

1993

# Marrilyn Susan Varallo v. Francis V. Varallo : Reply Brief

Utah Court of Appeals

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DOCKET NO.

930574

IN THE UTAH COURT OF APPEALS

MERRILYN SUSAN VARALLO,  
Plaintiff-Appellant,

v.

FRANCIS V. VARALLO,  
Defendant-Appellee.

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Case No. 930574-CA

Priority No. 15

REPLY BRIEF OF APPELLANT

Appeal from Decree of Divorce and Judgment  
of the Second District Court, Davis County, Utah  
The Honorable Jon M. Memmott, Presiding

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Utah Court of Appeals

NOV 30 1994

Marilyn M. Branch  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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	:	Case No. 930574-CA
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### INTRODUCTION

Plaintiff-appellant ("Sue" Varallo) and defendant-appellee ("Bob" Varallo) were married for over 22 years. During almost all of the marriage, Sue stayed out of the work force to care for Bob and their children, and to manage their homes (the Varallos resided in at least nine locations due to Bob's military career). Toward the end of the marriage, Sue was forced to return to work when Bob lost his civilian job at Unisys which paid him over \$57,000 per year.

Bob does not deny that the reason he lost his job was because of untruthful or incomplete polygraph answers concerning his affair with his brother's wife. Bob also does not deny the trial court's finding that after he lost his job at Unisys because of his own misconduct, he remained voluntarily unemployed, living off Sue's income and his military retirement benefits.

Despite these undisputed facts, Bob contends that Sue is not entitled to her share of his retirement benefits earned during the marriage (benefits of over \$50,000 per year at the time of trial), or to any increase in Survivor's Benefit Protection (SBP) to replace those benefits when he dies. He also contends that Sue is entitled to no alimony, despite the fact that Sue's ability to earn income was impaired while she was out of the work force caring for their family, that alimony is necessary to bring Sue to the standard of living enjoyed by

the Varallos during their marriage, and that Bob has the ability to pay alimony. Bob also argues that no income should be imputed to him, despite his voluntary unemployment. He also seeks to avoid contributing to the education of his children.

Thus, after over 22 years of marriage, Bob contends that Sue is entitled to virtually nothing from him. Yet he also insists that he is entitled to one half of Sue's already minimal retirement benefits, and one half of an account consisting solely of funds Sue inherited from her mother. These positions are not only inconsistent but also without legal support and must be rejected by this Court.

#### ARGUMENT

##### I. BOB'S BRIEF MISCHARACTERIZES IMPORTANT FACTS, RULINGS OF THE TRIAL COURT AND APPLICABLE LAW.

Preliminarily, it is necessary to correct a number of mischaracterizations in Bob's brief. They include:

1. The trial court did not award Sue any portion of Bob's military retirement or disability benefits, which is one of the main reasons for Sue's appeal. Thus, Bob's arguments that the Court awarded Sue 30% of Bob's gross benefits, including the disability portion of these benefits, is simply wrong.

- (a) Moreover, all that Sue is asking for on this appeal is what she is entitled to, 30% of his "disposable monthly retired pay". By statute "disposable monthly retired

pay" excludes the disability payment, as well as the SBP payment. 10 U.S.C. § 1408(a)(4) as amended. See, pp. 14-15 of Sue's opening brief and Add. "D" thereto.

(b) Although the Court apparently believed that an award of 30% of Bob's military benefits, if made, would be based upon the "gross" amount of benefits rather than "disposable retired pay", this error benefitted Bob. The two "options" presented to the parties were based upon the Court's belief that Sue's share of the benefits would be \$1,267.50 per month, rather than the \$1,028 per month she would actually receive (as of the time of trial, but subject to subsequent cost of living increases). Tr. 186-187 (Add. "A" to Sue's opening brief); Sue's opening brief, p. 24. Thus, under Option 1 (which was not adopted) the trial court would have awarded Bob \$850 per month in alimony, and required no increase in SBP benefits (thereby saving Bob about an additional \$280 per month) to offset against what the court thought would be an award of \$1,267.50 per month (rather than \$1,028 per month) in retirement benefits to Sue.

2. At the time of trial, amendments to 10 U.S.C. § 1448 permitted SBP protection either voluntarily or by court order. 10 U.S.C. § 1448(b)(5)(A) (requiring person electing to provide SBP benefits to former spouse to state "whether the election is being made pursuant to the requirements of a court order") (Add. "E" to Sue's opening brief); Sue's opening brief,



p. 19. Bob's brief also makes conflicting statements about his position on SBP benefits. At page 24, Bob's brief states:

The defendant [Bob], by providing the maximum survivor's benefit available, is providing a type of retirement benefit for the plaintiff. This is an equitable and fair resolution by the District Court to the problem of the division of the defendant's retirement fund.

(Emphasis added) However, on page 27, Bob's brief states:

"The trial court also erred when it ordered the defendant to provide the maximum coverage available under the Survivors Benefit Plan." The latter statement appears to be based on an erroneous assertion that the trial court had no power to order maximum SBP protection. It can. However, the former statement establishes that Bob now believes this component of the Order to be "equitable and fair", thereby making his acquisition of maximum SBP protection voluntary and not court mandated.

