

2005

Kristyna Diane Rose v. Donovan T. Rose : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KRISTYNA DIANE ROSE

Petitioner / APPELLEE,

vs.

DONOVAN T. ROSE,

Respondent / APPELLANT.

STATE OF UTAH, Office of Recovery*
Services, Intervenor.

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**** BRIEF OF APPELLEE**

[Utah R App P Rule 29]

["Oral Argument" — Priority (15)]

Case No. 2005-0409-CA

Trial Court # 03-490-3379 DA

APPEAL FROM THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT
JUDGE, J. DENNIS FREDERICK

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****Utah R App P Rule 24 "Briefs" [(b) Brief of the appellee]**

FILED
UTAH APPELLATE COURT
FILED 02 2005

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KRISTYNA DIANE ROSE

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**** TABLE OF CONTENTS**

Table of Contents	ii
Table of Authorities	iv
STATEMENT OF JURISDICTION	1
JURISDICTION OF THE COURT OF APPEALS.....	2
STATEMENT OF ISSUES PRESENTED FOR REVIEW	3
STANDARD OF REVIEW	3
ISSUES PRESERVED IN TRIAL COURT.	4
STATUTES & RULES OF CENTRAL IMPORTANCE	5
STATEMENT OF THE CASE.	6
The Nature of the case.	6
The Course of the proceedings.	6
Disposition in the court below	11

TABLE OF CONTENTS (Continued)

STATEMENT OF FACTS	12
SUMMARY OF ARGUMENTS MADE IN BODY OF BRIEF	18
DETAIL OF ARGUMENT ON ISSUES PRESENTED	19
Award of sole custody to Petitioner	20
Refusal of trial court to impute income.. . . .	22
Award of alimony.....	25
CONCLUSION	26
RELIEF REQUESTED	27
MANUAL SIGNATURE [Utah R App P Rule 21 “Filing & Service” (e) Signature].....	27
CERTIFICATE OF SERVICE [Utah R App P Rule 21 “Filing & Service”]	28

** Utah R App P Rule 24 “Briefs” [(a)(2) Table of Contents]

TABLE OF AUTHORITIES

Cases	Page (s)
<u>Allred v Allred</u> 1992.UT.128 < http://www.versuslaw.com > 835 P.2d 974, 188 Utah Adv. Rep. 47.	iv, 21
<u>Betterbridge v. Betterbridge</u> 2004 UT App 50, 2004 Utah App. LEXIS 123.....	iv, 24, 25
<u>Crouse v Crouse</u> 1991.UT.218 < http://www.versuslaw.com > 817 P.2d 836, 169 Utah Adv. Rep. 55.	iv,
<u>Hagan v Hagan</u> 810 P 2d 478, 481 (Utah App. 1991).	iv, 24
<u>Roderick v Ricks</u> 2002.UT.0000100 < http://www.versuslaw.com > 2002 UT 84, (Utah 08/13/2002)	iv, 3
<u>Saunders v Sharp</u> 806 P.2d 198, 199 (Utah 1991).....	iv, 21
<u>Sigg v Sigg</u> 1995.UT.16092 < http://www.versuslaw.com > 905 P.2d 908, 276 Utah Adv. Rep. 50	vi, 23

TABLE OF AUTHORITIES (Continued)

Utah Rules of Civil Procedure

URCP Rule 52 Findings by the court.....v, 3, 5

Utah Code Annotated

UCA 30-3-4 [Pleadings-Findings-Decree].....v, 4, 5, 9, 10

UCA 30-3-10.2 [Joint custody order...].....v, 26

UCA 30-3-10.8 [Parenting plan – Filing – Modifications].....v, 26

UCA 78-2a-3(2)(e) “Court of Appeals Jurisdiction”.....v, 2

UCA 78-45-7.5(7)(a) “Imputation of Income”.....v, 28, 29

Utah Rules of Appellate Procedure

Utah R App P Rule 3 [Appeal as of right: how taken.]v, 2

Utah R App P Rule 4 [Appeal as of right: when taken.]v, 2

Utah State Constitution

Article VIII Section 5 [Right of appeal].....v, 2

**Utah R App Rule 24 “Briefs” [(a)(3) Table of Authorities]

**** STATEMENT OF JURISDICTION**
[Utah Court of Appeals]

Notice of appeal was filed by appellant / respondent (Donovan T. Rose) within thirty (30) days of date of entry of judgment. [Judgment **filed** April 14, 2005 (**Record Vol II P- 599**), Notice of Appeal **filed** April 29, 2005 (**Record Vol II P- 628-630**)].

