

2005

Madsen v. Madsen : Brief of Appellant

Utah Court of Appeals

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Steve S. Christensen; Hirschi Christensen; Attorney for the Appellant.

Randall L. Skeen; Cook, Skeen & Robinson; Attorney for Appellee.

Recommended Citation

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

RAYMOND WILLIAM MADSEN,

Petitioner/Appellee,

vs.

LINDA DIANE MADSEN,

Respondent/Appellant.

Appellate Case No.: 20050139

District Ct. No. 024402853 DA

Oral Argument Requested – Priority 15

APPELLANT'S BRIEF

APPEAL FROM THE FOURTH DISTRICT COURT

UTAH COUNTY

Honorable Judge James R. Taylor

Randall L. Skeen
COOK, SKEEN & ROBINSON, L.L.C.
Attorney for Appellee
5788 South 900 East
Salt Lake City, UT 84121
Telephone: (801) 266-7414
Facsimile: (801) 892-5067

Steve S. Christensen (U.S.B. No. 6156)
HIRSCHI CHRISTENSEN, PLLC
Attorney for Appellant
136 East South Temple, Suite 850
Salt Lake City, Utah 84111-3156
Telephone: (801) 322-0593
Facsimile: (801) 322-0594

FILED
UTAH APPELLATE COURTS
NOV 15 2005

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Attorney for Appellant
136 East South Temple, Suite 850
Salt Lake City, Utah 84111-3156
Telephone: (801) 322-0593
Facsimile: (801) 322-0594

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APPELLANT'S BRIEF

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Priority Class 15

STATEMENT OF JURISDICTION

This matter comes within the jurisdiction of the Court of Appeals pursuant to Utah Code Ann. §78-2a-3(2)(h) (2001). **This is an appeal in a domestic relations matter.**

STATEMENT OF THE ISSUES

Issue 1: Did the trial court abuse its discretion by failing to make adequate findings of fact that would support its decisions regarding alimony, the division of marital assets and debts, and the award of attorneys' fees?

Standard of Review: "Trial courts have considerable discretion in determining alimony and property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated." *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991). The *Jones* factors must always be considered

when awarding alimony, and when considering the *Jones* factors, the trial court must make adequate findings of fact on all material issues—failure to do so is an abuse of discretion. *Bakanowski v. Bakanowski*, 80 P.3d 153, 155 (Utah Ct. App. 2003). “There is no fixed formula upon which to determine a division of assets or debts in a divorce action.” *Rappleye v. Rappleye*, 855 P.2d 260, 263 (Utah Ct. App. 1993). “To permit appellate review of the property distribution, the distribution must be based upon adequate factual findings and must be in accordance with the standards set by this state’s appellate courts.” *Dunn v. Dunn*, 802 P.2d 1314, 1317 (Utah Ct. App. 1990). An allocation of debts must also be based upon adequate findings of fact, which ruling is reviewed for abuse of discretion. *Rehn v. Rehn*, 974 P.2d 306, 313 (Utah Ct. App. 1999). Awards of attorneys’ fees in a divorce proceedings must be based on sufficient findings of fact, and whether the findings of fact are sufficient is a question of law reviewed for correctness. *Id.*

Preservation of issues: The alimony issue, the issue regarding the division of marital debts and assets, and the issue regarding the award of attorneys’ fees are all preserved on the record at R. 0427, pp. 217–50.

Issue 2: Did the trial court err by failing to award Linda a judgment for unpaid alimony?

Standard of review: Appellate courts “review a trial court’s conclusions as to the legal effect of a given set of found facts for correctness.” *Bradford v. Bradford*,

1999 UT App. 373 ¶ 10, 993 P.2d 887 (quoting *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998)). “The proper interpretation and application of a statute is a question of law which [appellate courts] review for correctness, affording no deference to the district court’s legal conclusion.” *Gutierrez v. Medley*, 972 P.2d 913, 914–15 (Utah 1998).

Preservation of issues: The issue regarding unpaid alimony is preserved on the record at R. 0427 at pp. 222–24.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are set forth in full in Addenda A, B, C, and D attached to the Brief: Utah Code Ann. §30-3-3; Utah Code Ann. §30-3-5; Utah Code Ann. § 30-3-10.5; and Utah R. Civ. P. 37.

STATEMENT OF THE CASE

Nature of the Case

Appellant Linda Madsen appeals the decisions of the trial court, as set forth in the divorce decree, concerning the amount of alimony that Raymond Madsen is obligated to pay, the division of marital debts and assets between the parties, and the award of attorneys’ fees to Raymond Madsen. Linda also appeals the trial court’s failure to grant her a judgment for unpaid alimony. The Decree and Findings of Fact, entered July 14, 2004, are attached as Addenda A and B, respectively.

Course of the Proceedings and Disposition

Raymond's Complaint for divorce and Linda's Counter Complaint were tried May 27, 2004, before the Hon. James R. Taylor in Utah County, Utah. The Trial Court entered the Findings and Decree on July 14, 2004, granting a divorce, dividing debts and assets, and awarding alimony and attorney's fees. R. at 368--80; Addenda A and B.

The formal Divorce Decree entered July 14, 2004, awarded to Linda \$900.00 per month for alimony based on her imputed monthly gross income of \$1,118.00 and Raymond's monthly gross income of \$7,197.00. The Decree also distributed marital assets and debts and ordered Linda to pay \$618.75 of Raymond's attorneys' fees.

