

2008

Marian C. Olson v. Bradley L. Olson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARIAN C. OLSON,

Appellant,

Case No.: 20080666

vs.

BRADLEY L. OLSON,

Trial Court Case No.: 054100358

Appellee.

BRIEF OF APPELLEE

Bradley L. Olson

Appeal from a Judgment and Decree entered in the First Judicial District, Cache County,
State of Utah, the Honorable Judge Clint S. Judkins, Presiding

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLEE
Bradley L. Olson

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78A- 4-103(2)(h) and Utah R. App. P. 3 and 4.

ISSUES PRESENTED FOR REVIEW

In her opening brief the Appellant (“Wife”) identifies twelve issues, provides only two standards of review and, contrary to Rule 24(a)(5)(A) Utah R. App. P., gives no citation to the record as to where any of the twelve issues were preserved. Because Rule 24(a)(5) requires that a *separate* standard of review be identified for each issue, the brief is technically deficient. In order to analyze the issues raised by Wife (and give organization to respond to the overlapping issues) Husband has re-framed the issues as follows:

Issue 1: The trial court did not commit error when it pierced the corporate veil and treated all the corporation's (B & B Drywall, Inc.) assets and liabilities as part of the marital estate.¹

Standard of Review: The trial court's decision to disregard a corporation and treat it as the parties' alter ego presents a mixed question. The ultimate determination to disregard the corporation is a legal question which will be reviewed for correctness. However, because this presents an issue which is highly fact-dependent, the trial judge is accorded a broad measure of discretion when applying the legal standard to a given set of facts. Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998). ("The finding that an easement exists is a conclusion of law. Such a finding is, however, the type of highly fact-dependent question, with numerous potential fact patterns, which accords the trial judge a broad measure of discretion when applying the correct legal standard to the given set of facts. We therefore overturn the finding of an easement only if we find that the trial judge's decision exceeded the broad discretion granted. See State v. Pena, 869 P.2d 932, 937 (Utah 1994).")

¹ This issue responds to the following issues raised in Wife's brief: I. The court's ruling which requires the parties to sell the Nibley house to pay the Cache Valley Bank debt violates Utah Code Annotated §30-2-5; II. The trial court erred in finding that Marian Olson was liable to Cache Valley Bank for the debt of B&B Drywall, Inc., when she did not personally guarantee the debt; III. The combined effect of the court's rulings was to illegally elevate the rights of Cache Valley Bank and Bradley Olson above those of Marian Olson; V. The debt to Capitol Building Supply was not a marital debt; but the LKL debt was a marital debt; and VIII. The division of the parties' remaining assets was inequitable.

The broad discretion accorded the trial court also reflects the reality that the alter ego issue presented in this appeal arises in the context of the division of the marital estate. Trubetskoy v. Trubetskoy, 2009 UT App 77, ¶ 8 (holding “[t]rial courts have considerable discretion in determining . . . property distribution in divorce cases, and [their decisions] will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.” Stonehocker v. Stonehocker, 2008 UT App 11, ¶ 8, 176 P.3d 476 (omission in original) (quoting Howell v. Howell, 806 P.2d 1209, 1211 (Utah App. 1991))). Indeed, the trial court's discretion is so broad "that its actions enjoy a presumption of validity." Elman v. Elman, 2002 UT App 83, ¶ 17, 45 P.3d 176.

Lastly, because the determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, Wife has the burden to first marshal all evidence supporting the trial court's findings and then show that the evidence is legally insufficient to support the findings even in the light most favorable to the trial court. Chen v. Stewart, 2004 UT 82 ¶ 20, 100 P.3d 1177; Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989).

Issue 2: The trial court did not err in its ruling relating to alimony.

Standard of Review: This issue requires application of an abuse of discretion standard. Andrus v. Andrus, 2007 UT App 291, 169 P.3d 754; See also Howell v. Howell, 806 P.2d 1209, 1211 (Utah App.1991) (applying the abuse of discretion standard of review for alimony determinations).

Issue 3: The record supports the trial court’s finding as to the value of the home.

Standard of Review: A valuation issue is reviewed under a clearly erroneous standard of review. Stonehocker v. Stonehocker, 2008 UT App 11, ¶44, 176 P.3d 476 (“We defer to the trial court in its findings of fact related to property valuation and distribution. See Howell v. Howell, 806 P.2d 1209, 1211 (Utah App.1991) (Findings of fact in divorce appeals are subject to the clearly erroneous standard of review such that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.)” (internal quotation marks omitted)).

Issue 4: Husband did not benefit by selling assets in violation of the court order.

Standard of Review: “Trial courts have considerable discretion in determining . . . property distribution in divorce cases, and [their decisions] will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.” Stonehocker v. Stonehocker, 2008 UT App 11, ¶ 8, 176 P.3d 476 (omission in original).

Issue 5: The trial court did not err in disallowing evidence from Jack Peterson, a Certified Public Accountant.

Standard of Review: The admission or non admission of evidence is reviewed under a standard granting the trial court broad discretion. In re Determination of Rights to Use All Water, 982 P.2d 65, 72 (Utah 1999). “In civil cases such as the present one, where the evidence sought to be introduced does not raise concerns of the type that have produced

heightened standards of sensitivity, a trial court decision to admit evidence is reviewed under a broad grant of discretion.” See Pena, 869 P.2d at 938.”

Issue 6: The trial court did not err in failing to award either party attorney fees.

Standard of Review: The standard of review for an award of attorney fees is based on an abuse of discretion standard. “[Utah Code § 30-3-3] grants trial courts the power to award attorney fees in divorce cases, which award must be based on evidence of the reasonableness of the requested fees, as well as the financial need of the receiving spouse, and the ability of the other spouse to pay. Both the decision to award attorney fees and the amount of such fees are within the sound discretion of the trial court.” Child v. Child, 2008 UT App 338, citing Crouse v. Crouse, 817 P.2d 836, 840 (Utah App. 1991) (additional citation omitted).

Issue 7: The trial court did not err in dismissing the protective order.

Standard of Review: The application of a statute (in this case Utah Code Ann. § 78B-7-115) is reviewed for correctness unless the trial court is given a measure of discretion. 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). 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.” State v. Vincent, 883 P.2d 278, 282, citing Pena, 869 P.2d at 935-36.

Issue 8: Judge Jones did not commit error in refusing to recuse Judge Willmore from presiding over the case after Judge Judkins recused himself from the case.

Standard of Review: This issue presents a question of law and will be reviewed for correctness. Lunt v. Lance, 2008 UT App 192 ¶ 7, 186 P.3d 978 (“Determining whether a trial judge committed error by failing to recuse himself . . . is a question of law, and we review such questions for correctness.’ State v. Tueller, 2001 UT App 317, ¶ 7, 37 P.3d 1180 (alteration in original)” (quoting State v. Alonzo, 973 P.2d 975, 979 (Utah 1998))).

Issue 9: Husband requests attorney fees and costs for the frivolous issues pursued on appeal.

Standard of Review: This issue is presented for the first time on appeal to this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS DETERMINATIVE OF CASE

Utah Code Ann. § 78B-7-115 (effective February 7, 2008, formerly codified as § 30-6-15):

78B-7-115. Dismissal of protective order.

(1) A protective order that has been in effect for at least two years may be dismissed if the court determines that the petitioner no longer has a reasonable fear of future abuse. In determining whether the petitioner no longer has a reasonable fear of future abuse, the court shall consider the following factors:

(a) whether the respondent has complied with treatment recommendations related to domestic violence, entered at the time the protective order was entered;

(b) whether the protective order was violated during the time it was in force;

(c) claims of harassment, abuse, or violence by either party during the time the protective order was in force;

(d) counseling or therapy undertaken by either party;

(e) impact on the well-being of any minor children of the parties, if relevant; and

(f) any other factors the court considers relevant to the case before it.

(2) The court may amend or dismiss a protective order issued in accordance with this part that has been in effect for at least one year if it finds that:

(a) the basis for the issuance of the protective order no longer exists;

(b) the petitioner has repeatedly acted in contravention of the protective order provisions to intentionally or knowingly induce the respondent to violate the protective order;

(c) the petitioner's actions demonstrate that the petitioner no longer has a reasonable fear of the respondent; and

(d) the respondent has not been convicted of a protective order violation or any crime of violence subsequent to the issuance of the protective order, and there are no unresolved charges involving violent conduct still on file with the court.

(3) The court shall enter sanctions against either party if the court determines that either party acted:

(a) in bad faith; or

(b) with intent to harass or intimidate either party.

(4) Notice of a motion to dismiss a protective order shall be made by personal service on the petitioner in a protective order action as provided in Rules 4 and 5, Utah Rules of Civil Procedure.

(5) If a divorce proceeding is pending between the parties to a protective order, the protective order shall be dismissed when the court issues a decree of divorce for the parties if:

(a) the petitioner in the protective order action is present or has been given notice in both the divorce and protective order action of the hearing; and

(b) the court specifically finds that the order need not continue.

(6) When the court dismisses a protective order, the court shall immediately issue an order of dismissal to be filed in the protective order action and transmit a copy of the order of dismissal to the statewide domestic violence network as described in Section 78B-7-113.

STATEMENT OF THE CASE

This is a divorce action. On April 16, 2008, after two full days of trial (February 6 and 7, 2008) and another one-half day of trial and oral argument (February 28, 2008), Judge

Clint S. Judkins issued his decision from the bench. (*See Transcript, April 16, 2008, Tr. 708-723*) Husband's counsel was directed by the trial court to prepare formal Findings of Fact and Conclusions of Law, which were filed with the trial court on April 30, 2008. Wife objected to the proposed Findings and Conclusions, and the trial court set the matter for a hearing on the objections.

On June 30, 2008, the trial court conducted a hearing on Wife's objections and also a separate motion filed by Husband to require the parties to accept an offer from a third party to purchase the Nibley property (home and shop) for the sum of \$550,000.00. The trial court overruled all of Wife's objections (with the exception of one proposed finding relative to alimony and "fault") and granted Husband's motion regarding the sale of the Nibley house. The trial court ordered the parties to attend a closing on or before July 15, 2008. Husband's counsel was directed by the trial court to prepare a formal order relative to the sale of the property and to title it "Temporary Order." The Temporary Order was prepared and filed July 3, 2008.

On July 11, 2008, Wife's counsel filed an objection to the content and form of a proposed Temporary Order. Once the objection was filed, the trial court set the matter for a hearing on the objection, which occurred on July 21, 2008.

On July 21, 2008, at the conclusion of the hearing, the trial court signed the Findings of Fact and Conclusions of Law, the Decree of Divorce, and the Temporary Order. On July 23, 2008, Wife's counsel mailed a Notice of Appeal to the trial court.

STATEMENT OF FACTS

Wife's "Statement of Facts" does not accurately set forth the facts ultimately determined by the trial court. Wife omits from her brief any mention of key findings that are essential to understanding the trial court's ultimate division of the marital estate in this case.

Notably absent from Wife's Statement of Facts are the trial court's findings concerning: (a) co-mingling of the parties' personal finances and the corporation finances (*Findings #15, #16 and #17*); (b) the trial court's mixed finding and conclusion that the parties "willfully siphoned off corporate funds to their own personal benefit" and that the corporate veil should be disregarded (*Conclusion #5*); (c) the trial court's finding that Wife's testimony lacked candor and credibility (*Finding #41*); (d) the finding concerning Wife's failure to deliver approximately ninety six thousand dollars (\$96,000.00) worth of corporate equipment in her possession to the corporate creditor which held a valid UCC lien on such equipment (*Findings #10 and #39*); and (e) Wife's failure to account for money the parties kept in a safe in their house (*Finding #40*), which accounting was ordered by the trial court at the outset of the case. (*Order on Order to Show Cause, Docket December 9, 2005.*)

Wife's Statement of Facts do not mention her own testimony at trial (reinforced by her deposition testimony) that she was aware of the intermingling of corporate and personal funds. (*Finding #15 and Conclusion #5*) It fails to address the testimony from the company accountant (David Saunders, CPA) which impeached Wife's testimony that she had no knowledge of the co-mingling or that the company funds were being used to pay the parties'

personal (non-corporate) expenses. (*Finding # 15*) Wife dismisses without discussion the findings of the trial court -- based on testimony which was not rebutted -- that the building lot as well as significant portions of the home and shop were acquired with corporate funds. Her brief seeks to dismiss evidence that the corporation made trades of labor and materials with various subcontractors when the parties built the Nibley house and shop -- all paid for by the corporation, but titled in their names. (*Findings #6 and #7*)

Because Wife's statement of the facts omits important findings made by the trial court Husband believes this Court should review the issues presented on this appeal by reference to the formal Findings of Fact and Conclusions of Law as set forth in Appendix 1 of this brief.

SUMMARY OF ARGUMENT

After taking oral and documentary evidence, and having an opportunity to judge the credibility of the witnesses, the trial court determined that the evidence justified treating the parties' corporation (B & B Drywall) as the alter ego of the parties. In support of this determination the trial court made several findings: 1) that the parties were the only shareholders, officers, and directors of the closely held corporation; 2) that the parties had knowingly co-mingled their personal and the corporation's finances; 3) that the parties had knowingly and willfully siphoned off corporation funds for their personal benefit; 4) that the parties had improperly dominated the corporation for their personal benefit; 5) that the corporation was undercapitalized; 6) that the corporation had never paid dividends; 7) that

the parties had not observed corporate formalities; and 8) treating the corporation separately under the circumstances of this case would lead to an unjust or inequitable result.

