

2006

Lana Gean Anderton v. Carl Lyle Anderton : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LANA GEAN ANDERTON,)	BRIEF OF APPELLANT
)	
Petitioner-Appellee.)	
)	
vs.)	
)	
CARL LYLE ANDERTON,)	
)	Trial Case No.: 054000065 CA
Respondent-Appellant.)	App. Case No.: 20060704-CA
)	

APPEAL FROM THE FINAL DECREE OF DIVORCE OF THE EIGHTH DISTRICT
COURT IN AND FOR DUCHESNE COUNTY, ROOSEVELT DEPARTMENT,
STATE OF UTAH, THE HONORABLE JOHN R. ANDERSON, PRESIDING

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III. JURISDICTION

This appeal is taken from a Decree of Divorce entered on June 1, 2006, in the Eighth Judicial District Court, by the Honorable John R. Anderson. This court has jurisdiction over such an appeal pursuant to UTAH CODE ANN. § 78-2a-3 (2)(h) (2006).

IV. STATEMENT OF THE ISSUES & STANDARD(S) OF REVIEW

Issue 1: Was it reversible error for the Trial Court to impute income to Mr. Anderton, for purposes of child support, without making a finding of “voluntary underemployment,” as required by UTAH CODE ANN. § 78-45-7.5(7) (2006), subsection (a)?

Standard of Review, Issue 1: Whether or not a statute applies to a particular set of facts is a question of law, reviewed for correctness.¹ The determination of whether or not a person is “voluntarily underemployed,” as defined by statute, is a conclusion of law.² Legal conclusions are reviewed for correctness.³ As used by Utah's appellate court's "correctness" means no particular deference is given to the Trial Court's ruling.⁴

¹See *Slisze v. Stanley-Bostlitch*, 979 P.2d 317, 319 (Utah 1999); *State v. Burgess*, 870 P.2d 276, 279 (Utah Ct. App. 1994).

²See *Hall v. Hall*, 858 P.2d 1018, 1025 (Utah Ct. App. 1993), *Add. Ex. 5* (“‘[F]inding’ on the ultimate issue of voluntary underemployment is in reality more like a legal conclusion. . . .”).

³See *S.S. v State*, 972 P.2d 439, 440-41 (Utah 1998); *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998); *A.K. & R. Wipple Plumbing & Heating v. Aspen Const.*, 977 P.2d 518, 522 (Utah Ct. App. 1999).

⁴See *Orton*, 970 P.2d at 1256; *Rackley v. Fairview Care Centers, Inc.*, 970 P.2d 277, 280 (Utah Ct. App. 1998).

As stated by the Utah Court of Appeals in *Hall v. Hall*, “[i]t is well established that where a statute expressly requires a trial court to make a threshold finding before taking specified judicial action, the trial court abuses its discretion if it proceeds without first making the legislatively mandated finding.” *Hall*, 858 P.2d at 1018, 1024, *Add. Ex. 5*, *citing Hill v. Hill*, 841 P.2d 722, 724-25 (Utah Ct. App. 1992).

Issue 2: Assuming it was appropriate to impute income for child support purposes, was it permissible to determine the amount to be imputed without entering factual findings addressing the factors set forth in UTAH CODE ANN. §78-45-7.5(7) (2006), subsection (b)?

Standard of Review, Issue 2: *See* citations for Standard of Review, Issue 1.

Issue 3: For purposes of child support and alimony, was the factual determination that Mr. Anderton earns an additional \$30,000 cutting firewood, beyond his W-2 earnings, supported by the evidence and by sufficient factual findings?

Standard of Review, Issue 3: In divorce cases, the Trial Court is accorded “considerable discretion in determining the financial interest of divorced parties.” *Id.*, at 1021, *citing Allred v. Allred*, 797 P.2d 1108, 1111 (Utah App. 1990). Its decisions are reviewed for a clear abuse of discretion. *See Willey v. Willey*, 951 P.2d 226, 230 (Utah 1997). So long as the Trial Court exercises discretion “within the standards set by the appellate courts,” its decisions will not be overturned. *Haumont v. Haumont*, 793 P.2d 421, 423 (Utah Ct. App. 1990).

However, a court “abuses its discretion when it fails to enter specific, detailed findings supporting its financial determinations.” *Id.* Furthermore, “[f]indings are adequate only if they are ‘sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.’”⁵

Issue 4: Were sufficient findings entered regarding the parties’ financial circumstances to support the order that Mr. Anderton pay \$750 a month in alimony?

Standard of Review, Issue 4: *See* citations for Standard of Review, Issue 1.

A Trial Court’s failure to “consider the financial condition and needs of the spouse claiming support, the ability of that spouse to provide sufficient income for him or herself, and the ability of the responding spouse to provide the support” constitutes reversible error.⁶

Issue 5: Was it reversible error to permit a real estate broker to testify regarding the value of the parties' marital property, given UTAH CODE ANN. § 61-2b-3 (2006)?

Standard of Review, Issue 5: Whether or not a statute applies to a particular set of facts is a question of law, reviewed for correctness. *See Slisze*, 979 P.2d at 319; *Burgess*, 870 P.2d at 279. The Trial Court's interpretation of a statute is also a question of law, reviewed for correctness.⁷

⁵*Id.*, citing *Allred*, (quoting *Stevens v. Stevens*, 754 P.2d 952, 958 (Utah Ct. App. 1992), *Add. Ex. 7*).

⁶*Stevens*, 754 P.2d at 958, *Add. Ex. 7*, citing *Paffel v. Paffel*, 732 P.2d 96, 101 (Utah 1986).

⁷*See, e.g. Rushton v. Salt Lake County*, 977 P.2d 1201, 1203 (Utah 1999); *County, Taylor ex rel. C.T. v. Johnson*, 977 P.2d 479, 480 (Utah 1999); *Loporto v. Hoegemann*,

Issue 6: Was a reversible mathematical error made in determining the value of the marital home?

Standard of Review, Issue 6: The Trial Court is accorded “considerable discretion in determining the financial interests of divorced parties.”⁸ Its decisions are reviewed for a clear abuse of discretion. *See Willey*, 951 P.2d at 230. “For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in the light most favorable to the trial court’s determination.” *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

In the alternative, a Trial Court’s mistake in computing an award arguably warrants reversal of a judgment.⁹

V. STATEMENT OF THE CASE

A. **Nature of the Case and Course of Proceedings Below**

A divorce trial involving the Petitioner, Lana Anderton, and the Respondent, Carl Anderton, was held on April 18, 2006, before the Honorable Judge John R. Anderson, of the Eighth Judicial District Court in Duchesne County.

370 Utah Adv. Rep. 21, 22 (Utah Ct. App. 1999); *A.K. & R.*, 977 P.2d at 521.

⁸*Hall*, 858 P.2d at 1021, *Add. Ex. 5*, citing *Allred*, 797 P.2d at 1111.

⁹*Nielsen v. Nielsen*, 2000 UT App, 37, ***nonofficial publication*** (Utah Ct. App. 2000), *Add. Ex. 6* (Trial Court erred in its method of calculating the interest awarded for arrears in child support and alimony, requiring remand).

B. Statement of the Facts

1. Summary of General Facts and Ruling by Trial Court

The parties in this matter were married for 26 years. (Rec. 20:22-24). They had four children together. (Rec. 20:25 21:01). However, only one was a minor at the time of trial, Carly Anderton, who was 10. (Rec. 21:3-6). By stipulation, the parties were awarded joint legal custody of Carly, with her father, Mr. Anderton, being awarded primary physical custody. (Rec. 3:23-24). Ms. Anderton was awarded parent-time rights, subject to the provisions of a safety agreement from a DCFS case. (Rec. 5:24-25, 6:1-11).

Two of the parties' adult sons live with Mr. Anderton, Adam, who was 18 at the time of trial, and Chris, who was 21. (Rec. 170:25, 171:21-22, 172:1). Mr. Anderton works as a mud logger for an oil company, and also has a part-time firewood-cutting business with his sons Adam and Chris. (Rec. 23:25, 24:1-2, 47:14-18). The parties' third adult son, Jeremy, was approximately 26 at the time of trial. (Rec. 50:12-18). Ms. Anderton resided with Jeremy in his home. (Rec. 6:14-16, 73:17-18, 204:23-24).

The Court awarded Mr. Anderton child support for Carly in the amount of \$138.00 per month, to be offset against his alimony obligation to Ms. Anderton. (Rec. 4:10-15). Ms. Anderton's W2 income from her job with the school district, of \$1,431 per month, was used for the calculation of child support and alimony. (Rec. 71:16-24, 202:13-15).

Mr. Anderton's W2 income earnings from his mud logging job with an oil company, of \$35,000 were used. (Rec. 202:8-9). Plus, the Court found that he was making an additional \$30,000, or "could be" making this amount, from the firewood-

cutting business. (Rec. 202:8-11). Based on those figures, the Court awarded Ms. Anderton alimony of \$750 per month. (Rec. 205:22-24).

The Court determined that Ms. Anderton's relationship with Justin Jackson was in the nature of a "short term fling," which was not long lasting, did not constitute cohabitation, and thus did not preclude an award of alimony. (Rec. 200:21-23, 201:3-4).

Ms. Anderton did not contest Mr. Anderton receiving the marital home but requested equity therein. (Rec. 62:19-25). The Court ordered the equity equally divided, and entered provisions requiring the sale or refinance of the home within 120 days. (Rec. 203:25, 204:1-5). Regarding the value of the home, the Court heard testimony from Ms. Anderton's witness, a real estate broker, and from Mr. Anderton's witness, an appraiser, and determined the fair market value to be \$175,000. (Rec. 203:14-25).

