

2005

Hayes v. Hayes : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARJORIE M. HAYES, :
 :
 Petitioner/Appellant, : **APPELLEE'S BRIEF**
 :
 vs. :
 :
 ARTHUR C. HAYES : Case No. 20050645
 :
 Respondent/Appellee. :

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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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to U.C.A. § 78-2a-3(2)(h).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court abused its discretion by awarding each of the parties their pre-marital properties and contributions during the marriage.
2. Whether the Trial Court abused its discretion by placing the parties back to their pre-marital status.¹

STANDARD OF REVIEW

The trial court must first determine what property is separate and what property is marital. These issues present questions of law which are reviewed for correctness. *Jeffreys v. Jeffreys*, 895 P.2d 835, 836 (Utah Ct. App. 1995); *Bradford v. Bradford*, 1999 Utah App. 373, 993 P.2d 887. In the allocation of property, the court has considerable discretion and will be upheld unless clear and prejudicial abuse of discretion is demonstrated. *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991). The Trial Court's findings will not be disturbed unless they are clearly erroneous, or a mistake has been made. *Dunn v. Dunn*, 802 P.2d 1314, 1317 (Utah Ct. App. 1990).

STATEMENT OF THE CASE

Petitioner, Marjorie Hayes ("Margee"), filed a Complaint for Divorce requesting dissolution of her approximate five-year marriage to Arthur ("Chuck") Hayes. The issues tried by the District Court concerned Marjorie Hayes' request to be awarded a portion of Chuck Hayes' pre-marital property, which the Trial Court denied, and an equitable

¹ Each of the Court's decisions achieved the same results.

allocation of marital property. Alimony, child support and custody were not at issue. The Trial Court returned to each party, as best it could, their separate pre-marital properties and contributions from separate properties, and, in doing so, returned the parties to their pre-marital financial status. Marjorie Hayes appealed from the District Court's Order.

STATEMENT OF FACTS

1. Petitioner Marjorie Hayes, age 47, and Respondent Chuck Hayes, age 60, separated on or about November 10, 2003 after four years and 10 months of marriage. (App. Ad. A, R. 811, ¶¶ 3, 5, 6).²
2. The marriage, a first for each party, produced one child, Cheyanna, whose care and custody was not at issue.
3. As of the date of marriage, Chuck had acquired and accumulated a substantial pre-marital estate valued at \$1.1 million, consisting of the following:
 - a. Equity in a beach-front home located in West Hampton Beach, New York, acquired in 1975, known as the Dune Road property, valued at \$600,000. (App. Ad. A., R. 821, ¶ 38.)
 - b. Proceeds from the sale of a residential property located in Florida, valued at \$106,000. (App. Ad. A., R. 821, ¶ 39.)
 - c. Proceeds from the sale of a residential property located in Quoque, New York, valued at \$349,000. (*Id.* at ¶ 37.)
 - d. Savings totaling \$60,000. (*Id.* at ¶ 40.)

² All references to the Findings of Fact, Conclusions of Law and Decree are to Appellant's Addendum).

4. As of the date of marriage, Petitioner had also acquired and accumulated a substantial pre-marital estate consisting of the following:

- a. A Park City condominium with an existing \$55,000 mortgage. (*Id.* at ¶ 42.)
- b. A Chicago condominium sold shortly after the marriage valued at \$60,000. (*Id.* at ¶ 41.)
- c. Equity in a Sun Valley, Idaho residential property, valued at \$90,000. (*Id.* at ¶ 44.)
- d. Certain retirement, deferred compensation, 401(K) and IRA benefits.
- e. Financial and brokerage accounts. (*Id.* at ¶¶ 45-52.)
- f. Furniture, personal effects and an automobile.

5. From the time Chuck Hayes left his full-time employment with Chemical Bank in 1978 until his marriage in 1998, he was self-employed as a real estate developer. He lived in, rehabilitated and remodeled residential properties, and used the equity from those properties to pay his living expenses and the expenses of improving his real estate investments. (*Id.* at R. 833, ¶ 93.)

