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Utah Court of Appeals

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BRIEF

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COURT OF APPEALS

STATE OF UTAH

JANET T MILLIKAN,

Plaintiff Appellant, : Case No 880213-CA

vs. :

: District Court D 86-2818

CLARK H. MILLIKAN, :

:

Defendant-Respondent. :

REPLY BRIEF OF RESPONDENT ON CROSS-APPEAL

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,

SALT LAKE COUNTY, THE HONORABLE HOMER F WILKINSON

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DEPOSITED BY THE STATE OF UTAH
AUG 16 1990

FILED
JUN 26 1989
Mary T Noonan
Clerk of the Court
Utah Court

COURT OF APPEALS

STATE OF UTAH

JANET T. MILLIKAN,	:	
	:	
Plaintiff-Appellant,	:	Case No. 880213-CA
	:	
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	:	District Court D-86-2818
CLARK H. MILLIKAN,	:	
	:	
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REPLY

SUMMARY OF ARGUMENT

D'Oro v. D'Oro, 454 A.2d 915 (N.J. Super. Ct. Ch. Div. 1982), aff'd, 474 A.2d 1070 (N.J. Super. Ct. App. Div. 1984), remains good law in the state of New Jersey. Although Innes v. Innes, 542 A.2d 39 (N.J. Super. Ct. App. Div. 1988), "disagreed" with D'Oro, D'Oro was not overruled. The Appellate Division panel that decided Innes had no power to overrule or disapprove D'Oro because D'Oro was decided by an appellate panel of equal authority to the Innes panel.

There is a split of authority on the issue of whether retirement benefits can be treated as income to the recipient for purposes of determining alimony to be paid to the other spouse. The majority rule is that retirement benefits cannot be treated as income to the recipient for purposes of determining alimony. Utah Supreme Court authority suggests that Utah follows the majority rule.

ARGUMENT

I. D'ORO IS GOOD LAW

Respondent ("Dr. Millikan") raises as his sole issue on Cross-Appeal the trial court's error in awarding Appellant ("Mrs. Millikan") alimony based on Dr. Millikan's share of

retirement benefits, which retirement benefits were divided between the parties pursuant to their irrevocable joint election. In support of his position, Dr. Millikan cites in his Brief Utah case law and cases from other states, including the New Jersey case of D'Oro v. D'Oro, 454 A.2d 915 (N.J. Super. Ct. Ch. Div. 1982), aff'd, 474 A.2d 1070 (N.J. Super. Ct. App. Div. 1984).

The issue decided in D'Oro was whether retirement payments to a working spouse, who had been previously ordered to pay alimony, should be considered as income to the working spouse for purposes of determining alimony. The holding of the court, affirmed on appeal, was that retirement benefits could not be considered as income to the working spouse.

Mrs. Millikan cites in her Reply Brief Innes v. Innes, 542 A.2d 39 (N.J. Super. Ct. App. Div. 1988), which "disagreed" with D'Oro. Mrs. Millikan incorrectly characterizes Innes as "disapproving" D'Oro. The Appellate Division panel deciding Innes had no power to overrule or disapprove D'Oro. A discussion of the New Jersey Superior Court system is necessary to understand the impact of Innes on D'Oro.

The New Jersey Superior Court system is divided into three sections. There are two trial court sections known as Chancery and Law. The other section is the Appellate

Division. The Appellate Division has twenty-eight judges who sit in seven panels of four judges (known as "parts"). Each part has co-equal power and cannot overrule another part or "disapprove" the decision of another part. Thus, it is possible in New Jersey to have inconsistent, yet valid case law. Presumably, conflicts between parts are ultimately resolved by appeal to the New Jersey Supreme Court, the highest court of appeals, which has not ruled on this issue.

It follows from this understanding of the New Jersey Superior Court system that Innes had no legal impact on D'Oro. The Innes court part obviously disagreed with D'Oro, but did not overrule or disapprove D'Oro. Therefore, D'Oro remains good law in New Jersey.

II. MOST COURTS THAT HAVE CONSIDERED THE ISSUE DO NOT TREAT RETIREMENT BENEFITS AS INCOME FOR PURPOSES OF DETERMINING ALIMONY

Of the several states that have expressly considered the issue raised on Cross-Appeal, most have held that retirement benefits cannot be treated as income to the recipient for purposes of determining alimony to be paid to the other spouse. This is the rule in Minnesota, Kruschel v. Kruschel, 419 N.W.2d 119 (Minn. Ct. App. 1988), Wisconsin, Pelot v. Pelot, 342 N.W.2d 64 (Wis. Ct. App. 1983), and, as

noted above, in New Jersey. Apparently, the only case reaching a different result is the New Jersey case of Innes, discussed above.

Mrs. Millikan, in anticipation of Dr. Millikan's Brief on Cross-Appeal, cited Innes, Lang v. Lang, 425 N.W.2d 800 (Mich. Ct. App. 1988), In re Marriage of Baker, 251 Cal. Rptr. 126 (Cal. Ct. App. 1988), and In re Marriage of White, 237 Cal. Rptr. 764 (Cal. Ct. App. 1987), in opposition to the Cross-Appeal.

