

2016

**Kylee J. Sandusky, Petitioner/ Appellee v. George A. Sandusky  
Respondent/ Appellant**

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

---

**Recommended Citation**

Reply Brief, *Sandusky v Sandusky*, No. 20160131 (Utah Court of Appeals, 2016).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/3648](https://digitalcommons.law.byu.edu/byu_ca3/3648)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007– ) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE COURT OF APPEALS  
STATE OF UTAH

---

**KYLEE J. SANDUSKY,**

Petitioner/Appellee

v.

**GEORGE A. SANDUSKY**

Respondent/Appellant

---

APPEAL NO. 20160131-CA

---

**REPLY BRIEF FOR APPELLANT**

---

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF  
SUMMIT COUNTY, UTAH, HON. KARA L. PETTIT

---

Elizabeth A. Shaffer  
4580 N. Silver Springs Drive  
Suite 100  
Park City, Utah 84060  
Telephone: 435-655-3033

Attorney for the Appellant

Paul J. Morken  
P.O. Box 980691  
Park City, Utah 8409

Frank D. Mylar (5116)  
2494 Bengal Blvd.  
Salt Lake City, Utah 84121  
Phone: (801) 858-0700

Attorneys for Appellee

FILED  
UTAH APPELLATE COURTS

OCT 05 2016

IN THE COURT OF APPEALS  
STATE OF UTAH

---

**KYLEE J. SANDUSKY,**

Petitioner/Appellee

v.

**GEORGE A. SANDUSKY**

Respondent/Appellant

---

APPEAL NO. 20160131-CA

---

**REPLY BRIEF FOR APPELLANT**

---

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF  
SUMMIT COUNTY, UTAH, HON. KARA L. PETTIT

---

Elizabeth A. Shaffer  
4580 N. Silver Springs Drive  
Suite 100  
Park City, Utah 84060  
Telephone: 435-655-3033

Attorney for the Appellant

Paul J. Morken  
P.O. Box 980691  
Park City, Utah 8409

Frank D. Mylar (5116)  
2494 Bengal Blvd.  
Salt Lake City, Utah 84121  
Phone: (801) 858-0700

Attorneys for Appellee

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
ARGUMENT .....	1
I. APPELLANT PRESERVED HIS ISSUES FOR APPEAL .....	1
A. THE ISSUES ON APPEAL WERE RAISED IN THE DISTRICT COURT .....	1
B. THE PLAIN ERROR EXCEPTION .....	3
C. THE APPELLATE COURT HAS WIDE DISCRETION TO HEAR ISSUES ON APPEAL.....	3
II. THE DISTRICT COURT ABUSED ITS DISCRETION IN THE PROPERTY DETERMINATIONS AND IN APPLYING THE SEPARATION AGREEMENT .....	5
III. THE TRIAL COURT ABUSED IT DISCRETION BY INCORRECTLY AWARDING ALIMONY .....	7
IV. APPELLEE'S ATTEMPT TO INTRODUCE EVIDENCE REGARDING ACCOUNTING SHOULD NOT BE ADMITTED INTO THE APPELLATE RECORD OR ARGUED, AS IT ADDRESSES AN ISSUE THAT WAS NOT APPEALED .....	8
V. THE DISTRICT COURT JUDGMENT SHOULD NOT BE AFFIRMED BASED ON THE INVITED ERROR DOCTRINE .....	9
VI. THE TRIAL COURT ABUSED ITS DISCREPTION IN ITS EQUITABLE DIVISION OF PROPERTY AND AWARD OF ALIMONY .....	10
VII. THE JUDGEMNT SHOULD NOT BE AFFIRMED BASED ON THE ARGUMENT THAT APPELALNT FAILED TO INVOKE THE AUTHORITY OF 59(a)(a)(1) IN HIS MOTION FOR A NEW TRIAL .....	12
VIII. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING ATTORNEYS FEES TO APPELLANT .....	12
IX. APPELLEE SHOULD NOT BE AWARDED FEES ON APPEAL.....	13
CONCLUSION .....	14

