2012

Brigette Jeanne Cook v. Lon Arden Cook : Brief of Appellee

Utah Court of Appeals

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Kirk M. Morgan; Mann Hadfield & Thorn; Attorney for Petitioner-Appellee.

IN THE UTAH COURT OF APPEALS

BRIGETTE JEANNE COOK,	)	
Petitioner–Appellee,	)	
v.	)	Appellate Case No. 20120035
LON ARDEN COOK,	)	District Court Case No. 084100428
Respondent–Appellant.	)	

Appeal from the First Judicial District Court
in and for Box Elder County, State of Utah,
The Honorable Ben Hadfield

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2), and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

The following constitutional provisions, statutes, and rules are determinative of the appeal:

UTAH CODE ANN. § 30-3-3 (see addendum)

UTAH CODE ANN. § 30-4-3 (see addendum)

UTAH CODE ANN. § 78B-12-202 (see addendum)

Utah Rule of Civil Procedure 52 (see addendum)

STATEMENT OF ISSUES OF THE CASE

The Respondent submits the following alternative statement of the issues of the case and standards of review:

1. Did the trial court abuse its discretion in awarding Petitioner sole physical custody of the parties' three minor children, and in awarding the Respondent joint legal custody, for the purpose of allowing the Respondent "access to school records and to information regarding the activities that are going on in the lives of the children . . . so that [Respondent] can obtain this information, rather than going through the [Petitioner] for this type of information?"

Alternative Standard of Review: "A trial judge's award of custody and support is . . . reviewed for abuse of discretion." *Sigg v. Sigg*, 905 P.2d 908, 912 (Utah Ct. App. 1995). "Only where trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment." *Jorgensen v. Jorgensen*, 599 P.2d 510, 512 (Utah 1979) (disavowed on other grounds by *Pusey v. Pusey*, 599 P.2d 510 (Utah 1979)).

2. Did the trial court abuse its discretion in awarding parent time to Respondent that was contrary to the recommendations of the child custody evaluator?

Alternative Standard of Review: "The appropriate award [of visitation rights] is within the trial court's discretion and is to be reversed only upon abuse of that discretion." *Kallas v. Kallas*, 614 P.2d 641, 645 (Utah 1980).

3. Did the trial court abuse its discretion in ordering the Respondent to pay child support based on a sole custody child support worksheet, when the Petitioner was awarded full physical custody of the parties' three minor children?

Alternative Standard of Review: "Due to the equitable nature of child support proceedings, [the Court of Appeals] accord[s] substantial deference to the trial court's findings and give it considerable latitude in fashioning support orders. Accordingly, [the Court of Appeals] will not disturb its actions unless there has been an abuse of discretion." *Hill v. Hill*, 841 P.2d 722, 724 (Utah Ct. App. 1992) (citing *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985)).

4. Did the trial court abuse its discretion in awarding the Petitioner the sum of $48,500.00 as her share of the home and real property?

Alternative Standard of Review: "[T]he trial court has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity. Changes will be made only if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." *Naranjo v. Naranjo*, 751 P.2d 1144, 1146 (Utah Ct. App. 1988) (internal citations omitted).

5. Did the trial court abuse its discretion in awarding the Petitioner a *Woodward* share of the Respondent's pension and thrift savings plan, where the dates of calculating such a share are not in strict compliance with the applicable guidelines?

Alternative Standard of Review: "[T]he trial court has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity. Changes will be made only if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." *Id.*

6. Did the trial court abuse its discretion in awarding Petitioner attorney fees in the sum of $3,000.00?

Alternative Standard of Review: "A trial court has the power to award attorney fees in divorce proceedings . . . [and] [t]he decision to make such an award and the amount therefor rest primarily in the sound discretion of the trial court." *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah Ct. App. 1988).

STATEMENT OF THE CASE

A. Nature of the Case

This is a divorce and child custody matter, where the Petitioner-Appellee filed for divorce on November 26, 2008 against Respondent-Appellant. R. 1. Petitioner filed on the grounds of irreconcilable differences, and both parties sought custody of the parties' three minor children. R. 1, 24. A bench trial on the relevant issues of child custody, real property, and attorney fees was held on October 18, 2011. R. 355. Respondent thereafter appealed numerous issues. *See Brief of Appellant.*

B. Course of Proceedings

Petitioner filed for divorce from Respondent on November 26, 2008, following approximately six years of marriage. R. 1. Petitioner also filed a Motion for Temporary Orders and Relief, requesting that the court grant her sole custody of the parties' three minor children; child support for such; and temporary alimony. R. 2. A hearing for the Motion for Temporary Orders and Relief was held on January 23, 2009. R. 105.

At the hearing, the court granted temporary sole custody of the minor children to Petitioner, subject to parent time with the father as specified by the court. R. 106. The court also ordered temporary monthly child support of $1,112.00 to be paid by Respondent. R. 106. The issue of alimony was reserved for a later date, pending Petitioner's counsel filing an Affidavit of Financial Declaration. R. 109.

On February 9, 2009, Respondent filed a motion for the appointment of a child custody evaluator. R43. The parties eventually stipulated to appoint Ms. Ali Thomas as

the custody evaluator in the matter. R. 177. Ms. Thomas conducted a child custody evaluation which was completed November 15, 2010, and filed with the District Court on December 9, 2010. R. 248.

On February 24, 2009, Petitioner filed a motion for temporary alimony. R. 47. Respondent responded on April 24, 2009, and a hearing on the matter was set for July 17, 2009. R. 136. At the hearing, the court held that there was a need for alimony, but also an inability for the Respondent to pay such. R. 159. The court also ordered a custody evaluation, and instructed counsel to select an evaluator who would be most cost-effective for the parties. R. 159. Each party was to pay half the expenses related to the evaluation. R. 159. Further, the court held that discovery was to be completed within 15 days. R. 159.

