

2009

Kathy J. Baum v. Michael Hayes : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Kathy J. Baum v. Michael Hayes*, No. 20091028 (Utah Court of Appeals, 2009).
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IN THE UTAH COURT OF APPEALS

KATHY J. BAUM,	:	
	:	
Petitioner/Appellant,	:	Case No. 20091028-CA
	:	
v.	:	
	:	
MICHAEL HAYES,	:	Trial Court No. 044905929
	:	
Respondent/Appellee.	:	

BRIEF OF PETITIONER/APPELLEE KATHY J. BAUM

**APPEAL FROM THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE TYRONE MEDLEY PRESIDING**

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FILED
UTAH APPELLATE COURT
JUL 19 2010

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103 and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Has Appellant, who does not adequately challenge the trial court’s findings in support of its alimony and child support determinations, shown that the findings are unsupported by substantial evidence? In challenging the trial court’s findings, an appellant “must first ‘marshal the evidence in support of the findings and then demonstrate that the findings are unsupported by substantial evidence.’” *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 9, 176 P.3d 476 (citation omitted); *see also* Utah R. App. P. 24(a)(9) (requiring an appellant who wishes to challenge a factual finding to marshal the evidence supporting that finding before attacking it); *Moon v. Moon*, 1999 UT App 12, ¶ 24, 973 P.2d 431 (“When an appellant fails to meet the heavy burden of marshaling the evidence . . . we assume that the record supports the findings of the trial court.”) (quotations and citation omitted).

2. Has Appellant shown that the trial court’s findings reflect a clear and prejudicial abuse of discretion? “Trial courts have considerable discretion in determining alimony and child support, and such determinations will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.”¹

¹ Pursuant to Rule 24(b)(1), Appellee respectfully sets forth her own statement of the issues properly before this Court. As an initial matter, Appellee notes that Appellant

STATEMENT OF THE CASE

This case is on appeal to this Court for the second time. The first appeal, brought by Petitioner/Appellee Kathy Baum (“Ms. Baum”), resulted in a remand to the trial court for additional findings related to its determinations of alimony and child support. On remand, the trial court applied the proper analytical framework, made the necessary findings, and determined alimony and child support accordingly.

has failed to meet the requirement of Rule 24(a)(5)(A) that his brief include “citation to the record showing that the issue was preserved in the trial court.” This is important because Appellant’s framing of the issues on appeal not only seeks to raise issues for the first time on appeal, but also is directly contrary to his arguments below.

Specifically, as to his first stated issue, Appellant not only did not preserve the issue, he never even argued to the trial court that it was required by “law of the case” to make “specific findings of clear error or a compelling reason” for revising the award of alimony and child support in the Amended Decree. (*See* R. 704-05; R. 806 p. 22 l. 4 – p. 31 l. 7).

Appellant also took an entirely different position below than he takes now on his second stated issue, the nature of this Court’s mandate. Appellant’s position below was that the trial court’s only option was to restate the findings and conclusions it had already reached. (*Id.*). That position was flatly contrary to this Court’s statement that it was remanding the case to the trial court “for more detailed findings without restriction to any corrections or modifications the trial court deems appropriate.” *See Baum v. Hayes*, 2008 UT App 371, ¶ 16. It was also contrary to other precedent emphasizing the same point. *See, e.g., Hodge v. Hodge*, 2007 UT App 394, ¶ 7 (“We do not intend our remand to be merely an exercise in bolstering and supporting the conclusion already reached.”) (citing *Allred v. Allred*, 797 P.2d 1108, 1112 (Utah Ct. App. 1990)). Now that the trial court has properly concluded that corrections and modifications were indeed appropriate, Appellant tries a new tack on appeal.

Appellant’s attempt to raise new issues for the first time on appeal, and to impose anything other than a straightforward “abuse of discretion” standard based on “law of the case,” cannot detract from the reality that this appeal is limited to examining whether the trial court’s Amended Findings of Fact support its revisions to the alimony and child support awards and reflect an appropriate use of the trial court’s substantial discretion.

Having argued below that the trial court's only option on remand was to reiterate its original alimony and child support awards, Respondent/Appellant Michael Hayes ("Dr. Hayes") now argues that the trial court abused its discretion in increasing those awards. In so doing, however, he fails to meet his own burden to marshal the facts in support of the trial court's findings on remand, and likewise fails to meet the heavy burden required to show an abuse of discretion.

STATEMENT OF THE FACTS

Dr. Hayes' "Statement of Relevant Facts" selectively lays out the evidence and argument favorable to Dr. Hayes' position, but ignores the actual findings made by the trial court on remand. This approach does not constitute a proper challenge to the trial court's findings on remand. *See Schaumberg v. Schaumberg*, 875 P.2d 598, 603 (Utah Ct. App. 1994) (rejecting husband's statement of facts that merely reargued evidence supporting his position).

To properly challenge a trial court's findings, an appellant "must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous." *Shepherd v. Shepherd*, 876 P.2d 429, 431 (Utah Ct. App. 1994) (quotations and citation omitted). "If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." *Id.* (quotations and citation omitted).

Because Dr. Hayes has not marshaled the evidence or otherwise properly challenged any of the trial court's specific findings on remand, the relevant facts are the trial court's Supplemental Findings of Fact, attached as Addendum F to Appellant's Brief. Although Dr. Hayes failed to satisfy the marshalling requirement as set forth below, the evidence amply supports the trial court's findings, thus precluding Dr. Hayes from meeting his burden to leave this Court with "a definite and firm conviction that a mistake has been made" by the trial court on remand. *See Cummings v. Cummings*, 821 P.2d 472, 476 (Utah Ct. App. 1991) (quotations and citation omitted).

A. General Background

The parties were married on September 11, 1987 in Utah. (R. 591, at 97:3-7). The only child of the marriage, Ruby, was born April 18, 1992. (*Id.* at 97:13-16).

When the parties married, Ms. Baum was working at the Howard Hughes Medical Institute as an office assistant doing payroll and benefits. (*Id.* at 104:14-22). Dr. Hayes was a full-time student and worked part time at Realms of Inquiry, a private school. (*Id.* at 104:23 - 105:12). Ms. Baum was soon recruited by a start-up company called NPS Pharmaceuticals, where she worked from January 1988 through December 1996, eventually rising to the position of Human Resources Manager. (*Id.* at 105:23 – 106:7).

Dr. Hayes eventually received BS, MS, and Ph.D. degrees. (*Id.* at 107:3-5). In 1996, after Dr. Hayes finished his schooling, he was offered a job at the University of Hawaii. (*Id.* at 118:14-16). Until he became a professor, Dr. Hayes never worked full time. (*Id.* at 106:25 – 107: 2). Instead, he studied full time and worked at various odd

jobs, such as a janitor, swim coach, bagel maker, and teaching assistant. (*Id.* at 106:19-24). Ms. Baum maintained primary responsibility for paying the family's monthly expenses. (*Id.* at 112:11-18).

