

1993

## Lynda Smith v. Richard Raymond Smith, Sr. : Petition for Rehearing

Utah Court of Appeals

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UTAH  
COURT OF APPEALS  
IN THE UTAH COURT OF APPEALS

930162 CA

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LYNDA SMITH,	)	
	)	Case No. 930162-CA
Plaintiff, Appellee,	)	
and Cross-Appellant	)	
	)	
vs.	)	
	)	
RICHARD RAYMOND SMITH, SR.,	)	Priority No. 15
	)	
Defendant, Appellant,	)	
and Cross-Appellee	)	

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**PETITION FOR REHEARING**

PETITION FOR REHEARING FOLLOWING ENTRY OF THE COURT'S  
MEMORANDUM DECISION AFFIRMING ON ALL ISSUES  
THE DECISIONS OF THE HONORABLE ROBERT T. BRAITHWAITE  
OF THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR  
IRON COUNTY, STATE OF UTAH

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**FILED**  
Utah Court of Appeals

NOV - 3 1994

Marilyn M. Branch  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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vs.	)	
	)	
RICHARD RAYMOND SMITH, SR.,	)	Priority No. 15
	)	
Defendant, Appellant,	)	
and Cross-Appellee	)	

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**PETITION FOR REHEARING**

Richard Raymond Smith, Sr., by and through his attorney, G. Michael Westfall of the law firm of GALLIAN, WESTFALL, WILCOX & WRIGHT, hereby petitions the Court for rehearing, pursuant to Rule 35 of the Utah Rules of Appellate Procedure.

**STATEMENT OF POINTS OF LAW OR FACT WHICH PETITIONER  
CLAIMS THE COURT HAS OVERLOOKED OR MISAPPREHENDED**

1. There was no substantial, competent evidence to support the trial court's factual findings that the proceeds of the sale of Mr. Smith's premarital home were co-mingled and that Mr. Smith does not have a premarital interest in the residence at 1098 South Fir Street in Cedar City. The standard for review of the trial court's factual findings is the "clearly erroneous" standard. Hagan v. Hagan, 810 P.2d 478 (Utah App. 1991).

2. Mrs. Smith's child support receivable accrued during the parties' marriage is a marital asset that should have been considered in the division of marital property. The standard for

appellate review of this aspect of the case is a "correction of error" standard, giving no deference to the trial court. Maxwell v. Maxwell, 796 P.2d 403 (Utah App. 1990).

3. Mr. Smith's 401K salaried savings plan should have been valued as of the date of the parties' separation, prior to his contribution of post-separation earnings to increase the value of the account. The standard for appellate review of this aspect of the case is a "correction of error" standard, giving no deference to the trial court. Maxwell v. Maxwell, 796 P.2d 403 (Utah App. 1990).

#### STATEMENT OF THE CASE

To the extent it is necessary to include a Statement of the Case in a Petition for Rehearing, Petitioner incorporates by reference herein the Statement of the Case as set forth in the Brief of Appellant in this matter.

On October 21, 1994, a Memorandum Decision was filed in this matter, affirming the trial court's decision on all issues. Only the claims relating to the home in Cedar City were addressed in the written opinion. All other issues were considered without merit.

#### SUMMARY OF ARGUMENT

In light of the length of the argument presented herein, no summary of the argument is presented.

#### ARGUMENT

##### I.

TO THE EXTENT THE COURT'S CHARACTERIZATION OF THE CEDAR CITY HOME AS A MARITAL ASSET WAS BASED ON A FACTUAL FINDING THAT MARITAL FUNDS WERE USED TO PURCHASE THE HOME, THAT CONCLUSION SHOULD BE SET

ASIDE SINCE THE FINDING THAT MARITAL FUNDS WERE USED TO PURCHASE THE HOME WAS CLEARLY ERRONEOUS.