On February 15, 2005 appellant / respondent (Donovan T. Rose) filed with the trial court document captioned "OBJECTION TO PROPOSED FINDINGS OF FACT, & CONCLUSIONS OF LAW AND PROPOSED DECREE OF DIVORCE" (**Record Vol II P 490 - 493**). On April 5, 2005 appellee / petitioner (Kristyna Diane Rose) filed with the trial court document captioned "RESPONSE TO RESPONDENT'S OBJECTION TO FORM OF PROPOSED FINDINGS & CONCLUSIONS AND DECREE OF DIVORCE" supported by a transcript of trial court's findings and conclusions on day of trial (**Record Vol II P 510 - 521**). On April 13, 2005, trial court overruled respondent's objections to proposed findings and decree on basis that the court was "...persuaded sufficient credible evidence was adduced to support the same as drafted." (**Record Vol II P – 567-568**).

There were no post-judgment motions filed by either party with trial court.

**** Utah R App P Rule 24 "Briefs" [(a)(4) Statement of Jurisdiction]**

**** JURISDICTION OF THE COURT OF APPEALS**

UTAH RULES OF APPELLATE PROCEDURE

Utah R App P Rule 3 [Appeal as of right: how taken.]

[(a) Filing appeal from final orders and judgments.]

Utah R App P Rule 4 [Appeal as of right: when taken.]

[(a) Appeal from final judgment and order.]

[(b) Time for appeal shall run from the entry of the order denying a new trial or granting or denying any other such motion]

UTAH CODE ANNOTATED

UCA 78-2a-3(2)(e) "Court of Appeals Jurisdiction"

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

UTAH STATE CONSTITUTION

Article VIII Section 5 Constitution of Utah

[Jurisdiction of district court and other courts -- Right of appeal.]

[Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.]

** Utah R App P Rule 24 "Briefs" [(a)(4) Statement of Jurisdiction]

**** STATEMENT OF ISSUES PRESENTED FOR REVIEW**

WHETHER THE TRIAL COURT ERRED IN AWARDING SOLE PHYSICAL CUSTODY OF THE PARTIES' MINOR CHILD TO PETITIONER.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT PETITIONER IS NOT UNDEREMPLOYED AND REFUSING TO IMPUTE INCOME TO HER

WHETHER THE TRIAL COURT ERRED IN AWARDING ALIMONY TO PETITIONER.

**** STANDARD OF APPELLATE REVIEW**

Roderick v Ricks 2002 UT 84, (Utah 08/13/2002)

2002.UT.0000100 <<http://www.versuslaw.com>>

[89] ¶27 When reviewing a bench trial, appellate courts may not set aside a trial court's findings of fact "unless clearly erroneous."^{fn5} *Utah R. Civ. P. 52(a)*. To successfully demonstrate that a factual finding is clearly erroneous, the appellant must marshal all the evidence in favor of the factual finding and show that, even when viewed in the light most favorable to the trial court's factual finding, the favorable evidence is insufficient to support the finding. *Tanner, 2001 UT 18 at ¶ 17; State v. Robertson, 932 P.2d 1219, 1223-24 (Utah 1997)*. Moreover, in assessing whether a finding is clearly erroneous, reviewing courts must give "due regard...to the opportunity of the trial court to judge the credibility of the witnesses." *Utah R. Civ. P. 52(a)*

^{**}Utah R App P Rule 24 "Briefs" [(a)(5) Issues presented for review]

^{**}Utah R App P Rule 24 "Briefs" [(a)(5) Standard of appellate review]

**** ISSUES PRESERVED IN TRIAL COURT**

Despite Donovan T. Rose having filed objections to proposed Findings of Fact & Conclusions of Law (**Record Vol II P 490 - 493**) , he did not , before the trial court, **(1)** raise objection, **(2)** submit memorandum of law, or **(3)** move the trial court to alter or amend judgment, and thereby allow the trial court an opportunity to address and rule upon issues petitioner now raises before the appellate court. (**See: URCP Rule 52 Findings by the court.**

Also See: UCA 30-3-4 [Findings]);

For the foregoing reasons, it is the contention of the appellee / petitioner (Kristyna Diane Rose) that issues now raised on appeal by respondent / appellant (Donovan T. Rose) were not preserved in the trial court.

