instead of granting summary judgment in favor of Mr. Lindsey, the trial court should have heard all equitable issues more fully at trial. This would allow the trial court to observe the parties’ demeanor, hear all the evidence, etc. Hearing all the equitable issues at trial would allow the Court to fashion an equitable outcome, which was otherwise prevented because summary judgment on the issue of the business was granted.

Ms. Lindsey should be provided the opportunity to argue at trial how the “ultimate division” is most equitable. She was improperly precluded from doing so at trial because of the summary judgment ruling. By way of illustration, Ms. Lindsey testified she contributed \$54,000 in proceeds from the sale of her premarital residence towards the business in approximately 2001 based on Mr. Lindsey’s representations to her the business needed the money. [R. at 1233-1234]. The trial court ruled that there was no evidence to support Ms. Lindsey’s claim that the \$54,000 was invested or loaned to the business, even though Mr. Lindsey did not contest that he received the \$54,000 from Ms. Lindsey. [R. at 1233] However, the \$54,000 in separate property came into the marital estate, and Ms. Lindsey should have been afforded the opportunity to make the argument

that based on the equity exception, she should have been awarded a portion of the business appreciation.

Moreover, it is a genuine issue of material fact whether Mr. Lindsey represented to Respondent that he would invest the \$54,000 in the business. [R. at 1233-1234] Ms. Lindsey relied on his representations. The issue should have gone to trial to be part of the final balancing of the equities.²

In addition, Ms. Lindsey should have been afforded the opportunity to argue that the 57 shares in the business that Mr. Lindsey acquired since the parties' marriage by electing to take dividend payments as shares instead of cash, should have been shared between the parties as part of the ultimate balancing of the equities. The trial court ruled that the 57 shares represented a return on investment, not personal income as other dividends were historically used, and therefore did not constitute commingling of marital funds in the business. [R. 1229-1230]. The issue of whether Ms. Lindsey should be awarded an interest in those shares as part of the equity exception should go to trial.

In sum, Ms. Lindsey should be able to make her specific equitable arguments at trial regarding the ultimate equitable division of property, including her specific arguments related to the \$54,000 and 57 shares, and more generally as to the equities of the overall division. The summary judgment ruling deprived her of doing that.

² While Ms. Lindsey argued at trial she should have been awarded the \$54,000 as her separate property, the trial court denied her request. [R. at 1782] In other words, the only recourse for her to receive some type of offset for her separate funds is through the equity exception.

CONCLUSION

For the foregoing reasons, Ms. Lindsey respectfully requests that the Court reverse the District Court's granting of summary judgment, find that Ms. Lindsey is entitled to a portion of the augmentation of Mr. Lindsey's business interest during the marriage, and remand to the District Court for a new trial wherein the amount of the business Ms. Lindsey is awarded can be ascertained and where all other equities may be rebalanced in light of this Court's ruling.

DATED this 10 day of February 2016.

DURHAM JONES & PINEGAR, P.C.

A handwritten signature in black ink, appearing to read 'D. B. Thayer', written over a horizontal line.

Douglas B. Thayer

Mark R. Nelson

Attorneys for Appellant

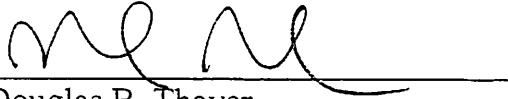
Certificate of Compliance with Rule 24(f)(1)

1. This brief complied with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 6,260 words, in total.

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows 2010, Times New Roman, Font Size 13.

DATED this 10 day of February 2016.

DURHAM JONES & PINEGAR



Douglas B. Thayer

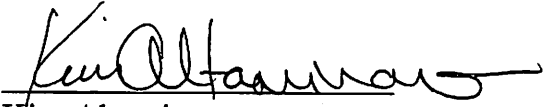
Mark R. Nelson

Attorneys for Appellant

PROOF OF SERVICE

I hereby certify that, on the 10th day of February, 2016, two true and correct copies of the foregoing **BRIEF OF APPELLANT** were mailed, postage prepaid, to the following:

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ADDENDUM

Findings of Fact and Conclusions of Law Regarding Order Granting Partial Summary
JudgmentR. 1239

The Order of Court is stated below:

Dated: November 17, 2014
10:13:08 AM

/s/ Fred D. Howard
District Court Judge



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IN THE FOURTH JUDICIAL DISTRICT COURT FOR WASATCH COUNTY

STATE OF UTAH

RICK J. LINDSEY,

Petitioner,

v.

KAREN M. LINDSEY,

Respondent.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
ORDER GRANTING PARTIAL
SUMMARY JUDGMENT**

Civil No. 134500010

Judge Fred D. Howard

The Motion for Partial Summary Judgment (the "Motion") of Petitioner Rick J. Lindsey ("Mr. Lindsey") came on regularly for hearing on October 21, 2014, before the Court, Judge Fred D. Howard presiding. Mr. Lindsey was present and represented by Dean C. Andreasen and Diana L. Telfer. Respondent Karen M. Lindsey ("Ms. Lindsey") was not present but represented by Douglas B. Thayer.

FINDINGS OF FACT

INTRODUCTION

1. This matter arises out of the dissolution of the parties' seventeen year marriage and, more specifically, involves the issue of whether Mr. Lindsey's premarital business interests, together with any appreciation or enhancement thereon, should be awarded to him as his separate property and are not, therefore, subject to equitable division as marital property. The grounds for the Motion are that Mr. Lindsey's business interests were owned prior to the marriage and Ms. Lindsey has not contributed to, augmented, maintained, or protected the business interests during the marriage.

SUMMARY JUDGMENT STANDARD

2. Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Johnson v. Hermes Assocs., Ltd.*, 2005 UT 82, ¶12, 128 P.3d 1151 (quoting Utah R. Civ. P. 56(c)). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is genuine issue for trial." *Whaley v. Park City Mun. Corp.*, 2008 UT App 234, ¶21. "When the moving party has presented evidence sufficient to support a judgment in its favor, and the opposing party fails to submit contrary evidence, a trial court is justified in concluding that no genuine issue of fact is present or would be at trial." *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah Ct. App. 1989).

MR. LINDSEY'S PREMARITAL BUSINESS INTERESTS

3. In Utah divorce proceedings, it is presumed that each party is entitled to all of his or her pre-marital and/or separate property and fifty percent of the marital property. See *Bradford v. Bradford*, 1999 UT App 373, ¶ 26. A trial court must first properly categorize property as marital or separate when distributing property. See *Elman v. Elman*, 2002 UT App 83, ¶18. “[P]remarital property . . . may be viewed as separate property, and the spouse bringing such separate property into the marriage may retain it following the marriage.” *Keiter v. Keiter*, 2010 UT App 169, ¶22.

4. It is undisputed that Mr. Lindsey and Ms. Lindsey are husband and wife having been married in November 1996. The parties have one minor son born as issue of their marriage.

5. It is undisputed that at the time of the parties' marriage, Ms. Lindsey was unemployed while Mr. Lindsey worked in his insurance business as will be more fully described below.

6. It is undisputed that Mr. Lindsey had been employed in the insurance industry for approximately 17 years at the time of the parties' marriage, having first begun working in his father's insurance business in 1979.

7. It is undisputed that after obtaining his own insurance brokerage license in 1981, Mr. Lindsey incorporated several insurance companies of his own over the next fifteen years prior to the marriage of the parties.

8. It is undisputed that at the time of the parties' marriage in November 1996, Mr. Lindsey owned the following entities in the indicated ownership percentages:

- a. Evolution Insurance Group (100%) and its subsidiaries (collectively referred to as "Evolution"); and
- b. Prime Holdings Insurance Services Inc. (8.1%) and its subsidiaries (collective referred to as "Prime Holdings").

9. It is undisputed in November 1997, one year after the parties' marriage, Mr. Lindsey's business interests in Evolution were merged into Prime Holdings, with Mr. Lindsey having a 30% equity interest in Prime Holdings after the merger. It is also undisputed that there is no indication in the financial documents, as analyzed by Mr. Lindsey's expert, Brad Townsend, that the operations of the entities owned by Mr. Lindsay changed in any significant way between the date of the marriage and the date of the merger.

10. It is undisputed that at the time of the merger, Evolution was valued at \$3.2 million and Prime Holdings was valued at \$5.2 million. Going into the merger, Mr. Lindsey had business interests worth \$3.62 million (100% of Evolution at \$3.2 million plus 8.1% of Prime Holdings at \$5.2 million, or \$.42 million).

11. It is undisputed that post-merger, Prime Holdings was valued in 1997 at between \$11.2 million and \$13.1 million because of the expected synergies between the merged entities. Based on these values, Mr. Lindsey's post-merger 30% interest in Prime Holdings was worth between \$3.36 million and \$3.93 million.

12. It is undisputed that in 2008, Prime Holdings made an offer to existing shareholders to either purchase more shares or have their shares redeemed. A number

of shares were redeemed pursuant to that offer and Mr. Lindsey's interest in Prime Holdings increased from 30% to 59.48%. Post-merger, Mr. Lindsey owned a larger percentage of a smaller entity, due to Prime Holdings' value decreasing after equity capital was used to retire the stock of the shareholders who elected to have their shares redeemed.

13. It is undisputed that based on the valuation analysis of Prime Holdings performed by Mr. Townsend as of December 31, 2012, Mr. Lindsey's 59.48% equity interest was worth between \$6 million and \$7 million, with an average value of \$6.5 million.

14. It is undisputed that effective as of December 31, 2013, Prime Holdings entered into a Stock Purchase Agreement with RLI Insurance Company to sell newly issued shares of Prime Holdings' common stock to RLI for a total purchase price of \$5,301,000. Based on the evaluation analysis performed by Mr. Townsend, that transaction decreased Mr. Lindsey's stock interest in Prime Holdings from 59.48% to 47.24%.

15. It is undisputed that based on the valuation analysis of Prime Holdings performed by Mr. Townsend as of June 30, 2014, Mr. Lindsey's 47.24% fully-diluted equity interest was worth \$10,944,000.

16. It is undisputed that the business purpose and focus of Prime Holdings, was at the time of the marriage, and is today, on general liability for risk purchasing groups and excess and surplus lines of insurance. Some of Prime Holdings' current key

employees have worked with Mr. Lindsey and his father for up to 40 years.

EXCEPTIONS TO FINDING OF SEPARATE PROPERTY

17. Exceptions to the general rule that premarital property may lose its separate characterization “include whether the property has been commingled, whether the other spouse has by his or her efforts augmented, maintained, or protected the separate property, and whether the distribution achieves a fair, just, and equitable result.” *Rappleye v. Rappleye*, 855 P.2d 260, 263 (Utah Ct. App. 1993).

Commingling

18. In *Mortensen v. Mortensen*, 760 P.2d 304, 307 (Utah 1988), the Utah Supreme Court articulated the general rule that premarital property may lose its separate distinction if it “is not traceable because it is commingled with other [marital] property.” In *Burt v. Burt*, 799 P.2d 1666, 1669 (Utah Ct. App. 1990), the Utah Court of Appeals held that “the thrust of *Mortensen* is not whether the mere form of property has changed but whether it has lost its ‘identity’ as separate property.” *Id.*

19. Ms. Lindsey claims that there is evidence of commingling of marital funds to support Mr. Lindsey’s premarital business interests based on the following allegations.

