IN THE UTAH COURT OF APPEALS

KIRKPATRICK MacDONALD, Appellant, v. LEE ANNE MacDONALD (nka FAHEY), Appellee.	Appellate Case No. 20150785-CA Third District Court Case No. 104500031

BRIEF OF APPELLEE LEE ANNE FAHEY

APPEAL FROM THE THIRD DISTRICT COURT,
SUMMIT COUNTY, STATE OF UTAH
THE HONORABLE KARA PETTIT, PRESIDING

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(h).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Issue 1: Did the District Court properly hold that income derived from the sale proceeds of property awarded to Lee Anne Fahey ("Ms. Fahey") in the parties' stipulated Decree of Divorce (or, "Decree") was contemplated by the Decree and therefore did not qualify as a substantial material change in circumstances upon which Kirkpatrick MacDonald ("Mr. MacDonald") could petition to modify the Decree to eliminate his alimony obligations? (R.818-24.)

Standard of review: Under Utah law, "[t]he determination of the trial court that there [has or has not] been a substantial change in circumstances . . . is presumed valid, and [the court of appeals] review[s] the ruling under an abuse of discretion standard." *Hibbens v. Hibbens*, 2015 UT App 278, ¶12, 363 P.3d 524.

This appeal is not subject to the "correctness" standard of review presented by Mr. MacDonald. (Br. at 2.) The "correctness" standard only applies if the Court is "presented with a question of law regarding what constitutes a substantial change of circumstances." *Toone v. Toone*, 952 P.2d 112, 114 (Utah Ct. App. 1998). (Emphasis added). Mr. MacDonald does not present a question of law for review. He states "Issue 1" as follows: "Whether income generated from investments made after a divorce qualifies as a substantial and material change in circumstances that was not contemplated

in the divorce decree." (Br. at 2.) The District Court answered that question in the negative, but its conclusion was determined by its factual findings specific to this case, including the terms of the parties' Decree and the factual circumstances upon which Mr. MacDonald petitioned to modify alimony. The question presented by Mr. MacDonald cannot alternatively be addressed in a legal vacuum because, again, the conclusion in this case necessarily turns on the facts at bar. The parties agree that governing legal principles provide that if an alleged change in circumstances was contemplated at the time of the divorce then that factual finding supersedes all other considerations and compels denial of a petition to modify.

As demonstrated herein, the District Court made explicit factual findings that the terms of the Decree ***did*** contemplate the purported change in circumstances identified by Mr. MacDonald—specifically, that Ms. Fahey would use income derived from the sale proceeds of real property awarded to her in the Decree to live off of, ***in addition to*** the stipulated amount of alimony awarded to her in the Decree. (R.822 at ¶17.) Its ruling reflected those factual findings and it is those findings that Mr. MacDonald appeals. The District Court did not abuse its discretion. In addition, because the District Court's findings of fact and conclusions of law are sound, its ruling should be affirmed even if the Court applies a "correctness" standard of review.

STATUTES OF CENTRAL IMPORTANCE

Utah Code Ann. § 30-3-5(8)(i)(i): Mr. MacDonald appeals the District Court's factual determination that he failed to show a "substantial material change in circumstances not foreseeable at the time of the divorce" to modify the Decree of Divorce. *See id.* This provision is set forth in Addendum B to Mr. MacDonald's brief.

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal from the District Court's Findings of Fact, Conclusions of Law, and Order (or, "Order") denying Mr. MacDonald's Verified Petition to Modify the parties' stipulated Decree of Divorce (or, "Petition") to eliminate Mr. MacDonald's obligation to pay alimony to Ms. Fahey. The District Court declined to terminate Mr. MacDonald's alimony obligations because it found, after a two-day trial in which it heard witness testimony and received evidence, that Mr. MacDonald failed to show a substantial material change in circumstances not contemplated at the time of the divorce.

II. Course of Proceedings and Disposition Below

The parties were divorced on January 6, 2012, pursuant to a Decree of Divorce that incorporated, in full, the terms of the parties' mediated Stipulation and Settlement Agreement (or, "Agreement"). (R.45-47.) Mr. MacDonald appeals the District Court's denial of his Petition to terminate alimony, which he filed on January 29, 2013. (R.825-27; R.257.) The Petition was based on his claim that Ms. Fahey sold one of the parcels of

real property awarded to her in the Decree at a higher value than Mr. MacDonald anticipated, and from the sale proceeds has received an income stream that he claimed was not contemplated by the Decree, thus warranting termination of his stipulated alimony obligations. (R.258 at ¶5(a)-(b).) Mr. MacDonald filed the Petition shortly after the court denied a Utah R. Civ. P. 60(b) motion he filed to rescind the property division in the Decree, also based Ms. Fahey's sale of Lot 1 for an amount higher than he claims he anticipated. (R.454-55.)

The District Court denied Mr. MacDonald's Petition by written Order entered on June 27, 2015. (R.816-24.) The Order set forth, among other findings:

> The legal standards governing a petition to modify alimony:
>
> - The governing standard to modify alimony is set forth in Utah Code Ann. § 30-3-5(8)(i)(i): "The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce." (R.819 at ¶8.)
>
> - Utah case law has interpreted that statute to require that in order for a change of circumstance to not be foreseeable it must be something that was "not contemplated." (*Id.* at ¶9.)
>
> - To make the determination, the District Court looks to the language of the Decree itself and preferably provisions in the Decree that substantiate whether the change was contemplated. (*Id.* at ¶10.)
>
> The change of circumstances alleged by Mr. MacDonald:
>
> - The alleged change in circumstances was two-fold: (a) "that the sales price of Lot 1 was more than what Mr. MacDonald anticipated" and (b) "that Ms. Fahey's income increased from the time of the Decree to the present time, or at the time of the [Petition], because of the sale of Lot 1

and her ability to invest those proceeds and earn income on those proceeds was not contemplated." (*Id.*)

The pertinent terms of the Decree:

- Despite whatever value Mr. MacDonald may have anticipated Lot 1 to be worth, "The Decree did not set forth an expected sales price for Lot 1 or any of the lots," and "also did not set forth an expected income number that Ms. Fahey would derive due to her investment of the lot sales proceeds, or how much she might make on selling the lots." (*Id.* at ¶11.)

- Paragraph 9 of Agreement (incorporated by the Decree) "did expressly contemplate that she would sell the lots and would use the proceeds of the sales of those lots to pay her expenses." (*Id.*)

and

The District Court's finding that the change was contemplated and was to have no effect on the stipulated alimony:

- "The Decree expressly contemplated that Ms. Fahey would sell the lot(s) and would thereby receive proceeds and be able to invest those proceeds and live off of those *in addition* to the alimony." (R.822 at ¶17.)

Accordingly, the District Court denied the Petition. (R.824.) Mr. MacDonald filed a Notice of Appeal of the Order on July 27, 2015. (R.825-26.)

III. Statement of Facts

Mr. MacDonald Petitions for Divorce and the Parties Negotiate a Stipulated Settlement

1. Ms. Fahey and Mr. MacDonald married on June 22, 1991. (R.19 at ¶2.)

2. The parties thereafter experienced irreconcilable differences, and, on February 10, 2010, Mr. MacDonald filed a Petition for Divorce. (R.1.)

3. On December 16, 2010, after engaging in a mediation with retired Judge Judith Billings, the parties reached an agreement on the terms of a mutual divorce, which terms were memorialized into a Stipulation and Settlement Agreement ("Agreement"), executed by Mr. MacDonald on October 18, 2011, and by Ms. Fahey on November 3, 2011. (R.19 at ¶3; R.18-24.)

4. The Agreement required Mr. MacDonald to pay alimony to Ms. Fahey for a period of ten years, to expire in December 2020, provided that "[a]limony shall terminate upon the earlier of [Respondent's] remarriage, cohabitation or death." (R.21-22 at ¶15.) The Agreement set the amount of alimony at $2,000 per month until December 2012, at which time it increased to $6,000 per month, commencing January 1, 2013. (*Id.*)

5. There were no recitals, terms, conditions, or references in the Agreement that alimony was conditioned upon the parties' real property division in any respect. The Agreement also contained no recitals, terms, conditions or references pertaining to Ms. Fahey's needs with respect to alimony. (R.18-24.)

6. The Agreement also provided for the award of real property to Ms. Fahey. Under the section heading "Real Property Awarded to Lee Anne," Ms. Fahey was awarded all right, title and interest to three real property lots of the Preserve development in Summit County, consisting of Lot 1, Lot 49 and a yet-to-be-platted lot, collectively referred to as the "The Preserve Lots." (R.20 at ¶¶6-8.) This section of the Agreement made two explicit references to Ms. Fahey's anticipated sale of Lot 1. (R.20 at ¶9, "[Mr.

MacDonald] shall pay the Homeowner's Association fees and property taxes on The Preserve Lots [defined to include Lot 1, *see* (R.20 at ¶8)] for a period of five years commencing January 1, 2011 ***or until [Ms. Fahey] sells one of The Preserve Lots***. [Mr. MacDonald's] payment of the HOA fees and property taxes shall be treated as a loan to [Ms. Fahey], and [Ms. Fahey] shall reimburse him for those payments without interest ***at the time she sells one of The Preserve Lots***.") (Emphasis added.)

7. The Agreement awarded to Mr. MacDonald all right, title and interest to all other real properties, including a five-story brownstone in the Upper West Side of New York City, where Mr. MacDonald currently resides and which he testified to be presently worth about $6.5 million. (R.21 at ¶10; R.980:2-6; R.982:1-4, 11-13.) Mr. MacDonald also received an apartment located at 25 West 71st Street in New York City, which sold after the divorce for $1,550,000, an amount that Mr. MacDonald testified to be approximately $550,000-$750,000 greater than the value he believed it to be worth at the time the parties entered into the Agreement. (R.978:19-25; R.979:10-21.)

8. There were no recitals, terms, conditions or references in the Agreement with respect to the purported monetary value of Lot 1, The Preserve Lots, or any of the real property awarded to the parties. (R.18-24.)

9. The Agreement also provided: "This is the final and only agreement between the Parties, and no other representation, oral or in writing, shall be binding upon them unless presented to and ordered by this Court." (R.18-19 at ¶2.) The District Court

ruled that the Agreement was not "facially ambiguous" (R.1337:1-2) and recognized the "integration clause" in paragraph 2. (R.1337:8-10; *see also* R.1340:22-25; R.1341:1-4.)

Judge Kelly Incorporates the Agreement into the Decree of Divorce

10. On January 6, 2012, Judge Keith Kelly of the Third District Court entered the Decree of Divorce and Findings of Fact and Conclusions of Law, incorporated by reference into the Decree. (R.45.)

11. The Decree and the Findings of Fact and Conclusions of Law incorporated all terms of the parties' Agreement. (R.38-43, 45.)

12. Specifically, the Decree provided, *inter alia*:

- As to alimony: "Alimony is ordered and shall be paid pursuant to the express terms of the Agreement." (R.46 at ¶2); and
- As to the parties' property division: "The real and personal property, assets, debts, and obligations of the parties shall be divided between them as set forth in the Agreement." (R.46 at ¶3.)

13. The Decree did not purport to accept the Agreement as an equal division based on monetary values or the need of the parties, but rather as "fair and equitable under the circumstances." (R.45; R.42 at ¶2.)

Ms. Fahey Sells Lot 1 of The Preserve Lots

14. On or around January 25, 2012, Ms. Fahey sold Lot 1, as contemplated in the Decree and the Agreement, for a gross pre-tax sale price of $1,425,000. (R.547.)

15. In December of 2011, Mr. MacDonald initially received the offer to purchase Lot 1 because the deed had not yet been transferred to Ms. Fahey pending entry of the Decree; however, Mr. MacDonald acknowledged at the time that Ms. Fahey owned Lot 1 and that Lot 1 was not his property to sell. (R.875:9-25; R.876:4-14, 25.)

16. Accordingly, Mr. MacDonald testified that Ms. Fahey sold the property. (R.978:5.)

17. Mr. MacDonald testified that in the negotiations he speculated that Ms. Fahey would not sell Lot 1 unless the sale price was $1.5 million, "which was $700,000 above what ***I thought*** it was worth." (R.877:2-5) (emphasis added.) To be clear, Ms. Fahey never agreed on the value of Lot 1, and its value was not a predicate for the Agreement. (R.1149:17-25; R.1150:1-2.) Ms. Fahey testified that Mr. MacDonald's occasional claim at trial that the parties had agreed to certain values as a predicate for the Agreement was "not truthful," and that she never agreed because of the "difficulty" of "his values, and papers, and reams of his accounting and his papers." (R.1146:20-25; R.1147:1-4.) As she explained, "[I]n the files are papers where he says that the three lots that I received were valueless. Then they were worth a lot of money. Then they were worth a little bit of money. It moved all over the map, depending on what he thought he wanted to take." (R.1147:5-9.) Thus, while Mr. MacDonald testified that he prepared spreadsheets of the parties' assets and liabilities in preparation for the mediation (R.862:5-6), a stipulation of the valuation of any asset, including Lot 1, was not included

as part of the Agreement. (R.1149:17-25; R.1150:1-2; R.18-24; R.45-47; R.186 at ¶8.) At trial, Mr. MacDonald's counsel confirmed that Mr. MacDonald's testimony on those values pertained to "his understanding" of those values. (R.880:25; R.881:1-4.)

18. Accordingly, after the District Court found that the Agreement was facially unambiguous and integrated (R.1340:22-25; R.1341:1-4), in its Order denying the Petition it found that the Agreement did not set forth any expected sales price or income Ms. Fahey was contemplated to derive from the sale of Lot 1 (R.819 at ¶11), and that any anticipated value or sales price of Lot 1 was the unilateral anticipation of Mr. MacDonald. (R.819 at ¶10; R.821 at ¶14.)

19. Ms. Fahey received the proceeds from the sale of Lot 1 and has since used those proceeds to supplement her alimony income, as she expected to do. (R.1150:3-10.)

Mr. MacDonald Attempts to Undo the Agreement and Set Aside the Decree

20. On April 6, 2012, Mr. MacDonald moved to set aside the Decree, pursuant to Utah R. Civ. P. 60(b), on the grounds that the sale price of Lot 1 was different from its anticipated value. (R.131-40.)

21. In response, Ms. Fahey pointed out that the Agreement was not predicated on real property values, did not contain any stipulated values, and did not purport to be an equal distribution of assets. (R.164.) Ms. Fahey also noted that any purported "mistake" about the expected sales price of Lot 1 is not a basis to set aside a stipulated property division under *Robinson v. Robinson*, 2010 UT App 96. (R.174-177.) Mr. MacDonald's

motion was denied. (R.454-55.) The minute entry for the hearing read: "*Robinson* does govern in this situation. The parties agreed to divide specific assets, and both took a risk that the value of the properties might change. The motion is denied." (R.445.)

22. Mr. MacDonald does not appeal that ruling. (Br. at 8.)

Mr. MacDonald Repackages His Failed Rule 60(b) Motion as a Petition to Modify

23. On January 24, 2013, Mr. MacDonald made a second attempt to disturb the Decree based on Ms. Fahey's sale of Lot 1. He reformulated his Rule 60(b) motion as a Petition to Modify Decree of Divorce, claiming that the sale of Lot 1 resulted in a financial "windfall" to Ms. Fahey, and her use of the sale proceeds constituted a substantial material change of circumstances such that Mr. MacDonald should avoid paying alimony as stipulated in the Agreement and ordered by the Decree. (R.257-59.)

24. After a two-day trial, the District Court denied the Petition, after finding that the sale of Lot 1 and Ms. Fahey's use of its sale proceeds was contemplated at the time of the Decree, and therefore did not constitute a substantial material change in circumstances to terminate Mr. MacDonald's alimony obligation. (R.816-24.)

25. Mr. MacDonald appeals the District Court's Order. (R.825-26.)

SUMMARY OF THE ARGUMENT

The Petition very clearly set forth the basis for Mr. MacDonald's request to terminate his alimony obligations: (1) that Lot 1 sold for double the value he thought it

was worth; and (2) as a result of the unexpected "windfall" from the sale, Ms. Fahey now can generate income sufficient to meet her needs.

The District Court's Order was also clear. It denied the Petition because it found that the alleged change in circumstances was contemplated by paragraph 9 of the Decree. This factual finding was dispositive to the Petition, and it is dispositive for this appeal.

In support of its ruling, the District Court made a series of foundational factual findings—none of which Mr. MacDonald has marshaled the evidence in order to dispute—that the value of Lot 1, its sales price, and any proceeds or income Ms. Fahey ultimately realizes as a result of selling Lot 1 was not stipulated to by the parties, and was not a condition to any other provision in the parties' settlement, including alimony. Then, the District Court pinpointed provisions in the Decree, specifically paragraph 9, that contemplated that Ms. Fahey would sell Lot 1 and use those proceeds to live on and pay her expenses. Mr. MacDonald may not have anticipated the amount of proceeds and income Ms. Fahey could generate from Lot 1, but his surprise or regret about the deal he made is not a basis to modify his independent alimony obligation in the Decree.

On appeal, Mr. MacDonald does all he can to avoid the District Court's findings. He ignores the District Court's dispositive holding that the change was contemplated until the very end of his brief. He complains that the District Court should have considered Ms. Fahey's needs, despite the fact that alimony in the Agreement was not based on or controlled by her needs in the first place. He accuses the District Court of

confusing a petition to modify a property division with a petition to modify alimony, even though his Petition was prompted by what he claims was the unanticipated sale price of real property awarded to Ms. Fahey in the Decree. He cites cases to show a change in circumstances, but those cases are immediately distinguishable because they concerned uncontemplated future income that was not derived from the property division in the divorce. He focuses on proving that the alleged change was substantial and occurred after the divorce, but those considerations are irrelevant where the circumstance was contemplated, and those elements were far from proven in the proceedings.

Ms. Fahey addresses each of Mr. MacDonald's arguments in turn. The conclusion remains: the District Court ruled within its discretion, and correctly, that the alleged change in circumstances was contemplated by the Decree, and so the Petition must fail.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED THE PETITION BASED ON FACTUAL FINDINGS THAT THE CHANGE IN CIRCUMSTANCES ALLEGED BY MR. MACDONALD WAS CONTEMPLATED BY THE DECREE OF DIVORCE.

A. The District Court's Factual Finding that the Change in Circumstances Alleged by Mr. MacDonald was Contemplated by the Decree is Dispositive to this Appeal.

"On a petition for a modification of a divorce decree, the threshold requirement for relief is a showing of a substantial change of circumstances occurring since the entry of the decree ***and not contemplated in the decree itself***." *Wall v. Wall*, 2007 UT App 61, ¶11, 157 P.3d 341 (emphasis added) (quoting *Moore v. Moore*, 872 P.2d 1054, 1055

(Utah Ct. App. 1994)). "If a change in circumstances is 'reasonably contemplated at the time of divorce, [then it] is not legally cognizable as a substantial change in circumstances in modification proceedings.'" *Wall*, 2007 UT App at ¶11 (quoting *Dana v. Dana*, 789 P.2d 726, 729 (Utah Ct. App. 1990)). Thus, to be clear, it is irrelevant whether the change of circumstances is substantial and material ***if it was otherwise contemplated***. Considerations including whether and in what amount there is an increase in income to the recipient as a result of the change, or whether the existing alimony amount comports with the recipient's needs, do not matter. *See, e.g., Wall*, 2007 UT App at ¶14 (Mr. Wall's arguments disputing purported findings about Mrs. Wall's "needs" were "not determinative as we have previously affirmed the trial court's finding that there has been no change in circumstances not contemplated at the time of the divorce[,]" specifically, that Mrs. Wall would complete college and get a job after the divorce).

The immediate problem with Mr. MacDonald's appeal is he starts from an incorrect presumption that the alleged change in circumstances at issue ***was not*** contemplated by the Decree, when the District Court found that the alleged change ***was*** contemplated. (R.822 at ¶17, "The Decree expressly contemplated that Ms. Fahey would sell the lot(s) and would thereby receive proceeds and be able to invest those proceeds and live off of those *in addition* to the alimony.") (Emphasis in original.) Mr. MacDonald compounds the problem by choosing to ignore this holding until the concluding arguments in his brief—despite the fact that it was ***the*** dispositive finding in

the Order. (Br. at 23.) As a result, he spends a significant amount of time discussing irrelevant issues. (*See, e.g.*, Br. at 13, phrasing the "question" before the District Court as whether "income generated from the investment of proceeds that result from the sale of property that was divided in a divorce constitutes 'income'"; Br. at 10, discussing the need-based factors that Utah courts look to when fixing an alimony award). The District Court did not reach these types of issues because they became moot upon its finding that the alleged change in circumstances ***was contemplated by the Decree***. *See Bolliger v. Bolliger*, 2000 UT App 47, ¶22, 997 P.2d 903 ("Once a party has established that a substantial material change in circumstances not foreseen at the time of the divorce has occurred, the trial court ***must then*** consider what a reasonable alimony award is in light of that change."). (Emphasis added).

To reach its conclusion, the District Court properly noted that it "looks to the language of the Decree itself and, preferably, there are provisions in the Decree that substantiate whether the circumstance was something that was contemplated or in the record itself." (R.819 at ¶10); *see also Wall*, 2007 UT App at ¶12 ("In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change."). The District Court then prefaced its analysis: "It is very clear under the law that if the circumstance is in the Decree and is contemplated by

the terms of the Decree, then it's not a change that would be sufficient to support a petition to modify." (R.819 at ¶10.)

Thus, the proper course of review on appeal starts with the District Court's finding that the alleged change was contemplated. It also ends there because, as demonstrated below, the District Court found, within its discretion, that the alleged change of circumstances was "contemplated" by the Decree. This finding was dispositive to the denial of the Petition, and is dispositive to Mr. MacDonald's appeal.

B. The District Court Properly Found that the Decree Contemplated Ms. Fahey Selling Real Property Awarded to Her in the Decree and Using the Proceeds of that Sale.

The change in circumstances alleged in the Petition was two-fold: First, that Ms. Fahey "sold one of the parcels of property for twice the value relied upon in settlement negotiations for one of her lots and received $1,425,000.00" and second, that it was "not contemplated that [she] would receive a significant cash windfall nor was it contemplated that she would not [sic] use such proceeds to meet her needs and given that she has received proceeds of $1,425,000.000, [Ms. Fahey] has no need for alimony and the alimony award should be vacated." (R.258 at ¶5(a)-(b).)

The District Court did not abuse its discretion in finding that (1) the parties never relied on a value for Lot 1 in the Agreement in the first place, and the fact that Mr. MacDonald may have anticipated that Lot 1 would sell for less than it did

is not a basis upon which he can seek to modify the Decree, and (2) conversely, the parties did contemplate in the Decree that Ms. Fahey would sell Lot 1 and use those sale proceeds—without any stipulation or condition as to the amount or ultimate value to be derived from those proceeds—***in addition*** to the alimony.

1. The District Court Properly Found that the Parties Did Not Stipulate to a Value of Lot 1 as Part of the Integrated Agreement and Decree.

The first change alleged by Mr. MacDonald is that Lot 1 sold for what he believed to be double its value when entering into the Agreement. This sale triggered the filing of his Rule 60(b) motion to rescind the property division, and, when that failed, the filing of his Petition to recoup the sale proceeds by offsetting them against his alimony obligations. The sale does not give rise to a modification of any provision of the Decree, however, because none of its provisions (including alimony) are conditioned upon the value of, or value to be derived from, real property awarded in the Decree.

In this regard, the District Court made four critical factual findings:

First: "The Decree did not set forth an expected sales price for Lot 1 or any of the lots. The Decree also did not set forth an expected income number that Ms. Fahey would derive due to her investment of the lot sale proceeds, or how much she might make on selling the lots." (R.819 at ¶11.) The Agreement incorporated by the Decree confirms this finding in the Order. There was no provision in the

Agreement affixing a value to Lot 1, or conditioning any other settlement terms on its monetary worth. (R.18-24; R.45-47.)

Second, the District Court found that the Agreement was not facially ambiguous and was fully integrated. (R.1340:22-24; R.1341:2-4.) Mr. MacDonald was barred from attempting to add to or modify terms in the Decree pursuant to his testimony, or otherwise, under the parol evidence rule. *See B.T. Moran, Inc. v. First Sec. Corporation*, 24 P.2d 384, 389 (Utah 1933) (for integrated written contracts, "parol evidence of contemporaneous conversations, representations, or statements will not be received for the purpose of varying or adding to the terms of the written document"); *Radman v. Flanders Corp.*, 2007 UT App 351, ¶7, 172 P.3d 668 ("[O]nce a contract has been found to be unambiguous, the trial court may not rely on extrinsic evidence to determine the intent of the parties or to vary the terms of the agreement") (internal citations omitted).

Third, the District Court found that to the extent the value of Lot 1 was contemplated at the time of the divorce, it was a unilateral anticipation of ***Mr. MacDonald***—not the parties, and not the Decree. (R.819 at ¶10, the first change in circumstances alleged by Mr. MacDonald is "that the sales price of Lot 1 was more than what ***Mr. MacDonald anticipated***"; R.821 at ¶14, Mr. MacDonald

"also alleges that the sales price was higher ***than he had anticipated***.") (All emphases added.)

Fourth, the District Court found that there is no practical distinction between the sale price of Lot 1 and the income Ms. Fahey is able to generate from the sale proceeds of Lot 1, because the parties did not agree to revise or reallocate any other asset in the Agreement based on the ultimate value to be derived from the real property awarded:

> The Court understands the position of Mr. MacDonald to be that it is not the sale of Lot 1 or the fact that Ms. Fahey earned income from the sale, but rather the degree, i.e., the amount of proceeds from the sale, that was not anticipated. The problem with that position is that there is not any provision in the Decree or the Agreement that sets forth what the parties agreed were the respective values of any of the various properties that were divided; which is something that the Decree clearly could have done if intended.

(R.820 at ¶13.) The Order underscored the point with an illustration:

> For example, if the property was sold for X% more or less than what the parties had agreed the value was, then there could possibly be some kind of reallocation. Moreover, the Decree does not have a requirement for any accounting after the sale of an asset, e.g. once an asset sells you report back to the other person and then, if it's different than anticipated, there should be some modification of the property division or the alimony. For instance, when Mr. MacDonald sold the 71st Street property, he received a different price then was assumed in the spreadsheet he offered as evidence, and when Ms. Fahey sold Lot 49, the sales price was also different than shown on the spreadsheet. Again, the Decree contained no mechanism or reporting for either party to true up the values of the assets ***or change alimony*** based on the sales price being different than was assumed by either [Mr. MacDonald] or [Ms. Fahey].

(R.820-21 at ¶13) (emphasis added.) The District Court ultimately found: "What wasn't originally contemplated one way or another [by the Decree] was how much she was going to earn off the sale of the property she was awarded." (R.822 at ¶17.) Thus, Mr. MacDonald cannot base his Petition to modify, in any respect, on money or income Ms. Fahey realized from the sale of Lot 1.

It bears noting that the "different price" Mr. MacDonald received for the 71st Street property was $500,000 more than his spreadsheet set its worth at the time of the divorce. (R.979:10-21.) As the District Court correctly stated:

> Similar to Mr. MacDonald not being able to seek a modification based on a valuation differential between what was assumed at the time of the Decree and the sales price, Ms. Fahey cannot seek a modification for more alimony based on an increase in income that Mr. MacDonald might have as a result of selling property for more than may have been anticipated at the time of the Agreement or the Decree.

(R.821-22, at ¶16.) Mr. MacDonald's attempt to refute this analogy misses the mark. He claims that yes, Ms. Fahey could not seek more alimony in such an instance, but the reason is because she cannot receive more than her need. (Br. at 17-18.) But the alimony here is not based on a court's finding of Ms. Fahey's need—it is a negotiated and stipulated amount. And the Decree does not condition the stipulated amount of alimony on the values of the real property, whether they went up or down. The point made by the District Court is that the property division was what it was and there was no intention—or mechanism—in the Decree to adjust any aspect of the settlement terms based on how much or how

little the parties ultimately derived from the real property division. As aptly conceded by Mr. MacDonald's counsel at trial: "[Ms. Fahey] just got lucky with this property division, so that's the result. We filed a 60(b) motion [to rescind the property division]. We lost. That's done." (R.1327:24-25; R.1328:1.) One could say Mr. MacDonald also "got lucky" selling the 71st Street property for a half-million dollars more than he anticipated, which Ms. Fahey accepts. Neither the parties nor the courts are served by reopening divorce decrees every time a piece of property sells for a higher or lesser value,[1] especially where an equal distribution based on value was not a salient factor in the settlement to begin with.

On appeal, this Court must accept the District Court's factual findings because Mr. MacDonald did not marshal the evidence in order to challenge those findings. Utah R. App. P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."). *See also Kimball v. Kimball*, 2009 UT App 233, ¶21, 217 P.3d 733, 743 ("When challenging factual findings, the challenging party must begin by undertaking the arduous and painstaking marshaling process."). Mr.

[1] Indeed, as stated in *Jense v. Jense*, 784 P.2d 1249, 1253 (Utah Ct. App. 1989), wherein this court rejected the plaintiff/husband's attempt to modify a decree based on a decline in the value of the marital home he was awarded in the divorce:

> Plaintiff received exactly what he bargained for, and the fact that his property declined in value is simply not a change in circumstances upon which the trial court may modify the divorce. ***For this court to rule otherwise would open a Pandora's box, permitting parties to a divorce to a seek subsequent modification of property settlements every time the property the received in the decree changed in value. This we are unwilling to do***. (Emphasis added).

MacDonald is required to present, "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists." *Id.* at ¶21 (emphasis in original). Then, [a]fter constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous." *Id.* (internal citation and quotation omitted). The court in *Kimball* found that both the husband and wife "failed to meet their respective marshaling duties on their various challenges to the factual findings or highly fact-sensitive legal analysis of the trial court." *Id.* at ¶22 (citing *Chen v. Stewart,* 2004 UT 82, ¶20, 100 P.3d 1177 ("Even where the defendants purport to challenge only the legal ruling, as here, if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the defendants also have a duty to marshal the evidence.")).

Not only has Mr. MacDonald failed to marshal the evidence, he goes a step further by simply ignoring these findings and repeatedly and casually misstating that the ***parties***—not Mr. MacDonald—jointly agreed to or contemplated the value of Lot 1 at the time of the Decree. (*See, e.g.*, Br. at 1, "The price for [Lot 1] was nearly double what the parties had estimated."; Br. at 4, the "parties determined the values of the real property . . ."; Br. at 6, the offer price for Lot 1 "was approximately twice what the parties had anticipated."; Br. at 33, "It is worth noting that the property turned out to be worth much

more than the parties anticipated when they constructed their Settlement Agreement[.]".) In support of these "facts," Mr. MacDonald cites to his own self-serving affidavit testimony that he filed in support of his failed Rule 60(b) motion in 2012. (R.157 at ¶10.) Since that time, the District Court adjudicated that any anticipated value or sales price was not mutual—it was unilaterally Mr. MacDonald's. At trial, the issue was never really even in dispute. When asked by the District Court at a pretrial hearing to clarify what Mr. MacDonald's "intention" was in introducing an exhibit of the table of property values he had prepared, his counsel responded that Mr. MacDonald intended to show "his understanding of what he thought that they had done when they divided up the property." (R.1328:20-25; R.1329:1.)

In sum, the facts adjudicated by the District Court at trial are clear: the Decree never set a stipulated value or sales price for Lot 1, or conditioned the other provisions in the Decree—including alimony—on the sale proceeds or income realized from the sale proceeds of the real property divided between the parties. That Ms. Fahey received more sale proceeds, or more income derived from those sale proceeds, than the amount that Mr. MacDonald assumed Lot 1 was worth, is not a cognizable basis to seek modification of the Decree. Thus, the only "change in circumstances" remaining before the District Court was whether the Decree otherwise contemplated that Ms. Fahey would sell Lot 1—for any price at

all—and use the sale proceeds to her benefit, including to repay the HOA fees and taxes. It found in the affirmative and that finding is correct.

2. The District Court Properly Found that the Decree Contemplated that Ms. Fahey Would Sell Lot 1 and Use the Sale Proceeds for Her Expenses.

"[I]f both the divorce decree and the record are bereft of any reference to the changed circumstance at issue in the petition to modify, then the subsequent changed circumstance was not contemplated in the original divorce decree." *Bolliger,* 2000 UT App at ¶13. Far from the record being "bereft," the District Court did not need to look beyond the express provisions in the Decree to find that Ms. Fahey's sale of Lot 1 and her use of those sale proceeds was contemplated:

> [T]he Decree did expressly contemplate that [Ms. Fahey] would sell the lots and would use the proceeds of the sales of those lots to pay her expenses. Specifically, the Court notes that Paragraph 9 of the Agreement, which was incorporated into the Decree, provides that Mr. MacDonald was going to pay the Homeowner's Association fees and property taxes on The Preserve Lots for a period of five years commencing January 1, 2011 ***or until [Ms. Fahey] sells one of The Preserve Lots***. Those payments were to be treated as a loan and Ms. Fahey was obligated to reimburse Mr. MacDonald. The provision states: '***Lee Anne shall reimburse him for those payments without interest at the time she sells one of The Preserve Lots.***' Based upon the foregoing, the Court finds that it is clear that the parties, in their Agreement, which contained both the property division and the setting of alimony, contemplated that Ms. Fahey was going to sell those lots and was going to use the proceeds of the sale of those lots to pay expenses.

(R.819-820 at ¶11) (emphasis added.) For a change to be contemplated, the Decree does not need to explicitly reference the change made, there need only be evidence to support the finding that it was contemplated. For example, in *Wall*, Mr. Wall petitioned to modify his alimony obligations because Mrs. Wall graduated from college and obtained employment after the divorce. In affirming the trial court's finding that the change was contemplated at the time of the divorce, the Court of Appeals fully acknowledged: "Mr. Wall is correct that neither the parties' original Settlement Agreement, nor the original Decree, reference Mrs. Wall's graduation from college or subsequent employment." *Id.* at ¶13. However, references describing the pertinent circumstances—that Mrs. Wall was a full-time student with limited work experience, and was trying to develop skills to allow her sufficient income to support herself—were held to "provide sufficient record evidence to support the trial court's conclusion that Mrs. Wall's graduation from college and subsequent employment were contemplated at the time of the divorce." *Id.*

Here the evidence was much stronger. The Decree not only contemplated the possibility of Ms. Fahey selling The Preserve Lots, but provided for this eventuality by stating that Ms. Fahey "shall" reimburse Mr. MacDonald with her proceeds from the sale, "at the time" she sells one of The Preserve Lots. (R.20 at ¶9.) Moreover, the idea that Ms. Fahey would take those sale proceeds and use them to her benefit as the owner and seller of all right, title and interest to Lot 1—to live off of, to invest, or to embark on a

spending spree the day the sale closed—is obvious. The Decree reinforces this point by requiring her to spend at least some of those proceeds to repay the HOA fees.

Mr. MacDonald's efforts to draw a contrary finding from Paragraph 9 of the Decree fall flat. He claims that the sale was not contemplated by the Decree because Ms. Fahey "is under no obligation to sell the lots and certainly there is no timeline—either as to when she must sell the lots, or when she would be able to sell the lots." (Br. at 27.) He claims that the Decree "is silent" as to what she would do with The Preserve Lots, such as converting them "into an income-producing asset that will produce enough income for her to live off." (*Id.* at 28.) Then, to conclude his point that "what Ms. Fahey would do with the properties was not contemplated," he speculates that the Decree could have conditioned her receipt of alimony on her not selling the lots, but that it did not. (*Id.*)

Mr. MacDonald's logic is flawed; the Decree can contemplate a change without ***requiring*** that it occur and then dictating every contingency if it does occur. *Wall* illustrates this point. References to circumstances about Mrs. Wall's education and employment aspirations were sufficient to find that her actually graduating college, and actually getting a job, were contemplated at the time of the divorce. The divorce record did not require her to finish college (she could have dropped out before then) in order for the change to be deemed contemplated when it did, in fact, occur. Similarly, the Decree did not have to require Ms. Fahey to sell Lot 1, or condition the alimony payments on her not selling Lot 1, in order to for the sale to be deemed contemplated when it did, in fact,

occur. (The fact that Mr. MacDonald acknowledges that the Decree could have conditioned alimony on ***not*** selling Lot 1, but did not do so, simply reinforces the fact that alimony was intended to be an independent stipulated obligation).

In sum, the sale of Lot 1, and Ms. Fahey using the sale proceeds to live on, was contemplated by the Decree.

II. MR. MACDONALD'S REMAINING ARGUMENTS ARE WITHOUT MERIT.

The District Court's factual findings were within its discretion, and are correct based on the record and applicable law. Each of its factual findings must be accepted by this Court, because Mr. MacDonald did not marshal the evidence in order to challenge them. The inquiry ends here and the District Court's Order should be affirmed.

The remaining arguments in Mr. MacDonald's brief do not otherwise disturb the propriety of the Order. These arguments are addressed in turn:

A. The District Court Did Not Improperly Confuse a Property Division Analysis with an Alimony Analysis.

Mr. MacDonald claims that the District Court erred in "failing to distinguish a request to alter a property division from a request to modify an alimony award based upon a new stream of income." (Br. at 12.) In this regard, Mr. MacDonald takes issue with the District Court's reference to *Jense v. Jense*, 784 P.2d 1249 (Utah Ct. App. 1989) in the Order. (R.821-22.) In *Jense*, this Court rejected the husband's request to modify the parties' property settlement based on his claim that a decline in the value of the home he received in the divorce constituted a change in circumstances. The District Court took

note of Mr. MacDonald's allegation "that the sales price [of Lot 1] was higher than he had anticipated." (R.821 at ¶14.) "However, the Court finds the evidence shows that Mr. MacDonald knows that real estate values fluctuate and can fluctuate quickly. He testified that markets change and the evidence showed that one piece of real estate appreciated by $500,000[2] in a matter of months." (*Id.*) The District Court then quoted *Jense* for the proposition "that to allow a plaintiff to come back later and ask the Court to modify the property settlement on the basis of a decline in value occurring subsequent to the decree is to ask the Court to overturn his bad bargain." (R.821 at ¶15, quoting *Jense*.) And, as demonstrated above, because there were no stipulated property values in the Decree and no mechanism in the Decree to reallocate the parties' settlement based on a perceived change in value, the District Court made the appropriate analogy that either party may sell their real property assets for as much as they can get and the other party has no grounds to attack the settlement, including alimony. (R.821-22 at ¶16.)

Mr. MacDonald, as he did in the Petition, at trial and now on appeal, makes a losing distinction between the value of Lot 1, and the income Ms. Fahey may derive from the sale proceeds of Lot 1:

> Unlike the husband in *Jense*, Mr. MacDonald has not asked the court to change a property settlement or to vacate a judgment against him. In fact, Mr. MacDonald agrees that Ms. Fahey is entitled to all of the proceeds from sales of her properties . . . Instead, Mr. MacDonald asked the trial court to recognize that a substantial change in circumstances occurred for purposes of alimony because, as a result of the annual *income* Ms. Fahey

[2] The District Court was referring to the 71st Street property discussed above.

> receives from her new investments, Ms. Fahey's 'earning capacity or ability to produce income' has changed.

(Br. at 16.)

Mr. MacDonald dismisses the District Court as "misunderstanding" this distinction. (Br. at 17.) In fact, the District Court perfectly articulated Mr. MacDonald's position, and then promptly rejected it:

> I understand [Mr. MacDonald's] argument is slightly different [from *Jense*], i.e., that it is not just a change in property value but that it is income derived from the change in property value one party may have assumed. But that's really the same valuation here. The Decree expressly contemplated that Ms. Fahey would sell the lot(s) and would thereby receive proceeds and be able to invest those proceeds and live off of those *in addition* to the alimony. What wasn't originally contemplated one way or another was how much she was going to earn off the sale of the property she was awarded. The Court finds that is not sufficient to establish a substantial change in circumstances.

(R.822 at ¶17) (emphasis in original.) The District Court was correct. It is the same valuation. Ms. Fahey merely converted an asset awarded to her in the Decree from real property into liquid funds. *See, e.g., Felt v. Felt*, 493 P.2d 620, 623 (Utah 1972) (on husband's motion to delete alimony provision from divorce decree, divorced wife's equity in home and insurance policies awarded to her in divorce decree were deemed "facts quite impertinent and inadmissible here").

The case *Denley v. Denley,* 661 A.2d 628, 631 (Conn. App. 1995) is illustrative. In *Denley*, the husband appealed the trial court's denial of his petition to modify alimony. He claimed that the trial court erred, when determining his income, by including profits

generated from the conversion of stock options granted to him in the divorce. The appellate court agreed: "The mere exchange of an asset awarded as property in a dissolution decree, for cash, the liquid form of the asset, does not transform the property into income" for purposes of a change in financial circumstances to be considered in modification action. *Id.* Moreover, "the fact that the asset, when converted into cash, produced a profit is irrelevant because only in cases of fraud can a modification be based on an increase in the value of assets." *Id.* (Internal citation and quotation omitted).[3]

The Petition was nothing more than a repackaging of Mr. MacDonald's Rule 60(b) motion, after the Rule 60(b) motion was denied and ostensibly to take advantage of a lesser standard for modification. Regardless of how Mr. MacDonald labels his effort to rescind the deal, at its core he is pursing the same asset awarded in the divorce. And, as

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[3] The only case Mr. MacDonald cites that even peripherally involves proceeds from an asset awarded in the divorce is *Esposito v. Esposito*, 385 A.2d 1266 (N.J. Super. Ct. App. Div. 1978). (Br. at 21, fn. 2.) This case is inapposite because there, the wife complained that alimony fashioned by the court to meet her needs was inadequate. The court relied on values affixed to the marital property to make the property division and alimony award, and in so doing had contemplated that she would use proceeds from the sale of the house to supplement her alimony. *See id.* at 1274. The other cases Mr. MacDonald cites as standing for the proposition that a change in future income can support an alimony modification involved entirely different streams of income. *See, e.g., Haslam v. Haslam*, 657 P.2d 575, 757-58 (Utah 1982) (husband's retirement and wife's unexpected employment); *Bolliger*, 2000 UT App at ¶11 (wife's social security and husband's unexpected early retirement); *Munns v. Munns*, 790 P.2d 116, 122 (Utah Ct. App. 1990) (social security or retirement benefits); *Johnson v. Johnson*, 855 P.2d 250, 253 (Utah Ct. App. 1993) (future retirement benefits). Where alimony was modified, these cases also found, unlike here, that the change in income was not contemplated at the time of the divorce.

the District Court keenly observed, this a party cannot do "every time the property [the parties] received in the decree changed in value." (R.822 at ¶17, quoting *Jense*.)

The District Court's reference to *Jense* and principles pertaining to property division were appropriate and correct because there is no practical distinction between the value of Lot 1 and what value Ms. Fahey ultimately derived from Lot 1 after the divorce. Even if there is a distinction, Ms. Fahey's sale of Lot 1 and her intent to use and live off those proceeds was contemplated by the Decree.

B. Ms. Fahey's "Need" is Not a Relevant Consideration.

Closely related to Mr. MacDonald's efforts to retreat from his failed assault on the parties' property division, is his insistence that the District Court should have evaluated Ms. Fahey's "reasonable need" in deciding the Petition, separate and apart from the value of Lot 1. (*See* Br. at 32-33, claiming that the "value of the lots has no significance" because alimony is based on need, and "[n]ow that she has transformed one of the pieces of dirt into an income-producing investment, she is able to meet all or some of her own needs.")

To be clear, "need," as Mr. MacDonald invokes it, refers to the so-called "*Jones* factors" under Utah law. (Br. at 10.) These factors apply when courts are making a judicial determination of a request for alimony in fixing a decree. Here, they had no application at the time of the parties' divorce, and had no application in deciding the Petition. This is because the alimony payments in the Decree were

not fixed by a court on a need-based analysis. They constituted a negotiated and stipulated obligation of Mr. MacDonald. "Need" was never determined in this case by design of the parties. *Wall* is illustrative:

> We conclude that simply because the parties stipulated to $800 per month alimony does not mean that they implicitly agreed $800 would sufficiently meet Mrs. Wall's needs. Instead, the stipulation indicates that they implicitly agreed that Mr. Wall has a legal obligation to pay alimony. Parties settle on alimony amounts for various reasons, including to balance a budget or to avoid extensive litigation.

Id. at ¶16. As noted previously, the court in *Wall* prefaced its discussion with a disclaimer that although it was addressing Mr. Wall's need-based arguments, they were not "determinative" because, like the District Court did here, it had already found that the alleged change in circumstances was contemplated. *Id.* at ¶14.

The need-based cases cited by Mr. MacDonald (Br. at 10-11) do not disagree that a "contemplated change" supersedes and renders moot any other considerations. For example, Mr. MacDonald cites *Callister v. Callister*, 261 P.2d 944 (Utah 1953) for the proposition that courts retain jurisdiction to modify alimony, even if the decree is based a stipulation instead of a judicially-determined decree. (Br. at 11.) *Callister* also recognized, however, that a court may modify a decree "when change of circumstances justifies it." *Id.* at 949. A change does not justify modification if it was contemplated. Mr. MacDonald agrees. (Br. at 25, "When a divorce decree does refer to anticipated changes, it should not later be modified.") (citing *Bolliger*, 2000 UT App 47 at ¶12.) Here, because the change was contemplated, there was no occasion for the District Court

to revert to a need-based analysis for the first time. Mr. MacDonald also claims that the court had to make specific findings as to all foreseeable changes in the Decree and how they would affect the alimony award. (Br. at 24.) He is incorrect because, again, the parties' alimony provision was not determined by the court based on Ms. Fahey's need.[4]

For this reason, it bears noting that even if the change was not contemplated by the Decree, there is no baseline or mechanism for the District Court to make an entirely new, need-based determination of alimony—not without unwinding the Agreement forged by the parties after arm's-length negotiations. In actuality, if the Court requires the District Court to revisit and redo the entire Decree, it is more likely than not that Mr. MacDonald

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[4] (Br. at 24, citing *Richardson v. Richardson*, 2008 UT 57, ¶10, 201 P.3d 942 and *Johnson v. Johnson*, 855 P.2d 250, 253 (Utah Ct. App. 1993).) *Johnson* stated, in regard to the judicially determined alimony award in that case: "We do not believe it makes for good law or sound policy to have parties arguing years after the fact ***over what a trial court may or may not have considered when making an alimony award***. Utah appellate courts have consistently required that trial courts make adequate findings on all material issues of alimony to reveal the reasoning followed in making the award." *Id.* at 253. (Emphasis added). *Johnson* continued, "Consequently, if a trial court knows that a party will be receiving additional future income it should make findings as to whether such additional income will affect the alimony award." *Id.* There, the trial court abused its discretion "by failing to expressly indicate whether the future retirement benefits were considered in making the alimony award." *Id.* at 254. *Roberts v. Roberts*, 2014 UT App 211, ¶14, 335 P.3d 378, also cited Mr. MacDonald's brief with respect to alimony, illustrates how the context is inapposite to this case. *Roberts* involved an appeal of the trial court's determination of alimony. The court "made detailed findings of fact on Wife's needs, her income, and Husband's ability to provide support," but the trial court did not explain why it calculated alimony in a manner that appeared to exceed the Wife's demonstrated monthly need of $1,000. *See id.* Here, there was no obligation to make findings about how foreseeable changes would affect Ms. Fahey's alimony because the court's determination of need was not the basis for the award.

will have to pay ***more*** alimony based on the standard of living Ms. Fahey enjoyed when they were married, compared to her current lifestyle pending resolution of Mr. MacDonald's efforts to rescind the parties' deal. Mr. MacDonald lives in a multi-million dollar brownstone in the Upper West Side of Manhattan (R.982:1-13) with other properties including a weekend home on the Hudson (R.986:18-25; R.987:1-5), and private club memberships in Utah, California and New York (R.1007:17-19; R.1000:12-22; R.1008:15-17; R.1009:13-21), whereas Ms. Fahey lives in a one-floor cottage on a farm in Kentucky that she does not own on a month-to-month lease for a thousand dollars a month. (R.1055:3-14; R.1093:7-9; R.1132:7-25.)

C. Whether the Change in Circumstances was "Substantial" or Occurred After the Divorce is Moot and Unproven.

Finally, because the change in circumstances was contemplated, it is irrelevant whether Ms. Fahey's change in income was "substantial" or whether it occurred before or after the divorce.

Mr. MacDonald devotes a significant portion of his brief attempting to distinguish *Wall* and why the District Court erred in citing to it in its Order. (Br. 29-31.) He also argues that Ms. Fahey has received a substantial change in income. (Br. at 19-22.) The District Court did, in fact, find that Ms. Fahey's income has changed. (R.822-23 at ¶18.) However, Mr. MacDonald mischaracterizes the District Court's reliance on *Wall* as standing for the proposition that the "mere fact" of a change income is insufficient to modify

alimony. (Br. at 30.) What the District Court actually found was "the mere fact that it's changed is not sufficient to show a substantial change of circumstances sufficient to support a petition to modify ***because the change was contemplated at the time of the Decree***." (R.822-23 at ¶18.) (Emphasis added.) This finding, again, renders the change in income moot.

Also rendered moot by the District Court's finding is "when" the alleged change occurred. And yet, not even Mr. MacDonald's position on this element rings true. He claims the alleged change occurred after the divorce, as required in order to support a change in circumstances. (Br. 23.) However, the basis for the Petition was that Lot 1 sold for double what Mr. MacDonald anticipated it was worth, resulting in a "windfall" of income to Ms. Fahey. (R.258 at ¶5(a)-(b).) Mr. MacDonald testified at trial that Lot 1 went under contract for the final sales price ***before*** the Decree was signed. (R.878:22-25; R.879:1-2.) Moreover, Mr. MacDonald began negotiating the sale the month prior, in December of 2011. (R.875:9-25;R.878:12-16.) Mr. MacDonald also testified that he represented to third parties at the time that Lot 1 belonged to Ms. Fahey and was not his to sell. (R.875:9-25; R.876:4-14, 25.) Thus, the "change" occurred prior to the Decree and despite having full knowledge of the proceeds coming to Ms. Fahey, Mr. MacDonald made no issue of it at the time. Only as an afterthought did Mr. MacDonald file the Rule 60(b) motion attacking the sale proceeds (and, when that

failed, the Petition), apparently because he thought he was entitled to some sort of commission from Ms. Fahey. (R.882:9-13.) The District Court found that this was not sufficient to modify the Decree. (R.821 at ¶14, "Mr. MacDonald thought he was entitled to a share of the proceeds of Lot 1 mostly because he was directly involved in and responsible for the sale, which is not the basis for a substantial change in circumstance warranting modification of the Decree.") Thus, even if the Court were to find that the alleged change in circumstances was not contemplated by the Decree, whether Mr. MacDonald satisfied his burden to show a change occurred is far from presumed.

CONCLUSION AND RELIEF REQUESTED

The District Court's factual finding that the alleged change in circumstances was contemplated by the Decree is dispositive. Mr. MacDonald's collateral arguments do not affect the District Court's proper exercise of its discretion, or the correctness of its Order. For these reasons, as demonstrated above, this Court should affirm the District Court.

Respectfully submitted this 21st day of March, 2016.

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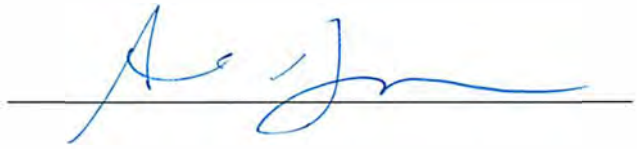
CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type-volume limitation of Utah Rule of Appellate Procedure 24(f)(1)(A) because it contains 9,906 words (including headings, footnotes and quotations) in 13 point Times New Roman font, excluding the parts of the Brief exempted by Rule 24(f)(1)(B), as calculated by Microsoft Word, the word processing system used to prepare the Brief.



CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Brief of Appellee Lee Anne Fahey to be mailed, via U.S. mail postage prepaid, to the following this 21st day of March 2016.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Floor v. Mitchell, Utah, February 11, 1935

82 Utah 316
Supreme Court of Utah.

B. T. MORAN, Inc.,
v.
FIRST SECURITY CORPORATION.

No. 5141.
|
Aug. 3, 1933.

Appeal from District Court, Weber County; Geo. S. Barker, Judge.

Action by B. T. Moran, Inc., against the First Security Corporation, which filed a counterclaim. From a judgment dismissing plaintiff's complaint and awarding defendant damages on its counterclaim, plaintiff appeals.

Judgment dismissing plaintiff's complaint affirmed, and cause remanded for new trial on defendant's counterclaim.

STRAUP, C. J., and EPHRAIM HANSON, J., dissenting in part.

West Headnotes (18)

[1] **Appeal and Error**
By Undisputed Facts or Evidence Thereof

Admission of copy of telegram canceling part of order *held* not prejudicial, where there was ample other evidence to sustain finding of cancellation and uncontradicted proof that seller's agent received telegram and acted on it.

Cases that cite this headnote

[2] **Evidence**
Notices, Letters and Telegrams

Where buyer sent telegram to cancel part of order, telegraph company was its agent, and message delivered to company would be the "original document" within best evidence rule.

Cases that cite this headnote

[3] **Evidence**
Prior and Contemporaneous Collateral Agreements

Where parties have reduced to writing apparently complete and certain agreement, it will, in absence of fraud, be conclusively presumed that writing contained whole agreement, and parol evidence of contemporaneous representations will not be received to vary such writing.

2 Cases that cite this headnote

[4] **Evidence**
Prior and Contemporaneous Collateral Agreements

Where advertising contract provided that seller should furnish operators to manage buyer's campaign, and that writing embodied entire contract, admission of parol evidence of contemporaneous representations that all work would be done by operators except mailing of letters, and concerning quality and conduct of operators, *held* reversible error.

3 Cases that cite this headnote

[5] **Principal and Agent**
Imputation to Principal in General

Generally, notice to agent touching subject-matter of agency or in regard to transaction in which he is engaged is notice to principal.

Cases that cite this headnote

[6] **Principal and Agent**
Notice of Particular Facts

Notice of cancellation of order is notice to seller, where given to salesman taking order, since salesman has apparent authority to receive such notice.

Cases that cite this headnote

[7] **Principal and Agent**

Notice of Particular Facts

Notice of cancellation of part of order for material to be used in advertising scheme *held* effective where given to agent taking order before seller's acceptance whether communicated by him to seller or not, although order provided that it embodied entire contract and could not be canceled except by mutual consent.

1 Cases that cite this headnote

[8] **Principal and Agent**

Salesmen

Provision in order, subject to seller's approval, that it embodied entire contract, which could not be canceled except by mutual consent, did not preclude authority of agent taking order to receive notice of cancellation before seller's acceptance.

Cases that cite this headnote

[9] **Sales**

Withdrawal or Countermand

Order taken by seller's agent subject to seller's acceptance may be withdrawn at any time before such acceptance.

Cases that cite this headnote

[10] **Sales**

Withdrawal or Countermand

Although order provides that it is not subject to change or countermand, it may be countermanded before seller's acceptance, where taken by agent whose authority is limited to taking orders and forwarding them to seller for acceptance.

Cases that cite this headnote

[11] **Sales**

Withdrawal or Countermand

Where goods were shipped after cancellation by buyer before seller's acceptance of order, buyer had right to refuse to accept goods.

Cases that cite this headnote

[12] **Sales**

Withdrawal or Countermand

Buyer was not obliged to return goods not ordered, where shipper was notified of refusal to accept and declined offer to return.

Cases that cite this headnote

[13] **Sales**

Acceptance of Offer

Order subject to approval by designated officer of seller does not take effect until so approved and buyer is notified, or until order is filled and goods are shipped.

Cases that cite this headnote

[14] **Sales**

Weight and Sufficiency

Evidence supporting finding that order for advertising material for six banks was canceled as regards one bank before acceptance by seller.

Cases that cite this headnote

[15] **Sales**

Provisions of Written Contracts in General

Contract to provide operators to manage buyer's advertising campaign required seller to provide reasonably qualified operators, as regards age, training, and experience, who should prosecute work with reasonable diligence.

Cases that cite this headnote

[16] **Sales**

Presumptions and Burden of Proof

While buyer may show breach of contract to provide operators to manage advertising campaign, proof of damage by reason thereof is essential to recovery.

Cases that cite this headnote

[17] **Sales**

Damages

That buyer of advertising plan did not obtain as good results as expected afforded no basis for damages, where there was no guaranty of certain results.

Cases that cite this headnote

[18] **Trial**

Finding of Fact or Conclusion of Law

Finding that because of seller's breach of advertising contract buyer had suffered damages in sum of $2,000, unsupported by specific findings of fact, *held* legal conclusion insufficient to support judgment.

Cases that cite this headnote

Attorneys and Law Firms

*385 R. J. Hogan and E. M. Morrissey, both of Salt Lake City, for appellant.

Thatcher & Young, of Ogden, for respondent.

Opinion

FOLLAND, Justice.

This is an action by plaintiff to recover $2,437.50, balance alleged to be due for goods manufactured, sold, and delivered to defendant pursuant to a written contract dated November 21, 1928. Defendant answered denying liability and filed a counterclaim wherein it sought to recover judgment against plaintiff for damages in the sum of $9,160 for breach of contract. The case was tried to the court without a jury. From a judgment in favor of defendant dismissing plaintiff's complaint and for damages in the sum of $2,000 on its counterclaim, plaintiff appeals and assigns numerous errors. For convenience we shall first treat the assignments of error to the dismissal of the complaint, and later take up the assignments directed to the judgment on the counterclaim.

The evidence discloses the following facts: Defendant is a Delaware holding corporation, owning practically all of the stock in a number of banks in Utah, Idaho, and Wyoming. Its principal place of business is Ogden, Utah. M. S. Eccles is its president, and E. G. Bennett is its vice president, manager, and purchasing agent. Plaintiff is an Illinois corporation engaged in the business of manufacturing and selling leather wallets and advertising matter consisting of form letters and cards designed to promote savings accounts in banks, and the furnishing of operators to manage such advertising campaigns. B. T. Moran is the president and manager of plaintiff corporation. Its sales agent throughout the Intermountain West at the time of the execution of this contract was E. A. Waugh. As a result of negotiations between Waugh and Bennett a proposal for contract was drawn by Waugh and signed by Bennett on the night of November 21, 1928, and sent by mail to the office of the company at Chicago for acceptance. It was, after receipt, accepted by B. T. Moran at Chicago who wrote his name on the contract under the words "Accepted: B. T. Moran, Inc." It is conceded the order was not a contract until accepted by the corporation. One of the disputed points in the case is when the offer was accepted. The contract is as follows:

"B. T. Moran,

400 North Michigan Avenue,

Chicago.

Date Nov. 21, 1928.

Manufacture for an

Ship to First Security Corporation

City	Ogden	State of Utah.
Quan.	Description	Price each
24,500	Letters at per M.....	$15.00
144,000	Cards at per M.....	5.00
1,500	Men's Goat Skin Single Units.....	1.45

1,500	Men's Ostrich Grain Single Units.....	1.45
1,500	Men's Calf Skin Single Units.....	1.45
1,500	Women's Goat Skin Units.....	1.45
1,500	Women's Ostrich Grain Units.....	1.45

To be shipped by express F. O. B. Factory. Terms: Net 30 days.
Stamp Wallets

Per copy attached-Letters per copy attached six different banks-The fewer the words the better the appearance of wallet.

B. T. Moran, Inc., agrees, without additional charge to furnish an operator to manage purchaser's campaign for a period not to exceed thirty days for each thousand wallets ordered.

Remarks.

Five operators at once per letter. Rush shipment-Exclusive in all towns in which corporation has banks.

All oral and other representations and understandings are fully set forth herein, and this contract is not subject to cancellation without the consent of both parties hereto.

Purchaser First Security Corporation

By E. G. Bennett,

Authorized Purchasing Agent V. P.

Accepted:

B. T. Moran, Inc.

By B. T. Moran,

Salesman E. A. Waugh,

Representing B. T. Moran, Inc."

The contract as signed refers to a letter "per copy attached." There was a difference between the parties as to the identity of the letter referred to. Defendant claimed the letter was one written by Waugh to Bennett outlining the requirements of the several banks, which letter was admitted in evidence. Plaintiff's testimony was to the effect that a ***386** letter written by Waugh to B. T. Moran was the one referred to. This letter was identified as an exhibit, but was not admitted in evidence for the reason it was not sufficiently connected up with the defendant. No error is assigned to its exclusion. The wallets, letters, and cards referred to in the above-quoted contract were to be used by the defendant's banks at Logan, Rock Springs, Idaho Falls, Pocatello, Boise, and Nampa. The full order for the wallets was prepared and shipped, as were the letters and cards for all the banks except the one at Boise. A bill was submitted by plaintiff to defendant which included all these goods in the total sum of $11,597.50. The defendant promptly paid $9,160 but refused to pay the balance of $2,437.50 for wallets shipped to the Pacific National Bank at Boise. This action was commenced to recover such balance claimed to be due and payable. Defendant defends this action on the ground, as claimed by it, that it canceled the order so far as it affected all supplies for the Boise bank, including, not only letters and cards, but also wallets, and that notice of cancellation was given before its offer was accepted by plaintiff and before the contract became a complete executory contract. The evidence with respect to cancellation shows that the written order was signed by Bennett at about 8:30 p. m. on the evening of November 21st. On the same evening, and after the order was signed, Bennett had a conversation over the telephone with Mr. Tucker, cashier of defendant's bank at Boise, and learned from him that Waugh had not correctly reported Tucker's views with respect to the desirability of an advertising campaign on behalf of the Boise bank. Tucker claimed that he was not in favor of the campaign at all. It appears that the defendant had only recently acquired a controlling interest in the Pacific National Bank at Boise and was about to change its name so it was inadvisable to print any advertising matter until the change of name could be effected. Bennett testified he attempted but failed to get in touch with Mr. Waugh that evening, but that the next morning he sent a telegram addressed to him at the Hotel Utah in Salt Lake City as follows: "Cancel work on order until can get in touch with you. 'Phone me promptly on your return." That Waugh called Bennett on the telephone either the evening of the 22d or the morning of the 23d and stated he had received the

telegram and wanted to know why the contract was canceled, and arranged for a meeting which was held on the evening of the 23d at the Hotel Utah in Salt Lake between Eccles, Bennett, and Waugh. At this meeting there was considerable conversation between the parties. It seems there had also been a misunderstanding with respect to the order for Rock Springs. Defendant claims the order for advertising matter for the Rock Springs bank was also canceled, but was later reinstated. The goods were shipped, used, and paid for, and the campaign conducted at Rock Springs. Since that portion of the contract is not now in question we shall make no further reference to it. Bennett testified that at this meeting he stated explicitly to Waugh that the order for Boise was canceled, and said, "Don't you have those supplies stamped or anything like that, because this is a cancellation of the order." That Waugh said it was not too late and he would fix the matter satisfactorily. No cancellation of the Boise order, so far as shown by the record, was transmitted to the office of plaintiff by Waugh, but merely directions to withhold printing of the letters and cards until further instructions. The wallets were made up and delivered to the Boise bank.

[1] [2] This is a law action tried to the court without a jury, and for that reason this court may not weigh the evidence and itself make findings. We may merely examine the record to determine whether there is sufficient competent evidence to support the findings of the trial court, and, if such is found, then it becomes our duty to sustain the findings. The evidence is voluminous, and we shall not attempt to set it out here even in abbreviated form. It is sufficient to say that on each of the disputed points there is evidence in the record which, as we view it, would support findings either in favor of the plaintiff or the defendant on the respective contentions made by each. Two questions arise: First, did the defendant give notice of the cancellation of its order for wallets for the Boise bank; and, second, if such notice was in fact given was it given before acceptance of the order by the plaintiff at its Chicago office?

Mr. Bennett testified directly that he did cancel the order both by telegram on November 22d and by conversation with Waugh on the evening of the 23d. There is undoubtedly sufficient evidence to show notice of cancellation. Whether it was given timely is a question of fact, and whether notice to Waugh was notice to his principal is a question of law. The court made finding that on or about November 22, 1928, and before the order had been accepted by plaintiff, the defendant withdrew and countermanded the order so far as the same related to the Pacific National Bank of Boise. Appellant attacks the finding as erroneous and not supported by evidence, and contends that the defendant did not sustain the burden of proving modification or cancellation of the order before acceptance.

If notification to Waugh is notice to his principal, then we think there is sufficient evidence to support the finding. Mr. Moran testified that he received the order through *387 the mail on the 23d of November and on or about that date placed his signature of acceptance on the contract and gave directions to the factory to commence work on the order; that his plant was of such capacity that the 7,500 wallets could be manufactured in about two days. The defendant relies on other facts and circumstances tending to prove or proving that acceptance was not thus promptly given to the contract. Notice of acceptance was sent to the defendant by letter dated November 28th, as follows:

"B. T. Moran, Inc.

400 North Michigan Avenue,

Chicago.

November 28, 1928.

First Security Corporation, Ogden, Utah.

Gentlemen: Attention Mr. E. G. Bennett, V. P.

We acknowledge with thanks your order of the 21st for 7,500 combination wallets and dime banks, 24,500 letters and 144,000 cards. All these items are now being prepared and will be shipped as promptly as possible.

We shall start the campaign in all of the banks (5), except the Pacific National of Boise, next week.

Very truly yours, B. T. Moran, Inc.

B. T. Moran."

Moran testified that it was his practice to acknowledge orders within 24 hours of receipt, although this was not an invariable rule. From the letter it appears that the work of manufacture of the goods had commenced, although not yet completed. The wallets were not received at Boise until on or about December 15th. The court could well find as it did, from all the evidence, that cancellation of the order, either by telegram of the 22d or verbal notice on the 23d, was given prior to acceptance of the order. Certainly notice of cancellation was given before notice of acceptance was mailed from plaintiff's office in Chicago.

[3] The rule, as stated in 1 Page on the Law of Contracts (2d Ed.) paragraph 152, is as follows: "If an order is subject to approval by some designated officer of the seller, such contract does not take effect until it has been approved and such approval has been communicated to the buyer." See, also, Krohn-Fechheimer Co. v. Palmer, 282 Mo. 82, 221 S. W. 353, 10 A. L. R. 673. Such an order as the one in question might, however, have been accepted by filling the order and shipping the goods. 1 Page on the Law of Contracts 154; 13 C. J. 284. The order was not filled or the goods shipped until after November 23d.

[4] [5] [6] While appellant does not concede there was a cancellation, it strenuously contends that the notice to the agent was not notice to his principal since the agent's authority was limited, and that notice of such limitation of authority was contained in the contract signed by the defendant. The contract provides: "All oral and other representations and understandings are fully set forth herein, and this contract is not subject to cancellation without the consent of both parties hereto." This language merely limits the authority of the agent to the terms and conditions of the agreement or offer as incorporated in the writing. Certainly such agent may not, after acceptance of the same by his principal, modify or change any of the terms or conditions of the contract. This, however, does not deny his authority to receive, on behalf of his principal, notice of withdrawal or cancellation of the order in whole or in part before it became a completed contract by acceptance. The words, "this contract is not subject to cancellation without the consent of both parties hereto," can, of course, not limit the right of the offeror to withdraw or change his offer before acceptance. If this language be construed to be a stipulation that the offeror cannot withdraw his offer before acceptance it is without consideration and hence not binding. The rule is stated in 23 R. C. L. p. 1288, as follows: "In case of orders for goods given to a traveling salesman of the seller, whose authority extends only to the solicitation of orders and the forwarding of them to his principal for acceptance or confirmation, it is well settled that the order or offer may be withdrawn at any time before it has been accepted by the seller. Although an order does not provide that it is subject to the seller's approval, and does provide that it is not subject to change or countermand, it, nevertheless, is held that it may be countermanded prior to its acceptance by the seller, where it is given to an agent whose only authority is to take orders and forward them to his principal for acceptance." The cases are to the same effect: Cedar Rapids National Bank v. McCord, 98 Ark. 81, 135 S. W. 365; Hallwood Cash Register Co. v. Finnegan (Sup.) 84 N. Y. S. 154; Howe Scale Co. v. Wolfshaut (Sup.) 170 N. Y. S. 943; Night Commander Lighting Co. v. Brown, 213 Mich. 214, 181 N. W. 979, 980; Krohn-Fechheimer Co. v. Palmer, supra; Bauman v. McManus, 75 Kan. 106, 89 P. 15, 10 L. R. A. (N. S.) 1138.

[7] [8] Ordinarily notice to an agent touching the subject-matter of his agency or in regard to the transaction in which he is engaged is notice to his principal. Modern Woodmen of America v. Berry, 100 Neb. 820, 161 N. W. 534, Ann. Cas. 1918D, 302. Notice of cancellation or withdrawal of an order or offer is notice to the principal where given to the agent who took the order, he having apparent authority to receive such notice. 55 C. J. 87; Night Commander Lighting Co. v. Brown, supra; Womack v. Dalton Adding Machine Co. (Tex. Civ. App.) 285 S. W. 680. In the case of Night Commander Lighting Co. v. Brown, supra, the court said: "It is elemental that an order such as this, though ***388** it contain the words 'not subject to countermand,' may be countermanded at any time before acceptance. Until so accepted, it is simply an offer to purchase, and in no way creates a binding agreement. 13 C. J. 293; Peck v. Freese, 101 Mich. 321, 59 N. W. 600; Challenge, etc., Co. v. Kerr, 93 Mich. 328, 53 N. W. 555. Plaintiff's counsel contend that 'by requesting the salesman to countermand this order the defendant made the salesman his agent to perform such service for him,' and, as the notice of countermand was not communicated to the plaintiff at its office, none was in fact and in law given. With this contention we are unable to agree. The notice of countermand given to the same agent who took the order was in our opinion, notice to the plaintiff. It was the agent's duty to communicate it to his principal, and his failure to do so in no way relieved the plaintiff from the effect thereof. Mechem on Agency, § 1831; Elliott on Contracts, § 33; Goodspeed v. Wiard Plow Co., 45 Mich. 322, 7 N. W. 902; Westinghouse Electric Co. v. Hubert, 175 Mich. 568, 141 N. W. 600, Ann. Cas. 1915A, 1099."

[9] Notice of cancellation to Waugh was notice to his principal, whether communicated or not, and had the effect of modifying the offer to the extent of eliminating the order for all of the supplies for the Boise bank. The court found this notice was communicated before acceptance of the offer, and, as we have already indicated, there is sufficient competent evidence in the record to support such a finding.

[10] [11] Error is assigned to the admission of the copy of a telegram from Bennett to Waugh dated November 22d, which we have quoted above. The objection was that the copy of the telegram was incompetent, not the best evidence, and no

foundation had been laid for its admission. The paper offered was a carbon copy from the files of the defendant, and the original of which Mr. Bennett testified was sent to Waugh on the 22d. Defendant served notice on plaintiff to produce the telegram, and demanded it at the trial, and, on failure of plaintiff to produce it, offered the copy. The gravamen of the objection was that the original telegram was the paper delivered to the telegraph office rather than the one received by Waugh. No effort was made to obtain the message from the telegraph office, nor was such shown to have been lost or destroyed. There seems to be some difficulty in determining what are original telegrams within the meaning of the best evidence rule. The weight of authority seems to be that, where the telegraph company is the agent of the sender, the original is the telegram that is delivered. 2 Jones' Commentaries on Evid. (2d Ed.) § 804, p. 1473; 10 R. C. L. 910. Here the sender took the initiative in sending the message, hence the telegraph company would be considered its agent and the telegram delivered would be the original. At any rate, no prejudice resulted to plaintiff by admission of the copy. Mr. Bennett testified that either on the evening of the 22d or morning of the 23d of November, Waugh called him on the telephone after receiving the telegram and arranged for the meeting which was held on the evening of the 23d. At this meeting Mr. Waugh asked why the order had been canceled, and the matter was discussed. According to Bennett's testimony, of which there is no contradiction, there was a definite cancellation of the order so far as it affected the supplies for the Boise bank. With the copy of the telegram eliminated there was sufficient evidence to support a finding that notice of withdrawal of the offer was communicated to the agent before acceptance of the contract by the principal at Chicago.

[12] [13] We conclude on this part of the case that Waugh had authority to represent his principal for the purpose, not only of soliciting orders, but of receiving notice of withdrawal or cancellation of the order given him, and that the finding by the trial court that such notice was given before acceptance of the order by his principal at Chicago is supported by evidence. This notice was binding on the company whether or not communicated to the principal. The new offer from the defendant excluded the goods originally ordered for the defendant's bank at Boise. When, therefore, the plaintiff made up and shipped the wallets for the Boise bank, it was not done pursuant to any contract and the defendant had the right to refuse to accept the goods. When Bennett learned that the goods had been received at Boise he wrote to the defendant declining to accept them and offered to return the package unopened. This plaintiff refused, and, having refused to accept the shipment, defendant was under no obligation to return the goods. The findings of fact are sufficiently supported by the evidence, and the judgment is supported by the findings. We find no sufficient error to justify reversal of the judgment of dismissal of plaintiff's complaint.

