

2007

# Mark F. Leppert v. Catherine L. Leppert : Reply Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](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.

David C. Anderson; Attorney for Petitioner.

Kellie F. Williams; Jared T. Hales; Attorney for Respondent.

---

## Recommended Citation

Reply Brief, *Leppert v. Leppert*, No. 20060872 (Utah Court of Appeals, 2007).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/7075](https://digitalcommons.law.byu.edu/byu_ca2/7075)

This Reply Brief 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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

MARK F. LEPPERT,

Petitioner, Appellee and  
Cross-Appellant,

-vs-

CATHERINE L. LEPPERT,

Respondent, Appellant and  
Cross-Appellee.

:  
:  
:  
:  
: Appellate Case No. 20060872  
:  
: Lower Court No. 044904145  
:  
:  
:  
:  
:

---

REPLY BRIEF OF APPELLANT and BRIEF OF CROSS-APPELLEE

---

KELLIE F. WILLIAMS #3493  
JARED T. HALES, #10767  
Attorneys for Respondent, Appellant and  
Cross-Appellee  
CORPORON & WILLIAMS, P.C.  
405 South Main Street, Suite 700  
Salt Lake City, Utah 84111  
Telephone: 801-328-1162  
Facsimile: 801-363-8243

DAVID C. ANDERSON  
Attorney for Petitioner, Appellee and  
Cross-Appellant  
39 Exchange Place, #100  
Salt Lake City, UT 84111  
Telephone: (801) 533-9400  
Facsimile: (801) 366-9022

FILED  
UTAH APPELLATE COURTS  
AUG 17 2007

---

IN THE UTAH COURT OF APPEALS

---

MARK F. LEPPERT,

Petitioner, Appellee and  
Cross-Appellant,

-vs-

CATHERINE L. LEPPERT,

Respondent, Appellant and  
Cross-Appellee.

:  
:  
:  
:  
: Appellate Case No. 20060872  
:  
: Lower Court No. 044904145  
:  
:  
:  
:  
:  
:

---

REPLY BRIEF OF APPELLANT and BRIEF OF CROSS-APPELLEE

---

KELLIE F. WILLIAMS #3493  
JARED T. HALES, #10767  
Attorneys for Respondent, Appellant and  
Cross-Appellee  
CORPORON & WILLIAMS, P.C.  
405 South Main Street, Suite 700  
Salt Lake City, Utah 84111  
Telephone: 801-328-1162  
Facsimile: 801-363-8243

DAVID C. ANDERSON  
Attorney for Petitioner, Appellee and  
Cross-Appellant  
39 Exchange Place, #100  
Salt Lake City, UT 84111  
Telephone: (801) 533-9400  
Facsimile: (801) 366-9022

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
ARGUMENT .....	1
POINT I. APPELLANT HAS EMPLOYED CORRECT STANDARDS OF REVIEW .....	1
POINT II. APPELLANT HAS MARSHALED THE EVIDENCE .....	7
POINT III. THE TRIAL COURT SHOULD NOT HAVE IMPUTED INCOME .....	12
POINT IV. THE AWARD OF ALIMONY WAS AN ABUSE OF DISCRETION .....	14
POINT V. THE REDUCTION OF ALIMONY WAS IN ERROR .....	19
POINT VI. THE KEY BANK DEBT WAS UNFAIRLY DIVIDED .....	19
POINT VII. THE TRIAL COURT ERRED IN THE AMOUNT OF ATTORNEY'S FEES AWARDED AND ITS REFUSAL TO AWARD COSTS .....	20
POINT VIII. THE TRIAL COURT CORRECTLY AWARDED CATHERINE AN INTEREST IN FUTURE PATENTS .....	22
POINT IX. MARK'S APPEAL OF THE AWARD OF ATTORNEY'S FEES SHOULD BE REJECTED .....	24
POINT X. MARK'S ARGUMENT REGARDING MARITAL DEBT SHOULD BE REJECTED .....	24
CONCLUSION .....	25
CERTIFICATE OF SERVICE .....	27

