

2008

Kathryn C. Brough v. Richard James Brough : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

KATHRYN C. BROUGH,)	REPLY BRIEF OF THE
)	
Petitioner and Appellee,)	APPELLANT
)	
vs.)	Case No: 20080816-CA
)	
RICHARD JAMES BROUGH,)	
)	
Respondent and Appellant.)	

An appeal in a divorce from the Eighth Judicial District Court, Duchene County
Roosevelt Department
The Honorable Judge John R. Anderson, presiding
District Court Case 054000084

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List of All Parties

Appellant/Respondent: Richard James Brough
Represented by: Randall T. Gaither

Appellee/Petitioner: Kathryn C. Brough
Represented by: Clark B. Allred

No other parties have entered an appearance in this matter.

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ARGUMENT

POINT I

THE RESPONDENT MARSHALLED EVIDENCE, INCLUDING DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW, SUBMITTED AFTER THE TRIAL WHICH REFER TO ALL MAJOR POINTS OF EVIDENCE RAISED DURING THE COURSE OF THE TRIAL AS WELL AS A DETAILED ADDENDUM FILED WITH THE COURT.

The Respondent first marshaled the evidence as to each relevant disputed issue after trial by submitting a detailed Proposed Findings of Fact and Conclusions of Law & Memorandum. (R. 323, Addendum pg. 173) Counsel for the Respondent ordered a video and audio CD of the trial testimony and prepared Findings that relate directly to each piece of evidence and to the testimony of the witnesses with detailed footnotes as to trial testimony. The issue in this divorce proceeding is not whether the evidence was marshaled at trial or on appeal, but instead whether the trial judge fairly reviewed the extensively marshaled evidence before arbitrarily adopting every word of proposed findings drafted by counsel for the Petitioner. The findings were prepared without any direction by the trial court and on appeal the Petitioner counsel attempts to portray the findings as a deliberate ruling of the court.

To demonstrate the actual situation on appeal, the Respondent has made part of the record the three-page document, "Findings of Fact, Conclusions of Law and Decree" drafted by the trial court and placed in the file, but not signed or amended. This was first discovered after the proposed findings of the Petitioner were signed and this document was marked as Exhibit One at the hearing on the Motion for New Trial. (Addendum pg.

24) This exhibit displays the fatal flaws in the lower court proceedings by graphically demonstrating the abandonment of the trial judge of the constitutional role in a divorce trial. The entire set of unilaterally drafted, one-sided findings that were merely signed by Judge Anderson should be set aside and a new trial ordered.

For example, the Petitioner in the responsive Brief states as fact that the value of the Neola residence was "...\$325,000.00 Pet.'s Trial Exhibit 1 (Barneck appraisal)". (See pg. 13 of Brief of Appellee) However, at trial another exhibit introduced at trial by joint stipulation of counsel was the Kings Peak appraisal for \$304,500.00. (Respondents Exhibit (Trial transcript page 5, R 598) The trial judge soon after trial after trial indicated in Exhibit One to the Motion for New Trial that value was \$312,000.00, a figure in between the to real estate appraisals. (Addendum pg. 24) The discrepancies between the "findings" drafted right after the trial by the trial judge and the later adopted findings increasing the value that Mr. Brough had to pay up \$20,500.00. This arbitrary increase demonstrates the error on the material points of the property issues. Which occurred when the Petitioner was rewarded with the adoption of her set of findings.

The evidence proved that prior to the marriage, the Respondent, Mr. Bough, owned lien free a home at 19487 East River Road in Duchesne County, Utah that was sold after the marriage for approximately \$114,000.00. The Respondent received a check of \$24,702.84 that was used to build the house in Neola, Utah. (Respondent's Exhibit 35) The Respondent, with the assistance of his daughters, has assembled a breakdown of substantially all of the costs as to each checking account in which Mr. Brough deposited \$326,251.00 to build the Neola residence that cost more than its present market value.

(Respondents Exhibit 15) However none of this premarital separate property was traced by the trial Court.