Ms. Lindsey’s Premarital Residence

20. Ms. Lindsey alleges that proceeds she received in 2001 from the sale of a residence she jointly owned with her prior husband, Alan Fitzgerald, in the amount of \$54,000 (the “Proceeds”) were invested in Prime Holdings. She claims that she gave

the Proceeds to Mr. Lindsey and he told her that he had deposited the funds into Prime Holdings.

21. In a deposition of Ms. Lindsey on May 9, 2014, Ms. Lindsey testified that she gave the Proceeds to Mr. Lindsey but she could not remember what happened to the Proceeds. She further testified she had no knowledge of where the Proceeds were deposited and that Mr. Lindsey could have deposited them into his personal account. She also testified that it was possible she deposited the funds into her own account.

22. In a declaration of Brent Seegmiller, Prime Holdings' Chief Financial Officer, Mr. Seegmiller testified that he had reviewed the accounting records of Prime Holdings for 2001 and found no evidence that personal funds of the parties or any related individual were invested into Prime Holdings or loaned to Prime Holdings. Mr. Seegmiller also testified that during 2001 no shares of stock were issued to the parties or any related individual.

23. Accordingly, the Court finds that there is no evidence to support Mr. Lindsey's allegation that the Proceeds from the sale of her premarital residence were invested in or loaned to Prime Holdings.

Draper Residence

24. Ms. Lindsey next alleges that the parties' residence located at 14259 S Rocky Mouth Circle, Draper, Utah Draper, Utah (the "Draper Residence") was sold to Prime Holdings in early 2009 at below fair market value. She further alleges that such purchase resulted in Mr. Lindsey benefiting from the equity in the Draper Residence as

a majority shareholder of Prime Holdings.

25. The only evidence presented by Ms. Lindsey to support her allegations includes the purchase contract and addendum between Prime Holdings and Mr. Lindsey with a purchase price of \$543,360 with Prime Holdings paying the purchase price by assuming the existing mortgage encumbering the Draper Residence. Ms. Lindsey also presented as evidence the Salt Lake County tax assessed values of the Draper Residence for 2008 and 2009, which were \$808,400 and \$628,800, respectively.

26. Mr. Lindsey testified that the parties had attempted to sell the Draper Residence after they moved to Heber City, Utah prior to the 2008/2009 school year and began construction on the parties' marital residence in Heber, Utah. He further stated that due to the depressed real estate market at that time and the number of homes in foreclosure in the area surrounding the Draper Residence, the parties received no offers to purchase the residence.

27. The Court finds that it is undisputed that on or about March 30, 2009, Prime Holdings assumed the mortgage of the Draper Residence in the amount of \$543,360 in order to remove Mr. Lindsey from the loan and assist him in obtaining financing for the construction of the parties' marital residence in Heber, Utah.

28. The Court finds that after acquiring the Draper Residence, Prime Holdings attempted to sell the residence but was unsuccessful. The evidence presented by Mr. Lindsey establishes that due to the collapse of the housing industry during this time, residences located near the Draper Residence were being sold for significantly less

than their applicable tax assessed values including the specific following-described examples:

- a. 708 Rocky Mouth Lane sold for \$374,500 on 10/24/2008 but the tax assessed value for 2008 was \$502,000.
- b. 855 E Rocky Mouth Lane sold for \$387,000 on 12/3/2008 but the tax assessed value for 2008 was \$654,200.
- c. 929 E Rocky Mouth Lane sold for \$479,900 on 8/26/2008 but the tax assessed value for 2008 was \$785,000.
- d. 14275 E Rocky Mouth Circle had been listed for \$649,900 as of November 25, 2008 but had not sold as of 4/20/2009. The tax assessed value for 2008 was \$822,400.
- e. 14284 Rocky Mouth Circle had been listed for \$469,900 as of October 15, 2008 but had not sold as of 4/20/2009. The tax assessed value for 2008 was \$704,900.

29. The Court finds that the evidence presented by Mr. Lindsey further establishes that there were at least two other homes located on the same street as the Draper Residence that had been listed for sale for, at least, five months at between \$173,400 and \$235,000 below the applicable tax assessed value.

30. The Court finds that there was no equity in the Draper Residence at the time Prime Holdings assumed the mortgage. Accordingly, the Court finds and concludes that since there was no equity in the Draper Residence, there could not have

been any commingling of marital equity in the Draper Residence with Mr. Lindsey's premarital business interests in Prime Holdings.

Stock Dividends

31. Ms. Lindsey next alleges that Mr. Lindsey received certain stock dividends during the marriage and that the same constitute marital income that is commingled with Mr. Lindsey's current ownership equity in Prime Holdings.

32. The Court finds that it is undisputed that the following-described shares of stock of Prime Holdings were issued to Mr. Lindsey as stock dividends (the "Shares"):

- a. 12 shares on December 31, 2004;
- b. 20 shares on December 31, 2010;
- c. 20 shares on May 2, 2011;
- d. 5 shares on May 2, 2012.

33. The Court finds that according to the deposition testimony of Brent Seegmiller, shareholders of Prime Holdings could elect to receive a cash dividend or a stock dividend. Mr. Lindsey elected to receive the Shares as a stock dividend in lieu of a cash dividend. Mr. Seegmiller further testified that such stock dividends simply constitute a reclassification from retained earnings to paid-in-capital on the balance sheet of Prime Holdings.

34. The Court finds that a dividend is a distribution of a portion of a company's earnings, to a class of its shareholders. A stock dividend is an increase in the number of outstanding shares of a company, with the new shares being given to existing

shareholders. In other words, a stock dividend represents a return on investment, not personal income earned by the recipient shareholder.

35. Based on the evidence presented, the Court finds that the Shares represent a return on Mr. Lindsey's investment in Prime Holdings and do not, therefore, constitute personal income earned by Mr. Lindsey during the marriage. Accordingly, the Shares do not constitute a commingling of marital income with Mr. Lindsey's premarital business interests in Prime Holdings.

Augmenting/Enhancing Property

36. Under *Mortensen*, property brought into the marriage by one spouse should generally be awarded to that spouse as his or her separate property unless "the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it." *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988). The Utah Court of Appeals in *Jensen v. Jensen*, 2009 UT App 1, ¶14, clarified that

Mortensen, *Dunn*, and *Elman* appear to require more active participation and contribution by the nonowner spouse in order to qualify under the contribution category of *Mortensen*. . . the results are different where there is effort made by the nondonee or nonheir spouse to preserve or augment the asset, as compared to situations where there is a lack of such efforts.

37. In *Mortensen* and *Dunn*, both wives worked in the husband's premarital businesses during the marriage without compensation. See *Mortensen*, 760 P.2d at 305; *Dunn*, 802 P.2d at 1316. They also had sole responsibility of running the marital household and managing the household accounts, which allowed their husbands to

focus solely on their businesses. *Id.*

38. In *Elman*, the wife had not worked in the husband's business but was found to have held unusual responsibilities in the marriage. *Elman*, 2002 UT App. 83, ¶ 24. In that case, the husband had terminated his regular employment during the marriage to focus on developing his family's business. *Id.* Meanwhile, the wife had left her private sector employment to actively manage the household and take on additional responsibilities at home including securing the land for and overseeing the building of the parties' marital residence and assisting in the acquisition of a Montana ranch. *Id.* These real properties significantly increased in value during the marriage due to the wife's ongoing efforts. *Id.* Because the wife had helped grow the marital properties, a value from which the husband would obviously receive benefit in the division of marital property, it was equitable that the wife also shares in the appreciation of his premarital family business. *Id.*

39. Likewise, in *Henshaw v. Henshaw*, 2012 UT App. 56, ¶18, the wife's contributions toward the preservation and maintenance of the husband's separate property were found to adequately support an award of such property to the wife where the wife worked the entire marriage and contributed all of her income toward the marriage while the husband earned limited income to support the family by working on a ranch and renting apartments he had purchased from gifted money. *Id.*

40. In *Jensen v. Jensen*, 2009 UT 1, ¶ 16, the Utah Court of Appeals reversed the trial court and held that the wife's efforts in caring for the parties' one child,

maintaining the household, and contributing some income from her own massage therapy business, were inadequate to justify an award of equity in the husband's premarital business. The Utah Supreme Court held that more is required to justify an award of otherwise separate property in cases where the spouse has neither assisted in running the other spouse's business nor contributed in any way to its increased value. *Id.*

41. Similarly in *Kunzler v. Kunzler*, 2008 UT App 263, ¶19, the wife's limited role in maintaining the marital household, which enabled the husband to work for longer stretches of time away from the home, was also held to be insufficient to rise to the level of contributions present in *Elman* and *Dunn*. *Kunzler v. Kunzler. Id.*

42. With respect to Ms. Lindsey's involvement with Prime Holdings, the Court finds that it is undisputed that Ms. Lindsey has never been employed by any of the business entities owned by Mr. Lindsey during the marriage, had little knowledge of the operations of the businesses, did not know about the details of Mr. Lindsey's businesses, did not speak extensively with Mr. Lindsey regarding his businesses, did not know the amount of Mr. Lindsey's income or the profitability of the businesses, and did not remember specifics regarding stock purchases or sales relative to the businesses.

43. Ms. Lindsey claims that she entertained business associates, clients, potential employees, and potential clients during the seventeen year marriage numerous times to further Mr. Lindsey's business without being paid. She specifically

testified of hosting six different business associates and their families in the following manner (in her March 4, 2014 Declaration and during her May 9, 2014 deposition Ms. Lindsey could not recall any other specific additional person or time she entertained):

- a. Mr. Sheehey: "I entertained Mr. Sheehy (one of Petitioner's business associates from insurance market Lloyd's of London) and his family. At least two times the Sheehy family of 5 came to stay for extended periods when it was their holiday. Each time I provided a hostess basket in the guest house with goodies, maps, event information, and clean sheets. They also used 2 bedrooms in the main house. One time they stayed at the house and then we all traveled on to Lake Powell and stayed on the Prime Holdings' houseboat. At the house and houseboat I cooked meals, cleaned up, and aided in laundry. Similarly, while Petitioner was at work I entertained Jane (Mr. Sheehy's spouse) and her kids and we became friends. The second trip I provided rides from Heber to Salt Lake so Petitioner and I could take them all to a rodeo, concert, and Real Salt Lake soccer game. Mr. Sheehy also came to stay with us without his family on another occasion when he was in town from London." Respondent also provided photographs from the events.
- b. Charles Smith: "[A]nother business associate from insurance market Lloyd's of London, Charles Norton Smith, stayed numerous

times at both the Draper and Heber houses. I often cooked for him (he loved my cooking) and also did his laundry. When he and his wife stayed at the Draper house, Petitioner and I took them skiing, and I cooked for them on the ski trip as well. The last time Mr. Smith stayed with us he left a sweater which I mailed back to him."

- c. Paul Daley: "Paul Daley (from insurance market Lloyd's of London) and his family of 5 came to stay during their Easter holiday in Heber. Paul Daley is another business associate. During that time, Petitioner was out of town at the beginning of the visit. I provided hostess baskets, cooked numerous meals, cleaned up after them, and entertained them. They used the guest house and used two bedrooms in the main house. They did not like the truck we provided for them so Petitioner gave them my car to drive for the last week of stay." Ms. Lindsey provided pictures of an event with the Daley family.
- d. A river runner insurance client: "When our son was 2 weeks old, James (I do not remember his last name but he was one of Petitioner's river runner insurance clients) and his son came to stay with us in our Draper home. I provided meals and other services for them. James and his son stayed another time when James had a stroke while skiing, which was the reason why James did not stay

in our Heber home."

e. J.T. Lemon: "J.T. Lemon (one of Petitioner's river runner insurance clients) also stayed at our Draper and Heber houses also and I entertained."

f. Frank Lukas: "Frank Lukas (one of Petitioner's river runner insurance clients) also stayed at our Heber house and I entertained."

