2008

Lori Ann Busche v. Matthias Busche : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LORI ANN BUSCHE, Petitioner/Cross-Appellant vs. MATTHIAS BUSCHE, Respondent/Appellant	**BRIEF OF APPELLEE AND CROSS-APPELLANT** App. Case No.: 20080388 **ORAL ARGUMENT REQUESTED**

APPEAL FROM JUDGMENT IN THE FOURTH JUDICIAL DISTRICT COURT

HONORABLE CLAUDIA LAYCOCK, DISTRICT COURT JUDGE

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has appellate jurisdiction over this matter pursuant to Utah Code Annotated § 78A-4-103.

STATEMENT OF THE ISSUES

A. Questions Presented and Standard of Review

Lori takes exception to Matthias' ("Matthias") presentation of the issues and corresponding standards of review. "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.' If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence." *Chen v. Stewart*, 2004 UT 82, ¶19, 100 P.3d 1177. As to mixed questions of law and fact:

> Even where the [appellant] purports to challenge only the legal ruling, ... if a determination of the correctness of a court's application of a legal standard is extremely fact sensitive, the [appellant] also ha[s] a duty to marshal the evidence."

Id.

Matthias' statement of the standards for review for his Issues is incorrect, as it erroneously characterizes the majority of his questions on appeal as strictly legal questions – or mixed questions of fact and law – when in reality they are a review of the trial court's Findings of Fact. [*See* Matthias's Brief ("Brief") at 1-2]. *Wayment v.*

Howard, 2007 UT 56, ¶ 9, 144 P.3d 1147.

Here, Matthias has in fact challenged the trial court's numerous factual findings, i.e., that the trial court erred in refusing to reduce Matthias' child support and alimony obligations based on the Court's factual findings that he was voluntarily underemployed, and that the trial court erred in awarding attorney fees based on its factual findings. [Brief at 1-2].

As the above issues are factual, Matthias has a duty to marshal the evidence in support of the trial court's findings. Matthias has not done this. Therefore, this Court should assume by Matthias' failure, that all findings of fact (including mixed findings of fact and law) are adequately supported by the evidence.

B. Issues on Appeal

1. Did the trial court clearly err when it found, based on ample evidence not marshaled by Matthias, that there was no material change in circumstances warranting a modification of the divorce decree because Matthias was voluntarily underemployed for purposes of imputing income to him?

2. Did the trial court clearly err when it determined, based on ample evidence not marshaled by Matthias, the amount of income imputed to Matthias for purposes of alimony and child support?

3. Did the trial court clearly err when it determined, based on ample evidence not marshaled by Matthias, when it awarded Lori attorney fees?

C. Standards of Review

District Court's Findings: A trial court's factual findings will not be disturbed unless they are shown by marshaling to be clearly erroneous. U.R.C.P. 52(a); *Bluffdale Mt. Homes, LC v. Bluffdale City,* 2007 UT 57, ¶ 46, 167 P.3d 1016. The application of law to facts found at trial is a mixed question of fact and law. *Wayment v. Howard,* 2007 UT 56, ¶ 9. This Court defers to the district court's application of law to the facts, granting broad deference when the issue is extremely fact dependent. *Id.* "In addition, when appealing a highly fact dependent issue, the appellant has a duty to marshal the evidence." *Id.*

Contrary to Matthias' presentation of the standards of review, the Utah Supreme Court has repeatedly held that factual findings in the context of a trial court's decisions in divorce proceedings decisions are granted broad deference by appellate courts; and that the proper standard of review is clearly erroneous or abuse of discretion. A trial court's factual findings will not be disturbed unless they are shown by marshaling to be clearly erroneous. U.R.C.P. 52(a); *Bluffdale Mt. Homes, LC v. Bluffdale City,* 2007 UT 57, ¶ 46, 582 Utah Adv. Rep. 41. This Court defers to the district court's application of law to the facts, granting broad deference when the issue is extremely fact dependent. *Id.* "In addition, when appealing a highly fact dependent issue, the appellant has a duty to marshal the evidence." *Id.* The law applied is reviewed for correctness. *Jones v. Barlow,* 2007 UT 20, ¶ 11, 154 P.3d 808 (Utah 2007).

D. Issue Preservation

Lori asserts that Matthias has not properly preserved his asserted Issue no. 3 (application of amended statute) for appellate review. This Court's rules require Matthias to demonstrate that issues raised on appeal were properly raised and preserved in the district court. U.R.A.P 24(a)(5)(A), (B). Matthias has failed to comply with this Rule. Further, because Matthias raises new issues for the first time on appeal, Lori had no opportunity to address such issues below. Moreover, Matthias has failed to comply with Utah R. App. P. 24(a)(5)(A) and cite to the record where his issues were preserved for appeal.

DETERMINATIVE PROVISIONS

U.C.A. §30-3-5(3); §U.C.A.78-45-7.2(7), this section renumbered in 2008 as &78B-12-210, et seq.; §U.C.A. 78-45-7.5 are relevant to the issues as set forth in this appeal.

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises from Matthias's petition to modify. The decree of divorce ordered Matthias to pay alimony and child support in the amounts of $1,545.00/month and $1,766.00/month respectively. On June 20, 2005, just five months after the divorce decree was final, Matthias filed a petition to modify. In his Petition, Matthias alleged that he had lost his job – through no fault of his own – and that such constituted a substantial

change in circumstances and that he no longer had the ability to pay the ordered amounts of alimony and child support.

Prior to the filing of his Petition to Modify, Matthias was given several warnings about his job performance; specifically, Matthias was warned that he was engaging in inappropriate conduct at work and that his work performance was below appropriate standards. On January 28, 2005 Matthias was "terminated" from his employment.

Despite being terminated from his employment, Matthias continued to perform labor at his place of employment for compensation; however, his compensation was reduced because he was considered an independent contractor.

During the course of the litigation between the parties, there were several hearings in which the issue of an award of attorney's fees was reserved. At the time of the trial of this matter, and subsequent thereto, the trial court addressed the attorney fees issue and Lori's claims thereon. Further, in her request for attorney's fees at the trial of this matter, Lori requested that the court consider Matthias' interest in the marital home for purposes of his ability to pay.

B. Proceedings Below

At the trial of this matter on June 7, 2007 on Matthias' Petition to Modify, the trial court tried the following issues: Matthias' request for a reduction of child support; Matthias' request for either a reduction in or an elimination of alimony; Lori's claims for attorney's fees, including her claims for fees for past hearings and fees under U.C.A. 30-

3-5(6) for claims without merit which were made in bad faith. On March 19, 2008 the trial court entered the Order from which this appeal is taken.

C. Statement of Facts

Lori takes her Statement of Facts, in large part, from the trial court's Findings of Fact [R. at 1017-1010], which have not been challenged by either party.

1. The parties were married on June 23, 1995. Lori filed her petition for divorce on March 12, 2004. [R. at 1017].

2. The parties were later divorced. This was achieved through a stipulation of the parties and their attorneys. Judge James R. Taylor signed the final documents on January 7, 2005. [*Id.*]

3. In paragraph 12 of the divorce decree the respondent was ordered to pay $1,545.00 per month as alimony--based upon an annual salary of $84,800.00 (gross amount minus medicare and FICA)-for 9 1/2years. The decree also ordered the parties to split equally all bonuses or other income received by the respondent in excess of his base annual salary of $84,800.00. [R. at 1016].

4. In paragraph 6 of the divorce decree the respondent was ordered to pay $1,766.00 per month as child support-based upon a monthly salary of $7,067.00--for the five children of the marriage. The respondent was employed by Tahitian Noni (Morinda, Inc.) at the time of the decree. The petitioner's monthly salary was imputed at minimum wage, $892.00 per month, as she was not employed outside the home. [*Id.*]

5. The age range of the five children at the time of the divorce was 22 months to 8 years of age. At the time of trial, all of the children were still younger than 18 years of age. [*Id.*]

6. The respondent filed his Petition to Modify on June 20, 2005-just 5 months after the divorce decree was signed. He requested modification of alimony and child support, alleging that "through no fault of his own [he] has been laid off by his former employer and is now an independent contractor. His income has been reduced to approximately $5,000.00 gross pay per month. This change of income was unforeseen and unexpected and has had a material effect on the Respondent's ability to pay alimony and child support ... " [*Id.*]

7. The petitioner filed her Petition to Modify Decree of Divorce on December 21, 2006. She requested clarification of paragraph 12 of the decree, because the respondent "has been untruthful in his declaration of his income which constitutes a substantial change in circumstances such that the decree of divorce should be clarified." She sought an "order of this Court modifying the Decree of Divorce by ordering that Respondent provide copies of his tax returns each year on or before April 30th of each year in order to determine his income and any bonuses received." [R. at 1015].

