

1994

# Ruth Ann Jefferies v. Wilbur R. Jefferies: Reply Brief

Utah Court of Appeals

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Clark W. Sessions; Jay W. Butler; Campbell Maack and Sessions; Attorneys for Defendant and Appellant, Wilbur R. Jefferies.

David S. Dolowitz; Cohne, Rappaport and Segal; Attorney for Plaintiff and Appellee, Ruth Ann Jefferies.

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**IN THE UTAH COURT OF APPEALS**

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RUTH ANN JEFFERIES, :  
 :  
 Plaintiff and Appellee, :  
 : No. 940373 CA  
 vs. :  
 :  
 WILBUR R. JEFFERIES, : Priority No. 15  
 :  
 Defendant and Appellant. :

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**REPLY BRIEF OF APPELLANT**

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Appeal from Final Decree of Divorce entered May 25, 1994  
in the Second Judicial District Court for Davis County  
Honorable Rodney S. Page, Civil No. 890901910CN

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David S. Dolowitz (0899)  
COHNE, RAPPAPORT & SEGAL  
525 East First South,  
Fifth Floor  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008  
Telephone: (801) 532-2666

Clark W. Sessions (2914)  
Jay W. Butler (0526)  
CAMPBELL MAACK & SESSIONS  
One Utah Center  
201 South Main Street, 13th Floor  
Salt Lake City, Utah 84111-2215  
Telephone: (801) 537-5555

Attorney for Plaintiff and Appellee,  
Ruth Ann Jefferies

Attorneys for Defendant and Appellant,  
Wilbur R. Jefferies

**UTAH COURT OF APPEALS  
BRIEF**

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**FILED**  
Utah Court of Appeals

**DEC 28 1994**

Marilyn M. Branch  
Clerk of the Court

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201 South Main Street, 13th Floor  
Salt Lake City, Utah 84111-2215  
Telephone: (801) 537-5555

Attorney for Plaintiff and Appellee,  
Ruth Ann Jefferies

Attorneys for Defendant and Appellant,  
Wilbur R. Jefferies

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## **DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS**

There are no constitutional provisions, statutes, ordinances, rules or regulations which are determinative of the issues addressed in the Reply Brief of Appellant.

### **ARGUMENT**

#### **POINT I.**

**THE DISTRICT COURT'S ERRONEOUS INCLUSION OF THE HUSBAND'S SECTION 401(a) BENEFITS IN THE MARITAL ESTATE WHILE EXCLUDING THE WIFE'S SOCIAL SECURITY BENEFITS IS NOT OFFSET BY ANY DERIVATIVE CLAIM WHICH THE HUSBAND MAY HAVE TO SOCIAL SECURITY BENEFITS UNDER THE WIFE'S ACCOUNT.**

The Wife's brief contends that "[Husband] is eligible for Social Security benefits by reason of [Wife]'s participation in Social Security in a marriage exceeding 10 years" and argues that this derivative eligibility of the Husband somehow redresses the inequity resulting from the District Court's inclusion of the Husband's § 401(a) social security substitute account, but not the Wife's social security benefits, in the marital estate. The Wife omits, however, two vital limitations on the Husband's derivative social security eligibility which completely vitiate her argument:

(i) *The eligibility of a divorced spouse for derivative social security benefits under an ex-spouse's coverage terminates upon remarriage.* 42 U.S.C. § 402(c)(1)(H) provides, in relevant part:

[E]very divorced husband . . . of an individual entitled to old-age or disability insurance benefits, if such . . . divorced husband . . . *is not married* . . . shall . . . be entitled to a husband's insurance benefit . . . .

Emphasis added. Thus, should the Husband remarry, he will have no derivative claim to social security benefits under the Wife's social security account. Since, as pointed out at page 8 of the Brief of Appellant, social security benefits are not a form of property and do not vest until received, consideration of such phantom benefits in dividing the marital estate at this point in time is an unwarranted exercise in speculation. Consideration of derivative benefits which the Husband might receive if he does not remarry, as urged by the Wife, would merely compound the speculation.

(ii) *Even if the Husband were to be eligible for benefits under the Wife's coverage, those benefits would be significantly and materially less than the benefits to which he would have been entitled had the Husband made contributions to a social security account in his own name.* 42 U.S.C. § 402(c)(2)(D) limits derivative benefits payable to a divorced husband in any month to one-half of the primary benefit payable to his ex-wife. Moreover, even that derivative benefit may be further reduced under 42 U.S.C. § 402(c)(2)(A), which requires that the Husband reduce the derivative benefit (but not below zero) by two-thirds of the benefits he will receive under his pension from the Wasatch Front Regional Council. (The Husband does not contend that those pension benefits were not properly included in the marital estate.)

(iii) *Inclusion of the Husband's social security substitute benefits in the marital estate created material inequities.* It is clear from the above-cited provisions of the

Social Security Act that the Husband will receive few benefits, if any, under the Wife's social security account. Without doubt, any such derivative benefits which he may receive will be far less than he would have received had he been a participant himself in social security. It is therefore clear that the District Court failed to consider the significant inequities resulting from its disparate treatment of the Wife's social security benefits and the Husband's substitute social security benefits. In this regard, the decision below should be reversed. Even if the Husband's § 401(a) benefits are to be included in the marital estate, a new trial is necessary so that the District Court may receive and consider evidence as to the precise economic impact under the Social Security Act of such inclusion on the Husband and the Wife, respectively.