Consequently the trial court included all of the corporate assets and debts as part of the marital estate and then proceeded to order an equitable division of those assets and liabilities it determined comprised the marital estate. Wife asserts that the findings do not justify application of the alter ego doctrine. In addition Wife asserts that the trial court's award of \$1,000.00 per month alimony (beginning the month after the sale of the parties home) is inadequate and that the order of the trial court to the effect that each party to bear their own attorney fees is in error.

Wife appeals multiple issues. However, because she failed to ascertain the correct standards of review for the several issues she raises, her brief merely re-argues the same facts that were unpersuasive to the trial court. Wife frames certain issues as questions of law to avoid the marshaling requirement. In doing so, however, she fails to take advantage of the opportunity that marshaling provides: to take a second look at the issue in light of the broad deference owed to the fact finder at trial. Consequently the issues Wife raises are not meritorious, because they are not discussed in light of the controlling case law or the controlling standards of review. The trial court did not commit error as to any of the issues Wife raises and there is ample evidence in the record to sustain the trial court's findings and conclusions. Taking into consideration the facts and circumstances of this case, the trial court's ruling implements an equitable division of the marital estate.

Because several of the issues are fact sensitive, Wife has the burden to first marshal all evidence supporting the trial court's findings and show that the evidence supporting the trial court's ruling is legally insufficient to support the findings, viewing it in the light most favorable to the court below. In the absence of proper marshaling this Court traditionally assumes the evidence adduced at trial supports the trial court's findings and accordingly affirms.

ARGUMENT

- 1. The trial court did not commit error in piercing the corporate veil and treating all the corporation's assets and liabilities as marital assets and marital debts, and ordering an equitable distribution of what the court determined to be the marital estate.**

This issue presents a mixed standard of review, with the trial court accorded a broad measure of discretion when applying the correct legal standard to the given set of facts. Wife attempts to circumvent the burden to marshal the evidence by attempting to frame her appealed issues as questions of law. There are several problems with this approach. First, it ignores the mixed standard of review this issue requires. (*See p. 2, infra*) Second, in so doing, Wife completely mischaracterizes what the trial court found and ordered. The trial court did not find that Wife was personally liable to Cache Valley Bank for a corporate debt. The trial court did not find or make Wife personally liable for any separate debt of Husband in violation of Utah Code Ann. § 30-2-5. The trial court found that the totality of the evidence supported a determination that the corporation was the alter ego of the parties and

that to accomplish an equitable distribution of the marital estate, all of the corporation assets and liabilities should be treated as marital assets and marital liabilities. (*Finding #23; Conclusions #2, #6 and #7*) The trial court then proceeded to make an equitable distribution of what the trial court determined to be the total marital estate. (*Finding #18; Conclusion #7*)

The trial court, after hearing all the evidence and having an opportunity to judge the credibility of the witnesses, found there was a sufficient factual basis to meet the legal requirement to treat the corporation as the alter ego of the parties. Wife claims that the trial court did not mention veil piercing in its Findings of Fact and Conclusions of Law. (*Wife's brief p. 12*) This is not true. The trial court entered detailed findings and conclusions supporting such. Wife objected to the proposed findings and conclusions, and the trial court overruled her objections. The trial court's relevant findings and conclusions supporting its decision to treat the corporation as the alter ego of the parties are set forth below. A fair and impartial reading of these findings and conclusions reveals that the trial court was familiar with applicable law and made ample findings in support of its decision:²

FINDINGS OF FACT

[. . .]

3. Smithfield Home. At the time of the parties marriage, Wife owned a home in Smithfield, Utah which she and her prior Husband had acquired 11 years earlier. After the marriage the parties lived in the Smithfield home for nine (9) years, during which time both parties

² Husband has provided emphasis by underlining particularly relevant portions of a finding and/or conclusion.

contributed to the mortgage payments and maintenance of the home. Husband testified that he also contributed improvements to the Smithfield residence in the form of finishing basement rooms and other construction labor and materials, which he estimated, based on his construction experience, exclusive of his labor to be approximately \$6-8,000.00. Husband further testified that materials that were purchased for the improvements to the Smithfield home were run through and “expensed off” through the drywall business, B & B Drywall, Inc.

4. B & B Drywall Incorporation. After the parties were married, Husband incorporated his drywall and acoustical business. Following incorporation, the Husband and Wife were equal (50%/50%) shareholders, were both directors, as well as officers of the corporation and each drew a salary from the corporation. Husband acted as the corporation’s president and secretary, and the Wife acted as the corporation’s vice-president.

[. . .]

6. Nibley Home. In November 1996, the parties acquired a building lot in Nibley, Utah. The lot was acquired in the parties’ joint names. [*Petitioner’s Ex. #1, tab 27*] The building lot was purchased for \$48,500.00 and was purchased with B & B Drywall, Inc., funds. During late 1997 and early 1998 the parties constructed a home on the lot in Nibley, Utah. The Nibley residence is approximately 6,000 square feet and lies on the west bank of the Blacksmith Fork River in Nibley, Utah. The home is completely finished (sheet rocked and painted throughout) including the basement. The 6,000 square foot home was constructed partially with a \$125,000.00 construction loan from Cache Valley Bank, which the parties obtained in November 1997. [*Petitioner’s Ex. #1, tab 3*] Husband testified that a significant amount of the building materials (lumber, drywall, wiring, etc.) used to build the home was purchased by B & B Drywall, Inc., and “expensed off” by the corporation; that labor from B & B employees, was used in the construction of the home; that trades (primarily labor) were made by B & B with other subcontractors (electrical, foundation, framing, etc.) which benefitted the parties personally, and which the parties never reimbursed B & B Drywall. Husband also testified that the \$125,000.00 construction loan was used primarily for the acquisition of building materials and that primarily B & B traded labor with other subcontractors.

7. Nibley Shop. In addition to the Nibley home, the parties constructed a large shop adjacent to the home. Husband testified that the shop was built at a cost of approximately \$75,000.00. Husband testified that the materials and labor for the shop also came from B & B Drywall, Inc. The shop is entirely finished - sheet rocked and painted - and has balconies at both the east and west ends of the shop. After the shop was built it was used primarily to store B & B equipment and supplies as well as some of the parties' personal property, including the Husband's woodworking equipment which was also purchased with B & B funds.

[. . .]

10. Equipment in Nibley Shop. The Court finds from a preponderance of the evidence that Petitioner had control over and cannot account for substantial property stored in the Nibley shop including the B & B equipment and other property as evidenced by the photographs taken by Terry Oliver, a loan officer for Cache Valley Bank, all the parties guns, as well as the money in the two (2) safes. Petitioner testified she has disposed of all of the guns, including Respondent's guns.

[. . .]

14. Timeshare. In March 2001, the parties purchased a timeshare from Worldmark (formerly Trendwest Resorts) for \$10,440.00. Husband testified that from the date of purchase until he left the marital residence in December, 2004 that B & B Drywall, Inc., paid the installment payments and quarterly dues on the timeshare. The purchase contract lists the parties and B & B Drywall, Inc., as the purchaser of the timeshare interest. [Respondents Ex. #1, tab 8] The Court finds that the Petitioner has had exclusive possession, control, benefit, and use of the same since their separation in December 2004. The Court finds the value of the timeshare to be \$6,500.00 and the Court awards it to the Petitioner as her sole and separate property, she also being solely responsible for any and all debt or maintenance on such.

15. Knowledge of Co-mingling of Business and Personal Accounts. Wife claimed that she was unaware that the family business (B & B Drywall, Inc.) had been used to pay for the construction of the home, the shop, home furnishings, personal woodworking tools, the timeshare, their personal living expenses and/or other non-business expenditures.

However, she was an officer, director and shareholder of the company since its incorporation and she testified that as vice-president part of her job duties included balancing the bank statements. David Saunders, the B & B Drywall, Inc., company accountant, testified that Wife gave him instructions not to reconcile the bank statements because she had already done that. During the process of reconciling the bank statements she would have had an opportunity to see exactly what the company checks were being written for. Furthermore Wife also admitted during cross-examination that in her deposition she testified that she was aware that the company had purchased personal items such as a treadmill, golf clubs, and other items without claiming the items as income from the corporation. Husband testified that it was not uncommon for them to utilize the B & B checking account to purchase personal goods as well as to place personal items on the company credit card and then pay off the company credit card using a company check. According to Husband's testimony, these items included the timeshare, materials for the Nibley home, home furnishings such as couches, personal woodworking equipment, a pool table, and other furnishings and fixtures. The Court finds that both the parties knew they were using B & B Drywall funds for their personal use and benefit.

16. Cache Valley Bank Loans. Greg Miller, President of Cache Valley Bank, testified that with respect to the \$250,000.00 loan to B & B Drywall that both parties participated in the initiation of the loan. The Court finds the total debt to Cache Valley Bank is approximately \$326,328.00, plus accruing interest. While the loan documents are only signed by Brad Olson in his capacity as President of B & B Drywall, Inc., and as a personal guarantor of the loan, the Court notes that all of the loan proceeds were either disbursed to suppliers directly or into the B&B checking accounts over which both parties had control, and the Court is persuaded that because of the way in which the parties handled the corporation financial affairs and personally benefitted from the corporation assets that all of the business debt should be treated as marital debt.

17. Co-mingling Found. The Court finds that the parties have co-mingled their personal and business financial affairs to a point that in order for this Court to make an equitable division of the marital property and debts, it is reasonable and equitable to treat all of the parties personal and business assets and business debts as marital debts and make an equitable division of the same.

[. . .]

20. Vehicles. The Court determines the value of the 2001 Ford Expedition to be \$10,000.00 and awards it to the Petitioner. The Court determines the value of the 1989 Ford Truck, which was impounded and sold, to be \$500.00, and awards it to the Respondent.³

[. . .]

36. Value of Equipment in Nibley Shop and Dominion over Equipment. Husband has claimed that Wife has also had the exclusive use of the household furnishings and the tools and equipment that were stored in the Nibley shop which both Husband and Mark Davis valued at approximately \$96,000.00. These items were in the Nibley shop at the time he left the residence (and was later excluded from the residence by the Protective Order) and were stored in the shop built adjacent to the Nibley home.

37. Cache Valley Bank Inspection of Equipment. On August 3, 2005, Cache Valley Bank through its loan officer Terry Oliver traveled to the Nibley property with Husband and obtained entry to the shop and took photographs of the equipment in the shop. Upon entry to the shop, Husband told Mr. Oliver that substantial amounts of B & B equipment had been removed from the shop. He immediately provided a list of said equipment to Cache Valley Bank, who had a secured lien (UCC-1) on all of the B&B Drywall, Inc. equipment. The Court notes that Mr. Oliver's entry to the shop occurred before the appointment of a receiver.

[. . .]

39. Evidence of Existence of Equipment. The Court finds that as to those items of equipment which were still in the shop on August 3, 2005, as evidenced by the photographs, Wife has had exclusive use and possession of the same. Terry Oliver testified that the Bank has made

³ The 2001 Ford Expedition, which Wife testified was her personal vehicle, and which was titled in the corporation, was listed on the corporation's depreciation schedules and over the course of the last few years fully expensed (depreciated) by the company. *Defendant's Exhibit 1, tab 6; Tr. 443.*

demand on Wife for the equipment and the Bank has even filed a separate lawsuit to recover the equipment secured by its UCC lien, which case was also assigned to this Court for disposition.

40. Money in Safes. Husband testified that when he left the residence in December 2004 the parties had \$28,000.00 in a safe located in the attic of the Nibley home and \$4,100.00 in a safe in the basement. Wife denied that these funds existed; however, during the hearing on temporary orders before Commissioner Garner, Wife acknowledged that she removed from the attic safe a sum of money, at least \$20,500.00, and was ordered by Commissioner Garner to account for the money. Wife's accounting [Respondent's Ex. #1, tab 16] listed \$5,000.00 as being used to pay off the Trendwest timeshare. This accounting, however, is inconsistent with Petitioner's Ex. #1, tab 45, which shows monthly and quarterly payments on the timeshare after the time period Wife claims to have used a portion of the \$20,500.00 to pay off the timeshare. In light of the Court's treatment of denying the Petitioner any increase in her premarital interest in the Nibley home, the Court believes it has disposed of all the parties' real and personal property.

[. . .]

42. Credibility of Petitioner. The Court finds the Petitioner's credibility was a concern to the Court, and in particular found her testimony to be less than credible with respect to disposition of the guns; the accounting for the money in the safe, and in particular the payoff of the Timeshare, as well as her claimed lack of any knowledge as to the business expenditures, which was inconsistent in light of the testimony that she reconciled the bank statements as part of her duties.

CONCLUSIONS OF LAW

[. . .]

2. "[T]he primary purpose of a property division, in conjunction with an alimony award, is to achieve a fair, just, and equitable result between the parties." *Riley v. Riley*, 2006 UT App 214, ¶ 27, 138 P.3d 84. The primary goal of this Court in any divorce proceeding is to accomplish an equitable division of the assets and debts of the parties. Divorce by its very nature is an equitable proceeding.

