

2008

# Martha I. Thompson v. James A. Thompson : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

MARTHA I. THOMPSON	
Petitioner/Appellee,	
v.	Appellate Case No. 20080548
JAMES A. THOMPSON	Trial Court Civil No: 074500408
Respondent/Appellant.	

**BRIEF OF THE APPELLEE**

Appeal from the Decree of Divorce  
entered on May 21, 2008 by the Fifth Judicial District Court,  
the Honorable G. Rand Beacham, Presiding

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## **ADDENDA**

- A. Findings of Fact and Conclusions of Law
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## **JURISDICTIONAL STATEMENT**

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. §78A-4-103(2)(h) (2008).

## **STANDARDS OF REVIEW**

### **Review of Trial Court's Factual Findings**

- a. A trial court's findings of fact will not be set aside unless clearly erroneous. Chen v. Stewart, 100 P.3d 1177, 1184 (Utah 2004). For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994), holding modified in, State v. Levin, 144 P.3d 1096 (Utah 2006). This standard is highly deferential to the trial court because it is before that court that the witnesses and parties appear and the evidence is adduced. Id. The judge of that court is therefore 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.
- b. In order to establish that a particular finding of fact is clearly erroneous, an appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking

in support as to be against the clear weight of the evidence. Chen v. Stewart, 100 P.3d 1177, 1184 (Utah 2004). If the evidence is inadequately marshaled, the reviewing court assumes that all findings are adequately supported by the evidence. Id.

- c. In the absence of a transcript, reviewing courts cannot determine whether the findings were based upon sufficient evidence and will presume the correctness of the findings made by the trial court. Meyers v. Meyers, 2005 UT App. 50. Absent the trial transcript, appellant's claim of error [in trial court's findings] is "merely an unsupported, unilateral allegation which [the Utah Court of Appeals] cannot resolve." Horton v. Gem State Mut. of Utah, 794 P.2d 847, 849 (Utah Ct. App. 1990) (citing Mark VII Fin. Consultants Corp. v. Smedley, 792 P.2d 130, 134 (Utah Ct. App. 1990)).

#### Review of Trial Court's Legal Conclusions

- d. The trial court is permitted considerable discretion in adjusting the financial interests of the parties to a divorce and its actions are entitled to a presumption of validity. Hansen v. Hansen, 736 P.2d 1055, 1056 (Utah Ct. App. 1987).
- e. Whether the trial court applied the proper legal standard is a question of law that is reviewed for correctness. Chen v. Stewart, 100 P.3d 1177, 1184 (Utah 2004). The application of a legal standard, once articulated, involves varying degrees of discretion depending on the standard in question. In Re Estate of

Beesley, 883 P.2d 1343, 1347-48 (Utah 1994). In cases where meeting the legal standard is extremely fact sensitive, reviewing courts should give trial courts considerable discretion in determining whether the facts of a particular case come within the established rule of law. See id. Even where the appellant purports to challenge only the legal ruling, if a determination of correctness of a court's application of a legal standard is extremely fact-sensitive, the appellant also has a duty to marshal the evidence. Chen, 100 P.3d at 1184-85.

### **PRESERVATION OF THE ISSUES**

The issues presented in this brief pertaining to the trial court's determinations were preserved by the evidence and testimony at trial and Mrs. Thompson's Post-Trial Memorandum of Points and Legal Authorities. (R. 157-59; R. 160-72).

### **DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES**

Utah Rule of Appellate Procedure 11(e)(2) (2008):

If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

Utah Rule of Appellate Procedure 24(a)(9) (2008):

An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented,

including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must marshal all record evidence that supports the challenged finding.

### **STATEMENT OF FACTS**

1. A bench trial was held in this matter on January 29, 2008 before the Honorable G. Rand Beacham. (R. 157).

2. On the date of trial, Mrs. Thompson took the witness stand to testify at approximately 9:33 a.m., and testified, with recesses being taken, until approximately 2:19 p.m. (Id.)

3. Mr. Thompson thereafter took the witness stand commencing at approximately 2:20 p.m. (Id.) Mr. Thompson testified, with recesses being taken, until 5:00 p.m. (Id.)

4. During the course of the trial, approximately 31 Exhibits were admitted into evidence. (R. 158-59).

5. On April 11, 2008, Judge Beacham signed his Findings of Fact and Conclusions of Law. (Addendum 1; R. 205-11).

6. In making his Findings of Fact and Conclusions of Law, Judge Beacham stated as follows:

The Court has considered the testimonies of the witnesses, the exhibits received into evidence, the arguments of counsel and the parties' proposed findings of fact and conclusions of law. Neither party's proposals were entirely acceptable to the Court. Accordingly, the Court now makes its Findings of Fact and Conclusions of Law. (Footnote omitted).

(Addendum 1 at 1; R. 205).

7. The Court went on to make the following findings of fact and conclusions of law:

#### MARITAL HOME

5. At the time of the parties' marriage in 2002, Respondent owned a home in California which was his sole property.

6. During the next two or three years of marriage, Petitioner acquired some community property interest in Respondent's California home, but the evidence before the Court does not allow this to be quantified.

7. When the parties moved to Utah in 2005, Respondent sold the California home and the parties jointly purchased a home in St. George, Utah.

8. Title to the Utah home was and is held by both parties as joint tenants, and is subject to a joint obligation for a debt secured by a trust deed.

9. The earnest money and down payment on the Utah home totaled more than \$80,000, and both were paid with funds from the proceeds of the sale of Respondent's premarital home in California.

10. The Utah home is a marital asset, in which each party is entitled to an equitable share, because the California home proceeds have been commingled into the marital estate [Dunn v. Dunn is the correct precedent] and because Petitioner had some community property interest in the proceeds of the California home

12. The Utah home should be sold and the net proceeds divided equally between the parties; in the alternative, either party should be allowed to purchase the interest of the other party for \$62,000 within the next six months after the entry of the final Decree of Divorce.

#### 401K ACCOUNT

13. Respondent's 401k retirement account had a value of \$68,784 at the time of the parties' marriage in 2002.

14. The 401k account had a value of \$177,302 at the time of trial.

15. The difference of \$108,518 accumulated during the marriage and as marital property [Jeffries v. Jeffries is the correct precedent] and Petitioner should be awarded one half of that accumulated amount.

(Addendum 1 at ¶¶ 5-15; R. 206-07).

