2009

Joann Sellers v. Glen Ray Sellers : Brief of Appellee/ Cross Appellant

Utah Court of Appeals

David J. Friel; Attorney for Appellant.
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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JOANN SELLERS,

Petitioner/Appellant
Cross Appellee,

Vs.

GLEN RAY SELLERS

Respondent/Appellee
Cross Appellant.

Appellate Case No. 2009518-CA

District Court Case No. 054902424

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BRIEF OF APPELLEE/CROSS APPELLANT

APPEAL FOR THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

HONORABLE ROBERT FAUST
DISTRICT COURT JUDGE
PRESIDING

--------oooooo0oooooo--------

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THE CAPTION OF THE CASE CONTAINES THE NAMES OF ALL PARTIES

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STATEMENT SHOWING JURISDICTION

The statutory provision that confers jurisdiction on the appellate court.

The Court of Appeals has jurisdiction in this matter pursuant to 78A-4-103(2)(j) which involves cases transferred from the Utah Supreme Court to the Utah Court of Appeals.

STATEMENT OF THE ISSUES

ARGUMENT ONE

THE TRIAL COURT MISCALCULATED CHILD SUPPORT

STANDARD OF REVIEW: Appellate Court gives the Trial Court considerable discretion. Note Carsten vs. Carsten, 2007 UT App. 174, 164 P.3d 429.

This issue was preserved on Appeal at page 578 of the Record.

ARGUMENT TWO

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO FACTOR TAX CONSEQUENCES IN THE BALANCING OF THE EQUITIES

STANDARD OF REVIEW: Appellate Court gives the Trial Court considerable discretion. Note Carsten vs. Carsten, 2007 UT App. 174, 164 P.3d 429.

This issue was preserved on Appeal at page 14 of the Transcript of June 2, 2008.

STATUTES

30-3-10. Custody of children in case of separation or divorce -- Custody consideration.

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate.

(a) In determining any form of custody, the court shall consider the best interests of the child and, among other factors the court finds relevant, the following:

(i) the past conduct and demonstrated moral standards of each of the parties;

(ii) which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent;

(iii) the extent of bonding between the parent and child, meaning the depth, quality, and nature of the relationship between a parent and child; and

(iv) those factors outlined in Section **30-3-10.2**.

(b) The court shall, in every case, consider joint custody but may award any form of custody which is determined to be in the best interest of the child.

(c) The children may not be required by either party to testify unless the trier of fact determines that extenuating circumstances exist that would necessitate the testimony of the children be heard and there is no other reasonable method to present their testimony.

(d) The court may inquire of the children and take into consideration the children's desires regarding future custody or parent-time schedules, but the expressed desires are not controlling and the court may determine the children's custody or parent-time otherwise. The desires of a child 16 years of age or older shall be given added weight, but is not the single controlling factor.

(e) If interviews with the children are conducted by the court pursuant to Subsection (1)(d), they shall be conducted by the judge in camera. The prior consent of the parties may be obtained but is not necessary if the court finds that an interview with the children is the only method to ascertain the child's desires regarding custody.

(2) In awarding custody, the court shall consider, among other factors the court

finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent.

(4) (a) Except as provided in Subsection (4)(b), a court may not discriminate against a parent due to a disability, as defined in Section **57-21-2**, in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody.

(b) If a court takes a parent's disability into account in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody, the parent with a disability may rebut any evidence, presumption, or inference arising from the disability by showing that:

(i) the disability does not significantly or substantially inhibit the parent's ability to provide for the physical and emotional needs of the child at issue; or

(ii) the parent with a disability has sufficient human, monetary, or other resources available to supplement the parent's ability to provide for the physical and emotional needs of the child at issue.

(c) Nothing in this section may be construed to apply to adoption proceedings under Title 78B, Chapter 6, Part 1, Utah Adoption Act.

(5) This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

30-3-10.1. Definitions -- Joint legal custody -- Joint physical custody.

As used in this chapter:

(1) "Joint legal custody":

(a) means the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified;

(b) may include an award of exclusive authority by the court to one parent to make specific decisions;

(c) does not affect the physical custody of the child except as specified in the order of joint legal custody;

(d) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated; and

(e) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

(2) "Joint physical custody":

(a) means the child stays with each parent overnight for more than 30% of the year, and both parents contribute to the expenses of the child in addition to paying child support;

(b) can mean equal or nearly equal periods of physical custody of and access to the child by each of the parents, as required to meet the best interest of the child;

(c) may require that a primary physical residence for the child be designated; and

(d) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

30-3-10.2. Joint custody order -- Factors for court determination -- Public assistance.

(1) The court may order joint legal custody or joint physical custody or both if one or both parents have filed a parenting plan in accordance with Section **30-3-10.8** and it determines that joint legal custody or joint physical custody or both is in the best interest of the child.

(2) In determining whether the best interest of a child will be served by ordering joint legal or physical custody, the court shall consider the following factors:

(a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal or physical custody;

(b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;

(c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent, including the sharing of love, affection, and contact between the child and the other parent;

(d) whether both parents participated in raising the child before the divorce;

(e) the geographical proximity of the homes of the parents;

(f) the preference of the child if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to joint legal or physical custody;

(g) the maturity of the parents and their willingness and ability to protect the child from conflict that may arise between the parents;

(h) the past and present ability of the parents to cooperate with each other and make decisions jointly;

(i) any history of, or potential for, child abuse, spouse abuse, or kidnaping; and

(j) any other factors the court finds relevant.

(3) The determination of the best interest of the child shall be by a preponderance of the evidence.

(4) The court shall inform both parties that an order for joint physical custody may preclude eligibility for cash assistance provided under Title 35A, Chapter 3, Employment Support Act.

(5) The court may order that where possible the parties attempt to settle future disputes by a dispute resolution method before seeking enforcement or modification of the terms and conditions of the order of joint legal custody or joint physical custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

RULES OF JUDICIAL ADMINISTRATION – RULE 4-903

The purpose of the custody evaluation will be to provide the court with information it can use to make decisions regarding custody and parenting time arrangements that are in the child's best interest. This is accomplished by assessing the prospective custodians' capacity to parent, the developmental, emotional, and physical needs of the child, and the fit between each prospective custodian and child. Unless otherwise specified in the order, evaluators must consider and respond to each of the following factors:

(5)(A) the child's preference;

(5)(B) the benefit of keeping siblings together;

(5)(C) the relative strength of the child's bond with one or both of the prospective custodians;

(5)(D) the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted;

(5)(E) factors relating to the prospective custodians' character or status or their capacity or willingness to function as parents, including:

(5)(E)(i) moral character and emotional stability;

(5)(E)(ii) duration and depth of desire for custody;

(5)(E)(iii) ability to provide personal rather than surrogate care;

(5)(E)(iv) significant impairment of ability to function as a parent through drug abuse, excessive drinking or other cause;

(5)(E)(v) reasons for having relinquished custody in the past;

(5)(E)(vi) religious compatibility with the child;

(5)(E)(vii) kinship, including in extraordinary circumstances stepparent status;

(5)(E)(viii) financial conditions; and

(5)(E)(ix) evidence of abuse of the subject child, another child or spouse; and

(5)(F) any other factors deemed important by the evaluator, the parties, or the court.

STATEMENT OF THE CASE

This is a Cross-Appeal to the Court of Appeals with essential two claims on appeal: (1) The Trial Court miscalculated child support and (2) The Trial Court failed to include tax consequences in the balancing of the equities.

NATURE OF THE CASE

Appellant has claimed many errors in reference to the Amended Findings of Fact, Amended Conclusions of Law and Amended Decree of Divorce. However, the claims of the Appellant, in reference to some issues were not preserved on Appeal, other claims were of Appellant's Counsel own errors and one can not raise their own errors at the Trial Court Level as the basis for an Appeal, seeking reversal.

COURSE OF PROCEEDINGS

Appellant sought extensions preserving her right of appeal. Each of the same were unopposed.

Appellee has Cross Appealed seeking the Appellate Court to reverse and remand on the issue of child support, tax consequences and for an award of attorneys fees on Appeal.

DISPOSITION AT THE TRIAL COURT LEVEL

The Honorable Robert Faust ruled that child support would be based upon the Appellant having (243) overnights and the Appellee having (122) overnights.

Appellee requested the Trial Court to adjust for the provisions of 30-3-35 Utah Code Annotated, however the Trial Court did not do so.

Additionally Appellee requested the Trial Court to factor the $57,000.00 tax consequence into the division of the equities, however the Trial Court did not do so.

STATEMENT OF THE FACTS

The Amended Decree of Divorce provides in paragraph #7 as follows: (Record at page 621 – Note Addendum)

"7. The Respondent shall pay to the Petitioner child support in the amount of $729.26 per month."

At page 578 of the Record, the Appellee/Cross Appellant raised this exact issue with the Trial Court, wherein he raised the following objections to the Findings of Fact and referencing each Finding that Respondent objected as follows:

> #7. The Respondent has the child 152 over nights as reflected in Exhibit A attached hereto.
>
> #9. The Petitioner now has earnings of $58,866.96 per year due to a pay increase.
>
> #11. The child support does not contemplate the overnights the Respondent has with the minor child as reflected in Exhibit A attached hereto, and child support should be $485.56 as shown on the Work Sheet attached hereto as Exhibit B.

Respondent also objected to the following paragraphs of the Decree of Divorce, found at page 578 of the Record:

> #4. The Respondent has the child 152 over nights as reflected in Exhibit A attached hereto.
>
> #7. The child support should be $485.56, when the overnights are factored in as reflected on Exhibit A and Exhibit B attached.

The Trial Court determined child support at page 253 of the Transcript as follows:

> "The Court finds that the petitioner has an income of $4,032. gross and that the respondent's income is $7,920 gross resulting in a child support obligation total between both parties of $1,157; thus, based upon a credit for the 20/10 split as

outlined in the new schedules found under Plaintiff's Exhibit 5, the petitioner's portion of her obligation is $393.38 per month and the respondent's portion is $729.26 after giving credits as outlined on the worksheet."

As shown on page 258 of the Transcript, the Trial Court intended to divide the equity in the home and then balance the Appellee's interest in the home against the retirement accounts, thereby granting to the Appellant all of the parties interest in the marital home and granting to the Appellee a corresponding amount in the retirement programs.

At page 258 of the transcript is the following:

"The Court is going to value the house at $290,000.00 based upon what the appraisals were. So $290,000 divided by two will give each party $145,000 equity into the home. The first thing – so what we're going to do, Mr. Walsh, if it's okay, put $145,000 for your client's equity interest in the home and then we're going to start subtracting and adding from that figure which is half, okay? Does that make sense?"

Appellee challenged this approach with the Trial Court at page 14 and following of the Transcript of the hearing on June 2, 2008:

MR. WALSH: Appreciate your patience with us, Judge. It's our belief, Your Honor, at least we hope that you'll see it this way, that you intended that there be a factor in the analysis of taking money out of the 401K and the penalties and the other things that are associated with that event versus having 100 per cent equity in the home in pure cash as we laid out in our memorandum, he's in a 28 percent tax liability on the 401K. He wanted – the testimony before Your Honor is he wanted to get his own home and so now to do this with the retirement of the 401K, this is going to have a 28 per cent federal tax consequence.

THE COURT: Back up. Why is the 290 going to have that – that's the home value not the 401K, right.

MR. WALSH: What we did, Judge, is we –

THE COURT: Yeah (inaudible).

MR. WALSH: -- she can have the whole home now, that's your ruling.

THE COURT: Right.

MR. WALSH: She gets the house and we correspondingly give him his value in the 401K.

THE COURT: That's right.

MR. WALSH: So if he takes his value out of the 401K, he's got a 28 per cent tax liability to do that.

THE COURT: I'm with you.

MR. WALSH: Cause he wants to have a house now because he wants to have these times with his boy. He's only got another four years approximately to be with his son. He wants to have a stable environment for his boy.

THE COURT: I'm with you.

MR. WALSH: He also has a 10 percent –

THE COURT: Penalty.

MR. WALSH: -- on the state level. So he's there now at 38 percent for the taking it out at this particular point. So it was our intent, Your Honor, it was out (sic) understanding – it's one thing over here to say we're not going to give you return on your investment. The house I would say three or four times the value from this event to this event and say we're going to give you zero here. But when you go the other way around, he's got a 38 percent detriment over here.

SUMMARY OF THE ARGUMENTS

ARGUMENT ONE: Cross Appellant claims that the Trial Court miscalculated the child support because the Trial Court did not include the overnights in the summertime nor the other provisions of 30-3-35 of the Utah Code Annotated in reference to the Father's parent time.

ARGUMENT TWO: Cross Appellant also claims that the Trial Court made a mistake in failing to factor in the $57,000.00 tax consequence of the Father in the division of the equities.

ARGUMENT ONE

APPELLANT'S CLAIMS THAT THE COURT FAILED TO CONSIDER THE PROVISIONS OF 30-3-10 UCA AND RULE 4-903 ARE WITHOUT MERIT

At page 17 of the Blue Brief the Appellant states:

> "In making a determination as to the future custody of a minor child, the trial court is under obligation to take into account certain statutory considerations as are specifically set forth in Utah Code 30-3-10 though 30-3-10.2. These factors include and are part of the "best interests of the child test" which must be analyzed by the trial court."

At page 18 of the Blue Brief the Appellant argues:

> "Custody evaluators are under stringent rules that they must identify and explore every one of the criteria that is expressly set for (sic) in Rule 4-903(5)."

Appellant argues that the Trial Court failed to apply these statutory references and therefore "the entry by the Court of an order of custody must fail and be reversed."

