

2008

# Michael Blocker v. Neil and Isabel Morkel : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MICHAEL BLOCKER,

Petitioner/Appellee

vs.

NEIL AND ISABEL MORKEL,

Respondent/Appellant.

Appeal No. 20080415

Trial Case No. 070402784

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REPLY BRIEF OF APPELLANT

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Appeal from Civil Stalking Injunction entered against Respondent/Appellant,  
Isabel Morkel on March 26, 2008 by the Honorable Samuel McVey of the Fourth Judicial  
District Court in and for Utah County, State of Utah.

FILED  
UTAH APPELLATE COURTS

OCT 14 2008

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**IN THE UTAH COURT OF APPEALS**

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**SUMMARY OF ARGUMENTS**

POINT I. APPELLANT WAS NOT REQUIRED TO MARSHAL THE EVIDENCE AS ISSUES APPELLANT RAISED CHALLENGED WHETHER THE TRIAL COURT PROPERLY APPLIED THE LAW TO THE FACTS.

**A. The Marshaling Requirement Is Not Triggered Simply Because A Challenged Issue Is Fact Sensitive.**

Leading Utah case law states that the burden to marshal is not triggered simply because the trial court is afforded a level of discretion, or because a challenged issue is fact sensitive. Isabel Morkel challenged whether the trial court properly applied the law to facts and therefore, under the “plain error” standard of review there is no need to marshal.

**B. Even If The Marshaling Requirement Is Applicable, The Court Should Find That The Evidence Was Sufficiently Marshaled By Isabel Morkel.**

Michael Blocker states that Isabel Morkel failed to identify several facts of the case in her Appeal. Isabel Morkel addresses these alleged issues in her Appeal Brief over the span of multiple pages.

POINT II. THE DISTRICT COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF UTAH CODE SECTION 76-5-106.5.

Utah Code Section 76-5-106.5 consists of three elements that must be satisfied.

The first element of “intentionally or knowingly” was not satisfied due to the court’s failure to apply, under leading Utah case law, the totality of the circumstances of the case.

POINT III: THIS COURT SHOULD AFFIRM APPELLANT’S REQUEST FOR ATTORNEY’S FEES AND COSTS ON REVERSAL OF THE DISTRICT COURT’S DECISION.

Under Rule 34(a) of the Utah Rules of Appellate Procedure, if a judgment or order is reversed, costs shall be charged against the Appellee unless otherwise ordered.

POINT IV: THIS COURT SHOULD REJECT RESPONDENT’S ACCUSATION THAT APPELLANT’S APPEAL IS FRIVOLOUS.

The issuance of a Civil Stalking Injunction against Isabel Morkel was an error of the court. Isabel Morkel filed her timely Appeal and filed with reasonable legal and factual basis by challenging the interpretation and application of the applicable Utah law.

**ARGUMENT**

POINT I. APPELLANT WAS NOT REQUIRED TO MARSHAL THE EVIDENCE AS ISSUES APPELLANT RAISED CHALLENGED WHETHER THE TRIAL COURT PROPERLY APPLIED THE LAW TO THE FACTS.

**A. The Marshaling Requirement Is Not Triggered Simply Because A Challenged Issue Is Fact Sensitive.**

Michael Blocker asserts that the court should reject Isabel Morkel’s sufficiency claim because she did not marshal the evidence in support of the District Court Findings. However, in the recent 2008 case of Ostermiller v. Ostermiller, the Utah Court of Appeals states:

The burden to marshal is not triggered simply because the trial court is afforded a level of discretion or because a challenged issue is fact-sensitive. Instead, the burden to marshal arises when a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive. But in cases where a party raises a legal issue--not dependant of factual findings but instead challenging whether the trial court properly applied the law to the facts ... there is no need to marshal.

Ostermiller v. Ostermiller, 2008 UT App. 249.

Neither the rationales in support of, nor the rule requiring marshaling of evidence, apply to review of questions of law, questions of application of law to fact, or questions within the trial court's discretion. (Ryan D. Tenny, *the Utah Marshaling Requirement: An Overview*, 17 Utah Bar J. 22 2004). See also, Judge Norman H. Jackson, *Utah Standards of Appellate Review: Revised*, 12 Utah Bar J. 8, 13 n.8 (1999). Appellant, Isabel Morkel does not challenge the facts of this case, but challenges the way in which the court applied the law to the facts. In satisfying what is required to meet the burden in presenting sufficient evidence to sustain a claim of emotional distress, Isabel Morkel laid a solid foundation based on leading Utah case law. In doing so, Isabel Morkel challenged the District Court's findings that Michael Blocker met his burden under Utah's Civil Stalking Injunction Statute.

Civil Stalking Injunction Order, as entered March 26, 2008 by the Honorable Judge Samuel McVey, states that his decision was made upon four (4) incidences of stalking by Isabel Morkel against Michael Blocker. Such incidences entail: 1) A phone call by Isabel to Michael and his mother, Marie on March 23, 2005; 2) a phone call from Isabel to Marie in June 2007; 3) Isabel repeatedly calling Michael's cell phone during

court hearings in September and October 2007; and 4) an e-mail sent by Isabel to Michael on September 16, 2007 containing information about Trudy and Michael's wedding and making disparaging remarks against Michael. (Transcript of February 14, 2008 hearing (hereafter "2/14/08 Trans."), 73:16-25; 74:1-24).

In her appeal, Isabel Morkel did not deny her e-mails and two phone calls to Marie Blocker, but only that the court failed to properly apply the facts to the law under the definitions and requirements recognized under Utah case law for entry of a Civil Stalking Order. Isabel Morkel asserts that the District Court erred by failing to recognize Utah's case law requirement of considering the effect of the entire course of conduct and the totality of the circumstances for purposes of the Utah stalking statute.

**B. Even If The Marshaling Requirement Is Applicable, The Court Should Find That The Evidence Was Sufficiently Marshaled By Isabel Morkel.**

Even if this court justifies a need for the marshaling requirement on Isabel Morkel's Appeal, the court should find that such evidence was sufficiently marshaled. In Michael Blocker's challenge to Isabel Morkel's marshaling requirement, he states Isabel Morkel failed to identify the fact that the Ex Parte Child Protective Order was ultimately dismissed and that Michael Blocker continues to have parent-time with his son. (Brief of Appellee, pg. 21, FN 7). Such allegation is incorrect. In her Appeal, Isabel Morkel stated the following:

At post-divorce hearing on August 13, 2007, the Domestic Relations Commissioner Ordered that all of Michael's parent-time with his son, Mackay be supervised. Thereafter, parent-time visitations between Michael and Mackay were supervised until a modified Order was subsequently entered which unsupervised such visits. The Ex Parte Child Protective Order was subsequently dismissed

and Michael was awarded make-up parent-time with his son pursuant to an October 31, 2007 review hearing before the divorce court.

Brief of Appellant, pg. 11, ¶ 7.

Additionally, Michael Blocker claims that, according to Isabel Morkel's Appeal, none of the incidences of stalking, more specifically, two harassing phone calls, restricted phone calls, and a harassing e-mail, ever occurred. (Reply Brief of Appellee, pg. 20).

Again, Isabel Morkel made these issues very clear in her Appeal. Such issues were addressed spanning four pages in her Brief. (Brief of Appellant, pgs. 17 – 20).

POINT II. THE DISTRICT COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF UTAH CODE SECTION 76-5-106.5.

Michael Blocker claims the court correctly interpreted and applied Section 76-5-106.5 of the Utah Code Annotated when the court concluded that Isabel Morkel engaged in a pattern of conduct that warranted the issuance of a Civil Stalking Injunction. First, Michael Blocker points out that the court must find the three elements of the statute satisfied for entry of a stalking injunction as follows: 1) the person intentionally or knowingly engaged in a course of conduct that would 2) cause a reasonable person to experience fear or emotional distress, and 3) the victim actually did experience fear or emotional distress as a result of the conduct. (Brief of Appellee, pg. 27). Section 76-5-106.5 U.C.A. While Michael Blocker argues his point in regards to elements 2 and 3, he skips right over any argument in trying to assert that Isabel Morkel intentionally or knowingly engaged in the alleged course of conduct, the first required element for issuance of a civil stalking injunction. In his own Brief, Michael Blocker makes

reference to testimony in which his counsel asked of Isabel Morkel if she believed that her behavior would cause Michael Blocker distress. In her reply, Isabel Morkel stated, “No.” (Brief of Appellee, pg. 13). (12/21/07 Trans. 98:2-4).

More importantly, Michael Blocker stated in his Brief that, under Ellison v. Stam, the analysis of “totality” refers to the totality of the Defendant’s conduct. While this may be a secondary explanation in part of the analysis, Ellison v. Stam clearly states “[t]he consideration of whether a Respondent has acted outrageously must be undertaken in light of all the facts and circumstances of the particular case.” Ellison v. Stam, 2006 UT App. 150, ¶ 29. Likewise, Ellison v. Stam also states that “[a]ny evaluation of Respondent’s conduct must be considered in the context of all of the facts and circumstances existing in the case.” Ellison v. Stam, 2006 UT App. 150, Id. at ¶ 27.

The court cannot apply the element of “knowingly and intentionally,” and find it satisfied without making a determination based on the totality of circumstances and facts of a particular case. The issues of 1) knowingly and intentionally, and 2) making a determination based on the totality of circumstances and facts for a particular case go hand in hand. Michael Blocker points out in his own Brief, that Judge McVey expressed his concerns for the child, Mackay Blocker, and urged the parties to think of the child’s best interests in their interactions with one another. (Brief of Appellee, pg. 4-5). Contention and ill-mannered behavior is a common theme between both parties. This would negate the existence of the “knowingly and intentionally” element as previously state in Utah Code Annotated Section 76-5-106.5. (See 2/14/08 Trans. 109:9-25; 110:1-15).

POINT III: THIS COURT SHOULD AFFIRM APPELLANT'S REQUEST FOR ATTORNEY'S FEES AND COSTS ON REVERSAL OF THE DISTRICT COURT'S DECISION.

Rule 34(a) of the Utah Rules of Appellate Procedure is a general provision that needs no formal introduction. Simply stated:

Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed costs shall be tacked against the appellant unless otherwise ordered; **if a judgment or order is reversed, costs shall be tacked against the appellee unless otherwise ordered**; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court.

Rule 34(a) URCP, emphasis added.

In her Appeal, Isabel Morkel's statement for attorney's fees simply reserved her right to receive attorney's fees and costs if and when she prevails in this Appeal.

POINT IV: THIS COURT SHOULD REJECT RESPONDENT'S ACCUSATION THAT APPELLANT'S APPEAL IS FRIVOLOUS.

Michael Blocker attempts to divert the focus off of Isabel Morkel's Appeal by allegations of claiming such is frivolous. Isabel Morkel's Appeal is far from frivolous. Michael Blocker's original Request for Entry of Civil Stalking Injunction was filed against Neil and Isabel Morkel. The Request against Neil Morkel was dismissed by the Honorable Judge McVey. The issuance of a Civil Stalking Injunction against Isabel Morkel was an error of the court. Isabel Morkel filed her Appeal timely, and appeals the trial court's interpretation and application of the applicable law, namely Utah Code Annotated Section 76-5-106.5, as well as leading Utah case law regarding such statute.

In Fuller v. Myers, the Utah Court of Appeals stated: “The sanction for filing a frivolous appeal applies only in ‘egregious cases’ with no ‘reasonable legal or factual basis.’” Fuller v. Myers, 2008 UT App. 230. Further, the Fuller v. Myers court states, “[a]lthough we have noted a number of significant problems with Plaintiffs’ appeal, we cannot say that the appeal was so egregious that ‘all competent counsel--much less an unrepresented party--would recognize the arguments made on appeal are without merit.’” Isabel Morkel’s appeal has a reasonable legal basis and has a meaningful legal analysis.

### **REQUEST FOR ATTORNEY’S FEES & COSTS**

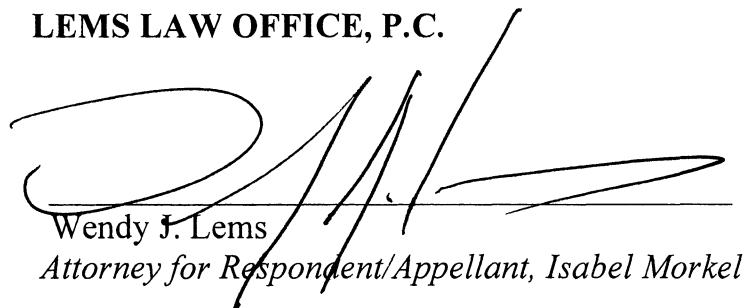
Pursuant to Rule 34 of the Utah Rules of Appellate Procedure, Appellant, Isabel Morkel respectfully requests attorney fees and costs incurred in filing this Reply on appeal.

### **CONCLUSION**

Appellant, Isabel Morkel respectfully requests that this Court: 1) Find that Isabel Morkel was not required to marshal the evidence, as the issues she presented for appeal did not challenge Findings of Fact, but interpretation of the law to such facts; 2) reverse the trial court’s issuance of Civil Stalking Injunction against Isabel Morkel; and 3) award attorneys costs and fees to Isabel Morkel.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of October, 2008.

**LEMS LAW OFFICE, P.C.**



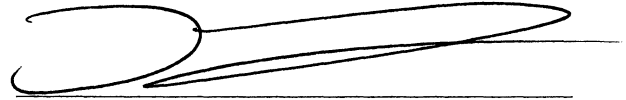
Wendy J. Lems  
*Attorney for Respondent/Appellant, Isabel Morkel*



**CERTIFICATE OF SERVICE**

I certify that on this 14<sup>th</sup> day of October, 2008, a true and correct copy of the forgoing was sent via U.S. mail, postage pre-paid, to the following:

Ronald D. Wilkinson/Kristin Gerdy  
815 East 800 South  
Orem, Utah 84097  
*Attorneys for Petitioner/Appellee*

A handwritten signature in black ink, consisting of a large, stylized 'W' or 'R' followed by a horizontal line.

**IN THE UTAH COURT OF APPEALS**

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MICHAEL BLOCKER,	
Petitioner/Appellee,	Appeal No. 20080415
vs.	
NEIL AND ISABEL MORKEL,	Trial Case No. 070402784
Respondent/Appellant.	

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ADDENDUM

APPELLANT'S REPLY BRIEF

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1. UTAH RULES:

- Utah Code Annotated §76-5-106.5
- Utah Rule of Appellate Procedure 34

2. Judge Norman H. Jackson, *Utah Standards of Appellate Review: Revised*, 12 Utah Bar J. 8, 13 n.8 (1999)

3. Ryan D. Tenny, *the Utah Marshaling Requirement: An Overview*, 17 Utah Bar J. 22 (2004)

**Tab 1**

## **Text of Constitutional Provisions, Statutes, and Rules**

### **Utah Code Ann. § 76-5-106.5. Stalking -- Definitions -- Injunction -- Penalties.**

(1) As used in this section:

(a) "Conviction" means:

(i) a verdict or conviction;

(ii) a plea of guilty or guilty and mentally ill;

(iii) a plea of no contest; or

(iv) the acceptance by the court of a plea in abeyance.

(b) "Course of conduct" means two or more acts directed at or toward a specific person, including:

(i) acts in which the actor follows, monitors, observes, photographs, surveils, threatens, or communicates to or about a person, or interferes with a person's property:

(A) directly, indirectly, or through any third party; and

(B) by any action, method, device, or means; or

(ii) when the actor engages in any of the following acts or causes someone else to engage in any of these acts:

(A) approaches or confronts a person;

(B) appears at the person's workplace or contacts the person's employer or coworkers;

(C) appears at a person's residence or contacts a person's neighbors, or enters property owned, leased, or occupied by a person;

(D) sends material by any means to the person or for the purpose of obtaining or disseminating information about or communicating with the person to a member of the person's family or household, employer, coworker, friend, or associate of the person;

(E) places an object on or delivers an object to property owned, leased, or occupied by a person, or to the person's place of employment with the intent that the object be delivered to the person; or

(F) uses a computer, the Internet, text messaging, or any other electronic means to commit an act that is a part of the course of conduct.

(c) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months.

(d) "Emotional distress" means significant mental or psychological suffering, whether or not medical or other professional treatment or counseling is required.

(e) "Reasonable person" means a reasonable person in the victim's circumstances.

(f) "Stalking" means an offense as described in Subsection (2) or (3).

(g) "Text messaging" means a communication in the form of electronic text or one or more electronic images sent by the actor from a telephone or computer to another person's telephone or computer by addressing the communication to the recipient's telephone number.

(2) A person is guilty of stalking who intentionally or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of

conduct would cause a reasonable person:

(a) to fear for the person's own safety or the safety of a third person; or

(b) to suffer other emotional distress.

(3) A person is guilty of stalking who intentionally or knowingly violates:

(a) a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions; or

(b) a permanent criminal stalking injunction issued pursuant to this section.

(4) In any prosecution under this section, it is not a defense that the actor:

(a) was not given actual notice that the course of conduct was unwanted; or

(b) did not intend to cause the victim fear or other emotional distress.

(5) An offense of stalking may be prosecuted under this section in any jurisdiction where one or more of the acts that is part of the course of conduct was initiated or caused an effect on the victim.

(6) Stalking is a class A misdemeanor:

(a) upon the offender's first violation of Subsection (2); or

(b) if the offender violated a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions.

(7) Stalking is a third degree felony if the offender:

(a) has been previously convicted of an offense of stalking;

(b) has been previously convicted in another jurisdiction of an offense that is substantially similar to the offense of stalking;

(c) has been previously convicted of any felony offense in Utah or of any crime in another jurisdiction which if committed in Utah would be a felony, in which the victim of the stalking offense or a member of the victim's immediate family was also a victim of the previous felony offense;

(d) violated a permanent criminal stalking injunction issued pursuant to Subsection (9); or

(e) has been or is at the time of the offense a cohabitant, as defined in Section **78B-7-102**, of the victim.

(8) Stalking is a second degree felony if the offender:

(a) used a dangerous weapon as defined in Section **76-1-601** or used other means or force likely to produce death or serious bodily injury, in the commission of the crime of stalking;

(b) has been previously convicted two or more times of the offense of stalking;

(c) has been convicted two or more times in another jurisdiction or jurisdictions of offenses that are substantially similar to the offense of stalking;

(d) has been convicted two or more times, in any combination, of offenses under Subsection (7)(a), (b), or (c);

(e) has been previously convicted two or more times of felony offenses in Utah or of crimes in another jurisdiction or jurisdictions which, if committed in Utah, would be felonies, in which the victim of the stalking was also a victim of the previous felony offenses; or

(f) has been previously convicted of an offense under Subsection (7)(d), (e), or (f).

(9) (a) A conviction for stalking or a plea accepted by the court and held in abeyance for a period of time serves as an application for a permanent criminal stalking injunction

limiting the contact between the defendant and the victim.

(b) A permanent criminal stalking injunction shall be issued by the court without a hearing unless the defendant requests a hearing at the time of the conviction. The court shall give the defendant notice of the right to request a hearing.

(c) If the defendant requests a hearing under Subsection (9)(b), it shall be held at the time of the conviction unless the victim requests otherwise, or for good cause.

(d) If the conviction was entered in a justice court, a certified copy of the judgment and conviction or a certified copy of the court's order holding the plea in abeyance must be filed by the victim in the district court as an application and request for a hearing for a permanent criminal stalking injunction.

(10) A permanent criminal stalking injunction may grant the following relief:

(a) an order:

(i) restraining the defendant from entering the residence, property, school, or place of employment of the victim; and

(ii) requiring the defendant to stay away from the victim and members of the victim's immediate family or household and to stay away from any specified place that is named in the order and is frequented regularly by the victim; and

(b) an order restraining the defendant from making contact with or regarding the victim, including an order forbidding the defendant from personally or through an agent initiating any communication likely to cause annoyance or alarm to the victim, including personal, written, or telephone contact with or regarding the victim, with the victim's employers, employees, coworkers, friends, associates, or others with whom communication would be likely to cause annoyance or alarm to the victim.

(11) A permanent criminal stalking injunction may be dissolved or dismissed only upon application of the victim to the court which granted the injunction.

(12) Notice of permanent criminal stalking injunctions issued pursuant to this section shall be sent by the court to the statewide warrants network or similar system.

(13) A permanent criminal stalking injunction issued pursuant to this section has effect statewide.

(14) (a) Violation of an injunction issued pursuant to this section constitutes a third degree felony offense of stalking under Subsection (7).

(b) Violations may be enforced in a civil action initiated by the stalking victim, a criminal action initiated by a prosecuting attorney, or both.

(15) This section does not preclude the filing of a criminal information for stalking based on the same act which is the basis for the violation of the stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions, or a permanent criminal stalking injunction.

#### **Utah Rule of Appellate Procedure 34. Award of costs.**

(a) To whom allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(b) Costs for and against the state of Utah. In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the discretion of the court unless specifically required or prohibited by law.

(c) Costs of briefs and attachments, record, bonds and other expenses on appeal. The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed \$3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for supersedeas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

(d) Bill of costs taxed after remittitur. A party claiming costs shall, within 15 days after the remittitur is filed with the clerk of the trial court, serve upon the adverse party and file with the clerk of the trial court an itemized and verified bill of costs. The adverse party may, within 5 days of service of the bill of costs, serve and file a notice of objection, together with a motion to have the costs taxed by the trial court. If there is no objection to the cost bill within the allotted time, the clerk of the trial court shall tax the costs as filed and enter judgment for the party entitled thereto, which judgment shall be entered in the judgment docket with the same force and effect as in the case of other judgments of record. If the cost bill of the prevailing party is timely opposed, the clerk, upon reasonable notice and hearing, shall tax the costs and enter a final determination and judgment which shall thereupon be entered in the judgment docket with the same force and effect as in the case of other judgments of record. The determination of the clerk shall be reviewable by the trial court upon the request of either party made within 5 days of the entry of the judgment.

(e) Costs in other proceedings and agency appeals. In all other matters before the court, including appeals from an agency, costs may be allowed as in cases on appeal from a trial court. Within 15 days after the expiration of the time in which a petition for rehearing may be filed or within 15 days after an order denying such a petition, the party to whom costs have been awarded may file with the clerk of the appellate court and serve upon the adverse party an itemized and verified bill of costs. The adverse party may, within 5 days after the service of the bill of costs file a notice of objection and a motion to have the costs taxed by the clerk. If no objection to the cost bill is filed within the allotted time, the

clerk shall thereupon tax the costs and enter judgment against the adverse party. If the adverse party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, shall determine and settle the costs, tax the same, and a judgment shall be entered thereon against the adverse party. The determination by the clerk shall be reviewable by the court upon the request of either party made within 5 days of the entry of judgment; unless otherwise ordered, oral argument shall not be permitted. A judgment under this section may be filed with the clerk of any district court in the state, who shall docket a certified copy of the same in the manner and with the same force and effect as judgments of the district court.



## Tab 2

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October, 1999

12 Utah Bar J. 8

ARTICLE: UTAH STANDARDS OF APPELLATE REVIEW -- REVISED n1

n1 This article is an update or revision of Norman II. Jackson, Utah Standards of Appellate Review, Utah Bar Journal, Vol. 1, No. 8, October 1994 (Collector's Issue).

by Judge Norman H. Jackson

NORMAN H. JACKSON was appointed to the Utah Court of Appeals in 1987 by Gov. Norman H. Bangerter. He graduated from the University of Utah College of Law and was a practicing attorney for twenty-five years. He has Masters and Bachelors degrees in Economics from BYU.

Formerly he served on the Utah State Bar Commission, Utah Legal Services Board, Board of Visitors J. Reuben Clark School of Law, Utah Air Travel Commission, Utah Information Technology Commission, and as President of the Utah Bar Foundation. Presently he serves on the Board of Appellate Judges and the Judicial Council's Alternate Dispute Resolution Committee and the Fee Arbitration Committee.

**TEXT:****[\*8] FOREWORD**

Recently, several attorneys and judges have asked me, "When are you going to update your standards of review article?" I appreciate their expressions of interest and have been pleased to reply, "In 1999." This comports with my original plan which was to keep an eye on standards of review in Utah appellate opinions for about five years before doing a revision. In 1994, I wrote: "For the serious appellate advocate I recommend careful study of the following Utah appellate decisions: *Pena*, *Thurman*, *Ramirez*, *Sykes* and *Vigil*." n2 Those cases remain essential to understanding how standards of review developed after the court of appeals joined the Utah appellate system. Moreover, they show the policy considerations and systemic concerns in keeping a proper balance between trial court discretion and appellate court deference.

n2 The following are the full cites for these cases: *State v. Pena*, 869 P.2d 932 (Utah 1994), *State v. Thurman*, 846 P.2d 1256 (Utah 1993), *State v. Ramirez*, 817 P.2d 774 (Utah 1991), *State v. Sykes*, 840 P.2d 825 (Utah Ct. App. 1992), and *State v. Vigil*, 815 P.2d 1296 (Utah Ct. App. 1991).

*Pena*, a landmark standard-of-review case, was published shortly before the 1994 article. In *Drake v. Industrial Commission*, 939 P.2d 177 (Utah 1997), counsel adroitly argued *Pena*, not to support the existing standard, but to change it. See *id.* at 180-82. When counsel convinced the Supreme Court to change the standard of review, he won the case. See *id.* at 180-84. *Drake* reveals astute appellate advocacy at its very best. Familiarity with *Pena*'s progeny, together with other standard-of-review law, will allow you to navigate carefully through the seas of appellate advocacy. My goal has been to help you by compiling a "users manual" or "ready reference" with which to begin charting your client's course.

Please note that new sections have been added to the outline as follows: *Pena* mixed questions, juvenile cases, rules of civil procedure, rules of criminal procedure and certiorari. Further, I recommend that you retain the 1994 article as a useful supplement to your standards of review research. See Norman H. Jackson, Utah Standards of Appellate Review, *Utah Bar Journal* 9 (October 1994) (article also available on Westlaw and Lexis).

Finally, I praise and credit my present law clerks, Laurie D. Gilliland and Tawni J. Anderson. n3 They have kept this vessel afloat and steered it carefully into port. Their contributions of skillful analysis and painstaking research went far beyond the call of duty. They personally examined each Utah appellate decision since 1994 -- numbering nearly 1200 cases -- and evaluated whether it should be cited in this outline. In my mind, their great work qualifies them as Utah standards of appellate review "experts." Again, I thank those clerks and externs, credited in the first edition, who laid the foundation for this publication. I hope that with this article as your compass you will avoid Titanic-like disasters, find peaceful passage, and reach safe harbor on your appellate voyage.

n3 Thanks also to Brigham Young University extern, Sharon White, who helped with the research.

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### INTRODUCTION

An attorney's initial evaluation of whether to file an appeal is the most consequential of appellate activities. Attorneys who do not properly assess the appellate worthiness of their cases disserve themselves, their clients and Utah's appellate system.

Attorneys should not file appeals unless their cases present realistic reasons for reversing significant trial court rulings. Low reversal rates in Utah reveal the need for attorneys to be more reasonable about their decision to appeal. Justice Cardozo made a similar observation some time ago. He estimated at least 90% of cases appealed "could not, with semblance of reason, be decided in any way but one," i.e., affirmed. Ruggiero J. Aldisert, *Opinion Writing* 111 n.20 (1990) (quoting Benjamin Cardozo, *Growth of the Law* 60 (1924)). In other words, he estimated that no more than 10% of cases appealed would be reversed. His estimate finds statistical support in the 1998 figures from our appellate system. During 1998, 577 appeals were filed with the Utah Supreme Court. In the same year, 40 cases resulted in some measure of reversal. Thus, the reversal rate was only 7%. In 1998, cases at the Utah Court of Appeals resulted in an identical reversal rate. 711 appeals were filed while 50 reversals occurred, i.e., 7%.

This 7% reversal rate shows that many attorneys are not realistic when they decide to file an appeal. They are as "the metaphorical descendants of Don Quixote . . . out in full force tilting at windmills, seeking to overturn trial results that had been preordained from the moment the complaints were filed." Aldisert, *supra*, at 5. Attorneys need to be intellectually and dispassionately objective about the fact that trial court "determinations for the most part are final and binding, irrespective of impressive appellate briefs, thick volumes of records or eloquent argument. This *reality* of the judicial process is an aspect of the law lost upon most laypersons and many lawyers." *Id.* at 54 (emphasis added). Here, for attorneys with prospective appeals, I summarize three essential "reality checks" to use in evaluating a case for appeal. For brevity's sake, the words "trial court" or "lower tribunal" should be read to also include administrative agencies.