Respondent requested that a pre-trial settlement conference be scheduled, as the parties attempted mediation on May 15, 2009 but were ultimately unsuccessful. R. 148. A pre-trial conference was scheduled for June 11, 2010. R. 218. At the conference, Petitioner's counsel requested that the case be certified to the District Court. R. 227. The court certified the case on the issues of custody, child support, income, alimony, division of debts, personal property, real property, and retirements and exemptions. R. 227.

On September 25, 2009, a hearing was held regarding an order to show cause originating with the Petitioner. R. 211. During the hearing, the court found Respondent in contempt of court for failing to abide by the temporary order dated August 31, 2009, in

that he failed to follow the parent-time as ordered by the court. R. 212. Respondent was sentenced to two days in jail; however, this jail time was stayed and Respondent was ordered to pay Petitioner $300.00 in attorney fees. R. 212.

In March 2011, Respondent filed a request for Petitioner to participate in a drug test and mental health examination, pursuant to Utah Rule of Civil Procedure 35. R. 284. A hearing on the matter was held June 28, 2011, during which time the court denied the request. R. 319.

The court scheduled a one day bench trial for October 18, 2011. R. 332.

C. Disposition of Case

The trial was held on the scheduled date before the Honorable Judge Ben H. Hadfield. R. 355. Among other exhibits, Ms. Thomas' child custody evaluation was admitted into evidence as Petitioner's Exhibit 3. *Trial Transcript*, 13. At the conclusion of the trial, the court stated on the record its findings of fact and conclusions of law, and instructed Petitioner to prepare written findings and the decree of divorce. R. 268. Petitioner did so, and the findings and decree were entered on December 19, 2011. R. 368.

In the findings, Petitioner was awarded sole physical custody of the parties' three minor children. R. 356. Both parties were awarded joint legal custody, with Respondent's custody being granted for the purpose of allowing his direct access to school records and information regarding the activities that are going on in the lives of the children. R. 356-57.

Child support was awarded to Petitioner in the sum of $1,142.00 per month, based on Petitioner's imputed income of $1,500.00 per month and Respondent's actual income of $4,641.00 per month. R. 357. This calculation was based on the sole custody worksheet submitted by Petitioner, as Respondent did not submit a worksheet. *See* R. 347; 358.

Respondent was awarded $16,000.00 in premarital funds he contributed to the purchase of the marital home. Respondent was also awarded a 1.22 acre tract of land and a tractor, both of which were purchased with his premarital funds. R. 362, 364. Petitioner was awarded $48,500.00 as her portion of the equity in the marital home. R. 362.

Petitioner was also awarded a *Woodward* share of Respondent's federal pension, to be calculated from March 2004 through January 1, 2011. R. 363. Further, Petitioner was awarded one-half of the Thrift Savings Plan, as of its closing balance on October 18, 2011, which was calculated to be valued at approximately $36,000.00 to $37,000.00. R. 363. Finally, Petitioner was awarded $3,000.00 in attorney fees. R. 365.

D. Statement of Facts

Petitioner does not dispute the facts as laid out by Respondent in his appellate brief, except for the final paragraph, which reads

> The Appellant, concerned about the Appellee's alleged illicit drug usage and mental capacity to care for the parties' children filed a request for a psychological test and for a drug test of the Appellee *as they were not performed by the child custody evaluator as part of the child custody evaluation as anticipated.*

Brief of Appellant, 15 (emphasis added).

Ms. Thomas' report was performed on November 15, 2010, R. 248, and was filed with the District Court on December 9, 2010, R. 248. Respondent did not file a Rule 35 Request for Physical Examination (for alleged illicit drug usage and mental capacity) with the District Court until March 30, 2011 – three and a half months after the child custody evaluation report was filed. R. 284.

Further, Respondent's statement that the psychological and drug tests were "anticipated" by the child custody evaluator but not performed during the evaluation is a complete and total farce, wholly and entirely unsupported by the evaluation cited by Respondent on page 15 of his brief. Nowhere in the child custody evaluation – indeed, nowhere in the entirety of the record – does the child custody evaluator "anticipate" or otherwise reference her desire to conduct such an unnecessary screening. She does, however, unequivocally state near the end of her report that "Ms. Cook does not fit the criteria for substance addiction." R. 274.

SUMMARY OF ARGUMENTS

1. Respondent claims that the findings of fact following the bench trial were insufficient to support the court's determination of physical and legal custody of the parties' three minor children. However, the Supreme Court of Utah has indicated that even if findings are "terse," as long as there is competent evidence to support the judgment and the holding is not flagrantly unjust, the trial court does not abuse its discretion.

2. Respondent claims that the trial court should have followed the recommendations of the child custody evaluator. However, the trial court is not obligated to follow such recommendations, as long as an explanation is provided. Further, the trial court's custody determination is in the best interests of the children and therefore valid.

3. Respondent argues that the trial court abused its discretion in ordering child support to be calculated using a sole custody worksheet. However, Respondent failed to submit a statutorily-required alternate worksheet, and since Petitioner was awarded sole custody of the three minor children, his argument is otherwise moot.

4. Respondent argues that the trial court abused its discretion in awarding Petitioner $48,500.00 as her equity in the marital home. However, the trial court properly placed a dollar amount on the assets in dispute, and provided ample written findings to support its determination. Further, Respondent received ALL of the premarital assets which he requested at trial, rendering his argument moot.

