

1997

Laura E. Starley v. Steven D. McDowell : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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970055-CA

IN THE UTAH COURT OF APPEALS

LAURA E. STARLEY,

Petitioner-Appellant,

v.

STEVEN D. McDOWELL,

Respondent-Appellee/
Cross Appellant

Case No. 970055-CA

Priority No. 15

BRIEF OF APPELLEE/CROSS APPELLANT

Appeal from a Supplemental Decree of Divorce Entered by the
Third District Court for Salt Lake County, State of Utah
Honorable Kenneth Rigtrup

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FILED

Utah Court of Appeals

APR 27 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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	:	
Petitioner-Appellant,	:	
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v.	:	Case No. 970055-CA
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IN THE UTAH COURT OF APPEALS

LAURA E. STARLEY,	:	
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Petitioner/Appellant,	:	
	:	
v.	:	Case No. 970055-CA
	:	
STEVEN D. McDOWELL,	:	
	:	
Respondent/Appellee.	:	

BRIEF OF APPELLEE/CROSS APPELLANT

APPELLEE'S JURISDICTIONAL STATEMENT

Jurisdiction of this court is conferred pursuant to the provisions of Sections 78-2a-3(g) and 78-2-2 Utah Code Ann. (1953) as amended and Rule 3 of the Utah rules of Appellate Procedure. This action involved the appeal of Findings of Fact and Conclusions of Law and a Decree of Divorce signed and entered in the Third Judicial District Court in and for Salt Lake County, State of Utah on October 18, 1993. A timely Notice of Appeal was filed on January 21, 1997. A timely cross appeal was filed on February 4, 1997.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- 1) Has the Appellant sufficiently marshalled the evidence in support of her appeal in attacking the trial court's Findings of Fact and Conclusions of Law.
- 2) Are the Findings of Fact and Conclusions of Law sufficient and supported by

the clear weight of the evidence to support the court's distribution of property and the classification of property as marital or premarital.

- 3) Was the evidence sufficient to support the court's distribution of property.
- 4) Are the Findings of Fact and Conclusions of Law sufficient and supported by the clear weight of the evidence in setting forth Appellee's income.
- 5) Are the Findings of Fact and Conclusions of Law sufficient in setting forth the trial court's alimony award.
- 6) Did the court err in awarding durational alimony.
- 7) Did the court err in refusing to award additional child support in the form of private school tuition and nanny expenses.
- 8) Did the court err in awarding Appellant her attorneys fees at trial and should Appellee be awarded his fees on appeal.

STANDARD FOR REVIEW

The standard for review for issues one (1) through seven (7) is that this Court of Appeals:

accords the trial court considerable discretion in adjusting the financial interest of divorced parties and, thus the court's "actions are entitled to a presumption of validity." *Allred v. Allred*, 797 P.2d 1108, 1111 (Utah Ct. App. 1990) (quoting *Hansen v. Hansen*, 736 P.2d 1055, 1056 (Utah Ct. App. 1987)). The trial court's determination "will not be upset on appeal unless the evidence clearly preponderates to the contrary or [this court] determine(s) that the court has abused its discretion." *Durfee v. Durfee*, 796 P.2d 713, 717 (Utah Ct. App. 1990) (quoting *Ostler v. Oster*, 789 P.2d 715 (Utah Ct. App. 1990)).

Cummings v. Cummings, 821 P.2d 472 (Utah Ct. App. 1991).

The standard of review on issue eight (8) above (attorney's fees) is:

Trial court's have broad discretion to award attorneys fees, however, the award "must be based on evidence of the receiving spouse's financial need for attorney's fees, the ability of the other spouse to pay, and the reasonableness of the requested award.

Rappleye v. Rappleye, 855 P.2d 260, 265 (Utah Ct. App. 1993).

A party may be awarded fees on appeal if they were awarded fees at trial and they substantially prevail on appeal.

Schaumberg v. Schaumberg, 875 P.2d 598, 604 (Utah Ct. App. 1994).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This appeal involves a divorce case. The parties were married on May 9, 1987 and divorced by a bifurcated Decree of Divorce entered in February 1995. The Complaint for Divorce was filed on November 8, 1994. The trial took place on November 16, and 17. and December 28, and 29, 1995 upon request of the trial court at the conclusion of trial, each of the parties filed submissions summarizing their respective positions as to the equitable distribution of the marital assets and liabilities, taking into account separate inherited or pre-marital property claims. (See Plaintiff's Submission re: Defendant's Proposed Property Distribution Set forth in Defendant's Exhibit 25, Dated February 9, 1996, R. at 221, 231, addendum A; Defendant's submission re: Defendant's Proposed Property Distribution set forth in Defendant's Exhibit 25, dated February 21, 1996, R. at 232-53, addendum B). The trial court issued it's Memorandum Decision deciding the case on November 12, 1996. (R. at 275-

96, addendum C). Supplemental Findings of Facts and Conclusions of Law and the Supplemental Decree of Divorce were entered on December 27, 1996. (R. at 298-316A, addendum D, and R. at 317-329, addendum E).

RELIEF SOUGHT ON APPEAL

Appellee/Cross Appellant, Steven D. McDowell, seeks the following relief in connection with this appeal:

- 1) An order affirming the trial court's distribution of property in all respects.
- 2) An order affirming the trial court's classification of property as premarital or marital in all respects.
- 3) An order affirming the trial court's award of alimony of \$1,000 per month for one year, to terminate December 31, 1997.
- 4) An order affirming the transitional alimony.
- 5) An order affirming the trial court's refusal to award additional child support in the form of private school tuition or nanny expenses.
- 6) An order reversing the trial court's award of \$15,000 attorneys fees to the Appellant.
- 7) An order awarding the Appellee/Cross Appellant his fees for appeal.

STATEMENT OF FACTS

The parties were married on May 9, 1987. They have two minor children, Brittany Jane McDowell, born September 5, 1989 and Megan Elizabeth McDowell, born June 16, 1992. The Petitioner was age 41 and the Respondent was age 48 at the time of the divorce. (R. at 299-300)

At the time of the marriage Respondent/Appellee ("Mr. McDowell") worked as a sales representative for Woolrich Clothing Company where his employment required him to travel approximately six months of every year. During his best year at Woolrich, he earned gross income of approximately \$130,000, before subtraction of necessary business expenses. (Tr. at 219). He also received rents and other income from real estate investments, promissory notes and contracts he bought and sold as he had done prior to the parties marriage. (Tr. at 219).

Mr. McDowell lost his employment with Woolrich during the marriage. Due to his inability to find comparable employment, he then devoted himself full-time to his real estate business, including the purchase and sale of real property, notes and contracts. (Tr. at 161-162).

The Petitioner/Appellant, Laura E. Starley ("Ms. Starley") was employed at Nordstrom during the course of the marriage. She was regional merchandise manager at the time of trial. According to the most recent tax return available for the trial court, Ms. Starley earned

\$68,000 in wages, and an additional \$7,000 contributed to her IRA and other retirement accounts. (Tr. at 164).

The parties 1994 income tax return showed that they had a total gross income of approximately \$332,000. That amount included a one-time buy out of Woolrich stock which was acquired by Mr. McDowell prior to marriage. It also included some capital gains, and approximately \$68,000 attributable to Ms. Starley's employment. Mr. McDowell's wages from Woolrich were approximately \$76,000. The remainder of the parties' total income was attributable to the Woolrich termination and sales of other premarital property. (Tr. at pp. 314-321, Defendant's Exhibit 16).

Mr. McDowell bought and sold real property throughout the marriage. At the time of trial, the parties jointly owned a marital residence located on Oakridge Drive in Salt Lake City, Utah. This residence was purchased prior to the marriage. However, the parties jointly signed on the underlying mortgage obligation. Mr. McDowell also owned a house located on Ontario in Park City, Utah, which he purchased two and one-half years before marriage; a house located on Sycamore Drive in Salt Lake City, Utah, in which Mr. McDowell resided and which he purchased one year prior to the marriage; a duplex located on Park Avenue in Park City, Utah, which he purchased six months prior to the marriage; a house located on Blair in Salt Lake City, Utah, which was purchased after the parties separation; plus three

other parcels of real estate properties. Except for the marital residence on Oakridge Drive, the Petitioner was not on the title of any real estate owned by Mr. McDowell. (Tr. at 249).

Mr. McDowell additionally held in his sole name, notes and other real estate contracts which had a value of more than \$300,000, a portion of which he acquired prior to the marriage, or which were purchased by him during the marriage with his pre-marital funds. (R. at 310, 311).

