

2005

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

Utah Court of Appeals

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



Part of the [Law Commons](#)

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

J. Keven Hofeling; attorney for petitioner.

Paige Bigelow; Kruse, Landa, Maycock & Ricks; attorney for appellant.

Recommended Citation

Brief of Appellant, *Rose v. Rose*, No. 20050409 (Utah Court of Appeals, 2005).

https://digitalcommons.law.byu.edu/byu_ca2/5784

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

PAIGE BIGELOW (6493)
KRUSE LANDA MAYCOCK & RICKS, LLC
Attorneys for Respondent/Appellant
Eighth Floor, Bank One Tower
50 West Broadway
P. O. Box 45561
Salt Lake City, Utah 84145-0561
Telephone: (801) 531-7090

IN THE UTAH COURT OF APPEALS

KRISTYNA DIANE ROSE,)	
Petitioner/Appellee,)	
vs.)	
DONOVAN T. ROSE,)	
Respondent/Appellant.)	Case No. 20050409-CA

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

BRIEF OF APPELLANT

Appeal from the Third District Court, Salt Lake County
Honorable J. Dennis Frederick

J. KEVEN HOFELING
Attorney for Petitioner / Appellee
1063 East 3300 South, Suite 200
Salt Lake City UT 84106
Telephone: (801) 364-4313

PAIGE BIGELOW
KRUSE LANDA MAYCOCK & RICKS
50 West Broadway, Suite 800
P. O. Box 45561
Salt Lake City, UT 84145-0561
Telephone: (801) 531-7090

SANDRA LANGLEY
Attorney for Intervenor
515 East 100 South
Salt Lake City, UT 84114
Telephone: (801) 536-8362

FILED
UTAH APPELLATE COURT
OCT 20 2005

PAIGE BIGELOW (6493)
KRUSE LANDA MAYCOCK & RICKS, LLC
Attorneys for Respondent/Appellant
Eighth Floor, Bank One Tower
50 West Broadway
P. O. Box 45561
Salt Lake City, Utah 84145-0561
Telephone: (801) 531-7090

IN THE UTAH COURT OF APPEALS

KRISTYNA DIANE ROSE,)	
Petitioner/Appellee,)	
vs.)	
DONOVAN T. ROSE,)	
Respondent/Appellant.)	Case No. 20050409-CA

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

BRIEF OF APPELLANT

Appeal from the Third District Court, Salt Lake County
Honorable J. Dennis Frederick

J. KEVEN HOFELING
Attorney for Petitioner / Appellee
1063 East 3300 South, Suite 200
Salt Lake City UT 84106
Telephone: (801) 364-4313

PAIGE BIGELOW
KRUSE LANDA MAYCOCK & RICKS
50 West Broadway, Suite 800
P. O. Box 45561
Salt Lake City, UT 84145-0561
Telephone: (801) 531-7090

SANDRA LANGLEY
Attorney for Intervenor
515 East 100 South
Salt Lake City, UT 84114
Telephone: (801) 536-8362

TABLE OF CONTENTS

JURISDICTION OF THE APPELLATE COURT	1
ISSUES PRESENTED FOR REVIEW	1
DETERMINATIVE PROVISIONS	2
STATEMENT OF THE CASE.....	3
Course of Proceedings and Disposition in Court Below	3
Statement of Facts	13
SUMMARY OF ARGUMENT	16
ARGUMENT	18
I. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SOLE PHYSICAL CUSTODY OF THE PARTIES' CHILD TO PETITIONER ..	18
II. THE TRIAL COURT ERRED IN REFUSING TO IMPUTE INCOME TO PETITIONER	25
A. The Trial Court's Finding That Petitioner Is Not Underemployed Is Clearly Erroneous.....	25
B. The Trial Court's Finding that Petitioner Has Cared For and Will Continue to Care For The Parties' Minor Child in Her Home is Insufficient as a Matter of Law to Support Its Conclusion that Income Should Not Be Imputed to Petitioner.....	27
III. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ALIMONY TO PETITIONER.....	31
CONCLUSION.....	36

ADDENDUM:

- A. Findings of Fact and Conclusions of Law**
- B. Unpublished Opinions Cited in Appellant's Brief**

TABLE OF AUTHORITIES

CASES

<u>Allred v. Allred</u> , 797 P.2d 1108, 1114, n.3 (Utah Ct. App. 1990).....	28
<u>Bakanowski v. Bakanowski</u> , 2003 UT App 357, ¶ 7, 80 P.3d 153.....	2, 34
<u>Betteridge v. Betteridge</u> , 2004 UT App 50, 2004 Utah App. LEXIS 123	26
<u>Department of Human Servs. Ex rel. Parker v. Irizarry</u> , 945 P.2d 676, 683 (Utah 1997).....	26
<u>Elmer v. Elmer</u> , 776 P.2d 599, 603 (Utah 1989).....	21
<u>Entropy v. Entropy</u> , 914 P.2d 1166, 1169 (Utah Ct. App. 1996).....	1, 2
<u>Girard v. Appleby</u> , 660 P.2d 245, 247 (Utah 1983).....	33
<u>Godfrey v. Godfrey</u> , 854 P.2d 585, 589 (Utah Ct. App. 1993).....	34
<u>Holmstead v. Holmstead</u> , 2004 UT App 147, 2004 Utah App. LEXIS 172.....	35
<u>Jenkins v. Weis</u> , 868 P.2d 1374, 1383-84 (Utah Ct. App. 1994).....	33
<u>Jones v. Jones</u> , 700 P.2d 1072, 1075 (Utah 1985)	30
<u>Madsen v. Madsen</u> , 1998 Utah App. LEXIS 180.....	35
<u>Mancil v. Smith</u> , 2000 UT App 378, ¶ 16, 18 P.3d 509.....	28
<u>Moon v. Moon</u> , 790 P.2d 52, 54 (Utah Ct. App. 1990)	1
<u>Peterson v. Peterson</u> , 2001 UT App 51, Utah App. LEXIS 177	32
<u>Roderick v. Ricks</u> , 2002 UT 84, ¶ 27, 54 P.3d 1119.....	1
<u>Sigg v. Sigg</u> , 905 P.2d 908, 916 (Utah Ct. App. 1995).....	1, 20

<u>Tucker v. Tucker</u> , 910 P.2d 1209, 1215-16 (Utah 1996).....	22
<u>Willey v. Willey</u> , 951 P.2d 226, 231 (Utah 1997).....	32

STATUTES

Utah Code Ann. § 30-3-5(8)(a)	31
Utah Code Ann. § 30-3-10(1)(a)(ii)	24
Utah Code Ann. § 78-2a-3(2)(h)	1
Utah Code Ann. § 78-45-3(1987).....	23, 26, 28
Utah Code Ann. § 78-45-4 (1987).....	28
Utah Code Ann. § 78-45-7.5(7)(a)	26
Utah Code Ann. § 78-45-7.5(d)(i) (2005)	29

RULES

Rule 4-903 of the Utah R. of Judicial Admin.	6, 8
---	------

CONSTITUTIONAL PROVISIONS

Utah Const. Art. I, § 24.....	23, 28
Utah Const. Art. IV, § 1	29

JURISDICTION OF THE APPELLATE COURT

Jurisdiction of this appeal is conferred on this Court pursuant to section 78-2a-3(2)(h) of the Utah Code.

ISSUES PRESENTED FOR REVIEW

Issue 1: Whether the trial court erred in awarding sole physical custody of the parties' minor child to petitioner. Considerable discretion is given to the trial court in making custody decisions, ““unless it appears that the trial court has given short shrift to the statutory criteria.”” Sigg v. Sigg, 905 P.2d 908, 916 (Utah Ct. App. 1995) (quoting Moon v. Moon, 790 P.2d 52, 54 (Utah Ct. App. 1990).

Whether the trial court's findings of fact are sufficient to support its custody award is a question of law, which is reviewed for correctness. Cf. Entropy v. Entropy, 914 P.2d 1166, 1169 (Utah Ct. App. 1996). The issue of custody of the parties' minor child was preserved by Respondent's Answer and CounterClaim to Petitioner's Verified Complaint for Divorce (R.30) and certification of the issue to the trial court (R.341).

Issue 2: Whether the trial court erred in finding that petitioner is not underemployed and refusing to impute income to her. Appellate courts may not set aside a trial court's findings of fact unless the finding is clearly erroneous. Roderick v. Ricks, 2002 UT 84, ¶ 27, 54 P.3d 1119. Whether the trial court's findings of fact are sufficient to support its conclusion that income should not be

imputed petitioner is a question of law, which is reviewed for correctness. Cf. Endrody v. Endrody, 914 P.2d 1166, 1169 (Utah Ct. App. 1996). The issue of whether full-time income should be imputed to petitioner was preserved by respondent's closing argument at trial (R.646, at 44:21-45:8).

Issue 3: Whether the trial court erred in awarding alimony to petitioner. The trial court's award of alimony is reviewed for an abuse of discretion and will not be disturbed if the trial court exercises its discretion within the standards set by the appellate courts. Bakanowski v. Bakanowski, 2003 UT App 357, ¶ 7, 80 P.3d 153. Whether the trial court's findings of fact are sufficient to support its alimony award is a question of law, which is reviewed for correctness. Cf. Endrody v. Endrody, 914 P.2d 1166, 1169 (Utah Ct. App. 1996). The issue of alimony was preserved by Respondent's Answer and CounterClaim to Petitioner's Verified Complaint for Divorce (R.30) and certification of the issue to the trial court (R.341).

DETERMINATIVE PROVISIONS

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of this appeal or of central importance to this appeal.

STATEMENT OF THE CASE

This appeal is from a final judgment of the Third District Court dissolving the parties' marriage and entering orders regarding custody, child support, allocation of marital debt, and alimony.

Course of Proceedings and Disposition in Court Below

Petitioner Kristyna Diane Rose ("petitioner") initiated divorce proceedings against respondent Donovan T. Rose ("respondent") on May 27, 2003, after less than three years of marriage (R.4). In her verified complaint for divorce, petitioner requested that she be awarded the "permanent care, custody and control of the parties' minor child," (R.5, ¶ 10), Madysen Rose, born September 5, 2002, and that respondent's parent-time with the child be supervised (R.9, ¶ 12). Respondent filed an answer and counterclaim and also requested an award of sole custody of Madysen (R.30, 34, ¶ 7).

Petitioner subsequently filed a motion for temporary relief, again requesting that respondent have supervised parent-time only (R.54, ¶ 2). In support of her request that visitation be supervised, petitioner alleged that she had been "advised by counselors and church leaders that [respondent] should not be allowed unsupervised visitation with Madysen (R.59, ¶ 10)." Petitioner also requested an award of temporary alimony in the amount of \$1,000 per month (R.55, ¶ 6), but submitted no financial declaration or other evidence of need. She claimed to be

“unemployed,” but also working for her sister “in return for her paying my attorney’s fees” (R.59, ¶ 12).

Respondent filed a responsive affidavit (R.74), and a complete financial declaration listing his gross income and his expenses, which included maintenance of the parties’ marital debt in the amount of \$734 per month, and attached a current paystub (R.65).

Petitioner’s motion was heard September 16, 2003 before the domestic relations commissioner. Petitioner was awarded temporary sole legal and physical custody of Madysen, and respondent was awarded temporary parent-time, unsupervised, per the minimum schedule for noncustodial parents set forth at Utah Code Ann. § 30-3-35.5 (R. 181-82, ¶¶ 1-2). The court ordered a custody evaluation to be performed, with the parties to agree upon the evaluator (R.182, ¶ 4). Respondent was ordered to maintain payments “on all debt owed by the Respondent or the parties” (R.183, ¶ 9). The issue of temporary alimony was reserved (R.182, ¶ 7).

On September 29, 2003, petitioner filed an objection to the commissioner’s recommendation, taking issue with the commissioner’s failure to recommend that respondent’s parent-time be supervised (R.92). In support of her motion, petitioner re-filed her own affidavit and, additionally, filed the affidavit of her sister, which alleged that respondent had been abusive with her children and other

children in the family (R.110). Petitioner also requested a stay of the order allowing respondent unsupervised parent-time with Madysen (R.128). The objection was overruled by minute entry ruling dated November 18, 2003 (R.196).

On November 14, 2003, petitioner sought and obtained a temporary restraining order, without notice to counsel for respondent or certification regarding efforts made to provide such notice, which restrained respondent from exercising parent-time with Madysen (R.203). At the preliminary injunction hearing held 10 days later, the temporary restraining order was dissolved, and the court ordered petitioner “not to interfere with defendant’s visitation with the child (R.224).” The court also ordered that a third-party act as an intermediary to transfer the child for parent-time, and that the transfer take place at petitioner’s home (R.224).

On February 23, 2004, petitioner filed yet another motion for temporary relief, together with a motion for temporary restraining order, this time requesting that respondent’s parent-time be reduced below the statutory minimum (R.248; R.261). Petitioner did not schedule a hearing on this motion.

