

1994

Mauria T. Tanner (Swensen) v. James G. Swensen, Jr. : Reply Brief

Utah Court of Appeals

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Kenneth Okazaki; Prince, Yeates & Gelzahler.

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IN THE UTAH COURT OF APPEALS
FOR THE STATE OF UTAH

MAURIA T. TANNER (Swensen))	REPLY TO APPELLEE'S RESPONSE
)	
Plaintiff and Appellant,)	
)	APPELLATE CASE
v.)	No. 940079-CA
)	
JAMES G. SWENSEN, JR.)	CIVIL CASE
)	No. 924902803DA
Defendant and Appellee.)	
)	PRIORITY NO. 15

APPEAL FROM AN ORDER OF
THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE J. DENNIS FREDERICK
DATE OF ORDER: December 16, 1993

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UTAH COURT OF APPEALS

CLERK

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Utah Court of Appeals

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Marilyn M. Branch
Clerk of the Court

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PARTIES BELOW:

- A. MAURIA T. TANNER (Swenson)
Plaintiff and Appellant,
- B. JAMES G. SWENSEN,
Defendant and Appellee.

TABLE OF CONTENTS

	PAGE
LIST OF THE PARTIES.....	
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
JURISDICTIONAL STATEMENT.....	1
NATURE OF PRECEDENCE.....	1
STATEMENT OF ISSUES ON APPEAL.....	2
STATEMENT OF FACTS.....	2
STANDARD OF REVIEW ON APPEAL.....	7
ISSUES FOR REVIEW.....	7
SUMMARY OF THE ARGUMENT.....	9
CONCLUSION.....	14
CERTIFICATE OF MAILING.....	15

TABLE OF AUTHORITIES

<u>CASES</u>	PAGE
Bunnell v. The Industrial Commission of Utah, 740 P.2d 1331, 62 Utah Adv. Rep. 9 (1987).....	9
English v. English, 565 P.2d 409, 410 (Utah 1977).....	7
Huck v. Huck, 734 P.2d 417 (Ut. 1986).....	9
Johnson v. Johnson, 855 P.2d 250, 214 Utah Adv. Rep. 41 (1994).....	8
Newmeyer v. Newmeyer, 745 P.2d 1276, 1279, 69 Utah Adv. Rep. 32 (1987).....	7, 8, 11,
Pusey v. Pusey, 728 P.2d 117 (Ut. 1986).....	9
Rasband v. Rasband, 752 P.2d 1331, 1337 (Ut. App. 1988).	9
Savage v. Savage. 658 P.2d 1201, (S. Ct. 1983).....	8
Sinclair v. Sinclair, 718 P.2d 396 (Ut. 1986).....	9
Walters v. Walters, 812 P.2d 64 (Ut. App. 1989).....	9
Wiley v. Wiley, 227 Ut. Adv. Rep. 39 (Utah Ct. App. 1993).....	9
Weston v. Weston, 773 P.2d 408, 107 Utah Adv. Rep. 78..	8
 <u>UTAH RULES OF APPELLATE PROCEDURE</u>	
Utah Rules of Appellate Procedure 1953, as amended Rule 9)c)(4).....	1, 2
 <u>STATUTES</u>	
Utah Code Annotated 1953, as amended, Section 78-2-2(3)(j).....	1

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

MAURIA T. TANNER (SWENSEN),)	
)	REPLY TO APPELLEE'S RESPONSE
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)	
v.)	
)	Civil Case No. 924901803DA
JAMES G. SWENSEN, JR.,)	
)	Appellate Case No. 940079-CA
Defendant and Appellee.)	
)	

RULE 9 (C) (2)A: JURISDICTIONAL AUTHORITY

This appeal is authorized under **Utah Code Annotated, sec. 78-2-2 (3)(j)**, and Utah Rule of Appellate Procedure 3 which indicates a procedure for taking appeals from judgments and order of trial courts. This brief follows the structural requirements outlined in Rule 24 of the Utah Rules of Appellant Procedure. This is an appeal by Mauria T. Tanner (Swensen), Plaintiff, from a judgment and Decree of Divorce.