Linda's prayer for a judgment against Raymond for unpaid alimony was denied.

Respondent Linda Madsen filed a timely appeal.

STATEMENT OF THE FACTS

This is an appeal of a divorce decree following a 34-year marriage. R. at 427, p. 8. Raymond was the primary earner for the family during the marriage. The evidence at trial included testimony that Raymond was the worldwide manager of production for the record department of the Church of Jesus Christ of Latter-day Saints. At the time of the divorce trial, Raymond's gross income was \$7,197.00. R at 427, pp. 45--47.

At trial, Linda testified that her most recent employment included working at a gas station convenience store for \$7.00 an hour in 1999. R. at 427, p. 113. Raymond testified at trial that during the course of the marriage, Linda has "been in airport security, she's worked for Hertz, she's worked for clothing stores, department stores,

she's managed food stores, (inaudible word) stores and she worked at Discover Card.”

R. at 427, p. 65. Linda had not been able to obtain outside employment during the period of separation in this case because she was the sole care provider for her father who suffered from Alzheimer's disease. R. at 427, p. 169. She had applied for work with jobs paying \$6.50 an hour prior to the time of trial, and the parties stipulated at trial that Linda's earning ability was \$1,118.00 per month even though she had not yet obtained employment at the time of trial. The court imputed \$1,118.00 per month income to Linda. R at 427, pp. 244–45.

Early in the proceedings, the court ordered temporary alimony in the amount of \$1,400.00 a month. R. at 44–47; Addendum E, paragraph 12. After moving out temporarily, Raymond moved back into the marital residence and unilaterally reduced alimony to \$81.00 a month with the explanation that he needed to use the alimony money to make the mortgage payment. R. at 425, p. 12. As of November 1, 2002, Raymond was in arrearages on alimony payments in the amount of \$3,957.00. *See* R. at 427, pp. 148–49; Addenda T and U. The court refused to grant a judgment in Linda's favor for three months of unpaid alimony, stating that Judge Hansen had directed Raymond to pay the alimony payments directly on the mortgage. *See* R. at 425, p. 21. Judge Hansen only held one hearing in this matter, and he did not enter an order directing Raymond to pay his alimony payments directly on the mortgage. *See* Addendum F.

The parties' two children had reached their majority at the time of the trial. R. at 427, p. 8. The Court only ordered \$900.00 of alimony to Linda, giving her a gross income of \$2,000 a month and leaving Raymond with a gross taxable income of \$6,297.00 a month. R. at 368, paragraphs 14 and 21; R. at 427, p. 45. There was a specific finding that Linda's monthly expenses were \$2,718.00 per month. *See* R. at 368, paragraphs 18 and 19; R. at 427, at pp. 245–47. The evidence was that these expenses of Linda's did not include taxes. *See* Addendum P, submitted at trial as Exhibit #R-8. The court found that Raymond had after tax income of approximately \$4,780.00. R. at 368, paragraph 16.

At trial, the court found that Raymond's monthly expenses were \$3,880.00 a month. R. at 368, paragraph 16. The evidence before the court of claimed expenses by Raymond was that he had \$2,980.00 in monthly expenses after the expenses not allowed by the court were redacted. R. at 380, pp. 2–3. In response to the Motion to Amend Findings, the court held that it had intentionally found that Raymond's expenses each month were \$900.00 higher than he reported in Exhibit P-5 because he had been ordered to pay the bulk of the debts. *See* R. 425 at p. 21; Addendum P.

Other than the extra \$900.00 attributed to Raymond, the court found that both parties had monthly expenses for their individual needs of roughly \$3,000.00 at the time of trial. *See* R. 368 at paragraphs 18 and 19. The court awarded Raymond approximately \$38,000.00 of assets, including an \$8,000.00 time share, a \$5,000.00 truck, and \$25,000.00 in cash, for payment of the debts assigned to him. *See* R. at 373,

paragraph 4; Addendum A at paragraph 4. The court ordered Raymond to pay all of the marital debt, except for \$9,000.00 to be paid by Linda. *See* R. at 373, paragraph 5; Addendum A, paragraph 5. However, the court failed to quantify the amount of the marital debt that Raymond would be required to pay and did not determine whether Raymond would have any outstanding obligation after using the cash he was awarded to pay the debts. *See id.*

The court awarded Linda the vehicle she was driving, and even though the bluebook on the car was approximately \$7,200.00, the court determined the value of the car was \$15,000.00 without making any findings to explain the basis of the finding. *See* R. at 368, paragraph 7. Linda was also ordered to pay the loan securing the vehicle in the amount of \$5,400.00. *See* R. at 368, paragraph 7; Addendum S, submitted at trial as Exhibit #R-24.

The court also refused to award attorney's fees even though \$25,000.00 in cash was awarded to Raymond, and Linda had no assets and insufficient income from which to even meet her monthly expenses. *See* R. at 368, paragraphs 8, 20, and 23.

SUMMARY OF ARGUMENT

The court made several findings which varied significantly from the evidence. The findings do not state how the court made its factual determinations in the face of undisputed contrary evidence. The motion to correct apparent errors in calculation were met with an invitation by the court to appeal the matter. R. at 425, pp. 21–22. Included in these findings which are unexplained are the following:

First, the parties stipulated that Linda could earn \$1,118.00 a month and that that amount should be imputed to her. The court made no findings as to the net amount of Linda's earnings for purposes of calculating her monthly needs.

