

2005

Marjorie M. Hayes v. Arthur C. Hayes : Reply Brief

Utah Court of Appeals

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MARJORIE M. HAYES,

Petitioner/Appellant,

VS.

ARTHUR C. HAYES,

Respondent/Appellee.

APPELLANT'S REPLY BRIEF

Case No. 20050645

**APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE BRUCE C. LUBECK**

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IN THE UTAH COURT OF APPEALS

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Petitioner/Appellant,
vs.

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ARGUMENT

POINT I. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO AWARD MARGEE FIFTY PERCENT (50%) OF THE VALUE OF THE PARTIES' MARITAL PROPERTY AND THE APPRECIATED VALUE OF DUNE ROAD AND THE DUNE ROAD RENTAL ACCOUNT.

- A. The district court misunderstood or misapplied the law by failing to award Margee her presumed fifty percent (50%) share of the value of the parties' marital property.**

As mandated by our case law as cited in our opening brief, the trial court properly categorized the Marital Home and its by-products, the \$263,000 Account and Kate Road, together with the Park City Condo, as marital property. Having reached that point, it appears from the trial court's expressed guiding principles of law, that the trial court was aware that each of the parties was presumptively entitled to 50% of that marital property. (Add. B, ¶ 1.b.). However, nowhere in the record is there any indication that the trial court understood that such presumption could only be ignored if there were "exceptional circumstances" that the trial court had to articulate. Instead, the trial court misunderstood or misapplied the law by incorrectly following another of the trial court's guiding principles expressed as follows:

Property acquired during the marriage with proceeds from separate property is usually considered pre-marital and not marital. (Add. B, ¶ 1.c.).

It is the unjustified application of that last cited principle that makes the trial court's ultimate ignoring of Margee's 50% entitlement reversible. The whole dynamics of the case changed once the Marital Home, the \$263,000 Account, Kate Road and the Park City Condo

were found and concluded to have been marital properties.¹ In spite of that correct determination, opposing counsel, as did the trial court, continues to treat a substantial portion of those assets as separate, pre-marital properties. Such is apparent from the following references to Appellee's Brief:

1. At paragraph 7 of the Statement of Facts, without any citation, opposing counsel states:

The parties agreed, prior to their marriage, that Chuck Hayes would continue his primary residential development business and, in doing so, this would provide a home for the parties.

What the trial court really found is as follows:

Just prior to their marriage, the parties agreed that after their marriage Chuck would continue with his real estate development business and provide a home for the family, and that Margee would continue to work as a flight attendant and provide steady income and valuable employment benefits for their family. (Add. A, ¶ 36).

There is an obvious dramatic difference in the two versions of the parties' agreement.

2. At paragraph 11 of the Statement of Facts, opposing counsel states "Similar to all his prior real estate projects, the Aerie home was titled in Chuck's name" thus implying that the Marital Home was not marital property. Such implication is directly contrary to the

¹ The reason why we have not found it necessary to quarrel with the trial court's finding that Chuck's forgery of Margee's signature on the \$300,000 Line of Credit secured by the Marital Home and Chuck's deeding of the Marital Home to her was innocuous, is because the trial court found and concluded that the Marital Home was marital property. Had the trial court found and concluded that the Marital Home was not marital property, then it would have been crucial for Margee to argue the effect of Chuck's forgeries and deeding of the Marital Home to Margee. That became unnecessary upon the trial court's determination that the Marital Home was marital property.

trial court's findings and conclusions that the Marital Home was marital property. (App. A, ¶ 67; App. B, ¶ 17; App. C, p. 17; App. D, pp. 470, 473, 474).

3. At paragraph 13 of the Statement of Facts, opposing counsel states:

The Court found . . . that it was fair and reasonable that both parties be awarded their pre-marital properties and contributions. (Citations omitted).

The way the paragraph is written, it implies that the pre-marital properties and contributions at issue never became marital property, but the record makes clear that the properties at issue were marital properties. *See* paragraph 2 above.

4. At paragraph 20 of the Statement of Facts, opposing counsel states in the introduction to such paragraph that:

As of the date of trial, but before recognition of each parties' separate contributions, the Court found that the following items were subject to distribution by the Court:

Note how opposing counsel has avoided characterizing the "following items" as marital properties, which they were.

