2016

Jillian Scott Appellant, v Bradley Scott, Appellee.

Utah Supreme Court

IN THE UTAH SUPREME COURT

JILLIAN SCOTT, Petitioner / Appellant, vs. BRADLEY SCOTT, Respondent / Appellee.	Case No. 20160299-SC

BRIEF OF RESPONDENT/APPELLEE

On Writ of Certiorari from the Utah Court of Appeals

Michael D. Zimmerman
Troy L. Booher
Julie J. Nelson
ZIMMERMAN JONES BOOHER LLC
Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, Utah 84111
mzimmerman@zjbappeals.com
tbooher@zjbappeals.com
jnelson@zjappeals.com

Bart J. Johnsen
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
bjohnsen@parsonsbehle.com

Attorneys for Petitioner-Appellant

Karra J. Porter, No. 5223
Kristen C. Kiburtz, No. 12572
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111
karra.porter@chrisjen.com
kristen.kiburtz@chrisjen.com
Telephone: (801) 323-5000

Attorneys for Respondent-Appellee

LIST OF PARTIES TO THE PROCEEDING

Both parties to the proceedings below (Jillian Scott, Petitioner/Appellant, and Bradley Scott, Respondent/Appellee) are identified in the caption on appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

JURISDICTION

Appellee Bradley Scott does not disagree with Appellant Jillian Scott's jurisdictional statement.

ISSUES FOR REVIEW

ISSUE 1: Whether the court of appeals erred in determining Utah Code § 30-3-5(10) permits a finding of cohabitation warranting a termination of alimony when that cohabitation has ceased prior to the filing or adjudication of a petition for termination of alimony?

Standard of Review: "On certiorari, [this Court] review[s] for correctness the decision of the court of appeals, not the decision of the district court." *Turner v. Univ. of Utah Hosp. & Clinics*, 2013 UT 52, ¶ 13, 310 P.3d 1212. In reviewing a determination of cohabitation, an appellate court "defer[s] to the trial court's factual findings unless they are shown to be clearly erroneous," and reviews "its ultimate conclusion [of cohabitation] for correctness." *Levin v. Carlton-Levin*, 2014 UT App 3, ¶ 9, 318 P.3d 1177 (citation and internal quotation marks omitted); *see also Myers v. Myers*, 2011 UT 65, ¶¶ 32 & 37, 266 P.3d 806 (same).

Preservation: This issue was preserved in the court of appeals, s*ee Scott v. Scott*, 2016 UT App. 31, ¶ 30-37, 368 P.3d 133, but was not preserved in the trial court.

ISSUE 2: Whether the court of appeals erred in its construction and application of the term domicile within the standard set forth in *Haddow v. Haddow*, 707 P.2d 669 (Utah 1985), and *Myers v. Myers*, 2011 UT 65, 266 P.3d 806, for ascertaining the establishment of a common residence.

Standard of Review: The interpretation of this Court's prior precedent is reviewed for correctness. *Ellis v. Estate of Ellis*, 2007 UT 77, ¶ 6, 169 P.3d 441.

Preservation: This issue was preserved. *Scott*, 2016 UT App. 31, ¶¶ 16-20.

ISSUE 3: Whether the court of appeals erred in its construction and application of a temporary or brief period of time within the standard set forth in *Haddow* and *Myers*.

Standard of Review: The interpretation of this Court's prior precedent is reviewed for correctness. *Ellis*, 2007 UT 77, ¶ 6.

Preservation: This issue was preserved. *Scott*, 2016 UT App. 31, ¶¶ 21-27.

DETERMINATIVE STATUTES, CONSTITUTIONAL PROVISIONS AND RULES

Utah Code Ann. § 30-3-5(10):

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

STATEMENT OF THE CASE

Nature of the case, course of proceeding, and disposition below

Jillian Scott and Bradley Scott divorced in 2006. Approximately two years later, Ms. Scott entered into a long-term intimate relationship with a man named James Okland.[1] In 2011, Mr. Scott learned about the relationship, including that Ms. Scott had been living with J.O. Mr. Scott filed a petition for termination of alimony pursuant to Utah Code § 30-3-5(10). (R.2237.)

A trial was held in 2013. The court heard testimony from several live witnesses, including Ms. Scott and J.O., and reviewed dozens of exhibits. (R.2237-38, R.3050.) The court noted that there are generally two elements of cohabitation: (1) common residency and (2) sexual contact evidencing conjugal association. It was undisputed that the latter element was present. The question for the court, then, was whether J.O. and Ms. Scott established a "common residency." (R.2259.)

[1] Mr. Okland, a principal of Okland Construction at the time, is not a party to this proceeding, and has since remarried. As a non-party, use of Mr. Okland's name and the resulting loss of privacy seem unnecessary in public filings. Accordingly, Mr. Scott refers to Mr. Okland hereafter as "J.O."

In weighing "common residency," the trial court considered evidence of several factors, including (a) access to the residence and independent comings and goings, (b) shared decisions, (c) the length and the continuity of the relationship, (d) shared meals, (e) keeping clothing in the same home, *etc.* (R.2259-2260.) The court concluded that the couple had established a common residency and had cohabitated under the Cohabitation Statute. The trial court drafted a 36-page decision summarizing the couple's relationship and facts it found relevant to its cohabitation determination. (R.2237.) The court noted that the record was too extensive for it to note every fact that was relevant to its findings. (R.2271.) Ms. Scott appealed.

In the court of appeals, Ms. Scott made three arguments. First, she claimed that she could not have cohabitated with J.O. because she maintained a separate home in Salt Lake City. Second, she claimed that she did not live with J.O. long enough to constitute cohabitation under the Statute. Third, she claimed that the Cohabitation Statute required present cohabitation and that she was no longer living with J.O. *Scott*, 2016 UT App. 31.

Relying on this Court's precedent (as well as its own precedent), the court of appeals affirmed the trial court's holding that the couple established a common residency when they jointly purchased a home together in Rancho Santa Fe, California and moved into that home for purposes of establishing a marriage-like relationship. *Id.*, ¶¶ 24, 37.

Although the couple ultimately separated, the court of appeals was not persuaded that the six-week period that the couple lived together in the Rancho Santa Fe home was too short a period to extrapolate a "common residency." To conclude otherwise, the court found, would be to ignore (among other things) the longstanding nature of the couple's relationship and that by moving into that home Ms. Scott and J.O. both intended to "deliberate[ly] escalat[e] their relationship to something akin to marriage with all of the trappings of cohabitation." *Id.*, ¶ 24. The court also concluded that the plain language of the statute did not require a finding that cohabitation is presently occurring. *Id.*, ¶ 36.

Although the trial court held the couple cohabited as early as December 22, the court of appeals adjusted this date to February 17, which is when the couple moved into the Rancho Santa Fee home. *Id.*, ¶ 26.

FACTS

Background Facts

Mr. and Ms. Scott were married May 12, 1979. During their marriage, the couple accumulated a significant amount of wealth, and were able to "live[] a lifestyle beyond even the imagination of most of humanity." (R.777-78.) The marriage was not a happy one, and once most of their children were at or approaching adulthood, the Scotts divorced. (R.762.)

Mr. and Ms. Scott entered into a written Stipulated Settlement Agreement setting forth the division of marital property and support obligations of the parties. (R.838.) This Stipulation was approved and adopted by the trial court. *Id.* A Final Decree of Divorce was entered on August 7, 2006. Pursuant to the Stipulation and the Divorce Decree, the parties agreed that Ms. Scott would receive, among other things, $2.4 million as an adjustment to the division of marital property, half of the proceeds received from the sale of the couple's $3.3 million home (minus marital liabilities), $6,000 a month in alimony equal to the number of years of the parties' marriage, and $2,000 a month in child support. (R.839, 841, 844, 784, 846-849.) Mr. Scott was also ordered to pay half of his children's medical expenses, private schooling, and college tuition. (R.839, 840.) The parties stipulated, and the Decree stated, that alimony would terminate "upon the remarriage or cohabitation of Ms. Scott." (R.841.)

Ms. Scott's alleged economic needs were "far removed from reality." (R.778.) After the divorce decree was entered, Ms. Scott filed several motions with the court arguing that she was entitled to more money under the decree than Mr. Scott was allegedly providing. The divorce court found that some of these motions had merit. (*See, e.g.*, R.1057, 883-889 (Ms. Scott was correct that Mr. Scott owed her $100 for SAT and ACT tests taken by their daughter); R.1819, 1161-1266 (Mr. Scott should

not have deducted medical insurance paid for adult daughter from Ms. Scott's support obligations when Ms. Scott canceled that daughter's policy).)

Most of Ms. Scott's arguments, however, were rejected by the court. (*See, e.g.*, R.1056-1060, 868-871 (disregarding Ms. Scott's complaint of untimeliness filed when Mr. Scott was four days late on a support obligation); R.1820-21, 1267-1268 (rejecting Ms. Scott's argument that Mr. Scott was required to reimburse Ms. Scott for more expense than she had actually incurred for college room and board); R. 1822, 1161-1266 (declining to hold Mr. Scott in contempt for not reimbursing Ms. Scott for medical and tuition bills for which she had not provided supporting documentation).)

The divorce court never found Mr. Scott to be in contempt of the divorce decree. By contrast, the court did sanction Ms. Scott for her own violation of the decree. (R.1452, 1443, ¶¶ 5-7.) The court noted that most of the problems of which Ms. Scott complained were the result of a breakdown in communication. (R.1855, 1835.) Ms. Scott's emails were laced with personal insults, which made such communication difficult. (*See, e.g.*, R.965 (email to Mr. Scott calling him a "coward" and his assistant "fat"), R.963 (email to Mr. Scott's assistant calling her "ugly"); *see also* R.3050, p. 12:3-17) (after the divorce, Ms. Scott sent mutual friend

Stuart Weissman a "very nasty" email about Mr. Scott and demanded that he choose between her and Mr. Scott).)[2]

Ms. Scott enters into a de facto marriage with J.O.

