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Robert Keith Levin v. Hope M. Carlton : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT KEITH LEVIN, Petitioner/Appellee, v. HOPE M. CARLTON, Respondent/Appellant.	:	**Case No. 20080192** **Trial Court No. 054700107**

BRIEF OF APPELLANT HOPE M. CARLTON

**APPEAL FROM FIFTH JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE LYLE R. ANDERSON PRESIDING**

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(h) (2006) and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Did the trial court err by concluding that the parties' Prenuptial Agreement was valid at its inception, and the court was constrained to strictly construe and enforce it against Wife, irrespective of whether at the time of enforcement such strict construction and enforcement resulted in an outcome that is patently unfair, unjust and inequitable? This is a question that centers on the trial court's interpretation of statutes and case law, including Utah Code Ann. §§ 30-3-1 *et seq.*, and cases such as *Reese v. Reese*, 1999 UT App. 75, ¶¶ 24-25, 984 P.2d 987. The trial court's interpretation and application of statutes and precedents is reviewed for correctness. *See Kessimakis v. Kessimakis*, 1999 UT App. 130, ¶ 8, 977 P.2d 1226 (in divorce proceeding, trial court's determination of questions of law is subject to review for correctness). This issue was preserved in the trial court at R. 2200, 2429, R. 2558 at 335-52 and R. 2559 at 750-66.

2. Did the trial court err in interpreting and applying the Prenuptial Agreement in reaching its conclusions on property division, alimony, child support and attorneys' fees? This is a question of law reviewed for correctness. *See Rudman v. Rudman*, 812 P.2d 73, 78 (Utah Ct. App. 1991) (whether trial court properly determined prenuptial agreement is ambiguous is subject to review for correctness); *Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998) (whether trial court properly applied an

unambiguous contract is subject to review for correctness). This issue was preserved in the trial court at R. 2200, R. 2429, R. 2554, R. 2558 at 335-52, and R. 2559 at 750-66.

3. Did the trial court err by failing to properly analyze this case as involving a long-term marriage that dissolved on the threshold of a major change in Husband's financial prospects due to the efforts of both parties during the marriage, and as a consequence did the trial court fail to make an appropriate compensating adjustment in the property division and alimony? This is a question that centers on the trial court's interpretation of statutes and case law, including Utah Code Ann. § 30-3-5(8)(c) and *Martinez v. Martinez,* 818 P.2d 538, 542 (Utah 1991). The standard of review is correctness, and the trial court's determination is entitled to no special deference on appeal. *See Kessimakis v. Kessimakis*, *supra.* This issue was preserved in the trial court at R. 1590 and 2200.

5. Did the trial court abuse its discretion in its determination of alimony, child support, property division and attorneys' fees? The standard of review is clearly erroneous or abuse of discretion. *Bradford v. Bradford*, 1999 UT App 373, ¶ 12, 993 P.2d 887. This issue was preserved in the trial court at R. 2200, 2429, R. 2558 at 335-52 and R. 2559 at 750-66.

6. Did the trial court err in failing to award Hope her attorneys' fees and requiring her to pay Robert's attorneys' fees without applying the relevant factors and making the requisite findings? *See Rudman,* 1991 UT App 41 at ¶ 22 ("The decision to award fees rests within the sound discretion of the trial court, but . . . the decision must be

based on evidence of financial need and reasonableness."); Rule 102, Utah Rules of Civil Procedure. The standard of review is correctness, and the trial court's determination is entitled to no special deference on appeal. *See Rehn v. Rehn*, 1999 UT 41, ¶ 22, 974 P.2d 306 (whether a trial court's award of attorney fees is supported by adequate findings of fact is subject to review for correctness). This issue was preserved in the trial court at R. 2200, 2429, R. 2558 at 335-52 and R. 2559 at 750-66.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah Code Ann. § 30-3-5 is applicable to the case on appeal. That Code section provides in pertinent part that in making an alimony award, the trial court is to consider certain factors, including (1) "the financial condition and needs of the recipient spouse," (2) "the recipient's earning capacity or ability to produce income," (3) "the length of the marriage," (4) "whether the recipient spouse has custody of minor children requiring support," and (5) "whether the recipient spouse worked in a business owned or operated by the payor spouse." *See* Utah Code Ann. § 30-3-5(8)(a)(1), (ii), (iv), (v) and (vi). That Code section further provides in pertinent part as follows:

> When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change *shall* be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court *may* make a compensating adjustment in dividing the marital property and awarding alimony.

Utah Code Ann. § 30-3-5(8)(e).

Utah Code Ann. § 30-3-5 and Rule 102 of the Utah Rules of Civil Procedure are also applicable on appeal as bearing on awards of attorneys' fees. Section 30-3-5 provides in part that "in any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action." Utah Code Ann. § 30-3-5(1).

Rule 102 provides:

> (a) In an action under Utah Code Section 30-3-3(1), either party may move the court for an order requiring the other party to provide costs, attorney fees, and witness fees, including expert witness fees, to enable the moving party to prosecute or defend the action. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amount requested. The motion may include a request for costs or fees incurred:
> (a)(1) prior to the commencement of the action;
> (a)(2) during the action; or
> (a)(3) after entry of judgment for the costs of enforcement of the judgment.
> (b) The court may grant the motion if the court finds that:
> (b)(1) the moving party lacks the financial resources to pay the costs and fees;
> (b)(2) the non moving party has the financial resources to pay the costs and fees;
> (b)(3) the costs and fees are necessary for the proper prosecution or defense of the action; and
> (b)(4) the amount of the costs and fees are reasonable.
> (c) The court may deny the motion or award limited payment of costs and fees if the court finds that one or more of the grounds in paragraph (b) is missing or enters in the record the reason for denial of the motion.
> (d) The order shall specify the costs and fees to be paid within 30 days of entry of the order or the court shall enter findings of fact that a delay in payment will not create an undue hardship to the moving party and will not impair the ability of the moving party to prosecute or defend the action. The order shall specify the amount to be paid. The court may order the amount to be paid in a lump sum or in periodic payments. The court may order the fees to be paid to the moving party or to the provider of the services for which the fees are awarded.

Rule 102, Utah R. Civ. P.

Because the Prenuptial Agreement at issue in this case is subject to California law, various California statutes are also applicable on appeal as bearing on the construction and interpretation of the Agreement and the property division thereunder. As relevant and applicable, those California statutes are quoted in the Argument section of this brief.

STATEMENT OF THE CASE

This appeal raises three main issues: the propriety of the trial court's property division ruling, which leaves the wife with no share in the substantial assets she helped build during the marriage; the propriety of the trial court's alimony ruling, which excludes the wife and the parties' daughter, of whom she has primary custody, from the lifestyle the husband continues to enjoy as a result of the substantial wealth the wife helped to create; and the propriety of the trial court's attorneys' fees award, which imposes on the wife a mountain of debt for her own attorneys' fees. The trial court made these rulings, patently unfair to the wife, because it felt to do otherwise would be unfair to the husband in light of a prenuptial agreement entered into two days before the parties' wedding and 16 years before their divorce.

At the time of the marriage, the wife was 25 years old and was working as an actress and model. The husband was 42 years old, had been married twice before, and was essentially retired, having sold his stake in a successful clothing business for millions of dollars. The wife left her promising career and moved to Utah with the husband. The couple lived a life of luxury, spending winters skiing and enjoying a $3 million home in

Deer Valley, spending much of their summers on a 62-foot custom-built houseboat on Lake Powell with all the comforts of home, and traveling and spending without worrying about working for a living or keeping within a budget.

The parties' lifestyle changed drastically when they located a run-down cattle farm on the Colorado River in Moab with the idea of developing a working ranch and homesites. Eventually, they decided instead to build a destination resort, and the result is the world-class luxury resort known as the Sorrel River Ranch Resort and Spa. The husband put up the funds from his pre-marital fortune to buy the property and pay for the improvements, but the wife worked along side him to create the highly-acclaimed destination resort. In doing so, not only did the wife experience a substantial diminution in her Deer Valley lifestyle, and attend to caring for and rearing the parties' daughter while the husband regularly worked more than 100 hours a week, but she also worked long hours without pay or benefits building the resort and developing the equestrian facilities and other amenities and generally acting as the proprietor and hostess to welcome guests and make them feel at home for their stay. She did so with great joy and satisfaction, but also with the expectation and understanding that she was helping to build a secure financial future. That expectation and understanding were bolstered by the fact that the husband touted her as a "co-owner" and featured her image and work on the resort in promotional materials.

The resort was the parties' main venture after moving from Deer Valley, but the husband also formed another business entity to pursue another real estate development

called Flat Iron Mesa, comprising a number of large luxury building sites. The husband put up the funds to buy the property, and he developed it with another partner, while the wife continued to work at the resort and in the home. That venture also greatly grew in value, and the husband earned about $1.5 million from the sales of the lots.

As a result of both parties' efforts, the husband's substantial pre-marital net worth, which he estimated at about $10 million at the time of the marriage, grew to more than an estimated $33 million in property and assets by the time the parties separated. There is no dispute that both parties worked hard to build that fortune. The question is whether the wife is entitled to any share of that fortune and the lifestyle it enabled.