## POINT II.

### THE DISTRICT COURT'S FAILURE TO JOIN THE CHILDREN IS JURISDICTIONAL AND MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

As this court noted in *Curtis v. Curtis*, 789 P.2d 717, 726 (Utah Ct. App. 1990), "a court must have jurisdiction over both the subject matter of the dispute and the individuals involved. If the court lacks either type of jurisdiction, it has no power to entertain the suit." It is a widely accepted principle that the issue of jurisdiction may be raised for the first time on appeal. *See, e.g., Seidenbach's v. Bland Terry Shoe Corp.*, 292 F.2d 206, 208 (10th Cir. 1961) ("The question . . . is jurisdictional and may be raised for the first time on appeal."); *Paine, Webber, Jackson & Curtis v. Adams*, 718 P.2d 508, 513 (Colo. 1986) (although the issue of jurisdiction was raised neither at trial nor before the court of appeals, "the defense of lack of jurisdiction over the subject matter can be raised at any time, even for the first time in this [Supreme] Court."). It is well-settled that jurisdictional questions can be addressed by an appellate court *sua sponte*. *H&V Engineering v. Board of Professional Engineers and Land Surveyors*, 747 P.2d 55, 57 (Idaho 1987) ("Even if jurisdictional questions are not raised by the parties, we are obligated to address them, when applicable, on our own initiative.").

Accordingly, the District Court's lack of jurisdiction over the minor children of the marriage is both fatal to its purported disposition of their property and properly raised by the Husband in this appeal. As asserted in Point II of the Brief of Appellant, a clearer denial of the fundamental rights of due process of the children than occurred here cannot be imagined.

### POINT III.

#### THE DISTRICT COURT COMMITTED "PLAIN ERROR" IN FINDING FRAUD ON THE PART OF THE HUSBAND IN HIS GIFTS TO THE MINOR CHILDREN.

While it is the general rule that an issue not raised at trial may not be asserted on appeal, there is an exception where the trial court has committed "plain error". *State v. Archambeau*, 820 P.2d 920, 922 (Utah Ct. App. 1991). An error is "plain" within the meaning of the exception, if from the appellate court's examination of the record, "it should have been obvious to a trial court that it was committing error." *State v. Eldredge*, 773 P.2d 29, 35 (Utah), *cert. denied*, 493 U.S. 814 (1989).

The District Court's finding of fraud in connection with the Husband's gifts to his minor children was doubtless such plain error. As more fully argued in the Brief of Appellant, Point III, pp. 17 *et seq.*, the District Court failed even to address the minimum elements of fraud under Utah law, omitting *any* finding of misrepresentation, concealment, intent, reliance or damage. Indeed, so far was the evidence from showing misrepresentation or concealment that the Wife *acknowledged* that the Husband had discussed with her putting money away in accounts for the children. R.1055. The District Court committed further "plain error" in entering its conclusory Finding 25, a clear violation of the rule that conclusory findings constitute reversible error. *Sukin v. Sukin*, 842 P.2d 922, 925 (Utah Ct. App. 1992).<sup>1</sup>

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<sup>1</sup>Finding 25 makes no reference to facts showing fraud beyond the bald assertion that "The court has determined that those deposits were made by the Defendant without the knowledge of the Plaintiff. They were fraudulent and were an attempt by the Defendant to hide assets from the Plaintiff and transfer them to the parties' children under his control." R.1112.

## CONCLUSION

The Brief of Appellee fails to respond to the substance of Appellant's arguments, and, in asserting technical and procedural grounds in support of the decision of the District Court, misreads relevant sections of the Social Security Act and ignores well-established principles which permit appellate courts to reverse "plain error" and to correct jurisdictional defects not raised below. The Court should therefore grant the relief requested in the Brief of Appellant.

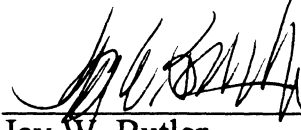
DATED this 28<sup>th</sup> day of December, 1994.

CAMPBELL MAACK & SESSIONS



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Clark W. Sessions



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Jay W. Butler  
Attorneys for Defendant/Appellant

Clark W. Sessions (2914)  
Jay W. Butler (0526)  
CAMPBELL MAACK & SESSIONS  
One Utah Center  
201 South Main Street, 13th Floor  
Salt Lake City Utah 84111-2215  
Telephone: (801) 537-5555

Attorneys for Plaintiff and Appellant

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**CERTIFICATE OF SERVICE**

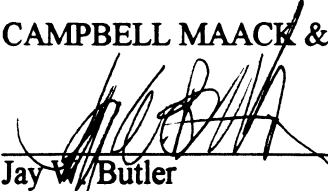
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I hereby certify that, on the date hereof, I caused to be hand-delivered a true and correct copy of the REPLY BRIEF OF APPELLANT to Plaintiff/Appellee's counsel at the following address:

David S. Dolowitz, Esq.  
COHNE, RAPPAPORT & SEGAL  
525 East First South,  
Fifth Floor  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008

DATED this 28 day of December, 1994

CAMPBELL MAACK & SESSIONS

  
\_\_\_\_\_  
Jay W. Butler  
Attorneys for Defendant/Appellant