Second, the court allowed Raymond to claim temporary alimony in this case as an expense which reduced his ability to pay permanent alimony. However, the court ordered permanent alimony to replace temporary alimony rather than be added to it. In doing this, it appears that the court found that Raymond had expenses of \$2,980.00 a month that were not tied to alimony. The court explicitly found that Raymond had approximately \$4,780.00 in disposable net income and that he only had the ability to pay \$900.00 a month in alimony. There are no findings explaining why Raymond could not pay \$1,800.00 in alimony when he had that available in his disposable income.

Third, the court found that Linda's vehicle had a value of \$15,500.00 even though the Kelley Blue Book estimate in evidence put the value at approximately \$7,390.00. No findings were made on how the court made its determination of value.

Fourth, the court awarded all of the escrow account holding the \$25,000.00 of undistributed marital equity in the parties' home, as well as the parties' Marriot timeshare and the vehicle with the most equity solely to Raymond. The explanation of the court for the distribution of the home equity was to help Raymond pay the marital debt. However, the court only identified two debts that were assigned to Raymond.

Fifth, the court also identified a debt assigned to Linda. There were no findings on the court's reasoning for assigning Linda marital debt but awarding her no property with which to pay the debt.

Sixth, the court appears to allow Raymond a monthly expense for making installment payments, thereby reducing his ability to pay alimony even though he has been awarded sufficient marketable assets to pay off all installment debt. In this way, it appears that Raymond's ability to pay alimony was artificially lowered. However, there are no findings to explain what expenses were allowed for the parties and why.

Finally, the court entered no findings on the issue of attorneys' fees. Linda was left with only imputed income of \$1,118.00 a month and \$900.00 of alimony a month. She had \$2,718 in monthly expenses and a credit card debt of \$9,000.00 and her attorneys' fees. At the same time Raymond is given equity to pay off the debts assigned to him and is left with \$6,297.00 a month of gross income after payment of alimony. There are no findings explaining either why Linda does not need assistance or why Raymond cannot afford to pay Linda's attorneys fees out of the \$25,000.00 of cash awarded to him.

The court erred when it granted a Motion for Sanctions when no notice of a deposition had been received and Rule 37 was not complied with by Raymond in bringing his motion before the court.

The court erred when it refused to order a judgment against Raymond when he unilaterally reduced his alimony payment to Linda from \$1,400.00 a month to \$81.00 a

month for three months. Raymond's reason that he had to pay the mortgage did not give him the right to withhold alimony. The court's stated basis for this order was that Judge Hansen permitted it is not supported in the record.

ARGUMENT

Point I

The Trial Court Abused its Discretion by Failing to Make Sufficient Findings of Fact that Would Support its Decisions Regarding Alimony, the Division of Debts and Assets, and the Award of Attorneys' Fees

A. Alimony

When awarding alimony, "the trial court must make detailed findings on all material issues, i.e. the *Jones* factors, which '**should . . . include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.**'" *Rehn v. Rehn*, 1999 UT App. 41 ¶ 6, 974 P.2d 306 (emphasis added and citation omitted). The *Jones* factors that must be considered include "the needs of the recipient spouse; the earning capacity of the recipient spouse; the ability of the obligor spouse to provide support; and, the length of the marriage." *Id.* The trial court failed to make sufficiently detailed findings on important material issues when awarding alimony to Linda, which will be discussed in detail below.

1. Linda's needs and earning capacity. Linda was unemployed at the time of the divorce, but the parties agreed that the court could impute \$1,118.00 of monthly gross income, *see* R. at 427, pp. 112–13, to Linda based on her past experience and her ability to earn. R. at 368, paragraph 14; Addendum B, paragraph 14. However, the

stipulation of the parties had no stipulated amount as to how much of this imputed amount would be net income. Further the trial court made no findings as to Linda's net income. At trial, Linda testified that the jobs she would be qualified for and applying for had starting wages of \$6.50 per hour. R. at 427, p. 112. If Linda were to work forty (40) hours per week for fifty (50) weeks out of the year at \$6.50 per hour, her yearly gross income would be \$13,000.00, and her monthly gross income would be \$1,083.33. Therefore, the monthly income imputed to Linda, \$1,118.00 per month, is roughly equal to a gross monthly income based on a wage of \$6.50 per hour, or \$1,083.33 per month.

The findings of fact on which the trial court based the Divorce Decree set forth Raymond's monthly income as \$4,781.00 per month and specified that this was a net amount. R. at 368, paragraph 15; Addendum B, paragraph 15. The financial declaration submitted by Raymond established that his monthly gross income was \$7,197.00. Therefore, Raymond's monthly net income was 34% less than his monthly gross income. In the trial court's findings of fact, Raymond's ability to provide support was calculated based on his monthly net income, but Linda's needs and earning capacity were calculated on her monthly gross income. R. at 368, paragraphs 14–21; Addendum B, paragraphs 14–21. Moreover, the trial court did not take into account a tax refund received by Raymond and other tax implications—such as Raymond not having to pay taxes on the amounts he pays in alimony—when determining his adjusted income and ability to pay. *See* R. at 427, p. 235. If Linda's imputed income of

\$1,118.00 per month had been adjusted for income tax and other deductions at a standard rate of 30%, her monthly net income would have totaled \$782.60—a difference of \$335.40 per month.

