

1994

Mauria Tanner (Swensen) v. James G. Swensen, Jr. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FOR THE STATE OF UTAH

: MAURIA TANNER (Swensen), :
: :
: Plaintiff and Appellant, : APPELLATE CASE
: : No. 940079-CA
: v. :
: : CIVIL CASE
JAMES G. SWENSEN, JR., : : No. 924902803DA
: :
Defendant and Appellee, : PRIORITY NO. 15
: :

BRIEF OF APPELLEE

APPEAL FROM AN ORDER OF THE
THIRD DISTRICT JUDICIAL COURT
SALT LAKE COUNTY, STATE OF UTAH

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UTAH COURT OF APPEALS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION AND NATURE OF PROCEEDINGS	1
STATEMENT OF ISSUES PRESENTED	1
STANDARD OF REVIEW	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	12
ARGUMENT	15
I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DIVIDING THE MARITAL PROPERTY	15
II. THE TRIAL COURT PROPERLY CONSIDERED AND APPLIED THE <u>JONES</u> FACTORS IN AWARDING ALIMONY	22
III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPUTING INCOME TO MS. TANNER	27
IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RECOGNIZING INCOME TO MS. TANNER FROM DISTRIBUTIONS RECEIVED WITH RESPECT TO A FAMILY CORPORATION	29
V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE AWARD OF ALIMONY	32
VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION DECLINING TO AWARD ATTORNEY'S FEES TO EITHER PARTY	35
VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISALLOWING BOTH PARTIES' PRESENTATION OF CLOSING ARGUMENT	38
CONCLUSION	39
CERTIFICATE OF MAILING	41
ADDENDUM TO BRIEF	42
DEFENDANT'S EXHIBIT NO. 13: "ASSET SHEET FOR TANNER, INC."	43

TABLE OF AUTHORITIES

CASES CITED

	Pages
Andersen v. Andersen, 757 P.2d 476 (Utah App. 1988)	. 35
Baker v. Baker 226 Utah Adv. Rep. 27 (Utah App. 1993)	. . . . . 15
Bell v. Bell, 810 P.2d 489 (Utah App. 1991)	. . . . . 35, 36, 37
Boyle v. Boyle, 735 P.2d 669 (Utah App. 1987)	. . . . . 16
Bunnell v. Industrial Commission of Utah, 740 P.2d 1331 (Utah 1987)	. . . . . 38
Burt v. Burt, 799 P.2d 1166 (Utah App. 1990)	. . . . . 29, 31
Butler v. Butler, 461 P.2d 727 (Utah 1969)	. . . . . 37
Chambers v. Chambers, 840 P.2d 841 (Utah App. 1992)	. 22
Delatore v. Delatore, 680 P.2d 27 (Utah 1984)	. . . . . 37
English v. English, 565 P.2d 409 (Utah 1977)	. . . . . 23
Finlayson v. Finlayson, 874 P.2d 843 (Utah App. 1994)	. . . . . 20
Gardner v. Gardner, 748 P.2d 1076 (Utah 1988)	. . . . . 23
Jones v. Jones, 700 P.2d 1072 (Utah 1985)	. . . . . 23
Kerr v. Kerr, 610 P.2d 1380 (Utah 1980)	. . . . . 37
Morgan v. Morgan, 854 P.2d 559 (Utah App. 1993)	. . . 16, 23
Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988)	. . . 29
Munns v. Munns, 790 P.2d 116, 118 (Utah App. 1990)	. . 15, 33, 34
Naranjo v. Naranjo, 751 P.2d 1144 (Utah App. 1988)	. . 15, 16
Noble v. Noble, 761 P.2d 1369 (Utah 1988)	. . . . . 33

	Pages
Olson v. Olson, 704 P.2d 564 (Utah 1985)	23
Paffel v. Paffel, 732 P.2d 96 (Utah 1986)	22
Potter v. Potter, 845 P.2d 272 (Utah App. 1993) . . .	15
Rappleye v. Rappleye, 855 P.2d 260 (Utah App. 1993) .	23, 31
Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988) . .	22
Roberts v. Roberts, 835 P.2d 193 (Utah App. 1992) . .	15
Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989) .	23
Shioji v. Shioji, 712 P.2d 197 (Utah 1985)	15
Watson v. Watson, 837 P.2d 1 (Utah App. 1992)	2, 15
Weston v. Weston, 773 P.2d 408 (Utah App. 1989) . . .	16
Willey v. Willey, 227 Utah Adv. Rep. 39 (Utah App. 1993)	35, 36, 37

STATUTES AND RULES

	Pages
Utah Code Annotated (1953, as amended) Section 78-2a-3(2)(i)	1
Utah Code Annotated (1953, as amended) Section 78-45-7.5(7)(b)	27
Utah Code Annotated (1953, as amended) Section 78-45-7.5(1)(b)	30, 31

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APPELLATE CASE
No. 940079-CA

CIVIL CASE
No. 924902803DA

PRIORITY NO. 15

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

The Utah Court of Appeals has jurisdiction of this appeal from a decree of divorce pursuant to Utah Code Annotated Section 78-2a-3(2)(i) (1953, as amended).

This appeal was brought by Mauria Tanner (Swensen), Plaintiff, from a final judgment and Amended Decree of Divorce entered on or about February 22, 1994, in the Third District Court in and for Salt Lake County, State of Utah.

STATEMENT OF ISSUES PRESENTED

I. Issue: Whether the trial court acted within its discretion in its division of the marital property.

II. Issue: Whether the trial court abused its discretion

in its award of alimony.

III. Issue: Whether the trial court acted within its discretion by imputing income to Ms. Tanner.

IV. Issue: Whether the trial court acted within its discretion in recognizing income to Ms. Tanner from distributions received from her interest in a family corporation.

V. Issue: Whether the trial court acted within its discretion in limiting Ms. Tanner's award of alimony.

VI. Issue: Whether the trial court acted within its discretion in declining to award either party attorney fees.

VII. Issue: Whether the trial court acted within its discretion disallowing both parties' presentation of closing argument.

STANDARD OF REVIEW

The appellate court should modify a decree of the district court only "if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." Watson v. Watson, 837 P.2d 1, 5 (Utah App. 1992).

STATUTORY PROVISIONS

Any relevant text of statutory provisions or rules pertinent

to the resolution of the divorce issues presented for review is contained in the body of this brief.

