

1988

# Karen C. Martinez v. Jess M. Martinez : Brief in Opposition to Certiorari

Utah Supreme Court

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**BRIEF**

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**880189**

IN THE SUPREME COURT OF THE STATE OF UTAH

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KAREN C. MARTINEZ,	)	
	)	Cert No.
Plaintiff/Appellant,	)	
	)	Category No. 13
vs.	)	
	)	Court of Appeals
JESS M. MARTINEZ,	)	Case No. 860159-CA
	)	
Defendant/Respondent/	)	
Petitioner.	)	

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APPELLATE'S BRIEF IN OPPOSITION TO  
RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

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Clerk, Supreme Court, Utah

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## QUESTIONS FOR REVIEW

Respondent presents no questions for review.

## REFERENCE TO COURT OF APPEALS OPINION

The Court of Appeals Opinion is reported at Martinez v. Martinez, 80 Utah Adv. Rep. 35 (April 26, 1988).

## JURISDICTIONAL STATEMENT

Respondent does not dispute Petitioner's jurisdictional statement.

## CONSTITUTIONAL OR STATUTORY PROVISIONS

26 U.S.C. Section 152 (included in Appendix 6, Petitioned to the Supreme Court of Utah for Writ of Certiorari).

Article VI, Clause 2 of the U.S. Constitution, which provides in part:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Capitalization from original)

The Sixteenth Amendment to the U.S. Constitution, which provides that:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, . . . ."

## STATEMENT OF THE CASE

Appellant respectfully objects to the factual assertions made in Respondent's Petition on the basis that essentially all relevant facts set forth therein are either totally misstated or are taken out of context and do not accurately reflect the facts of the case.

At the time of the trial, the parties had been married nearly 17 years. At the time of the marriage both parties were high school graduates, and Respondent was employed by the Army but did not remember his salary at the time of the trial. (Transcript, page 4, lines 23-24, hereinafter T4, 23-24). During the marriage Defendant obtained a bachelor's degree from Weber State College, a medical degree from the University of Utah School of Medicine, completed an internship at the Gysinger Medical Center in Danville, Pennsylvania, and had completed a residency as an emergency room physician at the same institution. He was employed in the first year of a two year contract which provided a salary of \$100,000.00 per year. (T8, 25). From this \$100,000.00 per year, the Defendant testified that he had approximately \$7,100.00 in practice-related expenditures, leaving him with a gross personal income of \$92,900.00 per year or \$7,741.67 per month. (T10-12 and T66, 24). It should also be noted that Defendant was able to command this salary without having yet become board certified as an emergency room specialist. (T8, 17-20). At the time that the parties

separated and Plaintiff returned to the State of Utah, Defendant had completed all but six month's of his residency, and had admitted to Plaintiff that he had been having an extra-marital affair which he was not willing to discontinue. (T20, 2-17). He had further earlier expressed an unwillingness to take part in marriage counseling to attempt to solve the parties' marital difficulties. (T20, 18-22). Under these circumstances, Plaintiff and the children returned to the State of Utah where she filed this action for divorce.

During the marriage Plaintiff had quit her job in Utah to accompany Defendant to Germany where the parties eked out an existence on the income of a junior enlisted person and started their family. (T4, 18-22 and T29, 19-13). In his Petition, Respondent claims that a portion of the schooling and living expenses experienced by the party during the marriage were paid for by "his" veteran's benefits. However, any "earning" of this benefit was participated in by Plaintiff who experienced the financial hardships associated with living in Europe on a junior enlisted person's pay right along with Defendant.

After Defendant's discharge from the Army, he obtained employment at Hill Air Force Base as an electronics technician at an income which he recalled to be approximately \$9,000.00 per year. (T5, 18-12). This figure is substantially below the income figure shown as an average for

a high school graduate and utilized by Plaintiff's experts at the time of trial, that sum being \$33,600.00 per year. (T83, 4).