Another example of the unfairness concerns personal property. Mrs. Brough acknowledged that some of the property that she listed as personal property that she wished to be awarded and which the Judge did award to her were fixtures inside the residence such as dimming lights and T.V. stands. (R. 598, pg. 104) The Findings signed by the Judge gave 100% of the additional property she requested on her exhibit list, including all of the horses and all the fixtures in the Neola house, which Mr. Brough could keep under the decree by buying out her one-half. (Addendum, pg. 20, ¶ 11)

On appeal, those documents have been clearly referenced and are available in the Addendum in support of the Respondent's Brief. Some of the lengthy documents were not included in the Addendum, such as the detailed accounting for the construction of the Neola residence. This detailed exhibit was stipulated and agreed as correct to at the hearing by the Attorney for the Petitioner. As to one of the two property issues at trial, it was the Respondent who marshaled detailed evidence itemizing and totaling the costs and sources of funds used from Mr. Brough's checking accounts to construct the Neola residence at trial. (Addendum pg. 168 and pg. 215) On the other hand, the Petitioner did not produce any checks at trial concerning financial contributions to the business or the residence at trial. Therefore, since August of 2008, a detailed marshalling of all of the evidence at the one-day trial has been available for the trial court and the Appellate Court on appeal. As to each point on each issue in the divorce, the Respondent presented evidence-based findings and marshaled the facts that were supported by legal authority in

the Conclusions of Law and Memorandum that were never addressed in any direct ruling of the judge.

In light of the unfair procedure adopted by the trial court to enter 100% of the Findings of the Petitioner and 100% of the Divorce Decree, a clear-cut situation is presented where the proposed, detailed Findings made by Respondent's counsel are more than sufficient to meet the standard concerning marshalling of evidence. Marshalling on specific issues is irrelevant if one or the other party entirely prevails on all issues based upon selection of one of two submissions after trial. The fundamental flaw is that findings and rulings are of Attorney Allred and not of the trial judge. The argument of lack of marshalling of evidence will be the first point in any divorce proceedings in which one party prevails on an all or nothing adoption of unilateral findings such as this. The prevailing party will have a distinct advantage on appeal on all issues and can use the presumptions and standards of review to support all the collateral issues on which the party prevailed because the trial court selected one draft of proposed findings entirely over the other and signed the document without any explanation or ruling from the bench.

POINT II

THE RECORD DOES NOT SUPPORT THE APPELLEE'S CLAIM THAT THE INHERENTLY UNFAIR PROCEDURE WAS A CUSTOMARY PROCEDURE USED IN DIVORCE PROCEEDINGS AND THE PROCEDURE VIOLATED THE RULES OF CIVIL PROCEDURE AND THE UTAH CONSTITUTION.

The decisions the Appellee has cited in an attempt to support the unique procedure used by the lower court judge are single-issue litigations that presented the Court with a

ruling and one issue, where there was some input from the Judge. For example in *State vs. James* 858 P.2d 1012 (Utah Ct. App. 1993) a preliminary ruling was involved and not a complex trial that involved balancing of many facts. The Court in *James* stated the narrow scope of preliminary ruling as follows:

At a subsequent hearing, defendant moved to suppress his confessions, claiming they were obtained in violation of his Fifth and Sixth Amendment rights. The two detectives testified as previously indicated. Defendant offered no evidence to contradict that of the detectives. The trial Judge initially indicated he intended to suppress defendant's confession because the Miranda warning should have been given at the beginning of the interview. Subsequently, after having reviewed case law cited by counsel, the trial court denied the motion to suppress.

The court in *James* went on to state:

Furthermore, the findings of fact are supported by the evidence presented, particularly the uncontroverted testimony of the two detectives. In addition, the findings do not conflict with any prior orders of the trial court. Therefore, defendant has not provided argument or evidence to rebut the presumption that the findings were appropriately entered by the trial court.

In *James*, the Court indicated that the Utah Appellate Courts looked to the record to determine whether the trial judge failed to adequately and deliberately consider the merits of the case. The issue in *James* revolved around uncontroverted testimony of two police detectives. Further, the findings did not conflict with the prior orders of the trial court. The *James* case is distinguishable in that it is a criminal case. The Court again noted the prior caution from the Utah Supreme Court about a trial courts mechanical adoption of findings prepared by counsel citing *Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282 (Utah 1993).