At the same time that Ms. Scott was attempting to convince the divorce court of her financial woes, she had entered into a romantic relationship with a wealthy man, J.O. "Ms. Scott began an intimate and exclusive relationship with" J.O. for nearly three years, "beginning in October 2008 and ending in April/May 2011." (R.2238.)

J.O. and Ms. Scott's living arrangements were atypical. Their lifestyle was not fixed around any "one home" but instead was transient, a lifestyle consisting of mainly travel and leisure. (R.2270.) The couple's extraordinary wealth allowed them the "ability to live in more than one home and travel extensively away from the numerous homes available to them and they did so." (*Id*.) J.O. owned at least three homes: one in Salt Lake City, Utah; one in Sun Valley, Idaho; and one in Rancho Santa Fe, California. (R.2238, 2252.) Although unclear, J.O. may also have owned

[2] Ms. Scott represents in her statement of facts that the Scotts' divorce was triggered because Ms. Scott found Mr. Scott with another woman (the "June 2004 incident"), and casts various other aspersions. *E.g.*, App. Br., pp. 5. Because the circumstances of the underlying divorce are immaterial to the present appeal, Mr. Scott will refrain from responding to Ms. Scott's personal attacks. As the divorce court noted, however, the parties had already filed for divorce before June 2004, and Ms. Scott's versions of events on this occasion was "exaggerated." (R. 769, 777.) In any event, the trial court here had ample opportunity to assess Ms. Scott as a witness; its rejection of most aspects of her factual testimony speaks volumes about her credibility.

a home in Arizona. The Rancho Santa Fe home was jointly obtained by Ms. Scott and J.O. (R.2252.)

Ms. Scott also had a home in Salt Lake but she did not live there. The probability of actually finding Ms. Scott in Salt Lake was quite low (at most 13-19%, mathematically stated). (R.2255, 2256.) Instead, Ms. Scott spent both her days and nights in one of J.O.'s homes or travelling with J.O.:

- "[F]rom November 15, 2010 to May 15, 2011, [Ms. Scott] spent only 31 days in Salt Lake City and she spent 147 days or 81% with [J.O.] or in a home owned by him." (R.2256.)

- "Out of a 144 day time period, [Ms. Scott] spent only 19 days in Salt Lake City, Utah, and spent 125 days or 87% of the time with [J.O.] or in one of his homes." (R.2256.)

- "During a 28 month time period in their relationship, [J.O.] and [Ms. Scott] traveled together on some 37 separate occasions." (R.2261). At least 17 of these trips were to [J.O.]'s Sun Valley Home. (*Id.*) Approximately 13 of these trips were made to California. (Resp. Ex. 12, pp. 1-2.)

- On May 15, 2010, Ms. Scott commented on Facebook "*We spend a lot of time in Sun Valley in the summer*" (R.2239 (emphasis in original).)

Ms. Scott spent so little time at her Salt Lake City house that she complained when Mr. Scott mailed alimony checks there because, with her "travel and other commitments," she was not there often enough to timely deposit the checks. (R.1684.) Her living arrangements with J.O. were well documented by Ms. Scott on Facebook and in emails:

- On July 13, 2010, Ms. Scott wrote, "In LA with my girls, flying back to SLC this afternoon & then on to Sun Valley for a week. [J.O.] took us to Grand Wailea for a week for Scarlett's graduation present. (Scarlett is [Mr. & Ms. Scott's] daughter)." (R.2239.)

- "On May 13-14, 2010, [Ms. Scott] commented on Facebook to a friend in Hawaii, 'We are flying to Maui on the 11th of June and staying until the 18th.' The friend asked if she could come over to see her and [Ms. Scott] responded 'We are not taking his plane, we are flying commercial, otherwise we would fly to Oahu to see you!!!'" (*Id.* (emphasis in original).)

- Ms. Scott also spent the night at J.O's Salt Lake City home when she was in Salt Lake. J.O. gave her the key code to access his home and she had the ability to access this home when he was away. (R.2238, 2253, 2261, 2268, 2271.)

- "On July 18, 2010, Ms. Scott wrote, 'We are planning a trip to [Rancho Santa Fe, California] on the 19th of August til the 23rd. He does not know RSF and I want him to fall in love with it so we could have a home there.'" (R.2239 (emphasis in original).)

- "On January 10, 2011, Ms. Scott commented on Facebook: 'Off to Singapore, Thailand, Vietnam, Cambodia and China for 25 days!! Good bye snow, Hello Humidity!'" (R.2245.)

- On January 28, 2011, Ms. Scott wrote: "'Only 2 more nights on the ship, getting sad to leave, but on the other hand we are looking forward to RSF!!!'" (R.2245 (emphasis in original).)

J.O. acknowledged that Ms. Scott rarely stayed in her Salt Lake City house, but instead stayed with him. (R.3050, p. 102:15-21.) They shared a common room when traveling, and when staying in his various homes. (R.2261.) On July 18, 2010, Ms. Scott wrote, "We are in Sun Valley for a week now. [J.O.] has a home here and I love it. Way more than Park City, we either hike, bike or play golf every

day . . . . *I would love to spend my time between Sun Valley and Southern California with just a few stops in SLC.* (R.2239 (emphasis in original).) Because Ms. Scott was rarely at her Salt Lake home, she arranged that all of her important mail, including her bills, could be retrieved online. The only mail that came to her Salt Lake home was junk mail, which she hired a housekeeper to clean out. (R.2256, ¶ 120.)

The couple's living arrangements were particularly clear at the home in Rancho Santa Fe, California. Sometime in August of 2010, one of Ms. Scott's daughters moved to southern California. (R.2240, ¶ 18.) Around this same time, Ms. Scott and J.O. began viewing homes in Rancho Santa Fe. (R.2240.) It was understood that Ms. Scott's daughter would be able to stay at the Rancho Santa Fe home during her vacations and summers. (R.2251.)

Ms. Scott contacted Brenda Weissman, a real estate agent in southern California, and asked her to be the buyer's agent for Ms. Scott and J.O. Ms. Weissman and her husband Stuart owned a home at the Bridges in Rancho Santa Fe, and were friends of both J.O. and Ms. Scott. (R.2238, 2250, 2252, 2264.) Mr. Weissman "was the designated driver and drove them [J.O. and Ms. Scott] around for a few months while they looked at property in Rancho Santa Fe[.]" (R.3050, p. 15:2-9.)

Ms. Scott put her Salt Lake home on the market in July of 2010 in anticipation of the move. (R.2239.) Ms. Scott and J.O. had discussions regarding selling Ms. Scott's house in terms of selling price and which listing agents she should use:

> J, what is the name of the agent at Linda Wolcott's office you think might be good for me? Liz, thinks Tom is right on with his appraisal of $630, and that the most I should list it for would be $699. My neighbors are at $799 and mine is better! Now they are not selling but to list mine 100k less is a bit much??? I think $740 would be more appropriate. What do you think? She is comparing it to the old ones that my neighbor bought up on the hill. Xo.

(R.2264.)

Initially it appeared that Ms. Scott would use the proceeds from her Salt Lake home to help fund the purchase of the house in southern California. But when Ms. Scott's home did not sell during the summer of 2010, J.O. agreed to front the money and take title of the property himself or through one of his entities. (R.2264.) As recognized by the trial court, however, Ms. Scott made clear that the California home was for both J.O. and her, and its purchase was a joint effort:

- On July 27, 2010, Ms. Scott wrote to Ms. Weissman: "That home is spectacular! But . . . and it's a big but, we have done big and NEVER want to go big again. If [J.O.] likes Rancho Santa Fe, and if we decide we would like a home there, then it would be on a much smaller scale." (Resp. Ex. 14, p. 2098.)

- On August 31, 2010, Ms. Scott wrote to Ms. Weissman: "This is the house that has my name all over it! I love it! I have my house up for sale and I'm putting my lot up as I type! [J.O.] still wants to look at the covenant and get a feel for everything in the area. I think he even wants to look at the Del Mar Country club. I like the Bridges but $2,000 a month in dues is a bit steep and I have to belong to a golf course." (Resp. Ex. 14, p. 10.)

- On September 2, 2010, Ms. Scott wrote Ms. Weissman and told her she would let her know which of the homes she liked, and that she had stopped considering the home from the Del Mar Country Club. (Resp. Ex. 14, p. 13.)

- On September 13, 2010, Ms. Scott wrote: "As you know from lunch it's really up to [J.O.] at this point. He has fallen in love with the area so now it's just talking to his 'finance guy.' As you can tell he is very conservative with his money and does not like debt. He made the comment 'we pay cash for everything. We only financed a part of the plane!' So after just writing the big check to the x he is a little skiddish about getting into debt 4 a home for me & Scarlett!! He loves me and told me last night 'you always get what you want.' I want him to want this too. So I'm not pushing too hard on him. He knows the house will not stay on the market too long so I'm sure he will make an offer soon. Keep your fingers crossed! I've wanted to be here for a long time. Maybe it was not supposed to happen until now. I told [J.O.] on the golf course I want to grow old here. Here with you. He agreed!" (Resp. Ex. 14, p. 16.)

- On September 14, 2010, Ms. Scott wrote Ms. Weissman: "We cannot go over 2.5. Do [you] think they would go for that? Gotta get my ass to rancho santa fe. I love it there. I hate. Hate salt lake city!!" (Resp. Ex. 14, p. 18.)