## REALITY CHECKS

### Reality Check #1: Has the trial court committed reversible error?

"Error" that does not affect substantial rights of the parties is not reversible error, but harmless error. See Utah R. Civ. P. 61; *accord State v. Perez*, 924 P.2d 1, 3 (Utah Ct. App. 1996). This rule places "upon an appellant the burden of showing not only that an error occurred, but that it was substantial and prejudicial." See *Ashton v. Ashton*, 733 P.2d 147, 154 (Utah 1987). To demonstrate prejudice, appellants must show reasonable likelihood that without the error, there would have been a different result. See *Tingey v. Christensen*, 373 Utah Adv. Rep. 10, 12 (Utah 1999). This likelihood must be high enough to undermine confidence in the outcome. See *id.*; *State v. Jacques*, 924 P.2d 898, 902 (Utah Ct. App. 1996). Rule 61 is a mandate to courts -- trial and appellate -- not to disturb a verdict or judgment unless it is clear that refusing to do so would be substantially unjust. "Thus, the integrity of verdicts, orders, and judgments is the rule and disturbance thereof the exception." 7 James W. Moore & Jo D. Lucas, *Moore's Federal Practice* § 61.03 (2d ed. 1993). Counsel should be mindful that no party, whether in a civil, criminal or administrative agency case, is entitled to a trial or hearing free of all error. Thus, unless the lower tribunal has committed reversible error, one should not pursue an appeal.

### Reality Check #2: Did trial counsel preserve the error or issue for appellate review?

The rationale for "preservation" is that the trial court, in fairness, ought to have the chance to correct its own errors. See *State v. Rudolph*, 970 P.2d 1221, 1225-26, 1227 (Utah 1998); *In re Estate of Morrison*, 933 P.2d 1015, 1018 (Utah Ct. App. [\*11] 1997). Claims of error should be timely raised so thoughtful and probing analysis can begin in the early stages of the proceeding. If not, the claim is waived. See *State v. Brown*, 856 P.2d 358, 359-60 (Utah Ct. App. 1993); *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 268-69 (Utah Ct. App.), *cert. denied*, 868 P.2d 95 (Utah 1993). When the trial court has not considered a matter, the appellate court has nothing to review (plain error and rare and exceptional circumstances aside). See *State v. Marvin*, 964 P.2d 313, 318 (Utah 1998) (plain error); *State v. Irwin*, 924 P.2d 5, 7-11 (Utah Ct. App. 1996) (exceptional circumstances). Specific and timely objections and motions must be made before the lower tribunal, then identified for the appellate court. See *State v. Whittle*, 780 P.2d 819, 820-21 (Utah 1989); *State v. Preece*, 971 P.2d 1, 6 (Utah Ct. App. 1998). Further, "issues not raised in the court of appeals may not be raised on certiorari [to the supreme court] unless the issue arose for the first time out of the court of appeals' decision." *DeBry v. Noble*, 889 P.2d 428, 444 (Utah 1995).

Through the years, many attorneys have overlooked this requirement, thus casting the burden on appellate courts to search the record for issue preservation. Now, Utah Rule of Appellate Procedure 24(a)(5) requires counsel to cite to the record in briefs showing preservation in the trial court of each issue raised or appealed. If the issue was not preserved, counsel must state other valid grounds for review. n4 See Utah R. Crim. P. 12(d). Counsel must search the record and confirm "preservation" of the suspected error. When it has not been preserved, an appeal has virtually no chance of success. If your case satisfies reality checks #1 and #2, turn your scrutiny to standards of review, your final checkpoint.

n4 Such grounds include the following: (1) The trial court proceedings showed "plain error." *State v. Marvin*, 964 P.2d 313, 318 (Utah 1998). (2) The case involves "exceptional circumstances." *State v. Dunn*, 850 P.2d 1201, 1209 n.3 (Utah 1993). (3) The trial court addressed the issue post-trial, rather than dismissing it on the basis of waiver. See *State v. Seale*, 853 P.2d 862, 870 (Utah 1993).

### Reality Check #3: Will this challenge of the trial court's action satisfy the burden imposed by appellate standards of review?

The appellate process consists of just three types of review. An attorney should forego filing an appeal unless he or she can objectively pursue one or more of the following three challenges:

(1) Challenge of Factual Findings: The appellant must show material findings are clearly erroneous by marshaling all evidence supporting the findings, then showing this evidence is legally insufficient to support the findings when viewed in a light most favorable to the trial court's findings. See *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994) (clearly erroneous standard of review); *Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 457 (Utah 1993) (marshaling requirement); *Johnson v. Higley*, 977 P.2d 1209, 1217 (Utah Ct. App. 1999). The following is an example of how the challenge for this kind of issue should be framed in written and oral arguments: "The trial court's finding that appellant breached its duty to appellee is clearly erroneous."

(2) Challenge of Discretionary Rulings: The appellant must show the trial court exceeded the measure of discretion allotted or boundaries set by principles or rules of law, see generally *Pena*, 869 P.2d at 936-39, by showing "no reasonable basis for the decision," *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993), or "arbitrary and capricious action," *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah Ct. App. 1993). The term of art describing this kind of trial court action is "abuse of discretion." The following is an example of how the challenge for these issues should be framed in written and oral arguments: "The trial court abused its discretion when it denied appellant's motion for a new trial."

(3) Challenge of Conclusions of Law: The appellant must show legal error by the trial court in its use of fixed principles and rules of law, demonstrating the trial court incorrectly selected, interpreted or applied the law. See *Pena*, 869 P.2d at 936. The following is an example of how the challenge for this kind of issue should be framed in written and oral arguments: "The trial court incorrectly interpreted the statute's plain language."

Vague assertions of trial court "error" or "mistake" and other similar challenges to trial court action will place a case among the high percentage that simply should not be appealed in the first place.

Utah Rule of Appellate Procedure 24(a)(5) requires attorneys to identify the standard of review for each issue appealed. Further, attorneys should apply the standard of review in the legal analysis set forth in their briefs. An attorney can realistically determine the odds of success on appeal by prudently applying the three-point test at the outset.

## CONCLUSION

Attorneys who conduct proper reality checking of cases will select cases with high odds for winning on appeal. Cases with low odds on appeal are not created by inferior briefs and oral arguments or lack of oral arguments. Rather, selecting cases with low odds on appeal results in shoddy briefs and useless oral arguments. Attorneys who use the three-point test will file appeals deemed worthy of votes to reverse the trial court.

## **[\*12] STANDARDS OF APPELLATE REVIEW COMPASS**

(An illustration of the relationship between the appellate court's deference and the trial court's discretion)

To help you, I have designed a Standards of Review Compass. (See illustration.) The compass shows the interplay of trial court discretion and appellate court deference regarding issues of fact and of law. Deference and discretion work in tandem -- as the direction of your issue moves toward fact, appellate court deference to trial court discretion increases. As the direction of your issue moves toward law, appellate court deference to trial court discretion decreases. When the issue reaches the point of pure fact, appellate court deference to trial court discretion reaches its zenith, thus trial court discretion is also at its highest degree. On the other side, when the issue reaches the point of pure law, appellate court deference to trial court discretion is nonexistent, thus trial court discretion is also at its lowest point. Between pure fact and pure law, the compass shows the degrees of the deference/discretion relationship to be constantly adjusting. n5

n5 Note the illustration of magnifying lenses in the prior article. There, standards of appellate review are described as the power of the lens through which an appellate court may examine a particular issue. The lenses also suggest that standards of review allocate judicial power between appellate courts and trial courts.

### **I. APPEALS FROM TRIAL COURT**

#### **A. Challenging Findings of Fact**

##### **1. Introduction**

Historically, appellate advocates have had difficulty distinguishing factual issues from legal issues. Simple factual questions seem to give little trouble. However, when factual issues are part of subsidiary or underlying facts that lead to legal conclusions, confusion has prevailed. Utah appellate courts have created some of this lack of certainty. See *Pena*, 869 P.2d at 935 ("This court and the court of appeals have created some confusion with regard to standards of review"). For example, the supreme court in *State v. Mendoza*, 748 P.2d 181, 183 (Utah 1987), treated a reasonable suspicion determination under a clearly erroneous standard, usually reserved for questions of fact. Many appellate decisions followed this approach. See, e.g., *State v. Leonard*, 825 P.2d 664, 667-68 (Utah Ct. App. 1991); *State v. Robinson*, 797 P.2d 431, 435 (Utah Ct. App. 1990); *State v. Talbot*, 792 P.2d 489, 493 (Utah Ct. App. 1990). However, the supreme court in *Pena* clarified the matter by determining that whether a given set of facts gives rise to reasonable suspicion is a determination of law, reviewed nondeferentially for correction, as opposed to being a fact determination reviewable for clear error. See *Pena*, 869 P.2d at 939.

Appellate counsel may also add to this confusion by characterizing issues as factual, when they are actually issues of law or issues of discretion. See *Pena*, 869 P.2d at 936. n6 Whether appellants are challenging a solitary finding of fact, an underlying fact, or a subsidiary fact, whatever the label, they must be able to distinguish factual questions and select the applicable standard of review.

n6 For a more complete discussion of discretion issues, see section 1(B)(1)-(3), an Introduction to Challenging Discretionary Rulings.

The supreme court provided the following definition of factual issues: "Factual questions are generally regarded as entailing the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind." *Pena*, 869 P.2d at 935 (citing Ronald R. Hofer, *Standards of Review -- Looking Beyond the Labels*, 74 Marq. L. Rev. 231, 236 (1991)). Each section below includes examples of factual questions that may help in determining whether an issue is indeed factual. Each section also includes cases outlining the corresponding standards of review.

##### **2. Marshaling Requirement n7**

n7 Although this marshaling discussion falls under the "Appeals from Trial Courts" heading, appellants challenging factual findings made by administrative agencies must also properly marshal the evidence. Thus, administrative cases discussing the marshaling requirement are included here, as well as in the administrative agency section of this article.

A caveat to appellate counsel is that when challenging a finding of fact, appellate courts will not address the challenge unless the appellant has properly "marshaled the evidence." See *State v. Benvenuto*, 372 Utah Adv. Rep. 3, 4 (Utah 1999); *Child v. Gonda*, 972 P.2d 425, 433-34 (Utah 1998); *Whitear v. Labor Comm'n*, 973 P.2d 982, 985 (Utah Ct. App. 1998). The marshaling requirement "serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder at trial." *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah Ct. App. 1991) (quoting *State v. Moore*, 802 P.2d 732, 739 (Utah Ct. App. 1990)). Further, marshaling "provides the appellate court the basis from which to conduct a meaningful and expedient review of facts challenged on appeal." *Robb v. Anderton*, 863 P.2d 1322, 1328 (Utah Ct. App. 1993). [\*13] "Our insistence on compliance with the marshaling requirement is not a case of exalting hypertechnical adherence to form over substance." *State v. Larsen*, 828 P.2d 487, 491 (Utah Ct. App. 1992), *aff'd*, 865 P.2d 1355 (Utah 1993). "[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." *Id.* (quoting *Williamson v. Opsahl*, 416 N.E.2d 783, 784 (111. App. Ct. 1981)).

Many appellants, apparently trying to marshal the evidence, merely present carefully selected facts and excerpts of trial testimony in support of *their own* position, conveniently omitting negative facts. See, e.g., *State v. Decorso*, 370 Utah Adv. Rep. 11, 15 (Utah 1999); *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998); *Johnson v. Higley*, 977 P.2d 1209, 1218 (Utah Ct. App. 1999). Others incorrectly state marshaled "facts" to try to improve their position. See, e.g., *State v. Pilling*, 875 P.2d 604, 608 (Utah Ct. App. 1994); *Johnson v. Board of Review of the Indus. Comm'n*, 842 P.2d 910, 912 (Utah Ct. App. 1992). Still other appellants merely reargue the same case made before the trial court. See, e.g., *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225, 236 (Utah 1995); *Moon v. Moon*, 973 P.2d 431, 437 (Utah Ct. App. 1999). One appellant went so far as to suggest that because the evidence supporting the jury verdict was "so 'light,'" he need not marshal the evidence. *Brown v. Richards*, 840 P.2d 143, 149 n.2 (Utah Ct. App. 1992). A few appellants, even one who filed an overlength brief, suggested that the page limitation on appellate briefs prevented them from marshaling the evidence. See *id.*; *Larsen*, 828 P.2d at 491. These tactics do not begin to meet the marshaling burden. See *Crookston*, 817 P.2d at 800.

Marshaling the evidence first entails marshaling, or listing, all the evidence *supporting* the finding that is challenged. See *Tingey v. Christensen*, 373 Utah Adv. Rep. 10, 11 (Utah 1999); *Benvenuto*, 372 Utah Adv. Rep. at 4; *State ex rel. T.J.*, 945 P.2d 158, 164 (Utah Ct. App. 1997); *In re Estate of Hamilton*, 869 P.2d 971, 977 (Utah Ct. App. 1994). n8

n8 Occasions exist when marshaling would prove ineffectual. In such situations, appellants are advised to marshal the evidence to the degree possible and then explain the reason for any deficiency. Appellants should not merely ignore the marshaling requirement. For example, situations arise when there may be no evidence in the record supporting the factual findings. See *Anderson v. Doms*, 372 Utah Adv. Rep. 20, 21 (Utah Ct. App. 1999); *Krauss v. Department of Transp.*, 852 P.2d 1014, 1022 (Utah Ct. App. 1993).

Similarly, if the factual findings are legally inadequate, the exercise of marshaling the evidence in support of the findings is futile. See *Campbell v. Campbell*, 896 P.2d 635, 638 (Utah Ct. App. 1995); *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah App. 1993).

For example, if the trial court's findings of fact are conclusory, that is, they do not contain enough detail to clearly show the evidence upon which they are grounded, attempts to marshal will prove largely ineffectual. See *Campbell*, 896 P.2d at 638-39; *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah Ct. App. 1991). Appellant can simply argue legal insufficiency of the court's findings as framed. See *id.* Sections of this article entitled "Adequacy of Trial Court's Factual Findings" and "Adequacy of Agency's Factual Findings" more completely discuss inadequacy of findings of fact.

Once the evidence is listed or marshaled with appropriate citation to the record, see Utah R. App. P. 24(e), the appellant must then show that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision. n9 See *Child*, 972 P.2d at 433; *Johnson*, 977 P.2d at 1217; *ELM, Inc. v. M T Enters, Inc.*, 968 P.2d 861, 865 (Utah Ct. App. 1998) (stating appellant must show that despite marshaled evidence "trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous'" (citations omitted)).

n9 Sections I(A)(3)(b), (4)(b), (5)(b), and (6)(b) of this article provide a more complete discussion of this requirement.

In summary:

"The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

*Moon v. Moon*, 973 P.2d 431, 437 (Utah Ct. App. 1999) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991)).

If an appellant fails to properly marshal the evidence, appellate courts must assume the findings are correct. See *Valcarce*, 961 P.2d at 312; *Johnson*, 977 P.2d at 1218. Appellate courts have shown no reluctance in affirming the factual findings of the trial court or administrative body if appellant does not properly marshal the evidence. See, e.g., *Benvenuto*, 372 Utah Adv. Rep. at 4; *Young v. Young*, 979 P.2d 338, 345 (Utah 1999); *Johnson*, 977 P.2d at 1218; *Drazich v. Lasson*, 964 P.2d 324, 326 n.4 (Utah Ct. App. 1998).

As shown in the outline, each section of this article includes a string cite of corresponding cases addressing the marshaling requirement.

### **3. Civil Bench Trial**

#### **a. Clearly Erroneous Standard**

A trial court's findings of fact are reviewed under a clearly erroneous standard. See *Young v. Young*, 979 P.2d 338, 342 (Utah 1999), *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 937 (Utah 1998); *Grossen v. DeWitt*, 369 Utah Adv. Rep. 31, 32 (Utah Ct. App. 1999), *Johnson v. Higley*, 977 P.2d 1209, 1214 (Utah Ct. App. 1999). This clearly erroneous standard of review comes from Rule 52(a) of the Utah Rules of Civil Procedure, which provides that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly [\*14] erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

A trial court's findings of fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence. See *Young*, 979 P.2d at 342; *Pennington*, 973 P.2d at 937; *State ex rel. J.N.*, 960 P.2d 403, 407 (Utah Ct. App. 1998). If, viewing the evidence in the light most favorable to the trial court's determination, a factual finding is based on sufficient evidence, the finding is not clearly erroneous. See *Jouffas v. Fox Television Stations, Inc.*, 927 P.2d 170, 174 (Utah 1996); *Butler, Crockett, & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225, 228 (Utah 1995); *Pena*, 869 P.2d at 935-36 (stating factual findings are clearly erroneous if they are "not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination"); *Taylor v. Hansen*, 958 P.2d 923, 929 (Utah Ct. App. 1998), *Bailey-Allen Co. v. Kurzett*, 945 P.2d 180, 186 (Utah Ct. App. 1997); *Gillmor v. Cummings*, 904 P.2d 703, 706 (Utah Ct. App. 1995).

The clearly erroneous standard is highly deferential to the trial court's decisions because the witnesses and parties appear before the trial court and the evidence is presented there. See *Pena*, 869 P.2d at 936; *accord Morse v. Packer*, 973 P.2d 422, 424 (Utah 1999); *Morton v. Continental Baking Co.*, 938 P.2d 271, 275 (Utah 1997). Thus, the trial judge is "considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record." *Pena*, 869 P.2d at 936; *accord Valcarce*, 961 P.2d at 314, *Poulsen v. Frear*, 946 P.2d 738, 742-43 (Utah Ct. App. 1997).

#### **b. Marshaling Cases**

The following are cases involving appeals from civil bench trials in which appellate courts have addressed the marshaling requirement. See *Young v. Young*, 979 P.2d 338, 344 (Utah 1999); *Valcarce*, 961 P.2d at 312; *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 230-34 (Utah 1998); *Johnson v. Higley*, 977 P.2d 1209, 1218 (Utah Ct. App. 1999) (assuming factual findings supported by evidence because appellant did not marshal); *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, [\*15] 977 P.2d 518, 524-25 (Utah Ct.

App. 1999); *ELM, Inc. v. M.T. Enters., Inc.*, 968 P.2d 861, 866 (Utah Ct. App. 1998) (assuming correctness of trial court's ruling because appellants failed to marshal evidence); *Drazich v. Lasson*, 964 P.2d 324, 326 n.4 (Utah Ct. App. 1998); *Campbell v. Box Elder County*, 962 P.2d 806, 807-08 (Utah Ct. App. 1998); *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180, 187 (Utah Ct. App. 1997).

### c. Examples of Fact Questions

The following cases have examples of factual issues requiring a clearly erroneous standard of review.

(1) Whether a doctor in a medical malpractice case checked for and removed air bubbles from an IV line before insertion. See *Robb v. Anderton*, 863 P.2d 1322, 1327 (Utah Ct. App. 1993).

(2) Whether a defendant was receiving kickbacks for inducing his employer to buy steel from a certain company. See *Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282, 1285-86 (Utah 1993).

(3) Whether a writing has been adopted as a final and complete expression of an agreement, or integrated contract. See *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180, 190 (Utah Ct. App. 1997).

(4) Whether a party had the requisite contractual intent. See *Fitzgerald v. Corbett*, 793 P.2d 356, 358 (Utah 1990); *Wade v. Stangl*, 869 P.2d 9, 12-13 (Utah Ct. App. 1994).

(5) Whether an agreement existed between parties as to how to pay a debt. See *Mountain States Tel. & Tel. v. Sohm*, 755 P.2d 155, 158-59 (Utah 1988).

(6) "The existence of possession and control and the intentions of the parties with respect to the property involved in a bailment . . . ." *Allred v. Brown*, 893 P.2d 1087, 1089 (Utah Ct. App. 1995).

(7) "Whether the parties had an implied-in-fact employment relationship . . . ." *Robertson v. Utah Fuel Co.*, 889 P.2d 1382, 1384 (Utah Ct. App. 1995).

(8) Whether the predecessors-in-interest actually used the front and rear parking areas to reach certain land in a prescriptive easement case. See *Homer v. Smith*, 866 P.2d 622, 626 (Utah Ct. App. 1993).

(9) Whether liquidated damages were a reasonable forecast of actual damages. See *Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363, 1367 (Utah 1993).

(10) "Whether a party had reasonable notice . . . ." *American First Credit Union v. First Sec. Bank*, 896 P.2d 25, 28 (Utah Ct. App. 1995), *aff'd*, 930 P.2d 1198 (Utah 1997).

(11) Whether a debt owed on a trust deed was extinguished. See *Reinbold v. Utah Fun Shares*, 850 P.2d 487, 489 (Utah Ct. App. 1993).

(12) What a reasonable person would have known or done in specific circumstances. See *Aurora Credit Servs., Inc. v. Liberty West Dev., Inc.*, 970 P.2d 1273, 1279 (Utah 1998) (research property title); *Andreini v. Hultgren*, 860 P.2d 916, 919 (Utah 1993) (suffered legal injury).

(13) Whether an attorney reviewed the record of bankruptcy proceedings to determine if there were outstanding court orders that needed attention. See *Harline v. Barker*, 854 P.2d 595, 600 (Utah Ct. App. 1993), *aff'd*, 912 P.2d 433 (Utah 1996).

(14) "Whether a party has had a 'reasonable opportunity to inspect' goods. See *Colonial Pac. Leasing Corp. v. J.W.C.J.R. Corp.*, 977 P.2d 541, 544 (Utah Ct. App. 1999).

(15) Whether the parties to a contract have orally modified that contract. See *id.* at 548.

(16) Whether a party has shown causation in fact and proximate cause. See *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1257 (Utah 1996); *Johnson v. Higley*, 977 P.2d 1209, 1217 (Utah Ct. App. 1999); *but see Harline*, 912 P.2d at 439 (stating issue of proximate cause is generally fact question, but "if 'there could be no reasonable difference of opinion' on a determination of the facts 'in the usual sense' or on an evaluative application of the legal standard to the facts, then the decision is one of law for the trial judge or for an appellate court") (citation omitted).

(17) Whether an award of damages was adequate. See *Lysenko v. Sawaya*, 973 P.2d 445, 447 (Utah Ct. App. 1999).

(18) Whether a party believed he or she had a life estate interest in property. See *Jeffs v. Stubbs*, 970 P.2d 1234, 1242 (Utah 1998), *cert. denied*, 119 S.Ct. 1803 (1999).

(19) Whether an agency relationship existed. See *Gildea v. Guardian Title Co.*, 970 P.2d 1265, 1269 (Utah 1998); *Valcarce*, 961 P.2d at 314.

(20) Whether the fraudulent concealment doctrine applies to a specific set of facts. See *Aurora Credit Servs.*, 970 P.2d at 1279.

(21) Whether a party acted with malice. See *Promax Dev. Corp. v. Mattson*, 943 P.2d 247, 260 (Utah Ct. App.), *cert. denied*, 953 P.2d 449 (Utah 1997).

(22) Whether the breach of a contract is material. See *Coalville City v. Lundgren*, 930 P.2d 1206, 1209 (Utah Ct. App. 1997); [\*16] *Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs.*, 889 P.2d 445, 458 (Utah Ct. App. 1994) (lease).

(23) "Whether a breach is so insubstantial as to trigger the application of equitable principles . . . ." *Housing Auth. v. Delgado*, 914 P.2d 1163, 1165 (Utah Ct. App. 1996).

(24) Whether a party had fraudulent intent. See *Selvae v. J.J. Johnson & Assocs.*, 910 P.2d 1252, 1262 (Utah Ct. App. 1996).



(25) "When a claimant discovered or should have discovered the facts forming the basis of a cause of action . . ." *Sevy v. Security Title Co.*, 902 P.2d 629, 634 (Utah 1995), *vacated, in part, on other grounds*, 902 P.2d 629 (Utah 1995)

(26) "Whether a party accepted an offer or a counteroffer . . ." *Cal Wadsworth Constr. v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995), *aff'd*, 898 P.2d 1372 (Utah 1995).

#### **d. Adequacy of Trial Court's Factual Findings**

Rule 52(a) of the Utah Rules of Civil Procedure provides that "the [trial] court shall find the facts specially and state separately its conclusions of law thereon." Utah appellate courts consistently stress the importance of adequate findings of fact. See *Jeffs v. Stubbs*, 970 P.2d 1234, 1242 (Utah 1998), *cert. denied*, 119 S.Ct. 1803 (1999); *State v. 633 E. 640 N.*, 942 P.2d 925, 931 (Utah 1997), *Williamson v. Williamson*, 372 Utah Adv. Rep. 45, 46 (Utah Ct. App. 1999). As stated above, to successfully challenge findings of fact, an appellant must prove they are clearly erroneous, i.e., against the clear weight of the evidence. Therefore, if appellate courts are to determine whether the evidence before the trial court supports the trial court's findings, the findings must be sufficiently detailed and include enough facts to show the evidence upon which they are grounded. See *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah Ct. App. 1991); *State ex rel. S.T.*, 928 P.2d 393, 398 (Utah Ct. App. 1996). The findings must contain enough detail to reveal the trial court's reasoning process. See *Williamson*, 372 Utah Adv. Rep. at 46. In other words, the findings must be articulated so that the basis of the ultimate conclusion can be understood. See *Jeffs*, 970 P.2d at 1242; *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979) (holding findings should be sufficiently detailed to show steps by which ultimate conclusion was reached on each factual issue); *Campbell v. Campbell*, 896 P.2d 635, 638-39 (Utah Ct. App. 1995); see also *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899-900 (Utah 1989) (noting although findings were not "model of clarity" findings of fact were sufficiently detailed to reveal trial court's reasoning process).

Unless the record clearly and uncontrovertedly supports the trial court's decision, the absence of adequate findings of fact generally requires remand for more detailed findings by the trial court. n10 See *Woodward*, 823 P.2d at 478 (observing without adequate findings of fact meaningful review of a decision's evidentiary basis is virtually impossible). Otherwise, appellate courts would be in the awkward position of speculating about what the trial court actually determined the facts to be, without the benefit of the guidance that adequate factual findings provide. See *Jeffs*, 970 P.2d at 1242 (stating appellate courts' role is not factfinding); *Woodward*, 823 P.2d at 478 n.7.

n10 For example, if a trial court errs in interpreting a statute, the factual findings are often inadequate in light of the incorrect interpretation. Accordingly, the case must be remanded for adequate findings. See *Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282, 1288 (Utah 1993).

#### **4. Civil Jury Trial Verdict**

##### **a. Substantial Evidence Standard**

Because an appellate court owes broad deference to the fact finder, its power to review a jury verdict challenged on grounds of insufficient evidence is limited. In reviewing a challenge to a civil jury verdict, the appellate court views all evidence in the light most favorable to the verdict. See *Child v. Gonda*, 972 P.2d 425, 433 (Utah 1998); *Ortiz v. Geneva Rock Prods., Inc.*, 939 P.2d 1213, 1216 (Utah Ct. App. 1997). The appellate court must assume the jury believed the evidence and inferences that support the verdict. See *Child*, 972 P.2d at 433-34.

However, in some unusual circumstances, a reviewing court may reassess witness credibility if the testimony is "inherently improbable." *State v. Workman*, 852 P.2d 981, 984 (Utah 1993) (stating to warrant review evidence must be physically impossible or apparently false, without resort to inferences or deductions) (citing *Curtis v. DeAtley*, 663 P.2d 1089, 1092 (Idaho 1983)).

The verdict will be reversed if no substantial evidence, or insufficient evidence, supports it. See *Crookston*, 817 P.2d at 799, *Canyon Country Store v. Bracey*, 781 P.2d 414, 417 (Utah 1989); *Commercial Inv. Corp. v. Siggard*, 936 P.2d 1105, 1108-09 (Utah Ct. App.), *cert. granted*, 945 P.2d 1118 (Utah 1997); *Selva v. J.J. Johnson & Assocs.*, 910 P.2d 1252, 1257, 1260-63 (Utah Ct. App. 1996), *Ames v. Maas*, 846 P.2d 468, 475 (Utah Ct. App. 1993) (concluding evidence justified jury's finding that defendant did not cross road center due to unreasonable conduct).

The evidence is insufficient if it "so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case." See *Ortiz*, 939 P.2d at 1216 (citations omitted).

