1996

Christiansen v. Christiansen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SANDRA CHRISTIANSEN, Plaintiff-Appellant/Cross-Appellee vs. ROBERT DAVID CHRISTIANSEN, Defendant-Appellee/Cross Appellant,	Case No. 960598-CA Priority Number 15

BRIEF OF APPELLANT

Appeal from the Judgment of the Fifth Judicial District Court in and for Iron County
Judge J. Philip Eves

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CONSTITUTIONAL PROVISIONS, STATUTES & RULES

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to § 78-2a-3(2)(h), Utah Code Ann. 1953 as amended.

STATEMENT OF ISSUES

1. Was the lower court's finding of fact that the marital residence of the parties was partially separate property, clearly erroneous?

2. Did the lower court abuse its discretion in the matter in which it divided the marital residence?

3. Is Plaintiff entitled to attorneys fees on appeal?

STANDARD FOR REVIEW

1. The standard for review to determine a clearly erroneous finding of fact is whether it is against the clear weight of the evidence, or, the Court is "left with the definite and firm conviction that a mistake has been committed", despite evidence to support the finding. Cummings v. Cummings, 821 P.2d, 472, 476 (Utah Ct. App. 1991).

2. A discretionary decision by a trial judge should be reversed if the ruling is so unreasonable as to be arbitrary and capricious or a clear abuse of discretion. Weaver v. Weaver, 21 Utah 2d, 1966, 442 P.2d 928 (1968); Ames v. Maas, 846 P.2d 468, 476 (Utah Ct. App. 1993).

3. As to attorneys fees on appeal, this court should determine whether the court

awarded such fees to the party seeking the same and if she prevails on appeal, remand to the lower court for a determination of the award of appropriate fees. Shaumberg v. Shaumberg, 875 P.2d 598, 604 (Utah Ct. App. 1994).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

The following constitutional provisions, statutes, and ordinances are determinative or of central importance to this appeal:

1. When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. Utah Code Ann. § 30-3-5(1) (Supp. 1996).

STATEMENT OF THE CASE

This is an appeal from a Supplemental Decree of Divorce entered August 12, 1996 after trial, before the Honorable J. Philip Eves in the Fifth Judicial District Court, in and for Iron County, State of Utah. (R. 166-172).

The parties were previously divorced on or about the 15th day of June, 1995. The proceedings were bifurcated and all other issues ultimately went to trial on November 8th and 9th, 1995 before the Honorable J. Philip Eves, District Court Judge. (R. 172). After a Memorandum Opinion of the court entered December 7, 1995 (R. 106-116), Defendant filed a Motion to Correct Clerical Mistakes, Oversights, and Omissions, which was heard by Judge Eves on January 16, 1996. (R. 117-121; 141). On March 22, 1996 the district court denied

the Defendant's Motion to Correct Clerical Mistakes, Oversights, and Omissions. (R. 146-147). After the ruling upon Defendant's motion and, based upon a Memorandum Opinion, the Supplemental Findings of Fact, Conclusions of Law and Decree of Divorce were finally entered by Judge Eves on August 12, 1996. (R.151-172).

STATEMENT OF FACTS

Plaintiff and Defendant were married in Beaver, Utah, on August 16, 1972. (R. 6, 12). Three (3) children were born as issue of the marriage, but at the time the Complaint for Divorce was filed, only one (1) child was under the age of majority; namely, Colin Tony Robert Christiansen, born July 29, 1980. (Tr. 23) (R. 6, 12-13). The parties acquired a home after the marriage which they sold prior to 1982 and received net proceeds from the sale of said home in the amount of $35,000.00. The parties then decided to build a second home, using the $35,000.00 net proceeds from the sale of the first home to be applied toward the down payment. Prior to 1982 and the construction of the second home, the Defendant's parents deeded to the Defendant a parcel of property to both Plaintiff and Defendant's names as joint tenants. In 1982 the parties began construction on their second home. (Tr. 28). Plaintiff participated in the actual design of the home and was active in supervising all phases of construction. (Tr. 31). The Defendant's testimony varies about what sums of money were actually borrowed by Plaintiff and Defendant toward the construction of the home, however; the Defendant testified that the parties jointly originally borrowed at least $20,000.00 but probably as much as $60,000.00 toward the