8. On May 21, 2008, the trial court entered a Decree of Divorce pursuant to and consistent with its Findings of Fact and Conclusions of Law. (R. 212).

9. Mr. Thompson initiated this appeal by filing a Notice of Appeal on June 18, 2008. (R. 224).

10. In violation of Utah Rule of Appellate Procedure 11(c) and (e)(1), Mr. Thompson did not request a transcript of any parts of the proceedings, nor did he file a certificate with the clerk of the trial court and a copy with the clerk of the appellate court indicating that no parts of the transcript of the proceedings was to be requested. Utah R. App. P. 11(c), (e)(1) (2008). (See Judgment Role and Index, attached as Addendum 2 at 2-

3).

11. Also in violation of Utah Rule of Appellate Procedure 11(c) and (e)(2), Mr. Thompson failed to include in the record a transcript of all evidence relevant to any finding or conclusion Mr. Thompson intends to urge on appeal is unsupported by or is contrary to the evidence. Utah R. App. P. 11(c), (e)(1) (2008). (See Judgment Role and Index, attached as Addendum 2 at 2-3).

12. In the absence of a transcript of the testimony given by the parties at trial, Mr. Thompson supports much of the “Statement of Material Facts” portion of his Appellate Brief by citing to an unverified trial brief that was prepared by his counsel. (Brief of the Appellant at 3-7; R. 193-204).

13. Of the 35 total paragraphs in Mr. Thompson’s “Statement of Material Facts,” the following are based exclusively upon the unverified trial brief which bears no evidentiary value for purposes of this appeal: 6, 7, 8, 10, 13, 14, 21, 22, 25, 30, and 31. (Brief of the Appellant at 3-7).

14. The following paragraphs in Mr. Thompson’s “Statement of Material Facts” are based, at least in part, on Mr. Thompson’s trial brief: 9, 11, 12, 18, 19, 20, 23, 26, and 28. (Id.)

15. Further, in the “Argument” portion of Mr. Thompson’s Appellate Brief, he states and relies on factual assertions, citing only to the trial brief or to nothing at all. (Id. at 10-17). For example, Mr. Thompson makes the following factual allegations unsupported



by any evidence:

- a. During the course of the marriage, it was undisputed that Mr. Thompson continued to make financial contributions to the same 401k account through his employment. (Id. at 11).
- b. Additionally, Mrs. Thompson did not, by her own efforts, augment, maintain, or protect Mr. Thompson's premarital contributions in any way. (Id.)
- c. In the instant case, Mr. Thompson acquired the California home as his sole and separate property. (Id. at 15).
- d. Mr. Thompson owned and lived in the California home prior to the marriage. (Id.)
- e. Even after the marriage, Mr. Thompson continued to make all financial contributions for the maintenance and mortgage payments secured by the California home. (Id.)
- f. The Trial Court, however, made a finding, but without any supporting evidence, that Mrs. Thompson somehow acquired "some community property interest" in Mr. Thompson's California home. (Id.)
- g. During the marriage, Mr. Thompson continued to be the sole contributor to the maintenance and mortgage payments secured by the Utah home. (Id. at 15-16).
- h. Mrs. Thompson did not make any financial contributions to maintenance, upkeep or mortgage payments. (Id. at 16).

16. Indeed, nowhere in Mr. Thompson's brief does he ever support any of his factual allegations by citations to actual trial testimony from the parties' one-day trial, as Mr. Thompson did not request a transcript of the trial. (See id. at 1-17).

17. While Mr. Thompson did not request a copy of the transcript, the following

documents were admitted into evidence, which, along with the parties' testimony, supports the trial court's factual determinations. On or about January 20, 2005, the parties jointly entered into a real estate purchase contract to acquire the St. George home at issue in this matter. (R. 158 at Exhibit 2). On April 18, 2005, Mr. Thompson signed a warranty deed conveying title of the St. George home from Mr. Thompson's name individually to himself and Mrs. Thompson as husband and wife and as joint tenants with full rights of survivorship. (R. 158 at Exhibit 5). On August 24, 2006, the parties jointly executed a uniform residential loan application to jointly refinance the debt associated with the St. George home. (R. 158 at Exhibit 6). The parties successfully refinanced the debt associated with the St. George home in the amount of approximately \$331,400.00, and both parties signed a note making them jointly liable for the debt. (R. 158 at Exhibit 7). The parties also signed a deed of trust pertaining to the note on August 24, 2006 securing the joint obligation with the jointly owned St. George home. (R. 158 at Exhibit 8). In Mr. Thompson's responses to interrogatories which were entered into evidence at trial as Exhibit 17, Mr. Thompson admitted that the debt associated with the marital home in the amount of approximately \$331,400.00 was marital debt. (R. 158 at Exhibit 17 p.7).

18. At the beginning of the parties' marriage, Mr. Thompson had a 401(k) retirement plan through his employment with a value of approximately \$68,784.00 as of March 31, 2002. (R. 158 at Exhibit 22 ). At the time of the divorce trial, the value of the 401(k) account was approximately \$177,302. (R. 159 at Exhibit 23).

## **SUMMARY OF ARGUMENTS**

### **SUMMARY OF SECTION I**

A trial court, in dividing a marital estate upon divorce, is not obligated as a matter of Utah law to “back out” alleged separate property. This Court has determined that separate property may lose its character as separate when it is commingled into the marital estate, or when it loses its identity as separate. Burt v. Burt, 799 P.2d 1166, 1169 (Utah Ct. App. 1990). In dividing a marital estate, trial courts are to first categorize the parties’ property as part of the marital estate or as the separate property of one or the other. Burt v. Burt, 799 P.2d 1166, 1172 (Utah Ct. App. 1990). Then, each party is presumed to be entitled to fifty percent of the marital property. Id. In this matter, the trial court properly characterized the assets at issue as marital property, and correctly determined to equally divide the marital portion of such assets.

