

IN THE UTAH COURT OF APPEALS

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Kathy J. Baum, ) MEMORANDUM DECISION  
) (Not For Official Publication)  
Petitioner and Appellee, ) Case No. 20091028-CA  
)  
v. ) F I L E D  
) (December 23, 2010)  
Michael T. Hayes, )  
) 2010 UT App 379  
Respondent and Appellant. )

Third District, Salt Lake Department, 044905929  
The Honorable Tyrone E. Medley

Attorneys: Randall Lee Marshall, Ogden, for Appellant  
Kenneth A. Okazaki and Stephen C. Clark, Salt Lake City, for Appellee

Before Judges McHugh, Thorne, and Voros.

McHUGH, Associate Presiding Judge:

Michael T. Hayes appeals the trial court's award of alimony and child support to Kathy J. Baum. This is the second appeal in this case.<sup>1</sup> In the previous appeal, Baum v. Hayes (Baum I), 2008 UT App 371, 196 P.3d 612, we reversed and remanded with instructions for the trial court to supplement its factual findings and to modify the alimony and child support awards if appropriate. See id. ¶ 16. In this most recent appeal, Hayes argues that the trial court exceeded its mandate and acted contrary to the law of the case by altering the alimony and child support awards on remand. Hayes also objects to the supplemental findings of fact entered by the trial court on remand. We affirm.

Hayes argues that because we did not decide in Baum I whether the trial court's alimony and child support awards were erroneous, but instead reversed and remanded due to inadequate factual findings, the trial court was limited on remand to making additional findings consistent with the original awards unless it

<sup>1</sup>The facts of this case are recited in detail in Baum v. Hayes (Baum I), 2008 UT App 371, ¶¶ 2-7, 196 P.3d 612.

articulated a "compelling reason" to do otherwise. On the contrary, we reversed the trial court's order and remanded with specific instructions to make "more detailed findings without restriction to any corrections or modifications the trial court deems appropriate." Id. (emphasis added); see also D'Aston v. Aston, 844 P.2d 345, 351 (Utah Ct. App. 1992) ("[A] reversal effectively invalidates the prior judgment with respect to those issues . . . which the appellate court decided in actuality or by necessary implication . . ." (internal quotation marks omitted)). A legal conclusion must be supported by and follow from the trial court's factual findings; a trial court may not simply tailor its factual findings to fit a desired conclusion. 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."). Where the trial court discovered on remand that its supplemental findings of fact did not support the original conclusions regarding alimony and child support, it acted well within the mandate of this court in modifying the awards to be consistent with those newly found facts.

Hayes also suggests that the supplemental findings of fact are not entitled to deference because the case was considered by a different judge on remand. However, a replacement judge may make corrections to an order to the same extent that the original judge could have, and the judge's conclusion "should be seen not as a ruling by a co-equal court, but rather as the same judicial officer reconsidering a prior ruling." Macris v. Sculptured Software, Inc., 2001 UT 43, ¶ 30, 24 P.3d 984; see also Interlake Distrib. v. Old Mill Towne, 954 P.2d 1295, 1299 (Utah Ct. App. 1998) (holding that a replacement judge had the authority to modify the prior judge's attorney fee award to correct a legal error). The replacement judge properly considered the evidence in the record and made the additional factual findings requested by this court.<sup>2</sup>

In reassessing its alimony award on remand, the trial court made supplemental findings of fact relating to Baum's need and Hayes's ability to pay. Relying on these findings, the trial court increased the alimony award to \$2,475 per month. Hayes challenges the trial court's modified alimony award, arguing that the trial court failed once again to make adequate factual

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<sup>2</sup>Given the more than two years that passed between the findings of fact and conclusions of law entered by the original trial judge and those entered on remand, combined with the heavy caseload of our trial courts, it is unlikely that the original trial judge would have been able to make the supplemental findings without careful review of the record evidence.

findings regarding Baum's need and that it improperly considered certain evidence relating to his ability to pay.