Ms. Baum had to quit her job at NPS so that the family could move to Hawaii for Dr. Hayes' teaching career. (*Id.* at 106:6-12). Dr. Hayes began his job at the University of Hawaii while the Ms. Baum looked for housing, dealt with moving the family furnishings, and located schooling for Ruby. (*Id.* at 110:7-8). At the same time, Ms. Baum, who had a long history of intermittent headaches and migraines, began to experience increasing headaches associated with nausea and vomiting. (*Id.*; *see also* Exhibit 6, p. 1). She went to the Emergency Room many times, but the doctors were unable to make a diagnosis. (R. 591, at 110:8-12). In early 1998, Ms. Baum was diagnosed with an operable brain tumor and she had surgery in Hawaii. (*See* Exhibit 6, p.1). The tumor was successfully removed, but the surgery left Ms. Baum with "severe depressive symptoms and stable cognitive deficits consistent with the diagnosis of dementia related to the brain trauma." (Exhibit 22, p. 1). She has "effectively responded to treatment for her depressive symptoms yet continues to have stable cognitive deficits in multiple areas including language skills (word finding, substitutions and paraphasic errors), speech prosody, short term memory, immediate recall and attention." (*Id.*).

In 2000, Dr. Hayes was terminated from the University of Hawaii, and accepted a position at Washington State University. (R. 591, at 118:14-16). Ms. Baum moved the family again to facilitate Dr. Hayes' career. (*Id.* at 118:18-21). With her parents'

assistance, they bought a house in Idaho (Washington State University was near the border). (R. 591, at 119:22 – 120:1). Ms. Baum began to experience additional health problems, was subsequently diagnosed with Graves Disease and underwent treatment and, eventually, surgery for a thyroid condition. (*Id.* at 127:1 – 128:3).

In March of 2004, the marriage dissolved after Ms. Baum and Ruby caught Dr. Hayes in compromising circumstances with his graduate student. (*Id.* at 35:12 – 36:18). Dr. Hayes admitted he and the graduate student were having an affair. (*Id.*) Dr. Hayes moved out of the marital home leaving Ms. Baum with her compromised health and in mental distress from her discovery and Dr. Hayes' admission. (*Id.* at 167:7-10). The home was sold for a loss, and Ms. Baum and Ruby moved back to Salt Lake City to live with Ms. Baum's mother. (*See* Exhibit 3). Ms. Baum's mother later purchased a home for Ms. Baum and Ruby to rent, and required a written lease. (*See* R. 591 at 136:9 – 18; Exhibit 7).

B. Facts Relating to Ms. Baum's Financial Contributions in the Marital Estate

From the time of the marriage until the parties moved to Hawaii in 1996, Ms. Baum consistently earned more money than Dr. Hayes. This fact is reflected on their Social Security statements as set forth in a trial exhibit and summarized as follows:

Year	EARNINGS		Total	Difference
	Dr. Hayes	Ms. Baum		
1987	\$7,234.00	\$21,761.00	\$28,995.00	\$14,527.00
1988	\$12,000.00	\$24,057.00	\$36,057.00	\$12,057.00
1989	\$12,790.00	\$28,359.00	\$41,149.00	\$15,569.00
1990	\$9,308.00	\$32,172.00	\$41,480.00	\$22,864.00
1991	\$4,049.00	\$31,989.00	\$36,038.00	\$27,940.00
1992	\$8,244.00	\$38,350.00	\$46,594.00	\$30,106.00

Year	EARNINGS		Total	Difference
	Dr. Hayes	Ms. Baum		
1993	\$9,257.00	\$39,999.00	\$49,256.00	\$30,742.00
1994	\$1,145.00	\$48,807.00	\$49,952.00	\$47,662.00
1995	\$4,200.00	\$53,846.00	\$58,046.00	\$49,646.00
1996	\$23,966.00	\$62,700.00	\$86,666.00	\$38,734.00

(See Exhibit 3, p. 4)

In addition to contributing her earnings to enable Dr. Hayes to complete his education without having to work full time, Ms. Baum also contributed other assets, including separate property and all of her retirement assets (including a premarital portion), to support the family. For example, in December of 1988, Dr. Hayes and Ms. Baum purchased their first home on Hollywood Avenue in Salt Lake City for \$70,800. (See Exhibit 3, p. 3). Ms. Baum liquidated her entire retirement account at Howard Hughes Medical Institute, which was approximately \$20,000, to pay toward the purchase of the home. (R. 591, at 111:18-24). When the family decided to move to Hawaii, they sold the Hollywood Avenue home and used the proceeds as a down payment on a condo in Hawaii. (*Id.* at 117:17-118:7). When the family moved from Hawaii to Idaho, Ms. Baum's family assisted the family with two loans for the purchase of the home, totaling \$276,000. (*Id.* at 121:10 - 122:23). Ms. Baum's mother also paid \$9,000 toward a family car. (*Id.* at 55:17 – 56:2).

Throughout the marriage, Ms. Baum periodically sold other assets and used the proceeds to pay the family's living expenses. For example, she liquidated shares of NPS Pharmaceutical stock she had accumulated through an employee purchase program. (*Id.* at 113:9-18). In addition, she liquidated property and other assets she received from her

grandfather as an inheritance. (*Id.* at 115:12-17). Besides paying living expenses, Ms. Baum paid off the full amount of Dr. Hayes' school loans, and Dr. Hayes signed a promissory note pledging to pay back the entire amount. (*Id.* at 122:24-123:23; *see also* Exhibit 4). Ms. Baum also paid off another school loan Dr. Hayes had defaulted on, this one for radio disc jockey school that he attended before the parties were even married. (R. 591, at 123: 12:-23, 134:22-135:6).

All totaled, Ms. Baum's financial contribution to the marital estate was in excess of \$500,000, as set forth in trial exhibits and testimony and summarized as follows:

Year	Asset	Value
1988	Howard Hughes Retirement (Part Premarital)	\$20,000.00
1990	Lot (Inherited)	\$3,000.00
1992	Land 1/5 MK (Inherited)	\$9,800.00
1993	Issac Baum 1st Sec (Inherited)	\$600.00
1993	Issac Baum 1st Sec (Inherited)	\$2,230.00
1995	NPS Pharm.	\$5,940.00
1995	NPS Pharm.	\$11,876.00
1996	Oppenheimer	\$476.00
1996	Oppenheimer	\$6,069.00
1997	NPS Pharm.	\$88,118.00
2000	NPS Pharm.	\$122,909.00
2001	Paine Webber	\$143,114.00
2001	NPS Pharm.	\$16,197.00
2002	NPS Pharm.	\$35,025.00
2003	NPS Pharm.	\$30,224.00
2003	NPS Pharm.	\$17,022.00
Total		\$512,600.00

(*See* Exhibit 3). For all intents and purposes, Ms. Baum used her salary, her savings and investments, her retirement, even her separate assets and inheritance, to financially

support the family so Dr. Hayes could concentrate on obtaining his degrees. (R. 591, at 166:4-24). Ms. Baum also sacrificed her promising career at NPS to further Dr. Hayes' career. (*Id.* at 106:8-15).

