

2004

Karen Lee Morris v. Michael Anthony Morris : Brief of Appellee

Utah Court of Appeals

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

KAREN LEE MORRIS,

Petitioner/Appellee,

v.

MICHAEL ANTHONY MORRIS,

Respondent/Appellant.

Appellate No. 20040342

Argument Priority No.

District Court 024500415 DA

BRIEF OF APPELLEE

Appeal from the Judgment and Orders of the District Court
of the Fifth Judicial District, State of Utah
the Honorable James L. Shumate, Presiding.

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**UTAH COURT OF APPEALS
BRIEF**

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JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(h)(2003).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1

Did the trial court abuse its discretion in awarding attorney's fees to Petitioner?

STANDARD OF REVIEW

"The decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court. However; the trial court must base the award on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees." *Kelly v. Kelly*, 9 P.3d 171, 181 (Utah Ct. App. 2000)(quoting *Childs v. Childs*, 967 P.2d 942, 947 (Utah Ct. App. 1998)). Where the trial court may exercise broad discretion, the appellate courts will presume the correctness of the court's decision absent "manifest injustice or inequity that indicates a clear abuse of . . . discretion." *Hansen v. Hansen*, 736 P.2d 1055, 1056 (Utah Ct. App.1987).

PRESERVATION OF THE ISSUE

This issue was preserved in oral argument and in post trial motions (R. 508; R. 770, p. 261-62; R. 771, p. 329).

ISSUE NO. 2

Did the trial court equitably value and divide the marital estate (property and debt distribution)?

STANDARD OF REVIEW

“Determining and assigning values to marital property is a matter for the trial court, and this Court will not disturb those determinations absent a showing of clear abuse of discretion. In making such orders, the trial court is permitted broad latitude, and its judgment is not to be lightly disturbed, so long as it exercises its discretion in accordance with the standards set by this court.” *Rappleye v. Rappleye*, 855 P.2d 260, 263 (Utah Ct. App. 1993)(citations omitted). “We disturb a trial court’s property division and valuation ‘only 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.’” *Schaumberg v. Schaumberg*, 875 P.2d 598, 602 (Utah Ct. App. 1994)(quoting *Noble v. Noble*, 761 P.2d 1369, 1373 (Utah 1988)).

PRESERVATION OF THE ISSUE

This issue was preserved in oral argument and in post trial motions (R. 504-09, R. 771, p. 323-27).

ISSUE NO. 3

Did the trial court abuse its discretion in determining alimony?¹

STANDARD OF REVIEW

¹ Issue No. 3 in this brief was raised in Respondent’s Docketing Statement, though Respondent failed to brief the issue. Petitioner, to maintain a clear record on appeal, will address Respondent’s failure to brief the issue.

The Court of Appeals will not disturb the trial court's award of alimony absent a clear and prejudicial abuse of discretion. *Howell v Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991). We have long held that where an appellant fails to brief an issue on appeal, the point is waived. *See, e g , Reid v Anderson*, 211 P.2d 206, 208 (1949); *McFarlane v. Winters*, 201 P.2d 494, 495 (1949); *see also Pixton v. State Farm Mutual Auto. Ins. Co.*, 809 P.2d 746, 751 (Utah Ct. App.1991).

PRESERVATION OF THE ISSUE

This issue was preserved in oral argument and in post trial motions (R. 500-04; R. 771, p. 304-23).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah Code Ann. § 30-3-3(1) (2003)

Utah Code Ann. § 30-3-5(1) (2003)

Utah Code Ann. § 78-2a-3(2)(h) (2003)

Utah Code Ann. § 78-27-56 (2003)

Utah R. App. P. 11 (2003)

The complete texts of the above statutes and rule appear in the addendum.

STATEMENT OF THE CASE

1. NATURE OF THE CASE

The parties in this action were married nearly 14 years when Petitioner commenced this action for divorce. The parties' marriage had been disintegrating over

several months prior to the filing. The parties had minor children from previous marriages, but never had any children together. The issues of alimony, property and debt distribution and attorney's fees were tried before the trial judge over two days. The judge ultimately entered the final Amended Findings of Fact and Conclusions of Law and Amended Decree of Divorce and Judgment, from which Respondent appeals.

2. COURSE OF THE PROCEEDINGS

Petitioner filed her Petition for Dissolution of Marriage on May 24, 2002 (R. 1). Petitioner filed her Motion and Memorandum for Temporary Orders on June 7, 2002, with a supporting affidavit (R.11, 17). Respondent filed his Answer and Counterclaim to Petition for Dissolution of Marriage on June 11, 2002 (R. 26). On June 11, 2002 Respondent filed his Motion to Bifurcate, with a supporting affidavit (R. 30, 37). On June 21, 2002, Petitioner filed her Reply to Respondent's Counterclaims (R. 48). Briefing on Petitioner's Motion for Temporary Orders was completed on June 26, 2002 and the trial court held a hearing on June 28, 2002 regarding the issues (R. 52, 55, 58, 65, 68, 81, 87, 156). The trial court entered Temporary Orders and Order in Re: Motion to Bifurcate on July 8, 2002 (R. 161).