6. All of Chuck Hayes' pre-marital net worth was acquired through the development of real estate properties over the twenty years preceding his marriage. (*Id.*)

7. 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.

8. Following the marriage Chuck Hayes located and purchased a lot in the Aerie Development in Park City, Utah and, acting as general contractor, began to design and construct a home. (*Id.* at R. 826, ¶¶ 61, 62.)

9. The lot and construction of the Aerie home cost approximately \$700,000 (*Id.* at ¶ 63.)

10. Chuck Hayes contributed \$619,000 from the sale proceeds of his separate assets (¶65) and Marjorie Hayes contributed \$79,000 from the sale proceeds of her separate assets (¶ 69) to the construction of the Aerie home.

11. Similar to all his prior real estate projects, the Aerie home was titled in Chuck's name.

12. The Aerie home was sold for the net amount of \$711,628 (¶ 64), thus producing a potential net marital equity of \$13,628 over the parties' pre-marital contributions. (*Id.* at ¶¶ 104, 105; App. Ad. C, R. 630 ¶ 8.)

13. The Court found (*Id.* at R. 824-825, ¶¶ 53, 67) that it was fair and reasonable that both parties be awarded their pre-marital properties and contributions.

14. With the exception of Margee's condominium, the parties always kept separate accounts of their individual assets and/or earnings, never opened joint accounts, and maintained titles to their separate properties in their own names. (App. Ad. C., R. 635, ¶ 2.)

15. Chuck Hayes traced his contributions into the Aerie home directly from the sale proceeds of the Florida property (\$106,000), the Quoque, Long Island property (\$349,000), and his separate pre-marital funds (\$60,000). He also sold a 50% interest in

the Dune Road property to Marjorie's parents for the sum of \$325,000 which was used, in part, for his remaining contribution in the Aerie home. (App. Ad., R. 825, ¶ 55.)

16. Chuck Hayes raised \$840,000 from the sale of his pre-marital properties and of that amount he contributed \$619,000 into the Aerie home and \$55,000 into Marjorie's Park City condominium (by paying off the mortgage). The remaining \$166,000 was expended on furniture, living expenses, tax payments for all properties and other family expenses incurred during the marriage. (*Id.* at R. 827, ¶ 65.)

17. Shortly after the marriage Chuck Hayes paid off the \$55,000 remaining mortgage on Marjorie's Park City condominium, not as a gift, but as a business decision (*Id.* at R. 822, ¶ 43.)

18. Approximately one year later, Marjorie deeded her interest in the Park City condominium to Chuck as a Joint Tenant. (*Id.* at R. 833, ¶ 94.) (Petitioner concedes and the Trial Court found, her Park City condominium became marital property by her acts. (*Id.* at R. 835, ¶ 10; Petitioner's Brief, p. 19.)

19. Chuck Hayes also paid off most of the property taxes on the Park City condominium, improved and maintained that condominium and purchased furnishings and other items for the condominium. (App. Ad. A., R. 834, ¶ 99.)

20. 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:

- a. \$644,000 after payment of marital debts and expenses, remaining from the sale of the Aerie home consisting of:

- i. \$381,000 equitable value of a lot on Little Kate Road;
 - ii. escrowed funds equal to \$263,000.³
- b. The Park City condominium, appraised at \$150,000 as of the date of trial.
 - c. Three vehicles and a four-wheeler with a gross value of \$35,600.
 - d. The marital portion of Marjorie's 401(K) contribution in the amount of \$27,215. (App. Ad. B, R. 842, ¶18i.)

Total value, excluding the 401(K) contribution⁴ and before credit for traced pre-marital contributions, equaled \$829,600.

21. The Trial Court concluded that each party should be awarded and credited their pre-marital contributions as follows:

To Respondent: \$674,500. (\$619,000 to the Aerie home and \$55,000 to the Park City condominium.)

To Petitioner: \$174,000. (\$79,000 contribution to the Aerie home and \$95,000 to the Park City condominium, valued at \$150,000.) (App. A. B, R. 842, ¶ 18.)