construction of the home (Tr. 408-411). The Defendant, although uncertain of the actual amount of the loan, did testify that the parties made payments on the note from marital funds for a period of three (3) to four (4) years after the note was taken out until the note, whether $20,000.00 or $60,000.00, or anywhere in between, was paid off. (Tr. 412). Eventually the family partnership, known as "Christiansen Trucking," borrowed money against the marital home in the amount of approximately $97,000.00 and, as of the date of trial there was a balance on the partnership note in the amount of approximately $90,000.00. At trial the home had a stipulated appraised value of $185,000.00. (R. 158). At the time of the divorce the Defendant had a 25% interest in the family partnership. Although Plaintiff had no named interest in the partnership the court considered Defendant's interest in the partnership as marital property. (Tr. 549, 550) (R. 155).

Despite Plaintiff's contrary testimony at trial, the lower court found Defendant's parents contributed an additional $165,000.00 cash as a gift to Defendant, toward the construction of the marital residence. From 1982 for approximately a period of six (6) to seven (7) years thereafter, Defendant was driving truck and was otherwise engaged in business affairs and was gone from the marital residence for four (4) to five (5) days a week. Plaintiff was left with the sole responsibility of raising the children, repairing and/or maintaining the home, landscaping the yard, and otherwise preserving the marital home. (Tr. 31-32, 393-394).

The district court ultimately concluded that the Plaintiff be awarded one half of the $35,000.00 from the previous home plus an additional $2,500.00 for a sprinkler system which

was financed by her parents as a gift to the Plaintiff. The Court also concluded that all other amounts paid toward the construction of the home was a gift by Defendant's parents and thus, remained separate property of the Defendant. (R. 156-158).

SUMMARY OF ARGUMENT

Point I: Despite the trial court's finding that the land and construction monies used to build the marital residence were a gift from Defendant's parents, because of the maintenance, enhancement, and protection of the property by Plaintiff and substantial evidence of commingling of the gifted funds with joint marital funds and a joint marital loan, the marital property lost its identity as being Defendant's separate property and should have been divided as marital property.

Point II: The trial court's finding as to division of the marital residence was an abuse of discretion because it failed to consider other factors besides the parties relative economic contributions to overcome the presumption that the equity in the marital property should be divided equally.

Point III: Assuming Plaintiff prevails on this appeal, then she should be entitled to attorneys fees on appeal because the court below found she was entitled to them.

ARGUMENT

POINT I

THE LOWER COURT'S FINDING OF FACT THAT THE MARITAL RESIDENCE OF THE PARTIES WAS PARTIALLY

SEPARATE PROPERTY WAS CLEARLY ERRONEOUS

Because Plaintiff is contesting the findings of fact of the trial court, the Plaintiff must first marshall all of the evidence in the light most favorable to the trial court's findings. Cummings v. Cummings, 821 P.2d 472, 476 (Utah Ct. App. 1991).

The lower court's crucial finding in this case was as follows: "The Court finds that the funds and real estate provided by Defendant's parents were intended to be a gift to him only, in the amount of $165,000.00, as an early distribution of his future inheritance". (R. 158, ¶12). Based upon this finding, the lower court concluded that the remaining equity of the home, was the $35,000.00 down payment was separate property of Defendant. (R. 156, ¶18).

The following evidence (findings) supports the Courts findings:

1. Defendant's mother and father both testified at the time of trial that the real property and funds for the construction of the home was intended to be a gift to the Defendant only as an early inheritance (R. 156-158, ¶¶ 12, 15);

2. The Defendant testified at the time of trial that the real property and funds used to construct the home were a part of his pre-inheritance and was thus separate property (R. 156, ¶ 16);

3. There was no evidence that there was an intent by Defendant to give a gift to Plaintiff when the deed to the home was made out in both of their names, as joint tenants (R. 156-157, ¶¶ 15-16);

4. The Plaintiff did not contribute "substantial" labor improving the value of the home, or any other "extraordinary" act preserving the value of the home. (R. 157, ¶ 14).

Based on the standard of review, as to the first two items of evidence the Plaintiff must, of course, concede that the real property and construction funds were a gift to the Defendant only. The trial court, however, has failed to properly analyze whether the gift lost its identity as separate property consistent with Utah case law.

There are three factors the court should consider in determining whether separate property loses its identity and becomes marital property. The existence of any one of those factors alone would be satisfactory to find that the separate property lost its identity. Those factors are as follows:

1. Whether the other spouse has contributed to the enhancement, maintenance or protection of that property and thereby acquired an equitable interest in it;
2. Whether the property has been consumed or its identity lost through commingling or exchanges; and
3. Whether the acquiring spouse made a gift of the property to the other spouse.