## TABLE OF AUTHORITIES

### CASES

<u>A.K. &amp; R. Whipple Plumbing &amp; Heating v. Aspen Const.,</u> 1999 Utah App. 87 .....	25
<u>Bingham v. Bingham</u> , 872 P.2d 1065 (Utah Ct App 1994) .....	7
<u>Bradford v. Bradford</u> , 1999 Utah App. 373 .....	20
<u>Bruer-Harrison, Inc. v. Combe</u> , 799 P.2d 716 (Utah Ct App 1990) .....	5
<u>Childs v. Childs</u> , 962 P.2d 942 (Utah Ct App 1982) .....	2
<u>Clark v. Clark</u> , 2001 UT 44 .....	2
<u>Cox v. Cox</u> , 877 P.2d 1262 (Utah Ct App 1994) .....	5, 16
<u>Davis v. Davis</u> , 2003 Utah App. 282 .....	9
<u>Dunn v. Dunn</u> , 802 P.2d 1314 (Utah Ct App 1990) .....	22
<u>Elman v. Elman</u> , 2002 Utah App. 83 .....	21, 22
<u>Fitzgerald v. Critchfield</u> , 744 P.2d 301 (Utah Ct App 1987) .....	9
<u>Griffith v. Griffith</u> , 1999 UT 78 .....	2
<u>Ellis v. Swenson</u> , 2000 UT 101 .....	24, 25
<u>Haumont v. Haumont</u> , 793 P.2d 421 (Utah Ct App 1990) .....	21
<u>Higley v. Higley</u> , 676 P.2d 379 (Utah 1983) .....	18
<u>Hill v. Hill</u> , 869 P.2d 963 (Utah Ct App 1994) .....	7
<u>Howell v. Howell</u> , 806 P.2d 1209 (Utah Ct App 1991) .....	7
<u>Howell v. Howell</u> , 817 P.2d 327 (Utah 1991) .....	7
<u>Martinez v. Martinez</u> , 754 P.2d 75 (Utah Ct App 1988) .....	18
<u>Martinez v. Media-Paymaster Plus</u> , 2007 UT 42 .....	7, 8
<u>Moon v. Moon</u> , 790 P.2d 52 (Utah Ct App 1990) .....	22
<u>Munns v. Munns</u> , 790 P.2d 116 (Utah Ct App 1990) .....	19
<u>Rosendahl v. Rosendahl</u> , 876 P.2d 870 (Utah Ct App 1994) .....	21, 22
<u>Watson v. Watson</u> , 837 P.2d 1 (Utah Ct App 1992). .....	2
<u>West Valley City v. Majestic Inv. Co.</u> , 818 P.2d 1311 (Utah 1991) .....	7, 8
<u>Wilde v. Wilde</u> , 969 P.2d 338 (Utah Ct App 1998) .....	21
<u>Willey v. Willey</u> , 866 P.2d 547 (Utah Ct App 1993) .....	13, 14
<u>Willey v. Willey</u> , 914 P.2d 1149 (Utah Ct App 1996) .....	16
<u>Willey v. Willey</u> , 951 P.2d 226 (Utah 1997) .....	18, 19

**RULES**

Rule 24(a)(9) Utah Rules of Appellate Procedure .....	7, 24, 25
Rule 52(a) Utah Rules of Civil Procedure .....	2

**STATUTES**

Utah Code Ann. § 30-3-3 .....	20, 21
-------------------------------	--------

---

IN THE UTAH COURT OF APPEALS

---

MARK F. LEPPERT,	:	
	:	REPLY BRIEF OF APPELLANT and
Petitioner, Appellee and	:	BRIEF OF CROSS-APPELLEE
Cross-Appellant,	:	
-vs-	:	
	:	Appellate Case No. 20060872
CATHERINE L. LEPPERT,	:	
	:	Lower Court No. 044904145
Respondent, Appellant and	:	
Cross-Appellee.	:	
	:	

---

APPEAL FROM JUDGMENT OF THE THIRD DISTRICT COURT,  
SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE L.A. DEVER

---

Appellant and Cross Appellee, Catherine L. Leppert, (“Catherine”) by and through counsel, hereby submits the following as her Reply Brief.

**ARGUMENT**

**POINT I. CATHERINE HAS EMPLOYED CORRECT STANDARDS OF REVIEW.**

**A. The Trial Court Abused Its Discretion In The Award Of Alimony And Entered Findings Of Fact Which Were Clearly Erroneous.**

The trial court erred in imputing income to Catherine, in the amount of alimony awarded and in reducing and eliminating alimony upon future events. Catherine correctly identified the standard of review in her challenge of the trial court’s legal conclusions. Appellee/Cross-Appellant (“Mark”) misstates the appropriate standard of review of a trial

court's award of alimony when he asserts that the correct standard is clear error. The clearly erroneous standard is applicable to instances in which an Appellant has challenged the incorrectness of the trial court's findings of fact. *See*, Rule 52(a) Utah Rules of Civil Procedure. "A trial court's findings of fact will not be reversed unless they are clearly erroneous, and the trial court's application of the statute to those findings will not be reversed absent an abuse of discretion." *See*, Clark v. Clark, 2001 UT 44, ¶ 14.

Catherine has articulated, within each argument, the trial court's clear error in regard to certain factual findings. Catherine submits that it is not relevant to this court whether the Appellant cited to the clearly erroneous standard of review in her brief. What is germane is whether the Appellant provided this court with a basis for finding that certain of the trial court's findings were clearly erroneous, and that said finding contributed to the trial court's abuse of discretion.

A trial court's determination of alimony is reviewed for abuse of discretion. *See*, Griffith v. Griffith, 1999 UT 78 ¶ 17. In formulating alimony awards a trial court has broad discretion, and the award will not be overturned absent an abuse of discretion or manifest injustice or inequity. *See*, Watson v. Watson, 837 P.2d 1, 3 (Utah Ct App 1992). Catherine acknowledges that this court will not disturb a trial court's alimony award so long as the trial court exercised discretion within the appropriate legal standards and supported its decision with adequate findings and conclusions. *See*, Childs v. Childs, 962 P.2d 942 (Utah Ct App 1982).



In this matter, the trial court arrived at an award of alimony that was outside appropriate legal standards, resulting in manifest injustice and inequity. The trial court supported its decision with erroneous findings. While Catherine has correctly stated the applicable standards of review as to each of the issues raised and has pointed out the court's clear error in its factual findings, should this court determine that the correct standard of review is clear error, as to any of the trial court's ultimate conclusions, Catherine has demonstrated that clear error and the trial court should be reversed.

