

## Utah Standards of Appellate Review – Third Edition

by Norman H. Jackson and Lisa Broderick Thornton

### PREFACE TO THE THIRD EDITION: 2010/2011

This new edition of Judge Jackson’s Utah Standards of Appellate Review revises and updates two prior *Utah Bar Journal* articles. The first was designated as a Collector’s Issue, Vol. 7, No. 8, October 1994. The second was published as a Revised edition, Vol. 12, No. 8, October 1999. Judge Jackson discovered early in his appellate practice that there was no ready reference where the standard of review for a particular issue could be located. Thus, one of his initial acts as an appellate judge was to ask his first law clerk, Annina Mitchell, to begin compiling a summary of standards of review. In due course, that summary grew and was circulated at the appellate courts, the attorney general’s office, and appellate practice seminars. Finally, it was cited by an attorney as legal authority in an appellant’s brief at the Utah Court of Appeals. Accordingly, the first edition was compiled and published in 1994, seven years after Utah became the 37th state to have a two court appellate system. The second edition was published in 1999 and this third edition arrives over a decade later. To access the two prior articles, go to: <http://www.utahbar.org/barjournal/frequently-requested-articles.html>. Lisa Thornton, Christensen Thornton, PLLC, has joined Judge Jackson as co-author of this series. Previously, she was the editor of the final draft of the first edition. The current edition will be published in a series of successive articles. However, the Outline of Contents below is the outline for the series. Thus, you should keep each article so your set will be complete. This first article provides an overview, commentary, analysis, and proceeds with text for the Outline to the end of Challenging Findings of Fact under Appeals from Trial Courts.

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### FOREWORD

In 1994, Judge Jackson wrote, “I recommend careful study of the following Utah appellate opinions: *State v. Pena*, 869 P.2d 932 (Utah 1994); *State v. Thurman*, 846 P.2d 1256 (Utah 1993); *State v. Ramirez*, 817 P.2d 774 (Utah 1991); *State v. Sykes*, 840 P.2d 825 (Utah [Ct.] App. 1992); [and] *State v. Vigil*, 815 P.2d 1296 (Utah [Ct.] App. 1991).” Judge Norman H. Jackson, *Utah Standards of Appellate Review*, 7 UTAH BAR J. 9, 11 (1994). In 1999, Judge Jackson stated that though the four cases are all search and seizure cases,

[t]hose cases remain essential to understanding how standards of review developed after the court of appeals joined the Utah appellate system. Moreover, they show the policy considerations and systemic concerns in keeping a proper balance between trial court discretion and appellate court deference. *Pena*, a landmark standard-of-review case, was published shortly before the 1994 article. In *Drake v. Industrial Commission*, 939 P.2d 177 (Utah 1997), counsel adroitly argued *Pena*, not to support the existing standard, but to change it. *See id.* at 180-82. When counsel convinced the Supreme Court to change the standard of review, he won the case. *See id.* at 180-84. *Drake* reveals astute appellate advocacy at its very best. Familiarity with *Pena*’s prolific progeny, together with other standard-of-review law, will allow you to navigate carefully through the seas of appellate advocacy. My goal has been to help you by compiling a “users manual” or “ready reference” with which to begin charting your client’s course.

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Judge Norman H. Jackson, *Utah Standards of Appellate Review – Revised*, 19 UTAH BAR J. 8, 8 (1999). The authors hope that this series of articles will provide meaningful direction as you pilot your clients on their appellate journey.

## INTRODUCTION

### To Appeal or Not to Appeal – Thinking About Reversal Rates

An attorney's initial evaluation of whether to file an appeal is the most consequential of appellate activities. Attorneys who do not properly assess the appellate worthiness of their cases do a disservice to themselves, their clients, and Utah's appellate system. Attorneys should not file appeals unless their cases present realistic reasons for reversing significant and substantive trial court rulings. Low reversal rates in Utah reveal the need for attorneys to be more careful and cautious about their decision to appeal. Justice Cardozo made a similar observation some time ago. He estimated at least 90% of cases appealed “could not, with semblance of reason, be decided in any way but one,” i.e., affirmed. Ruggero J. Aldisert, *Opinion Writing* 111 n.20 (1990) (quoting Benjamin Cardozo, *Growth of the Law* 60 (1924)). In other words, he estimated that no more than 10% of cases appealed would be reversed. For the period ending March 31, 2009, the reversal rate for all U.S. Courts of Appeals was 9.6%. For the same period the Tenth Circuit reversal rate was 6.8%. Reversal rates at Utah Appellate Courts are even lower. During 1998, 577 appeals were filed with the Utah Supreme Court. In the same year, 40 cases resulted in some measure of reversal. The reversal rate was a mere 7%. In 1998, 711 appeals were filed in the Utah Court of Appeals and 50 reversals occurred, i.e., 7%. Utah Court of Appeals reversal rates for 2005-2007 continued to average 7%. In 2007, 564 appeals were filed in the Utah Supreme Court and 30 were reversed, i.e. 5.3%. The rate was also 5.3% for 2009. These reversal rates clearly demonstrate that many Utah attorneys fail to reach a realistic conclusion when they decide to file an appeal. They are as “[t]he metaphorical descendants of Don Quixote . . . out in full force tilting at windmills, seeking to overturn trial results that had been preordained from the moment the complaints were filed.” Aldisert, *supra*, at 5. Attorneys need to be intellectually and dispassionately objective about the fact that trial court “determinations for the most part are final and binding, irrespective of impressive appellate briefs, thick volumes of records or eloquent argument. This reality of the judicial process is an aspect of the law lost upon most laypersons and many lawyers.” *Id.* at 54. Here, for attorneys with prospective appeals, we present three essential “reality checks” to use in evaluating your odds for success on appeal. For brevity, the words “trial court” or “lower tribunal” are meant to include administrative agencies.

## REALITY CHECKS

**Reality Check #1: Reversible Error.** Has the trial court committed reversible error? “Error” that does not affect substantial rights of the parties is not reversible error, but harmless error. *See* UTAH R. CIV. P. 61; UTAH R. CRIM. P. 30(a); *accord State v. Dominguez*, 2009 UT App 73, ¶ 12, 206 P.3d 640; *State v. Mora*, 2003 UT App 117, ¶ 22, 69 P.3d 838. This rule requires the appellant to show not only that an error occurred, but that it was “substantial and prejudicial.” *See Olson v. Olson*, 2010 UT App 22, ¶ 7, 226 P.3d 751; *see Jensen v. Jensen*, 2008 UT App 392, ¶ 7, 197 P.3d 117. To demonstrate prejudice, appellants must show reasonable likelihood that without the error, there would have been a different result. *See Morra v. Grand County*, 2010 UT 21, ¶ 36, 230 P.3d 1022; *State v. Johnson*, 2009 UT App 382, ¶ 37, 224 P.3d 720; *State v. Davis*, 2007 UT App 13, ¶¶ 15-21, 155 P.3d 909. This likelihood must be high enough to undermine confidence in the outcome. *See State v. Ott*, 2010 UT 1, ¶ 40, – P.3d –; *Taylor v. State*, 2007 UT 12, ¶ 56, 156 P.3d 739; *State v. Lafferty*, 2001 UT 19, ¶ 35, 20 P.3d 342. Utah Rule of Civil Procedure 61 is a mandate to courts – trial and appellate – not to disturb a verdict or judgment unless it is clear that refusing to do so would be substantially unjust. “Thus, the integrity of verdicts, orders, and judgments is the rule and disturbance thereof the exception.” 7 James W. Moore & Jo D. Lucas, *Moore’s Federal Practice* § 61.03 (2d ed. 1993). Counsel should be mindful that no party, whether in a civil, criminal, or administrative agency case, is entitled to a trial or hearing free of all error. Thus, unless the lower tribunal has committed reversible error, one should not pursue an appeal.

**Reality Check #2: Preservation.** Did trial counsel preserve the error or issue for appellate review? The rationale for “preservation” is that the trial court, in fairness, ought to have the chance to correct its own errors. *See Arbogast Family Trust v. River*, 2008 UT App 277, ¶ 10, 191 P.3d 39 (stating preservation rule exists to give trial court an opportunity to address claimed error and correct it). Claims of error should be timely raised so thoughtful and probing analysis can begin in the early stages of the proceeding. If not, the claim is waived. *See Utah Dept. of Transp. v. Ivers*, 2009 UT 56, ¶¶ 28-30, 218 P.3d 583; *Arbogast*, 2008 UT App 277, ¶ 10; *State v. Biggs*, 2007 UT App 261, ¶ 7 n.4, 167 P.3d 544. When the trial court has not considered a matter, the appellate court has nothing to review (plain error and rare and exceptional circumstances aside). *See State v. Rhinehart*, 2007 UT 61, ¶ 21, 167 P.3d 1046; *In re D.N.*, 2003 UT App 262, ¶ 1 n.1, 76 P.3d 194. Specific and timely objections and motions must first be made before the lower tribunal and then identified for the appellate court. *See H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 25, 203 P.3d 943; *State v. Low*, 2008 UT 58, ¶ 17, 192 P.3d 867. Further, “issues not raised in the court of appeals may not be raised on certiorari [to the supreme court] unless the issue arose for the first time out of the court of

appeals' decision.” *Collins v. Sandy City Bd. of Adjustment*, 2002 UT 77, ¶ 19 n.3, 52 P.3d 1267 (quoting *DeBry v. Noble*, 889 P.2d 428, 444 (Utah 1995)). Through the years, many attorneys have overlooked this requirement, thus casting the burden on appellate courts to search the record for issue preservation. Now, Utah Rule of Appellate Procedure 24(a)(5)(A) requires counsel to cite to the record in briefs showing preservation in the trial court of each issue raised or appealed. If the issue was not preserved, counsel must state other valid grounds for review. See UTAH R. CRIM. P. 12(f); UTAH R. APP. P. 24(a)(5)(B). Counsel must search the record and confirm “preservation” of the suspected error. When it has not been preserved, an appeal has virtually no chance of success. If your case satisfies reality checks #1 and #2, turn your scrutiny to standards of review, your final checkpoint.

**Reality Check #3: Standard of Review Burden.** Will this challenge of the trial court’s action satisfy the burden imposed by appellate standards of review? The appellate process consists of just three types of review. An attorney should forego filing an appeal unless he or she can objectively pursue one or more of the following three challenges:

(1) Challenge of Factual Findings: The appellant must show material findings are clearly erroneous by marshaling all evidence supporting the findings, then showing this evidence is legally insufficient to support the findings when viewed in a light most favorable to the trial court’s findings. See *Gilmor v. Family Link, LLC*, 2010 UT App 2, ¶ 19, 224 P.3d 741 (stating clearly erroneous standard of review); *Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177 (stating marshaling requirement). For example, a challenge to findings of fact may be framed in written and oral arguments as follows: “The trial court’s finding that appellant breached its duty to appellee is clearly erroneous.”

(2) Challenge of Discretionary Rulings: The appellant must show the trial court exceeded the measure of discretion allotted or exceeded the boundaries set by principles or rules of law, see *Utah County v. Butler*, 2006 UT App 444, ¶ 7, 147 P.3d 963, by showing the decision exceeds the limits of reasonability, see *State v. Brink*, 2007 UT App 353, ¶ 4, 173 P.3d 183, or by showing it is a “capricious and arbitrary action.” *Kelley v. Kelley*, 2000 UT App 236, ¶ 32, 9 P.3d 171. The term of art describing this kind of trial court action is “abuse of discretion.” For example, a challenge to discretionary rulings may be framed in written and oral arguments as follows: “The trial court abused its discretion when it denied appellant’s motion for a new trial.” See the section below titled “Metaphors for Measuring Discretion vs. Deference.”

(3) Challenge of Conclusions of Law: The appellant must show legal error by the trial court in its use of fixed principles and rules of law, demonstrating the trial court incorrectly selected,

interpreted, or applied the law. See *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). For example, a challenge to a court’s conclusion of law may be framed in written and oral arguments as follows: “The trial court incorrectly interpreted the statute’s plain language.” Vague assertions of trial court “error” or “mistake” and other similar challenges to trial court action will place a case among the high percentage that simply should not be appealed in the first place. Utah Rule of Appellate Procedure 24(a)(5) requires attorneys to identify the standard of review for each issue appealed. Further, attorneys should apply the standard of review in the legal analysis set forth in their briefs.

To summarize, an attorney can realistically determine the odds of success on appeal by prudently applying the three-point test at the outset. Attorneys who conduct proper reality checking of cases will select cases with high odds for winning on appeal. Appeals without reversible error, preservation, and the criteria for the standard of review are not likely to succeed regardless of careful briefing and presentation of oral arguments. Rather, success on appeal turns primarily on careful analysis of the principles set forth above. Attorneys who use the three-point test will be more likely to file appeals deemed worthy to reverse the trial court.

#### METAPHORS FOR MEASURING DISCRETION VS. DEFERENCE

*Pena* introduced two new and distinct discretion metaphors into Utah’s then limited universe of standard of review law: a spectrum and a pasture. Spectrum comes to us from the law of physics and represents the range of colors produced by passing a white light through a prism or lens. It is difficult to graphically illustrate the range of a rainbow in black and white. Thus, opinion writers have adopted words such as “scope, length, width, narrow, and degrees” when attempting to analogize this metaphor to judicial discretion. At times, their task has seemed to be as elusive as chasing rainbows. *Pena* conceded that the best we can do is to recognize that the spectrum of discretion exists and that the “closeness of appellate review . . . runs the entire length of this spectrum.” *State v. Pena*, 869 P.2d 932, 938 (Utah 1994). It has been described as a “sliding scale of scrutiny” in a Utah Law Review article. Michael J. Wilkins, et al., *A “Primer” in Utah State Appellate Practice*, 2000 UTAH L. REV. 111, 129 (2000).

On the other hand, *Pena*’s pasture metaphor proposes visual space bounded by fences and boundaries. However, the original pasture is not permanently fenced with pitchy pine or cedar posts planted in deep rocky holes with log pole panels all tied together with heavy duty wire. Rather, the boundaries of discretion are temporary and flexible. They can be moved from time to time and place to place much like the light metal fence panels produced by Powder River. And it seems that the pasture has been on a side-hill with a seep of water creating a slippery slope for opinion writers. Our

first edition has visual illustrations for both of Pena’s metaphors. Because of the limitations described, neither is alleged to have attained perfection. However, each provides some useful perception and understanding of these concepts which have driven the development of Utah Standard of Review law for the past 16 years.

First, the spectrum of discretion suggests use of a prism or lens to allocate “power and responsibility between the trial courts and the appellate courts.” The title of our first illustration is – Standards of Appellate Review at a Glance. The subtitle is – The power of the lens through which an appellate court may examine an issue. The illustration depicts three lenses of varying power. They demonstrate that the appellate process is reduced to three types of review: (1) The **Fact Lens** represents – Great Deference to the trial court or administrative agency on review of factual findings. The question asked is – was the determination clearly erroneous? Also, factual findings must be supported by adequate evidence. (2) The **Discretion Lens** represents – Some Degree of Deference to the trial court is given when reviewing the exercise of lower court discretion. The question asked is – does the decision fall within the measure of discretion allotted? Thus, the decision must be within the boundaries set by principles or rules of law. (3) The **Law Lens** – No Deference given to the trial court on review of conclusions of law. The question asked is – was there legal error? The issue is governed by fixed principles and rules of law.

Our second illustration is a graphic drawing depicting a pastoral scene. Distant mountains with a few trees at the base form the background. In the center foreground is the corner of a fence with sturdy posts and two rails of lumber. A rough hewn board inscribed with the words “Pena’s Pasture” is attached to the fence. The visible fence encloses three sides of a clear area in front and large trees at the back. Because the ground slopes to the rear and the right side of the scene, the view suggests that the pasture is not fenced at the back. Inside the fence is a tractor named “Discretion.” A driver is seated at the controls ready to explore and measure the nature and extent of the pasture and perhaps do some plowing. The 2004 case of *State v. Brake*, 2004 UT 95, ¶ 13, 103 P.3d 699, states that the “pasture is judicial discretion, and is bounded by fences which reduce or enlarge access to the available crop of discretion”; and that the “fence line is *long* for pure questions of fact and *narrow* for questions of law.” *Id.* (emphasis added). The court states that mixed questions pose a challenge to “those responsible for placing the fence lines *along* the spectrum of discretion.” *Id.* (emphasis added). Thus, use of these metaphors and this mixing of the metaphors, opens standard of review opportunities for the astute appellate advocate. That is, *Pena* and its progeny

## Standards of Appellate Review at a Glance

(The power of the lens through which an appellate court may examine an issue)

### 1. FACT LENS Great Deference

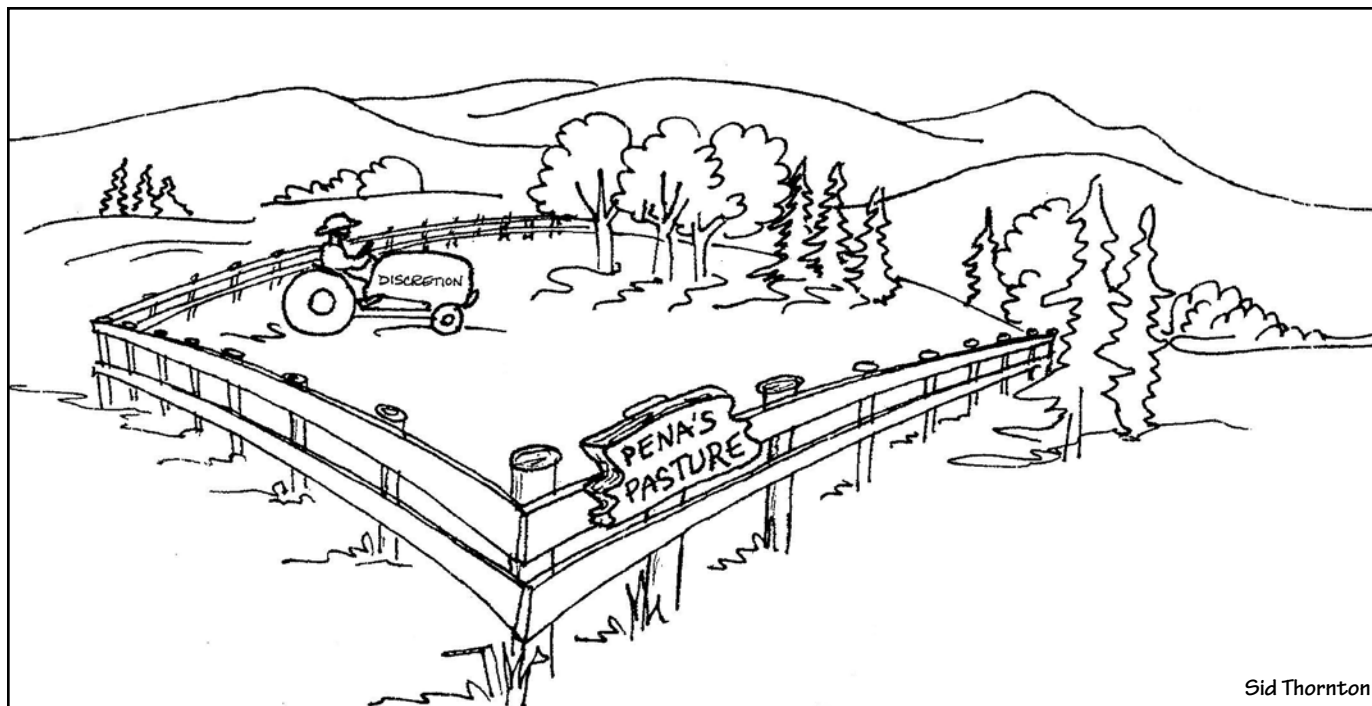
Was determination clearly erroneous?  
Factual findings must be supported by adequate evidence.

### 2. DISCRETION LENS Some Deference

Does decision fall within measure of discretion allotted?  
The decision must be within boundary set by principles of rules of law.

### 3. LAW LENS No Deference

Was there legal error?  
The issue is governed by fixed principles and rules.



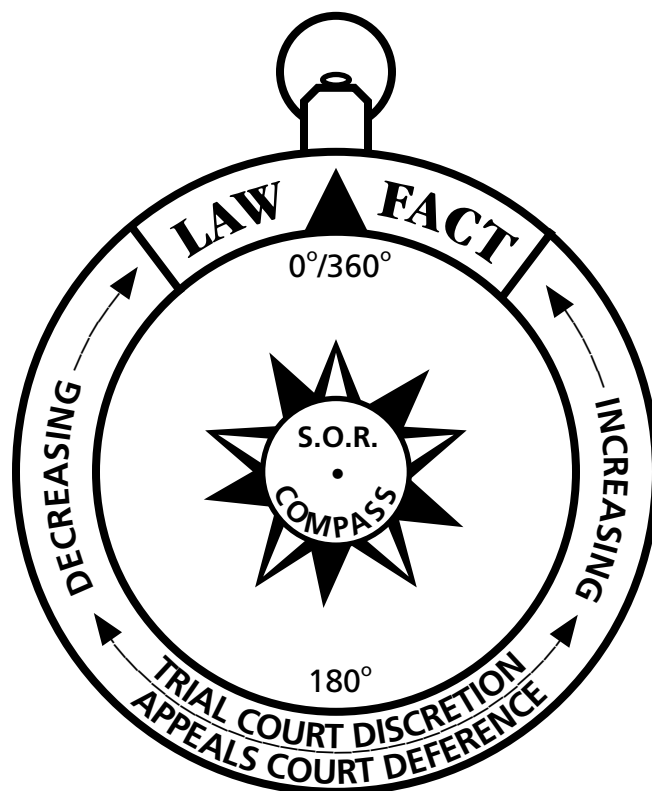
Sid Thornton

have created uncertainty. And uncertainty provides “elbow room” sufficient to bring about change in standards of review. See *Drake v. Indus. Comm’n*, 939 P.2d 177 (Utah 1997).

In *Brake*, the Utah Supreme Court noted in a 3-2 opinion that it had already altered the standard of review in search and seizure cases without saying so. See *Brake*, 2004 UT 95, ¶ 15. Thus, the court announced abandonment of the standard, which extended “some deference” to the application of law to the underlying factual findings and moved to non-deferential review. See *id.* The court utilized pasture, fence line, crop, and spectrum analysis to reach this conclusion, and also commented that it has an unresolved debate about whether to “chart our own course” via the Utah Constitution or the Federal Fourth Amendment. *Id.* ¶ 16 n.2. That phrase directs attention to the Standards of Appellate Review Compass introduced and illustrated in our 1999 article – and again on the previous page of this article. In 2005, the court analyzed standards of review in a jury verdict negligence case. See *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325. The court stated “[t]o the extent that *Pena* describes a two-dimensional standard of review universe that can be navigated using the coordinates of law and fact, the treatment of objective standards in jury trials exposes its limitations.” *Id.* ¶ 74. “Such a two-dimensional interpretation does not account for other important review considerations which lend breadth and depth to the review selection enterprise.” *Id.* The court noted that in *Pena*, the focus was where to place the reasonable suspicion inquiry on the “fact versus law continuum.” *Id.* ¶ 75. And the court observed that measuring the “ratio” of law to fact, placing it on

## Standards of Appellate Review Compass

(An illustration of the relationship between the appellate court’s deference and the trial court’s discretion.)



a “linear scale,” and applying it to a particular point did not work well when reviewing a jury verdict. *See id.* ¶ 76. Thus, the court concluded that it did not present the “variety of options” available for the application of discretion as when performing “Pena-like” analysis. *Id.*

In 2006, the court confirmed that “[w]e consider multiple factors when determining how much deference to grant a district court’s application of law to facts.” *Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 16, 133 P.3d 382 (citing *Jeff v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998)). The court noted that it typically grants “some level” of deference to the lower court when reviewing mixed questions. *See id.* ¶ 17. *Searle* involved review of a district court review of an informal decision of the State Engineer. The third issue on appeal dealt with the standard of review for the trial court’s rejection of a change application based on the probability that a vested water right would be impaired by the proposed use. The opinion identified this as a mixed question and stated that the measure of discretion afforded “varies” according to the issue being reviewed. *See id.* ¶ 16. The court conducted its analysis using the “three Pena factors”: (1) the complexity and variation of the facts; (2) whether the context is novel or new; and (3) district court observations of witness demeanor and credibility versus the adequacy of the record. *See id.* ¶¶ 16-17. However, due to the important public policy concerning water rights, the court deemed it proper that the district court’s discretion be “somewhat” constrained, and proceeded with its review. *See id.* ¶ 18.

A few months later, the court added “policy reasons” as factor 4 for review of mixed questions. *See State v. Virgin*, 2006 UT 29, ¶ 28, 137 P.3d 787. *Virgin* dealt with a magistrate’s declining bindover because the evidence lacked sufficient credibility and reliability to form a reasonable belief that the alleged offense occurred, obviously an area warranting public policy concerns. That same year, the court rearranged and refined the factors back to three. *See State v. Levin*, 2006 UT 50, ¶ 3, 144 P.3d 1096. Factor 2 above was eliminated, factor 3 was modified as 2 and factor 4 became factor 3. *See id.* ¶ 25-31. The court stated that these revisions were made to “enhance the analytical consistency and clarity of the balancing test to be applied in *placing* different mixed questions *along* the spectrum of deference and discretion.” *Id.* ¶ 27 (emphasis added). Thus, it appears that the *Pena* factors for review of mixed questions have been discarded in favor of a three factor “balancing test.” *See id.* ¶ 28. The goal identified is “to allocate tasks between the trial and appellate courts based on their institutional roles and competencies.” *Id.* ¶ 31. Then, the court announces its standard of review to be: whether a defendant was subjected to custodial interrogation is a mixed question of law and fact that we review for correctness. *See id.* ¶ 31.

In summary, the standard of review for mixed questions has been

in a state of flux since *Pena*. Perhaps the slope of its pasture metaphor was too slippery and the colors of its spectrum too diffused to provide clarity. However, over time this state of flux opened the doors of opportunity to the creative appellate practitioner. Have those doors been closed? Will the three factor “balancing test” be the final word? Or, would a simply stated standard of review prove to be more serviceable? The United States Tenth Circuit Court of Appeals standard of review for mixed questions appears to have stood the test of time: “[o]ur review of mixed questions of law will be ‘under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles.’” *Roberts v. Printup*, 595 F.3d 1181, 1186 (10th Cir. 2010) (quoting *Estate of Holl v. Comm’r*, 54 F.3d 648, 650 (10th Cir. 1995)); *accord Armstrong v. Comm’r*, 15 F.3d 970, 973 (10th Cir. 1994). The choice between these two standards is not complicated. However, given recent developments in the Utah courts, the standard of review for mixed questions remains largely untested.

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  - I. APPEALS FROM TRIAL COURTS**
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      - 1. Introduction**

Historically, appellate advocates have had difficulty distinguishing factual issues from legal issues. Simple factual questions seem to give little trouble. However, when factual issues are part of subsidiary or underlying facts that lead to legal conclusions, confusion has prevailed. Utah appellate courts have created some of this lack of certainty. *See State v. Pena*, 869 P.2d 932, 935 (Utah 1994) (“[T]his court and the court of appeals have

created some confusion with regard to standards of review.”). For example, the Utah Supreme Court in *State v. Mendoza*, 748 P.2d 181, 183 (Utah 1987), treated a reasonable suspicion determination under a clearly erroneous standard, usually reserved for questions of fact. Many appellate decisions followed this approach. See, e.g., *State v. Leonard*, 825 P.2d 664, 667-68 (Utah Ct. App. 1991); *State v. Robinson*, 797 P.2d 431, 435 (Utah Ct. App. 1990); *State v. Talbot*, 792 P.2d 489, 493 (Utah Ct. App. 1990). However, the supreme court in *Pena* clarified the matter by determining that whether a given set of facts gives rise to reasonable suspicion is a determination of law, reviewed nondeferentially for correction, as opposed to being a fact determination reviewable for clear error. See *Pena*, 869 P.2d at 939; accord *State v. Beach*, 2002 UT App 160, ¶ 7, 47 P.3d 932.

Appellate counsel may also add to this confusion by characterizing issues as factual, when they are actually issues of law or issues of discretion. See *Pena*, 869 P.2d at 936. Whether appellants are challenging a solitary finding of fact, an underlying fact, or a subsidiary fact, whatever the label, they must be able to distinguish factual questions and select the applicable standard of review.

The supreme court provided the following definition of factual issues: “Factual questions are generally regarded as entailing the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind.” *Id.* at 935 (citing Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 236 (1991)); accord *State v. Barzee*, 2007 UT 95, ¶ 82 n.9, 177 P.3d 48; *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, ¶ 26, 164 P.3d 384. Each section below includes examples of factual questions that may help in determining whether an issue is indeed factual. Each section also includes cases outlining the corresponding standards of review.

## 2. Marshaling Requirement

Recently, the Supreme Court adopted the language based on *Pena*’s Pasture theme in a marshaling requirement discussion, stating that the party neither “corralled the evidence” nor reviewed the evidence in a light most favorable to the trial court findings. See *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 40, 140 P.3d 1200.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires that “[a] party challenging a fact finding [must] first marshal all record evidence that supports the challenged finding.” *Accord Beehive Tel. Co v. Pub. Serv. Comm’n*, 2004 UT 18, ¶ 15, 89 P.3d 131 (first alteration in original); *Traco Steel Erectors, Inc., v. Comtrol, Inc.*, 2007 UT App 407, ¶ 32, 175 P.3d 572; *Aspenwood*,

*L.L.C. v. C.A.T., L.L.C.*, 2003 UT App 28, ¶ 44, 73 P.3d 947.

To fulfill the duty to marshal, a party must “present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.” *State v. Scott*, 2009 UT App 367U (mem.) (quoting *W. Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991)); accord *Boyer v. Boyer*, 2008 UT App 138, ¶ 21, 183 P.3d 1068, *cert. denied*, 199 P.3d 367 (Utah 2008); *State v. Coonce*, 2001 UT App 355, ¶ 6, 36 P.3d 533. Every scrap of evidence includes all inferences from the evidence. See *State v. Valdez*, 2003 UT App 100, ¶ 20 n.11, 68 P.3d 1052.

Many appellants merely present carefully selected facts and excerpts of trial testimony supporting their own position, omitting negative facts. See *Roderick v. Ricks*, 2002 UT 84, ¶ 46, 54 P.3d 1119; *Guenon v. Midvale City*, 2010 UT App 51, ¶ 6, 230 P.3d 1032; *Hi-Country Estates Homeowners Ass’n. v. Bagley & Co.*, 2008 UT App 105, ¶ 20, 182 P.3d 417, *cert. denied*, 199 P.3d 970 (Utah 2008); *Chapman v. Uintah County*, 2003 UT App 383, ¶ 32, 81 P.3d 761. Others conveniently reargue the same case made before the trial court. See *Wayment v. Howard*, 2006 UT 56, ¶ 14, 144 P.3d 1147; *State v. Hodge*, 2008 UT App 409, ¶ 18, 196 P.3d 124, *cert. denied*, 207 P.3d 432 (Utah 2009); *Jensen v. Jensen*, 2008 UT App 392, ¶ 12, 197 P.3d 117; *Neely v. Bennett*, 2002 UT App 189, ¶ 12, 51 P.3d 724.

A complicated case does not excuse the marshaling burden, but “demands even more attentiveness to presenting a clear picture of facts and argument to this court, which, of course, does not have the benefit of having previously reviewed the evidence.” *Tanner v. Carter*, 2001 UT 18, ¶ 19, 20 P.3d 332. Neither does the page limit for briefs excuse the requirement. See *Aspenwood*, 2003 UT App 28, ¶¶ 44-46 (noting that the party simply referred appellate court to its addenda, arguing that it could not marshal evidence within body of its brief because it was forced to stay within one-hundred page limit). Indeed, marshaling may often have the unexpected benefit of bolstering the cogency of the arguments advanced. See *United Park City Mines Co.*, 2006 UT 35, ¶ 25.

However, the marshaling requirement is not “an open invitation for appellants to bring [courts] their boxes.” *Beehive Tel.*, 2004 UT 18, ¶ 15. Courts have cautioned strongly against using “everything-but-the-kitchen-sink marshaling efforts” as being “almost completely unhelpful.” *Id.* The evidence marshaled must contain an appropriate citation to the record pursuant to Utah Rule of Appellate Procedure 24(e). See *In re W.A.*, 2002 UT 127, ¶ 45, 63 P.3d 607. A mere reference to where evidence supporting the verdict can be located (i.e., in exhibits 11, 12, and 13) does not constitute marshaling; rather, marshaling requires that the party challenging the finding show appellate courts where the evidence can be located and

list the specific evidence supporting the verdict. *See id.* (citing *Harding v. Bell*, 2002 UT 108, ¶ 19, 57 P.3d 1093).

Challenges to pure questions of law do not require marshaling. *See Utah Auto Auction v. Labor Comm'n*, 2008 UT App 293, ¶ 9 n.4, 191 P.3d 1252; *State v. Werner*, 2003 UT App 268, ¶¶ 10-11, 76 P.3d 204. However, courts have issued “frank, severe instruction” for “unsuspecting or overly creative” parties who dodge this duty by attempting to frame the fact-dependent questions issues as legal ones. *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶¶ 19, 25, 140 P.3d 1200. Further, if a party purports to challenge only a legal ruling, but the determination of the correctness of a court’s application of the law is extremely fact-sensitive, the party has a duty to marshal the evidence. *See Chen v. Stewart*, 2004 UT 82, ¶ 20, 100 P.3d 1177; *accord Cache County v. Beus*, 2005 UT App 503, ¶ 11, 128 P.3d 63; *United Park City Mines*, 2006 UT 35, ¶ 25 (holding that challenges to issue containing mixed question of law and fact do not relieve party of marshaling task).

