

2006

Kae Jensen v. David Leon Jensen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KAE JENSEN,

Petitioner / Appellee

v.

DAVID LEON JENSEN

Respondent / Appellant

Case No. 20061164

REPLY BRIEF OF
APPELLANT

APPEAL FROM SIXTH DISTRICT COURT, SEVIER COUNTY, UTAH

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SUMMARY OF THE ARGUMENT

Point One

Ms. Olson urges that Mr. Jensen should be required to marshal the evidence in favor of the lower court's findings. However, as will be discussed below, Mr. Jensen's appeal addresses the legal sufficiency of the lower court's conclusions of law, and the court's failure to make findings of material facts. Therefore, marshaling is not required or even appropriate.

Point Two

Ms. Olson argues that the court below committed harmless error when it failed to make a finding as to the ownership of the business. Ms. Olson suggests that such findings, at least with regard to Clara Jensen's shares, are implied in the division of property contained in the conclusions of law and that the error is harmless. However, as will be discussed below, Ms. Olson fails to confront that the court's conclusions of law imply away, not just Clara Jensen's ownership in the company, but also Mark Jensen's ownership. While the proper ownership of Clara Jensen's shares was at least under some debate, Mark Jensen's status as an equity holder in the company was never disputed and, while the court below never got around to pegging his ownership with any

specificity, the court seems to recognize in its findings of fact that he owns at least some substantial number of shares. By failing to make findings on material facts, the court committed reversible error.

Point Three

Ms. Olson asserts that it was within the court's discretion to determine that the entire increase in company equity was marital property. However, as will be discussed below, while the court makes no findings on the material facts regarding company ownership, it seems to recognize that some substantial equity ownership resides with Mark Jensen. Furthermore, the court's findings regarding Clara Jensen's shares are not clearly stated. It is not within the court's discretion to determine that equity ascribable to shares belonging to third parties is marital property. By determining that the entire increase in company equity was marital property, the court committed a reversible error.

Point Four

Ms. Olson admits that the court awarded attorneys fees in the case without making required inquiry or findings. However, Ms. Olsen asserts the failure was harmless error. In awarding attorney's 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. The court below did none of

these things.

ARGUMENT

POINT I

It is neither necessary nor appropriate for Mr. Jensen to marshal the evidence as his appeal does not challenge a finding of fact

Ms. Olsen urges that Mr. Jensen should be required to marshal the evidence in favor of the lower court's findings. However, Mr. Jensen's appeal does not seek to challenge a finding of fact, but rather, addresses the legal sufficiency of the lower court's conclusions of law, and the court's failure to make findings of material facts. Therefore, marshaling is not required or even appropriate.

Utah Rule of Appellate Procedure 24(a)(9) requires that "A party challenging a fact finding must marshal all record evidence that supports the challenged finding." As will be discussed below, Mr. Jensen's appeal asserts that the lower court failed to make findings on material facts regarding ownership interests in the company, and that it acted outside of its discretion when it determined that the entire increase in company equity was marital property. These are issues of law and do not constitute a challenge of a fact

finding. It is difficult to see how a marshaling of evidence would even apply to these legal challenges.

Nevertheless, Ms. Olson asserts that the application of the legal standards here are so highly fact sensitive as to require Mr. Jensen to marshal the evidence. Appellee's Brief, p. 6. Ms. Olsen also asserts that sufficient findings on the material issue of equity ownership in the company can be implied by the court's ultimate judgment. Mr. Jensen disagrees, but is willing, since Ms. Olsen raises the issue, to conduct the exercise here and demonstrate that the court's errors of law are in no way mitigated by a recitation of evidence.

The court below determined that the entire increase in company equity was marital property. Ms. Olsen asserts that a finding that Mr. Jensen was deemed owner of Clara Jensen's shares can fairly be implied from this judgment. But even if this is true, the judgment still fails to take into consideration Mark Jensen's equity ownership. While the court fails to make findings on material facts regarding Mark Jensen's ownership interests in the company, as will be discussed below, the court seems to recognize that Mark Jensen is an owner of some substantial portion of the company. If that is the case, then some part of the increase in the company's equity would be

ascribable to his shares. The increase in equity ascribable to Mark Jensen's shares would properly belong to Mark Jensen and any judgment deeming that increase to be marital property would be in error as a matter of law.