##### **[\*17] b. Marshaling Cases**

The following cases involve appeals from civil jury trials in which appellate courts have addressed the marshaling requirement. See *Tingey v. Christensen*, 373 Utah Adv. Rep. 10, 11 (Utah 1999); *Child v. Gonda*, 972 P.2d 425, 433-34 (Utah 1998) (holding appellant failed to marshal facts "fully and accurately" and then show, as matter of law, that evidence did not support jury verdict finding defendant was not negligent); *Steenblik v. Lichfield*, 906 P.2d 872, 875 (Utah 1995); *Crookston*, 817 P.2d at 799-800 (noting rather than marshaling evidence in favor of jury verdict of fraud appellant merely selected evidence favorable to its position); *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 156 (Utah 1991); *Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239, 1242 (Utah 1987), *Ames v. Maas*, 846 P.2d 468, 475 (Utah Ct. App. 1993); *Shoreline Dev., Inc. v. Utah County*, 835 P.2d 207, 210 (Utah Ct. App. 1992) (improper marshaling); *Evans ex rel. Evans v. Doty*, 824 P.2d 460, 469 (Utah Ct. App. 1991) (same); *Onyeabor v. Pro Roofing, Inc.*, 787 P.2d 525, 529 (Utah Ct. App. 1990) (proper marshaling).

##### **c. Examples of Jury Fact Questions**

The following cases contain examples of factual issues requiring a substantial evidence standard of review.

(1) Whether the plaintiff knew of the one-year statute of limitations in the insurance policy. See *Canyon Country Store v. Bracey*, 781 P.2d 414, 417 (Utah 1989).

(2) Whether the testator was mentally incompetent when the will was executed. See *In re Estate of Kesler*, 702 P.2d 86, 88 (Utah 1985).

(3) Whether the plaintiff's driving was reasonable. See *Onyeabor v. Pro Roofing, Inc.*, 787 P.2d 525, 529 (Utah 1990), *Ames v. Maas*, 846 P.2d 468, 475 (Utah Ct. App. 1993).

(4) Whether plaintiff reasonably relied on misrepresentations. See *Brown v. Richards*, 840 P.2d 143, 148-49 (Utah Ct. App. 1992).

(5) Whether lessor waived strict compliance with option terms. See *Geisdorf v. Doughty*, 972 P.2d 67, 71-72 (Utah 1998).

## 5. Criminal Bench Trial

### a. Clearly Erroneous Standard

The trial court has primary responsibility for making factual determinations. See *Pena*, 869 P.2d at 935. A trial court's findings of fact in a criminal bench trial are reviewed under a clearly erroneous standard. See *State v. Galli*, 967 P.2d 930, 933 (Utah 1998); *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997), cert. denied, 119 S.Ct. 89 (1998); *City of Orem v. Lee*, 846 P.2d 450, 452 (Utah Ct. App. 1992). This standard of review is derived from Rule 52(a) of the Utah Rules of Civil Procedure, which states, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

A trial court's finding is clearly erroneous when it is against the clear weight of the evidence or, although there is evidence to support it, the court reviewing all the record evidence is left with a definite and firm conviction that a mistake has been made. See *Pena*, 869 P.2d at 935-36 (stating reviewing court must rule clear error if factual findings are not adequately supported by record, resolving all disputes in evidence in light most favorable to trial court's determination); accord *Taylor*, 947 P.2d at 685; *State v. Patefield*, 927 P.2d 655, 657 (Utah Ct. App. 1996).

This clearly erroneous standard is highly deferential to the trial court's decisions because the witnesses and parties appear before the trial court and the evidence is presented there. See *Pena*, 869 P.2d at 936. Thus, the trial judge is "considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record." *Id.* (citing *In re J. Children*, 664 P.2d 1158, 1161 (Utah 1983)).

Further, when an appellate court reviews "a bench trial for sufficiency of the evidence, [the appellate court] must sustain the trial court's judgment unless it is 'against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made.'" *Spanish Fork City v. Bryan*, 975 P.2d 501, 502 (Utah Ct. App. 1999) (citations omitted). A conviction may be upheld only if "supported by a quantum of evidence concerning each element of the crime as charged from which the [factfinder] may base its conclusion of guilt beyond a reasonable doubt." *Id.* (alteration in original) (quoting *State v. Murphy*, 617 P.2d 399, 402 (Utah 1980)). Moreover, a guilty verdict is invalid if based exclusively "on inferences that give rise to only remote or speculative possibilities of guilt." *Id.* (quoting *State v. Workman*, 852 P.2d 981, 985 (Utah 1993)).

### b. Marshaling Cases

The following are cases involving appeals from criminal trial court rulings in which appellate courts have addressed the marshaling requirement. See *State v. Benvenuto*, 372 Utah Adv. Rep. 3, 4 (Utah 1999); *State v. Decorso*, 370 Utah Adv. Rep. 11, 15 (Utah 1999) (stating marshaling requirement not fulfilled when defendant "merely argued selected portions of the evidence [\*18] which he believes support[] his own position"); *State v. Gray*, 851 P.2d 1217, 1225 (Utah Ct. App. 1993) (concluding not only did defendant fail to marshal evidence in support of her motion to dismiss, she did not marshal evidence in opposition; instead she simply reargued her motion without referring to record); *State v. Gentlewind*, 844 P.2d 372, 376 n.3 (Utah Ct. App. 1992) (holding defendant failed to marshal evidence supporting trial court's findings that he did not meet statutory qualifications for probation); *State v. Peterson*, 841 P.2d 21, 25 (Utah Ct. App. 1992) (noting defendant failed to marshal evidence supporting court's findings as to transfer and distribution in general of cocaine, however, defendant adequately marshaled regarding finding that she arranged for distribution of cocaine); *State v. Burk*, 839 P.2d 880, 886 (Utah Ct. App. 1992) (assuming findings supported by evidence when defendant did not marshal evidence supporting trial court's findings about improper contact between jurors and witnesses).

### c. Examples of Fact Questions n11

n11 Several of these examples arise in criminal jury trials but deal with motions made to the trial judge concerning fact-dependent issues, such as motions to suppress evidence. Factual determinations by the judge, whether in a bench trial or in a jury trial, are reviewable under the clearly erroneous standard.

The following cases contain examples of factual issues requiring a clearly erroneous standard of review.

(1) Whether defendant knew of his right to counsel and intentionally relinquished it. See *State v. Wood*, 868 P.2d 70, 87 (Utah 1993). n12

n12 This, along with several other examples below, are underlying or subsidiary factual questions leading to a legal conclusion. The legal conclusion in this case is whether the defendant voluntarily waived his right to counsel.

(2) Whether officers intimidated, coerced, or deceived the defendant in the process of extracting a statement. See *State v. Archuleta*, 850 P.2d 1232, 1238-40 (Utah 1993); *State v. James*, 858 P.2d 1012, 1015-17 (Utah Ct. App. 1993).

(3) Whether defendant initiated contact and was read his Miranda warnings before giving a statement. See *Archuleta*, 850 P.2d at 1238-40.

(4) How long defendant was in custody and whether Miranda warnings were given before consent to search. See *State v. Thurman*, 846 P.2d 1256, 1273 (Utah 1993).

(5) Whether officers' concern for safety influenced their decision to make a forcible entry into a residence. See *id.* at 1273-74.

(6) Whether the defendant was told of his constitutional right not to have a search made without a search warrant and of his right to refuse such a search. See *id.* at 1274.

(7) Whether a juror answered a material question honestly on voir dire. See *State v. Thomas*, 830 P.2d 243, 245 (Utah 1992).

(8) Whether a victim's testimony was perjured. See *State v. Lancaster*, 765 P.2d 872, 873 (Utah 1988).

(9) Whether the criminal defendant was mentally ill. See *State v. Lafferty*, 749 P.2d 1239, 1244-47 (Utah 1988); *State v. Montoya*, 825 P.2d 676, 680-81 (Utah Ct. App. 1991).

- (10) Whether the officer saw defendant place drugs on a shelf in the next room. See *State v. Keitz*, 856 P.2d 685, 690-91 (Utah Ct. App. 1993).
- (11) Whether the defendant cooperated with officers when they asked if he had any drug paraphernalia. See *id.* at 691.
- (12) Whether the defendant had an adequate command of the English language to understand the court proceedings and probationary requirements. See *State v. Ruesga*, 851 P.2d 1229, 1233 (Utah Ct. App. 1993).
- (13) Whether a drunk motorist was in control of a vehicle. See *State v. Barnhart*, 850 P.2d 473, 479-80 (Utah Ct. App. 1993).
- (14) Whether an attorney communicated something to his or her client. See *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997), *cert. denied*, 119 S. Ct. 89 (1998); *State v. Long*, 844 P.2d 381, 384-86 (Utah Ct. App. 1992).
- (15) Whether an attorney reasonably supervised his nonlawyer assistant. See *Long*, 844 P.2d at 385.
- (16) Whether there was contact between witnesses and jurors. See *State v. Burk*, 839 P.2d 880, 886 (Utah Ct. App. 1992).
- (17) Whether an eyewitness identification was reliable. See *State v. Decorso*, 370 Utah Adv. Rep. 11, 15 (Utah 1999).
- (18) Whether a person had an actual expectation of privacy. See *State v. Holden*, 964 P.2d 318, 321 (Utah Ct. App. 1998), *cert. denied*, 1998 Utah LEXIS 132 (Utah Nov. 19, 1998) (unpublished opinion).
- (19) "Whether the opponent of the peremptory challenge has proved purposeful racial discrimination" under *Batson*, *State v. Bowman*, 945 P.2d 153, 155 (Utah Ct. App. 1997).
- (20) Whether a defendant is able "to consult with counsel with a reasonable degree of rational understanding." *State v. Woodland*, 945 P.2d 665, 667 (Utah 1997).
- (21) Whether a traffic violation was committed in the presence of a police officer. See *State v. Spurgeon*, 904 P.2d 220, 224 (Utah Ct. App. 1995).
- (22) The amount of the State's actual expenses in investigating a defendant's behavior and holding a hearing. See *State v. Mendoza*, 938 P.2d 303, 305 (Utah Ct. App. 1997).

#### **[\*19] d. Adequacy of Trial Court's Factual Findings**

Appellate courts persistently stress the requirement and importance of adequate findings of fact. n13 *State v. Ramirez*, 817 P.2d 774, 787-89 (Utah 1991), *State v. Vigil*, 815 P.2d 1296, 1300 (Utah Ct. App. 1991). As stated above, to successfully challenge findings of fact, an appellant must prove they are clearly erroneous, i.e., that the findings are against the clear weight of evidence. Deference to the trial court findings can only be extended when the trial court's factual findings adequately reveal the steps by which the ultimate conclusion is reached. *State v. Genovesi*, 871 P.2d 547, 549-52 (Utah Ct. App. 1994) (holding trial court made inadequate factual findings by failing to address some things and making irrelevant factual findings as to others); *State v. Hodson*, 866 P.2d 556, 564 (Utah Ct. App. 1993) (concluding trial court failed to set forth factual findings in sufficient detail for court of appeals to review validity of warrantless body search and seizure of defendant), *rev'd on other grounds*, 907 P.2d 1155 (Utah 1995), *Vigil*, 815 P.2d at 1301 (remanding because trial court failed to make any factual findings about consent question); *State v. Lovegren*, 798 P.2d 767, 770 (Utah Ct. App. 1990) (stating trial court's findings were inadequate to support conclusion that officer had reasonable suspicion).

Specific, detailed findings not only ease the burden of appellate review by communicating the steps by which the ultimate legal conclusions are reached, they also enable appellate counsel to properly frame issues on appeal and to comply with our rigid requirement of marshaling evidence in support of subsidiary facts when challenging a trial court's findings.

*Vigil*, 815 P.2d at 1300-01 (citations omitted). However, Utah appellate courts will uphold "the trial court even if it failed to make findings on the record whenever it would be reasonable to assume that the court actually made such findings." *Ramirez*, 817 P.2d at 774.

n13 For example, Rule 12(c) of the Utah Rules of Criminal Procedure "requires the trial court to specify its findings on the record when resolution of factual issues is necessary to the disposition of a motion." *State v. Genovesi*, 871 P.2d 547, 548 (Utah Ct. App. 1994); accord *State v. James*, 858 P.2d 1012, 1014-15 (Utah Ct. App. 1993).

## **6. Criminal Jury Trial Verdict**

### **a. Sufficiently Inconclusive or Inherently Improbable Standard**

Because an appellate court owes broad deference to the fact finder, its power to review a jury verdict challenged on the ground of insufficient evidence is limited. See *State v. James*, 819 P.2d 781, 784 (Utah 1991); *State v. Merila*, 966 P.2d 270, 272 (Utah Ct. App. 1998); *State v. Hawkins*, 967 P.2d 966, 971 (Utah Ct. App. 1998). In reviewing a jury verdict, the appellate court views the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict and "assumes the jury believed the evidence and inferences that support the verdict." *State v. Wood*, 868 P.2d 70, 87 (Utah 1993); see *State v. Hamilton*, 827 P.2d 232, 233 (Utah 1992); *State v. Harley*, 371 Utah Adv. Rep. 17, 17 (Utah Ct. App. 1999); *State v. Fisher*, 972 P.2d 90, 97 (Utah Ct. App. 1998).

Appellate courts will not weigh conflicting evidence, nor will they substitute their own judgment of the credibility of the witnesses for that of a jury. See *State v. Brown*, 948 P.2d 337, 343-44 (Utah 1997); *Merila*, 966 P.2d at 272. Moreover, the existence of contradictory evidence or conflicting inferences does not warrant disturbing the jury's verdict. See *State v. Howell*, 649 P.2d 91, 97 (Utah 1982); *Merila*, 966 P.2d at 272; *State v. Longshaw*, 961 P.2d 925, 931 (Utah Ct. App. 1998).

In some unusual circumstances, however, a reviewing court may reassess witness credibility if the testimony is inherently improbable. See *State v. Workman*, 852 P.2d 981, 984 (Utah 1993) (reviewing only when evidence is physically impossible or apparently false without resort to inferences or deductions) (citing *Curtis v. DeAtley*, 663 P.2d 1089, 1092 (Idaho 1983)).

Appellate courts will reverse a jury verdict only if the evidence is sufficiently inconclusive or so inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he or she was convicted. See *Workman*, 852 P.2d at 985-86 (stating, even when viewed in light most favorable to jury's verdict, State's evidence did not support reasonable inference that defendant had mental state required by statute for lawful conviction); *State v. Dunn*, 850 P.2d 1201, 1212-16 (Utah 1993) (challenged testimony sufficient); *Fisher*, 972 P.2d at 97; *Merila*, 966 P.2d at 272. n14

n14 This standard remains even when much of the evidence is circumstantial. See *State v. Span*, 819 P.2d 329, 332 (Utah 1991); *State v. Barlow*, 851 P.2d 1191, 1193 (Utah Ct. App. 1993).

Stated in other words, appellate courts will affirm the jury verdict if "there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made." *Wood*, 868 P.2d at 87-88 (quoting *State v. Booker*, 709 P.2d 342, 345 (Utah 1985)); accord *State v. Davis*, 965 P.2d 525, 535 (Utah Ct. App. 1998); *State v. Hall*, 946 P.2d 712, 724 (Utah Ct. App. 1997), cert. denied, 953 P.2d 449 (Utah 1998).

## **b. Marshaling Cases**

Following are cases discussing the marshaling requirement for factual issues underlying criminal jury trial verdicts. See *State v. Vessey*, 967 P.2d 960, 966 (Utah Ct. App. 1998) (refusing to address defendant's challenge to sufficiency of evidence supporting [\*20] his conviction because defendant failed to marshal evidence); *State v. Farron*, 919 P.2d 50, 53 n.1 (Utah Ct. App. 1996); *State v. Gallegos*, 851 P.2d 1185, 1190 (Utah Ct. App. 1993) (refusing to review issues improperly marshaled); *State v. Lemons*, 844 P.2d 378, 381 (Utah Ct. App. 1992) (failure to marshal); *State v. Mincy*, 838 P.2d 648, 652 n.1 (Utah Ct. App. 1992) (refusing to address sufficiency of evidence because defendant failed to marshal evidence); *State v. Scheel*, 823 P.2d 470, 473 (Utah Ct. App. 1991) (noting defendant marshaled version of facts most favorable to his position, ignoring testimony supporting jury's verdict); *State v. Day*, 815 P.2d 1345, 1351 (Utah Ct. App. 1991) (observing defendant neither marshaled evidence submitted at trial supporting jury verdict, nor did he argue why such evidence was insufficient).

## **c. Examples of Jury Fact Questions**

The following cases contain examples of factual issues requiring a sufficiently inconclusive or inherently improbable standard.

- (1) Whether the defendant helped beat and assault the victim. See *State v. Wood*, 868 P.2d 70, 87-88 (Utah 1993).
- (2) Whether the defendant raised a wrench and threatened to harm the victim. See *State v. Brown*, 853 P.2d 851, 860 (Utah 1992).
- (3) Whether the defendants knew that photographs would be used for sexual purposes. See *State v. Workman*, 852 P.2d 981, 985-86 (Utah 1993).
- (4) Whether the defendants had the requisite mental state for the offense charged. See *id.* at 987; *State v. Krueger*, 975 P.2d 489, 495 (Utah Ct. App. 1999); *State v. Hall*, 946 P.2d 712, 724 (Utah Ct. App. 1997), cert. denied, 953 P.2d 449 (Utah 1998).
- (5) Whether the defendant's actions caused the victim's death. See *State v. Stewart*, 729 P.2d 610, 611-12 (Utah 1986).
- (6) Whether the defendant was out of work during the time in which he failed to pay child support. See *State v. Barlow*, 851 P.2d 1191, 1194 (Utah Ct. App. 1993).
- (7) Whether the defendant supplied alcohol to minors. See *State v. Souza*, 846 P.2d 1313, 1322 (Utah Ct. App. 1993).
- (8) Whether the defendant tried to get a witness to withhold testimony about the defendants. See *State v. Burk*, 839 P.2d 880, 884-85 (Utah Ct. App. 1992).
- [\*21] (9) Whether the defendant had authority to enter storage units and whether he exceeded scope of that authority. See *State v. Hawkins*, 967 P.2d 966, 970-71 (Utah Ct. App. 1998).
- (10) Whether the defendant had a motive to kill the victim. See *State v. Brown*, 948 P.2d 337, 346 (Utah 1997).

## **B. Challenging Discretionary Rulings**

### **1. Introduction**

As discussed above, appellants often characterize issues as "findings of fact" when they are actually issues challenging discretionary rulings made by the trial court. The traditional "abuse of discretion" standard of review, as well as the discretion granted in mixed question situations, were discussed at length in *State v. Pena*, 869 P.2d 932, 936-40 (Utah 1994).

### **2. Traditional Abuse-of-Discretion Standard**

The abuse-of-discretion standard flows from the trial court's significant role in pre-appellate litigation. The trial court has "a great deal of latitude in determining the most fair and efficient manner to conduct court business." *Morton v. Continental Baking Co.*, 938 P.2d 271, 275 (Utah 1997). This is because "the trial judge is in the best position to evaluate the status of his cases, as well as the attitudes, motives, and credibility of the parties." *Id.*

### **a. Civil Cases**

Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make that determination. See *Pena*, 869 P.2d at 939-40 n.5. A trial court abuses its discretion if there is "no reasonable basis for the decision." *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993). A trial

judge's determination will be reversed if the ruling "is so unreasonable that it can be classified as arbitrary and capricious or a clear abuse of discretion." *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah Ct. App. 1993); see *Ames v. Maas*, 846 P.2d 468, 476 (Utah Ct. App. 1993).

#### **(i) Examples of Pretrial Discretion**

- (1) Whether the trial court properly granted or denied a motion to change venue. See *Durham v. Duchesne County*, 893 P.2d 581, 582 (Utah 1995).
- (2) Whether the trial court properly granted or denied injunctive relief. See *Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411, 412 (Utah 1998); *Miller v. Martineau & Co.*, 372 Utah Adv. Rep. 34, 36 (Utah Ct. App. 1999).
- (3) Whether the trial court properly ruled on a motion to amend a pleading. See *Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 405 (Utah 1998); *Graham v. Davis County Solid Waste Management and Energy Recovery Special Serv. Dist.*, 979 P.2d 363, 367 (Utah Ct. App. 1999).
- (4) Whether the trial court properly conducted voir dire. See *Barrett v. Peterson*, 868 P.2d 96, 98 (Utah Ct. App. 1993).
- (5) Whether the trial court should grant declaratory relief. See *Boyle v. National Union Fire Ins. Co.*, 866 P.2d 595, 598 (Utah Ct. App. 1993).
- (6) Whether the trial court properly denied a motion to continue. See *American Towers Owners Assoc., Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1195 (Utah 1996) (discovery); *Radcliffe v. Akhavan*, 875 P.2d 608, 610 (Utah Ct. App. 1994) (trial).
- (7) Whether the trial court should summarily enforce a settlement agreement. See *Goodmansen v. Liberty Vending Sys. Inc.*, 866 P.2d 581, 584 (Utah Ct. App. 1993).
- (8) Whether the trial court properly selected and imposed sanctions for discovery violations. See *Tuck v. Godfrey*, 367 Utah Adv. Rep. 42, 43 (Utah Ct. App. 1999).
- (9) Whether the trial court properly ordered that a trial be bifurcated. See *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1244 (Utah 1998).
- (10) Whether the trial court properly dismissed a case for failure to prosecute. See *Hartford Leasing Corp. v. State*, 888 P.2d 694, 697 (Utah Ct. App. 1994).

#### **(ii) Examples of Discretion Exercised During Trial n15**

n15 Most examples of challenges to discretion exercised during trial arise in the evidence context, covered later in this article.

- (1) Whether the trial court properly allowed complaint to be amended during trial. See *Slattery v. Covey & Co.*, 857 P.2d 243, 248 (Utah Ct. App. 1993).
- (2) Whether the trial court determined the proper amount for a punitive damage award. See *Lake Philgas Serv. v. Valley Bank & Trust Co.*, 845 P.2d 951, 959-60 (Utah Ct. App. 1993); *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 967 (Utah Ct. App. 1989).
- (3) Whether the trial court properly excluded witnesses from the courtroom. See *Terry's Sales, Inc. v. Vander Veur*, 618 P.2d 29, 32 (Utah 1980).
- (4) Whether the trial court properly refused to dismiss case for noncompliance with a scheduling order. See *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 977 P.2d 518, 522 (Utah Ct. App. 1999).
- [\*22]** (5) Whether the trial court properly decided to award damages. See *Lysenko v. Sawaya*, 973 P.2d 445, 447 (Utah Ct. App. 1999).
- (6) Whether the trial court properly disqualified an attorney. See *Houghton v. Department of Health*, 962 P.2d 58, 61 (Utah 1998) (holding trial court's discretion to disqualify attorney for ethical violations is limited because "the interpretation of the ethical rules governing the legal profession involves substantial legal questions" (quoting *Margulies ex rel. Margulies v. Upchurch*, 696 P.2d 1195, 1199 (Utah 1985))); *Cade v. Zions First Nat'l Bank*, 956 P.2d 1073, 1076 (Utah Ct. App. 1998).
- (7) Whether the trial court properly declared a mistrial. See *West Valley City v. Patten*, 368 Utah Adv. Rep. 50, 50 (Utah Ct. App. 1999); *State v. Castle*, 951 P.2d 1109, 1111 (Utah Ct. App. 1998).
- (8) Whether the trial court properly ordered specific performance of an option to buy. See *Shields v. Harris*, 934 P.2d 653, 655 (Utah Ct. App. 1997).
- (9) Whether the trial court properly imposed a constructive trust. See *Tolman v. Winchester Hills Water Co.*, 912 P.2d 457, 462 (Utah Ct. App. 1996).
- (10) Whether the trial court properly fashioned an equitable remedy. See *Thurston v. Box Elder County*, 892 P.2d 1034, 1041 (Utah 1995).

#### **(iii) Examples of Post-Trial Discretion**

- (1) Whether the trial court properly denied a motion for a new trial. See *Child v. Gonda*, 972 P.2d 425, 428 (Utah 1998); *Pena*, 869 P.2d at 938 ("At the extreme end of the discretion spectrum would be a decision by the trial court to grant or deny a new trial based on insufficiency of the evidence."); *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993); *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 977 P.2d 518, 522 (Utah Ct. App. 1999). n16

n16 "However, if the trial court has made a determination of law that provides a premise for its denial of a new trial, such legal decision is reviewed under a correctness standard," *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993), see *State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993); *State v. Ramirez*, 817 P.2d 774, 781-82 n.3 (Utah 1991)

(2) Whether a trial court should grant a motion for relief from a judgment. See *Gillmor v. Wright*, 850 P.2d 431, 434-36 (Utah 1993), *Miller v. Martineau & Co.*, 372 Utah Adv. Rep. 34, 36 (Utah Ct. App. 1999) (default judgment).

(3) Whether the amount of attorney fees awarded was proper. See *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 939 (Utah 1998); *Baldwin v. Burton*, 850 P.2d 1188, 1198 (Utah 1993); *J.V. Hatch Constr., Inc. v. Kampros*, 971 P.2d 8, 13 (Utah Ct. App. 1998) (mechanics' lien statute).

(4) Whether the amount of costs awarded was proper. See *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 939 (Utah 1998), *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 511 (Utah Ct. App. 1999)

(5) Whether the trial court properly imposed or denied sanctions under Utah Rule of Civil Procedure 37. See *Pennington*, 973 P.2d at 940.

(6) Whether the trial court properly denied "relief from judgment based on newly discovered evidence." *Promax Dev. Corp. v. Mattson*, 943 P.2d 247, 253 (Utah Ct. App.), cert. denied, 953 P.2d 449 (Utah 1997).

(7) Whether the trial court properly granted or denied "a motion to reconsider summary judgment." *Timm v. Dewsnap*, 921 P.2d 1381, 1386 (Utah 1996).

(8) Whether the trial court should grant, modify, or revoke probation. See *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990) (revoke); *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct. App. 1994); *State v. Ruesga*, 851 P.2d 1229, 1233 (Utah Ct. App. 1993) (revoke). n17

n17 "Probation revocation proceedings are civil in nature. Such proceedings are 'entirely independent of any related criminal proceeding.'" *State v. Hudecek*, 965 P.2d 1069, 1071 (Utah Ct. App. 1998).

## **b. Criminal Cases**

A trial court abuses its discretion if its decision is beyond the limits of reasonableness. See *State v. Galli*, 967 P.2d 930, 939 (Utah 1998) (Russon, J., dissenting); *State v. Olsen*, 860 P.2d 332, 334 (Utah 1993). If the actions of the trial court are inherently unfair, it has also abused its discretion. See *State v. Russell*, 791 P.2d 188, 192-93 (Utah 1990); *State v. Schweitzer*, 943 P.2d 649, 651 (Utah Ct. App. 1997). The exercise of discretion necessarily reflects the personal judgment of the trial judge, and the appellate court can properly find abuse only if no reasonable person would take the view adopted by the trial court. See *Schweitzer*, 943 P.2d at 651

### **(i) Examples of Pretrial Discretion**

(1) Whether the trial court properly denied a motion to remove a juror for cause. See *State v. Wood*, 868 P.2d 70, 76 (Utah 1993), *State v. Finlayson*, 956 P.2d 283, 290 (Utah Ct. App. 1998).

(2) Whether the trial court should grant or deny a motion to join or sever offenses. See *State v. Germonto*, 868 P.2d 50, 59 (Utah 1993) (joinder); *State v. Scales*, 946 P.2d 377, 384 (Utah Ct. App. 1997) (severance).

(3) Whether a trial court should allow the press to inspect and copy actual exhibits admitted during a preliminary hearing. See *State v. Archuleta*, 857 P.2d 234, 242 (Utah 1993)

(4) Whether security measures were necessary to ensure a safe and orderly proceeding. See *State v. Lemons*, 844 P.2d 378, 379 (Utah Ct. App. 1992).

**[\*23]** (5) Whether a trial judge properly decided to restrain the accused during trial. See *State v. Mitchell*, 824 P.2d 469, 474 (Utah Ct. App. 1991)

(6) Whether a trial court should deny or grant a motion for change of venue. See *State v. Pearson*, 943 P.2d 1347, 1350 (Utah 1997)

(7) Whether the trial court abused its discretion in granting or denying a continuance. See *Seel v. Van Der Veur*, 971 P.2d 924, 926 (Utah 1998); *State v. Arrellano*, 964 P.2d 1167, 1169 (Utah Ct. App. 1998).

(8) Whether the trial court properly denied a motion to quash a bindover order. See *State v. Wells*, 977 P.2d 1192, 1192 (Utah 1999).

(9) Whether the trial court properly conducted voir dire. See *State v. Saunders*, 371 Utah Adv. Rep. 6, 13 (Utah 1999) (noting trial court's discretion narrows when questions might be relevant to bias and that "when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears"); *State v. Vigil*, 922 P.2d 15, 25 (Utah Ct. App. 1996)

(10) Whether a magistrate properly determined that police officers had probable cause to support a search warrant. See *State v. Blevins*, 968 P.2d 402, 403 (Utah Ct. App. 1998); *State v. Womack*, 967 P.2d 536, 543 (Utah Ct. App. 1998)

(11) Whether the trial court properly denied defendant's motion to substitute appointed counsel. See *State v. Vessey*, 967 P.2d 960, 962 (Utah Ct. App. 1998).

