

1992

Hilde B. Montgomery (Snitchler) v. Robert G. Montgomery : Brief of Appellee

Utah Court of Appeals

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Donald C. Hughes; Attorney for Defendant/Appellant.

Brian R. Florence; Florence and Hutchison; Attorney for Plaintiff/Appellee.

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920138
IN THE UTAH COURT OF APPEALS

HILDE B. MONTGOMERY :
(SNITCHLER) , :
Plaintiff/Appellee, : Case No. 920138-CA
vs. : Priority 16
ROBERT G. MONTGOMERY, :
Defendant/Appellant. :

BRIEF OF APPELLEE

THIS IS AN APPEAL FROM AN ORDER GRANTING PLAINTIFF'S
PETITION FOR MODIFICATION REGARDING HER ENTITLEMENT
TO DEFENDANT'S RETIREMENT BENEFITS OF THE SECOND
JUDICIAL DISTRICT COURT, DAVIS COUNTY, STATE OF UTAH,
THE HONORABLE DOUGLAS L. CORNABY PRESIDING.

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IN THE UTAH COURT OF APPEALS

HILDE B. MONTGOMERY	:	
(SNITCHLER),	:	
Plaintiff/Appellee,	:	Case No. 920138-CA
vs.	:	Priority 16
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BRIEF OF APPELLEE

THIS IS AN APPEAL FROM AN ORDER GRANTING PLAINTIFF'S PETITION FOR MODIFICATION REGARDING HER ENTITLEMENT TO DEFENDANT'S RETIREMENT BENEFITS OF THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY, STATE OF UTAH, THE HONORABLE DOUGLAS L. CORNABY PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION

The Court of Appeals of the State of Utah has jurisdiction to review all final judgments and orders of the District Court involving domestic relations cases pursuant to Section 78-2a-3, Utah Code Annotated (1953, as amended) and Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUE

THE COURT CORRECTLY MODIFIED THE STIPULATION WHICH HAD PREVIOUSLY BEEN ENTERED INTO BY THE PARTIES REGARDING PLAINTIFF'S ENTITLEMENT TO DEFENDANT'S RETIREMENT BENEFITS.

A Stipulation based on inaccurate information or misrepresentation can be set aside. Gates v. Gates, 787 P.2d 1344 (Utah App. 1990). As long as the Court has made adequate factual findings, they should not be disturbed unless clearly erroneous, against the clear weight of evidence or the appellate Court determines that there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error. Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990) and Andersen v. Andersen, 757 P.2d 476, 479 (Utah App. 1988).

STATEMENT OF THE CASE

I. Nature of the Case.

This is an appeal from an order granting plaintiff's Petition for Modification regarding her entitlement to defendant's retirement benefits of the Second Judicial District Court, Davis County, State of Utah.

II. Course of Proceedings.

The parties were divorced on November 6, 1985. Pursuant to the terms of the Decree of Divorce, the plaintiff was awarded a one-half interest in the defendant's retirement with the appropriate offset for

his share of her retirement, all based on the formula set forth in Woodward v. Woodward, 656 P.2d 431 (1982).

Shortly after the divorce, the parties entered into a Stipulation modifying the Decree, wherein they agreed that after the Woodward formula was applied to the parties' respective retirements, the plaintiff would be entitled to receive \$400.00 per month from the defendant's retirement which would begin concurrently with the defendant's civil service retirement.

On November 2, 1990, the parties entered into a new Stipulation wherein the plaintiff agreed that she would settle her full claims against the defendant's retirement by having the retirement office pay her the lump sum of \$8,100.00 during the same time the defendant received the remaining portion of his lump sum entitlement.

On August 13, 1991, the plaintiff filed her Petition for Modification. A trial was held January 8, 1992, at which time the Court announced its decision from the bench. Specific Findings of Fact and Order were subsequently prepared and signed by the Court on February 6, 1992. They are attached as an Addendum to this Brief.

III. Disposition at Trial Court.

The Court found that the defendant had misrepresented to the plaintiff what the retirement benefits were and never conveyed to her what her actual entitlement was or could be, and that misrepresentation caused the plaintiff to enter into the Stipulation dated November 2, 1990. Accordingly, the Court set aside that Stipulation and entered a new Order which closely approximated that which had been granted to the plaintiff at the time of the original divorce.