The Court entered typical orders regarding health insurance coverage, division of related expenses and child care. (Rec. 202:21-25). Mr. Anderton was awarded the tax exemption for Carly. (Rec. 211:11-12). The Court equally divided a debt left over from the parties' bankruptcy, a past due tax debt, and Ms. Anderton's retirement account, valued at approximately \$5,000. (Rec. 213:15-19, 211:9-15). Mr. Anderton was ordered to pay a counseling bill for Carly. (Rec. 202:24-203:5). The parties were each ordered to pay their own post-separation debts. (Rec. 213:15-19). Finally, the Court awarded Ms. Anderton attorney's fees in the eventual amount of \$8,137. (Rec. 203:3-6, final amount determined at Order to Show Cause hearing held on July 20, 2006.)

2. Specific Facts, Issues #1 and #2 - Lack of Findings Pertaining to Imputation of Income for Child Support¹⁰

1. The Court indicated at the outset of the divorce trial that child support would be determined based upon the parties' gross incomes and the child support tables. (Rec. 4:9-12, *Add. Ex. 8*).

2. At the conclusion of the trial, the Court found that Ms. Anderton's gross income from her job was \$1,431 per month. (Rec. 202:13-15, *Add. Ex. 8*).

3. Regarding Mr. Anderton's income, the Court's findings were extremely limited and are set forth verbatim in this section. The Court's first statement was:

Looking at his income and his tax returns, there's a lot of deposits coming into that C&M account and the other account at Zion's Bank from the wood business. Mr. Anderton testified that he had some large expenses and that he had to split and pay wages to his boys that helped him. I don't know how many years that went on but the tax returns shows after an itemization on it that he suffered a loss in 2004 of 538 [sic] and that he suffered a loss in the following year of about \$1,200, I'm sorry, \$3,069.00. But this court is aware and knows that in a cash business like that the loss is the loss for purposes of taxes but, I think they [sic] are situations and I'm well aware of extra income that had, would come through on the basis of just the deposits to the account and perhaps cash, cash receipts that weren't put it in the bank account. I'm also a little bit confused about why with this oil economy the way it is and the company he works for doesn't have more work and I think he could be working more hours if he looked around but I don't now [sic]. But, even taking his gross income now on his, on his oil field business at \$35,000 a year I think that I could easily find that he is making in addition of \$30,000 a year out of that wood business or could be, or could be. I think his capability is in that range.

(Rec. 201:8-202:10, *Add. Ex. 8*.)

¹⁰All portions of the trial transcript which relate to this issue are contained in *Add. Ex. 8* for the Court's convenience.

4. The record reflects only two other uses of the word “cash,” besides the above statement, neither of which relate to Mr. Anderton’s firewood-cutting business, or his income from that business. *See* index of Rec., p.4, “cash,” *citing* Rec. 23:9 and 39:7.

5. Ms. Anderton testified, “[w]hat he reports and what he makes is two different things.” (Rec. 63:4-6, *Add. Ex. 8*). This is the closest any statement in the record comes to alleging the business was a cash business, or involved cash income.

6. Ms. Anderton introduced one trial exhibit documenting income from firewood cutting, Exhibit 8, containing receipts and two “check” payments for firewood purchased by Alta Lodge in 2005. (*See* Plaintiff’s Trial Exhibit 8, *Add. Ex. 9*).

7. The Court later adjusted its income number slightly from the amount included in the above quote, stating that the total from Mr. Anderton’s job, plus \$30,000, was \$63,000 divided by 12, or \$5,300 per month. (Rec. 207:21-22, *Add. Ex. 8*).

8. The only other explanation the Court gave for its determination of Mr. Anderton’s income were in response to Mr. Anderton’s protests, following the above ruling. Specifically:

MR. ANDERTON: Your Honor, that witness has never made more than \$20,000 a year, never.

....

THE COURT: Well, that's what I found based on my experience and what we've got here in front of us.

....

MR. ANDERTON: . . . but I mean when you're talking about firewood and my oil field thing how about if I work around the clock, it's impossible. You're talking \$30,000 on each job, there's no way I can do that. You're talking me working 24 hours around the clock.

THE COURT: Well do the best you can or find another job. The oil field's booming right now—

MR. ANDERTON: Yeah, I'm not going to make more, one of the better jobs out there—

THE COURT: You should be making more than \$35,000 a year.

MR. ANDERTON: That's where it's at.

THE COURT: Okay.

MR. ANDERTON: I've made less, this is the biggest year I've ever had.

THE COURT: Okay. . . .

(Rec. 207:23-202:10, *Add. Ex. 8*)

9. In addition to the Court's oral findings, the *Decree of Divorce* contains only three written findings regarding child support or Mr. Anderton's income – paragraphs 8, 10 and 14. *See Decree of Divorce, Add. Ex. 10.*

10. In paragraph 8, the Court indicates child support will be \$138 per month, in accordance with the guidelines. No income figures are specified. In paragraph 10, the Court indicates the parties will share the cost of Carly's health insurance.

11. Paragraph 14 is the only paragraph which addresses income, and it simply indicates that the court found Mr. Anderton earns \$63,600 per year, or \$5,300 per month, and that Ms. Anderton earns \$1,471.00 per month. *Add. Ex. 10, paragraph 14.*¹¹

12. To date, the actual *Findings of Fact and Conclusions of Law* have apparently not been submitted to the Court for signature by Ms. Anderton's counsel. However, the draft of such findings regarding child support and alimony is consistent with the oral findings and with the *Decree of Divorce*, with two minor exceptions:

¹¹This figure is slightly different from the Court's oral findings, which indicate Ms. Anderton's earnings are \$1,431.00 per month (Rec. 202:13-15, *Add. Ex. 8*). Ms. Anderton's Financial Declaration, submitted as Plaintiff's Trial Exhibit 9, also reflects the figure \$1,431. *Add. Ex. 19.* The tax return submitted by Ms. Anderton as Plaintiff's Trial Exhibit 4, contained in *Add. Ex. 23*, reflects an income of \$17,106, or \$1,426 per month. The Court's figure of \$1,431 will be used throughout the remainder of this brief.

A. First, the findings reflect support of \$132, as opposed to \$138. *See* proposed *Findings of Fact and Conclusions of Law*, contained in *Add. Ex. 11*, paragraph 10; and

B. Second, the findings reflect income of \$65,000 per year and \$6,416 per month for Mr. Anderton, as opposed to \$63,600 and \$5,300, respectively. *Add. Ex. 11*, paragraph 16.

3. Marshaling of Facts, Issue #3 - Mr. Anderton's Income from Firewood-Cutting Business¹²

13. Mr. Anderton testified he had been involved in a firewood-cutting business off and on for approximately 20 years. (Rec. 24:3-4, *Add. Ex. 12*). He indicated he and his brother initially started the business, and that the two eventually owned a semi-truck, several saws, and a log splitter. (Rec. 24:5, 154:7-18, *Add. Ex. 12*).

14. At some point over the years, due to a slow-down in the business, Mr. Anderton's brother went to work for Steward's Convalescent, where he had an accident which nearly paralyzed him. Mr. Anderton sold the business and the truck to give his brother his share of the money. (Rec. 154:12-23, *Add. Ex. 12*).

15. Several years later, as the parties' three boys grew old enough, they started cutting firewood on the side to earn money. (Rec. 154:24-155:9, *Add. Ex. 12*). Jeremy was the first to do this, but by the time of trial he had quit and Mr. Anderton, Chris, and Adam were the ones involved. (Rec. 155:3-13, 157:15-19, *Add. Ex. 12*).

¹²All portions of the trial transcript which relate to this issue are contained in *Add. Ex. 12* for the Court's convenience.

16. Mr. Anderton explained that the amount of time he spends on his firewood-cutting business depends entirely on the amount of work he is able to get with his normal job. As he stated: “If I’m mud logging [his W2 job] I’m not making any wood. If I’m not mud logging I’m making wood.” (Rec. 43:23-25, 162:6-163:12, *Add. Ex. 12*)

17. At the time of trial, the assets related to the firewood-cutting endeavor consisted of a five-year-old one-man chain saw, and a 25-year-old log splitter (Rec. 42:9, 43:13-15, *Add. Ex. 12*). Ms. Anderton agreed with Mr. Anderton’s description of such equipment (Rec. 63:8-11, *Add. Ex. 12*).

18. The Court heard testimony from Mr. Anderton and Ms. Anderton regarding income from the firewood-cutting business. The facts from their testimony follow, in the interest of marshaling the facts available to the Court in reaching its decision.

i. Information from Mr. Anderton re: Income from Firewood-Cutting Business

19. Mr. Anderton’s and Ms. Anderton’s joint tax return for 2004 reflects gross receipts of \$7,000 from the firewood business, and a taxable loss of (\$538).

See Defendant’s Trial Exhibit #13, 2004 Tax Return, contained in *Add. Ex. 13*.

20. Mr. Anderton’s tax return for 2005 reflects gross receipts of \$10,220 from the firewood-cutting business, and a taxable loss of (\$3,069.00). *See* Defendant’s Trial Exhibit #14, 2005 Tax Return, contained in *Add. Ex. 14*.

21. Ms. Anderton’s counsel elicited testimony from Mr. Anderton regarding deposits made into his two bank accounts, in an attempt to establish a higher income from this firewood-cutting business. (Rec. 25:20-31:6, 32:25-36:5, *Add. Ex. 12*). Additionally,

Ms. Anderton's counsel introduced copies of the bank statements as exhibits at the time of trial. *See* Plaintiff's Trial Exhibits 5 and 6, contained in *Add. Ex. 15* and *Ex. 16*.