**B. The Trial Court's Factual Findings Regarding Catherine's Ability to Work Were Clearly Erroneous.**

The trial court made erroneous findings which led to its legal conclusion to impute income. These erroneous findings include "Dr. Vickie Gregory does not believe that Respondent is unemployable." (R. 572, 768). At no time did Dr. Gregory testify that Catherine was employable. Dr. Gregory testified that she would have a very difficult time getting through a job interview and that she would not be able to work and maintain the regime that allows her to stay healthy. (R. 742 p. 392:20-23, p. 393:17-20). At one point, Dr. Gregory did state: "I don't - I am not going to say that Ms. Leppert is unemployable, because I do not know that that is the case, but she certainly, in my mind would fall between unemployable and occupationally disabled. (R. 742 p. 392:18-21). Dr. Gregory made it very clear in her testimony that she disagreed with the opinion of Dr. Farnsworth regarding Catherine's employability. (R. 742 p. 382:1-9, 11-24; p. 394:1-10).

The trial court erred in taking the testimony of Dr. Hallie Robbins out of context,

by “finding” from Dr. Robbins’s testimony that “she is of the opinion that the Respondent is so wrapped up in the minutia of the daily activities she has developed that she fails to see what to do to get better,” without considering the totality of her testimony. Dr. Robbins clearly stated that Catherine relies on her supplements, special diet, and food intake, like a “diabetic relies on insulin;” and that Catherine would suffer from further mental and emotional damage if she was forced to stop her diet without an appropriate substitution of care and treatment. (R. 742 pp. 431:22-25, 432:1-2, 433:1-14 and 19-21).

The trial court also committed clear error in finding that Catherine was diagnosed by “Dr. Darrell Anderson”<sup>1</sup> with ADHD. (R. 572 ¶ 4, R. 652 ¶ 3, 665 ¶ 4, 751 ¶ 3 and 767 ¶ 4). There was no witness named Dr. Darrell Anderson. Catherine was not diagnosed with ADHD. Mark argues that the court’s finding that Catherine had been diagnosed with ADHD was not clear error because Dr. Todd Mangum testified that Catherine’s obsessive compulsiveness was “almost a form of ADD.” (R. 743 p. 510:10-25). This argument ignores the distinction between a finding of an actual diagnosis of a medical condition and Dr. Mangum’s statement. The trial court made an erroneous finding that Catherine had been diagnosed with an illness she did not have, by a doctor that appears no where in the trial record. The trial court’s factual findings regarding Catherine’s employability are reversible as clear error.

---

<sup>1</sup> This error in citing to a Dr. Darrell Anderson was only corrected in a subsequent order by counsel for Mark. (R. 613, ¶4).

**C. The Trial Court's Findings In Regard To Catherine's Monthly Expenses Were Clearly Erroneous.**

The trial courts miscalculations of Catherine's monthly expenses were the basis for its award of alimony. The award based upon faulty mathematical calculations was clearly an abuse of discretion. Mark has failed to adequately address this clear error in his brief. This court has previously reversed and remanded a trial court's miscalculations. *See, Bruer-Harrison, Inc. v. Combe*, 799 P.2d 716, 731-32 (Utah Ct App 1990).

**D. The Trial Court Erred In Its Factual Findings Regarding Alimony.**

The trial court's factual findings regarding alimony are erroneous because they do not adequately detail "and include enough subsidiary facts" to support the trial court's ultimate conclusion. *See, Cox v. Cox*, 877 P.2d 1262, 1267 (Utah Ct App 1994). Judge Dever made findings based on speculation, not supported by the record or that were contradictory to other findings. The trial court made the finding that Catherine should not be denied her supplements, (R. 578), and made a finding that these supplements, should be included, not as a medical expense, but in food and household supplies. (R. 722). However, the trial court failed to increase Catherine's food and household expenses to account for the supplements, and made no finding as to what amount Catherine was allotted for supplements.

Further, the trial court arbitrarily reduced Catherine's claims for auto expenses, gifts, and travel without providing a reason for the reduction, other than to say it "seemed too high." (R. 775).

**E. The Trial Court's Findings Regarding Future Retirement Payments And Future Events Were Clearly Erroneous.**

The trial court erred by reducing Catherine's future alimony based on her receiving a specific amount from Mark's retirement, though it was unknown at the time of trial when Mark would retire or what amount Catherine would receive. The trial court found that Catherine would receive at least \$2,111.00 per month from Mark's retirement account, based solely on Mark's testimony. (Petitioner's Exhibit 22, R. 741, p. 121-25). Over counsel's objections, Mark testified that he calculated the figures using "average rates of return." (R. 741, p. 121:4-24). No testimony was given by any person from TIAA-CREF to determine what retirement benefit Catherine might be entitled to or when.

Mark has not yet retired so any "guess" as to what Catherine would be entitled to at retirement is purely speculative. (R. 741, pp. 88:11-25, 89:1-13). Further, no findings were made as to what Catherine's future needs or what Mark's ability to pay might be. Mark provides no support for his statement that the trial court "determined facts relative to the parties' present situation and the foreseeable future based upon the facts." (Brief of Appellee and Cross-Appellant, p. 30). The testimony was that Mark was 65 at the time of trial, and that he hoped to retire from the University in two to three years, but that he might do "emeritus-type work" (R. 741, pp. 88:13-25, 89:7-20), or work in the consulting field. (R. 741 p.165:1-10, 22-25). The trial court erred in basing its factual finding regarding income from a future annuity on Mark's calculations and then making downward adjustments in Catherine's alimony based upon those future unknowns.

**F. The Standard Of Review Of The Court's Division Of Debts And Personal Property Is An Abuse Of Discretion.**

Mark has argued that as to the division of debts and personal property, the appropriate standard of review is the clearly erroneous standard. Appellant disagrees.