STATEMENT OF THE FACTS

A. General Background

Appellant Hope Carlton ("Wife") was born on Long Island, New York, and moved with her family to Florida when she was 7. (R. 2558 at 354-55) A continuing life-long passion for horses began when she got her first horse at age 13, paying half the cost with money she earned working at a fast-food restaurant, and then working in a local stable in exchange for keeping her horse there. (*Id.* at 355-57) She also attended modeling school and signed on as a model with a local talent agency, appearing in beauty contests and advertisements. (*Id.* at 357-58)

After she turned 18, Wife began to get national recognition as a model, and moved to Los Angeles, California, to pursue a modeling and acting career. (*Id.* at 358-59) She worked hard to establish a career as a model and actress, and by the time she was 25 she

had appeared in 12 films, 9 in a starring role. (*Id.* at 359-60; Tr. Ex. 26) She had also appeared in commercials and television shows, including *Baywatch*, *Married with Children*, and *L.A. Law*. (*Id.*). She was making good money, earning up to $44,000 in 1989 from her Screen Actors Guild work. (*Id.* at 361-62; Tr. Ex. 9). She also continued to develop her love of horses. (R. 2558 at 360-61)

In 1990, when she was 24, Wife met and began dating Appellee Robert Keith Levin ("Husband"). (*Id.* at 154, 362-63) Husband was 17 years older and a successful businessman, earning about $2 million a year. (*Id.* at 154-55) Husband proposed within 4 months, and the couple married on September 14, 1991, in a storybook wedding. (*Id.* at 363-64) Three months after the marriage, the couple moved to Park City. (*Id.* at 378) Husband wished to leave Los Angeles and make a lifestyle change. (*Id.* at 310)

In the fall of 1992, they completed a multi-million dollar custom log home in Deer Valley that became known as the "Log Palace." (*Id.* at 379-80; Tr. Ex. 28) The parties occupied that home together throughout 1993 and into 1994. (R. 2559 at 626) There Wife continued to pursue her interest in horses, and began aggressively competing as an amateur in the American Quarter Horse Association with great success, while Husband pursued his interest in cycling. (R. 2558 at 379-81) They also enjoyed gourmet vegetarian cooking and entertaining friends. (*Id.* at 380) In the winter, they skied; in the summer, they spent long weekends at Lake Powell on a 62-foot custom-built luxury houseboat. (*Id.* at 381-85; R. 2559 at 626-27; Tr. Ex. 38) Both were able to take advantage of a home gym and elective cosmetic procedures. (R. 2558 at 386-87, 391)

They vacationed in Hawaii, and Wife was able to fly friends in from Los Angeles to visit. (*Id.* at 388-90) They ate out regularly. (*Id.* at 391) They had a live-in housekeeper and a landscaping service to maintain the property. (*Id.* at 394) Generally, they enjoyed a very relaxed lifestyle without having to work or worry about a budget. (*Id.* at 387, 416-17)

The parties experienced marital difficulties, which both testified were irreconcilable, and they separated at the end of 2005. (R. 2557 at 30, R. 2558 at 353) The evidence was undisputed that the plan originally was that Wife would relocate to Grand Junction, Colorado, with Calli Jo, and build a new home on a 9-acre lot she had found. (R. 2558 at 659-60) The lot was close to good private schools in town. (*Id.*) It could also be subdivided, which would have allowed Wife to sell part of it for additional financial security. (*Id.* at 660) In the interim, Wife was to temporarily occupy an existing house. (*Id.*) After Wife moved into that house, Husband sold the other lot. (*Id.* at 660-61) As a result, at the time of trial Wife and Calli Jo were still living in what was supposed to be the temporary home. (*Id.*)

B. Facts Relating to Development of Sorrel River Ranch

In 1993, due to Wife's interest in breeding American Quarter Horses, the couple began seeking ranch property which led them to a dilapidated cattle ranch on the Colorado River corridor in Moab, Utah. (*Id.* at 395-98) They originally intended to develop the ranch as a horse property and residential building lots. (*Id.*; R. 2557 at 174-75) In March 1994, Husband relocated to Moab while a home was being built for the couple in the Solano Vallejo Estates in Moab, which became their primary residence

while they worked on renovating the ranch. (R. 2559 at 626-27) The couple later moved into the ranch house and decided to turn the bunk house into a bed and breakfast, which opened at the end of 1998. (R. 2558 at 397-400; R. 2557 at141).

From there, they continued to work together to develop the property into a full-scale world-class resort, with Husband handling the infrastructure and planning of the property and the finances, and with Wife running the bed and breakfast, taking care of the horses and working to design the layout and facilities for the resort, including a barn, fields, pastures and fences as part of an equestrian facility. (R. 2558 at 400-02) The resort opened in May of 2000. (R. 2557 at 141) Wife came up with the name, Sorrel River Ranch, and also designed the logo. (*Id.* at 139)

As the facilities grew, the ranch house became the lodge, and Wife not only continued to develop the equestrian facilities but also worked to design and build the guest and staff facilities, including the design of the furniture and every detail of the furnishings. (*Id.* at 403-407) She also took responsibility for the gift shop. (*Id.* at 406-07) She also personally performed supply runs to Grand Junction to obtain material and supplies needed for the ranch. (*Id.* at 407-08)

In February 1997, Husband and Wife had a daughter, Calliway Jo Levin. (*Id.* at 403) Wife directed her attention to taking care of Calli Jo and returned to work full time when Calli Jo was a year and half old. (*Id.*) Thereafter she continued to play an active role in the management and operations of the ranch. (*Id.* at 403-08) Wife started a school on the property to provide a loving learning environment for Calli Jo and other

children. (*Id.* at 413) Wife also organized play dates and parties for Calli Jo with pony rides and other entertainment. (*Id.* at 413-14)

Once the resort was established, Wife was integrally involved in the marketing of the resort. (*Id.* at 417) She was featured in a number of national and international magazines including Sunset, Shape, Conde Nast and Traveler as well as a half-hour program on national television. (*Id.* at 417-23, 429-32) This publicity touted Wife's role as co-owner and hostess at the resort. (*Id.*)

Husband paid $800,000 for the property when it was acquired. (R. 2559 at 587) He invested another $11 million or so in the property to develop the resort. (*Id.*) Approximately $2 million of that investment was debt, and approximately $1.6 million came from the operations of the resort. (*Id.* at 587-88) The remainer came from Husband's separate accounts. (R. 2557 at 71, 81) Neither Husband nor Wife was paid a salary from the resort, but a lot of their joint bills were paid through the business. (*Id.* at 63-64; R. 2559 at 588-89) On the tax returns of Levinius LLC (the entity that Husband formed after the marriage to hold the ranch properties), the Sorrel River Ranch showed a cumulative loss of $2,043,120 from 1995 through 2005, with a profit of about $194,000 in 2005. (*Id.* at 84-87; Tr. Ex. 7) Over that same period, it had a positive net cash flow of $1.6 million. (R. 2558 at 508-512) A "Net Worth Statement" prepared by Husband in August 2005 listed the value of the Sorrel River Ranch properties at $25.9 million. (Tr. Ex. 25) It was revealed shortly before trial that Husband was in negotiations to sell the Ranch. (R. 2558 at 475)

C. Facts Relating to Development of Flat Iron Mesa

In addition to the Sorrel River Ranch, another property developed during the marriage was a residential property development known as Flat Iron Mesa. That development was carried out through a limited liability company Husband formed in 2004. (R. 2557 at 198-99; Tr. Ex. 24) Husband is the registered agent of Flat Iron Mesa LLC. (*Id.*) Husband is also a partner in the LLC, with 60 percent ownership. (R. 2558 at 321, 323) He was described as a "passive partner," having invested money but having no role in management and having spent little time at the site. (*Id.* at 323, 331) Husband's tax returns list his business as "real estate development." (Tr. Ex. 8) For this specific real estate venture, Husband maintained all the financial records for the LLC at the Ranch. (*Id.* at 325-26) Husband was not only a co-signer on all checks issued by the LLC but also was involved in issuing them from the ranch. (*Id.*) Husband's attorney and accounting firm performed the legal and accounting work for the LLC. (*Id.* at 324-25, 333-34) Husband also was involved in setting the sales price for the lots. (*Id.* at 326-27)

Husband reported income from Flat Iron Mesa of $285,006 in 2003, $294,465 in 2004 and $476,609 in 2005 – total of $1,056,080. (Tr. Ex. 8) No discovery was allowed of amounts earned after 2005, but the "Net Worth Statement" prepared by Husband in August 2005 listed his share of the value of the Flat Iron Mesa lots as $1,473,120. (Tr. Ex. 25) Husband and his partner in Flat Iron Mesa LLC also testified, and the trial court found, that the total paid to Husband from the sales of the lots was $1.5 million. (R. 2557 at 200-01, R. 2558 at 322; R. 2232)

D. Facts Relating to Alimony

At the outset of the case, Husband stipulated that he was able to pay any reasonable amount of alimony the trial court might award, and the trial court duly noted that fact. (*See, e.g.*, R. 2554 at 165) Husband retained an expert to opine as to Wife's ability to earn, but given that by agreement of the parties Wife had not worked outside the home and the resort during the marriage, the evidence (and the trial court's ruling) pivoted on Wife's need.

