

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/ Cross-  
Appellant,

vs.

COREY G. DAVIS,

Respondent/ Appellant/ Cross-  
Appellee.

**APPEAL**

Appellate Case No. 20100238

District Court No. 024400391

Reply Brief of Cross-Appellant

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

Oral Argument Requested

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Reply Brief of Cross-Appellant

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## Argument

### ***I. The trial court's finding was clearly erroneous.***

The trial court made only one finding regarding Lisa's request for attorney fees. Lisa argues in her brief that this singular finding was against the clear weight of the evidence. The trial court's only finding was as follows: "[t]he evidence at trial was insufficient for this court to determine attorney fees in this matter, specifically whether the attorney fees are related to the issues which have been adjudicated here. Accordingly, the court does not find that attorney fees should be awarded in this case." (Record at 670).

#### *A. Marshaling*

Corey first claims in his response brief that Lisa failed to marshal the evidence in challenging this finding. He claims that because she did not "produce any evidence in support of the finding she resists," that this court should not consider her claim. However, the reason Lisa did not produce any evidence in support of the finding she resists is that there was no evidence in the record supporting the trial court's finding. Lisa marshaled and presented to this court every scrap of evidence in the record relating to attorney fees. (*See* Brief of Appellee/Cross-Appellant, pp. 10-16, pp 42-44). She did not omit any evidence that was negative or harmful to her position. There simply was no evidence she omitted. She fully complied with the requirement that she "present . . . every

scrap of competent evidence introduced at trial which supports the very findings [she] resists.” *Boyer v. Boyer*, 2008 UT App 138 ¶ 21, 183 P.3d 1068 (quoting *Chen v. Stewart*, 2004 UT 82, ¶ 77, 100 P.3d 1177).

Neither the court nor Corey ever questioned whether the invoices related to the matter at hand. In fact Corey stated during the hearing, “They are her attorney fees, your honor. It’s okay.” (Trial Transcript at 75:4-5). Corey was unable in his response brief to provide any evidence that Lisa omitted. He merely stated that she did not produce any evidence in support of the finding. By his omission, he affirms that there was no evidence in support of the finding for her to present.

In summary, in her brief on pages 42-44, Lisa presented three invoices from her attorney for work completed in conjunction with her modification petition. The invoices total \$1,377.50. The invoices covered work for the matters covered at the hearing and were for work during the relevant time period before the hearing. The pleadings in the record also verify that this attorney did the work outlined on the invoices and that the work was for the modification proceedings at issue before the court.

In fact, Lisa testified that she was not able to find all the invoices and because her attorney had been hospitalized, she could not get all the invoices from him. In actuality, her attorney fees were higher for the services rendered, which makes sense given the amount of work performed and the low amount of the invoices, representing only a few hours work, presented to the court.

Thus, the trial court's finding is against the clear weight of evidence.

*Covey v. Covey*, 2003 UT App 380, ¶ 27, 80 P.3d 553.

B. Trial court was required to make findings.

Corey next claims that the trial court was not required to make any findings because the trial court denied the request for attorney fees. However, the Court of Appeals has determined in several cases that if a trial court denies attorney fees, that denial must be based upon the evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees. *Kimball v. Kimball*, 2009 UT App 233, ¶ 45, 217 P.3d 733 (findings of three factors must be made in denial of attorney fees); *Stonehocker v. Stonehocker*, 2009 UT App 11, ¶ 10, 176 P.3d 476 (“trial court’s . . . denial of attorney fees ‘must be based on evidence of financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees’”); *Oliekan v. Oliekan*, 2006 UT App 405, ¶ 30, 147 P.3d 464 (the denial of attorney fees must be based on evidence of the three factors); *Wilde v. Wilde*, 969 P.2d 438 (Utah App. 1998) (the denial of attorney fees must be based upon evidence of financial need, ability to pay, and reasonableness of fees).