22. As reflected in the transcript, the discussion between Mr. Anderton and Ms. Anderton's counsel's, about the months and amounts of deposits were occasionally mixed up, out of order, and/or a few dollars off. Additionally, because the two of them spoke over one another, it is often difficult to tell which month went with which deposit amount.

23. When sorted out, the numbers from the testimony and the exhibits are nearly identical. However, because the exhibits (contained in *Add. Ex. 15* and *Ex. 16*) are far easier to review, they are the source summarized as follows:

A. Deposits, Zions' Bank account, "Carl Anderton C & M Firewood:"	
i. December 2004 - January 2005	\$3,178
ii. January - February, 2005	\$9,327
iii. February - March, 2005	\$4,182
iv. March - April, 2005	\$5,881
v. April - May, 2005	\$4,149
vi. May - June, 2005	\$3,235
vii. June - July, 2005	<u>\$2,986</u>
Total	\$32,938
B. Deposits, Zions' bank account, "Chris Anderton, Carl Anderton:"	
i. April - May, 2005	\$2,572
ii. May - June, 2005	\$1,710
iii. June - July, 2005	\$5,556
iv. July - August, 2005	\$8,399
v. August - September, 2005	\$5,537
vi. September - October, 2005	\$6,426
vii. October - November, 2005	\$4,799
viii. November - December, 2005	<u>\$5,479</u>
Total¹³	\$40,478

¹³This section is totaled for the Court's convenience, as it completes the 2005 one-year period, when added to the section above.

ix.	December 2005 - January 2006	\$4,657
x.	January - February, 2006	\$5,849
xi.	February - March, 2006	<u>\$9,999</u>
Total	\$20,505

24. Mr. Anderton was asked what portion of the above bank deposits related to his wood and tree business. (Rec. 36:8-9, *Add. Ex. 12*). He indicated he would need to look at his taxes, because the deposits included his and Ms. Anderton's income tax refunds, as well as his income from his job at Milton Logging. (Rec. 36:12-18, *Add. Ex. 12*).

25. Mr. Anderton testified regarding the following tax refunds, included in the deposits (Rec. 38:4-25, *Add. Ex. 12*; *Add. Ex. 15* p.30, *Ex. 16* p.07):

A.	US Treasury Tax Refund, 2/18/05	\$4,348
B.	US Treasury Tax Refund, 2/24/06	\$2,764
C.	US Treasury Tax Refund, 2/24/06	\$539

26. Additionally, the bank statements specifically reflect the following additional tax refunds (*Add Exhibit 15*, p. 30, and *Exhibit 16*, p. 5):

A.	Tax EFT, 2/14/05	\$999
B.	Utah Tax EFT, 2/17/06	\$835
C.	Utah Tax EFT, 2/17/06	\$235

27. According to the parties' joint tax return, signed by both of them, and according to Mr. Anderton's testimony, the parties' combined income for 2004 was \$35,268. (Rec. 153:1-4, 18, *Add. Ex. 12*; *Add. Ex. 13*).

28. According to Mr. Anderton's income tax return for 2005, his income was \$35,728 (R 152:21-24, 153:18-19, *Add. Ex. 12*, *Add. Ex. 14*, line 22). This included

\$35,087 from Milton Logging, \$3,710 in unemployment compensation, and a business loss for 2005 of \$3,069. (*Add. Ex. 14*, lines 7 and 19).

29. Mr. Anderton testified that his W2 earnings from his employment were deposited into his bank account. (Rec. 158:24-25, 159:20-23, 161:14-16, *Add. Ex. 12*; *Add. Ex. 15*).

30. Mr. Anderton also testified that some of the money in the joint account related to deposits of income Chris received working in the oil fields through December, 2005. (Rec. 161:20-23, *Add. Ex. 12*).

31. Mr. Anderton testified, and it was uncontroverted by other testimony or argument, that expenses for the firewood-cutting business were paid for from gross income by dividing the total received by four, with 1/4 going to pay "upkeep," and he and the boys each taking 1/4. (Rec. 160:24-161:2, 169:13-21, *Add. Ex. 12*).

32. Mr. Anderton testified business expenses:

My biggest expense is fuel and the fuel expense has almost doubled since last year and the year before that I've got, I buy and resale firewood because sometimes I don't have the opportunity to do it, depending on if I'm working or what not, the kids, they can split and they can stack and they can haul and what not but I don't like them running the chain saw because it's a high powered saw. . . .

. . . .

Q. And, the money that's been brought in from the wood business, where does that go?

A. It either goes to fuel which is the biggest percentage, parts, saw upkeep, chains, permits, from about January up until I would say March it's kind of deceiving because what we'll do is we'll go up to Larson's and we'll buy the firewood up in the Enola and then turn around and resell it so there's not a big amount of profit on that aspect. In the first part of the year from July till November we're going down to the BLM and you're buying your wood that way and you're making more money but then you're doing more traveling time and so it still balances out about the same, it's kind of deceiving is what it is.

(Rec. 157:11-19, 160:1-16, *Add. Ex. 12*)

33. The parties' 2004 joint tax return, and Mr. Anderton's 2005 tax return, itemize similar business expenses to those of which Mr. Anderton testified. In 2005, such itemized expenses, reflected on *Add. Ex. 14*, were as follows:

A.	Advertising	\$425
B.	Car and truck expenses	\$58
C.	Depreciation and 179 expenses	\$4,043
D.	Repairs and maintenance	\$1,422
E.	Supplies	\$175
F.	Taxes and licenses	\$143
G.	Wages	\$875
H.	Other expenses	\$6,320
i.	Purchases	\$1,250
ii.	(Illegible on copy received from court)	\$1,110
iii.	(Illegible on copy received from court) Fee ...	\$265
iv.	(Illegible on copy received from court)	\$3,166
v.	Miscellaneous	\$245
vi.	(Illegible on copy received from court)	\$1,262
vii.	Permits BLM	\$150
viii.	(Illegible on copy received from court)	\$39
ix.	(Illegible on copy received from court)	\$83
Total		\$13,461

ii. Information from Ms. Anderton re: Income from Firewood-Cutting Business

34. Ms. Anderton testified "Carl makes good money with the wood business. What he reports and what he makes is two different things." (Rec. 63:4-6, *Add. Ex. 12*).

35. Ms. Anderton testified that she worked with Mr. Anderton in the business for 28 years, receiving and placing orders, setting up deliveries, splitting wood with him, cutting wood with him, delivering wood in the truck with him, stacking it and splitting it. (Rec. 64:7-19, 139:9-140:2, *Add. Ex. 12*).

36. Later, she testified that when Mr. Anderton and his brother were running the business in early years she did not help much because the boys were young. But in the last ten years she indicated she had helped when she wasn't working. "Oh, I'd say, you know, five or six days a month, I wasn't out there a lot, but –" (Rec. 191:10-192:4, *Add. Ex. 12*).

37. When asked what the business brought in, in a year, "gross?," Ms. Anderton testified "probably between, I'm going to say 35 and 45 a year." (Rec. 64:24-65:2, *Add. Ex. 12*). She then revised her answer to: A. "\$30,000" – Q. Okay. A. "to \$40,000 a year." (Rec. 64:7-65:5, *Add. Ex. 12*).

38. On cross-examination, Ms. Anderton acknowledged that none of the tax returns show \$30,000 or \$40,000 income from the firewood-cutting business, and acknowledged that she had signed the returns. (Rec. 87:3-25, *Add. Ex. 12*).

39. However, she also indicated that Mr. Anderton took care of the taxes, she didn't really read them, and she just signed them because she "trusted him." (Rec. 87:20-25, *Add. Ex. 12*).

4. **Specific Facts, Issue #4 - Lack of Court Findings Pertaining to Alimony Award**¹⁴

40. The Court found that due to the length of the marriage, and Ms. Anderton's needs, it would be an alimony case, absent the allegations of cohabitation. (Rec. 200:18-21, *Add. Ex. 17*).

¹⁴All portions of the trial transcript which relate to this issue are contained in *Add. Ex. 17* for the Court's convenience.

41. Regarding cohabitation, the Court found that Ms. Anderton was “on a fling with this young guy,” but “they never intended to make a permanent home together,” thus, there was “no evidence to justify [] finding there was cohabitation.” As such, he ruled it was not “a defense against the alimony.” (Rec. 200:21-201:7, *Add. Ex. 17*).

42. The only additional oral finding the Court entered regarding alimony, beyond the findings relating to income set forth in the facts above was: “I’m going to award alimony on the basis of the findings that I’ve talked about financially. I think \$750.00 a month. . . .” (Rec. 205:21-24, *Add. Ex. 17*).

43. The Court’s sole written finding regarding alimony is reflected in paragraph 14 of the *Decree of Divorce*, prepared by Ms. Anderton’s counsel, which states:

14. Consistent with this court’s Findings of Facts, the court has found that the Respondent, Carl Anderton earns sixty-three thousand six hundred dollars a year, or five thousand three hundred dollars monthly (\$5300.00). the court has found that the Petitioner earns about fourteen seventy one hundred dollars (\$1471.00) monthly. Further the court has found that the Petitioner has monthly financial needs that excced [sic] her income by at least seven hundred and fifty dollars (\$750.00). Therefore the court orders that the Respondent, Carl Anderton pays alimony to the Petitioner, Lana Gean Anderton, in the monthly amount of seven hundred and fifty dollars (\$750.00), effective . . . for the term of 25 years and 5 months or until the petitioner remarries or cohabitates pursuant to Utah law.¹⁵

¹⁵ *Add. Ex. 10*, paragraph 14. *See also* proposed *Findings of Fact and Conclusions of Law*, *Add. Ex. 11*, ¶ 16 (substantively identical, with the exception of the figures of \$65,000 for Mr. Anderton’s annual income, \$5,416 for his monthly income, and \$1,400 for Ms. Anderton’s monthly income.)