This issue was raised by Linda in a Motion to Amend the court’s Findings and the Decree. R. at 382, pp. 4–5. A hearing was held on the motion in which Linda’s counsel pointed out that “[Linda] by stipulation had a gross income of \$1,118.00 imputed to her at the time of trial, and that the Court in determining whether or not she needed alimony did not determine what her net income was.” R. at 425, p. 6. After oral argument the trial court denied the motion to amend and explained the following:

[I]n this case we were imputing [sic] income trying to come up with the best estimate of cash that she should be able to put in her pocket were she to engage in the most gainful employment we could anticipate from her history. And so it was dollars, I mean, it was anticipated real dollars that went into her pocket. And so I guess implicit in that is the idea that that’s what I thought she would net.

R. at 425, p. 22.

However, the imputed income figure was arrived at by stipulation. The stipulation said nothing about being a net income figure. Further, there was no evidence submitted at trial to support a finding that Linda could earn a net monthly income of \$1,118.00. For Linda to earn a monthly net income of \$1,118.00, her monthly gross income would have to be roughly \$1,600.00.¹ And for Linda to earn a

¹ A \$1,600.00 monthly gross income minus a 30% reduction for taxes and other withholdings (at \$480.00) would result in a monthly net income of \$1,120.00.

monthly gross income of \$1,600.00, her hourly wage would have to be \$9.60 per hour.² The undisputed testimony offered at trial was that Linda was qualified for and applying for jobs that would pay \$6.50 per hour. R. at 427, pp. 112–13. And her \$1,118.00 monthly gross income was based on that testimony. Thus, it was a prejudicial abuse of discretion for the trial court to hold that Linda’s imputed monthly income was “implicitly” a monthly net income. *See* R. at 425, p. 22.

Further, the court made no findings at the time of trial that it was not accepting the stipulated figure of imputed income. There are no findings that the court accepted that figure as a net income figure. The court made no subsidiary findings as to the basis of its determinations of Linda’s net income. *See* R. at 427, pp. 244–47.

This Court has required that findings on material issues be detailed and **“include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.”** *Rehn*, 1999 UT App. 41 at ¶ 6 (emphasis added and citation omitted). Linda’s earning capacity is a material issue and one of the *Jones* factors that must be considered by the trial court. *See id.* The trial court failed to disclose the steps it took to reach the finding that Linda should be imputed a monthly income of \$1,118.00, especially if the court, as it stated at oral argument on the Motion to Amend Findings, is using the \$1,118.00 figure as net income. This stated

² \$1,600.00 per month would result in a yearly gross income of \$19,200.00.

\$19,200.00 divided by 50 weeks per year equals \$384.00 per week. \$384.00 per week divided by 40 hours per week equals \$9.60 per hour.

presumption by the court is not supported by the findings. Such a presumption is not supported by the evidence considering that the only testimony offered at trial on the subject was that Linda was applying for jobs that would pay \$6.50 per hour [which would provide a monthly gross income of \$1,083.33].

In a 2001 case decided by this Court, in which an alimony award was at issue, the trial court's findings of fact were vacated and the case was remanded in order for the trial court to enter findings that more fully explained "the rationale for the court's determination concerning alimony." *Peterson v. Peterson*, 2001 UT App. 51 ¶ 2, WL 312145. In particular, this Court instructed that when calculating the income of the parties, the trial court should do so by "**fully spelling out its assumptions, adjustments, and calculations.**" *Id.* (emphasis added). Such a requirement is placed on the trial courts because "determining that [a trial court's decisions regarding alimony] are within the bounds of sound discretion is possible only if the trial court's rationale is spelled out with care." *Id.*

In this case, the trial court failed to spell out with care its assumptions, calculations, and rationale used to find that \$1,118.00 of monthly net income should be imputed to Linda. If the amount of income imputed to Linda was based on the party's stipulation and the testimony offered at trial, then it should have been a monthly gross income. However, the trial court later held that it was "implicit" that the imputed amount was a monthly net income. Such a rationale was neither supported by the evidence offered at trial nor explained by the trial court in its findings. The court's

insufficient findings of fact and denial of Linda's Motion to Amend Findings resulted in a determination of the needs of Linda Madsen which were less than her true needs without any explanation in the findings as to the basis for the court's decision.

In another case from 2002, this Court vacated an alimony award and remanded for more detailed findings related to the wife's expenses. In particular,

the trial court's findings on [the wife's] total expenses expressly did not take into account taxes owed by [the wife] on a portion of her income. . . . Moreover, in apparently using gross income figures for [the wife], without otherwise accounting for her tax and Social Security liability on income from her primary employment, the trial court may have overstated the income available to her to meet her expenses.

Montoya v. Montoya, 2002 UT App. 272 ¶ 1, 2002 WL 1870282. Likewise, in the present case, the trial court determined its alimony award based on Linda's income being \$1,118.00 per month and her needs being \$1,600.00 per month. However, by not accounting for tax or Social Security liabilities, the trial court overstated the income available to Linda to meet her expenses; she would only have \$782.60 a month after a 30% deduction for taxes and other withholdings. "[W]here a trial court fails to enter specific findings on the needs and condition of the recipient spouse, making effective review of the alimony award impossible, that omission is an abuse of discretion."