STATEMENT OF THE CASE

This is an action for divorce which was tried before the Honorable J. Dennis Frederick, Third District Court Judge, in and for Salt Lake County, State of Utah on December 16, 1993. Amended findings of fact, conclusions of law, and decree of divorce were entered on February 22, 1994. The submitted amended findings of fact were drafted by counsel for Appellee, Mr. Swensen.

STATEMENT OF FACTS

1. Appellant Mauria Tanner ("Ms. Tanner") and Appellee James G. Swensen, Jr. ("Mr. Swensen") were married on November 22, 1974 (Record (hereinafter "R.") at 23).

2. The parties have four children, Alison who was 18 at the time of the divorce, Nathan who was 17, Clare who was 13 and Tanner who was 9. (R. 24).

3. Ms. Tanner has a bachelor's degree in art which she received from BYU in 1989. (R. 22). Ms. Tanner also received a secretarial degree from BYU in 1976. *Id.*

4. Mr. Swensen is a tax attorney and Certified Public Accountant. He also has a Masters Degree in Accountancy. (R.

23-24).

5. Ms. Tanner was employed full time while Mr. Swensen was in law school from 1979 to 1982. (R. 59).

6. Beginning in 1979, Ms. Tanner was employed as a graduate assistant and secretary at a rate of \$6.00 per hour. (R. 23-24).

7. During law school Mr. Swensen worked as a graduate instructor earning between \$1,500 and \$2,000 each semester. (R. 142).

8. Mr. Swensen also received assistance from his parents during law school. (R. 25, 142).

9. Mr. Swensen's parents assisted in the purchase of the Crest View residence. Mr. Swensen's parents made payments on the house while Mr. Swensen was in law school. (R. 142).

10. The parties' purchased the Crest View residence and also paid law school expenses with proceeds received from the sale of a vehicle which was Mr. Swensen's pre-marital property. (R. 186).

11. Regarding the expert testimony on the value of Mr. Swensen's law practice, the trial court found the testimony of Mr. Swensen's expert, Mr. Shields, more credible. (Transcript of Judge's Ruling (hereinafter "Tr.") at 2-3).

12. Mr. Shields performed several evaluations of sole law practitioners in the past. (R. 116).

13. Mr. Shields made an on-site inspection at Mr. Swensen's law office of the equipment, furniture, and fixtures. (R. 117).

14. Mr. Shields considered an on-site inspection of the property essential for an accurate valuation of the present condition of the equipment, furniture, and fixtures. (R. 120).

15. Ms. Tanner's expert failed to inspect the property, had no personal experience in valuing a law firm, and prepared several different valuations, some of which used improper calculations. (R. 8-10).

16. Ms. Tanner's expert also failed to discount aged account receivables, although it was his general practice to do so. (R. 10).

17. Mr. Swensen inspected the marital property located at the Lincoln Lane residence several days before trial and compiled a partial listing and valuation of the property. (R. 110).

18. Mr. Swensen valued the parties' automobiles by current Blue Book value. Id.

19. Mr. Swensen valued the Lincoln Lane residence pursuant to a recent appraisal of the house and real property admitted as evidence. (R. 112).

20. Mr. Swensen's proposed property distribution valued the marital property in Ms. Tanner's possession at the time of trial with a net value of \$5,000 over the marital property in his

possession. (R. 110, 155-56).

21. Ms. Tanner owns an eight percent (8%) interest in a family corporation, Tanner, Inc., which value was not included in the marital estate. Only its income was considered by the trial court. (R. 86).

22. Tanner, Inc. has a large number of valuable assets including: 3,500 acres in the high New Mexico desert, 150 head of beef cattle, \$125,000 in vehicles and equipment, a \$305,000 contract balance, a \$4,700 checking account, and a \$24,700 money market account. (R. 84-86).

23. The approximate value of Ms. Tanner's eight percent (8%) interest in Tanner, Inc. assets is at least \$36,758, plus an eight percent (8%) ownership interest in 3,500 acres in the high New Mexico desert and 150 head of beef cattle. (R. 84-86).

24. In combination with the other assets, Ms. Tanner owns an eight percent (8%) interest in the \$305,000 contract balance from Tanner, Inc.'s sale of a trading post that is payable over ten years with interest. (R. 85).

25. In 1992 and in 1993, Ms. Tanner received income distributions from Tanner, Inc. in the amount of \$8,000 per year. (R. 48-49).

26. Ms. Tanner's comment that she was informed by her father she will not be receiving any more large disbursements

from the Tanner, Inc. was objected to and sustained as hearsay. (R. 51, 98).

27. Thus, the record is devoid of facts that Ms. Tanner will not receive such payments from the Tanner, Inc. in the future. (R. 83, 84 & 86).

28. The trial court awarded Ms. Tanner approximately one-half the parties' marital property (\$92,000) and awarded Mr. Swensen a similar amount. (Tr. 5).

29. Ms. Tanner received the Lincoln Lane residence and its total equity. Her own appraiser found that the house was not in need of repair. (R. 80).

30. Mr. Swensen is presently renting an unfurnished house. (R. 142).

31. Mr. Swensen has paid attorney's fees in the amount of \$3,000 - \$4,000 from his one-half share of the marital estate. (R. 163).

32. Mr. Swensen's attorney fees were charged against his portion of the marital property, were not charged against Ms. Tanner's portion of marital property, and the payment of attorney fees by Mr. Swensen did not reduce the total marital property to be distributed between the parties since he added the amount paid back into his proposed distribution. (R. 185-186.)

33. Prior to representation by Ms. McConkie, Ms. Tanner

paid her former attorneys' fees in the amount of \$5,000 from marital property. (R. 67).

34. The parties' only marital debts at the time of separation of the parties were a student loan and a mortgage on the Lincoln Lane residence. (R. 139).

35. Ms. Tanner testified that she should bear one-half of the liability of marital debts and obligations. (R. 62).

36. During the parties marriage, a student loan was incurred to finance law school and pay for living expenses. (R. 141).

37. Mr. Swensen used marital funds to pay off the marital debt of a student loan to Student Loan Servicing Corporation in the approximate amount of \$10,996. (R. 168).