3. Bob argues that the trial court erred in directing him to continue payments to a life insurance company Bob contended was in receivership. However, the trial court made allowance for the prospect of the company's financial instability when it expressly ordered that if ". . . owing to the financial instability of the insurance company it becomes no longer prudent to maintain coverage under the policies. . . defendant is ordered to obtain a substitute policy or policies. . . with a premium equal to that now paid by defendant. . .".

4. Page 34 of Bob's brief states: "The plaintiff's [Sue's] retirement fund was obtained from her employment with the federal government while the parties were married. (Tr. 7-8)." In fact, Sue Varallo's undisputed testimony on this point, (which begins at Tr. 6) as corrected at page 4 of her opening brief, establishes that most of her retirement was earned prior to marriage. She worked in federal civil service for four and one half years prior to the marriage (including a six-month temporary appointment at NASA and four years with the Census Bureau), and three and one half years during the marriage through the time of trial (one and one half years of which were also temporary appointments). At the time of the marriage Sue withdrew and contributed to the marital estate the retirement income accrued during her four years with the Census Bureau. No retirement deductions were made during the temporary appointments (and hence no retirement benefits accrued during these appointments). The \$8,500 that the Court ordered the parties to split was the cost to reinstate Sue's retirement benefits for the four years she worked for the Census Bureau prior to the marriage, and to obtain benefits for the periods she worked as a temporary appointee. Tr. 6-8 (Add. "A" hereto).

5. At page 9, paragraph 10, Bob's brief states that Sue's return to full time work in 1991 was voluntary. In reality, Bob told her, "that in order to support our lifestyle [she] better get out and find a job". Tr. 7 (Add. "A" hereto).

6. At pages 30-31, Bob's brief claims that his \$400 per month child support payment provides "the majority of support for . . . Cara". There is no support in the record for this statement, and it is false.

7. For unknown reasons, Bob's brief fails to point out that, subsequent to the filing of Sue's opening brief, Sean moved in with his father. Thus, the portion of Sue's appeal seeking child support for Sean and the right to claim Sean as a dependent for tax purposes is moot and will not be argued further.

II. SUE'S SALARY WAS EVIDENCE OF THE AMOUNT  
OF INCOME THAT SHOULD HAVE BEEN IMPUTED  
TO BOB.

There is no dispute that at the time of trial Bob was unemployed, but capable of employment. Any disability he has disqualifies him from physical labor only. It did not interfere with his prior employment at Unisys, nor would it compromise his ability to perform tasks required of those who hold office jobs such as Sue's. Tr. 98; Finding of Fact No. 8 (Add. "B" to Sue's opening brief). Thus, the evidence and findings of the trial court were sufficient to establish his voluntary unemployment. Hall v. Hall, 858 P.2d 1018, 1025 (Utah App. 1993); See also, Hill v. Hill, 869 P.2d 963 (Utah App. 1994).

The real issue is not whether income should be inputed to Bob, but how much. Bob's brief argues that there was no

evidence from which such an amount could be determined.

However, Bob ignores the evidence of Sue's salary, which, as argued in Sue's opening brief, is the amount of income that should be imputed to Bob.

Bob does not dispute that both have similar educational backgrounds, i.e., college B.A. degrees. Bob also does not dispute that, if anything, his work experience and training should enable him to find a better paying job than Sue's. Bob had 30 years experience in the military (retiring as a Colonel) and another two years experience with Unisys, and no time out of the work force until he lost his job at Unisys in 1990.

In contrast, Sue worked four and one-half years in federal civil service prior to the marriage in 1970, and a total of only 17 months in temporary civil service positions during the marriage (nine months at the beginning of the marriage and eight months in 1988) until 1991. Still, she was able to land her position with the Bureau of Reclamation in 1991, paying \$3,350 per month at the time of trial. Although the trial court may have been correct in finding that Bob could not, without retraining, duplicate his salary of over \$50,000 a year at Unisys, Bob makes no argument as to why he could not find a job paying at least what Sue earns, or why that amount of income should not be imputed to him.

Bob cites Utah Code Ann. § 78-45-7.5(2) for the proposition that only income from the equivalent of one full

time job may be used to determine the amount of child support. However, the only purpose of that statute is to prevent a parent from being required to hold down two jobs in order to meet a child support obligation. The statute was not designed to protect someone like Bob who chooses to avoid having even one job.

Moreover, Sue does not seek to increase the trial court's award of child support (or alimony) based upon imputed income. She merely argues that the trial court's failure to impute income to Bob led the Court to deprive her of her 30% interest in Bob's disposable monthly retired pay. However, if this Court were to accept Bob's misguided argument (addressed further below) that the disability portion of Bob's retirement benefit should not have been considered in determining the amount of child support and alimony, then Sue would ask that income be imputed to Bob for these purposes as well.

The trial court's indication that it would entertain a modification petition if Bob does decide to return to work, does not confront the imputation issue. Tr. 198; Finding No. 9 (Add. "A" and "B", respectively, to Sue's opening brief). This arrangement provides Bob with no incentive to return to work. He is permitted to live solely off of his retirement benefits, earned in part through Sue's efforts and support, while she is forced to work in order to approach a standard of living he maintains without working.

There is no question that the trial court erred in failing to impute income to Bob in at least the amount of Sue's salary. As will be argued next, once that income is imputed to Bob, there is also no question that Sue is entitled to 30% of Bob's disposable monthly retired pay.

