

1992

# Kathy Mary Ann Stewart v. Wayne Lloyd Stewart : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



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.

H. Delbert Welker; Sherri Palmer and Associates; Attorneys for Appellant.

Ellan Maycock; David C. Wright; Kruse, Landa and Maycock; Attorneys for Appellee.

---

## Recommended Citation

Brief of Appellee, *Kathy Mary Ann Stewart v. Wayne Lloyd Stewart*, No. 920369 (Utah Court of Appeals, 1992).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/4314](https://digitalcommons.law.byu.edu/byu_ca1/4314)

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](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.

**BRIEF**

UTAH  
DOCUMENT  
KFU  
50  
A10  
DOCKET NO. 92-0369-CA

**IN THE COURT OF APPEALS  
FOR THE STATE OF UTAH**

---

KATHY MARY ANN STEWART,	)	
Plaintiff/Appellee,	)	
vs.	)	Case No. 920369CA
WAYNE LLOYD STEWART,	)	
Defendant/Appellant.	)	Priority No. 16

---

**BRIEF OF APPELLEE  
KATHY MARY ANN STEWART**

---

Appeal from a Final Decree of Divorce  
Entered by the Sixth Judicial District Court  
for Sanpete County, State of Utah  
Honorable Don V. Tibbs  
District Judge

---

H. DELBERT WELKER (3418)  
SHERRI PALMER & ASSOCIATES  
Attorneys for Appellant  
3540 South 4000 West, #240  
West Valley City, Utah 84120  
Telephone: (801) 965-1787

ELLEN MAYCOCK (2131)  
DAVID C. WRIGHT (5566)  
KRUSE, LANDA & MAYCOCK  
A Professional Corporation  
Attorneys for Appellee  
Eighth Floor, Valley Tower  
50 West Broadway  
Salt Lake City, Utah 84101  
Telephone: (801) 531-7090

**FILED**

**NOV 5 1992**

**IN THE COURT OF APPEALS  
FOR THE STATE OF UTAH**

---

KATHY MARY ANN STEWART,	)	
Plaintiff/Appellee,	)	
vs.	)	Case No. 920369CA
WAYNE LLOYD STEWART,	)	
Defendant/Appellant.	)	Priority No. 16

---

**BRIEF OF APPELLEE  
KATHY MARY ANN STEWART**

---

Appeal from a Final Decree of Divorce  
Entered by the Sixth Judicial District Court  
for Sanpete County, State of Utah  
Honorable Don V. Tibbs  
District Judge

---

**H. DELBERT WELKER (3418)**  
**SHERRI PALMER & ASSOCIATES**  
Attorneys for Appellant  
3540 South 4000 West, #240  
West Valley City, Utah 84120  
Telephone: (801) 965-1787

**ELLEN MAYCOCK (2131)**  
**DAVID C. WRIGHT (5566)**  
**KRUSE, LANDA & MAYCOCK**  
A Professional Corporation  
Attorneys for Appellee  
Eighth Floor, Valley Tower  
50 West Broadway  
Salt Lake City, Utah 84101  
Telephone: (801) 531-7090

## TABLE OF CONTENTS

STATEMENT OF JURISDICTION .....	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW .....	1
STATUTORY AUTHORITIES .....	2
STATEMENT OF THE CASE .....	3
STATEMENT OF FACTS .....	3
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT	
I.    THE COURT SHOULD ASSUME THE CORRECTNESS OF THE TRIAL COURT'S FINDINGS AND CONCLUSIONS BECAUSE OF THE MANY DEFECTS IN APPELLANT'S BRIEF .....	4
II.   BECAUSE OF APPELLANT'S COMPLETE FAILURE TO RAISE ANY ISSUES ON APPEAL, THE COURT SHOULD STRIKE APPELLANT'S BRIEF AND AWARD SANCTIONS TO APPELLEE .....	11
III.  THE TRIAL COURT DID NOT ERR IN REQUIRING ADVANCE NOTICE OF VISITATION .....	12
IV.   THE TRIAL COURT DID NOT ERR IN DETERMINING THE PARTIES' INCOMES FOR PURPOSES OF COM- PUTING CHILD SUPPORT .....	13
V.    THE TRIAL COURT DID NOT ERR IN DIVIDING THE MARITAL PROPERTY .....	14
CONCLUSION .....	15
CERTIFICATE OF SERVICE .....	16