C. Facts Relating to Ms. Baum's Need for Alimony

Ms. Baum provided a Financial Declaration listing total after-tax needs of \$4,124 and asked that the amount be grossed up to account for taxes she estimated she would have to pay to net that amount. (*See* Exhibit 7, pp. 5-6). She testified the amounts of her claimed expenses (other than the tax estimate) reflected her and Ruby's actual expenses. These expenses included rent of \$1,000 a month payable to her mother for the house purchased when Ms. Baum and Ruby relocated to Utah, as well as substantial insurance and out-of-pocket medical costs due to her health problems. (R. 591, at 136:9 – 137:24, 168:2 – 175:13).

Following separation, Ms. Baum was awarded temporary alimony in the amount of \$1,350 per month and temporary child support in the amount of \$610 per month, for total payments of \$1,960 per month. (R. 591, at 205:7-11). Ms. Baum testified she was not able to cover all of her expenses with that temporary support, and had to rely on loans from her mother to cover many expenses. (*Id.* at 138:2-21). Ms. Baum's mother lent Ms. Baum money to pay for attorney fees, amounting to nearly \$64,000 as of trial, as well as moving costs, rent, and many month-to-month incidentals charged on credit cards. (*See* Exhibit 8; *see also* R. 591, at 247:25 – 248:3). As a result, Ms. Baum had

over \$123,000 in debt as of the time of trial, much of it owed to her mother. (*See* Exhibit 7, pp. 2-3).

Ms. Baum also testified to the high costs associated with the different medications she requires, and introduced evidence of the substantial increase in the cost of insurance she would face if indeed she were to be insurable at all when her COBRA coverage terminates. (*See* Exhibit 12). On cross examination, she acknowledged that she claimed both \$409 for her prescriptions without insurance, and \$441 for insurance, and that she likely would not need both. (R. 591, at 175:3-13).

D. Facts Relating to Dr. Hayes' Ability to Pay Alimony

After Ms. Baum became disabled due to her brain tumor and Dr. Hayes had become employed full time as a college professor, Dr. Hayes' earnings exceeded Ms. Baum's for the first time in the marriage, as set forth in a trial exhibit and summarized as follows:

Year	Earnings		Total	Difference
	Dr. Hayes	Ms. Baum		
1997	\$41,612.00	\$2,200.00	\$43,812.00	-\$39,412.00
1998	\$46,273.00	\$0.00	\$46,273.00	-\$46,273.00
1999	\$44,727.00	\$0.00	\$44,727.00	-\$44,727.00
2000	\$44,458.00	\$0.00	\$44,458.00	-\$44,458.00
2001	\$59,604.00	\$0.00	\$59,604.00	-\$59,604.00
2002	\$67,042.00	\$0.00	\$67,042.00	-\$67,042.00
2003	\$62,257.00	\$0.00	\$62,257.00	-\$62,257.00
2004	\$66,475.00	\$2,700.00	\$69,175.00	-\$63,775.00
2005	\$91,032.44	\$16,200.00	\$107,232.44	-\$74,832.44

(*See* Exhibit 3, p. 4).

At trial, Dr. Hayes admitted that his 2006 earnings were \$96,000, comprising \$66,600 from his full-time teaching position during the academic year, additional income from teaching during the summer, and \$21,000 from a second job with Walden University, an on-line university. (*See* Exhibit 41; R. 591, at 61:19 - 65:7, 92:7 – 93:12). Dr. Hayes testified that his salary from full-time teaching will increase in the future. (*Id.* at 66:4-6). He also testified he did not know what his income would be for 2007, but his income from 2006 was \$8,000 per month. (*Id.* at 196:18-24).

Dr. Hayes speculated that he may not be able to sustain his second job with Walden University at all, or at the same level as he has in the past, but he offered no proof and said his future pay from such a second job is “impossible to project.” (*Id.* at 83:9 – 86:8). His position was that he won’t be able to earn as much as he did in 2006, but should be able to supplement the salary he receives during the academic year through teaching summer courses, for total compensation of \$72,000. (*Id.* at 86:9 – 87:1).

Dr. Hayes admitted at trial that he was able to pay the amount of temporary alimony and child support Ms. Baum had been awarded (\$1,960 per month), and would be able to continue to pay those amounts after the divorce. (*Id.*, at 205:12-15). Dr. Hayes also continued to fully fund his retirement, in the amount of \$456 per month. (Exhibit 110, p.2). Dr. Hayes failed to pay the Guardian ad Litem or Ruby’s counselor, but was able instead to pay for many lifestyle amenities, including a boat and a boat slip he shares with his girlfriend as well as two kayaks and a 2002 Subaru. (R. 591, at 53:12 – 57:3, 242:3 – 243:14).

E. Ms. Baum’s Appeal, and This Court’s Remand.

Ms. Baum appealed the trial court’s original ruling, arguing it was not based on adequate findings, was contrary to law and was manifestly unjust. This Court “reverse[d] and remand[ed] to allow the trial court to enter more detailed findings.” *Baum v. Hayes*, 2008 UT App 371, ¶ 1, 196 P.3d 612. This Court’s mandate was “without restriction to any corrections or modifications the trial court deems appropriate.” *Id.*, 2008 UT App 371 at ¶ 16.

F. Trial Court’s Supplemental Findings of Fact, Conclusions of Law and Decree.

Following remand, Ms. Baum filed a Motion for Entry of Supplemental Findings of Fact and Conclusions of Law. She also filed a supporting memorandum of law discussing the applicable analytical framework and Proposed Supplemental Findings of Fact and Conclusions of Law, complete with citations to and excerpts of the record, to help the trial court address the defects the Court of Appeals found in its prior ruling. (R. 608-703). Consistent with this Court’s reversal and remand, Ms. Baum understood the trial court would not be limited simply to seeking any additional justification there might be for the result previously reached, but would thoroughly review the record, obtain any additional testimony or other evidence it deemed necessary, and make any appropriate “corrections or modifications.”

Dr. Hayes' also filed proposed "Amended Findings."² That filing, which gave Dr. Hayes the opportunity to marshal all the evidence available in support of the trial court's original alimony and child support awards, references only two trial exhibits (the parties' Financial Declarations) but includes no other citations to or excerpts from the record, and contains no legal analysis.

Instead, in terms of his own income and ability to pay, Dr. Hayes continued to rely solely on his own self-serving testimony as to an alleged "conflict" he conveniently discovered just before trial between his obligations to Washington State University and his online teaching at Walden University to conclude that his income from that teaching was "temporary and not a reasonable source of secondary income." (*See Amended Findings*, ¶ 9). The objective evidence at trial, however, was that Dr. Hayes had earned an additional \$21,000 a year from Walden University for the two years preceding trial (*see Exhibit 25; see also R. 592 at 65:2-5*), and additional unrebutted evidence provided by Ms. Baum showed he has apparently resolved the alleged "conflict," since he remains affiliated with Walden and continues to teach online classes (*see R. 673-76*).

In terms of Ms. Baum's needs, Dr. Hayes continued his refrain that Ms. Baum's mother should be required to take over the main obligation to support Ms. Baum after this nearly 20-year marriage, and therefore Ms. Baum should not have any housing expense. (*See Amended Findings*, ¶ 14). The evidence at trial, however was that Ms. Baum is

² Dr. Hayes' "Amended Finding [*sic*] of Fact and Conclusions of Law Following Remand from Court of Appeals," filed and served on or about March 17, 2009, do not appear in the Record on Appeal. Accordingly, they are attached as an Addendum (hereinafter, "Amended Findings").

indeed obligated to pay rent. (*See* R. 591 at 136:9 – 18). That obligation is set forth in a written, signed lease. (Exhibit 7). Ms. Baum has been unable to pay rent as required by the lease, but the arrearages are set forth in a signed Promissory Note. (Exhibit 8).