Osguthorpe v. Osguthorpe, 804 P.2d 530, 535 (Utah Ct. App. 1990). See also Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988); Burke v. Burke, 733 P.2d 133 (Utah 1987); Teece

v. Teece, 715 P.2d 106 (Utah 1986); Dunn v. Dunn, 802 P.2d 1314 (Utah Ct. App. 1990).

Factor #1: The evidence is uncontroverted that Plaintiff landscaped the property, used gift monies to install a sprinkler system, maintained the property, wallpapered the home, planted flowers, and did all of the house and yard work, while raising the parties' three minor children. The Plaintiff did this for a period of six (6) to seven (7) years.[1] The Plaintiff did this while the Defendant, during the same time frame, was driving truck and was gone from the marital residence four (4) to five (5) days per week leaving the Plaintiff with all household obligations.

Factor #2: There is also substantial uncontroverted evidence of commingling. The parties sold their first home and invested the net proceeds consisting of $35,000.00 into the construction of their new home. The real property upon which the home was built was held in joint tenancy. The parties jointly borrowed money to construct the home and, at least a portion of that debt was discharged using marital funds. The home was also used to secure a partnership debt which the court found was at least 25% marital property. The Defendant also admitted that in his Answers to Interrogatories, he stated that the house and real property were owned by he and his wife jointly (Tr. 265).

This fact pattern is analogous to a married couple having a joint bank account. They open the account with $35,000.00 of joint funds, together they borrow additional funds and

[1]Obviously Plaintiff contributed more to the protection and maintenance of the home than "sweeping the floor and planting a few flowers every year" as stated by Judge Eves during closing arguments. (Tr. 591).

place them in the same account, and then the husband receives a cash gift from his parents which he also deposits into the account. The parties keep the account open for a period of thirteen (13) years and during that time they lend a portion of those funds to a partnership of which the husband is a partner but the husband's interest in the partnership is determined to be marital property. There should be no question that because of such commingling, all of the remaining funds left in the account would be considered marital property.

Factor #3: The Defendant, by placing the marital residence in both he and Plaintiff's name, expressed no other intention than that it was to be a gift. the Defendant effectively admitted the same in Answers to Interrogatories and trial testimony as discussed above. Consequently, as to the third item of evidence, the joint tenancy deed, by itself, was substantial evidence of a gift from Defendant to Plaintiff. The Defendant presented no evidence that the deed was not intended to be a gift from Defendant or his parents to Plaintiff; only that he "thought" that the deed was joint "maybe" because of Plaintiff's investment in the home. Plaintiff, therefore, need not have presented additional evidence that it was intended as a gift. Mortensen, 760 P.2d at 307.

As to the fourth item of evidence supporting the lower court's findings, the court's reasoning is not supported by existing case law and thus, is clearly erroneous. Nowhere in the cases cited above is there any language requiring "substantial" or "extraordinary" contributions to the maintenance and protection of the property. Indeed, the extent of the contribution is not

even a criteria. Mortensen, 760 P.2d at 308; Osguthorpe, 804 P.2d at 535.

POINT II

THE LOWER COURT ABUSED ITS DISCRETION IN THE MANNER IN WHICH IT DIVIDED THE MARITAL RESIDENCE.

There is no question that the trial court has substantial discretion in dividing marital property. Sorensen v. Sorensen, 769 P.2d 820, 823 (Utah Ct. App. 1989). Therefore, even assuming the entire equity in the home was marital property, the Defendant may argue that the court was within its discretion to divide the marital home as the court did; however, the trial court abused its discretion under the circumstances of this case because it did not divide the property in accordance with the standards set by Utah appellate courts. Haumont v. Haumont, 793 P.2d 421, 424 (Utah Ct. App. 1990); Munns v. Munns, 790 P.2d 116, 118 (Utah Ct. App. 1990).

In Dunn v. Dunn, 802 P.2d 1314 (Utah Ct. App. 1990) the husband, a physician, brought substantial pre-marital property into the marriage. The wife also brought a pre-marital automobile into the marriage. During the course of the marriage, wife was left with the sole responsibility of managing the household affairs and accounts. In the meantime, the husband spent over seventy (70) hours per week working in his medical practice leaving his wife without his companionship and domestic contributions.