3. "Ordinarily, a corporation is regarded as a separate and distinct legal entity from its stockholders. This is true whether the corporation has many stockholders or only one. Consequently, the corporate veil which protects stockholders from individual liability will only be pierced reluctantly and cautiously." *Colman v. Colman*, 743 P.2d 782, 786 (Utah App. 1987) (quotations and citations omitted). To aid courts in deciding when to ignore the separate corporate existence, the Utah Supreme Court established a two-prong test in *Norman v. Murray First Thrift & Loan Co.*, 596 P.2d 1028 (Utah 1979): "[I]n order to disregard the corporate entity, there must be a concurrence of two circumstances: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow." *Schafir v. Harrigan*, 879 P.2d 1384, 1389 (Utah App. 1994) (alteration in original) (quoting *Norman*, 596 P.2d at 1030).

Certain factors which are deemed significant, although not conclusive, in determining whether this test has been met include: (1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) nonfunctioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud. *Colman*, 743 P.2d at 786 (footnotes omitted).

4. Respondent has demonstrated the existence of the type of siphoning off of corporate funds by the dominant shareholders that the Court is satisfied there exists in this case the "unity of interest" and "ownership" required by *Norman*. Respondent has testified that B & B Drywall, Inc., (B&B) paid for the shareholders' personal expenses including improvements to the Smithfield home; B&B paid for the Nibley property on which their home and shop were later constructed; B&B paid for materials for the Nibley home and shop; B&B its employees to work on the Nibley home and shop for which the shareholders did not reimburse the corporation; B&B made trades with other subcontractors for labor as to the Nibley home and shop; B&B purchased and paid for the Trendwest timeshare through 2004; B& owned and paid insurance and taxes on the parties' personal vehicles which they drove (the Expedition and Ford truck);

B&B paid for home furnishings; B&B paid for personal woodworking tools; and B&B even purchased personal goods and services on the company credit cards which B & B Drywall later paid for.

5. In addressing the Colman factors set forth above. the Court is satisfied that: (1) at the time the divorce was filed the corporation was insolvent and by stipulation of the parties was placed into a court-supervised receivership and was undercapitalized; (2) based on the Petitioner's own testimony they discussed matters almost daily but failed to observe the corporate formalities of holding shareholders' or directors' meetings; (3) there was no evidence of the payment of dividends and in fact the B & B corporate tax returns and other corporate financial records placed into evidence disclose no dividends were paid; (4) the parties knowingly and willfully siphoned off corporate funds to their own personal benefit; (5) other than the parties there were no other functioning officers or directors; (6) no evidence either way was produced as to the absence or existence of corporate records and therefore finds this factor neutral; (7) the manner in which the parties used the corporation for their personal financial benefit as dominant shareholders would be a facade; and (8) use of the corporate entity or shell to obtain a financial benefit as to the assets but not the debt would promote an injustice.

6. Respondent has demonstrated that the strict observance of the corporation would lead to an inequitable result. For several years the parties have received substantial financial benefits from a corporation which they largely disregarded when it came to taking money from the corporation for their personal benefit; a corporation in which they are 50%/50% or equal shareholders and are the only officers and directors of the corporation; a corporation they dominated for their own personal benefit. There has been such a co-mingling of the corporate funds with the marital assets acquired by the parties that it would be inequitable to treat the assets of the parties as marital assets and try to divide them equitably while disregarding the debts of the corporation from which the parties directly received the financial benefit.

7. The division of the real and personal property and the parties' debt as set forth above accomplishes an equitable division of the marital property and debt.

Given the detailed nature of the trial court's findings and conclusions it is difficult to understand how Wife can argue in good faith that the evidence adduced at trial does not support the trial court's decision to treat the corporation as the parties' alter ego – particularly because this case is an equitable proceeding, and this fact intensive issue arises specifically in the context of the trial court making an equitable distribution of the parties' marital estate. See Trubetskoy v. Trubetskoy, 2009 UT App 77, ¶ 8.

In Appendix 6 of Wife's brief, Wife makes a cursory attempt to marshal the evidence but only as to findings # 15 and # 17. This is problematic for several reasons. First, there are multiple findings and at least three mixed findings and conclusions (*i.e.*, Conclusions # 4, 5 and 6), besides findings # 15 and # 17, that support the trial court's ultimate ruling to treat the corporation as the parties' alter ego. Second, as this Court stated in A.K.&R. Whipple Plumbing and Heating v. Aspen Const., 977 P.2d 518, 525 (Utah App. 1999):

. . . the Utah Supreme Court has denounced the practice of marshaling evidence in an appendix stating that "[t]his does not comply with the requirement to marshal evidence. It is improper for counsel to attempt to enlarge the page limit of briefing by placing critical facts in appendices." *DeBry v. Cascade Enters.*, 879 P.2d 1353, 1360 n. 3 (Utah 1994). Worse yet, the addendum does not include a properly focused marshaling of the evidence supporting particular findings under attack, but rather is a comprehensive catalogue of all testimony in the record. Thus, we must assume the evidence supported the findings underlying the trial court's determination . . .

Third, Wife misinterprets the marshaling requirement. She argues that the only evidence in support of the trial court's decision to pierce the corporate veil was Husband's own self-serving testimony. (*Wife's brief Appendix 6, p. 5*) She argues that this Court should

essentially ignore such, find such of no importance, or that such is outweighed by her evidence, which she claims should have been accepted by the trial court. Wife's attempt at marshaling ignores a basic rule of appellate law – that this Court will not re-weigh the evidence, but view evidence that supports the trial court's decision in the light most favorable to the trial court's findings. The broad discretion accorded the trial court in making findings, particularly in the context of a divorce proceeding, simply acknowledges that the trial court is seeking to make an equitable distribution of the marital estate and that the trial court is best suited to weigh the evidence because "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." Jeffer v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998) (quoting Pena, 869 P.2d at 939).

Moreover, in Child v. Child, 2008 UT at ¶ 4 (fn. 1), this Court observed:

... But it is the role of the fact finder to assess the credibility of witnesses and to weigh the evidence. *See Utah R. Civ. P. 52(a)* ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."); *State v. Hodges*, 798 P.2d 270, 274 (Utah App. 1990) ("In a bench trial or other proceeding in which the judge serves as fact finder, the court has considerable discretion to assign relative weight to the evidence before it. This discretion includes the right to minimize or even disregard certain evidence."). Thus, we defer to the trial court's assessment on this matter. *See 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 75, 99 P.3d 801 ("When reviewing a district court's findings of fact on appeal, we do not undertake an independent assessment of the evidence presented during the course of trial and reach our own separate findings with respect to that evidence. Rather, we endeavor only to evaluate whether the court's findings are so lacking in support that they are against the clear weight of the evidence.").

Fourth, Wife has not effectively marshaled the evidence in favor of the trial court's findings in relationship to the alter ego issue. The following are additional evidentiary items which Wife failed to marshal and which support the trial court's findings of co-mingling and dominance:

- (a) Wife's personal vehicle, a 2001 Ford Expedition was fully depreciated on the corporate tax returns (*Defendant's Exhibit 1, Tab 6, Tr. 322, 433, 443*) but only used by her personally;
- (b) Testimony that the building lot was paid for by the corporation (*Tr. 203*);
- (c) Parties took perks in form of corporation paying personal vacation expenses (*Tr. 206*);
- (d) Wife acknowledges many items purchased for parties out of corporate funds (*Tr. 350*);
- (e) Wife acknowledges that home office equipment purchased by corporation but Wife refused to turn property over to the court appointed receiver (*Tr. 351*);
- (f) Parties used corporation credit card to pay for personal expenses (*Tr. 406*);
- (g) Wife's testimony that she was not aware of corporate funds being used for personal items which was impeached by CPA's testimony (*Tr. 442*);
- (h) Wife's failure to turn over the \$96,000.00 of corporate equipment to the corporate creditor holding a security interest in the same (*Tr. 665-666*);

Husband has not scoured the entire record, and there may be other items which support the alter ego findings; however from a cursory review of the trial transcript and exhibits admitted into evidence, it is apparent that Wife has not effectively or adequately marshaled the evidence in her Appendix 6.

Wife fails to mention or marshal the evidence as to other findings (set forth in their entirety above) that, taken as a whole, support the trial court's decision to treat the

corporation as the alter ego of the parties. The following, which Wife's brief fails to discuss, is illustrative of evidence supporting the trial court's decision: (a) evidence of co-mingling of the parties' personal finances and the corporation finances (*Findings* #3, #6, #7, #10, #14, #15, #16 and #17); (b) the trial court's conclusion (actually a mixed finding and conclusion) that the parties "willfully siphoned off corporate funds to their own personal benefit" and that the corporate veil should be disregarded and the corporation treated as the alter ego of the parties (*Finding* #16 and *Conclusion* #5); (c) the trial court's finding that Wife's testimony lacked candor and credibility, particularly as it relates to her knowledge of co-mingling (*Finding* #41); (d) the finding concerning Wife's failure to deliver approximately ninety six thousand dollars (\$96,000.00) worth of corporate property and equipment in her possession to a corporate lender which held a valid UCC lien on such equipment (*Tr.* 504, 665-666, *Findings* #10 and #39) essentially finding that Wife had converted or at the least failed to account for substantial corporate property⁴; (e) Wife's failure to account for money the parties had in a safe in their house (*Finding* #40) as ordered by the trial court at the outset of the case; (f) Wife's own testimony (reinforced by her deposition testimony that was

⁴ In light of Wife's failure to account for these corporate assets (which the evidence tended to show were valued around \$96,000.00) it is not difficult to understand how the trial court arrived at the conclusion that the corporation was dominated by its shareholders and should be treated as the alter ego of the parties. In as much as Wife acknowledged that she did not turn over these assets to either the secured creditor or the receiver, it is understandable that the trial court would conclude it was equitable to indirectly hold the marital assets accountable for at least that portion of the corporate debt.

introduced during cross examination) that she was aware of the intermingling of corporate and personal funds (*Finding #15 and Conclusion #5*); (g) the testimony from the company accountant (David Saunders) that impeached Wife's testimony that she was not aware the company funds were being used to pay the parties' personal expenses (*Finding #15*); and (h) the evidence of the payments made by the corporation for the building lot (on which the house and shop were built) and that labor and other trades were made by the corporation (dominated by the two shareholders) with various subcontractors when the parties built the Nibley house and shop--paid for by the corporation, but titled in their names. (*Findings #6 and #7*)

Taken as a whole there is a substantial basis for the trial court's alter ego ruling. Because the appellant has failed to adequately marshal the evidence this court should, applying prior appellate case law, “. . . assume that the evidence supports the trial court's finding with regard to the [alter ego issue].” Chen, 2004 UT 82, ¶ 80. Furthermore, there is substantial evidence that the trial court made an equitable distribution of the marital estate. “Trial courts have considerable discretion in determining . . . property distribution in divorce cases, and [their decisions] will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.” Stonehocker v. Stonehocker, 2008 UT App, ¶ 8 (omission in original).

2. The trial court did not commit error in its ruling relating to alimony.

This issue presents an abuse of discretion standard. Wife argues that the alimony is inadequate, that the trial court failed to take into consideration the statutory factors under Utah Code Ann. § 30 - 3-5(8), that the trial court should have considered fault and, lastly, that the trial court did not award enough alimony taking into consideration the parties' standard of living. (*Wife's brief* p. 17-19) The trial court made the following findings and conclusions relative to alimony:

FINDINGS OF FACT

1. Date of Marriage and Other Dates. The parties were married in Smithfield, Utah on November 18, 1989. No issue were born to the parties. This is a second marriage for both parties. Both parties are currently 54 years old and in good physical health. The parties have been married for 18+ years, but have been living separately since December 2004. The Petitioner resides in Nibley, Utah. The Respondent currently lives in Las Vegas, Nevada and moved there for purposes of obtaining employment in June 2006.

2. Employment at Time of Marriage. At the time of their marriage, the Petitioner (Wife) had been employed at Utah State University ("USU") for approximately 18 months. She began her employment at USU on May 1, 1988. At the time the parties married, the Respondent (Husband) owned and operated a drywall and acoustical business as a sole proprietor. Respondent (Husband) had just purchased his partner, Brad Johnson's interest, in their drywall partnership business prior to the marriage.

[. . .]

5. Husband's Experience in Construction. At the time of the trial, the Husband testified he had been in the drywall business for approximately 31 years.

[. . .]

29. Wife's Income & Employment: The Court finds from the evidence that the Wife is 54 years old and in good physical and mental health. She is not a college graduate but is employed at Utah State University in the HR-Personnel Office and is responsible for working with employee benefits. She has been employed at USU for over 19 years. During the marriage Wife also took a salary from B & B Drywall, Inc., ranging between \$15,000.00 and \$18,000.00 per year. [*Respondent's Ex 1, tab 1*] Because B & B is insolvent, and no longer in business, the Court does not believe the imputation of income from this source, is proper. Wife has testified that her current supervisor has made a college degree a requirement of employment in her current position, however, the Court feels it is unlikely that after 19 years of steady, full-time employment at this state institution, that she is in jeopardy of losing her employment. She may need to transfer to another position but the reduction of her income is not likely. At present she earns \$47,610.00 annually (\$3,967.50 per month) [*Petitioner's Ex..#1, tab 41*] and she has testified she receives a cost of living increase annually in July of each year. The Court notes that Wife has had sufficient income to add to her 401k retirement monthly.

From the property settlement, Wife will receive approximately \$138,000.00, to put down on a new home and assuming a modest home of \$200,000.00, Wife would be required to finance \$60 - 70,000.00 of that amount. Wife did not put into evidence her 2005 or 2006 income tax returns and so the Court is not aware of whether the withholdings result in a refund, however her current Federal & State withholdings are \$379.33 and \$207.05 respectively, and \$298.76 for FICA for a total of \$885.14 in tax deductions or 22.31% (\$885.14/\$3,967.50). As of December 1, 2007 Wife had 265 hours of accrued annual leave (33 days) and 367 hours of accrued sick leave (46 days). Wife's current monthly payroll deductions are \$991.00 per month leaving her a net monthly income of \$2,977.00.