8. Respondent now lives part-time in Bountiful with his parents. He also lives part-time with his girlfriend, to whom he does not pay room or board. He has helped to pay for some remodeling of her home. [*Id.*]

9. On March 24, 2004 the respondent's supervisor, Tom Black, prepared a "Performance Counseling Notice" which also constituted a written warning. The respondent was warned that further violations "may result in disciplinary action up to and including termination." The violations mentioned involved "sharing your personal life with employees or talking about inappropriate subjects with employees", "spending too much time interacting with a female distributor," and speaking to "an employee concerning your personal life which involved topics of a sexual nature." The respondent signed his acceptance of the written warning on March 29, 2004. [*Id.*]

10. On December 28, 2004 Tom Black wrote a performance evaluation after a conversation with the respondent. Among others, it contained the following statements:

> A. "Your performance has been below expectations; i.e. your time and contribution is not accounted for."
>
> B. "We agreed that from now on, you will be sensitive to your work peers by not burdening them with your personal challenges. They need your support."
>
> C. "In order to help you be successful, I want to meet with you every 6 weeks until no longer necessary to discuss the improvements of your performance, and adjust and/or clarify the goals and expectations for the next 6 weeks."
>
> D. "After we both reflect further upon this matter, let us meet and establish a plan for the coming year."

[*Id.*]

11. The respondent corresponded later by email with Tom Black,

acknowledged receipt of the memo, and stated his "full intentions to be again as dedicated and available as I have been in the past and beyond and be the leader I am expected to be in my position." [R. at 1014].

12. On a document entitled "Personnel Action Notice" and dated January 28, 2005, the respondent's employment with Morinda, Inc. was terminated and labeled a "discharge." No six-week review or interview between the respondent and Tom Black ever took place. [*Id.*]

13. In an affidavit dated August 22, 2006, Tom Black stated: "Matthias was terminated from a management position at TNI due to his inability to effectively manage employees in his department. This decision was difficult because of other skills Matthias has." [*Id.*]

14. On February 1, 2005 the respondent signed a document entitled, "Release of All Claims," in which he acknowledged that he would receive 22 weeks' salary ($35,876.94) from Morinda, Inc., plus $6,180.00 for 6 months of COBRA premiums. In return, the respondent agreed to release all claims for wages, profits, damages, court costs, attorneys' fees, etc. [R. at 1013].

15. Under paragraph 12 of the decree, Lori later was awarded one-half of the "other income" Matthias earned above his $84,800 salary. That amount equaled $10,553.00. Commissioner Patton deemed the severance pay to be a "bonus" under paragraph 12. To date, Lori has not been paid those funds. [*Id.*]

16 Despite this document and agreement, the respondent continued to work for Morinda, Inc. during March and Apri12005. A letter from Morinda, Inc., dated April 13, 2005, states that "Matthias Busche has been contracted to provide services to Tahitian Noni International for an indefinite period for the consideration of $5000.00 per month. Minimum expected time for project is approximately one year." He later worked for Tahitian Noni Cafe USA, Inc, which was located at the same premises. [*Id.*]

17. In June or July 2005 the respondent moved from his apartment in Orem to a condominium in Saratoga Springs. He testified that the rent was about the same, but the condo was halfway to Salt Lake City and was in a "quieter" location. [*Id.*]

18. This contract employment with Morinda, Inc. was terminated in January 2006, and he began to look for other jobs. [R. at 1012].

19. With regard to this termination, Tom Black stated (in the same affidavit):

> As an independent contractor for TNI and for TNI Cafe USA, Matthias had an open-ended schedule, being able to work at his own designated hours inside and outside the TNI offices. Even so, there were times when Matthias was difficult to reach and seemed consumed by things outside the office. As a result, in January 2006, the management of TNI Cafe USA asked me to terminate the independent contractor relationship with Matthias.

[*Id.*]

20. In a deposition of Tom Black held on October 30, 2006-a little more than 2 months after the affidavit was prepared-Mr. Black was less certain as to the reasons for the respondent's termination from his management position at Tahitian Noni, although he

admitted that he "created" the affidavit mentioned above and that there was nothing in it that was inaccurate:

A. Tom Black had no memory as to whether there had been an intervening event (between December 28, 2004 and February 1,2005) which was the cause of the respondent's termination. "There may have been," but he did not have any specific memory of such an event.

B. He was "not necessarily" confident that the termination was a reflection on the respondent's performance after December 28, 2004.

C. He could not recall whether the respondent's termination might have been related to the "structure" of his department or "other considerations for people's skill levels" or whether it might have been for a reduction in force.

D. He also said that there were no layoffs at that time and that the respondent's termination was not a layoff.

E. Tom Black was the person who told the respondent that his contracting services were being terminated in January 2006.

F. The two departments for whom the respondent did contract work did not have "enough work for Matthias." Black could not recall if that was the only reason the respondent's employment as a consultant was terminated.

G. He was also told that the respondent was difficult to reach and seemed consumed by things outside his office.

[*Id.*]; (See deposition, pp. 40-50.)

21. During his subsequent period of unemployment, the respondent sent out 30-40 resumes. [R. at 1011].

22. On Monday, October 2, 2006 he began working for SupraNaturals at an annual salary of $55,000.00, which amounts to a monthly salary of $4,583.33. [*Id.*].

23. The respondent receives no bonuses at SupraNaturals. [*Id.*].

24. On his 2005 U.S. tax return he declared an adjusted gross income of $63,256.00, after deducting the $22,755.00 that he declared in alimony payments. That would have given him a total gross income of $86,011.00 for this court's purposes. He received an income tax refund of $3,816.00 from the federal government and $240.00 from the state government. [*Id.*].

25. On his 2006 U.S. tax return he declared an adjusted gross income of $11,915.00, after deducting the $14,014.00 that he declared in alimony payments. That would have given him a total gross income of $25,929.00 for this court's purposes. He received an income tax refund of $940.00 from the federal government and $522.00 from the state government. [*Id.*].

26. The issue of awarding attorney's fees is a discretionary decision with the court. Both the decision to award attorney's fees and the amount of such fees is within the trial court's discretion. A few other factors, can be considered, including the difficultly of the litigation, the efficiency of the attorneys presenting the case, the reasonableness of the attorney's fees, etc. [R. at 0998].

27. I have two very experienced attorneys here with a great deal of expertise on each side. [*Id.*].

28. With regard to difficulty of the litigation, I didn't see this as a particularly difficult case for either side. I don't think that as far as litigation difficulties there was anything here that was truly difficult on either side. [*Id.*].

29. I do have some concerns as to the reasonableness of the fees as to the efficiency of the attorneys in presenting the case and preparation. As well, I find it very hard to believe that attorney's fees in excess of$51, 000 are necessary for an estate of this size between these two people. [*Id.*].

30. For what I saw before me at trial I had a difficult time believing that fees in excess of $51,000 were appropriate. I just don't find it reasonable that every single stone was turned over. There were a great number of exhibits that were never presented to the court and frankly all of the work that went into those credit cards and the analysis of how he spent every dime was not helpful to the court. [*Id.*].

31. I find that Mr. Thayer's fee is probably a little bit above the norm. I think that most of the other attorneys whose affidavits I see in the domestic are billing between a $180 to $200 and he's at $200 but I don't find that the extra twenty dollars is above and beyond belief. [R. at 0997].

32. The Petitioner did succeed. And I find that the result attained was in her favor. [*Id.*].

33. We are all agreed that she has a need. She's been a stay-at-home mom and is still a stay-at-home mom. So her imputed income would be at $892. [*Id.*].

34. As to the reasonableness of the attorney's fees I find them excessive. I was amazed to find there was a claim over $20,000 for one order to show cause hearing. It seemed a great deal of other preparation was being put into it. [*Id.*].

35. As to the Respondent's ability to pay, as I have indicated, his current income is $55,000 and in my ruling I imputed to him the salary of $84,800. Nevertheless, in reality what he has now is an obligation to pay $1,545 per month in alimony, $1,766 in child support for a total of $3,311. His monthly gross if you take $55,000 and divide it by 12, are a few cents over $4,583 and you subtract the $3,311 from that and that only leaves him with a gross amount of $1,272. [*Id.*].