## TABLE OF AUTHORITIES

### Cases Cited

<i>Christensen v. Munns</i> , 812 P.2d 69 (Utah App. 1991) .....	10, 11
<i>College Irr. Co. v. Logan R. &amp; Blacksmith Fork Irr. Co.</i> , 780 P.2d 1241 (Utah 1989) .....	5
<i>Colman v. Colman</i> , 743 P.2d 782 (Utah App. 1987) .....	14
<i>Doelle v. Bradley</i> , 784 P.2d 1176 (Utah 1989) .....	4, 5, 7
<i>English v. Standard Optical Co.</i> , 814 P.2d 613 (Utah App. 1991) .....	10
<i>Fackrell v. Fackrell</i> , 740 P.2d 1318 (Utah 1987) .....	8
<i>Hagan v. Hagan</i> , 810 P.2d 478 (Utah App. 1991) .....	7
<i>Kallas v. Kallas</i> , 614 P.2d 641 (Utah 1980) .....	12
<i>Koulis v. Standard Oil Co. of Cal.</i> , 746 P.2d 1182 (Utah App. 1987) ....	8, 11
<i>Marchant v. Park City</i> , 771 P.2d 677 (Utah App. 1989) .....	5, 6
<i>Mountain States Broadcasting Co. v. Neale</i> , 783 P.2d 551 (Utah App. 1989) .....	5
<i>Munns v. Munns</i> , 790 P.2d 116 (Utah App. 1990) .....	2
<i>Reed v. Reed</i> , 806 P.2d 1182 (Utah 1991) .....	5, 15
<i>State v. Day</i> , 815 P.2d 1345 (Utah App. 1991) .....	4, 9
<i>State v. Garza</i> , 820 P.2d 937 (Utah App. 1991) .....	9, 10
<i>State v. Price</i> , 827 P.2d 247 (Utah App. 1992) .....	4, 8, 9, 10, 11
<i>State v. Sterger</i> , 808 P.2d 122 (Utah App. 1991) .....	10
<i>Trees v. Lewis</i> , 738 P.2d 612 (Utah 1987) .....	8
<i>Uckerman v. Lincoln Nat. Life Ins. Co.</i> , 588 P.2d 142 (Utah 1978) .....	8
<i>Walker v. Walker</i> , 707 P.2d 110 (Utah 1985) .....	2, 12
<i>West Valley City v. Majestic Inv. Co.</i> , 818 P.2d 1311 (Utah App. 1991) .....	4
<i>Woodward v. Woodward</i> , 709 P.2d 393 (Utah 1985) .....	2
<i>Wright v. Westside Nursery</i> , 787 P.2d 508 (Utah App. 1990) .....	5, 6

### Statutes

<i>Utah Code Ann.</i> § 30-3-5 (Supp. 1992) .....	2
<i>Utah Code Ann.</i> § 78-2a-3(2)(i) (1953, as amended) .....	1
<i>Utah Code Ann.</i> § 78-45-7.5 (1953, as amended) .....	2, 13

### Rules

Utah Rule of Appellate Procedure 24 .....	4, 8, 9, 10, 11
---	-----------------

IN THE COURT OF APPEALS  
FOR THE STATE OF UTAH

---

KATHY MARY ANN STEWART,	)	
Plaintiff/Appellee,	)	
vs.	)	Case No. 920369CA
WAYNE LLOYD STEWART,	)	
Defendant/Appellant.	)	Priority No. 16

---

BRIEF OF APPELLEE  
KATHY MARY ANN STEWART

---

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this case pursuant to *Utah Code Ann.* § 78-2a-3(2)(i) (1953, as amended).

STATEMENT OF ISSUES PRESENTED  
FOR REVIEW AND STANDARD OF REVIEW

Issue 1: Whether this court should affirm the trial court's decision based on defects in appellant's brief.

