

1982

# Kathie Adell Munford v. Raymond G. Munford : Brief of Respondent

Utah Supreme Court

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Pete N. Vlanos; Vlanos, Perkins & Sharp; Attorneys for Appellant;  
Gaylen S. Young, Jr.; Attorney for Respondents;

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SUPREME COURT OF UTAH

STATE OF UTAH

MARVIN L. WOODWARD,	)	
	)	
Plaintiff and	)	
Appellant,	)	
	)	
-vs-	)	Case No. 18089
	)	
MILDRED L. WOODWARD,	)	
	)	
Defendant and	)	
Respondent.	)	

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BRIEF OF RESPONDENT

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Appeal from a Judgment of the  
First Judicial District Court  
Box Elder County, State of Utah  
Honorable VeNoy Christoffersen, Judge, Presiding

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BEN H. HADFIELD  
MANN, HADFIELD AND THORNE  
35 First Security Bank Building  
P. O. Box "F"  
Brigham City, Utah 84302  
Telephone (801) 723-3404  
Attorney for Respondent

BRIAN R. FLORENCE  
FLORENCE AND HUTCHISON  
818-26th Street  
Ogden, Utah 84401  
Attorney for Appellant

FILED

FEB 11 1982

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BEN H. HADFIELD  
MANN, HADFIELD AND THORNE  
35 First Security Bank Building  
P. O. Box "F"  
Brigham City, Utah 84302  
Telephone (801) 723-3404  
Attorney for Respondent

BRIAN R. FLORENCE  
FLORENCE AND HUTCHISON  
818-26th Street  
Ogden, Utah 84401  
Attorney for Appellant

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

\* \* \* \* \*

MARVIN L. WOODWARD,	)	
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Plaintiff and	)	
Appellant,	)	
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-vs-	)	Case No. 18089
	)	
	)	
MILDRED L. WOODWARD,	)	
	)	
Defendant and	)	
Respondent.	)	

\* \* \* \* \*

NATURE OF THE CASE

This is an appeal from a portion of the Decree of Divorce awarding Respondent a one-fourth interest in any retirement benefits Appellant receives, as he receives them.

DISPOSITION IN THE LOWER COURT

The parties were divorced on October 9, 1981. The trial court, Honorable Venoy Christoffersen, presiding, made a roughly equal division of all marriage assets with the exception of the husband's civil service retirement. The

retirement asset was isolated from all other assets in the court's property division, and the court awarded to the wife a one-fourth interest in all proceeds received through said retirement plan, as they are received by the husband.

#### RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks an affirmation of the trial court's division of the assets of the parties including the disposition of the civil service retirement.

Defendant-Respondent also requests that the case be remanded to the trial court for an additional award of attorney's fees incurred on appeal.

#### STATEMENT OF FACTS

The parties' divorce trial was heard on October 9, 1981 with the Honorable Venoy Christoffersen, District Judge, presiding. The court entered its decision awarding the divorce to Plaintiff-Appellant on his complaint, as well as to Defendant-Respondent on her counterclaim (T-76). (For purposes of clarity, Plaintiff-Appellant will hereafter be referred to as husband, and Defendant-Respondent will hereafter be referred to as wife). Custody of the four minor children and possession of the home were not contested

by the wife, and were subsequently awarded by the court to the husband.

The court isolated the husband's retirement benefit from all other items of property, both real and personal. The court then made a roughly equal division of these other assets (T-69 to 71).

With regards to the civil service retirement, the court found that the husband had worked for civil service for 15 years, approximately the same length of time as the parties' marriage (R-71). The court reasoned that since he would have to work another 15 years to obtain full retirement benefits, the wife would be entitled to one-fourth of his ultimate benefit, in other words, one-half of the amount accumulated by the husband during the marriage (T-72). The court did not mandate that this include amounts contributed by the government, rather the court indicated that the award would include amounts contributed by the government only if the husband actually receives such benefits (T-72).

### ARGUMENT

#### POINT I

THIS CASE IS CLEARLY DISTINGUISHED  
FROM THE BENNETT CASE.

The appellant cites as sole authority for his position the case of Bennett v. Bennett 607 P.2d 839 (Utah 1980).



There are one or two similarities between the cases. In both cases the husband-appellant was a civilian employee working at Hill Force Base. As such, they were covered under the same civil service plan. At this point the similarities between the two cases end.

