

1997

# Marion Marsh v. Scott Allan Marsh : Brief of Appellee

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

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MARION MARSH,

Petitioner/Appellee,

-vs-

SCOTT ALLAN MARSH,

Respondent/Appellant

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**BRIEF OF APPELLEE**

Appeal No. 970696-CA

Civil No. 894891070-DA

Priority No. 15

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE LESLIE A. LEWIS PRESIDING

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KELLIE F. WILLIAMS #3493  
Attorney for Appellee  
CORPORON & WILLIAMS, P.C.  
808 East South Temple  
Salt Lake City, Utah 84102  
Telephone: (801) 328-1162

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

## TABLE OF CONTENTS

TABLE OF CONTENTS. . . . .	I
TABLE OF AUTHORITIES . . . . .	ii
STATEMENT OF JURISDICTION. . . . .	1
STATEMENT OF THE ISSUES AND STANDARD OF REVIEW . . . . .	1
DETERMINATIVE PROVISIONS . . . . .	3
STATEMENT OF THE CASE. . . . .	3
I.    NATURE OF THE CASE . . . . .	3
II.   COURSE OF PROCEEDINGS BELOW. . . . .	4
III.  STATEMENT OF THE FACTS . . . . .	4
SUMMARY OF THE ARGUMENT. . . . .	7
ARGUMENT . . . . .	8
I. <u>THE TRIAL COURT CORRECTLY RULED THAT APPELLEE</u> <u>WAS ENTITLED TO 11/40THS OF APPELLANT'S</u> <u>SEPARATION PAY</u> . . . . .	8
A. <u>UNDER \$1174 APPELLEE WILL PARTICIPATE IN</u> <u>THE REPAYMENT OF THE SEPARATION PAY</u> . . . . .	13
II. <u>THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY</u> <u>REFUSING TO HOLD APPELLEE IN CONTEMPT WHERE</u> <u>APPELLANT INTENTIONALLY REFUSED TO PAY COURT-</u> <u>ORDERED SUPPORT TO APPELLEE CAUSING HER</u> <u>INABILITY TO MAKE PAYMENTS ON THE MORTGAGE</u> . . . . .	14
CONCLUSION . . . . .	17
CERTIFICATE OF MAILING . . . . .	18

## TABLE OF AUTHORITIES

### CASES

<u>Barbour v. Barbour</u> , 330 P.2d 1093 (Mont. 1958) . . . . .	17
<u>Bartholomew v. Bartholomew</u> , 548 P.2d 238 (Utah 1976) . . . . .	3,14
<u>Eames v. Eames</u> , 735 P.2d 395 (Utah App. 1987). . . . .	2
<u>Englert v. Englert</u> , 576 P.2d 1274 (Utah 1978). . . . .	8
<u>Gardner v. Gardner</u> , 748 P.2d 1076 (Utah 1988). . . . .	2,8
<u>Horton v. Horton</u> , 695 P.2d 102 (Utah 1984) . . . . .	16
<u>Kunzler v. O'Dell</u> , 855 P.2d 270 (Utah App. 1993) . . . . .	14
<u>Kuzmiak v. Kuzmiak</u> , 222 Cal. Rptr. 644 (Cal. App. 2d 1986), <u>cert. denied</u> 479 U.S. 885 (1986). . . . .	11-13
<u>Masters v. Worsley</u> , 777 P.2d 499 (Utah App. 1989). . . . .	17
<u>McCrary v. McCrary</u> , 599 P.2d 1248 (Utah 1979). . . . .	2
<u>Rohr v. Rohr</u> , 709 P.2d 382 (Utah 1985) . . . . .	16
<u>Ruhsam v. Ruhsam</u> , 742 P.2d 123 (Utah App. 1987). . . . .	2
<u>Throckmorton v. Throckmorton</u> , 767 P.2d 121 (Utah App. 1988). . . . .	2
<u>Von Hake v. Thomas</u> , 759 P.2d 1162 (Utah 1988). . . . .	14
<u>Woodward v. Woodward</u> , 656 P.2d 431 (Utah 1982) . . . . .	8,9,13

### STATUTES

UTAH CODE ANN. § 78-2A-3(2) (h) (1953 as amended) . . . . .	1
10 U.S.C. §1174(h) . . . . .	7,9,12,13
Rule 34 UTAH RULES OF APPELLATE PROCEDURE (1998) . . . . .	17

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THE HONORABLE LESLIE A. LEWIS PRESIDING

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**STATEMENT OF JURISDICTION**

The Utah Court of Appeals has appellate jurisdiction over this appeal pursuant to UTAH CODE ANN. § 78-2A-3(2) (h) (1953 as amended) .