Standard of Review: Because this question is initially considered in this court, no standard of review is applicable.

Issue 2: Whether sanctions should be awarded to appellee based on the defects in appellant's brief.

Standard of Review: As indicated above, no standard of review is applicable.

Issue 3: Whether the trial court erred in requiring appellant to provide notice of his intention to exercise visitation and in failing to provide for summer visitation.

Standard of Review: Abuse of discretion. *Walker v. Walker*, 707 P.2d 110 (Utah 1985).

Issue 4: Whether the trial court erred in determining the parties' incomes for purposes of computing child support.

Standard of Review: Abuse of discretion. *Woodward v. Woodward*, 709 P.2d 393 (Utah 1985).

Issue 5: Whether the trial court erred in dividing the marital property.

Standard of Review: Abuse of discretion. *Munns v. Munns*, 790 P.2d 116 (Utah App. 1990).

### STATUTORY AUTHORITIES

*Utah Code Ann.* § 30-3-5 (Supp. 1992) provides, in pertinent part, as follows:

(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.

. . . .

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

*Utah Code Ann.* § 78-45-7.5 (1953, as amended) provides, in pertinent part, as follows:

(5)(b) Each parent shall provide suitable documentation of current earnings, including year-to-date pay stubs or employer statements. Each parent shall supplement documentation of current earnings with copies of tax returns from at least the most recent year to provide verification of earnings over time and shall document income from nonearned sources according to the source.

. . . .

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

## STATEMENT OF THE CASE

This is an action for divorce. It was tried before the Honorable Don V. Tibbs on February 20, 1992. Findings of fact, conclusions of law, and a decree of divorce were entered on May 6, 1992.

## STATEMENT OF FACTS

Kathy and Wayne Stewart were married in 1982. During the marriage, two children were born: Stevie Anne, age 9, and Ashlee Autumn, age 5. (Trial transcript (hereinafter referred to as "Tr.") p. 21). Ms. Stewart was the primary caretaker of the children. (Tr. p. 8; Findings of Fact ¶ 5, R. at 81). Mr. Stewart lived part-time in Fairview, Sanpete County, where Ms. Stewart and the children resided, and part-time in another county.

During the marriage, the parties acquired a variety of real and personal property: a farm, a house, a cafe, farm equipment and animals, stock in PacifiCorp, a retirement fund, several vehicles, furniture, and other miscellaneous property. In entering its findings of fact herein and in awarding the property to the parties, the trial court assigned specific values to some of the items of property (*e.g.*, Findings of Fact ¶ 24) and did not assign values to others (*e.g.*, Findings of Fact ¶ 26, R. at 86).

The court also made orders governing child support, alimony, payment of debts, and attorney's fees.

## SUMMARY OF THE ARGUMENT

I. This court should affirm the trial court's decision because appellant's brief is defective in many respects. Appellant has failed to marshal the evidence, failed to support his arguments with citations to the record, and failed to present a cogent and supported legal argument. The brief should be stricken and sanctions should be imposed upon appellant.



II. The trial court did not err in requiring advance notice of visitation and in failing to award extended summer visitation. The evidence supports the court's finding on this issue, and the court did not abuse its discretion.

III. The trial court correctly determined the parties' incomes for purposes of computing child support. There was ample evidence in the record supporting the court's findings with respect to income.

IV. The trial court did not err in dividing the marital property. This court will not disturb the trial court's division of property absent a finding of abuse of discretion. In this case, the trial court did not assign values to all of the items of marital property it awarded; however, its division is fair and equitable. Further, the trial court did not err in failing to sustain appellant's claim of separate property. Appellant presented confusing, conflicting, and contradictory evidence with respect to this issue.