36. I also note from Ms. Blakelock's representation is that the sum total of Respondent's attorney's fees, from all of his attorneys including hers, was a fifth of Petitioner's, which would put it around $10,000. Whatever it was it was a lot less then what was incurred by the Petitioner. [*Id.*].

37. I find that the Respondent's equity in the marital home is not ongoing income and I agree with Ms. Blakelock that it is not appropriate to take the $66,000 in equity Respondent is entitled to be used for his payment of Petitioner's attorney's fees. So I am not going to consider Respondent's equity in the marital home. [R. at 0996].

38. Nevertheless, I will award some attorney's fees. Petitioner did prevail. I believe that some award is appropriate despite my concerns about the reasonableness of the fees and Respondent's admitted financial straights due to my decision at trial. [*Id.*].

39. In addition to the judgment of$3,324.71 previously awarded for Petitioner's attorney's fees for the August 29, 2005 order to show cause hearing, the court awards an additional $16,675.29. Therefore, the court awards a total judgment of$20,000.00 to the

Petitioner for attorney's fees. In addition, after reviewing the ORS documentation, the court finds that the total arrearage balance owed by the Respondent as of December 1, 2007 is $33,547.16. [*Id.*].

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's imputation of income to Matthias based on the trial court's factual finding that there was no material change of circumstances warranting a modification of Matthias' child support and alimony obligations. The trial court correctly determined that Matthias was voluntarily underemployed pursuant to controlling Utah law. Moreover, the trial court correctly considered the factual evidence presented by the parties at trial and correctly applied the facts to the law to find that Matthias was voluntarily underemployed and thus not entitled to a modification of his support obligations.

The trial court did not err in not applying the amended version of U.C.A. §78-45-7.5(7). First, Matthias failed to raise this issue at the trial of this matter and failed to raise this issue when he filed his docketing statement. Thus, this issue was not properly preserved for appeal and Lori had no opportunity to address this issue below. Moreover, even if the issue is properly raised by Matthias, any error was harmless as the amendment of the statute has no effect on the trial court's findings and conclusion.

Finally, the trial court did not err in awarding attorney fees to Lori.[1] The trial court properly considered all the factors as set forth under Utah law and found that she had a need for the fees, that Matthias was able to pay and that the fees were reasonable.

APPELLEE'S BRIEF

I. THIS COURT SHOULD AFFIRM BASED ON MATTHIAS' FAILURE TO MARSHAL THE EVIDENCE SUPPORTING THE TRIAL COURT'S FACTUAL FINDINGS.

A. Review of the Trial Court's Findings of Fact Requires Marshaling of the Evidence.

Matthias has challenged the trial court's factual findings, which requires marshaling of evidence supporting those findings. Matthias has failed to marshal the required evidence for any of the trial court's findings that he is appealing. If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence." *Chen v. Stewart*, 2004 UT 82, ¶19, 100 P.3d 1177, 1184. Matthias cannot escape the duty to marshal simply by characterizing this issue as a legal issue: "Even where the Appellant purports to challenge only the legal ruling, ... if a determination of the correctness of a court's application of a legal standard is extremely fact sensitive, the [Matthias] also have a duty to marshal the evidence." *Id.*

To successfully challenge the trial court's findings Matthias must "demonstrate that the finding was clearly erroneous." *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah

[1] Although Lori agrees that the trial court was correct in awarding fees to her, she has appealed the amount of fees awarded.

App. 1992). This demonstration requires that Matthias "marshal all of the evidence that supports the finding and then demonstrate that despite this evidence the finding is so lacking in support as to be against the clear weight of the evidence." *Wilde v. Wilde*, 2001 UT App 318, ¶ 29, 35 P.3d 341 (quoting *Crockett*, 836 P.2d at 820). If Matthias fails to marshal the facts, the appellate court will "not consider [the finding] properly challenged and [will] assume the evidence supports [the finding]." *Chen*, 2004 UT 82, ¶ 3; *see Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 800 (Utah 1991). An appellate court will assume the validity of the trial court finding because the "marshaling requirement is a prerequisite to the appellate court's examination of the finding." *Crockett*, 836 P.2d at 820.

Moreover, if Matthias simply "argue[s] selected evidence favorable to [his] position," that effort "does not begin to meet the marshalling burden [he] must carry." *Crookston*, 817 P.2d at 800. This is because an appellate court "begins its analysis with the trial court's findings of fact, not with an appellant's view of the way he or she believes the facts should have been found." *Ashton v. Ashton*, 733 P.2d 147, 150 (Utah 1987). To have any chance at reversing a trial court's factual finding, Matthias must "seriously discuss the trial court's findings that dispute [his] version of the facts." *Id.* If this is not done "the trial court's findings will not be disturbed." *Id.*

1. Voluntarily Underemployed.

Matthias challenges the trial court's findings regarding the determination that he

was voluntarily underemployed, specifically whether Matthias' termination was for cause. [Brief at 13]. However, Matthias has failed to set forth all the evidence in support of the trial court's voluntarily underemployed determination. The trial court provided a detailed description of its factual findings as a basis for its determination that Matthias was voluntarily underemployed. [R. at 1016-1000]. Thus, the trial court considered extensive information regarding Matthias' employment status and history.

Rather than marshal the evidence, Matthias cites isolated facts in support of his argument that the trial court somehow turned a blind eye to the evidence. Matthias clearly does not present an unbiased view of the evidence that was before the trial court, nor does he give an accurate representation of the court's ruling. Accordingly, this Court should not disturb the lower court's finding regarding alimony calculations.

2. Calculating Amount of Income for Imputation Purposes.

In addition, Matthias failed to marshal the required findings of the trial court regarding its imputation of income. The trial court carefully listened to and analyzed testimony from several witnesses and made factual findings upon which it based its ruling that there was no material change in circumstances and income should be imputed to Matthias at the level set forth in the Decree. [R. at 1001]. Each of these findings were incorporated into the trial court's conclusion that Matthias was voluntarily underemployed and that no modification of Matthias' support obligations were appropriate.

Matthias purports to challenge the trial court's legal ruling that it incorrectly failed to consider certain factors in imputing income to Matthias. However, instead of challenging that ruling on a review of the law, Matthias resorts to a discussion of the selective facts and extrinsic evidence to support his argument. Accordingly, this Court should hold that Matthias has mischaracterized the nature of his challenge and that, in fact, he is challenging the trial court's factual findings. As such, Matthias has a duty to marshal the evidence, which he has failed to do.

B. Matthias Has Failed to Marshal the Evidence.

Matthias has failed to challenge properly the trial court's conclusive ruling that Matthias was voluntarily underemployed and that because of this there was not a material change in circumstances warranting a modification of his support obligations. Despite this clear factual determination, Matthias has made no attempt to acknowledge his obligation to marshal the facts, and it has likewise failed to marshal the facts in his Brief. Because of this omission, this Court must reject Matthias' attack on the trial court's fact finding.

Matthias' attempt to characterize the question on appeal as a question of law, or even a mixed question of law and fact, does not make the trial court's findings regarding his termination from Tahitian Noni and thus his voluntary underemployment any less of a factual question. Matthias cannot escape the duty to marshal simply by characterizing an issue as legal: "[e]ven where the Appellant purport[s] to challenge only the legal ruling,

... if a determination of the correctness of a court's application of a legal standard is extremely fact sensitive, the Appellant also ha[s] a duty to marshal the evidence." *Kilpatrick*, 2001 UT 107, ¶ 49.

Here, Matthias has admittedly challenged the trial court's finding that Matthias was voluntarily underemployed. [Brief at 13]. In truth, Matthias' entire argument on this point is a recitation of the alleged inadequacy and misapplication of the trial court's factual findings. Moreover, in support of Matthias' argument that the trial court erred in finding that he was voluntarily underemployed, Matthias argues facts which – in Matthias' opinion – should have been considered above those facts the trial court exhaustively outlined in its ruling. [Brief at 13-14]. The most blatant examples of Matthias' reliance upon the factual record are Matthias' statements that "**the only evidence in the record** regarding Matthias' current income and employment was Matthias' own evidence that he had been laid off from full-time employment and that he was now earning substantially less money as an independent contractor" [Brief at 13] (emphasis added). This statement is simply wrong and ignores the overwhelming amount of evidence the trial court considered in making its Ruling.