As a part of the equitable distribution, the trial court awarded Ms. Starley her retirement accounts and the marital residence located on Oakridge Drive. (R. at 308). She was ordered to pay the first mortgage on that residence and he, Mr. McDowell, was required to pay the second mortgage equity line obligation. All of the other real properties, notes, and contracts, including all of Mr. McDowell's pre-marital assets and his retirement accounts, were awarded to Mr. McDowell. (R. at 305). The court found that Mr. McDowell's West One IRA account had a net pre-marital value worth approximately \$106,387. (R. at 307). Mr. McDowell brought approximately \$450,000 in assets into the marriage. (R. at 304). The court also found he received an inheritance from his mother in 1989 of approximately \$55,000, for a total pre-marital and inherited amount of \$505,000 as his separate property. (R. at 304). The court found that the Petitioner brought certain assets into the marriage which she was awarded, and other property traced or which was not carefully valued. (R. at 304).

She inherited \$33,000 from her mother's estate in November of 1989, and received a \$30,000 personal injury settlement, the details of which were never fully disclosed. (R. at 304).

The court found that the property division of \$379,811 to Petitioner and \$893,942 to be fair and equitable taking into account the parties needs and the Respondent's business. The award traced the pre-marital or inherited assets to the party of origin. The award recognized the pre-marital contributions, and the personal and business characteristics of the assets. (R. at 304). The following chart outlines the court's division of assets in a clear and readable manner:

<u>Petitioner</u>		<u>Respondent</u>	
Personal Property	\$ 17,000	Personal Property	\$ 15,500
Jewelry	17,500	Jewelry	2,300
Country Club	5,950	West One IRA	141,627
Smith Barney	7,367	(pre-marital)	(106,387)
(pre-marital)	(7,367)	Woolrich	20,185
Nordstorm IRA	6,885	Sycamore (pre-marital)	(50,000)
(pre-marital)	(6,885)	Ontario (pre-marital)	(121,000)
Nordstrom Stock Option	25,000	Park Ave (pre-marital)	(137,500)
Nordstrom PS Plus	45,930	Adams	32,800
Nordstrom Profit Sharing	70,000	Blair	19,271

<u>Oakridge</u>	\$	<u>208,000</u>	Meadow	0
			McDowell	4,000
TOTAL (minus pre-marital)	\$	389,380	Blakenship	0
			Jones	10,067
			Lot	14,420
			Rodriguez	15,485
			Sargetis	2,200
			Ivision	18,326
			Brown	20,615
			Hardle	5,962
			Wilmott	0
			Alvey	21,452
			Washburn	28,208
			Overy	47,851
			Evans	30,437
			Daher	2,981
			Umana	10,789
			Sherrick	18,600
			Hoyt	14,500

Flores	4,403
Seif	10,025
Eyre	11,055
<u>Stock</u>	<u>9,947</u>
(subtotal)	\$301,237
Baker (pre-marital)	(12,030)
Pippas/Baker (pre-marital)	(60,000)
Chidaster (pre-marital)	<u>20,782</u>
TOTAL (minus pre-marital)	\$369,860

The total estate value was approximately \$1,273,753. When the Respondent's pre-marital portion of \$450,000 and his inheritance of \$55,000 is deducted from that amount, the marital estate totals \$768,753. After the Petitioner's pre-marital personal injury settlement of \$30,000, and her inheritance of \$33,000, are separated from the marital estate, then the remaining estate is valued at \$705,753. That amount divided by two equals \$352,876.50 to be awarded to each party. The Petitioner was awarded \$379,811, which totals more than one-half of her share of the marital estate, without taking into account that her personal injury settlement and inheritance was not carefully valued or traced by Gee to existing marital property. As such, the Petitioner was in fact awarded more than one-half of the marital estate to be divided.

The trial court further ordered Mr. McDowell to pay alimony in the sum of \$1,000 per month to terminate December 31, 1997. (R. at 320). The Respondent was also ordered to pay child support in the amount of \$882 per month for the parties two minor children. (R. at 318). Mr. McDowell had previously paid alimony to Ms. Starley pursuant to a temporary order, totaling \$1,000 per month from December 1, 1994 to November 1995. (R. at 77). The total alimony award spanned three (3) years. Alimony was based on Ms. Starley's gross monthly income of \$4,622 per month and Mr. McDowell's gross monthly income of \$6,667 per month, for a difference between the parties two gross monthly incomes of \$2,045. Of that \$2,045, Mr. McDowell was required to pay Ms. Starley, \$1,882, in child support and alimony leaving Mr. McDowell only \$163 to pay all other expenses, including taxes.

The court ordered Mr. McDowell to pay \$15,000 of Ms. Starley's attorney's fees, as well as the equity line of credit against the Oakridge Drive residence awarded to Ms. Starley, and income taxes due for 1995. (R. at 321, 325).

The trial court ordered Ms. Starley to assume and pay debt totaling \$27,315, most of which the court found was incurred by her following the separation of the parties and the trial court's Temporary Orders. (R. at 305). The Respondent was ordered to assume and pay debts totaling \$56,682, most of which was incurred during the marriage. (R. at 321).

SUMMARY OF ARGUMENTS

Point I

Ms. Starley has failed in her requirement to marshal all of the evidence in support of the trial court's findings related to the distribution of property, Mr. McDowell's income, alimony, payment of nanny and private school expenses, and attorney's fees for Ms. Starley. She has further failed to demonstrate that the evidence in support of those findings is insufficient. Likewise Ms. Starley has failed to demonstrate that the findings on these issues are clearly erroneous. Consequently her appeal on the issue of equitable distribution should be denied.

Point II

The Findings of Fact entered by the Trial Court contains the requisite elements and details required in connection with a property distribution award because they distinguish pre-marital and separate property from marital property as well as the accumulations on that separate pre-marital property. Accordingly the property distribution award must be affirmed.

Point III

The Findings of Fact entered by the trial court contain the requisite elements and details to support the award of alimony. They reflect that the trial court considered the;

1. financial conditions and needs of Ms. Starley;
2. ability of Ms. Starley to produce a sufficient income for herself;

3. ability of Mr. McDowell to provide support to Ms. Starley.

There is more than ample credible evidence in the record to support each of the findings in this regard. The trial court did not err in making the alimony award being challenged by Ms. Starley, and it's ruling should therefore be upheld.

Point IV

The trial court did not err in awarding durational adjustments to Ms. Starley's alimony award. The record is clear as to the ample credible evidence that the alimony was transitional only, and that Ms. Starley has the ability to meet her own needs after the transition period. Accordingly the award of durational alimony should be affirmed.

Point V

The trial court did not err in failing to require Mr. McDowell to pay one-half of the costs of nanny and private school for the parties children. The evidence demonstrates that the nanny was a luxury rather than a necessary expense in relation to ordinary daycare expenses. Nor did the trial court err in failing to require Mr. McDowell to pay one-half the cost of private school tuition for the children; the evidence clearly demonstrates that there was not an agreement between the parties for private school, the children had not historically attended private school, and the children were of extremely young age. Accordingly the trial court's denial of nanny and private school tuition should be affirmed.

Point VI

The trial court erred in awarding Ms. Starley attorney's fees given the substantial amount of property she was awarded and her ability to meet her own needs. The court considered the evidence as to the parties respective incomes, expenses, assets and liabilities, as well as evidence relating to the number of hours expended, total amount of fees and costs, and the reasonableness of the amounts charged Ms. Starley for legal services. The court also had before it evidence of the debts, and made an unequal distribution of the debts by requiring Mr. McDowell to pay approximately double the debt allocated to Ms. Starley. From that evidence, however, the trial court incorrectly found that Mr. McDowell had the ability to pay an additional \$15,000 in attorney's fees. Therefore the court's award of attorney's fees at trial should be reversed.

Point VII

Ms. Starley should not be awarded her attorney's fees incurred in the appeal. Ms. Starley has appealed nearly every issue of the trial court's ruling, with the exception of the award of her attorney's fees. Many of her requests are frivolous, and have no basis in law or equity, such as the payment of nanny expenses and private school tuition for the parties children. Therefore, it would be inequitable to award Ms. Starley her attorney's fees on appeal.

Point VIII

As the prevailing party at trial, Mr. McDowell is entitled to be awarded all of his attorney's fees and costs related to this appeal.

ARGUMENT

POINT I

THE TRIAL COURT APPROPRIATELY EXERCISED IT'S CONSIDERABLE DISCRETION IN ORDERS OF EQUITABLE DISTRIBUTION, CHILD SUPPORT AND ALIMONY, AND ATTORNEY'S FEES AND THE FINDINGS ARE SUFFICIENT TO SUPPORT THAT AWARD.

