

1986

Jon E. Holderman v. Shirley Ann Holderman : Brief of Appellant

Utah Court of Appeals

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Bettie J. Marsh; Attorney for Respondent.

Scott W. Holt; Attorney for Defendant

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DOCKET NO. 860207

IN THE UTAH COURT OF APPEALS

JON E. HOLDERMAN,)	
Plaintiff-Respondent,)	BRIEF OF DEFENDANT-APPELLANT
vs.)	
SHIRLEY ANN HOLDERMAN,)	Case No. 860207-CA
Defendant-Appellant.)	13-B

APPEARANCES

For the Defendant-Appellant

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For the Plaintiff-Respondent

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COURT OF APPEALS

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STATEMENT OF ISSUE PRESENTED ON APPEAL

POINT ONE

DEFENDANT-APPELLANT IS ENTITLED TO A PORTION OF THE PLAINTIFF-RESPONDENT'S RETIREMENT AS PER PUBLIC LAW 97-252, UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT 10 USCS SEC 1408.

POINT TWO

DOCTRINE OF EQUITABLE ESTOPPEL SHOULD NOT BE APPLIED TO PREVENT BRINGING FORTH THE ISSUE OF THE PLAINTIFF-RESPONDENT'S MILITARY RETIREMENT BENEFITS BEFORE THE COURT AS THE ELEMENTS OF EQUITABLE ESTOPPEL HAVE NOT BEEN SATISFIED.

POINT THREE

DEFENDANT-APPELLANT'S REQUEST TO MODIFY THE DECREE WAS TIMELY.

POINT FOUR

ALIMONY AND MILITARY RETIREMENT BENEFITS ARE NOT IDENTICAL BUT ARE FOR DIFFERENT PURPOSES AND SHOULD BE TREATED DIFFERENTLY.

POINT FIVE

THE PARTIES' INTENTION IN THEIR STIPULATION MUST BE CONSTRUED TO HAVE TAKEN PLACE UNDER THE THEN EXISTING LAWS, NAMELY BENNETT AND WENT ONLY TO THE ISSUE OF ALIMONY.

IN THE UTAH COURT OF APPEALS

JON E. HOLDERMAN,) Plaintiff-Respondent,) vs.) SHIRLEY ANN HOLDERMAN,) Defendant-Appellant.)	Case No. 860207-CA 13-B
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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF NATURE OF CASE

This is an action based upon domestic law and equity. This appeal is taken from portions of the Findings of Fact, Conclusions of Law and Order on Order to Show cause in which Defendant-Appellant made a request for a portion of Plaintiff-Respondent's military retirement benefits based upon the Uniformed Services Former Spouses Protection Act (10 U.S.C.C. Sec, 1408 et.al).

DISPOSITION IN THE LOWER COURT

The District Court in the Order on Order to Show Cause signed and entered on the 25th of April, 1986, denied Defendant-Appellant's request for an allocation of Plaintiff-Respondent's military retirement benefits based upon the theory that "retirement and alimony awards have exactly the same purpose except that alimony is for the present and retirement is for later when the spouse is no longer working. The Court believes that the parties intended full well that \$8,500.00 would take care of all future claims

under the circumstances". FF, CL p2 par.2.

The Notice of Appeal was timely filed with the District Court on or about the 21st day of May, 1986. The Court ruled that the parties had entered into a stipulation and agreement which resolved all the divorce issues including spousal retirement benefits by reason that Defendant-Appellant had waived her right to alimony. Defendant-Appellant believes the Court erred in not fully considering two aspects of this case. The first being that at the time the parties entered into their property settlement the Uniform Services Former Spouses Protection Act had not been enacted by Congress and made retroactive to include divorces granted within the time frame of this divorce. Secondly, that the parties could not "mutually agree" or come to a meeting of the minds regarding Plaintiff-Respondent's military retirement division when the law in Utah at the time the parties entered into the stipulation wherein Defendant-Appellant agreed to waive alimony was that District Court would not consider a person's military retirement as part of the marital assets of a marriage.

Defendant-Appellant believes the lower court erred and didn't understand the Uniform Services Former Spouses Protection Act which was enacted in 1982 and made retroactive and applicable to divorces granted subsequent to June 26, 1981. Defendant-Appellant was notified that Plaintiff-Respondent was to retire and was further notified that she was entitled to benefits upon which she immediately filed the action with the District Court to obtain said benefits and requested the court to modify the Decree pursuant to the federal act division of Plaintiff-Respondent's retirement benefits.

RELIEF SOUGHT ON APPEAL

That the decision of the District Court be overruled and that Defendant-Appellant be awarded her portion of Plaintiff-Respondent's military benefits which she is entitled to pursuant to the federal act and the Woodward v. Woodward (cite) formula which this Court has already pronounced together with her costs and attorney's fees in this matter.

STATEMENT OF FACT

The parties hereto were granted a Decree of Divorce, which divorce was heard on the 1st day of December, 1981 and signed and entered on or about the 11th of December, 1981. The divorce was granted pursuant to a stipulation and agreement by and between the parties which was dated October, 1981.

At the time the parties entered into the stipulation and agreement, the military retirement issue was governed and controlled by the decision in McCarty vs. McCarty, 453 US 210, 101 S.Ct, 2728 which was decided on June 26, 1981. In essence, it ruled that unless the military retirement had been vested at the time of the divorce, i.e. that the military retirement was being received by the retiree, that the military retirement was not marital property and therefore could not be considered by a Court for a division of marital assets in a divorce. The law in the State of Utah at the time the divorce was granted on December 11, 1981 and when the parties negotiated their divorce settlement was governed by the decision as set forth in the case of Bennett v. Bennett, 607 P.2d 839, 840 (Utah, 1980), which held that it was error for a court to consider a retirement fund contributed by the U.S. Government as one of the

assets of the parties.

When the parties negotiated their divorce settlement, Plaintiff-Respondent had not retired, even though he had over twenty years in military service. Since the law which governed retirement did not deem it to be a marital asset, subject to the division by the Court, the parties and their counsel did not even consider it as a marital asset of the divorce nor could they consider it. The military retirement therefore, was not even considered by the parties in their property settlement negotiations and subsequent stipulation and agreement. Therefore, the property settlement is silent as is the Decree of Divorce regarding Plaintiff-Respondent's military retirement.

The U.S. Congress passed the Uniformed Services Former Spouses Protection Act on September 8, 1982, Public Law 97-252, 10 USC 1401 et.al. which revised the McCarty decision and granted to spouses of former spouses certain rights to their spouses' military retirement if they qualified by being married at lease 10 years to the military spouse before the divorce was granted. The law as applied to the States allowed the State's courts to consider a non-vested military retirement as an asset of a marriage and award the non-military spouse up to one-half of the military retirement based upon the length of the marriage vs. the length of the retirement.