30. Wife's Budget and Needs: Shortly after the divorce was filed in August of 2005, the parties appeared before Commissioner Garner for a hearing on temporary orders. Wife presented a budget at that time indicating her needs were \$3,095.00 per month (inclusive of food/household supplies of \$450.00 per month; \$500.00 per month in legal fees and \$200.00 for college courses). [*Respondent's Ex #1, tab 4*] At trial Wife submitted a budget totaling \$6,210.29 per month (inclusive of \$1,000.00 per month for legal fees and \$2,500.00 per month for a mortgage or lease payment). The Court has considered that the Petitioner will receive approximately \$138,000.00 from the sale of the Nibley residence and if she reinvests that

into a modest home in the \$200,000.00, range that her mortgage payment would be around \$600.00 - \$700.00. The Court is also aware that at some point she will need to replace her vehicle. The Court finds that the Wife needs would be approximately \$4,200.00, per month and that her net needs are approximately \$1,000.00, per month short.

31. Husband's income and employment: The Court finds from the evidence that the Husband is 54 years old and is not a college graduate. Husband is in good physical health, however, Husband has experienced severe depression and twice in late 2004 voluntarily admitted himself to a health care facility for assistance due to the manifestations of his depression. At present Husband is under the care of a physician and takes antidepressants, which have allowed him to function more productively. (This Court is also aware of the depression and suicide incidents in the Husband's medical history as it was the primary reason this Court issued the protective order in late 2005.)

Husband has been involved in the construction and drywall business for 31 years. In August of 2005 the Wife and Husband stipulated to the appointment of a court appointed receiver with respect to B & B Drywall, Inc., where the Husband had been employed since before the marriage. He had been drawing a salary of approximately \$36-37,000.00 annually until 2005 when the business failed. The Court notes that based on both parties testimony there were substantial personal expenses and other draws from the business and believes the parties' income from the business as reflected on the income tax return is not really indicative of either parties' historical earning potential prior to the business failure.

After the receiver was appointed (August 2005) Husband eventually found employment with Valley Drywall (a drywall business in Cache Valley) at \$15-16.00 per hour. In June 2006 Husband relocated to Las Vegas, Nevada to take a new job, at an annual salary \$65,000.00/year with M & H Building Specialties, as an assistant drywall estimator. Approximately three (3) months after he began working for M & H, his supervisor, the senior estimator, died and Husband was required to take on both his and his former supervisor's job responsibilities. In 2007 Husband worked 3,365 hours to meet the job demands of both his job and that of his former supervisor. Husband testified that his workload demands were unusually high due not only to the significant demand for building construction in the Las Vegas area but also because of his supervisor's untimely death. Because of his increased job responsibilities and the

substantial overtime required by the Husband's employer, Husband received a salary increase in 2007 to \$94,059.00 annual salary and a special discretionary bonus of \$46,416.00. Husband's current salary is \$1,850.00 per week or \$96,200.00 annually. He has the potential for additional bonuses; however these bonuses are totally discretionary with the owners of the company and such bonuses have historically been based on the company's overall performance, not individual performance.

Husband testified that he has asked his employer to hire another estimator as he cannot maintain the same level of stress that he did in 2007 or he would find other employment. At present the Husband is working hours closer to the normal 40 hour work week. The Court is persuaded that given Husband's medical condition as well as the general economic condition of the construction industry slow down nationwide, that it is unlikely that Husband would maintain the same level of hours at work that he did in 2007 or the corresponding compensation.

In addition the Court notes that a B & B Drywall supplier, Capital Building Supply, has obtained a \$61,000.00 personal judgment against Husband and is currently garnishing Husband's paycheck. Capital garnished approximately \$18,200.00 in 2007 and is entitled under Nevada law to take 25% of Husband's disposable income. It is likely that the Husband will continue to have another \$18,000.00-\$23,000.00 garnished in 2008.

For purposes of calculating a reasonable income based on a 40/50 hour work week, the Court will utilize the base salary of \$96,200.00, less the \$18,200.00 garnishment, and a reasonable allowance for state, federal and FICA taxes of 27 percent (\$25,974.00). The Court finds the Husband's 2008 disposable income is \$52,226.00 annually or \$4,352.00 per month. For purposes of setting alimony the Court finds the Husband's monthly available income of \$6,000.00, per month prior to any bonuses which bonuses the Court understands and finds is discretionary with the employer.

32. Husband's Budget and Needs: Husband submitted a monthly budget of \$7,991.00 per month (inclusive of \$1,514.00 per month garnishments). The Court finds that the cost of living and living expenses in general in the Las Vegas area are greater than similar living expenses in Logan, Utah. The Court accepts the Husband's budget as reasonable in the amount of \$6,800.00, per month.

33. Alimony Findings and Award. The Court finds that it is equitable to order alimony to be paid by Respondent/Husband to the Petitioner/Wife in the sum of \$1,000.00, per month, to be paid beginning 30 days after closing on the home and continue per the state statute for a period of no more than 18 years from the date of July 1, 2008, unless otherwise terminated by co-habitation, remarriage, or death of the Petitioner or the death of the Respondent. The Court has considered the alimony factors set forth in §30-3-5(8)(a) U.C.A., including the financial condition and needs of the recipient spouse; the recipient earning capacity; the ability of the payor spouse to provide support; the length of marriage; whether the recipient spouse directly contributed to any increase in the payor spouses skill; fault; the parties standard of living at separation. As to fault the Court finds the evidence is not sufficient to merit further consideration of that factor.

CONCLUSIONS OF LAW

1. The marriage between the parties should be terminated through entry of a Decree of Divorce on the grounds of irreconcilable differences. The Petitioner has argued that the assets and debts of the marriage should be determined at the date of separation (December 2004) or the date of filing the divorce (August 2005). The Court determines that it should determine the assets and debts as of the date of trial February 2008.

[. . .]

8. Awarding the Petitioner alimony in the amount of \$1,000.00 per month beginning 30 days after the home is sold and continuing for a period of no more than eighteen (18) years from July 1, 2008 unless otherwise terminated by statute by the co-habitation, remarriage of the Petitioner or the death of either the Petitioner Respondent is just and equitable.

Not only has Wife failed to marshal the evidence (or make any effort to do so as to this issue), her factual assertions are misleading and contrary to the trial court's findings set forth above and in the trial transcript. (*Tr.* 716-720) The trial court did explain in its findings as well as in its bench ruling why it was not going to give the fault factor much weight or

consideration. (*Tr. 716-720*) The trial court was aware of Husband's adultery but found the evidence of fault insufficient to merit much weight given all the facts and circumstances of the case. Moreover, the trial court was concerned that going down the road of fault was not very productive because it opened the door as to whether the reason he suffered from depression or transgressed was primarily the fault of the Wife. (*Tr. 719-720*)

Additional findings made by the trial court in support of its ruling include the following: The trial court found Wife's budget to be inflated. (*Tr. 716*) The standard of living the parties enjoyed was marginally relevant as it was artificial, since the parties treated the corporation as their alter ego by siphoning off corporate funds. (*Findings 3,6,7,15, 17 and Conclusions 4 - 6*) Contrary to Wife's assertions, the trial court took all of the statutory factors into consideration (*Tr. 718-720*)

Wife has been very selective in stating the facts and has failed to give this Court the entire picture. For example, Wife fails to inform this Court (or even acknowledge in her brief) that the evidence showed that Husband's income is being garnished and 25% of his disposable income or approximately \$1,500.00 per month plus 25% of any bonus, is going to satisfy a judgment debt which the trial court allocated solely to him (*Tr. 494*); that Husband's living expenses in Las Vegas were higher than in Logan (*Tr. 487*); and that from January 2005 to June 2006 husband had to pay rent and worked for wages of only \$15.25-\$16.00 per hour (*Tr. 110*); and that since December 2004 Wife had exclusive possession of

the 6,000 square foot marital residence free of rent or mortgage. These facts amply justify the trial court's decision not awarding retroactive alimony.

Wife cites no relevant legal authority nor provides any meaningful legal analysis for her position. Rather than discussing the evidence in terms of the trial court abusing its discretion or even discussing the evidence in light of the alimony factors (her needs, her ability to meet those needs, his needs and his ability to meet those needs) she merely re-argues her evidence. Because Wife has failed to adequately marshal the evidence on this issue, this Court should affirm the alimony findings. Wife has failed to demonstrate where the trial court abused its discretion. Moreover, because she has failed to identify the correct standard of review, identify where the issue was preserved in the record, or even attempt to marshal the evidence on the alimony issue, the Court should find the issues raised in this portion of the brief specious and frivolously raised. The evidence is more than adequate to support the trial court's findings regarding alimony. Had Wife marshaled the evidence it likely would have become evident that this issue was not well taken.⁵

⁵ See, e.g., Mountain States Broadcasting v. Neale, 738 P.2d 551, 553-554 (Utah App. 1989). In Neale this Court observed that a primary benefit of marshaling is a more focused brief. Id. The Court further noted that one of the parties had done such an admirable job of marshaling that they later conceded in their brief that adequate evidence existed for certain matters they had originally appealed. Id. As a result of marshaling the evidence they voluntarily abandoned those issues and focused instead on others. Id.

3. The record supports the trial court's finding as to the value of the home.

A valuation issue is analyzed under a clearly erroneous standard of review. Regarding the valuation of the home, Wife argues that there was no evidentiary support for the amount that the trial court found. Mr. Dustin Singleton, a certified appraiser, performed his appraisal work in November 2005. (*Tr.* 35) He testified that the fair market value of the property at that time was \$480,000.00. (*Tr.* 37, *Ex. 1, tab 2*) Mr. Singleton also testified that in the time between his appraisal and the date of the trial there was appreciation in the Cache Valley market for all homes. (*Tr.* 46) This appreciation ranged between “5 to 10 percent per year for 2006” and “3 or 4 percent for the first six months of 2007” and during the last six months of 2007 things had been flat. (*Tr.* 47) Wife acknowledges that Husband also testified the home was worth at least \$550,000. (*Tr.* 215).

In its bench ruling, the trial court explained how it arrived at the value of the home. (*Tr.* 710-711) Moreover, less than a month following the trial court's bench ruling the parties received an offer from a third-party to purchase the home and shop for \$550,000.00. Because Wife did not want to sell the property Husband filed a motion to force the sale. The trial court granted Husband's motion requiring the parties to sell the home. (*Docket July 21, 2008*) Wife, however, objected and obtained a supersedeas bond to stay the sale. Wife's brief fails to acknowledge the \$550,000.00 sale of the home that she frustrated, nor does her brief discuss the valuation issue in light of the discretion afforded the trial court on matters such as these. The evidence of value amply supports the trial court's finding. Given the

substantial evidence as to the value of the home and shop, Wife's appeal on this issue lacks merit.

Again, Wife makes no effort to marshal the evidence. Her argument is largely devoted to trying to discredit Husband and setting forth the evidence supporting her position rather than showing why the evidence is so clearly erroneous that this Court must reject it. Because Wife has failed to adequately marshal the evidence on this issue, this Court should affirm the valuation finding on this basis alone. See also State v. Hodges, 798 P.2d 270, 274 (Utah App. 1990) ("In a bench trial or other proceeding in which the judge serves as fact finder, the court has considerable discretion to assign relative weight to the evidence before it. This discretion includes the right to minimize or even disregard certain evidence.")

But there is also another basis on which this Court could affirm. Wife has posted a supersedeas bond to stay the order of the trial court that the home be sold. To satisfy the bond she has put up her equity in the home. In order to post the amount of the bond established by the trial court she represented the value of the home to be at least \$550,000.00. Having accepted the benefits of the trial court's ruling as to the value of the home for purposes of posting her bond she has waived her right to appeal the finding of the trial court as to value, otherwise she is in effect acknowledging that her bond is insufficient and the trial court's order should not be stayed. She should not be allowed to make a representation to the courts for one purpose and deny it for another. See Cingolani v. Utah Power & Light Co., 790 P.2d 1219 (Utah App. 1990).

4 Husband did not benefit by selling assets in violation of the court order.

This issue is reviewed on a clear and prejudicial abuse of discretion standard. Wife asserts that Husband admitted to violating the trial court's order not to dispose of assets. Wife herself admits that the trial court already factored this into its final ruling, and yet Wife still claims the trial court should have sanctioned Husband for such conduct. (*Wife's brief*, p. 22) Notably, also factoring into the trial court's final ruling, Wife engaged in more egregious conduct⁶ when she sold all of Husband's guns to satisfy the LKL judgment, which was obtained after the court ordered the parties not to dispose of assets. (*Tr.* 342) Furthermore she failed to account for the money (\$20,500.00) in the parties' safe. (*Findings* ## 10, 40-41) Given her own flagrant conduct, Wife's suggestion that Husband should be sanctioned violates even the most basic tenets of equity: *One who seeks equity must do equity*. As acknowledged by Wife in her brief, the trial court factored each of the parties' conduct into its final ruling, making an equitable distribution of the marital estate. (*Wife's brief* p. 22)

⁶ Husband did admit to using investment funds for living expenses when he was employed at Valley Drywall making only \$16.00 per hour (*Tr.* 109) and having a difficult time making ends meet. However, the funds he utilized were fully accounted for, and were generic dollars and replaceable. Wife sold off all of Husband's guns, some of which were heirlooms and irreplaceable and, even to this date, she has failed to account for them even though Judge Judkins' ruling allows a monetary offset if she can restore any of the guns.