Bakanowski v. Bakanowski, 2003 UT App 357 ¶10, 1080 P.3d 153. Like in the *Montoya* case, these gaps in the trial court's findings need to be filled in by more detailed findings, and a redetermination of alimony in this case would be appropriate. See *Montoya*, 2002 UT App. 272 ¶ 1. The court's failure to determine a net income

figure for Linda, or in the alternative, the failure to explain how the court found the net income figure, left her with inadequate income to meet her needs after payment of taxes. These errors constitute a prejudicial abuse of discretion.

2. *Raymond's ability to provide support.* The trial court also failed to make sufficiently detailed and accurate findings of fact when determining Raymond's ability to pay alimony. In particular, there were mistakes and inconsistencies in the findings related to Raymond's monthly expenses and disposable income.

This Court has held that even if a trial court considers the *Jones* factors, its determinations can be remanded when they demonstrate an abuse of discretion. *Schaumberg v. Schaumberg*, 875 P.2d 598, 602 (Utah Ct. App. 1994). In this case, the trial court found that "[Raymond's] reasonable needs total \$3,880.00 per month." R. at 368, paragraph 19; Addendum B, paragraph 19. Although there is no explanation set forth in the trial court's findings of fact as to how Raymond's needs were calculated, the court's discussion in its oral statements suggest that the expenses for Raymond were taken from a financial declaration worksheet submitted by Raymond as Exhibit "5" at trial. See R. at 427, pp. 245–46; Addendum P.

Because the court's findings do not set out the basis for the determination of the parties' Raymond's monthly expenses, the case should be remanded for further findings. Assuming that the court adopted the list of expenses in Exhibit 5 as the basis for Raymond's monthly expenses, the court erred in two respects. From the claimed expenses the court correctly did not include Raymond's claimed expenses for school

expenses, tithing, car payments, and attorneys' fees. R. at 427, pp. 245–47; R. at 380, pp. 1–3; Addendum P. If those amounts are deducted from Exhibit 5, the amount of claimed expenses on that exhibit would be \$3,880, consistent with the court's findings.

However, the worksheet included two additional separate amounts that should not have been treated as expenses by the trial court: (a) \$900.00 for “child support and alimony,” and (b) \$424.52 for “installment payments.”

(a) \$900.00 for “child support and alimony”: Neither party had been married previously to their marriage to each other. Neither party had had children other than the two children who were issue from the parties' marriage to each other. Neither party had had any support obligations ordered by another court. The only family support that could be claimed in this case was that to be determined by the court at the instant divorce trial.

At the time of the divorce, Linda's and Raymond's two children were both emancipated, and Raymond did not have any obligations for child support. Therefore, his expense identified as “child support and alimony” for \$900.00 in Exhibit 5 could only have been the amount that he had paid in spousal support based on a temporary order of the trial court. R. at 427, p. 55. By including alimony as a monthly expense for Raymond, the court would have to assume that the temporary order of alimony would continue as a permanent order. However, it did not. In fact, the court found that Raymond had approximately \$4,780.00 in monthly net income. R. at 368, paragraph 15; Addendum B, paragraph 15. From this the court deducted monthly expenses of

\$3,880.00 per month, including the claimed \$900 in family support, to arrive at the disposable income available for payment of alimony. R. at 368, paragraph 19; Addendum B, paragraph 19. Having found that, after the claimed expenses, Raymond had \$901.00 available to pay alimony, the court then ordered monthly alimony of \$900.00. R. at 368, paragraphs 16–17. Raymond’s available funds to make alimony payments were reduced from \$1,800.00 per month to \$900.00 per month through what appears to be an oversight. If the temporary alimony was intended to continue, the court should have added the \$900.00 that was claimed as a monthly expense to the \$901.00 that was available over and above the monthly claimed expenses of \$3,880.00 for Raymond in order to determine Raymond’s monthly disposable income which was available for payment of alimony.

The trial court seems to have accepted Raymond’s accounting of monthly expenses and found that “[Raymond] has the ability to contribute \$901.00 per month as alimony” and ordered Raymond to pay \$900.00. R. at 368, paragraphs 16–17; Addendum B, paragraphs 16–17. In truth, Raymond had the ability to contribute \$1,800.00 per month as alimony, but the \$900.00 payment was essentially counted twice—once as a monthly expense on Raymond’s trial exhibit, and once as the actual obligation set forth in the divorce decree. In Linda’s timely Motion to Amend Findings and Decree, she pointed out the court’s error in calculations. In response the court stated that it intended to add \$900.00 to Raymond’s expenses because of the debt the

court had ordered. R. at 425, p. 21. However, as is demonstrated in the following paragraph, there were no findings or evidence to support this conclusion by the court.

(b) \$424.52 for “installment payments”: Assuming that the court accepted Exhibit 5 as an accurate statement of Raymond’s debts, the trial court failed to make adequate findings to show how the allocation of marital assets to the parties affected the claimed debt expenses.

In Exhibit 5, Raymond claimed as a monthly expense a payment of \$424.52 toward installment debt incurred throughout the marriage. R. at 380, p. 2. Again, the court did not explain how it found the parties’ expenses. The case should be remanded for further findings on that basis. However, as demonstrated above, the court did not explicitly strike any claimed debt expenses from Raymond’s claimed expenses.

