FOCUS - 1 of 5 DOCUMENTS

Lawrence C. Kay, Joy Kay, Robert L. Kay, and Teresa Kay, Plaintiffs and Appellants, v. Summit Systems, Inc., a corporation, Val E. Southwick, et al., Defendants and Appellees.

No. 930626

SUPREME COURT OF UTAH

924 P.2d 338; ***284 Utah Adv. Rep. 3***; ***1996 Utah LEXIS 8***

February 9, 1996, FILED

PRIOR HISTORY: [*1] Third District, Salt Lake County. The Honorable J. Dennis Frederick.

CORE TERMS: notice of appeal, notice of appeal, different construction, post-judgment, premature

COUNSEL: Jackson Howard, Leslie W. Slaugh, Provo, for plaintiffs and appellants.

Summit Systems, Inc., and Val E. Southwick, unrepresented on this date.

Scott H. Clark, Dee R. Chambers, Stephen C.

Tingey, Brent D. Wride, Ronald G. Russell, Donald F. Dalton, Scott Daniels, Reed L., Martineau, **Diana** J. Huntsman, Salt Lake City, for other defendants and appellees unnamed in the case heading.

JUDGES: HOWE, Justice, dissenting. Justice Durham, having disqualified herself, does not participate herein; District Judge Steven L. Hansen sat.

OPINION

PER CURIAM:

Plaintiffs seek to appeal various issues decided by the district court; however, because we are compelled to dismiss the appeal for lack of jurisdiction, we do not reach the merits.

The trial court entered a judgment in favor of plaintiffs, and defendants Val Southwick and Summit Systems filed post-judgment motions that the trial court denied by a minute entry entered November 29, 1993. Later that day, the trial court entered an amended judgment against Southwick and Summit awarding plaintiffs [*2] $ 654,847. On December 7, 1993, the Kays filed a notice of appeal, contesting the trial court's dismissal of their motion to double the damage award and add prejudgment interest and attorney fees. On December 20, 1993, the trial court entered an order denying defendants' motion for a new trial. No notice of appeal was filed thereafter.

The issue is whether *Rule 4(b) of the Utah Rules of Appellate Procedure* permits the premature filing of a notice of appeal so as to confer jurisdiction on this Court. That rule states:

A notice of appeal filed before the disposition of any of the above motions [including a motion for a new trial under *Rule 59*] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

Swenson Associates Architects, P.C. v. State, 889 P.2d 415 (Utah 1994), is dispositive of the issue. *Swenson* squarely ruled that a notice of appeal filed before the trial court disposed of those post-judgment motions stated in *Rule 4(b) of the Utah Rules of Appellate Procedure* was premature and not effective to initiate

appeal. Plaintiffs' arguments [*3] for a different construction of *Rule 4(b)* were addressed and rejected in *Swenson*.

Because no timely notice of appeal was filed and plaintiffs' arguments for a different construction of *Rule 4(b)* were addressed and rejected in *Swenson*, the appeal in this case is dismissed.

DISSENT BY: HOWE

DISSENT

HOWE, Justice, dissenting:

I dissent for the reasons stated in my dissenting opinion in *Swenson Associates Architects, P.C. v. State, 889 P.2d 415, 417 (Utah 1994)*.

Justice Durham, having disqualified herself, does not participate herein; District Judge Steven L. Hansen sat.

FOCUS - 2 of 5 DOCUMENTS

Brianne Cammack-White, Craig Cammack, and Sharon Cammack, Petitioners and Appellants, v. Jason Harbaugh, Respondent and Appellee.

Case No. 20070168-CA

COURT OF APPEALS OF UTAH

2008 UT App 147*; *184 P.3d 631*; *602 Utah Adv. Rep. 17*; *2008 Utah App. LEXIS 146

April 24, 2008, Filed

PRIOR HISTORY: [***1]
Third District Juvenile, West Jordan Department, 513145. The Honorable Elizabeth A. Lindsley.

CORE TERMS: juvenile, attorney fees, protective order, custody, legal standard, child abuse, grandparents, awarding, temporary, reasonableness, immunity, unsubstantiated, ourt, current version, good faith, correctness, paternity, neglect, abused, physical custody, ex parte petition, ex parte, visitation order, insufficient evidence, statutory immunity, number of hours, reasonably incurred, incorporating, dependency, detailing

COUNSEL: Heather M. Jensen, Richfield, for Appellants.

Diana J. Huntsman, Salt Lake City, for Appellee.

JUDGES: James Z. Davis, Judge. WE CONCUR: Russell W. Bench, Judge, Gregory K. Orme, Judge.

OPINION BY: James Z. Davis

OPINION

[**632] DAVIS, Judge:

[*P1] A juvenile court awarded Jason Harbaugh (Father) attorney fees and costs in a child protective order case brought by Brianne Cammack-White, Sharon Cammack, and Craig Cammack (collectively, the Cammacks). We affirm in part and remand in part.

BACKGROUND

[*P2] O.H. was born on April 21, 2001, to Brianne Cammack-White (Mother) and Father. When O.H. was about eleven months old, Sharon and Craig Cammack (Mother's grandparents)--with whom Mother had resided off and on since she was fifteen--grew increasingly concerned about Mother's lifestyle, including her abusive relationship with her boyfriend, and her substance abuse

problems. The Cammacks met with Father and his family and agreed to seek a change in temporary custody of O.H.; the child was moved into Father's home around May 2002.

[*P3] Father, who initiated a paternity suit against Mother, was awarded temporary physical custody of O.H. on July 29, 2003. [***2] As part of that order, a custody evaluation was performed. That evaluation recognized Mother's grandparents' informal accusations that Father had sexually abused O.H. and that he was using illegal drugs to obtain sexual favors from young women like Mother. The report nonetheless recommended that Father obtain legal custody of O.H. and that Mother be allowed supervised visits every other week for six weeks, followed by weekly supervised visits.

[*P4] Three years later, the Cammacks filed an ex parte petition for a child protective order against Father, seeking a change of custody of O.H. and alleging abuse. Mother's grandparents took O.H. to the Manti office of the Division of Child and Family Services (DCFS) on July 12, 2006, claiming that O.H. had told them and a neighbor that Father had sexually abused her. In a memorandum accompanying the petition, DFCS noted that Mother's grandparents had reported similar allegations on June 5, 2006, which had been unsubstantiated. DCFS explained how in an interview resulting from the July allegation, O.H. described not feeling safe at Father's home and, after some prompting, said that Father forced her to perform oral sex and that she had seen Father [***3] and his current girlfriend engage in oral sex. The Cammacks made additional allegations of abuse--both physical and sexual--against Father in the petition.

[*P5] The juvenile court heard arguments on the Cammacks' Verified Petition for Child Protective Order, as well as on Father's motion for a change of venue to a Third District court from a Sixth District court. O.H.'s guardian ad litem (GAL) recommended that the ex parte protective order be dismissed [**633] and that a member of Father's family receive temporary custody of O.H. The juvenile court granted the change of venue motion, denied Mother's request for temporary custody (Mother's grandparents obtained temporary custody), and put in place a visitation schedule for Father to visit O.H. weekly.

