

2017

**Lynessa Michelle Anderson, Petitioner/Appellee, vs. Loren Price
Anderson Respondent/Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LYNESSA MICHELLE ANDERSON,
Petitioner/Appellee,

vs.

LOREN PRICE ANDERSON,
Respondent/Appellant;

APPELLEE'S BRIEF

Appellate Case No. 20160507-CA
District Court Case No. 084400367

Appeal from the Fourth District Court, Utah County, Judge Samuel D. McVey Presiding

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(h) in that this is an appeal from a domestic relations case regarding divorce.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Father's Income:

- a. Did the trial court abuse its discretion when it refused to base the father's income on his paystubs and tax returns?

- i. **Standard of Review:** "[This Court] review[s] the district court's factual findings for clear error and its conclusions of law for correctness, affording the court some discretion in applying the law to the facts." *Arnold v. Arnold*, 177 P.3d 89 (Ut. App. 2008). (internal quotation omitted). This Court will reverse only if "(1) there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; (2) the evidence clearly preponderated against the finding; or (3) such a serious inequity has resulted as to manifest a clear abuse of discretion." *Rayner v. Rayner*, 316 P. 3d 455 (Ut. App. 2013, ¶ 4 (citation and internal quotation marks omitted)).

2. Alimony:

- a. Did the court err in concluding as a matter of law that father's Alimony obligation should be \$1,900.00 per month, even if the father's income should be imputed at \$6,662.00 gross per month, when combined with the

award to the mother of child support, resulted in an award to the mother which was hundreds of dollars in excess of the mother's stated monthly needs, as determined by the trial court?

- i. **Standard of Review:** "We will review the trial court's decisions regarding child support and alimony under the abuse of discretion standard." *See Jenson v. Bowcut*, 892 P.2d 1053 (Ut. App. 1995) (applying the abuse of discretion standard of review for child support determinations); *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991) (applying the abuse of discretion standard of review for alimony determinations). *See Andrus v. Andrus*, 169 P.3d 754, 757.
- ii. We review a district court's alimony determination for an abuse of discretion and " will not disturb [its] ruling on alimony as long as the court exercises its discretion within the bounds and under the standards we have set and has supported its decision with adequate findings and conclusions." *Connell v. Connell*, 836 P. 3d 233 (Ut. App. 2010), ¶ 5, (internal quotation marks omitted).
- iii. [¶114] In *Bakanowski*, the court of appeals explained that if a district court considers each of the statutory alimony factors, "we will not disturb its award absent a showing that *such a serious inequity has resulted* as to manifest a clear abuse of discretion." *Bakanowski v. Bakanowski*, 80 P.3d 153 (Ut. App. 2003), ¶ 10, (emphasis added)

(internal quotation marks omitted).

iv. We will uphold a trial court's alimony determination on appeal

"unless a clear and prejudicial abuse of discretion is demonstrated."

Breinholt v. Breinholt, 905 P.2d 877 (Ut. App. 1995).

b. Did the Court err in finding the order of alimony must include expenses for the mother that she was not actually incurring and had never incurred?

i. "We will review the trial court's decisions regarding child support and alimony under the abuse of discretion standard." *See Jensen v.*

Bowcut, 892 P.2d 1053 (Ut. App. 1995) (applying the abuse of discretion standard of review for child support determinations);

Howell v. Howell, 806 P.2d 1209, 1211 (Utah Ct. App. 1991)

(applying the abuse of discretion standard of review for alimony determinations). *See Andrus v. Andrus*, 169 P.3d 754, 757.

c. If the court's ruling regarding imputation to the father of a monthly income of \$6,662.00 was in error, was the resulting award of alimony to the mother an abuse of discretion?

i. **Standard of Review:** "We will review the trial court's decisions regarding child support and alimony under the abuse of discretion standard." *See Jensen v. Bowcut*, 892 P.2d 1053, 1055 (Utah Ct. App. 1995) (applying the abuse of discretion standard of review for child support determinations); *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991) (applying the abuse of discretion

standard of review for alimony determinations). *See Andrus v. Andrus*, 169 P.3d 754, 757.

3. Child Support:

- a. Did the Court err in calculating the father's child support obligation based upon his imputed income of \$6,662.00 per month?
 - i. **Standard of Review:** "As for the modified child support, [this Court] will not upset the trial court's apportionment of financial responsibilities in the absence of manifest injustice or inequity that indicates a clear abuse of discretion." *Doyle v. Doyle*, 221 P.3d 888 (Ut. App. 2009) (internal quotation omitted) (App. to Supreme Court on other Grounds).
 - ii. A trial court's decision regarding child support will not be disturbed absent "manifest injustice or inequity that indicates a clear abuse of ... discretion." *Hansen v. Hansen*, 736 P.2d 1055, 1056 (Utah App. (1987) cert. denied, 765 P.2d 1277 (Utah 1987)).

4. Attorney Fees¹:

- a. Did the trial court err in awarding the mother's attorney fees²?

¹ Mother was awarded attorney fees under: 1) Utah Code 30-3-3 and 2) Utah Code 78B-5-825.

² Father states that the standard of review for an award of Attorney fee's is for err. However, Mother was awarded attorney feeds under Utah Code 30-3-3 which is held at a standard of review of abuse of discretion. Further, Mother was awarded fees under Utah Code 78B-5-825 which is held at a standard of review of correctness.

- i. Because the trial court exercises broad discretion regarding requests for attorneys' fees, this Court "presume the correctness of the [trial] court's decision absent manifest injustice or inequity that indicates a clear abuse of . . . discretion." *Wilde v. Wilde*, 35 P.3d 341 (Ut. App. 2001) (internal quotations omitted).
- ii. "Whether the trial court properly interpreted the legal prerequisites for awarding attorney fees under section [78B-5-825] is a 'question of law' that we 'review ... for correctness.'" *Still Standing Stable, LLC v. Allen*, 122 P. 3d 556 (Ut. 2005), ¶ 8, (quoting *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201 (holding that statutory interpretation presents a legal question)).

STATEMENT OF THE CASE

This is an appeal from father's February 28, 2011, filing of a Petition to Modify his child support and alimony obligations, alleging a substantial change of circumstance had arisen since the parties' Decree of Divorce, which was entered on September 5, 2008. Mother filed an Answer on March 25, 2011. Father failed to prosecute his Petition until he requested a final pre-trial on November 25, 2013—over two and a half years later. Mother, not having heard about anything on the case, assumed the case had been dismissed. Mother hired an attorney and asked the court to not set the case for trial as Father had failed to provide any of his initial disclosures as required by Rule 26 of the Utah Rules of Civil Procedure. Father did not file his initial disclosures until May 2014, even though Mother had requested them repeatedly. Father's financial disclosures were

dismal at best³. The parties litigated the matter and went to trial on October 22, 2015, in front of the Honorable Judge Samuel McVey.

Father sought from the trial court a reduction of his child support, a reduction of his alimony and for the court to issue any award of support *nunc pro tunc* to before the Divorce Decree was entered by the District Court.

The trial court heard testimony, took argument and received evidence. After trial, the court took the matter under advisement and made written findings on November 10, 2015. The trial court found Father to not be credible. The court imputed income to Father finding that he as the ability to earn at least \$6,662.00 per month. The trial court found that Father had the ability to pay alimony and that Mother had a need and thus, awarded Mother \$1,900 in alimony. The trial court ordered alimony to continue for the length of the marriage or 19 years.

The evidence and testimony provided to the trial court was sufficient for the court to enter its stated findings. This Court should find that there was not an abuse of discretion and that the trial court's Findings of Fact and Conclusions of Law along with the Order Modifying Decree of Divorce should be upheld. Mother should be awarded her attorney fees on appeal.

³ Father provided a partial (un-signed) copy of his personal 2011, 2012 and 2013 taxes and his personal paychecks (which were written by his wife out of the business account). Father failed to provide any documentation of the business, including QuickBooks files, tax returns, expense ledgers, bank account information, etc. Father did not provide any proof of personal bank accounts (claiming he did not have one) and/or any proof of his debts.