These provisions of the Utah Code provide:

30-3-10. Custody of children in case of separation or divorce -- Custody consideration.

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate.

(a) In determining any form of custody, the court shall consider the best interests of the child and, among other factors the court finds relevant, the following:

(i) the past conduct and demonstrated moral standards of each of the parties;

(ii) which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent;

(iii) the extent of bonding between the parent and child, meaning the depth, quality, and nature of the relationship between a parent and child; and

(iv) those factors outlined in Section **30-3-10.2**.

(b) The court shall, in every case, consider joint custody but may award any form of custody which is determined to be in the best interest of the child.

(c) The children may not be required by either party to testify unless the trier of fact determines that extenuating circumstances exist that would necessitate the testimony of the children be heard and there is no other reasonable method to

present their testimony.

(d) The court may inquire of the children and take into consideration the children's desires regarding future custody or parent-time schedules, but the expressed desires are not controlling and the court may determine the children's custody or parent-time otherwise. The desires of a child 16 years of age or older shall be given added weight, but is not the single controlling factor.

(e) If interviews with the children are conducted by the court pursuant to Subsection (1)(d), they shall be conducted by the judge in camera. The prior consent of the parties may be obtained but is not necessary if the court finds that an interview with the children is the only method to ascertain the child's desires regarding custody.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent.

(4) (a) Except as provided in Subsection (4)(b), a court may not discriminate against a parent due to a disability, as defined in Section **57-21-2**, in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody.

(b) If a court takes a parent's disability into account in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody, the parent with a disability may rebut any evidence, presumption, or inference arising from the disability by showing that:

(i) the disability does not significantly or substantially inhibit the parent's ability to provide for the physical and emotional needs of the child at issue; or

(ii) the parent with a disability has sufficient human, monetary, or other resources available to supplement the parent's ability to provide for the physical and emotional needs of the child at issue.

(c) Nothing in this section may be construed to apply to adoption proceedings under Title 78B, Chapter 6, Part 1, Utah Adoption Act.

(5) This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

30-3-10.1. Definitions -- Joint legal custody -- Joint physical custody.

As used in this chapter:

(1) "Joint legal custody":

(a) means the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified;

(b) may include an award of exclusive authority by the court to one parent to

make specific decisions;

(c) does not affect the physical custody of the child except as specified in the order of joint legal custody;

(d) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated; and

(e) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

(2) "Joint physical custody":

(a) means the child stays with each parent overnight for more than 30% of the year, and both parents contribute to the expenses of the child in addition to paying child support;

(b) can mean equal or nearly equal periods of physical custody of and access to the child by each of the parents, as required to meet the best interest of the child;

(c) may require that a primary physical residence for the child be designated; and

(d) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

30-3-10.2. Joint custody order -- Factors for court determination -- Public assistance.

(1) The court may order joint legal custody or joint physical custody or both if one or both parents have filed a parenting plan in accordance with Section **30-3-10.8** and it determines that joint legal custody or joint physical custody or both is in the best interest of the child.

(2) In determining whether the best interest of a child will be served by ordering joint legal or physical custody, the court shall consider the following factors:

(a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal or physical custody;

(b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;

(c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent, including the sharing of love, affection, and contact between the child and the other parent;

(d) whether both parents participated in raising the child before the divorce;

(e) the geographical proximity of the homes of the parents;

(f) the preference of the child if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to joint legal or physical custody;

(g) the maturity of the parents and their willingness and ability to protect the child from conflict that may arise between the parents;

(h) the past and present ability of the parents to cooperate with each other and make decisions jointly;

(i) any history of, or potential for, child abuse, spouse abuse, or kidnaping; and

(j) any other factors the court finds relevant.

(3) The determination of the best interest of the child shall be by a

preponderance of the evidence.

(4) The court shall inform both parties that an order for joint physical custody may preclude eligibility for cash assistance provided under Title 35A, Chapter 3, Employment Support Act.

(5) The court may order that where possible the parties attempt to settle future disputes by a dispute resolution method before seeking enforcement or modification of the terms and conditions of the order of joint legal custody or joint physical custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

The Rules of Judicial Administration, specifically 4-903(5) provides:

The purpose of the custody evaluation will be to provide the court with information it can use to make decisions regarding custody and parenting time arrangements that are in the child's best interest. This is accomplished by assessing the prospective custodians' capacity to parent, the developmental, emotional, and physical needs of the child, and the fit between each prospective custodian and child. Unless otherwise specified in the order, evaluators must consider and respond to each of the following factors:

(5)(A) the child's preference;

(5)(B) the benefit of keeping siblings together;

(5)(C) the relative strength of the child's bond with one or both of the prospective custodians;

(5)(D) the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted;

(5)(E) factors relating to the prospective custodians' character or status or their capacity or willingness to function as parents, including:

(5)(E)(i) moral character and emotional stability;

(5)(E)(ii) duration and depth of desire for custody;

(5)(E)(iii) ability to provide personal rather than surrogate care;

(5)(E)(iv) significant impairment of ability to function as a parent through drug abuse, excessive drinking or other cause;

(5)(E)(v) reasons for having relinquished custody in the past;

(5)(E)(vi) religious compatibility with the child;

(5)(E)(vii) kinship, including in extraordinary circumstances stepparent status;

(5)(E)(viii) financial conditions; and

(5)(E)(ix) evidence of abuse of the subject child, another child or spouse; and

(5)(F) any other factors deemed important by the evaluator, the parties, or the court.

COUNTER POINT I:

Appellant did not preserve this issue at the trial level.

In the Blue Brief at page 4, the Appellant states:

> ISSUE PRESERVED AT TRIAL: The issue of the trial court committing error by not conducting a best interest test to determine custody or having the custody evaluator enter a recommendation without fully complying with Rule 4-903 of the Rules of Judicial Administration was preserved at trial by the trial court's admission that the court must examine certain factors to determine custody. (R@682, page 20 and 35).

While Appellant claims that this issue was preserved at the trial level at (R@682, page 20 and 35), such is not the case.

The Record at page 682 is merely the cover page for the transcript and, of course, has nothing to do with the claim that Appellant raised this issue with the Trial Court so that the Trial Court Judge could address the issue.

Additionally at page 20 of the Transcript, if this is what the Appellant is claiming, the Trial Judge stated the following:

"THE COURT: Well, if it relates to the factors I need to look at, you're welcome to put on the evidence. Other than that, I don't care. Okay?"

Additionally at page 35 of the Transcript, if this is what the Appellant is claiming, the Trial Judge stated the following:

> "THE COURT: The things that I need to look at is who has been the primary care giver; which parent is better at giving personal care or attention rather than

> surrogate care; whether there's a factor to determine whether or not siblings should be kept together or not. I guess we have a situation that's different, there's no other kids. I need to know the relative strength of the child's bond with both of the prospective custodians and you've told me that there appears to be a child preference slightly for his mother. I need to understand the stability of the parents. It's these kinds of factors that I need to hear your testimony on if you have that type of information.?"

Hence, the Trial Judge appropriately identified the criteria outlined in Rule 4-903 of the Rules of Judicial Administration.

However, there is nothing here to substantiate the claim by the Appellant that she somehow preserved her issue for appeal.

There is no basis whatsoever for the Appellant to claim that she somehow challenged before the Trial Court the issue she is now raising on appeal.

Appellee submits that without raising the issue before the Trial Court the Appellant can not now raise the issue for the first time on appeal.

To have preserved the issue now raised before this Court, the Appellant must show how she raised the issue before Judge Faust so that he could address and correct the same at the Trial Court level.

Merely showing this Court where the Trial Court **correctly stated the law** can not now form the basis to say, "Here is where we asked the Trial Court to address the issue we are now raising before the Court of Appeals."

Appellee submits that since the Appellant did not raise the issues contained in their Argument One, she has waived the same and she can not now raise it for the first time on appeal.

The Appellate Courts as a general rule do not allow parties to raise issues not raised at the Trial Court level, because the intent of this rule is to give the Trial Judge

"notice of the asserted error and . . . opportunity for correction at that time in the course of the proceedings." Note State vs. Dean, 2004 UT 63, 95 P.3d 276 (Utah, 2004).

Additionally, if the Appellant is claiming that the Court failed to address the provisions of 30-3-10 and following of the Utah Code Annotated, the same argument holds true.

The Trial Judge at page 35, expressly requested the Appellant to put on her evidence regarding the provisions of 30-3-10 Utah Code Annotated.

At page 35 is the following:

"THE COURT: And how about in 30-310? (sic)

MS. HUNTSMAN: We'll certainly ask her those and I'm sure she's more than –

THE COURT: Okay, let's go ahead. That's where we need to go."

Here the Trial Court Judge correctly stated the law and how the parties would need to address the provisions of 30-3-10 Utah Code Annotated.

However, nowhere on this page or anywhere else in the Transcript or the Record did the Appellant raise the issue before the Trial Court that she is now raising for the first time on appeal.

The policy behind the requirement that issues must be raised at the trial level is well settled. Trial Courts are best suited to consider all of the factors and elements that go into a custody determination. Trial Courts have all of the evidence regarding the issues and claims before them; while at the same time all of the collateral issues.

So for example, a trial judge may find that the child for various reasons would do marginally better with his Mother; however, Mother may have no stable place to reside.

The resolution of the property issues plays into the resolution of the custody issues.

The Appellate Courts are not set up to redo all that the Trial Judge does in a divorce proceeding.

In the case of Trubetzkoy vs. Trubetzkoy, 2009 UT App 77, 205 P.3d 891 (also cited by the Appellant) the Court held:

> Despite a careful review of the extensive debate about the form and content of the Findings and Conclusions, we find no indication that Wife alerted the trial court to the need to make additional findings or conclusions. Instead, Wife's arguments were limited to the position that the evidence did not support certain findings of fact and conclusions of law reached by the district court. Consequently, Wife may not challenge the adequacy of the findings of fact on appeal. See In re K.F., 209 UT 4, 622 Utah Adv. Rep 11, 201 P.3d 985 ("Judicial economy would be disserved if we permitted a challenge to the adequacy of the detail in the findings to be heard for the first time on appeal.") 438 Main St. vs. Easy Heat, Inc., 2004 UT 72, 99 P.3d 801 ("(I)n order to preserve an issue for appeal (,) the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." (alterations in original) (internal quotation makes omitted)). Therefore we limit our review to the issue of whether the trial court's findings of fact were supported by sufficient evidence. See K.F., 2009 UT 4, 201 P.3d 985; see also Utah R. Civ. P. 52(b) ("(T)he question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings...")

Appellate Courts only address claimed errors made at the Trial Court level, hence one is required to raise problems at the Trial Court level so that the Trial Judge, who is best suited to address the same for many reasons, can address the same in the context of the entire matter.

Here the Trial Judge was called upon to decide where the child would be best placed "in the best interest of the child".

That determination included where the child would stay when with his mother and where the child would stay when with his father. Hence, the Trial Judge had to factor which parent would be awarded the marital home

In awarding the marital home, the Trial Judge would have to determine the equity in the same and how to fairly divide the same.

In that analysis the Trial Judge would have to determine if the Mom can afford to keep the marital home with her income.

In that analysis the Trial Judge would have to determine how alimony would factor in.

In that determination the Trial Judge would have to determine the allocation of the marital debt, etc.

The relevant issues go on and on and on.

As a result, to raise issues for the first time on Appeal defeats the entire balancing required at the Trial Court level and would require the Appellant Court to do the balancing all over again.

Hence, for the Appellant to raise for the first time on Appeal, just one element of the big picture, causes the Appellant Court to completely redo the whole divorce.

The balancing that the Trial Courts do in attempting to put the parties in the best financial setting for future success is thwarted by taking even one small part of the picture and putting it on the other side of the balance.

For this reason, and many more, Appellants are required to raise their issues with the Trial Court so that they can all be factored into the total solution.

Appellant can not raise issues, on Appeal, that were not raised at the Trial Court level and therefore this claim must be dismissed out right.

COUNTER POINT II:

The Amended Findings of Fact and Amended Conclusions of Law as well as the Amended Decree of Divorce were prepared by Counsel for the Appellant, and so if the claim here on appeal is that they were deficient for any reason, Appellant can not create the problem and then be heard before the Court of Appeals on the very problem Appellant herself created.

In this action, Counsel for the Respondent prepared the Amended Findings of Fact, Amended Conclusions of Law and Amended Decree of Divorce. Note the Record at page 610 and following.

Appellant objected to the same and then after a series of post-trial motions and hearings, Appellant submitted Amended Findings of Fact and Amended Conclusions of Law and Amended Decree of Divorce which were signed by the Trial Court and are now the subject of this appeal.

As noted in the Record at page 610, Appellant's Counsel pressed the Court for a whole new set of Findings and Conclusions; hence it is the Appellant's own Counsel that prepared the same.

The abundant case law is clear, that one can not create the problem at the Trial Court level and then be heard on appeal on the very problem Appellant created. Utah Chapter of Sierra Club vs. Air Quality Board, 2009 UT 76, (Utah, 2009).

COUNTER POINT III:

Not only did the Trial Court Judge correctly state the law in reference to custody determinations as noted at pages 20 and 35 of the Transcript, the Trial Judge correctly applied the law as found in 30-3-10 of the Utah Code Annotated and also Rule 9-403 of the Rules of Judicial Administration.