Wife cites no relevant legal authority nor provides any meaningful legal analysis for her position that the trial court should have sanctioned Husband. Wife's brief does not even identify the correct standard of review for this issue or identify where this issue was preserved. "Trial courts have considerable discretion in determining . . . property distribution in divorce cases, and [their decisions] will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated." Stonehocker v. Stonehocker, 2008 UT App 11, ¶ 8, 176 P.3d 476 (omission in original).

5. The trial court did not commit error in disallowing evidence from Jack Peterson, a Certified Public Accountant.

This issue is reviewed on an abuse of discretion standard. During the second day of trial Wife called Jack Peterson, CPA, to testify. The entire colloquy between the trial court, counsel, and Mr. Peterson's testimony is contained in the trial transcript at pages 411 to 418. Sometime in 2001, Mr. Peterson had been retained by Husband's first wife in connection with his first wife's then-pending petition to increase the child support in that case. Mr. Peterson had evidently conducted an evaluation of Husband's income in the Fall of 2001 (*Tr.* 417), supposedly for purposes of increasing child support. An objection was made because Mr. Peterson was not listed as an expert witness and no expert report had been provided to Husband's counsel. (*Tr.* 411) The trial court sustained the objection as to any opinion testimony. Mr. Peterson was called and allowed to testify, but not as an expert witness.

The document Wife wanted introduced through Mr. Peterson's testimony was based on Mr. Peterson's expertise as an accountant. (*Wife's brief* p. 24; *Tr.* 414) This was opinion testimony based on his analysis of other records, which would have been prejudicial to Husband because Mr. Peterson was not identified as an expert witness and any opinion testimony would have been a complete surprise. Furthermore the relevancy of "a factual analysis of [husband's] earnings during the marriage" (*Wife's brief* p. 24; *Tr.* 414) as of the Fall of 2001 would be marginal relative to any issues pending in this divorce action as of February 2008.⁷

Again Wife cites no relevant legal authority for her position that the exclusion of Mr. Peterson's testimony was error, nor does she provide any meaningful legal analysis. In her brief, Wife does not explain how she has been prejudiced, nor does she explain why, given the trial court's broad grant of discretion in admitting evidence, this Court should hold that the trial court abused that discretion. See In re Determination of Rights to Use All Water, 982 P.2d 65, 72. Wife's brief did not identify a separate or even correct standard of review for this issue or how or where this issue has been preserved. Given the manner in which this issue is raised, and then not adequately briefed as mandated by Utah R. App. P. 24, it too is frivolous.

⁷ There was no foundation provided for the document Wife sought to introduce. Lacking a sufficient foundation, the document would have been excludable as hearsay unless Mr. Peterson was allowed to testify as an expert.

6. The trial court did not commit error in failing to award either party attorney fees.

This issue is reviewed on an abuse of discretion standard. Except for a bare citation to Utah Code Ann. § 30-3-3(1), Wife provides no relevant authority for her position that the trial court erred in failing to award her attorney fees. Wife does not cite any case law acknowledging the elements for an award of attorney fees, nor does she provide any meaningful factual analysis in support for her position. She does not indicate where she preserved this error. She does not indicate where she even introduced evidence of attorney fees into the record either by way of exhibit or testimony. Her entire argument as to this issue is comprised of three somewhat enigmatic sentences designed not to enlighten the Court as to any error, but to disparage her former Husband.⁸

Wife introduced no evidence of her attorney fees during her case in chief— no exhibit and no testimony. On the last day of trial during rebuttal testimony she testified she had over \$85,000 in attorney fees.⁹ (*Tr.* 645) There is, however, no evidence in the record other than

⁸ Wife's entire argument concerning attorney fees consists of the following: "The claims made by [Husband] are not based on equitable arguments and were intended to the detriment of [Wife]. He has not operated in good faith towards a resolution of this matter believing that the trial court would award him a better deal if he went to trial. His unreasonable approach to this caused significant attorney fees to accrue and this court should award [Wife] attorney fees for having to defend against the unreasonable positions taken by [Husband]. (*Wife's brief* p. 24)

⁹ She provides no analysis as to why her oral testimony would even be credible, particularly in light of her testimony that she believed her attorney fees included the entire amount of the payoff of the judgment that LKL, a supplier, had obtained against her. (*Tr.* 338 line 23 to 339 line 2)

this statement. She provides no relevant citation to the legal factors for an award of attorney fees and provides no reasoning in her brief why the trial court abused its discretion given the factors the trial court should consider: 1) the reasonableness of the requested fees; 2) the financial need of the receiving spouse; and 3) the ability of the other spouse to pay. Child v. Child, 2008 UT App, ¶ 8.

Had Wife ascertained the applicable standard of review as to the attorney fees issue and then searched the record for any evidence even as to the first element, the reasonableness of the requested fees, and its underlying factors,¹⁰ she would have realized that neither party could have been awarded attorney fees, as neither party put any evidence into the record regarding even this first factor. In this context, Wife's argument that she is entitled to attorney fees is particularly disconcerting because proper research of the law and facts would have disclosed that this is an issue that could not be appealed in good faith, because neither party submitted any evidence on the reasonableness of their attorney fees.

7. The trial court did not commit error in dismissing the protective order.

This issue presents a mixed standard of review, with the appellate court according the trial judge a broad measure of discretion when applying the correct legal standard to a given set of facts. In its bench ruling of April 16, 2008, the trial court dismissed the

¹⁰ For example, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved. Utah R. Civ. P. 73; Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988).

protective order. (*Tr. 709*) The dismissal was effected on April 29, 2008 (*See Docket April 29, 2008 Case No. 054100378, Cohabitant Abuse*). Wife objected to the dismissal of the protective order. The trial court then scheduled a combined hearing on July 21, 2008 to consider the Wife's objections to the dismissal of the protective order and her objections to the proposed findings of facts and conclusions of law and decree of divorce (*Docket July 9, 2008 and July 18, 2008, Case No. 0541000358, Divorce*). On July 21, 2008, the trial court took additional evidence and allowed argument from Wife on the need to continue the protective order. Wife, however, has not provided this Court a transcript of the July 21, 2008 proceedings.

Utah Code Ann. § 78B-7-115 authorizes the trial court to dismiss the protective order as part of the decree of divorce in a pending divorce action. Recognizing that the issuance of a dismissal may have been premature (as the statute requires notice) the trial court set the matter for further hearing on July 21, 2008, resolving any concerns relative to due process or fairness. (*Docket July 21, 2008, Case No. 0541000358, Divorce*)

Wife argues that the trial court erred in combining a ruling from a protective order case with the divorce case and that it had no grounds to enter such an order. (*Wife's brief p. 24*) Utah Code Ann. § 78B-7-115 specifically authorizes the trial court's action. Section 78B-7-115(5) states that:

(5) If a divorce proceeding is pending between the parties to a protective order, the protective order shall be dismissed when the court issues a decree of divorce for the parties if:

(a) the petitioner in the protective order action is present or has been given notice in both the divorce and protective order action of the hearing; and

(b) the court specifically finds that the order need not continue.

Furthermore, given the applicable standard of review, in order to challenge the trial court's finding that the order need not continue, Wife must first show that the evidence was inadequate. This is not possible as Wife did not request a transcript of the July 21, 2008 proceedings. Wife indicates in her brief that she continues to live in fear (*Wife's brief* p. 25) – though this is purely subjective and not a reasonable concern. Wife does not cite to this Court any evidence or incident which would indicate that there was a need to continue the protective order. The protective order had been in place since August 2005 with no intervening incident or problem, and Husband had relocated in June 2006 to another city and state some 500 miles away.

As “relevant portions of the record are not before [the appellate court] [. . .] the proceedings before the trial court are presumed to support the trial court's findings.” Cornish Town v. Koller, 758 P.2d 919, 922 (Utah 1988) (citing several cases collected at footnote 7); see also Utah R. App. P. 11(e)(2), 24(a)(5)(A); Gorostieta v. Parkinson, 2000 UT 99, ¶ 16, 17 P.3d 1110 (citations omitted); State v. Jones, 657 P.2d 1263, 1267 (Utah 1982); Call v. City of West Jordan, 788 P.2d 1049, 1052 (Utah App. 1990); Angel Investors, LLC v.

Garritty, 2009 UT 32, ¶ 34-35. As noted above, no transcript of the July 21, 2008 proceedings was obtained, hence it should be presumed that the relevant portions of the July 21, 2008 proceedings not before the Court support the trial court's finding.

Again, Wife cites no relevant legal authority for her position that the trial court lacked authority to dismiss the protective order proceeding, nor does she provide any meaningful analysis of this issue. Wife's brief does not identify where in the record this issue was preserved. Again, had Wife taken the time to acknowledge the applicable standard of review for this issue it would be apparent that it could not be argued or maintained in good faith on appeal. It is reasonable to expect that without providing the transcript of the July 21, 2008 proceedings, the inadequacy of the evidence could not be argued. Given the manner in which Wife raises this issue, and then declines to provide adequate briefing or transcripts of challenged evidence as required by Utah R. App. P. 11(e)(2) and 24 (a)(5)(A), this issue is also frivolous.

8. Judge Jones did not commit error in refusing to recuse Judge Willmore from presiding over the case after Judge Judkins recused himself.

This issue presents a question of law and will be reviewed for correctness. There is no relationship between Judge Willmore and either the undersigned or the undersigned's new son-in-law, Jonathan P. Thomas. Judge Willmore conducted a civil marriage ceremony at the request of Mr. Thomas, a private practitioner and an attorney representing Cache Valley Bank. The undersigned has had no contact with Judge Willmore concerning this case except

for the hearings held in open court. Immediately prior to and following the referenced marriage ceremony, the undersigned has had no conversations with Judge Willmore on any legal matter, including this case, and only exchanged minor formal courtesies.

Initially Husband's counsel felt the motion was improper as it was not timely filed. However Judge Willmore allowed the motion to proceed and Husband's counsel did not vigorously object because the motion seemed based on unsupported suspicion of the court, not a reasonable belief that there existed any factual basis placing into question the impartiality of Judge Willmore or the integrity of the court. Judge Jones' decision independently supports this conclusion and correctly analyses the facts and the law, determining that Judge Willmore's impartiality could not be reasonably challenged, that Judge Willmore did nothing more than preside over a (civil) marriage ceremony, that Judge Willmore stated on the record that he had not had any *ex parte* discussions with any of the parties or their attorneys relative to this case, and that Wife presented no evidence of bias beyond her cursory allegations, and holding that there is no basis to recuse Judge Willmore. (*Memorandum Decision dated January 30, 2009, attached as Appendix 4 of Wife's Brief*)

9. Husband Requests Attorney Fees and Costs for the Frivolous Issues Pursued on Appeal.

Husband requests an award of attorney fees and costs under Utah R. App. 33 and 24 as a sanction for Wife pursuing a frivolous appeal and for failing to comply with adequate appellate briefing requirements. A frivolous appeal includes "one that is not grounded in

fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.” Utah R. App. P. 33 (b); see also Porco v. Porco, 752 P.2d 365, 369 (Utah App.1988) (“[S]anctions should be imposed when an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in delayed implementation of the judgment of the trial court; increased costs of litigation; and dissipation of the time and resources of the Law Court.”) (internal quotation marks omitted).

Husband acknowledges that sanctions for frivolous appeals should only be applied in egregious cases so as not to chill the exercise of the right to appeal erroneous trial court decisions. However, there is also a corresponding duty requiring appellant to comply with the Rules of Appellate Procedure and, in particular, Rule 24 mandating adequate briefing, including citations to the record showing preservation of issues, separate standards of review, and marshaling evidence, Rule 11 mandating transcripts of challenged evidentiary findings or conclusions made by the trial court, and the appellant’s obligation to provide adequate legal argument in its briefing to the Court (see, e.g., Angel Investors, 2009 UT 32, ¶¶ 34-36).

For example, in this case Wife has cited only two standards of review for twelve separate issues. Limited legal research would have disclosed the correct standard of review for each issue. Further research would have disclosed the controlling law. Wife has not provided this Court with any reference to where the issues appealed have been preserved. Wife has provided no meaningful legal analysis. In those instances where marshaling is mandated by the applicable standard of review Wife has not marshaled the evidence. Wife

has not been fully candid with the Court concerning the representation of the facts involved in this case. She selectively states facts supporting her case (and in some instances represents facts not found or categorically rejected by the trial court) and omits from her brief any mention of key facts supporting the trial court's conclusions of law. With regard to at least one issue (#7) Wife declined to provide a transcript of the relevant proceedings. Wife has simply deposited the issues with the Court of Appeals, abandoned the work of adequately clarifying, briefing, and researching to Husband, and has completely failed to comply with Utah R. App. P. 24(a).

Wife's appeal has unnecessarily increased the costs of litigation, simply delayed the implementation of the trial court's judgment, and has expended significant time and judicial resources. Any legal or factual basis for an appeal that may have existed, if properly briefed, was simply not presented to this Court.