## TABLE OF AUTHORITIES

### *State Cases*

<i>Argyle v. Argyle</i> , 688 P.2d 468 (Utah 1984) .....	6
<i>Bair v. Bair</i> , 737 P.2d 177, 179 (Utah 1987) .....	7
<i>Bell v. Bell</i> , 2013 UT App 248, (Utah Ct. App. 2013) .....	4
<i>Brooks v. A.S.</i> , 2015 UT 35 (Utah 2015) .....	4
<i>Burnham v. Burnham</i> , 716 P.2d 781 (Utah 1986) .....	6
<i>Chen v. Stewart</i> , 2004 UT 82, ¶77, 100 P.3d 1177) .....	3
<i>Crookston v. Fire Ins. Exch.</i> , 860 P.2d 937 (Utah 1993) .....	12
<i>Dahl v. Dahl</i> , 2015 UT 23 (Utah 2015) .....	13
<i>Donjuan v. McDermott</i> , 2011 UT 72, (Utah 2011) .....	1
<i>Farrell v. Porter</i> , 830 P.2d 299 (Utah Ct. App. 1992) .....	14
<i>Fort Pierce Indus. Park Phases II, III &amp; IV Owners Ass'n v. Shakespeare</i> , 2016 UT 28, (Utah 2016) .....	4
<i>Goggin I</i> , 2011 UT 76, 267 P.3d 885 (Utah 2011) .....	6
<i>Horrell v. State Farm Bureau Ins. Co.</i> , 909 P.2d 1279 (Utah Ct. App. 1996) .....	12
<i>Kell v. State</i> , 2012 UT 25, 285 P.3d 1133 (Utah 2012) .....	4
<i>Kimball v. Kimball</i> , 2009 UT App 233, 217 P.3d 733 (Utah Ct. App. 2009) .....	13
<i>Levin v. Carlton</i> , 2009 UT App 170, 213 P.3d 884 (Utah Ct. App. 2009) .....	13
<i>Liston v. Liston</i> , 2011 UT App 433 (Utah Ct. App. 2011) .....	13
<i>Lundgren v. Lundgren</i> , 2015 UT 58 (Utah 2015) .....	5
<i>O'Dea v. Olea</i> , 2009 UT 46, 217 P.3d 704 (Utah 2009) .....	1
<i>Oliekan v. Oliekan</i> , 2006 UT App 405, ¶147 P.3d 464 (Utah Ct. App. 2006) .....	13
<i>Pang v. Int'l Document Servs.</i> , 2015 UT 63 (Utah 2015) .....	14
<i>Patterson v. Patterson</i> , 2011 UT 68, 266 P.3d 828 (Utah 2011) .....	4
<i>Porco v. Porco</i> , 752 P.2d 365 (Utah Ct. App. 1988) .....	14
<i>Pratt v. Nelson</i> , 2007 UT 41, 164 P.3d 366 (Utah 2007) .....	9
<i>R.C.S. v. A.O.L. (In re Baby Girl T.)</i> , 2012 UT 78 (Utah 2012) .....	3
<i>Redd v. Hill</i> , 2013 UT 35, 304 P.3d 861 (Utah 2013) .....	14

<i>Roberts v. Roberts</i> , 2014 UT App 211 (Utah Ct. App. 2014).....	13
<i>Sittner v. Schriever</i> , 2000 UT 45, 2 P.3d 442 (Utah 2000) .....	12
<i>State v. Cooper</i> , 2011 UT App 234, (Utah Ct. App. 2011).....	9
<i>State v. Guard</i> , 2015 UT 96 (Utah 2015).....	1
<i>State v. McNeil</i> , 2016 UT 3, 365 P.3d 699 (Utah 2016) .....	9
<i>State v. Nielsen</i> , 2014 UT 10, 326 P.3d 645, (Utah 2014) .....	2
<i>State v. Thomas</i> , 961 P.2d 299 (Utah 1998).....	5
<i>T.D.G. v. L.R. (In re A.T.I.G.)</i> , 2012 UT 88 (Utah 2012) .....	3
<i>Town &amp; Country Bank v. Stevens</i> , 2014 UT App 172 (Utah Ct. App. 2014) .....	4
<i>Weiser v. Union Pac. R.R. Co.</i> , 2010 UT 4, 247 P.3d 357 (Utah 2010) .....	3
<i>White Water Whirlpool</i> , 2008 UT 79 (Utah 2008).....	9
<i>Wilson v. IHC Hosps., Inc.</i> , 2012 UT 43, 289 P.3d 369 (Utah 2012).....	2