**STATEMENT OF THE ISSUES AND STANDARD OF REVIEW**

1. Whether the trial court correctly ruled that Appellee was entitled to a portion of Appellant's military separation pay where Appellee was awarded a portion of Appellant's possible military retirement benefits in the Divorce Decree, and at the time Appellee was awarded a portion of the separation pay, Appellant had earned a longevity pension.

In reviewing a modification of a divorce decree, "[t]rial

courts have considerable discretion to adjust divorcing parties' financial and property interests." Throckmorton v. Throckmorton, 767 P.2d 121, 122 (Utah App. 1988) (citing Ruhsam v. Ruhsam, 742 P.2d 123, 124 (Utah App. 1987)). "The discretionary power to fashion an equitable property division extends equally to subsequent modifications of an earlier decree." Id. (citing McCrary v. McCrary, 599 P.2d 1248, 1250 (Utah 1979)). "Moreover, the trial court's actions are entitled to a presumption of validity." Id. (citing Ruhsam, 742 P.2d at 124). "Absent a showing of a clear and prejudicial abuse of discretion, [the Appellate Court] will not interfere with an alimony or property award." Id. (citing Gardner v. Gardner, 748 P.2d 1076, 1078 (Utah 1988); Eames v. Eames, 735 P.2d 395, 397 (Utah App. 1987)).

2. Whether the trial court correctly ruled that Appellee was not in contempt where the Decree of Divorce ordered Appellant to pay child support and alimony and ordered Appellee to hold Appellant harmless on a home mortgage, and Appellant intentionally refused to pay support and was over \$7,000.00 in arrears, and the mortgage was foreclosed due to Appellee's inability to pay the mortgage because of Appellant's refusal to pay support.

"[T]he generally accepted rule is that the issuance of an order relating to contempt of court, or the holding of a party in contempt of court, are matters which are not mandatory upon the

trial judge, but rest within his sound discretion." Bartholomew v. Bartholomew, 548 P.2d 238, 240 (Utah 1976) (citations omitted). "In the absence of any action in that regard which is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of his discretion, this court on review would not disagree with his determination and compel such an action." Id.

### **DETERMINATIVE PROVISIONS**

The determinative provisions for this appeal are 10 U.S.C. §§ 627-1174 and § 1408 (See Exhibit "A", Aplt. Brief) which govern military separation pay and pension and retirement benefits.

### **STATEMENT OF THE CASE**

#### **I. NATURE OF THE CASE**

This appeal arises from a Decree of Divorce and subsequent motions and petition. The parties to this action were married for approximately fifteen years. The Decree awarded Appellee a portion of Appellant's military retirement benefits and ordered Appellant to pay child support and alimony to Appellee. The Decree also ordered Appellee to hold Appellant harmless on the home mortgage. After the Decree was entered, Appellant was involuntarily discharged from the military and received "separation pay." Upon learning of this disbursement, Appellee made a claim to receive her portion of the disbursement, and



Appellant objected and moved to hold Appellee in contempt for failing to hold Appellant harmless on the home mortgage.

## II. COURSE OF PROCEEDINGS BELOW

The court below, the Honorable Leslie A. Lewis presiding, entered the decree of divorce on August 16, 1989. Appellee filed her Verified Petition for Modification of Decree of Divorce and Motion for Relief on January 4, 1995. Appellant filed his Answer on March 8, 1995. The Findings of Fact and Conclusions of Law were filed on June 9, 1997 along with the Order and Order of Modification. Appellant filed his Objection to Proposed Order on June 13, 1997. The Notice of Entry of Order was filed on June 16, 1997, and Appellant filed his Notice of Appeal on July 9, 1997.

## III. STATEMENT OF THE FACTS

The parties to this action were married on April 20, 1974, in Manti, Utah. (Complaint, R. at 1). The parties were divorced on August 16, 1989. (Decree of Divorce, R. at 38). Appellee was awarded physical custody of the parties' four minor children. (Decree, R. at 39). Appellant was ordered to pay \$300.00 per month per child, for a total of \$1,200.00 in child support, to Appellee. (Decree, R. at 41). Appellant was also ordered to pay Appellee \$468.00 per month in alimony. (Decree, R. at 42). The Decree awarded Appellee 11/40ths of all Appellant's military retirement benefits. (Decree, R. at 43). Appellee was also

ordered to hold Appellant harmless on the mortgage secured by the marital residence. (Decree, R. at 44).