Subsequently, the court-appointed custody evaluator, Dr. Heather Walker, notified the parties that she had completed her evaluation (R.290). A pre-trial settlement conference was scheduled for June 16, 2004 (R.337). Respondent filed his updated financial declaration on May 3, 2004 (R.295). The updated financial

declaration did not include continued maintenance of the parties' marital debt as a line item in respondent's expenses, though the total amount of \$684 required on a monthly basis to maintain the expenses was included in the "Debts and Obligations" section of the financial declaration (R.296-97). Respondent's monthly expenses, without the \$684 included for debt maintenance, were \$1,760.79 (R.299), his gross income was \$2,166.67, and his net income was \$1,891.85 (R.296).

Petitioner did not file a financial declaration or other evidence of any kind to indicate her income or expenses.

Dr. Walker submitted her child custody settlement conference report June 16, 2004 at the pre-trial settlement conference held that same date (R.652). In her report, Dr. Walker addressed the Rule 4-903 factors, noting that Madysen displayed equal attachment to both parents (R.652, at 3, ¶ 3), that petitioner "tends to be overly dependent upon her family and is submissive to their wishes" (R.652, at 3, ¶ 5.a.), that petitioner had made allegations of abuse against Donovan and reported him to child protective services, but the allegations had been found by the Division of Child and Family Services to be "Without Merit" and the Division had expressed concern about petitioner's inconsistencies in the reporting (R.652, at 3, ¶ 5.i.), that petitioner had not been willing to provide maximum access to respondent (R.652, at 4, ¶ 6.A.), that petitioner was unable to set good boundaries

between herself and Madysen (R.652, at 4, ¶ 6.B.), and that petitioner was unable to put Madysen's need for her father ahead of her own dislike or fear of respondent (R.652, at 4, ¶ 6.C.). Dr. Walker also noted that "one factor that plays a major role is that Kristyna's family does not like Donovan and does not encourage visitation. The concern is that over time Madysen will be exposed to much denigration of her father, and this is a set up for parent rejection" (R.652, at 5).

Dr. Walker recommended, *inter alia*, that respondent's parent-time with Madysen increase "until there is a three-day, four-day split", with the four-day parent being petitioner if she was cooperative with the process and respondent if she was not. Dr. Walker also recommended that the parties participate in therapy, attend a high-conflict co-parenting class, attend parenting classes, communicate directly, and that exchanges of the child take place at Willwin, a neutral setting, rather than at petitioner's home through the third-party intermediary designated by petitioner (R.652, at 5).

At the conclusion of the settlement conference, the commissioner certified the matter for trial on the issues of custody, debt allocation, alimony, and attorney fees (R.341). Thereafter, respondent requested a trial setting (R.343).

Petitioner objected to respondent's request for a trial setting (R.349) and filed a motion for temporary relief requesting, *inter alia*, the appointment of Dr.

Earl R. Seegrist to perform a second custody evaluation (R.369-70). This relief was granted at a hearing held August 11, 2004 before the domestic relations commissioner (R.426). Subsequently, the trial court granted petitioner a 45-day continuance of the scheduled trial date to allow the second evaluation to be completed (R.442).

Dr. Seegrist submitted his custody evaluation report September 28, 2004, two days prior to trial (R.652, at 7). Dr. Seegrist addressed the Rule 4-903 factors, as did Dr. Walker. Dr. Seegrist found that Madysen had bonded with both parents and that both parents were appropriate, nurturing and demonstrated good parent-child interaction (R.652, at 8, ¶ 5.C.). Dr. Seegrist expressed concern about petitioner's "unwillingness to cooperate and work openly with respondent" (R.652, at 8, ¶ 5.D.), and the strong negative influence that petitioner's mother had on petitioner, which "given the structure of [petitioner's] enmeshed and controlling family system," raised significant doubt as to whether respondent "will ever have open, emotionally healthy, unrestricted access to perform his role as Madysen's father" (R.652, at 9-10, ¶¶ 5.E.vii & 5.F). Dr. Seegrist emphasized that petitioner "demonstrates unfounded fears of respondent that are believed to be fostered, if not originated from her mother. . . . [Petitioner] appears to be overly suggestible to her mother's opinions. If [petitioner] can gain physical, emotional and financial independence from her family, she will be much better suited to act

in Madysen's best interest" (R.652, at 11). Finally, Dr. Seegrist expressed concern over petitioner's "possible malicious filing of faults [sic], misleading or irresponsible suspicion[s] of sexual abuse," noting that this type of behavior "may significantly hamper a positive father-daughter relationship between Donovan and Madysen" (R.652, at 10, ¶ (5)(E)(ix)).

Dr. Seegrist recommended that the parties share joint legal and physical custody of Madysen, "with as near to equal time as can be logistically arranged" (R.652, at 11). He concluded, "It is in Madysen's best interest that she have both parents involved with her. However, if one parent seeks to restrict Madysen's access to the other parent, it is in Madysen's best interest to be placed in the Full Physical and Legal custody of the open, non-restricting parent, with the other parent receiving Utah Statutory Visitation. This is to ensure the most stable and emotionally nurturing home environment for Madysen" (R.652, at 11).

The bench trial commenced September 30, 2004 at 10:30 a.m., as scheduled. The parties each testified. No exhibits were introduced, and no witnesses other than the parties were called (R.646).

With respect to her monthly expenses, petitioner testified only that she paid \$300 per month in rent (R.646, at 10:15). She submitted no financial declaration or other evidence of need. She also testified that she was living with her parents and receiving assistance from them (*id.* at 10:23 – 11:2). She testified that she was

aware of only three marital debts (id. at 18:1-11), which she was not in a financial position to pay except “a little bit at a time” (id. at 19:9-13), which is why, she testified, she was “hoping for alimony if he’s not going to take care of [the marital debt]” (id.).

As to her ability to meet her own need, petitioner testified that she was employed at Bluffdale Elementary as a PE specialist (id. at 8:17). She testified that she made \$8.17 per hour and worked 12 hours per week (id. at 8:21). She testified that she was employed during the marriage full-time, that she had no disability that would prevent her from working full-time now (id. at 20:11-18), and that her mother cared for Madysen while she worked at no cost to her (id. at 15:20-16:5).

On the issue of custody, petitioner testified that “[T]he most important thing for my daughter right now would be a stable environment where she’s not going to be changed, moved around a lot, because it would be hard on me, but I feel that Madysen, the best interest for Madysen is to have a relationship with both of her parents but also if we can try not to have her moved around as much as possible” (id. at 14:3).

For his part, respondent testified that the financial declaration he had filed with the court accurately set forth his income, with the exception of a 20-cent raise that he received July 1, 2005, his expenses, and the marital debt (id. at 34:11-23).

As to custody, respondent testified that he did not believe that petitioner's actions in the past year showed that she understood that Madysen's spending time with both parents and having a relationship with both parents is in fact in Madysen's best interest (id. at 29:20-30:5). He testified that it was his desire for Madysen to have a relationship with her mother that was not restricted in any way, but that he would also like to have that same privilege, as Madysen's father (id. at 37:1-11).

Thereafter, counsel for the parties gave closing argument, concluding their comments at 11:27 a.m. The court ruled from the bench at 11:30 a.m., and the court's Findings of Fact & Conclusions of Law (R.569) and Decree of Divorce (R.599) based thereon were entered April 14, 2005.

The court awarded the parties joint legal custody of Madysen, with petitioner being awarded sole physical custody, subject to respondent's parent-time pursuant to the minimum schedule for non-custodial parents set forth at Utah code Ann. §§ 30-3-35.5 and 30-3-35 (R.577-79, ¶¶ 16-17). The court found, in support of this award, that consistency in the caregiving arrangement was an important issue for the child, and that respondent would require more surrogate care than petitioner in that he works full-time while petitioner works only 12 hours per week (R.577-78, ¶ 16.a.). The court also acknowledged and agreed with the findings of both the custody evaluators, but took issue with their conclusions that

a joint physical custody arrangement would be appropriate, finding that such an arrangement would be “productive of considerable on-going dispute between these parties” (R.578, ¶ 16.b.i.). Finally, the court found that there was no evidence to support any claim of physical abuse, but that there clearly were “emotional resentments and/or disagreements” that would affect the ability of the parties to cooperate to the extent required by a joint physical custody order (R.579, ¶ 16.c.).

On the issues of child support and alimony, the court found that “no persuasive evidence was presented to the Court that the Petitioner is underemployed.” The court declined to impute full-time income to petitioner “in light of the fact that Petitioner has cared for and will continue to care for the two (2) year old minor child in her home” (R.580, ¶ 19). The court thus determined petitioner’s gross income to be \$424.84 per month, based on a 12-hour work week. The court found respondent’s gross income to be \$2,201.33 per month, based on a 40-hour work week (R.580, ¶ 18).

As to petitioner’s need for alimony, the court found that the need had been established by petitioner’s testimony that she is supported by her parents and receives food stamps and welfare supplements (R.584, ¶26). With no other findings of any kind pertinent to petitioner’s actual expenses, the court concluded that a “reasonable and fair sum to be paid for alimony is \$750 per month” (*id.*).

As to respondent's ability to pay alimony, the court found, without explanation, that respondent had overstated his expenses and that the amount of \$1,943 per month (determined by averaging respondent's monthly expenses from his two financial declarations, less amounts claimed for payment of tithing), "far exceeded any disposable earnings or income available to the Petitioner in this case" (R.584-85, ¶ 27). Thus, the court found, respondent did have the ability to pay \$750 per month in alimony, in addition to \$304.08 in child support (R.580, ¶ 20), and all the marital debt (R.586, ¶ 30).

The trial court's Findings of fact and Conclusions of Law and Decree of Divorce were entered April 14, 2005. Respondent filed his timely Notice of Appeal on April 29, 2005 (R.628).

Statement of Facts

Petitioner and respondent were married to one another on June 24, 2000 (R.573, ¶ 8). Their only child, Madysen, was born September 5, 2002 (R.576, ¶ 13). The parties were separated after less than three years of marriage, on April 15, 2003, when petitioner left the marital home with the parties' child while respondent was at school (R.74, ¶ 3; R.573, ¶ 8;). Madysen was 7 months old at the time (R.576, ¶13).

The parties both cared for Madysen prior to the separation (R.74, ¶ 2). However, after the separation, petitioner engaged in a concerted effort to restrict

respondent's access to Madysen, which included filing false reports of sexual abuse with the Division of Child and Family Services (R.652, at 3, ¶ 5.i.; R.652, at 10, ¶ 5.E.ix.), attempting to deny respondent unsupervised parent-time with Madysen (R.9, ¶ 12; R.54, ¶ 2; R.59, ¶ 10; R.92; R.110; R.128), obtaining temporary restraining orders on an ex parte and emergency basis prohibiting respondent from exercising parent-time with Madysen (R.203), and attempting to have respondent's parent-time with Madysen reduced below the statutory minimum (R.248; R.261).

Nevertheless, respondent persevered in maintaining his relationship with Madysen, despite petitioner's attempts to undermine the relationship and restrictions imposed by the temporary order, which limited his time with Madysen to the statutory minimum. At the time of trial, the uncontroverted evidence established that the strength of Madysen's bond with respondent was equal to that of her bond with petitioner (R.652, at 3, ¶ 3; R.652, at 8, ¶ 5.C.). There is no evidence that respondent has ever attempted to restrict petitioner's access to Madysen, nor to undermine petitioner's role as Madysen's mother. Respondent's desire is for Madysen to have both of her parents in her life, and for both he and petitioner to have the privilege of an unrestricted relationship with their daughter (R.646, at 37:5-11).

Petitioner was employed throughout the marriage (R.381, ¶ 8), historically on a full-time basis (R.646, at 20:11-15). She suffers no disability that prevents her from working full-time (R.646, at 20:16-18). Petitioner enjoys free child care provided by her mother (R.646, at 15:20-16:5).

Respondent also worked during the marriage and continued to do so after the parties separated. He also has child care available to him, through his sister (R.652, at 9, ¶ 5.E.iii).

At the time of trial, petitioner made \$8.17 per hour, for a gross monthly income of \$1,416.12 if employed full-time. Respondent made \$12.70 per hour, for a gross monthly income, based on full-time employment, of \$2,201.33 (R.580, ¶ 18). Respondent's uncontroverted monthly deductions for income tax, FICA, and health insurance totaled \$274.82 (R.296), leaving him a net monthly income of \$1,926.51. After payment of child support in the amount of \$304.08 per month (R.580, ¶ 20) and payment of marital debt for petitioner's benefit in the amount of \$177 per month¹ (R.296-97), respondent was left with \$1,445.51 per month to meet his monthly expenses.

¹ The three marital debts held in both the parties' name, and therefore nondischargeable as to petitioner upon bankruptcy of respondent, are the American Express debt of \$2,500, with a monthly payment of \$122, the Sam's Club debt of \$480, with a monthly payment of \$25, and the US Bank Res. Debt of \$1,000, with a monthly payment of \$30 (R.296-97).