### Bennett

In the Bennett case, the trial judge made a lump sum distribution of the retirement benefit. This was the result of several important factors. First, the trial judge valued the husband's retirement at a specific dollar figure, apparently including therein so-called "matching funds" from the government.

Second, in Bennett the retirement fund was treated as one component of the entire marital assets.. By awarding the entire retirement fund to the husband in his portion of the assets, the trial court placed the burden entirely on him for all future contingencies concerning the retirement fund.

Third, alternative ways for disposition of the retirement fund were not considered in the Bennett case, either at the trial level or on appeal. A review of the Bennett opinion and the briefs filed in connection with the case makes clear that no one ever raised the possibility of a "time rule" approach. (This will be discussed

hereafter). Additionally, in the present case appellant formulates the issue before the court as one involving "non-vested retirement benefits". The terms "vested" and "non-vested" appear nowhere in the Bennett opinion.

Fourth, there is in civil service retirement no such thing as a "matching amount from the government". This is borne out by the explanation of benefits made in the copy of the plan admitted into evidence. (R-31 Part III) This is also supported by language from the Bennett opinion.

"The retirement officer further testified, 'the amount of money that he (plaintiff) has in the retirement fund does not have any bearing on what he would get under retirement monthly annuity.'" Bennett supra 840.

Because of the foregoing it was clearly error for the trial judge in Bennett to attempt to place a dollar value on the retirement fund including "matching funds from the government" and allocate the entire amount as a lump sum in the husband's portion of the property division.

#### Woodward

The trial judge in the present case applied the "time rule" in making an equitable distribution of the retirement fund asset. The time rule is based on the concept that the non-employee spouse's share in the retirement fund is directly proportionate to the amount of time the spouse

contributed to that fund during the marriage. Thus, the time rule determines marital interest in a retirement fund by computing the ratio of the time of marriage during which pension benefits were earned to the total years of service during which the pension is earned. This percentage is then applied against the retirement income received. The non-employee spouse would then receive one-half of this amount as representing her half of the marital asset.

By applying the time rule, the judge treated the retirement fund entirely different from the trial court's approach in the Bennett case in several significant aspects. First, in the present case no specific dollar amount was ever assigned to the retirement fund as a marriage asset (T-72).

Second, the retirement fund was isolated from all other marital assets and disposed of separately. The court made an equitable division of all marriage assets except the retirement fund awarding roughly one-half of the value of these to each party (T-70,71). The court then turned to the retirement fund and made an equitable division thereof (T-71,72). The court in effect divided two pies. The wisdom in this approach is that it does not place an undue burden on either party for future contingencies concerning the asset. Both parties bear this burden in direct relation to their proportionate interest in the asset.

Third, in the present case other alternatives for disposition of the retirement fund were considered and rejected by the court. The wife's proposed division of the major marital assets suggested the court make a lump sum distribution of the retirement fund (T-55,56). The rejection of this proposal in favor of the time rule approach demonstrates the wisdom of an experienced trial judge.

Fourth, the time rule approach eliminates the need for an abstract discussion concerning such concepts as matching funds, vesting, non-vesting, etc. Regardless of what future contingencies occur, the parties know with certainty what proportions they will receive, thus equitable division of the marriage assets is guaranteed.

## POINT II

### OTHER JURISDICTIONS HAVE ADOPTED THE TIME RULE APPROACH IN SIMILAR CASES.

In view of the foregoing discussion of the significant distinctions between the Bennett case and this case, Respondent submits that the issue presently before the court is:

"Are non-vested pension benefits contingent property interests rather than mere expectancies?"

It appears that this is an issue of first impression in our jurisdiction. However, it has been litigated in a number of other states; most significantly, California.

### The Brown Case

In 1976, the California Supreme Court issued its decision in the case of In Re Marriage of Brown 544 P.2d 561 (Cal. 1976), Respondent Robert Brown had worked for the telephone company during most of the marriage. At trial the court refused to consider the non-vested pension rights of the husband as community property, even though he had accumulated 72/78ths of the time necessary to qualify for retirement benefits. Writing for a unanimous court, Justice Tobriner reversed a 35 year old precedent, and stated:

"...Non-vested pension rights are not an expectancy but a contingent interest in property;...Pension rights, whether or not vested, represent a property interest; to the extent that such rights derived from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding." Brown Supra 562, 563.

