

2006

Kae Jensen v. David Leon Jensen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KAE JENSEN,

Petitioner / Appellee

v.

DAVID LEON JENSEN

Respondent / Appellant

2006/164-CA
Case No. 044600066

BRIEF OF APPELLANT

APPEAL FROM SIXTH DISTRICT COURT, SEVIER COUNTY, UTAH

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UTAH APPELLATE COURTS
APR 24 2007

KAE JENSEN,	:	
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Petitioner / Appellee	:	Case No. 044600066
	:	
v.	:	
	:	
DAVID LEON JENSEN	:	
	:	BRIEF OF APPELLANT
Respondent / Appellant	:	
	:	

JUDGE DAVID L. MOWER

Attorney for Appellee

All Parties

Kae Jensen

David Leon Jensen

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Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988)

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Statutes

Utah Code Ann. 30-3-5

Utah Code Ann. § 78-2a-3

JURISDICTION

Jurisdiction is conferred upon this Court pursuant to Utah Code Annotated, § 78-2a-3.

ISSUES AND STANDARD OF REVIEW

In its Conclusions of Law, the court below ruled that the increase in equity of

Mr. Jensen's stock in the company should be divided between the parties. However, the formula used by the court failed to take into account the interest in the company of other individuals and resulted in Ms. Jensen being awarded much more than would have resulted in the division the court intended. Did the court err when it applied the formula it did in dividing the increase in equity?

In its Findings of Fact, the court below found that Clara Jensen's interest in the company does not pass to Mr. Jensen until the time of Clara Jensen's death. Yet in its Conclusions of Law the court awards to Ms. Jensen a portion of the increase in the stock of the company that is associated with Clara Jensen's shares, thus awarding to Ms. Jensen property that does not belong to either of the parties to the divorce. Did the court err when it awarded to Ms. Jensen property that belongs to an individual not a party to the divorce?

In its Conclusions of Law, the court below properly cited *Mortensen v. Mortensen* as the ruling law in this matter, yet the court failed to follow the rule laid out by the Utah Supreme Court in *Mortensen*. The court also misapplied precedential cases to the facts of this case. Did the court err when it failed to apply the rule of *Mortensen* after correctly stating it as the law governing this case, and when it applied to the facts of this case the outcome of cases that are not analogous to it?

The court below awarded attorney fees to Ms. Jensen without inquiring or

making findings concerning Ms. Jensen's financial need, Mr. Jensen's ability to pay, or the reasonableness of the fees. Did the court err when it awarded attorney fees?

Standards of Review

The trial court's property division is reviewed under an abuse of discretion standard. *Enrody v. Enrody*, 914 P.2d 1166, 1169 (Utah Ct. App. 1996). Whether the trial court's findings of fact in support an award of attorney's fees are sufficient is a question of law, reviewed for correctness. *Id.*

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This appeal concerns the divorce of Kae Jensen ("Ms. Jensen") and David Jensen ("Mr. Jensen"). On November 27, 2006 the trial court entered Supplemental Findings of Fact and Conclusions of Law and Supplemental Decree of Divorce. The parties were married in November, 1998, separated in January, 2004, and were divorced on May 16, 2005. By the time of trial both parties were remarried to other individuals.

At the time of the marriage Mr. Jensen owned stock in a closely held family company, A & D Jensen Contractors, Inc. ("the company") along with his brother, father, mother and uncle. Also, prior to the marriage, in 1985 the company purchased the stock of Mr. Jensen's uncle which stock was held in the company as treasury stock during the marriage.

In 1989 Mr. Jensen's father died. Mr. Jensen's mother, Clara Jensen, acquired ownership of his shares. In 1999, Clara Jensen assigned her shares to Mr. Jensen and his brother Mark Jensen in order that her personal assets would not have to be pledged as collateral when the company borrowed funds. However, Clara Jensen retained ownership of the shares and the trial court found that the assignment would not constitute a transfer of the stock until the time of her death. The court also recognized an ownership interest in the company by Mark Jensen.

Mr. Jensen worked for the company during the period of the marriage. Ms. Jensen went to school and owned and operated a massage business during the marriage.

Although the trial court seems to recognize numerous owners of the company, it ruled that half the increase in the adjusted value of the company be awarded to Ms. Jensen.

SUMMARY OF THE ARGUMENT

Point One

The trial court ruled that the increase in equity of Mr. Jensen's stock should be split between the parties. However, the court failed to take into account other owners of the company, thus dividing the increase as though all the stock belonged to Mr. Jensen. In this way the court erred by awarding more to Ms. Jensen than it had

intended to.