An appellate court is not a depository in which parties may dump the burden of their argument and research. See Smith v. Four Corners Mental Health Ctr., Inc., 2003 UT 23, ¶ 46, 70 P.3d 904. The appellant, in his or her brief, bears the burden of demonstrating with appropriate legal argument that the district court erred. See State v. Price, 827 P.2d 247, 250 (Utah App. 1992). This court may decline to consider the merits of an appeal if a party fails to cite relevant legal authority and also fails to provide meaningful legal analysis pertaining to the facts of his or her case. See Angel Investors, 2009 UT 32, ¶¶ 34-37; see also State v. Shepherd, 1999 UT App 305, ¶ 25, 989 P.2d 503. Although Utah appellate courts are

reluctant to penalize litigants for technical rule violations, the court will not assume a party's burden of argument and research. See Allen v. Friel, 2008 UT 56, ¶ 9, 194 P.3d 903.

Wife's arguments are not grounded in fact. Had Wife marshaled the evidence she would have discovered that the issues she raised in her appeal lacked merit. The legal authorities Wife cites are accurate for the rule of law they represent but ignore the facts and circumstances of this case and, most importantly, the context in which the trial court apportioned the total marital estate after determining that the parties' corporation was in fact their alter ego. Neither the legal issues nor the facts ultimately determined by the trial court are adequately addressed in her brief. Wife's brief simply re-argues the same points the trial court rejected.

Husband respectfully requests the Court award his attorney fees and costs reasonably incurred on appeal in responding to the frivolous issues raised by Wife on appeal. Her arguments, as a matter of law, cannot be deemed made in good faith where the brief is so lacking in the basic requirements mandated by Utah R. App. P. 24 for the issues appealed to be meaningfully developed. Wife's brief fails to address any current case law regarding the determination of value of marital property, property division, alimony, attorney fees, admission of evidence or any of the other issues she has raised. The issues raised by Wife are not grounded in fact nor are they warranted by existing law, have not been asserted in good faith but instead only for the purposes of delayed implementation of the trial court's

order, causing needless increase in the costs of litigation. An award of attorney fees and costs incurred by Husband in this appeal are appropriate under the circumstances.

CONCLUSION

Wife raises a multitude of issues in her brief, but fails to discuss and develop them with meaningful legal analysis that may be helpful to the Court in rendering its decision. The trial court observed witnesses and took evidence as a trier of fact in this case. It benefitted from first-hand experience in making determinations regarding weight and credibility of evidence and testimony. Though Wife neglects to reference them, the trial court also made copious and detailed findings of fact and conclusions of law regarding the issues that are currently before the Court. There is ample evidence in the record to support the findings and conclusions as originally set forth by the trial court. Given Wife's disregard for essential aspects of briefing the issues appealed to the Court, including ignoring the marshaling requirement, confusing standards of review, not specifying where each of the issues she argues have been preserved for appeal, and not mounting arguments by using current and relevant case law analysis, the Court should affirm the trial court on all issues.

With the varying deficiencies of Wife's brief as detailed above, the Court should find that the issues appealed by Wife were done so frivolously and speciously. Wife's arguments lack the support of meaningful legal analysis and or an accurate portrayal of facts as found

by the trial court. The Court should affirm the trial court on all issues, and award attorney fees and costs on appeal to Husband due to the frivolous nature of this appeal.

Respectfully submitted this 17 day of June 2009.

HARRIS, PRESTON & CHAMBERS, P.C.

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Joseph M. Chambers

Attorney for Respondent/Appellee

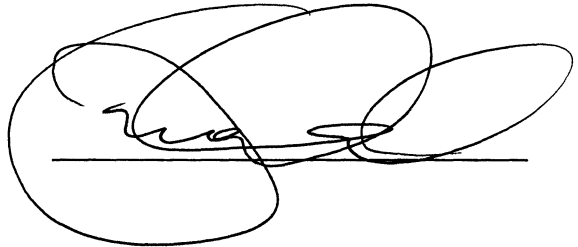
CERTIFICATE OF SERVICE

I hereby certify that one (1) original and seven (7) true and correct copies of the foregoing **Brief of Appellee** and **Addendum** were mailed, first class mail, postage prepaid, to the following this 17th day of June 2009:

Utah Court of Appeals
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114

I also certify that two (2) true and correct copies of the foregoing **Brief of Appellee** and **Addendum** were mailed, first class mail, postage prepaid, to the following this 17th day of June 2009:

M. Darin Hammond
Smith Knowles, P.C.
4723 Harrison, Suite 200
Ogden, Utah 84403

A handwritten signature in black ink, appearing to read "M. Darin Hammond", is written over a horizontal line.

APPENDIXES

1

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IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH

MARIAN C. OLSON,

Petitioner,

vs.

BRADLEY L. OLSON,

Respondent.

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**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Civil No. 054100358
Judge Clint Judkins

This matter came for trial on February 6 and 7, 2008 and oral argument on February 28, 2008, before the District Court, the Honorable Clint S. Judkins, District Judge presiding. The Petitioner was present and represented by her attorneys, Kenyon D. Dove and M. Darin Hammond, Smith Knowles, P.C., Ogden, Utah. The Respondent was present and represented by his attorney Joseph M. Chambers, Harris, Preston & Chambers, P.C., Logan, Utah. Having considered the evidence and arguments of counsel and having rendered its decision from the bench on Wednesday, April 16, 2008, the Court now enters its formal Findings of Facts & Conclusions of Law:

Findings of Fact

1. Date of Marriage and Other Dates. The parties were married in Smithfield, Utah on November 18, 1989. No issue were born to the parties. This is a second marriage for both parties. Both parties are currently 54 years old and in good physical health. The parties have been married for 18+ years, but have been living separately since December 2004. The Petitioner resides in Nibley, Utah. The Respondent currently lives in Las Vegas, Nevada and moved there for purposes of obtaining employment in June 2006.

2. Employment at Time of Marriage. At the time of their marriage, the Petitioner (wife) had been employed at Utah State University ("USU") for approximately 18 months. She began her employment at USU on May 1, 1988. At the time the parties married, the Respondent (husband) owned and operated a drywall and acoustical business as a sole proprietor. Respondent (husband) had just purchased his partner, Brad Johnson's interest, in their drywall partnership business prior to the marriage.

3. Smithfield Home. At the time of the parties marriage, Wife owned a home in Smithfield, Utah which she and her prior husband had acquired 11 years earlier. After the marriage the parties lived in the Smithfield home for nine (9) years, during which time both parties contributed to the mortgage payments and maintenance of the home. Husband testified that he also contributed improvements to the Smithfield residence in the form of finishing basement rooms and other construction labor and materials, which he estimated, based on his construction experience, exclusive of his labor to be approximately \$6-8,000.00. Husband further testified that materials that were purchased for the improvements to the Smithfield home were run through and "expensed off" through the drywall business, B & B Drywall, Inc.

4. B & B Drywall Incorporation. After the parties were married, husband incorporated his drywall and acoustical business. Following incorporation, the husband and wife were equal (50%/50%) shareholders, were both directors, as well as officers of the corporation and each drew a salary from the corporation. Husband acted as the corporation's president and secretary, and the wife acted as the corporation's vice-president.

5. Husband's Experience in Construction. At the time of the trial, the Husband testified he had been in the drywall business for approximately 31 years.

6. Nibley Home. In November 1996, the parties acquired a building lot in Nibley, Utah. The lot was acquired in the parties' joint names. [*Petitioner's Ex. #1, tab 27*] The building lot was purchased for \$48,500.00 and was purchased with B & B Drywall, Inc., funds. During late 1997 and early 1998 the parties constructed a home on the lot in Nibley, Utah. The Nibley residence is

approximately 6,000 square feet and lies on the west bank of the Blacksmith Fork River in Nibley, Utah. The home is completely finished (sheet rocked and painted throughout) including the basement. The 6,000 square foot home was constructed partially with a \$125,000.00 construction loan from Cache Valley Bank, which the parties obtained in November 1997. [*Petitioner's Ex. #1, tab 3*] Husband testified that a significant amount of the building materials (lumber, drywall, wiring, etc.) used to build the home was purchased by B & B Drywall, Inc., and "expensed off" by the corporation; that labor from B & B employees, was used in the construction of the home; that trades (primarily labor) were made by B & B with other subcontractors (electrical, foundation, framing, etc.) which benefitted the parties personally, and which the parties never reimbursed B & B Drywall. Husband also testified that the \$125,000.00 construction loan was used primarily for the acquisition of building materials and that primarily B & B was traded labor with other subcontractors.

7. Nibley Shop. In addition to the Nibley home, the parties constructed a large shop adjacent to the home. Husband testified that the shop was built at a cost of approximately \$75,000.00. Husband testified that the materials and labor for the shop also came from B & B Drywall, Inc. The shop is entirely finished - sheet rocked and painted - and has balconies at both the east and west ends of the shop. After the shop was built it was used primarily to store B & B equipment and supplies as well as some of the parties' personal property, including the Husband's woodworking equipment which was also purchased with B & B funds.

8. Premarital Interest. In July 1998, Wife sold the Smithfield home where the parties jointly resided after their marriage and received proceeds from the sale of approximately \$118,000.00. Wife deposited the money from the sale of the Smithfield property into a joint checking account owned by the wife and the husband. Wife provided evidence that shortly after the deposit of the money, \$94,320.00 of the funds were utilized to pay off then balance of the Cache Valley Bank construction loan. The Court finds that \$108,000.00 of the approximate \$118,000.00 constitutes Wife's pre-marital property interest in the parties' Nibley home.

9. Appreciation of Premarital Interest. The Court finds that the Petitioner should also receive a credit for the increase in her pre-marital interest (\$108,000.00) in the Nibley property. Assuming a five (5%) percent annual increase over the past ten (10) years this would result in a credit of approximately \$54,000.00.

10. Equipment in Nobly Shop. The Court finds from a preponderance of the evidence that Petitioner had control over and cannot account for substantial property stored in the Nibley shop including the B & B equipment and other property as evidenced by the photographs taken by Terry Oliver, a loan officer for Cache Valley Bank, all the parties guns, as well as the money in the two (2) safes. Petitioner testified she has disposed of all of the guns, including Respondent's guns.

11. Offset of Premarital Interest. Because of the Petitioner's actions set forth in Paragraph 10 the Court finds that it is equitable to effect a wash or offset as to the \$54,000.00 credit, and instead awards all of the property in the Nibley shop, the money in the safe, and the guns (subject to further provisions below) to the Petitioner.

12. Value of Nibley Home. The Court finds the value of the home to be \$550,000.00. Testimony of the appraiser Dustin Singleton, who appraised the home as of November 30, 2005, valued the home at approxi-mately \$480,000.00 subject to certain repairs. Mr. Singleton further testified that during 2006 and 2007 there was general appreciation in real estate in Cache Valley of between 5%- 10% annually. The Court finds that would equate to approximately \$76,000.00, of additional value. However, given the current real estate market, the Court finds the value of the home to be \$550,000.00.

13. Equitable Division of Nibley Home. The Court finds it is equitable to order the home to be sold with the proceeds to be paid as follows:

First: Those expenses necessary to put the home in a saleable position, i.e., to repair the foundation leak which the Court anticipates would be no more than approximately \$25,000.00; the evidence of the cost of repairs was less than concrete and by requiring each party to participate in the repairs each party benefits by having the repairs effected in the most economic fashion.

Second: The costs of sale, i.e., real estate commissions, title insurance, which the Court anticipates would be approximately \$33,000.00;

Third: The sum of \$108,000.00, to the Petitioner representing her premarital interest as found previously by the Court;

Fourth: That sum necessary to pay the balance of the Cache Valley Bank ("CVB") such amount necessary to pay the balance of the CVB debt plus accruing interest and costs, approximately \$326,328.00; and

Fifth: The balance, if any, to be divided one-half (½) to the Petitioner and one-half (½) to the Respondent which the Court anticipates would be approximately \$30,000.00, each. This would leave the Petitioner with approximately \$138,000.00, and the Respondent with \$30,000.00, from the sale of the home.

14. Timeshare. In March 2001, the parties purchased a timeshare from Worldmark (formerly Trendwest Resorts) for \$10,440.00. Husband testified that from the date of purchase until he left the marital residence in December, 2004 that B & B Drywall, Inc., paid the installment payments and quarterly dues on the timeshare. The purchase contract lists the parties and B & B Drywall, Inc., as the purchaser of the timeshare interest. [*Respondents Ex. #1, tab 8*] The Court finds that the Petitioner has had exclusive possession, control, benefit, and use of the same since their separation in December 2004. The Court finds the value of the timeshare to be \$6,500.00 and the Court awards it to the Petitioner as her sole and separate property, she also being solely responsible for any and all debt or maintenance on such.

15. Knowledge of Co-mingling of Business and Personal Accounts. Wife claimed that she was unaware that the family business (B & B Drywall, Inc.) had been used to pay for the construction of the home, the shop, home furnishings, personal woodworking tools, the timeshare, their personal living expenses and/or other non-business expenditures. However, she was an officer, director and shareholder of the company since its incorporation and she testified that as vice-president part of her job duties included balancing the bank statements. David Saunders, the B &

B Drywall, Inc., company accountant, testified that wife gave him instructions not to reconcile the bank statements because she had already done that. During the process of reconciling the bank statements she would have had an opportunity to see exactly what the company checks were being written for. Furthermore Wife also admitted during cross-examination that in her deposition she testified that she was aware that the company had purchased personal items such as a treadmill, golf clubs, and other items without claiming the items as income from the corporation. Husband testified that it was not uncommon for them to utilize the B & B checking account to purchase personal goods as well as to place personal items on the company credit card and then pay off the company credit card using a company check. According to husband's testimony, these items included the timeshare, materials for the Nibley home, home furnishings such as couches, personal woodworking equipment, a pool table, and other furnishings and fixtures. The Court finds that both the parties knew they were using B & B Drywall funds for their personal use and benefit.

