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Allison Q. Kunzler v. Alan Kunzler : Reply Brief

Utah Court of Appeals

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Kim M. Luhn; Schmi and Luhn, P.C.; Attorneys for Petitioner/Appellee/Cross-Appellant; Jennifer D. Reyes; Dorius Bond Reyes and Linares; Attorneys for Petitioner/Appellee/Cross-Appellant. David S. Dolowitz; Dena C. Sarandos; Thomas J. Burns; Cohne, Rappaport and Segal; Attorneys for Respondent/Appellant/Cross-Appellee.

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IN THE UTAH COURT OF APPEALS

ALLISON Q. KUNZLER,

Petitioner/Appellee/Cross-Appellant,

v.

ALAN KUNZLER,

Respondent/Appellant/Cross-Appellee.

: **REPLY BRIEF OF**
: **CROSS-APPELLANT**

:
: Case No. 20061146

:
: Civil No. 034100152

KIM M. LUHN (Bar No. 5105)

SCHMID & LUHN, P.C.

331 South Rio Grande, Suite 201

Salt Lake City, UT 84101

Telephone (801) 531-8300

Facsimile (801) 363-2420

Attorneys for Petitioner/Appellee/Cross-Appellant

JENNIFER D. REYES (Bar No. 9004)

DORIUS BOND REYES & LINARES

29 South Main

Brigham City, UT 84302

Telephone (435) 723-5219

Facsimile (435) 723-5210

Attorneys for

Petitioner/Appellee/Cross-Appellant

DAVID S. DOLOWITZ (Bar No. 0899)

DENA C. SARANDOS (Bar No. 6028)

COHNE, RAPPAPORT & SEGAL

257 East 200 South, Suite 700

P.O. Box 11008

Salt Lake City, UT 84147-0008

Telephone (801) 532-2666

Facsimile (801) 355-1813

Attorneys for

Respondent/Appellant/Cross-Appellee

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KIM M. LUHN (Bar No. 5105)
SCHMID & LUHN, P.C.
331 South Rio Grande, Suite 201
Salt Lake City, UT 84101
Telephone (801) 531-8300
Facsimile (801) 363-2420
Attorneys for Petitioner/Appellee/Cross-Appellant

JENNIFER D. REYES (Bar No. 9004)
DORIUS BOND REYES & LINARES
29 South Main
Brigham City, UT 84302
Telephone (435) 723-5219
Facsimile (435) 723-5210
Attorneys for
Petitioner/Appellee/Cross-Appellant

DAVID S. DOLOWITZ (Bar No. 0899)
DENA C. SARANDOS (Bar No. 6028)
COHNE, RAPPAPORT & SEGAL
257 East 200 South, Suite 700
P.O. Box 11008
Salt Lake City, UT 84147-0008
Telephone (801) 532-2666
Facsimile (801) 355-1813
Attorneys for
Respondent/Appellant/Cross-Appellee

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ARGUMENT I

THE FACTS AND REASONS WHICH SUPPORT THE TRIAL COURT'S DIVISION OF REAL PROPERTY ALSO SUPPORT THE DIVISION OF RESPONDENT'S INTEREST IN KUNZLER RANCH, LLC AND THE VALUE OF THE BULLS.

With respect to Mrs. Kunzler's cross appeal challenging the award to Mr. Kunzler of all of Mr. Kunzler's interest in Kunzler Ranch, LLC and the value of all of the bulls acquired during the marriage, Mr. Kunzler argues that there are "no facts" to contradict the district court's decision, and that Petitioner has failed to list "*any reason*" to overturn the lower court's determination. Superficial emphases aside, the Respondent also expressly recognizes that the Petitioner is relying on the very same "facts" and "reasons" as the court relied upon to award Mrs. Kunzler a one-half ($\frac{1}{2}$) interest in the five (5) parcels of real property. These same "facts" and "reasons" support an award to Mrs. Kunzler of one-half ($\frac{1}{2}$) of the value of Mr. Kunzler's interest in Kunzler Ranch, LLC and one half ($\frac{1}{2}$) of the value the bulls acquired during the marriage.

Specifically, Mrs. Kunzler maintained a home and family for twenty-two (22) years, allowing Mr. Kunzler to spend months away from home on the business of the ranch and the bulls and she actively participated in the feeding and branding of cattle, the raising of crops and in cattle drives and round ups. What there are "no facts" to support and what has been done without "*any reason*" is the differentiation between the parcels of real property, which the

court did divide and the interest in the ranch and the value of the bulls, which it did not divide.