STATEMENT OF RELEVANT FACTS

Appellee supplements and/or disputes Appellant's statement of facts as follows:

Procedural Summary

1. All arguments and facts related to the pre-signing of the Decree of Divorce signed on September 5, 2008 are irrelevant and were not issues before the trial court and are not before this Court on appeal.⁴

2. The Decree of Divorce ordered (in part) that Father shall pay to Mother the following:

- a. Child Support (For Four minor children): \$2,945 per month. R 0054
- b. Alimony: \$2,719 per month, commencing February 1, 2008, and continuing for a period equal to the length of the marriage, or until the death of the either party, the Petitioner's remarriage, or cohabitation with another person, whichever occurs first. R 0055

3. Father filed a Petition to Modify on February, 28, 2011. R 0065

4. Mother filed an answer to said Petition to Modify on March 25, 2011. R 0071.

5. Father failed to litigate said Petition to Modify until his attorney filed a

⁴ This appeal is from a Petition to Modify the Decree of Divorce. Father seems to blur his arguments attempting to argue that the Decree of Divorce should be set aside due to fraud. However, Father never filed a Rule 60B Motion to set aside and thus, any argument alluding to pre-Decree of Divorce is irrelevant and was not preserved for appeal.

Request for Final Pre-trial on November 25, 2013. R 0076

6. Mother objected to the request for final pre-trial as father had failed to file any initial disclosures or financial documents supporting his claim to modify child support and alimony and asked the court to dismiss his Petition to Modify pursuant to the failure to prosecute. R 0102

7. Mother filed her initial disclosures on March 6, 2014. R 0089

8. Father filed his incomplete initial disclosures on May 29, 2014. R 0104

9. Mother's Motion to Dismiss for Failure to Prosecute was heard by the court on June 27, 2014, in which the court denied the motion. R 0153

10. At the hearing on June 27, 2014 the court ordered the parties to complete discovery by August 28, 2014 and set the matter to be heard for pre-trial that same day. R 153

11. Mother sent out several subpoenas to various companies that Father's company did work with on August 11, 2014. R 0115-0218

12. Mother, needing additional time for discovery, filed a Motion to Re-open Discovery with the court on September 9, 2014. R 227-331

13. The court held a hearing on September 22, 2014 and denied Mother's request to re-open discovery. R 0446

14. The court held a final pre-trial on August 21, 2015 setting out the terms for preparing for trial. R 0565-0568

15. Trial was held on October 23, 2015.

16. At trial, Father made an oral motion asking the trial court to make any

orders *nunc pro tunc* to the date of the Decree of Divorce. R 0627-0659

17. Mother objected to said oral motion on October 27, 2015. R 0664-0666

18. The trial court entered its Findings of Fact and Conclusions of Law on November 10, 2015. R 0674-0682.

19. Mother was ordered to prepared the final order with the court. This was a long and strenuous task as Father's attorney kept objecting to Mother's proposed orders. However, the final Order Modifying Decree of Divorce was submitted and signed by the court on May 23, 2016. R 820-836

20. The trial court modified Father's child support and alimony obligation in its Findings of Fact and Conclusions of Law as follows:

- a. Father was to pay Child Support consistent with his imputed income of \$6,662.00 and Mother's income (at the time of trial) of \$2,503. Child support was ordered at \$714.64 per month. R 0833
- b. Child Support was backdated to the Decree of Divorce using father's imputed income. The court also took Mother's current income and backdated it to the Decree of Divorce noting though that this was not her income at the time of the Decree. R 0678
- c. Mother was awarded a judgement of child support arrears in the Amount of \$55,901.09. R 0833
- d. The Child Support was modified four times going back to the Decree of Divorce to account for the three children that had emancipated in May 2009, May 2010 and May 2013, respectively. R 0833-0834

- e. Father was ordered to pay Mother alimony in the amount of \$1,900 per month from the Time the Decree of Divorce. R 0834
 - f. Mother was awarded alimony for 19 years which was the length of the marriage. R 0680.
 - g. Mother was awarded a judgement for alimony in arrears of \$152,689.90 through October 23, 2015. This amount reflected all alimony from September 5, 2008, until the date of trial on October 25, 2015. R 083
21. Father filed for appeal on June 21, 2016. R 837-839.

Disputed Facts

22. Father uses paragraph 1-9 of his Statement of Facts to discuss history prior to the Decree of Divorce which is irrelevant to the case at hand. Father chose to file a Petition to Modify, not a Rule 60B Motion to Set Aside the Decree of Divorce. Thus, any facts and/or argument relating to prior to the Decree of Divorce being signed (September 9, 2008) are irrelevant and should be excluded from consideration in the trial court and this Court.

23. Father is incorrect when he argues that there was no evidence of income verification existing for either party in the court file when the Decree of Divorce was entered.

- a. Mother filed an Affidavit of Default on July 2, 2008 stating “the Respondent’s income is in dispute. The Respondent did not file taxes for 2006 and 2007. His 1099 for 2007 shows \$219,246 per year or 18,271 per

month". R 0020-0027

- b. Mother filed an Affidavit of Respondent's income on August 19, 2008 stating "the Respondent has recently been incarcerated in the Utah County Jail. He has a felony pending. His 1099 for 2007 shows \$219,246.00 per year or \$18,271.00 per month. R 0039-0040.

24. Father was mailed a copy of the Decree of Divorce on July 31, 2008. R 0053-0060. This was over a month prior to the Decree of Divorce being signed by the Judge on September 5, 2008. R 0053-0060. This Court should note that Father was not incarcerated at the time the Decree of Divorce was entered by the court as he had bailed himself out of Jail on July 28, 2008. R 1101 Petitioner's Exhibit 12.

25. Father states that Trial was held on October 25, 2015, however, this is incorrect as Trial was held on October 23, 2015. R 660-661. Mother does not dispute the Findings of Fact and Conclusions of Law of the trial court.

26. Father incorrectly argues that neither Father, Mother, nor any other witness or expert provided evidence or testimony to the trial court regarding the father's ability to earn.⁵

27. The Trial Court made several findings regarding the evidence presented (and/or lack of evidence due to Father's own doing) that would support the imputation of Father's income and/or his ability to earn. This evidence is as follows:

⁵ Father's argument leads one to believe that he is arguing that the Trial Court cannot make findings that are against him if he so chooses and fails to provide evidence of his actual income. This would lead parties to intentionally chose to not disclose as much information as possible so that the Trial Court could not make an adverse finding against them.

- a. Testimony of Father.
- b. Testimony of Mother.
- c. Testimony of Jennifer Hutchings.
- d. Testimony of Shane Hutchings.
- e. Testimony of Tyler Anderson.
- f. Testimony of Steal Anderson.
- g. Joint federal tax return for 2004. Petitioner's Trial Exhibit 7.
- h. Joint Tax Return for 2005. Petitioner's Trial Exhibit 8.
- i. Loren Anderson's Paystubs from Steelcoat. Petitioner's Trial Exhibit 11.
- j. Accounts Payable to Steelcoat and Loren Anderson from Action Target in the amount of \$494,979.65 between May 28, 2013 – August 20, 2014. Petitioner's Trial Exhibit 14.
- k. September 15, 2015 Financial Declaration of Loren Anderson. Respondent's Trial Exhibit 1.
- l. May 29, 2014 Financial Declaration of Loren Anderson. Respondent's Trial Exhibit 2.
- m. Loren Anderson's individual and business Tax Returns 2011. Respondent's Trial Exhibit A.
- n. Loren Anderson's individual Tax Return 2012. Respondent's Trial Exhibit B.
- o. Loren Anderson business Tax Return 2012. Respondent's Trial Exhibit G.
- p. Loren Anderson's individual and business Tax Return 2013. Respondent's

Trial Exhibit C.

- q. Loren Anderson's checks from his company DBA Steelcoat. Respondent Trial Exhibit C.
- r. Wells Fargo page showing Jennifer Hutchings (Father's current wife) is on the bank account for Steelcoat. Respondent's Trial Exhibit C.
- s. Invoices from Steelcoat. Respondent's Trial Exhibit 4.
- t. W-2's of Jennifer Hutchings from Steelcoat. Respondent's Trial Exhibit 14.