The court then defined the differences between non-vested pension rights and a mere expectancy.

"The term expectancy describes the interest of a person who merely foresees that he might receive a future beneficence, such as the interest of an heir apparent..., or of a beneficiary designated by a living insured who has a right to change the beneficiary...As these examples demonstrate,



the defining characteristic of an expectancy is that its holder has no enforceable right to his beneficence.

Although some jurisdictions classify retirement pensions as gratuities, it has long been settled that under California law such benefits 'do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee' "...the employee's right to such benefits is a contractual right, derived from the terms of the employment contract. ...a contractual right is not an expectancy but a chose in action, a form of property.

We conclude that French v French, and subsequent cases erred in characterizing nonvested pension rights as expectancies and in denying the trial courts the authority to divide such rights as community property. This mischaracterization of pension rights has, and unless overturned, will continue to result in inequitable division of community assets. Over the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his services." Brown Supra, pages 565, 566.

The court then turned to the practical question of how to distribute such a community asset.

"...if the court concludes that because of uncertainties affecting the vesting or maturation of the pension that it should not attempt to divide the present value of pension rights, it can instead award each spouse an appropriate portion of each pension payment as it is paid. This method of dividing the community interest in the pension renders it unnecessary for the court to compute the present value of the pension rights, and divides equally the risk that the pension will fail to vest." Brown Supra 567.

It is, of course, to be noted that California is a community property state, and Utah is not. However, for purposes of treatment of retirement benefits, the distinction is not significant. Whether these pension rights are termed "community property" or a "marital asset", practical concepts of equity and fairness mandate the same result. Additionally it would appear Utah Law sanctions this result inasmuch as the relevant state statute requires the trial court to "make such orders in relation to the...property...as may be equitable." (See U.C.A. 30-3-5 1953 as amended).

Other Community Property States Have  
Also Required an Equitable Division  
Of Non-Vested Pension Rights

In the same year as the Brown decision, the Supreme Court of Texas addressed this issue. The Texas opinion, Cearley v. Cearley, 544 S.W.2d 661 (Texas 1976), quotes extensively from Brown and establishes that all pension interests, whether vested or non-vested, are community property subject to division in divorce proceedings. The time rule as previously discussed is the standard for allocation.

The State of Washington has been the earliest in holding that unvested pension interests are subject to distribution in divorce proceedings. Perhaps the best evidence of this comes from a concise statement and citations contained in the opinion of the court in In Re Marriage of Pea, 566 P.2d 212 (Washington 1977). At page 213, writing for a unanimous court, Judge Pearson stated:

"It is clear that retirement pay even though benefits are not presently available, is held to be deferred compensation and subject to equitable distribution under RCW 26.09.080." Wilder v. Wilder, 85 Wash.2d 364, 534 P.2d 1355 (1975); DeRevere v. DeRevere, 5. Wash.App. 741, 491 P.2d 249 (1971).

A Number of Common Law States  
Have Also Treated Non-Vested Retirement Benefits  
As Marriage Assets

The New Jersey courts have consistently held pension benefits to be marital property, without any reference to "vesting". In the case of Stern v. Stern, 331 A.2d 257 (New Jersey 1975) at page 262 the court stated:

"We take the opportunity...to suggest that the concept of vesting should probably find no significant place in the developing law of equitable distribution."

Most recently in Kikkert v. Kikkert, 427 A.2d 76 (New Jersey 1981), the following clarification was made as to the law in the state of New Jersey.

"...where other assets for equitable distribution are inadequate or lacking



altogether, or where no present value can be established and the parties are unable to reach agreement, resort must be had to a form of deferred distribution based upon fixed percentages. In such event, the trial judge must determine how best to accomplish equitable distribution of all distributable property including, as appropriate, the sharing in fixed percentages of the pension payments when received. Kikkert Supra 80.

The Wisconsin courts have likewise held pension interests includable as marital property, and have noted that this is often the largest available asset in the marital estate. Pinkowski v. Pinkowski, 226 N.W.2d 518 (1975).