22. Each party was awarded one-half of the increase in Petitioner's 401(K) plan.

23. Petitioner was awarded her automobile.

24. Respondent was awarded the remaining vehicles, worth \$34,400.

³ The balance of the net sale proceeds from Aerie was used, with consent of the parties and the Trial Court, for the payment of taxes, marital obligations and living expenses before trial.

⁴ The marital portion was equally divided by a Qualified Domestic Relations Order.

25. Because the total value of all pre-marital contributions equaled \$848,500 and the total value of property subject to distribution only equaled \$829,600, the Court determined that each party should bear equal responsibility for the deficit, and therefore reduced each parties' reimbursement by \$9,450. (*See* ¶19 of the Conclusions; App. Ad. B, R. 842.)

26. After backing out each parties' separate contribution, there was no marital equity left to divide.

SUMMARY OF ARGUMENTS

I. 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 these findings, nor does she appeal from the Trial Court's determinations.

The Trial Court may credit either party's separate contributions before an equal division of the marital property. *See Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993).

After crediting each party with their separate contributions, there was no marital property left to divide. This placed the parties back into their financial status as of the date of marriage, which the Court found to be just and reasonable in light of the evidence, findings and circumstances of the parties. *Cox v. Cox*, 877 P.2d 1262 (Utah Ct. App. 1994).

II. The Trial Court correctly awarded to Chuck Hayes his pre-marital Dune Road property and all of its appreciated value after finding that all such appreciation was

the result of market forces, not the efforts of Chuck or Margee Hayes. The Court also found that Margee's claims to the enhanced value were not sufficient to entitle her to share in the appreciation of Dune Road.

III. Any claim that the Court made assumptions unsupported by the evidence regarding Margee Hayes' possibility of benefiting or inheriting her parents' portion of Dune Road is, at worst, "harmless" with the Court having explained that its comments were not determinative of the issues.

IV. The Trial Court did not err by the use of values determined as of the date of trial. It is within the Court's discretion to determine dates of valuation.

ARGUMENT I

I. THE TRIAL COURT DID NOT ERR IN AWARDING SEPARATE PROPERTIES

Petitioner combines two separate and distinct issues in her first Argument from which she appeals the Trial Court's decision claiming: 1) the Trial Court failed to award Margee 50% of the gross marital property; and 2) the Trial Court should have divided Chuck Hayes' interest in the appreciation of his pre-marital property. Petitioner then reargues her pre-marital claim in Point III of her brief. For clarity, Respondent must respond to these arguments separately.

A. DIVISION OF MARITAL PROPERTY.

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 to nor appealed from. The court's conclusions in this regard are amply supported by specific and detailed findings. (*See B, infra*, p. 12.) It is misleading because at first glance it appears that Margee received one-third of the estate while Chuck received two-thirds. It is not until later in the Appellant's brief that one understands the tables of awarded property include separate and marital properties combined.

Viewed in a more logical manner, the parties' circumstances going into the marriage are fairly simple and direct. Chuck Hayes had his Dune Road Property and significant cash from the recent sale of pre-marital properties totaling \$515,000. Within one year, he had sold a one-half interest in Dune Road to Margee's parents thereby increasing his pre-marital and separate funds to \$865,000.

After the divorce, Chuck Hayes continued to hold his one-half interest in Dune Road and received credit for his traced and separate contributions worth \$665,050. Thus, Chuck Hayes' post-divorce liquid financial status was approximately \$200,000 less than it was at the date of marriage.

As of the date of marriage, Margee Hayes owned her Park City condominium with a mortgage balance of \$55,000 and cash of \$60,000 from the recent sale of her Chicago condominium. After the divorce, Margee Hayes was awarded the same Park City condominium, now free and clear of any mortgage, together with additional cash in the amount of \$14,550 and all of her other pre-marital properties. Thus, Margee Hayes'

post-divorce financial status actually increased by \$9,550 (\$55,000 (paid mortgage) + \$14,550 (cash) - \$60,000 (pre-marital cash) = \$9,550).

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.

