

2010

## Lisa Davis v. Corey G. Davis : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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**LISA DAVIS,**  
**Petitioner / Appellee,**

**vs.**

**COREY G. DAVIS,**  
**Respondent / Appellant.**  
-----o000o-----

**APPEAL**

**Case No. 20100238**

**District Ct No. 024400391**

**Brief of Appellant/Cross Appellee**

**and**

**Reply Brief**

**Appeal from the Fourth Judicial District, Utah County, Judge David N.  
Mortensen**

**Oral Argument Requested**

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**UTAH APPELLATE COURTS**

**DEC 20 2010**

**IN THE UTAH COURT OF APPEALS**

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#### Challenges to Ms Davis' Statement of the Case, Nature of Case:

The vast majority of those sections of Ms Davis' Brief are mere argument, unsupported by any reference to the record. *See*, Brief of Appellee / Cross-Appellant, hereinafter referred to as, "Ms Davis' Brief". Where there is a reference, it goes to documents entered years before this matter. *Id.* Ms Davis makes one reference to the current record, Record at 530, to support her allegations about Mr. Davis' alleged failure to support her before the divorce (in 2002), and in failing to make mortgage payments. *Id.* Yet, the Record at 530 shows no mention of those matters, and fully fails to support Ms Davis' allegations. The only other reference, Record at 19 – 20, is an affidavit of Ms Davis, dated March 20, 2002, which is well before the divorce itself, let alone any issue pending herein.

#### Challenges to Ms Davis' Statement of Relevant Facts:

1. At ¶ 1, Ms Davis' Brief, p. 7, Ms Davis relates alleged facts which, per her own statements, occurred prior to the initial divorce, which was in 2002. Record at 19 - 20. The Record, at 530, does not address those alleged facts.

2. Again, ¶ 2, Ms Davis' Brief, p. 8, alleges facts which, per her own statements, occurred prior to, or were addressed in, the initial divorce.

3. In ¶ 3, Ms Davis' Brief, p. 8, she discusses conditions that existed at the time of the divorce, and makes accusations concerning visitation, which was not part of the case below, nor is it part of this appeal. The Transcript, at p. 5, lines 7 – 13, does not mention the children, or visitation, as alleged. It should be noted that the Trial Court does not start taking any evidence from Ms Davis, until page 52 of the Transcript, which is when she was sworn in to testify; the entire transcript, prior to that page, deals with a review of pleadings, or instruction to the parties on how to proceed. Transcript, p. 1, line 1, through p. 25, line 19.

4. As to the allegations raised in ¶ 4, Ms Davis's Brief, p. 8, the Record

cited by Ms Davis does not show that she was, “forced to move from her home where she lived with her three young children, due to foreclosure.”

5. The Record does not support Ms Davis’s assertion, raised in ¶ 9, Ms Davis’s Brief, p. 9, that Mr. Davis’ bankruptcy was filed, “well after Corey filed the Petition for Modification...”

6. The Record fails to support Ms Davis’s assertion, raised in ¶ 10, Ms Davis’s Brief, p. 9, that, “the court found that the only significant and material change in circumstances since the entry of the original Divorce Decree was that Corey’s income ha[d] been reduced approximately 29%.” Emphasis added. In fact, the trial court found that Mr. Davis’ income was reduced, “approximately 30%”, Record at 529, ¶ 19; Mr. Davis, “received a discharge in bankruptcy...”, Record at 530, ¶ 13; Ms Davis, “could work full-time and impute[d] income to her at minimum wage of \$940.00 per month”, Record at 529, ¶ 17; and, that Mr. Davis was, “the primary financial contributor to the cost of raising the children... [such] that the Decree should be modified to entitle Respondent [Mr. Davis] to claim the youngest child, Cierra as an exemption...”, Record at 527 ¶ 28. These additional findings on significant changes are noted, and admitted by Ms Davis, in ¶¶ 12 - 14 of Ms Davis’ Brief.

7. The Record fails to support Ms Davis’ assertions, raised in Ms Davis’ Brief, p. 9, and ¶ 16. Her claims about suffering the economic effects of Mr. Davis’ bankruptcy was not testimony, but a mere review of issues. Transcript p. 24, lines 16 - 24. In fact, all she stated was that the bankruptcy was not on the credit report until after 2005 Trial. Transcript p. 24, lines 14 - 15. As noted, in ¶ 3, above, Ms Davis was not sworn until page 52, of the Transcript. Also, the Record, at 677 – 678, fails to support her claims that she was sued, and forced to make payments on debts that Mr. Davis was allegedly ordered to pay.

8. It is interesting to note that Ms Davis admits that she, “and her chil-



dren have not been able to live in a home of their own for the last nine years because of her ruined credit...” Ms Davis’ Brief, p. 10, ¶ 16. Yet, Mr. Davis’ bankruptcy occurred only seven (7) years ago, in 2003.

9. At p. 10, ¶ 17, Ms Davis’ Brief, Ms Davis omits the fact that the first change she alleged, as the basis for the remainder of her claims for relief, was that, “Respondent [Mr. Davis] filed a bankruptcy and no longer is paying the debts he was ordered to pay.” Record at 559, ¶ 2A.

10. Ms Davis omits, at Ms Davis’ Brief, p. 11, ¶ 21, that she did not file her request to adjust child support until November 23, 2008. Record at 601, and specifically, at 599, ¶ 14.

11. Ms Davis repeats the allegations she made at ¶ 16, in ¶ 25, Ms Davis’ Brief, p. 12. Mr. Davis reiterates the fact that the Transcript, p. 24, was not testimony, it was mere review of issues. *See*, ¶¶ 3, and 7, hereinabove.

12. The Transcript fails to show that she was sued by credit card companies on bills owed by Mr. Davis, as alleged in Ms Davis’ Brief, p. 12, ¶ 26. That section of the Transcript cited by Ms Davis, shows a discussion of Exhibit 7, pleadings by a collection agency, but the Transcript does not show any correlation between Exhibit 7 and any debt related to Mr. Davis.

### **Argument**

#### **General Rebuttal:**

Throughout her brief, Ms Davis mischaracterizes Mr. Davis’ issues as being challenges to the Trial Judge’s findings. She then argues that Mr. Davis failed to meet his burdens, and, as such, this Court should deny the relief Mr. Davis requests.

Ms Davis spends almost the entirety of her brief arguing that Mr. Davis failed to marshal the facts (Ms Davis’ Brief, pp. 18 - 24, 25 - 27, 30 - 31, and 33 -

38), or Mr. Davis failed to preserve the issue at the trial court level (or failed to object) (Ms Davis' Brief, pp. 24 - 25, 27 - 30, and 31 - 33). Those arguments merely support Ms Davis' misrepresentations of the issues. As will be shown, when each issue is individually discussed, Ms Davis failed to address the legal issues raised by Mr. Davis; that the Trial Court erred in its readings, or interpretation of the pertinent statutes, and their application to the matter at hand.

As a general response to Ms Davis' claims of failure to marshal evidence, or challenges to the Trial Court's finding, Mr. Davis understands the difference between challenging the Trial Judge's findings, and his interpretation, and application of the law. It is the Trial Judge's interpretation, and application, of statute, which Mr. Davis alleges to be error. Mr. Davis does not argue that the Trial judge added two (2) and two (2), to come up with five (5) (an allegation of findings unsupported by the facts, as alleged by Ms Davis). Mr. Davis is saying that, regardless of what number the Trial Judge determined, he erred in his application of the pertinent law to those facts.

The Trial Court Judge's decision addressed various statutes, or legal doctrines. Record at 677 - 679. Mr. Davis asserts that the Trial Court Judge erred in his interpretation, and application, of the law to the facts of this case. This Court, "review[s] a trial court's statutory interpretation for correctness, according it no particular deference. *State v. Vigil*, 842 P.2d 843, 844 (Utah 1992); *State v. Singh*, 819 P.2d 356, 359 (Utah App. 1991), cert. denied, 832 P.2d 476 (Utah 1992)." *State v. Masciantonio*, 850 P.2d 492, 493 (Utah App. 1993). *See also*, *State Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, ¶ 44, 89 P.3d 97; *Brewster v. Brewster*, 2010 UT App. 260, ¶ 19; *Trubetzkoy v. Trubetzkoy*, 205 P.3d 891, 894 (Utah App. 2009) 2009 UT App. 77 ¶ 6; and, *Wells v. Wells*, 871 P.2d 1036, 1038 (Utah App. 1994). Even Ms Davis admits questions of law do not require marshaling. *See*, Ms Davis' Brief, p. 19.