In *Alta Indus. Ltd*, the Court stated:

In support of this contention, Wasatch cites Boyer Co. v. Lignell. In Boyer, this court stated that trial courts should not "'mechanically adopt' the findings as prepared by the prevailing party." We did not, however, determine how we would review findings proposed by the prevailing party and summarily adopted by the trial court because we concluded that the court took an active role in the preparation of the findings. In so concluding, we relied on the fact that prior to adopting the prevailing party's findings, the court considered the opposing party's objections and proposed amendments and conducted a hearing on the propriety of the proposed findings. In the instant case, the trial Judge took a more active role in preparation of the findings than did the trial Judge in Boyer. Not only were objections filed and a hearing conducted, but the trial Judge prepared an initial memorandum decision containing findings of fact before instructing Steelco to prepare additional findings consistent with his decision. Clearly, the trial court did not mechanically adopt the findings, and therefore, the findings are entitled to the normal deference accorded by rule 52(a).

The Petitioner has not given any basis to allow this Court to find that the trial judge took any active role whatsoever in the preparation of the findings or the decree. Further, the Court did not issue any memorandum decision or ruling. This is not a situation where the trial judge from the bench indicated that he was ruling for one party or the other on any issue. The Court must be presumed to have mechanically adopted the findings because the Petitioner's Attorney drafted every word of the final document that the trial judge signed.

The Petitioner on appeal cannot reference any record of court the balancing of interests that must take place in a complicated contested divorce. To the contrary, the trial court at the hearing on new trial described a unique procedure that was not clearly stated to counsel and the parties at the close of trial. The judge indicated a procedure when the judge said, "I had asked each of you to prepare findings, conclusions, and a

decree and then I was going to look them over and decide which one that I would sign and that's all I did." (R. 599, pg. 2) (*Emphasis added*)

The Petitioner does not address the basic inequity that results when a core judicial function depends on adoption of one or the other proposed rulings drafted by the attorney for a party. This is not a procedure that this Court should approve as a means to decide divorce matters in the courts of the State. The basic error cannot be justified by indicating that the trial court changed its mind based on the submissions in light of the statements made on the record detailed in the Respondent's Brief. There was no direction from the bench after the trial as to any issue in the presence of the parties and the attorneys at the close of the trial. The trial court's direction at the conclusion of trial on this important issue merits duplication:

THE COURT: This case presented some interesting concepts and some interesting allocations. I think that -and I apologize right up front for doing this and I need to research in depth the prenuptial thing, both in the facts and the equity. I recall a case that I read which isn't in the memorandums about a coal mine subject to a preup agreement which the Court dealt with royalties and I think interest had accrued on the production or the appreciation of the mine. I need to find that case and read it again. There's some other cases that are on point and I want to take a good look at that. I'm going to spend some time tomorrow and organize this and so that I don't drop the ball but I'm going to order each of you to prepare findings, conclusion and a decree and simultaneously submit those. I'm thinking 30 days. If you want to do it - will that work for both of you? (R. 598, Transcript of Trial, pg. 270)

The lack of responsible judicial decision-making should be presumed here because of the absence of any ruling from the bench giving direction on the main issues, the lack of hearing on the findings and the lack of a memorandum decision. A totally passive role

is graphically demonstrated by the rubber-stamping of attorneys fees that include a windfall bonus of repayment of at least \$7,000.00 in fees the Petitioner was able to pay prior to trial and excessive costs without contribution. (See Point IX of this Brief)

Judge Anderson said he was concerned with further research and acknowledged there were complicated issues concerning allocation of assets at the close of trial. The responsive Brief does not address the glaring discrepancy between the statements of the trial court after the trial as opposed to the trial judge's statements at the hearing for new trial in attempt to justify his signing of one set of documents prepared by counsel. After the fact, at the hearing on the Motion for New Trial concerning the process Judge Anderson indicated that he could "pick one or the other, or make up somewhere in between". (R. 599, pg. 2) However, on the record he gave no indication of a ruling and no direction to Petitioner's counsel. The unique formula of an election set forth in the decree of divorce as to property is purely a creation of Plaintiff's counsel without any input or direction by the Court.

The Petitioner asserts that the all or nothing manner that the trial court used to make a ruling in the divorce action is "customary practice" in Utah courts. (Appellee's Brief pg. 21) The Respondent submits that the customary practice is demonstrated by the letter of Respondent's Counsel that was submitted with a computer disk and included the Respondent's proposed findings in order that the Judge could use certain portions of that document in making a ruling to be issued and signed by the Court.