- On September 22, 2010, Ms. Scott wrote Ms. Weissman: "Don't waste your time in Fairbanks Ranch, we want the covenant or my dream home in the Bridges." (Resp. Ex. 14, p. 19.)

- On October 7, 2010, J.O. wrote Ms. Weissman: "The offer and addendum look fine. Jill and I would like to offer $2,125,000 all cash and close within 15 days. It may appear that this is a low ball offer based on the listing price, however we feel that this offer is what the house is worth." (Resp. Ex. 14, p. 24.)

- On December 2, 2010, Ms. Scott told [J.O.] regarding the counter offer on the home in Rancho Santa Fe: "I love being there with you, but I only want us to do this deal if YOU love being there TOO. If you see yourself walking the neighborhood, golfing the course, swimming in the pool when we have little guest, etc. It's a lifestyle for US, for OUR future." (Resp. Ex. 42.)

On November 10, 2010, Ms. Scott implemented a change of mailing address from her Salt Lake house to a P.O. Box. (R.1647.) Ms. Scott and J.O. finalized the purchase of their home in Rancho Santa Fe in mid-December, and the purchase closed in January 2011. (R.2243, 2266.) Ms. Scott and J.O. were traveling together in Arizona, Sun Valley, and then in Asia while the purchase was finalized. (R.2243-2245.)

The couple had to stop in Salt Lake for a short period so that they could jointly arrange for the shipment of personal items, cars, and furniture from their Salt Lake City houses to the Rancho Santa Fe Home. (R.2245.) "On February 11, 2011, [J.O.] told [Ms. Scott] that they may have to stay in Salt Lake for a few more days and the plan was to get Redman loaded with everything they wanted to ship and get it on the way." (*Id*.) J.O. also arranged to "have his Porsche shipped, with the timing for it to get in Rancho Santa Fe within a day or two of their arrival." (*Id*.)

J.O. and Ms. Scott flew to Rancho Santa Fe on J.O.'s private plane with their linens, computers, and whatever clothes that they wanted to take. (R.2245, 2246.) They physically moved into the Rancho Santa Fe home on February 17, 2011. (R.2246.) Ms. Scott wrote: "This is heaven! I have to pinch myself to make sure I'm not dreaming. [J.O.] and I love it here, even in the rain." (Resp. Ex. 11, p. 3.)

Ms. Scott treats J.O.'s various homes as her own

Ms. Scott and J.O. worked together to furnish and arrange utilities for the Rancho Santa Fe home. On January 7, Ms. Scott wrote J.O.: "*I got the cable pending the sellers disconnect call, the water is done, starting February 1st. You have to call on the gas & electric (unless we want my name on the account).* (R.2244 (emphasis in original).) J.O. asked that Ms. Scott ensure that all of the utilities for the RSF home be in J.O.'s trust's name with a billing address at his construction company. (*Id.*)

Ms. Scott bought décor for the RSF home. (R.2245; *also* R.3050, pp. 20-21:22-1) ("numerous times she [Ms. Scott] told us they're planning on trips and planning on decorating the house together and she was taking furniture out of the house and replacing it because [J.O.'s] taste was mediocre, and I mean, she was acting like a spouse").)

Ms. Scott had her furniture and personal items shipped to the house from Salt Lake at J.O.'s expense. (R.2246) Ms. Scott and J.O. had discussions regarding what furniture they were going to keep from the previous owners in their Rancho Santa Fe home, and shopped for and purchased a couch together for the home. (R.2244, 2247). Ms. Scott helped with landscaping decisions. (Resp. Ex. 14, p. 2197.) She arranged for the home to be cleaned and for the purchase of cleaning supplies.

(R.2246.) She made decisions regarding who should have keys to that home. (Resp. Ex. 14, p. 2235.)

The Rancho Santa Fe home was intended to be the couple's joint residence, which in fact was fulfilled when they both moved in. (R.2265.) J. O. confirmed that "[Ms. Scott] stayed there the same time that I did." (*Id*.) Ms. Scott also continued listing her Salt Lake City home for sale and represented that she would be staying in Rancho Santa Fe from then on. (R.2251; R.3050, p. 52:19-9; Resp. Ex. 29; Resp. Ex. 42.) She had no intent to return to Salt Lake City. (Resp. Ex. 31; R.2251, 2253.)[3]

Ms. Scott could come and go from the Rancho Santa Fe home as she pleased. (R.2266, 2267.) She had a key to the home and stayed there even when J.O. was not there. (*Id*.) Her friend Ms. Weissman testified that the couple lived together even while the house in Rancho Santa Fe was being purchased. According to Ms. Weissman, "[t]hey certainly lived together" from the "time they purchased the property until about May of that year." (R.3050, p. 20:10-16.)

Ms. Scott was not a mere guest in any of J.O.'s homes. She was given the garage door opener and the key code to J.O.'s Salt Lake City home and kept personal effects there. (R.3050, p. 82:5-8; *Id*., p. 200:15-20.) She spent the night there. (*Id*.,

[3] Despite Ms. Scott's acknowledgments in both her emails and statements to others that she intended to live at the Rancho Santa Fe home, at trial, Ms. Scott testified otherwise at trial—claiming that she had no intention of living at that house. (R.3050, p. 212:22-25.)

p. 163:14-16.) She had access to and the ability to come and go from that home as she pleased. (R.2261; R.3050, p. 81:15-21; *id*., p. 200:15-20.)

Ms. Scott could also come and go at will at the Sun Valley home when the couple was in Idaho. She had a key code to access that house. (R.3050, p. 200:21-23.) She kept her clothes (including winter clothes and sporting equipment) there. (R.2254.) Ms. Scott helped J.O. purchase items for and decorate the Sun Valley home on special occasions. (*See, e.g.*, R.2262 (listed on charge account for grocery store); R.2244 (purchasing Christmas garland and other decorations for Sun Valley home).)

J.O. and Ms. Scott represent that they live together full time

The home that J.O. and Ms. Scott purchased in Rancho Santa Fe was part of a golf community. (R.2244, 2266.) Upon arriving there, J.O. submitted the forms associated with both his and Ms. Scott's club status. (R.2267.) He was informed by the club as early as December 23, 2010, that Ms. Scott could have "Family Status" on his club membership if they were "living together and maintaining a common household." (*Id*.; R.2247.)

"This designation is not insignificant from the perspective of the Bridges Country Club that [J.O.] belonged to (in connection with the Rancho Santa Fe home) and it was considered to be tantamount to and equal to a spouse according to the testimony of Mr. Weissman, who is also a member of the Club." (R.2267.) Any

person designated with this status "must reside with the member on a full time permanent basis." (R.2247, ¶¶ 55, 57.) On the club application, J.O. listed Ms. Scott as the person with "family status." (*Id.*) He had the club application and was ready to submit it as early as December 23, 2010. (R.2244, ¶ 40; Resp. Ex. 14, p. 40.)

Ms. Scott knew that her membership privileges at Rancho Santa Fe would terminate if she failed "to continue residence with the member." (R.2247.) Ms. Scott and J.O. enjoyed the benefits of their membership at Rancho Santa Fe. (R.2267.) As a member of the Bridges club, Ms. Scott "enjoyed golf, cocktails, she could charge services, dinners, lunches at the club, attend club events and she wanted to be on a golf team." (R.2250, ¶ 77.)

J.O. is also a member of the Salt Lake Country Club. Records provided by the Salt Lake Country Club indicated that J.O. also designated Ms. Scott as his "significant other" at that club for 2010 and 2011. (R.2267.)

J.O. and Ms. Scott share common household duties

Joint finances/purchase decisions

J.O. paid the expenses associated with the couple's lifestyle, including meals and lodging starting in 2008. (R.2262, 2238.) Ms. Scott, in turn, helped J.O. arrange and keep track of his finances and orchestrate the couple's joint purchase decisions. J.O. had Ms. Scott listed as an authorized user on his credit cards with no restrictions. (R.2262, 2247.) According to J.O., Ms. Scott had permission to use his card in the

same capacity as he would give his (present) wife: Ms. Scott could make personal purchases (clothing, jewelry, etc.) as long as she had his permission in advance or J.O. was with her. (R.3050, p. 179:5-22.) For other necessities (gas, groceries, lodging, etc.), no such permission was required. (*See, e.g.*, R.2238, ¶ 8.)

Ms. Scott used J.O.'s credit cards for gas, groceries, entertainment, auctions, trips together, lodging, and other major purchases. (R.2262.) She would book airlines and hotels for the both of them. (Resp. Ex. 28, p. 1.) She was also in charge of and had permission to use J.O.'s cards to purchase wedding gifts, Christmas and birthday gifts, and gifts for the couple's grandchildren. (R.2254.) During the couple's travels, both Ms. Scott and her children charged expenses to J.O.'s card. (*Id.*) Ms. Scott was also listed as a permitted user on J.O.'s charge account at Atkinson's, a grocery store in Sun Valley. (R.2262.)

J.O. also paid other expenses of Ms. Scott's. During their relationship, J.O. suggested that Ms. Scott have a breast augmentation procedure. J.O. was involved in the decision-making process regarding which doctor to use and the extent of the augmentation, he attended the initial consult, and he paid the $18,000 bill. (R.2254, 2263; Resp. Ex. 44.) When Ms. Scott obtained an infection related to this procedure, J.O. paid the medical expenses associated with the treatment of the infection. (R.3050, p. 199:20-23; Resp. Ex. 4, p.22.)

Ms. Scott helped J.O. keep track of the account numbers and expiration dates on his credit cards. For example, Ms. Scott helped him change some automatic charges from one card to another. (R.2243, ¶ 31.)