The comparisons argued by Margee Hayes vastly confuse the issue by comparing pre- and post-marriage date values of non-marital properties. The Court specifically found that Chuck's interest in Dune Road was pre-marital and its increase in value was due solely to market forces. (App. Ad. A, R. 826, ¶ 59.) The property itself did not change. Similarly, Margee's interest in her pre-marital properties had not changed and were not valued by the District Court because they fall under the same general rule announced in *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988), awarding each party's pre-marital property, "together with any appreciation or enhancement of its value". Margee still owned the Sun Valley property, her brokerage and financial accounts, her furniture, furnishings and other properties. She was also awarded the same Park City condominium she had prior to the date of the marriage. The only change is that she now owned her condominium free and clear of a \$55,000 mortgage.

Margee complains that the Court failed to award her 50% of marital property but supports that claim by comparing all property, separate and marital. Once each parties' pre-marital and separate contributions are separated, it becomes apparent there is no marital estate to divide. (*See C infra.*)

The trial court is afforded considerable latitude in adjusting financial and property interests, and its decisions are given the presumption of validity, overcome only upon a

showing of a misunderstanding or misapplication of the law, resulting in substantial and prejudicial error, if the evidence clearly preponderates against the findings, or if a serious inequity has resulted manifesting a clear abuse of discretion. *Watson v. Watson*, 837 P.2d 1, 5 (Utah 1992); *Thomas v. Thomas*, 375 Utah Adv. Rpt. 23 (Utah 1999).

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 condominium worth \$150,000; and
- 3) Vehicles totaling \$35,600.

Total value of property to be divided: \$829,600.

Petitioner claims one-half of this \$829,600 should have been awarded to her (\$414,800), either before crediting the parties for their separate contributions, or without regard to either party's separate contributions.

Petitioner's methodology, however, has been specifically rejected by the Court of Appeals in *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993), (reversing a trial court's award of 50% of the net equity in the parties' home and then requiring the husband to reimburse the wife's separate contributions to that home from his share of the divided marital property). 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.

Petitioner's argument confuses the concept of marital property by presupposing that once it's designated as marital, the entire estate must be divided equally before reimbursing, crediting, or "backing out" the separate non-marital portions. The *Hall v. Hall* decision clearly requires, absent extraordinary findings to the contrary, an equal division of the marital estate after first subtracting the amount necessary to reimburse separate contributions. This is the method followed by the Trial Court in this matter.

B. PETITIONER IS NOT ENTITLED TO SHARE NON-MARITAL PROPERTY.

By arguing that Margee is entitled to 50% of all property, even the increased value of Dune Road, Petitioner disregards the Court's specific findings that each party made separate contributions (Findings, ¶¶ 65, 69), that the Court traced these contributions directly from the sale of pre-marital properties into their separate accounts (Appellant's Statement of Fact, ¶¶ 18, 21, 22, 27, 38 and 39); that the parties agreed before the marriage that Chuck Hayes would, and could, continue his 20-year history of reinvesting his separate properties into primary residential properties; that certain of these investments were "business decisions," not gifts of property into the marital estate; that Chuck Hayes intended by his acts to maintain the separate character of his pre-marital properties; 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.)

Petitioner has failed to marshal the evidence, or to suggest how the Trial Court's findings were bereft of significant value in finding and concluding that Chuck Hayes'

pre-marital property, including the appreciation thereof, and his separate contributions remained separate and not marital. Petitioner generalizes the result as simply “inequitable” upon a literal interpretation of the term “marital property.” Clearly, the Court made significant, uncontroverted findings of separate, non-marital properties and contributions, which justify the Court’s decision in extraordinary detail.

C. THERE IS NO MARITAL ESTATE TO DIVIDE.

Given the Court’s uncontested findings of separate property and the Court’s appropriate and customary treatment of that property, the net marital estate created a deficit as follows:

1) Gross marital property to be divided:	\$829,600
Less Credit for Petitioner’s separate property:	(\$174,000)
Less Credit for Respondent’s separate property:	(\$674,000)
NET DEFICIT:	(\$ 18,400).

