

2009

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Randall Lee Marshall; attorney for appellant.

Kenneth A. Okazaki, Stephen C. Clark; Jones, Waldo, Holbrook & McDonough; attorneys for appellee.

Recommended Citation

Brief of Appellant, *Kathy J. Baum v. Michael Hayes*, No. 20091028 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/2067

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

KATHY J. BAUM,

Petitioner/Appellee,

CASE NO. 20091028

vs.

MICHAEL HAYES,

Respondent/Appellant.

BRIEF OF RESPONDENT/APPELLANT MICHAEL HAYES

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH (ON REMAND)
HONORABLE TYRONE E. MEDLEY

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

Attorney for Respondent/Appellant

Kenneth A. Okazaki
Stephen C. Clark
Jones Waldo Holbrook &
McDonough
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Attorneys for Petitioner/Appellee

IN THE UTAH COURT OF APPEALS

KATHY J. BAUM,

Petitioner/Appellee,

CASE NO. 20091028

vs.

MICHAEL HAYES,

Respondent/Appellant.

BRIEF OF RESPONDENT/APPELLANT MICHAEL HAYES

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH (ON REMAND)
HONORABLE TYRONE E. MEDLEY

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

Attorney for Respondent/Appellant

Kenneth A. Okazaki
Stephen C. Clark
Jones Waldo Holbrook &
McDonough
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Attorneys for Petitioner/Appellee

TABLE OF CONTENTS

STATEMENT OF JURISDICTION.....	1
ISSUES PRESENTED FOR REVIEW.....	1
CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF RELEVANT FACTS.....	6
SUMMARY OF ARGUMENTS.....	10
ARGUMENT.....	12
THE TRIAL COURT ABUSED ITS DISCRETION ON REMAND BY DRAMATICALLY CHANGING THE ALIMONY AWARD, CHILD SUPPORT AWARD AND DISTRIBUTION OF PERSONAL PROPERTY WITHOUT FIRST MAKING SPECIFIC FINDINGS OF CLEAR ERROR OR EXPLAINING A COMPELLING REASON FOR THE NECESSITY OF MAKING SUCH A CHANGE.....	12
THE TRIAL COURT, ON REMAND FAILED TO FOLLOW THE MADATE RULE OF LAW WHEN IT DID NOT MAKE MORE DETAILED FINDINGS CONCERNING APPELLEE’S FINANCIAL NEEDS AND WHEN IT WENT BEYOND EVALUATING THE RATIONALE FOR INCLUDING THE INCOME FROM WALDEN UNIVERSITY	15
THE TRIAL COURT, ON REMAND DID NOT CONSIDER THE REQUIRED FACTORS IN DETERMINING ALIMONY AS WAS MANDATED BY THE APPELLATE COURT.....	16
THE TRIAL COURT ON REMAND ABUSED ITS DISCRETION IN ALTERING THE CHILD SUPPORT AWARD BY INCLUDING APPELLANT’S SECONDARY INCOME.....	18
CONCLUSION.....	19
MAILING CERTIFICATE.....	21

Table of Contents
(Continued)

ADDENDUM.....22

- Utah Code Ann. § 30-3-5(2)
- Utah Code Ann. § 30-3-5(8)
- Utah Code Ann. § 78 -45-7.5(2)
- Utah Code Ann. § 78B-12-203(2)
- Findings of Fact and Conclusions of Law
- Decree of Divorce
- Supplemental Findings of Fact and Conclusions of Law
- Amended Decree of Divorce

TABLE OF AUTHORITIES

UTAH CASE LAW

<u>Amax Magnesium Corp. v. State Tax Comm’n</u> , 874 P.2d 840 (Utah 1994).....	2
<u>Baum v. Hayes</u> , 2008 UT App 371, 196 P.3d 612 (Utah App. 2008).....	13, 17
<u>Gillmor v. Wright</u> , 850 P.2d 431 (Utah 1993).....	13
<u>IHC Health Servs., Inc. v. D & K Mgmt.</u> , 2008 UT 73 (Utah 2008).....	1, 16
<u>In re E.H.</u> , 103 P.3d 177 (Utah App. 2004).....	1, 13
<u>In re E.H.</u> , 137 P.3d 809 (Utah 2006)	12, 15
<u>Rehn v. Rehn</u> , 1999 UT App 41, 974 P.2d 306.....	16, 17
<u>Reinhart v. Reinhart</u> , 963 P.2d 757, 759 (Utah App 1998).....	2, 19
<u>Thurston v. Box Elder County</u> , 892 P.2d 1034 (Utah 1995).....	15, 18
<u>Trembly v. Mrs. Fields Cookies</u> , 884 P.2d 1306(Utah App. 1994).....	13

STATE STATUTES

Utah Code Ann. § 30-3-5(2).....	2
Utah Code Ann. § 30-3-5(8)	2
Utah Code Ann. § 78 -45-7.5(2).....	18
Utah Code Ann. § 78B-12-203(2).....	18
Utah Code Ann. § 78A-4-103(2008).....	1

STATEMENT OF JURISDICTION

The Court of appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103 (2008) and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

I. Did the trial court on remand abuse its discretion by revising the award of alimony and child support in the Amended Decree, without making specific findings of clear error or a compelling reason for such changes, thus violating the law of the case?

Standard of Review: The standard of review for the law of the case is abuse of discretion. In re E.H., 2004 UT App 419 (Utah App. 2006).

II. Did the trial court on remand fail to follow the mandate of the appellate court by not making specific findings of fact?

Standard of Review: The proper standard of review for challenges brought under the law of the case doctrine is abuse of discretion. In re E.H., 2004 UT App 419 (Utah App. 2006). The mandate of an appellate court binds the district and the parties and affords the district court no discretion whether to comply with that mandate. IHC Health Servs., Inc., v. D & K Mgmt., 2008 UT 73, ¶ 28, 196 P.3d 588 (Utah 2008). Consequently, because the mandate is a legal determination, reviewing whether the district

court complied with the mandate presents a question of law, which is reviewed for correctness. *See Amax Magnesium Corp. v. State Tax Comm'n*, 874 P.2d 840, 842 (Utah 1994).