38. Ms. Tanner testified to monthly expenses in the amount of \$2,885.00. Id.

39. Ms. Tanner pays her credit card balances and bills monthly and has no debt. (R. 60).

40. Ms. Tanner recently purchased a computer for \$1,500. (R. 63).

41. Ms. Tanner expended funds in the amount of \$2,800 for herself and her daughter to enroll in a voluntary self-esteem training course. (R. 88-89).

42. Ms. Tanner has also paid charitable contributions in

the amount of \$1,600. (R. 99).

43. Ms. Tanner is presently attending school for retraining. (R. 93).

44. Ms. Tanner is voluntarily underemployed and voluntarily enrolled at the University of Utah in a graduate program which she will complete within one to two years from the time of trial gaining a Master's Degree in Expressive Therapy. (R. 23-24, 60).

45. If Ms. Tanner elects not to write a thesis in conjunction with her Master's degree, she may finish the program within one year from the time of trial. (R. 95).

46. Ms. Tanner testified at trial that upon graduation she expects to be paid a starting salary of \$20,000 per year. (R. 94).

47. Whether there is any particular intention on the part of Ms. Tanner to pursue a Ph.D. following graduation from her Master's program is clearly speculation. (R. 99 - 100).

48. Ms. Tanner has a history of working during the summer teaching art and is capable of earning \$1,500 yearly doing so. (Tr. 3).

49. Ms. Tanner has voluntarily elected not to teach the summer art classes which she has taught in the past. (R. 87).

50. Additionally, Ms. Tanner has received a \$2,500 non-taxable student stipend. *Id.* The stipend Ms. Tanner received

was in the amount of \$500 per month from August through December, 1993. (R. 132).

51. The trial court imputed income to Ms. Tanner in the amount of \$1,000 per month based upon her income from teaching art, her student stipend, and her distributions from Tanner, Inc. (Tr. 3-4).

52. Ms. Tanner testified that she received a distribution of income from Tanner, Inc., not a distribution of assets. (R. 90).

53. Ms. Tanner also testified that Mr. Swensen, a Certified Public Accountant, prepared the parties' tax returns during the marriage. (R. 86).

54. Each year Ms. Tanner received a Form K-1 from Tanner, Inc. allocating taxes for her to pay in proportion to her eight percent (8%) ownership interest. (R. 104-105).

55. The Form K-1 allocates items of income, gain and loss deduction to individual shareholders of Tanner, Inc. in proportion to their stock ownership. (R. 105).

56. Form K-1 reports taxable income that the shareholders would include in their individual income tax returns. Id.

57. The Form K-1s submitted into evidence show that Ms. Tanner received distributions with respect to income, rather than distributions of assets from Tanner, Inc., in the amounts of

\$2,000 for 1989, \$2,000 for 1990, \$4,000 for 1991, \$8,000 for 1992, and \$8,000 for 1993. (R. 131).

58. The trial court found that Ms. Tanner's eight percent (8%) ownership interest in Tanner, Inc. was pre-inheritance/premarital property. (Tr. 5-6).

59. The trial court awarded Ms. Tanner \$700 alimony per month for a period of two years. (Tr. 5).

60. Mr. Swensen has a gross monthly income of \$5,625.00, disposable earnings of \$3,671.00 and monthly expenses in the amount of 2,108.00. (Tr. 3-4).

61. The trial court concluded that Mr. Swensen cannot pay any more than \$700 per month in alimony. (Tr. 4).

62. Mr. Swensen is paying \$1,286 for his child support obligation. (Tr. 4).

63. In addition to child support and alimony, Mr. Swensen is presently paying tuition for the parties' oldest daughter in the amount of \$3,200 per year. (R. 147).

64. Ms. Tanner retained three different attorneys to represent her in this matter. (R. 35).

65. Ms. Tanner testified that the first two attorneys who represented her were unqualified to handle her divorce. (R. 35-36).

66. Prior to representation by Ms. McConkie, Ms. Tanner

paid her former attorneys fees in the amount of \$5,000 from marital funds. (R. 35).

67. The trial court found that neither party demonstrated the ability to pay the other spouse's attorney's fees. (Tr. 6).

68. Ms. Tanner did not testify regarding her need for attorney's fees or her inability to pay her attorney's fees in her direct examination or otherwise. Therefore, no evidence was presented respecting her need. (R. 192).

69. The trial court specifically found that Ms. Tanner had sufficient assets from Tanner, Inc. and otherwise with which to pay her attorney fees. (Tr. 6).

70. The trial court further found that there was no evidentiary basis from which to make an award for attorney's fees. (Tr. 6).

71. The trial court disallowed both parties from presenting closing argument. (R. 192).

SUMMARY OF THE ARGUMENT

I. The trial court did not abuse its discretion in its division of the marital property. The trial court has broad discretion in valuing and distributing marital property. Based upon the evidence presented, the trial court's award reflects an equitable division of the parties' marital estate, each party receiving one-half of the value of the marital property.

II. The trial court properly considered and applied the Jones factors in awarding alimony. Sufficient evidence exists to support the trial court's findings and application of all of the Jones factors including: (1) Ms. Tanner's financial condition and needs in light of the lifestyle she has enjoyed; (2) Ms. Tanner's ability to support herself; and (3) Mr. Swensen's ability to pay alimony.

III. The trial court did not abuse its discretion by imputing income to Ms. Tanner. Ms. Tanner's imputed income from teaching art classes and from Tanner, Inc. was soundly based upon her historical earnings, her education, her marketable skills, etc., as set forth in her testimony.

IV. The trial court did not abuse its discretion in assessing Ms. Tanner income received from her ownership interest in Tanner, Inc. The trial court properly awarded Ms. Tanner her eight percent (8%) ownership interest in Tanner, Inc. free and clear of any claim by Mr. Swensen and did not consider its value in awarding and dividing the marital property. However, the facts of Ms. Tanner's historical income from Tanner, Inc. clearly provided an evidentiary basis for recognizing her distributions as actual income received.

V. The trial court did not abuse its discretion by limiting the award of alimony to two years. The trial court carefully

weighed the Jones factors in its decision to limit Ms. Tanner's award of alimony to two years, using the evidence regarding her need, her ability to provide for her needs, and Mr. Swensen's ability to pay.