### **ARGUMENT**

#### **I. THIS COURT SHOULD ASSUME THE CORRECTNESS OF THE TRIAL COURT'S FINDINGS AND CONCLUSIONS BECAUSE OF THE MANY DEFECTS IN APPELLANT'S BRIEF.**

Regardless of how ripe or meritorious an appeal might be, an appellant shoulders the threshold burdens of marshaling the evidence, citing to the record, and presenting a cogent argument complete with legal analysis. *See*, Utah R. App. P. 24; *Doelle v. Bradley*, 784 P.2d 1176 (Utah 1989); *State v. Price*, 827 P.2d 247 (Utah App. 1992). Failure to comply with these conditions ends the appeal, and the court will "assume[s] the correctness of the trial court's judgment." *State v. Day*, 815 P.2d 1345, 1351 (Utah App. 1991). In *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 n.1 (Utah App. 1991), the court noted: "We remind

counsel that it is our prerogative to affirm the lower court decision solely on the basis of failure to comply with the Utah Rules of Appellate Procedure.”

1. **The Trial Court's Judgment Should Be Affirmed Because of Appellant's Failure To Marshal the Evidence.**

A trial court's findings of fact enjoy a presumption of correctness and “will not be overturned unless . . . clearly erroneous.” *College Irr. Co. v. Logan R. & Blacksmith Fork Irr. Co.*, 780 P.2d 1241, 1244 (Utah 1989). To overcome this presumption, an appellant must “marshal all of the evidence in support of the findings of the trial court and . . . then demonstrate that even when viewed in the light most favorable to the factual determination of the trial court, the evidence is insufficient to support its findings.” *Id.*<sup>1</sup>

A challenge to a trial court's factual findings carries a “heavy burden”; when that burden is “not properly discharged, [the appellate court will] refuse to consider the merits of challenges to the findings and [will] accept the findings as valid.” *Mountain States Broadcasting, supra* at 553. *See also, College Irr. Co, supra* at 1244 (failure to marshal is “in and of itself, dispositive of [the] challenges to the trial court’s findings of fact.”)

After acknowledging an appellant's burden on appeal, the court in *Doelle* refused to disturb the trial court's findings because the appellant's brief presented “the conflicting evidence in a light most favorable to his position and largely ignore[d] the contrary evidence.” *Doelle, supra* p. 4 at 1178. This court reached a similar result in *Marchant v. Park City*, 771 P.2d 677 (Utah App. 1989).

---

<sup>1</sup> *Accord, Doelle, supra* p. 4; *Reed v. Reed*, 806 P.2d 1182, 1184 (Utah 1991); *Wright v. Westside Nursery*, 787 P.2d 508, 512 (Utah App. 1990); *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 553 (Utah App. 1989), *reh’g. denied*.

*Marchant* involved the appellant's claim to a prescriptive easement, which had been denied by the trial court. On appeal, the appellant failed to marshal the evidence supporting the court's finding, arguing instead only that the finding was not supported by the evidence. *Id.* at 682. The court refused to consider such "conclusory arguments without citation to either the record or cases involving pivotal issues." *Id.*<sup>2</sup> Indeed, the "very purpose of . . . the 'marshaling' doctrine and [Rule 24(a)(7), requiring citations to the record], is to spare appellate courts [the] onerous burden" of reviewing the entire record themselves. *Wright, supra* p. 5, at 512, n. 2.

**A. Appellant has failed to marshal the evidence in support of the trial court's findings as to appellant's visitation rights.**

Mr. Stewart argues first that the trial court was unreasonable when it found that the defendant should be awarded the right of reasonable visitation upon forty-eight hours' advance notice to the plaintiff. (Brief of Appellant at 2-3). Mr. Stewart has completely failed, however, even to attempt a demonstration that the evidence as to visitation is insufficient to support the trial court's findings. Mr. Stewart opted instead to argue that "[t]here is no finding that [Mr. Stewart] has any problem with parenting skills or exhibits any traits that are prejudicial to the children." (*Id.* at 2).

This is precisely the wrong way to attack a trial court's findings of fact. Mr. Stewart's failure to marshal any evidence supporting the trial court's findings

---

<sup>2</sup> *Marchant* also observed that an appellant's duty to marshal the evidence is essentially two-fold: the appellant must marshal all the evidence supporting the finding and then demonstrate the insufficiency of that evidence. The appellant must also "marshal evidence which would support each element required to prove their claim of prescriptive easement." *Id.* at 682. The court's refusal to upset the trial court's findings was apparently based on the appellant's failure to accomplish either of these tasks.

leaves nothing for this court to consider. Therefore, this court should affirm the trial court's ruling as to visitation.