Respondent's uncontroverted monthly expenses, not including tithing or maintenance of debts in respondent's individual name, were \$1,560.79 at the time of trial. This budget included nothing for clothing, dental expenses, child care, or entertainment. No item on respondent's monthly expenses is unusually high or out of the ordinary, and no item was challenged by petitioner in any way or found to be unreasonable by the trial court.

SUMMARY OF ARGUMENT

The trial court erred in awarding sole custody of the parties' child to petitioner, placing undue weight on consistency of the caregiving arrangement in effect during the interim period prior to trial and on respondent's need for surrogate care due to his full-time employment. The undue weight given to consistency of caregiving in this case effectively transformed the 15-minute proffer hearing at which temporary custody was decided into a conclusive determination of permanent custody. The undue weight given to respondent's need for surrogate care because he is employed full-time prejudiced respondent for fulfilling his statutorily mandated obligation to provide for his child, which, when taken together with the court's sanction of petitioner's failure to fulfill her obligation of support, is inequitable, discriminates against employed parents, is contrary to the public policy of this state, and results in a violation of respondent's constitutionally protected right to have the laws of this state applied uniformly.

Finally, the court failed to consider or weigh any other facts relevant to the best interests of the child in this case, and in particular, failed to consider the statutorily mandated factor of which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent, though the reports of both custody evaluators identified this factor as having particular significance in this case due to petitioner's enmeshment with her family and her history of attempting to limit respondent's contact with Madysen.

The trial court also erred in finding that petitioner was not underemployed, though she testified that she works only 12 hours per week, has historically worked full-time, and suffers no disability that prevents her from working full-time. The trial court further erred in refusing to impute income to petitioner because she cared for the parties child in her home and would continue to do so. The public policy of this state demands of all parents that they support their children. It does not permit mothers, but not fathers, or custodial parents, but not noncustodial parents, the luxury of choosing to forego their obligation of support in favor of staying home to care for the child, except in limited circumstances that are not germane in this case.

Finally, the trial court erred in awarding alimony to petitioner when she requested only "contingent alimony" to allow her to pay the parties' joint debt if

respondent did not pay it and she made no effort to establish her monthly expenses or otherwise quantify her need for alimony. The court also erred in awarding alimony to respondent without making adequate findings regarding petitioner's need and respondent's ability to pay alimony, simply concluding that \$750 per month "is a reasonable and fair sum to be paid."

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SOLE PHYSICAL CUSTODY OF THE PARTIES' CHILD TO PETITIONER

The trial court's Finding of Fact No. 16 sets forth the basis for its physical custody award. Of the three subsidiary findings, only 16.a. pertains to the court's reasoning for awarding sole custody to petitioner, while 16.c. pertains to the court's reasoning for not awarding joint physical custody to both of the parties, and 16.b. pertains to the court's reasoning for departing from the custody evaluators' joint custody recommendations, while otherwise "acknowledge[ing] and agree[ing] with the conclusions of both custody evaluators" (R.578, ¶ 16.b.i.).

The court's Finding No. 16.a. is inadequate to support the court's award of sole custody to petitioner. Finding No. 16.a. states that "consistency of care provider arrangements is an important issue in this child's life. Surrogate care has been and continues to be provided by the child's maternal grandmother, with whom Petitioner and the minor child live, at the rate of some twelve (12) hours per

week. If respondent were granted primary custody of the minor child, the fact that he works forty (40) hours per week would require him to obtain considerably more surrogate care” (R.577, ¶ 16.a.).

Implicit in this finding is the subsidiary finding that the child’s maternal grandmother is a positive influence in the child’s life and that it is therefore beneficial for the child to continue to live with her and to receive surrogate care from her. This implicit finding is contrary to the explicit findings of both custody evaluators, with which the trial court acknowledged and agreed, that petitioner’s mother is a negative influence, not a positive influence, in the child’s life. Dr. Seegrist indicated that petitioner’s mother actively initiates and supports conflict between the parties (R.652, at 9, ¶ 5.E.vii.) and uses her influence to undermine respondent’s role as Madysen’s father (R.652, at 10, ¶ 5.F.). Dr. Walker indicated that petitioner’s mother does not encourage visitation (R.652, at 5), and will likely expose Madysen to denigration of respondent (R.652, at 5). The trial court’s implicit finding is therefore contradictory and unexplained.

Nor is the emphasis placed by the trial court on consistency of caregiving in general appropriate under the circumstances of this case. The parties separated when Madysen was 7 months old, and thus no substantial history of caregiving existed with either party during the effective period of the parties’ marriage. Thereafter, the findings of both custody evaluators, as well as the court papers

filed by petitioner herein, establish that petitioner engaged in a pattern of interfering with respondent's access to Madysen. It is inequitable to give conclusive weight to "consistency of caregiving" when one parent has wrongfully deprived the other parent of the opportunity to provide care for the child.

Further, the findings of the custody evaluators indicate that there is much to be concerned about with the caregiving provided by petitioner, most notably with respect to petitioner's inability or unwillingness to become independent from her parents and provide an environment for Madysen that fosters and supports Madysen's right to enjoy an unrestricted and loving relationship with respondent. Consistency of a caregiving arrangement that creates "significant doubt . . . as to whether [respondent] will ever have open, emotionally healthy, unrestricted access to perform his role as Madysen's father" (R.652, at 10, ¶ 5.F.) cannot be said to be in Madysen's best interests. Cf. Sigg v. Sigg, 905 P.2d 908, 917 (Utah Ct. App. 1995) (endorsing custody evaluator's view that although stability is important, it cannot be used to maintain an unsatisfactory situation that creates tension for the children).

Nor is it clear that Madysen is happy and well-adjusted in the present caregiving arrangement. Dr. Seegrist determined that follow up regarding a potential diagnosis for Madysen of failure to thrive due to environmental causes was in order (R.652, at 10, ¶ 5.F). Where there is concern about the quality of

caregiving provided by a caregiver, and doubt as to how the child is functioning within the caregiving arrangement, consistency of caregiving does not promote, and may well be inimical to, the child's best interests. Cf. Elmer v. Elmer, 776 P.2d 599, 603 (Utah 1989) (when a child's custody is determined by stipulation or default, the custody determination may in fact be at odds with the best interests of the child).

Moreover, the trial court's custody determination in this case is an initial determination, not a modification of a previously adjudicated custody award. Petitioner's role as "primary caregiver" during the interim period prior to trial stems from a temporary custody award made at a 15-minute proffer hearing before at domestic relations commissioner. The only evidence pertaining to the child's best interests was introduced by the parties' through affidavits. Petitioner claimed in her affidavit that she had been the child's primary caregiver "during Madysen's lifetime," and that she had made the child available to respondent after separation but he had not followed through with scheduled visitation (R.59, ¶¶ 4-10). The former statement is conclusory and self-serving, and is disputed by respondent's affidavit stating that both he and petitioner cared for Madysen prior to the separation (R.74, ¶ 2). This was the sum total of the evidence before the commissioner, upon which a determination of temporary custody was made.

It is not in Madysen's best interests – or any child's – for custody to be effectively decided on such limited evidence. Trial on the issue of permanent custody, which in this case will determine a child's fate for the next 16 years, affords the court an opportunity to observe the parties' first-hand, to weigh the credibility of their testimony and the testimony of witnesses they produce, to be educated by a court-appointed expert (or two) who has conducted an independent investigation on factors pertaining to the child's best interests, and to carefully and thoroughly consider all the relevant custody factors. It should not be an exercise in rubber stamping the temporary custody arrangement. In this case, the trial court abused its discretion by according undue significance to consistency of the caregiving arrangement, awarding custody to petitioner primarily because she and her mother had been the caregivers of the child pursuant to the temporary order. See Tucker v. Tucker, 910 P.2d 1209, 1215-16 (Utah 1996) (emphasizing that “[a] temporary custody order is only that, temporary. It is effective only until a full informed custody determination can be made at a final hearing”).

In Finding No. 16.a., the trial court also found, as an additional basis for its award of sole custody to petitioner, that respondent's full-time employment would necessitate that he obtain more surrogate care for Madysen than the 12 hours per week under the caregiving arrangement in place during the interim period. This finding cannot justify an award of sole custody to petitioner. The custody

evaluators' findings, acknowledged and agreed with by the court, suggest that petitioner's unwillingness to support herself and her child is problematic, not beneficial, increasing petitioner's dependence on her family. This in turn results in Madysen's potential exposure to denigration of her father while living in the home of her grandparents and an otherwise unhealthy and enmeshed family environment. Under these circumstances, the trial court's implicit and conclusory finding that petitioner's limited employment favors her in her claim for custody of Madysen is contradictory and should be disregarded.

Further, the trial court's surrogate care finding has the effect of improperly discriminating against parents who are employed full-time. Respondent fulfills his statutorily mandated obligation to provide for his child by maintaining full-time employment, see discussion supra. It is contrary to the clear public policy of this state, which places upon every parent, whether mother or father, an obligation to support their children, see Utah Code Ann. §§ 78-45-3 & -4 (2005), to disfavor respondent in his claim for custody because he fulfills that mandate.

Moreover, the court's unstated finding that the child's mother is not required to fulfill her obligation of support, whereas the child's father is, violates this state's constitutional guarantee that "All laws of a general nature shall have uniform operation." See Utah Const. Art. I, § 24. Sections 78-45-3 and -4 of the Utah Code are identical in their imposition of the duty of support on every mother

and every father. These laws must be applied uniformly to mothers and fathers. Thus respondent should have no greater need for surrogate care than petitioner, insofar as they should each have an equal duty to support Madysen. The trial court abused its discretion in imposing upon petitioner no requirement to support her child, excusing her from her obligation under the law, and then weighing this factor in her favor in her claim for custody of Madysen.

Finding 16.a. is the only finding contained within the trial court's Findings of Fact that pertains to its award of sole custody of Madysen to petitioner. The court "acknowledges and agrees with" the findings set forth in the custody evaluators' reports, but it is unclear whether these findings are incorporated by reference by the trial court. If the findings are incorporated by reference, then the trial court's award of sole custody to petitioner does not flow from its findings. If the findings are not incorporated by reference, then the trial court abused its discretion by failing to consider or weigh any other factors, save for consistency of caregiving arrangements and relative need for surrogate care, relevant to the best interests inquiry. In particular, the trial court abused its discretion by failing to consider or properly weigh the statutorily mandated factor of which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent. See Utah Code Ann. § 30-3-10(1)(a)(ii).

The reports of both custody evaluators identified the ability to act in the best interests of the child as a factor having particular significance in this case.

Petitioner was found by Dr. Seegrist to be enmeshed with her family, which limited her ability “to act in Madysen’s best interests” (R.652, at 11). Petitioner was found by Dr. Walker to be unable to “put Madysen’s need for her father ahead of her dislike or fear of Donovan” (R.652, at 4, ¶ 6.C.). The court’s failure to consider this factor or to accord it greater weight in its custody determination constitutes an abuse of discretion.

The trial court’s findings of fact are inadequate to support its award of sole custody to petitioner. The award should therefore be reversed and remanded for entry of appropriate findings.

II. THE TRIAL COURT ERRED IN REFUSING TO IMPUTE INCOME TO PETITIONER

A. The Trial Court’s Finding That Petitioner Is Not Underemployed Is Clearly Erroneous

The trial court’s Finding of Fact No. 19 states: “No persuasive evidence was presented to the Court that the Petitioner is underemployed” (R.580). This finding is clearly erroneous. The evidence at trial on the question of petitioner’s employment is clear and uncontroverted, consists entirely of petitioner’s own testimony, and demonstrates without ambiguity that petitioner is underemployed.

Petitioner testified at trial that she was currently employed at Bluffdale Elementary as a PE specialist (id. at 8:17). She testified that she made \$8.17 per hour and worked 12 hours per week (id. at 8:21). She also testified that she was employed during the marriage full-time and that she had no disability that would prevent her from working full-time now (id. at 20:11-18). This evidence establishes that petitioner was capable of working full-time, but did not work full-time. She was therefore underemployed, by definition.

The policy of this state places upon every parent the responsibility to support the children that they bring into this world. See Utah Code Ann. §§ 78-45-3(1) & -4(1); Department of Human Servs. Ex rel. Parker v. Irizarry, 945 P.2d 676, 683 (Utah 1997) (Zimmerman, C.J., dissenting) (Utah's clear policy is to require both parents to support their child to the extent that each is financially able). In the divorce context, it is therefore incumbent upon all parents of minor children to work full-time. If they choose not to do so, it should be their burden to demonstrate that this choice is appropriate and that they should not be deemed underemployed pursuant to Section 78-45-7.5(7)(a) of the Utah Code. Cf. Betteridge v. Betteridge, 2004 UT App 50, 2004 Utah App. LEXIS 123 (Orme, J., concurring) (stating 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).