Respondent filed a Motion to Reconsider and/or to Amend Temporary Orders on September 6, 2002 (R. 177). Petitioner was forced to file an Order to Show Cause in Re: Contempt for Respondent's failures to comply with the temporary support orders (R. 201, 268). Petitioner also filed responses to Respondent's Motion to Amend (R. 201, 211). The issues in these matters were before the trial court for hearing on October 11, 2002 (R.

273). The trial court took the matters under advisement (R. 273). Another hearing was scheduled on December 9, 2002 in reference to Respondent's Motion to Bifurcate and at that hearing the trial court reduced the support obligation, adjusted the debt payments and ordered that a bifurcated divorce would be entered effective as of February 1, 2003 (R. 283, 354).

Respondent filed an additional Motion to Sell or Refinance Marital Home and Reduce Alimony on April 8, 2003 (R. 318, 320). Petitioner responded and the matter was taken under advisement by the trial court at hearings on April 25, 2003 and May 30, 2003 (R. 360, 408, 411). Trial in this matter occurred on June 24, 2003 and August 12, 2003 (R. 441, 449). Both parties were given ample time to present their individual cases and witnesses. The trial court directed the parties to submit attorney's fees affidavits and objections and ordered a deadline for the parties to simultaneously submit their proposed findings of fact and conclusions of law (R. 770, p. 261-62). The trial court entered its Findings of Fact and Conclusions of Law on October 6, 2003 (R. 484). Respondent filed an objection to the proposed Final Decree of Divorce and Judgment on October 22, 2003 (R. 499). The trial court held a hearing on that objection on February 9, 2004 and the trial court entered Amended Findings of Fact and Conclusions of Law and Amended Decree of Divorce and Judgment on March 16, 2004 (R. 590, 596, 611).

3. DISPOSITION IN THE COURT BELOW

Trial in this matter occurred on June 24, 2003 and August 12, 2003. Both parties were given ample time to present their individual cases and witnesses. The trial court

directed the parties to submit attorney's fees affidavits and objections and ordered a deadline for the parties to simultaneously submit their proposed findings of fact and conclusions of law. The trial court entered its Findings of Fact and Conclusions of Law on October 6, 2003. Respondent filed an objection to the proposed Final Decree of Divorce and Judgment on October 22, 2003. The trial court held a hearing on that objection on February 9, 2004 and the trial court entered Amended Findings of Fact and Conclusions of Law and Amended Decree of Divorce and Judgment on March 16, 2004.

4. STATEMENT OF FACTS

The parties in this action were married nearly 14 years before Petitioner filed this action (R. 769, p. 52-53; R. 771, p. 320-22). The parties had minor children from previous marriages, but never had any children together (R. 769, p. 93-94; R. 770, p. 223-24). At the time of the parties' breakup, all of Petitioner's children were over 18 and Respondent's son was just graduating from high school (R. 770, p. 223-24). Respondent moved out of the marital home and refused to provide any Petitioner any cash assistance, even though Petitioner was unemployed at the time (R. 769, p. 68-71; Ex. 12).

The parties first met at Pepsi Co. in Salt Lake City where they were both employed (R. 769, p. 99). Petitioner was employed in administrative support and Respondent as a service technician for the vending machines (R. 769, p. 84-85). Pepsi Co. has a non-fraternization policy and Petitioner left her employment and supported Respondent as he rose through the ranks of the company to become a manager in Southern Utah for Pepsi Co. (R. 769, p. 84-6). Respondent receives a base salary and performance bonuses, which

he has received every year, that place his yearly income in excess of \$100,000.00 (R. 598-99; R. 769, p. 84-85; R. 770, p. 281-83; Ex. 1). Respondent had significant retirement accounts through his employment (R. 770, p. 291; R. 602-06). Just before the parties' break up Respondent unilaterally removed \$30,000.00 from his marital 401(k) account through a loan and used the funds to purchase his son a Jeep Wrangler, sent his son on a cruise for high school graduation, and purchased over \$6,000.00 in furnishings for his new furnished rental (R. 605-06; R. 769, p. 88-90; R. 770, p. 230-31, 284, 291; Ex. 40). Respondent did not inform Petitioner of the loan or expenditures (R. 769, p. 89; R. 770, p. 267).

Petitioner had been employed at various jobs during the parties marriage (R. 769, p. 71-77). However, Petitioner does not have any specialized training that would enable her to obtain more than relatively low paying employment (R. 769, p. 73, 95-96). Petitioner's most recent employment before the parties break up was interior design work for a construction company, which provided her with a sporadic income stream (R. 769, p. 71-73). After the parties' break up, Petitioner looked for employment that would provide consistent income with employment benefits (R. 769, p. 77-80, 81; Ex. 3). She found employment at an educational tourism company, however she had a monthly shortfall between her monthly income and expenses (R. 597-98; R. 769, p. 76-77; Ex. 1).

Petitioner filed for the entry of temporary orders to assist her with the monthly expenses (R. 11, 17). The trial court entered temporary orders and awarded the payment of alimony and ordered Respondent to assist with some of the debt payments (R. 161).

Five weeks later Respondent moved to modify those temporary orders, which modification was ultimately awarded based upon Petitioner finding employment (R.177, 354). Within a few months after the hearing on that motion, Respondent again filed for a reduction of alimony and an order for the immediate sale of the marital residence (R. 318, 320). Petitioner was forced to respond to that motion, increasing her legal expenses, which was never heard by the trial court (R. 360, 408, 411).