Utah law requires that the appealing party must marshall all of the evidence in support of the trial court's findings to demonstrate that those findings are an abuse of discretion or are clearly erroneous. *Breinholt v. Breinholt*, 905 P.2d 877, 882 (Utah Ct. App. 1995). Ms. Starley has failed to do so.

In divorce actions the trial court is vested with considerable and broad discretion in fashioning fair and equitable remedies for the parties on the issues of distribution of property, support and attorney's fees. Utah Code Ann. §30-3-5; See *Burke v. Burke*, 733 P.2d 133, 134-35 (Utah 1987). The trial court's decisions will not be disturbed by the appellate court unless the appealing party demonstrates that the decision of the trial court is clearly unjust, or that the trial court clearly abused it's discretion. *Walters v. Walters*, 812 P.2d 64 (Utah Ct. App. 1991).

In order to meet her burden, it is a prerequisite that Ms. Starley must first marshall all of the evidence which supports the trial court's reasoning and decisions and then demonstrate that that evidence, when viewed in the light most favorable to the findings, is insufficient to support the finding or is clearly erroneous. As noted in *Schindler v. Schindler*, 776 P.2d 84 (Utah Ct. App. 1989):

To mount a successful attack on the trial court's factual findings, an appellant must marshall all the evidence in support of the trial court's findings and then demonstrate that, even viewing the evidence in the light most favorable to the findings, the evidence is insufficient to support the findings. . . or that it's findings are otherwise clearly erroneous. The finding is clearly erroneous when, even though there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.

Id. at 88. The Court of Appeals "does not consider evidence de novo, so the mere fact that [it] might reach a different result than the trial court on the same evidence does not justify setting aside the trial court's findings." *Id.* at 88 (citations omitted).

Ms. Starley's brief and accompanying arguments fail to satisfy the "marshalling" requirements of *Schindler*, and on this basis alone her appeal of the trial court's rulings on the distribution of property, support, and attorney's fees issues is fatally defective. Ms. Starley's brief is wholly lacking in specifying evidence both in support of and contrary to her position. She does not point this court to any evidence whatsoever that would support this court's findings. Her failure to indicate to this court instances in the record or in the transcripts of

trial, where there is substantial evidence in support of the findings, indicates her failure to marshal the evidence.

In the following arguments, Mr. McDowell will point to specific instances where Ms. Starley failed to marshal the evidence. Each specific instance relates to each separate issue, and will indicate to the court that the findings are based on the substantial weight of the credible evidence, and that Ms. Starley's failure to show that those findings are clearly erroneous warrants this court denying her requests on appeal.

It appears that Ms. Starley is operating under the misconception that what she presented as evidence to the trial court in support of her position below should automatically be treated as fact. In this case, the record reflects that the trial court accepted evidence from both parties, weighed that evidence and then found facts upon which to fashion remedies that are fair and equitable to both parties on the issues of distribution of property, the amount of support, and the duration of support. It is not error of a trial court to discount or give little weight to evidence offered by one side or the other at trial. *Gardner v. Madsen*, 949 P.2d 785, 790. In fact it is the trial court's prerogative and duty to analyze conflicting evidence in the process of determining the ultimate facts. *Id.* Therefore, based upon Ms. Starley's failure to marshal the evidence and show that the findings are contrary to the clear weight of the evidence, her appeal must be dismissed.

POINT II

THE TRIAL COURT COMMITTED NO ERROR IN REGARDING ITS ORDERS DISTRIBUTING MARITAL ASSETS OR IN ITS ENTRY OF FINDINGS RELATED TO THAT DISTRIBUTION.

The most hotly contested issue in this trial was the characterization of property as marital or pre-marital. Utah case law specifically permits an unequal division of property when one party has brought significant assets into a marriage, or inherited assets during the marriage, and has kept those assets separate. *See Burt v. Burt*, 799 P.2d 1166 (Utah Ct. App. 1990); *Burke v. Burke*, 733 P.2d 133 (Utah 1987); *Preston v. Preston*, 646 P.2d 705 (Utah 1982); *Kerr v. Kerr*, 610 P.2d 1380 (Utah 1980); *Pope v. Pope*, 589 P.2d 752 (Utah 1978); *Henderson v. Henderson*, 576 P.2d 1289 (Utah 1978).

Utah case law consistently holds that individuals are entitled to the return of their pre-marital property, gifts or inheritances, absent certain circumstances. *See Burke v. Burke*, 733 P.2d 133 (Utah 1987); *Mortensen v. Mortensen*, 760 P.2d 304 (Utah 1988); *Burt v. Burt*, 799 P.2d 1166 (Utah Ct. App. 1990). Those circumstances include, "(1) whether the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance or protection of that property; or (2) the property has been consumed or its identity lost through co-mingling or exchanges, or whether the acquiring spouse has made a gift of an interest therein to the other spouse." *Mortensen v. Mortensen*, 760 P.2d 304, 308. The *Mortensen* court went on to specifically state that the court need not divide the property classified as marital with strict

mathematical equality, however the court should not divide the property in such a way that a party would "lose the benefit of his or her gift or inheritance by the trial court's automatically or arbitrarily awarding the other spouse an equal amount of the remaining property which was acquired by their joint effort to offset the gifts or inheritance." *Id.*

In *Burke v. Burke*, 733 P.2d 133 (Utah 1987), the court listed certain factors to be considered in making an equitable property division. The *Burke* court determined that "pre-marital property, gifts and inheritance may be viewed as separate property and, in appropriate circumstances, equity will require that each party retain that separate property brought to the marriage." *Id.* at 135. However, the *Burke* court also determined that the trial court should review factors such as: "(1) the amount and kind of property to be divided; (2) whether the property was acquired before or during the marriage; (3) the source of the property; (4) the health of the parties; (5) the parties standard of living, respective financial needs and earning capacity; (6) the duration of the marriage; (7) the children of the marriage; (8) the parties ages at the time of marriage and divorce; (9) what the parties gave up by the marriage; and (10) the necessary relationship the property division has with the amount of alimony and child support to be awarded." *Id.* It seems clear from the trial court's Memorandum Decision, that it took into account all of the factors listed in *Mortensen* and *Burke* in making the property division in this case.

The trial court awarded property it found to have a net value of \$893,942 to Mr. McDowell. (R. at 304). Of that \$893,942, \$512,301 was directly attributable to or accumulated from, pre-marital assets. Of the \$379,811 awarded to Ms. Starley, \$14,252 was characterized as pre-marital. (R. at 307, 308). Petitioner argues that she was not given credit for her pre-marital property such as an inheritance of \$33,000 or her personal injury settlement of \$30,000. However, Ms. Starley herself testified that she lost that money. (Tr. at 68).

"In entering equitable orders to divide the marital estate, the trial court has considerable discretion, [which will not be disturbed on appeal], as long as the trial court exercises this discretion in harmony with the standards set by the appellate courts." *Roberts v. Roberts*, 835 P.2d 193, 198 (Utah Ct. App. 1992). The trial court's findings regarding the characterization of property as pre-marital or marital were sufficient and were supported by the evidence.

Furthermore, Ms. Starley cannot come back to the court now to contest findings on appeal which she did not challenge at the trial level. Speaking directly to this issue, the Utah Supreme Court stated in *Jones v. Jones*, 700 P.2d 1072 (Utah 1985):

Normally, we would grant the remedy sought by the wife and remand for findings on the specific value of the assets. In this case, however, the wife's attorney prepared the inadequate findings of fact she challenges on appeal and the conclusions of law and decree of divorce all of which the court entered without alteration. Counsel for the wife made no motion to have the trial court amend the findings to include values. See UTAH R.CIV.P 52(b). The wife cannot come now, albeit through new counsel, and

complain of her own failure to include specific property values in the findings if fact. She has waived the claim.

Id. at 1074-1075. Therefore, Ms. Starley's complaint about the Findings of Fact is too late.

As such, the Findings must be upheld as entered by the trial court.

The trial court's award of Mr. McDowell's pre-marital property to him was an appropriate use of the court's discretion. "While a trial court has discretion to award inherited property [to the non-inheriting spouse] such property `as well as it is appreciated value, is generally regarded as separate from the marital estate and hence is left with the receiving spouse in a property division incident to divorce.'" *Schaumberg v. Schaumberg*, 875 P.2d 598, 602 (Utah Ct. App. 1994) (quoting *Burt v. Burt*, 799 P.2d 1166, 1169 (Utah Ct. App. 1990)). Each of the trial court's findings regarding the pre-marital property are set forth below:

4721 Sycamore Drive:

Defendant has occupied a home located at 4721 Sycamore Drive. It was appraised in September 1995 to have a fair market value of \$196,000. Defendant placed the value thereon of \$213,000. The mortgage thereon was in the amount of \$147,874. Defendant liquidated pre-marital Woolrich stock to acquire said property. The court finds the reasonable value of the equity therein to be \$50,000, which should be awarded to the Defendant and the property should be awarded to Respondent to the debt thereon, which Respondent should be ordered to hold Petitioner harmless from. (R. at 309)(emphasis added).