An appellant cannot wait to marshal the evidence until it files its reply brief. *See Atlas Steel, Inc., v. Utah State Tax Comm'n*, 2002 UT 112, ¶¶ 40-41, 61 P.3d 1053 (noting such “eleventh-hour” tactics are too late and allowing such a maneuver would deprive the appellee of any opportunity to respond and defend the sufficiency of the evidence and the findings of fact); *In re A.B.*, 2007 UT App 286, ¶ 14 n.8, 168 P.3d 820 (denying party’s request to amend brief to comply with marshaling requirement even though party believed in good faith that requirement was inapplicable); *see also United Park City Mines*, 2006 UT 35, ¶ 26 (noting that appellant’s failure to marshal puts a burden on appellee that is “unfair, ineffective and unacceptable”).

While failure to marshal is not included in Utah Rule of Appellate Procedure 33(b)’s definition of a frivolous appeal, *see H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 55, 203 P.3d 943, parties bear the risk of sanctions if there is no basis in fact for their appeal. *See Fay v. Rodgers*, 2010 UT App 20U (mem.) (granting rule 33(b) sanctions and party chastised for willfully failing to marshal evidence).

As stated above, if an appellant fails to properly marshal the evidence, appellate courts may assume the findings are correct or adequately supported by the record. *See Chen*, 2004 UT 82, ¶ 19; *State v. Chavez-Espinoza*, 2008 UT App 191, ¶ 7, 186 P.3d 1023; *Tanner v. Carter*, 2001 UT 18, ¶ 17, 20 P.3d 332; *Houghton v. Miller*, 2005 UT App 303, ¶ 1 n.2, 118 P.3d 293. However, despite strong language implying that appellate courts *must* affirm the accuracy of an agency’s or trial court’s factual findings in the absence of marshaling, *see, e.g., United Park City Mines*, 2006 UT 35, ¶ 32 (stating that because defendant had failed to marshal the evidence supporting the award, “we

cannot conclude that the trial court abused its discretion”), “the marshaling requirement is not a limitation on the power of appellate courts.” *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, ¶ 19, 164 P.3d 384. “Rather, it is a tool pursuant to which the appellate courts impose on the parties an obligation to assist them in conducting a whole record review. It is not, itself, a rule of substantive law.” *Id.* Indeed, appellate courts have exercised discretion to independently review the record when a party has failed to marshal the evidence. *See Utah County v. Butler*, 2008 UT 12, ¶ 12, 179 P.3d 775 (choosing to exercise its discretion and review factual findings of trial court even though party failed to marshal when case was decided in tandem with two companion cases); *Media-Paymaster Plus*, 2007 UT 42, ¶¶ 19-20; *State v. Green*, 2005 UT 9, ¶ 13, 108 P.3d 710 (determining that despite being justified in turning away the arguments for “want of marshaling,” appellate court “elected to review several of them on their merits”); *Larry J. Coet Chevrolet v. Labrum*, 2008 UT App 69, ¶ 29, 180 P.3d 765.

After constructing this magnificent array of supporting evidence, the challenger must “ferret out a fatal flaw in the evidence” and demonstrate why the evidence does not support the trial court’s finding. *W. Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991); *accord Green*, 2005 UT 9, ¶ 28; *see Friends of Maple Mountain, Inc. v. Mapleton City*, 2010 UT 11, ¶ 10, 228 P.3d 1238 (stating appellant must educate court as to exactly how trial court arrived at each of the challenged findings); *Kimball v. Kimball*, 2009 UT App 233, ¶ 20 n.5, 217 P.3d 733 (“The pill that is hard for many appellants to swallow is that if there is evidence supporting a finding, absent a legal problem – a ‘fatal flaw’ – with that evidence, the finding will stand, even though there is ample record evidence that would have supported contrary findings”); *In re A.B.*, 2007 UT App 286, ¶ 13, 168 P.3d 820.

Stated in other words, the gravity of this “fatal flaw” must be sufficient to convince the appellate court that the court’s finding resting upon the evidence is clearly erroneous. *See Larry J. Coet Chevrolet*, 2008 UT App 69, ¶ 27 (noting that findings are so lacking in support as to be against clear weight of evidence, thus making them clearly erroneous); *Guenon v. Midvale City*, 2010 UT App 51, ¶ 5, 230 P.3d 1032 (stating that after marshaling evidence, party must show they are not supported by substantial evidence); *accord Carter v. Labor Comm’n Appeals Bd.*, 2006 UT App 477, ¶ 12, 153 P.3d 763; *Lefavi v. Bertoch*, 2000 UT App 5, ¶ 17, 994 P.2d 817. When challenging a civil jury verdict, a petitioner must marshal all the evidence supporting the verdict and then must show that the evidence cannot support the verdict. *See Water & Energy Sys. Tech., Inc., v. Keil*, 2002 UT 32, ¶ 15, 48 P.3d 888; *Holstrom*

*v. C.R. England, Inc.*, 2000 UT App 239, ¶ 29, 8 P.3d 281.

The appellant must show that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision. *See Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 31, 163 P.3d 615; *Kimball*, 2009 UT App 233, ¶ 20 n.5 (providing examples of legal insufficiency might include testimony that was later stricken by court, document that was used for impeachment only and had not been admitted as substantive evidence, document that was not properly admitted because it did not qualify under business record exception to hearsay rule, and testimony that seems to support finding was recanted on cross-examination); *Kendall Ins., Inc., v. R&R Group, Inc.*, 2008 UT App 235 ¶ 16, 189 P.3d 114 (stating party must marshal all facts used to support trial court's findings and then show that facts cannot possibly support conclusion reached by trial court, even when viewed most favorably to appellee); *State v. Larsen*, 2000 UT App 106, ¶ 11, 999 P.2d 1252.

If an appellant contends that the district court has no evidence to support its factual finding, then the appellee must present only a “scintilla” of evidence that would support the finding the district court made in order to show that the appellant did not meet his burden of marshaling the evidence. *See Orlob v. Wasatch Med. Mgmt.*, 2005 UT App 430, ¶ 20, 124 P.3d 269; *accord Parduhn v. Bennett*, 2005 UT 22, ¶ 25, 112 P.3d 495; *Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, ¶ 22, 54 P.3d 1177.

To summarize:

[t]he process of marshaling is . . . fundamentally different from that of presenting the evidence at trial. The challenging party must temporarily remove its own prejudices and fully embrace the adversary's position; [the challenging party] must play the devil's advocate. In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case. Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position. Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact. Furthermore, appellants cannot shift the burden of marshaling by falsely claiming there is no evidence in support of the trial court's findings.

*Chen v. Stewart*, 2004 UT 82, ¶ 78, 100 P.3d 1177 (citations and internal quotation marks omitted); *accord Hi Country Estates Homeowners Ass'n v. Bagley & Co.*, 2008 UT App 105, ¶ 19, 182 P.3d 417; *State v. Clark*, 2005 UT 75, ¶ 17, 124 P.3d 235.

The appellant must then demonstrate how the court found the facts from the evidence and then explain “why those findings contradict the clear weight of the evidence.” *Chen*, 2004 UT 82, ¶ 78; *see also Kimball v. Kimball*, 2009 UT App 233, ¶ 20 n.5, 217 P.3d 733 (providing detailed description and rationale of marshaling requirement in response to “oft-expressed frustration of the bar with the marshaling requirement”).

As shown in the outline, each section of this article includes a string cite of corresponding cases addressing the marshaling requirement.

### 3. Civil Bench Trial

#### a. Clearly Erroneous Standard

A trial court's findings of fact are reviewed under a clearly erroneous standard. *See Glew v. Ohio Sav. Bank*, 2007 UT 56, ¶ 18, 181 P.3d 791; *Chen*, 2004 UT 82, ¶ 19; *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 2004 UT 67, ¶ 33, 98 P.3d 1; *Gilmor v. Family Link, LLC*, 2010 UT App 2, ¶ 19, 224 P.3d 741; *Urbahn Constr. & Design, Inc. v. Hopkins*, 2008 UT App 41, ¶ 7, 179 P.3d 808. This clearly erroneous standard of review comes from Rule 52(a) of the Utah Rules of Civil Procedure, which provides that “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” UTAH R. CIV. P. 52(a). *See also Butler, Crockett & Walsh Dev. Corp.*, 2004 UT 67, ¶ 33.

A trial court's findings of fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence. *See Econ Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 11, 210 P.3d 263; *Chen*, 2004 UT 82, ¶ 19; *Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, ¶ 12, 54 P.3d 1177; *Gilmor*, 2010 UT App 2, ¶ 19. If, viewing the evidence in the light most favorable to the trial court's determination, a factual finding is based on sufficient evidence, the finding is not clearly erroneous. *See Save Our Schs. v. Bd. of Educ.*, 2005 UT 55, ¶ 9, 122 P.3d 611; *Butler, Crockett & Walsh Dev. Corp.*, 2004 UT 67, ¶ 33; *Roderick v. Ricks*, 2002 UT 84, ¶ 27, 54 P.3d 1119.

The clearly erroneous standard is highly deferential to the trial court's decisions, because the witnesses and parties appear before the trial court and the evidence is presented there. *See Glew*, 2007 UT 56, ¶ 18; *Butler, Crockett & Walsh Dev. Corp.*, 2004 UT 67, ¶ 33; *Roderick*, 2002 UT 84, ¶ 27; *Macris v. Sculptured Software, Inc.*, 2001 UT 43, ¶ 14, 24 P.3d 984; *In re S.Y.*, 2003 UT App 66, ¶ 11, 66 P.3d 601; *Lefavi v. Bertoch*, 2000 UT App 5, ¶ 16, 994 P.2d 817. Thus, “in those instances in which the trial court's findings include inferences drawn from the evidence, [the reviewing court] will not take issue with those inferences unless the logic

upon which their extrapolation from the evidence is based is so flawed as to render the inference clearly erroneous.” *Glew*, 2007 UT 56, ¶ 18.

### b. Marshaling Cases

The following are cases involving appeals from civil bench trials in which appellate courts have addressed the marshaling requirement. *Commercial Debenture Corp. v. Amenti, Inc.*, 2010 UT 10, ¶ 14, – P.3d – (noting that party was thorough in ferreting out portions of the record that may have been at odds with the district court’s ruling, but failed to describe how evidence in record that supported the court’s findings was insufficient); *Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2009 UT 81, ¶¶ 16-17, 32, 222 P.3d 1164 (holding that party’s failure to marshal evidence surrounding damage award precludes appellate review); *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 46, 210 P.3d 263 (finding that an addendum of excerpts without explanation does not show the evidence, and all reasonable inferences drawn, therefore, are insufficient to support the findings); *Ockey v. Lebmer*, 2008 UT 37, ¶ 34 n.32, 189 P.3d 51; *Wayment v. Howard*, 2006 UT 56, ¶ 14, 144 P.3d 1147 (finding appellant merely presented and reargued the opposing evidence presented by him at trial); *Roderick*, 2002 UT 84, ¶ 46 (concluding that party selectively highlighting evidence favorable to him in legal malpractice action did not satisfy marshaling requirement); *Tanner v. Carter*, 2001 UT 18, ¶ 18, 20 P.3d 332 (finding party raised issues in “scatter-shot fashion” with little or no attempt to marshal the evidence supporting its findings); *Kaealamakia, Inc. v. Kaealamakia*, 2009 UT App 148, ¶ 10, 213 P.3d 13 (noting that defendants wholly failed to properly marshal the evidence); *Davis v. Young*, 2008 UT App 246, ¶ 13, 190 P.3d 23 (determining that because party failed to marshal facts, appellate court accepted as fact that execution of quitclaim deed was based on undue influence compounded by mental incapacity); *Boyer v. Boyer*, 2008 UT App 138, ¶ 20, 183 P.3d 1068 (finding party failed to marshal evidence in quiet title action supporting trial court’s determination that damages evidence was too speculative); *AWINC Corp. v. Simonsen*, 2005 UT App 168, ¶ 10, 112 P.3d 1228 (noting party failed to properly marshal but instead provided an incomplete list of evidence supporting trial court findings and then claimed findings were not supported by clear and convincing evidence); *Shar’s Cars, L.L.C. v. Elder*, 2004 UT App 258, ¶ 31, 97 P.3d 724 (finding party did not even attempt to meet marshaling burden, rather simply repeated arguments raised to trial court); *Harris v. IES Assocs., Inc.*, 2003 UT App 112, ¶ 31, 69 P.3d 297 (finding party wholly failed to marshal the evidence supporting trial court’s finding); *Covey v. Covey*, 2003 UT App 380, ¶¶ 27-28, 80 P.3d 553.

### c. Examples of Fact Questions

The following cases have examples of factual issues requiring a clearly erroneous standard of review.

- (1) Whether a contract is integrated. *See Tangren Family Trust v. Tangren*, 2008 UT 20, ¶¶ 9-10, 182 P.3d 326.
- (2) Whether disconnection from a municipality was viable. *See Bluffdale Mountain Homes, LC v. Bluffdale City*, 2007 UT 57, ¶ 46, 167 P.3d 1016.
- (3) Whether a prescriptive easement existed. *See Lunt v. Lance*, 2008 UT App 192, ¶ 18, 186 P.3d 978.
- (4) Whether the parties “entered into a contract implied in fact that allowed them to agree orally to changes and extra work that deviated from the proposal agreement.” *Ubrbahn Constr. & Design, Inc. v. Hopkins*, 2008 UT App 41, ¶ 7, 179 P.3d 808.
- (5) Whether the parties adopted a writing as a complete integration of their agreement. *See Bennett v. Huish*, 2007 UT App 19, ¶ 8, 155 P.3d 917; *accord Spears v. Warr*, 2002 UT 24, ¶ 18, 44 P.3d 742, *overruled in part by Tangren Family Trust*, 2008 UT 20.
- (6) Whether there were two assignments of a trust deed. *See Hill v. Estate of Allred*, 2009 UT 28, ¶ 52, 216 P.3d 929.
- (7) Whether a party knew or should have known about an alleged conversion. *See Ockey v. Lebmer*, 2008 UT 37, ¶ 34, 189 P.3d 51.
- (8) “[W]hether an action is asserted in bad faith.” *Utah County v. Ivie*, 2006 UT 33, ¶ 17, 137 P.3d 797 (quoting *Warner v. DMG Color*, 2000 UT 102, ¶ 21, 20 P.3d 868); *accord Gallegos v. Lloyd*, 2008 UT App 40, ¶ 6, 178 P.3d 922.
- (9) Whether damages were proximately caused by the alleged breach. *See Hi-Country Estates Homeowners Ass’n v. Bagley & Co.*, 2008 UT App 105, ¶ 9, 182 P.3d 417.
- (10) Whether alleged stalking conduct was directed at the plaintiff. *See Ellison v. Stam*, 2006 UT App 150, ¶ 17, 136 P.3d 1242.
- (11) Whether there was actual or implied notice of a corporation’s actions. *See Bingham Consolidation Co. v. Groesbeck*, 2004 UT App 434, ¶ 26, 105 P.3d 365.
- (12) Whether the dealership was worth \$3.1 million at the time of termination. *See Kraatz v. Heritage Imps.*, 2003 UT App 201, ¶ 7, 71 P.3d 188 (considering valuation of stock).
- (13) Whether a plaintiff knew or should have known if he or she has suffered a legal injury. *See Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2004 UT App 436, ¶ 8, 104 P.3d 646;

*Rappleye v. Rappleye*, 2004 UT App 290, ¶ 13, 99 P.3d 348.

(14) Whether notice was given to an insurance company of the addition of a new vehicle. See *Renegade Oil, Inc. v. Progressive Cas. Ins. Co.*, 2004 UT App 356, ¶ 5, 101 P.3d 383.

(15) Whether questions were allowed that were outside the scope of deposition notices. See *Harris v. IES Assocs.*, 2003 UT App 112, ¶ 24, 69 P.3d 297.

(16) Whether a party actually made the purchases. See *Mule-Hide Prods. Co. v. White*, 2002 UT App 1, ¶ 10, 40 P.3d 1155.

(17) “Whether a breach of a contract constitutes a material breach.” *Orlob v. Wasatch Med. Mgmt.*, 2005 UT App 430, ¶ 26, 124 P.3d 269.

#### d. Adequacy of Trial Court’s Factual Findings

Rule 52(a) of the Utah Rules of Civil Procedure provides that “the [trial] court shall find the facts specially and state separately its conclusions of law thereon.” UTAH R. CIV. P. 52(a). Utah appellate courts consistently stress the importance of adequate findings of fact. See *Pardubn v. Bennett*, 2005 UT 22, ¶ 24, 112 P.3d 495; *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 2004 UT 67, ¶ 37, 98 P.3d 1. As stated above, to successfully challenge findings of fact, an appellant must prove they are clearly erroneous, *i.e.*, against the clear weight of the evidence. Therefore, if appellate courts are to determine whether the evidence before the trial court supports the trial court’s findings, the findings must be sufficiently detailed and include enough facts to show the evidence upon which they are grounded. See *Pardubn*, 2005 UT 22, ¶ 24; *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 28, 70 P.3d 35. The findings must contain enough detail to reveal the trial court’s reasoning process. See *Armed Forces Ins. Exch.*, 2003 UT 14, ¶ 28 (explaining that “[f]or findings of fact to be adequate, they ‘must show that the court’s judgment or decree follows logically from, and is supported by, the evidence’”) (quoting *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987)). In other words, the findings must be articulated so that the basis of the ultimate conclusion can be understood. See *Pardubn*, 2005 UT 22, ¶ 24.

The record must be complete and detailed, otherwise trial court findings are inadequate, and the reviewing court may remand for more detailed findings by the trial court. See *Armed Forces Ins. Exch.*, 2003 UT 14, ¶ 37; *Tangren Family Trust v. Tangren*, 2006 UT App 515, ¶¶ 13-14, 154 P.3d 180. “The absence of [adequate] findings by the trial court ‘is a fundamental defect that makes it impossible to review the issues that were briefed without invading the trial court’s fact-finding domain.’” *Armed Forces Ins. Exch.*, 2003 UT 14, ¶ 37 (quoting *Acton*, 737 P.2d at 999).

## 4. Civil Jury Trial Verdict

### a. Substantial Evidence Standard

Because an appellate court owes broad deference to the fact finder, its power to review a jury verdict that is challenged on grounds of insufficient evidence is limited. In reviewing a challenge to a civil jury verdict, the appellate court views all evidence in the light most favorable to the verdict. See *Jensen v. Sawyers*, 2005 UT 81, ¶ 100, 130 P.3d 325; *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 3, 82 P.3d 1064; *Water & Energy Sys. Tech., Inc. v. Keil*, 2002 UT 32, ¶ 2, 48 P.3d 888; *Holmstrom v. C.R. England, Inc.*, 2000 UT App 239, ¶ 2, 8 P.3d 281.

The appellate court must “assume that the jury believed those aspects of the evidence which sustain its findings and judgment.” See *Stevensen 3rd E., LC v. Watts*, 2009 UT App 137, ¶ 26, 210 P.3d 977 (quoting *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 467 (Utah 1996)). See also *Brewer v. Denver & Rio Grande W.R.R.*, 2001 UT 77, ¶ 36, 31 P.3d 557 (noting that it is the exclusive function of jury to weigh evidence and determine credibility of witnesses). However, in some unusual circumstances, a reviewing court may reassess witness credibility if the testimony is “inherently improbable.” See *State v. Robbins*, 2009 UT 23, ¶ 16, 210 P.3d 288 (citing *State v. Workman*, 852 P.2d 981, 984 (Utah 1993)); *Beard v. K-Mart Corp.*, 2000 UT App 285, ¶ 20, 12 P.3d 1015 (reversing a jury verdict because the record was insufficient to allow jury to consider whether surgeries were necessitated by negligence, and if so, what damage was suffered as a result of surgeries).

The verdict will be reversed if no substantial evidence, or insufficient evidence, supports it. See *Jensen*, 2005 UT 81, ¶ 100; *Stevensen 3rd E., LC*, 2009 UT App 137, ¶ 26. The evidence is insufficient if it “so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case.” See *Stevensen 3rd E., LC*, 2009 UT App 137, ¶ 26 (quoting *Billings*, 918 P.2d at 467).

### b. Marshaling Cases

The following cases involve appeals from civil jury trials in which appellate courts have addressed the marshaling requirement: *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 31, 163 P.3d 615 (noting that party did not even provide trial transcript in marshaling attempt to substantiate her claims of jury error); *Campbell v. State Farm Mut. Auto Ins. Co.*, 2001 UT 89, ¶ 102, 65 P.3d 1134, *rev’d on other grounds*, 538 U.S. 408 (2003) (stating that party chose to argue selected evidence favorable to its position rather than marshal evidence properly); *Brewer v. Denver & Rio Grande W.R.R.*, 2001 UT 77, ¶ 36, 31 P.3d 557 (stating party was required to marshal the evidence, not simply attack its credibility or offer other contradictory evidence

supporting its position); *Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 20, 214 P.3d 865 (finding plaintiff failed to marshal evidence in support of jury finding because plaintiff failed to include extensive testimony and evidence presented at trial); *Martinez v. Wells*, 2004 UT App 43, ¶ 35, 88 P.3d 343 (finding that the party reinstated evidence in light of his own position rather than assuming “devil’s advocate” role as required); *Chapman v. Uintah County*, 2003 UT App 383, ¶ 32, 81 P.3d 76, (noting that party “picked and chose the facts in favor of his position” and restated arguments below rather than properly marshaling evidence supporting jury verdict and explaining how, in spite of evidence, jury verdict should be overturned); *Bearden v. Wardley Corp.*, 2003 UT App 171, ¶ 10, 72 P.3d 144 (finding party failed to adequately marshal evidence in support of jury finding); *Eggett v. Wasatch Energy Corp.*, 2001 UT App 226, ¶¶ 41-43, 29 P.3d 668 (holding that party failed to marshal evidence because it neither provided the court with transcript from trial court’s hearing or any other order from that hearing); *Dishinger v. Potter*, 2001 UT App 209, ¶ 14, 47 P.3d 76 (finding transcript of proceedings not required if party relies on jury’s special verdict on appeal, not evidence presented at trial, and no marshaling is required if party is challenging trial court’s application of the law to the jury’s special verdict findings); *Holstrom v. C.R. England, Inc.*, 2000 UT App 239, ¶ 30, 8 P.3d 281 (noting that party “quite admirably fulfilled her marshaling duty, filling her brief with five pages of ‘evidence conceivably in support of the verdict,’ appropriately cited to the record,” but then confusingly asserted there was “literally no evidence which would support a reasonable jury’s determination”) (emphasis omitted).

### c. Examples of Jury Fact Questions

The following cases contain examples of factual issues requiring a substantial evidence standard of review.

- (1) Whether an allegedly defamatory statement was substantially true. *See Jensen v. Sawyers*, 2005 UT 81, ¶ 96, 130 P.3d 325.
- (2) Whether there was a misappropriation of trade secrets. *See Water & Energy Sys. Tech., Inc. v. Keil*, 2002 UT 32, ¶¶ 14-15, 48 P.3d 888.
- (3) Whether there was gross negligence or willful misconduct. *See Stevensen 3rd E., LC v. Watts*, 2009 UT App 137, ¶ 49, 210 P.3d 977.
- (4) Whether a prior lawsuit was brought without probable cause. *See Nielsen v. Spencer*, 2008 UT App 375, ¶ 27, 196 P.3d 616.

## 5. Criminal Bench Trial

### a. Clearly Erroneous Standard

Trial courts are given the primary responsibility for making factual determinations. *See State v. Green*, 2005 UT 9, ¶ 25, 108 P.3d 710 (citing *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994)). A trial court’s findings of fact in a criminal bench trial are reviewed under a clearly erroneous standard. *See State v. Tripp*, 2010 UT 9, ¶ 23, 227 P.3d 1251; *State v. Briggs*, 2008 UT 75, ¶¶ 10-11, 197 P.3d 628; *State v. Morris*, 2009 UT App 181, ¶ 5, 214 P.3d 883; *State v. Piep*, 2004 UT App 7, ¶ 7, 84 P.3d 850; *Am. Fork City v. Rotbe*, 2000 UT App 277, ¶ 4, 12 P.3d 108. This standard of review is derived from Rule 52(a) of the Utah Rules of Civil Procedure, which states, “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” UTAH R. CIV. P. 52(a).

A trial court’s finding is clearly erroneous when it is against the clear weight of the evidence or, although there is evidence to support it, the court reviewing all the record evidence is left with a definite and firm conviction that a mistake has been made. *See State v. Keener*, 2008 UT App 288, ¶ 11, 191 P.3d 835; *State v. Gordon*, 2004 UT 2, ¶ 5, 84 P.3d 1167; *State v. Greuber*, 2007 UT 50, ¶ 8, 165 P.3d 1185 (reviewing court must rule clear error if factual findings are not adequately supported by record, and court should resolve all disputes in light most favorable to trial court’s determination); *accord State v. Cornejo*, 2006 UT App 215, ¶ 12, 138 P.3d 97.

This clearly erroneous standard is highly deferential to the trial court’s decisions, because the witnesses and parties appear before the trial court, and the evidence is presented there. *See Green*, 2005 UT 9, ¶ 25 (citing *Pena*, 869 P.2d at 935-36). The trial court is “considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record.” *State v. Levin*, 2004 UT App 396, ¶ 21 n.1, 101 P.3d 846 (quoting *Pena*, 869 P.2d at 936); *accord State v. Hurt*, 2010 UT App 33, ¶ 15, 127 P.3d 271 (noting trial judge is “in a unique position to assess the credibility of witnesses and weigh the evidence” (internal quotation marks omitted)).

Further, when an appellate court reviews a trial court’s verdict for insufficient evidence, the appellate court sustains the trial court’s judgment unless it is “against the clear weight of the evidence,” or if the appellate court reaches a “definite and firm conviction that a mistake has been made.” *State v. Briggs*, 2008 UT 83, ¶ 11, 199 P.3d 935 (quoting *State v. Goodman*, 763 P.2d 786, 786 (Utah 1988); *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)); *State v. Nichols*, 2003 UT App 287, ¶ 24, 76 P.3d 1173; *State v. Larsen*, 2000 UT App 106, ¶ 10, 999 P.2d 1252. A conviction

may be upheld only if “supported by a quantum of evidence concerning each element of the crime as charged from which the [factfinder] may base its conclusion of guilt beyond a reasonable doubt.” *State v. Piep*, 2004 UT App 7, ¶ 7, 84 P.3d 850 (quoting *Larsen*, 2000 UT App 106, ¶ 10) (alteration in original). Moreover, a guilty verdict is invalid if based exclusively “on inferences that give rise to only remote or speculative possibilities of guilt.” *State v. Eberwein*, 2001 UT App 71, ¶ 14, 21 P.3d 1139 (quoting *Spanish Fork v. Bryan*, 1999 UT App 61, ¶ 5, 975 P.2d 501).

### b. Marshaling Cases

The following are cases involving appeals from criminal trial court rulings in which appellate courts have addressed the marshaling requirement. *See State v. Shipp*, 2005 UT 35, ¶ 20, 116 P.3d 317; *State v. Pinder*, 2005 UT 15, ¶ 40, 114 P.3d 551; *State v. Green*, 2005 UT 9, ¶ 12, 108 P.3d 710 (stating defendant’s brief offers “a disjointed array of facts selected because they aid his cause”); *State v. Hurt*, 2010 UT App 33, ¶ 16, 127 P.3d 271 (stating brief failed marshaling requirement because it did not acknowledge certain facts); *State v. Orr*, 2004 UT App 413, ¶ 9, 103 P.3d 164; *State v. Earl*, 2004 UT App 163, ¶ 11, 92 P.3d 167 (noting defendant chose to reiterate his own testimony rather than present evidence that supported the trial court’s finding); *Piep*, 2004 UT App 7, ¶ 6 n.3 (stating defendant “has notably complied with the marshaling requirement of rule 24”); *State v. Nichols*, 2003 UT App 287, ¶ 26 n.3, 76 P.3d 1173 (determining that defendant marshaled the evidence in his brief); *State v. Andreason*, 2001 UT App 395, ¶ 4, 38 P.3d 982 (noting that party adequately marshaled the evidence); *State v. Coonce*, 2001 UT App 355, ¶ 5, 36 P.3d 533 (stating defendant noted that he marshaled “most” of the evidence but admitted he did not include all relevant evidence and did not marshal inferences created by the evidence); *State v. Larsen*, 2000 UT App 106, ¶ 14, 999 P.2d 1252 (stating defendant adequately marshaled evidence by citing to the evidence and testimony).

### c. Examples of Fact Questions

The following cases contain examples of factual issues requiring a clearly erroneous standard of review.

(1) Whether an “opponent of a peremptory challenge has failed to prove purposeful racial discrimination.” *State v. Cannon*, 2002 UT App 18, ¶ 5, 41 P.3d 1153; *see also State v. Rosa-re*, 2008 UT App 472, ¶ 2, 200 P.3d 670.

(2) Whether a defendant failed to meet the probation statute’s requirements. *See State v. Offerman*, 2007 UT App 342, ¶ 5, 172 P.3d 310; *State v. Rodriguez*, 2002 UT App 119, ¶ 3, 46 P.3d 767.

(3) Whether the circumstances amounted to a situation that induced a mental state tending to block reflection and the reasoning process. *See State v. Allred*, 2002 UT App 291, ¶ 22, 55 P.3d 1158.

(4) Whether a defendant was in custody when he made the incriminating statements. *See id.* ¶ 13.

(5) Whether a defendant gave consent to search his vehicle. *See State v. Hansen*, 2002 UT 125, ¶ 48, 63 P.3d 650; *see also State v. Humphrey*, 2006 UT App 221, ¶¶ 14-15, 138 P.3d 590 (considering issue regarding consent to entry of defendant’s home); *State v. Grossi*, 2003 UT App 181, ¶ 7, 72 P.3d 686 (considering issue regarding consent to entry of defendant’s apartment).

(6) Whether a criminal defendant “knowingly and voluntarily entered his guilty plea.” *State v. Smit*, 2004 UT App 222, ¶ 24, 95 P.3d 1203; *State v. Beckstead*, 2006 UT 42, ¶ 7, 140 P.3d 1288.

(7) Whether communications were made that triggered the running of the statute of limitations for child rape. *See State v. Green*, 2005 UT 9, ¶ 15, 108 P.3d 710.

(8) Whether defendant was remorseful. *See State v. Moreno*, 2005 UT App 200, ¶ 15, 113 P.3d 992.

(9) Whether a juror failed to truthfully answer a question posed during voir dire. *See State v. Shipp*, 2005 UT 35, ¶ 20, 116 P.3d 317.

(10) Whether the delay was caused by the state, the defendant, or neutral causes. *See State v. Cornejo*, 2006 UT App 215, ¶ 30, 138 P.3d 97.

(11) Whether the officer reasonably suspected that defendant was violating the traffic laws. *See State v. Applegate*, 2008 UT 63, ¶ 12, 194 P.3d 925.

(12) Whether defendant’s waiver was clear, ambiguous, and not coerced. *See State v. Tiedemann*, 2007 UT 49, ¶¶ 18-19, 162 P.3d 1106.

(13) Whether a detective made threats, promises, misrepresentations, or used trickery during an interrogation. *See State v. Montero*, 2008 UT App 285, ¶ 14, 191 P.3d 828.

### d. Adequacy of Trial Court’s Factual Findings

Appellate courts stress the requirement and importance of adequate findings of fact. *See State v. Greuber*, 2007 UT 50, ¶ 6, 165 P.3d 1185; *State v. Harris*, 2004 UT 103, ¶ 29, 104 P.3d 1250 (noting trial court must adequately document its findings on the record in declaring a mistrial); *State v. Williams*, 2006 UT App 420 ¶ 25, 147 P.3d 497 (“[o]rdinarily, a trial court’s failure to make required factual findings will result in a remand to the trial court for the entry of such findings.”); *Keene v. Bonser*, 2005 UT App

37, ¶ 19, 107 P.3d 693 (noting that unless the record clearly and uncontrovertedly supports trial court's decision, absence of adequate findings of fact ordinarily requires remand for more detailed findings by trial court); *State v. Cannon*, 2002 UT App 18, ¶ 5, 41 P.3d 1153 (stating if trial court fails to make adequate findings, appellate court “must remand the case to trial court for further proceedings”) (quoting *State v. Pharris*, 846 P.2d 454, 459 (Utah Ct. App. 1993)).

As stated above, to successfully challenge findings of fact, parties must prove they are clearly erroneous. See UTAH R.CIV. P. 52(a); see also *State v. Tripp*, 2010 UT 9, ¶ 23, 227 P.3d 1251; *State v. Briggs*, 2008 UT 75, ¶¶ 10-11, 197 P.3d 628; *State v. Keener*, 2008 UT App 288, ¶ 11, 191 P.3d 835. Findings of fact are clearly erroneous if they are against the clear weight of the evidence. See *Greuber*, 2007 UT 50, ¶ 18 (affirming factual findings that defendant suffered no prejudice from his attorney's failure to investigate were adequate); *State v. Johnson*, 2006 UT App 3, ¶ 10, 129 P.3d 282 (finding that trial court made adequate findings at sentencing); *State v. Smith*, 2002 UT App 49, ¶ 2 n.1, 42 P.3d 1261 (noting that trial court findings more than adequately supported conclusion that counsel's performance was not deficient); *State v. Maestas*, 2000 UT App 22, ¶ 26, 997 P.2d 314 (holding trial court's findings of a parole violation were adequately supported by the evidence).

Deference to the trial court's findings can only be extended when the trial court's factual findings adequately reveal the steps by which the ultimate conclusion is reached. See *State v. Genovesi*, 871 P.2d 547, 549-50 (Utah Ct. App. 1994). However, Utah appellate courts will uphold the trial court even if it failed to make specific findings on the record when it is reasonable to assume the trial court actually made such findings. See *State v. Pecht*, 2002 UT 41, ¶ 22, 48 P.3d 931; *State v. Weeks*, 2000 UT App 273, ¶ 17, 12 P.3d 110; accord *State v. Helms*, 2002 UT 12, ¶ 11, 40 P.3d 626 (citing *State v. Robertson*, 932 P.2d 1219, 1234 (Utah 1997)).