Further, the findings of fact do not set forth a list of the debts that the court determined to be marital debts or the dollar amount of marital debt that was assigned to Raymond. Instead, the trial court merely found that Raymond “should be ordered to pay the Marriott credit card obligation, which was transferred to an MBNA account, the Deseret Federal obligation and all other marital debt.” R. at 368, paragraph 8; Addendum B, paragraph 8.

There are no findings to suggest that if the amount of \$424.52 was accepted by the court as a necessary monthly installment debt payment, that this was a necessary expense that Raymond would incur each month to make payments on installment debt. On the contrary, there are findings and evidence to suggest that Raymond should not be

allowed any amount as a monthly expense for revolving debt. The evidence would suggest that the marital debt could be paid off with marital assets. The trial court found that the “monies currently held in escrow from the sale of the parties’ home, in the approximate sum of \$25,000.00, should be transferred to [Raymond] to assist him in the payment of the marital debt.” R. at 368, paragraph 8; Addendum B, paragraph 8. The evidence of the amount on the Marriott Card was approximately \$21,000.00, *see* R. at 427, pp. 19–21. The evidence of the amount on the Deseret First [sic] obligation on Exhibit 5 was never clearly set forth by Raymond through his testimony, and as a result, there are no findings regarding which, if any, of the Deseret First [sic] obligations were marital. *See* R. at 427, pp. 32–40; Addendum P. Several obligations were in Exhibit 5. Addendum P. However, there is testimony that some of these obligations were joint and some were incurred personally by Raymond. *See* R. at 427, pp. 48–51. The evidence, though not entirely clear, suggests that the joint marital debts could all be paid off with the cash awarded to Raymond.

Raymond’s ability to provide support should be determined by calculating his monthly income and deducting his reasonable expenses. *See Peterson*, 2001 UT App. at ¶ 2. But because the court failed to find a dollar amount to describe the portion of marital debt assigned to Raymond, there is no way to adequately address his monthly needs and expenditures as they relate to installment payments. Further the evidence makes it doubtful that \$424.52 is a reasonable monthly expense considering that Raymond was awarded \$25,000.00 in cash specifically for the purpose of paying off

marital debts. In addition, he was awarded the marital Marriot time share which could be sold, if necessary, to pay off further debts. Therefore, there may be no basis for Raymond to claim expenses for revolving debt as a necessary living expense.

If Raymond does not need \$424.52 in claimed monthly expenses, he would have that amount available for contribution to the payment of alimony. Hypothetically, if the court later determined that the \$900.00 support expense claimed by Raymond was not an expense and the \$424.52 was not needed as a monthly expense, Raymond would be able to pay a total alimony award of \$2224.52. If Linda only had a net of \$782.60 to live on and had expenses of \$2,718.00, she would have unmet monthly needs of \$1,942.12. Because Linda would be required to pay taxes on the alimony received, it may also be appropriate for the trial court to determine the net available alimony with which Linda could meet her monthly expenses. If the expected overall tax rate is 30%, the alimony award to Linda would need to be \$2,525.00 a month.

If Raymond had the ability to pay \$2,525.00 in alimony, it may have been an abuse of discretion to grant such a small alimony award for a 34-year marriage in which the incomes of the parties are so significantly different. Certainly an alimony award of \$2,525.00 would not be excessive on its face when the gross income of the recipient was \$1,100.00 and the gross income of the payor spouse was \$7,197.00. With this amount of alimony, Linda would have a monthly taxable gross of \$3,625.00 and Raymond would have a monthly taxable gross of \$4,672.00.

However, in the current findings there is not sufficient explanation to allow this court to review of the parties' incomes and expenses, or how the court reached its conclusions from such findings in order to make its alimony order. Therefore this matter should be remanded to the trial court to enter further findings on the issues related to alimony.

Linda raised the issue of Raymond's erroneous claim of support in the amount of \$900.00 as one of his expenses in her Motion to Amend Findings, but the trial court rejected her arguments and held,

To make explicit, one of the most important factors that I observed and that I found and that I concluded in considering this case was . . . the uneven distribution of debt responsibility. There were substantial debts from this marriage, I gave them all to him. I ordered him to pay off all of the debt load. And that had a lot to do with my intentionally leaving the \$900.00 expense on his, in his expenses, intentionally ordering him the 25,000 [sic] cash, giving him the condo, but also giving him the debts.

R. 425 at p. 21.

The trial court found that Raymond's "reasonable needs total \$3,880.00," and that Linda's expenses total \$2,718.00 per month." R. at 368, paragraphs 18-20; Addendum B, paragraphs 18-20. Based on the finding that Raymond had the ability to contribute \$901.00 per month, the trial court ordered him to pay Linda \$900.00 per month as alimony. Under the court's scenario, Raymond would essentially be allowed to claim \$1,324.52 per month as revolving debt related expenses and yet it is not clear from the Decree that Raymond will have any debts if he liquidates the marital property and pays the debts in his name..

If the trial court were to disallow Raymond's expenses for "alimony" and "installment payments," then Raymond's needs would total \$2,555.48 per month, and he would have the ability to contribute \$2225.52 per month. Considering these adjusted numbers and the length of the parties' marriage—thirty four (34) years—it would be appropriate for the trial court to refigure alimony in this case and to consider equalizing the parties' standard of living. *See Fitzgerald v. Fitzgerald*, 2005 UT App. 67 ¶ 1, 2005 WL 375101. In the alternative, the court should remand this case for further findings.

