

2006

James Lewis Kimball v. Merae Kimball : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES LEWIS KIMBALL,)	BRIEF OF APPELLEE and
)	CROSS-APPELLANT
Petitioner/Appellant,)	
v.)	
)	Appellate Court No. 20060263-CA
MERAE KIMBALL,)	
)	Trial Court No 024901659DA
Respondent/Appellee)	
and Cross-Appellant.)	

MERAE P. KIMBALL,)	
)	
Plaintiff/Appellee,)	
v.)	Appellate Court No. 20070858
)	
JAMES L. KIMBALL,)	Trial Court No. 030902885
)	
Appellant/Defendant.)	

CONSOLIDATED CASES
APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY.
JUDGE JOSEPH C. FRATTO, JR.

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ABBREVIATIONS

The following abbreviations have been used in this brief:

Divorce Case	The divorce action assigned to the Honorable Joseph C. Fratto, Jr. bearing civil no. 024901659 DA
Fraud Case	The action brought for fraud and unjust enrichment assigned to the Honorable Joseph C. Fratto, Jr. and bearing civil no. 030902885.
James	James Lewis Kimball, the Petitioner below in the divorce case, the Defendant in the fraud case, and the Appellant in these proceedings.
Merae	Merae Kimball, the Respondent below in the divorce case, the Plaintiff in the fraud case, and the Appellee and Cross Appellant in these proceedings.
U R Civ P	Utah Rules of Civil Procedure.
Tr	Transcript of divorce trial testimony.
Ex	Divorce trial exhibit.
R	Divorce trial court pleadings.
F Tr	Transcript of fraud testimony.
FEx	Fraud trial exhibit.
Fr	Trial court pleadings in fraud case
Ruling Hearing	Transcript of the ruling hearing held on May 24 th , 2005.
1005 Shares	1005 shares of preferred stock of Utah Bearing and Fabrication Company, a Utah corporation, received

	by Merae from her father, Franklin Pardoe, the founder of the company.
Fidelity Account	An investment account with Fidelity Investment Company, opened by Merae in February of 1996.
Jay Rice Account	A joint investment account with American Investment opened by the parties and funded by Merae from her Fidelity Account.
Lori Kay Home	A home and real property located in Holladay, Utah, purchased in September of 1997 and sold in October of 1998.
Odd Piece of Lori Kay Property	An unimproved parcel of land, located at Holladay, Utah and jointly held by James and Merae at the time of trial.
Replacement Suburban	The 1997 Chevrolet Suburban purchases from Larry H. Miller Chrysler Jeep, to replace the Suburban destroyed in an accident.

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to Utah Code Ann: 78-2a-3 (2)(h)(Supp. 2001)

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

The trial court action was tried upon the facts, without a jury, and as required by Rule 52 (a) of the U R Civ P, the trial court entered findings of fact, conclusions of law, and an amended decree of divorce.

STATEMENT OF THE ISSUES ON CROSS APPEAL, STANDARDS OF REVIEW, AND PRESERVATION AT TRIAL COURT

The issues raised in Merae's cross-appeal are as follows:

1. Was there sufficient evidence presented at trial to support the finding that the money received by James from forging and altering Merae's checks was used for family purposes benefitting all members of the family, including James?

2. Did the trial court err in denying Merae's Rule 59 (b) motion to amend the findings of fact, conclusions of law, and amended decree of divorce a) to find that James used the \$142,647 he obtained by forging and altering Merae's checks for non-family purposes and b) to grant judgment in the amount of \$142,647 in Merae's favor and against James?

3. Did the trial court err in finding that Merae should be held in contempt of court for violating court orders?

Standard of Review: The standard of review applicable to the three issues stated above is the Clearly Erroneous Standard. A finding of fact is clearly erroneous if it is against the clear weight of the evidence. See *Cummings v. Cummings*, 821 P. 2d 472, 476 (Utah App. 1991). As to the contempt issue, see *Von Hake v. Thomas* 759 P. 2d 1162, 1172 (Utah 1988).

Issue preservation in trial court: The issues stated above were preserved in the trial court by Merae's motion to amend findings of fact and conclusions of law, and amended decree of divorce, see R 3751.

4. Did the trial court err in deciding not to award sanction against James' counsel under Rule 11 (b) (3) of the U R Civ P?

Standard of Review: The standard of review applicable to this issue is the Correction of Error Standard. Whether specific conduct amounts to a violation of Rule 11 is a question of law, therefore, an appellate court reviews the trial court's determination that a violation has occurred, for correctness. See *Rimensburger v. Rimensburger*, 841 P. 2d 709, 711 (Utah App. 1992).

Issue preservation in trial court: The issue stated above was preserved in the trial court by Merae's motion for sanctions under Rule 11 of the U R Civ P, see R 3820.

STATEMENT OF THE CONSOLIDATED CASES

The subjects of this consolidated appeal are two bench trials presided over by the Honorable Joseph C. Fratto, Jr. The first, a divorce lawsuit, the "divorce case" herein, was brought by James Lewis Kimball, "James" herein, against his wife, Merae Kimball, "Merae"

herein. James appealed. The second case was brought by Merae, against James for fraud and unjust enrichment, the “fraud case” herein. James appealed.

The divorce case involved custody of the parties’ four children and money. The custody issue was resolved prior to the trial by a stipulation of the parties that was approved by the trial court and reduced to an order, see R 3526.

The fourteen day bench trial that followed was about the money remaining in Merae’s Fidelity Account when the parties separate in February of 2002. While there were ancillary issues, the primary claim made by James was that the Fidelity Account money was a marital asset because it did not result from a gift, nor was it inheritance, and if it was inheritance, it was co-mingled. James also made a claim for his attorney’s fees.

Merae claimed that the Fidelity Account money was a result of her sale of the 1005 Shares she received from her father, and that it was never her intent to make those funds a part of the marital estate. She also claimed that she is entitled to a judgment against James for \$160,467 because he altered and forged her name on her Fidelity Account checks. Under cross-examination, James admitted to altering and forging Merae’s Fidelity Account checks but claimed he was entitled to do so because he and Merae were married, and that he used the money he obtained through altering and forging Merae’s checks for family purposes.

After hearing the evidence, the trial court ruled 1) that the 1005 Shares were Merae’s inheritance, 2) that the funds in Merae’s Fidelity Account at the time the parties separated were

not part of the marital estate, 3) that James had, without authorization, forged and altered Merae's Fidelity Account checks and used the money for family purposes. The court did not award James attorney fees because James did not prevail on the main issue of the case and because the fees were unreasonable and unnecessary.

James filed an appeal challenging the trial court's findings, claiming, among other things, that the findings of fact should not have been signed because they do not correspond with the findings and rulings of the trial court.

In response, Merae filed a cross-appeal claiming, among other things, that she is entitled to a judgment against James for \$142,467 representing the money he took from altering and forging her checks.

The fraud case was brought by Merae against her banks under §70A-4-401 Utah Code Ann. (Supp. 1993), because they processed and paid checks on her Fidelity Account that had been altered and forged, and against James for fraud and unjust enrichment, because he altered and forged checks on her Fidelity Account and took the money.

Merae's claims against her banks were dismissed pursuant to pretrial motions because the statute of limitations had run and her claim against James for fraud was dismissed at trial. However, after hearing the evidence, the trial court ruled that 1] James, without the consent or knowledge of Merae and without any right so to do, took Merae's money by either altering check amounts or drawing checks with James or "Cash" as the payee, by forging the signature of

Merae 2] James was unjustly enriched in that he took money to which he was not entitled 3] James' actions constitute theft and forgery and he deceived Merae into believing he was working 4] Merae relegated administration of the family finances and investments to James and she did not participate in their day-to-day management 5] James took improper advantage of his managerial position and Merae's minimal participation and oversight 6] At least for the altered checks and those made payable to James or "Cash", the proceeds were not used to financially support James' family 7] These are the circumstances and the "misleading acts" that would make it inequitable for James to retain the proceeds 8] It is reasonable that Merae be awarded a judgment against James in the sum of \$56,800 together with pre-judgment interest on each check from the date thereon, if the date is visible, to the date of judgment and, thereafter, at the legal rate.

STATEMENT OF FACTS

James has apparently either misunderstood or ignored his duty, as a matter of law and as the appellant in these consolidated cases, to marshal the evidence. "The appealing party has the burden of marshaling the evidence in support of the verdict [ruling] and then showing that it is insufficient." Fitz v. Synthes (USA), 990 P.2d 391, 393 (Utah 1999). In his Brief, rather than meeting his burden of marshaling the evidence, James selectively presented as "facts" those portions of testimony that are most favorable to his argument on appeal while, at the same time, omitted critical evidence supporting the trial court's findings. Thus, James has failed in his duty

to marshal (as is discussed further below). As a consequence, Merae has identified below certain critical facts (with citations to the Record) that support the trial court's findings. While not exhaustive as to James' appeal (since Merae does not have the marshaling burden in that respect), the facts presented below were adduced at trial and lend support to the trial court's findings, but were otherwise ignored by James in his recitation of selective material facts.

