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Kathy Montierth v. Utah State Retirement Board : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Kathy Montierth,

Appellant

v.

Utah State Retirement Board,

Appellee

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Appellate Case No. 20051022

**REPLY BRIEF OF APPELLANT
KATHY MONTIERTH**

**APPEAL FROM THE UTAH STATE RETIREMENT BOARD
DECISION AND ORDER**

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ORAL ARGUMENT REQUESTED

**FILED
UTAH APPELLATE COURTS**

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ARGUMENT

Appellee has advanced five positions: (1) there is no basis for considering Appellant's constitutional issues because they were not preserved below; (2) even if they were to be considered by this Court, they lack merit because Appellant has no property interest in the survivor annuity, and all constitutional processes "due" were offered at the hearing below; (3) Utah Code Ann. §49-13-405 has been misread by Appellant because, at the time of Mr. Montierth's death, he was a "retiree," not a member; (4) the AHO did consider the hearsay testimony of Appellant, and a specific finding in respect of that issue – "intent" – is not necessary; (5) with regard to the incomplete Retirement Application, it is sufficient to point out that Mr. Montierth's signature on Page 1 was notarized.

I. THERE IS NO LEGAL DIFFERENCE BETWEEN A "RIGHT" TO THE RETIREMENT BENEFIT, A "PROPERTY INTEREST" IN THE RETIREMENT BENEFIT, A "VESTED" PROPERTY INTEREST IN THE RETIREMENT BENEFIT, OR A "CONTRACTUALLY VESTED INTEREST" IN THE RETIREMENT BENEFIT.

In Appellant's Opening Brief, she went to some length to demonstrate the evolution and development of the courts' recognition, both here, and in California, of a non-employee spouse's legal interest in her husband's retirement benefit. After *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982) there should be no dispute that Mrs. Montierth had a legally protected interest in the retirement benefit, which virtually is recognized in all Utah dissolution decrees. Appellee argues, however, in syllogistic fashion, that actually, Appellant has no interest whatsoever. The argument is best appreciated on Page 12 of the Board's Brief.

- a. Public pension and retirement systems give rise to vested contractual rights.
- b. These vested contractual rights constitute a property interest.
- c. Accordingly, a person who has no vested contractual right does not have a property interest.

Therefore: Because Appellant did not have a vested contractual right, she has no property interest.

Fascinating logic, to say the least. The problem, of course, is that the syllogism ends with conclusion “c”. The statement about Appellant is a complete non-sequitur, disconnected to the major and minor premises above. Blithely stating that she does not have a property interest begs the central inquiry, ignores both *Woodward, supra*, the cases Appellee itself has marshaled to support its argument: *Hom v. Utah Dep’t of Public Safety*, 962 P.2d 95 (Utah Ct. App. 1998); *Utah Public Employees Ass’n v. State of Utah*, 2006 UT 9 (Utah 2006), is squarely at odds with Section 49-13-405, and explicitly contradicts a central premise of Appellee’s own argument.

Not necessarily in order of importance, we first examine *Hom v. Utah Dep’t of Public Safety*, 962 P.2d 95 (Utah App. 1998). In *Hom*, the issue was whether the plaintiff could use the Personnel Management Act, and implementing regulations, to establish an employment contract. The court said no, explaining that the contractually vested rights (to pension and retirement benefits) of a plan member are not analogous to statutory rights. *Id.* at 100. The court also remarked that retirement benefits “vest” when the employee attains retirement age. *Id.*

In *Utah Public Employees Ass’n v. State of Utah*, 2006 UT 9 (Utah 2006), the Supreme Court, against the backdrop of thousands of angry public employees, wrestled with whether a pending bill retroactively could alter the “cash-in or transfer” policy then applicable to sick leave benefits upon employment termination. The technical question, Judge Wilkins wrote, was whether the mere enactment of a statute constitutes a “taking” under the due process clause, which question, in turn, rested on whether plaintiffs had a protectable property interest in redeeming banked sick leave hours in a particular way. *Id.* at 12. Ultimately, the court said the employees did not. Both decisions, when read together as respects this case, recite first, the obvious: vesting occurs when pre-vesting conditions have been met; and, second, they fortify Appellant’s claim, by re-emphasizing that her husband had a contractually vested right to his retirement benefits, which, following *Woodward*, means she had the same right.