5. Respondent claims that the trial court abused its discretion in selecting the time periods applicable to Petitioner's award of a Woodward share of Respondent's pension and half of Respondent's Thrift Savings Plan. However, the court's determination of time periods provides a windfall to Respondent, and Petitioner would thereby stipulate to a "proper" time period if Respondent so agrees.

6. Respondent argues that Petitioner's award of partial attorney fees was an abuse of discretion because there were inadequate findings to support the determination. However, the record clearly indicates that Petitioner had a financial need, Respondent had the ability to pay, and the fees were reasonable.

ARGUMENT

1. The trial court's findings provide sufficiently competent evidence to support its custody determination.

"The importance of complete, accurate, and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law." *Riche v. Riche*, 784 P.2d 465, 469 (Utah Ct. App. 1989) (quoting *Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986)). Further, "the findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Id.* However,

> [i]n appropriate cases – where the findings are terse but still suggest the weight accorded to the testimony of the witnesses by the trial court and outline the basis of the custody award – we can find that there was competent evidence to support the judgment so long as it is not so flagrantly unjust as to constitute an abuse of discretion.

Pennington v. Pennington, 711 P.2d 254, 256 (Utah 1985) (internal quotations and citations omitted).

In *Pennington*, the Supreme Court recognized the "importance of well written findings" – in that case, the modification of the child custody portion of a divorce decree. *Id.* Indeed, the Court admonished the respondent's attorney (who drafted the modification) to "take the necessary effort in the future to prepare more specific and substantive findings." *Id.* However, even with the findings being "lean in their exposition of the trial court's rationale," the Court held that the evidence discussed in the decision, as well as its "review of the record and findings and giving due respect for the advantaged position of the trial judge," was "competent evidence to support the custody

award." *Id.* There, the holding was affirmed, and "although there was evidence favoring an award of custody to [the mother], the award to [the father] was not flagrantly unjust nor an abuse of discretion." *Id.* at 257.

In the present case, Respondent complains that "[t]here are no findings for this court to review the conclusory order of the trial court for its award of essentially sole custody to the Appellee." *Brief of Appellant*, 22. This argument is disingenuous, as Respondent has a copy of the trial transcript and all other documents associated with this litigation, which are the types of "competent evidence" Pennington seems to have envisioned as a validation for the court's rationale. Even if this court was to hold that the findings of fact could be characterized as "lean in their exposition of the trial court's rationale," a review of the record and findings unequivocally substantiate and support the court's rationale.

Further, the only scantily viable contention set forth by the Respondent supporting his position on the custody issues was that Petitioner had a drug problem and a psychological evaluation and drug test should have been conducted to investigate the matter. *Trial Transcript*, 198, 30. However, this contention was dismissed not only substantively by Ms. Thomas, but procedurally by the Court as well. Ms. Thomas stated that psychological testing would have been merely "a back-up," and that "the psychological [testing] would[n't] have presented anything more than . . . some dependent features on Ms. Cook . . . also, maybe some anxiety and depression as well."

Trial Transcript, 31-32. Ms. Thomas also dispelled Respondent's contention when she unequivocally stated that as someone who is "able to diagnose" and "make those determinations," she "[didn't] believe that Ms. Cook would have fallen into [the criteria] for substance addiction." *Trial Transcript*, 32. This opinion was restated by the court when the judge stated that "[Ms. Thomas] looked into [the alleged drug abuse] . . . and she checked it out and, while she said it, possibly, could be an issue, she seemed satisfied that it was not." *Trial Transcript*, 200.

In addition, the Court ruled that these tests and evaluations were properly denied because they were procedurally deficient as "a very tardy request" that should have been made "a year ago." *Trial Transcript*, 31. Despite this, Respondent held that because of the circumstances – specifically, an automobile accident in which Petitioner was involved, and which Respondent implied was related to Petitioner's alleged drug abuse problem – the tardy request was appropriate. *Trial Transcript*, 27. The trial court questioned Respondent's counsel regarding the police response to the accident, and determined that the police didn't request a blood test, and no charges were filed. *Trial Transcript*, 28. In subsequent testimony, Ms. Thomas further clarified by stating that no citations were issued to Petitioner in connection with the accident. *Trial Transcript*, 34.

Finally, the trial court substantiated its rejection of portions of Ms. Thomas' recommendation when it stated that

> The tragedy of this trial is that is has convinced me that the evaluator's recommendation was very well intended, but maybe missed the mark and, that is, she felt that these parties could really work together and I think they have convinced me they can't very well.

Trial Transcript, 263. The judge made this finding after hearing comprehensive testimony from Ms. Thomas, Respondent, and Petitioner. The Respondent *himself* stated, "I feel strongly, at this point, that [Petitioner] and I are not going to be able to get along. We're not going to be able to do the back and forth thing with the kids." *Trial Transcript*, 214. If Respondent himself acknowledged that he was incapable of sharing custody of the children, *Trial Transcript*, 214:15-18, and that he was unable because of his job to simply be physically present to care for his children, *Trial Transcript*, 212:18-25, 213:1-10, how could he now attempt to even suggest that the court abused its discretion in granting custody to Petitioner?

Respondent has failed to present a scintilla of evidence to suggest that the trial court, which made subsidiary findings on the record and explained its rejection of Ms. Thomas' recommendation, abused the broad discretion granted to it.

Additionally, in Utah, "statutes and case law are consistent and clear with respect to the *considerable* discretion allowed the trial court in child custody matters. *Rice v. Rice*, 564 P.2d 305, 306 (Utah 1977) (emphasis added). Thus, in custody disputes, "the trial court is best suited to assess the factors upon which it based its determination, given its proximity to the parties and circumstances, and its opportunity to personally observe and evaluate the witnesses." *Riche*, P.2d at 467. This is, in part, why appellate courts "defer to the trial court to judge the credibility of witnesses." *See Riche*, 784 P.2d at 467 (citing Utah R. Civ. P. 52(a)). As such, "[o]nly where trial court action is so flagrantly

unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment." *Jorgensen*, 599 P.2d at 512 (emphasis added).