The Act also made the law applicable retroactive to all divorces which had been granted after June 26, 1981 and allowed that State courts could modify Divorce Decrees which had been entered after June 26, 1981 but before the Act was passed on September 8, 1982, requiring the Court to modify those decrees and determine the allocation of the military benefits "in accordance with the law of the

jurisdiction of such court" 10 USC 1431.

The lower court failed to properly apply the Act and found military retirement and alimony to "have exactly the same purpose except that alimony is for the present and retirement is for later" FF, CL p2 Par.2; treated alimony and military retirement as being the same thing; determined that Defendant-Appellant had waived alimony and concluded that she therefore had waived her right to Plaintiff-Respondent's military retirement.

That Defendant-Appellant appealed the District Court's ruling to this court and seeks reversal and determination and an allocation of Plaintiff-Respondent's military retirement pursuant to the Act and costs and attorney's fees in this matter.

SUMMARY OF ARGUMENT

The lower court failed to correctly apply the Uniform Services Former Spouses Protection Act (10 U.S.C. Sec. 1408) retroactively pursuant to said Act and allow a division of a military retirement as set forth in Woodward v. Woodward, 656 P.2d 431. The court held alimony and a division of military retirement to be the same thing and denied Defendant-Appellant relief based upon a stipulation waiving alimony, which under the then existing law, it would have been error for the parties to have divided military retirement which had not vested.

Defendant-Appellant is entitled to have the courts consider a division of military retirement pursuant to Woodward. The Act requires the courts to allow modification of an entered divorce if said decree was entered between June 25, 1981 and September, 1982. Therefore, Defendant-Appellant is entitled to have the court divide

Plaintiff-Respondent's military retirement income and not be denied the claim because Defendant-Appellant waived alimony in the divorce action.

ARGUMENT

POINT ONE

DEFENDANT-APPELLANT IS ENTITLED TO A PORTION OF THE PLAINTIFF-RESPONDENT'S RETIREMENT AS PER PUBLIC LAW 97-252, UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (10 U.S.C.S. SEC. 1408).

The Uniformed Services Former Spouses Protection Act, enacted by Congress in 1982, overruled, for the most part, the effect of McCarty v. McCarty, 453 US 210, 69 L Ed. 2d 589, 101 Sct 2728. In the McCarty case, the United States Supreme Court held that upon dissolution of a military officer's marriage, a state court was precluded by federal law from dividing military nondisability retired pay pursuant to state property laws. Federal statute 10 USCS Sec. 2771, indicates that Congress intended retired pay to be a personal entitlement.

The Uniformed Services Former Spouses Protection Act in overruling McCarty provides that a state court can divide military retirement benefits as a part of a distribution of marital property incident to a divorce proceeding. The marriage must have been in existence for a minimum of ten years and the spouse's portion cannot exceed fifty percent. The purpose of the Act is to return jurisdiction of the issue to the states. Since the Decree of Divorce in the case at bar was granted after June 26, 1981, the Act allows the Defendant-Appellant to return to Court and have her case considered as one of

first impression.

There is considerable authority in other states for the contention that retirement benefits, whether military or otherwise, vested or non-vested are considered a marital assets, subject to division. This holds true whether the request to have the retirement benefits divided comes at the time of dissolution or at a later date.

In Smith v. Smith, 699 P2.d 448 (Wash 1983), the former wife filed a petition for modification of a dissolution decree asking to be awarded a percentage of the former husband's military retired pension payments. Former husband responded asking that the Court set aside his deed of the family home to the wife. The military pension had not been awarded to either spouse in the original decree or in the final documents granting the dissolution. Mr. Smith testified that although there was no agreement between him and his wife at the time he deeded the house to her, he took this action to "cause her to stop any action toward trying to secure one-half of my retirement pay." The trial court concluded, and the Supreme Court upheld that there was no agreement or waiver by the wife of her rights in the military pension inexchange for the deed.

In Gordon v. Gordon, 659 SW2d 475, (Tex. App. 13 Dist 1983), the Court held the failure of the trial court to consider the husband's military retired benefits in apportioning community estate was error in light of subsequent enactment of the Uniformed Services Former Spouses Protection Act, even though the trial court was not at fault since the law at the time of the divorce decree effectively precluded the trial court from considering such benefits.

On motion of the wife to reopen an eighteen month old

judgment to permit additional evidence and argument, the Family Court in Smith v. Smith, 458 A.2d 711, (Del. Fam. Ct. 1983) held that the wife's motion in view of the Uniformed Services Former Spouses Protection Act, to reopen would be granted, since the decision to reopen was a decision to permit the wife to present her case under Delaware law as it existed before McCarty and to do otherwise would be to carve out a category of people whose cases were decided between June 25, 1981 and September 9, 1982 and deprive them of substantial property interest which other similarly situated litigants have been awarded.

Where trial court still had control of its divorce judgment, awarding husband all military retirement benefits, when United States Supreme Court's McCarty decision was overturned by Uniformed Services Former Spouses Protection Act, community estate had divisible interest in husband's military nondisability retirement benefits. Veronin v. Veronin, 662 SW.2d 102 (Tex. App. 3 Dist. 1983)

In Walentowski v. Walentowski, 672 P.2d 657 (NM 1983), the wife appealed from a dissolution decree challenging the division of marital property. The Supreme Court of New Mexico held that the Uniformed Services Former Spouses Protection act, which allows each state to determine if military retirement benefits are to be considered marital property, applied retroactively to the date of McCarty and hence, although the Act was in effect after the date of the final divorce, the wife was entitled to the Act's benefits. Woodward v. Woodward, 656 P.2d 431 (Ut 1982) held that the concept of "vesting" of retirement or pension is an inappropriate

basis for determining what property should be subject to equitable division in divorce proceedings.

The Supreme Court of Utah upheld the trial Court's award of a portion of the husband's retirement benefits that accrued during marriage, notwithstanding the husband was not entitled to such benefits until he worked fifteen additional years.

Woodward overruled Bennett v. Bennett, 607 P.2d 839 (Ut 1980) in which the Supreme Court reversed a trial court's division of the husband's retirement benefits because the government's future contribution to retirement funds was found to have no present value.

To the extent that Bennett v. Bennett, *supra*, may limit the ability of the Court to consider all of the parties' assets and circumstances, including retirement and pension rights, it is expressly overruled. Woodward, *Op.cit.*

It was the intention of Congress that spouses aggrieved as a result of McCarty should have a chance to rectify the situation when the report stated at Page 5:

Former spouses divorced in the interim period between the McCarty decision and the effective date of this law will have the opportunity to return to Court to have their decrees modified in light of this legislation.

