

2006

Kevin "Buck" Robinson v. Cindy Robinson : Brief of Appellee

Utah Court of Appeals

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



Part of the [Law Commons](#)

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

Douglas B. Thayer; Andrew V. Wright; Courtney Davis; Hill, Johnson and Schmutz; Attorney for Plaintiff/Appellant.

Cindy Robinson.

Recommended Citation

Brief of Appellee, *Robinson v. Robinson*, No. 20060810 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6791

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

KEVIN "BUCK" ROBINSON,	:	
	:	BRIEF OF APPELLEE/
Plaintiff/Appellant,	:	CROSS APPELLANT
	:	
v.	:	Appellate Case No. 20060810
	:	
CINDY ROBINSON,	:	
	:	Oral argument requested
Defendant/Cross-Appellant.	:	

Appeal from the Judgment of the Fourth Judicial District Court,
County of Utah, State of Utah
The Honorable Anthony W. Schofield, District Court Judge

Cindy Robinson
53344 White Dawn Circle
Herriman, Utah 84096

Douglas B. Thayer
Andrew V. Wright
Courtney Davis
HILL, JOHNSON AND SCHMUTZ
RiverView Plaza, Suite 300
4844 North 300 West
Provo, UT 84604
Attorneys for Plaintiff/Appellant

FILED
UTAH APPELLATE COURTS

IN THE UTAH COURT OF APPEALS

KEVIN "BUCK" ROBINSON,

Plaintiff/Appellant,

v.

CINDY ROBINSON,

Defendant/Cross-Appellant.

:
:
:
:
:
:
:
:

**BRIEF OF APPELLEE/
CROSS APPELLANT**

Appellate Case No. 20060810

Oral argument requested

Appeal from the Judgment of the Fourth Judicial District Court,
County of Utah, State of Utah
The Honorable Anthony W. Schofield, District Court Judge

Cindy Robinson
53344 White Dawn Circle
Herriman, Utah 84096

Douglas B. Thayer
Andrew V. Wright
Courtney Davis
HILL, JOHNSON AND SCHMUTZ
RiverView Plaza, Suite 300
4844 North 300 West
Provo, UT 84604
Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

APPELLEE'S BRIEF

STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	1
A. Questions Presented and Standard of Review	1
B. Issues on Appeal.....	2
C. Standards of Review.....	2
D. Issue Preservation	3
DETERMINATIVE PROVISIONS	3
STATEMENT OF THE CASE	3
A. NATURE OF THE CASE AND PROCEEDINGS BELOW.....	3
B. STATEMENT OF FACTS	6
SUMMARY OF THE ARGUMENT	15
ARGUMENT	17
I. CINDY FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS WHICH SHE CHALLENGES.....	17
A. Alimony.....	17
B. Pleasant Grove Property.....	18
C. Distribution of Marital Property.....	19
II. THE ALLEGATION OF JUDICIAL BIAS IS MOOT AND UNFOUNDED; THE LOWER COURT CORRECTLY DISALLOWED CINDY'S FAULT EVIDENCE AND AWARDED HER SUFFICIENT ALIMONY.....	20

A.	The Allegation of Judicial Bias is Moot.....	20
B.	The Trial Court was Not Biased Against Cindy.....	21
i.	The Trial Court's Comments were Fair.....	21
ii.	The Trial Court Correctly Refused Evidence of Buck's Alleged Fault.....	23
C.	The Trial Court Awarded Sufficient Alimony Within the Appropriate Legal Standards and Properly Supported its Decision.....	24
III.	THE TRIAL COURT CORRECTLY CALCULATED ALIMONY.....	26
A.	For Purposes of Alimony, the Trial Court Correctly Estimated Buck's Income During the Years Preceding Trial.....	26
B.	The Trial Court Correctly Found that Buck Did Not Deplete Marital Assets.....	28
IV.	CINDY HAS FAILED TO PRESERVE FOR APPEAL AND THE TRIAL COURT CORRECTLY DETERMINED THAT BUCK HAD NO INTEREST IN THE PLEASANT GROVE PROPERTY.....	30
A.	The Issue of the Pleasant Grove Property May Not be Heard on Appeal Because Cindy Failed to Raise this Issue Below.....	30
B.	Buck's Interest in the Pleasant Grove Property was Forfeited and Extinguished.....	31
V.	THE TRIAL COURT ABUSED DID NOT ABUSE ITS DISCRETION IN DISTRIBUTING THE MARITAL ASSETS	33
VI.	THE COURT CORRECTLY DENIED CINDY AN AWARD OF ATTORNEY FEES.....	35

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY INTERPRETING ITS RULING TO VALUE BASCO AT THE TIME OF THE DIVORCE RATHER THAN THE TIME OF TRIAL.....	37
---	----

CONCLUSION.....	39
-----------------	----

CROSS APPELLANT'S BRIEF

DETERMINATIVE PROVISIONS	40
--------------------------------	----

STATEMENT OF THE ISSUES	40
-------------------------------	----

STATEMENT OF THE CASE	42
-----------------------------	----

SUMMARY OF THE ARGUMENT	42
-------------------------------	----

ARGUMENT.....	43
---------------	----

I. THE TRIAL COURT ERRED IN FINDING THAT CINDY WAS NOT COHABITATING WITH MR. BRADBURY BY BASING ITS DECISION SOLELY ON THE <u>SURSA</u> AND <u>HADDOW</u> FACTORS, WHERE MR. BRADBURY DIRECTLY ADMITTED TO COHABITATING WITH CINDY.....	43
---	----

II. THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING THE TESTIMONY OF BUCK'S EXPERT BUSINESS EVALUATOR AS TO THE AMOUNT OF DISCOUNTS TO BE APPLIED IN VALUING BUCK'S BUSINESS FOR LACK OF CONTROL AND MARKETABILITY, WHERE THE EXPERT BUSINESS EVALUATOR RELIED ON RESPONSIBLE STUDIES AND APPROPRIATE LITERATURE.....	48
--	----

III. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING INTEREST ON THE BASCO PRINCIPAL DATING FROM THE DATE OF DIVORCE, RATHER THAN FROM THE DATE OF THE RULING, WHEN THE ISSUE OF INTEREST WAS NOT RAISED BY EITHER PARTY, NOR WAS THE ISSUE RAISED IN ANY PREVIOUS PLEADING OR PREVIOUS HEARING, BUT THE ISSUE WAS ONLY RAISED FOR THE FIRST TIME ON THE TRIAL	
--	--

COURT’S INITIATIVE DURING A HEARING ON A POST-TRIAL
MOTION.....51

CONCLUSION.55

TABLE OF AUTHORITIES

CASES

<u>Badger v. Brooklyn Canal Co.</u> , 966 P.2d 844, 847 (Utah 1998)	31
<u>Balderas v. Starks</u> , 138 P.3d 75 (Utah Ct. App. 2006)	41, 48
<u>Bakanowski v. Bakanowski</u> , 80 P.3d 153, ¶ 8 (Utah App. 2003)	25
<u>Bluffdale Mt. Homes, LC v. Bluffdale City</u> , 2007 UT 57, ¶ 46, 582 Utah Adv. Rep. 41	2
<u>Brookside Mobile Home Park, LTD. v. Peebles</u> , 48 P.3d 968, 972 (Utah 2002)	31
<u>Campbell, Maack & Sessions v. Debry</u> , 38 P.3d 984 (Utah App. 2001)	21, 22, 23
<u>Chen v. Stewart</u> , 2004 UT 82, ¶19, 100 P.3d 1177 (Utah 2004)	1, 17, 48, 50
<u>Childs v. Childs</u> , 967 P.2d 942, 946 (Utah App. 1998)	24, 25, 27
<u>Davis v. Davis</u> , 76 P.3d 716 (Utah App. 2003)	37
<u>DeBry v. Cascade Enterprises</u> , 935 P.2d 499 (Utah 1997)	55
<u>Dority v. Dority</u> , 645 P.2d 56, 59 (Utah 1982)	38
<u>Doubleday & Co. v. Curtis</u> , 763 F.2d 495, 502 (2d Cir. 1985)	52, 53
<u>Duke v. Graham</u> , 2007 UT 31, ¶ 26, 158 P.3d 540 (Utah 2007)	2
<u>Elman v. Elman</u> , 35 P.3d 176, ¶ 17 (Utah App. 2002)	37
<u>England v. Horbach</u> , 944 P.2d 340 (Utah 1997)	41
<u>Endrody v. Endrody</u> , 914 P.2d 1166, 1169 (Utah App. 1996)	32
<u>Finlayson v. Finlayson</u> , 874 P.2d 843 (Utah App. 1994)	33, 34
<u>Fisher v. Bylund</u> , 93 P.2d 737, 739 (Utah 1939)	52

<u>Griffith v. Griffith</u> , 985 P.2d 255, 260 (Utah 1999)	26
<u>Haddow v. Haddow</u> , 707 P.2d 669, 672-674 (Utah 1985)	<i>passim</i>
<u>Harmon v. Harmon</u> , 491 P.2d 231, 233 (Utah 1971)	38
<u>Haumont v. Haumont</u> , 793 P.2d 421, 423 (Utah App. 1990)	26
<u>In re Behm’s Estate</u> , 213 P.2d 657, 633 (Utah 1950)	52
<u>In re J.P. Linahan, Inc.</u> , 138 F. 2d 650, 653-654 (2d Cir. 1943)	22
<u>Jones v. Barlow</u> , 2007 UT 20, ¶ 11, 154 P.3d 808 (Utah 2007)	3
<u>Lee v. Sanders</u> , 55 P.3d 1127, 1129 (Utah 2002)	41
<u>Liteky v. United States</u> , 510 U.S. 540, 555 (1994)	21
<u>Madsen v. Prudential Fed. Sav. & Loan</u> , 767 P.2d 538, 544 n. 5 (Utah 1988)	22
<u>Morgan v. Morgan</u> , 795 P.2d 684, 688 (Utah. App. 1990)	29
<u>Naranjo v. Naranjo</u> , 751 P.2d 1144, 1146 (Utah App. 1988)	20, 33
<u>Pratt v. Nelson</u> , 2007 UT 41, ¶ 15, 127 P.3d 1256 (Utah 2007)	2
<u>Rappleye v. Rappleye</u> , 855 P.2d 260 (Utah Ct. App. 1993)	41, 50
<u>Shepherd v. Shepherd</u> , 876 P.2d 429 (Utah Ct. App. 1994)	34, 41, 51
<u>Shinkoskey v. Shinkoskey</u> , 19. P.3d 1005 (Utah App. 2001)	36
<u>Sigg v. Sigg</u> , 905 P.2d 908, 918 (Utah Ct. App. 1995)	45
<u>State v. Larsen</u> , 865 P.2d 1355, 1361 (Utah 1993)	48
<u>Straley v. Halliday</u> , 997 P.2d 338, 340-341 (Utah App. 2000)	20
<u>Sukin v. Sukin</u> , 842 P.2d 922, 926-927 (Utah App. 1992)	20

<u>Sursa v. Sursa</u> , 2005 UT App. 282	<i>passim</i>
<u>Thomas v. Thomas</u> , 987 P.2d 603, ¶ 12 (Utah App. 1999)	25
<u>Wade v. Stangl</u> , 869 P.2d 9, 11 (Utah App. 1994)	20
<u>Woodward v. Woodward</u> , 656 P.2d 431, 432-433 (Utah 1982)	32
<u>Wayment v. Howard</u> , 2006 UT 56, ¶ 9, 144 P.3d 1147 (Utah 2006)	3

STATUTES

Utah Code Ann. § 15-1 <i>et seq.</i>	<i>passim</i>
Utah Code Ann. § 30-3-5(8)(b)	23
Utah Code Ann. § 30-3-5(8)(c)	27
Utah Code Ann. § 30-3-5(10)	44
Utah Code Ann. § 78-2a-3(2)(h)(2002)	1

RULES

Utah .R. App. P 24(a)(5)(A), (B).	3, 31
Utah R. Civ. P. 52(a)	2, 41
Utah R. Civ. P. 63(b)(1)(B)	20, 21
Utah R. Evid. 702	50
Utah R. Evid. 705	50

OTHER AUTHORITIES

<u>Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct</u> 23 (1986)	22
--	----

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(h)(2002).