5. At paragraph 25 of the Statement of Facts, opposing counsel again avoids identifying the property at issue as marital property, calling it only "property subject to distribution."

6. At section I of the Summary of Arguments on page 7, opposing counsel states:

The Trial Court correctly determined what properties were separate, which separate properties were contributed by each party toward the acquisition of marital properties, but maintained their separate character, and what marital properties were acquired. Appellant does not dispute those findings, nor does

she appeal from the trial court's determinations. (Emphasis added).

Of course Margee disputes that what opposing counsel refers to as "separate properties" maintained their separate character. The only findings and conclusions in the record make clear that the properties in question became marital properties, and there is absolutely nothing to indicate that they were maintained or remained as separate pre-marital properties. According to the trial court's findings and conclusions, the separate properties at issue all became marital properties. Ignoring that proposition is why the trial court should be reversed for its failure to award Margee 50% of the marital properties.

7. In the first paragraph of Argument I.A. on page 8, opposing counsel states:

By complaining that the Trial Court abused its discretion in unequally distributing the marital estate, Petitioner makes the conceptual and misleading mistake of comparing the valuations of the parties' pre- and post-separate estates, together with their marital estates. This is an indirect way of complaining that the District Court should not have held that the parties' separate contributions remained their separate contributions, a finding that petitioner neither objected nor appealed from. (Emphasis added).

Such argument totally ignores the reality that Margee has compared the 50% value of the marital estate to the pre-marital separate property which the trial court found was no longer separate property. Again, nowhere in the record did the trial court determine that the separate contributions "remained" separate property. That is one of the bases on which Margee has appealed the trial court's failure to give her 50% of the marital property. In other words, even though there was never any determination that what was originally separate property

remained separate property, that is precisely what opposing counsel's argument erroneously assumes. That the trial court eventually acted as though the separate property was really separate property all along, contrary to its own findings and conclusions, is an obvious reason why the trial court either misunderstood or misapplied the law.

8. At the first full paragraph on page 11, opposing counsel states:

The parties and the court all agree that the gross value of property subject to distribution as separate and marital property in this matter consists of:

- 1) The Aerie home, which was sold during the divorce proceedings, and the proceeds applied to the Little Kate lot worth \$381,000, and \$263,000 placed in escrow;
- 2) The Park City condo worth \$150,000; and
- 3) Vehicles totaling \$35,600.

Total value of property to be divided: \$829,600. (Emphasis added).

Here again we find the unwarranted conclusion that the property described in such paragraph has both a "separate and marital" component. That is directly contrary to the trial court's findings and conclusions and serves to make the point again that Margee was entitled to her 50% share of the marital property. Once it was determined to be marital property, it was no longer separate property.

9. In section B. on page 12, opposing counsel contends as follows:

By arguing that Margee is entitled to 50% of all property, . . . Petitioner disregards . . . that Chuck Hayes did not intend to deed the Aerie home as joint property, or to lose the separate character of his pre-marital contributions to that home. (App. Ad. B, R. 841-842, ¶¶ 14-16.). (Emphasis added).

Such argument again incorrectly assumes that Chuck's pre-marital contributions did not lose their separate character when they became marital property. What Chuck intended is

irrelevant, because the trial court found that regardless of his intent, the Aerie home was marital property. See footnote 1 on page 2 above.

10. In the final paragraph of such argument at the top of page 13, opposing counsel states:

Clearly, the Court made significant, uncontroverted findings of separate, non-marital properties and contributions, which justify the Court's decision in extraordinary detail. (Emphasis added).

To the contrary, with respect to the Marital Home, the \$263,000 Account, Kate Road and the Park City Condo, the trial court did not make any findings or conclusions that what had previously been "separate, non-marital properties and contributions" did not become marital properties.

From the foregoing, it is apparent that opposing counsel has tried to evade the reality that the Marital Home, the \$263,000 Account, Kate Road and the Park City Condo did not remain as separate properties, that they were all marital properties, and that there were no exceptional circumstances to justify the trial court's denial of an award to Margee of her 50% presumed share of those properties.