VI. The trial court did not abuse its discretion in its failure to award either party attorney's fees. The trial court made a specific finding that there was no evidentiary basis from which to award attorney's fees and that Ms. Tanner had sufficient assets with which to pay her own fees, and ruled accordingly. Also, Ms. Tanner paid approximately \$5,000 of her attorneys fees from marital property. Ms. Tanner received one-half of the marital estate, plus approximately \$36,758 in value from Tanner, Inc. together with an eight percent (8%) interest in the unknown value of 3,500 acres of real property, 150 head of beef cattle, and all income derived therefrom.

VII. There was no abuse of discretion in disallowing both parties' presentation of closing argument. The trial judge has discretion in allowing closing argument. Additionally, because neither party was allowed to present closing argument, Ms. Tanner could not have been unduly prejudiced.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS DIVISION OF THE MARITAL PROPERTY.

Trial courts have considerable discretion in creating equitable orders that divide marital property. Potter v. Potter, 845 P.2d 272 (Utah App. 1993); Roberts v. Roberts, 835 P.2d 193, 198 (Utah App. 1992); Munns v. Munns, 790 P.2d 116, 118 (Utah App. 1990). This Court stated: "[w]e afford the trial court considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity." Watson, 837 P.2d at 5 (quoting Naranjo v. Naranjo, 751 P.2d 1144, 1146 (Utah App. 1988)). The overriding consideration in a divorce action "is that the ultimate division be equitable," not necessarily exactly equal. Id. at 6. In order for Ms. Tanner to prevail on the issue of an inequitable marital property division, she must show that the trial court committed a "clear abuse of discretion." Id. This Court has held that with regard to property division "on appeal from a judgment of the trial court, our role is not to substitute our own findings for those of the trial court, but to examine the record for evidence supporting the judgment." Baker v. Baker 226 Utah Adv. Rep. 27, 28 (Utah App. 1993) (quoting Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985)).

The Utah Court of Appeals has held that it is "inappropriate for this court to reverse on an isolated item of property or debt distribution. Further, this court must examine the entire distribution to determine if the trial court abused its discretion." Naranjo, 751 P.2d at 1148 (quoting Boyle v. Boyle, 735 P.2d 669, 670-71 (Utah App. 1987)). Therefore, a trial court's determination on any one issue of property or debt distribution is not necessarily grounds for reversal.

Ms. Tanner attacks the property division on the basis that the trial court accepted the values stated on Defendant's exhibits. However, "[w]hen considering testimony regarding valuation of property, the trial court 'is entitled to give conflicting opinions whatever weight [it] deems appropriate.'" Morgan v. Morgan, 854 P.2d 559, 564 (Utah App. 1993) (quoting Weston v. Weston, 773 P.2d 408, 410 (Utah App. 1989)). Based upon the evidence, the trial court specifically found Mr. Swensen's values of the marital property to be more credible and accepted those values.

The trial court found the expert testimony of Mr. Shields, Mr. Swensen's expert, regarding the value of Mr. Swensen's law practice more credible because Mr. Shields had experience in valuing sole law practitioners' business. (R. 116). Mr. Shields made an on-site visit to Mr. Swensen's firm to value equipment,

furniture, and fixtures. (R. 117). Mr. Shields considered such an on-site inspection of the property essential in an accurate valuation since one should consider the condition of the firm's equipment, furniture, and fixtures. (R. 120). In contrast to Mr. Shield's testimony, Ms. Tanner's expert failed to discount aged account receivables, although it was his general practice to do so. (R. 10). Moreover, Ms. Tanner's expert failed to physically inspect the property, had no personal experience in valuing a law firm, and prepared several other general valuations, some of which used improper basis for his different conclusions. (R. 8-10).

Respecting the distribution of the personal marital property, Mr. Swensen inspected the personal marital property at the Lincoln Lane residence several days before trial. (R. 110). He also valued the parties automobiles pursuant to their Blue Book values. Id. The value of the Lincoln Lane residence was based upon a recent real estate appraisal placed in evidence. (R. 112). Additionally, Mr. Swensen's proposed distribution did not value any assets which Ms. Tanner might have obtained through inheritance or gifts. (R. 187).

Ms. Tanner argues that the trial court accepted the values stated on Mr. Swensen's proposed property distribution even though Mr. Swensen claimed a zero value in personal property for

himself. Ms. Tanner ignores the fact that Mr. Swensen's testimony as to the proposed property distribution was the personal marital property in Ms. Tanner's possession had a net value of \$5,000 over the personal property to be awarded to Mr. Swensen. (R. 110). The trial court's valuation of the property is soundly based upon the evidence and should not be disturbed.

Ms. Tanner contends that the trial court did not take into consideration her "special circumstances" in dividing the real property. However, there is nothing in the record indicating that Ms. Tanner was the victim of special circumstances or required any special consideration.

Ms. Tanner argues that she does not have any income from the properties she received to support herself. There was no evidence that the marital property included any income producing property, nor did she request the same. The division of property need not provide Ms. Tanner with income producing property. Ms. Tanner has failed to provide any authority to support her argument that she must be awarded income producing assets.

Even so, Ms. Tanner has received income producing assets. Ms. Tanner has an eight percent (8%) interest in Tanner, Inc. from which she derives income. (Tr. 5). Ms. Tanner's ownership of Tanner, Inc. was awarded to Ms. Tanner as separate property and not as a distribution of marital property. Ms. Tanner

personally receives income from the sale of assets by Tanner, Inc. (R. 82-83). Ms. Tanner has an eight percent (8%) interest in the \$305,000 balance owing on the contract balance payable over a ten year period. Id. Further, Ms. Tanner was awarded one-half, or \$92,000, of the parties' marital property in assets from which she may generate income. Id. The property awarded to Mr. Swensen generates no income except for the work product from his professional practice. Including the Tanner, Inc. assets awarded to Ms. Tanner, after the divorce Mr. Swensen has a lesser net worth than Ms. Tanner.

Ms. Tanner contends that during the marriage she had no control or access to marital funds, apparently implying some inappropriateness on the part of Mr. Swensen. However, control of the marital assets is irrelevant in the award of the marital assets. This is particularly true in the present circumstances, since there is no evidence exists that the marital property was depleted because of Mr. Swensen's control.