As to the cross-appeal, the marshaling requirement is a little different. In that respect, the trial court 1) denied Merae's Rule 59 (b) motion and ruled that there was sufficient evidence presented at trial to support a finding that James used the proceeds he obtained by forging and altering Merae's checks for family purposes, 2) denied her demand for a judgment in the amount of \$160,467 against James, 3) ruled that Merae was in contempt of court for violating court orders relative to visitation, and 4) denied Merae's motion for sanctions against James' counsel under Rule 11 (b)(3) of the U R Civ P.

The evidence presented at trial relative to the finding that James used, for family purposes, the proceeds he obtained by forging and altering Merae's checks, is:

1. On February 26th, 1996, Merae opened the Fidelity Account, see Page 2 of Ex R 9, 10, 15, 16, 17, and 18.
2. Merae's Fidelity Account was an "individual account", not a joint account with James, see Ex R 12.

3. James testified that the Fidelity Account was opened to hold monies from the sale of the 1005 Shares, see Tr 890 L 11-12.

4. James knew that the Fidelity Account was Merae's individual account, see Tr 1283 L 10-25.

5. Merae claims that she never gave James the authority to sign her name on Fidelity Account checks, see Tr 1510 L 1-3.

6. James claims that he had "trading privileges" on the Fidelity Account, see Tr 892 L 1, but produced no documentation to support his claim, see Tr 892 L 22-25, Tr 893 L 5.

7. James claimed that he could sign his own name on Fidelity Account checks, see Tr 897 L 2-4, Tr 1313 L 24, and Tr 1314 L 1-3, but produced no documentation to support his claim.

8. James never signed his name to a Fidelity Account check but forged Merae's name on several Fidelity Account checks, see Ex R 13, 14 and P 1933, 1934, 1935, 1937, 1939, 1940, 1941 and 1942 and FEx P 1-42.

9. Between June of 1999, and August of 2000, Merae gave James six \$1,000 checks on her Fidelity Account, that she had signed and made payable to James, see Ex R 13.

10. On December 8th, 2004, James stated, under oath, when asked if he altered Ex P1936, "Ummm, one of us did," see Tr 923 L 21-25.

11. On December 15th, 2004, during the divorce trial, James admitted, under oath, that he altered Ex P 1936 and other checks given to him by Merae, by changing the arabic number "1" to a "4", and writing an "F" in front of the "One" and cashing them, see Tr 1277 L 13-16.

12. Between June of 1998 and December of 2001, James forged Merae's signature on her Fidelity Account checks, and deposited or cashed them, see Ex R 14.

13. The total amount of funds received by James, from altering and forging Fidelity Account checks, was \$142,467, see Ex R 13 and Ex R 14.

14. None of the checks had notations on them, describing the reason the check was written or issued, see Ex R 13 and Ex R 14.

15. James testified that the funds he received from forging and altering checks in the Fidelity Account, were used for "maintenance of our home, recreation, food, clothing, medical needs, and other costs associated with running our household", see Tr 951 L 7-10, Tr 952 L 22-24, Tr 957 L 17-21, Tr 959 L 1-2, Tr 960 L 16-18, Tr 962 L 25, and Tr 963 L 1-2.

16. James did not present receipts, invoices, or other documents showing how he utilized the \$142,467.

17. James did not tell Merae what he did with the \$142,467, see Tr 1512 L 1-4.

18. James claimed that he had authority to sign Merae's name on her Fidelity Account checks, because "We were a couple, we were married, we were a unit, I don't know". See Tr 1316 L 16.

The evidence presented at trial, relative to the finding that Merae was in contempt of court for violating court orders relative to visitation, is:

1. Commissioner Bradford certified the issue of Merae's contempt relative to visitation, on one occasion prior to the date that the parties reached a stipulation that settled all disputes

between them relative to child custody, parent-time, and related matters, see recommendation dated 9/15/03.

2. On November 29th, 2004, the parties entered into a stipulation and agreement relative to custody of the minor children, parent-time, and related matters, and their agreement was memorialized by the trial court's order dated March 10th, 2005, see R 3526.

3. At paragraph 12 of the order, it is stated that all matters related to custody of the minor children and related matters were settled, and that the only issues reserved for trial were:

A. The issue of the costs of Special Master are reserved, if no settlement of the same.

B. The issue of costs concerning the custody evaluator, court-appointed evaluation, including the costs for any and all experts from both parties concerning the custody portion of this matter are hereby reserved.

C. The issue of child support is reserved, if no settlement of the same.

The evidence set forth in the trial court record, relative to the court's order by minute entry, dated February 21st, 2006, R 4063, stating that James' counsel did not mislead the court, is as follows:

1. Ex R 6 was filled out by James, see Tr 1278 L 15-21.
2. The document was signed by James, on December 29th, 2000, see Tr 1278 L 25 and Tr 1279 L 1-2.

3. Testimony given by David Ingles, a representative of the Larry H. Miller Group, was to the effect that Ex R 6 was completed by James and submitted to the Larry H. Miller Group and Zions Bank in connection with his request for a loan to purchase a 1997 Chevrolet Suburban, see Tr 1387 L 15-22 and Tr 1388 L 5-12. (This was the Replacement Suburban.)

4. The last line of the “Applicant” section of Ex R 6, states that James’ trade or occupation is “sales” and his gross monthly income is “\$60,000.”

5. Section VIII “Credit Application”, at page 13-14 of the memorandum signed by Wendy J. Lems, attorney for James, on November 10th, 2005, R 3842-3, states that “At time of trial, the Petitioner testified that the “per month” reference on his credit application meant “per year” and such was a mere inadvertence.”

6. A thorough review of the trial transcript of the testimony of James shows that the statement of James set forth in Ms. Lems November 10th, 2005 memorandum does not exist.

7. The only testimony given by James, at the trial concerning his income, was that between 1989 and 1993, the household brought in \$60,000 plus on an average year, see Tr 718 L 1.

SUMMARY OF THE ARGUMENT

James, who is the Appellant in both appeals, has failed to marshal all the evidence supporting the trial court’s findings in both the divorce case and the fraud case and then demonstrate that, despite such marshaled evidence, the findings are against the clear weight of the evidence. Instead, he has selectively presented and skewed evidence to support his arguments

on appeal in effect rearguing the merits of his case before this appellate court. There was insufficient evidence presented at trial to show that James used the money he received from forging and altering Merae's checks for family purposes. Therefore, the ruling of the trial court on this point should be reversed and Merae should be awarded a \$142,467 judgment against James.

In the parties' settlement of the custody issues, the questions of Merae's contempt were not reserved for trial, therefore, they should not have been considered and ruled upon by the trial court.

Evidence presented to the trial court by Merae's motion under Rule 11 U R Civ P clearly shows that James' counsel intentionally misrepresented a material fact to mislead the trial court and should have been sanctioned.

James has also failed to marshal all of the evidence supporting the trial court's findings in the fraud case.

ARGUMENT

I. JAMES HAS FAILED TO MEET HIS BURDEN OF MARSHALING THE EVIDENCE.

In challenging the rulings of the trial court and the rulings' associated factual findings in the two cases consolidated on appeal, James must proceed in two steps. First, he must marshal all the evidence that supports the rulings. Second, he must then demonstrate that, despite the marshaled evidence, the rulings and associated findings are so lacking in support as to be

“against the clear weight of the evidence” and, thus, clearly erroneous. See *Doelle v. Bradley*, 784 P.2d 1176, 1178 (Utah 1989); see also *Grayson Roper Ltd. Partnership v. Finlinson*, 782 P.2d 467, 470 (Utah 1989).

Furthermore, James has a high standard to meet in marshaling the evidence. “In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists.” *Interiors Contracting, Inc. v. Smith, Halander & Smith Assocs.*, 881 P.2d 929, 933 (Utah App. 1994) (emphasis in original, *quoting West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 (Utah App. 1991)). “Once appellants have established every pillar supporting their adversary’s position, they then ‘must ferret out fatal flaw in the evidence’ and show why those pillars fail to support the trial court’s findings.” *Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1053 (Utah App. 1994), *quoting West Valley*, 818 P.2d at 1314. An appellant fails to meet his burden of marshaling where he ignores evidence supportive of a jury’s verdict [or rulings of the trial court] and associated findings, and instead selectively marshals only evidence supportive of his position, since to do so is tantamount to improperly rearguing the merits of his case before the appellate court. *Interiors Contracting, supra* and *Oneida, supra*. Therefore, when an appellant fails to adequately marshal the evidence for the reviewing appellate court, that court should “refuse to consider the merits of challenges to the findings and accept the findings as valid.” *Mountain States Broadcasting v. Neale*, 783 P.2d 551, 553 (Utah App. 1989)

James' appeal questions whether the trial court abused its discretion on several issues. Ergo, James must successfully challenge the factual findings upon which the trial court's decision depended.