****Utah R App P Rule 24 "Briefs" [(a)(5)(A) Issues preserved in trial court]**

**** STATUTES & RULES WHOSE INTERPRETATION IS DETERMINATIVE
OF THE APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL**

UTAH RULES OF CIVIL PROCEDURE

URCP Rule 52 Findings by the court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A;...

...Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses....

...It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court...

(c) *Waiver of findings of fact and conclusions of law.*
Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact.

UCA 30-3-4 [Written Findings]

Amendment Notes – The 1995 amendment, effective July 1, 1995, added the second sentence of Subsection (1)(b) and in the second sentence of Subsection (1)(d) substituted “shall enter the decree” **for** “shall make and file findings and decree” and added the language beginning “or, in the case of” at the end.

****Utah R App P Rule 24 “Briefs” [(a)(6) Constitutional Provisions, Statutes, Ordinances, Rules, & Regulations whose interpretation is determinative of the appeal or of central importance to the appeal]**

**** STATEMENT OF THE CASE**

NATURE OF THE CASE

This is an appeal by appellant / respondent (Donovan T. Rose) from a Decree of Divorce. Appellant / respondent Donovan T. Rose ("Mr. Rose") asserts that the trial court findings of fact as to the award to petitioner of sole custody of the parties' minor child, refusal to impute petitioner's income, and award of alimony to petitioner are in error.

COURSE OF THE PROCEEDINGS

On June 2, 2003 (Complaint signed May 16, 2003) Kristyna Diane Rose ("Mrs. Rose") filed a Complaint For Divorce (**Record Vol I P 4- 16**). Complaint represented that Mrs. Rose was the primary caretaker of the minor child, that the minor child resided with Mrs. Rose since the time of the parties' separation, and that it was in the best interests of the minor child that permanent care, custody, and control of the child be awarded to Mrs. Rose (**Record Vol I P 5 ¶¶ 8-10**). Mrs. Rose also prayed for monthly alimony of \$1,000.00 in her complaint (**Record Vol I P 13 ¶ 27**).

COURSE OF PROCEEDINGS (Continued)

On June 17, 2003 (Counterclaim signed June 12, 2003) Mr. Rose filed an Answer & Counterclaim (**Record Vol I P 30-45**). Mr. Rose admitted in his answer that the minor child had resided with Mrs. Rose since the date of separation (**Record Vol I P 31 ¶ 9**), but in his counterclaim prayed for an award of "...the permanent care, and sole custody and control of the minor child of the parties..." (**Record Vol I P 34-35 ¶ 7**). At no time did Mr. Rose ever amend or seek leave of court to amend his counterclaim to seek joint custody of the minor child, nor did Mr. or Mrs. Rose at any time during the course of the proceedings ever file a parenting plan with the trial court (**Record Vol II P 577 ¶ 15**).

On September 16, 2003, at hearing on motions for temporary relief filed by both parties, the domestic commissioner recommended that sole physical and legal custody of the minor child be awarded to Mrs. Rose (**Record Vol I P 72-73 ¶ 1**), subject to Mr. Rose's statutory visitation rights (**Record Vol I P 73 ¶ 2**), and the commissioner's recommendation was entered as the order of the court on October 24, 2003 (**Record Vol I P 181-184**).

COURSE OF PROCEEDINGS (Continued)

Subsequent to the September 16, 2003 hearing on the parties' motions for temporary relief, pleadings were filed by Mrs. Rose supported by affidavits alleging a pattern of harassment and abusive behavior by Mr. Rose (**Record Vol I PP 96-116, 128-164, 167-174, 198-204**), while Mr. Rose responded with allegations that Mrs. Rose had interfered with his visitation rights (**Record Vol I P 214-220**). The allegations of both parties came before the trial court judge for hearing on November 24, 2003, and although the preliminary injunction obtained by Mrs. Rose on November 14, 2003 was "dissolved," the court entered a restraining order against Mr. Rose "...re any harassment, telephone calls, threats, etc. of plaintiff or others at her residence including no contact with the in-laws...", ordered the parties to limit their communications to visitation arrangements only, and ordered that a third party be used to effectuate the visitation pick ups and drop offs at Mrs. Rose's home (**Record Vol I PP 224-225, 229-234**).