As discussed above, the parties enjoyed a lavish lifestyle in the home they built in Deer Valley and occupied throughout 1993 until they moved to Moab and spent the next several years transforming the old cattle ranch into the Sorrel River Resort and Spa. After the resort was developed, Husband and Wife both worked long hours – which they had not done while living in Deer Valley – but they continued to enjoy the amenities of living at a world-class destination resort. (*Id.* at 408-416) Wife and Calli Jo regularly enjoyed the spa. (*Id.* at 408-09) They ate at the restaurant without being limited to what was offered on the menu, instead ordering whatever they wanted. (*Id.* at 410) Wife had a full-time nanny/housekeeper. (*Id.*) She had access to the gym and dance and yoga instructors on site as well as the swimming pool at the lodge. (*Id.* at 411) She continued to enjoy her horses. (*Id.* at 412) She had the use of numerous cars as well as work vehicles. (*Id.* at 412-13) Calli Jo attended a private school on the premises. (*Id.* at 413) Wife was able to host and entertain friends and family. (*Id.* at 413-414) She was able to travel and shop. (*Id.* at 415-16) The trial court found she "was generally able to

purchase anything she desired to purchase." (R. 2232) The trial court also found that "one of the benefits of living and working at the Resort is that many of the expenses of living were covered by the business, in exchange for having [Wife] and [Husband] readily accessible to work in the business." (R. 2232)

After the parties' separation, when Wife and Calli Jo left the resort and moved to Grand Junction, the parties agreed on temporary support of $11,200 per month, including $1,000 per month as child support for Calli Jo, and in a pre-trial ruling the trial court held that amount was to be net of taxes. (*See* Tr. Exs. 3, 5) As discussed in more detail below, the parties disagreed as to whether that amount reflected the marital lifestyle.

Husband and his expert prepared what they testified was a summary of Wife's "personal expenses" prior to separation (*i.e.*, when she was living at the resort and had no housing expense and limited other expenses with all the resort amenities at her disposal), based on data provided by Husband. (R. 2557 at 107-110, 242-44, 250; Tr. Ex. 13) That summary listed Wife's personal expenses at $8,658 per month, not including rent or mortgage and not including taxes. (Tr. Ex. 13) Husband's expert also prepared what he testified was a summary of Wife's post-separation expenses (*i.e.*, when she was receiving $11,200 per month from Husband based on the temporary stipulation). (R. 2557 at 112, 244-45; Tr. Ex. 14) That summary listed Wife's monthly expenses at $11,544, including her actual mortgage payment but not including taxes. (Tr. Ex. 14) Husband's expert agreed that amount, which is in excess of the $11,200 Wife was receiving in temporary alimony and child support, was being consumed by living expenses. (R. 2557 at 252)

Husband and his expert also prepared what they proposed as a monthly budget for Wife, with certain reductions to her actual, post-separation expenses, based on input from Husband, for a total monthly need of $8,786 before taxes. (R. 2557 at 112-13, 246-48, 250-51; Tr. Ex. 15) Husband's expert agreed their "proposal" was "based on what it takes to get by under these circumstances." (R. 2557 at 264) Husband's expert did not independently value the parties' lifestyle at the resort, nor did he evaluate the parties' Deer Valley lifestyle prior to moving to Moab. (*Id.* at 269) His proposed budget does not include a housekeeper or savings or retirement. (*Id.* at 279)

Based on his own analysis of the underlying data, Wife's expert testified that Husband's analysis of Wife's pre-separation personal expenses understated the amount of those expenses, and did not accurately reflect the parties' lifestyle at the resort. (R. 2558 at 518-29) Wife's expert performed a reconciliation of Husband's estimate of Wife's pre-separation expenses (which he testified understated the lifestyle), Husband's expert's estimate of Wife's post-separation expenses (which he agreed with Husband's expert reflected what she was able to get by on under the circumstances on the budget she was given), and their proposed budget for Wife, and made his own estimate of the amount Wife needed to replicate the parties' lifestyle. (*Id.* at 530-48; Tr. Ex. 50)

That analysis assumed Wife would be able to place Calli Jo in a private school, would be able to have household and ranch help, and would otherwise be able to enjoy the lifestyle amenities and services she enjoyed in Deer Valley and at the resort after it was built. (*Id.*) That analysis resulted in monthly expenses of $19,707 net of taxes. (Tr.

Ex. 50) With the additional assumption that Wife would not continue in the home she was forced to occupy after separation, but would have housing comparable to what the parties enjoyed in Deer Valley and at the resort, and including an amount necessary to cover income taxes, Wife's expert testified to a monthly budget to maintain the lifestyle of approximately $30,000. (R. 2558 at 541-42)

E. Prenuptial Agreement

Two days prior to their wedding, on September 12, 2001, the Parties signed a 58-page contract entitled "Premarital Agreement" (referred to herein as the "Agreement"). (Tr. Ex. 6) The Agreement recites that Husband had been previously married and divorced, and had an adult son, and that Wife had not been previously married and had no children. (*Id.* at p. 1, ¶ 2) The Agreement includes a disclosure of Husband's real and personal property at the time, which he valued at $10 million. (*Id.* at p. 2, ¶ 4, p. 49, Exhibit "A") By its terms, the Agreement sets forth Husband's and Wife's "rights with respect to the property owned by either of them at the time of the contemplated marriage or acquired during marriage to each other." (*Id.* at p. 3, ¶ A) The Agreement provides that it was "executed in the State of California and shall be subject to and interpreted under the laws of the State of California." (*Id.* at p. 42, ¶ X)

The Agreement generally provides that all property belonging to Husband at the commencement of the marriage would remain his separate property; that without the Agreement, "property acquired during the marriage could be categorized as community property" to which each would be entitled to a one-half interest; that by the Agreement

there would be no community property "unless specifically identified otherwise in this Agreement and/or on a document of title"; and that each waived any right of management and control over the separate property of the other, "as well as the duty to act in good faith with respect to same," and acknowledged "there is no fiduciary duty with respect to each spouse's management and control over the separate property in relation to the other spouse," although such a duty would attach to "community property or joint property rights created or reserved under this Agreement." (*Id.* at pp. 5-7, ¶ D.3)

The Agreement also provides that, without the Agreement, "all earnings or income resulting from the personal services, skills, efforts, talent, or work of the parties during the time that they are married and living together could be categorized as community property under California law," but that by the Agreement, "any earnings or income resulting from the personal services, skills, efforts, talents, or work of each of the parties during the time they are married and living together, and any property acquired therewith, shall be and remain the separate property of the party whose personal services, skills, efforts, talent, or work result in such earnings or income, **except as set forth hereinbelow.**" (*Id.* at pp. 8-9, ¶ F.1) (emphasis in original) Thereafter, the Agreement creates two main categories of community property relevant here.

First, the Agreement provides that "'earnings' or 'base salary,'" defined as "compensation for labor or services performed by [Husband]," as well as "accumulations from such earnings or salary, derived from actual effort or employment of [Husband], from and after the date of marriage, shall be community property." (*Id.* at p. 9, ¶ F.2)

Contrary to the general provision in the Agreement, which makes property separate unless there is a writing, this provision states "the parties' intention that all property acquired with such community property earnings of [Husband] shall be community property, unless the parties agree otherwise in writing." (*Id.*)

Second, the Agreement provides:

> In the event [Husband] enters into any type of business venture or ventures from and after the date of marriage from which [Husband] will receive earnings or salary therefrom (regardless of whether such earnings or salary have been derived from actual effort or services performed by [Husband] for or on behalf of the business venture), such earnings or salary, or accumulations from such earnings or salary, derived from said business venture or ventures, shall be community property. For purposes of this paragraph F.3., the term "earnings" or "salary" derived from said business venture or ventures excludes pension and deferred income contributions, stock, stock options, bonuses, benefits and rights, and perquisites, which items shall remain [Robert's] separate property subject to Paragraphs F.5., F.6. and F.7. It is the parties' intention that all property acquired with such "earnings" or "salary" (defined under this Paragraph F.3.) shall be community property unless the parties agree otherwise in writing.

(*Id.* at p. 10, ¶ F.3)

The Agreement goes on to provide mutual waivers, including among others a reiteration that "[e]xcept as otherwise provided in Paragraph F. hereinabove of this Agreement, all property of any kind or nature, including but not limited to the earnings, income and other distributions of any kind or nature, resulting from personal services, skill, effort, management and work by either party after the marriage shall be the separate property of the party so acquiring said property and shall be subject in the same manner as though the proposed marriage never had been entered into." (*Id.* at p. 16, ¶ G.1) The Agreement also provides that "all rents, issues, profits, increase, appreciation and income

from the separate property of [Husband], whether real or personal, shall remain his separate property," and that "a change in form of [Husband's] separate property shall not constitute a change of characterization, and the separate property shall remain [Husband's] separate property regardless of any change in form." (*Id.* at p. 19, ¶ I.1) The Agreement also provides that while each "may devote considerable time, skill and effort to the investment and management" of his or her separate property, that would not create any community interest, and that "[t]he expenditure of time, effort, skill and money by one party for the benefit of the separate property of the other party shall be deemed to be a gift to the other unless otherwise agreed to in writing." (*Id.* at pp. 20-21, ¶ J)

The Agreement expressly states that it "covers only property rights and intentionally does not address spousal support issues" but reserves them; and expressly states that, "in the event the parties eliminate spending any extended time in Southern California and reside in a rural area, if [Wife] is still pursuing her acting and/or modeling career, she will potentially be unable to continue pursuing same under new circumstances and, in the unlikely event the parties terminate their relationship, the court may take this into consideration regarding any support issue, notwithstanding the fact that his conceivable [*sic*] could be a marriage of short duration." (*Id.* at p. 40, ¶ U)

Finally, the Agreement includes an attorneys' fees provision:

> In the event of a dispute between the parties arising out of the terms, conditions and obligations imposed by this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees, costs and expenses incurred in connection therewith. This provision shall not constitute a waiver by either party of attorneys' fees and costs which may be awarded by the court relative to issues of spousal support, child support,

modifications and/or enforcement thereof pursuant to the Family Law Act (California Civil Code, § 4000 et seq.)