Turning now to Ms Davis' preservation arguments, Ms Davis does correctly state that, "[a]s a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate* 10 P.3d 346, 350 ¶11 (Utah 2000). That is, "unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." *Id.*

"The plain error exception enables the appellate court to 'balance the need for procedural regularity with the demands of fairness.' *State v. Verde*, 770 P.2d 116, 122 n. 12 (Utah 1989). 'At bottom, the plain error rule's purpose is to permit us to avoid injustice.' *Eldredge*, 773 P.2d at 35 n. 8. To demonstrate plain error, a defendant must establish that '(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.' *Dunn*, 850 P.2d at 1208-09."

*State v. Holgate* 10 P.3d 346, 350 ¶ 13 (Utah 2000). *See also*, *State v. Tarnawiecki*, 5 P.3d 1222, 1226 (UT App. 2000), and *State v. Dean*, 95 P.3d 276, 280 ¶ 15 (Utah 2004).

Mr. Davis' Brief, as well as his argument herein, shows the Trial Court's errors exist; the errors should have been obvious to the Trial Court; and, the errors, each individually addressed below, harmed Mr. Davis. Having established plain error, all of Ms Davis' arguments, and claims, based on a failure to preserve, must fail, regardless of where they exist in Ms Davis' Brief.

Point One: Standards for Modifying Prior Final Orders:

Mr. Davis asserts that, if the issues in the current petition for modification were addressed, or modified in a prior order, then the changed circumstances standard applies to changes that occurred since that last order modifying the decree, not all the way back to the original decree. *See*, Mr. Davis' Brief, pp. 17 - 19.

For example, let us assume that Mr. & Mrs. Jones are divorced in 2001, with Mrs. Jones being granted custody of the children, and that Mr. Jones obtains an order modifying that decree in 2003, granting him custody of the children. If Mrs. Jones now files a petition to modify custody, she must meet the standard of proving a change in circumstance relating to a change in Mr. Jones' ability to care for the children; the facts and circumstances as of the 2003 order. The trial court does not consider changes in circumstance before that 2003 time.

To do so would be ludicrous, as then the custody standard would revert to Mrs. Jones having to show a change in circumstances relating to her, not Mr. Jones', ability to care for the children. Such a change would simply reverse the standard of requiring the change in the custodial parent's ability to parent, contrary to Utah's stated standard.

Applying that logic to the instant case, the Trial Court should have allowed only changes in circumstances since the 2005 Order, without any relation back to the original Decree. The 2005 Order addressed all issues raised herein, and at the Trial Court.

Ms Davis alters Mr. Davis' claim from that of the legal issue, to an alleged challenge to the Trial Court's Findings. Ms Davis argues, almost exclusively, that Mr. Davis failed to marshal the facts. Ms Davis' Brief, pp. 18 - 24. However, as this issue appears to be an unresolved legal issue, there is no requirement for the marshaling of evidence. *See*, Mr. Davis' General Rebuttal section, above.

Mrs. Davis is correct that Mr. Davis did not cite authority exactly on point to his position. Mrs. Davis' Brief, p. 21. In fact, Mr. Davis admitted such. Mr. Davis' Brief, p. 18. That is because Mr. Davis was unable to find any binding authority in Utah, on this issue. *Id.* Contrary to Ms Davis' argument (*see*, Ms Davis' Brief, p. 22), Mr. Davis' Brief does cite Utah statute, and case law pertinent to the issue. *See*, Mr. Davis' Brief, pp. 17 - 18.

When a matter before this Court, “is an issue of first impression in Utah courts and we look to Utah statutory provisions for guidance.” *State of Utah v. Child Support Enforcement*, 888 P.2d 690, 692 (Utah App. 1994). Under that doctrine, this Court reviews Utah’s statutes. *Id.* The controlling statute is §30-3-5(3), Utah Code Annot. (1953, as amended), which states, “[t]he 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.” As such, that statute is not helpful.

Mr. Davis, in searching the neighboring states’ case law, which, even if directly on point would not be controlling on this Court, located only two (2) cases, both being in Idaho. *Jensen v. Jensen*, 917 P.2d 757 (Idaho, 1996), and *Rohr v. Rohr*, 911 P.2d 133 (Idaho, 1996). Both cases addressed the fact that the trial court is to consider changed circumstances since the last order modifying the divorce decree. *Jensen*, 917 P. 2d at 758, and *Rohr*, 911 P. 2d at 137. However, it appears that the statutory authority granted those courts, unlike Utah’s statute, specified changes since the last decree. *Rohr*, 911 P.2d at 137.

Ms Davis also asserts Mr. Davis inadequately briefed this point. "An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." *See, State v. Smith*, 2010 UT App. 231 ¶ 3, \_\_\_ P.3d \_\_\_ (citation omitted). This Court indicated that inadequately briefed means the brief lacks, "reasoned analysis based upon relevant legal authority," *see, State v. Sloan*, 72 P.3d 138, 141, 2003 UT App 170, ¶ 13; and, “because it is devoid of any meaningful analysis ...” *see Washington v. Kraft*, 2010 UT App 266 ¶ 7 (unpublished opinion, internal citations omitted).

In *State v. Smith*, the brief in question consisted solely of,

“a cursory summary of the argument, but it does not contain an argument section. The summary itself is a scant paragraph requesting this court to ‘consider the requirements of due process of law,’ followed by a list of constitutional rights. This argument is followed by a one-sentence conclusion stating, ‘The Defendant/Appellant invokes his right to appeal and asks the appella[te] court to determine if his rights as an accused were granted and due process of law allowed.’”

*State v. Smith*, 2010 UT App 231¶ 2. The result was that the brief was stricken, with a remand to appoint new counsel to submit a new brief. *State v. Smith*, 2010 UT App 231¶ 7.

In *Washington*, the Plaintiff’s brief completely ignored a Utah Supreme Court case, from approximately twenty (20) years earlier, which was directly on point. *Washington*, ¶¶ 5 - 6.

Both cases rely on *State v. Sloan*, 72 P.3d 138 (Utah App. 2003), which relies on *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14. *State v. Sloan* quotes directly from *Smith*. *State v. Sloan*, 72 P.3d 138, 142, 2003 UT App 170, ¶ 13.

In *Smith*, the brief consisted of:

1. three arguments, supported by five, "points", without citing a single legal authority and only obliquely referring to the Utah Rules of Civil Procedure, and to a general concept of due process in arguing that the court-appointed custody evaluator should not have been allowed to testify. *Smith*, 1999 UT App 370, ¶ 10, 995 P.2d 16.

2. a second point failing to cite relevant legal authority. In arguing that the trial court should not have issued a protective order that had the effect of limiting discovery, she quotes only one case. The language cited is a general statement about a policy of fairness behind discovery rules, but provides no grounds for comparison to the facts of Appellant's case. *Smith*, 1999 UT App 370, ¶ 11, 995 P.2d 16.

3. a third point, approximately one-half (½) page in length, containing little more than a quote from Rule 35(b)(1) Utah Rules of Civil Procedure, and arguing that Appellant should have received a report from the evaluator, when the record clearly showed that she had received that report. *Smith*, 1999 UT App 370, ¶ 12, 995 P.2d 16.

4. A fourth point merely rehashes the previous argument. *Smith*,

1999 UT App 370, ¶ 13, 995 P.2d 17.

5. The fifth and final point presented by Appellant, cites the Utah Constitution's Due Process Clause [2], and several Utah cases dealing with apparently unrelated matters. *Smith*, 1999 UT App 370, ¶ 15, 995 P.2d 17.

The *Smith* brief also ignored a relevant section of Utah Rules of Civil Procedure, that was on point in that case. *Smith*, 1999 UT App 370, ¶ 14, 995 P.2d 17.

In all of those cases pertinent law had been clearly established years prior, and none of the issues presented were of first impression. In the instant case, Mr. Davis cited some legal authority, case law, and statute, framing the issue. *See*, Mr. Davis' Brief, pp. 17 - 19. Mr. Davis was unable to point to an authoritative Utah source directly on point. Plus, Ms Davis, despite all of the cases cited by her, does not present to this Court any case, or statute, that refutes Mr. Davis' proposition.

Mr. Davis' argument was sufficient for Ms Davis to present a lengthy, and detailed response, which clearly shows that she understands the issue. As such, she is not prejudiced; it is not as if Mr. Davis was raising the issue for the first time, in oral argument.

Point Two: Application of *Res Judicata* to Claims Concerning a Prior Bankruptcy:

Ms Davis ignores the issue raised. *See*, Ms Davis' Brief, pp. 24 - 25, and 25 - 27, respectively. She shifts the Court's attention to her claims of lack of preservation, and that the Trial Court Judge's findings are adequate (a failure to marshal evidence claim). *Id.* As to those general claims, and allegations, Mr. Davis reiterates herein, his arguments set out in the General Rebuttal section.