The court heard testimony that disclosure statements in the company's Form 1120 corporate tax return list Mr. Jensen and Mark Jensen as each owning half the company. Trial Tr. July 31, 2006, p.16, l. 17- p.17, l. 4. The court heard testimony that Clara Jensen assigned all of her shares, half each, to Mr. Jensen and to Mark Jensen and the court took as evidence stock certificates noting these assignments. *Id.* at p.30, l. 10-p.32, l. 3. The court heard testimony from Clara Jensen that the shares are Mr. Jensen's and Mark Jensen's inheritance. *Id.* at p. 117, ll. 19-21.

Ms. Olsen asserts that this represents more than a "scintilla" of evidence supporting an implied finding by the trial court that Mr. Jensen is one-half owner of the company. But even if Ms. Olsen is right, it still does not support the trial court's judgment that all of the increase in company equity is marital property. Appellee's Brief, pp. 8-9.

Ms. Olson repeatedly points to the possibility that the court impliedly found that Mr. Jensen owns some part of Clara Jensen's equity, as though that would justify the court's judgment that all the increase in equity is marital

property. However, Ms. Olson persistently ignores the court's findings that indicate at least some substantial equity ownership resides with Mark Jensen. And, as will be discussed below, to the extent Mark Jensen - who is not, after all, a party to the divorce - retains an equity ownership, the court was in error when it determined an increase in equity ascribable to his shares is marital property.

There simply is no evidence supporting a finding that all of the increase in company equity is marital property. In fact, while it declines to make specific findings on the issue, the court itself seems to recognize that Mark Jensen is an owner of some substantial portion of the company equity. The court found that in 1980, 20,000 shares were owned by Delbert Jensen and his wife Clara Jensen, 20,000 shares were owned by Arnell Jensen and his wife Norine Jensen, and 10,000 shares were held as treasury stock. Supp. Findings of Fact, ¶ 32. The court found that Arnell Jensen's stock was subsequently assigned to Mr. Jensen and Mark Jensen as tenants in common. *Id.* at ¶ 38. The court found that in 1986 the 10,000 shares of treasury stock were divided equally among Mr. Jensen, Mark Jensen and Delbert Jensen. *Id.* at ¶ 39. The court found that Delbert Jensen died in 1989 and all of his shares passed to his wife, Clara Jensen. *Id.* at ¶ 40. The court found that in 1999 Clara Jensen

assigned some of her shares to Mr. Jensen and the rest of her shares to Mark Jensen. *Id.* at ¶ 42.

Thus, even the court's own findings mitigate against a judgment that all the increase in equity is marital property, never mind the evidence supporting those findings.

POINT II

By failing to make findings on material facts, the court committed a reversible error of law

Ms. Olson argues that the court below committed harmless error when it failed to make a finding as to the ownership of the business. However, the trial court must make findings on all material issues, and its failure to do so constitutes reversible error unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. *Lee v. Lee*, 744 P.2d 1378, 1380 (Utah Ct.App. 1987). The findings must be sufficiently detailed and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusion on each factual issue presented. *Id.*

The trial court heard evidence concerning ownership of the company. Trial Tr., July 31, 2006, pp. 4-136. The court found that in 1980 the total

number of shares in the company was 50,000. Supp. Findings of Fact, ¶ 31.

The court found that in 1980, 20,000 shares were owned by Delbert Jensen and his wife Clara Jensen, 20,000 shares were owned by Arnell Jensen and his wife Norine Jensen, and 10,000 shares were held as treasury stock. *Id.* at ¶ 32. The court found that Arnell Jensen's stock was subsequently assigned to Mr. Jensen and Mark Jensen as tenants in common. *Id.* at ¶ 38. The court found that in 1986 the 10,000 shares of treasury stock were divided equally among Mr. Jensen, Mark Jensen and Delbert Jensen. *Id.* at ¶ 39.

The court found that Delbert Jensen died in 1989 and all of his shares passed to his wife, Clara Jensen. *Id.* at ¶ 40. The court heard testimony from the company's tax accountant that, according to the tax accountant's records, Mr. Jensen and Mark Jensen each own 11 percent of the company's shares and Clara Jensen owns 78 percent. Trial Tr. July 31, 2006, p. 12, ll. 19-21. The court found that in 1999 Clara Jensen assigned some of her shares to Mr. Jensen and the rest of her shares to Mark Jensen. *Id.* at ¶ 42. The court found that Clara Jensen assigned her shares to Mr. Jensen and Mark Jensen to protect her assets and that Clara Jensen testified that the shares are Mr. Jensen's and Mark Jensen's inheritance and that the assignment would become a transfer to them upon her death. *Id.* at ¶¶ 44-45.