At page 49 and following of the Transcript is the following testimony by the Child Custody Evaluator:

> "I'll talk about 4903.(sic) Cameron prefers at this point the present schedule which is a standard visitation schedule and has appreciated the flexibility his parents have shown and the cooperation his parents have shown when he wants to do something at church or something that interferes but Cameron's stated preference as per my conversation with his therapist yesterday was that he likes it the way it is and he doesn't want to increase overnights. Cameron's siblings are grown so there's no benefit of keeping siblings together because they're out of the house. Both parents provide access to the siblings and they don't denigrate the siblings to him or interfere in any way. Cameron is more attached and comfortable with this mother than his father because she was the primary care giver although he was comfortable and enjoyed his father's company and provided multiple examples of that.
>
> He was told about the homosexual pornography issue by his older brother and he was confused about this initially. His therapist has really helped him with that. It's just that Cameron wants everyone to know that it doesn't matter if his dad is gay or his mom is gay, he loves his parents, period. He also was able to articulate negative things about his mother, so there was no sense in terms of looking at attachment or alienation or coaching by the mother because he was able to criticize her roundly.
>
> In general interest in continuing previously predetermined arrangements where he's happy and well adjusted, Cameron is finally recovering from the divorce and separation and he, more than other adolescents has taken a very long time to do that. Psychologically he is an anxious child, there's been consistent data that he doesn't do well with change that he doesn't initiate. Although now, he does not show intense depression or anxiety, you know, that is debilitating he would like and should have some flexibility in his schedule and I recommend that he have the opportunity to experience his dad, not as a visitor, but as a person who will allow normal teenage happenings in the home, meaning, it's okay for your friends to come over if you're going to be here with me.

Factors relating to the character or status, moral character and emotional stability, the father is in no way a child molester and there's no concerns in that regard. Mother is in no way a person who is overtly trying to hurt anyone but her anxiety about uncertainty of the signals and sexuality in the marriage did this. I don't believe that she would ever try to at this point harm anyone in any way.

With regard to emotional stability, Mrs. Sellers is not in counseling. She has been able to take responsibility for the inappropriate way in which she spread the news of her husband's looking at pornography. I talked with her psychologist whose worked with her about dealing with, how to help herself not ruminate.

Duration and depth of desire? Both parents want custody and both parents were initially worried about the other parent's capacity. Personal versus surrogate care, mother has the ability to provide more personal care although this child is now 14 and one-half years old and so it's less of a pressing issue.

There were no concerns about drug abuse, excessive drinking or other causes with his parents, no involuntarily relinquishment of custody or the house. Both are strong and faithful in their LDS faith and both support very much Cameron's practicing in the LDS faith. There's no kinship issues.

Financial issues. The father did make more money than the mother and the mother would rely in part on alimony and child support. It's my understanding she's pursuing a master's degree in order to better her financial situation.

Evidence of abuse of the child or spouse. I found no evidence of child abuse or spousal abuse and so that's all I've got.

Q. All right. And –

THE COURT: Excuse me, I'm sorry. No impairment in either's parent ability?

THE WITNESS: No, sir.

THE COURT: Thank you."

Appellee submits that any claim that the Trial Court committed reversible error in failing to consider the factors outlined in 4-903 of the Rules of Judicial Administration is wholly without any merit whatsoever.

Additionally, Appellee submits that any claim that the Trial Court committed reversible error in failing to consider the factors outlined in 30-3-10 of the Utah Code Annotated is wholly without any merit whatsoever, as well.

At page 52 of the Transcript, the Child Custody Evaluator testified as follows:

Q. (BY MS. HUNTSMAN) The factors under 30-310 (sic) are first were there any issues or findings – what are your findings regarding past conduct, demonstrated moral standards of each of the parties?

A. I think that these parents are both struggling with issues that are- it's unfortunate to discuss in court regarding deeply held issues about sexuality. I don't consider them immoral in their behavior but only distressed at times and I believe that those things are not perhaps completely resolved and they'll have to resolve them in their own personal work. But in terms of moral character, I don't believe these people have poor morals.

Q. All right. The next one, financial guardian, which parent is more likely to act in the best interest of the child?

A. I believe that Mrs. Sellers is more open to suggestion and feedback about how to manage her relationship with her child than perhaps Mr. Sellers is, only as evidenced by the issue about how understanding that even though Cameron might not want to spend time with him, it doesn't mean that that comes from his mother or anybody else. It's just a natural teenage development. But in terms of – I think that both of them are devoted to him.

Q. Findings regarding the extent of bonding between the parent and the child, meaning the depth, quality and nature of the relationship?

A. Cameron is attached and bonded to both of his parents. He is more comfortable by a fair degree and more spontaneous with his mother than with his father.

Q. Do you feel the parents would be able to reach shared decisions in the child's best interest in this case?

A. Yes, I do.

Q. And are both capable of encouraging or what would be your findings regarding whether or not each parent is capable of encouraging, accepting a positive relationship between the child and the other parent?

A. They're both very adept at that. In fact, they're more adept that just about any parents I've seen in 180 custody evaluations despite their deep differences and pain. The therapist also said, they don't backstab and they've done the best they can to keep Cameron out of it and they should be commended.

Q. Finally, do you have – what would be your findings regarding whether both parents participated in raising the child before the divorce?

A. I think that the parties divided their duties in a traditional way so that Mr. Sellers' direct diapering, feeding, playing with was limited because of his deep commitment to making sure the family was financially secure. So in Cameron's young childhood, JoAnn was, Mrs. Sellers was obviously more participatory. At this juncture, however, I believe that both parents have the capacity, interest and willingness to equally participate in whatever his needs are from school, to church, to anything.

Q. We addressed the child's preference. Maturity of the parents and their willingness and ability to protect the child from conflict?

A. Excellent.

Q. Past and present ability of parents to cooperate with each other?

A. I think these parents have been able to, with regard to Cameron, have been able to adjust schedules, be flexible and as per their reports and my understanding, they've gone a good job.

MS. HUNTSMAN: I believe that is it.

THE COURT: And excuse me, and both parents work. So any care of the child would have to be when the parents aren't available would have to be?

THE WITNESS: My understanding is, Your Honor, that Mrs. Sellers' schedule ends when the school day ends and for the most part except for she may be attending some classes. So typically she's home after school.

THE COURT: Thank you.

THE WITNESS: Yes, sir.

Appellee submits that not only did the Trial Court correctly apply the law in reference to 30-3-10 of the Utah Code Annotated, it was through Appellant's Counsel that the same occurred.

Hence, the claim that the Court failed to consider the provisions of 30-3-10 and following of the Utah Code Annotated is without merit.

Appellee submits that in reference to 4-903 of the Rules of Judicial Administration and in reference to the provisions of 30-3-10 of the Utah Code Annotated, it was Appellant's own Counsel that presented to the Trial Court the very evidence that Appellant now claims was not presented to the Trial Court.

ARGUMENT TWO

DID THE TRIAL COURT ERROR BY ENTERING FINDINGS AND ORDERING THE PARTIES TO EXERCISE JOINT LEGAL CUSTODY OF THE PARTIES MINOR CHILD WITHOUT THE PARTIES SUBMITTING A PARENTING PLAN AND WITHOUT THE COURT DETERMINING THAT JOINT LEGAL CUSTODY WAS IN THE BEST INTERESTS OF THE MINOR CHILD?

At page 19 of the Blue Brief, Appellant submits the following argument:

> "In order for joint legal custody to be ordered by the trial court, several statutory provisions of the Utah Code must be complied with. These statutory directives are two-fold. First, the trial Court must have received a parenting plan from one or both of the parties. Second, the trial court must have specifically made a determination that joint legal custody was in the best interest of the minor child."

COUNTER POINT I:

Appellant never preserved this issue at the trial level.

At page 5 of the Blue Brief, Appellant states:

> "ISSUE PRESERVED AT TRIAL: The issue of the trial court committing error by not entering a parenting plan with its order that the parties exercise joint legal custody, was preserved at trial with the trial court's acceptance of the custody evaluator recommendation (R@682, page 36 and 37) and Petitioner's concerns and rejection of such.

A simple review of R@682, page 36 and 37 shows that the Appellant never raised any claimed defect before the Trial Court.

Page 682 of the Record is merely the cover page of the Transcript, and at page 36 and 37 of the Transcript there was no objection raised whatsoever to the "joint legal custody".

At the bottom of page 35, (in order to put the points raised there in context) and continuing through the end of page 37 is the following:

> MR. WALSH: This witness takes the view that there should be 20 days with mom, 10 days with dad; that there should be joint physical and joint legal custody and we'll stipulate to that arrangement. I think the parties are in agreement with that.
>
> THE COURT: All right.
>
> MR. WALSH: The hangup we're having here –
>
> THE COURT: Is the home.
>
> MR. WALSH: Is the home. Does this kid have to stay in this brick and mortar place or can he be in some other? Can he be in some duplex down the street and that's our hangup. So this is not a generic custody battle where we're saying, run it though the factors and run – and we argue about it all because we don't have an argument there. Very competent evaluation, we're pleased with the result. We think that's in his best interest. The only issue is does it have to be in this home and so I don't know that it's going to be helpful when you find that we're not asking for custody, to have spent the time going over each of those factors, is going to be helpful to you.
>
> MS. HUNTSMAN: And Your Honor, before we get there, my client has some concerns about the 20-day, 10-day, the two overnights and I think it's, I think those are going to have be addressed as part of this. So...
>
> THE COURT: Let me do this then. Doctor, can you give me your specific recommendations of how you would propose the visitation go between the parties. So you're proposing No. 1, joint legal and physical custody between the parties, right?
>
> THE WITNESS: I proposed joint legal arrangement.

THE COURT: Join (sic) legal custody by both parties.

THE WITNESS: Yes sir.

THE COURT: Okay.

THE WITNESS: I proposed expanded visitation with dad and I didn't make a hard and fast recommendation. I had an aspirational recommendation but –

THE COURT: Okay, well –

THE WITNESS: -- That has that the mid-week overnight every week and alternative weekends, Sunday to Monday, next morning. That's an aspirational recommendation because the child is quite anxious at about having that much time as per his therapist and –

THE COURT: I'm lost then, what's the 20-day, 10-day?

THE WITNESS: What that ends up –

THE COURT: Oh, you just add the totals for the month?

MR. WALSH: That's right.

THE COURT: Okay.

THE WITNESS: Yeah, that's how it works out.

MR. WALSH: For a 30-day period.

THE WITNESSES: That's about how it works out."

The Appellee has recited herein, the bottom of page 35, to put things in context, the entire page 36 and the entire page 37 of the Transcript and so this Court can see that there is no claim that there be any kind of written parenting plan.

Appellant did not object at all to anything regarding a parenting plan.

The best that can be said is that Ms. Huntsman had some concerns about the 20 day, 10 split.

But that does not rise to the level of pointing out any kind of problem before the Trial Court so that the Trial Court can address the same, and resolve the same, at the Trial level.

There was no claim there that, "We object, Your Honor, there should be a written parenting plan, if you are going to order joint legal custody here."

Appellee submits that this claim by the Appellant was never raised with the Trial Court at all, and by virtue of the same, Appellant can not raise it for the first time on Appeal, as she has waived the same.

In the case of Fairbanks vs. Fairbanks, 2010 UT App 31, (February 11, 2010) the Utah Court of Appeals held:

> Husband first argues that the trial court erred it is division of the marital estate. Specifically, he challenges (1) the trial Court's failure to acknowledge than he contributed his separate property to the purchase of the parties' homes notwithstanding the credit given to Wife for contributions of her separate property and (2) the trial court's chosen method used in the division of the parties' homes. "'It is axiomatic that, before a party may advance the issue on appeal, the record must clearly show that it was timely presented to the trial court *in a manner sufficient to obtain a ruling thereon.*'" Holmstrom vs. C.R. England, Inc., 2000 Ut App 239, 8 P.3d 281 (quoting Salt Lake County vs. Carlston, 776 P.2d 653 (Utah Ct. App. 1989)). We do not see that Husband sufficiently raised these issues below. Husband points us to no occasion where he requested the trial court to acknowledge that he made separate contributions to the purchase of the parties' homes or advanced his model for the equitable division of the homes. There is no mention of these issues at trial, and the exhibits to which Husband points as preserving the issues are far from self-explanatory and were not explained to the trial court in a way that raised the issues to the court's attention. "For an issue to be sufficiently raised even if indirectly, it must at least be raised to a level of the consciousness such that the trial judge can consider it." James vs. Preston, 746 P.2d 799, 802 (Utah Ct. App. 1987). Thus, these issues are "deemed waived, precluding this Court from considering their merits on appeal. "" Holmstrom, 2000 UT App. 239, (quoting Carlston, 776 P.2d at 655).

COUNTER POINT II:

As noted above, Appellant's Counsel prepared the paper work for the Court to sign in the Amended Findings of Fact and the Amended Conclusions of Law.

Appellant caused the exact problem she is now raising before the Appellate Court.

The Record shows at page 610, the Diana Huntsman prepared the final papers for the Court and if requisite paperwork was omitted, she omitted the same. (Note Sierra)

COUNTER POINT III:

A careful review of the Amended Findings of Fact shows that the Appellant and the Appellee do in fact have a written Parenting Plan controlling the issues regarding custody, decision making, parent time, etc.

At page 611 of the Record is paragraph #5 and following, of the said Amended Findings of Fact, which provides as follows:

> "#5. Each of the parties is a fit and proper parent to be awarded joint legal custody of the minor child, with the Petitioner being awarded primary physical custody. Parent time shall be divided as follows:
>
> A. The Court is adopting the 20/10 parent-time split proposed by the custody evaluator. However, the Respondent may certainly have additional time, if agreed upon.
>
> B. The Respondent shall have parent time with the minor child on every Tuesday, from the time that Cameron is out of school to and including Wednesday morning when the child goes to school.
>
> C. The Respondent shall have every other weekend beginning from the time that Cameron is out of school on Friday to and including Monday morning when the child goes to school.
>
> D. The parties shall be bound by 30-3-35 of the Utah Code Annotated regarding the additional times that the Respondent shall have parent-time with the minor child.
>
> 6. The parties shall be bound by the provisions of 30-3-33 of the Utah Code Annotated. However, the first option to provide child care will apply only if the other parent is unavailable for a period of 4 hours or more.