42 Ontario Canyon Street:

Defendant acquired the property located at 42 Ontario Canyon Street, Park City, Utah, in 1985 prior to the marriage. The court finds that the value of the

property to be \$240,000 as of the end of the year 1995. The remaining balance due on the first mortgage at the time of trial was just over \$24,000, while the remaining balance due on the second mortgage was approximately \$95,000. The second mortgage proceeds were utilized in obtaining notes and real estate which are part of the investment business operated by Defendant. The net equity therein of \$121,000 should be awarded to Defendant subject to the first and second mortgages, which Respondent should pay and hold Petitioner harmless from. (R. at 309)(emphasis added).

1140 Park Avenue, Park City, Utah:

Defendant acquired the property located at 1140 Park Avenue, Park City, Utah, just prior to the marriage of the parties. An appraisal of the property as of October 1995 indicated that the property had a fair market value of \$240,000. Defendant valued the property at \$200,000 by making several adjustments to value. Although the court recognizes merit to the adjustments, the real estate market during the intervening year was rapidly appreciating, as testified to by Defendant. Accordingly, the court finds the fair market value of the property to be \$225,000. The mortgage thereon near the end of 1995 was approximately \$87,500. The equity therein of \$137,500 should be awarded to Defendant, subject to the mortgage thereon, which he should pay and hold Petitioner harmless from. (R. at 309, 310)(emphasis added).

Pippas Note:

Defendant contends that a note in the face amount of \$60,000, dated July 20, 1995, from William W. Pippas is a pre-marital asset. Plaintiff contends this asset to be marital. This divorce case was filed November 8, 1994. Troy Young paid off the remaining balance of his obligation on July 14, 1995, in the amount of \$68,422.87, which was used to secure the Pippas note. The \$60,000 Pippas note should be awarded to the Defendant. (R. at 311; Tr. at p. 224, p. 398, 399, 400, 401, 402, 403)(emphasis added).

Chidaster Note:

Finding 43. The parties disagree as to whether the Chidaster note of May 4, 1988 is marital or not. Defendant contends the Christensen (Chidaster) obligation was created from sale proceeds from the Edgeware property he held

prior to the marriage. The amount due there on of \$20,782 should be awarded to Defendant. (R. at 312; Tr. at p. 403, 404, 405, 406)(emphasis added).

Ms. Starley argues that she has presented extensive evidence regarding her contributions to this separate property and commingling of marital monies, however, she fails to point to that evidence to support her argument and completely fails to indicate the contrary evidence. Ms. Starley also provided scant evidence as to any contribution she made to the maintenance and management of the rental properties. (Tr. at 34-35). Mr. McDowell's contrary evidence included testimony from the parties accountant, Mr. William Page, who testified that Respondent's pre-marital properties and separate assets generates positive cash flow to maintain those separate properties. (Tr. 329-331; Defendant's Exhibit 31).

As Mr. Page testified, there was more than adequate separate property to provide for all expenses related to the rental properties without using any marital income or funds. As such, the court reached the obvious conclusion that marital funds were not used to supplement the rental income in supporting Mr. McDowell's properties.

The Appellant, by merely rearguing her position, has not only failed to marshal the evidence, but has completely overlooked the trial court's broad discretion making its equitable distribution award based on its advantaged position to assess the credibility of witnesses. *Poulsen v. Frear*, 946 P.2d 738, 742 (Utah Ct. App. 1997). The fact that the court gives more credence to one witness than another, does not demonstrate that the court abused its discretion. *Id.*

It is true that Respondent borrowed against the marital residence, with an equity line, to assist in the purchase of various rental properties. However, in finding that those rental properties should be awarded to Respondent, the trial court also ordered him to be obligated on that second mortgage equity line, forever holding the Petitioner harmless therefrom. (R. at 305).

The court's Findings of Fact were detailed in delineating which property was pre-marital property and separate from the estate, and which property was marital property. The ultimate division of property awarded the Petitioner \$389,380 in value, including the value the court placed on the personal property and on her jewelry. The Respondent, conversely, was awarded \$369,860 of the marital property, which included the value the court placed on the personal property awarded to Respondent and his jewelry. The discrepancy in the remaining property was based upon the court's findings that the remaining assets were the Respondent's pre-marital or separate assets, or assets which had a significant pre-marital component to which the Petitioner had not contributed. (R. at 304).

The Petitioner argues that she received an inheritance during the marriage, and that she also received a personal injury settlement. (Tr. at 44, 66-69). However, the Petitioner testified that those monies had been expended, or invested in assets in which Petitioner received the ultimate benefit. Specifically, Petitioner testified that \$10,000 of the money went towards the parties wedding and another \$10,000 went towards home improvements of the

home she was awarded, free and clear of any interest in the Respondent. (Tr. at p. 30-31). Furthermore, contrary to the assertions of the Petitioner, the Respondent was not specifically given credit for his inheritance in the distribution of property. The difference between the parties' property distribution awards was based upon the appreciation of separate property from the time of marriage to the time of divorce. The award of this difference to her Mr. McDowell is fully supported by Utah law. See *eq. Burt v. Burt*, 799 P.2d 1166, 1169 (Utah Ct. App. 1990). "Inherited or donated property, as well as it's appreciated value, is generally regarded as separate from the marital estate and hence is left with the receiving spouse in a property division instant to divorce."

The holding in *Burt* is also helpful to the analysis of this case because there, as here, the Appellant argued that the Respondent's separate property changed form during the marriage, thereby changing it's character from separate property to marital property. The *Burt* court clearly stated that what is essential is "not whether the mere form of property has changed, but whether it has lost it's 'identity' as separate property." See *Burt v. Burt*, 799 P.2d at 1169. See also, *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988). Where the court specifically stated that, "conversion from one investment medium to another does not, by itself, destroy the integrity of the segregation." See *Burt v. Burt*, 799 P.2d at 1169.

The facts in *Burt* are strikingly similar to the trial evidence here. Mr. McDowell took some separate property and transferred it into new assets or similar assets with new individuals

but in his sole name. Under the *Burt* analysis, those transfers did not change the character of Mr. McDowell's property as separate. Other properties of Mr. McDowell were clearly pre-marital assets and remained pre-marital because they were never co-mingled in any way.

Petitioner does not argue that certain properties of Mr. McDowell were not owned prior to the marriage. Those were the properties located on Ontario in Park City, Utah; Sycamore in Salt Lake City, Utah; Park Avenue in Park City, Utah; the Baker Notes; the Pippas Note; and the Chidaster Note. What Petitioner argues is that these assets should be included in the marital estate because she contributed to their maintenance or enhancement. However the trial court, in specifically finding that these assets were pre-marital, impliedly discredited the Petitioner's testimony in this regard, and found them to be pre-marital and therefore separate assets of Mr. McDowell. The Utah Supreme Court has noted that

the trial court was not necessarily compelled to accept such self-interested testimony whole cloth and make such an award; and in the absent of patent or clear abuse of discretion, this court will not disturb his findings and judgment. *Salmon v. Davis County*, 916 P.2d 890, 899 (Utah 1996) quoting *Beckstrom v. Beckstrom*, 578 P.2d 520, 523-24 (Utah 1978).

Id. at 1172. In fact, what the trial court did here was follow *Burt v. Burt* closely, by awarding each of the parties that separate property still in existence at the time of the divorce, and roughly 50% of the marital property. *Id.* The trial court specifically found that certain properties of the Petitioner's were pre-marital, including her Smith Barney account and her Nordstrom IRA, and awarded those to her. Therefore, the Petitioner's unhappiness with those

results does not make it contrary to the law and nor does it make the court's ruling an abuse of discretion. The court followed the case law, and, being in the best position to assess the credibility of the witnesses, reached a conclusion that it specifically found was fair and equitable. (R. at 309).

POINT III

THE COURT'S DIVISION OF PROPERTY WAS FAIR AND EQUITABLE UNDER THE CIRCUMSTANCES.