(*Id.* at p. 43, ¶ Z)

F. Procedural History

Husband initiated this action by filing a Complaint for Divorce on December 12, 2005. (R. 001-003) The parties entered into a Partial Stipulation and Settlement Agreement dated January 23, 2006 (R. 009-023), and the trial court entered an Order implementing that agreement on February 21, 2006. (R. 024-038) Husband filed a Motion for Summary Judgment Regarding Validity of Prenuptial Agreement on June 1, 2006. (R. 050-054) Wife opposed the motion and sought a stay for discovery pursuant to Rule 56(f) on the grounds that, assuming the Prenuptial Agreement was valid at its inception, the trial court must have all the relevant information as to its effect at the time of enforcement in order to determine its proper interpretation and application. (R. 456-496, R. 523-525) The trial court disagreed and granted Husband's motion for partial summary judgment on September 12, 2006. (R. 1029-34)

Wife filed a Motion for Temporary Orders on June 12, 2006. (R. 122-25) Wife also filed a Motion to Compel complete responses to her First Set of Interrogatories and Document Requests on August 18, 2007. (R. 730-32) This motion was necessary because Husband took the position that, based on his interpretation of the Prenuptial Agreement, Wife "has *no interest* in *any* property or assets owned by" Husband and that therefore information as to Husband's property and assets was "irrelevant" and not discoverable. (R. 792-93) After briefing, the trial court conducted a half-day evidentiary

hearing. (R. 2554) The trial court entered an Order on December 12, 2007, maintaining Wife's temporary alimony and child support at $11,200 per month; ruling that amount should be net of taxes; denying Wife's motion to compel except for information and documents related to possible "earnings" from the Sorrel River Ranch under the Prenuptial Agreement; and requiring Husband to pay Wife's attorneys' fees during the pendency of the action subject their being recaptured and charged back to her from property division and/or alimony. (R. 1163-67)

Husband subsequently imposed a discovery cutoff of December 31, 2005 – just when the Sorrel River Ranch first reported a profit – and Wife was forced to file another Motion to Compel along with supporting documents seeking up-to-date information on the issues of alimony and property division. (R. 1308-44) Husband also sought to preclude discovery of Flat Iron Mesa, again asserting it was his separate property under the Prenuptial Agreement and therefore no discovery should be permitted. (R. 1348-66) The trial court conducted a telephone hearing and denied Husband's motion to preclude any discovery into Flat Iron Mesa but took Wife's Motion to Compel under advisement. (R. 1467) Both parties submitted supplemental authority, but the trial court declined to consider that authority, and upheld Husband's cut-off of discovery as of December 12, 2005. (R. 1527-29) Wife filed a Rule 54(b) Motion on that ruling, and supporting documents. (R. 1587-97) The trial court denied that Motion. (R. 1635-36)

Wife thereafter pursued such limited discovery as the trial court permitted, but discovery disputes between the parties persisted, with both filing additional discovery

motions. (R. 1637-39 [Husband's Motion to Compel, August 1, 2007]; R. 1895-98 [Wife's Motion to Compel, August 20, 2007]). As early as April 2007, Husband's counsel agreed that Husband's delay in providing documents would justify resetting the trial, scheduled for September 5-7, 2007. (R. 1754) Wife's counsel confirmed in June the trial would have to be continued in light of the discovery disputes. (R.1827-29) The parties jointly requested a telephonic pretrial and agreed to continue the trial, scheduled for September 5-7, 2008, but they disagreed as to when it should be reset. (R. 1694-96) A telephone pretrial was scheduled for August 21, 2007. (R. 1697-99) During the telephone pretrial, Husband suddenly changed his mind and suggested he would insist on the original trial dates. (R. 2556 at 3) Wife filed a Motion for Continuance. (R. 190-92)

During the telephone pretrial, the trial court stated it would not change the trial date. (R. 2556, at 8) When advised Wife simply could not be ready to present an analysis of community property under the Prenuptial Agreement without complete information requested in discovery, the trial court stated, "Do the best you can." (*Id.* at 11) The court indicated it would consider Wife's motion to compel on the first day of trial. (*Id.* at 14-15) In a subsequent ruling on Wife's motion for expedited consideration of her motion to compel and motion for a continuance, the court indicated it was unwilling to reschedule the trial because of its inability at that juncture to "use the September trial date for other matters." (R. 1910) The court accused the parties of "posturing" and stated a continuance would "lead only to further conflict between the parties and their counsel." (R. 1911) The court reiterated that it would consider the

motions to compel at the beginning of trial. (*Id.*) The court added that it recognized the "substantial likelihood that it will be necessary to set an additional date to receive evidence which the parties cannot present now because of pending discovery disputes," but that the parties should come to trial "prepared to present all evidence currently available to them." (R. 1912)

At the beginning of trial, the court announced for the first time that each side would have 500 minutes, with the possibility of "more time because of the motions to compel that you filed." (R. 2557 at 5) There was no opportunity to address the motions to compel at the beginning of trial; after Wife's counsel reiterated the disadvantage Wife faced by the fact that Husband was in control of all financial information and had only produced what he had produced, the court invited opening statements. (*Id.* at 7-14)

At the conclusion of the evidence, the trial court explained that it had decided it did not need to deal with the discovery dispute at the beginning of trial, but to "put it over to the end." (*Id.* at 721) At that point, the court invited both parties to identify "additional documents or discovery responses you need so that you can present to the Court what the Court needs to make a fair determination in this case." (*Id.*) Wife responded with several specific requests for financial records pertaining to the Sorrel River Ranch and Flat Iron Mesa, and also reiterated an argument previously made in motions to compel that under California law there is an affirmative obligation, separate and independent from the rules of discovery in a contested divorce proceeding, to disclose information regarding any "assets in which the community has or may have an

interest." (*Id.* at 722-29) The court declined to allow any additional discovery, and indicated it would "go ahead and close the evidence in this case with all of you having presented what you wanted to present, at least that you have available." (*Id.* at 729-32)

G. The Trial Court's Ruling

The trial court issued a 28-page Memorandum Decision on September 14, 2007, addressing property division, alimony and attorneys' fees. (R. 2229-57)

With respect to property division, the trial court did not distinguish between "earnings or salary" defined as "compensation for labor or services performed by [Husband]" under Paragraph F.2 of the Prenuptial Agreement, and "earnings or salary" from a "business venture or ventures from and after the date of marriage . . . (regardless of whether such earnings or salary have been derived from actual effort or services performed by [Husband] for or on behalf of the business venture" under Paragraph F.3 of the Prenuptial Agreement. Instead, the trial court accepted Husband's narrow interpretation of the term "earnings" in both paragraphs to essentially be limited to salary or its equivalent actually paid out – "payment received because of services provided" – not profits. (R. 2242-43) Nevertheless, "because the court expects that an appeal of this decision is likely," it went on to "analyze what [Wife] should receive if her interpretation of F.3 is ultimately accepted." (R. 2244)

As to Flat Iron Mesa, the court first reiterated its legal conclusion that under California law, and under the terms of the Prenuptial Agreement, any "earnings," however defined, ceased to accumulate when the parties separated in December 2005.

(R. 2244) The trial court then noted the fact that Husband had received $1,056,080 from Flat Iron Mesa from 2003 through 2005. (R. 2245) Without any analysis, the trial court then summarily stated it was "not persuaded that Flat Iron Mesa was a business venture within the meaning of F.3. It was an investment. Robert contributed nothing of significance to Flat Iron Mesa other than his money. Any profits he received were clearly unearned income." (*Id.*)

As to Sorrel River Ranch, the trial court noted the resort "had an accumulated taxable loss of $2 million." (R. 2245) The court rejected Wife's argument that, because the resort also had accumulated appreciation of $3.6 million, there was net positive cash flow of $1.6 million, which could properly be considered "earnings" from the Ranch, and thus community property, within the meaning of Paragraph F.2 of the Agreement, even while acknowledging the tax allowance likely outstripped the actual costs associated with wasting assets. (R. 2245-46) The court also noted that Husband made "enormous cash investments" – not surprising, since he had the cash – while Wife "made no cash investment in the Resort" – apparently attributing any "earnings" to return on investment rather than the parties' substantial efforts. (R. 2246) Without analysis, the court summarily concluded that under Utah law Wife would be entitled to "only a small percentage, if any, of the Resort." (*Id.*) The court further concluded, again without analysis, that under the Agreement Wife "would be entitled only to one-half of the accumulated profits received by Robert, less one half of those profits applied to community expenses." (R. 2246-47) (emphasis in original)

On the issue of alimony, the trial court noted the difficulty of valuing Wife's lifestyle at the resort and sought, "by looking at historic expenditures, to approximate what monthly payment will enable [Wife] to enjoy the standard of living she enjoyed during the marriage." (R. 2249) The court made adjustments to Wife's expert's budget, concluded the home she occupied was adequate and she did not need any savings or retirement, concluded she would "require $12,000 per month after taxes to maintain her marital standard of living," and awarded her $15,000 gross alimony per month. (R. 2249-51) The court stated that "the Agreement does not authorize this court to consider Hope's career as a factor in any aspect of alimony" but provided that alimony would be non-terminable for five years "even if [Wife] remarries or cohabits" and only reduced by one-half thereafter until October 1, 2017, when it terminates. (R. 2252) The court stated that these provisions were made so that Wife could "make a gradual adjustment to a different lifestyle" and have "a cushion towards establishing a new career." (*Id.*)