Dr. Hayes arbitrarily reduced or eliminated other expenses Ms. Baum needs to incur and in fact incurs, including expenses for such obvious needs as health insurance and home maintenance, claiming there was “no support” for those expenses. (*See* Amended Findings, ¶¶ 14-15). The evidence at trial, however, included support for all of Ms. Baum’s claimed expenses other than her estimated tax and insurance payments. (*See* R. 591, at 136:9 – 137:24, 168:2 – 175:13; *see also* Exhibit 12).

Dr. Hayes’ bottom-line notion of “fairness” in ending this 20-year marriage was that he should be able to meet all his claimed expenses, continue to fully fund his retirement continued, pay his income taxes and have money left over (*see* Amended Findings, ¶¶ 9, 12), while Ms. Baum should struggle with what he concedes is not enough even to pay for health insurance (assuming she can even get it) let alone save for retirement (after liquidating all of her own retirement and separate property to help Dr. Hayes complete his education) or pay her taxes (she is of course taxed on her alimony). (*See* Amended Findings, ¶ 16; *see also* R. 591, at 111:18-24, 113:9-18, 115:12-17, 117:17-118:7, 121:10 - 122:23; R. 592, at 340:9-19).

SUMMARY OF ARGUMENT

On remand from this Court, the trial court properly applied the law to the facts and, consistent with this Court’s mandate, supplemented its prior findings of fact

and made appropriate corrections and modifications to its alimony and child support award. The evidence amply supports the trial court's supplemental findings, and Dr. Hayes fails to show the trial court abused its broad discretion in such matters. Specifically, the trial court properly did not abuse its discretion in including all of Dr. Hayes' historical earnings from teaching in establishing his ability to pay alimony and his gross income for child support.

ARGUMENT

I. THE TRIAL COURT'S RULING ON REMAND DOES NOT MANIFEST AN ABUSE OF DISCRETION.

"Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence." *Childs v. Childs*, 967 P.2d 942, 944 (Utah Ct. App. 1998) (citation omitted). Matters within the trial court's broad discretion include whether spousal support is sufficient (*see Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986), and *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985)), and whether an award of child custody and support is proper (*see Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985), and *Hill v. Hill*, 968 P.2d 866, 869 (Utah Ct. App. 1998)).

"Where the trial court may exercise broad discretion, we presume the correctness of the court's decision absent 'manifest injustice or inequity that indicates a clear abuse of . . . discretion.'" *Childs*, 967 P.2d at 944 (citation omitted) (alteration in original).

The analytical framework for determining a fair and equitable alimony award is well established:

First, the trial court should have determined Petitioner's needs
Second, the trial court should have determined Petitioner's ability to meet her own needs And if Petitioner is then capable of meeting her determined needs, no alimony should be awarded.
Third, if Petitioner is not able to meet her own needs, the trial court should have determined the ability of Respondent to fill the gap between Petitioner's needs and her own ability to meet those needs, with an eye towards equalizing the parties' standards of living only if there is not enough combined ability to maintain both parties at the standard of living they enjoyed during the marriage.

Batty v. Batty, 2006 UT App. 506, ¶ 5, 153 P.3d 827.

The trial court on remand properly applied this analytical framework. It first analyzed Ms. Baum's needs. (*See* Supplemental Findings of Fact ¶¶ 1-6). Her Financial Declaration in this matter lists total after-tax needs of \$4,124. (*See* Trial Exhibit 7, pp. 5-6). That amount reflects the actual, documented expenses for both Ms. Baum and Ruby, including rent of \$1,000 a month payable to Ms. Baum's mother for the house her mother purchased after Ms. Baum and Ruby were forced to relocate to Utah when Dr. Hayes' affair came to light. (R. 591, at 136:9 – 137:24, 168:2 – 175:13; Trial Exhibit 7).³

Dr. Hayes offered no evidence to contradict Ms. Baum's claimed expenses; he merely continued to argue, without evidence, that they were "inflated" – even though they are largely comparable to his own claimed needs when reconciled on a line-by-line,

³ In presenting the matter to Judge Medley on remand, Ms. Baum showed why it was proper to include a housing expense in Ms. Baum's need, citing and analyzing specific Utah precedent as well as the facts in the record of this case about how the parties historically had taken loans from Ms. Baum's family, documented with intra-family promissory notes, and Dr. Hayes himself admitted this was consistent with the parties' practice during the marriage. (R. 806, p. 10 l. 12 – p. 13 l. 16).

item-by-item basis. (*See* Exhibit 110; R. 806 p. 16 l. 8 – p. 17 l. 16). Among other things, he questioned why she would need any money in her budget for such necessities as housing and health insurance. (R. 591, at 175:3-13). The competent evidence therefore established that Ms. Baum’s reasonable needs, without consideration of income taxes payable on her alimony, are no less \$3,715 (her claimed after-tax needs of \$4,124 minus the \$409 claimed for prescriptions without insurance). (*See* R. 773, ¶ 6).

Ms. Baum’s ability to meet her own needs was not in dispute on remand. The original trial court recognized that Ms. Baum’s brain surgery rendered her unable to return to anything like her former employment, determined she is partially disabled, and imputed income of \$750 – a finding not challenged on either appeal. (R. 592, at 339:25 – 340:23). That leaves \$2,965 in unmet, after-tax needs. Clearly, Ms. Baum is unable to come close to meeting her needs, even if she could become employed; thus alimony is appropriate. (*See* R. 774, ¶ 7).

The trial court then turned to a detailed analysis of Dr. Hayes’ ability to pay. (*See* R. 774-76, ¶¶ 8-18). The undisputed evidence showed Dr. Hayes earned gross income of \$91,000 in 2005 and \$96,000 in 2006. (*See* Exhibit 25; *see also* R. 592, at 65:2-5). This income came not only from his main teaching job, supplemented through summer courses, but also through on-line teaching for Walden University. (*Id.*) Dr. Hayes speculated he might not be able to continue the work he has done for Walden University in the past, but he offered no evidence of that, and he continues to be publicly listed among the Walden University faculty. (*See* R. 774-75, ¶ 11). Even if he were not still

employed by Walden, there is no reason he cannot continue to work in some similar capacity to replace the income he previously obtained from Walden University while he is teaching full time. Thus for purposes of determining the parties' respective rights and obligations, the trial court properly imputed income to Dr. Hayes of at least \$96,000 a year, or \$8,000 a month, based on the above case law requiring the trial court to rely on the best evidence of future earnings, *i.e.*, recent past earnings. (*See* R. 775-76, ¶ 16).