COURSE OF PROCEEDINGS (Continued)

Certificates of Completion of the Shared Parenting Course were filed by both parties on April 27, and April 28, 2004 (**Record Vol I P 293-294**), a Certification of Readiness) for Trial (including a Financial Declaration and income substantiation for Mr. Rose) was filed by Mr. Rose on May 7, 2004 (**Record Vol I P 314-335**), and a Financial Declaration was prepared for Ms. Rose during this period of time for use at the pre-trial conference that would result from filing of the Certificate of Readiness, although it does not appear in the record where it should be, though a file stamped attorney copy of that particular Financial Declaration executed by Ms. Rose on June 8, 2004, and filed with the Court on June 16, 2004, is present in the record as an attachment to the Certificate of Compliance filed on April 8, 2005 (**Record Vol II P 558-563**).

COURSE OF PROCEEDINGS (Continued)

On June 16, 2004, case was certified for trial by the domestic commissioner at pre-trial conference where the first custody evaluation prepared by Dr. Heather Walker was discussed as follows in the domestic commissioner's minute entry:

"...Dr. Heather Walker has performed a custody evaluation and recommends what appears to be a joint physical custody arrangement that involves the parties exchanging the child on almost a daily basis. This does not appear to be in the best interests of the minor child. There is a history of domestic violence between these parties and Dr. Walker herself describes the Respondent as "controlling, argumentative and domineering.". From Dr. Walker's own report, it does not appear that these parties have the ability to communicate, cooperate and work together in a manner to effectuate joint physical custody. The child has been in the primary custody of the Petitioner since the parties' separation and it would appear to be the Respondent's burden of proof to show that it would be in the best interests of the minor child to change this **(Record Vol I P 341-342, ¶ 1)**.

The domestic commissioner's minute entry went on to address the issue of alimony as follows: "...The temporary order required the Respondent to pay marital debts in lieu of alimony. It appears that he has not done so and it appears that the Petitioner should be entitled to some alimony, particularly if the Respondent does file for Bankruptcy." **(Record Vol I P 342, ¶ 3)**.

COURSE OF PROCEEDINGS (Continued)

On August 6, 2004, Ms. Rose sought a continuance of the trial date to allow her to obtain a second custody evaluation by Dr. Earl E. Seegrist (**Record Vol II P 409 - 425**), and same was granted by the trial court judge by Minute Entry Ruling dated August 13, 2004 (**Record Vol II P 409 - 425**).

On September 30, 2004, bench trial was finally held before the Honorable, J. Dennis Frederick, Third District Court, Salt Lake County, Salt Lake City Department (**Record Vol II P 646 Transcript of Bench Trial**).

DISPOSITION IN THE TRIAL COURT

After non-jury Bench trial, on September 30, 2004, the court made findings orally from the bench. The court granted Mrs. Rose a divorce on grounds of irreconcilable differences, awarded sole physical custody of the minor child to Ms. Rose, subject to Mr. Roses' statutory visitation rights with same to be effectuated by third party exchanges, with the parties to share joint legal custody (**Record Vol II P 645 Transcript of Trial Ruling**). The trial court declined to impute Mrs. Rose's income from part time to full time wages, and calculated child support based upon the actual incomes and hours worked by both parties, awarded alimony to Mrs. Rose, ordered that child care and health care costs be assumed by the parties pursuant to the state statutes, ordered that Mr. Rose

disgorge to Mrs. Rose one half of the earned income credit that he had failed to share with her, ordered Mr. Rose to assume and hold Mrs. Rose harmless from the marital debt, and ordered that both parties assume their own attorney fees **(Record Vol II P 645 Transcript of Trial Ruling).**

****Utah R App P Rule 24 "Briefs" [(a)(7) Statement of the case]**

***STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED**

General Undisputed Facts

The parties were married on June 24, 2000 **(Record Vol II P 646 Trial Transcript P 47 Line 18 - 19)**. The parties separated on or about April 15, 2003 **(Record Vol II P 646 Trial Transcript P 47 Line 19 - 20)**. The parties have one (1) child named Madyson Jean Rose, born September 5, 2002, who was two (2) years old at time of trial **(Record Vol II P 646 Trial Transcript P 47 Line 20 - 22)**. The minor child has been with her mother, Mrs. Rose, since birth **(Record Vol II P 646 Trial Transcript P 47 Line 22 - 23)**.