III. Did the trial court on remand abuse its discretion in calculating child support by including Appellant's second or supplemental income?

Standard of Review: The standard of review for child support calculations is abuse of discretion. *Reinhart v. Reinhart*, 962 P.2d 757, 759 (Utah App 1998).

CONSTITUTIONAL PROVISIONS, STATUTES and ORDINANCES AT ISSUE

- There are no Constitutional Provisions at Issue.

- Statutes at issue include:

Utah Code Ann. § 30-3-5(2)

Utah Code Ann. § 30-3-5(8)

Utah Code Ann. § 78-45-7.5(2), now U.C.A. § 78B-12-203(2)

- There are no Ordinances at issue.

STATEMENT OF THE CASE

Nature of the case

This is an action for divorce. Specifically, the issues to be reviewed in this case relate to alimony and child support.

Course of Proceedings

A bench trial was held on March 5 and 6, 2007. The court entered findings of fact and conclusions of law on May 24, 2007. The Petitioner appealed the original findings and Decree. On October 23, 2008 the Appellate Court remanded the case to the trial court instructing the trial court to make specific findings regarding Petitioner/Appellee's financial needs and the rationale for excluding the Walden University salary from Appellant's income in calculating alimony. The trial court on remand entered Amended Findings of Fact and Conclusions of Law on September 2, 2009. The Amended Decree of Divorce was entered on November 9, 2009. Appellant filed his notice of Appeal on December 9, 2009.

Disposition of First Trial

After a two-day trial, Judge Cornaby, sitting as a substitute judge, found Appellant has an income of \$6,250 per month. The court imputed the Appellee with the capacity to earn \$750 per month. After hearing testimony, the court concluded Appellee had inflated her monthly needs. The court awarded \$1,200 alimony, \$565 per month in child support, one-half of Appellee's 401K, and one-half of the Sky miles. The court ordered that the parties share joint legal custody of the minor child with Appellee awarded physical custody. The court made orders pertaining to parent time. The court

concluded that Appellee had received 85% of the contents of the parties marital home and awarded each person the property in their possession. Appellant was ordered to pay Appellee \$951 representing one-half of the 2004 tax return and \$5,655 to Appellee for her moving expenses. The court allocated the fee of the guardian ad litem between the parties. The parties were each responsible for the debts in their own name and the debts each assumed upon their separation. The Appellee had improperly transferred her investment account of approximately \$29,000.00 into an irrevocable trust for the minor child, the court, nonetheless, left those funds for the child's benefit. The parties were each responsible for their own attorneys fees. Appellee moved the court to amend its findings of fact and conclusions of law and/or for a new trial on the issues of child support, alimony and the property division. The court denied the motion. Appellee then filed for an appeal.

Disposition in the Appellate Court

The Appellate court was presented with two issues first that the trial court's findings are insufficient to support its award of alimony, and second whether the trial court erred when it found Appellant's current income to be \$6,250 per month instead of approximately \$8,000 a month. The court was unable to review the appropriateness of the amount of alimony the trial court actually awarded because of insufficient findings. The court was also unable

to evaluate the issue of the Appellant's income about the excluded income from Walden University without supplemental findings. The case was then remanded to allow for more detailed findings concerning Appellee's financial needs and the rationale for excluding the Walden University salary from the calculation of Appellant's income.

Disposition of Trial Court on Remand

On remand, the trial court found that Appellee's financial needs were no less than \$3,715. The court made no comment on whether the financial needs were inflated or not. The court also imputed that Appellee had the earning capacity of \$750. The court then increased the amount of child support to \$700 per month, retroactive to March 1, 2007 and awarded Appellee alimony in the amount of \$2,475 per month retroactive to March 1, 2007. The court included the income from Walden University because Appellant's name "remained" on the website of the university. The court also stated that the Appellant's income needs to be a function of Appellant's historical earning capacity historically even though the income from the university had only been from the past two years. The court then established that Appellant's income was \$8,000 per month gross and \$6,000 per month net of taxes.

STATEMENT OF RELEVANT FACTS

(Appellant recites facts from the trial prior to remand as there was no additional testimony taken nor additional facts received through affidavit or other sworn statements by the trial court on remand.)

Kathy J. Baum (Appellee) and Michael T. Hayes (Appellant) were married on September 11, 1987. R 1, 36. They are the parents of one child born April 18, 1992. R 2, 36. Appellee filed this action for divorce on October 4, 2004. R1.

Facts in the Record Relating to Appellee's Needs.

At the time of trial, Appellee reported monthly needs of \$4,924 and requested monthly support in the amount of \$4,941. R 5, 68. Her initial financial declaration reported monthly expenses of \$3,191. R 26. The initial financial declaration filed October 21, 2004 reports Appellee's total debt to be \$22,876 with monthly payments on the debt of \$501. R 22. Appellee's monthly payments on debt do not equal her reported total monthly installments reported to be \$555. R 25.

On or about August 30, 2005, Appellee filed a second financial statement reporting additional debt, primarily incurred to her mother, in the amount of \$63,960.36. R 168, 169. The amended debt includes \$26,000 in attorney's fees and \$26,000 to pay off credit cards. R 168. The \$26,000

credit card debt reflects an increase of \$8,263 over the \$17,737 credit card debt reported in October 2004, less than one year earlier. R 169.

The trial court heard testimony that Appellee is living in a home owned by a trust established for the benefit of the family members. R 591, 168. Appellee has not paid any rent or mortgage payments on the home with the exception of one payment in 2004. Id. Her mother has purchased homes for the other siblings in the family. Id.

The court concluded that “many” of the expenses listed were “ideal monthly expenses” rather than “actual monthly expenses.” R 592, 339. For example, Appellee seeks \$1,800 a year for home maintenance. R 591, 169. Appellee testified she has someone to help her with the yard work, including law mowing, fertilizing the lawn, and repairing sprinklers. Id. Appellant seeks \$800 a month for taxes. R591, 170. Appellee testified that in 2005, her federal tax burden was “zero.” Id. Her state tax burden for 2005 was \$130 for the year. Id. Appellee could not adequately explain the \$4,900 she reportedly requires for prescriptions. R 591, 171-172.