When parties appeal a court's fact-sensitive use of its discretionary powers, they "must successfully challenge the factual findings upon which the trial court's decision... depended." *Chen v. Stewart*, 2004 UT 82, n. 14 100 P.3d 1177. This requires that parties marshal the evidence. As we have previously explained, parties who ask this court to consider fact-sensitive questions- including those questions reviewed under an abuse of discretion standard- have a duty to marshal all the evidence that formed the basis for the trial court's ruling. *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2005 UT 35, 140 P.3d 1200, 1208-09.

Even where the defendants purport to challenge only the legal ruling, as here, if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the defendants also have a duty to marshal the evidence. *Chen v. Stewart*, 2004 UT 82, ¶ 20, 100 P. 3d 1177. Where an appellant fails to so marshal the evidence, we need not consider the challenge to the sufficiency of the evidence. See *Tanner v. Carter*, 2001 UT 18 ¶17, 20 P.2d 332. *Cache County v. Beus*, 128 P.3d 63 (Utah App. 2005).

Therefore, if a party does not meet their marshaling requirement, then the appellate court may presume that the findings were valid and affirm those findings. Then, once the appellate court affirms the findings of fact, then they also may affirm the trial court's conclusion that arose from those facts.

As is apparent from a comparison between Merae's "Statement of Facts" section above and the selective "Statement of Facts" adduced by James in his brief, a number of important pieces of evidence presented to the trial court and supportive of the trial court's findings were not

cited by James in his brief. Instead of presenting such supportive evidence and attempting to demonstrate its insufficiency, James presented this appellate court with the selective version of the facts that James thinks the trial court should have accepted at the trial. In other words, James selected facts favorable to his theory of the consolidated cases, while wholly ignoring those facts supportive of the findings of the trial court. Rather than properly marshaling the evidence as required, James selectively presented facts favorable to his argument on appeal in a misplaced and inappropriate effort to reargue the merits of his case before this appellate court. Because James has failed in his basic threshold duty on appeal to properly marshal the evidence, the trial court's findings on both cases consolidated on appeal must stand.

Additionally, James not only failed to cite certain material facts supportive of the findings of the trial court, he goes a step further to actually misrepresent or skew the nature of certain facts adduced in his brief. In analyzing James' arguments as contained in his brief, it should be noted that a number of them are built on assumptions that he reached in his arguments before the trial court, but which the trial court did not accept and in fact, are contradicted by testimony.

Some examples are:

1. In James' Fact No. 4, the claim is made that during their marriage, the parties enjoyed and extravagant and luxurious lifestyle, and traveled all over the World and U.S. This statement is misleading because it omits the following material facts:

- A. Prior to March of 1995, when Merae sold her 1005 Shares, the parties had no savings, no boat, drove high-mileage used cars, the checks to pay their monthly

house payment bounced on at least two occasions, and their checking account at Bank One was frequently overdrawn and checks returned, see Tr-1295 L 24-25, Tr 1296 L 1-25.

B. After Merae sold her 1005 Shares, the parties drove new automobiles, purchased a 26 foot Sea Ray boat, became members of the University of Utah Crimson Club, enjoying its associated benefits, and had savings accounts, treasury bills, the Fidelity Account, and enjoyed, with their four children, cruises, vacations, and sporting events wherever they were played, see Tr-1297-8.

2. It is represented at James' Fact No. 4, that the parties' "jet-set" lifestyle was funded, in part, by James' salary and commissions. This statement is untrue because James did not earn enough money to contribute to the parties' lifestyle, see Tr 1298 L 20-25.

A. James earned \$2,391 in 1998, see Ex P1346.

B. James earned -\$61 in 1999, see Ex P1350.

C. James earned \$600 in 2000, see Ex P1354.

D. James earned \$1,748 in 2001, see Ex P1358.

3. One other area where James misrepresents the facts by omitting to state material facts related to the issue is set forth at Point II on page 36 of his Brief. James states that " he filed a Rule 60 (b) motion.... because the findings of fact drafted by Merae's counsel, did not accurately reflect the trial court's rulings". This statement fails to state facts material to the issue, which are:

A. At the conclusion of the ruling hearing, the trial court directed Merae's counsel to draft the findings of fact, conclusions of law, and an amended decree of divorce* reflecting the court's rulings.

B. The papers were prepared by Merae's counsel and hand-delivered to James' counsel on September 6th, 2005.

C. James' counsel filed no timely objections to the papers under Rule 7 (f)(2) of the U R Civ P, and on September 19th, 2005, the trial court signed the papers, on September 20th, the clerk entered them, R 3726, and on September 21st, the amended decree of divorce was entered in the registry of judgments, R 3746.

D. On November 10th, 2005, James filed objections to the papers, see R 3882.

E. The only post-trial motion filed by James was the Rule 60 (b) motion submitted on November 10th, 2005, claiming that the papers filed by Merae's counsel did not accurately reflect the trial court's rulings, see R 3901.

F. Merae filed a timely response to James' motion asserting that James waived his right to object to the papers filed by Merae's counsel because he did not file timely objections as allowed by Rule 7 (f)(2) of the U R Civ P, see R 3923, and that a Rule 60 (b) motion was an inappropriate means of objecting to the papers, see R 3923.

* An amended decree was appropriate because a bifurcated decree of divorce was signed on July 7th, 2003, see R 1171.

G. The trial court denied James' Rule 60 (b) motion on February 21st, 2006, stating, in part, that the papers correctly capture the court's findings, see R 4063.

4. James' Brief at page 34 states that the trial court made no findings regarding the \$460,000 received from the sale of the Lori Kay Home. This statement is untrue and again constitutes improper marshaling.

At the ruling hearing, the trial court found that the \$460,000 (\$406,142.55 net) was Merae's sole and separate property and gave the following reasons for that finding, see Ruling Hearing P 4 and 5.

A. The funds used to purchase and remodel the Lori Kay Home were Merae's.

B. When the Lori Kay Home was sold, the funds went back to Merae and every action taken thereafter was that the funds were hers.

C. James made no objection that the funds be placed back into Merae's account.

D. James made no claim on the funds.

E. It appears that James assented to the fact that these were Merae's funds that had purchased and remodeled the Lori Kay Home and that on sale, Merae was entitled to the proceeds.

The Court's rulings relative to the \$460,000 are set forth in the following findings, see R 3731 and 3732.

40. During September of 1997, the parties purchased a home on Lori Kay Drive, Holladay, Utah, the “Lori Kay Home” herein, and a vacant lot hereinafter referred to as the “Odd Piece of the Lori Kay Property”, for \$379,964.67.

41. The entire purchase price was paid by the Respondent from funds in the Fidelity Account.

42. The Lori Kay Home was remodeled and the entire cost of remodeling was paid by the Respondent from funds in the Fidelity Account.

43. The Lori Kay Home was sold in October of 1998 for \$406,142.55 after real estate commissions and closing costs were paid.

44. The Odd Piece of the Lori Kay Property was not sold and, at the time of trial, was held jointly by the parties.

45. The net proceeds of the sale of the Lori Kay Home were deposited in the Fidelity Account and every action taken thereafter shows that the funds were the Respondent’s sole and separate property.

46. Petitioner made no objection that the funds received from the sale of the Lori Kay Home be placed back into the Fidelity Account nor did he make a claim on the said funds, in fact, he assented that it was the Respondent’s funds that had purchased and remodeled the Lori Kay Home and that, when the Lori Kay Home was sold, Respondent was entitled to the proceeds.

47. It is reasonable that the funds received from the sale of the Lori Kay Home, \$406,142.55, be the Respondent's sole and separate property.

5. Another example of misleading and inadequate marshaling is the representation in James' Fact No. 17, that monthly payments of \$25,335.15 received by Merae, from the sale of her 1005 Shares, were deposited in the parties' joint bank accounts. This is a mis-statement of the evidence. The true testimony and other evidence are:

- A. The Fidelity Account statements show that the account was opened on February 26th, 1996, see Ex P 2040-2047.
- B. The statements show that Merae's Fidelity Account was an individual account, not a joint account with James, see Ex P 2048-2059.
- C. The Fidelity Account was opened to hold monies received by Merae from the sale of her 1005 Shares, Tr 890 L 10-20
- D. In June of 1995, Merae purchased \$224,000 worth of treasury bills, in her name only, from money she received from the sale of her 1005 Shares, see Ex P 1977-1980.
- E. When the treasury bills matured, they were cashed by Merae and the cash deposited by her in the Fidelity Account, see Tr 818 L 12-20 and Tr 819 L 14-22.
- F. Under the Stock Purchase Agreement, Ex P 2453 at paragraph 6, Merae received \$25,335.15 each month.

