

2008

Julie Ann Fairbanks v. Peter Nathan Fairbanks : Brief of Appellee

Utah Court of Appeals

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Case No. 20080774-CA

IN THE
UTAH COURT OF APPEALS

Julie Ann McKenzie Fairbanks,
Petitioner/ Appellee,

vs.

Peter Nathan Fairbanks,
Respondent/ Appellant.

Brief of Appellee

Appeal from Decree of Divorce issued by the Fourth Judicial District
Court of Utah, Utah County, the Honorable Samuel McVey presiding.

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IN THE
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Julie Ann McKenzie Fairbanks,
Petitioner/ Appellee,

vs.

Peter Nathan Fairbanks,
Respondent/ Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Annotated § 78A-4-103(2)(h) (West 2008).

STATEMENT OF THE ISSUES

1. Did the trial court clearly err when it categorized and accounted for the parties' residential properties?

Standard of Review: This Court reviews the correctness of the trial court's findings of fact for clear error. Utah Rule of Civil Procedure 52(a) provides that "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."

2. Did the trial court abuse its discretion when it divided the marital residential properties using a valuation model other than that advocated by

Appellant Peter Fairbanks?

Standard of Review: This Court reviews the trial court's decisions regarding property division in a divorce proceeding for a "clear abuse of discretion."

Elman v. Elman, 2002 UT App 83¶ 17

3. Did the trial court abuse its discretion when it rejected Appellant Peter Fairbanks's claims of "overt cruel and damaging behaviors of the Wife" as grounds for divorce?

Standard of Review: This Court reviews the trial court's decision on the grounds for divorce for "abuse of discretion." See *Trubetzky v. Trubetzky*, 2009 UT App 77, ¶ 30, __ P.2d __ (2009) (clearly applying an abuse of discretion standard to this issue).

4. Did the trial court abuse its discretion in its award of alimony to Appellee Julie Ann McKenzie Fairbanks?¹

Standard of Review: This Court reviews the trial court's award of alimony for "clear and prejudicial abuse of discretion." *Davis v. Davis*, 2003 UT App 282, ¶ 7, 76 P.3d 716

5. Is Appellee Julie Ann McKenzie Fairbanks entitled to costs and

¹ This issue includes both Appellant's argument regarding "fault" (Appellant's "issue 2") and his arguments regarding the consideration of his education, profession, and other issues in the alimony award (Appellant's "issue 3").

attorneys fees for defending against a frivolous appeal as defined in Utah Rules of Appellate Procedure 33?

Standard of Review: As this issue does not call on this Court to review a decision of the lower court, there is no applicable standard of review. Instead, this Court reviews the nature of Appellant Mr. Fairbanks's appeal under Rule 33 of the Utah Rules of Appellate Procedure.

STATUTORY PROVISIONS AND RULES

The statutes and rules pertinent to this appeal are Utah Code Annotated § 30-3-5(a), Utah Rules of Civil Procedure 52(a), and Utah Rules of Appellate Procedure 24(a)(9) and 33. The text of these provisions is included in the Addendum.

STATEMENT OF THE CASE

In July 2005, Julie Ann McKenzie Fairbanks (hereinafter Ms. Julie Fairbanks) filed a petition for divorce. Pre-trial hearings were held in January and March 2006. The couple attended mediation in both April and November 2007. A Final Pre-Trial Order was issued by the court on January 31, 2008. (R. 97.) That Order included a long list of undisputed claims and issues, including a statement that "during the course of the marriage, irreconcilable differences have arisen between the parties causing the irreparable breakdown of the marriage and as a consequence thereof continuation of the marriage was no longer viable."

(R. 94.) Trial was held in the Fourth District Court before Judge Samuel McVey on May 8, 2008. At trial, the parties' stipulation to the division of the majority of the couple's marital property was accepted by the court accepted, which it incorporated by reference into the Decree of Divorce. (Findings of Fact ¶ 6).

At the conclusion of the trial, the court presented its findings of facts and conclusions of law. Those relevant to this appeal include findings regarding the division of the martial homes, the award of alimony, and the grounds for the divorce.

