

2002

Melissa Shaw v. Scott Shaw : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James I. Watts; Attorney for Petitioner and Appellee.

Gayanne K. Schmid; Attorney for Respondent and Appellant.

Recommended Citation

Brief of Appellee, *Shaw v. Shaw*, No. 20020140 (Utah Court of Appeals, 2002).

https://digitalcommons.law.byu.edu/byu_ca2/3705

This Brief of Appellee 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 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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

JAMES I. WATTS (4768)
39 Exchange Place, Suite 100
Old Salt Lake Stock & Mining Bldg.
Salt Lake City, Utah 84111
Tel: (801) 994-0838
Fax: (801) 994-0833

Attorney for Petitioner and Appellee

IN THE UTAH COURT OF APPEALS

MELISSA SHAW,
Petitioner and Appellee,

v.
SCOTT SHAW,
Respondent and Appellant.

APPELLEE'S ~~REPLY~~ BRIEF

Appellate Case No. 20020140-CA

Priority _____

**APPEAL FROM DECREE OF DIVORCE AND AMENDED DECREE OF
DIVORCE GRANTED BY THE THIRD DISTRICT COURT, THE
HONORABLE STEPHEN L. HENRIOD PRESIDING**

James I. Watts
39 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 994-0838
Attorney for Petitioner and Appellee

Gayanne K. Schmid
68 S. Main Street
Salt Lake City, Utah 84111
Telephone: (801) 531-8300
Attorney for Respondent and Appellant



FILED
Utah Court of Appeals

NOV 13 2002

Paulette Stagg
Clerk of the Court

JAMES I. WATTS (4768)
39 Exchange Place, Suite 100
Old Salt Lake Stock & Mining Bldg.
Salt Lake City, Utah 84111
Tel: (801) 994-0838
Fax: (801) 994-0833

Attorney for Petitioner and Appellee

IN THE UTAH COURT OF APPEALS

<p>MELISSA SHAW, Petitioner and Appellee, v. SCOTT SHAW, Respondent and Appellant.</p>	<p>APPELLEE'S REPLY BRIEF Appellate Case No. 20020140-CA Priority _____</p>
---	---

**APPEAL FROM DECREE OF DIVORCE AND AMENDED DECREE OF
DIVORCE GRANTED BY THE THIRD DISTRICT COURT, THE
HONORABLE STEPHEN L. HENRIOD PRESIDING**

James I. Watts
39 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 994-0838
Attorney for Petitioner and Appellee

Gyanne K. Schmid
68 S. Main Street
Salt Lake City, Utah 84111
Telephone: (801) 531-8300
Attorney for Respondent and Appellant

TABLE OF CONTENTS

II.	STATEMENT OF JURISDICTION...	1
III.	CONSTITUTIONAL OR STATUTORY PROVISIONS...	1
IV.	ARGUMENT...	6
V.	CONCLUSION...	25

I. TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Astill v. Clark</i> , 956 P.2d 1081 (Utah App. 1998)	22
<i>Bramme v. Bramme</i> , 587 P. 2d 144 (Utah 1997)	16
<i>Elman v. Elman</i> , 45 P.3d 176 (Utah App. 2002)	16
<i>Howell v. Howell</i> , 806, P. 2d 1209 (Utah App. 1991)	16
<i>Jones v. Jones</i> , 700 P.2d (Utah 1985)	14
<i>Munns v. Munns</i> , 790 P.2d 116 (Utah App. 1990)	8,10,14
<i>Newmeyer v. Newmeyer</i> , 745 P.2d 1276 (Utah App. 1987)	11
<i>Randle v. Allen</i> , 862 P.2d 1329 (Utah 1993)	23
<i>Rappleye v. Rappleye</i> , 855 P.2d 260 (Utah App. 1993)	7, 14, 20
<i>Rudman v. Rudman</i> , 812 P.2d 73 (Utah App. 1991)	7
<i>Schaumberg v. Schaumberg</i> , 875 P.2d 598 (Utah App. 1994)	6
<i>UTC Associates, LTD. v. Zimmerman</i> , 27 P.3d 177 (Utah App. 2001)	24
 <u>Statutes</u>	
U.C.A. § 30-3-1(2)	1
U.C.A. § 30-3-5(1)	1
U.C.A. § 78-2a-3(2)(h)	1
U.C.A. § 78-45-7(2)	1

II. STATEMENT OF JURISDICTION

A. The Third District Judicial Court, Salt Lake County, State of Utah, had subject matter jurisdiction over this case because Appellant resided in that district for three months prior to the commencement of the action, and the action involved dissolution of the marriage between the parties. Utah Code Ann. §§30-3-1(2) and 30-3-5(1).