III. SUE IS ENTITLED BOTH TO 30% OF BOB'S  
DISPOSABLE MONTHLY RETIRED PAY DURING  
HIS LIFETIME AND TO MAXIMUM SBP  
PROTECTION AFTER HIS DEATH.

As discussed above, contrary to Bob's argument, Sue is seeking 30% of Bob's "disposable monthly retired pay", not 30% of his gross retirement benefits, and any error by the trial court in using Bob's gross retirement pay in calculating the economic consequences of its two options was to Bob's advantage. The other arguments Bob advances on the issue of the division of his retirement benefits and on SBP benefits also are without merit.

One of these arguments is that the trial court correctly ruled that Bob's life expectancy is too uncertain to permit a present value calculation of his retirement benefits, thereby barring a lump sum distribution. However, as demonstrated in Sue's opening brief at pp. 15-17, it is only when retirement has not yet occurred, and therefore the amount of benefits is unknown, that the present value of these benefits may be too speculative to determine. Woodward v. Woodward, 656 P.2d 431 (Utah 1982).

Once retirement has occurred, benefits are fixed and the only remaining variable is life expectancy. Courts have

long recognized the reliability of mortality tables to assess life expectancy, for example in personal injury cases where the present value of future lost income is at issue. In a divorce context, Motes v. Motes, 786 P.2d 232, 234 (Utah App. 1990) specifically holds that once retirement has occurred, the present value of retirement benefits can be determined and made part of the property distribution. The spouse may receive his or her share of the present value of retirement benefit from other marital assets of equivalent value, when available.

Thus, it is only the present value of Sue's retirement benefits that cannot be determined here, because she has not yet retired. Although Sue would prefer to receive her 30% share of Bob's disposable monthly retired pay on a monthly basis as it is paid to him, it is clear that Bob has sufficient other assets to pay the \$185,000 that represents her share of the present value of Bob's disposable monthly retired pay. P.Ex. 18; Sue's opening brief, pp. 6,17; Tr. 104 (Add. "A" to Sue's opening brief); Finding No. 15 (Add. "B" to Sue's opening brief).

The only other argument that Bob appears to make regarding his retirement benefits is that his obligation to pay for the maximum SBP benefit resulted in what should be treated as an equitable substitute for the award of Sue's share of his retirement benefits. As indicated above, this is a peculiar argument because Bob later argues in his brief that the trial court erred in ordering maximum SBP protection for Sue.

More importantly, SBP benefits are no substitute for Sue's share of Bob's retirement benefits. The SBP benefits are payable only upon Bob's death, while the retirement benefits are payable only during Bob's life. If Sue predeceases Bob, she will receive none of the SBP benefits, after already being deprived of her rightful share of the retirement benefits. The only equitable decision would have been to award Sue both her 30% share of Bob's disposable monthly retired pay (either in a lump sum based on present value, or on a monthly basis) and the maximum SBP protection.

Bob supplements his other SBP arguments with the assertions that he and Sue entered into a binding contract that Bob would provide Sue with only the minimum SBP protection, and that the trial court had no power to change that contract. Not only are these assertions without legal support under the SBP statute, they also contradict Bob's argument that the maximum SBP protection was an equitable tradeoff for Sue's share of Bob's retirement benefits.

Bob's assertions also fail under basic contract law principles. Contrary to the statement at page 28 of Bob's brief, Sue received no "bargained for consideration" in return for reduced SBP benefits. Moreover, any "contract" the parties may have made was dependent upon the marriage contract, and was terminated when the marriage contract was terminated as the result of Bob's philandering.



Bob's arguments aside, the trial court made two critical errors in its analysis of the military retirement and related SBP issues. The first error was in ruling that the present value of the retirement benefits could not be determined based upon Bob's actuarial life expectancy. The second error was in refusing to impute income to Bob, for purposes of determining whether Bob could afford to pay both Sue's share of his disposable retired pay on a monthly basis, along with the monthly payment for maximum SBP protection.

As shown in Sue's opening brief at pp. 23-25, with a salary equal to Sue's, Bob could pay Sue her share of his retirement benefits on a monthly basis, pay the maximum monthly SBP payment, meet his other existing monthly obligations under the Decree (including child support and alimony) and still have enough left over to live comfortably. Of course, this scenerio would require Bob to return to work, as Sue was required to do.

IV. EVEN WITHOUT IMPUTATION OF INCOME, THE  
UNDISPUTED FACTS AND EXPRESS AND  
IMPLIED FINDINGS OF THE TRIAL COURT  
SUPPORTED THE AMOUNT OF THE ALIMONY AND  
CHILD SUPPORT AWARDED TO SUE.

Bob's primary argument on the \$500 per month alimony award to Sue is not that the award was too high, but that the trial court's findings were insufficient to support the award. However, the record establishes that the trial court considered the appropriate factors (i.e., Sue's financial condition and needs, Sue's ability to meet those needs, and Bob's ability to

pay) and that these factors support the alimony amount (assuming no income is imputed to Bob.)

Although the formal Findings 8 and 9 (Add. "B" to Sue's opening brief) do not expressly recite all of the necessary factors, the undisputed evidence before the trial court, and the court's ruling from the bench (Add. "A" to Sue's opening brief), show that the trial court considered these factors, and, more importantly, show the analysis that led to the ultimate award. This is all that is required by this Court's decisions in Hall v. Hall, supra and Hill v. Hill, supra.