STATEMENT OF FACTS

The parties were married on June 13, 1964. As a result of the marriage, two children were born. (R 1) During the course of the marriage, defendant accumulated 21.6 years of civil service retirement benefits and the plaintiff accumulated 2.6 years of civil service retirement benefits. (R 61)

The parties were divorced on November 6, 1985. Among other things, the plaintiff waived any claim for alimony. (R 52) She was also awarded one-half of defendant's retirement, with the appropriate offset for his share of her retirement based upon the formula set forth in Woodward v. Woodward, 656 P.2d 431 (1982).

(R 52) The Decree of Divorce was signed
December 16, 1985. (R 56)

On December 28, 1985, the parties entered into a Stipulation modifying the retirement portion of the Decree of Divorce just referred to. The parties agreed the plaintiff would be awarded the specific sum of \$400.00 per month as her share of defendant's retirement which was to begin in the month the defendant retired and continue so long as he was entitled to his retirement. The Stipulation took into account the retirement the plaintiff had accumulated in her own right through civil service employment. The Order implementing the Stipulation was signed by the Court on January 8, 1986. (R 58-61)

Sometime in approximately August of 1990, the plaintiff met with Ogden Attorney Paul T. Kunz because the defendant had approached her and asked her if she would consent to his taking a lump sum settlement of his retirement benefits. A proposed Stipulation for Qualified Domestic Relations Order had been prepared by defendant's attorney and she wanted Attorney Kunz to review it and see whether it was in her interest to sign the Stipulation. (T 8-9)

The Stipulation provided:

1. The plaintiff has left government service early and has received a one-time payment of her retirement contributions. Defendant by agreement signed the release of said funds to the plaintiff. The plaintiff in return signed a waiver of any right she may have against the lump sum of the defendant's alternative annuity with lump sum.
3. The retirement administrator will not honor the written waiver of plaintiff without a modification of the divorce Decree.
4. The parties agree a Qualified Domestic Relations Order may be issued authorizing the plan administrator to pay retirement as follows:
 - a. In the event defendant chooses the alternative annuity with lump sum payment, defendant shall receive all of the lump sum.
 - b. Plaintiff shall receive one-half of fifty-five percent of the monthly retirement check due to defendant each month.
 - c. In January of 1986, the monthly amount was then calculated to be \$400.00 per month. This amount may vary depending on the actual monthly amount paid as determined at the time of actual retirement.
5. This agreement is to supersede any existing order and to become the governing law between the parties.
6. The parties agree to execute such documents as may be required to affect their intent as expressed herein.

(Plaintiff's Exhibit No. 1)

In an effort to properly advise the plaintiff, Mr. Kunz called retirement individuals at Hill Air Force Base and subsequently called the Office of Personnel Management in Washington, D.C. to obtain additional information concerning alternatives available to the plaintiff. Based on the information Mr. Kunz received, he came to the conclusion that both parties either had to accept the lump sum benefit or both parties had to accept the monthly benefit and that one party could not pull out the lump sum and then the secondary party receive monthly benefits. It was also his understanding that if the lump sum benefit was to be accepted, there would be no further benefits.

(T 10-12)

Because of that information, defendant's attorney prepared a new Stipulation wherein the plaintiff agreed the defendant could apply for his lump sum distribution and she would be entitled to receive \$8,100.00 of that lump sum payment as her share of the defendant's retirement benefits. Admittedly, the new Stipulation provides:

Upon payment of the twenty-seven percent of the lump sum totally (sic) approximately \$8,100.00, no further sums shall be paid to the plaintiff and any remaining

rights or benefits shall be the exclusive property of the defendant. Plaintiff waives all other rights, present and future in the defendant's retirement, including any annuity or regular retirement benefits. (R 68-69)

Before signing the Stipulation, Mr. Kunz explained to the plaintiff that:

It's my understanding that if you go with a lump sum, neither one of you will receive any monthly payments, that they make you go strictly one way or the other and that we don't have any alternative. (T 12)