STATEMENT OF THE ISSUES

A. Questions Presented and Standard of Review

Appellee/Cross Appellant (“Appellee/Cross Appellant” or “Buck”) takes exception to Appellant/Cross Appellee’s (“Cindy”) presentation of the issues and corresponding standards of review.

“In order to establish that a particular finding of fact is clearly erroneous, ‘[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court’s findings are so lacking in support as to be against the clear weight of the evidence.’ If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence.” Chen v. Stewart, 2004 UT 82, ¶19, 100 P.3d 1177, 1184. As to mixed questions of law and fact:

Even where the [appellants] purport to challenge only the legal ruling, ... if a determination of the correctness of a court’s application of a legal standard is extremely fact sensitive, the [appellants] also have a duty to marshal the evidence.” Id

Cindy’s statement of the standards for review for Issues 2-4 is incorrect, as it erroneously characterizes the questions on appeal as strictly legal questions when in reality they are a review of the trial court’s findings of fact. (See Appellant’s/Cross-

Appellee's Brief "Brief" at 2-3.) As Cindy has failed to marshal the evidence, the Court should assume that by Cindy's failure, all findings of fact (including mixed findings of fact and law) are adequately supported by the evidence.

B. Issues on Appeal

1. The district court's orders with respect to Cindy's issues should be affirmed because Cindy has not marshaled the evidence as required to challenge the trial court's findings of fact.

2. The district court's orders with respect to the issues raised in Cindy's appeal should be affirmed, because as a matter of fact and law, Cindy is not entitled to the relief as requested.

C. Standards of Review

New issues on appeal: Claims not raised in the district court may not be raised for the first time on appeal. Duke v. Graham, 2007 UT 31, ¶ 26, 158 P.3d 540 (Utah 2007). A party must give the district court an opportunity to address the purported error or is precluded from raising the issue on appeal. Pratt v. Nelson, 2007 UT 41, ¶ 15, 127 P.3d 1256 (Utah 2007).

District Court's Findings: A trial court's factual findings will not be disturbed unless they are shown by marshaling to be clearly erroneous. U.R.C.P. 52(a); Bluffdale Mt. Homes, LC v. Bluffdale City, 2007 UT 57, ¶ 46, 582 Utah Adv. Rep. 41. The application of law to facts found at trial is a mixed question of fact and law.

Wayment v. Howard, 2007 UT 56, ¶ 9, 144 P.3d 1147 (Utah 2007). This Court defers to the district court’s application of law to the facts, granting broad deference when the issue is extremely fact dependent. Id. “In addition, when appealing a highly fact dependent issue, the appellant has a duty to marshal the evidence.” Id. The law applied is reviewed for correctness. Jones v. Barlow, 2007 UT 20, ¶ 11, 154 P.3d 808 (Utah 2007).

D. Issue Preservation

Appellee/Cross-Appellant asserts that Cindy has not properly preserved her Issues for appellate review. This Court’s rules require an appellant to demonstrate that issues raised on appeal were properly raised and preserved in the district court. U.R.A.P 24(a)(5)(A), (B). Cindy has failed to comply with this Rule. Further, because Cindy raises new issues for the first time on appeal, Appellee/Cross-Appellant had no opportunity to address such issues below.

DETERMINATIVE PROVISIONS

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

STATEMENT OF CASE

A. Nature of the Case and Proceedings Below

The parties were married in August 1974 and separated in approximately April 2003. (R. at 2950). On June 13, 2003, Buck filed a Petition for Divorce against Cindy

and after Cindy failed to answer the Petition, Buck obtained a Decree of Divorce on September 5, 2003. (Id.) Subsequently, however, all provisions of the Decree of Divorce were set aside except for the divorce itself. (Id.)

1. Alimony

On October 11-12, 2005, an evidentiary hearing was held to resolve Buck's Motion to Terminate Alimony based on Cindy's suspected cohabitation with Mr. Bradbury. (R. at 2841-2842.) During the course of the hearing, Mr. Bradbury admitted to cohabitating with Cindy. (R. at 2841, 88-89.) However, during his bench ruling on October 12, 2005, Judge Schofield explained he was not sure how to apply Mr. Bradbury's admission given the fact that such admission is not one of the factors set forth in Sursa and/or Haddow. (R. at 2842, 261.)

Although the trial court found evidence indicative of cohabitation under some of the factors as required by Sursa and Haddow, the trial court ultimately denied Buck's Motion to Terminate Alimony because not *all* of the Sursa and Haddow factors indicating cohabitation were present (none of which included an "admission"). (R. at 2842, 255-263.) Judge Schofield signed the Order reflecting this final judgment regarding alimony on March 22, 2006. (R. at 2792.)

2. Property Distribution

On March 27-29, 2006, a trial was held on the remaining outstanding issues in the case, including property division. (R. at 2838-2840.) Further, on April 10, 2006

the trial court heard oral argument on the trial. (R. at 2830.) On June 16, 2006, Judge Schofield issued a Ruling on the trial and on July 27, 2006 the trial court entered the final Amended Decree of Divorce. (R. at 3007.)

a. KBR Systems, Inc. (“KBR”)

At trial, Buck asked the trial court to fix the value of his interest in KBR based on the stockholders equity/book value with discounts for lack of marketability and lack of control. (R. at 2840, 20-28.) Buck’s expert business evaluator, Mr. Townsend, testified that he relied on studies and literature to calculate a 27% discounted value. (R. at 2840, 25:3-13.) However, the trial court dismissed Mr. Townsend’s testimony and held that Mr. Townsend seemingly appeared to pick the discounts out of the air without resort to any objective criteria. (R. at 2948-2947.) Yet, subsequently, the trial court held that a fair valuation of Buck’s interest in KBR would be *two-thirds* of the way between Mr. Townsend’s discounted value and book value, without explanation as to why the two-thirds point was a more appropriate discounted value. (R. at 2946.)

b. Appreciated Value of the Marital Home

At the time the parties divorced in 2003, they owned a home in Lehi, Utah valued at \$550,000. (R. at 2945.) The trial court awarded Cindy this marital home, plus any appreciation since September 2003. (R. at 2945.) Since the time of separation, Buck paid the mortgage and marital home expenses. (R. at 2945, 2933, 2937-2936.) However, the trial court did not make a finding as to the value of that

appreciation, but merely awarded the appreciated value to Cindy without including this value in the equitable property distribution. (R. at 2922-2921.)

c. Interest on BASCO Award

In the final Amended Decree of Divorce, Cindy was awarded Buck's entire business interest in BASCO, LLC ("BASCO") as of September 2003. (R. at 3003.) The trial court's Ruling did not include accrued interest as part of the BASCO award. (Id.) However, at a post-judgment hearing on a Motion to Quash Subpoena Duces Tecum for Steven Cardin, the trial court interpreted its ruling to include interest to be paid to Cindy on the BASCO principal pursuant to U.C.A. § 15-1-1 *et seq.* dating from the time of the entry of the divorce decree. (R. at 2841, 16:19-21.) The issue of interest was not raised at trial, but was raised for the first time by the court during the post-judgment hearing.

B. Statement of Facts

1. Facts Regarding Alimony

a. Cohabitation Hearing

On October 11 and 12, 2005, an evidentiary hearing was held on Buck's request to terminate alimony based on Cindy's suspected cohabitation with Mr. Bradbury. (R. at 2841-2842.) On March 22, 2006, the trial court denied Buck's request (R. at 2798) based on the following findings:

Mr. Bradbury was allowed access to Cindy's residence only as a visitor. (R. at 2797-2796); (R. at 2842, 256-257.)

- Although Mr. Bradbury knew where a hidden key was located, this is not the same thing as possessing a key and there was no evidence that Mr. Bradbury ever used the hidden key to gain access to the residence. (R. at 2796); (R. at 2842, 256.)
- There is no compelling evidence that Mr. Bradbury spent all or even most of his time at Cindy's residence. (R. at 2796); (R. at 2842, 258.)
- Mr. Bradbury did have some shirts in Cindy's closet. There was no evidence that Mr. Bradbury had other clothing or toiletries there. (R. at 2796); (R. at 2842, 258.)
- A private investigator and other witnesses noted the presence of Mr. Bradbury's vehicle at Cindy's residence from time to time, but the number of times noted indicate that Mr. Bradbury was not doing anything more than visiting. (R. at 2796-2795.); (R. at 2842, 259.)
- There is insufficient evidence that Mr. Bradbury paid any of Cindy's living expenses. (R. at 2795.); (R. at 2842, 259.)
- There is insufficient evidence to conclude that Mr. Bradbury and Cindy were living as husband and wife. (R. at 2795.); (R. at 2842, 260.)

However, the trial court also made a number of findings that would support a finding that Cindy and Mr. Bradbury were in fact cohabitating:

- Cindy has maintained a sexual relationship with Mr. Bradbury. (R. at 2797.); (R. at 2842, 256.)
- Mr. Bradbury admitted to living at Cindy's residence by enrolling his daughter in school and filling out an admission form in which he stated he was living with friends or relatives at the address of Cindy. (R. at 2795.)
- When Cindy testified that "*we* didn't put a new [dishwasher] in", she was referring to Mr. Bradbury and herself. (R. at 2795.); (R. at 2842, 261.) This reference indicates "there was more going on here than may meet the eye." (R. at 2842, 261.)

Mr. Bradbury's credit card purchase activity in Utah County increased significantly after he began associating with Cindy. This spending pattern would be consistent with someone who is living in Utah County, but by itself it does not rise to the level of establishing the requirements necessary under Utah case law to conclude that Ms. Robinson and Mr. Bradbury were sharing a common residence. (R. at 2795-2794.); (R. at 2842, 261.)