**B. Appellant has failed to marshal the evidence in support of the trial court's findings as to the award of child support.**

Mr. Stewart next argues that the trial court's findings of fact with respect to its award of child support are "inaccurate" because of alleged errors in the determination of the incomes of both parties. (Brief of Appellant at 3-4). Again, Mr. Stewart has completely failed to marshal and then attack the evidence supporting the trial court's findings. Mr. Stewart instead argues that "[t]here was considerable testimony by appellant" that his income was lower than the trial court's finding. *Id.* at 4.

As in *Doelle*, Mr. Stewart in this case "presents the conflicting evidence in a light most favorable to his position and largely ignores the contrary evidence." *Doelle, supra* p. 4 at 1178. Mr. Stewart's failure to meet his burden of marshaling the evidence also disposes of his second argument, and the court should affirm the trial court's findings as to the child support award.

**C. Appellant has failed to marshal the evidence in support of the trial court's findings as to the division of the marital assets.**

After finally recognizing his duty to marshal the evidence,<sup>3</sup> Mr. Stewart attacks the trial court's division of the marital assets by observing only that "[t]he parties submitted a great deal of evidence to determine the value of the marital property." (Brief of Appellant at 6).

Mr. Stewart again has failed, however, to present any evidence supporting the court's findings. Indeed, his entire brief is merely an invitation for this court to do what Mr. Stewart has failed to do. The court should assume the correctness

---

<sup>3</sup> Mr. Stewart correctly cites *Hagan v. Hagan*, 810 P.2d 478 (Utah App. 1991), as authority for his duty to marshal the evidence. (Brief of Appellant at 6).

of the trial court's findings and affirm its judgment as to the division of the marital assets.

**2. Appellant's Failure To Support any Arguments with Citations to the Record Constitutes a Separate Defect in his Brief.**

The Utah Rules of Appellate Procedure, and specifically Rule 24,<sup>4</sup> constitute minimum standards against which every appellate brief is measured. *See, Koulis, id.* at 1184. An appellate brief must include the following:

A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record . . . .

Utah R. App. P. 24(a)(7).

Failure to comply with these standards is fatal. "If a party fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below." *Koulis, supra* at 1184. *See also, Fackrell v. Fackrell*, 740 P.2d 1318, 1319 (Utah 1987). Thus, this court "need not, and will not, consider any facts not properly cited to, or supported by, the record." *Id.* (quoting *Uckerman v. Lincoln Nat. Life Ins. Co.*, 588 P.2d 142, 144 (Utah 1978)).

This court has "routinely refused to consider arguments which do not include a statement of the facts properly supported by citations to the record." *Price, supra* p.4 at 249. For example, in *Trees v. Lewis*, 738 P.2d 612 (Utah 1987), the court dismissed an appeal because the appellant failed to cite to the record to

---

<sup>4</sup> The Utah Rules of Appellate Procedure replaced both sets of appellate rules for the Supreme Court and Court of Appeals, effective April 1, 1990. Rule 24, however, has remained the same and is thus subject to the same interpretation as its predecessor. *See, e.g., Koulis v. Standard Oil Co. of Cal.*, 746 P.2d 1182, 1184 (Utah App. 1987).

support his statement of facts. *See also, State v. Garza*, 820 P.2d 937 (Utah App. 1991) (court refused to reach an issue because the defendant failed to include a statement of facts in her brief).

Mr. Stewart's brief in this case consists of the following statement of facts:

The parties were married on August 7, 1982 and had two children as issue from the marriage relationship. The marital property consisted of real and personal property, a farming operation and a restaurant.