#### *Court Rules and Statutes*

Utah Code § 30-3-3(1) .....	12
Utah R. App. P. Rules 4(d).....	9
Utah R. App. P. 24(a).....	1
Utah R. App. P. 24(a)(5)(A).....	1
Utah R. App. P. 24(a)(5)(B).....	1
Utah R. App. P. 24(a)(9) .....	1
Utah R. App. P. 24(c).....	9
Utah R. App. P. 33 .....	14
Utah R. App. P. 33(b).....	14
Utah R. App. P. 52(b).....	9
Utah R. Civ. P. 59(a)(a)(1).....	12
Utah R. Civ. P. 59(a)(5)(6)(7) .....	12
Utah R. Civ. P. 60(b)(1) .....	12
Utah R. Civ. P. 102 .....	12

## ARGUMENT

### I. APPELLANT PRESERVED HIS ISSUES FOR APPEAL

Appellee claims that Appellant has failed to preserve his issues on appeal pursuant to Utah R. App. P. 24(a), stating that Utah appellate courts “will not address an issue if it is not preserved or if the appellant has not established other ground for seeking review.” However, the rule states that the appellant must provide in a “citation to the record showing that the issue was preserved in the trial court per Utah R. App. P. 24(a)(5)(A) or state grounds for seeking review of an issue not preserved in the trial court pursuant to Utah R. App. P. 24(a)(5)(B). In addition, Rule 24(a)(9) provides that a brief “argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.” Id.

#### A. THE ISSUES ON APPEAL WERE RAISED IN THE DISTRICT COURT

In order to preserve an issue for appeal, a party must present the issue in the trial court. The issue must be "specifically raised, in a timely manner, and must be supported by evidence and relevant legal authority." State v. Guard, 2015 UT 96, ¶ 29 (Utah 2015). The Utah Supreme Court has stated that to properly preserve an issue for appellate review, the issue must be raised in the district court. O'Dea v. Olea, 2009 UT 46, 217 P.3d 704 (Utah 2009). The purpose of the preservation requirement is to put the district court on notice of an issue and provide it with an opportunity to rule on it. Donjuan v. McDermott, 2011 UT 72, ¶ 20 (Utah 2011).

While Appellee claims that Appellant's issues were not adequately briefed, the record and the Appellant's Opening Brief both evidence that this is not the case. Appellant submitted to this Court a 40-page appellate brief that contains more than 60 citations to decisions and rules in support of his arguments. In addition, Appellant's brief cites to the district court's findings of fact and court transcripts which support his challenges to the findings of the lower court. Appellant has marshalled the record for evidence that supports his arguments. The Utah Supreme Court held that in order to satisfy rule 24(a)(9), "the argument must provide meaningful legal analysis." Wilson v. IHC Hosps., Inc., 2012 UT 43, ¶ 121, 289 P.3d 369 (Utah 2012) (internal quotation marks omitted).

Similarly, "The focus should be on the merits, not on some arguable deficiency in the appellant's duty of marshaling". State v. Nielsen, 2014 UT 10, ¶42 326 P.3d 645, (Utah 2014). "Too often, the appellee's brief is focused on this latter point, and not enough on the ultimate merits of the case. To encourage the latter and discourage the former, we also hereby repudiate the requirements of playing 'devil's advocate' and of presenting 'every scrap of competent evidence' in a 'comprehensive and fastidious order.' That formulation is nowhere required in the rule. And its principal impact on briefing has been to incentivize appellees to conduct a fastidious review of the record in the hope of identifying a scrap of evidence the appellant may have overlooked. That is not the point of the marshaling rule, and will no longer be an element of our consideration of it." State v. Nielsen, 2014 UT 10, ¶43, 326 P.3d 645, (Utah 2014)



(citing Chen v. Stewart, 2004 UT 82, ¶77, 100 P.3d 1177). Appellant's arguments and the trial court record are substantial outlining the mistake, inconsistency, error and confusion of the trial Court's distribution. Appellant has made strong persuasive arguments for his claims, and Appellee's claim is without merit.