A trial on this matter was held over two days (R. 441, 449). Both parties called several individuals as witnesses, including themselves, in support of their claims (R. 441, 449). Petitioner called her niece Brooke Pierce, who testified concerning a day trip to Las Vegas Respondent invited her to in 2001 when Ms. Pierce was about 17 years old (R. 769, p. 31-32, 33). Ms. Pierce testified that during the trip Respondent made unrequited sexual advances towards her, tried to kiss her in a sexual manner, placed his hand on her leg in the vehicle, drank alcohol while driving and asked her to cohabitate with him (R. 769, p. 31-36). The trial court then called Respondent on its own volition after Ms. Pierce finished testifying and questioned Respondent concerning these accusations (R. 769, p. 42-48). Respondent admitted that they stopped in Mesquite, Nevada, that he offered wine coolers to Ms. Pierce, a minor, and that he drank the wine coolers in the parking lot of a store (R. 769, p. 43-44, 49). Respondent denied drinking while driving and explained to the trial court that he had drank the wine coolers before making the drive from Mesquite to Las Vegas (R. 769, p. 43-44, 49).

During the pendency of the divorce matter and trial, Respondent engaged in

concealment and mischaracterization of information concerning his assets and earnings (R. 771, p. 326-27; Ex. 1, 15, 40). However, Respondent's Exhibit 15, as analyzed by the trial court, provides clear evidence of the double accounting and subterfuge Petitioner had to sift through to learn of Respondent's actual income and expenses (R. 599-00; R. 770, p.263-67, 269-75, 277-78). In an effort to avoid payment of spousal support, Respondent in some instances included expenses in three separate locations on his Full Disclosure Financial Declaration to artificially increase his monthly expenses (R. 599-00; R.770, p. 263-67, 269-75, 277-78; R. 771, p. 318-20; Ex. 15) . Respondent went even further and claimed he made deposits into an IRA with the 401(k) money which he never claimed on his taxes (R. 771, p. 326-27; Ex. 1, 15, 40). Respondent additionally included expenses for his adult child in his calculation of monthly expenses and included expenses that by his own admission he was not paying (R. 599-00; R. 770, p. 277-78, 290; Ex. 15).

Both parties made claims for attorney's fees and costs, which the trial court allowed the parties to submit via affidavit (R.6; R. 29; R. 453-83; R.770, p. 221, 261-62, 295). Petitioner was ordered to file her affidavit first and then Respondent could object to Petitioner's claimed fees and provide his own affidavit of fees and costs (R. 770, p. 261). Respondent completely failed to file any objection to Petitioner's affidavit or an affidavit of his own in support of his claimed fees. The trial court entered its Findings of Fact and Conclusions of Law in this matter (R. 484-97). Respondent filed an objection to the Findings and after a hearing, the trial court entered Amended Findings of Fact and Conclusions of Law and an Amended Final Decree of Divorce and Judgment (R. 499,

514, 519, 522, 567, 596, 611, 771). It is from those judgments that Respondent appeals.

SUMMARY OF ARGUMENTS

Issue No. 1

The award of attorney's fees to Petitioner was within the trial court's discretion as provided in clear Utah legal precedent. The *Davis v. Davis*, 76 P.3d 716 (Utah Ct. App. 2003) decision sets a standard and scope of discretion which the trial court in this matter met or exceeded in its findings relative to attorney fees. The trial court clearly acted within a scope of its broad discretion and therefore, this Court should affirm the award of attorney's fees and costs. Additionally, if this Court affirms the trial court's award of attorney's fees, alimony or property distribution this Court should award Petitioner her attorney's fees and costs on appeal. *Larson v. Larson*, 888 P.2d 719, 727 (Utah Ct. App. 1994); *Crouse v. Crouse*, 817 P.2d 836, 840 (Utah Ct. App. 1991).

Issue No. 2

The trial court in this matter made an equitable division of the parties assets and debts. The Court of Appeals will disturb a trial court's property division only 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. *Schaumberg v. Schaumberg*, 875 P.2d 598, 602 (Utah Ct. App. 1994)(quoting *Noble v. Noble*, 761 P.2d 1369, 1373 (Utah 1988)). Such error was not committed by the trial court in this matter. Further, Respondent has failed to meet his burden of marshaling the evidence in his brief so that

this Court can have a meaningful appellate review, and therefore, on this basis alone, the trial court's findings should be affirmed. *Moon v. Moon*, 973 P.2d 431, 437 (Utah Ct. App. 1999).

Issue No. 3

The issue of alimony was raised by Respondent in his docketing statement. However, Respondent failed to brief this issue, and therefore has waived that issue on appeal. *Smith v. Smith*, 832 P.2d 467, 470 (Utah 1992); *see, also, Reid v. Anderson*, 211 P.2d 206, 208 (Utah 1949); *McFarlane v. Winters*, 201 P.2d 494, 495 (Utah 1949).

ARGUMENTS

ISSUE NO. 1

THE COURT PROPERLY AWARDED PETITIONER HER ATTORNEY'S FEES AND COSTS

Utah Code Ann. § 30-3-3(1) endows the trial court with discretion to award attorney fees, witness fees, expert witness fees and costs in divorce proceedings. That discretion has been defined as "broad discretion" by appellate court rulings. "Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence." *Whitehead v. Whitehead*, 836 P.2d 814, 816 (Utah Ct. App. 1992). "The decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court. However; the trial court must base the award on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees." *Kelly v. Kelly*, 9 P.3d 171, 181 (Utah Ct. App.