[*P6] After the case was transferred to the Third District, Father filed a motion requesting an order to show cause (OSC), arguing that the Cammacks had not abided by the juvenile court's visitation order. On October 16, 2006, the district court entered a paternity order, awarding Father child support and full legal and physical custody of O.H. [1] Subsequently, the juvenile court held another hearing regarding the Cammacks' petition for a protective order. [***4] At that hearing, O.H.'s GAL conveyed a belief "that there was insufficient evidence to warrant a protective order." Upon hearing this, Father's counsel moved for attorney fees under *rule 37 of the Utah Rules of Juvenile Procedure*.

1 The paternity action was a separate but parallel proceeding in Third District Court in West Jordan, Utah.

[*P7] The juvenile court denied the Cammacks' petition for a child protective order, finding "that there ha[d] not been sufficient evidence to prove . . . by a preponderance of the evidence [that O.H.] ha[d] been abused." Additionally, the juvenile court ordered O.H. "to be returned to . . . [F]ather['s custody] immediately." The juvenile court then scheduled a hearing to address Father's request for an OSC and his *rule 37* motion.

[*P8] In the intervening months, Father's attorney presented affidavits detailing her legal services, respective hours, billings, and expenses. The Cammacks' counsel was given time and took advantage of the opportunity to respond to the *rule 37* motion both in writing and at the hearing on both the OSC and *rule 37* motion. At the hearing, Father's attorney argued that "all of the different things that have happened, including coaching [O.H.], [***5] . . . all play into why [the Cammacks'] actions weren't reasonable, and why it is very appropriate for the [c]ourt to enter [an award of] attorney fees, [and] to enter an award for contempt because that mindset is relevant." Neither party presented the juvenile court with the definition of the term "without merit" as used in *rule 37*, either at the hearing or in their subsequent written motions. In a written order, the juvenile court ruled in favor of Father respecting his request for an OSC. Specifically, the court found that Mother's grandparents "willfully and knowingly failed to follow the [August 15, 2006] visitation order and refused to do so on September 9, 2006. . . . by failing to bring [O.H.] for her visit [with Father]." In the same order, the juvenile court granted Father's *rule 37* motion, awarding Father attorney fees and costs by finding "the fees request[ed] to be reasonable." The Cammacks appeal

only the award of attorney fees and costs.

ISSUES AND STANDARDS OF REVIEW

[*P9] The Cammacks argue that the juvenile court improperly awarded attorney fees and costs to Father under *rule 37(d) of the Utah Rules of Juvenile Procedure*, *see Utah R. Juv. P. 37(d)*. We review the juvenile [***6] court's application of *rule 37(d)* for correctness. *See In re S.M., 2007 UT 21, P 15, 154 P.3d 835* (citing *In re Fox, 2004 UT 20, P 5, 89 P.3d 127*); *see also Jeschke v. Willis, 811 P.2d 202, 203 (Utah Ct. App. 1991)* (holding that the district court's ruling that a claim is without merit "is a question of law, and therefore we review it for correctness").

[*P10] The Cammacks also argue that the assessment of attorney fees and costs is improper because the legislature provided immunity to those who report allegations of abuse. "Because the interpretation of [a statute] is an issue of law, we review the decision below for correctness." *Munson v. Chamberlain, 2007 UT 91, P 6, 173 P.3d 848* (citing *State v. Burns, 2000 UT 56, P 15, 4 P.3d 795*).

[*P11] Finally, the Cammacks contend that the attorney fees and costs awarded were unreasonable. "[A] trial court has 'broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse-of-discretion [**634] standard.'" *Jensen v. Sawyers, 2005 UT 81, P 127, 130 P.3d 325* (quoting *Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988)).* [2]

2 Additionally, the Cammacks argue that the award of attorney fees and costs [***7] is against public policy. However, this issue was not preserved below; thus, we decline to address it. *See In re T.M., 2003 UT App 191, P 24, 73 P.3d 959.*

ANALYSIS

I. Adequacy of the Juvenile Court's *Rule 37(d)* Findings

[*P12] *Rule 37(d) of the Utah Rules of Juvenile Procedure* states that "[i]f the court finds that the [allegation of child abuse] is without merit, respondent's costs and attorney[] fees may be assessed against the petitioner." *Utah R. Juv. P. 37(d)*. The Cammacks claim that since the juvenile court found, in effect, their claims to be "unsubstantiated," it erred by awarding Father attorney fees and costs. "Terms in [the Utah Rules of Juvenile Procedure] have the same definitions as provided in . . . [s]ection 78-3a-103 [of the Utah Code] . . . ." *Id. R. 5*. Accordingly, the term "without merit" is statutorily defined as "a judicial finding[] that the alleged abuse, neglect, or dependency did not occur, or that the alleged perpetrator was not responsible for the abuse, neglect, or dependency." *Utah Code Ann. § 62A-4a-101(35)* (2006); *see also* Utah Code Ann. § 78-3a-103(1)(hh) (Supp. 2007) (current version at *Utah Code Ann. § 78A-6-105(34)*) (incorporating definition given in *section 62A-4a-101*). [***8] By contrast, the term "unsubstantiated" under the statute "means a judicial finding that there is insufficient evidence to conclude that abuse or neglect occurred." *Utah Code Ann. § 62A-4a-101(33)*; *see also* Utah Code Ann. § 78-3a-103(1)(gg) (current version at *Utah Code Ann. § 78A-6-105(33)*) (incorporating definition given in *section 62A-4a-101*). However, the term "unsubstantiated" is not referenced in the rule. Moreover, unlike the general civil statute regarding attorney fees, parties in a juvenile court setting need not prove bad faith. *Compare* Utah Code Ann. § 78-27-56(1) (2000) (current version at *Utah Code Ann. § 78B-5-825(1)*) ("In civil actions, the court shall award reasonable attorney[] fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith . . . ."), *with Utah R. Juv. P. 37(d)* (requiring only a determination that the allegation be without merit). Thus, we focus our analysis on whether the juvenile court's ruling satisfies the definition of "without merit" in the rule.

[*P13] In granting Father's *rule 37(d)* motion, the juvenile court stated:

> [T]he [c]ourt notes that *Utah Rule of Juvenile Procedure Rule 37* [***9] allows for the [c]ourt to assess [Father's] cost[s] and attorney[] fees against the [Cammacks] if the [c]ourt finds that the petition is without merit. On October 20, 2006[,] this court dismissed the Ex[ ]parte Protective Order issued August 15, 2006[,] and denied issuing the Child Protective Order due to the insufficiency of the evidence presented. [Father] has requested attorney[] fees which are allowed under the rule.

On appeal, the Cammacks do not challenge the findings of the juvenile court but argue that, as a matter of law, the findings do not satisfy the definition of the term "without merit" as used in *rule 37*. The juvenile court did not explicitly state that it found that the Cammacks' alleged abuse by Father "did not occur, or that [Father] was not responsible for the abuse." [3] *See Utah Code Ann. § 62A-4a-101(35)*. [**635] However, neither party brought *section 62A-4a-101(35)* to the attention of the juvenile court prior or subsequent to the court's awarding attorney fees and costs to Father. Rather than apprise the juvenile court that the findings did not address the definition of without merit as used in the rule, which resulted in the conclusion that Father was entitled to attorney [***10] fees and costs, the Cammacks objected to the award only on the bases of statutory immunity and unreasonableness. *See 438 Main St. v. Easy Heat, Inc., 2004 UT 72, PP 51-56, 99 P.3d 801* (discussing the perseveration requirement that the issue must have been specifically raised below). Therefore, we decline the Cammacks' invitation to reverse.