The court made no specific findings as to the ultimate ownership of the company. It would seem logical from the findings discussed above that the court recognized Mark Jensen as an owner of corporate equity. However, the court said that the increase in the *total* equity in the company is marital property and accordingly divided the increase in total equity in the company between Mr. Jensen and Ms. Olson. Supp. Conclusions of Law, ¶¶ 22, 23.

Ms. Olson suggests that findings, at least with regard to Clara Jensen's shares, are implied in the division of property contained in the conclusions of law and that the error is harmless. However, Ms. Olson fails to confront that the court's conclusions of law imply away, not just Clara Jensen's ownership in the company, but also Mark Jensen's ownership. While the proper ownership of Clara Jensen's shares was at least under some debate, Mark Jensen's status as an equity holder in the company was never disputed and, while the court below never got around to pegging his ownership with any specificity, the court seems to recognize in its findings of fact that he owns at least some substantial number of shares.

As argued in Appellant's Brief, to the extent the court deemed as marital property equity that properly belongs to third parties, the court has committed a reversible error of law. Appellant's Brief, pp. 7-9. The trial court failed to

make findings on the material issue of company ownership, and its failure to do so constitutes reversible error unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. However, the fact of Mark Jensen's ownership of at least some equity, which the court seems to recognize, though it makes no specific finding on the issue, would not support the court's judgment in which it deemed the entire increase in the company's equity as marital property.

In support of her contention that the court committed harmless error when it failed to make findings concerning company ownership, Ms. Olson cites to *Colonial Pacific Leasing Corp. v. JWCJR*, 1999 UT App 91, 977 P.2d 541 (Utah Ct.App. 1999), for the proposition that harmless error can occur where the unstated findings can be reasonably implied.

In *Colonial Pacific* the Utah Court of Appeals reversed a judgment enforcing a lease agreement, concluding that the court's findings of fact were insufficient to support its judgment. *Id.* at ¶ 1. In *Colonial Pacific*, an autobody shop sought a computer system from a vender. *Id.* at ¶ 2 Under a finance lease agreement, Colonial Pacific Leasing Corp. purchased the system from the vendor then leased it to the autobody shop. *Id.* Before the autobody shop received the computer system, Colonial Pacific Leasing Corp. Required

the autobody shop owner to sign an “acceptance and acknowledgment” form. *Id.* After the autobody shop received the computer system, Colonial Pacific Leasing Corp. called the autobody shop and obtained a verbal verification that the computer system was acceptable. *Id.* at ¶¶ 3,4. Later that day the computer system crashed and after several days of unsuccessfully trying to get it to work the autobody shop returned it to the vendor. *Id.* at ¶ 5. Colonial Pacific Leasing Corp. sought to recover the unpaid lease payments and the trial judge concluded that the autobody shop had breached the lease agreement by failing to make the required lease payments. *Id.* at ¶ 6,

In concluding that the trial court had failed to make findings of fact on the pivotal issue of whether the autobody shop had a reasonable opportunity to inspect the computer system, the court said, “It is well settled that the trial court should make findings on all material issues tried by the parties, and a failure to do so is generally considered reversible error and requires a remand.” *Id.* at ¶ 17 (Citations omitted).

However, the court went on to say that a trial court’s decision may be affirmed if the failure to make the missing findings can be viewed as harmless error. *Id.* (Citations omitted). Harmless error can occur two ways: First, if the undisputed evidence clearly establishes the factor or factors on which the

findings are missing or, second, even given controverted evidence, if the absent findings can reasonably be implied. *Id.*

According to that court, unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made. *Id.* at ¶ 18 (citation omitted). However, findings of fact may *not* be implied when the ambiguity of the facts makes such an assumption unreasonable. *Id.* (Citation omitted). The court said that “we will not imply a missing finding where there is a matrix of possible factual findings and we cannot ascertain the trial court’s actual findings.” *Id.* (quotations and citation omitted).