It is clear that Wes Montierth’s retirement benefits vested; indeed he paid \$35,817 to ensure that. (Transcript, pp. 38, 39, 42). We have demonstrated conclusively through *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988), *Estate of Frank Annelo, Jr. v. McQueen, et al.*, 953 P.2d 1143 (Utah 1998), and *Culbertson v. Continental Assurance Co.*, 631 P.2d 906 (Utah 1981), that without reservation, Utah courts recognize a non-employee spouse’s “right to” retirement benefits – once they vest. When Mr. Montierth’s retirement benefits vested, so did Appellant’s pursuant to *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982).¹ She is on equal footing with her husband regarding accrual and

¹ Appellee continues to resist this clear principle. On Page 46, n. 18, it writes: “Mr. Montierth owns any claim that he failed to complete the retirement application in some

vesting. Third, the Utah legislature has so clearly recognized this concept, that it has legislated a non-employee spouse's right to retirement benefits even if they do not technically vest. As we know, Section 49-13-405 bestows the annuity on a non-employee spouse if her husband dies before retirement, thus explicitly recognizing the spouse's interest in, and right to, the benefit as it accrues year to year. The Board appears mistakenly mesmerized by the concept of "vesting" when *Woodward* clearly stated the term is not definitive as a test of a spouse's claim to retirement property. *Id.* at 432-33.

The Board is left in the contradictory position of administering a retirement system that "gives" a non-employee spouse an annuity, pursuant to §49-13-405, prior to retirement "vesting," conceding that the retirement benefit of Appellant's husband vested upon his retirement, acknowledging that under *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561 (1976); *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982); *Estate of Frank Annelo, Jr. v. McQueen, et al.*, 953 P.2d 1143 (Utah 1998) and progeny, the concept of vesting is deemed irrelevant, and that both spouses have a protectable right to and interest in, retirement benefits, yet clinging to the indefensible position that Appellant has "no standing" to raise the instant claim because she does not have what they term is a

way," implying that only Mr. Montierth can have an interest in the benefit. Appellee's brief is replete with the assumption that Mrs. Montierth had no right to retirement benefits because: only a "member" can obtain vesting rights, only a "member" can submit a retirement application, and only a "member" has "contributions on deposit." Appellee's Brief, p. 38. The Board loses sight of the fact that retirement benefits vest, not members. The logical implication of the Board's view is that non-employee spouses in Utah have no right to the cars, home or checking account of their husband solely because he purchased them.

“vested contractual right.” The Board’s argument is baffling, and internally contradictory.

In response, Appellee argues, on Pages 34–39, that any reliance on *Woodward* is misplaced because: (1) *Woodward* only stands for the proposition that “non-vested” retirement benefits may be included in a marital estate; (2) the non-employee spouse has only a speculative potential contract right; (3) this “right to” does not exist until a court order so decrees; (4) a “right to” a percentage of the retirement benefit is not a property right; and (5) Utah Code Ann. §49-11-612(3)(a) proves this. Short shrift can be made of this improbable logic. First, a retirement benefit is property, personal property and so deemed by Utah courts. Black’s Law Dictionary, 8th Ed (1999), p. 1252, defines property as the right to possess, use, and enjoy a determinate thing: i.e., a right to ownership. Personal property means any movable or intangible thing subject to ownership and not classified as real property. The *Woodward* court, in discussing retirement benefits and vesting, said “[it] . . . is an inappropriate basis for determining what property should be subject to equitable division” *Id.* at 432-33. In *Greene v. Greene*, 751 P.2d 827, 831 (Utah App. 1988), the court held: “. . . retirement benefits accrued in whole or in part during marriage constitute mutual property under the Utah law . . . ” (emphasis added). To be sure, as in thousands of related or unrelated cases, it may take a court order to distribute the property equitably, but a court does not create the right as the Board confuses itself by so stating on Page 36, it enforces the right. Finally, Section 49-11-612(3)(a) actually disproves the Board’s assertion. This section expressly recognized

the “right to” defined contributions, allowances, death benefits, refunds by non-employee spouses, once it is directed “how” to divide them by a court.

Appellee also asserts that because Appellant is not a member (i.e., one who makes contributions) “she cannot . . . obtain a vested right, and thus maintains no individual property interest in her husband’s retirement benefit.” Appellee Brief, p. 39. It is hard to appreciate just how confused this reasoning is. It is the retirement benefit that vests, not members; they (along with their spouses) only own the right to the benefit. The Montierth retirement benefit did vest. Both Appellant and her husband therefore have a “right to” this vested benefit under Utah law. Indeed, both began securing a legally recognized right to this benefit from the first day the benefit started to accrue: “to the extent the right has so accrued, it is subject to equitable distribution.” *Woodward* at 432-33.