In Hill v. Hill, 869 P.2d 963, 966-967 (Utah Ct App 1994), this court rejected an argument that the trial court abused its discretion in ordering husband to pay 87% of the debt. "In a divorce action, there is no fixed formula upon which to determine a division of debts. However, such allocation must be based upon adequate factual findings which ruling we will not disturb absent an abuse of discretion." Bingham v. Bingham, 872 P.2d 1065, 1067 (Utah Ct App 1994). Property awards "will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated." Howell v. Howell, 806 P.2d 1209, 1211 (Utah Ct App 1991), cert. denied, 817 P.2d 327 (Utah 1991).

**POINT II. APPELLANT HAS MARSHALED THE EVIDENCE.**

Husband asks for a "gotcha" rule when he asserts that the trial court should be affirmed based on a supposed failure on the part of Catherine to marshal the evidence.

**A. Marshaling The Evidence Does Not Require A Complete Reproduction Of The Trial Court Record.**

Rule 24(a)(9) of the Utah Rules of Appellate Procedure states in relevant part: "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." The Utah Supreme Court had previously stated, "[t]his requires counsel to construct the evidence supporting the adversary's position, and then 'ferret out

a fatal flaw in the evidence.”” Martinez v. Media-Paymaster Plus, et al, 2007 UT 42, ¶ 17 (quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah 1991)).

In Martinez, the petitioner argued that this Court erred by not dismissing the respondent’s factual challenge to the Utah Labor Commission’s order based upon respondent’s failure to marshal the evidence. The Supreme Court labeled the assertion that a reviewing court is bound to dismiss a case where the evidence has not been marshaled, “a fundamental misunderstanding of the marshaling obligation.” Id. at ¶ 16.

The Supreme Court further clarified the marshaling requirement as follows:

In our zeal to emphasize the importance of the marshaling requirement to parties, we have used language implying that appellate courts are strictly bound to affirm the accuracy of the agency’s or trial court’s factual findings in the absence of marshaling . . . Despite this language, the marshaling requirement is not a limitation on the power of the appellate courts. Rather, it is a tool pursuant to which the appellate courts impose on the parties an obligation to assist them in conducting a whole record review. It is not, itself, a rule of substantive law. Consequently, parties that fail to marshal the evidence do so at risk that the reviewing court will decline, in its discretion, to review the trial court’s factual findings.

(Internal citations and quotations omitted).

The marshaling requirement should be viewed as an aid to this Court, not an opportunity for an opposing party to point to irrelevant facts not included in a brief. Mark argues that Catherine “utterly failed to marshal the evidence below.” (Appellee’s Brief, p. 23). Given that alimony is at issue, Mark’s interpretation of the marshaling rule would require Catherine to restate three days of testimony and hundreds of pleadings in order to set forth every minute factual detail that may have supported the trial court’s findings.

Mark is attempting to avoid responding to Catherine's argument by asserting a "gotcha" theory of the marshaling requirement.

Mark cited to Davis v. Davis, 2003 UT App. 282, in support of his argument that Catherine failed to marshal the evidence. In Davis, at ¶ 10, husband argued that the trial court miscalculated the wife's income and monthly expenses in its award of alimony to the wife, by overlooking the retirement contribution and mistakenly including a car payment as part of her expenses. The court chided the husband, stating that he was merely rearguing his case and "ignored the factual support for the trial court's decision to award Wife \$1,000 in monthly alimony." Davis, 2003 UT App at ¶ 10.

In Fitzgerald v. Critchfield, 744 P.2d 301, 304 (Utah Ct App 1987), this Court addressed the marshaling requirement as it relates to the necessity to cite to the record. In Fitzgerald, this Court found that the appellant failed to marshal the evidence when he simply entitled one section of the brief "FACTS" and then set forth his version of the facts and the appellee's version of the facts. The appellant also failed to set forth "the requisite presentation of supporting evidence" in the argument. 744 P.2d at 304.

Davis and Fitzgerald are distinguishable from this case. Catherine set forth the known and pertinent facts on which the trial court made its findings, and cited extensively to the record. Catherine's "Statement of Facts" consists of 29 pages, and additional citations to the record are found in her "Argument" section.

Mark has confused the marshaling rule with the requirement that the trial court

make sufficient findings to support its decision. Much of Catherine's argument is based on the trial court's failure to make sufficient findings. In some instances, there was little to marshal. For example, the trial court made a single finding regarding attorney fees: "[t]he Respondent does not have the means to pay all of the attorney fees generated by this matter." (Appellant's Brief, p. 58).

Although page constraints, prevent a complete recitation of the facts marshaled in Catherine's Brief, the following are some examples:

(1) **Imputation of income.** Catherine pointed out that the trial court entered an order based upon the parties' stipulation that Catherine undergo a vocational examination. (Appellant's Brief, p. 7). Dr. Farnsworth testified Catherine could work in a professional position and have a salary from \$22,880.00 to \$39,104.00. (Appellant's Brief, p. 16). Catherine included numerous facts regarding Catherine's work history. (Appellant's Brief, pp. 8, 13-14).

(2) **Amount of Alimony.** Mark accuses Catherine of not marshaling the evidence by failing to include the fact that she had three telephone providers, and two separate internet providers. (Brief of Appellee p. 26). This is incorrect. Catherine quoted the findings of the trial court that she had three telephone lines and two internet providers. (Appellant's Brief, p. 43). Catherine's Brief contained details of her monthly needs and the courts consideration and miscalculation of those monthly expenses. (Appellant's Brief, pp. 24-30). Mark's argument that Catherine failed to marshal the



evidence is contradicted by the contents of Catherine's Brief.