2000)(quoting *Childs v. Childs*, 967 P.2d 942, 947 (Utah Ct. App. 1998)). Where the trial court may exercise broad discretion, the appellate courts will presume the correctness of the court's decision absent "manifest injustice or inequity that indicates a clear abuse of . . . discretion." *Hansen v. Hansen*, 736 P.2d 1055, 1056 (Utah Ct. App.1987).

Respondent has failed to demonstrate the trial court committed reversible error in exercising its broad discretionary authority in awarding attorney's fees in this matter.

“ ‘[A]n [attorney fee] award must be based on sufficient findings,’ and the failure to make such findings ‘ requires remand for more detailed findings by the trial court.’”

Davis v. Davis, 76 P.3d 716, 720 (Utah Ct. App. 2003). In the *Davis* case, this Court found the following findings of the trial court sufficient to affirm an award of attorney's fees:

Here, the trial court found that the amount of the attorney fees was reasonable, given the length of the litigation and the numerous documents filed; that Husband had the ability to pay these fees, given a monthly income in excess of \$4,500; and that Wife demonstrated a need to have some assistance with payment of her attorney fees given that her monthly expenses exceeded her income by over \$700. These factual findings, while not extremely detailed, are sufficient to support the award of attorney fees and the trial court did not exceed its permitted range of discretion in making this award.

Id. Although this Court acknowledged the factual findings were “not extremely detailed,” said findings were sufficient to uphold the trial court's discretionary decision. *Id.* In the present matter, Respondent challenges the trial court's findings as inadequate to justify the award of attorney's fees to Petitioner. However; the findings of the trial court in this

matter are not that different than those found sufficient to support an award of attorney fees by the *Davis* court.

A. REASONABLENESS PRONG

In the matter before this Court, the trial judge made the required findings to support his award of attorney fees and costs. In reference to the reasonableness of the fees prong, the trial court made the following finding:

Petitioner has incurred significant attorney's fees and costs in bringing this matter to conclusion. Petitioner is requesting the amount of \$26,676.59, based upon the complexity of this matter and the necessity of trial and the hourly rates are customary to those charged in this jurisdiction. The Court finds that these fees are reasonable, but in order to equalize the division of marital assets, the fees assessed by the Court are reduced \$1,012.00 which amount the Petitioner shall pay herself.

(R. 608). Thus, the trial court found the fees requested were reasonable based upon: 1) the complexity of the litigation; 2) the necessity of trial; and 3) the hourly rates charged were customary to those charged in this jurisdiction. The findings as to reasonableness in this matter go well beyond the findings upheld in *Davis*.

Importantly, the trial court provided Respondent the opportunity to question the reasonableness of Petitioner's attorney's fees request and Respondent never filed with the trial court any objection to the fees requested (R. 770, p. 261). The trial court also allowed Respondent to file an affidavit to support his attorney's fees request (R. 770, p. 261). Respondent never filed any such affidavit with the trial court. Under the ruling in *Ebbert v. Ebbert*, 744 P.2d 1019, 1023 (Utah Ct. App. 1987), Respondent's failure to object to

Petitioner's attorney's fees and costs and failure to provide an affidavit of his own fees and costs would preclude him from raising those claims for the first time on appeal. The scope of attorney's fees and costs is further supported by Respondent's fabrications and exaggerations found by the trial court in Exhibit 15, Respondent's Full Disclosure Financial Declaration (R. 599-00). The trial court made the necessary findings of reasonableness of the requested fees and Respondent, though given multiple opportunities to object, completely failed to preserve the issue.

B. RECEIVING SPOUSE'S FINANCIAL NEED

The next prong of analysis is the evidence of the receiving spouse's financial need. In respect to this prong, the trial court made the following findings of fact:

The Court specifically finds that the Respondent is capable of paying this amount at the specified rate, and that the Petitioner is unable to pay more than the assessed figure of \$1,012.00.

(R. 608). The trial court made a specific finding concerning Petitioner's ability to pay her attorney's fees in this matter. Additionally, the trial court made findings in paragraph 4(a) of the Amended Final Decree of Divorce and Judgment that Petitioner's net monthly income was \$1,678.10 and found her reasonable monthly expenses to be \$2,984.33 for a monthly shortfall of \$1,306.23 (R. 597-98). The trial court specifically excluded any monthly claims for payment of attorney fees in its calculation of Petitioner's monthly expenses (R. 598; R. 771, p. 307-10). The trial court awarded alimony of \$1,300.00 per month to cover Petitioner's shortfall, therefore Petitioner had no additional monthly

income with which to pay her attorney's fees (R. 598-01). The trial court clearly made sufficient findings to support its discretionary award of attorney's fees, and the findings are certainly adequate under the *Davis* ruling. The trial court determined the amount of attorney's fees that she could pay and determined that she did not have the ability to pay above that specific amount (R. 608).

Respondent argues that Petitioner received ample assets with which to pay her attorney fees. However, none of those assets are income producing (R. 597-98, 601-05). In order to pay any such fees, Petitioner would be forced to liquidate assets which will result in an inequity in the distribution of the marital estate.

Moreover, Respondent is not entitled to his attorney's fees under the plain language of his attorney's fees pleading in his Answer and Counterclaim (R. 29, 261-62).