## **B. THE PLAIN ERROR EXCEPTION**

Assuming *arguendo*, an issue is raised on appeal that was not preserved below, the appellate court will review it for plain error. "Under plain error review, we may reverse the lower court on an issue not properly preserved" only if the party shows that "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the party." "An error is obvious only if the law governing the error was clear at the time the alleged error was made." T.D.G. v. L.R. (In re A.T.I.G.), 2012 UT 88, ¶ 22 (Utah 2012). The Supreme Court has also stated that "[f]or an issue to be sufficiently raised, it must at least be raised to a level of consciousness such that the trial judge can consider it." Weiser v. Union Pac. R.R. Co., 2010 UT 4, ¶ 14, 247 P.3d 357 (Utah 2010); R.C.S. v. A.O.L. (In re Baby Girl T.), 2012 UT 78, ¶ 34 (Utah 2012); Donjuan v. McDermott, 2011 UT 72, ¶ 21 (Utah 2011). The Court of Appeals will find that Appellant has made such a case, in the event that it found the issues not preserved for appeal.

### C. THE APPELLATE COURT HAS WIDE DISCRETION TO HEAR ISSUES ON APPEAL

Appellee's counsel provides an exhaustive dissertation on the requirements for preserving an issue for appeal. Utah R. App. P. 24(a)(5) states that a timely and specific objection supported by evidence or legal authority must be made in the trial court. *Id.* While Appellant has clearly preserved the issues presented for appeal, again, assuming *arguendo*, an issue is raised on appeal that was not preserved below, this Court has held that it may exercise wide discretion when deciding whether to entertain or reject matters that are first raised on appeal. Town & Country Bank v. Stevens, 2014 UT App 172 (Utah Ct. App. 2014). The Utah Supreme Court has stated that the two primary considerations underlying the preservation rule are judicial economy and fairness. Kell v. State, 2012 UT 25, ¶ 11, 285 P.3d 1133 (Utah 2012) (alteration in original) (citation omitted); Fort Pierce Indus. Park Phases II, III & IV Owners Ass'n v. Shakespeare, 2016 UT 28, ¶ 13 (Utah 2016). In Kell, the Supreme Court held that the district court "not only had an opportunity to rule on the issue [that the State argued was not preserved] but in fact "did rule on it." *Id.*, at 1136. In that case, the court noted that "[t]he district court's decision to take up the question . . . conclusively overcame any objection that the issue was not preserved for appeal." *Id.* See Fort Pierce Indus. Park, *supra*. Further, this court has held that the preservation requirement is "self-imposed and is therefore one of prudence rather than jurisdiction." Town & Country Bank v. Stevens, *supra*; Patterson v. Patterson, 2011 UT 68, ¶ 18, 266 P.3d 828 (Utah 2011); Bell v. Bell, 2013 UT App 248, ¶ 15 (Utah Ct. App. 2013). See also Brooks v. A.S., 2015 UT 35, ¶ 9-10 (Utah 2015)

(“[T]he legal questions presented are important, and counsel adequately preserved them below... [raising] statutory ...questions in the district court, and we therefore deem them preserved for purposes of appeal.”). The Court should find that judicial economy and fairness dictate that Appellant’s arguments be heard on appeal in the event that they are found to be not properly preserved. Rule 24(a)(9) does require “development of that authority and reasoned analysis based on that authority,” Lundgren v. Lundgren, 2015 UT 58, ¶ 13 (Utah 2015) (citing State v. Thomas, 961 P.2d 299, 305 (Utah 1998)), Appellant’s arguments on appeal satisfy this standard.