5. **Marshaling of Facts, Issue #4 - Determination of Financial Circumstances, for Purposes of Alimony**¹⁶

44. Both parties testified regarding their respective living expenses, and submitted exhibits related thereto.

i. **Information Re: Ms. Anderton**¹⁷

45. Pertinent portions of Ms. Anderton's financial declaration, introduced as Plaintiff's Trial Exhibit 9 and contained in *Add. Ex. 19*, reflect the following:

Gross Income	\$1,431
Less Insurance	-\$223
Less Retirement	-\$97
Less Other	-\$36
Net Monthly Income	\$1,075
Rent	\$900
Utilities	\$400
Property Tax and Insurance	\$75
Food	\$300
Clothing	\$100
Laundry and Cleaning	\$50
Medical, Dental, Glasses	\$50
Medical Insurance	\$100
Car expense, include insurance	\$31
Installment Payments	\$400
Capital One	\$150
Chapter 7 Bankruptcy	\$50
Uintah Basin Medical	\$25
Carly Mental Health	\$50
Home Depot	\$75
Capital One	\$50
Entertainment	\$50

¹⁶All portions of the trial transcript which relate to this issue are contained in *Add. Ex. 18* for the Court's convenience.

¹⁷Evidence regarding Ms. Anderton: Rec. 55:1-58:13, 71:2-11, 73:1-76:8, 77:1-78:21, *Add. Ex. 18*, and Plaintiff's Trial Exhibit 9, contained in *Add. Ex. 19*.

Incidentals	<u>\$50</u>
Expenses	\$2,500

46. The numbers result in **expenses, less net income equaling \$1,425.**

47. However, certain reductions were presumably made by the Court, based upon its specific rulings. Those items consist of the following:

A. The Court ordered Mr. Anderton to pay the **\$50** per month debt referred to as “Carly’s Mental Health” (Rec. 203:3-5, *Add. Ex. 17*);

B. The Court ordered the parties to alternate years in which they pay the \$50 per month Chapter 7 Bankruptcy debt (Rec. 213:17-23);

C. The Court ordered the parties to divide Carly’s portion of health insurance, pursuant to statute. (Rec. 202:16-24, *Add. Ex. 18*). This amount could be one of two numbers, based on the following:

i. Insurance is included twice in Ms. Anderton’s statement, first at \$223, and second at \$100. (*Add. Ex. 19*);

ii. In contrast, Ms. Anderton testified that the cost of her health insurance was \$197 per month. (Rec. 209:15-17, *Add. Ex. 18*);

iii. Ms. Anderton’s personal portion of health insurance is one-half of the above cost, to cover herself, plus one-half of Carly’s portion,

resulting in an expense of either \$242.25¹⁸ or \$147.75¹⁹, depending on whether the Court uses the information from Ms. Anderton's trial exhibit, or from her testimony;

iv. These numbers reduce Ms. Anderton's claimed budget by either \$80.75 or \$175.25, depending on which source the Court deems accurate.

48. Mathematically, the above corrections of \$50, \$25, and \$80.75 or \$175.25, total either \$155.75 or \$250.25, and reduce Ms. Anderton's need to \$1,269 or \$1,175, again depending on the numbers for health insurance.

49. Other arguments for reductions in Ms. Anderton's budget are reflected in the record. However, as the Court made no findings that such arguments were meritorious, and due to the Court's discretionary powers in determining which factors to consider, information regarding such arguments is not set forth herein.

50. Regarding employment, Ms. Anderton testified that she had not taught summer school for five years. (Rec. 194:15-17, *Add. Ex. 18*). The record contains no testimony or evidence regarding any other summer employment.

¹⁸Total health insurance premiums reflected in Ms. Anderton's Exhibit 9, *Add. Ex. 19* (\$223 + \$100), less Ms. Anderton's portion of such insurance ($\$323 / 2 \text{ people} * 1.5$ to provide coverage for herself and half of Carly's = \$242.25), results in a \$80.75 correction.

¹⁹Health insurance premiums reflected on Ms. Anderton's budget (\$223 + \$100), less Ms. Anderton's portion of premiums as testified to by her ($\$197 / 2 \text{ people} * 1.5$ to provide coverage for herself and half of Carly's coverage = \$147.75), results in a \$175.25 correction. Plaintiff's Exhibit 9, *Add. Ex. 19*.

ii. **Information Re: Mr. Anderton**²⁰

51. Mr. Anderton's statement of expenses is contained in Defendant's Trial Exhibit 15, *Add. Ex. 20*. Combined with Mr. Anderton's testimony, such information reflects the following:

House	\$780
Truck	\$302
Wells Fargo	\$50
Moonlake (electricity)	\$79
Roosevelt City (water, garbage pickup)	\$115
R&R Propane	\$75
Uintah Basin TV	\$52
Unitah Basis Telephone	\$64
Cell One	\$52
Dentist	\$50
Uintah Basin Medical Center (hospital)	\$50
Uintah Basin Medical Group (counseling)	\$50
Ashley Valley	\$50
Farmer's Insurance	\$200
Dex Media (yellow page ad)	\$26
Weinsteins & Associates (bankruptcy payment)	\$50
Joel Barrett ²¹	\$3,000
Probation	\$150
Food	\$500
Clothing	\$250
Laundry and Cleaning	\$50
Truck up keep	\$120
Gas average (driving to and from work only)	<u>\$1,000</u>
Total	\$4,115

(Rec. 167:17-21, *Add. Ex. 18*; *Add. Ex. 20*).

²⁰Evidence regarding Mr. Anderton: Rec. 167:9-170:1, *Add. Ex. 18*, and Defendant's Trial Exhibit 15, contained in *Add. Ex. 20*.

²¹Total excludes debt to Joel Barrett as no monthly figure was itemized.

52. The record does not reflect any challenges made by Ms. Anderton to any of the expenses listed on Mr. Anderton's budget.

53. However, a reduction of \$25 is necessary on Mr. Anderton's budget, due to the Court's ruling that the parties' bankruptcy debt should be divided in half. (Rec. 213:17-23, *Add. Ex. 18*).

6. Specific Facts, Issue #5 - Real Estate Broker Testimony as to Value of Property²²

54. Shar Lynn Benson, a real estate broker in Uintah County, was called as a witness for Ms. Anderton. Ms. Benson testified that she had been a real estate agent since 1987, and a real estate broker since 1998. (Rec. 8:25-10:8, *Add. Ex. 21*).

55. The Court, upon Ms. Anderton's counsel's motion to admit Ms. Benson's testimony as an expert stated: "Usually a real estate appraiser is qualified as an expert. I'm going to let her testify as to her opinion as to market value. . . . But, it's going to be as a matter of weight and as a real estate broker with twenty years experience." (Rec. 11:8-11, 13-15, *Add. Ex. 21*).

56. Ms. Benson then testified that her opinion regarding the market value of the home was that it was worth \$186,538. (Rec. 12:1-2, *Add. Ex. 21*). Ms. Benson also indicated that the list price she had given Ms. Anderton the prior year was \$179,000, but that prices had gone up in the meantime. (Rec. 12:12-13, *Add. Ex. 21*).

²²All portions of the trial transcript which relate to this issue are contained in *Add. Ex. 21* for the Court's convenience.

57. When Ms. Anderton's counsel moved for admission of Ms. Benson's comparable market analysis, counsel for Mr. Anderton objected, based upon the fact an "appraiser" should testify as to value. (Rec. 13:3-5, *Add. Ex. 21*).

58. The Court stated: "I'll note your objection but I've already stated why I'm going to let it come in." (Rec. 13:11-13, *Add. Ex. 21*).

7. **Marshaling of Facts, Issue #6 - Mathematical Error Made in Determining Value of Real Estate**²³

59. In addition to the above testimony by Ms. Benson, the Court heard testimony from Rex K. Cloward regarding the value of the home. Mr. Cloward testified that he had been a real estate appraiser for 27 years, and had lived in Roosevelt since 1970. (Rec. 15:23-16:7, *Add. Ex. 22*).

60. Ms. Anderton stipulated to Mr. Cloward being an expert. (Rec. 15:13-19, *Add. Ex. 22*).

61. Mr. Cloward testified regarding his inspection of the home, preparation of a market analysis, etc. (Rec. 16:8-17:3, *Add. Ex. 22*). He indicated he had appraised the Anderton home in December 2002, and determined the value to be \$120,000. (Rec. 16:15-16, 17:1-3, *Add. Ex. 22*).

62. On cross examination, Mr. Cloward was asked to estimate how much of an increase in value had occurred subsequent to his appraisal. He indicated he would hate to estimate the value without seeing the condition of the property, but when asked to

²³All portions of the trial transcript which relate to this issue are contained in *Add. Ex. 22* for the Court's convenience.

hypothetically assume it was in the same condition as when he appraised it, he indicated “I would guess that it’s appreciated in value somewhere between 25 and 30%.” (Rec. 17:16-18:22, *Add. Ex. 22*).

63. It is undisputed that the balance owed on the home mortgage at the time of trial was \$66,732.68. (Rec. 22:11-12, *Add. Ex. 22*, and Trial Exhibit #7).

64. In considering the above, the Court entered the following oral findings:

THE COURT: Let's look at the house. I think what we need to do with that house I heard from an appraiser, I heard from a real estate broker, both with a lot of years of experience. Mr. Cloward appraised the house in 2002 at \$120,000, asked about the appreciation he thought it would be around \$24,000 after two, six years, excuse me, four years. So his, his number would be one-hundred and sixty-five. Shar Benson's is one-hundred and eight-six; I think it's reasonable for me to find that it's worth \$175,000. That's the fair market value of that house and I need to make that finding to give Mr. Anderton the option of refinancing that house and buying her equity out for one-half of that amount on net . . .