Based upon the interest of Congress and the upholdings of other states in similar factual situation, the Court erred in denying Defendant-Appellant a hearing to allocate her entitlement to Plaintiff-Respondent's military benefits under the Uniformed Services Former Spouses Protection Act, which law was mandated by

Congress and made applicable to the state courts.

POINT TWO

DOCTRINE OF EQUITABLE ESTOPPEL SHOULD NOT BE APPLIED TO PREVENT BRINGING FORTH THE ISSUE OF THE PLAINTIFF-RESPONDENT'S MILITARY RETIREMENT BENEFITS BEFORE THE COURT AS THE ELEMENTS OF EQUITABLE ESTOPPEL HAVE NOT BEEN SATISFIED.

Broadly speaking the essential elements of estoppel are: (1) Conduct which amounts to a false representation or concealment of material facts or at least which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon or influence, the other party or other persons; and (3) knowledge actual or constructive, of the real facts. 28 AM JUR 2d Sec. 35, Estoppel and Waiver pp. 640-641.

Further elements as relating to the party claiming the estoppel are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance in good faith upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel to his injury, detriment or prejudice. 28 AM JUR 2d Sec 35, Estoppel and Waiver pp. 640-641.

The above elements have not been satisfied as the omission of the military retirement pension was not due to fraud, false representation or concealment. The law under McCarty, the controlling case at the time of dissolution, precluded consideration of the benefits as marital property. Further, the Plaintiff-Respondent has not shown a change in status to his detriment.

In Henn v. Henn, 605 P.2d 10 (Cal 1980), the wife's failure to assert her community property rights to the husband's military retirement pension during divorce proceedings did not collaterally estop her from asserting her right to the pension in a later action. A finding by the trial court in de Carteret v. de Carteret, 615 P.2d 513 (Wash App 1980) that the omission of retirement funds of the husband and wife from the dissolution decree was inadvertent could not support the conclusion that the husband received the funds by implication, in that the decree of dissolution did not purport to dispose of the parties' retirement benefits, either expressly or by reference.

The Court held that the wife should not be denied contemancy rights of the military retirement benefits which had inadvertently been omitted from the dissolution decree under the doctrine of equitable estoppel where there was no act or statement indicating any inconsistency or impropriety in the wife's representations, and the record reflected that failure to consider the retirement was entirely an innocent oversight shared by the husband.

POINT THREE

DEFENDANT-APPELLANT'S REQUEST TO MODIFY THE DECREE WAS TIMELY.

Defendant-Appellant was timely in her return to court to request an award of Plaintiff-Respondent's military retirement. Defendant-Appellant had just been notified in July, 1985 that Plaintiff-Respondent was to retire. She was sent forms from the military to complete and requested to furnish a copy of the Decree of

Divorce awarding her portion of Plaintiff-Respondent's retirement. She was further advised that she was eligible for a portion of the retirement and that she should return to court, modify the Decree to include an allocation and submit a certified copy to the military retirement board.

Defendant-Appellant filed her motion to modify the Decree within two months of Plaintiff-Respondent's retirement date. Until Plaintiff-Respondent retired, it would have been impossible to calculate her benefits since it is based upon the length of his service versus the number of years she was married to him.

There is no statute of limitations regarding modifying the Divorce Decree pursuant to the Act. Our statutes provide for just such an occasion Section 30-3-5(3) U.C.A. 1953 (as amended) provides that the Court has the "continuing jurisdiction to make subsequent changes or new orders for ... the distribution of property as is reasonable and necessary."

There is considerable case law dealing with property not disposed of in the judgment or decree of divorce in which parties are properly afforded the opportunity to return to the court for disposition.

Where issue of husband's military pension was not before the Court which issued final decree of marriage dissolution, wife's putative interest in such asset was not extinguished by decree and wife could later bring action claiming that she had community property interest in pension to extent it was earned during marriage. Henn, Op.cit.

Because a spouse's entitlement to a share of community property arises at the time that the

property is acquired, and that interest is not altered except by judicial decree or an agreement between the parties, property which is not mentioned in the pleadings in a dissolution proceeding as community property is left unadjudicated by the decree, and is subject to future litigation, the parties being tenants in common meanwhile. 24 AM JUR 2d Sec. 958, Divorce and Separation, p. 945; See also Barros, Op.cit.; de Carteret, Op.cit.; Gordon, Op.cit.

POINT FOUR

ALIMONY AND MILITARY RETIREMENT BENEFITS ARE NOT IDENTICAL BUT ARE FOR DIFFERENT PURPOSES AND SHOULD BE TREATED DIFFERENTLY.

The lower Court found that "alimony and retirement awards have exactly the same purpose, except that alimony is for the present and retirement is for later when the spouse is no longer working." FF, CL p2 par.2. In so finding, the Court erred. Alimony is for spousal support and is based upon need, current financial incomes of the parties, differences in earning potential, etc. A military retirement or any retirement is a marital asset of the marriage, like a savings account and would and should be considered in a property division. The Court in this case treated alimony and military retirement as being the same thing. Defendant-Appellant respectfully disagrees with the Court and urges this Court to so find.

POINT FIVE

THE PARTIES' INTENTION IN THEIR STIPULATION MUST BE CONSTRUED TO HAVE TAKEN PLACE UNDER THE THEN EXISTING LAWS, NAMELY BENNETT AND WENT ONLY TO THE ISSUE OF ALIMONY.

Paragraph 8 of the Amended Decree of Divorce reads at page 2:

8. The Defendant shall take \$8,500.00 in savings as and for full and final property settlement and thereby waives any present and future right to alimony.

The lower Court construed said paragraph to understand that Defendant-Appellant had somehow agreed to bargain her right to Plaintiff-Respondent's military retirement away. The lower court found that the parties intended full well that \$8,500.00 would take care of all future claims under the circumstances. FF. CL. p2 par.2.

I submit that the parties' only intention was that Plaintiff-Respondent's one-half of the marital savings was to be paid to Defendant-Appellant for a lump sum alimony settlement. How could the parties hereto reach a meeting of the minds regarding future military retirement benefits when the parties, their lawyers, and the courts were working under Bennett and the Uniformed Services Former Spouses Protection Act hadn't been passed allowing a division of the same. Clearly the Court erred in finding that the parties intended that \$4,250.00, Plaintiff-Respondent's one-half of savings was for alimony and future military benefits, which no court could divide, consider or grant. However, the lower court so found and denied Defendant-Appellant's request for division since the lower court considers alimony and military retirement benefits are one and the same.