According to Mr. Kunz, the plaintiff indicated that:

Well, if that is the case, he had consented for me to take out my lump sum. I feel that I am sort of honor bound to let him do it. (T 12-13)

Mr. Kunz further testified that had he known that in addition to the lump sum payment benefit Mr. Montgomery was applying for he would have also been entitled to go on receiving monthly retirement payments, he never would have agreed to sign the Stipulation with the plaintiff. It was clear to him that the mathematics of an \$8,100.00 lump sum settlement versus \$400.00 per month indefinitely was not a good bargain if both were available. (T 13)

During the trial, the defendant introduced defendant's Exhibit 1. The second sheet of the Exhibit is a document entitled Alternative Annuity Election. Option 2 of that form was signed by the parties which indicated that the defendant was electing to take an alternative annuity with lump sum payment and the plaintiff was consenting to that alternative annuity election. Although the form does refer to a monthly annuity in addition to the lump sum payment, no annuity amount or other information was provided on that form. The third sheet of Exhibit 1, another Alternative Annuity Election form, had all of the blanks filled in and had been signed by the defendant on March 14, 1991. This document was not signed by the plaintiff. It revealed that had the defendant decided to retire without making a request for a lump sum payment, he would have received a regular monthly annuity of \$1,914.00. By making the lump sum alternative election, however, he received a lump sum payment of \$29,774.17 plus an on-going monthly annuity of \$1,776.00.

The plaintiff testified that when she signed the second sheet of defendant's Exhibit 1 on October 10, 1989, she did not know that in addition to

the lump sum payment, the defendant would be receiving an additional monthly annuity retirement benefit. Had she known that information, she would not have signed an agreement waiving any monthly annuity. (T 37) At the time the plaintiff signed the specific waiver, she indicated that she asked for a copy of the informational cover sheet, which was page 1 of defendant's Exhibit 1, and she stated that:

The lady notary had it and was going to copy it, and he ripped it out of her hands. I don't have anything and he would not let me have it either. (T 31)

The fact that defendant was receiving a monthly annuity in addition to the lump sum was brought to light primarily because the plaintiff did not receive her \$8,100.00 lump sum share after the defendant retired. He had already received approximately \$17,000.00 of his lump sum benefits (T 17) and as of the date of the hearing, the plaintiff had not received anything. (T 37)

At the conclusion of the trial, the Court entered its findings and order, finding that the defendant failed to convey to the plaintiff what the actual entitlement was, that when she signed page 2 of Exhibit 1 it was in blank and that left her with the

understanding that the only benefit available would be the lump sum payment for a total settlement and that this lack of information constituted the misrepresentation. (T 48-51) and (R 110-116) The specific Finding provides:

10. At the time the plaintiff signed defendant's Exhibit 1, the defendant deliberately misrepresented to the plaintiff what the benefits were and never conveyed to her what her actual entitlement was or could be. This misrepresentation caused the plaintiff to enter into the Stipulation dated November 2, 1990.

SUMMARY OF ARGUMENT

The plaintiff entered into a Stipulation based upon misinformation. The defendant did not provide all relevant facts to her when he asked her to agree to modify an earlier retirement Stipulation. The trial Court exercised its equitable power to modify the Stipulation and restore the plaintiff to the position she would have been in had the true facts been known. The Order should be affirmed.

ARGUMENT

THE COURT CORRECTLY MODIFIED THE STIPULATION WHICH HAD PREVIOUSLY BEEN ENTERED INTO BY THE PARTIES REGARDING PLAINTIFF'S ENTITLEMENT TO DEFENDANT'S RETIREMENT BENEFITS.

The case of Gates v. Gates, 787 P.2d 1344 (Utah App. 1990) is closely analogous to this case.

In Gates, the trial Court modified a Stipulation increasing child support which had been entered into by the parties. The Court did so, acknowledging there had been no material change in circumstances, but justified the modification because of Mr. Gates' failure to disclose his true income. The failure to disclose was not really an express misrepresentation as much as it was an omission of facts given to his ex-wife.

In Gates, as in this case, appellant contended that it was error to modify a Stipulation absent a change in circumstances; there was no actual misrepresentation; and, since Mrs. Gates was represented by counsel, she had a duty to ascertain the true facts.