Despite being unemployed, Appellee “gets her clothes dry cleaned” requiring costs of approximately \$50 per month. R 591, 171. Appellee does not have a car payment but owns a 2002 Toyota 4-Runner which is unencumbered. R 591, 207.

Facts in the Record Pertaining to Appellant's Ability to Pay.

Appellant is an associate professor at Washington State University. R 591, 203. He has an annual salary of \$66,600. R 591, 204. Appellant can “count on” one or two credit hour courses to teach, earning an additional \$4,800 during the school's summer schedule. R 591, 204. One year, Appellant earned approximately \$3,000 because he had an administrative load. R 591, 93.

Appellant has supplemented his income from a second job. Continuing to work at a supplemental position threatens his full time employment. Id. To become a full professor, he is required to maintain a high level of academic work and publication. Id. If he continued to work at the second job, e would not be able to meet his requirements to become a full professor. R 591, 204.

Appellant received a tax refund for the year ending 2004. R 591, 93. Appellant applied the \$1,906 refund towards a marital property tax bill the parties were unable to pay. R 591, 93.

In 2006, Appellant received grant money and was given extra administrative duties which contributed to a one-time increase in his yearly income of approximately \$18,000. R 591, 94. That money is not regularly available. R 591, 94-95. The evidence adduced at trial was that Appellant's

supplemental income was not consistent, but based upon available grants, assignments of administrative duties, and the availability of additional courses. The court imputed additional income to Appellant in the amount of \$8,400 per year from summer or part time work. R 592, 339.

After mandatory deductions, Appellant has approximately \$3,900 a month available income. R 591, 206. He has assumed responsibility for a majority of the marital credit card debt and is paying off a loan to Appellee's mother, resulting in a monthly installment bill of \$740. R 591, 206. He is making a car payment. R 591, 207. His retirement account has a balance of \$64,000. R 591, 208.

Appellant's monthly budget is approximately \$2,400. R 591, 210. He has had a temporary child support obligation of \$610 per month and \$1350 per month for temporary alimony. R 591, 205. Appellant's monthly expenses, his child support obligation and his temporary alimony obligation total \$4360, resulting in a monthly income shortfall of \$360.

Facts Pertaining to the Parties' Financial Contribution During the Course of the Marriage.

Appellee contends that for the nine years of marriage, from 1987 until 1996, she contributed significantly more to the couples' finances, earning together from \$28,995 up to \$86,666 a year. R 591, 166. Between 1997 and

2003, while Appellee was not employed, the family relied on the income earned by Appellant in addition to savings, investments and retirement funds acquired by Appellee during the course of the marriage, through her employment, and through her personal inheritance. During that same period of time, Appellant's earning totaled approximately \$290,000. Id. During that second half of the marriage. Appellee did not work nor did she actively seek employment. R 103.

The parties' living expenses while married and living together were more than the income available through Appellant's income. R 591, 166. Appellee would, as needed over the years, sell assets including stock she received from her employer during the course of the marriage, to supplement the family's income. R 591, 166. Appellee and Appellant were functioning "as so many marriages do." R 592, 340. By the time the parties separated, they were insolvent. R 591, 167.

The court found that many of the credit card entries had accumulated since separation of the parties and cited that fact as a reason for the court's ruling. R 592, 343.

SUMMARY OF ARGUMENTS

The trial court abused its discretion on remand by dramatically changing the alimony award and child support award. To make such a

change the trial court would have to make detailed findings that the original trial court had made a clear error in its Decree of Divorce. The trial court on remand made no such findings. The trial court on remand further abused its discretion by including the income from Walden University solely because the Appellant's name was found to "remain" on the website of the university. Such a lack of findings as to clear error on the first trial court's findings do not support the trial court's findings on remand.

Additionally, the trial court on remand violated the mandate rule of law. The Appellate Court remanded the case with instructions to allow for more detailed findings concerning the Appellee's financial needs as well as a rationale for including or excluding the Appellant's income from Walden University. However, the trial court, on remand made no new findings or conclusions as to the financial needs of the Appellee other than what the previous trial court made. Also, the trial court, on remand went beyond evaluating the rationale for including the income of Walden University and instead focused on the expenditures of the Appellant. The issue of the Appellant's expenditures was not on remand. Thus, the trial court on remand went beyond the mandate of the Appellate Court.

Finally, the trial court on remand abused its discretion in considering the income from Walden University in computing child support. The statute

requires the court to consider income from the equivalent of one full-time 40-hour job. Instead, the trial court on remand included income from a second job. Even if the court can justify it, there must be adequate findings to do so. There were no findings of fact related to calculating the child support.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION ON REMAND BY DRAMATICALLY CHANGING THE ALIMONY AWARD AND CHILD SUPPORT AWARD WITHOUT FIRST MAKING SPECIFIC FINDINGS OF CLEAR ERROR OR EXPLAINING A COMPELLING REASON FOR THE NECESSITY OF MAKING SUCH A CHANGE.

The trial court on remand abused its discretion when it ruled on Appellee's award for alimony and on Appellant's historical income under the law of the case doctrine. A challenge to a judge's reversal of a ruling made by a predecessor judge is composed of two issues. The first is whether the reversal so offends the prudential practice of refusing to reopen matters that have already been decided that it cannot be sustained. *In re E.H.*, 137 P.3d 809, 816 (Utah 2006) *citing* *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). The second issue in looking at a reversal of a prior order focuses on the nature of the matter decided. *Id.*

The first issue involves the law of the case doctrine. When a judge is presented with an issue identical to one which has already been passed upon by a coordinate judge in the same case that judge not allowed to arbitrarily

change the previous ruling unless a compelling reason exists. In the current case, the trial court on remand did not articulate a compelling reason to change the alimony amounts, it only made minimal findings concerning Appellee's financial needs.

The law of the case doctrine is a flexible principle and not an absolute limit on the court's power that rigidly binds a court to its former decisions. Gillmor v. Wright, 850 P.2d 431, 439 (Utah 1993). The court may change the ruling if a compelling reason exists to do so such as a prior mistake that needed to be fixed to avoid injustice. Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah App. 1994). Therefore, the trial court on remand should not depart from the law of the case to avoid relitigating decided issues and to conserve court resources unless a compelling reason exists. In re E.H., 103 P.3d 177 (Utah App. 2004).

