

IN THE UTAH COURT OF APPEALS

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Kathryn C. Brough,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellee,)	
)	Case No. 20080816-CA
v.)	
)	F I L E D
Richard James Brough,)	(November 27, 2009)
)	
Respondent and Appellant.)	2009 UT App 344

Eighth District, Roosevelt Department, 054000084
The Honorable John R. Anderson

Attorneys: Randall T. Gaither, Salt Lake City, for Appellant
Clark B. Allred and Bradley D. Brotherson, Roosevelt,
for Appellee

Before Judges Bench, Davis, and Thorne.

BENCH, Judge:

Respondent Richard James Brough (Husband) appeals the trial court's order regarding property distribution, attorney fees, and costs in the parties' divorce action. We affirm and remand for a determination of Petitioner Kathryn C. Brough's (Wife) attorney fees reasonably incurred on appeal.

Husband first claims that the trial court's findings are defective because the trial court mechanically adopted proposed findings submitted by Wife and thereby abdicated its judicial role. "The law is well settled that a trial court may ask counsel--typically the prevailing counsel--to submit findings to aid the court in making these necessary determinations." Whitear v. Labor Comm'n, 973 P.2d 982, 986 (Utah Ct. App. 1998). "In determining whether the trial court adequately participated in adopting findings prepared by counsel, Utah's appellate courts look to the record and will affirm the findings if there is 'no indication from the record . . . that the trial judge failed to adequately deliberate and consider the merits of the case.'" State v. James, 858 P.2d 1012, 1015 (Utah Ct. App. 1993) (omission in original) (quoting Automatic Control Prods. Corp. v. Tel-Tech, Inc., 780 P.2d 1258, 1260 (Utah 1989)). "The discretion of adopting the findings as submitted to the trial

court is exclusively in that court as long as the findings are not clearly contrary to the evidence." Boyer Co. v. Lignell, 567 P.2d 1112, 1114 (Utah 1977); see also James, 858 P.2d at 1015 ("Thus, findings prepared by counsel . . . and adopted verbatim by a trial court are considered to be those of the trial court judge and may not be rejected out-of-hand, but they will stand if supported by the evidence.").

Here, the record shows that the trial court adequately participated in adopting the findings prepared by Wife. After the bench trial, the trial court took the case under advisement and, without issuing a ruling, asked both parties to prepare proposed findings of fact and conclusions of law. The next day, the trial court made notes regarding its initial view of the case. These notes demonstrate that the trial court agreed with Wife's general position on the critical issues, such as the interpretation of the prenuptial agreement, the Neola home's status as marital property, the claim that Wife's participation in Husband's business had enhanced its pre-marriage value, and Wife's claim of entitlement to attorney fees. The parties submitted their proposed findings, and the trial court signed those submitted by Wife. Within a day of the court's signature, Wife's counsel sent Husband notice that the trial court had entered its findings of fact and conclusions of law.¹ At the hearing on Husband's postjudgment motions, the trial court stated that it had read Husband's proposed findings, which the trial court found to be a "ridiculous position," as well as Husband's objections to Wife's proposed findings. While not the preferred approach, adopting the findings proposed by Wife did not constitute an abuse of discretion by the trial court in this case. The trial court therefore did not err in denying Husband's postjudgment motions.

Furthermore, even if Husband had adequately marshaled the evidence,² the record clearly shows that the evidence

1. Contrary to Husband's assertion, there was no error in the trial court's failure to notify Husband's counsel that it had signed Wife's proposed findings. "Our rules do not require the court to give notice but put the burden on counsel to check periodically with the clerk of the court as to the date of entry of the findings and judgment so that post-trial motions may be timely filed." Automatic Control Prods. Corp. v. Tel-Tech, Inc., 780 P.2d 1258, 1260 (Utah 1989).

2. To mount a successful challenge to the correctness of a trial court's findings of fact, an appellant must first marshal all the
(continued...)

sufficiently supports the findings regarding the value and ownership of the Neola home, the value of the business, Wife's participation in the business, and the commingling of Husband's separate property with marital property. While the two appraisals of the Neola home differed, one appraisal set the value of the home at \$325,000. The Neola home was held in joint tenancy by Husband and Wife. And although the construction of the Neola home was funded through the business, Brough Trucking & Crane Service Co., Husband and Wife both testified that almost all of the parties' living expenses and other marital purchases were paid with checks or credit cards from the business. While some of Husband's separate property was sold during the marriage, the evidence showed that certain funds from those sales were received well before the parties ever planned to build the Neola home. Additionally, the funds from the sale of Husband's property were put almost exclusively into the business account, which was consistently used for marital purposes. Finally, the evidence showed that Wife had remodeled the home that Husband had owned prior to the parties' marriage and that she had thereby improved it before it was eventually sold.