## 6. Criminal Jury Trial Verdict

### a. Sufficiently Inconclusive or Inherently Improbable Standard

Because an appellate court owes broad deference to the fact finder, its power to review a jury verdict challenged on the ground of insufficient evidence is limited. See *State v. Boss*, 2005 UT App 520, ¶ 9, 127 P.3d 1236. In reviewing a jury verdict, the appellate court views “the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict.” *State v. Tanner*, 2009 UT App 326, ¶ 14, 221 P.3d 901 (quoting *State v. Rowley*, 2008 UT App 233, ¶ 15, 189 P.3d 109); see also *State v. Fedorowicz*, 2002 UT 67, ¶ 40, 52 P.3d 1194 (stating that court must assume jury believed evidence that supported verdict); *State v. Buck*,

2009 UT App 2, ¶ 9, 200 P.3d 674; *State v. Arave*, 2009 UT App 278, ¶ 8, 220 P.3d 182.

An appellate court “will reverse a jury conviction for insufficient evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.” *Rowley*, 2008 UT App 233, ¶ 8 (quoting *State v. Shumway*, 2002 UT 124, ¶ 15, 63 P.3d 94); accord *State v. Robbins*, 2009 UT 23, ¶ 14, 210 P.3d 288; *State v. Winfield*, 2006 UT 4, ¶ 25, 128 P.3d 1171; *State v. Van Dyke*, 2009 UT App 369, ¶ 19, 223 P.3d 465 (quoting *Robbins*, 2009 UT 23, ¶ 14; *State v. Schwenke*, 2009 UT App 345, ¶ 8, 222 P.3d 768 (quoting *State v. Johnson*, 774 P.2d 1141, 1147 (Utah 1989)); *State v. Patrick*, 2009 UT App 226, ¶ 17 n.4, 217 P.3d 1150 (quoting *State v. Hirschi*, 2007 UT App 255, ¶¶ 15-16, 167 P.3d 503).

As a general matter, appellate courts will not weigh conflicting evidence, nor will they substitute their own judgment for that of the jury. See *State v. Hamilton*, 2003 UT 22, ¶ 38, 70 P.3d 111. Moreover, “the existence of contradictory evidence or of conflicting inferences does not warrant disturbing the jury's verdict.” *State v. Hardy*, 2002 UT App 244, ¶ 11, 54 P.3d 645 (quoting *State v. Howell*, 649 P.2d 91, 97 (Utah 1982) (internal quotation marks omitted)). However, “the definition of inherently improbable must include circumstances where a witness's testimony is incredibly dubious and, as such, apparently false.” *Robbins*, 2009 UT 23, ¶ 18.

Stated in other words, appellate courts will affirm the jury verdict if “there is some evidence, including all reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made.” *State v. Mead*, 2001 UT 58, ¶ 67, 27 P.3d 1115 (quoting *State v. Boyd*, 2001 UT 30, ¶ 16, 25 P.3d 985); accord *Boss*, 2005 UT App 520, ¶ 9.

### b. Marshaling Cases

Following are cases discussing the marshaling requirement for factual issues underlying criminal jury trial verdicts. See *State v. Clark*, 2005 UT 75, ¶ 17, 124 P.3d 235 (finding that defendant failed to marshal because he merely re-argued the factual case presented to the trial court rather than presenting all evidence); *State v. Pritchett*, 2003 UT 24, ¶ 25, 69 P.3d 1278 (stating defendant “fails entirely to address the evidence supporting aggravated sexual abuse – the crime for which he was convicted, focusing instead on the preliminary hearing transcript evidence supporting rape – the crime of which he was acquitted”); *State v. Widdison*, 2001 UT 60, ¶¶ 60-61, 28 P.3d 1278 (finding defendant failed to meet marshaling burden because she merely cited to portions of the testimony that favored her position and failed to set forth evidence in support of trial court findings); *State v. Maese*, 2010

UT App 106, ¶ 17, – P.3d – (finding that instead of presenting evidence in support of jury verdict, defendant selectively presented witness testimony that supported his assertions, omitting crucial and incriminating evidence from the “mountain of evidence” provided at trial); *State v. Chavez-Espinoza*, 2008 UT App 191, ¶ 21, 186 P.3d 1023 (finding defendant insufficiently marshaled evidence when he merely presented evidence in transcripts in addenda attached to brief); *State v. Waldron*, 2002 UT App 175, ¶ 15, 51 P.3d 21 (finding defendant failed to marshal when, through poor and selective citation to the record, his brief only pointed to parts of testimony that did not identify him as the perpetrator); *State v. Galvan*, 2001 UT App 329, ¶ 6, 37 P.3d 1197 (observing state failed to marshal evidence sufficient to challenge trial court’s finding); *State v. Lopez*, 2001 UT App 123, ¶¶ 18-19, 24 P.3d 993 (noting that to marshal properly, defendant cannot ignore conflicting testimony against him); *State v. Silva*, 2000 UT App 292, ¶ 26, 13 P.3d 604 (stating that although defendant jeopardized his claim by using overly broad strokes to fulfill marshaling burden, the court addressed his claim of insufficient evidence because the broad strokes did not compromise efficiency and fairness objectives that marshaling requirement seeks to ensure).

### c. Examples of Jury Fact Questions

The following cases contain examples of factual issues requiring a sufficiently inconclusive or inherently improbable standard.

- (1) Whether the property in criminal securities fraud case in fact had any value. *See State v. Johnson*, 2009 UT App 382, ¶ 16, 224 P.3d 720.
- (2) Whether defendant consumed enough alcohol to impair his ability to operate a vehicle safely. *See State v. Van Dyke*, 2009 UT App 369, ¶¶ 35-37, 223 P.3d 465.
- (3) Whether a school bus driver is in a position of special trust. *See State v. Tanner*, 2009 UT App 326, ¶ 17, 221 P.3d 901.
- (4) Whether defendant made untrue statements in relation to the transaction at issue. *See State v. Schwenke*, 2009 UT App 345, ¶ 15, 222 P.3d 768.
- (5) Whether defendant held a position of special trust over victim in aggravated sexual abuse case. *See State v. Rowley*, 2008 UT App 233, ¶ 13, 189 P.3d 109.
- (6) Whether party took computer with an honest belief that he had an ownership interest in it. *See State v. Buck*, 2009 UT App 2, ¶ 13, 200 P.3d 674.
- (7) Whether the defendant’s statements were willful rather than merely negligent or foolish. *See State v. Bolson*, 2007 UT App

268, ¶ 15, 167 P.3d 539.

(8) Whether the touching occurred through clothing. *See State v. Hirschi*, 2007 UT App 255, ¶ 17, 167 P.3d 503.

(9) Whether the value of the property was worth the requisite amount. *See State v. Greene*, 2006 UT App 445, ¶ 8, 147 P.3d 957.

(10) Whether item was registered as a security and whether defendant was licensed to sell securities. *See State v. Wallace*, 2005 UT App 434, ¶ 16, 124 P.3d 259.

(11) Whether defendant was the lawful owner of the property. *See State v. Hamilton*, 2003 UT 22, ¶¶ 20-22, 70 P.3d 111.

(12) Whether the defendant had a prior conviction. *See State v. Pirela*, 2003 UT App 39, ¶ 27, 65 P.3d 307.

(13) Whether defendant’s intoxicated state prevented him from forming intent to commit aggravated kidnapping. *See State v. Lopez*, 2001 UT App 123, ¶ 19, 24 P.3d 993.

## B. Challenging Discretionary Rulings

### 1. Introduction

As discussed in the first article of this series, appellants often characterize issues as “findings of fact” when they are actually issues challenging discretionary rulings made by the trial court. The traditional “abuse of discretion” standard of review, as well as the discretion granted in mixed question situations, were discussed at length in *State v. Pena*, 869 P.2d 932, 936-40 (Utah 1994).

### 2. Traditional Abuse-of-Discretion Standard

The abuse-of-discretion standard flows from the trial court’s significant role in pre-appellate litigation. The trial court has “a great deal of latitude in determining the most fair and efficient manner to conduct court business.” *Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶ 35, 215 P.3d 933 (quoting *Morton v. Cont’l Baking Co.*, 938 P.2d 271, 275 (Utah 1997)); accord *State v. Rhinehart*, 2006 UT App 517, ¶ 9, 153 P.3d 830. This is because the trial judge “is in the best position to evaluate the status of his [or her] cases, as well as the attitudes, motives, and credibility of the parties.” *Bodell*, 2009 UT 52, ¶ 35 (alteration in original) (quoting *Morton*, 938 P.2d at 275); accord *Rhinehart*, 2006 UT App 517, ¶ 25.

#### a. Civil Cases

Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make that

determination. *See Pena*, 869 P.2d at 939 n.5. A trial court abuses its discretion if there is “no reasonable basis for the decision.” *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615 (internal quotation marks omitted); *accord Gudmundson v. Del Ozone*, 2010 UT 33, ¶ 10, 232 P.3d 1059 (stating trial court abuses its discretion if decision exceeds the limits of reasonability); *Richards v. Brown*, 2009 UT App 315, ¶ 12, 222 P.3d 69; *Williams v. Bench*, 2008 UT App 306, ¶ 7, 193 P.3d 640; *Riley v. Riley*, 2006 UT App 214, ¶ 15, 138 P.3d 84; *Lefavi v. Bertoch*, 2000 UT App 5, ¶ 16, 994 P.2d 817 (providing appellate court will affirm trial court’s decision on appeal if reasonable basis exists for determination). A trial judge’s determination will be reversed if the ruling “is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of discretion.” *Anderson v. Thompson*, 2008 UT App 3, ¶ 11, 176 P.3d 464 (internal quotation marks omitted); *accord In re Weiskopf*, 2005 UT App 313, ¶ 1, 123 P.3d 453. An abuse of discretion may be demonstrated by showing that the trial court relied on an erroneous conclusion of law. *See Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957.

#### (i) Examples of Pretrial Discretion

(1) Whether the trial court properly denied a motion to change venue. *See Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 53, 233 P.3d 461; *United States Bank Nat’l Ass’n v. HMA, L.C.*, 2007 UT 40, ¶ 30, 169 P.3d 433.

(2) Whether the trial court properly granted or denied injunctive relief. *See Carrier v. Lindquist*, 2006 UT 105, ¶ 26, 37 P.3d 1112.

(3) Whether the trial court properly denied a motion to amend a pleading. *See Grantsville*, 2010 UT 38, ¶ 50; *Davencourt at Pilgrims Landing Homeowners Ass’n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶ 13, 221 P.3d 234 (regarding a motion to amend a complaint); *Red Cliffs Corner, LLC v. J.J. Hunan, Inc.*, 2009 UT App 240, ¶ 14, 219 P.3d 619.

(4) Whether the trial court properly conducted voir dire. *See Boyle v. Christensen*, 2009 UT App 241, ¶ 7, 219 P.3d 58; *Bee v. Anbeuser-Busch, Inc.*, 2009 UT App 35, ¶ 8, 204 P.3d 204.

(5) Whether the trial court properly denied a motion to continue. *See In re V.L.*, 2008 UT App 88, ¶ 30, 182 P.3d 395.

(6) Whether the trial court should summarily enforce a settlement agreement. *See LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 13, 221 P.3d 867.

(7) Whether the trial court properly enforced a scheduling order. *See Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 23, 222 P.3d 775.

(8) Whether the trial court properly imposed discovery sanctions.

*See Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶ 35, 215 P.3d 933; *SFR, Inc. v. Control, Inc.*, 2008 UT App 31, ¶ 9, 177 P.3d 629.

(9) Whether the trial court properly ordered that a trial should be bifurcated. *See Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 9, 214 P.3d 865, *cert. denied*, 221 P.3d 837.

(10) Whether the trial court properly dismissed a case for failure to prosecute. *See Gillmor v. Blue Ledge Corp.*, 2009 UT App 230, ¶ 6, 217 P.3d 723.

(11) Whether the trial court properly refused to reconsider a nonfinal summary judgment order. *See IHC Health Servs. Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 27, 196 P.3d 588; *Chilton v. Young*, 2009 UT App 265, ¶ 4, 220 P.3d 171, *cert. denied*, 230 P.3d 127 (Utah 2010).

(12) Whether the trial court improperly failed to require the posting of a bond for a temporary restraining order. *See Kenny v. Rich*, 2008 UT App 209, ¶ 22, 186 P.3d 989.

(13) Whether the trial court properly granted or denied a motion to reconsider summary judgment. *See Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615; *Johnson v. Gold’s Gym*, 2009 UT App 76, ¶ 10, 206 P.3d 302, *cert. denied*, 215 P.3d 161 (Utah 2010).

#### (ii) Examples of Discretion Exercised During Trial

Most examples of challenges to discretion exercised during trial arise in the evidence context, which will be covered in a later article.

(1) Whether the trial court properly determined not to award punitive damages. *See White v. Randall*, 2007 UT App 45, ¶ 23, 156 P.3d 849.

(2) Whether the trial court determined the proper amount for a punitive damage award. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 34, ¶ 12, 98 P.3d 409.

(3) Whether the trial court properly decided to award damages. *See Richards v. Brown*, 2009 UT App 315, ¶ 12, 222 P.3d 69.

(4) Whether the trial court properly ordered specific performance. *See Covey v. Covey*, 2003 UT App 380, ¶ 18, 80 P.3d 553.

(5) Whether the trial court properly fashioned an equitable remedy. *See Ockey v. Lebmer*, 2008 UT 37, ¶ 42, 189 P.3d 51; *Collard v. Nagle Constr. Inc.*, 2006 UT 72, ¶ 13, 149 P.3d 348; *In re Estate of LeFevre*, 2009 UT App 286, ¶ 10, 220 P.3d 476, *cert. denied*, 230 P.3d 127 (Utah 2010); *OLP, LLC v. Burningham*, 2008 UT App 173, ¶ 11, 185 P.3d 1138, *aff’d*, 2009 UT 75, 225 P.3d 177.

### (iii) Examples of Post-Trial Discretion

(1) Whether the trial court properly denied a motion for a new trial. *See Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064; *State v. Pena*, 869 P.2d 932, 938 (Utah 1994) (“At the extreme end of the discretion spectrum would be a decision by the trial court to grant or deny a new trial based on insufficiency of the evidence.”); *Wasatch Cnty. v. Okelberry*, 2010 UT App 13, ¶ 9, 226 P.3d 737; *Markham v. Bradley*, 2007 UT App 379, ¶ 14, 173 P.3d 865.

(2) Whether the trial court properly modified a final judgment. *See Dixon Bldg, LLC v. Jefferson*, 2010 UT App 34, ¶ 6, 127 P.3d 266.

(3) Whether a trial court should grant a motion for relief from a judgment. *See Davis v. Goldsworthy*, 2008 UT App 145, ¶ 10, 184 P.3d 626 (default judgment).

(4) Whether the amount of attorney fees awarded was proper. *See Kenny v. Rich*, 2008 UT App 209, ¶ 23, 186 P.3d 989; *Bonneville Distrib. Co. v. Green River Dev. Assocs., Inc.*, 2007 UT App 175, ¶ 44, 164 P.3d 433.

(5) Whether the trial court properly declined to award attorney fees. *See Fisher v. Fisher*, 2009 UT App 305, ¶ 8, 221 P.3d 845, *cert. denied*, 230 P.3d 127 (Utah 2010).

(6) Whether the trial court should award costs. *See Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶¶ 20, 78, 201 P.3d 966 (stating appellate courts review a trial court’s denial of costs for abuse of discretion); *Dale K. Barker Co., PC v. Bushnell*, 2009 UT App 385, ¶ 8, 222 P.3d 1188 (same).

(7) Whether the trial court should grant, modify, or revoke probation, which is a civil proceeding. *See State v. Killpack*, 2008 UT 49, ¶ 58, 191 P.3d 17 (denying probation); *State v. Orr*, 2005 UT 92, ¶ 9, 127 P.3d 1213 (extending probation); *State v. Cadedo*, 2008 UT App 4, ¶ 2, 176 P.3d 459.

(8) Whether the trial court properly determined the prevailing party. *See Crowley v. Black*, 2007 UT App 245, ¶ 6, 167 P.3d 1087.

(9) Whether trial court properly denied a motion for reconsideration. *See Tschagggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615.

### b. Criminal Cases

A trial court abuses its discretion if its decision is beyond the limits of reasonableness. *See State v. Clopten*, 2009 UT 84, ¶ 6, 223 P.3d 1103; *State v. Alfatlawi*, 2006 UT App 511, ¶ 20, 153 P.3d 804. If the actions of the trial court are inherently unfair, it has also abused its discretion. *See State v. Valdez*, 2008 UT App 329, ¶ 4, 194 P.3d 195 (mem.), *cert. denied*, 200 P.3d 193 (Utah 2010).

The exercise of discretion “necessarily reflects the personal judgment of the trial court,” and an appellate court can properly find abuse only if “no reasonable [person] would take the view adopted by the trial court.” *State v. Butterfield*, 2001 UT 59, ¶ 28, 27 P.3d 1133, *abrogated by State v. Clopten*, 2009 UT 84, 223 P.3d 1103 (alteration in original) (quoting *State v. Brown*, 948 P.2d 337, 340 (Utah 1997)); *accord State v. Hight*, 2008 UT App 118, ¶ 2, 182 P.3d 922.

### (i) Examples of Pretrial Discretion

(1) Whether the trial court properly denied a motion to remove a juror for cause. *See State v. Kell*, 2002 UT 106, ¶ 17, 61 P.3d 1019; *State v. Lafferty*, 2001 UT 19, ¶ 58, 20 P.3d 342.

(2) Whether the trial court should grant or deny a motion to sever offenses. *See State v. Balfour*, 2008 UT App 410, ¶ 10, 198 P.3d 471.

(3) Whether a trial judge properly decided to restrain the accused during trial. *See State v. Daniels*, 2002 UT 2, ¶ 16 n.1, 40 P.3d 611 (citing *United States v. Hack*, 782 F.2d 862, 867 (10th Cir. 1986)).

(4) Whether a trial court should deny or grant a motion for change of venue. *See State v. Stubbs*, 2005 UT 65, ¶ 8, 123 P.3d 407; *State v. Widdison*, 2001 UT 60, ¶ 38, 28 P.3d 1278.

(5) Whether the trial court abused its discretion in granting or denying a continuance. *See State v. Rogers*, 2006 UT 85, ¶ 18, 151 P.3d 171; *State v. Bernards*, 2007 UT App 238, ¶ 14, 166 P.3d 626.

(6) Whether the trial court properly conducted voir dire. *See State v. Robertson*, 2005 UT App 419, ¶ 4, 122 P.3d 895 (stating appellate court will reverse lower court’s decision concerning a for cause challenge only if it determines the court “has exceeded the bounds of its permitted range of discretion”); *accord State v. Wach*, 2001 UT 35, ¶ 25, 24 P.3d 948.

(7) Whether a trial court properly found that a motion to substitute counsel was timely. *See State v. Barber*, 2009 UT App 91, ¶ 53, 206 P.3d 1223.

(8) Appellate courts review “a trial court’s denial of a motion to withdraw a guilty plea under an abuse of discretion standard.” *State v. Moa*, 2009 UT App 231, ¶ 3, 220 P.3d 162 (internal quotation marks omitted); *see State v. Alexander*, 2009 UT App 188, ¶ 5, 214 P.3d 889.

(9) Whether the trial court properly decided “to admit or bar testimony for failure to adhere to discovery obligations.” *State v. McClellan*, 2008 UT App 48, ¶ 12, 179 P.3d 825 (internal

quotation marks omitted).

(10) Whether the defendant needed an interpreter for trial. *See State v. Jadama*, 2010 UT App 107, ¶ 12, 232 P.3d 545.

(11) Whether the trial court properly denied a motion to withdraw a guilty plea. *See Moa*, 2009 UT 231, ¶ 3; *Alexander*, 2009 UT App 188, ¶ 5, *State v. Lebi*, 2003 UT App 212, ¶ 7, 73 P.3d 985.

(12) Whether defendant's request to substitute one public defender for another was properly granted or denied. *See State v. Barber*, 2009 UT App 91, ¶ 17, 206 P.3d 1223 (citing *State v. Pursifell*, 746 P.2d 210, 272 (Utah Ct. App. 1987)).

(13) Whether the trial court properly accepted or rejected guilty plea. *See State v. Loveless*, 2008 UT App 336, ¶ 5, 194 P.3d 202.

(14) Whether the trial court properly declined to *sua sponte* conduct further questioning of jurors during jury selection process. *See State v. King*, 2008 UT 54, ¶ 36, 190 P.3d 1283.

(15) Whether the trial court properly denied a request for a bill of particulars. *See State v. Gulbransen*, 2005 UT 7, ¶ 26, 106 P.3d 734; *State v. Bernards*, 2007 UT App 238, ¶ 13, 166 P.3d 626.

(16) Whether the trial court properly administered its docket in refusing to hold a murder trial before the burglary and theft trial. *See State v. Rbinebart*, 2006 UT App 517, ¶ 9, 153 P.3d 830.

## (ii) Examples of Discretion Exercised During Trial

Most examples of challenges to discretion exercised during trial arise in the evidence context covered in a later article.

(1) Whether to allow a victim's mother to remain in the courtroom. *See State v. Billsie*, 2006 UT 13, ¶ 11, 131 P.3d 239.

(2) Whether the trial court should grant a motion for mistrial. *See State v. Allen*, 2005 UT 11, ¶ 39, 108 P.3d 730; *State v. Redding*, 2007 UT App 350, ¶ 9, 172 P.3d 319; *State v. Mahi*, 2005 UT App 494, ¶ 10, 125 P.3d 103.

(3) Whether a prosecutor's statements during closing arguments constituted prosecutorial misconduct. *See State v. Todd*, 2007 UT App 349, ¶ 14, 173 P.3d 170.

(4) Whether the trial court should bar a witness's testimony because a party failed to comply with discovery obligations. *See State v. Perez*, 2002 UT App 211, ¶ 24, 52 P.3d 451.

(5) Whether the trial court exceeded its authority in awarding restitution. *See State v. Johnson*, 2009 UT App 382, ¶ 19, 224 P.3d 720; *State v. Larsen*, 2009 UT App 293, ¶ 4, 221 P.3d 277 (mem.); *State v. Brown*, 2009 UT App 285, ¶ 6, 221 P.3d 273.

## (iii) Examples of Post-Trial Discretion

(1) Whether the trial court properly granted or denied a motion for a new trial. *See Redding*, 2007 UT App 350, ¶ 8; *Todd*, 2007 UT App 349, ¶ 14.

(2) Whether a sentence imposed by the trial court was proper. *See State v. Yazzi*, 2009 UT 14, ¶ 6, 203 P.3d 984; *State v. Moa*, 2009 UT App 231, ¶ 4, 220 P.3d 162; *State v. Valdez*, 2008 UT App 329, ¶ 4, 194 P.3d 195 (mem.) (considering whether imposition of consecutive sentence constituted an abuse of discretion).

(3) Whether an order of restitution was proper. *See State v. Harvell*, 2009 UT App 271, ¶ 7, 220 P.3d 174.

(4) Whether the trial court properly set aside a sentence. *See State v. Tryba*, 2000 UT App 230, ¶ 10, 8 P.3d 274.

(5) Whether the trial court properly decided to address the merits of a motion to reconsider. *See State v. Ruiz*, 2009 UT App 121, ¶ 12, 210 P.3d 955.

## 3. Mixed Questions

### a. Introduction

As discussed in the first article of this series, the standard of review for mixed questions has been in a state of flux since *State v. Pena*, 869 P.2d 932 (Utah 1994). We note that change has occurred primarily in criminal cases. In *Pena*, the supreme court discussed the "measure of discretion" given to trial courts. 869 P.2d at 936-39. When a legal rule is to be applied to a given set of facts, or, in other words, when the trial court must determine "whether a given set of facts comes within the reach of a given rule of law," the trial court is given a *de facto* grant of discretion. *Id.* at 936-37. This is the mixed question category.

The analytical complexity of standards of review is at its height when an appellate court reviews a trial court's application of a legal concept to a given set of facts. When appellate courts review mixed questions of fact and law, "the considerations that favor a more-deferential standard of review and those that favor a less-deferential standard of review compete for dominance, and the amount of deference that results will vary according to the nature of the legal concept at issue." *State v. Levin*, 2006 UT 50, ¶ 21, 144 P.3d 1096; *accord Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 16, 133 P.3d 382 (stating that the measure of discretion afforded varies according to the issue being reviewed).

With regard to many mixed questions of fact and law, it is either not possible or not wise for an appellate court to define strictly how a legal concept is to be applied to each set new of facts. *See Levin*, 2006 UT 50, ¶ 22; *Pena*, 869 P.2d at 938-40. The application of such a legal concept incorporates a *de facto* grant of discretion to

the trial court, and in those cases, appellate courts review the trial court's decision on the mixed question with deference commensurate to that discretion. *See Levin*, 2006 UT 50, ¶ 22; *Pena*, 869 P.2d at 937-39; *State v. Virgin*, 2006 UT 29, ¶ 27, 137 P.3d 787.

However, with certain mixed questions “uniform application is of high importance,” and policy considerations dictate that the application of the legal concept should be strictly controlled by the appellate courts. In such cases, appellate courts grant no discretion to the trial court and review the mixed question for correctness. *See Levin*, 2006 UT 50, ¶ 23; *State v. Brake*, 2004 UT 95, ¶¶ 14-15, 103 P.3d 699.

As explained in *Pena*, appellate courts “decide how much discretion to give a trial court in applying the law in a particular area by considering a number of factors pertinent to the relative expertise of appellate and trial courts in addressing those issues.” *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998) (citing *Pena*, 869 P.2d at 938-39). As described in the first standard of review article, the factors have changed over the last decade, and currently consist of the following: (1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court's application of the legal rule relies on “facts” observed by the trial judge, “such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts;” and (3) other “policy reasons that weigh for or against granting discretion to trial courts.” *Levin*, 2006 UT 50, ¶ 25 (internal quotation marks omitted). The goal in applying the above balancing test is to allocate tasks between the trial and appellate courts based on their institutional roles and competencies. *See id.* ¶ 31.

Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make that determination. *See State v. Pena*, 869 P.2d 932, 939-40 n.5 (Utah 1994).

#### **b. Examples of Mixed Questions in Civil Cases**

(1) Whether a party has effectuated a waiver. *See United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 21, 140 P.3d 1200; *Chen v. Stewart*, 2004 UT 82, ¶ 23, 100 P.3d 1177 (“The issues of equitable excuse and waiver are mixed questions of law and fact and we therefore grant broadened discretion to the trial court's findings.”); *Kenny v. Rich*, 2008 UT App 209, ¶ 18, 186 P.3d 989 (considering waiver of arbitration).

(2) Whether a notice of commencement of work filed pursuant to the mechanic's lien statute is enforceable. *See Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 7, 219 P.3d 918 (according “only a limited decree of deference to the district court's findings”).

(3) Whether the district court erred in holding party liable for forcible detainer and wrongful eviction. *See Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc.*, 2005 UT App 326, ¶ 16, 121 P.3d 24.

(4) The issue of equitable excuse is a mixed question of law and fact and appellate courts therefore grant “broadened” discretion to the trial court's findings. *See Chen v. Stewart*, 2004 UT 82, ¶ 23, 100 P.3d 1177.

(5) Whether the trial court properly granted a separate set of preemptory challenges to co-defendants. *See Bee v. Anbeuser-Busch, Inc.*, 2009 UT App 35, ¶ 7, 204 P.3d 204 (providing trial court is granted limited discretion in its determination; on spectrum of discretion, running from *de novo* to broad discretion, the appropriate discretion on this issue lies close to, although probably not at, *de novo* end).

(6) Whether the trial court properly determined that justice and equity require that a territory should be disconnected from a municipality in a disconnection action. *See Bluffdale Mountain Homes, LC v. Bluffdale City*, 2007 UT 57, ¶ 58, 167 P.3d 1016 (“[W]e review a trial court's ‘justice and equity’ determination as a mixed question of fact and law subject to substantial deference, but not so much deference that we will reverse such a determination only if clearly erroneous.”).

(7) Whether the doctrine of unjust enrichment applies. *See Richards v. Brown*, 2009 UT App 315, ¶ 11, 222 P.3d 69 (stating that because of the factual-intensive nature of equitable doctrines, appellate courts grant trial courts “broader discretion” in applying the law to facts); *Alpha Partners, Inc. v. Transamerica Inv. Mgmt., L.L.C.*, 2006 UT App 331, ¶ 16, 153 P.3d 714.

(8) Whether the equitable estoppel doctrine applies. *See Save Beaver Cnty. v. Beaver Cnty.*, 2009 UT 8, ¶ 9, 203 P.3d 937 (stating that because estoppel is extremely fact sensitive, significant deference is granted to district court); *RJW Media, Inc. v. CIT Group/Consumer Fin., Inc.*, 2008 UT App 476, ¶ 32, 202 P.3d 291.

(9) Whether a party was personally liable for acts in the course and scope of employment. *See Bennett v. Huisb*, 2007 UT App 19, ¶ 12, 155 P.3d 917 (“[W]e may . . . grant a trial court discretion in its application of the law to a given fact situation.” (internal quotation marks omitted) (alteration in original)).

(10) Whether a party breached a fiduciary duty. *See id.* ¶ 10 (granting “ample” discretion).

(11) Whether a given individual or association has standing to request particular judicial relief. *See Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 9, 233 P.3d 461 (providing minimal

deference is given to the district court's application of facts to the law); *Cedar Mountain Env't, Inc. v. Tooele Cnty.*, 2009 UT 48, ¶ 7, 214 P.3d 95.

(12) Whether the trial court properly found the parties enjoyed a confidential relationship and because of that relationship, there existed a presumption of undue influence. *See Davis v. Young*, 2008 UT App 246, ¶ 11, 190 P.3d 23 (stating appellate court grants "some discretion" to trial court in its application of law to facts).

(13) Whether the trial court properly found the party lacked good faith in an attorney fee award. *See Burton Lumber & Hardware Co. v. Graham*, 2008 UT App 207, ¶ 11, 186 P.3d 1012; *Gallegos v. Lloyd*, 2008 UT App 40, ¶ 6, 178 P.3d 922 ("The wide variety of circumstances that might support a finding of such intent requires that we give a trial court relatively broad discretion in concluding that bad faith has been shown." (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998))).

(14) Whether the trial court properly categorized devisees. *See In re Uzelac*, 2008 UT App 33, ¶ 11, 178 P.3d 347 (providing that appellate courts accord some deference to the trial court).

(15) Whether a public highway has been established under the requirements of the highway dedication statute is a mixed question of law. *See Wasatch Cnty. v. Okelberry*, 2008 UT 10, ¶ 8, 179 P.3d 768 (stating appellate court grants the district court significant discretion in its application of the facts to the statute); *Jennings Inv., LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 5, 208 P.3d 1077, *cert. denied*, 215 P.3d 161 (Utah 2009).

(16) Whether the trial court properly concluded that the party was a "creditor," that she had a "claim" to the transferred properties, whether the other party had "actual intent" to fraudulently transfer property and whether the other party was "insolvent." *See Tolle v. Fenley*, 2006 UT App 78, ¶ 11, 132 P.3d 63 (providing that appellate courts "may still grant a trial court discretion in its application of the law to a given fact situation" (internal quotation marks omitted)).

(17) Whether the district court properly rejected a change of use of a water right application when the ground for that rejection was the probability that vested water rights would be impaired by the use proposed in the application. *See Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 15, 133 P.3d 382 (stating district court should "enjoy significant, but not broad, discretion").

(18) Whether the trial court properly found interference with a water right. *See Wayment v. Howard*, 2006 UT 56, ¶ 9, 144 P.3d 1147 (granting broad deference to the trial court because issue is extremely fact dependent).

(19) Whether party put water to beneficial use. *See Butler; Crockett*

*& Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 2004 UT 67, ¶¶ 43-44, 50, 98 P.3d 1 (stating appellate court's afford trial court "significant, though not broad discretion").

(20) Whether the trial court appropriately applied the substantial hardship exception to the advocate-witness rule. *See D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C.*, 2006 UT 62, ¶¶ 20-25, 147 P.3d 414 (providing that court should grant district court "broad discretion" in applying substantial hardship exception).

### c. Examples of Mixed Questions in Criminal Cases

The first two examples below still grant some discretion to the appellate courts. However, in the remaining examples, appellate courts no longer afford any measure of discretion or deference to the trial court's application of the facts to the legal standard.

(1) Whether the trial court properly denied a motion to quash a bindover order. *See State v. Virgin*, 2006 UT 29, ¶¶ 27, 34, 137 P.3d 787 (stating that magistrates have "some discretion" in making their bindover determinations); *State v. Balfour*, 2008 UT App 410, ¶ 9, 198 P.3d 471 (stating that court affords "limited deference" to magistrate); *State v. Ingram*, 2006 UT App 237, ¶ 11, 139 P.3d 286 (affording the lower court's decision "limited deference").

(2) Whether the trial court conducting a trial inside prison deprives defendant of fair trial. *See State v. Daniels*, 2002 UT 2, ¶ 19, 40 P.3d 611 (providing that the right to a fair trial merits a "certain measure of discretion").