Under Hall, express findings are not required either as to undisputed issues, or if the express findings can be implied from subsidiary findings on disputed issues:

Unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made.

858 P.2d at 1025. Indeed, for purposes of appellate review, it is more important for the trial court to explain its analytical processes rather than to merely parrot the magic language of a required finding:

[W]here the court formulates detailed subsidiary findings of fact which . . . by themselves, show the steps by which the court arrived at its apparent conclusion, . . . the court's decision . . . will not be invalidated . . . .

Id.

In many cases, where a court fails to phrase findings in the exact language of the statute, the findings nevertheless reflect methodical and extensively detailed treatment of the facts, which is often more insightful and helpful on appeal than a shorter, more cursory recitation of the exact statutory language would have been. Such an approach frequently promotes more meaningful appellate review by providing the appellate court with insight into the steps taken by the trial court in arriving at its decision.

Id. at n.7 (citations omitted).

Here, in Finding No. 8, the Court expressly found that, "in order to maintain the standard of living which the parties enjoyed during their marriage, plaintiff [Sue] is in need of support . . . in the amount of \$500 per month". It was undisputed that Sue's standard of living had declined after she filed for divorce and she and the children moved out of the family home. Tr. 34. See, Martinez v. Martinez, 818 P.2d 538, 542 (Utah 1991) [". . . usually the needs of the spouses are assessed in light of the standard of living they had during the marriage" (citations omitted)].

In addition to making this ultimate finding on Sue's need for alimony, the trial court made subsidiary findings in its ruling from the bench regarding Sue's earnings, earning capacity and expenses, and Bob's ability to pay alimony. The court found Sue's monthly income from employment to be \$3,242.42. Tr. 194-195. Contrary to Bob's argument that the trial court did not consider Sue's income from other sources,

the court then added income from her separate savings and other investments of \$401 per month, for a total of \$3,643.42 per month. Tr. 195. The court then reduced her claimed expenses from \$2,496 per month to \$2,300 per month, because of expenses attributable to the adult children Sean and Valerie.

On Bob's side of the equation, the Court took Bob's monthly retirement income of \$4,225 and added \$250 per month in separate interest or investment income, for a total of \$4,475 per month. Id. The Court also reduced Bob's claimed expenses by \$200, to \$2,300 per month, based on a determination of what would be reasonable post-divorce. Id.

The Court then went on to consider Sue's education and employment, as well as the number of years she had been out of the work force (thereby losing the opportunity to climb the career ladder), and her ability to earn income from her share of the marital property distribution (which is the same as Bob's), in evaluating both her present need for income and her income needs upon retirement. Tr. 196-198. In light of all of these factors, and without imputing any income to Bob from his voluntary unemployment, the Court found \$500 per month alimony to be appropriate. Tr. 198.

These subsidiary findings are similar to those affirmed in Hill v. Hill, supra, where the defendant husband also contended that the trial court failed to make adequate findings concerning his ability to pay alimony. In response, this Court stated:

Ms. Hill concedes that the court did not make an express finding on Mr. Hill's ability to pay, but notes that the court fully considered this factor at trial. Mr. Hill provided the court with documentation concerning his present and historical earnings, along with his current expenses. The court made several references to Mr. Hill's financial condition, evidencing a complete understanding of the resources available to pay alimony.

869 P.2d at 966.

According to the chart on page 18 of Bob's brief, the net result of the alimony award was to approximately equalize the net monthly income and expenses of the parties, before taking into account Bob's child support and SBP obligations. However, any amount to be credited to Sue from child support is more than offset by the actual costs of raising a teenage daughter. (If any error was made by the trial court in calculating alimony, it was in attributing equal monthly expenses to the parties, despite the fact that Bob has only himself to support, while Sue must support both herself and Cara, and Sue has more withholdings from her gross salary than Bob does from his gross retirement pay. P. Ex. 1; D. Ex. 9.)

Also, Sue will not receive the benefit of the SBP payment until Bob dies (assuming she outlives him). Moreover, based on Bob's own calculations, and even without imputation of income, there is no question that he has the means to pay the alimony, child support and SBP payment ordered by the trial court.

Bob also argues that because the disability portion of his retirement pay is his separate property, it may not be taken into account for purposes of calculating alimony, or child support. This argument is nonsense, especially in light of Bob's own argument that Sue's income from her separate property had to be considered. Income from all sources may be considered in determining both financial need and ability to pay. See, Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988). As discussed above, the trial court considered income from the separate property of both parties in awarding alimony.

Moreover, at trial Bob conceded that child support was to be calculated based upon his gross retirement pay, including the disability component, and that \$393 per month in child support was appropriate (which the trial court increased by only \$8.) Ex. "A" to Bob's trial brief (R. 97-121). Page 10 of his trial brief also conceded that an award of alimony to Sue was appropriate (albeit in the amount of \$300 per month, rather than the \$500 actually awarded).

Finally, it is important to keep in mind that even with the existing alimony and child support awards, Sue must continue to work full time in order to maintain her and her daughter's current standard of living, while Bob may maintain his current standard of living by remaining idle. On the other hand, all Bob has to do to improve his standard of living is return to work, while there are no options available to Sue

to improve her standard of living (or Cara's). These facts suggest that even if no income is imputed to Bob, the alimony and child support awards were, if anything, too low.