28. All the evidence above was deduced by the trial court finding that Father is voluntarily underemployed and capable of making more money than he claims. The trial court also found that Father's argument/testimony cannot be found credible. R 0674-0681

29. Therefore, the trial court modified the Decree of Divorce as to Father's child support obligation and alimony pursuant to its Findings of Fact and Conclusions of Law made at trial.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion when it imputed Father's income at \$6,662.00 per month. The trial court did not abuse its discretion in awarding mother \$1,900 per month in alimony. The trial court did not abuse its discretion in awarding child support consistent with the Utah Child Support Calculator and based on Father's imputed income. The trial court did not abuse its discretion when it awarded attorney fees pursuant to Utah Code Ann. § 30-3-3. The trial court correctly awarded attorney

fees pursuant to Utah Code Ann. § 78B-5-825. Mother should be awarded her attorney fees on appeal.

ARGUMENT

I. The trial court did not abuse its discretion when imputing father's income to \$6,662.00 per month.

This Court will reverse a trial court's imputation of income to a party if "(1) there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; (2) the evidence clearly preponderated against the finding; or (3) such a serious inequity has resulted as to manifest a clear abuse of discretion."

Rayner v. Rayner, 316 P. 3d 455 (Ut. App. 2013), ¶ 4 (citation and internal quotation marks omitted). Having "considerable discretion," the trial court's "actions are entitled to a presumption of validity." *Id.* (citation omitted).

When considering the imputation argument, the trial court must enter "findings of fact as to the evidentiary basis for the imputation." Utah Code Ann. §78B-12-203(7)(a). If the court determined that imputation is proper, the court must decide the proper amount to impute by considering the factors outlined in Utah Code §78B-12-203(7)(b). A finding of voluntary underemployment is no longer necessary in the imputation analysis. *Reller v. Argenziana*, 360 P.3d 768 (Ut. App. 2015) at ¶33. This Court has further stated that

[f]indings are adequate only if they are sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusions on each factual issues was reached." *Hall*, 858 P.2d at 1021 (citation and internal quotation marks omitted); *accord Fish*, 2010 UT App 292, ¶ 20, 242 P.3s 787. "The trial court's decision to impute income may nonetheless be affirmed if the failure to have made the missing findings can be viewed as harmless error." *Hall*, 858 P.2d at 1025. "One method is to show that the undisputed evidence clearly establishes the factor or factors

on which findings are missing.” *Id.* (citation and internal quotation marks omitted); *see also Mancil*, 2000 UT App 378, ¶21, 18 P.3d 509 (concluding that specific findings on the statutory imputation factors were not necessary when the evidence was not in dispute). “Furthermore, even given controverted evidence, we could affirm the trial court’s decision to impute income, absent outright expression of the statutorily mandated finding, if the absent findings can be reasonably implied.” *Hall*, 858 P.2d at 1025. “Unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made.” *Id.*; *see Reese v. Reese*, 1999 UT 75, ¶ 15, 984 P.2d 987 (determining that some the statutory factors required in the imputation analysis were “necessarily implied” by the evidence). “Findings may not be implied, however, when the ambiguity of the facts makes such an assumption unreasonable.” *Hall*, 858 P.2d at 1025. (citation and internal quotation marks omitted). For example, “we will not imply any missing finding where there is a matrix of possible factual findings and we cannot ascertain the trial court’s actual findings.” *Id.* at 1025-26 (citation and internal quotation marks omitted).

Father’s primary contention on appeal is that the trial court improperly made findings from the evidence presented (or lack thereof) by Father as to his income and ability to earn. Father contends that the trial court abused its discretion in using the parties’ 2004 tax year as the benchmark for the trial court’s calculation of Father’s ability to earn. Father’s arguments are without merit as Father’s failure to present adequate evidence to support his claims and his evasive nature required the Court to make factual and legal findings based upon the best evidence presented to the court.

a. The trial court correctly found Father’s testimony to not be credible regarding his ability to earn.

In *Cecil v. Cecil*, No. 20030937 (unpublished) (Ut. App. 2005), the Court of Appeals found that the trial court did not abuse its discretion by finding that Husband was voluntarily underemployed and imputing him to an income based upon evidence the

Court found to be more credible. The court stated that “[t]he trial court's decision on each of these issues reveals no manifest injustice or inequity. Rather, the court's findings of fact show that the trial court duly considered the evidence Appellant points to on appeal but found other evidence more important or more credible.” *Id.*

In that case, Husband argued that his income at trial as a stocker at Wal-Mart should have been used as his income despite his previous employment at both a manager and assistant manager. Father argued that he was not voluntarily underemployed because his stress related health issues precluded him from working in management positions. The trial court found that Father was voluntarily underemployed and imputed him to a wage more commensurate with what the trial court believed he could earn based upon the evidence presented. The Court of Appeals commented that

[t]he trial court's findings of fact show that the court was simply not persuaded that these circumstances prevented Appellant from being successful as an assistant manager at Wal-Mart or that these circumstances forced him to work only as a stocker. These determinations are well within the sound discretion of the trial court since the trial court is in an advantaged position to weigh the evidence, determine the persuasive value of the evidence, and make determinations based on the evidence. *see Willey v. Willey*, 951 P.2d 226 (Ut. App. 1997).

Id.

This case is analogous to *Cecil* as Father contends that the trial court should have used his current income based upon his representations of current earnings and his apparent ability to earn based upon his criminal background which he argues prevents him from having any meaningful income. The trial court found that Father's testimony

and representations were not credible, therefore the trial court had to make independent determinations as to Father's ability to earn. *Id.*

Father's argument on appeal is the same as Father's argument in *Cecil*. Likewise, the trial court in this case found that certain evidence was more credible than other evidence presented at trial. Mother presented evidence that Father did have ability to earn an income similar to the amount he was able to earn during the marriage. This was established by showing the Father was operating a business similar to that of the business he had run during the marriage.

During the marriage, Father owned a business and "has worked in the past as a floor installer". (R. at 0675). Father's new wife started a company, Steelcoat, in 2011 "with [father's] help". *Id.* Steelcoat participated in largely similar activities and services as those Father provided through his business during the marriage. The trial court stated that "Steelcoat does the same kind of work father was doing before he started living with his new wife." *Id.* Father claimed that the business was owned and operated by his wife and that he only works for the company. *Id.* This is despite the evidence received by the trial court illustrating that Father is the primary owner and operator of the business.

The trial court made specific findings concluding that "[t]he Court finds Steelcoat is marital property of father and his new wife but is *controlled by him*." R. at 0676.

(emphasis added). In coming to a determination, the court found the following:

1. He [Father] and his new wife represented his adjusted gross income (AGI) as \$2,000 per month working for Steelcoat, a shooting range installation company which father and his new wife claim she started and owns. R. at 0675.

2. The Company has receipts of several hundred thousand dollars per year before expenses. R. at 0675.
3. Steelcoat does the same kind of work father was doing before he started living with his new wife. R. at 0675.
4. Steelcoat serves Father's primary principle customer, Action Target. R. at 0675.
5. The new wife states she earns \$30,000 per year from Steelcoat after paying other employees. She has a full-time job at Maverick earning \$12 per hour. R. at 0675.
6. Action Target switched from invoicing Father directly to Steelcoat in 2013. see Petitioner's Exhibit 14.
7. Father's current wife was unable to identify Steelcoat's tax year but Father knew exactly what it was. R. at 0675.
8. Father's current wife claimed she had spoken with Action Target's installation director. but he later testified, denied talking to her and testified he *only* dealt with father. R. at 0675.
9. Father's current wife claimed that she works three to four hours per day lining up jobs and making reservations for Steelcoat. R. at 0675.
10. Father's current wife claimed she works with Father to bid projects and keeps books. R. at 0675.
11. Father was much more familiar with Steelcoat's operations and financial information than his current wife. R. at 0676.
12. He [Father] was much more familiar with Steelcoat's operations and financial information than the new wife was. R. at 0676.

13. He [Father] helped her [new wife] set up the company, which does the same thing he was doing before the company was set up. R. at 0676.