B. The Utah Court of Appeals has appellate jurisdiction over divorce matters pursuant to Utah Code Ann. §78-2a-3(2)(h).

C. A Decree of Divorce was entered in this matter on January 15, 2002. An Amended Decree of Divorce was entered February 14, 2002. Appellant filed his Notice of Appeal on February 13, 2002. The Amended Decree of Divorce was a final judgment.

III. CONSTITUTIONAL OR STATUTORY PROVISIONS

Utah Code Ann. §30-3-1(2)

Utah Code Ann. §30-3-5(1)

Utah Code Ann. §78-2a-3(2)(h)

Utah Code Ann. §78-45-7(2)

IV. STATEMENT OF FACTS

Appellant and Appellee were married August 9, 1993. *Record on Appeal*, 213, ¶13. The parties had no children of their own, but Appellee has a 17-year-old son from a previous marriage. *Id.*, 214, ¶¶4,6. They separated on January 11, 2001. *Id.*

During the marriage, Appellant purchased a new 2000 Harley-Davidson motorcycle for \$18,875.42. *Record on Appeal*, 318, page 37, lines 10-11. Both parties presented conflicting evidence as to this vehicle's value, and the trial court set its value at \$19,000. *Record on Appeal*, 196, ¶16. The trial court found the payoff on the motorcycle to be \$5,452 and ordered the parties to split the equity after a credit was given to Appellant for proceeds from the sale of another vehicle. *Record on Appeal*, 196, ¶¶64-69.

During the course of the marriage, the parties also purchased a 1995 Harley-Davidson motorcycle. *Record on Appeal*, 318, page 35, lines 20-25. Appellee sold the motorcycle for \$9,400. *Record on Appeal*, 318, page 36, lines 1-6. After hearing conflicting testimony regarding the value of this vehicle, the trial court set its value at \$9,400 and ordered the parties to split the equity. *Record on Appeal*, 195-6, ¶¶63-64, 69. Also after hearing conflicting evidence, the court valued the party's marital 1992 Ford F250 truck at \$7,500 and awarded it to

Appellant subject to a credit to Appellee of \$3,750.00 representing ½ of the vehicles value. *Record on Appeal*, 196, ¶70.

Appellant had numerous construction tools including compressors and hand tools. Some of these were purchased prior to the marriage, others after. Appellee purchased a diamond ring during the marriage and later sold it to her mother for \$500. *Record on Appeal*, 198, ¶¶77-78. The trial court found that this sale was for less than the ring's actual value. *Id.* On finding that no detailed evidence was presented regarding the value of Appellant's tools, the trial court did not give either party a credit for these items. *Id.*, 225, ¶¶77-78

Appellee is employed as the office manager for Red Rock Brewing Company with a net monthly income of \$2,218.66 and reasonable and necessary living expenses of 3,519.30. *Record on Appeal*, 318, page 42, lines 4-9, 198, ¶81, 200, ¶91. Appellant is employed as a firefighter with a net monthly income of \$3,170, and reasonable and necessary living expenses of \$2,576 after the sale of the marital home. *Id.*, 227-229, ¶¶ 100, 115. Based on Appellee's shortfall of \$1,300 and Appellant's ability to pay, the trial court awarded Appellee alimony of \$250 per month until the marital home was sold and \$500 per month thereafter, for the length of the marriage. *Record on Appeal*, 239, ¶¶ 15-16, 261, ¶4.

The court awarded the Appellant the Trendwest and Marriott time shares subject to the debt thereon based upon Appellant's testimony that he wished to retain them. *Record on Appeal*, 318 page 207, lines 10-25, page 208, lines 1-16. Appellant testified he was told he could find somebody to take over the payments on the timeshares, and Appellee testified they were a luxury item. *Record on Appeal*, 318, page 203, lines 3-5.

During trial, and over Appellant's objections, the trial court allowed the rebuttal testimony of Ms. Barbara Underhill, certified public accountant. Ms. Underhill testified the party's allocation of the mortgage interest deduction on the marital home was incorrect and would expose the parties to an increased risk of audit from the IRS. *Record on Appeal*, 318, pages 261-2, lines 14-25 and 1-11. Ms. Underhill also testified as to the appropriateness of Appellant's mileage deduction. *Id.* The court found the parties were at an increased risk of an audit and financial loss unless Appellant filed an amended return claiming only one-half of the mortgage interest deduction rather than the entire deduction as he had previously done. *Id.*, 239, ¶12.

V. SUMMARY OF ARGUMENT

The trial court heard extensive evidence during the two-day trial of this matter. After taking the matter under advisement, the court issued 27 pages of Findings of Facts and Conclusions of Law, including 123 separate paragraphs of factual findings. *Record on Appeal*, 182. As in all trials, there were numerous hotly contested factual issues. There was conflicting evidence presented regarding the valuation of several items of marital property. In its role as fact finder, the trial court resolved these issues, some in favor of Appellant and some in favor of Appellee. The trial court entered detailed findings supporting its decisions. Appellant would like to retry on appeal the factual issues decided against him by the trial court.