First, the court concluded that Ms. Julie Fairbanks elected to invest \$50,000 of her separate property inheritance into the Orem home. (Findings of Fact ¶ 11; Conclusions of Law ¶ 2). In assessing the division of the marital property in the two homes, the court concluded that Ms. Julie Fairbanks had invested \$50,000 of her separate property into the Orem home, in a way that was "easily traceable." (Conclusions of Law ¶ 2). The court further notes that the parties had together transferred \$31,315.54 of marital property equity from the Washington home into the Orem home; half of which was attributed to each party. Thus, of the \$160,403.29 equity, Ms. Julie Fairbanks was credited with \$50,000 and her half of the \$31,315.54 (or \$15,657.77). (Conclusions of Law ¶ 2). Peter Fairbanks was credited with \$15,657.77. (Conclusions of Law ¶ 2). The remaining equity,

\$79,087.75, was divided equally. (Conclusions of Law ¶ 2). The Court further concluded that while Peter Fairbanks had paid the mortgage on the Orem home, this was akin to “temporary alimony payments” and the “mortgage [was] low enough that it appromixate[d] what rent would [have been] if wife leased a house,” and that, in fact, it was “substantially lower” because of the additional money Ms. Julie Fairbanks had contributed from her inheritance. (Conclusions of Law ¶ 2).

Second, the court awarded alimony to Ms. Julie Fairbanks in the amount of \$2,271 per month, subject to adjustment in Fall 2009 after she receives her teaching certification. (Conclusions of Law ¶ 8). The court’s award was based on a thorough analysis of her current monthly expenses, her ability to support herself, her husband’s ability to pay support, and the length of the marriage. (Conclusions of Law ¶ 7). The court noted that at trial Peter Fairbanks “raised fault . . . as a consideration for reducing alimony.” (Conclusions of Law ¶ 8). With regard to such arguments, the court concluded that while it believed that “wife significantly contributed to the divorce occurring, she did not engage in the activities the legislature primarily had in mind when enacting the fault factor.” (Conclusions of Law ¶ 8).

Finally, the Court granted the couple's divorce on grounds of "irreconcilable differences." (Decree of Divorce ¶ 1).

STATEMENT OF FACTS

Peter and Julie Ann McKenzie Fairbanks (hereinafter Mr. Fairbanks and Ms. Julie Fairbanks) were originally married from June 28, 1975 until September 1987. The couple remarried in July 1990 in Payson, Utah. They have four adult children. During the later years of their marriage, the couple resided in a home in Lake Stevens, Washington, which they owned together.

On August 8, 2002, Ms. Julie Fairbanks, with the knowledge and agreement of her husband, relocated to Utah, in part to help care for her ill mother and also to attend school at Brigham Young University. (See Trial Transcript page 16.) Together the couple purchased a home in Orem, Utah, for which they paid the mortgage together. (See Trial Transcript page 17.) The parties refinanced their Washington home and used \$31,000 of equity from that home toward the purchase of the Orem home. (See Trial Transcript page 58). Ms. Julie Fairbanks resided in that home until the time of the couple's divorce in May, 2008.

In July 2003, Ms. Julie Fairbanks received an inheritance. She elected to invest \$50,000 of that inheritance into the Orem home. (Findings of Fact ¶ 11).

On January 28, 2005, Ms. Julie Fairbanks filed for divorce, alleging that during the course of the marriage, irreconcilable difference arose between the parties causing the irreparable breakdown of the marriage, and as a consequence thereof, the continuation of the marriage was no longer viable.

SUMMARY OF ARGUMENT

Point I: This Court should affirm Judge McVey's Findings of Fact because (1) Mr. Fairbanks failed to marshal the evidence in support of the trial court's findings, and (2) Judge McVey's findings are supported by the record.

Point II: The trial court did not abuse its discretion when it chose and applied a valuation method for the parties' residential property.