(3) **The Reduction and Elimination of Alimony Based Upon Future Events.**

Catherine acknowledged the parties ages and that Catherine would be entitled to receive payments from Mark's retirement, and that Mark testified that Catherine would be entitled to monthly payments of \$2,111.00. (Appellant's Brief, pp. 11, 50-53). Further, Catherine would be eligible for social security at the age of 66. (Appellant's Brief, p. 30).

(4) **Division of Debts.** Mark set forth Catherine's "personal" use of funds from the parties' Key Bank debt. These points were clearly articulated in Catherine's Brief. Catherine testified that she used the Key Bank line to pay for an appraisal, collaborative law legal fees, attorney fees for present counsel, and a new computer and printer. (Appellant's Brief, p. 33). Once again, Mark misstates by pointing to alleged omissions which were clearly stated in Catherine's brief.

(5) **The Savings Account And Tax Refund To Pay Marital Debt.** Catherine stated that the parties' exercised a stock option in 2005 which netted \$21,298.00, which they placed in a Smith Barney account. (Appellant's Brief, p. 32). She further stated that the parties had marital debt of \$24,548.00 to Key Bank for a line of credit. (Appellant's Brief, p. 32). Other than what Catherine set forth in her statement of facts or reciting all of the testimony of the parties, there is no other evidence to marshal in support of the trial courts findings.

In the instances in which Catherine has challenged the trial courts factual findings,

she has fully marshaled the evidence. Catherine provided this court with any apparent factual basis for the trial court's findings. Mark's challenge to Catherine's marshaling of the evidence is merely an attempt to distract this Court. Instead of responding to Catherine's arguments, Mark sidesteps the court's clear errors by running up the "marshaling flag". This avoidance technique should not be condoned by this court.

**POINT III. THE TRIAL COURT SHOULD NOT HAVE IMPUTED INCOME.**

In his brief, Mark glossed over or failed to address the errors made by the trial court. The fact that a witness used the word ADD in the course of answering a question does not justify the court's specific finding that "Dr. Mangum diagnosed Catherine with ADHD." That is clear error, which error is exacerbated by the trial court's earlier finding that a Dr. Darrell Anderson had testified, when no such witness testified, and further compounded by the court's specific finding that Dr. Clegg treated Catherine since 1981. (R. 572). Those facts were not in the record, but were later corrected. (R. 665, 767). Contrary to the representations of Mark, Catherine provided the evaluation of her employability by Dr. Vickie Gregory. Dr. Gregory performs psychological evaluations, assesses capacity to perform work and earn money and has performed vocational analyses. (R. 742 p.377:22-25, p.378:1-11). Unlike Dr. Farnsworth, who did not review medical records, Dr. Gregory spent substantial time reviewing extensive medical records. (R. 742 p.377-376). Dr. Gregory found that Catherine had a number of physical problems and suffered from Obsessive Compulsive Disorder, a major psychiatric disorder and

cognitive deficits. (R. 742 p.382:17-21; 385:8-10).

Further, Mark failed to address the fact that Catherine had been out of the workforce since 1981. Instead, he argues that Catherine has a high IQ, and that Dr. Gregory did not independently test her computer skills. (Brief of Appellee p. 21). It is important to note that Dr. Farnsworth did not test Catherine's computer skills either. Mark gratuitously argued that Dr. Farnsworth determined that Catherine's lack of recent expertise or training may reduce her rate of compensation, (Brief of Appellee p.22), but, completely failed to address Dr. Gregory's diagnosis of a major psychiatric disorder. Again, Dr. Clegg, recommended that Catherine seek psychiatric testing. (R. 355). Mark did not address the court's finding that "nearly all of the experts testified that Catherine was capable of working" (R. 573, 666, 768), when there is no support for that finding in the record. While, Dr. Farnsworth testified that Catherine was capable of working, contrary testimony was provided by Dr. Mangum, Dr. Robbins, Dr. Gregory, and was implicit in the testimony of Dr. Clegg. The fact that the trial court imputed \$1,560.00 per month to Catherine rather than the range of \$22,880.00 - \$39,144.00 per year, as Dr. Farnsworth suggested she was able to earn in her analysis of employability is of little moment when the testimony and evidence was overwhelmingly contrary.

As stated in Willey v. Willey, 866 P.2d 547 (Utah Ct App 1993), if the court wishes to impute income, the findings of fact must be sufficient to support the conclusion. Id. at 230. In Willey, this Court reversed the trial court because it had not taken into

account the historical earnings and current situation of Mrs. Willey. Id. at 554. Judge Dever also premised the imputation of income upon “mere conjecture;” and did not make a “careful and precise assessment requiring detailed findings.” Id. at 554. The trial court abused its discretion and erred in imputing income to a 62 year old woman who had been out of the workforce since 1981, when she was forced to leave due to health issues, and who has since been diagnosed with a major psychiatric disorder, which prevents her from securing and holding a job. In the face of those facts, the findings of the court are clearly erroneous.

#### **POINT IV. THE AWARD OF ALIMONY WAS AN ABUSE OF DISCRETION.**

Contrary to Mark’s argument, the court miscalculated Catherine’s needs. Mark argues that the court found that Catherine’s housing costs and utilities were \$1,289.00. Nowhere in the record is there any such finding. In the court’s consideration of Catherine’s needs, the court referenced Catherine’s Financial Declaration and made eight adjustments, as follows: (1) maintenance: \$200 rather than \$289; (2) telephone: \$125 rather than \$213; (3) medical: \$634 rather than \$1,240; (4) entertainment: \$100 rather than \$119; (5) gifts: \$50 rather than \$146; (6) travel: \$200 rather than \$265; (7) auto expenses: \$223 rather than \$443, and (8) other: \$157 rather than \$495. (R. 774-777). That would reduce Catherine’s expenses by \$1,521.00. Catherine’s claimed expenses of \$6,785.00 less \$1,521.00 equals \$5,264.00.