As to the pre-marital property, husband sold an airplane and repurchased another and

used marital income to pay the debt on said airplane. Husband owned a condominium prior to the marriage which the parties occupied for some seven (7) years and then sold it and used part of the proceeds to pay for a down payment on a new home and for a promissory note payable to both parties jointly. Additionally, husband purchased a Porsche automobile and a Blazer automobile, using marital income as well as funds from his professional corporation. Id. at 1317-18, 1321.

This Court held that the credit to husband for the condominium, airplane, and automobile were inappropriate since the property had lost its separate identity. Id. at 1321. This Court further held that the trial court has abused its discretion in the distribution of the marital property. Id. at 1322. Specifically, this Court found that the relative economic contributions of the parties were not a factor, stating that "a spouse's property award at the time of divorce should [not] be measured according to the amount he or she directly contributed to the financial success of the marriage." Additionally, this Court stated that the lower court should "consider contributions of love, encouragement and companionship, which elude monetary valuation....[especially] to spouses who contribute homemaking skills and child care." Id.

Finally, this Court stated that in considering equitable distribution the lower court should start with the presumption that each party is entitled to fifty percent of the marital property and it would be an abuse of discretion to disturb that presumption "based solely on the parties' economic contributions to the marriage." Id. at 1323.

The facts in the case at bar are strikingly similar to those set forth in Dunn. Based upon those similar facts this Court held that because of commingling and household maintenance by the wife, separate property of both spouses lost its identity and thus should be treated as marital property. Second, in applying the similar factual pattern, this Court held that it was an abuse of discretion to divide the marital property unequally simply based upon the disparity of the economic contributions of the parties.

Based upon Dunn, this Court should likewise hold that the separate property of Defendant became marital property (as discussed in Point I above) and that it was an abuse of discretion for the lower court to not make an equal division of the home.

POINT III

PLAINTIFF IS ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL

In Schaumberg v. Schaumberg, 875 P.2d 598 (Utah App. Ct. 1994) this Court held "[w]hen a trial court has awarded fees at trial based on such findings [such as need of receiving spouse, ability of payor spouse to pay and the reasonableness of the fees] and when the receiving spouse has prevailed on appeal, we will award attorney fees on appeal and remand solely for the trial court to make the foregoing findings." Id. at 604. Schaumberg also holds that in order for a spouse to receive attorneys fees on appeal, it is not necessary that said spouse completely prevail based upon all of the issues he or she may present on appeal but rather must substantially prevail. Id..

The record is clear that the trial court awarded Plaintiff her attorneys fees based upon the appropriate factors and made specific findings as to the reasonableness of the fees requested and the Defendant's ability to pay. (R. 152-154). Should the Plaintiff be successful or substantially successful, on this appeal, the Court of Appeals should award attorneys fees and remand to the trial court to make findings regarding Plaintiff's reasonable attorneys fees.

CONCLUSION

The contents of this brief marshall the evidence in the light most favorable to the lower court's findings. However, it is clear that the trial court made clearly erroneous findings of fact and abused its discretion in its division of the marital residence. The matter should be remanded to the trial court to determine and award one-half of all of the equity in the marital residence to Plaintiff and, second, to determine what are reasonable attorneys fees for this appeal.

DATED this 23 day of January, 1997.

THE PARK FIRM, P.C.

JAMES M. PARK

FLOYD W HOLM

Attorneys for Plaintiff-Appellant

MAILING CERTIFICATE

I here by certify that on the 10th day of January, 1997, two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were mailed, first class, postage prepaid to Mr. Willard R. Bishop, Attorney At Law, P.O. Box 279, Cedar City, UT 84720.

FLOYD W HOLM

ADDENDUM

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IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

SANDRA CHRISTIANSEN, Plaintiff, vs. ROBERT DAVID CHRISTIANSEN, Defendant.	***SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW*** Civil No. 954500124 Honorable J. Philip Eves

The above-entitled matter came on regularly before the Honorable J. Philip Eves, District Judge, for trial on November 8 and 9, 1995. The Court noted that the proceedings had been bifurcated, and that on or about June 19, 1995, this Court entered its "Findings of Fact and Conclusions of Law" and its "Decree of Divorce" in the matter, awarding the parties a decree of divorce, one from the other, final and effective upon entry by the Court in the register of actions. All other issues between the parties were reserved for trial. Plaintiff Sandra Christiansen appeared personally at trial, and was represented by her attorney of record, Mr. James M. Park. Defendant Robert David Christiansen also appeared personally, and was represented by his attorney of record, Mr. Willard R. Bishop.

