

1997

Marion Marsh v. Scott Allan Marsh : Reply Brief of Appellant

Utah Court of Appeals

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Kellie F. Williams; Attorney for Appellee.

Richard N. Bigelow; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

* * * * *

MARION MARSH, Plaintiff-Appellee, vs. SCOTT ALLAN MARSH, Defendant-Appellant	REPLY BRIEF OF APPELLANT Appeal No. 970696-CA Civil No. 894891070 DA (Oral Argument Priority No: 15)
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* * * * *

Appeal from a Final Judgment
of the Third Judicial District Court
of Salt Lake County, Utah
The Honorable Leslie A. Lewis

Richard N. Bigelow (3991)
Attorney for Appellant
700 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 364-6450

Kellie F. Williams (3493)
Attorney for Appellee
808 East South Temple
Salt Lake City, Utah 84102
Telephone: (801) 328-1162

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Julia D'Alesandro
Clerk of the Court

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Attorney for Appellee
808 East South Temple
Salt Lake City, Utah 84102
Telephone: (801) 328-1162

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INTRODUCTION

The statement of jurisdiction, issues presented for review and standards of review, statement of the case, and facts have all been previously presented. (Brief of Appellants) Appellants present this brief in reply to issues raised by the Appellee in its brief.

ARGUMENT

Point I. A MILITARY SEPARATION PAYMENT MADE UNDER §1174 AND RELATED STATUTES IS NOT A PENSION OR RETIREMENT PAYMENT AND SHOULD NOT BE TREATED AS SUCH UNDER A DECREE OF DIVORCE.

Separation pay from the military is not a retirement payment and should not be treated as retirement under A Decree of Divorce. The applicable portion of the August 16, 1989 Divorce Decree awarded Marion Marsh "11/40ths of all pension and

retirement benefits that the [Mr. Marsh] may receive upon his retirement from military service." Appellee contends that since "marital property 'encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived" including pension funds and insurance," Gardner v. Gardner, 748 P.2d 1076, 1079 (Utah 1988) (quoting Englert v. Englert, 576 P.2d 1274 (Utah 1978)), this is intended to include military separation pay.

Appellee continues that "the essential criterion is whether a right to the benefit has accrued in whole or in part during the marriage." Mr. Marsh did not earn his separation "in whole or in part" during the marriage. He earned the separation pay when he was involuntarily separated from the military in November 1991. At that time he was given the separation pay to assist him in his re-entry into civilian life.

Under the statute, 10 U.S.C. §1174(h), in the event that the individual receiving separation pay eventually qualifies for retirement, the amount of the separation pay must be repaid. The statute does not state that this is an advancement on retirement as the Appellee implies or as her expert opines. The statute provides only that if the individual receives Retirement he must repay the separation pay. Appellee also raises the issue of the entry of the separation pay as Retirement/Pension on Mr. Marsh's W-2 form. Tax forms do not contain a place to enter

Military Separation Pay and according to Mr. Crist, Appellee's Expert Witness, the Retirement/Pension line is where Mr. Marsh was likely instructed to list that amount.

The Appellee implies that since Mr. Marsh has completed his requisite years of service with the military that he is entitled to retirement. What she fails to address, however, is that Mr. Marsh still must live to the age of 65 before he becomes eligible for any retirement benefits. If he receives these benefits, then at that time, Mrs. Marsh will be entitled to 11/40ths of the retirement.

Because Mr. Marsh turning age 65 was the agreed upon time that Mrs. Marsh would receive retirement, based upon current information she will, at that time, receive 11/40ths of the total \$1800 which totals \$495 per month. With Mr. Marsh repaying 75% of the retirement, he will receive \$495 each month which can be paid to Mrs. Marsh to compensate her accordingly. This appears to be the appropriate solution because Appellee is only entitled to the retirement if Mr. Marsh completes the requisite years of service and if he reaches retirement age. If he does not meet these requirements, he will not receive retirement benefits and should not be required to pay benefits to Mrs. Marsh prior to receiving them.

Appellee argues that without the separation pay she will suffer "an enormous hardship and injustice." Because the Divorce

Decree granted the retirement only should Mr. Marsh receive it, she has no interest in that retirement until that time. Mr. Marsh is not arguing that Appellee is not entitled to her 11/40ths of the retirement, only that she be given her share of the benefits if and when he receives them.