(Brief of Appellant at 1).<sup>5</sup>

This vague, useless summary is hardly what was contemplated by rule 24(a)(7). With the exception of one citation to some trial testimony, the rest of the brief is devoid of any useful references to the record. Having failed to cite those portions of the record necessary for this appeal, Mr. Stewart cannot now rely on this court to cull those facts from the record for him.

3. Appellant's Failure To Present a Cogent and Supported Legal Argument Requires that this Court Assume the Correctness of the Trial Court's Judgment.

Every appellate brief must include an argument containing "the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on." Utah R. App. P. 24(a)(9). Inadequate legal analysis is yet another basis for affirming a trial court's judgment. *Price, supra* p. 4 at 249 ("Utah courts have also declined to reach the merits of an issue on appeal due to inadequate legal analysis.")

In *Price*, the appellant "listed several errors . . . , [but] neglected 'to establish any of these arguments in the record or by legal authority.'" *Id.* (quoting *Day, supra* p. 4 at 1351 (Utah App. 1991)). Similarly, in *Garza*, the court declined

---

<sup>5</sup> The statement of facts includes a second paragraph containing only a report of the trial date and the issues decided. This statement is more properly included in the rule 24(a)(7) statement of the case, not in a statement of facts.

to even reach issues where the appellant failed to cite to the record or invoke any legal authority.<sup>6</sup> *Garza*, *supra* p. 9 at 939.

This court was asked in *Christensen v. Munns*, 812 P.2d 69 (Utah App. 1991) to reverse a lower court based upon a brief that failed to cite to the record, failed to invoke any legal authorities, and included “no analysis whatsoever.” *Id.* at 73. Observing that a challenge to a trial court's findings begins with those same findings, the court refused to reach the issue the appellant raised but failed to argue.

In this appeal, Mr. Stewart fails to assist the court with any substantive legal analysis of the standards used in deciding child visitation, child support, or asset division issues. Moreover, Mr. Stewart never addresses the substantive law regarding appellate review of those matters. Mr. Stewart relies only on perfunctory references to the *Utah Code* and a standardized visitation schedule. This presentation can hardly be characterized as legal argument or analysis within the meaning of rule 24. The court should, as is its right, ignore Mr. Stewart's contentions and assume the correctness of the judgment below.

**4. Appellant's Failure To Provide a Statement of the Issues and the Standard of Appellate Review for Each Issue Allows the Court To Affirm the Trial Court's Judgment.**

Rule 24(a)(5) provides that an appellate brief must contain a “statement of the issues presented for review and the standard of appellate review with supporting authority for each issue.” The purpose of this requirement “is to focus

---

<sup>6</sup> *Accord*, *English v. Standard Optical Co.*, 814 P.2d 613, 618-19 (Utah App. 1991) (appellant's “assertive analysis” was not meaningful argument thus allowing court to assume correctness of trial court judgment); *State v. Sterger*, 808 P.2d 122, 125 n. 2 (Utah App. 1991), *quoted in Price*, *supra* p. 4 at 249-50 n. 5 (“Because defendant fails to cite support or provide any meaningful analysis as to [arguments concerning a search of a vehicle], we decline to rule on them.”)

the briefs, thus promoting more accuracy and efficiency in the processing of appeals.” *Christensen, supra* p. 10 at 73. Like the other essentials of rule 24, this element is a *sine qua non* of a complete brief, one that is capable of invoking this court’s appellate powers. *Id.* (correctness of trial court’s judgment assumed on failure to comply with rule 24(a)(5)); *Price, supra* p. 4 at 250.

Mr. Stewart’s brief in this matter sets forth one “issue” -- whether the trial court erred in “determining visitation, child support, property division and alimony.” (Brief of Appellant at 1). Mr. Stewart has obviously failed to set forth the standard of appellate review or to specifically identify his claims. This defect, like the others already discussed, allows this court to affirm the trial court’s judgment.

**II. BECAUSE OF APPELLANT’S COMPLETE FAILURE TO RAISE ANY ISSUES ON APPEAL, THE COURT SHOULD STRIKE APPELLANT’S BRIEF AND AWARD SANCTIONS TO APPELLEE.**

The mandates of rule 24 may not be ignored. This rule exists to be enforced and carry with it a ready punishment when disregarded:

All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Utah R. App. P. 24(k).