Judge Schofield noted that although Mr. Bradbury clearly admitted that he was living with Cindy, he was "not sure what to make of that given the fact that so many of the other critical indicia of them sharing a common residence simply don't exist in this case." (R. at 2842, 260-261.)

b. The Court's Calculation of Alimony

The trial court determined that a fair and equitable rate of alimony for Cindy is \$4,000. (R. 2916.) To reach this award, the trial court relied upon the following factors, which the trial court included in its Ruling as findings of fact:

- Buck has the capacity of earning \$150,000 per year. (R. at 2934) The trial court came to this amount by considering Buck's income for 2002, 2003, and 2004, three of the four years at issue. R. at 2934-2933 The trial court did not consider Buck's income from 2005, since there was no evidence presented to the court that the "usually large" income for that year "will be repeated and a significant portion of that income was distributed so that Buck and his partner could retire some of their indebtedness to KBR." (R. at 2933.)
- Since the parties separated, Buck's debt increased by more than \$140,000. This amount was not available for the payment of alimony, but was used to pay attorneys fees and fees for Cindy of over \$170,000. (R. at 2933.)
- Cindy was able to meet most or all of her living expenses on the financial assistance she received from Buck before the March 2006 trial, which was \$5,670 per month. (R. at 2932.)

- Buck has an ongoing capacity to earn \$12,500 per month, and he has the capability of paying alimony to Cindy from that income. (R. at 2916.)
- The alimony award of \$4,000 per month represents 32 % of Buck’s gross income capacity. (R. at 2932.)
- The alimony award of \$4,000 per month will allow Cindy to meet her obligations and will also allow her “to still have funds available to meet her reasonable ongoing living expenses.” (R. at 2932.)

2. Facts Regarding Property Distribution

The trial court made an exhaustive and detailed accounting and analysis regarding the parties’ assets, interest therein, credits and debts, etc. in dividing the marital estate. (R. 2950, 2919.)

a. Discounted Value of KBR

Buck is a 50 % shareholder of KBR, however, this stock is a marital asset. (R. at 2949.) There are two KBR shareholders – Buck and his business partner Steven Cardin. (Id.) As of April 30, 2003 (the most recent accounting before the Divorce Decree), KBR had an adjusted stockholder’s equity of \$1,287,516. (Id.)

Buck and Mr. Cardin agreed in a buy-sell agreement that in the event one of them died, the other could buy out the deceased partner’s estate by paying 125 % of the stockholder’s equity. (R. at 2949.) They also agreed that in the event of an involuntary dissolution of the company, the buy-out amount would be fixed at the stockholder’s equity without any premium or discount. (Id.) Although, the trial court found that this divorce would constitute an involuntary transfer, it also recognized that

simply utilizing book value would be inappropriate due to the potential lack of control and lack of marketability. (R. at 2948-2947.)

In fact, Buck requested that the trial court fix the value of his interest in KBR based on the stockholder's equity with a discount for lack of control because any acquiring party would not have effective control of the company with only a 50% share. (R. at 2949.) The discount for lack of control is based in fact. (R. at 2948.) Without the direct and ongoing input and daily involvement of the two shareholders, KBR would have significantly less value and would likely fold without their direct involvement. (Id.) The ongoing success of KBR is directly dependent upon the continued involvement of Buck and Mr. Cardin in its operation. (Id.)

In addition, Buck requested a separate discount be applied to valuing his interest in KBR because of the lack of marketability of the company. (R. at 2949.) KBR's marketability is impacted by its lack of diversification and its heavy dependence on the economic outlook of the construction industry. (R. at 2949-2948.) Further, KBR relies heavily on its key managers, so the loss of either Mr. Cardin or Buck could significantly impact KBR's ability to generate cash flow and income as it has in the past. (Id.) Also, KBR is dependent upon the continued strength of the construction market in Utah and Nevada, since that is where it primarily conducts business. (Id.) Lastly, because of KBR's small size, it cannot expect to obtain financing without the

personal guarantees of Buck and Mr. Cardin. (Id.). “Each of these factors has a direct and significant impact on the true value of” KBR. (R. at 2948.)

Buck’s expert business evaluator, Mr. Townsend, applied a numerical percentage discount to the value of Buck’s interest in KBR for lack of control and lack of marketability. (Id.) The aggregate discount amount Mr. Townsend imposed was a discount of 27%. (Id.) Mr. Townsend concluded that the proper value of KBR, based on book value and discounts for lack of control and lack of marketability, is \$944,856. (Id.)

Mr. Townsend testified that he reached his discounted values based on “numerous studies . . . performed over the years by thinkers in business valuation that quantify kind of the reasonable range of discounts for minority interests and for lack of marketability.” (R. at 2840, 25:4-7.) The studies show that “[m]inority shareholders in closely held businesses . . . incur significant discounts typically.” (R. at 2810, 25:12-13.) He further explained that:

[T]he studies and the literature show and the general practice in business appraisal, is that these 50 percent interest don’t suffer a complete minority position with regard to discounts and they are a little bit easier to sell, so they exercise some amount of control and some enhanced level of marketability over a true minority interest, but it’s not at the same level as a controlling interest.

(R. at 2810, 26:22-27:5.) Thus, Mr. Townsend concluded that, “typically, appraisal practice is to place the discount somewhere in between a control position and a minority position.” (R. at 2810, 27:6-8.)

When further questioned by the trial court about the 27% discount, Mr. Townsend testified that he arrived at this percentage in the course of his normal appraisal business based on standards that he believed were acceptable in this industry. (R. at 2840, 27.) He also explained that the “literature indicates that the value of a 50-50 push interest is somewhere between control and non-control positions. And in this particular case, we calculated the value both ways, and then adjusted the discount to what it would be if the value were at the mid-point.” (R. at 2840, 81:24-82:2.)

However, the trial court ultimately found that Mr. Townsend arrived at the discount percentages himself (although using his best professional judgment) and that Mr. Townsend “seemingly appears” to have “picked the amounts of the two discounts out of the air.” (R. at 2948, 2947.) The trial court acknowledged that Mr. Townsend gave a rationale for imposing the two discounts, but claimed that “he did not provide any meaningful basis for his choice of the amounts of the two discounts. Indeed he conceded that he himself selected the amounts of the two discounts.” (R. at 2947.)

Subsequently, based on Mr. Townsend’s alleged failure to “provide reasons for his selection of the amounts of discounts”, the trial court refused to accept his discounted amounts “whole cloth”. (R. at 2947.) Instead, the trial court found that Mr. Townsend’s proposed value represented the lowest possible figure that the court could use in fixing the value of the marital asset, while book value represented the highest possible figure the court could use. (Id.) Then, the trial court found that a fair

valuation of KBR would be two-thirds of the way between Mr. Townsend's discounted value and the book value, or \$1,173,296. (R. at 2946.) The trial court failed to give any basis for its selection of the two-thirds point, other than it chose to err in Cindy's favor as to the discounted amount so that she would be divested of her KBR interest at a fair value. (R. at 2947-2946.)

b. Interest on BASCO Award

As of September 5, 2003, the net asset value of BASCO was \$515,750. (R. at 2946.) Since Buck is 50% owner of BASCO, the net asset value of his one-half interest was \$257,875. (R. at 2945.) Buck's entire one-half interest in BASCO was awarded to Cindy. (R. at 2945.)

The issue of interest on the BASCO principal was not included in the divorce decree. The trial court had awarded Buck's interest in BASCO to Cindy, finding that "[i]f either Mr. Cardin or Buck wish a different result, they will have to find a mechanism to buy out Cindy's interest in BASCO." (R. at 2922.)

However, in a post-judgment bench hearing, the trial court interpreted its ruling and awarded interest on the BASCO principal that has accrued since September 2003, to be paid by Buck to Cindy pursuant to section 15-1-1 *et seq.* of the Utah Code Annotated. (R. at 2841, 15-20.) The trial court explained that if Buck and Mr. Cardin did not like the result of the court's ruling as detailed above, they would need to buy out Cindy for the amount of \$257,875, or half the amount of BASCO as of the

September 2003 valuation date. (R. at 2841, 15-16.) The trial court then asserted that interest would be added to the September 2003 valuation price. (R. at 2841, 17:16-18.) In referring to section 15-1-1, of the Utah Code Annotated, the court stated, “I don’t think I have a basis to get into that statute that talks about legal interest” (R. at 2841, 18:21-23.) However, the court then stated, “[Ms. Robinson] gets her \$257,000 plus legal interest, which I think is ten percent under the statute.” (R. at 2841, 19:13-15.)

c. The Pleasant Grove Property.

The trial court heard testimony from several witnesses and made factual findings upon which it based its ruling that neither party had any interest in the Pleasant Grove property. (R. at 2944-2945.) Further, the trial court concluded that any interest that Buck may have had in the Pleasant Grove property was extinguished by his failure to pay under the terms of the purchase contract. (R. at 2944-2943.)

3. Facts Regarding Court’s Denial of Attorney Fees.

The trial court specifically denied an award of attorney’s fees based on its finding that both parties prevailed on some their issues at trial and neither party could afford to pay the attorney’s fees of the other. (R. 2929.)

SUMMARY OF THE ARGUMENT

First, Cindy did not properly preserve the issue of judicial bias at the trial court level, so she cannot raise it now upon appeal. Even if Cindy had preserved the issue of

bias at the trial court level, the allegations raised in Cindy's brief do not rise to the level of prejudice needed to establish judicial bias under Utah law. Additionally, Cindy's argument that the trial court should have allowed her to present fault evidence must also fail. The issue of fault was not before the trial court; therefore, the trial court properly disallowed the introduction of such evidence. No abuse of discretion by the trial court occurred that would warrant review.

Second, the trial court appropriately calculated alimony based on Buck's estimated income at the time of the parties' separation rather than at the time of trial. The lower court's calculation of Buck's income was in line with Utah law which gives trial court broad discretion in selecting a method to assess a spouse's income. Additionally, the trial court's valuation of the marital estate was also proper and should not be disturbed.

Third, this Court cannot and should not address the Pleasant Grove property interest issue because Cindy failed to raise and preserve this issue below and because Cindy failed to marshal the evidence on this issue in her appellate brief. Additionally, the trial court correctly found that Buck's interest in the property had been terminated prior to the time of trial. Thus, it was entirely appropriate for the trial court to determine whether or not Buck had any interest in the Pleasant Grove property.

Fourth, this Court should not second-guess the trial court's painstaking distribution of marital assets. Asset distribution is intensely factual. However, Cindy has failed to marshal the evidence, as required by Utah law.

Fifth, since Cindy's brief does not comply with Utah appellate procedure, this Court should not entertain Cindy's argument regarding attorney fees. Cindy herself represented that the issue of attorney fees should be reviewed under a clearly erroneous standard; however, Cindy failed to marshal the evidence in her brief. Additionally, Cindy failed to demonstrate the inaccuracy of the court's findings and also failed to demonstrate how Buck mislead the trial court.