Respondent has set forth no basis to support his abuse of discretion argument. After hearing testimony from Ms. Thomas, Respondent, and Petitioner, the judge – in proximity to the parties and circumstances, and with the opportunity to personally observe and evaluate the witnesses – came to the proper, equitable conclusion that was in the best interests of the parties' children. Again, if Respondent himself acknowledged that he was incapable of sharing custody of the children and unable to simply be physically present to care for his children, how could he now attempt to even suggest that the court abused its discretion in granting custody to Petitioner?

Respondent has failed to present any viable arguments to indicate that the trial court's actions were flagrantly unjust and that its ruling was an abuse of discretion. As such, the trial court's ruling should be sustained.

2. The trial court had the discretion to deviate from the child custody evaluator's recommendations, and did so properly by providing an explanation for its decision. Further, the trial court properly took into account the best interests of the child, as is reflected by the evidence in the record.

The trial court is not required to follow the recommendations of an evaluator; since "child custody turns on numerous factors . . . that choice [is] within its discretion." *Pusey v. Pusey*, 728 P.2d 117, 120 (Utah 1986). However, "although the trial court is not bound to accept the evaluation [of a court-appointed evaluator] . . . some reason for rejecting the recommendation . . . is in order." *Sukin v. Sukin*, 842 P.2d 922, 925-26 (Utah

Ct. App. 1992) (quoting *Tuckey v. Tuckey*, 649 P.2d 88, 91 (Utah 1982)). Further, "if it is not otherwise clear from the findings, the trial court should include an explanation of its decision to accept or reject [an evaluator's] recommendations." *Id.* at 927.

Additionally, "A court must, in a custody dispute, give the highest priority to the welfare of the children over the desires of either parent." *Kallas*, 614 P.2d at 645. "The visitation schedule should be realistic and reasonable and provide an adequate basis for preserving and fostering the child's relationship with the noncustodial parent." *Ebbert v. Ebbert*, 744 P.2d 1019, 1022 (Utah Ct. App. 1987).

a. Child Custody Evaluator's Recommendations.

In *Sukin*, the court held that "although the trial court is not bound to accept the evaluation [of a court-appointed evaluator], we think some reason for rejecting the recommendation . . . is in order." *Sukin*, 842 P.2d at 925-26 (quoting *Tuckey v. Tuckey*, 649 P.2d 88, 91 (Utah 1982)). The court further clarified by holding that "if it is not otherwise clear from the findings, the trial court should include an explanation of its decision to accept or reject [an evaluator's] recommendations." *Id.* at 927.

The trial court judge was *explicit* in his description of why the court ultimately rejected portions of Ms. Thomas' recommendation:

> The tragedy of this trial is that is has convinced me that the evaluator's recommendation was very well intended, but maybe missed the mark and, that is, she felt that these parties could really work together and I think they have convinced me they can't very well.

Trial Transcript, 263. The judge's determination as such is irrefutably supported by the Respondent himself, who claimed that "I feel strongly, at this point, that [Petitioner] and I are not going to be able to get along. We're not going to be able to do the back and forth thing with the kids." *Trial Transcript*, 214.

As such, the trial judge fulfilled his requirements for rejecting the recommendation according to *Sukin*. Respondent's argument that "the trial court . . . erred in its order of custody contrary to the recommendation of the child custody evaluator," *Brief of Appellant*, 24, is insincere and supported by neither law nor fact. The trial court's ruling should be sustained.

b. Best Interests of the Children

In *Kallas*, the Supreme Court of Utah emphasized that "[a] child custody proceeding is equitable in nature and must be based primarily and foremost on the welfare and interest of the minor children." *Kallas*, 614 P.2d at 645. In remanding the proceedings, the Supreme Court instructed that "the trial court['s decision] . . . should "be based on all relevant evidence as to the children's present and future well-being." *Id.* at 646.

Any reading of the findings, transcript, and complete record in the present case supports the court's parent time determination as in the best interests of the parties' children. Both the court-appointed evaluator and Petitioner agreed that it is beneficial for the children to spend time with Respondent. Ms. Thomas stated that "Mr. Cook needs further opportunity to attend to his children's care in a personal manner rather than a

surrogate manner." *Trial Exhibit 3*, R. 270. Even Petitioner felt that "[i]t's very important they have their father in their lives. I've encouraged that since the beginning." *Trial Transcript*, 246.

However, despite all this, Appellant failed to make himself physically or emotionally available to participate adequately in his children's upbringing. *Trial Transcript*, 212-13 (Respondent agreeing that his work schedule precluded him from participating in the parent time suggested by the child custody evaluator); 214 (Respondent stating, "I feel strongly, at this point, that [Petitioner] and I are not going to be able to get along. We're not going to be able to do the back and forth thing with the kids."). Additionally, Respondent was held in contempt of court for disregarding a court order relating to his parent time, R. 212, and was also given a plea in abeyance to a separate domestic violence charge involving his wife. R. 252. Even Appellant's own counsel indicated that he wasn't aware of how Appellant would be able to handle additional parent time, given the fact that Appellant was working a swing shift and was frequently out of the state on business. *See Trial Transcript*, 33. Appellant's actions, feelings, and statements fly in the face of the child custody evaluator's contention that "[b]oth parents are expected to support and facilitate a healthy relationship between the boys and each of their parents." R. 277.