(3) Whether the trial court properly granted or denied a motion to suppress evidence. *See State v. Richards*, 2009 UT App 397, ¶ 7, 224 P.3d 733; *State v. Morris*, 2009 UT App 181, ¶ 5, 214 P.3d 883 (providing that a trial court's decision to deny a motion to suppress evidence presents a mixed question of law and fact: appellate court reviews factual findings for clear error and its legal conclusion, including its application of the legal standard to the facts, non-deferentially for correctness); *State v. Wilkinson*, 2008 UT App 395, ¶ 5, 197 P.3d 96 (providing that challenges to suppression rulings present questions of law reviewed for correctness without deference to trial court's application of law to facts); *State v. Baker*, 2008 UT App 115, ¶ 8, 182 P.3d 935; *State v. Martinez*, 2008 UT App 90, ¶ 3, 182 P.3d 385 (providing that appellate courts give no deference to trial court's application of law to the facts); *State v. Weaver*, 2007 UT App 292, ¶ 8, 169 P.3d 760 (stating that suppression issue presents mixed question of law and fact); *State v. Adams*, 2007 UT App 117, ¶ 7, 158 P.3d 1134 (stating that appellate courts review a ruling on a motion to suppress for correctness, without deference to the district court's application of the law to the facts).

(4) Whether the trial court erred in trying a defendant *in absentia* is a mixed question of law and fact. *See State v. Pando*, 2005 UT

App 384, ¶ 13, 122 P.3d 672 (considering whether the trial court properly conducted the inquiry regarding the voluntariness of a defendant's absence is a question of law reviewed for correctness and whether the defendant was voluntarily absent is a question of fact).

(5) Whether the trial court erred in concluding a defendant had not been entrapped presents a mixed question of fact and law. *See State v. Haltom*, 2005 UT App 348, ¶ 7, 121 P.3d 42 (“Although we review factual findings for clear error and legal conclusions for correctness, due to the factually sensitive nature of entrapment cases we affirm the trial court's decision ‘unless we can hold, based on the given facts, that reasonable minds cannot differ as to whether entrapment occurred.’ Only when reasonable minds cannot differ can we find entrapments as a matter of law.” (citation omitted)).

(6) Whether the defendant's due process rights were violated. *See State v. Hales*, 2007 UT 14, ¶ 35, 152 P.3d 321 (stating that due process claims presents a mixed question of fact and law that appellate courts review *de novo* for correctness; but the courts “incorporate a clearly erroneous standard for the necessary subsidiary factual determinations” (citation omitted)).

(7) Whether the trial court properly refused to disqualify an attorney is a mixed question of law and fact. *See State v. Balfour*, 2008 UT App 410, ¶ 11, 198 P.3d 471 (stating appellate court reviews factual conclusions under clear error standard and legal interpretation of particular ethical norms under a *de novo* standard when that interpretation implicates important constitutional rights).

(8) In cases where the trial court has already ruled on an ineffective assistance of counsel claim, “the questions of [counsel's] performance and prejudice are mixed questions of law and fact.” *State v. Moore*, 2009 UT App 386, ¶ 7, 223 P.3d 1137 (quoting *State v. Tennyson*, 850 P.2d 461, 466 (Utah Ct. App. 1993)). When the trial court has already ruled on the issue, appellate courts review the trial court's application the law to the facts *de novo*, with no deference to the lower court's conclusions. *See State v. McClellan*, 2009 UT 50, ¶ 17, 216 P.3d 956 (providing that in determining ineffective assistance of counsel claims, appellate courts review trial court's purely factual findings for clear error, but review application of law to facts for correctness); *accord Menzies v. Galetka*, 2006 UT 81, ¶¶ 56, 58, 150 P.3d 480 (reviewing ineffective assistance of counsel issue under three *Levin* factors, appellate court determined that it should review for correctness the trial court's application of the law to the facts); *State v. Mecham*, 2000 UT App 247, ¶ 19, 9 P.3d 777. However, ineffective assistance of counsel arguments raised for the first time on appeal are questions of law reviewed for correctness. *See State v. Vos*, 2007 UT App 215, ¶ 9, 164 P.3d 1258.

(9) Whether the trial court properly found a defendant voluntarily, knowingly, and intelligently waived the right to counsel is a mixed question of law and fact. *See State v. Cabrera*, 2007 UT App 194, ¶ 7, 163 P.3d 707 (“While [appellate courts] review questions of law for correctness, a trial court's factual findings may be reversed on appeal only if they are clearly erroneous.” (citation omitted)); *State v. Pedockie*, 2006 UT 28, ¶ 23, 137 P.3d 716; *accord State v. Houston*, 2006 UT App 437, ¶ 4, 147 P.3d 543.

(10) Whether statements were made in the course of plea discussions. *See W. Valley City v. Fieeiki*, 2007 UT App 62, ¶ 17, 157 P.3d 802 (applying the three *Levin* factors, appellate court will “defer to the trial court's factual determinations but grant no deference to the trial court's ultimate conclusion”).

(11) Whether there was consent to search. *See State v. Tripp*, 2010 UT 9, ¶ 36, 227 P.3d 1251; *State v. Hansen*, 2002 UT 125, ¶ 26, 63 P.3d 650 (providing that appellate courts afford little discretion to the district court because there must be state wide standards that guide law enforcement and prosecutorial officials; these standards ensure different trial judges will reach the same legal conclusion in cases that have little factual differences).

(12) Whether the trial court properly determined evidence was obtained as a result of an illegal search and seizure. *See State v. Brake*, 2004 UT 95, ¶ 15, 103 P.3d 699 (abandoning “the standard which extended ‘some deference’ to the application of law to the underlying factual findings in search and seizure cases in favor of non-deferential review”); *State v. Lowe*, 2010 UT App 156, ¶ 5, 234 P.3d 160; *State v. Harding*, 2010 UT App 8, ¶ 5, 223 P.3d 1148 (“We afford little discretion to the district court's determination in cases involving the legality of search and seizure.”); *State v. Hogue*, 2007 UT App 86, ¶ 5, 157 P.3d 826; *State v. Naranjo*, 2005 UT App 311, ¶ 10, 118 P.3d 285 (stating that in search and seizure case, the ultimate question of whether a particular set of facts satisfied a given legal standard is a mixed question of law and fact; however, because courts need to ensure consistent disposition of similar cases, we review search and seizure issues for correctness).

(13) Whether a trial court properly determined that a person was or was not subjected to a custodial interrogation for the purpose of Fifth Amendment *Miranda* protections. *See State v. Levin*, 2006 UT 50, ¶ 4, 144 P.3d 1096 (providing that need for uniformity in custodial interrogation standard warrants nondeferential appellate review).

(14) Whether there was reasonable suspicion. *See State v. Chism*, 2005 UT App 41, ¶¶ 8-9, 107 P.3d 706 (stating that non-deferential or correctness standard applied when determining whether a given set of facts comes within the reach of a given rule of law).

## C. Challenging Conclusions of Law

### 1. Introduction

Legal determinations, sometimes labeled “questions of law” “legal conclusions,” “conclusions of law,” “ultimate facts,” or “ultimate determinations,” are defined as “those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances.” *Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 14, 133 P.3d 382 (quoting *State v. Pena*, 869 P.2d 932, 935 (Utah 1994)); accord *State v. Palmer*, 2009 UT 55, ¶ 16, 220 P.3d 1198. “[A]ppellate review of a trial court’s determination of the law is usually characterized by the term ‘correctness.’” *Pena* 869 P.2d at 936; accord *State v. Jackson*, 2010 UT App 136, ¶ 9, – P.3d –; *Call v. Keiter*, 2010 UT App 55, ¶ 14, 230 P.3d 128.

“Utah case law teaches that ‘correctness’ means the appellate court decides the matter for itself and does not defer in any degree to the trial judge’s determination of law.” *Pena*, 869 P.2d at 935; accord *Clark v. Smay*, 2005 UT App 36, ¶ 7, 110 P.3d 140. Thus, the broadest scope of judicial review extends to questions of law. This is because “‘appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction.’” *Levin*, 2006 UT 50, ¶ 20 n.18, (quoting *Pena*, 869 P.2d at 936) (citing Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 779 (1957)); accord *Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177; *State v. Daniels*, 2002 UT 2, ¶ 18, 40 P.3d 611.

It is important for the appellate advocate to be able to properly identify issues as legal rather than factual or discretionary so as to apply the appropriate standard of review. See *Drake v. Indus. Comm’n*, 939 P.2d 177, 181 (Utah 1997) (“Essential to any determination of the appropriate standard of review for an issue on appeal is the characterization of that issue as either a question of fact, a question of law, or a mixed question requiring application of the law to the facts.”). Often, trial courts will label an issue as a factual finding when it is actually a legal conclusion. The appellate courts will use the standard of review that is in accord with the substance of the issue and not the title given it by the trial court. See *Russell v. Thomas*, 2000 UT App 82, ¶ 6 n.6, 999 P.2d 1244 (stating appellate courts disregard labels on factual findings and legal conclusions and look to substance).

Further, appellate advocates should also be aware of court opinions recognizing that a determination is often the sum of several rulings, each of which may be reviewed under a separate standard of review. See *Brighton Corp. v. Ward*, 2001 UT App 236, ¶ 14, 31 P.3d 594 (stating whether contract exists “may embody several subsidiary rulings” (quoting *Cal Wadsworth Constr. v.*

*St. George*, 865 P.2d 1373, 1375 (Utah Ct. App. 1993))).

Thus, counsel should carefully examine an issue and explore all possible standards of review, rather than assuming only one standard applies. If counsel properly characterizes issues as legal, factual, or discretionary and in turn selects the proper standards of review, his or her brief and oral argument will be more effective, resulting in better judicial decisions.

### 2. Areas of Application

Appellate courts typically apply the correction-of-error standard of review to the following general categories:

(a) Challenges to the interpretation of the United States and Utah Constitutions:

Interpreting the constitution presents questions of law that appellate courts review for correctness, and appellate courts afford no deference to the lower court’s interpretation. See, e.g., *State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519 (interpreting state and federal constitutions); *State v. Lane*, 2009 UT 35, ¶ 14, 212 P.3d 529 (interpreting the Utah Constitution); *Ford v. State*, 2008 UT 66, ¶¶ 6, 18, 199 P.3d 892 (interpreting state and federal constitutional claims); *Grand Cnty. v. Emery Cnty.*, 2002 UT 57, ¶ 6, 52 P.3d 1148 (interpreting the Utah Constitution); *State v. Casey*, 2002 UT 29, ¶ 19, 44 P.3d 756 (interpreting the Utah Constitution); *Hatch v. Davis*, 2004 UT App 378, ¶ 19, 102 P.3d 774 (interpreting the federal constitution).

(b) Challenges to the constitutionality of statutes and ordinances:

A trial court’s conclusion that a statute or ordinance is constitutional presents a question of law reviewed under a correction-of-error standard. See *State v. Drej*, 2010 UT 35, ¶¶ 9-10, 233 P.3d 476 (special mitigation statute); *State v. Ross*, 2007 UT 89, ¶¶ 17-18, 174 P.3d 628 (death penalty statute); *State v. Green*, 2004 UT 76, ¶ 42, 99 P.3d 820; *Midvale City Corp. v. Haltom*, 2003 UT 26, ¶¶ 10-11, 73 P.3d 334 (business ordinance); *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 7, 67 P.3d 436; *Whaley v. Park City Mun. Corp.*, 2008 UT App 234, ¶ 8, 190 P.3d 1 (sound ordinance); *State v. Tenorio*, 2007 UT App 92, ¶ 5, 156 P.3d 854; *Provo City v. Whatcott*, 2000 UT App 86, ¶ 5, 1 P.3d 1113. A statute is afforded a presumption of validity, and any reasonable doubt is resolved in favor of constitutionality. See *W. Jordan City v. Goodman*, 2006 UT 27, ¶ 9, 135 P.3d 874; *State v. Willis*, 2004 UT 93, ¶ 4, 100 P.3d 1218; *State v. Morrison*, 2001 UT 73, ¶ 5, 31 P.3d 547; *Clearfield City v. Hoyer*, 2008 UT App 226, ¶ 6, 189 P.3d 94.

(c) Challenges to the constitutionality of rules:

A trial court’s ruling on the constitutionality of a rule is reviewed for correctness. See *In re B.A.P.*, 2006 UT 68, ¶ 6, 148 P.3d 934.

(d) Challenges to the trial court's interpretation of statutes, rules, and ordinances:

The trial court's interpretation of statutes, rules and ordinances is a question of law reviewed for correctness. *See e.g., Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 10, 127 P.3d 256 (interpretation of statute); *Arbogast Family Trust v. River Crossing, LLC*, 2010 UT 40, ¶ 10, — P.3d — (interpretation of rule of procedure); *State v. Rodrigues*, 2009 UT 62, ¶ 11, 218 P.3d 610; (interpretation of rule of procedure); *N.A.R., Inc. v. Walker*, 2001 UT 98, ¶ 4, 37 P.3d 1068 (interpretation of judicial code); *Estate of Higley v. Dep't. of Transp.*, 2010 UT App 143, ¶ 5, — P.3d — (interpretation of statute); *Haynes Land & Livestock Co. v. Jacob Family Chalk Creek, LLC*, 2010 UT App 112, ¶ 9, 233 P.3d 529 (interpretation of statute); *State v. Barney*, 2008 UT App 250, ¶ 5, 189 P.3d 1277 (interpretation of statute); *State v. Rowley*, 2008 UT App 233, ¶ 8, 189 P.3d 109 (interpretation of statute).

A question of legislative intent associated with statutory interpretation is a matter of law, not of fact. *See Archuleta v. St. Mark's Hosp.*, Nos. 20080580, 20080572, 2010 Utah LEXIS 70, at \*3-4 (Utah May 14, 2010); *State v. Steele*, 2010 UT App 185, ¶¶ 12, 16, — P.3d —. Whether a statute applies to a particular set of facts is a question of law. *See Slisze v. Stanley-Bostitch*, 1999 UT 20, ¶ 7, 979 P.2d 317 (Utah 1999); *State v. Pena*, 869 P.2d 932, 938 (Utah 1994).

(e) Challenges to the trial court's interpretation of common law:

Questions of common law interpretation are questions of law which the appellate court is well-suited to address, and thus gives no deference to the lower court. *See Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 46, 221 P.3d 256; *Ellis v. Estate of Ellis*, 2007 UT 77, ¶ 6, 169 P.3d 441; *State ex rel. Office of Recovery Serv. v. Streight*, 2004 UT 88, ¶ 6, 108 P.3d 690 (“We consider the trial court's interpretation of binding case law as presenting a question of law and review the trial court's interpretation of that law for correctness.” (quoting *State v. Richardson*, 843 P.2d 517, 518 (Utah Ct. App. 1992))); *State v. Steele*, 2010 UT App 185, ¶ 12; *Handy v. U.S. Bank*, 2008 UT App 9, ¶ 11, 177 P.3d 80.

(f) Challenges to the court of appeals' interpretation of a prior judicial decision, whether one of its own or one of another court. *See Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 131, 82 P.3d 1076.

### 3. Challenging Conclusions of Law in Civil Cases

#### a. Correction-of-Error Standard

A trial court's conclusions of law in civil cases are reviewed for correctness. *See Black v. Allstate Ins. Co.*, 2004 UT 66, ¶ 9,

100 P.3d 1163; *Kendall Ins., Inc. v. R & R Group, Inc.*, 2008 UT App 235, ¶ 8, 189 P.3d 114. This standard of review has also been referred to as a “correction-of-error standard.” *Lunt v. Lance*, 2008 UT App 192, ¶ 10, 186 P.3d 978; *SRF, Inc. v. Control, Inc.*, 2008 UT App 31, ¶ 10, 177 P.3d 629; *Crowley v. Porter*, 2005 UT App 518, ¶ 31, 127 P.3d 1224. As used by Utah's appellate courts, “correctness” means that no particular deference is given to the trial court's ruling on questions of law. *See Ellsworth Paulsen Constr. Co. v. 51-SPR- L.L.C.*, 2008 UT 28, ¶ 12, 183 P.3d 248; *DCH Holdings, LLC v. Nielsen*, 2009 UT App 269, ¶ 7, 220 P.3d 178.

#### b. Examples of Conclusions of Law

(1) Whether the trial court used the proper measure to calculate damages. *See Traco Steel Erectors, Inc. v. Control, Inc.*, 2009 UT 81, ¶ 18, 222 P.3d 1164; *Mabana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶ 25, 96 P.3d 893; *Richards v. Brown*, 2009 UT App 315, ¶ 47, 222 P.3d 69.

(2) Whether the trial court applied the correct interest rate. *See Knight Adjustment Bureau v. Lewis*, 2010 UT App 40, ¶ 2, 228 P.3d 754 (mem.); *Ron Case Roofing & Asphalt Paving, L.L.C. v. Sturzenegger*, 2007 UT App 100, ¶ 7, 158 P.3d 556.

(3) Whether a duty of care is owed. *See Lopez v. United Auto. Ins. Co.*, 2009 UT App 389, ¶ 8, 222 P.3d 1192 (negligence).

(4) Whether a party is entitled to summary judgment. *See Salt Lake Cnty. v. Holliday Water Co.*, 2010 UT 45, ¶ 14, — P.3d —.

(5) Whether a plaintiff is entitled to prejudgment interest. *See Lefavi v. Bertoch*, 2000 UT App 5, ¶ 22, 994 P.2d 817.

(6) Whether a court has personal or subject matter jurisdiction. *See Xiao Yang Li v. Univ. of Utah*, 2006 UT 57, ¶ 7, 144 P.3d 1142 (subject matter jurisdiction); *Hicks v. UBS Fin. Servs., Inc.*, 2010 UT App 26, ¶ 10, 226 P.3d 762 (subject matter jurisdiction).

(7) Whether a party is entitled to attorney fees. *See IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 38, 196 P.3d 588; *J. Pochynok Co., Inc. v. Smedsrud*, 2005 UT 39, ¶ 8, 116 P.3d 353; *Dale K. Barker Co., PC v. Bushnell & Bushnet, PC*, 2009 UT App 385, ¶ 3, 222 P.3d 1188; *Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 9, 222 P.3d 775; *Pugh v. N. Am. Warranty Servs., Inc.*, 2000 UT App 121, ¶ 13, 1 P.3d 570.

(8) Whether a lien constitutes a wrongful lien for purposes of the Wrongful Lien Injunction Act. *See Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 8, 219 P.3d 918.

(9) Whether the trial court erred in setting aside a sheriff's sale of property after the time period for redemption had expired.

See *Pyper v. Bond*, 2009 UT App 331, ¶ 9, 224 P.3d 713.

(10) Whether a contract exists. See *Urbahn Constr. & Design, Inc. v. Hopkins*, 2008 UT App 41, ¶ 11, 179 P.3d 808; *NexMed, Inc. v. Clealon Mann*, 2005 UT App 431, ¶ 10, 124 P.3d 252.

(11) Whether the trial court correctly interpreted a contract. See *Richardson v. Hart*, 2009 UT App 387, ¶ 6, 223 P.3d 484; *Deer Crest Assocs. I, LC v. Silver Creek Dev. Group, LLC*, 2009 UT App 356, ¶ 6, 222 P.3d 1184; *Little Caesar Enters., Inc. v. Bell Canyon Shopping Ctr., L.C.*, 2000 UT App 291, ¶ 10, 13 P.3d 600.

(12) Whether a contractual term or provision is ambiguous on its face. See *Daines v. Vincent*, 2008 UT 51, ¶ 25, 190 P.3d 1269; *S. Ridge Homeowners' Ass'n v. Brown*, 2010 UT App 23, ¶ 1, 226 P.3d 758 (mem.) (stating whether ambiguity exists in contract is a question of law); *Park v. Stanford*, 2009 UT App 307, ¶ 10, 221 P.3d 877.

(13) Whether the trial judge should have recused himself. See *Lunt v. Lance*, 2008 UT App 192, ¶ 7, 186 P.3d 978.

(14) Whether *res judicata* bars collateral attack is a question of law reviewed for correctness. See *PGM, Inc. v. Westchester Inv. Partners, Ltd.*, 2000 UT App 20, ¶ 3, 995 P.2d 1252.

(15) Whether trial court properly denied a petition for post-conviction relief. See *Gardner v. State*, 2010 UT 46, ¶ 55, — P.3d —.

(16) Whether the statute of frauds was applicable. See *LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 13, 221 P.3d 867; *Bennett v. Huish*, 2007 UT App 19, ¶ 9, 155 P.3d 917.

(17) Whether an equitable remedy was available. See *In re Estate of LeFevre*, 2009 UT App 286, ¶ 10, 220 P.3d 476.

(18) Whether an attorney-client privilege exists. See *Moler v. CW Mgmt., Corp.*, 2008 UT 46, ¶ 7, 190 P.3d 1250.

(19) Whether the trial court properly interpreted a rule in the Utah Code of Judicial Administration. See *N.A.R., Inc., v. Farr*, 2000 UT App 62, ¶ 5, 997 P.2d 343.

(20) A certified question from the federal court presents a question of law. See *Egbert v. Nissan Motor Co.*, 2010 UT 8, ¶ 8, 228 P.3d 737.

(21) Whether an agent's knowledge should be imputed to a principal. See *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, ¶ 14, 61 P.3d 1009.

(22) Whether the supreme court has jurisdiction to hear an appeal. See *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 18, 44 P.3d 663.

(23) Whether the discovery rule and the statute of limitations apply. See *Ockey v. Lebmer*, 2008 UT 37, ¶ 34, 189 P.3d 51; *Colosimo v. Roman Catholic Bishop*, 2007 UT 25, ¶ 11, 156 P.3d 806.

(24) Whether a party has proven a *prima facie* case. See *Handy v. U.S. Bank*, 2008 UT App 9, ¶ 12, 177 P.3d 80.

(25) Whether a denial of a motion to dismiss based on governmental immunity was proper. See *Wheeler v. McPherson*, 2002 UT 16, ¶ 9, 40 P.3d 632; *Heughs Land, L.L.C. v. Holladay City*, 2005 UT App 202, ¶ 5, 113 P.3d 1024.

(26) The application of a statute of limitations is a question of law. See *Arnold v. Grigsby*, 2009 UT 88, ¶ 7, 225 P.3d 192; *Call v. Keiter*, 2010 UT App 55, ¶¶ 14-15, 230 P.3d 128.

(27) Whether the trial court's refusal to give a jury instruction is proper. See *Eddy v. Albertson's Inc.*, 2001 UT 88, ¶ 17, 34 P.3d 781; *Chapman v. Uintah Cnty.*, 2003 UT App 383, ¶ 6, 81 P.3d 761.

(28) Whether the jury instruction correctly stated the law. See *Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 22, 221 P.3d 256; see also *Stevensen 3rd E., LC v. Watts*, 2009 UT App 137, ¶ 24, 210 P.3d 977.

(29) Whether a statute operates retroactively. See *Goebel v. Salt Lake City S. R.R. Co.*, 2004 UT 80, ¶ 36, 104 P.3d 1185; *Soriano v. Graul*, 2008 UT App 188, ¶ 4, 186 P.3d 960.

(30) Whether the trial court correctly determined that an agreement constituted an arbitration agreement. See *Kenny v. Rich*, 2008 UT App 209, ¶ 19, 186 P.3d 989.

(31) Whether a party has standing. See *Stocks v. United States Fid. & Guar. Co.*, 2000 UT App 139, ¶ 9, 3 P.3d 722.

(32) Whether *res judicata* or claim preclusion bars an action. See *Gillmore v. Family Link, LLC*, 2010 UT App 2, ¶ 9, 224 P.3d 741.

(33) Whether the trial court properly decided a motion to compel arbitration. See *Cent. Florida Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 10, 40 P.3d 599; *MacDonald Redhawk Invs. v. Ridges at Redhawk, L.L.C.*, 2006 UT App 491, ¶ 2, 153 P.3d 787.

(34) Whether a contract is unconscionable. See *Knight Adjustment Bureau v. Lewis*, 2010 UT App 40, ¶ 6, 228 P.3d 754 (mem.).

(35) Whether the trial court properly interpreted a prior judicial decision. See *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 131, 82 P.3d 1076.

#### 4. Challenging Conclusions of Law in Criminal Cases

### a. Correction-of-Error Standard

A trial court's conclusions of law in criminal cases are reviewed for correctness. *See State v. Tiedemann*, 2007 UT 49, ¶ 11, 162 P.3d 1106; *State v. Lowe*, 2010 UT App 156, ¶ 5, 234 P.3d 156; *State v. Perkins*, 2009 UT App 390, ¶ 8, 222 P.3d 1198. “Correctness” means that an “appellate court decides the matter for itself and does not defer in any degree to the trial court’s determination because it is the primary role of the appellate courts to say what the law is and ensure that it is uniform throughout the jurisdiction.” *State v. Daniels*, 2002 UT 2, ¶ 18, 40 P.3d 611 (citing *State v. Pena*, 869 P.2d 932, 935 (Utah 1994)).

### b. Examples of Conclusions of Law

(1) Whether the trial court strictly complied with the constitutional and procedural requirements for entry of a guilty plea. *See State v. Alexander*, 2009 UT App 188, ¶ 5, 214 P.3d 889; *State v. Gibson*, 2009 UT App 108, ¶ 8, 208 P.3d 543; *State v. Lebi*, 2003 UT App 212, ¶ 7, 73 P.3d 985.

(2) Whether a defendant was properly served. *See State v. Jensen*, 2003 UT App 273, ¶ 6, 76 P.3d 188.

(3) Whether a probable cause statement adequately notified defendant of the factual allegations supporting the criminal charges. *See State v. Maese*, 2010 UT App 106, ¶ 6, — P.3d —; *State v. Norcutt*, 2006 UT App 269, ¶ 8, 139 P.3d 1066.

(4) Whether a jury instruction correctly stated the law. *See State v. Housekeeper*, 2002 UT 118, ¶ 11, 62 P.3d 444; *see also Maese*, 2010 UT App 106, ¶ 7; *State v. Marchet*, 2009 UT App 262, ¶ 17, 219 P.3d 75; *State v. Weisberg*, 2002 UT App 434, ¶ 12, 62 P.3d 457; *State v. Tuckett*, 2000 UT App 295, ¶ 7, 13 P.3d 1060 (considering whether the trial court properly instructed the jury on the law of self-defense).

(5) Whether the trial court properly refused to give requested instructions to a jury. *See State v. Gallegos*, 2009 UT 42, ¶ 10, 220 P.3d 136; *State v. Bluff*, 2002 UT 66, ¶ 21, 52 P.3d 1210; *State v. White*, 2009 UT App 81, ¶ 16, 206 P.3d 646; *Chapman v. Uintah Cnty.*, 2003 UT App 383, ¶ 6, 81 P.3d 761; *State v. Stringham*, 2001 UT App 13, ¶ 17, 17 P.3d 1153.

(6) Whether the State was entitled to rescind a plea agreement. *See Stringham*, 2001 UT App 13, ¶ 10.

(7) Whether the trial court properly decided to grant or deny a motion to dismiss. *See State v. Bushman*, 2010 UT App 120, ¶ 6, 231 P.3d 833; *State v. Barnert*, 2004 UT App 321, ¶ 6, 100 P.3d 221; *State v. Horrocks*, 2001 UT App 4, ¶ 10, 17 P.3d 1145; *State v. Pierson*, 2000 UT App 274, ¶ 7, 12 P.3d 103.

(8) Whether one crime is a lesser included offense of another.

*See Pierson*, 2000 UT App 274, ¶ 7.

(9) Whether the trial court erred in sentencing the defendant for third degree felonies. *See State v. Kenison*, 2000 UT App 322, ¶ 7, 14 P.3d 129.

(10) “Whether the State’s destruction of potentially exculpatory evidence violated due process.” *State v. Jackson*, 2010 UT App 136, ¶ 10, — P.3d —; *accord State v. Tiedemann*, 2007 UT 49, ¶ 12, 162 P.3d 1106; *see also State v. Mejia*, 2007 UT App 337, ¶ 8, 172 P.3d 315 (considering whether due process rights have been violated).

(11) Whether the trial court properly applied the *Shondel* doctrine and sentenced the defendant under a provision carrying a lesser penalty. *See State v. Green*, 2000 UT App 33, ¶ 6, 995 P.2d 1250.

(12) Whether counsel provided ineffective assistance of counsel, when the issue is raised for the first time on appeal. *See State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162; *State v. Walker*, 2010 UT App 157, ¶ 13, — P.3d —; *State v. Marchet*, 2009 UT App 262, ¶ 18, 219 P.3d 75; *State v. Perry*, 2009 UT App 51, ¶ 9, 204 P.3d 880; *State v. Chavez-Espinoza*, 2008 UT App 191, ¶ 8, 186 P.3d 1023.

(13) Whether court properly denied right to confront and cross-examine witnesses. *See State v. Gonzales*, 2005 UT 72, ¶ 47, 125 P.3d 878; *State v. Clark*, 2009 UT App 252, ¶ 10, 219 P.3d 631.

(14) Whether a trial court properly dismissed a jury and held a bench trial in absentia. *See State v. Boyles*, 2009 UT App 23, ¶ 4, 204 P.3d 184; *Orem City v. Bovo*, 2003 UT App 286, ¶ 6, 76 P.3d 1170.

(15) Whether the trial court “properly complied with a legal duty to resolve on the record the accuracy of contested information in sentencing reports.” *State v. Scott*, 2008 UT App 68, ¶ 5, 180 P.3d 774 (internal quotation marks omitted); *State v. Veteto*, 2000 UT 62, ¶ 13, 6 P.3d 1133; *accord State v. Maroney*, 2004 UT App 206, ¶ 23, 94 P.3d 295.

(16) Whether an appellate court has jurisdiction to hear a criminal appeal. *See State v. Martin*, 2009 UT App 43, ¶ 8, 204 P.3d 875 (subject matter jurisdiction); *State v. Tenorio*, 2007 UT App 92, ¶ 5, 156 P.3d 854; *State v. Norris*, 2002 UT App 305, ¶ 5, 57 P.3d 238.

(17) Whether a district court has jurisdiction. *See Norris*, 2007 UT 6, ¶ 10; *State v. Reber*, 2007 UT 36, ¶ 8, 171 P.3d 406; *Salt Lake City v. Weiner*, 2009 UT App 249, ¶ 5, 219 P.3d 72.

(18) Whether an area is protected curtilage. *See State v. Perkins*, 2009 UT App 390, ¶ 17, 222 P.3d 1198.

(19) Whether a defendant's double jeopardy protections were violated. *See State v. Kell*, 2002 UT 106, ¶ 61, 61 P.3d 1019; *State v. Escamilla-Hernandez*, 2008 UT App 419, ¶ 7, 198 P.3d 997.

(20) Whether defendant was denied a fair trial because of the trial court's delivery of modified *Allen* instruction after the jury was deadlocked. *See State v. Harry*, 2008 UT App 224, ¶ 5, 189 P.3d 98.

(21) Whether the trial court should have merged defendant's kidnapping and assault charges. *See State v. Wareham*, 2006 UT App 327, ¶ 12, 143 P.3d 302; *State v. Diaz*, 2002 UT App 288, ¶ 10, 55 P.3d 1131.

(22) Whether the presiding judge improperly failed to remove the trial court judge after trial court judge refused to recuse himself. *See Wareham*, 2006 UT App 327, ¶ 13.

(23) Whether the trial court applied the proper legal standards in denying a motion for new trial. *See State v. Wengreen*, 2007 UT App 264, ¶ 12, 167 P.3d 516; *State v. Mitchell*, 2007 UT App 216, ¶ 6, 163 P.3d 737 (stating legal determinations made by trial court as a basis for its denial of a new trial are reviewed for correctness).

## D. Challenges in Specific Practice Areas

### 1. Challenges in Divorce Cases

#### a. Challenging Findings of Fact

##### (i) Clearly Erroneous Standard

Appellate courts give great deference to the trial court's findings of fact in divorce cases and will not overturn them unless they are clearly erroneous. *See Kimball v. Kimball*, 2009 UT App 233, ¶ 14, 217 P.3d 733; *Thompson v. Thompson*, 2009 UT App 101, ¶ 10, 208 P.3d 539; *Leppert v. Leppert*, 2009 UT App 10, ¶ 8, 200 P.3d 223; *Stonebocker v. Stonebocker*, 2008 UT App 11, ¶ 9, 176 P.3d 476; *Kelley v. Kelley*, 2000 UT App 236, ¶ 18, 9 P.3d 171. A finding of fact will be adjudged clearly erroneous if it violates the standards set by the appellate court; is against the clear weight of the evidence; or the reviewing court is left with a definite and firm conviction that a mistake has been made, although there is evidence to support the finding. *See Kimball*, 2009 UT App 233, ¶ 14; *Shinkoskey v. Shinkoskey*, 2001 UT App 44, ¶ 10 n.5, 19 P.3d 1005; *Kelley*, 2000 UT App 236, ¶ 18.

##### (ii) Marshaling Cases

The following are cases involving divorce proceedings in which appellate courts have addressed the marshaling requirement:

*Kimball*, 2009 UT App 233, ¶¶ 20-22 (finding husband and wife both failed to adequately marshal evidence in challenging property issues); *Levin v. Carlton*, 2009 UT App 170, ¶ 16 n.5, 231 P.3d 884 (holding wife failed to marshal all record evidence that supported challenged finding); *Young v. Young*, 2009 UT App 3, ¶ 12, 201 P.3d 301 (determining husband failed to adequately marshal evidence, rather he simply reargued issues raised below); *Stonebocker*, 2008 UT App 11, ¶ 9 n.4 (finding husband met minimum threshold of marshaling burden); *Sweet v. Sweet*, 2006 UT App 216, ¶ 6, 138 P.3d 63 (mem.) (finding wife failed to marshal all evidence in support of the finding and then demonstrate that evidence was legally insufficient to support the finding even when viewing it in light most favorable to trial court); *Davis v. Davis*, 2003 UT App 282, ¶ 10, 76 P.3d 716 (rejecting marshaling effort by husband who simply reargued evidence he presented at trial and ignored factual support for trial court's decision to award wife alimony); *Wilde v. Wilde*, 2001 UT App 318, ¶¶ 29-30, 35 P.3d 341 (holding appellant failed to meet her obligation to marshal evidence, and thus the court assumed the record supported the trial court's finding); *Shinkoskey*, 2001 UT App 44, ¶ 10 n.5 (finding husband failed to marshal evidence); *Kelley*, 2000 UT App 236, ¶ 19 (determining husband merely reargued his view of the evidence rather than marshaling other evidence supporting court's findings).

