IN THE UTAH COURT OF APPEALS

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Kevin "Buck" Robinson, Petitioner, Appellee, and Cross-appellant, v. Cindy Robinson, Respondent, Appellant, and Cross-appellee.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060810-CA F I L E D (October 17, 2008) 2008 UT App 365

Fourth District, Provo Department, 034401310
The Honorable Anthony W. Schofield

Attorneys: Cindy Robinson, Herriman, Appellant and Cross-appellee Pro Se
Douglas B. Thayer, Andrew V. Wright, and Courtney R. Davis, Provo, for Appellee and Cross-appellant

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Before Judges Bench, Davis, and Orme.

DAVIS, Judge:

Cindy Robinson (Wife) and Kevin Robinson (Husband) each appeal various aspects of the trial court's rulings regarding the amount and duration of alimony, and the division and evaluation of the marital estate. We affirm.

Both parties challenge the trial court's rulings respecting alimony. "A trial court's determination of alimony . . . [is] reviewed for an abuse of discretion." Griffith v. Griffith, 1999 UT 78, ¶ 17, 985 P.2d 255. Wife challenges the trial court's refusal to take evidence of Husband's alleged abuse of Wife. Husband challenges the trial court's refusal to terminate alimony due to alleged cohabitation. We address each in turn.

Wife contends that the trial court improperly declined to receive evidence of Husband's "bad behavior." "The court may consider the fault of the parties in determining alimony." Utah Code Ann. § 30-3-5(8)(b) (2007) (emphasis added). The trial court denied Wife's proffered evidence in part because the parties were divorced on September 5, 2003, and her allegation of "years" of abuse did not arise until much later in the context of

Husband's motion to terminate alimony. Wife claims that "since the alimony award was so low compared to [Husband]'s monthly income, it is apparent that fault was really a factor in the [trial] court's determination."[1] Keeping the parties' standards of living at a level as close as possible to that which they enjoyed during marriage, see generally Olsen v. Olsen, 704 P.2d 564, 566 (Utah 1985) (setting forth this requirement), does not mean that a party receiving alimony is entitled to half of the payor's monthly income. Rather, trial courts should examine the financial needs of the recipient spouse, that spouse's ability to support him or herself, and the ability of the payor spouse to support the recipient spouse. See Jensen v. Jensen, 2007 UT App 377, ¶ 4, 173 P.3d 223. Because the trial court properly applied the alimony factors and Wife has failed to demonstrate that any serious inequity occurred by the date chosen for computing Husband's income or the court's denial of Wife's attempt to show fault, we do not disturb the trial court's alimony award. See Childs v. Childs, 967 P.2d 942, 946 (Utah Ct. App. 1998).[2]

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1. For the first time on appeal, Wife contends that the trial court was biased against her due to several statements the trial court allegedly made disparaging Wife's lifestyle choices. "Having failed to properly preserve the issue of judicial bias for our review, [Wife] must show either 'plain error' or 'exceptional circumstances' before we can review the issue." State v. Tueller, 2001 UT App 317, ¶ 9, 37 P.3d 1180. Not only does Wife fail to argue plain error or exceptional circumstances, she admits that "[t]he trial court ultimately ruled that [Wife] had not cohabited after separation [from Husband]." Thus, Wife concedes she was not harmed by the court's ruling regarding cohabitation. As for her allegation that she was harmed by the trial court's refusal to take her evidence of Husband's alleged abusive behavior, she is unable to point to any record support indicating that but for the court's ruling, the alimony award would have been higher. Therefore, we decline to further pursue Wife's claim of judicial bias.

2. Wife also alleges the trial court erred by using an incorrect date as the basis for determining Husband's ability to pay for and valuing her share of the marital assets. In the Amended Findings of Fact and Conclusions of Law, the trial court explained its rationale for lowering Husband's average income from 2002 through 2005 from $180,127 to $150,000: "[T]here is no evidence that the unusually large income in 2005 will be repeated and a significant portion of that income was distributed so that [Husband] and his [business] partner could retire some of their indebtedness[.]" "[T]rial courts have broad discretion in selecting an appropriate method of assessing a spouse's income and will not be overturned absent an abuse of discretion."