## **II. THE DISTRICT COURT ABUSED ITS DISCRETION IN THE PROPERTY DETERMINATIONS AND IN APPLYING THE SEPARATION AGREEMENT.**

The intent of the property division pursuant to the Separation Agreement was clear and the distribution equitable; as a result, the property division agreed to by the parties should not have been disturbed by the district court. The Separation Agreement executed by the parties was clear in its intent and division of assets. The assets the parties had to deal with consisted of cash, individual pensions and the 10 lots in Hawaii. Specifically, it was understood and agreed that Appellant would maintain his pre-marital property, accumulated and appreciated from the Dover property, half acquired prior to the parties’ marriage and with funds kept separate and apart from marital assets. The parties would split equally the remaining cash assets approximately \$800,000. In addition, Appellant would keep the 10 lots in Hawaii titled in his name with consideration that he would assume complete responsibility of their son’s college education, which evidence indicated was in excess of \$200,000. (Appellant’s Brief, p. 8 and Transcript April 30,

page 163-164). The distribution made by the district court was not consistent with the Separation Agreement and was inequitable. The district court determined that the Separation Agreement was valid and therefore should have enforced it in its entirety as agreed to by the parties and under which they lived. Appellant clearly demonstrated the manner in which the trial court's classification and distribution of marital or separate property was an abuse of discretion. Appellant detailed the parties' discussions in preparing the separation agreement, their knowledge of the assets, their financial accounts, understanding of separate property, how the separate property was calculated, the issues concerning their funding, enhancement, repairs, and maintenance. (Appellant Brief, p. 14-15). As such, Appellee's contentions fail.

Although the trial court in a divorce action is allowed considerable discretion in adjusting the financial and property interests of the parties, Argyle v. Argyle, 688 P.2d 468, 470 (Utah 1984), Appellant has shown that (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. Burnham v. Burnham, 716 P.2d 781, 782-83 (Utah 1986). While this is a heavy burden, the district court abuses its discretion where "no reasonable person would take the view adopted by the trial court." Goggin I, 2011 UT 76, ¶ 26, 267 P.3d 885 (Utah 2011). Appellant provided substantial evidence that he owned premarital assets which he maintained as separate property and that certain assets were owned separately throughout the marriage. (Transcript April 29, page 196, L 10-12 and

page 198, L 21-25, and Transcript April 30, page 163, L 3-9) (Transcript April 29, page 196, L 23-25). See Appellant's Brief, p. 8-9 and 18-19.

### **III. THE TRIAL COURT ABUSED IT DISCRETION BY INCORRECTLY AWARDING ALIMONY.**

The trial court's order concerning alimony was incorrect and inconsistent with the purpose and intent of the Separation Agreement resulting in an inequitable distribution of assets. (Transcript April 30, Page 51 lines 18-23), (Transcript April 30, Page 52 lines 14-18) (G. Sandusky Depo 94, L 10-18), also included Exhibit 6 filed as pleading tiled Exhibits 6-10 on May 5, 2014). The trial court erred in concluding that the facts and circumstances warranted an award of alimony. The separation agreement allowed for Appellants separate property and an equal division of the remaining assets. (Findings of Fact No. 39). The monthly support and maintenance payments were determined as 6% interest on the Appellee's portion of the division of the remaining assets, or \$400,000. The lump sum amount was represented in addendum to the agreement wherein either party may terminate the monthly payments with a lump sum payment. (See Appellant's Brief, p. 21-22). When the parties' entered into the separation agreement they were dealing with fixed assets. (Findings of Fact dated No. 43) which distribution was understood and agreed upon. (Appellant's Brief, p. 29-30). At the time of trial, the assets effectively remained the same. (Findings of Fact No. 44). Instead the Court redistributed the assets contrary to the parties' agreement and awarded alimony. The correct interpretation of the lump sum award is Appellee's property distribution. The Utah Supreme Court in Bair v. Bair, 737 P.2d 177, 179 (Utah 1987), reversed the trial court's

finding of alimony based on similar language in an agreement between the parties and held "The only support for the trial court's 'alimony' finding is that the sum was designated as an 'allowance for support.' Yet the further provisions of the stipulation and agreement and the parties' intent as established by their affidavits overwhelmingly support our conclusion that the finding was erroneous and that the sum constituted a property settlement. The stipulation and agreement of the parties recited as its purpose the 'settlement of all rights and obligations ... including property rights.'" Likewise, this is the only equitable interpretation of the parties' separation agreement.