Beginning with the last paragraph of page 11 of Appellee's Brief, opposing counsel cites *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993) in an effort to support the trial court's error. Counsel first states that "Petitioner's methodolgy, however, has been specifically rejected by the Court of Appeals in *Hall v. Hall* . . ." That is simply a misreading of *Hall* since the opinion clearly affirmed the presumptive 50% rule as follows:

In *Burt v. Burt*, 79 P.2d 1166 (Utah App. 1990), this court observed that trial courts must distribute property between the parties to a divorce in a fair, systematic fashion. The *Burt* court noted that the trial court should ‘first properly categorize the parties’ property as part of the marital estate or as the separate property of one or the other. Each party is presumed to be entitled to all of his or her separate property and 50% of the marital property.’ The *Burt* court continued:

‘But rather than simply enter such a decree [automatically], the court should then consider the existence of exceptional circumstances and, if any be shown, proceed to effect an equitable distribution in light of those circumstances. . . .’

Thus, under *Burt*, once a court makes a finding that a specific item is marital property, the law presumes that it will be shared equally between the parties unless unusual circumstances, memorialized inadequate findings, require otherwise. (Citations omitted).

At the bottom of page 11 of Appellee’s Brief, opposing counsel next resorts to the sentence:

Unless the parties’ separate contributions are reimbursed from the proceeds before a division of the remaining marital property, one party would not receive his or her presumptive equal share of marital property or his separate contribution. (Emphasis added).

With that statement, opposing counsel has once again improperly missed the point that the trial court here did not categorize the parties separate contributions as separate property and that there was no “remaining” marital property. It was all marital property. This is the crucial distinction between *Hall* and the case at bar, because in *Hall* it was determined that the wife’s contribution to the parties’ home was always separate property and never became

marital property,² which is precisely the opposite of what happened in the present case. Accordingly, *Hall* does not stand for the proposition that the trial court was required to carve out the separate contributions before dividing the marital estate as urged by opposing counsel. In our case, the separate contributions lost their categorization as separate property.

Finally, on the issue of the trial court's failure to honor the 50% presumption, at pages 16 and 17 of Appellee's Brief opposing counsel lists ten possibilities as to what was in the trial court's mind. Each of the possibilities is discussed as follows:

1. The marriage was of short duration. This argument completely ignores the fact that in their pre-marital agreement the parties agreed that they would jointly produce the bulk of the marital property which the trial court refused to divide equally. The argument also overlooks the trial court's correctly stated principle of law that the standard with respect to marriages of short duration comes into play where no children are born of the marriage. (See Add. C, p. 12). Here, the parties knew Margee was pregnant with Cheyanna before they married.

2. Margee received major benefits from Chuck. Such fact was never mentioned by the trial court as a reason why Margee was not awarded 50% of the marital property. Furthermore, this argument completely ignores the fact that both parties received major benefits from each other as was contemplated by the pre-marital agreement. While Chuck's Statement of Fact number 7 as to the pre-marital

² See footnote 1 to the *Hall* opinion.

agreement between Margee and Chuck, and his Statement of Fact number 19 as to his contributions to the Park City Condo, infer that Margee did not discharge her part of the agreement, any such inference is incorrect. In the Memo Decision beginning with the last paragraph on page 15, the trial court wrote:

The court fully believes and accepts as a principle of law as well as equity, that the work of each spouse is valuable to a marriage. What one does almost always enables the other party to do something else productive. Petitioner's work enabled the parties to have benefits such as insurance, free travel, and income to meet daily expenses. Petitioner's condo from before the marriage enabled the parties to rent their home during the 2002 Olympics for \$40,000, from which the parties bought vehicles and used otherwise for the marriage. Both parties, and the child, benefitted from petitioner's work. The parties took numerous (over one hundred) airline trips, at no cost, to the Dune property and elsewhere. Similarly, respondent's chosen field, where his schedule is his own, enabled petitioner to work while he remained with the child. His work enabled the parties to have a place to go in using the free-fly benefit of petitioner's work. (Add.C, p.15).

3. The parties are older and brought substantial property to the marriage.

Again, this argument ignores the parties' pre-marital agreement.

4. The parties clearly intended that their properties remain separate.

Opposing counsel has failed to include all of what he contends the trial court "detailed." What the trial court wrote at page 14 of the Memo Decision is "The parties intended, and the court so finds, that their properties remained largely separate,

but not entirely.” (Emphasis added). (Add. C, p. 14³). Accordingly, there is nothing in that statement that identifies any exceptional circumstance with respect to what the trial court determined was marital property, and there is no indication that this was an exceptional circumstance relied upon.