CONCLUSION

The Court should reverse the lower court's decision in this matter and award Defendant-Appellant one-half of 22/25 of Plaintiff-Respondent's military benefits pursuant to Woodward and

the Act. That Defendant-Appellant should be awarded costs incurred herein together with her attorney's fees.

DATED this ____ day of _____, 1987.

SCOTT W. HOLT, Attorney for
Defendant-Appellant

CERTIFICATE OF MAILING

I, SCOTT W. HOLT, hereby certify that I have mailed four (4) true and accurate copies of the foregoing Brief of Defendant-Appellant to the attorney for Plaintiff-Respondent, BETTIE J. MARSH, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401 this ____ day of June, 1987.

Scott W. Holt

ADDENDUM

BETTIE J. MARSH, #2088
Attorney for Plaintiff
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
Telephone: 621-2464

IN THE DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

JON E. HOLDERMAN,)	
)	FINDINGS OF FACT AND
Plaintiff,)	CONCLUSIONS OF LAW
)	
-VS-)	
)	
SHIRLEY ANN HOLDERMAN,)	CIVIL NO: 1-30831
)	
Defendant.)	

The above-entitled matter came on regularly for hearing on the 8th day of April, 1986, at 3:30 p.m., before the Honorable Douglas L. Cornaby, District Judge, sitting without a jury. Neither party was personally present but was represented by their respective counsel, Bettie J. Marsh for Plaintiff and Scott W. Holt for Defendant, and counsel having proffered testimony in support of the allegations and their respective Affidavits on the Order To Show Cause, and having submitted Memorandums of Points and Authorities, and the Court being fully advised in the premises, makes and enters the following:

J. MARSH
BY AT LAW
SEL AVENUE
UTAH 84401

FINDINGS OF FACT

1. That the provision contained in Paragraph 8 of the Decree of Divorce whereby Defendant received \$8,500.00 "as and for full and final property settlement" concluded the retirement issue.

2. That retirement and alimony awards have exactly the same purpose except that alimony is for the present and retirement is for later when the spouse is no longer working. The Court believes that the parties intended full well that \$8,500.00 would take care of all future claims under the circumstances.

3. The parties have overlooked retirement rights which Defendant may have in Plaintiff's retirement benefits after his death. But Defendant is entitled to claim any "benefits" which may be available to her by Federal law as the surviving former spouse of a serviceman.

4. That the Divorce Decree clearly intended in Paragraph 9 for Plaintiff to reimburse Defendant for her travel expenses from Salt Lake City to Florida, and the parties have admitted through counsel that this amount was \$633.00.

5. That the time has long passed for Defendant to make any claims against Plaintiff for furniture and other items of personal property which she requests in her Affidavit for Order To Show Cause.

6. Based upon the foregoing Findings of Fact, the Court enters the following:

CONCLUSIONS OF LAW

1. That Defendant is denied any claim, past, present or future, for an award of any part of Plaintiff's current retirement benefits.

2. That Defendant is awarded the right to any benefits she may have by Federal law as the surviving former spouse of Plaintiff, a retired serviceman. Said benefits are those accruing upon his death.

3. Defendant is awarded a judgment against the Plaintiff in the sum of \$633.00 as and for her travel expenses pursuant to the award in the Decree of Divorce.

4. Defendant is denied any claim to personal property in the way of furniture or furnishings from Plaintiff.

5. Each party shall bear his own attorney's fees and costs incurred in this action.

DATED this _____ day of April, 1986.

BY THE COURT:

District Court Judge


D. J. MARSH
ATTORNEY AT LAW
202 WEST 100 SOUTH
SALT LAKE CITY, UTAH 84101

N O T I C E

TO: SCOTT W. HOLT, ATTORNEY FOR DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that the undersigned, attorney for Plaintiff, will submit the above and foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to the Judge of the above-entitled Court for his signature, upon the expiration of five (5) days from the date this Notice is mailed to you, and after allowing three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 2.9 of the Rules of Practice in the District Courts of the State of Utah. Kindly govern yourself accordingly.

DATED this 14th day of April, 1986.


BETTIE J. MARSH
Attorney for Plaintiff

BETTIE J. MARSH
ATTORNEY AT LAW
2447 KIMMEL AVENUE
OGDEN, UTAH 84401

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of April, 1986,
I mailed a true and correct copy of the above and foregoing
FINDINGS OF FACT AND CONCLUSIONS OF LAW by placing same in
the U.S. Mail postage prepaid and addressed to the follow-
ing:

Scott W. Holt
Attorney for Defendant
44 North Main
Layton, Utah 84041


SECRETARY

J. MARSH
ESQ. AT LAW
44 NORTH MAIN
LAYTON, UTAH 84041

BETTIE J. MARSH, #2088
Attorney for Plaintiff
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
Telephone: 621-2464

IN THE DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

JON E. HOLDERMAN,)	
)	ORDER ON ORDER
Plaintiff,)	TO SHOW CAUSE
)	
-vs-)	
)	
SHIRLEY ANN HOLDERMAN,)	CIVIL NO: 1-30831
)	
Defendant.)	

The above-entitled matter came on regularly for hearing on the 8th day of April, 1986, at 3:30 p.m., before the Honorable Douglas L. Cornaby, District Judge, sitting without a jury. Neither party was personally present but was represented by their respective counsel, Bettie J. Marsh for Plaintiff and Scott W. Holt for Defendant, and counsel having proffered testimony in support of the allegations and their respective Affidavits on the Order To Show Cause, and having submitted Memorandums of Points and Authorities, and the Court being fully advised in the premises, and having entered its Findings of Fact and Conclusions of Law, separately in writing, now states:

BETTIE J. MARSH
ATTORNEY AT LAW
2447 KIESEL AVENUE
OGDEN, UTAH 84401

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Defendant is denied any claim, past, present or future, for an award of any part of Plaintiff's current retirement benefits.

2. That Defendant is awarded the right to any benefits she may have by Federal law as the surviving former spouse of Plaintiff, a retired serviceman. Said benefits are those accruing upon his death.

3. Defendant is awarded a judgment against the Plaintiff in the sum of \$633.00 as and for her travel expenses pursuant to the award in the Decree of Divorce.

4. Defendant is denied any claim to personal property in the way of furniture or furnishings from Plaintiff.

5. Each party shall bear his own attorney's fees and costs incurred in this action.

DATED this _____ day of April, 1986.

BY THE COURT:

District Court Judge

N O T I C E

TO: SCOTT W. HOLT, ATTORNFY FOR DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that the undersigned, attorney for Plaintiff, will submit the above and foregoing ORDER ON ORDER TO SHOW CAUSE to the Judge of the above-entitled Court for his signature, upon the expiration of five (5) days from the date this Notice is mailed to you, and after allowing three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 2.9 of the Rules of Practice in the District Courts of the State of Utah.~ Kindly govern yourself accordingly.

