IN THE UTAH COURT OF APPEALS

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Julie Ann McKenzie Fairbanks, Petitioner and Appellee, v. Peter Nathan Fairbanks, Respondent and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080774-CA F I L E D (February 11, 2010) 2010 UT App 31

Fourth District, Provo Department, 054400186
The Honorable Samuel D. McVey

Attorneys: Peter Nathan Fairbanks, Lake Stevens, Washington, Appellant Pro Se
Kristin B. Gerdy and Ronald D. Wilkinson, Orem, for Appellee

Before Judges Davis, McHugh, and Thorne.

DAVIS, Presiding Judge:

Respondent Peter Nathan Fairbanks (Husband) appeals several trial court rulings made in the course of his divorce from Julie Ann McKenzie Fairbanks (Wife). We affirm.

Husband first argues that the trial court erred in its division of the marital estate. Specifically, he challenges (1) the trial court's failure to acknowledge that he contributed his separate property to the purchases of the parties' homes notwithstanding the credit given to Wife for contributions of her separate property and (2) the trial court's chosen method used in the division of the parties' homes. "'It is axiomatic that, before a party may advance an issue on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon.'" Holmstrom v. C.R. England, Inc., 2000 UT App 239, ¶ 26, 8 P.3d 281 (quoting Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah Ct. App. 1989)). We do not see that Husband sufficiently raised these issues below. Husband points us to no occasion where he requested the trial court to acknowledge that he made separate contributions to the purchases of the parties' homes or advanced his model for the equitable division of the homes. There is no

mention of these issues at trial, and the exhibits to which Husband points as preserving the issues are far from self-explanatory and were not explained to the trial court in a way that raised the issues to the court's attention. "For an issue to be sufficiently raised, even if indirectly, it must at least be raised to a level of consciousness such that the trial judge can consider it." James v. Preston, 746 P.2d 799, 802 (Utah Ct. App. 1987).[1] Thus, these issues are "'deemed waived, precluding this court from considering their merits on appeal.'" Holmstrom, 2000 UT App 239, ¶ 26 (quoting Carlston, 776 P.2d at 655).

Husband next argues that the trial court erred in refusing to reduce his alimony obligation due to Wife's desertion, neglect, and cruel behaviors. We have recently determined that although there is statutory authority for the consideration of fault in determining alimony, "the Utah Legislature has provided no definition of what, exactly, constitutes fault." Mark v. Mark, 2009 UT App 374, ¶ 18, 645 Utah Adv. Rep. 15. "Accordingly, until the legislature clearly defines fault in the statute, it is inappropriate to attach any consequence to the consideration of fault when making an alimony award." Id. ¶ 20. Furthermore, even if fault were established by a showing of one of the grounds for divorce listed in Utah Code section 30-3-1(3), as Husband apparently assumes, the acts of which Husband complains do not satisfy a finding of such grounds. First, Wife's move to Utah does not qualify as "willful desertion . . . for more than one year," see Utah Code Ann. § 30-3-1(3)(c) (2007). "A separation to which both parties willingly concur is not in any sense of the word a willful desertion of one by the other." Speak v. Speak, 81 Utah 423, 19 P.2d 386, 387 (1933).[2]

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[1]Further, even if the exhibit showing the equity analysis was sufficiently clear to raise the issue to the trial court, "there is no fixed rule or formula for the division of property, the trial court has wide discretion in property division, and its judgment will not be disturbed on appeal unless an abuse of discretion can be demonstrated." Mortensen v. Mortensen, 760 P.2d 304, 305-06 (Utah 1988). We cannot say that the trial court's sound equity analysis and division of the homes here violates that broad discretion.

[2]Husband argues that when Wife moved to Utah her "admitted intent was withdrawal from the marriage." But her testimony at trial does not support this assertion:

> Q. And do you remember telling [Husband] at that time that you were not coming back?
> A. It was apparent, yes.
> Q. Do you remember telling him that you wanted nothing to do with him anymore?

(continued...)