In the current case, the appellate court stated that the trial court's "ultimate finding may be supportable" Baum v. Hayes, 196 P.3d 612, 615 (Utah App 2008). Thus, there was no assumption that the first trial court was wrong, only a request that there be adequate findings. The trial court on remand did not make any findings that there was a clear error on the part of the first trial court, nor did it make any findings to show either a clear mistake or a compelling reason for the previous trial court's rulings to be overturned.

It is also noteworthy that the judge who received the case on remand was not the same judge who originally heard the testimony. The trial court on remand did not have the benefit of “reading” the witnesses and weighing the evidence. While the appellate court will defer to the discretion of the trial court, the trial court on remand had no more advantage than the appellate court as it could only rely on the record previously made. This is particularly important to consider because an important issue in this case relates to the Appellee’s ability to work in light of her previous brain surgery. While the appellate court and the trial court on remand can read the record, they cannot observe the subtleties of Appellee’s demeanor.

In the current case, the trial court on remand made inadequate new findings about the Appellee’s financial needs and the court did not make any new detailed findings other than what was already discussed and discovered by the trial court.

Another indication that the trial court on remand abused its discretion is that its rationale for including the Walden University income as part of Appellant’s income in computing the alimony was that Appellant was still listed on the university’s website. This information was not part of the trial record. Rather this “fact” was presented to the court as Tab 9 attached to Petitioner’s Memorandum in Support of Motion for Entry of Supplemental

Findings of Fact and Conclusions of Law. The printout attached to the memorandum as Tab 9 indicates it was printed or produced on March 5, 2009. This court remanded the case to the trial court in its decision dated October 23, 2008. The trial court on remand made a specific finding that Appellant “remains listed as a member of the faculty of Walden University on its current website.” Supplemental Findings of Fact and Conclusions of Law, page four, paragraph 11 (attached to this Brief).

Ironically, the trial court on remand made the same error committed by the first trial court: it failed to make adequate findings to support its decision.

THE TRIAL COURT ON REMAND FAILED TO FOLLOW THE MANDATE RULE OF LAW WHEN IT DID NOT MAKE MORE DETAILED FINDINGS CONCERNING APPELLEE’S FINANCIAL NEEDS AND WHEN IT WENT BEYOND EVALUATING THE RATIONALE FOR INCLUDING THE INCOME FROM WALDEN UNIVERSITY.

The second issue in looking at a challenge to a judge’s reversal of a ruling made by a predecessor judge focuses on the nature of the matter decided. In re E.H., 137 P.3d at 816. The mandate rule of the law of the case doctrine requires a trial court receiving a case by remand from the appellate court to stay within the bounds the appellate court sets. The trial court below is bound to follow the directions of the appellate court. See Thurston v. Box Elder County, 892 P.2d 1034, 1037-38(Utah 1995). In the current case, the

trial court did not follow the mandate of the appellate court to make a more detailed finding concerning Appellee's financial needs. Therefore, the court should vacate the second trial court's findings and conclusions and reinstate the first trial court's findings and conclusions of law.

The mandate rule applies to cases that have been appealed and remanded. However, when a case remains pending before the trial court prior to an appeal, the parties are bound by the court's prior decision, but the court remains free to reconsider that decision. IHC Health Servs., Inc., 2008 UT 73, ¶26. However, a trial court's power to reconsider decided issues is limited when the case has been appealed and remanded. Id. The mandate rule binds both the trial court and the parties to honor the mandate of the appellate court. Id. Thus, the decisions of an appellate court become the law of the case and cannot be reconsidered on remand. Id.

THE TRIAL COURT, ON REMAND DID NOT CONSIDER THE
REQUIRED FACTORS IN DETERMINING ALIMONY AS WAS
MANDATED BY THE APPELLATE COURT

In considering required factors to determine whether an award of alimony is appropriate in a divorce proceeding, the trial court is required to make adequate factual findings on all material issues, "unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." Rehn v. Rehn, 1999 UT App 41 ¶8, 974 P.2d 306.

The factors to be considered include (1) the financial needs and condition of the recipient spouse, (2) the ability of the recipient spouse to provide a sufficient income, and (3) the ability of the payor spouse to provide support. Id.

In the current case the Appellate court remanded this case with the instructions that the trial court should provide more detailed findings concerning Appellee's financial needs. Baum v. Hayes, 196 P.3d 612, 616 (Utah App. 2008). However, the trial court made little more findings as to the financial needs of the Appellee than what was already made by the first trial court. Through those limited findings the trial court, on remand, changed the alimony amounts from \$1,200 per month to \$2,475 per month. Additionally, the trial court, on remand, changed the child support amount from \$565 per month to \$700 per month.

Then the trial court on remand looked at Appellant's lifestyle. Instead of following the mandate of the appellate court to focus on finding more detailed information concerning the rationale for excluding the Walden University salary, the court focused on the Appellant's expenses. The court was more concerned with how Appellant was able to, "pay for many lifestyle amenities...", R. 591, at 53:12., than with its mandate. The trial court on

remand made no effort to determine a rationale for excluding the Walden income; rather, it focused on Appellant's expenditures.

In addition to not following the mandate, it appears the trial court on remand included the Walden University income based solely on the fact that Appellant's name "remained" on the university website when the trial court on remand made its findings – a "fact" not presented at the trial two years previously.

Unfortunately, the trial court on remand was more interested in Appellant's lifestyle and information not provided at trial than legitimate issues such as Appellant's responsibility for the marital credit card debt or his monthly installment payment of \$740 to Appellee's mother.

THE TRIAL COURT ON REMAND ABUSED ITS DISCRETION IN ALTERING THE CHILD SUPPORT AWARD BY INCLUDING APPELLANT'S SECONDARY INCOME.

The trial court on remand determined that Appellant's secondary income should be included in determining the alimony award. The court then used the same income figures in re-calculating child support.