II. WAIVER, CLEAR ERROR AND EXCEPTIONAL CIRCUMSTANCES.

Understandably, the bulk of Appellee’s 47-page brief is spent arguing that Appellant has no standing to bring the constitutional arguments not articulated below.² Appellee’s somewhat repetitive argument misses completely the point advanced by Appellant and inexplicably does not even address two key issues.

A. Criminal Cases Have Limited Applicability

State v. Lopez, 886 P.2d 1105 (Utah 1994) [aggravated sexual abuse]; *State v. Winfield*, 2006 UT 4 (Utah 2006) [aggravated robbery]; *State v. Pecht*, 2002 UT 41, 48

² The record is clear that the associate representing Mrs. Montierth at the hearing did not raise them.

P.3d 931 (Utah 2002) [child sodomy]; *State v. Dunn*, 850 P.2d 1201 (Utah 1993) [second degree murder]; *State v. Irwin*, 924 P.2d 5 (Utah Ct. App. 1996) [sexual abuse]; *State v. Buford*, 820 P.2d 1381 (Utah Ct. App. 1991) [possession of controlled substance]; *State v. Holgate*, 2000 UT 74, 10 P.3d 346 (Utah 2000) [murder], are all criminal cases.

Certainly, they enrich the waiver discussion, but their holdings are limited for two reasons. First, each case dealt with a piece of evidence, or testimony, to which no objection was lodged at trial. Here, there is no claim of improperly admitted evidence, and no failed objection to analyze. Second, the policy consideration which supports waiver in these cases - that the trial judge should be given the opportunity to bring his/her experience and independent judgment to the objection -- again, is not present in this case. One can hardly equate an AHO, employed by the Board, or better yet, the Board itself (as final adjudicative officer), to an independent state court judge whose experience and principally based decision might assist the appellate court greatly. Indeed, we hear no argument from the Board, now sitting as Appellee advocate, that had it been given the opportunity below, it might have sustained a constitutional challenge to its own actions or administrative regulations. This silence conclusively exposes, as pretense, any implication that raising the arguments at the hearing would have helped. In short, the foundational pillars upon which the waiver argument rests, in a criminal case, are simply absent here.

B. The Exceptions to Waiver are not Technical

The Board goes to considerable effort to demonstrate that there are two, and only two, exceptions to waiver – plain error and exceptional circumstance, and that both are

demanding in precision. Actually, the opposite is the case, certainly with regard to exceptional circumstances.

The *Archambeau* court, which invariably is cited by all cases including the Utah Supreme Court, admitted that realistically the “exception categories” are “sufficiently broad to encompass any situation requiring a Utah appellate court’s consideration of a constitutional issue, for the first time, in the interests of justice.” *State of Utah v. Archambeau*, 820 P.2d 920, 926 (Utah Ct. App. 1991). The court explained that this “catchall” exception works as a “safety device”. *Archambeau* at 923. The Utah Supreme Court echoed this approach just two years ago.

Recently, we have applied the exception sparingly, reserving it for the most unusual circumstances where our failure to consider an issue that was not properly preserved for appeal would have resulted in manifest injustice. The Court of Appeals has aptly characterized the concept as a “safety device” against injustice. (citing *Archambeau*)

State v. Nelson-Waggoner, 2004 UT 29, 94 P.3d 186, 191 (Utah 2004). See also, *State v. Dunn*, 850 P.2d 1201, 1216 (Utah 1993), (we have discretion to address claims not raised at trial under exceptional circumstances and to avoid a miscarriage of justice).³

With regard to plain error, in an advertent way, the Board has boot-strapped its own argument with respect to this doctrine, particularly if the test is subjective. Under *State v. Archambeau*, 820 P.2d 920, 922 (Utah Ct. App. 1991), the error must be obvious

³ In a confusing discussion on Pages 17-18, n. 4, the Board argues that the concept of manifest injustice may be confined to objections raised under Rule 19(c) of the Utah Rules of Criminal Procedure. The Board’s analysis is based on *State v. Irwin*, 924 P.2d 55, n. 5 (Utah Ct. App. 1996), but nothing in *Irwin* is so limiting.

to the trier of fact. If the Board cannot understand the Appellant's constitutional claims here, on appeal, *infra*, when they have been spelled out in detail, it seems particularly true that they would not have been obvious to either the AHO or the Board below.