Corey claims that in all the cases cited by Lisa, the trial court made detailed findings supporting the decision to deny attorney fees “for whatever reasons,” because the court was not required to do so. However, the many cases cited in both briefs by Lisa suggest otherwise. While the case cited by Corey, *Mark v.*

*Mark*, 2009 UT App 374, ¶ 21, 223 P.3d 476 states that the “trial court was not required to make factual findings,” this one sentence was not meant to overturn years of precedent where the courts have stated the need for denial of attorney fees to be based on specific findings. Indeed no courts since the *Mark* case have relied upon this decision to relieve trial courts of the burden of making the requisite findings.

Indeed, the failure to make the three findings requires remand for more detailed findings by the trial court. *Davis v. Davis*, 2003 UT App 282, 76 P.3d 716. Without adequate findings of fact on the attorney fee issue, there can be no meaningful appellate review. *Shinkoskey v. Shinkoskey*, 2001 UT App 44, ¶ 18, 19 P.3d 1005 (quoting *Willey v. Willey*, 951 P.2d 226, 230 (Utah 1997)). “Unless the record ‘clearly and uncontrovertedly supports’ the trial court’s decision, the absence of adequate findings of fact ordinarily requires remand for a more detailed findings by the trial court.” *Id.*

### *C. Elements to be Considered for an Attorney Fee Award*

Corey also claims that Lisa should have presented evidence regarding her need for attorney fees, the ability of the other spouse to pay, and the reasonableness of the fees. Lisa presented an invoice for attorney fees of \$1,377.50. In evidence was the fact that she runs short \$1,467.99 every month. The court found that Corey had a surplus of \$4,024.00 per month, giving him the ability to pay attorney fees. Further, the court had evidence that Lisa was only

able to access some of the invoices for the large amount of work done by her attorney. The court knew that she had presented only a few hours worth of work. Thus, the court had evidence as to the reasonableness of the fees she was presenting. Evidence was presented in court that met all three prongs necessary for the court to make the proper findings that Lisa was entitled to recover attorney fees.

## **II. *Lisa is entitled to attorney fees on appeal.***

Corey correctly claims in his response brief that this court may only award attorney fees on appeal if the party prevails on appeal. *Leppert v. Leppert*, 2009 UT App 10, ¶ 29, 200 P.3d 223. As was made clear in the *Kimball* case, if the trial court did not award attorney fees in a domestic action and if such fees may have been warranted, this court may remand for further consideration on the issue and may also award attorney fees on appeal if the party substantially prevails on appeal. *Kimball v. Kimball*, 2009 UT App 233, ¶ 52, 217 P.3d 733.

Corey claims that Lisa raises the issue of the parties' financial situations for the first time on appeal, thus precluding this court from awarding attorney fees on appeal. However, as discussed above, the trial court had ample evidence in the record regarding the financial condition of the parties. In evidence was the fact that Lisa runs short \$1,467.99 every month. The court found that Corey had a surplus of \$4,024.00 per month. If the trial court had properly determined that the invoices related to the current proceedings before the trial court, the court had

sufficient evidence regarding the financial need of the receiving spouse, ability of other spouse to pay, and the reasonableness of the fee. *Stonehocker v.*

*Stonehocker*, 2008 UT App 11, ¶ 10, 176 P.3d 476.

The record also shows that Lisa incurred attorney fees related to the proceedings before the trial court, that the fees presented to the court were reasonable and in fact represented only a portion of the work actually performed by the attorney.

If Lisa substantially prevails on the issues raised by Corey in his appeal, this court should exercise its discretion and award attorney fees to Lisa on appeal. The court should then remand the case back to the trial court to determine the reasonable amount of attorney fees incurred in this appeal.

#### Conclusion

Lisa properly marshaled every scrap of evidence and showed that the finding as to sufficiency of the attorney fee invoices was against the clear weight of the evidence. The trial court should have considered the three statutory factors and then made the appropriate findings regarding Lisa's need, Corey's ability to pay, and the reasonableness of the fee. This court should remand the case to the trial court to make this determination.

This court should also award attorney fees on appeal if Lisa substantially prevails on the issues raised by Corey in his brief and remand the case for a

determination of the reasonable amount of attorney fees incurred by Lisa in this appeal.

DATED this 19<sup>th</sup> day of January, 2011.



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**Certificate of Service**

I hereby certify that the foregoing was served via U.S. Mail, postage prepaid, on the 19<sup>th</sup> day of January, 2011 on:

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