In determining Dr. Hayes' ability to pay, the trial court also properly considered his own reasonable needs, since his ability to pay depends in part on his own "needs and expenditures." *See Moon v. Moon*, 973 P.2d 431, 438 n.8 (Utah Ct. App. 1999). The trial court implicitly found reasonable Respondent's claimed after-tax needs, as set forth in his Financial Declaration, of \$2,369 per month. (*See* Exhibit 110, p. 5). Assuming a combined effective tax rate of 25% on his \$8,000 gross monthly income, and continued contributions to his retirement of \$456 per month, the trial court properly determined Dr. Hayes has an ability to pay of at least \$2,475 per month while still fully meeting his own claimed needs ($\$8,000 - (\$8,000 \times 25\%) - \$456 - \$2,369 - \$700 = \$2,475$). (*See* R. 776, ¶ 18).

The foregoing analysis, all of which was grounded in evidence presented to the trial court on remand, clearly demonstrates that Ms. Baum was properly awarded child support in the amount of \$700 per month, based on gross income of \$750 a month imputed to her and Respondent's gross income of \$8,000 per month. The receipt of child support, which is not taxable to Ms. Baum, reduces her total post-tax need to

\$2,265. Assuming a lower combined effective tax rate for Ms. Baum of 20%, a gross alimony payment of \$2,900 would be required to meet Ms. Baum's post-tax need for alimony. Because that amount is in excess of Dr. Hayes' ability to pay, however, the trial court was within its discretion in capping his obligation at the \$2,475 per month he is demonstrably able to pay. (*See* R. 776, ¶ 18).

This award is not only firmly rooted in the law and the facts, but also is more than fair and equitable to Dr. Hayes, taking into account as required his actual earning capacity; Ms. Baum's substantially greater financial contributions during the parties' marriage; Ms. Baum's indisputably diminished ability to meet her own needs due to her disability; Ms. Baum's needs as the custodial parent; and the fact that the disparity in the share of Dr. Hayes' income between the parties will only increase after child support terminates. *See Howell v. Howell*, 806 P.2d 1209 (Utah Ct. App. 1991).

Having failed to marshal the evidence in support of the trial court's Supplemental Findings, and having failed to show that the Supplemental Findings are so contrary to the evidence as to leave this Court with "a definite and firm conviction that a mistake has been made," Dr. Hayes argues that the trial court's decision should nevertheless be reversed, and the original decision reinstated, based on the "law of the case" doctrine and the "mandate rule." (Appellant's Brief, pp. 12 - 16). Ms. Baum respectfully submits that Dr. Hayes' arguments are both factually and legally incorrect.

Dr. Hayes' arguments are factually incorrect because the trial court's detailed supplemental findings do in fact demonstrate that its prior alimony and child support

award were clearly erroneous, and they clearly conform to this Court's mandate. What the trial court did on remand was consider the pleadings submitted by the parties following remittitur; review the entire record in light of this Court's instructions on remand; and apply the appropriate analytical framework, taking into account as required Ms. Baum's demonstrated and indeed undisputed needs of \$3,175 per month after taxes and Dr. Hayes' actual, historical earnings as a means of identifying his ability to pay of at least \$2,475 per month after taxes and after his own reasonable expenses. (*See* R. 772-78).

Based on its analysis, the trial court properly concluded that an award of \$1,200 a month in alimony was inadequate, unfair, and unjust to Ms. Baum, and that child support based on an amount lower than Dr. Hayes had demonstrated he was historically capable of earning was also inadequate, unfair, and unjust to Ruby. Indeed, Ms. Baum demonstrated that the trial court's prior ruling was in fact clearly erroneous, citing the analogous precedent of *Howell v. Howell*, where this Court noted the clear error in an alimony award that left a husband with the overwhelming majority of his gross income and wife with a disproportionately smaller share – an imbalance that would only become worse when, as has occurred here, child support terminated – as well as the precedent of *Richardson v. Richardson*, 2007 UT App 222 (Memorandum Decision), where this Court upheld a trial court's incrementally increasing alimony at the end of a long-term marriage as child support decreased. (R. 806, at p. 3 l. 19 – p. 7 l. 20). Based on these precedents, the trial court's conclusion is unassailable, particularly in light of Ms. Baum's

substantially greater financial contributions during the parties' marriage, Ms. Baum's now indisputably diminished ability to meet her own needs due to her disability, and Dr. Hayes' ability to continue working and increasing his income as he gains tenure and otherwise advances in the career Ms. Baum enabled him to enjoy.

Dr. Hayes' arguments are legally incorrect because they misapprehend and misapply both the "law of the case" doctrine and the "mandate rule." Contrary to Dr. Hayes' arguments, given the procedural posture and substantive issues in this case, neither the "law of the case doctrine" nor the "mandate rule" serves here to limit the trial court's discretion on remand to reach different conclusions based on additional findings.

Dr. Hayes relies principally on the case of *In re E.H.*, 2006 UT 36, 137 P.3d 809, for his "law of the case" argument. That case involved, among other important issues, a second trial judge's decision (not on remand, but at a later stage of pre-appeal trial court proceedings) to reverse the first trial judge's order approving a stipulation, the central feature of which was an agreed-upon procedure to determine what custodial arrangement was in the best interests of a minor child in an otherwise contentious custody proceeding. *Id.*, 2006 UT 36, ¶¶ 9, 12. After the agreed-upon procedure resulted in a determination that custody should be granted to the child's mother rather than the putative adoptive parents, the adoptive parents, having previously agreed that the determination would be binding, changed their mind and sought to circumvent the stipulation. *Id.*, ¶¶ 11-13. When the mother appealed, this Court determined that the second judge improperly set aside the parties' stipulation. *Id.*, ¶ 15.

After an extended discussion of the “law of the case” doctrine, the Utah Supreme Court concluded simply that this Court had “misapprehended” the application of that doctrine to the second judge’s rejection of the parties’ stipulation, and in doing so made it clear that “considerations of law of the case must yield to those of the substance of the underlying ruling when ascertaining the proper standard of review.” *Id.*, ¶ 33. Having so found, the Supreme Court analyzed “the substance of the underlying ruling,” determined that it comprised a legal error, and applied a correctness standard of review. *Id.*, ¶ 34.

Dr. Hayes’ discussion of the “law of the case” doctrine ironically is not only characterized by the very analytical flaws the Supreme Court warned against in *In re E.H.*, but also compounds those flaws by suggesting that, following appeal, reversal and remand by this Court, the trial court’s discretion was severely limited. As the Utah Supreme Court has explained, “whether a trial court has discretion to reconsider a prior decision it has made” depends on “the procedural posture of a case at the time the law of the case doctrine is invoked.” *IHC Health Servs., Inc. v. D & K Management, Inc.*, 2008 UT 73, ¶ 27. Application of the “law of the case” in this context does not bind the trial court on remand to a previous ruling the appellate court has expressly instructed it to reconsider. Were this the case, the reversal and remand would be a futile and worthless exercise.

The procedural posture of this case when presented to the second trial court judge was that it had been *reversed* and *remanded* “for more detailed findings *without*

restriction to any corrections or modifications the trial court deems appropriate.” *Baum v. Hayes*, 2008 UT App 371, ¶ 16 (emphasis added). Dr. Hayes chose to simply ignore the procedural posture and insist the second trial judge could do nothing but bolster its original conclusion. That is contrary to the Supreme Court’s core teaching in *In re E.H.*: where the trial court retains the ultimate discretion and is “entitled to exercise considerable latitude” in crafting an appropriate resolution of matters within that discretion, which indisputably include ascertaining a wife’s needs and a husband’s ability to pay. It would be inappropriate to unduly constrain that discretion on remand. *In re E.H.*, 2006 UT 36, ¶ 37 (concluding this Court “reached too far when it reinstated the stipulation and the order of the first judge that gave it legal effect.”).