On the preservation issue, Mr. Davis raised the concept of *res judicata*, a number of times to the Trial Court. *See*, Mr. Davis' Brief, pp. 21 (citing the Record at 527, 529 - 530, 535 - 536, 562 - 566, and Transcript at p. 23, lines 2 - 13; p. 24, lines 2 - 9; p. 28, lines 17 - 23; p. 30, lines 1 - 8; p. 78, lines 6 - 10; and, p. 107, line 5, through p. 108, line 21). True, Mr. Davis did not use those exact

words, for Mr. Davis did not know the term, *res judicata*. Having raised the issue of the prior bankruptcy, and prior review of Ms Davis' claims, the Trial Court even commented thereon, stating:

“[t]o be frank with you, you presented me with a bit of a thorny issue. Mr. Davis has declared bankruptcy. And that's provided for, believe it or not, in the US Constitution. ... Bankruptcy is to provide a clean slate. So I'm concerned that if I take into account the bankruptcy the way you're asking me to do it, that I am essentially using that as an excuse to change the child tax deductions, which will have a financial impact on Mr. Davis, and, therefore, I'm backdooring the bankruptcy law. And to tell you the truth if I do it and it's wrong, I can get held in trouble for ignoring the effect of the bankruptcy law.”

Transcript, p.107, lines 7 – 21. The Trial Court based its award of the use of the children, as tax exemptions, directly on that 2003 bankruptcy. Record at 677, 673, and 671 - 672 (2010 Findings, p. 3, ¶ 1p. 7, ¶ 2, and p. 8, ¶ 1, through p. 9). Ms Davis' testimony was that, due to the 2003 bankruptcy, she should be awarded all the children, as dependents for tax purposes. Transcript, p. 57, lines 12 – 21; and, p. 94, lines 3 - 14.

Going to the actual issue, Ms Davis, citing *Hogge v. Hogge*, 649 P.2d 51, 53 (Utah, 1982), *Smith v. Smith*, 793 P.2d 407, 410 (UT App. 1990), and *Throckmorton v. Throckmorton*, 767 P.2d 121, 123 (Utah App. 1988), agrees that, “the doctrine of *res judicata* applies in divorce actions, and subsequent modification proceedings.” Ms Davis' Brief, p. 26 ¶ 1. Ms Davis also agrees that, “a domestic relations order may be modified and the policy concerns underlying the doctrine of *res judicata* will be safeguarded if a trial court modifies a divorce decree only after finding changed circumstances.” Ms Davis' Brief, p. 26, ¶ 2, citing *Kelley v. Kelley*, 2000 UT App ¶ 21, 9 P.3d 171, *Hogge*, 649 P.2d at 53 - 54, *Hiush v. Munro*, 2008 UT App. 283 ¶¶ 12-15, 191 P.3d 1242, and *Smith*, 793 P.2d at 410.

The real issue is, and this ties in with Mr. Davis' first issue, does *res judicata*



require that the material change of circumstances must have occurred since the last order modifying the decree of divorce, or can the trial court go back to the original decree? Our case law states that, “principles of res judicata require that ‘a party seeking modification of a divorce decree must demonstrate that a substantial change in circumstances has occurred since the entry of the decree, and not contemplated in the decree itself.’ ” *Krambule v. Krambule*, 994 P.2d 210, 214 ¶ 13 (Utah App. 1999) (citations omitted).

This Court, in *Krambule*, affirmed the application of the doctrine of *res judicata* in divorce modifications. As all of the support claims were based on facts known to the parties before the entry of the original decree, those claims, “should have been asserted in the original divorce action and is therefore now barred under the principles of res judicata.” *Krambule*, 994 P.2d at 215, ¶ 16.

Just like in *Krambule*, Ms Davis knew, at the time of the 2005 Trial, and 2005 Order, of the 2003 bankruptcy, and all the potential effects thereof, including the potential for creditors suing her, and her credit rating being damaged, back in 2003, 2004, and 2005. In fact, Ms Davis admits, and complains that she, “and her children have not been able to live in a home of their own for the last nine years because of her ruined credit...” Ms Davis’ Brief, p. 6, ¶ 2 (emphasis added). As she lived with, and knew about such a problem for nine years, her claims that her credit was damaged, being pursued by creditors, or having to pay on those marital debts, were known to her, or capable of being known to her, at the 2005 Trial. Plus, she had counsel appearing for her at that 2005 Trial. Record at 533, and 538.

Just like in *Krambule*, Ms Davis should have raised those claims during the 2005 Trial. As such, under *Krambule*, Ms Davis’ burden was to show a material change in circumstances since the entry of the last order; in the case of *Krambule*, it was the decree, *id*; in this case, it should have been the 2005 Order. And, as that 2005 Order resulted from a trial, the *Smith v. Smith* exception, about non-litigated

matters (*see, Smith*, 793 P.2d at 410), does not apply.

As Ms Davis argues, the Trial Court's findings were mostly based on Mr. Davis' 2003 bankruptcy specifically, the bankruptcy materially affected Ms Davis' financial condition; because of the bankruptcy, creditors are pursuing Ms Davis; Mr. Davis did not pay the marital debts which were discharged; and, the bankruptcy deprived Ms Davis of the benefit of the 2002 stipulation. *See*, Ms Davis' Brief, pp. 20 - 21. As to material changes in circumstances, Ms Davis argued that Mr. Davis' alleged, "failure to pay certain debts [which] had adversely affected Lisa [Ms Davis]..." Ms Davis' Brief, p. 35, ¶ 2. Those debts were the debts discharged in Mr. Davis' Bankruptcy.

In *Krambule*, this court ruled that those prior claims for support were barred by the doctrine of *res judicata*. *Krambule*, 994 P.2d at 217, ¶ 17. In exactly the same manner, this Court should rule that all of Ms Davis' claims which were based upon, or granted because of, the 2003 Bankruptcy, are barred by that doctrine.

### Point Three: Modification of Child Support Obligation:

Despite admitting the legal nature of Mr. Davis' claims, *see* Ms Davis' Brief, pp. 27 - 28, Ms Davis' defenses, and assertions, go to the usual arguments about preservation, and failure to marshal the facts. *See*, Ms Davis' Brief, pp. 27 -30, and 30 - 31, respectively. Mr. Davis realleges herein, his general arguments about preservation, and the differences between legal, and factual challenges, as set forth in his General Rebuttal.

Mr. Davis' actual position is that the Trial Court violated §78B-12-210, Utah Code Annot. (1953, as amended), when it adjusted his child support upward. *See*, Mr. Davis' Brief, pp. 22 - 24. The question goes to the material change of circumstances, and the fact that §78B-12-210, Utah Code Annot. (1953, as amended) states a difference in the support amount of ten-percent (10%), or more, and the

change in Mr. Davis' support was only nine-percent (9%). *Id.*

That argument takes this Court into the realms of interpretation, and application of statute; in other words, plain error. This Court, "review[s] a trial court's statutory interpretation for correctness, according it no particular deference. *State v. Vigil*, 842 P.2d 843, 844 (Utah 1992); *State v. Singh*, 819 P.2d 356, 359 (Utah App. 1991), cert. denied, 832 P.2d 476 (Utah 1992)." *State v. Masciantonio*, 850 P.2d 492, 493 (Utah App. 1993). *See also*, *State Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, ¶ 44, 89 P.3d 97; *Brewster v. Brewster*, 2010 UT App 260, ¶ 19; *Trubetzkoy v. Trubetzkoy*, 205 P.3d 891, 894 (Utah App. 2009) 2009 UT App 77 ¶ 6; and, *Wells v. Wells*, 871 P.2d 1036, 1038 (Utah Ct. App. 1994).

To demonstrate plain error, a defendant must establish that, "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant." *State v. Dean*, 95 P.3d 276, 280 (Utah 2004) ¶ 15. *See also*, *Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993), *State v. Holgate* 10 P.3d 346, 350 ¶ 13 (Utah 2000). *See also*, *State v. Tarnawiecki*, 5 P.3d 1222, 1226 (UT App. 2000).

Mr. Davis challenged the Trial Court on this issue. He put into evidence a letter from Office of Recovery Services (Trial Court, Exhibit 3), as well as testimony (Transcript, at p. 78, line 23 - p. 79, line 7) about not meeting that ten-percent (10%) change. Even Ms Davis admitted to the Trial Court that she knew of that bright-line limitation, and the fact that such a change would not be shown. *See*, Ms Davis' Brief, p. 29, ¶ 2. *See also*, Transcript, p. 53, lines 1 – 3. As such, the statutory limit was placed before the Trial Court, yet the Trial Court decided to rule contrary to statute.

