

1996

# Lynn Vincent Toone v. Ruby Joan Toone nka Ruby Joan Parkhurst : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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LYNN VINCENT TOONE,	)	
	)	<b>BRIEF OF APPELLANT</b>
Plaintiff/Appellee,	)	
	)	
vs.	)	
	)	
RUBY JOAN TOONE nka RUBY JOAN	)	District Court No. 19707
PARKHURST,	)	
	)	Court of Appeals No. 960675A
Defendant/Appellant.	)	
	)	Priority Classification 15

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**FILED**

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

LYNN VINCENT TOONE,

Plaintiff/Appellee,

vs.

RUBY JOAN TOONE nka RUBY JOAN  
PARKHURST,

Defendant/Appellant.

BRIEF OF APPELLANT

District Court No. 19707

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The Trial Court erred in granting Summary Judgment for the Plaintiff/Appellee and in denying Defendant/Appellant's Motion for Summary Judgment when the Trial Court refused to equitably divide the Naval Retirement Account, which was a marital account:

THE TRIAL COURT ERRED IN CONCLUDING THAT THE PRINCIPLE OF "RES JUDICATA" BARRED APPELLANT'S CLAIM TO A DIVISION OF THE NAVAL RETIREMENT WHERE THE NAVAL RETIREMENT WAS NOT EXPRESSLY ADJUDICATED BY THE TRIAL COURT, NOR COULD IT HAVE BEEN UNDER THE DECISION OF MCCARTY, AND WHERE THE LATER ENACTING OF (USFSPA) ELIMINATED THE HORRORS CAUSED BY MCCARTY, AND SPECIFICALLY PROVIDED THAT DIVORCES OCCURRING AFTER JUNE 25, 1981 COULD BE REOPENED TO ALLOW FOR RETROACTIVE APPLICATION OF THE LAW TO MODIFY OR DIVIDE MILITARY RETIREMENT. . . . . 17

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FEDERAL STATUTES

10 U.S.C.A. § 1408(c)(1)(1990 as Amended)     4, 6, 25, 26, 36

(1) Subject to the limitations of this section, a court may treat disposable retired 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. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court order, ratified, or approved property settlement incident to such decree) effecting the member and the member spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat, plan or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member spouse or former spouse.

STATE STATUTES

U.C.A. § 30-3-5(1) & (3) (1995)	3, 4, 14, 27
	29, 36, 37

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

- (a) an order assigning responsibility for payment of reasonable and necessary medical and dental expenses of the dependent children;
- (b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for dependent children;
- (c) pursuant to Section 15-4-6.5:
  - (i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during the marriage;
  - (ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and
  - (iii) provisions for the enforcement of these orders;
- (d) provisions for income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5; and
- (e) with regard to child support orders issued or modified on or after January 1, 1994, that are subject to income withholding, an order assessing against the obligor an additional \$7 per month check processing fee to be included in the amount withheld and paid to the Office of Recovery Services within the Department of Human Services for the purposes of income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

## RULES

Utah Rules of Civil Procedure Rule 60(a) . . . . . 27, 28

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

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IN THE UTAH COURT OF APPEALS  
STATE OF UTAH

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LYNN VINCENT TOONE,	)	
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Plaintiff/Appellee,	)	
	)	
vs.	)	
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RUBY JOAN TOONE nka RUBY JOAN	)	District Court No. 19707
PARKHURST,	)	
	)	Court of Appeals No. 960675A
Defendant/Appellant.	)	
	)	Priority Classification 15
	)	

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**BRIEF OF APPELLANT**

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Defendant/Appellant (hereinafter "Mrs. Parkhurst") submits the following as her Brief of Appellant herein:

JURISDICTIONAL AUTHORITY

Jurisdiction to hear the above-entitled appeal is conferred upon the Utah Court of Appeals, pursuant to Utah Code Ann. § 78-2a-2(h) (1953 as amended).

NATURE OF THE PROCEEDINGS

This is an appeal from an order granting Mr. Toone's Motion for Summary Judgment and denying Mrs. Parkhurst's Cross Motion for

Summary Judgment regarding Mrs. Parkhurst's Petition to Modify the Decree of Divorce or Partition the Military Retirement benefits. The order was entered by the Honorable Judge Gordon J. Low of the First Judicial District Court, Cache County, State of Utah, sitting without a jury and hearing the case as a case of first impression in Utah regarding the effects of McCarty.

#### STATEMENT OF THE ISSUES

1. Did the trial court err as a matter of law in alluding that the military retirement benefits had been silently adjudicated to Mr. Toone when in reality the Decree of Divorce did not mention the military retirement benefits; both parties stipulated that the military retirement benefits had not been specifically or expressly divided; McCarty forbade state courts from dividing or offsetting military retirement in the divorce as a matter of law; and when USFSPA overturned McCarty each former spouse became tenants-in-common to the retirement until a formal division occurs?

2. Did the trial court err as a matter of law in concluding that the doctrine of res judicata was appropriate in this case where the evidence indicated that the military retirement benefits were not specifically mentioned in the Decree of Divorce, the trial court had retained exclusive jurisdiction under the original Decree as well as the Supplemental Decree to revise other property matters under the Decree of Divorce, and USFSPA specifically allows retroactive modification of divorces such as this one entered after June 25, 1981?

3. Did the trial court err as a matter of law in concluding that the eight year statute of limitation barred Mrs. Parkhurst's Petition to Modify where no ouster of the cotenants occurred; where her partition action is an equitable remedy governed by the equitable doctrine of laches and not the statute of limitation; where USFSPA specifically granted retroactive treatment to reopen decrees entered after June 25, 1981; where the original Decree retained jurisdiction and the Supplemental Decree of Divorce was not entered until December 16, 1983 and specifically reserved the right to either party to file a motion to divide the marital property after December 16, 1988; and where the parties became tenants-in-common to the military retirement benefits under USFSPA, creating a new claim and a substantial change in circumstances governed by the courts continuing jurisdiction under U.C.A. § 30-3-5 (1995).

4. Did the trial court err by concluding that as a matter of equity that Mrs. Parkhurst's filing of the partition action fourteen (14) years after entry of the first Decree of Divorce was late and untimely where the lower court specifically ruled that neither laches nor estoppel could bar Mrs. Parkhurst's claim; where the retirement had not been withdrawn and would not be disbursed until May 3, 1998; and where, under the lower court's decision, Mr. Toone would receive one hundred percent (100%) of the retirement benefits, when the trial court obviously intended each party to receive fifty percent (50%) of the marital estate?

5. Did the trial court err by relying on the Throckmorton case where Throckmorton involves a divorce in 1978 (not after June 25, 1981); is not a military retirement case; where Woodward, could be applied to this divorce since judgment was entered after Woodward; and the facts make it totally distinguishable?

6. Did the trial court err as a matter of law in denying Mrs. Parkhurst's Cross Motion for Summary Judgment to divide the military benefits when legal precedent in a majority of jurisdictions permits division of military retirement post-divorce?

#### DETERMINATIVE PROVISIONS, CASES, STATUTES AND RULES

The Uniform Services Former Spouses Protection Act (USFSPA) which is codified under 10 U.S.C. § 1408(c)(1) (1990 as amended) along with U.C.A. § 30-3-5(1)&(3) (1995) may be determinative of the outcome of this appeal. Also the cases cited by Appellant in this Brief may be determinative of the outcome in this appeal, particularly since the majority of those cases hold that military retirement benefits can be divided post-divorce where the divorce was entered after June 25, 1981.

#### STANDARD OF REVIEW

The standard of review in this appeal as to the issue presented on appeal is a "correctness standard" in reviewing the trial court's Conclusions of Law in the application of legal principles such as res judicata, statute of limitations, and the substantial change in circumstances test in denying Mrs.

Parkhurst's request where the review pays no deference to trial courts holding. See State Farm Fire Casualty Co. v. Greary, 869 P.2d 952, 1954 (Ut. App. 1994); State v. Pena, 869 P.2d 936 (Utah 1994). The other standard of review is whether the trial court abused its discretion in granting Mr. Toone's Motion for Summary Judgment based solely on the affidavits before it, under principles of equity (such as partition, laches and estoppel), since the affidavits do not reveal harm to Mr. Toone or unreasonable delay by Mrs. Parkhurst and the trial court's decision was so unreasonable in this area that it was arbitrary, capricious and a clear abuse of discretion. See Gillmor v. Wright, 850 P.2d 431, 434-36 (Utah 1993).

#### STATEMENT OF THE CASE

This appeal is from an Order granting Mr. Toone's Motion for Summary Judgment and denying Mrs. Parkhurst's Cross Motion for Summary Judgment. The Order was entered on September 25, 1996 in the First Judicial District Court in and for Cache County, Utah, by the Honorable Judge Gordon J. Low. (R.O.A. 239) (Exhibit "E" attached hereto).

The Order stemmed from the following procedural facts: Lynn Vincent Toone and Ruby Joan Toone were married on June 20, 1958 in Manti, Utah. (R.O.A. 239) Mr. Toone began creditable time for service in the Navy by working from March 1958 to the end of 1979 which qualified him for full vesting of twenty (20) years of military service, some ten (10) years active duty and some eleven



(11) years in the Naval Reserve. (R.O.A. 240) During all of Mr. Toone's creditable time of military service the parties had been married a total of twenty-three years [over ten (10) years as required by 10 U.S.C. § 1408]. (R.O.A. 239-240) Mrs. Toone (nka Parkhurst) supported Mr. Toone and made it possible for him to qualify for this retirement. (R.O.A. 141-43) On June 25, 1981, the U.S. Supreme Court in McCarty v. McCarty, 453 U.S. 210 (1981), ruled that federal law preempted the application of state marital property concepts to military retirement benefits and disallowed state court authority to divide military retirement benefits in a divorce. When Mr. Toone filed a Verified Complaint for Divorce on or about June 22, 1981 (R.O.A. 1) and Mrs. Toone filed an Answer and Counterclaim on or about June 29, 1981, (R.O.A. 4), the McCarty decision did not permit marital division of military retirement by a state court. The parties agreed to bifurcate the divorce proceedings and permit Mr. Toone a divorce so he could remarry. (R.O.A. 18) The trial court granted Mr. Toone a bifurcated divorce on July 23, 1981 and retained specific jurisdiction to divide all other marital property at a later date. (R.O.A. 18) (See Exhibit "A" paragraph 2).

On July 9, 1982, the trial court held a trial on all other reserved issues (except for the naval retirement) and made Findings and an Order and asked Mr. Toone's attorney, Arden Lauritzen, to prepare the final papers and to present the same for the judge's signature. (R.O.A. 29-30) (Also see Exhibit "B" Trial Transcript). On September 2, 1983, Mr. Toone filed a motion for Further

Proceedings and to correct exhibits prior to submitting the Findings and Order to the court for signature. (R.O.A. 31) The court denied this request. (R.O.A. 38) Mr. Toone's attorney took so long to file the Findings of Fact and Conclusions of Law and a Decree of Divorce, that Mrs. Parkhurst's attorney finally prepared the Findings and submitted Supplemental Findings of Fact and Conclusions of Law together with a Supplemental Judgment and Decree which were signed and dated December 14, 1983. (R.O.A. at 41 & 59) Corrected Supplemental Findings and Judgment and Decree were entered on December 16, 1983. (R.O.A. at 50 & 68) (See Exhibit "C" for Corrected Supplemental Judgment and Decree).