Next, Appellant attacks the trial court's modest award of alimony to Appellee. As the record demonstrates, the trial court carefully considered the *Jones* factors in making its award. The court made some adjustments to the parties' claimed reasonable and necessary living expenses and to the parties' claimed income. In the end, however, Appellant's income being 2.27 times greater than Appellee's, a modest award of \$500 per month alimony was awarded to Appellee.

Finally, Appellant challenges the trial court's admission of the rebuttal testimony of Ms. Underhill, a certified public accountant. Appellant testified at trial that he helped prepare his year 2000 taxes and that he claimed certain exemptions and deductions Ms. Underhill's testimony related to Appellant's 2000 tax return and his claimed exemptions and deductions. Even if this Court should somehow find the trial court erred in allowing Ms. Underhill's testimony, any such error was harmless. Given the fact that Appellant claimed 100% of the mortgage interest deduction for 2000, and Appellee also claimed 50% of the mortgage interest deduction for the same year, the trial court would have reached the same inevitable conclusion that it did: one of the parties must amend their return.

VI. ARGUMENT

A. The Trial Court's Division and Valuation of the Marital Property Is Proper.

The trial court's division and valuation of the marital property is proper and well supported by adequate findings based on the evidence. It should first be noted that "a trial court has considerable discretion concerning property [division] in a divorce proceeding, thus its actions enjoy a presumption of validity." *Elman v. Elman*, 45 P.3d 176, 180 (Utah App. 2002) (quoting *Schaumberg v. Schaumberg*, 875 P.2d 598, 602 (Utah App. 1994)). This Court will only disturb

the trial court's property and valuation decisions "when there is a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." *Id.*

Finally, "there is no fixed formula upon which to determine a division of assets in a divorce action." *Rappleye v. Rappleye*, 855 P.2d 260, 263 (Utah App. 1993).

It is the Appellant's burden to marshal all the evidence supporting the trial court's findings. Appellant must then show the evidence to be legally insufficient to support these findings, even when viewed in the light most favorable to the trial court. See *Rudman v. Rudman*, 812 P.2d 73, 79 (Utah App. 1991). Appellant has clearly failed to meet this burden.

1. The 2000 Harley-Davidson Motorcycle was Valued and Allocated Correctly.

Appellant contends the trial court abused its discretion in valuing the 2000 Harley-Davidson motorcycle and in failing to make adequate findings as to why it did not give Appellant credit for his allegedly pre-marital contribution to this asset.

The trial court found the 2000 Harley-Davidson had an average retail price of \$19,000. *Record on appeal*, 223, ¶ 66. Petitioner's purchase agreement

indicated a purchase price of \$18,875.42. Mrs. Shaw testified the motorcycle had a value of between \$14,000 and \$19,000, with an actual value of \$18,000. *Record on Appeal*, 318, page 39, lines 21-25. Mr. Shaw testified the motorcycle's value was \$16,000, but in other documents submitted to the court conceded its value is \$18,000. *Id.* ¶ 67. Mr. Shaw also testified there was a waiting time for new Harley-Davidsons motorcycles. *Record on appeal*, 318, page 152, lines 2-13.

The trial court is not obligated to accept Appellant's proposed valuation. See *Munns v. Munns*, 790 P.2d 116, 199 (Utah App. 1990) (stating that "failure of the court to accept one party's proposed valuation of property is not an abuse of discretion."). This issue, like many others at trial, was contested. Conflicting evidence was presented and considered by the trial court. The trial court performed its duty and resolved the conflict. Appellant's argument is nothing but an attempt to have this Court substitute its judgment for that of the trial court and re-try this case on appeal. It can hardly be argued that a valuation of \$1,000 more than that conceded by Mr. Shaw and \$124.58 more than a recent purchase price amounts to a "clear abuse of discretion" which results in "serious inequity."

Appellant's contention that the trial court abused its discretion in failing to make adequate findings as to why it did not give Appellant credit for his allegedly pre-marital contribution to this asset is also without merit. Appellant claims he

traded-in a 1986 Harley-Davidson motorcycle and received a \$9,400 credit toward the purchase of the 2000 Harley-Davidson motorcycle. Appellant's Brief, page 13. It is conceded by Appellant, however, that "there was no testimony from either party as to the date Appellant purchased [the trade-in], or as to whether it was premarital." Appellant's Brief, page 15. Furthermore, Appellant admits he did not request a credit for this allegedly premarital motorcycle at trial. *Id.*

Despite this lack of evidence, Appellant now claims the trial court abused its discretion in failing to consider Appellant's premarital contribution to the 2000 Harley-Davidson. It is difficult to imagine how the trial court could have considered evidence that was not before it and made findings on such non-existent evidence.