5. The parties kept separate accounts and no joint accounts. Surely that fact does not constitute an exceptional circumstance to justify the trial court’s failure to equally divide over \$800,000 of marital property, and there is no indication that the trial court treated it as such.

6. Chuck had no intention to co-mingle his separate property. This argument is totally meaningless, because in spite of Chuck’s intent with respect to co-mingling his assets into the Marital Home, the \$263,000 Account and Kate Road, the trial court still determined that such of Chuck’s separate property became marital property. The fact that he did what he did with his fingers crossed is of no consequence, and the trial court did not identify this fact as an exceptional circumstance.

7. Chuck had no separate retirement and his premarital savings constituted his entire estate. This argument, apparently referring without any citation to Chuck’s pre-marital status, completely overlooks the fact that Chuck’s post-divorce status shows him to be very financially secure even if Margee is awarded 50% of the marital

³ This same language is in the conclusions at Add. B, p. 13.

property. In any event, there is no indication in the record that the trial court considered this an exceptional circumstance so as to justify the trial court's failure to award Margee 50% of the marital property.

8. The marriage was the parties' first and a occurred later in life. This argument is really a repeat of argument number 3 above. The extraneous material presented with respect to the possibility of Chuck having other children was never mentioned by the trial court as a basis for any decision the trial court made, and such certainly did not serve as an exceptional circumstance relied upon by the trial court to justify the trial court's failure to divide the marital property equally.

9. The Park City Condo was Margee's only Utah residence. Opposing counsel has failed to cite any portion of the record indicating that this was a factor at all in the trial court's decision. We fail to understand how this fact is of any significance at all.

10. Margee's needs were met. The same could be said of Chuck's needs. Again, opposing counsel has failed to cite any portion of the record indicating that this was an exceptional circumstance relied upon by the trial court.

What we are left with is that the only analysis for doing what the trial court did is the irrational basis stated in paragraph 17 of the conclusions. Rather than repeat that argument here, *see* the material beginning with the second full paragraph on page 20 through the end of the first paragraph on page 21 of our opening brief.

In summary, the 50% presumption is the law in Utah. Although it is a rebuttable presumption, it is not to be ignored cavalierly. Our law requires the existence of exceptional circumstances to rebut the presumption. In its conclusions the trial court acknowledged the existence of the presumption, yet nowhere does it acknowledge that the presumption can only be rebutted by circumstances that are exceptional. Furthermore, nowhere does the trial court provide us with any meaningful disclosure of the steps he took to reach the ultimate conclusion that Margee was not entitled to 50% of the parties' marital properties. Accordingly, the parties marital properties must be distributed on a 50-50 basis.

B. The district court abused its discretion by failing to award Margee a just and equitable share of the marital property.

Beginning with the last full paragraph on page 9 of Appellee's Brief, opposing counsel argues that Chuck ended up with \$200,000 less cash than when he came to the marriage, while Margee got \$9,550 more cash as a result of the court's treatment of the Park City Condo. First it should be noted that as of the date of the marriage, Margee did not have \$60,000 cash from the sale of her Chicago condo. That sale took place after the marriage. (App. A, ¶ 41). It should also be noted that nowhere does opposing counsel quarrel with the our rendering of what the trial court awarded to both Chuck and Margee as provided in the tables on pages 18 and 19 of our opening brief. Instead, opposing counsel comes up with the incredible statement in the first full paragraph on page 10 of Appellee's Brief that "A fair comparison of the parties' circumstances thus reveals that Chuck's pre-marital net worth declined by \$200,000, while Margee's increased by \$9,550." Such assertion is made in the

face of the fact that the charts referred to show that by virtue of the trial court's treatment of the parties' properties, Chuck's net worth increased by nearly \$650,000 while Margee's net worth increased by approximately \$75,000. Opposing counsel's argument is proof of the old adage that you can only cast aspersions on an argument by improperly trying to prove it.

POINT II. EVEN USING THE "BACK OUT" METHOD OF AWARDING THE PARTIES' ASSETS, THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GIVE MARGEE CREDIT FOR HER \$135,000 EQUITY IN THE PARK CITY CONDO AT THE TIME OF MARRIAGE, AND MARGEE SHOULD ONLY BE CHARGED WITH HER PRO-RATA SHARE OF ANY DEFICIT IN THE MARITAL EQUITY.