(Rec. 203:12-25, *Add. Ex. 22*).

65. The Court indicated it was adding \$120,000 and \$24,000, resulting in \$165,000 as a market value. However, as a factual matter, these numbers total **\$144,000**.

VI. SUMMARY OF THE ARGUMENT

Mr. Anderton makes approximately \$35,000 annually as a mud logger for an oil company. (Rec. 152:8-24). In addition, he earns seasonal money cutting and selling firewood with two of his adult sons. (Rec. 154-55). At trial, the Court determined that his income from this firewood-cutting business was \$30,000 per year. (Rec. 202:5-10).

However, the Court’s determination was inappropriate, based on any one of four (4) alternative grounds. First, no threshold finding of “voluntary underemployment” was

made, as required by UTAH CODE ANN. § 78-45-7.5(7)(a) (2006), for the imputation of income for child support purposes.

Second, the Court's analysis of the "amount" of Mr. Anderton's income did not meet the requirements of either of the two arguably applicable subsections of UTAH CODE ANN. § 78-45-7.5 (2006). Specifically, subsections (4) and (7), which relate to the "imputation of income," and the determination of "business income," respectively.

Third, even considering the evidence in the light most favorable to the Court's ruling, the determination that Mr. Anderton's income from his firewood-cutting business was \$30,000, for purposes of alimony and/or child support, was clearly erroneous.

Fourth, the findings required by UTAH CODE ANN. § 30-3-5 (2006) and applicable Utah case law, for the determination of income for purposes of alimony, were not entered.

In addition to the above arguments regarding problems with the determination of Mr. Anderton's "income," there were insufficient legal findings entered to support the award of alimony. Findings must be entered regarding "the financial condition and needs of the spouse claiming support, the ability of that spouse to provide sufficient income for him or herself, and the ability of the responding spouse to provide the support." *Stevens*, 754 P.2d at 958, *Add. Ex. 7* (citations omitted). In this case, the limited findings made regarding these factors were legally insufficient.

Finally, the determination of the value of the parties' marital home should be overturned, based on either of two grounds. First, a real estate broker was permitted to testify, over objection, as to the value of the parties' marital property. This testimony

violated UTAH CODE ANN. § 61-2b-3 (2006) and should be excluded. Second, a clear mathematical error, inadvertently made by the Court in determining the value of the marital home, should be corrected.

VII. ARGUMENT

A. The Determination that Mr. Anderton Earns an Additional \$30,000 a Year Cutting and Selling Firewood, in Addition to His W-2 Earnings, Was in Error

1. Imputation of Extra Income to Mr. Anderton for Child Support Purposes Was Inappropriate, as Mr. Anderton Was Not Found to Be “Voluntarily Underemployed,” as Required by Subsection (7)(a) of UTAH CODE ANN. § 78-45-7.5 (2006)²⁴

Under UTAH CODE ANN. § 78-45-7.5(7)(a) (2006), *Add. Ex. 4*, a threshold finding of “voluntary unemployment or underemployment” must be made **before** income may be imputed for purposes of child support. This section specifically states, “[i]ncome **may not** be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is **voluntarily** unemployed or underemployed.” UTAH CODE ANN. § 78-45-7.5(7)(a) (2006), *Add. Ex. 4* (emphasis added).

In this case, the \$30,000 figure determined by the Court far exceeded tax return information and Mr. Anderton’s testimony regarding his income; thus, it constituted the “imputation of income.” (Rec. 152:21-24, 153:18-19, *Add. Ex. 13, 14*). Mr. Anderton did not stipulate to the imputation of income. (Rec. 207-08, 211-12, *Add. Ex. 8*). Further,

²⁴All portions of the trial transcript relating to this issue are contained in *Add. Ex. 8* for the Court’s convenience.

there was no finding entered indicating that Mr. Anderton was "voluntarily unemployed or underemployed," as required by UTAH CODE ANN. § 78-45-7.5(7)(a) (2006).

In *Hall v. Hall*, the Utah Court of Appeals addressed a similar challenge to the findings made by a Trial Court under UTAH CODE ANN. § 78-45-7.5(7)(a) (2006). *Hall*, 858 P.2d at 1018, *Add. Ex. 5*. Mr. Hall challenged the Trial Court's decision to impute historic income to him for purposes of child support and alimony. He had been employed in a computer business in California at \$55,000. Subsequently, he worked for three years in Utah as a computer consultant and software developer, making \$100,000 a year. Approximately ten (10) days before trial, Mr. Hall obtained a job in Washington state, making only \$40,000. *Hall*, 858 P.2d at 1023, *Add. Ex. 5*.

The Trial Court entered detailed findings regarding Mr. Hall's historical income, his present income, and his occupational qualifications. Based thereon, his income was determined to be \$98,499 per year for purposes of alimony and child support. *Hall* 858 P.2 at 1023, *Add. Ex. 5*.

On appeal, the Utah Court of Appeals explained that findings regarding the "amount of income to impute" do not become relevant "until **after** [the Court] determines, as a threshold matter, that income should be imputed because the parent is *voluntarily* unemployed or underemployed, as required by section (7)(a)." *Hall*, 858 P.2d at 1024 (*italics in original, bolded emphasis added*), *Add. Ex. 5*.

The Court of Appeals went on to indicate that “findings on the whole are insufficient if they omit critical findings required by the statute.”²⁵ Based upon the lack of findings of voluntary underemployment, the *Hall* Court determined that the Trial Court’s findings were “statutorily insufficient,” and reversed and remanded the case. *Hall* 858 P.2 at 1025, *Add. Ex. 5*.

Just as in *Hall*, in this case there were no findings entered indicating that Mr. Anderton was voluntarily underemployed, as required to impute income under UTAH CODE ANN. § 78-45-7.5(7)(a) (2006). The closest the court came to such a finding was the following statement:

I’m also a little bit confused about why with this oil economy the way it is and the company he works for doesn’t have more work and I think he could be working more hours if he looked around but I don’t now [sic]. But, even taking his gross income now on his, on his oil field business at \$35,000 a year I think that I could easily find that he is making in addition of \$30,000 a year out of that wood business or could be, or could be. I think his capability is in that range.

(Rec. 202:1-10, *Add. Ex. 17*.)

However, this statement is not a “finding” of underemployment, rather, it indicated “confusion” about why there wasn’t more work; and an indication that the Court wondered, but did not know, whether or not he could be working more hours. In fact, in considering these questions, the judge specifically concluded, “**I don’t now** [sic].” *Id.*

In response to Mr. Anderton’s protests to the ruling, the Court also made the following comments:

²⁵*Hall*, 858 P.2d at 1025, *Add. Ex. 5*, citing *Allred*, 797 P.2d at 1111 (additional citations omitted).

MR. ANDERTON: Your Honor, that witness has never made more than \$20,000 a year, never.

....

THE COURT: Well, that's what I found based on my experience and what we've got here in front of us.

....

MR. ANDERTON: . . . but I mean when you're talking about firewood and my oil field thing how about if I work around the clock, it's impossible. You're talking \$30,000 on each job, there's no way I can do that. You're talking me working 24 hours around the clock.

THE COURT: Well do the best you can or find another job. The oil field's booming right now—

MR. ANDERTON: Yeah, I'm not going to make more, one of the better jobs out there—

THE COURT: You should be making more than \$35,000 a year.

MR. ANDERTON: That's where it's at.

THE COURT: Okay.

MR. ANDERTON: I've made less, this is the biggest year I've ever had.

THE COURT: Okay. . . .

(Rec. 207:23-208:3, 211:24-212:16, *Add.* 17)²⁶

From the above statements, it appears the Judge thought Mr. Anderton “should” be making more money. However, this is insufficient to constitute a finding that a party is voluntarily underemployed. Moreover, no evidence, testimony, or argument of underemployment is reflected in the record.

Further, such a finding would be grossly inequitable in this case. Mr. Anderton has custody of the parties’ minor child, Carly, and the responsibility of caring for her; yet he is working two jobs. (Rec. 3:23-24, *Add.* Ex. 4). On the other hand, Ms. Anderton has no such responsibilities, testified she has not worked during the summer for the last five

²⁶These comments are cited in other sections above but are restated here for the Court’s convenience in considering this issue.

years; and yet the Court did not impute income to her for the three summer months for purposes of providing child support for Carly.

If the facts of this case were reversed and a mother had custody of a child, was working two jobs, and had been required to refinance the home to pay her husband his share of the equity in a home, it is highly unlikely a Court would tell her she should be earning more money. On the other hand, it is also unlikely a Court would tolerate a father earning \$1,431 per month, taking his summers off, and being paid alimony.

a. The Lack of a Finding of Voluntary Underemployment Was Not “Harmless Error”

While a finding of voluntary underemployment is statutorily required, admittedly, under certain circumstances a decision to impute income without such a finding can still be upheld, if the failure can be viewed as “harmless error.” *Hall*, 858 P.2d at 1025, *Add. Ex. 5*.

The Utah Court of Appeals in *Hall* discussed two such circumstances. The first is if “the undisputed evidence clearly establishes the factor or factors on which findings are missing.”²⁷ The *Hall* Court determined that this circumstance did not apply in that case because there was at least some evidence to suggest Mr. Hall’s income level was the result of events beyond his control. For instance, Mr. Hall testified that some of his clients did not renew certain “lucrative consulting contracts.” *Hall*, 858 P.2d at 1025, *Add. Ex. 5*. Additionally, the Court noted that the parties hotly disputed the adequacy of Mr. Hall’s efforts to find other employment. Thus, the Utah Court of Appeals held:

²⁷*Hall*, 858 P.2d at 1025, *Add. Ex. 5*, citing *Allred*, 797 P.2d at 1111.