[14] [15] We come now to the judgment on the counterclaim. Defendant's contention is that plaintiff breached its contract with respect to the quality and experience of operators furnished and the methods adopted in conducting or managing the advertising campaign for savings accounts. It alleged that, because of such breach of contract, the campaign was a failure resulting in damages to defendant of $9,160, the amount paid by it to plaintiff under the contract. The contract provided: "B. T. Moran, Inc., agrees, without additional charge to furnish an operator to manage purchaser's campaign for a period not to exceed thirty days for each thousand wallets ordered." The parties by the terms of the written contract intended to incorporate ***389** in the writing all the terms and conditions which the agent was authorized by his principal to incorporate into such an agreement, and this was agreed to by the defendant as evidenced by its execution of the writing. The contract stated: "All oral and other representations and understandings are fully set forth herein." Notwithstanding such declared intention, the trial court permitted the defendant to introduce parol evidence to the effect that Waugh, plaintiff's agent, represented that the operators to be furnished under the provision above quoted would be experienced men in the savings account business, especially trained in sales psychology, and would conduct themselves so as to leave no adverse reflection upon the bank, and that the campaign would be conducted wholly by the plaintiff through its operators except merely the mailing out of letters to customers of the bank by the bank officials. This evidence was objected to as an attempt to modify or alter the terms of the written instrument by parol evidence, and that such representations were beyond the authority of the agent to bind his principal. The objections were overruled and testimony of conversations between Waugh and Bennett and Eccles prior to the execution of the written agreement admitted. These rulings are defended on the theory that the contract was ambiguous, and, under the exceptions to the parol evidence rule, such conversations were admissible to show what was meant by the words "operator" and "purchaser's campaign." The rule is well settled that, where the parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, be conclusively presumed that the writing contained the whole of the agreement between the parties, that it is

a complete memorial of such agreement, and that parol evidence of contemporaneous conversations, representations, or statements will not be received for the purpose of varying or adding to the terms of the written document. The rule and the exceptions thereto are well stated in the recent case of Fox Film Corporation v. Ogden Theatre Co. (Utah) 17 P.(2d) 294. The contract in that case contained recitals similar to those in the contract before us, indicating that the contract as written was intended to be complete. There are no such latent ambiguities in the contract as to warrant the admission of testimony of such conversations. The admitted conversations tend to enlarge the terms of the contract and to impose obligations on the plaintiff additional to those stated in the writing, not only as to the kind or character of the operators, but also as to responsibility for the conduct of the campaign and its successful results. There is not anything in the written contract which amounts to a guaranty or warranty that the campaign would be successful or that the responsibility for conducting it to a successful conclusion would rest on plaintiff.

There was here no such agreement, shown on its face to be incomplete, as to bring the case within the rule announced in Halverson v. Walker, 38 Utah, 264, 112 P. 804, and Potter v. Easton, 82 Minn. 247, 84 N. W. 1011, nor is there such ambiguity as to bring the case within the rule announced in Tyng v. Constant-Loraine Inv. Co., 47 Utah, 330, 154 P. 767; Egelund v. Fayter, 51 Utah, 579, 172 P. 313; and Jordan v. Madsen, 74 Utah, 280, 279 P. 499. The parol evidence should have been excluded. 22 C. J. 1098-1105; 4 Page on Contracts, § 2152, p. 3763; Bowser & Co. v. Independent Dye House, 276 Mass. 289, 177 N. E. 268; Farquhar v. Hardy Hardware Co., 174 N. C. 369, 93 S. E. 922; Emerson-Brantingham Implement Co. v. Edgar, 39 S. D. 139, 163 N. W. 575; Eastern Advertising Co. v. Patch, 235 Mass. 580, 127 N. E. 516; Ridgeway Dynamo & Engine Co. v. Pennsylvania Cement Co., 221 Pa. 160, 70 A. 557, 18 L. R. A. (N. S.) 613.

[16] [17] The evidence without contradiction shows that the five operators required by the contract were furnished by plaintiff, and that they remained at the respective banks in charge of the advertising campaigns conducted by such banks for a period of a month or six weeks. Complaint is now made that some of these men were inexperienced and that at least one of them conducted himself in an unbecoming manner, which might reflect on the reputation of the bank, yet it is significant that no complaint was made to plaintiff about the character or experience of these operators or their conduct until after this action was commenced. The contract construed without extraneous aid required that plaintiff supply persons as operators who by age, experience, or training were reasonably qualified to perform the duties incident to such an advertising campaign, and they were required to prosecute the work with reasonable diligence and application. The defendant may show breach of the contract, but, before it can recover, must prove the damage suffered by it because of such breach.

[18] [19] The last assignment of error to which we need pay attention is that the trial court's finding that, "because of the breach of said agreement on the part of the plaintiff and its failure to put over said campaign, defendant suffered damages in the sum of $2,000.00," is erroneous as not stating a finding of any fact as to how or in what manner defendant was damaged and is in the nature of a legal conclusion. This objection must be sustained. There is no finding of any fact on which damages in any specific amount can rest. The mere fact that defendant did not obtain as many new savings accounts as contemplated cannot afford ***390** a basis for damages where there is no guaranty that certain results would and could be obtained. The evidence shows that 1,200 new accounts were obtained, but it is silent as to the amount involved in these accounts or the value of them to the bank. It is possible that no evidence could be obtained which would show the probable value of such accounts to the defendant. The element of damages is so speculative, and the cause of damages so uncertain on the record before us, as to afford no basis for a judgment in favor of the defendant. 17 C. J. 756; 8 R. C. L. 438; Bredemeier v. Pacific Supply Co., 64 Or. 576, 131 P. 312.

The judgment of dismissal of plaintiff's complaint is affirmed, and the cause remanded to the district court of Weber county for a new trial on defendant's counterclaim. Each party to bear its own costs in this court.

ELIAS HANSEN and MOFFAT, JJ., concur.

STRAUP, Chief Justice (concurring in part, dissenting in part).

I concur in the result on the ground that neither by evidence nor by findings of fact was it shown what damages with any degree of certainty were sustained by the defendant on its counterclaim, except the conclusion that the defendant sustained damages in the sum of $2,000 as the result of plaintiff's breach of the contract. What the nature, character, or extent of the damages were was not found. But the disposition of the case lies deeper than that.

An order was given by the defendant at Salt Lake City to the sales agent of the plaintiff, whose home office was in Chicago, for the purchase of 7,500 combination wallets and dime banks at the agreed price of $10,875, 24,500 circular letters at the agreed price of $367.50, and 144,000 printed cards at the agreed price of $620, or a total agreed price of $11,862.50. The order as given and when accepted at the home office at Chicago constituted one contract. The goods when manufactured were to be delivered to six different banks at different towns or cities, one in Utah, one in Wyoming, and four in Idaho, including a bank at Boise, for which bank 9,000 letters, 53,000 cards, and 2,750 wallets, at an aggregate price of $2,437.50, were to be manufactured and delivered. The order was given November 21, 1928. To be binding it required acceptance by the plaintiff at its home office. The next morning, according to the testimony of Bennett, the vice president of the defendant and who on its behalf had given the order, he, at Ogden City, sent a telegram to the sales agent of the plaintiff at Salt Lake to "cancel work on order until I can get in touch with you. 'Phone me promptly on your return." On the evening of that day, or in the morning of the next, the 23d, the sales agent at Salt Lake called Bennett by phone, at which time a meeting between them was arranged for the evening of the 23d. By the terms of the telegram, the whole order was canceled until further arrangements were made. On the evening of the 23d, according to the testimony of Bennett, the whole of the order was reinstated, except as to the goods to be manufactured for and shipped to the bank at Rock Springs, Wyo., and at Boise, Idaho; the goods as to the Rock Springs bank, because of a strike at Rock Springs; the goods for the Boise bank, because of claimed misrepresentations of the sales agent as to statements made by officers or agents in charge of the bank at Boise of the desirability of the goods and because the defendant but recently having taken over the bank at Boise, and until matters could be more definitely checked up and additional arrangements made, no goods were to be manufactured or shipped to either of such banks. According to the testimony of Bennett, the strike at Rock Springs having been suppressed, the order, within a few days, about the 26th, for the manufacture and shipment of goods to that bank was reinstated; but as to the bank at Boise, until the exchange of the bank had been more completely effected, which was thought to be not until some time in February or March, it could not be determined whether any goods for that bank were desired, and, until then, no additional or definite arrangements could be made for the manufacture or shipment of goods to that bank, and that no such further arrangements had been made.

According to the testimony of the plaintiff, the order of November 21st, as originally signed by the defendant for approval by the plaintiff, was received by the plaintiff by air mail in Chicago on November 23d, and on that day was accepted by it by noting on the order that it was accepted, and five or six days thereafter writing the defendant an acknowledgment and receipt of "your order of the 21st for 7,500 combination wallets and dime banks, 24,500 letters and 144,000 cards," constituting the whole of the order as signed, including the goods to be manufactured for and shipped to the Boise bank, and informing the defendant that "all these items are now being prepared and will be shipped as promptly as possible." No reply was made to that by the defendant. The plaintiff gave testimony to show that, when it received and accepted the order and wrote the defendant of such acceptance, it had neither notice nor knowledge that the original order of November 21st as received by it had in any particular been canceled or modified. However, the court found that, by the telegram sent by Bennett on the morning of the 22d to the sales agent and the negotiations had between them on the evening of the 23d, the order was canceled or modified before the ***391** plaintiff in Chicago received and had accepted the order, and that knowledge of and notice to the sales agent of the cancellation or modification was notice to the plaintiff; and thus the court found that the order as to the goods to be manufactured and shipped to the bank at Boise was canceled and had not been reinstated.

Let it be assumed, as held by the prevailing opinion, that the evidence, though in conflict, was sufficient to support the finding so made, and that notice in such particular to the sales agent was notice to the plaintiff; and let it further be assumed that, when the manufactured goods were delivered to the Boise bank December 15, 1928, they, as found by the court, were not accepted by the defendant, notwithstanding it had not informed the plaintiff that it declined to accept the goods, until more than a month thereafter, and in the meantime the goods stored in the bank in the original packages as delivered. All the other goods manufactured for and shipped to the other banks were accepted by the defendant. The court so found, the defendant so alleged, and so was it undisputably shown by the evidence. On January 21, 1929, the defendant sent plaintiff a check in the sum of $9,160, in full payment of all of the goods manufactured and delivered, except the goods delivered to the Boise bank. In reply to that, the plaintiff, on January 23d, acknowledged receipt of the check as "on account of our bill of $11,862.50. We do not know why you did not include $2,437.50 additional" for goods and supplies shipped to Boise. In reply to that, Bennett, on January 25th, wrote

the plaintiff that there was no order for the goods shipped to the Boise bank, that it was expressly understood between the defendant and the sales agent that no work was to be done on the goods for that bank until a further and an additional order was given by the defendant for such goods, that none had been given, that the shipment sent to that bank was intact and in its original condition and asked to be advised what disposition should be made of them. In reply to that, the plaintiff, on January 30th, wrote the defendant that it had no knowledge of any understanding had between the defendant and the sales agent, and insisted on payment in full of the bill; and that, if not paid by February 15th, the matter would be placed in the hands of plaintiff's attorneys for collection.

This action was commenced August 20, 1929, to recover the balance claimed to be due amounting to $2,437.50. On October 1, 1929, the defendant filed an answer denying there was anything further due the plaintiff, alleged that the order for the goods at the Boise bank had been canceled, and the original order in such particular modified before the plaintiff had accepted the order. The defendant by its answer further alleged that:

"Defendant accepted delivery of all goods shipped to the various banks save and except those shipped to the Pacific National Bank of Boise, but as to the latter shipment, defendant, upon the arrival of said goods, refused to accept delivery thereof and immediately notified plaintiff of said refusal.

That defendant paid plaintiff in accordance with the terms of said order for all goods so ordered or accepted by it and the amount herein sued upon represents the purchase price for those goods so manufactured and shipped to Boise and which were not accepted by defendant."

The defendant also filed a counterclaim in which it, in substance, alleged that the plaintiff was engaged in the business of initiating, promoting, and carrying to a successful conclusion service campaigns for the purpose of educating the public as to the advantage of opening savings accounts, and at the request of purchasers to print circular letters and cards and manufacture a combination wallet and dime savings bank; that, to make such campaigns successful, the plaintiff agreed to furnish experienced operators thoroughly versed in banking and particularly relating to savings accounts and who were to manage the campaign and to be in the purchaser's bank during banking hours to meet customers and explain to them the advantage of savings accounts, after banking hours to contact students of public schools, workers in mines, industrial plants, and similar institutions and hold public meetings to educate the public as to the advantage to be derived from savings accounts; that the sales agent advised the defendant that by putting on the campaigns "it was feasible and practical to increase the savings accounts in the various banks," aggregating 11,500 new accounts; that when the letters and cards arrived at the various banks they were promptly mailed out by each bank in accordance with the plan as outlined by the plaintiff, "except the Pacific National Bank at Boise, Idaho, which said order had previously been countermanded," and that each of the other banks performed every duty required of it with respect to the campaign; that "the plaintiff failed and neglected to keep and perform its part of said agreement in this-that instead of furnishing five experienced operators, plaintiff sent out five inexperienced, immature young men, who knew nothing concerning banking or savings accounts, who had had no previous experience as managers of such campaigns," failed to do any work after banking hours, held no meetings, and made no contact with people on the outside; that they failed to conduct the campaign for a period of thirty days for each 1,000 wallets furnished, had not performed their duties diligently or faithfully, ***392** and, instead of obtaining approximately 11,500 new accounts as the result of the campaigns, there were obtained not in excess of 1,200 new savings accounts, and, by reason of such failures and delicts, "practically all of said wallets so purchased could not be used and became and are worthless"; that the plaintiff expended $9,160 for the purchase of materials as a part of such campaigns, and, "because of the breach of said agreement on the part of the plaintiff and its failure to put over said campaigns successfully, said money so expended as aforesaid was of no effect, and that defendant suffered damages in the sum of Nine Thousand One Hundred Sixty ($9,160.00) Dollars," for which amount, together with interest, judgment was prayed against plaintiff.

While the defendant in its letter of January 25th, after it, as alleged and as found by the court, had accepted all of the goods furnished and delivered by the defendant at all of the banks, except the Boise bank, and without objection or complaint had paid the full purchase price thereof, and after the plaintiff had inquired of the defendant why it had not paid for the goods delivered to the Boise bank, stated that the order in such particular had been canceled, and, in general terms, that representations made by the sales agent in connection with the campaigns were misrepresented, yet, not until the defendant filed its counterclaim was there any notice given or complaint made to the plaintiff of any of the delicts or breaches set forth in the counterclaim. It is not contended that

the counterclaim related to the goods shipped to the Boise bank where no campaign was had or conducted. The delicts and breaches set forth in the counterclaim related to the goods delivered to and accepted by the defendant prior to December 15, 1928, at the various banks other than the bank at Boise and where campaigns had been conducted by the plaintiff at each bank for a period of thirty days, at some places a little over a month, from about the middle of December, 1928, to about the latter part of January, 1929, when all the campaigns were concluded. A reply was filed putting in issue all the allegations of the counterclaim, except the order or contract as set forth in the prevailing opinion and the acceptance and payment by the defendant of the goods manufactured for and delivered to all of the banks except payment of the goods delivered to the Boise bank, and specifically denied all of the delicts and breaches set forth in the counterclaim.

The question thus is whether on the pleadings and the record the defendant was entitled to maintain its alleged counterclaim. We have a statute, Comp. Laws Utah 1917, § 5158, of the "Uniform Sales Act" which provides: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." Such provision frequently has been before the courts, and it uniformly has been held: "That the purpose of the provision is to prevent the buyer from retaining the goods and using them, failing to give notice of *any breach of the original agreement to the seller until he has been sued for the purchase price*, and then setting up affirmatively a defense by which it is sought to wipe out all of the original purchase price and demand an affirmative judgment for an additional sum against the seller." Uniform Laws Annotated, vol. 1, Sales Act, p. 184, and cases cited under section 49, corresponding with the section of our statute, and Supplement 1929, p. 114, and cases cited. (Italics added.)

The proposition is well put by the Tennessee court in the case of Wildman Mfg. Co. v. Davenport Hosiery Mills, 147 Tenn. 551, 249 S. W. 984, 986, that: "The purpose of this section, indeed, seems apparent, viz. to prevent the buyer from interposing belated claims for damages (too often a mere afterthought) as an offset to a suit begun by the seller for the purchase price." The provision is applicable not only to warranties, but also to a "breach of any promise or warranty in the contract." Supplement 1929, Uniform Laws Annotated, Sales Act, p. 115; 2 Williston on Sales (2d Ed.) 1261.

The alleged breach set forth in the counterclaim relates to the promise or agreement contained in the order or contract and referred to in the counterclaim, that "B. T. Moran, Inc., (the plaintiff) agrees, without additional charge, to furnish an operator to manage purchaser's campaign for a period not to exceed thirty days for each thousand wallets ordered." It is that stipulation or provision which the defendant by its counterclaim alleges the plaintiff failed to perform and breached. It was a material part of the contract directly relating to and connected with the sale and purchase of the combination wallets and dime banks and the printing of the circulars and cards for which the whole of the money consideration amounting to $11,862.50 was to be paid, and was just as much "a promise" as any other stipulation in the contract, and a failure to perform it, "a breach of a promise" contained in the contract rendering the plaintiff "liable in damages," to the same extent as the breach of any other promise or agreement contained in the contract, or a breach as to the quality or quantity of the goods or of a warranty express or implied, providing notice was given as by section 5158 provided.

***393** An allegation of the giving to the seller reasonable notice of a breach, as provided by the section in question, is in such case essential to a cause of action for damages; and a failure to give such notice precludes any claim for damages for a "breach of any promise or warranty in the contract." Uniform Laws Annotated, Sales Act, p. 186; Supplement 1929, p. 115, and cases there cited.

The counterclaim does not contain any allegation of the giving of any notice with respect to any of the delicts or breaches set forth in the counterclaim and upon which it is founded, nor any excuse or ground, either in law or fact, for not having given it. The absence of such an allegation, under the authorities, is fatal to the defendant's cause and precludes any relief thereunder. Such an allegation being an essential to the defendant's cause-a prerequisite without which no claim for damages may be asserted after acceptance of the goods-is not cured by evidence, findings, or verdict. However, there is neither evidence nor findings that such a notice was given. So far as disclosed by the record no such notice was given, nor any claim for damages made, until the filing of the counterclaim, eight or nine months after the goods were accepted and more than six months after the purchase price without objection was fully paid and the campaigns concluded. To treat or regard the filing of the

counterclaim as a sufficient notice is to fly in the very teeth of both the spirit and letter of section 5158 requiring the giving of notice as by its mandatory provisions provided. In support of the right to maintain the counterclaim, the defendant cites the cases of Detroit Vapor Stove Co. v. Weeter Lumber Co., 61 Utah, 503, 215 P. 995, 29 A. L. R. 659, and Detroit Vapor Stove Co. v. Farmers' Cash Union, 61 Utah, 567, 216 P. 1075. But for the reasons heretofore stated the cases do not support the contention. They rather make against the defendant, especially the first-cited case wherein was considered the section in question.

I thus am of the opinion that the judgment awarding the defendant damages should be reversed. Since it is to be reversed, I think it proper to express opinions also as to other assignments considered in the prevailing opinion. I think error was committed in admitting in evidence a copy of a telegram claimed to have been sent by Bennett to the sales agent without a sufficient foundation having been laid to admit secondary evidence of the contents of the telegram. Whether the telegram filed by Bennett with the telegraph office or company for transmission, or whether the telegram transmitted and delivered to the sales agent (when there is no dispute as to the contents of the telegram), is to be regarded as the best evidence of its contents, depends upon circumstances. Some authorities hold that a telegram filed with the telegraph company is the best evidence, and that a copy may be put in evidence only upon a showing that the filed telegram is lost or destroyed or is beyond the jurisdiction of the court. Smith Furniture Co. v. Peter & Volz, 205 Ill. App. 379; Smith & Whiting v. Easton, 54 Md. 138, 39 Am. Rep. 355. On the other hand, the general rule is stated to be that, if the person sending the telegram takes the initiative and the telegraph company considered to be his agent, the telegram delivered at its destination by the telegraph company to the sendee is regarded the original and the best evidence of its contents, if there is no dispute as to contents (note, 8 Ann. Cas. 270; 10 R. C. L. 910), and on proof that the telegram was sent, and as sent and delivered was lost or destroyed or was beyond the jurisdiction of the court or otherwise unavailable secondary evidence of its contents may be received. The same rule in such respect prevails in regard to telegrams as to other writings permitting secondary evidence of their contents when a proper foundation is laid that the original is lost or destroyed or otherwise cannot be produced. 2 Jones Comm. on Evid. (2d Ed.) 1471. That the copy here put in evidence was not the best evidence of the contents of the telegram is clear enough. The only foundation laid for its admission in evidence is this: Bennett having testified that he, after signing the order of November 21 and after talking over the telephone with the cashier of the Boise bank and on the morning of the 22d, sent a telegram to the sales agent canceling the order, counsel for the defendant inquired of counsel for the plaintiff, "Do you have in your possession a telegram dated November 22nd, 1928, from E. G. Bennett to E. A. Waugh (the sales agent)?" Counsel for the plaintiff replied, "We have not." Thereupon counsel for the defendant resumed his direct examination of Bennett and asked him if Exhibit 2 (a claimed copy of the telegram) was "a copy of the telegram to which you refer." The witness answered that it was, that it was a copy from his files and a copy of the telegram sent on the morning of November 22. The copy was thereupon offered and admitted in evidence over the objection of the plaintiff on the ground, among other grounds, that it was not the best evidence and that a proper foundation had not been laid to admit it. Thereafter the witness further testified that on the evening of November 23 he had a conversation with the sales agent in Salt Lake City in which the agent asked him why he had canceled the order, to which the witness replied because of misrepresentations made by the agent that officers of the bank at Boise desired the goods, and that after the witness had signed the order he learned that the representations were not *394 true; and that a meeting for the evening of November 23 was arranged over the telephone after the sales agent "had received my telegram." No claim is made that the telegram was directly sent to the plaintiff. The claim is that it was sent to the sales agent. No showing is made that the telegram or a copy thereof was transmitted to the plaintiff. On the contrary, evidence was given to show that the plaintiff had neither knowledge nor notice of any cancellation or modification of the order as given by the defendant on November 21, until the letter from Bennett on January 25, 1929, declining acceptance of the goods shipped to the Boise bank. No evidence was adduced to the contrary, nor any claim made, that any notice was given the plaintiff as to any cancellation or modification of the order, except the notice to or knowledge possessed by the sales agent and imputable to the plaintiff. In such circumstance mere inquiry of counsel for the plaintiff when the witness was on the stand whether the plaintiff had possession of a telegram sent by Bennett to the sales agent and counsel for the plaintiff replying that it had not, and without any showing of any kind that neither the telegram filed with the telegraph company nor the telegram transmitted and delivered to the sales agent could not be produced or was not available, in my opinion, was not the laying of a sufficient foundation to admit the copy in evidence, especially when no timely or reasonable notice was given the plaintiff to produce the telegram, if such a telegram was in the possession of the sales agent, or that its production was otherwise available

to the plaintiff on reasonable notice to produce it. In other words, no attempt whatever was made by the defendant to procure either the telegram claimed to have been filed with the telegraph company or the telegram claimed to have been transmitted and delivered to the sales agent, and no showing whatever made that neither was available to the defendant or could not be produced. It is said that, if error was committed in admitting the copy in evidence, no harm resulted, for the reason that there was other sufficient evidence to show that the order as to the goods to be shipped to the Boise bank was canceled or modified by the agreement made between Bennett and the sales agent on the evening of the 23d. One of the material questions as to plaintiff's cause was whether the cancellation or modification of the order was had before the order was accepted at the home office by the plaintiff and before it became a completed contract. If, by competent evidence, it had been shown that the telegram in question was transmitted and delivered to the sales agent on the morning of the 22d, then it might well be argued that the order was canceled before the plaintiff, as shown by its testimony, had accepted the order. On the other hand, if the order was not canceled or modified until the evening of the 23d, then it is more doubtful whether the cancellation or modification was had before the order was accepted by the plaintiff on the 23d as shown by its evidence. The telegram, therefore, had considerable probative value in determining whether the order was or was not canceled or modified before the plaintiff had accepted it, and may have been one reason, even the chief reason, inducing the finding that the order was canceled before it was accepted by plaintiff. Though, on the record now before us, it be considered that erroneously admitting a copy of the telegram in evidence was not of prejudicial effect, still, on a retrial of the case, the copy of the telegram, unless a better foundation is laid for its admissibility, should not be admitted, and the trial court should so be advised.

There is still a further point on which I find it necessary to express views not in harmony with the prevailing opinion. The point relates to the parol evidence rule with respect to the evidence received as to the character, experience, and qualifications of the operators to manage and conduct the campaigns. As is seen by the contract, the plaintiff agreed "to furnish an operator to manage purchaser's campaign," etc. The defendant, over the objection of the plaintiff, was permitted by parol to show the character, experience, and qualifications of the operators to be furnished. That, it is claimed, varied the terms of the contract, and hence was improperly received. I do not think so. The term "operator," as used in the contract, is not self-descriptive or explanatory. The term, as used in the contract, has no defined meaning in law, nor any popular or fixed meaning. It has rather a particular or special meaning as applied to the context or subject-matter to which it relates. How the parties regarded it, or understood the sense in which the term was used, can only be made evident by parol. To permit that is not to vary the terms of the contract itself, but only to explain the term and the sense in which the parties used the term and understood it. The evidence did not add anything to the contract itself; it only explained an undefined term. I thus think no error was committed in admitting the evidence in such particular. 22 C. J. 1109.

While, as indicated, I concur in the order reversing the judgment, I do not concur in the order that the case be remanded for a new trial only as to the counterclaim. I think the whole case should be remanded for a new trial with leave to the parties or to either of them to amend the pleadings as they may be advised. The judgment below was that the plaintiff take nothing by its complaint, that it be dismissed and the ***395** defendant given judgment against the plaintiff in the sum of $2,000. There was but one judgment and the appeal taken was from the whole of the judgment. The appeal involved the whole of the issues, those presented by the complaint as well as those presented by the counterclaim, and by assignments alleged errors are presented for review involving both. On a review and consideration of both, the conclusion is reached that no prejudicial error was committed by the court below denying the plaintiff relief on its complaint, but that error was committed in awarding judgment in favor of the defendant on its counterclaim. By the prevailing opinion the court thus by a final adjudication sets at rest that portion of the judgment dismissing plaintiff's complaint and remands the other portion for a new trial. In view of the issues it is doubtful whether in a law case the court may properly do that. However, though such power be assumed, yet the wisdom or propriety of exercising it, on a review of assignments as here, is another thing. The power to make an order and the wisdom or propriety of exercising it in a given case involves two distinct functions. Here the foundation of plaintiff's cause, as presented by its complaint, as well as that of the defendant presented by its counterclaim, grew out of one and the same contract, the same transaction, the same subject of the action. The cause of action presented by the counterclaim was one falling within the provision of Comp. Laws Utah 1917, § 6576, subd. 1, "a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." Were the case one where the plaintiff's cause rested upon one contract and the defendant's cause by counterclaim on another separate and distinct contract, I could see some basis justifying a splitting of the issues, rendering

a final judgment of the one and a new trial of the other, for in such case there would be different transactions and different subject-matters. But where, as here, the cause of action presented by the complaint and that presented by the counterclaim arise out of the same transaction and connected with the same subject of the action, I do not see the propriety of a final adjudication of the one and the granting of a new trial as to the other-giving to the one two bites at the cherry and to the other but one. This is not a case where the plaintiff failed to prove his cause by sufficient evidence, nor where by the great or manifest weight of the evidence the plaintiff was not entitled to prevail on the issue presented by its complaint, nor where the plaintiff in no event was entitled to prevail on such issue. As is seen, one of the material questions is as to whether by competent evidence it was shown that the order as to the goods to be manufactured and delivered to the Boise bank was modified and notice given the plaintiff before its acceptance of the order and before the order became a binding contract. Admittedly, the evidence with respect thereto is in direct conflict and of such character as to justify a finding either way, and hence there was sufficient evidence to justify the finding, though it be against the apparent preponderance of the evidence, that before acceptance of the order by the plaintiff, the order in the particular indicated was modified. If, on a new trial, the defendant may strengthen its cause on its counterclaim, it is not to be assumed that the plaintiff, if given an opportunity, may not also on a new trial strengthen its cause, or induce a finding in its favor on the issue presented by its complaint. Since the one party is given an opportunity to do so, I see no good reason why the other should not be given the same opportunity, especially since the point of law urged and relied on by the plaintiff in the court below, that after the order given and signed by the defendant had left the hands of the sales agent he had no authority to cancel or modify it, is on the appeal held against the plaintiff, that on a new trial it may be able to give further evidence which may induce a finding in its favor even on the theory of the defendant; and because the error admitting the copy of the telegram in evidence may have induced the finding that the order was canceled before it was accepted by the plaintiff.

I thus think justice is better reflected by remanding the whole cause for a new trial on all the issues.

EPHRAIM HANSON, Justice (dissenting).

The conclusion reached in the prevailing opinion creates an anomalous situation. This situation is, in my judgment, wholly unnecessary, even though the action is one at law. The plaintiff's action is dismissed, notwithstanding its complaint is found sufficient in law and is supported by evidence which the prevailing opinion deems sufficient to have entitled it to a judgment had the triers of fact found in its favor. On the other hand, the counterclaim does not state facts sufficient to constitute a cause of action. The evidence received in support thereof is adjudged by the prevailing opinion to be wholly insufficient to sustain the judgment rendered for the defendant in the trial court, yet the cause is remanded to the district court for a new trial solely on the counterclaim. I think the judgment of the trial court should be reversed, and the cause remanded for a new trial. I therefore concur in the dissenting opinion of Mr. Chief Justice STRAUP.

All Citations

82 Utah 316, 24 P.2d 384

997 P.2d 903
Court of Appeals of Utah.

Frances R. BOLLIGER, Petitioner and Appellee,
v.
Ronald E. BOLLIGER, Respondent and Appellant.

No. 990350-CA.
|
Feb. 25, 2000.

Former husband sought to modify alimony. The District Court, Salt Lake Department, Stephen L. Henriod, J., denied relief, and husband appealed. The Court of Appeals, Davis, J., held that husband's retirement and wife's receipt of social security benefits were substantial material changes in circumstances not foreseen by original divorce decree.

Reversed and remanded.

West Headnotes (10)

[1] **Divorce**
Spousal support
Divorce
Modification

Determination of the trial court that there has or has not been a substantial change of circumstances warranting the modification of an alimony award is presumed valid, and the Court of Appeals reviews the ruling under an abuse of discretion standard.

6 Cases that cite this headnote

[2] **Divorce**
Modification

To succeed on a petition to modify a divorce decree, the moving party must first show that a substantial material change of circumstances has occurred since the entry of the decree and not contemplated in the decree itself. U.C.A.1953, 30-3-5(7)(g)(i).

5 Cases that cite this headnote

[3] **Divorce**
Employment and wage or salary issues
Divorce
Pension, retirement, or government benefits or compensation

Husband's forced retirement and resulting income reduction and wife's receipt of social security benefits were substantial material changes of circumstances not foreseen at the time of divorce, which could support modification of alimony.

2 Cases that cite this headnote

[4] **Divorce**
Change in circumstances in general; materiality

If both the divorce decree and the record are bereft of any reference to the changed circumstance at issue in the petition to modify alimony, then the subsequent changed circumstance was not contemplated in the original divorce decree.

2 Cases that cite this headnote

[5] **Divorce**
Employment and wage or salary issues
Divorce
Pension, retirement, or government benefits or compensation

A party's retirement or receipt of social security, unless expressly foreseen at the time of the divorce, may amount to a substantial material change of circumstances entitling the petitioner to a determination of whether alimony should be modified.

2 Cases that cite this headnote

[6] **Divorce**
Change in circumstances in general; materiality

Even if permanent alimony is awarded, a later substantial material change of circumstances not foreseen at the time of the divorce can provide grounds for modifying permanent alimony upon

appropriate petition. U.C.A.1953, 30-3-5(7)(g)(i).

Cases that cite this headnote

[7] **Divorce**
Change in circumstances in general; materiality
Divorce
Amount

Once a party has established that a substantial material change in circumstances not foreseen at the time of the divorce has occurred, the trial court must then consider what a reasonable alimony award is in light of that change.

2 Cases that cite this headnote

[8] **Divorce**
Employment and wage or salary issues

While attempting to equalize the parties' income may be a factor trial court considers in determining what a reasonable alimony award is in light changed circumstances, it is not relevant to the determination of whether a substantial material change of circumstances has occurred. U.C.A.1953, 30-3-5(7)(a).

4 Cases that cite this headnote

[9] **Divorce**
Authority and discretion of court
Divorce
Nature of proceeding as factor in general
Divorce
Attorney Fees

Both the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion in alimony modification proceedings. U.C.A.1953, 30-3-3(1).

1 Cases that cite this headnote

[10] **Divorce**
Modification; opening and vacating

In order to award attorney fees in alimony modification proceeding, trial court must find: (1) the requesting party is in need of financial assistance, (2) the requested fees are reasonable, and (3) the other spouse has the ability to pay. U.C.A.1953, 30-3-3(1).

3 Cases that cite this headnote

Attorneys and Law Firms

***904** Michael A. Jensen, Salt Lake City, for Appellant.

Suzanne Marelius, Littlefield & Peterson, Salt Lake City, for Appellee.

Before GREENWOOD, Presiding Judge, JACKSON, Associate Presiding Judge, and DAVIS, Judge.

OPINION

DAVIS, Judge:

¶ 1 Respondent Ronald E. Bolliger appeals the trial court's denial of his petition to modify the alimony awarded in the parties' divorce decree. We reverse.

I. FACTS

¶ 2 The parties here had been married for approximately thirty-four years when they divorced in March 1987. A stipulation and settlement agreement was entered into and incorporated into the divorce decree. Regarding alimony, the decree provided:

> ***905** The Defendant shall pay to the Plaintiff for each of the months of January, February and March, 1987, the amount of $785.00 and the amount of $685.00 as of April, 1987, and thereafter, as monthly alimony and one-half of the military pension retirement benefits authorized under PL97-252, 10 USCS 1408 *et seq.* (Former Spouse's Protection Act). The Defendant is ordered to pay to Plaintiff one-half of any increase he receives in his retirement benefits and to pass along such increases at the time his

> benefits are increased.... The support payments outlined herein shall be payable to Plaintiff so long as she lives with the exception that they will cease upon Plaintiff's remarriage, cohabitation, or death.

¶ 3 Respondent filed a Petition to Modify Alimony in October 1997, seeking to reduce the permanent alimony award. [1] Respondent argued that a substantial change of circumstances had occurred by his unexpected early retirement, which was not anticipated in the divorce decree, and petitioner's receipt of social security, also not anticipated by the divorce decree and not considered in the amount of alimony awarded petitioner. Petitioner maintained that both the social security benefits and respondent's retirement were anticipated by the divorce decree and, therefore, did not amount to a substantial change of circumstances.

¶ 4 Before the hearing on respondent's petition, the parties entered into a Stipulation of Undisputed Facts. Regarding respondent's income, the parties stipulated that at the time of the divorce, he was earning $5700 per month. When the petition to modify was filed, respondent was earning $2937 per month: $1071 in social security benefits; half of his Air Force Retirement in the amount of $1184; and pension payments of $682 from his employer. Thus, his monthly income had decreased by $2763, or approximately forty-eight percent. The parties also stipulated that respondent "had to accept retirement through a reduction in force from [his employer]."

¶ 5 At the time of the divorce, petitioner earned a gross monthly income of about $340. She also received the $685 in alimony and half of respondent's Air Force Retirement in the amount of $1184. Thus, petitioner had a monthly income of approximately $2209. Petitioner's stipulated monthly income at the time of the petition to modify was $2390, derived from social security benefits in the amount of $521, half of respondent's Air Force Retirement in the amount of $1184, and alimony in the amount of $685. Petitioner became unemployed in June 1991 due to health problems.

¶ 6 At the hearing on respondent's petition, the trial court rejected respondent's arguments and denied his petition to modify. The trial court made the following determination regarding a substantial material change of circumstances:

> The Court first considered whether there had been any substantial change since entry of the Decree, unforeseen by the parties to support any modification to the Decree. The Court finds that there has been no substantial, material change in circumstances sufficient to modify the Decree. The alleged changes of Respondent's retirement and the parties' receipt of social security benefits are foreseeable events. Further the parties agreed to a permanent alimony award. The Court is also not persuaded that the current difference in the parties' incomes which has been stipulated as $138 is a sufficient difference to warrant any change to the Court orders herein. It is evident that ever since the divorce there has been a much greater difference between the incomes of the parties than the present gap of $138, and that in prior years the difference always favored the Respondent.

¶ 7 Thus, respondent was "ordered to continue all support orders stated in the Decree of Divorce issued March 3, 1987 in full force and effect consisting of the following: payment of alimony to Petitioner in the amount of $685 per month; one-half [of] his military retirement pension along with any increases ***906** or adjustments made by the military." [2] Petitioner was also awarded her costs and attorney fees.

¶ 8 Respondent appeals.

II. ISSUE AND STANDARD OF REVIEW

¶ 9 There is essentially one issue for our review: Did the trial court abuse its discretion by denying respondent's Petition to Modify Alimony on the basis that petitioner's receipt of social security benefits and respondent's retirement were foreseeable events when the divorce decree was entered, and therefore not a substantial material change of circumstances justifying a modification of the earlier alimony award?

[1] ¶ 10 " ' "The determination of the trial court that there [has or has not] been a substantial change of circumstances ...

is presumed valid," ' and we review the ruling under an abuse of discretion standard." *Moon v. Moon,* 1999 Utah Ct. App. 012, ¶ 28, 973 P.2d 431 (alteration in original) (citations omitted), *cert. denied,* 982 P.2d 89 (Utah 1999).

III. ANALYSIS

A. Change in Circumstances

[2] [3] ¶ 11 Respondent argues that the trial court abused its discretion by denying his petition to modify the original alimony award because both petitioner's receipt of social security benefits and his forced early retirement amount to a substantial material change in circumstances. "The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce." Utah Code Ann. § 30-3-5(7)(g)(i) (Supp.1999).[3] To succeed on a petition to modify a divorce decree, the moving party must first show that a substantial material change of circumstances has occurred " 'since the entry of the decree and *not contemplated in the decree itself.*' " *Durfee v. Durfee,* 796 P.2d 713, 716 (Utah Ct.App.1990) (emphasis added) (quoting *Stettler v. Stettler,* 713 P.2d 699, 701 (Utah 1985)); *accord Williamson v. Williamson,* 1999 UT App 219, ¶ 8, 983 P.2d 1103.

¶ 12 "[W]here a future change in circumstances is contemplated by the trial court in the divorce decree, the fulfillment of that future change will not constitute a material change of circumstances sufficient to modify the award." *Johnson v. Johnson,* 855 P.2d 250, 253 (Utah Ct.App.1993).

[4] ¶ 13 This court has articulated what is meant by "contemplated by the divorce decree":

> The fact that the parties may have anticipated [a substantial material change in circumstances] in their own minds or in their discussions does not mean that the decree itself contemplates the change. In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change.

Durfee, 796 P.2d at 716. Accordingly, if both the divorce decree and the record are bereft of any reference to the changed circumstance at issue in the petition to modify, then the subsequent changed circumstance was not contemplated in the original divorce decree. *See id.*

¶ 14 The issue of whether the receipt of social security benefits or a spouse's later retirement is a substantial change in circumstances has been discussed in several Utah cases. In *Haslam v. Haslam,* 657 P.2d 757 (Utah 1982), the parties divorced after twenty-one years of marriage. *See id.* at 757. At the time of the divorce, the defendant was earning between $1000 and $1200 per month, ***907** and the plaintiff was unemployed. *See id.* The divorce decree required the defendant to pay $200 per month in alimony. *See id.*

¶ 15 Fourteen years after the divorce was granted, the defendant retired and began receiving social security and pension benefits. *See id.* at 757-58. He had a monthly income of $1708.89, which included his social security and pension benefits, income from stock dividends, and social security benefits for his present wife along with child support for her child from another marriage. *See id.* at 758. After the divorce, the plaintiff procured gainful employment and was earning a monthly salary of $1100 plus interest from a savings account. *See id.*

¶ 16 Based upon the defendant's retirement and the plaintiff's newly realized income, the defendant filed a petition to terminate the alimony. *See id.* The trial court denied the petition because "the defendant had failed to demonstrate a 'change of circumstances' sufficient to warrant termination." *Id.* at 757. The defendant appealed, arguing that modification was appropriate because "his income is approximately the same as it was in 1966, and the plaintiff's income has increased dramatically." *Id.* at 758. The supreme court agreed, holding that "[o]n the instant facts it is clear that there has been a substantial change in circumstances." *Id.* "[T]he combination of the supporting spouse's retirement, together with the dependent spouse's employment, earning of a substantial income, and accumulation of substantial savings subsequent to the original divorce decree, constitutes a substantial change of circumstances." *Id.* The defendant's petition for modification was therefore reinstated and the case remanded "so that the trial court may consider whether the alimony award should be modified as equity requires under the circumstances." *Id.*

¶ 17 In *Munns v. Munns*, 790 P.2d 116 (Utah Ct.App.1990), the parties were married for thirty-eight years when they divorced. *See id.* at 117. The plaintiff was awarded alimony, but only until she turned sixty-two (she was fifty-eight at the time the divorce decree was entered) and became eligible for social security. *See id.* at 117-18, 121.

¶ 18 Among other issues not relevant here, the plaintiff appealed the duration of the alimony award. This court reversed, holding that "the trial court abused its discretion in terminating her alimony at age sixty-two." *Id.* at 122. The defendant was therefore ordered to pay alimony to the plaintiff "indefinitely." *Id.* Notwithstanding this ruling, we provided, "If the parties' circumstances change as a result of one or the other's receipt of social security and/or retirement benefits, the court, with its continuing jurisdiction, may modify the alimony award at such time as the entitlement and actual amounts of the benefits become definite." *Id.* Thus, even though this court ordered permanent alimony, we approved the concept that a receipt of social security or retirement benefits could amount to a substantial change of circumstances warranting a modification "upon appropriate petition." *Id.*

¶ 19 Lastly, in *Johnson v. Johnson*, 855 P.2d 250 (Utah Ct.App.1993), the defendant appealed the alimony award because it did "not contemplate [the plaintiff's] future eligibility to receive substantial retirement benefits." *Id.* at 253. This court noted that the trial court did not make findings regarding the plaintiff's receipt of future income from the pension plan and how that would affect her need for alimony. *See id.* We then said:

> We do not believe it makes for good law or sound policy to have parties arguing years after the fact over what a trial court may or may not have considered when making an alimony award. Utah appellate courts have consistently required that trial courts make adequate findings on all material issues of alimony to reveal the reasoning followed in making the award. Consequently, if a trial court knows that a party will be receiving additional future income it should make findings as to whether such additional income will affect the alimony award. The court should therefore have considered how [the plaintiff's] future receipt of retirement benefits would alter her future financial conditions and her ability to provide for her own needs. It then should have determined whether her future income would affect the alimony award.
>
> ***908** If the future income from the pension plan is too speculative at the time of trial to anticipate the effect it will have on a receiving spouse's financial condition and needs, the court may, in its discretion, delay the determination of how the future income will affect the alimony award. However, the trial court must make findings indicating that the future income has not been considered in making the present award. Such findings will then allow the paying spouse to bring a modification proceeding at the appropriate time while satisfying the legal principle[of whether a substantial change in circumstances has occurred].

Id. at 253-54 (citations omitted). We then held "that the trial court abused its discretion by failing to expressly indicate whether the future retirement benefits were considered in making the alimony award." *Id.* at 254.

[5] ¶ 20 The trial court here held that there was not a substantial material change of circumstances because "[t]he alleged changes of Respondent's retirement and the parties' receipt of social security benefits are foreseeable events." The trial court made this ruling in the absence of any evidence, either in the form of an express provision in the divorce decree or other evidence adduced at the hearing on the petition to modify, that these events were foreseen at the time of the divorce. While it is axiomatic that parties to a divorce decree will experience some type of economic change after the original divorce decree is entered, the change, if substantial, will support a modification to the decree only if it was not foreseen at the time of the divorce decree. *See Durfee*, 796 P.2d at 716 (holding significant increase in party's income, although reasonably anticipated by parties themselves, was not contemplated by divorce decree and thus provided basis for modification); *Dana v. Dana*, 789 P.2d 726, 729 (Utah Ct.App.1990) (holding substantial increase in income was not substantial change in circumstances because it was contemplated by divorce decree). *Haslam*, *Munns*, and *Johnson* demonstrate that a party's retirement or receipt of social security, unless expressly foreseen at the time of the divorce, may amount to a substantial material change of circumstances entitling the petitioner to a determination of whether the alimony should be modified. Accordingly, we hold that respondent's forced retirement and resulting income reduction and petitioner's receipt of social security benefits were substantial material changes of circumstances not foreseen at the time of the divorce. Thus, the trial court abused its discretion when it denied respondent's Petition to Modify Alimony on that basis.

[6] ¶ 21 The trial court also based its decision on the fact that the parties had agreed to permanent alimony in the original divorce decree, apparently determining that neither the parties nor the court could modify the permanent alimony award. However, even if permanent alimony is awarded, a later substantial material change of circumstances not foreseen at the time of the divorce can provide grounds for modifying the permanent alimony "upon appropriate petition." *Munns*, 790 P.2d at 122; *see also* Utah Code Ann. § 30-3-5(7)(g)(i) (Supp.1999). Thus, to the extent the trial court denied respondent's petition on this basis, it was also an abuse of discretion.

[7] [8] ¶ 22 Lastly, the trial court denied respondent's petition on the ground that "the current difference in the parties' incomes which has been stipulated as $138 is [not] a sufficient difference to warrant any change to the Court orders herein." Once a party has established that a substantial material change in circumstances not foreseen at the time of the divorce has occurred, the trial court must then consider what a reasonable alimony award is in light of that change. *See Throckmorton v. Throckmorton*, 767 P.2d 121, 124 (Utah Ct.App.1988). While attempting to equalize the parties' income may be a factor in that determination, it is not relevant to the determination of whether a substantial material change of circumstances has occurred. A substantial material change of circumstances may or may not have occurred regardless of the effect of the change on the parties' income. Accordingly, the trial court abused its discretion when it ruled that the insignificant difference between the parties' income justified denying respondent's petition ***909** on the basis of foreseen changed circumstances.

¶ 23 Once a finding is made that a substantial material change of circumstances has occurred that was not foreseeable at the time of the divorce, the trial court must then consider

> "at least the following factors in determining alimony: (i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; (iii) the ability of the payor spouse to provide support; and (iv) the length of the marriage." These factors apply not only to an initial award of alimony, but also to a redetermination of alimony during a modification proceeding. The trial court must then make findings of fact based on these factors.

Williamson v. Williamson, 1999 UT App 219, ¶ 8, 983 P.2d 1103 (quoting Utah Code Ann. § 30-3-5(7)(a) (1998)) (other citations omitted).

¶ 24 Because we hold that a substantial material change of circumstances not foreseen at the time of the divorce has occurred, we remand to the trial court to hear evidence on the above factors and determine whether a modification of petitioner's alimony is appropriate.

B. Attorney Fees

¶ 25 Respondent requests that this court reverse the trial court's award of attorney fees to petitioner, and award him his attorney fees incurred on appeal and below. Petitioner asks that we affirm her award of attorney fees below and award her attorney fees incurred on appeal.

[9] [10] ¶ 26 A trial court may award attorney fees in a modification proceeding. *See* Utah Code Ann. § 30-3-3(1) (1998); *accord Williamson*, 1999 UT App 219 at ¶ 13, 983 P.2d 1103. "Both the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion." *Wilde v. Wilde*, 969 P.2d 438, 444 (Utah Ct.App.1998). "In order to award attorney fees, the trial court must find (1) the requesting party is in need of financial assistance; (2) the requested fees are reasonable; and (3) the other spouse has the ability to pay." *Muir v. Muir*, 841 P.2d 736, 741 (Utah Ct.App.1992).

¶ 27 The trial court awarded petitioner her attorney fees below and entered the appropriate findings. Because respondent does not challenge those findings on appeal, we do not disturb the trial court's award to petitioner.

¶ 28 Respondent was the prevailing party on appeal. We therefore exercise our discretion and award him attorney fees subject to the factors set out above. *See id.; see also Wilde*, 969 P.2d at 444. We remand the issue to the trial court so respondent may have a hearing on his financial need, petitioner's ability to pay, and the reasonableness of his fees. We deny petitioner's request for her attorney fees incurred on appeal.

IV. CONCLUSION

¶ 29 In the absence of any evidence thereof in either the decree or the record, respondent's retirement and petitioner's receipt of social security benefits were substantial material changes in circumstances not foreseen by the original divorce decree. Because the trial court found the contrary, we hold that it abused its discretion by denying respondent's Petition to Modify Alimony.

¶ 30 The trial court's order denying respondent's petition is therefore reversed and the case remanded so the lower court can consider the factors set out in Utah Code Ann. § 30-3-5(7) (Supp.1999), and determine whether the changes in the parties' circumstances warrant a modification of the original alimony award.

¶ 31 We affirm the trial court's award of attorney fees to petitioner. Consistent with this opinion, on remand the trial court should determine respondent's entitlement to his reasonable attorney fees incurred on appeal.

¶ 32 WE CONCUR: PAMELA T. GREENWOOD, Presiding Judge, and NORMAN H. JACKSON, Associate Presiding Judge.

All Citations

997 P.2d 903, 24 Employee Benefits Cas. 1113, 389 Utah Adv. Rep. 11, 2000 UT App 47

Footnotes

1 Respondent initially argued that the sum of $685 should be reduced by the amount of Social Security received by petitioner. He later argued that the $685 should be eliminated in its entirety.

2 Other orders were entered by the trial court that are immaterial to this appeal.

3 The parties agree that this provision, added in 1995, does not alter the efficacy of our jurisprudence requiring evidence that the change was foreseen at the time of the divorce to preclude a finding of changed circumstances. We agree and observe that said jurisprudence is sound and grounded in principles of res judicata. *See Krambule v. Krambule,* 1999 UT App 357, ¶ 13, 994 P.2d 210; *Hudema v. Carpenter,* 1999 UT App 290, ¶ 22, 989 P.2d 491.

1 Utah 2d 34
Supreme Court of Utah.

CALLISTER
v.
CALLISTER.

No. 7967.
|
Oct. 16, 1953.

Proceeding on defendant's motion to modify decree of divorce. The District Court, Salt Lake County, Joseph G. Jeppson, J., entered judgment reducting monthly payments required of defendant to plaintiff from $400 per month to $250 per month, and ordering plaintiff to pay her own attorney's fees, and plaintiff appealed. The Supreme Court, Hoyt, D. J., held that payments made pursuant to provision of property settlement agreement which expressly referred to such payments as alimony without anywhere referring to such payments as payments for interest in property, were alimony, and were subject to modification by court granting decree.

Affirmed.

West Headnotes (6)

[1] **Child Support**
Duty and authority of court
Child Support
Effect of previous agreement
Divorce
Power and authority of court
Divorce
Spousal support
Divorce
Change in circumstances

An agreement or stipulation between parties to divorce suit as to alimony or payments for support of children is not binding upon court in entering divorce decree, but serves only as recommendation, and if court adopts suggestion of parties, court does not thereby lose right to make such modification or change thereafter as may be requested by either party, based upon change of circumstances warranting such modification. U.C.A.1953, 30-3-5.

4 Cases that cite this headnote

[2] **Divorce**
Modification of Agreement by Court Subsequent to Divorce or Legal Separation

Payments made pursuant to provision of property settlement agreement which expressly referred to such payments as alimony without anywhere referring to such payments as payments for interest in property were alimony and were subject to modification by court granting decree. U.C.A.1953, 30-3-5.

4 Cases that cite this headnote

[3] **Child Support**
Purpose
Divorce
Power or jurisdiction to make allowance or award in general

Purpose of statute authorizing court granting divorce decree to make such orders in relation to children, property and parties and their maintenance as may be equitable, reasonable and proper, is to give court power to enforce, after divorce, duty of support which exists between husband and wife, or parent and child. U.C.A.1953, 30-3-5.

5 Cases that cite this headnote

[4] **Evidence**
Particular facts

It is common knowledge that parties to divorce suits frequently enter into agreements relative to alimony or child support, which, if binding upon courts, would leave children or divorced wives inadequately provided for.

Cases that cite this headnote

[5] **Child Support**

Health; physical disabilities

Child Support

Voluntary unemployment or underemployment

Child Support

Obligor's income or financial condition

Divorce

Weight and sufficiency

In proceeding upon defendant's motion to amend divorce decree, evidence established that decrease in defendant's monthly income and impairment of defendant's health constituted change in circumstances sufficient to warrant reduction in amount of monthly payments made by defendant to plaintiff pursuant to order in divorce decree, and that reduction in defendant's income was not directly attributable to voluntary impoverishment. U.C.A.1953, 30-3-5.

1 Cases that cite this headnote

[6] **Divorce**

Evidence in general

In proceeding on defendant's motion for modification of divorce decree, evidence established that plaintiff had sufficient income from property owned by her that defendant should not be required to pay her attorney's fees and costs. U.C.A.1953, 30-3-5.

Cases that cite this headnote

Attorneys and Law Firms

*35 **944 James W. Beless, Jr., Gustin, Richards & Mattsson, Salt Lake City, for appellant.

Nielson & Conder, Salt Lake City, for respondent.

Opinion

HOYT, District Judge.

This appeal involves first the question of power of the court to modify provisions of a divorce decree which required defendant (respondent here) to make monthly payments to plaintiff throughout her life or until her remarriage. In 1945 plaintiff (appellant) commenced suit for divorce and prayed for division of property and for alimony. During the pendency of the proceedings **945 an 'Agreement of Property Settlement and Alimony' was entered into and executed by the parties. In addition to provisions for division between the parties of real and personal property of considerable value the agreement contained the following:

'That the second party (respondent) agrees to pay to the first party (appellant) alimony in the sum of $400.00 per month during the life of the first party or until her remarriage.

'Sixth. This agreement and conveyance is mutually intended to be, and the same is hereby expressly made and intended by each of the parties hereto as a mutual release, relinquishment and conveyance of all the right, title and interest that may now be or shall hereafter be, during the lifetime or at the *36 death of either of the parties hereto, acquired by the other by virtue of said marriage that now subsists between the parties hereto under the laws of the State of Utah, in and to all of the property, both personal and real, of the other party, except to the extent of the moneys to be paid by the second party to the first party as alimony and support money; and it is the intention of the parties hereto to mutually release and waive all provisions of the laws of the State of Utah relating to husband and wife as to dower or the interests of the wife in the real property, homestead rights, etc., and forever bar each other respectively from rights of succession or inheritance by reason of the marriage relation existing between them.

'Seventh. Second party hereby agrees to pay all attorneys' fees, costs, and expenses in any manner incurred by first party in the enforcement of this contract, or by reason of any controversy arising therefrom.'

The plaintiff was granted a divorce, custody of a minor child, and judgment for division of property in accordance with the terms of the agreement mentioned. A copy of the agreement was attached to the court's findings and by reference incorporated as a part of the findings. The decree entered in the case contained the following recitals:

'That plaintiff be and she is hereby awarded judgment against the defendant for alimony in the sum of $400 per month during the life of the plaintiff or until her remarriage, and for support money in the amount of $50 per month for the support of the minor child until said child becomes eighteen years of age. * * *

'That the agreement of property settlement and alimony dated July 28, 1945, heretofore entered into by and between the parties be and the same is hereby approved by the court and the same is hereby ordered to be binding upon the parties.'

In July 1952 the defendant filed a motion to amend the judgment with respect to the monthly payments, and asked the court to reduce the amount from $400 to $200 per month, alleging as grounds therefor that defendant's income had been materially reduced and his health impaired since the rendition of the decree. Plaintiff filed an amended answer denying the defendant's allegations. The original answer is not shown as a part of the record on appeal. Trial of issues was had and the court found that since the rendition of the decree the defendant's income from his practice as a physician and surgeon had decreased from $1,000 per month to $600 per month; that he had remarried and had a wife and child to support; that since 1949 he had suffered from heart trouble which had become progressively worse, making it ***37** necessary for him to abstain from activities producing physical or mental strain, thereby reducing his income from his profession; also that plaintiff had income from rentals in excess of $4,500 per year besides some income from investments in stocks. The court concluded that monthly payments required of defendant to plaintiff should be reduced from $400 per month to $250 per month, also that defendant should not be required to pay plaintiff's attorney fees in the proceeding. Judgment was entered accordingly. Defendant appeals and asserts (1) that the judgment requiring monthly payments is not subject to modification; ****946** that it was based upon an agreement for property settlement and that the payments required do not fall within the accepted definition of alimony; (2) that the evidence does not support the findings of the court relative to change of circumstances upon which the judgment is based; (3) that voluntary impoverishment is not ground for modification of the decree; (4) that the court erred in not allowing plaintiff her attorney fees.

Our statute Sec. 30-3-5, U.C.A.1953, provides that:

> 'When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable * * *. Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper.'

This court has interpreted the statute to authorize the courts to increase or decrease alimony payments upon a showing of substantial change of circumstances. Buzzo v. Buzzo, 45 Utah 625, 148 P. 362.

It is generally held that under such a statute the court can modify a decree for alimony regardless of whether the decree was based upon an agreement of the parties. See annotations in 58 A.L.R. 639; 109 A.L.R. 1068; 166 A.L.R. 675.

[1] This court has held that, by reason of the statute, an agreement or stipulation between parties to a divorce suit as to alimony or payments for support of children is not binding upon the court in entering a divorce decree, but serves only as a recommendation, and if the court adopts the suggestion of the parties it does not thereby lose the right to make such modification or change thereafter as may be requested by either party, based upon change of circumstances warranting such modification. Jones v. Jones, 104 Utah 275, 139 P.2d 222; Barraclough v. Barraclough, 100 Utah 196, 111 P.2d 792.

Counsel for plaintiff contends however that in the above cases there was not involved a property settlement agreement such as here and that this case must therefore be distinguished and should be governed by the doctrine announced in ***38** Dickey v. Dickey, 154 Md. 675, 141 A. 387, 58 A.L.R. 634, and North v. North, 339 Mo. 1226, 100 S.W.2d 582, 109 A.L.R. 1061. Plaintiffs also cites Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540; Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1; and Rich v. Rich, 44 Cal.App.2d 526, 112 P.2d 780. Counsel contends that in these cases it is held that where there has been a property settlement agreement, coupled with an agreement for monthly payments, and the court has approved of such agreement and adopted it in the divorce decree, the provision for monthly payments is an inseparable part of the property settlement and therefore may not be subsequently modified except by consent of both parties.

It is noted that in Dickey v. Dickey, supra, the Supreme Court of Maryland held that where both the agreement and the decree provided for monthly payments *during the life or until the remarriage of the wife*, such payments could not be considered to be alimony, and therefore the court did not have jurisdiction either to modify the decree or to enforce the

payments of contempt proceedings. This was based upon the view that the court in the divorce action did not have power, in the absence of agreement by the parties, to grant a judgment requiring payment of alimony *after the death of the husband*, and having granted judgment based upon the contract of the parties, which *might require payments after the husband's death*, such payments could not be considered alimony.

This view is opposed to the majority of appellate decisions as appears from annotations in 18 A.L.R. 1047, 1050, and 101 A.L.R. 324, 326, and is not in harmony with views of this court as announced in Murphy v. Moyle, 17 Utah 113, 53 P. 1010, 1012, 70 Am.St.Rep. 767. The Utah statute at the time of that decision was substantially the same as now. The court said:

'This statute is broad and comprehensive. Under it the court has power to make such a decree as the circumstances may warrant, and doubtless, if there is danger of the father squandering **947 the estate, or if, from hostility or other cause he is likely to refuse maintenance to his wife, or support to his children awarded to her, and thus leave the children to be supported by the mother without aid from his estate, the court may make such order, respecting the property and the support and maintenance of the wife and children, as is just and equitable, and such order or decree may be made to continue in force after his decease; and the court may afterwards, if occasion shall require it, make such change in any decree as 'will be conducive to the best interests of all parties concerned.' * * * it is the solemn duty of every husband and father to support his wife during life, and his children during their minority, suitably to their station in life, and, if he fail to do so, every *39 principle of justice demands that they be thus supported out of his estate.'

It is true that in that case the claim made against the deceased husband's estate was for support of a minor child, but the opinion expressed as to the power of the court under the statute to award alimony to continue after the death of the husband appears to be supported by the weight of judicial authority.

In North v. North, supra, the Supreme Court of Missouri held that in a divorce proceeding the court had no power to enter judgment calling for payments after the death of the husband, except pursuant to consent or agreement and that where a contract had been entered into for a division of property and for payment of $500 per month until the death or remarriage of the wife, with a note and trust deed given to secure performance, and where the divorce decree approved the contract and incorporated its terms in the judgment, the court had no jurisdiction to subsequently reduce the monthly payments, regardless of the fact that they were referred to in the decree as alimony. It should be noted however that in that case a note and trust deed had been given to secure payment of the installments of so-called alimony and the agreement expressly recited that in consideration of the provisions made for her, the wife agreed to release the husband from any further obligation to pay alimony or to support and maintain her. Under such an agreement and decree it would be unreasonable to reduce the payments ordered to be made. But insofar as the decision might be considered authority for the doctrine that the court has not jurisdiction to modify an award of alimony in a case where there has been a property settlement, we are not inclined to follow it.

In the California cases cited by plaintiff, it appears that the contract provisions relative to installment payments were found to be an integral element in the settlement of property rights, and that this was the basis for the holdings that the court could not subsequently modify the decree. In Ettlinger v. Ettlinger, the opinion recites:

'The agreement indicates that the monthly payments to be made thereunder by defendant to plaintiff, stated to be for the latter's 'support and maintenance,' constituted an integral and important element in the amicable adjustment and liquidation of such property rights. In our opinion, the contract suggests that such payments were to be made to and received by plaintiff as part of the property settlement and in lieu of *property rights* (emphasis added). This would appear to have been recognized in both the interlocutory and final decrees of divorce, for each provides that 'neither the making of this decree nor anything herein contained shall in any manner modify, restrict, affect or prejudice the provisions or any of them, of said agreement hereinabove *40 mentioned * * * which agreement * * * shall remain in full force and effect." [3 Cal.2d 172, 44 P.2d 543.]

A subsequent opinion by the Supreme Court of California, Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15, 18, clarifies and appears to set at rest the law of California relative to the issue here under discussion. It quotes with approval the following from 39 Michigan Law Review 128:

> 'Assuming that the court has power by statute to modify a decree not based **948 on contract, it would seem that in the view of most courts there is no sufficient reason to take the decree based on contract out of the

> operation of the statute as to the alimony provisions. That the interest of the state in the marital status and the dissolution thereof is sufficient reason to support such a view hardly seems to require demonstration. * * * The obligation to pay alimony or support money to a divorced wife is one peculiarly justified by considerations of social desirability and generally prescribed as a consequence to dissolution of the marital relation. Being a continuing obligation, and being subject to scrutiny of the courts as to fairness and adequacy at its inception, it should so remain and the contract of the parties should not be allowed to oust the court of power otherwise exercisable.'

The court then says:

> 'This does not mean that payments under property settlement agreements may be modified even though incorporated in the decree. They may not. (Citing cases.) But in such a situation there is not the same underlying policy. The settlement of property rights should be final in order to secure stability of titles. Support allowances on the other hand should be subject to the discretion of the court as justice may require. * * * It has been loosely stated generally in passing that the divorce court has no jurisdiction to modify a decree based upon a property settlement agreement. (Citing cases, including Ettlinger v. Ettlinger, supra.) However, that does not mean that the court does not have jurisdiction on an application for modification to decide correctly or incorrectly whether the decree is based upon a property settlement agreement, and is not subject to modification, or is based upon alimony or support allowance covenants, and is subject to modification.'

[2] [3] [4] In the case before us the agreement provided for division of property to each of the parties which so far as shown appears to have been of approximately equal value. The language of the paragraph relating to monthly payments to the plaintiff clearly shows that it was intended to be for support of the plaintiff. It is expressly referred to as 'alimony.' The paragraph ***41** begins with the statement that 'the second party agrees to pay to first party alimony in the sum of $400 per month during the life of the first party.' It ends with the statement 'The alimony and support money payments herein mentioned shall be paid to first party on or before the 5th day of each and every month.' There is no statement anywhere in the agreement that the monthly payments constituted payment for plaintiff's interest in property decreed to defendant. In paragraph Sixth of the agreement, hereinabove quoted, the payments to be made to plaintiff are again referred to as 'alimony.' In view of these facts we hold that the payments must be considered alimony for support of plaintiff. We further hold that these provisions are not an inseparable part of the agreement relating to division of property and that by approval of the agreement in the decree the court did not divest itself of jurisdiction under the statute to make such subsequent changes and orders with respect to alimony payments as might be reasonable and proper, based upon change of circumstances. We hold this to be true even though the provisions of the agreement should be interpreted to mean that the parties intended to stipulate for a fixed and unalterable amount of monthly alimony. The object and purpose of the statute is to give the courts power to enforce, after divorce, the duty of support which exists between a husband and wife or parent and child. Legislators who enacted the law were probably aware of a fact, which is a matter of common knowledge to trial courts, that parties to divorce suits frequently enter into agreements relative to alimony or for child support which, if binding upon the courts, would leave children or divorced wives inadequately provided for. It is therefore reasonable to assume that the law was intended to give courts power to disregard the stipulations or agreements of the parties in the first instance ****949** and enter judgment for such alimony or child support as appears reasonable, and to thereafter modify such judgments when change of circumstances justifies it, regardless of attempts of the parties to control the matter by contract. Under the authorities herein cited such a view seems to be generally if not universally adhered to by the courts. If it were held otherwise in this case, in which a husband asks for reduction of alimony, it would establish a precedent which in future cases might prevent divorced wives in serious distress from obtaining increased alimony from ex-husbands possessed of wealth or ample income to provide for them. We hold that the

trial court had power and jurisdiction to modify the decree of divorce with respect to the payments involved herein.

[5] [6] Plaintiff's next contention, that the evidence does not support the trial court's findings, nor its conclusions of law and judgment, makes it necessary for us to review the evidence since this is an equity case. Clawson v. Wallace, 16 Utah 300, 52 P. 9; Utah Const. Art. 8, Sec. 9. However, ***42** there is little or no dispute between the parties as to the evidence. The testimony of witnesses is also substantially without conflict. The trial court found that the income of the defendant from his profession as a physician and surgeon at the time of the divorce was approximately $1,000 per month and that at the time of the proceedings for modification it had decreased to approximately $600 per month. Counsel for plaintiff contends that the decrease in income 'is directly attributable to the luxury of a clinic which the defendant persists in maintaining' and it is asserted that voluntary improverishment is not a ground for reduction of alimony. With the latter statement we agree, but we cannot say that the circumstances shown by the evidence as to maintenance of the clinic by defendant amounts to voluntary impoverishment. It may not have proved a profitable venture, but we cannot say that that could have been foreseen with any degree of certainty. We believe from a reading of the transcript and exhibits that the findings of the trial court are approximately correct as to the income of the defendant from his profession at the time of the decree and at the time of the order for modification. His income from other sources appears to have been approximately $7,000 per year at the time of the divorce, and almost entirely from stocks and bonds which were then divided approximately equally between plaintiff and defendant. Defendant's income from sources other than his profession during the year 1951 appears to have been $3,243.11 and in 1950, $3,250.62. The evidence shows that the defendant was fifty-eight years of age at time of proceedings for modification, that between April 1949 and November 1952 he had three examinations by a recognized heart specialist; that such examinations showed a developing abnormality of the heart, indicating coronary disease, and that the specialist had advised defendant to reduce his activities and avoid strain and exhaustion. We believe the evidence justified a finding that defendant's health has become impaired to some extent and that this condition will probably result in reducing defendant's income. We also believe that the evidence shows that plaintiff has a sufficient income from property owned by her to justify the court's ruling that defendant should not be required to pay her attorney fees and costs in these proceedings.

The judgment of the trial court will be affirmed. Each party to bear his or her own costs.

WOLFE, C. J., and McDONOUGH and WADE, JJ., concur.

CROCKETT, J., having disqualified himself, does not participate herein.

HENRIOD, Justice, does not participate herein.

All Citations

1 Utah 2d 34, 261 P.2d 944

Footnotes

1 Jones v. Jones, 104 Utah 275, 139 P.2d 222; Barraclough v. Barraclough, 100 Utah 196, 111 P.2d 792.

100 P.3d 1177
Supreme Court of Utah.

Jau–Fei CHEN, individually and as the natural guardian of Chi Wei Zhang, E. Lei Zhang, and E.E. Zhang, her minor children, Rui–Kang Zhang, Plaintiffs and Appellees,
v.
Jau–Hwa STEWART, et al., Defendants.
E. Excel International, Inc., Cross–Claimant,
v.
Jau–Hwa Stewart, Cross–Defendant and Appellant.
E. Excel International, Inc., Third–Party Plaintiff and Appellee,
v.
Taig Stewart; Beverly Warner; Angela Barclay; Dale Stewart; Hwan Lan Chen; Sheue Wen Smith; Kim O'Neill; Byron Murray; Apogee, Inc., a Utah corporation; Apogee Essence International Philippines, Inc., a Philippine corporation; Excellent Essentials International Corporation, a Philippine Corporation; USA Apogee, Ltd., a Hong Kong corporation; Shannon River, Inc., a Utah corporation; Shannon Heaton; Sam Tzu; Richard Hu; Bryan Hyman; Paul Cooper; and John Does I through X, Third–Party Defendants and Appellants.

No. 20020927.
|
Oct. 8, 2004.
|
Rehearing Denied Nov. 24, 2004.

Synopsis

Background: Former president/director of family corporation brought derivative action against corporation and its president for corporate waste, breach of fiduciary duty, and improper removal of plaintiff as president/director. The parties stipulated to removal of defendant president and appointment of special master as interim chief executive officer (CEO). Interim CEO cross-claimed against defendant president, defendant president's and plaintiff's mother, defendant president's husband, and individuals working in concert with mother and defendant president. The Fourth District Court, Provo Department, Fred D. Howard, J., entered preliminary injunction barring defendants from worldwide competition with corporation, and denied mother's, defendant president's, and husband's motion to vacate trial court's orders regarding appointment of interim CEO. Interlocutory appeal was granted.

Holdings: The Supreme Court, Durham, C.J., held that:

[1] mother waived right to object to appointment of interim CEO;

[2] defendant president and her husband waived right to object to appointment of interim CEO;

[3] trial court had inherent equitable authority to appoint special master as interim CEO;

[4] trial court did not abuse its discretion by providing judicial immunity for interim CEO; and

[5] preliminary injunction against mother did not violate her procedural due process rights.

Affirmed.

West Headnotes (31)

[1] **Appeal and Error**
Defects, objections, and amendments

If appellants fail to properly marshal the evidence in support of the trial court's findings of fact, the appellate court does not consider those findings properly challenged, and therefore assumes the evidence supports them.

14 Cases that cite this headnote

[2] **Appeal and Error**
Clearly erroneous findings

A trial court's findings of fact will not be set aside unless clearly erroneous.

8 Cases that cite this headnote

[3] **Appeal and Error**
Statement of evidence

In order to establish that a particular finding of fact is "clearly erroneous," an appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence.

26 Cases that cite this headnote

[4] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

Whether the trial court applied the proper legal standard is a question of law that is reviewed for correctness.

26 Cases that cite this headnote

[5] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

If the application of the legal standard is extremely fact sensitive, then the reviewing court should generally give the trial court considerable discretion in determining whether the facts of a particular case come within the established rule of law.

3 Cases that cite this headnote

[6] **Appeal and Error**
Statement of evidence

Even where the defendants purport to challenge only the legal ruling, if a determination of the correctness of a trial court's application of a legal standard is extremely fact-sensitive, the defendants have a duty to marshal the evidence in support of the trial court's findings of fact.

14 Cases that cite this headnote

[7] **Appeal and Error**
Mixed questions of law and fact

Estoppel
Questions for jury

The issues of equitable excuse and waiver are mixed questions of law and fact, and the appellate court therefore grants broadened discretion to the trial court's findings.

10 Cases that cite this headnote

[8] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

Constitutional issues, including questions regarding due process, are questions of law that the appellate court reviews for correctness. West's U.C.A. Const. Art. 1, § 7.

35 Cases that cite this headnote

[9] **Constitutional Law**
Factors considered; flexibility and balancing

Procedural due process is not a technical conception with a fixed content unrelated to time, place, and circumstances; the requirements of due process depend upon the specific context in which they are applied. West's U.C.A. Const. Art. 1, § 7.

1 Cases that cite this headnote

[10] **Appeal and Error**
Injunction

A trial court's decision to grant a preliminary injunction is reviewed for abuse of discretion.

1 Cases that cite this headnote

[11] **Reference**
Objections and exceptions to order

Claim by president of family corporation and other defendants, that trial court's appointment of special master as interim chief executive officer (CEO) during pendency of derivative action alleging corporate waste, breach of fiduciary duty, and improper removal of former president/director, exceeded trial court's authority under civil procedure rule regarding special masters,

did not raise an issue of subject matter jurisdiction that would not be waivable. West's U.C.A. § 78–3–4; Rules Civ.Proc., Rules 53, 66(a).

1 Cases that cite this headnote

[12] **Courts**
Waiver of Objections

Subject matter jurisdiction cannot be waived.

4 Cases that cite this headnote

[13] **Courts**
Jurisdiction of Cause of Action

"Subject matter jurisdiction" is the existence of a relationship between the claim under adjudication and the forum that justifies the exercise of jurisdiction.

3 Cases that cite this headnote

[14] **Reference**
Objections and exceptions to order

Mother of president of family corporation waived her right to object to trial court's order appointing special master as interim chief executive officer (CEO) during pendency of derivative action alleging corporate waste, breach of fiduciary duty, and improper removal of former president/director, though mother had not been a party to the action when interim CEO was appointed by trial court pursuant to stipulation of parties, where mother waited until ten months after she became a party to raise an objection, and waited until after interim CEO had taken actions against her, including filing several extensive and unfavorable reports, filing claims against her on behalf of corporation, and successfully seeking preliminary injunction to stop her from competing with corporation.

Cases that cite this headnote

[15] **Reference**
Objections and exceptions to order

President of family corporation and her husband waived their right to object to trial court's order appointing special master as interim chief executive officer (CEO) during pendency of derivative action alleging corporate waste, breach of fiduciary duty, and improper removal of former president/director, where president and husband had stipulated to the trial court order making the appointment, they participated in the litigation for nearly a year before objecting to the appointment, and they waited until after interim CEO had taken actions against them, including filing several extensive and unfavorable reports, filing claims against them on behalf of corporation, and successfully seeking preliminary injunction to stop them from competing with corporation.