RULE 9(C) (3): NATURE OF PRECEDENCE

This appeal is from a trial of the Third Judicial District Court in and for Salt Lake County, State of Utah, before the Honorable Dennis Frederick, without a jury. The final orders were Amended Decree Of Divorce and Amended Findings Of Fact And Conclusions of Law.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the division of the marital property was equitable.

2. Whether the trial court abused its discretion in awarding alimony of \$700 per month for a two-year period.

3. Whether the trial court abused its discretion in imputing income from Tanner, Inc., as well as income from teaching Art classes in the past during the summer, for purposes of child support and alimony.

4. Whether the trial court abused its discretion in using Ms. Tanner's interest in Tanner, Inc., in figuring child support and/or alimony.

5. Whether the trial court abused its discretion in finding that Ms. Tanner has the future capacity to earn \$20,000 a year in approximately two years.

6. Whether the court abused its discretion in not awarding attorney's fees.

7. Whether the trial court abused its discretion in not allowing Plaintiff's counsel to present a closing argument.

RULE 9(C)4: STATEMENT OF FACTS

The facts which are material to the questions presented on this appeal are as follows:

1. The parties had a long-term marriage, approximately 19 years. They were married on the 22nd day of November, 1974, in Salt Lake City, Utah. (Record at 23, line 15)

2. The parties have four children. (Record at 21, line 13)

3. Mauria Tanner worked to help James Swensen, Jr. obtain two separate graduate degrees. (Record at 23, lines 18-25, Record at 24, line 1-6)

4. James Swensen, Jr., is currently a tax attorney as well as a Certified Public Accountant with a Masters Degree in Accountancy. (Record at 23 & 24)

5. Ms. Tanner has recently begun a graduate program which should be completed within two years with a Masters Degree in Expressive Therapy from the University of Utah. (Record 23, lines 1-10)

6. Ms. Tanner testified that in two years, she is hopeful that she might earn up to \$20,000 a year. (Record at 94, lines 2-4)

7. Mr. Swensen's projected annual income for the year of 1993 was \$67,500 (Defendant's Exhibit 2, page 0000043)

8. Ms. Tanner has, in the past, earned approximately \$1,500 a year for teaching Art in the summer time; however, she is not planning to continue this seasonal job as a result of her year-

round school obligation. (Transcript of Judge's Ruling, page 3, line 19)

9. Ms. Tanner owes her Father \$3,000, of which \$2,000 went to Attorney's fees. (Record 35, lines 13-18)

10. Ms. Tanner paid just under \$5,000 for Attorney's fees just prior to the loan from her Father. (Record at 35, lines 16-18)

11. Ms. Tanner owed approximately \$12,000 to law offices of present counsel. (Record 36, lines 17-20)

12. Ms. Tanner's lifestyle significantly altered since the separation. (Record at 39, lines 5-20)

13. The Tanner Corporation made disbursements for the purpose of paying the personal taxes of the parties. (Record at 48, lines 3-3)

14. Ms. Tanner had no control over any of the IRA's , retirement accounts, savings accounts, or other significant marital assets during separation - making no withdrawals from any of these accounts. (Record at 51, lines 23-25, Record at 52, lines 5-6)

15. Ms. Tanner never gave her permission to use or withdraw marital funds. (Record at 55, lines 1-2)

16. Mr. Swensen withdrew significant amounts from the marital IRA accounts during the separation. (Record at 53, lines 14-19)

17. Defendant/Appellee, James Swensen gave himself zero value

for furniture, he has in his possession, although he admits taking marital property. (Record at 152, lines 1-25, record at 153, lines 1-4, record 155, lines 1-25, and record at 156, lines 1-25)

18. Defendant/Appellee, James Swensen paid his personal legal fees from marital funds during the separation. (Record at 164, lines 11-15)

19. Defendant/Appellee, James Swensen used marital funds to pay off his student loans in the approximate amount of \$10,996. (Record at 168, lines 2-25)

