

2009

Linda Anderson v. Glenn Hunter Thompson : Brief of Appellant

Utah Court of Appeals

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David J. Friel; attorney for appellant.

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LINDA ANDERSON,
(f.k.a. Linda Thompson),

VS.

Respondent/Appellee.

Appellate Case No. 20090892-CA

JUDGE STEPHEN L. HENRIOD

BRIEF OF APPELLANT

Appeal from Findings of Fact and Conclusions of Law Regarding Attorney Fees and
Order Regarding Fees entered by Third District Court, Judge Stephen L. Henriod, on
September 24, 2009 (All parties contained in caption).

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UTAH APPELLATE COURTS
APR 05 2010

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JUDGE STEPHEN L. HENRIOD

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JURISDICTIONAL STATEMENT

Jurisdiction is proper pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. What specific issues were reversed and remanded by the Utah Court of Appeals from its decision in Anderson II and were Respondent’s appellate attorney fees included in the reversal and remand decision from the Utah Court of Appeals? 7,8

STANDARD OF REVIEW

Whether the trial court properly complied, on remand, with the Utah Court of appeals decision in Anderson II is a question of law the court must review for correctness. Amax Magnesium Corp. V. Utah State Tax Comm'n, 874 P.2d 840,842 (Utah 1994).

2. Did the trial court understand the breadth and scope of the remand issue directives from the Court of Appeals in Anderson II? 8,9, 10

STANDARD OF REVIEW

Whether the trial court properly complied, on remand, with the Utah Court of appeals decision in Anderson II is a question of law the court must review for correctness. Amax Magnesium Corp. V. Utah State Tax Comm'n, 874 P.2d 840,842 (Utah 1994).

3. There is caselaw handed down from the Utah Court of Appeals giving specific directives regarding when trial courts may consider awarding appellate attorney fees- did the trial court in Anderson II adhere to those directives?10, 11,12, 13

STANDARD OF REVIEW

Whether the trial court properly complied, on remand, with the Utah Court of appeals decision in Anderson II is a question of law the court must review for correctness. Amax Magnesium Corp. V. Utah State Tax Comm'n, 874 P.2d 840,842 (Utah 1994).

4. If the Court of Appeals reverses the trial court's decision regarding Respondent's appellate attorney fees as requested in this appeal, should Petitioner be entitled to consideration of her appellate attorney fees for this appeal?13, 14

STATEMENT OF THE CASE

The trial court committed error by awarding Appellee his attorney fees on appeal when the Utah Court of Appeals had not specifically remanded that issue to the trial court. In a Memorandum Decision issued by the Utah Court of Appeals in this same matter, Case #20070514 (Addendum #3), the Utah Court of Appeals remanded to the District Court

specific issues. The Court of Appeals directed that the trial court enter an order in accordance with the Court of Appeals directives which essentially reversed the initial trial court decision. The trial court awarded appellate attorney fees to the Respondent in the hearing on remand.

STATEMENT OF FACTS/NATURE OF THE CASE

A Decree of Divorce was signed in this case on April 20, 1999 (Record @ 46-54). Approximately six years later, Petitioner filed for a Modification of the Decree of Divorce (Record @ 59-61). On October 26, 2006 the case came on for trial. The trial court found Respondent to be in contempt of court for numerous violations of the Decree of Divorce and a judgment was entered against Respondent in the amount of \$44,311.00. The trial court also awarded Petitioner attorney fees and costs and ordered Respondent to pay Petitioner \$7,652.97 for her attorney fees and costs (Record @ 216-221).

Respondent appealed the trial court ruling (Record @ 222-223) resulting in Anderson v. Thompson, 2008 UT App3, 176 P.3d 464 (Anderson I, Addendum #4). The Utah Court of Appeals upheld the rulings of the trial court with the exception of the attorney fee award which was remanded to the trial court with specific directives that if the trial court determined that it could enter sufficient findings to support an attorney fee award, the trial court could enter an order of attorney fees. More importantly, the Court of Appeals gave the trial court specific additional directives regarding considerations the trial court could make concerning the determination of Petitioner's appeal attorney fees also to be examined by the trial court on remand.

After the October, 2006 trial, subsequent Order to Show Cause documents were filed by both sides (Record @ 233-274). In yet another hearing Respondent was found to be contempt of court for violation of a different court order than the contempts of court originally decided in the October, 2006 trial. The court awarded Petitioner her attorney fees and court costs dealing with this subsequent contempt of court by Respondent.

Respondent filed a second appeal, Anderson v. Thompson, 2008 UT App 170, (Anderson II) (Record @ 555-560 and Addendum #3). In this second appeal the Utah Court of Appeals reversed and remanded the trial court's finding of contempt against the Respondent stating that, "we remain unconvinced that there is clear and convincing proof that Husband knew what was required here, let alone that he willfully and knowingly refused to comply."

In Anderson II, because the Utah Court of Appeals reversed and remanded on the central issue regarding Respondent's contempt, the court also reversed the trial court's award of attorney fees and costs to Petitioner. Also in Anderson II, the Court of Appeals gave specific directives to the trial court in its remand on the issue of Respondent's attorney fees stating that, "we remand to the district court to determine if an award of costs and attorney fees should be awarded to husband and, if so, to determine the amount."

There was absolutely no directive by the Court of Appeals in Anderson II for the trial court on remand to address the issue of whether or not Respondent was entitled to his appeal attorney fees. On remand, the trial court awarded Respondent his attorney fees and costs and also awarded Respondent his attorney fees incurred from the appeal in Anderson II.

SUMMARY OF ARGUMENT

The District Court erred in its decision to award Respondent his appellate attorney fees and costs from the Utah Court of Appeals reversed and remanded decision in Anderson II. The Utah Court of Appeals did not specifically direct the district trial court that it could entertain this specific issue. If an appellate court does not give instructions to a district trial court to decide appellate attorney fees, that lack of instruction is tantamount to a denial of Respondent's request for appellate attorney fees.

The only time a district trial court has the discretion to make a determination as to appellate attorney fees is when the appellate court decides and informs the district trial court that it may entertain that issue.

Since the district court lacked authority to make this decision, the award of the district trial court to allow \$7,463.04 in appeal attorney fees to Respondent in Anderson II should be reversed. Further, Petitioner should be awarded her attorney fees and court costs for the need to file this appeal due to the error of the district court.

ARGUMENT: POINT ONE

WHAT SPECIFIC ISSUES WERE REVERSED AND REMANDED BY THE UTAH COURT OF APPEALS FROM ITS DECISION IN ANDERSON II AND WERE RESPONDENT'S APPELLATE ATTORNEY FEES INCLUDED IN THE REVERSAL AND REMAND DECISION FROM THE UTAH COURT OF APPEALS?

The Utah Court of Appeals set forth its decision in Anderson II on May 15, 2008 (Addendum #3 and Record @ 536-540). Respondent prevailed in Anderson II and the Court of Appeals reversed and remanded the trial court decision regarding its finding of

contempt on the part of Respondent. The Court of Appeals specifically entered the following:

1. remand to the district court for entry of findings on whether Wife should have been ordered to refund child support overpayment;
2. reversal on the issue of contempt against the Respondent;
3. reversal on the award of attorney fees and costs to Wife, which award was based on the holding of contempt;
4. there is no basis to grant Wife's request for an award of attorney fees and costs for the appeal;
5. remand to the district court to determine if an award of costs and attorney fees should be awarded to Husband and, if so, to determine the amount.

In other words the Utah Court of Appeals in Anderson II reversed two issues and remanded two issues. These were the exact directives from the Court of Appeals to the trial court.

Could there be any confusion whatsoever of what exactly was reversed and remanded. Could the trial court not have understood or misinterpreted exactly what its duties were in the remand process including whether Respondent's appellate attorney fees were to be addressed or included in its decision.

Absolutely nowhere in the specific reversal and remand directives of the Utah Court of Appeals does the appeal court give the district trial court permission to address the appellate attorney fees issue.

ARGUMENT: POINT TWO

DID THE TRIAL COURT UNDERSTAND THE BREADTH AND SCOPE OF THE REMAND DIRECTIVES FROM THE COURT OF APPEALS IN ANDERSON II?

Because the trial court lumped all of Respondent's attorney fees into one large figure as requested by Respondent, that being \$11,365.54, is it possible that the trial court did not understand what was required in the remand directives from the Court of Appeals in its Anderson II remand.