Under Ms. Olson’s rationale, the appeals court in *Colonial Pacific* would have concluded that the trial court’s judgment against the autobody shop contained an implicit finding that the autobody shop had a reasonable opportunity to inspect the computer system. However, the court rejected that rationale on the grounds that the facts were disputed and “not capable of supporting only a finding” of acceptance. *Id.* at ¶ 19.

As in *Colonial Pacific*, the facts here were disputed and are not capable of supporting only a finding that the entire increase in the company’s equity is

marital property. Moreover, the facts specifically found by the court indicating an equity ownership belonging to Mark Jensen do not support a finding that the entire increase in the company's equity is marital property.

Furthermore, the court's judgment that the entire increase in the company's equity is marital property does not support Ms. Olson's contention that "it is reasonable to assume that the trial court found that Mr. Jensen was a one-half owner of" the company. The court's judgment would seem instead to assume that Mr. Jensen was the sole owner of the company.

It is inconceivable that the court intended to strip Mark Jensen of all, or even any, equity ownership in the company. However, as discussed above, while the court's findings of fact seem to recognize Mark Jensen as an equity holder, the court's judgment that the entire increase in company equity is marital property would seem to assume away entirely Mark Jensen's equity ownership.

It is too much, given the court's schizophrenic treatment of Mark Jensen's equity ownership, to simply assume, as Ms. Olson would have it, that the court's "findings" regarding Clara Jensen's stock ownership are clearly implied by the court's judgment that the entire increase in equity is marital property. Not only are the relevant facts in dispute as they were in *Colonial*

Pacific, but the facts are not capable of supporting only a finding that the entire increase in the company's equity was marital property. On the contrary, it seems that the facts are not at all capable of supporting the finding that the entire increase in company equity is marital property.

POINT III

Because there were other owners of company equity besides Mr. Jensen, it was not within the court's discretion to determine that the entire increase in company equity was marital property

The court below ruled that the increase in the adjusted total equity of the company is marital property and divided it accordingly. Supplemental Conclusions of Law, ¶¶ 22, 23. Ms. Olson asserts that it was within the court's discretion to determine that the entire increase in company equity was marital property. Marital assets encompass all of the assets of every nature possessed by the parties. *Enrody v. Enrody*, 914 P.2d 1166, 1169 (Utah Ct.App. 1996) (Citing *Englert v. Englert*, 576 P.2d 1274, 1276 (Utah 1978)). Possession connotes not only physical possession, but also legal possession. *Id.* Here, neither of the parties has physical or legal possession of some part of the increase in company equity that the court found to be marital property.

As was discussed in Point II above, while the court declined to make a

specific finding as to Mark Jensen's equity ownership in the company, it seems nevertheless to recognize that Mark Jensen owns at least some portion of the equity. The court found for instance that Arnell Jensen's stock was assigned to Mr. Jensen and Mark Jensen as tenants in common. Supp. Findings of Fact, ¶ 38. The court also found that in 1986 the 10,000 shares of treasury stock were divided equally among Mr. Jensen, Mark Jensen and Delbert Jensen. *Id.* at ¶ 39. The court found that Delbert Jensen died in 1989 and all of his shares passed to his wife, Clara Jensen. *Id.* at ¶ 40. The court found that in 1999 Clara Jensen assigned some of her shares to Mr. Jensen and the rest of her shares to Mark Jensen. *Id.* at ¶ 42.

While the court made no specific findings as to the ultimate ownership of the company, it would seem logical from the findings discussed above that the court recognized Mark Jensen as an owner of corporate equity. However, the court said that the increase in the *total* equity in the company is marital property and accordingly divided the increase in total equity in the company between Mr. Jensen and Ms. Olson. Supp. Conclusions of Law, ¶¶ 22, 23.

Also as discussed in Point II above, Ms. Olson urges that the court's determination that all the increase in the company's equity is marital property supports her contention that the court implies that one-half ownership of the

company resides in Mr. Jensen. However, as discussed in Point II above, this does not follow. A determination that all of the increase in equity is marital property would rather support an implication that the court deems there are no other owners of equity besides Mr. Jensen (or, perhaps Mr. Jensen and Ms. Olson - however there appears to be no suggestion from any quarter that Ms. Olson is an owner of equity).