20. Plaintiff's expert witness, a CPA, never received requested materials and relied upon Swensen's figure for values regarding Defendant's business. (Record at 7, lines 7-20, record at 16, lines 10-18, and record at 19, lines 20-25)

21. Ms. Tanner has received some monies on a periodic basis from Tanner, Inc., a family corporation. These disbursements have occurred approximately five times in 19 years. The amounts have varied. Ms. Tanner has generally received approximately \$2,000 in one year until several years ago when she received \$8,000 two years in succession. (Record at 50, lines 24-25, record at 51)

22. Ms. Tanner received these two \$8,000 amounts as a result of the sale of a trading post business. (Record at 48, lines 18-23, record at 50, lines 12-23)

23. The two previous disbursements from Tanner Inc. were \$2,000 and \$4,000 respectively. (Record at 49, lines 1-5)

24. These disbursements were generally intended to cover Ms. Tanner's allotted portion of the taxes for the family business. (Record at 50)

25. Ms. Tanner has been advised that she will not be receiving any more lump sum payments as large as the amount of \$8,000 in the future by her father, Mr. Maurice Tanner, the President of Tanner, Inc. Those larger \$8,000 amounts accrued solely as a result of the sale of the trading post business. (Record at 50, lines 12-33)

26. At trial, Plaintiff's counsel was not given the opportunity to present a closing argument to make the court aware of case law which pertained to the issues of fact and law before the court, (Record at 192, lines 20-24)

27. The trial court imputed income from sources no longer available to Ms. Tanner. (Record at 50, lines 12-33)

28. Ms. Tanner is planning to pursue a Ph.D. degree if possible. Such training will require approximately 7 years (2 years for the Masters' degree and an additional 5 years for the Ph.D.) (Record at 99, lines 20-25, record at 100, line 1)

29. Ms. Tanner was awarded alimony for 2 years (Transcript of

Judge's Ruling, pages 1 & 2)

STANDARD OF REVIEW ON APPEAL

The Standard of Review on Appeal is that the Appellate Court must reverse if there is a misapplication or misunderstanding of the law, if the evidence clearly preponderates against the findings or conclusions or if there is a serious inequity that must be rectified as set forth in English v. English, 565 P.2d 409, 410 (Utah 1977).

ISSUES FOR REVIEW

1. The division of the marital property was not equitable. Newmeyer v. Newmeyer, 745 P.2d 1276, 1279 (Utah 1987), stated that "in determining whether a certain division of property is equitable ... the relative abilities of the spouses to support themselves after the divorce are pertinent to an equitable...division of the fixed assets of the marriage".

Ms. Tanner contends that in the division of the property, the trial court did not take into consideration her special circumstances, i.e., her relative lack of work experience, and her full-time student status.

2. The court accepted values of property not consistent with the worth of the property if sold, causing an inequitable division of property.

3. The court's award of \$700 per month alimony for a two-year period is an abuse of discretion. Johnson v. Johnson, 855 P.2d 250, 214 Utah Adv. Rep. 41 (1994).

4. The court abused its discretion in imputing income from Tanner, Inc., as well as income from teaching Art classes in the summer as Ms. Tanner can no longer participate in that activity because of her participation in year-round schooling. Savage v. Savage, 658 P.2d 1201, (S. Ct. 1983). Weston v. Weston, 773 P.2d 408, 107 Utah Adv. Rep. 78. Ms. Tanner provided an accurate figure regarding income for the purposes of child support.

5. Ms. Tanner's interest in Tanner, Inc. qualifies as a pre-inheritance gift and the court abused its discretion in utilizing the family corporation in figuring child support and/or alimony, as it was not income but a property interest.