Finally, on the issue of attorneys' fees, the trial court required Wife to pay $30,000 of her own fees, plus all fees she incurred after June 30, 2007. (R. 2255) The trial court also found that Husband was the "prevailing party" under the attorneys' fees provision of the Prenuptial Agreement and that it was therefore **required** to "award [Husband] his fees in connection with the dispute over the application of the Agreement" in the claimed amount of $167,884.75, with interest at 6.99% from and after October 1, 2007, to be paid by deducting $5,000 per month from Wife's alimony. (R. 2255)

Wife filed post-trial motions seeking relief from the onerous financial burdens imposed by the attorneys' fees ruling. (R. 2429-2480) Those filings included the amount of Wife's attorneys' and experts' fees incurred after June 30, 2007. (R. 2459) The trial court stated that it had consciously not applied Utah Code Ann. § 30-3-3(1) or Paragraph Z of the Prenuptial Agreement to each other, and invited "any guidance that might be provided on appeal" as to the effect of a "prevailing party" provision to an award of attorneys' fees under the Code. (R. 2519) The trial court acknowledged that the obligation that she pay Husband's fees increased Wife's need/decreased her income below what the court determined to be her need, but concluded that any other result "would not have been fair to [Husband]." (R. 2517-18) The court did, however, reduce the amount of Wife's monthly repayment from $5,000 to $2,500 per month. (R. 2521)

SUMMARY OF ARGUMENT

Utah law makes clear that a trial court's main task in a divorce trial is to make a fair and equitable property division. The trial court in this case failed at that task, imposing a property division award that can be justified only by imposing the most harsh and punitive interpretation and application of the parties' prenuptial agreement. The trial court also failed to properly apply Utah law that requires an upward adjustment to alimony in cases such as these. Finally, the trial court also failed to properly apply Utah law and public policy against imposing attorneys' fees pursuant to a "prevailing party" clause without regard to the parties' respective ability to pay or its impact on the payor spouse's ability to meet her own needs.

ARGUMENT

I. THE TRIAL COURT COMMITTED LEGAL ERROR IN CONCLUDING THAT A PRENUPTIAL AGREEMENT, VALID AT THE TIME OF ENTRY, MUST BE NARROWLY AND STRICTLY CONSTRUED AND APPLIED AT THE TIME OF ENFORCEMENT, EVEN IF IT RESULTS IN A PROPERTY DIVISION THAT IS PATENTLY UNFAIR AND INEQUITABLE.

The trial court approached its task in this matter as if it was applying an arms-length commercial contract, even as it acknowledged that trial courts in Utah divorce cases have "great latitude in considering the contributions of both parties to the accumulation of wealth during the marriage." (R. 2233-34) To the extent the trial court expressed any concern about the basic fairness of the outcome it reached, it did so only to Husband's advantage through a strict construction and application of the contract Husband's lawyer drafted. For example, the trial court expressed a concern that giving anything but the narrowest definition to the term "business venture" would expose all of Husband's separate passive investments to claims by Wife even though Wife made no such claim. (R. 2244) Similarly, ruling on Wife's post-trial motion, the trial court readily conceded that it could increase Wife's alimony to cover the increased need created by its requirement that she pay a substantial portion of Husband's attorneys' fees, but declined to do so because "it would not have been fair" to Husband. (R. 2517-18) Wife respectfully submits that the trial court's strict construction and application of the Prenuptial Agreement in this case in favor of Husband, the drafter, and against Wife, reflect an erroneous understanding of Utah trial courts' prime directive in divorce cases.

Utah law is clear that marital agreements are not to be construed and applied in the same fashion as arms-length commercial contracts. In *Peirce v. Peirce*, 2007 UT 7, 994 P.2d 193, the Utah Supreme Court examined what it called "the special rules that govern our analysis of postnuptial agreements," in a discussion also clearly applicable to prenuptial agreements:

> Postnuptial agreements are a type of contract and are generally subject to basic contract principles. See *In re Estate of Beesley*, 883 P.2d 1343, 1351 (Utah 1994). We have noted, however, in the context of prenuptial agreements, that important differences exist between marital agreements and commercial contracts:
>
> > Parties to premarital agreements do not deal with one another at arm's length. Unlike a party negotiating at arm's length, who generally will view any proposal with a degree of skepticism, a party to a premarital agreement is much less likely to critically examine representations made by the other party. The mutual trust between the parties raises an expectation that each party will act in the other's best interest. The closeness of this relationship, however, also renders it particularly susceptible to abuse. Parties to premarital agreements therefore are held to the highest degree of good faith, honesty, and candor in connection with the negotiation and execution of such agreements.
>
> *Id.* at 1346; *see also* 41 C.J.S. *Husband & Wife* § 87 (1991) ("Since a husband and wife do not deal at arm's length, a fiduciary duty of the highest degree is imposed in transactions between them."). Postnuptial agreements are generally scrutinized under the same standards as those applied to prenuptial agreements. See *Reese v. Reese*, 984 P.2d 987, 994-95 (Utah 1999); *D'Aston v. D'Aston*, 808 P.2d 111, 112-13 (Utah Ct. App. 1990).

Peirce, 2007 UT 7 at ¶ 20, 994 P.2d at 198-99.

This perspective extends to property divisions that would be dictated by the parties' agreement, even during the marriage or in contemplation of divorce when the

parties' might be more on guard for their self-interest. Thus, for example, in *Nunley v. Nunley*, 757 P.2d 473 (Utah Ct. App. 1988), this Court made it clear that "a property settlement agreement is not binding upon the trial court in a divorce action." *Id.* at 475 (*citing Clausen v. Clausen*, 675 P.2d 562, 564 (Utah 1988)). Similarly, in *Colman v. Colman*, 743 P.2d 782 (Utah Ct. App. 1987), this Court stated: "It is well recognized that parties' stipulation as to property rights in a divorce action, although advisory and usually followed unless the court finds it to be unfair or unreasonable, is not necessarily binding on the trial court. It is only a recommendation to be adhered to if the court believes it is fair and reasonable." *Id.* at 789. These cases all reflect the Utah Supreme Court's basic directive that it is always the trail court's prerogative "to make whatever disposition of property as it deems fair, equitable and necessary for the protection and welfare of the parties. . . ." *Naylor v. Naylor*, 563 P.2d 184, 185 (Utah 1977).[1]

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[1] To the extent the choice of law provision in the Prenuptial Agreement can be read so broadly as to require that a Utah court's entire analytical framework, and not just its interpretation of specific clauses, be subject to California law, it is worth noting that California law also leaves open the possibility for judicial review of a property dissolution even in the face of an otherwise valid prenuptial agreement. For example, in *Hall v. Hall*, 222 Cal. App. 3d 578, 586-87 (1990), the court recognized there can be equitable exceptions to strict enforcement. In that case, wife paid the husband money, stopped work, and took early Social Security in reliance on husband's promise to provide her with a house for the rest of her life. *Id.* This constituted a modification of the parties' prenuptial agreement, and contrary to the agreement there was no writing to support such a modification. The court concluded that the equitable doctrine of promissory estoppel, based on wife's part performance, barred husband from asserting the lack of a writing as a defense. In addition, referring to a postnuptial agreement, in *In re Marriage of Benson*, 171 Cal. App. 3d 907, 913 (1985) the court ruled, "Flexibility in the administration of judgments which will affect the lives of the parties far into the future, especially after lengthy marriages, is to be encouraged; in few other fields do the equities scream quite so loudly as they do in family law." California specifically holds agreements between spouses to a higher standard than commercial contracts. "[F]reedom of contract with respect to marital arrangements is tempered with statutory requirements and case law expressing social policy with respect to marriage." *In*

In this case, the trial court made no findings, and apparently gave no consideration whatsoever, to whether the ultimate outcome it imposed was just, fair and equitable to *both* parties. As a matter of basic fairness, it is inconceivable that, having agreed generally to waive all of her rights to community property, Wife would reasonably expect Husband to so manage the affairs of the entities he created to manage his post-marital business ventures (Levinius, LLC, as owner of the Sorrel River Ranch, and Flat Iron Mesa LLC, as owner of the Flat Iron subdivision lots) as to deprive her of any marital interest in those ventures.

As the Utah Supreme Court has stated: "A trial court, in the highly equitable matter of making a fair division of property in the context of a dispute that is often highly acrimonious and bitter, must take care that evasive stratagems not stand in the way of a just resolution." *Boyce v. Boyce*, 609 P.2d 928, 931 (Utah 1980). Wife respectfully submits that just such "stratagems" are involved here, where Husband takes full advantage of Wife's contributions and even allows her to be touted as an "owner" to third parties, but then relies on a strict interpretation of the Agreement to deprive her of any interest. This simply cannot pass muster for any court independently exercising its duty

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re Marriage of Bonds, 5 P.3d 815, 830 (Cal. 2000) (abrogated by statute on other grounds). Although articulated in a context where the wife was not represented by independent counsel, the California Supreme Court's basic observation remains valid: "[P]ersons, once they are married, are in a fiduciary relationship to one another so that whenever the parties enter into an agreement in which one party gains an advantage, the advantaged party bears the burden of demonstrating that the agreement was not obtained through undue influence." *Id.* at 831 (internal citation omitted). All of these precedents, in Utah and California, counsel against a slavish adherence to contract principles in the unique, fact-intensive and fundamentally equitable arena of divorce proceedings.

to ensure that a prenuptial agreement for property division, entered into some 16 years before the trial, results in a fair and equitable property division.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONSTRUING AND APPLYING THE PRENUPTIAL AGREEMENT TO DEPRIVE WIFE OF ANY SHARE IN THE WEALTH ACQUIRED DURING THE MARRIAGE.