In the hearing held on June 17, 2009 before Judge Henriod (Record @ 417, page 5 line 16) evidence was taken which insured that the trial court was aware of the specific several remanded issues and that the Anderson II remand did not direct the trial court to consider appellate attorney fees and costs for Respondent:

Mr. Friel: ... if we give respondent his attorney fees, this is not appeal fees, but his attorney fees, they should be \$3,902.50. The dispute is their interpretation or their position is that since they prevailed with the order to show cause, and since Your Honor ordered, gave them attorney fees, that since they prevailed on appeal they should also get those fees. And our - the Court of Appeals did not specifically address that, which was - which was exact opposite of appeal number one. And our position was that Your Honor, after receiving evidence at the February hearing and in your minute entry ruling, found not only that we should be awarded the reasonable attorney fees because of the needs-based analysis that Your Honor did, but Your Honor then specifically awarded our attorney fees for the appeal.

And the difference was the Court of Appeals gave this Court direction to do that. So in appeal one it said, we remand, or under appeal one was only remanded for attorney fees. Everything else stood on the contempt and all others. And then it said with the Judge Kouris ruling, since he didn't do the needs-based and reasonableness, it was remanded. So then the Court of Appeals gave this Court direction and said, if the court finds that there was need and does that analysis, then it can enter the attorney fees and specifically the court said, and the court

can then address the attorney fees for appeal number one. And so they're not disputing that.

And the only reason I bring it up is in appeal number two and that page number 5 specifically then, Your Honor, I'm looking at Line 3 again, backing up just a little bit, it's says, likewise, there is no basis to grant wife's request for an award of attorney fees and costs on appeal. Husband argues that with a reversal he should be awarded his attorney fees and costs below," and we're not going to dispute that. But it doesn't say anything about his attorney fees for appeal two.

And they're saying in the affidavit Mr. Richards provided in February, had a total of the pre-appeal fees of \$3,900 - \$3,902.50 and then had his appeal two fees in addition which I don't think, well, don't think - the court didn't say that they would be entitled to that ...

... (going to Record @417, page 9, line 16)

MR. FRIEL: Thank you, Your Honor. I've tracked with Mr. Richards' calculations and I think we are together. The issue is did Your Honor mean in the minute entry to include all of his fees, which I don't think was, well, it was not set forth by the Court of Appeals, or was it just up to the time of the filing of the appeal?

THE COURT: The answer is, I meant to include all of his fees exactly the way he put the order together.

Therefore, on its own accord, in the remand hearing the trial court lumped Respondent's attorney fees and costs incurred up to the time of the appeal totaling \$3,902.50 along with adding Respondent's appeal two attorney's fees of \$7,463.04 which totals the \$11,365.54 entered in the Court's Findings of Fact and Conclusions of Law, paragraph 24, (Record @ 818) and Order Regarding Fees and Costs on Remand, paragraph 2 (Record @ 821). It is Petitioner's position that the \$7,463.04 which were all of Respondent's appellate fees awarded by the trial court, should be reversed.

ARGUMENT: POINT THREE

**THERE IS CASELAW HANDED DOWN FROM THE UTAH COURT OF APPEALS
GIVING SPECIFIC DIRECTIVES REGARDING WHEN TRIAL COURTS MAY CONSIDER
AWARDING APPELLATE ATTORNEY FEES- DID THE TRIAL COURT IN ANDERSON II
ADHERE TO THOSE DIRECTIVES?**

In the case of Slattery v. Covey & Co., 909 P.2d 925, 929 (Utah Ct. App. 1995) (Slattery II) the Utah court of Appeals dealt directly head on with the exact same issues that Petitioner is asking the Court to consider in the case at hand. In Slattery II, the Utah Court of Appeals found that the trial court had exceeded its authority on remand by awarding Slattery judgment for attorney fees incurred by her in Slattery I. The Court went on to say that its decision in Slattery I specifically declined to consider Slattery's request for attorney fees on appeal (See Slattery I, 857 P.2d at 249 n.4).

The issue identified in Slattery II is identical to this appeal as the Court examines its reversal and remand directives from Anderson II. The last sentence of the remand decision from Anderson II states, "Accordingly, we remand to the district court to determine if an award of costs and attorney fees should be awarded to Husband and, if so, to determine the amount" (Record @ 536).

Earlier, in the same paragraph the Court of Appeals states, "Husband argues that with a reversal, he should be awarded his attorney fees and court costs below". On remand the Court of Appeals did allow the district court to consider Respondent's attorney fees and court costs and Petitioner is not challenging that ruling. However, the issue

remains: did the Court of Appeals in Anderson II authorize or direct the trial court to examine Respondent's appellate attorney fees in its decision.

Respondent might argue that since the Court of Appeals was silent on this issue the trial court could infer or take liberties in its decision to award the \$7,463.04 to Respondent for his appellate attorney fees incurred in Anderson II. This is the exact argument used in Slattery II. Specifically, the Utah Court of Appeals went on to say in Slattery II that, "Our refusal to consider Slattery's request for attorney fees is tantamount to a denial of that request, thus resolving that issue against Slattery. A trial court cannot consider the issue of entitlement to appellate attorney fees on its own initiative because this decision is the sole prerogative of the appellate court." TS 1 Partnership v. Allred, 877 P.2d 156, 160 n. 2 (Utah Ape.1994); Yorke Management v. Castro, 406 Mass. 17, 546 N.E.2d 342, 344 (1989); Vinton Eppsco, Inc. of Albuquerque v. Showe Homes, Inc., 97 N.M. 225, 226, ' 638 P.2d 1070, 1071 (1981); Schere v. Z.F., Inc., 578 So.2d 739, 740 (Fla.3d Dist.Ct.App.1991).

The Utah Court of Appeals ended its decision in Slattery II by stating on the issue of appellate attorney fees that, "the only time a trial court has any discretion in the matter of appellate attorney fees is when an appellate court determines that appellate attorney fees are warranted, but remands the issue to the trial court for a determination of the amount to be awarded. Vinton Eppsco, 638 p.2d at 1071.

Interestingly enough, when the Utah Court of Appeals reversed and remanded the trial court's initial decision to award Petitioner her attorney fees and court costs, the Court of Appeals in Anderson I did specifically give the trial court remand directives that it could consider entering findings to support a decision for Petitioner to receive her appellate

attorney fees. However, the Court of Appeals gave no such directives to the trial court in Anderson II regarding consideration of Respondent's appellate attorney fees and costs.

Further, the Utah Court of Appeals affirmed its decision on appellate attorney fees from Slattery in its decision in 2005 in the case of Cache County v. Beus, 128 P.3d 63, 539 Utah Adv. Rep. 72, 2005 UT App 503. In Cache County the Utah Court of Appeals reversed and remanded the trial court's decision to award Cache County its attorney fees and court costs from inception of the case. In its reversal and remand the Court of Appeals followed the rationale it had developed in Slattery by stating, "The trial court had no discretion to award Cache County attorney fees it had incurred on appeal in Cache County I". The Court of Appeals went on to restate in Cache County II the exact same caselaw it had carved out in Slattery II regarding appellate attorney fees.

POINT FOUR

IF THE COURT OF APPEALS REVERSES THE TRIAL COURT'S DECISION REGARDING APPELLATE ATTORNEY FEES AS REQUESTED IN THIS APPEAL, SHOULD PETITIONER BE ENTITLED TO CONSIDERATION OF HER APPELLATE ATTORNEY FEES FOR THIS APPEAL?

It possible for the Utah Court of Appeals to consider awarding Petitioner her appeal attorney fees for this appeal. If Petitioner is successful on this appeal, Respondent would still have substantially prevailed in Anderson II. As the Utah Court of Appeals has recently pointed out, "there can be only one prevailing party in any litigation" (Chang v. Soldier Summit Dev.; 2003 UT App 415, 82 P.3d 203).

On remand, the trial court followed the directives of the Utah Court of Appeals by its consideration of Respondent's costs and attorney fees. The trial court entered an award of attorney fees and costs in favor of Respondent for litigation expenses incurred up to the filing of appeal number two and it is Petitioner's position that the trial court also entered an order granting Respondent his appellate attorney fees from Anderson II, which was incorrect.

As an equity or fairness issue, is it proper that Petitioner must expend a good portion of funds she is seeking back from Respondent based upon the trial court not properly following the remand directives of the Utah Court of Appeals. Or is this deemed as the cost of litigation and doing business?

If the Court grants Petitioner the relief she is seeking in this third appeal between the parties, this means that Petitioner will have prevailed in two of the three appeal cases. Respondent filed Anderson I and Petitioner prevailed. Respondent filed Anderson II and Respondent prevailed. Yet, Petitioner will have received appellate attorney fees in Anderson I only.