Point Two

The trial court found that Clara Jensen's interest in the company would not pass to Mr. Jensen until the time of her death. Yet, the court awarded to Ms. Jensen an increase in the value of the stock that is ascribable to shares the court found to be Clara Jensen's. Thus the court awarded to Ms. Jensen property that does not belong to either party to the divorce.

Point Three

The trial court cited *Mortensen v. Mortensen* as the Supreme Court precedent driving the rule of this case. However the court's rulings ignored the rule laid down in *Mortensen*. Further, the court cites a number of cases in support of its ruling that Ms. Jensen's role as primary care-giver to the couple's child and her contribution to household responsibilities entitle her to a full half share in the company's increase in value over the years of the marriage. However these cases do not support the court's ruling.

Point Four

The trial court awarded attorney fees to Ms. Jensen. However, the trial court made no inquiry nor findings concerning Ms. Jensen's financial need, Mr. Jensen's ability to pay, or the reasonableness of the fees.

ARGUMENT

POINT I

The trial court erred when it calculated the division of the increase in the company's equity

In its Conclusions of Law, the court below ruled that the increase in equity of Mr. Jensen's stock in the company should be divided between the parties.

Conclusions of Law ¶ 22. The court then promulgated the following formula to effectuate this division:

[C]hange in adjusted total equity less the 75% of the credit card debt that respondent should pay, less the attorney's fees that Respondent should pay, and less the value of the Petitioner's business. ($\$230,851 - 18,724.68 - \$12,562.50 - \$5,000 = \$194,563.82$) This number should be divided by two, which represents each party's share of equity. ($\$194,563.82 / 2 = \$97,381.91$)

Id. at ¶ 23.

The court then awarded Ms. Jensen \$97,281.91 as her share of the increase in value of Mr. Jensen's stock. *Id.* at ¶ 24.

The court is in error. Instead of dividing Mr. Jensen's portion of the increase in equity between the parties, the court has divided the entire increase in equity. This includes the

value of shares not found to be owned by Mr. Jensen. While the court makes no specific findings as to ownership of the company stock, it does seem to accept that there is at least one other owner and possibly two. *Id.* at ¶¶ 30 - 46.

POINT II

The trial court assigned to Ms. Jensen property that belongs to an individual not a party to the divorce

The trial court found that Mr. Jensen's mother, Clara Jensen, had earmarked her 50% share in the company to be devised to Mr. Jensen and his brother Mark Jensen upon her death as their inheritance from her estate. Supplemental Findings of Fact ¶¶ 44, 45. The court found that Clara Jensen "assigned" her shares to Mr. Jensen and Mark Jensen so that her assets would be protected from the company's liabilities. *Id.* at ¶ 44. The court heard testimony that this method of asset protection was neither unusual among closely held companies such as this one, nor fraudulent. Trial Transcript, July 31, 2006, pp.12-13, ll. 23. Accordingly, the court found that this "assignment" would not constitute a "complete transfer" of her interest in the company to Mr. Jensen and Mark Jensen until the time of her death. Supplemental Findings of Fact, ¶ 45.

The court then ruled that the entire increase in equity of the company during the time of the marriage be divided between the parties. Supplemental Conclusions of Law ¶ 22. The court is in error since, for assets to be distributed as marital property, the assets

must be in the legal possession of one, or both, of the marital parties. Enrody v. Enrody, 914 P.2d 1166, 1169 (Utah Ct. App. 1996). Here, it appears that legal possession of the stock remains with Clara Jensen. In any case, the court does not specifically find otherwise. By way of illustrating the court's error in awarding away Clara Jensen's property, if she so pleased, Clara Jensen presumably could change her mind about leaving her stock to Mr. Jensen and could leave it instead to someone else or dispose of it in some other way.

POINT III

The Trial Court Ignored the rule of law laid out by the Utah Supreme Court in Mortensen v. Mortensen, and misapplied other precedents

The trial court cited Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988), as the Supreme Court precedent driving the rule of this case. Supplemental Conclusions of Law, ¶ 21. However the court's rulings ignored the rule laid down in Mortensen. Further, the court cites a number of cases in support of its ruling that Ms. Jensen's role as primary care-giver to the couple's child and her contribution to household responsibilities entitle her to a full half share in the company's increase in value over the years of the marriage. Id. at 22. As will be discussed below, these cases do not support the court's ruling.