Cases that cite this headnote

[16] **Receivers**
Estoppel and waiver

An objection to a court's decision to appoint a receiver can be waived if not brought in a timely manner.

Cases that cite this headnote

[17] **Reference**
Authority to appoint in general

Trial court had inherent equitable authority to appoint special master as interim chief executive officer (CEO), with the powers of a receiver, during pendency of derivative action alleging corporate waste, breach of fiduciary duty, and improper removal of former president/director, to forestall the erosion of corporate assets and to manage the family corporation until all legal issues before the court were resolved.

Cases that cite this headnote

[18] **Courts**
In general; nature and source of judicial authority

Reference
Jurisdiction and authority to order reference

Courts have, at least in the absence of legislation to the contrary, inherent power to provide themselves with appropriate instruments

required for the performance of their judicial duties, and this power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.

1 Cases that cite this headnote

[19] **Receivers**
Jurisdiction and Authority of Court or Judge

The authority to appoint a receiver is based on the court's inherent equitable power.

1 Cases that cite this headnote

[20] **Corporations and Business Organizations**
Powers, Duties and Liabilities of Receiver

Corporations and Business Organizations
Actions by or Against Receivers

Among the powers of a receiver for a corporation is the authority to conduct and settle litigation in order to manage the corporation.

Cases that cite this headnote

[21] **Reference**
Liabilities of referee

Trial court did not abuse its discretion by providing judicial immunity for special master, who held the powers of a receiver, with respect to special master's actions as interim chief executive officer (CEO) for family corporation during pendency of derivative action alleging corporate waste, breach of fiduciary duty, and improper removal of former president/director.

Cases that cite this headnote

[22] **Constitutional Law**
Preliminary injunction; temporary restraining order

Injunction
Directors, officers, and agents

Preliminary injunction prohibiting mother of president of family corporation from engaging in worldwide competition with corporation during pendency of derivative action alleging corporate waste, breach of fiduciary duty, and improper removal of former president/director did not violate mother's procedural due process rights, though mother had not been joined as party by service of process before preliminary injunction proceedings began and 50 percent of evidence on the preliminary injunction question was received by the court before she joined as party; mother waived her right to service of process when her attorney voluntarily entered notice of appearance, she had actual notice of proceedings because she lived with president and acted as co-conspirator with president, and she was present for 18 of 22 hearings and never objected to trial court's reliance of evidence at four early hearings she had not attended. West's U.C.A. Const. Art. 1, § 7.

4 Cases that cite this headnote

[23] **Constitutional Law**
Notice and Hearing

Although the exact requirements of procedural due process may vary from situation to situation, the minimum requirements of due process include adequate notice and an opportunity to be heard in a meaningful manner. West's U.C.A. Const. Art. 1, § 7.

9 Cases that cite this headnote

[24] **Constitutional Law**
Impartiality

To be considered a meaningful hearing, as element for procedural due process, the concerns of the affected parties should be heard by an impartial decision maker. West's U.C.A. Const. Art. 1, § 7.

4 Cases that cite this headnote

[25] **Appeal and Error**
Statement of evidence

In order to challenge a court's factual findings, an appellant must first marshal all the evidence in support of the finding and then demonstrate

that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.

32 Cases that cite this headnote

[26] **Appeal and Error**
Statement of evidence

In order to properly discharge the duty of marshaling the evidence in support of the trial court's findings of fact, the appellant must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists, and must present a precisely focused summary of all the evidence supporting the challenged findings, which must correlate all particular items of evidence with the challenged findings.

17 Cases that cite this headnote

[27] **Appeal and Error**
Statement of evidence

To fulfill the duty of marshaling the evidence in support of the trial court's findings of fact, appellants must present the evidence in a light most favorable to the trial court, and not attempt to construe the evidence in a light favorable to their case.

6 Cases that cite this headnote

[28] **Appeal and Error**
Statement of evidence

Appellants, to fulfill the duty of marshaling the evidence in support of the trial court's findings of fact, cannot merely present carefully selected facts and excerpts from the record in support of their position, nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact.

6 Cases that cite this headnote

[29] **Appeal and Error**
Statement of evidence

Appellants cannot shift their burden of marshaling the evidence in support of the trial court's findings of fact by falsely claiming that there is no evidence in support of the trial court's findings.

4 Cases that cite this headnote

[30] **Appeal and Error**
Statement of evidence

A proper marshaling of the evidence in support of the trial court's findings of fact promotes efficiency by avoiding a retrying of the facts and by assisting the appellate court in its decision-making and opinion writing, and it promotes fairness by requiring that the appellants bear the expense and time of marshaling the evidence rather than putting the appellee in the precarious position of performing the appellant's work at considerable time and expense.

2 Cases that cite this headnote

[31] **Appeal and Error**
Total failure of proof

An appellee need only point to a scintilla of evidence that supports a trial court's findings in order to refute an appellant's claim of no evidence.

1 Cases that cite this headnote

Attorneys and Law Firms

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Kim O'Neill, defendant pro se.

Byron Murray, defendant pro se.

*1181 DURHAM, Chief Justice:

INTRODUCTION

¶ 1 On January 10, 2001, plaintiff Jau–Fei Chen brought suit against her sister, defendant Jau–Hwa Stewart, and the family corporation, E. Excel, of which Jau–Hwa was president at that time. In the suit Jau–Fei claimed corporate waste, breach of fiduciary duty, and improper removal of a director. On March 13, 2001, the parties stipulated to the removal of Jau–Hwa Stewart from her position as president of E. Excel and agreed to the appointment of an interim CEO, Larry Holman, to run the company during the pendency of the lawsuit. On October 29, 2001, the interim CEO filed a cross-claim against Jau–Hwa Stewart and third-party defendants Hwan Lan Chen (Jau–Hwa and Jau–Fei's mother) and Taig Stewart, (Jau–Hwa Stewart's husband) as well as other individuals the court later found to have been working in concert with Hwan Lan Chen and Jau–Hwa Stewart. On October 16, 2002, the trial court entered a preliminary injunction barring all defendants from worldwide competition with E. Excel. Within ten days, Hwan Lan Chen filed a motion, in which Jau–Hwa and Taig Stewart joined, to vacate the trial court's orders relating to Mr. Holman's appointment as interim CEO. The trial court denied Hwan Lan Chen's motion to vacate. This court granted defendants' petition for an interlocutory appeal from the trial court's decision. We affirm.

BACKGROUND

¶ 2 The respective parties tell two different stories about the events that gave rise to this lawsuit; the facts, however, tell only one. Over 200 pages of findings of fact and conclusions of law entered by the trial court narrate a tale of intrigue, deceit, and family strife of surprising proportions.

[1] ¶ 3 The trial court's findings directly contradict defendants' characterization of the underlying dispute. Because defendants have failed to properly marshal the evidence in support of the trial court's findings of fact, we do not consider those findings properly challenged and, therefore, assume the evidence supports them. *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 233 (Utah 1998). As a result, we rely on those findings in reciting the facts here.

¶ 4 E. Excel International, Inc. (E. Excel) is a manufacturer of nutritional supplements and skin care products sold both nationally and internationally. In the United States and Canada, the products are sold directly through multilevel marketers. In Asia, the products are sold to a single territorial owner in each of the major markets, who in turn sells the products through a multilevel marketing network. Members of the Chen family control the corporation and have served in various roles as directors, officers, or employees of E. Excel. Prior to the events that form the basis of the present litigation, E. Excel was run by Jau–Fei Chen (Dr. Chen) as president and her sister Jau–Hwa Stewart (Ms. Stewart) as vice president.

¶ 5 Although this is not the Chen family's first serious internal feud, [1] in 2000 a particularly vicious dispute arose. In the early part of that year, Ms. Stewart and her mother, Hwan Lan Chen (Madame Chen), came to believe that Dr. Chen's husband, Rui–Kang Zhang, had been using company funds to support a mistress in California. They insisted that Dr. Chen immediately divorce her husband and give up custody of her children. When Dr. Chen refused, Ms. Stewart and Madame Chen demanded that both Dr. Chen and her husband end their affiliation with E. Excel. Dr. Chen again refused. Unable to convince Dr. Chen to remove herself voluntarily, Ms. Stewart and Madame Chen turned to more aggressive measures.

¶ 6 At the time the present dispute arose, the ownership of the company rested with Ms. Stewart, who possessed a 25% minority share in the company, and the three minor children of Dr. Chen, who possessed a combined 75% share. In September 2001, purporting *1182 to act as trustee for Dr. Chen's children, Ms. Stewart claimed control of 100% of the outstanding shares and removed Dr. Chen from the board of directors. She then installed her husband, Taig Stewart, and Madame Chen as new directors. [2] The new board voted to remove Dr. Chen as president of E. Excel, appointing Ms. Stewart in her place. Acting as president of E. Excel, without authorization from the board or any justifiable business reason, Ms. Stewart transferred nearly $2 million from E. Excel to her personal account. Ms. Stewart and Madame Chen then proceeded to attack the long-term distributors still loyal to Dr. Chen by stopping the shipment of supplies and transferring millions of dollars to Asian markets to establish new distribution networks.

¶ 7 On January 10, 2001, Dr. Chen brought derivative claims against Ms. Stewart and E. Excel, alleging corporate waste, breach of fiduciary duty, and improper removal of a director. That same day, the court granted a temporary

restraining order prohibiting Ms. Stewart from violating E. Excel's exclusive contracts with the territorial owners and from acting as president and spokesperson of E. Excel. The order also required Ms. Stewart to fulfill all pending orders from the territorial owners. The court held evidentiary hearings from January 19, 2001, to February 21, 2001, in order to determine whether the temporary restraining order should be converted into a preliminary injunction. During that time a series of increasingly bizarre events unfolded, manifesting Ms. Stewart and Madame Chen's intent to either squeeze Dr. Chen out of the corporation or destroy it entirely. In defiance of the temporary restraining order, Ms. Stewart continued to ship products to the new distributors, using "front" companies rather than shipping directly to them, and omitting the names of recipients from the shipping orders. Orders in transit to the new distributors were not stopped, and the only order shipped to a long-term distributor was rejected by the recipient country's government as adulterated. As it became increasingly clear that the court would grant a preliminary injunction in Dr. Chen's favor and remove Ms. Stewart as president of the company, defendants set out to disable E. Excel and set up a competing enterprise, Apogee, in its place. To this end, Ms. Stewart and the third-party defendants who assisted in the scheme disabled the surveillance system that monitored activities at E. Excel's warehouse and offices. They stole, converted, and destroyed millions of dollars worth of E. Excel's inventory, equipment, business records, and computer files. In one of the more bizarre episodes of this case, the defendants purchased mice at a pet store and released them into the warehouse, thereafter claiming that it was necessary to remove the product from the warehouse due to a rodent infestation.

¶ 8 Matters came to a head when, on February 13, 2001, a tape of a recorded conversation between Ms. Stewart and two new distributors located in Asia was anonymously delivered to Dr. Chen and her attorneys. During the conversation, Ms. Stewart and the distributors agreed to deny knowledge of certain critical matters during the evidentiary hearings and blame Dr. Chen for harmful events caused by Ms. Stewart or others. The trial court entered the tape into evidence and referred the recording and a transcript of testimony before the court to the county attorney.

¶ 9 On February 21, 2001, following the trial court's evidentiary hearings, all parties stipulated to an interim order. Among other things, the order prohibited Ms. Stewart from interfering with any contract between E. Excel and its distributors or third parties and required her to return to E. Excel's corporate headquarters any corporate assets in her custody. It also provided for the removal of Ms. Stewart as president of E. Excel, the removal of Madame Chen and Taig Stewart from the board, and the reinstatement of Dr. Chen and her husband to the board. Finally, the interim order directed the appointment of an interim CEO to conserve the remaining assets of E. Excel and to operate the company pending the outcome of the suit. The order provided that *1183 the parties would be allowed to choose the interim CEO; however, if they could not reach an agreement, the CEO would be appointed by the court. After the parties failed to agree on an individual, the court appointed Larry Holman on March 13, 2001, empowering him as interim CEO/special master with "full executive authority to act on behalf of the company, and conduct its business, subject to the continuing oversight of the board of directors and the Court."

¶ 10 When Mr. Holman arrived, E. Excel was dangerously close to going out of business. Though highly profitable just six months earlier, E. Excel's current liabilities now exceeded its current assets by $1.6 million and it faced imminent loss of its operating capital because it had defaulted on a $1 million line of credit with Zion's Bank. [3] Upon arrival, Mr. Holman found that Ms. Stewart and the other members of the conspiracy had removed the documents E. Excel needed to operate, including financial records, product information, invoices for accounts payable, and records of E. Excel's banking relationships.

¶ 11 Shortly thereafter, Mr. Holman learned that two of the new distributors had received more than $1 million worth of product from Ms. Stewart without paying for it, and were selling it at 30–40% below customary prices. These "dumping" practices by the new distributors made it virtually impossible for legitimate E. Excel distributors to compete and raised concerns among customers regarding the quality of the product and the future prospects of the company. These concerns were reflected in the significant decrease in the number of low-level sellers signing up with E. Excel in parts of Asia, a benchmark for the success of a multi-level marketing enterprise. [4] Mr. Holman was also confronted with claims by the long-term distributors, who had filed suit against E. Excel while Ms. Stewart was in charge for breach of their exclusive contracts. Damages levied against the company as a result of those suits could potentially have reached tens of millions of dollars.

¶ 12 In response to these events, and in order to settle a dispute regarding the authority of Mr. Holman to direct litigation

on behalf of the corporation, the trial court modified the interim order on May 11, 2001. The new order clarified that Mr. Holman had "full executive authority to direct and control, initiate, dismiss, settle or otherwise determine [E. Excel's] interests in all business relationships, assets, disputes or lawsuits, subject to the approval of the Board of Directors."

¶ 13 With court approval, Mr. Holman caused the company to enter a Master Settlement Agreement on June 1, 2001. The purpose of the Agreement was to restore minimal cash flow, settle litigation that was draining E. Excel of resources, and obtain waivers of the claims brought by the long-term distributors. Though it did not restore E. Excel to its economic position prior to the events of early 2001, the Agreement did, in small measure, mitigate E. Excel's damages and thus kept the company from imminent bankruptcy.

¶ 14 However, despite the interim order, Ms. Stewart and Madame Chen continued to work hand-in-hand to establish the Apogee enterprise so that the fledgling corporation would be ready to take the place of E. Excel. Madame Chen arranged for the transfer of some $3.5 million into a concealed account, which was used by Apogee for various business expenses. Madame Chen paid $1.2 million in cash, drawn from the concealed account, for land to be used by Apogee, and paid $3.2 million in construction costs for the new Apogee facility. Madame Chen's supporting role was also manifested by Ms. Stewart's own testimony: "I really can't do anything with my own idea. My mother's the one with the money. I have no money.... In the first place you have to have some cash in order to really make things ***1184** happen." Ms. Stewart even claimed that prior to her resignation as a director of E. Excel, everything regarding Apogee "was my mother's idea."

¶ 15 During the summer of 2001, Dr. Chen filed two motions for contempt against Ms. Stewart, alleging extensive violations of the temporary restraining order. On October 29, 2001, E. Excel, under the direction of Mr. Holman, filed a cross-claim against Ms. Stewart as well as third-party complaints against several third-party defendants, including Madame Chen. E. Excel sought preliminary and permanent injunctions to prevent defendants from competing with E. Excel so that the corporation could recover from the damage wrought by defendants. On October 31, 2001, a temporary restraining order was granted.

¶ 16 The trial court combined the hearings on the contempt and preliminary injunction motions on November 27, 2001, and from that time through the spring of 2002, the district court heard approximately twenty-two days of testimony and argument on these motions. Ms. Stewart filed a motion to disqualify Mr. Holman, but the lower court deferred hearings on the matter, stating that although such claims were serious, the court simply did not have the resources to consider them yet. On August 18 and 20, 2002, the court entered extensive findings of fact and conclusions of law. Two months later, on October 16, 2002, the trial court entered an order granting E. Excel's motion for a preliminary injunction. Eight days later, Madame Chen filed a motion to vacate and set aside the trial court's orders relating to the interim CEO's appointment, in which Ms. Stewart and her husband joined. On January 24, 2003, the court denied Madame Chen's motion to vacate.

¶ 17 The trial court's decision to deny Madame Chen's motion to vacate and set aside the trial court's orders relating to the appointment of the Interim CEO is the subject of this interlocutory appeal.

STANDARD OF REVIEW

¶ 18 Due to the significance of the standard to be applied in the present case, we briefly restate the various standards of review. We then list the issues and the applicable standards in order of their treatment in the analysis portion of the opinion.

[2] [3] [4] ¶ 19 A trial court's findings of fact will not be set aside unless clearly erroneous. *State v. Pena*, 869 P.2d 932, 935–36 (Utah 1994). In order to establish that a particular finding of fact is clearly erroneous, "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence." *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989) (internal quotations omitted). If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence. *In re Estate of Beesley*, 883 P.2d 1343, 1349 (Utah 1994). On the other hand, whether the trial court applied the proper legal standard is a question of law that is reviewed for correctness. *Pena*, 869 P.2d at 936 ("[A]ppellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction.").

[5] [6] ¶ 20 The application of a legal standard, once articulated, is a slightly different issue, one which involves varying degrees of discretion depending on the standard in question. *Id.* at 936–37, 938. If the application of the

standard is extremely fact sensitive, then the reviewing court should generally give the trial court considerable discretion in determining whether the facts of a particular case come within the established rule of law.[5] *Beesley*, 883 P.2d at 1347–48. Even where the defendants purport to challenge only the legal ruling, as here, if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the defendants also have a duty to marshal ***1185** the evidence. *See, e.g., id.* at 1347–49 (explaining that failure of the appellant to marshal the evidence meant findings were presumed valid, proving fatal to her legal argument).

¶ 21 The standards of review of the various questions presented in this appeal are as follows:

¶ 22 (1) Did appellants waive their right to challenge the appointment and empowerment of the special master?

[7] ¶ 23 The issues of equitable excuse and waiver are mixed questions of law and fact and we therefore grant broadened discretion to the trial court's findings. *U.S. Realty 86 Assocs. v. Sec. Inv., Ltd.*, 2002 UT 14, ¶ 11, 40 P.3d 586; *see also Pledger v. Gillespie*, 1999 UT 54, ¶ 16, 982 P.2d 572 ("[Waiver] presents mixed questions of law and fact: whether the trial court employed the proper standard of waiver presents a legal question which is reviewed for correctness, but the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations.").

¶ 24 (2) Was the trial court correct in holding that the preliminary injunction did not violate Madame Chen's due process rights despite her absence during the initial portion of the hearings?

[8] [9] ¶ 25 Constitutional issues, including questions regarding due process, are questions of law that we review for correctness. *In re K.M.*, 965 P.2d 576, 578 (Utah Ct.App.1998) (citing *State v. Holland*, 921 P.2d 430, 433 (Utah 1996) ("[T]he ultimate question of whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness.")). Due process, however, "is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Dairy Prod. Servs., Inc. v. City of Wellsville*, 2000 UT 81, ¶ 49, 13 P.3d 581 (quoting *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)). "The requirements of due process depend upon the specific context in which they are applied." *V–1 Oil Co., v. Dep't of Envtl. Quality*, 939 P.2d 1192, 1196 (Utah 1997). However, because this question requires the application of facts in the record to the due process standard, we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations. *State v. Hubbard*, 2002 UT 45, ¶ 22, 48 P.3d 953.

¶ 26 (3) Did the lower court abuse its discretion in granting the preliminary injunction that barred the defendants from worldwide competition with E. Excel?

[10] ¶ 27 A trial court's decision to grant a preliminary injunction is reviewed for abuse of discretion. "[I]n granting or refusing interlocutory injunctions the court shall similarly set forth findings of fact ... [which] shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a). This court will "reverse the trial court's findings of fact ... only if they are clearly erroneous as demonstrated by the challenger's marshaling of the evidence." *Utah Med. Prods.*, 958 P.2d at 231 (internal quotations omitted).

ANALYSIS

¶ 28 Defendants' claims depend on two key issues: (1) whether the appointment of the interim CEO was proper and (2) whether the preliminary injunction barring appellants from worldwide competition was justified. Within each of these two main questions are various sub-issues and a myriad of arguments. We need not discuss all of the defendants' arguments; however, given the complexity of this case and the trial court's relatively novel use of a court-appointed officer, we feel it appropriate to discuss several of the issues in addition to those upon which we eventually dispose of this case. Moreover, given the fact that this is an interlocutory appeal, with an appeal of the trial court's overall resolution of the case apparently making its way to us, we use this opportunity to review questions that may shape subsequent developments in this case. *See* Utah R.App. P. 37.

¶ 29 The first major issue—the propriety of the appointment of an interim CEO—is ***1186** dealt with in section I. In that section, we hold that the defendants' objection does not raise an issue of subject matter jurisdiction and that the trial court correctly determined that Madame Chen's claim challenging the appointment of the interim CEO is barred by the doctrine of waiver. Furthermore, we hold that even if

Madame Chen had not waived her right, the trial court had the equitable authority to appoint an interim CEO with judicial immunity. In section II, we decide the second major issue—the trial court's decision to grant the preliminary injunction. In this section we affirm the trial court's decision to grant the preliminary injunction, holding that it was not an abuse of discretion and did not violate Madame Chen's due process rights.

¶ 30 As a preliminary matter, we note that this dispute is not as complicated as defendants' counsel asserts. At the core of this case, the trial court, based on competent evidence, identified an insatiable appetite for revenge. Nearly 20,000 pages of combined record, exhibits, reports, and briefs stand witness to the immense financial resources that this family has and is willing to expend in pursuit of that revenge. Approximately 500 pages of briefs and addenda have included an array of arguments, issues, and cases having little bearing on our decision today. Notably, defendants' briefs before this court omit virtually any reference to the 206 pages of findings of fact upon which the resolution of the issues on appeal so heavily rely.

I. DEFENDANTS WAIVED THEIR RIGHT TO CHALLENGE THE APPOINTMENT, EMPOWERMENT, AND ACTIVITIES OF THE SPECIAL MASTER

¶ 31 Defendants appeal the trial court's holding that Madame Chen waived any right to challenge the appointment of the interim CEO by waiting over ten months to protest Mr. Holman's appointment. The trial court held that Madame Chen waived her right by failing to object in a timely manner. The trial court also noted that Madame Chen's involvement in the litigation and the difficulties she created when E. Excel tried to serve her with process further supported denial of her claims under the doctrine of waiver.

¶ 32 Defendants contend on appeal, however, that their objection to the appointment of the interim CEO raises an issue of subject matter jurisdiction and cannot be waived. Defendants also argue that even if their objection was subject to waiver, they neither implicitly nor explicitly waived their right to object. We reject both arguments. The claim defendants bring does not properly challenge the subject matter jurisdiction of the trial court, and the facts support the trial court's conclusion that defendants waived their right to object to the appointment of the interim CEO.

A. Defendants' Objection to the Interim CEO's Appointment Does Not Raise an Issue of Subject Matter Jurisdiction

[11] ¶ 33 Defendants attempt to bypass the doctrine of waiver by characterizing their claim as an objection to the court's subject matter jurisdiction. They claim that the appointment of a rule 53 special master with the powers of an executive officer exceeded the trial court's subject matter jurisdiction. Because an objection raising an issue of the court's subject matter jurisdiction cannot be waived and can be brought at any time, defendants argue the court erroneously ruled that Madame Chen waived her right to object to the appointment of the special master.

[12] ¶ 34 Defendants correctly assert that subject matter jurisdiction cannot be waived. *See Barnard v. Wassermann*, 855 P.2d 243, 248 (Utah 1993) ("This court has made clear that challenges to subject matter jurisdiction may be raised at any time and cannot be waived."). The claim they bring, however, does not raise an issue of subject matter jurisdiction.

[13] ¶ 35 Jurisdiction is "a many-hued term." *United States v. Wey*, 895 F.2d 429, 431 (7th Cir.1990). Two of the term's uses are explained in the Restatement of Judgments:

> [W]hat is indicated by the reference to the "subject matter" is the existence of a relationship between the claim under adjudication and the forum that justifies ***1187** the exercise of jurisdiction.... This usage can result in confusion, however, owing to the fact that the term "subject matter jurisdiction" is also used commonly as the synonym of the term "competence."

Restatement (Second) of Judgments § 11 (1982).[6] Unlike a challenge to the court's competence to decide the case, only an objection to the court's subject matter jurisdiction, or the relationship between the claim and the forum that allows for the exercise of jurisdiction, is not subject to waiver. *Barnard*, 855 P.2d at 248.

¶ 36 One of the consequences of the non-waivable nature of subject matter jurisdiction is that attempts are sometimes made to mischaracterize other jurisdictional elements as defects in subject matter jurisdiction in order to revive an

otherwise belated objection. *See Morrison v. Bestler*, 239 Va. 166, 387 S.E.2d 753, 756 (1990) (citing Restatement (Second) of Judgments § 11 (1980)). Defendants have made just such an attempt here.

¶ 37 Defendants frame the trial court's appointment of Mr. Holman as the empowerment of a rule 53 special master with the powers of an interim CEO. They then object on the grounds that the court had no such power under rule 53, arguing that empowering a rule 53 special master with the extrajudicial capabilities of a corporate executive "far exceeded the lawful subject matter jurisdiction of a judge or special master under rule 53."

¶ 38 Subject matter jurisdiction, however, is the authority of the court to decide the case. *Salt Lake City v. Ohms*, 881 P.2d 844, 853 (Utah 1994). Here, the trial court is a court of general jurisdiction over a broad range of actions under the common law and as set forth in Utah Code: "The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law." Utah Code Ann. § 78–3–4 (2003). A trial court's authority to appoint an officer such as an interim CEO arises out of its jurisdiction to hear the underlying case and is ancillary to the primary relief sought. Utah R. Civ. P. 66(a) ("A receiver may be appointed by the court in which an action is pending or has passed to judgment...."); *Kelleam v. Md. Cas. Co.*, 312 U.S. 377, 381, 61 S.Ct. 595, 85 L.Ed. 899 (1941). Thus, in order to challenge subject matter jurisdiction, defendants are required to challenge the authority of the court to hear the underlying case; they have not done so.

¶ 39 Defendants erroneously assume that the sole source of the court's power is rule 53 of the Utah Rules of Civil Procedure. However, as will be discussed more fully below, the trial court has broad equitable power to appoint a quasi-judicial officer such as a receiver, special master, or interim CEO. If, as it appears, defendants are using "jurisdiction" in a more general sense to describe the court's power or authority (i.e., power to appoint an interim CEO when it is clear the court has jurisdiction to decide the underlying dispute), then their challenge is properly directed to the equitable power of the court to make such an appointment. Again, defendants have not so characterized their challenge. [7]

***1188** ¶ 40 Though repeatedly described as a claim of subject matter jurisdiction in their brief, defendants' objection is essentially to the propriety of the court's powers in a context in which it clearly has jurisdiction. Their contention is thus "not a case where a court has exceeded or refused to exercise its jurisdiction; it is rather a question of whether the judge erred in ruling on matters within his jurisdiction." *Cruz v. Hauck*, 515 F.2d 322, 327 (5th Cir.1975) (internal quotations omitted).

¶ 41 In the alternative, defendants argue that even if they had been able to waive their right to object, Madame Chen and the Stewarts never expressly or impliedly did so. In this secondary argument, defendants appear to challenge directly the trial court's decision to grant waiver in regard to matters within the court's jurisdiction. Again, however, defendants fail to muster an adequate challenge.

B. Defendants Waived Their Right to Object to the Appointment of the Interim CEO

[14] [15] ¶ 42 In their alternative argument, which challenges the propriety of the trial court's decision to bar their objection based on waiver, defendants fail to convince us that the trial court abused its discretion in reaching such a conclusion. The unchallenged findings of fact present no evidence that the trial court abused its discretion in barring the defendants' objections.

¶ 43 Defendants claim that Madame Chen had no right to object because she was not a party to the suit at the time the trial court appointed the interim CEO and did not become a party until ten months thereafter. Thus they argue that when she did finally join the lawsuit as a party, she filed her motion to vacate the orders relating to the appointment of the interim CEO in a timely manner. In the case of Ms. Stewart and Taig Stewart, defendants assert that because they challenged the appointment of the interim CEO in their July 23, 2002, motion to disqualify Mr. Holman as special master and interim CEO, they did not waive their right to challenge his appointment.

¶ 44 As stated above, waiver is a mixed question of law and fact, and discretion will be given to the trial court in the application of this doctrine. In light of the unchallenged facts supporting the trial court's holding, it is clear that Madame Chen and the Stewarts did not bring their objection to the appointment of the interim CEO in a timely manner.

¶ 45 Over ten months after Madame Chen became a party to the suit, she entered her motion to vacate challenging the appointment and actions of the interim CEO. Similarly, Ms. Stewart and Taig Stewart not only stipulated to the

original orders appointing Mr. Holman as interim CEO/special master, [8] but also participated in the litigation for nearly a year before bringing an objection to Mr. Holman's appointment. [9] Furthermore, both Madame Chen and Ms. Stewart waited to bring their objection until after Mr. Holman took actions against them, including filing ***1189** several extensive and unfavorable reports, filing claims against them on behalf of E. Excel, and successfully seeking a preliminary injunction. Defendants have also made no effort to challenge the trial court's reliance on E. Excel's thirty-three-paragraph summary of Madame Chen's involvement in the litigation, the difficulties that she created when E. Excel attempted to serve her, and the general hide-and-seek tactics she employed until E. Excel announced its intention to seek default, all of which the trial court cited as reasons supporting its decision.

¶ 46 Cognizant of the broad discretion we give the trial court on issues of waiver, we affirm its determination that the totality of the circumstances warranted the inference of waiver. *Soter's, Inc., v. Deseret Fed. Sav. & Loan Ass'n,* 857 P.2d 935, 939–41 (Utah 1993). Madame Chen's ten months as an active party in the litigation, her membership on E. Excel's board of directors when the present litigation began, her extensive involvement in the rival Apogee corporation, and the fact that she lived with Ms. Stewart all lead us to conclude, as did the trial court, that Madame Chen had ample opportunity to bring her objection in a timely manner.

¶ 47 Furthermore, if, as defendants assert, Madame Chen, due to her position as a "matriarch in a traditional Chinese family," was an equitable stock owner and intricately involved in the decisions of the company, she could have brought her objection to the appointment of the interim CEO through a motion to intervene or through a derivative suit as an equitable stock owner. *See* Utah R. Civ. P. 23.1, 24. The fact that this, as defendants themselves contend, is a traditional Chinese family, in which the elders play a large, if not controlling, role in the company's dealings, without regard to corporate formalities, further supports the conclusion that defendants had sufficient opportunity to bring their challenge.

[16] ¶ 48 Finally, because the powers of the interim CEO appointed in the present case are largely identical to those of a receiver, the same policy concerns that justify application of the doctrine of waiver to the appointment of a receiver apply here. An objection to a court's decision to appoint a receiver can be waived if not brought in a timely manner. *Score v. Wilson,* 611 P.2d 367, 368 (Utah 1980). [10] The policy behind this rule has been articulated by the Fifth Circuit in *Cruz v. Hauck:*

> A party objecting to a reference should do so prior to or at the time of the reference. If this is infeasible, the objection should be made to the judge at the earliest possible opportunity. Such procedure permits the proper and efficient administration of the judicial process. Otherwise, a party disappointed with a master's report would be able to obtain 'a second bite at the apple' by withholding his objection to the reference until after the report.

515 F.2d 322, 331 (5th Cir.1975) (citations omitted).

¶ 49 Here, the parties specifically agreed that the trial court would appoint an officer to run their corporation because the situation made it impossible for them to do so. Once the parties agree to transfer the responsibility of running the corporation to a court appointed functionary, they cannot wait to see if such a decision fails to serve their interests and subsequently object to the appointment. *See id.* To preclude application ***1190** of the doctrine of waiver here would essentially allow defendants a "second bite at the apple." *Id.* Accordingly, we hold that an objection to the appointment of a court appointed interim CEO is subject to waiver, and was waived by defendants.

C. Equitable Authority To Appoint an Interim CEO

[17] [18] ¶ 50 Had defendants properly fashioned their claim to address the equitable power of the court to appoint an interim CEO, they nevertheless would have failed in their challenge because the trial court has the equitable power to appoint an officer such as an interim CEO.

> Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their judicial duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.

Ex Parte Peterson, 253 U.S. 300, 312, 40 S.Ct. 543, 64 L.Ed. 919 (1920). In situations such as the present case,

where misappropriation of corporate assets by insiders is asserted, courts have historically appointed receivers in order to preserve assets during the pendency of the suit. *Richardson v. Ariz. Fuels Corp.*, 614 P.2d 636, 638 (Utah 1980) (citing *Stevens v. S. Ogden Land, Bldg. & Improvement Co.*, 14 Utah 232, 47 P. 81 (1896)). Courts have also generally appointed receivers where a request is made by stockholders of a corporation suing either individually or on behalf of the company, *Stevens*, 47 P. at 83, or where dissent among a corporation's managers prevents the conduct of the business without serious losses. *Shaw v. Robison*, 537 P.2d 487, 490 (Utah 1975). Though somewhat uncommon, the appointment of an interim CEO for the same purpose and with the same powers as a receiver is not unprecedented. *See, e.g., In re Property Co. of Am. Joint Venture*, 110 B.R. 244, 246 (Bankr.N.D.Tex.1990) (appointing interim CEO during bankruptcy action).

[19] ¶ 51 The authority to appoint a receiver is based on the court's inherent equitable power. *Interlake Co. v. Von Hake*, 697 P.2d 238, 239 (Utah 1985) ("A receivership is an equitable matter and is entirely within the control of the court.") (citing *Shaw*, 537 P.2d 487). Rule 66 of the Utah Rules of Civil Procedure also recognizes this inherent equitable power. *See* Utah R. Civ. P. 66(a)(6) (allowing appointment of receiver in "cases where receivers have heretofore been appointed by the usages of courts of equity").

[20] ¶ 52 Contrary to the assertions of defendants, among a receiver's powers is the authority to conduct and settle litigation in order to manage the company. *Stevens*, 47 at 83 (authorizing receiver to bring suit to obtain books, property, and evidence of indebtedness belonging to the corporation); 19 C.J.S. *Corporations* § 791 (1990) ("A receiver for a corporation, for purpose of litigation, ordinarily stands in the place of the corporation, and may bring any action which the corporation could have maintained."); *Meyer v. Fleming*, 327 U.S. 161, 167–68, 66 S.Ct. 382, 90 L.Ed. 595, (1946)(holding a receiver may settle suits on behalf of company).

¶ 53 Here, rather than appoint a receiver, both parties stipulated to the appointment of an interim CEO/president who, as indicated in the interim order of February 21, 2001, was given "full executive authority to act on behalf of the Company, and conduct its business, subject to the continuing oversight of the board of directors and the Court." The purpose of his appointment was to forestall the erosion of corporate assets and manage the company until all legal issues before the court were resolved. As interim CEO, Mr. Holman was thus given essentially the same powers as those of a receiver. Even in authorizing him to conduct litigation on behalf of the company, the court was not granting him powers outside those of a general executive officer of a corporation or a court-appointed receiver. [11]

***1191** ¶ 54 The court had the inherent equitable authority to appoint a receiver with the same powers it granted Mr. Holman. As a result, we refuse to hold that such an act was void ab initio simply because the court designated Mr. Holman an interim CEO. [12]

D. The Court and Parties Decided To Extend Judicial Immunity To the Interim CEO

¶ 55 At the request of the parties, the trial court used its inherent equitable power to extend judicial immunity [13] to the interim CEO. The trial court and the parties decided that to do so the interim CEO would be titled a special master. Although the designation of Mr. Holman as a special master created no confusion at the time, defendants, in these later stages of litigation, have attempted to exploit and use to their advantage the inherent ambiguity in this somewhat atypical use of the special master terminology. We reject defendants' attempts to use this ambiguity to undermine the entire substance of the trial court's rulings. In the future, however, trial courts would do well to be cautious in their use of the title "special master," due to the confusion it can create.

¶ 56 Defendants argue that because Mr. Holman was referred to in the court's order as a special master, his role changed from that of a CEO—whose duty is to preserve corporate assets, protect them from others, and operate the company in a profitable manner—to a rule 53 special master who, as a quasi-judge, is limited to acting as a neutral magistrate. We decline to accept this argument, inconsistent as it is with the clear intent of the parties and the evidentiary record, which shows that Mr. Holman was appointed an interim CEO with the title of special master only for the purpose of providing him the judicial immunity associated with the designation.

¶ 57 The interim order of February 21, 2001, to which both parties stipulated, makes no reference to rule 53 and never mentions the appointment of a special master. It unambiguously establishes that the appointed officer will act as interim CEO.

¶ 58 Like the text of the February order, a March 5, 2001 telephonic hearing discussing the various candidates for the position also illustrates that the court and the parties understood that the interim CEO was not appointed as a neutral judicial magistrate. In that conversation, Ms. Stewart's counsel relied on the fact that the interim CEO would likely be an active participant in the ***1192** corporate litigation as a basis for arguing that her candidates, a team from the accounting firm of Arthur Anderson, would be more capable of investigating and participating in those claims.

¶ 59 Furthermore, consistent with the role of a CEO acting in the interest of E. Excel, and inconsistent with the functions of a quasi-judicial official, all parties understood and agreed that, in order to run the company, the interim CEO would engage in ex parte communication with both parties in the dispute, as well as other employees and territorial owners. Both parties stipulated to the establishment of a procedure for Mr. Holman's necessary ex parte communications.

¶ 60 The parties also agreed that the interim CEO should be granted judicial immunity. In the March 5, 2001, telephonic hearing the parties expressed concern that any candidate for the job of interim CEO would be wary of accepting due to the likelihood of being drawn personally into the litigation. Consequently, it was agreed that the interim CEO would be accorded the immunities of "a receiver" or "a master." As a result, in its March 13, 2001, order, the trial court appointed Mr. Holman as "interim chief executive officer of E. Excel International, Inc., and as a special master for and on behalf of the Court ... with all rights, protections and immunities available to a special master under the law." When the court revisited its decision to appoint the interim CEO in its January 24, 2003, order dismissing Madame Chen's motion to vacate, it reasserted that it had appointed the interim CEO and had given him the title "special master" because the parties insisted that he receive the same immunities and protections that a special master would receive.

[21] ¶ 61 We hold that it was not an abuse of the trial court's discretion to provide Mr. Holman judicial immunity for his actions as interim CEO. The nature of Mr. Holman's responsibilities and the integral role he played in the trial court's ability to properly adjudicate the present case created sufficient grounds for extending Mr. Holman judicial immunity without fully constituting him as a special master. *See Sanders v. Leavitt,* 2001 UT 78, ¶ 19, 37 P.3d 1052; *see also Parker v. Dodgion,* 971 P.2d 496, 498 (Utah 1998) ("Whether a person or entity should be afforded judicial immunity depends upon the specific work or function performed. If the acts were committed 'in the performance of an integral part of the judicial process,' the policies underlying judicial immunity apply and immunity should be granted.") (quoting *Bailey v. Utah State Bar,* 846 P.2d 1278, 1280 (Utah 1993) (citations omitted)). Furthermore, "[t]he courts that have considered the matter have held that a receiver is a court officer who shares the judge's immunity, at least if he is carrying out the orders of his appointing Judge." *T & W Inv. Co. v. Kurtz,* 588 F.2d 801, 802 (10th Cir.1978). Given both the close similarity between Mr. Holman's powers as an interim CEO and those of a receiver, and the integral role he played in the court's ability to adjudicate the case, Mr. Holman should clearly be afforded the same judicial immunity as a receiver, master, or other judicial officer.

¶ 62 We have already noted that relying on rule 53 for the purpose of providing judicial immunity can lead to confusion regarding the source and scope of an appointee's powers, and may make use of this nomenclature problematic in future cases. In this case, however, any confusion appears to have been manufactured after the fact rather than created by the court's order itself; no disagreement about Mr. Holman's powers surfaced until after his actions unfavorably affected defendants. Had Mr. Holman's designation as a special master led to an actual overlap of the quasi-judicial powers of a traditional rule 53 special master and the executive powers of a court-appointed CEO or receiver, the designation could have created conflict issues. However, it is quite clear that did not happen here. The orders of appointment are clear, as is the fact that the parties understood and agreed to them at the time they were issued. However, we encourage trial courts presented with similar situations in the future to rely on other means of granting judicial immunity, including their inherent equitable power, rather than resorting to this somewhat unorthodox use of the title "special master."

***1193** II. PRELIMINARY INJUNCTION

¶ 63 The second major issue raised in this appeal is the propriety of the trial court's decision to grant the preliminary injunction. Defendants challenge the decision on three separate grounds: first, defendants claim that the preliminary injunction was granted against Madame Chen in violation of her due process rights; second, defendants argue that even if the preliminary injunction was not granted in violation of Madame Chen's due process rights, it is facially invalid as a matter of law because barring Madame Chen,

Ms. Stewart, and other members of the conspiracy from worldwide competition is far too broad; and third, defendants contend that the facts do not support the court's decision.

¶ 64 After reviewing the arguments and pertinent aspects of the record, we affirm the trial court's decision to reject Madame Chen's due process claims. Madame Chen voluntarily appeared in the early stages of the preliminary injunction hearings, waiving her right to notice, and she makes no showing as to how her formal absence from the suit unduly prejudiced her. Furthermore, we hold that the preliminary injunction was not an abuse of the trial court's discretion. Defendants' failure to properly marshal the evidence undermines their claims regarding both the propriety and scope of the preliminary injunction.

A. Madame Chen's Due Process Rights

[22] ¶ 65 Defendants argue that Madame Chen's right to due process was violated because she was not joined as a party by service of process prior to the commencement of the preliminary injunction proceedings. Moreover, they assert that 50% of the evidence on the preliminary injunction question was received by the court prior to her joining as a party, and that she therefore had no opportunity to object to the evidence and present an opening argument.

¶ 66 In support of this position, defendants quote *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.,*: "In the absence of service of process ... a court may not exercise power over a party the complaint names as defendant." 526 U.S. 344, 350, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999). However, the complete quotation of this passage includes a parenthetical clause referring to a defendant's ability to waive the right to notice. *Id.* ("In the absence of service of process (*or waiver of service by the defendant*), a court ordinarily may not exercise power over a party the complaint names as defendant [,]") (emphasis added). We find the defendants' failure to quote the passage fully particularly interesting given that the omitted parenthetical describes precisely what Madame Chen did.

¶ 67 Article I, section 7 of the Utah Constitution states that "no person shall be deprived of life, liberty, or property, without due process of law." In interpreting this provision, we have previously recognized that " 'due process is not a technical conception with a fixed content unrelated to time, place, and circumstances.' " *Dairy Prod. Servs., Inc. v. City of Wellsville,* 2000 UT 81, ¶ 49, 13 P.3d 581 (quoting *Cafeteria Workers Union v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)). "Instead, due process is flexible and, being based on the concept of fairness, should afford the procedural protections that the given situation demands." *Id.* (internal quotation and citation omitted). Thus, "[t]he requirements of due process depend upon the specific context in which they are applied." *V–1 Oil Co. v. Dep't of Envtl. Quality,* 939 P.2d 1192, 1196 (Utah 1997).

[23] [24] ¶ 68 Although the exact requirements of due process may vary from situation to situation, the minimum requirements of due process include adequate notice and an opportunity to be heard in a meaningful manner. *See Dairy Prod. Serv.,* 2000 UT 81 at ¶ 49, 13 P.3d 581. "To be considered a meaningful hearing, the concerns of the affected parties should be heard by an impartial decision maker." *Id.* Inasmuch as this question of law requires the application of the facts to the due process standard, we use a clearly erroneous standard for the necessary factual determinations. *See State v. Hubbard,* 2002 UT 45, ¶ 22, 48 P.3d 953.

¶ 69 In the present case, the minimum requirements of due process were satisfied. ***1194** Madame Chen had notice and the opportunity to fairly state her case.

¶ 70 Hearings regarding the contempt motions filed against Madame Chen and Ms. Stewart began on October 25, 2001. On November 27, 2001, the contempt hearings were consolidated with the preliminary injunction hearings. On December 12, after hearings on November 27 and 28 and December 10 and 11, Madame Chen's counsel voluntarily entered a notice of appearance "on behalf of ... Hwan Lan Chen, also known as Madame Chen, and the corporation Apogee Incorporated." By entering such an appearance, Madame Chen effectively waived her right to be served. *McDonald v. Mabee,* 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608 (1917) ("Submission to the jurisdiction by appearance may take the place of service upon the person.") *cited in Mallory Eng'g., Inc. v. Ted R. Brown & Assocs., Inc.,* 618 P.2d 1004, 1007 n. 7 (Utah 1980); *see also Allen v. Coates,* 29 Minn. 46, 11 N.W. 132, 132 (1882) (defect in service can be waived by general appearance if appearance was not induced by fraud or mistake of fact). We conclude, therefore, that the trial court satisfied the first basic requirement of due process: having entered an appearance by way of counsel, it is clear that Madame Chen had adequate notice of the proceedings.

¶ 71 We also conclude that although she was not present for four of the consolidated preliminary injunction/contempt

hearings, Madame Chen nevertheless had an opportunity to be heard in a meaningful manner. Madame Chen was present as a party for eighteen of the twenty-two consolidated hearings. These eighteen hearings extended from December 12, 2001, to June 26, 2002. During these six months, Madame Chen never objected to the trial court's reliance on the evidence entered at the early hearing dates she had missed. Furthermore, nowhere does she describe how she was prejudiced or suffered any disadvantage by not being formally represented by counsel in these early hearings. This is particularly significant given that she was an active participant in the preliminary injunction hearing for nearly six months and had every opportunity to present evidence, call new witnesses, recall former witnesses for cross-examination, or to notify the trial judge of any technical or evidentiary objections to the trial testimony.

¶ 72 In rejecting her due process claims, the trial court also found that Madame Chen had *actual* notice of the proceedings. Madame Chen lived with Ms. Stewart, who had been involved in the litigation from the beginning, and Madame Chen also had been involved from the outset of the litigation as a coconspirator with Ms. Stewart. In light of her voluntary waiver of the right to service, the adequate time she had to present her case and challenge, if she desired, the evidence entered in her absence, and her actual notice of the proceedings, we affirm the lower court in rejecting her due process claims. Madame Chen had adequate notice and a fair opportunity to be heard before an impartial decision maker.

B. Defendants' Failure to Marshal the Evidence

¶ 73 Defendants' challenge to the propriety of the court's decision to enter the preliminary injunction and to its scope, barring defendants from world-wide competition with E. Excel, is entirely unsupported by the evidence.

¶ 74 Defendants claim the evidence establishes only that Madame Chen was a mother, matriarch of a traditional Chinese family, temporary director of E. Excel, and potential competitor to E. Excel through her participation in the Apogee enterprise. Defendants, however, fail to properly marshal the evidence in support of the trial court's findings upon which the preliminary injunction is based. As a result, they do not adequately challenge the trial court's findings. Because they have not properly marshaled the evidence supporting the findings, we accept the trial court's findings on that basis alone. *Wilson Supply, Inc. v. Fraden Mfg. Corp.*, 2002 UT 94, ¶ 26, 54 P.3d 1177. Given the court's factual findings, we affirm the trial court's decision to grant the preliminary injunction as well within its discretion.

¶ 75 Unfortunately, as is manifest by the defendants' failure to marshal in the present case, the requirements of marshaling still do not appear to be understood with the sense ***1195** of clarity and urgency we desire. As a result of this lack of understanding, and the fact that defendants' failure to marshal in this case proves virtually fatal to their claims, we take the opportunity to reiterate the requirements of marshaling.

1. Marshaling Requirement

[25] ¶ 76 In order to challenge a court's factual findings, "an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." *Wilson Supply*, 2002 UT 94 at ¶ 21, 54 P.3d 1177. Where a trial court's rulings on highly fact-dependent issues are challenged, this court grants broader than normal discretion to the trial court. *See State v. Pena*, 869 P.2d 932, 936–38 (Utah 1994); *see also Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 935, 939–42 (Utah 1993) (recognizing waiver to be a factually sensitive issue requiring the trial court's exercise of discretion in applying the law to facts). As a result, where the legal standard is extremely fact-sensitive, the appellant has the duty to marshal the evidence. *See In re Estate of Beesley*, 883 P.2d 1343, 1347–49 (Utah 1994). This duty requires an appellant to "marshal all the evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact." *Id.* (quoting *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991)).

[26] ¶ 77 More recently, the Utah Court of Appeals explained that "in order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *Neely v. Bennett*, 2002 UT App 189, ¶ 11, 51 P.3d 724 (emphasis omitted). This does not mean that the party may simply provide an exhaustive review of all evidence presented at trial. *Id.* at ¶ 12 n. 1. Rather, appellants must provide a precisely focused summary of all the evidence supporting the findings they challenge. *Id.* This summary must correlate all particular items of evidence with the challenged findings and then convince us that the trial

court erred in the assessment of that evidence to its findings. *W. Valley City v. Majestic Inv., Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991). What appellants cannot do is merely re-argue the factual case they presented in the trial court. *Oneida/SLIC v. Oneida Cold Storage & Warehouse Inc.*, 872 P.2d 1051, 1053 (Utah Ct.App.1994).

[27] [28] [29] ¶ 78 The process of marshaling is thus fundamentally different from that of presenting the evidence at trial. The challenging party must "temporarily remove its own prejudices and fully embrace the adversary's position"; he or she must play the "devil's advocate." *Harding v. Bell*, 2002 UT 108, ¶ 19, 57 P.3d 1093. In so doing, appellants must present the evidence in a light most favorable to the trial court, *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 232 (Utah 1998), and not attempt to construe the evidence in a light favorable to their case. *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989). Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position. *Oneida*, 872 P.2d at 1053. Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact. *Wilson Supply*, 2002 UT 94 at ¶ 22, 54 P.3d 1177. Furthermore, appellants cannot shift the burden of marshaling by falsely claiming that there is no evidence in support of the trial court's findings. *Id.* This would inappropriately force an appellee to marshal the evidence in order to refute an appellant's assertion of the absence of evidence. *Id.* In sum, to properly marshal the evidence the challenging party must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence. *Oneida*, 872 P.2d at 1054.

[30] ¶ 79 The purpose of this rigorous and strict requirement is to promote two interrelated court objectives: efficiency and fairness. *Id.* at 1053. A proper marshaling of the evidence promotes efficiency by avoiding ***1196** "retrying the facts" and by assisting the appellate court in its "decision-making and opinion writing." *Id.* It promotes fairness by requiring that the appellants bear the expense and time of marshaling the evidence rather than putting the appellee in the "precarious position" of performing the appellant's work at "considerable time and expense." *Id.* at 1053–54. This deference to a trial court's findings is "based on and fosters the principle that appellants rather than appellees bear the greater burden on appeal." *Id.* at 1053.

¶ 80 If the marshaling requirement is not met, the appellate court has grounds to affirm the court's findings on that basis alone. *Wilson Supply*, 2002 UT 94 at ¶ 26, 54 P.3d 1177. If appellants have failed to properly marshal the evidence, we assume that the evidence supports the trial court's findings. *Utah Med. Prods.*, 958 P.2d at 233.

2. Defendants' Failure To Marshal in Relation To Their Claims Regarding the Preliminary Injunction [14]

¶ 81 Both of defendants' claims regarding the propriety and scope of the preliminary injunction, regardless of the initial trappings, involve the application of a highly fact-sensitive legal standard. [15] Because of the factually sensitive nature of a court's decision to enter a preliminary injunction, to properly challenge such an order an appellant must "set forth findings of fact ... [which] shall not be set aside unless clearly erroneous." Utah R. Civ. P. 52(a). As we have discussed extensively, in order to show that these findings of fact are clearly erroneous, an appellant is required to marshal the evidence in support of the findings and show that they are against the clear weight of this evidence. *Utah Med. Prods.*, 958 P.2d at 232.

[31] ¶ 82 Defendants claim that there is "no evidence" supporting the trial court's findings. Their assertion, however, does not satisfy the marshaling requirements. In situations where there is virtually nothing in the record that would support the trial court's findings, a claim of no evidence might be sufficient. However, an appellee need only point to a scintilla of evidence that supports a court's findings in order to refute an appellant's claim of no evidence. *Wilson Supply*, 2002 UT 94 at ¶ 22, 54 P.3d 1177. Here, plaintiffs have met and surpassed that burden. They identify several of the trial ***1197** court's findings of fact used to justify the preliminary injunction, along with citations to the record containing evidence that does indeed support these findings. These citations to the record include, among other things, detailed evidence of Madame Chen's central role in the establishment of the competing Apogee enterprise. Plaintiffs have presented more than enough evidence to persuade us that the trial court's findings were amply supported by evidence. [16]

¶ 83 Defendants have merely ignored damaging findings and avoided confronting problematic facts by claiming that there is "no evidence." They restate evidence favorable to their position, point out facts that would support findings contrary to the trial court's findings, and attempt to recast damaging evidence in a light more favorable to their position. This is essentially an attempt to reargue the facts before us. Without proper marshaling of the evidence, we refuse to set aside

the ruling of the trial court or the findings upon which it is based. We have been given no reason to believe they were erroneous, and have many convincing reasons to believe they were justified.

CONCLUSION

¶ 84 The third-party defendants, including Madame Chen and defendants Ms. Stewart and Taig Stewart, who join in this appeal, waived their right to object to the appointment of the interim CEO. Moreover, even had they not waived their right to object, the trial court possessed the equitable power to appoint the interim CEO, and we affirm its orders doing so. We also affirm the trial court's decision granting the preliminary injunction. In light of the trial court's findings of facts, and defendants' failure to properly challenge these facts through marshaling, we hold that entry of the preliminary injunction was well within the trial court's discretion.

¶ 85 Justice PARRISH, Justice NEHRING, Judge ORME, and Judge IWASAKI concur in Chief Justice DURHAM'S opinion.

¶ 86 Having recused themselves, Associate Chief Justice WILKINS and Justice DURRANT do not participate herein; Court of Appeals Judge GREGORY K. ORME and Third District Judge GLENN K. IWASAKI sat.

All Citations

100 P.3d 1177, 510 Utah Adv. Rep. 9, 2004 UT 82

Footnotes

1 Previously, Ms. Stewart reported her brother to the Internal Revenue Service and U.S. Customs. As a result of her information, he was prosecuted, sent to prison, and assessed several million dollars in fines and unpaid taxes. Ms. Stewart received $2 million in compensation from the IRS for her information.

2 The trial court later ruled that the children's shares had not been properly transferred to a trust controlled by Ms. Stewart and that, as a result, her vote of these shares and all actions she subsequently took as E. Excel's president were void ab initio.

3 Ms. Stewart apparently never informed Mr. Holman of the company's financial condition. Moreover, given the liquidity crisis, her earlier transfer of nearly $2 million from E. Excel to her personal accounts is particularly troubling.

4 The company experienced an approximately 50% drop in the number of new low-level sellers who signed up with E. Excel in the Philippines and nearly an 88% decrease in new enrollees in Taiwan.

5 This is not to say that all fact-sensitive matters require broad grants of discretion. *See, e.g., State v. Warren,* 2003 UT 36, ¶ 12, 78 P.3d 590 ("When a case involves the reasonableness of a search and seizure, we afford little discretion to the district court ....") (internal quotations omitted).

6 The Virginia Supreme Court has also aptly described these and other uses of the term.

> The term jurisdiction embraces several concepts including subject matter jurisdiction, which is the authority granted through constitution or statute to adjudicate a class of cases or controversies; territorial jurisdiction, that is, authority over persons, things, or occurrences located in a defined geographical area; notice jurisdiction, or effective notice to a party or if the proceeding is *in rem* seizure of a *res;* and "the other conditions of fact" must exist which are demanded by the unwritten or statute law as the prerequisites of the authority of the court to proceed to judgment or decree.

Morrison v. Bestler, 239 Va. 166, 387 S.E.2d 753, 755 (1990) (quoting *Farant Inv. Corp. v. Francis,* 138 Va. 417, 122 S.E. 141, 144 (1924)).

7 The United States Supreme Court has drawn a similar distinction between subject matter jurisdiction and the "jurisdiction" (or power and authority) of a similar court-appointed officer. In *Gomez v. United States,* 490 U.S. 858, 876, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), the Court used the term "jurisdiction" to describe the authority of a magistrate judge. However, "it is also clear that the Court (in *Gomez*) was not using the term 'jurisdiction' in the sense of non-waivable subject matter jurisdiction." *Clark v. Poulton,* 963 F.2d 1361, 1367 (10th Cir.1992)(citing *Peretz v. United States,* 501 U.S. 923, 953, 111 S.Ct. 2661, 115 L.Ed.2d 808, (1991) (Scalia, J. dissenting) ("We used [the term 'jurisdiction'] in *Gomez* as a synonym for 'authority,' not in the technical sense involving subject matter jurisdiction.")). Following the Supreme Court's use of the term "jurisdiction" in *Gomez,* other federal courts have held that issues regarding the appointment of a magistrate or special master and claims that the appointment of a special master is outside the scope of rule 53 of the Federal Rules of Civil Procedure do not pose a subject matter jurisdiction problem. *See, e.g., Clark,* 963 F.2d at 1366–67; *Polin v. Dun,* 634 F.2d 1319, 1321 (10th Cir.1980). At most, they constitute claims of abuse of discretion. *Id.*

8 Defendants contend that they did not stipulate to the March 13, 2001, order appointing Mr. Holman. However, even though the trial court found that Ms. Stewart had stipulated to that order and defendants make no effort to challenge this factual finding, their argument has little relevance. Because Ms. Stewart waited nearly a year to bring any type of objection to the appointment of the interim CEO, regardless of whether or not she stipulated to the order, she waived her right to raise an objection now.

9 Ms. Stewart waited until January 23, 2002, to file her motion to disqualify Mr. Holman as special master and interim CEO of E. Excel. Because they waited well over a year after the appointment of the interim CEO to file their objection, the Stewarts have no basis independent of Madame Chen's claim, which they have joined, for arguing that their objection should not also be barred for being untimely.

10 Similarly, this court has recognized that the right to object to a special master's reports can be waived. *Score v. Wilson,* 611 P.2d 367, 368 (Utah 1980) ("The defendant made no objection to the Master's reports as required by the Utah Rules of Civil Procedure 53(e)(2) and therefore should not be allowed to question the same."); *see* Utah R. Civ. P. 53(e)(2) ("Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties."). It is also well established in federal case law that the right to object to the appointment of a special master can be waived if the objection is not brought in a timely manner. *See, e.g., Cruz v. Hauck,* 515 F.2d 322, 331 (5th Cir.1975); *Adriana Int'l Corp. v. Thoeren,* 913 F.2d 1406, 1410 (9th Cir.1990) ("An objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter."); *Regents of the Univ. of N.M. v. Knight,* 321 F.3d 1111, 1127–28 (Fed.Cir.2003) (holding that the objection to appointment of a Special Master can be waived if not made in a timely manner); *Constant v. Advanced Micro–Devices,* 848 F.2d 1560, 1566 (Fed.Cir.1988) ("A party cannot wait to see whether they like the master's findings before challenging the use of a master.").

11 Defendants contend that even had the trial court appointed Mr. Holman as a receiver, he would have been a "pendente lite" receiver, with none of the powers allocated to Mr. Holman as interim CEO. We need not decide today whether defendants' distinction between "pendente lite" receivers and other types of receivers merits the attention defendants give it. Nor do we need to decide today whether a "pendente lite" receiver has the powers to run the company in a "biased fashion" and bring suit. As heretofore stated, the trial court did not appoint a receiver, or even a "pendente lite" receiver.

12 Because the trial court had the equitable power to appoint an interim CEO in order to preserve the res of the litigation, we need not consider at this time whether a rule 53 special master could be so empowered. However, as plaintiffs point out, the trend has been to allow courts more freedom in appointing a variety of judicial officials to assist them in their duties. In *Plumb v. State,* 809 P.2d 734, 741 (Utah 1990), this court specifically refused to apply the much stricter interpretation of rule 53 of the Federal Rules of Civil Procedure, as set forth in *La Buy v. Howes Leather Co.,* 352 U.S. 249, 256–59, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957) (holding that reference to a special master cannot be justified under the "exceptional condition" language by congested calendars, complex issues, or a lengthy trial). This court held that *La Buy* is too limited in scope and "unnecessarily narrows the trial judge's options in dealing efficiently with the issues presented for decision." *Plumb,* 809 P.2d at 741. We reasoned that *La Buy* was authored long before the widespread use of magistrate judges within the federal system softened the federal courts' hostility to delegated judicial authority. *Id.* This tendency to allow courts to appoint a variety of officers to assist in implementing their orders under rule 53, even when they do not seem to fall squarely within the literal terms of rule 53, is seen as well in more recent federal cases. In *Jenkins v. Missouri,* 890 F.2d 65, 67 (8th Cir.1989), the Eighth Circuit rejected the narrow approach to rule 53, asserting that whatever the title, the court's equitable power to appoint an agent to supervise the implementation of its decrees is not terminated or modified by rule 53. Likewise, in *FTC v. World Wide Factors, Ltd.,* the Ninth Circuit recognized that though special master's responsibilities technically met the definition of a receiver, the trial court did not err by designating the court-appointed officer a special master. 882 F.2d 344, 348 (9th Cir.1989).

13 While the term "judicial immunity" historically refers to the immunity extended to judges for their official acts, we use it in this unique context as extending to those appointed to act under the court's direction.

14 Defendant's failure to marshal equally affects their claims regarding waiver and the appointment of the interim CEO. As discussed above, waiver is a highly fact-sensitive issue, *U.S. Realty 86 Assoc. v. Sec. Inv.,* 2002 UT 14, ¶ 11, 40 P.3d 586, requiring defendants to challenge the factual findings that led the court to its decision. *See In re Estate of Beesley,* 883 P.2d at 1347–49. Because defendants failed to marshal any of the evidence that led to the trial court's holding that they waived their right to object, we accept the findings of fact as adequately supported and find no reason to believe the trial court abused its discretion.

Similarly, the trial court's determination of the need for an interim CEO is highly factual, based largely on the exigency of the situation and availability of alternate remedies. As a result, similar to a court's appointment of a receiver, we

review the appointment of the interim CEO for abuse of discretion. *See Richardson v. Ariz. Fuels Corp.*, 614 P.2d 636, 638 (Utah 1980) ("The appointment of a receiver is among those discretionary powers subject to review for abuse."). To challenge such a decision, defendants must successfully challenge the factual findings upon which the trial court's decision so heavily depended—a challenge that once again requires defendants to marshal the evidence. Defendants made no effort to marshal the evidence in order to challenge the facts supporting the appointment of the interim CEO. Indeed, they contend that they do not need to marshal this evidence because the challenge raises only issues of law. Although defendants waived their right to object to the appointment of the interim CEO, we could have disposed of this claim on the basis of failure to marshal the evidence.

15 Defendants claim that the scope of the preliminary injunction which enjoins them from competing worldwide is invalid as a matter of law due to overbreadth. However, their argument merely attempts to characterize a factual argument as a legal one. Although they argue that the scope of a preliminary injunction is purely a matter of law, each of their claims requires us to call into question the factual findings of the trial court. For example, defendants claim that E. Excel has no interest in having Madame Chen enjoined from competition with E. Excel and there was no basis for so enjoining her. They also claim that there was no evidence that Madame Chen's actions posed a threat of irreparable harm to E. Excel. Each of these challenges, however, is contrary to the trial court's findings in entering the preliminary injunction. Absent marshaling, we decline to set aside these findings.

16 Defendants' challenge of the propriety and scope of the preliminary injunction demonstrates precisely why the marshaling requirement is so important. Defendants contend that it was improper for the trial court to characterize the activities of Madame Chen and Ms. Stewart as conspiratorial. However, to determine the validity of this characterization we must go behind the trial court's factual findings regarding the conspiracy to destroy E. Excel. In order to determine whether these factual findings were against the clear weight of the evidence we would have to comb the nearly 20,000 pages of the record, assemble all the relevant evidence, identify how the trial court used this evidence to support the finding in question and determine whether this decision was clearly erroneous. This would require a colossal commitment of time and resources, a burden that the party bringing the appeal must bear. *Oneida*, 872 P.2d at 1052–53.

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789 P.2d 726
Court of Appeals of Utah.

Susan C. DANA, Plaintiff and Appellant,
v.
Bruce E. DANA, Defendant and Respondent.

No. 880382–CA.
|
March 30, 1990.

Former wife filed petition to modify decree of divorce, seeking to require former husband to either visit children or pay more child support, and former husband counter-petitioned to modify decree. The First District Court, Cache County, John F. Wahlquist, J., granted former husband's request for reduction of child support but denied former wife's petition, and she appealed. The Court of Appeals, Greenwood, J., held that: (1) former wife's increase in income from $3,000 to $17,000 per year following divorce was not "substantial change in circumstances" permitting reduction of former husband's child support obligation, but (2) former wife was not entitled to order requiring former husband to either comply with visitation schedule or pay additional support, despite her contention that she would be required to hire babysitters, stay with children, or lose some free time if the children did not spend time with former husband.

Affirmed in part and reversed and remanded in part.

West Headnotes (9)

[1] **Child Support**
Other Support Obligations

Trial court could consider two additional children, born to former husband's new wife, that husband was obligated to support as a factor in determining whether a substantial change in circumstance had occurred warranting reduction in husband's child support obligation under divorce decree.

Cases that cite this headnote

[2] **Child Support**
Custodian's Income or Financial Condition

Former wife's increase in income from $3,000 to $17,000 per year following divorce was not "substantial change in circumstances" permitting reduction of former husband's child support obligation under divorce decree; at time of divorce decree court anticipated that former wife would increase her earnings from $10,000 to $12,000 shortly after divorce by finding outside employment. U.C.A.1953, 30–3–5.

2 Cases that cite this headnote

[3] **Divorce**
Modification

"Change in circumstances" of former spouse that was reasonably contemplated at time of divorce is not legally cognizable as "substantial change in circumstances" in divorce decree modification proceedings.

3 Cases that cite this headnote

[4] **Child Support**
Custodian's Income or Financial Condition

Termination of "emergency situation" of former wife's inability to work and earn adequate income because of small children was not substantial change in circumstances permitting reduction of former husband's child support obligation under divorce decree; there was no evidence that original support order was set at level recognizing continuing emergency situation or that former wife's financial burden of providing for three young children was alleviated because they were older. U.C.A.1953, 30–3–5.

Cases that cite this headnote

[5] **Child Support**
Other Support Obligations

Former husband's additional financial obligations as a result of two children born to former husband and new wife following divorce was not alone a substantial change in circumstances permitting reduction in child support obligation under divorce decree. U.C.A.1953, 30–3–5.

Cases that cite this headnote

[6] **Child Custody**
Judgment or Order

Former wife was not entitled to order requiring former husband to either comply with visitation schedule or pay additional support, despite her contentions that she would be required to hire babysitters, stay with children, or lose some free time if the children did not spend time with former husband and that additional money would enable her to do things with children that former husband would otherwise do during visitation.

Cases that cite this headnote

[7] **Child Custody**
Welfare and Best Interest of Child

Fostering child's relationship with noncustodial parent has important bearing on child's best interest, for purpose of visitation matters.

2 Cases that cite this headnote

[8] **Child Custody**
Visitation

Court may encourage noncustodial parent to visit his or her child, but compelling parent to visit by threatening to increase child support payments fails to promote environment for positive parent-child relationship.

2 Cases that cite this headnote

[9] **Child Custody**
Visitation

Purpose of visitation is to foster relationship between noncustodial parent and child, not simply provide activity for child.

1 Cases that cite this headnote

Attorneys and Law Firms

*728 Lyle W. Hillyard (argued), Hillyard, Low & Anderson, Logan, for plaintiff and appellant.

Pete N. Vlahos (argued), F. Kim Walpole, Vlahos & Sharp, Ogden, for defendant and respondent.

Before GARFF, GREENWOOD and ORME, JJ.

OPINION

GREENWOOD, Judge:

Plaintiff Susan C. Dana appeals from the trial court's order granting defendant's petition to reduce child support payments and denying her petition to require defendant to either visit his children or to pay additional child support. We reverse in part and affirm in part.

Plaintiff and defendant were divorced in January 1983. Plaintiff was awarded custody of their three children. The court did not establish a visitation schedule because of the parties' desire to work out visitation without court involvement. Defendant was ordered to pay $165 in child support per child each month.

Although plaintiff earned approximately $3,000 by babysitting in her home during 1982, she was not employed outside the home during the parties' marriage or at the time of the divorce. The court anticipated, however, that plaintiff would find employment soon after the divorce and earn approximately $10,000 to $12,000 per year in gross income. At the time of hearing on the parties' cross petitions in 1987, plaintiff was earning approximately $17,000 per year in gross income.

Defendant remarried in 1983. He adopted the child of his new spouse and they later had a child of their own. Defendant also had three children from an earlier marriage, prior to his marriage to plaintiff. Consequently, defendant and his new spouse now have five children living with them. Defendant's gross income increased from $21,000 at the time of the divorce in 1982 to $31,300 in 1987. Defendant also receives $306 per month in social security benefits for the three children from his first marriage.

The parties dispute how frequently defendant has visited the three children in plaintiff's custody. Plaintiff testified that

defendant rarely visited the children despite her encouraging him to visit regularly. Defendant testified that he visited the children more often than plaintiff maintains and that plaintiff's hostility impeded his efforts to spend more time with his children.

On November 6, 1986, plaintiff filed a petition to modify the decree of divorce, seeking to require defendant to either visit the children or pay more child support to compensate for the alleged loss of benefits plaintiff suffered from defendant's lack of visitation.

Defendant filed an answer and counter-petition to modify the divorce decree. Defendant claimed that his lack of visitation was because of his tight budget and the expenses of travelling long distance to see the children. He petitioned the court to reduce his child support payments on the basis of plaintiff's alleged substantial increase in income and his increased obligations, namely eight instead of six children to support.

Trial on the cross petitions for modification of the divorce decree was held on December 29, 1987. The trial court entered an order that encouraged visitation by defendant and established a specific visitation schedule. The court determined, however, that it could not force defendant to visit his children and thus declined to order defendant to either visit the children or pay extra child support.

The court also found that the increase in plaintiff's earnings from $3,000 to $17,000 per year, coupled with defendant's obligation to now support eight children rather than six, constituted a substantial change in circumstances. The court acknowledged that defendant's earnings had also increased, ***729** but determined that the "emergency situation" of plaintiff being unable to work and earn adequate income because of her young children had terminated. The court reduced child support payments to $100 per child per month.

Plaintiff claims the trial court erred in (1) reducing defendant's child support payments, and (2) refusing to order defendant to either visit the children in plaintiff's custody or pay extra child support.

Pursuant to Utah Code Ann. § 30–3–5 (1989), the trial court has continuing jurisdiction to modify child support obligations. The party seeking modification has the burden to show a substantial change in the circumstances of at least one of the parties such as to warrant a modification. *Jeppson v. Jeppson,* 684 P.2d 69, 70 (Utah 1984); *Christensen v. Christensen,* 628 P.2d 1297, 1299 (Utah 1981). We will not overturn the trial court's modification of a child support award absent a clear abuse of discretion or manifest injustice. *Maughan v. Maughan,* 770 P.2d 156, 161 (Utah Ct.App.1989).

SUBSTANTIAL CHANGE IN CIRCUMSTANCES

Plaintiff argues first that the trial court abused its discretion by (1) failing to define the substantial change in circumstances, and (2) considering defendant's obligation to support two children born or adopted subsequent to the divorce in finding a substantial change in circumstances. [1]

[1] We disagree with plaintiff on both points. First, the trial court entered findings of fact and conclusions of law that clearly define what it regarded as the substantial change in circumstances: plaintiff's increased income and the additional two children defendant is now obligated to support. Second, it was proper for the trial court to consider the two additional children that defendant is now obligated to support as one factor in determining whether a substantial change in circumstances has occurred. *Openshaw v. Openshaw,* 639 P.2d 177, 179 (Utah 1981).

[2] We agree with plaintiff, however, that the court's ultimate conclusion that there was a substantial change in circumstances is erroneous. "Parties to a divorce decree will undoubtedly experience economic and other changes following a divorce, but a modification in the decree is justified only when a party shows a substantial change in circumstances." *Lord v. Shaw,* 682 P.2d 853, 856 (Utah 1984), *rev'd on other grounds, Bailey v. Sound Lab Inc.,* 694 P.2d 1043, 1044 n. 1 (Utah 1984). In this case, while both parties have experienced economic change since the divorce decree, we find that defendant failed to meet his burden in showing a substantial change in circumstances.

[3] The court's conclusion that plaintiff's increase of annual earnings from $3,000 in 1983 to $17,000 in 1987 constitutes a substantial change in circumstances is erroneous. It ignores defendant's testimony that, at the time of the divorce decree, the court anticipated plaintiff would increase her earnings from $10,000 to $12,000 shortly after the divorce, by finding outside employment. A change in circumstances reasonably contemplated at the time of divorce is not legally cognizable as a substantial change in circumstances in modification proceedings. *Fullmer v. Fullmer,* 761 P.2d 942, 947 (Utah

Ct.App.1988). Based on the court's reasonable anticipation of plaintiff's earnings, her income increased by only $5,000 to $7,000, and not $14,000 during the five years following the divorce.

[4] The court's conclusion that "the emergency situation" of plaintiff's inability to work and earn adequate income because of her small children had terminated is also misplaced. Again, the level of child support payments was established in anticipation of plaintiff finding economically more gainful employment. There is no evidence that the trial court's original child support order was set at a level recognizing a continuing ***730** emergency situation. Nor is there evidence that plaintiff's financial burden of providing for three young children is alleviated because the children are now older. Indeed, the opposite is more likely. Therefore, the relatively small increase in plaintiff's income is insufficient to support a finding of a substantial change in circumstances.