Point III: The trial court did not abuse its discretion when it rejected Appellant Peter Fairbanks's claims of "overt cruel and damaging behaviors of the Wife" as grounds for divorce.

Point IV: The trial court did not abuse its discretion when it calculated an award of alimony for Ms. Julie Fairbanks.

Point V: This Court should award attorney fees to Ms. Julie Fairbanks for defending against this frivolous appeal.

ARGUMENT

This Court should affirm the trial court's findings of facts and conclusions of law as such were clearly within the court's discretion and supported by

evidence presented at trial. Further, the Court should award fees and costs to Appellee Ms. Julie Fairbanks for having to spend the time and money needed to defend against this frivolous appeal.

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE TRIAL COURT'S CATEGORIZATION AND ACCOUNTING FOR THE PARTIES' RESIDENTIAL PROPERTIES.

This Court should uphold the trial court's factual findings in this case for two reasons. First, because Mr. Fairbanks did not marshal the evidence in support of the findings he challenges. Second, because even if he had marshaled the evidence supporting the court's findings, there was sufficient evidence to support the trial court's categorization and accounting for the parties' residential property.

A. This Court should reject Mr. Fairbanks's allegations of factual error because he did not marshal the evidence in support of the trial court's findings.

Under Rule 24(a)(9) of the Utah Rules of Appellate Procedure, a "party challenging a fact finding must first marshal all record evidence that supports the challenged finding." In order to properly challenge factual findings such as these, the challenging party is required to marshal "all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by

substantial evidence.’” *Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶ 17, 164 P.3d 384 (quoting *Grace Drilling Co. v. Board of Review of Indus. Comm'n*, 776 P.2d 63, 68 (Utah Ct. App. 1989)). Thus, to fully comply with the requirement, the challenging party must “marshal all of the evidence in support of the trial court’s findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack.” *State v. Larsen*, 2000 UT App 106, ¶11, 999 P.2d 1252 (internal quotations and citation omitted). Perhaps the best explanation of the marshaling requirement came from the Utah Court of Appeals itself when it stated:

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

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

One key purpose of the marshaling requirement is to “remind[] litigants and appellate courts of the broad deference owed to the fact finder at trial.” *State v. Moore*, 802 P.2d 732, 739 (Utah Ct. App. 1990). Further, the marshaling

requirement is designed to ensure that the court is able to meaningfully review the sufficiency of the evidence upon which the court below relied and overturn only those factual determinations that lack the support of substantial evidence. *See Martinez v. Media-Paymaster Plus*, 2007 UT at ¶ 17. As one commentator noted, the marshaling requirement, which forces an appellant to “catalogue the evidence supporting the trial court’s decision,” insures that appellants do not merely “try to persuade the appellate court that their theory of the case was stronger than that which was advanced by the other side, or that their evidence and witnesses were more compelling;” but rather it insures that “appellate review of a factual determination is strictly confined to an analysis of whether there was sufficient evidence to support the particular factual conclusion that was actually reached below.” Ryan D. Tenney, *The Utah Marshaling Requirement: An Overview*, Utah B. J. 22 (August/September 2004).

Utah courts have imposed the marshaling requirements on pro se appellants. *See Thomas v. Department of Workforce Services*, 2008 UT App 361 ¶ 1 (unreported). Addressing whether a pro se litigant must satisfy the marshaling requirement, this Court opined that “while ‘this court generally is lenient with pro se litigants,’ such parties must still comply with our rules.” *Blosch v. Blosch*, 2005 UT App 281 ¶ 1 (unreported) (quoting *Lundahl v. Quinn*, 2003 UT 11, ¶ 4); *see also Maisbitt v. Fink*, 1999 UT App 129 ¶ 3 (unreported).

Utah's appellate courts have historically accepted the lower court's findings when the appellant fails to comply with the marshaling requirement. *See, e.g., State v. Earl*, 2004 UT App 163, ¶11, 92 P.3d 167. In *Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶¶16-21, 164 P.2d 384, the Utah Supreme Court held that while automatic affirmation may not be required in all cases, it is still a permissible sanction for a party who fails to properly marshal the evidence.