This deficit was equally allocated by the court and reduced each party’s distribution by \$9,200. In light of Respondent’s loss from his pre-marital status, an equal share of this deficit can hardly be described as inequitable.

D. PETITIONER RECEIVED MORE THAN SHE WAS ENTITLED.

All parties agree, and the district court’s findings hold, that the Park City condominium was marital property by reason of Petitioner unilaterally deeding it into joint tenancy. Utah law provides that a spouse may transfer her interest in separately acquired property into the marital estate. Utah Code Ann. § 30-2-3 (1953, as amended). This is generally presumed to be a gift and when coupled with the intent to do so,

transforms the property into marital property. *Bradford v. Bradford*, 1999 Utah App. 373, 993 P.2d 887.

Had the Trial Court maintained treatment of the Park City condominium as marital property and not returned each party's separate contributions to the condominium, the separate contributions each party would have received would have been: (a) \$619,000 to Respondent solely from the Aerie property and (b) \$79,000 to Petitioner solely from the Aerie property. Total \$698,000. This would have left a positive net marital estate of \$131,600.⁵ Assuming the court had equally divided that marital estate, as the law requires, each party would have received \$65,500 in addition to their separate contributions. This results in distributions to Petitioner of \$65,500 in marital property, and \$79,000 in separate property, totaling \$144,500.

By not treating the Park City condominium as marital, the Petitioner received back her Park City condominium, (\$90,000) and the \$79,000 separate contribution she made into the Aerie property. This \$164,800 award was \$20,300 more than if the court had recognized the Park City condominium as marital. If any error can be assigned to the trial judge, it is the Court's treatment of the Park City condominium as being non-marital when in fact all parties agreed, and the court found, that it was marital.

The Court initially expressed its reasoning by suggesting it denied Margee's request for a share of Chuck Hayes' non-marital appreciation in Dune Road, and chose instead to back out what each party had separately contributed to both properties, as a fair

⁵ (\$829,600 less 698,000 = \$131,600).

and equitable resolution. (R. 638.)⁶ As demonstrated above, this allocation gave Margee at least \$20,000 more. Respondent could have appealed the failure of the Court to divide the condominium as marital property, but is aware of the Court's equitable powers to divide all property as it deems reasonable, given all of the determinations of facts made by the Trial Court. Accordingly, neither party should fault the Trial Court's adoption of more than one hundred findings which support its equitable allocation of property.

E. RETURN TO PRE-MARITAL STATUS.

The Trial Court's choice to return both parties' separate contributions, thus returning them to their pre-marital status, was explained in depth in its Memorandum Decision and supported by findings, evidence and conclusions . In *Cox v. Cox*, 877 P.2d 1262 (Utah Ct. App. 1994), the Utah Court of Appeals affirmed the trial court's attempt to restore the parties to their pre-marital status even though the wife had deeded her pre-marital home in joint tenancy to her husband. The Court, relying on *Jesperson v. Jespersen*, 610 P.2d 326, 328 (Utah 1980) and *Georgedes v. Georgedes*, 627 P.2d 44, 45 (Utah 1981), listed a number of factors which support a trial judge: 1) a marriage of short duration; 2) a couple married later in life; 3) the amount and kind of property to be divided; 4) whether the property was acquired before the marriage; 5) the source of the property; 6) the health of the parties; 7) the standard of living; 8) the respective financial conditions; 9) needs and earning capacity; 10) the ages at the time of the marriage and divorce; 11) what each may have given up during the marriage. *See also Bradford v.*

⁶ This issue was then fully briefed and argued by the parties before the Trial Court on Margee's motions and objections (*See Tr. Beginning at R. 886, R. 672 and R. 686.*)

Bradford, 1999 Utah App. 373, 993 P.2d 887; *Hogue v. Hogue*, 831 P.2d 120, 122 (Utah Ct. App. 1992).