44. Mr. Lindsey testified that he handled the majority of the entertainment of business clients and associates. He stated that he alone would entertain clients at locations other than the marital residence and at his ranch in Uintah County. He further alleges that the business associates that Ms. Lindsey entertained at the marital residence involved associates or clients that Mr. Lindsey had known since prior to the marriage.

45. In addition, based on Ms. Lindsey's deposition testimony of May 9, 2014, the Court finds that Ms. Lindsey cared for the parties' one child and did the majority of the household duties, such as cleaning, cooking, washing clothes, and other such activities. A maid was employed to assist with some of the housework. Ms. Lindsey claimed she was home for the vast majority of repairs and deliveries at the Heber Residence. She remembered being home without Mr. Lindsey for delivery and installation of two new sound systems, weeks of punch list items when the home was new, delivery and installation of a new front door, updating central vacuum, heating,

plumbing, and air conditioning numerous times (there are 13 air conditioners and radiant floor heating, thermostat repairs and vent testing), sealing of the driveway and cement, outdoor furniture delivery, and many weeks of delivery of custom furniture, drapes, window coverings in theater room, pinball machine repair, and delivery of gravel by the pond. Ms. Lindsey testified to leaving the financial aspects of the parties' marriage to Mr. Lindsey, including payment of the marital bills except for one credit card that she paid. She further testified that she was not involved in the acquisition or development of the parties' real property other than to search for and visit the lot (and other parcels during the search), discuss and create goals for the residence with Mr. Lindsey over 10 years prior to building the residence, and approve the final floor plan and select furnishings of the parties' marital residence located in Heber, Utah.

46. The Court finds and concludes that Ms. Lindsey has had no involvement in the operation of Mr. Lindsey's business interests. Additionally, Ms. Lindsey's assistance in entertaining business clients was infrequent and had no material impact in augmenting or enhancing the value of Mr. Lindsey's business interests. Further, Ms. Lindsey has not taken on an extraordinary increased workload in the home or in managing the financial affairs or assets of the parties, thereby freeing up Mr. Lindsey to direct more time to his business interests. In conclusion, Ms. Lindsey's efforts are insufficient to rise to the level of contributions of a spouse in cases such *Elman*, *Dunn* and *Kunzler* resulting in the conclusion that Ms. Lindsey augmented or enhanced the value of Mr. Lindsey's business interests.

Equity Exception

47. In any property division, "[t]he overriding consideration is that the ultimate division be equitable—that property be fairly divided between the parties, given their contributions during the marriage and their circumstances at the time of the divorce." *Henshaw v. Henshaw*, 2012 UT App 56, ¶15. "The court must consider whether there are any extraordinary circumstances that warrant a departure from the presumptive rule." *Id.* at ¶15. "A spouse who seeks an interest in the other spouse's business as a marital asset has the burden to establish the value of that business and its assets." *Elman*, 2002 UT App 83, ¶ 32.

48. In *Elman*, the Utah Court of Appeals affirmed the trial court's method of calculating marital appreciation by subtracting a reasonable rate of return of 10% on the husband's premarital partnership interests and only categorizing as marital the growth above the reasonable rate of return. *Id.* at ¶ 34. Thus, under the *Elman* analysis, a party must be allowed a reasonable return on his premarital capital investment before quantifying or concluding the increase in value was created during the marriage and is deemed to be marital property.

49. In this matter, the Court finds that based on the declarations of Mr. Townsend, the internal rate of return on Mr. Lindsey's equity interest in Prime Holdings was 3.98%¹ during the 16 year period of 1997 through 2012. Mr. Townsend further determined that the internal rate of return had increased to 6.93% for the period

¹ Internal Rate of return measures the profitability of investments and are used to evaluate the desirability of such investments or projects. The higher the rate of return, the more desirable the investment.

between 1997 and June 30, 2014. According to Mr. Townsend, such internal rates of return remain well below the typical rate of return of between 15% to 25% for a closely held business.

50. In light of the low internal rate of return, the Court finds that the growth in Mr. Lindsey's equity interest in Prime Holdings should be attributed to his equity investment at the time of the merger in 1997, rather than his work effort during the period of 1997 through 2014. This is particularly true in light of the significant amounts of salary and dividends Mr. Lindsey received from the business during the marriage that drew down the value of Prime Holdings.

51. The Court finds that it is undisputed that during the period 1997 through 2012, Mr. Lindsey received \$9,625,623 in wages and other compensation and \$2,123,674 in dividends from Prime Holdings, for a total of \$11,749,297.

52. Based on the uncontroverted evidence, the Court finds that Mr. Lindsey was receiving a level of compensation commensurate with his work effort and that he was not leaving money in Prime Holdings to grow the business. The amount of compensation and dividends Mr. Lindsey received from Prime Holdings far exceeds the increase in value of his equity interest.

53. The Court further finds that the internal rate of return on his equity has been below 7% between 1997 and June 30, 2014, which is less than the 10% internal rate of return applied and affirmed in *Elman*. The Court finds and concludes that such a low internal rate of return results in the conclusion that there is no marital value in Prime

Holdings.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court now concludes as follows:

1. That there are no genuine issues of material fact that would require a trial relative to the issues raised in the Motion.
2. That Mr. Lindsey's current 47.24% fully diluted equity interest in Prime Holdings, which constitutes his premarital business interests together with any appreciation or enhancement thereon, should be awarded to Mr. Lindsey as his separate property.
3. That an Order Granting Partial Summary Judgment should be entered with terms consistent herewith.

1. **ENTERED BY THE COURT ON THE
DATE AND AS INDICATED BY
2. THE COURT'S SEAL AT THE TOP OF
THE FIRST PAGE**

3.
4.

APPROVED as to form this 12th day of November, 2014.

/s/ Mark R. Nelson

5. Douglas B. Thayer, Esq.
6. Mark R. Nelson, Esq.

Attorneys for Respondent
Signed with permission

2.

CERTIFICATE OF SERVICE

On this 13th day of November, 2014 I hereby caused the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING ORDER GRANTING PARTIAL SUMMARY JUDGMENT** to be e-filed which in turn caused notification of such filing to be sent to the following counsel who are identified as e-filers with this Court:

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THE UTAH COURT OF APPEALS

RICK J. LINDSEY,
Petitioner and Appellee,

v.

KAREN M. LINDSEY,
Respondent and Appellant.

BRIEF OF APPELLEE

On appeal from the Fourth Judicial District Court, Wasatch County,
Honorable Fred D. Howard, District Court No. 134500010

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Oral Argument Requested

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UTAH APPELLATE COURTS

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Oral Argument Requested

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Jurisdictional Statement

This court has jurisdiction pursuant to Utah Code section 78A-4-103(2)(h).

Introduction

The trial court ruled that Karen M. Lindsey did not acquire an equitable interest in the business that her husband, Rick J. Lindsey, brought into their marriage. The court recognized that no facts were in dispute. On appeal, Karen agrees with that aspect of the trial court's ruling, conceding that Karen's "contributions to the marriage and efforts to grow [the] business are undisputed" and arguing only that the "trial court misapplied the undisputed facts to governing case law." (App. Br. at 9, 11.) For that reason, the only issue on appeal concerning the trial court's ruling that Karen did not acquire an interest in the business is whether the trial court correctly applied the law to the undisputed facts. As demonstrated below, it did.

An underlying issue concerns whether the trial court must hear and consider all evidence on all issues before ruling Karen had not acquired an equitable interest in Rick's premarital business interests. All evidence relevant to that issue was before the court on summary judgment. There was no additional evidence to consider and nothing improper about the trial court's ruling. The facts are undisputed, and the court appropriately considered the equities based upon those undisputed facts. That is what courts do when applying equitable doctrines on summary judgment.

In making her equitable argument, Karen fails to mention that, even though she was not awarded an interest in the business, the court considered Rick's interest when dividing property and determining alimony. Karen was awarded \$7,300 per month in alimony. She was also awarded a positive \$566,545 in the property division, while Rick was awarded a *negative* \$419,880 in the property division – a difference of \$986,425.

It is also worth noting what is not at issue on appeal. Apart from the facts being undisputed, Karen does not claim an interest in the business by the commingling of assets. Therefore, the issue is whether, based upon the evidence presented to the trial court on summary judgment, Karen acquired an interest in the business, by contribution or the narrow equitable exception.

Statement of the Issues

Issue 1: Whether Karen's claimed contributions during the marriage augmented, maintained, or protected Rick's separate business interests.

Issue 2: Whether Karen failed to present the trial court with extraordinary circumstances that would warrant an equitable division of Rick's premarital business interests including any appreciation or enhancement of the value during the marriage.

Determinative Provisions

There are no constitutional provisions, statutes, ordinances, or rules that are determinative of the issues raised on appeal.

Statement of the Case

1. Nature of the Case and Course of Proceedings

This appeal arises out of a divorce action and centers on the trial court's treatment of Rick's premarital insurance business, Prime Holdings Insurance Services Inc. During the parties' 18 year marriage, Prime Holdings significantly increased in value.

Rick moved for partial summary judgment asking the trial court to determine that Rick's premarital business interests in Prime Holdings, together with any appreciation or enhancement of its value, were his separate property and not subject to equitable division as marital property.

Karen opposed the motion by asserting that (i) marital income and proceeds from the sale of Karen's premarital residence had been commingled with Rick's premarital business interests; (ii) Karen's care for the parties' minor son and management of the household augmented and enhanced the value of Prime Holdings; and (iii) equity required Karen be awarded a portion of Rick's business interests based on her contributions during the marriage.

The trial court granted partial summary judgment in favor of Rick on the basis that, based upon the undisputed facts, Rick's business interests were his premarital separate property and Karen's contributions did not satisfy the test to warrant a departure from the general rule that a spouse's premarital separate property and appreciation thereon belongs to that spouse alone.

2. Statement of Facts

The parties married in November 1996. (R.1237.) They separated in or about December 2012. (R.1838.) They have one minor child born as issue of their marriage. (R.1237.) Both parties had children from prior marriages who were of minority age during the marriage. (R.1820.)

Rick's Premarital Business Interests

At the time of the parties' marriage, Rick had been employed in the insurance industry for approximately 17 years, having first begun working in his father's insurance business in 1979. (R.1237.) After obtaining his own insurance brokerage license in 1981, Rick incorporated several insurance companies of his own over the next fifteen years prior to the marriage of the parties. (R.1237.) At that time, Rick was the sole owner of a Utah insurance business, Evolution Insurance Group and its subsidiaries, and owned an 8.1% interest in a national insurance company, Prime Holdings (and its subsidiaries). (R.1236-37.)

In November 1997, one year after the parties' marriage, Rick's business interests in Evolution were merged into Prime Holdings, resulting in Rick's obtaining a 30% equity interest in Prime Holdings. (R.1236.) As analyzed by Rick's accounting expert, Brad Townsend, the operation of the entities owned by Rick did not change in any significant way between the date of the marriage and the date of the merger. (R.1236.)