On the other hand, Petitioner was found by the child custody evaluator to "have positive parenting skills," *Trial Exhibit 3*, R. 269, and be a "compassionate, loving

mother, who sets realistic boundaries and incorporates natural and logical consequences in her children's lives." *Trial Exhibit 3*, R. 257. Despite concerns of Respondent that Petitioner was withholding the children from him, "evidence shows she is the parent most likely to encourage a healthy relationship with the other parent." *Trial Exhibit 3*, R. 270.

Finally, Respondent cites Ms. Thomas' suggestion that Respondent "needs further opportunity to attend to his children's care in a personal manner rather than a surrogate manner," *Trial Exhibit 3*, R. 270, as Ms. Thomas' rationale for increasing Respondent's parent time. *Brief of Appellant*, 17. However, Respondent does not support this proposition with any citation or other evidence, and actually ignores Ms. Thomas' comment following the aforementioned quote, where she continues by saying "[Respondent's] attachment with his children will continue to strengthen through his attendance to doctor's appointments, school meetings and such." *Trial Exhibit 3*, R. 270. Nowhere therein does Ms. Thomas allude to increased parent time as a natural result of her suggestion. The trial court recognized this, and in the findings of fact granted joint legal custody to the parties – specifically to Respondent – "for the purpose of allowing the Respondent access to school records and to information regarding the activities that are going on in the lives of the children . . . so [he] can obtain this information directly, rather than going through Petitioner." R. 357.

Given the testimony and evidence that was before it, the court in its wisdom made a decision irrefutably in the best interests of the children to have parent time set at the minimum standard established by the state legislature. This schedule is clearly realistic,

reasonable, and an adequate basis for Respondent to spend time with his children. As such, it is also in the best interests of his children, who need to continue to develop their respective relationships with Respondent. The trial court's ruling should be sustained.

3. The trial court was correct in using a sole custody worksheet, since Petitioner was awarded sole physical custody of the parties' three minor children.

"Utah law requires a court to use a joint custody child support worksheet when a child stays with each parent overnight for more than 25% of the year (and both parents pay overnight expenses and support child) *or* make findings supporting its deviation." *Rehn v. Rehn*, 1999 UT App 41, ¶ 16, 974 P.2d 306. "Labels do not control the child support determination . . . labels [such as] 'custody' and 'visitation' . . . are not as important as the description given by the court in defining their meaning in the context of a given case." *Udy v. Udy*, 893 P.2d 1097, 1100 (Utah Ct. App. 1995). Further, "[i]f no prior court order exists . . . the court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an order awarding child support . . . may be granted." Utah Code Ann. § 78B-12-202(2). Only "[i]f the court finds sufficient evidence to rebut the guidelines" shall the court "establish support after considering all relevant factors [as listed therein]." *Id.* at § 78B-12-202(3).

The trial court ruled that Petitioner "have sole physical custody of the three minor children." R. 356. Respondent failed to abide by § 78B-12-202(2) and did not submit a child support worksheet. *See* R. 347. However, Petitioner *did* submit a child support

worksheet, upon which basis the court computed Respondent's child support obligations. R. 358. Nowhere in the record does Respondent object to the child custody calculations, or attempt to introduce any evidence to rebut the statutory guidelines.

Further, Respondent's reliance on *Stevens* and *Jefferies* is deceptive and misleading. Respondent contends that "[t]he court must make explicit findings regarding the statutory factors pertinent in a child support determination and the trial court's failure to consider these statutory factors is an abuse of discretion." *Brief of Appellant*, 27. Respondent cites *Stevens* and *Jeffries* to underline the trial court's responsibility of considering the statutory factors set forth in U.C.A. § 78-45-7 (repealed and numbered as § 78B-12-202, effective Feb. 7, 2008). *See Stevens v. Stevens*, 754 P.2d 952 (Utah Ct. App. 1988); *Jefferies v. Jefferies*, 752 P.2d 909 (Utah Ct. App. 1988). **However, both *Stevens* and *Jeffries* rest on a previous version of the U.C.A.**, which is no longer applicable or in effect. As stated above, the current version of the statute states that the pertinent statutory factors only need to be considered "[i]f the court finds sufficient evidence to rebut the guidelines." § 78B-12-202(3).

As such, the trial judge appropriately used the sole custody worksheet to determine Respondent's child support payment responsibilities. Petitioner's argument that "the trial court . . . erred in its award of child support on the basis of a sole custody child support worksheet" is insincere and is supported by neither law nor fact. The trial court's ruling should be sustained.

4. The trial court properly awarded Petitioner $48,500.00 as her share of the marital real property, and adequately supported this award with proper findings that included dollar values placed on the relevant assets in dispute.

"Trial courts in divorce proceedings are given *considerable* discretion in adjusting the parties' financial and property interests." *Andersen v. Andersen*, 757 P.2d 476, 479 (Utah Ct. App. 1988) (emphasis added). Similarly, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a).

"[T]he general purpose to be achieved by a property division . . . is to allocate the property in a manner which best serves the needs of the parties and best permits them to pursue their separate lives." *Burke v.* Burke, 733 P.2d 133, 135 (Utah 1987). "Premarital property, gifts, and inheritances may be viewed as separate property, and in appropriate circumstances, equity will require that each party retain the separate property brought to the marriage." *Id.* This rule, however, "is not invariable." *Id.*

The trial court's distribution of property "should be based upon written findings." *Andersen*, 757 P.2d at 479. These findings "must place a dollar value on the assets distributed." *Id.* Additionally, a "failure to make findings on all material issues is reversible error unless the facts in the record are clear, uncontroverted and capable of supporting only a finding in favor of the judgment." *Id.* Further, a trial court's actions are presumed valid, and to rebut this presumption,

> the appealing party must demonstrate . . . that there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, or that the evidence clearly preponderated against the findings, or that such a serious inequity has resulted from the order as to constitute an abuse of the trial court's discretion.