3 We note that the findings here would nonetheless likely support the common law definition of without merit. In *Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998)*, the Utah Supreme Court examined whether a party's claims were without merit for the purposes of awarding attorney fees. *See id. at 315*. "Although the [plaintiffs'] claims may have had some basis in law and they ostensibly provided evidence of their factual claims, the trial court found the facts to be contrary to that evidence." *Id.* Thus, the supreme court held that the trial court had properly found the claims to be meritless. *See id.* "A claim is without merit if it is 'frivolous,' is 'of little weight or importance having no basis in law or fact,' or 'clearly [lacks a] legal basis for recovery.'" *Wardley Better Homes & Gardens v. Cannon, 2002 UT 99, P 30, 61 P.3d 1009* (alteration in original) [***11] (quoting *Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983))*. "The fact that the case went to trial does not change the fact that [a plaintiffs]'s case lacked any merit." *Id.*

[*P14] Nonetheless, "[i]f an appellate court determines that findings of fact are insufficient to support a necessary legal conclusion, the appellate court will normally remand the matter for further proceedings." *Jeffs v. Stubbs, 970 P.2d 1234, 1242 (Utah 1998)*. "Part of the trial court's function in attorney fee deliberations depends on an understanding and proper interpretation of the applicable legal standard." *Utahns for Better Dental Health-Davis, Inc. v. Rawlings, 2007 UT 97, P 7, 175 P.3d 1036*; *see also United States v. Hendershot, 614 F.2d 648, 653 (9th Cir. 1980)* (finding error "because of the possibility that the trial court applied [an] improper legal standard"); *State v. Wight, 765 P.2d 12, 19 (Utah Ct. App. 1988)* ("We . . . cannot ascertain from the record before us whether [the] proper [legal standard was applied], and, indeed, it appears that the court did not consider [the appropriate legal standard]. Therefore, because the trial court did not utilize [the proper legal standard], we find that the court erred [***12] . . . .").

[*P15] Here, the record supporting a finding of without merit consists of proffered and actual testimony, a court-ordered custody evaluation, two GAL assessments, the repeated awarding of custody to Father, and various motions before the court. The record also includes the juvenile court's finding of *insufficient* evidence, rather than a finding explicitly stating that the alleged abuse "did not occur, or that [Father] was not responsible for the abuse," *see Utah Code Ann. § 62A-4a-101(35)*. In short, the factual findings leave us unclear as to which legal standard the juvenile court used to award Father attorney fees and costs. Therefore, we remand the issue to the juvenile court to make findings against the backdrop of the appropriate legal standard under *rule 37* and to then enter whatever order is appropriate in view of those findings. *See Allred v. Allred, 797 P.2d 1108, 1112 (Utah Ct. App. 1990)* ("We do not intend our remand to be merely an exercise in bolstering and supporting the conclusion already reached."). [4]

4 In the event the juvenile court determines to award attorney fees and costs, its findings should also include the court's reasons for exercising that option under [***13] the rule. *See Utah R. Juv. P. 37(d)* ("If the court finds that the [allegation of child abuse] is without merit, respondent's costs and attorney[] fees *may* be assessed against the petitioner." (emphasis added)).

II. Immunity for Reporting Child Abuse

[*P16] The Cammacks contend that *Utah Code section 62A-4a-410(1)* provides them with immunity from liability for attorney fees and costs. *Section*

62A-4a-410(1) provides that "[a]ny person . . . participating in good faith in making a report [of child abuse] . . . is immune from any liability, civil or criminal, that otherwise might result by reason of those actions." *Utah Code Ann. § 62A-4a-410(1)* (2006).

[*P17] An ex parte petition for a child protective order, however, does not qualify as a "report" under the statute because a juvenile judge is not a "peace officer, law enforcement agency, or office of [DCFS]," *id. § 62A-4a-403(1)*; *see Allen v. Ortez, 802 P.2d 1307, 1310-11 (Utah 1990)* (holding that a letter alleging abuse, sent by social workers to the mayor, did not qualify as a report under the predecessor statute of *section 62A-4a-403*). Therefore, the immunity afforded to those who report child abuse is not applicable to the Cammacks and their petition [***14] for a child protective order alleging child abuse.

III. Reasonableness of Father's Attorney Fees and Costs

[*P18] The Cammacks argue that Father's attorney fees and costs were unreasonable [**636] and that the juvenile court failed to adequately inquire into the reasonableness factors. "[T]he trial court has broad discretion in determining what constitutes a reasonable [attorney] fee . . . ." *Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988)*. Appropriate factors to consider in such a determination include the following:

> the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.

Salmon v. Davis County, 916 P.2d 890, 893 (Utah 1996) (internal quotation marks omitted).

[*P19] Father's counsel provided the juvenile court with several affidavits detailing the number of hours spent on the case, the nature of the work performed, and the hourly rate billed, comparing these charges with those of similarly skilled attorneys in the field. [***15] This is all that is necessary to prove the reasonableness of attorney fees and costs. *See R.T. Nielson Co. v. Cook, 2002 UT 11, P 21, 40 P.3d 1119*. Father's attorney's preparation for the case, the juvenile court noted, "was extensive but cannot be characterized as unwarranted as the [Cammacks'] counsel states . . ., since [Father] had lost temporary custody and needed to prepare to defend himself against allegation[s] of abuse." The juvenile court's failure to enunciate all of the reasonableness factors does not necessarily mean that all of those factors were not considered when the juvenile court explicitly requested and received affidavits regarding attorney fees and costs and considered the Cammacks' motions in response to Father's motions. *See Mojave Uranium Co. v. Mesa Petroleum Co., 22 Utah 2d 239, 244 n.7, 451 P.2d 587, 591 n.7 (1969)* ("This court, in many cases has indulged the presumption that where the trial court did not make a specific finding on a particular phase of a case, that if such finding had been made it would be in harmony with the decision rendered." citing *Mower v. McCarthy, 122 Utah 1, 245 P.2d 224, 226 (Utah 1952)))*. Under the circumstances, we see no abuse of discretion [***16] in the juvenile court's determination that Father's attorney fees and costs were reasonable and reasonably incurred.

CONCLUSION

[*P20] We remand to the juvenile court for the entry of findings against the backdrop of the statutory definition of without merit--that the alleged abuse "did not occur, or that [Father] was not responsible for the abuse," *Utah Code Ann. § 62A-4a-101(35)* (2006)--and, if appropriate, to determine Father's fees on appeal. We affirm the juvenile court's ruling that statutory immunity for the good faith reporting of child abuse is not applicable here, where the Cammacks' claim of immunity is based on a petition for an ex parte child protective order filed with a juvenile court judge. And if the juvenile court awards Father attorney fees and costs on remand after clearly applying the proper legal standard, we would affirm the juvenile court's finding that the attorney fees and costs were reasonable and reasonably incurred.

James Z. Davis, Judge

[*P21] WE CONCUR:

Russell W. Bench, Judge

Gregory K. Orme, Judge

FOCUS - 3 of 5 DOCUMENTS

Lana Gean Anderton, Petitioner and Appellee, v. Carl Lyle Anderton, Respondent and Appellant.

Case No. 20060704-CA

COURT OF APPEALS OF UTAH

2008 UT App 92*; *2008 Utah App. LEXIS 91

March 13, 2008, Filed

NOTICE: NOT FOR OFFICIAL PUBLICATION

PRIOR HISTORY: [*1]
Eighth District, Roosevelt Department, 054000065. The Honorable John R. Anderson.