(12) Appellate courts review "trial court's denial of a motion to withdraw a guilty plea" for abuse of discretion, and review findings of fact supporting that decision for clear error. *State v. Benvenuto*, 372 Utah Adv. Rep. 3, 4 (Utah 1999)

(13) Whether the trial court properly decided "to admit or bar testimony for failure to adhere to discovery obligations." *Arrellano*, 964 P.2d at 1169.

(14) "Whether to allow an indigent defendant's attorney to withdraw after the attorney has expressed concern about his or her relationship with the defendant . . . ." *State v. Scales*, 946 P.2d 377, 381 (Utah Ct. App. 1997).

(15) Whether the trial court chose a competent translator. *See State v. Fung*, 907 P.2d 1192, 1194 (Utah Ct. App. 1995).

## **(ii) Examples of Discretion Exercised During Trial n18**

n18 Most examples of challenges to discretion exercised during trial arise in the evidence context, covered later in this article.

(1) Whether the trial court should allow jurors to view a crime scene. *See State v. Cabututan*, 861 P.2d 408, 412-13 (Utah 1993), *State v. Cayer*, 814 P.2d 604, 613 (Utah Ct. App. 1991).

(2) Whether a victim should be excluded from the courtroom after a trial has begun. *See State v. Rangel*, 866 P.2d 607, 613 (Utah Ct. App. 1993).

(3) Whether a trial court should disqualify a prosecutor. *See State v. Gray*, 851 P.2d 1217, 1228 (Utah Ct. App. 1993).

(4) Whether the trial court should deny a motion for special verdict with interrogatories. *See id.* at 1226

(5) Whether the trial court should grant a motion for mistrial. *See State v. Decorso*, 370 Utah Adv. Rep. 11, 15 (Utah 1999), *State v. Kiriluk*, 975 P.2d 469, 474 (Utah Ct. App. 1999).

(6) Whether the trial court should allow an attorney to testify at trial. *See State v. Bakalov*, 979 P.2d 799, 819 (Utah 1999)

(7) Whether a prosecutor's statements during closing arguments constituted prosecutorial misconduct. *See State v. Longshaw*, 961 P.2d 925, 927 (Utah Ct. App. 1998).

(8) Whether the trial court should bar a witness's testimony because a party failed to comply with discovery obligations. *See State v. Begishe*, 937 P.2d 527, 530 (Utah Ct. App. 1997).

(9) Whether the trial court properly ordered restitution. *See State ex rel. J.M.H.*, 924 P.2d 895, 896 (Utah Ct. App. 1996).

## **(iii) Examples of Post-Trial Discretion**

(1) Whether the trial court properly granted or denied a motion for a new trial. *See State v. Bakalov*, 979 P.2d 799, 811 (Utah 1999); *State v. Wetzel*, 868 P.2d 64, 70 (Utah 1993). n19

n19 "However, if the trial court has made a determination of law that provides a premise for its denial of a new trial, such legal decision is reviewed under a correctness standard." *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993)

(2) Whether a sentence imposed by the trial court was proper. *See State v. Galli*, 967 P.2d 930, 938 (Utah 1998), *State v. Woodland*, 945 P.2d 665, 671 (Utah 1997); *State v. Patience*, 944 P.2d 381, 389 (Utah Ct. App. 1997); *State v. Schweitzer*, 943 P.2d 649, 651 (Utah Ct. App. 1997).

(3) Whether the trial court abused its discretion in denying a motion to set aside a guilty plea. *See State v. Blair*, 868 P.2d 802, 805 (Utah 1993); *State v. Visser*, 973 P.2d 998, 1001 (Utah Ct. App. 1999).

(4) Whether an order of restitution was proper. *See State v. Westerman*, 945 P.2d 695, 696 (Utah Ct. App. 1997)

## **[\*24] 3. Mixed Questions Analyzed under *Pena***

### **a. Introduction**

In *Pena*, the supreme court discussed the "measure of discretion" given to trial courts. *Pena*, 869 P.2d at 936-39. When a legal rule n20 is to be applied to a given set of facts, or, in other words, when the trial court must determine "whether a given set of facts comes within the reach of a given rule of law," the trial court is given a de facto grant of discretion. *Id.* at 936-37

n20 The legal rules are determined without deference to the trial courts. *See State v. Pena*, 869 P.2d 932, 937 (Utah 1994).

In *Pena*, the supreme court relied on a pasture metaphor to explain the degrees of discretion granted to the trial court. n21 *See id.* at 937-38. Applying this pasture metaphor, appellate courts may give trial courts "little room to roam" in applying a legal rule to facts because the appellate courts "closely and regularly redetermine[] the legal effect of specific facts." *Id.* at 937. In such cases, the standard of review approximates a "de novo" review by the appellate courts. *Id.* On the other hand, appellate courts may give trial courts "considerable freedom" to roam about the pasture, either by not creating new fences or by expanding the size of the pasture, thus giving the trial court broad discretion. *Id.* at 937-38. "Only when the trial judge crosses an existing fence" or when appellate courts decide to more closely define the law by "fencing off a part of the pasture previously available does the trial judge's decision exceed the broad discretion granted." *Id.* at 938.

n21 Areas of discretion surrounded by boundaries have also been described as "fields of inquiry," *State v. Harmon*, 854 P.2d 1037, 1040 n.2 (Utah Ct. App. 1993), *aff'd*, 910 P.2d 1196 (Utah 1995); *State v. Rochell*, 850 P.2d 480, 485 n.3 (Utah Ct. App. 1993) (Bench, J., concurring); *State v. Barnhart*, 850 P.2d 473, 475 (Utah Ct. App. 1993); *State v. Richardson*, 843 P.2d 517, 525 (Utah Ct. App. 1992) (Bench, J., concurring), "holes in doughnuts," Ronald Dworkin, *Taking Rights Seriously* 31 (1977), and "uncharted minefields," Ruger J. Aldisert, *Opinion Writing* 63, 65 (1990).

Discretion issues can be placed at various points along a "spectrum of discretion." *Id.* Some of the examples in the next section reflect stated degrees of discretion. However, several situations involving a review of trial court discretion have not yet been defined under

the test enunciated in *Pena*. The examples in the next section are limited to cases that explicitly identify issues when the trial court acts with some discretion. Prudent appellate counsel will closely study *Pena* and its progeny before mechanically classifying an issue as one of fact, law, or discretion.

Appellate courts review factual questions under the clearly erroneous standard and legal questions under the correctness standard. See *Jefferis v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998), cert. denied, 119 S.Ct. 1803 (1999); *Platts v. Parents Helping Parents*, 947 P.2d 658, 661 (Utah 1997). However, although legal questions are reviewed for correctness, appellate courts "may still grant a trial court discretion in its application of the law to a given fact situation." *Jefferis*, 970 P.2d at 1244. This is the mixed question category.

As explained in *Pena*, 869 P.2d at 932, appellate courts "decide how much discretion to give a trial court in applying the law in a particular area by considering a number of factors pertinent to the relative expertise of appellate and trial courts in addressing those issues." *Id.* Considerations favoring a grant of broad discretion include the following:

(i) whether "the facts to which the legal rule is to be applied are so complex and varying that no rule adequately addressing the relevance of all these facts can be spelled out"; (ii) whether "the situation to which the legal principle is to be applied is sufficiently new to the courts that appellate judges are unable to anticipate and articulate definitively what factors should be outcome determinative"; and (iii) whether "the trial judge has observed 'facts,' such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts."

*Jefferis*, 970 P.2d at 1244 (quoting *Pena*, 869 P.2d at 939). Meanwhile a point disfavoring broad discretion is the existence of policy concerns that demand consistency among trial courts treating a particular question. See *id.*

Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make that determination. See *Pena*, 869 P.2d at 939-40 n.5.

#### **b. Examples of Mixed Questions in Civil Cases**

(1) Whether the trial court properly applied the doctrine of waiver. See *Pledger v. Gillespie*, 370 Utah Adv. Rep. 25, 26 (Utah 1999) (contractual right of arbitration); *Living Scriptures, Inc. v. Kudlik*, 890 P.2d 7, 10 (Utah Ct. App. 1995) (strict compliance with lease agreement).

(2) "Whether speech relates to a public concern . . ." *Cassidy v. Salt Lake County Fire Civil Serv. Council*, 976 P.2d 607, 613 (Utah Ct. App. 1999).

(3) Whether the unjust enrichment doctrine applies. See *Jefferis v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998), cert. denied, 119 S.Ct. 1803 (1999).

**[\*25]** (4) Whether a party breached a fiduciary duty. See *C & Y Corp. v. General Biometrics, Inc.*, 896 P.2d 47, 53 (Utah Ct. App. 1995) (granting "ample" discretion).

(5) Whether an easement exists. See *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998); *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998) (granting broad discretion).

(6) Whether a road has been dedicated to public use. See *Campbell v. Box Elder County*, 962 P.2d 806, 807-08 (Utah Ct. App. 1998).

(7) Whether a party acted in bad faith. See *Valcarce*, 961 P.2d at 315-16 (granting "relatively broad discretion").

(8) Whether an entity was a "health care provider" under the Utah Health Care Malpractice Act. See *Platts v. Parents Helping Parents*, 947 P.2d 658, 661 (Utah 1997) (referring to standard of review as abuse of discretion).

(9) Whether a given individual or association has standing to request particular judicial relief. See *Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373-74 (Utah 1997) ("minimal discretion").

(10) Whether the trial court properly allocated peremptory challenges under Rule 47 of the Utah Rules of Civil Procedure. See *Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 351 (Utah 1997).

(11) Whether a "given set of facts constitutes 'excusable neglect' under . . . rule 4(e)" of the Utah Rules of Appellate Procedure. *West v. Grand County*, 942 P.2d 337, 339 (Utah 1997).

(12) Whether the equitable estoppel doctrine applies. See *Department of Human Servs. ex rel. Parker v. Irizarry*, 945 P.2d 676, 681-82 (Utah 1997) ("fair degree of deference") (citation omitted).

(13) Whether an award of attorney fees was reasonable. See *Salmon v. Davis County*, 916 P.2d 890, 892 (Utah 1996).

(14) Whether the trial court properly determined that a thoroughfare had been dedicated to public use. See *Kohler v. Martin*, 916 P.2d 910, 912 (Utah Ct. App. 1996) ("some degree of deference").

(15) "The 'materiality' of a failure to disclose one's financial status prior to executing a premarital agreement . . ." See *In re Estate of Beesley*, 883 P.2d 1343, 1347-48 (Utah 1994).

#### **c. Examples of Mixed Questions in Criminal Cases**

(1) Whether an identification procedure is constitutional. See *State v. Parra*, 972 P.2d 924, 926 (Utah Ct. App. 1998).

(2) Whether a defendant is indigent. See *State v. Vincent*, 883 P.2d 278, 281-83 (Utah 1994); *State ex rel. W.B.J.*, 966 P.2d 295, 296 (Utah Ct. App. 1998) (stating "'underlying empirical facts regarding the claim of indigency'" are reviewed for clear error, while ultimate legal conclusion as to "whether those facts qualify the defendant as indigent" is reviewed for correctness) (citation omitted).



- (3) Whether trial court correctly ruled, on remand from appellate court under Utah Rule of Appellate Procedure 23B, that a defendant's Sixth Amendment right to effective assistance of counsel was violated. See *State v. Bredehoft*, 966 P.2d 285, 289 (Utah Ct. App. 1998), *cert. denied*, 1999 Utah LEXIS 57 (Utah Jan. 13, 1999) (unpublished opinion).
- (4) Whether specific police conduct rises to the level of bad faith. See *State v. Holden*, 964 P.2d 318, 324 (Utah Ct. App. 1998) (referring to standard of review as abuse of discretion), *cert. denied*, No. 981460 (Utah Nov. 19, 1998).
- (5) Whether a defendant waived counsel knowingly and intelligently. See *State v. Heaton*, 958 P.2d 911, 914 (Utah 1998); *State v. McDonald*, 922 P.2d 776, 780 (Utah Ct. App. 1996) ("reasonable measure of discretion").
- (6) Whether the trial court properly applied the law to the facts in a consent-to-search motion to suppress. See *Pena*, 869 P.2d at 938 (stating trial court's discretion in applying law to facts in consent-to-search case is quite narrow "for policy reasons").
- (7) Whether an officer had reasonable suspicion. See *Pena*, 869 P.2d at 939; *State ex rel. M.V.*, 977 P.2d 494, 496 (Utah Ct. App. 1999); *State v. Davis*, 965 P.2d 525, 529 (Utah Ct. App. 1998) (warrantless probation search).
- (8) Whether there was consent to search and seize. See *State v. 175,800 Dollars*, 942 P.2d 343, 346 (Utah 1997).
- (9) "Whether a defendant is competent to proceed to trial." *State v. Woodland*, 945 P.2d 665, 667 (Utah 1997), *State v. Robertson*, 932 P.2d 1219, 1223 (Utah 1997).
- (10) Whether a defendant waived his right to counsel. See *State v. Byington*, 936 P.2d 1112, 1115 (Utah Ct. App. 1997).
- (11) Whether a defendant received ineffective assistance of counsel. See *Taylor v. Warden*, 905 P.2d 277, 282 (Utah 1995), *but see State v. Maestas*, 367 Utah Adv. Rep. 15, 17 (Utah 1999) (stating whether defendant received ineffective assistance of counsel is question of law, reviewed for correctness); *State v. Gallegos*, 967 P.2d 973, 975-76 (Utah Ct. App. 1998) (same).
- [\*26]** (12) The legal effect of false or misleading testimony on defendant's trial. See *State v. Gordon*, 886 P.2d 112, 115 (Utah Ct. App. 1994) ("considerable discretion").
- (13) Whether facts give rise to "enticement" under Utah Code Annotated Section 76-5-406(11). See *State v. Scieszka*, 897 P.2d 1224, 1226 (Utah Ct. App. 1995).
- (14) Whether the State had "reasonable cause" to believe several radio stations had committed a civil antitrust violation. See *Evans v. State*, 963 P.2d 177, 179 (Utah 1998) ("measure of discretion") (citation omitted).

## C. Challenging Conclusions of Law

### 1. Introduction

Legal determinations n22 are defined as "those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances." *Pena*, 869 P.2d at 935 "Appellate review of a trial court's determination of the law is usually characterized by the term 'correctness.'" *Id.* at 936, *accord Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997); *Stangl v. Ernst Home Ctr., Inc.*, 948 P.2d 356, 360 (Utah Ct. App. 1997) "Utah case law teaches that 'correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *Pena*, 869 P.2d at 935, *accord Jeffs v. Stubbs*, 970 P.2d 1234, 1243 (Utah 1998), *cert. denied*, 119 S.Ct. 1803 (1999); *Stangl*, 948 P.2d at 360. Thus, the broadest scope of judicial review extends to questions of law. "This is because appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction." *Pena*, 869 P.2d at 936 (citing Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 779 (1957)); *accord Mariemont Corp. v. White City Water Improvement Dist.*, 958 P.2d 222, 223 (Utah 1998), *Drake*, 939 P.2d at 181; *Stangl*, 948 P.2d at 360.

n22 Although appellate courts usually refer to legal determinations as "questions of law," *Dubois v. Grand Cent.*, 872 P.2d 1073, 1076 (Utah Ct. App. 1994), or "legal conclusions," *Shaw v. Layton Constr. Co.*, 872 P.2d 1059, 1061 (Utah Ct. App. 1994), *Brown v. Weis*, 871 P.2d 552, 558 (Utah Ct. App. 1994), they have also been labeled as "ultimate facts," *State v. Rochelle*, 850 P.2d 480, 485 (Utah Ct. App. 1993), and "ultimate determinations," *State v. Mendoza*, 938 P.2d 303, 304 (Utah Ct. App. 1997), *State v. Bean*, 869 P.2d 984, 985 (Utah Ct. App. 1994).

It is important for the appellate advocate to be able to properly identify issues as legal rather than factual or discretionary so as to apply the appropriate standard of review. See *Drake*, 939 P.2d at 181 ("Essential to any determination of the appropriate standard of review for an issue on appeal is the characterization of that issue as either a question of fact, a question of law, or a mixed question requiring application of the law to the facts."). Often, trial courts will label an issue as a factual finding when it is actually a legal conclusion. The appellate courts will use the standard of review that is in accord with the substance of the issue and not the title given it by the trial court. See *Gillmor v. Wright*, 850 P.2d 431, 433 (Utah 1993) (stating appellate courts disregard labels on factual findings and legal conclusions and look to substance); *Fernandez v. Cook*, 870 P.2d 870, 874-75 (Utah 1993) (stating when reviewing lower court's findings and conclusions appellate courts disregard labels and examine substance of issue).

Further, appellate advocates should also be aware of recent court opinions recognizing that a determination is often the sum of several rulings, each of which may be reviewed under a separate standard of review. See *Fernandez*, 870 P.2d at 874; *State v. Mabe*, 864 P.2d 890, 892 (Utah 1993); *State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993); *Cal Wadsworth Constr. v. City of St. George*, 865 P.2d 1373, 1375 (Utah Ct. App. 1993) (stating whether contract exists "may embody several subsidiary rulings"), *aff'd*, 898 P.2d 1372 (Utah 1995); *State v. Horton*, 848 P.2d 708, 713 (Utah Ct. App. 1993).

Thus, counsel should carefully examine an issue and explore all possible standards of review, rather than assuming only one standard applies. If counsel properly characterizes issues as legal, factual, or discretionary and in turn selects the proper standards of review, his or her brief and oral argument will be more effective, resulting in better judicial decisions.

## 2. Areas of Application

Appellate courts typically apply the correction-of-error standard of review to the following general categories:

### (a) Challenges to the interpretation of the United States and Utah Constitutions:

The supreme court has the ultimate state authority to make legal determinations in its analysis of the United States Constitution, and it does not defer to the lower courts' interpretation of the Utah Constitution. *See, e.g., City of St. George v. Turner*, 860 P.2d 929, 932 (Utah 1993); *State v. Humphrey*, 823 P.2d 464, 465-66 (Utah 1991). Appellate courts have the ultimate power to independently review federal constitutional claims. *See St. George*, 860 P.2d at 932 (citing *Miller v. California*, 413 U.S. 15, 25, 93 S. Ct. 2607, 2615 (1973)); *accord Jeffs v. Stubbs*, 970 P.2d 1234, 1243 (Utah 1998), *cert. denied*, 119 S.Ct. 1803 (1999); *State v. Amoroso*, 975 P.2d 505, 509 (Utah Ct. App. 1999).

### (b) Challenges to the constitutionality of statutes and ordinances:

A trial court's conclusion that a statute or ordinance is constitutional presents a question of law reviewed under a correction-of-error standard. *See State v. Lopes*, 980 P.2d 191, 193 (Utah 1999); *Grand County v. Emery County*, 969 P.2d 421, 422 (Utah 1998); *State v. Krueger*, 975 P.2d 489, 495 (Utah Ct. App. 1999); *State ex rel. W.C.P.*, 974 P.2d 302, 305 **[\*27]** (Utah Ct. App. 1999). A statute is afforded a presumption of validity, and any reasonable doubt is resolved in favor of constitutionality. *See Lopes*, 980 P.2d at 193; *Jeffs*, 970 P.2d at 1248, *cert. denied*, 119 S.Ct. 1803 (1999); *W.C.P.*, 974 P.2d at 305.

### (c) Challenges to the constitutionality of rules:

A trial court's ruling on the constitutionality of a rule is reviewed for correctness. *See City of Monticello v. Christensen*, 788 P.2d 513, 516 (Utah 1990).

### (d) Challenges to the trial court's interpretation of statutes, rules, and ordinances:

The trial court's interpretation of statutes, rules and ordinances is a question of law reviewed for correctness. *See, e.g., Rushton v. Salt Lake County*, 977 P.2d 1201, 1203 (Utah 1999); *Taylor ex rel. C.T. v. Johnson*, 977 P.2d 479, 480 (Utah 1999); *Loporto v. Hoegemann*, 370 Utah Adv. Rep. 21, 22 (Utah Ct. App. 1999) (judicial code); *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 977 P.2d 518, 521 (Utah Ct. App. 1999) (contractor licensing).

A question of legislative intent associated with statutory interpretation is a matter of law, not of fact. *State v. Mitchell*, 824 P.2d 469, 471-72 (Utah Ct. App. 1991). Whether a statute applies to a particular set of facts is a question of law. *See Slisze v. Stanley-Bostitch*, 979 P.2d 317, 319 (Utah 1999); *State v. Burgess*, 870 P.2d 276, 279 (Utah Ct. App. 1994) (noting which statute governs defendant's placement is question of law reviewed for correctness).

### (e) Challenges to the trial court's interpretation of common law:

Questions of common law interpretation are questions of law which the appellate court is well suited to address, and thus gives no deference to the lower court. *See Trujillo v. Jenkins*, 840 P.2d 777, 778-79 (Utah 1992); *State v. Richardson*, 843 P.2d 517, 518 (Utah Ct. App. 1992) ("We consider the trial court's interpretation of binding case law as presenting a question of law and review the trial court's interpretation of that law for correctness.").

(f) Challenges to the court of appeals's "interpretation of the effect of a prior judicial decision, whether one of its own or one of another court." *State v. Montoya*, 887 P.2d 857, 858 (Utah 1994).

## 3. Challenging Conclusions of Law in Civil Cases

### a. Correction-of-Error Standard

A trial court's conclusions of law in civil cases are reviewed for correctness. *See S.S. v. State*, 972 P.2d 439, 440-41 (Utah 1998); *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998); *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 977 P.2d 518, 522 (Utah Ct. App. 1999).

This standard of review has also been referred to as a "correction of error standard." *Jacobsen Inv. Co. v. State Tax Comm'n*, 839 P.2d 789, 790 (Utah 1992); *Sanders v. Ovard*, 838 P.2d 1134, 1135 (Utah 1992); *Commercial Union Assocs. v. Clayton*, 863 P.2d 29, 36 (Utah Ct. App. 1993). As used by Utah's appellate courts, "correctness" means that no particular deference is given to the trial court's ruling on questions of law. *See Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998); *Pena*, 869 P.2d at 936; *Rackley v. Fairview Care Ctrs., Inc.*, 970 P.2d 277, 280 (Utah Ct. App. 1998).

### b. Examples of Conclusions of Law n23

n23 Several of these examples necessarily include underlying or subsidiary factual questions leading to the ultimate legal question.

(1) Whether the terms of a writing are ambiguous. *See Jeffs v. Stubbs*, 970 P.2d 1234, 1251 (Utah 1998), *cert. denied*, 119 S.Ct. 1803 (1999) (trust instrument); *Alf v. State Farm Fire & Cas.*, 850 P.2d 1272, 1274 (Utah 1993) (insurance policy); *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) (assignment); *SLW/Utah, L.C. v. Griffiths*, 967 P.2d 534, 535 (Utah Ct. App. 1998) (lease); *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180, 190 (Utah Ct. App. 1997) (contract); *Hall v. Process Instruments & Control, Inc.*, 866 P.2d 604, 606 (Utah Ct. App. 1993) (employment contract), *aff'd*, 890 P.2d 1024 (Utah 1995).

(2) Whether the trial court properly interpreted an unambiguous writing. *See S.W. Energy Corp. v. Continental Ins. Co.*, 974 P.2d 1239, 1242 (Utah 1999) (insurance policy); *Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998) (contract); *Lee v. Barnes*, 977 P.2d 550, 552 (Utah Ct. App. 1999) (real estate purchase agreement); *Johnson v. Higley*, 977 P.2d 1209, 1213 (Utah Ct. App. 1999) (deed).

(3) Whether a contract exists. *See Walker v. U.S. Gen., Inc.*, 916 P.2d 903, 906 (Utah 1990); *Herm Hughes & Sons, Inc. v. Quintek, Inc.*, 834 P.2d 582, 583 (Utah Ct. App. 1992).

- (4) Whether a privilege exists in a defamation action. See *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992)
- (5) Whether a person is properly served with process. See *In re Schwenke*, 865 P.2d 1350, 1354 (Utah 1993)
- (6) Whether an eminent domain taking was necessary. See *Cornish Town v. Koller*, 817 P.2d 305, 309-10 (Utah 1991).
- (7) Whether a duty of care is owed. See *Tallman v. City of Hurricane*, 370 Utah Adv. Rep. 31, 31 (Utah 1999) (negligence); *Trujillo v. Jenkins*, 840 P.2d 777, 778-79 (Utah 1992) (landowner).
- [\*28]** (8) Whether the discovery rule applies to toll a statute of limitations. See *Klinger v. Kightly*, 791 P.2d 868, 870 (Utah 1990), *Sevy v. Secury Title Co.*, 857 P.2d 958, 961 (Utah Ct. App. 1993), *vacated, in part, on other grounds*, 902 P.2d 629 (Utah 1995)
- (9) Whether a party has failed to prove a prima facie case. See *Sorenson v. Kennecott-Utah Copper Corp.*, 873 P.2d 1141, 1144 (Utah Ct. App. 1994), *Handy v. Union Pac. R.R.*, 841 P.2d 1210, 1215 (Utah Ct. App. 1992).
- (10) Whether a denial of a motion to dismiss based on governmental immunity was proper. See *Petersen v. Board of Educ.*, 855 P.2d 241, 242 (Utah 1993).
- (11) Whether a party has failed to comply with the requirements of a statute and the rules of civil procedure sufficient to justify involuntary dismissal. See *Avila v. Winn*, 794 P.2d 20, 22 (Utah 1990).
- (12) Whether a party is entitled to summary judgment. See *Tallman*, 370 Utah Adv. Rep. at 31; *Gerbich v. Numed, Inc.*, 977 P.2d 1205, 1207 (Utah 1999); *Coulter & Smith v. Russell*, 976 P.2d 1218, 1221 (Utah Ct. App. 1999); *Winters v. Schulman*, 977 P.2d 1218, 1221 (Utah Ct. App. 1999).
- (13) Whether the trial court's findings of fact and conclusions of law satisfy the elements of quasi-contract. See *Bailey-Allen*, 945 P.2d at 180.
- (14) Whether a statute of limitations has expired. See *Estes v. Tibbs*, 979 P.2d 823, 824 (Utah 1999); *Kessimakis v. Kessimakis*, 977 P.2d 1226, 1228 (Utah Ct. App. 1999).
- (15) Whether the trial court's refusal to give a jury instruction is proper. See *Cornia v. Wilcox*, 898 P.2d 1379, 1386 (Utah 1995)
- (16) Whether a plaintiff is entitled to prejudgment interest. See *Klinger v. Kightly*, 889 P.2d 1372, 1381 (Utah Ct. App. 1995); *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171, 177 (Utah Ct. App. 1993).
- (17) Whether a defense or claim is without merit. See *Broadwater v. Old Republic Sur.*, 854 P.2d 527, 534 n.3 (Utah 1993); *Jeschke v. Willis*, 811 P.2d 202, 203 (Utah Ct. App. 1991).
- [\*29]** (18) Whether the trial court correctly determined that Nevada rather than Utah law applied. See *Shaw v. Layton Constr. Co.*, 872 P.2d 1059, 1061 (Utah Ct. App. 1994).
- (19) Whether a statute operates retroactively. See *Brown & Root Indus. Serv. v. Industrial Comm'n*, 947 P.2d 671, 675 (Utah 1997), *State, Dep't of Human Servs. v. Jacoby*, 975 P.2d 939, 941 (Utah Ct. App. 1999)
- (20) Whether a court has personal or subject matter jurisdiction. See *Pledger v. Gillespie*, 370 Utah Adv. Rep. 25, 26 (Utah 1999), *Starways, Inc. v. Curry*, 980 P.2d 204, 205 (Utah 1999); *Jacoby*, 975 P.2d at 941; *Buddensick v. Stateline Hotel, Inc.*, 972 P.2d 928, 930 (Utah Ct. App. 1998), *cert. denied*, No. 990063 (Apr. 13, 1999).
- (21) Whether a party is entitled to attorney fees. See *Lee v. Barnes*, 977 P.2d 550, 552 (Utah Ct. App. 1999), *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 977 P.2d 518, 522 (Utah Ct. App. 1999).
- (22) Whether the trial court correctly determined that a complaint was or was not void ab initio, thus depriving the trial court of jurisdiction. See *Grabam v. Davis County Solid Waste Management & Energy Recovery Special Serv. Dist.*, 979 P.2d 363, 367 (Utah Ct. App. 1999).
- (23) Challenges to jury instructions. See *Child v. Gonda*, 972 P.2d 425, 429 (Utah 1998); *State v. Clements*, 967 P.2d 957, 959 (Utah Ct. App. 1998).
- (24) Whether trial court properly applied the law of conversion. See *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 974 P.2d 288, 295 (Utah 1999).
- (25) Whether trial court correctly selected applicable law. See *4447 Assocs. v. First Sec. Fin.*, 973 P.2d 992, 995 (Utah Ct. App. 1999); *Wilde v. Wilde*, 969 P.2d 438, 442 (Utah Ct. App. 1998).
- (26) Whether the trial court correctly determined that an arbitration agreement was enforceable. See *Jenkins v. Percival*, 962 P.2d 796, 798 (Utah 1998); *McCoy v. Blue Cross & Blue Shield*, 980 P.2d 694, 696-97 (Utah Ct. App. 1999)
- (27) Whether a party's substantial compliance with the renewal clause in a lease option operated as an exercise of the renewal clause. See *Geisdorf v. Doughty*, 972 P.2d 67, 69 (Utah 1998).
- (28) "Whether a clear and substantial public policy exists supporting a wrongful discharge claim based on an employer's violation of that policy . . ." *Rackley v. Fairview Care Ctrs., Inc.*, 970 P.2d 277, 280 (Utah Ct. App. 1998).
- (29) Whether a leasehold exists. See *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 107 (Utah 1998), *State v. Hawkins*, 967 P.2d 966, 970 (Utah Ct. App. 1998).
- (30) Appellate court review of an arbitration award "is limited to the legal issue of whether the trial court correctly exercised its authority in confirming, vacating, or modifying an arbitration award." *Intermountain Power Agency v. Union Pac. R.R. Co.*, 961 P.2d

320, 323 (Utah 1998); accord *Pacific Dev. L.C. v. Orton*, 372 Utah Adv. Rep. 40, 40-41 (Utah Ct. App. 1999).