##### (iii) Examples of Fact Questions

(1) Whether the trial court properly valued the marital home. *See Olson v. Olson*, 2010 UT App 22, ¶ 9, 226 P.3d 751, *cert. denied*, 2010 Utah LEXIS 144 (Utah, July 1, 2010).

(2) Whether a person has been served with process. *See Cooke v. Cooke*, 2001 UT App 110, ¶ 7, 22 P.3d 1249.

(3) Whether husband was voluntarily underemployed and his earning capacity had not diminished. *See Arnold v. Arnold*, 2008 UT App 17, ¶¶ 5-6, 177 P.3d 89.

(4) Whether property was commingled such that separate property converted to marital property. *See Keiter v. Keiter*, 2010 UT App 169, ¶¶ 22-26, 235 P.3d 782; *Thompson v. Thompson*, 2009 UT App 101, ¶ 10, 208 P.3d 539 (discussing whether property is marital or separate).

(5) Whether a husband used money from forged or altered checks for family purposes. *See Kimball v. Kimball*, 2009 UT App 233, ¶ 22, 217 P.3d 733.

(6) Whether husband was in "receipt" of his social security benefits and whether the amount of the benefits was readily ascertainable. *See Young v. Young*, 2009 UT App 3, ¶ 12, 201

P.3d 301.

(7) Whether husband was able to pay alimony. *See Leppert v. Leppert*, 2009 UT App 10, ¶ 14, 200 P.3d 223.

(8) Whether a party misrepresented her income in a mediation or during subsequent enforcement proceedings. *See Arnold v. Arnold*, 2008 UT App 17, ¶ 9, 177 P.3d 89.

(9) Whether a line of credit was debt of the family home or debt of the business. *See Stonebocker v. Stonebocker*, 2008 UT App 11, ¶ 26, 176 P.3d 476.

(10) Whether husband had any active involvement in a limited liability company. *See Levin v. Carlton*, 2009 UT App 170, ¶ 16 n.5, 213 P.3d 884.

(11) Whether husband misappropriated funds from his children's accounts. *See Shinkoskey v. Shinkoskey*, 2001 UT App 44, ¶ 10, 19 P.3d 1005.

#### (iv) Adequacy of Trial Court's Factual Findings

To ensure that the trial court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions. *See Connell v. Connell*, 2010 UT App 139, ¶¶ 5, 13, 233 P.3d 836 (holding trial court's findings of fact regarding alimony were sufficient); *Thompson v. Thompson*, 2009 UT App 101, ¶ 15, 208 P.3d 539 (regarding premarital contributions to retirement account findings); *Kunzler v. Kunzler*, 2008 UT App 263, ¶ 15, 190 P.3d 497, *cert. denied*, 199 P.3d 970 (Utah 2008) (regarding property division findings); *Arnold*, 2008 UT App 17, ¶ 11 (“[A] district court exceeds its permitted discretion when it fails to make findings establishing an adequate and reviewable basis for its fee award.”).

The trial court must make sufficiently detailed findings on each factor to enable a reviewing court to ensure that the trial court's discretionary determination was rationally based upon the applicable factors. *See Ostermiller v. Ostermiller*, 2010 UT App 218, ¶ 7, —P.3d— (mem.) (“Detailed findings of fact and conclusions of law are necessary for this reviewing court to ensure that the trial court's discretionary determination... was rationally based.” (internal quotation marks omitted)); *Keiter v. Keiter*, 2010 UT App 169, ¶ 17, 235 P.3d 782 (stating trial court's findings “should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached” (quoting *Stonebocker*, 2008 UT App 11, ¶ 16)); *Mark v. Mark*, 2009 UT App 374, ¶ 9, 223 P.3d 476 (concluding the absence of adequate findings of fact is a fundamental defect that warrants

reversal unless the record is clear and uncontroverted such to allow appellate court to apply statutory factors as matter of law on appeal); *Leppert v. Leppert*, 2009 UT App 10, ¶ 14, 200 P.3d 223 (finding district court's findings of fact addressing parties' financial needs and husband's ability to pay were not sufficiently detailed to disclose process court used in setting alimony award); *Hodge v. Hodge*, 2007 UT App 394, ¶ 3, 174 P.3d 1137 (mem.) (concluding property distribution must be based upon adequate factual findings); *Andrus v. Andrus*, 2007 UT App 291, ¶ 19, 169 P.3d 754 (holding trial court's finding regarding husband's ability to pay attorney fees failed to show steps it took in reaching its decision).

Formal findings of fact greatly help the parties determine if a basis for appeal exists, and, if the appeal is taken, significantly aid the appellate court in its review. *See Stonebocker v. Stonebocker*, 2008 UT App 11, ¶ 17, 176 P.3d 476 (noting that adequate findings are necessary for appellate courts to perform their assigned review function).

Appellate courts review the legal adequacy of findings of fact in divorce cases for correctness as a question of law. *See Kimball v. Kimball*, 2009 UT App 233, ¶ 13, 217 P.3d 733; *Levin v. Carlton*, 2009 UT App 170, ¶¶ 13, 20, 213 P.3d 884 (providing that findings of fact must be adequately supported by the evidence and the correct law); *Young v. Young*, 2009 UT App 3, ¶ 5, 201 P.3d 301; *Jensen v. Jensen*, 2009 UT App 1, ¶ 6, 203 P.3d 1020; *Wall v. Wall*, 2007 UT App 61, ¶ 7, 157 P.3d 341. If the findings are legally inadequate, the exercise of marshaling the evidence supporting the findings becomes futile and appellant need not marshal. *See Williamson v. Williamson*, 1999 UT App 219, ¶ 8 n.2, 983 P.2d 1103.

## b. Challenging Discretionary Rulings

### (i) Abuse-of-Discretion Standard

“Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence.” *Connell v. Connell*, 2010 UT App 139, ¶ 45, 233 P.3d 836 (quoting *Childs v. Childs*, 967 P.2d 942, 944 (Utah Ct. App. 1998)). Where the trial court may exercise broad discretion, we presume the correctness of the court's decision absent a clear and prejudicial abuse of discretion. *See Trubetzkoj v. Trubetzkoj*, 2009 UT App 77, ¶ 8, 205 P.3d 891 (noting that the trial court's discretion is so broad “that its actions enjoy a presumption of validity” (internal quotation marks omitted)), *cert. denied*, 215 P.3d 161 (Utah 2009). While trial courts have broad discretion, that discretion must be exercised under the standards and parameters set by appellate courts. *See Connell*, 2010 UT App 139, ¶ 5; *Mark*, 2009 UT App 374, ¶ 6 (stating

that appellate courts will not disturb alimony ruling as long as court exercises discretion within bounds and standards set by appellate courts); *Kimball*, 2009 UT App 233, ¶ 13 (noting that appellate courts will find an abuse of discretion if “there has been a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such inequity has resulted as to manifest a clear abuse of discretion” (internal quotation marks omitted)). Furthermore, to ensure the court acted within its broad discretion, the facts and reasons for the court’s decision must be set forth fully in adequate findings and conclusions. See *Connell*, 2010 UT App 139, ¶ 5; *Arnold v. Arnold*, 2008 UT App 17, ¶ 11, 177 P.3d 89 (“[A] district court exceeds its permitted discretion when it fails to make findings establishing an adequate and reviewable basis for its [decision].”).

#### (ii) Examples of Questions within the Trial Court’s Discretion

(1) Whether the trial court properly determined the amount and timing of an alimony award. See *Olson v. Olson*, 2010 UT App 22, ¶ 8, 226 P.3d 751, *cert. denied*, 2010 Utah LEXIS 144 (Utah, July 1, 2010); *Davis v. Davis*, 2003 UT App 282, ¶ 7, 76 P.3d 716.

(2) Whether the trial court properly terminated alimony and denied future alimony when wife began working full time. See *Connell*, 2010 UT App 139, ¶ 5.

(3) Whether the trial court properly ordered rehabilitative alimony. See *Mark v. Mark*, 2009 UT App 374, ¶ 6, 223 P.3d 476.

(4) Whether there has been a substantial and material change of circumstances sufficient to justify custody modification. See *Doyle v. Doyle*, 2009 UT App 306, ¶ 7, 221 P.3d 888, *cert. granted*, 225 P.3d 880 (Utah 2010); *Young v. Young*, 2009 UT App 3, ¶ 4, 201 P.3d 301, *cert. denied*, 211 P.3d 986 (Utah 2009).

(5) Whether the trial court properly decided mother’s entitlement to child support modification. See *Doyle*, 2009 UT App 306, ¶ 9 (“We will not upset the trial court’s apportionment of financial responsibilities in the absence of manifest injustice or inequity that indicates a clear abuse of discretion.” (quoting *Maughan v. Maughan*, 770 P.2d 156, 161 (Utah Ct. App. 1989))).

(6) Whether the trial court properly determined that proceeds from the wife’s stock were her sole and separate property. See *Kimball v. Kimball*, 2009 UT App 233, ¶ 13, 217 P.3d 733.

(7) Whether the trial court properly awarded attorney fees in a divorce proceeding. See *id.* ¶ 19; *Mark*, 2009 UT App 374, ¶ 7, (considering whether the trial court properly ordered parties to pay their own attorney fees).

(8) Whether the trial court properly included the cost of maintaining health insurance coverage for a couple’s two adult children in its alimony award. See *Olsen v. Olsen*, 2007 UT App 296, ¶ 8, 169 P.3d 765.

(9) Whether the trial court properly denied retroactive child support and nanny care costs. See *Connell v. Connell*, 2010 UT App 139, ¶ 7, 233 P.3d 836.

(10) Whether the trial court properly determined its award of parent-time. See *Trubetzky v. Trubetzky*, 2009 UT App 77, ¶ 7, 205 P.3d 891, *cert. denied*, 215 P.3d 161 (Utah 2009).

(11) Whether the marital property has been equitably divided. See *Keiter v. Keiter*, 2010 UT App 169, ¶ 16, 235 P.3d 782; *Thompson v. Thompson*, 2009 UT App 101, ¶ 5, 208 P.3d 539 (considering whether court erroneously denied husband principal and appreciated value of his separate premarital contribution to home and failed to award him appreciation on his premarital contribution to a 401(k)); *Trubetzky*, 2009 UT App 77, ¶ 8; *Stonebocker v. Stonebocker*, 2008 UT App 11, ¶ 8, 176 P.3d 476 (stating that courts have considerable discretion in property division).

(12) Whether the trial court properly denied an accounting and subsequent division of tangible business assets. See *Trubetzky*, 2009 UT App 77, ¶ 9.

(13) Whether the trial court properly disallowed testimony from wife’s fact witness. See *Olson v. Olson*, 2010 UT App 22, ¶ 10, 226 P.3d 751, *cert. denied*, 2010 Utah LEXIS 144 (Utah, July 1, 2010).

(14) Whether there has been a substantial change of circumstances. See *Boyce v. Goble*, 2000 UT App 237, ¶ 9, 8 P.3d 1042.

#### (iii) Examples of Mixed Questions

(1) Whether cohabitation exists is a mixed question of fact and law. See *Myers v. Myers*, 2010 UT App 74, ¶ 10, 231 P.3d 815 (“While we defer to the trial court’s factual findings unless they are shown to be clearly erroneous, we review its ultimate conclusion for correctness.”), *cert. granted*, 2010 Utah LEXIS 123 (Utah, July 27, 2010); *Jensen v. Jensen*, 2007 UT App 377, ¶ 2, 173 P.3d 223 (mem.).

(2) Whether the trial court properly determined husband waived his right to certain third party contractual provisions against wife is a mixed question of law and fact. See *Bayles v. Bayles*, No. 20070334-CA, 2008 Utah App. LEXIS 99, at \*1 (Mar. 20, 2008) (mem.) (“[W]e ‘grant broadened discretion to the trial court’s findings’ when reviewing questions of waiver.” (quoting *Chen v. Stewart*, 2004 UT 82, ¶ 23, 100 P.3d 1177)).

(3) Whether the trial court properly applied statutory law to the facts. *See Clark v. Clark*, 2001 UT 44, ¶ 14, 27 P.3d 538; *Olsen v. Olsen*, 2007 UT App 296, ¶ 7, 169 P.3d 765.

(4) The determination of residency for divorce purposes is a mixed question of law and fact. *See Archibald v. Archibald*, No. 20030553-CA, 2005 Utah App. LEXIS 56, at \*1-2 (Feb. 10, 2005) (mem.) (citing *Bustamante v. Bustamante*, 645 P.2d 40, 43 (Utah 1982)).

(5) Challenges to jurisdiction based upon improper service present a mixed question. *See Swapp v. Swapp*, No. 20040287-CA, 2004 Utah App. LEXIS 270, at \*3 (June 10, 2004) (citing *Cooke v. Cooke*, 2001 UT App 110, ¶ 7, 22 P.3d 1249).

(6) Whether the trial court properly granted husband's motion to set aside a default decree of divorce. *See Cooke*, 2001 UT App 110, ¶ 7.

### c. Challenging Conclusions of Law

#### (i) Correction-of-Error Standard

Although appellate courts give great deference to a trial court's factual findings, conclusions of law arising from those findings are reviewed for correctness and given no special deference on appeal. *See Keiter v. Keiter*, 2010 UT App 169, ¶ 16, 235 P.3d 782; *Leppert v. Leppert*, 2009 UT App 10, ¶ 8, 200 P.3d 223. "Controlling Utah case law teaches that 'correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). "This is because appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction." *Id.* (citing Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 779 (1957)).

#### (ii) Examples of Conclusions of Law

(1) Whether the trial court should have held separate hearings on the change of circumstances issue and the best interests issue. *See Doyle v. Doyle*, 2009 UT App 306, ¶ 6, 221 P.3d 888, *cert. granted*, 225 P.3d 880 (Utah 2010).

(2) Whether the trial court properly determined a party is entitled to prejudgment interest. *See Kimball v. Kimball*, 2009 UT App 233, ¶ 18, 217 P.3d 733.

(3) Whether the trial court properly treated wife's federal social security benefits as marital assets because Congress has preempted the state's divorce laws related to social security. *See Olsen v. Olsen*, 2007 UT App 296, ¶ 7, 169 P.3d 765 (stating that decisions

regarding whether a state law has been preempted by federal law are reviewed for correctness).

(4) Whether the district court properly interpreted the attorney fee statute in a divorce case. *See Connell v. Connell*, 2010 UT App 139, ¶ 6, 233 P.3d 836; *Fisher v. Fisher*, 2009 UT App 305, ¶ 8, 221 P.3d 845, *cert. denied*, 2010 Utah LEXIS 82 (Utah, Mar. 5, 2010).

(5) Whether the trial court properly characterized property as marital. *See Keiter v. Keiter*, 2010 UT App 169, ¶¶ 15-16, 235 P.3d 782.

(6) Whether the district court actually followed the terms of the stipulation. *See Lloyd v. Lloyd*, 2009 UT App 314, ¶ 6, 221 P.3d 884.

(7) Whether trial court properly granted a divorce due to irreconcilable differences, rather than adultery. *See Trubetzkoy v. Trubetzkoy*, 2009 UT App 77, ¶ 10, 205 P.3d 891, *cert. denied*, 215 P.3d 161 (Utah 2009).

(8) Whether the trial court misinterpreted the statutory requirements for an order of joint legal custody. *See id.* ¶ 6,

(9) Whether the court has subject matter jurisdiction. *See Johnson v. Johnson*, 2010 UT 28, ¶ 6, 234 P.3d 1100.

(10) Whether the defenses of mutual mistake and impossibility should have afforded husband relief under the facts. *See Robinson v. Robinson*, 2010 UT App 96, ¶ 6, 232 P.3d 1081.

(11) Whether the trial court violated husband's due process rights when it failed to hold an evidentiary hearing before enforcing a stipulation and entering a decree of divorce. *See id.* ¶ 8.

(12) Whether trial court made necessary factual findings to support determination. *See id.* ¶ 7.

(13) Whether the trial court placed the burden of proof on the appropriate party. *See Fisher v. Fisher*, 2009 UT App 305, ¶ 7, 221 P.3d 845.

(14) Whether party should have been given credit for payment of property taxes and water assessments on trust property. *See id.*

## 2. Challenges in Juvenile Court Cases

### a. Challenging Findings of Fact

#### (i) Clearly Erroneous Standard

A juvenile court's findings of fact will not be overturned unless they are clearly erroneous. *See In re adoption of Connor*, 2007 UT 33, ¶ 16, 158 P.3d 1097; *In re A.B.*, 2007 UT App 286, ¶ 10, 168 P.3d 820; *In re A.G.*, 2001 UT App 87, ¶ 4, 27 P.3d 562; *In*

*re E.R.*, 2001 UT App 66, ¶ 11, 21 P.3d 680. In juvenile cases, appellate courts will find clear error if the findings are “against the clear weight of the evidence, or if the appellate court is convinced a mistake has been made.” *In re T.M.*, 2006 UT App 435, ¶ 14, 147 P.3d 529; *accord In re S.Y.*, 2003 UT App 66, ¶ 11, 66 P.3d 601 (stating that a finding is clearly erroneous if the appellate court is left with “a definite and firm conviction that a mistake has been made”); *State ex rel. L.M.*, 2001 UT App 314, ¶ 11, 37 P.3d 1188; *State ex rel. C.K.*, 2000 UT App 11, ¶ 17, 996 P.2d 1059. Appellate courts give the juvenile court a “wide latitude of discretion as to the judgments arrived at’ based upon not only the court’s opportunity to judge credibility firsthand, but also based on the juvenile court judges’ special training, experience and interest in this field.” *In re K.F.*, 2009 UT 4, ¶ 18, 201 P.3d 985 (quoting *In re E.R.*, 2001 UT App 66, ¶ 11).

### (ii) Marshaling Cases

For an appellate court to overturn a juvenile court’s finding of fact, the appellant must “marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding when viewing it in a light most favorable to the court below.” *Id.* ¶ 44 (quoting *Wilson Supply v. Fradan Mfg. Corp.*, 2002 UT 94, ¶ 21, 54 P.3d 1177).

The following are cases involving appeals from juvenile court trials in which appellate courts have addressed the marshaling requirement: *In re G.C.*, 2008 UT App 270, ¶ 15, 191 P.3d 55 (finding that “[f]ather’s selective exclusion of unfavorable supporting evidence does not satisfy the marshaling requirement”); *In re A.B.*, 2007 UT App 286, ¶ 14 (finding that mother failed to comply with the marshaling requirement); *In re S.O.*, 2005 UT App 393, ¶ 12, 122 P.3d 686 (mem.) (per curiam) (determining party failed to marshal evidence supporting juvenile court’s findings); *In re S.D.C.*, 2001 UT App 353, ¶ 8, 36 P.3d 540 (stating that “when a party fails to challenge and marshal the evidence underlying ultimate findings, we assume the juvenile court’s judgment was correct”); *State ex rel. L.M.*, 2001 UT App 314, ¶¶ 15-16, (finding that parents “fail[ed] to properly discharge their duty to marshal” and, as a result, the appellate court assumed that the evidence supported the juvenile court’s findings); *In re J.W.*, 2001 UT App 208, ¶¶ 9-10, 30 P.3d 1232 (finding that party did not marshal evidence supporting juvenile court’s findings when party reargued the weight of the evidence “relying upon testimony favoring his innocence and ignoring the conflicting testimony against him”); *In re E.R.*, 2001 UT App 66, ¶ 11 (dismissing parents’ claim for failing to marshal the evidence).

### (iii) Examples of Fact Questions

(1) Whether parents met the requirements of the service plan.

See *In re E.R.*, 2001 UT App 66, ¶ 11.

(2) Whether party understood the consequences of signing the relinquishment petition, understood the permanent nature of those consequences, and signed the petition freely and voluntarily. See *In re A.G.*, 2001 UT App 87, ¶ 4, 27 P.3d 562.

(3) Whether the party understood and was capable of caring for two children with special needs. See *State ex rel. L.M.*, 2000 UT App 11, ¶ 10, 996 P.2d 1059.

### (iv) Adequacy of Trial Court’s Factual Findings

The importance of adequate findings applies with equal force to cases in juvenile court. The following cases address the adequacy of the juvenile court’s factual findings: *In re S.H.*, 2005 UT App 324, ¶ 23, 119 P.3d 309 (finding that the juvenile court’s conclusion of a father’s fitness and ability to parent were supported by the court’s findings of fact). *In re G.B.*, 2002 UT App 270, ¶ 22, 53 P.3d 963 (concluding from the court’s detailed findings that the juvenile court had properly considered each statutory factor before deciding to terminate mother’s parental rights).

## b. Challenging Discretionary Rulings

### (i) Abuse-of-Discretion Standard

Juvenile courts are granted substantial discretion in making certain determinations. See *In re V.L.*, 2008 UT App 88, ¶ 15, 182 P.3d 395 (denying a request for continuance in a termination proceeding). A reviewing court will not reverse a juvenile court’s discretionary ruling “unless that discretion has clearly been abused.” *Id.* Appellate courts will not reverse a juvenile court’s discretionary ruling if it is “consistent with the standards set by appellate courts and supported by adequate findings of fact and conclusions of law.” *In re K.H.*, 2004 UT App 483, ¶ 4, 105 P.3d 967 (quoting *In re J.M.V.*, 958 P.2d 943, 947 (Utah Ct. App. 1998)).

### (ii) Examples of Questions within the Trial Court’s Discretion

(1) Whether the trial court properly terminated parental rights. See *In re J.F.*, No. 20100447-CA, 2010 Utah App. LEXIS 228, at \*1 (Aug. 19, 2010) (mem.) (per curiam) (stating that termination petition reviewed for abuse of discretion); *In re A.G.*, 2001 UT App 87, ¶ 7, (stating that whether termination of parental rights is in the children’s best interests is a “legal conclusion” that “we review for abuse of discretion”); *but see State ex rel. D.H.*, 2009 UT App 32, ¶ 9, 204 P.3d 210 (stating that whether parental rights should be terminated presents a mixed question of law and fact).

(2) Whether to appoint a different attorney for an indigent defendant who expresses dissatisfaction with court-appointed counsel. See *In re R.H.*, 2003 UT App 154, ¶ 9, 71 P.3d 616.

(3) Whether the juvenile court properly dismissed father's ineffective assistance of counsel claim brought post-judgment on a rule 60(b)(6) motion. *See State ex rel. V.H.*, 2007 UT App 1, ¶ 8, 154 P.3d 867.

(4) Whether juvenile court properly determined that a transfer of custody was in the child's best interest. *See State ex rel. F.W.*, No. 20020767-CA, 2003 Utah App. LEXIS 249, at \*1 (July 3, 2003) (mem.) (citing *State ex rel. Summers v. Wulffenstein*, 616 P.2d 608, 611 (Utah 1980)).

(5) Whether the juvenile court properly denied a motion to withdraw an admission. *See In re K.M.*, 2006 UT App 74, ¶ 10, 136 P.3d 1230, *rev'd on other grounds*, 2007 UT 93, 173 P.3d 1279.

(6) Whether the juvenile court properly denied an updated assessment of the relationship between mother and child. *See State ex rel. A.M.D.*, 2006 UT App 457, ¶ 8, 153 P.3d 724.

(7) Whether the juvenile court properly allowed a witness to testify. *See State ex rel. A.M.S.*, 2000 UT App 182, ¶ 16, 4 P.3d 95; *State ex rel. A.M.D.*, 2006 UT App 457 ¶ 8 (expert witness).

(8) Whether the juvenile court erred in granting the State permission to administer psychiatric medications. *See In re E.R.*, 2001 UT App 66, ¶ 7, 21 P.3d 680.

### (iii) Examples of Mixed Questions

(1) Whether to bind over a criminal defendant for trial is a mixed question of law and fact. *See State ex rel. I.R.C.*, 2010 UT 41, ¶ 12, 232 P.3d 1040; *State ex rel. D.K.*, 2006 UT App 461, ¶ 7, 153 P.3d 736.

(2) Whether paternity was substantively adjudicated by the juvenile court. *See In re D.A.*, 2009 UT 83, ¶ 13, 222 P.3d 1172.

(3) "Whether the juvenile court properly terminated Father's parental rights 'presents a mixed question of law and fact.'" *See State ex rel. D.H.*, 2009 UT App 32, ¶ 9, 204 P.3d 210 (quoting *In re B.R.*, 2007 UT 82, ¶ 12, 171 P.3d 435); *In re A.B.*, 2007 UT App 286, ¶ 10, 168 P.3d 820 (stating that in reviewing termination of parental rights, we give the juvenile court a wide latitude of discretion). *But see In re K.H.*, 2004 UT App 483, ¶ 4, 105 P.3d 967 (providing that the appellate court will not disturb parental rights unless the court has abused its discretion).

(4) "Application of statutory law to the facts presents a mixed question of fact and law. We review the juvenile court's findings for clear error and its conclusions of law for correctness, affording the court 'some discretion in applying the law to the facts.'" *See In re S.H.*, 2005 UT App 324, ¶ 12, 119 P.3d 309 (quoting *In re G.B.*, 2002 UT App 270, ¶ 11, 53 P.3d 963).

(5) Whether reasonable reunification efforts were made is a mixed question of law and fact. *See In re T.M.*, 2006 UT App 435, ¶ 15, 147 P.3d 529.

## c. Challenging Conclusions of Law

### (i) Correction-of-Error Standard

In general, appellate courts apply a correction-of-error standard to the juvenile court's conclusions of law. *See In re A.M.*, 2009 UT App 118, ¶ 6, 208 P.3d 1058; *In re C.D.*, 2008 UT App 477, ¶ 7, 200 P.3d 194, *cert. granted*, 211 P.3d 986 (Utah 2009). However, although legal conclusions are reviewed for correctness, appellate courts may still allow a juvenile court some discretion in applying the law to the specific fact scenario. *See In re C.D.*, 2008 UT App 477, ¶ 7; *In re A.C.*, 2004 UT App 255, ¶ 9, 97 P.3d 706.

### (ii) Examples of Conclusions of Law

(1) Whether the juvenile court had subject matter jurisdiction. *See In re K.F.*, 2009 UT 4, ¶ 18, 201 P.3d 985; *In re A.M.*, 2009 UT App 118, ¶ 6.

(2) Whether the juvenile court applied the correct standard of proof to determine paternity. *See In re S.H.*, 2005 UT App 324, ¶ 10.

(3) Whether a gag order violated the right to free speech. *See In re L.M.*, 2001 UT App 314, ¶ 13, 37 P.3d 1188.

(4) Whether a permanency plan was properly imposed. *See In re E.R.*, 2001 UT App 66, ¶ 5, 21 P.3d 680.

(5) Whether the juvenile court illegally considered the guardian *ad litem's* petition to terminate parental rights. *See id.* ¶ 6.

(6) Whether the juvenile court properly interpreted a rule of procedure. *See In re A.M.D.*, 2006 UT App 457, ¶ 7, 153 P.3d 724.

(7) Whether evidence constitutes hearsay in juvenile court. *See In re K.O.*, 2010 UT App 155, ¶ 7, 238 P.3d 59.

(8) Whether the juvenile court is required to making findings of fact and legally determine reliability of eyewitness identification before admitting such testimony. *See id.* ¶ 6.

(9) Whether a statute has been interpreted and applied correctly by the juvenile court. *See In re A.M.*, 2009 UT App 118, ¶ 6, 208 P.3d 1058.

(10) Whether a parent has been afforded adequate due process. *See id.* ¶ 10.

## 3. Challenges to Evidentiary Rulings

## a. Introduction

In general, a trial court is granted a great deal of discretion in its decision to admit or exclude evidence. *See Cabaness v. Thomas*, 2010 UT 23, ¶ 31, 232 P.3d 486; *Daines v. Vincent*, 2008 UT 51, ¶ 21, 190 P.3d 1269; *Chen v. Stewart*, 2005 UT 68, ¶ 27, 123 P.3d 416; *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶ 10, 94 P.3d 193; *Gorostieta v. Parkinson*, 2000 UT 99, ¶ 14, 17 P.3d 1110; *Ottens v. McNeil*, 2010 UT App 237, ¶ 21, —P.3d—; *Vigil v. Div. of Child & Family Servs.*, 2005 UT App 43, ¶ 8, 107 P.3d 716. “An abuse of discretion may be demonstrated by showing that the district court relied on an erroneous conclusion of law or that there was no evidentiary basis for the trial court’s ruling.” *Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 32, 221 P.3d 256 (internal quotation marks omitted). The appellate court will not reverse “a trial court’s ruling on evidence unless the ruling ‘was beyond the limits of reasonability.’” *Daines*, 2008 UT 51, ¶ 21 (quoting *Jensen v. IHC Hosp., Inc.*, 2003 UT 51, ¶ 57, 82 P.3d 1076).

However, in keeping with the historic problematic standard of review relating to the admissibility of evidence, a few court of appeal cases state that “whether evidence is admissible is a question of law, which we review for correctness.” *State v. Johnson*, 2008 UT App 5, ¶ 9, 178 P.3d 915 (quoting *Gallegos v. Dick Simon Trucking, Inc.*, 2004 UT App 322, ¶ 9, 110 P.3d 710); *accord Radman v. Flanders Corp.*, 2007 UT App 351, ¶ 4, 172 P.3d 668. Other cases break the analysis into steps, stating that although admissibility of a particular item of evidence is a legal question, the trial court has a great deal of discretion in determining whether to admit or exclude evidence and the ruling will not be overturned unless there is an abuse of discretion. *See, e.g., State v. Eberwein*, 2001 UT App 71, ¶ 9, 21 P.3d 1139 (citing *Gorostieta*, 2000 UT 99, ¶ 14).

## b. Specific Standards of Review

### (i) Relevancy Challenges

Determining whether a piece of evidence is relevant and therefore admissible is a task within the trial court’s discretion. *See State v. Fedorowicz*, 2002 UT 67, ¶ 32, 52 P.3d 1194; *State v. Schwenke*, 2009 UT App 345, ¶ 9, 222 P.3d 768, *cert. denied*, 230 P.3d 127 (Utah 2010). Whether a trial court properly admitted or excluded evidence under Rule 403 of the Utah Rules of Evidence is reviewed for abuse of discretion and will not be overturned unless it is “beyond the limits of reasonability.” *Ottens v. McNeil*, 2010 UT App 237, ¶ 21, (internal quotation marks omitted); *see also Daines*, 2008 UT 51, ¶ 21; *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 6, 63 P.3d 686; *State v. Jackson*, 2010 UT App 136, ¶ 9, —P.3d—; *Schwenke*, 2009 UT App 345, ¶ 9; *State v. Downs*, 2008 UT App 247, ¶ 6, 190 P.3d 17

(stating that appellate court will not overturn trial court’s ruling on admissibility under Rule 403 unless abuse of discretion is “so severe that it results in a likelihood of injustice” (internal quotation marks omitted)).

### (ii) Challenges to Witnesses

An appellate court will review whether the trial court properly excluded a witness from the courtroom under an abuse of discretion standard. *See State v. Billsie*, 2006 UT 13, ¶ 8, 131 P.3d 239. Whether the trial court properly disallowed testimony from a fact witness is also reviewed under an abuse of discretion standard. *See Olson v. Olson*, 2010 UT App 22, ¶ 10, 226 P.3d 751, *cert. denied*, 2010 Utah LEXIS 144 (Utah, July 1, 2010).

### (iii) Expert Testimony

Whether to exclude expert witness testimony is reviewed for abuse of discretion. *See Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 15, ¶ 5, —P.3d.—; *State v. Clopten*, 2009 UT 84, ¶ 6, 223 P.3d 1103; *Welsh v. Hosp. Corp. of Utah*, 2010 UT App 171, ¶ 19, 235 P.3d 791. Appellate courts will overturn a trial court’s decision to strike expert testimony only when it “exceeds the limits of reasonability.” *Eskelson*, 2010 UT 15, ¶ 5 (quoting *State v. Hollen*, 2002 UT 34, ¶ 66, 44 P.3d 794).

Whether a trial court properly determined that an expert witness is qualified is reviewed for abuse of discretion. *See Nguyen v. IHC Health Servs, Inc.*, 2010 UT App 85, ¶ 7, 232 P.3d 529 (quoting *Carbaugh v. Asbestos Corp.*, 2007 UT 65, ¶ 7, 167 P.3d 1063).

### (iv) Hearsay Rulings

The standard of review for the admissibility of hearsay evidence is complex because the admissibility “often contains a number of rulings, each of which may require a different standard of review.” *State v. Tiliaia*, 2006 UT App 474, ¶ 13, 153 P.3d 757 (quoting *State v. Workman*, 2005 UT 66, ¶ 10, 122 P.3d 639 (quoting Norman H. Jackson, *Utah Standards of Appellate Review*, 12 UTAH BAR J. 8, 38 (1999))). As a result, the appropriate standard of review of a trial court’s decision to admit or exclude hearsay evidence under Rules 802 and 803 of the Utah Rule of Evidence depends on the particular ruling in dispute. *See Moss v. Parr Waddoups Brown Gee & Loveless*, 2008 UT App 405, ¶ 11, 197 P.3d 659; *TWN, Inc. v. Michel*, 2006 UT App 70, ¶ 9, 131 P.3d 882.