Accordingly, because the evidence in this case is not “clear, uncontroverted, and capable of supporting only a finding in favor of the judgment,” we cannot affirm on the basis of undisputed evidence in the record. *Id.*, citing *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983).

Similarly, in this case, there is not “clear, uncontroverted” evidence establishing voluntary underemployment. Ms. Anderton did not testify, or argue, that Mr. Anderton was not working full-time, nor did any other witness. Mr. Anderton testified to the fact that he works certain days, then is off while they move his rig to a new location. Sometimes it is moved quickly, other times it takes longer. (Rec.. 162:12-163:12, *Add. Ex. 4*). Additionally, Mr. Anderton testified that whenever he does not have work at his mud logging job, he works cutting firewood and that his income in 2005 was his best ever. (Rec.. 212:14-15, *Add. Ex. 4*).

In short, no evidence before the Court suggested voluntary underemployment.

Regarding the second circumstance discussed in *Hall*, the Utah Court of Appeals indicated that a Trial Court’s decision to impute income can also be affirmed, even “absent outright expression of the statutorily mandated finding, **if the absent findings can reasonably be implied.**”²⁸ The Court went on to explain that this second exception is intended to resolve circumstances where the Trial Court has gone through a detailed

²⁸*Hall*, 858 P.2d at 1025 (emphasis added), *Add. Ex. 5*; see also *State v. Ramirez*, 817 P.2d 774, 787-8 n.6 (Utah 1991); *Adams v. Board of Review*, 821 P.2d 1, 5 (Utah Ct. App. 1991) (“A finding may be implied if it is clear from the record, and therefore apparent on review, that the finding was actually made as part of the tribunal’s decision.”).

treatment of the facts related to voluntary underemployment, but has failed to use the statutory words. In such circumstances, the required findings can be implied.

The Utah Court of Appeals, in *Hall*, cautioned:

Findings may not be implied, however, when the ‘ambiguity of the facts’ makes such an assumption unreasonable. (*Citation omitted*) . . . [W]e will not imply any missing finding where there is a ‘matrix of possible factual findings’ and we cannot ascertain the trial court’s actual findings.²⁹

The Utah Court of Appeals in *Hall* outlined a number of questions that remained unanswered by the Trial Court, making it improper to imply a finding of voluntary underemployment in that case. Such questions included whether or not the drop in Mr. Hall’s earnings was “voluntary,” what his abilities were, whether or not his salary was “below the prevailing market for a person with his abilities,” and whether or not there were available job openings for someone with his abilities. *Hall*, 858 P.2d at 1026, *Add. Ex. 5*.

In the case at hand, there was **no** detailed treatment of the facts and none of the above questions were answered. The threshold finding required by the legislative mandate of UTAH CODE ANN. §78-45-7.5(7)(a) (2006) was not satisfied, and no proof of an implied finding exists. Thus, income should not have been imputed to Mr. Anderton, and it was an abuse of discretion to do so.

²⁹*Hall*, 858 P.2d at 1025, 1026, *Add. Ex. 5*, citing *Ramirez*, 817 P.2d at 788, and *Adams*, 821 P.2d at 6.

2. Even Assuming it Was Appropriate to Impute Income, the Findings Required to Determine the “Amount to Impute,” Under Subsection (7)(b) of UTAH CODE ANN. § 78-45-7.5 (2006), Were Not Made³⁰

Under UTAH CODE ANN. § 78-45-7.5(7)(b) (2006), *Add. Ex. 4*:

If income is imputed to a parent, the income **shall** be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

Without explanation, justification, or findings related to **any of the above factors other than work history**, it was determined that Mr. Anderton's income from the firewood-cutting business was \$30,000. (Rec. 202:7-8). No findings were entered regarding Mr. Anderton's employment qualifications, nor was evidence regarding such qualifications presented by Ms. Anderton. No findings were entered regarding prevailing earnings and job opportunities in the area for persons of similar backgrounds, nor was evidence regarding such opportunities presented by Ms. Anderton.

Mr. Anderton's work history was the sole item listed in the statute which was discussed, and only to a limited degree. Specifically, Mr. Anderton testified regarding the length of time he had worked at his present job, and the length of time he had been involved in cutting firewood. (Rec. 24:3-13, 152:13-14). However, there was no discussion of his earnings prior to 2004, and the only evidence about 2004 was the joint

³⁰All portions of the trial transcript relating to this issue are contained in *Add. Ex. 8* for the Court's convenience.

tax return reflecting a loss. (Rec. 153-54). Admittedly, Mr. Anderton's income for 2005 was discussed; however, a one-year period does not constitute "work history."

3. The Findings Required to Calculate "Business Income," Under Subsection (4) of UTAH CODE ANN. § 78-45-7.5 (2006), Were Not Made³¹

Under UTAH CODE ANNOTATED §78-45-7.5(4)(a) (2006), contained in *Add. Ex. 4*:

Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. . . .

No findings were entered regarding the Trial Court's calculation of Mr.

Anderton's expenses related to his firewood-cutting business. Undisputed testimony was introduced indicating that one-fourth of the gross income from the business was set aside for expenses. (Rec. 160:24-161:2, 169:13-21). Testimony was developed regarding the nature of such expenses. Tax returns were introduced reflecting such expenses. (*Add. Ex. 13, 14*). However, no findings were made regarding this issue.

4. The Factual Determination that Mr. Anderton Earns an Additional \$30,000 From His Firewood-Cutting Business was Clearly Erroneous³²

The factual finding that Mr. Anderton earns \$30,000 cutting firewood was not supported by the evidence, or by sufficient factual findings, even taking the evidence in the light most favorable to the Court's ruling. Thus, the use of that number for child support and alimony calculations constituted a clear abuse of discretion.

³¹All portions of the trial transcript relating to this issue are contained in *Add. Ex. 12* for the Court's convenience.

³²All portions of the trial transcript relating to this issue are contained in *Add. Ex. 12* for the Court's convenience.

In the fact section related to this issue, Mr. Anderton has marshaled all evidence heard by the Court regarding income. Taking from that section the assertions most favorable to the ruling, the evidence the Court heard which supports the highest possible income consists of two alternative arguments.

First, Ms. Anderton testified that in her view, the firewood-cutting business grossed “A. **\$30,000** – Q. Okay. A. **to \$40,000 a year.**” (Rec. 64:23-24, 65:3-65:5, *Add. Ex. 12*).

Even assuming this testimony to be true, Mr. Anderton’s testimony regarding expenses and the equal division of income with his two boys was undisputed by Ms. Anderton, by the testimony of any witness, or by the argument of counsel. Specifically, Mr. Anderton indicated one-fourth of the income was reserved to cover expenses, such as gas for travel to the mountains to cut wood, for delivering wood, for permits to cut firewood, for the purchase of wood to fill orders when the family was unable to cut it personally, for advertising, etc. (Rec. 160:24-161:2, 169:13-21, *Add. Ex. 12*). The remaining three-fourths was divided equally between Mr. Anderton and his two boys. *Id.*

Given this undisputed testimony, the absolute most the Court could have determined Mr. Anderton earned from this business, based upon the highest number asserted by Ms. Anderton, was **\$10,000** (1/4 of the \$40,000 testified to by Ms. Anderton).

The second alternative argument made by Ms. Anderton’s counsel was based on Mr. Anderton’s bank deposits. (Rec. 25:20-31:6, 32:25-36:5, *Add. Ex. 12*, *Ex. 15*, *Ex. 16*). According to bank statements for 2005, as summarized in paragraph 23 of the fact

section above, a total of \$32,938 was deposited into one account, and \$40,478 was deposited into a second account which Mr. Anderton held jointly with his son Chris. Thus, the total deposited in 2005 was \$73,416. *Id.*

Testimony and exhibits were introduced reflecting \$5,347 in Mr. and Ms. Anderton's tax refunds, deposited into Mr. Anderton's accounts in 2005. (Rec. 68:4-21, *Add. Ex. 12, Ex.15, Ex. 16*). These funds were not from the firewood-cutting business.

Additionally, Mr. Anderton testimony was undisputed that his W2 earnings from his employment as a mud logger were deposited into his account. (Rec. 158:24-25, 159:20-23, 161:14-16, *Add. Ex. 12*). The exact amount of "net" deposits was not established, however, Mr. Anderton's gross income was \$35,087. (Mr. Anderton's 2005 Tax Return, *Add. Ex. 14*). Liberally, at least 25 percent of this amount would have been taken out for taxes, leaving a conservative \$26,315 which was deposited.

Also, the deposit exhibits used by Ms. Anderton's counsel reflect multiple designated line items for "UT BEN EFT," or unemployment compensation benefits (*Add. Ex 16*). According to Mr. Anderton's tax return for 2005, such benefits totaled \$3,710. (*Add. 14*).

Taking these numbers into account, Mr. Anderton's deposits of \$73,416, less tax refunds received in 2005, of \$5,347, less net W2 earnings of approximately \$26,315, less unemployment compensation benefits of \$3,710 leaves \$38,044 in deposits. This number must then be divided by four based upon the undisputed testimony that one-fourth went to expenses, one-fourth to Mr. Anderton, one-fourth to Chris, and one-fourth to Adam.

Thus, Mr. Anderton's highest possible earnings from the firewood-cutting business for 2005, based upon the deposits, was \$9,511.