7. By virtue of the foregoing, the Respondent shall have a total of one hundred and twenty-two (122) over nights each year and the Petitioner shall have a total of two hundred and forty-three (243) over nights each year.

8. The parties are free to take the child out of state and out of the United States as long as each parent notifies the other parent in a timely fashion.

13. The parties shall talk together to reach a decision on all major issues. If they cannot agree, they shall talk to Cameron's therapist, and accept his input. If they are still unable to resolve the issue, the therapist shall have the final say."

Hence, the parties do in fact have a written Parenting Plan, which was fully endorsed and approved by the Court and in fact expressly incorporated officially in the said Amended Findings of Fact.

Again, Appellee acknowledges that Appellant has switched attorneys for purposes of appeal, still it was Counsel for the Petitioner/Appellant that created the exact issue raised now as a problem with the Appellate Court.

COUNTER POINT IV:

Not only did the parties have a written parenting plan as outlined above, the parties had actually applied the same and according to the Appellant herself, the same had worked well between the parties.

Beginning on page 22, of the Transcript of the proceedings on June 2, 2008, is the following dialogue in open Court:

"MR. WALSH: I find four hours to be a good rule now, Judge?

THE COURT: Fine.

MS. HUNTSMAN: That's fine.

MR. WALSH: Okay, four hours.

THE COURT: Four hours.

MS. HUNTSMAN: Their evaluator has suggested it shouldn't apply that but I don't care as long as there's a set time.

THE COURT: I think they should. The parents should have access to their children.

MS. HUNTSMAN: And the second one was that during the summer, there's going to be lot of time and I think you've addressed that. If you're saying first right of refusal, four hours, then the mom has the first right of refusal if dad is at work.

MR. WALSH: (Inaudible).

MS. SELLERS: So far we haven't had any problem with that.

THE COURT: Excellent, congratulations.

MS. HUNTSMAN: Very good."

Hence, not only did the parties have the requisite parenting plan, the parties had actually applied the same, and according to the Appellant herself, "we haven't had any problem with that."

Not only did the Appellant herself acknowledge the fact that there was a plan and it worked well, Appellant's Counsel admitted the same on page 24 of the Transcript of proceeding on June 2, 2008:

"MR. WALSH: What do you want it to say, Your Honor? They have a program where if they can't agree that they've got a method whereby they can reach agreement and have someone else decide.

MS. HUNTSMAN: Right, . . . "

In addition to all of the foregoing, the parties have entered into a stipulation and agreement on the record regarding critical parts of the subject parenting plan.

On page 2 of the Transcript of the hearing on June 2, 2008, the parties agreed in open Court and upon the record to the most critical part of the parenting plan, ie: Parent time.

"MS. HUNTSMAN: Then we have some that we're in disagreement on. So the next thing that we agree is to 2(b), specifically adding language that you awarded the 20/10 parent time split and indicated that the parties could agree to more if they chose to.

THE COURT: Okay."

Hence the claim on appeal that the Trial Court committed reversal error for failing to provide a parenting plan is wholly without any merit whatsoever.

If there is any problem with the same, Appellant created the problem and can not be heard on appeal challenging her own mistake. (Note Sierra above.)

Lastly, the Trial Court specifically found the joint legal custody arrangement to be in the child's best interest as reflected on page 253 of the Transcript where the Trial Court made its ruling as follows:

> "Custody of son, Cameron, the parties have agreed and the Court finds it in the best interest of the child that the parties are awarded joint legal custody of the minor child, Cameron, with primary physical custody to Ms. Sellers."

Therefore, Appellee respectfully submits that Argument II is wholly without merit and should be denied.

ARGUMENT THREE

DID THE TRIAL COURT COMMIT ERROR BY ENTERING AMENDED FINDINGS AND AN AMENDED DECREE THAT WERE INCONSISTENT AND CREATED CONFUSION REGARDING PARENT TIME OF THE MINOR CHILD'S OVERNIGHTS WITH EACH PARENT? DOES THIS ISSUE INTERTWINE WITH THE PROBLEM OF THERE BEING NO JOINT LEGAL CUSTODY PARENTING PLAN SUBMITTED BY THE PARTIES OR DEMANDED BY THE COURT?

Beginning on page 21 of the Blue Brief, Appellant claims that the Trial Court made a mistake in the parent time because it does not add up to twenty days for the Appellant and ten days for the Appellee.

On appeal, Appellant claims that since the specified parent time does not add up to the 20/10 split that there is ambiguity in the Amended Findings of Fact, Amended Conclusions of Law and the Amended Decree of Divorce, requiring reversal.

COUNTER POINT I:

Appellant did not preserve this issue for trial.

On page 6 of the Blue Brief, Appellant makes the following assertion:

> "ISSUE PRESERVED AT TRIAL: The issue of the trial court committing error by entering conflicting orders of parent time was preserved at trial when the court dealt with the recommendation of the custody evaluator and Petitioner rejected the recommendation (R@ 682, page 36 and 37)."

The verbatim record found at page 36 and 37 of the "Transcript" show that this issue was never raised at the time:

At the bottom of page 35, (in order to put the points raised there in context) and continuing through the end of page 37 is the following:

> MR. WALSH: This witness takes the view that there should be 20 days with mom, 10 days with dad; that there should be joint physical and joint legal custody and we'll stipulate to that arrangement. I think the parties are in agreement with that.
>
> THE COURT: All right.
>
> MR. WALSH: The hangup we're having here –
>
> THE COURT: Is the home.
>
> MR. WALSH: Is the home. Does this kid have to stay in this brick and mortar place or can he be in some other? Can he be in some duplex down the street and

that's our hangup. So this is not a generic custody battle where we're saying, run it though the factors and run – and we argue about it all because we don't have an argument there. Very competent evaluation, we're pleased with the result. We think that's in his best interest. The only issue is does it have to be in this home and so I don't know that it's going to be helpful when you find that we're not asking for custody, to have spent the time going over each of those factors, is going to be helpful to you.

MS. HUNTSMAN: And Your Honor, before we get there, my client has some concerns about the 20-day, 10-day, the two overnights and I think it's, I think those are going to have be addressed as part of this. So...

THE COURT: Let me do this then. Doctor, can you give me your specific recommendations of how you would propose the visitation go between the parties. So you're proposing No. 1, joint legal and physical custody between the parties, right?

THE WITNESS: I proposed joint legal arrangement.

THE COURT: Join (sic) legal custody by both parties.

THE WITNESS: Yes sir.

THE COURT: Okay.

THE WITNESS: I proposed expanded visitation with dad and I didn't make a hard and fast recommendation. I had an aspirational recommendation but –

THE COURT: Okay, well –

THE WITNESS: -- That has that the mid-week overnight every week and alternative weekends, Sunday to Monday, next morning. That's an aspirational recommendation because the child is quite anxious at about having that much time as per his therapist and –

THE COURT: I'm lost then, what's the 20-day, 10-day?

THE WITNESS: What that ends up –

THE COURT: Oh, you just add the totals for the month?

MR. WALSH: That's right.

THE COURT: Okay.

THE WITNESS: Yeah, that's how it works out.

MR. WALSH: For a 30-day period.

THE WITNESSES: That's about how it works out."

As noted above there is nothing at this location or elsewhere where the Appellant preserved this issue on appeal.

Hence, Appellant has not preserved this issue for appeal, and therefore precluded from attempting to get the issue addressed for the first time on appeal.

COUNTER POINT II:

Appellee agrees that there are problems with the actual math regarding parent time but absolutely does not agree that that is due to confusion in how it is written up.

Appellee will more fully address Appellee's claims in his Cross Appeal noted below.

It is absolutely clear in the documents which parent gets what overnights as outlined by the Court, but again Appellee has two problems with her claim:

(1) If there is an ambiguity in the documents, then such ambiguity would be construed against Appellant as the drafter of the document, and hence the matter would easily be resolved between the parties. Note Cherry vs. Utah State University, 966 P.2d 866, (Utah Ct. App. 1998); Ron Case Roofing & Asphalt Paving, Inc. vs. Blomquist, 773 P.2d 1382, (Utah, 1989) and Trolly Square Assoc. vs. Nielson, 886 P.3d 61, (Utah Ct. App. 1994) Each holding that an ambiguity will be construed against the drafter after extrinsic evidence is considered.

(2) If there is an ambiguity in the documents, then Appellant created the problem and can not challenged her own mistake on appeal.

This will be addressed as Counter Point III, below.

Appellee submits that the overnights, during the school year is very clear in the Amended Findings of Fact as found at page 610 of the Record:

> "#5. Each of the parties is a fit and proper parent to be awarded joint legal custody of the minor child, with the Petitioner being awarded primary physical custody. Parent time shall be divided as follows:
>
> A. The Court is adopting the 20/10 parent-time split proposed by the custody evaluator. However, the Respondent may certainly have additional time, if agreed upon.
>
> B. The Respondent shall have parent time with the minor child on every Tuesday, from the time that Cameron is out of school to and including Wednesday morning when the child goes to school.
>
> C. The Respondent shall have every other weekend beginning from the time that Cameron is out of school on Friday to and including Monday morning when the child goes to school.
>
> D. The parties shall be bound by 30-3-35 of the Utah Code Annotated regarding the additional times that the Respondent shall have parent-time with the minor child."

Hence, it is absolutely clear which parent would get which overnight.

Appellant can not argue that there is something unclear about which parent gets Tuesday over nights, nor can she argue that there is something unclear about which parent gets over nights on the Sunday evening where the weekend belongs to the Father.

Hence, the claim raised now by the Appellant that somehow the Amended Findings, Amended Conclusions and the Amended Decree of Divorce are unclear and therefore requiring reversal of the Trial Court is wholly without merit.

COUNTER POINT III:

If there is a problem with the clarity of the Amended Findings of Fact, Amended Conclusions of Law and the Amended Decree of Divorce, the Appellant created her own problem and can not raise the same as a basis for appeal. (Note Sierra above)

Appellee incorporates herein the more full discussion of this principle addressed above.

COUNTER POINT IV:

A careful reading of Argument Three is that the father actually has more overnights with the minor child than a strict twenty overnights with Mom and a strict ten overnights with Dad, each month.

The absurdity of Appellant's argument is that Appellant is claiming that the exactitude in the math should be more important to the Court than promoting the best interests of the minor child by focusing on the maximum parent time in the father.

As noted on page 253 of the Transcript, all the Trial Court did was adopt the agreement reached by the parties as found in the Court's ruling:

> "Custody of son, Cameron, the parties have agreed and the Court finds it in the best interest of the child that the parties are awarded joint legal custody of the minor child, Cameron, with primary physical custody to Ms. Sellers. The Court will adopt the recommendation proposed by the expert on the 20/10 split of the visitation. The parties are free to do a more aggressive schedule if they desire to do so and the Court so encourages that. The Court does fully understand that it is perhaps slightly more than the statutory guidelines and that the parties may not be able to get their son to agree but at least it gives them a tool or an encouragement for both of them to have him spend as much time with his father as has been recommended."

Appellee submits that there are two real clear messages in the Courts ruling and neither one of them center around limiting Father's parent time: (1) The Court intended to have the child "spend as much time with his father" as could be arranged and (2) the 20/10 split was intended to be a very general thing and frankly just a way for the parties to be able to share their time with their son. Mom would get approximately twice the amount of time with child as would Father.

Hence, to suggest to this Court that all of this is confusing as Father is getting a lot more time with the Child than is in standard parent time, so this Court must reverse and give Mom sole custody and Dad standard parent time.

As noted above the 20/10 split was evidence put on by the Appellant's Attorney calling Valerie Hale to the stand. She did not want to limit Dad's parent time in any way, but wanted the exact opposite extreme. Kind of like the Court at page 253, suggesting that "lets give Dad as much time as the child will allow."

Appellee respectfully submits that the determination by the Court for the very specific parent time, written up by Appellant's Counsel, is exactly what the Court intended and is based on the best interests of the minor child, and there is absolutely no basis for the Appellate Court to change anything about it.

There is no basis whatsoever to suggest that this Appellate Court must reverse with instructions to award Mom with sole custody and standard parent time in Dad.

ARGUMENT FOUR

DID THE TRIAL COURT COMMIT ERROR IN ITS DETERMINATION THAT NEITHER PARTY WAS AWARDED ALIMONY FROM THE OTHER, EITHER NOW OR IN THE FUTURE?

Appellee agrees that this issue was preserved by the Appellant at the Trial Court level.

Appellant claims, beginning on page 26 of the Appellant's Blue Brief, that the Trial Court committed reversible error by not awarding alimony now and forever barring alimony in the future.

At the close of evidence and argument of Counsel, the Court ruled on certain matters and then took other issues, including alimony under advisement.