The trial court's division of property, and classification of marital and pre-marital property was equitable given all the facts and circumstances of this case. Mr. McDowell brought over \$500,000 into the marriage. Ms. Starley brought approximately \$50,000 into the marriage. The each left the marriage with approximately \$300,000 more than they had when they were married if which, is a fair and equitable distribution of property.

Petitioner argues that because Mr. McDowell was awarded income producing properties, she should have been given a compensating award. Without those income producing assets Mr. McDowell would have no ability to pay child support or alimony. Notwithstanding that fact, Ms. Starley was awarded compensating property in being awarded the entire equity in the marital residence, as well as all of her Nordstrom retirement plan and stock option plans which totaled more than \$125,000. Furthermore, Ms. Starley did not dispute that the real properties awarded to Respondent should be awarded to him. (Tr. at p. 53; Pl.'s Ex. 18).

It is clear from examining Plaintiff's Exhibit 18, that she believes that she is entitled to her pre-marital assets, but that Respondent is not entitled to his. The court, in equity, returned to the Petitioner her pre-marital property still in existence, and also returned to the Respondent his pre-marital property. The trial court specifically valued each piece of property, including the personal property and jewelry awarded to each party, consistent with the requirement in *Munns v. Munns*, 790 P.2d 116, 119 (Utah Ct. App. 1990). Not only did the parties agree to the value of the bulk of the marital property, the court made specific findings regarding the value of each other piece of property after viewing all of the evidence.

Ms. Starley argues that notwithstanding the values, that all of Respondent's property was commingled. She argues that a primary example of commingling property is 42 Ontario in Park City, Utah. Ms. Starley contends that this asset was purchased a "short time" before the marriage. However the trial evidence is clear that this property was purchased in December 1985, a year and a half before the parties May 9, 1987 wedding. This year and a half was not a "short time" before the parties marriage.

Ms. Starley also testified that marital funds were used to augment the cash flow, reduce the mortgage and make improvements. (Tr. at 35). However, the parties accountant, a neutral third party, testified that this was not true, and that Mr. McDowell's separate funds from his inheritance and from the sale of certain pre-marital property, supplemented the cash flow thereby freeing all marital funds for marital purposes. (Tr. at 513). The court, being in

the best position to review and weigh the evidence, did so and found that that property was pre-marital and should be returned to Mr. McDowell.

Ms. Starley then argues that the second mortgage on the Ontario property was not marital obligation, but was Mr. McDowell's separate obligation because he used that second mortgage in his real estate business. The court, consistent with Ms. Starley's position, ordered Mr. McDowell to be solely responsible for all mortgages on the Ontario property and hold Ms. Starley harmless therefrom.

Ms. Starley argues that the court never made a finding as to whether or not Ontario was pre-marital property, however, the court's Memorandum Decision and the Findings drafted therefrom, made it clear that this was pre-marital property when they state, "that Defendant acquired the property located at 42 Ontario Canyon Street, Park City, Utah, in 1985 prior to the marriage." (R. at 290; Mem. Dec. at ¶36; R. at 309, Supp. Findings of Fact at ¶ m)(emphasis added).

Ms. Starley's argument confuses what is a clear finding by the trial court. She argues that the court determined that the Adams property was marital and the court still awarded to Mr. McDowell the entire \$32,800 of that equity. However, Ms. Starley does not contend that the property located at Oakridge was marital and that she should be awarded the entire \$208,000 in equity in that property. Her reasoning is inconsistent. The court, in an overall review of the findings, makes it entirely clear that the court took into account which properties

were pre-marital, and then divided the remaining marital property. The court based its decision on agreements between the parties regarding the values of those properties and how those properties should be divided.

In her brief, Ms. Starley makes a similar argument regarding the award of Notes in the total sum of \$301,000 to Mr. McDowell without taking into account the ultimate division of the property. As previously stated, the court made a similar finding that Ms. Starley should be entitled to her entire Nordstrom profit sharing plan in the sum of \$70,000. In *VI Oil Company v. Department of Environmental Quality*, 904 P.2d 214, 216 (Utah Ct. App. 1995) this court stated:

In reviewing the record as a whole, we consider not only the evidence supporting the board's findings but also the evidence negating them. However, 'this court will not substitute a judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review.'

Ms. Starley complains about those findings which are contrary to her desires but, by applying inconsistent reasoning, does not similarly complain about findings which support her position. Each specific finding need not contain a detailed explanation as to how the court arrived at it's decision. What the findings must do is support the ultimate decision when

viewed in light of the whole record before the court. *Nelson v. Board of Equalization of Salt Lake County*, 934 P.2d 1354, 1356 (Utah 1997).

The Petitioner's argument regarding the Pippas Note overlooks all of the facts and testimony upon which the court based its decision. Mr. McDowell had a pre-marital property which he sold to the Packs in December 1996, five months prior to the marriage. (Tr. at 400). Mr. McDowell held a note receivable on that property. (Tr. at 400). The Packs then sold the property to Troy Young and Mr. McDowell agreed to carry the contract and note on that property. (Tr. at 401-402). Mr. Young paid the balance of the note in the amount of \$68,422.87, which Mr. McDowell deposited into a separate account. (Tr. at 403). From that separate, and never co-mingled account, Mr. McDowell withdrew money to make a loan to Pippas to enable Pippas to purchase a replacement property. (Tr. at 403-404).

It is true, as Ms. Starley states in her brief, that Mr. McDowell only had \$33,000 in equity on the property from which the Pippas note evolved when the parties married. However, through payments made to reduce the mortgage and from an increase in property values, Mr. McDowell was able to increase the value on that separate asset. It is in this way that Mr. McDowell made his money throughout the marriage, and it is to his credit that he was able to increase the value of piece of property. That fact does not change the fact that this was separate property which was kept separate throughout the marriage making the passive

increase in that property also separate property. *See Burke v. Burke*, 733 P.2d 133 (Utah 1987).

Reviewing the record as a whole, and the findings as set forth, it is clear that the court took a careful look at all of the property, returned to each party the pre-marital property in existence at the time the parties divorced and divided the remaining property, approximately \$390,000 to Ms. Starley and approximately \$370,000 to Mr. McDowell. As such, the court's findings and its decision should be affirmed by this court as it is consistent with Utah statutory and case law regarding the equitable division of property.

POINT IV

THE TRIAL COURT'S FINDINGS OF FACT REGARDING MR. McDOWELL'S INCOME SHOULD BE AFFIRMED.

The trial court's Findings of Facts regarding the Mr. McDowell's income should be affirmed as that finding is supported by the clear weight of the evidence. The Finding of Fact regarding Mr. McDowell's income is as follows:

6. Employment and Income of Defendant. Defendant is 48 years old and works as an investor. He invests in real estate, notes, and contracts. His stock-in-trade is an inventory of parcels of real estate, notes, and contracts. The court feels that it is appropriate to be conservative in finding current income of defendant, as it has been in finding plaintiff's current income. Accordingly, the court has used plaintiff's 1995 actual earnings, yielding lower than usual income for plaintiff.

With respect to defendant's 1995 income, no meaningful accounting was available. Defendant estimated his 1995 income to be in the range of \$70,000 to \$98,000. In traditional business accounting, accounting for purchases and

tracking inventory of goods for the accounting period yields an accurate cost of goods sold number, which is a significant and important business expense. Defendant's inventory is made up of parcels of real property, notes, and contracts. No costs of goods sold analysis has been presented to the court for any tax period on defendant's investment business. Without such an analysis, it is difficult to determine defendant's income.

William Page, a certified public accountant with over twenty-five years experience, evaluated defendant's investment income. Mr. Page had done no accounting work for the parties during 1995. He analyzed defendant's 1994 income and expenses and based thereon, projected defendant's 1995 estimated annual income to be \$76,081 or \$6,340 per month. While the court is not entirely satisfied with the approach taken, it is nonetheless the best evidence of defendant's current income. As a self-employed individual, defendant is in a position to directly benefit through business expenses allowable for tax purposes, such as entertainment and travel expenses. For that reason, the court finds that, for purposes of calculating child support, defendant's current adjusted gross income is \$80,000 per year, or \$6,667 per month. Although defendant's cash flow for a particular period may be significantly higher, the court has taken into account the necessity of plowing back in to the properties proceeds from the sale of properties. If defendant fails to do that in a skillful and well-managed way, the business he is in will soon fail.

(R. at 300-301). This finding is supported by the credible weight of the evidence. (Tr. at 314-320).