Accordingly, Matthias has challenged the trial court's findings of fact by discussing and arguing selective and additional facts in an effort to refute the trial court's findings. Such an effort without complying with this Court's announced marshaling requirements is inappropriate and illustrates Matthias' attempt to circumvent this Court's

rules. Therefore, the trial court's finding that Matthias was terminated for cause and that he was voluntarily underemployed must not be disturbed.

C. This Court Need Not Reexamine the Trial Court's Factual Analysis.

Despite Matthias' contentions, it is clear from the trial court's detailed and exhaustive Findings that it considered and analyzed every piece of evidence before it in making its Ruling that Matthias was terminated for cause and that he was voluntarily underemployed. As such, Matthias has not met his burden of showing that the trial court erred under the abuse of discretion and clearly erroneous standards of review. Again, the trial court need not recite every indicia of reasoning leading to its conclusions. *Knickerbocker*, 912 P.2d at 979. Moreover, as discussed below, even if the Court were to consider Matthias' factual analysis, the evidence presented still does not support the conclusions put forth by Matthias.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT MATTHIAS WAS VOLUNTARILY UNDEREMPLOYED AND CORRECTLY IMPUTED INCOME TO MATTHIAS FOR PURPOSES OF DETERMINING HIS CHILD SUPPORT AND ALIMONY OBLIGATIONS.

Even overlooking Matthias' failure to marshal, there is an abundance of evidence supporting the trial court's factual finding that (1) Matthias was voluntarily underemployed, and (2) that income should be imputed to Matthias at the level set forth in the original divorce decree. [R. at 1001].

A. The Trial Court Correctly Considered Evidence of Matthias' Termination for Cause.

Matthias argues that the trial judge erred when it admitted the deposition testimony and affidavit of Tom Black, and considered them as substantive evidence. However, a trial court has "broad discretion to admit or exclude evidence." *Daines v. Vincent*, 190 P.3d 1269, 1275 (Utah 2008) (citing *State v. Whittle*, 989 P.2d 52, 58 (Utah 1999)). A reviewing court will disturb a trial court's evidentiary ruling "only for an abuse of discretion." *Id.* (citing *Whittle*, 989 P.2d at 58). Thus, a reviewing court will not "reverse a trial court's ruling on evidence unless the ruling 'was beyond the limits of reasonability.'" *Jensen v. IHC Hosps., Inc.* 82 P.3d 1076, 1089 Utah 2003) (quoting *State v. Hamilton*, 827 P.2d 232, 239-240 (Utah 1992)).

Here, during the trial of this matter, the Court allowed the deposition testimony of Tom Black to come in for impeachment purposes after it was determined that despite receiving a subpoena to testify he had failed to appear. [R. at 1034 p. 139]. Specifically, the deposition testimony was allowed to be introduced into evidence to impeach Matthias' testimony regarding the circumstances of his termination. [R. at 1034, pp. 141-145]. The parties accepted the Court's evidentiary ruling and both subsequently participated reading in portions of the deposition transcript which the Court specifically allowed into evidence. There was no objection to this Ruling. [R. at 1034, pp. 137-139]. Thus, based on its evidentiary ruling at trial, the Court properly considered the deposition

testimony of Tom Black when making its Ruling and issuing the Order appealed from. [R. 1012-11].

Based on its evidentiary ruling at trial, the Court was permitted to review and consider Tom Black's testimony in making its Ruling regarding Matthias' voluntary underemployment status. However, in his attempt to find error, Matthias narrowly focuses on this single piece of evidence which supports the Court's factual finding that Matthias was voluntarily underemployed. Matthias' approach is inappropriate. The trial court set forth numerous findings of fact, separate and apart from Tom Black's testimony, which support a finding that Matthias was voluntarily underemployed. Indeed, in the Findings of Fact and Amended Decree of Divorce, the trial court specifically stated that it was relying on: "[testimony] from the respondent [Matthias], Tom Black, and business records from Tahitian Noni [Matthias' former employer]." [R. at 1007].

In addition, the trial court specifically found that the "business records from Tahitian Noni clearly demonstrate a pattern of misbehavior by the respondent that the respondent refused to change." [R. at 1006]. The court also repeatedly discussed Matthias' credibility and reluctance to tell the truth regarding this termination from Tahitian Noni: "[Matthias'] reluctance to admit that he really was terminated by Tahitian Noni damages his credibility." [*Id*]. The trial judge also made specific findings based exclusively on the Tahitian Noni business records and Matthias' testimony on cross-examination which supported a finding that Matthias was voluntarily underemployed:

> [R]egardless of Tom Black's affidavit and deposition testimony, the documents from the respondent's personnel file at Tahitian Noni speak for themselves and tell a story of ongoing problems with respondent's behavior and work habits. Ten months prior to the 2005 termination, the respondent received a written warning from his supervisor, Tom Black. The respondent had been sharing his personal life with employees, talking about inappropriate subjects with fellow employees, spending too much time "interacting with a female distributor," and speaking to another employee regarding his personal life, including "topics of a sexual nature." This performance evaluation warned the respondent that further violations could result in termination.
>
> Exactly one month before the January 28, 2005 termination, Tom Black evaluated respondent again, noting that "his performance has been below expectations" with regard to unaccounted time and contributions. The respondent was also chastised for "burdening" his work peers with his "personal challenges." Tom Black and respondent agreed that they would meet every six weeks "until no longer necessary to discuss the improvements of [his] performance."
>
> That anticipated meeting never occurred, as respondent was terminated from his supervisory position. . . . [C]learly the respondent did something which took the Tahitian Noni management past any efforts to rehabilitate the respondent and his work habits.

[R. at 1005-1004]. Matthias does not challenge the trial judge's admission of the Tahitian Noni business records as substantive evidence (the parties stipulated to the admission of this evidence [R. at 1010]); rather, Matthias ignores the weight of the evidence and simply attacks the testimony of Tom Black. This is improper. As set forth above, the trial court was in the best position to observe the witnesses and Matthias' credibility. Given the above Findings of Fact, the trial judge relied heavily on the business records and Matthias' own sworn testimony in deciding that Matthias was

voluntarily underemployed. Thus, regardless of Tom Black's testimony, the trial court's findings with respect to Matthias' voluntary underemployment are supported by ample evidence in the record.

B. The Trial Court Correctly Determined that Matthias was Voluntarily Underemployed and Properly Imputed Income to Him.

Matthias spends the bulk of his brief arguing that the trial judge erred in determining that he was voluntarily underemployed based upon his termination for cause. Matthias first argues, based upon *Hall v. Hall*, that the trial court failed to consider all the appropriate factors in determining voluntary underemployment. Matthias next argues, based upon *In J.R.T. v. Martinez*, that the trial judge erred in concluding that Matthias' fault for his termination constitutes voluntary underemployment. However, Matthias is wrong: *Hall* is clearly distinguishable from this case and thus inapplicable and *Martinez* is not controlling authority.

i. *Hall v. Hall* is Distinguishable From This Case.

Matthias argues that the Utah Court of Appeals case, *Hall v. Hall*, requires a trial judge to consider several factors in determining voluntary underemployment. Matthias' reliance on *Hall* is misguided for at least two reasons. First, the context in *Hall* differs substantially from the context in this case. Second, Matthias misinterprets the *Hall* court's conclusions and has sought to apply *Hall* inappropriately to this case.

First, the context in *Hall* differs from the context in this case. The court in *Hall*

was deciding whether the trial court's absent findings regarding underemployment could be "implied." *Hall v. Hall*, 858 P.2d 1018, 1025-1026 (Utah Ct. App. 1993). *Hall* is obviously distinguishable from and inapplicable to this case because the trial court here made exhaustive factual findings regarding Matthias's voluntary underemployment. In *Hall*, the trial court imputed income to the appellant without explicitly determining that he was voluntarily underemployed. *See id.* Therefore, the Court of Appeals was left to consider whether it could imply the absent findings. *See id.* It was only in that context the Court noted the factors that trial courts should consider when determining voluntary underemployment. *See id.* at 1026. This case is different. In this case, the trial court, based upon specific findings of fact, explicitly determined that Matthias was voluntarily underemployed. Unlike *Hall,* this Court is not reduced to searching the trial court's factual findings to determine if the court considered any factor indicative of voluntary underemployment. Because the Court's analysis of underemployment in *Hall* was in the context of implying findings of underemployment, the analysis and reasoning of *Hall* are not applicable in this case.