14. Father is not allowed to have a checking account due to his criminal convictions and he finances purchases on a credit card in his mother's name. R. at 0676.

15. Steelcoat pays \$600 per month for Father's child support which is unreported on his tax documents. R. at 0676.

Father works only at the company full time and his functions consist of running the company projects. (R. at 0675). Based on these findings the court found that Steelcoat is marital property of father and his new wife but is controlled by him. The Court finds his and his wife's testimony incredible.

In addition to the findings by the court, there is an email from Steelcoat's primary customer, Action Target, that was admitted into evidence, that illustrates the payments that were being made to Father directly from May 28, 2013 through October 26, 2013. Action Target then started making payments immediately thereafter to Steelcoat starting in November 29, 2013. The email states that all payments made to both Father and Steelcoat from May 28, 2013 through August 20, 2014 totaled \$494,979.65. *See* Petitioner's Exhibit 14. Thus, the argument that father was not running or controlling Steelcoat is disingenuous and not supported by the evidence.

Father also argued that his criminal history had prevented him from obtaining employment comparable to the employment enjoyed during the marriage. (R. at 0943). This is unsupported as Father operated Steelcoat with very little repercussion of his criminal history. Shane Withers, Director of Installation and Project Management for

Action Target, testified that subcontractors are not subject to background checks because Action Target would have vetted them before then. (R. at 0981). Mr. Withers continues and states that “[b]efore they even become a subcontractor we have – we have checked out their credentials and got references and checked them out beforehand.” *Id.* In explaining what would disqualify a subcontractor or their business from doing work with Action Target, Mr. Withers replied,

The main thing would be there’s certain jobs where they couldn’t get onto say military bases, based off of their criminal records. Some of my current installers that have criminal records don’t allow them to go onto the military bases, but for the most part if something’s in the past we don’t really hold that against them.

If they – typically we don’t really exclude anybody from working with us unless they would have had something egregious in their past where we’ve had fights or disagreements or whatever with them, or previous things with them.

I guess – I mean, to answer your question, criminal past is usually not a – doesn’t – we don’t preclude people from working for us because of a criminal past or even drugs, as long as they are currently passing clean drug tests, they’re find working for us or being subcontractors for us.

R. at 0982.

Father stated the same in his testimony that his criminal background did not preclude him from working for Action Target or other similar companies. R. at 0943. Father also admits that he, and Steelcoat, can bid for other contracts outside of Action Target. *Id.* There are overwhelming findings made by the Trial Court in coming to its finding of imputing father income. It is obvious that the court did not abuse its discretion when imputing father to \$1,900 per month.

Based on the evidence the Trial court had at the time of the trial it could not find the father credible and was forced to use best evidence in determining his ability to earn

and imputation of income. A few of the findings the trial court made are as follows:

Father failed to provide a complete tax records. He also failed to introduce a 2014 return for Steelcoat even though the filing date is overdue and the finances are not complete. It is un rebutted father told his son about one month before trial that if mother would stop pursuing him, it would be easier and he would not have to hide things. By "hide" he was referring to unreported income because the son was asking him for help with hocked dues. In fact, Father has a long time practice of dealing in cash and not reporting the income or disclosing amounts to mother. Father deals in frequently cash. He paid his son cash for a job and issued no tax forms. During his marriage to mother, he generally had large accounts of cash with him. After the divorce, on the less than frequent occasions when he paid mother money before the ORS became involved he paid cash. His highest reported AGI while married to mother was about \$41,000. However, in that same tax year, besides always having large amounts of of cash from his business, he was able to pray travel expenses and team fees for his sons' hockey, as well as for other's children. These sums amounted to at least well over \$15,000 per year, he was not only paying his but other children's expenses to ensure there was a team. He was able to afford an illegal drug habit and the Court has never found a meth dealer takes anything but cash. He cannot have a checking account because of past forgery and thus deals in cash when not using his mother's credit card. His crimes of moral turpitude impeach his testimony under Rule 609 of the Utah Rules of Evidence. Father's evasive demeanor on the stand regarding income and the business did not inspire confidence in his truthfulness.

R. at 0676.

Based on these findings the court used its best evidence to determine Father's ability to earn and correctly imputed him.

b. The Trial Court correctly used 2004 as a benchmark.

Father argues that the trial court erroneously ignored the parties' tax return that was filed in 2005 stating the parties' gross income for tax purposes was \$16,917. Father supports his argument that 2005 should have been used by the trial court because this was "three years before the father began to 'abuse drugs'". Father's Brief at 12, ¶2. Father

fails to provide any reference to the record supporting a statement that Father had not started his drug use. Father is asking this Court to believe Father's drug use began in 2008 when Father was charged with drug crimes. *See* Plaintiff's Exhibit 12.

The trial court's decision to use the 2004 benchmark was not incorrect or an abuse of discretion as 2004 was the year that best reflected Father's ability to earn prior to the parties' divorce. In 2004 the parties' federal tax return indicates that Father earned \$41,317 of adjusted gross income. *See* Plaintiff's Exhibit 7. The same return indicates that the gross receipts for that year were \$343,614 and there were costs of goods sold in the amount of \$269,268. *Id.* This left a gross profit of \$74,346. Father failed to provide any accounting for costs of goods sold for any year, including Steelcoat. In that same year, Father deducted another \$29,888 for expenses for business use of his home. *Id.* Again, Father failed to provide any support for these expenses for this or any other year.

The parties' 2005 joint federal tax return shows that the parties had \$16,917 in adjusted gross income. *see* Plaintiff's exhibit 8. In that year, the total reported gross receipts were \$193,691 and a \$146,067 in costs of goods sold. *Id.* This left a gross profit of \$47,624. After Father's additional deduction of \$29,796 in additional personal business expenses, they were left with their adjusted gross income of \$16,917.

Father presented no evidence as to the significant drop in gross receipts from 2004 to 2006. This difference is significant as it dramatically decreased the parties reported earning on their federal taxes upon which Father argues the trial court should have relied. The only evidence as to when Father began his drug abuse is testimony from Mother regarding their separation. During trial the following exchange occurred:

Q. Prior to you guys getting a divorce in 2008 did you – were you aware of the issues that Loren had?

A. I packed his bags and put them in the garage and told him to come and get them and never come home in September of 2006.

[Question by Ms. Coil and objection by Ms. Blakelock]

Q. At the time leading up to that 2006 was there – were you able to maintain the bills at that time as well?

A. Um, yeah.

Q. When you say yes, was Loren continually contributing to your –

A. Yeah, he was still giving me money. It was less frequent and less willing at the time he was not in his right mind set, I don't think. He was very promiscuous, and I just didn't want him around anymore.

R. at 0996-0997.

When counsel asked Mother about “the issues Loren had”, counsel was referring to Father’s issues with drug abuse. Based upon Mother’s testimony, the trial court can reasonably infer that Father’s drug abuse, or “issues”, began prior to the parties’ separation in September 2006. The trial court could also reasonably infer that Father’s drug abuse was the cause for Father’s lack of earning potential in 2005.

In further support of the trial court’s use of 2004 for benchmark for the imputation of income, Father’s gross receipts as reported in 2004 (\$343,614) were substantially similar to the gross receipts of payments made to Father and Steelcoat from May 28, 2013 through August 20, 2014 (\$494, 979.65). These two-time periods are the only two periods of time the trial court had to compare Father’s ability to earn prior to, and after the divorce.

c. The trial court determination of imputed income was not an abuse of discretion.

As indicated, the trial court was placed in a position of using the best evidence before the court to obtain a reasonable amount of imputation of Father’s income. As

previously discussed, the trial court's use of the parties' 2004 tax records was reasonable. In addition to this income, the trial court imputed Father to an additional sum of "\$20,000 of unreported cash, again based on large hockey payments and his carrying large sums of cash from his contractor jobs." R. at 0678. Father argues that there is no basis or evidence supporting the trial courts finding.