At page 13 of Appellee's Brief, opposing counsel argues that there is no marital estate to divide. That is so only if Margee has no additional marital property because of the trial court's failure to honor the 50% presumption in favor of Margee. Such failure further resulted in an unfair result to Margee by the trial court assigning a full 50% share of the \$18,400 deficit in the marital estate as distributed by the trial court. *See* Point II of our opening brief at page 26.

At the bottom of page 13 of the Appellee's Brief, opposing counsel also argues that Margee received more than she was entitled to receive by virtue of the way the trial court treated distribution of the Park City Condo. This is a straw-man argument because Margee readily concedes that the Park City Condo was marital property, to be included with all other marital property, all of which marital property was then to be divided on a 50-50 basis. Opposing counsel's argument that somehow Margee ended up better off as a result of what the trial court did, only makes sense if the trial court were permitted to handle the Park City

Condo differently and apart from all of the other marital property. The bottom chart on page 37 of our opening brief, demonstrates that the \$263,000 Account, Kate Road and the Park City Condo should all be treated as marital properties and fairly allocated with all other marital properties, along with Margee's share of the appreciated value of the Dune Road assets as stated in such chart. Opposing counsel's argument wants us to believe that the trial court did Margee a favor by not treating the Park City Condo as marital property. How can such contention be taken seriously?

Based on what is written on page 23 of the Appellee's Brief, it also appears that opposing counsel misunderstands Margee's position. Margee's position is that the Park City Condo is marital property and should be treated the same as the Marital Home, the \$263,000 Account and Kate Road. However, the trial court did not recognize the 50% presumption in favor of Margee. Margee's argument then becomes two-fold:

(1) It was error to fail to award each of the parties their 50% portions of all of the marital property; or

(2) Even if one resorts to the back-out method of distribution used by the trial court, then Margee must be given credit for her \$135,000 contribution to the Park City Condo to the same extent the trial court gave Chuck credit for his \$55,000 contribution to the Park City Condo, since both contributions were made to such marital property within a month of each other.

Contrary to opposing counsel's argument on page 25 of Appellee's Brief, the trial court valued the Park City Condo at both the date of marriage and the date of trial. What the

trial court did not do was give Margee credit for the full amount of her contributions to the marital properties to the same extent that he gave Chuck credit for his contributions. We emphasize again that Margee's and Chuck's contributions to such marital property were made within one month of each other.

POINT III. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO AWARD MARGEE ANY SHARE OF THE APPRECIATED VALUE OF DUNE ROAD AND ITS RENTAL INCOME.

A. The evidence clearly preponderates against the district court's finding that Margee is not the reason that Chuck did not sell all of Dune Road.

In Argument II, beginning on page 18 of Appellee's Brief, opposing counsel contends that Margee is not entitled to 50% of the enhanced value of the Dune Road assets.

First, it is important to make clear that Margee does not contend she is entitled to any of the value of Dune Road that had accrued prior to the parties' marriage.⁴ There is no question that Chuck alone is entitled to that \$600,000 value. However, in an effort to defeat Margee's entitlement to 50% of the post-marriage appreciated value, opposing counsel states at the bottom of page 19 that "Petitioner also asserts without reference to the record that Chuck could not have built the Aerie home without selling 50% of Dune Road."

That argument completely overlooks the marshalled and controverting facts listed beginning with the last paragraph at the bottom of page 29 and continuing through the end of the first paragraph at the top of page 32 of our opening brief. Furthermore, opposing

⁴ Opposing counsel incorrectly assumes otherwise in his argument on page 12 of Appellee's Brief.

counsel's statement that Petitioner's assertion was "without reference" ignores the reference to Add. D, p. 238 from the transcript of the trial proceedings wherein Chuck is recorded as having testified as follows:

- Q. Had you not sold at least half of Dune Road, would you have been able to build the Aerie Road property as you did?
- A. Absolutely not.
- Q. My question to you is your testimony different today than it was then?
- A. Very little different. I -- there might have been some other options, but I certainly agree with that option.

Consequently, what opposing counsel characterizes as "Petitioner speculates" is fully supported by the record.