If this matter is reversed as Petitioner is requesting, there will be additional attorney fees needed and required for Petitioner to successfully finish what was a trial court error. Petitioner seeks an award of her attorney fees for the fees and costs necessary for this appeal.

CONCLUSION

The reversal and remand directives from the Utah Court of Appeals in Anderson II are clear. Specific instruction was not given by the Utah Court of Appeals to the district

trial court for the trial court to consider awarding Respondent his appellate attorney fees and costs in Anderson II. Without that directive from the Utah Court of Appeals, the district trial court had no authority to issue an order granting Respondent \$7,463.01 in appellate attorney fees from Anderson II. Therefore, the Findings and Order of the trial court must be reversed and Petitioner should be awarded attorney fees for this appeal.

DATED THIS 5 day of APRIL, 2010.


David J Friel
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing document on this 5 day of APRIL, 2010 by United States mail, first class, postage pre-paid, to:

Bruce L. Richards, Esquire
P.O. Box 25786
Salt Lake City, UT 84125



ADDENDUM TABLE OF CONTENTS

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ADDENDUM #2: Order Regarding Fees and Costs on Remand

ADDENDUM #3: Utah Court of Appeals Decision dated May 15, 2008

ADDENDUM #4: Utah Court of Appeals Decision dated January 4, 2008

ADDENDUM

#1

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING ATTORNEY FEES

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FILED BY
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JUDICIAL DISTRICT COURT - TOOELE

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
TOOELE COUNTY, STATE OF UTAH

LINDA ANDERSON,)	FINDINGS OF FACT AND
(f.k.a. Linda LaRee Thompson))	CONCLUSIONS OF LAW REGARDING
)	ATTORNEY'S FEES
Petitioner,)	
)	
v.)	Civil No. 994300102DA
)	
GLENN HUNTER THOMPSON,)	Judge: Henriod
)	
Respondent.)	

The above-entitled matter came before the Court on remand from the Utah Court of Appeals for an evidentiary hearing regarding attorney's fees on February 9, 2009. The issues before the Court were attorney's fees for the Petitioner's claim for fees after the Decision on appeal January 4, 2008, in favor of the Petitioner; and after the Decision on Appeal, May 15, 2008, in favor of the Respondent. David Friel appeared on behalf of the Petitioner. Bruce L. Richards appeared on behalf of the Respondent. The Court heard testimony, received exhibits and has entered a Minute Entry indicating the Court's Ruling. Subsequent oral argument was heard on June 17, 2009 on Petitioner's Objection to Proposed Findings of Fact and Conclusions of Law Regarding Attorneys Fees.

Based upon the foregoing and good cause appearing therefore, the court hereby makes the following:

FINDINGS OF FACT

1. Petitioner has gross monthly income of \$728.00 plus \$2,061.00 in monthly child support, plus an annual child support payment earmarked for Christmas and birthday gifts in an amount of \$2,200.00.
2. Petitioner's income has been static for the past eight years.
3. She works approximately 25 hours per week in a daycare facility.
4. She previously cut and colored women's hair in a salon in her home, but does that only once or twice a year at the present time.
5. She has remarried as of 2004, has an additional child, and her spouse earns \$13.50 per hour working full time.
6. Petitioner testified that she can't afford her attorney's fees and needs help.
7. The total family income at the present time is approximately \$3,138.00 per month gross.
8. Petitioner's family has a marital home, two vehicles which are paid for, and claims total monthly expenses of \$4,982.00, with expenses exceeding income in a relatively small amount.
9. Attorney's fees were not included in said monthly expenses.
10. The parties stipulated that Respondent has the ability to pay.
11. Petitioner's counsel bills his time at \$200.00 per hour and bills his office staff at \$40.00 per hour.
12. Petitioner billed, without adjustments, \$9,605.20 for the first appeal.

13. The Petitioner's hourly rate is toward the top end of hourly rates for domestic work in Tooele County, but is not unreasonable.

14. Billing out office staff time at \$40.00 per hour is neither reasonable nor ethical.

15. Office staff is not paid the \$40.00 per hour unless the client pays, so Petitioner's counsel has exactly the same interest in the firm's accounts receivable as Petitioner's counsel has.

16. A review of the time spent on the appeal does not indicate that increments of time expended on specific aspects of the appeal were unreasonable.

17. Respondent clearly prevailed on the second appeal.

18. The attorney's fees and costs expended on the second Order to Show Cause and second appeal are reasonable as to the hourly rate and the time increments for the tasks performed and were necessary.

19. The parties stipulated that \$512.00 could be subtracted from Petitioner's Attorneys Fees due to a suspension of Petitioner's Counsel's license.

20. An adjustment of \$136.00 is subtracted for charges related to the second appeal.

21. An adjustment of \$239.20 is subtracted for charges for secretarial services.

22. The total of the three adjustments is \$888.00. The net amount of fees and costs to be awarded to Petitioner is \$8,717.20 for attorneys' fees in appeal #1 solely. The Court also upheld the attorneys fees awarded at trial in the amount of \$7,652.97.

23. The amount of fees and costs for the Respondent's counsel through June 30, 2008 totals \$11,365.54, which includes attorneys' fees for Appeal #2.

24. The total amount of fees and costs to be awarded to Respondent is \$11,365.54. These fees and costs are found to be reasonable and necessary.

25. Respondent owes Petitioner a net amount of \$1,899.74 plus interest on the underlying amount after considering the amounts awarded to Petitioner and to Respondent and the payments already made to Petitioner totaling \$47,416.73.

26. The Court has on deposit from the supersedeas bonds and cost bonds posted by Respondent, a total of \$16,300.00.

CONCLUSIONS OF LAW

1. On the first remand, the District Court was directed to consider the standard criteria for award of fees: (1) requesting party in need of assistance; (2) the reasonableness; and (3) responding party's ability to pay.

2. Petitioner should be awarded fees in the amount of \$8,717.20 for Appeal #1 plus the attorneys' fees awarded by the trial court of \$7,652.97, plus interest.

3. On the second appeal, Respondent appealed the Court's Order holding him in contempt. The Appeals Court reversed and remanded specifically stating:

Utah Code Ann. §30-3-3(2), provides that, "in any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the Court may award costs and attorneys fees upon determining that the parties substantially prevailed upon the claim or defense." Accordingly, we remand to the District Court to determine if an award of costs and attorneys fees should be awarded the husband and, if so, to determine the amount.

4. Respondent clearly prevailed on the second appeal.

5. Since the Appeals Court relied on the enforcement provisions of the statute, it does not appear that the District Court needs to use the same analysis as used on the first remand, that of need and ability to pay, but should consider reasonableness.

6. The fees and costs expended on behalf of the Respondent were necessary and reasonable.

7. Petitioner should be awarded fees in the amount of \$8,717.20 plus the attorneys' fees awarded by the Trial Court of \$7,652.97, plus interest.

8. Respondent should be awarded fees in the amount of \$11,265.54.

9. The net amount owed by Respondent to Petitioner is \$1,899.74 plus interest on the underlying amount.

10. The amounts held by the Court as supersedeas or cost bonds totaling \$16,300.00 should be distributed with Petitioner receiving \$1,899.74 plus interest and the Respondent receiving the balance.

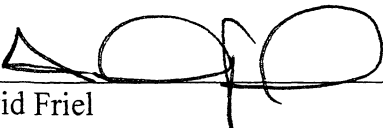
11. An Order incorporating the terms of these Findings and Conclusions should be entered.

DATED this 24 day of September, 2009.

BY THE COURT:


HONORABLE STEPHEN HENRIOD

APPROVED AS TO FORM:

 9/22/09
David Friel

ADDENDUM

#2

ORDER REGARDING FEE AND COSTS ON REMAND

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3RD DISTRICT COURT-TOOELE

09 SEP 24 PM 3:18

FILED BY AK

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
TOOELE COUNTY, STATE OF UTAH

LINDA ANDERSON,)	ORDER REGARDING FEES AND
(f.k.a. Linda LaRee Thompson))	COSTS ON REMAND
)	
Petitioner,)	
)	
v.)	Civil No. 994300102DA
)	
GLENN HUNTER THOMPSON,)	Judge: Henriod
)	
Respondent.)	

The above-entitled matter came before the Court on remand of two appeals from the Utah Court of Appeals. An evidentiary hearing was conducted by the Court on February 2, 2009. The Court entered its ruling in a Minute Entry entered March 20, 2009. The Court heard oral argument on the Petitioner's Objection to Proposed Findings of Fact and Conclusions of Law Regarding Attorneys Fees on June 17, 2009. The Court has entered Findings of Fact and Conclusions of Law. Based upon the foregoing and good cause appearing therefore,

IT IS HEREBY ORDERED AND DECREED AS FOLLOWS:

1. Petitioner is awarded attorney's fees and costs related to the first appeal in the amount of \$8,717.20 plus the attorneys fees awarded at trial in the amount of \$7,652.97.