Then on February 25, 2008, the Court issued a minute entry and addressed the alimony issue at page 440 of the Record, as follows:

> "2. The Court declines to take into the alimony determination the Petitioner's request to have the Respondent pay her money for a post-divorce savings investment or retirement account for her. The Court specifically finds the Petitioner's financial needs do not establish that she should be awarded alimony. The Petitioner has been awarded the marital home and it is free and clear of all debts and mortgages. Petitioner earns $4,031.82 per month. The Petitioner's car has no debt thereon and she has demonstrated her total monthly living expenses in the approximate $2,100 per month range, leaving her approximately $1,000 per month for discretionary spending and investment or retirement, as she so chooses. The Court specifically finds that the financial conditions and needs of the recipient spouse do not require alimony for the reasons set forth above. In addition, recipient's earning capacity and ability to produce income is more than adequate to maintain her in the lifestyle to which she is accustomed. In addition, in relatively a few months, the recipient will have earned a masters degree which will also increase her income. The Court finds that respondent would have the ability to pay some support. The Court has taken into consideration the length of the marriage, and the fact that the parties have both worked during the marriage."

COUNTER POINT I:

Appellant makes no claim that the Court somehow committed reversible error by not considering the three pronged test found in Jones vs. Jones. 700 P.2d 1072 (Utah, 1985).

Appellee submits that in determining alimony the most that the Trial Court can award in alimony is the demonstrated needs of the receiving spouse.

> Three factors have long been considered, and must always be considered, before awarding alimony: (1) the financial needs and condition of the recipient spouse; (2) the ability of the recipient spouse to provide a sufficient income for himself or herself; and (3) the ability of the payor spouse to provide support. See Davis vs. Davis, 749 P.2d 647 (Utah 1988) (citing Jones vs. Jones, 700 P.2d 1072 (Utah 1985) and Bakanoswki vs. Bankanowski 80 P.3d 153, 2003 UT App 357.
>
> If the trial court considers these factors in setting an award of alimony, we will not disturb it award absent a showing that such a serious inequity has resulted as to manifest a clear abuse of discretion." Haumont, 793 P.2d at 424.

The trial court concluded that Wife "has demonstrated a need for alimony in the amount of $1,000 per month, as the cost of equalize her standard of living to that of (Husband's)." As explained in Martinez vs. Martinez, 818 P.2d 538 (Utah 1991), (u)sually the need of the spouses are assessed in light of the standard of living they had during marriage." Id. At 542. Here, the trial court never determined the Wife's needs based upon the historical standard of living. Instead, the trial court engaged in an effort to simply equalize income. In attempting to equalize the parties income rather than going through the traditional needs analysis, the trial court abused its discretion. See Bingham vs. Bingham, 872 P.2d 1065, (Utah Ct. App. 1994) (hold that trial court "should not have awarded plaintiff more than her established needs required, regardless of the defendant's ability to pay this excess amount" and remanding "for a reassessment of the alimony award in accordance with the precept that the spouse's demonstrated need must, under Jones, constitute the maximum permissible alimony award").

Furthermore, Appellee makes no claim that the Court failed to consider the provisions of 30-3-5(8) of the Utah Code Annotated, which provides:

(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.

Appellee submits that the Appellant has not stated any legal basis for the Appellate Court to reverse the Trial Court.

Appellee submits that the Trial Court actually understated the enviable financial condition of the Appellant.

For example, the Appellant admitted on the stand at page 1, that she was getting a home with a stipulated value of $290,000.00 with no debt on the same.

That on page 108 of the Record Appellant submitted her sworn financial statement showing that she needs $2,687.00 per month to live on, which included some $215.00 per month for gifts and donations, $100.00 per month for entertainment, $520.00 for food for herself and minor son, (who would be with Dad ten days out of every month, minimum) and $119.00 for her water bill every month, etc.

At page 102 of the Transcsript she testified that she was making $48,381.00 per year and that her income would go up significantly when she would get her Masters Degree in the next few months.

Appellee submits that there is good reason why Appellant cited no legal basis for reversing the Trial Court's determination to not award Appellant with any alimony now or in the future, and the reason why that is so is because there is no legal basis to challenge the Trial Court's determination.

Appellant is actually set for life and can not deny the same either at the Trial Court level nor here at the Appellate Court level.

Appellee submits that there is no basis to reverse the determination made by the Trial Court.

ARGUMENT FIVE

DID THE TRIAL COURT COMMIT ERROR IN ITS DETERMINATIONS THAT JOANN WAS TO RECEIVE NO ALIMONY FROM GLEN BECAUSE SHE HAD NO NEED AND BECAUSE GLEN'S ABILITY TO PAY HAD NOT BEEN CALCULATED?

The majority of the Appellant's argument centers around her criticism of the Amended Findings of Fact.

For example on page 28 of the blue brief, she states:

> "Many of the findings of the Court's amended findings of fact are really conclusions of law and JoAnn contends that the trial court was deficient in making adequate findings to support its conclusions."

COUNTER POINT I:

The Amended Findings of Fact and the Amended Conclusions of Law were created by Appellant's own Counsel.

A simple review of the record beginning at page 610, shows that Diana J. Huntsman prepared the same.

Appellant can not create a problem and then sustain an appeal based upon her own conduct. (Note Sierra above)

COUNTER POINT II:

There is no need to consider the ability of Mr. Sellers to pay alimony to Mrs. Sellers, if there is no need for any contribution from Mr. Sellers.

At page 440 of the Record is the Minute Entry by the Trial Court regarding alimony:

> "The Court specifically finds the Petitioner's financial needs do not establish that she should be awarded alimony. The Petitioner has been awarded the marital home and it is free and clear of all debts and mortgages. Petitioner earns $4,031.82 per month. The Petitioner's car has no debt thereon and she has demonstrated her total monthly living expenses in the approximate $2,100 per month range, leaving her approximately $1,000 per month for discretionary spending and investment or retirement, as she so chooses. The Court specifically finds that the financial conditions and the needs of the recipient spouse do not require alimony for reasons set forth above. In addition, recipient's earning capacity and ability to produce income is more than adequate to maintain her in the lifestyle to which she is accustomed. In addition, in relatively a few months, the recipient will have earned a masters degree which will also increase her income. The Court finds that respondent would have the ability to pay some support. The Court has taken into consideration the length of the marriage, and the facts that the parties have both worked during the marriage."

The Appellee submits that rosy picture described by the Court is in fact an understatement for the following reasons:

At page 194 and following in the Transcript Appellant admitted that she would be the better parent for custody purposes because she can be home in the afternoon when the minor would be out of school. Hence, she is only required to work for part of the day.

Furthermore, not only does the Appellant work just part of the day, she only works part of the year.

At page 207 and elsewhere in the record that she admitted that she gets the summer time off.

At page 102 of the Transcript she testified that she is making $48,381.00 per month and that that figure would go to $56,000 when she gets her Masters but that that figure was for teaching. (Note transcript at page 190)

However, she established at page 193 that the Masters Degree could mean even more to her if she chose not to teach but be in administration.

In addition her retirement is already vested and worth over a third of a million dollars.

At page 205 of the Transcript is the following:

Q. (BY MR. WALSH) In summary you'll see the figure is $780,000, whatever figure it would be and under the theory here, you can have half of that, whatever he wouldn't have done premarital, correct? You'd be entitled to half?

A. Yes.

Q. So somewhere around $700,000 approximate divided between the two of you and so you're going to have approximately $350,000 in retirement program already vested, already paid for, 100 percent yours, right.

A. I think so.

In addition to the $350,000.00 plus, that the Appellant would get as part of the division of the Appellee's retirement account Appellant would get half of her own 401(k) which had a total value of $9,761.47; half of her own pension which had a total value of $55,970; Appellant would get half of the Merrill Lynch account which has a total value

of $30,559.35 and the Appellant would get half of Ameriprise Account worth $8,856.72. (Note Transcript at page 120 and following).

Appellee respectfully submits that the claims by the Appellant are just "pure greed", as the Courts are generally overwhelmed with parties that are getting divorced because of extreme financial problems.

The District Courts routinely have to find a way for parties to maintain two separate households post-divorce, on very limited income which pre-divorce, was unable to sustain even one.

Here the Appellant has a house worth $290,000 which is free and clear (Transcript at page 1), which is fully furnished to the tune of as much as $15,000 worth of furniture, which is also paid off, (Transcript at page 229 and following), a late make car fully paid for, income at about $56,000 per year with working part of the day and with full summers off, retirement of $350,000 plus in addition to all of the other pension and other savings programs outlined above (not including additional retirement that she was generating on her own) and with monthly expenses of only $2,100.00.

Yet on top of this Appellant claims that she is entitled to alimony so she can invest the same for more money in the bank waiting for her to retire.

The provisions of 30-3-5 of the Utah Code Annotated require the Trial Court to consider the following:

> (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.

Here the Trial Court appropriately denied alimony as should the Appellate Court.

ARGUMENT SIX

DID THE TRIAL COURT COMMIT ERROR BY DECLING TO TAKE INTO ACCOUNT IN ITS ALIMONY DETERMINATION JOANN'S REQUEST TO HAVE GLEN PAY POST-DIVORCE SAVINGS AND/OR RETIREMENT MONIES TO HER.

At page 34, Appellant argues:

> "Therefore, the trial court erred not only in its determination that no alimony should be awarded but also in its determination that the parties' post-divorce savings and retirement income should have not been allowed to be calculated as part of Petitioner's need for alimony."

At page 440 of the Record, the Trial Court Judge wrote in his Minute Entry as follows:

> "The Court declines to take into the alimony determination the Petitioner's request to have the Respondent pay her money for a post-divorce savings investment or retirement account for her. The Court specifically finds the Petitioner's financial needs do not establish that she should be awarded alimony. The Petitioner has been awarded the marital home and it is free and clear of all debts and mortgages. Petitioner earns $4,031.82 per month. The Petitioner's car has no debt thereon and she has demonstrated her total monthly living expenses in the approximate $2,100 per month range, leaving her approximately $1,000 per month for discretionary spending and investment or retirement, as she so chooses. The Court specifically finds that the financial conditions and the needs of the recipient spouse do not require alimony for reasons set forth above. In addition, recipient's earning capacity and ability to produce income is more than adequate to maintain her in the lifestyle to which she is accustomed. In addition, in relatively a few months, the recipient will have earned a masters degree which will also increase her income. The Court finds that respondent would have the ability to pay some support. The Court has taken into consideration the length of the marriage, and the facts that the parties have both worked during the marriage."

Appellee submits that what is most troubling about this argument that the savings accounts that the parties had should be divided is that Appellant unilaterially divided the same at the time of separation, and then wanted the District Court and now this Court to **re-divide** what Appellee saved from time of separation to time of divorce.

Beginning at page 185 of the Transcript, on Cross Examination, Appellant stated the following:

Q. (BY MR. WALSH) You show the America First account on Page 3 of this financial declaration and you're telling the Court when you swear that it's true and that it was already divided, right?

A. Yeah, I divided what was in the American (sic) First account.

Q. And you got $10,000.

A. Well, there was two accounts.

Q. Let's stay with just the one the one we've got, the $10,000.

A. That $10,000 didn't all come out of the America First account.

Q. Were there two America First Accounts?

A. No.

THE COURT: Let's just stay on the America First account and then we can move to other accounts.

Q. (BY MR. WALSH) How much did you get out of the America First Account?

A. I don't know because I'd have to look at my records. If you would allow me to tell you how I did it then you could understand.

Q. All I want to know did you already divide it then and take your half then? Is that what happened?

A. Yes.

Q. But now you make a claim on whatever he's been able to save since then, isn't that where we are today?

A. A claim on what he has saved...

Q. In the America First account, right?

A. Umm –

MR. WALSH: So stipulate, counsel?

MS. HUNTSMAN: So stipulate. We subtracted out the amount that they separated, that they split.

MR. WALSH: Deseret First, you stipulate to that, counsel?

MS. HUTSMAN: We subtracted out the amount that they each received and the rest should be split, yes.

THE COURT: So what I understand is they are making a claim for what was put into the account after it was already divided once between the parties.

MS. HUNTSMAN: Correct.

Appellee submits that part of the reasoning by the Court in declining to award alimony and attorneys fees is found at page 441 in the Record where the Court addressed both:

> "Both parties are ordered to pay their own attorney's fees and costs. The Court declines to award attorney's fees on the basis that there is no evidence of a financial need on the part of the Petitioner. In addition, it appears that much of the litigation that has occurred has been asserted by the Petitioner against Respondent were false allegations regarding child abuse. In addition, the Court has determined and was determined by the experts this claim of abuse to be completely groundless and without any foundation whatsoever."

Appellee submits that part of the analysis included the idea that while JoAnn Sellers was pointing her finger at Mr. Sellers and all of his faults and imperfections, she herself "admitted to having intense romantic feelings for another female." Note Transcript at page 43.

In fact, JoAnn Sellers homosexual problems caused the other woman to be either fired or transferred to another school, due to the advances that JoAnn Sellers were making toward her homosexual partner.

At page 70 of the Transcript, Dr. Valerie Hale, testified about this homosexual relationship of JoAnn Sellers as follows:

Q. Did anybody lose their job over her relationship?

A. I'm not aware if there was a job loss or if people were transferred to different schools but I don't get a sense anyone was fired.

The reason why the homosexual relationship of JoAnn Sellers was so relevant to the Court is that JoAnn Sellers was trying to advance her alimony claim by asserting that Glen Sellers was at fault by causing the divorce to come to a head.

Fault is a factor under 30-3-5 of the Utah Code Annotated and JoAnn Sellers was attempting to get the Trial Court to rule that Glen Sellers was to be blamed for the divorce, thereby advancing a basis to award JoAnn Sellers with alimony.

After all of the dust settled, the Court concluded in reference to the alleged fault of Glen Sellers as was reflected in the final minute entry which stated, ". . . the Court has determined and was determined by the experts this claim of abuse to be completely groundless and without any foundation whatsoever."

Hence, the Trial Court determined that JoAnn Sellers had caused the Divorce to cost so much, on completely groundless accusations and therefore the Court was not going to require the Appellee to pay even a dime of her attorneys fees.