(31) "Whether a party was prejudiced for purposes of the doctrine of laches . . . ." *Anderson v. Doms*, 372 Utah Adv. Rep. 20, 21 (Utah Ct. App. 1999).

(32) "Whether promissory estoppel precludes . . . asserting the statute of frauds as a defense . . . ." *Stangl v. Ernst Home Ctr., Inc.*, 948 P.2d 356, 360 (Utah Ct. App. 1997).

(33) "Whether a plaintiff has standing . . . ." *Architectural Comm. v. Kabatznick*, 949 P.2d 776, 777 (Utah Ct. App. 1997).

(34) Whether res judicata applies. See *Macris & Assocs. v. Neways*, 374 Utah Adv. Rep. 6, 7 (Utah Ct. App. 1999).

(35) Whether a trust is valid. See *In re Estate of Groesbeck*, 935 P.2d 1255, 1257 (Utah 1997).

(36) "Whether an attorney made an erroneous legal interpretation . . . ." *Watkiss & Saperstein v. Williams*, 931 P.2d 840, 846 (Utah 1996).

(37) "Whether a party's failure to state an actionable claim requires dismissal . . . ." *Mori v. Mori*, 931 P.2d 854, 856 (Utah 1997).

(38) Whether the trial court properly denied a motion to compel arbitration. See *Sosa v. Paulos*, 924 P.2d 357, 360 (Utah 1996).

(39) "Whether a contract is unconscionable . . . ." See *id.*, 924 P.2d at 360.

(40) Whether "Utah's one-action rule protect[s] co-makers on a secured promissory note who provided none of the real property securing the note." *APS v. Briggs*, 927 P.2d 670, 672 (Utah Ct. App. 1996).

(41) Whether the trial court correctly concluded that a party breached a covenant against encumbrances. See *Webb v. Interstate Land Corp.*, 920 P.2d 1187, 1190 (Utah 1996).

(42) Whether the trial court properly interpreted "'the effect of a prior judicial decision . . . .'" *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 464 (Utah 1996) (citation omitted).

**[\*30]** (43) "Whether an injury occurred within the course of employment . . . ." *Walker v. U.S. Gen., Inc.*, 916 P.2d 903, 907 (Utah 1996).

(44) Whether the trial court properly granted a motion for j.n.o.v. See *Walker v. Parish Chem. Co.*, 914 P.2d 1157, 1160 (Utah Ct. App. 1996).

(45) "Whether the substantial compliance doctrine applies to residential leases . . . ." *Housing Auth. v. Delgado*, 914 P.2d 1163, 1165 (Utah Ct. App. 1996).

(46) "Whether the trial court properly complied, on remand, with" an appellate court's earlier decision. *Slattery v. Covey & Co.*, 909 P.2d 925, 927 (Utah Ct. App. 1995).

(47) "Whether third-party adjusting by licensed public adjusters constitutes the practice of law . . . ." *Utah State Bar v. Summerhayes & Hayden*, 905 P.2d 867, 869 (Utah 1995).

(48) Whether the government has committed a "taking" of private property. See *Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995).

(49) Whether the trial court properly "structured the dissolution and winding up of a partnership." *Phillips v. Hatfield*, 904 P.2d 1108, 1109 (Utah Ct. App. 1995) (granting court "considerable deference") (citations omitted).

(50) Whether the trial court properly awarded or denied pre-judgment interest. See *Cornia*, 898 P.2d at 1387.

(51) Whether the trial court properly denied a motion to compel disclosure of a videotape. See *Roundy v. Staley*, 374 Utah Adv. Rep. 15, 16 (Utah Ct. App. 1999).

(52) Whether the trial court properly ruled on the sufficiency of a complaint. See *Roark v. Crabtree*, 893 P.2d 1058, 1061 (Utah 1995).

(53) "Whether reinstatement with back pay is a permissible remedy in an action based upon breach of an employment contract . . . ." *Thurston v. Box Elder County*, 892 P.2d 1034, 1040 (Utah 1995).

(54) Whether an agreement was an agreement to arbitrate. See *Reed v. Davis County Sch. Dist.*, 892 P.2d 1063, 1064 (Utah Ct. App. 1995).

(55) The effect of notice. See *4447 Assocs. v. First Sec. Fin.*, 889 P.2d 467, 471 (Utah Ct. App. 1995).

(56) "Whether a particular benefit or detriment may serve as consideration to support an enforceable contract . . . ." *In re Estate of Beesley*, 883 P.2d 1343, 1351 (Utah 1994).

#### **4. Challenging Conclusions of Law in Criminal Cases**

##### **a. Correction-of-Error Standard**

A trial court's conclusions of law in criminal cases are reviewed for correctness. n24 See *State v. Galli*, 967 P.2d 930, 933 (Utah 1998); *State v. Harley*, 371 Utah Adv. Rep. 17, 18 (Utah Ct. App. 1999). "Controlling Utah case law teaches that 'correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *Pena*, 869

P.2d at 936; see *State v. Maguire*, 975 P.2d 476, 478 (Utah Ct. App. 1999).

n24 Additionally, appellate courts will review the *sufficiency* of the trial court's findings of fact for correctness. See *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991), *State v. Pharris*, 846 P.2d 454, 459 (Utah Ct. App. 1993).

#### **b. Examples of Conclusions of Law n25**

n25 Several of these examples necessarily include underlying or subsidiary factual questions leading to the ultimate legal question.

(1) Whether a defendant validly waived his or her Miranda rights. See *State v. Dutchie*, 969 P.2d 422, 427 (Utah 1998), *State v. Leyva*, 951 P.2d 738, 741 (Utah 1997) (granting trial court "a measure of discretion . . . because of the variability of the factual settings") (quoting *Pena*, 869 P.2d at 941).

(2) "Whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea . . ." See *State v. Holland*, 921 P.2d 430, 433 (Utah 1996); accord *State v. Benvenuto*, 372 Utah Adv. Rep. 3, 4 (Utah 1999).

(3) Whether the Rules of Professional Conduct apply to a particular set of facts. See *State v. Johnson*, 823 P.2d 484, 489 (Utah Ct. App. 1991).

(4) Whether service of process is proper. See *State v. D.M.Z.*, 830 P.2d 314, 316 (Utah Ct. App. 1992).

(5) Whether a trial court has jurisdiction to quash bindover orders. See *State v. Humphrey*, 823 P.2d 464, 465-66 (Utah 1991).

(6) Whether res judicata applies. See *State v. V.G.P.*, 845 P.2d 944, 946 (Utah Ct. App. 1992).

(7) Whether consent to a search was voluntary. See *State v. Thurman*, 846 P.2d 1256, 1270-71 & n.11 (Utah 1993); *State v. Kiriluk*, 975 P.2d 469, 473 (Utah Ct. App. 1999).

(8) Whether a trial court may impose separate sentences for related crimes. See *State v. Stettina*, 868 P.2d 108, 109 (Utah Ct. App. 1994).

(9) Whether a defendant is "in custody" during a police interview. See *State v. Wood*, 868 P.2d 70, 83 (Utah 1993); *State v. Worthington*, 970 P.2d 714, 715 (Utah Ct. App. 1998); *State v. Brandley*, 972 P.2d 78, 81 (Utah Ct. App. 1998).

**[\*31]** (10) Whether a jury instruction correctly states the law. See *State v. Archuleta*, 850 P.2d 1232, 1244 (Utah 1993); *State v. Harley*, 371 Utah Adv. Rep. 17, 18 (Utah Ct. App. 1999).

(11) Whether the trial court properly refused to give requested instructions to a jury. See *State v. Parra*, 972 P.2d 924, 927 (Utah Ct. App. 1998) (lesser included offense); *State v. Payne*, 964 P.2d 327, 332 (Utah Ct. App. 1998) (same).

(12) Whether an attorney's decision not to contact prospective witnesses was reasonable. See *State v. Templin*, 805 P.2d 182, 187 (Utah 1990).

(13) Whether a trial court properly declined to exercise jurisdiction. See *State v. Humphrey*, 794 P.2d 496, 497 (Utah Ct. App. 1990), *rev'd on other grounds*, 823 P.2d 464 (Utah 1990).

(14) "Whether police action implicates a fundamental violation of [a defendant's] rights." See *State ex rel. A.R.*, 937 P.2d 1037, 1039 (Utah Ct. App. 1997) (citation omitted).

(15) Whether "the legal standard applicable to the defense of involuntary intoxication is incorporated within the" statutory mental illness defense. See *State v. Gardner*, 870 P.2d 900, 901 (Utah 1993).

(16) Whether one's spouse may consent to the search of jointly owned property. See *State v. Genovesi*, 871 P.2d 547, 551 (Utah Ct. App. 1994).

(17) As an ultimate legal determination, whether a confession was voluntary. See *State v. Mabe*, 864 P.2d 890, 892 (Utah 1993), *State v. Price*, 909 P.2d 256, 260 (Utah Ct. App. 1995).

(18) Whether a restitution order abates when a defendant dies during the pendency of an appeal. See *State v. Christensen*, 866 P.2d 533, 534-35 (Utah 1993).

(19) Whether a defendant has a legitimate expectation of privacy in a searched package. See *State v. Holden*, 964 P.2d 318, 321 (Utah Ct. App. 1998), *cert. denied*, No. 981 460 (Nov. 19, 1998).

(20) Whether a defendant may use the entrapment defense. See *State v. Gallegos*, 849 P.2d 586, 589 (Utah Ct. App. 1993).

(21) Whether a trial court has exceeded its discretion. See *Thurman*, 846 P.2d at 1270 n.11.

(22) Whether a prima facie case of race discrimination in a jury selection has been established. See *State v. Pharris*, 846 P.2d 454, 459 (Utah Ct. App. 1993).

(23) Whether a defendant validly invoked his or her right to counsel after first waiving his or her right to counsel. See *Kiriluk*, 975 P.2d at 471.

(24) Whether the Double Jeopardy Clause forbids a trial court from resentencing a defendant after a guilty plea at a second trial. See *State v. Maguire*, 975 P.2d 476, 478 (Utah Ct. App. 1999).

(25) Whether a trial court should have granted or denied a motion to dismiss. See *State v. Amoroso*, 975 P.2d 505, 506 (Utah Ct. App. 1999); *State v. Krueger*, 975 P.2d 489, 493 (Utah Ct. App. 1999).

(26) "Whether a fine is overwhelmingly disproportionate as to constitute punishment for double jeopardy purposes . . . ." *State v. Mendoza*, 938 P.2d 303, 305 (Utah Ct. App. 1997).

(27) Whether the right to a free press keeps the State from prosecuting journalists for contributing to the delinquency of minors when journalists asked minors to chew tobacco to be taped for a television news report. See *Krueger*, 975 P.2d at 496.

(28) Whether federal law preempts the State from passing boating registration legislation. See *State v. Sterkel*, 933 P.2d 409, 411 (Utah Ct. App. 1997).

(29) Whether, under "single criminal episode" statute, defendant can be prosecuted for possessing methamphetamine when he had pleaded guilty to possessing drug paraphernalia found at the same time and same place as methamphetamine. See *State v. Keppler*, 976 P.2d 99, 99 (Utah Ct. App. 1999).

(30) Whether defendant received ineffective assistance of counsel at trial. See *State v. Maestas*, 367 Utah Adv. Rep. 15, 17 (Utah 1999); *Gallegos*, 967 P.2d at 975-76; but see *Taylor v. Warden*, 905 P.2d 277, 282 (Utah 1995) (stating whether defendant received ineffective assistance of counsel is mixed question of fact and law).

(31) Whether two statutes proscribe the same conduct but impose different penalties, thereby mandating that a defendant be charged under the statute carrying the lesser penalty. See *State ex rel. W.C.P.*, 974 P.2d 302, 305 (Utah Ct. App. 1999); *State v. Fisher*, 972 P.2d 90, 98 (Utah Ct. App. 1998).

(32) Whether trial court should have consolidated multiple charges against the defendant. See *State v. Giles*, 966 P.2d 872, 877 (Utah Ct. App. 1998).

(33) Whether the good-faith exception to the exclusionary rule applies to an administrative traffic checkpoint stop. See *State v. Deherrera*, 965 P.2d 501, 503 (Utah Ct. App. 1998).

(34) Whether an affidavit asserting judicial bias is legally sufficient to support a judge's recusal. See *State ex rel. M.L.*, 965 P.2d 551, 556 (Utah Ct. App. 1998).

**[\*32]** (35) "The ultimate decision 'to bind a defendant over for trial . . . ." *State v. Rivera*, 954 P.2d 225, 227 (Utah Ct. App. 1998); accord *State v. Redd*, 954 P.2d 230, 234 (Utah Ct. App. 1998).

(36) Whether a defendant should be sentenced under a lesser penalty enacted before his or her sentencing. See *State v. Patience*, 944 P.2d 381, 384 (Utah Ct. App. 1997).

(37) Whether multiple counts of the same offense should be consolidated into one. See *id.* at 391.

(38) Whether trial court must "make findings of fact and legally determine the reliability of an eyewitness identification before admitting such testimony." *State v. Nelson*, 950 P.2d 940, 942-43 (Utah Ct. App. 1997).

(39) Whether the Utah Constitution recognizes "a reasonable expectation of privacy in . . . garbage left for collection outside the curtilage of a home . . . ." *State v. Jackson*, 937 P.2d 545, 547 (Utah Ct. App. 1997), cert. granted, 945 P.2d 1118 (Utah 1997).

(40) "Whether a statement is offered for the truth of the matter asserted . . . ." See *State v. Perez*, 924 P.2d 1, 2 (Utah Ct. App. 1996).

(41) Whether a defendant is "entitled to a lesser sentence when the legislature reduces the penalty for the crime charged after conviction but before sentencing." *State v. Yates*, 918 P.2d 136, 138 (Utah Ct. App. 1996).

(42) Whether a defendant's "dilatory conduct affects [his or her] entitlement to a lesser sentence." *Id.*

(43) Whether the trial court properly refused to grant defendant credit for time spent in the state hospital pending a competency determination. See *State v. Fife*, 911 P.2d 989, 991 (Utah Ct. App. 1996).

(44) Whether two crimes "constitute repugnant theories, requiring proof of contradictory facts." *State v. Montoya*, 910 P.2d 441, 443 (Utah Ct. App. 1996).

(45) Whether "the State failed to properly charge incest in [an] amended information thereby failing to provide [the defendant] with adequate notice." *Id.* at 443.

#### **D. Challenges in Specific Practice Areas**

##### **1. Challenges in Divorce Cases**

###### **a. Challenging Findings of Fact**

###### **(i) Clearly Erroneous Standard**

Appellate courts give great deference to the trial court's findings of fact in divorce cases and will not overturn them unless they are clearly erroneous. See *Kessimakis v. Kessimakis*, 977 P.2d 1226, 1228 (Utah Ct. App. 1999); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1277 (Utah 1987). A finding of fact will be adjudged clearly erroneous if it violates the standards set by the appellate court, is against the clear weight of the evidence, or the reviewing court is left with "a definite and firm conviction that a mistake has been made" although there is evidence to support the finding. *Cummings v. Cummings*, 821 P.2d 472, 476 (Utah Ct. App. 1991) (citation omitted).

###### **(ii) Marshaling Cases**

The following are cases involving divorce proceedings in which appellate courts have addressed the marshaling requirement: *Moon v. Moon*, 973 P.2d 431, 437 (Utah Ct. App. 1999) (affirming trial court's construction of ambiguous decree because appellant failed to marshal the evidence in support of trial court's ruling); *Larson v. Larson*, 888 P.2d 719, 723 (Utah Ct. App. 1994) (marshaling burden met); *Schaumburg v. Schaumburg*, 875 P.2d 598, 603 (Utah Ct. App. 1994) (rejecting marshaling effort of husband who had merely reargued evidence supporting his position); *Shepherd v. Shepherd*, 876 P.2d 429, 432 (Utah Ct. App. 1994) ("If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case.") (citation omitted).

### (iii) Examples of Fact Questions

(1) Whether a person has been served with process. See *Carnes v. Carnes*, 668 P.2d 555, 557 (Utah 1983). n26

n26 Whether a person has been *properly* served, however, is a question of law. See *Reed v. Reed*, 806 P.2d 1182, 1184 n.3 (Utah 1991).

(2) Whether an ex-wife may set aside a conveyance of property from an ex-husband based on fraud and mutual mistake. See *Despain v. Despain*, 855 P.2d 254, 256-57 (Utah Ct. App. 1993).

(3) Whether a spouse has waived his or her right to reduce alimony payments. See *Hinckley v. Hinckley*, 815 P.2d 1352, 1354 (Utah Ct. App. 1991).

(4) Whether a deed to property has been "delivered." See *Horton v. Horton*, 695 P.2d 102, 106 (Utah 1984).

(5) Whether a defendant is voluntarily underemployed. See *Hill v. Hill*, 869 P.2d 963, 965 (Utah Ct. App. 1994).

(6) Whether a spouse who is responsible for paying child support has inappropriately delayed trial proceedings. See *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah Ct. App. 1992).

(7) Whether a spouse is able to contribute to his or her own support by working part-time. See *Wilde v. Wilde*, 969 P.2d 438, 442 (Utah Ct. App. 1998).

[\*33] (8) Whether the trial court properly determined the child's best interests. See *Christensen v. Christensen*, 941 P.2d 622, 624 (Utah Ct. App. 1997).

(9) "Whether overtime work will continue at a certain level . . . ." *Crompton v. Crompton*, 888 P.2d 686, 689 (Utah Ct. App. 1994).

### (iv) Adequacy of Trial Court's Factual Findings

To ensure that the trial court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions. See *Willey v. Willey*, 951 P.2d 226, 230 (Utah 1997); *Rehn v. Rehn*, 974 P.2d 306, 310, 312 (Utah Ct. App. 1999) (regarding alimony factors and factors in child support guidelines); *Wilde v. Wilde*, 969 P.2d 438, 444 (Utah Ct. App. 1998) (holding trial court's findings of fact regarding attorney fees were insufficient).

The trial court must make sufficiently detailed findings on each factor to enable a reviewing court to ensure that the trial court's discretionary determination was rationally based upon the applicable factors. See *Williamson v. Williamson*, 372 Utah Adv. Rep. 45, 46 (Utah Ct. App. 1999) (stating trial court's findings "should be more than cursory statements; they must 'be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached'" (citation omitted); *Rehn*, 974 P.2d at 312 (remanding for further findings on "extenuating circumstances" justifying extending alimony award beyond length of marriage and regarding statutory child support factors); *Endrody v. Endrody*, 914 P.2d 1166, 1168, 1171 (Utah Ct. App. 1996) (remanding award of attorney fees for entry of findings); *but c.f. Hall v. Hall*, 858 P.2d 1018, 1025 (Utah Ct. App. 1993) ("Unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made").

Formal findings of fact greatly help the parties determine if a basis for appeal exists, and, if the appeal is taken, significantly aid the appellate court in its review. See *Christensen v. Christensen*, 628 P.2d 1297, 1301 (Utah 1981). If the findings are legally inadequate the exercise of marshaling the evidence supporting the findings becomes futile and appellant need not marshal. See *Williamson*, 372 Utah Adv. Rep. at 47 n.2.

## b. Challenging Discretionary Rulings

### (i) Abuse-of-Discretion Standard

"Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence." *Childs v. Childs*, 967 P.2d 942, 944 (Utah Ct. App. 1998) (citation omitted), *cert. denied*, No. 981807 (Utah Feb. 17, 1999). "Where the trial court may exercise broad discretion, we presume the correctness of the court's decision absent 'manifest injustice or inequity that indicates a clear abuse of . . . discretion.'" *Childs*, 967 P.2d at 944 (citation omitted) (alteration in original). However, "while trial courts have broad discretion . . . that discretion must be exercised within legal parameters set by appellate courts." *Cummings v. Cummings*, 821 P.2d 472, 474-75 (Utah Ct. App. 1991). Furthermore, "to ensure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions." *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah Ct. App. 1993) (citations omitted).

### (ii) Examples of Questions within the Trial Court's Discretion

(1) Whether property has been equitably divided. See *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1277 (Utah 1987) (giving trial court broad latitude in dividing marital estate); *Bingham v. Bingham*, 872 P.2d 1065, 1067 (Utah Ct. App. 1994).

(2) Whether spousal support is sufficient. See *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986); *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985); *Childs v. Childs*, 967 P.2d 942, 944 (Utah Ct. App. 1998), *cert. denied*, No. 981807 (Utah Feb. 17, 1999); *Griffith v. Griffith*, 959 P.2d 1015, 1019 (Utah Ct. App. 1998), *aff'd*, 1999 Utah LEXIS 114 (Utah Aug. 27, 1999).

- (3) Whether an award of child custody and support is proper. See *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985); *Hill v. Hill*, 968 P.2d 866, 869 (Utah Ct. App. 1998) (stating appellate court will not disturb "trial court's apportionment of financial responsibilities in the absence of manifest injustice or inequity that indicates a clear abuse of discretion") (citation omitted).
- (4) Whether a divorce decree should be modified because the parties have experienced a substantial, material change of circumstances. See *Moon v. Moon*, 973 P.2d 431, 437 (Utah Ct. App. 1999); *Wilde v. Wilde*, 969 P.2d 438, 442 (Utah Ct. App. 1998).
- (5) Whether the trial court properly determined visitation rights. See *Watson v. Watson*, 837 P.2d 1, 4 (Utah Ct. App. 1992).
- (6) Whether the trial court accurately determined and assigned values to marital property. See *Shepherd v. Shepherd*, 876 P.2d 429, 433 (Utah Ct. App. 1994) (stating, although marital estate is generally valued at time of trial, "trial court has broad discretion to use a different date, such as the date of separation"); *Morgan v. Morgan*, 854 P.2d 559, 563 (Utah Ct. App. 1993).
- [\*34]** (7) Whether the trial court properly allocated marital debts. See *Hill v. Hill*, 869 P.2d 963, 966-67 (Utah Ct. App. 1994).
- (8) Whether the trial court properly awarded a parent the right to claim children as income tax dependents. See *id.*, 869 P.2d at 967.
- (9) Whether the trial court should award attorney fees. See *Moon*, 973 P.2d at 439; *Wilde*, 969 P.2d at 442.
- (10) Whether premarital equity in the marital home has lost its separate character as premarital property. See *Willey v. Willey*, 866 P.2d 547, 555 (Utah Ct. App. 1993).
- (11) Whether a modified child or spousal support payment should be retroactive. See *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah Ct. App. 1992).
- (12) Whether the trial court should admit evidence of concealment or fraud. See *Wilde*, 969 P.2d at 442.
- (13) Whether the trial court properly allowed a party to amend his or her pleadings to show process was served by an alternate method. See *Mori v. Mori*, 896 P.2d 1237, 1239 (Utah Ct. App. 1995), *rev'd on other grounds*, 931 P.2d 854 (Utah 1997).
- (14) The standard of living that existed during the marriage. See *Crompton v. Crompton*, 888 P.2d 686, 689 (Utah Ct. App. 1994).
- (15) "Selecting an appropriate method of assessing a spouse's income . . . ." *Griffith v. Griffith*, No. 981462, 1999 Utah LEXIS 114, at \*16 (Utah Aug. 27, 1999)

### **(iii) Example of Mixed Question Analyzed Under *Pena***

- (1) Whether a former spouse is residing with a person of the opposite sex. See *Pendleton v. Pendleton*, 918 P.2d 159, 160 (Utah Ct. App. 1996).

## **c. Challenging Conclusions of Law**

### **(i) Correction-of-Error Standard**

Although appellate courts give great deference to a trial court's factual findings, conclusions of law arising from those findings are reviewed for correctness and given no special deference on appeal. See *Kessimakis v. Kessimakis*, 977 P.2d 1226, 1228 (Utah Ct. App. 1999); *Wilde v. Wilde*, 969 P.2d 438, 442 (Utah Ct. App. 1998).

"Controlling Utah case law teaches that 'correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *Pena*, 869 P.2d at 936 (Utah 1994). "This is because appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction." *Id.* at 936 (citing Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 779 (1957)).

### **(ii) Examples of Conclusions of Law**

- (1) Whether a person has been properly served with process. See *Reed v. Reed*, 806 P.2d 1182, 1184 n.3 (Utah 1991). n27  
n27 However, whether a person has been served with process is a question of fact. See *Carnes v. Carnes*, 668 P.2d 555, 557 (Utah 1983).
- (2) Whether the trial court properly denied a motion to strike an order to show cause. See *Grover v. Grover*, 839 P.2d 871, 873 (Utah Ct. App. 1992).
- (3) Whether a court has subject matter jurisdiction. See *Rimensburger v. Rimensburger*, 841 P.2d 709, 710 (Utah Ct. App. 1992); *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1337 (Utah Ct. App. 1991).
- (4) Whether a divorce decree is ambiguous. See *Moon v. Moon*, 973 P.2d 431, 435 (Utah Ct. App. 1999) (stating appellate court "interpret[s] a divorce decree according to established rules of contract interpretation" (citation omitted)); *Lyngle v. Lyngle*, 831 P.2d 1027, 1029 (Utah Ct. App. 1992).
- (5) Whether an agreement is ambiguous. See *Rudman v. Rudman*, 812 P.2d 73, 78 (Utah Ct. App. 1991) (prenuptial); *Neilson v. Neilson*, 780 P.2d 1264, 1267 (Utah Ct. App. 1989) (same); *D'Aston v. D'Aston*, 808 P.2d 111, 114 (Utah Ct. App. 1990) (postnuptial).
- (6) Whether res judicata applies. See *Smith v. Smith*, 793 P.2d 407, 409 (Utah Ct. App. 1990).
- (7) Whether a home fits the definition of "usual place of abode." See *Reed*, 806 P.2d at 1184.



(8) Whether a trial court correctly resolved a party's objection to the recommendation of a commissioner. See *Dent v. Dent*, 870 P.2d 280, 282 (Utah Ct. App. 1994).

(9) Which states' statute of limitation is longer under the Uniform Interstate Family Support Act. See *State, Dep't of Human Servs v Jacoby*, 975 P.2d 939, 941 (Utah Ct. App. 1999)

(10) Whether a statute of limitation has expired. See *Kessimakis v. Kessimakis*, 977 P.2d 1226, 1228 (Utah Ct. App. 1999).

(11) Whether a trial court's award of attorney fees is supported by adequate findings of fact. See *Rehn v. Rehn*, 974 P.2d 306, 313 (Utah Ct. App. 1999).

(12) Whether a lump sum separation payment from the military is a retirement payment for purposes of property division. See *Marsh v. Marsh*, 973 P.2d 988, 990 (Utah Ct. App. 1999).

**[\*35]** (13) Whether the trial court properly disregarded a domestic relations commissioner's recommendation. See *Moon*, 973 P.2d at 434

(14) Whether the trial court correctly selected the applicable law. See *Wilde v. Wilde*, 969 P.2d 438, 442 (Utah Ct. App. 1998); *Hill v Hill*, 968 P.2d 866, 868 (Utah Ct. App. 1998) (presenting question of whether trial court selected correct definition of "cohabitation").