Second, Matthias misinterprets the *Hall* Court's conclusions. Matthias asserts that *Hall* requires an analysis of several factors in determining voluntary underemployment. Matthias is mistaken. While *Hall* suggests various factors trial courts should consider, it only requires one factor that courts must consider – the parent's employment capacity and earning potential – in determining voluntary underemployment. *See id.* (stating that

in determining whether a parent is underemployed, "at a minimum, the trial court must determine [the parent's] employment capacity and earning potential"). *Id.*

In *Hall*, the Utah Court of Appeals reversed the trial court's determination that the appellant was underemployed. *Id.* The Court noted that the trial court's findings "[did] not include any findings to the effect that [the] appellant was voluntarily underemployed." *Id.* at 1025. Indeed, all the Court could determine from the trial court's findings was that the appellant was earning considerably less than he had in the recent past. It "[could] only guess at whether this state of affairs stemm[ed] from appellant's volition." *Id.* The Court explained:

> Although the trial court found that appellant is currently earning less than he was previously, that isolated finding does not answer the critical question of whether the drop in earnings was voluntary. Rather, Appellant's current earnings, as compared to historical income, is merely one element in the matrix of factual issues affecting the ultimate finding of whether Appellant is underemployed. Many critical questions are left unanswered: What are Appellant's abilities? Is Appellant's current salary below the prevailing market for a person with his abilities? Are there any job openings for a person with Appellant's abilities? At a minimum, the trial court must determine Appellant's employment capacity and earnings potential . . . before it could logically conclude that he is, in fact, underemployed.

Id. Accordingly, the Court suggested that if the trial court had considered the appellant's employment capacity and earnings potential, it could have logically concluded that he was underemployed. That, in turn, would give the Court a basis for implying findings supporting underemployment. However, because the trial court did not make *any*

findings supporting its determination of underemployment, the Court of Appeals reversed the trial court's finding that Matthias was underemployed.

Here, the facts are readily distinguishable from *Hall*. First, as noted above, the context is different. This Court is not deciding whether to imply findings supporting the trial judge's determination that Matthias was voluntarily underemployed – the trial court here carefully set forth numerous factual findings supporting its determination of voluntary underemployment. Second, the trial judge in this case did consider many of the factors stated in *Hall*. The trial judge considered Matthias's current earnings as compared to his historical earnings. [R. at 1011-12]. The trial judge answered the critical question of whether Matthias' drop in earnings was voluntary. [*Id.*] And the trial judge noted Matthias' efforts to seek employment after his termination from Tahitian Noni, demonstrating that the judge considered Matthias's employment opportunities. [*Id.*] Accordingly, the trial judge did not fail to consider the factors relevant to a determination of voluntary underemployment.

ii. Martinez is Not Controlling Authority.

Matthias next argues that the trial court erred in concluding that Matthias' fault for his termination constitutes voluntary underemployment. Matthias asserts that a parent is not voluntarily underemployed unless they are shirking their alimony and child support obligations by unreasonably foregoing higher paying employment. Matthias incorrectly argues that this case is one of first impression in Utah and then inappropriately relies

exclusively on a Colorado Supreme Court case for this proposition. In *In re J.R.T. v. Martinez*, the Colorado Supreme Court held that if a trial court doesn't find that a parent is shirking their child support obligation by unreasonably foregoing higher paying employment, the trial court should calculate the amount of child support starting from the parent's actual gross income only. 70 P.3d 474, 476 (Colo. 2003).

In *Martinez*, Martinez lost his job for violating his company's sexual harassment policy. *Id.* at 475. He lost his next job for failing to timely deposit company funds. *Id.* He then accepted a lower paying job and moved the court to modify child support. *Id.* The trial court found that Martinez was voluntarily underemployed because he lost his jobs as a direct result of his own actions, so it imputed income to Martinez. *Id.* at 476. The court of appeals found that the trial court mistakenly concluded that Martinez was voluntarily underemployed based exclusively on the fact that he was fired for misbehavior. *Id.* The Colorado Supreme Court affirmed the judgment of the court of appeals. The Supreme Court examined the statutory goals of Colorado's child support guidelines as well as the legislative history and determined that the intent of the General Assembly was "to impute income when the parent shirks his or her child support obligation by unreasonably foregoing higher paying employment that he or she could obtain." *Id.* at 479-480.

Matthias argues that because the facts of *Martinez* are similar to the facts in this case, this Court should follow the reasoning of the Colorado Supreme Court. Matthias'

argument is flawed. First, Colorado law is not controlling in this case. Second, there is Utah law directly on point. In a 2010 Utah Court of Appeals case, *Connell v. Connell*, Connell was forced to resign from his job at Brigham Young University ("BYU"), where he earned $5996 per month, for failing to fulfill a condition of employment. 2010 UT App 139, ¶ 14. At the time of trial, Connell was earning $5000 per month. *Id.* at ¶19. However, the trial court imputed income to Connell based upon the $5996 he was earning while at BYU. *Id.* The trial court found that Connell's "forced resignation from BYU was caused by his voluntary failure to maintain compliance with conditions of employment there." *Id.* The Court of Appeals upheld the trial court's judgment. It noted, a "court maintains its 'broad discretion to select an appropriate method of assessing a spouse's income.'" *Id.* at ¶ 17 (quoting *Griffith v. Griffith*, 959 P.2d 1015, 1019 (Utah Ct. App. 1998). The Court held: "[This] ruling[] of the trial court fall[s] within its broad discretion. We see no basis for disturbing [it]." *Id.* at ¶ 20.

The facts of this case parallel the facts of *Connell*. Just like Connell, Matthias lost his job at Tahitian Noni for voluntarily failing to comply with the conditions of employment there. Just like the trial court in *Connell,* the trial court in this case had broad discretion to conclude that Matthias was voluntarily underemployed because his termination resulted from his voluntary failure to comply with the conditions of his employment. *Connell* is controlling Utah authority which dictates that an individual whose termination results from his voluntary failure to comply with the conditions of

employment is not entitled to a modification of his support obligations. Accordingly, this Court should not disturb the trial judge's ruling.

III. The Trial Court Did Not Err By Applying Utah Code § 78-45-7.5(7).

Matthias argues, for the first time on appeal, that the trial court erred in applying Utah Code § 78-45-7.5(7) which, shortly before the trial court's memorandum decision, was amended and renumbered as § 78B-12-203(7)(b).

A. Amended Statutes Can Only Be Applied Retroactively to Pending Actions.

Matthias first argues, based on the trial court's application of § 78-45-7.5(7), that plain error exists and that the statute should be given retroactive effect as the amendment was a procedural amendment only. Matthias is incorrect regardless of whether the amendment is procedural or substantive. Matthias concedes that the statute was not amended until after the trial of this matter and after all the evidence had been submitted. [Brief at p. 24]. This is important because the retroactive application of an amended statute can only apply to accrued or pending actions. If the case has been tried and completed during which time the old version of the statute was in effect, a party cannot come in after the fact and argue the retroactive application of a statute which was amended after the action has been tried and all the evidence heard. In *Pilcher v. State,* the Utah Supreme Court explained this:

> . . . where a statute changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights . . . Such

> remedial statutes are generally applied retrospectively to accrued or pending actions to further the Legislature's remedial purpose. . . . [P]rocedural statutes enacted subsequent to the initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions as well.

663 P.2d 450, 455 (Utah 1983) (emphasis added). Therefore, because the statute was amended after the case was completed and all the evidence had been submitted to the trial court, the case was not a pending action and it was not error to apply the version of the statute in effect at the time of trial.

B. The Amendment of § 78-45-7.5(7) is Substantive.

In addition, the case cited by Matthias, *Harvey v. Cedar Hills,* 227 P.3d 256 (Utah 2010) clearly holds that "as a general rule, when adjudicating a dispute we apply the version of the statute that was in effect at the time of the events giving rise to the suit." *Id.* at 259. The *Harvey* court recognized that an exception to this rule applies when the amendment is one of procedure. However, in *Harvey* the court was faced with determining whether an amended statute, which added one factor a court was to consider in an illustrative list of factors, was procedural or substantive. The *Harvey* court found that the addition of an additional factor to be considered by a court when determining or defining the rights and duties of parties was a substantive change in the law which precluded retroactive effect of the amended statute. *Id.* at 262-63.