When reviewing rulings on hearsay, appellate courts review legal questions within the determination of admissibility for correctness, questions of fact for clear error, and assuming the correct application of law to facts is free from clear error, appellate courts review the final ruling on admissibility for

abuse of discretion. *See Tiliaia*, 2006 UT App 474, ¶ 13; *accord State v. Jackson*, 2010 UT App 136, ¶ 9, 238 P.3d 59; *Scott v. HK Contractors*, 2008 UT App 370, ¶ 5, 196 P.3d 635, *cert. denied*, 205 P.3d 103 (Utah 2009); *State v. Rhinehart*, 2006 UT App 517, ¶ 10, 153 P.3d 830.

“Whether proffered evidence meets the definition of hearsay . . . is a question of law, reviewed for correctness.” *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 44, 116 P.3d 271; *see also State ex rel. K.O.*, 2010 UT App 155, ¶ 7, 238 P.3d 59; *Moss*, 2008 UT App 405, ¶ 11; *Salt Lake City v. Alires*, 2000 UT App 244, ¶ 8, 9 P.3d 769 (considering whether a statement qualifies as an excited utterance thus violating a defendant’s right to confront witnesses against him is a question of law reviewed for correctness).

#### (v) Additional Challenges to Evidentiary Rulings within the Court’s Discretion

(1) Whether evidence of prior crimes or bad acts was properly admitted is reviewed for abuse of discretion. *See State v. Nelson-Waggoner*, 2000 UT 59, ¶ 16, 6 P.3d 1120; *State v. Pedersen*, 2010 UT App 38, ¶ 10, 227 P.3d 1264, *cert. denied*, 2010 Utah LEXIS 151 (Utah, July 27, 2010); *State v. Verde*, 2010 UT App 30, ¶ 14, 227 P.3d 840, *cert. granted*, 2010 Utah LEXIS 122 (Utah, July 27, 2010); *State v. Marchet*, 2009 UT App 262, ¶ 19, 219 P.3d 75, *cert. denied*, 221 P.3d 837 (Utah 2009); *State v. Miller*, 2004 UT App 445, ¶ 6, 104 P.3d 1272; *Alires*, 2000 UT App 244, ¶ 7.

(2) Whether a trial court properly excluded impeachment evidence for lack of foundation is reviewed for abuse of discretion. *See Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 6, 214 P.3d 865, *cert. denied*, 221 P.3d 837 (Utah 2009).

(3) Whether the trial court properly excluded internal engineering documents and memoranda is reviewed for abuse of discretion. *See id.* ¶ 10.

(4) Whether a trial court properly admitted or excluded “testimony regarding the contents of magazines and photographs without requiring production of the original items under Utah Rule of Evidence 1002.” *Vigil v. Div. of Child & Family Servs.*, 2005 UT App 43, ¶ 8, 107 P.3d 716.

(5) Whether a trial court erred in striking affidavits. *See Cabaness v. Thomas*, 2010 UT 23, ¶ 50, 232 P.3d 486.

#### (vi) Additional Challenges to Evidentiary Rulings Reviewed for Correctness

(1) Whether there existed a privilege or exception to a privilege is a question of law. *See Staley v. Jolles*, 2010 UT 19, ¶ 9, 230

P.3d 1007; *State v. Worthen*, 2008 UT App 23, ¶ 9, 177 P.3d 664, *aff’d*, 2009 UT 79 (citing *State v. Blake*, 2002 UT 113, ¶ 6, 63 P.3d 56)).

(2) Whether a trial court properly determined that an evidentiary hearing was not necessary by rule to determine the admissibility of an alleged victim’s sexual behavior is reviewed for correctness. *See State v. Clark*, 2009 UT App 252, ¶ 11, 219 P.3d 631, *cert. denied*, 225 P.3d 880.

(3) Whether trial court properly completely precluded rebuttal evidence. *See State v. Martin*, 2002 UT 34, ¶ 29, 44 P.3d 805. A ruling on the nature and extent of rebuttal evidence is reviewed for abuse of discretion. *See id.*

(4) Whether a photograph is gruesome is a question of law, reviewed for correctness. *See State v. Barber*, 2009 UT App 91, ¶ 18, 206 P.3d 1223.

#### c. Harmful Error

No evidentiary challenge will be successful without also showing that an error was harmful. *See State v. Loose*, 2000 UT 11, ¶ 10 n.1, 994 P.2d 1237; *Woods v. Zeluff*, 2007 UT App 84, ¶ 5, 158 P.3d 552; *State v. Bujan*, 2006 UT App 322, ¶ 30, 142 P.3d 581, (quoting *State v. Vargas*, 2001 UT 5, ¶ 48, 20 P.3d 271) (stating that a trial court’s ruling on the admissibility of evidence will not be reversed if the error was harmless), *aff’d*, 2008 UT 47.

#### 4. Rules of Civil Procedure – Examples of Standards of Review

##### (1) Rule 3 – Commencement of Action

Whether the failure to pay the filing fee under Rule 3 prior to the lapse of the limitation period is a jurisdictional requirement to the commencement of an action is a question of law. *See Dipoma v. McPhie*, 2000 UT App 130, ¶¶ 4, 8, 13, 29 P.3d 1225.

##### (2) Rule 4 – Process

Whether the requirements of Rule 4 have been met is a jurisdictional question which presents an issue of law. *See Jackson Constr. Co. v. Marrs*, 2004 UT 89, ¶¶ 8-9, 100 P.3d 1211.

Whether papers were served presents a question of fact and that decision will not be overturned unless the findings are against the clear weight of the evidence or if the appellate court reaches a definite and firm conviction that a mistake has been made. *See Kenny v. Rich*, 2008 UT App 209, ¶ 20, 186 P.3d 989, *cert. denied*, 199 P.3d 970 (Utah 2008).

Whether a parent has been afforded adequate due process through proper notice under Rule 4 is a question of law, reviewed for correctness. *See In re A.H.*, 2004 UT App 39, ¶ 8,

86 P.3d 745 (quoting *In re J.B.*, 2002 UT App 268, ¶ 7, 53 P.3d 968); *In re J.B.*, 2002 UT App 268, ¶ 8 (holding that the lack of proper notice to a father resulting in him being excluded as a custodian for his children constituted a violation of his due process rights).

### (3) Rule 5 – Service and Filing

Appellate courts review the interpretation of Rule 5 of the Utah Rules of Civil Procedure as a question of law. See *Arbogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶¶ 10, 16, — P.3d —.

### (4) Rule 6 – Time

Whether an order denying a motion to extend the time for filing a motion for substitution is reviewed for abuse of discretion. See *Stoddard v. Smith*, 2001 UT 47, ¶ 22, 27 P.3d 546.

### (5) Rule 7 – Pleadings Allowed

An appellate court will review the trial court's compliance with Rule 7 of the Utah Rules of Civil Procedure for abuse of discretion. See *Jennings Inv., LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 6, 208 P.3d 1077, *cert. denied*, 215 P.3d 161 (Utah 2009) (stating that appellate court must determine “whether the district court abused its discretion in admitting as uncontroverted the facts Plaintiffs submitted in their cross-motion for summary judgment”); *Bluffdale City v. Smith*, 2007 UT App 25, ¶ 7, 156 P.3d 175 (affirming the trial court's use of discretion “in admitting as uncontroverted the facts submitted by Plaintiff in support of its request for summary judgment”).

### (6) Rule 8 – General Rules of Pleadings

Whether the trial court failed to treat an affirmative defense as a counterclaim under Rule 8 is reviewed under an abuse of discretion standard. See *Berkshires, L.L.C. v. Sykes*, 2005 UT App 536, ¶ 12, 127 P.3d 1243 (turning to “federal decisions interpreting the identical federal rule” because Utah courts had yet to address the applicable standard of review for such issues).

### (7) Rule 11 – Sanctions

The standard of review for evaluating the denial or imposition of Rule 11 sanctions “involves a three-tiered approach: (1) findings of fact are reviewed under the clearly erroneous standard; (2) legal conclusions are reviewed under the correction of error standard; and (3) the type and amount of sanctions to be imposed [are] reviewed under an abuse of discretion standard.” *Hess v. Johnston*, 2007 UT App 213, ¶ 6, 163 P.3d 747, *cert. denied*, 186 P.3d 957 (Utah 2008) (quoting *Morse v. Packer*, 2000 UT 86, ¶ 16, 15 P.3d 1021) (alteration in original); *accord Gillmor v.*

*Family Link, LLC*, 2010 UT App 2, ¶ 10, 224 P.3d 741, *cert. granted*, 2010 Utah LEXIS 130 (Utah, May 13, 2010); *D.U. Co., Inc. v. Jenkins*, 2009 UT App 195, ¶ 8, 216 P.3d 360.

Whether to actually impose sanctions under Rule 11(c) for a violation of Rule 11(b) is within the trial court's discretion. See *Gillmor*, 2010 UT App 2, ¶ 10; *Crank v. Utah Judicial Council*, 2001 UT 8, ¶ 34, 20 P.3d 307 (stating that it remains in the trial court's discretion to apply sanctions under Rule 11(c) even if it finds a violation of Rule 11(b)).

Appellate courts review a district court's legal interpretation of Rule 11 for correctness. See *Crank*, 2001 UT 8, ¶ 32.

### (8) Rule 12 – Defenses and Objections

Whether to grant or deny a motion for judgment on the pleadings under Rule 12(c) is a question of law affirmed “only if...the plaintiff could not recover under the facts alleged.” *Intermountain Sports, Inc. v. Dep't of Transp.*, 2004 UT App 405, ¶ 7, 103 P.3d 716 (quoting *Arndt v. First Interstate Bank of Utah, N.A.*, 1999 UT 91, ¶ 2, 991 P.2d 584); See *Straley v. Halliday*, 2000 UT App 38, ¶ 8, 997 P.2d 338.

Whether a trial court properly dismissed a claim based on a forum selection clause under Rule 12(b)(3) is reviewed for abuse of discretion. See *Coombs v. Juice Works Dev., Inc.*, 2003 UT App 388, ¶ 5, 81 P.3d 769 (citing *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 810 (Utah 1993)).

Whether a trial court properly dismissed a claim under Rule 12(b)(6) is a question of law that is reviewed for correctness. See *Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999; *Walker v. Stowell*, 2009 UT 82, ¶ 7, 227 P.3d 242; *Mack v. Utah Dep't of Commerce*, 2009 UT 47, ¶ 12, 221 P.3d 194; *Summit Water Distrib. Co. v. Summit Cnty.*, 2005 UT 73, ¶ 12, 123 P.3d 437; *Miller v. State*, 2010 UT App 25, ¶ 6, 226 P.3d 743.

### (9) Rule 14 – Third Party Practice

Whether a trial court properly denied a motion to join third parties under Rule 14 is reviewed for abuse of discretion. See *Red Flame, Inc. v. Martinez*, 2000 UT 22, ¶ 6 n.2, 996 P.2d 540.

### (10) Rule 15 – Amended and Supplemental Proceedings

Whether a trial court properly denied a request to amend a pleading under Rule 15(a) is reviewed for abuse of discretion. See *Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 57, 221 P.3d 256 (citing *Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 405 (Utah 1998)); *Red Cliffs Corner, LLC v. J.J. Human, Inc.*, 2009 UT App 240, ¶ 14, 219 P.3d 619; *Failor v.*

*MegaDyne Med. Prods.*, 2009 UT App 179, ¶ 11, 213 P.3d 899.

Rule 15(b) has two provisions under which a court may address issues not raised in the pleadings. Under the first provision, the trial court must consider issues if the parties tried them by express or implied consent. A trial court's conclusion that the parties tried an issue by express or implied consent is a legal conclusion that the appellate court reviews for correctness. See *Eldridge v. Farnsworth*, 2007 UT App 243, ¶ 19, 166 P.3d 639. However, a trial court is given a “fairly broad measure of discretion in making that determination.” *Id.* (quoting *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 105 (Utah 1998)); *Haynes Land & Livestock Co. v. Jacob Family Chalk Creek, LLC*, 2010 UT App 112, ¶ 10, 233 P.3d 529. Whether a trial court properly applied Rule 15(b) is reviewed for correctness. See *Hill v. Estate of Allred*, 2009 UT 28, ¶ 44, 216 P.3d 929 (“[B]ecause the trial court's determination of whether the issues were tried with all parties' implied consent is highly fact intensive, we grant the trial court a fairly broad measure of discretion in making that determination under a given set of facts” (quoting *Keller*, 959 P.2d at 105)).

Under the second provision, which applies once a party has objected to evidence because it was not raised in the pleadings, the appellate court applies a conditional discretionary review. That is, the trial court must first make a preliminary determination that “the presentation of the merits of the action will be subserved by amendment” and the “admission of such evidence would not prejudice the adverse party” in maintaining his action or defense on the merits. *Eldridge*, 2007 UT App 243, ¶ 19 (internal quotation marks omitted). The trial court has limited discretion in making these threshold findings, but once the findings have been made, “the trial court has full discretion to allow amendment of the pleadings; that is, it may grant or deny a party's motion for amendment upon any reasonable basis, and the court's decision can be reversed only if abuse of discretion appears.” *Id.* (internal quotation marks omitted).

#### (11) Rule 17 – Parties Plaintiff and Defendant

“[W]hether two or more persons are doing business together for purposes of Rule 17(d) is a ‘conclusion of law which we review for correctness.’” *Tan v. Ohio Cas. Ins. Co.*, 2007 UT App 93, ¶ 7, 157 P.3d 367 (quoting *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389, 1392 (Utah 1996)).

#### (12) Rule 19 – Joinder of Persons Needed For Just Adjudication

A trial court's determination that a party should be joined in an action is reviewed for abuse of discretion. See *Turville v. J&J Props., L.C.*, 2006 UT App 305, ¶ 24, 145 P.3d 1146; *Green v.*

*Louder*, 2001 UT 62, ¶ 40, 29 P.3d 638; *Smith v. Osguthorpe*, 2002 UT App 361, ¶ 15, 58 P.3d 854 (stating appellate courts review a trial court's Rule 19 determination under an abuse of discretion standard). However, the district court's interpretation of Rule 19 is a question of law reviewed for correctness. See *Smith*, 2002 UT App 361, ¶ 15; *Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540.

#### (13) Rule 23 – Class Actions

“[W]hether [under Rule 23.1] a given individual or association has standing to request a particular relief is primarily a question of law, although there may be factual findings that bear on the issue.” *LeVanger v. Highland Estates Prop. Owners Ass'n, Inc.*, 2003 UT App 377, ¶ 8, 80 P.3d 569 (quoting *Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373-74 (Utah 1997)); accord *Angel Investors, LLC v. Garrity*, 2009 UT 40, ¶ 14, 216 P.3d 944. Those factual findings made by the trial court are closely reviewed but given deference. See *Angel Investors*, 2009 UT 40, ¶ 14; *LeVanger*, 2003 UT App 377, ¶ 8.

#### (14) Rule 24 – Intervention

A motion to intervene involves both questions of law and fact. See *Taylor-West Weber Water Improvement Dist. v. Olds*, 2009 UT 86, ¶ 3, 224 P.3d 709 (citing *Moreno v. Bd. of Educ.*, 926 P.2d 886, 888 (Utah 1996)). Appellate courts review the trial court's legal determinations for correctness, affording no deference to its conclusions. See *id.* They will not disturb the district court's factual findings unless they are clearly erroneous. See *id.* Because the district court has discretion in determining whether to grant permissive intervention, appellate courts review denials of Rule 24(b) motions to intervene under an abuse of discretion standard. See *id.* (“The district court abuses its discretion when it relies on an erroneous conclusion of law to come to its decision.”). However, mandatory intervention under Rule 24(a) turns on a legal determination, which requires *de novo* review. See *id.*; accord *In re Gonzalez*, 2000 UT 28, ¶ 16, 1 P.3d 1074.

#### (15) Rule 25 – Substitution of Parties

Whether a trial court properly dismissed a complaint under Rule 25 for failure to substitute a party within ninety days after the opposing party filed a suggestion of death is reviewed for correctness. See *Stoddard v. Smith*, 2001 UT 47, ¶ 4, 27 P.3d 546. “The interpretation of rule 25 is a question of law reviewed for correctness.” *Id.* (quoting *Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540).

#### (16) Rule 26 – General Provisions Governing Discovery

Whether a trial court properly denied a motion for protective

order under Rule 26(c) is reviewed for abuse of discretion. See *Christiansen v. Farmers Ins. Exch.*, 2005 UT 21, ¶ 7, 116 P.3d 259; *Spratley v. State Farm Mut. Auto. Ins. Co.*, 2003 UT 39, ¶ 8, 78 P.3d 603; *In re Pendleton*, 2000 UT 77, ¶ 38, 11 P.3d 284. To the extent the denial of a protective order is based on the trial court's interpretation of binding case law, appellate courts review the decision for correctness. See *Christiansen*, 2005 UT 21, ¶ 7.

#### (17) Rule 32 – Use of Depositions in Court Proceedings

Whether a trial court properly refused to allow the use of a deposition during the case-in-chief is reviewed for abuse of discretion. See *Evans v. Langston*, 2007 UT App 240, ¶ 7, 166 P.3d 621 (citing *Marshall v. Van Gerven*, 790 P.2d 62, 63 (Utah Ct. App. 1990)).

#### (18) Rule 36 – Request for Admission

The proper interpretation of Rule 36(a) is a question of law reviewed for correctness. See *State ex rel. E.R.*, 2000 UT App 143, ¶ 6, 2 P.3d 948. Appellate courts review the denial of a motion to withdraw admissions under a “conditional discretionary standard,” first determining whether certain conditions have been met and then determining whether the trial court abused the discretion that is allowed once the conditions have been met. See *Barnes v. Clarkson*, 2008 UT App 44, ¶¶ 9, 11-12, 178 P.3d 930, *cert. denied*, 199 P.3d 367 (Utah 2008) (citing *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1060-61 (Utah 1998)); *accord State ex rel. E.R.*, 2000 UT App 143, ¶ 7.

#### (19) Rule 37 – Failure to Cooperate in Discovery; Sanctions

Whether a trial court's imposition of a particular discovery sanction is proper is reviewed under an abuse of discretion standard of review. See *Welsh v. Hosp. Corp. of Utah*, 2010 UT App 171, ¶ 9, 235 P.3d 791; *Depew v. Sullivan*, 2003 UT App 152, ¶ 35, 71 P.3d 601. An abuse of discretion “may be demonstrated by showing that the district court relied on ‘an erroneous conclusion of law’ or that there was ‘no evidentiary basis for the trial court's ruling.’” *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957 (quoting *Morton v. Cont'l Baking Co.*, 938 P.2d 271, 274 (Utah 1997)); *accord Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶ 35, 215 P.3d 933.

The abuse of discretion standard grants the trial court “a great deal of latitude in determining the most fair and efficient manner to conduct court business’ because the district court judge ‘is in the best position to evaluate the status of his [or her] cases, as well as the attitudes, motives, and credibility of the parties.’” *Bodell*, 2009 UT 52, ¶ 35 (quoting *Morton*, 938 P.2d at 274-75).

#### (20) Rule 38 – Jury Trial of Right

Appellate courts review a trial court's finding that a party waived his right to a jury trial under Rule 38 for an abuse of discretion. See *Covey v. Covey*, 2003 UT App 380, ¶ 15, 80 P.3d 553; *Aspenwood, L.L.C. v. C.A.T., L.L.C.*, 2003 UT App 28, ¶ 33, 73 P.3d 947.

#### (21) Rule 39 – Trial by Jury or by the Court

Whether there is a right to a jury trial is a question of law that appellate courts review for correctness. See *Kenny v. Rich*, 2008 UT App 209, ¶ 21, 186 P.3d 989, *cert. denied*, 199 P.3d 970 (Utah 2008). Granting or denying a request for jury trial under Rule 39(b) is within the sound discretion of the trial court. See *id.*; *Pete v. Youngblood*, 2006 UT App 303, ¶¶ 9, 33, 141 P.3d 629 (citing *Aspenwood*, 2003 UT App 28, ¶ 33).

#### (22) Rule 40 – Scheduling and Postponing a Trial

Whether a trial court properly denied a motion for continuance is reviewed for abuse of discretion. See *Rohan v. Boseman*, 2002 UT App 109, ¶ 15, 46 P.3d 753; *Brown v. Glover*, 2000 UT 89, ¶ 43, 16 P.3d 540 (stating that abuse of discretion may be found if party has made timely objections, has given necessary notice, and has made a reasonable effort to have the trial date changed for good cause).

#### (23) Rule 41 – Dismissal of Actions

Whether dismissal of an action under Rule 41(b) was proper is reviewed for correctness. See *Miller v. San Juan Cnty.*, 2008 UT App 186, ¶ 6, 186 P.3d 965 (citing *C&Y Corp. v. Gen. Biometrics, Inc.*, 896 P.2d 47, 53 (Utah Ct. App. 1995)).

#### (24) Rule 42 – Consolidation; Separate Trials

A trial court has broad discretion under Rule 42 to bifurcate trials, and appellate courts review the trial court's bifurcation for abuse of discretion. See *Parker v. Parker*, 2000 UT App 30, ¶ 5, 996 P.2d 565 (citing *Olympus Hills Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc.*, 889 P.2d 445, 462 (Utah Ct. App. 1994)).

#### (25) Rule 47 – Jurors

Whether a trial court properly managed jury *voir dire* is reviewed for abuse of discretion. See *Boyle v. Christensen*, 2009 UT App 241, ¶ 7, 219 P.3d 58, *cert. granted*, 221 P.3d 837 (Utah 2009); *Bee v. Anheuser-Busch, Inc.* 2009 UT App 35, ¶ 8, 204 P.3d 204 (stating trial court is afforded broad discretion but that discretion “must be exercised in favor of allowing discovery of biases or prejudice in prospective jurors” (internal quotation marks omitted)); *Alcazar v. Univ. of Utah Hosps. & Clinics*, 2008 UT App 222, ¶ 9, 188 P.3d 490 (citing

*Barrett v. Peterson*, 868 P.2d 96, 98 (Utah Ct. App. 1993)); *Taylor v. State*, 2007 UT 12, ¶ 70, 156 P.3d 739; *Depew v. Sullivan*, 2003 UT App 152, ¶ 10, 71 P.3d 601.

Whether a trial court may grant separate sets of peremptory challenges for co-defendants under Rule 47(e) is a mixed question of law and fact. “[T]he trial court is granted ‘limited discretion’ in its determination” which, “[o]n the spectrum of discretion running from ‘*de novo*’ . . . to broad discretion . . .,” the court’s discretion in this situation lies close, though not at, the *de novo* end. *Bee*, 2009 UT App 35, ¶ 7, (quoting *Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 351, 353 (Utah 1997)).

Whether a trial court improperly communicated with a jury during deliberations is reviewed under a correction-of-error standard. See *Bearden v. Wardley Corp.*, 2003 UT App 171, ¶ 6, 72 P.3d 144 (citing *Bd. of Comm’rs, Utah State Bar v. Petersen*, 937 P.2d 1263, 1267 (Utah 1997)).

(26) Rule 50 – Motion for Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Directed Verdict:

“When reviewing any challenge to a trial court’s [grant] of a motion for directed verdict, we review the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against, and will sustain the [grant] if reasonable minds could [not] disagree with the ground asserted for directing a verdict.”

*U.S.A. United Staffing Alliance, LLC v. Workers’ Comp. Fund*, 2009 UT App 160, ¶ 8, 213 P.3d 20 (alterations in original) (quoting *Mahmood v. Ross*, 1999 UT 104, ¶ 16, 990 P.2d 933); *accord Beard v. K-Mart Corp.*, 2000 UT App 285, ¶ 5, 12 P.3d 1015. A motion for directed verdict can be granted only when the moving party is entitled to judgment as a matter of law. See *Beard*, 2000 UT App 285, ¶ 5.

(b) Judgment Notwithstanding the Verdict: A denial of a motion for judgment notwithstanding the verdict will be reversed only if “viewing the evidence in the light most favorable to the party who prevailed, [the appellate court] conclude[s] that the evidence is insufficient to support the verdict.” *Holmstrom v. C.R. Eng.*, 2000 UT App 239, ¶ 29, 8 P.3d 281; *accord Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶ 33, 31 P.3d 557; *Moore v. Smith*, 2007 UT App 101, ¶ 18, 158 P.3d 562. The motion can be granted only when the moving party is entitled to judgment as a matter of law. See *Moore*, 2007 UT App 101, ¶ 18.

(27) Rule 51 – Instructions to Jury; Objections

Rule 51(d) allows an appellate court to review errors in jury instruction in the interest of justice. However, “it is incumbent upon the aggrieved party to present a persuasive reason’ for exercising that discretion . . . and this requires ‘showing special circumstances warranting such a review.’” *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 8, 63 P.3d 686 (omission in original) (quoting *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991)). See also *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 13, 40 P.3d 1119.

(28) Rule 52 – Findings by the Court; Correction of the Record

“We review for correctness the issue of ‘whether in light of Utah Rule of Civil Procedure 52(a), the trial court adequately supported its decision to grant the . . . summary judgment motion.’” *Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 16, 183 P.3d 1059 (omission in original) (quoting *Gabriel v. Salt Lake City Corp.*, 2001 UT App 277, ¶ 8, 34 P.3d 234).

(29) Rule 54 – Judgments; Costs

Whether a trial court properly awarded a prevailing party costs of the litigation is reviewed under an abuse of discretion standard. See *Dale K. Barker Co., PC v. Bushnell*, 2009 UT App 385, ¶ 8, 222 P.3d 1188 (quoting *Jensen v. Sawyers*, 2005 UT 81, ¶ 140, 130 P.3d 325), *cert. granted*, 2010 Utah LEXIS 133 (Utah, June 10, 2010). “[T]o the extent the ruling on costs involves interpretation of’ Rule 54, an appellate court will “‘review for correctness, giving no deference to the trial court’s conclusion.’” *Id.* (quoting *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 2007 UT App 327, ¶ 5, 171 P.3d 465).

“Whether an order is eligible for certification under Rule 54(b) is a question of law which we review for correctness.” *UTCO Assocs., Ltd. v. Zimmerman*, 2001 UT App 117, ¶ 12, 27 P.3d 177 (citing *Kennecott Corp. v. Utah State Tax Comm’n*, 814 P.2d 1099, 1100 (Utah 1991)).

(30) Rule 56 – Summary Judgment

“An appellate court reviews a trial court’s legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the moving party.” *Martin v. Lauder*, 2010 UT App 216, ¶ 4, —P.3d— (mem.) (internal quotations marks omitted); *accord Cabaness v. Thomas*, 2010 UT 23, ¶ 18, 232 P.3d 486 (stating that because appellate court resolves only legal issues in reviewing a summary judgment, it is reviewed for correctness); *Wilkinson v. Washington City*, 2010 UT App 56, ¶ 4, 230 P.3d 136 (stating that appellate court reviewing grant of summary judgment on appeal affords trial court’s legal conclusions no deference and reviews them for

correctness); *Jones & Trevor Mktg. v. Lowry*, 2010 UT App 113, ¶ 4, 233 P.3d 538, *cert. granted*, 2010 Utah LEXIS 125 (Utah, Aug. 26, 2010).

Whether the trial court properly admitted an affidavit pursuant to Rule 56(e) is reviewed for abuse of discretion. *See State Farm Fire & Cas. Co. v. Forced Aire, LC*, 2009 UT App 15, ¶ 15, 202 P.3d 299 (quoting *Johannessen v. Canyon Rd. Towers Owners Ass'n*, 2002 UT App 332, ¶ 13, 57 P.3d 1119).

Whether a trial court properly granted or denied a request under Rule 56(f) is reviewed for abuse of discretion. *See Gudmundsen v. Del Ozone*, 2010 UT 33, ¶ 10, 232 P.3d 1059 (reviewing the district court's Rule 56(f) decision, asking whether the grant or denial exceeds limits of reasonability); *Jensen v. Smith*, 2007 UT App 152, ¶ 1, 163 P.3d 657 (mem.) (citing *Price Dev. Co. v. Orem City*, 2000 UT 26, ¶ 9, 995 P.2d 1237).

### (31) Rule 59 – New Trials; Amendments of Judgment

Whether a trial court properly granted or denied a motion for a new trial and motion to amend the judgment based on the discovery of new evidence is reviewed for an abuse of discretion. *See Florez v. Schindler Elevator Corp.*, 2010 UT App 254, ¶ 10, —P.3d— (motion for new trial); *In re Adoption of A.F.K.*, 2009 UT App 198, ¶ 17, 216 P.3d 980 (addressing whether trial court erred in denying motion for new trial and motion to amend judgment under abuse of discretion standard), *cert. denied*, 221 P.3d 827 (Utah 2009). The appellate court will reverse the trial court “only if there is no reasonable basis for the decision.” *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064.

### (32) Rule 60 – Relief from Judgment or Order

An appellate court reviews the grant or denial of a motion to set aside a judgment under Rule 60(b) for abuse of discretion. *See Golden Meadows Props, LC v. Strand*, 2010 UT App 258, ¶ 3, —P.3d—; *Kendall Ins., Inc. v. R & R Group, Inc.*, 2008 UT App 235, ¶ 11, 189 P.3d 114 (quoting *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, ¶ 9, 2 P.3d 114). However, when a motion to vacate a judgment under Rule 60 is based on a claim of lack of jurisdiction, it becomes a question of law reviewed for correctness. *See Johnson v. Johnson*, 2010 UT 28, ¶ 6, 234 P.3d 1100; *Franklin Covey*, 2000 UT App 110, ¶ 8.

### (33) Rule 62 – Stay of Proceedings to Enforce a Judgment

Whether a trial court properly interpreted Rule 62 is a question of law reviewed for correctness. *See In re Estate of LeFevre*, 2009 UT App 286, ¶ 14, 220 P.3d 476 (quoting *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 42, 989 P.2d

1077), *cert. denied*, 230 P.3d 127 (Utah 2010).

### (34) Rule 63 – Disability or Disqualification of a Judge

Appellate courts review the interpretation and application of Rule 63 for correctness. *See Edwards v. Powder Mountain Water & Sewer*, 2009 UT App 185, ¶ 14, 214 P.3d 120.

### (35) Rule 65A – Injunctions

Whether a trial court properly granted a preliminary injunction is reviewed for abuse of discretion. *See Chen v. Stewart*, 2004 UT 82, ¶ 27, 100 P.3d 1177. Findings of fact set forth in granting or refusing injunctions are reversed only if they are clearly erroneous as demonstrated by the challenger's marshaling of the evidence. *See id.*

Whether a trial court was justified in requiring posting a bond for a temporary restraining order to issue is reviewed for abuse of discretion. *See Kenny v. Rich*, 2008 UT App 209, ¶ 22, 186 P.3d 989 (citing *Corp. of the President of the Church of Jesus Christ of Latter-day Saints v. Wallace*, 573 P.2d 1285, 1287 (Utah 1978)), *cert. denied*, 199 P.3d 970 (Utah 2008).

Whether attorney fees and costs should be awarded under Rule 65A is a question of law, reviewed for correctness. *See IKON Office Solutions, Inc. v. Crook*, 2000 UT App 217, ¶ 9, 6 P.3d 1143.

### (36) Rule 65B – Extraordinary Relief

Even if a party can show the district court abused its discretion, extraordinary relief under Rule 65(d)(2) is completely at the discretion of the appellate court. *See Fundamentalist Church of Jesus Christ of Latter-day Saints v. Lindberg*, 2010 UT 51, ¶ 24, —P.3d—; *State v. Laycock*, 2009 UT 53, ¶ 8, 214 P.3d 104; *Nemelka v. Ethics & Discipline Comm.*, 2009 UT 33, ¶ 8, 212 P.3d 52; *Bowen v. Utah State Bar*, 2008 UT 5, ¶ 7, 177 P.3d 611; *State v. Barrett*, 2005 UT 88, ¶ 23, 127 P.3d 682. Several factors inform the reviewing court's discretion to grant extraordinary relief, including the “egregiousness of the alleged error, the significance of the legal issue presented by the petition, the severity of the consequences occasioned by the alleged error,” and any additional factors that may be regarded as important to the case's outcome. *Fundamentalist Church*, 2010 UT 51, ¶ 24 (quoting *State v. Laycock*, 2009 UT 53, ¶ 7, 214 P.3d 104).

On certiorari or appeal from a grant of extraordinary relief, the legal reasoning of the court in granting the writ is reviewed for correctness. *See Hogs R Us v. Town of Fairfield*, 2009 UT 21, ¶ 6, 207 P.3d 1221 (citing *V-1 Oil Co. v. Dept. of Env'tl. Quality*, 939 P.2d 1192, 1195 (Utah 1997)).

## (37) Rule 65C – Post-Conviction Relief

An appellate court will review “an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court’s conclusions of law.” *Gardner v. State*, 2010 UT 46, ¶ 55, 234 P.3d 1115 (quoting *Taylor v. State*, 2007 UT 12, ¶ 13, 156 P.3d 739).

## (38) Rule 73 – Attorney Fees

“Whether attorney fees are recoverable in an action is a question of law, which we review for correctness.” *Kenny v. Rich*, 2008 UT App 209, ¶ 23, 186 P.3d 989 (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998)), *cert. denied*, 199 P.3d 970 (Utah 2008). However, “[c]alculation of reasonable attorney fees is in the sound discretion of the trial court...and will not be overturned in the absence of a showing of a clear abuse of discretion.” *Kenny*, 2008 UT App 209, ¶ 23 (alteration and omission in original) (quoting *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988)).

## (39) Rule 74 – Withdrawal of Counsel

Whether the trial court correctly interpreted Rule 74 as a rule of procedure is reviewed for correctness. *See Migliore v. Migliore*, 2008 UT App 208, ¶ 10, 186 P.3d 973 (quoting *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 42, 989 P.2d 1077).