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Evidence was adduced, both testimonial and documentary in nature. Argument was had. The Court took the matter under submission. Having reviewed the matter fully, and being fully advised in the premises, the Court now makes and enters its:

SUPPLEMENTAL FINDINGS OF FACT

1. As issue of their marriage, the parties are parents of three children, only one of whom is still a minor, as follows:

A. Jackilyn Christiansen, a daughter, born February 25, 1973.
B. Kasey David Christiansen, a son, born March 8, 1975.
C. Tony Robert Christiansen, a son, born July 29, 1980.

No other children have been born to the parties and no other children are expected.

2. Tony Robert Christiansen, the parties' minor son, resides and has resided with Defendant, who has been and is the primary caregiver and physical custodian of said child. The parties agreed in open court that the parties should be awarded the joint care, custody, and control of the minor child, subject to rights of reasonable visitation being vested in Plaintiff, with Defendant being the primary caregiver and physical custodian of the minor child.

3. Plaintiff's reasonable rights of visitation should be construed to be those visitation rights as to which the parties may agree, but in the event the parties cannot agree, such rights of visitation should be decreed to be those contained in the provisions of UCA 30-3-35 (1953, as amended).

4. The parties agreed in open court that Plaintiff waived her right to any and all claims for alimony, in return for Defendant waiving any and all claims for child support. The parties agreed and the Court hereby finds, that Defendant Robert David Christiansen is capable of supporting the parties' minor child without assistance from Plaintiff.

5. During trial, the parties were able to agree concerning the disposition and value of various items of personal and/or real property. To the extent that agreement was not reached, by a preponderance of the evidence, the Court found values to be as are set forth below, and made what the Court finds to be an appropriate distribution.

6. It is fair, equitable, and reasonable that Plaintiff be awarded, as her sole and separate property, free and clear of any claim of Defendant, the following:

Item #	Description	Value
(1)	1985 Ford pickup	$ 4,238.00
(2)	Six-Pak camper	2,600.00
(3)	1990 Ford Mustang	7,000.00
(4)	Kenmore microwave	75.00
(5)	2 television sets	200.00
(6)	Checking account at Mountain America Credit Union	150.00
(7)	Savings account	563.00
(8)	Checking account at Utah Independent Bank	40.00
(9)	Clairnette stereo	50.00
(10)	Portable cassette player	50.00
(11)	Gas barbecues	10.00
(12)	VCRs	150.00
(13)	.22 rifle	150.00
(14)	Lynx golf clubs (Taylor-made woods)	500.00
(15)	RG28 pistol	125.00
(16)	Loveseat, chair, oak coffee and end table	700.00

(17)	Bookcase	100.00
(18)	3 bedroom dressers	100.00
(19)	4 lamps	100.00
(20)	Toro Blower Vac	25.00
(21)	Answering machines	30.00
(22)	2 patio chairs	100.00
(23)	1 garden bench	10.00
(24)	1 cooler	20.00
(25)	Camping supplies in camper	300.00
(26)	Sleeping bag	50.00
(27)	2 telephones	100.00
(28)	One-half of bank stock	½
(29)	1 fishing pole	20.00
(30)	401K	21,680.00
(31)	Retirement	15,871.00
(32)	1 life jacket	5.00
	TOTAL:	**$ 55,112.00**

7. The Court finds the total value of the marital property awarded to Plaintiff, above, to be $55,112.00

8. It is fair, equitable, and reasonable that Defendant be awarded as his sole and separate property, free and clear of any claim of Plaintiff, the following:

Item #	Description	Value
(1)	Bayliner ski boat, with tailer	$ 5,660.00
(2)	3 stainless steel boat propellers	400.00
(3)	1971 Dodge Challenger	14,593.64
(4)	1990 Ford Ranger pickup truck	6,538.00
(5)	Golf cart and stall	1,800.00
(6)	Upright freezer	75.00
(7)	Side-by-side refrigerator	500.00
(8)	Washer/dryer	400.00
(9)	4 television sets	600.00
(10)	Checking account at Utah Independent Bank	728.29