### **SUMMARY OF SECTION II**

The Court made factual determinations based on the testimonies of the parties and the evidence received at trial that the assets at issue in this appeal are marital property. For Mr. Thompson to properly challenge such factual determinations of the trial court, Mr. Thompson had an obligation under Utah Rule of Appellate Procedure 11(e)(2) (2008) to provide a transcript of the testimony given during the parties’ one-day trial. However, Respondent failed to provide a transcript, and, as such, the trial court’s factual determinations and fact intensive legal determinations should be affirmed on appeal. See Horton v. Gem State Mut.

of Utah, 974 P.2d 847, 849 (Utah Ct. App. 1990). In addition, Mr. Thompson failed to marshal the evidence as required under Utah Rule of Appellate Procedure 24(a)(9) (2008). Mr. Thompson’s “Statement of Material Facts” and “Argument” sections of his Brief are based, in large part, on self-serving allegations of fact that are unsupported by any actual evidence or testimony given at trial. Due to Mr. Thompson’s failure to marshal the evidence, this Court is again without sufficient basis to review the factual determinations and the fact intensive legal determinations of the trial court, which should therefore be affirmed. Chen v. Stewart, 100 P.3d 1177 (Utah 2004).

### **SUMMARY OF SECTION III**

The trial court properly awarded Mr. Thompson his premarital portion of his 401(k) retirement plan and divided the marital portion equally. The trial court’s determination of the marital portion of Mr. Thompson’s 401(k) retirement plan is consistent with Utah case law. Woodward v. Woodward, 656 P.2d 431, 433 (Utah 1982); Jefferies v. Jefferies, 895 P.2d 835 (Utah Ct. App. 1995).

### **SUMMARY OF SECTION IV**

The trial court properly found that the parties’ St. George home is marital property with its equity subject to equal division. The trial court found that the proceeds from the sale of Mr. Thompson’s California home were commingled into the marital estate. (Addendum 1 at ¶10; R. 206-07). Separate property may lose its character as separate when it is commingled into the marital estate, or when it loses its identity as separate. Burt v. Burt, 799

P.2d 1166, 1169 (Utah Ct. App. 1990). This Court has never created a bright-line test that would have required the trial court to credit Mr. Thompson the proceeds from the sale of his California home. Rather, the trial court's determination that the proceeds from said sale were commingled into the marital estate, and therefore subject to equal division, is in line with legal standards set forth by this Court. Id.; Dunn v. Dunn, 802 P.2d 1314, 1321 (Utah Ct. App. 1990).

### **ARGUMENT**

#### **I. THERE IS NO PRECEDENT IN UTAH LAW THAT A TRIAL COURT MUST “BACK OUT” ALLEGED SEPARATE PROPERTY INTERESTS AS UTAH LAW CLEARLY PROVIDES THAT SEPARATE PROPERTY OF ONE PARTY CAN BECOME MARITAL SUBJECT TO EQUAL DIVISION.**

The crux of Mr. Thompson's argument in this appeal is that the trial court was required to “back out” Mr. Thompson's alleged premarital property prior to dividing the parties' marital estate. Nowhere in Utah law is there such a bright-line test that requires trial courts in divorce matters to apply such a methodology in dividing a marital estate. Whether property is marital or separate is a fact intensive issue that is dependant on the particular circumstances of each case. Newmeyer v. Newmeyer, 745 P.2d 1276, 1277 (Utah 1987) (“The appropriate treatment of property brought into a marriage by one may vary from case to case.”).

This Court has provided a methodology trial courts are to follow when confronted with marital estates involving claims of separate property and marital property. Burt v. Burt, 799 P.2d 1166, 1172 (Utah Ct. App. 1990); Dunn v. Dunn, 802 P.2d 1314, 1322-23 (Utah

Ct. App. 1990). In Burt, this Court stated that a trial court should first properly categorize the parties' property as part of the marital estate or as the separate property of one or the other. Burt, 799 P.2d at 1172. In this matter, the trial court properly categorized the items of property at issue in this appeal, a portion of Mr. Thompson's 401(k) and the St. George home, as marital property. (See Addendum 1 at ¶ 10, ¶ 15; R 206-07). Once the trial court has found that property is marital, the next step is for the trial court to determine how the property should be divided. Burt, 799 P.2d 1172. Each party is presumed to be entitled to fifty percent of the marital property. Id. Here, the trial court divided the marital portion of Respondent's 401(k) and the equity in the marital home in St. George equally. Thus, the trial court's determinations regarding the division of these marital assets was certainly consistent with appellate authority.

Mr. Thompson's approach ignores that separate property may be consumed and its identification as separate property lost through commingling and exchanges. Dunn v. Dunn, 802 P.2d 1314, 1323 (Utah Ct. App. 1990). Separate property may lose its separate distinction where the parties have inextricably commingled it into the marital estate, or where one spouse has contributed all or part of the property to the marital estate. Id. Whether property has been commingled into the marital estate or otherwise lost its separate character is a factual determination for the trial court to make, which is presumed by this Court to be correct because this Court lacks the advantage of seeing and hearing witnesses testify. Baker v. Baker, 866 P.2d 540, 542-43 (Utah Ct. App. 1993) ("The trial court's findings of fact are

presumed to be correct, and because we lack the advantage of seeing and hearing witnesses testify, we do not make our own findings of fact.”).

Mr. Thompson relies heavily throughout his brief on the unpublished opinion of Hayes v. Hayes, 2006 UT App. 289, which is, incidentally, the only Utah case that has used the term “back-out method.” In Hayes, this Court stated that “the trial court properly used a ‘back-out’ method to credit Husband’s contribution toward the marital property before applying the fifty percent presumption.” Id. at \*1. At issue in Hayes was whether the trial court erred in awarding husband separate financial contributions to the marital estate. Id. In affirming the trial court’s decision, this Court stated that “the trial court can properly subtract the parties’ contributions to the marital property before equally dividing the remaining equity.” Id. (emphasis added). Mr. Thompson’s argument that the trial court must use the “back-out method” is not supported by Hayes or any other Utah case. The holding in Hayes was that the trial court in that matter did not abuse its discretion by giving husband his separate contributions to the marital estate, not that trial courts must do so or risk being overturned on appeal. Such absolute rule has never been applied by this Court and would not only unreasonably constrain trial courts from exercising their broad discretion in dividing marital estates, but would contradict this Court’s approach that “[t]he appropriate treatment of property brought into a marriage by one may vary from case to case.” Newmeyer v. Newmeyer, 745 P.2d 1276, 1277 (Utah 1987).