A parent's uncontroverted testimony that they do not work full-time but are capable of doing so and have done so necessitates a finding that the parent is voluntarily underemployed. Therefore, the trial court's finding that "[n]o persuasive evidence was presented to the Court that the Petitioner is underemployed" is clearly erroneous. This court should set aside the finding and direct entry of a finding that petitioner is underemployed, consistent with the uncontroverted evidence.

B. The Trial Court's Finding that Petitioner Has Cared For and Will Continue to Care For The Parties' Minor Child in Her Home is Insufficient as a Matter of Law to Support Its Conclusion that Income Should Not Be Imputed to Petitioner

The trial court "decline[d] to impute full time income to Petitioner at her currently hourly wage" because "Petitioner has cared for and will continue to care fo the two (2) year old minor child in her home" (R.580). This is an insufficient reason, as a matter of law, to support a determination not to impute income to an underemployed parent.

Caring for a child does not entitle a person not to work, absent exceptional circumstances, such as special needs on the part of the child. To the contrary, bringing a child into the world places on a person an obligation to support that child. This obligation is not gender-specific, and does not inure only to a noncustodial parent. As this court has noted, "Utah statutes draw no distinction in

terms of support duty between custodial and non-custodial parents nor between fathers and mothers. The duty of both is the same: ‘Every man shall support his child’ Utah Code Ann. § 78-45-3(1987); Every woman shall support her child’ Utah Code Ann. § 78-45-4 (1987).” Allred v. Allred, 797 P.2d 1108, 1114, n.3 (Utah Ct. App. 1990). Thus, custodial mothers are required to support their children, insofar as they are capable, to the same extent that noncustodial fathers are.

Further, it is inequitable and violative of the guarantees of this state’s constitution to place upon one parent, but not the other, an obligation to work full-time. Article I, Section 24 of the Utah Constitution provides: “All laws of a general nature shall have uniform operation.” Utah Const. art. I, § 24. The identical statutes pertaining to the obligations of mothers and fathers to support their children found at Sections 78-45-3 and -4 of the Utah Code cannot, consistent with this provision of the constitution, be applied to permit a mother to avoid her duty of support to stay home with her child while a father has no so luxury. Cf. Mancil v. Smith, 2000 UT App 378, ¶ 16, 18 P.3d 509 (holding that father may not disregard his duty to support his child to pursue a college education). Utah’s child support guidelines “are designed to maximize support to children from both parents” id., and no exception is made to allow a mother to choose not to do so in order to stay home with her child, except in the limited

circumstance that “the reasonable costs of child care for the parents’ minor children approach or equal the amount of income the custodial parent can earn.” Utah Code Ann. § 78-45-7.5(d)(i) (2005).

This conclusion is further supported by Article IV, Section I of the Utah Constitution, which provides in pertinent part: “Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.” Utah Const. art. IV, § 1. The right of choice to work or not to work on a full-time basis is a civil right that cannot be abridged for male citizens of this state who are parents, but not for female citizens of this state who are parents.

The inequity of the court’s determination that petitioner is not required to work full-time to support the parties’ child is particularly egregious under the circumstances of this case, where the court’s award of custody to petitioner is premised, almost entirely, on its finding that respondent’s full-time employment would require him to obtain more surrogate care than petitioner requires. Fathers who wish to actively participate in their children’s lives, but who have been designated “noncustodial parents” by a temporary order, are doomed by such circular logic. They must work to support their children, but by doing so they forfeit their opportunity to be awarded sole or joint custody of their children on a permanent basis. Thus, the distinction between “custodial parent” and “noncustodial parent” – which may be said to justify the unequal treatment of

mothers and fathers vis-à-vis their obligation to support their children – often stems directly from that very same unequal application of the duty of support.

This case does not present a situation where a mother has stayed home throughout a marriage of long duration to care for the parties' minor children, and must, upon divorce, attempt to enter the work force late in life with no substantial work experience or training. Cf. Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). The actual duration of the parties' marriage in this case was less than three years, during most of which petitioner worked full-time. Petitioner is young and free from any physical disability that would prevent her from maintaining full-time employment. She did not change her position or forego career or employment opportunities to care for the parties' child during the marriage: the sum total of the parties' effective marriage after the birth of Madysen was 7 months.² She has child care available to her at no cost (R.646, at 15:20-16:5) and a father to the minor child who is willing and anxious to assume greater parental responsibilities, and who the evidence demonstrates should be allowed to do so for the child's best interests. Under these circumstances, it is a clear inequity to sanction petitioner's decision not to work full-time, thus shortchanging the child's right of support from

² Respondent, on the other hand, did forego career opportunities in order to be in a position to care for his daughter after petitioner left the marital residence, turning down a position out-of-state (R.74-75, ¶ 3).

her mother and placing a disproportionate burden on respondent to support not only the minor child, but also petitioner.

The trial court's refusal to impute full-time income to petitioner because of her role in caring for the parties' child is error, as a matter of law, and should be reversed. On remand, the trial court should be directed to impute income to petitioner in the amount of \$1,416.12 per month, which represents employment of 40 hours per week at petitioner's uncontroverted wage of \$8.17 per hour.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ALIMONY TO PETITIONER

Section 30-3-5(8)(a) of the Utah Code requires a court to consider seven 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 payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

See Utah Code Ann. § 30-3-5(8)(a)(i)-(vii) (2005).

It is the burden of the party who is requesting alimony to establish that her or she is entitled to it pursuant to the foregoing factors. Cf. Willey v. Willey, 951 P.2d 226, 231 (Utah 1997) (wife requesting alimony had burden of proving monthly need for claimed medical expenses); Peterson v. Peterson, 2001 UT App 51, Utah App. LEXIS 177 (noting that “alimony is never automatic”).

Petitioner utterly failed in this case to meet her burden of establishing that she is entitled to alimony. Most crucially, petitioner failed to testify regarding her monthly expenses, or to submit a financial declaration to the court setting forth such expenses. On the issue of need, she testified only that she paid rent of \$300 per month while living with her parents, that she had had help from her parents, and that she had been on food stamps (R.646, at 10:13-11:2).

Petitioner’s testimony at trial, and the argument of her counsel in closing, indicate that petitioner in fact did not even seek an award of alimony per se, but only an award of “contingent alimony” to ensure that she would have the means to pay the parties’ joint debt if respondent were to file bankruptcy or otherwise fail to “take care of it” (R.646, at 19:4-13; R.646, at 42:11-23). Respondent does not appeal the trial court’s assignment of the parties’ debt to him, and he is willing to pay the joint debt, whether discharged by him or not, in lieu of alimony. However, the trial court abused its discretion and overstepped its proper role by requiring respondent to not only pay all the debt of the parties, but also to pay alimony,

granting relief to petitioner that petitioner did not request and failed to establish entitlement for. Cf. Jenkins v. Weis, 868 P.2d 1374, 1383-84 (Utah Ct. App. 1994) (Bench, J., dissenting) (““Preservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel’s role of advocacy. . . . The interests of justice are not enhanced when the court exceeds its role as arbiter by reaching out and deciding an issue that would otherwise be dead””) (quoting Girard v. Appleby, 660 P.2d 245, 247 (Utah 1983)). The trial court’s alimony award should be vacated, without remand.

Alternatively, the trial court’s alimony award should be vacated and the matter remanded for entry of findings on the statutorily mandated factors. Petitioner’s failure to adduce evidence necessary to support an award of alimony is evident in the court’s failure to make adequate findings to support an award of alimony. The sum total of the court’s findings pertaining to alimony are set forth in Findings of Fact No. 26 and No. 27. As to petitioner’s need, the court makes no findings as to petitioner’s monthly expenses, but instead summarily states that she has a need for alimony based on her testimony that she is supported by her parents, receives welfare, and pays rent of \$300 to her parents. While such testimony might establish a general need, it cannot establish the extent of that need in terms of a monthly amount, and it provides no basis for the court’s conclusory finding that “a reasonable and fair sum to be paid for alimony is \$750 per month.” See

Bakanowski v. Bakanowski, 2003 UT App 357, ¶¶ 10-13, 80 P.3d 153 (trial court abused its discretion in failing to enter specific findings on wife's financial need based on parties' historical standard of living, attempting instead to equalize the parties' incomes); Godfrey v. Godfrey, 854 P.2d 585, 589 (Utah Ct. App. 1993) (findings regarding parties' incomes, omitting expenses, "clearly insufficient to allow us to ensure that the trial court's discretionary determination was rationally based").

Similarly, the trial court's findings as to respondent's ability to pay are inadequate. The court found that averaging the two numbers set forth in respondent's financial declaration would result in a finding that it takes \$1,943 per month to support him. The court did not make such a finding, however, stating only: "[T]he Court believes that Respondent has overstated his expenses, and that the Respondent does have the ability to pay Petitioner \$750.00 per month alimony" (R.585, ¶ 27).

The court does not make any finding regarding what respondent's reasonable expenses are and fails to address any line item in respondent's uncontroverted financial declaration.

To support its conclusory finding that respondent has the ability to pay \$750 per month in alimony, the trial court was required to make subsidiary findings reducing respondent's monthly expenses to \$695.51 per month (representing the

difference between \$750 and respondent's net income of \$1,445.51 after taxes, payment of child support, and maintenance of joint debt). The uncontroverted expenses set forth in respondent's financial declaration establish that his rent and car payment alone exceed that amount.

Respondent does not live with his parents and does not enjoy an essentially expense-free existence, as does petitioner. The court's bare statement that it believes respondent's expenses to be inflated is simply insufficient to support the court's conclusory finding that respondent has the ability to pay alimony in the amount of \$750 per month. See Madsen v. Madsen, 1998 Utah App. LEXIS 180 (holding trial court is required to support, with appropriate findings of fact, any adjustments made to uncontroverted financial statements of a party); Holmstead v. Holmstead, 2004 UT App 147, 2004 Utah App. LEXIS 172 (remanding for entry of further findings where trial court reduced husband's monthly expense for loan payment without explanation).

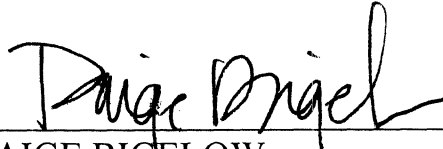
In sum, the trial court's findings as to both petitioner's need and respondent's ability to pay are insufficient to support its award of alimony to petitioner. The award should be vacated, and if remand is allowed, the trial court should be directed to enter detailed findings on each alimony factor that the trial court is required by statute to consider.

CONCLUSION

For the foregoing reasons, this court should reverse the trial court's award of sole physical custody to petitioner, should set aside the trial court's finding that income should not be imputed to petitioner, directing the trial court on remand to impute income to petitioner in an amount consistent with full-time employment at her current hourly wage, and should vacate the trial court's award of alimony to petitioner.

DATED this 19 day of October, 2005.

KRUSE LANDA MAYCOCK & RICKS, LLC
Eighth Floor, Bank One Tower
50 West Broadway
P. O. Box 45561
Salt Lake City, UT 84145-0561



PAIGE BIGELOW

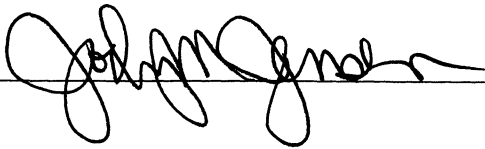
Attorneys for Respondent/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of October 2005, I caused two true and correct copies of the foregoing BRIEF OF APPELLANT to be sent by United States mail, postage prepaid, to the following:

J. Kevin Hofeling
1063 East 3300 South, Suite 200
Salt Lake City, UT 84106

Sandra Langley
Assistant Attorney General
515 East 100 South
Salt Lake City, UT 84114



A handwritten signature in black ink, appearing to read "John M. Jensen", is written over a horizontal line.

Tab A

RECITALS

WHEREFORE the above-entitled matter came on before the Court for hearing, trial, and taking of testimony before the Honorable J. Dennis Frederick, presiding in his Courtroom at Third District Court, in and for Salt Lake County, State of Utah, Salt Lake Department on Thursday, September 30, 2004 at 10:00 a.m.

Petitioner, Kristyna Diane Rose was present and represented by counsel of record, J. Keven Hofeling (U.S.B. No. 7890); Respondent, Donovan T. Rose was present and represented by counsel of record, Lori J. Cave (U.S.B. No. 7192); and Jaceson Maughan (U.S.B. No. 9802) representing the State of Utah, Office of Recovery Services was also present.