The trial court specifically ruled in paragraph 6 of the Corrected Supplemental Judgment and Decree (hereafter "Decree") that Mr. Toone's Utah State nonmilitary retirement was worth approximately \$10,000.00 and Mrs. Parkhurst's Utah State retirement was worth about \$3,000.00. (R.O.A. 70 & 181 to 185) (See also Exhibit "C" paragraph 6). The court offset these two (2) civil retirements one against the other leaving \$7,000.00, which it divided equally between the parties by granting \$3,500.00 to Mrs. Parkhurst. (R.O.A. 70) The affidavits, subsequent exhibits and Findings and Decree show that the court dealt only with the civil retirements of the parties and that the "navy" retirement was never mentioned and was totally omitted from the trial court evidence as well as the Findings and Decree. (R.O.A. 125, Exhibit "C" paragraph 10 of Decree).

In paragraph 4 of the Corrected Decree, the court retained jurisdiction for a period of five (5) years at the expiration of which time either party could file a motion with the court to revise the due date on Mrs. Parkhurst's equitable lien against the home which the court was allowing Mr. Toone to pay over a period of twenty (20) years and also reserved jurisdiction to revise any other property matters. (R.O.A. 70) Mr. Toone filed an objection requiring the trial court to make sure either party could file motions after the five (5) years expired. (R.O.A. 78) The trial court interlineated in paragraph 4 of the Decree, the change which allowed motions to be filed after the five (5) years ended in December of 1988. (R.O.A. 70) (Exhibit "C" paragraph 4; Exhibit "B" page 7).

Mrs. Parkhurst filed a Petition to Modify the Decree of Divorce on or about October 23, 1995 to receive her one-half (½) share of the naval retirement. (R.O.A. 106) Mr. Toone filed an Answer on November 1, 1995. (R.O.A. 110) Mr. Toone then filed a Motion for Summary Judgment on January 18, 1996 (R.O.A. 115), and Mrs. Parkhurst filed a Cross Motion for Summary Judgment on or about February 1, 1996. (R.O.A. 144) The only sworn testimony is contained in Mr. Toone's affidavit (R.O.A. 124-125) and Mrs. Parkhurst's affidavits (R.O.A. 139 to 143). The court entered a Memorandum Decision (R.O.A. 226, Exhibit "D") and Amended Order (R.O.A. 239, Exhibit "E"), based on the parties Motions, denying Mrs. Parkhurst's request to divide the naval retirement on

September 25, 1996. Mrs. Parkhurst filed a Notice of Appeal on October 15, 1996. (R.O.A. 246)

#### STATEMENT OF THE FACTS

For purposes of the Motion for Summary Judgment, as well as this appeal, both parties admit that the naval retirement benefits were not specifically divided in the trial court's Decree of Divorce. Moreover, no oral discussion took place during trial or written mention of military retirement benefits were made in the Findings of Fact and Conclusions of Law. (See Affidavit of Lynn Toone, paragraph 6 which states "The Decree of Divorce does not specify an allocation of military retirement benefits between the parties.") (R.O.A. 125 and affidavit of Joan Parkhurst, page 2 R.O.A. 142; Exhibit "B", page 5, Exhibit "C" paragraph 10).

Both parties admit for purposes of this appeal that the only retirements mentioned in the Decree of Divorce are Mr. Toone's retirement of \$10,000.00 from Utah State Retirement System and Mrs. Parkhurst's retirement of \$3,000.00 at Utah State University. (R.O.A. 175 to 185). The parties admit for purposes of this appeal that only two (2) civil retirements were discussed in the court's evidence and Findings.

Both parties acknowledge that the military retirement benefits have not been withdrawn by Mr. Toone and he will not start to receive those benefits until his 60th birthday on May 3, 1998. (Affidavit of Lynn Toone (R.O.A. 125) and facts presented in

paragraph 6 of Plaintiff's Response to Mrs. Parkhurst's Request for Reconsideration R.O.A. 208, paragraph 6).

Both parties also acknowledge that Mrs. Parkhurst was married to Mr. Toone for twenty-three (23) years, that Mr. Toone worked for the military retirement benefits for more than twenty years and that those military retirement benefits were earned entirely during the marriage (except for 2 or 3 months in 1958). (R.O.A. 208, paragraph 6)

Both parties stipulate that Mrs. Parkhurst was awarded only \$1.00 per month as alimony in the Decree of Divorce and that no alimony has been paid by Mr. Toone to Mrs. Parkhurst. (R.O.A. 70)

The parties basic disputed facts are over why Mrs. Parkhurst waited so long to bring the action to divide the naval retirement benefits. Mr. Toone also contends that the naval retirement was silently adjudicated by the trial court and awarded to Mr. Toone by default although no written evidence supports this claim and Mrs. Parkhurst flatly denies this claim.

The lower court ruled that estoppel and laches were not a bar to Mrs. Parkhurst's claim since no harm has occurred to Mr. Toone by Mrs. Parkhurst's action or inaction. (See Amended Order granting Summary Judgment, page 4 paragraph 3, Exhibit "E", R.O.A. 243). It was undisputed that Mrs. Parkhurst did not learn of USFSPA until 1995 and that she acted reasonably thereafter. (R.O.A. 232). The lower court also agreed that if Mrs. Parkhurst had brought her action earlier (i.e., within the eight-year statute of limitation) that Mrs. Parkhurst may have had a legitimate claim if

she could avoid the principle of res judicata. (R.O.A. paragraph 1, 193; 226-227) The main focus of the lower court was on the length of time which had passed since the divorce order and on the doctrine of res judicata. (R.O.A. 226 to 239)

#### SUMMARY OF THE ARGUMENT

The issues presently before this Court are of first impression in this state. The main issue is whether military retirement, expressly omitted from the Findings and Decree in a divorce decided after June 25, 1981, can now be divided pursuant to USFSPA and state law.

Mrs. Parkhurst's Brief will show the Court that Utah law, prior to McCarty, allowed for the equitable division of pension rights, retirement benefits, annuities and military retirement benefits. But for McCarty, Utah case law would have permitted an equitable division of the current military retirement before the Court. The lower court agreed. (R.O.A. 233) However, because of McCarty, the trial court could not consider, offset, or divide the military retirement. As a matter of law, the military retirement was not adjudicated nor could it have been adjudicated. Upon this issue the trial court erred. The trial transcript, Findings and Decree all indicate that the marital property, including the civil retirements, were divided 50/50 and no mention or reference was made to the military retirement. Res judicata does not bar Mrs. Parkhurst from seeking a division of the military retirement benefits. There are several cases which have decided that issue

and which hold that because McCarty forbade the division of military retirement benefits by state courts and further forbade any adjustment in the award of other community property to counter-balance or offset the loss of these benefits that res judicata cannot apply.

Partition actions to divide military retirement benefits have been allowed in post McCarty divorce decrees which did not expressly award the military retirement benefits to the service member. Omission of certain property from a decree of divorce does not affect the divorce's finality. It merely means that the omitted property is to be held by the former spouses as tenants in common since it was not formally divided by the court. Partition is and has always been available as a means of dividing property not formally divided upon divorce.

Only if the divorce court had specifically adjudicated or expressly stated in the decree a division of the retirement benefits would res judicata bar a subsequent suit for partition of the military retirement benefits in this case. The judgment is res judicata only to present and not future conditions. Because the enactment of USFSPA created a new fact and a change in the law, a new cause of action arose. This was a future condition to which res judicata does not apply.

Nor can Mrs. Parkhurst's claim be denied because of the statute of limitations. The statute of limitation defense is not applicable for several reasons.

First, this is a partition action against military benefits which were omitted from the Decree. Because USFSPA overturned the McCarty decision, the retirement benefits here reverted to the parties as tenants in common for which no disposition was made, thus giving the partitioners the right to divide this property at any time. The trial court erroneously thought it stayed in Mr. Toone's ownership only.

For the statute of limitations to begin to run in a partition action, there must first be an ouster of one tenant against the other. Neither party had been ousted by court order to this federal benefit, which arguably can only be divided by a court ruling. Since there was no ouster and no division of the property, each party remained in possession of their rights to the military benefits until someone began an action to do otherwise. The trial court erroneously held the limitations began to run on December 16, 1983 or February 1, 1983.

Second, the statute of limitation is a legal defense used against legal remedies. Divorce courts and partition actions are equitable remedies and it was inappropriate for the court to use the legal defense of a eight-year statute of limitation to bar Mrs. Parkhurst's claim as mentioned in the above paragraph. Mr. Toone could only assert the defense of laches in this case. Laches is not appropriate in this case as will be shown below and the trial court acknowledged this.

Third, provisions of USFSPA specifically allow parties retroactive benefits in divorce cases that happen after June 25,



1981 particularly when there is a specific reservation, as in this case, for a later property division. The Decree of Divorce also reserved jurisdiction to permit later property divisions which reservations preclude the use of the statute of limitations to bar this claim.

Lastly, the court has continuing jurisdiction under U.C.A. § 30-3-5 on new issues to make new orders. There is no statute of limitations for such continuing jurisdiction. A substantial change in circumstances allows reopening of the Decree. The enactment of USFSPA and Woodward, both created a substantial change in circumstances when other facts are considered herein.

For the defense of laches to apply, there must be a lack of diligence on the part of Mrs. Parkhurst and resulting injury to Mr. Toone. Equity does not encourage laches, and the doctrine may not be invoked to defeat justice but only to prevent injustice. The equitable defense of laches would only be available to prevent unfairness to a spouse who may have spent the money in reliance on the judgment. However, that is not the case here since the money has not yet been received by either party and will not be received until 1998. Furthermore, knowledge of the enactment of USFSPA, may not be imputed to Mrs. Parkhurst. That is a "new fact" that cannot be imputed. It created new evidence to divide retirement. Upon this issue the trial court erred. Rather, the delay must be unreasonable under the circumstances, including the party's actual subjective knowledge of her right, and it must be shown that any change in the circumstances caused by the delay has resulted in

prejudice to Mr. Toone sufficient to justify denial of relief. Courts have held that the critical date upon which to base laches or statute of limitations is when the wife first gained actual knowledge of her rights under USFSPA. Mrs. Parkhurst, after learning about her rights under USFSPA, acted timely and filed her Petition. When one considers the evidence in the light most favorable to Mrs. Parkhurst, the trial court abused its discretion in holding against her.

Utah case law prior to the McCarty Decision made it clear that the general rule as established in Englert v. Englert, 576 P.2d 1274 (Utah 1978) was that the trial court's duty is to make an equitable division of property in a divorce action which "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." Id. at 1276.

The retirement benefits in this case were fully vested prior to the date of divorce. Mr. Toone had served over twenty (20) years in the military naval retirement system. The parties had been married for twenty-three (23) years. Federal law permits division of retirements in those cases and have set up a procedure for so doing under USFSPA. Utah law not only allowed for the division of such property but also found creative ways for insuring that the other spouse received equitable treatment if one party did receive all of the retirement, such as lump sum alimony awards, survivor annuity benefits, larger alimony payments, claim upon the

other spouse's estate upon death, and various other methods. More recent Utah cases indicate that waiting until the retirement is actually distributed and entering an order dividing the same at that time might even be more equitable. In this case, the trial court in 1982 could have easily ruled that once the retirement annuity payments began each party would receive fifty percent (50%) of that annuity payment.