Sixth, although both parties argue that the trial court should not have interpreted its Ruling regarding BASCO *sua sponte* at the January 18, 2007 hearing, if this Court finds that the trial court did not err, BASCO should be valued at the time of the divorce, not at the time of the trial. Otherwise, if this Court were to value BASCO at the time of the trial, it would be effectively redistributing assets between the parties and allowing Cindy two bites at the same apple – to have the interest that accrued since September 2003 as well as any appreciation on BASCO between the September 2003 separation and the March 2006 trial. Such a windfall would be both unwarranted and unfair.

APPELLEE'S BRIEF

I. CINDY FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT FINDINGS WHICH SHE CHALLENGES

Cindy has failed to marshal the required evidence for many of the trial court's findings that she is appealing. If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence." Chen v. Stewart, 2004 UT 82, ¶19, 100 P.3d 1177, 1184. Cindy cannot escape the duty to marshal simply by characterizing this issue as a legal issue: "Even where the [appellants] purport to challenge only the legal ruling, ... if a determination of the correctness of a court's application of a legal standard is extremely fact sensitive, the [appellants] also have a duty to marshal the evidence." Id.

A. Alimony

Cindy challenges the trial court's findings regarding alimony, specifically regarding the calculation of Buck's income and the refusal to consider Buck's alleged fault. However, Cindy failed to set forth all the evidence in support of the trial court's alimony award. The trial court provided a detailed description of its alimony calculations and property distributions, including its reasons for using the date of separation for valuation, rather than the date of the trial. (R. at 2926.) Thus, the trial court considered extensive information regarding Buck's income level and the parties' assets.

Rather than marshal the evidence, Cindy cites isolated facts in support of her argument that the trial court somehow turned a blind eye to certain transactions. Cindy

clearly does not present an unbiased view of the evidence that was before the trial court, nor does she give an accurate representation of the court's ruling.

Further, Cindy claims the trial court was allegedly biased against her in the alimony award. Without marshaling the evidence, she attempts to use "judicial bias" as a vehicle to allow the Court to revisit the trial court's calculation of alimony. Cindy, who relies largely upon allegations of judicial unfairness, does not present any additional, solid evidence showing an abuse of discretion. Accordingly, this Court should not disturb the lower court's finding regarding alimony calculations.

B. Pleasant Grove Property

In addition, Cindy failed to marshal the required findings of the trial court regarding the Pleasant Grove Property. The trial court carefully listened to and analyzed testimony from several witnesses and made factual findings upon which it based its ruling that neither party had any interest in the Pleasant Grove property. (R. at 2944-2945.) Each of these findings were incorporated into the trial court's conclusions that Buck's interest in the property had been forfeited and consequently, neither Buck nor Cindy had any interest in the property.

Cindy purports to challenge the trial court's legal ruling that it exceeded its jurisdictional authority to adjudicate claims between non-parties. However, instead of

challenging that ruling on a review of the law¹, Cindy resorts to a discussion of the selective facts and extrinsic evidence to support her argument.

As demonstrated by Cindy's recitation of facts relating to the Pleasant Grove property issue, Cindy's entire argument regarding this issue consists of a presentation of selective facts which the court in fact heard and evaluated regarding the disposition of the Pleasant Grove property. The mere recitation of selective extrinsic facts in support of argument does not fulfill a party's marshaling burden. Far from presenting an unbiased recitation of all the evidence on which the trial court based its finding, Cindy's Brief does not analyze the evidence in a light most favorable to Buck. Indeed, Cindy ignores key evidence in the record, key findings of fact made by the trial court, and fails completely to examine the testimony and documentary exhibits admitted in support of the trial court's findings.

Accordingly, this Court should hold that Cindy has mischaracterized the nature of her challenge and that, in fact, she is challenging the trial court's factual findings. As such, Cindy has a duty to marshal the evidence, which she has failed to do.

C. Distribution of Marital Property

Cindy also challenges the trial court's findings regarding the division of marital assets. However, Cindy has not marshaled the evidence but rather picks and chooses various statements from the trial supporting her position that Buck somehow

¹ Appellee/Cross Appellant also asserts that Cindy never raised her jurisdictional issue at trial and has therefore failed to preserve the issue for appeal and thus waived any right to raise the issue now. See Section IV.

unilaterally diminished the value of the marital estate. (Brief at 38-41.) Such self-serving citation to the record is woefully inadequate to meet her marshaling burden in light of the fact that the trial court made very detailed factual findings regarding the assets and the distribution and division of such. (R. 2950). Naranjo at 1146.

Therefore, as Cindy has failed to marshal the required evidence to demonstrate that the trial court's detailed and accurate findings were allegedly wrong, this Court may not consider her challenge to the distribution of marital property on appeal.

II. THE ALLEGATION OF JUDICIAL BIAS IS MOOT AND UNFOUNDED; THE LOWER COURT CORRECTLY DISALLOWED CINDY'S FAULT EVIDENCE AND AWARDED HER SUFFICIENT ALIMONY

A. The Allegation of Judicial Bias is Moot

Pursuant to Utah law, the issue of judicial bias is moot and cannot be considered by this Court since Cindy failed to raise this issue below.

This Court has specifically asserted "that matters not put in issue before the trial court may not be raised for the first time on appeal." Wade v. Stangl, 869 P.2d 9, 11 (Utah App. 1994) (internal references omitted). See also Straley v. Halliday, 997 P.2d 338, 340-341 (Utah App. 2000).

Further, in order to preserve the issue of judicial bias for appeal, a party must first file an affidavit in trial court, pursuant to Utah Rule of Civil Procedure 63(b). See Sukin v. Sukin, 842 P.2d 922, 926-927 (Utah App. 1992). Under Rule 63(b)(1)(A), a party's motion to disqualify a judge "shall be . . . supported by an affidavit stating facts

sufficient to show bias, prejudice or conflict of interest.” This motion shall be filed no later than 20 days after the assignment of the action to the judge, the appearance of the party, or “the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.” Utah R. Civ. P. 63(b)(1)(B).

Alternatively, Cindy should have filed a motion for a new trial or to alter or amend the judgment pursuant to Rule 59 of the Utah Rules of Civil Procedure. Utah R. Civ. P. 59(a)(1). Accordingly, by failing to file the appropriate motion and affidavit with the trial court or by failing to file a motion for a new trial or to alter or amend judgment, Cindy did not properly preserve the issue of bias for appeal.

B. The Trial Court was Not Biased Against Cindy

Assuming *arguendo*, that Cindy’s bias argument is not moot, the trial court’s commentary, statements of fact and its decision to disallow evidence of Buck’s alleged fault in the divorce simply does not rise to the level of judicial bias or prejudice.

i. The Trial Court’s Comments Were Fair

The comments made by the trial court were fair and did not rise to the level of judicial bias. In Campbell, Maack & Sessions v. Debry, 38 P.3d 984, 992 (Utah App. 2001), this Court followed the reasoning of the United States Supreme Court in Liteky v. United States, 510 U.S. 540 (1994), which held that,

[O]pinions formed by the judge...do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or

antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to...the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Id. at 555. Thus, “[m]ere ‘expressions of impatience, dissatisfaction, annoyance, and even anger,’ are insufficient to establish the existence of bias or partiality.” Campbell, Maack & Sessions, 38 P.3d at 992 (citations omitted).

Since the trial court stands at the center of fact-finding and the assessment of witness reliability, the Second Circuit declared, “*If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.*” Id., citing In re J.P. Linahan, Inc., 138 F. 2d 650, 653-654 (2d Cir. 1943) (emphasis added). Further, the Utah Supreme Court ruled that an alleged bias must “be grounded on more than conjecture and speculation.” Madsen v. Prudential Fed. Sav. & Loan, 767 P.2d 538, 544 n. 5 (Utah 1988). The Utah Supreme Court has additionally noted that if, “[t]he traditional view is that if a judge can be disqualified for bias following a comment or ruling during the court proceedings, there is no limit to disqualification motions and there would be a return to ‘judge shopping.’” Id., quoting L. Abramson, Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct 23 (1986).

In an attempt to bolster her alleged judicial bias argument, Cindy cites four comments made by the trial court judge. Each comment is unbiased and falls within the realms of permissive judicial remarks. For example, the trial judge stated he “was offended by Cindy’s morals” at the cohabitation hearing and that

this offense influenced “his ultimate award of alimony to her.” Brief at 25.

However, these comments were merely critical of Cindy and disapproving of her morals, but such is insufficient to establish bias. See Campbell, Maack & Sessions, 38 P.3d at 992. The same argument applies to each comment cited by Cindy and thus, the trial judge was not biased against Cindy.

ii. The Trial Court Correctly Refused Evidence of Buck’s Alleged Fault

Cindy also improperly asserts that the trial court was allegedly biased against her because it refused to receive evidence of Buck’s supposed fault. Contrary to Cindy’s argument, Utah Code § 30-3-5(8)(b) states that “[t]he court *may* consider the fault of the parties in determining alimony.” The statute does not require the trial court to consider fault, nor does the statute mandate that if fault of one party is admitted, fault of the other party must then follow.

A review of the record clearly indicates that the trial court refused to hear evidence on Buck’s alleged abuse—not because the court was biased against Cindy, but because the issue of fault *was not before the court at that time*. After Cindy’s counsel pursued questions related to abuse during his direct examination of Cindy, the trial court asserted that abuse was not an issue before the court and that the “grounds for divorce are long since behind” the court proceedings. (R. at 2840, 515:2-5.) (See also R. at 28240, 515:15-18 (“she could attack his character if it’s relevant to the issues. But whether he was abusive is not relevant to any issue before the Court today . . .”).

It should be noted that the issue of Buck's fault was raised by Cindy's counsel at the March 2006 trial, which focused on financial issues, not at the October 2005 cohabitation hearing.

Further, in its Amended Findings of Fact and Conclusions of Law, the trial court asserted:

In this matter, while [the appellant] claims to have been victimized by Buck, the only significant evidence of fault that I have observed has been Cindy's near cohabitation. I have not seen any other significant fault. Thus, if I err, I err on Buck's behalf as Cindy is the one who has turned up the flames during the period after separation and before this trial by her open flaunting of her relationship with Mr. Bradbury while continuing to demand alimony.

R. at 2963. Thus, the trial court specifically noted that it would not consider evidence of Buck's alleged fault because it had not seen any significant evidence of his fault. Interestingly, Cindy is attempting to use facts from the October 2005 cohabitation hearing, in which she prevailed, as evidence that the trial court was somehow biased against her.