The customary practice is for the trial judge to spend the time to make a ruling from the bench in which he explains to each of the individuals involved in the divorce the

reasons why he gave weight to one argument or the other on the issues. Or, the judge after deliberation and a review on notes and submissions issues a detailed finding of fact and ruling. Many of the diligent Utah trial judges, do both the oral statements from the bench and the written rulings by signed minute entry. In Mr. Brough's matter, neither occurred. As counsel for Mr. Brough stated in the Affidavit in support of new trial, if counsel had been advised as to the fact that the Judge intended to adopt one or the other of the findings, the document would have been drafted in a different manner with more of a view as to a balancing of the evidence.

Then, the Petitioner asserts that the Respondent reliance on Rule 52(a) of the *Utah Rules of Civil Procedure* is "somewhat opaque". The Respondent submitted in the post-trial motions and on appeal that the Rule was not complied in any manner by the trial court. Rule 52(a) of the *Utah Rules of Civil Procedure*, which governs findings of fact, states that "[i]t 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." Utah R. Civ. P. 52(a) In *Erwin v. Erwin*, 773 P.2d 847, 849 (Utah Ct. App. 1989) the Court of Appeals indicated that in assessing the sufficiency of the findings, the court is not confined to the contents of a particular document entitled 'Findings'; rather, the findings may be expressed orally from the bench or contained in other documents such as a memorandum. The only evidence in writing is the document composed by the trial judge marked as Exhibit One at the hearing on Motion for New Trial. (Addendum pg. 24)

A trial court may ask counsel to submit findings to aid the court in making the necessary findings for the particular case. In *SLW/Utah v. Labor Com'n*, 98 Ut. App. 971497-CA (1998), the Court stated:

Furthermore, there is no indication from the record that Judge George failed to adequately guide defense counsel in counsel's preparation of the proposed decision. At the end of the hearing, Judge George explained both the factual and legal basis for his decision. Also, he specifically retained the right to accept, reject, or modify the proposed decision.

The findings crafted by the Petitioner's advocate are clearly contrary to the evidence on the material issues involving the prenuptial agreement, the business, and residence, the failure to separate property of Mr. Brough. Further, on the issue of the allocation of costs and attorney fees the lopsided aspect of the manner of the ruling is demonstrated. The resulting "ruling" was as one sided as should be expected when an advocate for one party is allowed to dictate a ruling in a contested divorce.

POINT III

THE PRENUPTIAL AGREEMENT SHOULD BE APPLIED AS TO BUSINESS PROPERTY, A PROCEDURE THAT THE COURT FAILED TO DO BY ADOPTING THE POSITION OF THE PETITIONER.

On appeal, the attorney for Mrs. Brough argues that the Court, in some manner, did apply the prenuptial agreement. However, Mr. Allred in drafting the conclusions of law in composed Paragraph One indicates that the parties did not negotiate the prenuptial agreement. The Petitioner argued that there was no disclosure tracking the elements of the statute that applies to prenuptial agreement as grounds to not apply the prenuptial agreement. However, the proposed Findings of Fact and Conclusions of Law of the

Petitioner mirror the legal argument on the issue of the prenuptial agreement that the trial court addressed at the closing of trial that the document was not a serious agreement and was designed to please family members.

The Petitioner on appeal has attempted to support the ruling that counsel drafted negating the prenuptial agreement by indicating that the trial court actually enforced the agreement by limiting the agreement to premarital separate property. As stated in *Walters v. Walters*, 812 P.2d 64 (Ct. App. 1991):

As a general rule, however, premarital property is viewed as separate property, and equity usually requires that "each party retain the separate property he or she brought into the marriage." *Haumont v. Haumont*, 793 P.2d 421, 424 (Utah Ct. App. 1990).

Therefore, the interpretation in the adopted Findings of Fact and Conclusions of Law is essentially non-enforcement of a prenuptial agreement. Mr. Brough gained nothing by obtaining a prenuptial agreement if it applies only to premarital property in a matter where both parties had been married multiple times. As respondent indicated in the Brief, the parties are usually returned to premarital status.

The Petitioner fails to address the point that such an interpretation would render meaningless the purpose of a pre-marital agreement. A prenuptial agreement is designed to protect that separate property referred to in the agreement through the duration of the marriage and to be incorporated in a Decree of Divorce. The Petitioner's position ignores the language in the prenuptial agreement that Kathryn Brough was not to be held liable on any of the debts that would incur from any of the properties described in the

document. There was also further consideration that Mr. Brough would not be liable for any debts that Mrs. Brough might acquire.