C. The Board Failed to Respond to the "Exceptional Circumstance" Advanced by Appellant.

Important by its absence, the Board mentioned only in passing "the circumstances" Appellant has offered as exceptional, yet this analysis should have been the centerpiece of its response. The sole reference is found on Page 31, n. 12. The Board simply identifies them, and then dismisses their importance as being "modest" examples only, and not previously recognized by appellate courts.

The underlying merits of this case are so compelling, and the damage to the Montierth family so great, however, these alone would warrant initial review on appeal. A mother and four children have now lost their lifetime source of income, over \$800,000. They were relegated to this position because the Board failed to give her notice, or opportunity to object, to her husband's election of Plan 1, which stripped her of a benefit all courts in Utah definitively say she has: a right to public retirement benefits. At another level going forward, the system the Board has used, and is using, to administer its retirement-election-survivor-annuity program is devoid of any "notice and opportunity to object" mechanism; it is not Montierth specific. Hence, this system, or lack thereof, does presently, and will hereinafter continue, to impact scores of women each year who are disenfranchised by a sloppy, unstable or deliberately uncharitable husband. Because this flavor of constitutional denial will continue into the future, it takes the instant

“circumstances” completely out of the normal case-specific injury category. Whether exceptional circumstances, manifest injustice, or in the interests of justice, is the correct label, is immaterial; the catchall niche of the waiver doctrine appears inescapable in this special context. And yet, the Board did not devote a single line to these circumstances. Rather, it dismissively stated “Petitioner cannot point to any exceptional circumstances . . . to invoke the exception.” (Appellee Brief, p. 31). That was it.

Also ignored by the Board is an equally compelling reason to trump the waiver doctrine. The very heart of the policy supporting waiver is the assumption that timely raising an issue will allow the trial court to deal with it, perhaps even resolve the issue. But as alluded to above, that consideration is nowhere to be found in this setting. It is highly improbable that an AHO would ever conclude that the Board’s pre-election retirement scheme was unconstitutional, no matter how scintillating the argument advanced. And certainly the Board, by rigidly defending its actions here as a party litigant, cannot now protest that, had it heard these very claims when it was sitting as “final arbiter” six months ago, it might have ruled against itself.⁴

Finally, and dispositive, Utah courts have held, without exception, that little, or no, deference is paid to the Board’s analysis of legal issues. *Gottfredson v. Utah State Retirement Board*, 808 P.2d 153, 154 (Utah App. 1991) stated it best: because the appeal presents an issue of law “we therefore apply a correction-of-error standard where we extend no deference to the agency’s conclusions.” To the same effect is *Horton v. Utah*

⁴ It is telling to note that, if the Board had thought any position of Appellant was meritorious on appeal, it would have sought a remand from this Court to consider the case. It did not.

State Retirement Board, 842 P.2d 928, 931 (Utah App. 1992). In *Johnson v. Utah State Retirement Office*, 621 P.2d 1234, 1238 (Utah 1980), noted previously, the court cynically, but accurately, observed that agencies do not generally determine the constitutionality of their organic legislation.

Both the Board's unlikely independence as a trier of fact, and the limited deference given to its legal interpretations of constitutional law, reinforce the injunction of futility. The doctrine of futility is invoked both successfully and unsuccessfully in many contexts by Utah courts. *Andalex Resources, Inc. v. Meyers*, 871 P.2d 1041, 1046 (Utah Ct. App. 1999) (leave to amend unnecessary if futile); *Hipwell v. IHC Hospital*, 82 P.3d 1076 (Utah 2003) (motion to amend futile if new action is moot); *Patterson Const. v. American Fork City*, 2003 UT 7; 67 P.3d 466 (Utah 2003) (futility of exhausting administrative remedies, denied); *First Security Bank of Utah v. Creech, et al.*, 858 P.2d 958 (Utah 1993) (motion to lift stay an exercise in futility, dissent); *State of Utah v. Dale*, 681 P.2d 1210 (Utah 1984) (futility of ruling on two motions on the same ground); *Rice, Melby Enterprises v. Salt Lake County*, 646 P.2d 696 (Utah 1982) (entering into contract, because of the futility of refusing to do so); *Ludahl v. Larson*, 586 P.2d 439 (Utah 1978) (request, even if granted, would make no difference); *Mills v. Gronning, et al.*, 581 P.2d 1334 (Utah 1978) (for employee to have a "good cause" basis for his grievance, he must first attempt to work out problem); *Nuzum, et al. v. Construction and Mining Corp., et al.*, 566 P.2d 1144 (Utah 1997) (an appellate review would be futile if it amounted to rubber-stamping Industrial Commission orders); *L.W. Flynn v. W.P. Harlin Const.*, 509 P.2d 356 (Utah 1973) (futility of a trial by a jury, if judge is going to set it aside); *State of*

