

IN THE UTAH COURT OF APPEALS

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Barbara Soderborg,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellant,)	
)	Case No. 20080398-CA
v.)	
)	F I L E D
David S. Soderborg,)	(December 3, 2009)
)	
Respondent and Appellee.)	2009 UT App 359

Third District, Salt Lake Department, 064901622
The Honorable Robert P. Faust

Attorneys: Grant W.P. Morrison and Matthew G. Morrison, Salt
Lake City, for Appellant
Kim M. Luhn and Paul H. Liapis, Salt Lake City, for
Appellee

Before Judges Greenwood, Bench, and Thorne.

BENCH, Judge:

Barbara Soderborg (Wife) appeals the trial court's order denying her alimony, attorney fees, and a share of David S. Soderborg's (Husband) separate, nonmarital property in the parties' divorce action. Wife also challenges some of the court's factual findings relating to that order.¹ We affirm.

Wife claims that the trial court abused its discretion by failing to award her a share of the appreciated value of Husband's separate, nonmarital property. See Jensen v. Jensen, 2009 UT App 1, ¶ 6, 203 P.3d 1020 ("A trial court has considerable discretion concerning property [division] in a

¹To the extent Wife challenges the trial court's findings concerning Husband's income and whether the subject properties were received as a gift or inheritance, we conclude that Wife has failed to meet her marshaling burden. See Utah R. App. P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."); West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991) (explaining the marshaling requirement).

divorce proceeding, thus its actions enjoy a presumption of validity." (alteration in original) (internal quotation marks omitted)). "[A] spouse's separate property and/or its appreciation, may be awarded in whole or in part to the other spouse . . . where the nonowner spouse has 'contributed to the enhancement, maintenance[,] or protection of that property,' or . . . [if] there are 'other extraordinary situations where equity so demands.'" Id. ¶ 11 (quoting Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988)).² "[A]ctive participation and contribution" is required for a nonowner spouse to receive separate, nonmarital property under the contribution category. Id. ¶ 14 (emphasis added).

Here, Husband either inherited or was gifted two properties from his father. When Husband received them, the properties were in violation of building codes and zoning ordinances and were facing condemnation due to their severe states of disrepair. For several years, Husband dedicated most of his time to repairing these properties, transforming them from nearly-condemned "dumps" to habitable, profitable rental properties. Once the properties could be used as rentals, Husband then dedicated most of his time to operating and managing the rental properties.

Wife argues that Husband's labor, which transformed these properties into profitable rental properties, is a marital asset, thereby entitling her to a portion of the properties' appreciated value. However, Wife has not presented any evidence showing how she directly "contributed to the enhancement, maintenance[,] or protection" of the properties, save a half-day of painting. See id. ¶ 11 (internal quotation marks omitted). In fact, the evidence shows that the properties were improved through Husband's labors alone. Because Wife has failed to show that she had any "active participation [with] or contribution" to the properties, we conclude that she cannot claim a portion of their value under the contribution theory for granting separate, nonmarital property to the nonowner spouse. See id. ¶ 14. Further, Wife has not adequately demonstrated that this case presents an extraordinary situation where equity demands division of Husband's separate, nonmarital property. See id. ¶ 11.

Wife next claims that the trial court made several erroneous factual findings in support of its decision to deny her alimony.

²Separate, nonmarital property may also be awarded to the nonowner spouse if "the property has been consumed or its identity lost through commingling," where the nonowner spouse is granted an interest in the property, or in lieu of alimony or attorney fees. Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988). Wife makes no such arguments on appeal.

See Davis v. Davis, 2003 UT App 282, ¶ 7, 76 P.3d 716 ("If . . . [an appellate court is] charged with the task of reviewing the trial court's findings of fact [in support of an alimony determination], we will reverse only if the findings are clearly erroneous." (internal quotation marks omitted)). Wife argues that the trial court should have awarded her alimony because she became disabled following cancer treatment and cannot support herself by becoming employed and producing her own income, save the \$1470 monthly disability payment she receives from a private insurer.³ See generally Utah Code Ann. § 30-3-5(8)(a)(ii) (2007) (requiring trial courts to consider "the recipient[spouse]'s earning capacity or ability to produce income" in determining alimony). At trial, the only evidence Wife presented to prove her disability was her own testimony and her monthly receipt of a disability check from a private insurer. Indeed, after testifying that her doctor had not released her to work, Wife admitted on cross-examination that she had not requested work release. The trial court therefore found Wife had failed to prove she could not become employed in order to earn income and contribute to her own support, reasoning that Wife had not presented any testimony from a medical doctor that she could not work due to a disability.

The trial court also found that Husband did not have the ability to pay alimony to Wife. See generally id. § 30-3-5(8)(a)(iii) (requiring trial courts to consider "the ability of the payor spouse to provide support" in determining alimony). Husband had been ordered to pay temporary alimony to Wife, and the trial court found that Husband needed to work a second job to meet this obligation. The record also shows that Husband and Wife were living beyond their means, both claiming expenses well

³Concerning her ability to produce income, Wife argues that her disability payments are her only source of income and any assertion that she makes a substantial income from breeding dogs is not supported by the evidence. We decline to address this argument, however, because the trial court did not include any profits Wife may have made from her dog-breeding hobby in calculating her yearly income. In fact, the court calculated Wife's yearly income from her disability insurance "without consideration of any additional income she may derive from her dogs, the sale of puppies, or other ventures that she was engaged in during the marriage." (Emphasis added.) Nor did the court use any of Wife's profits from dog breeding as a basis for imputing income. Rather, it appears that any evidence concerning Wife's dog-breeding hobby was used only to show that Wife had the physical ability to work.

beyond their monthly incomes.⁴ Although these facts illustrate that both parties need alimony to maintain their respective lifestyles, see generally id. § 30-3-5(8)(a)(i) (requiring trial courts to consider "the financial condition and needs of the recipient spouse" in determining alimony), these facts also illustrate that neither party is able to pay alimony to the other. Accordingly, we cannot say that the trial court's findings were clearly erroneous. See Davis, 2003 UT App 282, ¶ 7.

Finally, Wife claims that the trial court abused its discretion in denying her attorney fees. See Stonehocker v. Stonehocker, 2008 UT App 11, ¶ 10, 176 P.3d 476 ("[T]he decision to award attorney fees . . . [is] within the trial court's sound discretion." (internal quotation marks omitted)). The trial court ordered that both parties pay their own attorney fees, finding that neither party had the ability to pay for the other. See id. ("[T]he trial court's . . . denial of attorney fees must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." (internal quotation marks omitted)). In light of the facts concerning the parties' monthly incomes and expenses, the trial court's decision to deny Wife attorney fees was not an abuse of discretion.

Accordingly, we affirm.

Russell W. Bench, Judge

WE CONCUR:

Pamela T. Greenwood,
Presiding Judge

William A. Thorne Jr., Judge

⁴Wife claimed a monthly income of \$1470 with expenses totaling around \$3500 while Husband claimed a monthly income of \$1932 with monthly expenses of \$2579, not including the temporary alimony obligation.