Dr. Hayes’ “mandate rule” argument is even less persuasive in light of the key language in this Court’s remand that he chose and continues now to ignore. It is difficult to see how the trial court’s supplemental findings, which indisputably provide more detail than its original findings, and its modification of the alimony and child support awards, which are fully consistent with those supplemental findings, run afoul of this Court’s open-ended mandate. Indeed, it appears the only way the “mandate rule” could apply here is if this Court had itself specifically endorsed the first trial court’s findings and conclusions – something this Court manifestly did not do. Perhaps this is why Dr. Hayes utterly fails to provide any meaningful analysis, in his roughly one-page discussion, of how the “mandate rule” might apply here. This Court clearly understood that the issue of including or excluding Dr. Hayes’ Walden income could be resolved in

favor of *either* party on remand and thus empowered the trial court with significant discretion on remand. *Baum v. Hayes*, 2008 UT App 371, ¶ 16 (“each of the party’s arguments may have merit depending on the reason the trial court excluded Hayes’ additional income.”).

To the extent Dr. Hayes suggests the trial court’s supplemental findings do not comply with the “mandate rule” because they remain insufficient, two points should be made.

First, that suggestion is inconsistent with the relief Dr. Hayes seeks, which is that this court “vacate the second trial court’s findings and conclusions and reinstate the first trial court’s findings and conclusions of law.” (Appellant’s Brief, p. 16). If the findings were still insufficient, which they are not, the appropriate relief would be to remand again.

Second, a trial court’s obligation is to make sufficiently detailed findings on each relevant factor to enable a reviewing court to ensure that the trial court’s discretionary determination was rationally based upon the applicable factors. *See Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986) (appellate courts must ensure the decree “follows logically from, and is supported by, the evidence.”); *Williamson v. Williamson*, 1999 UT App 219, ¶ 9 (trial court’s findings “should be more than cursory statements; they must be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached”). Dr. Hayes does not address this standard; the trial court’s Supplemental Findings satisfy it.

In short, in this case as in *In re E.H.*, irrespective of the “law of the case” doctrine or the “mandate rule,” the only question properly before this Court on Dr. Hayes’ appeal is whether the trial court’s Supplemental Findings of Fact and Conclusions of Law show that its modifications to its original alimony and child support determinations are supported by the evidence, or on the other hand are so inadequate or contrary to the evidence as to manifest an abuse of discretion. Because the trial court did what it was asked to do on remand, applied the proper analytical framework and made supplemental findings necessary to reach a reasoned determination of alimony and child support based on the evidence, its decision is correct and should be affirmed.

II. THE TRIAL COURT PROPERLY REVISED ITS ALIMONY RULING AS TO DR. HAYES’ ABILITY TO PAY BASED ON HIS HISTORICAL EARNINGS AND UNDISPUTED CONTINUING ASSOCIATION WITH WALDEN UNIVERSITY.

Established Utah law requires that in determining alimony the trial court consider income from *all* sources, including “overtime, *second job*, self-employment, etc.” *Breinholt v. Breinholt*, 905 P.2d 877, 880-81 (Utah Ct. App. 1995) (emphasis added) (internal quotations and citation omitted). To the extent one has attained a level of income from various sources in the past, but chooses not to do so during the pendency of a divorce proceeding, he is voluntarily underemployed, and the trial court can properly impute to him future earnings based on his past earnings. *See Cox v. Cox*, 877 P.2d 1262, 1267-68 (Utah Ct. App. 1994) (court can “appropriately rel[y] on historical rather than income at the time of divorce”). If his “income later proves to be ‘seriously and

permanently diminished,’ that party may seek a modification.” *Id.* (internal citations omitted).

In this case, the undisputed evidence showed Dr. Hayes made \$91,000 in 2005 and \$96,000 in 2006. (*See* Exhibit 25; *see also* R. 592, at 65:2-5). This income came not only from his main teaching job, supplemented through summer courses (as the trial court found), but also through on-line teaching for Walden University. (*Id.*) Dr. Hayes speculated he might not be able to continue the work he has done for Walden University in the past, but he offered no conflict letter or any other evidence to support his position, nor did he offer any reason or evidence he cannot continue to work in *some* capacity to replace the income he previously obtained from Walden University while he is teaching full time.

Dr. Hayes argues that the trial court “did not consider the required factors in determining alimony as was mandated by the appellate court,” but instead “focused on the Appellant’s expenses” and improperly considered the undisputed evidence of his continuing employment by Walden University notwithstanding his self-serving speculation at trial that he would not be able to continue that affiliation. (Appellant’s Brief, pp. 16-18).

The argument that the trial court did not consider the required *Jones* factors is spurious, since the trial court’s Supplemental Findings demonstrably and expressly *do* consider the required factors, under the specific headings of “Petitioner’s Needs” and “Respondent’s Ability to Pay.” The argument that the trial court improperly considered

Dr. Hayes' lifestyle and expenses is similarly groundless, since Appellant's expenses *must* be considered as part of his ability to pay. *See Young v. Young*, 2009 UT App 3, ¶ 19, 201 P.3d 301, *cert. denied*, 211 P.3d 986 (Utah 2009) ("adequate analysis of the factor regarding ability to pay must do more than simply state the payor spouse's income." The court must also consider the payor spouse's "needs and expenditures, such as housing, payment of debts, and other living expenses.") (emphasis and internal quotation marks omitted) (citation omitted).

As for Dr. Hayes' argument that the trial court improperly considered evidence of his continuing employment by Walden University, it is worth noting again that this Court provided the trial court a broad mandate to make additional findings as to whether Dr. Hayes' historical income should be excluded. Following remittitur, Ms. Baum provided the evidence of Dr. Hayes' continuing employment with Walden University. Dr. Hayes did not dispute, and has not to this day disputed, either that evidence or the fact of his continuing employment.

Ms. Baum was fully prepared to produce even more evidence, specifically stating in her post-remittitur filings: "If this Court believes it is necessary or appropriate to conduct a further evidentiary hearing on the specific issues of Petitioner's needs and Respondent's ability to pay, since a different Judge presided at the original trial, Petitioner will of course participate and provide such information as may be helpful to the Court in fulfilling its duty to reach a fair and equitable result." (R. 715).

Dr. Hayes did not object to any specific evidence or offer any of his own. Instead, he took the position that no further proceedings or evidence was necessary because no different outcome could be reached. (R. 806, p. 22 ll. 3-20, arguing “the clock stopped in March 2007” at the time of trial; *id.*, p. 24 l. 24 – p. 25 l. 5, arguing the second judge was “locked into” making additional findings that supported the first judge’s decision). Only now does Dr. Hayes belatedly argue, for the first time on appeal, that the trial court should not have considered this specific evidence that is directly contrary to his unsupported speculation at trial.