Utah v. Belwood, 494 P.2d 519 (Utah 1972) (no reason to grant a new trial solely on a technical error, if the result will be the same). A review of some fifty Utah cases on this point show that there is no elegance to the definition of futility: it is simply invoked whenever common sense demonstrates that the challenged action, or lack thereof, would not have mattered anyway.

Thus, with respect to each “exceptional circumstance” – the catastrophic harm to the Montierth family – the ongoing nature of the problem statewide – the obvious implausibility of the Board ruling against itself below – and the lack of deference paid to the Board’s legal analysis by Utah courts – the Appellee was non-responsive. Whether it misunderstood the importance of this piece, or simply had nothing to offer, its silence is particularly remarkable on a key issue.

III. THE BOARD HAS CONFUSED THE CONSTITUTIONAL ISSUES HERE BEING CHALLENGED.

The Board has organized a very effective argument that due process considerations were fully met in the context of the administrative hearing. On Pages 11 and 12, and on Pages 33 – 34, the Board argues successfully that Appellant had a right to counsel, did have counsel, received notice of the hearing, called a witness, and presented argument.⁵ The Appellee concludes “. . . Petitioner received all the process she was

⁵ The key section heading reads “. . . The Board Granted Petitioner Constitutional Procedural Due Process by Granting Her a Full and Fair Hearing.” The title is pregnant with one implication. It does not matter what the Board failed to do constitutionally in processing the retirement selection; all is cured by affording an administrative hearing.

due. . . .” This statement is correct, but completely irrelevant. There is no claim of due process denial at the hearing.

The issue, indeed the epicenter of Appellant’s Brief, is the constitutional denial of *notice and opportunity to object to her husband’s pre-retirement selection on August 16, 2002, two years before the hearing.* This argument is spelled out in detail on pages 11-14 in Montierth’s Brief, in a section entitled: “III. Petitioner Has Been Deprived of Property in Violation of the Utah and United States Constitutions By Failing to Provide Notice and Opportunity to Object.” The only rejoinder offered by the Board to the precise constitutional question advanced by Appellant is found on Page 33. The Board simply noted: The argument “makes no cognitive sense.” It did not explain or defend its pre-retirement application system. It simply said nothing. Although it is unclear why, in 47 pages of brief the Board devoted but a single sentence to the issue, seemingly oblivious to the importance of the argument. Indeed, it came close to insulting the Montierth family by stating: “One must wonder what kind of harm Petitioner believes that she has suffered by not being able to bring a claim at the time her husband made his retirement plan election (since she was able to challenge it after he died).” Appellee Brief, p. 34.

Perhaps Mrs. Montierth and her four minor children could “wonder” about the loss of \$800,000, for starters. Either the Board conceded the argument, or became so enamored with an easier, but irrelevant target – due process at the hearing -- that it completely missed the issue. Thus, in sequence, first exceptional circumstances, and now the constitutional issues, the Board has chosen not to confront a linchpin Appellant position.

IV. POINT BY POINT REJOINDER TO UNRELATED POSITIONS ADVANCED BY THE BOARD.

A number of arguments or statements advanced by the Board are better handled by subsection rejoinders.

A. Hearsay or Not Hearsay.

Hearsay, in any context, can be difficult, but when the issue is “belief,” it is often black ice. The question is Mr. Montierth’s belief as to what he did, not what he said he did, not what he did. As we tried to state precisely on page 17: the statement he made to his wife (that she would be covered if he died) was offered to demonstrate that he actually believed he had selected a plan that protected Appellant. There was no other evidence as respects what he believed he had done – only the application showing what he did. Mistakenly, the Board takes this as direct evidence of intent: “Mr. Montierth’s notarized statement . . . shows his express intent to select retirement Plan One.” Appellee Brief, page 20, n. 6. No, it only shows that he signed the document. Mr. Montierth never said he made a mistake. Just the opposite, he seemed to express the belief that he had correctly chosen a plan which contained a survivor annuity. The importance of this piece of evidence is apparent when coupled with the incomplete Application for Service Retirement. Neither the AHO nor the Board ever directly confronted the obvious connection between the two when it made its finding. . . (no evidence to support the claim that Mr. Montierth mistakenly selected Plan 1).