Hayes has not preserved his challenge to the adequacy of the trial court's factual findings. If a party believes that the trial court's findings of fact are not sufficiently detailed to support its conclusions, that party must specifically raise its objection so that the trial court has an opportunity to correct the alleged error. See 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 56, 99 P.3d 801; see also In re K.F., 2009 UT 4, ¶ 58-64, 201 P.3d 985 (reaffirming the holding in 438 Main St., 2004 UT 72). Hayes fails to indicate where in the record this issue was preserved or to identify any alternative ground for review if the issue was not preserved. See generally Utah R. App. P. 24(a)(5) (requiring that the appellant's brief contain "[a] statement of the issues presented for review, including for each issue . . . citation to the record showing that the issue was preserved in the trial court; or . . . a statement of grounds for seeking review of an issue not preserved in the trial court"). Therefore, Hayes has waived any argument that the trial court's factual findings were not sufficiently detailed.

In addition to the adequacy of the factual findings, Hayes objects to the trial court's finding that he was still listed as a faculty member on the Walden University website at the time of remand because this fact was not part of the evidence presented at trial. We need not consider the appropriateness of this evidence because the trial court's findings and conclusions indicate that it did not rely on the website listing in assessing Hayes's ability to pay. Rather, the trial court appropriately determined that "[Hayes]'s ability to pay should be a function of the earning capacity historically established," rather than Hayes's "speculation" at trial that he may be unable to sustain that income. See generally Cox v. Cox, 877 P.2d 1262, 1267-68 (Utah Ct. App. 1994) (holding that it is appropriate for courts to rely on a party's historical income in assessing ability to pay). The trial court's reliance on the evidence of historical earnings, rather than on speculation about future events, was not clear error. See generally Hill v. Estate of Allred, 2009 UT 28, ¶ 52, 216 P.3d 929 ("We review the district court's finding[s] of fact for clear error."). If, at some point in the future, Hayes actually experiences an involuntary permanent decrease in income, he would be free to seek a modification of the alimony award at that time. See Cox, 877 P.2d at 1268.<sup>3</sup>

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<sup>3</sup>Hayes also objects to the trial court's consideration of his lifestyle in assessing his ability to pay. However, Hayes failed to raise this objection in the trial court and we do not consider it further.

Hayes also contends that the trial court erred by including his income from Walden University as part of his gross income for purposes of calculating child support without making "specific findings to justify the variance." Hayes notes that when the trial court calculates a party's gross income for child support purposes,

[i]ncome from earned income sources is limited to the equivalent of one full-time 40-hour job. If and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at the parent's job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support.

Utah Code Ann. § 78B-12-203(2) (2008) (emphases added).

Because the trial court did not expressly find that Hayes's employment with Walden University was normal and consistent, Hayes argues that the income could not be considered in calculating child support. See generally Reinhart v. Reinhart, 963 P.2d 757, 759 (Utah Ct. App. 1998) (holding that the trial court did not err by considering physician husband's entire income for child support purposes, as hours in excess of forty hours per week were normal for his profession); Jensen v. Bowcut, 892 P.2d 1053, 1057 & n.3 (Utah Ct. App. 1995) (holding that the trial court did not err by considering husband's second job for purposes of calculating child support because it involved the same professional duties and was consistent with his prior practice). We need not consider this issue, however, because Hayes failed to preserve his objection to the adequacy of the trial court's findings of fact with respect to the child support award.<sup>4</sup> See generally 438 Main St., 2004 UT 72, ¶ 56 (holding that in order to preserve its objection to the adequacy of the trial court's factual findings, a party must raise the objection so as to give the trial court a sufficient opportunity to correct the alleged error).

To the extent that Hayes's objections to the trial court's supplemental findings and conclusions were preserved, they are

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<sup>4</sup>In fact, Hayes's counsel conceded as much at oral argument, acknowledging that he did not cite Utah Code section 78B-12-203(2) to the trial court or request that the trial court make findings of fact on whether Hayes normally and consistently worked more than forty hours per week.

without merit. We therefore affirm the trial court's modified alimony and child support awards.

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Carolyn B. McHugh,  
Associate Presiding Judge

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WE CONCUR:

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William A. Thorne Jr., Judge

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J. Frederic Voros Jr., Judge