CONCLUSION

Appellee respectfully submits that the Appellant's claims are without merit and not asserted in good faith.

Many of the claims are claims regarding Appellant's own Counsel failing to prepare appropriate findings. Many of the claims were not preserved at the Trial Court level. Claims regarding alimony, etc., are particularly baseless as there is no showing where there was any need whatsoever and without need for any alimony such is dispositive of the whole analysis.

Appellee respectfully requests that the claims of the Appellant all be denied and that this Court remand the matter to the District Court to determine an appropriate attorneys fee to be paid by the Appellant to the Appellee.

CROSS APPEAL

ARGUMENT ONE

THE TRIAL COURT MISCALCULATED CHILD SUPPORT

In this action the Trial Court determined child support at page 623 of the Record.

The Amended Decree of Divorce provides in paragraph #7 as follows:

"7. The Respondent shall pay to the Petitioner child support in the amount of $729.26 per month."

At page 578 of the Record, the Appellee/Cross Appellant raised this exact issue with the Trial Court, wherein he raised the following objections to the Findings of Fact and referencing each Finding that Respondent objected as follows:

> #7. The Respondent has the child 152 over nights as reflected in Exhibit A attached hereto.
>
> #9. The Petitioner now has earnings of $58,866.96 per year due to a pay increase.
>
> #11. The child support does not contemplate the overnights the Respondent has with the minor child as reflected in Exhibit A attached hereto, and child support should be $485.56 as shown on the Work Sheet attached hereto as Exhibit B.

Respondent also objected to the following paragraphs of the Decree of Divorce, found at page 578 of the Record:

> #4. The Respondent has the child 152 over nights as reflected in Exhibit A attached hereto.
>
> #7. The child support should be $485.56, when the overnights are factored in as reflected on Exhibit A and Exhibit B attached.

The Trial Court determined child support at page 253 of the Transcript as follows:

"The Court finds that the petitioner has an income of $4,032. gross and that the respondent's income is $7,920 gross resulting in a child support obligation total between both parties of $1,157; thus, based upon a credit for the 20/10 split as outlined in the new schedules found under Plaintiff's Exhibit 5, the petitioner's portion of her obligation is $393.38 per month and the respondent's portion is $729.26 after giving credits as outlined on the worksheet."

Appellee/Cross Appellant submits that child support should have been determined at $485.56.

Appellee/Cross Appellant submits that the easiest way to establish the miscalculation is in the determination of the overnights that the Appellee/Cross Appellant would have in a given year.

The following Findings of Fact, establish the amount of overnights as follows:

5. B. The Respondent shall have parent time with the minor child on every Tuesday, from the time that Cameron is out of school to and including Wednesday morning when the child goes to school.

5. C. The Respondent shall have every other weekend beginning from the time that Cameron is out of school on Friday to and including Monday morning when the child goes to school.

5. D. The parties shall be bound by 30-3-35 of the Utah Code Annotated regarding the additional times that the Respondent shall have parent-time with the minor child.

6. The parties shall be bound by the provisions of 30-3-33 of the Utah Code Annotated. However, the first option to provide child care will apply only if the other parent is unavailable for a period of 4 hours or more.

7. By virtue of the foregoing, the Respondent shall have a total of one hundred and twenty-two (122) over nights each year and the Petitioner shall have a total of two hundred and forty-three (243) over nights each year.

As a result of the foregoing, Appellee/Cross Appellant would have a total of the following overnights during the school year (Please note that the Finding specifically references "out of school" in the subject Findings:

5. B. – September through May – Every Tuesday Evening - Total - 39

5. C - September through May – Every other weekend Friday Evening, Saturday Evening and Sunday Evening – Total – 63

5.D. – Holidays and Summertime as defined in 30-3-35 – Total -61 based upon the following criteria:

(f) In years ending in an odd number, the noncustodial parent is entitled to the following holidays:

(i) child's birthday on the day before or after the actual birthdate beginning at 3 p.m. until 9 p.m.; at the discretion of the noncustodial parent, he may take other siblings along for the birthday;

(ii) Martin Luther King, Jr. beginning 6 p.m. on Friday until Monday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(iii) spring break beginning at 6 p.m. on the day school lets out for the holiday until 7 p.m. on the Sunday before school resumes;

(iv) July 4 beginning 6 p.m. the day before the holiday until 11 p.m. or no later than 6 p.m. on the day following the holiday, at the option of the parent exercising the holiday;

(v) Labor Day beginning 6 p.m. on Friday until Monday at 7 p.m., unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(vi) the fall school break, if applicable, commonly known as U.E.A. weekend beginning at 6 p.m. on Wednesday until Sunday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(vii) Veteran's Day holiday beginning 6 p.m. the day before the holiday until 7 p.m. on the holiday; and

(viii) the first portion of the Christmas school vacation as defined in Subsection **30-3-32**(3)(b) including Christmas Eve and Christmas Day until 1 p.m. on the day halfway through the holiday, if there are an odd number of days for the holiday period, or until 7 p.m. if there are an even number of days for the holiday period, so long as the entire holiday is equally divided.

(g) In years ending in an even number, the noncustodial parent is entitled to the following holidays:

(i) child's birthday on actual birthdate beginning at 3 p.m. until 9 p.m.; at the discretion of the noncustodial parent, he may take other siblings along for the birthday;

(ii) President's Day beginning at 6 p.m. on Friday until 7 p.m. on Monday unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(iii) Memorial Day beginning at 6 p.m. on Friday until Monday at 7 p.m., unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(iv) July 24 beginning at 6 p.m. on the day before the holiday until 11 p.m. or no later than 6 p.m. on the day following the holiday, at the option of the parent exercising the holiday;

(v) Columbus Day beginning at 6 p.m. the day before the holiday until 7 p.m. on the holiday;

(vi) Halloween on October 31 or the day Halloween is traditionally celebrated in the local community from after school until 9 p.m. if on a school day, or from 4 p.m. until 9 p.m.;

(vii) Thanksgiving holiday beginning Wednesday at 7 p.m. until Sunday at 7 p.m.; and

(viii) the second portion of the Christmas school vacation as defined in Subsection **30-3-32**(3)(b), beginning 1 p.m. on the day halfway through the holiday, if there are an odd number of days for the holiday period, or at 7 p.m. if there are an even number of days for the holiday period, so long as the entire Christmas holiday is equally divided.

(h) The custodial parent is entitled to the odd year holidays in even years and the even year holidays in odd years.

(i) Father's Day shall be spent with the natural or adoptive father every year beginning at 9 a.m. until 7 p.m. on the holiday.

(j) Mother's Day shall be spent with the natural or adoptive mother every year beginning at 9 a.m. until 7 p.m. on the holiday.

(k) Extended parent-time with the noncustodial parent may be:

(i) up to four weeks consecutive at the option of the noncustodial parent, including weekends normally exercised by the noncustodial parent, but not holidays;

(ii) two weeks shall be uninterrupted time for the noncustodial parent; and

(iii) the remaining two weeks shall be subject to parent-time for the custodial parent for weekday parent-time but not weekends, except for a holiday to be exercised by the other parent.

(l) The custodial parent shall have an identical two-week period of uninterrupted time during the children's summer vacation from school for purposes of vacation.

Hence, Appellee/Cross Appellant would be entitled to a total of 163 overnights in a given year.

Finding of Fact #7, shows the miscalculation made by the Trial Court:

"By virtue of the foregoing, the Respondent shall have a total of one hundred and twenty-two (122) over nights each year and the Petitioner shall have a total of two hundred and forty-three (243) over nights each year."

As shown above the ratio would be 163 overnights for the Appellee/Cross Appellant and 202 overnights for the Appellant.

Appellee/Cross Appellant respectfully submits that by virtue of the foregoing child support should have been established at $485.56

ARGUMENT TWO

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO FACTOR TAX CONSEQUENCES IN THE BALANCING OF THE EQUITIES

As shown on page 258 of the Transcript, the Trial Court intended to divide the equity in the home and then balance the Appellee's interest in the home against the retirement accounts, thereby granting to the Appellant all of the parties interest in the marital home and granting to the Appellee a corresponding amount in the retirement programs.

At page 258 of the transcript is the following:

> "The Court is going to value the house at $290,000.00 based upon what the appraisals were. So $290,000 divided by two will give each party $145,000 equity into the home. The first thing – so what we're going to do, Mr. Walsh, if it's okay, put $145,000 for your client's equity interest in the home and then we're going to start subtracting and adding from that figure which is half, okay? Does that make sense?"

Appellee challenged this approach with the Trial Court at page 14 and following of the Transcript of the hearing on June 2, 2008:

> MR. WALSH: Appreciate your patience with us, Judge. It's our belief, Your Honor, at least we hope that you'll see it this way, that you intended that there be a factor in the analysis of taking money out of the 401K and the penalties and the other things that are associated with that event versus having 100 per cent equity in the home in pure cash as we laid out in our memorandum, he's in a 28 percent tax liability on the 401K. He wanted – the testimony before Your Honor is he wanted to get his own home and so now to do this with the retirement of the 401K, this is going to have a 28 per cent federal tax consequence.
>
> THE COURT: Back up. Why is the 290 going to have that – that's the home value not the 401K, right.
>
> MR. WALSH: What we did, Judge, is we –

THE COURT: Yeah (inaudible).

MR. WALSH: -- she can have the whole home now, that's your ruling.

THE COURT: Right.

MR. WALSH: She gets the house and we correspondingly give him his value in the 401K.

THE COURT: That's right.

MR. WALSH: So if he takes his value out of the 401K, he's got a 28 per cent tax liability to do that.

THE COURT: I'm with you.

MR. WALSH: Cause he wants to have a house now because he wants to have these times with his boy. He's only got another four years approximately to be with his son. He wants to have a stable environment for his boy.

THE COURT: I'm with you.

MR. WALSH: He also has a 10 percent –

THE COURT: Penalty.

MR. WALSH: -- on the state level. So he's there now at 38 percent for the taking it out at this particular point. So it was our intent, Your Honor, it was out (sic) understanding – it's one thing over here to say we're not going to give you return on your investment. The house I would say three or four times the value from this event to this event and say we're going to give you zero here. But when you go the other way around, he's got a 38 percent detriment over here.

Apellee/Cross Appellant submits that it was an abuse of discretion for the trial Court judge to overlook the tax consequences in the determination of the equities.

This argument is fortified in the analysis by the Trial Court in dividing the equity in the home.

At page 248 and following the Trial Court gave the Petitioner two choices in either keeping the home or waiting until Cameron turn eighteen and then selling the home.

Please note in the transcript the reference by the Court to the tax consequences in selling the home:

> THE COURT: Two choices. Considering giving her the home and adjusting out the respondent's equity in the home by awarding him more in the retirement accounts. So if she wants the home free and clear of any right, claim, title or interest to him and the right and the equity and the value that he has in the home gets shifted over into his column in the retirement/savings accounts. That's Option 1. That way, nobody is required to finance, she's not required to go out and have additional expenses for living either in an apartment or to refinance the mortgage. That's a choice.
>
> The other option is to leave the home as is until Cameron is 18 at which point in time the parties will sell the home and split the equity as I describe and determine **with each party paying one-half of the taxes for the real property** and each party parting (sic) one half of the insurance on the home because you could consider it an investment for either party during the four years until the child reaches age 18 at which time they split it. The investment may go up, it may go down. So if they're going to walk away with half the proceeds, **they should carry both half the expense to pay the tax on it** or and/or carry the insurance to protest the asset. All other expense for the maintenance, care and upgrade of the home would be born by your client during those four years. Give me your thoughts of those. (Emphasis added)

Hence, the Trial Court was abundantly fair is splitting the tax consequences in the division of the equity regarding the marital home.

Appellee/Cross Appellant respectfully submits that it was an abuse of discretion for the Trial Court to refuse to factor the tax consequences on the quid pro quo for the equity in the marital home, ie: $150,000 offset in the retirement.

Appellee/Cross Appellant would have a 38 per cent tax on $150,000.00, which would be $57,000.00.

In this action, the Appellant made a claim for taxes she paid on the marital residence during the time that she lived in the marital home after the Respondent left.

This amount was around $4,500.00 approximately.

The Trial Court, in an abundance of fairness and equity, required that each side bear half of the property taxes on the marital home while Appellant **used** the same.

At page 259 of the Transcript is the following:

> THE COURT: First thing we're going to do is subtract out of the defendant's equity $2,284.45 for real estate taxes. That's half of the real estate taxes that have been covered on the property in those years. According to my calculations, that gives him $142,715.35.

Appellee/Cross Appellant submits that the very first thing the Trial Court did in dividing the equities was requiring the Respondent to pay half of the taxes incurred while the Appellant alone occupied the marital home.

Appellee/Cross Appellant submits that it would have been much more fair to require the Petitioner to pay all of the taxes on the marital home that she alone occupied.

Respondent had to pay rent for a substitute place to stay.

Appellant occupied the home during that time frame and should have been required to pay for what she used, just like he had to pay for what he used.

Notwithstanding, the Trial Court made each party pay half of the real property taxes which amounted to a mere $4,568.90.

In sharp contrast the Appellee/Cross Appellant was required to pay $57,000 for taxes for his equity on property that he had not used.

The Trial Court considered the rent, etc. under Option one above as no small matter, when the Court stated, on page 248 of the Transcript:

> "Option 1. That way, nobody is required to finance, she's not required to go out and have additional expenses for living either in an apartment or to refinance the mortgage."