Plaintiff concedes that Defendant continued to work and support the family during the period of time that he obtained the college education. However, during this time he devoted considerable time and effort to the pursuit of the education, and Plaintiff was required to bear a larger portion of the family responsibilities than would normally be the case, (T30, 1-5 and 10-14) in addition to which she was employed outside of the home to the maximum extent feasible under the circumstances then existing. (T34, 13-23 and T7, 16-17). At trial she pointed out that her employment possibilities were limited by child care expenses, and that her employment outside the home was therefore essentially restricted to times when Defendant would be at home to care for the children. (T35, 1-10). Under these circumstances it was evident at trial that her employment outside the home for six years represented a sacrifice by the entire family, but this was one of the sacrifices paid as part of the investment decision based upon the expectation of substantially increased future income and benefits which would be available to the entire family. (T33, 15-20 and T34, 19). The magnitude of the sacrifices made is clearly evident throughout the record before the Court, and included the parties living in a home which was not much more than a shack

in a sparsely populated rural area of Pennsylvania with no telephone, no close neighbors, and income which did not even provide adequate funds for the parties' children to buy school lunch. (T36, 1-4 and T37, 18-19). In addition, during this time, the testimony was clear that Defendant refused to allow Plaintiff to work in any fast food or other types of restaurants where she might otherwise be able to find a job with her limited employment skills. (T37, 1-4). In Defendant's Exhibit A he claims that Plaintiff worked for only three years during the marriage, when in fact his own Petition for Writ of Certiorari he admits that she also worked during 1978, 1979 and 1980 as a waitress but these years are omitted from the Defendant's exhibit. (Petition for Writ of Certiorari page 7). An analysis of his dates reflects that she worked at least six and one-half years before being precluded from further work by the move to Pennsylvania where Plaintiff could not find work despite a diligent search. (T36, 6-25 and T37, 1-4).

During the marriage, Plaintiff admitted to being extremely concerned about the marriage being able to survive additional stress and sacrifices required for Defendant to complete medical school. (T31, 1-8 and 13-21). However, she also testified that she had been repeatedly assured that if she and the children would support this investment concept, her sacrifices would be more than made up to them by the significantly increased income and standard of living, and in

his flexible time as a physician which would enable him to see the children more. (T33, 17-21). The fact that she was reluctant to make sacrifices of that magnitude on an ongoing basis only highlights the extent of her "contribution" to the investment matrix pursuit by the family entity.

## ARGUMENTS

### POINT I

THE COURT OF APPEALS' DECISION CREATING THE REMEDY OF EQUITABLE RESTITUTION IS THE COURT'S ANSWER TO A PROBLEM ADDRESSED IN PREVIOUS CASES FOR WHICH A REMEDY WAS NECESSARY.

In Peterson v. Peterson, 737 P.2d 237 at 242 (Utah App. 1987), the Utah Court of Appeals addresses the problem of reimbursing a spouse who has sacrificed to help the other spouse attain education but is divorced before the fruits of that education are realized. In footnote 4, the Peterson Court says that "rehabilitative" or "reimbursement" alimony, not terminable upon remarriage, may be the creative remedy necessary to achieve fairness in such cases. The Court cites Wisconsin and New Jersey decisions as examples. Haugan v. Haugan, 117 Wis.2d 200, 343 N.W.2d 796 (1984) and Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982). The Court's creation of the equitable restitution remedy is merely a form of reimbursement or rehabilitative alimony to compensate the sacrificing spouse when a division of assets would be wholly inadequate. In the case at bar, the parties' main asset was a house valued at \$63,000.00, hardly sufficient to compensate

Mrs. Martinez for having sacrificed and supported the Defendant during 17 years of marriage while the Defendant earned both his bachelors and M.D. degrees. In Peterson, the Utah Court of Appeals awarded Mrs. Peterson \$1,000.00 per month alimony and characterized the Trial Court's \$120,000.00 cash settlement representing Mrs. Peterson's interest in her husband's medical degree as additional alimony making a total alimony award of \$2,000.00 per month. In Martinez, the Court of Appeals awarded Mrs. Martinez permanent alimony in the amount of \$750.00 per month and created the remedy of equitable restitution to repay Mrs. Martinez for her sacrifice, similar to the \$120,000.00 cash settlement awarded in Peterson.

In Rayburn v. Rayburn, 738 P.2d 238 (Utah App. 1987), the Court affirmed the Peterson decision holding that although an advanced degree is not property, the disparity in earning potential is a factor in the alimony analysis. However, in Rayburn, the parties were not married until Dr. Rayburn had already obtained his M.D. degree and there were substantial assets to be divided. In addition, Mrs. Rayburn already had a masters degree and the Court presumes she was capable of earning substantial income particularly after the rehabilitative alimony awarded allowed her to obtain further education. The Rayburn Court reiterates the Peterson decision that in cases such as the Martinez case where the parties are divorced before there are sufficient assets to

compensate the supporting spouse, "an award of non-terminable rehabilitative or reimbursement alimony would be appropriate." Id. at 241.