In her brief, Ms. Starley has taken gross income from the parties income tax returns to indicate that the court's findings are inaccurate. The figures as presented by Petitioner do not reflect "adjusted gross" income as stated by Petitioner, but rather reflect "gross gross" income prior to the subtraction of reasonable and necessary business expenses. Furthermore, the incomes stated by Ms. Starley include both parties wages (which Mr. McDowell no longer receives having lost his job with Woolrich), and non-recurring income to the parties which

includes capital gains realized from sales, sales from motor homes, stock sales of pre-marital stock, and some retirement buy-outs. (Tr. at p. 316-319).

Ms. Starley's brief is particularly unhelpful regarding income because it completely fails to tell the court what Mr. McDowell's reasonable and necessary business expenses would be. Defendant's Exhibit 16, which was received by the court, a copy of which is attached hereto as exhibit A, indicates exactly what Mr. McDowell's 1994 income was. This actually reflects Mr. McDowell's income after counting for reasonable and necessary business expenses and after subtracting both parties wages and non-recurring income events.

Ms. Starley refers to Petitioner's Exhibit 29 to show Mr. McDowell's gross income. Petitioner's Exhibit 29 was not offered nor received in evidence, and therefore is not part of the record for this court to consider. Furthermore, as previously stated, Ms. Starley's assessment of Mr. McDowell's income does not take into account all of Mr. McDowell's expenses that he must pay in order to keep his business running, including the payment of interest expense. Mr. McDowell explained clearly in his testimony that he purchases properties, carries the underlying note and then sells the properties on contract so individuals then pay him. He still has the obligation on the underlying property, and must pay the interest expense on that property, thereby reducing his income accordingly. (Tr. at p. 170-171).

Contrary to the assertions of Ms. Starley, Mr. Page, the accountant, did make an explanation for the \$54,000 in interest expense he claimed should be deducted from Mr.

McDowell's income. Specifically, on page 318 of the transcript, line 9. Mr. Page explains the interest deduction from IRS form 1040. As previously explained, that interest deduction was paid by Mr. McDowell for underlying notes he carried on properties on which he was holding contracts.

Utah Code Ann. §78-45-7.5(4)(a), specifically allows for the deduction from gross income for those business expenses reasonable and necessary to continue operation of the business. If Mr. McDowell did not carry the underlying interest payments on notes, he would not be able to sell those notes and receive a higher payment thereon. That would decrease his ability to operate his business in any form. Therefore, the expenses as outlined by Mr. McDowell and his accountant are clearly a reasonable and necessary business expenses.

Ms. Starley refers to Defendant's Exhibit 18, however, that exhibit was not admitted at trial and is not part of the record. That exhibit was specifically excluded by the trial court because it did not specify the federal income tax reductions from the parties income. The revised exhibit which was admitted into evidence, was Defendant's Exhibit 31, a copy of which is attached as exhibit B. It indicates that, for the periods of January 1, 1987 through December 31, 1994, Mr. McDowell from his separate business and funds, had a total income of \$751,477.58. During that same time period, Mr. McDowell had expenses of \$608,710.63, for an average of \$142,766.95. As Mr. Page testified at trial, this sum included \$55,000 in inheritance which was non-recurring, and \$15,000 worth of non-recurring sample sales, plus

additional income from the sale of motor homes. (Tr. at 502). With the non-recurring income subtracted from the \$142,766.95 Mr. McDowell's average income for that eight year period is \$58,966.94. The court did not rely on Mr. McDowell's income averaged over the eight year period, but rather looked at current earnings as required by Utah Code Ann. §78-45-7.5(5)(b). *See Thronson v. Thronson*, 810 P.2d 428 (Utah Ct. App. 1991). The court's findings were detailed regarding Mr. McDowell's income, and the record is replete with testimony regarding Mr. McDowell's income. Mr. Page, the accountant, testified twice, regarding that income.

This court must uphold the findings made by the trial court regarding Mr. McDowell's income. Those findings are adequate and the record is replete with examples specifically identifying Mr. McDowell's income. Furthermore, Ms. Starley's counsel drafted those findings, and it is contrary to Utah law to allow Ms. Starley to now come back, at this late date, and complain of "her own failure to include specific values in the Findings of Fact. She has waived the claim." *Jones v. Jones*, 700 P.2d 702, 705 (Utah 1985)("Normally we would grant the remedy sought by the wife and remand for findings on the specific value of the assets. In this case, however, the wife's attorney prepared the inadequate Findings of Fact, she challenges on appeal, and the Conclusions of the Law and Decree of Divorce, all of which the court entered without alteration. Counsel for wife made no motion to have the trial court amend the Findings to include values."). *See UTAH R.CIV.P. 52(b)*.

POINT V

THE COURT'S FINDINGS AS TO ALIMONY ARE SUFFICIENT TO SUPPORT IT'S AWARD.

The Court's Findings of Fact regarding the award of alimony should be affirmed. As stated above, it was Ms. Starley's failure to make a post-trial motion to amend those findings to make them more detailed. Ms. Starley's counsel prepared the findings of which she now complains, and which the court signed without alteration. As such, she has waived her right to now come back and complain about the findings. See *Jones v. Jones*, 702 P.2d 1072 (Utah 1985). In addition, Ms. Starley has totally failed to marshal the evidence in support of the findings. Therefore, her appeal in this regard should be dismissed. See *Breinholt v. Breinholt*, 905 P.2d 877 (Utah Ct. App. 1995).

In any award of alimony the court must make findings on three factors. Those are:

1. The financial conditions and needs of the wife;
2. The ability of the wife to produce a sufficient income for herself; and
3. The ability of the husband to provide support.

Id. at 1075 (quoting *English v. English*, 565 P.2d 409, 411 (Utah 1977)); See also *Gramme v. Gramme*, 587 P.2d 144, 147 (Utah 1978); *Fletcher v. Fletcher*, 615 P.2d 1218, 1223 (Utah 1980).

The trial court's finding as to Ms. Starley's income is set out in its Finding of Fact No. 5, and Ms. Starley concedes that that finding was adequate. (R. at 299-300). The court also made a finding regarding Mr. McDowell's income. That finding was Finding of Fact No. 6.

(R. at 300-301). Each of the parties filed Financial Declarations indicating what their incomes were after payment of taxes, enabling the court to review each parties gross and net incomes. (R. at 127, 139). There was also extensive testimony on Ms. Starley's monthly living expenses. She testified at great length as to her Exhibit 12, setting out about her monthly expenses. On cross-examination, Ms. Starley admitted that the car expense she included of \$581.50 was for a car in Mr. McDowell's possession and for which he was paying. (Tr. at pp. 114-115). Ms. Starley also admitted that \$100 in monthly yard maintenance was only incurred during the summer and fall months. (Tr. at p. 108). Also included in her monthly expenses was the price of health insurance for the nanny, whom she now no longer requires due to the school age of both minor children. She also testified that her monthly medical and dental expenses where high because they were partially covered by insurance, and because they are treated and incur the expense twice annually rather than monthly as her exhibit set out. (Tr. at p. 111-112). Ms. Starley also testified that the quarterly food fee at Country Club is only used during the summer months. (Tr. at p. 116). Ms. Starley also testified that the incidentals for grooming were a generalized maximum expense and that although it costs her \$80 to get her hair dyed, it was not an ongoing expense. (Tr. at p. 18, "if I get my hair dyed, it is \$80"). The court, being in the best position to review the evidence, clearly reviewed Ms. Starley's expenses, and reduced those he felt were overstated such as yard maintenance, house

cleaning, entertainment, incidentals and grooming, a car expense and child care, half of which Mr. McDowell would pay.

The court also had available to it Mr. McDowell's monthly living expenses in Mr. McDowell's Financial Declaration. (R. at 127). The court, being in the best position to judge the credibility of the witnesses and access the expenses, made an alimony award that fit the parties needs and abilities to pay. It is clear that "under our case law, 'trial courts are given primary responsibility for making determinations of fact' because trial judges are 'in the best position to access the credibility of witnesses and to derive a sense of the proceedings as a whole, something an appellate court cannot hope to garner from a cold record.'" *Richard Barton Enter.'s Inc. v. Tsern*, 928 P.2d 368, 382 (Utah 1996), quoting, *State v. Pena*, 869 P.2d 932, 935-936 (Utah 1994).

The trial court, in making it's findings of fact, and after judging Ms. Starley's credibility, determined that her expenses were on their face, incredible. This is most likely because her expenses included a \$500 car payment which she did not pay, a \$1,050 child care expense, of which the Respondent paid half, residence maintenance, yard maintenance, and house cleaning of a combined total of \$400 per month, incidentals and grooming for hair cuts of \$165 per month, and a family insurance expense of \$247, of which Mr. McDowell paid half, and a medical and dental expense of \$200 per month, when that was the yearly average.