G. James testified that Merae received her monthly stock purchase payment agreement near the latter part of the month. See Tr 853 L 14-16.

H. Merae's June 1996 payment was deposited in the parties' Bank One Account and a check for \$23,000 was written to the Fidelity Account and \$2,335.15 was left in the Bank One Account to pay bills, see Ex P 1627, Tr 851 L 23-25 and Tr 852 L 1-7.

I. Merae's November 1996 payment was deposited in the parties' Bank One Account and a check for \$21,000 was written to the Fidelity Account and \$4,335.15 was left in the Bank One Account to pay bills, see Ex P 1627, and Tr 853 L 8.

J. Merae's May 1996 payment of \$25,335.15 was deposited in the parties' Bank One Account and a check for \$22,000 was written to the Fidelity Account, see Ex P 1627 and Tr 853 L 10.

K. During January of 2002, James told Merae that he was earning good money and was the top salesman at MESCO, earning enough to pay family necessities and bills, see Tr 1514 L 16-17 and Tr 1515 L 13-24.

L. Merae's intent was to use the Fidelity Account money for the education of the parties' four children and to provide cars, boats, trips, and recreation for the family, see Tr 902 L 11 and Tr 1519 L 1-4.

M. Merae payed off the mortgage on the parties' home at Village Point Way from the Fidelity Account, see Tr 1284 L 11-18.

N. Merae paid \$34,000 for a 26 foot Sea Ray boat from her Fidelity Account, see the 6/4/99 entry on Ex R 10.

O. When the boat was demolished in an accident, the insurance company paid \$30,000 and that sum went into the Fidelity Account, see the 5/8/01 entry on Ex R 11.

P. James told Merae that the purchase and remodel of the Lori Kay Home would be a very profitable investment, see Tr 1534 L 12-18, Tr 1545 L 12-19, and Tr 1548 L 10-13.

Q. Merae purchased the Lori Kay Home by issuing a \$379,964.67 check on her Fidelity Account, see the 9/15/97 entry on Ex R 16.

R. All funds utilized to remodel the Lori Kay Home came from the Fidelity Account, see Ex R 16 checks to Class One Construction.

S. When the Lori Kay Home was sold in October of 1998 for \$460,000, the net proceeds of \$406,142.55 were deposited in the Fidelity Account, see 10/20/98 entry on Ex R 17.

T. James made no claim to any of the proceeds from the sale of the Lori Kay Home, see Tr 704 L 1-3.

U. Merae lost approximately \$51,000 by purchasing, remodeling, and selling the Lori Kay Home, see Ex R 16.

V. The Odd Piece of Lori Kay Property has questionable value because it is landlocked, cannot be re-zoned for commercial use, and may not be a legal building lot, see Tr 558 L 19-25 and Tr 559 L 1-9.

W. Merae paid \$28,570.94 for a 1997 Chevrolet Suburban from the Fidelity Account, see 10/12/99 entry on Ex R 9.

X. From the funds she received from the sale of her 1005 Shares, Merae deposited \$2,507,873.99 in the Fidelity Account, see Ex R 15.

Y. At the time of the parties' separation, February of 2002, Merae had a balance of approximately \$1,055,000 in her Fidelity Account, see Ex P 2049.

6. Set forth in James' Brief at page 14, paragraph 6, is the statement that "during their marriage, both parties freely signed each others names on checks from various accounts....both had trading privileges on the parties' stock accounts." As support for these factual statements are a Sandy Police Officer report, Ex P 2123; a \$252 check written on April 22nd, 1994, Ex P 1625; the testimony of Officer Brown at Tr 464 L 16-25 and Tr 465 L 722 and the testimony of James at Tr 828 L 9-25.

Again, James is guilty of misleading marshaling and misrepresenting the evidence. Officer Brown testified that Merae communicated to him that over \$100,000 was missing from her Fidelity Account. When Officer Brown discussed the matter with Greg Bown, Assistant

District Attorney, Officer Brown stated that in the his family it was a common practice for a husband and wife to sign each other's signatures, deposit checks. James testified that on April 22nd, 1994, a \$252 check was made out and the signature "looks like Merae's", see Tr 828 L 9-25. The Sandy City Police Report, Ex P 2123 at Page 4 states that "the DA's office would not file in this case, because it was too problematic. He indicated that it was common practice for husbands and wives to sign each other's names and he believed the funds to be common property within the marriage.... plus the account was in both parties names."

No reference is made in the exhibits or testimony related to the parties' stock trading privileges.

The above examples of failed, incomplete, skewed, and/or misleading marshaling are by no means exhaustive. The number and magnitude of such examples demonstrate that such instances of failure on the part of James are neither incidental, inadvertent, nor harmless. Rather, they are legion, they are material, and they are systematic. In short, they call into serious question all of James' factual representations, both what has been included (including whether any given factual representation is accurate or placed in proper context) and what has not been included.

II. WHEN THE APPELLANT DOES NOT MARSHAL THE EVIDENCE, SHOULD THE APPELLEE DO SO?

When the Appellant fails to meet the burden of marshaling the evidence, the Appellee is on the horns of a dilemma, to use a well known phrase. Should the Appellee point out the deficiency of the Appellant and close the brief or should the Appellee marshal the evidence to

demonstrate and show the deficiencies of the Appellant's brief?. As an abundance of caution, Merae, the Appellee in both of the consolidated cases, has decided to take the second position and marshal the evidence on each point made on appeal by James.

1. James claims that the \$2,500,000 received by Merae from the sale of her 1005 Shares was not Merae's inheritance. The evidence on this point is

A. Merae's father, Frank Pardoe, founded Utah Bearing and Fabrication, Inc., see Tr 1402 L 3-8.

B. Mr. Pardoe died in August of 1993 Tr 1402 L 7 and 8.

C. Prior to his death, Mr. Pardoe gave interests in the business to his children, see Tr 1402 L 9-25.

D. Mr. Pardoe gave Merae, who is one of his children, the 1005 Shares, see Tr 1403 L 16-25 and Ex P 2453.

E. In 1995, Merae wanted to sell her 1005 Shares, see Tr 1404 L 5-11.

F. On May 24th, 1995 the corporation agreed to pay Merae \$2,500,000 for her 1005 Shares, see Ex P 2453, payable \$500,000 as a down payment and a ten year trust deed note, Ex P 2449 for \$2,000,000 payable at the rate of \$25,335.15 per month.

G. The agreement, Ex P 2453, was signed by Merae, her brother Dirk Pardoe, then president of the company, and Thomas KLC, Merae's attorney in the transaction.

H. On June 9th, 1997, Merae received \$1,697,039.88 as full payment of the remaining balance owed under the Stock Purchase Agreement, see Ex P 2451.

2. James claims that the funds Merae received from the sale of her 1005 shares of Utah Bearing lost their character by co-mingling and by the purchase of two parcels of property in joint tenancy. The evidence on the co-mingling issue is

A. James testified that the “half million went into a joint money market for a month”, see Tr 804 L 6-7, and that “we depleted the money by buying U.S. Treasury Bills”, see Tr 804 L 8 and 9.

B. James produced no exhibit showing the existence of the half million dollar joint money market account.

C. Exhibit P 1977 shows that a \$100,000 treasury bill was purchased in Merae’s name only.

D. Merae testified that it was her intent to keep her inheritance for the childrens’ education, family entertainment, tennis lessons, and vacations, see Tr 902 L 11 and 12 and Tr 1519 L 1-4.

E. Merae testified that she understood from James that his earnings would be used to pay monthly living expenses such as the mortgage, utilities, taxes, and things like that, see Tr 1514 L 14-20, Tr 1515 L 20-24, and 1516-1517.

F. Merae wrote a \$34,000 check from her Fidelity Account for a 26 foot SeaRay boat and trailer, see Tr 1519 L 5-19 and the 6/4/99 entry, check 1126, on Ex R 10.

G. Merae wrote a \$28,570.94 check from her Fidelity Account for a 1977 Suburban automobile for use by the family and to pull the boat and trailer, see 10/12/99 entry on Ex R 9.

H. The boat and trailer were totaled in an accident and the insurance proceeds of \$30,000 were deposited in Merae's Fidelity Account, see Ex R 11, 5/8/01 transaction period.

I. Merae wrote a \$35,806.77 check from her Fidelity Account on 8/8/01 to purchase a boat to replace the 26 foot Sea Rey that had been totaled, see Ex R 12.