Specifically, Ms. Tanner complains that Mr. Swensen used marital funds for the payment of his attorney's fees in the amount of \$3,000 - \$4,000. (R. 163). However, Mr. Swensen's attorney's fees were charged against his portion of the marital property and were not charged against Ms. Tanner's portion of marital property. The payment of attorney fees by Mr. Swensen

did not reduce the total marital property to be distributed between the parties since the amount paid was added into his share of the proposed distribution of property. (R. 185-186). Thus, Ms. Tanner's marital property distribution was not reduced by what Mr. Swensen paid in attorney's fees.

Ms. Tanner fails to note that prior to legal representation by Ms. McConkie, Ms. Tanner had access to marital funds and used those marital resources to pay legal fees to her former attorneys in the sum of at least \$5,000. (R. 67). Additionally, Ms. Tanner had a garage sale at the Lincoln Lane residence where marital assets were sold in order to pay for a self-esteem training course for Ms. Tanner. (R. 89). Accordingly, Ms. Tanner reduced the total marital estate to be divided.

Ms. Tanner also complains that Mr. Swensen paid off a student loan with marital funds. The student loan was a marital debt and legal obligation. Ms. Tanner testified at trial that she should bear one-half of the liability of marital debts and obligations. (R. 62). Therefore, it was appropriate to pay the student loan with marital property.

Ms. Tanner argues that Finlayson v. Finlayson controls. 874 P.2d 843, 849 (Utah App. 1994). However, the present case is distinguishable from Finlayson, where the Utah Court of Appeals held that the trial court abused its discretion in crediting the

husband's payments to his mother as a discharge of marital debt. In the Finlayson case there was dispute regarding whether the loan from the husband's mother was actually an enforceable debt or a gift. In the present case, there is no such controversy. The student loan discharged by Mr. Swensen was a legally enforceable contractual obligation to an independent third party, Student Loan Servicing Corporation, incurred during the marriage for the benefit of both parties.

The Court should note that the Appellant's Addendum C and D to her brief contains financial declarations which were prepared by the parties and filed with the trial court several months before trial. The financial declarations were not evidence introduced at trial. While untested financial declarations are an acceptable basis for temporary awards, trial evidence is the basis for making final awards.

The trial court's division and award of the marital property was well within the bounds of its discretion. Ms. Tanner received all of the equity in the Lincoln Lane residence. Pursuant to Ms. Tanner's own appraiser of the Lincoln Lane residence, there are no repairs needed on the house. (R. 80). In contrast, Mr. Swensen is presently renting an unfurnished house. (R. 142). Not only did Ms. Tanner received one-half of the parties' marital estate, she also received her eight percent

(8%) ownership interest in Tanner, Inc. free and clear of any claim by Mr. Swensen with significant value. Ms. Tanner actually received more than Mr. Swensen in tangible assets. Ms. Tanner has not met the burden of showing that "there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." Watson, 837 P.2d at 5.

POINT II

THE TRIAL COURT PROPERLY CONSIDERED AND APPLIED THE JONES FACTORS IN AWARDING ALIMONY.

Trial courts have broad discretion in awarding alimony. In reviewing the trial court's award of alimony, the appellate court will not disturb the trial court's award absent a showing of clear and prejudicial abuse of discretion. Chambers v. Chambers, 840 P.2d 841, 843 (Utah App. 1992); Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah App. 1988) (citing Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986)). Utah law requires that the trial court consider three factors in determining a reasonable award of alimony: (1) the financial condition and needs of the requesting spouse; (2) the ability of the requesting spouse to produce a sufficient income for herself; and (3) the ability of the responding spouse to provide support. Rasband, 752 P.2d at 1333

(citing Gardner v. Gardner, 748 P.2d 1076, 1081 (Utah 1988)); Olson v. Olson, 704 P.2d 564, 566 (Utah 1985); and Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). These three factors are herein referred to as the "Jones factors" as identified in Appellant's brief.

If the trial court considered the Jones factors, the appellate court will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion. Morgan, 854 P.2d at 567 (quoting Schindler v. Schindler, 776 P.2d 84, 90 (Utah App. 1989)); accord English v. English, 565 P.2d 409, 411-412 (Utah 1977); Rappleye v. Rappleye, 855 P.2d 260, 264 (Utah App. 1993).

First, the trial court considered Ms. Tanner's present financial condition and needs. The trial court found that Ms. Tanner had monthly expenses in the amount of \$2,885 per month and imputable income of \$1,000 per month. (Tr. 4). The trial court held that Ms. Tanner had a present need for alimony and awarded her \$700 per month for two years. (Tr. 4-5). Based upon Ms. Tanner's testimony regarding graduation with her Master's degree, the trial court found that Ms. Tanner required assistance for a two year period of time. Ms. Tanner testified that upon graduation she will earn \$20,000 per year. (R. 94). Ms. Tanner also testified that she pays off her credit cards

monthly and has no debt. (R. 60). Further, there is evidence that Ms. Tanner has disposable income. Ms. Tanner purchased a computer for \$1,500 (R. 63), voluntarily enrolled and paid for self-esteem training in the amount of \$2,800 (R. 88-89) for herself and her daughter, and gave charitable contributions in the amount of \$1,600. (R. 99).

Second, the trial court made findings regarding Ms. Tanner's ability to produce a sufficient income for herself. The trial court found that Ms. Tanner had actual income and imputable income in the amount of \$1,000 per month. The trial court computed Ms. Tanner's income by calculating (1) the \$8,000 she received from distribution of the family corporation, (2) the \$1,500 she is capable of earning teaching art classes in the summer, and (3) the \$2,500 she received as a student stipend. The trial court divided the 12,000 attributable as yearly income to Ms. Tanner to conclude that she had an income of \$1,000 per month. (Tr. 3).

Evidence in the records exists to establish that the trial judge considered Ms. Tanner's financial condition and ability to support herself. The record shows that Ms. Tanner received various distributions from Tanner, Inc. over the marriage including distributions of \$8,000 per year for each of the last two years, one distribution in the amount of \$4,000, and two

others in the amount of \$2,000 each. (R. 49, 74-75). Ms. Tanner owns an eight percent (8%) ownership interest in Tanner, Inc. valued at approximately \$36,758 plus an eight percent (8%) interest in the unknown value of 3,500 acres of real property and 150 head of beef cattle. (R. 84-86). The record shows that Ms. Tanner owns eight percent (8%) interest on the \$305,000 contract balance from Tanner, Inc.'s sale of a trading post payable over ten years. Id. The record is devoid of evidence that Ms. Tanner will not receive such distributions in the future.