[5] Further, defendant's additional financial obligations do not, alone, constitute a substantial change in circumstances. The Utah Supreme Court has stated:

> [W]hile it is possible that the fact that defendant has two children by his second marriage could show a change in circumstances substantial enough to warrant modification of child support payments, there is no evidence in the record to warrant so finding. It cannot be presumed that defendant's support obligation toward his six children by his prior marriage is changed by the fact he now has two additional children.

Christensen, 628 P.2d at 1300.

Defendant vigorously contends that in this case, contrary to *Christensen,* there is a substantial change in circumstances. Defendant testified that he had a negative cash flow and had contemplated bankruptcy. However, we find that there is inadequate evidence that the circumstances have substantially changed from the time of the divorce decree. Admittedly, defendant has two additional dependents,[2] but he earns $10,000 more in gross income since the divorce.

In sum, because defendant failed to meet his burden to show a substantial change in circumstances, we find that the trial court abused its discretion in granting defendant's petition to reduce the child support payments. We, therefore, reverse the court's order reducing child support.

VISITATION

[6] [7] [8] [9] We find that the trial court did not abuse its discretion by refusing to order that defendant either comply with its visitation schedule or pay additional child support. The paramount concern in child visitation matters is the child's welfare or best interest. *Rohr v. Rohr,* 709 P.2d 382, 383–84 (Utah 1985) (per curiam). Fostering a child's relationship with the noncustodial parent has an important bearing on the child's best interest. *Long v. Long,* 127 Wis.2d 521, 381 N.W.2d 350, 356 (1986). A court may encourage a noncustodial parent to visit his or her child, but compelling a parent to visit by threatening to increase child support payments certainly fails to promote an environment for a positive parent-child relationship. We are not persuaded by plaintiff's argument that she must hire babysitters, stay with the children, or lose some free time if the children do not spend time with defendant. Orders regarding visitation should give paramount weight to the children's welfare, "over the desires of either parent." *Kallas v. Kallas,* 614 P.2d 641, 645 (Utah 1980). We are also not persuaded by plaintiff's argument that the additional money would enable her to do things with the children that defendant would otherwise do during visitation. Again, the purpose of visitation is to foster a relationship between the noncustodial parent and the child, not to simply provide activity for the child. Furthermore, visitation orders do not customarily encompass a description of activities which must take place during visitation or required expenditures. We, therefore, affirm the trial court's denial of plaintiff's petition.

In sum, we reverse the trial court's decrease in child support and restore it to the original level. In all other respects, we affirm the trial court's order. Each party to bear his or her own attorney fees and costs.

GARFF and ORME, JJ., concur.

All Citations

789 P.2d 726

Footnotes

1 Plaintiff also contends that the trial court erred in using the uniform child support schedule, not then in effect, in setting child support. We do not reach that issue because of our determination that the court erred in finding a substantial change in circumstances.

2 Of course, defendant was aware of his existing responsibilities and support obligations when he made the decision to have two more children—one by adoption and one by birth.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Spencer v. Spencer, Conn.App., August 6, 2002

38 Conn.App. 349
Appellate Court of Connecticut.

Robert W. DENLEY
v.
Mary Ellen DENLEY.

No. 13297.
|
Argued May 2, 1995.
|
Decided July 4, 1995.

Ex-husband filed motion for modification of alimony and child support payments that had been awarded upon dissolution of marriage. The Superior Court, Judicial District of Waterbury, Harrigan, J., denied motion, and ex-husband appealed. The Appellate Court, Dupont, C.J., held that: (1) trial court did not abuse discretion by comparing ex-husband's financial condition at time of modification proceeding and during last full calendar year prior to dissolution judgment; (2) amount of car allowance did not affect trial court's determination that there had not been substantial change in circumstances; (3) trial court should not have considered as income profit that ex-husband received through redemption of stock options that had been awarded to him at time of dissolution; and (4) there was no substantial change in circumstances of either party warranting modification of ex-husband's obligation of support and alimony.

Affirmed.

West Headnotes (16)

[1] **Divorce**
Scope of judicial remedies in general

Trial court is endowed with broad discretion in domestic relations cases.

Cases that cite this headnote

[2] **Divorce**
Scope and extent in general

Appellate Court review of decisions in domestic relations cases is confined to whether court correctly applied law, and whether it could reasonably have concluded as it did.

1 Cases that cite this headnote

[3] **Child Support**
Necessity of change in circumstances

Divorce
Change in circumstances in general; materiality

To avoid relitigation of matters already settled, courts in modification proceedings allow parties only to present evidence going back to latest petition for modification, and decrees may only be modified upon proof that relevant circumstances have changed since original decree was granted. C.G.S.A. § 46b-86.

Cases that cite this headnote

[4] **Child Support**
Discretion

Divorce
Evidence

It is within trial court's discretion to ascertain what financial information is relevant in modification proceeding, and thus limitation allowing parties only to present evidence going back to latest petition for modification does not prevent trial court from considering relevant evidence of party's circumstances prior to and subsequent to last applicable court order if needed for purposes of reasonable comparison. C.G.S.A. § 46b-86.

1 Cases that cite this headnote

[5] **Evidence**
Relevancy in general

Evidence
Remoteness

Trial court has broad discretion to determine both relevancy and remoteness of evidence.

Cases that cite this headnote

[6] **Appeal and Error**
Rulings on admissibility of evidence in general

Only upon showing of clear abuse of discretion will Appellate Court set aside on appeal rulings on evidentiary matters made by trial court.

Cases that cite this headnote

[7] **Evidence**
Relevancy in general

In considering relevancy of evidence, Appellate Court asks whether it tends to establish existence of material fact or to corroborate other direct evidence in case.

1 Cases that cite this headnote

[8] **Evidence**
Relevancy in general

Because there is no precise and universal test of relevancy, question must ultimately be addressed on case-by-case basis in accordance with teachings of reason and judicial experience.

Cases that cite this headnote

[9] **Child Support**
Calculation

Divorce
Evidence

Trial court did not abuse discretion by comparing ex-husband's financial condition during full year between dissolution judgment and modification proceeding with his financial conditions from last full calendar year prior to dissolution judgment where ex-husband was commissioned salesman whose income varied from month to month. C.G.S.A. § 46b-86.

2 Cases that cite this headnote

[10] **Child Support**
Financial condition in general

Divorce
Expenses in general

Amount of car allowance did not vary from date of ex-husband's affidavit at time of dissolution to date of ex-husband's latest affidavit submitted in modification proceeding, and thus allowance did not affect trial court's determination that there had not been substantial change in circumstances. C.G.S.A. § 46b-86.

4 Cases that cite this headnote

[11] **Child Support**
Income

Divorce
Separate wealth, estate and resources in general

Mere exchange of an asset awarded as property in dissolution decree, for cash, liquid form of asset, does not transform property into income so as to support modification of alimony and child support.

14 Cases that cite this headnote

[12] **Child Support**
Assets, investments, and holdings

Fact that asset awarded as property in dissolution decree, when converted to cash, produced a profit is irrelevant to determination of whether modification of support is warranted.

5 Cases that cite this headnote

[13] **Child Support**
Calculation

Divorce
Employment and wage or salary issues

In modification of alimony and child support proceeding, trial court improperly considered as income profit that ex-husband had received through redemption of stock options that had been awarded to him at time of dissolution.

7 Cases that cite this headnote

[14] **Appeal and Error**
Conclusiveness in General

Appellate Court does not review evidence to determine whether conclusion different from one reached could have been reached, but rather to decide whether trial court's conclusion was reasonable.

Cases that cite this headnote

[15] **Child Support**
Calculation
Child Support
Change in circumstances
Divorce
Separate wealth, estate and resources in general

There was no substantial change in circumstances of either party warranting modification of ex-husband's obligation to pay support and alimony to ex-wife, despite trial court's improper determination that profits from redemption of stock were includable income. C.G.S.A. § 46b-86.

4 Cases that cite this headnote

[16] **Child Support**
Custodian's income or financial condition
Divorce
Presumptions and burden of proof

Ex-husband failed to meet his burden of proving substantial change in circumstances to warrant modification of support and alimony by introducing evidence that he lost a substantial client, because he did not show that new assignment of another substantial account would not produce income equivalent to that of lost account. C.G.S.A. § 46b-86.

Cases that cite this headnote

Attorneys and Law Firms

**629 *349 Robert W. Denley, pro se, for appellant (plaintiff).

Kevin P. Thornton, Southbury, with whom, on the brief, was Michele A. Caulfield, Thomaston, for appellee (defendant).

Before DUPONT, C.J., and HEIMAN and SCHALLER, JJ.

Opinion

DUPONT, Chief Judge.

The plaintiff appeals from the judgment of the trial court denying his motion for modification of alimony and child support payments that had been awarded to the defendant upon the dissolution of the marriage of the parties. The plaintiff claims that the trial court improperly (1) allowed to be introduced *350 and considered evidence of the plaintiff's income in 1991 and 1992, (2) characterized the plaintiff's automobile allowance as income, (3) included in the calculation of income money that the plaintiff had received from the exercise **630 of stock options, awarded to him as part of the dissolution, and (4) rendered a decision that was contrary to the evidence presented at the hearing on the motion for modification. We affirm.

The marriage of the plaintiff and the defendant was dissolved on March 10, 1992. The dissolution decree required the plaintiff to pay to the defendant $300 a week in alimony and $375 a week in child support for the parties' two children. The dissolution decree further provided that the plaintiff would retain certain stock options, not then exercisable, which the plaintiff had acquired as part of his employment compensation as a field salesman with Anthem Electronics.

On April 21, 1993, the plaintiff filed a motion for modification of alimony and support payments. In the motion and at the hearing on the motion, the plaintiff argued that there had been a substantial change in his financial circumstances since the entry of the decree. The plaintiff claimed that because he had lost an important client, his income had decreased substantially. In support of his argument, the plaintiff submitted an affidavit that reflected his average weekly income for part of 1993.

The trial court held a hearing on the motion for modification and allowed evidence to be introduced of the plaintiff's income in 1991, 1992 and part of 1993, including the profit that the plaintiff had generated by exercising his stock options. The trial court found that the plaintiff had failed to satisfy his burden of proving a substantial change in his circumstances.

"General Statutes § 46b-86 governs the modification or termination of an alimony or support order after the *351 date of a dissolution judgment." *Borkowski v. Borkowski,* 228 Conn. 729, 734, 638 A.2d 1060 (1994). The disputed order may be modified "upon a showing of a substantial change in the circumstances of either party...." General Statutes § 46b-86(a). [1]

[1] [2] " 'A trial court is endowed with broad discretion in domestic relations cases. Our review of such decisions is confined to two questions: (1) whether the court correctly applied the law, and (2) whether it could reasonably have concluded as it did.' " *Glinski v. Glinski,* 26 Conn.App. 617, 620, 602 A.2d 1070 (1992).

The plaintiff claims that the trial court should not have allowed evidence of the plaintiff's income from 1991 and 1992 to be introduced and considered. The plaintiff asserts that the trial court should have considered only the plaintiff's most recent financial information that was contained in his latest financial affidavit. The plaintiff contends that any other financial information, such as his income in 1991 and 1992, was not current information and, thus, was irrelevant to the trial court's decision. We disagree.

[3] [4] "Section 46b-86 reflects the legislative judgment that continuing ... payments should be based on current conditions.... Thus, [t]o avoid re-litigation of matters already settled, courts in modification proceedings allow the parties only to present evidence going back to the latest petition for modification.... [D]ecrees may only be modified upon proof that relevant circumstances have changed since the original decree was granted." (Citations omitted; internal quotation marks omitted.) *Borkowski v. Borkowski,* supra, 228 Conn. at 735-36, 638 A.2d 1060. *352 This limitation, however, does not prevent a trial court from considering relevant evidence of a party's circumstances prior to and subsequent to the last applicable court order if needed for purposes of a reasonable comparison. It is within the trial court's discretion to ascertain what financial information is relevant.

[5] [6] [7] [8] "The rules for determining the admissibility of evidence are well settled. The trial court has broad discretion to determine both the relevancy and remoteness of evidence.... Only upon a showing of a clear abuse of discretion will this court set aside on **631 appeal rulings on evidentiary matters.... In considering the relevancy of evidence, we ask whether it tends to establish the existence of a material fact or to corroborate other direct evidence in a case.... Because there is no precise and universal test of relevancy, however, the question must ultimately be addressed on a case-by-case basis in accordance with the teachings of reason and judicial experience." (Citations omitted; internal quotation marks omitted.) *Dunham v. Dunham,* 204 Conn. 303, 324, 528 A.2d 1123 (1987).

[9] Here, the original alimony and support payments were based on the plaintiff's financial condition in 1991 and up to March 10, 1992, the date of dissolution. The trial court compared that financial condition with the plaintiff's "current" circumstances to determine if there had been a substantial change in circumstances. The trial court indicated that it contrasted the plaintiff's financial information from the last full calendar year prior to the dissolution judgment with the first full calendar year postjudgment.

The plaintiff is a commissioned salesman whose income varies from month to month. Therefore, it was not an abuse of discretion for the trial court to have reviewed a block of time exceeding that included in the *353 plaintiff's latest financial affidavit to obtain an accurate picture of the plaintiff's financial circumstances. The trial court did not abuse its discretion by comparing the plaintiff's financial condition as it did.

[10] The plaintiff also claims that the trial court mischaracterized the plaintiff's automobile allowance as income, and considered the allowance in its determination of whether there had been a substantial change in circumstances. Neither the trial court's memorandum of decision nor its subsequent articulation contain any discussion about the plaintiff's automobile allowance, and we cannot know to what extent, if any, the court did consider it. The plaintiff's W-2 statement for 1992, however, includes an automobile allowance as income, as did his financial affidavit at the time of the dissolution. The amount of the car allowance did not vary from the date of the plaintiff's affidavit at the time of the dissolution to the date of the plaintiff's latest affidavit. We cannot, therefore, conclude that the car allowance affected the trial court's determination.

[11] [12] [13] The plaintiff next contends that the trial court improperly considered as income the profit that he had received through the redemption of stock options that had been awarded to him at the time of the dissolution. The plaintiff contends that because he was awarded the stock options as property in the dissolution decree, any money that he received from the exercise of those stock options was

simply a conversion of an asset and should not have been considered income by the trial court for purposes of assessing whether there had been a substantial change in circumstances. We agree.

The mere exchange of an asset awarded as property in a dissolution decree, for cash, the liquid form of the asset, does not transform the property into income. *Simms v. Simms,* 25 Conn.App. 231, 234, 593 A.2d 161, cert. denied, 220 Conn. 911, 597 A.2d 335 (1991). ***354** The fact that the asset, when converted to cash, produced a profit is irrelevant because "[o]nly in cases of fraud can a modification be based on an increase in the value of assets." *Id.* The trial court should not have included the profit that the plaintiff generated by exercising the stock options in its determination of whether there had been a substantial change in the circumstances of the parties. Our inquiry, however, does not end with that conclusion.

[14] [15] The question becomes whether, exclusive of the profit, there was a substantial change in circumstances since the judgment of dissolution. In other words, the question becomes whether the trial court was correct despite its improper determination that the profits from the stock were includable income. " 'As an appellate court, we do not review the evidence to determine whether a conclusion different from the one reached could have been reached.... The goal of our analysis is simply to decide whether the trial court's conclusion was reasonable.' " (Citations omitted.) *Glinski v. Glinski,* supra, 26 Conn.App. at 620, 602 A.2d 1070. After carefully examining the relevant ****632** facts concerning the financial circumstances of the parties, we conclude that even if the profit from the options was disregarded, the trial court exercised its discretion properly in concluding that there was no substantial change in circumstances of either party warranting a modification of the plaintiff's obligation of support and alimony.

Finally, the plaintiff claims that the trial court's finding, that the plaintiff had failed to sustain his burden of proving a substantial change in circumstances, was not supported by other evidence in the record. The plaintiff directs our attention to specific testimony that indicated a decrease in income because of the loss of a substantial client.

[16] The trial court's memorandum of decision, however, indicates that the court did consider this information, ***355** as well as the new assignment to him of another substantial account, in its determination of whether the plaintiff had sustained his burden. The plaintiff failed to meet his burden to show that this new account would not produce income equivalent to that of the lost account. The plaintiff had the burden of proving a substantial change in circumstances. *Bunche v. Bunche,* 180 Conn. 285, 290, 429 A.2d 874 (1980). He did not.

Primarily, the plaintiff relied on the loss of a major account and on a comparison of his weekly income for a portion of 1993 with his weekly income at the date of dissolution to establish a substantial change in circumstances. We conclude that the trial court was correct in its conclusion that there was no substantial change in the financial circumstances of the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

All Citations

38 Conn.App. 349, 661 A.2d 628

Footnotes

1 General Statutes § 46b-86 provides in pertinent part: "(a) Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support or an order for alimony or support pendente lite may at any time thereafter be continued, set aside, altered or modified by said court upon a showing of a substantial change in the circumstances of either party...."

158 N.J.Super. 285
Superior Court of New Jersey,Appellate Division.

Muriel ESPOSITO, Plaintiff-Appellant,
v.
Daniel Joseph ESPOSITO, Defendant-Respondent.

Argued Feb. 28, 1978.
|
Decided March 20, 1978.

In divorce proceeding, wife appealed from order of equitable distribution and alimony award entered in the Superior Court, Chancery Division. The Superior Court, Appellate Division, Larner, J. A. D., held that: (1) normally, nature of findings which were inadequate would require remand to trial judge in divorce case to make meaningful findings of fact, but since judge who decided case had retired, Superior Court, Appellate Division, did not deem it appropriate or fair to remand case for retrial by another judge, thus entailing a tremendous expenditure of time and money for parties, and thus court invoked its original jurisdiction and proceeded to determine merits of controversy on existing record; (2) trial judge's acceptance of value for mutual funds held by husband, which was quoted value as of August 31, 1974, was erroneous in view of stipulated valuation date of March 31, 1975; (3) under circumstances, including fact that some of limited partnership interests in real estate held by husband failed to produce income and required replenishment of capital to maintain them, court accepted book value of interests as a fair valuation; (4) evidence established that net worth figure in financial statement submitted by defendant husband's automobile dealership to automobile manufacturer was fair and reliable representation of company's position at that date and would be accepted as valuation; (5) considerations of real estate holdings of defendant husband utilized in operation of his automobile dealership required consideration of factors including age of buildings, their single special use and value and the absence of viable market because of such special use, and valuation figure was required to be adjusted to reflect certain corporate liabilities and current assets connected with the properties; (6) in arriving at valuation of defendants' 50% interest in corporation, actual sales figure was more realistic evaluation than mere book value, and although husband consummated sale of his stock three months after valuation date, such time was close enough for practical use in arriving at a fair figure; (7) consideration of relevant factors required conclusion that plaintiff wife be awarded 40% of marital assets as measure of her fair and equitable share thereof, and (8) alimony award of $275 per week was not inadequate.

Judgment for equitable distribution modified to direct defendant to pay to plaintiff an additional sum of $108,000; except for such modification, judgment affirmed in all respects.

West Headnotes (13)

[1] **Divorce**
Sufficiency and clarity

In divorce action involving complex financial valuation issues, it is particularly important that judge make specific findings so that parties and reviewing court may be informed of rationale underlying his conclusion.

13 Cases that cite this headnote

[2] **Divorce**
Determination and Disposition of Cause

Normally, nature of findings which were inadequate would require remand to trial judge in divorce case to make meaningful findings of fact, but since judge who decided case had retired, Superior Court, Appellate Division, did not deem it appropriate or fair to remand case for retrial by another judge, thus entailing a tremendous expenditure of time and money for parties, and thus court invoked its original jurisdiction and proceeded to determine merits of controversy on existing record. R. 2:10-5.

6 Cases that cite this headnote

[3] **Divorce**
Accounts and deposits

Divorce
Rights in property in general

In divorce proceedings, trial judge's acceptance of value for mutual funds held by husband, which was quoted value as of August 31, 1974, was erroneous in view of stipulated valuation date of March 31, 1975, and thus values computed by plaintiff's accountant from mesne

figures between bid and asked prices obtained from brokers, which amounted to $35,572, was accepted as proper valuation.

3 Cases that cite this headnote

[4] **Divorce**
Real estate and proceeds thereof in general

In divorce proceedings, under circumstances, including fact that some of limited partnership interests in real estate held by husband failed to produce income and require replenishment of capital to maintain them, court accepted book value of interests as a fair valuation.

Cases that cite this headnote

[5] **Divorce**
Businesses and associated assets in general
Divorce
Stocks, bonds, and other investments

In divorce proceedings, record established that defendant husband was beneficial owner of all of stock of automobile dealership.

Cases that cite this headnote

[6] **Divorce**
Businesses and associated assets in general
Divorce
Stocks, bonds, and other investments
Divorce
Weight and sufficiency

In divorce proceedings, evidence established that net worth figure in financial statement submitted by defendant husband's automobile dealership to automobile manufacturer was a fair and reliable representation of company's position at that date and would be accepted as valuation of defendant's interest in his business corporation.

Cases that cite this headnote

[7] **Evidence**
Value

In divorce proceeding, an appraisal made by a qualified and recognized expert concerning real estate assets held by defendant husband had greater evidential impact on true value than a mere book value computed on cost less depreciation.

Cases that cite this headnote

[8] **Divorce**
Real estate and proceeds thereof in general
Divorce
Businesses and associated assets in general

In divorce proceedings, consideration of real estate holdings of defendant husband utilized in operation of his automobile dealership required consideration of factors including age of buildings, their single special use and value and the absence of a viable market because of such special use, valuation figure was required to be adjusted to reflect certain corporate liabilities and current assets connected with the properties.

Cases that cite this headnote

[9] **Divorce**
Stocks, bonds, and other investments

In divorce proceedings, in arriving at valuation of husband's 50% interest in corporation, actual sales figure was more realistic evaluation than mere book value, and although husband consummated sale of his stock three months after valuation date, such time was close enough for practical use in arriving at a fair figure, but feature of installment payments of balance of purchase price over a four-year period barred use of total price as fair valuation of assets.

Cases that cite this headnote

[10] **Divorce**
Nature and extent of assets allocated in general

In divorce proceedings, consideration of relevant factors revealed by record and established criteria applicable to concept of equitable distribution required conclusion that plaintiff wife be awarded 30% of marital assets as measure of her fair and equitable share thereof.

2 Cases that cite this headnote

[11] **Divorce**
Effect of property distribution

In divorce proceedings, support payments are intimately related to equitable distribution and the financial security and potential income available because of such distribution.

4 Cases that cite this headnote

[12] **Divorce**
Separate wealth, estate and resources

In divorce proceedings, since plaintiff wife, following equitable distribution, had total available cash fund of $220,000 which conservatively could return 8% yielding $17,600 per annum, alimony award of $275 per week was not inadequate.

2 Cases that cite this headnote

[13] **Divorce**
Estoppel, waiver, or agreements affecting right

Wife's actions including her acceptance of partial benefits of divorce judgment did not bar her right to appeal on asserted doctrine of equitable estoppel, where wife did not repudiate judgment below, her appeal was not materially inconsistent therewith and her appellate position was limited to an effort to modify upwards the monetary awards of equitable distribution and alimony and reviewing court's determination vindicated that position.

4 Cases that cite this headnote

Attorneys and Law Firms

**1268 *289 James C. Orr, Newark, for plaintiff-appellant (Lum, Biunno & Tompkins, Newark, attorneys; Claire T. Barile, Newark, on the brief).

Everett M. Scherer, Newark, for defendant-respondent (Riker, Danzig, Scherer & Debevoise, Newark, attorneys).

Before Judges HALPERN, LARNER and KING.

Opinion

The opinion of the court was delivered by

LARNER, J. A. D.

In this matrimonial action the wife appeals from the order of equitable distribution and the alimony award.

The parties were married in 1942 and had three children, all of whom were over 21 and emancipated as of the time of decision below. The marriage was apparently a harmonious one until their separation in 1969. Plaintiff filed her complaint for divorce in late 1971 alleging desertion, and defendant filed a counterclaim based on 18 months' separation. The trial judge granted each litigant a divorce on the respective grounds asserted by them in a judgment dated December 5, 1972. Issues of equitable distribution and support were reserved and ultimately were heard in a series of hearings between January and October of 1975. The court's decision was rendered in a letter opinion dated March 25, 1976, wherein the marital assets were distributed by allocating to the wife a new automobile and two parcels of real estate consisting of the marital home in Livingston and a summer home in Point Pleasant, and awarding all other assets to the husband. The judgment additionally provided for a weekly alimony of $275.

Plaintiff attacks the propriety of the equitable distribution order on two grounds: (1) the judge erred in arriving *290 at the valuation of some of the assets, and (2) the division of the same was disproportionate **1269 and inequitable. There is no dispute on appeal as to the assets which are eligible for distribution. She also contends that the alimony award is inadequate.

I

In the presentation of the valuation of the marital assets the parties indicated their accord on the value of the following items, based upon an agreed valuation date for all eligible property as of March 31, 1975:

Asset	Value

Cash	$ 10,024
Marketable securities	145,000
Life insurance policies (cash value)	7,353
Precision Planning, Inc.	- 0 -
Livingston residence (net)	112,658
Point Pleasant residence (clear)	62,000
Florida condominium (net)	16,500
Defendant's pension	8,000
Less: Accounts payable	(4,500)
Net total of undisputed items	$357,035

The items whose valuation was in dispute involve the following:
Mutual funds

Limited partnership interests in real estate

Defendant's interest in automobile dealership known as Dan Esposito Olds, Inc.

Real estate holdings designated as Nassau Central Corp.,

Nassau Rose Holding Corp. and 355 Central Avenue, East Orange

Stock interest in Airmet, Inc.

The trial judge's finding on the valuation of these disputed items is limited to a mere statement: "I adopt as my fact findings * * * the values as set forth in defendant's memorandum on pages 8 through 20 * * *." This was a written summation submitted by counsel for defendant after the completion of the hearings.

***291** It is noteworthy that there is no articulation by way of factual preference or analysis to support the carte blanche acceptance of defendant's contentions as to values. It is no more nor less than the purported findings in the case of Nochenson v. Nochenson, 148 N.J.Super. 448, 450, 372 A.2d 1139, 1140 (App.Div.1977), where the judge simply stated that he was in "agreement with the defendant's summation of the evidence submitted at the trial." As we noted in that opinion, such a finding is not an adequate finding of fact which can stand judicial scrutiny on appeal. See also, Benjamin Moore & Co. v. Newark, 133 N.J.Super. 427, 337 A.2d 371 (App.Div.1975).

[1] In a complex financial case of this type it is particularly important that the judge make specific findings so that the parties and the appellate court may be informed of the rationale underlying his conclusion. Because of the absence of adequate articulation the following questions come to mind. Why did the judge accept each of the valuations advanced by defendant? Why were they more reliable evidentially than those submitted by plaintiff? What were the elements in the evidence which led to such a wholesale acceptance of the argument of one side of the controversy versus the other side? And furthermore, which of defendant's values did the judge accept as to those items where defendant vacillated between differing proposed valuations? The conclusory reliance upon a party's argumentative position relating to a series of disputed valuations of several different property interests renders the judge's findings in this respect

valueless. As a consequence, we cannot and will not apply the normal standard of review which limits us to the determination whether there is sufficient credible evidence in the record to support the trial court's finding. See State v. Johnson, 42 N.J. 146, 162, 199 A.2d 809 (1964). Accord, Close v. Kordulak Bros., 44 N.J. 589, 598-599, 210 A.2d 753 (1965). See also, Benjamin Moore & Co. v. Newark, supra.

[2] Normally, the nature of these findings would require a remand to the trial judge to make meaningful findings of fact. However, since the judge who decided the case is now *292 retired, we do not deem it appropriate or fair to the litigants to remand the case for a retrial by another judge, which would entail a tremendous expenditure of time and money for both parties. We therefore invoke our original **1270 jurisdiction under R. 2:10-5 and proceed to determine the merits of the controversy on the existing record.

All of the assets were acquired during marriage and did not arise through gift or inheritance. As a consequence, there is no issue as to the nature of the assets subject to distribution and, as already noted, there is no dispute as to the valuation of some of the items. We shall therefore limit our factual determination of value to the disputed items and apply the valuation date of March 31, 1975, as accepted by the parties and the trial judge.

Mutual Funds

[3] Defendant proposed and the judge accepted a value for the mutual funds held by defendant of $24,429, which concededly was the quoted value as of August 31, 1974. This was manifestly erroneous in view of the stipulated valuation date of March 31, 1975. As of that date the values computed by plaintiff's accountant from mesne figures between bid and asked prices obtained from brokers amounted to $35,572. We find that the proper valuation of this item is $35,572.

Limited partnership interests in real estate

[4] Defendant had interests in 12 limited partnerships in which he invested a total of $68,150. The book value as of the end of 1974 totalled $30,740 the figure suggested by defendant and accepted by the judge. The only evidence countervailing this valuation was that presented by plaintiff's accountant, who arrived at a total of $102,003 by using assessed valuations and a personal appraisal of the real estate. In view of the absence of competent expert testimony as to values, we find no basis for reliance upon the accountant's *293 opinion in this connection. It is also apparent from the record that some of these properties fail to produce income and require replenishment of capital to maintain them. Under the circumstances reflected by the record, we are impelled to accept the book value of these interests as a fair valuation namely, $30,740.

Dan Esposito Olds, Inc.

[5] The determination of the value of defendant's interest in the corporate enterprise known as Dan Esposito Olds, Inc., involves a two-step process: (1) the quantum of his true beneficial stock holdings and (2) the valuation of said interest.

The company is engaged in the sale of new and used cars under a General Motors dealership, with its place of business located on Central Avenue, East Orange. Prior to 1970 defendant was the owner of virtually all of the stock of the company. He asserts that he transferred in that year a 25% stock interest to a nephew who was employed in the business. The record is clear that this transfer, if made, was made without consideration and in order to satisfy a General Motors regulation relating to multiple dealerships which were contemplated by defendant at the time. However, except for the communication of the alleged transfer to General Motors, no stock certificate was ever issued, nor was documentary evidence of any kind presented which would establish the actual transfer. It is also significant that in answers to interrogatories, defendant admitted ownership of all the stock of the corporation except for two qualifying shares allocated to his wife and father. And neither the contemporaneous corporate records nor the corporate tax returns reflected any beneficial interest in anyone other than defendant himself.

Defendant's allegation as to his nephew's stock ownership is further muddied by the fact that defendant testified that he expected payment for the stock at some time, while the nephew testified that it was a gift.

*294 In the face of the foregoing evidential record, the trial judge found that the nephew owned a 25% interest in the corporation and that defendant owned 75% thereof. We are satisfied that his conclusion is contrary to the weight of the evidence and that it clearly and convincingly appears to be a miscarriage of justice. Our careful review of the record convinces us that defendant was and is the beneficial owner of all of the stock of Dan Esposito Olds, Inc.

**1271 [6] We next turn to the valuation of this corporate stock interest. As we have observed, the judge accepted all valuations submitted by defendant, which in this instance

reflected a figure of $172,104 for the total equity interest, derived from the corporate balance sheet attached to the 1974 federal income tax return. The result reflected by this return did not contemplate the corporate financial status as of March 31, 1975, while the record contains a financial statement submitted by the corporation to General Motors reflecting its financial status as of that date, with a net worth of $233,000. Since we note that the record also contains a General Motors statement as of December 31, 1974 which was almost identical to the federal income tax return as of that same date, it is apparent that the General Motors statement as of March 31, 1975 is a fair and reliable representation of the company's position at that date. We therefore find that the interest of defendant in his business corporation had a value of $233,000 as of March 31, 1975.

Nassau Central Corp., Nassau Rose Holding Corp. and 355 Central Avenue

These three entities encompass the real estate on Central Avenue and Nassau Street utilized in the operation of the automobile dealership, together with a parcel in Springfield, New Jersey occupied as a residence by defendant. Defendant presented a total net valuation of these assets based mainly on book value amounting to $173,372. Plaintiff, on the other hand, offered in evidence an appraisal by a real estate expert retained by defendant and dated September 27, 1974.

***295** The trial judge made no mention of this appraisal and the substantial discrepancy between the estimate of value by defendant's real estate expert and the book value figure utilized by defendant in his argumentative summation. The court simply accepted defendant's proposed figure of $173,372.

[7] It is apparent to us that an appraisal made by a qualified and recognized expert hired by defendant has a much greater evidential impact on true value than a mere book value computed on cost less depreciation. For obvious reasons defendant did not offer this appraisal in evidence, while plaintiff accepted its reliability as an item of evidence created by defendant's agent in the preparation of the case prior to trial.

The appraisal, consisting of 78 pages in the record, constitutes a complete and comprehensive analysis of all the real estate owned by the parties. The values as to the residences were accepted and agreed upon by both litigants. The point of departure arises, however, with respect to the values of the business properties.

The appraiser arrived at a gross figure of $450,000 for the value of the complex of lands and buildings making up the real estate utilized in the business operation on Central Avenue and Nassau Street in East Orange. This was the bottom line result as of August 31, 1974, after a rather extensive investigation of comparable sales in the area as well as an analysis based upon the recognized income and cost approaches.

Although we are impressed by the thoroughness of the expert's appraisal, there are several factors noted therein which require us as factfinders to discount the final figure and arrive at a value which is more consonant with the particular problems applicable to the property involved.

Initially we note that the real estate is located in the core of the City of East Orange which has suffered a tremendous loss of business enterprises and an accompanying loss in property values and available market for their purchase. As ***296** pointed out in the appraisal, the "subject neighborhood is considered to be on a precarious brink between complete ultimate blight or overall rehabilitation and survival. In large part, survival is dependent upon governmental agencies and financial institutions outside of the neighborhood committing their resources to the reclamation of the urban cities. * * * Change is not imminent and it can be anticipated that this centralized static period would be maintained into the immediately foreseeable future." ****1272** Nevertheless, the appraiser proceeded to state that "(t)he sheer quantity of people has placed a premium upon all real estate in the city."

What is perhaps more significant is the concession in the appraisal that the estimate of value presupposes the continued use of the property as a viable and successful automobile agency. In fact, the appraiser specifically points out that "if the business and/or management were to cease, so as to require that the property be disposed of for alternate use * * * ," the buildings would have a value defined as the salvage value to offset the cost of demolition and clearing the land for redevelopment. In such an eventuality the market value of the property would not exceed the land value, namely, $292,000. Furthermore, the assessed valuation of the involved properties is $348,600.

It is of interest to note that the income approach of value is not computed upon actual rental income, for the rental established between the business entity and the real estate companies was artificially created to cover the necessary costs and carrying

charges of the real estate. Under such circumstances the valuation based upon an anticipated gross income computed on a square-foot rental value has little significance on the issue of realistic evaluation for the purpose of determining immediate equitable distribution.

[8] After a consideration of the appraisal and the foregoing factors relating to the location of the properties, the age of the buildings, their single special use and value, and the absence of a viable market because of such special use, we *297 conclude as factfinders, for the purposes of this litigation, that the total fair valuation of the business lands and buildings on Central Avenue and Nassau Street, East Orange, whether held individually by defendant or in corporate entities controlled by him, should be set at the gross figure of $300,000. This figure must be adjusted to reflect certain corporate liabilities and current assets connected with the properties, which amount to a net deduction of approximately $88,000. We therefore arrive at a net valuation of these business properties in the sum of $212,000.

We should also note that included in the holdings of Nassau Rose Holding Corp. is the Springfield residence, the value of which is not included in the foregoing evaluation of the business properties. This additional asset owned by defendant's company was appraised at $52,000, which value is not contested by either party. Thus, this additional sum of $52,000 must be added to the total of marital assets available for distribution.

Airmet, Inc.

Defendant owned a 50% interest in a corporation known as Airmet, Inc. In June 1975 he sold his stock for the sum of $55,000, payable by $15,000 in cash and $10,000 a year for four years. Defendant proposed a value of $34,840, which represented the book value of his interest as of December 31, 1974; and the trial judge also accepted this valuation without further discussion.

[9] It hardly requires profound analysis to arrive at the conclusion that the actual sales figure is a more realistic evaluation than mere book value. And although the sale was consummated three months after the valuation date of March 31, 1975, the time is close enough for our practical use in the endeavor to arrive at a fair figure.

Defendant urges that the feature of the installment payments of the balance of the purchase price over a four-year period should bar the use of the total price as the fair valuation of this asset. We agree. We have therefore computed the value *298 based upon the extended payout, and applying an 8% interest factor have arrived at the commuted present value as of the time of sale (or March 31, 1975) of $48,121.

A recapitulation of the value of the marital assets which were not included in the **1273 list of undisputed items set forth earlier in this opinion follows:

Mutual funds	$ 35,572
Limited partnership interests	30,740
Dan Esposito Olds, Inc.	233,000
Business real estate in names of Nassau Central Corp., Nassau Rose Holding Corp. and defendant, individually	212,000
Springfield property	52,000
Airmet, Inc.	48,121
Total	611,433

Added to this total are the

undisputed items listed above	357,035
Total eligible marital assets	$ 968,468

II

Our next problem is to determine how the allocation between husband and wife can be made most equitably within the criteria set forth in the cases of Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974), and Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974).

Plaintiff owns no assets of her own. She is not employed, apparently has not been employed for most of the period of the marriage and has no independent income or earning capacity. She was 58 years of age at the time of the judgment and, as far as the record reveals, the marriage was a harmonious one for a period of approximately 27 years until the parties separated in 1969. During this period of time plaintiff acted as a homemaker, contributing to defendant's needs and the family development by running the household and bringing up three children. Although the business grew and prospered because of the efforts of defendant, nevertheless ***299** this business success with the accompanying accumulation of substantial assets was in part the product of the activities of the wife as well as those of the husband as the titular breadwinner. While they lived together their standard of living reflected a substantial income, with a fine suburban home, a summer home at the shore, a condominium in Florida, a boat, three or four automobiles in the family, charge accounts, credit cards and other trappings of an upper middle-class family.

As observed by the Supreme Court in Rothman v. Rothman, supra:

> In the second place the enactment seeks to right what many have felt to be a grave wrong. It gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership. Only if it is clearly understood that far more than economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the statute. See generally, Freed and Foster, Economic Effects of Divorce, 7 Family Law Quart. 275 (1973). (65 N.J. at 229, 320 A.2d at 501.)

See also Scherzer v. Scherzer, 136 N.J.Super. 397, 401, 346 A.2d 434 (App.Div.1975).

[10] In considering all the relevant factors revealed by the record and the established criteria applicable to the concept of equitable distribution, we are of the opinion that plaintiff should be awarded 30% of the marital assets as the measure of her fair and equitable share thereof. This would result in an allocation to her of the rounded-out sum of $290,000.

The trial judge determined that plaintiff's share of the marital assets should be satisfied by the transfer of defendant's interest in the marital home in Livingston and the summer home in Point Pleasant, free and clear except for the outstanding mortgage on the Livingston property. In addition, he directed defendant to provide plaintiff with a ***300** new automobile having a value of $7,000. Based upon the undisputed valuations of the interests in the real estate, this distribution amounted to a total value of approximately $182,000. In light of the absence of proper findings below and our foregoing valuation and allocation of the marital assets, we conclude that the distribution under the order of the trial court is woefully inadequate and not supportable by the evidence in the record.

****1274** Since the distribution mandated by the order has already been implemented, defendant is entitled to credit in the sum of $182,000, thereby leaving a balance due from defendant to plaintiff under the terms of this opinion in the sum of $108,000.

III

[11] Plaintiff urges that the alimony award of $275 a week is inadequate. If we were to consider this portion of the judgment in isolation, plaintiff's contention would have substantial merit. However, support payments are intimately related to equitable distribution and the financial security and

potential income available because of said distribution. See Smith v. Smith, 72 N.J. 350, 360, 371 A.2d 1 (1977); Painter v. Painter, supra, 65 N.J. at 218, 320 A.2d 484; Rothman v. Rothman, supra, 65 N.J. at 234, 320 A.2d 496.

[12] Our determination of the issue of equitable distribution will result in a substantial capital fund which plaintiff will be able to invest in order to produce additional income. The sale of the Livingston home, as contemplated by plaintiff, should have resulted in a net fund of approximately $112,000 before taxes. The additional distribution of $108,000 under our order will therefore create a total available cash fund of $220,000. If this sum is invested conservatively in prime corporate bonds at a current available return of 8%, it would yield $17,600. If this income of $17,600 is added to the support order for annual payments of $14,200, plaintiff would receive $31,800 a year, without invasion of capital and subject only to income taxes.

***301** It is our considered opinion that this financial picture is one which is consonant with the evidence in the case relating to plaintiff's needs and defendant's income. It represents a fair and equitable resolution of the support feature of this litigation. We will therefore not disturb the alimony award granted by the trial court.

IV

In his appellate brief defendant, citing Tassie v. Tassie, 140 N.J.Super. 517, 357 A.2d 10 (App.Div.1976), urges that the appeal be dismissed because the provisions of the judgment below have been implemented by him and plaintiff has accepted the benefits thereof. Apparently this was accomplished sometime after the filing of the notice of appeal, without application by either party for a stay of the lower court's judgment.

In Tassie this court dismissed the appeal on the ground that appellant was equitably estopped because her actions under the particular facts therein reflected a voluntary acceptance of all the benefits of the judgment and barred her from prosecuting the appeal. In addition, it is noteworthy that the court in that case found no basis for reversal on the factual merits of the case, thereby watering down the precedential effect of the holding dismissing the appeal.

[13] In any event, we are not convinced that plaintiff's actions herein warrant the application of the doctrine of equitable estoppel so as to mandate a dismissal of the appeal. See Simon v. Simon, 148 N.J.Super. 40, 42, 371 A.2d 818 (App.Div.1977). Appellant did not repudiate the judgment below, nor is her appeal materially inconsistent therewith. Her appellate position was limited to an effort to modify upwards the monetary awards of equitable distribution and alimony; and our determination vindicates that position. Her acceptance of the partial benefits in her financial position cannot serve as a legal bar to her right to appeal. Defendant's argument is without merit.

***302** *Conclusion*

In view of the foregoing, we modify the judgment for equitable distribution so as to direct defendant to pay to plaintiff an addition sum of $108,000. Except for this modification, the judgment below is affirmed in all respects. [1]

All Citations

158 N.J.Super. 285, 385 A.2d 1266

Footnotes

1 We have not discussed other items contained in the judgment for equitable distribution because they were not raised as appellate issues by either party. These include: distribution of furnishings in the marital home and in the condominium in Florida, provision for payment of capital gains taxes, return of used automobile by plaintiff to defendant, etc.

27 Utah 2d 103
Supreme Court of Utah.

Lee C. FELT, aka Lee Craig Felt, Plaintiff and Appellant,
v.
Robert S. FELT, Defendant and Respondent.

No. 12409.
|
Feb. 1, 1972.

From a judgment of the Third District Court, Salt Lake County, Gordon R. Hall, J., reducing alimony award, an appeal was taken. The Supreme Court, Henriod, J., held that it was immaterial that divorced husband had since married a woman with a child.

Remanded for new trial.

West Headnotes (10)

[1] **Divorce**
Presumptions and burden of proof

Divorced husband, moving to delete alimony provision of divorce decree, had burden of proving change of circumstances warranting modification, and, on record presented, burden was not borne with such substantiality as to warrant emasculation of $12,000 award of alimony except for token annual $1.

1 Cases that cite this headnote

[2] **Divorce**
Proceedings for termination of alimony or support

Evidence that his counsel had advised him to sign agreement under which divorced wife accepted alimony in specified amount on condition that she could supplement it with other income was not pertinent to divorced husband's motion to delete alimony provision from divorce decree incorporating agreement.

Cases that cite this headnote

[3] **Divorce**
Conditions Terminating or Suspending Obligation

On divorced husband's motion to delete alimony provision from divorce decree, divorced wife's equity in home and insurance policies awarded to her in divorce decree were impertinent.

Cases that cite this headnote

[4] **Divorce**
Conditions Terminating or Suspending Obligation

On divorced husband's motion to delete alimony provision of divorce decree, husband's sterilization 18 years before divorce was not pertinent matter.

Cases that cite this headnote

[5] **Divorce**
Sexual relations, cohabitation, or remarriage

On divorced husband's motion to delete alimony provision of divorce decree, it was immaterial that he had since married a woman with a child.

Cases that cite this headnote

[6] **Divorce**
Rehabilitative awards; awards until self-supporting

That divorced wife was qualified by education and experience to support herself was not appropriate consideration on divorced husband's motion to delete alimony provision of divorce decree.

Cases that cite this headnote

[7] **Divorce**
Conditions Terminating or Suspending Obligation

Neither finding that divorced wife, who was under doctor's care and working only part time when divorce decree was entered, was presently working full time nor other findings justified termination of $12,000 annual alimony award.

Cases that cite this headnote

[8] **Divorce**
Conditions Terminating or Suspending Obligation

That agreement incorporated into divorce decree was based in part on recognition of wife's assistance in husband's education could not be considered in determining divorced husband's right to termination of $12,000 annual alimony award.

Cases that cite this headnote

[9] **Divorce**
Factors considered in general

Divorce decree containing awards for support based on either expressed or assumed facts contemplated by parties or court or both should not be modified, and continuous jurisdiction of court to modify should not be used to thwart expressed or obvious intentions of parties and/or court-unless such contemplated facts lead to manifest injustice or unconscionable inequity.

1 Cases that cite this headnote

[10] **Divorce**
Spousal Support

Where findings did not reflect such inequity as justified drastic modification of substituting award of $1 per year for $12,000 per year alimony but did represent such change in circumstances as, with other changes, if shown, might justify some lesser modification, reviewing court remanded case for new trial.

Cases that cite this headnote

Attorneys and Law Firms

**621 *104 VanCott, Bagley, Cromwell & McCarthy, Clifford L. Ashton, Thomas M. Burton, Richard H. Stahle, Salt Lake City, for plaintiff-appellant.

Gayle Dean Hunt, Salt Lake City, for defendant-respondent.

Opinion

HENRIOD, Justice:

Appeal from a judgment reducing an alimony award of $12,000 per year to $1.00 per year. Reversed and remanded for a new trial, with costs to appellant.

The parties had been wife and husband for about 18 years before Mrs. F filed for divorce. Incident thereto a 13-page 'Property Settlement Agreement' was executed by the parties, the significant part of which, so far as this case is concerned, was the following paragraph:

> It is further agreed . . . that the aforesaid amount of alimony ($1, **622 000 per month) . . . is a reasonable sum in view of the efforts made by plaintiff in assisting defendant in his *105 professional education and considering the present circumstances and social standing now enjoyed by Lee C. Felt: and that said amount shall not be hereafter adjusted, notwithstanding increases or decreases in any amount on the income of plaintiff, and notwithstanding any changes in the income of the defendant unless said changes are substantial and so decrease the defendant's income so that defendant is reasonably unable to pay the alimony agreed to herein.

The paragraph above certainly contemplates that plaintiff intended to seek employment for more than the part-time work and its income, in which the record reflects she then was engaged, with no reference to or finding as to her then income.

The court, upon hearing the matter, must have understood that Mrs. F accepted the $1,000 per month alimony on condition that she could supplement it with other income,-otherwise the provision, to which Mr. F, without objection, voluntarily became signatory, made no sense. The court incorporated the

paragraph as a part of the decree, with the statement: 'which Property Settlement Agreement the court hereby adopts as fair and reasonable.' The findings and decree of the court were supported by Mrs. F's testimony that she was the main source of income for the first seven years while her husband was completing his medical training, that she presently worked part-time and hoped to work again, which the trial court remarked at that point, by asking what we think was a very significant question to the effect that: 'So you can supplement your income to some extent?' to which Mrs. F said 'Yes.'

[1] About a year after the divorce, Mr. F was cited for nonpayment of alimony and was ordered to pay $4,000 in arrearages, and again, about eight months later, was ordered to pay another $8,000 for the same reason, and pursuant thereto he was ordered to appear about two months later to determine the issue of contempt at which time he was found in contempt, was sentenced to 10 days in jail, and given an opportunity to purge himself by promptly paying the alimony when it accrued, and by paying off the past due judgments. At the time Mr. F was cited for contempt, he filed a motion to delete the alimony, which was heard at the same time as the contempt issue. Mr. F's counsel referred to the case of Callister v. Callister [1] which holds in effect that the court has continuing jurisdiction to raise or lower alimony irrespective of any agreement of the parties, if there if change of circumstances warranting such modification,-a principle which consistently we have espoused,-and a principle which simply is repeated ***106** in the paragraph signed by the parties and quoted above, the only question in the instant case being whether the burden of proof, which in this case was Mr. F's, was borne with such substantiality as to warrant the emasculation of a $12,000 award of alimony except for a token annual $1.00 that certainly cannot be categorized as deficit financing.

Mr. F's brief makes much of certain testimony, that the trial court apparently did not believe, or which was not pertinent in the hearing on the motion to amend the decree, since nowhere are the facts reflected in said testimony found in the court's written Findings, i.e.:

[2] [3] [4] [5] Mr. F said he questioned the advisability of signing the agreement, but his counsel advised him to sign it, saying any district court judge would agree it was fair and equitable. His counsel proved to be right, since the district court in a signed decree said just that, and such evidence is not pertinent since he signed the agreement. His counsel questioned Mrs. F as to her role in helping Mr. F in securing his medical education. This had already ****623** been canvassed before the divorce decree was entered, and hence was inapropos here, but only a possible matter to consider on a motion for new trial or appeal. He questioned Mrs. F about her present income and the best he could get from such interrogation was $9,000, without any testimony or adduced facts about what Mrs. F was making part-time at the time of the decree. In such event the $9,000 is not an absolute and at best an elusive factor in determining changed circumstances. He questioned her about her equity in the home and about insurance policies awarded to her in the decree,-facts quite impertinent and inadmissible here. He asked her about her husband's sterilization that occurred 18 years before the divorce, another matter not pertinent and a fact existing before and merged in the decree. He asked Mr. F about his health problem occurring after the decree, and about the added burdens of his practice and about his being so tried that he stumbled around on going to bed, and about consulting doctors and what they advised him, and about some immaterial matters such as increased seminar costs, insurance costs, etc. It is apparent that the trial court thought the above recitals either were immaterial or that he did not believe Mr. F, since no mention of them was made in the court's Findings. The fact that Mr. F remarried a woman with a child was not material, but considered so in the Findings.

[6] [7] [8] What seems to be cogent to us in this case that the findings of the trial court, some of which cannot be used in a conclusion to relieve one of alimony payments, did not warrant the termination of a $12,000 annual award. To justify our ***107** conclusion in this respect we advert to the Findings of the court, set forth in italics, abstracted so far as pertinent here, as follows, without comments thereon in plain type:

> 6. That plaintiff is qualified by education and experience to support herself, which was demonstrated throughout the marriage and particularly now after she works full time, while only part time at the time of the decree, at which time she was under the doctor's care.

This finding has to do largely with matters existing before the decree and taken into account in arriving at the alimony award, except that part about full-time employment, and with that exception the Finding is on matters that are res judicata and if canvassable at all, were matters to be considered on timely appeal, not three or four years later on motion to amend.

> 7. That the agreement was based in part on recognition of Mrs. F's assistance

> in Mr. F's education; that such efforts were substantial, but that his education was substantially completed before the marriage.

All the facts recited in this finding were before the court prior to the decree and cannot be considered by another division of the court three years later, since they are merged in the decree, are res judicata, and their consideration in this case is tantamount to the granting of a three-year belated new trial on the merits,-and hence cannot be considered in determining the modification of the alimony award.

> 8. That Mrs. F was entitled to alimony for a given period of time sufficient to adjust to single life; that to continue to allow permanent alimony in the light of present circumstances is unjust, unnecessary and unequitable and hence the decree should be modified to nothing but $1.00 a year.

This Finding mostly is a conclusion and not a statement of proven fact and there is nothing recited therein to indicate what present circumstances are, let alone that they are unjust,-all of which amounts to an ipse dixit probative of nothing enlightening in determining that an alimony award should be modified. Besides, it is somewhat of an affront to the decree whose author entertained the motion and said that it was fair and reasonable that any increase or decrease in Mrs. F's income, as ****624** agreed to by Mr. F, should not be considered as a factor in any adjustment of the award.

> 9. That Mrs. F's earnings are sufficient to maintain herself without dependence on Mr. F.

This simply is a conclusion not bottomed on any specific facts recounted anywhere in the Findings, and it is impotent as a factor in changing the award.

> ***108** 10. That Mr. F has remarried one who has a child, both of whom he supports; that Mrs. F is single.

The fact of remarriage cannot be used in determining modification of an alimony award, although in some conceivable rare case it might, and we are at a loss to know why the trial court so found,-unless it was on account of what was said in Callister v. Callister, supra, which recited the fact of remarriage, which we disaffirm if it is urged that such fact is admissible for the purpose of reducing the alimony award in the instant case.

> 11. That since the divorce Mr. F's costs of doing business has substantially increased, as has his income but not commensurate therewith.

Nothing is reflected in this Finding that would indicate that Mr. F's income had decreased so that he was reasonably unable to pay what he agreed or to justify the wiping out of a $12,000-per-year-alimony award, and we are unimpressed with such a generalized, unspecific finding in this case.

> 12. That Mrs. F's income is substantially higher than at the time of divorce.

The Finding does not state how much higher, and represents conjecture, since there is no fact stated in comparison as to what Mrs. F's income was at the time of divorce, because there was no evidence before the decree or thereafter as to her part-time income.

> 14. That substantial changes in the circumstances have occurred since the decree.

This kind of Finding is fraught with meaninglessness without any recitation as to what the substantial changes were, and lends nothing to a justification for the elimination of an annual $12,000 alimony award.

[9] [10] We think the written Findings in this case are so fragmentary and unspecific as not to justify the drastic elimination of an annual $12,000 award, except for a dollar, and we so hold. In doing so, we affirm our previous pronouncements that a divorce decree containing awards for support based on either expressed or assumed facts contemplated by the parties or the court or both, should not be modified when the contemplated facts are obvious or agreed to by the parties and in turn incorporated in the decree, in which even the continuous jurisdiction of the court to modify should not be used to thwart the expressed or obvious intentions of the parties and/or the court,-unless such contemplated facts lead to manifest injustice or unconscionable inequity. [2] The Findings of the instant case, in our opinion, do not reflect such inequity justifying the

drastic modification indulged, *109 but do represent some change in circumstances that, with other changes, if shown, might in the aggregate require the application of the rule that the court in a proper case is not bound by an agreement, that might warrant some lesser or total modification. Therefore we are constrained to remand this case for a new **625 trial with instructions to entertain evidence of facts occurring after, not before, the decree was entered, and in accordance with the observations stated herein,-and we so hold. (Emphasis added.)

CALLISTER, C.J., and TUCKETT, ELLETT and CROCKETT, JJ., concur.

All Citations

27 Utah 2d 103, 493 P.2d 620

Footnotes

1 1 Utah 2d 34, 261 P.2d 944 (1953).

2 Cody v. Cody, 47 Utah 456, 154 P. 952 (1916); Allen v. Allen, 25 Utah 2d 87, 475 P.2d 1021 (1970); Short v. Short, 25 Utah 2d 326, 481 P.2d 54 (1971). See also 18 A.L.R.2d 10, 21 (1951) where it is observed that 'Where the alleged change in circumstances of the parties is one that the trial court expected and probably made allowances for when entering the original decree, the change is not a ground for modification of the decree.' See also concurring opinion of two of the Justices in MacDonald v. MacDonald, 120 Utah 573, 236 P.2d 1066 (1951).

657 P.2d 757
Supreme Court of Utah.

Mary Ruth HASLAM, Plaintiff and Respondent,
v.
James Vincent HASLAM, Defendant and Appellant.

No. 18013.
|
Dec. 31, 1982.

Former husband appealed from an order of the Third District Court, Salt Lake County, G. Hal Taylor, J., dismissing his motion to terminate alimony. The Supreme Court, Stewart, J., held that there was substantial change in circumstances warranting modification of the alimony award where, since the divorce, former wife had obtained employment, experienced a substantial increase in income, and accumulated some savings, while former husband had retired and received income in approximately the same amount as he received at the time of the divorce some 17 years previously.

Reversed and remanded.

West Headnotes (3)

[1] **Divorce**
Modification

Party seeking modification of divorce decree must demonstrate substantial change of circumstances. U.C.A. 1953, 30-3-5.

9 Cases that cite this headnote

[2] **Divorce**
Modification

Change in circumstances required to justify modification of divorce decree varies with type of modification sought. U.C.A. 1953, 30-3-5.

6 Cases that cite this headnote

[3] **Divorce**
Employment and wage or salary issues

There was substantial change in circumstances warranting modification of alimony award where, since divorce, former wife had obtained employment, experienced substantial increase in income, and accumulated some savings, while former husband had retired and received income in approximately the same amount as he received at time of divorce some 17 years previously. U.C.A. 1953, 30-3-5.

7 Cases that cite this headnote

Attorneys and Law Firms

*757 Leland S. McCullough, Salt Lake City, for defendant and appellant.

Mary Ruth Haslam, pro se.

Opinion

STEWART, Justice:

The issue in this case is whether the trial court erred in dismissing defendant's motion to terminate alimony on the ground that the defendant had failed to demonstrate a "change of circumstances" sufficient to warrant termination.

In 1945 the parties were married and subsequently had two children. In 1966 the plaintiff obtained a divorce and upon an agreement between the parties an order was entered directing the defendant to pay $200 a month alimony plus child support. The child support has since then terminated by virtue of the children's reaching their majority. At the time of the divorce, defendant earned between $1000 and $1200 per month, and the plaintiff was unemployed.

In 1972, some six years after the divorce, the defendant remarried, and in 1980 he *758 retired. The trial court found that at the time of the hearing defendant's health and age did not permit him to work. The defendant now receives Social Security in the amount of $532.80, pension benefits in the amount of $618.09, and approximately $100 from stock dividends, for a total of $1,250.89. He receives an additional $229 from Social Security for his present wife and $229 for her minor child by a former husband. The household income therefore totals $1,708.89 and expenses total $1,607.83.

Plaintiff, subsequent to the divorce, secured a job and now earns $1,100 per month. In addition to the $200 alimony, she draws interest from $12,000 in savings. She has not remarried and claims expenses in the amount of $1,606. The trial court dismissed defendant's petition for a modification, finding that there had been no material change of circumstances.

Defendant's contention is that his income is approximately the same as it was in 1966, and the plaintiff's income has increased dramatically. He argues that it is unfair to require him to supplement the plaintiff's income when she has about the same income as he does and no dependents.

[1] [2] The district court has "continuing jurisdiction" in divorce cases "to make such subsequent changes or new orders with respect to the support and maintenance of the parties ... as shall be reasonable and necessary." U.C.A., 1953, § 30-3-5. To provide some stability to decrees, however, and to prevent an inundation of the courts with petitions for modification, a party seeking a modification must demonstrate a substantial change of circumstances. *E.g., Adams v. Adams,* Utah, 593 P.2d 147 (1979). The change in circumstances required to justify a modification of a divorce decree varies with the type of modification sought. *Foulger v. Foulger,* Utah, 626 P.2d 412 (1981). As to cases involving a petition to change the custody of children, see *Hogge v. Hogge,* Utah, 649 P.2d 51 (1982). As to changes in the disposition of real property, see *Despain v. Despain,* Utah, 610 P.2d 1303 (1980); *Land v. Land,* Utah, 605 P.2d 1248 (1980).

With respect to modifying alimony, this Court has recently stated that "provisions in the original decree of divorce granting alimony, child support, and the like must be readily susceptible to alteration at a later date, as the needs which such provisions were designed to fill are subject to rapid and unpredictable change." *Foulger v. Foulger,* Utah, 626 P.2d 412 (1981).

[3] On the instant facts it is clear that there has been a substantial change in circumstances. Since the divorce, the former Mrs. Haslam has obtained employment, experienced a substantial increase in income and has accumulated some savings. Mr. Haslam has retired and presently receives income in approximately the same amount as he received at the time of the divorce some seventeen years ago.

Under the circumstances of this case, we think that the combination of the supporting spouse's retirement, together with the dependent spouse's employment, earning of a substantial income, and accumulation of substantial savings subsequent to the original divorce decree, constitutes a substantial change of circumstances. *See Lepis v. Lepis,* 83 N.J. 139, 416 A.2d 45 (1980), and cases cited. Therefore, defendant's petition for modification is reinstated and the case remanded so that the trial court may consider whether the alimony award should be modified as equity requires under the circumstances.

Reversed and remanded. Costs to respondent.

HALL, C.J., and OAKS, HOWE and DURHAM, JJ., concur.

All Citations

657 P.2d 757

363 P.3d 524
Court of Appeals of Utah.

Lisa V. HIBBENS, Appellant,
v.
Mark H. HIBBENS, Appellee.

No. 20140826–CA.
|
Nov. 19, 2015.

Synopsis

Background: Ex-husband and ex-wife filed cross-petitions to modify divorce decree. The Third District Court, Salt Lake Department, Robert P. Faust, J., entered judgment in a bench trial in favor of ex-husband. Ex-wife appealed.

Holdings: The Court of Appeals, J. Frederic Voros Jr., J., held that:

[1] terminating ex-husband's obligation to pay off second mortgage on ex-wife's parents' house was not an abuse of discretion;

[2] terminating ex-husband's obligation to pay support for adult children was not an abuse of discretion; and

[3] determination that there was a substantial change in circumstances justifying increase in support obligation for minor child was not an abuse of discretion.

Affirmed.

West Headnotes (9)

[1] **Divorce**
Proceedings

Trial court did not abuse its discretion in concluding that a material and substantial change occurred justifying modification of divorce decree requiring ex-husband to pay off second mortgage on ex-wife's parents' house, and thus terminating his obligation to pay mortgage; trial court believed ex-husband's testimony that ex-wife told him she planned to refinance mortgage, after which he would no longer have to pay it, ex-wife refinanced mortgage and court found that parties did not anticipate an assumption of mortgage obligation by the party who had not been previously ordered to pay debt, and court disbelieved ex-wife's testimony that she intended to relieve ex-husband of obligation to pay mortgage only temporarily.

Cases that cite this headnote

[2] **Divorce**
Modification

To succeed on a petition to modify a divorce decree, the moving party must first show that a substantial material change of circumstances has occurred since the entry of the decree and not contemplated in the decree itself.

Cases that cite this headnote

[3] **Divorce**
Presumptions

Divorce
Discretion of court

The determination of the trial court that there has or has not been a substantial change in circumstances, as required for modification of a divorce decree, is presumed valid, and the Court of Appeals reviews the ruling under an abuse of discretion standard.

Cases that cite this headnote

[4] **Appeal and Error**
Abuse of discretion

An appellate court can properly find abuse of discretion only if no reasonable person would take the view adopted by the trial court.

Cases that cite this headnote

[5] **Child Support**
Discretion

Child Support
Questions of Fact and Findings of Court

In reviewing child support proceedings, the Court of Appeals accords substantial deference to the trial court's findings and gives it considerable latitude in fashioning the appropriate relief and will not disturb that court's actions unless the evidence clearly preponderates to the contrary or there has been an abuse of discretion.

Cases that cite this headnote

[6] **Child Support**
Adult children

The trial court has power to order continued child support until age 21 when it appears to be necessary and when the court makes findings of any special or unusual circumstances to justify the order. West's U.C.A. §§ 15–2–1, 78B–12–102(7), 78B–12–219(1, 3).

Cases that cite this headnote

[7] **Child Support**
Age

Trial court did not abuse its discretion in terminating ex-husband's obligation to pay child support for two adult children, despite divorce decree's provision that support "shall continue until all of the children are no longer attending college"; one child was married, neither emancipated child was disabled or struggling with any special needs justifying extended child support beyond high school graduation or turning 18 years of age, and neither child had ever attended college. West's U.C.A. §§ 15–2–1, 78B–12–102(7), 78B–12–219(1, 3).

Cases that cite this headnote

[8] **Child Support**
Findings

Child Support
Modification

When explaining the outcome of a child support modification petition, the court must make findings on all material issues, and its failure to delineate what circumstances have changed and why the changes support the modification constitutes reversible error unless the facts in the record are clear, uncontroverted, and only support the judgment.

Cases that cite this headnote

[9] **Child Support**
Income

Child Support
Age

Trial court did not abuse its discretion in determining there was a substantial change in circumstances justifying increase in ex-husband's child support obligation for minor child until child turned 18 or graduated from high school, whichever was later, and termination of his support obligation for adult children, despite divorce decree's provision that support "shall continue until all of the children are no longer attending college"; ex-wife's income amounted to a 53% decrease and her recent disability constituted a permanent condition which materially changed her employment potential and ability to earn income, ex-wife's change in income and emancipation of two children resulted in a 15% or more change in ex-husband's support obligation, and there were no special and unusual circumstances that would have justified extending support of minor child beyond age of 18. West's U.C.A. §§ 15–2–1, 78B–12–102(7), 78B–12–210(9)(a), (9)(b)(iii, iv), (9)(c)(i–iii), 78B–12–219(1, 3).

Cases that cite this headnote

Attorneys and Law Firms

***525** David Pedrazas, Salt Lake City, for Appellant.

Platte Seth Nielson, Salt Lake City, for Appellee.

Judge J. FREDERIC VOROS JR. authored this Opinion, in which Judge KATE A. TOOMEY and Senior Judge RUSSELL W. BENCH concurred. [1]

Opinion

VOROS, Judge:

¶ 1 Lisa V. Hibbens (Wife) and Mark H. Hibbens (Husband) divorced in 2006. At the time of the divorce, Wife and Husband had three minor children. The divorce decree required, among other things, that Husband make the payments on the second mortgage on Wife's parents' house and pay child support. By 2013, Wife had retired the second mortgage on her parents' house, and two of the three children had reached the age of 18. Both parties asked the court to modify the decree. After a bench trial, the trial court found a substantial and material change in circumstances. It extinguished Husband's obligation to make payments on the retired mortgage, terminated his child support obligation with respect to the adult children, increased his child support for the minor child, and ordered Wife to repay child support overpayments. Wife appeals. We affirm.

BACKGROUND

The Mortgage

¶ 2 The 2006 divorce decree (the Decree) awarded Wife the marital home and required her to assume the mortgage on it. It also required Husband to assume the second mortgage on Wife's parents' house (the Mortgage). Wife's parents died the following month. She sold the marital home and moved into her parents' house. In February 2007, Wife told Husband that she planned to refinance the Mortgage, after which he would not have to make payments on it. Wife refinanced the Mortgage in January 2008 but did not inform Husband of the refinance. In the meantime, due to health issues, Husband moved in with Wife and her partner. During this time, Husband continued to make partial payments on the (by then retired) Mortgage, paid child support, paid Wife some rent, and contributed to the utilities.

¶ 3 When Husband learned in December 2009 or January 2010 that Wife had refinanced the Mortgage, he stopped making ***526** payments on it. From the time of the refinance until Husband stopped making the Mortgage payments, he paid Wife $9,600 toward the Mortgage. In August 2010, Husband's then-fiancée exchanged Facebook messages with Wife. Wife acknowledged that she told Husband he did not have to pay the Mortgage:

> [Husband] was court ordered to pay off the loan ... on my parents' house.... The payment was $575.00 with a balance of $45,000. I told [Husband] he does not have to pay that off, I will. He accepted and no longer has to make that payment.

Wife testified at trial that she only intended to relieve Husband of his obligation to pay the Mortgage temporarily. In December 2010, Wife emailed Husband and asked if he would "resume paying the $575 mortgage payment." Husband replied, "What mortgage payment, it got rolled into the refinance. You said once you did that I was no longer responsible."

¶ 4 The trial court found that a substantial and material change in the parties' circumstances had occurred since entry of the Decree. The court concluded that the "parties did not anticipate an assumption of the [Mortgage] by the party who had not previously been ordered to pay." The court found Husband's testimony regarding the Mortgage credible and found Wife's testimony regarding the Mortgage not credible. The court explained that the message Wife sent to Husband's then-fiancée made no qualifications regarding Husband's obligation for the Mortgage and did not support her testimony. In light of these facts, the court ordered that Husband "is no longer required to pay any sums to [Wife] relating to the [Mortgage]."

Child Support

¶ 5 At the time of their divorce, Wife and Husband had three minor children. Wife's average monthly income was $1,925.21; Husband's average monthly income was $4,158.33. The Decree required Husband to "pay $962.00 per month in child support in conformance with the Utah Child Support guidelines." The Decree also provided that Husband's child support obligation would continue "until all children are no longer attending college." Husband and Wife both acknowledged at trial that they were unaware of this provision at the time of the divorce.

¶ 6 By the time the court issued its decision on the parties' petitions to modify, only one of the three children remained a minor. The other two children had turned 18 and graduated

from high school. Neither had attended college. One had married, and neither had any special needs.

¶ 7 Since the divorce, Wife had become permanently disabled. As a result, the trial court found that Wife had a monthly income of $895 per month. Thus, the trial court found Wife's monthly income suffered a 53% decrease, constituting a material change under Utah law. The trial court also found that Wife's disability constituted a permanent condition, "which materially changes her employment potential and her ability to earn income." Finally, the trial court concluded that because the Decree contemplated that the children would attend college, the fact that neither of the adult children had attended college constituted a substantial and material change in circumstances.

¶ 8 Based on these changes in the parties' circumstances, the trial court modified Husband's child support obligation. The court first determined that "[t]he child support provision in the Decree is unusual and constitutes a 'deviated' child support order." The trial court terminated Husband's child support obligations with respect to the two adult children. The court increased Husband's child support for the minor child to $517 and ordered that obligation to continue until the child turns 18 or graduates from high school, whichever occurs later. The court made its child support modifications effective as of February 2013, the date the parties filed their cross-petitions. Accordingly, it awarded Husband $7,565, "representing the overpayment of child support from February 2013 through June 2014."

ISSUES ON APPEAL

¶ 9 Wife raises two issues on appeal. First, she contends that the trial court erred in relieving Husband of his obligation to pay ***527** the Mortgage. Second, she contends that the trial court erred in modifying Husband's child support obligation.

ANALYSIS

I. The Mortgage

[1] ¶ 10 Wife contends that the trial court erred in terminating Husband's obligation to pay the Mortgage. Specifically, she argues that the trial court could terminate Husband's obligation to pay the Mortgage only if the court found that Wife "intentional[ly] and distinctly" waived her right to receive payments. Husband responds that the trial court's ruling "was not dependent on the trial court's application of the law on waiver. It was based upon the normal standard applied in divorce modification cases—whether a substantial change in circumstances has occurred since the entry of the decree that supports a modification of the decree."

¶ 11 We agree with Husband. This round of litigation arose from the parties' cross-petitions to modify the Decree based on a substantial change in circumstances. The trial court did find that Wife told Husband that he no longer had to make payments on the second mortgage. But, as explained below, the court based its modification of the Decree not on waiver, but on a finding of a substantial and material change in the parties' circumstances. Accordingly, we consider whether a substantial change in circumstances supports the trial court's modification of the Decree.

[2] [3] [4] ¶ 12 "To succeed on a petition to modify a divorce decree, the moving party must first show that a substantial material change of circumstances has occurred since the entry of the decree and not contemplated in the decree itself." *Bolliger v. Bolliger*, 2000 UT App 47, ¶ 11, 997 P.2d 903 (emphasis, citation, and internal quotation marks omitted). "The determination of the trial court that there [has or has not] been a substantial change in circumstances ... is presumed valid, and we review the ruling under an abuse of discretion standard." *Id.* ¶ 10 (alteration and omission in original) (citation and internal quotation marks omitted). An appellate court "can properly find abuse [of discretion] only if no reasonable person would take the view adopted by the trial court." *Goggin v. Goggin*, 2011 UT 76, ¶ 26, 267 P.3d 885 (citation and internal quotation marks omitted).

¶ 13 Here, the trial court found that "[t]he parties did not anticipate an assumption of the [Mortgage] obligation by the party who had not been previously ordered to pay the debt." Further, the trial court found Wife's "refinance of the [Mortgage] obligation constitutes a substantial and material change since the entry of the [D]ecree which supports modification of the [D]ecree." Thus, the trial court ruled that Husband "should no longer be obligated to pay [Wife] on the [Mortgage] obligation, or to reimburse her for payments she made on the refinance of that obligation."

¶ 14 The court also believed Husband's testimony that Wife had told him she planned to refinance the Mortgage, after which he would no longer have to pay the Mortgage;

the court disbelieved Wife's testimony that she intended to relieve Husband of his obligation to pay the Mortgage only temporarily. While these findings might lend support to a finding of waiver, in context they demonstrate that the parties themselves viewed the sale of the house and the payoff of the Mortgage as material circumstances justifying a modification of Husband's mortgage obligation. Wife challenges none of these findings on appeal; accordingly, "we accept these findings as true in our analysis on appeal." *See D'Elia v. Rice Dev., Inc.*, 2006 UT App 416, ¶ 24, 147 P.3d 515.

¶ 15 Based on the trial court's factual findings, we conclude that the trial court did not abuse its discretion in concluding that a material and substantial change occurred justifying a modification of the Decree. Accordingly, we affirm the trial court's order terminating Husband's obligation to pay the Mortgage.

II. Child Support

¶ 16 Wife contends that "the trial court's modification of [Husband's] child support obligation was incorrect." She challenges the trial court's modification in two respects. ***528** First, she challenges the termination of Husband's child support obligation with respect to the two older children. She argues that "the Court failed to make any findings sufficient [to] justify[ ] a modification of the child support termination date based upon a change in circumstances and in the best interests of the child." Second, Wife challenges the amount of Husband's new child support obligation. She argues that "modifying child support in this case by lowering child support based upon [her] reduction in income based upon her disability is unconscionable and not in the best interest of the child."

[5] ¶ 17 "In reviewing child ... support proceedings, we accord substantial deference to the trial court's findings and give it considerable latitude in fashioning the appropriate relief. We will not disturb that court's actions unless the evidence clearly preponderates to the contrary or there has been an abuse of discretion." *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985) (per curiam).

A. The Adult Children

¶ 18 The Utah Child Support Act defines *child* generally as an unemancipated son or daughter under 18, in high school or incapacitated from earning a living:

> "Child" means:
>
> (a) a son or daughter under the age of 18 years who is not otherwise emancipated, self-supporting, married, or a member of the armed forces of the United States;
>
> (b) a son or daughter over the age of 18 years, while enrolled in high school during the normal and expected year of graduation and not otherwise emancipated, self-supporting, married, or a member of the armed forces of the United States; or
>
> (c) a son or daughter of any age who is incapacitated from earning a living and, if able to provide some financial resources to the family, is not able to support self by own means.

