

1995

# Mary Elizabeth Colburn v. James Robert Colburn : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

IN THE COURT OF APPEALS  
STATE OF UTAH

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MARY ELIZABETH COLBURN, )  
Plaintiff and Respondent, ) Case No. 950225 CA  
vs. )  
JAMES ROBERT COLBURN, ) Priority No. 15  
Defendant and Appellant. )

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REPLY BRIEF

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Appeal from Judgment  
Entered in the Third Judicial District Court  
for Summit County, State of Utah

Honorable Glenn K. Iwasaki  
District Court Judge

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**FILED**

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COURT OF APPEALS

IN THE COURT OF APPEALS

STATE OF UTAH

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Plaintiff and Respondent, ) Case No. 950225 CA  
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## ARGUMENT

### POINT I.

THERE IS NO EVIDENCE OF JOB OPENINGS AVAILABLE TO MR. COLBURN UTILIZING HIS SKILLS AND EXPERIENCE. IF THE COURT IMPUTES INCOME TO MR. COLBURN IT SHOULD BE CALCULATED AT \$23,000 WHICH IS THE HIGHEST JOB OFFER RECEIVED OR \$26,600 WHICH IS THE SALARY FOR STARTING FINANCIAL PLANNERS.

Both briefs filed in this action cite Hall v. Hall, 858 P.2d 1018 (Utah App. 1993) for the legal principal that a finding of voluntary underemployment must be based on Mr. Colburn's abilities, employment capacity, earning potential and possible job openings available. Mrs. Romboy testified that Mr. Colburn had abilities and skills that could be transferred to employment as either a public relations manager or management consultant. However, there was no testimony presented at trial that there were job openings available in either of these fields. Further, it is mere conjecture that Mr. Colburn who was fifty-one years of age and without experience in these areas could land a job in either public relations or management consulting.

A review of Respondent's brief gives an inaccurate and distorted picture of the efforts made by Mr. Colburn to secure employment after being forced to resign from Southern Marine and Aviation Underwriters. There are a number of representations that are either taken out of context or do not provide a complete picture. Paragraph 12 of Respondent's Statement of Facts provides:

12. After resigning from Southern Marine and Aviation Underwriters, Defendant contacted three (3) or four (4) individuals, and attended one (1) interviews seeking employment. (Tr. 39, 94)

Page 39 of the transcript relied on for the foregoing paragraph provides:

Q (By Mr. Anderson) To the best of your knowledge did he attempt to find full-time employment after resigning from Southern Marine and Aviation?

A (Mrs. Colburn) Well, he initially made some calls around the country. We took sort of a driving vacation in the southeast and he went to Atlanta, talked with a company there, but to my knowledge that's the only actual interview he had. And he had it in his mind that he really wasn't going to work, he was going to start his own business.

Mrs. Colburn's self-serving testimony completely ignores the testimony of Mr. Colburn that he spent months seeking employment both in and outside of the aviation insurance industry. Mr. Colburn testified he contacted head hunters, all of his previous contacts and six or seven companies within the aviation industry and there were no employment offers for senior aviation insurance underwriters. (Tr. 93,96,97; R.212 ¶ 8 FOF).

Page 94 of the transcript is also relied on to support paragraph 12 of Respondent's Statement of Facts. On page 94 there is a reference to three or four individuals Mr. Colburn contacted that had contacts with reinsurance treaties. As set forth above, these people are not the only individuals contacted by Mr. Colburn for employment.

Paragraph 13 of Mrs. Colburn's Statement of Facts provides:

13. Defendant declined to seek employment in other areas of the insurance business, and turned down two (2) job offers. (Tr. 98).

Mr. Colburn sought employment in areas other than aviation insurance or he would have not contacted the Marine division of Southern Marine and Aviation Underwriters or New York Life and I.D.S. for employment. The two job offers turned down were \$13,000 a year for New York Life and \$23,000 per year for I.D.S.. (Tr. 90,98; R. 212 ¶ 8 FOF).

Paragraph 14 of Respondent's Statement of Facts states:

14. Defendant declined to seek employment outside of his specific areas of expertise in the aviation insurance industry, desiring instead to start his own business as a financial planner in Park City. (Tr. 98,99,100,101).