16. Cache Valley Bank Loans. Greg Miller, President of Cache Valley Bank, testified that with respect to the \$250,000.00 loan to B & B Drywall that both parties participated in the initiation of the loan. The Court finds the total debt to Cache Valley Bank is approximately \$326,328.00, plus accruing interest. While the loan documents are only signed by Brad Olson in his capacity as President of B & B Drywall, Inc., and as a personal guarantor of the loan, the Court notes that all of the loan proceeds were either disbursed to suppliers directly or into the B&B checking accounts over which both parties had control, and the Court is persuaded that because of the way in which the parties handled the corporation financial affairs and personally benefitted from the corporation assets that all of the business debt should be treated as marital debt.

17. Co-mingling Found. The Court finds that the parties have co-mingled their personal and business financial affairs to a point that in order for this Court to make an equitable division of the marital property and debts, it is reasonable and equitable to treat all of the parties personal and business assets and business debts as marital debts and make an equitable division of the same.

18. Summary of Marital Property & Debts. The Court finds that the marital assets and debts consist of the following:

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<u>Assets:</u>	<u>Value</u>
Home	\$550,000.00
Less approximate cost to repair	(25,000.00)
Less R/E Comm. & Title	(33,000.00)
Less Premarital Interest	(108,000.00)
Less Cache Valley Bank debt	(326,328.00)
Net Value to be divided ½ to each	\$57,672.00

Personal Property per Lists:

Timeshare	6,500.00	
Equipment in Nibley shop	to Petitioner	as an offset
Equipment in Hyrum shed	21,000.00	
Personal property per list attached		
B & B Drywall, Inc., a Utah corp.	0.00	
Coin collection	15,000.00	
Cash in attic safe	to Petitioner	as an offset
cash in basement safe	to Petitioner	as an offset
2001 Ford Expedition	10,000.00	

Brad Olson's 401k/retirements

North Track Invest.	4192.00	Resp. Ex. 1 Tab. 10
Janus funds	63,202.00	Resp. Ex. 1 Tab 10
MB 401k	15,891.00	Resp. Ex. 1 Tab 10

Mariam's 401k/retirements

AGI Valic	53,768.00	Resp. Ex. 1 Tab 10
URS 401k	52,747.00	R Ex. 1 Tab 10 P Ex. 43
North Track Invest.	7,444.00	Pet. Ex. 42
USU/USR annuity	Value Not Determ.	Resp. Ex. 43

Debts:

Attorney fees	Each takes their own
Cache Valley Bank	(326,328.00)
LKL judgment	(40,985.00)
LWL (Capital Builders) judgment	(61,774.00)
Subtotal debt:	(429,087.00)

19. Woodward Division of Retirement Accounts. The Court finds it is equitable to divide the retirements pursuant to the Woodward Formula.

20. Vehicles. The Court determines the value of the 2001 Ford Expedition to be \$10,000.00 and awards it to the Petitioner. The Court determines the value of the 1989 Ford Truck, which was impounded and sold, to be \$500.00, and awards it to the Respondent.

21. Coin Collection. The Court determines the value of the coin collection, consisting of the items set forth below and all ancillary supplies and equipment to be \$15,000.00, and finds it equitable to award that to the Respondent, including all items currently in the Petitioners possession or control. The Court finds the Coin Collection consists of the following:

- Any and all supplies associated with coin collecting
- New microscope for coins
- Coin paper, plastic, and box holders
- Paper coin holders and stapler for holders
- Coin computer software
- Coin books and brochures
- Coin desk lamp / magnifying glass
- Paper money collection and collectables
- US Quarter & Stamp Collection and Binder
- Misc. coins and collectables left in Factory Safe

22. Equipment in Hyrum Storage Shed. The Court finds the value of the tools and equipment in the Hyrum storage shed to be \$21,000.00, and that it is equitable to award that to the Respondent subject to the lien of Cache Valley Bank, which should be satisfied by the proceeds from the sale of the home.

23. Marital Debts and Equitable Division Thereof. The Court finds the debts of the marriage consists of the following:

Cache Valley Bank	\$326,328.00
Capitol Building Supply	\$ 61,774.00
LKL Associates	\$ 40,965.00

The Court has already dealt with the Cache Valley Bank debt as provided above, to be satisfied out of the proceeds from the sale of the home. The Court finds it is equitable for the Respondent to assume the Capitol Building Supply debt and the Petitioner to assume the LKL

Associates debt, and that each party should be ordered to hold the other harmless from any claim by the respective creditor.

24. Remaining Personal Property and Household Goods. With regards to the remaining personal property, the Court finds it is equitable for the Respondent to make two (2) lists of approximate equal value and that the Petitioner shall then have her first choice of the two (2) lists.

25. Guns. The Court finds it equitable to award the guns as follows:

A. Petitioner: All guns on the Respondents' list submitted to the Court identifying the guns as Marian's guns or joint ownership, which consists of the following: [

i. Savage 12 gauge shot gun pump. Purchased from father-in-laws' collection after his death.

ii. Savage 12 gauge shot gun pump. Purchased from father-in-laws' collection after death.

iii. (2) each Derringer small 22 cal pistols (collectors items) purchased from father-in-laws' collection after death.

iv. Smith & Wesson 38 cal short barrel revolver. Purchased from father-in-laws' collection after death.

v. Smith & Wesson 357 cal revolver, short barrel. Purchased from father-in-laws' collection after death.

vi. Savage 30-06 rifle bolt action. To member of family from father-in-laws' collection after death.

vii. Remington 22 cal rifle single shot bolt action with sling (black plastic stock). To member of family from father-in-laws' collection after death.

viii. Remington 22 cal rifle single shot bolt action. To member of family from father-in-laws' collection after death.

ix. Remington 12 gauge pump shot gun. To member of family from father-in-laws' collection after death.

B. Respondent: All guns on the list identified as Brads guns which consists of the

following:

- i. 1917 Springfield 30-06 Army Rifle. Bolt Action, sling with Weaver 4x scope. First gun Brad ever owned has had for 44 years. Priceless sentimental value.
- ii. 1948 JC Higgins 410 gauge Single Shot (not bolt action) shotgun. Was Brad's Fathers gun. Hand me down priceless sentimental value.
- iii. 1946 JC Higgins 16 gauge Single Shot (not bolt action) shotgun. Was Brad's fathers gun. Hand me down priceless sentimental value.
- iv. New (approx. 2000) Remington Model 7400 30-06 Semi Auto Rifle, with sling and Redfield 3x9 scope. Also with (2) carrying cases and (1) hard case for 4-wheeler. Brad's priceless sentimental value. Less than 200 rounds fired.
- v. New (approx. 1992) AR-15 Assault Rifle. Never been shot. Fold away stock, with extra wood stock still in package. Brads priceless sentimental value.
- vi. New (approx. 1988 prior to marriage) Ruger 10-22 Semi Auto Rifle, with 3 clips, sling. Brads priceless sentimental value.
- vii. New (approx 1986 prior to marriage) Remington 12 gauge 2" Mag. Pump shot gun. Brads priceless sentimental value.
- viii. Ruger 22 Magnum Super Six pistol with Leopold 2x7x scope, (2) holsters, and carrying case. Brads priceless sentimental value. Was given to Brad as a gift from father-in-law (when he was still alive) and children.
- ix. Ruger Red Hawk 44 Cal Mag. Pistol with holster and gun case. Brads priceless sentimental value. Was given to Brad while father-in-law was still alive as a gift from Marian and children.
- x. Smith & Wesson 45 Cal Model 25 pistol. Brads priceless sentimental value. Was given to Brad as a gift from father-in-laws collection from Marian and children.
- xi. (4) new (2005) High Point 9 mm Pistols Model C-9. All 4 pistols brand new, never been shot.
- xii. Ruger 357 cal revolver. Was purchased from father-in-laws' collection after

death. (Never been shot)

xiii. Misc. Supplies: 2 soft case rifle holders, 2 nylon pistol holsters, 2 soft shot gun holders, 1 antique leather gun holder from father (priceless sentimental value), all cleaning supplies and complete cleaning kits for all guns.

ivx. (1) gun safe full of ammunition, approx. 10 bricks of 22 long rifle bullets, approx. (500) 22-mag cal bullets, approx. (200) 44 cal bullets, approx. (100_ 45 cal bullets, approx. 10 boxes total 12 gauge, 16 gauge, and 4-10 gauge shot gun shells.

Again the Court is taking into consideration that it is not awarding any increase in the premarital interest in the home, however, the Petitioner has testified that all of the guns have been disposed of (testimony which the Court did not find credible) and hence the Respondent's guns may not be capable of delivery to the Respondent..

26. Amount to Equalize Division of Assets and Debts. The Court finds that the Respondent has been given more debt to assume and in order to equalize the property and debt division it is equitable to award a judgment in favor of the Respondent against the Petitioner in the amount of \$5,275.00, to equalize the parties.

27. Adjustment for Accounts. However, despite the award outlined above, the Court finds that the Respondent has disposed of Cache Investment Club \$6,108.00, and Ameritrade \$2,277.00, (total \$8,385.00) one-half or \$4,192.00, of which the Petitioner should receive credit towards the \$5,275.00. ($\$5,275.00 - \$4,192.00 = \$1,083.00$). The net amount the Petitioner owes to Respondent is \$1,083.00, which shall be taken out of the proceeds from the sale of the home.

28. Award of Judgment Against Petitioner. However, if the Petitioner can reclaim any of the Respondent's guns she claims to have sold the value of those guns, if delivered to the Respondent in the same condition when she took control of the same shall be applied to the \$1,083.00, amount she owes to the Respondent. If the parties' cannot come to an agreement as to the value of the returned guns the parties' may ask the Court to assign a value to the returned guns.

29. Wife's income & employment: The Court finds from the evidence that the wife is 54 years old and in good physical and mental health. She is not a college graduate but is employed at

Utah State University in the HR-Personnel Office and is responsible for working with employee benefits. She has been employed at USU for over 19 years. During the marriage wife also took a salary from B & B Drywall, Inc., ranging between \$15,000.00 and \$18,000.00 per year. [*Respondent's Ex 1, tab 1*] Because B & B is insolvent, and no longer in business, the Court does not believe the imputation of income from this source, is proper. Wife has testified that her current supervisor has made a college degree a requirement of employment in her current position, however, the Court feels it is unlikely that after 19 years of steady, full-time employment at this state institution, that she is in jeopardy of losing her employment. She may need to transfer to another position but the reduction of her income is not likely. At present she earns \$47,610.00 annually (\$3,967.50 per month) [*Petitioner's Ex. #1, tab 41*] and she has testified she receives a cost of living increase annually in July of each year. The Court notes that Wife has had sufficient income to add to her 401k retirement monthly.

From the property settlement, Wife will receive approximately \$138,000.00, to put down on a new home and assuming a modest home of \$200,000.00, Wife would be required to finance \$60 - 70,000.00 of that amount. Wife did not put into evidence her 2005 or 2006 income tax returns and so the Court is not aware of whether the withholdings result in a refund, however her current Federal & State withholdings are \$379.33 and \$207.05 respectively, and \$298.76 for FICA for a total of \$885.14 in tax deductions or 22.31% (\$885.14/\$3,967.50). As of December 1, 2007 wife had 265 hours of accrued annual leave (33 days) and 367 hours of accrued sick leave (46 days). Wife's current monthly payroll deductions are \$991.00 per month leaving her a net monthly income of \$2,977.00.

30. Wife's budget and needs: Shortly after the divorce was filed in August of 2005, the parties appeared before Commissioner Garner for a hearing on temporary orders. Wife presented a budget at that time indicating her needs were \$3,095.00 per month (inclusive of food/household supplies of \$450.00 per month; \$500.00 per month in legal fees and \$200.00 for college courses). [*Respondent's Ex #1, tab 4*] At trial Wife submitted a budget totaling \$6,210.29 per month (inclusive of \$1,000.00 per month for legal fees and \$2,500.00 per month for a mortgage or lease

payment). The Court has considered that the Petitioner will receive approximately \$138,000.00 from the sale of the Nibley residence and if she reinvests that into a modest home in the \$200,000.00, range that her mortgage payment would be around \$600.00 - \$700.00. The Court is also aware that at some point she will need to replace her vehicle. The Court finds that the Wife needs would be approximately \$4,200.00, per month and that her net needs are approximately \$1,000.00, per month short.

31. Husband's income and employment: The Court finds from the evidence that the Husband is 54 years old and is not a college graduate. Husband is in good physical health, however, husband has experienced severe depression and twice in late 2004 voluntarily admitted himself to a health care facility for assistance due to the manifestations of his depression. At present Husband is under the care of a physician and takes antidepressants, which have allowed him to function more productively. (This Court is also aware of the depression and suicide incidents in the Husband's medical history as it was the primary reason this Court issued the protective order in late 2005.)

Husband has been involved in the construction and drywall business for 31 years. In August of 2005 the wife and husband stipulated to the appointment of a court appointed receiver with respect to B & B Drywall, Inc., where the husband had been employed since before the marriage. He had been drawing a salary of approximately \$36-37,000.00 annually until 2005 when the business failed. The Court notes that based on both parties testimony there were substantial personal expenses and other draws from the business and believes the parties' income from the business as reflected on the income tax return is not really indicative of either parties' historical earning potential prior to the business failure.