General Undisputed Facts (Continued)

Mrs. Rose's uncontroverted testimony that Mr. Rose and she could never come to agreement on anything, that he was controlling, and that she did not feel that Mr. Rose allowed her to have a say in their marriage, to make decisions for herself, or to do anything her own way, was accepted by the court as sufficient grounds to grant her a divorce from Mr. Rose for irreconcilable differences **(Record Vol II P 646 Trial Transcript P 7 Line 10 - 24)**. Ms. Rose was employed full time during the marriage several different times at medical offices up until the time that she gave birth to the minor child, but at that point became a stay at home mother **(Record Vol II P 646 Trial Transcript P 8 Line 3 - 8)**. At time of trial, Ms. Rose had been employed for approximately one (1) month as a PE Specialist at Bluffdale Elementary School earning \$8.17 an hour, twelve (12) hours a week **(Record Vol II P 646 Trial Transcript P 8 Line 15 - 25)**. Ms. Rose testified at trial that she had a gross income of approximately \$400.00 per month, and netted about \$300.00 per month **(Record Vol II P 646 Trial Transcript P 10 Line 13 - 25)**. At time of trial, Ms. Rose's financial condition required her to live with her parents, and receive state assistance, such as food stamps and Medicaid **(Record Vol II P 646 Trial Transcript P 11 Line 1-2)**.

General Undisputed Facts (Continued)

A third party intermediary was being used for visitation exchanges because of a history of domestic violence in the marriage (**Record Vol II P 646 Trial Transcript P 11 Line 9-24**). Child care was being provided at no cost to the parties by Mrs. Rose's mother in three (3) hour increments, up to twelve (12) hours per week, while Mrs. Rose was working, and the minor child would otherwise be at home in Mrs. Rose's care (**Record Vol II P 646 Trial Transcript P 15 Line 18-25, and P 16 Line 1-5**). Mr. Rose had, during a hearing prior to trial, been ordered to maintain the payments on the marital debt in lieu of paying alimony to Mrs. Rose, but had not done so, and creditors had commenced collection activities against Mrs. Rose by the time of trial (**Record Vol II P 646 Trial Transcript P 18 Line 1-25, and P 19 Line 1-5**).

General Undisputed Facts (Continued)

It was Mrs. Rose's uncontroverted testimony that although she does not believe herself to suffer from a disability that would prevent her from working full time (**Record Vol II P 646 Trial Transcript P 20 Line 16-18**), she is afflicted with a condition called "Coloboma," which means that half her "...retina is missing in [her] left eye, and a quarter of it in [her] right eye..." which restricts the light, and if it is "too bright" or "too dark" outside she has "a hard time" because her eyes "...don't dilate right...." with the consequence that if she is driving her vehicle for too long of a period, her "...eyes will fade in and out, they'll go blurry so [she] can't see anything...." during the day, but mostly at night when she is driving (**Record Vol II P 646 Trial Transcript P 23 Line 9-25, and P 24 Line 1-3**). It was Mrs. Rose's uncontroverted testimony at trial that her "Coloboma" imposes limitations on the distances she can drive, saying that a distance equivalent to that between South Salt Lake and North Salt Lake is "hard" for her, and that she is only able to drive comfortably between 9:00 a.m. and 4:00 p.m. (**Record Vol II P 646 Trial Transcript P 24 Line 4-16**).

General Undisputed Facts (Continued)

Mr. Rose testified at trial that he had been employed by the University of Utah since July 20, 2003, earns \$12.70 an hour forty (40) hours a week, making approximately \$26,000.00 a year (**Record Vol II P 646 Trial Transcript P 25 Line 21-25, and P 26 Line 1-8**). It was also Mr. Rose's testimony at time of trial that although he had not yet filed bankruptcy, that he did "...have a lawyer involved...." (**Record Vol II P 646 Trial Transcript P 31 Line 1-7**). Mrs. Rose's closing argument to the court, made through counsel, and never disputed at trial by Mr. Rose, pointed out that the negative inferences made by both custody evaluators that Mrs. Rose's insistence on third party intermediaries for visitation exchanges reflected an unwillingness on her part to be cooperative were unjustified because neither custody evaluator appeared to know that the third party visitation exchanges were court ordered (**See Record Vol I P 224**), and that the custody evaluators likely did not, as a result, have an accurate understanding of the conflict between the parties (**Record Vol II P 646 Trial Transcript P 41 Line 1-20**). Such erroneous inferences were clearly present in Mr. Rose's closing argument, suggesting that the third party exchanges should reflect negatively on whether Mrs. Rose should be awarded sole custody of the minor child (**Record Vol II P 646 Trial Transcript P 43 Line 23-25, and P 44 Line 1-2**).