## 5. Rules of Criminal Procedure – Examples of Standards of Review

(1) Rule 4 – Prosecution of public offenses. Whether the trial court properly denied a motion for a bill of particulars under Rule 4(e) is reviewed for abuse of discretion. *See State v. Gulbransen*, 2005 UT 7, ¶ 26, 106 P.3d 734; *State v. Bernards*, 2007 UT App 238, ¶ 13, 166 P.3d 626. Whether the trial court properly permitted the prosecution to amend the information under Rule 4(d) is reviewed for an abuse of discretion. *See State v. Hamblin*, 2010 UT App 239, ¶ 26, —P.3d—.

(2) Rule 11 – Pleas. A district court’s ruling on a motion to withdraw a guilty plea involves both factual and legal determinations, and “thus invites multiple standards of review.” *State v. Lovell*, 2010 UT 48, ¶ 5, —P.3d—; *State v. Beckstead*, 2006 UT 42, ¶¶ 7-8, 140 P.3d 1288. An appellate court will overturn a district court’s ruling on a motion to withdraw a guilty plea if convinced that the district court has abused its discretion. *See Lovell*, 2010 UT 48, ¶ 5; *Beckstead*, 2006 UT 42, ¶¶ 7-8; *State v. Moe*, 2009 UT App 231, ¶ 3, 220 P.3d 162, *cert. granted*, 225 P.3d 880 (Utah 2010); *State v. Alexander*, 2009 UT App 188, ¶ 5, 214 P.3d 889, *cert. granted*, 225 P.3d 880 (Utah 2010); *State v. Ruiz*, 2009 UT App 121, ¶ 12, 210 P.3d 955, *cert. granted*,

221 P.3d 837 (Utah 2009). The findings of fact supporting this decision will be overturned only if they are clearly erroneous. *See State v. Visser*, 2000 UT 88, ¶ 9, 22 P.3d 1242; *Lovell*, 2010 UT 48, ¶ 5 (quoting *Beckstead*, 2006 UT 42, ¶ 7). However, the “ultimate question of whether the trial court complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness.” *State v. Hittle*, 2004 UT 46, ¶ 4, 94 P.3d 268 (internal quotation marks omitted); *accord Moe*, 2009 UT App 231, ¶ 3.

(3) Rule 15 – Expert witnesses and interpreters. Whether the trial court properly refused to appoint an interpreter is reviewed for abuse of discretion. *See State v. Jadama*, 2010 UT App 107, ¶ 12, 232 P.3d 545.

(4) Rule 15.5 – Visual Recording of Statement or Testimony of Child Victim. Whether the trial court properly admitted into evidence a child witness’s videotaped testimony is reviewed for correctness. *See In re J.B.M.*, No. 20020931-CA, 2003 Utah App. LEXIS 201, at \*1 (Oct. 23, 2003) (mem.) (citing *State v. Snyder*, 932 P.2d 120, 125 (Utah Ct. App. 1997)). *But see In re L.N.*, 2004 UT App 120, ¶ 9, 91 P.3d 836 (holding that admission of videotaped testimony of children is reviewable for an abuse of discretion).

(5) Rule 16 – Discovery. Whether the trial court properly granted or denied a motion for discovery under Rule 16(c) is reviewed for abuse of discretion. *See State v. McNearney*, 2005 UT App 133, ¶ 8, 110 P.3d 183; *State v. Spry*, 2001 UT App 75, ¶ 8, 21 P.3d 675; *accord State v. Kearns*, 2006 UT App 458, ¶ 4, 153 P.3d 731. However, the proper interpretation of Rule 16 is a question of law reviewed for correctness. *See McNearney*, 2005 UT App 133, ¶ 8.

(6) Rule 18 – Selection of jury. A trial court’s decision to grant or deny a motion to remove a juror for cause is reviewed for an abuse of discretion. *See Taylor v. State*, 2007 UT 12, ¶ 80 n.3, 156 P.3d 739 (stating that the ultimate decision to remove a juror under Rule 18 lies within the discretion of the trial court); *State v. Kell*, 2002 UT 106, ¶ 17, 61 P.3d 1019; *State v. Robertson*, 2005 UT App 419, ¶ 7, 122 P.3d 895.

(7) Rule 22 – Sentence, judgment and commitment. The interpretation of Rule 22 is reviewed for correctness. *See State v. Tyree*, 2000 UT App 350, ¶ 5, 17 P.3d 587. Whether a sentence is illegal and qualifies for a review under Rule 22(e) of the Utah Rules of Criminal Procedure is reviewed for correctness. *See State v. Garner*, 2008 UT App 32, ¶ 10, 177 P.3d 637, *cert. denied*, 187 P.3d 1276 (Utah 2008); *State v. Thorkelson*, 2004 UT App 9, ¶ 9, 84 P.3d 854; *State v. Telford*, 2002 UT 51, ¶¶ 3-4, 48 P.3d 228 (per curiam).

(8) Rule 24 – Motion for new trial. Whether the trial court properly granted or denied a motion for a new trial is reviewed for abuse of discretion. *See State v. Mitchell*, 2007 UT App 216, ¶ 6, 163 P.3d 737 (stating the decision to grant or deny motion for a new trial lies within discretion of the district court); *State v. Pinder*, 2005 UT 15, ¶ 20, 114 P.3d 551; *State v. Montoya*, 2004 UT 5, ¶ 10, 84 P.3d 1183; *State v. Colwell*, 2000 UT 8, ¶ 12, 994 P.2d 177. However, the trial court’s conclusions underlying its determination are reviewed for correctness. *See Mitchell*, 2007 UT App 216, ¶ 6 (stating that legal determinations made by the trial court as a basis for its denial of a new trial motion are reviewed for correctness); *State v. Loose*, 2000 UT 11, ¶ 8, 994 P.2d 1237. The legal standards applied by the trial court in denying a motion for new trial are reviewed for correctness, while the trial court’s factual findings are reviewed for clear error. *See Pinder*, 2005 UT 15, ¶ 20.

(9) Rule 29 – Disability and disqualification of a judge or change of venue. Whether a trial court properly denied or granted a motion for change of venue is reviewed for abuse of discretion. *See Lafferty v. State*, 2007 UT 73, ¶ 42, 175 P.3d 530; *State v. Stubbs*, 2005 UT 65, ¶ 8, 123 P.3d 407 (stating that a trial court’s decision to grant or deny a motion to change venue is within the trial court’s sound discretion and will not be disturbed absent a finding that the court exceeded its discretion); *State v. Widdison*, 2001 UT 60, ¶ 38, 28 P.3d 1278.

## 6. Review of Attorney and Judge Disciplinary Proceedings

Attorney discipline cases are a unique class of cases. *See In re Discipline of Pendleton*, 2000 UT 77, ¶ 20, 11 P.3d 284 (quoting *In re Stubbs*, 1999 UT 15, ¶ 19, 974 P.2d 296). The Utah Supreme Court is charged with “governing the conduct and discipline of those admitted to practice law in this state.” *In re Discipline of Johnson*, 2001 UT 110, ¶ 3, 48 P.3d 881. In attorney discipline cases, the supreme court reviews the factual determinations of the trial court for clear error but may also draw its own inferences from those factual determinations. *See id.*; *Pendleton*, 2000 UT 77, ¶ 20.

The court has a duty to review the sanction imposed by the trial court for correctness. *See In re Discipline of Ennenga*, 2001 UT 111, ¶ 9, 37 P.3d 1150 (citing *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998)); *see also In re Discipline of Doncouse*, 2004 UT 77, ¶ 9, 99 P.3d 837. While the court is required to seriously consider the rulings and factual findings of the trial court, it may make an independent determination as to the level of discipline warranted given the circumstances. *See Pendleton*, 2000 UT 77, ¶ 20 (quoting *In re Knowlton*, 800 P.2d 806, 809 (Utah 1990)).

Supreme court review of proceedings before the Judicial Conduct Commission is unlike an appeal from an administrative body. *See In re Anderson*, 2004 UT 7, ¶ 47, 82 P.3d 1134. Indeed, the court may raise, and rely on, issues not considered before the trial court or the Commission. *See id.* In such proceedings, the court is required to review the findings of the Commission as to both law and fact and may take additional evidence and “enter an order as seems to [the court] just and proper under the circumstances.” *Id.*

The supreme court reviews interpretations of the Rules of Professional Practice for correctness. *See Nemelka v. Ethics & Discipline Comm.*, 2009 UT 33, ¶ 9, 212 P.3d 525; *In re Welker*, 2004 UT 83, ¶ 11, 100 P.3d 1197. Appellate courts afford no deference to a panel chair’s interpretation of our rules. *See Nemelka*, 2009 UT 33, ¶ 9.

## 7. Contempt

In general, orders relating to contempt of court are within the trial court’s sound discretion and are reviewed for abuse of that discretion. *See Anderson v. Thompson*, 2008 UT App 3, ¶ 11, 176 P.3d 464 (stating that contempt decisions will not be disturbed on appeal unless trial court’s action is “so unreasonable as to be classified as capricious and arbitrary or a clear abuse of discretion” (internal quotation marks omitted)); *accord Chen v. Stewart*, 2005 UT 68, ¶ 44, 123 P.3d 416; *Shipman v. Evans*, 2004 UT 44, ¶ 39, 100 P.3d 1151. “On appeal from a contempt order following an evidentiary hearing, we recite the evidence in a light consistent with the trial court’s factual findings unless the findings are clearly erroneous.” *Chen*, 2005 UT 68, ¶ 1 n.1. *See also State v. Parke*, 2009 UT App 50, ¶ 5, 205 P.3d 104, *cert. denied*, 215 P.3d 161 (Utah 2009); *State v. Baker*, 2008 UT App 115, ¶ 8, 182 P.3d 935, *aff’d*, 2010 UT 18, 229 P.3d 650.

## II. Appeals From State Administrative Agencies

Judicial review of administrative decisions for cases is governed by the Utah Administrative Procedures Act (UAPA), *see* UTAH CODE ANN. § 63G-4-102(1)(b) (2008); *see also Utah Chapter of the Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 13, 226 P.3d 719; *In re Questar Gas Co.*, 2007 UT 79, ¶ 28, 175 P.3d 545; *Orchard Park Care Ctr. v. Dep’t of Health*, 2009 UT App 284, ¶ 8, 222 P.3d 64.

As an initial note, for a reviewing court to grant relief under UAPA, it must determine that the party has been “substantially prejudiced” by the agency action in question. *See* UTAH CODE ANN. § 63G-4-403(4)(d); *accord Nat’l Parks Conservation Ass’n v. Bd. of Trs.*, 2010 UT 13, ¶ 15, 231 P.3d 1193; *Sullivan v. Utah Bd. of Oil, Gas & Mining*, 2008 UT 44, ¶ 10, 189 P.3d 63; *Questar Gas*, 2007 UT 79, ¶ 48; *Orchard Park*, 2009 UT App 284, ¶ 8;

*Whitaker v. Utah State Ret. Bd.*, 2008 UT App 282, ¶ 10, 191 P.3d 814; *Mendoza v. Labor Comm'n*, 2007 UT App 186, ¶ 5, 164 P.3d 447. In other words, appellate courts must be able to determine that the alleged error was not harmless. See *Nat'l Parks*, 2010 UT 13, ¶ 15; *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 12, 148 P.3d 960.

Further, the principle of exhausting administrative remedies is embodied in the general provisions of UAPA. A party may seek judicial review only after exhausting all administrative remedies available. See UTAH CODE ANN. § 63G-4-401; *id.* § 63G-3-602(2) (a); *Frito-Lay v. Utah Labor Comm'n*, 2009 UT 71, ¶ 30, 222 P.3d 55 (stating that the exhaustion requirement mandates that the litigant follow all outlined administrative review procedures prior to state court having subject matter jurisdiction to hear the case); *Salt Lake City Mission v. Salt Lake City*, 2008 UT 31, ¶ 6, 184 P.3d 599 (noting that a party must exhaust administrative remedies before challenging a municipality's land use decision); *Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶ 14, 34 P.3d 180; *Pen & Ink, LLC v. Alpine City*, 2010 UT App 203, ¶ 15, 238 P.3d 63 (mem.), *cert. denied*, 2010 Utah LEXIS 172 (Utah, Oct. 27, 2010); *Holladay Towne Ctr., LLC v. Holladay*, 2008 UT App 301, ¶ 6, 192 P.3d 302 (mem.) (providing that Utah law requires an aggrieved party to exhaust administrative remedies before challenging a land use decision in court); *Decker v. Rolfe*, 2008 UT App 70, ¶ 10, 180 P.3d 778 (stating that UAPA permits aggrieved parties to seek judicial review only after exhausting all administrative remedies except in a limited number of circumstances, including when other pertinent statutes do not require exhaustion); *TDM, Inc. v. State Tax Comm'n*, 2004 UT App 433, ¶ 4, 103 P.3d 190 (mem.) (per curiam) (noting that while parties need not exhaust administrative remedies if “it appears that exhaustion would serve no useful purpose,” the introduction of a constitutional issue “does not necessarily avoid the requirement to exhaust administrative remedies”).

### A. Review of Informal Agency Proceedings

UAPA allows state agencies to promulgate rules designating as informal certain adjudicative proceedings. See UTAH CODE ANN. § 63G-4-202(1). Under UAPA, the district courts have jurisdiction to “review by trial de novo all final agency actions resulting from informal adjudicative proceedings.” *Id.* § 63G-4-402(1) (a); accord *Friends of Great Salt Lake v. Utah Dep't of Natural Res.*, 2010 UT 20, ¶ 14, 230 P.3d 1014; *Taylor-West Weber Water Improvement Dist. v. Olds*, 2009 UT 86, ¶ 6, 224 P.3d 709; *Due S., Inc. v. Dep't of Alcoholic Beverage Control*, 2008 UT 71, ¶ 17, 197 P.3d 82. Section 63G-4-402(3)(a) requires that the trial court's review of informal adjudicative proceedings

be accomplished by holding a new trial, not just by reviewing an informal record. See *Due S., Inc.*, 2008 UT 71, ¶ 17; *Gilley v. Blackstock*, 2002 UT App 414, ¶ 9, 61 P.3d 305; *Sorenson's Ranch Sch. v. Oram*, 2001 UT App 354, ¶ 16, 36 P.3d 528. The review of an informal agency proceeding by a new trial at the trial court level ensures that an adequate record will be created for appellate court review. See *Archer v. Bd. of State Lands & Forestry*, 907 P.2d 1142, 1144 (Utah 1995); *Cordova v. Blackstock*, 861 P.2d 449, 452 (Utah Ct. App. 1993).

The trial court's final orders and decrees from review of informal adjudicative proceedings of agencies may be appealed to the appellate courts. See UTAH CODE ANN. § 78A-3-102(3)(f) (2009); *id.* § 78A-4-103(2)(a); *Taylor-West*, 2009 UT 86, ¶ 2.

### B. Review of Formal Agency Proceedings

Sections 63G-4-401, 403, and 404, see UTAH CODE ANN. §§ 63G-4-401, 403, 404 (2008) (formerly § 63-46b-16(4) (1997)), of UAPA outline the circumstances under which a reviewing court may grant relief from formal agency action. See *Desert Power LP v. Pub. Serv. Comm'n*, 2007 UT App 374, ¶ 11, 173 P.3d 218 (citing *Anderson v. Pub. Serv. Comm'n*, 839 P.2d 822, 824 (Utah 1992)). Some standards of review are explicitly set forth in section 63G-4-403(4). Others have been provided by appellate courts in interpreting the statute. See, e.g., *Exxon Corp. v. Utah State Tax Comm'n*, 2010 UT 16, ¶ 6, 228 P.3d 1246 (providing that the commission's interpretation of general law including “case law, constitutional law, or non-agency specific legislative acts” is reviewed under a correction of error standard with no deference given to the agency's decision (internal quotation marks omitted)); *Merrill v. Utah Labor Comm'n*, 2009 UT 26, ¶ 5, 223 P.3d 1089 (stating that the commission's conclusions as to legality or constitutionality of statute should be reviewed for correctness, with no deference to commission (citing *Amax Magnesium Corp. v. Utah State Tax Comm'n*, 796 P.2d 1256, 1258 (Utah 1990))); *Resort Retainers v. Labor Comm'n*, 2010 UT App 229, ¶ 11, 238 P.3d 1081 (reviewing an agency's application of its own rules to the facts is reviewed under “an intermediate standard, one of some, but not total deference” (internal quotation marks omitted)). The remainder of this administrative outline discusses the standards of review for formal agency proceedings and the diagram on the following page provides a flow chart for standards of review for formal agency proceedings.

## 1. Challenging Findings of Fact

### a. Substantial Evidence Standard

Under UAPA, an agency's factual findings will be affirmed only if they are supported by “substantial evidence when viewed in



light of the whole record before the court.” UTAH CODE ANN. § 63G-4-403(4)(g); *accord Utah Chapter of the Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 13, 226 P.3d 719; *Mandell v. Auditing Div. of the Utah State Tax Comm’n*, 2008 UT 34, ¶ 11, 186 P.3d 335; *Resort Retainers*, 2010 UT App 229, ¶ 13, (stating factual findings must be “supported by substantial evidence based upon the record as a whole”); *Hymas v. Labor Comm’n*, 2008 UT App 471, ¶ 12, 200 P.3d 218, cert. denied, 2009 Utah LEXIS 75 (Utah, Apr. 1, 2009); *Desert Power LP*, 2007 UT App 374, ¶ 12.

“Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *Pen & Ink, LLC v. Alpine City*, 2010 UT App 203, ¶ 16, 238 P.3d 63 (mem.) (quoting *Caster v. W. Valley City*, 2001 UT App 212, ¶ 4, 29 P.3d 22), cert. denied, 2010 Utah LEXIS 172 (Utah, Oct. 27, 2010); *accord Kennon v. Air Quality Bd.* 2009 UT 77, ¶ 28, —P.3d—; *WWC Holding Co., Inc. v. Pub. Serv. Comm’n of Utah*, 2002 UT 23, ¶ 8, 44 P.3d 714; *Pac. W. Communities, Inc. v. Grantsville City*, 2009 UT App 291, ¶ 22, 221 P.3d 280, cert. denied, 2010 Utah LEXIS 29 (Utah, Jan. 20, 2010); *Desert Power LP*, 2007 UT App 374, ¶ 11. Substantial evidence is more than a “mere scintilla of evidence,” though “something less than the weight of the evidence.” *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 35, 164 P.3d 384 (internal quotation marks omitted); *Harmon City, Inc. v. Draper City*, 2000 UT App 31, ¶ 60, 997 P.2d 321.

When reviewing an agency’s decision under the substantial evidence test, the reviewing court “does not [conduct] a de novo review or a reweighing of the evidence.” *Associated Gen. Contractors v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶ 21, 38 P.3d 291 (internal quotation marks omitted); *accord Huemiller v. Ogden Civil Serv. Comm’n*, 2004 UT App 375, ¶ 2, 101 P.3d 394 (mem.). An appellate court will not substitute its judgment “as between two reasonably conflicting views,” even though it may have come to a different conclusion had the case come before it for de novo review. *Carter v. Labor Comm’n Appeals Bd.*, 2006 UT App 477, ¶ 17, 153 P.3d 763 (internal quotation marks omitted). “It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences.” *EAGALA, Inc. v. Dep’t of Workforce Servs.*, 2007 UT App 43, ¶ 16, 157 P.3d 334 (quoting *Grace Drilling Co. v. Bd. of Review of the Indus. Comm’n*, 776 P.2d 63, 68 (Utah Ct. App. 1989)); *accord Carter*, 2006 UT App 477, ¶ 17. When applying the substantial evidence test under UAPA, appellate courts must

consider not only the evidence supporting the board’s findings but also the evidence that fairly detracts from the weight of the board’s evidence. *See Rd. Runner Oil, Inc. v. Bd. of Oil, Gas & Mining*, 2003 UT App 275, ¶ 15, 76 P.3d 692 (citing *Grace Drilling Co.*, 776 P.2d at 68); *see WWC Holding*, 2002 UT 23, ¶ 8 (providing that in evaluating sufficiency of evidence, appellate court “will not sustain a decision which ignores uncontradicted, competent, credible evidence to the contrary”). Because a party seeking review of an agency order must show that the agency’s factual determinations are not supported by substantial evidence, the reviewing court examines the facts and all legitimate inferences drawn therefrom in the light most favorable to the agency’s findings. *See ABCO Enters v. Utah State Tax Comm’n*, 2009 UT 36, ¶ 1 n.1, 211 P.3d 382; *WWC Holding*, 2002 UT 23, ¶ 2.

### b. Marshaling Cases

The following are cases involving appeals from administrative agencies in which appellate courts address the marshaling requirement. *See Kennon*, 2009 UT 77, ¶ 27 (determining that party properly marshaled all record evidence available to support board findings, namely a photocopy of a Post-it note and a letter from the division); *Ball v. Pub. Serv. Comm’n*, 2007 UT 79, ¶ 39, 177 P.3d 545 (finding that rather than properly marshaling evidence in support of the commission’s finding, parties merely advocated their own position); *Martinez*, 2007 UT 42, ¶¶ 17-21; *WWC Holding*, 2002 UT 23, ¶¶ 8, 15 (finding that rather than properly marshaling the evidence, appellant simply pointed to testimony in the record favorable to its position); *Clements v. Utah State Tax Comm’n*, 2002 UT 1, ¶ 1, 16 P.3d 1250 (determining that party failed to meet obligation to marshal evidence and then demonstrate fatal flaw in that evidentiary support); *Associated Gen. Contractors*, 2001 UT 112, ¶ 34 (finding that party “utterly fails to marshal the evidence in support of the Board’s finding”); *Morgan Cnty. v. Holnam, Inc.*, 2001 UT 57, ¶ 12 n.8, 29 P.3d 629 (finding that county failed to marshal evidence and thus, court would not disturb the commission’s findings); *Beaver Cnty. v. WillTel, Inc.*, 2000 UT 29, ¶ 25, 995 P.2d 602 (finding party failed to marshal all relevant evidence); *Guenon v. Midvale City*, 2010 UT App 51, ¶¶ 5-6, 230 P.3d 1032 (mem.) (determining that officer omitted critical facts from his brief, thus failing to properly marshal evidence resulting in court accepting the board’s findings of fact as true), cert. denied, 2010 Utah LEXIS 124 (Utah, June 11, 2010); *Utah Auto Auction v. Labor Comm’n*, 2008 UT App 293, ¶ 9 n.4, 191 P.3d 1252 (stating that party need not marshal when only challenging legal conclusions drawn from decision); *EAGALA*, 2007 UT App 43, ¶ 15 (finding

that party properly marshaled the evidence in support of board's decision); *Carter v. Labor Comm'n Appeals Bd.*, 2006 UT App 477, ¶ 12, 153 P.3d 763; *Ameritemps, Inc. v. Labor Comm'n*, 2005 UT App 491, ¶ 27, 128 P.3d 31 (determining that petitioner's "selective recitation of the facts" did not meet the marshaling requirement), *aff'd*, 133 P.3d 437 (Utah 2006); *Save Our Canyons v. Bd. of Adjustment*, 2005 UT App 285, ¶¶ 15-17, 116 P.3d 978 (finding that party failed to marshal all evidence that supported findings); *Huemiller*, 2004 UT App 375, ¶ 6 (finding that party failed to mention pertinent facts in marshaling effort).

### c. Examples of Fact Questions

The following cases contain examples of factual issues reviewed under the substantial evidence standard of review:

(1) Determining the "essential functions" of prior employment and ascertaining whether other work is "reasonably available." *Martinez*, 2007 UT 42, ¶ 23.

(2) Whether a party's own miscalculations, decisions, and actions affected timelines and caused delays. *See Desert Power LP v. Pub. Serv. Comm'n*, 2007 UT App 374, ¶¶ 15-16, 173 P.3d 218.

(3) Whether there are conflicting medical reports is a question of fact. *See Resort Retainers v. Labor Comm'n*, 2010 UT App 229, ¶ 24, 238 P.3d 1081.

(4) Whether party knew his expenses were improper. *See EAGALA, Inc. v. Dep't of Workforce Servs.*, 2007 UT App 43, ¶ 7, 157 P.3d 334.

(5) Whether a preliminary plat is part of an annexation agreement. *See Pen & Ink, LLC v. Alpine City*, 2010 UT App 203, ¶ 17, 238 P.3d 63 (mem.), *cert. denied*, 2010 Utah LEXIS 172 (Utah, Oct. 27, 2010).

(6) Whether party provided its insurance carrier with written notice. *See Pinnacle Homes, Inc. v. Labor Comm'n*, 2007 UT App 368, ¶ 14, 173 P.3d 208.

(7) Whether employee established a causal connection between her complaint letter and her termination. *See Carter v. Labor Comm'n Appeals Bd.*, 2006 UT App 477, ¶ 13, 153 P.3d 763.

(8) Whether company took adverse action subsequent to a protected activity. *See Viktron/Lika Utah v. Labor Comm'n*, 2001 UT App 394, ¶ 5, 38 P.3d 993.

### d. Adequacy of Agencies' Factual Findings

"An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review." *Arrow Legal Solutions, Group, P.C. v. Dep't. of Workforce Servs.*, 2007 UT App 9, ¶ 15, 156 P.3d 830 (quoting *Adams v. Bd. of Review of Indus. Comm'n*, 821 P.2d 1, 4 (Utah Ct. App. 1991)); *accord Wood v. Labor Comm'n*, 2005 UT App 490, ¶ 9, 128 P.3d 41 (quoting *LaSal Oil Co. v. Dep't of Envtl Quality*, 843 P.2d 1045, 1047 (Utah Ct. App. 1992)). An agency's failure to make adequate findings of fact on material issues renders its findings "arbitrary and capricious unless the evidence is clear, uncontroverted and capable of only one conclusion." *Strate v. Labor Comm'n*, 2006 UT App 179, ¶ 16, 136 P.3d 1273 (quoting *Nyrebn v. Indus. Comm'n*, 800 P.2d 330, 335 (Utah Ct. App. 1990)); *accord Resort Retainers v. Labor Comm'n*, 2010 UT App 229, ¶ 14, 238 P.3d 1081 (stating appellate court will not overturn commission's factual findings "unless they are arbitrary and capricious, or wholly without cause, or contrary to the one [inevitable] conclusion from the evidence" (quoting *McKesson Corp. v. Labor Comm'n*, 2002 UT App 10, ¶ 25, 41 P.3d 468 (alteration in original))); *Utahns for Better Dental Health-Davis, Inc. v. Davis Cnty. Comm'n*, 2005 UT App 347, ¶ 7, 121 P.3d 39 (stating similar standard for findings regarding award of attorney fees).

An agency's failure to make adequate findings is prejudicial to the appealing party. *See Arrow Legal Solutions*, 2007 UT App 9, ¶ 15 (findings must be adequate to permit meaningful appellate review (citing *Adams*, 821 P.2d at 4) (recognizing that without adequate findings, petitioner challenging agency's factual findings cannot marshal evidence supporting findings)). When the agency's findings are inadequate, the case will be remanded unless the failure to make adequate findings of fact and conclusions of law is nevertheless harmless. *See id.* (stating that remand particularly appropriate when party was harmed by inadequate factual findings).

## 2. Challenging Discretionary Rulings

### a. Challenging Agency's Interpretation of Statutes

Utah Code section 63G-4-403(4)(h)(i) states that an appellate court may grant relief if an agency's action is "an abuse of the discretion delegated to the agency by statute." *See Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 24, 164 P.3d 384 (quoting UTAH CODE ANN. § 63-46b-16(4)(h)(i) (2004)); *Petro-Hunt, L.L.C. v. Dep't of Workforce Servs.*, 2008 UT App 391, ¶ 8, 197 P.3d 107 (stating that appellate court shall grant relief if the agency action is "an abuse of discretion delegated to the

agency by statute” (internal quotation marks omitted), *cert. denied*, 2009 Utah LEXIS 32 (Utah, Feb. 12, 2009). An agency’s interpretation and application of statutory terms should be reviewed under a correction of error standard. *See Heber Light & Power v. Pub. Serv. Comm’n*, 2010 UT 27, ¶ 6, 231 P.3d 1203; *ExxonMobile Corp. v. Utah State Tax Comm’n*, 2003 UT 53, ¶ 10, 86 P.3d 706 (applying correction of error standard and granting no deference for agency interpretation of oil and gas valuation methods), *abrogated in part by Union Oil Co. v. Utah State Tax Comm’n*, 2009 UT 78, 222 P.3d 1158; *Wood v. Labor Comm’n*, 2005 UT App 490, ¶ 5, 128 P.3d 41. However, an exception to the rule is that appellate courts defer to an agency’s statutory interpretation “when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language.” *Id.* (quoting *Esquivel v. Labor Comm’n*, 2000 UT 66, ¶ 16, 7 P.3d 777); *see also LPI Servs. & Travelers Indem. Co. of Conn. v. Labor Comm’n*, 2007 UT App 375, ¶ 8, 173 P.3d 858, *cert. denied*, 187 P.3d 232 (Utah 2008); *accord Rd. Runner Oil, Inc. v. Bd. of Oil, Gas & Mining*, 2003 UT App 275, ¶ 26, 76 P.3d 692 (citing *Morton Int’l, Inc. v. Auditing Div.*, 814 P.2d 581, 589 (Utah 1991)).

When such a grant of discretion exists, appellate courts will not disturb the agency’s ruling unless its determination exceeds “the bounds of reasonableness and rationality.” *Rd. Runner*, 2003 UT App 275, ¶ 26 (quoting *Osman Home Improvement v. Indus. Comm’n*, 958 P.2d 240, 243 (Utah Ct. App. 1998)); *accord Salt Lake Cnty. v. Labor Comm’n*, 2009 UT App 112, ¶ 9, 208 P.3d 1087 (stating appellate court reviews the agency’s action for reasonableness when the legislature has granted an agency discretion); *Rousell v. Labor Comm’n*, 2008 UT App 187, ¶ 8, 186 P.3d 968 (mem.) (stating the statute’s grant of discretion to commission to apply the law requires that appellate courts apply intermediate standard of review (citing *Johnson Bros. Constr. v. Labor Comm’n*, 967 P.2d 1258, 1259 (Utah Ct. App. 1998))); *LPI Servs.*, 2007 UT App 375, ¶ 8 (stating court assesses whether ruling is within the bounds of reasonableness).

This review for reasonableness and rationality is the same standard as the “abuse of discretion” standard mentioned in Utah Code section 63G-4-403(4)(h)(i). *See Sullivan v. Utah Bd. of Oil, Gas & Mining*, 2008 UT 44, ¶ 10, 189 P.3d 63; *WWC Holding Co., Inc. v. Pub. Serv. Comm’n*, 2002 UT 23, ¶ 8, 44 P.3d 714.

### (i) Explicit Discretion

An explicit grant of discretion exists “when a statute specifically authorizes an agency to interpret or apply statutory language.”

*King v. Indus. Comm’n*, 850 P.2d 1281, 1287 (Utah Ct. App. 1993); *see Salt Lake Cnty. v. Labor Comm’n*, 2009 UT App 112, ¶ 10, 208 P.3d 1087. An explicit grant of discretion to the agency can be found in the following statutory language in the 2005 version of Utah Code section 34A-1-301: “The [c]ommission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers.” *Salt Lake Cnty.*, 2009 UT App 112, ¶ 10 (quoting UTAH CODE ANN. § 34A-1-301 (2005)); *Barnard & Burk Group, Inc. v. Labor Comm’n*, 2005 UT App 401, ¶ 5, 122 P.3d 700; *Ae Clevite v. Labor Comm’n*, 2000 UT App 35, ¶ 7, 996 P.2d 1072. An explicit grant can also be found in this statutory language in Utah Code section 34A-2-413(7)(f)(i): “[t]he commission shall establish rules regarding part-time work and offset.” *LPI Servs. v. McGee*, 2009 UT 41, ¶ 8, 215 P.3d 135 (quoting UTAH CODE ANN. § 34A-2-413(7)(f)(i) (2005)). Another example of an explicit grant of discretion can be found in Utah Code section 35A-4-405(2)(a), which states, “discharged for just cause. . . if so found by the division.” *Albertsons, Inc. v. Dep’t of Emp’t Sec.*, 854 P.2d 570, 573 (Utah Ct. App. 1993) (omission in original) (citing former UTAH CODE ANN. § 35-4-5(b)(1) (Supp. 1992)).

### (ii) Implied Discretion

If an agency has not been granted explicit discretion to interpret a statute, the agency may nonetheless have implied discretion. An implied grant of discretion may be found from statutory language such as “equity and good conscience.” *McGee*, 2009 UT 41, ¶ 8 (citing *Salt Lake City Corp. v. Dep’t of Emp’t Sec.*, 657 P.2d 1312, 1316-17 (Utah 1982)); *Martinez*, 2007 UT 42, ¶ 44. Thus, “when the operative terms of a statute are broad and generalized, these terms bespeak a legislative intent to delegate their interpretation to the responsible agency.” *McGee*, 2009 UT 41, ¶ 8 (quoting *Morton Int’l, Inc. v. Auditing Div. of the Utah State Tax Comm’n*, 814 P.2d 581, 588 (Utah 1991)). Further, an implicit grant of authority exists when statutory language suggests that the legislature has left the particular issue in question undecided. *See id.* ¶ 9 (citing *Morton Int’l*, 814 P.2d at 588). Accordingly, when there is “more than one permissible reading of the statute and no basis in the statutory language or legislative history to prefer one interpretation over another,” the agency “that has been granted authority to administer the statute is the appropriate body” to interpret it. *Id.* (quoting *Morton Int’l*, 814 P.2d at 589); *accord Ekshteyn v. Dep’t of Workforce Servs.*, 2002 UT App 74, ¶ 10, 45 P.3d 173; *see also R.O.A. Gen., Inc. v. Dep’t of Transp.*, 966 P.2d 840, 843 (Utah 1998) (holding when legislative intent is not discernible by applying traditional rules

of statutory construction, agency has implied grant of authority and decision is reviewed for reasonableness and rationality). “[I]n the absence of a discernible legislative intent concerning the specific question in issue, a choice among permissible interpretations of a statute is largely a policy determination. The agency that has been granted authority to administer the statute is the appropriate body to make such a determination.” *R.O.A. Gen.*, 966 P.2d at 843 (internal quotation marks omitted); *accord McGee*, 2009 UT 41, ¶ 9.