Baker has absolutely nothing to do with the issue on Cross-Appeal and appears to be an erroneous citation. White, as noted at pages 63-64 of Dr. Millikan's Brief, actually supports this Cross-Appeal, pointing out that double counting of retirement benefits does occur when the non-working spouse is awarded (or contractually entitled to receive) a portion of the working spouse's retirement benefits. Lang is distinguishable on the basis that there were no facts before the Lang court indicating that the working spouse's retirement benefits would be lower, as a result of the non-working spouse's beneficiary interest in the retirement plan. This fact also distinguishes Innes.

Thus, from a review of cases located by the parties, it appears that four states, Minnesota, Wisconsin, New Jersey,

and California, support the position asserted by Dr. Millikan on Cross-Appeal. Only one state, New Jersey, has taken a contrary view.

III. UTAH CASE LAW SUPPORTS APPLICATION OF THE MAJORITY RULE

In its pronouncements in the case of Dogu v. Dogu, 652 P.2d 1308 (Utah 1982), the Utah Supreme Court gives guidance to how it would rule on the issue raised on Cross-Appeal. On remand to the district court, the Dogu court suggested several methods the trial court could use to distribute retirement benefits:

> (1) The court could order that respondent elect a joint and survivor annuity under each retirement fund where that is an option, with appropriate adjustment to his alimony obligation during the period following retirement. (2) If respondent's retirement rights permit this option, the court could order that respondent elect that upon his retirement appellant be paid, in lieu of alimony after retirement, a lump sum equal to one-half the value of the retirement benefit as of the date of divorce, plus investment income accumulated thereafter. (3) The court might order that appellants's rights to alimony continue after respondent's death (until her own death or remarriage).

Id. at 1311 (emphasis added).

Thus, the Utah Supreme Court has already set forth the various permissible treatments of retirement benefits. Under the first method of distribution in Dogu, the district court can order retirement benefits split between the parties by providing survivor payments to the non-working spouse. If this method is invoked, the income from retirement benefits is "adjusted" out of the alimony obligation, because the non-working spouse is provided for under the working spouse's retirement plan. This is the result which should be applied here. Under the second distribution method, retirement benefits can be paid in a lump sum when such benefits are payable from the retirement plan, assuming the plan provides for lump-sum distribution. In that case, also, the non-working spouse will receive no alimony based on the working spouse's retirement income. Finally, the trial court could allow the working spouse to retain one hundred percent of his or her retirement benefits, and consider the benefits as "income" from which alimony is paid.

The Utah Supreme Court's first recommended approach should be applied in the case at bar because Mrs. Millikan is entitled to one hundred percent survivorship rights under Dr. Millikan's retirement plans. Dr. and Mrs. Millikan jointly and irrevocably chose retirement options that maximized

survivorship benefits to Mrs. Millikan and reduced retirement benefits payable to Dr. Millikan during his life.

The trial court in this case acknowledged Mrs. Millikan's irrevocable right to share in Dr. Millikan's retirement benefits and, in fact, recognized that Mrs. Millikan would receive more from Dr. Millikan's retirement than Dr. Millikan. Yet, Dr. Millikan was required by the trial court to pay alimony to Mrs. Millikan based on Dr. Millikan's share of his retirement benefits. This amounts to double payment to Mrs. Millikan of the retirement benefits. Nowhere in Dogu does the Supreme Court allow for an alternative that splits retirement benefits between the parties and also entitles the non-working spouse to alimony based on the working spouse's share of retirement benefits.

IV. IT WOULD BE INEQUITABLE TO TREAT RETIREMENT BENEFITS AS BOTH MARITAL PROPERTY AND INCOME

Most states grant to their trial courts discretion to consider vested retirement benefits in making property division or alimony awards. In some cases, the marital estate is sizable and the trial court is able to off-set with property of the marital estate an award to the working spouse of all of his or her retirement benefits. More often, however, the marital

estate will not bear such an off-set award and the working spouse will be required to pay alimony in lieu of division of the retirement benefits.

In the latter case, upon retirement of the working spouse, courts may require the spouse receiving retirement benefits to continue paying alimony from retirement benefits. Where the non-working spouse has received no portion of the retirement benefits in the divorce, this is not an unfair result.

Where, however, the non-working spouse is entitled to directly receive a share of the working spouse's retirement benefits, it is unfair to treat retirement benefits as income and impose on the working spouse the burden of alimony. As noted by the Kruschel court, "pension [payments] should be viewed as property or income, but not both." 419 N.W.2d. at 122 (emphasis added).

CONCLUSION

Nearly all courts that have considered the issue on Cross-Appeal have held that retirement benefits split between parties to a divorce cannot be counted as income when paid to the working spouse to then be paid out as alimony to the non-working spouse. The Utah Supreme Court in Dogu clearly prohibits this sort of double-counting of retirement benefits.

RESPECTFULLY SUBMITTED this 26th day of June, 1989.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of June, 1989, I caused to be hand-delivered four true and correct copies of the foregoing Reply Brief of Respondent on Cross-Appeal, to the following:

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