2. The 1995 Harley-Davidson Motorcycle was also Valued Properly.

Based on Mrs. Shaw's testimony, the trial court found that Mrs. Shaw sold the 1995 motorcycle for \$9,400. *Record on Appeal*, 195, ¶62. The trial court also found that this amount was fair and reasonable compensation for a motorcycle of the same year and in like condition and repair. *Id.* ¶63. The trial court had conflicting evidence before it on this issue. Mrs. Shaw testified the motorcycle had an oil leak, which was reflected in a lower sales price. *Record on Appeal*, 318, page 36, lines 12-14. She also testified she researched the NADA blue book

value before selling it and learned that it was \$9,500. *Id.*, page 77, lines 6-12.

Mrs. Shaw also testified that she looked at advertisements for similar vehicles in the newspaper before selling the motorcycle. *Id.*, lines 15-17.

Appellant also testified regarding the value of the 1995 Harley-Davidson. He stated that he researched the NADA blue book valuation and found it to be \$12,800. *Record on Appeal*, 318, page 146, lines 1-4. He also testified that he looked at newspaper advertisements for similar vehicles with asking prices between \$13,000 and \$15,000. He further testified that the motorcycle had accessories which would increase its value, and that the oil leak was cosmetic and would not affect the vehicle's performance. See *id.*, page 147, lines 3-10, page 235, lines 3-9, 15-17. Appellant also argued in closing that Mrs. Shaw wanted to punish him by selling the motorcycle at a price below its value. *Record on Appeal*, 318, page 277, lines 3-15.

Once again, it is not an abuse of discretion for the trial court to refuse to accept one party's proposed valuation. See *Munns v. Munns*, 790 P.2d 116, 199 (Utah App. 1990). There was evidence supporting both parties' positions, and the trial court resolved the conflict. Appellant is again attempting to retry this matter on appeal.

3. The Valuation of the 1992 Ford Truck Was Proper.

As Appellant's Brief appropriately details, the trial court received extensive and conflicting evidence regarding valuation of the parties' 1992 Ford F250 pick-up truck. See Appellant's Brief, pages 20-22. Appellee's expert estimated the vehicle's value "somewhere close to the \$10,000 range." *Record on Appeal*, 318, page 96, lines 16-24. Appellant estimated the truck was worth between \$3,500 and \$4,000. *Record on Appeal*, 318, page 151, lines 9-13. The trial court also heard evidence regarding the NADA blue book valuation, reviewed photographs of the vehicle, and listened to testimony regarding its condition.

The trial court valued this vehicle at \$7,500. *Record on Appeal*, 224, ¶70. Once again, Appellant would like to have this issue retried on appeal. The case of *Newmeyer v. Newmeyer* is instructive. In that case, the appellant's expert valued the parties' marital home at \$122,000. See *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). Appellee's expert testified that the marital home was worth \$112,000. See *id.* The trial court simply fixed the value of the home at \$117,000. The Appellee in *Newmeyer* argued the trial court improperly "split" the difference between the values fixed by the experts, and that his expert should be believed. See *id.* The Utah Supreme Court rejected this argument, stating that it "is nothing but an attempt to have this Court substitute its judgment for that of the

trial court on a contested factual issue.” *Id.* In the instant case, there was credible evidence fixing the value of the vehicle anywhere between \$3,500 and \$10,000.

The trial court was clearly within its discretion to establish the value at \$7,500.

4. The Trial Court Properly Exercised its Discretion in Deciding the Diamond Ring and Construction Tools Issue.

Appellant contends the trial court erred in apparently netting the value of Appellee’s diamond ring against the value of Appellant’s tools. Appellant’s Brief, page 24. Appellant claims the court’s factual findings that Appellee purchased a diamond ring for \$2,400, and that there was no detailed testimony regarding the actual value of Appellant’s tools, should be set aside as clearly erroneous.

Appellant’s Brief, page 24. The trial court found that Appellee, in order to subsist, had to borrow money from her parents and sell her personal property, including a diamond ring. *Record on Appeal*, 225, ¶77. The court found the ring was appraised for \$4,500 for insurance purposes, and that Appellee’s sale of the ring for \$500 was less than the ring’s actual value. *Id.*

The court indeed did not have detailed testimony regarding the value of Appellant’s hand tools, compressors, table saws, and other tools. The only testimony regarding the value of Appellant’s tools was from Ms. Bennion. When asked if Appellee told her how much Appellant had paid for a table saw, she

replied, “I think it was \$400, \$500.” *Record on Appeal*, page 108, lines 13-15.

There was no other evidence regarding the value of Appellant’s table saw. There was no specific evidence at all as to the value of Appellant’s other tools such as his compressors and hand tools. Appellant’s counsel, asked Appellant about all of his tools, the compressors and table saws. Appellant’s counsel asked “thousands of dollars, correct?” *Record on Appeal*, 318, page 201, lines 9-13. Appellant responded with “most of it prior to us getting married.” *Id.* The trial court was within its discretion to find that he did not have detailed testimony regarding the value of Appellant’s compressors and other tools.