The full extent of the monies earned and available to Father during the marriage are only known by Father. Father was sole wage earner after the birth of the minor children. R. at 0993-4. Mother testified that she was not privy to the income and workings of the business R. at 995. During the marriage, Mother was responsible for paying most of the bills. R. at 0994. Father would place money into an account that Mother had access to pay the bills. Id. Mother also testified that Father had additional monies to the amount provided to Mother to pay bills. R. at 0996. Mother testified that Father "always carried cash. He always had cash on hand, always." Id.

The amount Father had on hand and access to was supported by the testimony given by the parties' child, Tyler Anderson, and testimony of Father. As Father indicates, at trial Tyler Anderson was twenty-three (23) years of age. He testified regarding his experience working with Father, as follows:

Q. Can you tell the Court what the nature of that work was?

A. So it started off as carpet. We did – we installed carpet. I usually tore it out, and you know, helped lay it out. Then we got to do coating (inaudible). That was mainly at Wendover on counter tops and some floors.

Q. Did you observe how your dad would pay for you for these jobs?

A. Just cash. It's always been cash.

Q. Do you have knowledge or – of your dad carrying lots of cash throughout kind of your childhood and up to working with him?

A. Yes, for the most part there was – a lot of cash was involved. I never seen a check.

Q. Then did you observe him paying other employees of or other people working with you in the same manner?

A. Well, for the most part it was me and him. There was a few guys that did tag along and it was cash.

R. at 0973-0974.

It was well supported by the evidence that Father (as a contractor) dealt heavily with cash. Father paid his child in cash. There is no indication that the cash paid to Tyler Anderson or others that performed work for Father was reported to the IRS. Such business practices would lead the trial court to the reasonable conclusion that Father did obtain earnings that were likely also unreported through his taxes.

Mother, Father, and their son, Tyler Anderson, testified that hockey was a sport the children participated in and paid for by Father. Father provided the following testimony:

Q. Isn't it true that you have some sons that play hockey?

A. Yes.

Q. Isn't it true that hockey's a pretty expensive sport?

A. Yes.

Q. Isn't it true that you were able to cover those costs of their hockey prior to 2008?

A. Um, yeah, with some help.

Q. Isn't it true that you would even sometimes pay for other kids' hockey tuition fees because their families couldn't afford it themselves, correct?

A. Yes, there were times.

Q. Isn't it true that your family prior to the divorce really lived a satisfying life, correct?

A. I would say so.

R. at 0950-1.

Mother provided testimony establishing the nature of the boy's hockey participation in their youth.

Q. Okay, can you specifically talk about in 2006, right before you guys separated, your marital expenses at that time. Did you have a mortgage?

A. Uh-huh, we had a mortgage. Our – two of our boys played ice hockey. They both played on two travel teams. My older son swam a lot. I mean, he was always in training. He never competed because he couldn't – he's not competitive, but he – I mean, we spend a lot of time at the pool with him and would go – when the boys were younger, generally they tried to keep the younger kids when [they] had to travel weekend to tournaments together so they were in groups, but as they hold a little older Tyler played in a different group, and so Loren would take Tyler to tournaments and I would take Steele.

Q. All those expenses prior to 2006 were being paid for by Loren?

A. Yes.

R. at 0997-8.

Tyler Anderson testified as to his participation in hockey and the circumstances around it.

Q. Okay, can you tell the Court what kind of activities you would participate in as a youth?

A. Hockey, for the most part, school, the normal things.

Q. With hockey, can you tell the Court a little bit about how much that would cost?

A. Well, I was young and I really didn't know exactly. I think – because for a house – house league it was cheaper. That was the local stuff. Maybe 2,000, and then travel was 7 – upwards of 7,000.

Q. Were you responsible to pay for that a youth or –

A. I was not.

Q. Did your parents pay for that?

A. Yep.

Q. When you would play hockey would – did you also travel a lot?

A. Yep, yeah, a lot.

Q. Would your family or parents come with you to watch?

A. Yes, sometimes both, but it was most often my dad, I think.

Q. Okay, and your dad would pay for all of that?

A. Yeah.

Q. Then also you would have like equipment that was involved?

A. Yeah, yep, exactly.

Q. Do you – did you – did your parents always make sure that that was available to you as well?

A. Yes, I didn't go without.

R. at 0972-3.

Based on the foregoing evidence, the trial court reasonably found that Father had access to cash greater than the amount indicated on his federal tax returns. The amounts needed to pay for hockey with two children is significant and supported by the testimony of the parties. As Father primarily covered the costs of such expenses, he is the only one that can provide any evidence of the actual amounts. Mother was unable to have access to this information and she still does not have that access. If Father is unwilling to be forthright with the trial court and provide accurate testimony as to the amounts of these expenses, the court is left to make findings based upon the best evidence presented to the court.

d. Father's attack on the testimony of Steele Anderson is not relevant.

Father attacks the testimony of the parties' son, Steele Anderson, arguing that his statement that Father "made mention that if my mom would stop doing whatever [she's] doing it would be easier for him to not have to hide what he's doing." (R. at 0970). The statement was regarding his request for assistance to pay hockey dues. *Id.* Father further argues that Steele did not identify exactly when Father made this statement. This argument seems to be that the statement was made sometime in the past and not immediately before trial. Father uses faulty logic that because Steele is out of high school, therefore he would not be a on a team for which dues would have to be paid.

Father's argument is outside the scope and irrelevant to the argument regarding Father's imputed income. Such a statement goes more to Father's credibility and indication of bad faith. Father's logic and assumed facts from the record can also be viewed in an alternative manner. A full review of the exchange in Steele's testimony provides greater context. Steele testified as follows:

Q. . . . has there ever been a time when you've had a conversation with your dad that has led you to believe that he's hiding money?

A. There were a couple incidents. The most recent was September. I – he made a mention that if my mom would stop doing whatever [she's] doing it would be easier for him to not have to hide what he's doing.

Q. Did he make that comment in relation to something personally you were asking for?

A. Yes, ma'am, it was for some hockey dues to help with my hockey season.

Q. Did he allude for you that he's be able to pay those fees if his mom just would stop coming after him with money?

A. He said it would be easier, but that's pretty much it. That it would be easier if he didn't have the problem of my mother.

R. at 0969-0970.

The trial court could reasonably infer that Steele was speaking about the September immediately preceding the October 2015 trial. It would stand to reason that if it had been any time before that Steele would have included a year. Father's argument also fails as Father's counsel had an opportunity to cross-examine Steele to clarify his statement and declined. *Id.*

II. Alimony:

a. The trial court did not err in awarding mother alimony in the amount of \$1900 per month.

Father's argument that the court abused its discretion by awarding mother \$1,900 per month in alimony is flawed on its face. Alimony is governed by both statutory and case law factors. As the Utah Supreme Court stated, "the purpose of alimony ... 'is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage, and to prevent the wife from becoming a public charge.'" *Jones, Jones v. Jones*, 700 P.2d 1075 (Ut. App. 1985) (quoting *English v. English*, 565 P.2d 409 (Ut. App. 1977)). Based upon this underlying purpose, the Utah Supreme Court "articulated three factors that must be considered in fixing a reasonable alimony award: '[1] the financial condition and needs of the wife; [2] the ability of the wife to produce a sufficient income for herself; and [3] the ability of the husband to provide support.'" *Id.* (quoting *English*, 565 P.2d 411-12). In addition, Utah Code Ann. 30-3-5(8)(a) provides: "the court shall consider at least the following factors in determining alimony:

- i. the financial condition and needs of the recipient spouse;
- ii. the recipient's earning capacity or ability to produce income;
- iii. the ability of the payor spouse to provide support;
- iv. the length of the marriage;
- v. whether the recipient spouse has custody of the minor children requiring support;

vi. whether the recipient spouse worked in a business owned or operated by the payor spouse; and

vii. whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor or allowing the payor spouse to attend school during the marriage."

Utah Code Ann. §30-3-5(8)

Additionally, section 8(c) provides that "As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial." (emphasis added). This Court will uphold a trial court's alimony determination on appeal "unless a clear and prejudicial abuse of discretion is demonstrated." *Brienholt v. Brienholt*, 905 P.2d 877 (Ut. App. 1995). Father has not been able to show that the trial court's findings amount to a clear and prejudicial abuse of discretion. Father's arguments on appeal only show that he does not like the ruling and that he wants to continue to shirk his responsibility of supporting his children and Mother.