- A. Ms. Tanner testified at trial that her brothers and sisters also received similar disbursements to hers.
- B. That the Tanner family corporation has been in place for approximately 35 years and it was in the form of pre-inheritance. (Record at 46, lines 16-21, record at 47, line 11, and record at 47, lines 24-25). Typically, inherited property will be awarded to the person who inherited it, even when the property was inherited years before the divorce.
- C. Newmeyer v. Newmeyer, 745 P.2d 1276 (Ut. 1987). If the court should determine that Tanner, Inc., was not pre-inheritance, it would be forced to admit that the Plaintiff's/Appellant's interest in the family corporation property was premarital property, at the very

least, an interest which had not been commingled into the marital estate, and one that was not augmented and/or maintained by the other spouse in any capacity. A court must find unique circumstances that warrant disregarding the general rule that premarital property is separate property. Waiters v. Waiters, 812 P.2d 64 (Ut. App. 1989).

6. The trial court abused its discretion in finding that Ms. Tanner could earn \$20,000 a year in two years, after she completed her schooling. It presumed that she will indeed complete the schooling, secure employment and earn that amount. Wiley v. Wiley, 227 Ut. Adv. Rep. 39 (1993), found such a finding improper.

7. The court abused its discretion in not awarding attorney's fees. Utah law provides that the award be based upon the need of the party seeking the award, and reasonableness of the fee sought. Huck v. Huck, 734 P.2d 417 (Ut. 1986). Sinclair v. Sinclair, 718 P.2d 396 (Ut. 1986). Pusey v. Pusey, 728 P.2d 117 (Ut. 1986). Rasband v. Rasband, 752 P.2d 1331, 1337 (Ut. App. 1988).

8. The court abused its discretion in not allowing Plaintiff's counsel to present argument and cases relevant to the matter at bar in closing argument. Bunnell v. The Industrial Commission of Utah, 740 P.2d 1331, 62 Utah Adv. Rep. 9 (1987).

ARGUMENT

Appellee relies upon Roberts v. Roberts, 835 P.2d 193, 198

(Utah App 1992), as authority in claiming that the trial court did not abuse its discretion in its division of the marital property.

In Roberts, as in the matter at hand, the property distribution is an issue. The court clearly states that property distribution must be based on adequate findings. The Court defined "adequate findings " in that opinion in its review of the custody issue. In cases tried by the bench, the court is required to find the fact specifically and ground its decision on findings of fact which resolve the material factual uncertainties and those findings should be expressed in enough detail to enable a reviewing court to determine whether they are Utah R. Civ P.52(a) - "To ensure the court acted within its broad discretion, the facts & reasons for the courts decision must be set forth fully in appropriate Findings and Conclusions." These findings must be adequate to ensure on appeal that the trial court's discretionary determination was rationally based. (Painter v. Painter 752 P.2d 907, 909 (Ut App 1988.)

Paryzek v. Paryzek, 776 P.2d 78, 83, describes the legal standards applied by the appellate courts which are based on Utah Code Ann Sec. 30-3-10(1) (1989) which requires the trial court to be a guide in assessing correctness, not merely proceeding conclusions of law. The Findings should divine how the court

reached it's final legal conclusion.

In Roberts, as here, the wife also contested the nominal alimony award. As in Roberts, no where, in the findings did the court make a specific analysis of the parties circumstances in light of the Jones analysis,

[1] needs of receiving spouse to produce sufficient income;
and

[2] ability of receiving spouse to produce sufficient income;
and

[3] ability of supporting spouse to provide support.

As in Roberts, this court did not make specific or adequate findings on the parties relative needs, or make a comparison of their relative abilities to provide support.

The Findings are clearly insufficient to give weight to the court's judgement regarding property division and alimony.

In addition, the Appellee contends that this court must examine the entire distribution of property and not reverse on any isolated item of property. Naranyo 751 P.2d At 1148. The Appellant agrees and encourages the court to review the broad sweep of property division, attorney's fees, child support and alimony to determine if the court has not shown prejudice against Appellant.

A clarification of the facts specified by Appellee might be

helpful in regards to the ruling of division of marital property in this case, such as the fact that contrary to the Response brief, Ms. Tanner's expert testified that he did have personal experience in valuing a law firm (R-8-11), not that he was inexperienced.