With regard to the value of Appellee’s ring, when asked if she knew how much Appellee paid for the ring, Ms. Bennion replied, “I think it was like \$5,000.” *Record on Appeal*, page 108, lines 16-18. Given the evidence, the trial court’s finding that Appellee sold the ring for less than its value is not clearly erroneous.

Even if the trial court made a minor factual misstatement when it found that Appellee purchased the ring for \$2,400, this misstatement was harmless. Given the sparse and vague evidence before it, the trial court reasonably failed to award either party an equalizing payment for Appellant’s tools and Appellee’s sale of the diamond ring for less than its actual value. The evidence supports this ruling, and it is not based on clearly erroneous findings.

B. The Trial Court's Award of Alimony Is Proper.

The trial court awarded Appellee \$250 per month in alimony until the marital home was sold, and \$500 per month thereafter, for the length of the marriage. *Record on Appeal*, 239-40, ¶¶15-16. This award is well supported by the evidence and relevant legal authority.

The general purposes of alimony are to enable the receiving spouse to maintain, as nearly as possible, the standard of living enjoyed during the marriage, to prevent the receiving spouse from becoming a public charge, and to equalize the parties' respective standards of living. See *Munn v. Munns*, 790 P.2d 116, 121 (Utah App. 1990). The trial court must consider three factors in awarding alimony: 1) the financial condition and needs of the receiving spouse; 2) the ability of the receiving spouse to produce income for herself or himself; and 3) the ability of the paying spouse to provide support. See *Rappleye v. Rappleye*, 855 P.2d 260, 264 (Utah App. 1993); *Jones v. Jones*, 700 P.2d (Utah 1985). As long as these factors are considered, this Court will not disturb the trial court's alimony award "unless such a serious inequity resulted as to manifest a clear abuse of discretion." *Id.* The trial court in this case carefully and properly considered the requisite factors in awarding Mrs. Shaw alimony.

With regard to the financial condition and needs of Mrs. Shaw, the trial court found her monthly living expenses of \$3,519.30 to be “very fair and reasonable.” *Record on Appeal*, Page 225, ¶ 81. These expenses included items such as her monthly mortgage payment, revolving installment payments, automobile gas, insurance, and installments payments for her vehicle and her son’s vehicle, as well as other expenses. Mrs. Shaw’s net monthly income was found to be \$2,334.66. Therefore, she had established a need for alimony based on a \$1,300.64 shortfall.

With regard to Mr. Shaw’s ability to pay, the trial court found his net monthly income was \$3,171.88 and his reasonable and fair living expenses upon the sale of the marital home to be \$2,576. *Record on Appeal*, 227, 229, ¶¶ 100, 115. The Court further found that Mr. Shaw had misrepresented and misstated his actual monthly income from present employment when he claimed his earnings to be \$2,739.99. *Record on Appeal*, page 206, lines 9-25, page 207, lines 109. Based on these findings, the trial court found Mr. Shaw had the ability to pay support. The trial court awarded Mrs. Shaw \$250 per month in alimony until the marital home was sold and \$500 per month thereafter, for the length of the marriage. *Record on Appeal*, 239, ¶¶ 15-16, 261, ¶4. Appellant concedes that,

based on the numbers the trial court used, its decision was reasonable. See Appellant's Brief, 27.

Appellant's contention that the award of \$500 in permanent alimony contravenes the trial court's finding that Mrs. Shaw be solely liable for debts she incurred after the date of separation, is without merit. It ignores the fact that Mrs. Shaw incurred these debts to replace items she left at the marital residence.

Record on Appeal, 318, page 56, lines 9-17, page 57, lines 17-22. Mrs. Shaw testified the R.C. Willey and Granite Furniture debts were to purchase a washer and dryer and furniture for her condominium. *Id.* She testified that the Lowe's debt was to replace a refrigerator and the debt to Dell was to replace a computer.

Record on Appeal, 318, page 58, lines 17-21. Given the purpose of alimony, to approximate the parties' standard of living during the marriage, it is certainly reasonable for Mrs. Shaw to have expenses relating to usual household furnishings and appliances. As the courts have stated, "if the payor spouse's resources are adequate, alimony need not be limited to provide for only basic need, but should also consider the recipient spouse's 'station in life.'" *Howell v. Howell*, 806 P.2d 1209, 1212 (Utah App. 1991) (quoting *Bramme v. Bramme*, 587 P.2d 144, 147 (Utah 1997)).