V. BOB IS ENTITLED TO NO PART OF SUE'S  
RETIREMENT BENEFITS.

Bob argues that he is entitled to one-half of the retirement benefits Sue earned during the marriage. Of course, this argument is undercut by Bob's opposition to an award to Sue of one-half of the retirement benefits he earned during the marriage. However, even if Sue is awarded her share of his retirement benefits, Bob should be awarded no part of her benefits.

At first blush, it would seem reasonable that if Sue were awarded a share of Bob's benefits, reciprocity should apply. [Indeed, in his Answer to Sue's Complaint at p.2, ¶ 8 (R. 30-32), Bob conceded that Sue should get one-half of his benefits and he should get one-half of hers.] However, on the facts of this case, reciprocity would be totally inequitable.

Although Bob was ordered to pay one-half of the amount necessary to reinstate Sue's retirement benefits, most of this amount is traceable to benefits accrued during her four years of employment with the Census Bureau prior to the marriage. Sue cashed out these benefits during the marriage and contributed the proceeds to the marital estate. Since Bob is presumed to have already received one-half of these proceeds, it is only fair that he reimburse her for this amount, plus

interest, with no right to this portion of her retirement benefits once she retires.

As discussed above, the portion of her retirement benefits attributable to her employment during the marriage is negligible. However, Bob should receive none of this portion either. Sue's retirement benefits are calculated based upon a combination of her years of service and average salary. Because she was out of the work force for almost 20 years during the marriage, her retirement prospects are adversely affected in two ways. First, she was unable to work her way up the career ladder in terms of salary. Second, she was unable to accrue years of service. See, Mansell v. Mansell, 490 U.S. 581, 602 (1989) (dissenting opinion of Justice O'Connor). In order to accrue the 30 years of service Bob has, she would not be able to retire until age 73.

Given this scenario, it would be unconscionable to award Bob any part of Sue's retirement benefits, which already will be meager, especially in comparison to his.

VI. BOB AGREED TO CONTRIBUTE TOWARD THE  
CHILDREN'S EDUCATIONAL EXPENSES.

Bob's brief correctly points out that under Utah law, he cannot be compelled to contribute toward the educational expenses of his children after they reach age 18, absent special circumstances. What Bob overlooks, however, is his agreement to contribute to such expenses. Such agreements are enforceable in Utah, even as to children that have reached the



age of majority, and may be embodied in a divorce decree.

Despain v. Despain, 627 P.2d 526 (Utah 1981); Hill v. Hill, 841 P.2d 722 (Utah App. 1992).

At trial both Bob and Sue expressed a commitment to share the costs of providing each of their children with the opportunity to pursue educational opportunities. At Tr. 128-130 (Add. "A" hereto), Bob testified that he was willing and able to contribute both towards Cara's expenses at Judge Memorial High School and Valerie's expenses at Westminster College. Valerie was over age 18 at the time of trial. (Subsequent to trial, Valerie graduated from college. To that extent, the issue is moot, leaving for determination the question of Cara's college expenses from age 18 through age 22 and educational costs which may be incurred by Sean, now 20 years of age.) The trial court took Bob at his word and embodied his agreement in the Decree. This Court should also enforce that agreement and uphold the Decree.

VII. THE ROYAL BANK OF SCOTLAND ACCOUNT IS  
SUE'S SEPARATE PROPERTY.

It is undisputed that the Royal Bank of Scotland account (about \$15,000) is made up entirely of funds received by Sue through inheritance from her mother. Tr. 19-21. Sue became determined to segregate these funds when she learned that Bob had yet another paramour (in addition to his brother's wife). Id. Bob does not contend that he augmented these funds in any fashion or that they became commingled with marital

assets. Accordingly, the trial court correctly awarded Sue's separate, inherited funds to Sue. See, Mortensen v. Mortensen, supra; Burt v. Burt, 799 P.2d 1166, 1168 (Utah App. 1991).

Bob's sole claim to these funds is based on the fact that Sue set up the account in which the bonds are held as a joint account. This argument is absurd. The name or names put on an account does not determine whether it is marital or separate property. See, Huck v. Huck, 734 P.2d 417, 420 (Utah 1986); Jackson v. Jackson, 617 P.2d 338, 340-341 (Utah 1980). According to Bob's rationale, a spouse could lay sole claim to marital property (for example, the family home) simply by withholding the name of the other spouse from documents evidencing ownership. The law does not countenance such mechanistic and artificial tests to determine whether property is subject to distribution upon divorce.

At page 35 of his brief, Bob goes on to argue that establishing the account as a joint account shows that Sue "intended for [Bob] to be a recipient of those funds should [Sue] die while the parties were still married" (emphasis added). Of course, Sue did not die during the marriage, so that any such intent is irrelevant.

Sue did not contribute this asset to the marital estate merely by engaging in an estate planning device designed to avoid probate. If this were so, a spouse could again lay claim to separate assets as marital assets, simply because they

were the subject of a bequest to that spouse in the other spouse's will. Furthermore, wills and most other estate planning devices are revocable, and nothing is more common than to remove a divorced spouse as a death beneficiary.

Finally, at trial, Bob conceded that Sue's inheritance, including the Royal Bank of Scotland Account, were Sue's separate property, not part of the marital estate, and should be awarded to her. See, Bob's trial brief (R. 97-121) at pp. 12, 14.