On appeal, the Court held that:

Since respondent did not have accurate information about appellant's income at the time she executed the Stipulation, the trial Court did not err in modifying its prior order based on that Stipulation. A party may not obtain a Stipulation based on a misrepresentation or material omission of facts and later claim that a child support order cannot be modified because there has been no material change in circumstances based on those same undisclosed or misrepresented facts. at 1346

The Gates case did seem to create some limitation to this rule when it cited Myers v. Myers, 768 P.2d 979 (Utah App. 1989) holding that contract theories of bargain and waiver can be applied to stipulations involving property distribution, but not "to issues which involve the continuing, equitable powers of the Court, such as child custody and support". at 1346. That limitation, if it is one, should be inapplicable to this case because we are dealing with a form of support for Mrs. Snitchler. When the Woodward formula was created by the Supreme Court in 1982, they referred to pension benefits as an "economic resource subject to equitable distribution".

Alternatively, the Myers holding should be narrowed to permit an additional exception to a case such as this. Even better would be to eliminate the limitation altogether. It makes little sense in cases of equity to allow a person to profit from active or passive misinformation knowingly relied upon by the other party.

This had been a marriage of forty-one years. During that time, Mr. Montgomery was able to accumulate 21.6 years of civil service retirement while Mrs. Montgomery only accumulated 2.6 years. Her original

Stipulation entitlement of Mr. Montgomery's retirement was to be \$400.00 per month commencing at his retirement. This took into account her own civil service retirement benefit amount.

Had Mr. Montgomery elected not to request a lump sum payment, he would have received \$1,914.00 per month, less the \$400.00 due Mrs. Montgomery. By electing the lump sum payment, his monthly annuity is only reduced to \$1,776.00 and he received \$29,774.00 cash. He wants to be forgiven of any further obligation to his former wife by paying her \$8,100.00 out of his cash settlement. That result is not logical or equitable.

Mr. Montgomery argues that he has radically changed his position by retiring and he only did so in reliance on the Stipulation signed by his ex-wife. He claims he would have continued to work had he known she would attempt to back out of the Stipulation. His argument belies the facts. The first Stipulation he presented to her for signing provided that she would receive one-half of fifty-five percent of his monthly retirement check if she would waive any claim to the lump sum distribution. As it turns out, had she signed that Stipulation, he would have received and kept

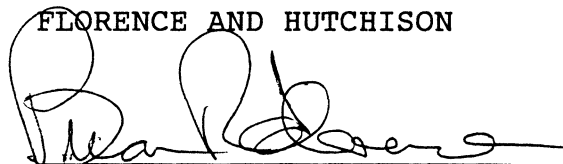
\$29,774.00 and she would have started receiving \$488.40 per month ($\$1,776.00 \times .55\% \times 1/2$). This is what he wanted in the first place. Had she signed it, he still would have retired. She is not asking for anything more. She does not want any of his lump sum. She just wants her monthly entitlement. She didn't sign that Stipulation believing that if he elected the lump sum, she could not get a monthly annuity. Mr. Montgomery was aware of, or should have been aware of, this misunderstanding. This omission of accurate information has caused her to radically alter her entitlement. The Court's Order should be affirmed.

CONCLUSION

The trial Court has the right and equitable power to modify a Stipulation entered into based upon omissions of material facts. The Court-ordered modification should be affirmed.

DATED this 17th day of June, 1992.

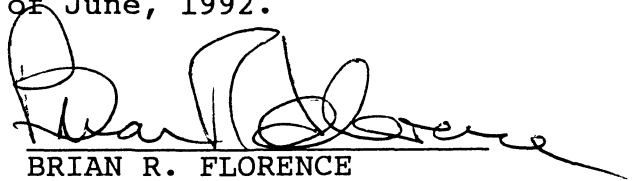
FLORENCE AND HUTCHISON



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MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Appellee, postage prepaid, to Donald C. Hughes, Attorney for Defendant/Appellant, 298-24th Street #125, Ogden, UT 84401, on this 17th day of June, 1992.