When it came to the couple's joint purchase of the Rancho Santa Fe home, Ms. Scott arranged for the realtor. (R.2266.) She was involved in the decisions regarding the type of home the couple would purchase, and was responsible for selecting and presenting to J.O. for approval those homes that met the couple's joint requirements. (*Id*.) She was primarily responsible for picking out the location, and very much wanted the home to be in Rancho Santa Fe. (*Id*.)

Ms. Scott and J.O. share holidays and other major events together

Ms. Scott and J.O. celebrated holidays and special events together. (R.2269.) On October 31, 2010, Ms. Scott informed J.O. that she had just bought their tickets for Los Angeles for Thanksgiving. (R.2243.) On December 26, 2010, Ms. Scott posted pictures of Christmas in Sun Valley and commented on Facebook: "Sun Valley Christmas" and "Christmas in Sun Valley—with Noelle." (Noelle is Mr. and Ms. Scott's daughter.) (R.2244.)

In January 2011, J.O. and Ms. Scott went on a 25-day cruise which coincided with J.O.'s retirement. (R.2262.) The couple took Ms. Scott's daughter Scarlett to Grand Wailea in Hawaii to celebrate Scarlett's graduation. (*Id.*) "[J.O.], consistent with his view of the relationship with Petitioner, treated her children by giving them

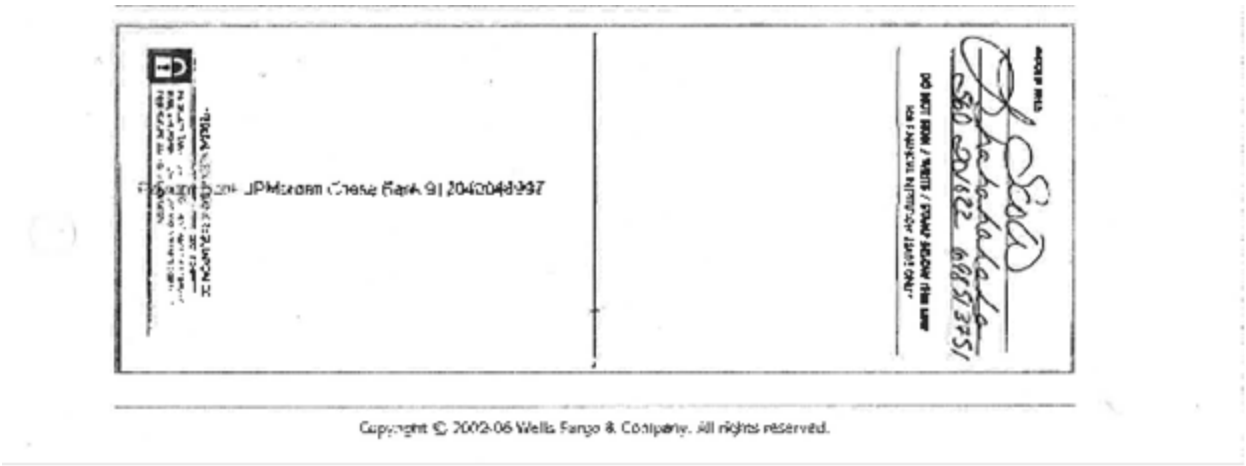
substantial financial gifts at appropriate occasions and enjoying holidays and travel with them, as well as Ms. Scott." (*Id.*) J.O. paid to ship Scarlett's car to California for college, and gave her $5,000 as a graduation gift. *Id.*

During Ms. Scott's relationship with J.O., her alimony becomes "fun money"

J.O. proposed marriage to Ms. Scott in Liberty Park in August or September 2010. (R.2263.) He told Ms. Scott that he had bought her a diamond, and instructed her and Ms. Scott's daughter to pick out a setting. (*Id.*) In a letter to Ms. Weissman, Ms. Scott stated, "we talked about marriage but I am not ready to give up my alimony . . . . I lowered my alimony so that when I did fall in love with a man it would be easy to give up that extra 'fun money.'" (Resp. Ex. 14, p. 8.)[4]

Ms. Weissman's perception was that Ms. Scott considered her alimony payments "discretion[ary]" money. (R.3050, p. 50:10-18.) Ms. Scott and J.O. contemplated how Ms. Scott could use these alimony payments, and J.O. suggested that she could invest them in a Roth IRA. (R.2263-2264.) On November 1, 2010, Ms. Scott endorsed the back of one of her alimony checks from Mr. Scott "hahahaha ha." (R.2243.)

[4] A binder titled "Respondent's Trial Exhibits" is part of the record but has not been marked with a record number.



(Resp. Ex. 13, p. 1.)[5]

Both J.O. and Ms. Scott were aware of the consequences that getting married would have on Ms. Scott's alimony payments, and told "third parties on three different occasions the reason why they were not married was because they knew [Ms. Scott's] alimony would terminate." (R.3019.) J.O. admitted to Stuart Weissman that he and Ms. Scott were buying a home that the couple would live in for the rest of their lives, but that he did not want Ms. Scott to lose her alimony and that is why they were not getting married. (*Id.*) On another occasion during the summer of 2010, J.O. stated to Mr. Weissman that he didn't want to get married right away because he didn't want Jill to lose her alimony. (*Id.*) Ms. Scott also indicated

[5] Ms. Scott's brief provides a new explanation for the "hahahahaha" endorsement. (App. Br. 13). At trial, Ms. Scott testified:

> Q: (By Mr. Green) What did you intend by [ha, ha, ha, ha, ha]?
> A: Nothing. Scribble, you know.
> Q: You didn't intend anything by it?
> A: No.

(R.3050, p.208:10-16.)

that the reason that the couple was not married is because she did not want to lose her alimony. (*Id*.)

J.O. & Ms. Scott separate as though they were married

J.O. and Ms. Scott physically moved into and stayed in the Rancho Santa Fe home for approximately six weeks together, beginning sometime around February 2011. (R.2270.) In April 2011, while J.O. was away, he informed Ms. Scott that he wanted to end the relationship. (R.2256.) At this same time, J.O. told Ms. Scott that she could keep his credit cards for now and continue to use them to buy gas and groceries. (R.2247.)

Even after this communication, Ms. Scott continued to act as though the Rancho Santa Fe home was hers. On April 10, 2011, Ms. Scott posted on Facebook a picture of herself in the pool and tub and commented: "Just another Sunday in Sunny California." She also posted a picture of the yard and wrote: "*I love my rose garden*." (R.2247 (emphasis in original).)

On April 11, 2011, Ms. Scott told J.O. to send all of her clothes and belongings from his Sun Valley home to her:

> Please have Leslie send all my clothes and belongings from Sun Valley, I was planning on getting them sometime this summer, but if you want to ship them that's okay with me. I have extra ski clothes in the guest bedroom closet along with gators, goggles and gloves. My golf clubs and golf shoes, too please. I don't need the snowshoes/boots you just bought me.

(R.2261.)

She also told J.O. that she was not moving back to Utah. (Resp. Ex. 31.) On April 13, 2011, Ms. Scott wrote to J.O.: "You asked me to marry you, to spend my life with you. I introduce you to Rancho Santa Fe and dream of mine to live here, you buy a dream home for us to share our lives in. (along with all our children). We decorate it with my furniture and furniture we pick out together." (Resp. Ex. 29.)

Around this same time, Ms. Scott decided to go on a shopping spree with J.O.'s credit cards, spending at least $4,000 on clothing, jewelry, etc. (R.2248, *also* R.3050, p. 28:7-20 ($2,000 on wine).) When J.O. confronted her about the purchases, Ms. Scott reminded him that she was an authorized user on his account. (Resp. Ex. 28, p. 2.) J.O. expressed concern that he could no longer trust her, and indicated that he wanted her out of the Rancho Santa Fe house and was canceling his credit cards. (*Id*., p. 3.)

J.O. and Ms. Scott started discussions on a financial settlement relating to their relationship. (R.2248.) "These negotiations were over potential legal rights and obligations owed one to the other arising out of their relationship." (R.2268; *see also* R.3050, p. 26:7-16) ("[Ms. Scott] thought that she was entitled – and I agreed – to some compensation" from J.O.).)

Overall, J.O. paid $110,000 in settlement to Ms. Scott through three wire transfers of $40,000, $20,000, and $50,000. (R.2249.) After outlining the terms of the proposal to Ms. Scott, J.O. wrote, "Also, though I believe you have no cause

against me I would also like you to sign a release from all future claims. Only the attorney would win on that one." (R.2268.)

J.O. wanted his Porsche back from Ms. Scott and indicated that as part of their separation, she could not keep the car. (R.2249.) He suggested that Ms. Scott find a new car she liked, and indicated that he was willing to give her money to lease the car for the first year or pay her $36,000 to buy a car. (*Id*.) Ms. Scott held both J.O.'s car and the keys to the Rancho Santa Fe house until she received the final $50,000 installment from him. On May 24, 2011, she wrote:

> I will agree to tell you where your car is, have both garage door openers and a full tank of gas in it. I will mail both keys to 4315 Via Ravello immediately upon receiving 50K in my chase account #XXXXX routing #XXXXXXX. When the money is in my account, you may consider this email as the disclaimer to any and all future claims against you."

(R.2249 (emphasis in original).) The following day, she wrote:

> Your car is at the airport short term parking 3rd level, I wrote the coordinates on the ticket. The ticket along with your Rolex, and the keys are in your mailbox in a small plastic bag . . . You stole my dream of Rancho Santa Fe . . .*There you are in the house you bought for US alone*.

(R.2250 (emphasis in original).)