Id. (internal quotation and citation omitted).

In his testimony at trial, Respondent stated that he had spent approximately $38,000.00 in pre-marital funds on "the home, for the water shares [and] for the tractor." *Trial Transcript*, 143. Of that total amount, Respondent testified that $18,000.00 was specifically paid towards a 1.22 acre parcel of land in the name of Respondent. *Trial Transcript*, 132, 157. Respondent also testified that $16,618.00 was specifically paid towards the marital home. *Trial Transcript*, 120.

During the trial, Respondent attempted to admit two exhibits into evidence to support his testimony regarding pre-marital fund contribution. *Trial Transcript*, 121, 132. The court ultimately denied these exhibits admission into evidence because they were "not timely provided during discovery, nor were they timely supplemented, as required by the Rules of Civil Procedure governing discovery." *Trial Transcript*, 191. In fact, the trial judge opined several times through the trial regarding his concern and frustration with Respondent's counsel's failure to timely provide documents to Petitioner's counsel. *Trial Transcript*, pp. 127-128, 135, 143-144, 146, 190. In addition to not timely providing documents, Respondent failed to disclose his ownership of the 1.22 acre parcel of land until the day before trial. *Trial Transcript*, 129. Thus, the court's determination of Respondent's alleged pre-marital fund contributions revolved solely on the credibility of

his testimony. *Trial Transcript*, 191 ("[The relevant exhibits, among others] are not received as evidence. Now, I'm not striking any of his testimony as far as what he recalls.").

The trial judge signed Findings of Fact and Conclusions of Law regarding this case on December 19, 2011. R. 368. Therein, Respondent was awarded his $16,000.00 of pre-marital funds contributed to the purchase of the marital home; the tractor; and the 1.22 acre parcel of land. R. 362, 364. Further, the judge placed a dollar value on the asset disputed by Respondent – Petitioner's award of $48,500.00 as her share of the parties' home equity. R. 362. Specifically, the findings place a dollar amount on the value of the home as of 2009 ($225,000.00); the mortgage balance ($112,000.00); the amount of equity in the home ($113,000.00); the amount of pre-marital funds Respondent paid towards the purchase of the home ($16,000.00); the remaining equity balance ($97,000.00); and Petitioner's portion of that equity ($48,500.00). R. 362.

Respondent's contention that "there are no factual findings as to how the trial court arrived" at the conclusion of the awards is difficult to understand. *Brief of Appellant*, 29. Respondent received back **ALL** of the pre-marital funds he requested at trial. These include the $16,000.00 in pre-marital funds contributed to the marital home; the 1.22 acre parcel of land for which Respondent paid $18,000.00 in pre-marital funds; and the tractor, which Respondent testified was purchased with pre-marital funds. After being granted all that he requested, Respondent cannot, with any legitimacy, claim that

there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; that the evidence clearly preponderated against the findings; or that a serious inequity has resulted.

As such, the trial judge appropriately exercised his *considerable* discretion in equitably dividing the marital estate. Respondent's argument that "the trial court . . . abused its discretion in awarding . . . Appellee . . . $48,500.00 as her share of the parties' home equity and erred in only allowing the Appellant less than one-half of his premarital contribution to the home without factual findings," *Brief of Appellant*, 29, collapses on itself when viewed in light of the fact that Respondent was awarded precisely what he requested. The trial court's ruling should be sustained.

5. The trial court was correct in its determination of the dates by which to calculate Petitioner's share of Respondent's Pension and Thrift Savings Plan.

In divorce proceedings, trial courts may "award to either spouse the possession of any real or personal property of the other spouse or acquired by the spouses *during the marriage*." § 30-4-3 (emphasis added). "As a general rule, the marital estate is valued at the time of the divorce decree." *Rappleye v. Rappleye*, 855 P.2d 260, 262 (Utah Ct. App. 1993). "Any deviation from the general rule must be supported by sufficiently detailed findings of fact that explain the trial court's basis for such deviation." *Id.*

The trial court awarded to Petitioner "[o]ne-half of the TSP account as of its closing balance on October 18, 2011." *Findings of Fact and Conclusions of Law*, p.9. Petitioner's portion of the TSP account was calculated according to Utah statute and the

guidance provided in *Rappleye*, as the date of division is the date of the divorce (subsequent to the trial on the divorce, which occurred on the same day).

The trial court also awarded to Petitioner a share of Respondent's Federal Pension Plan pursuant to the Woodward Formula calculated from March 2004 until January 1, 2011. R. 363. The Woodward Formula holds that the recipient spouse

> receive one-half of the benefits accrued during the marriage, regardless of the length of time the husband continues in the same employment. Whenever the husband chooses to terminate his government employment, the marital property subject to distribution is a portion of the retirement benefits represented by the number of years of the marriage divided by the number of years of the husband's employment.

Woodward v. Woodward, 656 P.2d 431, 433-34 (Utah 1982).

Following the Woodward Formula, the trial court should have found that Petitioner was entitled to a share of Respondent's pension based on the division date of October 18, 2011 (since that was the date of the divorce pursuant to the trial held on that day) or December 19, 2011 (since that was the date the Decree of Divorce was entered by the court). Respondent correctly noted that "[t]he trial court indicated that [the judge] picked an arbitrary date as stated on the record." *Brief of Appellant*, 30. However, Respondent fails to mention that the judge also stated that the decision was made in response to the situation being "a difficult one [in which] to decide what's fair." *Trial Transcript*, 265. Most importantly, **the date selected provides only a benefit to Respondent**. Had the court followed the letter of the law according to *Woodward*, Petitioner's share of the pension would

have increased by the value of an additional nine and one-half months (from January 1, 2011 to October 18, 2011). Thus, Respondent receives a windfall which should have gone to Petitioner. Should Respondent so wish, Petitioner is amenable to modifying the divorce decree in strict accordance with *Woodward*.