The situation in this case is identical. The only change to the subsection at issue was the addition of "employment opportunities" as a factor to consider in determining a

parent's employment potential and probable earnings. Based on the holding in *Harvey*, this amendment was a substantive alteration of the law, "which creates, defines and regulates the rights and duties of the parties. . ." *Id.* Therefore, retroactive application of the statute is inappropriate; thus, the trial court did not err in applying the version of the statute in effect at the time of trial.

C. Matthias Cannot Demonstrate Plain Error.

Regardless of whether the amended statute has retroactive effect, Utah courts "have recognized three instances in which an appellate court may address an issue for the first time on appeal[2]: (1) where the appellant establishes that the trial court committed 'plain error'; (2) where 'exceptional circumstances' exist; or (3) in some situations, where a claim of ineffective assistance of counsel is raised on appeal." *State v. Weaver*, 122 P.3d 566, 570 (Utah 2005). In this case, Matthias argues that the trial court committed plain error by not applying the amended version of the statute. [Brief at p. 25].

To establish plain error, Matthias must demonstrate that (1) an error exists; (2) it should have been obvious to the trial judge; and (3) the error is harmful, meaning "'absent the error, there is a reasonable likelihood of a more favorable outcome for Matthias, or phrased differently, [the reviewing court's] confidence in the [judgment] is undermined.'" *State v. Cruz*, 122 P.3d 543, 549 (Utah 2005) (quoting *State v. Casey*, 82

[2] Matthias concedes that he failed to raise this issue below. [Brief at pp. 25-26].

P.3d 1106, 1116 (Utah 2003)). "If any one of these requirements is not met, plain error is not established." *State v. Dean*, 95 P.3d 276, 280 (Utah 2004) (citing *State v. Dunn*, 850 P.2d 1201, 1209 (Utah 1992)). In this case, plain error is not established because Matthias cannot demonstrate all three requirements.

Matthias also argues that the error was obvious to the trial judge. "An error is obvious when 'the law governing the error was clear at the time the alleged error was made.'" *State v. Low*, 192 P.3d 867, 879(Utah 2008) (citing *Dean* 95 P.3d at 281). Given that the statute was amended just weeks before the trial judge's memorandum decision, and because neither party nor the judge noted the change in the statute, the trial judge was unaware of the change. Accordingly, it was not "obvious" to the trial judge that they were making an error in applying the pre-amended version of the statute.

Finally, even if there was an error, it was not harmful. The only change to the subsection at issue was the addition of "employment opportunities" as a factor to consider in determining a parent's employment potential and probable earnings. Here, Matthias' argument falls flat because the trial court in fact considered Matthias's employment opportunities. In the Findings of Fact and Amended Decree of Divorce, the trial court noted Matthias's employment opportunities following his termination from Tahitian Noni. The trial judge found that Matthias secured employment at Morinda, Inc. following his termination from a management position at Tahitian Noni. [R. at 1013]. The trial judge also found that Matthias sent out thirty to forty resumes after his

termination from Morinda, Inc. as an independent contractor. [R. at 1011]. Thus, the trial court considered evidence of Matthias' employment opportunities to make these findings. Accordingly, if there was an error, it was not harmful. Because Matthias cannot demonstrate all three requirements necessary to establish plain error, there can be no error.

IV. The Trial Court Did Not Err in Calculating the Amount of Income Imputed to Matthias.

Matthias next argues that even if the Court did not err in imputing income to Matthias, the Court erred in calculating the amount of income to impute to Matthias. Matthias is incorrect. As set forth herein, a "court maintains its 'broad discretion to select an appropriate method of assessing a spouse's income.'" *Griffith v. Griffith*, 959 P.2d 1015, 1019 (Utah Ct. App. 1998). Here, Matthias argues that the Court's findings did not support the amount of income imputed to Matthias. Here again, Matthias has selectively chosen the evidence presented in his brief. Matthias has failed to marshal the evidence in support of the trial court's findings and simply states: "Instead of considering the economic realities facing Matthias . . . the trial court started and finished its analysis at Matthias's prior income at a higher rate." Brief at 22. Matthias is incorrect, again.

In fact, the trial court considered numerous factors and found several facts supporting its determination and calculation of income imputed to Matthias. First, the Court determined that there was no material change in circumstances warranting a

modification or elimination of Matthias' child support and alimony obligations. [R. at 1001]. In addition, the Court found facts supporting Matthias' past income earnings demonstrating his ability to earn income at the rate set forth in the original decree of divorce. [R. at 1013-1010]. In the Findings of Fact and Amended Decree of Divorce, the trial court noted Matthias's employment opportunities following his termination from Tahitian Noni. The trial judge found that Matthias secured employment at Morinda, Inc. following his termination from a management position at Tahitian Noni. [R. at 1013]. The trial judge also found that Matthias sent out thirty to forty resumes after his termination from Morinda, Inc. as an independent contractor. [R. at 1011]. Thus, the Court analyzed sufficient facts and data, under *Hall* and U.C.A. §78-45-7.5(7), in determining its calculation of income imputed to Matthias.

V. THE TRIAL COURT DID NOT ERR IN AWARDING FEES TO LORI.

The standard of review for a trial court's decision to award attorney's fees is abuse of discretion. *Haumont v. Haumont*, 793 P.2d 421, 426 (Utah App. 1990); *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah App. 1988). "In a divorce action, both the decision to award attorney fees and the amount of such fees are within the sound discretion of the trial court. However, the trial court's decision whether to award 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." *Davis v. Davis*, 1999 UT App. LEXIS 368, *4-5 (internal quotations and citations omitted). Furthermore, "[a] trial

court's failure to consider any of the enumerated factors is ground for reversal on the fee issue." *Id.* These three factors are "mandatory findings." *Lovato v. Lovato*, 2002 UT App. LEXIS 337, *5. The reasonableness determination can include findings such as "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." *Haumont v. Haumont*, 793 P.2d at 425-26. Here, the trial court properly considered and analyzed all the required findings in making its award.[3]

Matthias argues that the Court erred in awarding attorney fees to Lori in this matter. Matthias essentially argues that the Court erred because the award of fees are a burden and not fair. Matthias argues, incorrectly, that the Court also erred because it failed to make any findings regarding Lori's need for fees. [Brief at 33-35]. This is incorrect; Matthias has failed to cite the trial court's specific findings regarding Lori's need for fees. Indeed, the trial court found: "we are all agreed that [Lori] has a need. She's been a stay-at-home mom and is still a stay-at-home mom." [R. at 0997]. Again, instead of presenting an accurate and full picture to this Court, Matthias selectively argues and mischaracterizes the record. The Court then continued and made findings

[3] Although the trial court considered the requisite factors in awarding fees to Lori, Lori has appealed the amount as set forth in her Appellee's brief.

with respect to the "reasonableness of the attorney's fees" and the "Respondent's ability to pay . . ." [*Id.*]

The trial court considered all the requisite factors and then, based on its discretion, determined the amount of reasonable fees to award to Lori. Thus, the trial court's determination to award fees to Lori was not in err.

VI. LORI SHOULD BE AWARDED HER ATTORNEY FEES ON APPEAL.

Pursuant to Utah R. App. P. 33, Lori requests that she be awarded her attorney fees incurred from responding to Matthias' frivolous appeal. Under Rule 33, a party may recover its attorney fees from an appeal that "is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Because Matthias' appeal is frivolous, Lori respectfully requests her attorney fees incurred herein.

CONCLUSION

Based on the foregoing, Lori respectfully requests that this Court affirm the trial court's ruling that there was no material change in circumstances based on the determination that Matthias was voluntarily underemployed. Thus, Matthias was not entitled to a modification of his support obligations.

CROSS APPELLANT'S BRIEF

DETERMINATIVE PROVISIONS

Lori incorporates the Determinative Provisions section as stated prior to Appellee's brief.

STATEMENT OF ISSUES

I. Did the trial court err in its ruling regarding an award of attorney's fees and did it err in ruling that the amount of Petitioner/Cross-Appellant's attorney's fees were unreasonable and that Matthias' Petition to Modify was not brought in bad faith?

"In a divorce action, both the decision to award attorney fees and the amount of such fees are within the sound discretion of the trial court. However, the trial court's decision whether to award 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." *Davis v. Davis*, 1999 UT App. LEXIS 368, (internal quotations and citations omitted). Furthermore, "[a] trial court's failure to consider any of the enumerated factors is ground for reversal on the fee issue." *Id.* These three factors are "mandatory findings." *Lovato v. Lovato*, 2002 UT App. LEXIS 337, *5. The reasonableness determination can include findings such as "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." *Haumont v. Haumont*, 793 P.2d at 425-26 (Utah App. 1990). The standard of review for a trial court's decision to award attorney's fees is abuse of discretion. *Haumont v. Haumont*, 793 P.2d 421, 426 (Utah App. 1990); *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah App. 1988).