J. After talking to James, Merae believed that insurance proceeds were sufficient to purchase the Replacement Suburban, see Tr 1479 L 9-13.

K. James forged Merae's name on a \$30,510.93 check on her Fidelity Account, made payable to Larry H. Miller Chrysler/Jeep, to pay for the Replacement Suburban, see last page of Ex R 14.

L. James told Merae that he was MESCO'S top salesman, see Tr 515 L 18 and 19.

M. Evidence produced by Merae showed that James did not earn sufficient money at MESCO to pay any of the family's expenses, see Ex P 1346, P 1350, P 1354, and P 1358.

N. James testified that some of the payments made to Merae under the Stock Purchase Agreement were deposited in the parties' joint bank account at Bank One, see Tr 851 L 14-20.

O. James wrote a check on the parties' joint account payable to Merae's individual Fidelity Account for \$10,000 on January 9th, 1996, see Ex P 2102.

P. James wrote a check on the parties' joint account payable to Merae's individual Fidelity Account for \$22,000 on May 23rd, 1996, see Ex P 2102.

Q. James wrote a check on the parties' joint account payable to Merae's individual Fidelity Account for \$23,000 on June 16th, 1996, see Ex P 2102.

R. James wrote a check on the parties' joint account payable to Merae's individual Fidelity Account for \$21,000 on November 25th, 1996, see Ex P 2103.

S. James wrote a check on the parties' joint account payable to Merae's individual Fidelity Account for \$18,000 on May 23rd, 1997, see Ex P 2103.

The evidence related to the two parcels of property in joint tenancy is

A. Merae wrote a check on September 15th, 1997, from her Fidelity Account for the sum of \$379,964.67 to buy the Lori Kay Home and Odd piece of Lori Kay Property, see 9/15/07 transaction on Ex R 16.

B. Thereafter, Merae wrote checks for remodeling expenses for the Lori Kay Home, see Ex R 16.

C. Merae did not feel good about putting that much money into the Lori Kay Home, see Tr 1536 L 18-25, but James suggested that the home be purchased using Merae's inheritance and after making a profit on the home, she would have

more money to put into her inheritance, see Tr 1537 L 4-6 and 24-25 and Tr 1538 L 1 and 2.

D. The parties talked about getting a conventional loan to purchase the Lori Kay Home and James told Merae that his parents would not give him an early inheritance, but that he could qualify for a loan based on his earnings but knew that Merae did not like paying interest, see Tr 1538 L 12-20.

E. James told Merae that the Odd Piece of the Lori Kay Property could be purchased for \$20,000, see Tr 1541-1542 L 1 and 2, and re-sold at a profit when an easement was obtained, see Tr 1458 L 10-13.

F. James told Merae that she should be glad she used her inheritance to get the Lori Kay Home because she would have more money to put back into her Fidelity Account. See Tr 1548 L 1-3.

G. James told Merae that the Lori Kay Home could be sold for a profit and if the back lot was divided, it could be sold for another profit. See Tr 1548 L 10-13.

H. From her Fidelity Account, on September 15th, 1997, Merae paid \$457,146.18 to purchase and improve the Lori Kay Home, see Ex R 16.

I. On October 20th, 1998, the Lori Kay Home was sold for \$406,142.55, net, and that sum was deposited via wire transfer to Merae's Fidelity Account, see Ex R 17.

J. James made no claim to any of the proceeds from the sale of the Lori Kay Home.

3. James claims that there was insufficient evidence produced at the trial to show that the parties' joint bank accounts were used as conduits for Merae's inheritance, not as repositories in which they became co-mingled. The evidence on this issue is

A. The Fidelity Account was opened to hold monies received by Merae from the sale of her 1005 Shares, see Tr 890 L 10-20.

B. In June of 1995, Merae purchased \$224,000 worth of treasury bills, in her name only, from money she received from the sale of her 1005 Shares, see Ex P 1977-1980.

C. When the treasury bills matured, they were cashed by Merae and the cash deposited by her in the Fidelity Account, see Tr 818 L 12-20 and Tr 819 L 14-22.

D. Merae's June 1996 payment of \$25,335.15 was deposited in the parties' Bank One account and a check for \$23,000 was written by James to the Fidelity Account and \$2,335.15 was left in the Bank One account to pay bills, see Ex. P 1627, Tr 851 L 23-25, and Tr 852 L 1-7.

E. Merae's November 1996 payment was deposited in the parties' Bank One Account and a check for \$21,000 was written by James to the Fidelity Account and \$4,335.15 was left in the Bank One account to pay bills, see Ex. P 1627 and Tr 853 L 8.

F. Merae's May 1996 payment of \$25,335.15 was deposited in the parties' Bank One account and a check for \$22,000 was written by James to the Fidelity Account, see Ex. P 1627 and Tr 853 L 10.

G. From the funds she received from the sale of her 1005 Shares, Merae deposited \$2,507,873.99 in the Fidelity Account, see Ex R 15.

H. At the time of the parties' separation, February of 2002, Merae had a balance of approximately \$1,055,000 in her Fidelity Account, see Ex P 2049.

III. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT THE TRIAL AT THE TRIAL OF THE DIVORCE CASE TO SHOW THAT JAMES USED THE MONEY HE RECEIVED FROM FORGING AND ALTERING CHECKS FOR FAMILY PURPOSES, BENEFITTING ALL MEMBERS OF THE FAMILY, INCLUDING JAMES.

Because Merae claimed that James altered and forged checks on her Fidelity Account, she had the burden of proving that fact by a preponderance of the evidence, see *In re:Swans Estate*, 293 P. 2d 682, 686 (Utah 1956). Merae sustained this burden by establishing a) that the Fidelity Account was her individual account, see Ex P 2048-2059 b) that James altered checks by changing the arabic number 1 to a 4, and writing an "F" in front of the written "One" on six checks, see Ex R 13, and forged her signature on nineteen checks, see Ex R 14, c) that James had no authority to alter checks signed by Merae and no authority to sign Merae's name to checks on her Fidelity Account, see Tr 1510 L 1-3, d) that Merae was not aware that James had forged and

altered checks on her Fidelity Account until after the parties' separated in February of 2002, see Tr 1510 L 1-3, and e) James did not tell Merae what he did with the \$142,647, see Tr 1512 L 1-4.

Based upon this evidence, the trial court ruled that James, without authorization, signed Merae's name to checks and he, without authorization, altered the amount on certain checks, see Ruling Hearing P 5 L 5-8.

With this ruling as a predicate, the trial court entered findings 72, 75, and 76, see R 3735 and R 3736, which are:

72. Petitioner, without authorization, forged Respondent's name on Fidelity Account checks totaling \$142,467 made payable to himself or cash that he converted to cash.

75. Petitioner, without authorization, altered 6 checks given to him by the Respondent by increasing them from \$1,000 to \$4,000.

76. The alterations reduced Respondent's balance in the Fidelity Account \$18,000 more than Respondent intended when she wrote the checks and gave them to the Petitioner.

James contended that he had the authority to write checks, alter checks, and forge Merae's signature on the Fidelity Account, therefore, he had the burden at trial to prove these facts, by a preponderance of the evidence.

The trial court determined that James did not sustain his burden of proof, and that he forged Merae's name without authorization and, as a result, entered findings 72-76, inclusive, see R 3735 and 3736.

James contended at trial that the \$142,467 he received by forging Merae's name and altering checks was used by him "to pay family expenses." The burden of proof was upon James to establish this fact by a preponderance of the evidence. In this regard, it was his burden to prove that his evidence was more credible or entitled to the greater weight and if he failed to do so, he did not sustain his burden of proof and this issue must be decided against him, see *Koeslinger v. Basamaklis*, 539 P. 2d 1043, 1046 (Utah 1975).

The only evidence James produced, in an effort to sustain his burden of proof, was his testimony. His statements were not supported by a document, such as a receipt, journal entry, cancelled check nor a witness, such as a piano teacher or a tennis instructor who could testify that James paid in cash or by a check written on James' account or on Merae's and James' joint checking account.

This lack of evidence supporting and corroborating his testimony is particularly fatal because James' credibility as a witness was so badly damaged at the divorce trial by the following evidence:

1. James misrepresented to Larry H. Miller Chrysler Jeep and Zions Bank his year 2000 income and failed to disclose collection actions and lawsuits pending against him, see Ex R 6.

