

1983

## Shannon L. Tanner v. Wayne R. Tanner : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SHARON L. TANNER, :  
 :  
 Plaintiff, : CASE NO. 19155  
 :  
 vs. :  
 :  
 WAYNE R. TANNER, :  
 :  
 Defendant. :

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BRIEF OF APPELLANT

Appeal from the Decision of the  
Second Judicial District Court of  
Weber County, State of Utah

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HONORABLE CALVIN GOULD  
DISTRICT COURT JUDGE

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Respondent)

**FILED**

1993

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Clerk, Supreme Court, Utah

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THE DISTRICT COURT ABUSED ITS DISCRETION IN ITS FAILURE TO TAKE INTO CONSIDERATION, IN DIVIDING THE MARITAL ESTATE, RESPONDENT'S 1/8 INTEREST IN A RANCH VALUED AT \$2,050,361 WHICH HE INHERITED IN 1963 DURING THE COURSE OF THE 29 YEAR MARRIAGE. . . .	4
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THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING RESPONDENT 1/2 OF APPELLANT'S RETIREMENT ANNUITY, TO BE PAYABLE UPON APPELLANT'S RETIREMENT PLUS INTEREST EARNED THEREUPON, WITHOUT REDUCING SAID SUM BY THE AMOUNT OF TAXES APPELLANT MAY BE REQUIRED TO PAY UPON WITHDRAWING SAID SUM UPON RETIREMENT TO PAY RESPONDENT PURSUANT TO COURT ORDER. . . . .	7
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IN THE SUPREME COURT OF THE STATE OF UTAH

SHARON L. TANNER, :  
 :  
 Plaintiff and :  
 Appellant, :  
 :  
 vs. : CASE No. 19155  
 :  
 WAYNE R. TANNER, :  
 :  
 Defendant and :  
 Respondent. :

---

NATURE OF THE CASE

This is a divorce action.

DISPOSITION IN THE LOWER COURT

Plaintiff-Appellant commenced this action in the lower court to obtain a Decree of Divorce. Trial was held and a judgment rendered on March 2, 1982. The court entered its Findings of Fact and Conclusions of Law and Decree of Divorce. Both parties were granted a divorce and Plaintiff was granted custody of the couples one child; however, the court ruled that the Respondent's 1/8 interest in a family partnership was irrelevant to the marital estate. Consequently, pursuant to Rule 59 of the Rules of Civil Procedure, a motion was made to amend the decree but it was denied on March 25, 1983. Appellant appeals all aspects of lower court's Order concerning the division of property. The Divorce itself is not appealed.

RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the District Court in its failure to take into consideration in dividing the

marital estate respondent's 1/8 interest in ranch land) by respondent himself at \$2,050,361 which he received in 1963 during the course of the 29 year marriage. The finding itself is not appealed.

#### STATEMENT OF THE FACTS

The parties to this action were married on June 2, 1953. (R-123) In 1963 Respondent and several relatives inherited a ranch from Respondent's father. (R 38, 39, 12). According to the estate plan Respondent became the owner of a 1/8 undivided interest in the ranch and its improvements.

On February 8, 1980 Respondent and his family represented to a financial institution, with whom they were applying for a loan, in a financial statement signed by Respondent, that the value of the ranch with improvements was \$1,023,475.00. (Plaintiff's Exhibit J, R 181,182)

On December 19, 1980 Respondent and others certified the value of the ranch to be \$1,697,873, (Plaintiff's Exhibit K, R-183) and on the same date to another financial institution \$1,713,773.00. (Plaintiff's Exhibit L, R184) Finally on December 17, 1981 respondent and his relatives certified that the value was \$2,050,361.00 with total current liabilities of \$433,035 and a net worth of \$1,617,326.00. (Plaintiff's Exhibit M, Appendix A, R 184, 195) Thus, Respondent's interest (1/8) in the net worth thereof in December of 1981 would have been \$202,165.00.

Despite the representations by Respondent and his  
BRIEF OF RESPONDENT 2

monthly financial institutions from February 1980 until December 1981 showing that the value of the land and improvements doubled in two years, Respondent testified at trial on November 19, 1982 that the value of the ranch and improvements was between \$400,000 and \$700,000 (R181) with approximately \$480,000 of debts outstanding against the property.