(15) "Whether a trial court's equitable powers over divorce proceedings allow it to invade a valid, inter-vivos trust . . . ." *Endrody v. Endrody*, 914 P.2d 1166, 1168 (Utah Ct. App. 1996).

(16) Whether the trial court properly declined to exercise jurisdiction. See *Liska v. Liska*, 902 P.2d 644, 646 (Utah Ct. App. 1995)

(17) "Whether a 401(a) plan can be considered marital property . . . ." *Jefferies v. Jefferies*, 895 P.2d 835, 836 (Utah Ct. App. 1995).

(18) "The articulation of the proper legal standard for inadequate disclosure in the context of premarital agreements . . . ." *In re Estate of Beesley*, 883 P.2d 1343, 1347 (Utah 1994).

## **2. Challenges in Juvenile Court Cases**

### **a. Challenging Findings of Fact**

#### **(i) Clearly Erroneous Standard**

In juvenile cases, appellate courts "will find clear error if [they] are convinced that a mistake has been made, or if the [trial court's] findings are against the clear weight of the evidence." *State ex rel. M.E.C.*, 942 P.2d 955, 960 (Utah Ct. App. 1997)

#### **(ii) Marshaling Cases**

In challenging the sufficiency of the juvenile court's findings of fact, an appellant "must marshal [sic] the evidence in support of the findings and then demonstrate that despite this evidence, the [juvenile] court's findings are so lacking in support as to be against the clear weight of the evidence." *State ex rel. D.G.*, 938 P.2d 298, 301 (Utah Ct. App. 1997) (citations omitted) (alterations in original)

The following are cases involving appeals from juvenile court trials in which appellate courts have addressed the marshaling requirement: *State ex rel. M.W.*, 970 P.2d 284, 291 (Utah Ct. App. 1998) (rejecting appellant's "general" challenge to findings of fact establishing rebuttal of parental presumption because evidence not marshaled), *cert. granted*, No. 990137 (May 16, 1999); *State ex rel. T.J.*, 945 P.2d 158, 164 (Utah Ct. App. 1997) (affirming juvenile court when appellant raised no record evidence contradicting findings and conclusions and simply reargued "same points she argued to the juvenile court"); *State ex rel. D.G.*, 938 P.2d at 301 (affirming juvenile court because appellant did not marshal).

#### **(iii) Examples of Fact Questions**

(1) Whether a parent lacks the three *Hutchison* characteristics giving rise to the presumption that a natural parent will be given custody of his or her children over a nonparent. See *State ex rel. M.W.*, 970 P.2d 284, 291 (Utah Ct. App. 1998)

(2) Whether a trial court properly found grounds to terminate a parent's rights is reviewed for clear error. See *State ex rel. J.N.*, 960 P.2d 403, 407 (Utah Ct. App. 1998); *State ex rel. M.E.C.*, 942 P.2d 955, 960 (Utah Ct. App. 1997)

#### **(iv) Adequacy of Trial Court's Factual Findings**

The importance of adequate findings, as discussed above, applies with equal force to cases in juvenile court. The following cases address the adequacy of the trial court's factual findings: *State ex rel. M.C.*, 940 P.2d 1229, 1236-37 (Utah Ct. App. 1997) (stating "in cases involving the abuse and neglect of children, trial courts should go to extra lengths to enter detailed findings of fact"); *State ex rel. S.T.*, 928 P.2d 393, 398-99 (Utah Ct. App. 1996) (discussing sufficiency of findings in termination of parental rights case).

### **b. Challenging Discretionary Rulings**

#### **(i) Abuse-of-Discretion Standard**

Juvenile courts are granted broad discretion in making certain determinations. See *J.M.V. v. State*, 958 P.2d 943, 947 (Utah Ct. App. 1998) (custody); *State ex rel. M.L.*, 965 P.2d 551, 559 (Utah Ct. App. 1998) (termination of parental rights). A reviewing court will not reverse a juvenile court's discretionary ruling "if it is consistent with the standards set by appellate courts and supported by adequate findings of fact and conclusions of law." *J.M.V.*, 958 P.2d at 947 (citations omitted).

#### **(ii) Examples of Questions within Trial Court's Discretion**

(1) Whether parental rights should be terminated. See *State ex rel. M.L.*, 965 P.2d 551, 559 (Utah Ct. App. 1998).

(2) Whether the juvenile court properly assigned custody. See *J.M.V. v. State*, 958 P.2d 943, 947 (Utah Ct. App. 1998).

(3) Whether the juvenile court properly restricted a parent's visitation rights. See *State ex rel. W.S.*, 939 P.2d 196, 200 (Utah Ct. App.), cert. denied, 953 P.2d 449 (Utah 1997).

**[\*36]** (4) Whether the juvenile court properly denied a motion for a new trial. See *State ex rel. J.P.*, 921 P.2d 1012, 1016 (Utah Ct. App. 1996).

### **c. Challenging Conclusions of Law**

#### **(i) Correction-of-Error Standard**

In general, appellate courts apply a correction-of-error standard to the juvenile court's conclusions of law. See *State ex rel. L.P.*, 369 Utah Adv. Rep. 26, 26 (Utah Ct. App. 1999). However, although legal conclusions are reviewed for correctness, appellate courts may still allow a juvenile court discretion in applying the law to a specific fact scenario. See *id.* at 26.

#### **(ii) Examples of Conclusions of Law**

(1) Whether the juvenile court applied the appropriate definition of "abused child." See *State ex rel. L.P.*, 369 Utah Adv. Rep. 26, 26 (Utah Ct. App. 1999).

(2) Whether the rules of civil procedure apply in adoption proceedings. See *Thiele v. Anderson*, 975 P.2d 481, 484-85 (Utah Ct. App. 1999).

(3) Whether a trial judge has jurisdiction over an adoption petition. See *id.* at 485.

(4) Whether two statutes proscribe the same conduct, thereby precluding a defendant from being charged under both statutes. See *State ex rel. W.C.P.*, 974 P.2d 302, 305 (Utah Ct. App. 1999).

(5) "Whether the juvenile court had authority to postpone [a] dispositional review hearing and combine it with a termination of parental rights hearing" under Utah Code Annotated Section 78-3a-312 (1996). *A.E. v. Christean*, 938 P.2d 811, 814 (Utah Ct. App. 1997).

(6) Whether the right to a jury trial is provided in parental rights termination proceedings. See *State ex rel. T.B.*, 933 P.2d 397, 398 (Utah Ct. App. 1997).

### **3. Challenges to Evidentiary Rulings**

#### **a. Introduction**

In general, a trial court is granted broad discretion in its decision to admit or exclude evidence. See *Jensen v. Intermountain Power Agency*, 977 P.2d 474, 477 (Utah 1999); *Pena*, 869 P.2d at 938; *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 511 (Utah Ct. App. 1999); *Rehn v. Rehn*, 974 P.2d 306, 314 (Utah Ct. App. 1999). The appellate court "will presume that the discretion of the trial court was properly exercised unless the **[\*37]** record clearly shows to the contrary." *State v. Morgan*, 813 P.2d 1207, 1210 n.4 (Utah Ct. App. 1991) (citations omitted). However, some clarity about the proper standard of review in evidence issues remains to be developed.

The standard of review for trial court rulings on the admissibility of evidence has been problematic. Many decisions from the court of appeals considered footnote three of the Utah Supreme Court's ruling in *State v. Ramirez*, 817 P.2d 774, 781 n.3 (Utah 1991), to designate a trial court's ruling on the admissibility of evidence as a question of law reviewed for correctness with a clearly erroneous standard for subsidiary factual findings. See *State v. Morgan*, 865 P.2d 1377, 1380 (Utah Ct. App. 1993); *State v. Diaz*, 859 P.2d 19, 23 (Utah Ct. App. 1993); *State v. Gray*, 851 P.2d 1217, 1224 (Utah Ct. App. 1993); *State v. Martinez*, 848 P.2d 702, 704 (Utah Ct. App. 1993).

However, Utah Supreme Court decisions since *Ramirez* have continued to apply an abuse-of-discretion standard of review. See, e.g., *Boice v. Marble*, 375 Utah Adv. Rep. 3, 4 (Utah 1999); *Pena*, 869 P.2d at 938 ("Rulings on the admission of evidence . . . generally entail a great deal of discretion."); *State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993); *State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993) (clarifying *Ramirez* and its footnote three and stating that *Ramirez* incorrectly portrayed standard of review for admissibility of evidence as correctness standard).

The most recent court of appeals decisions have followed this discretion approach. See, e.g., *Stevenett*, 977 P.2d at 511 (stating abuse of discretion as appropriate standard when rule of evidence requires trial court to balance factors); *State v. Alonzo*, 932 P.2d 606, 613 (Utah Ct. App. 1997) (Rule 403), *aff'd*, 973 P.2d 975 (Utah 1998). Abuse of discretion has been defined as acting beyond the bounds of reasonability. See *Alonzo*, 932 P.2d at 613.

The parts of evidentiary rulings requiring a balancing of factors are reviewed under an abuse-of-discretion standard. See *Thurman*, 846 P.2d at 1270 n.11; *Stevenett*, 977 P.2d at 511. However, while abuse of discretion is always the proper standard of review for evidentiary rulings requiring a balancing of factors, the appellate advocate should be aware that recent court rulings have found that admissibility decisions are the sum of several rulings, each of which may be reviewed under a separate standard of review. See *Stevenett*, 977 P.2d at 511; *State v. Jacques*, 924 P.2d 898, 900 (Utah Ct. App. 1996) ("In reviewing a trial court's decision to admit evidence, we apply several standards of review."); *State v. Blubaugh*, 904 P.2d 688, 697 (Utah Ct. App. 1995).

Therefore, individual legal determinations are still reviewed under a correction-of-error standard and not an abuse-of-discretion standard, although the legal determinations may be part of the overall evidentiary ruling. See *Jensen*, 977 P.2d at 477 ("The admissibility of an item of evidence is a legal question. However, in reviewing a trial court's decision to admit or exclude evidence, we allow for broad discretion."); *State v. Dunn*, 850 P.2d 1201, 1222 n.22 (Utah 1993) (stating, when appellate court is in same position as trial court to view photograph for gruesomeness, correctness standard of review applies); *Dalebout v. Union Pac. R.R. Co.*, 980 P.2d 1194 (Utah Ct. App. 1999) (giving great deference to trial court's ruling on whether evidence is admissible, but trial court's

"selection, interpretation, and application" of particular rule of evidence is reviewed for correctness (citation omitted)); *Jacques*, 924 P.2d at 900 (applying correction-of-error standard to trial court's selection, interpretation, and application of rules of evidence, and abuse-of-discretion standard to trial court's ultimate determination that witness's testimony should be admitted).

## **b. Specific Standards of Review**

### **(i) Relevancy Challenges**

When deciding whether evidence is relevant, the trial court must balance several factors, such as the probativeness of a piece of evidence against its potential for unfair prejudice. See, e.g., *State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993); *State v. Lindgren*, 910 P.2d 1268, 1272 (Utah Ct. App. 1996). The trial court has broad discretion in determining the relevance of proffered evidence, and its determination will be reversed only if the trial court abuses that discretion. See *Slisze v. Stanley-Bostitch*, 979 P.2d 317, 321 (Utah 1999); *State v. Jaeger*, 973 P.2d 404, 408 (Utah 1999) (Rule 403).

### **(ii) Challenges to Witnesses**

Rules 601 to 615 of the Utah Rules of Evidence govern challenges to a witness's testimony and presence in the courtroom. The application of these rules by the trial court is typically reviewed under an abuse-of-discretion standard. See *State v. Hovater*, 914 P.2d 37, 41 (Utah 1996) (Rule 608(b)); *Astill v. Clark*, 956 P.2d 1081, 1087 (Utah Ct. App. 1998) (Rule 615).

### **(iii) Expert Testimony**

The trial court is granted broad discretion in determining whether expert testimony is admissible, and appellate courts review such decisions for abuse of discretion. See *Gerbich v. Numed, Inc.*, 977 P.2d 1205, 1208 (Utah 1999); *Patey v. Lainbart*, 977 P.2d 1193, 1196 (Utah 1999); *A.K. & R. Whipple* [\*38] *Plumbing & Heating v. Aspen Constr.*, 977 P.2d 518, 522 (Utah Ct. App. 1999) (limiting testimony of expert witness); *State v. Rugebregt*, 965 P.2d 518, 522 (Utah Ct. App. 1998).

Whether a trial court properly granted or denied a motion to designate a substitute expert witness is reviewed for correctness, but appellate courts grant the trial court "very broad discretion in ruling on such a motion." *Boice v. Marble*, 375 Utah Adv. Rep. 3, 4 (Utah 1999).

### **(iv) Hearsay Rulings**

The standard of review for evidentiary rulings on hearsay has also been problematic. For example, the supreme court in *State v. Ireland*, 773 P.2d 1375, 1378 (Utah 1989), and *State v. Auble*, 754 P.2d 935, 937 (Utah 1988), apparently applies a correctness standard to a finding of admissibility under Rule 803(3), while the supreme court in *State v. Kaytso*, 684 P.2d 63, 64 (Utah 1984), held that no "abuse of prerogative" occurred when the trial court admitted evidence under Rule 63(4) (now 803(3)). Further, the supreme court in *State v. Cude*, 784 P.2d 1197, 1201 (Utah 1989), applied a clear error standard to find that a statement did not fall within Rule 803(2), and the supreme court in *State v. Thomas*, 777 P.2d 445, 449 (Utah 1989), stated that determinations of whether evidence meets the requirements of Rule 803(2) are within the "sound discretion" of the trial court. These variations arise because the exceptions to Utah Rule of Evidence 803 vary the trial court's analysis between factual issues, legal issues, and a mixture of both. See *Hansen v. Heath*, 852 P.2d 977, 978 & n.4 (Utah 1993).

In a recent case, the Utah Supreme Court recognized this problem and stated a trial court's determination often contains a number of rulings, each of which may require a different standard of review. See *State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993) (stating admissibility decisions are "sum of several rulings, each of which may be reviewed under a separate standard" of review). As a result, "the appropriate standard of review of a trial court's decision admitting or excluding evidence under Rules 802 and 803 depends on the particular ruling in dispute." *Hansen*, 852 P.2d at 978.

Therefore, legal questions, which are part of the evidentiary ruling, are reviewed for correctness even though the evidentiary ruling is reviewed for an abuse of discretion. See *State v. Bryant*, 965 P.2d 539, 546 (Utah Ct. App. 1998) ("To the extent that there is no pertinent factual dispute, whether a statement is offered for the truth of the matter asserted is a question of law, to be reviewed under a correction of error standard.") (citation omitted); *State ex rel. G.Y.*, 962 P.2d 78, 84 (Utah Ct. App. 1998) (same).

### **(v) Additional Challenges to Evidentiary Rulings within Trial Court's Discretion**

(1) Whether the trial court's determination on a preliminary question concerning the admissibility of evidence was proper under Rule 104 of the Utah Rules of Evidence. See *State v. Harrison*, 805 P.2d 769, 782 (Utah Ct. App. 1991).

(2) Whether the trial court abused its discretion in applying the rules of evidence under Rule 104(a). See *State v. Ruschetta*, 742 P.2d 114, 117 (Utah Ct. App. 1987).

(3) Whether the trial court properly took judicial notice of a fact under Rule 201(b) of the Utah Rules of Evidence. See *Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah Ct. App. 1994); *Riche v. Riche*, 784 P.2d 465, 468 (Utah Ct. App. 1989).

(4) Whether the trial court reasonably determined a witness failed to properly authenticate a photograph under Rule 901. See *State v. Horton*, 848 P.2d 708, 714 (Utah Ct. App. 1993).

(5) Whether the trial court's determination to allow photo-copied palm prints into evidence under Rule 1003 was proper. See *State v. Casias*, 772 P.2d 975, 977 (Utah Ct. App. 1989).

(6) Whether the trial court abused its discretion in refusing to require a psychological examination of a state's witness in a criminal trial. See *State v. Hubbard*, 601 P.2d 929, 930-31 (Utah 1979) (predates present rules of evidence).

(7) Whether the trial court properly interrogated a witness. See *State v. Boyatt*, 854 P.2d 550, 553 (Utah Ct. App. 1993).

(8) Whether the trial court properly admitted evidence of other crimes under Rule 404(b). See *State v. Decorso*, 370 Utah Adv. Rep. 11, 13 (Utah 1999) (requiring "scrupulous[] examination" of other crimes evidence by trial court properly exercising its discretion and disavowing standard articulated in *State v. Doperto*, 935 P.2d 484, 489 (Utah 1997) (granting trial court "a relatively small degree of

discretion"))).

(9) Whether the trial court properly excluded an exhibit on the ground that it lacked adequate foundation. See *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 511 (Utah Ct. App. 1999).

**(vi) Additional Challenges to Evidentiary Rulings Reviewed for Correctness**

(1) Whether the trial court properly determined that a defendant's communication with several physicians was protected by the physician-patient privilege. See *State v. Anderson*, 972 P.2d 86, 88 (Utah Ct. App. 1998).

**[\*39]** (2) Whether the trial court properly granted or denied a motion to designate a substitute expert witness. See *Boice v. Marble*, 375 Utah Adv. Rep. 3, 4 (Utah 1999).

**c. Harmful Error**

No evidentiary challenge will be successful without also showing that an error was harmful. See Utah R. Evid. 103(a); *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 511 (Utah Ct. App. 1999) (stating "the person asserting error has the burden to show not only that the error occurred but also that it was substantial and prejudicial"); *State v. Kiriluk*, 975 P.2d 469, 472-73 (Utah Ct. App. 1999).

**4. Rules of Civil Procedure -- Examples of Standards of Review**

**(1) Rule 11 -- Sanctions.**

Three different standards of review [are used] in considering a trial court's rule 11 determination, depending on the issue being considered. The trial court's findings of fact are reviewed under a clearly erroneous standard; its ultimate conclusion that rule 11 was violated and any subsidiary legal conclusions are reviewed under a correction of error standard; and its determination as to the type and amount of sanctions to be imposed is reviewed under an abuse of discretion standard.

*Griffith v. Griffith*, No. 981462, 1999 Utah LEXIS 114, at \*8 (Utah Aug. 27, 1999).

(2) Rule 12 -- Defenses. Whether a trial court properly dismissed a claim under Rule 12(b)(6) is reviewed for correctness. See *Larson v. Park City Mun. Corp.*, 955 P.2d 343, 345 (Utah 1998); *Sulzen v. Williams*, 977 P.2d 497, 500 (Utah Ct. App. 1999). In so reviewing, the appellate court "takes as true all well-pled allegations of fact in the complaint and all reasonable inferences from those facts." *Richardson v. Matador Steak House, Inc.*, 948 P.2d 347, 348 (Utah 1997). Further, "if a motion to dismiss . . . is presented, the decision to consider matters outside the pleadings initially lies in the discretion of the trial court." *Strand v. Associated Students of the Univ. of Utah*, 561 P.2d 191, 193 (Utah 1977).

(3) Rule 13 -- Counterclaim and cross-claim. Whether the trial court properly denied a motion "to allow a counterclaim and to bring in third party defendants which were filed two weeks before the scheduled trial date, where inadequate reasons for the untimely motion were presented and where the parties failed to demonstrate that the court's denial of the motions resulted in prejudice," is reviewed for abuse of discretion.

*Tripp v. Vaughn*, 746 P.2d 794, 798 (Utah Ct. App. 1987).

(4) Rule 15 -- Amended and supplemental pleadings. Whether the trial court properly denied a motion to amend the pleadings is reviewed for abuse of discretion. See *Aurora Credit Servs., Inc. v. Liberty West Dev., Inc.*, 970 P.2d 1273, 1281 (Utah 1998); *Sulzen*, 977 P.2d at 500. However, if the trial court states no reason for its denial and the reason is not obvious on the record, the denial is per se an abuse of discretion. See *Aurora Credit Servs.*, 970 P.2d at 1281-82.

Rule 15(b) has two provisions under which a court may address issues not raised in the pleadings. Under the first provision (mandatory amendment to conform to the pleadings), the trial court must consider issues if the parties tried them by express or implied consent. A trial court's conclusion that the parties tried an issue by express or implied consent is a legal conclusion that the appellate court reviews for correctness. See *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 974 P.2d 288, 291 (Utah 1999); *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 105 (Utah 1998) (noting, however, that "because the trial court's determination of whether the issues were tried with all parties' 'implied consent' is highly fact intensive, we grant the trial court a fairly broad measure of discretion in making that determination under a given set of facts").

Under the second provision (permissive amendment), which applies once a party has objected to evidence because it was not raised in the pleadings, the appellate court applies a "conditional discretionary review." That is, the trial court must first make a preliminary determination that "the presentation of the merits of the action will be subserved" by allowing an amendment, and "the admission of such evidence would not prejudice the adverse party in maintaining his action or defense on the merits." *Fibro Trust*, 974 P.2d at 291 (citation omitted); *England v. Horbach*, 944 P.2d 340, 345 (Utah 1997). The trial court has limited discretion in making these threshold findings, but once the findings have been made, the trial court "has full discretion to allow an amendment of the pleadings." *Fibro Trust*, 974 P.2d at 291 (citation omitted).

(5) Rule 19 -- Joinder of persons needed for just adjudication. A trial court's decision whether to join a necessary and indispensable party is reviewed for abuse of discretion. See *Johnson v. Higley*, 977 P.2d 1209, 1216 (Utah Ct. App. 1999).

(6) Rule 32 -- Use of Depositions in Court Proceedings. Whether the trial court properly denied a motion to admit a deposition into evidence is reviewed for abuse of discretion. See *Marshall v. Van Gerven*, 790 P.2d 62, 64 (Utah Ct. App. 1990) (stating **[\*40]** "the element of discretion provided by the rule is a narrow one -- exceptions to the preference for oral testimony apply 'absent some compelling reason otherwise'" (citation omitted)).

(7) Rule 35 -- Physical and mental examination of persons. Whether the trial court properly ordered a party to submit to a physical or mental examination is reviewed for abuse of discretion. See *Stone v. Stone*, 431 P.2d 802, 804 (1967).

(8) Rule 36 -- Request for Admission. A trial court's grant or denial of a motion to amend admissions is reviewed under a

"conditional' discretionary standard." *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1060 (Utah 1998)

(9) Rule 37 -- Failure to make or cooperate in discovery; sanctions. A trial court has broad discretion to select and impose sanctions for discovery violations. See *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 940 (Utah 1998); *Tuck v. Godfrey*, 367 Utah Adv. Rep. 42, 43 (Utah Ct. App. 1999). An appellate court "will find that a trial court has abused its discretion in choosing which sanction to impose only if there is either 'an erroneous conclusion of law or . . . no evidentiary basis for the trial court's ruling.'" *Morton v. Continental Baking Co.*, 938 P.2d 271, 274 (Utah 1997) (citation omitted).

(10) Rule 38 -- Jury trial of right. Whether the trial court properly granted or denied a request for a jury trial is reviewed for abuse of discretion. See *James Mfg. Co. v. Wilson*, 390 P.2d 127, 128 (1964).

(11) Rule 39 -- Trial by jury or by the court. "Whether the trial court erred in designating the jury's verdict as advisory and ruling contrary to that verdict" is reviewed for correctness. *Goldberg v. Jay Timmons & Assocs.*, 896 P.2d 1241, 1242 (Utah Ct. App. 1995)

(12) Rule 40 -- Assignment of cases for trial; continuance. Whether the trial court properly granted a motion to continue is reviewed for abuse of discretion. See *Christenson v. Jewkes*, 761 P.2d 1375, 1377 (Utah 1988).

(13) Rule 41 -- Dismissal of actions. The dismissal of a case under Rule 41(b) is reviewed for correctness. See *C & Y Corp. v. General Biometrics, Inc.*, 896 P.2d 47, 53 (Utah Ct. App. 1995).

(14) Rule 42 -- Consolidation; separate trials. "Trial courts 'enjoy considerable discretion' in determining whether to bifurcate issues under Rule 42." *Olympus Hills Shopping Ctr. v. Smith's Food & Drug Ctrs.*, 889 P.2d 445, 462 (Utah Ct. App. 1994) (citation omitted)

(15) Rule 47 -- Jurors. Whether the trial court conducted voir dire properly is reviewed for abuse of discretion. See *Ostler v. Albina Transfer Co.*, 781 P.2d 445, 447 (Utah Ct. App. 1989).

(16) Rule 50 -- Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) Directed Verdicts -- "A trial court is justified in granting a directed verdict only if, examining all evidence in a light most favorable to the non-moving party, there is no competent evidence that would support a verdict in the non-moving party's favor." *Merino v. Albertsons, Inc.*, 975 P.2d 467, 468 (Utah 1999). "A motion for directed verdict 'can be granted only when the moving party is entitled to judgment as a matter of law.'" *Id.* (citation omitted).

(b) Judgments Notwithstanding the Verdict -- A trial court may grant a motion for j.n.o.v. only when it determines that, when viewing the evidence and all reasonable inferences in a light most favorable to the nonmoving party, the evidence is insufficient to support the verdict. See *Collins v. Wilson*, 370 Utah Adv. Rep. 6, 8 (Utah 1999); *Ricci v. Schoultz*, 963 P.2d 784, 785 (Utah Ct. App.), *cert. denied*, No. 981494 (Utah Nov. 19, 1998). The appellate court will "reverse only if, viewing the evidence in the light most favorable to the prevailing party, [it] concludes that the evidence is insufficient to support the verdict." *Collins*, 370 Utah Adv. Rep. at 8 (citations omitted).

(17) Rule 51 -- Instructions to jury; objections. The appellate court may review a claim that the jury instructions given (or not given) were in error, even if no party has objected, if the review would be in the interest of justice. See *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991). "However, 'it is incumbent upon the aggrieved party to present a persuasive reason' for exercising that discretion . . . and this requires 'showing special circumstances warranting such a review.'" *Id.* (citations omitted).

(18) Rule 54 -- Judgments; Costs.

(a) A trial court's decision to award expenses incurred in court-ordered mediation is reviewed for abuse of discretion. See *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 511 (Utah Ct. App. 1999).

(b) Whether a trial court's order is final and can be certified under Rule 54(b) is a question of law, reviewed for correctness. See *Kennecott Corp. v. State Tax Comm'n*, 814 P.2d 1099, 1100 (Utah 1991); *Pasquin v. Pasquin*, 371 Utah Adv. Rep. 3, 4 (Utah Ct. App. 1999).

**[\*41]** (19) Rule 55 -- Default judgment. Legal conclusions used to justify entering a default judgment are reviewed for correctness and no deference is given to the trial court. For example, whether, in a default judgment situation, an intervenor could raise defenses available to the defendant regarding liability is reviewed for correctness. See *Chatterton v. Walker*, 938 P.2d 255, 257 (Utah 1997)

(20) Rule 56 -- Summary judgment.

(a) "Because summary judgment is granted as a matter of law, [appellate courts] give the trial court's legal conclusions no particular deference." *Mast v. Overson*, 971 P.2d 928, 931 (Utah Ct. App. 1998) (citation omitted).

(b) Whether the trial court properly denied a Rule 56(f) response to a summary judgment motion is reviewed under an abuse-of-discretion standard. See *Mast*, 971 P.2d at 931.

(21) Rule 59 -- New trials; amendments of judgment.

(a) Whether the trial court properly decided to remit a damages award on the ground of insufficient evidence is reviewed for abuse of discretion. See *Stevenett*, 977 P.2d at 511.

(b) Whether the trial court properly granted or denied a motion to open a judgment for additional evidence or for a new trial is reviewed for abuse of discretion. See *A K & R. Whipple Plumbing & Heating v. Aspen Constr.*, 977 P.2d 518, 522 (Utah Ct. App. 1999).

(22) Rule 60 -- Relief from Judgment or Order.

(a) Whether the trial court properly determined that a party has shown "mistake, inadvertence, surprise, or excusable neglect" is reviewed for abuse of discretion. See *Ostler v. Buhler*, 957 P.2d 205, 206 (Utah Ct. App. 1998)

**[\*42]** (b) Whether the trial court properly denied a motion to vacate a judgment is reviewed for abuse of discretion. See *Butters v. Jackson*, 917 P.2d 87, 88 (Utah Ct. App. 1996).