This is procedurally improper – specific and timely objections and motions must be made before the lower court, then identified for the appellate court. *See State v. Whittle*, 780 P.2d 819, 820- 21 (Utah 1989); *State v. Preece*, 971 P.2d 1, 6 (Utah Ct. App. 1998). It is also substantively incorrect. The trial court’s duty on remand was to make further findings as to Dr. Hayes’ ability to pay. It exercised that duty well within the confines of this Court’s clear mandate and the broad discretion it has on such matters. *See Crompton v. Crompton*, 888 P.2d 686, 689 (Utah Ct. App. 1994) (“Whether overtime work will continue at a certain level” is within trial court’s discretion); *Hill v. Hill*, 869 P.2d 963, 965 (Utah Ct. App. 1994) (whether a defendant is voluntarily underemployed is within trial court’s discretion). The trial court’s conclusion should be affirmed.

III. THE TRIAL COURT PROPERLY REVISED ITS CHILD SUPPORT RULING BASED ON DR. HAYES' HISTORICAL EARNINGS.

Finally, Dr. Hayes argues that the trial court erroneously used his historical earnings as the basis for calculating his child support obligation. (*See* Appellant's Brief, pp. 18-19). As this Court has consistently held, trial courts have broad discretion to select an appropriate means of calculating income when awarding child support, and this Court will uphold a trial court's calculation of income for child support purposes absent a clear and prejudicial abuse of discretion. *See Howell v. Howell*, 806 P.2d at 1211. Thus in *Reinhart v. Reinhart*, 963 P.2d 757, 759 (Utah Ct. App. 1998), this Court rejected the very argument Dr. Hayes makes on appeal: that the trial court violated Utah Code Ann. § 78-45-7.5(2) (now Utah Code Ann. § 78B-12-203(2)) because it considered his entire income rather than "the equivalent of one full-time 40-hour job." Once again, Dr. Hayes' argument is both factually and legally flawed.

As a factual matter, Dr. Hayes' full-time job as a university professor does not, by his own description, involve year-round full-time employment. Thus he has historically supplemented his base teaching salary with various other teaching jobs both during the academic year and during his summer break. Dr. Hayes does not demonstrate that his efforts amount to anything more than the equivalent of one year-round full-time job, and in fact his "job" is clearly not limited to his teaching for Washington State University but extends to any teaching he might do for anyone. This makes it proper for the trial court to consider all income related to his teaching as emanating from a single "job." *See Jensen v. Bowcut*, 892 P.2d 1053, 1057 (Utah Ct. App. 1995) ("The trial court's decision

to consider Bowcut's second source of income as part of his primary job is supported by the fact that both sources involved the performance of Bowcut's professional duties as a physician. Bowcut maintains a private medical practice and his "second job" consists of his contract with the Utah County Jail to provide medical services. Thus, the trial court did not abuse its discretion in considering Bowcut's second source of income.").

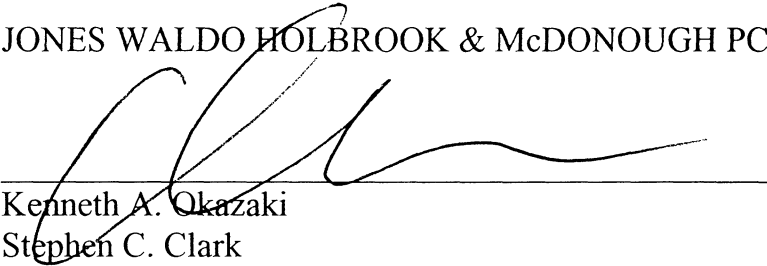
In any event, the relevant statute specifically authorizes the trial courts to consider the actual historical record: "If and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at the parent's job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support." *See* Utah Code Ann. § 78B-12-203(2). As Dr. Hayes himself notes, this very pattern was established and in place for at least two years before the child support order was established in the Decree. (*See* Appellant's Brief, p. 5). Thus, the trial court's considering Dr. Hayes' historical income for purposes of child support as well as alimony was well within the trial court's broad discretion.

CONCLUSION

Based on the foregoing, Ms. Baum respectfully asks that this Court affirm the trial court's alimony and property division as consistent with established legal and equitable requirements. Ms. Baum also asks that this Court award her attorneys' fees incurred on appeal.

DATED this 19th day of July, 2010.

JONES WALDO HOLBROOK & McDONOUGH PC




Kenneth A. Okazaki
Stephen C. Clark
Attorneys for Appellant

CERTIFICATE OF SERVICE

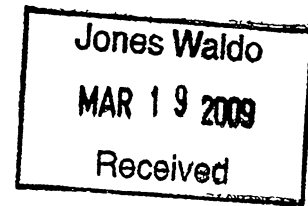
I hereby certify that on the 19th day of July, 2010, two true and correct copies of the foregoing BRIEF OF PETITIONER/APPELLEE KATHY J. BAUM were sent by United States Mail, postage prepaid, address to the following:

Randall Lee Marshall
2650 Washington Blvd., Suite 101
Ogden, Utah 84401



A handwritten signature in black ink, appearing to read "Michael W. Smutz", is written over a horizontal line.

Addendum 1



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IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, UTAH

	* * * * *		
)		
KATHY J. BAUM,)		AMENDED FINDING OF
)		FACT AND CONCLUSIONS
Petitioner,)		OF LAW FOLLOWING REMAND
)		FROM COURT OF APPEALS
vs.)		
)		Case No. 04-4905929 DA
MICHAEL T. HAYES,)		
)		Judge Tyrone E. Medley
Respondent.)		Commissioner Michael S. Evans
)		
	* * * * *		

This matter came on for trial on March 5-6, 2007 before the Honorable Douglas L. Cornaby. Petitioner was present and represented by Kenneth A. Okazaki. Respondent was present and represented by James H. Woodall. The Court entered Findings of Fact, Conclusions of Law, and Decree of Divorce on May 24, 2007. Petitioner appealed the Court's decision to the Court of Appeals. In a published opinion dated October 23, 2008, the appellate court remanded the matter for more detailed findings in support of the Court's alimony award.

Accordingly, the Court enters the following Amended Findings of Fact and Conclusions of Law:

1. Petitioner had been a resident of Salt Lake County, Utah for more than three months prior to the filing of this matter.

2. The parties have irreconcilable differences which prevent the continuation of their marriage. Petitioner shall be granted a decree of divorce from respondent on such grounds, to become final upon entry.

3. The parties have one child in common, Ruby Samantha Baum-Hayes, born April 18, 1992. It is in Ruby's best interests that the parties be awarded her joint legal custody, with petitioner awarded Ruby's physical custody.

4. Respondent shall be entitled to exercise parent time with Ruby under the relocation statute as set forth at § 30-3-37, Utah Code Ann. The Court recognizes that parent time problems have occurred. Both parties shall be required to work together to do everything they can to remedy these problems.

5. Petitioner, in particular, shall be required to cooperate fully with respondent to ensure visits. She shall maintain a positive point of view about respondent in her discussions with Ruby. She shall not schedule any activities for Ruby during respondent's parent time. Finally, she shall indicate to Ruby that it is not her choice to visit with respondent, but rather a responsibility she has to her father.