In deciding to return the parties to their pre-marital status, the Trial Court detailed, first in its memorandum decision, that:

- 1) the marriage was short-term (R. 627, ¶ 4);
- 2) the Petitioner had received a major benefit during the marriage by Respondent paying the taxes on all properties and substantial sums toward family utilities, activities of the family and child, and many other expenses (R. 633, ¶ 20);
- 3) the parties are older and each brought substantial property to the marriage (R. 635);
- 4) the parties clearly intended that their properties remain separate (R. 635);
- 5) the parties kept separate accounts with no joint accounts at any time (R. 635);
- 6) the Respondent's actions were not a reflection of an intention to co-mingle his separate property;
- 7) the Respondent had no separate retirement benefits and his pre-marital savings constituted his entire estate;
- 8) the marriage was a first for each and each married later in life. The implication that Respondent, at 60 years of age, may not have other children and had no prior children, together with Chuck Hayes' testimony that his daughter would be his only beneficiary, limits one's concern that a child was born as issue of this marriage; (App. Ad. D, p. 374.)

9) the Park City condominium previously owned by the Petitioner was her only Utah residence at the time of the divorce;

10) the Petitioner's needs were met by her job with Delta Airlines, income from invested sources and other properties held such as her now valuable Sun Valley condominium, together with her retirement plans and benefits (*Cox v. Cox*, 877 P.2d at 1269);

The Trial Court clearly considered the factors set forth in *Cox v. Cox, supra*, and supported that decision with sufficient evidence. The Petitioner suggested that the Trial Court abused that discretion by failing to adopt findings which demonstrate the step used by the Trial Court to reach its decision. The exercise of the Trial Court's equitable powers is both a question of law and fact. Yet, where the Petitioner has failed to marshal the evidence, the appeals court may accept the facts found by the trial court in its Memorandum Decision and in its Findings of Fact. *Cox v. Cox, supra* at p. 1270. Clearly, the Trial Court acted properly and within its discretion.

The Trial Court could have distributed Marjorie's Park City condominium as marital property but chose not to do so as a benefit to Petitioner. Margee in fact benefited, as demonstrated, by \$20,300, and should have no room to complain that the court failed to exercise its discretion as provided by law.

ARGUMENT II

THE COURT DID NOT ABUSE ITS DISCRETION BY AWARDING CHUCK HAYES HIS PRE-MARITAL INTEREST IN THE DUNE ROAD PROPERTY

Petitioner has correctly stated Utah law relating to the characterization of separate property and the parties' entitlement to maintain that separate property, together with its appreciation, in a divorce proceeding. The Dune Road property, having been acquired some twenty-three years before the marriage, was pre-marital property. Chuck testified he endured twelve years of litigation with the United States government, rebuilt and remodeled the home several times, all before this marriage. The Court found, based on competent, uncontroverted evidence that any appreciation during the marriage was solely attributable to market forces, not anything either party did during the marriage to improve the property. (App. Ad. C, R. 627-630, ¶ 7.)

Trial courts have been directed to distribute property between parties in a fair and systematic fashion. *Burt v. Burt*, 799 P.2d 1166, 1172 (Utah Ct. App. 1990). Once the court properly categorizes the property as part of the marital estate or as the separate property of one or the other, the court may apply the presumed entitlement to each party by awarding all of his or her separate property and fifty percent of the marital property. *Id.* at 1172. If there are exceptional circumstances that require alternate treatment, the court may effect an equitable distribution in light of the circumstances if the court enters adequate findings memorializing a departure from these general principles. *Mortensen v. Mortensen*, 760 P.2d 304 (Utah 1988); *Neumeyer v. Neumeyer*, 745 P.2d 1276, 1278, n.1 (Utah 1987).

In order to lay proper claim to the Dune Road property, Petitioner must demonstrate that the property was either co-mingled, the Petitioner, by her efforts, significantly augmented, maintained or protected the separate property, or the distribution failed to achieve a full, just and equitable result. *Dunn v. Dunn*, 802 P.2d 1314, 1320 (Utah Ct. App. 1990).