2. James misrepresented to Merae his years 1998, 1999, 2000 and 2001 income, see Tr 1514 L 17.
3. At James' suggestion, in August and November of 1996, Merae took \$55,000 from her Fidelity Account and put it in a joint account with James at American Investment, "The Jay Rice Account," see Ex R 18.
4. During February of 2002, James told Merae that there was \$41,000 in the Jay Rice Account, see Tr 1470 L 20-25, when in fact it had a zero balance, see Tr 385 L 18-20.
5. James, during the first part of 2002, asked Mr. Rice to stall Merae when she asked to see the Jay Rice Account balance until James could replace the funds he took, see Tr 386 L 24-25 and Tr 387 L 1-18.
6. James did not replace the funds he took from the Jay Rice Account, see Tr 1299 L 2-4.
7. James told Merae that the purchase price of the Replacement Suburban, \$30,510.93, was paid by insurance proceeds, see Tr 1490 L 16-22.
8. James forged Merae's name on a \$30,510.93 check on her Fidelity Account made payable to Larry H. Miller Chrysler/Jeep to pay for the Replacement Suburban and it was returned "signature no match," see last page of Ex R 14.
9. James did not tell Merae that he wrote a \$30,510.93 check on her Fidelity Account, see Tr 1386 L 17-25 and Tr 1395 L 1-5.
10. James did not inform Merae that he borrowed \$12,555.95 from Zions Bank to purchase the Replacement Suburban, see Tr 1499 L 13-16.

11. James did not inform Merae that he wrote checks payable to Zions Bank to make monthly payments on the Replacement Suburban loan by forging her name on her Fidelity Account checks, see Tr 1510 L 1-3.

James' testimony, standing alone, is so slight and unconvincing that Merae's motion to amend should have been granted. In ruling on a Rule 59 motion, the trial court should grant the motion if it can be reasonably concluded that the evidence supporting a finding is so slight and unconvincing as to make the finding unreasonable and unjust. See Rule 59 (a)(6) U R Civ P and *Sharp v. Williams*, 915 P. 2d 495, 497 (Utah 1996).

IV. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT THE DIVORCE TRIAL TO SHOW THAT MERAЕ SHOULD BE HELD IN CONTEMPT OF COURT.

At findings 100, 101 and 102, see R 3740, the trial court determined that Merae was in contempt of court for failing to provide information to James about the children's activities, removing the children from school, interfering with parent-time, etc.

There was insufficient evidence presented at trial to support these findings. Prior to the commencement of the trial, the parties, after nearly three full days of intense negotiations, entered into a stipulation and agreement relative to custody of the minor children and related matters. In the trial court's order that memorialized the parties' agreement, R 3526, it is clearly stated at paragraph 12 that all matters related to custody of the minor children and related matters were settled and that the only issues reserved for trial were:

A. The issue of the costs of Special Master are reserved, if no settlement of the same.

B. The issue of costs concerning the custody evaluator, court appointed evaluation, including the costs for any and all experts from both parties concerning the custody portion of this matter are hereby reserved.

C. The issue of child support is reserved, if no settlement of the same.

In accord with the foregoing, James had the burden to show, by clear and convincing evidence, 1) that the issue of contempt was reserved for trial, 2) that Merae knew of orders of the court relative to child custody and parent-time matters, 3) that she had the ability to comply, and 4) willfully and knowingly refused to do so, none of which was proven by the clear and convincing standard.

A reasonable interpretation of the order is that all issues pending between the parties relating to custody, parent-time, and related matters were settled and the only issues reserved for trial were those set forth in the order. Issues of contempt were not reserved, therefore, they were settled, not to be considered by the trial court.

V. JAMES' COUNSEL SHOULD HAVE BEEN SANCTIONED UNDER RULE 11 (B)(3) U R CIV P.

During the divorce trial, a Larry H. Miller Group Automobile Loan Application, Ex R 6, was received in evidence as a document kept in the normal course of business by the Larry H. Miller Group.

Ex R 6 was filled out by James, see Tr 1278 L 15-21. The document was signed by James, on December 29, 2000, see Tr 1278 L 25 and Tr 1279 L 1-2. Testimony given by David Ingles, a representative of the Larry H. Miller Group, was to the effect that Ex R 6 was completed by James and submitted to the Larry H. Miller Group and Zions Bank in connection with his request for a loan to purchase a 1997 Chevrolet Suburban, see Tr 1387 L 15-22 and Tr 1388 L 5-12. The last line of the “Applicant” section of Ex R 6, states that James’ trade or occupation is “sales” and his gross monthly income is “\$60,000.”

Section VIII “Credit Application”, at page 13-14 of the memorandum signed by Wendy J. Lems, attorney for James, on November 10th, 2005, R 3842-3, states that “At time of trial, the Petitioner testified that the “per month” reference on his credit application meant “per year” and such was a mere inadvertence.” A thorough review of the trial transcript of the testimony of James shows that he did not testify concerning the gross monthly income section of Ex R 6 nor did he testify concerning any other information contained in said exhibit.

The only testimony given by James at the time Ex R 6 was introduced in evidence is found at Tr 1278 L 4-24 that reads:

Q Graduate from high school though?

A Yes.

Q You read and write the English language?

A Yes.

Q Did you take any math classes in college?

A I did.

Q Tell the Court what math classes you took?

A I took algebra.

Q So you're familiar with simple math and higher math?

A Yes, that's correct.

Q And..... I'm handing you what's been marked as Exhibit 6 and ask you if you can identify that? Let me help you with it a little bit. Isn't that the loan application that you filled out at Larry Miller when the check that you delivered to them for \$30,000 was returned by Fidelity because the signature didn't match?

A I believe that's correct.

Q As a matter of fact it bears your signature down at the bottom where it says applicant's signature, correct?

A Correct.

By executing the memorandum on November 10th, 2005, James' counsel certified, to the best of her knowledge, information and belief, formed after an inquiry reasonable under circumstances, that the factual contentions in the memorandum have evidentiary support. Merae filed her motion for sanctions under Rule 11(b)(3) because there is no evidentiary support for the factual contention that James testified that the "per month" reference on his credit application meant "per year."

Pursuant to Rule 11 (c)(1)(A) U R Civ P, Merae's motion for sanctions, with a supporting memorandum, see R 3959-3964, describing the specific conduct alleged to violate subsection (b) of Rule 11, was served upon James' counsel, but not filed with the Court. In response to the motion, James' counsel reiterated that James had corrected Ex P 6 at trial, see R 3944-3950. Twenty one days after service of the motion and because the challenged paper was not withdrawn or appropriately corrected, Merae's motion for sanctions was filed with the trial court, see R 3966.

The trial court denied Merae's motion by the minute entry dated February 21st, 2006, see R 4063, stating that "Whether the petitioner intended to inflate his monthly or yearly income is unclear and open to different views of the evidence on that point. Consequently, the petitioner's representations about the evidence that take one view to the exclusion of the other is appropriate. There does not appear to be an intention to mislead or misrepresent."

The trial court erred in denying Merae's motion for Rule 11 sanctions because the evidence is clear and uncontroverted that James' counsel intentionally misrepresented a material fact to mislead the trial court.

VI. JAMES FAILED TO SUSTAIN HIS BURDEN OF PROOF IN BOTH THE DIVORCE CASE AND THE FRAUD CASE

In the divorce case, James alleged that the funds received by Merae from the sale of the 1005 Shares was part of the marital estate because 1] they were received during the marriage and

2] they were neither inheritance nor gift, see R 7, therefore, he had the burden of proving, by a preponderance of the evidence, these facts.

In the fraud case, Merae alleged that James forged and altered her Fidelity Account checks, that his acts constituted fraud and that he was unjustly enriched by his conduct, see FR 17. In response, James denied the allegations of Merae's complaint and as affirmative defenses thereto averred that 1] he was Merae's express, implied, or apparent agent in all financial matters 2] all monies in the Fidelity Account went to pay marital debts, Merae's excessive spending habits and to support and care for the parties' children 3] none of the money in the Fidelity Account was used for the sole purpose of benefitting James, see FR 248. In addition, James filed a counterclaim that he did not pursue.

It is an elementary rule of law that the burden of proof on any point is upon the party asserting it. Stated another way is, the burden of proof is on the one having the affirmative of the issue. *In Re: Swan's Estate, infra; In Re: Wright's Estate v. Wright*, 228 P. 2d 911, 914 (Kansas 1951); *Gibson v. Gibson*, 340 P. 2d 190, 191 (Oregon 1959).

"The Plaintiff must present evidence first, because it is the Plaintiff that must establish a prime facie case, that if unchallenged, is sufficiently proved to justify the granting of relief."... "At that point, the Defendant may either challenge the prima facie sufficiency of the Plaintiff's case or go forward with the Defendant's evidence."... "In most civil cases, the party with the burden of proof must prove the case by a preponderance of the evidence, which is a less rigorous standard than the "clear and convincing" standard for some civil cases, such as fraud, or the

standard for criminal cases of “beyond a reasonable doubt.” David A. Thomas, Utah Civil Practice §11.07[2][c] (LexisNexis 2003).