CORE TERMS: alimony, imputing, market value, citation omitted, underemployment, self-employment, imputed, marital, impute

COUNSEL: Diana J. Huntsman, Salt Lake City, for Appellant.

Matthew C. Brimley, Provo, for Appellee.

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

OPINION BY: Gregory K. Orme

OPINION

MEMORANDUM DECISION

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." *Utah R. App. P. 29(a)(3)*. Moreover, the issues presented are readily resolved under existing law.

It was not improper for the trial court to impute income to Appellant. A trial court "may impute gross income" to a spouse after "determin[ing] that underemployment . . . exists." *Hill v. Hill, 869 P.2d 963, 964-65 (Utah Ct. App. 1994)*. Such a determination or "finding" of underemployment need not be explicitly stated. Rather, it may be implied where it is reasonable to assume that the trial court actually considered the controverted evidence and made a finding but merely neglected to record its factual determination. *See Hall v. Hall, 858 P.2d 1018, 1025 (Utah Ct. App. 1993)*. On review of the record, [*2] it is clear that the trial court considered Appellant to be underemployed. Therefore, the trial court did not abuse its discretion by imputing income.

Appellant also argues that even if income was properly imputed, the trial court erred in imputing an additional $ 30,000 without making specific findings as required by law. *See* Utah Code Ann. § 78-45-7.5(7)(b) (Supp. 2007). Appellant's urged construction of the statute is too strict. The Utah Supreme Court has allowed such "findings" to be implied based upon the "nature of the work . . . regularly performed [in the past]." *Reese v. Reese, 1999 UT 75, P 15, 984 P.2d 987*. A trial court may, as it did here, look at a party's prior work history and take note of his or her wages in making its findings. *See Mancil v. Smith, 2000 UT App 378, P 21, 18 P.3d 509*.

We do, however, share Appellant's concern about the

amount of income imputed. Our statute requires that "[g]ross income from self-employment . . . be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts." Utah Code Ann. § 78-45-7.5(4)(a) (Supp. 2007). There is no indication that the trial court took into account the expenses [*3] necessary to operate C & M Firewood. The absence of appropriate findings in this respect necessitates remand to the trial court.

We see no merit in Appellant's argument that it was reversible error to allow Ms. Benson to testify as to the market value of the marital home. "'Qualification of a person as an expert witness . . . is in the discretion of the trial court.'" *Patey v. Lainhart, 1999 UT 31, P 15, 977 P.2d 1193* (omission in original) (citation omitted). "'The critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issues before it.'" *Id.* (citation omitted). Given Ms. Benson's experience, the trial court was well within its discretion in allowing her to testify as an expert on *market* value.

Appellant argues that alimony was inappropriate in this case. We disagree. The trial court heard considerable evidence concerning each of the mandatory factors for determining alimony. *See Utah Code Ann. § 30-3-5(8)(a)* (2007). In its financial findings, the court discussed the income of the parties, Appellant's ability to pay, and Appellee's ability to support herself. However, given the possible error [*4] in imputing Appellant's income, we cannot necessarily say that the amount of alimony awarded was proper. Therefore, we remand this case to the trial court to correctly determine Appellant's income attributable to the C & M Firewood business and to adjust the alimony award, if appropriate. [1]

1 Appellant also alleges a math error made by the trial court in calculating the value of the marital home. On remand, the trial court should remedy this problem if Appellant's point is well-taken and make such related adjustments as may then be necessary.

Given our disposition, it cannot be said that Appellee prevailed on all of the main issues on appeal. Therefore, we deny her request for attorney fees incurred on appeal. *See Reinhart v. Reinhart, 963 P.2d 757, 760 (Utah Ct. App. 1998).*

Gregory K. Orme, Judge

WE CONCUR:

Pamela T. Greenwood,

Presiding Judge

Russell W. Bench, Judge

FOCUS - 4 of 5 DOCUMENTS

Cindy Hatanaka, Petitioner and Appellee, v. Robert Hatanaka, Respondent and Appellant.

Case No. 20030370-CA

COURT OF APPEALS OF UTAH

2003 UT App 198*; *2003 Utah App. LEXIS 175

June 12, 2003, Filed

NOTICE: [*1] NOT FOR OFFICIAL PUBLICATION

PRIOR HISTORY: Third District, Salt Lake Department. The Honorable Michael K. Burton

DISPOSITION: Appeal dismissed for lack of jurisdiction.

CORE TERMS: decree, notice of appeal, new trial, clerk, date of entry, untimely, toll

COUNSEL: Steve S. Christensen, Salt Lake City, for Appellant

Diana Huntsman, Salt Lake City, for Appellee

JUDGES: Norman H. Jackson, Presiding Judge, Judith M. Billings, Associate residing Judge, Pamela T. Greenwood, Judge

OPINION

MEMORANDUM DECISION

Before Judges Jackson, Billings, and Greenwood.

PER CURIAM:

This matter is before the court on Appellee's motion to dismiss for lack of jurisdiction. *See Glezos v. Frontier Invs., 896 P.2d 1230, 1233 (Utah Ct. App. 1995)* (noting lack of "jurisdiction can be raised at any time").

A notice of appeal "shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." *Utah R. App. P. 4(a)*. Appellant argues that his notice of appeal was timely because it was filed within 30 days of the date of entry in the registry of judgments on March 28, 2003. However, a judgment is entered when signed by the trial judge and filed with the clerk. *See Utah R. Civ. P. 58A(b)-(c)*. In the present case, the trial judge signed the decree and it was filed with [*2] the clerk, as indicated by the "filed" stamp on the decree, on March 24, 2003. Therefore entry of the decree occurred on March 24, 2003. *See id.* Appellant filed a notice of appeal with the trial court on April 24, 2003, 31 days after the decree was entered. Because Appellant's notice of appeal was not filed within 30 days after the entry of the decree, it was untimely. *See Utah R. App. P. 4(a)*. "Failure to file a timely notice of appeal deprives this court of jurisdiction over the appeal." *See Reisbeck v. HCA Health Servs. of Utah, Inc., 2000 UT 48, P5, 2 P.3d 447*.

Furthermore, an untimely motion for a new trial does not "toll the time for taking an appeal." *Burgers v. Maiben, 652 P.2d 1320, 1322 (Utah 1982)*. The record indicates that Appellant's motion for a new trial was served on April 18, 2003. Because Appellant's motion for a new trial was served "later than 10 days after the entry" of the decree on March 24, 2003, it was not timely. *Utah R. Civ. P. 59(b)*; *see Burgers, 652 P.2d at 1321-22*. Therefore, Appellant's motion for a new trial did not toll the time for appeal.

Accordingly, the appeal is dismissed [*3] for lack of jurisdiction.

Norman H. Jackson, Presiding Judge

Judith M. Billings, Associate Presiding Judge

Pamela T. Greenwood, Judge

FOCUS - 5 of 5 DOCUMENTS

J. Lynn Wilde, Petitioner and Appellee, v. Sherrie D. Wilde, Respondent and Appellant.

Case No. 20000473-CA

COURT OF APPEALS OF UTAH

2001 UT App 318*; *35 P.3d 341*; *433 Utah Adv. Rep. 14*; *2001 Utah App. LEXIS 79

October 25, 2001, Filed

PRIOR HISTORY: [***1] Third District, Salt Lake Department. The Honorable Stephen L. Henriod.