2. Respondent is awarded attorney's fees and costs with respect to the second Order to Show Cause and appeal in the amount of \$11,365.54.

3. The net amount owed by Respondent to Petitioner is \$1,899.74 plus interest on the underlying amounts.

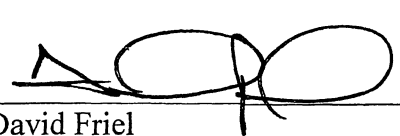
4. The amounts held by the Court as supersedeas or cost bonds totaling \$16,300.00 shall be distributed by the Clerk of the Court with Petitioner receiving \$1,899.74 plus interest and the Respondent receiving the balance.

DATED this 24 day of September, 2009.

BY THE COURT:


HONORABLE STEPHEN HENRIOD

APPROVED AS TO FORM:

 9/22/09
David Friel

ADDENDUM

#3

UTAH COURT OF APPEALS MEMORANDUM DECISION
DATED MAY 15, 2008 [ANDERSON II]

FILED
UTAH APPELLATE COURTS
MAY 15 2008

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Linda Anderson fka Linda LaRee)
Thompson,)
Petitioner and Appellee,)
v.)
Glenn Hunter Thompson,)
Respondent and Appellant.)

MEMORANDUM DECISION
(Not For Official Publication)
Case No. 20070514-CA

F I L E D
(May 15, 2008)

2008 UT App 170

FILED BY 4
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Third District, Tooele Department, 994300102
The Honorable Mark S. Kouris

Attorneys: Bruce L. Richards and Dean A. Stuart, Salt Lake City,
for Appellant
David J. Friel, Salt Lake City, for Appellee

Before Judges Thorne, Bench, and Davis.

DAVIS, Judge:

Glenn Hunter Thompson (Husband) appeals from the district court's order holding him in contempt. He also appeals the district court's determination in that same order that Linda Anderson fka Linda LaRee Thompson (Wife) need not refund him a child support overpayment. Husband further argues that because of these errors, the district court improperly awarded Wife attorney fees and costs, and should have instead awarded attorney fees and costs to him. We reverse and remand.

Husband primarily challenges the contempt ruling. "The decision to hold a party in contempt of court rests within the sound discretion of the trial court and will not be disturbed on appeal unless the trial court's action 'is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of discretion.'" Marsh v. Marsh, 1999 UT App 14, ¶ 8, 973 P.2d 988 (quoting Bartholomew v. Bartholomew, 548 P.2d 238, 240 (Utah 1976)). "'To find contempt [in a civil case], the [district] court must find from clear and convincing proof that the contemnor knew what was required, had the ability to comply, and willfully and knowingly failed and refused to do so.'" Id. ¶ 10

(quoting Kunzler v. O'Dell, 855 P.2d 270, 275 (Utah Ct. App. 1993)).¹

Here, the first action causing the district court to hold Husband in contempt was Husband's holding of a family meeting in which he told the children to forgive Wife and made statements that because of Wife he could no longer give them a big Christmas or take them on trips and vacations. The actions causing the court to hold Husband in contempt the second time were his knowing that his new wife made the notation "B" on the memo area of two support checks and his delivery of one of these checks to the parties' oldest child for him to give to Wife. The district court determined that such actions violated a provision of the parties' divorce decree, which stated that "[t]he parties shall work together to resolve issues involving the children."² The court made the specific finding that "[Husband] was aware of the

1. Wife argues that we should not reach Husband's argument regarding contempt because he has failed to marshal the evidence as required by Chen v. Stewart, 2004 UT 82, ¶¶ 76-80, 100 P.3d 1177. Although often referred to as a "finding" of contempt, the contempt determination here is not a true factual finding that would require a party challenging it to marshal the evidence. Rather, this is a legal conclusion that must be supported by factual findings. We do not see that Husband is challenging any of the findings of the district court regarding his actions or his awareness of the divorce decree; he instead challenges the legal conclusion that his actions and knowledge allowed the court to exercise its discretion and hold him in contempt.

Wife also argues that because Husband sets forth the incorrect standard of review, his challenges must fail. Wife provides no support for this reasoning, and we know of no rule to this effect. Although in his initial statement of the issues Husband provides the burden of proof for contempt as opposed to the standard of review, this appears to result from the fact that his primary contention is that the standard of proof was not met and, thus, the district court had no discretion to exercise in this matter. Further, Husband quotes both the appropriate standard of review and the related standard of proof in the analysis portion of his brief.

2. The district court also held Husband in contempt based on the court's understanding that in an earlier proceeding it had instructed that the children not "be involved." Such instruction, however, was never memorialized in the corresponding written order. Further, neither party addressed this instruction at oral argument, neither party provided a record citation for the instruction, and we see no such instruction in our cursory review of the court's ruling from the bench. Thus, we do not address this oral instruction allegedly given from the bench.

[d]ecree and certainly had the capacity to follow the decree."³ However, the issue is not whether Husband was aware of the divorce decree but whether he knew that his actions were prohibited by the divorce decree. We determine that the language of the divorce decree does not establish the basis for clear and convincing proof that Husband knew what was required, i.e., that he knew his actions relating to the family meeting and the support checks were in violation of the divorce decree.

The paragraph of the divorce decree relied upon by the district court states, in its entirety:

That the parties are both fit and proper persons to be awarded the care, custody and control of the minor children and therefore the parties should be awarded joint legal custody with [Wife] being granted primary physical custody. The parties shall work together to resolve issues involving the children, however [Wife] as custodial parent shall make the final decision.

When reading the entire provision containing the "work together" phrase, it appears that the term references making decisions regarding the children. Wife argues that this sentence should be read to prevent the parties from "working against each other." But the "work together" phrase, sandwiched between phrases clearly addressing custody arrangements and referencing decisions involving the children, does not prohibit any and all actions on the part of Husband that would be less than friendly. Although Husband's actions may have been, as the district court found, "deplorable," "upset[ting]," and "appall[ing]," such does not alone meet the standard of proof required to hold a person in contempt. As inappropriate as the actions may be, the simple fact that one party behaves in a petty or childish manner is not sufficient to justify holding that party in contempt for violating the general direction to work with the other party regarding the children. Indeed, "[for] a court order to be the basis of a finding of guilty of contempt for disobedience thereof[, it] must be clear and unambiguous." Foreman v. Foreman, 111 Utah 72, 176 P.2d 144, 156 (1946) (Wolfe, J., concurring). Thus, when it is not clear as to what the language of the order references, "the order [is] not sufficiently clear on that point to support the finding of guilty of contempt for disobedience of that element of the order or to base a judgment for damages for disobedience of that element of the order." See id.

3. The district court determined that Husband could have followed the decree by taking the blame for his challenging financial situation, even suggesting that Husband should have told the children less than truthful reasons for the money shortage.

Wife points to the fact that this court recently upheld other holdings of contempt in prior proceedings of this case, see Anderson v. Thompson, 2008 UT App 3, 176 P.3d 464. Husband's actions at that time, however, highlight the issue here. Husband was previously held in contempt for his failure to pay child support, a portion of the children's activity costs, and spousal support. See id. ¶¶ 19-20. Each of these responsibilities was specifically set forth in the divorce decree. See id. Husband was also held in contempt for his failure to provide, as previously stipulated, the tax documents from which the decree-ordered support would be calculated. See id. ¶ 18. Husband's obligations on these matters are set forth in clear language in the divorce decree and are not derived from the general statement that the parties must work together on issues involving the children. Thus, we remain unconvinced that there is clear and convincing proof that Husband knew what was required here, let alone that he willfully and knowingly refused to comply.