B. Distribution of Marital Property

"Generally, in a divorce proceeding '[e]ach party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property.'" *Bradford v. Bradford*, 1999 UT App. 373 ¶26, 993 P.2d 887 (citation omitted). At times,

A trial court may elect to distribute marital property unequally when the circumstances and needs of the parties dictate a departure from the general rule (e.g., to enable one party to fulfill an alimony or child support obligation). *See Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987) (holding **trial courts should be guided by general purpose of property division, "which is to allocate the property in a manner which best serves the needs of the parties and best permits them to pursue their separate lives"**); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1279 n. 1 (Utah 1987) ("In determining whether a certain division of property is equitable, ... the **relative abilities of the spouses to support themselves after the divorce are pertinent to an equitable . . . division of the fixed assets of the marriage.**"); *Cox v. Cox*, 877 P.2d 1262, 1269–70 (Utah Ct. App.1994) (affirming award to husband of marital home previously owned by husband but conveyed to wife in joint tenancy just before marriage; trial court found marriage was of short duration, no children were born, and couple married later in life).

An unequal division of marital property, however, is only justified when the trial court “memorialize[s] in commendably detailed findings” the exceptional circumstances supporting the distribution. *Thomas v. Thomas*, 1999 UT App. 239 ¶ 23, 987 P.2d 603.

Id. ¶¶ 26–27 (emphasis added and some citations omitted).

This response by the trial court at the hearing on the Motion to Amend Decree and Findings when it said the debt was all ordered to be paid by Raymond was inaccurate because Linda was explicitly ordered to pay \$9,000.00 of marital debt. R. 425 at p. 21. It is unclear what the court meant by requiring Raymond to pay all marital debt. Due to this silence, Linda appears to be stuck with all \$20,500.00 of debt in her name and no assets to pay them with.

There were many debts presented at trial that were not mentioned specifically by the court. See Addendum R which contains trial exhibits 14-18 identified at trial as debts Linda incurred during the marriage. The debt assigned to Raymond was never specifically quantified by the trial court. The court ordered Raymond to pay all of the marital debt. However, it is difficult to enforce an order that Raymond pay the debts set forth in Addendum R when the court has not specifically found them to be marital debt.

Without a more specific order it looks like the debts were almost equally divided and the assets were all awarded to Raymond. This result would be contrary to Utah law. Further the evidence which show a much stronger ability of Raymond to pay the debts suggests that this result would be very inequitable.

Raymond was given \$25,000.00 in cash to pay his portion of the marital debts. Linda was awarded none of the cash. and he also listed a monthly expense of \$424.52 for installment payments on his expense worksheet submitted to the trial court. The judge held that he intentionally allowed an additional \$900.00 expense (labeled by Raymond as “child support and alimony” on his expenses worksheet) for Raymond in order to help pay off marital debt, even though all of the debt assigned to Raymond appears to be listed in Exhibit 5 and the need for this higher amount each month was not claimed by Raymond. Addendum P.

In the end, Raymond ended up with a \$5,000.00 truck and Linda a car worth a net of \$1,990.00. There were no debts in Ray’s name and \$20,500.00 of debts in Linda’s name. The court made no findings as to why Linda should be stuck with at least \$9,300.00 of debt and no income to pay the debt. This matter should be reversed and remanded for the court to evenly divide the assets and make adequate findings regarding its order on the division of debt.

The disproportionate award of property was an abuse of discretion. He was awarded a vehicle and another \$33,000.00 of assets for the stated purpose of paying marital debt. The debts in Raymond’s name listed in Exhibit 5 at trial were equal to \$32,750.00. R. at 427, pp. 49–52, and 243; Addendum P. Raymond should have been able to pay off his portion of the marital debts with the property awarded to him. However, only one of the debts in Exhibits 14-18, the debts in Linda’s name, was

Raymond's monthly expenses to aid him with the debt assigned to him. R. at 425, p.

21. With this additional setoff against Raymond's alimony obligation for marital debt, the court's basis for a disproportionate award of property appears to have been frustrated. There are no findings showing why Raymond would need the lion's share of marital property plus an additional \$900.00 a month to help pay marital debt.

Moreover, the trial court also assigned a debt to Linda, but there were no findings on the court's reasoning for assigning Linda marital debt but awarding her no property with which to pay the debt. R. at 368, paragraph 8.

A 1994 case heard by this Court addressed the issue of distribution of marital debts, and in particular, the propriety of allowing one party to use liquid marital assets to pay a marital debt:

In determining whether a certain division of property is equitable, neither the trial court nor [the appellate court] considers the property division in a vacuum. The amount of alimony awarded and the relative earning capabilities of the spouses to support themselves after the divorce are pertinent to an equitable division of the fixed assets of the marriage. Here, the court found that each party had a relatively equal ability to support him or herself, yet it allowed Husband to unilaterally use a large share of the liquid assets to discharge [a marital debt]. . . . The court made no findings, however, regarding the propriety or effect of using liquid assets of the marital estate to discharge the debt. Accordingly, we hold that the trial court abused its discretion in crediting Husband's [use of the liquid assets] as a discharge of a marital debt. **Given the court's findings regarding the parties' relatively equal ability to support themselves, we remand for the trial court to equally distribute the liquid assets of the marital estate**

Finlayson v. Finlayson, 874 P.2d 843, 849 (Utah Ct. App.1994) (emphasis added). In the present case, Raymond has a much greater capability to support himself than Linda

has to support herself (\$7,197.00 per month compared to \$1,118.00 per month).