Through this appeal, Mr. Thompson is attempting to persuade this Court to substitute

its judgment on factual determinations, i.e. the designation of property as marital, which this Court cannot do under Utah Rule of Civil Procedure 52(a). (“Findings of fact, whether based on oral documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the trial court to judge the credibility of the witness.”). Mr. Thompson attempts to frame his appellate arguments as involving purely legal issues. However, whether the property has been properly characterized as separate or marital is fact intensive and should not be reviewed in a vacuum as purely a legal issue. As discussed in Section II, infra, Mr. Thompson has failed to provide a transcript of the trial, resulting in this Court having absolutely no ability to review the testimony given by the parties during their one-day trial setting. Thus, this Court has an insufficient record upon which to review the trial court’s findings of fact for clear error. Further, Mr. Thompson has failed to marshal the evidence as he is required to do under Utah Rule of Appellate Procedure 24(a)(9). The deficiencies in Mr. Thompson’s brief are fatal to his appeal because he is attempting to challenge factual findings without providing this Court an adequate basis to review such findings.

**II. MR. THOMPSON FAILED TO OBTAIN A TRANSCRIPT OF THE TRIAL AND HAS FAILED TO MARSHAL THE EVIDENCE IN HIS BRIEF, AND ON THESE GROUNDS ALONE THE TRIAL COURT’S FINDINGS AND CONCLUSIONS SHOULD BE AFFIRMED.**

**A. Mr. Thompson did not request a transcript of the trial which results in this Court having an inadequate basis to determine whether the trial court erred in making its factual and legal determinations.**

As the appellant in the matter, Mr. Thompson had the duty to request a copy of the trial transcript. Utah Rule of Appellate Procedure 11(e)(2) (2008) provides that:



If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

This Court has determined that “without all the relevant evidence bearing on the issues raised on appeal, as required by Utah R. App. P. 11(e)(2), ‘we can only presume that the judgment was supported by sufficient evidence.’” Horton v. Gem State Mut. of Utah, 974 P.2d 847, 849 (Utah Ct. App. 1990). This Court has further stated that “[w]hen an appellant argues on appeal that a finding or conclusion is unsupported by or contrary to the evidence, the appellant is required to include in the record a transcript of all evidence relevant to the finding or conclusion.” Orem City v. Walton, 2002 UT App. 427. Both the Utah Supreme Court and this Court have routinely affirmed trial court determinations on the basis that appellants have failed to provide a trial transcript. See, e.g., Burke v. Burke, 773 P.2d 498 (Utah 1987); Fackrell v. Fackrell, 740 P.2d 1318 (Utah 1987); Goodman v. Wilkinson, 629 P.2d 447 (Utah 1981); Sawyers v. Sawyers, 558 P.2d 607 (Utah 1976); Spanish Fork City v. Rupper, 2007 UT App. 57; Radl v. Univ. of Utah, 2003 UT App. 164; West Valley City v. Pettengill, 1999 UT App. 236.

The success of Mr. Thompson's appeal swings on whether this Court decides that the trial court erred in finding the assets in question marital. Mr. Thompson has set forth a self serving factual scenario in his “Statement of Material Facts” and “Argument” sections of his appellate brief. However, most of Mr. Thompson's factual allegations are based, either in

whole or in part, on Mr. Thompson's trial brief which is not in evidence and cannot be relied on by this Court as a depiction of the facts in this divorce matter. Lacking a transcript of the trial, Mr. Thompson is unable to cite to any testimony received by the trial court that may have supported the trial court's determinations. Judge Beacham explicitly stated in his Findings of Fact and Conclusions of Law that he relied on "testimonies of the witnesses" in making its determinations. (Addendum 1 at p.1; R. 205). Absent the trial transcript, this Court is left without an adequate record of the proceedings to determine whether the trial court erred in making its factual findings and applying the law to the fact intense question of whether property is marital or separate. Mr. Thompson's claims of error are "merely an unsupported, unilateral allegation which this Court cannot resolve." Horton v. Gem State Mut. of Utah, 794 P.2d 847, 849 (Utah Ct. App. 1990) (citing Mark VII Fin. Consultants Corp. v. Smedley, 792 P.2d 130, 134 (Utah Ct. App. 1990)).

Mr. Thompson has the burden of providing this Court with an adequate record to preserve his arguments for review. Horton v. Gem State Mut. of Utah, 794 P.2d 847, 849 (Utah Ct. App. 1990). This Court should determine, as it has done in many previous cases, that in light of Mr. Thompson's failure to provide a transcript of the trial proceeding, this Court can only presume that the determinations of the trial court were supported by sufficient evidence.

**B. Mr. Thompson failed to marshal the evidence as required under the Utah Rules of Appellate Procedure.**

Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires that a party

challenging a finding of fact must marshal all record evidence that supports the challenged finding. In the absence of an adequate record, an appellant cannot satisfy his burden on appeal to marshal the evidence, and this Court cannot perform meaningful appellate review of the evidentiary support for the judgment. Orem City v. Carrasco, 2003 UT App. 185; Horton v. Gem State Mut. Of Utah, 794 P.2d 847, 849 (Utah Ct. App. 1990). Even where a party seeks to challenge a legal determination that is based on the application of a legal standard that is extremely fact sensitive, the appellant also has a duty to marshal the evidence. Chen v. Stewart, 100 P.3d 1177, 1184 (Utah 2004). Mr. Thompson has failed entirely to marshal the evidence in his Brief.

To properly marshal evidence, the challenging party must “demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.” Chen v. Stewart, 100 P.3d 1177, 1195 (Utah 2004). Where an appellant challenges a trial court’s rulings on highly fact-dependent issues, like those frequently encountered in divorce cases, appellate courts grant broader than normal discretion to the trial court. Id. The marshaling requirement is not one that is easily met, in fact, the requirements are “rigorous and strict.” Id. An appellant, in order to properly discharge the duty of marshaling the evidence, “must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very finding the appellant resists.” Id. (quoting Neely v. Bennett, 51 P.3d 724, 727 (Utah Ct. App. 2002)). “The process of marshaling is thus fundamentally different from that of

presenting the evidence at trial. The challenging party must ‘temporarily remove its own prejudices and fully embrace the adversary's position’; he or she must play the ‘devil's advocate.’” Id. (quoting Harding v. Bell, 57 P.3d 1093 (Utah 2002)). Appellants must not attempt to construe the evidence in a light favorable to their case, nor can they merely present carefully selected facts and excerpts from the record to support their position. Id. Appellants are also prohibited from simply restating or reviewing evidence that “points to an alternate finding or a finding contrary to the trial court’s finding of fact.” Id. Further, appellants cannot shift the burden of marshaling by falsely claiming that there is no evidence in support of the trial court’s findings. Id.