The failure of the trial court to make findings on the first three of those factors listed under Section 30-3-5(8) constitutes an abuse of discretion. *See Jones v. Jones*, 700 P.2d 1072 (Utah 1985); *Bell v. Bell*, 810 P.2d 189 (Ut. App. 1991). To satisfy this burden, a party seeking alimony must provide the court with a credible financial declaration and financial documentation to demonstrate that the *Jones* factors support an award of

alimony. *Bakanowski v. Bakanowski*, 80 P.3d 153 (Ut. App. 2003), ¶ 9, (explaining that before awarding alimony, " the trial court is required to make adequate factual findings on all material issues, unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment" (internal quotation marks omitted)); *see also* Utah R. Civ. P. 101(d)(1) ("Attachments for motions and responses regarding alimony shall include income verification and a financial declaration."). *See Dahl v. Dahl* 345 P.3d 566 (Utah App. 2015). The trial court did make specific findings to the financial need of Mother. This is evident in the fact that the trial court reduced her reasonable and necessary expenses to what it found were not reasonable or necessary. The trial court did allow for health insurance, a car payment and retirement. The trial Court found that "She [Mother] included expenses that were reasonable, such as a car, insurance and health insurance, even though she does not presently have them but would have them if Father paid support." R. 0678. "Since neither party complied with *Dahl* to the extent of documenting each expense, although Mother did better than Father on this point, the Court has no choice but to rely to a certain extent on their uncorroborated testimonies to establish expenses." R 0678. The court did not abuse its discretion in making this finding.

b. The trial court did not err in assessing mother's needs based on actual and anticipated expenses.

Father claims "that mother provided a financial declaration (Petitioner's exhibit 2) containing claims for expenses that were not actual expenses and which were not support by any evidence and which did not exist, but were still allowed as expenses by the trial

court.” See Father’s Appellate Argument paragraph 2 page 29. Mother did provide evidence and testimony that she would have an expense for health insurance, a car payment and retirement if Father had not blatantly refused to fulfill his court ordered obligation of child support and alimony. Father’s argument is not well founded and the trial court agreed. “She [mother] included expenses that were reasonable, such as a car, insurance and health insurance, even though she does not presently have them but would have them if father paid support” See R 0678.

In the case *Woolums v. Woolums*, 312 P.3d 939 (Utah App. 2013), a case analogous to this case, this Court specifically stated that

Husband's argument that expenses must be current expenses that are actually being incurred at the time of trial is foreclosed by Utah case law addressing this exact issue. This court has disavowed the notion that "standard of living is determined by actual expenses alone." *Howell v. Howell*, 806 P.2d 1209, 1212 (Utah Ct.App.1991). A party's current, actual expenses "may be necessarily lower than needed to maintain an appropriate standard of living for various reasons, including, possibly, lack of income."

The evidence and testimony at trial establishes that Mother and Father lived a much higher standard of living during the marriage. During the marriage, they were able to travel, pay for their children’s expensive extracurricular activities, etc. (R 997). At the time of trial, not only was Mother living well below the standard of living of the marriage, but was not even able to afford basic reasonable and necessary expenses such as health insurance, car payment and retirement. This was evident in Mother’s testimony as follows:

Q. Have there been things that you have had to go out – go without because you can’t afford it?

A. Absolutely. I was without a car for two years, because mine died.

Q. Have you been able to get medical treatment?

A. Minimal.

Q. Have there been any medical conditions you've had that you haven't been able to resolve because you don't have the money?

A. I um, was diagnosed 19 years ago with something called polycystic ovary syndrome, and it causes, among other things, a severe hormonal imbalance. So I have to be on testosterone and progesterone and estrogen block, and Metformin to control my blood sugar.

Q. Do you have medical insurance right now?

A. No.

Q. So how do you pay for those medications?

A. Well, some of it – the more important ones I get, and the ones I can do without I do without.

Transcript Page 158-159.

Father's attorney uses the case *Dahl v. Dahl*, 345 P.3d 566 (Utah App. 2015)) as stating that Mother failed to provide proof for each of her expenses and thus should be precluded them from being included in her reasonable and necessary expenses. However, *Dahl* does not override *Woolums*. *Dahl* states "Mother bore the burden of providing the district court with sufficient evidence of each factor listed in the Alimony statute." *Dahl* did not hold that Mother was to specifically provide evidence for her actual and current expenses. Mother did provide testimony regarding a car payment as follows:

Q: You told the Court that you didn't have a car for a long time because you couldn't afford it. Were you able to finally get a car?

A: I did get one. I got one Monday.

Q: What is that payment?

A: It's 305 (Transcript Page 162 Line 17-22)

This Court should find that this is sufficient evidence to satisfy the legal standard.

In addressing Father's objection, the trial court specifically made findings to this issue stating that "Father has not provided documentary backup for his claimed expenses. This is particularly noteworthy because father argued mother should not be allowed

expenses because her documentary back was incomplete under *Dahl v. Dahl*. In making this argument, father ignored the identical deficiency in his documentation. The only backup document he provided were expenses reflected in the bank records of Steelcoat and thus were the company's expenses, not his. Wife provided more documentation than he did." R 0677.

Justice Durham in *Dahl* made a dissenting opinion that also opines the situation at hand in this case.

I also find that the district court applied the wrong legal standard to its determination to deny permanent alimony. The court ruled that " alimony may not be awarded without specific findings of the need of the recipient spouse." I disagree with this conclusion of law. The controlling statute mandates that courts " shall consider" seven enumerated " factors in determining alimony," including " the financial condition and needs of the recipient spouse." Utah Code § 30-3-5(8)(a); accord *Jones v. Jones*, 700 P.2d 1075 (Ut. App. 1985) (" financial conditions and needs" of the recipient spouse " must be considered in fixing a reasonable alimony award"). Although courts certainly must consider the financial need of the recipient spouse, among other mandatory factors, the absence of evidence on any one factor does not require the court to deny an award of alimony. The lack of evidence of need may certainly affect the court's alimony determination, but it is not necessarily dispositive. Because need is a factor relevant to a holistic alimony determination, rather than a required element, I would hold that the district court erred when it ruled that the absence of credible evidence of need required a complete denial of an alimony award *Dahl v. Dahl*, 345 P.3d 566 (Utah App. 2015) Dissenting opinion from Justice Durham.

The trial court did not abuse its discretion in findings that Mother's reasonable and necessary expenses per month (at the time of trial) were \$4,400 per month. The trial court clearly scrutinized Mother's expenses as her financial declaration

stated she had \$5,496.21 per month in expenses. Allowing Mother to have a reasonable expense of Health Insurance, a car payment and small allotment for retirement

is reasonable and Mother should not be denied such because she was unable to afford such expenses at the time of trial due to Father's refusal to pay court ordered child support and alimony.

c. The trial court did not abuse its discretion in awarding mother alimony in the amount of \$1,900 per month.

Father argues that even if the court was correct in its findings of mother's reasonable and necessary need and its imputation of Father's income to \$6,662.00 per month, that it resulted in Mother having a net windfall each month. However, this is flawed on its face. The parties were divorced on September 5, 2008. Father did not file its Petition to Modify the Decree of Divorce until March 7, 2011. At trial on October 23, 2015 the trial court heard an oral motion from Father to *nunc pro tunc* its findings back to the entry of the Decree of the Divorce. The trial court allowed for a post-trial brief to be filed. The trial court found in its findings that it would grant Father's *nunc pro tunc* motion retroactively apply its findings and orders back to the entry of the Decree of Divorce. The trial court apparently did this as a courtesy to Father and stated:

Father seeks in essence to set aside the income declared in the decree in 2008 by asking the Court for a *nunc pro tunc* order modifying support to the date of the decree. There has never been a motion to set aside the decree's provisions under rule 60(b) of the Utah Rules of Civil Procedure in the past six years. However, in order to reach an equitable resolution in this case, and in light of the fact father was most certainly not making over \$200,000 per year at any time, but also taking into account the Court is using inflationary adjustment to impute this current income, the Court will select a middle ground and set the effective date of the income found herein to the date of the divorce decree, September 5, 2008. The Court does this even though the time limits under rule 60(b) have long expired. The Court see no obligation to do this as father did nothing about the decree until just before trial, and did not make consistent payment of any amount for three years—and still has not after filing the petition to modify. The Court

emphasizes it is taking into account the fact it is adjusting and reducing father' imputed income for inflation now but applying that figure beginning in 2008 rather than now. This approach benefits father but sanctions him for his lack of diligence, good faith and failure to support his children and former spouse notwithstanding his ability to do so.