The Undisputed Valuation of Rick's Business Interests

At the time of the merger, Evolution was valued at \$3.2 million and Prime Holdings was valued at \$5.2 million. (R.1236.) Prior to the merger, Rick's business interests were valued at \$3.62 million (100% of Evolution at \$3.2 million plus 8.1% of Prime Holdings at \$5.2 million, or \$0.42 million). (R.1236.) Post-merger, Prime Holdings was valued in 1997 at between \$11.2 million and \$13.1 million because of the synergies created by the merged entities. (R.1236.) Based on these values, Rick's post-merger 30% interest in Prime Holdings was valued between \$3.36 million and \$3.93 million, which averages \$3.645 million. (R.1236.)

Following a shareholder buyout in 2008, Rick's equity interest in Prime Holding increased to 59.48% and remained at that percentage until the parties separated on or near December 31, 2012. (R.1235-36.) As of December 31, 2012, Rick's 59.48% equity interest was valued between \$6 million and \$7 million, with an average value of \$6.5 million. (R.1235.) As of December 31, 2013, Prime Holdings acquired another insurance company, RLI, which acquisition diluted Rick's interest in Prime Holdings to 47.24% with an estimated value of \$10,944,000 for his interest. (R.1235.)

As testified to by Mr. Townsend, the value of Rick's business interests increased from 1997 through June 2014 by \$7,324,000, not \$7,299,000.¹ (R.1234-36.) Thus, the internal rate of return on Rick's equity interest in Prime Holdings

¹ Karen incorrectly states that the appreciation on Rick's business interests was \$7.299 million. (App. Br. at 3.)

was 6.93%² during the 17 year period between 1997 through June 30, 2014.

(R.1222.) The unchallenged testimony of Mr. Townsend was that such an internal rate of return is well below the typical rate of return of between 15% to 25% anticipated for a closely held business. (R.1221.)

The evidence established that Rick received \$9,625,623 in wages and other compensation and \$2,123,674 in dividends from Prime Holdings, for a total of \$11,749,297, between 1997 and 2012. (R.1221.) Mr. Townsend testified that this substantial compensation established that Rick was receiving a significant level of compensation for his work effort and that he was not leaving earnings in Prime Holdings to enhance the value of the business. (R.526-27.)

Karen shared in a high standard of living derived from Rick's substantial income. Mr. Townsend testified that the amount of compensation and dividends received from Prime Holdings far exceeded the increase in value of Rick's equity interest in Prime Holdings. (R.526.) In light of the low internal rate of return and Rick's compensation, the trial court determined that the growth in Rick's equity interest in Prime Holdings should be attributed to his equity investment at the time of the merger in 1997, rather than his work effort during the period of 1997 through 2014. (R.1221.)

² "Internal rate of return" measures the profitability of investments and is used to evaluate the desirability of such investments or projects. The higher the rate of return, the more desirable the investment. (R.1222.)

Karen's Undisputed Relationship to Rick's Business Interests

At the time of and during the parties' marriage, Karen was unemployed. (R.1227, 1237, 1820.) Karen cared for the parties' one child and performed the majority of the household duties, such as cleaning, cooking, washing clothes, and similar activities, although she did have the assistance of a maid. (R.1224.) Karen cared for her four children from her prior marriage and Rick's two children from a prior marriage during his statutory parent-time. (R.1882:71-75.)

Karen initially admitted that Rick handled every aspect of the parties' finances, although she later indicated that she was responsible for paying one credit card. (R.59, 593, 1223.) Karen was never involved in the acquisition or development of the parties' real property other than to search for and visit the parcel on which their Heber City home was constructed, visit other potential sites, and approve the final floor plan and select furnishings for the parties' Heber City residence. (R.1223.) Karen was home for the majority of repairs, deliveries, and installation of HVAC and other appliances at the Heber City residence. (R.1224.)

Karen had little, if any, involvement with Prime Holdings during the marriage. Karen was never employed by any of the business entities owned by Rick during the marriage, had little knowledge of the operations of the businesses, did not know about the details of Rick's businesses, did not speak extensively with Rick regarding his businesses, did not know the amount of Rick's income or the profitability of the businesses, and did not remember

specifics regarding stock purchases or sales relative to the businesses. (R.1227.)

During the parties' 17 year marriage, Karen recalled entertaining business clients and associates, with whom Rick had worked since prior to the parties' marriage, and their families at the parties' marital residence on seven occasions. (R.1224-27.) Rick, however, performed the majority of the entertainment of business clients and associates, taking them to locations other than the marital residence. (R.1224.)

In 2001, Karen received \$54,000 from the sale of a residence she jointly owned with her prior husband, Alan Fitzgerald. (R.1233-34.) Karen claimed that the proceeds were given to Rick to invest in Prime Holdings, but she presented no evidence to support her claim.³ (R.1233.) In response, Rick presented the testimony of Brent Seegmiller, Prime Holdings' Chief Financial Officer, that after reviewing the accounting records of Prime Holdings for 2001, there was no evidence that personal funds of the parties or any related individual were invested into Prime Holdings or loaned to Prime Holdings. (R.738-39, 1233.) Mr. Seegmiller further testified that during 2001 no shares of stock were issued to the parties or any related individual. (R.738-39, 1233.)

³ Karen states in her brief that Rick told her that money could be used for the business without new shares being issued. (App. Br. at 11 n.1.) In fact, no such testimony was provided. Karen testified that she gave the proceeds to Rick but she could not remember what happened to the proceeds. (R.1233.) She also testified she had no knowledge of where the proceeds were deposited and that Rick could have deposited them into his personal account. (R.1233.) She testified that it was possible she deposited the funds into her own account. (R.1233.)

Karen also alleged that Rick received stock dividends of 57 shares ("Shares") of Prime Holdings during the marriage and that the shares constitute marital income that is commingled with Rick's current ownership interest in Prime Holdings.⁴ (R.1230.) Mr. Seegmiller testified that shareholders of Prime Holdings could elect to receive a cash dividend or a stock dividend. (R.1103, 1058-61, 1230.) Rick elected to receive the distribution as stock dividends in lieu of cash dividends. (R.1230.) Mr. Seegmiller further testified that such stock dividends simply constitute a reclassification from retained earnings to paid-in-capital on the balance sheet of Prime Holdings. (R.1103, 1058-61, 1230.) Mr. Townsend's unchallenged testimony was that the Shares represented a return on Rick's investment in Prime Holdings and do not, therefore, constitute personal income earned by Rick during the marriage. (R.1103.)⁵

Summary Judgment Record and Ruling

Rick filed for divorce on January 10, 2013, in the Fourth Judicial District Court for Wasatch County, Utah. (R.1-6.) On February 18, 2014, Rick filed a Motion for Partial Summary Judgment. (R.482-530.) In support, Rick filed the Declaration of Brad Townsend, Rick's expert, providing his opinions as to the

⁴ Karen also argued to the trial court that Prime Holdings benefited from acquiring a Draper residence purchased by the parties during the marriage. (R.534-52; 985-97.) She has not raised that issue on appeal.

⁵ In opposing the summary judgment motion, Karen argued that Prime Holdings' assuming the mortgage of the parties' residence in Draper, Utah in 2009 constituted a commingling of marital income with Rick's premarital business interests. (R.536-37, 987-88.) However, Karen does not raise the claim on appeal.

value of Rick's business interests in Prime Holdings at the time of the marriage and the time of separation. (R.522-30.)

Rick argued that his premarital business interests, together with any appreciation or enhancement of its value, should be awarded to him as his separate property because the undisputed facts established (i) the business interests were never commingled with the marital estate, (ii) Karen never actively participated or contributed in any material way to enhance, maintain, or protect the value of Prime Holdings, and (iii) there were no extraordinary circumstances warranting an equitable division of his separate property and any appreciation thereon. (R.483-500.)

Karen moved for a continuance under rule 56(f) of the Utah Rules of Civil Procedure, requesting that the trial court defer consideration of the summary judgment motion until discovery could be completed on the issues raised therein. (R.531-33.) The trial court reserved ruling to provide Karen's expert, Cory Kennedy, an opportunity to determine whether further expert testimony would be necessary relative to Mr. Townsend's opinions, particularly his valuation of Prime Holdings. (R.927-30.)

At a hearing on the rule 56(f) motion, Karen stipulated to the values of Prime Holdings as of the marriage date and separation date as prepared by Mr. Townsend with an update to be done as to the valuation as of June 30, 2014. (R.951.) The trial court ordered that further discovery could be conducted

through October 7, 2014. (R.951.) The trial court then set a supplemental briefing schedule and a hearing. (R.951, 981.)

At the close of fact discovery, Karen filed a Supplemental Opposition to Rick's Motion for Partial Summary Judgment. (R.985-97.) Rick filed a reply memorandum, along with the supporting Second Supplemental Declaration of Brad Townsend. (R.1022-1107.) This included the updated business valuation. (R.1022-1107.)

After a hearing, the trial court awarded Rick, as his separate property, his 47.24% fully diluted equity interest in Prime Holdings, which constituted his premarital business interests together with any appreciation or enhancement thereon. (R.1240-42.) The trial court explained its reasoning in a ruling entered on November 17, 2014. (R.1220-42.)

In granting partial summary judgment, the trial court determined that Karen presented no evidence that Rick's premarital business interests had been commingled with Karen's separate property or marital property. (R.1229-34.) Specifically, the trial court concluded that (i) there was no evidence to support Karen's allegation that proceeds she received from the sale of her premarital residence were invested in or loaned to Prime Holdings (R.1233); (ii) the undisputed evidence established there to be no equity in the parties' marital residence in Draper, Utah, at the time Prime Holdings assumed the mortgage encumbering that residence in 2009 (R.1231); and (iii) the undisputed evidence

established that the stock dividends received by Rick during the marriage represented a return on Rick's investment in Prime Holdings and did not constitute personal income earned by Rick during the marriage. (R.1229.)

The trial court further concluded that the undisputed facts established that Karen was not involved in the operation of Rick's business interests, as her assistance in entertaining business clients was infrequent and such assistance had no material impact that augmented or enhanced the value of Rick's business interests. (R.1223.) The trial court further concluded that the undisputed facts did not establish that Karen had assumed an increased workload in the home or in managing the financial affairs or assets of the parties, thereby freeing up Rick to devote more time to his business interests. (R.1223.) Thus, the trial court concluded that Karen's contributions were insufficient to rise to the level of contributions needed to conclude that she had augmented or enhanced the value of Rick's business interests. (R.1223.) Finally, the court recognized that, based on the low rate of return on Rick's equity in the business, Rick did not retain earnings in Prime Holdings to expand the business. (R.1221.)

Six weeks later, a trial was held on the disputed issues of support and marital property division. (R.1881-82.) Karen reasserted her claim that her premarital funds had been commingled with Rick's business interests in Prime Holdings, but she presented no new testimony or evidence relative to her contributions during the marriage, the alleged investment of Karen's premarital

funds in Prime Holdings, and any alleged marital income that had been invested in Prime Holdings. (R.1882:64-163.) Nor does she appeal the commingling issue.