If an appellant fails to meet the marshaling requirement, the appellate court has grounds to affirm the trial court’s findings on that basis alone. Id. at 1196. An appellant’s failure to marshal the evidence will result in the appellate court assuming that the evidence supports the trial court’s findings. Id.

As discussed previously, the essential question in this appeal is whether property was properly characterized by the trial court as marital property subject to equal division. In making its determinations, the trial court in this matter clearly relied on the “testimony of the parties” given at trial. (Addendum 1, at p.1; R. 205). For Mr. Thompson to show the trial court erred in making its findings and conclusions, Mr. Thompson has the marshaling burden of presenting, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very finding he resists. Id. Mr. Thompson has made

no effort whatsoever to marshal the evidence in his Appellate Brief. Instead, Mr. Thompson did exactly what this Court has stated appellants must not do, which is “attempt to construe the evidence in a light favorable to their case” and “merely present carefully selected facts and excerpts from the record to support their position.” *Id.* at 1195. As Mr. Thompson has failed to marshal the evidence, this Court should, based on that factor alone, affirm the trial court’s determinations at issue on this appeal.

### **III. THE TRIAL COURT DID NOT ERR IN DIVIDING EQUALLY THE AMOUNT IN MR. THOMPSON’S 401(k) RETIREMENT PLAN THAT ACCRUED DURING THE MARRIAGE.**

In its Findings of Fact and Conclusions of Law, the trial court found that Respondent’s 401(k) retirement account had a value of \$68,784.00 at the time of the parties’ marriage. (Addendum 1 at ¶ 13; R. 207). The trial court also found that the 401(k) account increased in value to \$177,302.00 at the time of trial. (Addendum 1 at ¶ 14; R. 207). The trial court then found that “[t]he difference of \$108,518 accumulated during the marriage and is marital property . . .” and awarded Mrs. Thompson one-half of the marital portion of the 401(k) account. (Addendum 1 at ¶ 15; R. 207) (emphasis added). As stated above in Section II, since Mr. Thompson failed to request a transcript of the trial proceedings, this Court “can only presume that the judgment was supported by sufficient evidence.” Horton v. Gem State Mut. of Utah, 974 P.2d 847, 849 (Utah Ct. App. 1990). Here, the trial court’s finding that the amount accumulated in Mr. Thompson’s 401(k) account is marital property must stand because Mr. Thompson has failed to provide this Court with a copy of the transcript from the

trial and this Court will not substitute its judgment for the trial court's. Baker v. Baker, 866 P.2d 540, 542-43 (Utah Ct. App. 1993) ("The trial court's findings of fact are presumed to be correct, and because we lack the advantage of seeing and hearing witnesses testify, we do not make our own findings of fact.").

Moreover, it is a firmly established principle that "the interest in a retirement plan accrued during marriage is considered a marital asset subject to equitable distribution upon divorce." Motes v. Motes, 786 P.2d 232, 234 (Utah Ct. App. 1990) (citations omitted). In the watershed case regarding the division of retirement accounts in divorce cases, Woodward v. Woodward, 656 P.2d 431, 433 (Utah 1982), the Utah Supreme Court determined that the "wife is entitled to share in the portion of benefits to which the rights accrued during the marriage."

Mr. Thompson argues in his Appellate Brief that the trial court should not have relied on Jefferies v. Jefferies, 895 P.2d 835 (Utah Ct. App. 1995). Mr. Thompson's argument is misplaced. In Jefferies, this Court determined that the husband's 401(a) retirement plan, which, for purposes of this matter, is equivalent to a 401(k) plan,<sup>1</sup> was marital property. Id. at 837-38. In citing previous Utah Supreme Court decisions, including the Woodward

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<sup>1</sup> For purposes of the issue before the Court, the difference between a 401(a) plan and a 401(k) plan is of no consequence. A 401(k) plan is essentially a retirement plan authorized under title 26 U.S.C. § 401(a) (2008). Section 401(k)(1) provides that a plan will not fail to qualify as a 401(a) plan merely because the plan includes a qualified cash or deferred arrangement. The qualified cash or deferred arrangement is essentially a program under which an employer may make payments on behalf of the employee to the plan. See 26 U.S.C. 401(k)(2) (2008).

decision, this Court articulated two important legal principles that justify dividing the amount accrued in a 401(a) plan during the marriage upon divorce:

[T]wo principles are clear from the law of this state. First, all assets acquired by the parties during marriage are to be considered by the trial court when making an equitable distribution, unless the law specifically prevents the Court from considering a particular asset. Second, a marital asset is defined functionally as any right that has accrued during the marriage to a present or future benefit.

Id. at 837. The Court then determined that “[the] funds that accumulated in [husband’s] 401(a) plan during the marriage clearly fit the functional definition of a marital asset.” Id. This Court further stated that “not only was it proper for the trial court to consider [husband’s] 401(a) plan as a marital asset, it was required.” Id. at 837-38. This Court went on to declare that “[we] hold that retirement funds accumulated in a 401(a) plan during marriage are marital assets and were appropriately considered by the trial court.” Id. at 838.

As in Jefferies, Mr. Thompson’s retirement plan accumulated funds during the marriage. The funds accumulated in Mr. Thompson’s 401(k) during the marriage constitute (1) an asset acquired by the parties during the marriage, and (2) a right that accrued during the marriage to a present or future benefit. As such, the full amount of the funds that accumulated in Mr. Thompson’s 401(k) during the marriage are part of the marital estate subject to division by the trial court. The trial court then did not abuse its discretion by following the fifty percent presumption and awarding the parties an equal share of the accumulated funds.

Mr. Thompson cites to Burt v. Burt, 799 P.2d 1166 (Utah Ct. App. 1990) and Hayes v. Hayes, 2006 UT App. 289 to support the argument that the trial court should award Mr. Thompson the growth on the premarital portion of his 401(k) that accumulated during the marriage. These cases stand only for the proposition that separate property should be awarded to the owner in the event of divorce, as long as the asset has not become part of the marital estate. See Burt, 799 P.2d at 1169; Hayes, 2006 UT App. 289 at \*1. These cases do not deal specifically with how the growth of a 401(k) retirement plan during marriage should be divided. As indicated above, Utah has a *specific* line of authority which provides that the full interest in a retirement plan accrued during the marriage is considered a marital asset subject to equitable division upon divorce. See, e.g., Woodward v. Woodward, 656 P.2d 431, 432 (Utah 1982); Jefferies v. Jefferies, 895 P.2d 835, 838 (Utah Ct. App. 1995). The trial court did not abuse its discretion in dividing equally the marital growth in Mr. Thompson's 401(k), as the trial court's approach is rooted in Utah case law. Therefore, the trial court's ruling regarding the division of the marital interest in Mr. Thompson's 401(k) should be affirmed.