On this issue Petitioner recognizes her obligation to marshal the substantial evidence upon which the Trial Court relied in finding that Chuck Hayes' interest in the Dune Road property remained his separate property. However, Petitioner misperceives her second burden of demonstrating that, despite this marshaled evidence, the findings are "so lacking in support as to be against the clear weight of evidence and therefore clearly erroneous." *Kraus v. Kraus*, 817 P.2d 836, 838 (Utah Ct. App. 1991); *Watson v. Watson*, 837 P.2d 1, 6 (Utah Ct. App. 1992). Petitioner simply re-argues that her cited findings preponderate against the marshaled findings; this does not rise to a level necessary to overcome the district court's determinations. Petitioner must show, while viewing the evidence in the light most favorable to the findings, the evidence is insufficient to support the findings. *Schindler v. Schindler*, 776 P.2d 84, 88 (Utah Ct. App. 1989).

Petitioner also asserts without reference to the record that Chuck could not have built the Aerie home without selling 50% of Dune Road. Yet on that same page, Petitioner refers to Chuck's testimony on page 411 of Addendum D: "I had a lot of options. I could have mortgaged it and built 938. I could have sold it outright . . ."

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 suggested⁷ 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.

Respondent testified, and the court found, (App. Ad. C, R. 627-630, ¶ 7) that he could have sold all or a portion of the property, he could have mortgaged or obtained financing using Dune Road or the Aerie property, or he could have sold all or a portion to others. His decision to sell fifty percent to her parents remained his own decision, related to his own property, and related to the continuation of his separate business of building and developing primary residential properties.

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 a property that Chuck Hayes had worked on, litigated over, rebuilt and renovated throughout a period of twenty-three years prior to the parties' marriage. It was Margee's parents who received the significant benefit of a \$700,000 increase in the value of their investment and it was that ownership which allowed Margee to spend as much as four months a year vacationing at this beachfront property. To the extent that she did any

⁷ Petitioner uses the word "brokered" on page 15 of her Brief. This legal concept has not been used or suggested anywhere in the record below.

clean-up or any “maintenance”, the court determined that she had done so for her own use, or for the benefit of her parents, but it was clearly not significant enough to overcome the huge pre-marital contribution made by Chuck Hayes. Margee’s claim that she cared for or protected the property did not rise to the significant level reflected in *Mortensen v. Mortensen*, 760 P.2d at 307: “...unless the other spouse ... has significantly cared for, protected or preserved it, thereby acquiring an equitable interest in the property”.

The Court’s specific finding that the value and appreciation of the Dune Road property occurred not by reason of either party’s contribution from and after the date of the marriage, but solely because of market forces, meant that Margee Hayes had no claim to any appreciation in the value of the separate marital property since none of that appreciation was attributable to any work performed by Chuck or Margee Hayes during the marriage. *Burke v. Burke*, 733 P.2d 133 (Utah 1987).

ARGUMENT III

MARGEE’S CLAIM THAT THE COURT RELIED UPON INFORMATION OUTSIDE THE RECORD IS HARMLESS.

Margee complains of the Court’s initial belief, expressed in the Memorandum Opinion that Margee may receive a benefit from Dune Road in the future. The District Court explained that the benefit to which he referred was the benefit of her continued use of that property through her family’s fifty percent ownership following the divorce. Dune Road had not sold as of the date of divorce and there was no evidence that Mrs. Hayes would not continue to use that property as a member of her parents’ family.

Believing the statement guided the Court's determinations, Margee objected to the conclusion as not being supported by the evidence and sought to admit an affidavit from Margee's parents that they had no plans to dispose of this property by gift or inheritance. The Court clearly explained that no direct evidence of inheritance was received, but felt that future advantage would not be an improper implication based upon certain facts in the record. Those facts included, as the Court explained, Margee's use of the Dune Road property for as much as four months during the year. The evidence also suggested that Margee had received substantial gifts from her parents (Trial Tr. R. 884 at p. 93). Margee's mother unilaterally placed Margee as a tenant-in-common with her on the Dune Road property rental account to the exclusion of Chuck Hayes. (Trial Tr. R. 884 at p. 124). In addition, Margee's parents were financially secure enough to have purchased the fifty-percent interest in Dune Road for \$325,000 and would likely receive the same \$700,000 appreciation Chuck Hayes would have received if Dune Road sold for its appraised value. There was no evidence that Margee would be disinherited or had an adverse standing in her family or that her family would not have made her a beneficiary of some part of their estate. The implication that she might benefit is not unreasonable.