Mark speculates that the court had something in mind other than acknowledging

the rest of Catherine's expenses as appropriate. When the "adjusted" expenses are added to the remaining expenses, the total monthly expenses are as follows:

<u>Catherine's Expenses</u>	<u>Trial Court's Adjustment</u>
1 <sup>st</sup> mortgage	1,148.00
2 <sup>nd</sup> mortgage	247.00
Real property taxes (res)	150.00
Real property insurance (res)	38.00
Maintenance (res)	200.00
Food/household supplies	567.00
Utilities: Electricity	50.00
Natural gas	89.00
Water	14.00
Sewer	5.00
Garbage	13.00
Telephone	125.00
Laundry and dry cleaning	25.00
Clothing	101.00
Insurance	20.00
Medical	634.00
Dental	42.00
Entertainment	100.00
Gifts	50.00
Donations	10.00
Travel	200.00
Auto expenses	223.00
Auto payments	308.00
Credit card debt	748.00
<u>Other expenses</u>	<u>157.00</u>
<b>Total</b>	<b>5,264.00</b>

The difference between \$5,264.00 and \$4,293.00, or the miscalculation of the court, totals \$971.00. There are no findings in the record to explain how the court found Catherine's monthly need to be \$4,293.00. Mark's assertion that the sum of \$1,289.00 was the difference between the adjusted amounts and what the court found to be

Catherine's needs is nonsensical and found nowhere in the record. (Brief of Appellee pp. 24 - 25).

Mark is asking this court to speculate as to what the trial court did, or is arguing that the trial court did not wish to speculate as to some of Catherine's future expenses, and therefore, adopted an additional monthly need of \$1,289.00. In either event, the trial court's approach is contrary to the law in the State of Utah. *See Willey v. Willey*, 914 P.2d 1149 (Utah Ct App 1996), and *Cox v. Cox*, 877 P.2d 1262 (Utah Ct App 1994).

Contrary to Mark's assertions in his Brief, Catherine provided evidence of the standard of living enjoyed during the marriage (R. 742 p.469:15-25; p. 470:1-24). Further, early in the action, Catherine submitted a statement of monthly expenses totaling \$6,756.00 per month, excluding a tax reserve or Cobra coverage. (R. 52-53). Indeed, the parties stipulated to a temporary order in which Mark agreed to pay expenses, totaling, approximately, \$4,558.78 per month (R. 83-85). This was modified to \$5,708.00 per month temporary alimony, by an order of the court dated March 15, 2006 (R. 344-347).

Mark has alleged that Catherine is requesting a windfall in requesting that the court's prior order regarding the Cobra premium be adhered to. The stipulated Order of Bifurcation required Mark to pay Catherine's Cobra insurance through February of 2008. This was a primary basis for the stipulation. (R. 64). Despite this order, the trial court ordered that the payment of that Cobra premium would be deducted from the monthly alimony. (R. 779 ¶20). If the trial court had awarded alimony in an amount which met

Catherine's needs, including Cobra premiums, then the courts rejection of the prior order would not be of moment. Catherine is not attempting to receive a windfall or "double-dip" but is objecting to the trial court's failure to enforce the Order of Bifurcation.

Further, Catherine's argument that the court should not have included speculative royalty payments to reduce her monthly need is not inconsistent with her testimony. The parties stipulated to divide prospective royalties for existing inventions that had been patented as of the date of the divorce. (R. 741 p. 27:9-18). On page 8 of her Financial Declaration, under "other assets" Catherine indicated that there were four currently licensed patents and that the nine year average earnings were \$8,987.00 per year. (Respondent's Exhibit 25 p. 8). Mark's Financial Declaration, Petitioner's Exhibit 9, set forth a monthly royalty income average, of \$281.50. The trial court arrived at a figure of \$375.00 and imputed that monthly gross against Catherine's expenses. There was no clear evidence to support the trial court's adding \$375.00 to Catherine's income. It is logical to simply acknowledge that each party should receive 50% of whatever uncertain royalties are received in the future.

Mark did not respond to the trial court's failure to consider the testimony of Robert Cole, who provided clear and cogent evidence of the tax impact of alimony and what award would be necessary to equalize the parties' standards of living by equalizing net income. (R. 742 p. 448:12-20, p. 462:13-18). Mr. Cole testified that in order for Catherine to net \$5,690.00, per month, she would need \$7,318.00, and that a failure to

account for taxation consequences of an award of alimony would result in an inaccurate alimony award. (R. 742 p.448:12-20, p. 462:13-18). As the trial court did not reference Mr. Cole's testimony in its findings, it must be assumed that the trial court did not consider the impact of taxes in the award of alimony. Mark failed to address the error made by the court in failing to recognize that imputed gross income cannot be offset against net need. The trial court refused to address the issue of taxation and consistently offset gross income or alimony against net need. Catherine requested that the trial court address this error in a post-trial motion, but the court declined. (R. 722 ¶8).