Typically, a court only looks at income derived from "the equivalent of one full-time 40-hour job." Utah Code Ann. § 78-45-7.5(2), now Utah Code Ann. § 78B-12-203(2). There can be exceptions, but the court needs to make

specific findings to justify the variance. *See, e.g., Reinhart v. Reinhart*, 963 P.2d 757, 759 (Utah App 1998).

Here, the trial court on remand made no findings of fact at all to address the change in child support. While a court may look at income in addition to 40 hours in some circumstances, the trial court on remand gave no indication what that circumstance may be.

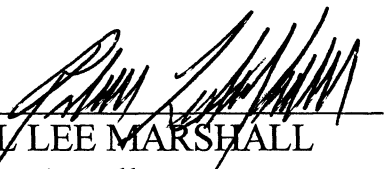
Appellant was employed by Washington State University as a full-time professor. As such, that income would be considered the equivalent of a full-time 40-hour job. To include additional income, the trial court on remand would have to consider whether Appellant was self-employed or whether the additional work was customary for members of his profession – assuming his profession was highly compensated. *Id.* While Appellant would argue neither is the circumstance, it is moot as the trial court on remand made absolutely no findings.

CONCLUSION

For the above stated reasons the appellant believes it is appropriate to reverse the trial court's findings and decree as there was no clear error in the original findings and decree. Rather, there was a lack of findings to support the decree. By failing to follow the appellate court's mandate and without the

benefit of any significant additional findings, it is a clear abuse of discretion for the trial court on remand to drastically change the former decree.

RESPECTFULLY SUBMITTED this 17th day of June, 2010.




RANDALL LEE MARSHALL
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that, on this 17th day of June, 2010, I caused a true and correct copy of the foregoing Appellant's Brief to be mailed, postage pre-paid, to:

Kenneth A. Okazaki
Stephen C. Clark
JONES WALDO HOLBROOK & McDONOUGH
170 S. Main, Suite 1500
Salt Lake City, UT 84101



ADDENDUM:

The following documents are attached hereto:

Utah Code Ann. § 30-3-5(2)

Utah Code Ann. § 30-3-5(8)

Utah Code Ann. § 78-45-7.5(2)

Utah Code Ann. § 78B-12-203(2)

Findings of Fact and Conclusions of Law

Decree of Divorce

Supplemental Findings of Fact and Conclusions of Law

Amended Decree of Divorce

ADDENDUM A

Utah Code Ann. § 30-3-5(2)

Utah Code Ann. § 30-3-5(8)

Title/Chapter/Section:

Go To

Utah CodeTitle 30 Husband and WifeChapter 3 Divorce

Section 5 Disposition of property -- Maintenance and health care of parties and children -- Division of debts -- Court to have continuing jurisdiction -- Custody and parent-time -- Determination of alimony -- Nonmeritorious petition for modification.

30-3-5. Disposition of property -- Maintenance and health care of parties and children -- Division of debts -- Court to have continuing jurisdiction -- Custody and parent-time -- Determination of alimony -- Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children including responsibility for health insurance out-of-pocket expenses such as co-payments, co-insurance, and deductibles;

(b) (i) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

(ii) a designation of which health, hospital, or dental insurance plan is primary and which health, hospital, or dental insurance plan is secondary in accordance with the provisions of Section 30-3-5.4 which will take effect if at any time a dependent child is covered by both parents' health, hospital, or dental insurance plans;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.

(5) (a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter.

(6) If a petition for modification of child custody or parent-time provisions of a court

order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(7) If a petition alleges noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

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

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

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

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

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

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

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

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

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

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

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

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

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

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

(9) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(10) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

Amended by Chapter 285, 2010 General Session

Download Code Section [Zipped](#) WordPerfect [30_03_000500.ZIP](#) 5,376 Bytes

[<< Previous Section \(30-3-4.5\)](#) [Next Section \(30-3-5.1\) >>](#)

[Questions/Comments](#) | [Utah State Home Page](#) | [Terms of Use/Privacy Policy](#)

ADDENDUM B

Utah Code Ann. § 78-45-7.5(2)

78-45-7.5. Determination of gross income — Imputed income.

(1) As used in the guidelines, “gross income” includes

(a) prospective income from any source, including nonearned sources, except under Subsection (3), and

(b) income from salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits workers' compensation benefits, unemployment compensation income replacement disability insurance benefits, and payments from “nonmeans-tested” government programs

(2) Income from earned income sources is limited to the equivalent of one full-time 40-hour job. However, if and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at his job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support

(3) Specifically excluded from gross income are

(a) cash assistance provided under Title 35A, Chapter 3, Part 3, Family Employment Program,

(b) benefits received under a housing subsidy program, the Job Training Partnership Act, Supplemental Security Income, Social Security Disability Insurance, Medicaid, Food Stamps, or General Assistance, and

(c) other similar means-tested welfare benefits received by a parent

(4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts

(b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes

(5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income

(b) Each parent shall provide verification of current income. Each parent shall provide year-to-date pay stubs or employer statements and complete copies of tax returns from at least the most recent year unless the court finds the verification is not reasonably available. Verification of income from records maintained by the Department of Workforce Services may be substituted for pay stubs, employer statements, and income tax returns

(c) Historical and current earnings shall be used to

ADDENDUM C

Utah Code Ann. § 78B-12-203(2)

Title/Chapter/Section:

[Go To](#)[Utah Code](#)[Title 78B](#) Judicial Code[Chapter 12](#) Utah Child Support Act[Section 203](#) Determination of gross income -- Imputed income.**78B-12-203. Determination of gross income -- Imputed income.**

(1) As used in the guidelines, "gross income" includes prospective income from any source, including earned and unearned income sources which may include salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment compensation, income replacement disability insurance benefits, and payments from "nonmeans-tested" government programs.

(2) Income from earned income sources is limited to the equivalent of one full-time 40-hour job. 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.

(3) Notwithstanding Subsection (1), specifically excluded from gross income are:

- (a) cash assistance provided under Title 35A, Chapter 3, Part 3, Family Employment Program;
- (b) benefits received under a housing subsidy program, the Job Training Partnership Act, Supplemental Security Income, Social Security Disability Insurance, Medicaid, Food Stamps, or General Assistance; and
- (c) other similar means-tested welfare benefits received by a parent.