As set forth above, Mr. Colburn sought employment outside of the aviation insurance industry. There were areas of employment he did not consider for various reasons. He did not consider the automobile insurance business because he would have to learn a whole new trade and in the long term he could make more money as a financial planner. He did not consider becoming a pilot because he had not flown an airplane for fifteen years and he was not aware of any jobs other than flying co-pilot which would earn less than \$20,000 per year. (Tr. 98-101).

Paragraph 18 in Respondent's Statement of Facts provides:

18. Defendant was requested by the President of VEMCO to head up its commercial department. (Tr. 180).

Page 180 of the Transcript provides:

Q (by Mr. Anderson) You stated when you were let go from National Underwriters that you weren't-- you couldn't find another position. Isn't it true that you were offered a position with VEMCO in Frederick, Maryland?

A (Mr. Colburn) Yeah, but I don't think -- the chairman just said that he wanted me to head up the commercial department, which was going backwards, and it was just something he said I think to appease me. There was no actual job offer. (Emphasis added).

Paragraph 19 of Mrs. Colburn's Statement of Facts provides:

19. Defendant testified that he did not look for employment in other areas of the insurance industry because he was tired of getting bumped out of the corporate jobs. (Tr. 180).

Mr. Colburn looked for employment in aviation and other areas of



the insurance industry. Mr. Colburn did testify he was "tired of getting bumped out of these corporate jobs". However, this statement refers to his being terminated as an aviation insurance executive with both National Aviation Underwriters and Southern Marine and Aviation Underwriters. It does not mean Mr. Colburn wasn't attempting to seek other employment.

The body of Respondent's Brief also distorts the facts of the case. Page 22 and 23 of Respondent's brief provides:

The similarity between the facts in Hill and the case at bar are striking. In justifying his decision to become a self-employed financial planner earning \$260.00 per month, Defendant continually asserted he chose to do so because that is where his education and interests lie. (Tr. 180). This choice was made at the expense of the opportunity to make a higher salary in a job less related to his expressed desire to become a fee-only financial planner. While Mr. Colburn is free to make such a personal decision, in light of the ruling in Hill, his personal preferences should not undermine his obligations to support Mrs. Colburn.

In Hill v. Hill, 869 P.2d 963 (Utah App. 1993), the husband quit his job at Morton Thiokol and obtained employment in Utah County at a substantial decrease in salary. Mr. Colburn did not quit his employment with either National Aviation Underwriters or Southern Marine and Aviation Underwriters. He was terminated by both employers as a result of the contracting aviation industry. Mr. Colburn chose to become a certified financial planner (CFP) because there were no jobs available in aviation insurance and he felt financial planning provided the best long-term employment prospects available.

Under the facts and circumstances of this case, Mr. Colburn's position as set forth in Appellant's Brief is that he is not voluntarily underemployed and the court pursuant to Section 78-45-

7.5(7)(a) is not authorized to impute income. However, should the court determine that income should be imputed for the purposes of calculating alimony, the court should use \$23,000 per year which is the highest job offer received by Mr. Colburn, or \$10.00 per hour (approximately \$21,000 per year) based on Mr. Colburn's testimony that he could earn \$10.00 per year working for another financial planner. (Tr. 156). The maximum amount of income the court is justified in imputing to Mr. Colburn based on the testimony of Connie Romboy is \$26,600 per year which is her testimony of the salary for a beginning financial planner in the State of Utah. (Tr. 128).

#### POINT II.

THE ALIMONY AWARD TO MRS. COLBURN CONSTITUTES AN ABUSE OF DISCRETION WHETHER OR NOT INCOME IS IMPUTED TO MR. COLBURN BECAUSE IT RESULTS IN UNEQUAL POST-DIVORCE LIVING STANDARDS.

As set forth in Point II of Appellant's Brief, alimony should seek to the extent possible to equalize the parties' respective post-divorce living standards. However, alimony may only raise the standard of living of the receiving spouse until it is roughly equal to that of the paying spouse. Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988), Howell v. Howell, 806 P.2d 1209 (Utah App 1991). The alimony award in this case results in disproportionate standards of living for the parties even if Mr. Colburn is imputed income at \$40,000 per year.