Respondent requested that he be awarded "attorney's fees against Petitioner for all claims she has asserted in bad faith and without merit as may be support by proof at trial or temporary hearings in the interim" (R. 29, 261-62). This language is clearly based on Utah Code Ann. § 78-27-56, concerning bad faith litigation. The trial court made no finding of bad faith litigation against Petitioner and Respondent never provided the trial court with any evidence concerning his attorney's fees and costs. Therefore, Respondent cannot now claim that the trail court erred in denying his claim for attorney's fees when the trial court made absolutely no findings that Petitioner acted in bad faith and Respondent failed to provide any evidence of his attorney's fees and costs.

C. ABILITY TO PAY

Finally, the trial court made sufficient findings concerning Respondent's ability to pay. This finding, as quoted above, *supra* 14, was clearly and distinctly made by the trial court and is supported through other findings in the record (R. 608, 598-99, R. 601). The trial court found that Respondent had net monthly income of \$6,750.54, less his reasonable monthly expenses of \$3,068.91 per month, for net monthly discretionary income of \$3,681.63 (R. 601). Deducting \$1,300.00 per month for the alimony payment leaves Respondent net discretionary monthly income of \$2,381.63 (R. 601). Based alone upon Respondent's discretionary income, the trial court had a sufficient factual basis to find he had the ability to pay Petitioner's attorney's fees.

The *Davis* court holding sets a standard and scope of discretion which the trial court in this matter met or exceeded in its findings relative to attorney's fees. The trial court acted within the scope of its discretion and therefore, this Court should affirm the award of attorney's fees and costs.

Finally, if this Court affirms the trial court's award of attorney's fees, alimony or property distribution this Court should award Petitioner her attorney's fees and costs on appeal. *Larson v. Larson*, 888 P.2d 719, 727 (Utah Ct. App. 1994); *Crouse v. Crouse*, 817 P.2d 836, 840 (Utah Ct. App. 1991).

ISSUE NO. 2

THE TRIAL COURT PROPERLY DIVIDED THE PROPERTY AND DEBTS

Utah Code Ann. § 30-3-5(1) provides the trial court with authority to enter equitable orders concerning the distribution of the parties' property and for the payment of

obligations or liabilities incurred by the parties during the marriage.

It has been held that:

In a divorce proceeding, there is no fixed formula from which to determine the division of property. Thus, we afford the trial court considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity. The trial court's findings of fact are presumed to be correct, and because we lack the advantage of seeing and hearing witnesses testify, we do not make our own findings of fact. Accordingly, we view the evidence and all the inferences that can reasonably be drawn therefrom in a light most supportive of the trial court's findings.

Baker v. Baker, 866 P.2d 540, 542-43 (Utah Ct. App. 1993). Further:

‘Determining and assigning values to marital property is a matter for the trial court, and this Court will not disturb those determinations absent a showing of clear abuse of discretion.’ In making such orders, the trial court is permitted broad latitude, and its judgment is not to be lightly disturbed, so long as it exercises its discretion in accordance with the standards set by this court.

Rappleye v. Rappleye, 855 P.2d 260, 263 (Utah Ct. App. 1993)(citations omitted). “We disturb a trial court’s property division and valuation ‘only 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.’” *Schaumberg v. Schaumberg*, 875 P.2d 598, 602 (Utah Ct. App. 1994)(quoting *Noble v. Noble*, 761 P.2d 1369, 1373 (Utah 1988)).

MARSHALING REQUIREMENT

Respondent has completely failed to meet the marshaling duty in his appellate brief before this Court. In *Moon v. Moon*, 973 P.2d 431 (Utah Ct. App. 1999), this honorable

Court provided a clear framework for advocates who must marshal evidence on appeal.

To meet the marshaling requirement, this Court explained:

The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of the flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

Id. at 437 (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991)). “When an appellant fails to meet the ‘heavy burden’ of marshaling the evidence, we ‘assume [] that the record supports the findings of the trial court.’” *Id.* (quoting *Wade v. Stangl*, 869 P.2d 9, 12 (Utah Ct. App. 1994))(quoting *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991))). When a party simply reargues their evidence, or a version thereof, they have not satisfied the very high burden of the marshaling requirement and the trial court's ruling should be affirmed. *Id.*

Respondent has utterly failed in his marshaling requirement in his brief. Other than sporadic references to the record mixed with brief and unexamined citations and legal conclusions, Respondent has failed to marshal the evidence supporting the trial court's findings and then demonstrate how the trial court abused its broad discretion. Respondent has absolutely failed to provide this Court with all of the evidence that supports the trial court's findings and then ferreted out the fatal flaws. Based alone upon Respondent's

failure to meet his marshaling requirements, the trial court's rulings should be affirmed.

**RESPONDENT SHOULD NOT BE ALLOWED TO SUPPLEMENT THE
RECORD**

In his brief, Respondent, attached and makes reference to Appendix A, also referred in his brief as Attachment A, which he claims is a summary of several trial exhibits.

However, these summaries were never produced at trial or in any subsequent hearings and never admitted into evidence. Utah Rule of Appellate Procedure 11(h) provides a procedure by which a party may move the trial court or the appellate court to supplement the record before the appellate court. The moving party must serve a statement of proposed changes on the other parties. *Id.* The non-moving parties then have 10-days to serve objections to the proposed changes. *Id.* Respondent has entirely failed to follow this procedure and rather simply attached his Attachment A to his brief.