However, because of the ruling in McCarty, the trial court had no authority or jurisdiction to divide the military retirement or to offset it against other marital property. It is also evident from the trial court's findings that it did not consider the military retirement. Mrs. Parkhurst did not receive extra alimony or other extra property to offset the military retirement benefits of Mr. Toone. The trial court decision was in error on this matter. Because McCarty has now been overturned and USFSPA has been enacted to permit retroactive adjustments to avoid the inequities caused by McCarty it is not only fair and equitable for the court to divide the same but justice requires it.

Obviously, because the trial court divided all marital property 50/50 and did not take into consideration the military retirement benefit or provide any offsets or adjustments for those military retirement benefits, an injustice will result if Mr. Toone were to receive one hundred percent (100%) of those benefits. Mrs. Parkhurst is asking that she receive fifty percent (50%) of those benefits, not all of them. The trial court's decision in denying Mrs. Parkhurst's Motion for Summary Judgment, however, and in

granting Mr. Toone's Summary Judgment Motion effectively gives Mr. Toone an unintended windfall to one hundred percent (100%) of those benefits without justification or offset to Mrs. Parkhurst. USFSPA, and all of the laws surrounding these issues make it clear that the court should lean towards creating equity rather than an injustice and that courts should find a way to treat both parties fairly rather than find ways to block Mrs. Parkhurst's Petition on legal theories of res judicata and statute of limitations. It was err for the trial court to foreclose Mrs. Parkhurst's ability to receive her share of the retirement funds.

#### LEGAL ARGUMENT

- I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE PRINCIPLE OF "RES JUDICATA" BARRED APPELLANT'S CLAIM TO A DIVISION OF THE NAVAL RETIREMENT WHERE THE NAVAL RETIREMENT WAS NOT EXPRESSLY ADJUDICATED BY THE TRIAL COURT, NOR COULD IT HAVE BEEN UNDER THE DECISION OF MCCARTY, AND WHERE THE LATER ENACTING OF (USFSPA) ELIMINATED THE HORRORS CAUSED BY MCCARTY, AND SPECIFICALLY PROVIDED THAT DIVORCES OCCURRING AFTER JUNE 25, 1981 COULD BE REOPENED TO ALLOW FOR RETROACTIVE APPLICATION OF THE LAW TO MODIFY OR DIVIDE MILITARY RETIREMENT.

The doctrine of res judicata is applicable only in the following situations:

When there has been an adjudication, it becomes res judicata as to those issues which were either (1) tried and determined, or (2) upon all issues which the party had a fair opportunity to present and have determined in the other proceeding. Throckmorton v. Throckmorton, 767 P.2d 121, 123 (Ut. Ct. App. 1988). However, in order for a claim to be barred by res judicata, both the prior claim and the current claim must meet three requirements:

1. Both actions must involve the same parties, their priedvies, or their assignees;
2. The claim that is asserted to be barred must have been presented or be such that it could have been presented in the first case; and
3. The first suit must have resulted in a final judgment on the merits by a court of competent jurisdiction. Fitzgerald v. Corvit, 793 P.2d 356, 359 (Utah 1990).

In the present case item one was met but items 2 and 3 were not. Item 2 was not met because the trial court could not divide the military retirement since McCarty v. McCarty, 453 US 210 (1981) held that federal law precluded a state court from dividing military retirement pay pursuant to state property laws, or even using it to offset property in the divorce. Id. at 229 and Hisquierdo v. Hisquierdo, 439 U.S. 572, 588 (1979).

If McCarty precluded the trial court from even hearing the matter or allowing a party to bring the matter before it, then there was no way Mrs. Parkhurst could have had a fair opportunity to present and have determined that issue in the first trial. Both parties stipulate and agree that the issue was not presented to the court and the only question is whether by silence it was awarded to Mr. Toone by default.

Several cases since McCarty have held that res judicata does not bar a partition suit brought by a former spouse of a service member to obtain a division of the military retirement benefits. McCarty rests on the premise that the purpose of the statute that created military retirement would be frustrated if state courts were allowed to divide the retirement in divorce proceedings. Thus, to prevent this result, the Supreme Court held that the

federal statute superseded state property laws that allowed for the division of military retirements. Surely, the purpose of the federal statute would also be frustrated if a state court was allowed to offset military retirement against other marital property. Accordingly, because the trial court was silent on the treatment of the military retirement benefits, Mr. Toone cannot now argue that Mrs. Parkhurst somehow received additional property as an offset against the military retirement benefits.

In addition, res judicata does not apply because USFSPA, the cause of action that allowed a spouse to seek a division of the military retirement account, did not exist at the time of the divorce. Res judicata only bars claims that were or could have been brought during the first case, not to future conditions or future claims.

One of the better cases to decide this issue is Powell v. Powell, 703 S.W.2d 434 (Texas App. 1985). In Powell the court dealt with a divorce in 1965 that was silent as to any division of the military retirement pay. The wife brought suit in 1979 seeking a judgment for 46% of the retirement. Thus, the wife (as in our case) waited fourteen years after the divorce to seek part of the military retirement pay. The trial court entered judgment for the wife for 46% of all retirement benefits and the husband appealed arguing res judicata. The appellate court followed McCarty and ruled that the wife was not entitled to anything. On February 1, 1983, USFSPA was enacted and on April 7, 1983 the wife again filed for one-half (½) of the military retirement seeking a declaratory

judgment. The husband again asserted the defense of res judicata and argued that the wife was not entitled to one-half (½) of the military pay because it was not earned in a community property state, and the trial court took into account the military benefits in dividing the property and setting child support payments in the original decree. This time the trial court found that wife was entitled to 46% of the military retirement benefits, so the husband appealed again. The Powell court specifically held:

Res judicata will operate as a bar only to matters actually raised or that could have been raised in the previous litigation. As to matters which arise subsequently, the prior judgment will not be res judicata. Our Supreme Court expresses the rule thusly: 'The judgment is res judicata only of present and not future conditions' . . . (citations omitted)

The enactment by congress of the FSPA created a new fact, a change in the law and a new cause of action. See also Muchard v. Berenson, 307 F.2d 368; State Farm Mutual Auto Ins. Co. v. Duel, 327 U.S. 154; U.S. v. Lubbock Ind. Sch. Dist., 455 F.Supp. 1223; and Colorado Co. FED. S&L Assn. v. Lewis CCA, 498 S.W.2d 723. Id. at 436

Powell also held regarding the argument on community property vs. common law property at page 437:

"We recognize that property acquired in common law jurisdictions has historically been termed separate property, but we hold that the property spouses acquire during marriage, except by gift, devise or descend should be divided upon divorce in Texas in the same manner as community property, irrespective of the domicile of the spouses where they acquire the property. Id. at 437.

Utah would agree with this statement because it too divides all marital property acquired during marriage, regardless of whose name it was titled in or from what state it originated.

Regarding the Defendant's argument that other marital property and support was offset against the military retirement, the Powell court stated:

"Appellant contends in his defense that the trial court took the military retirement benefits into consideration when dividing the parties' property and fixing child support payments cannot be adjudicated here by Summary Judgment. The military retired pay was not divided or mentioned in or by the divorce decree of 1965. Thus, the husband and wife became joint owners thereof." Id. at 437.

Several cases, in addition to Powell, have held that res judicata is not a bar to a former spouse seeking one-half (½) of the retirement benefits. See generally Eddie v. Eddie, 710 S.W.2d 783 (Texas 1986); Marino v. Alejandro, Jr., 775 S.W.2d 735 (Texas 1989); Koepke v. Koepke, 732 S.W.2d 299 (Texas 1987); (wherein the court held that the doctrine of res judicata did not bar a partition suit despite language in the Divorce Decree that stated "all relief requested in this case and not expressly granted herein is hereby denied" because the Decree did not expressly award the military retirement benefits to the service member); Casas v. Thompson, 720 P.2d 921 (Cal. 1986) (where, eleven years after divorce, wife is allowed to divide retirement that was silent in the Decree).

The only cases which have permitted res judicata to bar an action for partition have been those where the court expressly awarded the military retirement benefits in the divorce decree.

In the present case, the trial court did not expressly mention the military retirement benefits in the Decree of Divorce. The



divorce trial fits squarely within the time period after June 25, 1981 (i.e., July 23, 1981 and July 9, 1982). The federal legislation made USFSPA retroactive to June 25, 1981. The property was not adjudicated and it remains in both parties as tenants in common.

Regarding item 3 - whether there was a final judgment on the merits over the military retirement, there was not. The trial court specifically reserved jurisdiction to divide marital property later. Because of McCarty, the military retirement was initially treated as separate property of Mr. Toone but with the enactment of USFSPA on February 1, 1983, the effects of McCarty were eliminated and the retirement became marital property once again. The military retirement therefore was never divided by a final order of the court. Omission of certain property does not affect the finality of the Order as to property adjudicated, but on property not adjudicated, it remains held as tenants in common.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN APPLYING THE EIGHT-YEAR STATUTE OF LIMITATIONS TO BAR APPELLANT'S CLAIM FOR A DIVISION OF THE MILITARY RETIREMENT.

The defense of statute of limitations is not applicable to this case, for several reasons:

- A. The former spouses are tenants in common to the retirement, no judgment was entered on its division and no ouster has occurred.

Because the divorce court failed to divide the retirement, it remains marital property and is held as tenants in common. Several cases have decided the issue of omitted property in a decree of

divorce and how the property is held after the divorce. The majority, including Utah, have held that omitted property remains titled in both parties as tenants in common. See generally Cooper v. Cooper, 808 P.2d 1234 (Ariz. App. 1990); Mosier v. Mosier, 830 P.2d 1175 (Idaho 1992); Koepke v. Koepke, 732 S.W.2d (Texas 1987); Henn v. Henn, 605 P.2d 10 (Cal. 1980); and Iverson v. Iverson, 526 P.2d 1126 (Utah 1974) (where the court found the parties who were previously joint tenants in a family home which the court did not fully divide would now become tenants in common to said home); see also Booth v. Booth, 722 P.2d 771 (Utah 1986) (similar holding).

Obviously, if the parties could not adjudicate the property and the property was not expressly divided in the Decree of Divorce, they must remain as tenants in common to the property since it was a marital asset that was jointly owned during the marriage. Before the statute of limitations or laches begins to run in a situation where both parties are tenants in common to the property, one party must oust the other one. An ouster requires open, clear and hostile speech or acts that show a clear intent to exclude the other cotenant from the property. See Massey v. Protagro, 664 P.2d 1176 (Utah 1983) (where the tax title statute of limitations and adverse possession limitation of seven years did not run against cotenant until other cotenant was ousted, merely waiting twenty (20) years or even ten (10) years after tax sale was not enough).

Mr. Toone, who has the burden to show an ouster, has proffered no evidence that an ouster ever occurred in this case. The trial

court erroneously held that the limitations began on final divorce or when USFSPA was enacted in February 1983. This was error since no ouster can take place by passage of a law or by silent, nondistribution in a divorce decree. Ouster requires much more as stated above.

B. Statute of limitations is a legal defense and not applicable to this equitable claim.

Because the retirement is held as tenants in common, a partition action is appropriate to divide the property. Partition actions are equitable proceedings. Likewise, the division of property in Utah in a divorce case is an equitable determination. Consequently, only equitable defenses are available to bar Mrs. Parkhurst's claim. Legal defenses, like the statute of limitations, do not apply to equitable claims.