Respondent's brother testified the value of the land without improvements was \$800,000 (R202,219) with \$506,000 owed against it. (R 202-205) However, he admitted to representing the value on December 17, 1981 to be \$2,050,362 (R220, plaintiff's Exhibit M, Appendix A)

The Appellant and Respondent are both social workers, both of which supported the other while they went to school and earned their degrees. (R 136, 195) In 1974 Appellant began paying into a retirement fund. (R150) She encouraged Respondent to set up a retirement fund or pension annuity but he refused stating that the ranch was to be his retirement. (R 154, 155) On the date of trial the present value of Appellant's Retirement annuity was \$34,200.00. (R 132) Respondent contributed nothing to this annuity (R 156,157) Even though both parties worked the responsibility of caring for the parties infant child and keeping the house fell upon the Appellant. (R 134)

Appellant's current income is approximately \$29,000/year (R125) and Respondent's income between \$18,000 and \$19,000/year. (R176) Both parties have educational

backgrounds equally impressive. (R 134, 179)

After 29 years of marriage the Appellant filed a divorce action against Respondent based upon mental cruelty. Respondent counterclaimed. (R 163) Divorce was granted to both parties on March 2, 1982. (R 91-92)

The District Court concluded that the marital property should be divided equally. (R83) The court decided that Appellant's \$34,200.00 retirement annuity should be included in the marital estate and divided it equally. The court, however, refused to consider, in dividing the assets, Respondent's interest in the Ranch which the evidence proved, was worth over Two Hundred Thousand Dollars to him. (Plaintiff's Exhibit M, Appendix A, R 184, 185)

#### ARGUMENT

##### POINT I.

THE DISTRICT COURT ABUSED ITS DISCRETION IN ITS FAILURE TO TAKE INTO CONSIDERATION, IN DIVIDING THE MARITAL ESTATE, RESPONDENT'S 1/8 INTEREST IN A RANCH VALUED AT \$2,050,361 WHICH HE INHERITED IN 1963 DURING THE COURSE OF THE 29 YEAR MARRIAGE.

It is the law of the State of Utah that a court, in dividing the marital estate, consider "all assets of every nature possessed by the parties, whenever obtained and from whatever source derived," Woodward v. Woodward, 656 P.2d 431, 432 (Utah 1982); Englert v. Englert, 576 P.2d 1274 (Utah



1978) at 1270. This rule applies even though the property may have been a gift from close relatives.<sup>1</sup>

This court in Englert, in sustaining an award of a portion of a retirement fund of one of the spouses, took a close look at the language of the Utah Statute which governs the property rights of the parties in divorce matters. U.C.A. 30-3-5 states as follows:

When a decree of divorce is made, the court may make such orders in relation to the children, property and parties and the maintenance of the parties and children, as may be equitable.

In Englert the court made the observation, "It is to be particularly noted that the language is in general terms and contains no hint of limitation." Englert at p. 1276.

In Weaver v. Weaver, 2, Utah 2nd 166, 442 P.2d 928 (1968) the husband had received a gift of stock of a sizeable sum from his father and sister. The trial court treated said property as part of the marital estate in dividing the assets. This Court affirmed holding that such property should not be excluded from the marital estate.

In the case Bushell v. Bushell, 649 P.2d 85, (Utah 1982) the husband had received 14 acres of real estate as a gift from his father just three years before his wife filed for a divorce. This court affirmed the trial court's ruling that it was proper to treat said parcel of real estate as

<sup>1</sup> Bushell v. Bushell, 644 P.2d 85 (Utah 1982)  
Hamilton v. Hamilton, 562 P.2d 235 (Utah 1977);  
Weaver v. Weaver, 21 Utah 2d 166, 442 P.2d 928 (1968)

part of the marital estate. In that case the court awarded one of the 14 acres to the wife and the other 13 to the husband, but gave the wife use of the 13 for seven and one-half years so she could use the income therefrom to raise her children.

The broad language of U.C.A. 39-3-5 and the rules of law applied in the cases above cited make it clear that the District Court should have considered all of the parties assets from whatever source derived in dividing the marital estate.