Husband next argues that Wife should have been ordered to refund his child support overpayment for January 2007.⁴ Having determined that Husband overpaid, the court's entire reference to this issue is the following: "Regarding the issue of refunding \$455.08 from [Wife] to [Husband] concerning the difference in the January child support payment is ruled in favor of [Wife]. Therefore, [Wife] has no need to refund those monies." Without findings supporting this ruling, we cannot determine the basis for the denial of the refund. Indeed, in response to Husband's argument, Wife only speculates that this denial was "probably" because Husband was held in contempt and because monies were still owing to Wife. Adequate findings of fact "'show that the court's judgment or decree follows logically from, and is

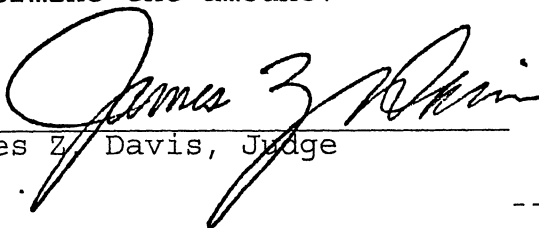
4. Wife argues that we should not consider this issue, asserting that Husband failed to "properly raise[]" the issue because he did not include it among those issues listed in his "Statement of Issues" section. We agree that rule 24 of the Utah Rules of Appellate Procedure requires that this issue be included among the initial listing of issues in Husband's brief. See Utah R. App. P. 24(a)(5). And we recognize that we may disregard or strike briefs that do not comply with the requirements of rule 24. See id. R. 24(k). "However, we are not obligated to strike or disregard a marginal or inadequate brief," State v. Gamblin, 2000 UT 44, ¶ 8, 1 P.3d 1108 (emphasis added), and we usually reserve such a harsh sanction for cases where the noncompliance with rule 24 is much more egregious than that here, see, e.g., MacKay v. Hardy, 973 P.2d 941, 948 (Utah 1998) (disregarding issues raised in a brief that "fail[ed] to comply with almost every requirement set forth in rule 24"). Here, where the failure to comply with the requirements of rule 24 was fairly minor, where the argument was presented with sufficient clarity in the analysis portion of the brief, and where the noncompliance does not frustrate the purposes behind rule 24, see id. at 949, we decline to exercise our discretion to impose a sanction under rule 24.

supported by, the evidence. The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.'" Armed Forces Ins. Exch. v. Harrison, 2003 UT 14, ¶ 28, 70 P.3d 35 (quoting Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987)).

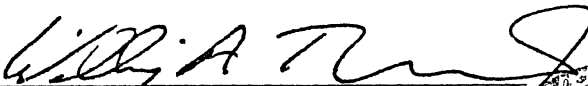
If the findings of fact in a case are incomplete, the court may order the trial court . . . to supplement, modify, or complete the findings to make them conform to the issues presented and the facts as found from the evidence and may direct the trial court . . . to enter judgment in accordance with the findings as revised.

Utah R. App. P. 30(a). We therefore remand to the district court for entry of findings on this issue and an entry of an order in accordance with those findings.

Because we reverse on the issue of contempt, we reverse the award of attorney fees and costs to Wife, which award was based on the holding of contempt. Likewise, there is no basis to grant Wife's request for an award of attorney fees and costs on appeal. Husband argues that with a reversal, he should be awarded his attorney fees and costs below. Utah Code section 30-3-3(2) provides that "[i]n any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense." Utah Code Ann. § 30-3-3(2) (2007). Accordingly, we remand to the district court to determine if an award of costs and attorney fees should be awarded to Husband and, if so, to determine the amount.


James Z. Davis, Judge

WE CONCUR:


William A. Thorne Jr.,
Associate Presiding Judge


Russell W. Bench, Judge

I, the undersigned, Clerk of the Utah Court of Appeals, do hereby certify that the foregoing is a full, true and correct copy of an original document on file in the Utah Court of Appeals. In testimony whereof, I have set my hand and affixed the seal of the Court.

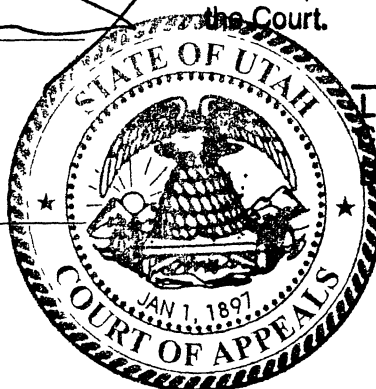


Lisa Collins
Clerk of the Court


Deputy Clerk

Date

8/4/08



ADDENDUM

#4

UTAH COURT OF APPEALS MEMORANDUM DECISION
DATED JANUARY 4, 2008 [ANDERSON I]

JAN 04 2008

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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Linda Anderson fka Linda LaRee)	OPINION
Thompson,)	(For Official Publication)
Petitioner and Appellee,)	Case No. 20070176-CA
v.)	
Glenn Hunter Thompson,)	F I L E D
Respondent and Appellant.)	(January 4, 2008)
	<div style="border: 1px solid black; padding: 2px; display: inline-block;">2008 UT App 3</div>

By
TOOELE COUNTY
MAR 11 2008
Deputy Clerk
Third Judicial District

Third District, Tooele Department, 994300102
The Honorable Mark S. Kouris

Attorneys: Bruce L. Richards and Dean A. Stuart, Salt Lake City,
 for Appellant
 David J. Friel, Salt Lake City, for Appellee

Before Judges Billings, Davis, and McHugh.

McHUGH, Judge:

¶1 Respondent Glenn Thompson (Husband) appeals from the trial court's order, which awarded Petitioner Linda Anderson (Wife) a judgment, found Husband in contempt of court for violating the parties' Decree of Divorce, and awarded attorney fees to Wife. We affirm in part, reverse in part, and remand for the entry of more detailed findings of fact regarding the award of attorney fees.

BACKGROUND

¶2 Husband and Wife married on June 12, 1987, and divorced on April 20, 1999. Four children were born during the course of the marriage. Paragraph nine of the parties' Decree of Divorce (the Decree) stated that "[u]pon the termination of alimony [Husband's] monthly child support obligation shall be automatically increased each year by .7% (.007) of [Husband's] gross business receipts . . . in order to preserve the ratio of monthly child support to [Husband's] yearly gross business receipts." Paragraph ten of the Decree required Husband to make

several payments to Wife "for the benefit of the children in addition to child support," including money for Christmas and all costs for "non-school extra-curricular activities and lessons." Paragraph twenty of the Decree required Husband to pay Wife "a reasonable annual 'cost of living' increase in alimony."

¶3 The parties also entered into a verbal agreement to resolve certain issues not addressed in the Decree. One aspect of Husband and Wife's verbal agreement required the parties to split equally the cost of all of their children's non-school extracurricular activities. A second aspect of the verbal agreement was that Husband would pay Wife's income taxes that were "above and beyond \$1200 per month." Both parties complied with the Decree and their oral agreement until 2004, when, according to Wife, Husband failed to pay for the children's extracurricular activities and for Wife's taxes.

¶4 In March 2005, Wife filed a Motion for Order to Show Cause and a Petition to Modify Decree of Divorce, both of which alleged that Husband had failed to comply with various obligations under the Decree, including his obligation to pay increased child support upon the termination of alimony. In response, Husband filed an Answer and Counter Petition to Modify Decree of Divorce. At the hearing on the Order to Show Cause, Wife's counsel stated that the parties had reached a "partial resolution and stipulation" whereby Husband and Wife would "exchange their tax returns for the years 2002, 2003, [and] 2004." Based on this stipulation, the parties agreed to reserve the issue of increasing Husband's monthly child support obligations for a future hearing.

¶5 Approximately one year later, Wife filed a Motion to Compel, which alleged that Husband had failed to respond to a request for the production of documents. Specifically, the motion sought production of Husband's tax records. In an order dated June 2, 2006, the trial court denied Wife's Motion to Compel without prejudice. In its order, the court noted that Husband's "response to the document request did not provide all documents requested, but set forth explanations as to why certain documents were withheld."

¶6 Wife then obtained new counsel and filed a second Motion for Order to Show Cause, which alleged that Husband had failed to pay for the children's extracurricular activities, to comply with discovery requests, and to pay increased child support. At the Order to Show Cause hearing, Wife's counsel clarified that Husband had produced some of the requested tax records, but alleged that Husband had failed to produce the "critical document" showing Husband's "gross receipts or gross revenues" for 2002 through 2004. The trial court also asked why Wife had

previously failed to enforce Husband's obligation to pay for extracurricular activities, to which Wife's counsel replied that Wife's view was, "'I'm not going to be able to get it out of him, so why should I try.'" Finally, after listening to Husband's arguments on the Motion for Order to Show Cause, the trial court stayed the proceedings and set a trial for the parties' petitions to modify. The court also ordered Husband to produce his tax records prior to trial.

¶7 During trial, Wife's counsel asked Husband whether he had sent an email to Wife that stated, "'If you are successful in raising child support, the children will suffer.'" Husband denied making such a statement, and then Wife's counsel had Husband read from a letter written by Husband, which contained the above statement. Husband's counsel objected to the admission of the letter on the grounds that it contained privileged settlement negotiations. Ultimately, the trial court admitted the letter with all but two sentences redacted.