That sanction is appropriate here. This is not a case where an appellant largely complied with the marshaling requirement but then inadvertently omitted a few peripheral details. Rather, this is a case in which the party challenging the court's factual findings completely failed to marshal any evidence and instead merely provides the court with a restatement of his unsuccessful arguments from trial.

Given Mr. Fairbanks's multiple marshaling failures, this Court should decline to address the merits of his sufficiency challenge.

B. Even if this Court addresses Mr. Fairbanks's sufficiency challenge on its merits, this Court should still hold that there was sufficient evidence to support the trial court's findings.

Even if the Court determines that Mr. Fairbanks's brief meets the lower level of marshaling required for pro se litigants, the Court should still affirm the trial court's findings of fact because sufficient evidence was presented to overcome a challenge of clear error. A finding of fact is only "clearly erroneous"

when it is “so lacking in support as to be against the clear weight of the evidence.” *State ex rel. E. R.*, 2001 UT App 66, ¶ 5, 21 P.3d 680.

There is sufficient evidence on the Record supporting the trial court’s categorization and accounting for the parties’ residential properties to overcome a challenge of “clear error.”

First, there is sufficient evidence on the Record to support the trial court’s conclusion that Ms. Julie Fairbanks was entitled to a \$50,000 credit in the Orem home reflecting her investment of separate inheritance money into that property. In her testimony, Ms. Julie Fairbanks testified that she received \$100,000 inheritance after the death of her mother in 2003. (See Trial Transcript page 28.) Mr. Fairbanks testified that Ms. Julie Fairbanks invested \$50,000 of that inheritance into the mortgage of the Orem house. (See Trial Transcript page 60.) When asked if Ms. Julie Fairbanks should receive credit for that \$50,000, which she placed in the Orem home, Mr. Fairbanks opined that “it would depend on the assessment on it, [whether it was] a legal mixing of marital assets.” (See Trial Transcript p. 67.) The trial court did not clearly err when it decided that Ms. Julie Fairbanks’s inheritance was separate property for which she was entitled to a credit.

Second, although Mr. Fairbanks argues in his appeal that he also contributed “traceable” separate property to the two homes, there is sufficient

evidence on the Record to support the trial court's conclusion that those investments were either marital property or insufficiently traceable to constitute separate property. The only evidence on the Record regarding any arguably separate property invested by Mr. Fairbanks involves his own opinion that post-separation funds should be deemed separate rather than marital property. The only specific mention of such arguably separate funds is found when Mr. Fairbanks testified that he had refinanced the mortgage on the Washington home and paid "additional funds" in order to secure a lower interest rate on the loan. (See Trial Transcript page 66.) However, he failed to show that the money invested was not marital property, nor did he show that he invested any traceably separate funds into the home. He simply argues that any equity earned in the home since Ms. Julie Fairbanks's move to Utah in August 2002 should be attributed to him as "separate" rather than "marital" property. Nothing in the Record shows that the trial court committed clear error in rejecting such an argument.

Therefore, this Court should affirm the trial court's factual findings with regard to the categorization and accounting for the parties' residential properties.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DIVIDED THE MARITAL RESIDENTIAL PROPERTIES USING A VALUATION MODEL OTHER THAN THAT ADVOCATED BY APPELLANT PETER FAIRBANKS.

In addition to rejecting Mr. Fairbanks's claim that the trial court's findings of facts are in error, this Court should affirm the trial court's decision regarding the division and valuation of marital properties in this case because the trial court's choice of valuation models did not show a clear abuse of discretion.

As this Court has aptly stated, "A trial court has considerable discretion concerning property [division] in a divorce proceeding, thus its actions enjoy a presumption of validity." *Schaumberg v. Schaumberg*, 875 P.2d 598, 602 (Utah Ct. App. 1994). An appellate court will only disturb a trial court's property division and valuation "when there is 'a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion.' " *Id.* (quoting *Noble v. Noble*, 761 P.2d 1369, 1373 (Utah 1988)). Likewise, "[i]n divorce actions, the trial court has considerable discretion in adjusting the financial and property interests of the parties, and [the appellate court] will not disturb its decision unless it is clearly unjust or a clear abuse of discretion." *Smith v. Smith*, 751 P.2d 1149, 1151 (Utah Ct. App. 1988).