Ms. Tanner is voluntarily enrolled in school and is voluntarily underemployed. (R. 60). She voluntarily elected not to teach the summer art classes that she taught in the past from which she received \$1,500 annual income. (R. 87).

The trial court also examined Ms. Tanner's educational status and career goals. Ms. Tanner has a secretarial degree from BYU. (R. 22). She worked full time from 1979 through 1982, when Mr. Swensen finished law school. (R. 59). Ms. Tanner received her bachelor's degree from BYU as recently as 1989. (R. 22). Ms. Tanner testified that she is going to school to be retrained. (R. 93). The trial court found that Ms. Tanner is presently enrolled at the University of Utah in a graduate program which she will complete within two years with a Masters Degree in Expressive Therapy. (R. 23-24). Further, the trial

court found that upon graduation Ms. Tanner expects to earn \$20,000 per year. (R. 94). The trial court carefully evaluated Ms. Tanner's financial condition and ability to support herself in awarding rehabilitative alimony, holding that in two years she, by her own testimony, will have income of at least \$20,000 and in two years her need for alimony will cease since she will then be able to provide for herself.

Third, in the Jones factors, the trial court made a specific finding as to Mr. Swensen's ability to provide support. In weighing Mr. Swensen's disposable earnings of \$3,671 per month against his monthly expenses of \$2,108, and \$1,286 child support obligation, the trial court concluded that Mr. Swensen had an ability to pay alimony in an amount of no more than \$700 per month. (Tr. 4). Thus, Mr. Swensen's monthly expenses and court-ordered monthly obligations amount to \$4,094.00.

Ms. Tanner argues that she will not be able to maintain the same standard of living she enjoyed during the marriage. Based upon the evidence and the trial court's finding, any inadequacy in the amount of the alimony award is limited by the family's limited resources and Mr. Swensen's inability to pay any more for monthly support. Therefore, neither party will be able to maintain the pre-divorce lifestyle.

The basic undisputed evidence in the record explains the

basis for the trial court's award of alimony. Where evidence exists to support the trial court's decision regarding each of these three factors, the appellate court will not reweigh the evidence. Watson, 837 P.2d at 5.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPUTING INCOME TO MS. TANNER BASED ON HER HISTORICAL INCOME.

Ms. Tanner claims that the trial court erred by imputing income to Ms. Tanner in the amount of \$1,500 for teaching summer art classes, and in the amount of \$8,000 from Tanner, Inc. However, the trial court did not abuse its discretion in basing its alimony award on Ms. Tanner's historical income. Utah Code Annotated Section 78-45-7.5(7) authorizes the court to impute income in determining support obligations: "(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community." Utah Code Ann. § 78-45-7.5(7)(b) (1953, as amended). The trial court imputed income to Ms. Tanner after careful consideration of Ms. Tanner's employment history and educational qualifications.

The record and testimony reflect that in 1979 Ms. Tanner was employed at a rate of \$6.00 per hour as a graduate assistant and secretary. (R. 23-24). Since that time, Ms. Tanner has acquired

a bachelor's degree and enrolled in a graduate program. Moreover, the judge made a specific finding as to Ms. Tanner's "work history" of receiving \$1,500 for teaching summer art classes. (Tr. 3). Ms. Tanner is voluntarily enrolled in a graduate program at the University of Utah and is voluntarily underemployed. (R. 60). There is no evidence in the record that Ms. Tanner cannot teach summer art classes while she is enrolled as a student in her graduate program.

The trial court also found that Ms. Tanner had imputable income of \$8,000 per year from Tanner, Inc. Contrary to Ms. Tanner's argument, there is no evidence in the record that Ms. Tanner will not receive continuing large distributions from Tanner, Inc. in the future. (R. 83, 84 & 86). The evidence clearly establishes that Tanner, Inc. has a large number of valuable assets including: 3,500 acres in the high New Mexico desert, 150 head of beef cattle, \$125,000 in vehicles and equipment, \$305,000 contract balance, \$4,700 checking account and \$24,700 money market account. (R. 84-86). The assets in Tanner, Inc. have considerable value of which Ms. Tanner owns an eight percent (8%) interest. If Ms. Tanner does not receive stock distributions from Tanner, Inc. in the future, she could liquidate its assets. Ms. Tanner's comment that she was informed by her father that she will not be receiving any more large

disbursements is hearsay which was objected to and sustained on two occasions in the record. (R. 51, 98). Ms. Tanner's argument based upon purported facts which were objected to and sustained by the trial court violative of trial and appellate procedure.

Thus, the trial court formulated its alimony award based upon the Jones factors.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ASSESSING MS. TANNER INCOME FROM EARNINGS RECEIVED FROM HER INTEREST IN HER FAMILY'S CORPORATION.

The Utah courts have adopted the general rule that inherited property is separate property from the marital estate and not subject to distribution upon divorce. Burt v. Burt, 799 P.2d 1166, 1168 (Utah App. 1990); see also Mortensen v. Mortensen 760 P.2d 304, 308 (Utah 1988). Ms. Tanner appears to contend that any distributions that she receives from Tanner, Inc., is "pre-inheritance or pre-marital property," rather than income or imputed income. However, it is clearly within the trial court's discretion to attribute the distributions Ms. Tanner receives from Tanner, Inc. as gross or imputed "income."

Clearly, the distributions from Tanner, Inc. are "income." Ms. Tanner explicitly testified that the disbursements from Tanner, Inc. were "income." (R. 90). Ms. Tanner further testified that Mr. Swensen prepared the parties' tax returns.

(R. 86). Mr. Swensen is a Certified Public Accountant. He testified that he prepared all the tax returns for the family and that he did so pursuant to generally accepted accounting principles. (R. 103). Mr. Swensen further testified that each year Ms. Tanner would receive a Form K-1 allocating the taxable distributions from Tanner, Inc. (R. 104-105). Form K-1 allocates items of income gain, loss, and deduction to the individual shareholders in proportion to their stock ownership. (R. 105). Ms. Tanner and the other shareholders of Tanner, Inc. would receive a Form K-1 representing taxable income which should be included in their respective individual income taxes. Id. Corporate income was taxable to Ms. Tanner and Mr. Swensen was responsible for including Ms. Tanner's Form K-1s as income on the parties' joint tax returns. The Form K-1s evidence distributions received by Ms. Tanner for income tax purposes and are clear evidence of income. Pursuant to the Form K-1s received into evidence, the actual distributions received by Ms. Tanner from Tanner, Inc. amounting to \$2,000 for 1989, \$2,000 for 1990, \$4,000 for 1991, \$8,000 for 1992, and \$8,000 for 1993 (\$24,000) were income from the asset and not a distribution of an asset. (R. 131).