¶8 Upon the completion of trial, the trial court entered Findings of Fact and Conclusions of Law. The court determined that Husband had not complied with several provisions of the Decree. First, the court found that Husband had failed to pay for the children's extracurricular activities as required by paragraph ten of the Decree. Second, the court found that Husband did not provide Wife with "a reasonable annual 'cost of living' increase in alimony" as required by paragraph twenty of the Decree. Third, the court determined that Husband failed to provide his tax records to Wife as required by paragraph nine of the Decree. Further, the trial court made a specific finding, based on the parties' testimony, that Wife was credible but Husband was not. In addition, the court found that although Wife did not bring her enforcement action before the trial court for "a long period of time," such delay was reasonable because Wife had attempted to enforce the Decree several times without success.

¶9 Because of Husband's noncompliance with multiple provisions of the Decree, the trial court held Husband in contempt of court and awarded judgment to Wife in the amount of \$44,311. In addition, the trial court awarded Wife \$7652.97 in attorney fees based on the court's finding that "attorney fees are justified and necessary and reasonable."

¶10 Husband appeals.

ISSUES AND STANDARDS OF REVIEW

¶11 Husband asserts that the trial court erred by finding him in contempt for his alleged failure to comply with the Decree. "The decision to hold a party in contempt of court rests within the sound discretion of the trial court and will not be disturbed on appeal unless the trial court's action 'is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of discretion.'" Marsh v. Marsh, 1999 UT App 14, ¶ 8, 973 P.2d 988 (quoting Bartholomew v. Bartholomew, 548 P.2d 238, 240 (Utah 1976)). In a related argument, Husband claims that the trial court erred by "disregard[ing] the stipulation of the parties and the law of the case . . . in finding [Husband] in contempt." We likewise review this contention for an abuse of discretion. See id.

¶12 Second, Husband argues that the trial court exceeded its discretion by admitting a portion of a letter that contained statements made during settlement negotiations. "In reviewing the admissibility of evidence at trial, we give deference to the trial court's advantageous position, and do not overturn the result unless it is clear the trial court erred." Davidson v. Prince, 813 P.2d 1225, 1230 (Utah Ct. App. 1991).

¶13 Next, Husband claims that Wife should be equitably estopped from receiving past alimony and child support and that Wife waived any right she had to enforce such payments. "The application of the facts to the legal standard of equitable estoppel is a mixed question of fact and law." Trolley Square Assocs. v. Nielson, 886 P.2d 61, 65 (Utah Ct. App. 1994). Consequently, we review questions of fact "under a deferential clear error standard," but grant no deference to questions of law. Terry v. Retirement Bd., 2007 UT App 87, ¶ 8, 157 P.3d 362 (internal quotation marks omitted). Similarly, "'whether the trial court employed the proper standard of waiver presents a legal question which is reviewed for correctness, but the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations, to which we give a [trial] court deference.'" Smile Inc. Asia Pte. Ltd. v. BriteSmile Mgmt., Inc., 2005 UT App 381, ¶ 20, 122 P.3d 654 (quoting Pledger v. Gillespie, 1999 UT 54, ¶ 16, 982 P.2d 572).

¶14 Husband also challenges the trial court's award of attorney fees to Wife. "[A] trial court must base its award of attorney fees on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees. The decision to award attorney fees must be based on sufficient findings regarding these factors." Riley v. Riley, 2006 UT App 214, ¶ 25, 138 P.3d 84 (internal quotation marks and citation omitted).

¶15 Finally, Wife asserts that she should be awarded her attorney fees on appeal. "'Generally, when fees in a divorce case are awarded to the prevailing party at the trial court, and that party in turn prevails on appeal, then fees will also be awarded on appeal.'" Shinkoskey v. Shinkoskey, 2001 UT App 44, ¶ 20, 19 P.3d 1005 (quoting Marshall v. Marshall, 915 P.2d 508, 517 (Utah Ct. App. 1996)).

ANALYSIS

I. Contempt of Court

¶16 Husband's first argument is that the trial court erred by finding him in contempt of court. "Under Utah law, 'in order to prove contempt for failure to comply with a court order it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so.'" Homeyer v. Stagg & Assocs., 2006 UT App 89, ¶ 6, 132 P.3d 684 (quoting Von Hake v. Thomas, 759 P.2d 1162, 1172 (Utah 1988)); see also Utah Code Ann. § 78-32-1 (2002). The trial court ruled that "[Husband] knew there was an order of the Court and had the ability and capacity to comply with the orders of the Court" and that "[Husband] intentionally chose not to follow the orders of the Court." As such, the trial court found Husband in contempt for failing to follow paragraphs nine, ten, and twenty of the Decree.

¶17 On appeal, Husband claims that he should not be held in contempt because he "paid all child support and spousal support as worked out by the parties" and because he complied with the parties' stipulation on production of tax records. In other words, Husband contends that he did not intentionally fail or refuse to comply with the Decree. See Homeyer, 2006 UT App 89, ¶ 6. We disagree.¹

A. Production of Documents

¶18 Both parties admit that they stipulated to exchange their tax records for 2002 through 2004. However, at the hearing on the second Order to Show Cause, Wife's counsel stated that

1. Indeed, "[s]o long as [a divorce] decree stands, it is incumbent upon [the parties] to comply with it, or at least to exercise every reasonable effort to comply with it. If because of change in the circumstances of the parties it appears that the decree is inequitable, or impossible to comply with, [a party] may petition for modification." Osmus v. Osmus, 114 Utah 216, 198 P.2d 233, 236 (1948).

Husband had produced some documents, but alleged that Husband failed to produce the "critical document" showing Husband's "gross receipts or gross revenues" for 2002 through 2004. Furthermore, according to Wife, she did not receive these "critical" tax records until six days before trial. The trial court found Husband's testimony that he fully complied with the requirement that he produce tax records incredible. We defer to the trial court's unique position to evaluate the credibility of the witnesses. See Schaumberg v. Schaumberg, 875 P.2d 598, 603 (Utah Ct. App. 1994) (deferring to the trial court's "superior position to judge the credibility of the witnesses and to weigh the evidence").

B. Child Support and Alimony Payments

¶19 Husband also contends that he made all alimony and child support payments required by the Decree and the parties' oral agreement. After considering all the evidence, the trial court expressly found that Husband had failed to pay \$31,997 in child support as required by paragraph nine of the Decree and violated paragraph ten of the Decree by failing to pay for \$1726 worth of the children's non-school extracurricular activities. The trial court was in the best position to consider the conflicting evidence on this point, and we defer to its findings.

¶20 The trial court also ruled that Husband had failed to pay \$3808 in cost of living spousal support, as required by paragraph twenty of the Decree. Husband has not specifically challenged this finding on appeal. We therefore affirm the trial court's finding of Husband in contempt of court for his violation of paragraph twenty of the Decree. See, e.g., Chen v. Stewart, 2004 UT 82, ¶ 74, 100 P.3d 1177 (affirming because appellant failed to adequately challenge trial court's findings of fact by marshaling the evidence).

¶21 In light of the foregoing, we cannot conclude that the trial court's action in finding Husband in contempt for failing to produce his tax records and failing to comply with his child support and alimony obligations "'is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of discretion.'" Marsh v. Marsh, 1999 UT App 14, ¶ 8, 973 P.2d 988 (quoting Bartholomew v. Bartholomew, 548 P.2d 238, 240 (Utah 1976)). We therefore affirm the trial court's decision to hold Husband in contempt of court based on his failure to produce tax records and to pay alimony and child support.

C. Additional Arguments

¶22 In a related claim, Husband asserts that the trial court should not have found him in contempt because such a ruling

"disregard[ed] the stipulation of the parties and the law of the case." These arguments are without merit. As noted above, Husband failed to make all of his child support and alimony obligations and did not fully comply with the stipulation to exchange tax records. Indeed, Husband did not produce the most relevant tax records until six days prior to trial.

¶23 Furthermore, the law of the case doctrine is inapplicable here. "The 'law of the case' doctrine specifies that when a legal 'decision [is] made on an issue during one stage of a case,' that decision 'is binding in successive stages of the same litigation.'" Jensen v. IHC Hosps., Inc., 2003 UT 51, ¶ 67, 82 P.3d 1076 (alteration in original) (quoting Thurston v. Box Elder County, 892 P.2d 1034, 1037 (Utah 1995)). However, there are exceptions to the doctrine: "(1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." Gildea v. Guardian Title Co., 2001 UT 75, ¶ 9, 31 P.3d 543 (internal quotation marks omitted). More importantly, "the law of the case doctrine does not prevent a judge from reconsidering his or her previous nonfinal orders." Macris v. Sculptured Software, Inc., 2001 UT 43, ¶ 29, 24 P.3d 984.