Moreover, a relatively small alimony payment was imposed upon Raymond by the trial court (\$900.00 when Raymond has the ability to contribute \$2225.52 per month).

The distribution of marital assets in this case was inequitable and constituted an abuse of discretion. The general rule is that parties should split the marital assets equally unless exceptional circumstances compel otherwise. If, as the court implies in its findings, the assets were divided in a way so as to reduce the marital debt, the court should have applied the assets to the debts and then determined if any debts remained to be paid. Otherwise, the assets should have been distributed equally. When trial courts depart from this general rule, it is usually to provide for a distribution of property that favors the party with the most need.

Raymond was awarded almost all of the marital assets, including 100% of the liquid proceeds from the sale of the house. The trial court sought to justify this distribution by implying that Raymond would take over the bulk of the marital debt, but no detailed findings were made by the trial court as to the amount of debt assumed by Raymond. As a result, there are no findings to support this inequitable distribution of marital property.

C. Attorneys' Fees

This Court has held,

A trial court has the power to award attorney fees in divorce proceedings pursuant to Utah Code Ann. § 30-3-3 (1998). **Such an award must be based on sufficient findings addressing the financial need of the recipient**

spouse; the ability of the other spouse to pay; and the reasonableness of the fees. See *Schaumberg v. Schaumberg*, 875 P.2d 598, 604 (Utah Ct. App.1994); *Bell v. Bell*, 810 P.2d 489, 493 (Utah Ct. App.1991) (remanding for redetermination of attorney fees when court failed to address wife's need or husband's ability to pay fees).

Rehn v. Rehn, 1999 UT App 41 ¶22, 974 P.2d 306.

In this case, the trial court refused Linda's request for attorneys' fees without making any of the findings required by *Rehn*. The trial court held, "Based upon the allocation of debts and assets, each party has the ability to assume and pay their own attorney's fees." R. at 368, paragraph 23. Having said this, it is unclear from the court's findings whether Linda needed her attorneys' fees paid by Raymond. The court did not award enough alimony to meet Linda's basic needs, so the evidence appears to suggest that Linda needed help. Moreover, based on each party's income at the time of trial—Raymond was earning \$7,197.00 per month, and Linda was imputed \$1,118.00 a month—Linda appears to need assistance.

The court made no specific finding concerning Raymond's ability to pay Linda's attorneys' fees. However, since the court allowed at least \$900.00 more in monthly expenses than was reasonably claimed, which the court explained was to assist in paying unspecified marital debts, it appears that there was a basis to find the ability to pay the fees. No finding was made as to a reasonable fee although both attorneys submitted fees that were similar. The court abused its discretion by awarding Raymond attorneys' fees when failing to make any of the findings of fact required by this Court.

Point II

The Trial Court Erred by Failing to Grant Linda a Judgment for Unpaid Alimony

A trial court's conclusions as to the legal effect of a given set of facts are reviewed for correctness. *Bradford v. Bradford*, 1999 UT App. 373 ¶ 10, 993 P.2d 887 (quoting *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998)). And when those conclusions involve the interpretation and application of a statute, no deference is given to the district court's legal conclusions. *Gutierrez v. Medley*, 972 P.2d 913, 914–15 (Utah 1998). Early in the divorce proceedings between the parties, Raymond was ordered to pay \$1,400.00 per month in alimony. R. at 44–47; Addendum F. In August of 2003 Raymond moved into the parties' marital home and Linda moved out. From August to November of 2003, Raymond only paid \$81.00 per month in alimony to Linda. Raymond used the remaining \$1,319.00 of Linda's alimony money to make mortgage payments for the house in which Raymond was living. R. at 427, pp. 222–24.

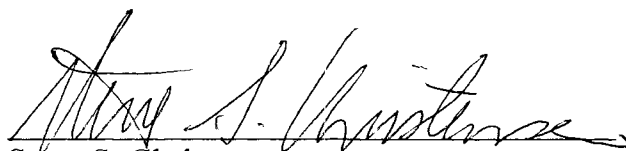
No court order issued allowing Raymond to stop making his alimony payments, and no petition was filed by Raymond to modify his support obligations. When Linda raised this issue in her Motion to Amend Findings and Decree, the trial court responded that Raymond “was given leave to pay the mortgage payment instead of paying alimony” by Judge Hansen. R. at 425, p. 21. On the contrary, Judge Hansen never gave Raymond such leave, as can be seen in the relevant minute entry and Order. *See* R. at 44–47; Addendum F.

CONCLUSION

The trial court abused its discretion by failing to make sufficient findings of fact that would support its conclusions in this divorce case. The trial court also erred by failing to award Linda a judgment for unpaid alimony. In each instance, the trial court committed reversible error that prejudiced Linda, and this case should be remanded to the trial court for further findings of fact and proper application of the law.

DATED this 14th day of November 2005.

HIRSCHI CHRISTENSEN, PLLC



Steve S. Christensen

Attorney for Appellant/Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S BRIEF** was mailed via first class U.S. mail, postage prepaid, on the 14th day of November, 2005 to the following:

Randall L. Skeen. Esq.
Cook, Skeen & Robinson, L.L.C.
5788 South 900 East
Salt Lake City, Utah 84121