In this case it is absolutely clear from the record that the trial court excluded Respondent's 1/8 interest in the ranch, in dividing the marital assets, the court states in its minute entry after trial:

"The separate estate of the defendat (Respondent) which came to him by inheritance is . . . irrelevant to a decision in this case . . ." (R82)

According to the law of the State said property was very relevant in deciding how the parties assets should have been divided. Had the District Court concluded that the land had no value and had divided the property as it did, Appellant would have no argument on appeal. However, when the court arbitrarily decided not to take Respondent's interest into account, an interest which could be worth \$200,000 to the Respondent, it was an abuse of the court's discretion not to consider it.

Even if this court does not award the Appellant an interest in the Respondent's 1/8 interest in the ranch, it should at least consider the value of the Respondent's 1/8 interest in the ranch to offset the award to the Respondent of one-half of the Appellant's retirement annuity. Therefore, the court should exercise its equity power to reverse the trial court to the extent that it awarded Respondent 1/2 of Appellant's \$34,000.00 retirement annuity.

#### POINT II.

THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING RESPONDENT 1/2 OF APPELLANT'S RETIREMENT ANNUITY, TO BE PAYABLE UPON APPELLANT'S RETIREMENT PLUS INTEREST EARNED THEREUPON, WITHOUT REDUCING SAID SUM BY THE AMOUNT OF TAXES APPELLANT MAY BE REQUIRED TO PAY UPON WITHDRAWING SAID SUM UPON RETIREMENT TO PAY RESPONDENT PURSUANT TO COURT ORDER.

It is impossible to predict what the tax laws will state when Appellant retires ten years from now and it is impossible to predict how much interest the retirement annuity will earn during that period. However, it is foreseeable that upon Appellant's retirement the amount owed to Respondent may be very large because of accrued interest. It is also foreseeable that a large amount of tax thereupon could be assessed against Appellant for withdrawing the same to pay Respondent. In the event this court chooses not to set aside the District Court's order awarding 1/2 of Appellant's retirement annuity to the Respondent, in equity and good conscience Appellant should not have to pay taxes on the benefit Respondent derives therefrom.

Therefore, the District Court's ruling,

"The court further finds that the value of said annuity should not be reduced by the amount of taxes which Plaintiff will have to pay when she withdraws monies from said annuity in order to pay the defendant that portion that he was awarded." (R 1

should be set aside. The tax burden should rest with the respondent who will have derived the benefit of cashing in the \$17,000.00 of the annuity plus interest.

In Savage v. Savage, 658 P.2d 1201 (Utah 1983) the tax consequences of the distribution of the marital estate was held to be an important aspect for the valuation and the distribution of that estate.

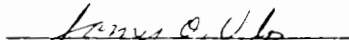
#### CONCLUSION

In order to better achieve equity and fairness the Appellant respectfully requests this court to reverse the District Court to the extent that it did not consider as part of the marital estate, Respondent's 1/8 interest in the ranch valued at \$2,050,361.00 which he inherited from his father in 1963 during the course of the parties 29 year marriage.

In the event this court chooses not to set aside the District Court's order awarding 1/2 of Appellant's retirement annuity to the Respondent, this court should at least amend that order to ensure that Respondent will have:

to pay the taxes thereupon rather the Appellant.

Respectfully submitted this 29 day of June, 1983.

  
\_\_\_\_\_  
JAMES D. VILOS  
Attorney for Appellant  
Suite 300, 2605 Washington Blvd.  
Ogden, Utah 8440

CERTIFICATE OF MAILING

I hereby certify that on this 29 day of June, 1983, I mailed two true and correct copies of the above and foregoing Brief of Appellant, by placing the same in the United States Mail, postage prepaid and addressed to the following: Pete N. Vlahos, Vlahos, Perkins & Sharp, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401.