In November, 1991, Appellant was involuntarily discharged from his employment with the United States Navy. (Transcript at 52, Aplt. Exhibit "E"). Appellant received \$30,000.00 in severance pay in February, 1992. (Transcript at 52, Aplt. Exhibit "E").

Subsequent to Appellant's discharge, and after receiving the \$30,000.00 in severance pay, Appellant intentionally refused to pay his support obligations to Appellee, and by November 25, 1992, Appellant had accrued \$7,637.00 in arrearages in family support. (Order, R. at 114). Due to Appellant's willful failure to pay the support and alimony ordered by the court, Appellee was unable to maintain the mortgage on the house. (Affidavit, R. at 210). The house was foreclosed on March 10, 1992. (Affidavit, R. at 210). Due to the foreclosure, a debt of \$12,469.58 was established against Appellant. (Letter, R. at 227). However, upon Appellant's request, a waiver was granted on December 13, 1993, relieving Appellant of this debt. (Letter, R. at 227).

Although the debt was waived by the Department of Veterans' Affairs, Appellant moved for an order to show cause seeking an order holding Appellee in contempt for failing to hold Appellant harmless on the mortgage as ordered by the Decree. (Motion, R. at 230).

In the hearing held on this matter on November 7, 1994, before Commissioner Michael S. Evans, with counsel for both parties present, the court found that Appellant's failure and refusal to pay the previously ordered child support and alimony payments to Appellee was the direct cause of Appellee's inability to pay the mortgage payments on the real property. (Minute Entry, R. at 239, Response, R. at 256). On November 18, 1994, Appellant filed his objection to Commissioner Evan's recommendation. (Objection, R. at 240). On or about January 4, 1995, Appellee filed her Verified Petition for Modification of Divorce Decree and Motion for Relief. (Petition, R. at 281). Appellee's Petition sought to modify child support and asserted her claim to 11/40ths of the separation pay received by Appellant. (Petition, R. at 283).

On April 17, 1997, these issues came to trial before the Honorable Leslie A. Lewis. (Findings, R. at 454). Judge Lewis found that Appellant's objection to Commissioner Evans' recommendation should be denied because Appellee only failed to make payments on the mortgage after Appellant intentionally failed to pay his child support and alimony obligations, and the deficiency owed due to the foreclosure was waived so that Appellant paid no monies out of pocket due to the foreclosure. (Findings, R. at 455). Judge Lewis also found that the \$30,000.00 disbursement made to Appellant when he separated from

the Navy was either a marital asset or in anticipation of retirement and therefore an advance on retirement. (Findings, R. at 458). This finding was based on the expert testimony of Neil B. Crist and because at the time of trial, Appellant's retirement was fully vested. (Findings, R. at 457, Transcript at 70 , Appellant's Testimony, Aplt. Exhibit "E").

#### SUMMARY OF THE ARGUMENT

The parties to this action were married for approximately fifteen years. The Divorce Decree awarded Appellee 11/40ths of Appellant's military retirement benefits. Upon being involuntarily separated from the military, Appellant elected to receive \$30,000.00 in separation pay. At the time of trial, Appellant had completed twenty years of service in the military. Therefore, his retirement benefits had vested.

Under 10 U.S.C. §1174, because Appellant elected to receive separation pay, and because he later reenlisted and earned his retirement benefits, Appellant must pay back the separation pay through deductions from his retirement benefits. Therefore, the trial court correctly ruled that, because Appellant's retirement benefits had vested at the time of trial, this separation pay was an advance on his retirement benefits and Appellee was entitled to her 11/40ths share.

In addition, the trial court was within its discretion in

denying Appellant's objection to Commissioner Evan's ruling restricting Appellant's rights under the Divorce Decree and denying Appellant's motion to hold Appellee in contempt. The Divorce Decree ordered Appellant to pay family support and Appellee to hold Appellant harmless on a mortgage. Appellant intentionally refused to pay the court-ordered family support. This intentional refusal caused Appellee to be unable to pay the mortgage payments. Because Appellee was unable to make the payments due to Appellant's inequitable conduct, the court was within its discretion in denying Appellant's motion for contempt. In addition, the trial court was within its discretion in restricting Appellant's rights under the Divorce Decree because "equity refuses to lend its aid to a party whose conduct is inequitable."

#### ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT APPELLEE WAS ENTITLED TO 11/40THS OF APPELLANT'S SEPARATION PAY.

"Marital property 'encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and this includes any such pension fund or insurance." Gardner v. Gardner, 748 P.2d 1076, 1079 (Utah 1988) (quoting Englert v. Englert, 576 P.2d 1274 (Utah 1978)). Utah's definition of marital property includes deferred compensation. See Gardner, 748 P.2d at 1078-79; Woodward v.

Woodward, 656 P.2d 431, 432-33 (Utah 1982). "The essential criterion is whether a right to the benefit has accrued in whole or in part during the marriage. To the extent the right has so accrued it is subject to equitable distribution." Woodward, 656 P.2d 432-33.

The parties' Divorce Decree awarded Appellee 11/40ths of all pension and retirement benefits that Appellant may receive. During the parties' fifteen year marriage, Appellant accrued an interest in a military pension. In addition, during the marriage, Appellant accrued the right to elect to receive separation pay based on his years of service. If Appellant elected to take the separation pay, and in the event that Appellant would qualify for retirement, 10 U.S.C. §1174(h) would require that the separation pay amount would be withheld from the retirement benefits until paid off.

**A member who has received separation pay under this section, or separation pay, severance pay, or readjustment pay under any other provision of law, based on service in the armed forces, and who later qualifies for retired or retainer pay under this title or title 14 shall have deducted from each payment of such retired or retainer pay so much of such pay as is based on the service pay under this section or separation pay, severance pay, or readjustment pay under any other provision of law until the total amount deducted is equal to the total amount of separation pay, severance pay, and readjustment pay received.** 10 U.S.C. §1174(h) (1) (emphasis added).

Appellant did elect to take the separation pay in the amount of \$30,000.00 upon being involuntarily discharged. The separation pay was treated as an advance on his retirement by

Appellant on his W-2 form and by the IRS. In addition, Appellant did qualify for retirement benefits after reenlisting in the reserve and prior to trial in this matter. (Transcript at 70, Appellant's Testimony, Aplt. Exhibit "E"). Therefore, under §1174, prior to Appellant or Appellee receiving their respective shares of the retirement benefits, the \$30,000.00 would have to be deducted from the retirement benefits. This is achieved by deducting 75% of every payment until the \$30,000.00 is repaid. (Transcript at 42, Aplt. Exhibit "E").

Mr. Crist, the expert witness in this case estimated that Appellant's retirement benefit would be around \$1,800.00 per month. (Transcript at 44, Aplt.. Exhibit "E"). Appellee's 11/40ths share of this would be \$495.00 per month. Because Appellant elected to take the separation pay, 75% of the retirement benefits will be withheld until this amount is paid back. Therefore, \$1,350.00 will be withheld, reducing Appellee's 11/40ths to \$123.75 per month. This will continue until the \$30,000.00 is paid off, approximately two years. If Appellee is not awarded her share of the separation pay, this will have the effect of causing an enormous hardship and injustice by reducing Appellee's share of the retirement benefits and keeping Appellee from being made whole, as well as requiring Appellee to pay back 11/40ths of the \$30,000.00 for Appellant.

Appellant argues that military retirement pay and separation

pay are not related and must be handled separately because "someone who receives the separation payment will not necessarily receive retirement." However, in the present case, Appellant, at the time of trial, had qualified for retirement. (Transcript at 70, Appellant's Testimony, Aplt. Exhibit "E"). Therefore, Appellant **will** receive retirement benefits. In addition, because Appellant qualified for retirement benefits, these benefits are **substantially** related to the separation pay under §1174(h). Once Appellant qualified for retirement benefits, the separation pay became an advance on retirement under §1174, which would have to be repaid through deductions from the retirement benefits.

Appellant also argues that while Utah does not have any case law concerning separation pay, the California case of Kuzmiak "is precisely on point." Kuzmiak v. Kuzmiak, 222 Cal. Rptr. 644 (Cal. App. 2d 1986), cert. denied 479 U.S. 885 (1986). However, in Kuzmiak, at the time of trial, the husband was not entitled to retirement benefits because he had not completed his 20 years of service. Id. at 645. In our case, Appellant was entitled to retirement benefits at the time of trial.

While the Kuzmiak case did not directly concern this issue, the California case did discuss the possibility of someone who took a separation pay and then reenlisted and subsequently earned retirement benefits.