In March 2009, this Court reinforced its position regarding the trial court's

discretion in such issues when it stated:

“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) (quoting *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. 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 (internal quotation marks omitted).

Trubetzkoy v. Trubetzkoy, 2009 UT App 77, ¶ 8, __ P.2d __ (2009).

The fact that a distribution is not “equal” numerically does not make it presumptively invalid. As this Court stated,

An equitable distribution of marital property does not require strict mathematical equality. See *Teece v. Teece*, 715 P.2d 106, 107 (Utah 1986). In fact, the Utah Supreme Court has affirmed a marital property distribution with the same ratio as in this case, 56% and 44%. See *Yelderman v. Yelderman*, 669 P.2d 406, 408 (Utah 1983) (per curiam) (rejecting the husband's challenge where he received 56% of the assets).

Trubetzkoy v. Trubetzkoy, 2009 UT App 77, ¶ 24, __ P.2d __ (2009).

Mr. Fairbanks points to the case of *Argyle v. Argyle*, 688 P.2d 464, 470-471 (Utah 1984), to support his argument that the trial court abused its discretion in choosing a different valuation model from that which he advocated. However, the court in *Argyle*, which was examining a much more difficult valuation problem involving jointly held stock, upheld the trial court's valuation finding that while its method differed from that advanced by the complaining party, it

was a “reasonable and fair valuation” and did not evidence an abuse of discretion. *Id.* at 471.

Mr. Fairbanks asserts that the valuation method employed by the trial court was faulty because it did not calculate the residential properties in the way that he would have, but he fails to show that the method employed reflected a “misunderstanding or misapplication of the law resulting in substantial and prejudicial error.” Nor has he shown that “the evidence clearly preponderates against the findings.” Ultimately, he has failed to demonstrate that the method employed by the trial court resulted in “such a serious inequity . . . as to manifest a clear abuse of discretion.” Therefore, this Court should uphold the trial court’s decision.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REJECTED APPELLANT PETER FAIRBANKS’S CLAIMS OF “OVERT CRUEL AND DAMAGING BEHAVIORS OF THE WIFE” AS GROUNDS FOR DIVORCE.

This Court should uphold the trial court’s decision to decide the parties’ divorce on grounds other than those forwarded by Appellant Peter Fairbanks. This Court should not review the lower court’s grounds for granting the parties’ divorce unless the Appellant is able to provide authority for such review. Mr. Fairbanks has not done so.

In a case decided by this Court in March 2009, the appealing party

similarly petitioned the court to modify the grounds of divorce from “irreconcilable differences” to the fault-based ground of adultery. *Trubetzkoy v. Trubetzkoy*, 2009 UT App 77, ¶ 30, __ P.2d __ (2009). In refusing to do so, this Court noted that in that case the wife “simply prefer[ed] that the divorce be granted due to adultery instead,” and concluded that there was “nothing in the governing statute” and no other authority “that would require the trial court to adopt one ground for divorce over another.” *Id.* (citing Utah Code Ann. § 30-3-1 (2007)). Therefore, this Court declined to order the trial court to substitute the basis of the divorce. *Id.*

This case is directly analogous to the *Trubetzkoy* decision. Appellant Peter Fairbanks has presented this Court with no authority for substituting its judgment regarding the proper grounds for this divorce for the judgment of the trial court. Mr. Fairbanks may believe that he was entitled to a divorce based on the grounds of desertion, neglect, and cruel behavior on the part of his former wife. In fact, he admits that he made such arguments at trial. *See Appellant’s Brief* p. 38. The trial court, having heard both evidence and argument from Mr. Fairbanks and his trial counsel, declined to base the parties’ divorce on such grounds. Nothing in the Record nor in Mr. Fairbanks’s brief shows evidence that the trial court abused its discretion in so finding, and therefore, this Court should reject Mr. Fairbanks’s plea and affirm the trial court’s conclusion.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD OF ALIMONY TO MS. JULIE FAIRBANKS.