The trial court did not abuse its discretion by setting alimony at \$1,900 per month.

Father argues that if you go through each minor emancipating that Mother is receiving a net windfall. However, Mother, at the time of the Decree of Divorce, had an imputed income of \$1,015 per month⁶ Father is attempting to take Mother's current income (at the time of trial of \$2,503) and state that this was Mother's income *nunc pro tunc* back to the Decree of Divorce. This is wrong and would make a grave injustice for Mother.

Additionally, at the time of the Decree of Divorce Mother had an increased need as she had four minor children compared to the one minor children she has today. For the court to validate Father's argument, the court would then have to go back and make a finding of Mother's actual income each year and her actual need each year post decree to ensure that they were correct for calculating alimony. The trial court attempted to forgo such a timely and costly analysis by making an equitable resolution. R 0679. Father cannot show that there was a clear and prejudicial abuse of discretion is demonstrated and thus this court must uphold the trial court's findings.

⁶ Mother was not working at the time of the Decree of Divorce but stipulated to be imputed to be imputed to \$1,015 per month.

III. The court did not abuse its discretion in setting father's child support obligation in an amount based on his imputed income of \$6,662.00 per month.

This Court should refer to the above argument regarding Father's imputed income as to why the trial court did not abuse its discretion in imputing Father's income to \$6,662.00 per month. Father received a benefit from the court's finding and, therefore, cannot show that the court abused its discretion. Mother was, at the time of trial, making an undisputed amount of \$2,503.00. The trial court allowed for Father to *pro nunc tunc* the trial court's findings back to the entry of the Decree of Divorce. Because of this, Mother's income at the time of trial was used to calculate the modified child support orders. However, Mother's income was only \$1,105 at the time of the entry of the Decree of Divorce. Likewise, her expenses at the time of the Decree of Divorce were higher as she had four minor children, rather than the one that she had at the time of trial. Thus, Father cannot show, and this Court should not find, that the trial court abused its discretion when Father received a benefit that washed away several thousand dollars of his arrears that he owed to Mother.

IV. The trial court did not abuse its discretion in awarding mother attorney fees?

The trial court awarded attorney fees based off two different legal bases: 1) Utah Code 30-3-3 (1) states that in any action filed under Title 30...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. (2) Utah Code 78B-5-825 "in civil actions, the court shall award reasonable attorney fees to a prevailing party if the

court determines that the action or defense to the action was without merit and not brought or asserted in good faith.” Herein, the trial court awarded Mother attorney fees because the trial court found that Father’s hiding of income and failure to be forthcoming with complete records allowed an award of attorney fees to Mother pursuant to Utah Code §78B-5-825. Furthermore, the court found that under Utah Code §30-3-3, Mother should be awarded fees due to her inability to afford attorney fees and Father has the ability to pay them.

a. Fees are proper under Utah Code 30-3-3:

“The district court has broad discretion to award attorney fees in a divorce decree modification action, and we reverse such an award only if it is " seriously inequitable or otherwise unjust." *Young v. Young*, 201 P. 3d 301 (Ut. App. 2009), ¶ 21. “To allow meaningful appellate review, however, the decision to award attorney fees must be supported by detailed findings of fact.” See *Connell v. Connell*, 836 P. 3d 233 (Ut. App. 2010), ¶ 27. "Fees awarded ... [for establishing a support order] must be based on the usual factors of need, ability to pay, and reasonableness." See *id.*; see also Utah Code Ann. § 30-3-3(1) (Supp.2011). " The court specifically made some findings that “Since father has not been paying adequate alimony or child support mother cannot afford attorney’s fees but father has the ability to pay them and thus mother is awarded fees under Utah Code 30-3-3.” R 0681.

b. Fees are proper under Utah Code 78B-5-825:

The trial court did not err when it awarded attorney’s fees under Utah Code Ann. § 78B-5-825. Section 78B-5-825 states that “[i]n civil actions, the court shall award

reasonable attorney fees to a prevailing party if the court determines that the *action or defense to the action* was without merit and not brought or asserted in good faith.”

UTAH CODE ANN. § 78B-5-825 (1) (emphasis added). “Whether the trial court properly interpreted the legal prerequisites for awarding attorney fees under section [78B-5-825] is a ‘question of law’ that we ‘review ... for correctness.’” *Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 8, 122 P.3d 556 (quoting *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201 (holding that statutory interpretation presents a legal question)).

“According to the plain language of section 78-27-56 [renumbered as section 78B-5-825], three requirements must be met before the court shall award attorney fees: (1) the party must prevail, (2) the claim asserted by the opposing party must be without merit, and (3) the claim must not be brought or asserted in good faith.” *Gallegos v. Lloyd*, 178 P.3d 922 (Ut. App. 2008), ¶ 9, *certiorari denied* 189 P.3d 1276 (citing *Hermes Assocs. v. Park's Sportsman*, 813 P.2d 1221, 1225 (Utah Ct.App.1991)).

Mother prevailed in showing that Father was and can make more than \$11.00 per hour. R 0680. The trial court found that Father’s claim that he only could makes \$2,000 per month was without merit and not credible. “In this case, the Court concludes although father has been able to get support and income modified from the decree, his hiding of income and failure to be forthcoming with complete records make it inequitable to award him attorney’s fees.” R 0680. The Court then found that “he [Father] did not obtain nearly the results he desired-basically validation of his claim that he only makes about \$11.00 per hour. Those same factors would allow an award to mother under the bad faith provision in title 78 of the Utah Code. *Id.* Therefore, this

court should find that the trial court was correct in awarding attorney fees to Mother.

V. MOTHER SHOULD BE AWARDED HER ATTORNEY FEES ON APPEAL

Mother should be awarded her attorney fees on appeal. " In divorce actions where the trial court has awarded attorney fees and the receiving spouse [prevails] on the main issues, we generally award fees on appeal." *Stonehocker v. Stonhocker*, 176 P.3d 476 (Ut. App. 2008), ¶ 11, (alteration in original) (citation and internal quotation marks omitted). Mother has expended monies having to defend her position. Therefore, she should be awarded her attorney fees on appeal.

CONCLUSION

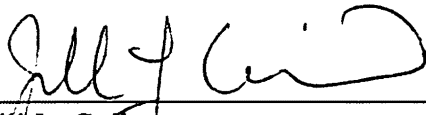
The trial court did not abuse it's in imputing income at \$6,662. The evidence is clear that Father was not being truthful about his income and can earn more than the \$11.00 per hour that he claimed. The trial court did not abuse its discretion in awarding Mother \$1,900 per month in alimony for the length of the marriage. Though the court did grant Father *nunc pro tunc* motion and allowed for the court award to be backdated to the entry of the Decree of Divorce, it did not discredit that Mother had a lower income and much higher expenses at the time of the Decree of Divorce. Father essentially, "wants his cake, and wants to eat it to." However, this would be to Mother's detriment and overshadow the fact that the court was trying to be fair and equitable toward both parties. The trial court did not abuse its discretion in awarding child support as imputing Father to an income of \$6662.00. Finally, the trial court did not abuse its discretion and was

correct in awarding Mother attorney's fees pursuant to Utah Code § 30-3-3 and Utah Code § 78B-5-825. Mother should also be awarded her attorney fees on appeal.

WHEREFORE, PREMISES CONSIDERED, this Court should affirm the judgment of the district court.

Respectfully submitted this 21st day of February, 2017.