B. Incomplete Application for Retirement Benefits.

Given the reinforcement by the Utah Supreme Court in *Utah Public Employees Association v. State of Utah*, 2006 UT 9 (Utah 2006), that public employee pension and retirement benefits are contractual in nature, the incomplete “Application for Service Retirement” becomes all the more important. Since there is a clear issue going to what Mr. Montierth believed he was doing, then page 2 of the Application (the contract), which relates specifically to “understanding the choice made” becomes all the more important in establishing the “meeting of the minds” requirement of contract formation. The Board’s answer to this assertion is found on Page 14 of its Brief. Citing Utah Code Ann. §49-13-401, the Board argues that once Appellant’s husband submitted a notarized signature and a selection retirement date, the “retirement application was complete.” The Board dismisses, without comment, any mention of the second page.

Utah Code Ann. §49-13-401(b) is a “qualifying” predicate to eligibility, it hardly speaks to the issue raised. Second, the document remains problematical as an inspection shows. It is signed on August 16, 2002, yet the 16th of July, one month earlier, is selected as a retirement date, and apparently he had not worked since May 30th, two months earlier. The box above his signature reads, “I understand the limitations as described on the reverse side of this form.” However, the absence of his signature on the reverse side, which reads, “The above statements and options have been reviewed with me by a counselor,” deepens the suspicion that it was filled out quickly with no care,

completeness or understanding.⁶ Despite this deficiency, this is “the” document the Board produces as conclusive evidence that Mr. Montierth waived his wife’s right to an \$800,000 survivor annuity. We recall at this juncture the observations of *Eldredge v. Utah State Retirement Board*, 795 P.2d 671, 676 (Utah App. 1990) that this document represents “. . . the irrevocable one-in-a-lifetime retirement decision . . . (which) imposes a strict duty of certitude upon those charged with the supervision and implementation of the system.” At the very least Montierth is owed an explanation as to why this second page remained unsigned. But at a more fundamental level, why, we ask rhetorically, is the Board’s stringent duty as a fiduciary left in the hands of administrators who only “presume” that the retiring member understands his selection, and who make no effort to scrutinize, question and carefully explain the consequences of an election, particularly one that disenfranchises a spouse. It is recalled that Mrs. Montierth’s name is clearly set out on page one.

C. Not Designating the Section Being Reviewed Under §63-46b-15(4).

The admonition in *King v. Industrial Com’n of Utah*, 850 P.2d 1281, 1287 n.7 (Utah App. 1993)⁷ is well taken, but realistically not in play in the instant matter because Appellant’s attack is broadly constitutional in nature and does not focus on a specific Board interpretation of a statute. In *King*, the claimant sought reversal of the IC’s order

⁶ Charged with fiduciary responsibility, and given the fact that the second page admonition is of the Board’s own creation, it is exasperating that the Appellee simply ignores page two. To the same effect is the statement on Page 47 of its Brief to the effect that Montierth did not present a “scintilla” of evidence to show that page two was incomplete. It is almost as though the Board tries to “pretend-away” evidence or law it does not like.

⁷ The correct citation is n.6.

denying him temporary disability. The question in *King*, unlike here, was what standard of review is applicable when the court reviews a Board interpretation of a statute with respect to which discretion has been granted. The court did re-emphasize the review standard applicable here: “The standard we apply when an agency interprets or applies general law . . . constitutional law . . . our review . . . (is) a correction of error standard, giving no deference to the agency’s decision.” *Id.* at 1285. See also, *Epperson v. Utah State Retirement Bd.*, 949 P.2d 779, 781 (Utah App. 1997).

The Board also cites Utah Code Ann. §49-11-203(1)(k) on page 5 of its Brief, for the proposition that because the Board is charged to develop broad policies and programs, its interpretation must be upheld if reasonable and rational. That may be true, but for the same reasons just explicated, is irrelevant here: The Board did not interpret anything.