#### **IV. THE TRIAL COURT DID NOT ERR IN ORDERING THE EQUAL DIVISION OF THE EQUITY IN THE PARTIES' ST. GEORGE HOME.**

The trial court properly characterized the parties' St. George home as marital, subject to equal division. Again, Mr. Thompson argues that the trial court was bound by a bright-line standard that required the trial court to award Mr. Thompson a credit for the proceeds from the sale of the California home. (See Brief of the Appellant at 13). Mr. Thompson's



approach is simply not supported by the law as set forth by Utah appellate courts. This Court has stated, in citing to the Utah Supreme Court case of Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1998), that separate property may be considered part of the marital estate subject to division when the other spouse has by his or her efforts augmented, maintained, or protected the separate property. Burt v. Burt, 799 P.2d 1166, 1169 (Utah Ct. App. 1990). Separate property may also become marital property where the separate property has been commingled with marital property so that it has lost its separate character, or where the separate property has been contributed to the marital estate. Burt, 799 P.2d at 1169. Of particular significance is whether the alleged separate property has lost its distinction as separate. Id. “The thrust of Mortensen is not whether the mere form of the property has changed, but whether it has lost its *identity* as separate property.” Id. (citing Mortensen, 760 P.2d at 308) (emphasis in original).

In this matter, the trial court made the following findings of fact pertaining to the parties’ St. George home:

#### MARITAL HOME

5. At the time of the parties’ marriage in 2002, Respondent owned a home in California which was his sole property.
6. During the next two or three years of marriage, Petitioner acquired some community property interest in Respondent’s California home, but the evidence before the Court does not allow this to be quantified.
7. When the parties moved to Utah in 2005, Respondent sold the California home and the parties jointly purchased a

home in St. George, Utah.

8. Title to the Utah home was and is held by both parties as joint tenants, and is subject to a joint obligation for a debt secured by a trust deed.

9. The earnest money and down payment on the Utah home totaled more than \$80,000, and both were paid with funds from the proceeds of the sale of Respondent's premarital home in California.

10. The Utah home is a marital asset, in which each party is entitled to an equitable share, because the California home proceeds have been commingled into the marital estate [Dunn v. Dunn is the correct precedent] and because Petitioner had some community property interest in the proceeds of the California home [. . .]

(Addendum 1 at 2-3; R. 206-07).

Mr. Thompson has failed to challenge any of the trial court's above quoted findings of fact in his Appellate Brief. In any case, Mr. Thompson has additionally failed to provide this Court with a transcript which would, in any way, allow appellate review of the trial court's factual determinations. As such, this Court should accept that the trial court's factual determinations were based on sufficient evidence.

The trial court's findings of fact support its determinations, based on legal authority, that the equity in the St. George home is marital property subject to equal division. First, the trial court determined that Mrs. Thompson acquired some community property interest in Mr. Thompson's California home. Such determination is consistent with California law. In the California case of Bare v. Bare, 256 Cal.App.2d 684 (1967), husband owned a home as

separate property prior to marriage. Id. at 689. During the marriage, the property remained titled in the husband's name, and the husband made payments toward the debt associated with the property. Id. This continued until the parties eventually divorced. Id. Under these facts, the California Court of Appeals determined that "the rule developed through the decisions in California gives to the community a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds." Id. at 690. The Court further went on to determine that:

Where the husband has used community funds to increase his separate estate, the court must determine the increase in his equity in the home during marriage and also the fair market value of the dwelling before and after the marriage. The community is entitled to a minimum interest in the property represented by the ratio of the community investment to the total separate and community investment in the property. In the event the fair market value has increased disproportionately to the increase in equity, the wife is entitled to participate in that increment in a similar proportion.

Id. Mrs. Thompson had an interest in the proceeds from the sale of the California property pursuant to the above analysis. The trial court correctly determined that "Petitioner acquired some community property interest in Respondent's California home," while acknowledging that "the evidence before the Court does not allow this to be quantified." (Addendum 1 at ¶ 6; R. 206).

In addition, the trial court found that title to the St. George home was and is held by both parties as joint tenants, and is subject to a joint obligation for debt secured by a trust

deed. (Addendum 1 at ¶ 8; R. 206). Thus, any form or identity of the funds as separate property changed from separate to joint and were commingled into the marital estate. A very similar scenario was presented to this Court in the case of Dunn v. Dunn, 802 P.2d 1314 (Utah Ct. App. 1990), upon which the trial court explicitly relied in its Findings of Fact and Conclusions of Law. (Addendum 1 at ¶ 10. R. 205). In Dunn, husband owned a condominium prior to the parties' marriage. Id. at 1321. The parties occupied the condominium from the time of the marriage until they sold it and used part of the proceeds for a cash down payment on their new home and to purchase a joint promissory note. Id. At trial, the court granted husband a credit of \$22,493.00 that was intended to represent husband's premarital equity in the condominium. Id. Wife argued on appeal that husband should not have been given the credit for the separate property funds from the condominium because the funds were converted to marital property by using them to purchase joint assets. See id. This Court reversed the trial court, holding that the award of the premarital funds to the husband was an abuse of discretion. Id. In arriving at this decision, this Court in Dunn first noted that "[g]enerally, the rule for premarital property is that each party retain the separate property he or she brought into the marriage." Id. (citing Haumont v. Haumont, 793 P.2d 421, 424-25 (Utah Ct. App. 1990)). This Court determined, as it pertained to the proceeds of the condominium husband owned prior to the marriage, that:

premarital property was consumed and its identification lost through commingling and exchanges. The record shows that the sale of each credited piece of property resulted in a deposit into the parties' joint accounts, or in the case of the condominium, a

promissory note in the joint names of the parties.

Id. This Court went on to determine that “we therefore hold the trial court’s treatment of this property as separate property was an abuse of discretion.” Id. This Court reversed the award of credits to the husband for the proceeds from the sale of the condominium. Id.