Mr. Swenson argues that in Finlayson v. Finlayson, 874 P.2d 843, 849 (Utah App 1994), there was dispute regarding whether the loan from husband's mother was actually an enforceable debt or gift. The court, however, clearly gives its basis of division in that a trial abuses its discretion when it unilaterally allows one party, the husband in this case, to use a large share of the liquid assets to discharge debt. The court, here as well as in Finlayson, should have equitably distributed the liquid assets.

Appellee argues that the financial declarations should not be a basis for making a final award. The financial declarations were part of the record, the parties also testified regarding the figures therein contained. Certainly, they should be utilized in a determination.

Appellee misstates when he alleges the marital home was appraised by Ms. Tanner's own appraiser. Indeed, the appraiser was suggested by Mr Swenson.

Mr. Swenson includes the amount in Tanner Inc. in his discussion of Ms. Tanner's large award. Tanner Inc. was clearly

pre-marital property and any review of those assets in relation to the marital estate is clearly improper. Appellee improperly characterizes Ms. Tanner's disposable income. This mischaracterization is evidenced again as Ms. Tanner received monies from her family in her purchase of a computer and testified she borrowed money from her father to enroll and pay for self-esteem training. She did not pay for those things herself, as evidenced by the record.

The court abused its discretion in imputing income. Contrary to the characterization of the facts in Appellees Brief:

[1] Ms. Tanner testified she would be receiving no further large distributions from Tanner Inc. Certainly none that would come close to the \$8,000 figure. In fact, she clearly stated that the large amount was a one time occurrence because of the sale of a family owned Trading Post Business.

[2] In addition, because of her schooling, Ms. Tanner testified she had not been teaching summer art classes nor did she intend to continue to do so because her schooling went all year round.

[3] Ms. Tanner further testified that any stipends she may have received were not continuing.

Ms. Tanner also testified she expects to earn \$20,000 if, in

fact, she completes her graduate program but she has not made inquiries to determine whether that expectation is valid.

CONCLUSION

The Findings at trial in the instant case exemplify a pattern abuse of discretion and prejudice against the Plaintiff in almost every instance.

The parties have had a long-term marriage. The Appellee is a professional tax attorney and C.P.A.; the Appellant, primarily a mother with little work experience, who presently is a full-time graduate student. The court heard evidence that the Appellant had not really worked since she put the Appellee through law school, (almost 20 years ago) and yet the court ordered term alimony for only two years.

In terms of the child support award, the court imputed the Appellant income from summer art classes she testified she could no longer participate in as well as from periodic pre-inheritance sums of money, which Appellant testified she would not have any significant access to in the future.

The court did not take into consideration the differences in ability to produce income while making a division of the marital assets.

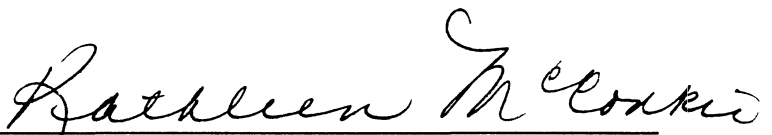
Although, Ms. Tanner was not earning any income, the court

awarded no attorney's fees and made a Finding that the Appellant had not testified as to need which, in fact, was not consistent with the record. Appellant's counsel also testified as to reasonableness.

The Trial court refused to listen to closing argument and directly articulated that the court was not interested in Appellant's rights.

Dated this 11th day of January, 1995.

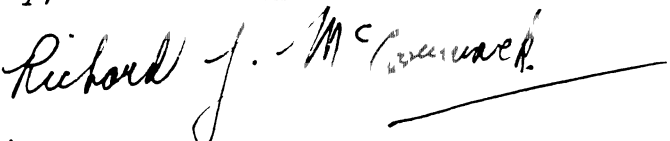
Respectfully submitted,
Nebeker, McConkie & Wright


Kathleen McConkie, Esq.

CERTIFICATE OF MAILING

This is to certify that on the 11th day of January, 1995, one (1) true and correct copy of the foregoing Response to Appellants Reply was hand delivered to:

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