The Court accepted a stipulation between the State of Utah and the parties (submitted as a separate order, a copy of which is attached hereto), then heard the testimony of the Petitioner, followed by the testimony of the Respondent, as well as closing argument from the parties' attorneys. The Court further reviewed written submissions of all parties, and after having heard oral argument from all parties in open court, orally entered its findings of fact, conclusions of law, and decision which is herewith reduced to writing as follows:

FINDINGS OF FACT

[Potter v. Potter, 845 P.2d 272 (Ut. Ct. App. 1993)]
[UTAH CODE ANN. § 30-3-4 [Findings]
(UTAH RULES OF CIVIL PROCEDURE R.52(a) [Effect])
(UTAH RULES OF CIVIL PROCEDURE R.52(c) [Required])]

JURISDICTION

1. Jurisdiction of the Court is pursuant to Utah state law as follows:

UTAH CODE ANN. § 78-3-4: "Jurisdiction --Appeals"
[Jurisdiction of District Court]

Article VIII, Section 5, Constitution of Utah
[Jurisdiction of District Courts; Effective July 1, 1985]

Article I, Section 11, Constitution of Utah
[Courts Open -- Redress of Injuries]

"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party."

UTAH RULES OF CIVIL PROCEDURE, Rule 2: "One form of action"
[There shall be one form of action to be known as "civil action."]

UTAH RULES OF CIVIL PROCEDURE, Rule 3: "Commencement of action"
(b) "Time of Jurisdiction" [Complaint filed or summons and complaint served]

UTAH RULES OF CIVIL PROCEDURE, Rule 82 "Jurisdiction and venue unaffected"
[These rules shall not be construed to extend or limit the jurisdiction of the courts of this state or the venue of actions therein.]

Divorce Jurisdiction

UTAH CODE ANN. § 30-3-1 "Procedure-Residence-Grounds."
[Proceedings in divorce are commenced and conducted as provided by law for proceedings in civil causes, except as provided in this chapter.]

Equity Jurisdiction

Marlowe Investment Corp. v. Radmall, 26 Utah 2d 124, 485 P.2d 1402 (Utah 1971)
[Equitable principles can be applied in action at law]

Williamson v. Wanlass, 545 P.2d 1145 (Utah 1976)
[Equitable principles can be applied in action at law]

VENUE

[Rimensburger v. Rimensburger, 841 P.2d 709 (Utah Ct. App. 1992)]
[Neville v. Neville, 740 P.2d 290 (Utah Ct. App. 1987)]
[Weiss v. Weiss, 111 Utah 353, 179 P.2d 1005 (Utah 1947)]
[Kidman v. Kidman, 109 Utah 81, 164 P.2d 201 (Utah 1945)]

2. Venue is proper in Salt Lake County, state of Utah, pursuant to state statutes as follows:

UTAH CODE ANN. § 30-3-1 "Procedure-Residence -- Grounds."
[Petitioner **or** Respondent resident of county where action brought]

UTAH CODE ANN. § 78-13-7 "All Other Actions"
[County in which cause of action arises, or county in which any Respondent resides at the commencement of the action.]

PARTIES

3. KRISTYNA DIANE ROSE, **Petitioner**, is an individual, a resident, and a "domiciliary" of **Salt Lake County, State of Utah**, at all times relevant herein, currently residing at 14985 South 3200 West, Bluffdale, Utah 84065.

4. DONOVAN T. ROSE, **Respondent**, is an individual, a resident, and a "domiciliary" of **Salt Lake County, State of Utah**, at all times relevant herein, currently residing at 1043 South 800 East, Apartment 3, Salt Lake City, Utah 84105-1262.

SOCIAL SECURITY NUMBER

(UTAH CODE ANN. § 30-3-10.17 [Social security number in court records.])

5. **Petitioner's** social security number is 529-78-9723.
6. **Respondent's** social security number is 540-23-2385.

CAUSE OF ACTION (Divorce)

RESIDENCE

(UTAH CODE ANN. § 30-3-1 [Grounds])
(UTAH CODE ANN. § 30-3-2 [Right of Divorce -- Husband & Wife])

7. PETITIONER is an individual, and a resident of Salt Lake County, and has been for more than three (3) months prior to the commencement of this action. Therefore, pursuant to statute, the Court has jurisdiction.

8. PETITIONER and RESPONDENT were married on **June 24, 2000** in Salt Lake County, State of Utah, and have ever since been husband and wife. The parties separated on or about **April 15, 2003**.

DIVORCE & GROUNDS

(UTAH CODE ANN. § 30-3-1 [Grounds])
(UTAH CODE ANN. § 30-3-2 [Right of Divorce -- Husband & Wife])

9. PETITIONER has adequate and sufficient grounds for divorce from
RESPONDENT for reasons as follows:

(a) "Irreconcilable differences" exist between the parties.

(b) "Irreconcilable differences" between the parties constitute
adequate and sufficient grounds for divorce under the provisions of **UTAH
CODE ANN. § 30-3-1(h) [Grounds]** as amended [**Haumont vs. Haumont,
793 P.2d 421 (Utah App. 1990)**].

FINAL JUDGMENT & DECREE

(UTAH CODE ANN. § 30-3-7 [When decree becomes absolute])
[Preece v. Preece, 682 P.2d 293 (Utah 1984)]

10. Decree of Divorce should be a final judgment and decree immediately at
such time as said decree is signed by the Court.

90-DAY WAITING PERIOD WAIVED

(UTAH RULES OF CIVIL PROCEDURE R.105 "Shortening 90 Day Waiting Period...")
(UTAH CODE ANNOTATED § 30-3-18 "**Waiting period for Hearing After Filing For Divorce -- Exemption...**")

[Heath v. Heath, 541 P.2d 1040 (Utah 1975)]
[Howard v. Howard, 601 P.2d 931 (Utah 1979)]

11. As this divorce was filed on June 2, 2003, the ninety (90) day waiting period has elapsed. Additionally, both parties have completed the Divorce Education Class.

DIVORCE EDUCATION CLASS

(UTAH CODE ANN. § 30-2-11.3 "Mandatory educational course for divorcing parents -- Purpose -- Curriculum -- Exceptions")
(UTAH CODE ANN. § 30-3-18 "Waiting period for hearing after filing for divorce -- Exemption -- Use of counseling and education services not to be construed as condonation or promotion")
(CODE OF JUDICIAL ADMINISTRATION Rule 4-907 "Mandatory Divorce Education")

12. This case is subject to provisions of law requiring that the parties enroll and complete mandatory divorce education class, and both **have** attended same, with the Petitioner's Certificate of Completion being filed with the Court on September 17, 2003, and the Respondent's Certificate of Completion being filed on April 27, 2004.

CHILDREN & CUSTODY

(UTAH CODE ANN. § 30-3-10 "Custody of children in case of separation or divorce --
Custody consideration")

13. There has been ONE (1) child born as issue of the marriage as follows:

<u>Name:</u>	<u>Birthdate:</u>	<u>Social Security No:</u>
MADYSON JEAN ROSE	September 5, 2002	647-66-3630

LEGAL CUSTODY

(UTAH CODE ANN. § 30-3-10.1 "Definitions -- Joint legal custody...")

14. **Joint Legal Custody:** Consistent with the two (2) custody evaluations that were reviewed by the Court *in camera*, the parties should share joint legal custody of the minor child.

UTAH CODE ANN. § 30-3-10.1 "Definitions -- Joint legal custody..."

UTAH CODE ANN. § 30-3-10.2 "Joint custody order..."

UTAH CODE ANN. § 30-3-10.3 "Terms of joint legal custody order"

UTAH CODE ANN. § 30-3-10.4 "Modification or termination of order"

PARENTING PLAN

(UTAH CODE ANN. § 30-3-10.7 "Parenting plan -- Definitions")
(UTAH CODE ANN. § 30-3-10.8 "Parenting Plan -- Filing -- Modifications")
(UTAH CODE ANN. § 30-3-10.9 "Parenting plan -- Objectives -- Required provisions --
Dispute resolution")

15. Neither party filed a Parenting Plan with the Court.

PHYSICAL CUSTODY

(UTAH CODE ANN. § 30-3-10. "Custody of children in case of separation or divorce --
Custody consideration")
(UTAH CODE ANN. § 30-3-10.2 "Joint custody order -- factors for court determination --
Public assistance")
[Tucker v. Tucker, 910 P.2d 1209 (Utah 1996)]
[Rosendahl v. Rosendahl, 876 P.2d 870 (Utah Ct. App. 1994)]
[Moon v. Moon, 790 P.2d 52 (Utah Ct. App. 1990)]

16. Both parties in their Petition and Counterclaim for divorce sought sole legal and physical care and control of the minor child, but the Court finds that sole physical custody should be awarded to the Petitioner, who has been primary caretaker and nurturer to the minor child, based upon the conclusion of the Court that same is in the best interests of the minor child; and in support of said conclusion the Court makes the following findings:

a. **Consistency of child care provider arrangements:** consistency of care provider arrangements is an important issue in this child's life. Surrogate care has been and continues to be provided by the child's maternal grandmother, with whom Petitioner and the minor child live, at the rate of some twelve (12) hours per week. If Respondent were granted primary custody of the minor child, the fact that he works forty (40) hours per week would require him to obtain considerably more surrogate care.

b. **Custody Evaluations:** Two custody evaluations were performed in this case. Neither evaluator was called as a witness at trial, and neither party moved to enter the written custody evaluations of either evaluator into evidence at trial; however, the Court reviewed the written recommendations of both evaluators *in camera*, and observed that both evaluators in rather unusual recommendations concluded that the parties should share joint physical custody of the minor child.

i. **CODE OF JUDICIAL ADMINISTRATION Rule 4-903:** Considering the factors of Rule 4-903, the child's tender age and lack of siblings is all quite clear. The Court acknowledges and agrees with the conclusions of both custody evaluators, except for the conclusion that a 50/50 joint custody arrangement ought to be, or will be appropriate. The Court declines to acknowledge and accept that sort of arrangement primarily on the basis that it would be productive of considerable on-going dispute between these parties, and the Court finds that such would not be in the best interests of the minor child.

c. **Allegation of physical abuse and inability of parties to cooperate and make joint decisions:** In the judgment of the Court, joint physical custody is not appropriate. These parties have a long history of being emotionally at odds with each other. There have been allegations of physical abuse, but as has been rightly pointed out by Respondent's counsel, those allegations have been determined to be "without foundation" by the state. In the judgment of the Court, there is no evidence to support any claim of physical abuse. But there clearly are, in the judgment of the Court, emotional resentments and/or disagreements that would seriously affect, and indeed, in the history of this case, have affected the ability of these parties to cooperate and get along to the extent that would be required by a joint physical custody order. Accordingly, the Court declines to order joint physical custody.

PARENT-TIME

17. Award of sole physical custody of the minor child to Petitioner should be subject to Respondent's right to parent-time sharing as the parties agree, or if they cannot agree, parent-time sharing should be pursuant to the statutory guidelines of UTAH CODE ANN. §§ 30-3-33, 30-3-35.5, and 30-3-35 (See copies attached hereto, and incorporated by reference herein).

a. **Use of intermediary for exchange of minor child between parties:**
Exchanges of the minor child between the parties should continue to be accomplished with the use of an intermediary until the parties can agree to dispense with the use of the intermediary.

CHILD SUPPORT

(UTAH CODE ANN. § 78-45-7 "Determination of amount of support...")
(UTAH CODE ANN. § 30-3-5 [Support & Maintenance])
(UTAH CODE ANN. § 30-3-10.3(5)(a) "Terms of joint legal custody order")
(UTAH CODE ANN. § 78-45-7.18 "Limitation on amount of support ordered")

18. **Gross incomes of parties:** The testimony of the parties was that the Petitioner earns \$8.17 per hour working twelve (12) hours per week as at Bluffdale Elementary School, resulting in a gross income of \$424.84 per month; and that the Respondent earns \$12.70 an hour working forty (40) hours per week, resulting in a gross income of \$2,201.33 per month.

19. **Issue of whether Petitioner is underemployed:** No persuasive evidence was presented to the Court that the Petitioner is underemployed, and in light of the fact that the Petitioner has cared for and will continue to care for the two (2) year old minor child in her home, the Court declines to impute full time income to Petitioner at her current hourly wage.

20. **Calculation of child support obligations:** The parties have a combined gross monthly income of \$2,626.17, eighty four percent (84%) of which is attributable to the Respondent, with sixteen percent (16%) being attributable to the Petitioner. The base child support obligation corresponding to the combined monthly gross income of the parties is \$362.00. Petitioner's monthly child support obligation to the minor child is sixteen percent (16%) of the base child support obligation in the sum of \$57.92, while the Respondent's eighty-four percent (84%) share of the combined monthly obligation to the child is \$304.08.

PAYMENT OF CHILD SUPPORT

(UTAH CODE ANN. § 78-45-9.3 "Payment under child support order --Judgment")

21. Commencing October 1, 2004, Respondent should pay monthly child support to the Petitioner in the sum of \$304.08, due and payable on the first day of each month.

22. **Immediate and automatic income withholding:** Pursuant to the stipulation of the parties made at trial, same having been reduced to writing and reflected in the Court's Order of October 28, 2004 (See copy attached hereto), child support should be collected by the Utah Office of Recovery Services by immediate and automatic income withholding.