Wilde v. Wilde, 969 P.2d 438, 1998 Utah App. LEXIS 112, 357 Utah Adv. Rep. 29 (Utah Ct. App. 1998)

DISPOSITION: Affirmed. Appellant's request for attorney fees and costs for this second appeal is denied.

CORE TERMS: alimony, modification, modified, attorney fees, retroactive, disability benefits, temporary, fraud claim, retroactively, itemization, divorce, new trial, exceeded, allocate, requesting party, citation omitted, obligor, modify, church, reasonableness, obligee, decree, support payment, fees incurred, broad discretion, extenuating, part-time, sentence, spousal, notice

COUNSEL: Douglas G. Mortensen, Salt Lake City, for Appellant Nicolaas Dejonge and **Diana** J. Huntsman, Salt Lake City, for Appellee.

JUDGES: Before Judges Greenwood, Billings, and Orme.

OPINION BY: Judith M. Billings

OPINION

[**343] BILLINGS, Judge:

[*P1] This is Appellant Sherrie D. Wilde's second appeal concerning an alimony modification petition she filed in 1994. In particular, she appeals the trial court's refusal to award her modified alimony retroactive to the date of her modification petition and the trial court's refusal to award her prejudgment interest. She also challenges the trial court's finding that she has the ability to contribute to her support. Finally, she appeals the trial court's denial of her attorney fees and costs incurred at trial. We affirm.

BACKGROUND

[*P2] In 1987, after twenty-five years of marriage, Appellant and Appellee J. Lynn Wilde divorced. In the divorce decree, Appellant [***2] was awarded alimony of $ 200 a month for seven years. In 1992, in an amended divorce decree, the parties stipulated to increase the alimony to $ 318 a month.

[*P3] In August of 1994, Appellant filed a petition to modify the amended decree, seeking an increase in the amount and duration of the alimony. The petition alleged a substantial and material change in circumstances based on a substantial increase in Appellee's income, a substantial decrease in Appellant's income, and Appellant's contraction of rheumatoid arthritis. Appellee was served with the petition in September of 1994.

[*P4] In January of 1995, Appellant lost her job for reasons unrelated to her health. In February, she filed a motion for temporary alimony. She was awarded $ 800 a month, effective March 1, 1995. Sometime in April of 1995, Appellant obtained part-time employment. In March of 1996, Appellant terminated her employment. Since terminating her employment, she has not made efforts to gain employment.

[*P5] In November of 1995, Appellant filed an amended modification petition restating her request for increased alimony and accusing Appellee of orchestrating the parties' divorce to [***3] deprive Appellant of her fair share of the marital estate (the fraud claim). Appellant then proceeded to conduct discovery of Appellee's assets, requesting financial records from Beneficial International, Inc., of which Appellee is a principal, from "the beginning" of the corporation, and related entities, from 1985.

[*P6] In March of 1997, during the first trial on the amended modification petition, and in response to Appellee's motion in limine, the trial court barred further inquiry into Appellant's fraud claim. Following the trial, the court concluded that Appellant's arthritis was a substantial, material change in circumstances justifying modification of the alimony award. However, the trial court also concluded that Appellant's arthritis was not an extenuating circumstance required to support a modification by an amendment to Utah's Divorce Statute (extenuating circumstance amendment), which became effective during the proceedings. Therefore, the trial court denied Appellant's modification petition and ordered that alimony terminate.

[*P7] Appellant appealed to this court. We reversed

in part, holding the extenuating circumstance amendment did not apply, and [***4] remanded for the trial court:

(1) to determine the amount and duration of additional alimony to be awarded to [Appellant]; (2) to determine the amount of attorney fees reasonably incurred on appeal by [Appellant]; and (3) to reconsider whether or not [Appellant] should be awarded attorney fees incurred at trial on [**344] the petition to modify, and if so, the amount thereof, all supported by the required findings of fact.

Wilde v. Wilde, 969 P.2d 438, 445 (Utah Ct. App. 1998). 1

1 This remand is quite limited and does not seem to require a new trial. However, neither party objected to the scope of the proceedings that followed.

[*P8] Following our remand, Appellant filed a petition for temporary alimony, alleging that she had become totally disabled and unemployable. She was awarded temporary alimony of $ 2,000 a month from March of 1999.

[*P9] A second trial was held on four separate days between August 9 and October 13, 1999. At trial, Appellant sought modified [***5] alimony retroactive to the date of her modification petition. To support her claims that she was unable to work to meet her living expenses of $ 3,200 a month, Appellant offered evidence that the Social Security Administration (SSA) had awarded her disability benefits, effective March 1, 1996. She also offered testimony by two new medical experts, in addition to two experts who testified at the first trial. The experts testified Appellant's arthritis had worsened and she had developed Parkinson's Disease, Shogren's Syndrome, and Fibromyalgia since the first trial. In regard to Appellant's employability, Appellee offered videos showing Appellant performing "normal day-to-day activities" and testimony of a temporary staffing agency sales president and two individuals who had been awarded disability benefits by the SSA but were employed.

[*P10] Following the second trial, the court found Appellant had the ability to work part-time and contribute to her support and was voluntarily unemployed. The court additionally found Appellee's earnings had increased since the divorce and he had the ability to pay reasonable alimony. The court therefore awarded Appellant alimony of $ 1,500 [***6] a month, effective November 1, 1999. The court denied Appellant retroactive modified alimony, finding she had received temporary alimony, disability benefits, Medicaid, and support from her friends and her church during the proceedings. Although the trial court awarded Appellant all of the attorney fees and costs she requested for the first appeal, the trial court denied all of the attorney fees and costs she requested for the two trials.

[*P11] Following the trial court's ruling, Appellant filed a Motion to Alter or Amend Judgment, for Relief from Judgment, and/or for a New Trial (motion for a new trial). The trial court denied the motion. In June of 2001, Appellant filed this second appeal.

ANALYSIS

I. Retroactive Alimony

[*P12] Appellant argues an amendment to *Utah Code Ann. § 30-3-* 10.6(2), effective May 1, 2001, following the second trial, requires an alimony modification to be applied retroactively to the date the modification pleading is served. She further argues amended *section 30-3-10.6(2)* should apply in this case because it clarifies, rather than substantively changes, the statute in effect when Appellee was served. She alternatively argues even if [***7] the trial court had discretion, under *section 30-3-10.6(2)* or the common law, it exceeded that discretion in not awarding her modified alimony retroactive to the date her petition was served.