Adverse Facts Not Marshalled By Appellant

The extensive facts adverse to Mr. Rose, as set out herein, have not been marshaled by him, nor has he cited or directed the court to the trial record where such adverse facts are found. As is made obvious by the facts set out above that comprise most of the relevant testimony and evidence that was actually before the Court on the day of trial, Mr. Rose appears to be asking this Court to reverse the trial court based upon information and allegations that his counsel did not introduce into evidence through testimony, exhibits, or even in summation on the day of trial. Nor did Mr. Rose present said information and allegations to the trial court through post judgment motions as were readily available to him; and as a result, the Court of Appeals is now asked by Mr. Rose to act as the finder of fact, and is being asked to order the trial court to accommodate Mr. Rose for a second trial in order to present information and allegations that his duty to marshal the evidence required be presented on the day of trial below.

****Utah R App P Rule 24 "Briefs" [(a)(7) Statement of facts]
relevant to the issues presented for review]**

****SUMMARY OF ARGUMENT MADE IN BODY OF BRIEF**

Donovan T. Rose, as the appellant in the case, has the duty to marshal all evidence in the record, both favorable and unfavorable, to the position he now asserts on appeal. He has failed to marshal adverse facts, which then mandates and requires the appellate court to confirm the trial court decision.

Furthermore, Donovan T. Rose presented no testimony or evidence to the trial court contrary to the testimony and evidence offered by petitioner.

The Appellate Court cannot substitute its judgment for the trial court as to which witnesses were more credible, and therefore must defer to the trial court on issues of witness credibility, and evidence offered.

****Utah R App P Rule 24 "Briefs" [(a)(8) Summary of arguments actually made in the body of the brief]**

****DETAIL OF ARGUMENT**

I. FAILURE TO MARSHALL EVIDENCE ON APPEAL REQUIRES TRIAL COURT DECISION BE AFFIRMED

A party must do more than merely reargue the evidence supporting his or her position. The appellant must marshal all the evidence in favor of the factual finding, and show that even when viewed in the light most favorable to the trial court's factual finding, the favorable evidence is insufficient to support the finding.

***Sigg v Sigg* 1995.UT.16092 <<http://www.versuslaw.com>>
905 P.2d 908, 276 Utah Adv. Rep. 50**

[87] Footnote 7...[A] party challenging a trial court's factual finding must do more than merely reargue the evidence supporting his or her position; rather, the party is required to first marshal the evidence in support of the finding. *Shepherd v. Shepherd*, 876 P.2d 429, 432 (Utah App. 1994).

Although Ms. Sigg does cite to portions of the trial transcript in which Mr. Sigg testified that he was unaware of Ms. Sigg's plans to travel to New Zealand, she fails to cite the equally crucial recommendations of Dr. Stewart, who states unequivocally that Ms. Sigg left Park City without warning. For this reason, Ms. Sigg falls short of the requirement of marshalling the evidence.

Alta Indus. Ltd. v. Hurst, 846 P. 2d 1282, 1287 (Utah 1993) ("Although [appellant] cites some evidence that supports the court's findings, even a cursory review of the record reveals [appellant] frequently omits crucial and incriminating evidence and cites testimony. . . without reference to conflicting testimony. . . .")

Donovan T. Rose, as the appellant, has the burden of marshalling the

evidence in support of the challenged findings, and then of demonstrating that those findings are so void of support as to be clearly erroneous.

See: Hagan v Hagan, 810 P 2d 478, 481 (Utah App. 1991)

None of the facts adverse to Donovan T. Rose, as have been set out in the respondent's Statement of Facts herein, were cited by reference to the record and in fact were omitted in their entirety from his own rather cursory recitation only of evidence in the record, which he believes supports his position.

When an appellant has not marshalled the evidence supporting the trial court findings and shown them to be clearly erroneous, the sufficiency of the evidence will not be reviewed by the appeals court which then assumes that the record supports the findings of the trial court. ***Saunders v Sharp 806 P.2d 198, 199 (Utah 1991)(per curiam); Also See Crouse v Crouse 1991.UT.218***

<<http://www.versuslaw.com>> 817 P.2d 836, 169 Utah Adv. Rep. 55

AWARD OF SOLE CUSTODY TO PETITIONER

None of the arguments presented in Mr. Rose's brief that he now relies upon to attack the award of sole custody to Mrs. Rose were presented to the trial court, either at the time of trial itself, or in post decree proceedings readily available to him. Mr. Rose's heavy reliance on the custody evaluations is also misplaced in that the evaluations were never introduced into evidence, the experts who prepared them were not called as witnesses, and Mr. Rose even

failed to present testimony of his own to the Court regarding any of the conclusions and findings of the custody evaluations he now relies upon to attack the trial court's custody determination.