However, an implied grant is not found, and an appellate court grants no deference to an agency’s interpretation of a statute, when that court is in as good a position as the agency to interpret the general statutory language in question, or when the legislative intent concerning the specific question at issue can be derived through traditional methods of statutory construction. *See McGee*, 2009 UT 41, ¶¶ 9, 11 (citing *Morton Int’l*, 814 P.2d at 589).

### **b. Challenging Agency’s Application of Law**

An agency’s application of the law to the facts of a case is reviewed for correctness unless the agency is given a measure of discretion. *See* Utah Code Ann. § 63G-4-403(4)(d) (2008); *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 24, 164 P.3d 384 (stating that an abuse of discretion standard is used “when an agency has discretion to apply its factual findings to the law” (internal quotation marks omitted)); *Ae Clevite, Inc. v. Labor Comm’n*, 2000 UT App 35, ¶ 6, 996 P.2d 1072 (stating absent grant of discretion, appellate courts use correction of error standard in reviewing agency’s application of statutory term); *Drake v. Indus. Comm’n of Utah*, 939 P.2d 177, 181 (Utah 1997); *Morton Int’l*, 814 P.2d at 587-88. The terms application of the law and mixed question of law and fact have been used interchangeably by the Utah appellate courts. *See Se. Utah Ass’n of Local Gov’t v. Workforce Appeals Bd.*, 2007 UT App 20, ¶ 6, 155 P.3d 932.

The measure of discretion may derive from an implicit or explicit grant in the statute applied by an agency. *See Martinez*, 2007 UT 42, ¶¶ 25, 41 (citing *Morton Int’l*, 814 P.2d at 588-89); *Rd. Runner Oil, Inc. v. Bd. of Oil, Gas & Mining*, 2003 UT App 275, ¶ 26, 76 P.3d 692 (stating that grant of discretion may be made either expressly in the statute or implied from the statutory language). For a discussion of implicit and explicit grants of discretion, please refer to the above section addressing these topics in the context of agency interpretations of statute.

Otherwise, an agency may be granted a measure of discretion in

applying the law to the facts of a case through the *Pena* analysis adopted by the supreme court in *Drake v. Industrial Commission of Utah*, 939 P.2d 177, 181-82 (Utah 1997) (citing *State v. Pena*, 869 P.2d 932, 935-39 (Utah 1994)), for use in administrative agency cases. *See Martinez*, 2007 UT 42, ¶¶ 27-28.

### **(i) Explicit Discretion**

When a statute makes an explicit grant of discretion to an agency, the appellate court applies a reasonableness and rationality standard, and may only overturn the agency’s conclusions of law if they are unreasonable and irrational. *See Ae Clevite*, 2000 UT App 35, ¶ 7 (stating when there exists a grant of discretion, appellate courts will not disturb the agency’s determination unless it “exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion”).

### **(ii) Implicit Discretion**

The legislature may also implicitly delegate discretion to the agency to apply statutes. *See Martinez*, 2007 UT 42, ¶ 25.

### **(iii) Pena Factors and Case Examples**

In general, the legal effect of specific facts “is the province of the appellate courts, and no deference need be given a trial court’s resolution of such questions of law.” *Drake*, 939 P.2d at 181. However, “policy considerations and other factors” may influence the appellate court “to define a legal standard so that it actually grants some operational discretion to the trial courts applying it.” *Id.* (quoting *State v. Vincent*, 883 P.2d 278, 282 (Utah 1994) (citing *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994))); *see Mandell v. Auditing Div. of the Utah State Tax Comm’n*, 2008 UT 34, ¶ 12, 186 P.3d 335 (stating discretion accorded under mixed questions of law and fact varies “according to the nature of the legal concept at issue” (quoting *State v. Levin*, 2006 UT 50, ¶ 21, 144 P.3d 1096)). Consequently, appellate courts may review an agency’s application of the law to the facts, depending on the issue, with varying levels of rigor ranging between de novo and broad discretion. *See Drake*, 939 P.2d at 181; *Pena*, 869 P.2d at 936-39; *see also Utah Chapter of the Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 14, 226 P.3d 719 (stating questions of “ultimate fact” or “mixed findings of fact and law,” are reviewed under an “intermediate standard” that considers whether the agency’s determination was rational (internal quotation marks omitted)); *Resort Retainers v. Labor Comm’n*, 2010 UT App 229, ¶ 11, 238 P.3d 1081 (reviewing an agency’s application of its own rules to the facts is reviewed under “an intermediate standard, one of some, but not total deference” (internal quotation marks omitted)); *Pinnacle Homes, Inc. v. Labor Comm’n*, 2007 UT App 368, ¶ 8, 173

P.3d 208 (stating that because issue requires application of a statutory standard to the facts, it is reviewed with “some deference”); *EAGALA, Inc. v. Dep’t of Workforce Servs.*, 2007 UT App 43, ¶ 9, 157 P.3d 334 (stating appellate court gives degree of deference when applying application of law to facts); *Utah Ass’n v. Workforce Appeals Bd.*, 2007 UT App 20, ¶ 6, 155 P.3d 932 (reviewing agency’s application of law to particular set of facts, giving “a degree of deference” to the agency); *Arrow Legal Solutions Group, P.C. v. Dep’t of Workforce Servs.*, 2007 UT App 9, ¶ 6, 156 P.3d 830 (stating appellate court grants board “moderate deference” in reviewing board’s application of the law to the relevant facts); *Autoliv ASP, Inc. v. Dep’t of Workforce Servs.*, 2001 UT App 198, ¶ 16, 29 P.3d 7.

In deciding the degree of deference to allow an agency’s application of law to fact, appellate courts consider the agency’s expertise in a specific area of law. See *Terry v. Ret. Bd.*, 2007 UT App 87, ¶ 8, 157 P.3d 362; *EAGALA*, 2007 UT App 43, ¶ 9 (providing that appellate court grants “moderate deference” to Board’s decision because Employment Security Act requires “little highly specialized or technical knowledge”); *Autoliv*, 2001 UT App 198, ¶ 16 (stating degree of deference accorded to agency’s application of law to fact is determined by, among other factors, the agency’s expertise).

As stated in the introduction to the first article in this standard of review series, “it appears that the *Pena* factors for review of mixed questions have been discarded in favor of a three factor ‘balancing test’” set forth in *State v. Levin*, 2006 UT 50, ¶ 28, 144 P.3d 1096. Norman H. Jackson, *Utah Standards of Appellate Review*, 23 UTAH BAR J. 10, 15 (2010). The Utah Supreme Court has applied the new three factor test in the administrative law context:

To determine the standard of review for a mixed question of law and fact, we apply a test that considers (1) the complexity of the facts; (2) the degree to which the lower court relied on observable facts that cannot be adequately reflected in the record, such as witness demeanor and appearance; and (3) any policy reasons favoring or disfavoring the exercise of discretion.

*Mandell*, 2008 UT 34, ¶ 12.

The following cases contain examples of agency application of law to fact or mixed questions:

(1) Whether integrated gasification combine cycle is an available control technology. See *Sierra Club*, 2009 UT 76, ¶ 44.

(2) Whether a worker is an employee within the meaning of the worker’s compensation laws. See *Pinnacle Homes, Inc. v. Labor Comm’n*, 2007 UT App 368, ¶ 8, 273 P.3d 208.

(3) The ultimate decision as to whether good cause exists is a mixed question of law and fact and should be affirmed only if it is reasonable. See *Autoliv ASP v. Dep’t of Workforce Servs.*, 2000 UT App 223, ¶ 11, 29 P.3d 7.

(4) Whether company had any supervision or control over entity that warrants finding that a worker was entity’s employee. See *Pinnacle Homes*, 2007 UT App 368, ¶ 18, 173.

(5) Whether employee’s separation from company constituted a discharge rather than a “voluntary quit without good cause.” See *Arrow Legal Solutions Group, P.C. v. Dep’t of Workforce Servs.*, 2007 UT App 9, ¶ 6, 156 P.3d 830 (giving “moderate deference”).

(6) Whether an employee is terminated for just cause. See *EAGALA, Inc., v. Dep’t of Workforce Servs.*, 2007 UT App 43, ¶ 9, 157 P.3d 334 (providing appellate court grants “moderate deference” to the board’s decision); See *Utah Ass’n of Local Gov’t v. Workforce Appeals Bd.*, 2007 UT App 20, ¶ 6, 155 P.3d 932 (stating appellate courts give “a degree of deference to the agency”).

(7) Whether the district court properly rejected a change of use of a water right application when the ground for that rejection was the probability that vested water rights would be impaired by the use proposed in the application. See *Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 18, 133 P.3d 382 (giving “significant, but not broad, discretion”).

(8) Whether company should be equitably estopped from denying the existence of a policy after issuing a certificate. See *Terry v. Ret. Bd.*, 2007 UT App 87, ¶¶ 8, 14, 157 P.3d 362.

(9) Whether decision to terminate was an abuse of discretion. See *Sorge v. Office of the Attorney Gen.*, 2006 UT App 2, ¶ 17, 128 P.3d 566 (applying deferential standard).

(10) Whether the commission erroneously applied the Allen test for proving legal causation is a mixed question of law and fact reviewed for reasonableness and rationality. See *Utah Auto Auction v. Labor Comm’n*, 2008 UT App 293, ¶ 8, 191 P.3d 1252; *Acosta v. Labor Comm’n*, 2002 UT App 67, ¶¶ 11, 18, 44 P.3d 819.

(11) Whether a special errand is within an employee’s scope of employment. See *Martinez v. Media-Paymaster Plus/*

*Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 28, 164 P.3d 384 (citing *Drake v. Indus. Comm’n*, 939 P.2d 177 (Utah 1997)).

### c. Challenging Determinations Contrary to Agency’s Rule

Under Utah Code section 63G-4-403(4)(h)(ii), the appellate court reviews whether the agency action is contrary to a rule of the agency by applying an intermediate deference reasonableness and rationality standard of review. *Cf. Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, ¶¶ 8, 32, 94 P.3d 242; *Westside Dixon Assocs. LLC v. Utah Power & Light Co./PacifiCorp*, 2002 UT 31, ¶ 7, 44 P.3d 775 (citing Utah Code Ann. § 63-46b-1 to -22 (1997)).

### d. Challenging Rulings Contrary to Agency’s Prior Practice

Under Utah Code section 63G-4-403(4)(h)(iii), the appellate court reviews whether the agency action is contrary to the agency’s prior practice and whether the inconsistency has a fair and rational basis. If the challenging party can prove by a preponderance of the evidence that the agency’s action was contrary to prior practice, the agency’s reason for the inconsistency or argument of consistency is reviewed under a reasonableness and rationality standard of review. *See Comm. of Consumer Servs. v. Pub. Serv. Comm’n*, 2003 UT 29, ¶ 13, 75 P.3d 481 (stating commission’s safety rationale is “neither an adequate nor a fair and rational basis for departing from its prudence review standard”); *Questar Gas Co. v. Utah Pub. Serv. Comm’n*, 2001 UT 93, ¶¶ 18-19, 34 P.3d 218; *Brent Brown Dealerships v. Tax Comm’n*, 2006 UT App 261, ¶ 31 n.5, 139 P.3d 296 (stating that citation to one commission case involving a statutory violation different from the one at issue is insufficient to show departure from prior practice); *Rd. Runner Oil, Inc. v. Bd. of Oil, Gas & Mining*, 2003 UT App 275, ¶ 25, 76 P.3d 692 (finding petitioners failed to show that board’s actions are inconsistent with actions involving a similar fact pattern); *Kelly v. Salt Lake City Civil Serv. Comm’n*, 2000 UT App 235, ¶¶ 29-33, 8 P.3d 1048 (determining that party failed to show inconsistency).

### e. Challenging Agency’s “Arbitrary and Capricious” Actions

Under Utah Code section 63G-4-403(4)(h)(iv), when a claim is brought alleging that an agency action was arbitrary and capricious, the appellate court reviews the agency action for reasonableness and rationality. *See Rd. Runner*, 2003 UT App 275, ¶ 24 (finding that because the board based its decision upon substantial evidence, decision was reasonable and rational); *Utah Chapter of the Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 13, 226 P.3d 719 (determining that UAPA grants relief if agency action is “otherwise arbitrary or

capricious” (quoting Utah Code Ann. § 63G-4-403(4)(d), (g), (h) (Supp. 2008)).

### 3. Challenging Conclusions of Law

If, as discussed above, an administrative agency has not been given discretion to interpret and administer a statute, under Utah Code section 63-46b-16(4)(d), appellate courts review the agency decision under a correction-of-error standard. *See Utah Chapter of the Sierra Club*, 2009 UT 76, ¶ 13; *LPI Servs. v. McGee*, 2009 UT 41, ¶ 7, 215 P.3d 135; *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶¶ 41-42, 164 P.3d 384; *Comm. of Consumer Servs. v. Pub. Serv. Comm’n*, 2003 UT 29, ¶ 8, 75 P.3d 481; *Salt Lake Cnty. v. Labor Comm’n*, 2009 UT App 112, ¶ 9, 208 P.3d 1087; *Ae Clevite, Inc. v. Labor Comm’n*, 2000 UT App 35, ¶ 6, 996 P.2d 1072. Appellate courts apply a correction-of-error standard not simply because the court characterizes an issue as one of general law, but because the agency has no special experience or expertise placing it in a better position than the reviewing courts to construe the law. *See Martinez*, 2007 UT 42, ¶ 45 (noting that grants of discretion should be limited to issues on which agencies have “special experience or expertise placing [them] in a better position than the courts to construe the law” (quoting *King v. Indus. Comm’n*, 850 P.2d 1281, 1286 (Utah Ct. App. 1993))); *WWC Holding Co. v. Pub. Serv. Comm’n*, 2002 UT 23, ¶ 8, 44 P.3d 714; *Level 3 Commc’ns, LLC v. Pub. Serv Comm’n*, 2007 UT App 127, ¶ 9, 163 P.3d 652.

#### a. Examples of Questions of Law

(1) Whether the department “decided all of the issues requiring resolution.” *Orchard Park Care Ctr. v. Dep’t of Health*, 2009 UT App 284, ¶ 8, 222 P.3d 64.

(2) An “interpretation of a contract presents a question of law.” *Desert Power, LP v. Pub. Serv. Comm’n*, 2007 UT App 374, ¶ 12, 173 P.3d 218 (stating that when reviewing an application or interpretation of law, appellate court uses correction of error standard, giving no deference to commission’s interpretation).

(3) A municipality’s decision to deny a rezoning request is a question of law. *See Petersen v. Riverton City*, 2010 UT 58, ¶ 8, —P.3d—.

(4) Whether agency’s actions violated a party’s due process rights. *See Kenmon v. Air Quality Bd.*, 2009 UT 77, ¶ 14, —P.3d—; *Resort Retainers v. Labor Comm’n*, 2010 UT App 229, ¶ 12, 238 P.3d 1081 (“Due Process challenges are questions of law that we review applying a correction of error standard.” (internal quotation marks omitted)).

(5) Whether a party has standing. See *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 12, 148 P.3d 960.

(6) Whether the commission's order dismissing a case with prejudice was enforceable as a judicial judgment is a question of law, reviewed for correctness. See *Rousell v. Labor Comm'n*, 2008 UT App 187, ¶ 9, 186 P.3d 968 (mem.).

(7) "Burden of proof questions typically present issue of law that an appellate court reviews for correctness." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 41, 164 P.3d 384.

(8) Whether a state administrative rule is preempted by a federal statute. See *WWC Holding Co. v. Pub. Serv. Comm'n*, 2002 UT 23, ¶ 8, 44 P.3d 714.

(9) Whether a state administrative agency engaged in an unlawful decision-making process. See *id.*

(10) Whether subject matter jurisdiction exists is a question of law. See *Ameritemps, Inc. v. Utah Labor Comm'n*, 2007 UT 8, ¶ 6, 152 P.3d 298; *Beaver Cnty. v. Qwest, Inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147.

(11) Whether a contract has been formed. See *Terry v. Ret. Bd.*, 2007 UT App 87, ¶ 7, 157 P.3d 362.

(12) Whether an agency has jurisdiction. See *Mendoza v. Labor Comm'n*, 2007 UT App 186, ¶ 5, 164 P.3d 447.

(13) Whether res judicata bars an action presents a question of law. See *Strate v. Labor Comm'n*, 2006 UT App 179, ¶ 14, 136 P.3d 1273.

#### 4. Appeals from the State Tax Commission

The appellate advocate should be aware of Utah Code section 59-1-610, which codifies a separate standard of review for appeals from formal adjudicative proceedings before the state tax commission. The standard of review for written findings of fact from formal adjudicative proceedings by the Utah State Tax Commission is a substantial evidence standard. See UTAH CODE ANN. § 59-1-610(1) (a) (2008); *ABCO Enters. v. Utah State Tax Comm'n*, 2009 UT 36, ¶ 7, 211 P.3d 382; *Mountain Ranch Estates v. Utah State Tax Comm'n*, 2004 UT 86, ¶ 7, 100 P.3d 1206 (stating that appellate court affirms commission's factual findings if they are supported by substantial evidence); *Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶ 21, 34 P.3d 180; *Brent Brown Dealerships v. Tax Comm'n*, 2006 UT App 261, ¶ 8, 139 P.3d 296; *Kennecott Utah Copper Corp. v. Utah State*

*Tax Comm'n*, 2004 UT App 60, ¶ 10, 87 P.3d 751; *Bd. Of Equalization Summit Cnty. v. State Tax Comm'n*, 2004 UT App 283, ¶ 5, 98 P.3d 782. Substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Atlas Steel, Inc. v. Utah State Tax Comm'n*, 2002 UT 112, ¶ 16, 61 P.3d 1053 (internal quotation marks omitted); *Yeargin, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 2001 UT 11, ¶ 11, 20 P.3d 287. In order to challenge the findings of fact, the party must marshal the evidence in support of the decision of the tax commission, and then demonstrate the fatal flaw in that evidentiary support. See *Clements v. Utah State Tax Comm'n*, 2001 UT 1, ¶ 1, 16 P.3d 1250.

The standard of review for conclusions of law is the correction-of-error standard "unless there is an explicit grant of discretion contained in a statute at issue before the appellate court." UTAH CODE ANN. § 59-1-610(1) (b); *accord ABCO Enters.*, 2009 UT 36, ¶ 7; *Utah Ry. Co. v. Utah State Tax Comm'n*, 2000 UT 49, ¶ 6, 5 P.3d 652 (stating appellate court grants commission no deference concerning its conclusion of law, applying correction of error standard); *Brent Brown Dealerships*, 2006 UT App 261, ¶ 8; *Kennecott*, 2004 UT App 60, ¶ 10; *Alpine Sch. Dist. Bd. of Educ. v. State Tax Comm'n*, 2000 UT App 319, ¶ 6, 14 P.3d 125. "If the Commission is granted discretion by the statute at issue, then the standard of review is narrower. The court is to defer to the Commission's conclusions of law, applying a reasonableness standard." *Newspaper Agency Corp. v. Auditing Div. of the Utah State Tax Comm'n*, 938 P.2d 266, 268 (Utah 1997).

Utah Code section 59-1-610 does not establish a standard of review for mixed questions of law and fact. See *Utah State Tax Comm'n v. Stevenson*, 2006 UT 84, ¶ 20, 150 P.3d 521. Tax commission appellate cases state that the standard of review for mixed questions of law and fact varies "according to the nature of the legal concept at issue." *Mandell v. Auditing Div. of the Utah State Tax Comm'n*, 2008 UT 34, ¶ 12, 186 P.3d 335 (quoting *State v. Levin*, 2006 UT 50, ¶ 21, 144 P.3d 1096).

To determine the standard of review for a mixed question of law and fact, [appellate courts] apply a test that considers (1) the complexity of the facts; (2) the degree to which the lower court relied on observable facts that cannot be adequately reflected in the record, such as witness demeanor and appearance; and (3) any policy reasons favoring or disfavoring the exercise of discretion.

*Id.* (quoting *Levin*, 2006 UT 50, ¶ 25).

### a. Examples of Fact Questions

(1) Whether the commission erred in its appraisal methodology is a question of fact reviewed to determine whether substantial evidence supports the commission's methodology. *See Osborn v. Tax Comm'n*, 2009 UT App 222, ¶ 4, 217 P.3d 274, *cert. denied*, 2009 Utah LEXIS 241 (Utah, Nov. 23, 2009).

(2) Whether company does not use an electrometallurgical process in its production activities. *See Atlas Steel, Inc. v. Utah State Tax Comm'n*, 2002 UT 112, ¶ 37, 61 P.3d 1053.

(3) Whether company converted material into real property. *See Yeargin, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 2001 UT 11, ¶ 32, 20 P.3d 287.

(4) Whether the east side of the property was devoted to agricultural use for the relevant time period. *See Marsh v. Tax Comm'n & Bd. of Equalization of Box Elder Cnty.*, 2009 UT App 44U (mem.) (per curiam).

### b. Examples of Agency's Discretion

(1) The tax commission has an explicit grant of discretion to define "establishment" for purposes of the sales tax exemption. *See Atlas Steel*, 2002 UT 112, ¶ 14 n.5; *Salt Lake Brewing Co. v. Auditing Div. of the Utah State Tax Comm'n*, 945 P.2d 691, 694 (Utah 1997).

(2) The tax commission was not granted an explicit grant of discretion to interpret "new or expanding operations." *See Atlas Steel*, 2002 UT 112, ¶ 14 n.5.

(3) Whether the commission's rule defining "normal operating replacements" is a reasonable interpretation of that term as used in Utah Code section 59-12-104(16). *See Newspaper Agency Corp. v. Auditing Div. of the Utah State Tax Comm'n*, 938 P.2d 266, 268 (Utah 1997) (stating appellate court applies a reasonableness standard to the commission's conclusions regarding "normal operating replacement [parts]" because statute provides explicit grant of discretion).

### c. Example of Mixed Question of Fact and Law

(1) Whether a party is a real property contractor for the purposes of determining sales tax liability. *See Yeargin, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 2001 UT 11, ¶ 31, 20 P.3d 287,

(2) Whether a party willfully failed to collect a tax. *See Utah State Tax Comm'n v. Stevenson*, 2006 UT 84, ¶¶ 8, 22-23,

150 P.3d 521 (citing *State v. Pena*, 869 P.2d 932, 936 (Utah 1994)); *State v. Brake*, 2004 UT 95, ¶ 12, 103 P.3d 699.

(3) "Determining the true character and nature of the settlement proceeds presents a mixed question of law and fact[.]" *Mandell v. Auditing Div. of Utah State Tax Comm'n*, 2008 UT 34, ¶ 17, 186 P.3d 335; *see also id.* ¶ 20 (concluding that the three *Levin* factors "weigh in favor of according less deference to the Commission's application of the law to the facts").

### d. Examples of Questions of Law

(1) Whether the tax commission properly interpreted a statute. *See Heber Light & Power Co. v. Utah Pub. Serv. Comm'n*, 2010 UT 27, ¶ 6, 231 P.3d 1203 (citing *Indus. Commc'ns, Inc. v. Utah State Tax Comm'n*, 2000 UT 78, ¶ 11, 12 P.3d 87); *MacFarlane v. State Tax Comm'n*, 2006 UT 25, ¶ 9, 134 P.3d 1116; *Mountain Ranch Estates v. Utah State Tax Comm'n*, 2004 UT 86, ¶ 7, 100 P.3d 1206; *ExxonMobil Corp. v. Utah State Tax Comm'n*, 2003 UT 53, ¶ 10, 86 P.3d 706, *abrogated in part by Union Oil Co. v. Utah State Tax Comm'n*, 2009 UT 78, ¶ 2, 222 P.3d 1158; *Atlas Steel, Inc. v. Utah State Tax Comm'n*, 2002 UT 112, ¶ 15, 61 P.3d 1053.

(2) The plain language application of contract provisions is a question of law reviewed for correctness. *See Envirocare of Utah, Inc. v. Utah State Tax Comm'n*, 2009 UT 1, ¶ 3, 209 P.3d 982.

(3) Whether the district court has subject matter jurisdiction to hear a case. *See Wasatch Cnty. v. Tax Comm'n*, 2009 UT App 221, ¶ 4, 217 P.3d 270.

(4) Whether the appellate court has jurisdiction to consider an issue. *See Bd. of Equalization of Summit Cnty. v. Tax Comm'n*, 2004 UT App 283, ¶ 6, 98 P.3d 782; *Bluth v. Tax Comm'n*, 2001 UT App 138, ¶ 4, 26 P.3d 882.

(5) Whether the term "gas" under the tax code includes nitrogen gas. *See Hercules, Inc. v. Utah State Tax Comm'n*, 2000 UT App 372, ¶ 6, 21 P.3d 231.

(6) Whether the tax division had authority under Utah statute to lower a school district's tax rate. *See Alpine Sch. Dist. v. State Tax Comm'n*, 2000 UT App 319, ¶ 6, 14 P.3d 125.

(7) Whether a tax is constitutional. *See Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 8, 225 P.2d 153, *cert. denied, Denali, L.L.C. v. Utah State Tax Comm'n*, 2010 U.S. LEXIS 8081 (U.S., Oct. 12, 2010).

(8) Whether the tax commission ignored statutory directives

when applying an appraisal methodology. *See Osborn v. Tax Comm'n*, 2009 UT App 222, ¶ 4, 217 P.3d 274, cert. denied, 2009 Utah LEXIS 241 (Utah, Nov. 23, 2009).

(9) Whether party is entitled to litigation expenses under the small business act. *See Salt Lake Cnty. Bd. of Equalization v. Tax Comm'n*, 2004 UT App 472, ¶ 11, 106 P.3d 182.

(10) The tax commission's interpretation of the tax code is a question of law and appellate courts grant no deference to the commission's interpretation. *See Hercules, Inc. v. Utah State Tax Comm'n*, 2000 UT App 372, ¶ 6, 21 P.3d 231.

(11) The tax commission's interpretation of general law including "case law, constitutional law, or non-agency specific legislative acts" is a correction of error standard with no deference given to the agency's decision. *See Exxon Corp v. Utah State Tax Comm'n*, 2010 UT 16, ¶ 6, 228 P.3d 1246 (internal quotation marks omitted); *Union Oil Co. v. Tax Comm'n*, 2009 UT 78, ¶ 8, 222 P.3d 1158.

(12) Whether the district court's determination that a tax is constitutional is a legal question. *See Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 8, 225 P.2d 153, cert. denied, *Denali, L.L.C. v. Utah State Tax Comm'n*, 2010 U.S. LEXIS 8081 (U.S., Oct. 2, 2010).

(13) The determination of the meaning of gross receipts under Utah Code section 59-24-102 (5) is a question of law reviewed for correctness. *See Envirocare of Utah, Inc. v. Utah State Tax Comm'n*, 2009 UT 1, ¶ 3, 201 P.3d 982.

(14) Whether the court of appeals applied the correct standard of review is reviewed for correctness by the Utah Supreme Court. *See Utah State Tax Comm'n v. Stevenson*, 2006 UT 84, ¶ 19, 150 P.3d 521.

(15) The application of a limitations period presents a question of law reviewed for correctness, giving no deference to the Commission's determination. *See Beaver Cnty. v. Prop. Tax Div. of the Utah State Tax Comm'n*, 2006 UT 6, ¶ 16, 128 P.3d 1187.

(16) Whether a settlement agreement violates Utah law. *See Alliant Techsystems, Inc. v. Salt Lake Cnty. Bd. of Equalization*, 2005 UT 16, ¶ 27, 110 P.3d 691.

(17) Whether a tax applied to a one-way pager service falls under the statutory definition of telephone services. *See Indus. Commc'ns, Inc. v. Utah State Tax Comm'n*, 2000 UT 78, ¶¶ 1, 11, 12 P.3d 87.

(18) Whether an ambiguity exists in a contract. *See Level 3 Commc'ns, LLC v. Pub. Serv. Comm'n*, 2007 UT App 127, ¶ 9, 163 P.3d 652.

### III. Challenges on Certiorari and upon Certification by Federal Courts

On certiorari, the supreme court reviews the decision of the court of appeals, not the trial court. *See Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 10, 182 P.3d 326; *J. Pochynok Co. v. Smedsrud*, 2005 UT 39, ¶ 8, 116 P.3d 353; *Salt Lake Cnty. v. Metro W. Ready Mix, Inc.*, 2004 UT 23, ¶ 11, 89 P.3d 155; *Grand Cnty. v. Rogers*, 2002 UT 25, ¶ 6, 44 P.3d 734; *Mitchell v. Christensen*, 2001 UT 80, ¶ 8, 31 P.3d 572. The court of appeal's decision is reviewed for correctness, and its conclusions of law are afforded no deference. *See State v. Harker*, 2010 UT 56, ¶ 8, 240 P.3d 780; *Arnold v. Grigsby*, 2009 UT 88, ¶ 7, 225 P.3d 192; *State v. Casey*, 2003 UT 55, ¶ 10, 82 P.3d 1106. When a question has been certified to the supreme court by the federal district court, the supreme court does not "refind the facts;" rather, the court answers only the certified question of law presented. *See TruGreen Cos., L.L.C. v. Mower Bros., Inc.*, 2008 UT 81, ¶ 8, 199 P.3d 929; *Burkholz v. Joyce*, 972 P.2d 1235, 1236 (Utah 1998). A certified question presents a question of law, which the Utah Supreme Court reviews for correctness without resolving the underlying dispute. *See Egbert v. Nissan Motor Co.*, 2010 UT 8, ¶ 8, 228 P.3d 737; *Smith v. Mosier*, 2009 UT 3, ¶ 5, 2001 P.3d 1001; *Tabor v. Metal Ware Corp.*, 2007 UT 71, ¶ 5, 168 P.3d 814; *In re Kunz*, 2004 UT 71, ¶ 6, 99 P.3d 793.

### CONCLUSION

Appellate judges often advise both lawyers and laymen that "trial courts search for truth and appellate courts search for error." This axiom advises that an appeal is not a re-trial. We stated at the outset that trial court determinations for the most part are final and binding regardless of impressive appellate briefs or



eloquent oral arguments. Rule 61 of the Utah Rules of Civil Procedure is a mandate to courts – trial and appellate – to not disturb a judgment or a verdict, unless it is clear that refusal to do so would be substantially unjust. Accordingly, the integrity of orders, judgments and verdicts is the rule and reversal is the exception. Thus, while the attorney is focusing on the trial proceedings at hand, the attorney must also keep an eye on preserving and preparing the case for appeal. The best way to succeed on appeal is to prevail at trial.

While writing this edition of the Utah Standards of Appellate Review, we were called upon to consult regarding a case that was struggling to survive in the trial court due to two adverse rulings on motions to dismiss. A sports analogy seemed to best illustrate the status of the proceedings: You are at bat in the ninth inning with two out. You have just hit the ball down the base line and you are arguing with the umpire/judge whether the ball was fair or foul. Realistically, your odds of hitting a home run on appeal are very slim. Moreover, differences between trial practice and appellate process require different attorney skill sets. Typically, trial investigation, preparation, and presentation require aggressive, quick-thinking skills. On the other hand, appellate briefing and oral argument require deliberate research, writing, and oral advocacy skills.

Appellate judges in California were recently surveyed concerning the skills required for effective appellate advocacy. They reported a wide variety of deficiencies in writing styles, proof reading, and use of the trial court record. In civil cases, large numbers of appellate briefs lacked internal consistency with the main messages and failed to serve the best interests of the parties. Briefing in criminal cases rated higher approval. This was attributed to more experienced appellate practitioners handling those appeals. See Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Methodologies in One California Appellate Court*, 4 JOURNAL OF APPELLATE PRACTICE AND PROCESS 141, 156 (2002). In Utah, we have also observed that the attorneys who specialize in criminal appeals at the Utah Attorney General's office and the Salt Lake Legal Defenders are effective appellate advocates. Thus, we surmise that experience and familiarity with the appellate process, including standards of review, are of paramount importance.

Sooner or later, the drafters of Utah appellate briefs and opinions must come to terms with standards of review. They are the keystone to appellate court decision making. These “standards” serve several useful purposes which the drafter should understand and keep in mind. The standards of review: (1) improve the judicial system by balancing power between

appellate and trial judges, (2) insure “judicial” economy in use of resources and time, (3) establish a standardized process of review, and (4) provide parties with a basis to evaluate the probability of success on appeal.

Standards of review are imperative and effective tools for outlining and framing the issues on appeal. Due to their significance, thorough research is required to identify, define, and apply the appropriate standard for each issue. The analysis of legal issues by attorney and judge alike must demonstrate fidelity to the standard from beginning to end. Their conclusions and results should confirm that they were reached within the limits imposed by the standard.

In summary, standards of review occupy a singularly vital role in the disposition of cases. They are the essential language of both appellate briefs and appellate opinions. Isolation of the correct standard of review should be the starting point for analyzing any appellate law issue. From the perspective of allocation of judicial power, a review standard allocates the positive authority an appellate court wields in its review function. The appellate court decides the nature and extent of error by the trial court and whether the error attained a reversible level. From the perspective of appellate practitioner, the practitioner's skill in persuading the court to utilize the most favorable standard of review will make all the difference in the outcome.

As we conclude this third edition of Utah Standards of Appellate Review, we extend our thanks to those who contributed their time, talent, and energy to research, writing, and editing behind the scenes. They are: Christine Critchley, Laniece Roberts, Alisha Giles, Sam Sorensen, Rachel Spohn, Ben Lusty, Brent Clayton, Matthew Anderson, and Dorothy Hatch.