On its face, the Trial Court's ruling does not comply with the guidelines, and no findings to rebut the guidelines were pronounced by the Trial Court. And,

Mr. Davis would have had a more favorable outcome had the Trial Court not made that error — his child support would not have been increased.

Point Four: Retroactive Application of Child Support Obligation:

Ms Davis' entire argument against Mr. Davis' assertion is based upon an alleged failure to preserve the issue. See, Ms Davis' Brief, pp. 31 - 33. She does not refute Mr. Davis' assertion, claim, or argument; and, she fails to show any evidence, or cite any authority, contradicting Mr. Davis' argument that the Trial Court violated §78B-12-112(4), Utah Code Annot. (1953, as amended), in ordering changes in child support to be retroactive to April 4, 2008, (Record at 724), when Ms Davis did not request that change, until November 23, 2009, (Record at 599).

As noted in the General Rebuttal section, “[a]s a general rule, claims not raised before the trial court may not be raised on appeal.” *State v. Holgate* 10 P.3d 346, 350 ¶11 (Utah 2000). That is, “unless a defendant can demonstrate that ‘exceptional circumstances’ exist or ‘plain error’ occurred.” *Id.* The general argument, and case law cited therein, is reasserted herein by reference

Turning to this specific issue, Mr. Davis' Brief certainly gives notice that the Trial Court's extended retroactive application of the modified support amount was plain error, on its face. The error exists. The Trial Court made the modified child support order retroactive to a date nineteen (19) months prior to the date Ms Davis requested the change in child support. No one can argue that this did not happen, and Ms Davis does not deny this point.

Pursuant to statute, “[a] child or spousal support payment under a support order maybe modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner, or on the obligor, if the obligee is the petitioner.” Section 78B-12-112(4), Utah Code Annot. (1953, as amended).

“Initially, this court examines a statute's ‘plain language and resort[s] to other methods of statutory interpretation only if the language is ambiguous.’ *State v. Masciantonio*, 850 P.2d 492, 493 (Utah App. 1993); see also *State v. Larsen*, 865 P.2d 1355, 1357 (Utah 1993). We attempt to construe a statute using its ‘plain language’ because it is the ‘best indication of legislative intent.’ *Luckau v. Board of Review*, 840 P.2d 811, 815 (Utah App. 1992) (quoting *Berube v. Fashion Centre*, 771 P.2d 1033, 1038 (Utah 1989)).” *State v. Child Support Enforcement*, 888 P.2d 690, 692 (Utah App. 1994). This rule of construction is conceded by Ms Davis. See, Ms Davis’ Brief, pp. 27 - 28.

With those rules of construction in place, when one turns to the controlling statute, §78B-12-112(4), Utah Code Annot. (1953, as amended), one sees that its language is clear; its prohibition against retroactively modifying a support payment, before service of the pleading requesting the change, is unambiguous. That, “plain language”, gives this court the, “best indication of legislative intent.” *Id.* The Trial Court cannot make child support retroactive past the date of service of the pleading requesting the change upon the other party.

The Trial Court’s power in awarding a modified child support obligation retroactively is authorized, and limited by that statute, §78B-12-112(4), Utah Code Annot. (1953, as amended). When the Trial Court went beyond the limits of §78B-12-112(4), Utah Code Annot. (1953, as amended), in awarding retroactive child support to be effective, on a date almost nineteen (19) months before Ms Davis requested the change, the Trial Court committed error. Plain error.

The error should have been obvious to the Trial Court. Section 78B-12-112(4), Utah Code Annot. (1953, as amended), is, nor was, newly established, it has been in place since 1987 (having previously been designated at §30-3-10.6, and §78-45-9.3, Utah Code Annot. (1953, as amended)). The legislative language is clear; the statute’s meaning is unambiguous. The legislature’s words are used

precisely; the plain language of the statute is that, there cannot be any order for support made to begin before the date the request for the change is served. That is the date of service, easily determined from the Trial Court's docket, and the file.

Not only was the Trial Court's order in violation of statute, it was also harmful to Mr. Davis. Because of that erroneous order, Mr. Davis was required to pay Ms Davis nineteen (19) months of child support, at the higher rate of \$1,287.00, per month. Mr. Davis was financially damaged by that erroneous order.

Point Five: Requirement for Reimbursement of School Expenses:

Mr. Davis is challenging the Trial Court's interpretation, and application of §78B-12-210, Utah Code Annot, (1953, as amended), in this matter. See, Mr. Davis Brief, pp. 26 - 28. Mr. Davis is not arguing that the Trial Court made inadequate findings, as Ms Davis alleges. See, Ms Davis' Brief, pp. 34 - 36. Mr. Davis is arguing that the Trial Court erred, as a matter of law, in requiring him to reimburse Ms Davis for one-half (½) of the children's school, or extracurricular, expenses.

This Court, "review[s] a trial court's statutory interpretation for correctness, according it no particular deference. *State v. Vigil*, 842 P.2d 843, 844 (Utah 1992); *State v. Singh*, 819 P.2d 356, 359 (Utah App. 1991), cert. denied, 832 P.2d 476 (Utah 1992)." *State v. Masciantonio*, 850 P.2d 492, 493 (Utah App. 1993). See also, *State Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, ¶ 44, 89 P.3d 97; *Brewster v. Brewster*, 2010 UT App 260, ¶ 19; *Trubetzkoy v. Trubetzkoy*, 205 P.3d 891, 894, 2009 UT App 77 ¶ 6; and, *Wells v. Wells*, 871 P.2d 1036, 1038 (UT App. 1994).

Ms Davis cites this Court to three (3) cases, as support for her position that the Trial Court did not err in ordering Mr. Davis to pay one-half (½) the children's school fees, clothing, and extracurricular costs, in addition to child support. See,

Ms Davis' Brief, p. 35. Those cases are: *Anderson v. Thompson*, 176 P.3d 464, 2008 UT App 3; *Arnold v. Arnold*, 177 P.3d 89, 2008 UT App 17; and, an unreported case, *Gillette v. Costa*.

The *Arnold* case is very pertinent, as in it, this Court clearly sets forth the general rule regarding school, and such related, expenses. In fact, *Arnold* affirms *Brooks v. Brooks* 881 P.2d 955 (UT App. 1994), the case cited by Mr. Davis in support of his proposition. As such, *Arnold* supports Mr. Davis' position that, but for the fact that Mr. Arnold had previously agreed to pay one-half (½) the costs of the child's private school, school expenses are part and parcel of the child support order. *Arnold*, 177 P.3d at 91. 2008 UT App. 17 ¶10.

In *Arnold*, the parties were attempting to modify a prior order, which resulted from the parties' stipulation and agreement, wherein Mr. Arnold agreed to pay one-half (½) the costs of sending a child to private school. *Arnold*, 177 P.3d at 90,, 2008 UT App. 17 ¶ 3. *Arnold* states the general rule that,

“it is not appropriate for a district court to award private school expenses in addition to child support. *See Brooks v. Brooks*, 881 P.2d 955, 959 n.3 (Utah Ct. App. 1994) (treating private school expenses as ‘part and parcel of the child support award’); *see also Starley v. McDowell*, 1999 UT App 46U, para. 10. (mem.) (affirming child support order that did not require noncustodial parent to pay half of private school tuition).”

*Arnold*, 177 P.3d at 91. 2008 UT App. 17 ¶10.

That is the general rule in Utah. *Id.* It is just that Mr. Arnold had agreed otherwise, and this Court held him to that agreement to pay one-half (½) of the private school expenses. *Id.* In the instant case, Mr. Davis has not made any such agreement; in fact, he argued the contrary. Transcript, p. 32, lines 14 - 25.

*Anderson v. Thompson*, 176 P.3d 464, 2008 UT App 3, involves a case where the wife (Ms Anderson) obtained an order against the husband (Mr. Thomp-

son) finding him in contempt of court, granted the wife judgment for the children's non-school expenses, and awarded the wife attorney fees. *Anderson*, 176 P.3d at 467, 2008 UT App 3 ¶ 1. In *Anderson*, the provisions concerning the additional payments of support for the children, beyond the child support obligation, including non-school extracurricular fees, appear to have been originally obtained through agreement of the parties. *Anderson*, 176 P.3d at 467, 2008 UT App 3 ¶ 3. The court simply enforced the agreement of the parties; the court did not impose the payment of the children's non-school expenses, in addition to the statutory child support previously ordered. *Anderson*, 176 P.3d at 470, 2008 UT App 3 ¶ 20.