Furthermore, Respondent cites absolutely no Utah statutes or case law to support his proposition that the division date for both the Thrift Savings Account and federal pension should be the date of the parties' separation. *See Brief of Appellant*, pp. 29-31. As such, Respondent's proposition flies in the face of § 30-4-3, and should be disregarded.

Therefore, the trial judge appropriately, equitably, and lawfully determined that the division of the Thrift Savings Account and federal pension benefits should be calculated at October 18, 2011 and January 1, 2011, respectively. Respondent's argument that "the trial court abused its discretion in its award . . . and [that] the division date should be the date of the Appellee's filing for divorce," *Brief of Appellant*, 30-31, is based in neither law nor fact. The trial court's ruling should be sustained.

6. The trial court properly awarded Petitioner $3,000.00 in attorney fees because Petitioner was in financial need, Respondent had the ability to pay, and the fees were reasonable.

Utah allows for attorney fees to be awarded in divorce and child custody proceedings. § 30-3-3(1). "Both the decision to award attorney fees and the amount of such fees are within the sound discretion of the trial court." *Chambers v. Chambers*, 840 P.2d 841, 844 (Utah Ct. App. 1992). "However, such award must be based on evidence

of [1] the reasonableness of the requested fees, as well as [2] the financial need of the receiving spouse, and [3] the ability of the other spouse to pay." *Id.*

The record clearly indicates that Petitioner's requested fees were reasonable, that she had a financial need, and that Respondent was capable of paying the fees.

Petitioner's attorney submitted a signed affidavit outlining in detail the fees incurred by Petitioner during the course of litigation. *Trial Transcript*, 251. Respondent's attorney even stated that his client's attorney fees were *more* than Petitioner's. *Trial Transcript*, 247.

Petitioner was certainly in financial need, necessitating an award of attorney fees. Petitioner obtained employment per the direction of the court at the Temporary Orders Hearing. R. 38. This employment was obtained despite the fact that she was also awarded sole custody of the parties' three young children at the same hearing. R. 38. At trial, the court imputed income to Petitioner of $1,500.00 per month, *Trial Transcript*, 263, even though her $8.72 per-hour job provided her with only 32 hours per week during the school year, requiring her to file for unemployment during the summer months. *Trial Transcript*, 263. The court also awarded to Petitioner $1,142.00 in monthly child support payments. *Trial Transcript*, 263. Thus, Petitioner's gross income of $2,642.00 – artificially inflated by the income imputed by the court – was to be split between the support of herself and four minor children. Petitioner's financial need for attorney fees is thus readily apparent.

Respondent's monthly gross income of $4,641.00 dwarfed Petitioner's earnings in comparison. *See Trial Transcript*, 263. Once the dust of trial had settled, Respondent would be taking home $3,499.00, while Petitioner would only have access to $2642.00. *See Trial Transcript*, 263. Such a disparity could be easily overlooked until it is acknowledged that Petitioner's gross income was intended to support five individuals, while Respondent's only supported **one**. All things considered, the monthly difference of $857.00 between the parties' gross earnings is ample evidence to indicate Respondent's ability to pay attorney fees. Thus, the attorney fees are reasonable, Petitioner was in financial need of such, and Respondent was fully capable of paying.

Further, Respondent's reference to the court's denying Petitioner alimony (on the basis of failure to show need) is irrelevant to the determination of awarding attorney fees. Respondent provides no statutory or case law to support its argument, and as such this unsubstantiated contention should be attributed neither legitimacy nor validity.

Finally, Respondent erroneously relies on *Chambers* for the proposition that

> [i]f the trial court . . . does not address the reasonableness of the fees and stops short in finding that each party would have the means to pay his or her own attorney's fees out of the money being distributed to both, the award of attorney's fees would be an abuse of discretion of the trial court.

Brief of Appellant, 32. Respondent is misleading in the aforementioned quote, some of which is found in *Chambers*, by omitting internal quotation marks which reference the specific language of the trial court's findings. "The money being distributed to both," as quoted from the trial court's findings, referred to the initial alimony awarded by the trial court (approximately $120,000 per year) to the wife, as well as the husband's lucrative

earnings as a veteran professional basketball player. *Chambers*, 840 P.2d at 843. This "money being distributed to both" was in addition to a stipulation in which the husband agreed to pay – and subsequently *did* pay – $12,500.00 of the wife's attorney fees. *Id.* at 844. To apply *Chambers*' narrow holding to the present case distorts that court's logic and attempts to establish a precedent where none is appropriate.

As such, the trial judge appropriately, equitably, and lawfully determined that attorney fees in the amount of $3,000.00 be awarded to Petitioner. The trial court's ruling should be sustained.

Additionally, this court has recognized that "'in divorce proceedings, when the trial court has awarded attorney fees below to the party who then prevails on the main issues on appeal, we generally award fees on appeal.'" *Wall v. Wall*, 2007 UT App 61, ¶ 26, 157 P.3d 341 (quoting *Childs v. Childs*, 967 P.2d 942, 947 (Utah Ct. App. 1998)); *see also Nelson v. Nelson*, 2004 UT App 254, ¶ 9, 97 P.3d 722.

As Petitioner was properly awarded attorney fees, should she prevail on the main issues on appeal, she respectfully requests attorney fees for the present matter.