The trial courts findings and conclusions are unsupportable and the award of alimony is inequitable and the alimony award should be modified by this court. *See Higley v. Higley*, 676 P.2d 379, 382 (Utah 1983) and *Martinez v. Martinez*, 754 P.2d 75 (Utah Ct App 1988). Mark cited *Willey v. Willey*, 951 P.2d 226 (Utah 1997), in support of his assertion that it would be error for this court to consider modifying the alimony award unless there were stipulated facts pertaining to the expenses. (Brief of Appellee p. 28). However, that was not the holding of *Willey*. The Utah Supreme Court, in its analysis, reiterated the necessity that the trial court make explicit findings in support of its legal conclusions, thus enabling an appellate court to determine if the trial court had abused its discretion. The *Willey* court recognized that without adequate findings of fact, there can be no meaningful appellate review. *Willey v. Willey*, 951 P.2d 226, 230 (Utah 1997). However, the court in *Willey* also acknowledged that in certain instances the



appellate court may exercise its equitable powers and weigh the evidence and make its own findings, when the appellate court is in an equal position with the trial court with respect to the facts and evidence at issue. Id. at 231. Catherine has provided sufficient evidence to this court to enable this court to provide direction on remand and enter findings in relation to the many errors made by the trial court.

**POINT V. THE REDUCTION OF ALIMONY WAS IN ERROR.**

In Point III of his Brief, Mark has set forth facts A - L which he states Catherine has not marshaled. Indeed, Catherine has included all but one or two of those facts in her statement of facts or argument. Further, none of the articulated facts support the trial court's rapid step-down of alimony, as the step-down is based upon speculative future events, or Mark's calculation of Catherine's retirement benefit. The trial courts reduction of Catherine's inadequate alimony also fails to account for either Mark or Catherine's future circumstances. The findings and conclusions of the court in regard to this reduction and termination of alimony is contrary to case law in the State of Utah and should be reversed. *See Munns v. Munns*, 790 P.2d 116 (Utah Ct App 1990).

**POINT VI. THE KEY BANK DEBT WAS UNFAIRLY DIVIDED.**

While Catherine acknowledges that the Penny Appraisal was not used to determine values, it was the seminal exhibit used by the court in the division of personalty. Testimony and exhibits were adduced utilizing this appraisal, including which items were considered by Mark to be separate and the parties' proposed divisions of the personal

property. Also, the trial court used the appraisal in dividing the items of personalty, with specific references to the lists and numbers set forth on the appraisal. (R. 769-771 ¶¶7-9).

Further, Mark admitted that he had agreed to pay Catherine's collaborative law expenses, but now argues that it was only if she "participated in good faith," with Mark as the arbiter of whether good faith was exercised. (Brief of Appellee p. 33). Catherine acknowledged that \$4,080.00 of the Key Bank debt was her separate personal debt. The balance of that debt was to Penny Group, the collaborative lawyer, and for attorneys fees and accounting fees for the divorce action. This court has made it clear that any division of debt must be equitable. Bradford v. Bradford, 1999 Utah App. 373 ¶25. Further, U.C.A. §30-3-3 provides the trial court with authority to award Catherine fees and costs, which the court failed to do, as addressed by Catherine in Point VII.

**POINT VII. THE TRIAL COURT ERRED IN THE AMOUNT OF ATTORNEY'S FEES AWARDED AND ITS REFUSAL TO AWARD COSTS.**

**A. The Trial Court Failed to Make Adequate Findings**

Catherine and Mark are in agreement on one point: The trial court failed to make adequate findings pertaining to attorney's fees. (Brief of Appellee p. 37). Mark's unusual argument, however, is that since the trial court failed to make findings, it is an abuse of discretion to award any fees to Catherine and that it is a greater abuse of discretion to award her a greater amount of fees. Indeed, the trial court erred when it awarded only \$8,000.00 in attorneys fees without any explanation as to how he arrived at this figure, and without considering Mark's ability to pay. The trial court's failure to

make findings and failure to award all of Catherine's fees is an abuse of discretion.

Haumont v. Haumont, 793 P.2d 421, 426 (Utah Ct App 1990).

**B. The Trial Court's Failure To Award Or Make Findings Regarding Costs Is An Abuse of Discretion.**

Mark's argument that the trial court did not abuse its discretion by refusing to award Catherine costs but that its findings on attorney's fees are inadequate, is disingenuous. Utah Code Ann. § 30-3-3 gives authority to the trial court to award costs and witness fees. A denial of fees and costs "must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." Wilde v. Wilde, 969 P.2d 338, 444 (Utah Ct App 1998).

Mark's assertion that the trial court made a proper finding regarding Catherine's request for costs is unsupportable. The record is void of any findings in support of the denial of costs. There was no consideration of Catherine's financial needs, Mark's ability to pay, or the reasonableness of the request. The sole finding of the trial court on Catherine's request for costs was, "[t]he cost of experts will be borne by the party calling the expert." (R. 774 ¶ 18, 763 ¶ 24.) The trial court erred by not making the necessary findings regarding Catherine's request for costs, particularly when it has previously found that Catherine did not have the means to pay all of her attorneys fees. (R. 754 ¶9).

**C. Catherine Is Entitled To Attorney's Fees And Costs On Appeal.**

"[W]here the trial court has awarded attorney fees and the receiving spouse has prevailed on the main issues, we generally award fees on appeal." Elman v. Elman, 2002

UT App 83, ¶ 43 (quoting Rosendahl v. Rosendahl, 876 P.2d 870, 875 (Utah Ct App 1994)). Should Catherine prevail on any or all of the issues raised on appeal, she should be awarded her fees and costs on appeal.