If Mrs. Kunzler's activities in maintaining the home and working on the ranch are sufficient to entitle her to an interest in the five (5) parcels of real property acquired during the marriage, why are they insufficient to award her one half ($\frac{1}{2}$) of the LLC interest acquired during the marriage? If her activities are sufficient to entitle her to one-half ($\frac{1}{2}$) the value of the cows, why are those very same activities insufficient to award her one-half ($\frac{1}{2}$) of the value of the bulls? The answer is that they are not. Instead, Mrs. Kunzler's activities over the course of the marriage are sufficient, and the lower court erred in awarding to Mr. Kunzler all of his interest in Kunzler Ranch LLC and all the value of the bulls.

The Respondent's argument to set aside the court's award to Petitioner of a one-half ($\frac{1}{2}$) interest in the five (5) parcels of real property given to Respondent during the marriage and his argument opposing Mrs. Kunzler's claim that she is entitled to one-half ($\frac{1}{2}$) of his interest in Kunzler Ranch, LLC and the bulls is simple. Everything was gifted to Respondent and Petitioner did nothing to maintain, enhance or protect them. Thus, according to Respondent, Petitioner should leave a twenty-two (22) year marriage, having kept a home for the family and having raised seven (7) children with the following: 1) \$441 per

month in child support for a few years; 2) \$138 in alimony for a period of a few years; 3) \$2,500 for her one-half (½) share of horses; 4) the value of one-half (½) of sixty (60) cows; 5) a 1991 Pontiac; and 6) one-half (½) of a couple of very small investment accounts. Meanwhile, the Respondent should have the other half of the value of the horses, the other half of the sixty (60) cows, and the other half of the investment accounts, together with his entire interest in thousands of acres of real property, his full interest in a cattle ranching business which was the parties' way of life during their marriage, and all of the personal property and livestock that goes with the business but for those animals addressed above. The suggestion is inequity at its worst and contrary to the law.

Both parties acknowledge that the five (5) parcels of real property and the interest in the LLC were given solely to Alan Kunzler and that they were given to him during the marriage. The issue comes down to whether these assets have or have not lost their identity as separate property due to Allison Kunzler's efforts and whether those efforts have augmented, maintained, protected, or enhanced the value of those properties. But, the Respondent fails to mention the other half of the analysis. As set forth in the Petitioner's primary brief, the second half of the analysis is whether "the distribution [of

property in a divorce] achieves a fair, just and equitable result.” Dunn v. Dunn, 802 P.2d 1314, 1320 (Utah Ct. App. 1990).

The Respondent’s argument must fail on both halves of the analysis. In applying the first half of the analysis to the facts of this case, that of the spouse’s efforts resulting in the maintenance, protection or enhancement of the property, Respondent completely ignores that Allison Kunzler was his marriage partner, maintaining the party’s home and raising seven (7) children. Thus, as this court concluded in the Dunn case, supra, even though Mrs. Dunn did not work in Dr. Dunn’s corporation, “she was his partner in the ‘business’ of marriage, and her efforts were necessary contributions to the growth of [Dr. Dunn’s] practice and the business.” Dunn, at 1318.

Applying this standard to the facts of this case, the Kunzlers lived in a remote part of Box Elder County, and the ranch was the family’s way of life. Alan Kunzler was gone for months at a time herding, buying and selling cattle, and Allison Kunzler was left alone to care for the home and the family. Alan Kunzler simply could not have invested the time and energy in the business of the ranch if it were not for his partner in the business of marriage. “[H]er efforts were necessary contributions to the growth [of the ranch].”

Secondly, Allison Kunzler did in fact actively participate in the business of the ranch. The only argument that the Respondent can make to counter

these facts is that the testimony at issue was not elicited at trial, but was instead submitted via affidavit as part of a previously filed motion for summary judgment. The motion and Alan Kunzler's opposition were fully briefed long before trial, but the court did not rule on the motion prior to trial. Instead, at the beginning of the second day of trial, counsel for the parties' argued the motion for summary judgment. In the course of this argument, counsel for Allison Kunzler made specific reference to the affidavit. (See Trial Transcript, day 2, August 18, 2005 at pages 7 through 12.) Thus, the testimony in the affidavit was addressed specifically at trial.

Therefore, in addition to being a partner in the business of marriage, Mrs. Kunzler actively participated in the business of the ranch, feeding cattle, branding cattle, making meals for ranch hands, assisting in the production of crops and feed, including running a swather and driving trucks and trailers, and she participated in various cattle drives and round ups. Yet, if the Respondent prevails on appeal, she will have little to show for a lifetime of work.

This brings us to the second half of the argument relating to when separate property can and cannot be awarded to another spouse. If in fact the five (5) parcels of real property, the interest in the Ranch and the bulls are not divisible as they remained separate property, then the issue becomes whether

such a “distribution of property achieves a fair, just and equitable result.”