None of J.O.'s prior dating relationships had ended with a financial settlement. None of his prior girlfriends had been given keys or other unattended access to his Salt Lake home. None of them had been authorized to use his credit cards. He had not paid for any medical care for any prior girlfriends. Other than one gift for a

girlfriend's son who was leaving on a mission, J.O. did not give substantial gifts to the children of other girlfriends. He did not give any prior girlfriends advice on how to use their alimony money. (R.3050, p. 156:14-25; *id*., p. 157:9-20.)

Ms. Scott has had "many boyfriends" whose credit cards she did not use. (R.3050, pp. 193-194:17-7.) Nor had any relationships with prior boyfriends ended with a financial settlement. (*Id*., p. 194:10-15.)

SUMMARY OF ARGUMENT

The court of appeals did not err when it concluded that Ms. Scott cohabitated with J.O. The court of appeals agreed with the trial court that, among other things, Ms. Scott and J.O.'s relationship was more than a serious dating relationship and that they lived together as husband and wife. Both the trial court and the court of appeals rejected Ms. Scott's claim that the couple's time together in the Rancho Santa Fe home was nothing more than a vacation.

For the first time, Ms. Scott challenges several of the trial court's factfindings. Ms. Scott did not challenge any of these findings in the court of appeals. Instead, she simply construed (and continues to construe) the evidence in her favor and disregards the trial court's contrary interpretation. Ms. Scott's arguments misapprehend her burden on appeal. The trial court's factfindings are reviewed for clear error. To successfully challenge these findings, Ms. Scott must have clearly raised her challenges in the court of appeals by addressing the evidence that

supported the trial court's findings, and then demonstrating that the trial court's reliance on this evidence was clear error. Ms. Scott, however, never preserved any of the challenges that she makes now and the court of appeals did not err in referencing the trial court's findings of fact.

The court of appeals did not err in concluding that Ms. Scott cohabitated with J.O. Under Utah law, cohabitation is defined according to its ordinary meaning—to live together as husband and wife. The definition of cohabitation is not confined to any preconceived elements because not all marriages are the same. Instead, cohabitation turns on whether the couple's relationship has certain "hallmarks of marriage." These "hallmarks" generally fall within two categories: (1) shared residence(s), and (2) shared common household, involving shared expenses, shared decisions, shared space, shared meals, etc.

In this case, the court of appeals did not err in recognizing that Ms. Scott shared a common residence with J.O. at the Rancho Santa Fe home. This conclusion was supported by the trial court's undisputed findings that, among other things, Ms. Scott stated that she and J.O. purchased the house in Rancho Santa Fe to "grow old" together; Ms. Scott kept her personal belongings including her furniture in his homes; she came and went from his homes as she pleased, etc. The court also did not err in finding that she shared a common household with J.O. Among other indicia, Ms. Scott was given J.O.'s credit cards to pay for her living expenses, she shared

decisions regarding major purchases with J.O. (including the purchase of the Rancho Santa Fe home and the sale of her Salt Lake home), she shared a bedroom with J.O., and she shared meals with J.O.

Ms. Scott does not meaningfully challenge the court of appeals' holding. Instead, Ms. Scott advances three arguments, all of which are unsupportable and inconsistent with Utah law. First, Ms. Scott argues that the court of appeals allegedly erred because couples cannot cohabitate unless they share a common residence that constitutes their domicile per the tax code and other irrelevant statutes. That is incorrect. Utah does not prescribe to the same rigid "one-home" or domicile test set forth in the tax code. Utah courts have advised against such a formulistic approach. Ms. Scott's approach ignores the context of this case. Moreover, such an approach ignores this Court's advisement that not all marriages are the same. Even if the domicile test as set forth in the tax code were the test, the court of appeals did not err in concluding that Ms. Scott and J.O. were not domiciled in their respective Salt Lake homes. Ms. Scott moved out of that home. Additionally, she rarely stayed in that home, but instead spent both her days and nights in J.O's homes or on travel with J.O. J.O. claimed that he lived on a full time and permanent basis with Ms. Scott.

Second, Ms. Scott claims the court of appeals allegedly erred because Ms. Scott did not live with J.O. long enough to constitute cohabitation under the statute. That argument is unpersuasive. Utah's Cohabitation Statute does not set forth a

deadline in which cohabitation is set to occur, nor does it allow couples who live together in a marriage-like-living arrangement a trial period.

Third, Ms. Scott argues that the court of appeals erred when it terminated her alimony because Ms. Scott and J.O. were no longer living together at the time Mr. Scott's termination petition was filed. Ms. Scott's argument is not supported by the language or purpose of Utah's cohabitation statute or the divorce decree. Under this statute, alimony automatically terminates upon the establishment of cohabitation. Once a party has cohabitated, she cannot avoid the consequences thereof by one half of the couple later moving out.

ARGUMENT

I. MS. SCOTT HAS NOT PRESERVED HER CHALLENGES TO THE TRIAL COURT'S FACTFINDINGS.

On certiorari review, this Court reviews the decision of the court of appeals, and not that of the trial court. *Judge v. Saltz Plastic Surgery, P.C.*, 2016 UT 7, ¶ 11, 367 P.3d 1006. Despite this Court's limited jurisdiction, Ms. Scott raises several factual challenges of which she never sought review in the court of appeals. For instance, Ms. Scott claims that the panel allegedly erred by stating that "Jillian and [J.O] brought significant household property together in one place" at the Rancho Santa Fe home. (App. Br. 39.) She also argues that the court of appeals allegedly erred when it found that Ms. Scott and J.O. were engaged. Finally, Ms.

Scott challenges the court's statement that Ms. Scott's daughter—Scarlett—"moved in with the couple." (*Id*., 41.)

There is a fundamental problem with Ms. Scott's attribution of error to the court of appeals. The court of appeals did not make these findings—the trial court did.[6] Nowhere in Ms. Scott's brief to the court of appeals did she make the sufficiency of the evidence arguments that she makes now. Indeed, in her reply brief to the court of appeals, Ms. Scott clarified that she was not making a sufficiency of the evidence challenge. (Ct App. Reply Br., pp. 1 & 4-5.) Consistently, the court of appeals never analyzed whether any of the trial court's factfindings were clearly erroneous. *Scott*, 2016 UT App. 31. Because Ms. Scott did not preserve her sufficiency of the evidence arguments, this Court should decline to review them on appeal.

In any event, even had this issue been preserved, the trial court's findings are not clearly erroneous. The standard of review in cohabitation cases has two components: First, the court's factual conclusions are reviewed under a clearly erroneous standard. *Levin v. Carlton-Levin*, 2014 UT App 3, ¶ 9, 318 P.3d 1177.

[6] *See* R.2266 (trial court's finding that "Petitioner moved a significant amount of furniture and belonging to the Rancho Santa Fe home and employed professional movers to handle that for her" and that Ms. Scott and J.O. "shopped together to further furnish the home"); R.2264 (trial court's finding that J.O. proposed marriage to Petitioner); R.2241¸¶ 22 (finding that Ms. Scott stated that the Rancho Santa Fe home was being purchased for the couple as well as Ms. Scott's daughter to live in together).

All evidence in the case, and reasonable inferences therefrom, are construed in favor of the court's factfindings. *State v. Nielsen*, 2014 UT 10, ¶ 30, 326 P.3d 645. The court's ultimate conclusion regarding cohabitation is reviewed for correctness. *Levin*, 2014 UT App 3, ¶ 9. *see also Myers v. Myers*, 2011 UT 65, ¶¶ 32 & 37, 266 P.3d 806 (same).

Ms. Scott, while purporting to acknowledge these distinctions in the court of appeals, failed (and continues to fail) to afford the required deference – or any deference – to the trial court's factfindings. This is evident for each of the following challenges she makes now, all of which are supported by the evidence:

- Support for the trial court's finding that J.O. and Ms. Scott brought significant property together in the Rancho Santa Fe Home, includes: Resp. Ex. 3, pp. 5-6 (Ms. Scott's answers to interrogatories detailing items that were moved by Ms. Scott from Salt Lake to Rancho Santa Fe); Resp Ex. 6 (packing slip detailing those items that Ms. Scott moved from Rancho Santa Fe back to Salt Lake when the couple separated); Resp. Ex. 29 (Ms. Scott's email to J.O. stating "we decorate [the Rancho Santa Fe home with *my furniture* and the furniture that we pick out together" (emphasis added)); R.2247, R.3050 p. 104:9-11 (J.O. and Ms. Scott jointly purchased a couch together); R.2245, Resp. Ex. 32 (J.O. had his Porsche shipped from Salt Lake to the Rancho Santa Fe home).

- Support for the trial court's finding that J.O. proposed to Ms. Scott, includes: Resp. Ex. 5, pp. 18-19 (Ms. Scott's deposition testimony that J.O. proposed to her at Liberty Park); Resp. Ex. 29 (Ms. Scott's email to J.O. stating: "You asked me to marry you, to spend my life with you.")
- Support for finding that Ms. Scott's daughter moved into the Rancho Santa Fe home, includes: R.2241(Ms. Scott's email stating that "J.O. was getting into debt 4 a home for [Ms. Scott] and Scarlett."); R.2249, ¶ 67 (stating that Scarlet and Ms. Scott "would be out [of the Rancho Santa Fe house] by Sunday the 15th"); R.2251, R.3050 p.27:10-14 (testimony that Ms. Scott's daughter, Scarlett, was going to stay in the Bridges, Rancho Santa Fe home).