(11)	Savings account at First Security Bank	105.00
(12)	Savings account at Utah Independent Bank	46.00
(13)	Large stack stereo	300.00
(14)	Gas barbecue	75.00
(17)	Camcorder	325.00
(18)	Pentax camera	200.00
(19)	VCRs	200.00
(20)	.223 rifle	250.00
(21)	4 cases ammunition	350.00
(22)	Taylor-made clubs (Calloway woods)	700.00
(23)	10 golf woods	400.00
(24)	RG22 pistol	60.00
(25)	Jennings .25-automatic pistol	90.00
(26)	2 electric guitars	500.00
(27)	1 guitar amplifier	300.00
(28)	Large sectional sofa	1,000.00
(29)	2 recliners	200.00
(30)	Pine end tables/coffee tables	300.00
(31)	Queen size sofa sleeper	200.00
(32)	All condominium contents (besides furniture)	500.00
(33)	Chair	50.00
(34)	Oak end and coffee tables	150.00
(35)	Large sofa	50.00
(36)	Pine dinette set in condominium	200.00
(37)	1 dinette set	200.00
(38)	1 bedroom set, two dressers, and nightstand	1,300.00
(39)	2 queen beds, and 2 double beds	300.00
(40)	7 lamps	175.00
(41)	Toro lawn mower	250.00
(42)	Weedeater	25.00
(43)	Custom entertainment center	600.00
(44)	Yard tools, wheelbarrow, and spreader	100.00
(45)	Battery charger	50.00
(46)	Generator (belongs to partnership business)	325.00
(47)	Tools	500.00
(48)	Answering machines	30.00
(49)	Fax machine	25.00
(50)	Patio table and chairs	100.00
(51)	2 patio chairs	25.00

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(52)	1 garden bench	50.00
(53)	9 coolers	150.00
(54)	sleeping bags	100.00
(55)	2 truck tool boxes	150.00
(56)	1 large tool box	170.00
(57)	4 CB radios	100.00
(58)	3 telephones	100.00
(59)	One-half of the bank stock	½
(60)	Chainsaw	50.00
(61)	4 waterskis	200.00
(62)	4 life jackets	100.00
(63)	Boat Sonar	150.00
(64)	5 fishing poles and tackle	150.00
(65)	Fishing boat/boat motor	300.00
(66)	Motorcycle	500.00
(67)	Chevy Blazer	2,450.00
	TOTAL:	**$46,570.00**

9. The Court finds the total value of the marital property awarded to Defendant, above, to be $46,570.93.

10. At the time of trial, there was an issue as to whether or not the Chevrolet Blazer and the shed were marital property or personal property. The Court finds as follows:

A. The shed is the separate property of Defendant, it having been acquired after the parties separated from funds provided by the parents of Defendant. Plaintiff could provide no evidence as to value or character of this piece of property, except to guess at its value. No evidence was presented that it was, in fact, a marital asset. It should be awarded to Defendant, and has not been included in calculating the total value of the marital assets awarded to Defendant, above.

B. The Court finds that the Chevrolet Blazer is, in fact, a marital asset. Some history is necessary to explain this finding. Defendant is in a partnership with his parents in an enterprise called "Christiansen Trucking Company". He has a 25% interest in that enterprise, and he derives his earnings by working for the partnership. Originally, the partnership was involved in the trucking business but gave up that endeavor some years ago. At the time of trial, the sole business of the partnership was farming the land owned by the Defendant's parents, and selling the crops. As compensation for his work, Defendant is allowed to pay many of his personal expenses through the business and is provided with transportation, utilities, and other benefits. The partnership is only loosely organized and apparently keeps few, if any, records of the benefits conferred upon the Defendant. During the marriage the parties jointly enjoyed these benefits and accepted them as compensation for Defendant's work. The Chevrolet Blazer appears to be one of the benefits conferred upon the Defendant as part of his compensation. The evidence is to the effect that the Blazer was purchased by trading in a truck belonging to the Defendant's father. The partnership then covered the cost of the vehicle. Although the vehicle was provided to the Defendant, the Court finds that the vehicle was actually compensation for the Defendant's work and therefore marital, rather than separate, property. The vehicle should be awarded to Defendant, and the value thereof, being $2,450.00, has been included in the list of marital assets set forth above.