Mr. McDowell also testified, and submitted in Defendant's Exhibit 9, that his monthly expenses were \$5,743. Those expenses include the home equity line on the Oakridge property which he was ordered to assume and pay, and the home equity line on Ontario which he was also ordered to assume and pay. Those monthly living expenses, plus the \$882 in child support and \$1,000 in alimony, which Mr. McDowell was ordered to pay, totaled a monthly obligation of \$7,625, an amount which exceeds his monthly gross income by \$958. The court also specifically found that it would be impossible for the parties to maintain the same standard of living they enjoyed during the marriage, as the income had to be divided between two households. (R. at 311).

Because the uncontroverted evidence in the record supports the court's findings regarding alimony, the trial court's award should be affirmed.

POINT VI

THE TRIAL COURT DID NOT ERR IN AWARDING DURATIONAL ALIMONY.

It is clear from the court's findings that the alimony award was intended to be a bridge to assist Ms. Starley in adjusting her income and expenses to a more realistic average. *See Willey v. Willey*, 866 P.2d 547, 554 (Utah Ct. App. 1993).

In addition to the transitional alimony award, the court ordered Mr. McDowell to pay more than double the debt that Ms. Starley was ordered to pay. This is significant given the fact that nearly every debt that Ms. Starley incurred was post-separation debt. However, the

court's finding that "under the 'for better or worse' contract of the parties" the court found those debts to be marital. (R. at 305).

The court noted the difference in property awarded to each party and the need of the Petitioner to adjust her circumstances. The court also noted the unequal award of assets, however, the court, was aware of the substantial amount of assets awarded to the Petitioner which would enable her to meet her monthly living expenses. (R, at 287-289).

Most importantly, this is a marriage of short duration and Mr. McDowell paid alimony throughout the parties separation. Overall, Mr. McDowell paid \$1,000 per month for a period of three years. The one year of alimony awarded subsequent to the trial, was more than sufficient to enable Ms. Starley to "adjust her circumstances." (R. at 303).

There is substantial authority for durational alimony not only in Utah, but in her sister states. *See Galant v. Galant*, 945 P.2d 795, 801 (Alaska 1997) ("reorientation alimony is essentially transitional and may be awarded for brief periods. . ."); *Devila v. Devila*, 908 P.2d 1025, 1027 (Alaska 1995)("the court abused it's discretion in awarding reorientation alimony of more than one years duration."); *Rabie v. Ogaki*, 860 P.2d 785 (N.M. Ct. App. 1993)(limited duration of alimony is appropriate where the recipient has substantial job skills and its a marriage of relatively short duration); *Musgrove v. Musgrove*, 821 P.2d 1366, 1370 (Alaska 1991)("rehabilitative alimony in contradistinction to permanent alimony, is an award

of spousal support of limited duration and for a specific purpose.")(quoting *Larson v. Larson*, 661 P.2d 626, 632 n.4 (Alaska 1983)).

Ms. Starley's cites *Thronson v. Thronson*, 810 P.2d 428 (Utah Ct. App. 1991) for the proposition that it is inappropriate to award durational alimony when there are no findings regarding the recipient's ability to meet those needs at the end of the duration. However, Ms. Starley failed to point out that in *Thronson* the Court of Appeals specifically found that Mr. Thronson had discretionary income which would continue from which to pay alimony. It was that finding, combined with the others, that justified an award of permanent alimony. *Id.* at 435. There is no such finding in this case. All of the testimony at trial, including the exhibits presented, indicate that there is no discretionary income from which Mr. McDowell can pay a permanent alimony award to Ms. Starley. In making the court's findings regarding the parties respective incomes, the court specifically found that Ms. Starley had earned more money in the past, and the court was being conservative in it's assessment of her present income. (R. at 300). In limiting alimony to one year, the court inherently ruled that Ms. Starley had the ability to, and in all likelihood would be, earning more money in future years thereby increasing her own ability to meet her future needs. The durational award also gave Ms. Starley a window in which to adjust her expenses to meet her income. Therefore, the court's findings regarding limited and durational alimony should be affirmed.

POINT VII

THE TRIAL COURT DID NOT ERR IN NOT AWARDING NANNY EXPENSES OR PRIVATE SCHOOL EXPENSES.

The trial court's refusal to award additional child support to Ms. Starley in the form of private school tuition and nanny expenses must be affirmed. Utah law requires the parties to pay child support based upon their combined gross monthly incomes. Application of the Child Support Guidelines is a rebuttable presumption. Utah Code Ann. §78-45-7.2(2)(a) (Supp. 1994). Before the guidelines can be rebutted the court must make specific findings of fact as to why the presumption should not apply in that specific case. *See Brooks v. Brooks*, 881 P.2d 955, 959 (Utah Ct. App. 1994).

In *Brooks v. Brooks*, the wife petitioned the court to modify the child support obligation and to require the husband to pay one-half of private school tuition. The court on that case made a specific finding at trial that both parties wanted the children enrolled in private school. At the time of trial the court found there was no substantial material change of circumstances warranting a modification of the child support obligation. *Id.* at 959. However, the trial court went on to determine that Mr. Brooks should pay one-half of private school costs. On appeal, this Court determined that the trial court's award would double Mr. Brooks child support obligation. *Id.* This Court went on to discuss the fact to that other factors could be applied to rebut the child support guidelines such as special educational needs or health needs. The matter was remanded for additional findings either justifying an upward

increase in child support obligation or an order vacating all of past and future private school related expenses. *Id.* at 960. This Court determined that in order to maintain the award of private school expenses, the trial court must find special circumstances.

In this case no such special circumstances exists in *Brooks*. The parties oldest child was attending Kids Campus, where she went for daycare and also attended pre-public school age kindergarten. This caused no disruption in the child's life, as she could attend kindergarten with the same individuals that she spent the day with for her regular daycare. Then, subsequent to the separation, Ms. Starley unilaterally enrolled the minor child in private school. There was no reason supporting Ms. Starley's decision to enroll the child in private school other than her explanation to the court that it was because the child would miss the deadline for entering first grade. (R. at 22-23). However, there is no evidence whatsoever that Ms. Starley investigated special programs for advanced students, or the ability for a waiver of the deadline given her child's abilities. Furthermore, there is no family tradition, religion, past attendance at private school, or other legitimate reason which would warrant attendance at a private school given the parties limited income and ability to meet their needs and expenses upon divorce. See *In re Marriage of Stern*, 789 P.2d 807, 814 (Wash. Ct. App. 1990).

There was no essential reason for a nanny, and the matter is now moot. The Petitioner has changed her work schedule such that no nanny is required. Ms. Starley can now use

ordinary after school daycare given her change in work schedule, for which Mr. McDowell was ordered to pay one-half.

As Mr. McDowell testified, given the necessity of the parties supporting two (2) households subsequent to the divorce, private school and a nanny are luxuries the parties can not afford. Mr. McDowell testified to these expenses as a luxury, and did not agree to there expenditure at trial and does not agree with their expenditure now. (Tr. at p. 433-34).

Accordingly, the court's order that Mr. McDowell not pay additional child support in the form of private school and nanny, should be upheld.

POINT VIII

IT WAS AN ABUSE OF DISCRETION TO AWARD MS. STARLEY HER ATTORNEY'S FEES AT TRIAL.

Utah Code Ann. §30-3-3 (1989), grants trial courts the authority to award attorney's fees in divorce actions. See *Rappleye v. Rappleye*, 855 P.2d 260, 265 (Utah Ct. App. 1993). "The award, however, must be based on evidence of the receiving spouse's financial need for attorney's fees, the ability of the other spouse to pay, and the reasonableness of the requested award." *Id.*

Both parties submitted evidence of the fees that were incurred and the reasonableness of those fees. The court may also consider factors such as the difficulty of the litigation, the efficiency, expertise and experience of the attorneys involved, and the result attained. See *Bell v. Bell*, 810 P.2d 489, 493-94 (Utah Ct. App. 1991). In reviewing the case at hand, and

examining the result attained, it appears that Mr. McDowell substantially prevailed at trial, in that he was entitled to keep his pre-marital assets, something Ms. Starley strongly resisted.

Furthermore, the court did not make a finding about the Ms. Starley's ability to pay her own fees based upon the substantial assets she was awarded, including a retirement fund in the sum of \$70,000. Based upon Ms. Starley's receipt of those assets, she had the ability to pay her own fees. Absent findings to the contrary, the court's award of attorney's fees at trial should be overturned.

Mr. McDowell should be awarded his fees on appeal and Ms. Starley should be denied her fees on appeal. A party may be awarded fees on appeal if they were awarded fees at trial and they substantially prevail on appeal. *Schaumberg v. Schaumberg*, 875 P.2d 598, 604 (Utah Ct. App. 1994).