Throughout her brief, Ms. Scott also makes other unpreserved, but more veiled, challenges to the trial court's factfindings. This is apparent as early as page one of Ms. Scott's brief, in which she claims that the court of appeals ruled that "Jillian cohabitated with [J.O.] as of the moment they entered the California Vacation house." (App. Br., p. 1; *see also id*., pp. 8-10, 27, 30 (repeatedly insisting that she and J.O. were simply "vacation[ing]" together in the Rancho Santa Fe home).) Ms. Scott's characterization of J.O. and Ms. Scott's time together in the California home as "vacationing" is in reality nothing more than an unpreserved disagreement with the trial court's (not the court of appeals) interpretation of the evidence. The trial court did not find J.O.'s and Ms. Scott's time together in the

Rancho Santa Fe home to be mere vacationing together; rather, the trial court found that Ms. Scott and J.O. intended the Rancho Santa Fe home to be their joint full time residence where they planned on "sharing their lives together." (R.2267-68.)

Ms. Scott also makes other similarly veiled attacks on the trial court's factual conclusions. For example, she implies that J.O. and Ms. Scott were merely dating when they moved in together. (App. Br., 31; 39.) This characterization conflicts with the trial court's factual conclusion that "their relationship was neither casual nor mere dating." (R.2268.) It also ignores the couple's own testimony that there were many aspects of this relationship that did not exist with others whom they had dated. *See* pp. 25-26, *supra*. Other examples of implicit (but unsupported) challenges to the trial court's factfindings abound in Ms. Scott's brief.[7]

[7] *Compare, for example*, App. Br., 30 (claiming no support for conclusion that J.O. was domiciled anywhere other than Salt Lake) *with* pp. 13-18,21, *supra* (evidence that couple moved their belongings to California, evidence that J.O. and Ms. Scott intended to grow old together in California home, evidence that J.O.'s significant other had moved away from and had no intention of returning to Salt Lake, J.O.'s statement that he lived on a permanent full time basis with Ms. Scott, evidence of J.O.'s engagement to Ms. Scott); App. Br., 31 (claiming no support for conclusion that Ms. Scott moved out of her house) *with* pp.10, 16, *supra* (evidence that both Ms. Scott and J.O. hardly lived in Salt Lake and that Ms. Scott moved out of her home); App. Br., 41 (claim that Ms. Scott never intended California home to be her residence and that she was only staying in the home to recover from complications associated with her breast surgery) *with* pp. 15-17, *supra* (evidence of Ms. Scott's intent to make the Rancho Santa Fe house her permanent home).

Rule 24 of the Utah Rules of Appellate Procedure describes the requirements that an appellant must meet when challenging a trial court's factual conclusions. This rule is generally referred to as the "marshaling requirement." Under this rule, "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." Utah R. App. P. 24(a)(9). The marshaling requirement includes both direct and circumstantial evidence. *See Nielsen*, 2014 UT 10, ¶ 47.

"[A] party challenging a factual finding or sufficiency of the evidence . . . will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal." *Id*. ¶ 42. Moreover, an appellate court's assessment of a party's claim on appeal is certainly affected ("and greatly undermined") by assertions regarding insufficiency of evidence when the appellant has failed to acknowledge material evidence supporting the finding(s). *Id*. ¶ 44.

In this case, Ms. Scott did not clearly address her marshaling obligation in the court of appeals. She did not indicate (or at least clearly indicate) which, if any, of the trial court's facts she was challenging. Instead, she intertwined her challenge to the trial court's factual conclusions with her legal arguments, thereby implying these factfindings should be reviewed under a correctness standard. Ms. Scott's failure to adequately identify her factual challenges and marshal the

evidence surrounding these challenges undermine her argument, and the court of appeals did not err in referencing the trial court's factfindings.

II. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT MS. SCOTT COHABITATED WITH J.O.

A. Background of Utah's cohabitation statute

Utah Code § 30-3-5(10) provides that "alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person." This provision first appeared in the code in 1979. Prior to that date, alimony only terminated upon remarriage. 43rd Legislature, Utah House of Representatives, Floor Debate, Disc. No. 5 (February 26, 1979 morning session). At that time, social mores were seen as preventing a receiving spouse from cohabitating with a person of the opposite sex. *Id*.

By 1979, however, cultural norms no longer prevented a couple from living out of wedlock. The Legislature was concerned that given these new social norms, a supporting spouse would be left paying support despite the receiving spouse entering into a *de facto* marriage. As stated by its sponsor (Rep. Pace), the purpose of the new law was to establish a public policy that if a couple chose to "share the bed," then they must "share the board." The statute allowed courts to grant supporting spouses relief from alimony when the receiving spouse chooses to live with a person "under conditions consistent with marriage." *Id*.

The cohabitation statute was amended in 1995. In the prior version, the statute "predicate[d] termination . . . on a showing that the former spouse [was] 'residing' with a person of the opposite sex." *Myers v. Myers*, 2011 UT 65, ¶ 18, 266 P.3d 806 (alterations in original). The 1995 amendment changed the language "residing" to "cohabitation." As Sen. Hillyard stated, the change was to bring the language of the statute in line with the Utah Supreme Court's decision in *Haddow v. Haddow*, 707 P.2d 669 (Utah 1985). 51st Legislature, Utah Senate, Floor Debate, Tape No. 26 (February 16, 1995 general session).[8] The term "cohabitate" more than "reside" encompassed the intent of the statute, *i.e.*, that if the receiving spouse has entered into a substitute marriage relationship, alimony should terminate:

> If someone really is cohabitating, they are living with another person in that companionship relationship that is at least commensurate with marriage, then alimony ought to stop. . . . . If they are in a substitute marriage relationship, alimony ought to end.

51st Legislature, Utah House of Representatives, Floor Debate, Tape No. 1 (January 23, 1995 morning session).[9]

B. Hallmarks of "liv[ing] together as husband and wife"

Under Utah law the term "cohabitation" is defined in accord with its ordinary meaning—"to live together as husband and wife." *See Haddow*, 707 P.2d

[8] *Available at* http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=15582&meta_id=477350.

[9] *Available at* http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=9294&meta_id=405408.

at 671 (internal quotation marks omitted). "The Utah Supreme Court has never 'delineate[d] a list of required elements of cohabitation because there is no single prototype of marriage that all married couples conform to.'" *Levin*, 2014 UT App 3, ¶ 15 (alterations in original) (quoting *Myers*, 2011 UT 65, ¶24). "What Utah courts have done 'is identify general hallmarks of marriage' (and thus cohabitation)." *Id*. (quoting *Myers*, 2011 UT 65, ¶¶ 23-24).

These "hallmarks include a shared residence, an intimate relationship, and a common household involving shared expenses, shared decisions, shared space, and shared meals." *Id*. (internal quotation marks omitted.) The court is not limited to these factors, and may consider other hallmarks that are often associated with marriage. *See id*. In analyzing such hallmarks, the ultimate question is whether the parties' relationship is "akin to that generally existing between a husband and wife." *Roberts v. Roberts*, 2014 UT App 211, ¶ 52, 355 P.3d 378 (quoting *Myers*, 2011 UT 65, ¶ 22).

In this case, the court of appeals found that the trial court made (unchallenged) subsidiary findings on several hallmarks of a *de facto* marriage.

1. Shared residence(s)

A shared residence means the "sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of

time." *Haddow*, 707 P.2d at 672. In other words, the parties must intend to establish a home together on a continuous basis.

A shared residence can be found if there is evidence that a couple spends their nights together in a common home, and the couple can come and go from that home without restrictions. *See e.g.*, *Levin*, 2014 UT App. 3, ¶¶ 4; *Myers*, 2011 UT 65, ¶ 37; *Sigg v. Sigg*, 905 P.2d 908, 911, 917-18 (Utah Ct. App. 1995); *Haddow*, 707 P. 2d at 673. These factors are not exclusive, and courts are free to consider any other factors suggesting that the couple uses the residence as a home. *See Myers*, 2011 UT 65, ¶¶ 23-24, n.2 & n.3. Other factors that courts have considered include whether a couple keeps personal effects at the home and shares expenses for the residence. *Pendleton v. Pendleton*, 918 P. 2d 159, 160-61 (Utah Ct. App. 1996).

The first factor—spending nights at the home—is self explanatory, and undisputed in this case. The second factor—whether a couple can come and go without restriction—can be established by evidence that the receiving spouse has been given a key or other evidence demonstrating that the receiving spouse stays in the home when her paramour is not there. *Haddow*, 707 P.2d at 673; *see also Sigg*, 905 P.2d at 917-918.

The giving of a key is significant because it symbolizes unfettered access to the residence in question. Other factors, such as the sharing of expenses for the

home, are also helpful in answering this question, but the lack of such evidence in a particular case is not dispositive. *Myers*, 2011 UT 65, ¶ 23; *Haddow*, 707 P.2d at 673.

Here, the court's task in determining whether J.O. and Ms. Scott established a common residence was made more complicated because they had multiple homes and traveled extensively. The court, however, found an abundance of evidence to show common residency. Among other things, the court noted that Ms. Scott had been given a key to the Rancho Santa Fe home. There was also evidence that Ms. Scott in fact came and went from that home as she pleased, even when J.O. was not there.

Other evidence supported the court of appeals conclusion as well. The couple themselves represented to others that they lived together on a permanent full time basis. *See* p. 18, *supra*. Ms. Scott moved her furniture into the home. When they split up, she said she was not going to "*move back*" to Salt Lake City – odd language to use if someone has allegedly not moved away in the first instance, as Ms. Scott claimed.

2. Shared decisions, space, expenses, meals, etc.

Another factor relevant to the cohabitation determination is whether the couple shared a common household. Factors indicating a common household include shared expenses, shared decisions, shared space, and shared meals. *See* p.