Utah Code Ann. § 78B–12–102(7) (LexisNexis 2012). Consistent with this definition, the Act provides that, unless a child support order provides otherwise, when a child turns 18 or graduates from high school, the child support obligation "automatically adjust[s]," excluding that child from the calculation:

> When a child becomes 18 years of age or graduates from high school during the child's normal and expected year of graduation, whichever occurs later ... the base child support award is automatically adjusted to the base combined child support obligation for the remaining number of children due child support ... unless otherwise provided in the child support order.

Id. § 78B–12–219(1). However, if "the order deviates from the guidelines, automatic adjustment of the order does not apply and the order will continue until modified by the issuing tribunal." *Id.* § 78B–12–219(3).

[6] ¶ 19 Furthermore, "courts in divorce actions may order support to age 21." *Id.* § 15–2–1 (2013). Thus, the court " 'has power to order continued support until age 21 when it appears to be necessary and when the court makes findings of any special or unusual circumstances to justify the order.' " *Thornblad v. Thornblad*, 849 P.2d 1197, 1199 (Utah Ct.App.1993) (quoting *Harris v. Harris*, 585 P.2d 435, 437 (Utah 1978)).

[7] ¶ 20 Here, because the Decree provided that child support "shall continue until all of the children are no longer attending college," the trial court determined this to be "a 'deviated' child support order." Thus, under Utah law, the order would not automatically adjust as the children became emancipated; rather, it would "continue until modified by the issuing tribunal." Utah Code Ann. § 78B–12–219(3).

¶ 21 The issuing tribunal in this case modified the child support order with respect to the parties' adult children. The trial court found that these children are not under the age of 18 years, that one is married, and that "[n]either of the two emancipated children is disabled or struggling with any special needs that would justify extended child support for them ... beyond high school graduation or turning 18 years of age." Accordingly, neither qualifies as a child as defined by the Utah Child Support Act. In addition, the court found that neither had ever attended college.

*529 ¶ 22 Given these findings, we cannot conclude that the trial court failed to make required findings or otherwise abused its discretion in terminating Husband's obligation to pay child support for the two adult children. The children both turned 18 and no longer qualified as children under the Act. The court had power to order support to continue until age 21 based on finding "special or unusual circumstances to justify the order." *Thornblad,* 849 P.2d at 1199 (citation and internal quotation marks omitted). But the court found no such special or unusual circumstances, and Wife presented no evidence to support such a finding. Finally, we cannot agree that the trial court's order was not in the best interest of any children. As explained above, the adult children at issue here are not, for purposes of the Utah Child Support Act, children.

¶ 23 Accordingly, we affirm the trial court's order terminating Husband's child support obligation for his adult children.

B. The Minor Child

¶ 24 Under the Utah Child Support Act, "A parent ... may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances." Utah Code Ann. § 78B–12–210(9)(a) (LexisNexis 2012). A substantial change in circumstances may include, among other things, "material changes of 30% or more in the income of a parent," or "material changes in the employment potential and ability of a parent to earn." *Id.* § 78B–12–210(9)(b)(iii)–(iv).

[8] ¶ 25 Taking the best interests of the child into account, a court tasked with reviewing a petition to modify the amount of a child support order first determines whether a substantial change has occurred. *Id.* § 78B–12–210(9)(c)(i). Then, if a substantial change has occurred, the court determines "whether the change results in a difference of 15% or more between the payor's ordered support amount and the payor's support amount that would be required under the guidelines." *Id.* § 78B–12–210(9)(c)(ii). Next, if "there is a difference of 15% or more" and "the difference is not of a temporary nature," the court shall adjust the child support amount in conformance with the guidelines. *Id.* § 78B–12–210(9)(c)(iii). "Finally, when explaining the outcome of a modification petition, the court must make findings on all material issues, and its failure to delineate what circumstances have changed and why the changes support the modification ... constitutes reversible error unless the facts in the record are clear, uncontroverted and only support the judgment." *Diener v. Diener,* 2004 UT App 314, ¶ 7, 98 P.3d 1178 (citation and internal quotation marks omitted).

[9] ¶ 26 The trial court followed these requirements to the letter. In considering an adjustment in the amount of child support for the minor child, the court found Wife's income changed from $1,925 per month to $895 per month. The court found the change in Wife's income amounted to a 53% decrease and thus constituted a substantial change—i.e., a change of more than 30% in income. The court also found that Wife's disability constituted a "permanent condition which materially changes her employment potential and her ability to earn income." This too, the court concluded, constituted a substantial change under Utah law.

¶ 27 The court next determined that Wife's change in income, together with the emancipation of two of the children, resulted in a 15% or more change in Husband's child support obligation. *See* Utah Code Ann. § 78B–12–210(9)(c)(ii). Given the difference of at least 15%, and given the court's finding that the decrease in Wife's income was not temporary, the court adjusted Husband's child support obligation. Husband's child support obligation for the minor child effectively increased under the court's order. Because the trial court followed the statute to the letter and clearly delineated the facts underlying the change in circumstances, we cannot agree that it abused its discretion in increasing Husband's child support obligation for the minor child.

¶ 28 Nevertheless, Wife argues that the trial court's order "modifying the child support amount failed to consider the

best interests of the children." Wife continues, " 'Clearly a decrease in child support from ***530** the guideline amount has an obvious potential to negatively affect the best interest of the child.' " (Quoting *Cantrell v. Cantrell*, 2013 UT App 296, ¶ 14 n. 5, 323 P.3d 586.) Wife goes on to assert that "modifying child support in this case by lowering child support based upon [her] reduction in income ... [and] disability is unconscionable and not in the best interest of the child."

¶ 29 If the trial court had actually reduced the child support obligation with respect to the minor child or otherwise deviated from the guidelines, we might agree. But it did not do so. True, the Husband's total child support obligation decreased from $962 (for three children) to $517 (for one child). But the court based the overall decrease not on Wife's "reduction in income," as she now claims, but on the two older children's emancipation. We have already concluded that the trial court did not abuse its discretion by discontinuing child support for the adult children. *See supra* ¶¶ 20—23. And we similarly cannot say that the court abused its discretion by setting the remaining minor child's support in conformance with the guidelines. [2]

¶ 30 Finally, Wife argues that the trial court failed to consider "the best interests of the child and/or make findings of a substantial change in circumstances to justify a modification of the termination date of the child support obligation." Specifically, she asserts that "[t]he court failed to consider whether it was in the best interest of the children to modify[ ] the termination date of the child support and whether the youngest child would be attending college." Again, we do not agree.

¶ 31 The trial court found that "[t]he Decree does not address the intent of the parties regarding payment for college expenses for any of the children." Thus, the trial court concluded "[t]he parties are left to resolve between themselves as to the extent they will help their children with college expenses or with support beyond the age of 18 and the graduation from high school." Further, our supreme court has explained "that the court has power to order continued [child] support until age 21 *when it appears to be necessary and when the court makes findings of any special or unusual circumstances to justify the order.*" *Harris v. Harris*, 585 P.2d 435, 437 (Utah 1978) (emphasis added).

¶ 32 Here, the court's findings do not reveal any necessity or special or unusual circumstances that would have justified extending the minor child's child support beyond the age of 18. The fact that Husband might have been obligated to pay child support for the adult children had they chosen to attend college does not constitute such a circumstance. As a result, we cannot conclude the trial court abused its discretion, and we accordingly affirm.

CONCLUSION

¶ 33 Because the trial court did not abuse its discretion in terminating Husband's obligation to pay the Mortgage, or in modifying Husband's child support obligations, we affirm.

All Citations

363 P.3d 524, 800 Utah Adv. Rep. 4, 2015 UT App 278

Footnotes

1 The Honorable Russell W. Bench, Senior Judge, sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11–201(6).

2 To the extent Wife's argument challenges the sufficiency of the trial court's findings with respect to the best interests of the child, we reject her argument as unpreserved. *See 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶¶ 50–51, 99 P.3d 801 (declining to consider the appellant's sufficiency challenge where the appellant raised the sufficiency issue for the first time on appeal).

KeyCite Yellow Flag - Negative Treatment
Distinguished by Van Dyke v. Van Dyke, Utah App., February 20, 2004

784 P.2d 1249
Court of Appeals of Utah.

Gary W. JENSE, Plaintiff and Respondent,
v.
Sara A. JENSE, Defendant and Appellant.

No. 880016–CA.
|
Dec. 21, 1989.

Former wife appealed from an order of the Third District Court, Salt Lake County, Scott Daniels, J., modifying a decree of divorce and vacating a money judgment for amounts awarded in the decree. The Court of Appeals, Garff, J., held that: (1) finding that former wife wrongly took possession of silverware after divorce decree was entered was clearly erroneous, and (2) neither failure of former husband to receive employment bonus, former husband's loss of job, nor decline in value of former marital home, which had been awarded to former husband, constituted change of circumstances justifying modification of divorce awards.

Order reversed; original awards reinstated.

West Headnotes (5)

[1] **Divorce**
Proceedings

Finding that former wife wrongly took possession of silverware after divorce decree was entered, as basis for ordering $10,000 setoff against divorce judgment in favor of former husband, was clearly erroneous; property settlement awarded former husband all items of personal property currently in his possession, evidence showed that silverware was not in former husband's possession at time divorce action was initiated, and former wife clearly established that silverware was in her possession at time of divorce decree and that she put former husband on notice of that fact.

6 Cases that cite this headnote

[2] **Divorce**
Credits, offsets and compensating payments

Trial court properly based monetary award to former wife to equalize distribution of marital estate and award of temporary alimony upon valuations and circumstances present at time divorce decree was issued, not upon future speculation as to valuation or financial circumstances.

Cases that cite this headnote

[3] **Divorce**
Multiple grounds or defenses

Neither failure of former husband to receive employment bonus, former husband's loss of job, nor decline in value of former marital home which had been awarded to former husband constituted change in circumstances justifying modification of awards made in divorce decree; failure to receive bonus and loss of job went to former husband's ability to pay judgment rather than circumstances upon which original awards were made, and parties agreed on valuation of marital home at time of decree.

2 Cases that cite this headnote

[4] **Divorce**
Res judicata and conclusiveness

Principles of res judicata mandate that, absent compelling reasons, parties to a property settlement set forth in a decree of divorce be able to rely on finality of that judgment.

1 Cases that cite this headnote

[5] **Divorce**
Modification

Subsequent changes in property value, without additional compelling reasons, do not constitute substantial change in circumstances upon which trial court may enter modification of decree of divorce.

4 Cases that cite this headnote

Attorneys and Law Firms

***1250** Craig M. Peterson and E. Paul Wood, Salt Lake City, for defendant and appellant.

David S. Dolowitz and Leslie Van Frank, Salt Lake City, for plaintiff and respondent.

Before DAVIDSON, GARFF and GREENWOOD, JJ.

OPINION

GARFF, Judge:

Defendant appeals the trial court's order modifying the parties' decree of divorce and vacating a money judgment for amounts awarded in the decree. We reverse.

Defendant was granted a decree of divorce on July 9, 1986. This decree awarded defendant, in relevant part: (1) $27,750, with twelve percent interest, to "equalize the marital estate"; (2) temporary alimony of $500 per month for one year; and (3) attorney fees of $5,000 and appraisal costs of $670. However, defendant was ordered not to reduce these awards to a final judgment or to enforce payment until April 1, 1987, in order to allow plaintiff time to receive his bonus for the 1986 income year, which was payable in 1987. In addition to other property, plaintiff was awarded the marital home in Pleasant Grove, and all furnishings and personal property in his possession.

On April 1, 1987, the court reduced to judgment amounts accrued under the decree of divorce for alimony, attorney fees, and the property settlement, with interest, for a total of $43,314.46. On April 14, 1987, the court granted plaintiff's motion to stay execution of the judgment for four months.

On June 24, 1987, plaintiff filed a motion requesting the court to set off $10,000 against defendant's judgment for silverware allegedly awarded to him but taken by defendant from a safety deposit box at Deseret Bank.

On August 3, 1987, plaintiff requested that the court amend the decree of divorce and vacate the judgment against him because of changed circumstances.

On August 24, 1987, the trial court heard plaintiff's motions. Defendant's counsel consented to go forward with the motion for set-off on the basis of proffers of evidence and affidavits, but objected to consideration of the motion to amend the divorce decree without discovery, oral testimony by witnesses, or other standard evidentiary proceedings. Overruling defendant's objections, the trial court proceeded to hear both motions on proffers and affidavits.

The court held that there had been a significant change of circumstances in that: (1) plaintiff failed to receive a bonus in 1987; (2) he lost his job in July 1987; (3) the Pleasant Grove home declined in value; and (4) between the original divorce hearing ***1251** and the entry of the decree, defendant had removed the silverware from the parties' safety deposit box. The court found that the change in circumstances thwarted its intent to equalize the marital estate in the divorce decree, resulting in defendant being awarded more than half of the estate. This, the court found, required modification of the decree of divorce and the April 1, 1987 judgment. To equalize the estate, the court awarded the silverware and the net proceeds of the sale of the Pleasant Grove home to defendant. The court held that this new award satisfied all prior awards and judgments payable to defendant by plaintiff.

SILVERWARE

Defendant appeals the trial court's decision to set off $10,000 against her money judgment on the finding that the silverware was awarded to plaintiff in the decree and was taken by defendant from the parties' safety deposit box after the entry of the decree.

Rule 52(a) of the Utah Rules of Civil Procedure provides, in part:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377 (Utah 1987), the Utah Supreme Court stated that, under this standard, "we do not set aside the trial court's factual findings unless they are against the clear weight of the evidence or we otherwise reach a

definite and firm conviction that a mistake has been made." *See also* Utah R.Civ.P. 52(a); *State v. Walker*, 743 P.2d 191, 193 (Utah 1987); *Schmidt v. Downs*, 775 P.2d 427, 429 (Utah Ct.App.1989).

[1] Here, the clear weight of the evidence is against the findings of the trial court. The property settlement awards plaintiff all items of personal property currently in his possession. The evidence clearly shows that the silverware was not in plaintiff's possession at the time the divorce action was initiated. Plaintiff makes no assertion that the silverware was in the safety deposit box at the time of the divorce decree on July 9, 1986. Defendant, on the other hand, clearly establishes that the silverware was not in the safety deposit box but in her possession at that time, and that she put plaintiff on notice of that fact. In her answer to plaintiff's interrogatory of May 24, 1985, defendant states that there are no items in the safety deposit box, and that plaintiff has the keys. This is confirmed by the unrefuted affidavit of Kay L. Jacobs, president of Deseret Bank, who stated that the last recorded visit to the safety deposit box was on March 22, 1985.

Because the silverware was not in plaintiff's possession at the time of the decree, he is not entitled to it. Therefore, the trial court's finding that defendant wrongly took possession of the silverware after the decree is clearly erroneous, and there is no basis for the $10,000 set-off against defendant's judgment.

MODIFICATION OF DECREE

Defendant also argues that the trial court abused its discretion or misapplied the law in granting a modification of the decree of divorce and vacating the April 1, 1987 judgment.

The standard of review for this court to overturn a trial court's modification of a decree of divorce is a showing that "the evidence clearly preponderates against the findings or that the trial court has abused its discretion." *Thompson v. Thompson*, 709 P.2d 360, 362 (Utah 1985); *see also Porco v. Porco*, 752 P.2d 365, 367 (Utah Ct.App.1988). In this case, we find both circumstances.

To obtain a modification of a divorce decree, the movant must show a substantial change of circumstances subsequent to the decree, that was not originally contemplated within the decree itself. *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985) (per curiam); *Thompson*, 709 P.2d at 362. In addition, when a substantial change in circumstances is shown, it must

***1252** relate to the basis upon which the original award was made by the trial court. *Mineer v. Mineer*, 706 P.2d 1060, 1062 (Utah 1985).

In the August 1987 hearing, the trial court stated that the awards in the original decree of divorce were based upon the presumption that plaintiff was going to receive a big bonus in 1987. Although we give great deference to the trial court's findings and do not overturn them unless clearly erroneous, Utah R.Civ.P. 52(a); *Walker*, 743 P.2d at 193, a close examination of the record reveals that this finding is clearly erroneous.

[2] The findings of fact in the decree of divorce show that defendant was awarded $27,750 to equalize the distribution of the marital estate as it existed on the date of the decree. Although there was no stipulated property settlement incorporated into the decree, both parties agreed to the valuation of the Pleasant Grove home at $150,000. The award of temporary alimony was based upon the then-current financial circumstances of the parties. The award of attorney fees was based upon the disparity of the incomes and the financial circumstances of the parties at the time of the decree. The trial court properly based these awards upon valuations and circumstances present at the time the decree was issued, not upon future speculation as to valuation or financial circumstances.

[3] When the trial court ordered defendant not to reduce her awards to judgment until April 1, 1987, its purpose was to allow plaintiff time to receive an anticipated bonus so that he could more easily pay this obligation. [1] The failure of plaintiff to receive a bonus in 1987 is not a change of circumstances justifying a modification of the awards made in the decree because it is unrelated to the circumstances upon which the original awards were made by the trial court, and relates only to plaintiff's ability to pay them.

Likewise, plaintiff's loss of his job in July 1987 is not a change in circumstances upon which the original award or the money judgment of April 1, 1987 was based. The loss of employment occurred subsequent to both events. The loss of a job, like the failure to receive a bonus, may go to plaintiff's ability to pay the judgment, but it is not a proper basis upon which to change the amount of the original award.

Finally, plaintiff's argument that the decline in value of the Pleasant Grove home constitutes a change in circumstances upon which to modify the decree of divorce and the

subsequent judgment is also without merit. As noted above, the parties agreed on the valuation of the home at the time of the decree. Under Utah law, "[t]he marital estate should be valued as of the time of the divorce decree." *Berger v. Berger,* 713 P.2d 695, 697 (Utah 1985); *see also Fletcher v. Fletcher,* 615 P.2d 1218, 1222–23 (Utah 1980); *Carlton v. Carlton,* 756 P.2d 86, 88–89 (Utah Ct.App.1988). The parties stipulated to a valuation of $150,000 at the time of divorce. At the time of the modification hearings, the value was deemed to be $119,000. The final selling price of $104,000 was partially due to plaintiff's lack of diligence in selling the Pleasant Grove home immediately after the decree. For plaintiff to come back later and ask the court to modify the property settlement on the basis of a decline in value occurring subsequent to the decree is to ask the court to overturn his bad bargain. In *Lea v. Bowers,* 658 P.2d 1213 (Utah 1983), the Utah Supreme Court stated:

> [W]hen a decree is based upon a property settlement agreement, forged by the parties and sanctioned by the court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction of the court where a property settlement agreement has been incorporated ***1253** into the decree, and the outright abrogation of the provisions of such an agreement is only to be resorted to with great reluctance and for compelling reasons.

Id. at 1215 (quoting *Land v. Land,* 605 P.2d 1248, 1250–51 (Utah 1980)).

[4] [5] Here, there are no such compelling reasons. Plaintiff received exactly what he bargained for, and the fact that his property declined in value is simply not a change in circumstances upon which the trial court may modify the divorce. For this court to rule otherwise would open a Pandora's box, permitting parties to a divorce to seek subsequent modification of property settlements every time the property they received in the decree changed in value. This we are unwilling to do. The principles of res judicata mandate that, absent compelling reasons, the parties to a property settlement set forth in a decree of divorce be able to rely on the finality of that judgment. We hold that subsequent changes in property value, without additional compelling reasons, do not constitute a substantial change in circumstances upon which the trial court may enter a modification of a decree of divorce. Thus, the order of December 7, 1987 was a clear abuse of discretion and we, accordingly, reverse and reinstate the awards of the original decree.

GREENWOOD and DAVIDSON, JJ., concur.

All Citations

784 P.2d 1249

Footnotes

1 Plaintiff's 1985 bonus, which he received in 1986, was part of the trial court's consideration in determining the awards in the divorce decree. The anticipated bonus for 1986, which would have been paid in 1987, was not part of the court's deliberations in determining distribution of the marital estate.

855 P.2d 250
Court of Appeals of Utah.

Janet Sue JOHNSON, Plaintiff and Appellee,
v.
Val Budge JOHNSON, Defendant and Appellant.

No. 910179–CA.
|
June 4, 1993.

Divorce action was brought. The Second District Court, Weber County, John F. Wahlquist, J., divorced parties, and wife appealed. The Court of Appeals, Jackson, J., 771 P.2d 696,affirmed in part, reversed in part, and remanded. The District Court, Stanton M. Taylor, J., awarded wife nonterminable alimony. Husband appealed. The Court of Appeals, Bench, J., held that: (1) it was impermissible to grant nonterminable alimony based on a finding that wife was entitled to share in the benefits of the other spouse's professional degree, and (2) trial court abused its discretion in not considering the retirement benefits the wife would receive in award of alimony.

Vacated and remanded.

West Headnotes (9)

[1] **Divorce** Authority and Discretion of Trial Court
Divorce Spousal Support
Trial courts have broad discretion in making alimony awards, and appellate court will not upset trial court's alimony award so long as the court exercises its discretion within the appropriate legal standards.

Cases that cite this headnote

[2] **Divorce** Sexual relations, cohabitation, or remarriage
Alimony is presumed to terminate upon the remarriage of the receiving spouse. U.C.A.1953, 30–3–5(5).

Cases that cite this headnote

[3] **Divorce** Sexual relations, cohabitation, or remarriage
Trial court has discretion to make an award of alimony that would survive remarriage of receiving spouse, so long as trial court makes adequate and specific finding of fact justifying award and award complies with relevant legal principles governing alimony awards. U.C.A.1953, 30–5–5(5).

1 Cases that cite this headnote

[4] **Divorce** Grounds and Defenses in Determining Existence and Amount of Obligation
Divorce Sexual relations, cohabitation, or remarriage

"Assisting in the support" of spouse was permissible ground for an alimony award, but was not a sufficient reason, standing alone, to extend alimony payments beyond remarriage of receiving spouse given statutory presumption against awards continuing beyond remarriage. U.C.A.1953, 30–3–5(3).

Cases that cite this headnote

[5] **Divorce** ⬅ Extent of Time of Payments

Divorce ⬅ Licenses, education and degrees; compensating payments

It is legally impermissible to grant share of or interest in one spouse's professional degree or license to another spouse upon divorce; it is likewise impermissible to award nonterminable alimony on finding that one spouse is entitled to share in benefits of other spouse's professional degree or license.

2 Cases that cite this headnote

[6] **Divorce** ⬅ Extent of Time of Payments

Trial court abused its discretion by failing to expressly indicate whether future retirement benefits that would be received by wife were considered in making nonterminable alimony award.

2 Cases that cite this headnote

[7] **Divorce** ⬅ Power and authority of court

A trial court maintains continuing jurisdiction over alimony award and it can make future modifications as necessary. U.C.A.1953, 30–3–5(3).

1 Cases that cite this headnote

[8] **Divorce** ⬅ Modification

Where future change in circumstances is contemplated by trial court in divorce decree, occurrence of that change will not constitute a material change of circumstances sufficient to modify decree.

Cases that cite this headnote

[9] **Divorce** ⬅ Determination and findings

If a trial court knows that a party will be receiving additional future income, it should make findings as to whether such additional income will affect the alimony award.

1 Cases that cite this headnote

Attorneys and Law Firms

***250** C. Gerald Parker, Ogden, for defendant and appellant.

Stephen W. Farr, Ogden, for plaintiff and appellee.

Opinion

*251 Before BENCH, GARFF and JACKSON, JJ.

OPINION

BENCH, Judge:

Val Johnson appeals from an order of the trial court granting his ex-wife, Janet Johnson, alimony that is nonterminable, even upon her remarriage. He also challenges the alimony award in view of Mrs. Johnson's eligibility to receive substantial retirement benefits in the future. We vacate the alimony award and remand.

FACTS

A decree of divorce between the parties was entered in 1987. The decree provided that Mrs. Johnson be awarded alimony of $1,000 per month to continue for ten years or until she either remarries, cohabits, or dies. The decree also awarded child support to Mrs. Johnson in the amount of $648 per child per month. Mr. Johnson filed an appeal with this court seeking a reversal or adjustment of the property division and the alimony and child support awards. *See Johnson v. Johnson,* 771 P.2d 696 (Utah App.1989). The facts of this case, as outlined in the previous appeal, are as follows:

> The parties married in 1966, following Dr. Johnson's first year in medical school. Mrs. Johnson had a Bachelor's Degree in business. While he was in medical school, she worked, thereby supplying $14,000 to the marriage. He earned about $3,500 during that time. His parents paid for tuition and books. During his one-year internship, both worked. After 1970, she did not work outside the home. The parties have three children. After twenty years of marriage they separated, having enjoyed an affluent standard of living. They stipulated to an equal division of real and personal property, yielding $428,000 for her and $428,000 for him. Each party received over $200,000 of income-producing personal property.

Id. at 697. This court upheld the property division but reversed and remanded the alimony and child support awards for the entry of adequate findings. [1]

On remand, the trial court ordered that Mr. Johnson pay to Mrs. Johnson alimony in the amount of $2,250 per month. Of that sum, $250 was to terminate after four years and was for the purpose of assisting Mrs. Johnson in upgrading her employment skills. The remaining $2,000 of the alimony award was ordered to be permanent and would not terminate, even if Mrs. Johnson remarried. The trial court stated two reasons in support of the nonterminable alimony award. First, that the alimony was "to assist in the support of [Mrs. Johnson]," and second, to "further assist in allowing [Mrs. Johnson] to share in the benefits of [Mr. Johnson's] professional status."

The trial court also awarded to Mrs. Johnson one-half of Mr. Johnson's pension plan. The trial court made no findings as to how the alimony award might be affected when Mrs. Johnson became eligible to receive retirement benefits.

ISSUES

Mr. Johnson does not appeal the amount of the alimony award. Instead, he challenges the award in two particulars: First, did the trial court abuse its discretion in awarding Mrs. Johnson alimony that was nonterminable, even upon her remarriage? Second, did the trial court abuse its discretion in not providing that the alimony be reduced when

Mrs. Johnson reaches the age of fifty-nine and one-half, at which time she will be eligible to withdraw substantial retirement benefits?

STANDARD OF REVIEW

[1] Trial courts have broad discretion in making alimony awards. ***252** *Haumont v. Haumont,* 793 P.2d 421, 423 (Utah App.1990). We will not upset a trial court's award of alimony so long as the trial court exercises its discretion within the appropriate legal standards. *Id.*

ANALYSIS

Alimony Beyond Remarriage

Mr. Johnson argues that the trial court abused its discretion by making the award of alimony nonterminable, even in the event that Mrs. Johnson remarries. We agree.

[2] **[3]** Alimony is presumed to terminate upon the remarriage of the receiving spouse. Utah Code Ann. § 30–3–5(5) (1989), states that "[u]nless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of the former spouse." The trial court therefore has the discretion to make an award of alimony that will survive the remarriage of the receiving spouse. In exercising this discretion, however, the trial court must make adequate and specific findings of fact justifying such an award. Such an award must also comply with the relevant legal principles governing alimony awards. *See Haumont,* 793 P.2d at 423.

[4] The court stated that it granted nonterminable alimony "to assist in the support of [Mrs. Johnson]." This is a permissible ground for an alimony award. *See Haumont,* 793 P.2d at 423 (purpose of alimony is to maintain the receiving spouse, as nearly as possible, in the same standard of living that existed during the marriage); *Munns v. Munns,* 790 P.2d 116, 121 (Utah App.1990 (same). Standing alone, however, it is not a sufficient reason to extend alimony payments beyond the remarriage of the receiving spouse. To allow nonterminable awards to be based on this justification alone would violate the statutory presumption against such awards, since every alimony award is necessarily based upon this justification.

The court further stated that it granted nonterminable alimony to allow Mrs. Johnson to "share in the benefits of [Mr. Johnson's] professional status." We interpret this to mean she was to share in his professional degree. Utah appellate courts, however, have consistently held that professional degrees and licenses are not property subject to division upon divorce. In fact, this court expressly stated in its earlier opinion in this case that a professional degree or license is not marital property to be distributed between the parties. *Johnson,* 771 P.2d at 697.

In *Peterson v. Peterson,* 737 P.2d 237 (Utah App.1987), the parties were married near the end of their undergraduate educations. By mutual consent, Mrs. Peterson entered the work force and continued to work while Mr. Peterson obtained his medical degree. When Mr. Peterson finished his medical degree, Mrs. Peterson quit work and remained in the home. The parties had been married for over twenty years when they were divorced. The trial court awarded Mrs. Peterson, among other things, $120,000 to be paid in $1,000 monthly installments "reflecting an ownership interest of [Mrs. Peterson] in [Mr. Peterson's] medical degree." *Id.* at 238.

This court examined the law from other jurisdictions regarding the treatment of professional degrees and licenses and concluded that "an advanced degree is or confers an intangible right which, because of its character, cannot properly be characterized as property subject to division between the spouses." *Id.* at 241. This court reasoned that:

> Property can be bought, sold, and devised. Bona fide degrees cannot be bought; they are earned. They cannot be sold; they are personal to the named recipient. Upon the death of the named recipient, the certificate commemorating award of the degree might be passed along and treasured as a family heirloom, but the recipient may not, on the strength of that degree, practice law or medicine. In this case, the court awarded the parties' home to Mrs. Peterson. But it might have awarded the home to Dr. Peterson or it might have ordered the home sold and the net proceeds divided. ***253** The court had no such alternatives with the medical degree, precisely because the degree is not property.

Id. at 240; *see also Martinez v. Martinez,* 818 P.2d 538 (Utah 1991) (overturned award of equitable restitution based on medical degree); *Gardner v. Gardner,* 748 P.2d 1076, 1081 (Utah 1988) (benefit of wife's investment in husband was adequately reflected in a greater property settlement and higher alimony); *Rayburn v. Rayburn,* 738 P.2d 238 (Utah App.1987) (disparity in income due to license is adequately addressed under traditional alimony analysis).

[5] Inasmuch as it is legally impermissive to grant a share or interest of one spouse's professional degree or license to another spouse upon divorce, it is likewise impermissible to award nonterminable alimony on a finding that one spouse is entitled to share in the benefits of the other spouse's professional degree or license. Such an award is a de facto division of the professional degree or license.

We conclude that the trial court abused its discretion by violating applicable legal principles when it made Mrs. Johnson's alimony award nonterminable. We therefore vacate the trial court's award of nonterminable alimony and remand the case for entry of an order consistent with this opinion.

Retirement Benefits

[6] Mr. Johnson also claims that the trial court abused its discretion in awarding alimony that does not contemplate Mrs. Johnson's future eligibility to receive substantial retirement benefits. We agree.

In 1987, the trial court awarded one half of the parties' pension plan to each party. The division of the pension plan was not at issue in the first appeal and remains in force. In awarding alimony, the trial court made no findings with regard to Mrs. Johnson's future ability to withdraw income from the pension plan, and how this additional income would affect her financial condition and her ability to provide for her own needs.

[7] **[8]** We acknowledge that a trial court maintains continuing jurisdiction over alimony awards and can make future modifications as appropriate. *See* Utah Code Ann. § 30–3–5(3) (1989). However, where a future change in circumstances is contemplated by the trial court in the divorce decree, the fulfillment of that future change will not constitute a material change of circumstances sufficient to modify the award. "A change in circumstances reasonably contemplated at the time of divorce is not legally cognizable as a substantial change in circumstances in modification proceedings." *Dana v. Dana,* 789 P.2d 726, 729 (Utah App.1990); *see also Durfee v. Durfee,* 796 P.2d 713, 716 (Utah App.1990) (a material change in circumstances contemplated in the divorce decree cannot be the grounds for a future modification). Since the trial court in the instant case divided the pension plan between the parties, it was cognizant of Mrs. Johnson's ability to receive additional income in the future that would alter her financial condition and needs. Thus, under *Dana* and *Durfee,* Mrs. Johnson could argue that her receipt of retirement benefits was an anticipated event and the trial court considered it when making the alimony

award. Therefore, Mrs. Johnson's receipt of retirement benefits might not be considered a material change of circumstances.

[9] We do not believe it makes for good law or sound policy to have parties arguing years after the fact over what a trial court may or may not have considered when making an alimony award. Utah appellate courts have consistently required that trial courts make adequate findings on all material issues of alimony to reveal the reasoning followed in making the award. *See Rudman v. Rudman,* 812 P.2d 73, 76 (Utah App.1991); *accord Burt v. Burt,* 799 P.2d 1166, 1170 (Utah App.1990); *Throckmorton v. Throckmorton,* 767 P.2d 121, 124 (Utah App.1988). Consequently, if a trial court knows that a party will be receiving additional future income it should make findings as to whether such additional income will affect the alimony award. The court should therefore have considered how Mrs. Johnson's future receipt of retirement ***254** benefits would alter her future financial conditions and her ability to provide for her own needs. It then should have determined whether her future income would affect the alimony award.

If the future income from the pension plan is too speculative at the time of trial to anticipate the effect it will have on a receiving spouse's financial condition and needs, the court may, in its discretion, delay the determination of how the future income will affect the alimony award. However, the trial court must make findings indicating that the future income has not been considered in making the present award. Such findings will then allow the paying spouse to bring a modification proceeding at the appropriate time while satisfying the legal principles presented in *Dana* and *Durfee.*

We conclude that the trial court abused its discretion by failing to expressly indicate whether the future retirement benefits were considered in making the alimony award. We therefore remand this issue for entry of adequate findings.

CONCLUSION

We vacate the alimony award and remand for findings and an order consistent with this opinion.

GARFF and JACKSON, JJ., concur.

All Citations

855 P.2d 250

Footnotes

1 This court remanded the alimony award for the entry of findings consistent with the following factors:
(1) Mrs. Johnson's needs; (2) her ability to provide for herself, including an earning capacity baseline; (3) elimination of the ten-year cap on alimony; (4) a separate finding concerning income which will flow to both parties from the respective properties awarded; and (5) an alimony award consistent with those findings.
Johnson, 771 P.2d at 700.

217 P.3d 733
Court of Appeals of Utah.

James Lewis KIMBALL, Petitioner, Appellant, and Cross-appellee,
v.
Merae KIMBALL, Respondent, Appellee, and Cross-appellant.
Merae Kimball, Plaintiff and Appellee,
v.
James Lewis Kimball, Defendant and Appellant.

No. 20060263–CA.
|
Aug. 27, 2009.

Synopsis

Background: Husband brought action for divorce. The Third District, Salt Lake Department, 024901659, Joseph C. Fratto Jr., J., entered judgment of divorce, but ruled in wife's favor with respect to husband's subsidiary claims seeking equitable distribution of wife's stock, which had been inherited, and attorney fees. Wife subsequently filed action against husband, alleging fraud and unjust enrichment for his forgery and alteration of wife's checks. The trial court dismissed fraud claim but ruled in wife's favor on unjust enrichment claim. Both parties appealed from final rulings in divorce and unjust enrichment actions, which appeals were consolidated for review.

Holdings: The Court of Appeals, Orme, J., held that:

[1] neither husband nor wife satisfied their obligation to marshal evidence relative to their respective challenges to trial court's factual findings;

[2] wife's stock was her sole and separate property that was exempt from equitable distribution;

[3] evidence was sufficient to support finding of contempt against wife for her failure to comply with visitation and custody order;

[4] evidence was sufficient to support trial court's factual finding that husband used money obtained from altered or forged checks for family purposes;

[5] trial court did not misallocate the burden of proof between the parties with respect to wife's unjust enrichment claim;

[6] evidence was sufficient to support unjust enrichment claim;

[7] wife was entitled to prejudgment interest on her award for unjust enrichment; and

[8] that husband's family assisted him in paying attorney fees was an inappropriate basis on which to deny his request for fee award.

Affirmed in part, reversed in part, and remanded.

West Headnotes (45)

[1] **Divorce**
Discretion of court in general
Divorce
Disposition of property

A trial court has considerable discretion concerning property division in a divorce proceeding, thus its actions enjoy a presumption of validity.

1 Cases that cite this headnote

[2] **Divorce**
Disposition of Property
Divorce
Disposition of Property
Divorce
Property valuation and distribution

An appellate court will not disturb a property award in divorce action unless it determines that there has been a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a

serious inequity has resulted as to manifest a clear abuse of discretion.

Cases that cite this headnote

[3] **Divorce**
Findings of court or chancellor

In a divorce action, the appellate court reviews the legal adequacy of findings of fact for correctness as a question of law.

Cases that cite this headnote

[4] **Divorce**
Findings of court or chancellor

A challenge to the sufficiency of the evidence on appeal in a divorce action concerns the trial court's findings of fact, and those findings will not be disturbed unless they are clearly erroneous.

7 Cases that cite this headnote

[5] **Divorce**
Findings of court or chancellor

A trial court's factual determinations in a divorce action are clearly erroneous only if they are in conflict with the clear weight of the evidence, or if the reviewing court has a definite and firm conviction that a mistake has been made.

11 Cases that cite this headnote

[6] **Divorce**
Findings of court or chancellor

In a divorce action, the appellate court reviews the legal sufficiency of factual findings and examines the conclusions of law arising from those findings under a correction-of-error standard, according no particular deference to the trial court.

2 Cases that cite this headnote

[7] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

Burden of proof questions typically present issues of law that an appellate court reviews for correctness.

Cases that cite this headnote

[8] **Appeal and Error**
Findings of fact and conclusions of law

Appeal and Error
Questions of Fact on Motions or Other Interlocutory or Special Proceedings

When reviewing a rule 11 ruling, the trial court's findings of fact are reviewed under a clearly erroneous standard, and its ultimate conclusion that rule 11 was violated and any subsidiary legal conclusions are reviewed under a correction of error standard. Rules Civ.Proc., Rule 11.

2 Cases that cite this headnote

[9] **Appeal and Error**
Refusal to vacate

The appellate court will generally reverse a trial court's denial of a motion to set aside the judgment only if the court has exceeded its discretion. Rules Civ.Proc., Rule 60(b).

Cases that cite this headnote

[10] **Appeal and Error**
Vacating Judgment or Order

Rulings on a motion to set aside the judgment are rarely vulnerable to attack, and the appellate court grants broad discretion to trial court's rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review; of course, if the trial court's ruling is entirely based on legal grounds, the ruling will be reviewed for correctness.

Cases that cite this headnote

[11] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

Whether a trial court properly determined that a party is entitled to prejudgment interest presents a question of law that is reviewed for correctness.

1 Cases that cite this headnote

[12] **Divorce**

Discretion of court

A trial court's attorney fees award in divorce proceedings is reviewed for abuse of discretion; to demonstrate that the trial court has acted within its allotted discretion, the trial court must base the award on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees.

1 Cases that cite this headnote

[13] **Divorce**

Initiating and prevailing party; partial success

Divorce

Appeal or review

In divorce actions where the trial court has awarded attorney fees and the receiving spouse prevails on the main issues, the appellate court generally awards fees on appeal.

2 Cases that cite this headnote

[14] **Divorce**

Findings of court or chancellor

Neither husband nor wife satisfied their obligation to marshal evidence relative to their respective challenges to trial court's factual findings entered in support of property division order and finding of contempt, in divorce action, and thus, trial court's findings of fact were accepted as valid, on the various issues where the marshaling burden was not met, and trial court's ultimate legal conclusions were reviewed in light of those findings.

3 Cases that cite this headnote

[15] **Appeal and Error**

Statement of evidence

In its classic application, marshaling the evidence serves a very important function in adding discipline and order to challenges to factual findings on appeal, precluding an unfocused allegation that the findings lack evidentiary support and requiring the appellate court to comb the record and see if that might possibly be true. Rules App.Proc., Rule 24(a)(9).

1 Cases that cite this headnote

[16] **Appeal and Error**

Statement of evidence

With respect to the appellate process of marshaling evidence necessary to challenge a trial court's factual findings, if there simply is no supportive evidence, counsel need only say so and the challenge will be well taken, as counsel is not expected to marshal the nonexistent; however, if there is clearly ample supportive evidence, counsel will properly forego pressing that challenge on appeal.

Cases that cite this headnote

[17] **Appeal and Error**

Statement of evidence

If there is some evidence to support a trial court's challenged factual finding, once that evidence is marshaled on appeal by the party challenging the finding, it is the challenger's burden to show the fatal flaw in that supportive evidence, and explain why the evidence is legally insufficient to support the finding.

11 Cases that cite this headnote

[18] **Appeal and Error**

Statement of evidence

No matter what contrary facts might have been found from all the evidence, in an appellant's process of marshaling the evidence necessary to challenge a court's factual findings, the appellate court's deference to the trial court's pre-eminent role as fact-finder requires the appellate court to take the findings of fact as its starting point, unless particular findings have been shown,

in the course of an appellant's meeting the marshaling requirement, to lack legally adequate evidentiary support.

5 Cases that cite this headnote

[19] **Appeal and Error**
Statement of evidence

When challenging factual findings on appeal, the challenging party must begin by undertaking the arduous and painstaking process of marshaling the evidence.

4 Cases that cite this headnote

[20] **Appeal and Error**
Statement of evidence

Marshaling evidence, for purpose of challenging factual findings on appeal, requires counsel for challenging party to extricate himself or herself from the client's shoes and fully assume the adversary's position and then present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists; after constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence, which must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

7 Cases that cite this headnote

[21] **Appeal and Error**
Statement of evidence

The marshaling of evidence requirement on appeal is not satisfied if parties just list all the evidence presented at trial, or simply rehash the arguments on evidence they presented at trial.

2 Cases that cite this headnote

[22] **Divorce**
Stocks, bonds, and other investments
Divorce
Gifts and inheritance

Wife's stock holdings were an inheritance that husband did not enhance, and parties did not commingle the proceeds with marital property, and thus, the stock was wife's sole and separate property that was exempt from equitable distribution upon divorce; wife's receipt of the shares of stock was a consequence of her father's death and her family's agreement, no act of husband enhanced the stock's value, and proceeds were deposited into wife's account.

Cases that cite this headnote

[23] **Divorce**
Gifts and inheritance

Trial courts making equitable property division orders 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. West's U.C.A. § 30–3–5.

Cases that cite this headnote

[24] **Divorce**
Community property in general

Even in divorce actions in which a spouse's inherited property has not lost its identity as such, the court may nevertheless award it to the non-heir spouse in lieu of alimony and in other extraordinary situations when equity so demands.

Cases that cite this headnote

[25] **Divorce**
Gifts and inheritance
Divorce
Gifts, inheritance, and change of form

The question of whether a spouse's gift or inheritance has remained separate property that is thus exempt from equitable distribution of marital property upon divorce is highly fact intensive and the trial court is in the best position to weigh the evidence and make that determination.

1 Cases that cite this headnote

[26] **Child Custody**
Visitation

In divorce action, evidence was sufficient to support finding of contempt against wife for her noncompliance with child visitation order, specifically for failure to provide information about children's activities, removal of children from school, interference with parent-time, change of children's school enrollment, interference with phone calls, and prevention of visitation that should have occurred; factual findings in support of contempt were accepted as true given wife's failure to marshal evidence on appeal.

1 Cases that cite this headnote

[27] **Contempt**
Nature and form of remedy

A contempt issue is a collateral matter and, as long as the complaining party presents a proper affidavit, a trial court is justified in considering the issue without undue regard for procedural niceties.

Cases that cite this headnote

[28] **Divorce**
Testimony of Parties, and Corroboration

Evidence was sufficient to support trial court's factual finding that husband used money obtained from altered or forged checks for family purposes, in divorce action, where, although evidence consisted of husband's testimony, trial court's factual findings based on such testimony were not clearly erroneous as to require trial court to set aside testimony. Rules Civ.Proc., Rule 52(a).

4 Cases that cite this headnote

[29] **Divorce**
Presumptions and Burden of Proof

Trial court did not misallocate the burden of proof between the parties with respect to wife's unjust enrichment claim against husband incident to divorce; although wife's counsel indicated that husband did not support his self-serving testimony with any proof, trial took its normal course with wife presenting her case, including asking husband relevant questions regarding his self-serving statements and husband having the opportunity to present his defense.

Cases that cite this headnote

[30] **Divorce**
Dissipation, Secreting and Waste; Recapture

Evidence was sufficient to establish that a benefit was conferred upon husband in altering or forging checks in wife's name, thus supporting unjust enrichment claim incident to divorce action; husband's testimony regarding his use of proceeds from altered or forged checks was not corroborated by any credible evidence, bank records did not show that such proceeds were deposited in the household account as would be expected, if the funds were to be expended to support the family, at least for the altered checks and those made payable to husband or "cash," the proceeds were not used to financially support the family, and husband took money to which he was not entitled.

1 Cases that cite this headnote

[31] **Divorce**
Scope and extent in general

Issues concerning trial court's denial of husband's motion to set aside judgment and his statute of frauds and collateral estoppel defenses, in addition to wife's request for rule 11 sanctions, were inadequately briefed by the respective parties, on appeal in divorce action, and thus, Court of Appeals declined to address the claims on appeal.

Cases that cite this headnote

[32] **Interest**
Particular cases and issues

Wife was entitled to prejudgment interest on her award for unjust enrichment relative to husband's conduct in altering and forging wife's name to cash checks; prejudgment interest awarded was based on a fixed, readily ascertainable amount because the dollar amount written on each check established the amount of the loss that could be calculated with mathematical accuracy and fixed as of a definite time based on the date written on each check.

2 Cases that cite this headnote

[33] **Interest**

Prejudgment Interest in General

Prejudgment interest may be awarded to provide full compensation for actual loss.

1 Cases that cite this headnote

[34] **Interest**

Liquidated or unliquidated claims in general

Facts underlying equitable claims typically do not support an award of prejudgment interest because, in most equitable cases, the damages are not readily calculable to a mathematical certainty.

2 Cases that cite this headnote

[35] **Interest**

Liquidated or unliquidated claims in general

Prejudgment interest may be proper when the loss has been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages.

1 Cases that cite this headnote

[36] **Interest**

Demand for interest

Wife's award of prejudgment interest in an unjust enrichment action, stemming from husband's conduct in forging and altering wife's checks, was appropriate even absent a specific request by wife, where trial court's factual findings included a detailed listing of each check on which the principal award was based and then separately listed and calculated the prejudgment interest on each amount.

2 Cases that cite this headnote

[37] **Interest**

Demand for interest

A party is not required to request prejudgment interest prior to judgment because the interest issue is injected by law into every action for payment of past due money.

1 Cases that cite this headnote

[38] **Divorce**

Attorney fees and costs

That husband's family assisted him in paying attorney fees incurred in divorce proceeding was an inappropriate basis on which to deny his request for attorney fee award, thus requiring remand for trial court to evaluate the husband's personal ability to pay based on his income, assets, and expenses, taking into account money expected to be earned or distributed in light of the divorce decree.

1 Cases that cite this headnote

[39] **Divorce**

Financial condition and resources in general

Divorce

Attorney Fees

When reviewing requests for attorney fees in divorce proceedings, both the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion; however, the trial court's award or 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.

6 Cases that cite this headnote

[40] **Divorce**

Financial condition and resources in general

raised, are whether Wife's stock proceeds that were originally deposited into joint accounts but later transferred to Wife's individual account retained their nature as separate property; whether prejudgment interest was appropriate on the unjust enrichment award, which award was calculated based on canceled checks showing both a date and the amount; and whether the trial court erred in refusing to award attorney fees to Husband when it reasoned that Husband had no financial need because his family had already paid his attorney fees. Except for the attorney fees determination, we affirm the trial courts' various rulings in the two actions.

BACKGROUND

¶ 2 On March 18, 2002, after being married to Wife for a little over fifteen years, Husband sought a divorce. The August 7, 2003 decree of divorce dissolved the parties' marriage. When the matter ultimately went to trial, the main issues remaining involved whether money obtained after the sale of Wife's stock was separate property and whether Husband was entitled to an award of attorney fees. The trial court determined both matters in Wife's favor. Wife filed a fraud and unjust enrichment action against Husband on February 7, 2003, claiming that Husband altered the amounts of, and forged Wife's name on, certain checks, and that Husband was unjustly enriched thereby. [2] At trial, the court dismissed the fraud claim against Husband but ruled in Wife's favor on the unjust enrichment claim. Both parties appeal from the trial court's final rulings in the divorce and unjust enrichment actions. The record is extensive. We discuss the relevant factual findings from both proceedings doing our best—believe it or not—to be as succinct as possible.

I. Wife's Stock

A. Wife's Receipt of the Stock

¶ 3 Wife's father formed Utah Bearing and Fabrication, Inc. (the Corporation). After her father's death in 1993, Wife, her mother, and her siblings reached an arrangement whereby Wife received 1005 shares of the Corporation's stock, which the Corporation repurchased for $2,500,000 in 1995. Under the terms of the sale, "[Wife] received a down payment of $500,000 during March of 1995, and a ten year trust deed note for $2,000,000 payable at the rate of $25,335.15 per month." Wife received the scheduled monthly payments through June 1997. During July 1997, she received the remaining balance owed, $1,697,039.70. Mindful of the family origins of the stock proceeds, the trial court characterized the money Wife received ***739** from the stock transaction as an "inheritance."

B. Separate Property that Was Not Commingled

¶ 4 Even though Wife used some of the stock proceeds for family purchases, and even though some of the stock proceeds at times were deposited into the parties' joint accounts, the trial court determined that Wife's actions as a whole manifested an intent to keep her stock proceeds as separate property. Wife also opened and used an individual account with Fidelity Investments to hold some of the stock proceeds. Wife "filed an individual tax return for 1998 and reported all earnings ... from the Fidelity Account." While during "1996 and 1997[ ] the trust deed monthly payment[s were] deposited in the parties' joint account," Wife's practice was to later transfer some of that money to her individual Fidelity account. The trial court accordingly characterized the joint account as "conduits" not "repositories" for her inheritance. While acknowledging that the money may have had a marital character while in the joint accounts or when used to purchase family items, the trial court determined that when the funds were removed from the joint accounts "they resumed their character as [Wife]'s inherited funds and as such they became the sole and separate property of [Wife]." The trial court viewed the stock proceeds as readily traceable, and further determined that "[t]o the extent ... inherited funds were placed in [other] joint accounts," such placement "was done as a convenience and did not have the legal, the factual or the intended legal [e]ffect of either commingling the funds or making them marital property."

¶ 5 Based on these facts, the trial court found that "[e]very act of [Wife] manifested her intent that her inheritance be handled separately" when the "inheritance was placed in a separate account accessible through the writing of checks by [Wife] only"; the "inherited funds were placed in the Fidelity Account that was in [Wife]'s name at all times"; and the parties' "[j]oint accounts were used as conduits for [Wife]'s inherited funds, not as repositories in which they became commingled."

C. Husband's Claimed Enhancement

¶ 6 When Wife received the first offer for her stock, the amount proposed was $1,700,000. Husband claims he discouraged acceptance of the offer. As mentioned above, Wife ultimately sold her stock for considerably more, namely $2,500,000. The trial court determined that "[Husband] did

not enhance [Wife]' s inheritance," finding that "[n]o act of [Husband] increased the [number] of shares of the Family Business that [Wife] received, caused [Wife]'s holdings in the Family Business to have greater value or resulted in [Wife] receiving a greater price for her holdings." It reasoned that "[Husband's] efforts ... were to at best encourage seeking brief replacement stock; but there is no evidence that his efforts directly resulted in a greater price being paid, or that the stock had a greater value because of his efforts."

II. Husband's Dishonest and Questionable Actions

¶ 7 In the divorce proceeding, the trial court found that "[Husband], without authorization, forged [Wife]'s name on Fidelity Account checks totaling $142,467 made payable to himself or [to] 'cash' that he converted to cash." While claiming that he used the money "for family purposes," Husband did not disclose the transactions to Wife at the time, did not at any time tell Wife how he used the funds, and did not provide an accounting of how the funds were spent. The trial court found that "[Husband] did not substantiate his testimony by producing receipts, cancelled checks or other documentation." Husband additionally, "without authorization, altered 6 checks given to him by [Wife] by increasing them from $1,000 to $4,000" and these "alterations reduced [Wife]'s balance in the Fidelity Account [by] $18,000 more than [Wife] intended when she wrote the checks." Husband also did not substantiate his claim that he used the $18,000 for family expenses. In making its ruling on the altered checks, however, the trial court found Husband's testimony credible and determined that "[i]t ***740** [wa]s reasonable that the money so obtained by [Husband] was used for family purposes for the benefit of all members of the family, including [Husband]." The trial court further determined that "[Husband] should not be punished in this [divorce] proceeding" for altering or forging the checks at issue.

¶ 8 The trial court additionally found that Husband misrepresented his income to Wife from 1998 to 2001, apparently overstating his productivity as a salesman, and that he also "failed to disclose collection actions and lawsuits filed against him." Further, Husband represented to Wife that a Suburban, a vehicle the parties needed to acquire following an accident, could be purchased entirely with insurance proceeds. Husband then "forged [Wife's] name on a $30,510.95 check drawn on the Fidelity Account and made payable to Larry H. Miller Bountiful to pay for the ... Suburban." This "check was returned by Fidelity Investments marked 'signature does not match.' " Husband later obtained a loan from Zions Bank because the insurance proceeds did not cover the full price of the Suburban, without informing Wife of the loan. Husband also did not tell Wife that he signed her name to checks, drawn on the Fidelity account, to make payments on the Zions loan. Further, during December 2000, Husband represented on a credit application that he made $60,000 per month while his income from 1998 to 2000 was inconsequential, if he earned anything at all. He claims that this was an error on his application, which was supposed to reflect an income of $60,000 per year. [3]

¶ 9 In the unjust enrichment action, the trial court found that Husband denied acting wrongly in altering or signing Wife's name to checks and instead Husband insisted "that he acted consistent with his role as manager of family finances." Husband claimed that he had Wife's "tacit approval" to sign her name to the checks or to alter the amounts of the checks. Husband also continued to state that he used the money for "family purposes." The trial court found that his claim that the money was used for family purposes was "not corroborated by any credible evidence." It further determined that "[his] actions constitute[d] theft and forgery and he deceived [Wife] into believing he was working" and that "[he] took improper advantage of his managerial position" within the family. Finally, the court determined that none of the proceeds obtained from the altered checks, or checks made payable to Husband or to "Cash" that Husband signed in Wife's name, were used for family purposes.

¶ 10 The trial court further concluded that Husband was unjustly enriched from the money taken to which he was not entitled because he "received a benefit," "had knowledge of the benefit," and "committed misleading acts that would make it inequitable for him to retain the proceeds that he received from altering and forging [Wife]'s checks." The trial court awarded Wife a judgment in the amount of $56,800; "pre-judgment interest from the date of each check, if visible," in an amount totaling $34,392.30; and "post-judgment interest at the legal rate."

III. Wife's Contempt in the Divorce Proceeding

¶ 11 While financial issues were the main event in this complex case, the trial court found that Wife was in violation of the court's orders when she "failed to provide information about the children['s] activities, removed the

children from school, interfered with parent-time, changed the children's enrollment, interfered with phone calls and prevented visitation that should have occurred." The court accordingly determined that Wife was in contempt because "[she] knew of the order applicable to these matters, had the ability to comply and willfully and knowingly refused to do so." "[T]o purge the contempt," the court ordered that Wife pay Husband $3500.

IV. Attorney Fees in the Divorce Proceeding

¶ 12 The trial court determined that attorney fees as a whole "got out of hand" and *741 were not reasonable. Specifically, with regard to Husband, the trial court found that "[Husband] ha[d] not prevailed on the main issues of this case[,] which were his claims for one-half of [Wife]'s inheritance and enhancement of [Wife]'s inheritance." It further found that the attorney fees sought by Husband were unreasonable and unnecessary as a whole, but it was unable to pinpoint exactly which fees were unnecessary or unreasonable. Additionally, with regard to his fees incurred in "child custody and related matters," the trial court found that Husband had no financial need because his family paid his fees, and he was not "legally" required to reimburse his family. Relying on the fact that Husband did not prevail on the main issue and its conclusion that the fees were not reasonable or necessary, it declined to award Husband any attorney fees. The trial court also declined to award Wife attorney fees because "she ha[d] no financial need" and Husband did not have the "ability to pay" such fees.

ISSUES AND STANDARDS OF REVIEW

[1] [2] [3] ¶ 13 First, Husband claims that the trial court, in the divorce action, abused its discretion in determining that the proceeds from the sale of Wife's stock were Wife's sole and separate property, averring that the proceeds were not an inheritance, were commingled, and were enhanced by his actions. " 'A trial court has considerable discretion concerning property [division] in a divorce proceeding, thus its actions enjoy a presumption of validity.' " *Jensen v. Jensen*, 2009 UT App 1, ¶ 6, 203 P.3d 1020 (quoting *Elman v. Elman*, 2002 UT App 83, ¶ 17, 45 P.3d 176) (alteration in original) (additional internal quotation marks omitted). On appeal, we therefore "will not disturb a property award unless we determine that there has been a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." *Id.* (citation and internal quotation marks omitted). Further, "[w]e review the legal adequacy of findings of fact for correctness as a question of law." *Id.*

[4] [5] [6] ¶ 14 Second, Wife, in her cross-appeal, challenges the sufficiency of the evidence to support the trial court's factual findings in the divorce proceeding pertaining to the issues of whether Husband used the money obtained from the forged or altered checks for family purposes and whether Wife was in contempt of court for failing to follow a visitation order. "A challenge to the sufficiency of the evidence concerns the trial court's findings of fact. Those findings will not be disturbed unless they are clearly erroneous." *Cummings v. Cummings*, 821 P.2d 472, 476 (Utah Ct.App.1991). A "trial court's factual determinations are clearly erroneous only if they are in conflict with the clear weight of the evidence, or if this court has a 'definite and firm conviction that a mistake has been made.' " *Id.* (citation omitted). We review the legal sufficiency of factual findings, *see Jensen*, 2009 UT App 1, ¶ 6, 203 P.3d 1020, and "examine the conclusions of law arising from those findings under a correction-of-error standard, according no particular deference to the trial court." *Cummings*, 821 P.2d at 476.

[7] ¶ 15 Third, Husband contests the sufficiency of the evidence with regard to certain factual findings made in the unjust enrichment proceeding. In relation to this argument, Husband alleges that the trial court erred by inappropriately placing the burden of proof on him. Husband further contends that the trial court erred by failing to make findings of fact on his statute of limitations and collateral estoppel defenses and invites this court to rule on those issues as a matter of law. As indicated above, we review a trial court's factual findings under a clearly erroneous standard and the legal sufficiency of those findings, as well as the legal conclusions based on those findings, under a correction-of-error standard. *See Jensen*, 2009 UT App 1, ¶ 6, 203 P.3d 1020; *Cummings*, 821 P.2d at 476. Furthermore, "[b]urden of proof questions typically present issues of law that an appellate court reviews for correctness." *Martinez v. Media–Paymaster Plus*, 2007 UT 42, ¶ 41, 164 P.3d 384.

*742 [8] ¶ 16 Fourth, Wife alleges that the trial court erred in denying her rule 11 motion for sanctions. When reviewing a rule 11 ruling, "[t]he trial court's findings of fact are reviewed under a clearly erroneous standard[, and]

its ultimate conclusion that rule 11 was violated and any subsidiary legal conclusions are reviewed under a correction of error standard." *Griffith v. Griffith*, 1999 UT 78, ¶ 10, 985 P.2d 255.

[9] [10] ¶ 17 Fifth, Husband seeks reversal of the trial court's denial of his rule 60(b) motion. "We will generally reverse a trial court's denial of a rule 60(b) motion only where the court has exceeded its discretion." *Fisher v. Bybee*, 2004 UT 92, ¶ 7, 104 P.3d 1198. Rulings on "rule 60(b) motions are rarely vulnerable to attack. We grant broad discretion to trial court's rule 60(b) rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review." *Id.* Of course, if the trial court's ruling is entirely based on legal grounds, we will review the ruling for correctness. *See id.*

[11] ¶ 18 Sixth, Husband asks us to overturn the trial court's award of prejudgment interest in the unjust enrichment proceeding because Wife never requested prejudgment interest and the award of damages was on an equitable claim. Whether a trial court properly determined that a party is "entitle[d] to prejudgment interest presents a question of law which we review for correctness." *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171, 177 (Utah Ct.App.1993).

[12] [13] ¶ 19 And seventh, Husband challenges the trial court's denial of attorney fees and costs in the divorce proceeding, and also seeks attorney fees on appeal.

> We review a trial court's attorney fees award in divorce proceedings for abuse of discretion. To demonstrate that the trial court has acted within its allotted discretion, the trial court must base the award on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees.

Jensen v. Jensen, 2009 UT App 1, ¶ 7, 203 P.3d 1020 (citations and internal quotation marks omitted). "In divorce actions where the trial court has awarded attorney fees and the receiving spouse [prevails] on the main issues, we generally award fees on appeal." *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 11, 176 P.3d 476 (alteration in original) (citation and internal quotation marks omitted).

ANALYSIS

I. Challenges to the Trial Court's Factual Findings and Legal Conclusions in Both Proceedings

A. Failure to Marshal

[14] [15] [16] [17] [18] ¶ 20 Wife asserts that we should not consider Husband's challenges to the trial court's separate property ruling because Husband failed to marshal the evidence in support of the trial court's salient factual findings. Husband, on the other hand, asserts in his reply brief that he did not challenge the sufficiency of the evidence supporting the factual findings or raise any factual questions regarding the separate property issue, and that he therefore was not required to marshal the evidence. *See Jensen*, 2009 UT App 1, ¶ 8 n. 3, 203 P.3d 1020 ("Husband's arguments address the legal sufficiency of the findings themselves. As such, marshaling is not required."). At oral argument, however, Husband back-pedaled somewhat, indicating that he may have been required to marshal evidence to support the factual findings on commingling but that he really was just challenging the trial court's application of case law. He further asserted that to the extent he was required to marshal the evidence, he actually did—specifically with regard to the unjust enrichment and commingling issues.[4] At oral argument, Wife also asserted, in response to related questions by the panel, that she met her respective marshaling duty.[5]

*743 [19] [20] [21] ¶ 21 When challenging factual findings, the challenging party "must begin by undertaking the arduous and painstaking marshaling process." *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991).

> [T]he marshaling concept does not reflect a desire to merely have pertinent excerpts from the record readily available to a reviewing court. The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order,

> every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

Id. (emphasis in original). The marshaling requirement is not satisfied if parties just list all the evidence presented at trial, or simply rehash the arguments on evidence they presented at trial. *See Neely v. Bennett,* 2002 UT App 189, ¶ 12, 51 P.3d 724, *cert. denied,* 59 P.3d 603 (Utah 2002).

¶ 22 Except for Husband's challenges to the trial court's factual findings on the unjust enrichment issue and Wife's challenges to the trial court's finding that Husband used money from forged or altered checks for family purposes, both parties have failed to meet their respective marshaling duties on their various challenges to the factual findings or highly fact-sensitive legal analysis of the trial ***744** court. *See Chen v. Stewart,* 2004 UT 82, ¶ 20, 100 P.3d 1177 ("Even where the defendants purport to challenge only the legal ruling, as here, if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the defendants also have a duty to marshal the evidence."). Husband failed to meet his marshaling duty on the commingling and other separate property issues because he just reargued evidence supporting his position. While he did discuss the trial court's factual findings, he did not indicate what evidence supported those findings. Wife also wholly failed to marshal the evidence on the contempt issue as she neither summarizes any evidence that would support the trial court's salient findings nor claims the findings simply lack any evidentiary support whatsoever. We accordingly accept the trial court's findings of fact as valid, on the various issues where the marshaling burden was not met and review the trial court's ultimate legal conclusions in light of those findings. *See Martinez v. Media–Paymaster Plus,* 2007 UT 42, ¶ 19, 164 P.3d 384 ("[P]arties that fail to marshal the evidence do so at the risk that the reviewing court will decline, in its discretion, to review the trial court's factual findings."); *Beesley v. Harris (In re Estate of Beesley),* 883 P.2d 1343, 1349 (Utah 1994) ("Because [the appellant] has not properly challenged the district court's factual findings, we must presume that the evidence supports the findings and proceed to an examination of the court's 'conclusions of law and the application of that law in the case.' ") (citation omitted).

B. Wife's Stock Proceeds as Separate Property

[22] ¶ 23 Husband claims that the trial court abused its discretion in determining that the proceeds from Wife's stock were Wife's sole and separate property. He specifically challenges its legal determination that the stock proceeds were an inheritance that Husband did not enhance and that the parties did not commingle.

[23] [24] [25] ¶ 24 "[T]rial courts making 'equitable' property division pursuant to section 30–3–5 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[.]" *Mortensen v. Mortensen,* 760 P.2d 304, 308 (Utah 1988). But

> [c]ourts have considered inherited property as part of the marital estate when "the other spouse has by his or her efforts augmented, maintained, or protected the inherited or donated property, when the parties have *inextricably* commingled the property with marital property so that it has lost its separate character, or when the recipient spouse has contributed all or part of the property to the marital estate."

Schaumberg v. Schaumberg, 875 P.2d 598, 602 (Utah Ct.App.1994) (emphasis added) (quoting *Burt v. Burt,* 799 P.2d 1166, 1169 (Utah Ct.App.1990)). And "even in cases when the inherited property has not lost its identity as such, the court may nevertheless award it to the non-heir spouse in lieu of alimony and in other extraordinary situations when equity so demands." *Id.* "The question of whether a gift or inheritance has remained separate is highly fact intensive and the trial court is in the best position to weigh the evidence and make that determination." *Stonehocker v. Stonehocker,* 2008 UT App 11, ¶ 29, 176 P.3d 476.

¶ 25 Regardless of whether Husband is correct in asserting that Wife's stock proceeds were not an inheritance per se, the trial court nonetheless was correct in characterizing the stock proceeds as Wife's separate property. *See generally Salt Lake County v. Metro W. Ready Mix, Inc.,* 2004 UT 23, ¶ 21, 89 P.3d 155 (" '[A]n appellate court may affirm a trial court's ruling on any proper grounds, even though the trial court relied on some other ground.' To do so,

however, the facts established in the record must be sufficient to support the alternative ground.") (alteration in original) (citation omitted). The record and factual findings show that, pursuant to Wife's father's will, his shares in the family business were to be deposited into a certain trust, and that trust was "to be divided into two separate [t]rusts." Wife, her mother, and her siblings were the beneficiaries of the trusts, and they ***745** reached an agreement whereby they wanted to alter the amounts they received to give Wife's mother all the shares outright. Then, pursuant to the family agreement, Wife received 1005 shares of stock in the family business. Irrespective of whether Wife's shares were technically an inheritance,[6] they clearly were her separate property, as her receipt of the shares was a consequence of her father's death and her family's agreement. The intent of her father's will and the family's agreement was that she—not she and Husband—receive the stock. *See Mortensen*, 760 P.2d at 308 ("[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[.]") (emphasis added).

¶ 26 Further, the trial court's factual findings support its determination that Husband did not enhance the property. Husband argues that "[he] played a key role in negotiations over the purchase price of the stock and thereafter managed investment of the sale[']s proceeds." The trial court's factual findings, however, as well as Husband's description of his own actions, indicate that he just "encourage[d]" Wife to look at other offers or "initiated advice from his relatives and family friends regarding negotiations for the purchase price of the stock." The trial court found that "[n]o act of [Husband] increased the amount of shares ... or resulted in [Wife] receiving a greater price for her holdings." Moreover, while Husband claims that he managed all the family's finances, including the stock proceeds, and that such management enhanced and protected the stock's value, he provides no argument or information on what specific actions he took to enhance or protect the value of the stock proceeds.

¶ 27 Even if Husband encouraged Wife to decline the first offer and performed basic management of the family's money, these actions—even ignoring his forgeries, alterations, and misrepresentations—are not the type of active enhancement efforts contemplated by Utah's case law. *See Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987) (determining that the husband did not enhance the wife's inheritance when he only "urged [the wife] to take her inheritance in land rather than in cash"); *Kunzler v. Kunzler*, 2008 UT App 263, ¶ 19 & n. 5, 190 P.3d 497 (stating that the wife's performance of "domestic labors [that] enabled [the h]usband to ranch for longer periods of time without having to, for example, return home to launder his clothes" did not show that the wife enhanced the real property, and that even if an affidavit, which listed all the wife's labors and purported benefits she gave to the ranch, "had been properly admitted into evidence, [the w]ife's claims of assistance therein would not rise to the level present in *Elman* and *Dunn*," two prior cases where spousal enhancement was found), *cert. denied*, 199 P.3d 970 (Utah 2008); *Elman v. Elman*, 2002 UT App 83, ¶¶ 24, 26, 45 P.3d 176 (determining that a partnership's assets were enhanced by the wife's actions when she left private employment to allow the husband "to engage in partnership managing activities" and so that she could manage the household and marital properties, which properties' value increased substantially under her management and of which value the husband received half in the divorce decree); *Dunn v. Dunn*, 802 P.2d 1314, 1318 (Utah Ct.App.1990) (determining that a corporation was a marital asset because it "was founded and operated through the joint efforts and joint sacrifices of the parties" "and its assets accrued during the marriage"; the wife "performed bookkeeping and secretarial services without pay f[rom] the corporation"; and the wife's "efforts were necessary contributions to the growth of [the husband's] practice and the business"). Far more is necessary to actually enhance the value of a separately-owned asset, so as to convert it to marital property, than merely urging a spouse to seek other offers or generally performing ordinary maintenance of family finances.

***746** ¶ 28 Finally, we also affirm the trial court's determination that the stock proceeds, which were in Wife's individual Fidelity account and not used to purchase family items, were not inextricably commingled with marital funds. This is true even with respect to funds that passed through the joint accounts. As indicated by the trial court's factual findings, the majority of the stock proceeds were placed in Wife's own individual account, and Wife's actions manifested an intent to keep such property separate. While at times the monthly payments from the sale of her stock were deposited in joint accounts, the trial court's description of the accounts as "conduits" rather than "repositories" is apt and supports its determination that the money, while assuming a de facto marital character when present in the joint accounts or used to purchase family items, regained its separate nature when the remainder of the stock proceeds was taken out of those

joint accounts and deposited into Wife's individual account. Such funds clearly were not totally consumed by the family, did not lose their identity while in the joint account when they were not inextricably combined, and were not a gift from Wife to Husband or to the family when she removed such funds not designated for family purposes to her own individual account. We accordingly affirm the trial court's determination that the stock proceeds were Wife's sole and separate property and that "[Wife] should be awarded as her sole and separate property all funds that were in the Fidelity Account at the time of the parties' separation."

C. Wife's Contempt

[26] ¶ 29 Wife challenges the trial court's determination that she was in contempt of court for failing to follow its visitation order, alleging that there was insufficient evidence to support the findings of fact and that the issue of contempt was not even reserved for trial. As indicated above, Wife wholly failed to marshal the evidence in favor of the trial court's findings of fact on this issue, and we accordingly accept the trial court's findings as valid. *See supra* ¶ 22. The trial court found that "[Wife] failed to provide information about the children['s] activities, removed the children from school, interfered with parent-time, changed the children's enrollment, interfered with phone calls and prevented visitation that should have occurred." It further concluded that Wife's actions were in violation of the court's orders, of which Wife was aware and with which she "had the ability to comply and willfully and knowingly refused to do so." The trial court's findings and conclusions clearly support its contempt determination. *See generally Von Hake v. Thomas,* 759 P.2d 1162, 1172 (Utah 1988) ("As a general rule, in order to prove contempt for failure to comply with a court order it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally [7] failed or refused to do so. These three elements must be proven beyond a reasonable doubt in a criminal contempt proceeding, and by clear and convincing evidence in a civil contempt proceeding.") (citations omitted).

[27] ¶ 30 Further, as argued by Husband, a contempt issue is a collateral matter and as long as the complaining party presents a proper affidavit, a trial court is justified in considering the issue without undue regard for procedural niceties. *See Robinson v. City Court,* 112 Utah 36, 185 P.2d 256, 258 (1947) ("It is necessary, in all proceedings for contempts which are not committed in the presence of the court, in order to give the court jurisdiction, that an affidavit or affidavits be presented to the court stating the facts constituting contempt. A contempt proceeding is separate and apart from the principle action and in order for the court to acquire jurisdiction of the offense when committed, as here, it is necessary that an affidavit or initiating pleading be filed.") (citations omitted); Utah Code Ann. § 78B–6–302(2) (2008) [8] ("When the contempt is not committed in the immediate view and presence of *747 the court or judge, an affidavit or statement of the facts by a judicial officer shall be presented to the court or judge of the facts constituting the contempt."). As Wife does not challenge that a proper affidavit was filed, we conclude the contempt matter was properly before the trial court and affirm its ruling for the reasons discussed.

D. Husband's Use of Money from Forged or Altered Checks

[28] ¶ 31 Wife also alleges that there was insufficient evidence presented during the divorce trial to support the trial court's factual finding that Husband used the money obtained from checks he altered or forged for family purposes. She challenges the trial court's original factual findings and its denial of her post-trial motion to alter or amend those findings on the issue. In properly marshaling the evidence with respect to this issue, Wife points out that the trial court indicated, in making its factual findings, that the only evidence before it in the divorce proceeding regarding Husband's use of the money was Husband's self-serving testimony that he did indeed use the money for family purposes. The trial court noted in its ruling on Wife's post-trial motion that Husband had the "burden to show that he used the proceeds from forgery for family purposes" and that, in its discretion, "[t]he court may consider his testimony and give it the weight and credibility it deserves." The trial court clearly found Husband's testimony in the divorce proceeding credible on this point. We determine that its factual findings based on such testimony were not clearly erroneous. *See generally* Utah R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."); *Homer v. Smith,* 866 P.2d 622, 627 (Utah Ct.App.1993) ("Clearly, the fact-finder is in the best position to judge the credibility of witnesses [.]"), *cert. denied,* 878 P.2d 1154 (Utah 1994).