C. The Trial Court Awarded Sufficient Alimony within the Appropriate Legal Standards and Properly Supported its Decision

Even if the trial court was allegedly biased against Cindy, her alimony award was sufficient and within the appropriate legal standards. Under Utah law, the appellate court "will not disturb a trial court's alimony award so long as the trial court exercised its discretion within the appropriate legal standards . . . and "supported its decision with adequate findings and conclusions ... " Childs v. Childs, 967 P.2d 942,

946 (Utah App. 1998) (citations omitted); see also Thomas v. Thomas, 987 P.2d 603, ¶ 12 (Utah App. 1999). The trial court must consider the following factors in awarding alimony, “(1) the financial needs and condition of the recipient spouse; (2) the ability of the recipient spouse to provide a sufficient income for himself or herself; and (3) the ability of the payor spouse to provide support.” Bakanowski v. Bakanowski, 80 P.3d 153, ¶ 8 (Utah App. 2003) (citations omitted). *See also* Utah Code Ann. § 30-3-5(8)(a). This Court has clearly articulated the standard: “If these factors have been considered, “ we will not disturb the trial court’s alimony award *unless such serious inequity has resulted as to manifest a clear abuse of discretion.*” ’ ’ ” Childs, 967 P.2d at 946 (omitting citations) (emphasis added).

The trial court clearly considered the required alimony factors:

1. “In attempting to determine an appropriate level of permanent alimony in this case, the most persuasive evidence is the amount of alimony and payments in the form of alimony which Buck made under the temporary order, as moderated by the amount of debt which he had to incur to make those payments, coupled with the income which Buck received from KBR as reported on his tax returns.” (R. at 2965-2964.)
2. “Other than the payment of her attorney’s fees, [Cindy] has been able to meet most or all of her living expenses with this level of alimony.” (R. at 2964.)
3. Cindy is entitled, to the extent possible, to retain the standard of living she enjoyed during the marriage, and “alimony is one vehicle to make that happen ” (Id.)

The trial court thus settled on an alimony award of \$4,000 per month, which represents 32% of Buck’s gross income. (Id.) The trial court found this amount

sufficient for Cindy to meet her expenses, noting that the amount Cindy sought (\$7,500 per month), “results in a penalty to Buck and a windfall to Cindy.” (R. at 2964-2963.) It is unreasonable for appellant to argue that “it was grossly inequitable for the lower court to force Cindy to tightly budget a living on \$4,000 per month” Brief at 27-28. The fact that Cindy is not happy with \$48,000 per year in alimony is by no means a legal factor meriting this Court’s recalculation of the trial court’s award.

Accordingly, Cindy has failed to identify any serious inequities demonstrating the trial court’s alleged bias against her or abuse of discretion. Thus, the trial court awarded Cindy sufficient alimony within the appropriate legal standards.

III. THE TRIAL COURT CORRECTLY CALCULATED ALIMONY

A. For Purposes Of Alimony, The Trial Court Correctly Estimated Buck’s Income During The Years Preceding Trial

The trial court correctly calculated alimony by employing Buck’s estimated income during the years preceding trial, rather than his estimated income at the date of the trial. “[T]rial courts have broad discretion in selecting an appropriate method of assessing a spouse’s income and will not be overturned absent an abuse of discretion.” Griffith v. Griffith, 985 P.2d 255, 260 (Utah 1999). See also Haumont v. Haumont, 793 P.2d 421, 423 (Utah App. 1990). Further, as stated above, this Court “will not disturb a trial court’s alimony award so long as the trial court exercised its discretion within the appropriate legal standards . . . and ‘ supported its decision with adequate

legal findings and conclusions’ ” Childs, 967 P.2d at 946 (references omitted).

In addition, the Utah Code provides that:

[a]s a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony...However, the court shall consider all relevant facts and equitable principles *and may, in its discretion*, base alimony on the standard of living that existed at the time of trial.

Utah Code Ann. § 30-3-5(8)(c) (emphasis added).

The decree of divorce was issued on September 5, 2003, with the financial issues reserved for trial. The Amended Decree of Divorce was not issued until June 2006—nearly three years after the divorce date. In the summer of 2006, the trial court was faced with the challenge of awarding alimony and dividing the marital estate equitably after the parties had been separated for several years. The trial court exercised its discretion to find a median point to determine alimony – one that would not prejudice nor give a windfall to either party.

Cindy ignores the fact that the trial court did not simply base alimony on Buck’s income at the time of separation. The trial court explained its calculation of Buck’s earning capacity in its Amended Findings of Fact and Conclusions of Law, dated July 27, 2006, wherein the court considered Buck’s income from 2002 through 2005, not the separation date of 2003 alone. (R. 2966.) The court concluded that Buck has the capacity of earning \$150,000 per year because “for three of the four years at issue Buck’s average annual income from KBR has been \$136,000.” (Id.)

Accordingly, the trial court did not pick a sum arbitrarily, but clearly delineated its method of determining alimony. The trial court did not abuse its discretion, nor has Cindy put forth any reasons showing such an abuse of discretion.

B. The Trial Court Correctly Found that Buck Did Not Deplete Marital Assets

Cindy also makes the argument that the trial court failed to take into consideration the alleged depletion of the marital estate between the September 2003 divorce and the March 2006 trial. (Brief at 30-31.) However, Cindy misapprehends the correct date for property division and the trial court never found any evidence that Buck depleted marital assets.

Cindy quotes Shepard v. Shepard, 876 P.2d 429, 432-433 (Utah App. 1994) for the rule that the marital estate is valued at the time of the divorce decree or trial and that any deviation from this general rule should be supported by detailed findings by the trial court. Brief at 32. However, in this case, which was a bifurcated divorce, the parties obtained a divorce on September 5, 2003, while reserving the issues of property division and alimony for trial. Cindy erroneously refers to the divorce date as June 21, 2006, which was actually the date of the trial court's *ruling regarding property division and alimony*. See Amended Decree of Divorce, R. at 3007. The trial court itself asserted, "[t]he case law is replete that assets generally should be valued as of the date of the divorce decree. In this case the decree was entered in September 2003." (R. at 2926).

Thus, Cindy incorrectly relies upon Morgan v. Morgan, 795 P.2d 684, 688 (Utah. App. 1990) for the proposition that “ ‘[a]ny deviation from the general rule (marital estate is valued at the time of divorce decree) must be supported by sufficiently detailed findings of fact that explain the trial court’s basis for such deviation.’ ” Brief at 32. Since Robinson v. Robinson was a bifurcated divorce, the trial court correctly valued the martial assets *at the date the divorce decree was entered*, September 5, 2003, rather than the date of trial. Thus, the trial court was not required to provide detailed findings of fact regarding its choice of valuation date, since it did not deviate from the standard date of divorce.

In addition, Cindy incorrectly alleges that “the lower court failed to acknowledge [Buck’s] additional income for the purposes of determining the appropriate amount of alimony or in dividing martial assets.” Brief at 31. The lower court’s Ruling set forth detailed descriptions of the trial court’s property division and alimony calculation. (R. at 2950.) The trial court by no means turned a blind eye to Buck’s expenditures of the martial estate prior to trial, despite Cindy’s allegations of depletion.

Finally, Cindy sets forth a series of allegations, none of which accurately support her argument. First, she asserts that Buck “admitted he took \$106,373.07 from an equity line backed on the martial home for personal use.” (R. at 2839, pp. 308:5-11.) Brief at 31. In its Amended Decree of Divorce, the trial court specifically stated that “[a]fter April 1, 2003, Buck incurred additional debt on the home equity loan. *Buck*

must repay all of the home equity loan debt on the home incurred after April 1, 2003.”

(R. at 3002-3001, 2998.) Second, Cindy asserts, “Buck admitted to purchasing furniture from RC Willey during the separation for his new home.” Brief at 31 (citations omitted). However, these purchases are not part of the marital estate, as noted by the trial court. (R. at 3000.) Additionally, Cindy states that Buck admitted at trial that he sold a camper trailer belonging to the parties after the separation for \$18,000. Brief at 31. But Cindy fails to state that the trial court also found that the appellee “must be charged for that amount [\$18,000] in the final financial settlement between the parties.” (*Id.*) It is difficult to understand how this is an example of the trial court’s turning a blind eye to the Buck’s expenditures.

Cindy appears to ignore the tedious balancing by the trial court of Buck’s expenditures during the period between the divorce and the trial. Despite its thorough investigation of Buck’s income and assets, the trial court never found he dissipated assets, nor anything close to dissipation. Accordingly, no abuse of discretion occurred by the trial court, and thus, this Court should not overturn the lower court’s decision.

IV. CINDY HAS FAILED TO PRESERVE FOR APPEAL AND THE TRIAL COURT CORRECTLY DETERMINED THAT BUCK HAD NO INTEREST IN THE PLEASANT GROVE PROPERTY.

A. The Issue of the Pleasant Grove Property may not be Heard on Appeal Because Cindy Failed to Raise this Issue Below.

Cindy never raised the issue of the Pleasant Grove property with the trial court, and thus it may not be raised on appeal. Utah courts generally look at three factors

when determining whether a party properly preserved an issue for appeal: “(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority.” Brookside Mobile Home Park, LTD. v. Peebles, 48 P.3d 968, 972 (Utah 2002) as cited from Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998). With respect to each issue argued, an appellant must provide “citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court.” U.R.A.P 24(a)(5)(A), (B).

Cindy failed to cite to the Court where (1) she timely raised the issue that the court exceeded its jurisdictional authority by determining that Buck had no interest in the Pleasant Grove property, (2) that the issue was specifically raised and (3) that Cindy introduced supporting evidence or relevant legal authority supporting her position. Further, Cindy did not cite to the record to demonstrate where this issue on appeal was raised and preserved in the trial court. In addition, Cindy fails to provide any grounds for reviewing this issue regardless of her failure to raise it below. Accordingly, Cindy may not raise the Pleasant Grove property issue for the first time on appeal.

B. Buck’s Interest in the Pleasant Grove Property was Forfeited and Extinguished

Assuming *arguendo* Cindy properly raised the Pleasant Grove Property issue below, the trial court correctly determined that Buck’s interest in said property was forfeited and extinguished. In dividing marital assets the “essential criterion is whether

a right to the benefit or asset has accrued in whole or in part during the marriage. To the extent that the right has so accrued it is subject to equitable distribution.”

Woodward v. Woodward, 656 P.2d 431, 432-433 (Utah 1982). Moreover, “for marital assets to be distributed, the assets must be in the possession of one, or both, of the marital parties.” Endrody v. Endrody, 914 P.2d 1166, 1169 (Utah App. 1996).

Further, if a party does not possess the assets – that is they are in the legal possession of another individual or entity not a party to the action – then the assets are not available for distribution as marital assets. Id.

The present matter is factually analogous to the facts in Enrody. In Enrody, the court determined that certain assets owned by a trust which was created by the husband’s parent were in fact not owned by either the wife or the husband and as such, the assets were not available for distribution as marital assets. Id. at 1170. It is entirely appropriate and necessary for the trial court to determine whether or not the parties possess the assets claimed to be marital property.