Both parties agree that Mrs. Colburn has gross monthly resources of \$4,729.00 per month. Mr. Colburn claims that using \$40,000 per year or \$3,333.33 per month in imputed income, his gross monthly available resources are \$4,764.43. This amount is calculated as

follows:

<u>Amount</u>	<u>Description</u>
\$3,333.33	Imputed Income
1,125.00	Non-IRA earnings
<u>306.10</u>	ULTRA earnings
\$4,764.43	TOTAL

In Respondent's Brief it is alleged that Mr. Colburn has gross monthly resources of \$5,028.43 which is \$264.00 more than that claimed by Mr. Colburn. The \$264.00 difference is assumed to be Mr. Colburn's earnings from Summit Financial Advisors Group. It is clearly improper to add the \$264.00 per month actual earnings to the \$3,333.33 imputed income. Accordingly, Mrs. Colburn's actual monthly resources is only \$35.00 less than Mr. Colburn's monthly resources using imputed monthly earnings of \$3,333.33.

While the parties resources using imputed income for Mr. Colburn are similar, there is a tremendous disparity in the standard of living of the parties as evidenced by their claimed expenses. Mrs. Colburn's expenses total \$3,906.30 whereas Mr. Colburn's expenses total \$2,179.00 per month which includes a \$704.00 child support obligation. When child support is factored out, Mr. Colburn lives on \$1,475.00 per month.

A comparison of some of the expenses of the parties clearly establishes the disproportionate living standards:

<u>Expense</u>	<u>Mrs. Colburn</u>	<u>Mr. Colburn</u>
Rent or Mortgage payment	\$1,500	\$400
Food & household supplies	\$ 600	\$200
Entertainment	\$ 600	\$200
Auto expense	\$ 200	\$150
School	\$ 350	\$0

In the five items set forth above, Mrs. Colburn's expenses are \$2,300.00 more than Mr. Colburn. These expenses reflect a substantial difference in standard of living relating to housing, food, entertainment and education. While there is only a \$50 difference in auto expense, it should be noted that Mr. Colburn's auto expenses are less for his 1982 Volvo than Mrs. Colburn incurs for her 1993 Subaru.

While Mrs. Colburn's living expenses should be somewhat higher inasmuch as she is the custodial parent for the two minor children, there is no justification for a discrepancy in living expenses of \$2,431.30. Further, as noted in footnote 4 of Respondent's Brief, the parties' oldest child attained 18 years of age and graduated from high school in June, 1995 which further reduces Mrs. Colburn's household expense.

Respondent argues that with \$3,330 imputed monthly income to Mr. Colburn, he is able to pay his expenses, including alimony, and still maintain about the same positive cash flow as Mrs. Colburn (\$1,849.43 vs. \$1,823.00). This argument fails to take into consideration that Mr. Colburn's ability to generate gross monthly income as calculated by Respondent is \$264.00 too high and the standard of living of the parties is not equal. Mr. Colburn should not be penalized nor Mrs. Colburn rewarded because Mr. Colburn's living expenses are \$2,431.30 per month (\$3,906.30 less \$1,475) less than Mrs. Colburn's. Further,

if Mr. Colburn is imputed income at \$26,600 year or \$2,217 per month (see Point I, supra), his gross monthly imputed resources of \$3,648 are \$1,081 less than Mrs. Colburn's actual gross monthly resources exclusive of alimony.

Respondent's Brief indicates that Mrs. Colburn's monthly expenses "did not include amounts normally used for regular savings and family vacations, which had been substantial in the past." Mr. Colburn's expenses also do not include regular savings or vacations. Without taking into consideration the alimony award, Mr. Colburn has a negative cash flow of \$484.00 per month while Mrs. Colburn has a positive cash flow of \$823.00 per month. Mrs. Colburn also argues that her positive cash flow of \$823.00 per month completely ignores all tax consequences and her regular taxes and deductions consume her positive cash flow. If the court takes into consideration taxes, it should consider tax consequences to both parties. As set forth on page 20 of Appellant's Brief, Mr. Colburn is required to earn \$80,311.58 per year just to meet his financial obligations of \$3,179.00 (includes alimony) per month when taxes are taken into consideration.