37, *supra*. Again, these factors are not exclusive and courts may consider other factors that inform the decision of whether the relationship is a *de facto* marriage.

In this case there were a multitude of findings that the couple shared a common household. Among other things, J.O. supported Ms. Scott's lifestyle by giving her access to his credit cards. Ms. Scott used these cards to buy furnishings, gas, groceries, entertainment, auctions, trips together, lodging, and major purchases. *See* pp. 19, *supra*.

Additionally, the couple shared important decisions typical of a marital relationship. For instance, when it came to purchasing the $2.5 million Rancho Santa Fe home, Ms. Scott was in charge of retaining the realtor and had a substantial say in which home would be purchased. She also took a major role in decorating and furnishing that home. J.O. participated in the decision for Ms. Scott to have breast augmentation, he helped choose the doctor and paid for the procedure. The couple shared meals together, slept in the same bedroom, and took all their holidays and vacations together. Ms. Scott drove J.O.'s cars, and J.O. gave significant gifts to Ms. Scott's children. *See* 20-21, 5 *supra*.

There were other factfindings relevant to a determination that the couple entered into a *de facto* marriage, not simply a "dating relationship." Among other things, Ms. Scott equated her alimony to fun money. *See* pp. 21-23, *supra*.

Implicit in this finding is that J.O. had not just been sharing Ms. Scott's bed but was also "sharing [her] board."

Related to these findings is the trial court's conclusion that J.O. had proposed and/or suggested marriage to Ms. Scott in July 2010, and that the reason they were not married already (even though they were living together) was because Ms. Scott did not want to lose her alimony. *See* pp. 21-22, *supra*. Despite Ms. Scott's suggestion otherwise, this factor is certainly relevant. The very purpose of the cohabitation statute is to prevent people from doing exactly what Ms. Scott did—"clearly liv[e]" with someone without acknowledging it as a marriage to avoid losing alimony.

Also significant was the substantial financial settlement that Ms. Scott extracted from J.O. when their relationship ended. By entering into this agreement the couple tacitly acknowledged that their relationship was something more than a casual dating relationship: "[It] was a relationship with legal rights that may attach which they duly resolved after negotiations and consideration of their rights and liabilities." (R.2268.)[10]

[10] Ms. Scott devotes much of her briefing to suggesting that the financial consequences of the cohabitation statute are somehow unfair to her or to women in general. While her reasoning is far from clear (and would seem more properly directed at the legislature in any event), it certainly would not apply to someone like Ms. Scott who obtains a large cash settlement from the person with whom she has cohabited. Moreover, she knew quite well what she was doing, even to the

III. MS. SCOTT'S LEGAL ARGUMENTS AGAINST A FINDING OF COHABITATION ARE NOT SUPPORTABLE.

Ms. Scott did not meaningfully challenge the trial court's subsidiary factfindings, which were more than sufficient to sustain the court of appeals ultimate conclusion that Ms. Scott and J.O. were cohabitating. Faced with rather overwhelming factual evidence against her, Ms. Scott offers three legal arguments for why Section 30-3-5(10) should not apply to her, none of which has merit.

A. Ms. Scott's argument that couples who live in more than one home cannot "cohabit" is unsustainable.

Ms. Scott's principal contention is that, as a matter of law, a couple cannot legally "reside" in more than one home, even if they own more than one home and regularly travel among those homes. Thus, according to Ms. Scott, if a couple engages in conduct that constitutes "cohabitation" in every other way, they can still avoid consequences on alimony by simply relocating periodically.

The court of appeals did not buy this argument, and for good reason. First, Utah courts have never engaged in a rigid domicile or "one home" analysis. In *Haddow*, 707 P.2d 669, for example—where the couple each maintained a separate home—this Court did not engage in a formulistic test to determine which of the two homes the couple's true domicile was and then determine whether the couple shared that home. *Id*. at 673-74. Rather, this Court focused on whether the couple

---

point of taunting her ex-husband with snide commentary ("hahahahaha") on the back of an alimony check.

lived together in either one or both of the two homes in a marriage-like arrangement. Similarly, in *Knuteson v. Knuteson*, 619 P.2d 1387 (Utah 1980), another case where two homes were involved, this Court did not employ Ms. Scott's "one-home" analysis. Rather, the question was whether the couple's living arrangements were akin to a marriage.

Second, the "one-domicile" formulation that Ms. Scott proposes is based on irrelevant tax code principles. *See, e.g., O'Rourke v. Utah State Tax Com'n*, 830 P. 2d 230 (Utah 1992). The purpose of establishing "domicile" for tax, as well as other purposes, is not the same as the purpose for establishing "common residency" for cohabitation purposes. *Id.*; *see also Keene v. Bonser*, 2005 UT App 37, ¶ 7, 107 P.3d 693. As the court of appeals correctly noted, the definition of domicile as found in the statutes Ms. Scott cites (*see* App. Br., pp. 28-29), "focuses more on the reach of local governments," whereas the Cohabitation Statute focuses on the relationship of the couple. *Scott*, 2016 UT App. 31, ¶ 19.

Third, the court of appeals correctly held that the "domicile" test that Ms. Scott proposes is inconsistent with Utah law. As noted above, the "common residence" test is meant to be flexible, and certain factors may weigh more heavily in some cases than others depending on the facts and circumstances of each case. Put simply, not all "marriages" are the same.

This principle is illustrated by *Myers*, *supra*. In that case, the trial court imposed a strict application of the elements for cohabitation and in doing so lost sight of the ultimate question for its determination. The couple could come and go from the particular home in question, both appeared to have a key, and they had an intimate relationship. The lower court therefore concluded that they cohabitated.

The court of appeals reversed, and this Court affirmed, because under the circumstances of that particular case, the factors employed did little to inform whether the couple actually lived together akin to husband and wife. The wife was living in her parents' house and her living arrangements were clearly temporary. The boyfriend was a foster child in that house. They were both "guests" of the home, and the question the trial court should have asked is whether the couple shared the home as "separate guests" or in a manner consistent with husband and wife. *See Myers*, 2011 UT 65, ¶ 39. The Supreme Court held that the "common residency" element was not met because the couple's living arrangements did not resemble those of a married couple—for example, Ms. Myers slept on the couch while M.H. had a separate room, they shared no common household duties or expenses, and the nature of their sexual relationship was likewise not permanent. *Id*.

Following the Supreme Court's guidance in *Myers*, the court of appeals here focused on whether, given the couple's multiple homes and jet-set lifestyle, they still lived as husband and wife. Ms. Scott asks this Court to do what this Court advised

against in *Myers*—*i.e.*, ignore the facts of the particular case and instead follow a rigid formula. The facts of this particular case, as found by the trial court, are that Ms. Scott and J.O. lived in more than one home, and traveled frequently in between. An artificial "one-home-maximum" test would make no sense in this context.[11]

Indeed, even in the tax context, the "one home" or "domicile" test has been seen as problematic when it comes to the outer fringes of society (*e.g.*, the very rich and the very poor). *See, e.g.*, *Texas v. Florida*, 307 US 398, 429 (1939) (Frankfurter, dissenting) (stating the idea of domicile when applied to the very rich is a legal fiction); *see also In re Dorrance's Estate*, 163 A. 303 (Pa. 1932), *cert. denied* 287 U.S. 660, 53 (1932), *and Dorrance v. Thayer-Martin*, 184 A. 743 (N.J. 1936), cert. denied 298 U.S. 678 (1936) (where two states independently determined that a taxpayer was domiciled in their respective states).

Finally, even if Ms. Scott's "domicile" test were adopted in Utah, and even if the court of appeals should have ignored the couple's mobile living arrangements, the court was still correct in its analysis. In a general sense, domicile means physical presence plus the intent to return or remain. *See O'Rourke*, 830 P. 2d at 232, n.1. The question would then become where was Ms. Scott domiciled? Was the trial court required to find that it was her Salt Lake

[11] Nor would Ms. Scott's argument make sense in other contexts. Under her theory, a couple who traveled for a living, or who transferred frequently, or who were in the military, or who do not have a steady home, could never qualify as "cohabitating." There is no support in the statute for this interpretation.

house? As the court noted and Ms. Scott admitted, Ms. Scott was essentially never there. She spent the vast majority of her days and nights in one of J.O.'s homes. *Id.*

She put her Salt Lake house on the market in July 2010 and, according to her own emails, moved out. She asked that mail not be sent there because she would not get it timely, and by November 2010 she had switched to a P.O. Box. Even when J.O. and Ms. Scott separated, Ms. Scott made clear to J.O. she did not intend to return to Salt Lake. *See* p. 16, *supra*.

As for J.O., the court was likewise entitled to find that his domicile was Rancho Santa Fe. Among other things, J.O. represented that he lived with Ms. Scott on a full time permanent basis; Ms. Scott testified that "she and J.O. both "hated Salt Lake and wanted to live in Rancho Santa Fe;" J.O. proposed to Ms. Scott; and J.O. transported personal items and possessions to the Rancho Santa Fe home.

B. The court of appeals was correct in declining Ms. Scott's invitation to insert a deadline into the cohabitation statute.

Ms. Scott also claims that the time she lived in the Rancho Santa Fe home was too short to amount to cohabitation. According to her, couples should be given a trial-period to determine whether their marriage-like-living arrangement will work. This Court should decline Ms. Scott's invitation to interpret the statute or this Court's precedent in this manner.