A. The Trial Court's Conclusion That There Were No "Earnings" From Sorrel River Ranch Was Legal Error.

The trial court erred as a matter of law in narrowly construing and applying the term "earnings" in Paragraph F.2 of the Prenuptial Agreement to deprive Wife of any share of the value she helped create in the Sorrel River Ranch.

Paragraph F.2 expressly provides that post-marital "earnings," defined as "compensation for labor or services performed" (with certain exclusions that are not relevant here), "shall be community property." (Tr. Ex. 6, at p. 6, ¶ F.2) It does not require that "earnings" be paid out, simply that they be "derived from" or traceable to Husband's post-marital efforts. (*Id.*)

The term "earnings" is commonly used in California family law practice. Consistent with the plain language of the Agreement, California courts have interpreted the term "earnings" as "broader in scope than 'wages' and 'salary.'" *In re Marriage of Imperato*, 45 Cal. App. 3d 432, 437, 199 Cal. Rptr. 590, 593 (Cal. App. 1975) (holding that earnings can encompass income derived from carrying on a business) (*citing* Cal. Fam. Code § 771). Defining "earnings" as "compensation" provides even more breadth of meaning:

> The ordinary and common understanding of the word "compensation" is broad, unrestricted and encompassing: "[S]omething given or received as an equivalent for services, debt, loss, injury, suffering lack, etc." (The Random House Dict. of the English Language (2d ed. 1987) p. 417, italics added.) " Something given or received as an equivalent or as reparation for a loss, service, or debt; a recompense; an indemnity." (The American Heritage Dict. of the English Language (1976) p. 271, italics added.) "[P]ayment for value received or service rendered: REMUNERATION." (Webster's Third New Internat. Dict. of the English Language Unabridged (2002) p. 463.) "Remunerate" itself is defined as: "[T]o pay, recompense, or reward for work, trouble, etc." (The Random House Dict. of the English Language, supra, at p. 1630.)

Sturgeon v. County of Los Angeles, 167 Cal. App. 4th 630, 645, 84 Cal. Rptr. 3d 242, 254 (Cal. App. 4 Dist. 2008).

In contrast to these broad legal definitions, the trial court imposed a narrow and stringent definition that essentially equated "earnings" with "salary" – as Husband consistently contended throughout discovery and trial, claiming that because he was never paid a salary, there were no "earnings" and no community property. The trial court's acceptance of that definition empowered Husband, who controls the entity that owns the Ranch and solely makes all the financial decisions, to so conduct his affairs as to deprive Wife of the benefit of her bargain solely by paying his personal expenses (including expensive road bikes, cosmetic hair plugs and designer clothing) through the business. Not only is such a consequence unfair, it is contrary to the plain, and broad, terms in the Agreement.

The fact that Husband took no salary, and the fact that the business entity controlling the resort reported a net loss for tax purposes, is not determinative of whether there were community property "earnings." California law recognizes various ways of

recognizing "earnings" where they properly can be found to exist, even if not paid out or realized. This doctrine applies whether the earnings from the efforts of the husband during the marriage realized before or after separation. In *Zaentz v. Zaentz*, 218 Cal. App. 3d 154 (Cal. Ct. App. 1st Dist. 1990), for example, the husband had worked for a number of years prior to the parties' separation producing the movie "Amadeus." The movie was not completed and did not begin to generate ticket sales until after the parties' separation. The court held that "the community would be entitled to at least an equitable portion thereof." *Id.* at 165-66 (*internal quotations omitted*). Moreover, because the husband had not fully realized his earnings, the court based the amount of its award, at least in part, on the value of the husband's business. *Id.*

Wife's expert, although limited in his ability to perform any analysis because of the trial court's discovery rulings, sought to explain different conceptual approaches to properly determining "earnings" as an accounting matter. (R. 2558 at 505-15) By that time (the second day of trial), however, the trial court had already made up its mind, at least with respect to the "value" approach. (*See id.* at 513 ["There is not any chance I'm going to interpret earnings to mean simply value."]) The trial court simply was not open to any definition of "earnings" beyond Husband's narrow construction: Husband was not paid a salary, and the Ranch had no cumulative profits, and therefore there was no community property interest to be valued and equitably divided. In this the trial court erred, and its ruling should be reversed and remanded for proper consideration of

"earnings" from Sorrel River Ranch in light of the broad definition and appropriate equitable considerations.

B. The Trial Court's Denying Wife Half Of Husband's Income From Flat Iron Mesa Was Legal Error.

The trial court also erred as a matter of law in narrowly construing and applying Paragraph F.3 of the Agreement to deprive Wife of any share of Husband's income from the Flat Iron Mesa real estate development.

The specific language of Paragraph F.3. expressly requires only a "business venture" entered into "from and after the date of marriage from which [Husband] will receive earnings or salary therefrom (regardless of whether such earnings or salary have been derived from actual effort or services performed by [Husband] for or on behalf of the business venture)" to create community property. (Tr. Ex. 6 at p. 10, ¶ F.3) There is no dispute that Husband "entered into" Flat Iron Mesa LLC after the date of the marriage, having acquired the property in 1993 and thereafter forming the LLC. (*See* Tr. Ex. 24) There is also no dispute that Husband received $1,056,080 from Flat Iron Mesa before 2005, and a total of $1.5 million by the time of trial.[2] (Tr. Ex. 8, at 9, 12) The only questions are, is Flat Iron Mesa a "business venture," and is Husband's income from Flat Iron Mesa "earnings," as those terms are used in Paragraph F.3 of the Agreement?

First, with respect to "business venture," the Agreement does not define the term, nor does Black's Law Dictionary, nor did research reveal any California case law

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[2] As discussed below, the trial court also erred in ruling that nothing earned after 2005, when the parties separated, can be considered as part of the property division. (*See infra*, Argument Section III)

definitions. One Ohio case defines a "joint business venture" as "an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each coadventurer shall stand in the relation of principal, as well as agent, as to each of the other coadventurers." *Johnson Constr. Co. v. Kosydar*, 42 Ohio St. 2d 29, 325 N.E.2d 549, ¶ 1 (1975). This is a sensible and straightforward definition, capturing the concept of a joint effort to realize a profit from activity.

The undisputed evidence established that Flat Iron Mesa LLC is a "business venture" within any sensible definition of the term. Husband did not merely invest his funds through a brokerage or a REIT. He took the affirmative steps of establishing a business entity, appointing himself as registered agent, creating and maintaining books and records, writing checks and involving himself in business decisions – all in a business that his own tax returns ascribe to him as an occupation.

In arriving its conclusion that Flat Iron Mesa is not a "business venture," the Court ignored all these facts, as well as the express language of the Agreement that does not require any "actual effort or services" in connection with a "business venture," and concluded that Husband had not contributed anything significant other than his money. That conclusion is both contrary to the evidence and irrelevant. Husband was involved in running the venture, but the fact that he consciously created the venture is determinative.

The trial court seemed to be concerned about creating an exception to the Agreement's "general presumption" that separate property and earnings and profits were to remain separate. (*See* R. 2239-44) But of course Paragraph F.3 is *on its face* an exception to that "general presumption," and whether the exception applies is completely up to Husband and whether he decides to create a business entity or not. Having chosen to create the business entity, and to actively participate in its management by maintaining the books and records, helping to establish the sales prices of the lots and signing the checks to pay the entity's obligations, Husband brought this particular "investment" (unlike his other "passive investments" in securities and so on) within the definition of "business venture."

With respect to "earnings," again Paragraph F.3 (unlike paragraph F.2 discussed below), does not define the term, except by what it does **not** include (exceptions that are not relevant here). (*Id.*) It does not require that "earnings" be paid out; rather, it uses the future tense in creating a community property interest in any venture from which Husband "**will** receive earnings or salary." (*Id.*, emphasis added)[3] Most importantly, unlike paragraph F.2. this provision does **not** require that Husband be engaged in any actual effort in the business venture for the "earnings" to be community property; on the contrary, the earnings are community property "regardless of whether such earnings or

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[3] Husband's counsel and the trial court both dismissed this language by noting that when a premarital agreement is entered into, *everything* that is to occur during the marriage is in the future. (R. 2557 at 202-03) While that is certainly true, it does not explain why this particular language was used only in this particular paragraph and not in reference to other "earnings," and contrary to standard rules of contract construction it renders this particular language superfluous as opposed to giving it meaning.

salary have been derived from actual effort or services performed by [Robert] for or on behalf of the business venture." (*Id.*) For the same reasons discussed above, only the most restrictive interpretation of the term "earnings," one virtually calculated to deprive Wife of the benefit of the very limited exception to the exclusion of community property under the Agreement, would preclude Wife from a one-half share of the $1,056,080 in income Husband received pre-separation from Flat Iron Mesa LLC.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CUTTING OFF DISCOVERY AND EVIDENCE OF "EARNINGS" AS OF THE END OF 2005 WHEN THE PARTIES SEPARATED.

In the course of discovery, Husband objected to producing any information about his "earnings" after the parties separated at the end of 2005, relying on Section 771 of the California Family Code.[4] The trial court agreed, and excluded discovery and evidence of post-separation earnings. (*See* Tr. Ex. 4) The trial court's ruling was erroneous as a matter of law, and Wife is entitled to reversal and remand to allow discovery and consideration of evidence of Husband's post-separation earnings, including not only the additional $500,000 or so he earned from the sale of the Flat Iron Mesa lots after separation, but also, at a minimum, 2006 and 2007 earnings from the Ranch.