If a member reenlists after involuntary discharge and subsequently receives a longevity pension after serving 20



years, the purposes of the separation pay have not been fulfilled. Subdivision (h)(1) of section 1174 recognizes this by compelling reimbursement of separation pay from the members retirement payments. **There is no reason for finding separation pay to be the member's separate property once the member reenlists and earns a longevity pension.** Kuzmiak, 222 Cal. Rptr. at 647 (emphasis added).

This is exactly what happened in the present case. Appellant elected to take his separation pay. He reenlisted. He earned his retirement benefits. Therefore, under the Kuzmiak reasoning, there is **no reason** for finding Appellant's separation pay to be Appellant's separate property.

Appellant argues that the Kuzmiak court "concluded" that separation pay is the separate property of the service member. However, while this may be true for service members who have not qualified for retirement yet, this is a misstatement of the "conclusion" of the Kuzmiak court. The Kuzmaik conclusion is clearly stated on page 648 of the decision. It states:

For these reasons, we **conclude** that wife has a community property interest in husband's longevity pension, including the \$30,000 separation pay the government will withhold from his retirement benefits. This holding recognizes the separate property characteristic of the separation pay **(until husband's actions in reenlisting and earning a longevity pension)** and also protects wife's rights to a community property asset. Kuzmiak, 222 Cal. Rptr. at 648 (emphasis added).

Therefore, the Kuzmiak holding supports the trial court in the present case that if the service member reenlists and earns retirement benefits, the separation pay becomes an advance on the retirement benefits under §1174, and as such, Appellee is

entitled to her 11/40ths share of the separation pay.

While separation pay is generally separate property, once a service member, such as Appellant, reenlists and earns a retirement benefit, the separation pay becomes an advance on the retirement benefits as held by the trial court and Kuzmiak, and must be repaid through retirement pay deductions under §1174. Retirement benefits are marital property subject to distribution under Woodward. Appellee was awarded 11/40ths of Appellant's retirement benefits by the Divorce Decree. Therefore, the trial court correctly awarded Appellee 11/40ths of the separation pay as "an advance on retirement pay . . . accrued during marriage." (Transcript at 97, Appt. Exhibit "E").

A. UNDER §1174 APPELLEE WILL PARTICIPATE IN THE REPAYMENT OF THE SEPARATION PAY.

Appellant next argues that if Appellee is awarded 11/40ths of the separation pay, she should have to participate in the repayment. This is already provided for by 10 U.S.C. §1174. As stated above, because Appellant elected to receive separation pay and then reenlisted and qualified for retirement benefits, the separation pay will be repaid through deductions from the retirement benefits. Thus, 75% of the retirement pay is withheld until the \$30,000.00 is repaid. Therefore, if the retirement benefit is \$1,800.00, \$1,350.00 will be withheld. During the repayment time, Appellee will receive \$123.75 and Appellant will

receive \$326.25. Had Appellant not elected to receive the separation pay, Appellee would have received \$495.00 per month while Appellant would have received \$1305.00 per month. Therefore, during the repayment time, Appellee is repaying \$371.25 (\$495.00 - \$123.75) per month, which is exactly 11/40ths of \$1,350.00 (\$371.25 / \$1,350.00), the entire repayment amount per month. Therefore, once the retirement benefits begin to be paid out, Appellee will repay her 11/40ths share of the separation pay thereby making both parties whole.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO HOLD APPELLEE IN CONTEMPT WHERE APPELLANT INTENTIONALLY REFUSED TO PAY COURT-ORDERED SUPPORT TO APPELLEE CAUSING HER INABILITY TO MAKE PAYMENTS ON THE MORTGAGE.

"It is generally accepted that the issuance of an order relating to contempt of court is discretionary with the trial judge." Kunzler v. O'Dell, 855 P.2d 270, 275 (Utah App. 1993) (citing Bartholomew v. Bartholomew, 548 P.2d 238, 240 (Utah 1976)). "To find contempt, the court must find from clear and convincing proof that the contemnor knew what was required, **had the ability to comply**, and willfully and knowingly failed and refused to do so." Id. (citing Von Hake v. Thomas, 759 P.2d 1162, 1172 (Utah 1988)) (emphasis added).

The Decree of Divorce awarded child support and alimony to Appellee. The Decree also ordered Appellee to hold Appellant

harmless on the mortgage secured by the parties' marital residence. Appellant intentionally<sup>1</sup> refused to pay his court ordered family support, thereby causing extreme hardship on Appellee and the parties' four children. By November, 1992, Appellant was \$7,637.00 in arrears.