Furthermore, Mr. Rose did not even have a petition before the Court seeking joint custody, as he never amended or sought leave to amend his Counterclaim to seek joint physical custody. And even if Mr. Rose had amended his Counterclaim to seek joint custody of the minor child, he would also have had to comply with UCA 30-3-10.8 [Parenting plan – Filing - Modifications] which requires parties seeking any kind of shared parenting arrangement to file a parenting plan. Finally, UCA 30-3-10.2 [Joint custody order – Factors for court determination – Public assistance] at subsection (1) makes the filing of a parenting plan prerequisite to the ability of the trial court to render a joint physical custody order, and in doing so, the Court is required to consider the other factors in the subsequent sections of UCA 30-3-10.2 such as the abilities of the parties to cooperate with each other and make shared decisions in the child's best interests; some of which the trial court nevertheless did consider, concluding that "...there is clearly, in my judgment, emotional resentment and/or disagreements which would seriously affect and, indeed, in the history of this case, have affected these parties' ability to cooperate and get along to the extent that would

be required by joint physical custody....” (**Record Vol II P 646 Trial Transcript P 48 Line 19-25**).

As for sole physical custody, Mr. Rose marshalled no evidence or testimony whatsoever that appeared in any way calculated to obtain an award of sole physical custody, or to justify removing the minor child from Mrs. Rose, who had been a stay at home mother and care provider to the minor child up to the date of the parties’ separation (**Record Vol II P 646 Trial Transcript P 8 Line 3 - 8**), and thereafter maintaining that role by keeping less than part time employment (**Record Vol II P 646 Trial Transcript P 15 Line 20-25**).

REFUSAL OF TRIAL COURT TO IMPUTE INCOME TO PETITIONER

Once again, none of the arguments presented in Mr. Rose’s brief that he now relies upon to attack the refusal of the trial court to impute full time income to Mrs. Rose were presented to the trial court, either at the trial itself, or in post decree proceedings readily available to him. Particularly obvious in this instance is Mr. Rose’s failure to address the evidence in the record that does not support his position that Mrs. Rose’s income should be imputed, such as uncontroverted evidence that Mrs. Rose has been a stay at home mother and care provider to the minor child up to the date of the parties’ separation (**Record Vol II P 646**

Trial Transcript P 8 Line 3 - 8), and thereafter maintained that role by maintaining less than part time employment (**Record Vol II P 646 Trial Transcript P 15 Line 20-25**). Mr. Rose goes on in his brief to imply that it should be Mrs. Rose's burden of proof to show that additional income should not be imputed to her, which is wholly inconsistent with the requirements of UCA 78-45-7.5(7)(a), same being unambiguous in its pronouncement that "[i]ncome may not be imputed to a parent unless the parent stipulates to the amount imputed, the party defaults, or, in contested cases, a hearing is held and a finding is made that the parent is voluntarily unemployed or underemployed..." Secondly, Mr. Rose's reliance upon the unpublished dissenting opinion in Betterbridge v. Betterbridge, 2004 UT App 50, 2004 Utah App. LEXIS 123 -- without pointing out it was a dissenting opinion with regard to imputation of income -- to advance the proposition that "...minimum wage income should be imputed as a matter of course, without requiring challenging spouse to provide evidence that employment was available to underemployed spouse...." appears to be an attempt by Mr. Rose to lead the Court into error. The actual holding of the majority opinion stood instead for the well settled principle of law that imputation of income cannot be premised upon mere conjecture, but instead demands a careful and precise assessment requiring detailed findings. Utah law is therefore

clear that it was Mr. Rose's burden to bring to the trial court something more than mere conjecture and to marshal the evidence to the trial court as required by UCA 78-45-7.5(7)(a) and Betterbridge v. Betterbridge, 2004 UT App 50, 2004 Utah App. LEXIS 123 to allow the trial court to perform the careful and precise assessment necessary to make the detailed findings prior to the trial court imputing Mrs. Rose's income. Mr. Rose failed to do so, which was correctly reflected in the trial court finding that it was "...not persuaded that the petitioner here is underemployed. After all, she has a two year old child to care for in the home, and I therefore decline to impute to her full time income at her current earnings rate...." (**Record Vol II P 646 Trial Transcript P 50 Line 13-17**). That Mr. Rose would want the minor child to spend more time being cared for by the maternal grandmother whom he has claimed to believe has been the driving force behind the visitation interference he has alleged simply to reduce his child support and alimony obligations is not only suggestive of where the minor child's best interests ranks in his hierarchy of priorities, but also raises questions about the veracity of his accusations against the maternal grandmother.