(continued...)

On cross-appeal, Husband argues that the trial court erred when it ruled that despite the admission of Wife's paramour, Harley Bradbury, that he was "living with" Wife, Bradbury and Wife were not cohabitating as a matter of law. In short, Husband argues "if there is a direct admission of cohabitation the trial court need not consider any of the [appropriate] factors," or "[a]lternatively, if there is a direct admission of cohabitation, the trial court need only balance the admission with some of the factors . . . . [A] direct admission of cohabitation should be given more weight than any individual factor." Husband marshals the trial court's findings but does not contest the sufficiency of the evidence underlying the trial court's factual findings, nor does Husband otherwise challenge the cohabitation factors.

As for the weight the court should have placed on Bradbury's statement, "the testimony of a lay witness is limited to opinions and inferences which are rationally based on the witness's perception and helpful to the factfinder to clearly understand the witness's testimony or to determine a fact in issue." State v. Bryant, 965 P.2d 539, 547 (Utah Ct. App. 1998). "[A] witness may use a legal term . . . where the testimony is 'factual and not a legal conclusion.'" Id. at 548 (quoting State v. Larsen, 828 P.2d 487, 493 n.8 (Utah Ct. App. 1992), aff'd, 865 P.2d 1355 (Utah 1993)). Counsel may not ask "questions which would merely allow the witness to tell the [factfinder] what result to reach . . . . [or] to allow a witness to give legal conclusions." Id. (internal quotation marks omitted). Thus, although the trial court disagreed with Wife's contention that Bradbury's admission was due to "a trick question" and that the court believed that Bradbury's statement constituted "a clear admission . . . that [Bradbury] was living with [Wife]," the court properly used the test laid out in Haddow v. Haddow, 707 P.2d 669 (Utah 1985), see id. at 672, and not Bradbury's alleged legal conclusion, to determine whether Bradbury was cohabitating with Wife as a matter of law. Therefore, we affirm the trial court's ruling as to Husband's motion to terminate alimony based on the allegation of cohabitation.

The parties next dispute various aspects of the trial court's distribution of the marital estate. "We will alter the trial court's property division only if there was a misunderstanding or misapplication of the law resulting in a substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." Baker

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2. (...continued)
Griffith v. Griffith, 1999 UT 78, ¶ 19, 985 P.2d 255. Wife shows no serious inequity from the court's decision on this matter, and we therefore affirm.

v. Baker, 866 P.2d 540, 542 (Utah Ct. App. 1993) (internal quotation marks omitted).

First, Wife challenges the trial court's determination that the Pleasant Grove property that Husband had failed to complete payments on was not part of the marital estate. Rather than cite to the record where she made any objection to this ruling at trial, Wife seeks to misconstrue the issue as one of jurisdiction, i.e., that the trial court improperly awarded Husband's mother the property. Even if we were to ignore Wife's failure to preserve this issue, in order "for marital assets to be distributed, the assets must be in the possession of one, or both, of the marital parties." Endrody v. Endrody, 914 P.2d 1166, 1169 (Utah Ct. App. 1996). The trial court found that the property did not belong to either of the marital parties because Husband had failed to make all of the contractually required down payments. Given that Wife "did not marshal all of the evidence in support of the trial court's findings regarding the . . . property, this court will not disturb the trial court's findings on appeal." Marshall v. Marshall, 915 P.2d 508, 517 (Utah Ct. App. 1996).

Second, Wife argues that the trial court ignored Husband's depletions of the marital estate during the course of litigation and that the court therefore inequitably divided the marital assets. Yet in its ruling the trial court specifically compensated for each of the actions to which Wife points. For example, Husband sold a trailer for $18,000 in the course of the litigation, and the trial court ruled that "he must be charged for that amount in the final financial settlement between the parties." "[T]he trial court 'has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity.'" Finlayson v. Finlayson, 874 P.2d 843, 847 (Utah Ct. App. 1994) (quoting Naranjo v. Naranjo, 751 P.2d 1144, 1146 (Utah Ct. App. 1988)). We therefore affirm on this issue.[3]

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3. Wife also argues that the trial court abused its discretion by declining to award attorney fees, despite Husband's "dog and pony show using [misleading] income affidavits." "The decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court. However, the trial court must base the award on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees." Davis v. Davis, 2003 UT App 282, ¶ 14, 76 P.3d 716 (internal quotation marks omitted). Here, the trial court found that neither party had the ability to pay the other party's attorney fees.