### POINT III

THE TRIAL COURT WAS PROVIDED SUFFICIENT EVIDENCE TO CALCULATE MR. COLBURN'S RETIREMENT BENEFITS UNDER THE NAVY POINT SYSTEM. THE NAVY POINT SYSTEM IS CONSISTENT WITH WOODWARD.

In Respondent's Brief it is alleged there was insufficient evidence presented at trial for the court to determine that the true value of Mr. Colburn's retirement is measured by the Navy point system and the court was without a reliable means of determining how to

translate the accrued points into a set monetary value. This position fails to take into consideration the court's admission of Exhibit 20 and receipt of a copy of In Re Marriage of Poppe, 97 Cal.App.3d 1, 158 Cal.Rptr. 500 (1979). With respect to admission of Exhibit 20, the transcript provides:

MR. CHRISTIANSEN: We would renew our admission for Exhibit 20.

THE COURT: All right. I am going to allow admission of D-20 and as to what weight would be my determination regarding whether-- what weight and to the applicable law in effect. (Tr. 117)

During closing arguments, the navy point system and the Poppe decision were specifically argued. (Tr. 212-214). Mr. Colburn's counsel argued in part as follows:

Now the benefits accrued during the marriage in terms of Navy retirement are the points that Mr. Colburn receives from the U.S. Navy. And those points are set forth on Exhibit 20, a letter from the U.S. Navy. And she [Mrs. Colburn] is certainly entitled to one-half of the benefits that Mr. Colburn receives for retirement during the 21-year marriage.

Now the fact of it is he was on active duty before their marriage and she is not entitled to those points, based upon the Poppe decision I provided to the Court. I don't find anything, you Honor, inconsistent with Poppe and Woodward.

If evidence regarding the naval point system had not been introduced at trial, Mrs. Colburn's attorney would certainly have objected to the foregoing argument and the court would not have allowed the same.

Application of the naval point system is consistent with Woodward v. Woodward, 656 P.2d 431 (Utah 1982). Woodward specifically provides with respect to retirement benefits that "to the extent that

the right has so accrued it is subject to equitable distribution". 656 P.2d at 433. Over sixty percent of Mr. Colburn's retirement benefits accrued prior to marriage when Mr. Colburn was on active duty. Accordingly, Mrs. Colburn is not entitled to the benefits which Mr. Colburn accrued prior to marriage. Based on the evidence presented during trial, Mrs. Colburn's retirement award is computed by multiplying one-half times the fraction 939/2409 times the amount of the pension or 19.5% of Mr. Colburn's Navy retirement. This information was available to the trial court and is consistent with the Woodward decision.

#### POINT IV

#### MR. COLBURN HAS SATISFACTORILY MARSHALLED THE EVIDENCE RELATING TO THE ISSUE OF VOLUNTARY UNDEREMPLOYMENT.

Point I of Respondent's Brief contends that Mr. Colburn has failed to satisfactorily marshal the evidence relating to the issue of voluntarily underemployment. Specifically, it is alleged that there was a failure to marshal the evidence in the following areas:

- (1) Omission of Mr. Colburn's position as a high level executive during most of his career, serving as President and C.E.O. National Aviation Underwriters from 1986 through 1988 and Vice-President Southern Marine Aviation and Underwriters from 1988 through 1992;
- (2) Failure to note Connie Romboy's testimony that it is essential to look at the transferability and marketability of skills obtained as a result of defendant's employment as a high level executive to accurately determine what he might make in the current labor market;
- (3) Failure to note that Mr. Colburn declined to accept employment outside of the aviation insurance industry and that he was asked to head of the commercial department of VEMCO; and,
- (4) Failure to refer to evidence of career possibilities that exist outside of operating his own business including employment as a pilot and other opportunities inside the field of financial planning.

A careful review of Mr. Colburn's Brief reflects that each of the foregoing alleged omissions were addressed in Appellant's brief.

Past Employment. Paragraphs 4, 5 and 6 of the Statement of Facts in Appellant's Brief clearly set forth that Mr. Colburn worked for National Aviation Underwriters from 1971 through February, 1988 and Southern Marine and Aviation Underwriters from May, 1988 until 1992 and stated his salary for the six years prior to trial. Page 14 of Appellant's Brief specifically provides "the court also found that Mr. Colburn with his education and experience as a high level executive in the insurance industry and an officer in the United States Navy had acquired qualification skills to be transferred to different or other fields of employment". Accordingly, there was not an omission as to Mr. Colburn's past employment.