SUPPORT DURATION

23. Support for the minor child should continue until the child reaches the age of majority [UTAH CODE ANN. § 15-2-1 "Eighteen" (18)], or graduates from high school in year normally expected to graduate [subject to continuation of support payments until last day of school year if child turns eighteen (18) while enrolled in high school] whichever event should occur last; however, subject to provisions of Utah state law relating to duration and review as follows:

UTAH CODE ANN. § 78-45-7.2(8) "Application of Guidelines -- Rebuttal" 10% differential -- review every three (3) years

CHILD CARE EXPENSES

(UTAH CODE ANN. § 30-3-5(2) "Care of Children")
(UTAH CODE ANN. § 78-45-7.16 "Child care expenses -- Expenses not incurred")
(UTAH CODE ANN. § 78-45-7.17 "Child care costs")

24. Each parent should share equally the reasonable work-related child care expenses of the parents.

a. If an actual expense for child care is incurred, a parent should begin paying his or her share on a monthly basis immediately upon presentation of proof of the child care expense, but if the child care expense ceases to be incurred, that parent may suspend making monthly payment of that expense while it is not being incurred, without obtaining a modification of the child support order.

b. A parent who incurs child care expenses should provide written verification of the cost and identity of the child care provider to the other parent upon initial engagement of a provider, and thereafter at the request of the other parent.

c. Notification should be provided to the other parent of any change of child care provider or change in monthly expense of child care within thirty (30) days of the change.

d. A parent incurring child care expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if the parent fails to comply with the requirements of these Child Care Expense provisions.



MEDICAL EXPENSES

(UTAH CODE ANN. § 78-45-7.15 "Medical expenses")

25. Respondent should insure the minor child with the health insurance available to him through his employment, and should forthwith provide substantiation of said coverage to Petitioner's counsel through his attorney.

a. Each parent should share equally all out-of-pocket medical and dental expenses for the child, including the child's per capita share of the insurance premium, deductibles, copayments and all other reasonable and necessary uninsured expenses, including routine office visits, physical examinations, and immunizations, as well as prescription glasses [including contacts], optical services, orthodontic expenses, psychological counseling, and prescriptions of all types (all of which should be considered to fall within the definition of "medical expenses").

b. A parent who incurs medical expenses should provide written verification of the cost and payment of medical expenses to the other parent within thirty (30) days of payment.

c. A parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if the parent fails to comply with the requirements of these Medical Expense provisions.

52

ALIMONY

(UTAH CODE ANN. § 30-3-5 " ...– Determination of alimony --....")
[Thronson v. Thronson, 810 P.2d 428 (Utah Ct. App. 1991)]
[Rasband v. Rasband, 810 P.2d 828 (Utah Ct. App. 1991)]
[Jones v. Jones, 700 P.2d 1072 (Utah 1985)]

26. **Findings regarding Petitioner's need for alimony:** The testimony of the Petitioner was that she earns \$8.17 per hour working twelve (12) hours per week at Bluffdale Elementary School, resulting in a gross income of \$424.84 per month. Of Petitioner's gross monthly income of \$424.84 per month, she testified that she pays \$300.00 to her parents each month for rent for her and the parties' minor child. The Petitioner further testified not only that she is supported by her own parents, but that she requires food stamps, and is receiving in one form or another welfare supplements to support her and the Respondent's child. It is thus quite apparent to this Court that the Petitioner has a need for alimony, and that a reasonable and fair sum to be paid for alimony is \$750 per month.

27. **Findings regarding Respondent's ability to pay alimony:** The Respondent testified that he earns \$12.70 an hour working forty (40) hours per week, resulting in a gross income of \$2,201.33 per month. Respondent represented in his first financial declaration form signed September 15, 2003 that his monthly expenses, excluding tithing, amount to \$2,326.00, and represented in his second financial declaration form signed April 27, 2004 that his monthly expenses, excluding tithing amount to \$1,561.00. Averaging those two numbers, one would find it takes to support him, a single individual, some

\$1,943.00 per month. That far exceeds any disposable earnings or income available to the Petitioner in this case. And furthermore, the Court believes the Respondent has overstated his expenses, and that the Respondent does have the ability to pay Petitioner \$750.00 per month alimony, which Respondent should commence to pay Petitioner as of October 1, 2004; same to be terminable upon the remarriage or cohabitation of the Petitioner, and to be paid for a duration equal to the length of the marriage.

PERSONAL PROPERTY

[Ruhsam v. Ruhsam, 742 P.2d 123 (Utah Ct. App. 1987)]
[Jones v. Jones, 700 P.2d 1072 (Utah 1985)]
[Munns v. Munns 790 P.2d 116 (Utah Ct. App. 1990)]

28. The personal property of the parties should be divided as they have heretofore divided it.

MOTOR VEHICLES

(UTAH CODE ANN. § 41-1a-219 "Change of name -- New registration")
(UTAH CODE ANN. § 41-1a-102(40)(a) Definitions -- "Owner")
(UTAH CODE ANN. § 30-3-5(1) [Division of Property])
(UTAH CODE ANN. § 30-3-5(1)(c)(i)(ii)(iii) [Debts -- Creditor Notice])
(UTAH CODE ANN. § 15-4-6.5 [Debt Division -- Notice To Creditors])

29. The parties should be awarded the motor vehicles currently in their possession subject to each party assuming, paying, and holding the other harmless from any and all debts and obligations associated therewith.

DEBTS & OBLIGATIONS

(UTAH CODE ANN. § 30-2-5 "Separate Debts")
(UTAH CODE ANN. § 30-3-5(1) [Division of Property])
(UTAH CODE ANN. § 30-4-3(d) "...Property & debt division...")
(UTAH CODE ANN. § 15-4-6.5 "Divorce or separate maintenance of co-obligors")

30. **Marital debt:** The Respondent should assume, pay, and hold the Petitioner harmless from any and all liability for marital debt and for the debts and obligations set out in his second financial declaration, to wit: Comp U.S.A. in the approximate amount of \$1,463.10; Best Buy in the approximate amount of \$1,369.94; Circuit City in the approximate amount of \$1,246.21; American Express in the approximate amount of \$2,500.00; Navy Fed. Visa in the approximate amount of \$4,300.00; U LaneO Debit in the approximate amount of \$462.87; Sam's Club in the approximate amount of \$480.00; RC Willey in the approximate amount of \$1,000.00; US Bank Res. in the approximate amount of \$1,000.00; Home Depot in the approximate amount of \$300.00; and Rulon T. Burton in the approximate amount of \$4,310.00.

31. **Separate Debts:** Respondent and Petitioner should pay any and all other debts and obligations without limitation incurred without the knowledge of the other or upon which that parties signature does not appear pursuant to Utah State Law as follows:

UTAH CODE ANN. § 70A-3-401 "Liability of Parties"

UTAH CODE ANN. § 30-2-5 "Separate Debts Contracted"

Horman v. Gordon, 740 P.2d 1346 (Ut. App. Ct. 1987)

[Where a person's signature does not appear on a note, he cannot be held liable for it, even if the parties so intended.]

RETIREMENT AWARD

[Woodward v. Woodward, 656 P.2d 431 (Utah 1982)]
[Marchant v. Marchant, 743 P.2d 199 (Ut. Ct. App.1987)]
[Dunn v. Dunn, 802 P.2d 1314 (Ut. Ct. App. 1990)]

32. It was the testimony of both parties that they have no retirement.

NAME CHANGE PROVISION

(UTAH CODE ANN. § 30-3-5(1) [Power of court to enter equitable orders])
(UTAH CODE ANN. § 53-3-216 [Drivers License Name Change])
(UTAH CODE ANN. § 41-1-1 thru 42-1-3 "...Change of name....")
[See State v. Housekeeper, 588 P.2d 139 (Utah 1978)]

33. **Maiden Name:** If Petitioner desires to take some name in the future other than ROSE, including but not limited to her maiden name, family name, or any other name of her choice, or name she was known by prior to the marriage, she may do so.

DEPENDENT TAX EXEMPTION

34. Subject to applicable IRS rules and regulations, the parties should alternate claiming the dependent tax exemption every other year, each year the child is eligible to be so claimed, beginning with the Petitioner claiming the exemption for the 2004 tax year. Respondent's eligibility to claim the dependent tax exemption should be contingent on Respondent being current with his financial obligations to the Petitioner related to the minor child.

TAX REFUND

35. The Court finds that the 2003 tax refund in the amount of \$2,740.00 received by the Respondent is joint marital property, that Respondent inappropriately used Petitioner's half of said refund, and that Respondent should disgorge Petitioner's half of same. Thus, judgment for \$1,370.00 should enter against the Respondent in favor of the Petitioner for Petitioner's half of the 2003 tax refund.

EXECUTION AND DELIVERY OF DOCUMENTS

36. Each party should cooperate in signing, endorsing, and delivering any and all documents, deeds, contracts, assignments and transfers necessary to carry out the provisions of the Decree of Divorce as entered by the Court.

ATTORNEY'S FEES AND COSTS

(UTAH CODE ANN. § 30-3-3 [Attorney Fees & Costs])

37. Each party should assume their own costs and attorney's fees incurred herein.

MISCELLANEOUS

38. Attorney for Petitioner should prepare Findings and Decree.

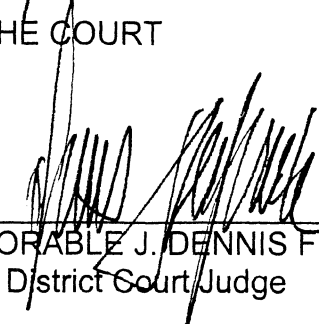
NOW, THEREFORE, having made and entered the foregoing Findings of Fact, the Court makes and enters the following:

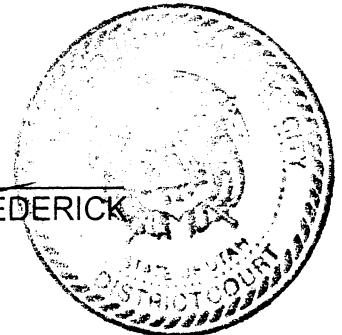
CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the parties to and the subject matter of this action;
2. That the Petitioner should be granted a divorce on the grounds of irreconcilable differences, to become final and absolute upon entry herein;
3. That all other issues of dispute have been resolved by the Court pursuant to the above Findings of Fact; and,
4. That the Decree of Divorce should be in conformance with the foregoing Findings of Fact.

DATED this 13th day of Apr., 2005.


BY THE COURT


HONORABLE J. DENNIS FREDERICK
Third District Court Judge



**** CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **FINDINGS OF FACT & CONCLUSIONS OF LAW** with attachments were mailed via United States Mail first class, postage prepaid, **unless otherwise indicated below**, on the 9TH day of FEBRUARY, 20 05, to the following:


Page Bigelow KRUSE LANDA MAYCOCK & RICKS, LLC Attorneys for Respondent Eighth Floor, Bank One Tower 50 West Broadway, P.O. Box 45561 Salt Lake City, Utah 84145-0561 BY HAND DELIVERY	Third District Court Scott M. Matheson Courthouse 450 South State Street Salt Lake City, Utah 84111 HAND DELIVERED ON 2/15/05 
Kristina Diane Rose 14985 South 3200 West Bluffdale, Utah 84065	Jaceson Maughan Attorney for State of Utah 515 East 100 South Salt Lake City, Utah 84114 (U.S. CERTIFICATE OF MAILING)

SUBMITTED TO COURT on 5TH day of APRIL,
20 05.

**** NOTICE TO PARTIES**

TO THE ABOVE-NAMED PARTIES:

Pursuant to Rule 7(f)(2) of the UTAH RULES OF CIVIL PROCEDURE, the above FINDINGS OF FACT & CONCLUSIONS OF LAW will be filed with the Court five (5) days after service upon you. Your objections, if any, must be filed with the Court and to the undersigned counsel for Petitioner within five (5) days of this service.



J. KEVEN HOFELING
Attorney for Petitioner

Tab B

Sindy Holmstead, Petitioner and Appellee, v. Tony D. Holmstead, Respondent and Appellant.

COURT OF APPEALS OF UTAH

2004 UT App 147; 2004 Utah App. LEXIS 172

Case No. 20030248-CA

May 6, 2004, Filed

Notice:

NOT FOR OFFICIAL PUBLICATION

Editorial Information: Prior History

Sixth District, Richfield Department. The Honorable Paul D. Lyman

Disposition

Affirmed in part; reversed and remanded in part.

Counsel

Howard Chuntz, Orem, for Appellant

Douglas L. Neeley, Manti, for Appellee

Judges: Pamela T. Greenwood, Judge. WE CONCUR: Russell W. Bench, Associate Presiding Judge, Norman H. Jackson, Judge

Opinion

Opinion by: Pamela T. Greenwood

MEMORANDUM DECISION

Before Judges Bench, Greenwood, and Jackson.

GREENWOOD, Judge:

Tony Holmstead (Husband) appeals from the trial court's Decree of Divorce. We affirm in part and reverse and remand in part.