Section 78-45-7.5(1)(b) also provides for determination of imputed and gross income. That provision clearly states that

gross income includes "dividends." Utah Code Ann. § 78-45-7.5(1)(b) (1953, as amended). The distributions that Ms. Tanner received were distributions declared by Tanner, Inc.

Arguendo, even if the actual distributions were considered "pre-inheritance or premarital property" as suggested by Ms. Tanner, the evidence establishes that those distributions were commingled and used by the parties to pay family taxes, obligations, and other family expenditures. (R. 49). Thus, in any case the prior distributions lost their identity and became marital property. Rappleye, 855 P.2d at 263 (citing Burt, 799 P.2d at 1168).

In accordance with Utah law, the trial court properly held that Ms. Tanner's eight percent (8%) interest in her family corporation was pre-inheritance/premarital property. However, the evidence clearly established that the distributions which Ms. Tanner received during the marriage were income and not a distribution of assets. (R. 84). Thus, the trial court did not abuse its discretion by imputing income to Ms. Tanner from the earnings actually received from her interest in Tanner, Inc. since the basis for her income was the sale of a trading post on a ten year contract which has a balance payable of \$305,000.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE ALIMONY AWARD TO TWO YEARS.

Ms. Tanner also contends that the trial court abused its discretion in limiting her alimony award to two years. The trial court's award of alimony is rehabilitative in nature. The trial court found that Ms. Tanner is presently enrolled at the University of Utah in a graduate program which she will complete within two years with a Masters Degree in Expressive Therapy. (Tr. 5, R. 23-24). The trial court specifically found that upon graduation Ms. Tanner expects to be able to earn \$20,000 per year, which together with the child support which she receives from Mr. Swensen will be more than adequate to meet her needs as established by her testimony. (Tr. 5). Finding that Ms. Tanner will complete her graduate schooling within two years, the trial court awarded alimony of \$700 per month for those two years. (Tr. 5). The trial court's award is generous based upon the fact that Ms. Tanner could finish as early as one year. The trial court appropriately found that Ms. Tanner will not have sufficient income for the first two years following the divorce. However, after two years Ms. Tanner will be able to produce sufficient income.

Unlike the facts in the Jones case, Ms. Tanner has a number of marketable skills as evidenced by her secretarial degree, her

art degree, and she has worked intermittently throughout the marriage. Ms. Tanner worked full time in clerical positions up through 1982, when Mr. Swensen finished law school. (R. 59). Since she received her art degree in 1989, Ms. Tanner has regularly taught summer art classes. (R. 87). Further distinguishable from Jones, Ms. Tanner has recently spent a substantial amount of time obtaining higher education for herself while being supported by Mr. Swensen. Within the last five years, she has enhanced her marketability by completing a four-year art degree. Ms. Tanner is presently completing a Master's degree from which she expects to benefit from an income of \$20,000 per year.

"The purposes of an alimony award include enabling the receiving spouse to maintain, as nearly as possible, the standard of living enjoyed during the marriage," and preventing him or her from becoming a public charge. Munns, 790 P.2d at 118; Noble v. Noble, 761 P.2d 1369, 1372 (Utah 1988). The trial court carefully considered Ms. Tanner's ability to maintain, as nearly as possible, the standard of living enjoyed during the marriage. Moreover, the trial judge took measures to ensure that Ms. Tanner will not become a public charge.

Based upon the trial court's findings, Ms. Tanner has received over \$92,000 worth of marital property in assets, has an

eight percent (8%) interest in Tanner Family Corporation, will receive \$700.00 a month for over 24 months (\$16,800.00) in temporary support, and upon completion of her Master's degree, she thereafter expects to earn \$20,000 a year. (Tr. 5-6). Notably, Ms. Tanner owns an eight percent (8%) interest in the ten year contract for the sale of Tanner, Inc.'s trading post which has a contract balance of \$305,000. Ms. Tanner is not, and will not become a public charge. See Munns, 790 P.2d at 118.

The evidence at trial further established that Ms. Tanner has disposable income as evidenced by her testimony of monthly payoff of her credit card obligations, computer purchase, enrollment in self-esteem training courses, and charitable contributions. (R. 60, 63, 88-89, 99).

Contrary to Ms. Tanner's argument, terminating Ms. Tanner's alimony in two years is not "speculative and pure conjecture." The Judge's findings were based upon Ms. Tanner's testimony regarding her expectations and opinions of obtaining employment that would enable her to support herself. By Ms. Tanner's own calculations she will complete her Master's degree and her thesis within two years. (R. 94). Further, Ms. Tanner testified that if she decides not to write a thesis, she may be finished within a year. (R. 95). The trial court gave Ms. Tanner the benefit of any doubt that she will not complete a thesis and finish school

early in making its rehabilitative alimony award. Thus, there was no abuse of discretion in the trial court's consideration of the evidence and limiting of the alimony award to two years.

POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO AWARD ATTORNEY FEES TO EITHER PARTY.

The trial court has discretion to either award or deny attorney's fees. Andersen v. Andersen, 757 P.2d 476, 480 (Utah App. 1988). This Court has held that "[t]he award must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." Willey v. Willey, 227 Utah Adv. Rep. 39, 43 (Utah App. 1993) (quoting Bell v. Bell, 810 P.2d 489, 493 (Utah App. 1991)).

First, Ms. Tanner has not demonstrated financial need for assistance in discharging her attorney's fees as required by Willey and Bell. Id. Based upon the evidence, the trial court specifically found that Ms. Tanner would not need assistance in the payment of her attorney's fees. (Tr. 6). The findings of the trial court are supported by the fact that Ms. Tanner has no outstanding debt and pays off her credit cards monthly. (R. 60). Additionally, Ms. Tanner has sufficient disposable income evidenced by a recent computer purchase (\$1,500), expenditures

for self-esteem training courses (\$2,800), and charitable contributions (\$1,600). (R. 60, 63, 88-89, 99).