Finally, Mr. Anderton testimony was undisputed that some of the money in the joint account he held with Chris came from Chris' earnings. (Rec. 161:20-23, *Add. Ex.* 12). However, the amount was not established, thus, specifics cannot be deducted.

A change from \$30,000 to \$10,000 in income from Mr. Anderton's firewood-cutting business would reduce his income for purposes of child support and alimony by **\$1,666** per month. A change to \$9,511 would drop it by **\$1,707** per month.

As a reality check, if the Trial Court were correct in ruling that Mr. Anderton received \$30,000 for his one-fourth share of the earnings, it would mean he and his sons were earning \$120,000 per year in Roosevelt cutting firewood. Yet the evidence and testimony reflects that the family took out bankruptcy, their home mortgage was delinquent on a number of occasions, and their income taxes reflected a loss from this business. These facts do not appear consistent.

The transcript does not contain any evidence of how the conclusion was reached that Mr. Anderton "could be" making \$30,000 from the firewood-cutting business.

Rather, the discussion regarding this matter was fairly general, specifically, the Trial Court stated:

Looking at his income and his tax returns, there's a lot of deposits coming into that C&M account and the other account at Zion's Bank from the wood business. Mr. Anderton testified that he had some large expenses and that he had to split and pay wages to his boys that helped him. I don't know how many years that went on but the tax returns shows after an itemization on it that he suffered a loss in 2004 of 538 [sic] and that he suffered a loss in the following year of about \$1,200, I'm

sorry, \$3,069.00. But this court is aware and knows that in a cash business like that the loss is the loss for purposes of taxes but, I think they [sic] are situations and I'm well aware of extra income that had, would come through on the basis of just the deposits to the account and perhaps cash, cash receipts that weren't put it in the bank account. I'm also a little bit confused about why with this oil economy the way it is and the company he works for doesn't have more work and I think he could be working more hours if he looked around but I don't now [sic]. But, even taking his gross income now on his, on his oil field business at \$35,000 a year I think that I could easily find that he is making in addition of \$30,000 a year out of that wood business or could be, or could be. I think his capability is in that range.

(Rec. 201:8-202:10, *Add. Ex. 12*).

The Court later adjusted the income numbers slightly, from those reflected in the above quote, finding that the total from Mr. Anderton's job, plus the \$30,000, was \$63,000 divided by 12, or \$5,300 per month. (Rec. 207:21-22, *Add. Ex. 12*).

Regarding the conclusion reflected in the above statement that there was additional "cash" income beyond the deposits, there was nothing in the testimony or evidence to support this finding. Facts regarding this assertion are marshaled in the fact section addressing this issue, paragraphs 4 through 6 above. However, to summarize, neither Ms. Anderton nor her counsel made this argument; no witness testified to this effect; and an exhibit introduced by Ms. Anderton's counsel reflects **checks** received from a customer, not cash. (*See Plaintiff's Trial Exhibit 8, Add. Ex. 9*).

Alta Lodge was one of three regular clients named by Mr. Anderton. (Rec. 56:22-57:3, *Add. Ex. 12*). Its firewood purchases in 2005 totaled \$1,680. (*Add. Ex 9*). Hypothetically speaking, Mr. Anderton and his boys would need to have 71 clients purchasing \$1,680 in firewood, like Alta Lodge, to bring in a gross income of \$120,000 per year, and net income of the \$30,000 imputed to Mr. Anderton.

The only other statements made by the Court regarding the determination of Mr. Anderton's income were:

THE COURT: Well, that's what I found based on my experience and what we've got here in front of us.

....

THE COURT: Well do the best you can or find another job. The oil field's booming right now—

....

THE COURT: You should be making more than \$35,000 a year.

(Rec. 208:1-3, 212:5-7, 212:10-11, *Add. Ex. 17.*)

As explained by the Utah Court of Appeals in *Hall*, a “trial court abuses its discretion when it fails to enter specific, detailed findings supporting its financial determinations.” *Hall*, 858 P.2d at 1018, *Add. Ex. 5*. The “findings” of a Trial Court “are adequate only if they are sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” *Id.* Such detailed findings are required to determine whether the Trial Court exercised its discretion in a rational manner. *Id.*

In this case, there are no oral or written findings detailing how the decision regarding Mr. Anderton's income was reached. No findings were entered regarding the portion of deposits attributable to Mr. Anderton's firewood-cutting business. No findings were made deducting deposits specifically from other sources, such as the tax refunds, or Mr. Anderton's W-2 income. No findings were made regarding expenses of the firewood-cutting business. No findings were made regarding the division of income from the firewood-cutting business between Mr. Anderton and his two sons.

In short, the income imputed to Mr. Anderton's for his firewood-cutting business, of \$30,000, simply was not justified by the evidence, nor were sufficient findings entered to support the Court's determination of that amount.

B. The Alimony Award in this Case Should be Overturned, Based Upon the Lack of Required Findings Pertaining to Mr. and Ms. Anderton's Financial Circumstances³³

In determining alimony, a Trial Court has considerable discretion, and its ruling typically “will not be overturned absent a showing of a clear and prejudicial abuse of discretion.”³⁴ However, in exercising its discretion, the Trial Court “must consider the financial condition and needs of the spouse claiming support, the ability of that spouse to provide sufficient income for him or herself, and the ability of the responding spouse to provide the support.” *Stevens*, 754 P.2d at 958, *Add. Ex. 7*, citing *Paffel*, 732 P.2d at 101.

UTAH CODE ANN. § 30-3-5(8) (2006) *Add. Ex. 1*, codifies the three requirements described above and adds others. Specifically, it indicates a Court “shall” consider the following factors in determining alimony:

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

³³All portions of the trial transcript relating to this issue are contained in *Add. Ex. 17* for the Court's convenience.

³⁴*Stevens*, 754 P.2d at 958, *Add. Ex. 7*, citing *Paffel*, 732 P.2d at 100; and *Eames v. Eames*, 735 P.2d 395, 397 (Utah Ct. App. 1987).

(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.

If the Court fails to consider the factors set forth by UTAH CODE ANN. §30-3-5(8) (2006), *Add. Ex. 1*, and Utah case law, it is an “abuse of discretion.” *Stevens*, 754 P.2d at 958, *Add. Ex. 7*, citing *Paffel*, 732 P.2d at 101. Furthermore, a Trial Court “must make findings on all material issues.” *Id.* Such findings “should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.”³⁵

In this case, Ms. Anderton was awarded alimony of \$750 per month. In support of this amount, the Court found, “I’m going to award alimony on the basis of the findings that I’ve talked about financially. I think \$750.00 a month.” Rec: 205:21-23, *Add. Ex. 17*.

The “financial findings” mentioned are those pertaining to income, addressed in the Argument, Section A, above. As discussed at length, such findings were insufficient, and were not supported by the evidence.

Moreover, there are not findings related to the other factors a Court is required to address in determining alimony. No findings were entered determining the parties’ respective “net earnings” available to pay expenses. No findings were entered regarding the reasonableness of the parties’ respective living expenses, or what those expenses were.

³⁵*Hall*, 858 P.2d at 1024, *Add. Ex. 5*, citing *Allred*, 797 P.2d at 1111 (quoting *Stevens*, 754 P.2d at 958, *Add. Ex. 7*. See also *Sukin v. Sukin*, 842 P.2d 922, 924 (detailed findings are necessary to determine whether Trial Court has exercised its discretion in a rational manner).

No findings were made regarding Ms. Anderton needs, or what income Mr. Anderton had left after paying his expenses, to provide assistance to her. No finding was made regarding any extra monthly expense Mr. Anderton would bear as a result of the Court's order to refinance the home. Nor was the issue of Ms. Anderton's ability to earn additional money during the summer months addressed.

In short, almost none of the findings required by UTAH CODE ANN. § 30-3-5(8) (2006) were considered in this case. Thus, the alimony award entered constituted an abuse of discretion, and should be reversed.³⁶

1. There are No Applicable Exceptions Excusing the Lack of Findings Required for Entry of an Alimony Award

There is one exception to the requirement that a court enter findings on all material issues related to alimony. However, it does not apply in this case. Specifically, findings do not need to be as detailed if the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of judgment. *Haumont*, 793 P.2d at 425. However, for this exception to apply, there must at least be sufficient findings to show that the court's judgment or decree follows logically from, and is supported by the evidence.³⁷ Further, the findings must be sufficiently detailed and include enough

³⁶*Haumont*, 793 P.2d at 425 (failure of a Trial Court to enter findings on all material issues related to alimony, constitutes reversible error); and *Paffel*, 732 P.2d at 101.

³⁷*Hall*, 858 P.2d at 1021, *Add. Ex. 5*; *see also, Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986).

subsidiary facts to disclose the steps which were taken to reach the ultimate conclusion on each factual issue.³⁸

In this case, it is absolutely **not** clear what facts were relied upon, what steps were taken, or what findings were made on any of the material issues required for determining alimony. The determination was not explained, nor were the steps which were taken described. Further, the Court's determination does not appear to be supported by the evidence, let alone flow logically therefrom. Additionally, as described above, there are no specific or detailed findings regarding net incomes, expenses, or how such amounts were calculated.

It is interesting to note that the Court advised **Mr.** Anderton that he should be making more than \$35,000, and imposed obligations upon him based upon an assumption he was making \$30,000 in extra income. (Rec. 212:1-16, *Add. Ex. 17*). Yet the Court said nothing about **Ms.** Anderton's income of \$17,652, nor did the Court discuss imputing income to **her**, for the purpose of providing child support for Carly, despite her testimony she had not worked for the last five (5) summers.