The Utah Supreme Court also recognizes the need for some type of rehabilitative or reimbursement payment to the supporting spouse. In Gardner v. Gardner, 748 P.2d 1076 at 1081 (Utah 1988), the Court points out that the Gardner case involved a long term marriage where the fruits of the M.D. degree were available to be divided. The Court recognizes that in cases where there are not sufficient assets to compensate the supporting spouse, "equity and fairness required another solution." Equitable restitution is the Court of Appeals' "other" solution to the problem addressed in Peterson, Rayburn, and Gardner.

Defendant and his counsel were fully advised early in the proceeding that Plaintiff was claiming an interest in the medical degree as a part of the marital assets accumulated during the marriage. (Stipulation And Settlement Agreement paragraph 9, February, 1983). Defendant had adequate opportunity to present expert testimony at the trial of the case to establish the value of that medical degree or to challenge Plaintiff's valuation thereof, but elected not to do so at the trial. Two experts retained by Plaintiff, a certified financial advisor and the professor of economics from Utah State University valued the flow of income attributable to the medical degree in excess of that which

would be earned by the average high school graduate within the United States using \$33,600.00 per year as the average high school graduate's income, a sum far in excess of that earned by Defendant prior to the commencement of the educational process. The values placed by the experts were 1.8 million dollars and 1.7 million dollars respectively. (T82, 17; T83, 18; and T71, 10). The difference in the two valuations was explained as being caused by a difference in the gross income figures utilized by the respective witnesses, one having utilized the estimated cost of \$10,000.00 per year based upon pre-trial discovery indications, and the other being based on the actual cost of doing business testified to by Dr. Martinez of \$7,100.00 per year. (T66, 21-24; T67, 7(9); T83, 21-25; and T84, 1-4). Both witnesses testified that the concept of "human capital" and investment in such human capital was a readily accepted concept within the field of economics and one subject to reasonable valuation based upon the data available to the experts. (T64, 7-9 and T79. 5-10).

## POINT II

THE COURT OF APPEALS CORRECTLY DECIDED THAT UNDER FEDERAL LAW THE CUSTODIAL PARENT IS ENTITLED TO TAX EXEMPTIONS FOR THE CHILDREN UNLESS THERE IS A PRE-1985 INSTRUMENT ORDERING OTHERWISE.

The Court of Appeals correctly decided that under federal law, the custodial parent is entitled to tax

exemptions for the children unless there is a pre-1985 instrument ordering otherwise. As Appellant argued on appeal, Section 152 of 26 U.S.C. outlines the federal law for income tax exemptions. The Supremacy clause of the U.S. Constitution, Article IV, Clause 2, says that the laws of the United States shall be the Supreme Law of the Land. The Sixteenth Amendment to the U.S. Constitution provides that Congress has the power to collect taxes on income. Thus, federal law would preempt any state law to the contrary.

The Petitioner cites Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987) for the proposition that the Trial Court can distribute tax exemptions equitably. The case in fact stands for the proposition that issues can be adjudicated although not plead. The Utah Supreme Court says in Newmeyer that the Trial Court can adjudicate "such issues" as tax exemptions even when the issues are not raised in the pleadings under Utah Rule of Civil Procedure, 15(b). Id. at 1279. The Court says nothing about the tax exemption issue per se. The Court no gives indication that it even considered or was aware of the 1984 Tax Reform Act and its affect on 26 U.S.C. Section 152(e). Mrs. Newmeyer's prayer for relief gave the tax exemption to Mr. Newmeyer, the non-custodial parent. The Trial Court awarded the exemption to Mrs. Newmeyer after adjudication and Mr. Newmeyer argues on appeal that the issue was not plead and therefore should not have been heard. The Utah Court upholds the Trial Court but does not refer to

federal law at all and the case can hardly be considered a definitive holding on the tax exemption issue.

In Martinez, the Utah Court of Appeals, having decided that there was no longer a pre-1985 instrument to qualify as an exception to the rule in U.S.C. Section 152(e), correctly decides that the custodial parent is entitled to the tax exemptions for the children under federal law. The Utah statute relied upon by the Petitioner is silent as to the tax exemption issue. U.C.A. Section 30-3-5 (1987) would be preempted by federal law even if it were specific on the tax exemption issue.