DATED this 14th day of April, 1986.


BETTIE J. MARSH
Attorney for Plaintiff

BETTIE J. MARSH
ATTORNEY AT LAW
847 KIDNEL AVENUE
OGDEN UTAH 84401

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of April, 1986,
I mailed a true and correct copy of the above and foregoing
ORDER ON ORDER TO SHOW CAUSE by placing same in the U.S.
Mail postage prepaid and addressed to the following:

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Uniformed
Services Former
Spouses'
Protection Act.

10 USC 1401
note.

TITLE X—FORMER SPOUSES' PROTECTION

SHORT TITLE

SEC. 1001. This title may be cited as the "Uniformed Services Former Spouses' Protection Act".

PAYMENT OF RETIRED AND RETAINER PAY

SEC. 1002. (a) Chapter 71 of title 10, United States Code, is amended by adding at the end thereof the following new section:

10 USC 1408.

"§ 1408. Payment of retired or retainer pay in compliance with court orders

Definitions.

"(a) In this section:

"(1) 'Court' means—

"(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

"(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

"(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

"(2) 'Court order' means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

"(A) is issued in accordance with the laws of the jurisdiction of that court;

"(B) provides for—

"(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)))";

"(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)))"; or

"(iii) division of property (including a division of community property); and

"(C) specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

"(3) 'Final decree' means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

"(4) 'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled

(other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which—

“(A) are owed by that member to the United States;

10 USC 1201 *et seq.*

“(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

5 USC 101; 38 USC 101.

“(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

“(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

“(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

“(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

10 USC 1431 *et seq.*

“(5) ‘Member’ includes a former member.

“(6) ‘Spouse or former spouse’ means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

“(b) For the purposes of this section—

“(1) service of a court order is effective if—

“(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

“(B) the court order is regular on its face;

“(C) the court order or other documents served with the court order identify the member concerned and include the social security number of such member; and

“(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 *et seq.*) were observed; and

“(2) a court order is regular on its face if the order—

“(A) is issued by a court of competent jurisdiction;

“(B) is legal in form; and

“(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

“(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

"(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

"(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

"(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

"(d)(1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

"(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

"(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

"(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

"(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

"(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

"(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse from the disposable retired or retainer pay of a member, such pay shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

"(3)(A) In the event of effective service of conflicting court orders under this section which assert that different amounts be paid during a month to the same spouse or former spouse from the disposable retired or retainer pay of the same member, the Secretary concerned shall—

"(i) pay to that spouse the least amount of disposable retired or retainer pay directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

"(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of—

"(I) the difference between the largest amount of retired or retainer pay required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

"(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

"(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—

"(I) the amount of disposable retired or retainer pay paid under clause (i); and

"(II) the amount of disposable retired or retainer pay retained under clause (ii).

"(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

"(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the retired or retainer pay of the same

member, such court orders and legal process shall be satisfied on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

“(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

“(5) A court order which itself or because of previously served court orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount of disposable retired or retainer pay that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

“(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

“(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

“(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

“(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of

such court order (together with a copy of such order) to the member affected by the court order at his last known address.

"(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section." Regulations.

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"1408. Payment of retired or retainer pay in compliance with court orders."

ANNUITIES UNDER THE SURVIVOR BENEFIT PLAN

SEC. 1003. (a) Section 1447 of title 10, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(6) 'Former spouse' means the surviving former husband or wife of a person who is eligible to participate in the Plan. Definitions.

"(7) 'Court' has the meaning given that term by section 1408(a)(1) of this title. Ante, p. 730.

"(8) 'Court order' means a court's final decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or of a court ordered, ratified, or approved property settlement agreement incident to such previously issued decree).

"(9) 'Final decree' means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for the taking of such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

"(10) 'Regular on its face', when used in connection with a court order, means a court order that meets the conditions prescribed in section 1408(b)(2) of this title."

(b)(1) Section 1448(a) of such title is amended—

Ante, p. 730.
10 USC 1448.

(A) in paragraph (3)(A) by inserting "or elects to provide an annuity under subsection (b)(2) of this section," after "for his spouse,"; and

(B) in paragraph (3)(B) by inserting "or elects to provide an annuity under subsection (b)(2) of this section," after "for his spouse,".

(2) Section 1448(b) of such title is amended to read as follows:

"(b)(1) A person who is not married and does not have a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a natural person with an insurable interest in that person or to provide an annuity to a former spouse.

"(2) A person who is married or has a dependent child may elect to provide an annuity to a former spouse instead of providing an annuity to a spouse or dependent child if the election is made in order to carry out the terms of a written agreement entered into voluntarily with the former spouse (without regard to whether such agreement is included in or approved by a court order).

"(3) In the case of a person electing to provide an annuity under paragraph (1) or (2) of this subsection by virtue of eligibility under subsection (a)(1)(B), the election shall include a designation under subsection (e).

"(4) Any person who elects under paragraph (1) or (2) to provide an annuity to a former spouse shall, at the time of making such election, provide the Secretary concerned with a written statement, in a form to be prescribed by that Secretary, signed by such person and the former spouse setting forth whether the election is being made pursuant to a voluntary written agreement previously entered into by such person as a part of or incident to a proceeding of divorce, dissolution, annulment, or legal separation, and if so, whether such voluntary written agreement has been incorporated in or ratified or approved by a court order."

10 USC 1450.

(c) Section 1450(a)(4) of such title is amended—

(1) by inserting "former spouse or other" before "natural person"; and

(2) by striking out "if there is no eligible beneficiary under clause (1) or clause (2)" and inserting in lieu thereof "unless the election to provide an annuity to the former spouse or other natural person has been changed as provided in subsection (f)".

(d) Section 1450(f) of such title is amended to read as follows:

Ante, p. 735.

"(f)(1) A person who elects to provide an annuity to a person designated by him under section 1448(b) of this title may, subject to paragraph (2) of this subsection, change that election and provide an annuity to his spouse or dependent child. The Secretary concerned shall notify the former spouse or other natural person previously designated under section 1448(b) of this title of any change of election under the first sentence of this paragraph. Any such change of election is subject to the same rules with respect to execution, revocation, and effectiveness as are set forth in section 1448(a)(5) of this title.