*Arnold*, and *Anderson* are distinguishable from the instant case. There is no agreement to pay beyond the child support obligation; and, there is no agreement to pay for the children's non-school expenses. Instead, the Trial Court, in violation of statute, and contrary to *Brooks*, and *Anderson*, ordered Mr. Davis to reimburse Ms Davis one-half (½) of the school expenses. 2010 Order, ¶ 8. Record at 723.

*Gillette v. Costa*, 2007 UT App 104, 2007 WL 858711 (not reported), the third case cited by Ms Davis as support for her assertion that this Court upheld a lower court's order that the father pay for extracurricular activities, and schooling, is likewise distinguishable. In *Gillette*, this Court did not reach the merits of the appeal. See, *Gillette*, ¶ 3 (as this is an unreported case, a courtesy copy is attached hereto, in the Addendum, p. 39). Instead, this Court dismissed the appeal, pursuant to Rule 24, Utah Rules of Appellate Procedure, due to *Gillette*'s inadequate briefing. See, *Gillette*, ¶¶ 5, and 6. Having dismissed *Gillette*, due to inadequate briefing, it did not address this issue. It does not support Ms Davis' position.

Ms Davis correctly asserts that the child support guidelines are guidelines. Ms Davis' Brief, p. 36, n. 6. However, she fails to show that the guidelines were rebutted, or that the Trial Court complied with §78B-12-210 (3), Utah Code Annot. (1953, as amended), which states that,



“[a] written finding or specific finding on the record supporting the conclusion that complying with a provision of the guidelines or ordering an award amount resulting from use of the guidelines would be unjust, inappropriate, or not in the best interest of a child in a particular case is sufficient to rebut the presumption in that case.”

The Trial Court did not make any such findings. It never rebutted the presumption that the guidelines apply. As set forth in §78B-12-210 (2), Utah Code Annot. (1953, as amended),

“(a) The guidelines shall be applied as a rebuttable presumption in establishing or modifying the amount of temporary or permanent child support. (b) The rebuttable presumption means the provisions and considerations required by the guidelines, the award amounts resulting from the application of the guidelines, and the use of worksheets consistent with these guidelines are presumed to be correct, unless rebutted under the provisions of this section.”

Ms Davis fails to show that the Trial Court rebutted the presumptive use of the statutory guidelines. The 2010 Findings, and the transcript itself, fail to even mention those guidelines.

As to material changes in circumstances, Ms Davis argues only that Mr. Davis’ alleged, “failure to pay certain debts [which] had adversely affected Lisa [Ms Davis]...” Ms Davis’ Brief, p. 35, ¶ 2. Those debts were the debts discharged in 2003, and, as such, Ms Davis should have raised those claims in the 2005 Trial.

As she did not raise those claims in the 2005 Trial, all of Ms Davis’ arguments fail. The Trial Court erred in ordering Mr. Davis to pay one-half (½) of school, or extracurricular activities, be they for Ms Davis, or the children, as the Trial Court was not specific in its 2010 Order.

Point Six: Requirement for Reimbursement of any Child Related Expenses Without Proof of Payment:

Mr. Davis challenged the Trial Court's interpretation, and application of §78B-12-212, Utah Code Annot, (1953, as amended). Mr. Davis' Brief, pp. 28 -30.

This Court, "review[s] a trial court's statutory interpretation for correctness, according it no particular deference. *State v. Vigil*, 842 P.2d 843, 844 (Utah 1992); *State v. Singh*, 819 P.2d 356, 359 (Utah App. 1991), cert. denied, 832 P.2d 476 (Utah 1992)." *State v. Masciantonio*, 850 P.2d 492, 493 (Utah App. 1993). *See also, State Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, ¶ 44, 89 P.3d 97. *See also, Brewster v. Brewster*, 2010 UT App 260, ¶ 19, *Trubetzkoy v. Trubetzkoy*, 205 P.3d 891, 894 (Utah App. 2009) 2009 UT App 77 ¶ 6, and *Wells v. Wells*, 871 P.2d 1036, 1038 (Utah Ct. App. 1994).

From the time of the initial Decree of Divorce, in 2002, up to the 2010 Findings, and 2010 Order, Ms Davis was required to provide Mr. Davis written verification of the cost and payment of medical expenses, in order to be reimbursed by Mr. Davis for one-half (½) of such expenses, as required by §78B-12-212, Utah Code Annot, (1953, as amended). Section 78B-12-212, Utah Code Annot, (1953, as amended) states, in pertinent parts, that,

"[t]he order shall include a cash medical support provision that requires each parent to equally share all reasonable and necessary uninsured and unreimbursed medical and dental expenses incurred for the dependent children, including but not limited to deductibles and copayments",

"[a] parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment", and,

"[i]n addition to any other sanctions provided by the court, a parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if that parent fails to comply with Subsections (7) and (8)."

§§78B-12-212 (6), 78B-12-212 (8), and 78B-12-212 (9), Utah Code Annot, (1953, as amended), respectively.

That statute has been in effect, without any significant change to the pertinent portion, since its enactment in July, 1994. It was, at that time, §78-45-7.15, Utah Code Annot. (1953, as amended). It did, and still does, state, “[a] parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment.” §78B-12-212(8), Utah Code Annot., (1953, as amended). Emphasis added. Yet, for unknown, and unstated, reasons the Trial Court decided that it had the power to exceed statute, and removed the mandatory verification of payment from Ms Davis’ responsibilities in this matter in its 2010 Order.

“The term ‘shall’ is generally ‘presumed mandatory’ and has ‘a usually accepted mandatory connotation’ that requires strict compliance with the other statutory terms. *See Board of Educ.*, 659 P.2d at 1035; *see also Barnard v. Mansell*, 2009 UT App 298, ¶ 7, 221 P.3d 874 (stating that ‘shall’ is a ‘mandatory word’).” *Brewster v. Brewster*, 2010 UT App 260, ¶ 19.

“In undertaking statutory construction, ‘we look first to the plain language of a statute to determine its meaning. Only when there is ambiguity do we look further.’ *MacFarlane v. Utah State Tax Comm’n*, 2006 UT 25, ¶ 12, 134 P.3d 1116 (alteration in original) (quoting *J. Pochynok Co. v. Smedsrud*, 2005 UT 39, ¶ 15, 116 P.3d 353). We ‘assume[] that the terms of a statute are used advisedly and should be given an interpretation and application which is in accord with their usually accepted meanings.’ *Board of Educ. of Granite Sch. Dist. v. Salt Lake Cnty.*, 659 P.2d 1030, 1035 (Utah 1983).”

*Brewster*, 2010 UT App. 260 ¶16.

“When interpreting statutory language, we first examine the statute's plain language and resort to other methods of statutory interpretation only if the language is ambiguous. *State v. Vigil*, 842 P.2d 843, 845 (Utah 1992); *State v. Singh*, 819 P.2d 356, 359 (Utah App. 1991), cert. denied, 832 P.2d 476

(Utah 1992). In addition, we construe the statute to give effect to legislative intent in so far as possible, and in doing so, assume ‘the Legislature used each term advisedly, and we give effect to each term according to its ordinary Page 494 and accepted meaning.’ *Versluis v. Guaranty Nat’l. Cos.*, 842 P.2d 865, 867 (Utah 1992).”

*State v. Masciantonio*, 850 P.2d 492, at 493 - 494. *See also State Farm Mut. Auto. Ins. Co. v. DeHerrera*, 2006 UT App 388, 145 P.3d 1172 (Utah App. 2006).

So, what we have here is precedent that this Court uses common language, whenever such language is unambiguous; that the word, “shall”, is a mandatory statement, and carries a mandatory connotation; and, that a statute should be read in its whole, for a congruent understanding. Doing so with §78B-12-212, Utah Code Annot. (1953, as amended), on the issue of reimbursing one party for uncovered medical expenses, yields the facts that: 1. Parents share equally all such uncovered costs; 2. The person incurring a medical expense shall (which is a mandatory statement, i.e. that person must) provide written confirmation of the cost, and payment of that expense to the other parent; and, 3. Should the parent incurring the expense fail to do so, that parent may be denied reimbursement of one-half (½) of the medical expense.

The statutory language is clear, and unambiguous. The provision of written confirmation of the cost, and payment, of a medical expense is required. There is no permissive aspect to that statutory requirement. And, for the Trial Court to abrogate that statutory requirement is error, plain and simple. (Mr. Davis has discussed the “plain error”, issue elsewhere herein. *See* pp. 5, 13 - 14, above).