D. The Reach and Implication of Section 49-13-405(2)

Appellant has argued that on its face, Utah Code Ann. §49-13-405(2) allows a spouse to request that her husband be deemed to have retired under Plan Three when he dies. Appellee, as anticipated, claims, on Page 19 of its Brief, that Utah Code Ann. §49-13-405(2) is limited to members who die before retirement, relying on the definition of “member” in Utah Code Ann. §49-11-102(23)(a).⁸ The Board explains the policy behind Utah Code Ann. §49-13-405(2) as follows: “Those members with long-term service to the public who die not having retired and selected a retirement option, are allowed a continuing benefit to their spouse,” while those who have elected a plan are excluded.

⁸ The Board cites incorrectly to §49-11-102(22) which applies to inactive members. Appellee Brief, p. 19.

(Appellee Brief, p. 40). Yes, that accurately describes what happens, but it doesn't explain why it happens. The real problem with allowing Mrs. Montierth the same right, argues the Board, is that it would frustrate the "actuarial soundness" of the Plan. The Board is concerned that all plan participants would elect option one which pays out a slightly higher monthly benefit, then switch to Plan 3 upon death. That concern, which can be real, is easily remedied by offsets down the line, which Appellant specifically requested. (See letter of February 15, 2005, from Crofts to Newman). The difference in treatment, we submit, remains unconvincing since it creates two classes of spouses with identical constitutional rights. One receives a survivor annuity, even though the retirement benefit has not technically vested because of the premature death of her spouse. The second receives nothing, even though the retirement benefit has vested, because of the sloppy, unstable or deliberate lack of charity of her husband. Both spouses are innocent of any wrongdoing, and neither participated in a retirement selection decision.

V. THE BOARD CONCEDED KEY ARGUMENTS BY FAILING TO RESPOND.

Despite the length and breadth of the Board's Brief, it ignored a panoply of central arguments advanced by Appellant.

It failed to respond to the "exceptional circumstances" set forth by Appellant (the harm to the Montierths, etc.), or the futility of presenting the constitutional issues below. Instead, it ground away at the technical requirements of plain error in the context of criminal cases. It missed, or misunderstood, the nature of the constitutional challenge,

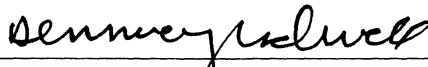
focusing instead on due process requirements at the hearing. It tiptoed around *State of Utah v. Archambeau*, 820 P.2d 920 (Utah App. 1991), a case cited by all courts, which held that waiver could be overcome “in the interests of justice.” Indeed on Page 17 of its Brief, it denied the holding: “This is simply untrue.” It never explained, or defended, a system that fails to provide a non-employee spouse with an opportunity to review her husband’s retirement plan selection before she is divested, or the obvious inconsistency between that system, and the policy under §49-13-405(2), which awards a survivor benefit to wives of “members” prior to vesting. It ignored, without comment, the prevailing Utah law requiring clear and specific waivers before property rights can be relinquished. It did not rebut Appellant’s argument that the Board is a fiduciary and owed a fiduciary duty to all members (which includes spouses). And, it seemed unconcerned that page 2 of the Application for Service Retirement Benefit was unsigned, shrugging off, without comment, Judy Lund’s statement that the Board only “presumes the member has selected the right plan” and does nothing else to verify it (in violation of its own page 2 requirement). Finally, it does not identify the standard of review for decisions of law by the Board – no deference – but instead cites inapplicable case law dealing with code section interpretation.

CONCLUSION

For all the foregoing, we respectfully request that the appeal be granted on the terms previously stated: (1) that the Application for Service Retirement be disregarded as incomplete and legally ineffective, and that her 2005 request to receive the annuity be

granted under §49-13-405(2); or alternatively, (2) that the legislative and administrative scheme here discussed be declared unconstitutional, that the Board be reversed, and that the ALJ be ordered to grant Appellant her annuity; or in the event the Court seeks the Board's view of the constitutional issues raised in this proceeding, (3) that a remand to the Administrative Law Judge be made pursuant to *Johnson v. Utah State Retirement Office*, 621 P.2d 1234 (Utah 1980).

RESPECTFULLY SUBMITTED this 29 day of March, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT KATHY MONTIERTH, were mailed by first-class mail with postage fully prepaid this 29th day of March, 2006, to each of the following:

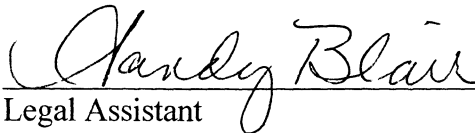
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