Further, the lump sum property distribution negates a need for alimony by Appellee. And distribution of all the cash assets of the parties negates Appellant's ability to pay. The trial court erroneously concluded that "although Respondent is unemployed, he is able to earn income from his real estate and hard money loan ventures." (Findings of Fact No. 34). The evidence was clear that these ventures were conducted with the cash proceeds now being distributed to the parties and such ventures had not occurred since the parties' separation. The court also conversely found, Appellant's "monthly deficit is approximately \$750.00. (Findings of Fact No. 34). The trial court's interpretation of the agreement on the issue of alimony is reversible error.

**IV. APPELLEE'S ATTEMPT TO INTRODUCE EVIDENCE REGARDING ACCOUNTING SHOULD NOT BE ADMITTED INTO THE APPELLATE RECORD OR ARGUED, AS IT ADDRESSES AN ISSUE THAT WAS NOT APPEALED.**

Appellee raises for the first time in her opposition brief that Appellant failed to produce evidence of tracings or accounting of funds between the time of the Separation

Agreement and the trial. Appellee did not cross-appeal on this issue. As a result, she is prohibited from raising it in her opposition brief. Utah R. App. P. Rule 24(c) ("if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal."). The Court should not consider this issue raised only in her opposition brief, as Appellee has waived her right to address this in a cross-appeal. See Utah R. App. P. Rules 4(d) and 52(b).

**V. THE DISTRICT COURT JUDGMENT SHOULD NOT BE AFFIRMED  
BASED ON THE INVITED ERROR DOCTRINE.**

Appellee claims that the district court judgment should be affirmed in light of the invited error doctrine. However, the doctrine is invoked when there are affirmative representations "where counsel stipulates to the court's instruction, states directly that there is no objection to a specific ruling of the court, or provides the court with erroneous authority upon which the court relies." Pratt v. Nelson, 2007 UT 41, ¶ 23, 164 P.3d 366 (Utah 2007); State v. Cooper, 2011 UT App 234, ¶ 10 (Utah Ct. App. 2011); Newman v. White Water Whirlpool, 2008 UT 79, ¶ 16 (Utah 2008). The record gives no evidence of Appellant's counsel encouraging the trial court to make any erroneous ruling or intentionally misleading the district court in order to preserve a hidden ground for reversal on appeal..." State v. McNeil, 2016 UT 3, ¶ 17, 365 P.3d 699 (Utah 2016) (internal quotation marks omitted)). See Fort Pierce Indus. Park Phases II, III & IV Owners Ass'n v. Shakespeare, 2016 UT 28, ¶ 14 (Utah 2016).

## **VI. THE TRIAL COURT ABUSED ITS DISCRETION IN ITS EQUITABLE DIVISION OF PROPERTY AND AWARD OF ALIMONY.**

Contrary to Appellee's persistent argument, Appellant has consistently throughout his Appellate Brief marshalled and supported his claims with factual citations from the record and evidenced an abuse of discretion or an incorrect application of law to fact by the district court.

The district court ruled the Separation Agreement and Addendum valid (Findings of Fact Nos. 19-21) but contradictorily interpreted the Agreement inequitably against its purpose. The district court found that Appellant's testimony as to the intent and basis for the property distribution in the Separation Agreement was in direct conflict with the language of the agreement, specifically Article 4. (Findings of Fact No. 39). Yet the agreement addendum specifically terminates monthly alimony payments with a lump sum cash payment of \$400,000. This language is consistent with Appellant's testimony and not in direct conflict.

The table below clearly outlines error in the trial court's identification and distribution of assets.