Appellant seems to be arguing that simply because Mrs. Shaw was ordered to be solely liable for certain debts, they somehow are not necessary and reasonable living expenses. If the logic of this argument is applied to Appellant, he would have the ability to pay more than the \$500 ordered by the court. He was ordered to be solely liable and responsible for his Discover card debt, the debt on the 2000 Harley Davidson motorcycle, and the 1992 Ford F250 truck. *Record on Appeal*, Page 231, ¶¶129-30. Following Appellant's argument, because Mr. Shaw is solely responsible for these obligations, he should not get the additional benefit of including them in his monthly obligations. Deducting these expenses would significantly increase his disposable income and thus his financial ability to pay alimony to Mrs. Shaw.

Appellant makes a similar argument regarding Mrs. Shaw's debt to Linda Tobin of \$3,034. See Appellant's Brief, Page 30. The trial court found this debt was incurred so Mrs. Shaw could pay her share of the replacement cost of carpeting in the marital home. *Record on Appeal*, 220, ¶¶36-37. Appellant claims it is unfair to equally divide debts and then "by awarding permanent alimony, one party ends up assuming the entire debt." Brief of Appellant, Page 30. If Appellant's logic is followed, one party could never be awarded alimony in cases

where there was also a division of debt. This is clearly not the law. The trial court did not abuse its discretion.

Appellant implies Mrs. Shaw's purchase of a 2001 Hyundai Tiburon for herself and a lease of a Ford Ranger for her son was inappropriate. The trial court, however, found that Mrs. Shaw purchased the Hyandai Tiburon at the request and demand of Appellant in order to remove him from the financial obligation on the parties 2000 Hyundai Elantra, which had been acquired by the parties approximately one year earlier. *Record on Appeal*, Page 225, ¶82. Furthermore, the trial court found that the monthly payment on the Hyundai Tiberon is equal to the Hyundai Elantra, and that the exchange did not increase Mrs. Shaw's reasonable and necessary living expense. See *id.* at page 226, ¶85.

Mrs. Shaw's leased a Ford Ranger truck for her 18-year-old son, Jason. She also contributes \$100 per month toward his private school education. Petitioner's Exhibit 21. Appellant argues Jason is not his son and he should not have to "pay for his expensive transportation." See Appellant's Brief, Page 31. Even if Appellant is correct in his contention that he should not have to contribute to Jason's support, Mrs. Shaw has a demonstrated need for alimony even without these expenses. According to Appellant's calculations, the lease payment on the Ford Ranger is \$200, half of the insurance and gas expense is \$174.09, and Jason's

private school is \$100. See *id.* The total of these expenses attributable to Jason is \$474.09. Subtracting this amount from Mrs. Shaw's expenses of \$3,519.30, still leaves her with a shortfall of \$826.55. Even if the trial court erred in allowing her to include expenses relating to her son Jason, Mrs. Shaw continues to have a need for alimony in excess of what she was awarded. Therefore, any alleged error on the part of the trial court relating to these expenses was harmless.

Finally, Appellant challenges the trial court's decision to exclude the payments for the parties Marriott (\$250) and Worldmart (\$150) timeshares from Appellant's monthly living expenses. The trial court found these timeshares had no market value and awarded them to Appellant. *Record on Appeal*, 221, ¶ 44, 228-229, ¶112.

Mrs. Shaw testified that she had found a purchaser for the WorldMart timeshare, but Appellant testified he was unwilling to sell it. *Record on Appeal*, 318, page 34, lines 4-20, page 207, lines 18-21. Appellant testified that he was willing to sell the Marriott timeshare. *Id.*, page 207, lines 22-23. When asked if he could sell the timeshares, Appellant testified that he could "get somebody to assume [the] payments." *Record on Appeal*, 318, page 207, lines 3-5. Mrs. Shaw testified that the timeshares were a luxury. *Id.*, page 33, lines 11-15, Appellant

agreed that it was a luxury but wished to retain it. *Record on Appeal*, page 207, lines 10-14.

The trial court found that Appellant “overstated his living expenses.” *Record on Appeal*, page 228, ¶105. The trial court went on to find that “adjustments made to the respondent’s living expenses for food and household supplies, reducing said sum to \$150 from \$350 claimed, reducing entertainment by \$100, and eliminating the timeshare payment will result in an immediate savings to respondent of \$656 per month.” *Id.*, pages 228-229, ¶112. Given these findings, it is clear that the court found Appellant had overstated his expenses, and that these expenses were not reasonable and necessary. Therefore, it was not error to exclude them from Appellant’s monthly expenses.

As the record demonstrates, the trial court carefully considered each of the *Jones* factors in awarding alimony to Mrs. Shaw. Therefore, this Court should not disturb the award “unless such a serious inequity has resulted as to manifest a clear abuse of discretion.” *Rappleve v. Rappleve*, 855 P.2d 260, 264 (Utah App. 1993). Given the parties’ respective incomes and expenses, a modest alimony award of \$500 per month is certainly equitable and should not be disturbed.