BRIAN R. FLORENCE

ADDENDUM

Findings of Fact and Order.

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of FLORENCE AND HUTCHISON
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IN THE DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

HILDE B. MONTGOMERY
(SNITCHLER)

Plaintiff,

vs.

ROBERT G. MONTGOMERY,

Defendant.

:

:

:

:

:

FINDINGS OF FACT
AND ORDER

Civil No. 850737455
Hon. Douglas L. Cornaby

The above-entitled matter came on for trial on the 8th day of January, 1992, pursuant to plaintiff's Petition for Modification, plaintiff present and represented by counsel, Brian R. Florence, and defendant present and represented by counsel, Donald C. Hughes, and the Court having been fully advised in the premise, now makes the following:

FINDINGS OF FACT

1. The above-named parties were divorced on November 6, 1985, at which time the plaintiff was "awarded one-half of defendant's retirement, with the appropriate offset for defendant's share of her retirement, based on the formula set forth in Woodward".

2. The parties thereafter entered into a Stipulation that after calculating the defendant's regular civil service

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years and deducting the plaintiff's civil service years, that the plaintiff would be entitled to a monthly annuity in the sum of \$400.00 which would represent her full Woodward share in the defendant's retirement benefits at such time as he retired.

3. A Qualified Domestic Relations Order was prepared and submitted to the government retirement office awarding to the plaintiff a \$400.00 monthly benefit from the defendant's retirement which would begin upon his retirement.

4. In October of 1989, the plaintiff signed a form at the defendant's request agreeing to permit him to obtain a lump sum retirement payment. This form was introduced as part of defendant's Exhibit 1. There were no other attachments to the form signed by the plaintiff and there was nothing on the form that would indicate to the plaintiff the amount of annuity she would be receiving or that she was waiving.

5. In the summer of 1990, the defendant asked the plaintiff to sign a Stipulation wherein she would waive all claims to his lump sum retirement payment in exchange for one-half of 55% of his monthly annuity benefit. This Stipulation was marked as plaintiff's Exhibit 1 and introduced into evidence.

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6. The plaintiff consulted with Attorney Paul Kunz and was led to believe that a lump sum retirement benefit could not be paid and additionally preserve a monthly annuity retirement benefit.

7. Thereafter, the plaintiff entered into a Stipulation with the defendant to receive 27% of his lump sum retirement payment or the approximate amount of \$8,100.00 in lieu of the monthly annuity benefit she had earlier received in connection with the divorce. The plaintiff believed that civil service regulations prohibited her or the defendant from receiving a lump sum retirement benefit and monthly annuity benefits.

8. When it came time for the plaintiff to receive her lump sum payment, she learned that the defendant had received a portion of his lump sum payment and was also receiving a monthly annuity benefit.

9. As an additional part of defendant's Exhibit 1, it is determined that had defendant not agreed to accept a lump sum retirement benefit, his monthly annuity would have been \$1,914.00. By electing to receive the lump sum benefit, his monthly annuity benefit would be reduced to \$1,776.00. His lump sum retirement benefit that he is entitled to receive is \$29,774.00.

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MONTGOMERY (SNITCHLER) v. MONTGOMERY
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Findings of Fact and Order
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10. At the time the plaintiff signed defendant's Exhibit 1, the defendant deliberately misrepresented to the plaintiff what the benefits were and never conveyed to her what her actual entitlement was or could be. This misrepresentation caused the plaintiff to enter into the Stipulation dated November 2, 1990.

11. The defendant retired effective December 1, 1990 and has received approximately \$17,000.00 of his lump sum benefits and is also receiving \$1,776.00 per month retirement annuity benefits. The plaintiff has received nothing to date.

12. The defendant retired earlier than he might otherwise have retired believing that the plaintiff would be making no further claim on any future annuity rights and as a result, his monthly benefit has been diminished some by reason of his lump sum retirement election.

Based on the foregoing Findings of Fact, the Court now makes and files its:

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ORDER

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IT IS HEREBY ORDERED that the Stipulation entered into by the plaintiff on November 2, 1990 and the corresponding QDRO that was issued as a result of that Stipulation is set aside.