While other jurisdictions have crafted their cohabitation statutes to specify a precise number of days that a couple must live together before cohabitation occurs, Utah's statute does not allow for such a trial period. *Compare* S.C. Code Ann. § 20-3-150 (2002) (defining cohabitation to mean that the "supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days") *with* Utah Code § 30-3-5(10). Instead, this Court examines whether the parties intended to enter into a relationship akin to marriage by living together. *See Myers*, 2011 UT 65, ¶ 26 ("cohabitation is not a sojourn, nor a habit of visiting, nor even remaining with for a time, the term implies continuity").

This principle is illustrated by the Court's holding in *Knuteson*, 619 P.2d 1387. In that case, an ex-wife (recipient of alimony) moved in with her male neighbor after her husband became "considerably in arrears in his alimony payments." *Id*. at 1388. The ex-wife was thereby left destitute. During her two-month stay, the ex-wife began a sexual relationship with the neighbor. During this same time frame, the ex-wife worked diligently to garnish her ex-husband's wages so that she could quickly move back into her home. As soon as the ex-wife was financially able to do so, she moved back home. In conducting its cohabitation analysis, this Court found it significant that neither the ex-wife nor neighbor "consider[ed]" the neighbors' home to be the ex-wife's "principle domicile for more than a temporary or brief period of time." *Haddow*, 707 P.2d 669, 672

(citing *Knuteson* at 1399). The ex-wife always considered her living arrangements with the neighbor to be a temporary or brief condition. In other words, by moving in with the neighbor, the ex-wife did not intend to establish a settled abode with him.

This Court's decision in *Haddow*, 707 P.2d 669, and *Myers*, 2011 UT 65, are in accord. In *Haddow*, this Court was asked whether an alimony recipient's time spent in boyfriend's home amounted to cohabitation. In making this determination, this Court did not look to some arbitrary deadline. Rather, the Court analyzed factors relevant to determining whether the couple's actual living arrangements in the boyfriend's home were akin to that of a married couple. The Court held that they were not: The ex-wife did not even have a key to the boyfriend's home and did not move any furniture or belongings (other than toiletries) into the boyfriend's home.

Likewise, in *Myers*, the couple only lived together for a short period of time (during the "spring and summer of 2007"). This Court, however, did not analyze whether this period was too short to constitute cohabitation. Instead, consistent with its precedent, the Court focused on whether the couple entered into a living arrangement akin to marriage.

In contrast with the foregoing cases, Ms. Scott and J.O. intended to enter into a marriage-like relationship: "Their move to the California house represented a

deliberate escalation of their relationship to something akin to marriage with all the trappings of cohabitation." *Scott*, 2016 UT App. 31, ¶ 24.

Ms. Scott lived at the Rancho Santa Fe home for approximately eighty-seven days, from February 17, 2011 until approximately May 15, 2011, during which time her financial settlement/separation from J.O. was finalized. Ms. Scott's suggestion that this Court give her at least two-months (or longer) to "try on" a marriage-type relationship, just in case it doesn't work out, is not supported by precedent or the statute.

Moreover, the court of appeals erred in limiting the time of cohabitation to six weeks. As correctly recognized by the trial court, J.O. and Ms. Scott were cohabitating "at least by December 22, 2010, if not earlier, until the separation and settlement of their claims in May 2011." (R.2270.) Limiting the cohabitation analysis to the time the couple cohabitated in the Rancho Santa Fe home was err given the transient nature of the couple's living arrangement. (*Id*.) As of December 22, Ms. Scott was spending almost every night with J.O., had unfettered access to all of J.O.'s homes, and the couple had jointly obtained a home and were preparing to move into it. A close friend testified that they were living together during this period. *See* p. 16, *supra*.[12]

[12] Ms. Scott makes much of this Court's statement in *Haddow* citing *Knuteson* for the proposition that a stay of two months and ten days did not establish a settled abode. *See Haddow*, 707 P.2d at 673 (citing *Knuteson*, 619 P.2d at 1389. This

C. The court of appeals correctly decided that under the cohabitation statute, Mr. Scott's obligation to pay alimony terminated when Ms. Scott began cohabitating with J.O.

Ms. Scott argues that the court of appeals erred in terminating alimony because she was no longer cohabitating with J.O. when Mr. Scott filed his petition. According to Ms. Scott, if a couple stops living together, the court can no longer terminate alimony. There are several problems with this argument. First, Ms. Scott failed to preserve this argument in the trial court. *See* Record, *passim*. Therefore it should not have been considered by the court of appeals.

Second, Ms. Scott's interpretation of Utah law is incorrect. "The plain language of [Utah's cohabitation statute] indicates the legislature's express mandate that the order imposing alimony terminate automatically upon the establishment of cohabitation, thereby eliminating any future alimony obligations." *Black v. Black*, 2008 UT App 465, ¶ 8, 199 P.3d 371; Utah Code § 30-3-5(10).

Utah's statute is different from the cohabitation statutes of other states. A number of states treat cohabitation or even remarriage as a change in circumstances, which may nonetheless warrant the continued obligation to pay alimony. *See, e.g.*, Conn. Gen. Stat. § 46b-86(b) (2014) (authorizing superior courts to modify, suspend, or terminate alimony upon a showing that the recipient "is living with another person

---

statement, however, cannot be divorced from the factual circumstances of *Knuteson*. As discussed above, the facts in that case were that the couple's two-month stay together was always intended to be temporary.

under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party"); Fla. Stat. § 61.14(1)(b)(1) (2014) (authorizing the court to reduce or terminate alimony upon proof that "a supportive relationship has existed between the obligee and a person with whom the obligee resides"); Okla. Stat. Title 43, § 134(C) (2014) (granting the court the power to reduce or terminate alimony payments if cohabitation is alleged and there is "proof of substantial change of circumstances of either party to the dissolution of marriage relating to need for support or ability to support").

By contrast, in Utah, cohabitation automatically terminates alimony upon a finding of cohabitation regardless of whether the couple eventually separates or terminates their cohabitation. *See* Utah Code § 30-3-5(10) ("Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person."). This provision is both similar to and stands in contrast with the provision of the code dealing with automatic termination upon remarriage. *See id* § 30-3-5(9) (terminating alimony but not requiring court involvement). In cases of annulment, alimony can be reinstated only if certain conditions are met. *Id*. ("However, if the remarriage is annulled and found to be void *ab initio*, payment of alimony shall resume if the

party paying alimony is made a party to the action of annulment and the payor party's rights are determined.")

The Legislature chose not to include a similar reinstatement provision for cohabitation. Thus, once a couple has been found to have cohabitated, the cohabitation cannot be undone. For example, in *Pendleton,* 918 P.2d 159, 161, the receiving spouse and her boyfriend were cohabitating. Just prior to the husband filing his petition to terminate alimony, the receiving spouse decided to end her cohabitation. The court still terminated alimony, finding that the couple had cohabitated. Other courts have similarly held. *See J.N. v. M.N.*, 2007 Del. Fam. Ct. LEXIS 252, 2007 WL 5361879 (Del. Fam. Ct. Aug. 23, 2007) ("The fact that cohabitation may have ceased is irrelevant under the wording of Del. Code Ann. Title 13, § 1512(g)."); *In re Marriage of Frasco*, 638 N.E.2d 655, 660 (Ill. App. 1994) (refusing to reinstate alimony simply because the couple quit cohabitating); *McRae v. McRae*, 381 So. 2d 1052 (Miss. 1980) (refusing to reinstate alimony when cohabitant moved out).[13]

The rationale for such a rule is apparent. If "current cohabitation" were the test under the statute, then one half of a couple could simply move out any time a

[13] Even if Utah law included an "annulment" type exception for cohabitation similar to that provided for remarriage, Ms. Scott does not claim that she would qualify. *See* Utah Code § 13-1-17.1 (criteria for annulling a marriage, none of which include the length of marriage.)

petition for termination is filed. Ms. Scott's argument is not supported by the statute, or by the stipulated Decree itself (which provides that alimony terminates "upon" cohabitation).

IV. MR. SCOTT REQUESTS ATTORNEYS' FEES

Ms. Scott argues that the prevailing party on appeal should be awarded attorneys' fees under Utah Code § 30-3-3-(2). Ms. Scott did not cite this statute in either the trial court or the court of appeals. (R.1882-83; R.2146; Ct. App. Reply Br., 19.) Under Ms. Scott's argument, then, Mr. Scott should be awarded his attorneys' fees as a prevailing party. In any event, an award of attorneys' fees is not appropriate under the statute.[14]

CONCLUSION

For the foregoing reasons this Court should affirm the court of appeals' decision.

[14] Section 30-3-3(2) concerns only alimony enforcement proceedings, not alimony termination proceedings: "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."

DATED this 26th day of September, 2016.

CHRISTENSEN & JENSEN, P.C.

/s/ Karra J. Porter
Karra J. Porter
Kristen C. Kiburtz
Attorneys for Appellee Bradley Scott

CERTIFICATE OF SERVICE

This is to certify that on the 26th day of September, 2016, two true and correct copies of the foregoing **BRIEF OF APPELLEE** were mailed, first-class postage prepaid, to:

Michael D. Zimmerman
Troy L. Booher
Julie J. Nelson
ZIMMERMAN JONES BOOHER
341 South Main Street, Fourth Floor
Salt Lake City, Utah 84111
mzimmerman@zjbappeals.com
tbooher@zjbappeals.com
jnelson@zjbappeals.com

Bart J. Johnsen
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
bjohnsen@parsonsbehle.com

/s/ Karra J. Porter
Karra J. Porter
Kristen C. Kiburtz
Attorneys for Appellee Bradley Scott

CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Appellee hereby certifies that the foregoing brief contains a proportionally spaced 14-point typeface and contains 13,440 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.

/s/ Karra J. Porter
Karra J. Porter
Kristen C. Kiburtz
Attorneys for Appellee Bradley Scott