Husband first challenges the trial court's division of his and Sindy Holmstead's (Wife) marital property. "In dividing the marital estate, the trial court may make such orders concerning property distribution . . . as are equitable." *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1277 (Utah 1987) . "In making such orders, the trial court is permitted broad latitude" *Id.* Accordingly, "changes will be made in a trial court's property division determination in a divorce action only if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion."

Bradford v. Bradford, 1999 UT App 373, P 25, 993 P.2d 887 (citations omitted). However, when a court is dividing marital property, "each party is presumed to be entitled to . . . fifty percent of the marital property." *Id.* at P 26 (first alteration in original) (citation omitted). Therefore, "an unequal division of marital property . . . is only justified when the trial court memorializes in commendably detailed findings' the exceptional circumstances supporting the distribution." *Id.* at P 27 (citation omitted).

In this case, the trial court emphasized that it did not make a "'mathematically incorrect' finding," as asserted by Husband, and that its "Findings and Decree . . . accurately reflect[ed] the court's

equitable division of the parties' assets and liabilities." Although the trial court never used the term "exceptional circumstances" to justify the unequal division of the marital property, the court stated that Husband "had the ability to earn many times what [Wife] earns," and that "by awarding the house to [Wife], the court reduced [Wife's] need for alimony." Moreover, the trial court made it clear that it was awarding Wife her hair cutting business in its entirety because it was her only source of income.¹

In *Newmeyer*, the Utah Supreme Court specifically noted that "the relative abilities of the spouses to support themselves after the divorce are pertinent to an equitable determination of the division of the fixed assets of the marriage." *Newmeyer*, 745 P.2d at 1279 n.1. Therefore, we conclude that the trial court's consideration of Husband's and Wife's earning capacities after the parties' divorce constituted an "exceptional circumstance[.]" *Bradford*, 1999 UT App 373 at P 27, justifying the unequal division of the parties' marital property. Accordingly, the trial court did not abuse its discretion by awarding Wife more of the marital property.

Husband next claims that the trial court abused its discretion by awarding alimony to Wife without properly determining his ability to pay. "Trial courts have considerable discretion in determining alimony . . . and [determinations of alimony] will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated." *Breinholt v. Breinholt*, 905 P.2d 877, 879 (Utah Ct. App. 1995) (first alteration in original) (citation omitted). When determining an award of alimony, a trial court is required to consider several enumerated factors including "the ability of the payor spouse to provide support." Utah Code Ann. § 30-3-5(7) (a) (iii) (Supp. 2002). Therefore, the trial court abused its discretion, if as Husband contends, it failed to properly consider his ability to pay. See *Marshall v. Marshall*, 915 P.2d 508, 516 (Utah Ct. App. 1996) (noting that trial court abuses its discretion when it fails to consider enumerated factors).

In determining his ability to pay, Husband does not dispute that the trial court correctly calculated his income. Rather, he argues that the trial court understated his monthly expenses by discounting his testimony that his monthly 401(k) loan payment was \$ 618, and allowing him instead only \$ 120 to cover the payment. After reviewing the record, we conclude that there is no evidence to support the trial court's finding that "\$ 120 per month . . . [was] a more reasonable payment." The only evidence, other than Husband's testimony, pertaining to Husband's loan repayment obligation is his retirement account statement, which reflects that Husband's scheduled repayment was \$ 308.49 per month immediately prior to the parties' divorce. For reasons that are not clear from the record, this amount was rejected by the trial court. Without additional information, it is impossible to ascertain whether the trial court's determination of Husband's expenses and consequent award of alimony constituted an abuse of discretion. Therefore, we remand for the entry of further findings detailing how Husband's monthly loan payment obligation was determined or, if there is no evidence to support the trial court's decision to reduce the 401(k) monthly payment to \$ 120, the trial court should adjust the payment to \$ 308.49 and recalculate the alimony award.

Finally, Husband argues that the trial court abused its discretion in ordering him to pay \$ 3500 of Wife's attorney fees (totaling \$ 4500 at the time of the parties' divorce). Husband does not dispute that the trial court considered Wife's ability to pay her attorney fees. However, he maintains that the trial court failed to consider the reasonableness of Wife's attorney fees and his ability to pay.

A trial court may award attorney fees and costs in divorce proceedings. See Utah Code Ann. § 30-3-3 (Supp. 2002). "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." *Shinkoskey v. Shinkoskey*, 2001 UT App 44, P 18, 19 P.3d 1005 (quotations and citations omitted). Therefore, "an [attorney fee] award must be based on sufficient findings," and the failure to make such findings "ordinarily requires remand for more detailed findings by the trial court." *Id.* (quotations and citations omitted).

Here, despite Husband's assertion to the contrary, the trial court considered his ability to pay. Prior to awarding Wife her attorney fees, the court specifically noted that Husband had an income of \$ 1100 per month. However, because we remand the issue of Husband's expenses and alimony obligation, we also remand for the trial court to determine Husband's ability to pay any of Wife's attorney fees incurred. In addition, there is no evidence that the trial court considered the reasonableness of Wife's attorney fees. Therefore, we also remand for the entry of findings detailing the reasonableness of Wife's attorney fees.

Wife seeks an award of attorney fees incurred on appeal. "Generally, when fees in a divorce case are awarded to the prevailing party at the trial court, and that party in turn prevails on appeal, then fees will also be awarded on appeal." *Id.* at P 20 (quotations and citations omitted). In this case, the trial court ordered Husband to pay a portion of Wife's attorney fees. On appeal, Wife has substantially prevailed, but not entirely. We therefore remand to the trial court to determine what, if any, portion of Wife's fees incurred on appeal is appropriate for Husband to pay and the reasonableness of such fees.

Pamela T. Greenwood, Judge

WE CONCUR:

Russell W. Bench, Associate Presiding Judge

Norman H. Jackson, Judge

Footnotes

Footnotes

- 1 The trial court also noted, based on Wife's testimony, that the entire balance in the business savings account was used to pay the business's expenses, thereby negating Husband's argument, unsupported by any evidence, that "there was nothing to offset against the value of the business assets."

Andra D. Betteridge, Petitioner and Appellee, v. Brent R. Betteridge, Defendant and Appellant.

COURT OF APPEALS OF UTAH

2004 UT App 50; 2004 Utah App. LEXIS 123

Case No. 20030065-CA

March 4, 2004, Filed

Notice:

NOT FOR OFFICIAL PUBLICATION

Editorial Information: Prior History

Third District, Salt Lake Department. The Honorable William B. Bohling

Disposition

Affirmed.

Counsel

Lisa A. Jones, Salt Lake City, for Appellant

Glen M. Richman and Barbara W. Richman, Salt Lake City, for

Appellee

Judges: James Z. Davis, Judge. I CONCUR: Judith M. Billings, Presiding Judge, Gregory K. Orme, Judge (concurring in part and dissenting in part)

Opinion

Opinion by: James Z. Davis

MEMORANDUM DECISION

Before Judges Billings, Davis, and Orme.

DAVIS, Judge:

Brent Betteridge (Husband) argues that the trial court abused its discretion in its award of alimony because (1) it did not make specific findings regarding his income; (2) it awarded Andra Betteridge (Wife) nine months of retroactive alimony; and (3) it did not impute summer income to Wife. Husband additionally argues that the trial court abused its discretion in its distribution of marital property. We affirm.

"In determining whether to award alimony and in setting the amount, a trial court must consider 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." *Rehn v. Rehn*, 1999 UT App 41, P 6, 974 P.2d 306 ; see Utah Code Ann. § 30-3-5(8)(a)(i)-(vii) (Supp. 2003)¹ (outlining factors that trial courts must consider when determining an alimony award). "If these factors have been considered, we will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion." *Kelley v. Kelley*, 2000 UT App 236, P 26, 9 P.3d 171 (quotations and citation omitted).

Husband does not challenge the trial court's findings, but asserts they are inadequate. The trial court made detailed findings regarding Husband's income and ability to pay the alimony award. The trial court found that Husband's annual pay varied because he "has historically been required to work mandatory overtime as part of his employment as a lineman and historically receives additional premium pay for overtime plus incentive bonus awards." The trial court correctly relied

upon Husband's historical earnings in determining the alimony award. See *Cox v. Cox*, 877 P.2d 1262, 1267 (Utah Ct. App. 1994) ("In assessing spousal support, trial courts have appropriately relied on historical income rather than income at the time of the divorce where a party has experienced a temporary decrease in income." (quotations and citations omitted)). Specifically, the trial court noted that Husband's average monthly gross earnings for the years 1998 through 2002 were \$ 6166.50, \$ 8496.34, \$ 7743.67, \$ 8715.17, and \$ 6200.84, respectively. The trial court found that Husband's year-to-date net monthly income for 2002 was \$ 2901.08 after taxes and deductions. Further, with respect to Husband's claim of \$ 3775.57 in living expenses, the trial court found, inter alia, that "based upon the testimony at trial and the evidence offered and accepted," Husband had "some exaggerated and inflated expenses in his budget line items," and subsequently determined that Husband had the ability to pay \$ 1600 per month in alimony. Because the trial court adequately considered the factors outlined in *Rehn*, see 1999 UT App 41 at P 6 , it did not abuse its discretion in concluding that Husband has the ability to pay the alimony award.

Next, Husband argues that by ordering nine months of retroactive alimony, the trial court abused its discretion because it impermissibly modified a temporary order that it had issued. Husband's argument is misplaced. The commissioner, in his recommendations and in his certification of the matter to trial, specifically reserved the issue of temporary alimony. Because this matter was reserved for disposition, no temporary order on alimony was in place, and thus the trial court did not abuse its discretion in awarding nine months of retroactive alimony.

Husband also argues that the trial court abused its discretion by not imputing summer income to Wife. "Imputing income to an unemployed or underemployed spouse when setting an alimony award is conceptually appropriate as part of the determination of that spouse's ability to produce a sufficient income." *Cox*, 877 P.2d at 1267 (quotations and citation omitted). "However, it cannot be premised upon mere conjecture; instead, it demands a careful and precise assessment requiring detailed findings." *Willey v. Willey*, 866 P.2d 547, 554 (Utah Ct. App. 1993). Husband presented no evidence that Wife had regular employment or that employment was available to her during the summer months, let alone evidence of prospective earnings.² Because Husband's argument was essentially "premised upon mere conjecture," the trial court did not abuse its discretion in refusing to impute summer income to Wife. *Id.*

Finally, Husband argues that the trial court abused its discretion in its distribution of marital property and debts.

We afford the trial court considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity. Accordingly, changes will be made in a trial court's property division determination in a divorce action only if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion.

Davis v. Davis, 2003 UT App 282, P 8, 76 P.3d 716 (quotations and citations omitted). The trial court received detailed testimony, exhibits, and charts from both Husband and Wife regarding their marital property and debts. Upon a review of the trial court's detailed and extensive findings supporting its division of marital property and debts, we conclude that the trial court did not abuse its discretion.

Wife seeks an award of attorney fees on appeal. Attorney fees are generally not awarded on appeal unless awarded below, except when an appeal is frivolous, or when a party demonstrates a "well-supported claim of changed circumstances." *Burt v. Burt*, 799 P.2d 1166, 1171 (Utah Ct. App. 1990) . Since attorney fees were not awarded below, and because Wife has not made a showing that Husband's appeal is frivolous, nor has she made a "well-supported claim of changed

circumstances," Wife is not entitled to attorney fees on appeal. *Id.*

Affirmed.

James Z. Davis, Judge

I CONCUR:

Judith M. Billings, Presiding Judge

Concur

Concur by: Gregory K. Orme, Judge

Dissent

Dissent by: Gregory K. Orme, Judge

I concur in the court's opinion except in one respect. Even without the kind of evidence the majority says Husband should have introduced if summer income was to be imputed to Wife, income should have been imputed, as a matter of course, at minimum wage, for a 40-hour week. Thus, I would remand with instructions to impute this minimal additional income to Wife, and to adjust the amount of monthly alimony as may then be appropriate. *See generally Reese v. Reese*, 1999 UT 75, P 13, 984 P.2d 987 (referring to statute that considers minimum wage to be default level for imputing income in child support cases in all but a few circumstances); *Ball v. Peterson*, 912 P.2d 1006, 1008 (Utah Ct. App. 1996) (noting, without criticism, that trial court imputed income to wife at minimum wage level in child support context); *Rasband v. Rasband*, 752 P.2d 1331, 1334 n.3 (Utah Ct. App. 1988) (noting alimony amount awarded by trial court was inadequate even with imputation of minimum wage income to wife).

Gregory K. Orme, Judge

Footnotes

Footnotes

- 1 We cite to the most current version of the alimony determination statute for convenience.
- 2 During oral argument, Husband's counsel even alluded to the adequacy of the findings respecting imputation of income.

Paula Jean Peterson, Plaintiff and Appellant, v. Kent Courtney Peterson, Defendant and Appellee.
COURT OF APPEALS OF UTAH
2001 UT App 51; 2001 Utah App. LEXIS 177
Case No. 990829-CA
February 23, 2001, Filed

Notice:

NOT FOR OFFICIAL PUBLICATION

Editorial Information: Prior History

Fourth District, Provo Department. The Honorable Ray M. Harding, Jr.