#### CONCLUSION

Bob's cross-appeal is nothing more than an attempt at gross overreaching and must be denied. Sue respectfully urges that the Decree be affirmed in all respects, except that the trial court be directed on remand to award Sue 30% of Bob's disposable monthly retired pay, either in the lump sum present value amount of \$185,000, or as it is paid on a monthly basis. Sue would prefer payment on a monthly basis.

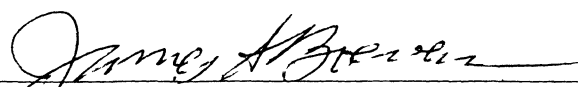
Alternatively, Sue urges this Court to remand to the trial court with directions to make findings on the amount of income to be imputed to Bob, based on Sue's salary, to find that Sue has a 30% property interest in Bob's disposable

monthly retired pay, and to reconsider the trial court's option  
nos. 1 and 2 accordingly.

DATED this 31<sup>st</sup> day of November, 1994.

PRINCE, YEATES & GELDZAHLER

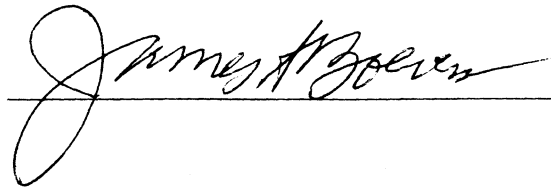
By   
Ronald E. Nehring

By   
James A. Boevers  
Attorneys for Plaintiff

CERTIFICATE OF HAND DELIVERY

I hereby certify that, on the 30th day of November, 1994, I caused the original and seven copies of the foregoing REPLY BRIEF OF APPELLANT to be hand-delivered to the Utah Court of Appeals and two copies to be hand-delivered to the following:

W. Kevin Jackson, Esq.  
Douglas P. Hoyt, Esq.  
JENSEN, DUFFIN, DIBB & JACKSON  
311 South State, Suite 380  
Salt Lake City, Utah 84111-2379



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10475-1

## **ADDENDUM "A"**

1           IN THE DISTRICT COURT OF THE SECOND DISTRICT OF THE  
2           STATE OF UTAH, IN AND FOR THE COUNTY OF DAVIS

3

4

5

6

7 MERRILYN SUSAN VARALLO,

8                   PLAINTIFF,

CASE NO. 924701381

9

VS.

10

FRANCIS V. VARALLO,

11

DEFENDANT.

12

13                   BE IT REMEMBERED THAT ON THE 17TH AND 18TH  
14 DAYS OF FEBRUARY, 1993, THE ABOVE-ENTITLED CAUSE CAME ON  
15 FOR TRIAL BEFORE THE HONORABLE JON M. MEMMOTT, DISTRICT  
16 JUDGE, FARMINGTON, UTAH.

17

18

APPEARANCES

19

FOR THE PLAINTIFF

20

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PRINCE, YEATES & GELDZAHLER  
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FOR THE DEFENDANT

22

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SALT LAKE CITY, UT 84106

23

24

JOANNE PRATT, CSR  
HALL OF JUSTICE  
800 WEST STATE STREET  
FARMINGTON, UT 84025

25

26

COPY

1 Q MRS. VARALLO, MAY I ASK YOU NOW SOME QUESTIONS  
2 ABOUT YOUR OWN BACKGROUND. COULD YOU BRIEFLY TELL US  
3 SOMETHING ABOUT YOUR EDUCATION?

4 A I HAVE A BACHELOR'S DEGREE IN ENGLISH FROM THE  
5 UNIVERSITY OF FLORIDA.

6 Q IN WHAT AREA WAS YOUR DEGREE TAKEN?

7 A IN LIBERAL ARTS.

8 Q WHAT IS YOUR WORK HISTORY?

9 A I BASICALLY STARTED IN--MOST OF MY WORK  
10 HISTORY HAS BEEN WITH THE FEDERAL SERVICE AND WITH THE  
11 FEDERAL GOVERNMENT. AND I STARTED WITH THEM IN JANUARY  
12 OF 1966 ON A TEMPORARY APPOINTMENT WITH NASA AT CAPE  
13 KENNEDY. I WAS THEN PUT ON THE CIVIL SERVICE REGISTER  
14 AND WOUND UP WITH A PERMANENT JOB WITH THE CENSUS BUREAU  
15 IN JUNE OF 1966. I WORKED FOR THE CENSUS BUREAU FOR FOUR  
16 YEARS UNTIL I MARRIED BOB AND LEFT THE CENSUS IN JUNE OF  
17 '70. AFTER THAT I WORKED FOR ABOUT 15 MONTHS WITH THE  
18 DEPARTMENT OF ARMY AT FORTH LEAVENWORTH ON A TEMPORARY  
19 APPOINTMENT. AND THEN I DIDN'T WORK AGAIN FROM MAY OF  
20 1971 UNTIL JANUARY OF 1988 WHEN I WENT BACK TO WORK AT  
21 DEFENSE NUCLEAR AGENCY IN ALEXANDRIA, VIRGINIA. I WORKED  
22 THERE FOR EIGHT MONTHS. AND THEN WE MOVED TO UTAH. I  
23 STAYED OUT OF THE WORK FORCE AGAIN ANOTHER TWO YEARS.  
24 THEN I WENT BACK TO WORK JANUARY OF 1991 FOR THE BUREAU  
25 OF RECLAMATION HERE IN SALT LAKE.