A. The Ruling Is Erroneous As A Matter Of California Law Governing The Marital Estate.

Contrary to this Court's ruling that "California law does not allow earnings after a couple stops living together to be treated as community property," California law is clear

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[4] Section 771 provides in pertinent part: "The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse." Cal. Fam. Code § 771(a).

that the trial court has discretion to consider post-separation earnings. Section 771 of the Family Code, which provides that "a spouse's earnings after separation are his or her separate property." Section 2552 of the Family Code, like its Utah counterpart, requires valuation of the marital estate "as near as practicable to the time of trial." In the case of *In re Marriage of Geraci*, the California appellate court discussed the "inherent tension" between these two provisions. That case makes clear that Section 771 cannot be read in isolation to automatically preclude any claim to post-separation earnings. Instead, it must be read together with Section 2552, which states the general rule that courts shall consider post-separation earnings absent notice and good cause shown. Far from tying the trial court's hands, as this Court ruled, the California statutes "give[ ] the trial court **considerable discretion to divide community property in order to assure an equitable settlement is reached**. *In re Marriage of Geraci*, 144 Cal. App. 4th 1278, 1290-91, 51 Cal. Rptr. 3d 234, 243-44 (Cal. App. 2 Dist. 2006) (emphasis added).

Even if Section 771 could be read in isolation and without regard to the nature of the earnings here to preclude any discovery into or proof of post-separation earnings, that provision is trumped by express language in the parties' Prenuptial Agreement. Paragraph F of the Agreement, "PROPERTIES OF EACH SPOUSE THAT ARE TO BE COMMUNITY," makes clear their very purpose is to trump provisions of California law that would otherwise apply with respect to the classification of Husband's earnings: "**Without** this agreement, the parties acknowledge that **all earnings or income** resulting from the personal services, skills, efforts, talent or work of the parties **during the time**

that they are married and living together could be categorized as community property under California law." (Tr. Ex. 6 at p. 9, ¶ F.1) (emphasis added) The parties stated their intent to derogate from California law and make such earnings and income separate "except as set forth hereinbelow." (*Id.*) The parties specifically agreed that Husband's "'earnings' or 'base salary,' or accumulations from such earnings or salary, derived from actual effort or employment of [Husband], **from and after the date of the marriage**, shall be community property." (*Id.* at p. 9, ¶ F.2) (emphasis added).

This language evidences that the parties (1) were aware that Husband's earnings "during the time that [the parties] are married and living together" could be community property by operation of California law, but (2) specifically agreed such earnings would be community property if they were derived at any point "from and after the date of the marriage," even if the parties were married but **not** living together, *i.e.*, separated. The parties' express agreement that the marital estate includes all earnings "from and after the date of the marriage" is controlling, and the trial court erred in cutting off discovery and proof of post-separation earnings.

B. The Ruling Is Also Erroneous As A Matter Of Utah Law Governing Alimony.

Even if this Court's reading of California law were correct, Wife would still be entitled to inquire into Husband's post-separation earnings, since they bear on the determination of alimony, which is not covered by the parties' Prenuptial Agreement and which is governed by Utah law. This is so because this case pattern falls squarely within Utah Code Ann. § 30-3-5(8)(e), which provides as follows:

> When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change *shall* be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court *may* make a compensating adjustment in dividing the marital property and awarding alimony.

Utah Code Ann. § 30-3-5(8)(e) (emphasis added).

Husband consistently took the position that he has no "earnings," and there is no "marital estate," because the Ranch never had a profit until 2005. Presumably, after all the hard work and investment of the parties, after achieving profitability in 2005 the Ranch continued to prosper and earn even greater profits. Indeed, it was revealed shortly before trial that Husband was in negotiations to sell the Ranch. (R. 2558 at 475) All of the evidence suggests that, after Husband's investing some $12 million and both parties' investing incredible "sweat equity," as of the time of the divorce Husband stood "on the threshold of a major change" in his income "due to the collective efforts of both," and the trial court was **required** to consider that change "in determining the amount of alimony." (*See infra* at Argument, Section V) The effect of the trial court's discovery ruling, however, was to preclude Wife from even gathering evidence to demonstrate and quantify that change, evidence that indisputably falls within the scope of Rule 26. The trial court's ruling was therefore erroneous as a matter of Utah law applicable to the alimony determination and constitutes a manifest injustice.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO BASE WIFE'S ALIMONY AWARD ON THE LIFESTYLE ACHIEVED WHEN THE PARTIES LIVED IN DEER VALLEY.

There was no dispute alimony was to be considered under Utah law. Utah law requires that the determination of alimony begin with a consideration of Wife's needs. *Batty v. Batty*, 2006 UT App. 506, ¶ 5, 153 P.3d 827. Wife's needs are not what she needs for survival, and not based on what she could get by with on a post-separation budget. *Id.* Rather, they are based on the standard of living that parties had during the time of the marriage. *Id. See* Utah Code Ann. § 30-3-5(8)(c) ("As a general rule, the court should look to the standard of living existing at the time of separation, in determining alimony"). Wife's expert provided a reasonable and appropriate alimony calculation comprised of pre-tax monthly expenses of $19,707, plus estimated income tax of $4,832 and a home mortgage of $6,880.

There is an important additional consideration here, based not only on the equities but also on the language of the parties' Prenuptial Agreement. In terms of the equities, it is clear Wife agreed to leave Southern California and forego her career to move to Utah and devote her efforts to the benefit of the marital estate. The Agreement provides:

> in the event the parties eliminate spending any extended time in Southern California and reside in a rural area, if Hope is still pursuing her acting and/or modeling career, she will potentially be unable to continue pursuing same under the new circumstances and, in the unlikely event the parties terminate their relationship, the ***court may take this into consideration regarding any support issue***, notwithstanding the fact that this conceivable could be a marriage of short duration.

(Tr. Ex. 6 at p. 40, ¶ U) (emphasis added) The plain intent of this provision is to provide Wife with compensation for uprooting herself, foregoing her own opportunities and joining Husband.

Wife did that not just once, but twice – first in moving from Los Angeles to Deer Valley, and second in moving from Deer Valley to Moab. Rather than take that into account, however, the trial court disparaged her career prospects and essentially "capped" her lifestyle at what the parties worked to achieve at the Ranch. It would be more consistent with the letter and the intent of the above provision to peg the parties' lifestyle at what they enjoyed in Deer Valley, because that, which was beyond even the luxury resort lifestyle available at the Sorrel River Ranch, is the nearest analog to what Wife gave up to relocate to a remote rural area to accommodate Husband's desires for a lifestyle change.

V. THE TRIAL COURT ERRED IN FAILING TO MAKE A COMPENSATING ADJUSTMENT IN ALIMONY AND/OR PROPERTY DIVISION BASED ON WIFE'S CONTRIBUTIONS TO HUSBAND'S GREATLY INCREASED EARNING CAPACITY.

As discussed above, Utah law provides that in making an appropriate alimony award and property division the trial court must consider, among other factors, "whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage." *See* Utah Code Ann. § 30-3-5(8)(a)(vii). Similarly, Utah law provides that in fashioning an appropriate property division the trial court must

consider what the parties contributed or sacrificed because of the marriage. *See* Utah Code Ann. § 30-3-5(1); *Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987).

The importance of considering these facts was articulated and underscored in the case of *Martinez v. Martinez*, 818 P.2d 538 (Utah 1991). In that case the Supreme Court recognized that where one spouse "invests" her own time, labor and earnings and otherwise sacrifices for future hoped-for improvements in standard of living to be realized upon the other spouse's obtaining a professional or advanced degree that enhances his earning capacity, equity requires that the other spouse not deny the "investing" spouse the enhanced standard of living attributable in part to her own efforts during the marriage, but instead that the "investing" spouse enjoy a fair return on her "investment" when the marriage ends before the investment pays off. *See Martinez*, 818 P.2d at 542, 544; *see also Gardner v. Gardner*, 748 P.2d 1076, 1078 (Utah 1988).

The evidence at trial established exactly the fact pattern that these important principles and statutory mandates address. Husband testified to post-separation earnings derived from the Flat Iron Mesa development and to the pending sale of the Sorrel River Ranch. The evidence established that Wife expended direct efforts for the benefit of Husband's business ventures. The evidence also established that Wife indirectly contributed to the business ventures by rearing Calli Jo and managing the parties' household, allowing Husband to work in excess of 100 hours per week. Husband insisted that the parties separate just prior to his realization of substantial earnings from at least two business ventures. The trial court erred in failing to recognize Wife's contribution to

the post-separation earnings through an enhanced alimony award. *See Burke*, 733 P.2d at 135 ("Of particular concern in a case such as this is whether one spouse has made any contribution toward the growth of the separate assets for the other spouse and whether the assets were accumulated or enhanced by the joint efforts of the parties.") For the reasons set forth herein, the Court should enhance the property distribution and alimony awarded to Wife to reflect anticipated enhancement in Husband's income due to her efforts.

VI. THE TRIAL COURT ERRED AS A MATTER OF LAW IN REQUIRING WIFE TO PAY HUSBAND'S ATTORNEYS' FEES UNDER THE PRENUPTIAL AGREEEMNT

The trial court erred in concluding it was *required* as a matter of law to award Husband his attorneys' fees. Indeed, such a rigid construction would render the attorneys' fees provision of the Agreement unenforceable because it conflicts with this Court's equitable powers, Utah statutes and public policy.