The trial court has broad discretion to fashion an equitable distribution of property between the parties. However, in fashioning that equitable distribution, the trial court must first determine whether property is marital or separate (Burt v. Burt, 799 P.2d 1166 at 1172 (Utah App. 1990)).

If the trial court's responsibility to distinguish between separate and marital property is to be meaningful at all, the trial court's classification of property as separate or marital must be supported by substantial credible evidence. As pointed out in State v. Arroyo, 796 P.2d 684 (Utah 1990), "A finding not supported by substantial competent evidence is clearly erroneous." Id. at 687. In 50 W. Broadway Assoc. v. Redevelopment Agency, 784 P.2d 1162 (Utah 1989), the Utah Supreme Court stated:

A trial court's findings cannot be made up out of whole cloth; substantial, competent evidence must exist that supports the findings, and when a finding of fact is not so supported, it must be rejected. Id. at 1171

In this case there was no evidence to support a factual finding that proceeds from the sale of the Mr. Smith's premarital home were commingled with the marital estate. Mrs. Smith's testimony that she "believed" the money for the down payment for purchase of the home came from the parties' joint account (T<sup>1</sup> at 71) can hardly rise to the level of substantial, competent evidence when she admitted that she did not know where the funds came from

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<sup>1</sup>References to the transcript of trial shall be designated by the letter "T" followed by the page of the trial transcript.



to buy the home (T at 52). Mr. Smith then testified that he did know where the funds came from to buy the home and that the funds came from the proceeds of the sale of his premarital home in Mission Hills, California (T at 518-519). Mrs. Smith admitted the proceeds of the sale of his premarital home were Mr. Smith's premarital funds (T at 431), in which she did not claim any interest (T at 399) because the Mission Hills home was Mr. Smith's premarital asset (T at 490). Mr. Smith also testified that the monthly mortgage payments made to purchase the home came from his Langley Credit Union checking account (T at 601-602) into which his premarital and separate Air Force retirement had been deposited and into which no other funds were deposited during the marriage (T at 499). The evidence at trial supported only one conclusion, that the funds used to purchase the Cedar City home were Mr. Smith's separate property.

This Court's written opinion seems to suggest that, despite Mrs. Smith's lack of knowledge and Mr. Smith's specific testimony, Mr. Smith was still under an obligation to present documentary evidence at trial to support his uncontradicted testimony. To the extent that the Court of Appeals' decision is based on Mr. Smith's failure to produce additional documentary exhibits at trial on issues for which there was no real conflict in the evidence, Petitioner requests that the Court of Appeals remand the case to the trial court for the presentation of such additional documentary evidence.

In this case the trial court erred when it concluded that Mr. Smith did not have a separate property interest in the residence at 1098 South Fir Street (Record at 369). Since the trial court's decision to treat that property as marital property, in which each party had an equal interest, was apparently based on its finding that Mr. Smith had no separate property interest in the home, that finding should be set aside and, in the absence of exceptional circumstances which would justify including that separate asset in the marital estate, the home should be awarded to Mr. Smith as his sole and separate property, free and clear of any claim by Mrs. Smith to the same.

## II.

MR. SMITH'S CLAIMS THAT MRS. SMITH'S CHILD SUPPORT RECEIVABLE SHOULD HAVE BEEN TREATED AS A MARITAL ASSET AND THAT THE VALUE OF HIS 401K SALARIED SAVINGS PLAN SHOULD HAVE BEEN VALUED AS OF THE DATE THE PARTIES SEPARATED HAVE MERIT AND THE TRIAL COURT'S RULINGS ON THESE ISSUES SHOULD HAVE BEEN REVERSED.

The Court of Appeals is not obligated to address in its opinion each issue presented on appeal. State v. Carter, 776 P.2d 886 at 888 (Utah 1989). However, the Petitioner respectfully requests that the Court reconsider at least two of the issues presented by this appeal. Those issues involve: 1) treatment of Mrs. Smith's child support receivable accrued during the marriage, and 2) the valuation date for the Mr. Smith's 401K salaried savings plan.