E. Unjust Enrichment

[29] [30] ¶ 32 Husband asks us to overturn the trial court's unjust enrichment ruling, alleging that there was insufficient

evidence to support its factual findings. Husband does marshal the evidence in support of the trial court's ruling and attempts to "ferret out [the] fatal flaw," *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991), by arguing that the trial court erroneously placed the burden of proof on him to show how the funds received from the forged or altered checks were used. He avers that the allegedly inappropriate findings of fact addressing Husband's use of the funds are all related to the trial court's ultimate conclusion that a benefit was conferred on him—a necessary element of an unjust enrichment claim, *see Desert Miriah, Inc. v. B & L Auto, Inc.*, 2000 UT 83, ¶ 13, 12 P.3d 580 ("In order to prevail on a claim for unjust enrichment, three elements must be met. First, there must be a benefit conferred on one person by another. Second, the conferee must appreciate or have knowledge of the benefit. Finally, there must be 'the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.' ") (citations omitted).

¶ 33 Husband's contention that the trial court inappropriately placed the burden of proof on him seems to arise from the way Wife's counsel phrased several of his questions at trial, i.e., what "proof" Husband had to support his self-serving testimony.[9] Our review, however, indicates that no inappropriate shifting of the parties' respective burdens occurred. Rather, the trial took its normal course with Wife presenting her case—including asking Husband relevant questions regarding his self-serving statements—and Husband having the opportunity to present his defense.

¶ 34 There is no doubt that Wife, as the plaintiff who claimed Husband was unjustly ***748** enriched, had the burden of proving each element of her unjust enrichment claim by a preponderance of the evidence. *See id.* ("The plaintiff must prove all three elements to sustain a claim of unjust enrichment."); *Hansen v. Hansen*, 958 P.2d 931, 934 (Utah Ct.App.1998) ("[T]he standard of proof generally applied in civil proceedings is the preponderance of the evidence standard."). At trial, Wife presented evidence in the form of canceled checks, which showed that Husband had altered the check amounts "to higher amounts" or signed Wife's name to several checks drawn on her individual account, many of which were made out to "Cash" or to Husband. Husband testified that he received the funds from those checks. When so many checks were forged or altered by Husband and made out to Husband or "Cash," and Husband admitted receiving the funds, the trial court could reasonably infer that Husband benefitted from the money he received from those checks.

¶ 35 As part of proving her case, it was Wife's prerogative to ask Husband how he used the cash received from the checks at issue in an attempt to establish more concretely, rather than just inferentially, whether or not Husband used the money for his own purposes and therefore benefitted from the altered or forged checks drawn on her account. Additionally, when Husband only provided his self-serving and inherently implausible testimony on the issue—i.e., that he used all funds from the forged or altered checks strictly for family purposes[10]—Wife was entitled to ask if he had other evidence to support such a statement to help undermine his credibility in the event he was unable to substantiate his testimony. *Cf. De Lane v. Moore*, 55 U.S. 253, 264, 14 How. 253, 14 L.Ed. 409 (1852) ("The rule of law is, that the best evidence must be given of which the nature of the thing is capable.... The withholding of that better evidence raises a presumption, that if produced, it might not operate in his favor.") (citation and internal quotation marks omitted). Asking such questions did not inappropriately switch the burden of proof but was an attempt by Wife to elicit additional testimony that would help prove her case and impeach Husband's credibility.

¶ 36 As part of his defense, once Wife presented evidence supporting her unjust enrichment claim, Husband needed to present evidence that tended to lessen the credibility or strength of Wife's evidence in order to prevent her from proving her case by a preponderance of evidence. *See Wightman v. Mountain Fuel Supply Co.*, 5 Utah 2d 373, 302 P.2d 471, 473 n. 5 (1956) (indicating that proof by a "[preponderance of the evidence] means the greater weight of the evidence, or as sometimes stated, such degree of proof that the greater probability of truth lies therein") (alteration in original) (citation and internal quotation marks omitted). When Husband only offered his self-serving testimony and was unable to specifically answer questions about how he used the money to benefit the family,[11] the court was in the best ***749** position to judge his credibility on this issue. It was free to infer from Husband's statements and demeanor either that Husband did not appear to be entirely forthcoming about his use of the money or that he appeared to be lying, which inferences would, of course, tend to lessen his credibility. *See Glauser Storage, LLC v. Smedley*, 2001 UT App 141, ¶ 24, 27 P.3d 565 (" 'Clearly, the fact-finder is in the best position to judge the credibility of witnesses and is free to disbelieve their testimony.' Even

where testimony is uncontroverted, a trial court is free to disregard such testimony if it finds the evidence 'self-serving and not credible.' ") (citations omitted).

¶ 37 On the other hand, the trial court also could, as it did in the divorce proceeding, take at face value Husband's testimony that all checks altered and forged were used for family purposes. In the unjust enrichment proceeding, however, which was more precisely focused on the question and on the issue of whether Husband should be held accountable for his actions, the trial court determined that Husband's testimony was not credible and that Wife's evidence preponderated over Husband's weaker evidence. [12] While Husband's lack of an explanation hurt his credibility and ultimately factored into the trial court's decision, contrary to Husband's assertion the trial court did not determine that Wife succeeded on her unjust enrichment claim only because Husband failed to meet an erroneously misplaced burden of proof regarding his use of the funds. [13] Instead, Wife's evidence and the trial court's factual findings show that the trial court determined Wife met her burden and proved the necessary elements of her unjust enrichment claim by a preponderance of the evidence.

¶ 38 As we conclude that the trial court did not misallocate the burden of proof between the parties, Husband has failed to establish his perceived "fatal flaw" in the trial court's factual findings. So, as explained above, we take the findings as our starting point in evaluating the unjust enrichment determination. The following factual findings support the trial court's determination that Husband received a benefit from the forged or altered checks drawn on Wife's individual account: (1) Husband's testimony regarding his use of proceeds from altered or forged checks "[wa]s not corroborated by any credible evidence"; (2) "bank records d[id] not show [that such proceeds were] deposit[ed] in the household account as would be expected, if the funds were to be expended to support the family"; (3) "[a]t least for the altered checks and those made payable to [Husband] or 'Cash', the proceeds were not used to financially support the ... family"; and (4) Husband took money to "which he was not entitled." Given these findings, we readily ***750** affirm the trial court's unjust enrichment ruling.

II. Inadequately Briefed Issues

[31] ¶ 39 We decline to address Husband's claims regarding his rule 60(b) motion and his statute of frauds and collateral estoppel defenses, and Wife's arguments regarding her request for rule 11 sanctions. *See generally State v. Carter*, 776 P.2d 886, 888 (Utah 1989) (indicating that appellate courts "need not analyze and address in writing each and every argument, issue, or claim raised"). These issues are inadequately briefed by the respective parties. *See Ball v. Public Serv. Comm'n (In re Questar Gas Co.)*, 2007 UT 79, ¶¶ 40, 43, 175 P.3d 545 (indicating that the court could have declined to address an argument because it was inadequately briefed when the "overall analysis of the issue [wa]s so lacking as to shift the burden of research and argument to the reviewing court") (citation and internal quotation marks omitted); *West Jordan City v. Goodman*, 2006 UT 27, ¶ 29, 135 P.3d 874 ("This court is not a depository in which the appealing party may dump the burden of argument and research. An adequately briefed argument must provide meaningful legal analysis. A brief must go beyond providing conclusory statements and fully identify, analyze, and cite its legal arguments.") (footnotes and internal quotation marks omitted).

III. Prejudgment Interest

[32] ¶ 40 Husband seeks reversal of the trial court's imposition of prejudgment interest on Wife's unjust enrichment award for two reasons. First, he argues that the prejudgment interest award was inappropriate "because [Wife]'s only claim at issue was unjust enrichment, the damages upon which require the assessment of a fact-finder" and which "were not mathematically certain." Second, he claims that Utah's jurisprudence foreclosed the trial court from awarding prejudgment interest when Wife did not specifically request such interest.

[33] [34] [35] ¶ 41 "Under Utah law, prejudgment interest may be awarded to provide full compensation for actual loss." *Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355, ¶ 24, 993 P.2d 222, *cert. denied*, 4 P.3d 1289 (Utah 2000). Husband correctly asserts that the facts underlying equitable claims typically do not support an award of prejudgment interest because in most equitable cases the damages are not readily calculable to a mathematical certainty. *Cf. Iron Head Constr., Inc. v. Gurney*, 2009 UT 25, ¶ 12, 207 P.3d 1231 ("[P]rejudgment interest is not permissible in cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of the trial. This includes cases in which the fact finder is left to determine the amount of damages from a mere description of the wrongs done or injuries inflicted.")

(citations and internal quotation marks omitted); *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 53, 210 P.3d 263 ("[L]osses that cannot be calculated with mathematical accuracy are those in which damage amounts are to be determined by the broad discretion of the trier of fact, such as in cases of personal injury, wrongful death, defamation of character, and false imprisonment.") (emphasis, footnote, and internal quotation marks omitted). However, solely "rel[ying] on the nature of the claim" to determine whether prejudgment interest is allowed "is misplaced." *Shoreline Dev., Inc. v. Utah County*, 835 P.2d 207, 211 (Utah Ct.App.1992). Instead, "prejudgment interest may be proper when 'the loss ha [s] been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages.' " *Iron Head Constr., Inc.*, 2009 UT 25, ¶ 11, 207 P.3d 1231 (alteration in original) (citation omitted). "[T]he standard focuses on the measurability and calculability of the damages." *Encon Utah, LLC*, 2009 UT 7, ¶ 52, 210 P.3d 263. We accordingly must analyze whether the particular facts of this case support awarding prejudgment interest on Wife's unjust enrichment award.

¶ 42 Wife presented evidence in the form of several canceled checks that had been forged by Husband and made payable to Husband or "Cash," many of which showed ***751** specific amounts and dates.[14] The trial court calculated its unjust enrichment award based on the dollar amounts written on the forged checks and determined its prejudgment interest award based on the checks that showed a definite amount and date. Accordingly, the prejudgment interest awarded was based on a fixed, readily ascertainable amount because the dollar amount written on each check established "the amount of the loss [that could be] calculated with mathematical accuracy" and "fixed as of a definite time" based on the date written on each check. *Iron Head Constr., Inc.*, 2009 UT 25, ¶ 11, 207 P.3d 1231 ("[P]rejudgment interest was appropriate where the injury and consequent damages are complete and [can] be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value.") (second alteration in original) (citation and internal quotation marks omitted). Further, even though the trial court exercised reasonable discretion to determine which checks should be included in the calculation, that does not foreclose a conclusion that the principal amount was readily quantifiable. *See Crowley v. Black*, 2007 UT App 245, ¶ 9, 167 P.3d 1087 (concluding that "[a]lthough the trial court determined which costs to include and which to exclude, this determination did not render the resulting damage award less 'measurable by facts and figures' " when the trial "court reviewed receipts and work orders" and was able "to ascertain both 'the amount due and the due date' ") (citations omitted). The trial court's prejudgment interest award on those amounts is, accordingly, sustainable.

[36] [37] ¶ 43 We also reject Husband's argument that the trial court erred in awarding prejudgment interest when Wife never specifically requested it. The prejudgment interest award was appropriate, even absent a specific request by Wife, given that a party is not required "to request prejudgment interest prior to judgment ... because the interest issue is injected by law into every action for payment of past due money." *Id.* ¶¶ 9–11. And the prejudgment interest awarded clearly did not result in a double recovery for Wife. *Cf. Shoreline Dev., Inc. v. Utah County*, 835 P.2d 207, 211–12 (Utah Ct.App.1992) (requiring the party to specifically request that prejudgment interest be included in the award in unjust enrichment cases because *when a jury hears the case*, uncertainty exists as to the basis of the jury's award and any prejudgment interest awarded by the trial court could result in a "risk of double recovery"). The trial court's factual findings included a detailed listing of each check on which the principal award was based and then separately listed and calculated the prejudgment interest on each amount. Therefore, based on the facts of this case, the prejudgment interest award was proper, and this is so despite the fact that Wife did not specifically request prejudgment interest.

IV. Attorney Fees

A. Attorney Fees in the Divorce Proceeding

[38] ¶ 44 The trial court determined that Husband was not entitled to an award of attorney fees—taking into account the fact that Husband did not prevail on the main issue[15]—because the "matter got out of hand," the fees were "neither reasonable nor necessary," and Husband had no need to pay certain fees when those fees had already been paid by his family and he was not "legally" required to repay his family. Husband argues that "[t]here is no sound analytical basis upon which a trial court can distinguish attorney [ ] fees and costs that are currently represented as a debt to his attorney from those represented as a debt to his parents, bank, or otherwise." He also contends that if the fees were not reasonable in some respect, the trial court should not have denied the award in its entirety but, instead, should have awarded the fees it determined ***752** to be reasonable. We agree with Husband in both respects.

[39] ¶ 45 When reviewing requests for attorney fees in divorce proceedings,

> [b]oth the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion. However, the trial court's award or 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.

Stonehocker v. Stonehocker, 2008 UT App 11, ¶ 10, 176 P.3d 476 (alteration in original) (citations and internal quotation marks omitted).

[40] [41] ¶ 46 In determining whether a spouse has a reasonable financial need, courts generally look to the requesting spouse's income, including alimony received as a result of a divorce decree; the property received via the property distribution award; and his or her expenses. *See, e.g., Child v. Child*, 2008 UT App 338, ¶ 8, 194 P.3d 205 (mem.) (affirming trial court's denial of attorney fees when "the trial court determined that Wife was not in need of such assistance, relying upon an earlier order which provided each party with '$18–20,000 ... from which to retain attorneys and pay costs' and upon each party receiving 'a substantial property distribution free and clear of debt' ") (omission in original), *rev'd on other grounds*, 2009 UT 17, 206 P.3d 633; *Davis v. Davis*, 2003 UT App 282, ¶ 15, 76 P.3d 716 ("Wife demonstrated a need to have some assistance with payment of her attorney fees given that her monthly expenses exceeded her income by over $700."); *Griffith v. Griffith*, 959 P.2d 1015, 1021 (Utah Ct.App.1998) (affirming trial court's decision not to award attorney fees when "the court noted that there was no financial need for fees as both parties were gainfully employed and had approximately equal post-divorce income"), *aff'd*, 1999 UT 78, 985 P.2d 255; *Larson v. Larson*, 888 P.2d 719, 726–27 (Utah Ct.App.1994) (affirming trial court's decision not to award attorney fees when the wife "receive[d] income by way of alimony in the amount of $3000 per month, and ha[d] a secured distribution of approximately $108,000 due to be paid to her" and "[t]he costs and attorney fees in question total[ed] $5,077.40"). Throughout the course of a divorce proceeding, if a spouse is in need of financial assistance to pay an attorney, he or she, in most cases, will incur debt to retain and maintain an attorney's services. Whether that debt is to an attorney, a bank, family, or a friend is not determinative of whether the spouse has a need, but the very existence of indebtedness to fund legal services may tend to show need.

[42] ¶ 47 Whether the other spouse is able to assist and should be held accountable for a portion of those fees, in light of the distribution of the marital estate, remain pertinent issues to be addressed. *Cf. Peterson v. Peterson*, 818 P.2d 1305, 1310 (Utah Ct.App.1991) ("Costs in divorce litigation are treated differently from other civil litigation because the costs of such litigation, whether taxable or nontaxable, will ordinarily be paid from the marital estate, which the court is equitably empowered to divide between the parties."). While considering whether a spouse has already paid fees, and the source of such money to pay those fees, may be factors in determining whether fees should be awarded, we hold that such facts are not determinative of the need issue. Rather, courts should evaluate the requesting spouse's personal ability to pay based on his or her income, assets, and expenses, taking into account money expected to be earned or distributed in light of the divorce decree. *Cf. Andrus v. Andrus*, 2007 UT App 291, ¶ 19, 169 P.3d 754 ("The trial court's findings regarding [the husband's] ability to pay attorney fees are similar to those regarding alimony in that the trial court has not adequately shown the steps it took in reaching its decision.... A correct calculation of his disposable income is an important step in determining [the husband's] ability to pay, so we therefore remand to the trial court for more specific and adequate findings.").

¶ 48 We accordingly remand this issue to the trial court to determine whether Husband was personally able to pay his attorney fees based on his income and expenses, and given the sums he will receive as a result of the divorce decree. While the court may also consider whether and how those fees ***753** were already paid, such payment should not be determinative of the issue—especially if Husband is expected to repay his family in due course, even if the family members are disinclined to commence a collection action to enforce such repayment.

¶ 49 The trial court in this case also based its determination that fees were not warranted on its conclusion that the fees were excessive in amount and therefore were not reasonable or necessary. Husband does not challenge the trial court's conclusion that the requested attorney fees were unreasonable but instead challenges the trial court's failure to take the next step and award fees in such amount as it deemed reasonable.

[43] [44] ¶ 50 We agree with Husband that a finding of unreasonableness does not end the attorney fees inquiry. *Cf. Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah Ct.App.1988) (affirming the trial court's determination that fees were not reasonable and its *reduction* of requested amount). If attorney fees are otherwise warranted, the trial court should then make factual findings showing why the requested amount should be reduced to some ascertainable, reasonable figure. *Cf. Martindale v. Adams*, 777 P.2d 514, 517–18 (Utah Ct.App.1989) ("Where the evidence supporting the reasonableness of requested attorney fees is both adequate and entirely undisputed, ... the court abuses its discretion in awarding less than the amount requested *unless* the reduction is warranted by one or more of the factors described in *Dixie State Bank v. Bracken*, 764 P.2d 985, 987–91 (Utah 1988). To permit meaningful review on appeal, it is necessary that the trial court, on the record, identify such factors and otherwise explain the basis for its sua sponte reduction.") (additional citations omitted) (emphasis in original).

¶ 51 Here, because the trial court also denied fees based on its conclusion that Husband had no need, the trial court likely believed it was unnecessary to go through the process of reducing the fees Husband had incurred to a reasonable, awardable level. In light of our reversal of the need decision, however, if on remand the trial court determines Husband does have a need for assistance in paying his attorney fees, it should then make factual findings showing why the requested fees should be reduced to the amount it deems reasonable based on the pertinent factors. *See generally Morgan v. Morgan*, 795 P.2d 684, 688 (Utah Ct.App.1990) ("Reasonable attorneys fees are not measured by what an attorney actually bills, nor is the number of hours spent on the case determinative in computing fees, ... [a] court may consider, among other factors, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.") (alteration and omission in original) (citation and internal quotation marks omitted).

B. Attorney Fees on Appeal

[45] ¶ 52 Husband further requests his attorney fees on appeal. " 'Generally, when the trial court awards fees in a domestic action to the party who then substantially prevails on appeal, fees will also be awarded to that party on appeal.' " *Leppert v. Leppert*, 2009 UT App 10, ¶ 29, 200 P.3d 223 (citation omitted). The trial court did not award attorney fees to Husband below, but we have held that such fees may have been warranted and remand for further consideration of the issue. Husband, however, has not substantially prevailed on appeal, as he only succeeded on the attorney fees issue. He is therefore not entitled to an award of attorney fees incurred on appeal.

CONCLUSION

¶ 53 Husband's challenge to the trial court's failure to make findings on his affirmative defenses and to its rulings on his 60(b) motion in the unjust enrichment proceedings, as well as Wife's argument that the trial court improperly denied her rule 11 motion for sanctions, are inadequately briefed. We accordingly affirm the trial court's rulings on those issues.

¶ 54 We conclude that the trial court, in the divorce proceeding, correctly determined ***754** that Wife's stock proceeds were separate property that was not commingled, given that the joint accounts were just a conduit for the stock proceeds and that Husband did not enhance the stock proceeds through his general recommendations regarding the sale of Wife's stock and his general handling of the marital funds. The trial court also properly determined that Wife was in contempt of court when she failed to obey certain visitation orders. The trial court did not improperly shift the burden of proof to Husband in the unjust enrichment action. Further, the prejudgment interest on Wife's unjust enrichment award is sustainable because the damages were fixed and definite in time and amount—conclusions about which there is not the typical uncertainty given that the trial was to the bench.

¶ 55 With regard to whether Husband was entitled to attorney fees incurred below, we reverse, as the trial court inappropriately determined that Husband had no need for assistance because Husband's family paid his fees. We accordingly remand to the trial court for a proper evaluation of whether Husband had a demonstrated need, in accordance with the framework set forth in this opinion. If on remand the trial court determines that Husband does indeed have such a need, it should make factual findings and adjust the requested fees to an amount it deems reasonable. Finally, as Husband did not substantially prevail on appeal, we do not award him his attorney fees on appeal. In sum, we affirm the trial courts' rulings in the two actions, excepting the attorney fees determination, which we remand for further consideration.

¶ 56 WE CONCUR: WILLIAM A. THORNE JR., Associate Presiding Judge and JUDITH M. BILLINGS, Senior Judge.

All Citations

217 P.3d 733, 637 Utah Adv. Rep. 6, 2009 UT App 233

Footnotes

1 The Honorable Judith M. Billings, Senior Judge, sat by special assignment pursuant to Utah Code section 78A–3–102 (2008) and rule 11–201(6) of the Utah Code of Judicial Administration.

2 This action was also filed against Wife's bank, with claims of breach of contract and improper payment on certain checks. Wife has not appealed the trial court's rulings on those issues.

3 His earnings for this time period were as follows: (1) 1998, $2391; (2) 1999, negative $61; (3) 2000, $600; (4) 2001, $1624. Other testimony at trial suggested that he had made as much as $60,000 per year for a certain number of years prior to 1998, which of course would be of no particular interest to a potential creditor three years later, when he earned a scant 1% of that amount.

4 As will be clear when footnote 5 is considered, the odds of successfully—but accidentally—marshaling the evidence when one did not recognize a duty to marshal are slim, indeed.

5 In light of the confusion evidenced in this case regarding when and how a party must engage in a marshaling analysis, and given the oft-expressed frustration of the bar with the marshaling requirement, we take this opportunity to clarify what marshaling really is. In its classic application, marshaling the evidence serves a very important function. It adds discipline and order to challenges to factual findings, precluding an unfocused allegation that the findings lack evidentiary support and requiring the appellate court to comb the record and see if that might possibly be true. Instead, the marshaling doctrine, now recognized in our rules, *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."), requires that counsel identify which particular findings are challenged as lacking adequate evidentiary support and then show the court why that is so. This can only logically be done by summarizing, or "marshaling," whatever evidence there is that *supports* each challenged finding. We emphasize that only the *supportive evidence* is legally relevant and is all that counsel should call our attention to. *See Neely v. Bennett,* 2002 UT App 189, ¶ 12, 51 P.3d 724 ("[A]n exhaustive or voluminous recitation of all the facts presented at trial, even if this recitation includes within its body the facts that support the challenged ruling, is not what is expected."), *cert. denied,* 59 P.3d 603 (Utah 2002).

If there simply is no supportive evidence, counsel need only say so and the challenge will be well-taken—counsel is not expected to marshal the nonexistent. If there is clearly ample supportive evidence, counsel will properly forego pressing that challenge on appeal. *See, e.g., Mountain States Broad. Co. v. Neale,* 783 P.2d 551, 553–54 (Utah Ct.App.1989) ("[T]he benefits of the [marshaling] requirement are demonstrated by the fact that Mountain States, after its careful review of the evidence, candidly concedes the adequacy of the evidence to support the findings as to all but five of its original claims[.]").

If there is some supportive evidence, once that evidence is marshaled it is the challenger's burden to show the "fatal flaw" in that supportive evidence, *West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah Ct.App.1991), and explain why the evidence is legally insufficient to support the finding. Examples of such legal insufficiency might include that testimony was later stricken by the court; that a document was used for impeachment only and had not been admitted as substantive evidence; that a document was not properly admitted because it did not qualify under the business record exception to the hearsay rule; and that testimony that seems to support a finding was recanted on cross-examination.

The pill that is hard for many appellants to swallow is that if there is evidence supporting a finding, absent a legal problem—a "fatal flaw"—with that evidence, the finding will stand, even though there is ample record evidence that would have supported contrary findings. After all, it is the trial court's singularly important mission to consider and weigh all the conflicting evidence and find the facts. No matter what contrary facts might have been found from all the evidence, our deference to the trial court's pre-eminent role as fact-finder requires us to take the findings of fact as our starting point, unless particular findings have been shown, in the course of an appellant's meeting the marshaling requirement, to lack legally adequate evidentiary support.

6 Notably, counsel indicated at oral argument that Wife paid inheritance tax on the stock proceeds.

7 While not specifically indicating that Wife "intentionally" disobeyed the trial court's order, such intent is readily inferred from the trial court's factual findings.

8 We cite to the current version of this section because the recent amendments do not affect our analysis or the issue as presented by the parties. *See* Utah Code Ann. § 78B–6–302 amendment notes (2008).

9 We note that most of the questions actually asked what "evidence" Husband had, rather than what "proof" Husband had; however, in Husband's counsel's objections to such questions, and in both parties' counsels' closing arguments on the subject, counsel discussed proof and the respective burdens.

10 Given Wife's consistent willingness to generously use her separate funds for family purposes of which she approved, there is no obvious reason why Husband would need to tamper with checks drawn on Wife's account for the sole purpose of providing for the family.

11 Of some initial concern, Husband insists that he had evidence at trial, in notebooks, that would have explained his use of certain checks, but that the trial court would not let him look through the notebooks. Indeed, at trial, Wife's counsel asked if Husband had evidence to show what he did with certain checks. Husband responded that he might have been "able to produce that evidence, if given sufficient time." He stated that "[he] just need[ed] to check other places in this notebook, if that would be allowed." He also stated that if he was required to present evidence "[i]n the next 30 seconds" that he would not have evidence to present and requested "a few minutes" to look through the notebooks. The trial court stated, "Let's move onto some other area. I'm not going to give him a few minutes to go through the notebooks." As this line of questioning continued, Husband repeatedly referred to his notebooks but was not given an opportunity to dig through them while on the stand.

We agree with Wife's counsel's assertion at oral argument that this was a proper course of action for the trial court to take when Husband was not prepared for trial and allowing him to look through the books would not necessarily have been productive. *See generally* Utah R. Evid. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."). We note that if Husband had had all the information in the notebook organized and tabbed so that he could have easily flipped to the documents he needed, the trial court undoubtedly would have reached the opposite conclusion. But, as Husband repeatedly requested "a few minutes" to search for evidence that might help, it does not appear that his notebook was so carefully organized and that he really was requesting an opportunity to undertake a rather unfocused fishing expedition.

12 Conceptually, it is easy to understand how the same judge in one proceeding may find a witness credible on a certain matter but find the same witness incredible on the same matter in a second proceeding in light of other evidence and testimony presented in that second proceeding. *Cf. State v. Murphy,* 92 Utah 382, 68 P.2d 188, 191 (1937) ("But it must be remembered that trials cannot be made mathematical or governed by exact patterns. The human element looms very large. Two trials over exactly the same issues between the same parties will vary greatly depending on counsel. Some latitude must be given to the personal element."). We note that in the divorce proceeding the trial court only had Husband's testimony regarding how the money was used and that Wife presented the issue to discredit Husband as a witness. The unjust enrichment proceeding, on the other hand, was specifically directed toward determining whether Husband was at fault for his actions and should be penalized, rather than evaluating whether Husband's dishonest behavior made him generally incredible as a witness.

13 While in closing argument Wife's counsel did state that Husband had the burden to prove how he used the funds, it is clear from the trial court's questions, in context, that the court understood counsel meant that once Wife proved Husband obtained the money from the altered checks that Husband, in his defense, needed to counter Wife's evidence by showing that his expenditure of the proceeds was for the family's benefit.

14 The dates on some checks were apparently illegible and the court did not award prejudgment interest on those checks.

15 We note that whether Husband prevailed is not dispositive as concerns an award of attorney fees in a divorce proceeding at the trial level. *See Jensen v. Jensen,* 2008 UT App 392, ¶ 29, 197 P.3d 117 ("Utah Code section 30–3–3 permits trial courts to award attorney fees in divorce proceedings to either party regardless of who prevails[.]").

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872 P.2d 1054
Court of Appeals of Utah.

Roy B. MOORE, Plaintiff,
Appellee, and Cross-Appellant,
v.
Lorna B. MOORE, Defendant,
Appellant, and Cross-Appellee.

No. 910174-CA.
|
April 6, 1994.

Former wife appealed from order of the Third District Court, Salt Lake County, Scott Daniels, J., which modified alimony award. The Court of Appeals, Billings, P.J., held that neither emancipation of parties' children nor wife's new income justified modification where both developments were contemplated by the parties at the time of the divorce decree.

Reversed and remanded.

West Headnotes (3)

[1] **Divorce**
Discretion of court

Divorce
Findings of court or chancellor

Court of Appeals will not overturn trial court's modification of divorce decree absent abuse of discretion or manifest injustice.

1 Cases that cite this headnote

[2] **Divorce**
Factors considered in general

Emancipation of parties' three children was not material change in circumstances justifying modification of alimony award where emancipation was anticipated at time of decree, which provided for alimony separate from child support and provided that child support would cease when children reached majority.

Cases that cite this headnote

[3] **Divorce**
Employment and wage or salary issues

Former wife's stable income was not change in circumstances justifying modification of alimony award where parties expected at time of decree that wife would return to teaching and earn the income which she now received.

3 Cases that cite this headnote

Attorneys and Law Firms

***1054** John Walsh, Salt Lake City, for defendant, appellant.

Clark W. Sessions, Salt Lake City, for plaintiff, appellee.

Before BILLINGS, P.J., and BENCH and DAVIS, JJ.

OPINION

BILLINGS, Presiding Judge:

Lorna B. Moore appeals from the trial court's order granting Roy B. Moore's petition to modify the parties' divorce decree. Principally, Mrs. Moore complains that the trial court erred in finding a substantial change in her material circumstances and in reducing her alimony award from $1050 per month to one dollar per month three years after the filing of the present action. Mr. Moore has filed a cross-appeal claiming the court erred in continuing alimony at $1050 ***1055** per month for three years. We reverse and remand for reinstatement of the original alimony award.

FACTS

The parties were married in Elko, Nevada, on March 25, 1964, and had three children during the course of their sixteen-year marriage. All three children have reached majority. In 1980, the parties entered into a stipulation and property settlement agreement, which became the basis for a divorce decree entered on December 23, 1980. At the time of the divorce, the parties had an adjusted gross income of $40,996, the majority of which was Mr. Moore's income as Mrs. Moore was employed part-time for five dollars an hour. At the time the decree was entered, the parties had discussed Mrs.

Moore's plan to recertify as a school teacher or to obtain a master's degree in sociology.

Pursuant to the decree, Mr. Moore was required to pay $1150 per month in alimony during the first year following the divorce and $1050 per month thereafter. Additionally, the divorce decree divided the parties' marital property and required Mr. Moore to pay $750 per month in child support. This support obligation ceased when all three children reached the age of majority.

In October 1989, Mr. Moore filed a petition for modification of the divorce decree asking that his alimony obligation be terminated. The trial court determined that a substantial change of material circumstances had occurred because the parties' children had become emancipated and Mrs. Moore then had a stable income. In its written findings, the court found that Mrs. Moore had a monthly income of $1373-the same amount she would have earned if she had been employed as a school teacher at the time of the divorce. Moreover, the court found that Mrs. Moore had reasonable monthly expenses of $2783.87. The court also determined that Mr. Moore's income had increased since the entry of the divorce decree from $40,000 per year to $120,000 per year. Based on these findings, the trial court granted Mr. Moore's request to modify the divorce decree and reduced alimony from $1050 per month to one dollar per month beginning November 1992. This appeal followed.

SUBSTANTIAL CHANGE OF MATERIAL CIRCUMSTANCES

[1] Mrs. Moore argues that the trial court erred in finding that a substantial change of material circumstances had occurred since the decree was entered, affecting the issue of alimony. This court will not overturn a trial court's modification of a divorce decree absent a clear abuse of discretion or manifest injustice. *Maughan v. Maughan*, 770 P.2d 156, 161 (Utah App.1989). This court must consider whether the findings of the trial court adequately support the determination that there has been a substantial change in the parties' material circumstances. In this regard, "the trial court must make findings on all material issues, and its failure to delineate what circumstances have changed and why these changes support the modification made in the prior divorce decree constitutes reversible error unless the facts in the record are clear, uncontroverted and only support the judgment." *Whitehouse v. Whitehouse*, 790 P.2d 57, 61 (Utah App.1990); *accord Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987). " 'On a petition for a modification of a divorce decree, the threshold requirement for relief is a showing of a substantial change of circumstances occurring since the entry of the decree and *not contemplated in the decree itself*.' " *Durfee v. Durfee*, 796 P.2d 713, 716 (Utah App.1990) (emphasis added) (quoting *Stettler v. Stettler*, 713 P.2d 699, 701 (Utah 1985)).

[2] In determining there had been a change in Mrs. Moore's circumstances, the trial court considered the emancipation of the three children to be a substantial change of material circumstances. We need not decide whether a child reaching majority constitutes a substantial, material change in circumstances as it certainly is a circumstance that was contemplated at the time the decree was entered. *See id.* at 713. The divorce decree provided that Mr. Moore would pay $750 per month in child support until the children ***1056** reached majority.[1] Moreover, the decree provided for permanent alimony separate from the child support. Therefore, the plain language of the divorce decree demonstrates the parties agreed that even once the children reached majority, Mr. Moore would continue to pay alimony.

The trial court further determined that Mrs. Moore's employment and stable income constituted a substantial change in material circumstances. However, the court in its own findings makes clear that this circumstance was also contemplated at the time the decree was entered. Although Mrs. Moore is currently employed and earns $1373.22 per month, in its findings of fact the court stated "[t]hat [Mrs. Moore's] income now is at or about what her income would have been at the time of the Decree of Divorce in 1980, had she been employed as a school teacher at that time."

[3] The fact that Mrs. Moore presently has a stable income cannot be considered a change in circumstances. The parties obviously contemplated that Mrs. Moore would earn approximately $1300 at the time the divorce decree was entered. Mrs. Moore's stable level of income was anticipated at the time of the divorce when the original alimony award was set. Thus, the court incorrectly determined that Mrs. Moore's present, stable income was a substantial change in her material circumstances.

In sum, the court's findings do not support a determination that a substantial change in material circumstances not contemplated at the time of the entry of the original decree has occurred. We therefore reverse the court's determination

of a substantial change in circumstances and remand for a reinstatement of the original $1050 alimony award. [2]

ATTORNEY FEES ON APPEAL

Mrs. Moore seeks an award of reasonable attorney fees incurred on appeal. " 'Ordinarily, when fees in a divorce were awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal.' " *Bell v. Bell*, 810 P.2d 489, 494 (Utah App.1991) (quoting *Burt v. Burt*, 799 P.2d 1166, 1171 (Utah App.1990)). Mrs. Moore was awarded attorney fees below and because she has prevailed on appeal she should be awarded reasonable attorney fees. We remand for determination of the amount of those fees.

CONCLUSION

We reverse the trial court's determination that there has been a substantial change of material circumstances not contemplated by the parties at the time of the divorce decree, and remand for reinstatement of the original $1050 alimony award. The trial court erred in determining that the emancipation of the parties' children was a substantial change in circumstances not contemplated by the parties at the time of the decree. Further, it is clear from the court's findings that Mrs. Moore's current salary was contemplated by the parties at the time the original decree was entered. Thus, no substantial change in material circumstances has occurred. Accordingly, we reverse and remand for the reinstatement of the original alimony award and for the assessment and award of reasonable attorney fees incurred in this appeal by Mrs. Moore.

BENCH and DAVIS, JJ., concur.

All Citations

872 P.2d 1054

Footnotes

1 "The period of minority extends in males and females to the age of eighteen years; but all minors obtain their majority by marriage." Utah Code Ann. § 15-2-1 (1992).

2 We do not consider the other issues concerning alimony raised in the appeal and cross-appeal because our holding that no substantial change of circumstances has occurred makes reaching these issues unnecessary.

790 P.2d 116
Court of Appeals of Utah.

Mary **MUNNS**, Plaintiff and Appellant,
v.
Lowell Shelley **MUNNS**,
Defendant and Respondent.

No. 880585–CA.
|
April 4, 1990.

Husband and wife were divorced by the First District Court, Box Elder County, Gordon J. Low, J. Wife appealed. The Court of Appeals, Garff, J., held that: (1) trial court did not abuse its discretion in dividing property in kind rather than ordering its sale and then awarding proceeds; (2) equitable division of property was not abuse of discretion; (3) award of $300 per month in alimony to 58–year-old wife who had no substantial employment history was not abuse of discretion; (4) however, providing for temporary alimony until age 62 was abuse of discretion, given wife's work history; (5) trial court did not abuse its discretion in requiring each party to pay his or her attorney fees; and (6) wife's appeal was not frivolous and would not support award of fees to husband for costs incurred on appeal.

Affirmed in part and reversed in part; remanded.

West Headnotes (11)

[1] **Divorce**
Discretion of court in general
Divorce
Disposition of Property

In making equitable orders dividing marital estate, court is permitted considerable discretion, which will not be disturbed so long as its exercise of discretion is in accordance with standards set by state's appellate courts.

4 Cases that cite this headnote

[2] **Divorce**
Distribution in kind
Divorce
Sale and distribution of proceeds

Awarding all property in kind rather than ordering its sale and then awarding proceeds was not abuse of discretion in divorce proceedings, particularly given parties' hostility toward each other and their failure to cooperate.

1 Cases that cite this headnote

[3] **Divorce**
Weight and sufficiency
Divorce
Valuation, Division or Distribution of Particular Property or Interests

Evidence was sufficient to support trial court's valuations of marital property in making in kind distribution in divorce proceeding; court ordered further appraisals, personally inspected property and made specific written findings as to value of each item of property.

Cases that cite this headnote

[4] **Divorce**
Weight and sufficiency

Failure of court to accept one party's proposed valuation of property in divorce proceeding is not abuse of discretion.

Cases that cite this headnote

[5] **Divorce**
Notes and payment over time; interest
Divorce
Other particular and multiple debts

Trial court did not abuse its discretion in allowing husband to pay off $9,000 judgment, entered to balance distribution of marital assets, over period of two years, where in allocating property, trial court granted debt-free properties to wife, but awarded properties heavily encumbered with debt to husband; court indicated it was concerned with husband's ability to make mortgage payments on farm property along with his other, court-ordered obligations.

1 Cases that cite this headnote

[6] **Divorce**
Relative needs and abilities to pay in general
Divorce
Earnings; earning capacity

In setting award of alimony, trial court must consider financial condition and need of receiving spouse, ability of receiving spouse to produce sufficient income for him or herself, and ability of responding spouse to provide support.

2 Cases that cite this headnote

[7] **Divorce**
Earnings; earning capacity
Divorce
Expenses and debts in general
Divorce
Age of parties

Trial court did not abuse its discretion in setting alimony award at $300 per month for wife in her late fifties, who had not worked outside home during marriage except for some minor part-time work in school lunch program, but was capable of employment; husband earned $13.90 per hour, but had been ordered to pay all marital debts, which were substantial.

4 Cases that cite this headnote

[8] **Divorce**
Rehabilitative awards; awards until self-supporting

Awarding only temporary alimony to wife who was in her late fifties until she reached age 62 was abuse of discretion where wife had never been substantially employed and had not developed any employable skills, even though she was capable of employment. U.C.A.1953, 30–3–5.

1 Cases that cite this headnote

[9] **Divorce**
Evidence in general

To recover attorney fees in divorce action, moving party must show evidence establishing financial need and demonstrating reasonableness of amount of award.

3 Cases that cite this headnote

[10] **Divorce**
Financial condition and resources in general

Trial court did not abuse its discretion in ordering each party to pay his or her own attorney fees in case in which it was established that neither party reasonably had ability to pay other party's attorney fees, notwithstanding 58–year-old wife's lack of employment skills and lack of any history of substantial employment outside home. U.C.A.1953, 30–3–3.

3 Cases that cite this headnote

[11] **Costs**
Nature and form of judgment, action, or proceedings for review

Wife's appeal of marital property and alimony awards in divorce action was not frivolous where she prevailed on issue of termination of alimony at age 62, even though some of her grounds for error were not well taken; thus husband was not entitled to award of attorney fees for frivolous appeal.

3 Cases that cite this headnote

Attorneys and Law Firms

*117 Kelly G. Cardon, Judy Dawn Barking, Kelly G. Cardon & Associates, Ogden, for plaintiff and appellant.

Ben H. Hadfield, Mann, Hadfield, & Thorne, Brigham City, for defendant and respondent.

Before BILLINGS, GARFF, and ORME, JJ.

OPINION

GARFF, Judge:

Appellant challenges the district court's rulings in her divorce proceeding concerning alimony, property distribution, and attorney fees. We affirm in part and reverse in part.

Appellant Mary Munns and respondent Lowell Shelley Munns had been married for thirty-eight years at the time their decree of divorce was entered. Twelve children were born from this marriage, three of whom were still minors at the time the divorce was filed, and two of whom are still minors.

Appellant was, at the time of the divorce, fifty-eight years old. She is in relatively good health except for a problem with her hands, which required surgery, and an ulcer. She also suffers from a partial hearing loss, for which she must wear a hearing aid in each ear. She did not work outside of the home during the marriage, so developed no marketable skills. Since the beginning of the divorce proceedings, appellant has been unable to obtain full or part-time work except as a substitute in the local school lunch program, totalling three to four hours per day of minimum-wage work when available. At the time of the final hearing, she had only worked two shifts as a substitute, and had no expectation of getting a permanent position.

*118 Respondent had worked full-time at Morton Thiokol for fourteen years, with an hourly wage at the time of the final hearing of $13.97 per hour. During many of the years of the marriage, he had been able to work substantial overtime, resulting in annual incomes of between $35,000 and $38,669. However, beginning in 1988, his opportunity to work overtime decreased dramatically. Respondent is also self-employed on his farm, generating an annual income of $4,000 to $7,000.

During the course of the marriage, the parties acquired the following property: A house on .82 acres of land and an adjoining unimproved .79 acre lot; household furnishings; a one-half acre lot with a double wide mobile home on it; two parcels of agricultural property, totalling about 200 acres; several old vehicles, most of which did not operate; livestock; a savings account; and a huge collection of junk and scrap metal.

Appellant filed for divorce on July 31, 1986. During the pendency of these proceedings, appellant paid off the mortgage on the house.

On November 24, 1987, the court granted the parties a divorce decree and continued the case for the purpose of obtaining testimony regarding property valuation.

The court subsequently issued a memorandum decision on August 1, 1988. In it, the court granted appellant custody of the two remaining minor children, child support of $197 per child per month, and temporary alimony of $300 per month, ending when appellant reaches the age of 62. The court valued the parties' properties and divided them in kind, equalizing the property division by awarding appellant $9,000, to be paid in two equal annual installments of $4,500.

Appellant had incurred $2,000 in attorney fees, exclusive of costs, during the pendency of the divorce. By the time of the final hearing, she had paid $475 of this amount from joint funds, leaving a balance of $1,525 plus costs. Respondent had incurred $2,300 in attorney fees. The court ordered each party to pay his or her own attorney fees.

Appellant contends that: (1) The trial court unfairly distributed the property by (a) awarding all the property in kind, rather than requiring that the properties be sold and the proceeds used to first liquidate the parties' obligations and then to be split between them; (b) awarding an oversized portion of the property, including all the liquid assets, to respondent; and (c) allowing respondent to pay the $9,000 judgment over a two year period. (2) The trial court abused its discretion in awarding her temporary alimony of only $300 per month. (3) The trial court similarly abused its discretion in failing to award her attorney fees. Respondent alleges that appellant has brought a frivolous appeal and, thus, should be required to pay his attorney fees on appeal.

I.

PROPERTY DISTRIBUTION

The trial court awarded plaintiff, as her portion of the marital property, the family house, the mobile home and lot, the building lot, two vehicles, the household furnishings, and the savings account, plus the $9,000 judgment. Respondent received the farm property, subject to the mortgage; the remaining vehicles and machinery, subject to the debts owed on them; the junk and scrap metal; and the livestock. As indicated, he was ordered to pay appellant $4,500 within twelve months of the date of the entry of the decree, and the balance of $4,500 within the following twelve months.

[1] In dividing a marital estate, the trial court is empowered to enter equitable orders concerning property distribution. *Kerr v. Kerr,* 610 P.2d 1380, 1382 (Utah 1980); *Weston v. Weston,* 773 P.2d 408, 410 (Utah Ct.App.1989); *Rasband v. Rasband,* 752 P.2d 1331, 1335 (Utah Ct.App.1988). In making such orders, the court is permitted considerable discretion, which will not be disturbed so long as it exercises this discretion in accordance with the standards set by this state's appellate courts. *Weston,* 773 P.2d at 410; *see also Carlton v. Carlton,* 756 P.2d 86, 87 (Utah Ct.App.1988).

***119** [2] First, we do not find that the trial court abused its discretion in awarding all property in kind rather than ordering its sale and then awarding the proceeds. It is clear from the record that the trial court considered forcing such a sale, but apparently abandoned that solution because of the parties' hostility toward each other and their total refusal to cooperate during the course of the litigation. [1] The court is not required to order the sale of any property, but may award property in kind and leave any sale to the discretion of the party to whom it is awarded.

[3] Second, we do not find that the trial court awarded a substantially larger portion of the marital estate to respondent than to appellant. To permit appellate review of a trial court's property distribution in a divorce proceeding, the distribution should be based upon adequate findings. *Andersen v. Andersen,* 757 P.2d 476, 479 (Utah Ct.App.1988). These findings must place a dollar value on the distributed assets. *Id.*

In the present case, the trial court was so concerned with finding the appropriate property values that, when the valuation evidence was inadequate, it continued the hearing for further appraisal information. [2] After hearing evidence as to the value of the parties' properties, and after personally inspecting the property, the court made specific written findings as to value of each item of property, as follows: (1) The family home and lot plus the undeveloped lot, $26,388; (2) the mobile home and lot, $26,000; (3) the building lot, $11,000; (4) the farm, $48,547; (5) various vehicles and farm machinery, $23,859; (6) junk and scrap metal, $10,000; (7) household furnishings, $3,000; (8) livestock, $4,000; (9) the savings account, $3,200; and (10) two vehicles, $850.

[4] This court will not disturb the trial court's valuations absent a showing of a clear abuse of discretion. *Ebbert v. Ebbert,* 744 P.2d 1019, 1023 (Utah Ct.App.1987). The evidence presented on the record supports the trial court's findings. Respondent correctly points out that much of appellant's so-called "evidence" as to her property valuations were not part of the record, but were introduced for the first time on appeal. It is well settled that we do not review evidence for the first time on appeal. *Low v. Bonacci,* 788 P.2d 512, 513 (1990). Further, even if appellant's appraisal had been a part of the evidence, failure of the court to accept one party's proposed valuation of property is not an abuse of discretion. ***120** *Ebbert,* 744 P.2d at 1023. We find that the trial court did not abuse its discretion in evaluating the parties' property and, therefore, did not unfairly distribute it.

Third, the record does not support appellant's claim that the trial court awarded all the nonliquid assets to her while awarding all the liquid assets to respondent. It is well settled that there is no fixed formula for the division of marital property, but that the trial court has the power to divide property and income so that the parties may readjust their lives to their new circumstances as well as possible. *Weston,* 773 P.2d at 411; *see also Sorensen v. Sorensen,* 769 P.2d 820, 824 (Utah Ct.App.1989) *cert. granted* 779 P.2d 688 (1989).

Here, the trial court awarded appellant, who needed income and was clearly unable to provide herself with a place to live, the marital home, the building lot, the mobile home and lot, vehicles, the household furnishings, a savings account, and the $9,000 judgment. Respondent, who loved the farm and worked it, and who had acquired the junk over the course of the marriage, was awarded the farm property subject to the mortgage, vehicles and farm machinery subject to the debts on them, livestock, and the junk. The trial court apparently allocated the property based upon the parties' needs and interests. We find no error in this.

While the farm property generated some income, the record suggests that the income generated did not even offset the cost of servicing the various mortgages on the property. Farm property and equipment are not easily and quickly sold, and so are not, as appellant contends, liquid assets. However, the junk and the livestock have some liquidity, in that a $10,000 offer had been made for the junk and respondent had sold some of the livestock during the pendency of this action.

While appellant's assets are, likewise, not very liquid, she was awarded more liquid assets than respondent. Although the house was in such poor condition that it probably could not be sold without a great deal of renovation expense, the parties had previously sold the mobile home to a buyer who had defaulted, indicating that it could be sold or at least

rented; the building lot was certainly able to be sold; and the savings account and the $9,000 judgment, being cash, are liquid assets. We find no abuse of discretion here.

[5] Fourth, the trial court did not err in allowing respondent to pay off the $9,000 judgment over the period of two years. In allocating the properties, the trial court granted the debt-free properties to appellant, but granted properties heavily encumbered with debt to respondent. From the court's remarks during the trial, it is evident that he was concerned with respondent's ability to make the mortgage payments on the farm property, along with his other, court-ordered obligations. Given respondent's heavy debt burden, we do not find that the trial court abused its discretion in allowing respondent to pay the judgment off over a two year period.

In sum, we do not find that the trial court abused its discretion in distributing the parties' scant resources.

II.

ALIMONY

A. Amount

Appellant argues that the trial court did not consider the necessary factors in making the alimony award when, as she states, the record clearly shows that the property awarded to her is not capable of producing income, she is not financially able to repair her dilapidated house, and $300 per month is inadequate to cover her personal expenses. Further, she states that she is unable to produce a sufficient income for herself because she is a woman in her fifties with no marketable skills and no prospects of employment, while respondent, because of his assets and his regular employment, is in a position to pay a larger alimony award than the court ordered.

Respondent, on the other hand, maintains that appellant does not have financial need for an increased alimony award because the $300 in alimony, along with the child support, rental income she should be ***121** able to receive from the mobile home property, and interest income on the proceeds of the sale of the building lot should result in a net income sufficient to meet her expenses. He further argues that she is capable of part-time employment and, in fact, is employed part-time; and that his court-ordered debt burden, including alimony, has left him with only $410.83 per month to live on, so he is unable to pay additional alimony.

[6] In setting an award of alimony, a trial court must consider three factors: (1) the financial condition and need of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income for him or herself; and (3) the ability of the responding spouse to provide support. *Noble v. Noble*, 761 P.2d 1369, 1372 (Utah 1988); *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985); *Throckmorton v. Throckmorton*, 767 P.2d 121, 124 (Utah Ct.App.1988). On appeal, we will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion. *Fullmer v. Fullmer*, 761 P.2d 942, 950 (Utah Ct.App.1988).

[7] Appellant estimated that she would need a minimum of $1,090 per month to meet her expenses. The trial court specifically found, in its findings of fact, that appellant had not worked outside the home during the marriage except for her part-time work in the school lunch program, but was capable of employment. It also found that respondent was currently employed at the rate of $13.90 per hour at Morton Thiokol, but that there were substantial marital debts, which it ordered respondent to pay. It then granted plaintiff $300 per month alimony based upon "the debts, the duration of payment, duration of the marriage, plaintiff's lack of work experience and employment skills, recognizing the ages of the children, the eventual receipt of social security and retirement benefits together with income realized from the properties." Upon a review of the record, including these findings, it is apparent to us that the trial court did consider the three *Jones* factors in determining the amount of alimony.

The purposes of alimony include enabling the receiving spouse to maintain, as nearly as possible, the standard of living enjoyed during the marriage, and preventing the receiving spouse from becoming a public charge. *Throckmorton*, 767 P.2d at 124; *Martinez v. Martinez*, 754 P.2d 69, 74 (Utah Ct.App.1988) *cert. granted* 765 P.2d 1277 (1989); *Naranjo v. Naranjo*, 751 P.2d 1144, 1146 (Utah Ct.App.1988). Further, alimony should, so far as possible, equalize the parties' respective standards of living. *Naranjo*, 751 P.2d at 1146; *see also Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988).

Here, the parties have approximately equal, if low, standards of living, which is not a substantial deviation from the "low, minimum" standard of living which the parties experienced during the marriage. "This is simply one of those all-too-frequent situations where the court was confronted with the impossible task of attempting to cut one blanket to cover two

beds and satisfy both parties when the truth of the matter is that they cannot afford a divorce, but must have one anyway." *Bader v. Bader*, 18 Utah 2d 407, 424 P.2d 150, 151 (1967). We find no abuse of discretion in the trial court's amount of alimony awarded.

B. Duration

[8] However, the trial court ordered that appellant's alimony terminate, inter alia, "upon the plaintiff's 62nd birthday and her eligibility to begin receiving Social Security payments." Appellant challenges this termination of her alimony award.

While an award of temporary alimony is entirely appropriate in other situations, *see, e.g., Rayburn v. Rayburn*, 738 P.2d 238, 241 (Utah Ct.App.1987), we have held on numerous occasions that temporary alimony is inappropriate for women in circumstances comparable to those of appellant.

For example, in *Andersen v. Andersen*, 757 P.2d 476 (UtahCt.App. 1988), the wife was in her fifties, had spent most of her life providing services to her family with no monetary remuneration, and had minimal work experience. This court found that ***122** she could not be expected to find a job immediately upon completing her schooling, and that her salary, when she did find employment, was unknown. *Id.* at 478. Thus, it overruled a temporary alimony award. *Id.* at 479.

Similarly, in *Jones*, 700 P.2d at 1072, Mrs. Jones was fifty-two years old at the time of trial. She had only performed sporadic, seasonal, and unskilled jobs during the marriage, and, with the full consent of her husband, had devoted most of her time to rearing the parties' four children. She had no professional training, few marketable skills, and no independent income. *Id.* at 1075. The Utah Supreme Court stated, in overruling her temporary alimony award and ordering permanent alimony, that it is "entirely unrealistic to assume that a woman in her mid–50's with no substantial work experience or training will be able to enter the job market and support herself in anything even resembling the style in which the couple had been living." *Id.* at 1075; *see also Paffel v. Paffel*, 732 P.2d 96, 103 (Utah 1986); *Olson v. Olson*, 704 P.2d 564, 567 (Utah 1985); *Higley v. Higley*, 676 P.2d 379, 381–82 (Utah 1983); *Rasband*, 752 P.2d at 1334; *Sampinos v. Sampinos*, 750 P.2d 615, 618 (Utah Ct.App.1988).

In the present case, appellant is a woman in her late fifties, who, while in reasonably good health, has never been substantially employed and has not developed any employable skills. It is similarly unrealistic to assume that she will ever be able to provide for herself at any reasonable level. Therefore, the trial court abused its discretion in terminating her alimony at age sixty-two. If the parties' circumstances change as a result of one or the other's receipt of social security and/or retirement benefits, the court, with its continuing jurisdiction, may modify the alimony award at such time as the entitlement and actual amounts of the benefits become definite.[3] *Olson*, 704 P.2d at 567; *Andersen*, 757 P.2d at 479. We, therefore, reverse the trial court's termination of appellant's alimony and order that respondent be required to pay alimony to appellant indefinitely. Of course, alimony will terminate as a matter of statute upon certain occurrences, *see* Utah Code Ann. § 30–3–5 (1989), and may be modified as to amount upon appropriate petition and a showing of changed circumstances.

III.

ATTORNEY FEES

Appellant alleges that the trial court abused its discretion by failing to award her attorney fees. She states that she should have been awarded attorney fees because the record is replete with evidence that she is in dire need of financial assistance, having no income other than alimony and child support and no liquid assets or marketable skills, while respondent has a steady job and liquid assets. On the other hand, respondent alleges that appellant did not demonstrate need because her property is virtually debt-free and she would be receiving a $9,000 judgment over the space of two years from which she could pay the attorney fees.

[9] To recover attorney fees in a divorce action, the moving party must show evidence (1) establishing the financial need of the requesting party, and (2) demonstrating the reasonableness of the amount of the award. *Rasband*, 752 P.2d at 1336; *Huck v. Huck*, 734 P.2d 417, 419 (Utah 1986); *Kerr*, 610 P.2d at 1384; *Sorensen*, 769 P.2d at 832. Where either of these two factors have not been shown, we have reversed awards of attorney fees. *Beals v. Beals*, 682 P.2d 862, 864 (Utah 1984).

***123** [10] The parties both succeeded in establishing their respective financial need, and the attorneys presented evidence demonstrating the reasonableness of their respective fees. Therefore, the trial court would have been justified

in awarding either party attorney fees. However, while a trial court may award attorney fees in divorce proceedings, pursuant to Utah Code Ann. § 30–3–3 (1989), *Rasband*, 752 P.2d at 1336, the decision to award attorney fees lies primarily within the trial court's sound discretion. *Kerr*, 610 P.2d at 1384; *Andersen*, 757 P.2d at 480. Under the present circumstances, in which neither party reasonably has the ability to pay the other party's attorney fees, we do not find that the trial court abused its discretion in ordering each party to pay his or her own attorney fees.

IV.

FRIVOLOUS APPEAL

[11] Respondent argues that appellant has brought a frivolous appeal because she relies substantially on valuation evidence that was not admitted on the record, so she does not have a reasonable factual basis for her appeal. He, therefore, requests that this court award him attorney fees on appeal.

We have defined a frivolous appeal as one without a reasonable legal or factual basis as defined in rule 40(a) of the Rules of the Utah Court of Appeals. *Riche v. Riche*, 784 P.2d 465, 470 (Utah Ct.App.1989); *Maughan v. Maughan*, 770 P.2d 156, 162 (Utah Ct.App.1989); *Porco v. Porco*, 752 P.2d 365, 369 (Utah Ct.App.1988). Because appellant prevailed on the issue of the termination of alimony, she has not brought a frivolous appeal, even though some of her grounds for error were not well taken. With respect to the issues upon which respondent prevailed, an unsuccessful appeal which is worthy of consideration is not an egregious case worthy of sanctions and, therefore, is not frivolous. *See Maughan*, 770 P.2d at 162; *Brown v. Harry Heathman, Inc.*, 744 P.2d 1016, 1019 (Utah Ct.App.1987). We, therefore, decline to award attorney fees to respondent on appeal.

Affirmed in part and reversed in part, and the matter is remanded for further proceedings consistent with this opinion.

BILLINGS and ORME, JJ., concur.

All Citations

790 P.2d 116

Footnotes

1 At the close of the September 22, 1986 hearing, at which the trial court ordered the parties' divorce, the court stated:

> As far as this court is concerned, I think you are going to have to dispose of some property or else you are going to lose it by default. I'm going to make an order that neither party disposes of any property unless both attorneys consent to the sale or otherwise in refinancing or otherwise because I can't see how you can survive in making those payments and apparently not getting any income out of the farm. It doesn't seem practical to the court that you retain the 300 acres, but that's up to the parties to decide on ... and I hope the parties can get together and figure out some way to dispose of the property because you are not going to be able to live separately on the present income.

As subsequent events indicated, the parties were unable to cooperate in even the most trivial matters, so the trial court apparently concluded that they would not be able to cooperate in making major property sales.

2 The trial court stated, after the first valuation hearing, that:

> The court is left without a whole lot of information relative to values.
>
> We have not had one professional appraiser in here that I felt had any real competence, either in personal property or real estate, either one. I understand the reasons for that but I'm still left without information that would be very helpful, particularly in light of the testimony by Mr. **Munns** that he wants to retain a lot of that property, and I can understand his desire to do so, but it makes it very difficult.... I recognize the difficulty of getting appraisals but I, frankly, cannot decide a case of this magnitude without having some idea as to the values of the property, and had the motion not been made, I'd have made it myself. I don't know how to handle that, but I'm going to give a continuance on this thing for one purpose....
>
> In this case I find it entirely lacking testimony as to values. The plaintiff's case had not rested. I'm going to give an opportunity for both parties to come back at another time and schedule it for one half day, one purpose only. That's for testimony relative to values, hopefully from some experts.

3 Respondent's reliance on language in *Dehm v. Dehm*, 545 P.2d 525 (Utah 1976) for the proposition that alimony is not intended to provide retirement income is not well placed. Taking the relevant language in context is sufficient to distinguish

Dehm from the present situation, in which appellant has never worked outside the home and is almost totally without ability to provide for herself:

> In a situation such as this, where the defendant is gainfully employed, making a salary sufficient to satisfy her needs, is adequately housed, and is in good health; one of the functions of alimony is not to provide retirement income. We do not want to confuse alimony with annuity.

Id. at 528–29.

End of Document

172 P.3d 668
Court of Appeals of Utah.

Ivan RADMAN, Janet Radman, Donna Smylie, Peter Radman, Joanne Crook, Bronte Clark, Martin Radman, and Jordan Radman, Plaintiffs and Cross-appellees,
v.
FLANDERS CORPORATION, a North Carolina corporation, Defendant and Cross-appellant.
Flanders Corporation, a North Carolina corporation, et al., Counterclaim and Third-party Plaintiffs, and Appellee,
v.
Ivan Radman, Janet Radman, Donna Smylie, Peter Radman, Joanne Crook, Bronte Clark, Martin Radman, and Jordan Radman, Counterclaim Defendants and Appellants.

No. 20060479–CA.
|
Oct. 25, 2007.

Synopsis
Background: Shareholders brought action against corporation which acquired their corporation to enforce market protection clause in merger agreement when shares of acquiring corporation's restricted stock declined in value following merger. Acquiring corporation counterclaimed for breach of merger agreement warranties. Following a bench trial, the Third District Court, Salt Lake Department, Joseph C. Fratto, Jr., J., awarded shareholders damages on their claims and acquiring corporation damages on its claims. All parties appealed.

Holdings: The Court of Appeals, Davis, J., held that:

[1] extrinsic evidence of pre-merger statements was admissible to establish whether shareholders breached their warranties;

[2] measure of damages for shareholders' breach was the difference between the value of the assets in the promised condition and the actual value of the assets ultimately transferred;

[3] evidence was sufficient to establish that acquiring corporation's breach of warranty damages were $1,162,528;

[4] interest on balance rule applied, and thus shareholders were not entitled to have prejudgment interest calculated on their damages award before it was offset by damages award for acquiring corporation;

[5] market protection clause guaranteed that shareholders would receive their full purchase price for the restricted shares issued to them; and

[6] trial court did not abuse its discretion by finding that both parties were prevailing parties for purposes of an attorney fees award.

Affirmed.

West Headnotes (22)

[1] **Appeal and Error**
Admissibility and reception of evidence
Appeal and Error
Clearly erroneous findings

Whether evidence is admissible is a question of law, which is reviewed for correctness, incorporating a clearly erroneous standard of review for subsidiary factual determinations.

Cases that cite this headnote

[2] **Appeal and Error**
Damages or amount of recovery

Whether a district court applied the correct rule for measuring damages is a question of law that is reviewed for correctness.

Cases that cite this headnote

[3] **Appeal and Error**
Amount of recovery

Whether the amount awarded by the district court for damages was supported by the evidence is a determination of fact that may be reversed on appeal only if clearly erroneous.

Cases that cite this headnote

[4] **Appeal and Error**
Damages or amount of recovery

Issue of whether it was error to offset an unliquidated damages award against a liquidated damages award before calculating prejudgment interest is a question of law, which is reviewed for correctness.

Cases that cite this headnote

[5] **Appeal and Error**
Prejudice to Rights of Party as Ground of Review

A claim that a trial court decision should be reversed under the cumulative error doctrine requires the reviewing court to apply the standard of review applicable to each underlying claim of error.

5 Cases that cite this headnote

[6] **Appeal and Error**
Review where evidence consists of documents

A trial court's legal conclusion that a contract is ambiguous is reviewed for correctness.

Cases that cite this headnote

[7] **Appeal and Error**
Where extrinsic evidence introduced to interpret contracts

If a contract is deemed ambiguous, and the trial court allows extrinsic evidence of intent, interpretation of the contract becomes a factual matter and an appellate court's review is strictly limited.

1 Cases that cite this headnote

[8] **Appeal and Error**
Attorney fees

Question of which party is prevailing party for purposes of an award of attorney fees is a question for trial court, which is reviewed for abuse of discretion, although trial court's interpretation of binding case law on issue is a question of law reviewed for correctness.

Cases that cite this headnote

[9] **Evidence**
Contracts in General

Evidence
Grounds for admission of extrinsic evidence

Once a contract has been found to be unambiguous, a trial court may not rely on extrinsic evidence to determine the intent of the parties or to vary the terms of the agreement, though extrinsic evidence may appropriately be considered for other purposes.

Cases that cite this headnote

[10] **Evidence**
Performance

Extrinsic evidence of pre-agreement statements, although not admissible to interpret merger agreement which had been found to be unambiguous, was admissible to establish whether shareholders of acquired corporation breached warranties contained in agreement.

Cases that cite this headnote

[11] **Damages**
Failure to Perform in General

When determining damages for a contract breach, the aim in view is to put the injured party in as good a position as that party would have been in if performance had been rendered as promised under the contract.

Cases that cite this headnote

[12] **Corporations and Business Organizations**
Warranties and representations

Measure of damages sustained by acquiring corporation for breach by shareholders of acquired corporation of merger agreement's warranty regarding the condition of assets of

acquired corporation was difference between value of assets in promised condition and actual value of assets ultimately transferred, when acquired corporation was not operating at a profit, acquired corporation had no good will value, and entire value of acquired corporation was solely attributable to its assets.

Cases that cite this headnote

[13] **Corporations and Business Organizations**
Warranties and representations

Evidence was sufficient to establish that acquiring corporation suffered damages of $1,162,528 as a result of breach by shareholders of acquired corporation, which was in fiberglass industry, of merger agreement's warranty that acquired corporation's electric melters were in good operating condition, in trial of acquiring corporation's breach of warranty claims against shareholders; parties did not contest the value of acquired corporation's accounts receivable and inventory, and there was evidence that the equipment other than the electric melters had no value, that the melters did not conform to industry standards, that acquiring corporation spent nearly $1.3 million in relation to problems with the melters, and that the melters were flawed technology and without any value.

Cases that cite this headnote

[14] **Interest**
Prejudgment Interest in General

Prejudgment interest is awarded to compensate for the full loss suffered by the plaintiff in losing the use of the money over time.

Cases that cite this headnote

[15] **Interest**
Particular cases and issues

"Interest on balance rule" applied to claim by shareholders of acquired corporation for prejudgment interest upon damages awarded to them in their action against acquiring corporation for breach of market protection clause in parties' merger agreement, and thus shareholders were not entitled to have interest calculated prior to offset of shareholders' award by amount of damages awarded to acquiring corporation on its counterclaim for breach of warranty, where claims arose from same transaction, acquiring corporation's counterclaim arose before shareholders' claim arose, and shareholders were not denied use of money to which they were entitled.

Cases that cite this headnote

[16] **Appeal and Error**
Prejudice to Rights of Party as Ground of Review

Under the cumulative error doctrine, Court of Appeals will reverse only if the cumulative effect of the several errors undermines the Court's confidence that a fair trial was had.

5 Cases that cite this headnote

[17] **Appeal and Error**
Prejudice to Rights of Party as Ground of Review

If the Court of Appeals determines that the error claims are not errors on the part of the trial court or if the Court determines that any errors were so minor as to result in no harm, the Court does not apply the cumulative error doctrine.

5 Cases that cite this headnote

[18] **Corporations and Business Organizations**
Construction, operation, and effect

Market protection clause in merger agreement regarding restricted stock issued to shareholders of acquired corporation, which shareholders could not sell for one year, guaranteed that shareholders would receive their full $1.5 million purchase price if acquiring corporation's common stock dropped below eight dollars per share during the year following the merger, and thus additional stock that acquiring corporation was required to issue to shareholders under such clause was to be valued at the market price at the time the shareholders sold their previously restricted stock and the shortfall

stock was issued; construing clause as allowing acquiring corporation to pretend that shortfall stock had a value of eight dollars per share would produce an absurd result and would not guarantee shareholders their full purchase price as the parties intended.

Cases that cite this headnote

[19] **Appeal and Error**
Contract cases

Error of trial court in considering extrinsic evidence to interpret market protection clause in merger agreement regarding restricted stock issued to shareholders of acquired corporation, when such clause was not ambiguous, was harmless, when there was only one reasonable interpretation of the clause, which trial court adopted.

Cases that cite this headnote

[20] **Costs**
Prevailing party

The question of which party is the prevailing party, for purposes of an award of attorney fees, depends, to a large measure, on the context of each case, and, therefore, it is appropriate to leave this determination to the sound discretion of the trial court.

3 Cases that cite this headnote

[21] **Costs**
Prevailing party

When determining who is the prevailing party for purposes of an award of attorney fees, a trial court may appropriately consider, among other things: (1) contractual language; (2) the number of claims, counterclaims and cross-claims brought by the parties; (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole; and (4) the dollar amounts attached to and awarded in connection with the various claims.

2 Cases that cite this headnote

[22] **Corporations and Business Organizations**
Costs and attorney fees

Trial court did not abuse its discretion by finding that both parties were prevailing parties for purposes of attorney fee award in action brought by shareholders of acquired corporation to enforce market protection clause in merger agreement regarding restricted stock in which acquiring corporation counterclaimed for breach of warranties, as parties prevailed on their respective claims, and each claim was factually and procedurally distinct.

Cases that cite this headnote

Attorneys and Law Firms

*670 David M. Connors, Jennifer A. Brown, and Nicole C. Squires, Salt Lake City, for Appellants and Cross-appellees.

Clark Waddoups, Jonathan O. Hafen, and Michael D. Black, Salt Lake City, for Appellee and Cross-appellant.

Before BENCH, P.J., BILLINGS and DAVIS, JJ.

OPINION

DAVIS, Judge:

¶ 1 Plaintiffs and Counterclaim Defendants Ivan Radman, Janet Radman, Donna Smylie, Peter Radman, Joanne Crook, Bronte Clark, Martin Radman, and Jordan Radman (collectively, the Radmans) appeal various aspects of the trial court's decision on the counterclaim presented below. Defendant and Counterclaim Plaintiff Flanders Corporation (Flanders) appeals the court's decision regarding the Radmans' original claim. We affirm.

*671 BACKGROUND

¶ 2 In November 1997, the parties entered into an Agreement and Plan of Merger (the Agreement) whereby Flanders exchanged some of its restricted capital stock for all the stock of G.F.I., Inc. (GFI), a company owned by the Radmans that manufactured fiberglass and fiberglass air filters. Because

the stock shares transferred by Flanders were restricted, the Radmans could not sell the shares for at least one year after the merger. To address the possibility that the stock trading prices might drop during this period, the Agreement contained a clause entitled "Market Protection" (the Market Protection Clause) that provided that the Radmans would receive additional compensation if such a drop were to occur. [1] When the Radmans were finally able to sell their shares, the trading price had fallen significantly below the $8.00 per share that it had been at the time of merger. Thus, the Radmans sought to enforce the Agreement's Market Protection Clause and obtain compensation for the full shortfall amount. Although Flanders did tender some additional shares of stock in an effort to comply with the Agreement, the value of these shares was not enough to fully compensate the Radmans for the shortfall amount, as the Radmans believed was required by the Agreement.

¶ 3 The Radmans brought this action against Flanders in May 2001, seeking damages for the uncompensated shortfall amount. Flanders counterclaimed, alleging, inter alia, that the Radmans had breached several warranties contained in the Agreement. The Radmans were successful on their claim regarding the uncompensated shortfall amount and were awarded damages in the amount of $547,904.50. Flanders, too, was successful on its breach-of-warranties counterclaim, and the trial court awarded damages of $1,162,528.00. The trial court then determined that both parties had prevailed and awarded them the reasonable attorney fees incurred in connection with their prevailing claims. Thus, in the end, Flanders received a net award of $696,446.90. Both parties now appeal.

ISSUES AND STANDARDS OF REVIEW

[1] [2] [3] [4] [5] ¶ 4 First, the Radmans contest the trial court's allowance of and reliance on extrinsic evidence of pre-Agreement conversation between the parties. "Whether evidence is admissible is a question of law, which we review for correctness, incorporating a 'clearly erroneous' standard of review for subsidiary factual determinations." *State v. Diaz*, 859 P.2d 19, 23 (Utah Ct.App.1993). Second, the Radmans assert that even if this evidence was appropriately admitted, the trial court's method of assessing breach-of-warranty damages was incorrect and unsupported by the evidence. "Whether the district court applied the correct rule for measuring damages is a question of law that we review for correctness. Whether the amount awarded by the district court was supported by the evidence is a determination of fact that may be reversed on appeal only if clearly erroneous." *Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶ 25, 96 P.3d 893 (citation omitted). Third, the Radmans argue that the trial court erred by offsetting Flanders's unliquidated award against the Radmans' liquidated award before calculating any prejudgment interest. This is a question of law, which we review for correctness. *See Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 28, 133 P.3d 428 ("Generally, a decision to grant or deny prejudgment interest presents a question of law which we review for correctness." (internal quotation marks omitted)). Finally, the Radmans claim that we should reverse under the cumulative error doctrine, which requires us to apply the standard of review applicable to each underlying claim of error, each of which here is an abuse of discretion review. [2]

*672 [6] [7] [8] ¶ 5 Flanders primarily contests the trial court's interpretation of the Market Protection Clause, arguing that the trial court erred in concluding that the clause was ambiguous and in considering extrinsic evidence of the parties' intent to "completely rewrite[ ]" the clause. "We review for correctness the trial court's legal conclusion that the contract is ambiguous. If a contract is deemed ambiguous, and the trial court allows extrinsic evidence of intent, interpretation of the contract becomes a factual matter and our review is strictly limited." *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 6, 78 P.3d 600 (citation omitted). Flanders also argues that the trial court erred in determining that both parties prevailed below and in awarding attorney fees accordingly. The question of which party is the prevailing party is a question for the trial court, and we therefore review the trial court's determination on this matter for abuse of discretion. *See R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 25, 40 P.3d 1119. However, the court's interpretation of binding case law on this matter is a question of law, reviewed for correctness. *See Houghton v. Department of Health*, 2005 UT 63, ¶ 32, 125 P.3d 860.

ANALYSIS

I. The Radmans' Appeal

¶ 6 The Radmans assert that in relation to the counterclaim below, the trial court erred in several aspects, including using extrinsic evidence inappropriately, using an improper and unsupported method to determine damages, and refusing

to award prejudgment interest. The Radmans also point to several other alleged errors in the context of a cumulative error argument. We address each argument in turn.