Second, Wife's failure to offer financial and emotional support after her move and her failure to let him stay overnight in her home when he came to visit do not rise to a "willful neglect . . . to provide . . . the common necessaries of life," see Utah Code Ann. § 30-3-1(3)(d). "The failure [to provide common necessaries of life], to be willful, must be intentional or of such callous neglect and indifference as to be equivalent to an intentional failure." Holman v. Holman, 94 Utah 300, 77 P.2d 329, 330 (1938).[3] Third, a sexual encounter initiated by Husband that had "turned sour," resulting in Husband's comment that he "felt like [he] had been raped," followed by Wife's hurtful response and refusal to have sexual relations thereafter does not amount to "cruel treatment . . . to the extent of causing bodily injury or great mental distress," see Utah Code Ann. § 30-3-1(3)(g). Indeed, there were apparently hurtful and distressing actions on the part of both parties, and we cannot say that any fault here was one-sided.[4]

Finally, Husband argues that the trial court erred in considering improper evidence in determining alimony. Although Husband claims that Wife's counsel referred to acts from the first marriage in opening statements, no objection was made to such mention. Moreover, Husband points to nothing in the record that would indicate that the trial court considered counsel's statement--or those regarding intimacy or other issues in the

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[2](...continued)

A. No.
Q. But did you make it clear that you wanted a divorce?
A. At that time it was a separation, there was a time left open to work on our marriage.
Q. But you admit that you told him you were never coming back?
A. I would not go back to Washington. He's welcome to come down here.

[3]Wife clearly did not have the financial means to contribute to Husband's support. Indeed, Husband continued to support Wife financially after the move because she had little means to support herself at that time.

[4]In fact, Wife testified that she takes medication for anxiety and depression, which she has been told by doctors and counselors were caused by her marriage to Husband.

prior marriage[5]--when determining alimony.[6] And although the parties agreed that Wife would be responsible for the debts she incurred after the move, the trial court was allowed to consider those debts as part of Wife's need in the alimony analysis. Such consideration in no way held Husband liable for those debts or made those debts marital obligations.[7]

Affirmed.[8]

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James Z. Davis, Presiding Judge

I CONCUR:

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William A. Thorne Jr., Judge

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[5]Husband claims other premarital issues were raised throughout trial, but does not specify what those were. We therefore cannot consider those unidentified statements.

[6]It is unclear why Husband argues that Wife brought children into this marriage but that he did not, because the children were also his. In any event, we do not see the relevance of this issue where the children were all adults at the time of the divorce.

[7]Husband argues that Wife's needs assessment was changed on the eve of trial, giving him inadequate time to review the same. But Husband does not elaborate on how this alleged error prejudiced him. There is no evidence that his needs assessment would have been different or that he could have challenged any of Wife's listed needs.

[8]Wife requests an award of attorney fees on appeal, arguing that Husband's appeal is frivolous. See generally Utah R. App. P. 33(a) (allowing an award of attorney fees if the appellate court determines that an appeal is frivolous). We do not agree with Wife that Husband's appeal is frivolous as that term is defined. See generally id. R. 33(b) ("[A] frivolous appeal . . . is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law."); O'Brien v. Rush, 744 P.2d 306, 310 (Utah Ct. App. 1987) ("A frivolous appeal is one without merit. But something more must be required or we will find ourselves in a 'loser pay' situation.").

McHUGH, Associate Presiding Judge (concurring):

I write separately only on the issue of fault. Our legislature has provided, "The court may consider the fault of the parties in determining alimony." Utah Code Ann. § 30-3-5(8)(b) (2007). In Mark v. Mark, 2009 UT App 374, ¶ 18, 645 Utah Adv. Rep. 15, a divided panel of this court held that absent further clarification from the legislature on the definition of fault, "it is inappropriate to attach any consequence to the consideration of fault when making an alimony award." Id. ¶ 20. By our principles of horizontal stare decisis, I am bound by the majority decision in Mark. See State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993) (recognizing that, in most instances, subsequent panels of the court of appeals should follow the decisions of a prior panel). Thus, although I find the dissent in Mark persuasive, I concur with the majority's reliance on Mark in affirming the alimony award here. See generally Mark, 2009 UT App 374, ¶¶ 25-28 (Orme, J., concurring in part and dissenting in part) (noting that the "broad and generalized" language of section 30-3-5(8)(b) "strongly suggests that the Legislature appreciates the multitude of factual scenarios that arise in divorce cases, recognizes the broad equitable powers traditionally enjoyed by the courts in doing justice in divorce proceedings on a case-by-case basis, and trusts the courts to flesh out the alimony/fault concept in the course of adjudication of cases over time").

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Carolyn B. McHugh,
Associate Presiding Judge