### A. The Child Support Receivable Accrued During the Marriage Is An Asset Of The Marital Estate.

With regard to Mr. Smith's claim that the child support

receivable accumulated in Mrs. Smith's favor during the parties' marriage is a marital asset, the trial court found simply that:

Plaintiff's accounts receivable for child support from a prior marriage are not an asset of the marriage and not something the court should distribute as part of this action. The court finds those to be a premarital obligation of a prior husband and, as such, are not appropriate for the court to distribute as an asset of the marriage in this case. (Record at 363).

That finding is clearly in error. Child support is not a lump sum debt on the date the support is ordered, payable in monthly installments, as suggested by the trial court's characterization of the receivable as a premarital obligation. Each installment of child support in this state is considered separately and becomes a judgment, entitled to full faith and credit "on and after the date it is due..." UCA §30-3-10.6(1). Where a stepparent, whether on his own behalf or on behalf of the marital partnership, has supported the child during the marriage and at the time each "judgment" arose, the trial court should at least consider those "judgments" in dividing the marital estate, subject to valuation and equitable allocation. Had the court ordered support been paid and used to help support the child, thereby making available more disposable income for the parties, any property purchased with the additional disposable income would be clearly subject to award by the Court. The support receivable that has accrued should be treated the same. Petitioner has no objection to Mrs. Smith receiving the asset. However, there should be a proper accounting of the same as it relates to disposition of the entire marital estate.

B. The 401K Salaried Savings Plan Should Have Been Valued As Of The Date The Parties Separated.

The choice of laws issue presented in this case, relating to treatment of retirement funds purchased with post-separation earnings, should be resolved in favor of the law of the state where the money was earned.

In California, post-separation earnings are separate property. In Utah, property is generally valued as of the date of divorce. If one spouse resides full time in one state and the other spouse, while maintaining the common residence in that state, works and maintains a second residence in a foreign state, a conflict between the law of the two states as it relates to treatment of marital assets should be resolved in favor of the state having the closest contact with the asset. In this instance, involving a 401K salaried savings plan acquired with earnings from Mr. Smith's California employer and maintained in that state, the law of the state of California should govern. Petitioner therefore respectfully requests that this Court rule that California law should govern classification of post-separation contributions to the 401k salaried savings plan as separate property.

In the event this Court were to determine that California law were not applicable to post-separation contributions to the 401K salaried savings plan, the asset should still be valued as of the date of separation to the extent that any increase in the value of the savings plan resulted from the exclusive efforts of one party. This Court has held that if one party has dissipated an asset then

the trial court may value the property at an earlier date, i.e., the date of separation. Peck v. Peck, 738 P.2d 1050 (Utah App. 1987). It stands to reason that, if one party, through his or her independent efforts has enhanced an asset, an alternate valuation date may also be, and in this instance is, appropriate.

#### CONCLUSION

Petitioner respectfully submits that the evidence does not support the trial court's finding that the proceeds of the sale of Mr. Smith's premarital home were co-mingled and that he did not have a premarital interest in the home in Cedar City. In addition, two issues considered by this Court to be without merit, i.e., consideration of the accumulated child support as a receivable of the marriage and establishing the valuation date for the 401K salaried savings plan as the date of separation, should be resolved in favor of Petitioner. The trial court's findings and order on each issue should be reversed.

Counsel for Petitioner respectfully certifies that this petition is presented in good faith and not for delay.

DATED this 3d day of November, 1994.

GALLIAN, WESTFALL, WILCOX & WRIGHT

  
\_\_\_\_\_  
G. Michael Westfall

#### CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing document to Dale Sessions, Esq., P.O. Box 1586, Cedar City, Utah

84720 and two copies to Jim Jensen, CHAMBERLAIN & HIGBEE, successor counsel, at 250 South Main, P.O. Box 726, Cedar City, Utah 84720, postage prepaid, this 3d day of November, 1994.



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G. Michael Westfall