Discussing presumptions, *In Re: Swan’s Estate* cited above, the Utah Supreme Court indicated “[o]rdinarily the burden of persuasion, as distinguished from the burden of making a prima facie case from which the fact finder could reasonably find the issue in his favor, is on the party whose claim for relief depends on the existence of such fact.”

Applying the *In Re: Swan’s Estate* case to the divorce case, James had the burden of proof on each of his claims.

1. James claimed that funds received by Merae from the sale of her 1005 Shares is part of the marital estate because 1) they were received during the marriage and 2) they are neither inheritance nor gift, therefore, he has the burden of proving, by a preponderance of the evidence, these facts.

2. James claimed that Merae’s funds lost their identity through commingling, therefore, he has the burden of proving this fact, by a preponderance of the evidence, in order to prevail.

3. James claimed that the funds received by Merae from the sale of her 1005 Shares were increased as a result of his efforts, therefore, he has the burden of proving this fact, by a preponderance of the evidence, in order to prevail.

4. James contended that he had the authority to right checks and forge Merae’s signature on said checks on her Fidelity Account, therefore, he has the burden to prove this fact, by a preponderance of the evidence, in order to prevail. On this issue as well as those set forth at

paragraphs 1,2, and 3 above, James must prove that his evidence is more credible or entitled to the greater weight and if he fails to do so, he has failed to sustain his burden of proof.

5. James contended that he was given the authority by Merae to alter six \$1,000 checks making them \$4,000 checks, therefore, the burden of proof is upon him to establish this fact by a preponderant of the evidence. In this regard also, he must prove that his evidence is more credible or entitled to the greater weight and if he fails to do so, he has not sustained his burden of proof and this issue must be decided against him.

In addition to the *In Re: Swan's Estate* case, there are other supreme court cases that are in accord.

The proponent of a proposition has two burdens relative to his proof: to produce evidence which proves or tends to prove the proposition asserted; and to persuade the trier of fact that his evidence is more credible or entitled to the greater weight. Once the proponent has produced such evidence, the burden of producing evidence disproving or tending to disprove the proposition shifts to the opponent, and he must introduce such evidence as may be necessary to avoid the risk of a directed verdict or a peremptory finding against him as to the existence of the proposition.

Koesling v. Basamaklis, 539 P.2d 1043, 1046 (Utah 1975).

The party having the risk of non-persuasion is naturally the one upon whom first falls this duty of going forward with the evidence. Upon meeting their duty of going forward with evidence that all authorized stock had been issued before the issuance of plaintiffs' stock certificate, plaintiffs made out a prima facie case. Thereupon, the burden, in the second meaning of the

phrase, shifted to the defendants, but the risk of non-persuasion, which never shifts, remained with plaintiffs. *Kartchner v. Home*, 262 P.2d 749, 751 (Utah 1953).

Paragraph 1. A. through H. above that begins at page 24 of this Brief shows that James failed to sustain his burden of proving that the \$2,500,000 Merae received from the sale of her 1005 Shares was a marital asset.

The law applicable to the issue of what property is marital or separate requires the trial court to characterize the property of the parties and donated or inherited property is generally considered separate property. “In distributing property in divorce proceedings, trial courts are first required to properly categorize the parties’ property as marital or separate.” *Elman v. Elman*, 2002 Utah App. 83, ¶ 18, 45 P.3d 176 (Utah App. 2002) *citing Kelly v. Kelly*, 2000 Utah App. 236, ¶ 24, 9 P. 3d 171. Generally, trial courts are also required to award premarital property, and appreciation on that property, to the spouse who brought the property in to the marriage. *Id.*

“Inherited or donated property, as well as its appreciated value, is generally regarded as separate from the marital estate and hence is left with the receiving spouse in a property division incident to divorce.” *Burt v. Burt*, 799 P.2d 1166, 1169 *citing Mortensen v. Mortensen*, 760 P. 2d 304, 308 (Utah 1988).

Separate property does not become marital property unless the other spouse has augmented, maintained, or protected the separate property. See *Mackey v. Mackey*, 202 Utah App. 349, 2002 WL 3138774 [Unpublished opinion]. The facts of the divorce case show that James altered checks on Merae’s Fidelity Account and forged her signature on checks payable to him or

to cash. By so doing, rather than augmenting Merae's Fidelity Account, he decreased it, rather than maintaining, he manipulated it, and rather than protecting, he raided it.

Applying the law to the facts of the fraud case, it follows that because Merae alleged that James altered and forged checks on her Fidelity Account and was unjustly enriched by his conduct, she had the burden of proving, by a preponderance of the evidence that this occurred. If she failed to sustain her burden of proof, her complaint against James would be subject to a motion for a directed verdict under Rule 50 (a) of the UR Civ P. If, however, Merae sustained her burden, then James must produce evidence to show, by a preponderance of the evidence that he did not forge or alter checks on Merae's Fidelity Account, he forged and altered Fidelity Account checks with Merae's permission, that he acted as her agent, that the money obtained by forging and altering Merae's checks was used for family purposes and not for the sole benefit of James.

Merae sustained her burden by producing the following evidence:

A. Merae testified that she gave FEx P 7 to James as \$1,000 checks made payable to him, see F Tr 229 L 18-22.

B. Merae testified that when she gave FEx 1-7 to James, she intended to give him \$1,000 for each check, see F Tr 229 L 18-25 and F Tr 230 L 1-6.

C. James testified that he received FEx P 1-7 from as \$1,000 checks made payable to him and that he changed the arabic 1 on each check to a 4 and wrote an "F" in front of the "one" on each check and received \$4,000 from each check, see Tr 1277 L 13-25.

D. James admitted, during his testimony on August 22nd, 2006, that he signed his then

wife's name "Merae Kimball" to the following Fidelity Account checks made payable to either "James Kimball" or "Cash" that were received in evidence during the fraud trial:

FEx P 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 41, 45, and 46.

See F Tr 61-90.

E. When pressed as to what he did with the \$4,000 he received from FEx P 5, James stated that "it possibly paid closing costs on Lori Kay Home," see F Tr 22 L 19-25.

F. FEx P 5 was given to James by Merae on January 29th, 2000.

G. The closing on the Lori Kay Home purchase was in September of 1997, see Ex 16, and the closing on the Lori Kay sale was in October of 1998, see Ex 17.

H. Merae testified that prior to the date the parties separated in February of 2002, she had no knowledge that James had signed her name on Fidelity Account checks or that he had altered the \$1,000 Fidelity Account checks she gave him, see F Tr 230 L 7-12 and F Tr 240 L 17-19.

I. Merae testified that she never gave James permission to sign her name on Fidelity Account checks, see F Tr 240 L 17-19.

J. Merae testified that she never gave James permission to alter the Fidelity Account checks she gave him, see F Tr 238 L 18-20.

K. After the parties' separation, in February of 2002, Merae became aware that James had forged her signature on her Fidelity Account checks and had altered the \$1,000 checks she gave him, to be \$4,000 checks, see F Tr 230 L 7-12.

L. Merae testified that she confronted James about the altered and forged checks on her Fidelity Account and he refused to tell to her, see F Tr 240 L 24 and 25, F Tr 241 L 1 and 2.

M. The first time Merae knew that James was the person who had altered and forged her Fidelity Account checks was on December 15th, 2004, when she heard him testify in the divorce trial, see Tr 1277 L 13-25.

N. The first time she knew that James claimed he used the money he received from altering and forging her Fidelity Account checks to pay family related expenses was on December 15th, 2004 when she heard him testify at the divorce trial, see Tr 1276 L 3-11.

O. James testified on August 22nd, 2006 in the fraud case that he altered and forged checks on Merae's Fidelity Account, see F Tr 16 L 19-21; F Tr 19 L 9-11; F Tr 29 L 1-11.

P. James testified on August 22nd, 2006 at the trial in the fraud case that:

1. He understood that he had authority to sign checks on Merae's Fidelity Account, see F Tr 16 L 3-6.

2. He never signed a check on the Fidelity Account "James L. Kimball" or "James Lewis Kimball", see F Tr 16 L 15-18, and on every check he signed on the account, he signed Merae's name, see F Tr 19 L 19-21.

3. He altered the following checks to obtain \$4,000 instead of \$1,000:

- a. FEx P 5, see F Tr 18 L 11-25 and F Tr 19.