This Court should affirm the trial court's award of alimony because such award does not show a "clear and prejudicial abuse of discretion."

Utah law clearly upholds the broad discretion of trial courts in determining awards of alimony. According to this Court, "'Trial courts have considerable discretion in determining alimony ... and [determinations of alimony] will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.'" *Davis v. Davis*, 2003 UT App 282, ¶ 7, 76 P.3d 716 (alterations in original) (quoting *Breinholt v. Breinholt*, 905 P.2d 877, 879 (Utah Ct.App.1995)). Thus, as a general rule, trial courts have wide discretion in awarding alimony, and an appellate court will disturb such an award only when the trial court exceeds its discretion. See *Bakanowski v. Bakanowski*, 2003 UT App 357, ¶ 7, 80 P.3d 153.

Trial courts have broad discretion in making alimony awards so long as they consider at least the following factors:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

Utah Code Ann. § 30-3-5(8)(a)(i)-(vii) (Supp.2008).

In addition to the statutory factors, the trial court is obliged to consider the three primary purposes of alimony awards: “(1) to get the parties as close as possible to the same standard of living that existed during the marriage; (2) to equalize the standards of living of each party; and (3) to prevent the recipient spouse from becoming a public charge.” *Richardson v. Richardson*, 2008 UT 57, ¶ 7. When a trial court’s decision has considered these statutory and intent factors, this Court should only disturb its alimony award if there is “‘a serious inequity . . . manifest[ing] a clear abuse of discretion.’” *Kelley v. Kelley*, 2000 UT App 236, ¶ 26, 9 P.3d 171 (quoting *Childs v. Childs*, 967 P.2d 942, 946 (Utah Ct.App.1998)).

While Mr. Fairbanks argues that there were factors that he believes should have made a significant difference in the alimony awarded by the trial court, he fails to show that the trial court either ignored any of the statutory or intent

factors or that the court's decision resulted in a "serious inequity . . . manifesting a clear abuse of discretion."

First, Mr. Fairbanks's argument that the trial court abused its discretion in failing to consider "fault" when determining Ms. Julie Fairbanks's alimony award fails because the court did, in fact, consider potential fault when making its decision. In its Conclusion of Law the trial court noted Mr. Fairbanks's arguments regarding fault and its conclusion that Ms. Julie Fairbanks "did not engage in the activities the legislature primarily had in mind when enacting the fault factor." (Conclusions of Law ¶ 7 citing Utah Code Ann. § 30-3-5).

In addition to his arguments regarding the "fault" factors in the trial court's alimony award, Mr. Fairbanks argues that the trial court further erred in its award of alimony for Ms. Julie Fairbanks because it considered what he claims were "impertinent issues" and "untimely claims." Despite Mr. Fairbanks's assertion that such conclusions are subject to *de novo* review, as part of the alimony award they are subject to the trial court's discretion. *See Davis v. Davis*, 2003 UT App 282, ¶ 7, 76 P.3d 716

Whether the trial court did consider Ms. Julie Fairbanks's support of her husband during his schooling or other obligations Mr. Fairbanks refutes is unclear from the court's findings and conclusions, but regardless of whether it did or did not consider such things, this would be within the court's broad

discretion in determining the alimony award in the case. Mr. Fairbanks has failed to show that the decision reached represented an abuse of the trial court's discretion, and therefore, that decision should be affirmed.

Because the trial court did consider all aspects of the case when determining the alimony award and did not abuse its discretion in so doing, this Court should find that the trial court's award of alimony fell within its broad discretion and affirm that award.

V. THIS COURT SHOULD AWARD ATTORNEY'S FEES TO MS. JULIE FAIRBANKS BECAUSE HER HUSBAND'S APPEAL WAS FRIVOLOUS UNDER UTAH RULE OF APPELLATE PROCEDURE 33.