The doctrine of laches is an equitable defense which arises in cases where the plaintiff seeks equitable relief. A defendant may successfully assert this defense when a plaintiff seeking equity unreasonably delays in bringing an action and this delay prejudices the defendant. However, where the plaintiff's claims are based in law, the statute of limitations, not the doctrine of laches, governs the timing surrounding a plaintiff's filing of a complaint. See Doit, Inc. v. Touche, Ross & Company, 926 P.2d 835 (Utah 1996)

Likewise, the doctrine of laches, not statute of limitations, applies as a defense against the equitable claim of partition of the retirement. Otherwise, none of the ex-spouses in cases such as Henn, Casas, Powell, Id. (all from eleven to fourteen years after divorce) could have reopened the decree.

C. Statute of limitations is not applicable because Congress expressly made USFSPA retroactive to June 25, 1981 by Amendment in November 1990.

Several cases have challenged the retroactive effect of USFSPA. In the majority, if not all of those decisions, the court has held that Congress intended that USFSPA apply retroactively. See generally In re: Marriage of Barnes, 743 P.2d 915 (Cal. 1987), and cases cited therein. The committee report accompanying the measure on USFSPA says:

The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the McCarty decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal presumption found to exist by the United States Supreme Court and permit state and other courts of competent jurisdiction to apply pertinent state or other laws in determining whether military retired or retainer pay should be divisible.

S. Rep. No. 502, 97th Cong., 2d Sess. 16 (1982), 1982 U.S.C.C.A.N. 1555, 1611. "[T]he states interest in remedying the 'rank injustice' of the situation and in achieving an equitable dissolution of the marital relationship justifies such retroactive application." In re Marriage of Barnes, 743 P.2d 915 at page 918 (Cal. 1987). Congress amended § 1408(c) of USFSPA in November 1990 to clarify that point and to allow for modification back to June 25, 1981. Because of the intended retroactive application, the statute of limitations cannot bar Mrs. Parkhurst's claim.

- D. The original Decree of Divorce reserved jurisdiction to decide future splits of property between the parties and that reservation avoids the statute of limitations problem.

The Decree of Divorce dated July 23, 1981 states in paragraph 2: "The court herein makes no order in respect to custody, child support or division of property and that jurisdiction is retained

by the court to consider said matters at a later date." This specific reservation in the Decree retains by court order jurisdiction to consider division of any property at a later date. The statute of limitations cannot apply to such an order. This order would cover the military retirement benefits since that division of property has not yet taken place and jurisdiction was specifically reserved for it. Section (c) (1) (B) of 10 U.S.C. § 1408 indicates that a spouse could even seek division of retirement before June 25, 1981 decrees if the divorce decree reserved jurisdiction to treat any amount of the retired pay of the member as property of the member and the member spouse or former spouse. The trial court also reserved jurisdiction in the Corrected Decree dated December 16, 1983, specifically at paragraph 4 it states: "The court retains jurisdiction for a period of five (5) years at the expiration of which time either party may motion the court to revise due date of the loan or other property matters herein." This reservation of jurisdiction by the trial court would cover any property that the Corrected Judgment and Decree adjudicated, and would allow Mrs. Parkhurst to file a motion sometime after the expiration of five (5) years to deal with other property matters. Arguably, Mrs. Parkhurst's motion to partition the retirement filed in October 1995 was within the eight (8) year statute of limitations, if one was to be applied, because the five (5) years ended in December of 1988.

Under either reservation of jurisdiction above, the court would have the authority to take another look at and divide the

military retirement, thus, omitting it from the operation of the statute of limitations and the cutoff provisions in USFSPA and leaving that issue open to be litigated by the parties.

E. The court has continuing jurisdiction to review property matters in Utah Code Ann. § 30-3-5 and the statute of limitations is not applicable in such situations.

Utah law provides that a divorce court "has continuing jurisdiction to make subsequent changes or new orders for the support in maintenance of the parties, the custody of the children and their support, maintenance, health, dental care, or the distribution of the property and obligations for debts as is reasonable and necessary." Utah Code Ann. § 30-3-5(3) (1953 as amended) (emphasis added).

Other courts have also ruled that if there are marital assets which were not disposed of in a divorce decree, then the court has continuing equitable power to divide those assets. See Elsworth v. Elsworth, 423 P.2d 364, 365 (Ariz. Ct. App. 1967); In re: Marriage of Brown, 544 P.2d 561 (Cal. 1976); Cribbee v. McDermott, 521 P.2d 1023 (Idaho 1974); Harris v. Harris, 493 P.2d 407 (N.M. 1972); Pittmann v. Pittmann, 393 P.2d 957 (Wash. 1964).

The proper treatment of undisclosed and unlitigated property is that both parties become tenants in common of the property until the court can determine how the property is to be divided. Note that § 30-3-5 of the Utah Code allows the court continuing jurisdiction to make "new orders" which we are asking the court to do in this case since McCarty created a new cause of action for Mrs. Parkhurst and she seeks a new order regarding the retirement.

Utah law further recognizes the court's authority to correct judgments at any time based on error or omission. Utah R. Civ. P. 60(a). Other states have likewise recognized the theory of correction of a judgment to allow the court, where a husband's pension was omitted from the original findings and decree, to make a correction at any time. See In re the Marriage of Getz, 789 P.2d 331 (Wash. Ct. App. 1990) based on a statute permitting correction of clerical errors under Rule 60(a) which is very similar to the Utah rule. According to Getz, the rule provides that "clerical mistakes in judgments . . . and errors therein arising from oversight or omission may be corrected at any time . . . . Getz at 332 (emphasis omitted). Utah's Rule 60(a) reads "clerical mistakes in judgments . . . arising from oversight or omission may be corrected by the court at any time of its own initiative . . . ."

In Getz, the husband had two pensions, one state plan and one national plan, which was disclosed during discovery to the wife. The decree of divorce was later issued, dividing the assets of the state plan but was silent as to the national retirement plan. Wife requested a Nunc Pro Tunc order to modify the decree to include the national plan. The court found that the parties had intended to divide their assets and that the trial judge intended to divide all assets and allowed the division of the national plan through the Nunc Pro Tunc order. Id.

The Utah Supreme Court, at the time in which this divorce was granted, clearly recognized the trial court's continuing jurisdiction to make changes to orders regarding property

distribution, including modifying a spouse's interest in property consisting of a stream of payments and income which the parties had not yet received. In Sundquist v. Sundquist, 639 P.2d 181 (Utah 1981), the court stated that "§ 30-3-5 does authorize the divorce court to reallocate property rights between the parties to the divorce, such as by modifying the earlier decree as to the parties interest in the Big Bear property, including installment payments not yet received." Id. at 186.

Likewise, in this case, retirement payments have not yet been received but soon will and the court can examine how to equitably divide this future stream of payments between the parties despite any contention regarding statute of limitations or a lapse of time since the decree of divorce.

Mrs. Parkhurst will also show in Point IV below that a substantial change in circumstances has occurred to permit reopening of the Decree.

III. LACHES CANNOT BE A DEFENSE IN THIS CASE BECAUSE THE TRIAL COURT SO HELD AND NO HARM HAS OCCURRED TO MR. TOONE.

The trial court in Mrs. Parkhurst case ruled that laches and estoppel were not applicable (see Amended Order on Summary Judgment, page 4 paragraph 3) but then used equitable type arguments (similar to laches) to bar Mrs. Parkhurst's claim. This was err for several reasons.

To make out a defense of laches, the plaintiff must show (1) that the defendant unreasonably delayed in bringing the action and (2) that the plaintiff was prejudiced by the delay. Bruer-



Harrison, Inc. v. Combe, 799 P.2d 716, 726 (Utah App. 1990). A mere delay in time will not constitute laches. Therefore, even though the delay may be inexcusable and of a long duration (i.e., even exceeding the statute of limitations), if there is no prejudice to the other party that has issued from the mere passage of time then laches would not be a bar. In fact, for the doctrine of laches to apply to a suit for the partition of personal property such as military retirement pay, there must be evidence of a repudiation of the partitioning cotenant's interest in the property by the other cotenant. See Bankston v. Taft, 612 SW 2d 216 (Texas).

In Openshaw v. Openshaw, 144 P.2d 528 (Utah 1943), it was held that mere delay is not enough. One critical element of laches is knowledge of essential facts. In Openshaw, the Utah Supreme Court stated that laches cannot be imputed to one who was ignorant of the facts and for that reason failed to assert his rights. Id. at 531. Laches requires subjective, actual knowledge. It was error for the trial court to impute knowledge of USFSPA to Mrs. Parkhurst, when she had no actual knowledge of it.

In addition, laches requires an unreasonable delay in commencing an action after obtaining actual knowledge. As stated above, a mere lapse of time is not enough. There must be evidence that Mrs. Parkhurst actually delayed filing for partition, after actually learning she could do so which delay was inexcusable. The only evidence presented was that Mrs. Parkhurst filed her claim soon after learning of her rights under USFSPA.

Finally, for the defense of laches to bar an action, there must be damage to Mr. Toone resulting from the unreasonable delay.

As stated in Openshaw:

Laches is more than a mere lapse of time, its essence is estoppel. While delay is an important factor, yet mere delay, unless unreasonable or inexcusable, is not enough; and of an equal importance are the circumstances occurring during the delay, the relationship of the parties to the subject, disadvantages, that may have come through loss of evidence, change of title, intervention of equities, or injury from other causes. Id.

Cases involving military retirement pay and laches have made it clear that laches does not apply to retirement benefits that will be received prospectively because there is no prejudice to the service member. The service member has no right to control the retirement until it is received and they cannot assign or transfer their property interest. The court in Beltran v. Razo, 788 P.2d 1256 (Ariz. App. 1990), so held. Another case decided subsequent to Beltran is Flynn v. Rogers, 834 P.2d 148 (Ariz. 1992). In Flynn, the husband had retired from the military and was collecting retirement at the time the couple divorced. The wife was told by a friend about USFSPA six and one-half (6½) years after its enactment. She then filed for a partition of the military retirement benefits. The court found that USFSPA created a new fact and the passage of the law should not be imputed to her for purposes of laches. Consequently, the court found that laches did not bar her claim to a retroactive award of \$35,000.00 that had already been received by her ex-husband and was not a defense at all to a prospective claim to future retirement benefits. The court reasoned as follows:

Here, by contrast, the wife did not learn of any such 'fact' after the filing of the dissolution decree. Assuming that the 'fact' giving rise to the wife's claim was the husband's receipt of pension benefits, the wife had knowledge of that fact before the decree was entered, at which time, under McCarty, she had no claim. On the other hand, if the inception of rights flowing from the enactment of FSPA could possibly be considered a 'fact', then laches should not defeat her claim because the trial court found, upon consideration of the evidence, that she had no knowledge of that 'fact' until shortly before the commencement of this proceeding. Id. at 153.

The court found that the wife's prior knowledge of the 'fact' of the husband's receipt of military pension benefits could not, and did not, give rise to a claim on her part. Rather, her claim evolved from rights created by the passage of USFSPA, and the trial court found that she had no knowledge of those rights until shortly before she commenced the proceeding. In Flynn the court refused to impute knowledge to the wife or state that her ignorance of the law was inexcusable.

As the court stated in Beltran v. Razo, 788 P.2d 1256, (Ariz. Ct. App. 1990), "equity does not encourage laches, and the doctrine may not be invoked to defeat justice but only to prevent injustice." Id. at 1258.

In the present case, Mr. Toone has not received or spent any of the retirement benefits. They are not due to be received until 1998. Laches cannot be used as an argument to stop Mrs. Parkhurst from receiving her entitled one-half (½) share to these retirement benefits. There has been no injustice created to Mr. Toone and justice demands that Mrs. Parkhurst receive her fair share of these retirement benefits.