"(2) A person who, incident to a proceeding of divorce, dissolution, annulment, or legal separation, enters into a voluntary written agreement to elect under section 1448(b) of this title to provide an annuity to a former spouse and who makes an election pursuant to such agreement may not change such election under paragraph (1) unless—

"(A) in a case in which such agreement has been incorporated in or ratified or approved by a court order, the person—

"(i) furnishes to the Secretary concerned a certified copy of a court order which is regular on its face and modifies the provisions of all previous court orders relating to the agreement to make such election so as to permit the person to change the election; and

"(ii) certifies to the Secretary concerned that the court order is valid and in effect; or

"(B) in a case in which such agreement has not been incorporated or ratified or approved by a court order, the person—

"(i) furnishes to the Secretary concerned a statement, in such form as the Secretary concerned may prescribe, signed by the former spouse and evidencing the former spouse' agreement to a change in the election under paragraph (1) and

"(ii) certifies to the Secretary concerned that the statement is current and in effect.

"(3) Nothing in this chapter authorizes any court to order a person to elect under section 1448(b) of this title to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such election."

MEDICAL BENEFITS

SEC. 1004. (a) Section 1072(2) of title 10, United States Code, is amended—

- (1) by striking out “and” at the end of clause (D);
- (2) by striking out the period at the end of clause (E) and inserting in lieu thereof a semicolon and “and”; and

- (3) by adding at the end thereof the following new clause:

“(F) the unremarried former spouse of a member or former member who (i) on the date of the final decree of divorce, dissolution, or annulment, had been married to the member or former member for a period of at least 20 years during which period the member or former member performed at least 20 years of service which is creditable in determining that member’s or former member’s eligibility for retired or retainer pay, or equivalent pay, and (ii) does not have medical coverage under an employer-sponsored health plan.”

(b) Section 1076(b) of such title is amended by inserting at the end thereof the following: “A dependent described in section 1072(2)(F) of this title may be provided medical and dental care pursuant to clause (2) without regard to subclause (B) of such clause.” 10 USC 1076.

(c) Section 1086(c) of such title is amended by inserting after clause (2) the following new clause: 10 USC 1086.

“(3) A dependent covered by section 1072(2)(F) of this title.” 10 USC 1072.

COMMISSARY AND EXCHANGE PRIVILEGES

SEC. 1005. The Secretary of Defense shall prescribe such regulations as may be necessary to provide that an unremarried former spouse described in subparagraph (F)(i) of section 1072(2) of title 10, United States Code (as added by section 1004), is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services.

Regulations.
10 USC 1408
note.

EFFECTIVE DATES AND TRANSITION

SEC. 1006. (a) The amendments made by this title shall take effect on the first day of the first month which begins more than one hundred and twenty days after the date of the enactment of this title.

10 USC 1408
note.

(b) Subsection (d) of section 1408 of title 10, United States Code, as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

Ante, p. 730.

(c) The amendments made by section 1003 of this title shall apply to persons who become eligible to participate in the Survivor Benefit Plan provided for in subchapter II of chapter 73 of title 10, United States Code, before, on, or after the effective date of such amendments.

10 USC 1447.

(d) The amendments made by section 1004 of this title and the provisions of section 1005 of this title shall apply in the case of any

former spouse of a member or former member of the uniformed services only if the final decree of divorce, dissolution, or annulment of the marriage of the former spouse and such member or former member is dated on or after the effective date of such amendments.

Definitions.

(e) For the purposes of this section—

Ante, p. 730.

(1) the term “court order” has the same meaning as provided in section 1408(a)(2) of title 10, United States Code (as added by section 1002 of this title);

(2) the term “former spouse” has the same meaning as provided in section 1408(a)(6) of such title (as added by section 1002 of this title); and

(3) the term “uniformed services” has the same meaning as provided in section 1408(a)(7) of such title (as added by section 1002 of this title).

appealed. In a per curiam unpublished opinion, the Supreme Court affirmed, and husband filed petition for rehearing. The Supreme Court, Wilkins, J., held that fact that testimony and findings in case established that that portion of husband's retirement fund contributed by United States Government had no present value, and may not have any value in future, meant that it was error for trial court to consider such matter as one of assets of parties, thereby using it as one of significant predicates in court's determination of property division between parties provided for in decree.

Reversed and remanded.

Crockett, C. J., dissented and filed opinion in which Stewart, J., concurred.

Divorce ⇐253(3)

In divorce action, fact that testimony and findings in case established that that portion of husband's retirement fund contributed by United States Government had no present value, and may not have any value in future, meant that it was error for trial court to consider such matter as one of assets of parties, thereby using it as one of significant predicates in court's determination of property division between parties provided for in decree. U.C.A.1953, 30-3-5.

Charles N. BENNETT, Plaintiff
and Appellant,

v.

Donna Mae BENNETT, Defendant
and Respondent.

No. 16268.

Supreme Court of Utah.

Feb. 20, 1980.

In divorce action, the Second District Court, Davis County, Maurice J. Harding, J., entered judgment from which husband

Pete N. Vlahos, Ogden, for plaintiff and appellant.

J. Val Roberts, Centerville, for defendant and respondent.

WILKINS, Justice:

A petition for rehearing in this divorce action was granted by this Court after its per curiam unpublished opinion was filed on October 19, 1979, which affirmed the action of the District Court of Davis County.

8. *Center Creek Water and Irrigation Co. v. Lindsay*, 21 Utah 192, 60 P. 559 (1900). See also *Houser v. Smith*, 19 Utah 150, 56 P. 683 (1899).

9. *Jacobsen v. Jacobsen*, Utah, 557 P.2d 156 (1976).

10. *State ex rel. Burk v. Oklahoma City, Okl.*, 522 P.2d 612 (1973). See also *Pacific Metals Co. v. Tracy-Collins Bank & Trust Co.*, 21 Utah 2d 400, 446 P.2d 303 (1968).

11. U.C.A. 1953, 57-1-13.

Plaintiff and defendant were married on May 31, 1947, and have four children as issue of this marriage, two of whom are emancipated. The two minor children reside with defendant, to whom care, custody, and control were awarded on November 29, 1978, by the District Court.

The only issue we shall address here is whether the District Court erred in considering as an asset of this marriage the share of plaintiff's retirement fund contributed by the United States government. The plaintiff is—and has been—employed at Hill Air Force Base, Utah.

The Court, in its award to the defendant of the real property of the parties, the equity of which was \$38,000, imposed a lien of \$5,000 on that property in favor of the plaintiff, making the lien payable upon the occurrence of one of four conditions, which are not pertinent to this appeal.