(4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

(b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.

(5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.

(b) Each parent shall provide verification of current income. Each parent shall provide year-to-date pay stubs or employer statements and complete copies of tax returns from at least the most recent year unless the court finds the verification is not reasonably available. Verification of income from records maintained by the Department of Workforce Services may be substituted for pay stubs, employer statements, and income tax returns.

(c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.

(6) Gross income includes income imputed to the parent under Subsection (7).

(7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the parent defaults, or, in contested cases, a hearing is held and the judge in a judicial proceeding or the presiding officer in an administrative proceeding enters findings of fact as to the evidentiary basis for the imputation.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from employment opportunities, work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical

area as found in the statistics maintained by the Bureau of Labor Statistics.

(c) If a parent has no recent work history or a parent's occupation is unknown, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.

(d) Income may not be imputed if any of the following conditions exist and the condition is not of a temporary nature:

(i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;

(ii) a parent is physically or mentally unable to earn minimum wage;

(iii) a parent is engaged in career or occupational training to establish basic job skills; or

(iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

(8) (a) Gross income may not include the earnings of a minor child who is the subject of a child support award nor

benefits to a minor child in the child's own right such as Supplemental Security Income.

(b) Social Security benefits received by a child due to the earnings of a parent shall be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

Renumbered and Amended by Chapter 3, 2008 General Session

Download Code Section [Zipped](#) WordPerfect [78B12_020300.ZIP](#) 4,262 Bytes

[<< Previous Section \(78B-12-202\)](#) [Next Section \(78B-12-204\) >>](#)

[Questions/Comments](#) | [Utah State Home Page](#) | [Terms of Use/Privacy Policy](#)

ADDENDUM D

Findings of Fact and Conclusions of Law

JAMES H. WOODALL (5361)
WOODALL & WASSERMANN
Attorneys for respondent
10653 River Front Parkway, Suite 290
South Jordan, Utah 84095
Telephone (801) 254-9450

07 APR -2 11:42
BY DEPUTY CLERK

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

KATHY J. BAUM,)	
)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
Petitioner,)	
)	
vs.)	
)	Case No. 04-4905929 DA
MICHAEL T. HAYES,)	
)	Judge Leslie A. Lewis
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, having reviewed the file, having considered the evidence offered, and having heard the testimony of the parties and their witnesses, enters the following 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. Petitioner reports monthly needs of \$4,924. She requests monthly support of \$4,941. 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. The Court concludes that petitioner's listed needs are exaggerated in many respects, including her claim for \$800 per month to pay taxes on her hypothetical alimony award, as well as other expenses that while ideal, are not actually being paid.

10. The Court finds that respondent should maintain his full time employment at an annual salary of \$66,600, and that he has the ability to earn an additional \$8,400 during the summer months, for a total of \$75,000 annually, or \$6,250 per month.

11. 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.

12. 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.

13. Respondent shall further 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 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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 _____, 2007.

BY THE COURT:

DOUGLAS L. CORNABY
DISTRICT COURT JUDGE

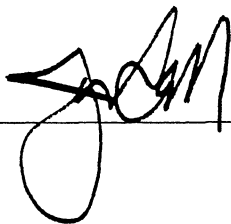
Approved as to form:

Kenneth A. Okazaki
Attorney for petitioner

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing FINDINGS OF
FACT AND CONCLUSIONS OF LAW to the following on April 2, 2007:

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



ADDENDUM E

Decree of Divorce

8

FILED DISTRICT COURT
Third Judicial District

MAY 24 2007

By [Signature] **SALT LAKE COUNTY**
Deputy Clerk

JAMES H. WOODALL (5361)
WOODALL & WASSERMANN
Attorneys for respondent
10653 River Front Parkway, Suite 290
South Jordan, Utah 84095
Telephone (801) 254-9450

**ENTERED IN REGISTRY
OF JUDGMENTS**
DATE 06/08/07

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

* * * * *

KATHY J. BAUM,

Petitioner,

vs.

MICHAEL T. HAYES,

Respondent.

DECREE OF DIVORCE

Case No. 04-4905929 DA

Judge ~~Leslie A. Lewis~~ medley
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, having reviewed the file, having considered the evidence offered, having heard the testimony of the parties and their witnesses, and the Court having previously entered its Findings of Fact and Conclusions of Law, the Court enters the following **DECREE OF DIVORCE**:

Divorce Decree @J



JD21437694

pages

DECREE OF DIVORCE

1. Petitioner is awarded a decree of divorce from respondent on grounds of irreconcilable differences, to become final upon entry.

2. The parties have one child in common, Ruby Samantha Baum-Hayes, born April 18, 1992. The parties awarded her joint legal custody, with petitioner awarded Ruby's physical custody.

3. 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 work together to do everything they can to remedy these problems.

4. Petitioner, in particular, shall 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.

5. Petitioner shall 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.

6. 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.

7. 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.

8. Respondent is ordered 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.

9. Respondent shall further 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 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.

10. 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.

11. 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.

12. The Sky miles accounts shall be divided equally as of March 6, 2007. The Summiya business is awarded to respondent.

13. 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.


14. 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.

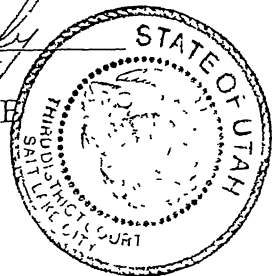
15. Respondent's 401(k) account shall be divided equally, using February 28, 2007 as the valuation date.

16. Each party shall be responsible for his or her fees, without reimbursement from the other.

DATED this 24 day of May, 2007.