1           Q       DID YOUR HUSBAND HAVE ANY OPINION ABOUT  
2   WHETHER YOU SHOULD BE WORKING DURING THE TIME-- DURING  
3   THE EARLY YEARS OF YOUR MARRIAGE?

4           A       HE DID NOT WANT ME TO WORK.  WE HAD MADE A  
5   MUTUAL AGREEMENT THAT I SHOULD, IF AT ALL FINANCIALLY  
6   POSSIBLE, I SHOULD STAY HOME WITH THE CHILDREN.  THERE  
7   WAS NO REAL QUESTION ABOUT MY BEING ABLE TO GO BACK TO  
8   WORK.  IT WAS DIFFICULT WITH THREE KIDS AND NOT A LOT OF  
9   SUPPORT ABOUT IT.

10          Q       WHAT PROMPTED THE RETURN TO WORK IN 1991?

11          A       IN '91.

12          Q       YES.

13          A       OKAY.  BOB LEFT UNISYS IN AUGUST OF 1990.  AND  
14   IN NOVEMBER OF 1990 HE WAS STILL UNEMPLOYED.  SO HE TOLD  
15   ME ONE DAY THAT IN ORDER TO SUPPORT OUR LIFESTYLE I'D  
16   BETTER GET OUT AND FIND A JOB.  SO I STARTED LOOKING FOR  
17   A JOB.

18          Q       DID YOU ACCUMULATE ANY RETIREMENT BENEFITS  
19   DURING THE TIME YOU HAD EMPLOYMENT IN THE EARLY YEARS OF  
20   YOUR MARRIAGE?

21          A       MY RETIREMENT SITUATION IS A LITTLE BIT  
22   COMPLICATED.  BUT THE TIME THAT I HAD ON TEMPORARY  
23   APPOINTMENTS DOES NOT COUNT TOWARD COMPUTATION OF ANNUITY  
24   FOR CIVIL SERVICE RETIREMENT PURPOSES.  THE FOUR YEARS I  
25   HAD WITH THE CENSUS WHICH WAS THE ONLY TIME THAT I HAD

1 PERMANENT PRIOR TO 1991, I WITHDREW THE RETIREMENT  
2 CONTRIBUTION AFTER I WAS MARRIED. AND IN ORDER TO GET  
3 CREDIT FOR THAT, I HAVE TO PAY THAT BACK WITH INTEREST.  
4 IN ORDER TO GET CREDIT FOR THE TEMPORARY TIME THAT I'VE  
5 HAD, I HAVE TO PAY INTO THE SOCIAL SECURITY SYSTEM--NOT  
6 SOCIAL SECURITY--CIVIL SERVICE RETIREMENT SYSTEM IN ORDER  
7 TO GET CREDIT FOR THAT TIME ALSO. SO OF THE SEVEN YEARS  
8 AND SEVEN MONTHS THAT I HAVE OF EMPLOYMENT IN FEDERAL  
9 SERVICE, FIVE YEARS AND SEVEN MONTHS ARE NOT COVERED FOR  
10 RETIREMENT PURPOSES UNLESS I PAY BACK \$8,511.

11 Q HAVE YOU RECENTLY REVIEWED THE OBLIGATION THAT  
12 YOU HAVE IN ORDER TO--FOR LACK OF A BETTER TERM--  
13 REINSTATE YOUR RETIREMENT?

14 A YES. I SENT OFF TO THE OFFICE OF PERSONNEL  
15 MANAGEMENT AND GOT A NOTICE FROM THEM ON HOW MUCH IT  
16 WOULD COST ME TO COVER ALL THE YEARS OF SERVICE I'M  
17 PRESENTLY UNCOVERED FOR, AND THAT AMOUNT IS \$8,511.

18 Q DO YOU KNOW WHAT LINE OF WORK YOUR HUSBAND HAS  
19 BEEN IN DURING YOUR MARRIAGE TO HIM?

20 A WHEN WE FIRST MARRIED BOB WAS A MAJOR IN THE  
21 ARMY. HE WAS IN THE INTELLIGENCE AREA. AND HE STAYED IN  
22 THE ARMY AND STAYED IN THE INTELLIGENCE FIELD UNTIL HE  
23 RETIRED THE FIRST OF MARCH OF 1988. AFTER THAT HE GOT  
24 THE JOB WITH UNISYS HERE IN SALT LAKE IN AUGUST OF 1988.  
25 AND HE WAS THE REGIONAL SECURITY MANAGER FOR UNISYS.

1           A        THAT'S MY RECOLLECTION.

2           Q        OKAY.  BUT SEAN DOES HAVE THE SUPERIOR I.Q?

3           A        HE DOES.

4           Q        HE HAS SUCCEEDED AT BOUNTIFUL JR. HIGH SCHOOL?

5   HE HAS BEEN EMPLOYED?  YOU ARE AWARE OF AN EMPLOYMENT  
6   HISTORY?

7           A        UH-HUH.

8           Q        OKAY.  THANK YOU, DOCTOR.

9                   MR. NEHRING:  NO FURTHER QUESTIONS.

10                  THE COURT:  THANK YOU.  YOU MAY BE EXCUSED.

11                  MR. NEHRING:  WE'RE PREPARED TO RECALL MR.  
12   VARALLO.

13                               CROSS EXAMINATION

14   BY MR. NEHRING:

15           Q        MR. VARALLO, I WOULD LIKE TO RETURN TO THE  
16   ANSWERS THAT YOU GAVE TO MR. DENT'S QUESTIONS CONCERNING  
17   EDUCATION.  AS I UNDERSTAND IT, YOU TOO PUT A PREMIUM ON  
18   YOUR CHILDREN'S EDUCATION.  IS THAT RIGHT?