Mortensen v. Mortensen does not support the trial court's ruling

The trial court correctly cites *Mortensen v. Mortensen*, 760 P.2d 304 (Utah 1988), for the proposition that a party's separate property acquired by gift should be awarded to the party. (Supplemental Conclusions of Law ¶ 21.) However, the court then erroneously enlists *Mortensen* and three other cases to support awarding Ms. Jensen a portion of the increase in value that occurred during the marriage. *Id.* at ¶ 22.

In *Mortensen*, the Utah Supreme Court laid out the rule for courts making property divisions pursuant to Utah Code Ann. 30-3-5. “[T]rial courts making “equitable” property division...should...generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its value, unless...the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it....The remaining property should be divided equitably between the parties as in other divorce cases....” *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988) (other exceptions to the general rule not relied upon by the trial court are omitted from the quoted material).

Ironically, the *Mortensen* court let stand an unequal division of marital property. However, the Court based its affirmance, not on one of the exceptions to the general rule it had laid out, but rather on the fact that it was not the trial court who had made the property division. *Id.* at 309. The unfortunate appellant had stipulated to a

property division that awarded him personal property in stock in a family farm but offset that with a division of the remaining property that the appellant felt was less than he was entitled to. *Id.*

“Since the trial court did not actually make the division of property here but only accepted the division made by the parties themselves,” the Supreme Court explained, “we cannot presume that had the court made the division, it would have fallen into error.” *Id.* In explaining that the division was not facially inequitable, the Court pointed out that, for her part in the stipulated settlement, the appellee wife had waived all right to alimony. *Id.*

Thus, while *Mortensen* is a proper statement of the rule the court should have followed when dividing the property in the present case, its facts do not provide any rationale for deviating from the general rule and awarding Ms. Jensen half the increase in value of the company that occurred during the marriage.

The court below cites three additional cases in support of its ruling that Ms. Jensen is entitled to half the increase of the company’s value. The court made no attempt to analyze these cases or to explain why they should determine the outcome under the facts of this case. Each case will be discussed below.

***Elman v. Elman* is not analogous to the present case**

In *Elman* the husband had acquired interests in family real estate partnerships.

Elman v. Elman, 45 P.3d 176, 2002 UT App 83, ¶ 3 (Utah Ct. App. 2002). In awarding a “small share of the appreciation on Husband’s partnership interest,” to the wife, the court first pointed to the fact that the couple had jointly agreed that the wife would quit her career in property management in order to manage the couple’s sizeable marital properties. *Id.* at ¶ 4.

“She secured land for, and was in charge of, building the parties’ Park City home. The home increased in value from \$685,000 to over \$1,000,000 at the time of trial. Additionally, Wife located, sold, and traded other marital properties. In particular, she was involved in the acquisition of a Montana ranch, which increased in value by approximately \$442,000 at the time of trial; a Park City lot that sold for a \$30,000 profit; and a lot, valued at \$895,000, which she traded for a lot in the Colony at the Canyons..., valued at \$1,200,000 at the time of trial.” *Id.*

These marital assets, which the court found the wife had grown, were awarded 50% to the husband. *Id.* at ¶ 24. Thus, the court found it “only equitable, given the unusual responsibilities she assumed, that Wife share in the appreciation on the properties Husband grew during the marriage.” *Id.*

While the court deemed these unusual facts of the wife managing and growing sizeable marital assets an “extraordinary situation” where equity demanded an award of the husband’s separate property to the wife, it nevertheless made only a “small and

narrowly drawn award based on the years of Husband's most active partnership management and only above a reasonable rate of appreciation." *Id.* at ¶ 26. Unlike the present case in which the trial court awarded to the wife half of the asset's appreciation, the *Elman* court subtracted from the award appreciation due to inflation by subtracting from the award a reasonable rate of return.

The *Elman* court awarded the wife a share of the husband's non-marital property's appreciation because the case was a truly extraordinary situation in which, by mutual agreement of the parties, the wife quit her career in order to take on the considerable job of managing the couple's sizeable property assets. Furthermore, by the wife's efforts, those assets greatly increased in value. The court here sites *Elman* as authority for awarding Ms. Jensen with half of the appreciation of the company's value. Supplemental Conclusions of Law, ¶ 22.