IV. THE TRIAL COURT ERRED IN HOLDING NO CHANGE IN CIRCUMSTANCES OCCURRED JUSTIFYING REOPENING THE DECREE WHERE THE TRIAL COURT SPECIFICALLY RETAINED JURISDICTION TO DIVIDE THE MARITAL PROPERTY IN THIS CASE AT A LATER DATE, HAD CONTINUING JURISDICTION TO DO SO BY STATUTE, AND A NEW CLAIM AROSE BECAUSE OF THE ENACTMENT OF USFSPA WHICH WAS CLEARLY A CHANGE IN CIRCUMSTANCE CREATED BY STATUTORY ENACTMENT.

This Court's holding in Throckmorton v. Throckmorton, 767 P.2d 121 (Utah App. Court 1988), can clearly be distinguished from the instant case because a substantial change in circumstances can be shown, thus permitting the court to reopen the divorce and divide the military retirement.

The Court's decision in Throckmorton, cited by Mr. Toone as authority for granting Mr. Toone's motion for summary judgment, was based on an entirely different legal claim and set of circumstances which have substantial factual distinction from the instant case.

Throckmorton involved parties who divorced in September 1976, five (5) years before the effective date of USFSPA and therefore clearly outside of the gap period created by McCarty. In the present case, the divorce was granted after the effective date of June 25, 1981 created by USFSPA and is given retroactive effect by USFSPA to that time.

Throckmorton also involved a request to modify 1976 divorce decree, regarding a pension fund upon which the divorce decree was silent, on the main theory that a subsequent change in law by Woodward v. Woodward, 656 P.2d 431 (Utah 1982) created a "substantial change in circumstances". The Court in Throckmorton relied heavily, if not entirely, on the principle that Woodward would not have retroactive effect and could only be applied

prospectively and therefore could not constitute a substantial change in circumstances to divorces prior to Woodward. However, in Mrs. Parkhurst's case, the divorce decree was actually finalized in December 1983, after Woodward became law, and therefore a substantial change in circumstances could be created by Woodward as well as USFSPA allowing this court to retroactively adjust the military retirement benefits. Congress clearly intended to create a new cause of action for cases that fell after June 25, 1981.

Throckmorton also held "that the legal recognition of a new category of property rights after a decree of divorce has been entered, is not itself sufficient to establish a substantial change in circumstances justifying a re-evaluation of the prior property division", but did not restrict itself if other facts that would also indicate that a substantial change in circumstances exist. See Throckmorton at 124. In Throckmorton, the court found that under the totality of the circumstances, the property distribution does not offend our sense of justice. Id. at 124. Mr. Throckmorton was ordered to pay \$12,000.00 in marital debt in the original decree, and Mrs. Throckmorton was awarded the family home and ultimately received \$24,000.00 in equity and had her alimony increased. In addition, the trial court in Throckmorton found that the former spouse had an opportunity to litigate retirement issues during the first proceeding. After looking at the totality of the circumstances, Throckmorton decided there was no substantial change in circumstances. Id. 123

However, Mrs. Parkhurst, in the current case, had no opportunity to litigate the division of the military retirement at the first trial. Furthermore, because the trial court in Mrs. Parkhurst's case divided all other martial property 50/50, she received no offsetting child support or alimony, and due to the recognition of a new category of property rights by USFSPA and the windfall that Mr. Toone would receive if he were allowed one hundred percent (100%) of those military retirement benefits a substantial change of circumstances does exist justifying the reopening of the decree.

Lastly, Throckmorton as well as Ostler v. Ostler, 789 P.2d 713 (Utah Ct. App. 1990), which followed Throckmorton were both based on divorce cases involving omitted retirement benefits for divorces granted prior to 1981 (i.e., Throckmorton 1976 and Ostler 1978) and did not involve military retirement, which was specifically excluded by McCarty from being considered in the divorce. As stated in Jefferies v. Jefferies, 895 P.2d 835 (Utah Ct. App. 1995), the divorce court is to consider all marital property when making an equitable distribution unless the law specifically prevents the court from considering a particular asset. Id. at 837. Because the retirement funds in Throckmorton and Ostler could have been considered by the trial court and no law prevented their consideration, the court specifically found that the matters were res judicata. However, in Mrs. Parkhurst's case, federal law and the U.S. Supreme Court's interpretation of that law in McCarty

specifically prevented the trial court from considering the military retirement.

In Mrs. Parkhurst's case, the military retirement was not previously litigated or incorporated in the Decree and she can now attack the original Decree and seek a new order regarding the same.

V. THE NAVAL RETIREMENT ACCOUNT EARNED DURING THE MARRIAGE FROM MARCH, 1958 THROUGH THE END OF 1979 IS CONSIDERED MARITAL PROPERTY UNDER UTAH LAW AND CAPABLE OF DIVISION DURING THE DIVORCE TRIAL IN JULY OF 1982 WERE IT NOT FOR THE U.S. SUPREME COURT DECISION IN MCCARTY, WHICH STATED FEDERAL LAW PREEMPTED APPLICATION OF STATE MARITAL PROPERTY CONCEPTS TO MILITARY RETIREMENT BENEFITS.

USFSPA 10 U.S.C. § 1408(c)(1), provides in part:

(1) Subject to the limitations of this section, a court may treat disposable retired 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.

This provision specifically provides that a court may treat the retired pay as property of the member and the former spouse for all divorces occurring after June 25, 1981, in accordance with the law of the jurisdiction of the court. The status of Utah law regarding the division of retirement on June 25, 1981 is found in the Englert, Bennett, and Dogu decisions which defined the divisibility of retirement prior to Woodward.

The Utah Supreme Court in Englert v. Englert, 576 P.2d 1274 (Utah 1978), defined retirement benefits to be included under § 30-3-5 and divisible by the courts. Id. at 1276. The defendant in that case argued that his veterans retirement fund was not property within the meaning of the statute and should not be considered in

the property division. Id. at 1275. The defendant cited In re: Marriage of Ellis, 538 P.2d 1347 (Colo. App. 1975), where the Colorado Court of Appeals held: "that the husband's army retirement pension and future retired pay to be received thereunder do not constitute "property" and are, therefore, not subject to division under the Colorado statute." Defendant also argued in that case that since Utah was not a community property state and only community property states had recognized military retirement funds and pensions which accrued during the marriage as subject to division. Accordingly, defendant said that Utah should not uphold the rulings in the community property states. Id. 1275-76.

However, the Utah Supreme Court in Englert defined § 30-3-5, which states "when a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable", to contain general terms and no hint of a limitation. The court said:

The import of our decisions implementing that statute is that proceedings in regard to the family are equitable in a high degree; and that the court may take into consideration all of the pertinent circumstances. 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.

Id. at 1276.

Utah law recognized in Englert that the military retirement benefits provided by the Veterans Hospital were a divisible asset



under Utah law and followed the position of community property states who held likewise.

In Bennett v. Bennett, 607 P.2d 839 (Utah 1980), the Utah Supreme Court also considered the division of a husband's military retirement fund contributed by the federal government while he was employed at Hill Air Force Base. In Bennett, a civilian personnel officer testified at the time of the divorce hearing that the present value of the husband's retirement fund was \$15,681.95. She further stated that the federal government had contributed the same amount to his retirement fund but that no present value could be assigned to that portion. Id. at 840. The court followed the language in Englert and divided the husband's contributions to his retirement, but held that because the contributions by the federal government had no present value and may not have any value in the future, that it was err for the district court to consider the federal contribution to the retirement as one of the assets of the parties. Chief Justice Crockett dissented from the majority opinion and said he was in hardy agreement with the quote from the Englert case and stated that the court should include anything that is realistic and substantial, even an expectancy of future retirement funds. Id. at 841.

The next Utah case dealing with division of retirements was Dogu v. Dogu, 652 P.2d 1308 (Utah 1982). In Dogu the husband argued that since none of his separate retirement funds could be withdrawn until he retired, the total value of those funds, \$86,730.00, should not be subject to division between the parties

even though they were all accumulated during the marriage. Id. at 1309-11. The Dogu court considered the decision in both Bennett and Englert and ruled that the Bennett case reflected a failure of proof on present value and still included the marital property portion of the husband's retirement, even though he had not yet retired or received the actual enjoyment of his retirement benefits which were purely prospective. Id. The Dogu court then held that it is the trial court's duty to make an equitable division of property in a divorce action which includes assets of every nature, including pension funds. Id. In Dogu the court divided the \$86,730.00 of retirement and considered the entire amount a marital asset. The Court also suggested several methods for making that division: (1) The court could order that respondent elect a join and survivor annuity under each retirement fund or that is an option, with appropriate adjustments to his alimony obligation during the period following retirement; (2) If respondent's retirement rights permit this option, the court could order that respondent elect that upon his retirement appellant be paid, in lieu of alimony after retirement, a lump sum equal to one-half (½) the value of the retirement benefit as of the date of divorce, plus investment income accumulated thereafter; (3) The court might order that appellant's rights to alimony continue after respondent's death or up until her own death or remarriage. Id. The court recognized that each of the foregoing alternatives assumed that the respondent would live long enough to retire. The Dogu court also provided for the eventuality if the respondent dies

before retirement. If respondent is awarded full ownership of the retirement funds, the court could order that upon his death before retirement the commuted value of appellant's post-retirement alimony for the period of her life expectancy be a claim against respondent's estate or, in the alternative, if respondent's retirement rights permit this option, it could also order that respondent elect that upon his death prior to retirement, appellant be paid the cash value of one-half ( $\frac{1}{2}$ ) of the retirement right as of the date of the divorce, plus investment income accumulated thereafter. Id. The court recognized that there may also be other alternatives. The court stated "in any case, the district court may require additional evidence on the nature of the retirement funds and the needs and preferences of the parties in order to exercise its statutory power to divide the retirement funds equitably." Id. at 1311.

These three cases define the scope of the law as it existed in Utah during 1981 and 1982 when Mrs. Parkhurst divorced Mr. Toone. These cases indicate the trial court does have a right to look at the military retirement benefits and make decisions regarding its equitable division. Later Woodward v. Woodward, 656 P.2d 431 (Utah 1982) overruled the holding in Bennett, followed the Dogu decision and upheld the Englert decision and stated that it is not necessary to consider whether pension rights are vested or nonvested. Id. 432-33. The court specifically said it had the right to divide any retirement benefits even though they are in a form of deferred compensation by the employer. Id. The main consideration is

whether those rights accrued during the marriage, and if so, then the court must at least consider those benefits in making an equitable distribution of the marital assets. It is interesting to note that Woodward upheld the trial court's decision which divided a civilian retirement benefit. The Woodward trial took place at approximately the same time as the trial in the Parkhurst-Toone matter.

Subsequent cases dealing with military retirement benefits acquired in whole or in part during the marriage have been found to constitute marital property under Utah law and are subject to division. In Greene v. Greene, 751 P.2d 827 (Utah Ct. App. 1988), the Utah Supreme Court again stated "the essential criteria is whether the right to the benefit or asset has accrued in whole or in part during the marriage." Id. at 831. The court in Greene concluded that under Utah case law, marital property encompasses all types of retirement funds and any retirement fund that accrued in whole or in part during the marriage may be distributed in a divorce proceeding. Id. The Greene case and all subsequent Utah cases have relied heavily on the statement in Englert that "marital property encompasses all of the assets of every nature possessed by the parties whenever obtained and from whatever source derived; and this includes any such pension fund or insurance." Id.