Because it was an abuse of discretion to award Ms. Starley fees at trial, and because Ms. Starley should not prevail on appeal, Ms. Starley should not be awarded her attorney's fees in connection with the appeal.

CONCLUSION

Ms. Starley has failed in her obligation to marshall the evidence presented to the trial court on each issue, distribution of property, classification of property as marital or pre-marital, calculation of Mr. McDowell's income, award of alimony, refusal to award nanny expenses and private school tuition expenses, and attorney's fees. Furthermore, Ms. Starley

has failed to demonstrate that the evidence was not sufficient to support the trial court's ultimate finding on each of those issues. Ms. Starley has also failed to demonstrate any error in law committed by the trial court.

Ms. Starley's brief is simply an improper attempt to reargue evidence, including her request that her evidence is the evidence that the trial court should have concluded with fact.

The trial court entered the requisite findings related to the parties respective ownership of property prior to and subsequent to the marriage, and the parties respective financial needs and their abilities and resources to provide for their respective ongoing support. As the same is related to alimony and attorney's fees. Furthermore, the court specifically made a finding that the year term of alimony would assist Ms. Starley in adjusting her circumstances making it clear that award was transitional. The record contains more than sufficient evidence to support each of the trial court's findings as it relates to all of the issues with the exception of the payment of attorney's fees.


The court erred in awarding Ms. Starley her attorney's fees as it failed to take into account the income producing aspect of the property awarded to Ms. Starley including her stock options, her IRA, and her separate bank accounts.

Mr. McDowell should be awarded all of the attorney's fees he incurred in connection with the appeal of this matter, the order granting Ms. Starley her attorney's fees at trial should be reversed, and she should similarly not receive attorney's fees for appeal.

Mr. McDowell respectfully requests this court grant him the relief he has requested as set out in this brief.

RESPECTFULLY SUBMITTED this 27th day of April, 1998.

DART, ADAMSON & DONOVAN


JOHN D. SHEAFFER, JR.
Attorneys for Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 1998, I caused a true and correct copy of the foregoing to be ☒ mailed, postage prepaid, [] hand-delivered, [] sent via facsimile to:

Ellen Maycock
KRUSE, LANDA & MAYCOCK
Eighth Floor, Bank One Tower
50 West Broadway
P.O. Box 45561
Salt Lake City, UT 84145-0561


JOHN D. SHEAFFER, JR.

ADDENDUM / TABLE OF CONTENTS

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ADDENDUM
EXHIBIT "A"

SDM95A-1

STEVEN D. MCDOWELL
P O BOX 11896
SALT LAKE CITY, UT 84147

DEFENDANT
INVESTMENT INCOME
1994

INTEREST INCOME PER 1994 FORM 1040		92,630	
LESS: INTEREST FROM WOOLRICH	(7,889)		
SMITH BARNEY	(914)		
FIRST INTERSTATE BANK	(17)		

	(8,800)	(8,800)	
ESTIMATE OF INTEREST INCOME		83,830	83,830
DIVIDEND INCOME PER 1994 FORM 1040		226	
LESS: DIVIDENDS FROM WOOLRICH	(226)		

	(226)	(226)	
ESTIMATE OF DIVIDEND INCOME		0	0
CAPITAL GAINS PER 1994 FORM 1040		67,191	
LESS: LONG-TERM GAINS--BLDG LOT	(24,644)		
LONG-TERM GAINS--WOOLRICH STOCK	(18,200)		
SHORT-TERM GAIN--HOUSE & LOT	(10,887)		
ADD: SHORT-TERM LOSSES FROM SMITH BARNEY	8,060		

	(47,671)	(47,671)	

		19,520	19,520
OTHER GAINS & LOSSES PER 1994 FORM 1040		9,948	
LESS: GAIN ON THE SALE OF MOTORHOME	(9,948)		

	(9,948)	(9,948)	
ESTIMATE OF OTHER GAINS & LOSSES		0	0
RENTAL INCOME & LOSSES PER 1994 FORM 1040		0	
ADD: PASSIVE ACTIVITY LOSS CARRYOVER	8,560		

	8,560	8,560	
ESTIMATE OF RENTAL INCOME & LOSSES		8,560	8,560
PARTNERSHIP INCOME & LOSSES		18,480	
NO ADJUSTMENTS	0		

	0	0	
ESTIMATE OF PARTNERSHIP INCOME & LOSSES		18,480	18,480
INTEREST EXPENSE PER 1994 FORM 1040		(54,309)	
NO ADJUSTMENTS	0		

	0	0	
ESTIMATE OF INTEREST EXPENSE		(54,309)	(54,309)

		76,081	—

**ADDENDUM
EXHIBIT "B"**

Profit and Loss Report
1/1/87 Through 12/31/94

an. C. McDowell-All Accounts
9/95

Page: 1

Inc/Exp Description	1/1/87- 12/31/94
INCOME/EXPENSE	
INCOME	
INT INC-RENTALS-Interest Income:	
2600 E-	103,337.10
EDGE-	18,724.5
Total INT INC-RENTALS-Interest Income	132,661.6
LOAN PROCEEDS-LOAN PROCEEDS	44,731.05
MONEY FR ESTATE-STEVE'S MOTHER	55,000.00
RENTALS-RENTAL ACTIVITIES:	
D' STREET-	60,695.00
3RD AVE-	23,535.00
42 CHAMBERS-	110,274.45
EDGEWARE-	5,309.00
PARK AVE-	122,111.16
TOTAL RENTALS-RENTAL ACTIVITIES	321,924.61
SALES CASH FLOW-SALES CASH FLOW:	
D' ST-	26,475.00
2600 E-	3,292.20
3RD AVE-	82,285.6
BAKER-	10,000.00
EDGEWARE-	8,064.00
LOWELL AVE-	67,644.00
MOTOR HOME-	13,800.00
SALES CASH FLOW-SALES CASH FLOW - Other	13,800.00
TOTAL SALES CASH FLOW-SALES CASH FLOW	197,760.36
SAMPLE SALES-SAMPLE SALES	1.00
TOTAL INCOME	751,477.58
EXPENSES	
ASSET ACCTS-:	
D' ST-:	
FIXTURES-	3,746.00
IMPROV-	5,174.00
TOTAL D' ST-	8,920.00
3RD AVE-:	
IMPROV-	27.32
TOTAL 3RD AVE-	727.32
CHAMBERS-:	
FIXTURES-	5,679.00
IMPROV-	2,951.00
SECT 173-	54.08
TOTAL CHAMBERS-	8,004.08
EDGEWARE-:	
IMPROV-	103.50
TOTAL EDGEWARE-	102.50
PARK AVE-:	
FIXTURES-	1,550.00
IMPROV-	11,090.55
TOTAL PARK AVE-	12,640.55
TOTAL ASSET ACCTS-	30,395.45
INV EXP-:	
FED TX-D' ST-	11,337.93
FED TX-2600 E-	16.00
FED TX-3RD AVE-	1,571.00
FED TX-EDGEWARE-	133.00
FED TX-LOWELL-	5,990.00
PR TX-LOWELL-	2,872.00
UT TX-D' ST-	2,956.00
UT TX-3RD AVE-	3,017.00
UT TX-EDGEWARE-	38.00
UT TX-LOWELL-	1,800.00
TOTAL INV EXP-	40,640.00
PRIN PAY-PRINCIPAL PAYMENTS:	

Profit and Loss Statement
1/1/87 Through 12/31/87

McDowell-All Accounts

Page 2

Income Description	1/1/87 12/31/87
0 ST-	17,550.47
2600 E-	11,119.00
3RD AVE-	83,225.29
CHAMBERS-	34,155.00
EDGEWARE-	1,111.00
LOWELL AVE-	1,111.00
PARK AVE-	11,117.00
TOTAL PRIN PAY-PRINCIPAL PAYMENTS	167,184.76
Rental expenses-Rental expenses:	
0 STREET-	62,378.76
3RD AVE-	32,655.15
42 CHAMBERS-	99,432.69
EDGEWARE-	10,567.99
PARK AVE-	93,132.89
Total Rental expenses-Rental expenses	298,168.48
SALES INTEREST-SALES INTEREST EXPENSE:	
2600 EAST-2600 EAST (PACK)	57,520.86
EDGEWARE-EDGEWARE	11,111.08
TOTAL SALES INTEREST-SALES INTEREST EXPENSE	72,321.94
TOTAL EXPENSES	608,710.63
TOTAL INCOME/EXPENSE	142,756.95