Cross Appellant acknowledges that the Trial Court has broad discretion in the division the marital estate and that the Appellate Courts will not disturb the Trial Courts'

determination absent a finding of an abuse of that discretion. Note Burnham vs. Burnham, 716 P.2d 781 (Utah, 1986).

Here the Trial Court balanced the equities and then granted to the Wife a $2,284.45 off set against the Appellee's interest in the marital home, for taxes that accrued during the time that the parties were separated, when she alone occupied the home.

This is not a case, where the court factored in the taxes in the original division of the equities, rather this is a matter where the Court balanced the equities first and then refused to grant any kind of offset to the Husband for the taxes he would suffer.

It is important to note on appeal that the $57,000.00 tax consequence suffered by the Cross Appellant has never been challenged.

That $57,000.00 loss sustained by the Cross Appellant is not disputed by the Cross Appellee.

The unfairness of this result is best seen when applied to actual parties, as $57,000 may not be a big dial to some folks.

However, here the Husband's $57,000.00 loss is approximately an entire year's salary of the Respondent. That would be gross earnings for the entire year.

This clearly was a manifest injustice to the Cross Appellant.

Cross Appellant submits that typically the Trial Court will take all of the factors into consideration and then balance the equities as best they can.

Here, the analysis is different, the Trial Court divided the equities and then granted to the Wife a $2,284.45 concession on the property tax generated on the marital

home, but then refused to grant to the Cross Appellant any kind of consideration or offset for the undisputed $57,000.00 he had to sustain.

Appellee/Cross Appellant respectfully submits that it was a clear abuse of discretion by the Trial Court to refuse to factor the tax consequences in the division of the equities, thereby requiring the Cross Appellant to pay all $57,000.00 of the tax consequence he was facing, while at the same time granting a concession to the Cross Appellee for the $4,568.90 tax consequence she was facing.

CONCLUSION

Cross Appellant submits that it was reversible error to not determine child support to be $485.56.

Additionally it was manifestly unfair to require the Husband to pay all of the undisputed $57,000.00 while at the same time requiring the he pay half of the property taxes of $4,568.90.

RELIEF SOUGHT

Appellee/Cross Appellant requests that the Appellate Court sustain the Trial Court's determination regarding Appellant's claims, but reverse and remand to the Trial Court for a correct determination of child support and for an equitable division of the $57,000.00 tax consequence as well as for a determination of the amount of an award of Attorneys Fees for Appellee on appeal.

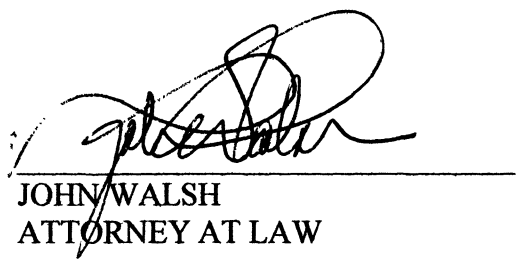
Dated this 10th day of March, 2010.

JOHN WALSH
ATTORNEY FOR APPELLEE/
CROSS APPELLANT

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two (2) true and correct copies of the APPELLEE/CROSS APPELLANTS BRIEF, to the Appellant by mailing the same in the United States Mails, postage fully prepaid addressed to DAVID J. FRIEL, ATTORNEY AT LAW, RIVER PARK EXECUTIVE SUITES, 10808 SOUTH RIVER FRONT PARKWAY, SUITE #310, SOUTH JORDAN, UTAH, 84095.

Dated this 11th day of March, 2010.



JOHN WALSH
ATTORNEY AT LAW

ADDENDUM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOANN SELLERS,	:	**MINUTE ENTRY**
Petitioner,	:	**CASE NO. 054902424**
vs.	:	
GLEN RAY SELLERS,	:	
Respondent.	:	

This matter came on for hearing on February 20, 2008. After hearing the evidence at trial and rendering a partial decision from the bench, the Court reserved and took under advisement four issues: (1) Petitioner's debt of approximately $18,000; (2) the potential division of any accumulated savings by Respondent during the three years of separation of the parties; (3) alimony; and (4) attorney's fees. The Court hereby rules as follows.

1 The Petitioner is required to pay all debt she accumulated during the three years of separation from the Respondent, except for those debts which can be substantiated as relating to repairs, maintenance or upgrade of the marital home, Respondent shall pay and reimburse Petitioner one-half of those documented home expenses.

Respondent is awarded all the savings he accumulated since the date of the parties' separation.

2 The Court declines to take into the alimony determination the Petitioner's request to have the Respondent pay her money for a post-divorce savings investment or retirement account for her. The Court specifically finds the Petitioner's financial needs do not establish that she should be awarded alimony. The Petitioner has been awarded the marital home and it is free and clear of all debts and mortgages. Petitioner earns $4,031.82 per month. The Petitioner's car has no debt thereon and she has demonstrated her total monthly living expenses in the approximate $2,100 per month range, leaving her approximately $1,000 per month for discretionary spending and investment or retirement, as she so chooses. The Court specifically finds that the financial conditions and the needs of the recipient spouse do not require alimony for the reasons set forth above. In addition, recipient's earning capacity and ability to produce income is more than adequate to maintain her in the lifestyle to which she is accustomed. In addition, in relatively a few months, the recipient will have earned a masters degree which will also increase her income. The Court finds that respondent would have the ability to pay some support. The Court has taken into consideration the

length of the marriage, and the fact that the parties have both worked during the marriage.

3 Both parties are ordered to pay their own attorney's fees and costs. The Court declines to award attorney's fees on the basis that there is no evidence of a financial need on the part of the Petitioner. In addition, it appears that much of the litigation that has occurred has been asserted by the Petitioner against Respondent were false allegations regarding child abuse. In addition, the Court has determined and was determined by the experts this claim of abuse to be completely groundless and without any foundation whatsoever. counsel for Respondent shall prepare the findings, conclusions + order. RA

Dated this 25th day of February, 2008.

ROBERT P. FAUST
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 26 day of February, 2008:

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Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE CITY, STATE OF UTAH

JOANN SELLERS, Petitioner, vs. GLEN RAY SELLERS, Respondent	Amended **FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No. 054902424 Honorable Judge **ROBERT FAUST**

The above entitled matter came on regularly for trial before the Honorable Robert Faust, District Court Judge, on Wednesday, February 20, 2008, at the hour of 8:30 A.M.. The Petitioner, JoAnn Sellers, appeared and was represented by Diana J. Huntsman, Attorney at Law. The Respondent, Glen Ray Sellers, appeared and was represented by John Walsh, Attorney at Law. The Court heard a partial Stipulation, entered into by the parties, and approved the same. The Court then heard testimony and considered exhibits and arguments, and based thereon issued a ruling.

Subsequently, an objection was filed regarding certain issues and a subsequent hearing

was held by the Court on June 2, 2008. At that time, the Petitioner, JoAnn Sellers, appeared and was represented by Diana J. Huntsman, Attorney at Law. The Respondent was not present, but was represented by John Walsh, Attorney at Law. The Court received a partial Stipulation regarding the resolution of certain objections, and approved the same. The Court then heard the argument of counsel regarding the remaining objections and issued a ruling thereon.

BASED UPON the foregoing, the Court makes and enters the following:

FINDINGS OF FACT

1. Each of the parties is a resident of Salt Lake County, State of Utah and each has been a resident for a period of at least three months immediately prior to the filing of this action.

2. The parties were married on March 20, 1981 in Salt Lake County, State of Utah.

3. During the course of the marriage, irreconcilable differences have arisen, making the continuation of the marriage an impossibility. The parties have attempted significant marital counseling, however, they are unable to resolve their differences and by virtue of the same the Petitioner is entitled to a Decree of Divorce on the basis of irreconcilable differences.

4. There have been three (3) children born as issue of this marriage, one of whom is a minor, to wit: Cameron Alex Sellers, who was born on October 29, 1993, and is presently fifteen (15) years of age.

5. Each of the parties is a fit and proper parent to be awarded joint legal custody of the minor child, with the Petitioner being awarded primary physical custody. Parent-time shall be divided as follows:

A. The Court is adopting the 20/10 parent-time split proposed by the custody

evaluator. However, the Respondent may certainly have additional time, if agreed upon.

B. The Respondent shall have parent time with the minor child on every Tuesday, from the time that Cameron is out of school to and including Wednesday morning when the child goes to school.

C. The Respondent shall have every other weekend beginning from the time that Cameron is out of school on Friday to and including Monday morning when the child goes to school.

D. The parties shall be bound by §30-3-35 of Utah Code Annotated regarding the additional times that the Respondent shall have parent-time with the minor child.

6. The parties shall be bound by the provision of §30-3-33 of the Utah Code Annotated. However, the first option to provide child care will apply only if the other parent is unavailable for a period of 4 hours or more.

7. By virtue of the foregoing, the Respondent shall have a total of one hundred and twenty-two (122) over nights each year and the Petitioner shall have a total of two hundred and forty-three (243) over nights each year.

8. The parties are free to take the child out of state and out of the United States as long as each parent notifies the other parent in a timely fashion.

9. The Petitioner is regularly employed as a Special Education teacher with the granite School District, and had an income of $48,382 on her 2007 W-2.

10. The Respondent is regularly employed at Quest, as a Manager of Network Operations. His annual income from his 2007 W-2 was $95,044.

11. Using a 20/10 division of time, and the child support guidelines which took effect on January 1, 2008, coupled with the annual incomes of the parties, the Petitioner's child support obligation is $393.38, and the Respondent's is $729.26. *See* Joint Custody Child Support Worksheet, attached hereto as Exhibit A.

12. Child support shall continue until the month after the child turns 18 years of age, or until the month after the child's normal and expected date of graduation from high school, whichever occurs later.

13. The parties shall talk together to reach a decision on all major issues. If they cannot agree, they shall talk to Cameron's therapist, and accept his input. If they are still unable to resolve the issue, the therapist shall have the final say.

14. The parties shall provide medical and dental insurance for the minor child, as per the Utah Code Annotated sections regarding the same, with the parties deciding which policy has the most benefit, and the most coverage, at the best cost. The parties shall equally divide Cameron's portion of the premiums as well as all uncovered out-of-pocket medical, dental, orthodontia and eye care.

15. Mr. Sellers shall maintain life insurance sufficient to cover his child support obligation for the years remaining. At the time of trial, that amount would have been approximately $26,000. Mr. Sellers may reduce the amount over time, so long as he carries sufficient insurance to cover the remaining child support. The child shall be listed as the beneficiary, with Ms. Sellers being listed as trustee.

16. The parties shall alternate taking the tax exemption for the minor child, with the

Petitioner being entitled to claim Cameron for odd numbered tax years, and the Respondent being entitled to claim him for even numbered tax years. The Respondent's right to claim the exemption shall be subject to his being current on child support as of December 31st of the tax year in question.

17. Also, in years when the Petitioner is entitled to the exemption, the Respondent may claim the exemption if he pays the Petitioner the difference, in advance, on state and federal taxes. If he does not pay her in advance, he will not be entitled to exercise this option.

18. After Cameron turns 18, the exemption will be determined by where Cameron resides.

19. For 2007, the parties may file jointly if they agree to do so, or Ms. Sellers is entitled to the exemption if they file separately.

20. The home of the parties, located at 2838 Stafford Circle, West Valley City, Utah, has a total value of $290,000.00 with no mortgages on the same. It is equitable and just that the home be awarded exclusively to the Petitioner with no remaining right, title nor interest in the Respondent.

21. The Petitioner shall be solely responsible for all upkeep on the said home, as well as solely responsible for the payment of all costs associated with the same, including but not limited to all taxes, insurance, maintenance, etc.

22. Mr. Sellers shall execute a QuitClaim deed transferring the marital home to Ms. Sellers.

23. Pursuant to stipulation between the parties, they shall divide the marital personal

property in a manner and fashion that is acceptable to each. All premarital personal property, all inherited personal property and all personal property that belongs to either party by way of gift shall be awarded exclusively to the respective party.

24. The Petitioner currently has a 2002 Saturn with nothing owed on the same and the Respondent currently has a 2004 Camry with nothing owed on the same. Each of the said vehicles shall be awarded exclusively to each respective party.

25. The Petitioner is employed by the Granite School District as an Elementary Special Education Teacher. She has dramatically improved her condition through additional training and education and is expected to obtain her Master's Degree shortly.

26. The Court specifically finds that the Petitioner's financial needs do no establish that she should be awarded alimony. The Petitioner has been awarded the marital home and it is free and clear of all debts and mortgages. Her car has no debt thereon.

27. Petitioner's income, based upon her 2007 W-2 tax return is $48,382 per year, or $4,031.82 per month. She has demonstrated her total monthly living expenses in the approximate $2,100 per month range, leaving her approximately $1,000 per month for discretionary spending and investment or retirement, as she so chooses.

28. The Court declines to take into the alimony determination the Petitioner's request to have the Respondent pay her money for post-divorce savings investment or retirement account for her.

29. The Court specifically finds that the financial conditions and needs of the recipient spouse do not require alimony for the reasons set forth above. In addition, recipient's

earning capacity and ability to produce income is more than adequate to maintain her in the lifestyle to which she is accustomed. Moreover, the Petitioner will soon earn a masters degree which will also increase her income.

30. The Court finds that the Respondent would have the ability to pay some support. The Court has also taken into consideration the length of the marriage, and the fact that the parties have both worked during the marriage.

31. In short, the Court has considered all of the Jones factors, as well as the provisions of §30-3-5 of the Utah Code Annotated, regarding alimony.

32. The Respondent is employed as a Manager of Network Operations at Qwest and made $95,044, in 2007, according to his W-2.