Mrs. Parkhurst had a right to share in the military retirement benefits earned during her marriage to Mr. Toone. Utah recognized that right in 1981 and 1982 when this matter went to trial. However, because of the McCarty decision of June 25, 1981, the

trial court did not have authority to divide the military benefits at that time and the military retirement benefits were omitted from the trial court Findings and were not considered. USFSPA eliminated the effects of McCarty and permitted retroactive divisions of military retirement benefits for all divorces which happened after June 25, 1981. Because this divorce happened after June 25, 1981, and because Utah law recognized the right to divide all marital assets of whatever nature from whatever source, the court should now consider dividing the military retirement in this case.

VI. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED MRS. PARKHURST'S MOTION FOR SUMMARY JUDGMENT TO EQUITABLY DIVIDE THE MILITARY RETIREMENT BENEFITS PARTICULARLY WHEN ALL OTHER MARITAL PROPERTY HAD BEEN DIVIDED ON A-50/50 BASIS AND WHERE MRS. PARKHURST DID NOT RECEIVE ANY ALIMONY IN LIEU OF THE RETIREMENT, AND WHERE THE MILITARY RETIREMENT BENEFITS HAVE NOT YET BEEN RECEIVED OR PAID TO EITHER PARTY.

Review of the Findings of Fact and the Corrected Decree relative to the property distribution in this case makes it clear that the trial court's intent was to divide the property equally between the parties. The trial court decision addresses Mr. Toone's Utah State retirement and Mrs. Parkhurst's Utah State retirement plans but is silent on the question of Mr. Toone's naval retirement. The court intended to split the retirements equally when it valued Mr. Toone's civil retirement at roughly \$10,000.00 and Mrs. Parkhurst's Utah State retirement at roughly \$3,000.00. The court awarded Mrs. Parkhurst \$3,500.00 (i.e., one-half (½) of the difference of \$7,000.00) in other property to make up for the

difference in retirement division. The trial court also divided other marital property between the parties on a 50/50 basis pursuant to Exhibit "A," which was attached to the Decree of Divorce and valued every personal property item between the parties. The court specifically equalized the property on Exhibit "A," which was awarded to Mr. Toone at \$5,766.00 and the items awarded to Mrs. Parkhurst at \$8,017.00 by giving offsets and adjustments in paragraph 10 of the Decree of Divorce so that both parties received \$35,586.75 in total equity in the marital estate. The only other asset was a parcel of property which was awarded equally to both parties as tenants in common and was to be sold later and the proceeds equitably divided. In fact, the parties sold that parcel of property on April 1995 and divided the same. Mrs. Parkhurst was not awarded any alimony except for \$1.00 a year in paragraph 13 of the Divorce Decree, and Mr. Toone never paid any of that alimony.

Consequently, the Findings and the Decree in the original property division make it clear that the court divided what property was before it on a 50/50 basis. This court should continue with this trend and permit Mrs. Parkhurst her rightful equitable share of the military retirement so that justice is created and an inequity avoided. If Mr. Toone is to receive one hundred percent (100%) of the retirement he will receive a windfall that was not intended.

The recent cases of Bailey v. Bailey, 745 P.2d 830 (Utah App. 1987) and Marchant v. Marchant, 743 P.2d 199 (Utah Ct. App. 1987),

both held that it may be more equitable to distribute retirement benefits that are difficult to value later, rather than at the time of divorce. Marchant dealt with a federal retirement plan. The court in Bailey reasoned that postponing the distribution equalizes the risk and the benefits to both parties. "Not only is postponed distribution generally fair, it also allows the asset to be used by both parties in a way and at a time the asset was intended to be used, that is 'for retirement'". Id. at 832. The Bailey court specifically found the trial court retains the discretion to divide retirement account along with other assets and if it chooses to divide the retirement at the date of divorce, it must make specific findings as to reasons for immediate distribution. Otherwise, the distribution of retirement benefits should generally be postponed until the benefits are received. Id. at 833.

There is no reason why the Court in this case should not do likewise. There is a strong indication that the trial court divided all marital property 50/50 that was before it. The military retirement which was not before the court and could not be because of existing law, was a military retirement which could have been easily postponed for distribution later. By allowing Mrs. Parkhurst to now equitably divide that military retirement at the date and time that it was intended to be used for retirement is in line with the public policy and methodology provided in Marchant and Bailey.

The fact that the military retirement was not expressly placed in the Findings and Decree of Divorce by Mr. Toone, whose attorney

was supposed to draft the Decree and Order, likewise prohibits him from arguing that he was, in fact, awarded one hundred percent (100%) of that retirement pay. Under this logic, res judicata bars Mr. Toone's claim that he is entitled to all of the military retirement benefits since McCarty did not prevent Mr. Toone from at least asking the court to make an express award of the retirement to him; it only prevented its division between the parties. Mr. Toone's failure to raise his claim to one hundred percent (100%) of the military retirement benefits at the time of divorce should bar his attempt to make that claim now.

The Memorandum Decision regarding the Summary Judgment Order was based in large part on the assumption that the trial court must have taken into account the military retirement benefits and if the court now allowed Mrs. Parkhurst to receive some share of those benefits, all other issues regarding division of property would have to be relitigated. That assumption was made in error and was not correct. The trial court divided all of the other marital property 50/50 and totally omitted the military retirement. Using the logic of the trial judge to award Mr. Toone one hundred percent (100%) of that military retirement would now be an injustice to Mrs. Parkhurst since she did not receive one-half ( $\frac{1}{2}$ ) of that benefit.

WHEREFORE, Mrs. Parkhurst respectfully requests this Court to find that the trial court erred and that she is, in fact, entitled to one-half ( $\frac{1}{2}$ ) of the future military retirement benefits.



### CONCLUSION

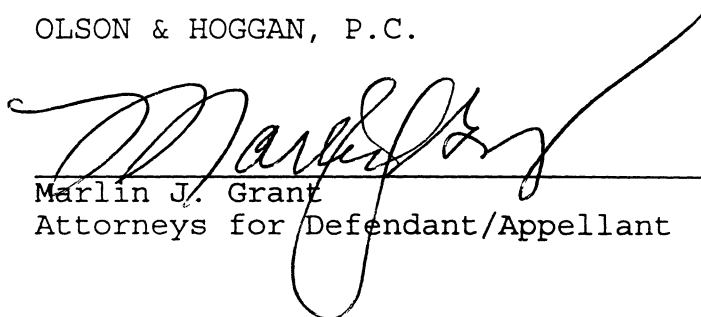
In conclusion the facts and law before the Court clearly show that the parties not only omitted the military retirement benefit from the property division and that no express mention or findings were issued regarding the military retirement, but also that McCarty and Woodward, did not allow for actual division or litigation on that issue. As such the military retirement was not adjudicated, nor could it have been adjudicated. Mrs. Parkhurst is entitled to have that property divided now.

Mrs. Parkhurst is entitled to be treated fairly and equitably in this matter. The principles of equity outrule and outweigh the need for finality in this case. Public policy in Utah favors division of military retirement benefits at the time they are to be received by the parties. In the limited context of omitted assets in a divorce, public policy favoring the equitable division of marital property outweighs the need for the stability and finality of judgments.

WHEREFORE, Mrs. Parkhurst requests that this Court reverse the trial court on Mr. Toone's Motion for Summary Judgment and reverse the decision on Mrs. Parkhurst's Cross Motion for Summary Judgment and hereby asks the Court to either remand the case back to the trial court for further decision consistent with the opinion of the Appellate Court or to deny Mr. Toone's Motion for Summary Judgment and grant Mrs. Parkhurst's Cross Motion for Summary Judgment as a matter of law.

DATED this 9th day of June, 1997.

OLSON & HOGGAN, P.C.



Marlin J. Grant  
Attorneys for Defendant/Appellant

MAILING CERTIFICATE

I hereby certify that I mailed one original signed copy and seven (7) exact copies of the foregoing BRIEF OF APPELLANT, to the Utah Court of Appeals, at 230 South 500 East #400, Salt Lake City, Utah 84102, and two (2) exact copies to Plaintiff/Appellee's Attorney, George Preston, at Preston & Chambers, 31 Federal Avenue, Logan, Utah 84321, postage prepaid in Logan, Utah, this 9th day of June, 1997.



Janet Baker

wpd/mjg/d:/parkhur.brf  
N-558.1



**FILED**

**JUN 10 1997**

**COURT OF APPEALS**

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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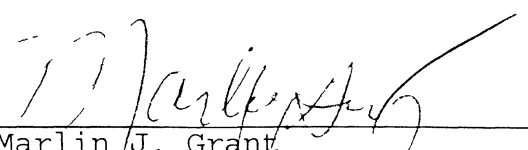
LYNN VINCENT TOONE,	)	
	)	
Plaintiff/Appellee,	)	
	)	
vs.	)	
	)	
RUBY JOAN TOONE nka RUBY JOAN	)	District Court No. 19707
PARKHURST,	)	
	)	Court of Appeals No. 960675A
Defendant/Appellant.	)	
	)	Priority Classification 15
	)	

---

**CERTIFICATE OF MAILING**

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I hereby certify that I mailed one original signed copy and seven (7) exact copies of the foregoing BRIEF OF APPELLANT, to the Utah Court of Appeals, at 230 South 500 East #400, Salt Lake City, Utah 84102, and two (2) exact copies to Plaintiff/Appellee's Attorney, George Preston, at Preston & Chambers, 31 Federal Avenue, Logan, Utah 84321, postage prepaid in Logan, Utah, this 9th day of June, 1997.

  
\_\_\_\_\_  
Marlin J. Grant  
Attorneys for Defendant/Appellant

## Exhibit A

Robert D. Atwood  
Attorney for Plaintiff  
ZOLLINGER & ATWOOD  
ATTORNEYS AT LAW  
256 NORTH FIRST WEST  
LOGAN, UTAH 84321  
(801) 753-0012

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

---

LYNN VINCENT TOONE,	*	
Plaintiff,	*	DECREE OF DIVORCE
VS.	*	
RUBY JOAN TOONE,	*	CIVIL NO. 19707
Defendant.	*	

---

This matter was heard on the 20th day of July, 1981, before the Honorable Omer J. Call, District Judge; the Plaintiff was present in person and represented by his attorney, Robert D. Atwood, of Zollinger & Atwood. The Defendant, and her attorney, David W. Sorenson, did not appear. The parties have agreed that Plaintiff may proceed on his motion to shorten time. Upon conclusion of the hearing and the Court having heard the testimony and having examined the evidence and being fully advised in the premises and having theretofore made and entered its Findings of Fact and Conclusions of Law, now makes and enters the following judgment and Decree.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Plaintiff, LYNN VINCENT TOONE, be and he is hereby awarded a Decree of Divorce from the Defendant, RUBY JOAN TOONE, the same to become final upon signing of the Decree by the Court.

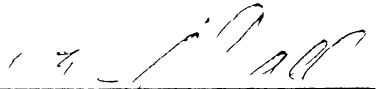
2. That the Court herein makes no order in respect to custody, child support or division of property and that jurisdiction is retained by the Court to consider said matters at a later date.

DATED this 23 day of July, 1981.