The testimony at trial also showed that the nature, name, and value of Husband's prior business, N.J. Trucking Inc., had changed after the parties married. The evidence indicated that the parties expanded the business by buying a crane and other equipment and that they changed the business's name to Brough Trucking & Crane Service Co. The testimony at trial showed that both Husband and Wife worked in the business, that Husband and Wife jointly took out a \$160,000 loan that was used to pay off the debt on the crane and other equipment, and that the jointly owned Neola home was used as collateral for the business loan. Other property that was later deeded to Brough Trucking & Crane Services Co. was originally titled in both Husband's and Wife's names. The appraisal of the business indicated that, prior to the marriage, N.J. Trucking Inc. had a gross income of \$188,785. The year before the parties separated, Brough Trucking & Crane Service Co. had a gross income of \$785,250. Although the

2. (...continued)

evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even in viewing it in the light most favorable to the court below.

Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989); see also Utah R. App. P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."). Husband has failed to meet this requirement.

accountant who assessed the value of Brough Trucking & Crane Service Co. stated that he could not determine the value of the business at the time the parties married in 1998, the value at the time they separated was \$492,000. Evidence was also introduced that in approximately 1994, Husband had valued N.J. Trucking Inc. at \$44,000. While other evidence may have conflicted with the evidence that supports the trial court's findings, we cannot say that "the evidence clearly preponderated against the findings," thereby requiring "changes [to] be made in [the] trial court's property division determination." See Leppert v. Leppert, 2009 UT App 10, ¶ 9, 200 P.3d 223 (internal quotation marks omitted).

Next, Husband claims that the trial court erroneously interpreted the prenuptial agreement as limiting Wife's claim to assets and debts existing at the time of the marriage but permitting her claim to subsequently acquired property and enhancements to the business.

We review the trial court's interpretation of the agreement for correctness, according no deference to the court's conclusions of law.

. . . In addition, we interpret the terms of a contract in light of the reasonable expectations of the parties, looking to the agreement as a whole and to the circumstances, nature, and purpose of the contract. Moreover, where there is doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one.

. . . [And] in the context of prenuptial agreements, . . . [p]arties . . . are held to the highest degree of good faith, honesty, and candor in connection with the negotiation and execution of such agreements.

Peirce v. Peirce, 2000 UT 7, ¶¶ 18-20, 994 P.2d 193 (citations and internal quotation marks omitted).

The parties' prenuptial agreement stated,

I Kathryn Curfew Baum am in no way associated with and hold no claim to any personal properties, assets or money of Richard James Brough, N.J. Trucking Inc., The Glass Store, any personal or family

properties. Also I will not be liable for any debts that occur [sic] from any of the above properties.

Richard James Brough will not be liable for any debt that Kathryn Curfew Baum has acquired.

This agreement predicates Wife's disclaimer of interest in the listed entities or properties on the fact that Wife was "in no way associated with" them. The agreement makes no mention, let alone a disclaimer, of interest with respect to subsequently acquired property or subsequently created entities. Thus, it was not error for the trial court to interpret the agreement as permitting Wife's interest in subsequently acquired properties and entities that she was clearly "associated with" during the marriage.

Finally, Husband claims that the trial court abused its discretion in awarding Wife attorney fees and costs incurred in the divorce litigation. "[T]he trial court's award or denial of attorney fees 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." Stonehocker v. Stonehocker, 2008 UT App 11, ¶ 10, 176 P.3d 476 (internal quotation marks omitted); see also Peterson v. Peterson, 818 P.2d 1305, 1310 (Utah Ct. App. 1991) ("[S]ection 30-3-3 [of the Utah Code] empowers a court to use its sound discretion to define costs as those reasonable amounts that are reasonably expended to prosecute or defend a divorce action."). Here, the evidence showed that Wife's monthly expenses slightly exceeded her modest monthly income, that Husband's income through his business was substantially higher than Wife's, that the requested fees were reasonable for the amount of work performed, and that the appraisal of the business was necessary for the calculation of its value. Thus, we cannot say that the trial court exceeded the discretion afforded it when it awarded Wife's attorney fees and costs.

"Generally, when the trial court awards fees in a domestic action to the party who then substantially prevails on appeal, fees will also be awarded to that party on appeal." Potter v. Potter, 845 P.2d 272, 275 (Utah Ct. App. 1993) (internal quotation marks omitted). As the prevailing party on appeal, Wife is entitled to reasonable attorney fees incurred on appeal.

We therefore affirm the trial court's order and remand for a determination regarding the amount of attorney fees reasonably incurred on appeal.

Russell W. Bench, Judge

WE CONCUR:

James Z. Davis, Judge

William A. Thorne Jr., Judge