33. At the time of separation, April, 2005, there was no marital debt except approximately $6,000.00 owed on the Petitioner's vehicle. This debt was paid off in full by the Petitioner prior to trial.

34. At the time of trial, the Petitioner had accumulated approximately $18,000.00 as post separation debt.

35. The Petitioner is required to pay all debts she accumulated during the three years of separation from the Respondent, except for those debts which can be substantiated as relating to repairs, maintenance or upgrades of the marital home, Respondent shall pay and reimburse Petitioner one-half of those documented home expenses.

36. With the exception of the home expenses as outlined above, each party shall be solely responsible for any and all debt accumulated by the respective parties since the date of

separation.

37. Each of the parties shall be awarded what they have been able to save during the time of separation.

38. The parties purchased the marital home in October, 1980 and have made substantial improvements and upgrades since then.

39. Respondent made the down payment of approximately $4,164.00 from premarital funds on the total purchase price of approximately $79,000.00.

40. Additionally, in approximately 1991, the Respondent paid another $10,000.00, which was applied completely against principle. This $10,000.00 was monies inherited from the Respondent's Father, of which the Petitioner makes no claim of contribution.

41. Mr. Sellers shall be allowed an offset for these amounts, without appreciation.

42. The parties have a Merrill Lynch IRA of approximately $20,000.00, an Ameriprise IRA of approximately $8,000.00, the Petitioner has a retirement program through her work and the Respondent has a 401 (k) along with a Retirement package.

43. The parties are ordered to exchange information reflecting valuations closest to the date of trial, February 20, 2008, of their 401(k) retirements; pensions; and IRAs.

44. Each of these retirement investments are to be divided equally, valued as of their valuation closest to the date of trial, subject to the Respondent receiving $143,857.35, to offset the home Ms. Sellers is receiving.

45. The $143,857.35 amount is calculated as follows:

Value of home $290,000

Less repayment to Mr. Sellers' of his premarital investment ..... -$4,164
Less repayment to Mr. Sellers' of his inheritance pd. to home ..... -$10,000
Net marital value of home, to be divided equally ..... $275,836 / 2

Each party's half of remaining marital value **$137,918**

Offsets for amounts the Court indicated were to be paid from Mr. Sellers' equity to Ms. Sellers:

Mr. Seller's half of the real estate taxes paid by Ms. Sellers ($4,569.31) during separation ..... -$2,284.65
Mr. Sellers' half of the insurance costs paid by Ms. Sellers ($3,130) during separation ..... -$1,565
One-half of the difference between the values of the parties' respective vehicles ($8,750) ..... -$4,375

The net amount of these figures is:

Mr. Sellers $143,857.35
$137,918 + *$14,164 - $2,284.65 - $1,565 - $4,375
Ms. Sellers $146,142.65
$137,918 + $2,284.65 + $1,565 + $4,375

46. The Franklin Templeton Investment account, in the approximate amount of $7,000, shall be awarded to the parties' son, Weston, based upon the parties' agreement.

47. The Court approves the parties' agreement that the stock reflected in Petitioner's Exhibits 18 and 19 were Mr. Sellers' separate pre-marital property, and finds that they shall be awarded to him.

48. The parties shall cooperate to offset their respective retirement programs to minimize the number of QDRO's required.

49. Each side shall pay their own costs and attorney fees associated with this action as it appears that much of the litigation that has occurred has been asserted by the Petitioner against the Respondent in regards to allegations of child abuse. The Court has determined, and it was

determined by the experts, that no abuse ever occurred.

From the foregoing *Findings of Fact,* the Court now for good cause appearing, does hereby make and adopt its,

CONCLUSIONS OF LAW

1. The Court has both personal and subject matter jurisdiction in this matter.

2. The Petitioner shall be granted a Decree of Divorce on the grounds of irreconcilable differences, with the same to be final and absolute on entry, all consistent with the terms and conditions as set forth in the foregoing *Findings of Fact.*

Dated this 23 day of March 2009.

BY THE COURT:

Hon. Judge ROBERT FAUST

SALT LAKE COUNTY · SALT LAKE COUNTY · STATE OF UTAH · DISTRICT COURT

APPROVED AS TO FORM AND CONTENT

JOHN WALSH
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of January, 2009, a true and correct copy of the foregoing document was sent via first class mail, postage prepaid, to the following:

JOHN WALSH
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Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE CITY, STATE OF UTAH

JOANN SELLERS, Petitioner, vs. GLEN RAY SELLERS, Respondent	Amended **DECREE OF DIVORCE** Case No. 054902424 Hon. Judge ROBERT FAUST Hon. Comm. MICHELLE BLOMQUIST

THE ABOVE ENTITLED MATTER came on regularly for trial before the Honorable Robert Faust, District Court Judge, on Wednesday, February 20, 2008, at the hour of 8:30 A.M.. The Petitioner, JoAnn Sellers, appeared and was represented by Diana J. Huntsman, Attorney at Law. The Respondent, Glen Ray Sellers, appeared and was represented by John Walsh, Attorney at Law. The Court heard a partial Stipulation, entered into by the parties, and approved the same. The Court then heard testimony and considered exhibits and arguments, and based thereon issued a ruling.

Subsequently, an objection was filed regarding certain issues and a subsequent hearing

was held by the Court on June 2, 2008. At that time, the Petitioner, JoAnn Sellers, appeared and was represented by Diana J. Huntsman, Attorney at Law. The Respondent was not present, but was represented by John Walsh, Attorney at Law. The Court received a partial Stipulation regarding the resolution of certain objections, and approved the same. The Court then heard the argument of counsel regarding the remaining objections and issued a ruling thereon.

BASED THEREON, *Findings of Fact and Conclusion of Law* have been entered, from which, the Court now

ORDERS, ADJUDGES and DECREES

1. The Petitioner, JoAnn Sellers, is hereby granted a Decree of Divorce on the basis of irreconcilable differences with the same to become absolute and final upon entry.

2. Each of the parties is hereby awarded joint legal custody of their minor child, Cameron, with the Petitioner to be designated primary custodial parent.

3. Parent-time shall be divided as follows:

A. The Court hereby adopts the 20/10 parent-time split proposed by the custody evaluator. However, the Respondent may certainly have additional time, if agreed upon.

B. The Respondent shall have parent time with the minor child on every Tuesday, from the time that Cameron is out of school to and including Wednesday morning when the child goes to school.

C. The Respondent shall have every other weekend beginning from the time that Cameron is out of school on Friday to and including Monday morning when the

child goes to school.

D. The parties shall be bound by §30-3-35 of Utah Code Annotated regarding the additional times that the Respondent shall have parent-time with the minor child.

4. By virtue of the foregoing, the Respondent shall have a total of one hundred and twenty-two (122) over nights each year and the Petitioner shall have a total of two hundred and forty-three (243) over nights each year.

5. The parties shall be bound by the provision of §30-3-33, Utah Code Annotated. However, the first option to provide child care shall apply only if the other parent is unavailable for a period of 4 hours or more.

6. The parties shall each be free to take the minor child out of state and out of the United States, as long as each parent notifies the other parent in a timely fashion.

7. The Respondent shall pay to the Petitioner child support in the amount of $729.26 per month.

8. Said child support shall continue until the month after the child turns 18 years of age, or until the month after the child's normal and expected date of graduation from high school, whichever occurs later.

9. The parties shall talk together to reach a decision on all major issues. If they cannot agree, they shall talk to Cameron's therapist, and accept his input. If they are still unable to resolve the issue, the therapist shall have the final say.

10. The parties shall provide medical and dental insurance for the minor child, as per the Utah Code Annotated sections regarding the same, with the parties deciding which policy has

the most benefit, and the most coverage, at the best cost. The parties shall equally divide Cameron's portion of the premiums as well as all uncovered out-of-pocket medical, dental, orthodontia and eye care, as provided in the Utah Code Annotated regarding the same.

11. Mr. Sellers shall maintain life insurance sufficient to cover his child support obligation for the years remaining. At the time of trial, that amount was approximately $26,000. Mr. Sellers may reduce the amount over time, so long as he carries sufficient insurance to cover the remaining child support. The child shall be listed as the beneficiary, with Ms. Sellers being listed as trustee.

12. The parties shall alternate taking the tax exemption for the minor child, with the Petitioner being entitled to claim Cameron for odd numbered tax years, and the Respondent being entitled to claim him for even numbered tax years. The Respondent's right to claim the exemption shall be subject to his being current on child support as of December 31st of the tax year in question.

13. Also, in years when the Petitioner is entitled to the exemption, the Respondent may claim the exemption if he pays the Petitioner the difference, in advance, on state and federal taxes. If he does not pay her in advance, he will not be entitled to exercise this option.

14. After Cameron turns 18, the exemption will be determined by where Cameron resides.

15. For 2007, the parties may file jointly if they agree to do so, or Ms. Sellers shall be entitled to the exemption if they file separately.

16. The Petitioner, JoAnn Sellers, is hereby awarded all of the parties' right, title and

interest in the marital home located at 2838 Stafford Circle, West Valley City, Utah. The Petitioner shall be solely responsible for all upkeep on the home, as well as solely responsible for the payment of all costs associated with the same, including but not limited to all taxes, insurance, maintenance, etc.

17. Mr. Sellers shall execute a QuitClaim deed transferring the marital home to Ms. Sellers.

18. The parties shall divide the marital personal property in a manner and fashion that is acceptable to each. All premarital personal property, all inherited personal property and all personal property and all personal property that belongs to either party by way of gift shall be awarded exclusively to the respective party.

19. The Petitioner is hereby awarded the 2002 Saturn free and clear of any interest in the Respondent; and the Respondent is hereby awarded the 2004 Camry free and clear of any interest in the Petitioner.

20. Neither party is awarded any alimony from the other, either now or in the future.

21. The Petitioner shall pay debt she accumulated during the three years of separation from the Respondent, except for those debts which can be substantiated as relating to repairs, maintenance or upgrades of the marital home. Respondent shall pay and reimburse Petitioner one-half of those documented home expenses. Petitioner shall submit in writing one-half of those documented home expenses within (90) days of entry of this Decree, and any expense that she does not designate within said ninety (90) days shall be her sole expense and obligation.

22. With the exception of the home expenses outlined above, each party shall be

solely responsible for any and all debt accumulated by him or her since the date of separation.

23. Each of the parties shall be awarded what they have been able to save during the time of separation.

24. The parties own a Merrill Lynch IRA of approximately $20,000.00; an Ameriprise IRA of approximately $8,000.00; the Petitioner has a retirement program through her work; and the Respondent has a 401 (k) along with a Retirement package.

25. The parties are ordered to exchange information reflecting valuations closest to the date of trial, February 20, 2008, of all their 401(k) retirements; pensions; and IRAs.

26. Each of these shall be divided between the parties as per Woodward, valued as of the date of trial, February 20, 2008, subject to the Respondent receiving an offset of $143,857.35, for his equitable interest in the home offset by various credits outlined in the Court's *Findings of Fact and Conclusions of Law.*

27. The parties shall cooperate to offset their respective retirement programs to minimize the number of QDRO's required.

28. Each side shall pay their own costs and attorney fees associated with this action.

29. Each of the parties shall cooperate to sign whatever papers or to take any other action to implement the terms and conditions of this Decree of Divorce.

Dated this 23 day of March, 2009.

BY THE COURT:

HON. JUDGE ROBERT FAUST

SALT LAKE COUNTY · SALT LAKE COUNTY · STATE OF UTAH · DISTRICT COURT

APPROVED AS TO FORM AND CONTENT

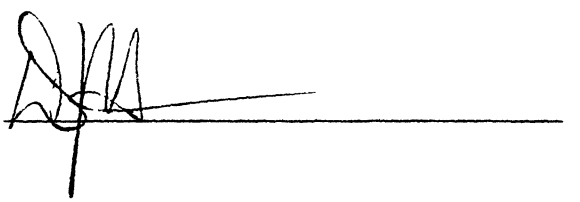
_____

JOHN WALSH
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of January, 2009, a true and correct copy of the foregoing document was sent via first class mail, postage prepaid, to the following:

JOHN WALSH
2319 FOOTHILL DRIVE, SUITE 270
SALT LAKE CITY, UTAH 84109



JOHN WALSH
ATTORNEY AT LAW, #3371
3191 SOUTH VALLEY STREET, SUITE 240
SALT LAKE CITY, UTAH
84109
Telephone: 467-9700

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

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JOANN SELLERS	;	**NOTICE OF CROSS APPEAL**
Petitioner,	;	
vs.	;	Case No. 054902424
GLEN RAY SELLERS,	;	Judge ROBERT FAUST
Respondent.	;	Commissioner BLOMQUIST

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Comes now the Respondent, Glen Ray Sellers, by and through his Attorney, John Walsh and Cross Appeals the final Judgment and Amended Decree of Divorce entered by the Honorable Robert Faust on or about March 23, 2009. This appeal is from the District Court in and for Salt Lake County, State of Utah, to the Utah Court of Appeals.

Specifically the Cross Appellant appeals the issue regarding his paying all of the taxes to get his funds out of his 401(k) as well as the determination of child support and not including all of his overnights in the determination of the same

Cross Appellant appeals all other issues in the said Amended Decree of Divorce.

Dated this 1st day of July, 2009

JOHN WALSH
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing NOTICE OF CROSS APPEAL, to the Petitioner, by mailing the same in the United States Mails, postage fully prepaid addressed to DAVID J. FRIEL, ATTORNEY AT LAW, 2875 SOUTH DECKER LAKE DRIVE, #225, SALT LAKE CITY, UTAH, 84119.

Dated this 1st day of July, 2009.

JOHN WALSH
ATTORNEY AT LAW