Both Husband and Wife dispute the trial court's decision to award Wife a ten percent "interest" on Wife's share of BASCO, should Husband seek to buy the portion of BASCO the trial court awarded Wife. Wife objects, believing that the court's order compelled her to sell her share to Husband. For his part, Husband argues that the trial court improperly imposed interest on BASCO sua sponte. Both parties are mistaken.

In the Amended Decree of Divorce, the trial court used the September 2003 value of BASCO and awarded Husband's fifty-percent share in BASCO to Wife. "If either [Husband's business partner] or [Husband] wish a different result," the court added, "they will have to find a mechanism to buy out [Wife]'s interest in BASCO awarded here." To that end, the trial court held a hearing on January 18, 2007, during which Wife's attorney argued that "[the 2003 value for BASCO] doesn't represent the fair value of that asset today." Given the increased value of BASCO and the fact that neither of the parties nor Husband's business partner wanted Wife to be a partner in BASCO, the trial court determined, "The answer is [the September 2003 value] plus ten-percent interest per year from [September 2003]. That's what she's entitled to." That is, the trial court sought to equitably determine how much BASCO had appreciated since the last accounting in September 2003 so that in the event that either Husband or his business partner sought to buy Wife's fifty-percent share of BASCO, she would receive the fair market value of her share. It is axiomatic that since marital property is to be divided equitably, parties seeking to purchase awarded marital property must pay the fair value thereof and not receive a windfall by using a years-old evaluation as an imposed sale price.

Finally, Husband argues on cross-appeal that the trial court improperly determined the value of KBR by not wholly incorporating his expert witness's estimation of the proper discount rate for the company. "To successfully attack a trial court's findings of fact, an appellant must first marshal all the evidence in support of the findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings[.]" Grayson Roper Ltd. P'ship v. Finlinson, 782 P.2d 467, 470 (Utah 1989). "To accomplish this, a party may not simply cite to the evidence which supports his or her position and hope to prevail. Rather, a party should construct the evidence supporting the adversary's position, and then ferret out a fatal flaw in the evidence." Utah County v. Butler, 2008 UT 12, ¶ 11, 179 P.3d 775 (footnote and internal quotation marks omitted). Failure to do so "is a sufficient basis for affirmance," Ball v. Public Serv. Comm'n (In re Questar Gas Co.), 2007 UT 79, ¶ 39, 175 P.3d 545, and "we must assume that all the trial court's findings are supported by the evidence," Utah Med. Prods., Inc. v. Searcy, 958 P.2d 228, 233

(Utah 1998). And, "we will not overturn a trial court's factual determinations if they are supported by substantial evidence." Warner v. Rasmussen, 704 P.2d 559, 563 (Utah 1985).

Husband's expert witness concluded that "based on book value with discounts for lack of control and lack of marketability," the proper discount rate of the value of the company was twenty-seven percent. The trial court found that the expert "did not provide reasons for his selection of the amounts of the discounts which he applied in this case" and that the expert had conceded that he selected these amounts himself. Accordingly, the trial court stated,

> [The twenty-seven percent discount] represents the lowest possible figure that the court can use in fixing the value of this marital asset while book value represents the highest possible figure that the court can use. . . . I am convinced that a fair valuation would be two-thirds of the way between [the expert]'s discounted value and the book value.

Husband relies on his expert's explanation of how he arrived at the twenty-seven percent figure. However, the expert also testified that it is typical appraisal practice "to place the discount somewhere in between a control position and a minority position." This methodology seems to describe both the trial court's determination of the discount value as well as that of Husband's expert. Therefore, we find no error in the trial court's finding and affirm.

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James Z. Davis, Judge

I CONCUR:

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Russell W. Bench, Judge

I CONCUR IN THE RESULT:

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Gregory K. Orme, Judge