Just as in Dunn, any contribution to the St. George home that could be characterized as Mr. Thompson’s separate property lost its identity as separate property as it was contributed toward the home that the parties purchased and owned jointly. (Addendum 1 at ¶ ¶ 7-8; R. 206). The fact that the down payment on the St. George property can be determined bears no significance. In Dunn, the proceeds of the sale of the condominium that husband argued were separate property were determined to be in the amount of \$22,493.00. Dunn, 802 P.2d at 1321. Although husband could “trace” this amount out, this Court still determined it was an abuse of discretion for the trial court to credit husband that amount because the property lost its identity as separate. Id.

Mr. Thompson relies heavily on the case of Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987). The Newmeyer case does not set forth any law that requires a trial court to “back out” separate property from a marital estate. The most significant point from the Newmeyer case that applies to this matter is that “trial courts are permitted broad latitude, and its judgment is not to be lightly disturbed, so long as it exercises discretion in accordance with the standards set forth by this Court.” Id. at 1277. It is incumbent on the appealing party to provide that the trial court’s division violates those standards. Id. In Newmeyer,

husband argued that wife should not have been given a credit from the marital estate for inheritances she received during the marriage. Id. This Court stated “there is nothing in our cases that mandates such a result.” Id. The essence of the Newmeyer case, as it applies to this matter, is that this Court will not reverse a trial court’s division of property as long as the trial court acted within standards set forth by this Court. Id. at 1277-78.

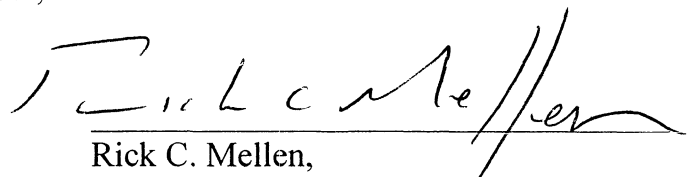
Here, the trial court acted within standards set forth by this Court in determining that the St. George home was marital property. The trial court determined that the proceeds from the sale of Mr. Thompson’s California home were commingled into the marital estate, which is clearly supported by the trial court’s unchallenged factual findings. The trial court’s determination falls squarely within this Court’s legal standards set forth in Burt and Dunn that separate property may become commingled into the marital estate. Burt v. Burt, 799 P.2d 1166, 1169 (Utah Ct. App. 1990); Dunn, 802 P.2d at 1321. The trial court’s application of the uncontested facts of this matter was consistent with this Court’s analysis under analogous facts in Dunn. 802 P.2d at 1321. Clearly, the trial court was acting within legal standards set forth by this Court when it determined that the St. George home is marital property. As such, it was within the trial court’s discretion to divide equally the equity in the home according to the presumption of equal distribution. Burt, 799 P.2d at 1172. The trial court’s determinations regarding the St. George home should be affirmed.

### **CONCLUSION**

This Court is asked to reverse the trial court’s determinations pertaining to the division

of assets. However, this Court has not been supplied with an adequate record to allow this court to review any of the trial court's factual determinations that are at issue on appeal. Furthermore, Mr. Thompson has failed to marshal the evidence as he is required to do under Utah Rule of Appellate Procedure 24(a)(9). In addition, the Court did not commit error in applying the legal standards set forth by Utah Appellate Courts in dividing the parties' marital property. The Findings of Fact and Conclusions of Law and the Decree of Divorce entered by the trial court should be affirmed.

DATED this 26 day of November, 2008

  
Rick C. Mellen,  
Attorney for Appellee

**CERTIFICATE OF MAILING**

I hereby certify that a full, true and correct copy of the **BRIEF OF THE APPELLEE** was mailed first class postage pre-paid, on the 24 day of November, 2008, addressed as follows:

Shawn T. Farris  
2107 W. Sunset Blvd.  
St. George, UT 84770

  
\_\_\_\_\_  
LEGAL ASSISTANT



# ADDENDUM 1

FILED  
FIFTH DISTRICT COURT  
2008 APR 14 AM 8:12  
WASHINGTON COUNTY

IN THE FIFTH DISTRICT COURT FOR,  
WASHINGTON COUNTY, STATE OF UTAH

MARTHA I. THOMPSON,

Petitioner,

vs.

JAMES A. THOMPSON,

Respondent.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Civil No. 074500408  
Judge G. Rand Beacham

This case came before the Court for trial on January 29, 2008. Petitioner appeared in person and was represented by her counsel of record, Rick C. Mellen. Respondent appeared in person and was represented by his counsel of record, Shawn T. Farris. At the conclusion of the trial, the Court *required the parties' counsel to submit proposed findings of fact and conclusions of law.* Those proposals were received by the deadline, February 11, 2008, and the matter was taken under advisement at that time.

The Court has considered the testimonies of the witnesses, the exhibits received into evidence, the arguments of counsel and the parties' proposed findings of fact and conclusions of law. Neither party's proposals were entirely acceptable to the Court. Accordingly, the Court now makes its Findings of Fact and Conclusions of Law<sup>1</sup>:

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<sup>1</sup>Notwithstanding the requirement of URCP Rule 52 that "the court shall find the facts specially and state separately its conclusions of law thereon," this Court finds no particular merit in the traditional separation of findings of fact from conclusions of law into separate sections, for two reasons: First, the separation of a legal conclusion from the facts on which it depends makes reading and comprehension unnecessarily difficult. Second, the appellate courts may review and characterize a trial court's findings of fact and conclusions of law without deference to what the trial court has called them. Consequently, the Court intends that the "findings" and "conclusions" be considered as a whole and without regard to technical distinctions among them.

1. Both parties were residents of Washington County, Utah, for at least three months prior to the commencement of this action for divorce.

2. The parties were married on February 14, 2002 in Palm Springs, California.

3. Differences have occurred in the parties' relationship that prevent the continuation of a viable marriage. Each party should be awarded a divorce from the other on the grounds of irreconcilable differences.

4. The parties do not have any children in common. Petitioner does have two children from a prior marriage. The children lived with the parties during their marriage relationship and during the time the parties lived together prior to their marriage relationship, which was for approximately two years.

#### MARITAL HOME

5. At the time of the parties' marriage in 2002, Respondent owned a home in California which was his sole property.

6. During the next two or three years of marriage, Petitioner acquired some community property interest in Respondent's California home, but the evidence before the Court does not allow this to be quantified.