(c) Whether the trial court properly denied a motion to reconsider summary judgment is reviewed for abuse of discretion. See *Lund v. Hall*, 938 P.2d 285, 287 (Utah 1997). However, no deference is given to the trial court's conclusions of law. See *id.*

**(23) Rule 65A -- Preliminary Injunctions.**

(a) Whether trial court properly granted a preliminary injunction is reviewed for abuse of discretion. See *Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411, 412 (Utah 1998). The trial court's determination will be reversed only if it abused its discretion or its decision was against the clear weight of the evidence. See *id.*

(b) Whether the trial court properly applied Rule 65A(e)(4) is reviewed for correctness. See *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 231 (Utah 1998).

**(24) Rule 65B -- Extraordinary Relief.**

(a) The standard of review is whether a judge regularly exercised his or her authority. See *Thiele v. Anderson*, 975 P.2d 481, 484 (Utah Ct. App. 1999); accord *Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017, 1019 (Utah 1995). The appellate court's decision of whether to grant or deny a petition for extraordinary relief under Rule 65B is discretionary; the party seeking extraordinary relief has no absolute right to receive it. See *V-1 Oil Co. v. Department of Env'tl. Quality*, 939 P.2d 1192, 1195 (Utah 1997); *Newman v. Behrens*, 365 Utah Adv. Rep. 35, 36 (Utah Ct. App. 1999). "However, on certiorari or appeal from a grant of extraordinary relief, the legal reasoning of the court granting the writ is reviewed for correctness." *V-1 Oil*, 939 P.2d at 1195.

(b) Habeas Corpus Petitions. The record is reviewed in a "light most favorable to the findings and judgment." See *Seel v. Van Der Veur*, 971 P.2d 924, 926 (Utah 1998) (citations omitted). The appellate court will not reverse if reasonable grounds support the trial court's decision to deny the petition. See *id.* As in other contexts, the trial court's findings of fact are reviewed for clear error, while conclusions of law are reviewed for correctness. See *id.*; accord *Frausto v. State*, 966 P.2d 849, 851 (Utah 1998).

**5. Rules of Criminal Procedure -- Examples of Standards of Review**

(1) Rule 4 -- Prosecution of public offenses. Whether the trial court properly denied a motion for a bill of particulars is reviewed for abuse of discretion. See *State v. Blubaugh*, 904 P.2d 688, 701 (Utah Ct. App. 1995).

(2) Rule 8 -- Appointment of counsel. Whether a defendant is indigent is a question of fact. See *Webster v. Jones*, 587 P.2d 528, 530 (Utah 1978).

(3) Rule 11 -- Pleas. A trial court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. See *State v. Visser*, 973 P.2d 998, 1001 (Utah Ct. App. 1999); *State v. Penman*, 964 P.2d 1157, 1160 (Utah Ct. App. 1998). The findings of fact supporting this decision will be overturned only if they are clearly erroneous. See *Visser*, 973 P.2d at 1001; *Penman*, 964 P.2d at 1160. "However, 'if the trial court failed to strictly comply with Rule 11 . . . in taking the defendant's guilty plea, and subsequently denies the withdrawal of the plea, the trial court has exceeded its permitted range of discretion as a matter of law.'" *Visser*, 973 P.2d at 1001 (citation omitted).

(4) Rule 15 -- Expert witnesses and interpreters. Whether the trial court properly refused to appoint an interpreter is reviewed for abuse of discretion. See *State v. Drobek*, 815 P.2d 724, 737 (Utah Ct. App. 1991).

(5) Rule 15.5 -- Whether the trial court properly admitted into evidence a child witness's videotaped testimony is reviewed for correctness. See *State v. Snyder*, 932 P.2d 120, 125 (Utah Ct. App. 1997).

(6) Rule 16 -- Discovery. Whether the trial court properly granted or denied a motion for discovery is reviewed for abuse of discretion. See *State v. Knill*, 656 P.2d 1026, 1027 (Utah 1982).

(7) Rule 18 -- Selection of jury. Whether the trial court properly granted or denied a motion to dismiss a juror for cause is reviewed for abuse of discretion. See *State v. Wood*, 868 P.2d 70, 76 (Utah 1993); *State v. Finlayson*, 956 P.2d 283, 290 (Utah Ct. App. 1998).

(8) Rule 22 -- Sentence, judgment and commitment. "An appellate court may not review the legality of a sentence under rule 22(e) when the substance of the appeal is . . . a challenge, not to the sentence itself, but to the underlying conviction." *State v. Brooks*, 908 P.2d 856, 859 (Utah 1995). Whether the appellate court properly interpreted Rule 22(e) is reviewed for correctness. See *id.*

**[\*43]** (9) Rule 24 -- Motion for new trial. Whether the trial court properly granted or denied a motion for a new trial is reviewed for abuse of discretion. See *State v. Bakalov*, 979 P.2d 799, 811 (Utah 1999). However, the trial court's conclusions underlying its determination are reviewed for correctness. See *id.*

(10) Rule 29 -- Disability and disqualification of a judge or change of venue. Whether a trial court properly denied or granted a motion for change of venue is reviewed for abuse of discretion. See *State v. Pearson*, 943 P.2d 1347, 1350 (Utah 1997).

**6. Review of Attorney and Judge Disciplinary Proceedings**

"Review of attorney discipline proceedings is fundamentally different from judicial review in other cases." *In re Discipline of Tanner*, 960 P.2d 399, 401 (Utah 1998) (citation omitted). Under the Rules of Lawyer Discipline, the supreme court reviews the trial court's findings of fact in an attorney discipline case for clear error. See *Tanner*, 960 P.2d at 401; *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998). However, the supreme court may draw its own inferences from those findings. See *Tanner*, 960 P.2d at 401. "With respect to the discipline actually imposed, [the supreme court's] constitutional responsibility requires [it] to make an independent determination as to its correctness." *Ince*, 957 P.2d at 1236.

This same standard of review applies to proceedings before the Judicial Conduct Commission. See *In re Worthen*, 926 P.2d 853, 865 (Utah 1996).

**7. Contempt**

In general, orders relating to contempt of court are within the trial court's sound discretion. See *Dansie v. Dansie*, 977 P.2d 539, 540 (Utah Ct. App. 1999); *Marsh v. Marsh*, 973 P.2d 988, 990 (Utah Ct. App. 1999). "On review of both criminal and civil [contempt] proceedings, [appellate courts] accept the trial court's findings of fact unless they are clearly erroneous." *Von Hake v. Thomas*, 759 P.2d 1162, 1172 (Utah 1988). The trial court must make written findings of fact and conclusions of law on all substantive elements. See *id.* (reversing judgment of contempt because no adequate written findings); *State v. Long*, 844 P.2d 381, 383 (Utah Ct. App. 1992) (accepting trial court's findings of fact unless clearly erroneous and reviewing whether findings support legal conclusion of violation of statutory duty under correction-of-error standard).

## II. APPEALS FROM STATE ADMINISTRATIVE AGENCIES

Review of administrative decisions for cases begun after December 31, 1987 is governed by the Utah Administrative Procedures Act (UAPA), Utah Code Annotated Sections 63-46b-0.5 to - 22 (1997 & Supp. 1999). n28 See *Thorup Bros. Constr., Inc. v. Auditing Div.*, 860 P.2d 324, 327 (Utah 1993); *Uintah Oil Ass'n v. County Bd. of Equalization*, 853 P.2d 894, 896 (Utah 1993). The Utah Supreme Court provided a detailed discussion of the governing UAPA provisions in *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 583-89 (Utah 1991). See also *Uintah Oil*, 853 P.2d at 896.

n28 Review of state agency adjudicative proceedings begun on or before December 31, 1987, is not subject to UAPA. See Utah Code Ann. § 63-46b-22(b) (1997). Guidelines for pre-UAPA standards of review are set forth in great detail in the following cases: *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 583-89 (Utah 1991); *Hurley v. Board of Review*, 767 P.2d 524, 526-27 (Utah 1988); *Utah Dep't of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 607-12 (Utah 1983).

As an initial note, for a reviewing court to grant relief under UAPA, it must determine that the party has been "substantially prejudiced" by the agency action in question. Utah Code Ann. § 63-46b-16(4) (1997). "In other words, [appellate courts] must be able to determine that the alleged error was not harmless." *Alta Pac. Assocs. v. Utah State Tax Comm'n*, 931 P.2d 103, 116 (Utah 1997) (citation omitted).

Further, the principle of exhausting administrative remedies is embodied in the general provisions of UAPA. "A party may seek judicial review only after exhausting all administrative remedies available . . ." Utah Code Ann. § 63-46b-14(2) (1997); *Mountain Fuel Supply Co. v. Public Serv. Comm'n*, 861 P.2d 414, 423 (Utah 1993); *Kunz & Co. v. State*, 913 P.2d 765, 770 (Utah Ct. App. 1996).

### A. Review of Informal Agency Proceedings

UAPA allows state agencies to promulgate rules designating as informal certain adjudicative proceedings. See Utah Code Ann. § 63-46b-4(1) (1997); *Cordova v. Blackstock*, 861 P.2d 449, 451 (Utah Ct. App. 1993). Under UAPA, "the district courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings . . ." Utah Code Ann. § 63-46b-15(1)(a) (1997); see also *Archer v. Board of State Lands & Forestry*, 907 P.2d 1142, 1144 (Utah 1995). Section 63-46b-15(1)(a) requires that the trial court's review of informal adjudicative proceedings be accomplished by holding a new trial, not just by reviewing an informal record. See *Cordova*, 861 P.2d at 451; see also *Brinkerboff v. Schwendiman*, 790 P.2d 587, 588 (Utah Ct. App. 1990). The review of an informal agency proceeding by a new trial at the trial court level ensures that an adequate record will be created for appellate court review. See *Cordova*, 861 P.2d at 452.

The trial court's final orders and decrees from review of informal adjudicative proceedings of agencies may be appealed to the appellate courts. See Utah Code Ann. § 78-2-2(3)(f) (1996); *id.* § 78-2a-3(2)(a).

### [\*44] B. Review of Formal Agency Proceedings

"Subsection 63-46b-16(4) [1997] of [UAPA] outlines the circumstances under which a reviewing court may grant relief from formal agency action." *Anderson v. Public Serv. Comm'n*, 839 P.2d 822, 824 (Utah 1992). Some standards of review are explicitly set forth in section 63-46b-16(4). Others have been provided by appellate courts in interpreting the statute. See, e.g., *SEMECO Indus., Inc. v. Auditing Div.*, 849 P.2d 1167, 1170-75 (Utah 1993) (Durham, J., dissenting) (noting some provisions of 63-46b-16(4) "give little guidance concerning what standard of review the court should apply"); *Questar Pipeline Co. v. State Tax Comm'n*, 817 P.2d 316, 317 (Utah 1991) (stating under UAPA "agency determinations of general law -- which we hold include interpretations of the state and federal constitutions -- are to be reviewed under a correction of error standard, giving no deference to the agency's decision"); *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 584-87 (Utah 1991) (interpreting UAPA to allow agencies some discretion in certain situations involving statutory interpretation). The remainder of this administrative outline discusses the standards of review for formal agency proceedings and the diagram on the following page provides a flow chart for standards of review for formal agency proceedings.

## 1. Challenging Findings of Fact

### a. Substantial Evidence Standard

Under UAPA, an agency's factual findings will be affirmed only if they are "supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1997); accord *Brown & Root Indus. Serv. v. Industrial Comm'n*, 947 P.2d 671, 677 (Utah 1997); *Harken v. Board of Oil, Gas & Mining*, 920 P.2d 1176, 1180 (Utah 1996); *Whitewar v. Labor Comm'n*, 973 P.2d 982, 984 (Utah Ct. App. 1998).

"Substantial evidence is 'that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.'" *Harken*, 920 P.2d at 1180 (citation omitted); accord *Mountain Fuel Supply Co. v. Public Serv. Comm'n*, 861 P.2d 414, 428 (Utah 1993). "Substantial evidence is more than a 'scintilla' of evidence," though "less than the weight of the evidence." *Commercial Carriers v. Industrial Comm'n*, 888 P.2d 707, 711 (Utah Ct. App. 1994) (citations omitted).

When reviewing an agency's decision under the substantial evidence test, the reviewing court "does not conduct a de novo credibility determination or reweigh the evidence." *Questar Pipeline Co. v. State Tax Comm'n*, 850 P.2d 1175, 1178 (Utah 1993); accord *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 269 (Utah Ct. App. 1993). An appellate court "will not substitute its judgment as between two reasonably conflicting views, even though [it] may have come to a different conclusion had the case come before [it] for de novo review." *V-1 Oil Co. v. Department of Envtl. Quality*, 904 P.2d 214, 216 (Utah Ct. App. 1995) (citations omitted); accord *Whitewar*, 973 P.2d at 984. "It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences." *V-1 Oil Co. v. Division of Envtl. Response & Remediation*, 962 P.2d 93, 95 (Utah Ct. App. 1998) (citation omitted).

When applying the substantial evidence test under UAPA, appellate courts must consider not only the evidence supporting the Board's findings but also the evidence negating them. See *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1385 (Utah 1993) ("We consider both the evidence supporting the Commission's factual findings and the evidence that detracts from those findings."); *Commercial Carriers*, 888 P.2d at 711.

Because a party seeking review of an agency order must show that the agency's factual determinations are not supported by substantial evidence, the reviewing court examines the facts and all legitimate inferences drawn therefrom in the light most favorable to the agency's findings. See *Hales Sand & Gravel v. Audit Div.*, 842 P.2d 887, 888 (Utah 1992).

#### **b. Marshaling Cases**

The following are cases involving appeals from administrative agencies in which appellate courts address the marshaling requirement. See *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1385 (Utah 1993) (stating party challenging commission's factual findings must marshal all evidence supporting agency's findings and show that, despite supporting facts and all reasonable inferences that can be drawn therefrom, findings are not supported by substantial evidence given record as whole); *Hales Sand & Gravel, Inc. v. Audit Div.*, 842 P.2d 887, 893 (Utah 1992) (holding petitioner did not marshal facts showing commission's finding was not supported by substantial evidence); *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990); *Whitear v. Labor Comm'n*, 973 P.2d 982, 984 (Utah Ct. App. 1998) (refusing to consider petitioner's challenge to findings of fact because petitioner failed to marshal evidence supporting findings); *Tasters Ltd. v. Department of Employment Sec.*, 863 P.2d 12, 18 (Utah Ct. App. 1993).

#### **[\*46] c. Examples of Fact Questions**

The following cases contain examples of factual issues reviewed under the substantial evidence standard of review:

- (1) Whether a person has been served with process. See *In re Schwenke*, 865 P.2d 1350, 1354 (Utah 1993).
- (2) Whether the public service commission properly accepted post-test-year adjustments. See *Mountain Fuel Supply Co. v. Public Serv. Comm'n*, 861 P.2d 414, 424-25 (Utah 1993).
- (3) Whether the amount of a nonconsent penalty was proper. See *Bennion v. ANR Prod. Co.*, 819 P.2d 343, 349 (Utah 1991).
- (4) Whether a heart attack was the result of a pre-existing medical condition or employment activities. See *Olsen v. Industrial Comm'n*, 797 P.2d 1098, 1099 (Utah 1990).
- (5) "Whether the termination of employment . . . was the result primarily of the employee's volition . . . ." *Professional Staff Management, Inc. v. Department of Employment Sec.*, 953 P.2d 76, 80 (Utah Ct. App. 1998) (citation omitted).
- (6) Whether medical reports conflict. See *Brown & Root Indus. Serv. v. Industrial Comm'n*, 947 P.2d 671, 677 (Utah 1997).

#### **d. Adequacy of Agencies' Factual Findings**

"An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review." *LaSal Oil Co. v. Department of Envtl. Quality*, 843 P.2d 1045, 1047 (Utah Ct. App. 1992) (citation omitted). An agency's failure to make adequate findings of fact on material issues renders its findings "arbitrary and capricious" unless the evidence is clear and uncontroverted and capable of supporting only one conclusion. See *Hidden Valley Coal Co. v. Utah Bd. of Oil, Gas & Mining*, 866 P.2d 564, 568 (Utah Ct. App. 1993) (pre-UAPA case); *Adams v. Board of Review*, 821 P.2d 1, 4-5 (Utah Ct. App. 1991).

An agency's failure to make adequate findings is prejudicial to the appealing party. See *Adams*, 821 P.2d at 4-8 (recognizing that without adequate findings petitioner challenging agency's factual findings cannot marshal evidence supporting findings). When the agency's findings are inadequate, the case will be remanded unless the failure to make adequate findings of fact and conclusions of law is nevertheless harmless. See *LaSal Oil*, 843 P.2d at 1048 (remanding case for more adequate findings because inadequacy of findings made meaningful review impossible); *Adams*, 821 P.2d at 7.

### **2. Challenging Discretionary Rulings**

#### **a. Challenging Agency's Interpretation of Statutes**

Section 63-46b-16(4)(h)(i) states that an appellate court may grant relief if an agency's action is "an abuse of the discretion delegated to the agency by statute." Utah Code Ann. § 63-46b-16(4)(h)(i) (1997). Appellate courts defer to an agency's statutory interpretation only "when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language." *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 589 (Utah 1991); accord *Nucor Corp. v. State Tax Comm'n*, 832 P.2d 1294, 1296 (Utah 1992) (stating "agency discretion may be either express or implied and, if granted, results in review of agency action for an abuse of discretion"); *Sierra Club v. Utah Solid & Hazardous Waste Control Bd.*, 964 P.2d 335, 344 (Utah Ct. App. 1998); *Osman Home Improvement v. Industrial Comm'n*, 958 P.2d 240, 242-43 (Utah Ct. App. 1998).

When such a grant of discretion exists, appellate courts will not disturb the agency's ruling unless its determination exceeds "the bounds of reasonableness and rationality." *Osman Home Improvement*, 958 P.2d at 243 (citations omitted); accord *Morton Int'l*, 814 P.2d at 587; *Uintah Oil Assoc. v. County Bd. of Equalization*, 853 P.2d 894, 896 (Utah 1993); *Johnson Bros. Constr. v. Labor Comm'n*, 967 P.2d 1258, 1259 (Utah Ct. App. 1998) (stating when legislature has explicitly granted discretion to agency, appellate court applies "an intermediate standard of review" to the agency's decision, reviewing that determination for reasonableness (citation omitted)).

This review for reasonableness and rationality is the same standard as the "abuse of discretion" standard mentioned in Utah Code Annotated Section 63-46b-16(4)(h)(i). See *Morton Int'l*, 814 P.2d at 587; *Niederbauer Ornamental & Metal Works Co. v. Tax Comm'n*, 858 P.2d 1034, 1037 (Utah Ct. App. 1993); *King v. Industrial Comm'n*, 850 P.2d 1281, 1286 (Utah Ct. App. 1993).

#### **(i) Explicit Discretion**

An explicit grant of discretion exists "when a statute specifically authorizes an agency to interpret or apply statutory language." *King v. Industrial Comm'n*, 850 P.2d 1281, 1287 (Utah Ct. App. 1993). An explicit grant of discretion to the agency can be found from statutory language such as: "unless it is shown to the satisfaction of the commission," "as determined by the commission," "if the [commission determines that the] weight of the evidence supports that finding," and "considered [by the commission] if applicable." *Tasters Ltd. v. Department of* [\*47] *Employment Sec.*, 819 P.2d 361, 364 (Utah Ct. App. 1991) (citation omitted). Another example



of an explicit grant of discretion can be found in Utah Code Annotated Section 35A-4-405(2)(a) (1997), which states, "discharged for just cause . . . if so found by the" agency. *Albertsons, Inc. v. Department of Employment Sec.*, 854 P.2d 570, 573 (Utah Ct. App. 1993) (citing former section 35-4-5(b)(1) (Supp. 1992)).

## **(ii) Implied Discretion n29**

n29 Whether an agency has been granted implied discretion to interpret or apply a statute, and thus, whether the courts should apply the reasonableness standard of review, has been the subject of much debate. I refer the reader to the following cases for assistance: *SEMECO Indus., Inc. v. Auditing Div.*, 849 P.2d 1167, 1170-75 (Utah 1993) (Durham, J., dissenting); *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 583-589 (Utah 1991); *Employers' Reinsurance Fund v. Industrial Comm'n*, 856 P.2d 648, 650-51 (Utah Ct. App. 1993); *King v. Industrial Comm'n*, 850 P.2d 1281, 1284-92 (Utah Ct. App. 1993).

If an agency has not been granted explicit discretion to interpret a statute, the agency may nonetheless have implied discretion. An implied grant may be found from statutory language such as "equity and good conscience." *Tasters Ltd. v. Department of Employment Sec.*, 819 P.2d 361, 364 (Utah Ct. App. 1991) (citation omitted). Thus, "when the operative terms of a statute are broad and generalized, these terms 'bespeak a legislative intent to delegate their interpretation to the responsible agency.'" *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 588 (Utah 1991) (citation omitted).

Further, an implicit grant of authority exists when statutory language suggests that the Legislature has left the particular issue in question undecided. See *Morton Int'l*, 814 P.2d at 588. For instance, in *Salt Lake City Corp. v. Confer*, 674 P.2d 632 (Utah 1983), the Utah Supreme Court noted that an agency's interpretation of statutory provisions is entitled to deference when there is more than one permissible reading of the statute and no basis in the statutory language or the legislative history to prefer one interpretation over another. See *id.* at 636; see also *R.O.A. Gen., Inc. v. Department of Transp.*, 966 P.2d 840, 843 (Utah 1998) (holding when legislative intent is not discernible by applying traditional rules of statutory construction, agency has implied grant of authority and decision is reviewed for reasonableness and rationality). "In the absence of a discernible legislative intent concerning the specific question in issue, a choice among permissible interpretations of a statute is largely a policy determination. The agency that has been granted authority to administer the statute is the appropriate body to make such a determination." *R.O.A. Gen.*, 966 P.2d at 843 (citation omitted). n30

n30 While some agency interpretations and applications of statutory law receive discretion, "no agency enjoys the discretion to exceed the authority vested in it by the Legislature" and such will be reviewed for legal error, without deference. *Tasters Ltd. v. Department of Employment Sec.*, 863 P.2d 12, 19 (Utah Ct. App. 1993); accord Utah Code Ann. § 63-46b-16(4)(d) (1997); *LaSal Oil Co. v. Department of Envtl. Quality*, 843 P.2d 1045, 1047 (Utah Ct. App. 1992); *Adams v. Board of Review*, 821 P.2d 1, 4 (Utah Ct. App. 1991).

However, an implied grant is not found, and an appellate court grants no deference to an agency's interpretation of a statute, "when the court is in as good a position as the agency to interpret the general statutory provision in question, or 'when a legislative intent concerning the specific question at issue can be derived through traditional methods of statutory construction.'" *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 858 P.2d 1034, 1036 (Utah Ct. App. 1993) (quoting *Morton Int'l*, 814 P.2d at 589); accord *R.O.A. Gen.*, 966 P.2d at 843.

## **b. Challenging Agency's Application of Law**

An agency's application of the law to the facts of a case is reviewed for correctness unless the agency is given a measure of discretion. n31 See Utah Code Ann. § 63-46b-16(4)(d) (1997); *Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997); *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 587-88 (Utah 1991). *Zissi v. State Tax Comm'n*, 842 P.2d 848 (Utah 1992), indicates that the measure of discretion may derive from an implicit or explicit grant in the statute applied by an agency. See *id.* at 853 n.2 (citing *Morton Int'l*, 814 P.2d at 589); see also *Commercial Carriers v. Industrial Comm'n*, 888 P.2d 707, 710 (Utah Ct. App. 1994) ("We review an agency's . . . application of statutes for correctness, unless the statute in question grants the agency discretion."). For a discussion of implicit and explicit grants of discretion, please refer to the above section addressing these topics in the context of agency interpretations of statute.

n31 The terms "application of the law" and "mixed question of law and fact" have been used interchangeably by Utah appellate courts. See *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 586 n.23 (Utah 1991).

Otherwise, an agency may be granted a measure of discretion in applying the law to the facts of a case through the *Pena* analysis adopted by the supreme court in *Drake*, 939 P.2d at 181-82 (citing *State v. Pena*, 869 P.2d 932, 935-39 (Utah 1994)), for use in administrative agency cases.

## **(i) Explicit Discretion**

When "the governing statute makes an explicit grant of discretion to [an agency, the appellate court] applies a reasonableness and rationality standard, and may only overturn the [agency's] conclusions of law if they are unreasonable and irrational." *Barnard v. Motor Vehicle Div.*, 905 P.2d 317, 320 (Utah Ct. App. 1995).

## **(ii) Implicit Discretion**

The Legislature may also implicitly delegate discretion to the agency to apply statutes. See *Zissi v. State Tax Comm'n*, 842 P.2d 848 (Utah 1992).

## **(iii) Pena Factors and Case Examples**

In general, the legal effect of specific facts "is the province of the appellate courts, and no deference need be given a trial court's resolution of such questions of law." *Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997) (quoting *State v. Vincent*, 883 P.2d 278, 281 (Utah 1994)). However, "policy considerations and other factors" may influence the appellate court "to define a legal standard so that it actually grants some operational discretion to the trial courts applying it." *Id.* (quoting [\*48] *Vincent*, 883 P.2d at 282 (citing *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994))). Consequently, appellate courts may review an agency's application of the law to the facts, depending on the issue, with varying levels of rigor ranging between de novo and broad discretion. See *id.* at 181; *Pena*, 869 P.2d at 936-39; *Sierra Club v. Utah Solid & Hazardous Waste Control Bd.*, 964 P.2d 335, 341 (Utah Ct. App. 1998);

*Professional Staff Management, Inc. v. Department of Employment Sec.*, 953 P.2d 76, 79 (Utah Ct. App. 1998).

One factor appellate courts consider in deciding the degree of deference to allow an agency's application of law to fact is the agency's expertise. See *Drake*, 939 P.2d at 181 n.6; *Sierra Club*, 964 P.2d at 341; *Professional Staff Management*, 953 P.2d at 79. Other considerations include (1) the level of complexity and range of potential patterns involved in a factual scenario to which a legal principle is to be applied; (2) the newness of the situation to which the legal principle is to be applied and whether appellate courts have had a chance "to anticipate and articulate definitively what factors should be outcome determinative;" and (3) the agency fact finder's ability to observe "'facts,' such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts." *Pena*, 869 P.2d at 939.

The following cases contain examples of agency application of law to fact (mixed questions) reviewed using the *Pena* analysis adopted by *Drake*:

- (1) Whether a set of facts qualifies an employee for workers' compensation benefits under the special errand rule. See *Drake*, 939 P.2d at 182 (giving "heightened deference" to determination, but exercising "some scrutiny").
- (2) Whether potential hazards to human health and the environment mandate revocation of a trial burn permit. See *Sierra Club*, 964 P.2d at 341 (considering "highly technical, specialized scientific knowledge . . . uniquely within the [agency's] expertise" to weigh in favor of "a relatively high degree of deference in reviewing its application of the law to the facts in this case").
- (3) Whether an agency erred in refusing to revoke a permit to operate a chemical weapons demilitarization facility in light of accidents and mishaps at the facility. See *Sierra Club*, 964 P.2d at 345 (granting "relatively high degree of deference").
- (4) Whether agency properly applied the Employment Security Act and pertinent rules. See *Professional Staff Management*, 953 P.2d at 79 (granting agency "only moderate deference" because proper application of the governing law "requires little highly specialized or technical knowledge that would be uniquely within the Department's expertise") (citations omitted).
- (5) Whether agency properly concluded that a veterinarian's actions were grossly incompetent and grossly negligent. See *Taylor v. Department of Commerce*, 952 P.2d 1090, 1092 (Utah Ct. App. 1998).

#### **c. Challenging Determinations Contrary to Agency's Rule**

Under Utah Code Annotated Section 63-46b-16(4)(h)(ii) (1997), the appellate court reviews whether the agency action is contrary to a rule of the agency by applying an intermediate-deference reasonableness and rationality standard of review. See *SF Phosphates Ltd. v. Auditing Div.*, 972 P.2d 384, 385 (Utah 1998); *R.O.A. Gen., Inc. v. Department of Transp.*, 966 P.2d 840, 842 (Utah 1998); *Brown & Root Indus. Serv. v. Industrial Comm'n*, 947 P.2d 671, 677 (Utah 1997) ("When reviewing the [agency's] application of its own rules, this court will not disturb the agency's interpretation or application of one of the agency's rules unless its determination exceeds the bounds of reasonableness and rationality.").

