

1992

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

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920138 IN THE COURT OF APPEALS

HILDE B. MONTGOMERY
(SNITCHLER),

Plaintiff/Appellee,

vs.

ROBERT G. MONTGOMERY,

Defendant/Appellant.

:
:
:
:
:

Case No. 920138-CA

Priority 16

REPLY OF APPELLANT

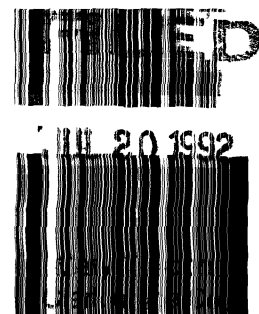
THIS IS AN APPEAL FROM AN ORDER GRANTING PLAINTIFF'S PETITION FOR MODIFICATION REGARDING HER ENTITLEMENT TO DEFENDANT'S RETIREMENT BENEFITS OF THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY, STATE OF UTAH, THE HONORABLE DOUGLAS L. CORNABY PRESIDING.

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TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY OF ARGUMENT	1
ARGUMENT	
Point One	2
Point Two	2
Point Three	4
CONCLUSION	6

TABLE OF AUTHORITIES

	<u>PAGE</u>
GATES v. GATES, 787 P.2d 1344 (Utah App. 1990)	2
MYERS v. MYERS, 768 P.2d 979 (Utah App. 1989)	3
DESPAIN v. DESPAIN, 627 P.2d 526 (Utah 1981)	3
WOODWARD v. WOODWARD, 656 P.2d 431 (Utah 1982)	3

SUMMARY OF ARGUMENT

POINT ONE

EXHIBIT ONE WAS A BEGINNING POINT OF NEGOTIATION AND WAS NOT ACCEPTED BY EITHER PARTY AND SHOULD NOT BE CONSIDERED AS IN ANY WAY BINDING ON EITHER PARTY.

POINT TWO

PLAINTIFF MISINTERPRETS THE GATES-MYERS-DESPAIN LINE OF CASES.

POINT THREE:

MRS. SNITCHLER MADE AN INTELLIGENT DECISION TO MODIFY THE DECREE BASED UPON HER OWN INVESTIGATION AND COUNSEL.

ARGUMENT

POINT ONE

EXHIBIT ONE WAS A BEGINNING POINT OF NEGOTIATION AND WAS NOT ACCEPTED BY EITHER PARTY AND SHOULD NOT BE CONSIDERED AS IN ANY WAY BINDING ON EITHER PARTY.

Mrs. Snitchler places great weight on the initial unsigned stipulation presented to her, which is represented by exhibit one. Mr. Montgomery never proposed it and did not sign it. Its sole purpose was as a starting point of negotiation. Mr. Montgomery's proposal was the executed stipulation ultimately agreed to by the parties and approved by the court. At best the initial document is a part of negotiations and therefore should be given no weight.

POINT TWO

PLAINTIFF MISINTERPRETS THE GATES-MYERS-DESPAIN LINE OF CASES.

Mrs. Snitchler relies exclusively on the authority of *Gates v Gates*, 787 P.2d 1344 (Utah App. 1990). *Gates*, stands for the proposition that a party cannot claim the benefit of asking for a finding of "no change of circumstances" when the reason there is no change is that he previously misrepresented his income. The court has consistently treated differently those issues that were subject to the equitable powers of the court and those that were property

agreements and susceptible to contract principles.

The Court of Appeals in *Gates*, specifically quoted with approval the distinctions made in *Myers v Myers*, 768 P.2d 979 (Utah App. 1989).

In *Myers*, this court noted that while contract theories such as bargain and waiver are properly applied to a stipulation as to property-distribution, such theories are inapplicable to issues which involve the continuing, equitable powers of the court, such as child custody and support.

In *Myers*, the Court of Appeals was critical of the defendant for trying to make the distinction Mrs. Snitchler wants the court to make in the present case.

In *Despain*, the Utah Supreme Court stated that, [d]efendant has failed to observe the distinction between those cases involving the statutory power of a court in a divorce proceeding to enter orders concerning support and those cases in which parties in a divorce action have settled their property rights by agreement, the terms of which are incorporated in a decree. (*Myers*)

In *Despain v Despain*, 627 P.2d 526 (Utah 1981), the Supreme Court reached the conclusion that parties to a divorce could bargain for property settlements that were beyond the power of the court to impose because they were a part of the quid pro quo of a divorce settlement and subject to contract law principles.

A husband, who has undertaken an obligation in consideration of the provisions of the property settlement agreement which were for his benefit cannot subsequently complain that the court, in the absence of such agreement would have been without power to order him to do so. (*Despain*)

The court affirmed the right of parties to bargain their property rights as may seem to them in their individual best interest.