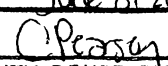
BY THE COURT:


DOUGLAS L. CORNABY
DISTRICT COURT JUDGE



Approved as to form:

Kenneth A. Okazaki
Attorney for petitioner

CERTIFY THAT THIS IS A TRUE COPY
OF AN ORIGINAL DOCUMENT ON FILE
IN THE THIRD DISTRICT COURT SALT
LAKE COUNTY STATE OF UTAH
DATE June 8, 2007

DEPUTY COURT CLERK

ADDENDUM F

Amended Findings of Fact and Conclusions of Law

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KATHY J. BAUM, Petitioner, vs. MICHAEL T. HAYES, Respondent.	SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 04-4905929 DA Judge Tyrone E. Medley Commissioner Michael S. Evans
--	---

This case was originally assigned to Judge Leslie A. Lewis. A bench trial was conducted in this case on March 5 and 6, 2007, by retired Judge Douglas L. Cornaby. This matter is before the Court on petitioner's Motion for Supplemental Findings of Fact and Conclusions of Law following remand of Judge Douglas L. Cornaby's decision from the Court of Appeals by Remittitur dated December 30, 2008. Having considered the pleadings submitted by the parties on Remittitur, the Findings of Fact and Conclusions of Law and Decree of Divorce previously entered by this Court, and the record, all in light of the instructions issued by the Court of Appeals on remand for detailed findings as to Wife's needs and Husband's ability to pay, the Court now makes the following:

SUPPLEMENTAL FINDINGS OF FACT

Petitioner's Needs

1. Petitioner's Financial Declaration in this matter lists total after-tax needs of \$4,124. (See Trial Exhibit 7, pp. 5-6)

2. This amount reflects petitioner's and the parties' daughter Ruby's actual expenses, including rent of \$1,000 a month payable to petitioner's mother for the house her mother purchased for petitioner and Ruby when they relocated to Utah, and substantial insurance and out-of-pocket medical costs due to petitioner's health problems. (R. 591, at 136:9 - 137:24, 168:2 - 175:13; Trial Exhibit 12)

3. Petitioner was not able to cover all of her and Ruby's expenses through temporary alimony and child support awarded her during the pendency of this action in the amount of \$1,960 per month, and had to rely on loans from her mother for rent and many other expenses. (*Id.* at 138:2-21)

4. As a result, petitioner had over \$123,000 in debt as of the time of trial, much of it owed to her mother. (See Trial Exhibit 7, pp. 2-3)

5. Respondent did not offer any evidence to contradict petitioner's expenses or debt, but questioned whether petitioner was indeed obligated to pay her mother rent and whether she needed both \$409 for prescriptions without insurance and \$441 for insurance. (R. 591, at 175:3-13)

6. The evidence therefore establishes that petitioner'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).

7. This Court previously determined that petitioner's brain surgery rendered her unable to return to anything like her former employment. Indeed, the evidence showed she is incapable of anything but menial labor. As a result, this Court previously determined petitioner is partially disabled, and therefore imputed income of \$750 - a finding not challenged on appeal. (R. 592, at 339:25 - 340:23) That leaves \$2,965 in unmet, after-tax needs. The receipt of child support in the amount of \$700 which is not taxable to petitioner reduces her total post-tax reasonable needs to \$2,265.

Respondent's Ability to Pay

8. Respondent made \$91,000 in 2005 and \$96,000 in 2006. (See Trial Exhibit 25; see also R. 592 at 65:2-5).

9. Respondent's 2006 earnings comprised \$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, for a total of \$96,000 annually, or \$8,000 a month. (See Trial Exhibit 41; R. 591, at 61:19 - 65:7, 92:7 - 93:12)

10. Respondent testified that he anticipated his salary from full-time teaching will increase in the future. (*Id.* at 66:4-6)

11. Respondent speculated at trial 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 remains listed as a member of the faculty of Walden University on its current website. (See http://www.waldenu.edu/c/Schools/Schools_8314.htm.)

12. Respondent's Financial Declaration listed after-tax needs of \$2,369 per month. (See Trial Exhibit 110, p. 5)

13. Respondent testified at trial that he was able to pay the \$1,960 per month awarded as temporary alimony and child support, and would be able to continue to pay those amounts after the divorce. (R. 591, at 205:12-15)

14. Respondent also continued to fully fund his retirement, in the amount of \$456 per month. (Trial Exhibit 110, p.2)

15. Respondent failed to pay the Guardian ad Litem or Ruby's counselor, but was able to pay for many lifestyle amenities during the pendency of this action, including a boat and a boat slip he shares with his girlfriend as well as two kayaks and a new 2002 Subaru. (R. 591, at 53:12 - 57:3, 242:3 - 243:14)

16. The Court finds that respondent's ability to pay should be a function of the earning capacity historically established, not the one presented at trial based on a few months' earnings and speculation that he may not be able to build on past increases in earnings, and therefore imputes gross income to him of \$96,000 per year, or \$8,000 per month gross, \$6,000 per month net of taxes (at a 25% combined effective rate). The foregoing analysis demonstrates that petitioner should be awarded

child support in the amount of \$700 per month based on gross income of \$750 a month imputed to petitioner and respondent's gross income of \$8,000 per month.

17. Respondent's Financial Declaration listed after-tax needs of \$2,369 per month. (See Trial Exhibit 110, p. 5) Including a child support payment of \$700, respondent's total after-tax needs total \$3,069.

18. 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, respondent has an ability to pay at least \$2,475 per month while still fully meeting his own claimed needs ($\$8,000 \times 25\% - \$456 - \$2,369 - \700). Requiring respondent to pay \$2,475 per month for alimony exceeds petitioner's reasonable needs of \$2,265, however, the excess amount is necessary to assist petitioner's tax liability consequences from receipt of alimony.

Based on the foregoing Findings of Fact, the Court now enters the following:

Supplemental Conclusions of Law

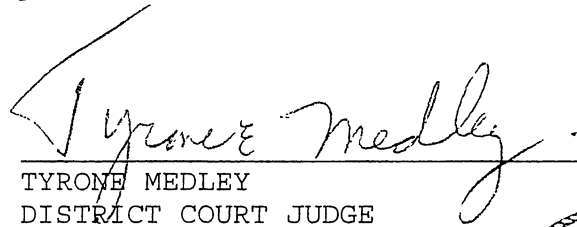
1. The amount of petitioner's alimony should be \$2,475 per month retroactive to March 1, 2007.