The retirement officer in the Civilian Personnel Office at Hill Air Force Base, a Margaret S. Woods, testified that as of the time of this divorce hearing the present value of plaintiff's retirement fund was \$15,681.95, the amount of his total contribution. She further stated that the U. S. government had contributed the same amount to his retirement fund; viz., \$15,681.95, and that plaintiff could withdraw his contribution any time prior to thirty-one days before the eligibility date for his retirement on May 7, 1984. The retirement officer further testified, "[t]he amount of money that he (plaintiff) has in the retirement fund does not have any bearing on what he would get under retirement monthly annuity. The only value of what he has in the retirement fund is for income tax purposes or death benefit purposes." She did not elaborate on this last, somewhat cryptic, sentence. But, from her uncontradicted testimony, we believe no reasonable interpretation can be placed on it other than one that concludes no present value can be assigned to that portion of plaintiff's retirement fund contributed by the U. S.

government. And the Court in its findings found no present value on this portion.

Significantly, the Court, in determining what an equitable amount of this lien should be, frankly acknowledged that it considered the amount of the government's contribution to plaintiff's retirement fund. The following dialogue occurred between the Court and plaintiff's counsel:

Mr. Vlahos: Your Honor, if I understand your Honor's position in reference to this \$5,000.00 lien, it is based on some \$15,000.00 that the government has that he can't touch, has no control over, has never seen, rather than taking what the parties can have right now?

The Court: Yes. That's taken into consideration. I want that understood, so that in case you do want to appeal, and have that matter raised you can do so.

In *Englert v. Englert*, Utah, 576 P.2d 1274, 1276 (1978), this Court in interpreting Sec. 30-3-5¹ stated:

It is our opinion that the correct view under our law is that this encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and that this includes any such pension fund or insurance. These should be given due consideration along with all other assets, income and the earnings and the potential earning capacity of the parties, in determining what is the most practical, just and equitable way to serve the best interests and welfare of the parties and their children. (Emphasis added).

Because the testimony and findings in this case clearly establish that that portion of the plaintiff's retirement fund contributed by the U. S. government has no present value—and may not have any value in the future—we hold that it was error for the District Court to consider this matter as one of the assets of the parties, thereby using as one of the significant predicates in the Court's determination of property division

1. This section reads:

"When a decree of divorce is made, the court may make such orders in relation to the chil-

dren, property and parties, and the maintenance of the parties and children, as may be equitable"

between the parties provided for in the decree.

Other matters raised by plaintiff are deemed to be without merit.

Reversed and remanded for proceedings concerning the matter of property distribution between the parties consistent with this opinion. Affirmed in all other respects. No costs or attorney's fees are awarded.

MAUGHAN and HALL, JJ., concur.

CROCKETT, Chief Justice (dissenting):

I would adhere to our prior decision. I am in hearty agreement with the quote from the *Englert* case that the court should consider "all of the assets of every nature possessed by the parties whenever obtained and from whatever source derived and that this includes such pension fund or insurance"; and this should include anything that is realistic and substantial, even in expectancy. To demonstrate the complete illogic of plaintiff's counsel's argument that the court should not consider the pension fund because the plaintiff has never seen it or had possession or control over it: suppose it had been determined in a probate proceeding that the plaintiff was to receive a substantial inheritance from a relative's estate, but it was not to be paid him until completion of the probate. Would it be argued that because he had never seen the money, nor had possession or control over it, the court could not consider it as a part of the total circumstances.

The trial judge was ineluctably correct in stating that he had considered all the circumstances, including the possibility that the plaintiff would receive the pension referred to.

There is a matter far more important and controlling than the foregoing, quite regardless of the statement the trial judge made, which has provided a basis for further controversy, and for this appeal. As indicated in our original opinion, when this Court surveys the circumstances of these parties, as it may do in such cases, it is my judgment that the decree does no such ineq-

uity or injustice as to warrant this Court's interference therewith.

STEWART, J., concurs in the views expressed in the opinion of CROCKETT, C. J.



Marvin L. WOODWARD, Plaintiff,
Appellant and Cross-Respondent,

v.

Mildred L. WOODWARD, Defendant,
Respondent and Cross-Appellant.

No. 18089.

Supreme Court of Utah.

Nov. 4, 1982.

The First District Court, Box Elder County, VeNoy Christoffersen, J., granted divorce with property division, and husband appealed. The Supreme Court, Durham, J., held that: (1) trial court properly awarded wife share in that portion of husband's retirement benefits to which rights accrued during marriage, notwithstanding that husband was not entitled to such benefits until he worked additional 15 years, and (2) award of such benefits was properly made in form of deferred distribution based upon fixed percentage.

Affirmed in part, reversed in part, and remanded.

1. Divorce ⇌ 252.3(4)

Concept of "vesting" of retirement and pension rights is inappropriate basis for determining what property should be subject to equitable division in divorce proceeding.

2. Divorce ⇌ 252.3(1, 4)

In fashioning equitable property division in divorce proceeding, court may take into consideration all pertinent circumstances, encompassing all assets of every nature possessed by parties, whenever obtained and from whatever source derived, and including retirement and pension rights; overruling *Bennett v. Bennett*, 607 P.2d 839.

3. Divorce ⇌ 252.3(1)

Whether resource is subject to distribution in divorce proceeding does not turn on whether spouse can presently use or control it, or on whether resource can be given present dollar value; essential criterion is

whether right to benefit or asset has accrued in whole or in part during marriage, and, to extent that right has so accrued, it is subject to equitable distribution.

4. Divorce ⇌ 252.3(4)

In divorce proceeding, trial court properly awarded wife one-half share in that portion of husband's government retirement benefits to which rights accrued during marriage, notwithstanding that husband was not entitled to any such benefits until and unless he worked additional 15 years at government job.

5. Divorce ⇌ 252.3(4)

Where husband's right to retirement benefits was contingent upon his working an additional 15 years, trial court properly awarded wife share in such benefits in form of deferred distribution based upon fixed percentage.

Brian R. Florence, Ogden, for plaintiff, appellant and cross-respondent.

Ben H. Hadfield, Brigham City, for defendant, respondent and cross-appellant.

DURHAM, Justice:

The plaintiff husband appeals from that portion of the trial court's decree of divorce which awarded to the defendant wife a portion of his retirement benefits. The husband argues that the court erred in considering, as a marital asset, that portion of his pension which would be contributed by the government at some future date.

The husband has worked as a civilian employee at Hill Air Force Base for fifteen years. Under his government pension plan, he has contributed \$17,500 to the pension fund during that time. If he were to leave his job now, he would receive only the amount of his contributions. In order to receive maximum benefits from the plan, the husband would have to participate in it for a total of 30 years. At that time, the government would match the amount of his contributions and the husband could elect to receive the benefits as an annuity or as a lump sum. In its Findings of Fact, the trial

court stated that, because one-half of the 30-year period occurred during the marriage and because the wife is entitled to one-half of the amount accrued during that time, the wife was therefore "granted an equity interest of one-fourth of all proceeds which the [husband] receives on his retirement account, to be paid to [the wife] . . . as [the husband] receives the proceeds." The husband concedes that the wife is entitled to one-half of the sum he has contributed during the fifteen years of their marriage. However, he claims that she has no right or interest in the amount to be contributed by the government at the time of his retirement because that amount is contingent upon his continued government employment.

