

2016

**Rick J. Lindsey, Petitioner and Appellee, v. Karen M. Lindsey,
Respondent and Appellant.**

Utah Court of Appeals

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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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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

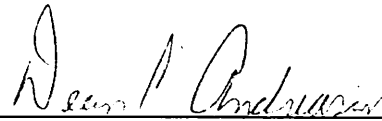
in alimony and was awarded marital property with a positive value of \$566,545 while Rick received marital debt with a negative value of (\$419,880). (R.1776.) Thus, the equities were considered and resolved in Karen's favor.

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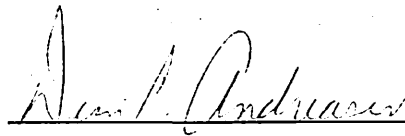
Certificate of Compliance With Rule 24(f)(1)

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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