A. Does the Amendment to *Section 30-3-10.6(2)* Apply?

[*P13] As a general rule, amendments which "'affect substantive or vested rights . . . operate only prospectively.'" *Wilde v. Wilde, 969 P.2d 438, 442 (Utah Ct. App. 1998)* (quoting *Department of Soc. Servs. v. Higgs, 656 P.2d 998, 1000 (Utah 1982))*. However, if an amendment is procedural or remedial, then it applies to accrued, pending, and future actions. *See id.* When the Legislature amends a statute, we presume it intended to make a substantive, rather than procedural or remedial change. *See id.*

[*P14] "A substantive law 'creates, defines and regulates the rights and duties of the parties which may give rise to

a cause of action.'" *Wilde, 969 P.2d at 442* (concluding amendment which conditioned modification of alimony on showing of "extenuating circumstances" [**345] regulated right to receive alimony and substantively changed law) (citation omitted). A procedural or remedial [***8] law "provides a different mode or form of procedure for enforcing substantive rights," *Pilcher v. Department of Soc. Servs., 663 P.2d 450, 455 (Utah 1983)*, or clarifies the meaning of an earlier enactment. *See Foil v. Ballinger, 601 P.2d 144, 151 (Utah 1979).*

[*P15] Appellant does not appear to argue that the amendment to *section 30-3-10.6(2)* is procedural; rather, she argues the amendment clarifies how *section 30-3-10.6(2)* should have been understood. "'Every amendment not expressly characterized as a clarification carries the rebuttable presumption that it is intended to change . . . existing legal rights and liabilities.'" *Abel v. Industrial Comm'n, 860 P.2d 367, 369 (Utah Ct. App. 1993)* (citation omitted). In *Foil*, the Utah Supreme Court held that an amendment to the statute requiring a plaintiff to file a notice of intent to commence a malpractice action was procedural because it clarified the Legislature's intent which had been questioned in prior case law. *See Foil, 601 P.2d at 151.* Appellant asserts there has been "dispute and uncertainty" as to whether prior section 30-3-10.2(6) granted trial [***9] courts the discretion to award or required them to award modified alimony retroactively to the date of the modification petition. However, she cites no authority for this proposition. Cases interpreting this section do not mention any dispute or uncertainty. Rather, they suggest that prior *section 30-3-10.6(2)* unambiguously granted trial courts the discretion to determine if and when support should be awarded retroactive to the petition. *See Ball v. Peterson, 912 P.2d 1006, 1012 (Utah Ct. App. 1996)*; *Crockett v. Crockett, 836 P.2d 818, 820 (Utah Ct. App. 1992).*

[*P16] As we discuss in section I.B., we conclude the amendment to *section 30-3-10.6(2)* now requires a court that awards retroactive modified alimony to enter a judgment for the retroactive alimony. That judgment begins to accrue interest and may be filed as a lien to secure that judgment. Under prior *section 30-3-10.6(2)*, a trial court was not required to enter such a judgment. We conclude that this is a substantive change in the law and not a clarification of the prior statute. Thus, amended *section 30-3-10.6(2)* does not apply in this case.

B. Does the Amendment to *Section 30-3-10.6(2)* [***10] Require that Modified Alimony be Awarded Retroactively?

[*P17] However, even if the amendment to *section 30-3-10.6(2)* applies in this case, we conclude that the amendment does not eliminate a trial court's discretion to select the effective date of a modification.

[*P18] When Appellant served Appellee with her modification petition, *section 30-3-10.6(2)* provided:

> A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

Utah Code Ann. § 30-3-10.6(2) (1998).

[*P19] We interpreted that section to give courts the discretion to determine both if and when a modified child support award should be made retroactive. [2] *See Ball, 912 P.2d at 1012*; *Crockett, 836 P.2d at 820.* The only substantive limitation on that discretion was that the modification could run only from the date of notice of the petition. *See id.*

> 2 We had not explicitly stated that *section 30-3-10.6(2)* applies to alimony as well as child support modifications. However, we conclude that this section applies to Appellant's alimony modification because Appellant was receiving child support when she filed her modification petition and thus sought to modify a "spousal support payment under a child support order."

[***11] [*P20] As amended and renumbered, *section 30-3-10.6(2)* now provides:

> A child or spousal support payment under a child support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner, or on the obligor, if the obligee is the petitioner. The tribunal shall order a judgment for the period from the service of the pleading [**346] until the final order of modification is entered for any difference in the original order and the modified amount.

Utah Code Ann. § 78-45-9.3(4) (Supp. 2000).

[*P21] The amendment retains the sentence this court interpreted in *Ball* and *Crockett*, but adds a sentence requiring a trial court to order a judgment for the period from the service of the pleading until the final order, for any difference between the original award and the modified amount. We conclude the retained sentence still provides that support *may be* modified retroactively with respect to *any* post-service period, not that it must be. Under the amendment, the trial court is only required to order a judgment [***12] for *any difference* as opposed to *the difference* during this period. In context, the added sentence merely requires a court to reduce to judgment any award of retroactive support it chooses to make.

[*P22] Our interpretation is sensible given the delay inherent in the normal judicial process. The parties' circumstances may change, as in the present case, before a hearing on the modification petition can be held; thus, the trial court should be afforded broad discretion. *See Trezevant v. Trezevant, 403 A.2d 1134, 1138 (D.C. 1979).*

C. Did the Trial Court Exceed its Discretion in Refusing to Award Retroactive Alimony?

[*P23] Under the statutes discussed above and Utah common law, we conclude trial courts have the discretion to award modified alimony retroactively to the date a modification petition is served. The Utah Supreme Court has suggested that courts have the discretion to retroactively award modified alimony for the period during which a modification is pending. *See Marks v. Marks, 98 Utah 400, 404, 100 P.2d 207, 209 (Utah 1940)* (noting "courts do[] not have the power to . . . modify an installment of alimony which [***13] has accrued *prior to the making of the application* to modify the decree" (emphasis added)) (citing *Myers v. Myers, 62 Utah 90, 218 P. 123 (Utah 1923))*. This is clearly the majority rule. *See Hill v. Hill, 335 N.C. 140, 435 S.E.2d 766, 768 (N.C. 1993)* ("'[A] majority of the courts of other states which have considered the question have held a trial court may make modifications effective as of the date the petition is filed.'" (quoting *Kruse v. Kruse, 464 N.E.2d 934, 938 (Ind. Ct. App. 1984)))*; *Trezevant v. Trezevant, 403 A.2d 1134, 1138 (D.C. 1979)* ("The few cases addressing this question in other jurisdictions have also concluded that orders increasing support payments may, in the discretion of the trial judge, be retroactive to the date when application for the increase was made." (citing *McArthur v. McArthur, 106 So. 2d 73, 76 (Fla. 1958)* (citations omitted))); *cf. Shelton v. Shelton, 885 P.2d 807, 808 (Utah Ct. App. 1994)* (concluding retroactive award of alimony was within trial court's discretion because obligor deceived court regarding income and other equities were not present).

[***14] [*P24] Appellant argues if the trial court had discretion, it exceeded its discretion in refusing to award her modified alimony retroactively. After Appellant filed her modification petition in August 1994, she received $ 318 a month in alimony, under the amended divorce decree, through October of 1994. Through January of 1995, when she lost her job for reasons unrelated to her health, she was also working full-time or close to full-time. In February of 1995, Appellant's counsel filed a petition for temporary alimony. She was awarded temporary alimony of $ 800 a month, from March of 1995, until the trial court terminated alimony at the end of the first trial in March of 1997. Between May of 1995 and March of 1996, she worked up to thirty hours a week. Her August 1995 financial declaration indicates she earned $ 1,097 a month.

[*P25] During the twenty-two months following the first trial and while the first appeal was pending, Appellant did not receive any temporary alimony. The trial court found that during this period, Appellant received disability benefits, Medicaid, and assistance from her friends and church. [3] Specifically, after becoming eligible for disability [***15] benefits, [**347] she received $ 3,374 in April 1997, for disability benefits due from September 1996 through March 1997, and approximately $ 464 a month, reduced by a Medicare premium, thereafter. Medicaid paid for part of her prescriptions during this period. Additionally, sometime after March of 1997, a friend gave Appellant $ 11,000 and her church made one of her house payments, some utility payments, and gave her regular food assistance. Her bishop testified that "from 1/3 of 96" her church gave her $ 29,307. She has no obligation to repay her friends or church.