19707-6

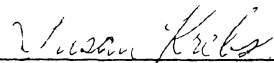
*L. J. Atwood*

BY THE COURT

  
\_\_\_\_\_  
Omar J Call, District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of  
the foregoing Decree of Divorce was mailed, postpaid, to the  
Defendant's attorney, David W Sorenson at 56 W Center,  
Logan, Utah 84321, this 31<sup>st</sup> day of July, 1981.

  
\_\_\_\_\_

## Exhibit B



1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
2 STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

3  
4 LYNN TOONE, )

5 Plaintiff, )

6 -vs- )

7 RUBY TOONE, )

8 Defendant. )

CIVIL NO. 19707  
REPORTER'S TRANSCRIPT OF  
COURT'S ORAL DECISION

9  
10 TRIAL ON THE MERITS RE PROPERTY DISTRIBUTION  
11 held in the above-entitled Court and Cause on July 9, 1982,  
12 on the morning calendar, before the Hon. VeNoy Christoffer-  
13 sen, District Judge.

14  
15 APPEARANCES:

16 For the Plaintiff ARDEN W. LAURITZEN, ESQ.  
Attorney at Law  
17 180 North 100 East  
Logan, Utah 84321

18 For the Defendant DAVID W. SORENSON, ESQ.  
Attorney at Law  
19 56 West Center  
20 Logan, Utah 84321

21  
22  
23  
24 GEORGE A. PARKER  
Certified Shorthand Reporter  
25 208 Hall of Justice  
Logan, Utah 84321

Number 19707-26

FILED DEC 2 1983

SETH S. ALLEN, Clerk

Rv

Dupa /

P R O C E E D I N G S

1  
2  
3  
4 THE COURT: As to the personal items that are on  
5 the list that has been submitted as exhibits D-5 and -6 and  
6 plaintiff's one, this is pretty much the only evidence I  
7 have as to their worth, is what the parties say, so I'm<sup>not</sup> going  
8 to take the time here to go through each item, but I'll  
9 start out the list and tell you what I would do if we spent  
10 all afternoon in here doing it.

11 For example, the camper, value by the plaintiff  
12 six, value by the defendant at 450. Split the difference is  
13 525. Truck would be 200 and--by the defendant, and 500 by  
14 the plaintiff. There's a difference; a split would be 350,  
15 to arrive at a final value. And you can go through that on  
16 each item and get a final value list. \*\*\* There's one item  
17 I guess on exhibit six, the first item in the possession of  
18 Lynn, he doesn't have a value on the '80 Plymouth. She has  
19 \$5,460. I think that has to be treated separately.

20 MR. SORENSON: All right. Your honor, to be abso-  
21 lutely candid with the court on that, and I can tell counsel  
22 this, we've shown that as an '81 Plymouth Champ because she  
23 thought it was an '81. The testimony today comes out as a  
24 1980. Those figures were arrived at by calling Alan Palmer  
25 at Palmer's Motor to get the figures, and we'd just have to  
either leave that for a later date and let the court find out

1 what that would be--

2 THE COURT: Well, I can tell you, if you want to  
3 figure it out to give a value, is that you get what the low--  
4 the difference, or the middle difference between low and high  
5 book and subtract the balance due and give the equity bal-  
6 ance and then allot that figure.

7 MR. SORENSON: Fine. We'd accept that.

8 THE COURT: Okay. Now as to those items such as--  
9 that he wanted--the computer and the electrical parts, grill,  
10 she wanted the camp stand, cooler chest which--some of them  
11 you both indicated a willingness to make the exchange. Those  
12 that you are, using the same method of value, you just switch  
13 it as to who gets the total value if you're willing to ex-  
14 change them. If you're not, I'm not going to get into any  
15 kind of a hassle about forcing an exchange.

16 MR. SORENSON: Can we go through those items one  
17 by one, the computer?

18 MR. LAURITZEN: We can do that. I think counsel  
19 can do that, can't we?

20 THE COURT: Yeah. The only one that I have that  
21 *would be different that you don't already have in your notes*  
22 *would be the question on the personal papers, and this doesn't*  
23 *attach any value at all, it's simply a matter of access to*  
24 *make copies, and I would say he should be entitled to do*  
25 *that. \*\* Now are there any other then questions that you*

1 can't arrive at at least a total figure that each receives  
2 on the personal items under the method I've outlined, without--

3 MR. SORENSON: No, we'd accept the court's method  
4 of handling that.

5 THE COURT: Yeah. Then once you reach a total on  
6 those values and who has what, you can reach a total value  
7 as to--one may come out say \$5,000 worth of stuff and another  
8 seven, so you have a difference. One is getting more than  
9 the other. We'll just say for example \*\* that the plaintiff  
10 has \$3,000 more than the defendant he receives by way of  
11 personal property. We'll just keep that as an example. \*\*  
12 One thing that I'm really not sure about, and that's on this  
13 for example Willis's appraisal says Tract Two at \$2,800. \*\*  
14 Would it be possible for you both to agree as to that partic-  
15 ular parcel, to go ahead through a sale and split it?

16 MR. LAURITZEN: Yeah, that's what we'd do.

17 MR. SORENSON: She'd agree.

18 THE COURT: Why don't we say as to parcel two it  
19 will be sold and after the costs of sale that the parties  
20 split the proceeds equally. Then we don't need to worry  
21 about plugging a speculative figure in there. \*\* Now the  
22 other parcel I assume is in the possession of the plaintiff.  
23 Again there's a difference, one being 76,000 in round figures  
24 as opposed to 82,500. \*\* So taking into account the differ-  
25 ence in valuation and a reason why it could be greater than

1 the 75, I'll put that at 80. \*\* And I will make that total  
2 labor and materials at a value of \$3,000. \*\* What I'm saying  
3 is I think the principle is the same whether it's 3,000 or  
4 a hundred thousand. But first of all we take the 80,000  
5 figure, and then I don't know what the <sup>mortgage</sup> balance is today.

6 MR. SORENSON: \*\* As of 7-1-82 a printout shows  
7 \$25,489.76.

8 \*\* THE COURT: Take that \$25,489, make it 490, what  
9 do you get, 54,510?

10 MR. SORENSON: Are you taking it from the 80,000  
11 or from the 77,000?

12 THE COURT: 80.

13 MR. SORENSON: Okay. 54,510.

14 THE COURT: I think that half of that is \$27,255.  
15 You take those as two base figures then to start with. Now  
16 on the retirement, his is ten, hers is three. \*\* She's  
17 entitled to half of his, which is \$5,000, he's entitled to  
18 half of hers, which is 1,500. She keeps her three, he keeps  
19 his ten, but then he'd owe her \$3,500. So she'd have a full  
20 credit of \$3,500 to be added on to her \$27,255. Well, we  
21 got to do it another way. As I said, this goes as a credit  
22 to her, he gets a credit of three on what I think he's im-  
23 proved after the divorce that adds to the value of the house.  
24 So on the retirement she has a \$3,500 credit, he has a 3,000.  
25 You'll have to adjust it so that the credits adjust out what

1 she's going to have finally either added or deducted to this  
2 \$27,255. She already gets that as half of the property, and  
3 this is the one with the house on it. The other one they're  
4 going to sell. \*\* Now then, you arrive at another credit,  
5 but I don't know what this figure is going to be, and that is  
6 why I gave you this example: Suppose it comes out that he  
7 has 3,000 more of the personal than she does, so he's got  
8 \$3,000 more that she's entitled to half of as far as value  
9 is concerned, so that would give her an additional 1,500  
10 credit. \*\*

11 MR. SORENSON: And that's something that counsel  
12 will have to work out, I'm assuming. Not going to take the  
13 time today to go through each one.

14 THE COURT: Yeah, to get that figure. I'm not  
15 sure what that will be, but I'm assuming \$1,500 just for the  
16 purposes of--and she would also have \$3,500 on the retire-  
17 ment, which is now fixed. That would give her 5,000 credits  
18 and the plaintiff three, so she's got an extra two coming.  
19 So you take the 27,255 and that would make 29,255 and then  
20 you take his credit for the equity in the house and take the  
21 two from that, so his would be 29,255. Does that make any  
22 sense, so you still come up with the 8,000 when you add  
23 them?

24 MR. SORENSON: Yes. We can see what the shift is  
25 there. You're just adding a bigger lien and bigger credit

1 against the property.

2 THE COURT: Yes. Because I think when you balance  
3 all of these credits you're going to have to make it a lien  
4 of that figure against the property. \*\* So after you work  
5 out this personal property thing, and say she does have a  
6 lien then against the house of \$29,250, that the lien is now  
7 due and payable, except that I understand, I'm sure that he  
8 cannot come up with, tomorrow, 29,000 whatever it is. So she  
9 will have a note for that much at present legal interest. \*\*  
10 I think it's twelve per cent. But it's in the statute.

11 MR. LAURITZEN: Or can he in the alternative give  
12 her the house and let her pay it?

13 THE COURT: Well, either that or sell it.

14 \*\*MR. SORENSON: According to Bruce Jorgensen,  
15 your honor, on 29,000 even at twelve per cent, \$319.31 a  
16 month. \*\*

17 THE COURT: Okay, I'll make it a 20-year loan,  
18 legal rate, and pay that monthly figure. Now I have a prob-  
19 lem with the balloon figure at this time because you get  
20 into so much speculation of what his situation is going to  
21 be in five years, but I will reserve jurisdiction under that  
22 provision under the statute where the court can reserve juris-  
23 diction on custody and property settlement, to undertake any  
24 motions at the five-year period to see what should be done on  
25 it.

1           As to alimony, \*\* I'll make a dollar a year alimony  
2 provision. \*\* As to child support, I will have the defendant  
3 contribute to the support of her daughter in the amount of  
4 \$50.00 a month, which may be deducted from the monthly pay-  
5 ment. And as to attorney's fees, that he contribute toward  
6 her attorney's fees \*\* based on the fractional difference  
7 in their income \*\* the amount of \$275.00 plus costs.

8           \*\* If he still has the insurance in force, the  
9 minor children be kept on as beneficiaries for at least half  
10 of the value. \*\* If you can get the cash value that's  
11 satisfactory with Mr. Lauritzen that you have a correct fig-  
12 ure, she can have a credit again to be fixed like we were  
13 shown here of credits, of one-half.

14           MR. SORENSON: As of July, 1982, there's \$4,698.50  
15 on the Beneficial Life policy.

16           THE COURT: If you can satisfy Mr. Lauritzen that  
17 that's correct and there's nothing wrong with it, she'd have  
18 an additional credit of \$2,349.00.

19  
20  
21  
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23  
24  
25



## Exhibit C

David W. Sorenson  
OLSON, HOGGAN & SORENSON  
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P.O. Box 525  
Logan, Utah 84321-0525  
Telephone: 752-1551

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

-----		
LYNN VINCENT TOONE,	)	CORRECTED
	)	SUPPLEMENTAL
Plaintiff,	)	JUDGMENT AND DECREE
	)	
vs.	)	
	)	
RUBY JOAN TOONE,	)	Civil No. 19707
	)	
Defendant.	)	
-----		

This matter came on for hearing on the 9th day of July, 1982 at the hour of 9:00 a.m., the Honorable VeNoy Christoffersen presiding. The Plaintiff was present in person and was represented by his attorney, A.W. Lauritzen; the Defendant was present and was represented by her attorneys, Olson, Hoggan & Sorenson, David W. Sorenson. The parties were sworn and testified and documents having been presented and admitted into Court, and the Court having granted a divorce in this action on the 20th day of July, 1981, reserving until this time to hearing the matter of property settlement, the Court having made its decision at the conclusion of the hearing from the Bench, and the Court having entered its Findings of Fact and Conclusions of Law and being fully advised in the premises, now makes and enters the following:

19707-23



1. The items of personal property awarded to the Plaintiff are incorporated in Schedule "A" attached hereto and have a value of \$5,766.00; the items of personal property awarded to the Defendant are incorporated in Schedule "A" attached hereto and have a value of \$8,017.00.