[1,2] The only authority cited by the husband for his position is *Bennett v. Bennett*, Utah, 607 P.2d 839 (1980). In that case, this Court reversed a trial court's division of the husband's retirement benefits because the government's future contribution to the retirement fund was found to have "no present value." *Id.* at 840. However, in *Dogu v. Dogu*, Utah, 652 P.2d 1308 (1982), we commented that "that holding reflected a failure of proof." *Id.* The wife urges the adoption of the position taken by the California Supreme Court in *In re Marriage of Brown*, 15 Cal.3d 838, 544 P.2d 561, 126 Cal.Rptr. 633 (1976). There the court held that "[p]ension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding." *Id.* at 562-63, 126 Cal.Rptr. at 634-35. This case overruled an earlier California case of longstanding which had distinguished pension rights on the basis of whether the rights had vested. In the context of Utah law, we find it unnecessary to consider whether or

not the pension rights are "vested or non-vested."¹ In *Englert v. Englert*, Utah, 574 P.2d 1274 (1978), we emphasized the equitable nature of proceedings dealing with the family, pointing out that the court may take into consideration all of the pertinent circumstances. These circumstances encompass "all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and that this includes any such pension fund or insurance." *Id.* at 1276. To the extent that *Bennett v. Bennett*, *supra*, may limit the ability of the court to consider all of the parties' assets and circumstances, including retirement and pension rights, it is expressly overruled.

[3] In the instant case, the husband argues that because he cannot now benefit from the government's promised contributions to his pension at the time of retirement, the wife should not receive any portion of the benefits which are based on the government's participation. This argument fails to recognize that pension or retirement benefits are a form of deferred compensation by the employer. If the rights to those benefits are acquired during the marriage, then the court must at least consider those benefits in making an equitable distribution of the marital assets. "The right to receive monies in the future is unquestionably . . . an economic resource' subject to equitable distribution based upon proper computation of its present dollar value." *Kikkert v. Kikkert*, 177 N.J.Super. 471, 475, 427 A.2d 76, 78 (1981) (emphasis and omission in original) (quoting *Kruger v. Kruger*, 73 N.J. 464, 468, 375 A.2d 659, 662 (1977)), *aff'd*, 88 N.J. 4, 438 A.2d 317 (1981). Whether that resource is subject to distribution does not turn on whether the spouse can presently use or control it, or on whether the resource can be given a present dollar value. The essential criterion is whether a right to the

1. In *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975), the court commented that "the concept of vesting should probably find no significant place in the developing law of equitable distribution." *Id.* at 348, 331 A.2d at 262. The court refers briefly to the origins of the vested interest as it was associated with the concept of

seisin and also to its use in connection with "vested rights" in discussions of Constitutional guaranties. We agree that this concept of "vesting" is an inappropriate basis for determining what property should be subject to equitable division in a divorce proceeding.

efit or asset has accrued in whole or in part during the marriage. To the extent the right has so accrued it is subject to equitable distribution.

[4] In the instant case, the husband must work for another fifteen years to qualify for the maximum benefits under the pension plan. He will not qualify in the twenty-ninth year or in the next to the last year. Because he must work for a total of thirty years, his pension benefits, including any contribution by the government, are as dependent on the first fifteen years as the last fifteen. Thus, the wife is entitled to share in that portion of the benefits which the rights accrued during the marriage. We hold that the trial court did not err in making equitable distribution of the husband's retirement benefits.

[5] We also hold that the method used to distribute the retirement benefits was a proper exercise of the court's discretion. We agree with the discussion in *Kikkert*, *supra*, where it was stated:

Long-term and deferred sharing of financial interests are obviously too susceptible to continued strife and hostility, circumstances which our courts traditionally strive to avoid to the greatest extent possible. This goal may be best accomplished, if a present value of the pension plan is ascertainable, by fixing the other spouse's share thereof, as adjusted for all appropriate considerations, including the length of time the pensioner must survive to enjoy its benefits, to be satisfied out of other assets leaving all pension benefits to the employee himself.

On the other hand, where other assets for equitable distribution are inadequate or lacking altogether, or where no present value can be established and the parties are unable to reach agreement, resort must be had to a form of deferred distribution based upon fixed percentages.

Id. at 478, 427 A.2d at 79-80. The facts in the present case present just such a circumstance: other assets available for equitable distribution are inadequate, and a present value of retirement benefits would be diffi-

cult if not impossible to ascertain because the value of the benefits is contingent on the husband's decision to remain working for the government. In such a case, "the trial court could use a method widely employed in other states, whereby the trial court determines what percentage of the marital property each spouse is to receive, and then divides payments from the pension plan accordingly." *Selchert v. Selchert*, 90 Wis.2d 1, 10, 280 N.W.2d 293, 298 (1979). The Wisconsin court continued:

Under this approach it is unnecessary to make any determination as to the value of the pension fund. . . . When the beneficiary spouse then opts to receive payments under the pension plan, the non-covered spouse would be entitled to her established percentage of those payments. . . . Any risk associated with the fund . . . would be by this method apportioned equally between the parties. This method may [sic] particularly appropriate where the present value of a pension fund is very difficult or impossible to assess.

Id. at 10-12, 280 N.W.2d at 298 (footnotes omitted).

The trial court awarded one-half of the marital property to each of the parties in the instant case. It is clear that the court intended the wife to receive one-half of the retirement benefits which had accrued during the fifteen-year marriage. However, in its order, the court specified that the wife receive one-fourth of the proceeds of the retirement plan as they are received by the husband. This portion, one-fourth, awards to the wife one-half of the benefits accrued during the marriage only if the husband works for the full thirty years. The order should be modified to provide for the wife to receive one-half of the benefits accrued during the marriage, regardless of the length of time the husband continues in the same employment. Whenever the husband chooses to terminate his government employment, the marital property subject to distribution is a portion of the retirement benefits represented by the number of years of the marriage divided by the num-

ber of years of the husband's employment. The wife is entitled to one-half of that portion pursuant to the award of the trial judge in this case, which our modification is intended to sustain.

We therefore affirm in part, reverse in part and remand to the trial court so that the order may be amended to conform with this opinion. No costs or fees are awarded.

HALL, C.J., and STEWART, OAKS and HOWE, JJ., concur.