Cindy’s argument and citation to case law that “[a] court may not grant relief to a nonparty” and courts “can only make a legally binding adjudication between parties actually joined in the action” in and of itself, is accurate. (Brief at 35). However, Cindy has attempted to portray to this Court that the trial court somehow stepped outside of its jurisdiction to adjudicate claims or issues between non-parties. (Brief at 35-37). That simply is not the case.

Accordingly, the trial court properly concluded that any interest Buck may have had in the Pleasant Grove property was extinguished by his failure to pay under the terms of the purchase contract. (R. at 2944-2943.) The court's decision in no way renders judgment in favor of a non-party.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISTRIBUTING THE MARITAL ASSETS

Cindy claimed that this Court should review the trial court's division of marital assets under a legal standard for correctness. However, because trial courts are afforded broad discretion in divorce proceedings, appellate courts will not reverse a trial court's distribution of marital assets absent a clear abuse of discretion. See Shepherd v. Shepherd, 876 P.2d 429, 433 (Utah Ct.App.1994). See also Naranjo v. Naranjo, 751 P.2d 1144, 1146 (Utah App. 1988). Further, under Finlayson v. Finlayson, 874 P.2d 843 (Utah App. 1994), "the trial court has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity." Id. at 847, citing Naranjo, 751 P.2d at 1146.

Further, even under the proper standard, the trial court did not abuse its discretion in the distribution of marital assets. Cindy has failed to accurately represent the trial court's division of marital assets. Cindy has misrepresented the effect of the "ledger" which is attached to the trial court's ruling on this matter. The trial court painstakingly accounted for each asset and marital debt between the parties and correctly, under the above Utah authorities, divided the assets based on the factual

findings made after the March 2006 trial. For example, Cindy argues, albeit unclearly, that the court erred in not taking into account various different figures relating to Buck's income at various points in time, alleged distributions of funds from BASCO and KBR, purchases of furniture and the valuation of the business.² (Brief at 38-41). However, Cindy fails to acknowledge that the trial court specifically addressed all these issues in its detailed factual findings and rulings regarding the equitable division of the marital estate. (R. 2950). The trial court thoroughly accounted for any diminishment in the marital estate and applied debts and credits to the parties so as to reach an equitable distribution consistent with the established law. (R. 2950; See also Finlayson, supra). Additionally, the trial court specifically accounted for its finding regarding Buck's historically fluctuating income levels when it stated:

Taken together, I conclude that for purposes of fixing alimony, Buck has the capacity of earning not less than \$150,000.00 per year. I arrive at this conclusion because for three of the four years at issue Buck's average annual income from KBR has been \$136,000.00. There is no evidence that the unusually large income in 2005 will be repeated and a significant portion of that income was distributed so that Buck and his partner could retire some of their indebtedness to KBR.

(R. 2922-2933.)

Further, the trial court's findings concerning marital assets, income potential, alimony and the division of the marital estate reflect many factors that were taken into consideration by the trial court. These factors included: (1) the value of the marital

² Cindy fails to acknowledge that the alleged wrongful distributions from BASCO and KBR (if they occurred at all) and various purchases of personal property occurred after the trial court entered the divorce decree in 2003 and are therefore irrelevant as to a discussion of distribution of marital property.

assets, (2) credits and debts incurred by the parties, (3) payments ordered by the court to equalize the assignment of assets, and (4) an historical analysis conducted by the court regarding the parties' income. (R. 2919.) Curiously, Cindy fails to address any of the trial court's multi-factored considerations reflected in its detailed findings.

Rather, and as argued above, Cindy resorts to a selective presentation of self-serving figures in an attempt to divert this Court's attention away from the true nature of the trial court's rulings. Thus, the trial court undertook a detailed analysis to equitably divide the marital assets and did not abuse its discretion.

V. THE COURT CORRECTLY DENIED CINDY AN AWARD OF ATTORNEYS' FEES

The trial court properly denied Cindy an award of attorneys' fees and Buck did not mislead the trial court. Although U.C.A. § 30-3-3 permits a trial court to award attorneys' fees in divorce proceedings, the decision to award fees and the amount thereof rests primarily in the *sound discretion of the trial court*. Shinkoskey v. Shinkoskey, 19. P.3d 1005 (Utah App. 2001) (emphasis added).

The trial court concluded that an award of attorneys' fees was not appropriate or warranted. Among other things, the court specifically found that neither party had the ability to pay the attorneys' fees of the other. (R. 2915.) Such a decision to deny an award of attorneys' fees was within the sound discretion of the trial court and should not be disturbed absent a finding that the trial court clearly abused its discretion.

However, Cindy failed to demonstrate how the trial court abused its discretion, and instead she weakly asserts that Buck misled the trial court concerning his income. Cindy has misconstrued and misrepresented the nature of the evidence in a random and self-serving presentation of figures regarding Buck's income. (Brief at 42-43).

Importantly, the arguments set forth by Cindy that Buck misled the trial court are entirely based on evidence that was before the trial court and already considered at length. As such, it is difficult to fathom the argument that somehow the appellate Court should now, after the fact, determine that Buck misled the trial court when the trial court itself was aware of all the evidence and facts presented in support of Cindy's 'misleading' argument.

Assuming *arguendo* Buck mislead the trial court, which he vigorously opposes, such does not provide a basis for an award of attorneys' fees. In fact, Cindy even cites to the case of Davis v. Davis, 76 P.3d 716 (Utah App. 2003) in support of her position that the court should have awarded her attorneys' fees. However, the *Davis* case stands for the principle that when a court awards attorneys' fees in divorce proceedings, it should be based on the receiving spouse's financial need, the payer spouse's ability to pay, and the reasonableness of the requested fees. Id. at 720. Davis says nothing about an award of attorney fees based on assertions of misleading the court. Yet, the

trial court determined not to award fees because neither party had the ability to pay the fees of the other and neither was entitled to such an award.³ (R. at 2915.)

Accordingly, Cindy has failed to demonstrate that the trial court abused its discretion in not awarding attorney fees to either party. In addition Cindy has failed to demonstrate that Buck misled the trial court in any way, and thus the trial court's ruling regarding attorneys' fees should be affirmed.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY INTERPRETING ITS RULING TO VALUE BASCO AT THE TIME OF THE DIVORCE RATHER THAN THE TIME OF TRIAL

Cindy alleges that the trial court erred in interpreting its ruling to value BASCO at the time of divorce rather than the time of trial during the January 18, 2007 hearing.⁴ Again, "[i]t is well settle that this Court will not disturb the trial court's distribution of property and award of alimony in a divorce proceeding unless a clear and prejudicial abuse of discretion is shown." Dority v. Dority, 645 P.2d 56, 59 (Utah 1982) (citations omitted). Under Utah law, the "trial court has considerable discretion concerning property [division] in a divorce proceeding, thus its actions enjoy a presumption of validity." Elman v. Elman, 35 P.3d 176, ¶ 17 (Utah App. 2002). This Court has stated that it will not disturb a trial court's property division and valuation unless "there 'is a misunderstanding or misapplication of the law resulting in a substantial and prejudicial error, the evidence clearly preponderates against the

³ In trial court also found that neither party is entitled to fees because both parties prevailed on some issues at trial and an award of fees was unwarranted. (R. at 2915).

⁴ Although the trial court correctly interpreted the date for valuing BASCO, it incorrectly raised the issue of interest on BASCO *sua sponte*. Buck addresses this issue in more detail in his counter-appeal.

findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion.’” Id.

Cindy alleges that the trial court’s “modification” forces “Cindy to take less than fair market value for her interest in BASCO”, citing Harmon v. Harmon, 491 P.2d 231, 233 (Utah 1971) for the rule that when money is past due and reduced to judgment, the court should be reluctant to interfere with the collection of such debt. (Brief at 46-47.) However, the trial court did not stand in the way of Cindy’s collection of an asset she was awarded, rather, the trial court interpreted its ruling to include the addition of interest on the BASCO principle *should Buck wish to buy out Cindy’s interest*. The appellant appears to confuse the application of interest with the transfer of the principal.

Cindy is essentially asking this Court to redistribute assets between the parties. The trial court unequivocally awarded BASCO to Cindy. (R. at 3003) (“In order to reduce the amount of ongoing connection between Buck and Cindy hereafter, Buck’s entire interest in BASCO shall be awarded to Cindy. If either Mr. Cardin or Buck wish a different result, they will have to find a mechanism to buy out Cindy’s interest in BASCO awarded here.”). The trial court used the divorce date, September 5, 2003, as the date of valuation for BASCO. Thus, to change that value of BASCO would be to change the distribution of assets between the parties.

It appears that Cindy wants two bites at the same apple: To be awarded interest on the BASCO principal and also to realize any increase in value of BASCO between the September 2003 valuation date and the trial date. Thus, rather than merely appealing from the January 18, 2007 postjudgment hearing, Cindy is also appealing from the lower court's ruling regarding the valuation of BASCO.

Should Buck wish to purchase Cindy's share of BASCO, the appropriate purchasing price is the September 2003 valuation price of \$257,875. It would be unfair to Buck to require him to pay 2007 market value on BASCO, since this would increase the award of martial property awarded to Cindy by the trial court, thus interfering with the trial court's broad discretion in allocating property and awarding alimony.

Accordingly, Cindy has failed to demonstrate that the trial court's use of the September 2003 valuation date for BASCO was an abuse of discretion. This Court should not reexamine the trial court's division of martial property by considering the increase in value of BASCO between the September 2003 divorce and the March 2006 trial.

CONCLUSION

Based on the foregoing, Appellee/Cross-Appellant respectfully requests that this Court rule in favor of the Appellee/Cross-Appellant on the above issues.

CROSS APPELLANT'S BRIEF

DETERMINATIVE PROVISIONS

Appellee/Cross-Appellant incorporates the Determinative Provisions section as stated prior to Appellee's brief.

STATEMENT OF ISSUES

- I. Pursuant to Buck's motion to terminate alimony, did the trial court err in finding that Cindy was not cohabitating with Harley Bradbury based solely on the factors established by Sursa v. Sursa, 2005 UT App. 282, 1 and/or Haddow v. Haddow, 707 P.2d 669, 672-74 (Utah 1985), despite a direct admission by Mr. Bradbury that he was in fact cohabitating with Cindy?**

"[T]he determination of whether given circumstances constitute cohabitation...is in reality a mixed question of fact and law..." and the appellate court is "not bound by the conclusion reached by the trial court." Haddow, 707 P.2d at 671. Further, "in reviewing a trial court's actions in a divorce case", the appellate court is "vested with broad equitable powers." Id. This issue was preserved for appeal because Buck sought, but was denied, the termination of his alimony obligations based on Cindy's suspected cohabitation with Mr. Bradbury. (R. 2842 at 221-241, 263).