19           A        YES, I DO.

20           Q        AND YOU HAVE BEEN A WILLING FINANCIAL  
21   CONTRIBUTOR TO THEIR EDUCATION?  IS THAT RIGHT, SIR?

22           A        CERTAINLY UP TO THIS DATE, COUNSELOR.

23           Q        AND AS I UNDERSTAND YOUR TESTIMONY THEN, SIR,  
24   BECAUSE EDUCATION IS SOMETHING THAT'S IMPORTANT TO YOU,  
25   YOU WOULD BE WILLING TO MAKE THE APPROPRIATE FINANCIAL

1 CONTRIBUTIONS TO CONTINUE YOUR CHILDREN'S EDUCATION. IS  
2 THAT RIGHT, SIR?

3 A THAT DEPENDS, COUNSELOR.

4 Q WELL, SIR. ISN'T IT TRUE, SIR, THAT BASED ON  
5 YOUR PLACING OF PREMIUM, YOU ARE WILLING TO TAKE OUT YOUR  
6 WALLET AND PUT DOWN MONEY TO CONTINUE, FOR EXAMPLE,  
7 KARA'S EDUCATION AT JUDGE MEMORIAL? IS THAT RIGHT, SIR?

8 A WELL, IT'S ONE THING, COUNSELOR, TO WANT TO  
9 HAVE YOUR DAUGHTER BENEFIT. IT'S ANOTHER THING TO BE  
10 ABLE TO AFFORD IT WHEN YOU DON'T HAVE THE INCOME, SIR.  
11 OR IT'S PRACTICALITY AND REALITY OF CAN ONE REALLY AFFORD  
12 THE LUXURY OF THE PRIVATE EDUCATION THAT'S BEEN PROVIDED  
13 THUS FAR FOR OUR CHILDREN, BASED ON THE FINANCIAL ABILITY  
14 FOR US TO DO THAT--FOR ME TO DO THAT. OKAY.

15 Q WELL--

16 A I THINK A DIVORCE, THE SETTLEMENT OF A DIVORCE  
17 AND THE OUTCOME OF THAT, COUNSELOR, I THINK YOU CAN  
18 REASON THAT COULD HAVE AN IMPACT ON WHAT ONE IS ABLE OR  
19 NOT ABLE TO DO IN TERMS OF THEIR OWN SUSTENANCE AS WELL  
20 AS THEIR OWN CHILDREN'S SUSTENANCE, REGARDLESS OF WHAT  
21 THEY DESIRE FOR THOSE CHILDREN.

22 Q SIR, YOU ARE FAMILIAR WITH YOUR CURRENT  
23 FINANCIAL SITUATION, ARE YOU NOT?

24 A THAT'S CORRECT.

25 Q NOW SIR, BASED ON WHAT YOU KNOW ABOUT YOUR

1 CURRENT FINANCIAL CONDITION, DO YOU BELIEVE THAT YOU HAVE  
2 THE WHEREWITHAL, TAKING INTO CONSIDERATION YOUR WIFE'S  
3 FINANCIAL CONDITION, TO MAKE A CONTRIBUTION TO KEEP KARA  
4 AT JUDGE MEMORIAL? YES OR NO?

5 A AS OF THE 17TH OF FEBRUARY AND 18TH OF  
6 FEBRUARY 1993, THAT'S CORRECT.

7 Q YOU WOULD?

8 A AS OF TODAY, COUNSELOR.

9 Q ALL RIGHT. NOW, A SIMILAR QUESTION FOR  
10 VALERIE AT WESTMINSTER. BASED ON THE CURRENT STATE OF  
11 AFFAIRS OF YOUR RESPECTIVE FINANCIAL CONDITIONS, ARE YOU  
12 IN A POSITION TO MAKE A FINANCIAL CONTRIBUTION TO KEEPING  
13 VALERIE AT WESTMINSTER THROUGH GRADUATION?

14 A THE SAME ANSWER APPLIES, COUNSELOR.

15 Q OKAY. THE SECOND LINE OF QUESTIONING THAT MR.  
16 DENT POSED TO YOU CONCERNED ALLEGATIONS MADE IN OUR TRIAL  
17 BRIEF. AND I'M NOT GOING TO QUIBBLE WITH YOU ON THE  
18 DEFINITION OF WORDS. BUT I WANT TO KNOW THE STUFF. YOU  
19 DID HAVE AN AFFAIR WITH YOUR SISTER-IN-LAW. IS THAT  
20 RIGHT, SIR?

21 A IN 1987.

22 Q AND YOU DID HAVE AN AFFAIR WITH A WOMAN NAMED  
23 ROXANNE FOX. IS THAT RIGHT, SIR?

24 A COUNSELOR, I WISH YOU WOULD CLARIFY AT THIS  
25 TIME WHAT YOUR INTERPRETATION OR DEFINITION OF AFFAIR IS.