On August 13, 2015, the trial court entered Amended and Restated Findings of Fact and Conclusions of Law. (R.1770-1839.) The trial court determined, in relevant part, that (i) no new evidence was presented at trial warranting reconsideration of the summary judgment; (ii) each party testified that he or she did not know where Karen's proceeds from the sale of her premarital residence were deposited or how the proceeds were used, the proceeds had lost their separate character having been commingled with marital funds and ultimately consumed; and (iii) Karen's efforts during the marriage have been compensated by her enjoying the benefits of Rick's salary, bonus, and other perquisites. (R.1770-1839.)

Independent of the value of the business, the parties enjoyed a high standard of living during the marriage based on Rick's compensation of over \$11,000,000 from Prime Holdings. Karen was awarded alimony in the amount of \$7,300 per month. (R.1801.) But the total value of the parties' marital estate was only \$146,665. (R.1221, 1780.) From that, the trial court awarded Karen \$566,527 – the value of two vehicles, certain personal property, retirement, and portion of a judgment awarded to Rick – and awarded Rick some property but substantial debt of the marital estate: a *negative* value of (\$419,862). (R.1776.)

Karen appealed. (R.1871-72.)

Summary of the Argument

The trial court awarded Rick, on summary judgment, his interest in Prime Holdings, together with any appreciation or enhancement thereon, on the grounds that it was separate, premarital property. On appeal, Karen does not assert that the trial court erred because there were disputed issues of fact. Nor could she. The facts were undisputed, and the issue was and is whether those undisputed facts entitled Karen to an interest in the business.

Generally, premarital property, together with its appreciation, is awarded to the spouse who brought the property into the marriage unless the owner spouse has commingled it with the marital estate; the nonowner spouse has contributed to the enhancement, maintenance or protection of that property; or other extraordinary situations exist where equity warrants a deviation from the presumptive rule. None of those circumstances are present here.

Commingling is not at issue on appeal. As to contribution, this court requires active participation and contribution by the nonowner spouse, through such means as working for the business without pay; contributing one's income to the marriage while the other spouse's income is used to enhance the value of the separate property; quitting a job to assume sole responsibility of running the household and managing household accounts while the other spouse worked; or managing and enhancing the value of the parties' marital property.

Karen did none of those. It was undisputed that Karen never worked for any of Rick's business entities nor did she have any involvement in the business. Rick agrees that Karen remained at home to focus on caring for the parties' child and managing the maintenance and upkeep of the household. It was undisputed that Rick handled all aspects of the parties' finances during the marriage except for one credit card, which Karen paid. It is also undisputed that no earnings of Prime Holdings were retained in the business to expand the business. Karen presented no evidence to establish that the value of Rick's premarital business or appreciation thereon can be attributed to her efforts. The trial court therefore correctly concluded, as a matter of law, that Karen did not contribute to Rick's premarital separate property such that she should be awarded a portion of it.

As to the narrow equitable exception, Karen argues that the court should have considered more evidence on issues other than the rate of return on Rick's interest in the business. If that were true, it was Karen's responsibility to present the court with that evidence at the summary judgment stage. But it is not true. The court properly applied the equitable exception to the facts of this case and rejected Karen's arguments. The court did, however, consider Rick's interest in the business when it employed equitable principles in awarding alimony and dividing marital assets. The court awarded Karen \$7,300 per month in alimony and a positive value of marital property of \$566,545 and awarded Rick a negative value of marital property of \$419,862. The court did not err.

Argument

Karen has appealed the trial court's grant of summary judgment that awarded to Rick the interest in the business he brought into the marriage. Granting summary judgment is appropriate where "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). A summary judgment movant must "affirmatively provide factual evidence establishing that there is no genuine issue of material fact." *Bahr v. Imus*, 2009 UT App 155, ¶ 6, 211 P.3d 987.

"Although upon summary judgment the court must view all facts and inferences in favor of the nonmoving party, it may not assume facts for which no evidence is offered. Allegations or denials in the pleadings are not a sufficient basis for opposing summary judgment." *Peterson v. Coca-Cola USA*, 2002 UT 42, ¶ 20, 48 P.3d 941 (internal quotation marks omitted). The non-moving party must set forth specific facts showing that there is a genuine issue for trial. *Id.* (internal quotation marks omitted).

Here, the trial court correctly applied these standards after allowing Karen additional discovery to create a complete summary judgment record. Karen provided evidence that was legally insufficient to establish her interest in the business. For that reason, the trial court did not err in awarding the interest in the business to Rick.

1. The Trial Court Correctly Granted Summary Judgment in favor of Rick because the Undisputed Facts Showed that Karen Had Not Augmented or Enhanced Rick's Separate Property

The trial court correctly followed and applied well-established Utah law when it awarded Rick his premarital business interests in Prime Holdings, together with any appreciation and enhancement thereon. Under Utah law, "marital property is ordinarily divided equally between the divorcing spouses and separate property, which may include premarital assets, inheritances, or similar assets, will be awarded to the acquiring spouse." *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 13, 176 P.3d 476 (internal quotation marks omitted). Premarital property "may be viewed as separate property, and the spouse bringing such separate property into the marriage may retain it following the marriage." *Keiter v. Keiter*, 2010 UT App 169, ¶ 22, 235 P.3d 782 (internal quotation marks omitted). Said differently, "trial courts making 'equitable' property division should generally award property acquired by one spouse by gift and inheritance during the marriage ... to that spouse, together with any appreciation or enhancement of its value." *Jensen v. Jensen*, 2009 UT App 1, ¶ 10, 203 P.3d 1020 (internal quotation marks and ellipses omitted).

To reach this result, a trial court must *first* properly categorize property as marital or separate when distributing property. *Dahl v. Dahl*, 2015 UT 79, ¶ 121, --- P.3d ---. "It is only after this initial characterization that the trial court can continue in making its property distributions." *Kunzler v. Kunzler*, 2008 UT App 263, ¶ 33, 190 P.3d 497. "Trial courts must follow this systematic approach when

making property division determinations.” *Hodge v. Hodge*, 2007 UT App 394, ¶ 5, 174 P.3d 1137 (internal quotation marks omitted).

But “separate property is not totally beyond a court’s reach in an equitable property division.” *Elman v. Elman*, 2002 UT App 83, ¶ 19, 45 P.3d 176 (internal quotation marks and alteration omitted). Courts have allowed a nonowner spouse to receive an equitable portion of the owner spouse’s separate property where the owner spouse has commingled the asset; the nonowner spouse has materially contributed or enhanced the value of the asset; or where equity so requires. *Keiter*, 2010 UT App 169, ¶ 22; *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988); *Dunn v. Dunn*, 802 P.2d 1314, 1318 (Utah Ct. App. 1990). Karen has not asserted on appeal that Rick commingled his business interest. The two questions at issue are whether she, the nonowner spouse, materially contributed or enhanced the value of the asset, and whether equity required that she be given a share of Rick’s business. As described below, the trial court correctly ruled that neither exception applied, and instead, the general rule that the owner spouse (Rick) was entitled to all of his separate property would control.

1.1 This Court Has Explained What Is Necessary to Cross the “Contribution Theory” Threshold

As to “the contribution category,” Utah courts have long held distribution of one spouse’s separate property to the other may be appropriate if “the other spouse has by his or her efforts or expense contributed to the enhancement,

maintenance, or protection of that property, thereby acquiring an equitable interest in it." *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988).

This court has clarified that "active participation and contribution by the nonowner spouse" is required "in order to qualify under the contribution category of *Mortensen*." *Jensen*, 2009 UT App 1, ¶ 14. More recently in *Dahl*, the Utah Supreme Court explained that trial courts should "look to a party's actions as a manifestation of a spouse's intent to contribute separate property to the marital estate." 2015 UT 79, ¶ 143.

For example, in *Elman*, the wife never worked in the husband's business but was found to have held "unusual" responsibilities in the marriage. 2002 UT App 83, ¶ 24. In that case, the husband had quit his regular employment during the marriage to focus on developing his family's business. *Id.* Meanwhile, the wife had left her private sector employment to actively manage the household and take on additional responsibilities at home including securing the land for and overseeing the building of the parties' marital residence and assisting in the acquisition of a Montana ranch. *Id.* These real properties significantly increased in value during the marriage due to the wife's ongoing efforts. *Id.* Because the wife had helped enhance the value of the marital properties, a value that the husband obviously would receive benefit from in the division of marital property, it was equitable that she also share in the appreciation in the value of his premarital family business. *Id.*

Similarly, in *Henshaw v. Henshaw*, the wife's contributions toward the "preservation and maintenance" of the husband's separate property were found to "adequately support[]" an award of such property to the wife where the wife worked the entire marriage and contributed all of her income toward the marriage while the husband earned limited income to support the family by working on a ranch and renting apartments he had purchased from gifted money. 2012 UT App 56, ¶¶ 17- 18, 271 P.3d 837.

In *Dunn*, the wife "performed bookkeeping and secretarial services without pay for [her husband's] corporation" and the corporation "was founded and operated through the joint efforts and joint sacrifices of the parties." 802 P.2d at 1318. She had sole responsibility not only of running the marital household but of managing the household accounts, which allowed her husband to focus solely on his business. *Id.* This court concluded "she was his partner in the 'business' of marriage and her efforts were necessary contributions to the growth of his practice and the business." *Id.*; see also *Mortensen*, 760 P.2d at 305, 309.

On the other hand, in *Jensen*, this court held that the wife's efforts were *not* adequate to justify an award of equity in the husband's premarital business. 2009 UT App 1, ¶ 16. In that case, the wife cared for the parties' one child, maintained the household, and contributed some income from her own massage therapy business. *Id.* ¶ 3. But this court held, "Wife behaved in a very normal and commendable manner by caring for the parties' child, maintaining the

household, and running her own part-time business from their home. More is required, however, to justify an award of Husband's separate property." *Id.* ¶ 16.

Likewise in *Kunzler*, this court found the wife's limited role in maintaining the marital household, which enabled the husband to work for longer stretches of time away from the home, was also held to be insufficient to rise to the level of contributions present in *Elman* and *Dunn*. 2008 UT App 263, ¶ 19. This court wrote, "at trial Wife testified only as to how her domestic labors enabled Husband to ranch for longer periods of time without having to, for example, return home to launder his clothes." *Id.* This court held that such activity did *not* support the conclusion that she had augmented or enhanced the value of her husband's separate property. *Id.*

1.2 Karen's Efforts During the Marriage Did Not Cross the Contribution Threshold By Augmenting or Enhancing Rick's Premarital Business and Were Insufficient to Create an Equitable Interest in the Appreciation and Growth of Rick's Premarital Business

The facts as to Karen's contributions to the marriage and Rick's business interests in Prime Holdings are undisputed. (App. Br. at 11 (indicating that Facts 8-17 of Appellant's brief are undisputed)). The only question is whether those facts satisfy the legal standard set forth in the above cases.

Karen admits her contributions during the marriage do not rise to the level of the facts described in *Elman*. (App. Br. at 14.) But she asserts that her involvement in the household is more like that of the wives in *Dunn* and

Henshaw, and not like the wives' involvement in *Jensen* and *Kunzler*.⁶ The trial court was correct to reject these assertions.

Karen failed to provide evidence that, under the parameters described in the case law, her efforts augmented or enhanced the value of Rick's premarital business interests. She did not provide evidence that she did the sorts of things that amount to "augmenting" or "enhancing" business interests, such as (i) working for the business without pay; (ii) working the entire marriage and contributing all of her income toward the marriage while the husband's income was used to enhance the value of the business; (iii) quitting a job to assume sole responsibility of running the household and managing household accounts while the husband worked, or (iv) managing and enhancing the value of the parties' marital property.