¶24 In an attempt to apply the law of the case doctrine here, Husband asserts that the trial court's order holding him in contempt is inconsistent with its prior rulings. We agree that the trial court accepted the parties' stipulation and later denied, without prejudice, Wife's motion to compel production of Husband's tax records. However, Wife later filed a new motion in response to Husband's continued failure to produce the documents. During the hearing on the second Order to Show Cause, Wife's counsel explained that Husband had failed to produce the "critical documents" showing his tax information. As a result, the trial court revisited its prior ruling and required Husband to produce his tax records prior to trial. Thus, any change to the court's prior ruling was brought about by Husband's noncompliance, and was well within the trial court's discretion. See id. (noting that trial court may reconsider its prior nonfinal rulings). We therefore affirm the trial court's order finding Husband in contempt of court.

II. Admission of the Settlement Letter

¶25 Next, Husband argues that the trial court erred by admitting statements in a letter authored by Husband, which Husband sent to Wife in the context of settlement negotiations. Husband further contends that the trial court should not have relied on these statements in making its determination that Husband's testimony

lacked credibility. In response, Wife argues that the statements in the letter were properly admitted because such statements were used to impeach Husband's prior testimony. We review the trial court's determinations regarding the admissibility of evidence under an abuse of discretion standard. See Davidson v. Prince, 813 P.2d 1225, 1230 (Utah Ct. App. 1991). We affirm because even if the trial court erred by admitting Husband's statements, such error was harmless.

¶26 Husband has the burden of proving not only that the trial court erred, but that such error "was substantial and prejudicial in that [Husband] was deprived in some manner of a full and fair consideration of the disputed issues by the [finder of fact]." Ashton v. Ashton, 733 P.2d 147, 154 (Utah 1987). We therefore must first determine whether the trial court erred by admitting the settlement letter.

¶27 During trial, Wife's counsel asked Husband whether he admitted sending Wife an email stating that "the children will suffer" if Wife succeeded in raising child support. Husband responded that he had not sent such an email. Wife's counsel then had Husband read from a letter written by Husband, which stated, "If successful in raising child support, ultimately, the children will suffer." Prior to entering the letter into evidence, Wife's counsel informed the court that the letter contained "some settlement discussions" and offered to redact portions of the letter. Husband's counsel then objected to the admission of the letter, arguing that all of its contents were inadmissible as communications made during settlement negotiations. After a colloquy on the issue, the trial court instructed counsel to redact all statements relating to the settlement negotiations. The letter was then admitted with all but two sentences redacted.²

¶28 In order for statements made during settlement negotiations to be excluded from the evidence, "the party seeking to have evidence of offers to compromise or statements made in the course thereof excluded must show that the discussions in question were made in compromise negotiations." Davidson, 813 P.2d at 1232 (internal quotation marks omitted). Husband argues that the entire letter contained settlement negotiations. More specifically, Husband states that the phrase "[i]f successful in raising child support, ultimately the children will suffer" was made in response to a specific settlement amount offered by Wife

2. The admitted portions of the letter read: "If successful in raising child support, ultimately the children will suffer. I will no longer provide the additional help that I have in the past."

and was meant to demonstrate that Wife's offer was unacceptable. In response, Wife argues that statements made in settlement negotiations can be admitted for impeachment.

¶29 Under rule 408 of the Utah Rules of Evidence, "[e]vidence of conduct or statements made in compromise negotiations is . . . not admissible." Utah R. Evid. 408. Rule 408, however, "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness" Id. Thus, although generally statements made during settlement negotiations are inadmissible under rule 408, there are exceptions, one of which allows for the admission of statements made during settlement negotiations if offered for another purpose, such as proving bias or prejudice.³

¶30 As Wife points out, a footnote in our prior case law suggests impeachment as one permissible use of statements made in settlement negotiations. In Davidson v. Prince, 813 P.2d 1225 (Utah Ct. App. 1991), we stated that "evidence of statements made in settlement negotiations can and should be admitted for purposes of impeachment." Id. at 1233 n.9. Because the Davidson court held that the demand at issue was not made in the course of settlement negotiations, see id. at 1233, its footnote regarding the impeachment exception to rule 408 is dictum. This statement reflected a then-existing trend among courts interpreting rule 408 of the Federal Rules of Evidence and similar state rules. See id. at 1233 n.9 (discussing several cases in which statements made in settlement negotiations were admitted for purposes of impeachment). This tendency to admit settlement negotiations for impeachment received much criticism. See EEOC v. Gear Petroleum, Inc., 948 F.2d 1542, 1546 (10th Cir. 1991) ("[T]he Court should decide against admitting statements made during settlement negotiations as impeachment evidence when they are used to impeach a party who tried to settle a case but failed. The

3. We note, however, that for statements from settlement negotiations to be admissible "for another purpose, such as proving bias or prejudice of a witness," Utah R. Evid. 408, the negotiations must still be relevant. See R. Collin Mangrum & Dee Benson, Mangrum & Benson on Utah Evidence 183 (2006-07 ed.) (noting that a party seeking to admit evidence over a rule 408 objection must show that the evidence is relevant). Indeed, under rule 403 of the Utah Rules of Evidence, any relevant evidence, including impeachment evidence under rule 408, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Utah R. Evid. 403; see also id. R. 401 (defining "relevant evidence").

philosophy of [rule 408 of the Federal Rules of Evidence] is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial. Opening the door to impeachment evidence on a regular basis may well result in more restricted negotiations." (internal quotation marks omitted)); see also Edward Kimball & Ronald Boyce, Utah Evidence Law 4-131 n.269 (2d ed. 2004) (stating that Davidson "effectively nullifies" rule 408 because "the jury is not likely to make much of the distinction between admission to impeach and admission as substantive evidence").

¶31 In 2006, rule 408 of the Federal Rules of Evidence was amended to state that evidence of settlement negotiations is not admissible "to impeach through a prior inconsistent statement or contradiction."⁴ Fed. R. Evid. 408. This amendment was in response to the division among the courts over whether settlement negotiations can be admitted for impeachment. See Fed. R. Evid. 408 Advisory Committee Notes: 2006 Amendment, 28 U.S.C.A. (West Supp. 2007) (noting that 2006 amendments were meant to "settle some questions in the courts about the scope of the Rule"). According to the Advisory Committee Notes, "[t]he amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements." Id. Thus, Federal rule 408 now explicitly prohibits the use of evidence of settlement negotiations for impeachment by prior inconsistent statement or contradiction.

¶32 Rule 408 of the Utah Rules of Evidence has not been amended to include an express prohibition on the use of evidence of settlement negotiations for impeachment of prior inconsistent statements. We recognize, however, the persuasive rationale behind the current trend among courts to exclude evidence of settlement negotiations even for purposes of impeachment. Therefore, we hold that the trial court erred by admitting the

4. "When . . . there is almost no case law interpreting the Utah rule and the Utah and federal rules are identical, we freely resort to federal law as a useful guide." Oakwood Vill. LLC v. Albertsons, Inc., 2004 UT 101, ¶ 12 n.1, 104 P.3d 1226 (internal quotation marks omitted). Although the current version of rule 408 of the Federal Rules of Evidence is no longer identical to rule 408 of the Utah Rules of Evidence, we nonetheless discuss the federal rule as indicative of the current trend regarding the admissibility of evidence of settlement negotiations for impeachment purposes.

statements from Husband's settlement letter. Consequently, to the extent that our dicta in Davidson suggests that evidence of settlement negotiations are admissible for purposes of impeachment, we now depart from that non-binding precedent. See Jones v. Barlow, 2007 UT 20, ¶ 28, 154 P.3d 808 (noting that dicta is not binding on appellate court).

¶33 Nevertheless, we affirm the trial court on the ground that even if it did err by admitting Husband's statements during settlement negotiations, such error was harmless. In order to prove prejudice, Husband must show that the trial court's error "was substantial and prejudicial in that [Husband] was deprived in some manner of a full and fair consideration of the disputed issues by the [finder of fact]." Ashton v. Ashton, 733 P.2d 147, 154 (Utah 1987); see also Utah R. Civ. P. 61 ("No error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

¶34 Husband argues that the error was prejudicial because the trial court based its determination that he was incredible in part on the impeachment evidence. At trial, however, the court stated that its finding regarding Husband's credibility was also based on Husband's statement that "he was following all of the different measures inside of the . . . divorce decree, despite the fact that he admitted that in fact he was behind on a couple of them." The trial court also found Husband's claim that he misinterpreted the requirements of the Decree to be "unreasonable and quite frankly, incredible." Thus, the trial court's finding that Husband was not believable was based on at least two grounds unrelated to the impeachment evidence. We therefore conclude that the admission of the evidence of settlement negotiations did not prejudice Husband, and affirm the trial court.