A. Extrinsic Evidence

[9] [10] ¶ 7 The Radmans argue that the trial court inappropriately considered extrinsic evidence in its determination that the Radmans breached the Agreement's warranties regarding the operating condition of certain equipment, specifically, electric melters. The Radmans assert that the Agreement's integration clause and the court's rulings that the warranties were unambiguous prohibited any sort of reliance on extrinsic evidence. The Radmans are correct in their argument that once a contract has been found to be unambiguous, the trial court may not rely on extrinsic evidence to determine the intent of the parties or to vary the terms of the agreement. *See View Condo. Owners Ass'n v. MSICO, LLC*, 2005 UT 91, ¶ 27, 127 P.3d 697 ("Well-settled law precludes us from considering extrinsic evidence to vary the terms of an unambiguous written agreement."); *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) ("If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement."). Extrinsic evidence may, however, appropriately be considered for other purposes. *See, e.g., Eggett v. Wasatch Energy Corp.*, 2001 UT App 226, ¶ 26, 29 P.3d 668 (concluding that although certain extrinsic evidence was not admissible to vary the terms of a contract, the evidence was relevant in determining whether a party had breached the covenant of good faith and fair dealing), *aff'd*, 2004 UT 28, 94 P.3d 193. Here, it appears that any pre-Agreement statements relied on by the trial court were used not for altering the terms of the Agreement or for determining what the parties intended by the language of the warranties, but rather, the statements were appropriately used to assess whether the Radmans had actually breached those unambiguous warranties.

¶ 8 In the Agreement, the Radmans warranted that the assets being transferred were "in good operating condition and repair, ordinary wear and tear excepted." The trial court determined that this warranty was unambiguous and that it required "that the equipment performs the function expected of a similar piece of equipment in the industry to the standards of the industry, modified to take into account the effects of the equipment's age and prior wear." *See Utah State Med. Ass'n v. Utah State Employees Credit* ***673** *Union*, 655 P.2d 643, 645 (Utah 1982) (interpreting, in a similar way, a contract provision requiring "good condition," i.e., taking into account the equipment's age and previous use). The Radmans do not contest this interpretation, but argue that because the trial court determined that the warranty was unambiguous, the court was not allowed to rely on pre-Agreement statements to determine whether the equipment was in good operating condition.

¶ 9 We agree that in determining whether the equipment was in good operating condition, it would have been inappropriate for the trial court to have required the equipment to conform exactly to specific numbers mentioned in pre-Agreement statements. Such would, indeed, add terms to the Agreement. It was, however, appropriate for the trial court to use extrinsic evidence for other purposes, including to determine what good operating condition generally was for the electric melters, i.e., what was expected of similar pieces of equipment in the industry according to the industry standards. The Radmans assert that instead of looking to the normal operating condition of these particular melters, the trial court was required to "look[ ] to comparable used equipment of similar age when determining whether [the Radmans] had breached the warranty regarding the condition of the equipment." It is clear from the trial court's findings that it *did* look to other melters in the industry; however, the court's evaluation was not limited to such evidence because, as the Radmans acknowledge, the melters here were unique as they were electric melters and not the typical gas melters used by the remainder of the industry. Thus, some consideration of the generally expected operating function of these particular melters would be appropriate to determine what good operating condition was for electric melters, especially considering the parties' mutual understanding that the electric melters were superior to the gas melters used elsewhere in the industry.

¶ 10 We agree that in some findings the language of the trial court may be read as relying too heavily on the precise numbers mentioned in pre-Agreement statements and as requiring this specific level of performance for the equipment to be considered in good operating condition. But even assuming this were the intended meaning of those findings, we see no prejudice because the court made other findings —which rely on none of the pre-Agreement statements and which the Radmans do not contest—that alone would support the conclusion that the Radmans breached the warranty that the electric melters were in good operating condition. Specifically, relying on information regarding the function

attributable to its assets and that the sum of those assets would be equal to the entire amount that the Radmans were expecting to benefit from the merger—$1,500,016. Thus, the method that the court ultimately relied upon to calculate damages—the difference between the value of the assets as received and their value as warranted—would arguably directly correspond to the method which the Radmans assert was required—the difference between the value of GFI as received and its value as warranted.

[13] ¶ 15 The Radmans additionally argue that even if the method for computing damages was correctly set forth by the trial court, there is not sufficient evidence to support the values the court used to do such computation. The Radmans spend a large part of their brief setting forth the facts that would support using other values, but our focus is only on whether there is sufficient evidence that, when viewed in the light most favorable to Flanders, would support the trial court's determination. *See Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743, 747 (Utah 1982) ("It is well established that this Court will presume findings of fact to be correct and will not overturn them so long as they are supported by substantial evidence in the record. The Court must view the evidence and all inferences that might reasonably be made from the evidence in a light most favorable to the judgment entered." (citation omitted)).

¶ 16 In arriving at the value of the melters as warranted, the trial court first found that the only assets with value—the sum of which accounted for the transaction price—were the accounts receivable, the inventory, and the electric melters. The court then subtracted from the transaction price the value of the first two assets, which values were uncontested by the parties, to arrive at the value the electric melters would have had as warranted. The Radmans argue that this method was flawed because the court failed to give any value to other GFI equipment. The evidence, however, supports the trial court's determination that the electric melters were the only equipment with value. There was evidence presented that (1) this other equipment was purchased by GFI in the early 1990s and was already about twenty-five years old at that point, (2) much of the equipment was in poor condition, (3) the equipment was "essentially valueless," (4) the equipment was written off by Flanders, and (5) some of the equipment was eventually scrapped because it could not be resold.

¶ 17 After determining the value of the electric melters as warranted, the trial court found that the melters had no actual value at the time of the merger. Again, there is sufficient evidence to support such a finding, such as (1) the melters "did not conform to industry standards," (2) Flanders spent much time and nearly $1.3 million in relation to problems with the melters, and (3) the melters were " 'flawed technology' " and were without any value. Because there was sufficient evidence to support the findings of value arrived at by the trial court, and because ***676** its method of calculating damages was correct, we affirm the court's award of damages to Flanders for breach of warranty.

C. Prejudgment Interest

¶ 18 The Radmans argue that they were entitled to an award of prejudgment interest before the court offset Flanders's award against their award. Both parties agree that Utah courts have not specifically addressed whether an unliquidated counterclaim should be offset before prejudgment interest is applied to a liquidated claim. The parties further agree that the prevailing law in other jurisdictions is that the offset is applied prior to calculating prejudgment interest—i.e., the interest is applied only to the balance of the awards—when the parties' claims are "related." *See Local Okla. Bank, N.A. v. United States*, 59 Fed.Cl. 713, 722 (2004) (applying the interest on balance rule to "claims aris[ing] out of related transactions"), *aff'd*, 452 F.3d 1371 (Fed.Cir.2006); *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 603 P.2d 513, 537 (Ct.App.1979) (stating that the interest on balance rule applies when "the unliquidated counterclaim offsets are attributable to the same contracts which are the basis of the primary liquidated claims"); *Hansen v. Covell*, 218 Cal. 622, 24 P.2d 772, 776 (1933) (applying the interest on balance rule where the counterclaim is "of a character such as to constitute payment to the [plaintiff]"); *York Plumbing & Heating Co. v. Groussman Inv. Co.*, 166 Colo. 382, 443 P.2d 986, 988 (1968) (stating that the interest on balance rule applies "in situations in which the two claims arise out of the same general transaction"); *Harmon Cable Commc'ns of Neb. Ltd. P'ship v. Scope Cable Television, Inc.*, 237 Neb. 871, 468 N.W.2d 350, 371 (1991) (agreeing that the interest on balance rule should be applied where "the claims arose from the same transaction"); *Mall Tool Co. v. Far W. Equip. Co.*, 45 Wash.2d 158, 273 P.2d 652, 663 (1954) (stating that the interest on balance rule is applicable "when the amount to which a defendant is entitled as a counterclaim or setoff is for defective workmanship or other defective performance by the plaintiff, of the contract on which his liquidated or determinable claim is based, of a character such that the award of damages as compensation is regarded as constituting either

a reduction of the amount due the plaintiff or a payment to him"); *Hollon v. McComb*, 636 P.2d 513, 517 (Wyo.1981) (stating that the interest on balance rule should be applied "at least in those cases where the claims arise out of the same general transaction"); *see also Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc.*, 416 F.2d 207, 211 (8th Cir.1969) (stating that the interest on balance rule does not apply when "the unliquidated counterclaim arises out of a collateral matter"); *Socony Mobil Oil Co. v. Klapal*, 205 F.Supp. 388, 393 (D.Neb.1962) (refusing to apply the interest on balance rule because "[t]he counterclaim d[id] not seek a reduction of the [amount owed] for any defects in the products supplied under that figure"); *Pocatello Auto Color v. Akzo Coatings*, No. 20349, 1994 WL 246701, 1994 Ida.App. LEXIS 76, at *34 (Idaho Ct.App. June 9, 1994) (refusing to apply the interest on balance rule because the counterclaim "was a separate claim for damages based on a matter collateral to [the original] claim"), aff'd in part and rev'd in part, 127 Idaho 41, 896 P.2d 949 (1995). We believe that the reasoning behind such an approach is appropriate to the facts of this case.

[14] [15] ¶ 19 Prejudgment interest is awarded "to compensate for the full loss suffered by the plaintiff in losing the use of the money over time." *Kraatz v. Heritage Imps.*, 2003 UT App 201, ¶ 75, 71 P.3d 188. Where, as in this case, the two claims arose from the same transaction and the defendant's counterclaim arose before the plaintiff's claim arose, the plaintiff was never entitled to the amount equal to the counterclaim.[8] *See Hansen*, 24 P.2d at 776 ***677** (stating that the interest on balance rule applied "on the theory that the [plaintiff] is entitled to interest only on such amount of the use of which he has been deprived during the period of default"); *accord Mall Tool Co.*, 273 P.2d at 663. Thus, if the Radmans were owing an amount to Flanders under the contract, that amount must be subtracted from their later-accruing claim before prejudgment interest is applied. We agree with the trial court that "[b]ecause Flanders'[s] damages were incurred before any further payment was due to the Radmans and because the damages incurred by Flanders exceeded the additional payment due to the Radmans, the Radmans never were denied the use of money to which they were entitled." "It simply would not make good sense to charge [Flanders] interest on money [it] do[es] not owe." *Hollon*, 636 P.2d at 517. Thus, the trial court's failure to award prejudgment interest was not in error.

D. Cumulative Error

[16] [17] ¶ 20 The Radmans allege several other errors on the part of the trial court, including improperly allowing late-produced documents, summaries of documents, a late designation of an expert witness, substitution of a party, and testimony about settlement discussions. " 'Under the cumulative error doctrine, we will reverse only if the cumulative effect of the several errors undermines our confidence ... that a fair trial was had.' " *State v. Kohl*, 2000 UT 35, ¶ 25, 999 P.2d 7 (omission in original) (quoting *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993)). However, if we determine that the claims are not errors on the part of the trial court or if we determine that any errors were "so minor as to result in no harm," we do not apply the cumulative error doctrine. *See id.* Here the Radmans fail to show by their one-paragraph summaries of each of the alleged errors that these trial court actions even qualified as errors. Thus, the cumulative error doctrine is inapplicable in this case.[9]

II. Flanders's Cross-appeal

¶ 21 Flanders contests two aspects of the trial court's ruling in favor of the Radmans on the original claim. Specifically, Flanders argues that the only plausible interpretation of the Agreement's Market Protection Clause is the one Flanders advanced below and that the court erred in determining that both parties had prevailed for purposes of awarding attorney fees.

A. The Market Protection Clause

¶ 22 Flanders appeals the trial court's award to the Radmans under the Agreement's Market Protection Clause. Flanders argues that the trial court erred by determining that the clause was ambiguous and resorting to extrinsic evidence to decide that the Radmans' interpretation of the clause was correct.

[18] ¶ 23 The Market Protection Clause states:

> Pursuant to this Agreement, the G.F.I. Shareholders are receiving 187,502 shares of Flanders Capital Stock as set forth on Exhibit "A" attached hereto. Since the 187,502 shares of Flanders Capital Stock are restricted

> shares, each share has a discounted market value of $8.00 per share, for an aggregate market price of $1,500,016 (the "Market Price"). If at the time any of the G.F.I. Shareholders sell any of the 187,502 shares of Flanders Capital ***678** Stock at a price below $8.00 per share, and the average trading price for the preceding three business days of Flanders Capital Stock as listed on the NASDAQ Stock Exchange is below $8.00 per share, Flanders shall deliver additional restricted shares of Flanders Common Stock to such G.F.I. Shareholders in order to maintain the Market Price (the "Short Fall"), with such Short Fall shares valued at the Market Price.

The trial court ruled that the last phrase of the clause was ambiguous, as the meaning of the final term "the Market Price" was unclear. We agree that the phrase is confusing. But we also determine that when the clause is taken as a whole, there is only one plausible interpretation of the final usage of the phrase "the Market Price."

¶ 24 Flanders argues that the phrase "the Market Price" must in every instance refer to either "$8.00 per share" or "an aggregate market price of $1,500,016." However, we cannot consistently apply either one of these numbers in place of the phrase "the Market Price" without obtaining an absurd result. If we apply the $8.00 figure as argued by Flanders, the clause requires Flanders to issue extra stock "in order to maintain [$8.00 per share] (the 'Short Fall'), with such Short Fall Shares valued at [$8.00 per share]." This language is far from clear and if applied as the Flanders argue it should be—pretending the replacement shares had a value of $8.00 per share—would provide little "protection" for the Radmans and would not "maintain" in any way the value originally agreed upon. Indeed, under such a reading, the Radmans could realistically end up with a very small fraction of the value agreed upon, notwithstanding the Market Protection Clause. Were we to strictly apply the other figure to the term "the Market Price," the result would likewise be absurd. The clause language would then require the extra stock issued "in order to maintain [an aggregate market price of $1,500,016] (the 'Short Fall'), with such Short Fall Shares valued at [an aggregate market price of $1,500,016]." Again, such an interpretation is nonsensical, valuing a single share at the total dollar amount intended to be represented by 187,502 shares.

[19] ¶ 25 Instead, as the trial court ultimately ruled, the only plausible interpretation of the final usage of the term "the Market Price" was that it meant something different than either of the numbers previously mentioned. We agree with the trial court that the very title of the clause "is evidence that the parties intended to insure that the Radmans[ ] would receive their full $1.5 million purchase price if the price of Flanders common stock dropped below $8.00 per share during the year following the merger." We also agree that the only way to "maintain" the price as intended by the parties and as stated by the Market Protection Clause was for the additionally issued shares to make up the total shortfall price, which means that the shares would have to be valued at their true and current price, i.e., the shares' market value at the time the Radmans sold the stock and the shortfall shares were issued. [10] Thus, applying this one plausible meaning did not "scrap[ ] the language used and agreed to by the parties, ***679** and rewr[ite] a provision with terms and calculations not found in the [Agreement]"; rather, it only replaced the one confusing usage of the term "the Market Value" with a previously-undefined, lowercase "the market value," i.e., the trade value of the shares at the time the shortfall shares were issued, which was the only plausible interpretation that would make sense when combined with the other language of the Market Protection Clause.

B. Attorney Fees

[20] [21] ¶ 26 Flanders contends that the trial court erred in the award of attorney fees below by awarding the parties the fees attributable to their successful claims. The question of which party is the prevailing party "depends, to a large measure, on the context of each case, and, therefore, it is appropriate to leave this determination to the sound discretion of the trial court." *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 25, 40 P.3d 1119. This court has previously

> noted the difficulty in determining which party prevails in complicated cases involving multiple claims and parties, mentioned that in some circumstances both parties may be considered to have prevailed, and expressed the "need for a flexible and reasoned approach to deciding in particular cases who actually is the 'prevailing party.' "

Id. ¶ 24 (quoting *Mountain States Broad. Co. v. Neale*, 776 P.2d 643, 648 n. 7 (Utah Ct.App.1989), *clarified by* 783 P.2d 551, 556 (Utah Ct.App.1989) (mem. decision

on petition for reh'g)). Under this flexible and reasoned approach, the trial court may appropriately consider, among other things "(1) contractual language, (2) the number of claims, counterclaims, cross-claims, etc., brought by the parties, (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole, and (4) the dollar amounts attached to and awarded in connection with the various claims." *Id.* ¶ 25.

[22] ¶ 27 It appears from the trial court's findings that the court, in appropriately applying the flexible and reasoned approach, took into account several of the above factors, in addition to other reasonable considerations—including that each claim was "factually distinct" and that trial on each claim was "procedurally distinct"—to arrive at its determination that both parties prevailed. [11] Because the trial court is in a better position than we are to make this determination, *see id.*, and because we see no abuse of the trial court's discretion in this matter, we affirm the award of attorney fees below. [12]

CONCLUSION

¶ 28 First, we determine that it was proper for the trial court to rely on pre-Agreement statements to determine whether the Radmans ***680** had breached certain warranties, and that any use of these statements beyond this scope was harmless error. Second, the trial court applied the appropriate method for determining breach-of-warranty damages, and the court's findings underlying the damage award were supported by sufficient evidence. Third, the trial court did not err in its refusal to award prejudgment interest because the parties' claims were related and the Radmans would therefore have been allowed interest only on the balance of their award remaining after the offset of Flanders's award was applied, i.e., the amount of money of which they were truly deprived. Fourth, the cumulative error doctrine is inapplicable in this case because the Radmans have failed to show that the complained of actions were even errors. Fifth, as to Flanders's cross-appeal, the trial court looked to appropriate evidence and correctly determined that there was only one reasonable interpretation of the Market Protection Clause. Finally, the trial court reasonably considered several appropriate factors in determining that both parties prevailed, and thus, the court did not abuse its discretion in awarding attorney fees to both parties. Therefore, we affirm the decision of the trial court on all of the above issues.

¶ 29 WE CONCUR: RUSSELL W. BENCH, Presiding Judge, and JUDITH M. BILLINGS, Judge.

All Citations

172 P.3d 668, 589 Utah Adv. Rep. 19, 2007 UT App 351

Footnotes

1 For the complete text of the Market Protection Clause, see *infra* Part II.A.

2 Respecting the cumulative error claim, all but one of the alleged errors regard the admissibility of evidence, for which the trial court is granted a large measure of discretion. *See State v. Powell*, 2007 UT 9, ¶ 13, 154 P.3d 788 ("A trial court's 'rulings on the admission of evidence ... generally entail a good deal of discretion.' " (omission in original) (quoting *State v. Pena*, 869 P.2d 932, 938 (Utah 1994))). The other alleged error involves the late addition of a counterclaimant, which we also review for abuse of discretion. *See Savage v. Utah Youth Vill.*, 2004 UT 102, ¶ 9, 104 P.3d 1242 ("The district court's decision to allow amendment of the pleadings is reviewed for abuse of discretion resulting in prejudice to the complaining party." (internal quotation marks omitted)).

3 Specifically, the court found that problems with the melters included "fiber breakage, uneven temperature across the bushings, breakage of the bushings, bridging, transformers 'blowing up,' and problems with the 'weave' of the fiberglass." It further found that these problems "prevented the electric melters from operating consistently and producing fiberglass of reasonable quality."

4 We recognize the potential inconsistency between an integration clause and a warranty—like the one here—that ensures against misrepresentations occurring prior to the contract formation. Nonetheless, the parties here plainly intended the application of such a warranty, and we therefore cannot simply ignore the warranty language based on the existence of an integration clause.

5 We disagree with the Radmans' assertion that the pre-Agreement statements regarding the high production capacity, low operating requirements, and lucrative payoff capability of the electric melters "have no bearing on whether the equipment was in 'good operating condition.' " Instead, we think that these statements were directly related to the issue; each

statement was an assertion that the melters were indeed functioning at high levels, which would thus indicate that they were in good operating condition.

6 The Radmans mention in their brief a third warranty regarding financial statements. The trial court determined that the Radmans had breached this warranty, but the court also determined that Flanders had not proven any related damages. Because there was no prejudice to the Radmans and because Flanders does not contest the court's ruling regarding failure to prove damages, the Radmans do not discuss this warranty in any detail; and we likewise do not address it.

7 The Radmans argue that the findings regarding goodwill are "conclusory" because the fact that GFI was not operating at a profit and the fact that Flanders was more concerned in acquiring the electric melters than the ongoing business of GFI are not sufficient to arrive at this conclusion. But both of these factors were appropriate for the trial court to consider here, and the Radmans do not point to any authority indicating otherwise. Goodwill is defined as "the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets," *Black's Law Dictionary* 703 (7th ed.1999); thus, whether the business was operating at any profit would surely be relevant. And the going-concern value of a business involves the future earning power of the business, *see id.* at 1549; therefore, evidence that Flanders was not concerned with the ongoing business of GFI and the additional finding that the Radmans were operating GFI primarily to develop the electric melters, speak to the future earning power GFI had as an active business. Moreover, the Radmans do not appropriately marshal *all* the record evidence supporting the findings regarding goodwill, as would be required in any attack upon the sufficiency of the evidence to support those findings. *See* Utah R.App. P. 24(a)(9).

8 The trial court determined that Flanders's damages for breach of warranty were incurred in November 1997, when the Agreement was signed, and that the Radmans' damages were incurred in April 1999, after the stock sale. In their reply brief, the Radmans argue that the interest on balance rule should not apply because Flanders's counterclaim was not "demandable" at the time of merger. They argue that this is so because Flanders still used the equipment after the merger and because Flanders only asserted a claim regarding the warranties after the Radmans filed their claim. But the Radmans warranted the equipment as of the time of merger, and any breach of that warranty occurred at that time, giving rise to the Flanders's cause of action. *See Valley Colour, Inc. v. Beuchert Builders, Inc.*, 944 P.2d 361, 364 (Utah 1997) (" 'The true test in determining when a cause of action arises or accrues is to establish the time when the plaintiff could have first maintained the action to a successful conclusion.' " (quoting 51 Am.Jur.2d *Limitation of Actions* § 107 (1970))). And of course, when the claim was finally asserted has no bearing on when it actually arose.

9 Further, the only prejudice the Radmans point to resulting from these alleged errors is "an atmosphere in which the Radmans were placed at a significant disadvantage in preparing for and presenting their defense against Flanders'[s] counterclaim." But the Radmans do not explain how this atmosphere and the accompanying "unnecessary surprise and inconvenience" resulted in an unfair trial.

10 Because the trial court determined that the Market Protection Clause was ambiguous, the court also looked to extrinsic evidence to determine what the parties intended at the time the Agreement was drafted. This extrinsic evidence gave further support to the interpretation ultimately arrived at by the trial court. Flanders argues that reliance on extrinsic evidence was inappropriate here because the Market Protection Clause was unambiguous as there were not "two or more plausible meanings" of the phrase at issue. *See Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1274 (Utah 1993) (internal quotation marks omitted). We agree that there is only one plausible interpretation of the Market Protection Clause and that the clause was therefore unambiguous. But, even so, consideration of extrinsic evidence is proper here for the limited purpose of determining whether an ambiguity existed. *See Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995) ("Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties ... so that the court can place itself in the same situation in which the parties found themselves at the time of contracting." (omission in original) (internal quotation marks omitted)). After using extrinsic evidence to consider the Agreement "in light of the surrounding circumstances," we see only one reasonable interpretation of the Market Protection Clause and we are able to determine the parties' intentions "solely from the language of the contract," as is discussed above. *Id.*

11 Flanders argues that the trial court erred by ignoring applicable case law, specifically, the case of *Cache County v. Beus*, 2005 UT App 503, 128 P.3d 63, wherein we stated that "[t]here can be only one prevailing party in any litigation," *id.* ¶ 14. That case, however, was the more typical and simplistic case in which only one party prevailed on each of the issues of the decision below. *See id.* ¶ 15. Further, *Beus* cites only two cases in support of this statement; one of which is *Mountain States Broadcasting Co. v. Neale*, 776 P.2d 643, 648 n. 7 (Utah Ct.App.1989), *clarified by* 783 P.2d 551, 556 (Utah Ct.App.1989) (mem. decision on petition for reh'g), and the other of which directly relies on *Mountain States Broadcasting*. The Utah Supreme Court has specifically addressed this cited language from *Mountain States Broadcasting* in *R.T.*

Nielson Co. v. Cook, 2002 UT 11, ¶ 25, 40 P.3d 1119. In *Cook*, the supreme court recognized that although there is generally only one prevailing party when contractual language similar to that here is employed, the flexible and reasoned approach "will permit a case-by-case evaluation by the trial court, and flexibility to handle circumstances where both, or neither, parties may be considered to have prevailed." *Id.*; *see also Brown v. Richards*, 840 P.2d 143, 154 n. 10 (Utah Ct.App.1992) ("[B]oth parties are entitled to fees when both parties are successful in enforcing different provisions of a contract against the other." (citing *Trayner v. Cushing*, 688 P.2d 856, 858 (Utah 1984))).

12 The Radmans were the only party to request attorney fees on appeal. *See generally Brown*, 840 P.2d at 156 ("The general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal."). But as the Radmans were not successful on any of their claims on appeal, we do not award attorney fees on appeal.

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201 P.3d 942
Supreme Court of Utah.

Kynda Kay RICHARDSON, Respondent,
v.
Kenneth Andrew RICHARDSON, Petitioner.

No. 20070578.
|
Aug. 19, 2008.
|
Rehearing Denied Jan. 7, 2009.

Synopsis

Background: Wife sought divorce. The District Court, Third District, Salt Lake City, Stephen L. Roth, J., required former husband to pay child support and alimony that increased by $100 per month as each child reached majority. Former husband appealed. The Court of Appeals, Billings, J., 2007 WL 1784017, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Wilkins, J., held that prospective increase in alimony was based on eventuality that children would reach majority, and, thus, was appropriate.

Affirmed.

West Headnotes (9)

[1] **Divorce**
Automatic or built-in adjustments; escalator clauses
Divorce
Grounds, Factors, and Defenses

Prospective increase in alimony as each child in former wife's custody reached majority or graduated from high school was appropriate; former husband's obligation to pay child support for each child was certain to end at a specified time, and result of end of this obligation was that former husband's financial condition would improve, and that of former wife would worsen. West's U.C.A. § 30–3–5(8)(c, d).

3 Cases that cite this headnote

[2] **Certiorari**
Scope and Extent in General

On a writ of certiorari, the Supreme Court reviews the decision of the court of appeals, not that of the district court.

Cases that cite this headnote

[3] **Divorce**
Spousal Support

When reviewing a district court determination of alimony, an appellate court reviews it for abuse of discretion.

2 Cases that cite this headnote

[4] **Divorce**
Discretion as to amount

A district court has broad discretion when deciding alimony awards.

Cases that cite this headnote

[5] **Divorce**
Relative needs and abilities to pay in general
Divorce
Earnings; earning capacity

In making alimony determinations, a district court considers several factors, including (1) the financial condition and needs of the recipient spouse; (2) the ability of the recipient spouse to produce sufficient income; and (3) the ability of the payor spouse to provide support.

3 Cases that cite this headnote

[6] **Divorce**
Grounds and Defenses in Determining Existence and Amount of Obligation
Divorce
Standard of living and station in life

The primary aims of a trial court when making an alimony award are (1) to get the parties as

close as possible to the same standard of living that existed during the marriage; (2) to equalize the standards of living of each party; and (3) to prevent the recipient spouse from becoming a public charge. West's U.C.A. § 30–3–5(8)(c, d).

3 Cases that cite this headnote

[7] **Divorce**
Automatic or built-in adjustments; escalator clauses
Divorce
Scope of relief granted in general

Generally, it is true that, because of the uncertainty of future events, prospective changes to alimony are disfavored.

1 Cases that cite this headnote

[8] **Divorce**
Automatic or built-in adjustments; escalator clauses
Divorce
Employment and wage or salary issues

A plan to retire, without actually retiring, is insufficient to justify a prospective alimony reduction.

Cases that cite this headnote

[9] **Divorce**
Automatic or built-in adjustments; escalator clauses
Divorce
Scope of relief granted in general

Where the future event is certain to occur within a known time frame, then prospective changes to alimony awards are appropriate.

1 Cases that cite this headnote

Attorneys and Law Firms

***942** Scott L. Wiggins, Joseph Lee Nemelka, Salt Lake City, for respondent.

J. Bruce Reading, Jonathan H. Rupp, Salt Lake City, for petitioner.

On Certiorari to the Utah Court of Appeals

WILKINS, Justice:

¶ 1 We granted certiorari to determine whether the court of appeals was correct in affirming the prospective increases in alimony made by the district court in the alimony order. We hold that the court of appeals was correct, and that the prospective increases ***943** in alimony were within the district court's discretion.

BACKGROUND

¶ 2 In 2003, Respondent Kynda Kay Richardson filed for divorce from Petitioner Kenneth Andrew Richardson. At trial, the district court awarded Respondent physical custody of the couple's four minor children. Respondent was also awarded the statutorily mandated amount of $1374 per month in child support payments, with Petitioner's obligation to pay ceasing as each minor child reached the age of eighteen or graduated from high school. The district court also awarded Respondent $420 per month in alimony.

¶ 3 In addition, the district court ruled that as each minor child reached majority—and Petitioner's child support obligation therefore ceased as to that child—Petitioner's alimony obligation was to increase by $100 per month. Petitioner appealed to the court of appeals, arguing that a prospective increase in alimony constituted an abuse of discretion by the district court. He also argued that the decision amounted to child support for his adult children masquerading as alimony.

[1] ¶ 4 On appeal, the court of appeals reviewed the district court's decision and determined there was no abuse of discretion. We granted certiorari to determine whether the court of appeals erred in affirming the prospective increases in alimony.

ANALYSIS

[2] [3] [4] ¶ 5 "On a writ of certiorari, we review the decision of the court of appeals, not that of the [district] court. When reviewing a [district] court determination of alimony ...

an appellate court reviews [it] for abuse of discretion." *Willey v. Willey*, 951 P.2d 226, 230 (Utah 1997) (citations omitted). A district court has broad discretion when deciding alimony awards. *See, e.g., Higley v. Higley*, 676 P.2d 379, 382 (Utah 1983).

[5] ¶ 6 In making alimony determinations, a district court considers several factors, including: (1) the financial condition and needs of the recipient spouse, (2) the ability of the recipient spouse to produce sufficient income, and (3) the ability of the payor spouse to provide support. [1] *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985).

[6] ¶ 7 Along with these factors, a district court also considers the primary aims of alimony when making an award: (1) to get the parties as close as possible to the same standard of living that existed during the marriage, *see* Utah Code Ann. § 30–3–5(8)(c) (Supp.2007); (2) to equalize the standards of living of each party, *see id.* § 30–3–5(8)(d); and (3) to prevent the recipient spouse from becoming a public charge, *English v. English*, 565 P.2d 409, 411 (Utah 1977).

¶ 8 The court of appeals correctly determined that, in making its alimony determination in this case, the district court did not exceed its permitted discretion. Instead, the district court properly considered the three factors in fashioning an alimony order that sought to achieve the stated goals. The amounts awarded, both before and after Petitioner's child support obligations ended, were arrived at after careful consideration of the appropriate factors and the stated aims.

¶ 9 Petitioner argues, however, that *any* prospective increase in alimony exceeds the district court's discretion. [2] In support, Petitioner cites to cases from the court of appeals where such prospective changes in alimony ***944** orders have been held improper. [3] Petitioner argues that whether a change in the amount of alimony will be appropriate in the future should be left to the district court's continuing jurisdiction and should not be done speculatively.

[7] [8] [9] ¶ 10 Generally, it is true that, because of the uncertainty of future events, prospective changes to alimony are disfavored. Thus, a plan to retire, without actually retiring, would be insufficient to justify a prospective alimony reduction. *See Nelson v. Nelson*, 2004 UT App 254, ¶ 7, 97 P.3d 722. There are other contexts, however, where the certainty of the future event is such that prospective changes are appropriate. Where the future event is certain to occur within a known time frame, then prospective changes are appropriate.

¶ 11 The prospective increase in alimony here was based on such circumstances. Within a known time frame—each minor child reaching majority—Petitioner's child support obligations for each child will cease. These events are certain to take place on specified dates. The result of Petitioner's obligations ending is also certain: Petitioner's financial condition will have improved and Respondent's financial condition—which previously included the $1374 in child support payments—will have worsened. Because Petitioner's obligation to pay child support for each child is certain to end at a specified time, prospective changes to the amount of alimony based thereon are appropriate, and are within the district court's discretion to include in the alimony order.

CONCLUSION

¶ 12 The court of appeals was correct in affirming the district court's alimony order, because the district court properly analyzed the appropriate factors and made a reasonable decision within its permitted discretion. Accordingly, we affirm.

¶ 13 Chief Justice DURHAM, Associate Chief Justice DURRANT, Justice PARRISH, and Judge PAGE concur in Justice WILKINS' opinion.

¶ 14 Justice NEHRING does not participate herein, District Judge RODNEY S. PAGE sat.

All Citations

201 P.3d 942, 611 Utah Adv. Rep. 12, 2008 UT 57

Footnotes

1 A district court also examines other factors, including the length of the marriage and which spouse has custody of minor children, which are not relevant to our analysis. *See* Utah Code Ann. § 30–3–5(8)(a)(iv)–(vii) (Supp.2007).

2 Petitioner also argues, based upon certain language used by the district court, that the increases in alimony were actually intended to be child support for those children who had reached majority, but who were still living with Respondent. It is well settled that a parent's child support obligation terminates when a child reaches majority, and alimony is not a substitute for child support. *See* Utah Code Ann. §§ 78B–12–102(6), –105(1) (2008). We do not find, however, that the district court intended the increased amount to be child support disguised as alimony, and accordingly do not address Petitioner's argument on this point.

3 *See, e.g., Nelson v. Nelson*, 2004 UT App 254, ¶ 7, 97 P.3d 722 (holding that a petition to change alimony based upon the husband's imminent retirement was not ripe because the planned retirement was not an "actual 'substantial material change in circumstances' " (quoting Utah Code Ann. § 30–3–5(8)(g)(i) (Supp.2003))); *Howell v. Howell*, 806 P.2d 1209, 1212 (Utah Ct.App.1991) ("[A]ny future changes in alimony are limited to instances where a material change of circumstances *has occurred.*" (emphasis added)).

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335 P.3d 378
Court of Appeals of Utah.

Kristen A. ROBERTS, Petitioner and Appellee,
v.
Ty H. ROBERTS, Respondent and Appellant.

No. 20120302–CA.
|
Sept. 5, 2014.

Synopsis

Background: Wife petitioned for divorce, and husband filed answer and counter-petition. The Second District Court, Farmington Department, Robert J. Dale, J., entered divorce decree and awarded custody, child support, and alimony. Husband appealed.

Holdings: The Court of Appeals, Roth, J., held that:

[1] trial court judgment failed to adequately explain why court calculated husband's alimony and child support obligations in manner that appeared to exceed wife's demonstrated monthly need;

[2] trial court's factual findings regarding its award of permanent alimony to wife were insufficient;

[3] husband made judicial admission that there was a basis for divorce based on irreconcilable differences rather than on fault;

[4] trial court was not required to take into account wife's adultery in calculating either duration or amount of alimony award to wife; and

[5] evidence was sufficient to support finding that wife was not cohabiting with male friend, as could support termination of alimony payments by husband.

Affirmed in part, reversed in part, and remanded.

West Headnotes (25)

[1] **Trial**
Sufficiency in General

A trial court's findings of fact and conclusions of law must be sufficiently detailed to allow a reviewing court to ensure that the trial court's discretionary determination was rationally based upon the relevant facts and controlling legal principles.

Cases that cite this headnote

[2] **Appeal and Error**
Insufficiency of verdict or findings

Trial
Sufficiency in General

A trial court decision with deficient findings prevents appellate courts from effectively reviewing the trial court's decision, and it may therefore be remanded for the entry of more-detailed findings.

Cases that cite this headnote

[3] **Divorce**
Relative needs and abilities to pay in general

Divorce
Child custody and support

Divorce
Length of marriage

Trial courts consider a number of factors when determining the amount and duration of alimony, focusing principally on three factors: (1) the financial condition and needs of the recipient spouse; (2) the ability of the recipient spouse to produce sufficient income; and (3) the ability of the payor spouse to provide support; other relevant considerations include length of marriage and whether recipient spouse had custody of minor children requiring support. West's U.C.A. § 30–3–5(8)(a)(iv, v).

Cases that cite this headnote

[4] **Divorce**
Nature and purpose of spousal support; property award distinguished
Divorce
Relative needs and abilities to pay in general

The core function of alimony is economic, and it should not operate as a penalty against the payor nor a reward to the recipient; for that reason, regardless of the payor spouse's ability to pay more, the recipient spouse's demonstrated need must constitute the maximum permissible alimony award.

Cases that cite this headnote

[5] **Child Support**
Decision and findings by court
Child Support
Determination and disposition of cause
Divorce
Spousal Support

Trial court judgment failed to adequately explain why court calculated husband's alimony and child support obligations in manner that appeared to exceed wife's demonstrated monthly need, and thus remand was required for reassessment, even though court made detailed findings of fact on each factor in alimony analysis, where court did not explain either its reasoning or its calculation, and appellate court was unable to discern basis for court's conclusion.

Cases that cite this headnote

[6] **Divorce**
Determination and Findings
Divorce
Spousal Support

Trial court's factual findings regarding its award of permanent alimony to wife were insufficient, and thus remand was required for reconsideration, where court did not address husband's request that alimony be rehabilitative only, and circumstances, including wife's employment history, arguably supported rehabilitative alimony.

Cases that cite this headnote

[7] **Divorce**
Earnings; earning capacity
Divorce
Age of parties
Divorce
Rehabilitative awards; awards until self-supporting

The length of the marriage, the age of the recipient spouse, and the employment history and employability of the recipient spouse are relevant factors to consider in determining whether an award of rehabilitative alimony, rather than traditional alimony, is appropriate.

Cases that cite this headnote

[8] **Divorce**
Authority and Discretion of Trial Court
Divorce
Determination and Findings

A trial court has broad discretion to fashion the alimony award that is most appropriate to the particular circumstances before it, but the court must explain its decision with adequate findings of fact.

1 Cases that cite this headnote

[9] **Child Support**
Determination and disposition of cause

Trial court's factual findings regarding its refusal to retroactively modify temporary child support order were inadequate, and thus remand was required for reconsideration, where court gave no explanation or subsidiary factual findings to justify use of imputed income for wife which was lower than that urged by husband.

Cases that cite this headnote

[10] **Child Support**

Time of taking effect; retrospective modification

Divorce

Retroactivity

Courts have discretion to modify child support and alimony awards retroactively. West's U.C.A. § 78B–12–112(4).

Cases that cite this headnote

[11] **Divorce**

Hearing and determination

Divorce

Attorney fees and costs

Trial court's factual findings were inadequate to support its decision to award wife attorney fees in divorce case, and thus remand was required for reconsideration, where, other than a passing reference to parties' relative financial circumstances, court did not make any specific findings on reasonableness of award, husband's ability to pay, or wife's needs.

Cases that cite this headnote

[12] **Divorce**

Authority and discretion of court

Divorce

Attorney Fees

In divorce cases, both the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion.

Cases that cite this headnote

[13] **Divorce**

Need and Ability to Pay

Divorce

Attorney Fees

Divorce

Attorney fees or costs

Attorney fee awards in a divorce case 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; failure to consider these factors is grounds for reversal on the fee issue.

Cases that cite this headnote

[14] **Child Support**

Assignment of errors and briefs

Husband failed to satisfy his burden of persuasion on appeal of award to wife, in divorce case, of medical and dental expenses for children, where husband did not point to any evidence that called trial court's reasoning into question, and husband cited no controlling case law or statute that required a different result.

Cases that cite this headnote

[15] **Appeal and Error**

Form and requisites in general

Appeal and Error

Points and arguments

Appeal and Error

Burden of showing error

An appellant has the burden of persuasion on appeal and must point out the perceived errors of the lower court and provide an argument containing the contentions and reasons with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.

Cases that cite this headnote

[16] **Divorce**

Discretion in determining financial obligations

Divorce

Presumptions

In a divorce proceeding, the trial court is permitted considerable discretion in adjusting the financial and property interests of the parties, and its actions are entitled to a presumption of validity.

Cases that cite this headnote

[17] **Divorce**

Admissions and confessions

Husband made judicial admission that there was a basis for divorce based on irreconcilable differences rather than on fault, where husband, in answer to wife's divorce petition, admitted that parties' differences had "become irreconcilable... making continuation of the marriage under the circumstances impossible," and in husband's counter-petition for divorce, husband requested a divorce based on an "irretrievable breakdown of the marriage" that husband alleged arose from "[i]rreconcilable differences."

Cases that cite this headnote

[18] **Evidence**
Pleadings
Evidence
Pleadings

An admission of fact in a pleading is a judicial admission and is normally conclusive on the party making it.

Cases that cite this headnote

[19] **Evidence**
Pleadings

Unless withdrawn or amended, admissions have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.

Cases that cite this headnote

[20] **Divorce**
Conduct of parties; cause of divorce

Trial court was not required to take into account wife's adultery in calculating either duration or amount of alimony award to wife, even though statute allowed court to consider fault in making such determination; purpose of divorce proceedings was not to impose punishment on either party. West's U.C.A. § 30–3–5(8)(b).

Cases that cite this headnote

[21] **Courts**
Previous Decisions as Controlling or as Precedents

Parties asking the appellate court to overturn prior precedent have a substantial burden of persuasion.

Cases that cite this headnote

[22] **Courts**
Decisions of Same Court or Co-Ordinate Court
Courts
Number of judges concurring in opinion, and opinion by divided court

Horizontal stare decisis requires appellate courts to adhere to their own prior decisions, and that obligation applies with equal force to courts that are comprised of multiple panels.

Cases that cite this headnote

[23] **Courts**
Erroneous or injudicious decisions

Although the Court of Appeals has the authority to overrule its own precedent in some limited circumstances, it will not do so lightly; the challenged decision must be: clearly erroneous, or conditions must have changed so as to render prior decision inapplicable.

Cases that cite this headnote

[24] **Courts**
Number of judges concurring in opinion, and opinion by divided court

The mere fact that a decision has been criticized by prior panels or that a particular panel disagrees with a prior decision is insufficient by itself to justify departures by the appellate court from its own case law.

Cases that cite this headnote

[25] **Divorce**
Proceedings for termination of alimony or support

Evidence was sufficient to support finding that wife was not cohabiting with male friend, as could support termination of alimony payments by husband, even though wife admitted to having sexual relationship with friend, where wife testified that she maintained a separate residence from friend, that she did not have a key to friend's home, that she paid her own mortgage and bills, and that she stayed at friend's home less than 50 percent of the time. West's U.C.A. § 30–3–5(10).

Cases that cite this headnote

Attorneys and Law Firms

***381** Brad C. Smith and Ryan B. Wilkinson, for Appellant.

Brittany R. Brown, for Appellee.

Judge STEPHEN L. ROTH authored this Opinion, in which Judge JOHN A. PEARCE and Senior Judge RUSSELL W. BENCH concurred. [1]

Opinion

ROTH, Judge:

¶ 1 Ty H. Roberts (Husband) appeals the trial court's ruling ordering him to pay Kristen A. Roberts (Wife) alimony and attorney fees, denying his request for reimbursement of child care expenses, allocating to both parties the tax liability of Wife's business, and refusing to grant him a fault-based divorce or take into account Wife's extramarital affair in its alimony calculation. We affirm in part, reverse in part, and remand to the trial court.

BACKGROUND

¶ 2 Wife and Husband were married in September 1989 and have four children. The couple separated in June 2009 after Wife admitted to an extramarital affair. Wife filed a petition for divorce one month later, citing irreconcilable differences. Husband filed an answer and counter-petition seeking a divorce for "irreconcilable differences" or alternatively, "on the basis of [Wife]'s adultery."

¶ 3 Both parties worked outside the home throughout their marriage. Husband worked at a bank, earning a gross monthly income of $6,886. Wife worked as a sales representative at a fashion retailer for thirteen years, but at the time of the divorce, she had opened a deli franchise. The business struggled, and Wife drew a monthly salary of $1,000 until about June 2010 and $2,000 thereafter.

¶ 4 The court issued a temporary order in September 2009 that awarded the parties joint physical custody of their three younger children but gave primary physical custody of their oldest son to Husband. Because Husband had primary custody of the couple's oldest child, Wife was ordered to pay Husband $121.23 per month in child support, and she was also required to pay $146.25 per month for her share of the children's medical and dental insurance as well as half of any out-of-pocket medical costs the children incurred. In making this determination, the court imputed to Wife a monthly income of $1,256 (minimum wage). In a second temporary order issued three months later, the court ordered Husband to pay $1,500 per month in temporary spousal support, but it later reduced that amount to $1,281.

¶ 5 The couple's oldest son turned eighteen in June 2010, and the parties agreed that the temporary child support obligations should be revisited as a result. Husband argued that the court should impute to Wife a different income when making this new calculation because he believed Wife had significantly understated her earnings from the deli business and was actually taking home as much as $3,500 per month. The child support issue was ultimately reserved for trial. After considering the evidence presented at the February 2011 trial, the court imputed to Wife a gross monthly income much higher than minimum wage but retroactively modified the temporary child support from the time of the oldest son's majority through February 2011 using the same minimum-wage income it had imputed to Wife in the second temporary order. In this regard the court explained only that "for the purposes of the temporary award it is reasonable to use the same incomes of the parties used to calculate child support in the Temporary Order." As a result, the court awarded Wife back child support in the amount of $518 per ***382** month from July 2010 through February 2011. The court denied Husband's request to retroactively modify the award of unpaid child support using Wife's higher imputed income from trial.

¶ 6 The court ultimately entered a decree of divorce in February 2012, granting Wife a divorce from Husband based on irreconcilable differences. The parties were awarded joint

physical and legal custody of their three minor children. To calculate Husband's alimony and child support obligations, the court imputed to Wife a gross monthly income of $3,000 and found that she had $4,000 in reasonable monthly expenses. Based on Husband's gross monthly income of $6,886 and monthly expenses of $4,000, the court awarded Wife $1,281 per month in permanent alimony, $381 per month in child support, and $5,000 in attorney fees. Wife was awarded her deli business with its debt, but the court ordered that both "parties shall be equally liable" for any tax liability that arose from the business for any year in which they had filed a joint tax return. The court also denied Husband's request for reimbursement for medical expenses of the children that he claimed Wife had failed to pay between July 2009 and February 2011.

ISSUES AND STANDARDS OF REVIEW

¶ 7 Husband raises a number of issues on appeal. First, he challenges the trial court's decisions awarding alimony, refusing to retroactively modify the temporary child support order, and granting Wife's request for attorney fees. Because trial courts have broad discretion to award alimony, child support, and attorney fees, we will not disturb such decisions absent an abuse of discretion. *Connell v. Connell*, 2010 UT App 139, ¶¶ 5–7, 233 P.3d 836. That means that "as long as the court exercise[d] its discretion within the bounds and under the standards we have set and has supported its decision with adequate findings and conclusions," we will not substitute our judgment for the trial court's. *Id.* ¶ 5 (citation and internal quotation marks omitted).

¶ 8 Second, Husband argues that the court improperly denied his request to offset temporary child support and alimony payments with medical expenses he incurred for his children during the divorce proceedings. He also contends that the court erred in awarding Wife her deli business but dividing equally between the parties the tax consequences the business incurred during their marriage. "Trial courts have considerable discretion in determining the financial interests of divorced parties," so we will not disturb either decision unless the trial court abused its discretion. *Bingham v. Bingham*, 872 P.2d 1065, 1067 (Utah Ct.App.1994) (citation and internal quotation marks omitted).

¶ 9 Third, Husband argues that the trial court failed to take into account Wife's extramarital affair when it calculated alimony and refused to grant Husband's counter-petition for a fault-based divorce. Husband further urges us to overrule *Mark v. Mark*, 2009 UT App 374, 223 P.3d 476, a case the trial court relied on that instructs courts to ignore evidence of fault when making alimony determinations. *See id.* ¶ 20. "We review the trial court's interpretations of law for correctness." *Trubetzkoy v. Trubetzkoy*, 2009 UT App 77, ¶ 10, 205 P.3d 891. Husband's final issue relates to Husband's claim that his alimony obligation ought to be terminated. Specifically, he challenges the court's determination that Wife was not cohabiting with a male friend (Friend). "While we defer to the trial court's factual findings unless they are shown to be clearly erroneous, we review its ultimate conclusion [of cohabitation] for correctness." *Levin v. Carlton–Levin*, 2014 UT App 3, ¶ 9, 318 P.3d 1177 (citation and internal quotation marks omitted).

ANALYSIS

I. Inadequate Findings of Fact and Conclusions of Law

[1] [2] ¶ 10 A trial court's findings of fact and conclusions of law must be "sufficiently detailed" to allow "a reviewing court to ensure that the trial court's discretionary determination was rationally based upon" the relevant facts and controlling legal principles. *Connell*, 2010 UT App 139, ¶ 12, 233 P.3d 836 (citation and internal quotation marks omitted). We have stated that a court's findings and conclusions must be sufficiently "detailed," ***383** including "enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Id.* (citation and internal quotation marks omitted). In practice, this does not mean that trial courts must analyze each issue in the same depth as an appellate opinion; rather, the court's findings and conclusions must contain just enough detail to allow a reviewing court "to ascertain the basis of the trial court's decision." *Allen v. Ciokewicz*, 2012 UT App 162, ¶ 42, 280 P.3d 425 (citation and internal quotation marks omitted). A trial court decision with deficient findings prevents appellate courts "from effectively reviewing the trial court's decision," and it may therefore be "remand[ed] for the entry of more-detailed findings." *Id.* (citations and internal quotation marks omitted).

¶ 11 We conclude that the trial court's factual findings and conclusions are deficient in a number of areas, and we remand for the entry of additional findings of fact on the following issues: (1) the amount and duration of alimony awarded to Wife, (2) the denial of Husband's motion to modify the

temporary child support award, and (3) the decision to award Wife attorney fees. We express no opinion on the merits of the underlying issues and emphasize that each of these questions is within a trial court's broad discretion. Our decision to remand is not meant to point the court to any particular result; rather, on remand the court ought to provide a fuller explanation for whatever conclusion it reaches.

A. Alimony

[3] ¶ 12 Trial courts consider a number of factors when determining the amount and duration of alimony, focusing principally on the three *Jones* factors: "(1) the financial condition and needs of the recipient spouse, (2) the ability of the recipient spouse to produce sufficient income, and (3) the ability of the payor spouse to provide support." *Richardson v. Richardson*, 2008 UT 57, ¶ 6, 201 P.3d 942 (citing *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985)). Other relevant considerations include "the length of the marriage" and "whether the recipient spouse has custody of minor children requiring support." Utah Code Ann. § 30–3–5(8)(a)(iv), (v) (LexisNexis 2007). [2] As discussed, a trial court's analysis of each factor must contain factual findings with enough detail to permit meaningful appellate review of its decision.

¶ 13 The trial court found that Wife had $4,000 in monthly expenses, and it imputed to her a monthly income of $3,000. Her monthly shortfall was accordingly $1,000. Husband argues that Wife's alimony award of $1,281 is excessive for two reasons. First, he cites precedent indicating, in his words, that "a recipient spouse's demonstrated need ... must constitute the maximum permissible alimony award" and argues that the trial court awarded Wife $281 per month beyond her demonstrated financial need. (Citation and internal quotation marks omitted.) Second, he contends that because Wife claimed expenses for the children as personal expenses in her financial declaration, the court should have treated Wife's $381 child support award as income in calculating alimony. Husband maintains that these oversights resulted in an alimony award "more than $600 per month *more* than Wife's determined monthly need." In other words, because the court found that Wife had $1,000 in unmet monthly needs—including child expenses—Husband argues that the court abused its discretion when it awarded Wife $1,662 in support payments ($381 in child support plus $1,281 in alimony). Husband also contends that the court erred when it "awarded Wife alimony for the maximum possible duration, 23 years," instead of ordering a shorter period of rehabilitative alimony. We consider each issue in turn.

1. The Amount of Alimony

[4] [5] ¶ 14 The purposes of alimony are "(1) to get the parties as close as possible to the same standard of living that existed during the marriage, (2) to equalize the standards of living of each party, and (3) to prevent the recipient spouse from becoming a public charge." *Richardson*, 2008 UT 57, ¶ 7, 201 P.3d 942 (citations omitted). The ***384** core function of alimony is therefore economic-it should not operate as a penalty against the payor nor a reward to the recipient. *Myers v. Myers*, 2010 UT App 74, ¶ 12, 231 P.3d 815. For that reason, "regardless of the payor spouse's ability to pay more, the [recipient] spouse's demonstrated need must ... constitute the maximum permissible alimony award." *Jensen v. Jensen*, 2008 UT App 392, ¶ 13, 197 P.3d 117 (alteration and omission in original) (citation and internal quotation marks omitted). We conclude that although the trial court made detailed findings of fact on Wife's needs, her income, and Husband's ability to provide support, the court did not adequately explain why it calculated Husband's alimony and child support obligations in a manner that appears to have exceeded Wife's demonstrated monthly need of $1,000.

¶ 15 The trial court made detailed findings on each of the *Jones* factors. The court found that Husband and Wife were both employed throughout the duration of their marriage. Wife worked as a sales representative for a fashion retailer for thirteen years before opening her deli business in 2004. As a sales representative, Wife earned more than $3,600 a month, but her monthly draw from the deli business was just $1,000 between 2004 and 2010. After that, Wife's draw increased to $2,000. The court evaluated expert testimony from each side on Wife's potential future income and imputed to Wife an annual income of $36,000, or "a gross monthly income of $3,000.00." The court also found that Wife had reasonable monthly living expenses of $4,000. With respect to Husband's ability to provide support, the court found that Husband has worked in banking since 1998 and earns $6,886 per month. Husband testified that his monthly living expenses were $6,500, but the court determined that he had included in that amount expenses incurred for the parties' adult son and Husband's temporary alimony obligation. After deducting these payments, the court found that Husband's monthly living expenses were $4,000.

¶ 16 The court determined that Wife's "after-tax income" was insufficient to meet her monthly needs and that an

"alimony award of $1,281.00 per month [was] ... reasonable and proper" for "a term no longer than the term of the marriage of the parties," which was between twenty-two and twenty-three years. The court also awarded Wife $381 per month in child support. The court denied Husband's post-trial request to modify the alimony award, noting that the award was "fair and equitable" in light of "the tax implications" to both parties.

¶ 17 Husband argues that "the court failed to explain why or how it reached its decision" to award Wife support payments in excess of her demonstrated need, particularly in light of the child expenses Wife listed in her financial declaration. We agree and conclude that the trial court's findings of fact are deficient in two respects. First, the court did not explain why it declined to treat the child support award as income in making its alimony determination when it apparently considered the children's expenses as part of Wife's need. While "[i]t is typically best practice for trial courts to analyze alimony without factoring in child support obligations," we have held that treating child support payments as the recipient spouse's income is permissible where the recipient "combine[s] her expenses with those of the children" in her financial declaration. *Dobson v. Dobson*, 2012 UT App 373, ¶ 11, 294 P.3d 591. Here, Wife's $4,000 in monthly expenses included $200 for "Children's education expenses"; $300 for "Children's dance classes, costumes, [and] other fees"; and $246 for her share of the children's medical and dental expenses. It is unclear whether she also included the children's food and other necessities under those expense categories. The court awarded Wife a total of $1,662 in monthly support payments ($1,281 in alimony plus $381 in child support) even though its findings demonstrated that Wife's monthly need—which might include some significant part of her children's expenses—was just $1,000. While that choice might have been within the trial court's discretion, *see Connell v. Connell*, 2010 UT App 139, ¶¶ 5, 7, 233 P.3d 836, the court did not explain why it did not include the child support payment as income in its alimony determination when at least some of the children's expenses seem to have been factored into the alimony calculation already.

***385** ¶ 18 Second, even if the trial court had adequately explained its decision to exclude child support from Wife's income, the court still awarded $1,281 per month in alimony even though Wife's demonstrated need seems to have been just $1,000. The court's justification for the $281 disparity was a simple reference to "tax implications." Presumably, the court believed that there were tax consequences to one or both parties stemming from its determinations of income and expenses that would leave Wife with insufficient net income to meet her needs, even though the gross income seemed adequate. But the court did not explain either its reasoning or its calculation, and we are unable to discern the basis for the court's conclusion. Consequently, even though the court carefully analyzed Husband's ability to pay, Wife's needs, and Wife's earning capacity, there are simply not enough "subsidiary facts to disclose" how the court determined that an alimony award in excess of Wife's demonstrated need was warranted. *See Hall v. Hall*, 858 P.2d 1018, 1021 (Utah Ct.App.1993); *see also Bingham v. Bingham*, 872 P.2d 1065, 1068 (Utah Ct.App.1994) (remanding a divorce "case for reassessment of the alimony award" because the trial court "awarded [the recipient spouse] $701.76 per month more than her projected financial requirements" without offering any "explanation for such a discrepancy"). We therefore conclude that the trial court did not make sufficient factual findings to justify the amount of Wife's alimony award, and we remand for a reassessment of Husband's alimony obligation.

2. Rehabilitative Alimony

[6] ¶ 19 Husband also contends that the "trial court incorrectly awarded Wife alimony for the maximum possible duration, 23 years," instead of rehabilitative alimony. Because the court did not provide sufficient analysis of its alimony duration determination, we are unable to appropriately address this issue on appeal and so must remand for the trial court's further consideration.

[7] [8] ¶ 20 As we have discussed, the purposes of alimony are "(1) to get the parties as close as possible to the same standard of living that existed during the marriage, (2) to equalize the standards of living of each party, and (3) to prevent the recipient spouse from becoming a public charge." *Richardson v. Richardson*, 2008 UT 57, ¶ 7, 201 P.3d 942 (citations omitted). Determining the proper duration of alimony payments can be challenging when the recipient spouse is underemployed or not working because the recipient's earning potential must be estimated and long-term needs are therefore difficult to ascertain. Depending on the circumstances, trial courts consider two different types of alimony to deal with this uncertainty—either the more traditional permanent alimony award for up to the length of the marriage or rehabilitative alimony, which typically is for a shorter period. "[T]he length of the marriage, the age of the recipient spouse, and the employment history and employability of the recipient spouse are relevant factors to consider in determining whether an award of rehabilitative

alimony, rather than traditional alimony, is appropriate." *Boyer v. Boyer*, 2011 UT App 141, ¶ 17, 259 P.3d 1063 (alteration in original) (citation and internal quotation marks omitted); *see, e.g., Jones v. Jones*, 700 P.2d 1072, 1076 (Utah 1985) (reversing an award for rehabilitative alimony where the recipient spouse was "in her mid–50's, possesse[d] few marketable job skills, and ha[d] little hope of retraining"). Rehabilitative alimony can be appropriate when the recipient spouse has the requisite education and work history to eventually meet his or her own needs, and alimony functions to " 'close the gap between actual expenses and actual income to enable the receiving spouse to' " become self-sufficient before " 'the [rehabilitative period] end[s].' " *Boyer*, 2011 UT App 141, ¶ 16, 259 P.3d 1063 (quoting *Mark v. Mark*, 2009 UT App 374, ¶ 12, 223 P.3d 476). A trial court has broad discretion to fashion the alimony award that is most appropriate to the particular circumstances before it, but the court must explain its decision with adequate findings of fact. *See supra* ¶ 10.

¶ 21 Here, Husband requested rehabilitative alimony during closing argument, and there are circumstances in this case that could weigh in favor of such an award. Wife was forty-three years old at the time of trial and had completed two years of college. She ***386** was employed throughout the marriage, including thirteen years as an award-winning sales associate at a large retailer and then another seven years as a small business owner. Although Wife's deli business struggled, her employment history demonstrated that she was a talented salesperson, earning between $41,000 and $47,000 each of her last seven years in retail sales. The court agreed with Wife that it could take several years for her to rebuild her career in sales, and it imputed to her an annual income of $36,000.

¶ 22 But the trial court's findings of fact and conclusions of law in this case do not address Husband's request for rehabilitative alimony, concluding simply that "[a]limony should be paid commencing March 2011 and continuing each month thereafter until ... the expiration of a term no longer than the term of the marriage of the parties." As a consequence, the trial court's factual findings are insufficient to support a permanent alimony award in the face of Husband's request and evidence that might support a rehabilitative award. *See, e.g., Jensen v. Jensen*, 2008 UT App 392, ¶¶ 2, 10, 19, 20, 197 P.3d 117 (concluding that the trial court did not abuse its discretion by awarding rehabilitative alimony where the recipient spouse had an associate's degree, worked sporadically for four years during a sixteen-year marriage, was not employed when the parties divorced, and had an imputed income of $1,419 per month). Accordingly, we remand for the trial court to reconsider the duration of its alimony award. We reiterate the discretion afforded to the trial court.

B. Child Support

[9] ¶ 23 Husband argues that the trial court abused its discretion when it refused to retroactively modify the temporary child support order. Before trial, the court entered a temporary order requiring Wife to pay Husband "$121.23 per month" in child support based on Wife's then "imputed gross income ... of $1,256.00 per month" and the fact that Husband had temporary physical custody of the couple's oldest son while the parties shared joint physical custody of their other three children. Before trial, the couple's oldest son turned eighteen, and the parties asked the court to recalculate child support. Husband urged the court to use what he considered a more realistic assessment of Wife's income in making that calculation, but the issue was ultimately reserved for trial. At trial, the court imputed to Wife a monthly income of $3,000, but it denied Husband's request to retroactively modify Wife's temporary child support obligation, stating only that "for the purposes of the temporary award it is reasonable to use the same incomes of the parties used to calculate child support in the Temporary Order."

¶ 24 Wife maintains that there was no basis in the record to retroactively modify the temporary child support award, and she directs us to a variety of evidence that shows her actual income was far below $3,000 while the temporary order was in place. For example, Wife testified at trial that her deli business operated at a loss, and the trial court found that Wife received a $1,000 monthly salary from the deli until 2010 when her salary increased to $2,000 per month. Wife maintains that " '[t]he fact that the trial court determined that [she] has the potential to earn $3,000 per month is no indication that she was earning even close to that amount during the time frame of 2009–2010' " when the temporary order was in place. That may be true, but because the trial court's factual findings are too terse to support that conclusion, we conclude that its denial of Husband's request to retroactively modify the temporary order must be remanded for further consideration and appropriate findings.

[10] ¶ 25 Courts have discretion to modify child support and alimony awards retroactively. *Wall v. Wall*, 2007 UT App 61, ¶ 20, 157 P.3d 341; *see also* Utah Code Ann. § 78B–12–112(4) (LexisNexis 2007). In *McPherson v. McPherson*, 2011 UT App 382, 265 P.3d 839, we reversed a trial court's

refusal to modify an alimony award retroactively where the court calculated the husband's support obligation based on a six-figure income that had diminished drastically after he lost his job. *Id.* ¶¶ 2, 21–23. We noted that even though "harsh awards or a disparity in obligations can be justified by a finding of one or more discretionary factors," "the trial court ... did not identify any ... *387 explanation for the imposition of a temporary award beyond Husband's financial capability." *Id.* ¶ 20. In this case, it is possible, as Wife seems to suggest, that the court imputed a monthly income of $1,256 to more accurately reflect Wife's actual earnings and earning capacity before trial but used $3,000 a month in the divorce decree to reflect the forward-looking nature of income imputation and to give her an incentive to reach her earning capacity in the context of an award of permanent alimony over a longer term. Wife is speculating, however, because the court did not explain how it reached its conclusion. Rather, it simply determined that using $1,256 instead of $3,000 was "reasonable." Without any explanation or subsidiary factual findings to justify this decision, the court's findings and conclusions are inadequate to support its decision, and we therefore remand for the court to reconsider the issue. *See Connell v. Connell*, 2010 UT App 139, ¶¶ 5, 7, 12, 233 P.3d 836.

C. Attorney Fees

[11] ¶ 26 Husband next challenges the trial court's decision to award Wife $5,000 in attorney fees. In the initial findings of fact and conclusions of law, the court found that Wife incurred $56,275 in attorney fees and that she had "borrowed over $33,000 from her parents to partially pay for the fees." "Given the relative financial circumstances the parties will have after the divorce, and in applying the factors set forth in Rule 102, Utah Rules of Civil Procedure," the court concluded that "it is fair and equitable that [Husband] pay [Wife] the amount of $25,000 toward her attorney fees and costs." The court later reduced that amount to $5,000 without further findings of fact or explanation. Husband argues that the court's factual findings are inadequate to support its decision to award Wife attorney fees. We agree.

[12] [13] ¶ 27 In divorce cases, "[b]oth the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion." *Oliekan v. Oliekan*, 2006 UT App 405, ¶ 30, 147 P.3d 464 (citation and internal quotation marks omitted). Attorney fee awards, however, "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. And, [f]ailure to consider these factors is grounds for reversal on the fee issue." *Id.* (alteration in original) (citations and internal quotation marks omitted). For example, in *Stonehocker v. Stonehocker*, 2008 UT App 11, 176 P.3d 476, we reversed an attorney fee award where the court found that the wife "has the need for attorney[ ] fees [,] ... [the husband] has the ability to pay," and "the attorney[ ] fees were reasonable." *Id.* ¶ 51 (first and last alteration in original) (internal quotation marks and citation omitted). We noted that even though the court "address[ed] the parties' annual income and monthly expenses" in its alimony determination and mentioned the factors pertinent to an attorney fee award, the court made no "express factual findings related to the award of attorney fees that include[d] findings on the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." *Id.* ¶¶ 50–51 (citation and internal quotation marks omitted).

¶ 28 Wife maintains that the court's detailed findings of fact regarding the parties' incomes, expenses, and assets to determine alimony and divide marital property are enough to support the attorney fee award. But even if "there are facts in other sections of the findings and conclusions that could support [an attorney fee] award," failure to enter specific factual findings on each of the pertinent factors is reversible error. *See id.* ¶ 51. Here, the trial court indicated that Wife had incurred more than $50,000 in attorney fees and had "borrowed over $33,000 from her parents to partially pay for the fees." But other than a passing reference to the parties' "relative financial circumstances," the court did not make any specific findings on the reasonableness of the award, Husband's ability to pay, or Wife's needs.[3] *388 Consequently, we conclude that the court's findings of fact are insufficient to support its conclusion that an attorney fee award was warranted because regardless of the ultimate propriety of the award, "it is not apparent from the record before us that the court followed the appropriate analytical path in reaching its conclusion." *See Allen v. Allen*, 2014 UT App 27, ¶ 28, 319 P.3d 770; *see also Willey v. Willey*, 951 P.2d 226, 230 (Utah 1997) ("Without adequate findings of fact, there can be no meaningful appellate review.").

D. Summary

¶ 29 In summary, we conclude that the trial court's findings of fact are insufficiently detailed to permit meaningful appellate review of the amount of alimony awarded to Wife. We also conclude that in light of Husband's request for rehabilitative alimony, the court should have more fully explained its

decision to award permanent alimony for the length of the marriage. Finally, we conclude that the court did not adequately explain its decisions awarding Wife attorney fees and denying Husband's request to retroactively modify his child support obligation. Accordingly, we remand for the court to reconsider these issues and enter additional findings of fact. In doing so, we reiterate that our decision should not be read to require the court to reach any particular result on the merits. Rather, we leave to the trial court the task of resolving each issue with supporting findings of fact that provide a fuller explanation for whatever conclusion it determines is most appropriate. *See McPherson*, 2013 UT App 302, ¶ 8, 318 P.3d 773 (noting that comments on the trial court's estimation of the husband's income before remanding for additional findings of fact "were intended to guide and focus the trial court's consideration on remand on an issue we conclude had not been adequately addressed," not "to superimpose any particular findings of fact, limit the sound exercise of the trial court's discretion, or dictate any particular result").

II. Medical Expenses and the Tax Liability of Wife's Business

¶ 30 Husband next argues that the trial court erred when it denied his request to offset unpaid temporary alimony payments with medical and dental expenses he incurred for the children during the period of temporary support. He also asserts that the court should not have divided the tax obligations of Wife's deli business equally between the parties while awarding ownership of the business solely to Wife. We decline to disturb either decision because Husband has not met his burden of persuasion on appeal.

A. Medical and Dental Expenses

[14] ¶ 31 The trial court entered temporary orders in September and December 2009 that required Husband to pay Wife temporary support and ordered each party to pay "one-half of any child's deductible, co-pay or non-covered amounts for ... essential medical or dental services or prescriptions." Husband asserts that even after he made repeated "timely requests for reimbursement from Wife" for her portion of the children's medical expenses, she never paid her half. According to Husband, in "August and October 2010, after [Wife's] repeated failure to reimburse [him], [he] offset these amounts against alimony and child support payments he owed to Wife."

¶ 32 The trial court found that Husband improperly offset these expenses from his alimony payments and denied his request for reimbursement. The court noted that Husband included in the amounts he offset not just medical expenses, but also "expenses relative to school fees, extracurricular activity costs, clothing, and auto expenses for the children," which were not the subject of either of the temporary orders. The court also noted that Husband did not support the other expenses he claimed with "receipts verifying costs incurred," so there was "insufficient evidence to support an award to [Husband] for unpaid child-related expenses."

[15] ¶ 33 On appeal, Husband does not point us to any evidence that calls the court's reasoning into question, and he cites no controlling case law or statute that requires a different result. Rather, Husband merely cites portions of his trial testimony describing the expenses that the trial court ultimately found were unsupported by the evidence. ***389** An appellant has the burden of persuasion on appeal and must "point out the perceived errors of the lower court" and provide "an argument containing the contentions and reasons ... with respect to the issues presented, ... with citations to the authorities, statutes, and parts of the record relied on." *Allen v. Friel*, 2008 UT 56, ¶¶ 7, 10, 194 P.3d 903 (first omission in original) (citation and internal quotation marks omitted); *see also* Utah R.App. P. 24(a)(9). Without more, Husband has not met his burden of persuasion, and we therefore decline to disturb the trial court's decision.

B. Tax Consequences of Wife's Business

¶ 34 For similar reasons, we also decline to disturb the trial court's decision to divide the tax consequences of Wife's business equally between the parties. Wife testified that she opened a deli business in 2004 and operated it at a loss each year from 2007 to 2009. The trial court found that the business had "no value" based on the substantial debt it had accumulated. The court then awarded "the deli business, together with all [its] debt obligations" to Wife, but it also ordered that "the parties be equally liable for any tax, penalty or interest assessed" for any tax year in which they filed a joint income tax return. Husband asked the court to modify its order to insulate him from any tax liability arising from Wife's business, but the court declined to do so. It explained that because "there were mutual tax benefits derived by the parties during the marriage, any tax liability should also flow to both parties." Presumably, the business's losses enabled the couple to reduce their taxable income each year in which they filed a joint return, so the court determined that Husband, having

already enjoyed tax benefits from the business, should also share any financial pain that a subsequent audit might impose.

¶ 35 Husband disagrees and argues that it is inequitable for him to be "potentially liable for business-related taxes on a business in which he was never involved, had no management or other authority, and which Wife has admitted has substantial potential tax liabilities." "Under the facts of this case," Husband asserts, "the trial court abused its discretion in dividing the tax obligation between the parties, but awarding the business to Wife alone." Husband, however, has not carried his burden of persuasion on appeal.

[16] ¶ 36 "In a divorce proceeding, it is well established that the trial court is permitted considerable discretion in adjusting the financial and property interests of the parties, and its actions are entitled to a presumption of validity." *Savage v. Savage*, 658 P.2d 1201, 1203 (Utah 1983). Accordingly, we will not disturb a decision adjusting the financial interests of the parties in a divorce action unless the decision "works such a manifest injustice or inequity as to indicate a clear abuse of discretion." *Id.* (emphasis, citation, and internal quotation marks omitted). Here, Husband offers little analysis demonstrating that the court's decision to divide the business's tax liability between the parties was an abuse of discretion. Rather, he simply asserts that the court's ruling was unfair because Wife mismanaged the business, "kept no accounting records," "used business cash for personal expenses, and therefore, she could not vouch for the accuracy of business tax matters." But Husband does not point to any evidence in the record to support those assertions, nor does he direct us to any authority that is inconsistent with the trial court's analysis. As a result, Husband has not carried his burden of persuasion on appeal, and we will not disturb the trial court's decision. *See Allen*, 2008 UT 56, ¶¶ 7, 10, 194 P.3d 903.

III. Wife's Conduct

¶ 37 Finally, Husband raises a variety of issues that are related to Wife's extramarital affair. First, he argues that the trial court was obligated to grant his counter-petition for a fault-based divorce because "[n]o showing whatsoever was made of irreconcilability" and "it was only the fact of the adulterous conduct that would provide any basis at all to conclude that the marriage was irretrievably lost." Second, he argues that the trial court ignored Wife's fault in determining the amount and duration of alimony, and he urges us to overrule *Mark v. Mark*, 2009 UT App 374, 223 P.3d 476, a decision that instructed trial courts to do just that until the ***390** legislature provided further guidance about how fault should be considered. *See id.* ¶ 20; *see also* Utah Code Ann. § 30–3–5(8)(b) (LexisNexis 2007) (providing that courts "may consider the fault of the parties in determining alimony" without defining fault). Finally, Husband argues that the trial court erred when it concluded that Wife was not cohabiting with Friend.

¶ 38 We conclude that the trial court did not err in failing to grant Husband's counter-petition for a fault-based divorce. We also conclude that the trial court properly relied on *Mark* and did not err in its determination that there was no cohabitation.

A. Husband's Counter-petition

[17] ¶ 39 Wife filed a petition for divorce based on the parties' persistent failure "to reconcile and resolve their differences." Husband filed a counter-petition for divorce, alleging that " '[i]rreconcilable differences have arisen between [Wife] and [Husband] which have caused and led to the irretrievable breakdown of the marriage between the parties[,] rendering the marriage unworkable and subject to dissolution.' " He also alleged an alternative ground for the divorce "on the basis of [Wife's] adultery." The trial court granted Wife's petition for a divorce based on irreconcilable differences, and in its findings of fact, the court also noted that Wife "admits to adultery as an additional ground for the divorce." The final decree of divorce did not address Husband's alternative claim for a fault-based divorce, concluding simply that Wife "is awarded a divorce from" Husband.