Rule 24 demands only a minimum effort to prepare a written appellate presentation. The numerous reported decisions interpreting rule 24 apply it faithfully and provide ample guidance for compliance, along with sure notice of the consequences for noncompliance. *See, e.g., Koulis, supra* p. 8 at 1184-85; *Price, supra* p. 4 at 248-50; *Christensen, supra* p. 10 at 72-73.

There is no excuse for defects in Mr. Stewart’s brief. His systematic failure to marshal evidence and to comply with the clear requirements of rule 24 make



disposing of this appeal an easy task for the court. Ms. Stewart, however, has, as she must, prepared an opposing brief and a motion to strike, causing her substantial unnecessary expense. Under rule 24, Mr. Stewart's brief should be stricken and Ms. Stewart awarded her attorneys' fees incurred by reason of Mr. Stewart's disregard for that rule.

### **III. THE TRIAL COURT DID NOT ERR IN REQUIRING ADVANCE NOTICE OF VISITATION.**

As Mr. Stewart notes in his brief, the trial court has broad discretion in establishing a visitation schedule. The court's visitation order will not be reversed unless the appellate court is convinced that there has been a clear abuse of discretion. *Walker, supra* p. 2 at 112. The court must give priority to the welfare of the children over the desires of either parent. *Kallas v. Kallas*, 614 P.2d 641 (Utah 1980).

In this case, Mr. Stewart asserts that there was no evidence that he has any traits prejudicial to the children. In fact, however, the trial court found a history of alcohol and drugs. (Tr. p. 295). Further, since Mr. Stewart sometimes lives and works some distance from Fairview, it is entirely reasonable that he be required to give notice when he intends to exercise visitation.

Mr. Stewart also argues that the trial court should have followed the standard visitation schedule for the Third District and should have ordered a longer period of continuous visitation during the summer months. He offers no authority for this proposition, nor does he explain why he did not request such visitation at trial.

Accordingly, the trial court's visitation order should be affirmed.

#### IV. THE TRIAL COURT DID NOT ERR IN DETERMINING THE PARTIES' INCOMES FOR PURPOSES OF COMPUTING CHILD SUPPORT.

Mr. Stewart argues that the trial court erred in finding that his income was \$4,600 per month. However, this argument ignores the fact that Mr. Stewart's 1991 W-2 from his employer, Pacificorp, showed income of \$55,537.54, or \$4,628 per month. (Tr. p. 106). In addition, the trial court found that Mr. Stewart had income from his farm for purposes of computing child support pursuant to *Utah Code Ann.* § 78-45-1 (1953, as amended). (Findings of Fact ¶ 7, R. at 82).

Mr. Stewart argues that *Utah Code Ann.* § 78-45-7.5 (1953, as amended) requires that the court consider historical income and that his historical income is less than \$4,600 per month. This argument is simply wrong. The statute imposes no such requirement and indicates instead that current income should be determinative. *Utah Code Ann.* § 78-45-7.5(1) (1953, as amended). Historical income is used only to determine whether underemployment exists. In addition, the evidence as to historical income was unconvincing. (Tr. p. 149, l. 23; p. 150, ll. 3-4).

This case was tried in February of 1992. It was entirely proper for the court to use Mr. Stewart's 1991 income in computing child support and to disregard speculation on defendant's part that his 1992 income might be less.<sup>7</sup>

Apparently, Mr. Stewart believes that the court's finding as to Ms. Stewart's income is also incorrect. Since he offers no argument whatsoever in support of that position, however, it is impossible to make an intelligent response.

---

<sup>7</sup> Mr. Stewart cites to p. 147 of the transcript for testimony concerning his income; the testimony actually appears on pp. 149-51.

Mr. Stewart devotes only one paragraph of his brief to the issue of alimony. Based on the disparity in the parties' incomes and the evidence as to need, the basis for alimony is obvious. The court's order as to alimony should be affirmed.