- II. Whether the trial court abused its discretion in rejecting the testimony of Buck's expert business evaluator, Brad Townsend, as to the amount of discounts to be applied in valuing Buck's business (i.e., KBR Systems, Inc.) for lack of control and lack of marketability, where Mr. Townsend relied on responsible studies and appropriate literature to determine the appropriate discounted amounts.**

A trial court's division and value assignment of marital property is reviewed for a clear abuse of discretion. Shepherd v. Shepherd, 876 P.2d 429, 433 (Utah Ct. App.

1994). See also Rappleye v. Rappleye, 855 P.2d 260, 263 (Utah Ct. App. 1993).

Also, findings of fact are reviewed under a “clearly erroneous” standard. Utah R. Civ. P. 52(a); England v. Horbach, 944 P.2d 340, 342 (Utah 1997). Further, a trial court’s decision regarding the admission of expert witness testimony is reviewed for an abuse of discretion. Balderas v. Starks, 138 P.3d 75, 78 (Utah Ct. App. 2006). This issue was preserved for appeal because Buck’s expert business evaluator testified during trial about the appropriate discounted value of Buck’s minority business interest based on previous studies and literature, but the trial court chose to reject this expert testimony. (R. at 2924-292).

III. Whether the trial court erred by imposing interest on the BASCO principal dating from the date of divorce decree, rather than from the date of the ruling, when the issue of interest was not raised by either party, nor was the issue raised in any previous pleading or previous hearing, but the issue was only raised for the first time on the court’s initiative during a hearing on a post-trial motion.

“Whether an issue was properly before the trial court presents a question of law, which we review for correctness.” Lee v. Sanders, 55 P.3d 1127, 1129 (Utah 2002).

This issue was preserved for appeal because it was not properly before the trial court and was only raised *sua sponte* by the court in a post-trial hearing on January 18, 2007.

In addition, both parties stipulated on the record that this issue could be raised on appeal. (R. at 2841, 22:1-23:2-3).

STATEMENT OF CASE

The Statement of the Case, Statement of Jurisdiction and Material Facts are hereby incorporated as set forth in the sections directly preceding Appellee's Brief.

SUMMARY OF THE ARGUMENT

The parties divorced in September 2003, but issues such as alimony and property division were reserved. Subsequently, the trial court held an evidentiary hearing on whether to terminate alimony based on Cindy's suspected cohabitation with Mr. Bradbury. Although Mr. Bradbury directly admitted to cohabiting with Cindy, the trial court found that solely under the factors set forth in Sursa and/or Haddow (which do not include an admission) there was insufficient evidence of cohabitation. Buck asserts that if there is a direct admission of cohabitation, the trial court need not even consider the Sursa factors. Alternatively, if there is a direct admission, the trial court need only balance some of the Sursa factors, not all of them, to make a finding of cohabitation.

In addition, the trial court abused its discretion by rejecting the testimony of Buck's expert business evaluator regarding the appropriate discounted values for KBR. Although the trial court claims that Mr. Townsend allegedly picked the discounted values without providing a meaningful basis for his values, Mr. Townsend testified at length about how he arrived at these values, including his reliance on numerous studies and literature. Subsequently, the trial court further abused its discretion by arbitrarily selecting an alternative "fair" value for KBR at a two-thirds point between Mr.

Townsend's suggested value and the book value. Interestingly, the trial court failed to provide any meaningful basis or findings to support its selection of an alternative "fair" value for KBR.

Finally, the trial court abused its discretion by awarding interest on the BASCO principal dating from the date of divorce decree, rather than from the date of the ruling, since the issue of interest was not raised by either party, the issue was not raised in any previous pleading or previous hearing, and the issue was raised for the first time on the court's initiative during a hearing on a post trial motion.

ARGUMENT

I. The Trial Court Erred in Finding that Cindy was Not Cohabiting with Mr. Bradbury by Basing Its Decision Solely on the Sursa and Haddow Factors, Where Mr. Bradbury Directly Admitted to Cohabiting with Cindy

Buck appeals the trial court's decision that Cindy was not cohabitating with Mr. Bradbury based solely on the factors set forth in Sursa and Haddow where Mr. Bradbury clearly admitted to cohabitating. However, if there is a direct admission of cohabitation, the trial court need not consider any of the factors in Sursa or Haddow to make a finding of cohabitation. Alternatively, the trial court need only balance the admission with *some* of the factors established in Sursa and Haddow, pursuant to the court's equitable powers, to make a finding of cohabitation. Further, if a party's admission to cohabitation is not dispositive, establishing cohabitation would indeed be a difficult if not impossible task.

U.C.A. § 30-3-5(10) provides that alimony “terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.” In Haddow, the Utah Supreme Court sets forth two key elements for determining whether cohabitation exists: “common residency and sexual contact evidencing a conjugal association.” Haddow, 707 P.2d at 672. “Common residency means the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time.” Id. Utah courts will look at various factors to determine whether a couple is sharing a common residence, including “open access to the residence, possession of a key, time spent at the residence, using the same furniture, keeping clothing and toiletries at the residence, presence of vehicles, shared living expenses, and ‘otherwise liv[ing] as though they were husband and wife.’” Sursa, 2005 Ut App 282 at 1, citing Sigg v. Sigg, 905 P.2d 908, 918 (Utah Ct. App. 1995).

Here, it is undisputed that Cindy has maintained a sexual relationship with Mr. Bradbury. (R. at 2797); (R. at 2842, 256). Thus, Buck is only appealing the trial court’s analysis under the second element – whether Cindy and Mr. Bradbury shared a common residence.

To determine whether Cindy and Mr. Bradbury were sharing a common residence and thus cohabitating, (and to fulfill Appellee/Cross-Appellant’s duty to marshal the evidence in support of the trial court’s finding that Cindy was not

cohabitating) the trial court relied on the following evidence and then applied the Sursa factors set forth above and issued findings as to each element:

1. **Open access to the residence.** The trial court found that Mr. Bradbury did not have open access to Cindy's residence, but was only allowed access as a visitor. (R. at 2797-2796); (R. at 2842, 256-257)
2. **Possession of a key.** The trial court found that Mr. Bradbury did not possess a key to the residence. Although Mr. Bradbury knew where a hidden key was located, this is not the same thing as possessing a key and there was no evidence that Mr. Bradbury ever used the hidden key to gain access to the residence. (R. at 2796); (R. at 2842, 257:12-18)
3. **Time spent at the residence.** The trial court found that there was no compelling evidence that Mr. Bradbury spent all or even most of his time at Cindy's residence. (R. at 2796); (R. at 2842, 258:1-13)
4. **Using the same furniture, keeping clothing and toiletries at the residence.** The trial court found that Mr. Bradbury did have some shirts in Cindy's closet. There was no evidence that Mr. Bradbury had other clothing or toiletries there. (R. at 2796); (R. at 2842, 258-259)
5. **Presence of vehicles.** The trial court found that a private investigator and other witnesses noted the presence of Mr. Bradbury's vehicle at Cindy's residence from time to time, but the number of time noted indicated that Mr. Bradbury was not doing anything more than visiting. (R. at 2796-2795); (R. at 2842, 259:10-15)
6. **Shared living expenses.** The trial court found that there was insufficient evidence that Mr. Bradbury paid any of Cindy's living expenses. (R. at 2795); (R. at 2842, 259-260)
7. **Living as though they were husband and wife.** The trial court found that there was insufficient evidence to conclude that Mr. Bradbury and Cindy were living as husband and wife. (R. at 2795); (R. at 2842, 260:3-10)

However, the trial court also found that other evidence outside of the Sursa factors indicated cohabitation. Most significantly, on cross examination, when shown Exhibit 15 (Freedom Elementary School records) Mr. Bradbury directly admitted that he was cohabitating with Cindy. (R. at 2841-A:88-89). Mr. Bradbury filled out the school forms and attested to the fact that he and his daughter were living with Cindy. (Id.) The trial court, upon consideration of this testimony, stated: “I think that that’s a clear admission, Mr. Thayer, that he [Mr. Bradbury] was living with her [Cindy]. (R. at 2842: 261).

In addition to the above admission, Cindy made references to Mr. Bradbury and herself as “we” regarding decisions on home improvements, implying that “there was more going on here than may meet the eye”. (R. at 2795); (R. at 2842, 261: 7-17) Moreover, Mr. Bradbury’s credit card purchase activity in Utah County increased significantly after he began associating with Cindy. (R. at 2795-2794); (R. at 2842, 261)

Ultimately, the trial court found that *in light of the Sursa factors*, Cindy and Mr. Bradbury did not share a common residence and thus, they were not cohabitating. (R. at 2794); (R. at 2842, 256) Yet the trial court further elaborated that it was unsure of how to apply Mr. Bradbury’s admission of cohabitation in light of the Sursa factors, given that a direct admission was not contemplated as one of the factors to be considered. (R. at 2842, 260-261)

Essentially, the trial court took the approach that only the Sursa factors should be considered in determining whether a couple is sharing a common residence. However, if there is a direct admission of cohabitation the trial court need not consider any of the Sursa factors. In fact, Haddow even defines a common residence as a place where “both parties consider their principal domicile.” Haddow, 707 P.2d at 672. Mr. Bradbury clearly considered Cindy’s residence his principal domicile. Thus, the Sursa factors should only be considered when there is a question of whether a couple is sharing a common residence. In this case, however, Mr. Bradbury’s direct admission makes it unnecessary to analyze this case under Sursa since there is no question as to whether the parties were sharing a common residence.

Alternatively, if there is a direct admission of cohabitation, the trial court need only balance the admission with *some* of the factors established in Sursa, not *all* of the factors. Further, a direct admission of cohabitation should be given more weight than any individual factor in Sursa. Thus, Mr. Bradbury’s admission, along with the evidence found under the Sursa analysis, establishes that Cindy was cohabitating with Mr. Bradbury.

Importantly, if this Court were to affirm the trial court’s ruling that Cindy was not cohabitating, despite the direct admission of Mr. Bradbury, such precedent would create an almost untenable burden to demonstrate cohabitation. As such, when a trial

court has a direct admission, such should be found to be conclusive evidence of cohabitation for purposes of an alimony determination.

As the above evidence and testimony reflect the evidence before the trial court, the trial court's ruling that Cindy was not cohabitating with Mr. Bradbury is clearly against the weight of the evidence. *Chen* at 1184-1185. Accordingly, the trial court's determination regarding cohabitating should be reversed.

II. The Trial Court Erred in Rejecting the Testimony of Buck's Expert Business Evaluator as to the Amount of Discounts to be Applied in Valuing Buck's Business for Lack of Control and Lack of Marketability, Where the Expert Business Evaluator Relied on Studies and Literature

The trial court erred in rejecting Buck's expert business evaluator's testimony regarding appropriate discounted values. (R. at 2948-2947). A trial court's decision regarding the admission of expert witness testimony is reviewed for an abuse of discretion. *Balderas*, 138 P.3d at 78. Moreover, the "trial court has wide discretion in determining the admissibility of expert testimony," and [the appeal court] "will not reverse unless the decision exceeds the limits of reasonability.'" *Id.* at 81, citing *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993).