Ms Davis’ sole argument on point, was that the trial court has discretion to establish payment methods under §78B-12-212, Utah Code Annot. (1953, as amended). Yet, they cite only the, “may”, language of §78B-12-212 (9), Utah Code Annot. (1953, as amended). That section deals only with a potential penalty

for a party's failure to comply with statute. Ms Davis ignores §78B-12-212 (8), Utah Code Annot. (1953, as amended), which uses the mandatory, "shall", in relation to providing verification of cost and payment. That enforcement section, §78B-12-212 (9), Utah Code Annot. (1953, as amended), is not what Mr. Davis raises.

Ms Davis' point that a parent's responsibility for payment of such an expense is created when the expense is incurred, seems correct. But that liability is to the provider. §78B-12-212(6), Utah Code Annot. (1953, as amended). Ms Davis seeks reimbursement for her alleged payment to the provider. Per §78B-12-212(8), Utah Code Annot. (1953, as amended), a right to reimbursement arises only after Ms Davis provides the proof of incurring, and paying, the bill to Mr. Davis.

The language of §78B-12-212(8), Utah Code Annot. (1953, as amended) is clear. It mandates that a, "parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment".

"The term 'shall' is generally 'presumed mandatory' and has 'a usually accepted mandatory connotation' that requires strict compliance with the other statutory terms. *See Board of Educ.*, 659 P.2d at 1035; *see also Barnard v. Mansell*, 2009 UT App 298, ¶ 7, 221 P.3d 874 (stating that 'shall' is a 'mandatory word')."  
*Brewster*, ¶ 19.

The 2010 Order is clearly contrary to statute. No basis was given, by the Trial Court, for that variation from statute. And, the statute contains the, "presumed mandatory", requirement that Ms Davis shall provide verification of not only the cost, but also the payment, of medical expenses to Mr. Davis in order to qualify for reimbursement from him.

Point Seven: In denying Ms Davis' request for attorney fees, the Trial Court did not abuse its discretion:

A. Standard when the court does not award fees:

Ms Davis correctly states that an award of attorney fees is discretionary. This Court has often stated that, “[w]here a 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.’ ” *Crockett v. Crockett*, 836 P.2d 818, 819--20 (Utah Ct. App. 1992) (quoting *Hansen v. Hansen*, 736 P.2d 1055, 1056 (Utah Ct. App. 1987)).” *Wilde v. Wilde*, 35 P.3d 341, 348 2001 UT App 318, ¶38.

“To recover attorney fees and costs in modification proceedings ‘the requesting party must demonstrate his or her need for attorney fees, the ability of the other spouse to pay, and the reasonableness of the fees.’ *Larson*, 888 P.2d at 726. Utah appellate courts have reversed attorney fee awards where the requesting party has failed to show any one of these factors. See, e.g., *Hoagland v. Hoagland*, 852 P.2d 1025, 1028 (Utah Ct. App. 1993) (citing *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1280 (Utah 1987)); *Hagan v. Hagan*, 810 P.2d 478, 484 (Utah Ct. App. 1991).”

*Wilde*, 35 P.3d 349, 2001 UT App 318, ¶39. The *Wilde*, standards are restated in *Marshall v. Marshall*, 915 P.2d 508 (Utah App. 1996), *Kimball v. Kimball*, 217 P.3d 733, 2009 UT App 233, and *Mark v. Mark*, 223 P.3d 476, 2009 UT App 374.

Those citations provide a simple answer to Ms Davis' question. She cited *Mark* for the proposition that the Trial Court must address the three prongs stated. The actual quotation showing such support is, “[if a trial court uses its broad discretion to award attorney fees, ‘[s]uch an award must be based on sufficient findings addressing the financial need of the recipient spouse; the ability of the other spouse to pay; and the reasonableness of the fees.’ *Rehn v. Rehn*, 1999 UT App 41, ¶ 12, 974 P.2d 306.” *Mark v. Mark*, 223 P.3, 476, 488, 2009 UT App. ¶ 21.

However, the next two (2) sentences in *Mark*, which Ms Davis did not cite, provide the resolution to Ms Davis' issue. They are: "In this case, the trial court did not award attorney fees; rather, it ordered that '[e]ach party shall be responsible for their own legal fees and costs associated with this action.' Because it awarded no attorney fees, the trial court was not required to make factual findings supporting the same." *Id.* In the instant case, "[a]ttorneys fees are denied." Record, 723.

With the exception of *Mark*, all cases cited by Ms Davis, in support of her proposition that the Trial Court erred in denying her an award of attorney fees, are distinguishable. Some involve a review of the lower court's award of attorney fees. *See, Connell v. Connell*, 233 P.3d 836, 843, 2010 UT App 139 ¶ 26; and, *Marshall v. Marshall*, 915 P.2d 508, 517 (Utah App. 1996). Others involved cases where, for whatever reasons, the trial court entered detailed findings supporting its decisions to deny requests for attorney fees. *See, Kimball v. Kimball*, 217 P.3d 733, 2009 UT App 233; and *Wilde v. Wilde*, 35 P.3d 341, 348, 2001 UT App 318 ¶ 38. Clearly on the facts of the instant case, the Trial Court was not required to make factual findings concerning its denial, *see Mark*, and it did not make any, as in *Kimball*, or *Wilde*.

"If a trial court uses its broad discretion to award attorney fees, '[s]uch an award must be based on sufficient findings addressing the financial need of the recipient spouse; the ability of the other spouse to pay; and the reasonableness of the fees.' *Rehn v. Rehn*, 1999 UT App 41, ¶ 12, 974 P.2d 306. In this case, the trial court did not award attorney fees; rather, it ordered that '[e]ach party shall be responsible for their own legal fees and costs associated with this action.' Because it awarded no attorney fees, the trial court was not required to make factual findings supporting the same."

*Mark*, 223 P.3, at 488, 2009 UT App. ¶ 21

"Because it awarded no attorney fees, the trial court was not required to make factual findings supporting the same." *Id.* That is exactly what happened in

the case below. The Trial Court stated, “[a]ttorney fees are denied.” Findings, ¶ 10. The 2010 Order, which was drafted by Ms Davis’ counsel, states, “[a]ttorney fees are denied.” 2010 Order, ¶ 11. Because the Trial Court awarded no attorney fees, it was not required to make factual findings supporting that finding. See, *Mark*. Ms Davis’ claim must fail.

B. Even if the Trial Court was required to make findings to support its denial, Ms Davis failed to marshal the evidence:

Ms Davis faces an extremely difficult task, as does any party who challenges a trial court’s finding. Ms Davis spent a great deal of time, in her Brief, addressing the burden one faces when one claims the trial court abused its discretion in making a finding. See Ms Davis’ Brief, pp. 18 - 24, 25 - 27, 30 - 31, and 33 - 38.

“[T]he marshaling concept does not reflect a desire to merely have pertinent excerpts from the record readily available to a reviewing court. The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous. *Id.* (emphasis in original). The marshaling requirement is not satisfied if parties just list all the evidence presented at trial, or simply rehash the arguments on evidence they presented at trial. See *Neely v. Bennett*, 2002 UT App 189, ¶ 12, 51 P.3d 724, *cert. denied*, 59 P.3d 603 (Utah 2002).”

*Kimball v. Kimball*, 217 P.3d 733, 743, 2009 UT App 233 ¶ 21.

Ms Davis never marshaled the evidence as required under *Kimball*; all she did was to, “just list all the evidence presented at trial, or simply rehash the argu-



ments on evidence they presented at trial.” *Id.* Ms Davis never produced any evidence supportive of the findings she resists — that the Trial Court’s denial of attorney fees to both parties was appropriate, based upon the facts before the court. As she failed to appropriately marshal the evidence, this Court should not consider her claim. *See, Covey v. Covey*, 80 P.3d 553, 560, 2003 UT App. 380, ¶ 27. *See also*, Ms Davis’ Brief, p. 20, ¶ 1; 24, ¶ 1; p. 30, ¶2; p. 34, ¶¶ 1 – 2; and, p. 36, ¶ 2, through p. 38.

Furthermore, “[t]o recover attorney fees and costs in modification proceedings ‘the requesting party must demonstrate his or her need for attorney fees, the ability of the other spouse to pay, and the reasonableness of the fees.’ *Larson*, 888 P.2d at 726.” *Wilde*, 35 P.3d at 349, 2001 UT App. ¶ 39. That means that it was Ms Davis’ burden to prove that her testimony met all three prongs. Yet, nowhere does she show that she ever discussed a, “need”, for attorney fees, any discussion about Mr. Davis’ ability to pay those fees, or indeed, the, “reasonableness of the fees”. That is due to the fact that there was no such testimony, the Transcript is devoid of such.

Ms Davis failed to show that the evidence before the Trial Court met any of the three prongs she had to meet in order to recover any attorney fees. Ms Davis’ request must fail.