3 Additionally, the trial court found that Appellant's adult son lived with her and gave her $ 100 per month. However, it is not clear when the son began paying her. The trial court found that a reasonable value for room and board was $

400.

[*P26] Following the first appeal, Appellant was awarded temporary alimony of $ 2,000 a month, from March of 1999. Following the second trial, she was awarded modified alimony of $ 1,500 a month, effective [***16] November 1, 1999.

[*P27] Appellant argues the trial court should not have "credited" Appellee for the disability benefits, Medicaid, and assistance from her friends and church. We have stated that "'it is appropriate and necessary for [trial courts] to consider all sources of income'" of the parties in awarding alimony. *Breinholt v. Breinholt, 905 P.2d 877, 880 (Utah Ct. App. 1995)* (quoting *Crompton v. Crompton, 888 P.2d 686, 690 (Utah Ct. App. 1994))*. In dicta, the Utah Supreme Court has suggested that it may be appropriate for a trial court to consider "welfare" and unemployment benefits as income of an obligee spouse in determining reasonable alimony in a modification proceeding. *See Montoya v. Montoya, 696 P.2d 1193, 1195 (Utah 1985)*. We have also held that disability benefits may be considered income of an obligor spouse in determining alimony. *See Ruhsam v. Ruhsam, 742 P.2d 123, 125-26 (Utah Ct. App. 1987)*. Thus, we cannot say the trial court exceeded its discretion in considering all of Appellant's sources of income in determining whether to award her retroactive alimony.

[*P28] Appellant [***17] next argues she should be awarded modified alimony retroactively because Appellee consistently delayed the proceedings. This argument was apparently raised in Appellant's motion for a new trial. In denying that motion, the trial court noted "no evidence of delay by either party was presented at . . . trial" and the court "did not find or reward [the] delay alleged by [Appellant]."

[*P29] To challenge the trial court's finding of no delay, Appellant "must demonstrate that the finding was clearly erroneous." *See Crockett v. Crockett, 836 P.2d 818, 820 (Utah Ct. App. 1992)* (citing *Utah R. Civ. P. 52(a)*). When challenging a finding, Appellant "must first marshal all [of] the evidence that supports the finding and then demonstrate that despite this evidence the finding is so lacking in support as to be 'against the clear weight of the evidence.'" *Id.* (citation omitted). The marshaling requirement is a prerequisite to our examination of the finding. *See id.* "'If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the finding[] of the trial court . . . .'" *Id.* (citation omitted).

[*P30] [***18] We conclude Appellant has failed to meet her obligation to marshal and we thus assume the record supports the trial court's finding. Based upon the totality of the record, we cannot say the trial court exceeded its broad discretion in denying Appellant retroactive alimony. [4]

4 Because we affirm the trial court's denial of retroactive alimony, we do not reach Appellant's claim that she is entitled to prejudgment interest on retroactive alimony.

II. Appellant's Ability to Contribute to her Support

[*P31] In the first appeal, we concluded the trial court's finding that Appellant was able to contribute to her support and work part-time was well supported by the evidence. *See Wilde v. Wilde, 969 P.2d 438, 443 (Utah Ct. App. 1998)*. In this second appeal, Appellant again challenges the trial court's finding that she is able to contribute to her support and work part-time. We will not disturb a trial court's factual findings unless they are clearly erroneous. *See id. at 442* [***19] (citing *Hagan v. Hagan, 810 P.2d 478, 481 (Utah Ct. App. 1991))*.

[*P32] Appellant maintains that her condition has worsened since the first trial, [**348] rendering her completely unable to work. She first emphasizes that in 1996 the SSA determined she is disabled. We conclude the SSA's determination alone does not establish Appellant was unable to contribute to her support. *Cf. Taliaferro v. Taliaferro, 188 Ariz. 333, 935 P.2d 911, 915 (Ariz. Ct. App. 1996)* (affirming trial court's denial of spousal support to husband although he had been awarded SSA disability benefits).

[*P33] Appellant next maintains that medical expert testimony conclusively establishes her inability to work and alleges that the trial court arbitrarily disregarded that testimony in favor of other evidence. "The trial court is free to accept or reject an expert's opinion, and may accord to the witnesses' opinions whatever weight it deems proper." *Schindler v. Schindler, 776 P.2d 84, 89 (Utah Ct. App. 1989)* (internal citations omitted).

[*P34] The record shows the trial court did not arbitrarily disregard medical expert testimony offered at

[***20] trial. The court acknowledged the testimony, but was more persuaded by other witnesses. In addition to the medical experts, the trial court considered testimony by a temporary staffing agency sales president that Appellant's skills are in demand and she could earn between $ 10 and $ 15 an hour. The trial court also emphasized the testimony of two individuals who, like Appellant, qualify for SSA disability benefits but who work.

[*P35] The trial court further emphasized Appellant's testimony that she has made no effort to obtain further employment or training or to take advantage of any program with respect to disabilities or workplace variations available to persons with disabilities, but if she were required to take advantage of such training she would. She also testified she is taking medication, her pain is reduced, and she hopes to return to work.

[*P36] The trial court also emphasized that videotapes taken of Appellant in March of 1999 show that she is mobile, animated, and can walk without assistance for extended periods of time. The videos show she can do many normal daily activities given her age and physical condition.

[*P37] We cannot say the [***21] trial court's finding that Appellant is able to contribute to her support is clearly erroneous. Although experts clearly indicated that Appellant is unable to work, other evidence offered at trial supports the contrary. [5]

5 Appellant also asks us to modify the alimony awarded to her by $ 400 a month to reflect the post-trial loss of room and board from her son. The son was paying only $ 100 a month, and the trial court determined that fair rental value of the room and board was $ 400. That fair rental value holds constant whether or not the son lives with Appellant. Further, Appellant raised this change in circumstance after her motion for a new trial, in her counter-motion to compel compliance with the court's order. In fact, in support of her motion for a new trial, she indicated her son was still living with her and contributing to her support.

Raising an issue in a post-trial motion fails to preserve that issue for appeal without evidence that the trial court considered and ruled on the merits of the issue. *See In re Covington, 888 P.2d 675, 678 (Utah Ct. App. 1994).* Appellants bear the burden of presenting us with an adequate record that preserves their arguments for appeal. *See Bake v. Bake, 772 P.2d 461, 466 (Utah Ct. App. 1989)*; *Birch v. Birch, 771 P.2d 1114, 1116 (Utah Ct. App. 1989).* After combing the record, we have been unable to find any evidence showing that Appellant's son in fact no longer lives with her. It is also impossible to determine whether the trial court considered this change in circumstance. Thus, we decline to reach this issue.