#### **d. Challenging Rulings Contrary to Agency's Prior Practice**

Under Utah Code Annotated Section 63-46b-16(4)(h)(iii) (1997), the appellate court reviews whether the agency action is contrary to the agency's prior practice and whether the inconsistency has a fair and rational basis. If the challenging party can prove by a preponderance of the evidence that the agency's action was contrary to prior practice, the agency's reason for the inconsistency or argument of consistency is reviewed under a reasonableness and rationality standard of review. See *Steiner Corp. v. Auditing Div.*, 979 P.2d 357, 362 (Utah 1999); *Taylor v. Department of Commerce*, 952 P.2d 1090, 1094-95 (Utah Ct. App. 1998); *Doxey-Hatch Med. Ctr. v. Department of Health*, 899 P.2d 784, 786 (Utah Ct. App. 1995).

#### **e. Challenging Agency's "Arbitrary and Capricious" Actions**

Under Utah Code Annotated Section 63-46b-16(4)(h)(iv) (1997), when a claim is brought alleging that an agency action was arbitrary and capricious, the appellate court reviews the agency action for reasonableness and rationality. See *R.O.A. Gen., Inc. v. Department of Transp.*, 966 P.2d 840, 842 (Utah 1998) (holding agency's actions were both contrary to agency's rule and arbitrary and capricious); *Doxey-Hatch Med. Ctr. v. Department of Health*, 899 P.2d 784, 785 (Utah Ct. App. 1995).

### **[\*49] 3. Challenging Conclusions of Law**

If, as discussed above, an administrative agency has not been given discretion to interpret and administer a statute, under Utah Code Annotated Section 63-46b-16(4)(d) (1997), appellate courts review the agency decision under a correction-of-error standard. See *Uintah Oil Assoc. v. County Bd. of Equalization*, 853 P.2d 894, 896 (Utah 1993) (granting agency some discretion because it has expertise in property assessment); *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 588 (Utah 1991); *Draughon v. Department of Fin. Insts.*, 975 P.2d 935, 938 (Utah Ct. App. 1999) (invalidating as matter of law agency's rule because it conflicted with statute); *Sierra Club v. Utah Solid & Hazardous Waste Control Bd.*, 964 P.2d 335, 344 (Utah Ct. App. 1998); *Epperson v. Utah State Retirement Bd.*, 949 P.2d 779, 781 (Utah Ct. App. 1997).

Appellate courts apply a correction-of-error standard not simply because the court characterizes an issue as one of general law, but because the agency has no special experience or expertise placing it in a better position than the reviewing courts to construe the law. See *Morton Int'l*, 814 P.2d at 586-87; *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 858 P.2d 1034, 1036 (Utah Ct. App. 1993).

#### **a. Examples of Questions of Law**

(1) Whether an agency has properly interpreted or applied general law such as case law, constitutional law, or nonagency specific legislative acts. See Utah Code Ann. § 63-46b-16(4)(d) (1997); see also *Elks Lodges # 719 & 2021 v. Department of Alcoholic Beverage Control*, 905 P.2d 1189, 1202 (Utah 1995); *Harrington v. Industrial Comm'n*, 942 P.2d 961, 963 (Utah Ct. App. 1997).

(2) Whether an agency has properly interpreted and applied agency-specific law in cases where that agency has not been granted discretion. See Utah Code Ann. § 63-46b-16(4)(d) (1997); *Nucor Corp. v. State Tax Comm'n*, 832 P.2d 1294, 1296 (Utah 1992); *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 589 (Utah 1991); *Sierra Club v. Utah Solid & Hazardous Waste Control Bd.*,

964 P.2d 335, 344 (Utah Ct. App. 1998); *O'Keefe v. Utah State Retirement Bd.*, 929 P.2d 1112, 1114-15 (Utah Ct. App. 1996), *aff'd*, 956 P.2d 279 (Utah 1998).

(3) Whether the statute upon which an agency's action is based is constitutional. See Utah Code Ann. § 63-46b-16(4)(a) (1997); see also *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1384 (Utah 1993); *Union Pac. R.R. Co. v. Auditing Div.*, 842 P.2d 876, 881 (Utah 1992); *Lander v. Industrial Comm'n*, 894 P.2d 552, 554 (Utah Ct. App. 1995); *Velarde v. Board of Review*, 831 P.2d 123, 125 (Utah Ct. App. 1992). n32

n32 However, interpretations of the state and federal constitutions are questions of law, reviewed for correctness under Utah Code Ann. § 63-46b-16(4)(d) (1997). See *Questar Pipeline Co. v. State Tax Comm'n*, 817 P.2d 316, 317 (Utah 1991).

(4) Whether an agency has jurisdiction. See Utah Code Ann. § 63-46b-16(4)(b) (1997); see also *Stokes v. Flanders*, 970 P.2d 1260, 1262 (Utah 1998); *Sheppick v. Albertson's, Inc.*, 922 P.2d 769, 773 (Utah 1996).

(5) Whether an agency has decided all necessary issues. See Utah Code Ann. § 63-46b-16(4)(c) (1997); see also *SEMECO Indus., Inc. v. Auditing Div.*, 849 P.2d 1167, 1171 (Utah 1993) (Durham, J., dissenting); *Zimmerman v. Industrial Comm'n*, 785 P.2d 1127, 1132 (Utah Ct. App. 1989) (concluding no error in failure to make finding of disability).

(6) Whether an agency's procedures and decision-making processes are proper. See Utah Code Ann. § 63-46b-16(4)(e) (1997); *SEMECO*, 849 P.2d at 1172 (Durham, J., dissenting); *Whitear v. Labor Comm'n*, 973 P.2d 982, 984 (Utah Ct. App. 1998); *C.P. v. Office of Crime Victims' Reparations*, 966 P.2d 1226, 1230 (Utah Ct. App. 1998) (addressing issue of whether Office of Crimes Victims' Reparations "can bar reparation claims based on an informal policy not adopted pursuant to the Utah Administrative Rulemaking Act"), *cert. denied*, No. 981833 (Utah Feb. 17, 1999); *Sierra Club v. Utah Solid & Hazardous Waste Control Bd.*, 964 P.2d 335, 347 (Utah Ct. App. 1998) ("Questions regarding whether an administrative agency has afforded a petitioner due process in its hearings are questions of law.") (citation omitted).

(7) Whether "the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification." Utah Code Ann. § 63-46b-16(4)(f) (1997); accord *SEMECO*, 849 P.2d at 1172 (Durham, J., dissenting).

(8) Whether a medical treatment is experimental. See *Peterson v. Department of Health*, 969 P.2d 1, 4 (Utah Ct. App. 1998).

(9) Whether an agency's order is enforceable as a judicial judgment. See *Stokes v. Flanders*, 970 P.2d 1260, 1262 (Utah 1998).

(10) Whether an entity is an "operator" under Utah Code Annotated Section 19-6-108(3)(a) (Supp. 1997) and therefore required to get a permit to run a chemical agent demilitarization facility. See *Sierra Club*, 964 P.2d at 344.

(11) Whether an agency has properly interpreted an unambiguous contract. See *Magnesium Corp. of Am. v. Air Quality Bd.*, 941 P.2d 653, 658 (Utah Ct. App. 1997) (approval order).

(12) Whether a coal mining company was required under the Federal Surface Mining Act to provide replacement water to a water users' group. See *Castle Valley Special Serv. Dist. v. [\*50] Board of Oil, Gas & Mining*, 938 P.2d 248, 252 (Utah 1996).

(13) "When a district court's review of an administrative decision is challenged on appeal and the district court's review was limited to the record before the board, "[the appellate court] reviews the administrative decision just as if the appeal had come directly from the agency." . . . Therefore, [the appellate court] owes no particular deference to the district court's decision." *Wells v. Board of Adjustment*, 936 P.2d 1102, 1104 (Utah Ct. App. 1997) (citations omitted).

(14) Whether an agency properly allocated burdens of proof. See *Beaver County v. Utah State Tax Comm'n*, 916 P.2d 344, 357 (Utah 1996).

(15) "Whether to give retroactive effect to an amended statute of limitations . . . when 'the [agency's] experience or expertise is not helpful in resolving the issue.'" *Brown & Root Indus. Serv. v. Industrial Comm'n*, 905 P.2d 305, 307 (Utah Ct. App. 1995) (quoting *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 585 (Utah 1991)), *rev'd on other grounds*, 947 P.2d 671 (Utah 1997).

(16) "Whether the [agency] acted improperly by raising and deciding an issue sua sponte . . . ." *Hilton Hotel v. Industrial Comm'n*, 897 P.2d 352, 354 (Utah Ct. App. 1995).

(17) Whether an agency has properly determined the nature of an employment relationship. See *BB & B Transp. v. Industrial Comm'n*, 893 P.2d 611, 612 (Utah Ct. App. 1995).

(18) Whether a trial court correctly determined that the "savings statute" applies to judicial review of final agency action. See *C.P. v. Utah Office of Crime Victims' Reparations*, 966 P.2d 1226, 1228 (Utah Ct. App. 1998), *cert. denied*, No. 981833 (Utah Feb. 17, 1999).

#### 4. Appeals from the State Tax Commission

The appellate advocate should be aware of Utah Code Annotated Section 59-1-610 (1996), which codified a separate standard of review for appeals from formal adjudicative proceedings before the state tax commission. "This [statute] became effective on May 3, 1993, and 'superseded section 63-46b-16 pertaining to judicial review of formal adjudicative proceedings.'" n33 *Board of Equalization v. State Tax Comm'n*, 864 P.2d 882, 884 (Utah 1993) (citation omitted).

n33 This section also applies to cases filed before its effective date. See *Yeargin, Inc. v. Tax Comm'n*, 977 P.2d 527, 531 (Utah Ct. App. 1999) (applying section 59-1-610 retroactively because it is procedural not substantive); *Board of Equalization v. State Tax Comm'n*, 864 P.2d 882, 884 (Utah 1993) (holding section 59-1-610 applies to actions filed before its effective date).

The standard of review for written findings of fact from formal adjudicative proceedings by the Utah State Tax Commission remains a substantial evidence standard. See Utah Code Ann. § 59-1-610(1)(a) (1996); *Schmidt v. Utah State Tax Comm'n*, 980 P.2d 690, 692 (Utah 1999); *Yeargin, Inc. v. Tax Comm'n*, 977 P.2d 527, 531 (Utah Ct. App. 1999). The standard of review for conclusions of law is the correction-of-error standard "unless there is an explicit grant of discretion contained in a statute at issue before the appellate court." Utah Code Ann. § 59-1-610(1)(b) (1996); *Airport Hilton Ventures, Ltd. v. Utah State Tax Comm'n*, 976 P.2d 1197, 1199-1200

(Utah 1999); *SF Phosphates Ltd. v. Auditing Div.*, 972 P.2d 384, 385 (Utah 1998). "If the Commission is granted discretion by the statute at issue, then the standard of review is narrower. The court is to defer to the Commission's conclusions of law, applying a reasonableness standard." *Newspaper Agency Corp. v. Auditing Div.*, 938 P.2d 266, 268 (Utah 1997).

#### **a. Examples of Fact Questions**

(1) Whether the capitalized net revenue method may be used in property tax calculations. See *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1385-86 (Utah 1993).

(2) Whether fair market value may be assessed by income and market methods rather than by cost method. See *Questar Pipeline Co. v. State Tax Comm'n*, 850 P.2d 1175, 1176-79 (Utah 1993).

(3) Whether an explicit bilateral agreement existed on the subject of title transfer. See *Hales Sand & Gravel, Inc. v. Audit Div.*, 842 P.2d 887, 893 (Utah 1992).

(4) Whether amphetamine tablets are drugs sold by weight or by "dosage unit." See *Zissi v. State Tax Comm'n*, 842 P.2d 848, 852-53 (Utah 1992).

(5) Whether the commission properly determined the amount of a tax deficiency. See *Jensen v. State Tax Comm'n*, 835 P.2d 965, 970 (Utah 1992).

(6) Whether a party established a domicile in Utah. See *Clements v. State Tax Comm'n*, 893 P.2d 1078, 1081 (Utah Ct. App. 1995).

(7) Whether the amount of an expense ratio on property was proper. See *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165-66 (Utah 1990).

(8) Whether the commission properly applied an appraisal methodology. See *Alta Pac. Assocs. v. State Tax Comm'n*, 931 P.2d 103, 108-10 (Utah 1997); *Beaver County v. State Tax Comm'n*, 919 P.2d 547, 554 (Utah 1996).

(9) Whether the commission properly determined fair market value. See *Mallinckrodt v. Salt Lake County*, 373 Utah Adv. Rep. 8, 9 (Utah 1999) (real estate); *Action TV v. County Bd. of [\*51] Equalization*, 374 Utah Adv. Rep. 26, 27 (Utah Ct. App. 1999) (rent-to-own personal property).

#### **b. Examples of Agency's Discretion**

(1) Whether the Commission correctly included an entity as an "establishment" within the definition of "manufacturing facility" for purposes of the sales tax exemption in Utah Code Annotated Section 59-12-104(16) (1989). See *Salt Lake Brewing Co. v. Auditing Div.*, 945 P.2d 691, 694 (Utah 1997) (explicit grant of discretion).

(2) "Whether the Commission's rule defining 'normal operating replacements' is a reasonable interpretation of that term as used in [Utah Code Annotated Section] 59-12-104(16)." *Newspaper Agency Corp. v. Auditing Div. of the Utah State Tax Comm'n*, 938 P.2d 266, 268 (Utah 1997).

(3) "Whether the Commission acted reasonably in concluding that [certain] circumstances . . . fall within the definition of 'normal operating replacements' in [Utah Administrative Code] Rule 865-19-85S(A)(6) [(1991)]." *Newspaper Agency Corp.*, 938 P.2d at 269.

#### **c. Example of Mixed Question of Fact and Law**

(1) Whether a party is a real property contractor. See *Yeargin, Inc. v. Tax Comm'n*, 977 P.2d 527, 530 (Utah Ct. App. 1999).

#### **d. Examples of Questions of Law**

(1) Whether the Drug Stamp Tax Act violates the Federal Double Jeopardy Clause. See *Brunner v. Collection Div.*, 945 P.2d 687, 689 (Utah 1997).

(2) Whether "the 'normal operating replacements' exclusion applies to both new and expanding operations." *Newspaper Agency Corp. v. Auditing Div.*, 938 P.2d 266, 268 (Utah 1997).

(3) "Whether the Commission created a classification of property for tax purposes in violation of the Utah Constitution . . . ." *Alta Pac. Assocs. v. State Tax Comm'n*, 931 P.2d 103, 114 (Utah 1997).

(4) Whether a plaintiff has standing. See *Barnard v. Motor Vehicle Div.*, 905 P.2d 317, 320 (Utah Ct. App. 1995).

(5) Whether income is taxable. See *Maryboy v. State Tax Comm'n*, 904 P.2d 662, 665 (Utah 1995).

(6) "Whether property has escaped assessment . . . ." *Action TV v. County Bd. of Equalization*, 374 Utah Adv. Rep. 26, 27 (Utah Ct. App. 1999) (citation omitted).

### **III. CHALLENGES ON CERTIORARI AND UPON CERTIFICATION BY FEDERAL COURTS**

On certiorari, the supreme court "reviews the decision of the court of appeals, not the decision of the trial court." *Bear River Mut. Ins. Co. v. Wall*, 978 P.2d 460, 461 (Utah 1999); accord *State v. Alonzo*, 973 P.2d 975, 978 (Utah 1998); *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 855 (Utah 1998). The court of appeals' decision is reviewed for correctness, and its conclusions of law are afforded no deference. See *Bear River*, 978 P.2d at 461.

**[\*52]** When a question has been certified to the supreme court by the federal district court, the supreme court does not "refind the facts;" rather, the court answers only the certified question of law presented. See *Burkholz v. Joyce*, 972 P.2d 1235, 1236 (Utah 1998).

## CONCLUSION

The appellate voyage is a joint intellectual effort requiring teamwork between the bench and the bar. Appellate advocates are vital members of the team and their briefs and arguments are crucial to the judges' decision-making. The importance of their role and contribution should be recognized. When material for an opinion can be lifted directly from a brief, the appellate judge rejoices. For example, the phrase set forth in advocate Daniel Webster's brief: "An undaunted power to tax involves, necessarily, the power to destroy," became Chief Justice Marshall's: "The power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

The effective appellate advocate will carefully consult the standards of review compass to locate the proper standard of review. If the standard is ignored or misplaced, chances for success are jeopardized. If the proper standard is selected and applied, the odds for success are improved. I wish you well as you navigate the seas of appellate advocacy.

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## ARTICLE: THE UTAH MARSHALING REQUIREMENT: AN OVERVIEW

by Ryan D. Tenney n1

n1 The author wishes to thank both Judge Norman H. Jackson of the Utah Court of Appeals and Andrew Petersen for their helpful comments and suggestions in preparation of this article. Any views or errors that are contained herein, however, are solely the responsibility of the author.

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**TEXT:**

**[\*22]** Rule 24(a)(9) of the Utah Rules of Appellate Procedure states that "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." At first glance, this rule may appear misguided. After all, ours is a profession that stresses zealous advocacy on behalf of a client. It may sometimes be difficult for an appellate litigator to imagine why he or she should have to make the opponent's case for them; it may be even more difficult for the attorney to then imagine having to explain that particular portion of the brief to their client. As the reported cases suggest, however, the appellate courts can and do regard a failure to marshal as a fatal defect.

In an effort to aid the inexperienced appellate litigator in his or her efforts to understand and comply with the marshaling requirement, this article will briefly discuss (i) the purpose of the marshaling requirement, (ii) the steps that a party must take to comply with the marshaling requirement, and (iii) the types of appeals for which marshaling is required.

**I. Purpose of the Marshaling Requirement**

As indicated in the reported cases, the marshaling requirement has two chief purposes. First, because appellate courts are only deemed competent to overturn findings of fact under certain limited circumstances, our appellate system has incorporated several procedural mechanisms that are expressly designed to protect the fact-finding prerogative of the trial courts. One mechanism is the strict standard of review that is used in evaluating a challenge to a finding of fact. n2 Another mechanism is the marshaling requirement. In *State v. Moore*, the Utah Court of Appeals noted that "the process of marshaling the evidence serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder at trial." n3 By requiring an appellant to catalogue the evidence supporting the trial court's decision, the marshaling requirement thus acts as a clear reminder that appellants should not try to persuade the appellate court that their theory of the case was stronger than that which was advanced by the other side, or that their evidence and witnesses were more compelling; instead, the marshaling requirement reminds us that appellate review of a factual determination is strictly confined to an analysis as to whether there was sufficient evidence to support the particular factual conclusion that was actually reached below. n4

n2 See, e.g., Utah Rules of Civil Procedure 52(a) ("Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.")

n3 802 P.2d 732, 739 (Utah Ct. App. 1990).

n4 See, e.g., *State v. Goddard*, 871 P.2d 540, 543 (Utah 1994) ("We will not sit as a second fact finder, nor will we determine the credibility of witnesses. That is the prerogative of the jury."); *ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 255, 257 (Utah Ct. App. 1997) ("It is the trial court's role to assess witness credibility, given its advantaged position to observe testimony firsthand, and normally, we will not second guess the trial court's findings in this regard. . . . We emphasize, . . . that this court does not sit as a fact finder.").

The second purpose of the marshaling requirement is a more practical one. Trial courts are gradually exposed to the facts of a case through both the pretrial motion process and through the presentation of the parties' evidence and witnesses at trial. In contrast, an appellate court's exposure to the facts of a case only comes through reference to the record. Absent effective briefing, an appellate court that is reviewing a factual challenge would be forced to wade through hundreds and perhaps thousands of pages in the record in order to gain an accurate sense of how much evidence supported a particular finding. Such a process would not only be inefficient, but it would create the very real risk that an appellate court, starting from scratch, might inadvertently overlook a piece of relevant



evidence. To help avoid such a result, the marshaling requirement places the onerous burden of conducting this research on the party who should by disposition be most familiar with the quantum of evidence (or putative lack thereof) that supports the challenged finding. "Thus, an appellate court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." The marshaling requirement provides the appellate court the basis from which to conduct a meaningful review of facts challenged on appeal. n5

n5 *State v. Larsen*, 828 P.2d 487, 491 (Utah Ct. App. 1992); *see also, Wright v. Westside Nursery*, 787 P.2d 508, 512 n.2 (Utah Ct. App. 1990) ("Wright beseeches us to make a thorough review of the whole record, which fills a box the size of an orange crate. We do not apologize for declining Wright's invitation. The very purpose of such devices as the 'marshaling' doctrine and R. Utah Ct. App. 24 (a)(7), requiring that all references in briefs to factual matters 'be supported by citations to the record,' is to spare appellate courts such an onerous burden. Absent exceptional circumstances, our review of the record is limited to those specific portions of the record which have been drawn to our attention by the parties and which are relevant to the legal questions properly before us.").

While accepting that the appellate court should be spared the initial burden of research that accompanies factual challenges, some have argued that the burden would be better carried by the appellee, rather than the appellant. Though there may be some merit to this argument, it is again worth noting that, because of the stringent standard of review, a party seeking to overturn a factual determination clearly faces an uphill battle. Given the long odds against reversal in these circumstances, there is a certain sense of logic and fairness involved in ensuring that the party initiating such an appeal be the one to initially carry the burden and expense that is involved in setting the stage for meaningful appellate review. *See, e.g., Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799-800 (Utah 1991) (stating "the marshaling [sic] burden" is one that must be carried by "the one challenging the verdict").

## II. Satisfying the Marshaling Requirement

There are two chief requirements that must be satisfied in order to properly fulfill the marshaling requirement. First, the marshaling should be correctly located, and second, the marshaling should be thorough.

**Location:** The Utah Rules of Appellate Procedure are explicit as to the proper placement of the marshaled facts. Rule 24(a) states that

the brief of the appellant shall contain under appropriate [\*23] headings and in the order indicated:

(a)(9) *An argument.* The argument shall contain the contentions and reasons of the appellant with respect to the issues presented . . . . A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. n6

n6 Emphasis added.

The courts have repeatedly stressed that this placement rule should be observed. Among the reported cases discussing this requirement are those in which appellate courts have rejected a party's attempt to place the marshaled evidence in the fact section of the brief n7 or in an appendix, n8 or where the party has instead attempted to comply with the requirement by scattering the marshaled evidence throughout the entirety of the brief. n9 In order to ensure that the requirement is properly satisfied, a party challenging a fact finding should therefore always place the marshaled evidence in the argument section of his or her brief.

n7 *See Fitzgerald v. Critchfield*, 744 P.2d 301, 304 (Utah Ct. App. 1987) ("[Appellant's] brief contains a heading 'FACTS' under which appellant has set forth both parties' 'versions' of the facts. This does not constitute a sufficient marshaling of the evidence in support of the findings made by the court below. The requisite presentation of supporting evidence is also not found in the argument portion of appellant's brief. Appellant has, therefore, failed to meet his threshold burden on appeal, one that is neither elective nor optional.").

n8 *See Debry v. Cascade Enters.*, 879 P.2d 1353, 1360 n.3 (Utah 1994) ("The DeBrys purport to marshal the evidence in support of the verdict in an appendix to their brief which, together with the pages in the brief, exceeds the page limitation allowed by Rule 24(g) of the Rules of Appellate Procedure. This does not comply with the requirement to marshal evidence. It is improper for counsel to attempt to enlarge the page limit of the brief by placing critical facts in appendices.").

n9 *See Roderick v. Ricks*, 2002 UT 84, P47 n.11, 54 P.3d 1119 ("Though Castleton did mention some evidence favorable to the court's finding, he generally dispersed this evidence throughout his appellate brief. To comply with the marshaling requirement, appellants must marshal all the favorable evidence at the point at which they challenge the factual finding.") (Emphasis added.)

**Thoroughness:** As noted above, Rule 24(a)(9) states that a party challenging a fact finding "must first marshal *all record evidence* that supports the challenged finding." n10 Though many overly zealous advocates may be tempted to read this requirement less than literally, the reported cases clearly indicate that the courts are serious about enforcing the requirement under its express terms. In one oft-quoted passage, the Utah Court of Appeals set forth the requirement as follows:

the marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous. n11

n10 Emphasis added.

n11 *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991) (emphasis in original).

All too often, it seems, appellants attempt to evade the strictures of this requirement by either selectively omitting particularly unfavorable pieces of evidence from their marshaling or by instead mischaracterizing the unfavorable pieces of evidence that have been included. Neither strategy is acceptable. n12 Similarly, it is also not acceptable to attempt to evade the requirement by complaining of its effect on a brief's page-length, n13 or by instead arguing that marshaling should not be required due to the paucity of evidence that supports the trial court's finding. n14

n12 See *Crookston*, 817 P.2d at 800 ("Here, Fire Insurance has made no attempt to marshal the evidence in support of the jury finding of fraud. In fact, all Fire Insurance has done is argue selected evidence favorable to . . . its position. That does not begin to meet the marshaling burden it must carry. . . . This failure alone is grounds to reject Fire Insurance's attack on the fraud finding."); *State v. Pilling*, 875 P.2d 604, 608 (Utah Ct. App. 1994).

n13 See *Larsen*, 828 P.2d at 491 ("Larsen challenges several factual findings of the trial court concerning the nature or extent of their professional relationship, but admits he 'may have fallen somewhat short' in marshaling the evidence. Larsen even goes so far as to suggest that he was prevented from doing so because of page limitations imposed upon him. Our insistence on compliance with the marshaling requirement is not a case of exalting hypertechnical adherence to form over substance. . . . Because Larsen failed to marshal evidence in support of the trial court's findings . . . , we affirm . . .").

n14 See *Brown v. Richards*, 840 P.2d 143, 149 n.2 (Utah Ct. App. 1992). However, it is worth noting that there is some authority for the proposition that marshaling may be deemed futile in certain circumstances. See, e.g., *Campbell v. Campbell*, 896 P.2d 635, 638 (Utah Ct. App. 1995). In such circumstances, "appellants are advised to marshal the evidence to the degree possible and then explain the reason for any deficiency. Appellants should not merely ignore the marshaling requirement." Judge Norman H. Jackson, "Utah Standards of Appellate Review: Revised," 12 *Utah Bar J.* 8, 13 n.8 (1999) (citing and discussing the authority relevant to circumstances in which marshaling might otherwise be deemed "futile").

In short, a proper satisfaction of the marshaling requirement entails a "listing [of] all the evidence *supporting* the finding that is challenged. Once the evidence is listed . . . with appropriate citation to the record, the appellant must then show that the marshaled evidence is legally insufficient to support the findings . . . ." n15 If a party fails to fully comply with the requirement, the appellate court is required to assume that the findings are correct, n16 and the appeal will thus necessarily fail.

n15 Jackson, *id.* at 8 at 13 (emphasis in original).

n16 See *Valcarve v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998); *Johnson v. Higley*, 1999 UT App 278, P37, 989 P.2d 61.

### III. Circumstances Under Which Marshaling is Required

Rule 24(a)(9) states that marshaling is required for parties who are "challenging a fact finding." In addition to the requirement's applicability to straightforward factual challenges, there is also a line of cases applying the requirement to certain legal questions. Specifically, appellate courts have held that the requirement is applicable to appeals from: (i) a trial court's denial of a motion for a directed verdict; n17 (ii) a trial court's denial of a motion for a judgment notwithstanding the verdict (JNOV); n18 and (iii) a trial court's denial of a motion for a new trial. n19 The common link between these three motions is that appellate review of their denials involves the sufficiency of the evidence standard of review. n20 As such, there is a certain degree of consistency in requiring an appellant who must establish that the collected evidence was insufficient to first marshal the evidence that actually supports [\*24] the challenged ruling. On a broader scale, it is worth noting that these examples seem to indicate that the precise contours of the marshaling requirement are still open to interpretation. It thus remains to be seen whether the appellate courts will further expand the requirement's applicability to other ostensibly legal questions that also involve evidentiary reviews.

n17 See *Water & Energy Sys Tech., Inc. v. Keil*, 2002 UT 32, PP14-15, 48 P.3d 888; *Neely v. Bennett*, 2002 UT App 189, P11, 51 P.3d 724.

n18 See *Debry*, 879 P.2d at 1359-60; *Crookston*, 817 P.2d at 799-800.

n19 See *Child v. Gonda*, 972 P.2d 425, 433 (Utah 1998); *Neely*, 2002 UT App 189 at P11.


n20 See *Child*, 972 P.2d at 433; *Crookston*, 817 P.2d at 799.

### IV. Conclusion

In short, the marshaling requirement is a procedural mechanism that is designed to protect the trial court's fact-finding prerogative and to promote the efficiency and quality of an appellate court's review. Under the terms of the requirement, a party who is challenging a trial court's finding of fact is required to include a listing of all pieces of evidence that support the trial court's finding in the argument section of the opening brief. Failure to comply with this rule will result in dismissal of the party's claim. Finally, there is authority for the proposition that marshaling is not only required on straightforward challenges to findings of fact, but that it is also required on any challenge that involves a sufficiency of the evidence review.

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