2. Consideration of the Alimony Numbers Presented in this Case.

In the fact section above, paragraphs 45 through 47, Mr. Anderton outlined the income and expense numbers submitted by Ms. Anderton through her exhibits, deducted items the Court ordered him to pay, and reached an alleged unmet need of \$1,269 or \$1,175, depending on the numbers used for health insurance. If income were imputed to

³⁸*Hall*, 858 P.2d at 1021, *Add. Ex. 5*; *see also, Action*, 737 P.2d at 999.

Ms. Anderton for the three (3) summer months of the year, it would add to her ability to meet her own needs.

Mr. Anderton's **gross** 2005 W2 earnings were approximately \$35,087,³⁹ plus unemployment compensation of \$3,710, equals \$38,797. (*Add. Ex. 14*). As outlined above, Mr. Anderton's highest possible income from the firewood-cutting business, based upon Ms. Anderton's testimony (less the undisputed division of earnings with his boys, and expenses), was \$10,000 for 2005. His highest income based upon Ms. Anderton's counsel's introduction of evidence regarding bank deposits (less the undisputed division of earnings with his boys, and expenses), was \$9,511.

Based upon the foregoing, the two highest possible total income figures for Mr. Anderton, taking the evidence in the light most favorable to Ms. Anderton, were \$48,797, or \$4,067 per month (using Ms. Anderton's testimony); and \$48,308, or \$4,026 per month (using her counsel's bank deposit argument).

Mr. Anderton's unchallenged expenses were \$4,115 per month, leaving no ability to pay alimony.

C. It Was Reversible Error for a Realtor to be Permitted to Testify, Over Objection, as to the Value of the Parties' Marital Property⁴⁰

The parties in this case agreed to Mr. Anderton being awarded the marital home. (Rec. 211:11-12, *Add. Ex. 21*). The Court ordered the equity equally divided, with Mr.

³⁹Gross income is being used in the interest of being conservative, as the Court made no findings regarding Mr. Anderton's net income.

⁴⁰All portions of the trial transcript relating to this issue are contained in *Add. Ex. 21* for the Court's convenience.

Anderton to sell or refinance the home within 120 days. (Rec. 203:25, 204:1-5, *Add. Ex. 21*).

Regarding the value of the home, the Court heard testimony from Ms. Anderton's realtor (over Mr. Anderton's counsel's objection), and heard testimony from Mr. Anderton's appraiser. (Rec. 203:14-25, *Add. Ex. 21*). Based upon these sources, the Court determined the fair market value of the property to be \$175,000. (Rec. 203:21-22, *Add. Ex. 21*).

The Court, sua sponte, raised the issue of Ms. Anderton's realtor not being an appraiser, but indicated he would hear her testimony and consider that issue in regards to the weight to give her testimony. (Rec. 11:8-15, *Add. Ex. 21*). Mr. Anderton's counsel appropriately objected to the Court accepting Ms. Anderton's exhibit, however, the Court overruled his objection, stating, "Yeah, I'll note your objection but I've already stated why I'm going to let it come in." (Rec. 13:11-13, *Add. Ex. 21*).

According to UTAH CODE ANN. § 61-2b-3 (2006), it is unlawful for an individual to prepare an appraisal or perform a consultation service related to the value of property, unless they are a licensed appraiser. This statute specifically states:

- (1) Except as provided in Subsection (2) and in Subsection 61-2b-6(2), **it is unlawful for anyone to prepare, for valuable consideration, an appraisal, an appraisal report, a certified appraisal report, or perform a consultation service relating to real estate or real property in this state without first being licensed or certified in accordance with this chapter. .**

UTAH CODE ANN. § 61-2b-3 (2006), *Add. Ex. 2*.

There are certain exceptions to this rule. However, none of them apply to a realtor testifying in Court regarding value. The first exception which could be argued is for a realtor giving an opinion to a potential buyer or seller as to a “listing price” or “purchase price,” **"in the ordinary course of [his or her] business."** UTAH CODE ANN. § 61-2b-3(2)(a) (2006), *Add. Ex. 2*. However, testifying in Court does not constitute "the ordinary course of [] business" for a real estate broker.

The second exception which could be argued is UTAH CODE ANN. § 61-2b-3 (2006), subsection (f), which allows an individual to state an opinion **if no consideration is paid, and no other party is expected to rely on the appraisal.** *See* UTAH CODE ANN. § 61-2b-3(f) (2006), *Add. Ex. 2*. However, clearly the Court was expected to rely on the appraisal in this matter, and presumably consideration was paid, so this exception does not apply either.

D. A Mathematical Error Made in Determining the Value of the Marital Home Should be Corrected⁴¹

A Trial Court’s findings of fact will be overturned if “clearly erroneous.” *Young v. Young*, 979 P.2d 338, 342 (Utah 1999). A clear math error should be sufficient to meet this standard.⁴²

In his ruling regarding the value of the parties’ marital home, the judge stated:

⁴¹All portions of the trial transcript relating to this issue are contained in *Add Ex. 22* for the Court’s convenience.

⁴²*See also Nielsen*, 2000 UT App at 37, ***nonofficial publication***, *Add. Ex. 6* (Utah Court of Appeals held that Trial Court erred in its method of calculating the interest awarded for arrears in child support and alimony, requiring remand).

I heard from an appraiser, I heard from a real estate broker, both with a lot of years of experience. Mr. Cloward appraised the home in 2002 at **\$120,000**, asked about the appreciation he thought it would be around **\$24,000** after . . . four years. So his, his number would be one-hundred and sixty five [**\$165,000**]. Shar Benson's is one-hundred and eighty-six [**\$186,000**]; I think it's reasonable for me to find that it's worth \$175,000. That's the fair market value of that house."

(Rec. 203:13-22, *Add. Ex. 22*).

However, \$120,000 plus \$24,000 equals **\$144,000**, not \$165,000. A math error of this nature is simple to make when dealing with a complicated case; however, it significantly impacted the Court's ruling, and should be corrected.

Using the Court's apparent averaging of the numbers from the two witnesses, the value of the home using the corrected figures of \$144,000 and \$186,000, is **\$165,000**. Deducting the mortgage balance of \$66,732.68, this leaves an equity figure of \$98,267 to be equally divided as ordered by the Court.

However, the Trial Court's use of a real estate broker's estimate, over objection, was inappropriate under UTAH CODE ANN. § 61-2b-3 (2006); thus, Mr. Cloward's appraisal of \$144,000 should be used. Deducting the mortgage balance of \$66,732.68, this would leave an equity figure of \$77,267 to be equally divided.

Mr. Anderton believes this second calculation would be most appropriate for the following equitable reasons, in addition to the legal arguments related to UTAH CODE ANN. § 61-2b-3 (2006), set forth above.

It would arguably have been appropriate for the Court to value the parties' property as of the date of Mr. Cloward's first valuation, 2002, at \$120,000, given the fact

the parties were separated for a portion of the time⁴³ in between then and trial, and given Ms. Anderton's testimony that **she did not contribute her paycheck to the marriage for two years prior to the date of trial.** (Rec. 192:15-24, *Add. Ex. 12*).

Also, it would arguably have been appropriate for the Court to allow Mr. Anderton to pay Ms. Anderton her portion of the equity in the parties' home after the parties' ten-year old daughter, Carly, turned 18 years of age.

Both the issue of valuation date and the issue of when equity is paid, rest soundly within a Trial Court's discretion; thus, Mr. Anderton is not challenging those issues. However, these facts do at least provide additional equitable arguments for using Mr. Cloward's \$144,000 valuation of the home from the time of trial, as opposed to the higher figure obtained by averaging his appraisal with the real estate broker's estimate.

VIII. CONCLUSION

Based upon the foregoing, the determination to impute \$30,000 in income to Mr. Anderton was inappropriate. No threshold finding of "voluntary underemployment" was made, as required by UTAH CODE ANN. § 78-45-7.5(7)(a) (2006). Additionally, the analysis of the "amount" of Mr. Anderton's income for child support purposes did not meet the requirements of subsection (4) or (7) of UTAH CODE ANN. § 78-45-7.5 (2006).

⁴³The amount of time Ms. Anderton lived out of the home was vigorously disputed by the parties, however, even Ms. Anderton acknowledged she was out of the home for at least eight months of the two years prior to the parties' separation. (Rec. 80:3-8).

Additionally, even considering the evidence in the light most favorable to the Court's ruling, the determination that Mr. Anderton makes \$30,000 from this business, for purposes of alimony or child support, was clearly erroneous.

Insufficient findings were entered regarding the factors a Court must consider in determining alimony under UTAH CODE ANN. § 30-3-5 (2006) and applicable case law.

Finally, the Trial Court's determination of the value of the parties' marital home should be modified, based upon the improper admission of evidence, over objection, and based upon mathematical error.

DATED this 14th day of May, 2007.

HUNTSMAN EVANS AND LOFGAN, PLLC

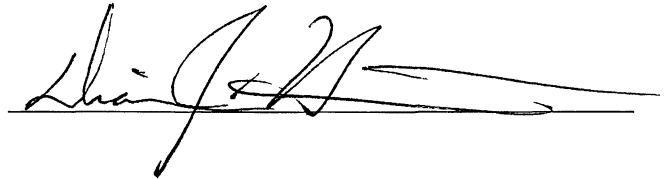
A handwritten signature in black ink, appearing to read "Diana J. Huntsman", is written over a horizontal line.

DIANA J. HUNTSMAN
Attorney for Respondent/Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of May, 2007, two true and correct copies of this document were sent via first class mail, postage pre-paid, to the following:

MATT BRIMLEY
43 EAST 200 NORTH
PROVO, UTAH 84606

A handwritten signature in black ink, appearing to read "Matt Brimley", is written over a horizontal line.