**POINT VIII. THE TRIAL COURT CORRECTLY AWARDED CATHERINE AN INTEREST IN FUTURE PATENTS.**

Mark asserts that the court erred in its award of an interest in future royalties from patents and inventions. Mark's argument is confusing, given that in Point IV of his Brief, he argued that the trial court did not err in the formula used in dividing future patents. (Brief of Appellee pp. 31-32). Mark asserts in Point IX of his Brief, that the trial court did err in awarding Catherine an interest in future patents.

Catherine has a marital interest in income from patents and royalties that are the result of efforts made during the marriage. "[T]he right to future income is a marital asset where that right is derived from efforts or products produced during the marriage, even in cases where the right cannot be easily valued." Dunn v. Dunn, 802 P.2d 1314, 1318 (Utah Ct App 1990) (citing Moon v. Moon, 790 P.2d 52, 56-57 (Utah Ct App 1990)).

Mark misapplied the holding in Dunn, arguing that Dunn prohibits trial courts from awarding royalty payments to a former spouse based upon required future services. In Dunn, husband received two separate royalty payments for his invention of surgical instruments for knee replacements and hip replacements. Id. at 1319. Wife asserted an interest in royalties from the instruments for knee replacement, but did not seek royalties from the hip replacement instruments. Id. Under the contract for the hip replacement

instruments, husband was required to perform additional services. Id. The Court held that husband was entitled to be “recompensed” for the time he spent promoting the hip replacement instruments for which the wife was not making any claim. Id.

The present case is distinguishable from Dunn. Catherine did seek an interest in money received from patents after the date of the parties’ divorce. Mark acknowledged that he was working on projects which may result in patents and royalties. (R. 741 p.88). Catherine should receive a portion of income for projects that were in process during the marriage. The two year window provided by the trial court intends to capture those projects. Nothing in the record indicates that the income that might be received from patents are conditioned on Mark’s future services. The parties were married for approximately 32 years, during which time Mark acquired the knowledge and skills to create patentable inventions. (R. 651at ¶ 1).

Mark has ignored the 20 year history of royalty payments that the parties have received, (R. 743, p. 542:24-25, 543:1-3) and argues that Catherine should not be entitled to income from future patents because the patents are property of the University of Utah, the payments on those patents would not be made solely to Mark, Mark is performing less research, and because he is not the “primary investigator on some projects.” (Brief of Appellee, p. 40, ¶ E). Mark cannot point to any facts in the record that show that future payments for patents would be treated any differently than they have been over the last twenty years. Although Catherine has disputed the manner in which future income from

patents and royalties should be divided, the trial court did not err in awarding Catherine an interest in such future income.

**POINT IX. MARK’S APPEAL OF THE AWARD OF ATTORNEYS FEES SHOULD BE REJECTED.**

Mark has failed to adequately brief Point X. “A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which [a party] may dump the burden of argument and research.” Ellis v. Swenson, 2000 UT 101, ¶ 17. When a party fails to comply with the requirements of Rule 24, the reviewing court declines to address the issue. Id. at ¶ 18.

Mark has failed to make an argument, cite to any law or the record, in support of Point X of his cross-appeal. Instead, Mark refers the Court to his response to Catherine’s appeal of attorney’s fees, contained in his Point VIII, “Mark contests any award to her as improper, as contained in his cross-appeal, Point X below.” (Brief of Appellee, p. 37). Mark completely failed to brief the award of attorney’s fees in his cross-appeal and this Court should decline to address Point X of Mark’s cross-appeal.

**POINT X. MARK’S ARGUMENT REGARDING MARITAL DEBT SHOULD BE REJECTED.**

This Court should reject Mark’s argument in Point XI due to his failure to marshal the evidence or cite to relevant legal authority. Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires parties to cite to “the authorities, statutes, and parts of the record relied on” in the argument section of a brief. This Court has previously held that it

will uphold the trial court's findings "if the party challenging the findings fails to appropriately marshal all the evidence supporting the findings." A.K. & R. Whipple Plumbing & Heating v. Aspen Const., 1999 UT App 87, ¶ 27. When a party fails to comply with the requirements of Rule 24, the reviewing court declines to address the issue. Ellis v. Swenson, 2000 UT 101 at ¶18.

Mark has failed to provide the Court with any citations to the record, other than to a single addendum in Catherine's Brief. Further, Mark has failed to cite to any legal authority that supports his position, in violation of Rule 24. As such, it is appropriate for this Court to decline to address Point XI of Mark's Brief.

Further, Mark's trial exhibit, appended to Catherine's Motion to Clarify and Amend Order and Judgment, revealed \$1,355.56 in marital debt at date of separation, excluding the Honda loan. (R. 601). The trial court made specific findings as to what was marital debt, and how post separation debt would be divided. (R. 761, 762¶19). Based upon the courts clear findings and Mark's failure to provide support in the record for his argument, the trial courts ruling as to this issue should be affirmed.

### **CONCLUSION**

Catherine has marshaled the evidence to support her appeal. For the reasons set forth in Catherine's Brief, the trial court should be reversed as prayed for therein.

Mark's cross-appeal is not supported by case law or the record, and the trial courts determinations from whence Mark has appealed should be affirmed.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

CORPORON & WILLIAMS, P.C.

---

KELLIE F. WILLIAMS

JARED T. HALES

Attorneys for Respondent, Appellant and Cross-  
Appellee



**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, 2007, I caused a true and correct copy of the foregoing to be [ ] mailed, postage prepaid, [ ] hand-delivered, [ ] sent via facsimile to:

David C. Anderson  
Attorney for Petitioner/Appellee and Cross-Appellant  
39 Exchange Place, #100  
Salt Lake City, UT 84111

\_\_\_\_\_