During the period when Appellant refused to pay his family support obligations, and as a result of Appellant's refusal, Appellee could not keep the mortgage on the home current. (Affidavit, R. at 210). As a result of Appellee's inability to make the payments and due to Appellant's refusal to pay his ordered support obligations, the home was foreclosed. However, on December 13, 1993, by Appellant's request, **the outstanding debt on the home was waived** by the Veterans' Administration so that Appellant would not have to pay anything on the loan deficiency. (Letter, R. at 227). The trial court found that because Appellee's inability to pay the mortgage payments was a direct result of Appellant's intentional refusal to pay his family support obligations and because the deficiency owed was also waived, Appellee was not in contempt. Clearly such a ruling was within the trial court's discretion since the trial court determined that Appellee was unable to make the payments due to Appellant's intentional refusal to pay his support obligations.

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<sup>1</sup>Besides Appellant's other substantial sources of income, Appellant received \$30,000.00 in separation pay in February of 1992 and therefore could have met his support obligations.

Appellant also argues that "[t]he obligations of the Divorce Decree are separate obligations and should be treated as such." He then cites cases where the court held that generally visitation could not be denied merely because child support obligations had not been paid. However, visitation issues are only concerned with the best interests of the children. Appellant has not alleged that Appellee has denied Appellant any visitation rights.

Appellant claims that the Rohr court "concluded that '[a] court may not deny the noncustodial parent visitation rights for the mere failure to pay child support, where the failure to pay is due to an inability to pay.'" (Applt.. Brief quoting Rohr v. Rohr, 709 P.2d 382, 383 (Utah 1985)). However, this was not the "conclusion" of the Rohr court. The court actually held that because Mr. Rohr intentionally and willfully refused to pay child support and intentionally failed to abide by the court-ordered visitation schedule, the trial court **properly** restricted his visitation rights. Id. at 384.

This is the same as the present case where Appellant intentionally refused to pay his family support obligations, and as a result, the trial court properly restricted his rights under the divorce decree. The Rohr holding was based on the general principle that "equity refuses to lend its aid to a party whose conduct is inequitable." Id. (citing Horton v. Horton, 695 P.2d

102, 107 (Utah 1984) (stating that "he who seeks equity must do equity"); Barbour v. Barbour, 330 P.2d 1093 (Mont. 1958); see also Masters v. Worsley, 777 P.2d 499, 502 (Utah App. 1989)).

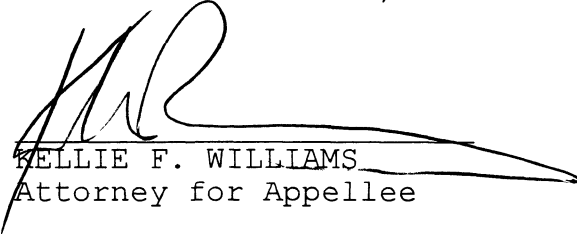
Therefore, because Appellee's inability to pay the mortgage was due to Appellant's inequitable conduct, the trial court was clearly within its discretion in denying Appellant's objection to Commissioner Evan's ruling.

#### CONCLUSION

Therefore, for the reasons set forth above, this Court should affirm the trial court's ruling, with costs awarded to Appellee as allowed by Rule 34 of the UTAH RULES OF APPELLATE PROCEDURE.

RESPECTFULLY submitted this 10<sup>th</sup> day of July, 1998.

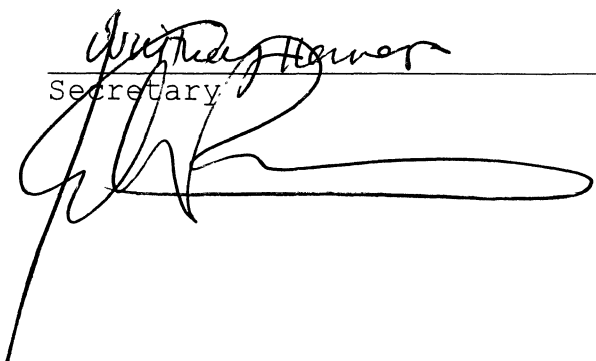
CORPORON & WILLIAMS, P.C.

  
NELLIE F. WILLIAMS  
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of July, 1998, I  
caused the foregoing to be hand-delivered to the following:

Richard N. Bigelow  
Attorney at Law  
700 Kearns Building  
136 South Main Street  
Salt Lake City, Utah 84101

  
Secretary