The Petitioner had obtained and sought the appointment of an expert who was paid for at Mr. Brough's expense. That expert was unable to formulate and set forth any value of the business described in the prenuptial agreement as of the time of the marriage even though he had been asked by the Petitioner to formulate such value. (See Addendum, pg. 28) This failure of evidence placed the Petitioner in a position of attempting to argue that the statements made by Mr. Brough in relation to a Divorce Decree at the time of his prior divorce in the early 90's many years before the remarriage somehow established the "value" of the business at the time of the marriage.

It is the Petitioner who was unable to marshal evidence at trial that there was enhancement of business that took place after the marriage. Also, the Petitioner was unable to prove any monetary compensation to the business by the Petitioner who worked for a salary as an employee of the business; a salary she placed in her separate accounts. In an effort to sustain the findings adopted by the trial court, the Petitioner is arguing against the evidence of the expert hired by the Petitioner who Mr. Brough has been ordered to pay by pretrial order. The Petitioner's position on appeal is the same as it was at trial, that the prenuptial document although clearly defining the business, should not be applied to the business.

The findings that are set forth in the Respondent's proposed Findings of Fact comport with the evidence and were totally disregarded by the adoption of the trial court based on the unreasonable theory of the Petitioner. (R. 323, Addendum pg. 173) This

conclusion is set forth in the first paragraph of the expert's report (Respondent's Exhibit 40, Addendum pg. 28) The Petitioner's attorney in the Findings of Fact and Conclusions of Law argues that the business corporation, which was managed and operated solely by Mr. Brough, somehow increased in value during the marriage because of the "enhancements of the Petitioner". However, there was no evidence as to this argument presented on behalf of the Petitioner by the forensic appraiser.

The Petitioner admitted she was not involved in the management of the company and all the decisions to buy and sell equipment in this company were Mr. Brough's decisions. She acknowledged that she was working in a capacity as a bookkeeper and performed manual labor in cleaning and building the Roosevelt shop for which her salary adequately compensated her.

Yet, on appeal the Petitioner asked the Court to disregard the Petitioner's expert's testimony stating there was no book value or inherent income value of the business Corporation over Mr. Brough's services. The Petitioner seeks to have this Court adopt the creative value of the business argument that was made at trial that is not supported by the objective facts at trial.

The Petitioner creatively drafted findings to exclude the main opinion of her own expert, Brad Townsend. The expert found that as far as the income stream, there was no inherent value of the business over and above Mr. Brough's services performed for the business. As to the value of the business at the time of the marriage, Brad Townsend, stated that in testimony and in the report he was unable to determine a value for N.J. Trucking, Inc. at the time of the marriage in 1999.(See first page of report of Brad

Townsend, Addendum pg 24)The Court should have found that the Petitioner failed to prove any value and the business was separate property based on the prenuptial agreement and the non-owner spouse should not be given one half of the corporate assets.

POINT IV

THE TRIAL COURT'S RULING AS TO ATTORNEYS FEES DOES NOT COMPORT WITH THE APPELLATE DECISIONS IN RELATION TO AN AWARD OF ATTORNEYS FEES.

As to attorney's fees, the Petitioner had paid and was paying off her agreement to pay her fees in monthly installments. Counsel for the Respondent referred in the opening Brief to a "Promissory Note" which was in error. The evidence was that the Attorney for the Plaintiff was continuing to work for her and had accepted her monthly installment payments which she was financially able to pay every month to pay for attorney fees bill.

The Court totally disregarded the evidence that Kathryn Brough was financially able to make payments prior to trial of at least \$7,000.00 to her attorney at the rate of \$200.00 per month. (R. 598, pg. 150) In addition, after the alimony order and separation from the person with whom she resided with which resulted in her waiver of alimony in March 2007, Mrs. Brough admitted on the stand she was not paying rent to any landlord. At the time of trial, she had moved back in to her mother's residence and she was able to save and purchase with her own funds a double wide trailer for \$10,000.00 to place free of charge on her mother's property, partially due to the fact Mr. Brough paid her truck payment for several years. All of which shows she was financially able to pay her attorneys fees and at least one half of her own costs.