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11. There were disputed issues at trial with respect to (1) the home of the parties; (2) the shop; (3) Christiansen Trucking Company; and (4) attorney fees. In deciding the issues relating to these items, the Court was aware that one of its duties is to determine whether an item of property is a separate property of one of the parties, or a marital asset to be divided between the parties equitably. Generally, if an item of property is determined to be a gift or inheritance of one party, it should be awarded to the party to whom it was given, unless the other party has acquired an equitable interest therein by commingling, or by maintenance, protection, or improvement thereof, or by gift. [See *Mortensen v. Mortensen*, 760 P.2d 304 (Utah, 1988) and *Osguthorpe v. Osguthorpe*, 804 P.2d 530 (Utah, 1990)]

The Home

12. The Court finds that the marital residence originally cost $200,000.00 to build, but appraised for $185,000.00 at time of trial, including the value of the lot which was apparently provided by the Defendant's parents without charge. The construction funds were provided principally by the Defendant's parents, except for the amount of $35,000.00 which was put in by the parties from their previous home. The Court finds that the funds and real estate provided by the Defendant's parents were intended to be a gift to him only, in the amount of $165,000.00 as an early distribution of his future inheritance.

13. The Court finds that Plaintiff has an equitable interest in the home of the parties. That interest arises from two sources. First, the parties invested $35,000.00 of

money derived from the sale of their previous home, admittedly a marital asset partially owned by the Plaintiff, when the current home was constructed. Second, the evidence demonstrates, by a preponderance, that during the construction of the home, or shortly thereafter, the Plaintiff's parents invested $2,500.00 in a sprinkler system for the house as a gift to the Plaintiff.

14. Plaintiff argued in this case that she acquired an equitable interest in the home by improving it, maintaining it, cleaning it, and decorating it during the marriage of the parties. The Court finds otherwise. Plaintiff could point to no unusual contribution made to the value of the home by her efforts. She did nothing that would not be expected of an occupant of any residential property. To find that this Plaintiff earned an interest in the Defendant's gifted equity simply by living in the house and watching over it, would make it impossible for any person having premarital separate property to remarry, since the new spouse could earn equity in that separate property by living there and doing normal household chores. The law certainly contemplates that one may earn an equitable position in a spouse's separate property, but that position must be earned as a result of financial contributions, or substantial labor improving the value of the separate property, or some other extraordinary act preserving the value of the home. Plaintiff did not establish any such equitable position.

15. Plaintiff also argues that since the deed to the house lists both herself and the Defendant as grantees, she acquired an interest in the house by way of gift. The problem

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with Plaintiff's position is that the evidence is completely devoid of any donative intent towards her. The grantees testified that they intended their contribution to the house as a gift to their son, and that the Plaintiff's name appears on the deed in recognition of the fact that she had an interest in the home by virtue of her share of the money coming from the sale of the previous home of the parties. The Court finds that the grantors intended no gift to the Plaintiff by including her name on the deed.

16. Likewise, Defendant testified that he thought the Plaintiff's name appeared on the deed because her money was invested in the home, not because he was giving her part of the gift he was getting from his parents.

17. The Court finds that Plaintiff failed to prove that she acquired any additional equity in the marital home by way of gift.

18. Plaintiff should be awarded one-half of the $35,000.00 from the previous home, or $17,500.00, plus $2,500.00 for the sprinkler system, for a total award of $20,000.00 against the value of the home. The remaining equity in the home is the separate property of the Defendant and should be awarded to him.

The Shop

19. The Court finds that the Defendant's interest in the shop is his separate property, and is not a marital asset. The shop was built by the Defendant's father on land owned by the father, with the father's money. Originally, the shop belonged to the father. However, to avoid a political embarrassment, a one-third interest was deeded to the

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Defendant. The Plaintiff was not included on the deed and there was no evidence of any intent by the grantors to give anything to Plaintiff. Plaintiff failed to prove that she ever acquired any equitable interest in the shop. The Defendant's interest in the shop should be awarded to him free and clear of any claim by Plaintiff.

Christiansen Trucking Company

20. The Defendant acquired, during the marriage, a 25% interest in the Christiansen Trucking Company Partnership, by agreement with his parents. The Court finds that Defendant has failed to prove that the interest in the partnership was intended as a gift or inheritance to him alone. Rather, the evidence preponderates in favor of the proposition that it is a business asset acquired during the marriage as compensation for the Defendant's labors, and is therefore a marital asset. The asset therefore belongs to both Defendant and Plaintiff, and its value must be divided between them.