The District Court acknowledged at a subsequent hearing (as it did in the Memorandum Decision) that there was no direct evidence that Margee Hayes would inherit any benefits from her parents related to their substantial interest in the Dune Road property. To the extent the court committed error by making a reasonable assumption, i.e., that a sibling may one day inherit from her family, is, if anything, "harmless error."

Even if the court had not modified or explained its ruling, the statement that “the increase will likely inure to the benefit of Petitioner though there was no testimony about her siblings or estate plan of her parents” simply stated the obvious. Any evidence suggested by Petitioner, proffered during a post-trial motion through Affidavit of the Petitioner’s parents, is outside the scope of this record and should not be accepted or reviewed by this Court.

The intestate succession laws presume that children will inherit property from their parents. The implication that Margee might benefit in the future is not unreasonable. The Trial Court commented, in addition to being a reasonably natural assumption that she might inherit something, this was not the sole or determinative basis for his belief on any finding or comment that there was a benefit. “She used it, I think the testimony was, at times for as much as four months in the year; and that’s a great benefit. So whether or not she is going to inherit, to me, isn’t determinative. There have been benefits.” (Transcript of Oral Arguments on Objections, p. 24, R. 887.)

ARGUMENT IV

THE TRIAL COURT DID NOT ERR IN VALUING MARGEE’S CONDOMINIUM

Even though Margee acknowledges her Park City condominium became marital property by reason of her deeding it in joint tenancy to Chuck Hayes, she requested of the Trial Court to treat her now consumed pre-marital property as a separate contribution and asked that it be returned to her. Using its equitable powers, that is how the Trial Court decided to treat the Park City condominium even though all parties agreed, and the Court

had found, that it was marital property. Thus, Chuck Hayes lost a legitimate claim to one-half of the value of Margee's donation, or \$45,000, as of the date of trial. Margee next urged the Trial Court to credit her back not \$90,000, based upon the valuation as of the date of trial, but \$135,000, the value she argued the condominium was worth as of the date of marriage.

In doing so, she is attempting to shift to Chuck the responsibility for all of the diminished market value of the condominium which would cost Chuck Hayes another \$45,000. In effect, Margee was able to request the Trial Court use its equitable powers to return to her, as separate property, an interest that was clearly marital. In doing so, the Court recognized that Chuck Hayes would be further adversely affected if a marriage date valuation was used as opposed the trial date valuation.

The Court gave back to Margee, in kind, what she, in fact, had contributed – the condominium. It had been maintained and improved; therefore, she did receive back a tangible property that was in as good a condition as it was on the date of marriage. Chuck Hayes received back his original \$55,000 in traced pre-marital cash, which the Court had earlier determined was not a gift and had come from his separate pre-marital property.

Petitioner's request would have created a shell game, playing tricks with valuations. Had the Court used the higher valuation shifting the entire appraised market loss to Chuck Hayes, he would have lost approximately \$235,000 from his pre-marital status while Margee Hayes would have gained approximately \$55,000. (*See p. 9, supra.*) The Trial Court adopted the values as of the date of trial in a well-considered approach to

an equitable allocation of property in this matter. It is clearly within the Court's discretion to choose an appropriate date to value property and usually that is the trial date. *Rappleye v. Rappleye*, 855 P.2d 260, 262 (Utah Ct. App. 1993).

It is not fair to criticize an overall equitable allocation by analyzing only a few of its parts. The overall allocation of property achieved its equitable purpose and cannot be disturbed on appeal short of a finding of mistake or abuse of discretion.

CONCLUSION

The Trial Court's determinations should be affirmed.

Respectfully submitted this 28th day of February, 2006.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of February, 2006, I caused two true and correct copies of the foregoing Appellee's Brief to be sent, by hand delivery, to the following:

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A handwritten signature in cursive script, appearing to read "Roger W. Steel", written over a horizontal line.