In *Reese*, the Supreme Court reiterated that "the general principle derived from our case law is that spouses or prospective spouses may make binding contracts with each other and arrange their affairs as they see fit, insofar as the negotiations are conducted in good faith, as described in *In re Beesley,* **and do not unreasonably constrain the court's equitable and statutory duties**." 1999 UT 75 at ¶ 25, 984 P.2d at 994-995 (emphasis added). The Utah Uniform Premarital Agreement Act itself contains this important limitation on the parties' freedom of contract, since it allows parties to contract with respect to any matter, "including their personal rights and obligations, **not in violation of public policy**." Utah Code Ann. § 30-8-4(g) (emphasis added).

Utah's public policy in this area is clearly set forth in the Utah statutes and rules governing awards of attorneys' fees: they are to be awarded based on the requesting party's need and the parties' respective ability to pay, so as to allow both parties to pursue their claims and defenses. *See Rudman*, 812 P.2d at 77 ("The decision to award fees rests within the sound discretion of the trial court, but . . . the decision must be based on evidence of financial need and reasonableness."); Utah R. Civ. P. 102. The important public policy of giving both parties the chance to present their claims and defenses would be wholly frustrated if parties could by a "prevailing party" clause in a premarital agreement preclude the trial court from exercising its discretion to award fees based on the established standards of need and ability to pay. Indeed, the non-monied party would always be deterred from pressing any claim under such an agreement, and would essentially be forced to acquiesce in the monied party's interpretation, to forestall the possibility of a financially disastrous outcome such as the one visited upon Wife in this case. Clearly the Prenuptial Agreement in this case cannot be so construed without violating the Court's equitable discretion and Utah statutes and public policy.[5]

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[5] "The enforceability of a provision of a prenuptial agreement waiving the right to seek an award of an attorney's fee presents a clash of two competing public policies-that in favor of resolving marital issues by agreement and that in favor of assuring that matrimonial matters are determined by parties operating on a level playing field." *Kessler v. Kessler*, 33 A.D.3d 42, 45, 818 N.Y.S.2d 571 (N.Y. App. Div. 2006). "The determination as to whether or not a provision waiving the right to seek an award of an attorney's fee is enforceable must be made on a case-by-case basis after weighing the competing public policy interests in light of all relevant facts and circumstances both at the time the agreement was entered and at the time it is to be enforced. If, upon such an inquiry, the court determines that enforcement of the provision would preclude the non-monied spouse from carrying on or defending a matrimonial action or proceeding as justice requires, the provision may be held unenforceable." *Id.* at 47-48. *See also Mulhern v. Mulhern*,

The trial court's ruling was evidently based on a fundamentally flawed elevation of a certain interpretation of the parties' Prenuptial Agreement over the primary obligation to do equity in divorce matters, reflected in the trial court's belief that it "*must award* [Husband] his fees in connection with the dispute over the application of the [Prenuptial] Agreement" (R. 2255, emphasis added) and that the Agreement "*requires* that the prevailing party in a dispute over the effect of the agreement recovers attorney fees" (R. 2333) The trial court's ruling on this issue is erroneous.

The Utah Uniform Premarital Agreement Act (the "Act") does not specifically address attorney fees, but it does provide that it must be "applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it." Utah Code Ann. § 30-8-9. Other state courts have interpreted attorneys' fees provisions as within subsection (g) and require that the provisions not be contrary to public policy. *See, e.g. Hardee v. Hardee*, 558 S.E.2d 264, 269 (S.C. App. 2001) ; *In re Marriage of Ikelar*, 161 P.3d 663, 667 (Colo. 2007).

In *Marriage of Ikelar*, the Colorado Supreme Court ruled that in passing the Colorado's Marital Agreement Act, modeled after the Uniform Premarital Agreement Act, the Colorado legislature "did not intend to preclude courts from reviewing waivers of attorney's fees in marital agreements for unconscionability at the time of

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446 So.2d 1124, 1125 (Fla. App. 1984) ("the denial of attorney fees based solely on the agreement waiver was reversible error. [T]he trial court should have adjudicated the issue, without bar of the agreement, considering all the usual pertinent criteria such as the respective financial circumstances of the parties, that is to say, the need of the wife and the ability of the husband to pay. It is basic that the purpose of awarding attorney fees is to place the spouses on a financial parity for the prosecution or defense of the dissolution action."

enforcement." *Id.,* 161 P.3d at 667; *see also Prell v. Silverstein*, 162 P.3d 2, 12-13 (Hawaii App. 2007) (unconscionability is a plausible ground for not upholding a premarital agreement). At the time of the agreement both husband and wife worked, but at the time of the court's ruling, the couple had triplets, wife no longer worked, her health had deteriorated, and husband had a net worth of $10 million. *Ikeler,* 161 P.3d at 666 n.3. Accordingly, despite a premarital agreement wherein the parties waived the right to spousal support and attorneys' fees, the court ruled that at the time of the enforcement, the provision was unconscionable and therefore unenforceable. *Id.*, 161 P.3d at 670.

These important public policy considerations require that trial courts not be *compelled* to award fees based on a "prevailing party" clause in a prenuptial agreement, but remain free to enter an award that is just and equitable in light of all the facts and circumstances as they exist at the time of trial.

VII. THE TRIAL COURT ERRED AS A MATTER OF LAW IN REQUIRING WIFE TO PAY HER OWN ATTORNEYS' FEES WITHOUT REGARD TO THE PARTIES' RELATIVE ABILITY TO PAY.

In a domestic case, the trial court "may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action." Utah Code Ann. § 33-3-3(1). "Such an award must be based on sufficient findings addressing the financial need of the recipient spouse; the ability of the other spouse to pay; and the reasonableness of the fees." *See Rehn v. Rehn,* 1999 UT App. 41, ¶ 22, 974 P.2d 306; Utah R. Civ. P. 102. The court must also consider the relative incomes of the parties. *Rehn*, 1999 UT App. 41, at ¶ 23.

Utah law is clear that attorneys' fees are to be awarded based on the reasonableness of the fees and the parties' relative abilities to pay. Utah Code Ann. § 30-3-4; Utah R. Civ. P. 102; *Muir v. Muir*, 841 P.2d 736, 741 (Utah Ct. App. 1992) ("In order to award attorney fees, the trial court must find (1) the requesting party is in need of financial assistance; (2) the requested fees are reasonable; and (3) the other spouse has the ability to pay."); *Rudman,* 812 P.2d at 77 ("The decision to award fees rests within the sound discretion of the trial court, but, as with alimony awards, the decision must be based on evidence of financial need and reasonableness."). "'[A]n [attorney fee] award must be based on sufficient findings,' and the failure to make such findings 'requires remand for more detailed findings by the trial court.'" *Davis v. Davis*, 2003 UT App 282, ¶ 14, 76 P.3d 716 (citations omitted).

In this case, the trial court's ruling requires Wife to use $30,000 of her own resources toward her fees, including all fees incurred after June 30, 2007. The trial court cannot make these rulings without first making the necessary findings. *Bell v. Bell,* 810 P.2d 489, 493 (Utah Ct. App. 1991) (remanding for redetermination of attorney fees when court failed to address wife's need or husband's ability to pay fees); *Willey v. Willey*, 866 P.2d 547, 556 (Utah Ct. App. 1993) (remanding where "the trial court made no findings regarding either [wife's] ability to pay her own attorney fees or [husband's] ability to pay her fees").

To the extent the trial court made any of the relevant findings in this case, they support an award of attorneys' fees to Wife. Specifically, the court found that Husband

"clearly has the ability to pay all of [Wife's] fees." (R. 2517) Wife does not have any resources to pay her own attorneys' fees, let alone Husband's, beyond $30,000 from the $35,000 investment account that is her only savings for retirement. (R. 2254) To the extent the court made findings on reasonableness, it concluded both parties' attorneys' fees were reasonably and necessarily incurred in that they are comparable. (R. 2253)

Far from allowing Wife to make the "gradual adjustment to a different lifestyle" (R. 2252), the effect of the trial court's ruling on attorneys' fees has been to force Wife to make immediate and dramatic adjustments to her post-separation lifestyle, which is already substantially diminished from the marital lifestyle. Even if Wife could somehow manage those adjustments, the effect on Calli Jo of having one parent in dire financial straits and the other carrying on a luxury lifestyle as before, can only be incalculable emotional damage and stress. The trial court dismissively noted its ruling will require Wife to "curtail her living standard," but that is just "the natural consequence of her decision to pursue a claim for community property when the clear intention of the agreement she signed before marrying was to sharply curtail the creation of community property." (R. 2333). The trial court's overall tone and tenor suggests its disposition of the parties' claims in this case was based not on fairness and equity, but on a desire to punish Wife merely for exercising her legal right to seek some reasonable share of the vast wealth she helped to create through an application of the Prenuptial Agreement.

CONCLUSION

Based on the foregoing, Wife respectfully asks that this Court reverse the trial court's property division, alimony and attorneys' fees rulings as contrary to law and an abuse of discretion and remand with instructions to enter an alimony award and a property division consistent with established legal and equitable requirements. Wife also asks that this Court award her attorneys' fees incurred on appeal.

DATED this 21st day of November, 2008.

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NO ADDENDUM IS NECESSARY UNDER RULE 24(a)(11), UTAH RULES OF APPELLATE PROCEDURE

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2008, two true and correct copies of the foregoing BRIEF OF APPELLANT were sent by United States Mail, postage prepaid, addressed to the following:

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