Pursuant to Utah R. App. P. 24(a)(5)(A), this issue was preserved in the trial court for appeal at [R. at 0998-96; 1001-1002].

II. Did the trial court err by ruling that for purposes of awarding attorney fees, a party's equity or interest in a home or property cannot be considered assets or income?

Crompton v. Crompton, 888 P.2d 686, 689 (Utah App. 1994); *Wilde v. Wilde,* 35 P.3d 341, 347 (Utah App 2001); *Breinholt v. Breinholt*, 905 P.2d 877, 880 (Utah App. 1995); *Moon v. Moon*, 973 P.2d 431, 438 n.8 (Utah App. 1999); *Adelman v. Adelman*, 815 P.2d 741, 746 (Utah App. 1991). Legal conclusions should be "reviewed for legal correctness." *Morse v. Packer*, 973 P.2d 422, 424 (Utah 1999); *State v. Deli*, 861 P.2d 431, 433 (Utah 1993) ("We accord the trial court's conclusions of law no deference but instead review them for correctness."); *Kennecott Corp. v. Utah State Tax Commission*, 858 P.2d 1381, 1384 (Utah 1993) ("[W]e afford no deference because they are conclusions of law and are therefore reviewed for correctness.").

Pursuant to Utah R. App. P. 24(a)(5)(A), this issue was preserved in the trial court for appeal at [R. at 0998-96; 1001-1002].

III. Did the trial court err in basing its finding – that the sum total of

Respondent's attorney's fees from all of his attorneys was a fifth of Petitioner's, based on a statement made by counsel during argument which statement was unsupported by any evidence presented at trial?

Jensen v. Sawyers, 2005 UT 81; *Foote v. Clark*, 962 P.2d 52, 55 (Utah 1998); *Willey v. Willey*, 866 P.2d 547 (Utah App. 1993) (rev'd on other grounds by *Willey v. Willey*, 951 P.2d 226 (Utah 1997); *Salmon v. Davis County*, 916 P.2d 890, 893 (Utah 1996); *Foxley v. Foxley*, 801 P.2d 155 (Utah App. 1990). Clearly Erroneous. *Cummings v. Cummings,* 821 P.2d 472 (Utah App. 1991).

Pursuant to Utah R. App. P. 24(a)(5)(A), this issue was preserved in the trial court for appeal at [R. at 0998-96; 1001-1002].

STATEMENT OF CASE

The Statement of the Case, Statement of Jurisdiction and Material Facts are hereby incorporated as set forth in the sections directly preceding Appellee's Brief.

SUMMARY OF THE ARGUMENT

The trial court erred in failing to award Lori all her attorneys fees incurred in prosecuting and defending against Matthias' petition to modify. The court found that Lori was the prevailing party, that she had a need for the fees and that Matthias was able to pay. However, the court arbitrarily determined that Lori's requested fees were unreasonable.

Lori challenges the trial court's determination on several grounds. First, the trial

court erred as a matter of law that Matthias' equity and interest in the marital home could not be considered by the court in determining attorneys fees. Second, the trial court erred as a matter of law in relying on an unsupported statement made by Matthias' counsel that Matthias' attorneys fees were a fifth of Lori's.

ARGUMENT

I. THE TRIAL COURT ERRED BY RULING THAT FOR PURPOSES OF AWARDING ATTORNEY FEES, A PARTY'S EQUITY OR INTEREST IN A HOME OR PROPERTY CANNOT BE CONSIDERED ASSETS OR INCOME.

In its Ruling, the trial court found as a matter of law, that "the Respondent's equity in the marital home is not ongoing income [for purposes of ability to pay attorneys fees]." [R. at 0996]. This issue has not been directly determined in any Utah appellate case. However, several other appellate decisions speak to the legitimacy of utilizing the equity in a home to pay for awards against a party and costs incurred in a divorce proceeding.

In *Crompton v. Crompton* the Utah Court of Appeals stated that "it would be inappropriate for an appellate court to tie the hands of a trial court by confining its consideration of income in every case to only that which springs from a forty-hour-week source." 888 P.2d 686, 689 (Utah App. 1994). Rather, "[a] trial court must be able to consider all sources of income that were used by the parties during their marriage to meet their self-defined needs, from whatever source—overtime, second job, self-employment, etc., *as well as unearned income*." *Id.* (emphasis added). Since *Crompton*, appellate

courts have consistently required that trial courts consider all possible sources of income in their divorce-related orders.

In *Wilde v. Wilde*, the appellate court stated that "'it is appropriate and necessary for trial courts to consider all sources of income' of the parties in awarding alimony." 35 P.3d 341, 347 (Utah App 2001) (quoting *Breinholt v. Breinholt*, 905 P.2d 877, 880 (Utah App. 1995)). The court stated that a trial court can consider welfare, unemployment, and disability benefits, as well as assistance from a party's friends and church when determining a reasonable alimony. *Id.* In *Breinholt*, the court approved consideration of a payor's spouse's income, retirement benefits, and "unearned" investment income. 905 P.2d at 880-82. A party's "historical earnings" and imputed "unemployed" or "underemployed" income are also relevant. *Moon v. Moon*, 973 P.2d 431, 438 n.8 (Utah App. 1999).

Utah courts have also considered how the parties' equity in a home impacts obligations to pay divorce-related orders. In *Moon* the court stated that "responsibility for marital debts such as mortgages" is a relevant consideration when determining income for alimony purposes. *Id.* Other courts have recognized that equity is relevant as well. In *Flannery v. Flannery*, 536 P.2d 136 (Utah App. 1975) the appellate court affirmed a trial court's award to a party of all of the equity in the marital home as well as attorney's fees. In *Adelman v. Adelman*, 815 P.2d 741, 746 (Utah App. 1991), the court affirmed a trial court's order for the husband's equity in the marital home "to be offset by the judgment

[against him] for back alimony."

In *Proctor v. Proctor* an appellate court affirmed the trial court's order subtracting unpaid child support "from his equity interest in the marital home." 773 P.2d 1389, 1391 (Utah App. 1989). The appellate court explained that even though the husband was incarcerated, he was still voluntarily unemployed, and he "nonetheless retain[ed] the ability to earn and the duty to support his ... children." The court stated that "[i]n fashioning an appropriate support order in cases where there is inadequate income flow, the trial court may properly consider assets of a responsible parent with which the support obligation can be met." *Id.*

Finally, in an unpublished appellate court opinion, the court stated that requiring that a party borrow against equity in a home to pay for an attorney's fee in a divorce proceeding is a legitimate requirement of a trial court. *Madsen v. Madsen*, 1998 Utah App. LEXIS 180. The appellate court expressly used the trial court's finding that the husband "has the ability to pay attorney fees because he has equity in the home which he can borrow against" to determine that the trial court had erred in another part of its order. *Id.* at *2 n1. Furthermore, the appellate court stated that "[b]ased on [testimony] and its finding that Mr. Madsen has equity in the [marital] home, the trial court ordered him to pay $2,000 in attorney fees." *Id.* at *6.

Therefore, because Utah appellate courts have ruled that trial courts should consider equity in a home for various determinations and orders in divorce cases,

including ability to pay attorneys fees, the trial court's ruling on this point should be overturned.

II. THE TRIAL COURT ERRED WHEN IT RULED THAT THE AMOUNT OF LORI'S ATTORNEYS FEES WERE UNREASONABLE.

In a divorce action, "the court may order a party to pay the . . . attorney fees . . . of the other party to enable the other party to prosecute or defend the action." Utah Code Ann. § 30-3-1 (2010). The decision to award attorney fees and the amount of the award is within the broad discretion of the trial court. *See Oliekan v. Oliekan*, 147 P.3d 464, 468 (Utah Ct. App. 2006) (citing *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah Ct. App. 1988)). The award 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." *Bell v. Bell*, 810 P.2d 489, 493 (Utah Ct. App. 1991) (citing *Rasband*, 752 P.2d at 1337). Furthermore, "[a] trial court's failure to consider any of the enumerated factors is ground for reversal on the fee issue." *Davis v. Davis*, 1999 UT App. LEXIS 368, (internal quotations and citations omitted). The standard of review for a trial court's decision to award attorney's fees is abuse of discretion. *See Rasband*, 752 P.2d at 1336.