COILLAW, LLC



Jill L. Coil
Luke Shaw
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)

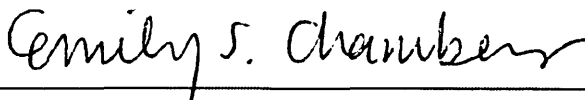
I hereby certify that this brief complies with the requirements of Rule 24(f)(1) of the Utah Rules of Appellate Procedure. This is a principal brief which must be less than 14,000 words. I have used the word processor to count the amount of words in this brief, excluding words in the table of contents, table of citations, and the addenda. The total number of words in this brief is 11,886.


An employee of COILLAW, LLC

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **APPELLEE'S BRIEF** to be sent via first class U.S. Mail, postage prepaid, on the 21st day of February, 2017, to:

Rosemond Blakelock
495 South Orem Boulevard
Orem, UT 84058


An employee of COILLAW, LLC

ADDENDUM

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.

Amended by Chapter 3, 2008 General Session

78B-5-825 Attorney fees -- Award where action or defense in bad faith -- Exceptions.

(1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Renumbered and Amended by Chapter 3, 2008 General Session

78B-12-203 Determination of gross income -- Imputed income.

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

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

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

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

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

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

(4)

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

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

(5)

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

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

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

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

(7)

(a) Income may not be imputed to a parent unless the parent stipulates to the amount

imputed, the parent defaults, or, in contested cases, a hearing is held and the judge in a judicial proceeding or the presiding officer in an administrative proceeding enters findings of fact as to the evidentiary basis for the imputation.

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

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

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

- (i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;
- (ii) a parent is physically or mentally unable to earn minimum wage;
- (iii) a parent is engaged in career or occupational training to establish basic job skills;
- or
- (iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

(8)

(a) Gross income may not include the earnings of a minor child who is the subject of a child support award nor benefits to a minor child in the child's own right such as Supplemental Security Income.

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

Amended by Chapter 41, 2012 General Session

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

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

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

(b)

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

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

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

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

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

(iii) provisions for the enforcement of these orders;

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

(e) if either party owns a life insurance policy or an annuity contract, an acknowledgment by the court that the owner:

(i) has reviewed and updated, where appropriate, the list of beneficiaries;

(ii) has affirmed that those listed as beneficiaries are in fact the intended beneficiaries after the divorce becomes final; and

(iii) understands that if no changes are made to the policy or contract, the beneficiaries currently listed will receive any funds paid by the insurance company under the terms of the policy or contract.

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

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and

for distribution of the property and obligations for debts as is reasonable and necessary.
(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.

(5)

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

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

(6) If a petition for modification of child custody or parent-time provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

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

(8)

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

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

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

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

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or enabling the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining whether to award alimony and the terms thereof.

(c) "Fault" means any of the following wrongful conduct during the marriage that substantially contributed to the breakup of the marriage relationship:

(i) engaging in sexual relations with a person other than the party's spouse;

(ii) knowingly and intentionally causing or attempting to cause physical harm to the other party or minor children;

(iii) knowingly and intentionally causing the other party or minor children to reasonably fear life-threatening harm; or

(iv) substantially undermining the financial stability of the other party or the minor children.

(d) The court may, when fault is at issue, close the proceedings and seal the court

records.

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

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

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

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

(i)

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

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

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

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

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

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

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

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

Rule 101. Motion practice before court commissioners.

(a) Written motion required. An application to a court commissioner for an order must be by motion which, unless made during a hearing, must be made in accordance with this rule. A motion must be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought. Any evidence necessary to support the moving party's position must be presented by way of one or more affidavits or declarations or other admissible evidence. The moving party may also file a supporting memorandum.

(b) Time to file and serve. The moving party must file the motion and any supporting papers with the clerk of the court and obtain a hearing date and time. The moving party must serve the responding party with the motion and supporting papers, together with notice of the hearing at least 28 days before the hearing. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response. Any other party may file a response, consisting of any responsive memorandum, affidavit(s) or declaration(s). The response must be filed and served on the moving party at least 14 days before the hearing.

(d) Reply. The moving party may file a reply, consisting of any reply memorandum, affidavit(s) or declaration(s). The reply must be filed and served on the responding party at least 7 days before the hearing. The contents of the reply must be limited to rebuttal of new matters raised in the response to the motion.

(e) Counter motion. Responding to a motion is not sufficient to grant relief to the responding party. A responding party may request affirmative relief by way of a counter motion. A counter motion need not be limited to the subject matter of the original motion. All of the provisions of this rule apply to counter motions except that a counter motion must be filed and served with the response. Any response to the counter motion must be filed and served no later than the reply to the motion. Any reply to the response to the counter motion must be filed and served at least 3 business days before the hearing. The reply must be served in a manner that will cause the reply to be actually received by the party responding to the counter motion (i.e. hand-delivery, fax or other electronic delivery as allowed by rule or agreed by the parties) at least 3 business days before the hearing. A separate notice of hearing on counter motions is not required.

(f) Necessary documentation. Motions and responses regarding temporary orders concerning alimony, child support, division of debts, possession or disposition of assets, or litigation expenses, must be accompanied by verified financial declarations with documentary income verification attached as exhibits, unless financial declarations and documentation are already in the court's file and remain current. Attachments for motions and responses regarding child support and child custody must also include a child support worksheet.

(g) No other papers. No moving or responding papers other than those specified in this rule are permitted.

(h) Exhibits; objection to failure to attach.

(h)(1) Except as provided in paragraph (h)(3) of this rule, any documents such as tax returns, bank statements, receipts, photographs, correspondence, calendars, medical records, forms, or photographs must be supplied to the court as exhibits to one or more affidavits (as appropriate) establishing the necessary foundational requirements. Copies of court papers such as decrees, orders, minute entries, motions, or affidavits, already in the court's case file, may not be filed as exhibits. Court papers from cases other than that before the court, such as protective orders, prior divorce decrees, criminal orders, information or dockets, and juvenile court orders (to the extent the law does not prohibit their filing), may be submitted as exhibits.

(h)(2) If papers or exhibits referred to in a motion or necessary to support the moving party's position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If papers or exhibits referred to in the response or necessary to support the responding party's position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect must be cured within 2 business days after notice of the defect or at least 3 business days before the hearing, whichever is earlier.

(h)(3) Voluminous exhibits which cannot conveniently be examined in court may not be filed as exhibits, but the contents of such documents may be presented in the form of a summary, chart or calculation under Rule 1006 of the Utah Rules of Evidence. Unless they have been previously supplied through discovery or otherwise and are readily identifiable, copies of any such voluminous documents must be supplied to the other parties at the time of the filing of the summary, chart or calculation. The originals or duplicates of the documents must be available at the hearing for examination by the parties and the commissioner. Collections of documents, such as bank statements, checks, receipts, medical records, photographs, e-mails, calendars and journal entries, that collectively exceed ten pages in length must be presented in summary form. Individual documents with specific legal significance, such as tax returns, appraisals, financial statements and reports prepared by an accountant, wills, trust documents, contracts, or settlement agreements must be submitted in their entirety.

(i) Length. Initial and responding memoranda may not exceed 10 pages of argument without leave of the court. Reply memoranda may not exceed 5 pages of argument without leave of the court. The total number of pages submitted to the court by each party may not exceed 25 pages, including affidavits, attachments and summaries, but excluding financial declarations and income verification. The court commissioner may permit the party to file an over-length memorandum upon ex parte application and showing of good cause.

(j) Late filings; sanctions. If a party files or serves papers beyond the time required in this rule, the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(k) Limit on order to show cause. An application to the court for an order to show cause may be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by affidavit or other evidence sufficient to show cause to believe a party has violated a court order.

(l) Hearings.

(l)(1) The court commissioner may not hold a hearing on a motion for temporary orders before the deadline for an appearance by the respondent under Rule 12.

(l)(2) Unless the court commissioner specifically requires otherwise, when the statement of a person is set forth in an affidavit, declaration or other document accepted by the commissioner, that person need not be present at the hearing. The statements of any person not set forth in an affidavit, declaration or other acceptable document may not be presented by proffer unless the person is present at the hearing and the commissioner finds that fairness requires its admission.

(m) Motions to judge. The following motions must be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be considered by the judge.

(n) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection under Rule 108.