Disposition Vacated and remanded.

Counsel David A. McPhie, Salt Lake City, for Appellant.
A. Howard Lundgren, Salt Lake City, for Appellee

Judges: Gregory K. Orme, Judge. WE CONCUR: Pamela T. Greenwood, Presiding Judge, Russell W. Bench, Judge

Opinion

Opinion by: Gregory K. Orme

MEMORANDUM DECISION

Before Judges Greenwood, Bench, and Orme.

ORME, Judge:

Alimony is ongoing post-marital support paid to an ex-spouse. It is not payments voluntarily made to a spouse during marriage, even if the spouses live apart, and it is not "separate support and maintenance" ordered to be paid pending resolution of the divorce proceeding in accordance with Utah Code Ann. § 30-3-3(3) (1998), although such support is sometimes casually referred to as "temporary alimony." Thus, despite verbiage suggesting otherwise in the findings of fact, this really appears to be a case where no alimony was awarded, and the question before us is whether failure to award alimony was an abuse of discretion. *Butsee Thomas v. Thomas*, 1999 UT App 239, PP 13-15, 987 P.2d 603 (affirming "an award of alimony that ended before it began," because trial court gave credit for temporary alimony paid by appellee, where appellant's "transition into her new life . . . was complete" and appellant "had no need of alimony beyond that paid . . . under the temporary support order"). We are unable to make that determination because the trial court's findings of fact, while detailed in many respects, are inadequate, essentially because they are incomplete, as hereafter explained.

The court found that petitioner earns \$ 600 per month, not counting social security income for the benefit of her adult daughter, and had reasonable monthly expenses of \$ 2,415. However, petitioner concedes that some unspecified part of these monthly expenses is attributable to her daughter. Those expenses are not relevant to alimony calculation. Moreover, while findings 28-34 seem wholly irrelevant except in the context of imputing additional income to petitioner, and indeed strongly suggest the propriety of imputing such income to her, no specific amount of

income is imputed to petitioner.

Because of the intricacies of respondent's income and expense picture, the unadorned findings that respondent's monthly income is \$ 3,449, and thus less than his reasonable monthly expenses of \$ 3,878, are also inadequate. To evaluate the propriety of those findings, we must know how they were derived, i.e., what expenses are included in the expenses total and how the income figure was determined. In connection with the income, it is particularly important that the trial court explain how it dealt with overtime compensation and historical income.

The various findings touching upon the duration of the marriage and respondent's relocation are perplexing. The finding that the parties' marriage "was effectively over as of August 1994" is clearly erroneous given, if nothing else, respondent's continued voluntary support of petitioner. Insofar as the trial court's purpose was to limit the number of years for which alimony could be awarded, Utah Code Ann. § 30-3-5(7)(h) (Supp. 2000) merely sets a maximum duration, and the court is free to award alimony for a shorter duration in the exercise of its sound discretion. Moreover, while we see no basis on which the trial court may fictionalize the length of the marriage for purposes of section 30-3-5(7)(a)(iv) , we acknowledge that under section 30-3-5(7)(b) the circumstances leading to termination of the marriage, and each party's responsibility therefor, may well be germane. We also recognize that whether a marriage is of "short duration" for purposes of section 30-3-5(7)(c) & (f) is a relative and a factual matter, not an absolute and a legal one.

In conclusion, a more systematic approach on remand will better enable us to evaluate whether the trial court properly exercises its discretion to award -- or not to award -- alimony. The court should first find petitioner's earning capacity, including imputation of additional income if she is voluntarily underemployed. Then it should find her reasonable monthly expenses, taking into account the standard of living enjoyed during the marriage and excluding amounts attributable to the support of her adult daughter. If there is no shortfall between her reasonable expenses and earning capacity, the court's inquiry is at an end. See *Bingham v. Bingham*, 872 P.2d 1065, 1068 (Utah Ct. App. 1994) (noting "that the spouse's demonstrated need must . . . constitute the maximum permissible alimony award"). If there is a shortfall, the court should proceed to find respondent's actual expenses and then make whatever adjustment is necessary to find his reasonable expenses. It should then determine the amount of his income, fully spelling out its assumptions, adjustments, and calculations. If his reasonable expenses exceed his adjusted income, he presumably should not pay alimony other than as may be necessary "to equalize the parties' standards of living . . . [if this is a case] in which insufficient resources exist to satisfy both parties' legitimate needs." *Williamson v. Williamson*, 1999 UT App 219, P 11, 983 P.2d 1103 . If his adjusted income exceeds his reasonable expenses, alimony should presumptively be ordered. However, alimony is never automatic, and if considerations spelled out in section 30-3-5 , applicable case law, or principles of equity suggest otherwise, the presumptive amount may be reduced or restricted in duration, all as may be appropriate under the circumstances. However, determining that such adjustments are within the bounds of sound discretion is possible only if the trial court's rationale is spelled out with care.

The findings of fact entered by the court are vacated and the case is remanded for the entry of findings more fully explaining the rationale for the trial court's determination concerning alimony, and for such amendment to the alimony determination as the revised findings may suggest.

Gregory K. Orme, Judge

WE CONCUR:

Pamela T. Greenwood, Presiding Judge

Russell W. Bench, Judge

Scott Eugene Madsen, Plaintiff and Appellant, v. Shauna Marie Bullock Madsen, Defendant and Appellee.

**COURT OF APPEALS OF UTAH
1998 Utah App. LEXIS 180
Case No. 971680-CA
November 19, 1998, Filed**

Notice:

NOT FOR OFFICIAL PUBLICATION

Editorial Information: Prior History

Second District, Farmington Department. The Honorable Michael G. Allphin

Disposition Affirmed in part and reversed in part; remanded for further proceedings.

Counsel Phillip W. Dyer and Kevin C. Timken, Salt Lake City, for Appellant
D. Michael Nielsen and David J. Peters, Bountiful, for Appellee

Judges: Pamela T. Greenwood, Judge. WE CONCUR: Michael J. Wilkins, Associate Presiding Judge, Gregory K., Judge

Opinion

Opinion by: Pamela T. Greenwood

MEMORANDUM DECISION

Before Judges Wilkins, Greenwood, and Orme.

GREENWOOD, Judge:

Scott Eugene Madsen appeals the trial court's award of alimony and attorney fees. We affirm in part and reverse in part and remand for further findings on the awards of alimony and attorney fees.

Alimony

We will not disturb a trial court's award of alimony unless "a clear and prejudicial abuse of discretion is demonstrated." *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah Ct. App. 1988) . Although trial courts are given broad latitude in awarding alimony in a divorce proceeding, an award of alimony unsupported by sufficient findings constitutes an abuse of discretion. In this case, the trial court listed Mr. Madsen's expenses without explaining the reason for reducing some of the amounts from those submitted by Mr. Madsen. Although a trial court need not accept as true the financial statements of a party simply because the statement is received into evidence, see *Willey v. Willey*, 951 P.2d 226, 231 (Utah 1997) , it is required to support, with appropriate findings of fact, any adjustments made to the uncontroverted financial statements of a party. Cf. *Marchant v. Marchant*, 743 P.2d 199, 207 (Utah Ct. App. 1987) (holding trial court abused discretion by rejecting, without explanation, plaintiff's claim for alimony). Therefore, we remand this issue to the trial court for appropriate findings and any necessary adjustment in the alimony award.

Similarly, Mr. Madsen challenges the trial court's refusal to include property taxes, insurance and maintenance costs in his monthly expenses. The undisputed evidence submitted was that Mr. Madsen is responsible for these expenses. In addition, because Mr. Madsen has legal title to the home as a joint tenant and is obligated on the mortgage,¹ he is legally responsible for taxes, insurance and maintenance costs on the home. Therefore, the trial court erred as a matter of law in refusing to include these costs in Mr. Madsen's monthly expenses. See *Massey v. Prothero*, 664 P.2d 1176, 1178 (Utah 1983) (holding all cotenants owe a duty to pay taxes).² Therefore, on remand, the trial court should include \$ 147 in Mr. Madsen's monthly expenses, and adjust the alimony award accordingly.

Mr. Madsen further argues the trial court erred in awarding alimony without considering the length of the marriage, as required under Utah Code Ann. 30-3-5(7)(a)(iv) (Supp. 1998). We disagree. In awarding alimony "in the sum of \$ 550.00 per month for a period equal to the length of thirty-five months, which was the length of the parties' marriage," the trial court clearly considered the length of the marriage in awarding alimony. Additionally, we believe the trial court properly considered the relevant factors in awarding alimony, see *Lee v. Lee*, 744 P.2d 1378, 1382 (Utah Ct. App. 1987) , and therefore did not abuse its discretion regarding this issue.

Mr. Madsen also contends it was error for the trial to consider fault in awarding alimony to Mrs. Madsen. He contends a trial court may not consider fault in awarding alimony because the purpose of alimony is to provide spousal support, not to punish either of the parties. See *English v. English*, 565 P.2d 409, 411 (Utah 1977) . While it is true that Utah courts have consistently held that the purpose of alimony is for spousal support, the Utah Legislature has recently enacted a statute stating that trial courts "may consider fault of the parties in determining alimony." Utah Code Ann. 30-3-5(7)(b) (Supp. 1998) (emphasis added). Thus, the cases cited by appellant which pre-date the statute are inapposite and the trial court acted within its discretion in considering Mr. Madsen's acts of violence which lead to the destruction of the marriage.

As a final challenge, Mr. Madsen argues the trial court was required to restore the parties to their financial condition before the marriage, pursuant to Utah Code Ann. 30-3-5(7)(f) (Supp. 1998). We disagree because this argument is contrary to the statute's plain meaning. See *In re Worthen*, 926 P.2d 853, 866 (Utah 1996) (holding court must first look to plain meaning when interpreting statute.) Section 30-3-5(7)(f) provides "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. " Utah Code Ann. 30-3-5(7) (Supp. 1998) (emphasis added). The term "may" is permissive and gives the trial court discretion to restore the parties to their condition prior to the marriage. See *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah Ct. App. 1992) (citation omitted) (holding "may" is permissive and "should receive that interpretation unless such a construction would be obviously repugnant to the intention of the Legislature or would lead to some other inconvenience or absurdity."). Thus, the trial court acted within its discretion in awarding alimony and distributing property without restoring the parties to their condition prior to the marriage.

Attorney Fees

Mr. Madsen challenges the trial court's award of \$ 2,000 contending the amount was unreasonable. The decision to award attorney fees in divorce proceedings and the amount of those fees is within the sound discretion of the trial court. See *Crouse v. Crouse*, 817 P.2d 836, 840 (Utah Ct. App. 1991) . Consequently, we review the decision to award attorney fees under an abuse of discretion standard.

At trial, Mrs. Madsen's attorney presented testimony explaining why \$ 3,900 in fees was a

reasonable charge in this case. Based on this testimony and on its finding that Mr. Madsen has equity in the Bountiful home, the trial court ordered him to pay \$ 2,000 in attorney fees. Because the trial court failed to explain its reduction in the amount of fees requested, and did not specify in its findings why \$ 2,000 was reasonable, we remand this issue to the trial court for further findings supporting its award.³ See *Foxley v. Foxley*, 801 P.2d 155, 158 (Utah Ct. App. 1990) (reversing award of attorney fees where there was "no admissible evidence in the record to substantiate the reasonableness of amount awarded"); *Martindale v. Adams*, 777 P.2d 514, 517-18 (Utah Ct. App. 1989) (holding error to award less attorney's fees than requested "without finding the request unreasonable or offering any explanation as to the basis for the reduction.").

Finally, Mrs. Madsen requests attorney fees on appeal. Because she has only prevailed in part on appeal, we hold that each party is responsible for his or her own attorney fees. See *Marshall v. Marshall*, 915 P.2d 508, 517 (Utah Ct. App. 1996) (holding "generally, when fees in a divorce case are granted to the prevailing party at the trial court, and that party in turn prevails on appeal, then fees will also be awarded on appeal.").

Conclusion

We reverse the trial court's refusal to include property taxes, insurance and maintenance costs in Mr. Madsen's monthly expenses. We remand for appropriate findings and adjustment of the awards of alimony and attorney fees. In all other respects, we affirm the trial court's ruling.

Pamela T. Greenwood, Judge

WE CONCUR:

Michael J. Wilkins, Associate Presiding Judge

Gregory K. Orme, Judge

Footnotes

Footnotes

1 We note that the trial court's finding that Mr. Madsen was not responsible for these costs is entirely inconsistent with the finding that he has the ability to pay attorney fees because he has equity in the home which he can borrow against.

2 Any testimony by Mr. Madsen's mother that she intended to convey title to him only after her death does not change the legal impact of the Quit Claim Deed she executed.

3 The trial court may consider Mr. Madsen's motion to admit into evidence the affidavit of attorney fees.