The issue of parties providing additional evidence or information to the appellate court that was not admitted into evidence by the trial court was addressed in the case of *Ebbert v. Ebbert*, 744 P.2d 1019 (Utah Ct. App. 1987). The plaintiff in *Ebbert* presented to the Court of Appeals an affidavit of his counsel to demonstrate that the trial court judge “was biased and predisposed to award custody to defendant.” *Id.* at 1023. In refusing to consider this affidavit, this Court held that “[m]atters not admitted in evidence before the trier of fact will not be considered on appeal to this Court.” *Id.*

Here, the Court has the full record of the trial court before it, including all trial exhibits. Respondent's Attachment A to his brief should not be considered by this Court

because it was not admitted into evidence by the trial court. Respondent has not followed the proper procedures to supplement the record and therefore, this Court should not consider Attachment A.

THE COURT MADE AN EQUITABLE DISTRIBUTION

In fashioning equitable property division, the trial court needs to consider all pertinent circumstances that exist between the parties. *Walters v. Walters*, 812 P.2d 64 (Utah Ct. App. 1991). There is no fixed formula to determine the division of a marital estate, however; the court is afforded broad discretion based upon the court's equitable powers. *Baker v. Baker*, 866 P.2d 540 (Utah Ct. App. 1993); *Bradford v. Bradford*, 993 P.2d 887 (Utah Ct. App. 1999). An appellant, seeking to overturn an award of property in a divorce action, must articulate the basis of their claim that the distribution was inequitable by explaining what property should have been awarded to the parties and how the court abused its discretion in awarding the property. *Bell v. Bell*, 810 P.2d 489 (Utah Ct. App. 1991). Other than providing conclusory statements that the trial court abused its discretion, Respondent has failed to marshal the evidence and demonstrate how the trial court abused its discretion.

A. VALUATION OF PROPERTY

The trial court is afforded broad discretion concerning the division of property and the valuation of such property. *Munns v. Munns*, 790 P.2d 116, 119-20 (Utah Ct. App. 1990). To permit appellate review, the distribution should be based on adequate findings which place a dollar value on the distribution. *Id.* There is no requirement that the trial

court value every item of property, but that the trial court provide sufficient findings of fact from which an appellate court can have a meaningful review.

In this action, the trial court in paragraph 7 of the Amended Findings of Fact and Conclusions of Law made specific valuations concerning several items of personal property and divided those items between the parties (R. 602-05). Contrary to Respondent's assertions, both parties placed the issue of property evaluation at issue before the trial court by providing the trial court with differing values for the property (Ex. 1, 2, 4, 5, 6, 7, 8, 11, 14, 15, 27, 28, 34, 35, 46, 47, 48, 51, 52, 54, 55, 56). Petitioner testified that her values for the property awarded to the parties would be consistent with those she listed in tab three to trial Exhibit 1 (R. 769, p. 92-3). Respondent equally testified concerning his process for evaluating the parties' property and testified that he felt his values were correct (R. 770, p. 247-48, 256-57). While neither party testified that they disagreed with the other party's valuations, such disagreement is obvious considering the conflicting evidence presented by the parties through Exhibits 1 and 15. Based upon that conflicting evidence, the trial court was left to weigh the evidence and determine an appropriate valuation of the parties' assets. Respondent has failed to demonstrate that the trial court abused its broad discretion in determining the value of the property in this action. Without proper marshaling, this Court is left with the proper assumption that the trial court effectuated an equitable distribution of the parties' assets.

Finally, Respondent urges this Court on multiple occasions throughout his brief to weigh and assign credibility to the evidence presented at trial. "The trial court is uniquely

situated to judge matters bearing on the weight and credibility that should be given to evidence, and we will not overturn the court's ruling in this regard unless it is clearly erroneous.” *Kessimakis v. Kessimakis*, 977 P.2d 1226, 1229 (Utah Ct. App. 1999).

Respondent, who failed to marshal all of the evidence and to provide this Court with the evidence supporting both sides of the valuation issues, requests that this Court choose one side of the evidence over the other. Such weighing of the evidence, without a showing that the trial court’s decision was clearly erroneous, is not required of this Court.

B. DIVISION OF PROPERTY

In dividing a marital estate, the trial court is not bound to effectuate a mathematically equivalent division of the property, but is mandated to provide the parties an equitable division of their assets. *Colman v. Colman*, 743 P.2d 782, 789 (Utah Ct. App. 1987). “[A] fair and equitable property distribution is not necessarily an equal distribution.” *Id.* To have this Court reverse the trial court’s property division Respondent must demonstrate that there was a manifest injustice or inequality that indicates a clear abuse of discretion. *Id.* Regardless of this burden, Respondent has failed to marshal the evidence and provide this Court with the ability to determine that there has been an abuse of discretion. The trial court placed values on several items of property and equalized the distribution of those items through an offset on the payment of attorneys fees (R. 602-05; R. 606-07). Failure to place a value on each item awarded does not invalidate a trial court’s award of property. It is equally reasonable to assume that the trial court found the values of the remaining items to be essentially equivalent and effectuated an equitable

distribution (R.771, p. 323-28). When the issue was brought to the trial court's attention through post-judgment motions, the court does indicate on the record that it considered all of the evidence and all items not specifically valued and awarded fell under the catch all provisions of paragraph 8 of the Amended Decree of Divorce and Judgment (R, 771, p. 328).