## V. THE TRIAL COURT DID NOT ERR IN DIVIDING THE MARITAL PROPERTY.

Mr. Stewart argues that the trial court erred in dividing the marital property because, as to those items to which the court assigned a value, the net value of the items awarded to Ms. Stewart exceeds the net value of the items awarded to him. There are several problems with Mr. Stewart's argument:

(1) The court did not assign a value of \$3,000 to the 1967 Mustang vehicle (Findings of Fact ¶ 23, R. at 85); rather, there was no value assigned. Ms. Stewart testified that the value was \$1,500. (Tr. p. 64).

(2) The court did not assign any value to many items; thus, it is impossible to determine whether there was exact mathematical equality in the division. (*E.g.*, Findings of Fact ¶¶ 18, 19, 20, 22, 25, 26, 27, 28, and 29, R. at 85-86). In addition, appellant had dissipated cash savings of the parties (Tr. p. 66, ll. 14-25; p. 67, ll. 1-2) and had failed to make a payment that would have increased the equity in the farm. (Tr. p. 37, ll. 10-25; p. 38, ll. 1-25; p. 39, ll. 1-25; p. 40, ll. 1-6).

(3) The trial court is not required to make an exact 50/50 division of the property. *Colman v. Colman*, 743 P.2d 782 (Utah App. 1987).

Mr. Stewart also argues that the court did not give him credit for "separate property." Mr. Stewart's evidence to the existence and amount of premarital property was vague, confusing, and contradictory. (Tr. p. 160, ll. 19-25; p. 161, ll. 1-11; p. 165, ll. 3-25; p. 166, ll. 1-20).

As the court commented with respect to Mr. Stewart's claim of premarital property: "You see, you got me in a situation. They say you didn't have any, and

you say, 'We had \$20,000.' And what am I supposed to do? Flip a coin and say, 'Well, if it lands on its end, we'll say 10.'" (Tr. p. 161, ll. 24-25; p. 162, ll. 1-3).

Having failed to provide sufficient evidence to the court concerning his claim of premarital property, and having failed to produce any documentation to support his claims, it is naive for Mr. Stewart to now claim that the court should have found he is entitled to a return of certain premarital property.

### CONCLUSION

It is difficult to respond to Mr. Stewart's arguments because appellee cannot determine whether he is arguing that the trial court's findings of fact were inadequate, or that the evidence does not support the findings of fact. In either event, in order to challenge the court's findings of fact, "the defendant must marshal all of the evidence in favor of the findings and then demonstrate that even when reviewing the evidence in the light most favorable to the court below, the evidence is insufficient to support the findings." *Reed, supra* p. 5 at 1184. Mr. Stewart has clearly not accomplished this.

Further, the rulings of the court challenged by Mr. Stewart are not inequitable. There was evidence from which the court could find that advance notice of visitation was appropriate. Mr. Stewart did not even request extended summer time visitation. Child support was based on evidence of Mr. Stewart's current income and a reasonable interpretation of Ms. Stewart's income. Likewise, there is ample evidence to support the award of alimony. Nor has Mr. Stewart demonstrated that the trial court's division of the parties' real and personal property is inequitable under the circumstances.

Accordingly, the decision of the trial court should be affirmed. Mr. Stewart should be ordered to pay Ms. Stewart's attorney's fees incurred in connection with this appeal based on his failure to conform to the Utah Rules of Appellate Procedure as set forth herein.

DATED this 5th day of November, 1992.

Respectfully submitted,

**KRUSE, LANDA & MAYCOCK**


A Professional Corporation  
Eighth Floor, Valley Tower  
50 West Broadway  
Salt Lake City, Utah 84101

By   
\_\_\_\_\_  
**ELLEN MAYCOCK**  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that I caused four true and correct copies of the foregoing  
**BRIEF OF APPELLEE KATHY MARY ANN STEWART** to be mailed,  
postage prepaid, to the following, this 5th day of November, 1992:

H. Delbert Walker, Esq.  
Sherri Palmer & Associates  
3540 South 4000 West, Suite 240  
West Valley City, Utah 84120

  
\_\_\_\_\_