2. The amount of petitioner's child support should be \$700 per month retroactive to March 1, 2007.

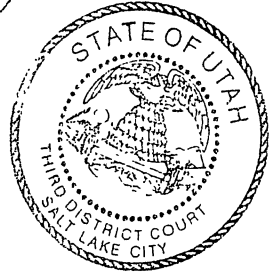
3. Respondent's Motion to Strike petitioner's proposed Supplemental Findings of Fact and Conclusions of Law is denied.

4. The terms of the Decree of Divorce should be amended consistent with the above Findings of Fact and Conclusions of Law. Counsel for petitioner is directed to submit an Amended Decree accordingly.

Dated this 2 day of September, 2009.



TYRONE MEDLEY
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Supplemental Findings of Fact and Conclusions of Law, to the following, this 2 day of September, 2009:

Kenneth A. Okazaki
Stephen C. Clark
Attorneys for Petitioner
170 S. Main Street, Suite 1500
Salt Lake City, Utah 84101

James H. Woodall
Attorneys for Respondent
10653 River Front Parkway, Suite 290
South Jordan, Utah 84095

J Ashley

ADDENDUM G

Amended Decree of Divorce

FILED DISTRICT COURT
Third Judicial District

NOV - 9 2009

Kenneth A. Okazaki (USB #3844)
Stephen C. Clark (USB #4551)
Jessica P. Wilde (USB #11801)
JONES WALDO HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200
Facsimile: (801) 328-0537

SALT LAKE COUNTY
By [Signature]
Deputy Clerk

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 11/10/09

Attorneys for Petitioner

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

KATHY J. BAUM,

Petitioner,

v.

MICHAEL T. HAYES,

Respondent.

AMENDED DECREE OF DIVORCE

Civil No. 044905929

Honorable Tyrone E. Medley

Commissioner Michael S. Evans

The above-captioned matter came before the Court on Petitioner's Motion for Supplemental Findings of Fact and Conclusions of Law, following remand of the Court's decision from the Utah Court of Appeals by Remittitur, dated December 31, 2008. The Court, having reviewed the file and pleadings submitted by the parties on Remittitur, the Findings of Fact and Conclusions of Law, the Supplemental Findings of Fact and Conclusions of Law, and the Decree of Divorce previously entered by this Court, and for good cause appearing therefore;

Amended Decree of Divorce @J



IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Petitioner was previously awarded a decree of divorce from Respondent on grounds of irreconcilable differences on May 24, 2007.

2. The parties have one child, Ruby Samantha Baum-Hayes, born April 18, 1992. Both parties are awarded joint legal custody, and Petitioner is awarded sole physical custody.

3. Respondent shall be entitled to exercise parent time with the child pursuant to Utah Code Ann. § 30-3-37.

4. The Court recognizes that parent time problems have occurred. The parties shall work together to do everything they can to ensure that parent time problems do not occur. Specifically, Petitioner shall cooperate fully with Respondent to ensure parent time visits. She shall maintain a positive point of view about Respondent in her discussions with the child. Petitioner shall not schedule any activities for the child during Respondent's parent time. Petitioner shall indicate to the child that it is not her choice that the child visits with Respondent; rather, it is a responsibility that she has to her father.

5. Petitioner shall accept telephone calls from Respondent to arrange parent time. It is not solely the Respondent's responsibility to schedule visits with the child.

6. The parties shall make every effort to avoid discussing issues relating to the parties' divorce in the child's presence, or involving the child in a conflict in any way. The parties shall make every effort to resolve their conflicts with the understanding that any unresolved conflict will distract and agitate the child.

7. Petitioner shall have the continuing duty to notify Respondent of the child's medical and school-related 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.

8. Petitioner is awarded alimony in the amount of \$2,475 per month, beginning October 1, 2009, and continuing until Petitioner's death, remarriage, or cohabitation.

9. Judgment is hereby entered against Respondent and in favor of Petitioner for alimony retroactive to March 1, 2007, in the amount of \$39,525.

10. Respondent is not required to maintain life insurance for Petitioner's benefit.

11. Petitioner is awarded child support in the amount of \$700 per month, beginning October 1, 2009, and continuing until the child reaches the age of eighteen years or graduates from high school, whichever occurs last.

12. Judgment is hereby entered against Respondent and in favor of Petitioner for child support retroactive to March 1, 2007, in the amount of \$4,185.

13. The total judgment hereby entered against Respondent for retroactive alimony and child support is \$43,710.

14. Respondent shall maintain medical insurance for the child for as long as she is eligible, at his sole expense. Respondent shall maintain life insurance naming the child as beneficiary for as long as he has a child support obligation to the child.

15. The parties shall each pay one-half of the child's out-of-pocket medical expenses, including the costs of her therapy with Dr. Johanna McManemin.

16. The furniture, furnishings, bank accounts, vehicles, and personal property that were awarded to the respective parties on March 24, 2007 in the Decree of Divorce shall continue to be retained by the parties, free and clear of any claim by the other.

17. Respondent shall be responsible for \$1,500 of the Guardian Ad Litem's fees, representing those fees incurred prior to his reappointment. Petitioner shall be responsible for the Guardian Ad Litem's fees incurred subsequent to his reappointment.

18. 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, the total amount due having been reduced to judgment by prior court order in the amount of \$6,601.

19. The Sky miles accounts and Summiya business that were awarded to the respective parties on March 24, 2007 in the Decree of Divorce shall continue to be retained by the parties, free and clear of any claim by the other.

20. Respondent's 401(k) account shall be divided equally, retroactive to February 28, 2007.

21. Each party shall continue to be responsible for the debts and obligations in his or her name.

22. Each party shall be responsible for his or her attorneys' fees and costs incurred.

DATED this 9 day of Nov, 2009.

BY THE COURT:

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE:

DEPUTY COURT CLERK

Honorable Tyrone E. Medley
Third Judicial District Judge

Approved as to form:

James H. Woodall
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2009, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing **Amended Decree of Divorce**, to the following:

James H. Woodall
Woodall & Wasserman
10653 River Front Parkway, Suite 290
South Jordan, Utah 84095
Fax: 801-254-9451

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