C. The Testimony of Appellee's Rebuttal Witness Was Properly Admitted.

Ms. Underhill's testimony was properly admitted rebuttal testimony. Ms. Underhill, a certified public accountant was called as a rebuttal witness to testify regarding Appellant's income tax return for the 2000 income tax year. Specifically, to testify regarding Appellant's allocation of his expenses and the deductibility of certain claimed exemptions under IRS regulations. *Record on Appeal*, 318, page 257, lines 17-22. Appellant objected to Ms. Underhill's testimony arguing her testimony should have been part of Appellee's case-in-chief, and that Appellant had not addressed how Appellee had allocated her expenses. *Id.*, lines 12-16. Appellant also argued he was not given notice or an expert opinion report prior to trial. *Id.*, lines 23-25. The trial court ruled that Ms. Underhill could testify as a rebuttal witness. *Id.*, page 258, lines 4-5.

In relevant portion, Ms. Underhill testified that Appellee claimed one-half of the mortgage interest deduction on her 2000 income tax return and that Appellant claimed the entire mortgage interest deduction for the same year. *Record on Appeal*, 318, page 275, lines 3-7; page 260, lines 15-19. Based on the inconsistencies in the tax returns, Ms. Underhill testified that the parties were at an increased risk of audit, and that one of the parties' income tax returns should be admitted. *Id.*, page 261, lines 10-13.

Ms. Underhill also testified regarding the deductibility of mileage expenses incurred for business purposes. *Record on Appeal*, 318, pages 261-2, lines 14-25 and 1-11. She stated that the mileage had to be related to business use rather than commuting and that if the individual was reimbursed for mileage, it would not be deductible. *Id.*, lines 5-11.

Ms. Underhill's testimony was proper rebuttal in that it related to evidence given by Appellant. Appellant had earlier testified that he had Federal and State Income Tax deductions of \$951.04. *Record on Appeal*, page 204, lines 1-2. He testified that he claimed "zero" exemptions. *Id.*, lines 6-8. Appellant also testified that he assisted in the preparation of his year 2000 tax return. *Id.*, page 226, lines 5-10. He further testified that he claimed a mileage expense of 7,488 miles, and that he was reimbursed by his employer for some of these miles. *Id.*, page 227, lines 2-20. Appellant used these deductions and exemptions to justify or support his claimed income and expenses.

Appellant's contention that Ms. Underhill's testimony should have been presented as part of Appellee's case-in-chief is without merit. As this Court has stated, "evidence should not be excluded from rebuttal merely because it could have been made part of the case-in-chief." *Astill v. Clark*, 956 P.2d 1081, 1086 (Utah App. 1998). Fairness requires that a party introduce evidence to rebut

inferences the fact finder can draw from the opposing party's evidence. See *id.* at 1087. This is what occurred in the present case.

Rebuttal evidence has been defined as “evidence tending to refute, modify, explain, or otherwise minimize or nullify the effect of the opponent's evidence.” *Id.* at 1086 (quoting *Randle v. Allen*, 862 P.2d 1329, 1338 (Utah 1993)). Ms. Underhill's testimony helped rebut and explain Appellant's testimony regarding his deductions for his mileage expenses. Appellant also testified that he assisted in the preparation of his 2000 tax return. *Record on Appeal*, 318, page 226, lines 5-10, page 260, lines 3-6. In so doing, he opened the door to Ms. Underhill's testimony and put the accuracy and legality of this return at issue. Therefore, the trial court's ruling was proper.

Appellant argues the trial court made no findings regarding the basis for overruling Appellant's objection. Appellant's Brief, page 37. Appellant further argues that this alleged failure constitutes an abuse of discretion. See *id.* This, however, is not the case. Appellant stated his objections to Ms. Underhill's testimony and Appellee responded with her reasons why the testimony should be admitted. *Record on Appeal*, page 257-58, lines 12-25, and 1-5. The court then ruled that “she can testify as a rebuttal witness.” *Id.*, lines 4-5. The law does not

require the trial judge to make detailed findings on the record as to why it rules on each objection to evidence.

Finally, even if this Court should somehow find the trial court erred in allowing Ms. Underhill's testimony, any alleged error was harmless. Appellant has the burden to show that absent the alleged error there is a reasonable likelihood that a different result would have been reached. See *UTC Associates, LTD. v. Zimmerman*, 27 P.3d 177, 182 (Utah App. 2001). Appellant has failed to make this showing. In fact, Appellant concedes that it may have been appropriate for the parties to share the mortgage interest deduction equally since the parties resided together as husband and wife for all of 2000. See Appellant's Brief, page 39. Appellant also concedes that "the trial court may not have believed Appellant that he had sought advice from his accountant and the accountant had advised him to claim the entire deduction and the business expense mileage." *Id.* Appellant goes on to state that, "if so, then it was harmless error to allow Ms. Underhill to testify." *Id.* Indeed it was harmless error.