The court invokes *Elman* for authority to deem the increase in the company's value over the course of the marriage as marital property where Ms. Jensen took "upon herself the household responsibilities and care of the child." Supplemental Conclusions of Law ¶ 22. But *Elman* does not support such an outcome. Unlike in *Elman*, there is nothing extraordinary about the present case justifying the court's award to Ms. Jensen of half the appreciation of the non-marital property. Unlike Ms. *Elman*, Ms. Jensen continued to work outside the home throughout the marriage. Supplemental Findings of

Fact ¶ 13 - 15. The business she ran was not incorporated into the divided marital assets but remained her own non-marital property. Supplemental Conclusion of law ¶ 19.

Furthermore, even under the extraordinary facts of *Elman*, the court did not award the wife half the appreciation of the business over the entire period of the marriage. Rather, the court awarded a small portion of the increase, removing from the wife's share that increase resulting from inflation, and awarded a share of the increase extending over only a part of the marriage.

Savage v. Savage and Lee v. Lee predate and violate the rule laid out in Mortensen v. Mortensen

The court cites to *Savage v. Savage*, 658 P.2d 1201 (Utah Ct. App. 1983), and *Lee v. Lee*, 744 P.2d 1378 (Utah Ct. App. 1987) for support of its ruling that the increase in the company's value over the course of the marriage is marital property since the wife took on household responsibilities and care of the child. Supplemental Conclusions of Law ¶ 22. But both these cases were decided prior to the rule enunciated in *Mortensen v. Mortensen* discussed above. Further, in the case of *Lee*, the wife quit her job at her husband's request and assisted in the operation of the corporation without receiving pay for her work. *Lee* at 1380.

In *Mortensen v. Mortensen* the Utah Supreme Court reviewed the field of conflicting decisions regarding awards of gifted, inherited and premarital property in

divorce proceedings both in Utah as well as in other jurisdictions. 760 P.2d at 305 - 308. The court then announced the rule to be followed by Utah courts when making property divisions in divorce cases. *Id.* at 308. Under that rule courts should generally award property acquired by one spouse by gift and inheritance during the marriage to that spouse, together with any appreciation or enhancement of its value unless the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it. *Id.*

The court here asserts that the increase in the value of Mr. Jensen's property is marital property because Ms. Jensen contributed to the increase by taking on household duties and care of the couple's child. Supplemental Conclusions of Law ¶ 22. In so doing, the court has abused its discretion unless the taking on by a party of such duties *by law* constitutes contribution to the enhancement, maintenance, or protection of the other party's non-marital property. It is not clear, for instance, how or to what extent Ms. Jensen's efforts contributed to the increase. It is not even clear that her efforts contributed to such increase.

POINT IV

The Trial Court Awarded Attorney Fees Without Considering Need, Ability, or Reasonableness

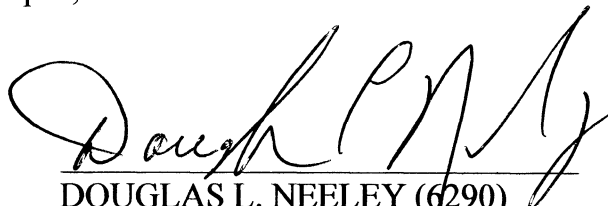
The trial court awarded attorney fees to Ms. Jensen. However, the trial court

made no inquiry nor findings concerning Ms. Jensen's financial need, Mr. Jensen's ability to pay, or the reasonableness of the fees. See e.g., *Kelley v. Kelley*, 9 P.3d, 171, 2000 UT App 236, ¶30 (Utah Ct. App. 2000) (stating, "in awarding attorney fees, the trial court must consider the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees").

CONCLUSION

For the foregoing reasons, the court's award to Kae Jensen of the increase in the value of the company stock and attorney fees should be reversed. Appellant, David Leon Jensen, asks for an award of attorneys fees incurred on appeal.

DATED this 24th day of April, 2007.


DOUGLAS L. NEELEY (6290)
Attorney for the Respondent/Appellant

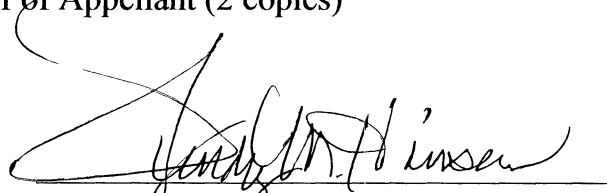
Mailing Certificate

I hereby certify that I conveyed the following this 24 day of April, 2007, to the following by the following means:

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