Although Appellee argues that Appellant "will receive retirement benefits," that is not the case. Although he has currently completed the requisite years of service, he has not reached the age of 65 and will not reach that age for a number of years. His retirement is contingent upon his reaching that age and is not, as Appellee states, a foregone conclusion.

Appellee indicated that in the case of Kuzmiak v. Kuzmiak, 222 Cal. Rptr. 644, (Cal. App. 2d 1986), cert. denied 479 U.S. 885, the employee had not completed 20 years of service to entitle him to retirement and as noted, Mr. Marsh has currently completed the requisite years of service. However, as noted above Mr. Marsh has not "earned his longevity pension" because he is not entitled to such pension unless or until he reaches the age of 65.

Since separation pay is generally separate property, Appellee is not entitled to receive 11/40ths of the separation pay. Since Mr. Marsh has currently fulfilled his requisite years of service he is one step closer to receiving retirement. However, he is not entitled to receive those retirement benefits

unless or until he reaches the age of 65. Should that event occur, Appellee will then be entitled to receive her 11/40ths of the retirement pay. Since the amount paid to Mr. Marsh was separation pay as a part of his involuntary discharge, the reasoning used in the Kuzmiak case should be applied to determine that separation pay is not compensation for past services and is consequently not divisible in the divorce decree.

POINT II. IF APPELLEE RECEIVES 11/40THS OF THE MILITARY SEPARATION PAY SHE MUST PARTICIPATE IN THE REPAYMENT IN THE EVENT THAT MR. MARSH RECEIVES HIS RETIREMENT BENEFITS.

Equity requires that Mrs. Marsh be required to participate in the repayment if she receives part of the separation pay. If she receives her 11/40ths of the separation pay, she should be required to repay 11/40ths when and if she receives retirement benefits.

POINT III. THE TRIAL COURT ERRED IN FINDING THAT THE OBLIGATION FOR MR. MARSH TO HOLD APPELLEE HARMLESS ON THE MORTGAGE WAS CONTINGENT ON HIS PAYMENT OF CHILD SUPPORT.

The Decree of Divorce awarded child support and alimony to Appellee. The Decree also ordered Appellee to hold Appellant harmless on the mortgage for their marital home. As a result of Appellee's failure to do so, Mr. Marsh or someone on his behalf must repay the Department of Veteran's Affairs the sum of

\$12,870.96 before the Appellant can once again be eligible for Veteran's loans. Although, as Appellee noted, "the outstanding debt on the home was waived by the Veteran's Administration," Mr. Marsh has been damaged and not held harmless in that he is precluded from obtaining any type of Veteran's loans until this amount is paid off.

As courts have found in child support and visitation cases, separate obligations such as visitation and child support are not contingent upon one another. In addition, the Divorce Decree expressly provided Mrs. Marsh a remedy in the event of an arrearage in support payments. The Decree states "if the Defendant falls thirty (30) days or more in arrears in his child support obligation, the Plaintiff should be entitled to mandatory income withholding relief pursuant to Utah Code Annotated (78-45(d)(1) et. seq.) (1984 as amended)." The Decree does not permit or provide her justification to evade her obligations under the Decree nor does it make meeting her obligations contingent upon his.

In addition, Appellee failed to note that as of the date of trial, Mr. Marsh had paid all his arrearages, including interest, and has made Mrs. Marsh whole. Mr. Marsh is entitled to the same. It is Appellee's obligation to make Mr. Marsh whole by repaying the debt of \$12,870.96. Mr. Marsh has remained current in his support. He has fulfilled all his obligations under the

Divorce Decree and is entitled to the same fulfillment of obligations from Mrs. Marsh. It would be inequitable to require Mr. Marsh to remain current on his obligations and not require the same from Appellee.

CONCLUSION

The Court of Appeals should reverse the judgment of the trial court and enter judgment in favor of Mr. Marsh since Military Separation Pay is not the same as retirement and consequently should not be divided as retirement under the decree of divorce. In the alternative, if the Separation pay is divided under the Decree, Appellee should be required to contribute to the repayment of such in the event of Mr. Marsh receiving retirement. Finally, Appellee should be required to uphold her obligation to hold Mr. Marsh harmless on their mortgage and should be required to repay the Veteran's Affairs loan so that Mr. Marsh is again made whole and has the opportunity to again obtain a Veteran's Affairs loan.

RESPECTFULLY SUBMITTED this 10th Day of August, 1998.

RICHARD N. BIGELOW

By: Richard N. Bigelow
Richard N. Bigelow (3991)
Attorney for Appellant