C. GIFTED ITEMS

Both parties introduced proposed property valuations and made arguments concerning gifted property to the trial court (R. 769, p. 114-17, 148-50; R. 770, p. 201-06, 207-08, 217-20, 258-61; R. 771, p. 323-28; Ex. 1, 2, 5, 6, 7, 8, 11, 14, 15, 27, 47, 48, 54). The trial court found that neither party carried their burden of proof on the issue of gifted items (R. 602; R. 605; R. 771, p. 327-28). It is essential to point out that most of the alleged gifted items were not gifted from third parties, but were intra-spousal gifts or family gifts.

In determining the status of an item of property, the trial court is first faced with the determination of whether the property is part of the marital estate or would pass outside the marital estate. Intra-spousal gifts can be distinguished from third party gifts or inheritance, based solely upon the fact that marital funds are used to purchase the item. Additionally, to prove a gift the party alleging the item as a gift must prove by "clear and convincing evidence" that there was a clear intention by the "donor to pass immediate ownership, an irrevocable delivery, and acceptance." *In re Estate of Ross*, 626 P.2d 489, 491 (Utah 1981). The trial court clearly held that the parties did not prove by clear and

convincing evidence that the property was gifted, therefore the trial court's ruling should be upheld by this Court.

D. DEBTS

Contrary to Respondent's arguments, the trial court did consider debt distribution in this matter (R. 616, 620-21, 622). Petitioner was ordered to be solely responsible for the home mortgage, which the court found had a balance of \$97,352.94 (R. 616, 622). Additionally, Petitioner was ordered to pay her Mountain American credit card, with a balance of \$2,118.30, a Sears Card, with a balance of \$146.91 and Mountain America truck lien, with a balance of \$7,000.00 (R. 622; Ex. 1). In total Petitioner was ordered to assume and pay \$106,618.15 worth of debts. Respondent was ordered to assume and pay the debt on his vehicle, which he bought just days before the trial, in the amount of \$43,657.48, his Mountain America credit card, in the amount of \$4,329.33, his Zion's Bank credit card, in the amount of \$0.00, his AT&T Universal credit card, in the amount of \$0.00, and his Capital One credit card, in the amount of \$7,362.08 (R. 622; Ex. 1, 15)². In total Respondent was ordered to assume and pay \$55,348.89 in debts.

Respondent himself testified that he had accumulated an additional \$10,000.00 or more in credit card debts after the parties separated (R. 290). Included in that post-separation debt is at least an additional charge of close to \$3,600.00 for jewelry for Respondent's paramour (R. 769, p. 127-28; Ex. 13). Additionally, Respondent is servicing

² The amounts used herein are drawn from trial Exhibit 1, which places the outstanding balances on Respondent's debts higher than those found in Respondent's Exhibit 15.

the debt payment on the 401(k) loan which he took out just before the parties' separation which the trial court specifically found was a dissipation of the marital estate (R. 620-21). Respondent's credit card debts, if contrasted between Exhibit 1 and 15, are higher in Petitioner's Exhibit 1, which are the amounts used here for comparison. Given those amounts, Petitioner was still ordered to pay in excess of \$50,000.00 more in debt than Respondent. If this Court were to add Respondent's 401(k) loan, Petitioner was still ordered to pay over \$20,000.00 more in debt than Respondent. Respondent will not be able to prove that his client suffered any prejudice by the trial court's award, therefore the same should be affirmed by this Court.

ISSUE NO. 3

RESPONDENT WAIVED HIS ARGUMENT

In his Docketing Statement on file in this matter, Respondent places the award of alimony at issue in this appeal. However, in Respondent's brief on file in this matter, Respondent has failed to make any argument or reference to the issue. When a party fails to brief an issue, which is properly before the Court, that party is deemed to have waived that issue on appeal. *Smith v. Smith*, 832 P.2d 467, 470 (Utah 1992); *see, also, Reid v. Anderson*, 211 P.2d 206, 208 (Utah 1949); *McFarlane v. Winters*, 201 P.2d 494, 495 (Utah 1949). For clarity in the record, this Court should affirm the trial court's alimony award in this matter.

CONCLUSION

Based upon the foregoing, this Court should affirm the rulings of the trial court and

award Petitioner her attorney's fees and costs on appeal.

DATED this 4th day of April 2005

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by 'D. Bursell' and a long horizontal flourish.

Jeffery D. Bursell
Hughes & Bursell, P.C.

ADDENDUM

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U.C.A. 1953 § 30-3-3

C

WEST'S UTAH CODE ANNOTATED
TITLE 30. HUSBAND AND WIFE
CHAPTER 3. DIVORCE

→§ 30-3-3. Award of costs, attorney and witness fees--Temporary alimony

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

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UT ST § 78-2a-3
U.C.A. 1953 § 78-2a-3

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C

WEST'S UTAH CODE ANNOTATED
TITLE 78. JUDICIAL CODE
PART I. COURTS
CHAPTER 2A. COURT OF APPEALS

→§ 78-2a-3. Court of Appeals jurisdiction

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

- (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
- (ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first

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degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

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WEST'S UTAH CODE ANNOTATED

TITLE 78. JUDICIAL CODE

PART III. PROCEDURE

CHAPTER 27. MISCELLANEOUS PROVISIONS

→§ 78-27-56. Attorney's fees--Award where action or defense in bad faith--
Exceptions

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

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

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

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

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U.C.A. 1953 § 30-3-5



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WEST'S UTAH CODE ANNOTATED
TITLE 30. HUSBAND AND WIFE
CHAPTER 3. DIVORCE

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

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

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

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

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

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

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

(iii) provisions for the enforcement of these orders; and

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

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

U.C.A. 1953 § 30-3-5

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.