The Petitioner fails to address the evidence at trial that negated any claim she could not pay her attorneys fees. The lack of balancing by the trial court is demonstrated because the court did not factor in the amount that she paid fees prior to trial. The fees awarded included all fees generated by her attorney through trial, without reduction for her payments made to the date of trial of \$7,000.00. The Petitioner has not addressed the issue of windfall raised by the Respondent in the opening Brief. (See Appellants Brief pg. 46)

A trial judge in a divorce should not rubber stamp fees based upon a claim that one party makes more money than the other party. In *Leppert v. Leppert*, 2007 UT App 10 (01/15/2009), the Court noted that a wife's financial need cannot be supported by finding that the '[Wife] does not have the means to pay all of the attorney fees generated by this matter' the court did not explain how it arrived at the amount of the award. In this matter, a finding that the husband had the greater ability does not address actual financial need and the lower court was reversed.

The draft of the findings prepared by the court, even if considered as "present thought impressions" indicated that the court thought there was a basis to award fees based on a "disparity of income". (Addendum pg. 24) The Petitioner attempts to show a disparity in the findings by claiming that Mr. Brough had use of the business during the divorce. This finding ignores the record that he had to pay alimony and make a substantial payment on the Petitioner's new vehicle every month pursuant to a temporary order. As to relative finances, the record only supports income as to the Respondent. Brad Townsend's opinion of a fair salary for Mr. Brough adjusted for the payment of

directly out of business for personal expenditures that were provided to him by Mr.

Brough, was as follows (R. 598, pg. 155) :

2003	\$15,000
2004	\$57,000
2005	\$40,000
2006	\$ 25,000
2007	\$53,000

The Petitioner waived alimony because she moved in with another man during the proceeding. The Petitioner also does not address the fact that she benefited by a pretrial order requiring Mr. Brough to advance her pretrial legal costs of her expert, Brad Townsend at over \$12,000.00. This allowed her to pay her attorney fees from her employment that the trial testimony proved that she did to the extent of over \$7,000.00. The expert indicated at trial and in his report that Mr. Brough only made a reasonable income and compensation as the key employee of the business corporation. The expert factored in the fact that including having some expenses paid from the business to pay for the value of his services in reaching this determination. (Addendum pg. 28)

The findings and argument of the Petitioner do not address the failure to justify the costs Mr. Brough had to pay which amount to over \$12,000.00 to the expert, Brad Townsend, retained by the Petitioner. The value of equipment that ultimately was used in the findings as the corporation's value was based upon the equipment appraisal. Mr. Brough paid for this second appraisal. The value of the remainder of the business was merely based upon property tax statements mailed to Mr. Townsend by Petitioner's Attorney. Brad Townsend's total bill to testify that Mr. Brough had to pay was \$12,707.00 that was not a necessary cost in light of his testimony.

Regarding costs, the district court is afforded discretion to define costs as those reasonable amounts that are reasonably expended to prosecute or defend a divorce action and in determining whether to award costs based on need and ability to pay. See *Peterson v. Peterson*, 818 P.2d 1305, 1310 (Utah Ct. App. 1991). Here the burden of costs was shifted unfairly to one party. When there is no evidence she could not pay the costs, the costs should at a minimum have been split between the parties, not assessed against one party.

The findings drafted by the Attorney for the Petitioner were based on an argument that Mr. Brough had the “greater ability” to pay legal fees. (See Appellee’s Brief, pg. 45) The same paragraph in the Brief, references the gross income of the corporation of \$785,000.00 in the year prior to separation as purported proof of such “greater ability”. (disregarding the testimony of the expert) This argument is only a “finding” because the trial court, without any change, adopted it and it ignores the evidence at trial as well as the lack of proof of the wife’s actual need based on financial inability.

The Petitioner does not address the larger issue that the award as framed by the Petitioner and the election made by the Respondent creates a large sum of readily available money to pay for attorneys’ fees. From this large judgment that may require sale of important assets, Mr. Brough should equitably be reimbursed for the costs and expenses of the expert for which he had to advance for trial. Since Mr. Brough elected to buy her out, the petitioner obtains a large amount of cash which logically would allow her to finish paying her bills and pay for her own costs. Basic equity should require a non-owner getting cash for half of most of the value of the business to pay her half.

The facts demonstrated at trial as developed by the Respondent and presented in proposed Findings of Fact support the conclusion that the Petitioner never made the requisite showing at trial or on appeal to obtain an award for attorney's fees and costs in this matter.