The trial court was entitled to believe whatever evidence was before him. As part of the record, the trial court had both parties' tax returns and testimony regarding deductions. *Record on Appeal*, 318, page 47-8, lines 23-25, 1-8. Even without the testimony of Ms. Underhill, the trial court could have appropriately

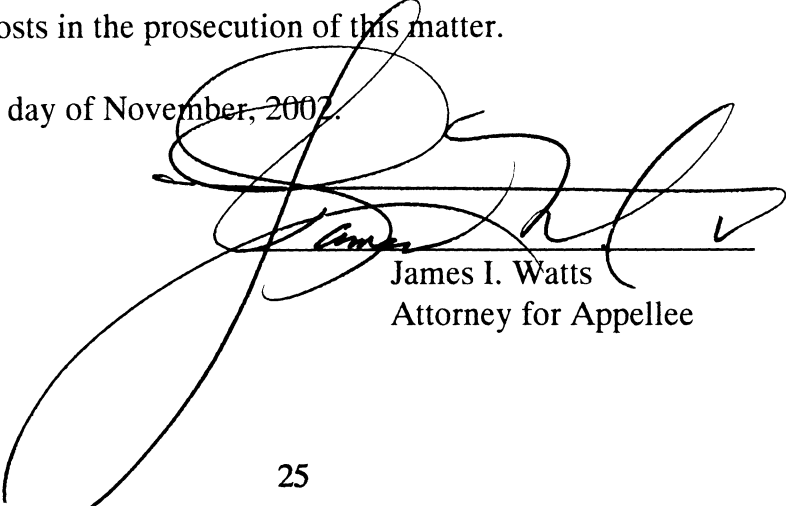
found that it was improper for Appellant to take 100% of the mortgage interest deduction and for Appellee to take 50% of this deduction.

Appellant claims had he known that Ms. Underhill was going to testify regarding his mortgage interest deduction and mileage deduction, he would have called his own accountant to testify on his behalf. Appellant's Brief, page 39. This accountant would have apparently testified that he had advised Appellant to take the entire mortgage interest deduction and to deduct his mileage expense. *Id.* However, even if this accountant had so testified, the trial court could have properly concluded that the parties cannot collectively claim a 150% mortgage interest deduction. Therefore, because any alleged error regarding Ms. Underhill's testimony was harmless, the trial court's decision must stand.

VI. CONCLUSION

Based on the forgoing, Appellee respectfully asks this Court to uphold the trial Court's judgment in all respects and to award to Appellee her reasonable attorney's fees and costs in the prosecution of this matter.

DATED this 13 day of November, 2007.



James I. Watts
Attorney for Appellee

JAMES I. WATTS (4768)
39 Exchange Place, Suite 100
Old Salt Lake Stock & Mining Bldg.
Salt Lake City, Utah 84111
Tel: (801) 994-0838
Fax: (801) 994-0833

Attorney for Petitioner and Appellee

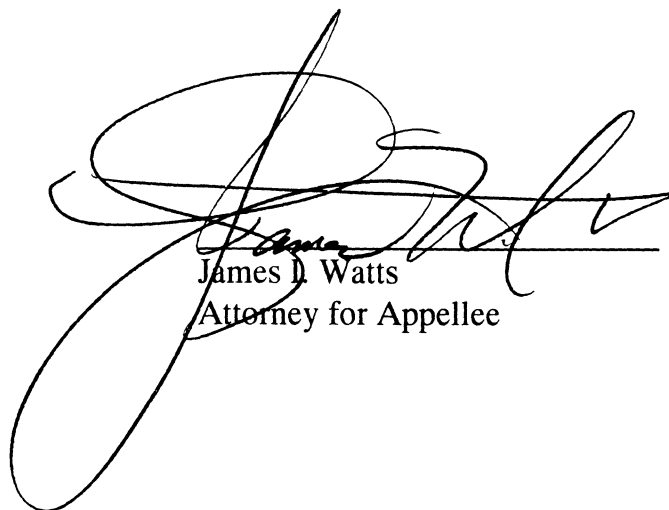
IN THE UTAH COURT OF APPEALS

<p>MELISSA SHAW, Petitioner and Appellee, v. SCOTT SHAW, Respondent and Appellant.</p>	<p>APPELLEE'S REPLY BRIEF Appellate Case No. 20020140-CA Priority _____</p>
---	--

I hereby certify that on this _____ day of November 2002, I caused a true and correct copy of the foregoing **APPELLEE'S REPLY BRIEF**, to be mailed, postage prepaid, via United State Mail, to the following:

Gayanne Schmid
68 S. Main Street, Suite 800
Salt Lake City, Utah 84111
Attorney for Appellant

Dated: November 13, 2002


James I. Watts
Attorney for Appellee