Instead, the undisputed facts establish none of these circumstances. Each circumstance is addressed in turn.

First, Karen presented no evidence that she performed any labor during the marriage to enhance or maintain Rick's premarital business interests.

(R.1227.) To the contrary, she admitted she had no involvement with Rick's

⁶ Karen also refers to cases predating *Mortensen*, which had a lower threshold. (App. Br. at 16-17 (citing *Savage v. Savage*, 658 P.2d 1201, 1204 (Utah 1983)). But Karen concedes that post-*Mortensen* case law "has drifted from th[at] more liberal standard." (*Id.*) This court has made clear that, since the time of *Mortensen*, the law "require[s] more active participation and contribution by the nonowner spouse in order to qualify under the contribution category of *Mortensen*." *Jensen*, 2009 UT App 1, ¶ 14.

insurance business prior to or during the marriage. (R.1227.) She was never employed by any of the business entities owned by Rick during the marriage. (R.1227.) Karen acknowledged she had no knowledge of how interests in the business were held, business operations, merger of business entities, redemption of stock, business litigation, the profitability of the businesses, any fluctuation in income or earnings, or any loss or decline in market value. (R.1227.) She admitted she was not involved in any business related discussions with Rick. (R.1227.) While Karen entertained six of Rick's business associates on seven occasions over the seventeen years, the associates were conducting business with Rick prior to the marriage. (R.1224.) Karen presented no evidence she entertained potential or new clients or business associates. Karen did not dispute that Rick handled the vast majority of entertaining his business clients and associates. (R.1224.) Nor did she dispute that Rick entertained clients at locations other than the marital residence and at his ranch in Uintah County. (R.1224.)

Second, Karen presented no evidence that she had taken on any *unusual* responsibilities in the marriage that enhanced the value of the parties' marital assets. Karen was primarily responsible for the care of the parties' minor son. (R.1224.) She was responsible for the maintenance and upkeep of the parties' residences, although she had the assistance of a maid. (R.1224.) She was present during the majority of deliveries to and repairs made to the parties' Heber City residence. (R.1224.) Karen originally testified that she left all aspects of the

parties' finances to Rick but later modified her statement by claiming she was responsible for paying one credit card. (R.59, 593, 1223-24.) Karen indicates in her brief that she cared for Rick's two children from a prior marriage during his parent-time, (App. Br. at 15) but she did not provide any details as to what that entailed when responding to the summary judgment motion. (R.537, 989.) In short, Karen did not perform any extraordinary duties.

Third, Karen presented no evidence to establish how her contributions enhanced the value of the parties' real properties during the marriage as required under *Elman*. By her own admission, Karen had a limited role in the acquisition, development, and maintenance of the parties' real properties. (R.592-93, 1223.) The value of the parties' marital estate significantly decreased during the marriage. For example, it was undisputed at trial that the parties had spent approximately \$7,000,000 to build and furnish the Heber City residence but the marital residence had a negative equity in the amount of (\$1,045,619) as of September 30, 2014. (R.1795, 1881:83.) Despite Rick having earned more than \$11,000,000 during the marriage, the value of the parties' marital estate was only \$146,665 at the time of trial. (R.1221, 1780.)

Finally, Karen failed to present sufficient evidence demonstrating an "active participation with or contribution to" the growth of Rick's premarital business interests entitling her to an equitable claim against a portion of those business interests, including appreciation. (R.1223-27.) As stated above, Karen

had no involvement in the operation of the business and only infrequently entertained longstanding business associates of Rick. (R.1227.) In short, she did not establish that her contributions materially augmented or enhanced the value of Rick's business interests. (R.1224-27.) She presented no evidence to establish she had taken on any extraordinary increased workload in the home or in managing the financial affairs or assets of the parties, thereby allowing Rick to direct more time to his business interests.

In sum, the undisputed facts do not satisfy the test. Karen did not present evidence to show her efforts rose to the level of "active contributions" of a spouse who would be entitled to an equitable claim on the other spouse's separate property. The trial court was correct when it concluded that Karen had not shown that she was entitled to a portion of Rick's separate property.

It is worth noting, however, that Karen's contributions were recognized and rewarded by the trial court in other ways in its final division of property. Karen was awarded marital property with a positive value of \$566,545 while Rick received property and debt with a negative value of (\$419,880). (R.1776.) The trial court burdened Rick with marital debt. The trial court addressed Karen's equity argument by awarding marital property and debt between the parties with an approximate \$1,000,000 differential as to value. Karen was also awarded alimony in the amount of \$7,300 per month after the trial court considered the factors under Utah statutory and case law.

2. The Undisputed Facts Reveal No Extraordinary Circumstances to Warrant an Equitable Claim in Rick's Premarital Business

The trial court also ruled that Karen was not entitled to any of Rick's separate property under an equity exception. "Utah has a long-established policy in favor of the equitable distribution of property in divorce cases." *CFD Payson, LLC v. Christensen*, 2015 UT App 251, ¶ 10 n.2, 361 P.3d 145. "In most cases, equity requires that each party retain the separate property that he or she brought into the marriage, including any appreciation of the separate property." *Keyes v. Keyes*, 2015 UT App 114, ¶ 28, 351 P.3d 90 (quoting *Dunn v. Dunn*, 802 P.2d 1314, 1320 (Utah Ct. App. 1990)). But "the court must consider whether there are any extraordinary circumstances that warrant a departure from the presumptive rule." *Henshaw v. Henshaw*, 2012 UT App 56, ¶ 15, 271 P.3d 837.

This court has stated the overriding consideration is that the ultimate division be equitable. *Id.* (internal quotation marks omitted). Even so, an equitable distribution "does not need to be divided with strict mathematical equality," *Christian v. Christian*, 2014 UT App 283, ¶ 12, 341 P.3d 254, "since a fair and equitable property distribution is not necessarily an equal distribution," *Clarke v. Clarke*, 2012 UT App 328, ¶ 9, 292 P.3d 76 (internal quotation marks omitted). And it is important to note that a trial court should not deprive a spouse who owns separate property of the benefit of that separate property by awarding a disproportionate share of the marital property in order to offset the separate property award. *Mortensen*, 760 P.2d at 308.

In *Elman v. Elman*, this court affirmed that, with respect to premarital businesses, a spouse should be entitled to a reasonable rate of return on his premarital investment before quantifying or concluding the increase in value created during the marriage is deemed to be marital. 2002 UT App 83, ¶¶ 20, 29, 45 P.3d 176. The court affirmed the trial court's method of calculating marital appreciation by subtracting a reasonable rate of return of 10% on the husband's premarital partnership interests and only categorizing the growth above the reasonable rate of return as marital. *Id.* In other words, under *Elman*, a party should be allowed a reasonable return on his premarital capital investment before concluding the increase in value was created personally, and a percentage of 10% was found to be reasonable.

Rick's annual return on his premarital equity was less than 7%. It is undisputed that at the time of the merger in 1997, the total value of Rick's business was valued at \$3.62 million. (R.1236.) It is also undisputed that as of December 31, 2012, Rick's 59.48% equity interest in Prime Holdings was worth between \$6 million and \$7 million with a reasonable mid-point estimate of \$6.5 million. (R.1235.) On December 31, 2013, Rick's interest in Prime Holdings decreased from 59.48% to 47.24%. (R.1235.) As of June 30, 2014, Rick's 47.24% fully-diluted equity interest was worth \$10,944,000. (R.1235.) And between 1997 through 2012, Rick received \$9,625,623 in wages as compensation and \$2,123,674 in dividends from Prime Holdings, for a total of \$11,749,297. (R.1221.)

Mr. Townsend testified that the internal rate of return on Rick's business interests increased 6.93% during the period between 1997 and June 30, 2014. (R.1221-22.) According to Mr. Townsend, such an internal rate of return is well below the anticipated rate of return of between 15% to 25% for a closely held business. (R.1221-22.) Mr. Townsend further testified that in light of the low rate of return, the growth in Rick's equity interest in Prime Holdings should be attributed to his equity investment at the time of the merger in 1997, rather than his work effort during the period between 1997 and 2012. (R.1221.) This is particularly true in light of the significant amounts of salary and dividends Rick received from the business that decreased the value of Prime Holdings. (R.1221.) In other words, during the marriage, the marital estate benefitted more from Rick's work efforts than Prime Holdings. (R.1221.)

Karen presented no evidence to dispute Mr. Townsend's testimony. (R.1221.) The trial court correctly considered the rate of return when making its determination that there are no extraordinary circumstances justifying a deviation from the presumptive rule.

Karen quotes *Naranjo v. Naranjo*, 751 P.2d 1144, 1147 (Utah Ct. App. 1988), to assert that the trial court was required to consider "all of the pertinent circumstances" when "fashioning an equitable property division." (App. Br. at 19.) Those circumstances include "the amount and kind of property to be divided, the source of the property, the parties' health, the parties' standard of

living and respective financial conditions, their needs and earning capacities, the duration of the marriage, what the parties gave up by the marriage, and the relationship the property division has with the amount of alimony awarded.”

Naranjo, 751 P.2d at 1147. However, this is not the applicable standard. This court has since clarified that the standard is “whether there are any extraordinary circumstances that warrant a departure from the presumptive rule.” *Henshaw*, 2012 UT App 56, ¶ 15.

Karen complains that the trial court “did not make findings relative” to the *Naranjo* factors. But Karen did not, at summary judgment, and does not, on appeal, present any evidence to support her claims that extraordinary circumstances exist warranting that she be awarded an equitable interest in Rick’s premarital business.

Instead, she complains that “the trial court should have heard all equitable issues more fully at trial” so that the trial court could “observe the parties’ demeanor, hear all the evidence, etc.” (App. Br. at 21.) She asserts that she “should be provided the opportunity to argue at trial how the ‘ultimate division’ is most equitable.” (*Id.*) As “illustrations,” she contends that the trial court should have heard more about the \$54,000 she received from her first divorce and the 57 shares in the business that Rick received instead of cash. (App. Br. at 21-22.)

But Karen’s argument does not defeat a summary judgment motion because she has provided *no facts* to show that anything was incomplete from the

summary judgment record. Discovery was complete. It was Karen's obligation to provide the court with whatever evidence she considered relevant to the narrow equitable exception. *Paget v. Dep't of Transp.*, 2014 UT App 62, ¶ 2, 322 P.3d 1180 (holding that summary judgment was correct where there was no conflicting evidence and the time for discovery had passed). She did not do so at trial and has not done so on appeal. She cannot now complain that the court failed to consider evidence she did not provide. Even were she correct that the summary judgment record was incomplete, that would not be a reason to reverse.

Perhaps more important, the trial court's analysis did not stop at its conclusion that the reasonably anticipated market rate of return was higher than Rick's actual rate of return. The trial court considered Mr. Townsend's testimony regarding Rick's earnings during the marriage and determined Rick received a level of compensation commensurate with his work effort. (R.1221.) It was undisputed that Rick did not retain earnings in Prime Holdings for purposes of enhancing the value of the business, but instead took compensation and dividends in the amount of \$11,749,297, from which Karen benefited. (*Id.*)

And because Karen points only to small contributions, at best, the equitable exception would have done her no good in the end. Ultimately, Karen was compensated for her contributions to the marriage and given a significant share of the overall assets when the trial court made its final decisions regarding alimony and division of marital property. Karen was awarded \$7,300 per month

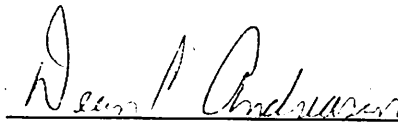
in alimony and was awarded marital property with a positive value of \$566,545 while Rick received marital debt with a negative value of (\$419,880). (R.1776.) Thus, the equities were considered and resolved in Karen's favor.