Dunn, 802 P.2d at 1320.

This court relied on Dunn in the case of Elman v. Elman, 45 P.2d 176 (Utah App. 2002). In Elman, this court affirmed the trial court’s award to the Wife of a portion of Husband’s premarital and separate business partnerships where the trial court found that Wife “aided and freed [Husband] to engage in [partnership managing] activities largely because of the responsibilities [she] assumed”. Id. at 182. The Elman court concluded that “marital labor augmented Husband’s partnership interests.” Id. Even if no evidence from Mrs. Kunzler’s affidavit is considered, she spent months alone in a remote area of Box Elder County, maintaining the family and raising the parties’ children, thus “aiding and freeing” Mr. Kunzler to engage in ranch activities because of the responsibilities she assumed. As such, her “marital labor augmented” Mr. Kunzler’s ranch interest.

Therefore, even if Mr. Kunzler could prevail on his argument that Mrs. Kunzler did nothing to enhance, maintain or protect the ranch and its properties, an award of one hundred percent (100%) of these assets to Mr. Kunzler does not and cannot achieve a fair, just and equitable result, and his appeal must also fail on this argument.

This court should affirm the trial court's award to Mrs. Kunzler of a one-half (½) interest in the five (5) parcels of real property acquired by Mr. Kunzler over the course of their marriage and reverse the award to Mr. Kunzler of his interest in Kunzler Ranch LLC and one hundred percent (100%) of the value of the bulls.

ARGUMENT II

THIS CASE MUST BE REMANDED FOR DETERMINATION OF A PROCESS TO SEPARATE THE PROPERTY INTERESTS OF THE PARTIES.

In a divorce, courts must strive to separate the parties and their interests as completely as possible to avoid future disputes and litigation. Although Mrs. Kunzler did not make a proposal at trial for the delivery to her of her interest in the real property, she was stymied by a previous court order denying her request that the properties be appraised and that the parties be ordered to share those costs equally. The court went so far as to rule that, despite his greater knowledge, Mr. Kunzler would not be required to present any evidence at trial regarding the value of the properties. Given Mrs. Kunzler's complete lack of funds to obtain extensive appraisals on her own, Mrs. Kunzler was unable to present evidence of value at trial.

Even so, the current circumstances where the parties continue to hold property together, and sometimes holding that property with Mr. Kunzler's

siblings is untenable. Something must be sold to obtain proceeds to do appraisals on the properties and some process designated for the payout of Mrs. Kunzler's interest. The parties only other option is to engage in protracted partition litigation, not only between themselves, but also joining all of the co-owner siblings.

Frankly, if the court affirms the property division over Mr. Kunzler's objections, it is clear that it is also in Mr. Kunzler's best interest that a procedure be determined. Otherwise, Mrs. Kunzler must either file the expensive partition litigation or, if she simply holds her interest, she will be free to do such things as encumber her interest or leave it to someone other than the parties' children in her will. No set procedure for payout will only make things more expensive or more complicated. Such a result is in neither party's best interest.

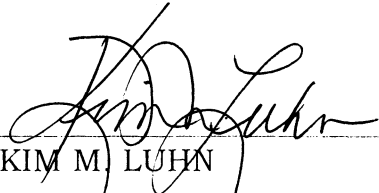
CONCLUSION

Contrary to Mr. Kunzler's argument, the same "facts" and "reasons" which clearly support the trial court's division of his interest in real property acquired during the marriage also support a division of his interest in Kunzler Ranch, LLC and the value of the bulls. The award of the properties should be affirmed; the award of the ranch interest and the bulls solely to Mr. Kunzler

should be reversed; and the case must be remanded for determination of a process to payout Mrs. Kunzler's interest to her.

DATED this 9th day of March, 2008.

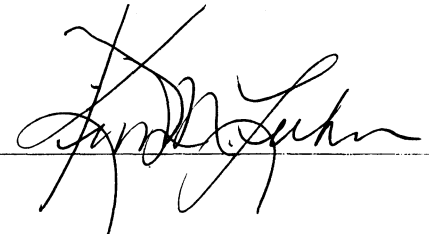
SCHMID & LUHN, P.C.


KIM M. LUHN

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 2008, I caused to be hand delivered, two (2) true and correct copies of the foregoing document to the following:

David S. Dolowitz
Dena C. Sarandos
COHNE, RAPPAPORT & SEGAL P.C.
257 East 200 South, Suite 700
P.O. Box 11008
Salt Lake City, UT 84147-0008


KIM M. LUHN

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2008, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing document to the following:

Jennifer D. Reyes
Dorius, Bond, Reyes, & Linares
P.O. Box 895
29 South Main
Brigham City, UT 84302