- b. Merae may have altered P 5, see F Tr 19 L 9-14.

c. FEx P 1 - James “possibly” changed the 1 to a 4, see F Tr 29 L 4-5.

d. FEx P 2 - James “possibly” changed the 1 to a 4, see F Tr 32 L 5-7.

e. FEx P 3 - James testified that “I may have. Its possible” that he changed the 1 to a 4, see F Tr 34 L 9-12.

f. FEx P 4 - James testified that he may have altered the check by stating “may have; its possible” that he put the “F” in front of the “one” on the second line of the check and changed the arabic 1 to a 4, see F Tr 36 L 19-23.

g. FEx P 6- James testified that “its possible” that he altered the check, see F Tr 38 L 22-25 and F Tr 39 L 1-8.

h. FEx P 7- James testified “I don’t recall, but I may have” put a capital “F” in front of the word “one” before receiving \$4,000 for it, see F Tr 41 L 9-12 and L 18-25.

Q. As the foregoing paragraph 3. a. through h. shows, on August 22nd, 2006, when James was asked about altering and forging Fidelity Account checks, his answers were peppered with evasive answers such as “possibly”, “I may have”, “It’s possible”, and “I don’t recall”, however, on December 15th, 2004 in the divorce case, James admitted altering those checks, see Tr 1277 L 13-25.

R. James earned \$600 in the year 2000, see FEx 640, and \$1,748 in the year 2001, see FEx 641 and F Tr 202.

S. James considered the money in the Fidelity Account to be his money and Merae's money, see F Tr 201 L 8-20.

T. During the year 2000, the Kimball family lived on the \$600 James earned and the Fidelity Account, see F Tr 201 L 21-25.

U. James did not tell Merae that he only earned \$600 in the year 2000, see F Tr 204 L 20-25.

V. In the year 2001, James earned \$1,748, F Tr 204 L 17-19, but did not divulge that fact to Merae, see F Tr 204 L 20-25.

W. James did not tell Merae that he had changed the \$1,000 checks she gave him to 4,000 checks, see F Tr 238 L 21-23.

X. Merae testified that she did not give James permission or authority to alter the checks she gave him, see F Tr 238 L 15-20.

Merae presented her case-in-chief on August 22nd and 23rd, 2006. During those two days, she produced testimony and exhibits showing that between October of 1999 and December of 2001, James altered and forged 24 checks on the Fidelity Account, payable to "Cash" or "James Kimball" that totaled \$54,800.

As part of Merae's presentation, James was asked if he had any evidence to show what he did with the money he received from altering and forging Merae's Fidelity Account checks and he stated the his evidence was in his lawyers' trial notebooks, see F Tr 28 L 1-7. The Court did not allow James to go through the notebooks, while he was on the stand, to assemble his evidence, see

F Tr 28 L 8-10.

To sustain his burden of proving that he used the money he received by altering and forging Fidelity Account checks for family purposes, James presented checks that he wrote between October of 1999 and December of 2001 on his Bank One account. The total of those checks was \$52,398.30 of which \$44,587.19 were written to “Cash” or “James Kimball” see F Tr 181-183.

After considering the evidence, the trial court ruled that James had forged and altered Merae’s Fidelity Account checks that he was unjustly enriched thereby and that Merae was entitled to a judgment in the sum of \$54,800 plus pre and post judgment interest, see F Tr 502.

VII. PREJUDGMENT INTEREST WAS PROPERLY AWARDED

Under Utah case law, prejudgment interest can be awarded if the loss is fixed at a definite time and the interest can be calculated, see *Coalville City v. Lundgren*, 930 P. 2d 1206, 1212 (Utah App. 1997). This case and others are discussed in the trial court’s memorandum decision, see F R 763.

VIII. THE DENIAL OF ATTORNEY’S FEE WAS PROPER

Both parties requested that the trial court award them costs and attorney’s fees and in considering their requests, the trial court analyzed the factors set forth at Utah Code Ann §78-27-56 (Supp. 1988) which, applied to the divorce case, are:

1. Did the party prevail on the main issue of the case?
2. Were the fees sought reasonable?

IN THE UTAH COURT OF APPEALS

JAMES LEWIS KIMBALL,)
)
) Petitioner/Appellant,)
v.)
) Appellate Court No. 20060263-CA
MERAЕ KIMBALL,)
) Trial Court No. 024901659DA
) Respondent/Appellee
) and Cross-Appellant.)

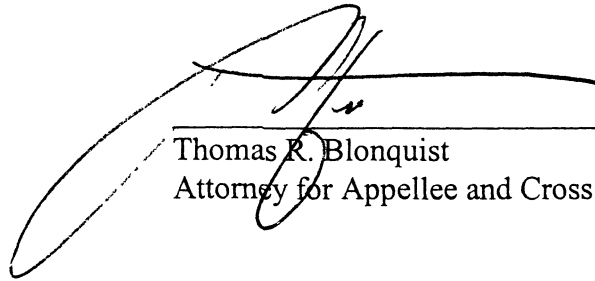
MERAЕ P. KIMBALL,)
)
) Plaintiff/Appellee,)
v.)
) Appellate Court No. 20070858
JAMES L KIMBALL,)
) Trial Court No. 030902885
) Appellant/Defendant.)

CONSOLIDATED CASES

NOTICE OF ERRATA RE: PAGES 51 AND 52 OF BRIEF OF APPELLEE and CROSS
APPELLANT

Notice is hereby given that due to a typographical error, the footnote at the bottom of page 51 and a portion of the text of page 52 of the Brief of Appellee and Cross Appellant, Merae Kimball are incorrect. The corrected pages are attached hereto.

DATED this 17th day of June, 2008.

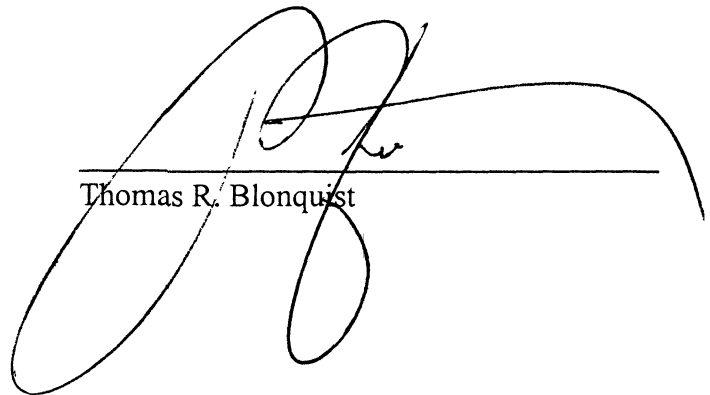


Thomas R. Blonquist
Attorney for Appellee and Cross Appellant

MAILING CERTIFICATE

The undersigned hereby certifies that on this 17th day of June, 2008, two copies of the foregoing notice of errata were mailed, postage pre-paid, to:

Wendy Lems, Esq.
7050 Union Park Center Suite 350
Midvale, UT 84047



Thomas R. Blonquist

3. Did the party have a need?

In exercising its sound discretion, the trial court denied both parties' requests for their attorney's fees and costs based upon the evidence presented at the divorce trial.

The trial court determined, as to James, that:

1. He did not prevail on the main issue of the case, see Ruling Hearing P 12 L 19-23.
2. The fees sought were not reasonable or necessary, see Ruling Hearing P 12 L 5-8.
3. James did not have a need because his fees were paid for him by his parents and he is not legally bound to pay back his parents, see Ruling Hearing P 13 L 6-10.*

The trial court determined, as to Merae, that:

1. She prevailed on the main issue of the case, see Ruling Hearing P 13 L 11-12.
2. The fees she sought were unreasonable and unnecessary because this is a case that "got out of hand." See Ruling Hearing P 12 L 12-14.
3. With the funds she was awarded, she does not have a need, see Ruling Hearing P 13 L 11-13.
4. James does not have the ability to pay Merae's costs and fees, see Ruling Hearing P 13 L 13-14.

CONCLUSION

Based upon the foregoing reasoning, analyses, and case law, Merae urges that this

* James failed to produce a promissory note or any other evidence of his obligation to his parents.

appellate court enter a decision:

1. Allowing the trial court's findings in both the divorce case and the fraud case to stand because James has failed in his basic threshold duty on appeal to properly marshal the evidence.
2. Granting Merae a judgment against James in the amount of \$142,467 in the divorce case or, in the alternative, upholding her judgment against James in the fraud case.*
3. Reversing the trial court order holding Merae in contempt of court.
4. Ruling that James' counsel violated Rule 11 of U R Civ P and remanding the issue to the trial court for determining the appropriate sanction.

DATED this 17 day of June, 2008.

/s/
Thomas R. Blonquist
Attorney for Merae

MAILING CERTIFICATE

The undersigned certifies that on this 17 day of June, 2008, two copies of the forgoing brief of appellee and cross appellant and addendum were mailed, postage pre-paid, to:

Wendy J. Lems, Esq.
7050 South Union Park Center, Suite 350
Midvale, Utah 84047

/s/
Thomas R. Blonquist

* Merae's prayer is in the alternative because she is not entitled to both judgments.