Assuming, *arguendo*, the trial court correctly found that Mr. Townsend supposedly picked the discount amounts out of the air without any meaningful basis, it would have exceeded the "limits of reasonability" in rejecting his testimony.

However, to fulfill Appellee/Cross-Appellant's marshaling duty and to demonstrate the trial court's error, the testimony and evidence before the trial court

clearly demonstrated that Mr. Townsend in fact did not simply pick the discount amounts out of the air but rather arrived at his discounted values based on “numerous studies . . . performed over the years by thinkers in business valuation that quantify...the reasonable range of discounts for minority interests and for lack of marketability.” (R. at 2840, 25:4-7.) The studies further demonstrated that “[m]inority shareholders in closely held businesses...incur significant discounts typically.” (R. at 2840, 25:12-13.) Mr. Townsend also testified that:

[T]he studies and the literature show and the general practice in business appraisal, is that these 50 percent interest don’t suffer a complete minority position with regard to discounts and they are a little bit easier to sell, so they exercise some amount of control and some enhanced level of marketability over a true minority interest, but it’s not at the same level as a controlling interest.

(R. at 2840, 26:22-27:5.) Thus, Mr. Townsend concluded that, “typically, appraisal practice is to place the discount somewhere in between a control position and a minority position.” (R. at 2840, 27:6-8.)

When questioned by the trial court about the discounted values, Mr. Townsend testified that he arrived at a 27% discount in the course of his normal appraisal business based on standards that he believed were acceptable in this industry. (R. at 2840, 27) He also explained that the “literature indicates that the value of a 50-50 push interest is somewhere between control and non-control positions. And in this particular case, we calculated the value both ways, and then adjusted the discount to what it would be if the value were at the mid-point.” (R. at 2840, 81-82.)

In fact, the trial court recognized that Mr. Townsend used his best professional judgment to arrive at the discounted values. (R. at 2948.) The trial court even incorporated Mr. Townsend's discounted values in arriving at its own discounted value. (R. at 2947.)

Moreover, Rule 702 of the Utah Rules of Evidence provides that an expert witness may testify "in the form of an opinion or otherwise." Utah R. Evid. 702. Mr. Townsend was not required to provide "underlying facts or data, unless the court require[d] otherwise", which the trial court did not do. Utah R. Evid. 705.

As the above evidence and testimony reflect the evidence before the trial court, the trial court's ruling that Mr. Townsend picked the discount amounts out of the air is clearly against the weight of the evidence. *Chen* at 1184-1185. Thus, the trial court abused its discretion and exceeded the "limits of reasonability" by rejecting Mr. Townsend's testimony based on his alleged failure to apply any "meaningful basis" to arrive at the discounted values.

Alternatively, the trial court abused its discretion by selecting an arbitrary alternative value for KBR. A trial court's division and value assignment of marital property is reviewed for a clear abuse of discretion. Shepherd, 876 P.2d at 433. See also Rappleye, 855 P.2d at 263.

In reaching a value for KBR, the trial court found that Mr. Townsend's proposed value (\$944,856) represented the lowest possible figure that the court could use in

fixing the value of the marital asset, while book value (\$1,287,516) represented the highest possible figure the court could use. (R. at 2947) Then, the trial court arbitrarily selected a two-thirds way between these two values and declared this amount to be a fair valuation of KBR (\$1,173,296). (R. at 2946) The trial court failed to give any basis for its selection of the two-thirds point. (R. at 2947-2946) Thus, the trial court abused its discretion by arbitrarily picking a value for KBR without appropriate findings to support its decision.

Accordingly, this Court should reverse the trial court's value assigned to KBR and replace it with Mr. Townsend's proposed discounted value. Alternatively, this matter should be remanded to provide the trial court with another opportunity to review Mr. Townsend's methods for arriving at the discounted amounts.

III. The Trial Court Erred by Imposing Interest on the BASCO Principal Dating from the Divorce Decree, Rather than from the Date of the Ruling, Since the Issue of Interest was Not Raised by Either Party, the Issue was Not Raised in Any Previous Pleading or Previous Hearing, and the Issue was Raised for the First Time on the Court's Initiative During a Hearing on a Post-Trial Motion

Buck appeals the trial court's award of interest on the BASCO principal. The issue of interest was not raised in the pleadings, during trial, or by either of the parties. In its Ruling, the trial court awarded Buck's interest in BASCO to Cindy, finding that "[i]f either Mr. Cardin or Buck wish a different result, they will have to find a mechanism to buy out Cindy's interest in BASCO awarded here." (R. at 2922). The trial court later interpreted its Ruling at the post-judgment hearing held on January 18,

2007. The trial court explained that if Buck and Mr. Cardin did not like the result of the court's ruling as detailed above, they would need to buy out Cindy. (R. at 2841, 15:25-16:1.) The court used the September 2003 valuation to establish a buy-out price for the BASCO interest awarded to Cindy. The trial court then asserted that interest would be added to the September 2003 valuation price. (R. at 2841, 17:16-18)

Generally, a court may not add a new issue not raised by a party. "A trial court's findings should fit 'within the framework of the petition as originally drawn, or as amended' and should be supported by the evidence presented." Lee, 55 P.3d at 1129, citing In re Behm's Estate, 213 P.2d 657, 633 (Utah 1950). Thus, trial courts may not find on issues not raised by the pleadings. Fisher v. Bylund, 93 P.2d 737, 739 (Utah 1939) ("As stated above, no such issue is raised by the pleadings. Without such issues in the pleadings, the findings and conclusions of the lower court upon these questions are all nullities.").

Adding an issue not before the trial court runs counter to the notions of fairness implicit in the legal system. "Among the cardinal principles of our Anglo-American system of justice is the notion that the legal parameters of a given dispute are framed by the positions advanced by the adversaries, and may not be expanded sua sponte by the trial judge." Doubleday & Co. v. Curtis, 763 F.2d 495, 502 (2d Cir. 1985). See also Reddell v. Johnson, 942 P.2d 200, 202 (Okla. 1997). In Doubleday & Co. v. Curtis, the appellate court found that the district court improperly dismissed plaintiff's

complaint on the basis of an issue that was not properly before the court. The court asserted that “dismissal of Doubleday’s claim based on an issue never pleaded by [defendant] Curtis—or even implicitly raised at trial—is inconsistent with the due process concerns of adequate notice and an opportunity to be heard.” Doubleday & Co., 763 F.2d at 502. The trial court further noted that “such a result runs counter to the spirit of fairness embodied in the Federal Rules of Civil Procedure.” Id.

In this case, the issue of interest was not raised by either party nor was the issue raised in any previous pleading or previous hearing. Instead, the issue was raised for the first time on the trial court’s initiative during a hearing on a post trial motion.

Assuming, *arguendo*, that the trial court was correct in raising the issue of interest on its own initiative, the court nonetheless erred by awarding interest on the BASCO principal. Interest became an issue only when the trial court interpreted its own ruling and reduced the value of BASCO to a dollar amount. However, the trial court did not impose interest upon the other assets divided between the parties, nor did the trial court contemplate interest on BASCO at trial or in its ruling.

The trial court did not order Buck to pay \$257,875 for the interest in BASCO awarded to Cindy. Rather, the court gave Buck the *option* of buying out Cindy’s portion of BASCO for \$257,875, or one half of the value as of September 2003. (R. at 2841, 16:20) The payment of \$257,875 would occur only if Buck wanted to buyout Cindy’s interest in BASCO, which was the interest awarded to her by the court.

Because the trial court did not contemplate interest in its ruling, nor did it impose interest on any other asset awarded to Cindy, it is unfair to impose interest on the one-half share of BASCO awarded to Cindy. In effect, Buck is being penalized for buying out Cindy's share of BASCO.

Even if interest should be applied to the BASCO principal, the trial court should have applied *post-judgment* interest only, not an interest rate of possibly ten percent. (R. at 2841, 16:20-21.) However, the court expressed uncertainty as to the proper rate of interest: "I intended that it be paid at whatever the value was plus reasonable interest." (R. at 2841, 18:16-17) Referring to section 15-1-1, of the Utah Code Annotated, the court stated, "I don't think I have a basis to get into that statute that talks about legal interest" (R. at 2841, 18:21-23) The court then stated, "[Ms. Robinson] gets her \$257,000 plus legal interest, which I think is ten percent under the statute." (R. at 2841, 19:13-15.)

Based upon the court's statements, the court awarded "reasonable" or "legal interest". However, the court erred in using ten percent interest as a guide. The Utah Code differentiates between the post-judgment interest rate and the contract interest rate. Section 15-1-4(3)(a) of the Utah Code Annotated, states, "[e]xcept as otherwise provided by law, other civil and criminal judgments of the district court and justice court shall bear interest at the federal post judgment interest rate as of January 1 of each year, plus 2%." In contrast, section 15-1-1 addresses contract interest rates.

Section 15-1-1(2) states, “[u]nless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.” Thus, interest should be imposed on the BASCO principal, if at all, at the post-judgment rate, since this is not a contract case, but an award pursuant to a judgment.

In addition, if interest applies at all, interest should run from the date of the divorce ruling, not from the date of the divorce decree. It is clear that post-judgment interest begins to accrue at the time a judgment is entered. DeBry v. Cascade Enterprises, 935 P.2d 499, 500 n.1 (Utah 1997) (“Ordinarily postjudgment interest is imposed as of the date of entry of judgment.”). In addition, it would cause a tremendous burden on the parties if the courts were to award interest from the date of a divorce decree in bifurcated proceedings, as opposed to the date of the ruling.

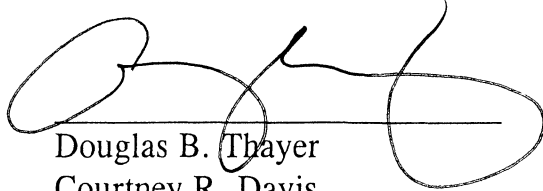
Accordingly, the trial court’s erroneous imposition of interest on the BASCO principal should be reversed. In the alternative, if interest is imposed, such interest should be calculated at the post-judgment rate, as pursuant to U.C.A. §15-1-4, and it should accrue upon the date of the divorce ruling, not the date of the divorce decree.

CONCLUSION

For the reasons stated in this brief, Cross-Appellant Buck Robinson respectfully requests that this Court grant his appeal and reverse the trial court’s judgments.

DATED this 3^d day of January, 2008.

HILL, JOHNSON & SCHMUTZ

A handwritten signature in black ink, appearing to read 'Douglas B. Thayer', written over a horizontal line.

Douglas B. Thayer

Courtney R. Davis

Andrew V. Wright

Counsel for Appellee/Cross Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Amended Docketing Statement postage prepaid, this 3rd day of January, 2008 to the following:

Cindy Robinson
5344 White Dawn Circle
Herriman, Utah 84096

Drake Raab

Sent Via:

☐ Hand-Delivery

☐ Facsimile

☒ Mailed (postage prepaid)