CONCLUSION

The trial court correctly awarded Petitioner sole physical custody, and Petitioner and Respondent joint legal custody (subject to limitations placed on Respondent), of the

parties' three minor children. It properly supported its determination and lawfully exercised the considerable discretion provided to it.

The trial court appropriately chose not to follow all of the child custody evaluator's recommendations, as it provided a more than adequate explanation for its minor deviation.

The trial court properly calculated child support based on a sole custody worksheet. Respondent failed to submit an alternate worksheet, which would have still been otherwise irrelevant due to the fact that Petitioner was properly granted sole custody of the parties' three minor children.

The trial court properly awarded Petitioner $48,500.00 as her equity in the marital home. The findings of fact appropriately placed a dollar amount on the assets in dispute, and ample written findings supported the determination. Further, Respondent received ALL of the premarital assets he requested at trial.

The trial court rightly chose the dates to calculate Petitioner's portion of Respondent's pension and Thrift Savings Plan. However, if Respondent wishes strictly apply the guidelines, Petitioner will stipulate to such.

Finally, the trial court correctly awarded partial attorney fees to Petitioner. This was done with adequate evidence that Petitioner had the financial need, Respondent had the ability to pay, and that the fees were reasonable. Petitioner also respectfully requests attorney fees in the present matter, should she prevail on the main issues on appeal.

For the forgoing reasons, the District Court's ruling should be upheld.

DATED this 12 day of September, 2012.

By: _____
Kirk M. Morgan
Counsel for Petitioner

CERTIFICATE OF COMPLAINCE WITH UTAH RULE OF APPELLATE PROCEDURE 24(f)(1)(C)

This brief complies with the type-volume limitations, typeface requirements, and type style requirements set forth in Utah Rule of Appellate Procedure 24(f)(1)(C). This brief contains 8,097 words, excluding the portions of the brief exempted by Rule 24(f)(1)(B).

DATED this 12 day of September, 2012.

By: _____
Kirk M. Morgan
Counsel for Petitioner

ADDENDUM

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UTAH CODE ANN. § 30-3-3. Award of costs, attorney and witness fees – Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, Divorce, Chapter 4, Separate Maintenance, or Title 78B, Chapter 7, Part 1, Cohabitant Abuse Act, and in any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

UTAH CODE ANN. § 30-4-3. Custody and maintenance of children – Property and debt division – Support payments.

(1) In all actions brought under this chapter the court may by order or decree:

(a) provide for the care, custody, and maintenance of the minor children of the parties and may determine with which of the parties the children or any of them shall remain;

(b)(i) provide for support of either spouse and the support of the minor children remaining with that spouse;

(ii) provide how and when support payments shall be made; and

(iii) provide that either spouse have a lien upon the property of the other to secure payment of the support or maintenance obligation;

(c) award to either spouse the possession of any real or personal property of the other spouse or acquired by the spouses during the marriage; or

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

(i) specify which party is responsible for the payment of joint debts, obligations, or liabilities contracted or incurred by the parties during the marriage;
(ii) require the parties to notify respective creditors or obligees regarding the court's division of debts, obligations, and liabilities and regarding the parties' separate, current addresses; and
(iii) provide for the enforcement of these orders.

(2) The orders and decrees under this section may be enforced by sale of any property of the spouse or by contempt proceedings or otherwise as may be necessary.

(3) The court may change the support or maintenance of a party from time to time according to circumstances, and may terminate altogether any obligation upon satisfactory proof of voluntary and permanent reconciliation. An order or decree of support or maintenance shall in every case be valid only during the joint lives of the husband and wife.

UTAH CODE ANN. § 78B-12-202. Determination of amount of support – Rebuttable guidelines.

(1) (a) Prospective support shall be equal to the amount granted by prior court order unless there has been a substantial change of circumstance on the part of the obligor or obligee or adjustment under Subsection 78B-12-210(6) has been made.

(b) If the prior court order contains a stipulated provision for the automatic adjustment for prospective support, the prospective support shall be the amount as stated in the order, without a showing of a material change of circumstances, if the stipulated provision:

(i) is clear and unambiguous;
(ii) is self-executing;
(iii) provides for support which equals or exceeds the base child support award required by the guidelines; and
(iv) does not allow a decrease in support as a result of the obligor's voluntary reduction of income.

(2) If no prior court order exists, a substantial change in circumstances has occurred, or a petition to modify an order under Subsection 78B-12-210(6) has been filed, the court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an order awarding child support or modifying an existing award may be granted.

(3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering all relevant factors, including but not limited to:

(a) the standard of living and situation of the parties;
(b) the relative wealth and income of the parties;
(c) the ability of the obligor to earn;

(d) the ability of the obligee to earn;
(e) the ability of an incapacitated adult child to earn, or other benefits received by the adult child or on the adult child's behalf including Supplemental Security Income;
(f) the needs of the obligee, the obligor, and the child;
(g) the ages of the parties; and
(h) the responsibilities of the obligor and the obligee for the support of others.

(4) When no prior court order exists, the court shall determine and assess all arrearages based upon the guidelines described in this chapter.

Utah Rule of Civil Procedure 52. Findings by the Court; Correction of the Record.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(1) by default or by failing to appear at the trial;

(2) by consent in writing, filed in the cause;

(3) by oral consent in open court, entered in the minutes.

(d) Correction of the record. If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the record accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be filed within 10 days after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement shall be resolved by the court and the record made to accurately reflect the proceeding.

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of September, 2012, I mailed a true and correct copy of this "BRIEF OF APPELLEE" to F. Kim Walpole, attorney for the Respondent-Appellant, at the following address:

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