7. When the parties moved to Utah in 2005, Respondent sold the California home and the parties jointly purchased a home in St. George, Utah.

8. Title to the Utah home was and is held by both parties as joint tenants, and is subject to a joint obligation for a debt secured by a trust deed.

9. The earnest money and down payment on the Utah home totaled more than \$80,000,

and both were paid with funds from the proceeds of the sale of Respondent's premarital home in California.

10. The Utah home is a marital asset, in which each party is entitled to an equitable share, because the California home proceeds have been commingled into the marital estate [Dunn v. Dunn is correct precedent] and because Petitioner had some community property interest in the proceeds of the California home.

11. The parties stipulated that the value of the Utah home is \$450,000 and that the debt thereon is currently about \$326,000.

12. The Utah home should be sold and the net proceeds divided equally between the parties; in the alternative, either party should be allowed to purchase the interest of the other party for \$62,000 within the next six months after the entry of the final Decree of Divorce.

#### 410K ACCOUNT

13. Respondent's 401k retirement account had a value of \$68,784 at the time of the parties' marriage in 2002.

14. The 410k account had a value of \$177,302 at the time of trial.

15. The difference of \$108,518 accumulated during the marriage and is marital property [Jeffries v. Jeffries is the correct precedent] and Petitioner should be awarded one-half of that accumulated amount.

#### SHARES IN SKYWEST

16. The parties stipulated that 408 shares in Respondent's employer, SkyWest, constituted marital property.

17      Petitioner should be awarded 204 shares

#### STOCK OPTIONS

18      From time to time, Respondent has been able to exercise stock options in connection with his employment

19      Respondent has been able to sell the options and/or stocks purchased and has used the proceeds for marital expenses

20      Stock options are not guaranteed to Respondent and are not a vested right

21      The mere possibility of future stock options is not a marital asset which can be awarded or divided by the Court

#### PERSONAL PROPERTY

22      The evidence was not complete as to all of the parties' premarital and marital personal property    The evidence was sufficient as to the following items

Picture in master bathroom Picture in bar TV in master bedroom Computer and printer Children's bedroom sets	Premarital property of Petitioner
Mexican furniture set Master bedroom armoire Desks and chairs Entertainment center "downstairs" 1993 Oldsmobile, as is Ford pickup (subject to debt thereon)	Premarital property of Respondent
Dining room set One-half of DVD collection Subaru vehicle (subject to debt thereon)	Marital property awarded to Petitioner

Bar in basement of home Two wall paintings Pool table One-half of DVD collection Love seat, sofa, chair (subject to debt thereon) 62" TV (subject to debt thereon) ATVs and trailer (subject to debt thereon) Washer and dryer (subject to debt thereon) Ford vehicle (subject to debt thereon)	Marital property awarded to Respondent
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23. All other personal property should be awarded to the party who has possession thereof.

#### ALIMONY

24. Petitioner was unemployed at the time of trial, but she was previously employed and earning at least \$10 per hour until she quit her job and left Utah in late 2007.

25. Petitioner has good work experience and skills, and has a bachelors degree.

26. Petitioner is capable of earning at least as much as she did in Utah, which was about \$1733 per month at her last employment, and she is probably capable of earning much more in California where wages are generally higher than in Utah.

27. Respondent remains employed, and his salary has averaged about \$5125 per month over the past four years.

28. Although Respondent has also received income from exercising periodic stock options, that income is unpredictable and unreliable.

29. Petitioner's necessary expenses<sup>2</sup> total about \$3117 per month, and her debt payments

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<sup>2</sup>I consider necessary expenses to include those for rent or mortgage, utilities, food and household, telephone, vehicle purchase and operation, insurance, and uninsured medical/dental.

are about \$932 more

30 Respondent's necessary expenses total about \$4606, and his debt payments (which include large marital debts) are about \$660 more

31 The parties' total gross incomes are less than their total necessary expenses

32 The parties' total net incomes are far less than their total necessary expenses and debts

33 Each party is in need of support, and neither party is able to pay support for the other

34 Alimony is not awarded

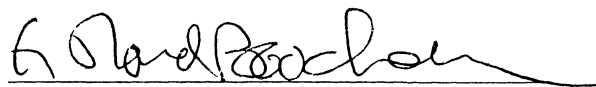
#### ATTORNEY FEES

35 Neither party is able to pay any amount toward the attorney fees of the other party

36 The parties should pay their own attorney fees and costs

37 Petitioner's attorney should submit a final Decree of Divorce which is consistent with these Findings of Fact and Conclusions of Law

DATED this 11 day of April, 2008



G RAND BEACHAM  
District Court Judge

CERTIFICATE OF MAILING OR HAND DELIVERY

I hereby certify that on this 14 day of April, 2008, I provided true and correct copies of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to each of the attorneys/parties named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

Rick C. Mellen  
Attorney for Petitioner

Shawn T. Farris  
Attorney for Respondent

P. F. Jordan  
DEPUTY CLERK OF COURT



# ADDENDUM 2

FILED  
UTAH APPELLATE COURTS

SEP 09 2008

FIFTH DISTRICT COURT-ST GEORGE  
STATE OF UTAH

20080548-GA

MARTHA I THOMPSON  
Petitioner  
vs  
JAMES A THOMPSON  
Respondent

JUDGMENT ROLL AND INDEX

Civil No. 074500408  
Appellate No:

STATE OF UTAH )

ss.

COUNTY OF WASHINGTON)

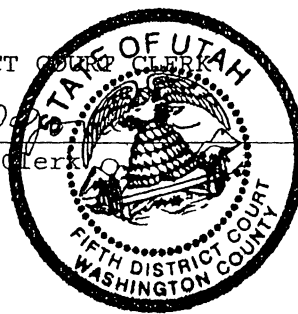
I, PATRICIA JORDAN, Deputy Clerk of the District Court of the FIFTH DISTRICT COURT-ST GEORGE, State of Utah, do hereby certify that the attached papers constitute the Judgment Roll and Index and other papers in the above-entitled action, that the following is a list of said papers.

Refer to the attached document list

WITNESS MY HAND THE SEAL OF THIS Court, affixed at my office in FIFTH DISTRICT COURT-ST GEORGE, STATE OF UTAH, this 4 day of Sept., 2008.

DISTRICT COURT CLERK

By P. Jordan  
Deputy Clerk



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