Mrs. Snitchler wrongly interprets the meaning of the "Woodward Formula". *Woodward v Woodward*, 656 P.2d 431 (Utah 1982) and all of its progeny stand for the proposition that pension and retirement benefits are marital assets susceptible of division as part of the property settlement. Appellee acknowledges in her brief that to obtain her relief the court must reinterpret and create "an additional exception" to the established case law.

POINT THREE

MRS. SNITCHLER MADE AN INTELLIGENT DECISION TO MODIFY THE DECREE BASED UPON HER OWN INVESTIGATION AND COUNSEL.

The simple fact is there was no misrepresentation of any kind by Mr. Montgomery. He did not even speak to Mrs. Snitchler for more than a year before the stipulation was executed. His counsel never even spoke with Mrs. Montgomery. All negotiations were conducted between attorney's. If there was a mistake taking place in Mrs. Snitchler's interpretation of what could happen, Mr. Montgomery had no way of knowing about it. However there was no mistake.

Montgomery gave her the proposed stipulation as an option in straight forward plain language. Either waive the monthly retirement payment and take a percentage of the lump sum or wait years for him to build up enough additional retirement benefits to meet her \$400.00 per month demand. In consideration of her health and the health of Mr. Montgomery her decision to execute the stipulation was a reasonable one. In an aging, frail, remarried individual an immediate lump sum may be preferable to an income

stream ten years in the future.

The stipulation and subsequent order are abundantly clear that she is waiving and giving up all claim to any monthly payment or annuity. The disclosure is as plain as language can make it. This is all the more poignant because she retired from Civil Service as well. This is not some obscure retirement plan, this is government civil service. There are several offices in the Ogden area to answer any questions she or her counsel may have had. The document being signed by Mrs. Snitchler in October of 1989 was the standard government form.

Her claim that it was some how hidden from her is ludicrous. She had already retired herself and filled out the same form. Even if she hadn't she could easily obtained the form from any of the local civil service offices. But even if there was shenanigans with the form, Civil Service required a new QDRO. The government document was not enough without a new QDRO to replace the existing one.

The new QDRO required a new stipulation signed by the parties and counsel. Montgomery offered only one inducement to sign the stipulation. That was, his promise to retire now, if she waived the monthly payments, instead of in ten years. He told her if she insisted on the rights she had under the prior order, then he would work the next ten years to earn enough retirement benefits to pay her and still live on the income he wanted to. There was no way Montgomery could compel her. He could only propose the agreement and offer to retire early if she signed. It could only be done

with her consent to the stipulation. The court lacked authority to impose the agreement if the parties didn't stipulate. It could only be done by bargained for agreement.

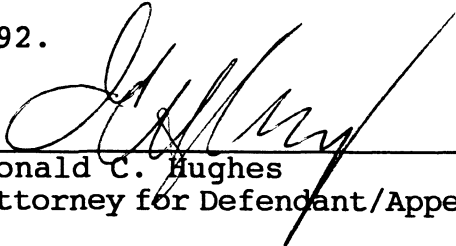
Montgomery lived up to his part of the bargain and retired. Mrs. Snitchler now wants to renege on her promise. Don't let her.

CONCLUSION

This is a case in which Mrs. Snitchler was entitled to a portion of her exhusband's civil service retirement benefits per the divorce decree. The parties agreed to a modification of their property rights. The inducement for the modification was the waiver by Mrs. Snitchler of monthly payments. Mr. Montgomery in return agreed to retire early. Neither party could have compelled the other to do what they stipulated to do. The court lacked jurisdiction to alter the property provisions of the decree except as they bargained.

The principles of bargain and exchange apply. No one seriously thinks there was any misrepresentation. There is absolutely no evidence of such. Mrs. Snitchler now wants more out of Montgomery now that he is retired. She is suffering from buyers remorse. At the time, her deal was an intelligent one considering the length of time before Montgomery would otherwise retire and the respective health of the parties. The trial court's modification should be overturned and the previous order honored.

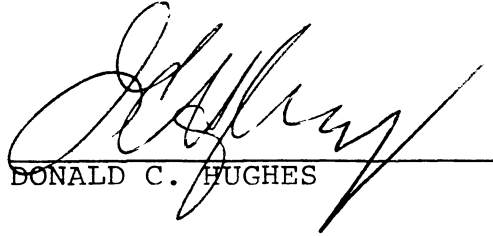
Dated this 14th day of July, 1992.



Donald C. Hughes
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that I mailed four true and correct copies of the foregoing REPLY OF APPELANT, postage prepaid to BRIAN R. FLORENCE, Attorney for Plaintiff/Appellee, at 818 - 26TH STREET, Ogden, Utah 84401, on this 14th day of July, 1992.


DONALD C. HUGHES