  
\_\_\_\_\_  
Secretary

APPENDIX A

Plan # 67#  
\*m

FORM 19 (Rev. 12-76)

LOAN DESIGNATION: Tanner & Tanner Enterprises

STATEMENT OF FINANCIAL CONDITION AS OF 12/17, 1981

CURRENT ASSETS*		AMOUNT	CURRENT LIABILITIES*		AMOUNT
Cash-Checking (Bank)		2,343	Accounts Payable (Sch. E)		
Savings (Bank)			Notes Payable - Due Within One Yr. (Sch. E)		
Notes and Accounts Rec (Sch. A)			PCA Operating P+I		102,978
Listed Stocks and Bonds (Sch. B)	FEB Stock	9,000	Misc. <del>Stocks</del> <del>PAID</del>		1,500
Prepaid Cash Rents	B-Side K	9,125	Miss Tanner - Fuel Pass		1,516
Other Prepaids	PHOTO, LAW ON BAL	550	Federal Income Taxes (Yr.)		
	MISC PAID (Yr)	934	State Income Taxes (Yr.)		
	FUNDS AVAILABLE @ FEB	55,009	Real Estate Taxes (Yr.)		
Inventory (Sch. C)		23,550	Other Taxes (Identify)		
Livestock (From Application)		173,150	Grass Creek Water Ren - Fund		1,000
Other Current Assets			Current Portion of Long Term Debt		14,446
			Other Payables, Rent, Etc.		
Cash Value of Life Insurance					
Total Current Assets		273,661	Total Current Liabilities		121,446
LONG TERM ASSETS*			LONG TERM LIABILITIES*		
Equipment, Vehicles, Trucks, and Autos		21,000	Notes Payable (Sch. E Less Current)		
68 1/2 Gall. Boat @ 200		13,600	1st Security - Sprinkler System		105,000
54 1/2 Winch Boat @ 200		10,800	includes Int. to 6/1/82		
Other Livestock (Horses, Etc.)			Loans Secured By Life Insurance		
68 1/2 Spring 5LM @ 200		13,600	Real Estate Liens (Par/Lien Hold/Maturity/Rate/P & I Delinquencies If Any)		
200 1/2 Summer Boat @ 400		80,000	Less Current Portion Reported Above (Sch. D)		
Unlisted Stocks and Bonds (Sch. B)		48,600	Par No		
200 1/2 Gas Tank 1800 1/2 1/2		20,000	1) Feb 1981 975 paid		177,967
Other Personal Property	20 1/2 St. Schull Lane	8,000	reduced 1/yr. 11/82		
	84 1/2 Shore Water Tank	50,100	with 1/2 Int.		
Farm Land and Improvements (Description of Farming Land (Sch. D) - Include Value of Improvements)					
	Schedule D	1,709,600	Schedule D		28,028
Non-farm Real Estate			Other Liabilities		
SA. Miller System 1/2 1/2					
1977 Chev 3/4 T Ply.		4,000			
Other Long Term Assets	1974 Chev 1700	7,000			
	1973 Oldsm. Ply.	1,000			
	3 Gas Cook 1/2 1/2 1/2	210,000			
	Total Long Term Assets	1,776,780			
	Total Assets	2,050,361			
			Total Long Term Liabilities		311,595
			Total Liabilities		433,035
			Net Worth		1,617,326
			Total Net Worth and Liabilities		2,050,361
Contingent Liabilities	\$	0-	Explain		
Notes Endorsed for Others	\$	0-	Explain		
Judgments, Suits or Claims Pending	\$	0-	Explain		
Insurance:					
1 Motor Vehicles	\$	Yes	Property Damage	\$	Personal Liability
2 Farm Buildings	\$	None	Extended Coverage	\$	Feed
Equipment	\$	21,617.71			
3 Public Liability on Premises	\$	Yes	4 Workmen's Compensation Insurance?	\$	Beneficiary
5 Life?	\$	Insured	5 Other (describe)		
6 Disability Health	\$		6 Status		
Date of Last IRS Audit					

The undersigned (borrower) delivers the foregoing (and attached, if any) financial statements certifying that they fully, truly, and correctly represent borrower's financial condition as of the effective date indicated and furnishes them to PCA in order to induce PCA to establish and/or continue financing for the benefit of the borrower.

DATED 12/17, 1981 Wagner & Partners

\*Most applicants will find the first page of the statement of financial condition sufficient for stating their financial condition. Applicants who require additional space should use the schedules on the reverse side of this form. Totals may be transferred to the frontside.