Conclusion

For the foregoing reasons, this court should affirm. But if this court reverses, it should reopen all issues that concern the equitable division of property, including the division of marital property and alimony.

DATED this 15th day of April, 2016.

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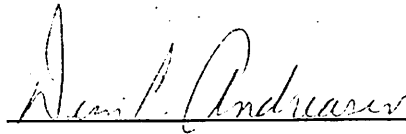
Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 7,459 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

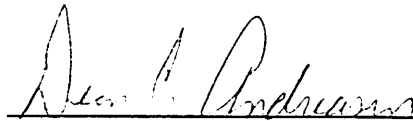
DATED this 15th day of April, 2016.



Certificate of Service

This is to certify that on the 15th day of April, 2016, I caused two true and correct copies of the Brief of Appellee to be served on the following via first-class mail, postage prepaid:

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IN THE COURT OF APPEALS, STATE OF UTAH

RICK J. LINDSEY,

Petitioner/Appellee,

vs.

KAREN M. LINDSEY,

Respondent/Appellant.

APPELLANT'S REPLY BRIEF

Appellate Case No. 20150769

Civil Case No. 134500010

ON APPEAL FROM THE DECISION OF THE FOURTH DISTRICT COURT,
UTAH COUNTY, HONORABLE FRED HOWARD, DISTRICT COURT JUDGE

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ARGUMENT

The trial court incorrectly granted Mr. Lindsey's motion for summary judgment awarding him not only his premarital interest in the business, but also all of the \$7,324,000 in appreciation of the business during the 19 year marriage. The trial court made this award in spite of Ms. Lindsey's contributions to the business and family life. Specifically, the trial court awarded Ms. Lindsey \$566,527 in assets, while awarding Mr. Lindsey \$10,524,138 million in assets. The trial court minimized and disregarded Ms. Lindsey's efforts and contributions, misapplied the facts on summary judgment and at trial¹, depriving her of the interest she earned in the business during the marriage.

Moreover, in spite of the requirement in any property division "that the ultimate division be equitable," *Henshaw v. Henshaw*, 2012 UT App 56, ¶15, Ms. Lindsey was awarded only 5.2% of value compared to Mr. Lindsey's \$10,524,138 award. The trial court misapplied the facts to Utah law on equity, to Ms. Lindsey's prejudice.

The arguments made in Mr. Lindsey's brief do not change the fact that the trial court incorrectly applied facts to Utah law, and failed to make an equitable division of

¹ The trial court found that "no new evidence was presented at trial warranting reconsideration of the summary judgment." [R.1782.] In other words, evidence presented at trial was considered and rejected by the trial court as impacting its ruling on summary judgment. This is consistent with Rule 54 of the Utah Rules of Civil Procedure providing that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Utah R. Civ. P. 54(b). As such, evidence at trial may be considered as part of the analysis as to whether the summary judgment ruling was correct.

property.

- I. On summary judgment the trial court improperly denied Ms. Lindsey her interest in a portion of the appreciation of Mr. Lindsey's business which she acquired through her contributions to the business and the family during the marriage.

In his brief Mr. Lindsey correctly notes that one spouse's separate property may be properly distributed to the other, if "the other spouse has by his or her efforts contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest." *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988). However, the clarification of *Mortensen* in *Jensen* is not as clear as Mr. Lindsey argues. Specifically, Mr. Lindsey argues that "in order to qualify under the contribution category of *Mortensen*," "active participation and contribution by the nonowner spouse" "is required." [Appellee's Brief at p. 19.] However, Mr. Lindsey omits that this Court stated that "*Mortensen*, *Dunn*, and *Elman* appear to require more active participation and contribution by the nonowner spouse [than caring for the parties' child, maintaining the household, and running her own part-time business from their home as the facts in *Jensen* state] in order to qualify under the contribution theory of *Mortensen*." *Jensen v. Jensen*, 2009 UT App. 1, ¶ 14 (underline added). If the standard were as clear as Mr. Lindsey argues, this Court would not have included the words "appear to" in its recitation and clarification of the law.

This distinction is important because it reflects this Court's intentionally loose and flexible interpretation of the contribution theory given how liberal the standard was in the

1980s² as compared to how the standard has morphed in more recent cases such as *Jensen*. In *Jensen*, the wife “did not assist in running the business or contribute in any way to its increase in equity,” and was not awarded an interest in the separate property. *Jensen v. Jensen*, 2009 UT App. 1, ¶ 16. However, in this case Ms. Lindsey contributed to the business (as discussed in greater detail below) so she exceeds the wife’s failure to contribute to the business “in any way” in *Jensen*. Similarly, Ms. Lindsey’s efforts exceed the wife’s efforts in *Kunzler* which were limited to “domestic labors enabl[ing] Husband to ranch for longer periods of time without having to, for example, return home to launder his clothes.” *Kunzler v. Kunzler*, 2008 UT App 263, ¶19.

As set forth in Ms. Lindsey’s original brief, her actions and contributions fall somewhere between the extreme contribution case of *Elman* and the solely domestic contribution case of *Kunzler*. However, the trial court improperly minimized Ms. Lindsey’s efforts and incorrectly applied the facts to Utah law on summary judgment and at trial.

Mr. Lindsey also overreaches and misstates undisputed facts in his brief. For example, Mr. Lindsey claims Ms. Lindsey “admitted she had no involvement with [Mr. Lindsey’s] insurance business prior to or during the marriage . . . [and that] she had no

² See, e.g., *Savage v. Savage*, 658 P.2d 1201, 1204 (Utah 1983) (holding that the trial court’s property distribution—granting the wife forty percent of the value of the husband’s company—was within its allotted discretion, in part, “while it is true that the [wife] took no responsibility for the business, it was her assumption of domestic burdens which made possible the [husband’s] full-time participation in the business.”).

knowledge of . . . business operations . . . [and that Ms. Lindsey] admitted she was not involved in any business related discussions with [Mr. Lindsey].” [Appellee’s Brief at p. 23.] Rather, the undisputed facts are that Ms. Lindsey was involved in the business to the extent she hosted various business associates and clients, and she “had little knowledge [but not “no knowledge”] of the operations of the business . . . [and] did not speak extensively [but she did speak] with Mr. Lindsey regarding his businesses” [R.1224-27.] Ms. Lindsey was also involved in planning, building, and maintaining of the Heber residence (used to entertain business clients and associates) and involved in the acquisition of the helicopter (used for the business). [R.1881:79-80, 1882:44-45.]

More specifically with respect to hosting business associates and clients, Mr. Lindsey misstates the undisputed facts when he claims that Ms. Lindsey “entertained six of [Mr. Lindsey’s] business associates on seven occasions over the seventeen years” [Appellee’s Brief at p. 23.] Rather, the undisputed and unrefuted facts are that Ms. Lindsey claimed “she entertained business associates, clients, potential employees, and potential clients during the . . . marriage numerous times to further Mr. Lindsey’s business without being paid. She specifically testified [at the time of summary judgment] of hosting six different business associates and their families” [R.1226-27.] The unpaid hosting Ms. Lindsey could recall included:

1. Mr. Sheehey (from Lloyd’s of London) visited twice with his family of five for extended periods. Each visit Ms. Lindsey provided a hostess basket, maps, event

information, and clean sheets. The Sheeheys stayed at the Lindsey residence, as well as the business houseboat at Lake Powell. Ms. Lindsey cooked meals, cleaned up, and aided in laundry. When Mr. Lindsey was at work, Ms. Lindsey entertained the Sheehey family. Ms. Lindsey provided transportation to such events as a rodeo, concert, and sporting event. Mr. Sheehey also stayed at the parties' residence on a trip without his family on another occasion. [R.1226.]

2. Charles Smith (from Lloyd's of London) "stayed *numerous* times at both the Draper and Heber houses." Ms. Lindsey often cooked for Mr. Smith and did his laundry. Mr. Smith and his wife stayed at the Draper house and the parties took them skiing and Ms. Lindsey cooked for them. [R.1225-26 (emphasis added).]
3. Paul Daley (from Lloyd's of London) and his family of five stayed and were hosted in the Heber residence. Mr. Lindsey was not even in town during the beginning of the visit. Ms. Lindsey provided hostess baskets, cooked numerous meals, cleaned up after them, and entertained them. Ms. Lindsey's car was loaned to the Dales for a week. [R.1225.]
4. James (a river runner insurance client) stayed with his son at the Draper residence. Ms. Lindsey provided meals and other services to them. The same client was hosted another time (but not at the parties' residence). [R.1224-25.]

5. J.T. Lemon (a river runner insurance client) was hosted on at least two occasions, once at the Heber residence and another time at the Draper residence. Ms. Lindsey also entertained him. [R.1224.]
6. Frank Lukas (a river runner insurance client) was hosted at the Heber residence and Ms. Lindsey entertained. [R.1224.]
7. In addition, at trial Ms. Lindsey recollected that she had hosted Justin Tweety and he stayed at the parties' residence and she cleaned up after him and entertained him. [R.1881:80-81.]

Also at trial Ms. Lindsey's unrefuted testimony was that part of Mr. Lindsey's job was to retain clients, and part of retaining clients is entertaining them, taking care of them, and making them happy. [R.1882:77.] Ms. Lindsey's unrefuted testimony was that she facilitated and participated in that process, but she was never paid. [R.1882:77-78.]

The above is evidence Ms. Lindsey hosted, fed, entertained, and cleaned up after seven (not six) business associates/clients, plus their families (two with five family members). In addition, contrary to Mr. Lindsey's claims of only hosting seven times, the undisputed facts are that the hosting occurred on "numerous" occasions, sometimes for extended periods of time. [R.1224-27.] For example, some stays were for 10 days and over holidays. [R.1882:91.]

While Mr. Lindsey "stated that he alone would entertain clients at locations other than the marital residence and at his ranch in Uintah County," [R.1224], it is undisputed

and unrefuted that Ms. Lindsey also entertained outside of the home. For example, she hosted the Sheeheys in Lake Powell and at other events, like a rodeo, concert, and sporting event, outside of the home. She also went skiing with the Smiths away from the residence. [R.1225-26.]

Ms. Lindsey's "numerous" hosting of various business clients and associates is evidence of providing services to the business without pay. Mr. Lindsey tries to minimize her efforts, but the undisputed facts speak for themselves. The law does not require a non-owner spouse to be formally employed by the other spouse's business in order to prove the non-owner spouse has "augmented" or "enhanced" business interests. For example, the wife in *Dunn* performed unpaid services for the business but was found to have an interest in the business. *Dunn v. Dunn*, 802 P.2d 1314, 1318 (Utah Ct. App. 1990).