*(INTENTIONALLY LEFT BLANK TO INSERT TABLE ON NEXT PAGE)*



<b>Assets Per Decree of Divorce Judgment</b>		
<b>BANK ACCOUNTS<sup>1</sup></b>		
Hawaii Credit Union Acct	\$166,694.00	
LAFCU Acct (ending in 400)	\$345,020.00	
LAFCU Acct (ending in 401)	\$860.50	
Chase Acct	\$2,400.22	
MACU	\$250.00	
EAS Trust Acct	\$310,000.00	
Cash in Safety Deposit Box	\$40,000.00	
	<b>TOTAL</b>	<b>\$865,224.72</b>
<b>ACCOUNTS RECEIVABLE<sup>2</sup></b>		
Loan to Mike Anderson	\$40,000.00	
Loan to Sister and Niece	\$265,000.00	
Mednick deficiency Judgment	TBD	
<b>REAL PROPERTY<sup>3</sup></b>		
Foo house and lot	\$428,500.00	
	<b>TOTAL</b>	<b>\$428,500.00</b>
	<b>TOTAL VALUE OF ASSETS</b>	<b>\$1,293,724.72</b>
<b>Distribution Ordered by the Court<sup>4</sup></b>		
<b>PETITIONER</b>		
Amount in attorney trust account <sup>5</sup>	\$310,000.00	
Bond Amount based on Final Order (held in Court trust) <sup>6</sup>	\$487,106.14	
50% of Foo house and lot <sup>7</sup>	\$214,250.00	
	<b>TOTAL</b>	<b>\$1,011,356.14</b>
<b>RESPONDENT</b>		
10 lots awarded as separate property (cash in bank accts) <sup>7</sup>	\$335,000.00	
50% of Foo house and lot <sup>7</sup>	\$214,250.00	
	<b>TOTAL</b>	<b>\$549,250.00</b>

<sup>1</sup> Findings of Fact, p. 36

<sup>2</sup> Evidence shows repaid; Appellant's Brief, p. 9, Transcript April 30, p. 51, L 18-23, p. 52, L 14-18

<sup>3</sup> Findings of Fact, p. 37

<sup>4</sup> These amounts do not include personal property or the parties' separate pension/401(K) that the Court determined to be a fair and equitable distribution per the Separation Agreement

<sup>5</sup> November 2, 2015 Order

<sup>6</sup> January 5, 2016 Order

<sup>7</sup> July 23, 2015 Divorce Decree

**VII. THE JUDGEMNT SHOULD NOT BE AFFIRMED BASED ON THE ARGUMENT THAT APPELALNT FAILED TO INVOKE THE AUTHORITY OF 59(a)(a)(1) IN HIS MOTION FOR A NEW TRIAL.**

Appellee's counsel raises the issue of Appellant basis for his motion for a new trial. Appellee's counsel claims that Appellant cited Utah R. Civ. P. 59(a)(a)(1); that the motion was limited to 59(a)(5)(6)(7) and Rule 60(b)(1) and (6); and that the motion or arguments at trial did not invoke the authority of 59(a)(a)(1). For this reason, he claims that the order should be affirmed because Appellant's appeal was not directed at what the trial court ruled upon. However, the Utah Supreme Court has held that filing a post-judgment motion is not a necessary prerequisite to filing an appeal. Sittner v. Schriever, 2000 UT 45, ¶ 16, 2 P.3d 442 (Utah 2000). As a result, citing to one subsection of the rule or another does not prohibit the appeal or give the Court reason to affirm the district court decision.

Further, Appellee's counsel states that Appellant erred by claiming the standard of review is correctness for legal error and that the correct standard of review is an abuse of discretion. However, if the court's ruling is based upon a conclusion of law, it is reviewed for correctness. Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993); Horrell v. State Farm Bureau Ins. Co., 909 P.2d 1279, 1280 (Utah Ct. App. 1996).