Transferability of Job Skills. The issue of transferability and marketability of job skills was also addressed as evidenced by the above quoted language. Further, page 15 of Appellant's Brief contains the actual dialogue between the court and Connie Romboy regarding the issue of transferability of job skills with a statement by Ms. Romboy that she specifically looked at two areas for transferability, those being the areas of marketing and public relations manager and management consultant. Appellant's Brief then cited Mrs. Romboy's testimony regarding the salary range for both a public relations manager and a management consultant.

Employment with VEMCO or outside of Aviation Industry. Contrary to the allegations set forth in Respondent's Brief, Mr. Colburn was not offered the job of heading up the commercial department of VEMCO.



(p.3 supra) Further, paragraph 7 of Appellant's Statement of Facts and page 17 of Appellant's Brief refer to Mr. Colburn receiving job offers of \$13,000 and \$23,000 per year which were rejected.

Failure to Consider other Career Opportunities Including a Pilot and other Areas of Financial Planning. Page 16-17 of Appellant's Brief specifically addresses Mrs. Romboy's testimony that Mr. Colburn "has job skills and education which could be transferred to other employment such as a co-pilot (average salary \$28,000-\$30,000)". However, Mr. Colburn testified he has not flown an airplane for fifteen years, does not currently have a valid medical, has eye sight problems, does not have an A.P.P. rating, and companies are not hiring 50-year old pilots. (Tr. 164-166, 190).

Appellant's Brief also included the prospect of Mr. Colburn working for another financial planner and Ms. Romboy's testimony relating to salaries for a beginning financial consultant. Page 17 of Appellant's Brief provides:

Mr. Colburn testified he could earn \$10.00 per hour working for another financial planner and Connie Romboy testified that a beginning financial planning consultant would earn \$28,000 per year nationally or \$26,600 in the State of Utah.

Mr. Colburn adequately marshalled the evidence relating to the issue of voluntary underemployment by addressing his job qualifications and work experience and the testimony of Connie Romboy relating to the transferability and marketability of skills he obtained through his past employment. Accordingly, Respondent's argument that Appellant's Brief fails to satisfactory marshall the evidence is not well founded.


### CONCLUSION

Mr. Colburn made a prudent business decision to become a certified financial planner because it was the best long-term job opportunity available. Accordingly, he is not underemployed and underemployment is a statutory requirement before income can be imputed. Should the Court determine that Mr. Colburn is voluntarily underemployed, income should be imputed at a maximum of \$26,600 per year which is the trial testimony regarding the starting salary for a financial planner. There was no evidence presented regarding job openings available to Mr. Colburn at a higher salary.

The trial court clearly abused its discretion in awarding alimony whether or not income is imputed to Mr. Colburn. Alimony may only raise the standard of living of the receiving spouse until it is roughly equal to that of the paying spouse. As evidenced by the disproportionate expenses of the parties, Mrs. Colburn's standard of living is substantially higher than that of Mr. Colburn's without an alimony award.

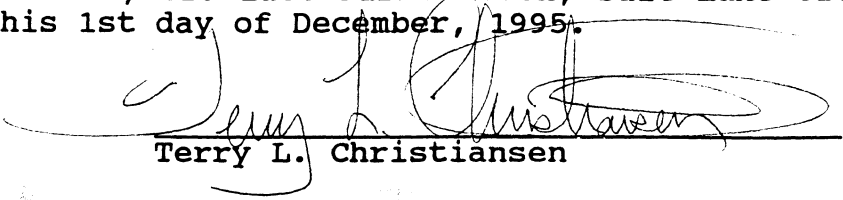
Adequate evidence was introduced at trial to support Mr. Colburn's contention that his Navy retirement is determined by a point system and the point system is the proper method to use in allocating his retirement benefits between the parties.

RESPECTFULLY SUBMITTED this 1st day of December, 1995.

  
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Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I hereby certify that two true and correct copies of the foregoing Reply Brief, were delivered to John B. Anderson, Attorney for Plaintiff and Respondent, 623 East First South, Salt Lake City, Utah 84147-0643, on this 1st day of December, 1995.



Terry L. Christiansen