#### C. Standards to meet to award fees:

In the alternative, should this Court consider a decision contrary to *Mark*, including the potential of a remand for detailed findings, then this Court must consider its standards, and whether Ms Davis made timely objection, so as to put the Trial Court on notice, thereby preserving the issue; appropriately marshaled the evidence, as her claims challenge the Trial Court’s Findings of Fact; and, appropriately addressed all three (3) prongs required for an award of attorney fees before

the Trial Court.

“To recover attorney fees and costs in modification proceedings ‘the requesting party must demonstrate his or her need for attorney fees, the ability of the other spouse to pay, and the reasonableness of the fees.’ *Larson*, 888 P.2d at 726.” *Wilde*, 35 P.3d at 349, 2001 UT App. ¶ 39. As noted immediately above, Ms Davis failed to meet those requirements. Only now, on appeal, does she talk about the, “reasonableness”, of the fees (Ms Davis’ Brief, pp. 42 – 44), or that she does not have the assets or resources to pay fees (Ms Davis’ Brief, p. 46).

As those claims were not laid before the Trial Court, Ms Davis cannot raise them now, for the first time, on appeal. *See, Searle v. Searle*, 38 P.3d 307, 313, 2001 UT App. 46, ¶ 17. Nor should she be allowed to bring in such new evidence to the Trial Court, should this issue be remanded. Ms Davis had her opportunity at trial; this Court should not give her the proverbial, “second bite”. If this issue is remanded, the Trial Court should be instructed to make findings, per the evidence, which was presented at trial, without taking any further testimony.

On a side matter, Ms Davis brings up the differing standards for an award of attorney fees, at P. 41. In her footnote, Ms Davis raised the potential of an award under a “motion to compel” standard. However, the Trial Court addressed that issue, and combined all of the pending motions into the trial, under Rule 15(b), Utah Rules of Civil Procedure. Record at 677, fn 1. *See also*, Transcript, p. 96, line 15, through p. 97, line 5. Ms Davis has made no objection to that ruling.

Point Eight: Ms Davis’ request for attorney fees on appeal:

The cases Ms Davis cited do stand for the proposition that, if fees are awarded below, then this court will likely award on appeal. Yet, the court below ruled that attorney fees are denied.

*Schaumberg v. Schaumberg*, 875 P.2d 598 (UT App. 1994), does support the

concept that this Court can remand for a determination of fees, including fees on appeal. However, that is only if a party prevails on appeal. *Schaumberg*, 875 P.2d at 604. And if so, “A prevailing party's claim for attorney fees on appeal based on an allegation of need must be addressed by the trial court to determine the need of the claiming spouse, the ability of the other spouse to pay, the reasonableness of the fees and the amount, if any, to be paid.” *Id.*

In the instant case, Ms Davis now, for the first time, raises the issue of assets, in determining an award of fees. Ms Davis’ Brief, p. 46, ¶ 1. There was no discussion of assets before the Trial Court. Ms Davis never presented any evidence, or argument, concerning assets to the Trial Court. And, as noted in the preceding section arguing against attorney fees, Ms Davis did not place such evidence before the Trial Court, and this Court should not now allow her to present new evidence on this issue. It was Ms Davis’ burden of proof, upon which she failed. She should not be allowed to now take a, “second bite at the apple”.

### **Conclusion**

Ms Davis’ misrepresentation of Mr. Davis’ arguments is ineffective. Mr. Davis rebuts her misplaced arguments. Her failure to actually address any of the legal issues, solidifies Mr. Davis’ position: The Trial Court erred in reconsidering the situation of the parties, in light of Mr. Davis’ 2003 Bankruptcy, as that 2003 Bankruptcy had already been addressed in the 2005 Order, and in considering changes in circumstances that had occurred prior to that 2005 Trial.

As such, the doctrine of *res judicata*, specifically the doctrine of claim preclusion, applied. The Trial Court should not have heard, or allowed, any of Ms Davis’ claims which touched upon, or concerned Mr. Davis’ 2003 Bankruptcy. Those claims include: The Trial Court’s modifying the award of the use of the minor children as exemptions for tax purposes; modifying Mr. Davis’ ongoing child

support obligation; and, ordering Mr. Davis to pay portions of schooling, and extracurricular activities.

The Trial Court also erred in modifying Mr. Davis' child support, as there had not been the statutorily required change in the child support amount; in making any such change retroactive to the date of the original petition (April 2008), rather than when Ms Davis made the request (November, 2009). The Trial Court's modification was in violation of statute; and, in modifying the prior Orders to state that any reimbursement claims did not require proof of payment being given to Mr. Davis, was again in violation of statute. Furthermore, the Trial Court demonstrated no basis, nor rationale, for varying from those statutes.

All of those errors involved matters of law, statutory interpretation, or some combination of the two. This Court should reverse all those errors.

Ms Davis failed in meeting her burdens to support her claim for attorney fees, both in the Trial Court, and in this Court. All relief requested in Ms Davis's Cross-Appeal should be denied

Respectfully submitted this 20<sup>th</sup> day of December, 2010.

18  
DAVID R. HARTWIG, ESQ.  
Attorney for Appellant

Certificate of Mailing

On this 20<sup>th</sup> day of December, 2010, two true and correct copies of the foregoing Brief were deposited in the United States Mail, postage prepaid, and ad-

dressed to:

Christensen Thornton, PLLC  
136 East South Temple, Suite 1400  
Salt Lake City, Utah 84111

Attn: Steve S. Christensen

Attorneys for Appellee

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## Addendum

Reproduction of determinative constitutional provisions, statutes, or rules.

**Utah Statutes**

**Title 78B. Judicial Code**

**Chapter 12. Utah Child Support Act**

*Current through 2009 Legislative Session*

**§ 78B-12-112. Payment under child support order - Judgment.**

(1) All monthly payments of child support shall be due on the 1st day of each month pursuant to Title 62A, Chapter 11, Part 3, Child Support Services Act, Part 4, Income Withholding in IV-D Cases, and Part 5, Income Withholding in Non-IV-D Cases.

(2) For purposes of child support services and income withholding pursuant to Title 62A, Chapter 11, Part 3 and Part 4, child support is not considered past due until the 1st day of the following month. For purposes other than those specified in Subsection (1) support shall be payable 1/2 by the 5th day of each month and 1/2 by the 20th day of that month, unless the order or decree provides for a different time for payment.

(3) Each payment or installment of child or spousal support under any support order, as defined by Section 78B-12-102, is, on and after the date it is due:

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (4);

(b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (4).

(4) A child or spousal support payment under a support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner, or on the obligor, if the obligee is the petitioner. If the tribunal orders that the support should be modified, the effective date of the modification shall be the month following service on the parent whose support is affected. Once the tribunal determines that a modification is appropriate, the tribunal shall order a judgment to be entered for any difference in the original order and the modified amount for the period from the service of the pleading until the final order of modification is entered.

(5) The judgment provided for in Subsection (3)(a), to be effective and enforceable as a lien against the real property interest of any third party relying on the public record, shall be docketed in the district court in accordance with Sections 78B-5-202 and 62A-11-312.5.

**History.** Renumbered and Amended by Chapter 3, 2008 General Session



78B-12-210. Application of guidelines -- Use of ordered child support.

(1) The guidelines in this chapter apply to any judicial or administrative order establishing or modifying an award of child support entered on or after July 1, 1989.

(2) (a) The guidelines shall be applied as a rebuttable presumption in establishing or modifying the amount of temporary or permanent child support.

(b) The rebuttable presumption means the provisions and considerations required by the guidelines, the award amounts resulting from the application of the guidelines, and the use of worksheets consistent with these guidelines are presumed to be correct, unless rebutted under the provisions of this section.

(3) A written finding or specific finding on the record supporting the conclusion that complying with a provision of the guidelines or ordering an award amount resulting from use of the guidelines would be unjust, inappropriate, or not in the best interest of a child in a particular case is sufficient to rebut the presumption in that case. If an order rebuts the presumption through findings, it is considered a deviated order.

(4) The following shall be considered deviations from the guidelines, if:

(a) the order includes a written finding that it is a deviation from the guidelines;

(b) the guidelines worksheet has:

(i) the box checked for a deviation; and

(ii) an explanation as to the reason; or

(c) the deviation is made because there were more children than provided for in the guidelines table.

(5) If the amount in the order and the amount on the guidelines worksheet differ by \$10 or more:

(a) the order is considered deviated; and

(b) the incomes listed on the worksheet may not be used in adjusting support for emancipation.

(6) (a) Natural or adoptive children of either parent who live in the home of that parent and are not children in common to both parties may at the option of either party be taken into account under the guidelines in setting or modifying a child support award, as provided in Subsection (7). Credit may not be given if:

(i) by giving credit to the obligor, children for whom a prior support order exists would have their child support reduced; or

(ii) by giving credit to the obligee for a present family, the obligation of the obligor would increase.