III. Equitable Estoppel and Waiver

¶35 Husband asserts that Wife should be equitably estopped from claiming unpaid alimony and child support because she failed to enforce the Decree for several years and because she accepted

payments not required by the Decree.⁵ There are three elements that must be met to succeed on a claim of equitable estoppel:

first, a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; next, reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act; and, third, injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶ 14, 158 P.3d 1088 (internal quotation marks omitted). In essence, Husband claims that Wife's failure to enforce the Decree and acceptance of certain payments reasonably led him to comply only partially with the Decree, and that it would be inequitable to require Husband to pay the full amount of unpaid alimony and child support at this late date.

¶36 In response, Wife argues that estoppel is inappropriate because her actions demonstrated a desire to enforce fully the Decree. We agree. At trial, Wife testified that "[f]or the first few years" after the parties' divorce, she frequently requested to exchange tax documents and go over expense receipts with Husband. Further, Wife testified that she felt that Husband would never give her the proper documentation and that the only way to enforce the Decree fully would be through litigation. Again, the trial court expressly found that Wife's testimony was credible, which finding we defer to on appellate review. See Schaumberg v. Schaumberg, 875 P.2d 598, 603 (Utah Ct. App. 1994) (deferring to the trial court's "superior position to judge the

5. Wife contends that Husband failed to preserve his estoppel argument for appeal. See Pratt v. Nelson, 2007 UT 41, ¶ 15, 164 P.3d 366 ("Generally, in 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." (internal quotation marks omitted)). Our review of the record, however, reveals that Husband specifically argued the issue of estoppel in the second Motion on the Order to Show Cause and during the trial. We therefore address the merits of Husband's estoppel claim.

credibility of the witnesses and to weigh the evidence"). We therefore reject Husband's equitable estoppel claim.⁶

¶37 In a similar vein, Husband argues that "[Wife's] actions in not pursuing recovery of past support and acceptance of payments not required by [the Decree] constitute a waiver" of her right to enforce the Decree. "A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. [The relinquishment] must be distinctly made, although it may be express or implied." Flake v. Flake, 2003 UT 17, ¶ 29, 71 P.3d 589 (alteration in original) (internal quotation marks omitted).

¶38 Wife again claims that Husband failed to preserve this issue for appeal. See Pratt v. Nelson, 2007 UT 41, ¶ 15, 164 P.3d 366 (discussing necessity of preserving issues for appeal). We agree. Because Husband raises his waiver argument for the first time on appeal, and has failed to cite where in the record his argument is preserved, we refuse to address the merits of this claim. See, e.g., Tindley v. Salt Lake City Sch. Dist., 2005 UT 30, ¶ 10 n.2, 116 P.3d 295 ("With limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal." (internal quotation marks omitted)).

IV. Attorney Fees

¶39 Husband challenges the trial court's award of attorney fees to Wife. Husband's primary argument is that attorney fees were improper because the trial court should not have found him in contempt of court. Given our disposition of Husband's challenge to the contempt finding, we must reject this argument. Husband also alleges, however, that the trial court did not enter

6. We note also that "[t]he right to support from the parents belongs to the minor children and is not subject to being bartered away, extinguished, estopped or in any way defeated by the agreement or conduct of the parents." Andrus v. Andrus, 2007 UT App 291, ¶ 14, 169 P.3d 754 (quoting Hills v. Hills, 638 P.2d 516, 517 (Utah 1981)); but see Department of Human Servs. ex rel. Parker v. Irizarry, 945 P.2d 676, 680 (Utah 1997) (holding that mother may, by her actions or representations, be precluded from recovering past due installments of support money to reimburse her for child rearing expenses she incurred before father's paternity was established). Thus, even if Husband were to succeed on his estoppel claim, Wife's actions could not curtail the right of the children to receive future child support from Husband.

sufficient findings on the reasonableness of Wife's attorney fees or Wife's need for such fees. We agree.

¶40 Under Utah Code section 30-3-3, a trial court "may order a party to pay the costs, attorney fees, and witness fees . . . of the other party to enable the other party to prosecute or defend the action." Utah Code Ann. § 30-3-3(1) (2007). "In doing so, however, the trial court must base its award of attorney fees 'on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees.'" Riley v. Riley, 2006 UT App 214, ¶ 25, 138 P.3d 84 (quoting Childs v. Childs, 967 P.2d 942, 947 (Utah Ct. App. 1998)). Further, "[t]he decision to award attorney fees 'must be based on sufficient findings regarding these factors.'" Id. (quoting Shinkoskey v. Shinkoskey, 2001 UT App 44, ¶ 18, 19 P.3d 1005).

¶41 Here, the trial court awarded Wife \$7652 in attorney fees. In its Findings of Fact and Conclusions of Law, the court concluded that attorney fees were "justified and necessary and reasonable." The court also instructed Wife's counsel to "prepare an affidavit of attorney fees incurred by [Wife]." Because the trial court did not set forth findings of fact to support this conclusion, there is no evidence in the court's order "of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees," id. ¶ 25 (internal quotation marks omitted). Consequently, we agree with Husband and hold that the trial court failed to make the findings of fact needed to support an award of attorney fees to Wife.

¶42 "'The trial court . . . must make the findings of fact explicit in support of its legal conclusions Without adequate findings of fact, there can be no meaningful appellate review.'" Shinkoskey, 2001 UT App 44, ¶ 18 (omissions in original) (quoting Willey v. Willey, 951 P.2d 226, 230 (Utah 1997)). Furthermore, "'unless the record clearly and uncontrovertedly supports the trial court's decision, the absence of adequate findings of fact ordinarily requires remand for more detailed findings by the trial court.'" Id. (quoting Woodward v. Fazzio, 823 P.2d 474, 478 (Utah Ct. App. 1991)).

¶43 Finally, Wife urges this court to award her attorney fees on appeal. "[W]hen fees in a divorce case are awarded to the prevailing party at the trial court, and that party in turn prevails on appeal, then fees will also be awarded on appeal." Id. ¶ 20 (internal quotation marks omitted). We have previously held, however, that

[b]ecause the trial court did not make sufficient findings to support the award of attorney fees to [the receiving spouse], we cannot determine if she should be awarded fees on appeal. However, if the trial court determines it can make sufficient findings on each of the factors required to support the award then [the receiving spouse] should also receive her reasonable fees on appeal.

Id. We therefore deny Wife's request for attorney fees on appeal at this time, but if the trial court determines that it can enter sufficient findings of fact to support such an award, the court may also grant Wife her attorney fees on appeal.

CONCLUSION

¶44 The trial court properly held Husband in contempt of court for his intentional violation of the Decree. Although the court exceeded its discretion by admitting Husband's statements from the settlement letter, the error was harmless because such statements were merely cumulative of other reasons the trial court found Husband's testimony incredible. We also hold that Wife is not estopped from enforcing the Decree and that Husband did not preserve his waiver argument. We reverse the trial court's award of attorney fees to Wife and remand for the entry of sufficient findings of fact.

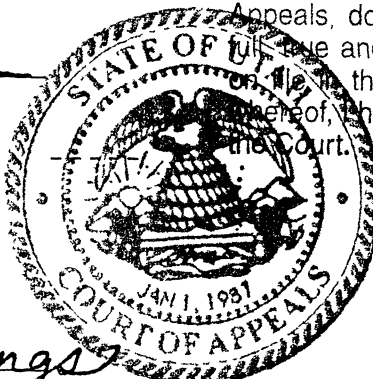
¶45 Affirmed in part, reversed in part, and remanded for further proceedings in part.

Carolyn B. McHugh
Carolyn B. McHugh, Judge

¶46 WE CONCUR:

Judith M. Billings
Judith M. Billings, Judge

James Z. Davis
James Z. Davis, Judge



I, the undersigned, Clerk of the Utah Court of Appeals, do hereby certify that the foregoing is a full, true and correct copy of an original document on file in the Utah Court of Appeals. In testimony whereof, I have set my hand and affixed the seal of the Court.

Lisa Collins
Lisa Collins
Clerk of the Court
By [Signature]
Deputy Clerk
Date March 10, 2008