AWARD OF ALIMONY

The trial court made its findings supporting the award of alimony as comprehensive as possible given the information presented to the court to enable it to do so. Neither party introduced a Financial Declaration into evidence, and when attempts were made to elicit testimony on the subject of Mr. Rose's income and expenses, Mr. Rose responded that all such information was filed with the court in his financial declaration "...[a]nd being that I don't have it in front of me, I don't think that I can rattle down all of it..." (**Record Vol II P 646 Trial Transcript P 30 Line 20-23**). Nor did his own counsel attempt to elicit testimony from either party as to their need for or ability to pay alimony, although it was addressed in Mr. Rose's summation (**Record Vol II P 646 Trial Transcript P 45 Line 8-20**), which the trial court clearly considered, but found unpersuasive (**Record Vol II P 646 Trial Transcript P 50 Line 17-25 and P 51 Line 1-18**). Nor did Mr. Rose attempt through post-decree proceedings to provide the trial court with additional information which may or may not have led the trial court to alter or amend its findings. Instead, Mr. Rose made a decision to ask the Court of Appeals to act as a fact-finder. Mr. Rose had a duty to marshal the evidence to the trial court, and having failed to do so, now appeals claiming that the trial court erred for not having information that Mr. Rose only now presents to the

Court of Appeals. But this begs the question of how the trial court could be in error if it was the failure of Mr. Rose to marshal the evidence that would have prevented the error, if there is such error; and consequently, he is now inappropriately asking the Court of Appeals to address same in the role of a trial court.

****Utah R App P Rule 24 "Briefs" [(a)(9) Argument containing contentions and reasons with respect to issues presented]**

****CONCLUSION**


Donovan T. Rose has not marshalled the evidence by citation to the transcript of all evidence which supports the trial court findings. He likewise has failed to disclose, by citation to the transcript, the fact that he never amended his counterclaim to seek joint custody, that neither party ever filed a parenting plan with the court, that Kristyna Diane Rose has never been employed full time since the birth of the minor child, that a financial declaration filed by Ms. Rose is present in the record, and that Kristyna Rose does in fact have a disability that limits her ability to drive certain distances and at night. Pursuant to the established standard of review, when assessing whether a finding is clearly erroneous, the reviewing court is required to give due regard to the opportunity of

the trial court, to judge the credibility of the witnesses. The record further establishes that Donovan T. Rose presented no expert testimony, exhibits, or evidence. Thus the trial court decided the issues on the best evidence before it.

RELIEF REQUESTED

Kristyna Diane Rose request the trial court judgment be affirmed and that there be an award of attorney fees and costs necessitated by this appeal.

DATED THIS 22nd DAY OF NOVEMBER 2005.



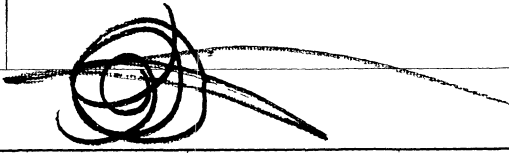
J. Keven Hofeling (#7890)
Attorney for Petitioner / APPELLEE
Kristyna Diane Rose

**Utah R App P Rule 24 "Briefs" [(a)(10) Short conclusion
stating the precise relief sought]

**Utah R App P Rule 21 "Filing and service" [(e) "Signature"
Manual signature by counsel of record]

**** CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing
BRIEF OF APPELLEE was mailed via United States Mail, first class,
postage prepaid unless otherwise indicated below on the 22nd day
of November 20 05 to the following:

<p>PAGE BIGELOW (#6493) KRUSE LANDA MAYCOCK & RICKS, LLC 50 West Broadway, Suite 800 P.O. Box 45561 Salt Lake City, UT 84145-0561</p> <p>CERTIFIED MAIL [2 Copies]</p> <p>Attorney for Respondent / Appellant</p>	<p>Utah Court of Appeals Scott M. Matheson Courthouse 450 South State Street P O Box 140230 Salt Lake City, UT 84144</p> <p>CERTIFIED MAIL [Original & 7 Copies]</p>
<p>SANDRA LANGLEY Attorney for Intervenor 515 East 100 South Salt Lake City, UT 84114</p> <p>CERTIFIED MAIL [2 Copies]</p>	

****Utah R App P Rule 21 Filing and service [(d) Proof of service]**