(b) Additional worksheets shall be prepared that compute the obligations of the respective parents for the additional children. The obligations shall then be subtracted from the appropriate parent's income before determining the award in the instant case.

(7) In a proceeding to adjust or modify an existing award, consideration of natural or adoptive children born after entry of the order and who are not in common to both parties may be applied to mitigate an increase in the award but may not be applied:

(a) for the benefit of the obligee if the credit would increase the support obligation of the obligor from the most recent order; or

(b) for the benefit of the obligor if the amount of support received by the obligee would be

decreased from the most recent order.

(8) (a) If a child support order has not been issued or modified within the previous three

years, a parent, legal guardian, or the office may move the court to adjust the amount of a child support order.

(b) Upon receiving a motion under Subsection (8)(a), the court shall, taking into account the best interests of the child:

(i) determine whether there is a difference between the payor's ordered support amount and the payor's support amount that would be required under the guidelines; and

(ii) if there is a difference as described in Subsection (8)(b)(i), adjust the payor's ordered support amount to the payor's support amount provided in the guidelines if:

(A) the difference is 10% or more;

(B) the difference is not of a temporary nature; and

(C) the order adjusting the payor's ordered support amount does not deviate from the guidelines.

(c) A showing of a substantial change in circumstances is not necessary for an adjustment under this Subsection (8).

(9) (a) A parent, legal guardian, or the office may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances. A change in the base combined child support obligation table set forth in Section 78B-12-301 is not a substantial change in circumstances for the purposes of this Subsection (9).

(b) For purposes of this Subsection (9), a substantial change in circumstances may include:

(i) material changes in custody;

(ii) material changes in the relative wealth or assets of the parties;

(iii) material changes of 30% or more in the income of a parent;

(iv) material changes in the employment potential and ability of a parent to earn;

(v) material changes in the medical needs of the child; or

(vi) material changes in the legal responsibilities of either parent for the support of others.

(c) Upon receiving a petition under Subsection (9)(a), the court shall, taking into account the best interests of the child:

(i) determine whether a substantial change has occurred;

(ii) if a substantial change has occurred, determine whether the change results in a difference of 15% or more between the payor's ordered support amount and the payor's support amount that would be required under the guidelines; and

(iii) adjust the payor's ordered support amount to that which is provided for in the guidelines if:

(A) there is a difference of 15% or more; and

(B) the difference is not of a temporary nature.

(10) Notice of the opportunity to adjust a support order under Subsections (8) and (9) shall be included in each child support order.

**Title 78B - Judicial Code**  
**Chapter 12 - Utah Child Support Act**

**78B-12-212. Medical expenses.**

(1) The court shall order that insurance for the medical expenses of the minor children be provided by a parent if it is available at a reasonable cost.

(2) In determining which parent shall be ordered to maintain insurance for medical expenses, the court or administrative agency may consider the:

- (a) reasonableness of the cost;
- (b) availability of a group insurance policy;
- (c) coverage of the policy; and
- (d) preference of the custodial parent.

(3) The order shall require each parent to share equally the out-of-pocket costs of the premium actually paid by a parent for the children's portion of insurance.

(4) The parent who provides the insurance coverage may receive credit against the base child support award or recover the other parent's share of the children's portion of the premium. In cases in which the parent does not have insurance but another member of the parent's household provides insurance coverage for the children, the parent may receive credit against the base child support award or recover the other parent's share of the children's portion of the premium.

(5) The children's portion of the premium is a per capita share of the premium actually paid. The premium expense for the children shall be calculated by dividing the premium amount by the number of persons covered under the policy and multiplying the result by the number of children in the instant case.

(6) The order shall require each parent to share equally all reasonable and necessary uninsured medical expenses incurred for the dependent children, including but not limited to deductibles and copayments.

(7) The parent ordered to maintain insurance shall provide verification of coverage to the other parent, or to the Office of Recovery Services under Title IV of the Social Security Act, 42 U.S.C. Section 601 et seq., upon initial enrollment of the dependent children, and thereafter on or before January 2 of each calendar year. The parent shall notify the other parent, or the Office of Recovery Services under Title IV of the Social Security Act, 42 U.S.C. Section 601 et seq., of any change of insurance carrier, premium, or benefits within 30 calendar days of the date the parent first knew or should have known of the change.

(8) A parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment.

(9) In addition to any other sanctions provided by the court, a parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if that parent fails to comply with Subsections (7) and (8).

Renumbered and Amended by Chapter 3, 2008 General Session

Courtesy Reproduction of Unreported Cases

IN THE UTAH COURT OF APPEALS

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Rebecca Gillette,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner and Appellee,	)	
	)	Case No. 20060808-CA
v.	)	
	)	F I L E D
Steven Michael Costa,	)	(March 22, 2007)
	)	
Respondent and Appellant.	)	2007 UT App 104

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Fourth District, Provo Department, 054401077  
The Honorable James R. Taylor

Attorneys: Steven Michael Costa, Aliso Viejo, California,  
Appellant Pro Se  
Steven C. Tycksen and Chad C. Shattuck, Salt Lake  
City, for Appellee

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Before Judges Greenwood, Davis, and McHugh.

PER CURIAM:

Steven Michael Costa appeals from various decisions issued by the district court. We affirm.

Costa first argues that the district court erred when it failed to modify an order regarding child support. Second, Costa argues that the district court erred when it ordered him to pay for extracurricular activities and schooling. Third, Costa asserts that he is entitled to a credit of \$400.00 for alimony paid to Rebecca Gillette. Last, Costa requests that this court reverse an award of attorney fees.

Costa's arguments are inadequately briefed. Rule 24(a)(9) of the Utah Rules of Appellate Procedure mandates that an "argument shall contain the contentions and reasons of the

appellant with respect to the issues presented . . . with citations to the authorities [and] statutes." Utah R. App. P. 24(a)(9). Costa has failed to meet this duty and has not provided "adequate legal analysis and legal authority in support of [his] claims." *Flower Homeowners Ass'n v. Snow Flower, Ltd.*, 2001 UT App 207, ¶14, 31 P.3d 576 (quotations and citation omitted). Consequently, Costa's "assertions do not permit appellate review." *Id.* "While failure to cite to pertinent authority may not always render an issue inadequately briefed, it does so when the overall analysis of the issue is so lacking as to shift the burden of research to the reviewing court." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998). Therefore, we decline to address Costa's arguments on appeal.

Moreover, we note that Costa has failed to marshal any evidence in support of the trial court's findings. "In order to challenge a court's factual findings, an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." *Chen v. Stewart*, 2004 UT 82, ¶76, 100 P.3d 1177 (quotations and citation omitted); see also Utah R. App. P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."). Instead, Costa "simply reasserts the evidence [he] presented to the district court and asks this court to reconsider the validity of that evidence. In fact, [Costa's] arguments are 'nothing but an attempt to have this [c]ourt substitute its judgment for that of the [district] court on a contested factual issue. This we cannot do.'" *Sweet v. Sweet*, 2006 UT App 216, ¶7, 138 P.3d 63 (mem.) (quoting *Covey v. Covey*, 2003 UT App 380, ¶28, 80 P.3d 553).

When a party fails to meet the marshaling requirement, this court may affirm the trial court's ruling "on that basis alone." *Chen*, 2004 UT 82 at ¶80. Costa barely references the district court's factual findings, let alone marshals the evidence in support of such findings. Costa's failure to marshal any facts in this case provides this court with an additional basis to decline to address Costa's arguments.

Accordingly, we affirm the district court's order and award Gillette costs pursuant to rule 34 of the Utah Rules of Appellate Procedure. See Utah R. App. P. 34(a).

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Pamela T. Greenwood,  
Associate Presiding Judge

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James Z. Davis, Judge

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Carolyn B. McHugh, Judge

We deny Gillette's request for attorney fees pursuant to Utah Code section 30-3-10.4(4). See Utah Code Ann. § 30-3-10.4(4) (Supp. 2006) ("If the court finds that an action under this section is filed or answered frivolously and in a manner designed to harass the other party, the court shall assess attorney's fees as costs against the offending party."). Gillette argues that this court should award attorney fees because the appeal was filed in bad faith. This is not a case egregiously lacking in a reasonable factual or legal basis. See *Cooke v. Cooke*, 2001 UT App 110, ¶14, 22 P.3d 1249 ("The sanction for filing a frivolous appeal applies only in 'egregious cases' with no 'reasonable legal or factual basis.'" (citation omitted)); see also Utah R. App. P. 33(a).