Mr. Lindsey argues there was no evidence Ms. Lindsey took on any "unusual" or extraordinary responsibilities in the marriage that enhanced the value of the parties' marital assets. However, during trial Mr. Lindsey testified regarding Ms. Lindsey's significant influence and contributions. In addition to hosting business associates and clients on "numerous" occasions, Mr. Lindsey testified at trial³ that he and Ms. Lindsey were jointly involved in discussions and decisions related to acquiring the land and

³ Again, the parties' trial testimony made after the summary judgment ruling are relevant to this appeal as the trial court found that "no new evidence was presented at trial warranting reconsideration of the summary judgment." [R.1782.]

building the Heber residence. [R.1881:78-79.] Mr. Lindsey testified that he preferred a different lot in Wallsburg, but Ms. Lindsey liked the Heber lot better. [R.1881:79.] Mr. Lindsey testified that Ms. Lindsey was involved in the construction process, she reviewed building plans and made changes to them, and they had “all kinds of discussions.” [R.1881:79-80.] The home took just under two years to build (this was not the typical modest or uncomplicated residence—the home has thirteen air conditioners, for example). [R.1881:80-81, 1223-24.]

The parties spent nearly \$7,000,000 to build the residence. [R.1881:83.] The home is large (15,000 square feet—5,000 square feet is the helicopter hangar and garage), and has a guest house, outdoor pool, game room, theater room, and many other rooms. [R.1881:88-89.] Ms. Lindsey had complete control over designing and decorating the guest house (which, in addition to the main residence, was used to host and entertain business associates). [R.1882:115-16.] Ms. Lindsey assisted in maintaining the property and made sure repairs were done and deliveries were made. [R. at 590-591, 1223-24.] Ms. Lindsey’s assistance with the building, furnishing, and maintaining the home, which was used to host business associates and clients as well as family, was “unusual,” and contributed to enhancing, maintaining, and protecting the business and the marital assets.

Ms. Lindsey also contributed to the business and marriage in other ways. Mr. Lindsey conceded at trial that Ms. Lindsey accompanied him on business trips both domestic and international. [R.1881:97-100, 1816.] Mr. Lindsey testified at trial that Ms.

Lindsey was involved in his helicopter acquisition, knew where Mr. Lindsey went with regard to the helicopter and what he was doing, and supported him buying it. [R.1882:44-45.] The helicopter had a marketing contract with Mr. Lindsey's premarital business. [R.1824; 1881:62.] Ms. Lindsey also spent every other weekend for ten years at the parties' ranch while the ranch buildings and improvements were being made during the marriage. [R.1882:73; 1881:61.] Mr. Lindsey testified that he used the family ranch to take business associates in the helicopter to fish or otherwise entertain. [R.1881:61-62.] Ms. Lindsey also testified she provided \$54,000 of her separate money to Mr. Lindsey for "his work" and "work related use." [R.1881:75-76.] Ms. Lindsey's stated intent with the \$54,000 was that it go towards the business, although at trial Mr. Lindsey claimed the \$54,000 was used for marital expenses (he testified "I know that they were spent on marital expenses"), but shortly after he conceded there was "no document or recollection or specific evidence" that led him "to know for any degree of surety" "what happened to the funds." [R.1882:249-50.]

Ms. Lindsey also undertook "unusual" responsibilities in the family. Ms. Lindsey's unrefuted testimony was that she served Mr. Lindsey a home cooked meal every night that was waiting for him when he got home, and she had all of his clothes laid out every morning from the shirt to the socks. [R.1882:74.] She cared for the parties' son, was always his primary caregiver, attended parent teacher conferences and doctor's visits, did the laundry, assisted in student government campaigns, supported their son's

religious choices, bought groceries, and so on. [R.1882:69-75.] She also cared for Mr. Lindsey's two children from his prior marriage, "loved them like [her] own," and facilitated visitation every other weekend and every Wednesday, and even allowed the children to live with the parties full time when they were 16 years old and were having disputes with their mother. [R.1882:71-72.] Ms. Lindsey provided unrefuted testimony that she provided "[e]very ounce of the parenting" for her son and Mr. Lindsey's children from his prior marriage, for all of the parties' son's life and when Mr. Lindsey's sons were four and six and continuing until the children became adults. [R.1882:71-72.]

Ms. Lindsey also supported Mr. Lindsey during an extremely stressful time in his life when the Heber residence was being built and there was difficulty with financing the building of the home. [R.1881:83-89.] Mr. Lindsey testified at trial that due to the financing difficulties, his "world was falling apart" and caused Mr. Lindsey "physical ailment."⁴ [R.1881:88.] In fact, Mr. Lindsey was so emotional in recounting the event from years prior that the trial court allowed a recess for him to "collect" himself. [R.1881:87.] Ms. Lindsey supported Mr. Lindsey during this "unusual" time, which benefitted the business and the family.

All of Ms. Lindsey's above "unusual" efforts augmented the value of the marital assets, and Mr. Lindsey's business. She enabled him to spend time away from home to

⁴ Mr. Lindsey's physical ailment was serious enough it was made part of the successful lawsuit against Countrywide. [R.1881:88.] The lawsuit resulted in a \$1,038,225 judgment against Countrywide. [R.1776.]

focus on business through her excellent homemaking. She entertained and hosted clients. She assisted in decisions regarding extremely expensive acquisitions such as the helicopter and Heber residence, both of which were used in part by the business. For perspective, Mr. Lindsey's entire income during the marriage was \$11,749,297, and the parties spent \$7,000,000 on building the residence. [R.1221, 1881:83.] The residence was unusual, as were Ms. Lindsey's contributions. Ms. Lindsey intended \$54,000 of her separate money to go towards the business. She was the primary caregiver for the parties' son and Mr. Lindsey's two children from his previous marriage. And Ms. Lindsey cared for Mr. Lindsey when his "world was falling apart" and suffering physically due to stress. Ms. Lindsey contributed to the business sufficient to satisfy the contribution theory as her actions show an "active participation with or contribution to" the growth of Mr. Lindsey's business. Ms. Lindsey went to great lengths to enhance, maintain, and protect the business and the marital assets, many of which were intertwined (the business used and benefited from the parties' residence, ranch, and helicopter). Ms. Lindsey's actions entitle her to an equitable claim against a portion of the business, including appreciation. Summary judgment should be reversed.

II. The trial court's ruling on summary judgment precluded an equitable division of the marital estate and misapplied legal precedent to the prejudice of Ms. Lindsey.

It is undisputed that in any property division, "[t]he overriding consideration is that the *ultimate division be equitable*—that property be fairly divided between the

parties, given their contributions during the marriage and their circumstances at the time of the divorce.” *Henshaw v. Henshaw*, 2012 UT App 56, ¶15 (emphasis added). [R. at 1222.] It is also undisputed that “[t]he court must consider whether there are any extraordinary circumstances that warrant a departure from the presumptive rule.” *Id.* [R. at 1222.]

Regardless of whether Ms. Lindsey met the contribution standard (which she did), the final balance of the property division (in a case with no prenuptial agreement or similar contract protecting separate assets or corresponding appreciation) resulted in a drastic imbalance of equities. While it is correct that an equitable distribution “does not need to be divided with strict mathematical equality,” *Christian v. Christian*, 2014 UT App 283, ¶12, 341 P.3d 254, the final distribution was not even close to mathematical equality. Ms. Lindsey was awarded only 5.2% of the value of Mr. Lindsey’s \$10,524,138 award.

The trial court and Mr. Lindsey focus on *Elman* for the position that a spouse should be entitled to a reasonable rate of return on a premarital business before quantifying or concluding that an increase in value during the marriage is marital. However, *Elman* does not require that in every case a party should have a return on a premarital asset, much less a 10% return. Rather, this Court merely found based on the unique facts, that the trial court equitably subtracted a reasonable rate of return to

appropriately account for appreciation due to inflation. *Elman v. Elman*, 2002 UT App 83, ¶¶20, 29, 45 P.3d 176.

An extension of the trial court's and Mr. Lindsey's overly broad logic would have this Court find that *Elman* requires a party with separate property to be entitled to no less than a 10% return before any consideration of equitable division of the asset. Notably, the 10% rate in *Elman* was based on "[e]vidence . . . presented that California real property values were increasing at 10% a year." *Id.* at ¶34. Mr. Lindsey's logic places excessive weight on the fact that his business was his separate property originally, while it nearly quadrupled in value during the 19 year marriage.

Mr. Lindsey's argument (i.e., that his right for a return automatically trumps any of Ms. Lindsey's right to a return on the parties' largest asset) is not equity. While rate of return is one factor to be considered in balancing equity, it cannot be the only factor to consider. Mr. Lindsey argues that the *Naranjo* factors (i.e., the parties' health, their standard of living and respective financial conditions, their needs and earning capacities, the duration of the marriage, what the parties gave up by the marriage, and the relationship the property division has with the amount of alimony awarded) do not need to be considered. *Naranjo v. Naranjo*, 751 P.2d 1144, 1147-48 (Utah Ct. App. 1988). The *Naranjo* factors are the type of factors that can inform the equities as to "whether there are any extraordinary circumstances that warrant a departure from the presumptive rule." *Henshaw*, 2012 UT App 56, ¶15.

Moreover and most importantly, all of the factors discussed in Section I above showing Ms. Lindsey contributed to the business, also cut in favor of a more balanced division of property. Ms. Lindsey's extraordinary contributions, as well as the extraordinary facts of the case, justify the equity exception.

Finally, under the equity exception, Mr. Lindsey argues that Ms. Lindsey's "small contributions, at best" would have done Ms. Lindsey "no good in the end." [Appellee's Brief at p.30.] Mr. Lindsey's labels of "small contributions" encompasses all the reasons discussed in Section 1, as well as the \$54,000 (which at the time of trial would have been worth \$129,029 [R.1882:186-87]) and the value of the 57 shares (which issue was foreclosed at summary judgment [R.1229-30]). It is easy for Mr. Lindsey to minimize Ms. Lindsey's financial and physical contributions to the business and marriage when he was awarded \$10,524,138 in assets. However, simply taking into account Ms. Lindsey's \$54,000 at the appreciated value would have increased the value of the assets awarded to her by over 20%. The trial court should have applied the equity exception in order to do justice.

CONCLUSION

Therefore, in light of the foregoing reasons and those contained in the Appellant's original brief, Ms. Lindsey respectfully requests that the Court reverse the District Court's granting of summary judgment, find that Ms. Lindsey is entitled to a portion of the augmentation of Mr. Lindsey's business interest during the marriage, and remand to

the District Court for a new trial wherein the amount of the business Ms. Lindsey is awarded can be ascertained and where all other equities may be rebalanced in light of this Court's ruling.

DATED this 16th day of May 2016.

DURHAM JONES & PINEGAR, P.C.

A handwritten signature in black ink, appearing to read 'D. Thayer', written over a horizontal line.

Douglas B. Thayer

Mark R. Nelson

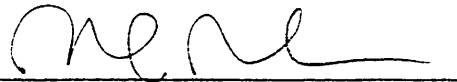
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Certificate of Compliance with Rule 24(f)(1)

1. This brief complied with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 4,190 words, in total.
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DATED this 16th day of May 2016.

DURHAM JONES & PINEGAR



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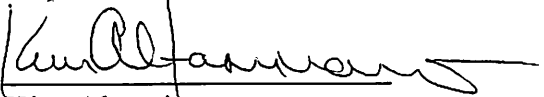
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PROOF OF SERVICE

I hereby certify that, on the 16th day of May, 2016, two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** were mailed, postage prepaid, to the following:

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