**VIII. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING ATTORNEYS FEES TO APPELLANT.**

Appellee argues that Appellant may not be awarded attorney's fees because of his failure to file a motion under Utah R. Civ. P. 102, and further that he did not object or preserve an objection to the court's not awarding him attorney fees. However, § 30-3-

3(1) of the Utah Code authorizes courts to award attorney fees and costs in divorce cases if doing so would "enable the other party to prosecute or defend the action." Dahl v. Dahl, 2015 UT 23, ¶ 168 (Utah 2015). The award of attorney's fees must be based on "evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees." Levin v. Carlton, 2009 UT App 170, ¶ 27, 213 P.3d 884 (Utah Ct. App. 2009) (internal quotation marks omitted). The decision of whether to award attorney fees pursuant to § 30-3-3 rests in the sound discretion of the district court. As such, this Court must review the district court's award or denial of fees for abuse of discretion. Kimball v. Kimball, 2009 UT App 233, ¶ 19, 217 P.3d 733 (Utah Ct. App. 2009). See Oliekan v. Oliekan, 2006 UT App 405, ¶ 30, 147 P.3d 464 (Utah Ct. App. 2006) (In divorce cases, "[b]oth the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion.") (citation and internal quotation marks omitted); Roberts v. Roberts, 2014 UT App 211, ¶ 27 (Utah Ct. App. 2014); Liston v. Liston, 2011 UT App 433, ¶ 26 (Utah Ct. App. 2011) (when a trial court awards fees under its inherent power to sanction, evidentiary requirements are not implicated.)

#### **IX. APPELLEE SHOULD NOT BE AWARDED FEES ON APPEAL.**

Appellee's counsel has determined that Appellant's appellate brief is frivolous for failing to preserve issues, failing to marshal the evidence, and "he invited error in the trial court..." (Appellee's Brief, p. 55.) In addition, opposing counsel explains that the fact Appellant brought three "separate post-trial motions, all which were in large part denied" as evidence of a frivolous appeal. (Id.)

The Utah Rules of Appellate Procedure state that a frivolous appeal is "one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Utah R. App. P. 33(b). The Utah Supreme Court states that this is a "high bar," Redd v. Hill, 2013 UT 35, ¶ 28, 304 P.3d 861 (Utah 2013) (internal quotation marks omitted), and the Court will sanction attorneys for frivolous appeals only in the most "egregious cases" where an obviously meritless appeal "result[s] in the delay of a proper judgment." Redd v. Hill, supra; Pang v. Int'l Document Servs., 2015 UT 63, ¶ 13 (Utah 2015). See, e.g., Farrell v. Porter, 830 P.2d 299, 302 (Utah Ct. App. 1992) ("Sanctions are appropriate for appeals obviously without merit, with no reasonable likelihood of success, and which result in the delay of a proper judgment.") (internal quotation marks omitted); Porco v. Porco, 752 P.2d 365, 369 (Utah Ct. App. 1988). Appellant's petition does not present such a case. Sanctions under Rule 33 are inappropriate. Redd v. Hill, supra. Accordingly, there is no basis on which to award attorney fees to Appellee.

### CONCLUSION

Based on the foregoing, Appellant requests that this Court reverse the decision of the trial court and direct that court to modify its Findings of Fact and Conclusions of Law to correct its errors in the interpretation of the Separation Agreement, its miscalculations of the assets, and inequitable distribution in order for the Appellant to have a fair resolution of this matter.

DATED this 5<sup>th</sup> day of October, 2016.



---

Elizabeth A. Shaffer  
Attorney for Respondent/Appellant

## CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

### Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

- ✓ this brief contains 3890 [number of] words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B), or
- ☐ this brief uses a monospaced typeface and contains \_\_\_\_\_ [number of] lines of text, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because:

- ✓ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Size 13 font, Times New Roman, or
- ☐ this brief has been prepared in a monospaced typeface using \_\_\_\_\_ [name and version of word processing program] with \_\_\_\_\_ [name of characters per inch and name of type style].

/s/ Elizabeth A. Shaffer

Elizabeth A. Shaffer

Dated: 10/5/2016



## CERTIFICATE OF SERVICE

I certify that on this the 5<sup>th</sup> day of October, 2016, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was filed via the Court's electronic filing system which automatically delivered service to the following:

Paul J. Morken  
P.O. Box 980691  
Park City, UT 84098

/s/ C. Kramer