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MONTGOMERY (SNITCHLER) v. MONTGOMERY
Civil No. 850737455
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IT IS FURTHER ORDERED that under the circumstances of defendant's early retirement and the misrepresentations that have occurred, the plaintiff should not have the benefit of both a part of defendant's lump sum retirement payment and his lump sum annuity.

IT IS FURTHER ORDERED that defendant is awarded all of the lump sum retirement pursuant to his election. Effective with his retirement on December 1, 1990, the plaintiff is entitled to 27% of each monthly annuity amount paid to the defendant or owed to the defendant by the civil service retirement office.

IT IS FURTHER ORDERED that a new Qualified Domestic Relations Order should be issued to the civil service retirement office directing them to forthwith pay to the plaintiff 27% of the defendant's monthly annuity benefit effective immediately and that all prior orders and elections previously received by them are deemed rescinded and void.

IT IS FURTHER ORDERED that until the civil service retirement office begins sending the plaintiff her proportionate retirement share, the defendant is directed to begin paying her effective with the month of January, 1991, the sum of \$400.00 per month towards this amount.

IT IS FURTHER ORDERED that as soon as it is calculated

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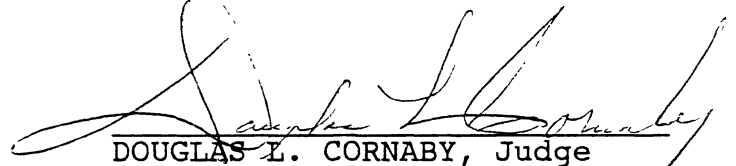
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MONTGOMERY (SNITCHLER) v. MONTGOMERY
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Page 6

as to how much the defendant has received for the months from and including December, 1990 through December, 1991, and any difference between the amount that the plaintiff is actually entitled to and the \$400.00 that the defendant pays her beginning with January, 1991, until the plaintiff starts receiving retirement benefits directly, shall be owed by the defendant to the plaintiff. As soon as that specific amount is determined, the defendant should make arrangements to pay the plaintiff that amount.

DATED this 26 day of February, 1992.

BY THE COURT:


DOUGLAS L. CORNABY, Judge

NOTICE TO DEFENDANT

TO DEFENDANT ABOVE-NAMED AND HIS COUNSEL:

Pursuant to Rule 4-504 of the Code of Judicial Administration, you are hereby notified that the undersigned will hold the original hereof for a period of five days from the date this notice is mailed to you to allow you sufficient time to file any written objections to the form of the foregoing with the Court and mail a copy to the undersigned. If no objections to the form are filed within that time, the

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MONTGOMERY (SNITCHLER) v. MONTGOMERY
Civil No. 850737455
Findings of Fact and Order
Page 7

original hereof will be submitted to the Court for signature
and filing.

DATED this 10th day of February, 1992.

FLORENCE AND HUTCHISON



BRIAN R. FLORENCE
Attorney for Plaintiff
818-26th Street
Ogden, UT 84401

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing Findings of Fact and Order, postage prepaid,
to Donald C. Hughes, Attorney for defendant, 520-26th Street
#206, Ogden, UT 84401, on this 10th day of February, 1992.



EILEEN CHRISTENSEN
Secretary

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IN THE UTAH COURT OF APPEALS

OF APPEALS

HILDE B. MONTGOMERY
(SNITCHLER),

Plaintiff/Appellee,

vs.

ROBERT G. MONTGOMERY,

Defendant/Appellant.

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Case No. 920138-CA

Priority 16

SUPPLEMENT TO BRIEF OF APPELLEE

DETERMINATIVE LEGAL PROVISIONS

There are no Constitutions, Statutes, Ordinances, Rules
or Regulations whose interpretation is determinative of this
case.

DATED this 24th day of June, 1992.

FLORENCE AND HUTCHISON



BRIAN R. FLORENCE
Attorney for
Plaintiff/Appellee
818-26th Street
Ogden, Utah 84401

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Supplement to Brief of Appellee, postage prepaid, to Donald C. Hughes, Attorney for Defendant/Appellant, 298-24th Street #125, Ogden, UT 84401, on this 24th day of June, 1992.


BRIAN R. FLORENCE