¶ 40 Husband argues that even though "the trial court made express findings establishing Husband's right to judgment in his favor on the fault basis of adultery," the court nevertheless "refused to enter a judgment in his favor" contrary to rule 54 of the Utah Rules of Civil Procedure. *See generally* Utah R. Civ. P. 54(c)(1) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled...."). He further asserts that there "was no evidentiary basis for a finding of irreconcilable differences, but only for the fault basis of Wife's adultery."

[18] [19] ¶ 41 Husband's argument overlooks the fact that he admitted there was a basis for a divorce based on irreconcilable differences. "An admission of fact in a pleading is a judicial admission and is normally conclusive on the party making it." *Baldwin v. Vantage Corp.*, 676

P.2d 413, 415 (Utah 1984). Unless withdrawn or amended, admissions "have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Guidry v. Sheet Metal Workers Int'l Ass'n,* 10 F.3d 700, 716 (10th Cir.1993) (citation and internal quotation marks omitted), *modified en banc on other grounds sub nom. Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 39 F.3d 1078 (10th Cir.1994). In his answer to Wife's petition for divorce, Husband admitted that the parties' differences had "become irreconcilable [,] making continuation of the marriage under the circumstances impossible." And in his counter-petition for divorce, Husband requested a divorce based on an "irretrievable breakdown of the marriage" that he alleges arose from the parties' "[i]rreconcilable differences." He alleged adultery only as an alternative ground for the divorce. Consequently, Husband's admission by itself provides an evidentiary basis for the court's decision, and having granted a divorce on grounds asserted by both parties, the court had no obligation to rule on Husband's claim for a fault-based divorce that he asserted only in the alternative. [4]

***391** B. *Mark* and the Relevance of Fault

[20] ¶ 42 The version of Utah Code section 30–3–5(8)(b) in effect during the parties' divorce proceedings allowed trial courts to "consider the fault of the parties in determining alimony." *See* Utah Code Ann. § 30–3–5(8)(b) (LexisNexis 2007). Five months after Wife filed her petition for divorce, we issued a decision in *Mark* instructing trial courts that it is "inappropriate to attach any consequence to the consideration of fault when making an alimony award." 2009 UT App 374, ¶ 20, 223 P.3d 476. We noted that the legislature had "provided no definition of what, exactly, constitutes fault," leading to confusion over whether the statute referred to fault-based grounds for divorce or bad behavior unrelated to the divorce's underlying cause. *Id.* ¶ 18. And we invited the legislature to more "clearly define [ ] fault in the statute" to resolve those ambiguities. *Id.* ¶ 20. The dissent in *Mark* opined that because the language in section 30–3–5(8)(b) was "broad and generalized," the statute "strongly suggests that the Legislature appreciates the multitude of factual scenarios that arise in divorce cases" and "trusts the courts to flesh out the alimony/fault concept in the course of adjudication of cases over time." *Id.* ¶ 25 (Orme, J., dissenting). Subsequent appellate panels have questioned the reasoning in *Mark* without overruling it, *see Fairbanks v. Fairbanks,* 2010 UT App 31U, para. 5, 2009 WL 5824126 (McHugh, J., concurring) (noting that the dissent's reasoning in *Mark* is persuasive, but concurring in the majority's reliance on *Mark* based on "principles of horizontal stare decisis"), and noted its potential inconsistency with prior precedent, *see Myers v. Myers,* 2010 UT App 74, ¶ 11 n. 3, 231 P.3d 815, *aff'd,* 2011 UT 65, 266 P.3d 806.

¶ 43 At trial, Husband argued that Wife's adultery "should terminate any right to alimony" and that the trial court could "ignore" *Mark* because the case was inconsistent with prior Utah case law. Evidently, the trial court did not take Husband up on that request and awarded Wife $1,281 per month in alimony. Husband argues that the trial court "committed injustice" by "ignoring the fault basis for terminating this marriage" when it "fashion[ed] an award of alimony," and he urges us to overrule *Mark.* We decline to do so and conclude that the court properly relied on that case.

[21] **[22]** **[23]** **[24]** ¶ 44 "Those asking us to overturn prior precedent have a substantial burden of persuasion." *State v. Menzies,* 889 P.2d 393, 398 (Utah 1994). Horizontal stare decisis requires appellate courts to adhere to their own prior decisions, and that obligation "applies with equal force to courts"—like ours—that are "comprised of multiple panels." *Id.* at 399 n. 3. Each appellate panel must "observe the prior decisions of another." *Id.* Although we have authority to overrule our own precedent in some limited circumstances, we will "not do so lightly"—the challenged decision must be (1) "clearly erroneous" or (2) "conditions [must] have changed so as to render the prior decision inapplicable." *Id.* (citation and internal quotation marks omitted). Consequently, the mere fact that a decision has been criticized by prior panels or that a particular panel disagrees with a prior decision is insufficient by itself to justify departures from our own case law.

¶ 45 We first note that Husband has not argued that changed circumstances make *Mark* a candidate for reversal, so he must demonstrate that the decision was clearly erroneous. [5] He has not met that "substantial burden of persuasion." *Menzies,* 889 P.2d at 398.

***392** ¶ 46 While the *Mark* decision has been criticized, it is not clearly erroneous. It is settled law in Utah that "[t]he purpose of alimony is to provide support" to the recipient spouse "and not to inflict punitive damages" on the payor spouse. *See English v. English,* 565 P.2d 409, 411 (Utah 1977) (citation and internal quotation marks omitted). As early as 1946, the Utah Supreme Court overturned an alimony award that was clearly intended to "compensate [the wife] for her suffering" and "teach [the husband] a lesson."

Foreman v. Foreman, 111 Utah 72, 176 P.2d 144, 153–54 (1946). The court noted that "[n]either task is properly within the issues of a divorce case." *Id.* at 153. This approach to alimony differs from the common law rule that "a wife could not obtain alimony when a divorce was granted by reason of her misconduct." *See Alldredge v. Alldredge*, 119 Utah 504, 229 P.2d 681, 684–86 (1951) (describing the common law rule and Utah's departure from it), *overruled on other grounds by Kiger v. Kiger*, 29 Utah 2d 167, 506 P.2d 441 (1973). Accordingly, in determining alimony, Utah courts have traditionally considered the recipient spouse's "financial conditions," "needs," and ability "to produce a sufficient income," as well as the payor spouse's "ability ... to provide support." *English*, 565 P.2d at 411–12; *see also Hendricks v. Hendricks*, 91 Utah 553, 63 P.2d 277, 279 (1936) ("The amount of alimony is measured by the wife's needs and requirements, considering her station in life, and upon the husband's ability to pay."), *modified on other grounds*, 91 Utah 564, 65 P.2d 642 (1937). And historically, fault has also been "one of the factors to be considered with all of the others" to determine alimony. *See Christensen v. Christensen*, 21 Utah 2d 263, 444 P.2d 511, 512 (1968); *see also Riley v. Riley*, 2006 UT App 214, ¶¶ 19–24, 138 P.3d 84 (affirming an alimony award where "the trial court explicitly stated it had considered [the husband's] fault"); *Christiansen v. Christiansen*, 2003 UT App 348U, para. 9, 2003 WL 22361312 ("Fault may correctly be considered by the trial court without penalizing the party found to be at fault.").

¶ 47 In 1995, the legislature codified these factors, providing that courts "shall consider" the recipient spouse's financial needs and ability to meet those needs, the payor spouse's ability to pay, and the length of the marriage in determining alimony. *See* Utah Code Ann. § 30–3–5(7)(a)(i)–(iv) (Michie Supp.1995). These factors are still part of Utah law today. *Id.* § 30–3–5(8)(a)(i)–(iv) (LexisNexis 2013). The 1995 changes to section 30–3–5 also allowed trial courts to continue to exercise their discretion to "consider the fault of the parties in determining alimony." *See id.* § 30–3–5(7)(b) (Michie Supp.1995). But nowhere in the 1995 amendments did the legislature repudiate what had become something of an axiom before the statute was passed and has since remained uncontroversial—that the purpose of divorce proceedings "should not be to impose punishment on either party." *See Jesperson v. Jesperson*, 610 P.2d 326, 328 (Utah 1980); *see also Goggin v. Goggin*, 2013 UT 16, ¶ 52, 299 P.3d 1079 (noting that courts do not "have discretion to distribute marital property in a way that is designed to punish a party's contemptuous behavior").

¶ 48 In *Mark*, we noted the analytical tension involved in allowing courts to consider fault to determine alimony but prohibiting any spousal support obligations that operate as a punishment for misconduct. 2009 UT App 374, ¶ 17, 223 P.3d 476. That is, "if a trial court uses its broad statutory discretion to consider fault in fashioning an alimony award and then, *taking that fault into consideration*, adjusts the alimony award upward or downward, it simply cannot be said that fault was not used to punish or reward either spouse." *Id.* In light of clear Utah law expressing disapproval for punitive alimony awards, "trial courts [were] left in the difficult position of trying to determine what the term 'fault' means, in what context, and what, if any, consequence fault should have on an award of alimony." *Id.* We pointed out that the version of the statute applicable at the time provided "no meaningful guidance" on that issue, *id.* ¶ 18, and we also noted that "consideration of fault is already built into the system on virtually every issue that arises in domestic cases," *id.* ¶ 19.

¶ 49 We acknowledge that *Mark's* prohibition on considering fault *at all* in determining alimony seems facially inconsistent with the ***393** statute's clear direction that courts "may consider the fault of the parties in determining alimony." Utah Code Ann. § 30–3–5(8)(b) (LexisNexis 2007). As we have discussed, there is a long line of cases that explicitly take fault into consideration. But the tension between considering fault and avoiding punitive alimony awards existed long before the legislature amended section 30–3–5 in 1995, and nothing in those revisions explicitly resolved that tension. *See Kirtsaeng v. John Wiley & Sons, Inc.*, —— U.S. ——, 133 S.Ct. 1351, 1363, 185 L.Ed.2d 392 (2013) ("[W]hen a statute covers an issue previously governed by the common law," courts typically presume that the legislature "intended to retain the substance of the common law." (alteration in original) (citation and internal quotation marks omitted)). So while *Mark* is certainly open to criticism, it can also be read as a reasonable attempt to resolve an analytical problem that has plagued this area of the law for decades—a problem that became less amenable to judicial resolution after the legislature essentially codified it by enacting the 1995 version of section 30–3–5. [6]

¶ 50 Husband is, of course, correct that the precedent in this area of the law is difficult to reconcile, and at least two members of this court have indicated that they would probably decide *Mark* differently today if given the

opportunity to write on a clean slate. *See supra* ¶ 42. But the slate is not clean, and without a compelling demonstration that *Mark* was clearly erroneous or that there has been some dramatic change in circumstances, principles of stare decisis require us to refuse Husband's invitation to go back to the drawing board. We therefore conclude that the court properly relied on *Mark* and had no obligation to take into account Wife's adultery in calculating either the amount or duration of alimony.

C. Cohabitation

[25] ¶ 51 Finally, we also affirm the trial court's conclusion that Wife was not cohabiting with Friend. The trial court found that even though Wife admitted "to having a sexual relationship" with Friend, Wife also testified that "she maintains a separate residency" from him. Wife did not have a key to Friend's home; she paid her own mortgage, insurance, and utility bills; and while she spent most nights at Friend's home when she did not have the children with her, she stayed over "less than fifty percent of the time." The court further found that although Wife and Friend "occasionally share dining and other food expenses" and Friend "previously stored his boat" in Wife's garage, they had "not jointly acquired any assets," and the boat was now stored elsewhere. Husband does not challenge the court's findings of fact, but he argues that the "trial court erred in concluding, based upon these facts, that Wife did not cohabit with [Friend]." Without citation to the record, he asserts that "Wife spent virtually every night with [Friend] at his home," that they "shared expenses," and that they were also contemplating marriage. Coupled with their intimate relationship and the storage of Friend's boat in Wife's garage, Husband maintains, these facts demonstrated "a relationship akin to that between a husband and wife."

¶ 52 Utah Code section 30–3–5 provides that an alimony award "terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person." Utah Code Ann. § 30–3–5(10) (LexisNexis 2013). The key question in analyzing cohabitation is "whether the parties entered into a relationship akin to that generally existing between husband and wife." *Myers v. Myers*, 2011 UT 65, ¶ 22, 266 P.3d 806 (citation and internal quotation marks omitted). While there are no "required elements of cohabitation because there is no single prototype of marriage that all married couples conform to," the "hallmarks" courts look for include whether the parties have "a ***394** shared residence, an intimate relationship, and a common household involving shared expenses and shared decisions." *Id.* ¶ 24. In *Haddow v. Haddow*, 707 P.2d 669 (Utah 1985), for example, although the parties had a sexual relationship, the supreme court reversed a cohabitation finding where the man did not have a key to the woman's home, there was no evidence he used her home when she was not there, and he did not contribute any money to the woman's mortgage, insurance, or utility bills. *Id.* at 672–74. The fact that the man had parked his van in the woman's driveway for several months was not sufficient to show cohabitation, particularly in light of evidence that the van was not the man's primary vehicle. *Id.* at 673.

¶ 53 Here, the trial court's findings of fact are adequate to support its conclusion that Wife and Friend had not established a relationship akin to that of a married couple. The facts that Friend stored a vehicle in Wife's garage at some point, that Wife and Friend shared some dining and food expenses, and that they had an ongoing intimate relationship weighs in favor of finding cohabitation. But, as in *Haddow*, neither party here had a key to the other's residence; Wife paid her own mortgage, insurance, and utility bills; and neither she nor Friend regarded the other's home as their permanent residence. Without any conclusive evidence that Wife and Friend had established a common residence and shared any major household expenses, their sexual relationship and willingness to buy food together simply does not amount to cohabitation as a matter of law and therefore did not require such a determination by the trial court.

CONCLUSION

¶ 54 We conclude that the trial court's findings of fact are insufficiently detailed to permit appellate review of its decisions awarding Wife alimony, denying Husband's request to retroactively modify his child support payments, and awarding Wife attorney fees. Accordingly, we remand those issues for the entry of additional findings of fact. We affirm the trial court's denial of Husband's request for reimbursement of the children's medical expenses and its decision imposing the tax liability of Wife's business on both parties. Finally, we conclude that the trial court properly relied on *Mark* when it declined to take into account Wife's fault in determining alimony and that the court had no obligation to grant Husband's counter-petition for a fault-based divorce. We also affirm the court's determination that there was no cohabitation.

All Citations

335 P.3d 378, 768 Utah Adv. Rep. 12, 2014 UT App 211

Footnotes

1 The Honorable Russell W. Bench, Senior Judge, sat by special assignment as authorized by law. *See generally* Utah Code Jud. Admin. R. 11–201(6).

2 Except where we have noted otherwise, we cite the 2007 version of the Utah Code because that version was in effect at the time the parties filed for divorce.

3 Nor did the court offer any explanation for its decision to decrease Wife's award from $25,000 to $5,000. Although Wife has not appealed that decision, we mention it simply because it underscores the difficulty of tracing the factual and legal path to the court's ultimate attorney fee award.

4 We note in passing that the trial court in this case granted Wife a divorce based on irreconcilable differences, but it did not grant Husband's request for the same relief. While the practical effect of the decree would likely be the same in any event, there is precedent indicating that where both parties request a divorce on the same grounds and the divorce is granted, each party is entitled to a decree of divorce. *See Haumont v. Haumont,* 793 P.2d 421, 427 (Utah Ct.App.1990) (concluding that "both parties [were] entitled to a decree of divorce" where the husband and the wife had each sought a divorce based on irreconcilable differences, but the trial court "improper[ly]" granted a divorce only to the wife after finding that the husband "was at fault"). But on appeal, Husband has not requested that he be granted a decree of divorce based on irreconcilable differences, so we do not address the issue further.

5 In 2013, the legislature passed H.B. 338, a bill that "allows a court to consider fault when awarding alimony" and defines "fault to include acts that intentionally and knowingly harm or cause substantial harm, physically or financially, to a spouse or the children of the marriage." H.B. 338, ch. 373, sec. 1, § 8(b)-(d), 2013 Utah Laws 1907, 1908 (codified at Utah Code Ann. § 30–3–5(8)(b)–(c) (LexisNexis 2013)). The bill was passed long after the events that gave rise to this appeal, and neither party has argued that H.B. 338 calls into question *Mark's* continuing validity as to pre–2013 cases or suggested that it is relevant to this appeal. So although the 2013 amendment appears to be a direct response to *Mark's* invitation for the legislature to more "clearly define[ ] fault in the statute," 2009 UT App 374, ¶ 20, 223 P.3d 476, we leave for another day the task of determining how the new law affects this line of precedent.

6 As we have discussed, the 2013 version of the statute appears to be an attempt to more "clearly define fault" and clarify how courts may permissibly consider it when awarding alimony. *See Mark v. Mark,* 2009 UT App 374, ¶ 20, 223 P.3d 476; *see also* Utah Code Ann. § 30–3–5(8)(b)–(c) (LexisNexis 2013) (allowing courts to "consider the fault of the parties" when awarding alimony and providing a definition of fault). Whether the new statute resolves the analytical tension involved in prohibiting punitive alimony awards while also taking fault into account is an issue that is not before us, so we leave that question for another day. *See supra* note 5.

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232 P.3d 1081
Court of Appeals of Utah.

Michael S. ROBINSON, Petitioner and Appellant,
v.
Debra J. ROBINSON, Respondent and Appellee.

No. 20090082–CA.
|
April 22, 2010.

Synopsis

Background: Divorcing husband and wife entered a stipulation for division of property at mediation. The District Court, Third District, Salt Lake Department, Glenn K. Iwasaki, J., entered divorce decree incorporating provisions of the stipulation, and husband appealed.

Holdings: The Court of Appeals, Davis, P.J., held that:

[1] contractual defense of mutual mistake was inapplicable;

[2] contractual defense of impossibility was inapplicable;

[3] trial court was not required to make a formal finding that stipulation was fair and reasonable; and

[4] due process did not require trial court to hold an evidentiary hearing.

Affirmed.

West Headnotes (8)

[1] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

Constitutional issues, including questions regarding due process, are questions of law that appellate court reviews for correctness. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[2] **Contracts**
Mutual mistake

A party may rescind a contract when, at the time the contract is made, the parties make a mutual mistake about a material fact, the existence of which is a basic assumption of the contract; if the parties harbor only mistaken expectations as to the course of future events and their assumptions as to facts existing at the time of the contract are correct, rescission is not proper.

Cases that cite this headnote

[3] **Divorce**
Accident or mistake

Contractual defense of mutual mistake did not provide relief to husband from obligations imposed by stipulation for division of property in divorce case, where the only mistaken assumptions husband pointed to were mistaken expectations as to future events, such as the money that a strip mall would generate, the mall's future value, and the expectation that the husband would be able to refinance the mall, and husband took no steps to avoid risk associated with inadequate information.

Cases that cite this headnote

[4] **Contracts**
Mutual mistake

Under contract law, a party may not rescind an agreement based on mutual mistake where that party bears the risk of mistake; a party bears the risk of a mistake when he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.

Cases that cite this headnote

[5] **Contracts**
Discharge by Impossibility of Performance

Under the contractual defense of impossibility, an obligation is deemed discharged if an unforeseen event occurs after formation of the

contract and without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable.

Cases that cite this headnote

[6] **Divorce**
Validity of Assent

Contractual defense of impossibility of performance was inapplicable to husband who alleged he could not obtain loan to refinance strip mall as required by divorce stipulation because he alleged no unforeseen event occurring after the parties signed stipulation that altered the possibility of performance; husband's ineligibility for loan based on the status of strip mall's leases was not an unforeseen future event because he was aware of the status of the leases and could have determined whether they would be adequate to support the contemplated loan.

1 Cases that cite this headnote

[7] **Divorce**
Presumptions and burden of proof
Divorce
Sufficiency and clarity
Divorce
Approval by court

Trial court was not required to make a formal finding that division of assets contained in divorce stipulation was fair and reasonable; although trial court made a finding that was ambiguous as to whether the parties or the court had determined that the stipulation was equitable, presumption was that stipulation would be enforced unless the trial court had found it to be unfair or unreasonable.

Cases that cite this headnote

[8] **Constitutional Law**
Termination; divorce, dissolution, and separation
Divorce
Mode and conduct of trial in general

Due process did not require trial court to hold an evidentiary hearing before entering divorce decree, despite husband's request, where all factual disputes related to contractual defenses that were immaterial to the trial court's decision. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

*1082 Stephen T. Hard, Holladay, for Appellant.

Dean C. Andreasen and Sarah L. Campbell, Salt Lake City, for Appellee.

Before Judges DAVIS, ORME, and VOROS.

OPINION

DAVIS, Presiding Judge:

¶ 1 Petitioner Michael S. Robinson (Husband) appeals the Decree of Divorce finalizing his divorce from Respondent Debra J. Robinson (Wife). Husband argues that the district court erred, in several respects, by enforcing a stipulation between the parties. We affirm.

BACKGROUND

¶ 2 During Husband and Wife's marriage, they acquired many pieces of income-producing real property, including condominiums, vacant land, and strip malls. The most valuable of these pieces of property was a strip mall in southern Utah (the plaza). After Husband filed for divorce in February 2007, the parties, over the course of several months, discussed their differing views as to how they should divide the various properties in which they had an interest.

¶ 3 On November 2, 2007, Husband and Wife attended formal mediation, at which they were each represented by counsel. At the mediation, the parties finally resolved the property division issues and signed a Stipulation and Property Settlement Agreement (the stipulation). The stipulation calculated Wife's share of various assets to be approximately $1.78 million, awarded the plaza to Husband, and provided

that Husband would refinance the mortgage on the plaza so as to pay Wife the $1.78 million. The parties stipulated that the fair market value of the plaza was $7.25 million. The stipulation also provided that Husband would file a loan application within fifteen days and that Wife would provide information necessary to assist Husband in preparing the application.

¶ 4 Husband not only failed to apply for a loan within the fifteen days provided for in the stipulation, but he at no time thereafter made such an application. In February 2008, Wife moved for entry of a divorce decree based on the stipulation. Husband thereafter filed motions to set aside the stipulation, arguing that his performance under the stipulation was excused because due to the parties' mistaken assumptions regarding the status of the plaza's leases, it was impossible ***1083** for him to secure the contemplated loan on the plaza.

¶ 5 Based upon affidavits and proffered testimony, the commissioner recommended that the stipulation be enforced. The commissioner reasoned, "[I]t's clear to me that the deal was reached in a fair fashion, and it represented the parties' agreement at the time." The district court then, without complying with Husband's request for an evidentiary hearing, accepted the commissioner's recommendations and entered the decree of divorce incorporating the provisions of the stipulation.

ISSUES AND STANDARD OF REVIEW

¶ 6 Husband argues that his performance under the stipulation should have been excused under the contractual defenses of mutual mistake and impossibility. Whether such defenses should have afforded Husband relief under the facts as he argues them is a question of law that we review for correctness. *See American Towers Owners Ass'n v. CCI Mech., Inc.*, 930 P.2d 1182, 1185 (Utah 1996).

¶ 7 Husband next argues that in order to enforce the stipulation, the district court was obliged to make a specific determination that the stipulation represented a fair and equitable division of the parties' property. Whether the district court made the necessary factual findings to support its determination is a question of law that we review for correctness. *Cf. State v. Nelson*, 950 P.2d 940, 942–43 (Utah Ct.App.1997).

[1] ¶ 8 Husband also argues that the district court violated his due process rights when it failed to hold an evidentiary hearing before enforcing the stipulation and entering the decree of divorce. "Constitutional issues, including questions regarding due process, are questions of law that we review for correctness." *Chen v. Stewart*, 2004 UT 82, ¶ 25, 100 P.3d 1177.

ANALYSIS

I. Contractual Defenses

¶ 9 Husband argues that the district court erred in failing to grant relief under two contractual defenses. Because neither of these defenses was applicable to the facts of this case, we conclude that the district court did not err in this regard.

A. Mutual Mistake

[2] [3] ¶ 10 Husband alleges that he should have been relieved from performance under the stipulation because of the contractual defense of mutual mistake. [1]

> "A party may rescind a contract when, at the time the contract is made, the parties make a mutual mistake about a material fact, the existence of which is a basic assumption of the contract. If the parties harbor only mistaken expectations as to the course of future events and their assumptions as to facts existing at the time of the contract are correct, rescission is not proper."
> *Deep Creek Ranch, LLC v. Utah State Armory Bd.*, 2008 UT 3, ¶ 17, 178 P.3d 886 (quoting *Mooney v. GR & Assocs.*, 746 P.2d 1174, 1178 (Utah Ct.App.1987)). The mistaken assumptions to which Husband points are regarding the money that the plaza "would generate"; the vacancy rate that "would" exist; the value the plaza "would have"; that the leases "would be" sufficient to secure a new loan or else the existing tenants "would re-sign extensions"; and that Husband "would be able to" refinance the plaza. These assumptions are simply expectations as to future events —that those events would not vary significantly from the current state of events—and therefore do not support the contractual defense of mutual mistake. As ***1084** to the current status of the leases and the income of the plaza—the amounts from which the plaza's value was calculated [2]— Husband was well aware of those figures. Indeed, the evidence Husband offers to show that the parties were

> mistaken as to the value of the plaza speaks only to the value of the plaza *after* events unfolded regarding the expiring leases. Husband sets forth no evidence that *at the time the stipulation was signed* the plaza was not worth the value the parties attributed to it.

[4] ¶ 11 Further, even had Husband, as he alleges, made a mistake in his valuation due to inadequate information, his argument would still be unavailing because "[u]nder contract law, a party may not rescind an agreement based on mutual mistake where that party bears the risk of mistake." *State v. Patience*, 944 P.2d 381, 387–88 (Utah Ct.App.1997) (citing 17A Am. Jur. 2d *Contracts* § 215 (1991)). "A party bears the risk of a mistake when ... he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient...." Restatement (Second) of Contracts § 154 (1981); *see also Klas v. Van Wagoner*, 829 P.2d 135, 141 n. 8 (Utah Ct.App.1992) (applying the above rule from the restatement). Thus, if Husband did not feel that the information upon which he relied was sufficient, he should have either insisted on any information he felt he needed before he entered into the stipulation or modified the terms of the stipulation accordingly. But as the commissioner recognized, Husband took no such steps to avoid the risk associated with inadequate information:

> To the extent [Husband] relied upon [Wife]'s handwritten analysis or any other verbal representations that she made, [Husband] chose to rely upon those representations and he chose not to include any of those representations in the [stipulation], to make any reference to them whatsoever, or to include them as pre-conditions.

The commissioner determined that, instead, Husband was simply asking for the deal to be fair "in hindsight," which is not a ground for rescission, *see Blackhurst v. Transamerica Ins. Co.*, 699 P.2d 688, 692 (Utah 1985) (stating that an appellate court "will not nullify a settlement contract because one of the parties would have acted differently if all the future outcomes had been known at the time of agreement"). Thus, the defense of mutual mistake does not provide relief under the facts of this case.

B. Impossibility

[5] [6] ¶ 12 Husband also argues that his performance under the stipulation should have been excused due to the impossibility of such performance. "Under the contractual defense of impossibility, an obligation is deemed discharged if an *unforeseen* event occurs *after formation of the contract* and without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable." *Western Props. v. Southern Utah Aviation, Inc.*, 776 P.2d 656, 658 (Utah Ct.App.1989) (emphases added) (footnote omitted); *see also* Restatement (Second) of Contracts § 266(1) (1981) ("Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact *of which he has no reason to know* and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary." (emphasis added)). This defense is wholly inapplicable here because Husband alleges no unforeseen event occurring after the stipulation was signed in November 2007 that altered the possibility of performance. *See generally Western Props.*, 776 P.2d at 658 n. 3 ("The requirement that the event occur after formation of the contract distinguishes a case of supervening impossibility ... from a case in which the contract cannot be performed because of a mistake, an unknown legal requirement, or other fact in existence at the time the contract is made."). ***1085** Instead, Husband argues in his brief that *at no point* could he have obtained a loan "given the state of the leases in November 2007, January 2008, or anytime thereafter."[3] Thus, without any later-occurring event rendering performance impossible or highly impracticable, Husband's argument of impossibility is unavailing and the district court did not err in failing to address the issue.[4]

II. Fair and Equitable Division of Property

[7] ¶ 13 Husband next argues that the district court erred in failing to make a determination that the division of assets contained in the stipulation was fair and reasonable. But the district court did discuss whether the division of the properties was equitable:

> The Court finds that the parties represent that prior to the execution of the [stipulation] they have each reviewed and discussed its terms with their respective counsel, if deemed necessary, and that the same represents a fair and equitable distribution of the

> assets acquired and liabilities incurred by the parties.

We do, however, recognize that this finding is somewhat ambiguous in that it could have been relating that *the parties* determined the division to be equitable, as opposed to the district court having made such a determination.[5] Nonetheless, we are unconvinced that further findings are necessary in this case. Husband correctly asserts that a stipulation dividing property between divorcing parties should be adopted only "if the court believes it to be fair and reasonable," *Klein v. Klein*, 544 P.2d 472, 476 (Utah 1975). But Husband provides no authority for his resulting assertion that a district court *may not* enforce a stipulation unless the district court makes a formal finding that it is fair and reasonable. And the presumption seems to be the exact opposite, that is, that a stipulation will ordinarily be enforced "unless the court finds it to be *un*fair or *un*reasonable," *Colman v. Colman*, 743 P.2d 782, 789 (Utah Ct.App.1987) (emphases added). Thus, from the district court's decision to enforce the stipulation, we assume—and have no findings that would indicate otherwise—that the court determined that the property division was equitable. And based on the facts of this case, in particular the sophistication of the parties and the fact that they each had the opportunity to consult with counsel and other advisors before entering the stipulation, we cannot say that the court's admittedly cursory finding exceeds the limits of reasonableness.

III. Failure to Hold an Evidentiary Hearing

[8] ¶ 14 Despite Husband's request for an evidentiary hearing, the district court accepted the commissioner's recommendation ***1086** and entered the decree of divorce without holding an evidentiary hearing. Husband argues that this denied him due process. We disagree. Importantly, Husband argues that we may reach his first issue on appeal because there are no disputed facts determinative of whether the contractual defenses apply. We agree and determine that for this same reason, no evidentiary hearing was required. Although factual disputes ordinarily require a complete evidentiary hearing, there is simply no need for such a hearing when, as here, all factual disputes are immaterial to the district court's decision. *See Beltran v. Allan*, 926 P.2d 892, 898 (Utah Ct.App.1996) ("There is no dispute to these facts, and an evidentiary hearing would be of no benefit."); *Liska v. Liska*, 902 P.2d 644, 650 (Utah Ct.App.1995) ("We have already determined the commissioner's recommendation was appropriate ... because the undisputed facts overwhelmingly demonstrate [such]. Accordingly, any error made by the district court in failing to conduct an evidentiary hearing to determine the appropriateness of the commissioner's recommendation is likewise harmless."). Regardless of the disputed issues—who had the financial records of the plaza, who was responsible for signing leases, whether Husband had sufficient information from Wife to file a loan application, and what representations Wife made as to the financial situation of the plaza—Husband was not, as we have explained above, entitled to relief under the contractual defenses asserted. Therefore, the district court did not err in declining to hold an evidentiary hearing before enforcing the stipulation and entering the decree of divorce.

CONCLUSION

¶ 15 We determine that the contractual defenses of mutual mistake and impossibility are inapplicable under the facts of this case. We also determine that the district court did not err in accepting the stipulation without making further findings that the stipulation was fair and equitable. Finally, we are convinced that Husband's due process rights were not violated due to the absence of an evidentiary hearing because there were no disputed factual issues material to the question before the district court. Accordingly, we affirm.

¶ 16 WE CONCUR: GREGORY K. ORME and J. FREDERIC VOROS JR., Judges.

All Citations

232 P.3d 1081, 654 Utah Adv. Rep. 25, 2010 UT App 96

Footnotes

1 In making his argument for mutual mistake, Husband places some reliance on the case of *Kendall Insurance, Inc. v. R & R Group, Inc.*, 2008 UT App 235, 189 P.3d 114. But the lead opinion in that case is that of only one judge because the second judge concurred only in the result—without elaboration—and the third judge dissented. Thus, the opinion relied on is not binding as precedent, as it would be had at least two judges joined the opinion. *See generally State v. Thurman*,

846 P.2d 1256, 1269 (Utah 1993) (quoting authority stating that " 'a decision of a panel constitutes a decision of the court and carries the weight of stare decisis in a subsequent case before the same or different panel' ").

2 Interestingly, although the parties agreed on a fair market value for the plaza, they did not agree as to the underlying amounts on which such a calculation is typically based. For example, although the parties knew that the property was fully occupied at the time of the stipulation, they could not agree on whether to use a vacancy rate of three percent or five percent.

3 Husband argues that his ineligibility for a loan based on the status of the leases was an unforeseen future event. However, when Husband entered the stipulation, he was well aware of the current status of the leases and could have checked to see if such would be adequate to support the contemplated loan. This ineligibility therefore fails as an unforeseen future event. Likewise, the future expectations advanced under Husband's mutual mistake argument do not support his impossibility claim because they are not future events that *made performance impossible*. Husband admits that the alleged impossibility of performance existed even when the stipulation was signed. Furthermore, as a general rule, stability in market events and financial ability are not basic assumptions of contracts. *See* Restatement (Second) of Contracts § 261 cmt. b (1981) ("The continuation of existing market conditions and of the financial situation of the parties are ordinarily not such [basic] assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rule [regarding impracticability].").

4 We further note that Husband's ability to provide evidence that performance was impossible or highly impracticable is severely limited where he never actually applied for a loan as contemplated, let alone having done so in the time frame set forth by the stipulation.

5 However, according to comments made at oral argument, both parties apparently considered this finding to express the determination, albeit a conclusory one, *by the district court* that the stipulation was fair and equitable. Yet Husband neither marshals the evidence to adequately challenge this finding nor cites to any authority providing that more detailed findings are required to explain *why* the stipulation was fair and reasonable. *See generally Chen v. Stewart*, 2004 UT 82, ¶¶ 76–80, 100 P.3d 1177 (explaining the marshaling requirement); *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14 (discussing briefing requirements).

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952 P.2d 112
Court of Appeals of Utah.

Lynn Vincent TOONE, Plaintiff and Appellee,
v.
Ruby Joan TOONE nka Ruby Joan Parkhurst, Defendant and Appellant.

No. 960675-CA.
|
Jan. 29, 1998.

Almost 12 years after divorce was finalized, former wife sought to reopen divorce decree in order to obtain share of former husband's military retirement. The District Court, Logan Department, Gordon J. Low, J., granted former husband's motion for summary judgment dismissing petition, and former wife appealed. The Court of Appeals, Greenwood, J., held that former wife's legal recognition of new property interest was not substantial change of circumstances sufficient to reopen divorce decree.

Affirmed.

West Headnotes (5)

[1] **Divorce**
Modification

Party seeking modification of divorce decree must demonstrate that substantial change in circumstances has occurred since entry of decree. U.C.A.1953, 30-3-5(3).

2 Cases that cite this headnote

[2] **Divorce**
Discretion of court

Court of Appeals reviews trial court's modifications of divorce decrees for abuse of discretion. U.C.A.1953, 30-3-5(3).

1 Cases that cite this headnote

[3] **Divorce**
Amendments, additional proofs, and trial of cause anew

Question of law as to what constituted substantial change of circumstances warranting modification of divorce decree was reviewed for correctness. U.C.A.1953, 30-3-5(3).

6 Cases that cite this headnote

[4] **Divorce**
Grounds in general

Passage of Uniformed Services Former Spouses Protection Act (USFSPA) was not "substantial change of circumstances" that would allow former wife to reopen divorce decree and obtain share of former husband's military retirement benefits; moreover, passage of USFSPA was not a "change," since it was enacted and took effect before parties' divorce was finalized. 10 U.S.C.A. §§ 1401-1408.

2 Cases that cite this headnote

[5] **Divorce**
Power and authority of court

In divorce proceeding, trial court, exercising its equitable powers, may dispose of marital property.

Cases that cite this headnote

Attorneys and Law Firms

***112** Marlin J. Grant, Logan, for Defendant and Appellant.

George Preston, Logan, for Plaintiff and Appellee.

Before BENCH, GREENWOOD and ORME, JJ.

OPINION

GREENWOOD, Judge:

Ruby Joan Toone, nka Parkhurst (Parkhurst), appeals the trial court's grant of summary judgment in favor of her ex-husband, Lynn Vincent Toone (Toone), dismissing Parkhurst's petition to modify their divorce decree. We affirm.

BACKGROUND

Toone filed for divorce from Parkhurst in June 1981. The parties agreed to bifurcate the divorce proceeding, and the divorce was granted on July 23, 1981. The trial court reserved the issues of custody, child support, property division, and all other matters until a later date.

On July 9, 1982, the trial court heard testimony regarding the remaining issues. The trial court awarded each party one-half of the equity in the parties' home and ordered that a parcel of property they owned be sold and the proceeds equally divided. Additionally, the trial court found that "each of the parties has a retirement, to-wit: Plaintiff's is worth $10,000, and Defendant's is worth $3,000." The trial court split the combined total and awarded each party $6,500.00. ***113** The trial court did not specify whether these retirements included a military pension that Toone had earned during the parties' twenty-three year marriage. The trial court awarded an equal amount of marital property, valued at $35,864.25, to each party, but did not indicate whether it had considered Toone's military retirement pension in its calculation.

Although the hearing regarding property took place in July 1982, the final decree was not signed until December 16, 1983. In its supplemental findings of fact and conclusions of law, the trial court "retain[ed] jurisdiction for a period of five (5) years, at the expiration of which time either party may motion the Court to revise ... other property matters herein."

On October 23, 1995, almost twelve years after the divorce was finalized, Parkhurst filed a Petition to Modify the Decree of Divorce, claiming she had only recently discovered she was entitled to a share of Toone's military retirement. Parkhurst asserted that because of the United States Supreme Court decision in *McCarty v. McCarty,* 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the parties had believed at the time of the divorce that federal law prohibited the division of military retirement benefits by any state court in a divorce proceeding. Accordingly, Parkhurst claimed, neither party had asked the divorce court to divide this marital asset. However, Parkhurst argued, the enactment of the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C.A. § 1401-1408 (amended 1990), which nullified *McCarty,* now entitled her to a share of the military retirement benefits.

Toone countered that the action was beyond the statute of limitations. He also asserted waiver, estoppel, and laches, and further claimed that USFSPA did not apply retroactively. Lastly, Toone argued that the doctrine of res judicata barred Parkhurst's action, since Parkhurst could not demonstrate a substantial change in circumstances which would justify reopening the property distribution.

Toone filed a Motion for Summary Judgment and Parkhurst filed an Answer and Cross Motion for Summary Judgment. The trial court granted summary judgment to Toone on the basis that the action was barred by the eight-year statute of limitations contained in Utah Code Ann. § 78-12-22 (1992). The trial court further concluded that Parkhurst had demonstrated no change of circumstances that would warrant a modification of the decree and that res judicata therefore applied. Parkhurst appeals.

ISSUES

Parkhurst seeks review on three grounds: (1) the trial court erred in holding there had been no substantial change in circumstances sufficient to justify reopening the divorce decree; (2) the retirement benefits are owned by the parties as tenants in common, subject to division at any time; and (3) the trial court incorrectly applied the eight-year statute of limitations to bar Parkhurst's claim.

ANALYSIS

Military Retirement Benefits

We begin by describing the law regarding division of military retirement benefits in state court divorce actions. As this court noted in *Maxwell v. Maxwell,* the United States Supreme Court held in *McCarty v. McCarty,* 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), that "the federal statutes then governing military retirement pay prevented state courts from dividing military retirement pay pursuant to state community property laws because of federal preemption." 796 P.2d 403, 404-05 (Utah Ct.App.1990). This ruling was applicable to equitable distribution states, as well. *See id.* at 405 n. 2. However, to counteract the effect of *McCarty,* Congress enacted USFSPA. *Id.* at 404-05. This statute provides that "a court may treat disposable retire[ment] ... pay payable to a member for pay periods beginning after June 25, 1981,

either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C.A. § 1408(c)(1) (1983); *see also* S.Rep. No. 97-502, at 16 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596:

> *114 The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of ... *McCarty* .... The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State ... courts ... to apply pertinent State or other laws in determining whether military retire[ment] ... pay should be divisable.

Id. at 1611. USFSPA became effective February 1, 1983, and allowed for retroactive application to June 25, 1981. *See* USFSPA, Pub.L. No. 97-252, 96 Stat. 730 (1982). USFSPA created for the military spouse a previously unavailable legal right to an award of a portion of the service member's retirement benefits and affected divorces finalized after June 26, 1981. Thus, USFSPA became effective prior to the 1983 final divorce decree of Toone and Parkhurst.

Change of Circumstances

Parkhurst contends that she had no opportunity to litigate the retirement issue at the divorce trial, and that her circumstances have since changed substantially because she is now allowed under USFSPA to claim her share of Toone's military retirement. Parkhurst claims the trial court erred in determining this was not a change of circumstances that would justify reopening the decree.

[1] [2] [3] While a trial court "has continuing jurisdiction to make subsequent changes or new orders for ... distribution of the property ... as is reasonable and necessary," Utah Code Ann. § 30-3-5(3) (1995), a party seeking modification of a divorce decree must demonstrate that "a substantial change in circumstances has occurred since the entry of the decree." *Thompson v. Thompson,* 709 P.2d 360, 362 (Utah 1985) (citations and quotation marks omitted); *Muir v. Muir,* 841 P.2d 736, 739 (Utah Ct.App.1992). Typically, this court reviews a trial court's modification determination for an abuse of discretion. *Hill v. Hill,* 841 P.2d 722, 724 (Utah Ct.App.1992). However, in this case, we are presented with a question of law regarding what constitutes a substantial change of circumstances, which is reviewed for correctness. *See State v. Leyva,* 951 P.2d 738, 739-742 (Utah 1997).

[4] This court considered whether the recognition of a new legal right constitutes a change in circumstances sufficient to reopen a divorce decree in *Throckmorton v. Throckmorton,* 767 P.2d 121 (Utah Ct.App.1988). In that case, a former wife sought to reopen the parties' 1976 divorce decree in order to obtain a share of her former husband's civil retirement benefits. *See id.* at 122. The wife claimed that although she was aware of the retirement account at the time of the divorce, she was unaware that she had any legal rights in it because at that time, Utah law did not recognize pension benefits as marital assets distributable upon divorce. *See id.* at 123. On appeal, the wife argued that the Utah Supreme Court's recognition of pension benefits as marital assets in *Woodward v. Woodward,* 656 P.2d 431, 432-33 (Utah 1982) (holding trial court may consider "all of the parties' assets and circumstances, including retirement and pension rights" accrued during marriage, and may equitably distribute them in a divorce decree), constituted a substantial change of circumstances and precluded the application of res judicata. *See Throckmorton,* 767 P.2d at 123.

This court disagreed and held that the subsequent legal recognition of a new property interest is not a substantial change of circumstances sufficient to override the " 'compelling policy interest favoring the finality of property settlements.' " *Id.* at 124 (quoting *Guffey v. LaChance,* 127 Ariz. 140, 618 P.2d 634, 636 (Ariz.Ct.App.1980)).

We believe the *Throckmorton* decision is controlling and precludes Parkhurst's claim of a substantial change of circumstances. She has failed to assert any change of circumstances other than her claim that the passage of USFSPA constitutes such a change. That enactment does not, under *Throckmorton,* constitute a substantial change sufficient to justify reopening the decree. Moreover, USFSPA was enacted and took effect before the Toones' divorce was finalized, so its passage does not properly constitute a "change" which has occurred *115 since the divorce.[1] Accordingly, we find no error in the trial court's ruling that Parkhurst did not demonstrate a change of circumstances sufficient to justify reopening the divorce decree. Because there was no substantial change of circumstances, res judicata applies to preclude Parkhurst's petition. *See Jacobsen v. Jacobsen,* 703 P.2d 303, 305 (Utah 1985) (" 'In the absence of [a showing of substantial change of circumstances], the

[divorce] decree shall not be modified and the matters previously litigated and incorporated therein cannot be collaterally attacked in face of the doctrine of res judicata.' " (citation omitted)).

Other Issues

[5] Parkhurst also argues the parties held the retirement benefits as joint tenants during the marriage, but, upon divorce, became tenants in common who could request partition of the property at any time. However, because she relies on cases from community property states [2] and misconstrues the Utah cases, we reject that argument.

Having concluded, as a matter of law, that Parkhurst has not shown a change of circumstances as would permit modification of the decree, it is unnecessary to consider whether affirmative defenses would have been available to bar the petition if Parkhurst had met the threshold change-of-circumstances requirement. We therefore do not address Parkhurst's arguments regarding application of a statute of limitations.

CONCLUSION

Because a change of law does not constitute a substantial change of circumstances and because Parkhurst has demonstrated no other substantial change of circumstances, the doctrine of res judicata bars Parkhurst's petition to modify the decree of divorce. Furthermore, we reject Parkhurst's argument regarding ownership of property after divorce because it is based on inapplicable case law. The order of the trial court granting summary judgment to Toone is affirmed.

BENCH and ORME, JJ., concur.

All Citations

952 P.2d 112, 335 Utah Adv. Rep. 25

Footnotes

1 Parkhurst admitted at oral argument that although she could have raised the issue of Toone's military retirement by filing a Rule 59 motion for new trial within ten days of entry of the final decree, or, alternatively, a Rule 60(b) motion for relief from judgment within three months after the decree was entered, she did not do so. *See* Utah R. Civ. P. 59, 60(b).

2 Utah adheres to the common law principle that marital property may be disposed of by the trial court exercising its equitable powers. *See, e.g., Wiles v. Wiles*, 871 P.2d 1026, 1028 (Utah Ct.App.1994).

157 P.3d 341
Court of Appeals of Utah.

Laurie P. WALL, Petitioner and Appellee,
v.
Cory R. WALL, Respondent and Appellant.

No. 20060312–CA.
|
Feb. 23, 2007.

Synopsis

Background: Ex-husband appealed from decision of the Third District Court, Salt Lake Department, Sandra N. Peuler, J., modifying decree of divorce and denying his motion for new trial.

Holdings: The Court of Appeals, Billings, J., held that:

[1] downward modification of ex-wife's alimony award was not warranted, and

[2] trial court was within its discretion in refusing to make the child support modification order retroactive.

Affirmed and remanded.

West Headnotes (15)

[1] **Divorce**
Discretion of court
Divorce
Findings of court or chancellor

The determination to modify a divorce decree is generally reviewed under an abuse of discretion standard; however, questions about the legal adequacy of findings of fact and the legal accuracy of the trial court's statements present issues of law, which appellate courts review for correctness.

5 Cases that cite this headnote

[2] **Appeal and Error**
New Trial or Rehearing
New Trial
Discretion of court

In deciding whether to grant a new trial, the trial court has some discretion, and appellate courts reverse only for abuse of that discretion.

Cases that cite this headnote

[3] **Divorce**
Authority and discretion of court
Divorce
Counsel fees, costs and allowances

An award of attorney fees in divorce actions rests within the sound discretion of the trial court, which appellate court will not disturb absent an abuse of discretion.

1 Cases that cite this headnote

[4] **Divorce**
Grounds

Downward modification of ex-wife's alimony award was not warranted; simply because parties stipulated to $800 per month alimony did not mean that they implicitly agreed $800 would sufficiently meet ex-wife's needs, and, although ex-husband alleged that $800 per month alimony was sufficient to meet ex-wife's needs at time of divorce and that, because her monthly income was triple the amount of alimony she received, the court must have included additional needs that were not present at time of divorce, ex-husband failed to acknowledge substantial debt ex-wife accumulated to attend college, and this was a circumstance contemplated by court at time of divorce. West's U.C.A. § 30–3–5(8)(g)(ii).

Cases that cite this headnote

[5] **Divorce**
Modification

On a petition for a modification of a divorce decree, the threshold requirement for relief is a showing of a substantial change of circumstances

occurring since the entry of the decree and not contemplated in the decree itself, and if a change in circumstances is reasonably contemplated at the time of divorce, then it is not legally cognizable as a substantial change in circumstances in modification proceedings.

2 Cases that cite this headnote

[6] **Divorce**
Modification

In order for a material change in circumstances to be contemplated in a divorce decree, there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change.

2 Cases that cite this headnote

[7] **Divorce**
Modification

If both the divorce decree and the record are bereft of any reference to the changed circumstance at issue in the petition to modify divorce decree, then the subsequent changed circumstance was not contemplated in the original divorce decree.

2 Cases that cite this headnote

[8] **Divorce**
Weight and sufficiency

Evidence supported trial court's conclusion that ex-wife's graduation from college and subsequent employment were contemplated at the time of divorce, for purposes of determining if substantial change of circumstances occurred since the entry of the divorce decree so as to warrant modification of alimony; trial court's findings of fact at time of divorce stated that ex-wife was full-time student with limited recent work experience, and ex-wife's divorce complaint stated that she was attending college at the time of the divorce in attempt to obtain skills which would allow her sufficient income to support herself.

Cases that cite this headnote

[9] **Divorce**
Relative needs and abilities to pay in general

Simply because the parties stipulated to $800 per month alimony did not mean that they implicitly agreed $800 would sufficiently meet ex-wife's needs, and instead, the stipulation indicated that they implicitly agreed that ex-husband had legal obligation to pay alimony.

Cases that cite this headnote

[10] **Child Support**
Time of taking effect; retrospective modification

Under statute providing that court "may" modify child support with respect to any period during which a modification is pending, legislature's use of "may" gives the court discretion to make child support modification orders retroactive. West's U.C.A. § 78–45–9.3(4).

2 Cases that cite this headnote

[11] **Child Support**
Time of taking effect; retrospective modification

Because the trial court's retroactive application of the child support modification order was discretionary, trial court was within its discretion in refusing to make the modification order retroactive. West's U.C.A. § 78–45–9.3(4).

2 Cases that cite this headnote

[12] **Costs**
Discretion of court

Costs
Items and amount; hours; rate

Decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court.

Cases that cite this headnote

[13] **Divorce**

Initiating and prevailing party; partial success

In awarding attorney fees in divorce action, 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.

1 Cases that cite this headnote

[14] **Divorce**

Initiating and prevailing party; partial success

Divorce

Nature of proceeding as factor in general

Ex-wife was entitled to attorney fees in ex-husband's action seeking to modify divorce decree; ex-wife's employment was only six weeks old at the time of the attorney fee award, she did not have sufficient funds to handle her ongoing expenses, she was the prevailing party on the most contested issue, namely modification of alimony, and ex-husband had more discretionary income.

Cases that cite this headnote

[15] **Divorce**

Initiating and prevailing party; partial success

Divorce

Appeal or review

In divorce proceedings, when the trial court has awarded attorney fees below to the party who then prevails on the main issues on appeal, appellate courts generally award fees on appeal.

3 Cases that cite this headnote

Attorneys and Law Firms

***342** Gregory B. Wall, Wall & Wall, Salt Lake City, for Appellant.

Robert H. Wilde, Robert H. Wilde PC, Midvale, for Appellee.

Before BENCH, P.J., BILLINGS and DAVIS, JJ.

OPINION

BILLINGS, Judge:

¶ 1 Cory R. Wall appeals from the trial court's order modifying decree of divorce and order denying motion for new trial. Specifically, Mr. Wall argues that the trial court erred when it denied his petition to reduce or terminate his alimony obligation to his ex-wife, Laurie P. Wall; denied his request to make the child support modification retroactive; denied his request for a new trial; and awarded Mrs. Wall attorney fees. We affirm and remand for a determination of attorney fees accrued on appeal.

BACKGROUND

¶ 2 Mr. and Mrs. Wall were married on June 10, 1981, and were divorced by decree of divorce (the Decree) on November 2, 2000. At the time of the divorce, Mrs. Wall was not working because she was caring for the parties' three children and attending college. Mr. Wall was self-employed as an attorney. ***343** Due to the nature of his law practice, his income fluctuated; however, at the time of the divorce, Mr. Wall's most current tax returns reflected a gross monthly income of $4734. According to the parties' settlement agreement (the Settlement Agreement) and the original Decree, Mr. Wall was required to pay Mrs. Wall $1200 per month in child support and $800 per month in alimony.

¶ 3 Following the parties' divorce, Mrs. Wall graduated from college and found full-time employment. On March 3, 2004, Mr. Wall filed a verified petition to modify the decree of divorce (the Petition). The Petition sought to terminate or reduce Mr. Wall's alimony obligation and to reduce his child support obligation based on Mrs. Wall's change in circumstances, specifically her graduation from college and subsequent employment.

¶ 4 On November 1, 2005, the trial court conducted a one-day trial regarding the Petition. At that time, the court determined that Mr. Wall's gross monthly income was approximately $4706 and Mrs. Wall's gross monthly income was approximately $2666. At the conclusion of the trial, the court found that there had been a substantial change in circumstances sufficient to reduce Mr. Wall's child support

obligations to $977 per month, effective December 1, 2005. The court declined to make the modified child support order retroactive because it would harm the children as Mrs. Wall was unable to pay Mr. Wall the retroactive amount of approximately $4000.

¶ 5 Regarding Mr. Wall's alimony obligation, the trial court found that the parties did not agree at the time of divorce that the $800 monthly alimony was sufficient to meet Mrs. Wall's needs and that the documents on file with the court at the time of the divorce showed that the $800 per month actually did not meet her needs. The trial court further found that Mrs. Wall's completion of college and getting a job were contemplated by the parties at the time of divorce, and therefore she did not experience a substantial change in circumstances. The trial court declined to modify Mr. Wall's alimony obligations, and determined that the alimony should remain consistent with the provisions of the original Decree. The court awarded attorney fees to Mrs. Wall.

¶ 6 On January 20, 2006, Mr. Wall filed a motion for new trial, requesting that a new trial be held on the issues of alimony reduction or termination, retroactive application of the child support modification order, and the award of attorney fees to Mrs. Wall. The trial court denied Mr. Wall's motion on March 28, 2006. Mr. Wall now appeals.

ISSUES AND STANDARDS OF REVIEW

[1] ¶ 7 On appeal, Mr. Wall argues that the trial court erred in refusing to modify the original Decree. "The determination to modify a divorce decree is generally reviewed under an abuse of discretion standard. However, questions about the legal adequacy of findings of fact and the legal accuracy of the trial court's statements present issues of law, which we review for correctness." *Van Dyke v. Van Dyke*, 2004 UT App 37, ¶ 9, 86 P.3d 767 (quotations and citations omitted).

[2] ¶ 8 Mr. Wall also asserts that the trial court erred when it denied his motion for a new trial. "In deciding whether to grant a new trial, the trial court has some discretion, and we reverse only for abuse of that discretion." *Okelberry v. W. Daniels Land Ass'n*, 2005 UT App 327, ¶ 20 n. 14, 120 P.3d 34 (quotations and citation omitted).

[3] ¶ 9 Finally, Mr. Wall contends that the trial court erred in awarding attorney fees to Mrs. Wall at the conclusion of trial. "An award of attorney fees in divorce actions rests within the sound discretion of the trial court, which we will not disturb absent an abuse of discretion." *Wells v. Wells*, 871 P.2d 1036, 1038 (Utah Ct.App.1994).

ANALYSIS

I. Alimony

[4] ¶ 10 Mr. Wall contends that the trial court erred in failing to reduce or terminate his alimony obligation to Mrs. Wall. More specifically, he asserts that Mrs. Wall experienced a substantial change in circumstances when she completed college and became qualified for full-time employment.

*344 [5] ¶ 11 "On a petition for a modification of a divorce decree, the threshold requirement for relief is a showing of a substantial change of circumstances occurring since the entry of the decree and not contemplated in the decree itself." *Moore v. Moore*, 872 P.2d 1054, 1055 (Utah Ct.App.1994) (quotations and citations omitted) (emphasis omitted). If a change in circumstances is "reasonably contemplated at the time of divorce [, then it] is not legally cognizable as a substantial change in circumstances in modification proceedings." *Dana v. Dana*, 789 P.2d 726, 729 (Utah Ct.App.1990).

[6] [7] ¶ 12 "In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change." *Durfee v. Durfee*, 796 P.2d 713, 716 (Utah Ct.App.1990). Thus, "if both the divorce decree and the record are bereft of any reference to the changed circumstance at issue in the petition to modify, then the subsequent changed circumstance was not contemplated in the original divorce decree." *Bolliger v. Bolliger*, 2000 UT App 47, ¶ 13, 997 P.2d 903.

[8] ¶ 13 In its findings of fact, the trial court determined that at the time of the parties' divorce, Mrs. Wall was a full-time student with limited recent work experience and that either her completing a college degree or her getting a job, or both, was contemplated at the time of the divorce. Mr. Wall is correct that neither the parties' original Settlement Agreement, nor the original Decree, reference Mrs. Wall's graduation from college or subsequent employment. However, the trial court's findings of fact at the time of the divorce state that Mrs. Wall "is a full-time

student with limited recent work experience." Moreover, Mrs. Wall's divorce complaint states that she was attending college at the time of the divorce "in an attempt to obtain skills which [would] allow her sufficient income to support herself." These references, made at the time of divorce, provide sufficient record evidence to support the trial court's conclusion that Mrs. Wall's graduation from college and subsequent employment were contemplated at the time of divorce.

¶ 14 Mr. Wall also argues that when the trial court refused to modify the alimony amount, it erred in determining that the $800 per month alimony payments did not meet Mrs. Wall's needs at the time of the divorce, and in considering Mrs. Wall's current needs—needs that did not exist at the time of the divorce. Although these arguments are not determinative as we have previously affirmed the trial court's finding that there has been no change in circumstances not contemplated at the time of the divorce, we nonetheless respond to Mr. Wall's concerns.

¶ 15 First, regarding Mr. Wall's argument that $800 per month was sufficient to meet Mrs. Wall's needs at the time of the divorce, we note that at the time of the divorce, the parties entered into the Settlement Agreement and stipulated that Mrs. Wall would receive $800 per month in alimony payments. Mr. Wall claims that by stipulating to this amount, Mrs. Wall agreed that $800 per month would sufficiently meet her needs. However, Mrs. Wall argues that the $800 per month was merely a settlement as to the amount she was to receive each month, not a stipulation that $800 per month was sufficient to meet her needs.

[9] ¶ 16 We conclude that simply because the parties stipulated to $800 per month alimony does not mean that they implicitly agreed $800 would sufficiently meet Mrs. Wall's needs. Instead, the stipulation indicates that they implicitly agreed that Mr. Wall has a legal obligation to pay alimony. Parties settle on alimony amounts for various reasons, including to balance a budget or to avoid extensive litigation.

¶ 17 Second, Mr. Wall argues that in refusing to modify the alimony amount the trial court improperly considered Mrs. Wall's current needs—needs that did not exist at the time of the divorce. Under Utah law, "[t]he court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action." Utah Code Ann. § 30–3–5(8)(g)(ii) (Supp.2006).

***345** ¶ 18 We have previously discussed the crux of Mr. Wall's argument on this issue—that $800 per month alimony was sufficient to meet Mrs. Wall's needs at the time of the divorce and that because her monthly income is triple the amount of alimony she receives, the court must have included additional needs that were not present at the time of the divorce. In making his argument, Mr. Wall fails to acknowledge the substantial debt Mrs. Wall accumulated to attend college. As we noted above, the record indicates that this was a circumstance contemplated by the trial court at the time of the divorce. In sum, we conclude that the trial court did not abuse its discretion in refusing to modify Mrs. Wall's alimony award.

II. Child Support

¶ 19 Next, Mr. Wall argues that the trial court erred when it refused to apply the modification of child support retroactively. Utah Code section 78–45–9.3(4) states:

> A child or spousal support payment under a child support order *may be* modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner, or on the obligor, if the obligee is the petitioner. If the tribunal orders that the support should be modified, the effective date of the modification *shall* be the month following service on the parent whose support is affected. Once the tribunal determines that a modification is appropriate, the tribunal shall order a judgment to be entered for any difference in the original order and the modified amount for the period from the service of the pleading until the final order of modification is entered.

Utah Code Ann. § 78–45–9.3(4) (Supp.2006) (emphasis added). [1] Mr. Wall asserts that the Utah Legislature created a mandatory requirement for retroactive application of a child support modification when it amended this section in 2003

to include the second sentence: "If the tribunal orders that the support should be modified, the effective date of the modification *shall* be the month following service on the parent whose support is affected." *Id.* (emphasis added).

[10] ¶ 20 However, we read the statute as a whole, which makes it clear that as a general rule, child support orders are "not subject to retroactive modification." *Id.* § 78–45–9.3(3)(c). The statute goes on to provide an exception to the general rule and gives the court discretion to make child support modification orders retroactive. *See id.* § 78–45–9.3(3)(c), (4). The language in subsection (4) specifically states that the court "may" modify child support "with respect to any period during which a modification is pending." *Id.* § 78–45–9.3(4). The legislature's use of "may" clearly gives the court discretion to make child support modification orders retroactive.

¶ 21 Moreover, in *Wilde v. Wilde*, 2001 UT App 318, 35 P.3d 341, this court interpreted section 78–45–9.3(4) to give courts discretion to retroactively apply a modified child support award. *See id.* at ¶ 21. In addressing the Utah Legislature's 2000 amendment to this section, this court noted that the 2000 amendment retained the first sentence:

> "A child or spousal support payment under a child support order *may* be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner, or on the obligor, if the obligee is the petitioner."

Id. (emphasis added) (quoting Utah Code Ann. § 78–45–9.3(4)). This sentence had previously been interpreted "to give courts the discretion to determine both if and when a modified child support award should be made retroactive." *Id.* at ¶ 19; *see also Ball v. Peterson*, 912 P.2d 1006, 1012 (Utah Ct.App.1996); *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah Ct.App.1992). Accordingly, this court concluded that by retaining the first sentence after the 2000 amendment, the statute "still provide[d] that support may be ***346** modified retroactively with respect to any post-service period, not that it must be." *Wilde*, 2001 UT App 318 at ¶ 21, 35 P.3d 341 (emphasis omitted).

[11] ¶ 22 Similarly, we note that the Utah Legislature's 2003 amendment retained this same first sentence, giving the trial court discretion to make a child support modification order retroactive. Thus, the 2003 amendment merely made the date of retroactivity mandatory if the court decides to make a retroactive modification. In sum, because the trial court's retroactive application of the child support modification order is discretionary, we conclude that in this case the trial court was within its discretion in refusing to make the modification order retroactive.

III. New Trial

¶ 23 Mr. Wall argues that the trial court erred when it denied his motion for a new trial. Specifically, he argues that he is entitled to a new trial because the trial court's findings concerning Mrs. Wall's claimed living expenses at the time of the divorce were not supported by sufficient evidence. Essentially, Mr. Wall is again arguing that the trial court should have used the amount of alimony that Mrs. Wall agreed to in the Settlement Agreement as the basis for Mrs. Wall's needs at the time of the divorce, instead of her financial declaration filed at the time of the divorce. However, as concluded above, the trial court was within its discretion to conclude that the $800 alimony award did not meet Mrs. Wall's needs at the time of divorce. Mr. Wall's motion for a new trial basically reargues his position on the trial court's findings concerning Mrs. Wall's financial needs at the time of the divorce; therefore, because we have already decided these issues, we conclude that the trial court did not err in denying his motion for a new trial.

IV. Attorney Fees

[12] [13] ¶ 24 Mr. Wall also asserts that the trial court erred in awarding attorney fees to Mrs. Wall. "The decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court." *Kelley v. Kelley*, 2000 UT App 236, ¶ 30, 9 P.3d 171 (quotations and citation omitted). Still, 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." *Id.* (quotations and citation omitted).

[14] ¶ 25 Mr. Wall fails to cite to the trial court's minute entry regarding attorney fees, in which the trial court found that Mrs. Wall's employment was only six weeks old at the time of the attorney fees award; Mrs. Wall did not have sufficient funds to handle her ongoing expenses; Mrs.

Wall was the prevailing party on the most contested issue—alimony; and Mr. Wall had more discretionary income. The trial court noted Mr. Wall's limited discretionary income and thus only awarded Mrs. Wall a portion of her attorney fees. Because the trial court considered all of the necessary factors for determining an attorney fees award, we conclude that the trial court was within its discretion in awarding attorney fees to Mrs. Wall.

[15] ¶ 26 Finally, we note that "[i]n divorce proceedings, when the trial court has awarded attorney fees below to the party who then prevails on the main issues on appeal, we generally award fees on appeal." *Childs v. Childs*, 967 P.2d 942, 947 (Utah Ct.App.1998); *see also Nelson v. Nelson*, 2004 UT App 254, ¶ 9, 97 P.3d 722. Therefore, we remand to the trial court for an award of costs and attorney fees reasonably incurred by Mrs. Wall on appeal.

CONCLUSION

¶ 27 Based on the foregoing reasons, we affirm the trial court's order modifying decree of divorce, in which the court denied the Petition to reduce or terminate alimony and declined to make the modified child support retroactive. We also affirm the trial court's denial of Mr. Wall's motion for a new trial and its award of attorney fees to Mrs. Wall. Finally, we award Mrs. Wall attorney fees on appeal and remand to the trial court for a determination of the amount of those fees.

¶ 28 WE CONCUR: RUSSELL W. BENCH, Presiding Judge, and JAMES Z. DAVIS, Judge.

All Citations

157 P.3d 341, 2007 UT App 61

Footnotes

1 This section was amended in 2003 and became effective on May 5, 2003. *See* Utah Code Ann. § 78–45–9.3 Amendment Notes. Mr. Wall's Petition was filed on March 3, 2004. Because the Petition was filed after the 2003 amendment became effective, the provisions of the statute's current version apply.

30-3-5 Disposition of property -- Maintenance and health care of parties and children -- Division of debts -- Court to have continuing jurisdiction -- Custody and parent-time -- Determination of alimony -- Nonmeritorious petition for modification.

(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. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children including responsibility for health insurance out-of-pocket expenses such as co-payments, co-insurance, and deductibles;

(b)

(i) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

(ii) a designation of which health, hospital, or dental insurance plan is primary and which health, hospital, or dental insurance plan is secondary in accordance with the provisions of Section 30-3-5.4 which will take effect if at any time a dependent child is covered by both parents' health, hospital, or dental insurance plans;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders;

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services; and

(e) if either party owns a life insurance policy or an annuity contract, an acknowledgment by the court that the owner:

(i) has reviewed and updated, where appropriate, the list of beneficiaries;

(ii) has affirmed that those listed as beneficiaries are in fact the intended beneficiaries after the divorce becomes final; and

(iii) understands that if no changes are made to the policy or contract, the beneficiaries currently listed will receive any funds paid by the insurance company under the terms of the policy or contract.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.

(5)

(a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter.

(6) If a petition for modification of child custody or parent-time provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(7) If a petition alleges noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

(8)

(a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or enabling the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining whether to award alimony and the terms thereof.

(c) "Fault" means any of the following wrongful conduct during the marriage that substantially contributed to the breakup of the marriage relationship:

(i) engaging in sexual relations with a person other than the party's spouse;

(ii) knowingly and intentionally causing or attempting to cause physical harm to the other party or minor children;

(iii) knowingly and intentionally causing the other party or minor children to reasonably fear life-threatening harm; or

(iv) substantially undermining the financial stability of the other party or the minor children.

(d) The court may, when fault is at issue, close the proceedings and seal the court records.

(e) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(f) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(g) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered

in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(h) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(i)

(i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(j) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(9) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and the payor party's rights are determined.

(10) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

Amended by Chapter 264, 2013 General Session
Amended by Chapter 373, 2013 General Session

Chapter 4
Court of Appeals

Part 1
General Provisions

78A-4-101 Creation -- Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal.

Renumbered and Amended by Chapter 3, 2008 General Session

78A-4-102 Number of judges -- Terms -- Functions -- Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation $1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

(a) administer the rotation and scheduling of panels;

(b) act as liaison with the Supreme Court;

(c) call and preside over the meetings of the Court of Appeals; and

(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

Renumbered and Amended by Chapter 3, 2008 General Session

78A-4-103 Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a)
(i) a final order or decree resulting from:
(A) a formal adjudicative proceeding of a state agency; or
(B) a special adjudicative proceeding, as described in Section 19-1-301.5; or
(ii) an appeal from the district court review of an informal adjudicative proceeding of an agency other than the following:
(A) the Public Service Commission;
(B) the State Tax Commission;
(C) the School and Institutional Trust Lands Board of Trustees;
(D) the Division of Forestry, Fire, and State Lands, for an action reviewed by the executive director of the Department of Natural Resources;
(E) the Board of Oil, Gas, and Mining; or
(F) the state engineer;
(b) appeals from the district court review of:
(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
(ii) a challenge to agency action under Section 63G-3-602;
(c) appeals from the juvenile courts;
(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;
(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;
(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;
(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;
(i) appeals from the Utah Military Court; and
(j) cases transferred to the Court of Appeals from the Supreme Court.
(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.
(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Amended by Chapter 441, 2015 General Session

78A-4-104 Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state.

Renumbered and Amended by Chapter 3, 2008 General Session

78A-4-105 Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court.

Renumbered and Amended by Chapter 3, 2008 General Session

78A-4-106 Appellate Mediation Office -- Protected records and information -- Governmental immunity.

(1) Unless a more restrictive rule of court is adopted pursuant to Subsection 63G-2-201(3)(b), information and records relating to any matter on appeal received or generated by the Chief Appellate Mediator or other staff of the Appellate Mediation Office as a result of any party's participation or lack of participation in the settlement program shall be maintained as protected records pursuant to Subsections 63G-2-305(17), (18), and (33).

(2) In addition to the access restrictions on protected records provided in Section 63G-2-202, the information and records may not be disclosed to judges, staff, or employees of any court of this state.

(3) The Chief Appellate Mediator may disclose statistical and other demographic information as may be necessary and useful to report on the status and to allow supervision and oversight of the Appellate Mediation Office.

(4) When acting as mediators, the Chief Appellate Mediator and other professional staff of the Appellate Mediation Office shall be immune from liability pursuant to Title 63G, Chapter 7, Governmental Immunity Act of Utah.

(5) Pursuant to Utah Constitution, Article VIII, Section 4, the Supreme Court may exercise overall supervision of the Appellate Mediation Office as part of the appellate process.

Amended by Chapter 445, 2013 General Session

Part 2
Juvenile Courts

78A-4-201 Appellate review of juvenile courts.

To uphold the clear and compelling fundamental liberty interests and constitutionally protected rights of parents and the strong public policy in favor of maximizing family unification, appropriate appellate review shall be made available and applied in furtherance of those interests.

Enacted by Chapter 281, 2012 General Session

Rule 24. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the

appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person,' "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs.

(f)(1) Type-volume limitation.

(f)(1)(A) In an appeal involving the legality of a death sentence, a principal brief is acceptable if it contains no more than 28,000 words or if it uses a monospaced face and contains no more than 2,600 lines of text; and a reply brief is acceptable if it contains no more than 14,000 words or if it uses a monospaced face and contains no more than 1,300 lines of text. In all other appeals, a principal brief is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text; and a reply brief is acceptable if it contains no more than 7,000 words or it uses a monospaced face and contains no more than 650 lines of text.

(f)(1)(B) Headings, footnotes and quotations count toward the word and line limitations, but the table of contents, table of citations, and any addendum containing statutes, rules, regulations or portions of the record as required by paragraph (a) of this rule do not count toward the word and line limitations.

(f)(1)(C) Certificate of compliance. A brief submitted under Rule 24(f)(1) must include a certificate by the attorney or an unrepresented party that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word processing system used to prepare the brief. The certificate must state either the number of words in the brief or the number of lines of monospaced type in the brief.

(f)(2) Page limitation. Unless a brief complies with Rule 24(f)(1), a principal briefs shall not exceed 30 pages, and a reply briefs shall not exceed 15 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule.

In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to

the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(g)(5) Type-Volume Limitation.

(g)(5)(A) The appellant's Brief of Appellant is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.

(g)(5)(B) The appellee's Brief of Appellee and Cross-Appellant is acceptable if it contains no more than 16,500 words or it uses a monospaced face and contains no more than 1,500 lines of text.

(g)(5)(C) The appellant's Reply Brief of Appellant and Brief of Cross-Appellee is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.

(g)(5)(D) The appellee's Reply Brief of Cross-Appellant is acceptable if it contains no more than half of the type volume specified in Rule 24(g)(5)(A).

(g)(6) Certificate of Compliance.

A brief submitted under Rule 24(g)(5) must comply with Rule 24(f)(1)(C).

(g)(7) Page Limitation.

Unless it complies with Rule 24(g)(5) and (6), the appellant's Brief of Appellant must not exceed 30 pages; the appellee's Brief of Appellee and Cross-Appellant, 35 pages; the appellant's Reply Brief of Appellant and Brief of Cross-Appellee, 30 pages; and the appellee's Reply Brief of Cross-Appellant, 15 pages.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the page, word, or line limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages, words, or lines requested, and the good cause for granting the motion. A motion filed at least seven days prior to the date the brief is due or seeking three or fewer additional pages, 1,400 or fewer additional words, or 130 or fewer lines of text need not be accompanied by a copy of the brief. A motion filed within seven days of the date the brief is due and seeking more than three additional pages, 1,400 additional words, or 130 lines of text shall be accompanied by a copy of the finished brief. If the motion is granted, the responding party is entitled to an equal number of additional pages, words, or lines without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within seven days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Advisory Committee Notes

The rule reflects the marshaling requirement articulated in *State v. Nielsen*, 2014 UT 10, 326 P.3d 645, which holds that the failure to marshal is no longer a technical deficiency that will result in default, but is the manner in which an appellant carries its burden of persuasion when challenging a finding or verdict based upon evidence.

Briefs that do not comply with the technical requirements of this rule are subject to Rule 27(e).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

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Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 90 days after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Advisory Committee Notes