Under Utah Rule of Appellate Procedure 24(a)(9), "a party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award."

This Court should award attorney's fees and costs to Ms. Julie Fairbanks as Mr. Fairbanks's appeal falls under the definition of "frivolous" found in Utah Rule of Appellate Procedure 33. Under Rule 33, if the Court "determines that a motion made or appeal taken under these rules is . . . frivolous . . . , it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party."

Rule 33 further defines a "frivolous" appeal as 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.” Although Utah courts may hesitate awarding fees for frivolous appeals, they have clearly concluded that an award of attorney’s fees is proper when “an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in . . . increased costs of litigation; and dissipation of the time and resources of the Law Court.” *Porco v. Porco*, 752 P.2d 365, 369 (Utah Ct. App. 1988), *quoting Auburn Harpswell Ass'n v. Day*, 438 A.2d 234, 239 (Me. 1981).

Mr. Fairbanks’s appeal satisfies the definition of “frivolous.” It is completely without merit as it contains no arguments upon which the lower court’s decision could be reversed. The arguments therein boil down to nothing more than “I don’t like the decision below, so it should be reversed.”

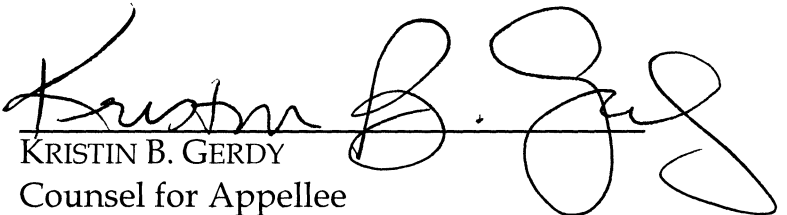
Clearly Mr. Fairbanks feels hurt and personally slighted by the dissolution of his marriage for a second time, particularly in light of his obviously intense personal objection to divorce. This, however, does not make his appeal meritorious. At the end of the day, Mr. Fairbanks’s brief does not argue any specific error in the trial court’s findings of fact except that the trial court did not interpret the facts in the same way that he does. Further, his brief does not set out any valid legal arguments under which this Court could reverse the lower court’s findings and conclusions. Thus, Mr. Fairbanks’s appeal is frivolous in that it is neither “grounded in fact” nor “warranted by existing law.” Mr.

Fairbanks's appeal is also frivolous because it was taken with "no reasonable likelihood of prevailing," especially as he has failed to marshal any facts supporting the factual findings he challenges, and his inability to support his allegations of the court's alleged abuse of discretion with anything more than his own opinions. Finally, Mr. Fairbanks's appeal is frivolous because it has clearly "result[ed] in . . . increased costs of litigation; and dissipation of the time and resources of the Law Court." For these reasons, this Court should award Ms. Julie Fairbanks both costs and attorney's fees in defending against this frivolous appeal.

CONCLUSION

For the foregoing reasons, the Court should affirm the Decree of Divorce issued by the lower court and award attorney's fees and costs to Ms. Julie Fairbanks for having to defend against this frivolous appeal.

Respectfully submitted April 29 2009.


KRISTIN B. GERDY
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on ~~April~~^{May} 4, 2009, two copies of the foregoing brief were ~~2~~³ mailed

☐ hand-delivered to:

PETER N. FAIRBANKS
Appellant *Pro Se*
2109 127th Dr. NE
Lake Stevens, WA 98258

A digital copy of the brief was also included: ☒ Yes ☐ No



ADDENDUM

Utah Code Ann. § 30-3-5(8) (Supp. 2008)

(8) (a) The court shall consider at least the following factors in determining alimony:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
- (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and

new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

Utah Rule of Civil Procedure 52(a)

Rule 52. Findings by the court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.

Requests for findings are not necessary for purposes of review. 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. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

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

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

Utah Rule of Appellate Procedure 33

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures.

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.