After the receiver was appointed (August 2005) Husband eventually found employment with Valley Drywall (a drywall business in Cache Valley) at \$15-16.00 per hour. In June 2006 Husband relocated to Las Vegas, Nevada to take a new job, at an annual salary \$65,000.00/year with M & H Building Specialties, as an assistant drywall estimator. Approximately three (3) months after he began working for M & H, his supervisor, the senior estimator, died and Husband was required to take on both his and his former supervisor's job responsibilities. In 2007 Husband worked 3,365

hours to meet the job demands of both his job and that of his former supervisor. Husband testified that his workload demands were unusually high due not only to the significant demand for building construction in the Las Vegas area but also because of his supervisor's untimely death. Because of his increased job responsibilities and the substantial overtime required by the Husband's employer, husband received a salary increase in 2007 to \$94,059.00 annual salary and a special discretionary bonus of \$46,416.00. Husband's current salary is \$1,850.00 per week or \$96,200.00 annually. He has the potential for additional bonuses; however these bonuses are totally discretionary with the owners of the company and such bonuses have historically been based on the company's overall performance, not individual performance.

Husband testified that he has asked his employer to hire another estimator as he cannot maintain the same level of stress that he did in 2007 or he would find other employment. At present the Husband is working hours closer to the normal 40 hour work week. The Court is persuaded that given Husband's medical condition as well as the general economic condition of the construction industry slow down nationwide, that it is unlikely that husband would maintain the same level of hours at work that he did in 2007 or the corresponding compensation.

In addition the Court notes that a B & B Drywall supplier, Capital Building Supply, has obtained a \$61,000.00 personal judgment against Husband and is currently garnishing husband's paycheck. Capital garnished approximately \$18,200.00 in 2007 and is entitled under Nevada law to take 25% of husband's disposable income. It is likely that the husband will continue to have another \$18,000.00-\$23,000.00 garnished in 2008.

For purposes of calculating a reasonable income based on a 40/50 hour work week, the Court will utilize the base salary of \$96,200.00, less the \$18,200.00 garnishment, and a reasonable allowance for state, federal and FICA taxes of 27 percent (\$25,974.00). The Court finds the Husband's 2008 disposable income is \$52,226.00 annually or \$4,352.00 per month. For purposes of setting alimony the Court finds the Husband's monthly available income of \$6,000.00, per month prior to any bonuses which bonuses the Court understands and finds is discretionary with the employer.

32. Husband's Budget and Needs: Husband submitted a monthly budget of \$7,991.00 per month (inclusive of \$1,514.00 per month garnishments). The Court finds that the cost of living and living expenses in general in the Las Vegas area are greater than similar living expenses in Logan, Utah. The Court accepts the Husband's budget as reasonable in the amount of \$6,800.00, per month.

33. Alimony Findings and Award. The Court finds that it is equitable to order alimony to be paid by Respondent/Husband to the Petitioner/Wife in the sum of \$1,000.00, per month, to be paid beginning 30 days after closing on the home and continue per the state statute for a period of no more than 18 years from the date of July 1, 2008, unless otherwise terminated by co-habitation, remarriage, or death of the Petitioner or the death of the Respondent. The Court has considered the alimony factors set forth in §30-3-5(8)(a) U.C.A., including the financial condition and needs of the recipient spouse; the recipient earning capacity; the ability of the payor spouse to provide support; the length of marriage; whether the recipient spouse directly contributed to any increase in the payor spouses skill; fault; the parties standard of living at separation. As to fault the Court finds the evidence is not sufficient to merit further consideration of that factor.

34. B & B Drywall Going Concern Value. The Court finds the parties Drywall and Acoustical business has no going concern value.

35. Petitioner's Exclusive Possession of Home. The Court finds that since December 2004, Wife has had the exclusive use of the home subject only to paying the real property taxes and insurance while the Husband has been excluded from the property.

36. Value of Equipment in Nibley Shop and Dominion over Equipment. Husband has claimed that Wife has also had the exclusive use of the household furnishings and the tools and equipment that were stored in the Nibley shop which both husband and Mark Davis valued at approximately \$96,000.00. These items were in the Nibley shop at the time he left the residence (and was later excluded from the residence by the Protective Order) and were stored in the shop built adjacent to the Nibley home.

37. Cache Valley Bank Inspection of Equipment. On August 3, 2005, Cache Valley Bank through its loan officer Terry Oliver traveled to the Nibley property with Husband and obtained entry

to the shop and took photographs of the equipment in the shop. Upon entry to the shop, Husband told Mr. Oliver that substantial amounts of B & B equipment had been removed from the shop. He immediately provided a list of said equipment to Cache Valley Bank, who had a secured lien (UCC-1) on all of the B&B Drywall, Inc. equipment. The Court notes that Mr. Oliver's entry to the shop occurred before the appointment of a receiver.

38. Ultimate Finding of Value of Equipment in Nibley Shop. Based on the testimony of Mark Davis, a former supervisor for B&B Drywall, Inc., who also had knowledge of what was in the shop on a regular basis, the Court finds that the Wife has had exclusive use and possession of the shop and the equipment since December of 2004. The Court declines to find a value of the equipment, but has instead treated it as an offset to allowing any increase to the Petitioners premarital interest in the Nibley home.

39. Evidence of Existence of Equipment. The Court finds that as to those items of equipment which were still in the shop on August 3, 2005, as evidenced by the photographs, wife has had exclusive use and possession of the same. Terry Oliver testified that the Bank has made demand on Wife for the equipment and the Bank has even filed a separate lawsuit to recover the equipment secured by its UCC lien, which case was also assigned to this Court for disposition

40. Money in Safes. Husband testified that when he left the residence in December 2004 the parties had \$28,000.00 in an safe located in the attic of the Nibley home and \$4,100.00 in a safe in the basement. Wife denied that these funds existed; however, during the hearing on temporary orders before Commissioner Garner, Wife acknowledged that she removed from the attic safe a sum of money, at least \$20,500.00, and was ordered by Commissioner Garner to account for the money. Wife's accounting [Respondent's Ex. #1, tab 16] listed \$5,000.00 as being used to pay off the Trendwest timeshare. This accounting, however, is inconsistent with Petitioner's Ex. #1, tab 45, which shows monthly and quarterly payments on the timeshare after the time period Wife claims to have used a portion of the \$20,500.00 to pay off the timeshare. In light of the Court's treatment of denying the Petitioner any increase in her premarital interest in the Nibley home, the Court believes it has disposed of all the parties' real and personal property.

41. Value of B & B Drywall, Inc., Stock. The B & B Drywall business has no value as it is in a receivership and the business is insolvent, and the Court finds the value of the stock is worthless.

42. Credibility of Petitioner. The Court finds the Petitioner's credibility was a concern to the Court, and in particular found her testimony to be less than credible with respect to disposition of the guns; the accounting for the money in the safe, and in particular the payoff of the Timeshare, as well as her claimed lack of any knowledge as to the business expenditures, which was inconsistent in light of the testimony that she reconciled the bank statements as part of her duties.

43. Attorney Fees. The Court finds it equitable for each party to bear their own costs and attorney fees subject to the following provisions. Because Respondent did not timely respond to Petitioner's discovery and Petitioner was required to submit a Motion to Compel, the Court finds it equitable for the Respondent to be ordered to prepare the Findings of Fact and Conclusions of Law, Decree of Divorce, and any Qualified Domestic Relations Orders necessary to divide the retirement accounts as an offset to fees incurred by the Petitioner for filing the Motion to Compel.

Conclusions of Law

1. The marriage between the parties should be terminated through entry of a Decree of Divorce on the grounds of irreconcilable differences. The Petitioner has argued that the assets and debts of the marriage should be determined at the date of separation (December 2004) or the date of filing the divorce (August 2005). The Court determines that it should determine the assets and debts as of the date of trial February 2008.

2. "[T]he primary purpose of a property division, in conjunction with an alimony award, is to achieve a fair, just, and equitable result between the parties." Riley v. Riley, 2006 UT App 214, ¶ 27, 138 P.3d 84. The primary goal of this Court in any divorce proceeding is to accomplish an equitable division of the assets and debts of the parties. Divorce by its very nature is an equitable proceeding.

3. "Ordinarily, a corporation is regarded as a separate and distinct legal entity from its stockholders. This is true whether the corporation has many stockholders or only one. Consequently,

the corporate veil which protects stockholders from individual liability will only be pierced reluctantly and cautiously." *Colman v. Colman*, 743 P.2d 782, 786 (Utah Ct. App. 1987) (quotations and citations omitted). To aid courts in deciding when to ignore the separate corporate existence, the Utah Supreme Court established a two-prong test in *Norman v. Murray First Thrift & Loan Co.*, 596 P.2d 1028 (Utah 1979): "[I]n order to disregard the corporate entity, there must be a concurrence of two circumstances: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow." *Schafir v. Harrigan*, 879 P.2d 1384, 1389 (Utah Ct. App. 1994) (alteration in original) (quoting *Norman*, 596 P.2d at 1030).

Certain factors which are deemed significant, although not conclusive, in determining whether this test has been met include: (1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) nonfunctioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud. *Colman*, 743 P.2d at 786 (footnotes omitted).

4. Respondent has demonstrated the existence of the type of siphoning off of corporate funds by the dominant shareholders that the Court is satisfied there exists in this case the "unity of interest" and "ownership" required by *Norman*. Respondent has testified that B & B Drywall, Inc., (B&B) paid for the shareholders' personal expenses including improvements to the Smithfield home; B&B paid for the Nibley property on which their home and shop were later constructed; B&B paid for materials for the Nibley home and shop; B&B its employees to work on the Nibley home and shop for which the shareholders did not reimburse the corporation; B&B made trades with other subcontractors for labor as to the Nibley home and shop; B&B purchased and paid for the Trendwest timeshare through 2004; B& owned and paid insurance and taxes on the parties' personal vehicles which they drove (the Expedition and Ford truck); B&B paid for home furnishings; B&B paid for personal woodworking tools; and B&B even purchased personal goods and services on the company

credit cards which B & B Drywall later paid for.

5. In addressing the Colman factors set forth above. the Court is satisfied that: (1) at the time the divorce was filed the corporation was insolvent and by stipulation of the parties was placed into a court-supervised receivership and was undercapitalized; (2) based on the Petitioner's own testimony they discussed matters almost daily but failed to observe the corporate formalities of holding shareholders' or directors' meetings; (3) there was no evidence of the payment of dividends and in fact the B & B corporate tax returns and other corporate financial records placed into evidence disclose no dividends were paid; (4) the parties knowingly and willfully siphoned off corporate funds to their own personal benefit; (5) other than the parties there were no other functioning officers or directors; (6) no evidence either way was produced as to the absence or existence of corporate records and therefore finds this factor neutral; (7) the manner in which the parties used the corporation for their personal financial benefit as dominant shareholders would be a facade; and (8) use of the corporate entity or shell to obtain a financial benefit as to the assets but not the debt would promote an injustice.

6. Respondent has demonstrated that the strict observance of the corporation would lead to an inequitable result. For several years the parties have received substantial financial benefits from a corporation which they largely disregarded when it came to taking money from the corporation for their personal benefit; a corporation in which they are 50%/50% or equal shareholders and are the only officers and directors of the corporation; a corporation they dominated for their own personal benefit. There has been such a co-mingling of the corporate funds with the marital assets acquired by the parties that it would be inequitable to treat the assets of the parties as marital assets and try to divide them equitably while disregarding the debts of the corporation from which the parties directly received the financial benefit.


7. The division of the real and personal property and the parties' debt as set forth above accomplishes an equitable division of the marital property and debt.

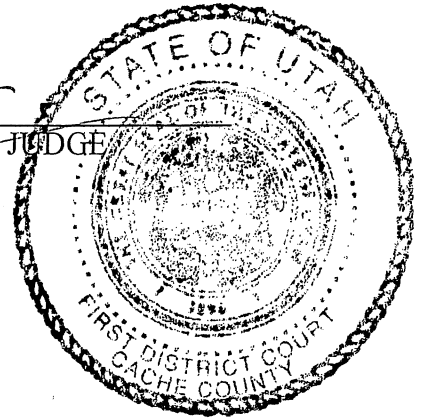
8. Awarding the Petitioner alimony in the amount of \$1,000.00 per month beginning 30 days after the home is sold and continuing for a period of no more than eighteen (18) years from July 1, 2008 unless otherwise terminated by statute by the co-habitation, remarriage of the Petitioner or

the death of either the Petitioner Respondent is just and equitable.

9. Additionally, each of the parties individually should assume any debt incurred by them individually after the divorce was filed in August of 2005.

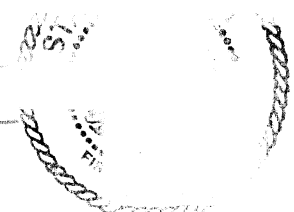
Dated this 21 day of July, 2008.


DISTRICT COURT JUDGE



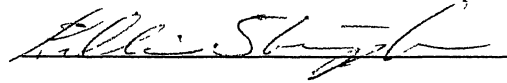
I, CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY
OF THE ORIGINAL FILED IN FIRST
COURTS.

7/21/08
Nicole Tate
DEPUTY CLERK



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **Findings of Fact and Conclusions of Law**, postage prepaid, to Petitioner's attorney, Kenyon Dove, Smith Knowles, 4723 Harrison Blvd., Suite 200, Ogden, Utah 84403, dated this 8 day of July, 2008.



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