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

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

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

(7) If a petition alleges substantial noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

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

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
- (vii) whether the recipient spouse directly contributed to any increase in the

U.C.A. 1953 § 30-3-5

payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

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

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

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

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

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

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

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

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

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

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

U C A. 1953 § 30-3-5

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

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

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Rules App.Proc., Rule 11

C

WEST'S UTAH COURT RULES ANNOTATED

STATE COURT RULES

UTAH RULES OF APPELLATE PROCEDURE

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS

→RULE 11. THE RECORD ON APPEAL.

(a) Composition of the record on appeal. The original papers and exhibits filed in the trial court, including the presentence report in criminal matters, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and the docket sheet, shall constitute the record on appeal in all cases. A copy of the record certified by the clerk of the trial court to conform to the original may be substituted for the original as the record on appeal. Only those papers prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.

(b) Pagination and indexing of record.

(b)(1) Immediately upon filing of the notice of appeal, the clerk of the trial court shall securely fasten the record in a trial court case file, with collation in the following order:

(b)(1)(A) the index prepared by the clerk;

(b)(1)(B) the docket sheet;

(b)(1)(C) all original papers in chronological order;

(b)(1)(D) all published depositions in chronological order;

(b)(1)(E) all transcripts prepared for appeal in chronological order;

(b)(1)(F) a list of all exhibits offered in the proceeding; and

(b)(1)(G) in criminal cases, the presentence investigation report.

(b)(2)(A) The clerk shall mark the bottom right corner of every page of the collated index, docket sheet, and all original papers as well as the cover page only of all published depositions and the cover page only of each volume of transcripts constituting the record with a sequential number using one series of numerals for the entire record.

(b)(2)(B) If a supplemental record is forwarded to the appellate court, the clerk shall collate the papers, depositions, and transcripts of the supplemental record in the same order as the original record and mark the bottom right corner of each page of the collated original papers as well as the cover page only of all published depositions and the cover page only of each volume of transcripts constituting the supplemental record with a sequential number beginning with the number next following the number of the last page of the original record.

(b)(3) The clerk shall prepare a chronological index of the record. The index shall contain a reference to the date on which the paper, deposition or transcript was filed in the trial court and the starting page of the record on which the paper, deposition or transcript will be found.

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(b)(4) Clerks of the trial and appellate courts shall establish rules and procedures for checking out the record after pagination for use by the parties in preparing briefs for an appeal or in preparing or briefing a petition for writ of certiorari.

(c) Duty of appellant. After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be transmitted.

(d) Papers on appeal.

(d)(1) *Criminal cases.* All of the papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal.

(d)(2) *Civil cases.* Unless otherwise directed by the appellate court upon sua sponte motion or motion of a party, the clerk of the trial court shall include all of the papers in a civil case as part of the record on appeal.

(d)(3) *Agency cases.* Unless otherwise directed by the appellate court upon sua sponte motion or motion of a party, the agency shall include all papers in the agency file as part of the record.

(e) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

(e)(1) *Request for transcript; time for filing.* Within 10 days after filing the notice of appeal, the appellant shall request from the court executive a transcript of such parts of the proceedings not already on file as the appellant deems necessary. The request shall be in writing and shall state that the transcript is needed for purposes of an appeal. Within the same period, a copy shall be filed with the clerk of the trial court and the clerk of the appellate court. If the appellant desires a transcript in a compressed format, appellant shall include the request for a compressed format within the request for transcript. If no such parts of the proceedings are to be requested, within the same period the appellant shall file a certificate to that effect with the clerk of the trial court and a copy with the clerk of the appellate court.

(e)(2) *Transcript required of all evidence regarding challenged finding or conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

(e)(3) *Statement of issues; cross-designation by appellee.* Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues that will be presented on appeal and shall serve on the appellee a copy of the request or certificate and a copy of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the request or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has requested such parts and has so notified the appellee, the appellee may within the following 10 days either request the parts or move in the trial court for an order requiring the appellant to do so.

(f) Agreed statement as the record on appeal. In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal, shall be

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approved by the trial court. The clerk of the trial court shall transmit the statement to the clerk of the appellate court within the time prescribed by Rule 12(b)(2). The clerk of the trial court shall transmit the index of the record to the clerk of the appellate court upon approval of the statement by the trial court.

(g) Statement of evidence or proceedings when no report was made or when transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, or if the appellant is impecunious and unable to afford a transcript in a civil case, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or propose amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.

(h) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted. The moving party, or the court if it is acting on its own initiative, shall serve on the parties a statement of the proposed changes. Within 10 days after service, any party may serve objections to the proposed changes. All other questions as to the form and content of the record shall be presented to the appellate court.

Current with amendments received through March 1, 2005

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