[***22] III. Attorney Fees and Costs Incurred at Trial

[*P38] Appellant argues she is entitled to attorney fees and costs incurred at trial. Trial courts are afforded broad discretion in deciding whether to award attorney fees and costs in modification proceedings. *See, e.g.*, *Larson v. Larson, 888 P.2d 719, 726 (Utah Ct. App. 1994)* (citing *Utah Code Ann. § 30-3-3* (1989 & Supp. 1994)); *Munns v. Munns, 790 P.2d 116, 123 (Utah Ct. App. 1990)).* "Where a trial court may exercise broad discretion, we presume the correctness of the court's decision absent 'manifest injustice or inequity that indicates a clear abuse of . . . discretion.'" *Crockett v. Crockett, 836 P.2d 818, 819-20 (Utah Ct. App. 1992)* (quoting *Hansen v. Hansen, 736 P.2d 1055, 1056 (Utah Ct. App. 1987)).*

[**349] [*P39] To recover attorney fees and costs in modification proceedings "the requesting party must demonstrate his or her need for attorney fees, the ability of the other spouse to pay, and the reasonableness of the fees." *Larson, 888 P.2d at 726*. Utah appellate courts have reversed attorney fee awards [***23] where the requesting party has failed to show any one of these factors. *See, e.g.*, *Hoagland v. Hoagland, 852 P.2d 1025, 1028 (Utah Ct. App. 1993)* (citing *Newmeyer v. Newmeyer, 745 P.2d 1276, 1280 (Utah 1987))*; *Hagan v. Hagan, 810 P.2d 478, 484 (Utah Ct. App. 1991).*

[*P40] The trial court found that Appellant's requests were unreasonable because: (1) "it is impossible to tell from the evidence presented . . . [what] portion of the time expended related" to the modification and the fraud claim; (2) "it is impossible to tell what portion of the time was expended with respect to those issues upon which [Appellant] . . . prevailed;" (3) "it is very clear that [Appellant] in this case engaged in overkill to an enormous degree with respect to attorney time, costs, expert witnesses and the like;" (4) "the facts and issues in

this matter were not unusually difficult," but Appellant worked "many more hours than what would be reasonable;" (5) "both sides . . . filed motions for sanctions and contempt;" (6) "there were violations," primarily on the part of Appellant, "of the Court's pretrial orders and the rules of procedure [***24] with respect to identification of witnesses and disclosure of exhibits;" and (7) "neither side was ready for trial with respect to their evidence, but both sides were adamant about going [forward]."

[*P41] Appellant first maintains that where a party clearly has need, it is an abuse of discretion to deny any fees and costs because the fees and costs requested are unreasonable. However, Utah appellate courts have denied fees, although the requesting party appeared to have significant need and the other party had the ability to pay, because the requesting party failed to establish the reasonableness of the fees. *See Delatore v. Delatore, 680 P.2d 27, 28 (Utah 1984)* (reversing attorney fee award where requesting party failed to offer evidence of reasonableness, but affirming alimony award to requesting party because she was unemployed at the time of trial and suffered from several health problems); *Talley v. Talley, 739 P.2d 83, 84 (Utah Ct. App. 1987)* (reversing attorney fee award for failure to establish reasonableness of fees although party had established financial need).

[*P42] Appellant next maintains the trial court exceeded [***25] its discretion in determining that her fees and costs were unreasonable because she failed to allocate them between the modification and the fraud claim. In other contexts we have held that the failure to allocate attorney fees between compensable and non-compensable claims constitutes grounds for complete denial. *See Jorgensen's, Inc. v. Ogden City Mall, 2001 UT App 128, P32, 26 P.3d 872*. We have also recognized an exception to a party's duty to allocate where compensable and non-compensable claims are based on related legal theories and involve a common core of facts. *See 2001 UT App 128 at P27, 26 P.3d 872*. We cannot say that Appellant demonstrated on the record before the trial court that her modification and fraud claims were supported by a common core of facts.

[*P43] Appellant argues even if her counsel was required to allocate fees and costs, her counsel's testimony, affidavit, and itemizations offered as exhibits established that allocation. In essence Appellant argues the trial court should have allocated the fees and costs based on the evidence presented. In support of Appellant's request for fees and costs incurred during the first trial, Appellant's counsel submitted [***26] a fee itemization with a few entries indicating fees incurred were related to the fraud claim. He also submitted a cost itemization, but that itemization does not make any distinction between the modification and the fraud claim. In the first trial, Appellant's counsel testified that he could not allocate the fees and costs and did not think it was necessary to do so because the modification and fraud claim were intertwined. He resubmitted this same itemization during the second trial although he had been cross-examined by Appellee's counsel regarding allocating the fees in the first trial. However, during the second trial, Appellant's counsel summarily testified that $ 4,406.25 of the [**350] fees incurred during the first trial were related to work on the fraud claim.

[*P44] Given that Appellee's counsel had cross-examined him during the first trial about allocating, Appellant's counsel arguably should have been on notice that he needed to allocate. He could have done so in his motion for a new trial, rather than waiting until his second appeal to submit a new fee itemization as a reply brief addendum. [6] Thus, again we cannot say the trial court exceeded its discretion in basing [***27] its denial of attorney fees on a failure to allocate.

6 In her reply brief Appellant has offered an entirely new fee itemization. In this itemization Appellant seeks $ 26,443.75 in fees for both trials. Appellant failed to offer this new itemization below. It is not part of the record; therefore, we refuse to consider it on appeal. *See Finlayson v. Finlayson, 874 P.2d 843, 847 (Utah Ct. App. 1994)*.

[*P45] Appellant next challenges the trial court's findings that her counsel failed to comply with pre-trial orders and rules of procedure and engaged in overkill to an enormous degree with respect to attorney time, costs, and expert witnesses. The second trial was limited, by our remand, to three issues: the amount and duration of modified alimony to be awarded Appellant, reasonable attorney fees and costs on appeal, and attorney fees incurred for the first trial. In retrying the modification, Appellant retained an investigative accountant and again subpoenaed financial records of Appellee, [***28] Appellee's employer, and additional entities. These

efforts were to establish Appellant's "true income," yet no substantial difference in income was found by the trial court. Therefore, we cannot say that the trial court's findings are clearly erroneous or that the trial court exceeded its discretion in denying attorney fees and costs.

IV. Attorney Fees and Costs on Appeal

[*P46] Appellant seeks attorney fees and costs for this second appeal. "Generally, when a trial court awards fees in a divorce action to a party who then prevails on appeal, that party will also be entitled to fees on appeal." *Larson v. Larson, 888 P.2d 719, 727 (Utah Ct. App. 1994).* However, when the trial court does not award fees to either party below, then "regardless of which party prevails on appeal," absent a showing of changed circumstances following the trial court's decision warranting such award on appeal, "both parties must bear their own fees on appeal." *Id.* Thus, we deny Appellant's attorney fees and costs on appeal.

CONCLUSION

[*P47] We hold the amendment to *section 30-3-10.6(2)* of Utah's Divorce Statute makes a substantive change in the law, and therefore [***29] the amended statute does not apply in this case. We also hold that even if amended *section 30-3-10.6(2)* applied, it maintains trial court discretion to award modified alimony retroactively for the period following service of the modification pleading. Based on the totality of the record, we conclude: (1) the trial court did not exceed its discretion in denying Appellant's request for retroactive modified alimony; (2) the trial court's finding that Appellant has the ability to contribute to her support is not clearly erroneous; and (3) Appellant failed to establish the reasonableness of her attorney fees and costs, and therefore, the trial court did not exceed its discretion in denying attorney fees and costs incurred at trial.

We therefore affirm. Appellant's request for attorney fees and costs for this second appeal is denied.

Judith M. Billings, Judge

Pamela T. Greenwood,

Presiding Judge

Gregory K. Orme, Judge