21. The Court finds that a difficulty arises in attempting to affix a value to the partnership. Defendant's father, who keeps the scant records of the partnership, testified that there is no equity in the partnership. Plaintiff attempted to show that the partnership owns land, farm equipment or other assets. The Court finds that those assets actually belong to the Defendant's parents and not to the partnership. The parties did agree that the partnership owned certain trucks and trailers, identified as items 113 through 121 on the Schedule of Assets attached to Trial Exhibit 2, Plaintiff's financial declaration. The evidence failed to show that the partnership owns any other asset. The partnership has no

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contractual rights at all, even with the landowners where it farms, since those owners are part of the partnership. The right to farm the land may be revoked at any time. The income produced by the partnership is totally dependent upon the labor of the Defendant and his father. That income is a year-by-year matter and could be changed, or ended, at any time. The opportunity to work in such an enterprise creates no equity to divide between the parties. No credible evidence was produced as to the value or existence of any assets other than the vehicles referred to above.

22. The Court therefore finds the value of Defendant's interest in the partnership to be $2,531.25, which is 25% of the value of the vehicles ($10,125.00). Plaintiff should be awarded one-half of that amount, or $1,265.63, while Defendant should be awarded the other one-half of that amount, or $1,265.63.

Attorney Fees

23. Both parties seek an award of attorney fees in this case. Both proffered evidence of the amount of attorney fees each had expended without objection and without challenge as to the reasonableness or necessity of the fees. The Court finds that the fees presented by both parties are reasonable in amount and necessary, given the character of the case and the issues presented. The Court is then left to determine whether any award of attorney fees is appropriate, and if so, to whom and in what amount.

24. Generally, the fees of an attorney should be paid by the litigant who hired the attorney. However, the Court has discretion under the provisions of UCA 30-3-3 (1953, as amended), to award attorney fees in a divorce case under appropriate circumstances. Plaintiff and Defendant seek attorney fees on the basis that each has incurred attorney fees, each claims lack of financial ability to pay attorney fees, and each claims the other is capable of paying attorney fees. To determine the issue, the Court must compare the financial situations of each party.

25. Plaintiff filed her Full Disclosure Financial Declaration (Trial Exhibit 2) in which she claimed $2,580.00 per month in income from her job. After deductions, her net pay is $1,749.00. By her own account, her monthly expenses are $1,850.00. She is unable to meet her expenses from her current salary.

26. Defendant filed his Full Disclosure Financial Declaration (Trial Exhibit 3) and claimed negative income from his employment. The claim was based on a comparison of the current debts and assets of the partnership. He claimed living expenses of $1,867.43 per month and claimed to be living on borrowed money.

27. The Court finds, however, that Defendant's financial statement presents an inaccurate picture of his situation. Throughout the trial it was obvious that Defendant derives great financial benefits from his employment, far in excess of the negative income he portrays. The evidence showed that, in addition to limitless cash draws available from

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the partnership till, the Defendant has his living expenses, including utilities, phone, car payments, insurance, house payments, taxes and other bills paid by the partnership directly. Although the Defendant does not characterize these as compensation, the Court finds otherwise.

28. In addition, Defendant's father testified that the partnership owes about $400,000.00 in loans and has annual income of $250,000.00 to $500,000.00, which clearly shows that the partnership is profitable.

29. Defendant also has received direct gifts from his parents which include, among other things, an interest in a valuable shop and real property, and money invested in the home which should be awarded to Defendant by stipulation of the parties. The Defendant's interest in those assets exceeds $250,000.00, at a minimum.

30. The Court finds that Defendant has the ability to pay the Plaintiff's attorney fees, that the Plaintiff does not, and that the equities of the situation dictate that the Defendant pay the Plaintiff's attorney fees and costs in this case.

31. Plaintiff has incurred reasonable attorney fees in the amount of $5,500.00, and should be awarded judgment for the same, together with judgment for her costs of court.

From the foregoing Findings of Fact, the Court now makes and enters its:

CONCLUSIONS OF LAW

1. Plaintiff should be awarded the relief set forth above.

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2. Defendant should be awarded the relief set forth above.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED this 12th day of August, 1996.

BY THE COURT:

J. PHILIP EVES, District Judge

APPROVED AS TO FORM:

JAMES M. PARK
Attorney for Plaintiff

WILLARD R. BISHOP
Attorney for Defendant

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