As further evidence of Ms. Tanner's disposable income, she has retained three different attorneys to represent her in this matter. (R. 35). The first two attorneys were dismissed because Ms. Tanner believed, as a lay person, they were unqualified to handle her matter. (R. 35-36). Prior to representation by Ms. McConkie, Ms. Tanner paid her former attorneys fees in the amount of approximately \$5,000. (R. 35). Thus, the record demonstrates that Ms. Tanner has been able to pay her attorneys fees in the past.

The trial court also found that Ms. Tanner was not in need of assistance to pay her attorney's fees based upon the property distribution and other sources of income available to her. (Tr. 5-6). Ms. Tanner received \$92,000 of the marital estate and a sizable interest in the Tanner, Inc. Id. Therefore, the trial court was "persuaded that [Ms. Tanner] would not need assistance in the payment of her attorney's fees." (Tr. 6).

Second, according to Bell and Willey, the receiving spouse must demonstrate the ability of the other spouse to pay their attorney's fees. Willey, 227 Utah Adv. Rep. at 43; Bell, 810 P.2d at 493. In this case, the trial court found that neither party demonstrated the ability of the other spouse to pay

attorney's fees. Specifically the trial court evaluated Mr. Swensen's disposable earnings of \$3,671 per month against his reasonable monthly expenses of \$2,108, child support obligation of \$1,286, and alimony obligation of \$700, and made a finding that Mr. Swensen did not have an ability to pay any more to Ms. Tanner in the way of assistance or support. (Tr. 4).

Third, there is no evidence of need or the reasonableness of the requested fees. Bell, 810 P.2d at 493; Willey, 227 Utah Adv. Rep. at 43. Attorney's fees should be denied where there is no evidentiary basis for attorney's fees. Delatore v. Delatore, 680 P.2d 27, 28 (Utah 1984); Kerr v. Kerr, 610 P.2d 1380 (Utah 1980); Butler v. Butler, 461 P.2d 727 (Utah 1969) (holding that an attorney's fee may not be awarded "where there is nothing in the record to sustain the award, either by way of evidence or by stipulation of the parties as to how the court may fix it").

In the present case, the trial court expressly found that there was no evidentiary basis upon which to make an order for attorney's fees to be paid by either Mr. Swensen or Ms. Tanner. (Tr. 6). Moreover, there was no testimony from Ms. Tanner regarding her need for attorney's fees or inability to pay attorney's fees in direct examination or otherwise. (R. 192). Therefore, this Court should affirm the trial court's ruling regarding attorney's fees.

POINT VII

THERE WAS NO ABUSE OF DISCRETION IN THE TRIAL JUDGE DISALLOWING THE PARTIES FROM PRESENTING CLOSING ARGUMENT.

The trial judge did not abuse its discretion in denying both parties the opportunity to present closing argument. The present case is easily distinguishable from the Bunnell v. Industrial Commission of Utah case cited by Appellant. 740 P.2d 1331 (Utah 1987). In the Bunnell case, the Utah Supreme Court held that due process was denied where several unacceptable factors demonstrated that the administrative law judge's conduct was not impartial. Id. at 1333-34. Mere dicta in the Bunnell case suggests that the judge "was also intolerant of counsel's argument on behalf of plaintiff . . . [and] refused to listen to closing argument." The administrative law judge then "told the plaintiff's counsel to save the argument for rehearing, indicating that he had already decided to hold against plaintiff without even examining the medical records." Id. Unlike the Bunnell case, Ms. Tanner was not prejudiced, because neither party was allowed to present closing argument. The trial judge made no indication that he had already made a decision against Ms. Tanner.

The issues in this case were largely factual. The parties were not inhibited in their ability to present the facts or evidence. Ms. Tanner could have filed a trial brief, but chose

not to. The trial judge merely disallowed the parties from arguing the law in closing arguments. The present divorce matter did not involve issues of complex law requiring a presentation and explanation of case law. The trial judge is very familiar with the law and legal standards in divorce proceedings. No such argument was needed for the trial court to come to an equitable resolution of the issues. Divorce matters are heard before a trial judge rather than a jury where argument and instruction may be required. Neither party presented closing argument. It was within the trial judge's discretion to deny both parties' presentation of closing arguments.

CONCLUSION

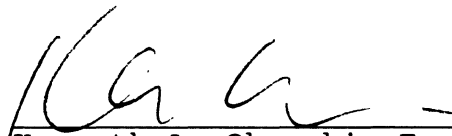
Ms. Tanner contends that the court did not follow the Jones factors in making its findings relating to alimony, property division, and attorney's fees. However, in analysis, it is evident that the trial court's findings support those very factors. The trial court clearly and equitably considered each of the Jones factors in making its findings relating to property distribution, support, and attorney's fees.

Ms. Tanner distorts the facts and ignores the trial court's findings Ms. Tanner received over one-half of the marital assets value at \$92,000, she received an eight percent (8%) interest in Tanner, Inc. and its income (\$36,758 plus 8% interest in 3,600

acres and 150 head of cattle), continues to receive \$700.00 a month for over 24 months (\$16,800.00) in temporary support. Upon completion of her Master's degree, she will have marketable skills from which she expects to earn at least \$20,000 a year. In reality, Ms. Tanner received more tangible assets than did Mr. Swensen. Accordingly, the decision of the trial court should be affirmed.

DATED this 18 day of October, 1994.

Respectfully submitted,

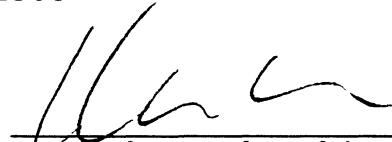
A handwritten signature in dark ink, appearing to read 'K. A. Okazaki', is written over a horizontal line.

Kenneth A. Okazaki, Esq.
PRINCE, YEATES & GELDZAHLER
Attorney for Defendant/Appellee

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 10 day of October, 1994, two
(2) true and correct copies of the foregoing Appellee's Brief
were hand-delivered to:

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ADDENDUM TO BRIEF

D
18

Asset Sheet For Tanner Inc.

Approximately:

1. 3,500 acres in high New Mexico desert (value unknown without appraisal).
2. 150 heads of beef cattle (value presently unknown).
3. \$125,000.00--vehicles and equipment.
4. \$305,000.00--contract balance.
5. \$4,786.00--checking account balance.
6. \$24,700.00--Money Market Account.