Ms. Olson asserts that *Enrody v. Enrody*, 914 P.2d 1166 (Utah Ct.App. 1996) is inapposite, claiming its holding that marital assets must be legally possessed by one or both of the parties pertains only to assets held in a trust created by third parties. This pinched view ignores the court's broadly constructed rule of the case: "[F]or assets to be distributed, the assets must be in the possession of one, or both, of the marital parties....[M]arital assets encompass all of the assets of every nature possessed by the parties. While possession usually connotes physical possession, we believe it also connotes legal possession." *Enrody*, 914 P.2d at 1169 (citations omitted).

Enrody involved an appeal from a divorce decree. At issue was an inter vivos trust into which had been transferred various parties' interests in a family ranch. *Id.* at 1168. Beneficiaries of the trust included the parties to the divorce, their children, and various other members of the extended family. *Id.*

Ms. Enrody, who had filed for divorce, was divested of her shares in the trust pursuant to its terms. *Id.* The trial court denied Ms. Enrody's claims against the trust, but found that Mr. Enrody's shares in the trust were marital property. *Id.* In concluding that Ms. Enrody was not entitled to a distribution of the assets held in the trust, the Utah Court of Appeals said, "the equitable powers of the trial court do not allow the distribution of assets that are not in the legal possession of the divorcing parties. *Id.* at 1171-72.

As in *enrody*, the present case involves assets not in the legal possession of the divorcing parties. Ms. Olson repeatedly points to the possibility that the court impliedly found that Mr. Jensen owns Clara Jensen's equity. However, Ms. Olson persistently ignores the court's findings that indicate at least some substantial equity ownership resides with Mark Jensen. To the extent the court finds ownership with Mark Jensen (and to the extent the court fails to make findings on the material issue of Clara Jensen's ownership), it is not within the court's discretion to determine that the entire increase in company equity was marital property.

POINT IV

**It was not within the trial court's discretion to awarded attorney fees
without considering need, ability to pay, or reasonableness**

The trial court awarded attorney fees to Ms. Olsen. However, the trial court made no inquiry nor findings concerning Ms. Olsen's financial need, Mr. Jensen's ability to pay, or the reasonableness of the fees. Ms. Olsen admits the court failed to make required findings to support its award but she asserts that the court's failure is harmless error. Appellee's Brief, p.19.

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. *Kelley v. Kelley*, 9 P.3d, 171, 2000 UT App 236, ¶30 (Utah Ct. App. 2000). A trial court's findings of fact must show that the court's judgment or decree follows logically from, and is supported by, the evidence. *Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986). The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. *Rasband v. Rasband*, 752 P.2d 1331, 1334 (Utah Ct. App. 1988) (quoting *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987)) (internal quotations and citation omitted). A trial court's failure to provide adequate findings is reversible error when the facts are not clear from the record. See *id.* at 1334-35 (vacating an alimony award and remanding for adequate findings).

Ms. Olsen points to no authority for the proposition that a court may

dispense with the required findings in awarding attorneys fees, but points to *Colonial Pacific Leasing Corp.*, 1999 Utah Ct.App. 91, 977 P.2d 541, a financing lease case, to support her contention that the court's award of attorneys fees itself renders it reasonable to imply unstated findings.

Appellee's Brief, p. 19.

Ms. Olsen asserts that the court's finding that Mr. Jensen had a higher income than Ms. Olsen should serve as reasonable inference of a finding of Ms. Olsen's financial need and Mr. Jensen's ability to pay. However, a simple finding that Mr. Jensen makes more than Ms. Olsen does not constitute sufficiently detailed findings or subsidiary facts to disclose the steps by which the ultimate conclusions on the factual issues were reached concerning Ms. Olsen's financial need OR Mr. Jensen's ability to pay.

Similarly, Ms. Olsen asserts that an affidavit of fees submitted by Ms. Olsen's attorney, stating the fees were reasonable, ought to serve as inference that the court considered and found the fees to be reasonable. In both this assertion and the assertion discussed above concerning ability and need, Ms. Olsen essentially argues that the court's award of attorney fees ought to be taken as reasonably implying that the required findings were made. But this assertion ignores the requirement that findings be sufficiently detailed and

include enough subsidiary facts to disclose the steps by which the ultimate conclusion was reached.

Here, there are no findings, much less findings sufficiently detailed to disclose the steps the court took in making the required inquiry concerning Ms. Olsen's financial need, Mr. Jensen's ability to pay, or the reasonableness of the fees.

CONCLUSION

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

DATED this 29th day of October, 2007


Douglas L. Neeley (#6290)