Not only did the appellate court in *Madsen* (cited above) affirm the use of a party's home equity to pay attorney's fees, the court also stated that the trial court's imposition of a fee that was less than requested was improper. *Id.* at *6-7. The court

stated:

> At trial, Mrs. Madsen's attorney presented testimony explaining why $3,900 in fees was a reasonable charge in this case. ... [T]he trial court ordered [Mr. Madsen] to pay $2,000 in attorney fees. Because the trial court failed to explain its reduction in the amount of fees requested, and did not specify in its findings why $2,000 was reasonable, we remand for further findings supporting its award.

Id. This is in accord with the general doctrine that the trial court does have "considerable discretion in fixing the amount of a reasonable fee, and may award considerably less than requested so long as the reduction is supported by adequate findings." *Brookside Mobile Home Park v. Sporl*, 2000 UT App. 195, *3 (emphasis in original).

In *Martindale v. Adams* the Utah Court of Appeals stated that, "[w]here 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 [mandatory] factors." 777 P.2d 514, 518 (Utah App. 1989). This analysis was applied to the divorce setting in *Haumont*, 793 P.2d at 426. In that case, the wife requested $12,000 in attorney's fees, and the court awarded $10,000. The wife did not present any evidence to substantiate the reasonableness of her fee request. The trial court stated only "I have a little problem with the amount" before reducing the award to $10,000. The appellate court stated that:

> The trial court based its award of attorney fees upon inadequate evidence, in that appellee failed to present any evidence whatsoever as to the reasonableness of the fee awarded. It also awarded less than the claimed amount without any reasonable justification.

Id. The court then found that the trial court had abused its discretion and reversed the award and remanded the issue back to the trial court for proper determination. *Id.*

In *Rappleye v. Rappleye*, 855 P.2d 260, 266 (Utah App. 1993) the court of appeals found that the trial court had abused its discretion when it awarded a lower amount of attorney's fees than Mrs. Rappleye had requested. The court stated, after reviewing the trial courts findings, that "[t]he foregoing findings are insufficient to support the trial court's sua sponte reduction of the amount of attorney fees awarded to Mrs. Rappleye." *Id.* The court continued, stating that "[b]ecause the court's findings fail to demonstrate that the $5,000 award was arrived at after proper consideration of the relevant factors for determining the reasonableness of attorney fee awards, such award constituted an abuse of discretion." *Id.* The court then vacated the award and remanded the issue to the trial court "for further findings regarding the reasonableness of such award." *Id.*

The trial court here undertook an exercise similar to the judge in *Rappleye*. Although it made some findings regarding why the attorney's fee figure of approximately $51,000 was unreasonably high [R. at 0996], it set an arbitrary amount of $20,000 without explanation or any findings to support the amount. This is incorrect, and is error.

As required by *Madsen,* Lori's counsel presented evidence by affidavit that the amount of requested fees were reasonable and in fact justified to defend the case. However, the court disregarded this testimony despite no other evidence that the amount

was unreasonable and unjustified. [R. at 0996-0995]. Then, the court simply affixed an arbitrary figure for the amount of fees awarded. The court failed to make any findings that the modified amount was reasonable. Thus, pursuant to the above authorities, the trial court's determination of the amount of fees is in error and should be remanded for appropriate findings.

III. THE TRIAL COURT ERRED IN BASING ITS FINDING THAT THE SUM TOTAL OF MATTHIAS' ATTORNEYS FEES FROM ALL HIS ATTORNEYS WAS A FIFTH OF PETITIONER'S, BASED ON A STATEMENT MADE BY COUNSEL DURING ARGUMENT WHICH STATEMENT WAS UNSUPPORTED BY ANY EVIDENCE PRESENTED AT TRIAL.

The trial court found, based on a representation of Matthias' counsel, "that the sum of Respondent's attorney's fees, from all of his attorneys . . . was a fifth of Petitioner's." [R. at 0996]. For a trial court to correctly award attorney's fees, "it must first review all the evidence and make specific findings of fact." *Jensen v. Sawyers*, 2005 UT 81, ¶ 132. This is because "[a]n award of attorney fees must be based on the evidence and supported by findings of fact." *Foote v. Clark*, 962 P.2d 52, 55 (Utah 1998) (emphasis added). In *Willey v. Willey*, 866 P.2d 547, 555-56 (Utah App. 1993) (rev'd on other grounds by *Willey v. Willey*, 951 P.2d 226 (Utah 1997)), the appellate court stated that the trial court had not sufficiently considered the issue of reasonableness of attorneys fees. According to the court, opposing counsel "challenged the reasonableness of [moving party's counsel's] expenses, activities, and billing rate. However, the trial court

did not independently assess [hearing] testimony or the reasonableness of [moving party's] fees. *Id.* (emphasis added). In other words, there was no evidentiary review nor was there a clear exposition of the findings of fact upon which the court relied. Nothing in that trial court's findings allowed the reviewing court to know why the court ruled the way that it did.

The moving party has the burden to establish that the necessary elements of an attorney's fee award exist. *Haumont*, 793 P.2d at 425. Once that burden is met, however, the opposing party must offer "evidence to rebut [the moving party's] showing and thereby support an award for less than the amount ... requested. *Salmon v. Davis County*, 916 P.2d 890, 893 (Utah 1996).

In *Foxley v. Foxley* the appellate court assailed "the evidentiary basis establishing the reasonableness of the amount awarded." 801 P.2d 155, 157 (Utah App. 1990). In that case the trial court entered an order awarding fees based upon "an unsworn statement concerning them." *Id.* However, there was "no admissible evidence in the record to substantiate the reasonableness of [the] amount awarded." *Id.* at 158. The court then remanded the case for a determination of a reasonable fee amount. *Id.*

The trial court's order in this case points to no evidence other than one unsubstantiated statement by opposing counsel (the trial court did not even assign an exact amount to the other party's fees because, presumably, one was never provided) during the hearing to justify any finding of unreasonableness. [R. at 0996]. This is an

unacceptable basis for finding that the requested award is unreasonable.

In fact, the trial court essentially accepted a representation of Matthias' counsel as evidence that Lori's requested fees were unreasonable. Based upon that representation, which was not supported by any evidence presented at trial, the trial court found that Matthias' fees were "a fifth of Petitioner's." *Id.* This finding was insufficient because there was no supporting evidence. Accordingly, the trial court erred in relying on the representation of counsel to find that Matthias' attorneys fees were a fifth of Lori's.

Moreover, because the trial court relied on its finding that Matthias' attorneys fees were a fifth of Loris's to determine that Lori's requested attorney's fees were unreasonable, the trial court erred. In *Salmon v. Davis*, Salmon appealed the trial court's reduction of requested attorney's fees. 916 P.2d 890 (Utah 1996). The Utah Supreme Court found that Salmon had presented sufficient evidence to establish that the requested fees were reasonable. *Id.* at 893. The Court also found that the opposing party "failed to offer any evidence to rebut Salmon's showing and thereby support an award for less than the amount Salmon requested." *Id.* Accordingly, the Court concluded that there was insufficient evidence to support the trial court's reduction of attorney's fees and found that Salmon was "entitled to an award of the full amount requested." *Id.* at 895.

Here, based upon the representation of Matthias' counsel, the trial court found that Matthias' attorney's fees were "a lot less than what was incurred by the Petitioner." [R. at 0996]. As noted above, this finding was not supported by any evidence presented at

trial. Accordingly, because the trial court relied on this finding to determine that Lori's requested attorneys fees were unreasonable, the trial court erred.

CONCLUSION

Based on the foregoing, Lori respectfully requests that this Court find that the trial court erred in determining the amount of fees awarded to Lori. In addition, Lori requests that this Court find that it was error for the trial court not to consider Matthias' equity in the marital home for purposes of determining his ability to pay attorneys fees.

STATEMENT CONCERNING ADDENDUM

Pursuant to Utah R. App. P. 24(A)(11), Lori states that no addendum is necessary inasmuch as Matthias' addendum includes the trial court's Findings, determinations and Conclusions of Law which are challenged on appeal.

DATED this 26th day of August, 2010.

HILL, JOHNSON & SCHMUTZ

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 26th day of August, 2010 she caused a true and correct copy of the foregoing to be delivered to the following:

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Sent Via:
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____Facsimile
__X__Mailed (postage prepaid)

Lauren Gardner