6. Petitioner shall be ordered to accept telephone calls from respondent to arrange visits. Discussions shall be limited to Ruby, and shall not get into the causes for the divorce. The Court expects the parties to jointly work together to arrange visits. It is not respondent's responsibility to do so alone, nor is it his responsibility to schedule visits through Ruby.

7. The parties shall make every effort to avoid discussing issues relating to the divorce in Ruby's presence, or involving Ruby in their conflict in any way. The parties shall make every effort to resolve their conflicts, understanding that until the conflict is resolved once and for all, Ruby will continue to be distracted and agitated by the conflict.

8. Petitioner shall have a continuing duty to notify respondent of Ruby's medical and educational needs, and to share such information with respondent. The parties are to attempt to make important decisions jointly, but in the event of a dispute, petitioner shall have the final authority.

9. The Court finds that respondent should maintain his full time employment with Washington State University at an annual salary of \$66,600. The Court finds that respondent has the ability to earn an additional \$8,400 during the summer months, for a total of \$75,000. On his Amended Financial Declaration (respondent's Exhibit 10), respondent reports gross monthly income of \$5,933 (\$71,196 annually) and net monthly income of \$3,901. The Court will adjust respondent's monthly income to \$6,250 gross and \$4,109 net. The Court recognizes that respondent has earned income in excess of this amount, primarily from Walden University. The Court accepts respondent's testimony that this employment was temporary and not a reasonable source of supplemental income because it conflicted with his primary employment. Consequently, the Court has excluded this source of income.

10. The Court regards petitioner as partially disabled as a result of a brain tumor that was discovered during the parties' marriage. From the testimony of the parties' experts, the Court is persuaded that petitioner is capable of working, and will impute \$750 per month to her, with an estimated net monthly income of \$600.

11. Using these figures, respondent shall be ordered to pay petitioner \$565 per month as child support until Ruby attains the age of eighteen years or graduates from high school, whichever occurs last. Respondent shall also maintain medical insurance for Ruby's benefit for as long as she is eligible, as his sole expense, as well as life insurance for as long as he has a child support obligation Ruby. The parties shall each pay one-half of Ruby's out-of-pocket medical expenses, including the costs of her therapy with Dr. Johanna McManemin.

12. Respondent's Amended Financial Declaration reports monthly needs of \$2,369. Of this figure, \$1,740 is allocated to ongoing living expenses. The remainder is earmarked for debt service, including a \$215 automobile payment. The Court finds this to be reasonable. Deducting respondent's needs from his net monthly income of \$4,109, respondent has the ability to pay \$1,740 per month, \$565 of which has already been allocated as child support. This leaves respondent with \$1,175 available to pay petitioner.

13. In her Financial Declaration (petitioner's Exhibit 7), petitioner reports monthly needs of \$4,924. She requests monthly support of \$4,941. This exceeds respondent's net monthly income; if the Court entered such an order, respondent would be left with nothing to meet his expenses. It is evident to the Court that there is not enough money for the parties to live as they did prior to their separation, and that they lived beyond their means at that time.

14. The Court concludes that petitioner's listed needs are exaggerated in many respects. For example, she has included \$800 per month to pay taxes on a hypothetical alimony award. No evidence was presented to support this claim. The Court will exclude it as speculative. Other expenses, while ideal, are not actually being paid; petitioner conceded that, with the exception of a single payment in 2004, she has not paid her mother any rent (claimed to

be \$1,000) on the home she claims to be renting. There was no support for petitioner's claim for \$150 per month for home maintenance, \$50 for laundry and dry cleaning, over \$600 per month for medical and dental expenses, or \$441 for medical insurance.

15. Cumulatively, this amounts to over \$3,000 in speculative or unsupported expenses. In addition to the tax on alimony, the Court will disallow the rent and medical insurance costs because neither is actually paid. Based on petitioner's testimony that she pays modest amounts for yard care and sprinkler maintenance, the Court will allow \$50 per month for home maintenance. The dry cleaning expense of \$50 will be disallowed as unnecessary. Finally, based on petitioner's testimony, the Court will reduce petitioner's medical and dental expenses to \$200 per month. Accordingly, the Court finds that petitioner's actual monthly needs are \$2,350.

16. Deducting petitioner's imputed net monthly income of \$600, petitioner will be left with a monthly shortfall of \$1,750. Deducting respondent's child support of \$565, petitioner needs \$1,185 as alimony. Considering the nature of petitioner's disability, the parties' respective needs and abilities to pay, the Court will order respondent to pay petitioner \$1,200 per month as alimony, commencing March 1, 2007 and continuing until petitioner's death, remarriage, or cohabitation. The Court will not require respondent to maintain life insurance for petitioner's benefit. Petitioner may maintain continuing medical insurance under COBRA, but it shall be at her sole expense.

17. The Court recognized that both parties contributed all of their available resources to the marriage. While respondent's financial contribution was not nearly as significant as petitioner's, the Court will not structure a property award based on the parties' relative contributions, nor will it attempt to restore either party to his or her former condition. The Court

notes that petitioner received 85% of the contents of the parties' home at separation. The parties shall each retain the furniture, furnishings, bank accounts, vehicles, and personal property in his or her possession, free of any claim by the other. Respondent shall therefore retain the Ford Escort automobile, which the Court values at \$3,700, with no obligation to hold it for Ruby. Nor shall respondent be required to pay for Ruby's trip to Europe. The Court does not believe either party has the ability to pay for it.

18. Respondent shall be responsible for \$1,500 of the Guardian Ad Litem's fees, representing those fees incurred prior to his reappointment. Thereafter, petitioner shall be responsible for all such fees.

19. The Sky miles accounts shall be divided equally as of March 6, 2007. The Court does not find that the Summiya business has any value. It shall be awarded to respondent.

20. Respondent shall pay petitioner \$951, representing one-half of the 2004 income tax refund, plus \$5,655, representing a portion of petitioner's moving expenses.

21. Each party shall be responsible for the debts and obligations in his or her name, and those debts he or she assumed upon the parties' separation. The Court will not order respondent to reimburse petitioner for the payments she claims to have made on his behalf, or for the loans she made to him during the marriage.

22. Petitioner transferred her investment account into an irrevocable trust for Ruby's benefit. While it was improper for her to do so, the Court will leave those funds for Ruby's benefit. Respondent's 401(k) account shall be divided equally, using February 28, 2007 as the valuation date.

23. The fees incurred in this matter are a great concern to the Court. Petitioner claims over \$70,000 in fees, which she asks respondent be ordered to pay. The Court concludes that neither party has the ability to pay the fees they have incurred. Accordingly, each party shall be responsible for his or her fees, without reimbursement from the other.

DATED this ____ day of _____, 2009.

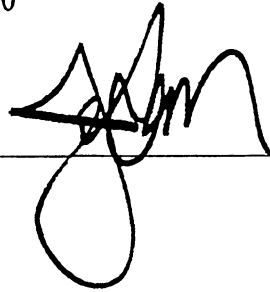
BY THE COURT:

TYRONE E. MEDLEY
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing AMENDED
FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following on March 17, 2009:

Kenneth A. Okazaki
JONES WALDO HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to be 'K. Okazaki', is written over a horizontal line.