Everyone understands that the rule with respect to separate pre-marital property is that the court should generally award such property to the spouse bringing the property to the marriage, together with any appreciation or enhancement of its value, unless the other spouse has enhanced, augmented, maintained, preserved or protected such separate property. See *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1998) and *Dunn v. Dunn*, 802 P.2d 1314, 1320, (Utah App. 1990).

In the face of that case law, Chuck relies heavily on the notion that in 1999 he had options as to what he could have done with Dune Road, including borrowing against it and selling it. However, opposing counsel fails to come to grips with Chuck's uncontroverted admission that neither of such options was realistic, particularly in light of the fact that he could not sell Dune Road for his asking price during the crucial time in 1999, and further in

light of the fact that the sale of the one-half interest to Margee's mother was most advantageous to him and his preferred option. (Add. D, pp. 235-238, 411).

Nothing opposing counsel has said defeats the proposition that by Margee convincing her mother to buy 50% of Dune Road, Margee enabled Chuck to keep 50% of Dune Road. Our case law says that if Margee enhanced, augmented, maintained, preserved or protected Chuck's separate property, then Margee is entitled to a share of the enhanced value of that property. While neither Chuck nor Margee was responsible for the post-marriage increased value of Dune Road, Margee was responsible for the fact that Chuck got to keep his one-half interest in Dune Road.

In an attempt to minimize Margee's contributions, at the top of page 20 of the Appellee's Brief, opposing counsel writes:

Petitioner's sole claim appears to be based upon the fact that she suggested her parents purchase a one-half interest in the Dune Road property, which allowed Chuck Hayes sufficient cash assets to complete the home in Park City, Utah and to maintain his remaining one-half separate interest. Petitioner speculates that had she not suggested her parents buy Chuck's one-half interest, he could not have raised the financing necessary to complete the Aerie home, nor would he be in a position to reap the benefits of the substantial appreciation his one-half interest in Dune Road experienced after the sale. (Emphasis added).

In the paragraph beginning at the bottom of the page 20, opposing counsel further writes:

The most that can be attributed to Petitioner's "suggestion" is that a substantial benefit inured to her parents, who were allowed to purchase a fifty percent interest in the property that Chuck Hayes had worked on, litigated over, rebuilt and renovated throughout a period of twenty-three years prior to the parties' marriage. (Emphasis added).

Nowhere in the record is there evidence that what Margee did was a mere “suggestion.” To the contrary, the trial court found that Margee encouraged such sale, and Margee’s uncontroverted testimony is that she “begged” her mother to buy the one-half interest Chuck was willing to sell in order make good on his obligation to provide the marital home. (App. A, ¶ 44; App. D, p. 155).

In the final analysis, there is the overwhelming evidence as recited in our opening brief that Margee was the reason that Chuck did not sell all of Dune Road, and consequently Margee is the reason why Chuck was able to enjoy a tremendous appreciation of the value of his retained part of Dune Road. Consequently, the trial court’s finding of fact that Margee was not the reason that Chuck did not sell all or part of any of Dune Road is simply contrary to the evidence.

In summary, the increased value of Dune Road resulted from market forces from which Chuck would not have been able to reap any benefit, had Margee not made it possible for Chuck to keep his one-half interest in Dune Road.

B. The evidence clearly preponderates against the district court’s finding that in the future Margee will benefit greatly from Dune Road.

In its Memo Decision, the trial court clearly relied heavily on the notion that in the future Margee would “benefit greatly” from her mother’s one-half interest in Dune Road. The trial court later stated that what the trial court had written in the Memo Decision was not all that determinative of its ultimate decision on that issue.

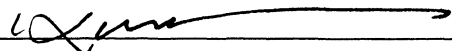
However, nothing opposing counsel has written demonstrates that at the time of the divorce, Margee would “benefit greatly” from Dune Road. The evidence remains uncontroverted that Margee would not inherit any of Dune Road. Any notion that Margee would benefit greatly in the future because in the past Margee used Dune Road along with Chuck and Cheyenna, surely is not sufficient to support the trial court’s finding.

CONCLUSIONS AND RELIEF SOUGHT

Based on the foregoing, Margee repeats her request that the Court issue one of two alternative orders in favor of Margee as detailed in our opening brief.

DATED this 28th day of April, 2006.

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

By 
Kent B Linebaugh
Attorneys for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2006 I caused to be sent, via hand-delivery, two (2) true and correct copies of the foregoing **APPELLANT’S REPLY BRIEF** to the following:

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