Most recently in the case of Selchert v. Selchert, 280 N.W.2d 293 (Wisconsin 1979), the court of appeals stated:

"...the trial court could use a method widely employed in other states, whereby the trial court determines what percentage of the marital property each spouse is to receive, and then divides payments from the pension plan accordingly. Under this approach it is unnecessary to make any determination as to the value of the pension fund. The only consideration is the appropriate percentage of the marital property to which each spouse is entitled...When the beneficiary spouse then opts to receive payments under the pension plan, the non-covered spouse would be entitled to her established percentage of those payments...This method may be particularly appropriate where the present value of a pension fund is very difficult or impossible to assess. Selchert Supra. 298.

In a 1978 case the Supreme Court of Minnesota in Elliot v. Elliot 274 N.W.2d 75 (Minn.1978), observed that other

jurisdictions have almost unanimously ruled that such pension benefits are property. (See Footnote 8 at page 77 of the opinion, which catalogs the various jurisdictions.)

### POINT III

THE TRIAL COURT'S ORDER SHOULD  
BE AFFIRMED.

While many states have not yet ruled on this issue, it appears clear that the trend is towards including contingent pension interests as marital assets.

This court has on numerous previous occasions elucidated the wide range of discretion enjoyed by a trial judge in making a division of marital property. No one is in a better position than the trial judge who has heard all of the testimony and observed the parties, to determine fairness as between the parties. Modifying the order in this case would necessitate restructuring the entire property division. It would most certainly require that the wife's lien against the home be increased in value and perhaps bear interest. It also would reopen the issue of alimony, inasmuch as Judge Christoffersen in making his decision may have felt he had provided for the wife in later years. It would serve no useful purpose to relitigate all of these issues.

Judge Christoffersen's decision is in harmony with prior Utah law. As has already been shown, the Bennett case is clearly distinguishable from this case. Also U.C.A. 30-3-5 has been shown to be in harmony with the court's ruling. Finally, the most relevant precedent in Utah is also in harmony with the Judge's ruling. In Englert v. Englert, this court stated:

"It is our opinion that the correct view under our law is that this (UCA 30-3-5) encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and that this includes any such pension fund or insurance." Englert v Englert, 576 P.2d 1274, 1276 Utah 1978. (Emphasis added).

It must be concluded that when the court says "all of the assets of every nature" this includes non-vested or contingent pension interests.

Finally, the trial court's order should be affirmed because the court's ruling involves sound social policy. In addressing this very issue in an article in the Journal of Family Law, the authors state:

"...sound social policy and the facts of modern life dictate a recognition of the claim on a public interest basis. For example, inadequate attention has been given to the plight of elderly women, fifty percent of whom have incomes under \$1,800 a year. A pro rata interest in a former husband's pension or retirement benefits would improve the financial situation of some elderly women who have been divorced. In essence, these elderly women would benefit by such an interest if they regularly

obtained their share of benefit payments when made..." Foster and Freed, Spousal Rights in Retirement Pension Benefits, 16 Journal of Family Law 187 (1977-78).

A review of the facts of this case demonstrates the truth of the authors' statements. The evidence showed the husband had worked for over 15 years and earns in excess of \$12.00 per hour plus fringe benefits. The wife has very little work experience and earns slightly over \$4.00 per hour at a job which provides no fringe benefits and provides no retirement benefits (T-53).

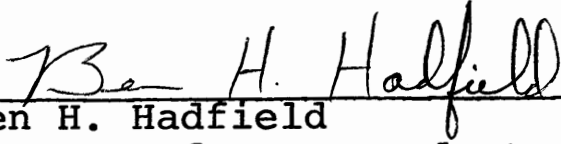
### CONCLUSION

This case presents the court with an important opportunity. An opportunity to establish a policy which is logically and equitably sound. Too often in the past, various courts have proclaimed equality through equal division of the marital assets. Yet these very courts have ignored the fact that some of the most valuable assets of the marriage have remained outside the division and in the husband's wallet. This case presents the court with an opportunity to provide more meaning to the concept of equal rights. It presents the court the opportunity to reaffirm fairness as the basic principle of domestic property divisions. The trial court's decision should be affirmed as a matter of law.

DATED this 10<sup>th</sup> day of February, 1982.

Respectfully submitted,

MANN, HADFIELD AND THORNE

  
Ben H. Hadfield  
Attorney for Respondent  
P. O. Box "F"  
Brigham City, Utah 84302

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Respondent, postage prepaid, to Brian R. Florence, Attorney for Appellant, 818-26th Street, Ogden, Utah 84401 on this 10<sup>th</sup> day of February, 1982.

  
Ben H. Hadfield