CONCLUSION

The Motion filed by counsel after discovery that a Decree had been entered when Petitioners counsel filed a notice of entry of the Decree should have been granted and a new trial ordered. (Addendum pg. 57) The grounds set forth in that motion were:

1. Irregularity in the procedure of the Court exist in these proceedings because the Minute Entry and the ruling issued by the Court from the bench after the trial indicates that the Court would prepare a written ruling. No findings were announced in open court. No ruling was issued by Memorandum Decision or otherwise. The Court has never explained the adoption by the Court of the documents prepared by the Attorney for the Petitioner.
2. Under the facts and circumstances, the Respondent requests either a new trial, a written ruling of the Court, and/or an opportunity to present final oral argument.
3. The current procedure followed by the Court has denied the Respondent a fair and equitable divorce trial.
4. Counsel for the Respondent complied with the court ordered procedure in submitting a "proposed" findings to the Court.
5. The Judgment awarded against the Respondent is excessive under Rule 59(a)(5) of the *Utah Rules of Civil Procedure* in any of the following aspects and should be reconsidered on any of the following grounds:
 - a. The *Decree of Divorce* awards to the Petitioner substantial pre-marital business property and pre-marital property owned by the Respondent without required findings as to separate property.
 - b. The award of \$386,500.00 grants to the Petitioner an award of the value of the business which does not fairly allocate liabilities of the business and therefore the award is unfair and inequitable.
 - c. If the Court did not rule that the pre-nuptial agreement was void or non-effective, then the evidence and exhibits have shown that Mr. Brough owned much of the equipment which was used for value of the business prior to the marriage.

d. The *Decree of Divorce* awards the Petitioner in excess of \$20,000.00 in legal fees and costs. This award is inequitable and excessive in that it requires the Respondent to pay that amount to the Petitioner in light of the fact that she has been awarded substantial cash settlement from which she can pay her promissory note for legal fees.

6. Pursuant to Rule 59 of the *Utah Rules of Civil Procedure* the manner in which the Judgment was entered appears to have been given under the influence of prejudice against the Respondent in that the Court adopted 100% of the proposed findings submitted by the Petitioner and failed to include any proposed findings, rulings or language submitted by the Respondent even if based on objective, undisputed evidence introduced by the Respondent at trial.

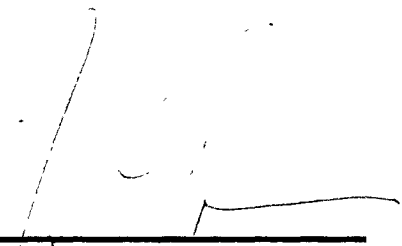
7. The *Findings of Fact & Conclusions of Law* and *Decree of Divorce* is an error of law in this divorce case in that best practice in divorce matters require consideration by the Court of separate property owned prior to the marriage and an equitable balancing of issues and awards.

8. The ruling concerning the pre-nuptial agreement constitutes an error in law and is contrary to the evidence introduced at trial, including the closing argument of the Attorney for the Petitioner who indicated that the pre-nuptial agreement was effective. Therefore the Court should determine the scope of the pre-nuptial agreement.

9. The manner of entry, lack of notice and error in law has denied the Respondent the opportunity to object to the *Findings of Fact & Conclusions of Law* and *Decree of Divorce* or to receive a copy of the proposed Judgment.

Based upon the Brief, the Addendum in support of the Brief on Appeal, and this Reply, the Appellant requests that the Court find that the court erred in not granting the Respondent's Motion for New Trial. The court should remand the proceedings for a new trial, to amend the findings based upon the Motion filed before the court, or further relief including setting aside of the unsubstantiated and arbitrary attorneys fees award.

DATED this 20th day of July 2009.



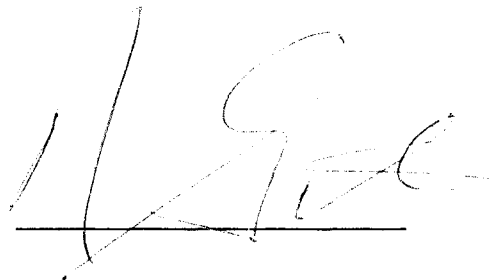
RANDALL GAITHER
Attorney for the Appellant

Proof of Service

I hereby certify that two true and correct copy of the foregoing REPLY BRIEF OF
THE APPELLANT was mailed First Class Mail, postage prepaid to:

CLARK B. ALLRED
ALLRED & MCCLELLAN, P.C.
72 NORTH 300 EAST
ROOSEVELT, UTAH 84066

DATED this 20th day of July 2009.

A handwritten signature in black ink, appearing to read "C. Allred", is written over a horizontal line.