### POINT III

#### THE COURT OF APPEALS' MODIFICATION OF ALIMONY AND CHILD SUPPORT AWARDS WAS BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD.

The record in this case includes a 137 page transcript and 10 exhibits. The transcript includes testimony as to Mrs. Martinez' income (T42, 6-25) and her monthly expenses including a list of many needed home repairs and appliances that needed to be replaced or repaired (T41, 9-13 and Plaintiff's Exhibit F). There was testimony as to Dr. Martinez' gross and net earnings. (T8, 25 and T103, 4-8). The value of the parties' only major asset, the home, was stipulated to as was the equity and was outlined in exhibits. (T24, 17-19 and Plaintiff's Exhibits B, C, D and E).

Petitioner complains that the Utah Court of Appeals set alimony based on Dr. Martinez' future income which was speculative. At the time of trial, Dr. Martinez was not yet board certified but was earning \$100,000.00 per year on a two year contract. While there was no evidence of future employment or potential income in the record, an assumption that he could earn as much after becoming board certified as he had before is certainly not too speculative.

The Trial Court's award was a clear abuse of discretion and amounted to manifest injustice and inequity. The Utah Court of Appeals substituted its own judgment for that of the Trial Court based on substantial evidence in the record following the standard for review outlined in Gardner v. Gardner, 748 P.2d 1076 at 1076 (Utah 1988) citing Turner v. Turner, 649 P.2d 6 at 8 (Utah 1982), and Peterson v. Peterson, 737 P.2d 237 at 239 (Utah App. 1987) also citing Turner. In addition, the Martinez decision analyzes its child support award and award of alimony by Utah common law criteria.

At the trial, Plaintiff presented all evidence reasonably necessary to the establishment of a child support and alimony award, in addition to any value necessary for the decree itself. Defendant had adequate opportunity to present whatever evidence he felt appropriate to the same subject. Any shortcoming in the record, is as a result of Defendant's failure to adequately present the case to the trial court,

and certainly does not justify a remand for further evidentiary hearing in order to allow Defendant to better prepare for a second trial than he and his counsel did for the first. The fact that Plaintiff's establishment of "need" had been based upon her and the children living within the limited means available to them up to and prior to the trial was correctly perceived by the Court of Appeals as a problem characteristic of cases such as these characterized as "threshold cases" wherein the fruits of the investment are never received by the supporting spouse prior to the divorce initiation after an extended period of "investments".

#### CONCLUSION

The Court of Appeals' decision creating the remedy of equitable restitution is the Court's answer to a problem addressed in previous cases for which a new remedy was necessary. The equitable restitution may be a refinement of the rehabilitative or reimbursement alimony concept, a remedy described by the Utah Court of Appeals in both the Peterson and Rayburn cases. The need for such a remedy is also outlined by the Utah Supreme Court in the Gardner case.

The Court of Appeals correctly decided that under federal law, the custodial parent is entitled to tax exemptions for the children unless there is a pre-1985 instrument ordering otherwise. As Appellant argued on

appeal, Section 152 of 26 U.S.C. outlines the federal law for income tax exemptions. The Supremacy clause of the U.S. Constitution, Article IV, Clause 2, says that the laws of the United States shall be the Supreme Law of the Land. The Sixteenth Amendment to the U.S. Constitution provides that Congress has the power to collect taxes on income. Thus, federal law would preempt any state law to the contrary.

The Court of Appeals' modification of alimony and child support awards was based on substantial evidence in the record and was well within the Court's power.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of June, 1988.

Nelda M Bishop  
for NEIL B. CRIST

#### CERTIFICATE OF SERVICE

I hereby certify that on this 16<sup>th</sup> day of June, 1988, I hand delivered to each of the two attorneys below two true and correct copies of the foregoing Appellate's Brief in Opposition to Respondent's Petition for Writ of Certiorari to the Supreme Court of Utah and to:

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## APPENDIX

All cases cited are included in the Appendix of the Petition the Supreme Court of Utah for Writ of Certiorari, as is 26 U.S.C. Section 152. Article IV, Clause 2 of the U.S. Constitution and the Sixteenth Amendment to the U.S. Constitution are included in the text herein.