2. Plaintiff is awarded the 1980 Plymouth Champ automobile subject to the indebtedness thereon. There exists a difference between the value and the indebtedness on said vehicle in the amount of \$618.00 as of July 20, 1982.

3. The parties own the following parcels of real property:

Parcel 1

All of that part of Lots 3 and 4, Block 2, Plat "B" Richmond City Survey lying West of the canal and described as: Beginning at the Northwest corner of Lot 4, said Block 2, and running thence East 225 feet, more or less to the right-of-way line of the canal; thence Southwesterly along the right-of-way line of said canal, to the West line of Lot 4; thence North 245 feet, more or less, along the West line of said Lot 4 to point of beginning. Containing 0.63 acre more or less.

Parcel 2 (Home)

Part of the West half of Section 7 described as follows and Part of the Southwest quarter of Section 7 as follows: Beginning at a point 1328.25 feet by measurement (1320 feet by record) and 125 feet East of the Northwest corner of the Southwest quarter of said Section 7, and running thence South 239.85 feet; thence South 79°18' East 549 feet to the High Creek Canyon Road; thence North 21°24' East 200 feet; thence North 79°17'30" West 207.2 feet; thence North 4°53' East 129.7 feet; thence North 75°45' West 464 feet; thence South 88.2 feet to point of beginning, and further described as being situate in Township 14 North, Range 1 and 2 East of the Salt Lake Base and Meridian.

4. Each of the parties are awarded one-half (1/2) the equity of the home, \$27,255.00 subject to adjustment for values of other items as elsewhere provided herein. Plaintiff is awarded the home

(Parcel 2, paragraph 3 herein) subject to any and all indebtedness thereon and a lien in favor of Defendant in the sum of \$32,505.29 (equity of \$27,569.75 plus interest of \$4,935.54), which Defendant is hereby awarded and, which is now due and payable, which lien includes \$4,935.54 interest at the rate of twelve percent (12%) per annum from July 9, 1982, the date of the hearing to December 31, 1983, and payable monthly over a period of twenty (20) years, payments to commence on January 1, 1984 in the sum of \$357.85 and \$357.85 on the 1st day of each month thereafter until January 1, 2004, on which date the entire unpaid balance of principal and interest to be paid. Said sum shall bear interest at 12% per annum from January 1, 1984 until paid. The Court retains jurisdiction for a period of five (5) years <sup>for the expiration</sup> ~~during~~ which time either party may motion the Court to revise due date of the loan or other property matters herein.

5. Parcel 1, as described in paragraph 3 is awarded equally to the two parties as tenants in common and is to be sold and after the costs of sale, each of the parties shall divide the proceeds equally.

6. Plaintiff's retirement is worth \$10,000.00 and Defendant's is worth \$3,000.00. Adjusting for one-half (1/2) the value of each other's retirement leaving a credit in favor of Defendant in the amount of \$3,500.00. As an offset, Plaintiff is awarded a credit of \$3,000.00 for improvements to the home leaving a total credit in favor of Defendant from the \$3,500.00 to \$3,000.00 in the sum of \$500.00.

7. Defendant is awarded a credit of \$2,349.00 as and for one-half (1/2) of the cash value of the insurance policy of the parties.

8. Defendant is awarded alimony in the sum of \$1.00 per year.

9. Defendant is awarded a judgment against Plaintiff for attorney's fees in the sum of \$275.00, plus costs in the sum of \$2.50.

10. Based upon the credits and net values of property the respective values and credits/debits are determined as follows:

Plaintiff

Home	\$26,662.75
Net credit of retirement and home improvements	500.00
Car (1/2 equity)	309.00
Personal property	5,766.00
Insurance (1/2 cash value)	2,349.00
TOTAL	<u>\$35,586.75</u>

Defendant

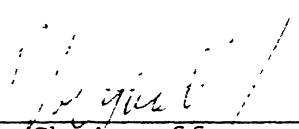
Home	\$27,569.75
Personal property	8,017.00
TOTAL	<u>\$35,586.75</u>

11. Plaintiff is ordered to maintain the children as beneficiaries on at least one-half of his life insurance and to maintain the same in force so long as the children are minors.

12. Each should be and is awarded the property now in their possession.

13. Defendant shall be and is awarded alimony in the sum of \$1.00 per year.

14. Defendant is ordered to pay to Plaintiff the sum of \$50.00 per month as and for child support which may be deducted from the monthly payment of the lien to Defendant from Plaintiff.

  
\_\_\_\_\_  
VeNoy Christoffersen  
District Judge

HAND CARRY CERTIFICATE

I hereby certify that I hand carried an exact copy of the foregoing Corrected Supplemental Judgment and Decree to Arden W. Lauritzen at 180 North 100 East, P. O. Box 171, Logan, Utah 84321, postage prepaid in Logan, Utah, this 16 day of December, 1983.

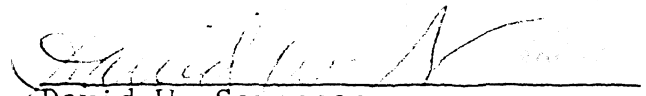
  
David W. Sorenson

EXHIBIT "A"

<u>ITEM</u>	<u>HELD BY</u>	<u>VALUE EST. BY JOAN</u>	<u>VALUE EST. BY LYNN</u>	<u>FINAL VALUE</u>	<u>PARTY TO KEEP ITEM LYNN JOAN</u>
Camper	J	\$450.00	\$600.00	\$525.00	J
Truck (Dodge)	J	200.00	500.00	350.00	J
Freezer	J	150.00	500.00	325.00	J
Clothes Washer	J	20.00	100.00	60.00	J
Television Set	J	40.00	600.00	320.00	J
Computer	J	250.00	300.00	275.00	J
Piano	J	850.00	1,300.00	1,075.00	J
Stereo (Old)					
Speakers					
Amplifier					
Tuner	J	100.00	400.00		
Stereo (New)	J		150.00		
Tape Recorder (Akai)	J		100.00	375.00	J
Microwave Oven	J	150.00	400.00	275.00	J
Wheat Grinder & Mixer	J	200.00	300.00	250.00	J
Sewing Machine	J	175.00	400.00	287.50	J
Double Bed	J	10.00	150.00	80.00	J
Single Bed	J	20.00	150.00	85.00	J
Green Couch (2ea)	J	20.00	50.00	35.00	J
New Sofa (2ea)	J	275.00	600.00	437.50	J
Flowered Chair	J	15.00	50.00	32.50	J
Dresser & Chest of Dr.	J	10.00	100.00	55.00	J
Card Tables (2ea)	J	40.00	60.00		
Folding Chairs (8ea)	J		120.00	110.00	J
Hoover Vacuum	J	45.00	130.00	87.50	J
Shop Vacuum	J	10.00	60.00	35.00	J
Exercycle	J	10.00	60.00	35.00	J
Hanging Seats (2)	J	20.00	60.00	40.00	J
Antique Table	J	100.00	100.00	87.50	J
Antique Chairs (6ea)	J		150.00	87.50	J
Slide Projector	J	30.00	60.00	45.00	J
Guns					
22 Rifle	J	40.00	40.00	40.00	J
243 Rifle	J	90.00	160.00	125.00	J
Binoculars	J	10.00	30.00	20.00	J
Paintings					
Farm	J				
Flowers	J	100.00			
String	J		100.00		
Shield (Mexico)			20.00	110.00	J

-2-

<u>ITEM</u>	<u>HELD BY</u>	<u>VALUE EST. BY JOAN</u>	<u>VALUE EST. BY LYNN</u>	<u>FINAL VALUE</u>	<u>PARTY TO KEEP ITEM LYNN JOAN</u>
Plants					
Fig	J				
Fern	J				
Palm	J				
Schefflera	J	10.00	150.00	80.00	J
Lamps (2ea)	J	14.00	100.00	57.00	J
Toaster	J	2.00	10.00	6.00	J
Blender	J	3.00	30.00	16.50	J
Dishes					
China	J				
Stoneware	J				
Pots & Pans	J				
Silverware & etc.	J	200.00	1,000.00	600.00	J
Camp Stove	J	10.00	30.00	20.00	J
Bedding	J	Unsellable	300.00	150.00	J
Carpet for stairs	J	90.00	100.00	95.00	J
Tile for Entry	J	150.00	150.00	150.00	J
Sleeping Bags (2ea)	J	Unsellable	40.00	20.00	J
Chain Saw (Gas)	J	95.00	200.00	147.50	J
Chain Saw (Electric)	J	20.00	30.00	25.00	J
Saber Saw	J	20.00	30.00	25.00	J
1/2" Drill	J	20.00	40.00	30.00	J
Antique Chairs (3ea)	J	20.00	100.00	60.00	J
Large Pillows (3ea)	J	15.00	60.00	37.50	J
Dehydrator	J	Gift	100.00	gift	J
Typewriter	J	20.00	50.00	35.00	J
Pressure Cookers (2ea)	J	50.00	100.00	75.00	J
Head Phones	J	5.00	20.00	12.50	J
Wall Decorations					
(Shield Mexico)	J	(Listed on page 2 with paintings)			
Frozen Food					
(in freezer)	J	---	200.00	200.00	J
Cash					
(from checkbook)	J	---	510.00	510.00	J
Motorcycle (Honda)	L	300.00	300.00	300.00	L
Camper Shell	L	75.00	100.00	87.50	L
Rototiller	L	150.00	150.00	150.00	L
Lawn Mower	L	75.00	50.00	62.50	L
Organ (Thomas)	L	600.00	600.00	600.00	L
Atari	L	90.00	100.00	95.00	L
Table Saw	L	175.00	200.00	187.50	L
Sander	L	130.00	150.00	140.00	L
Water Bed	L	30.00	100.00	65.00	L
Vacuum (Filter Queen)	L	10.00	20.00	15.00	L



- 3 -

<u>ITEM</u>	<u>HELD BY</u>	<u>VALUE EST. BY JOAN</u>	<u>VALUE EST. BY LYNN</u>	<u>FINAL VALUE</u>	<u>PARTY TO KEEP ITEM LYNN JOAN</u>
Movie Projector	L	30.00	40.00	35.00	L
Lamp (Mexico)	L	---	20.00	20.00	L
Paintings					
Acropolis	L				
Large Vase	L	180.00	100.00	140.00	L
Food Storage	L	2,000.00	200.00	1,100.00	L
Camera	L	150.00	200.00	175.00	L
Gun (308)	L	95.00	200.00	147.50	L
Single bed	L	20.00	---	20.00	L
Bedding, Linens	L	Unsellable	Unsellable		L
Couch/Bed (grn/vinyl)	L	15.00	---	15.00	L
Couch (brown section)	L	15.00	---	15.00	L
Antique coffee table	L	10.00	---	10.00	L
Kitchen dining set	L				
Chest of drawers (2)	L	20.00	---	20.00	L
Cast iron grill	L	8.00	---	8.00	L
Desk	L	15.00	---	15.00	L
Wood burning stove	L	350.00	---	350.00	L
Hanging light (cappa shell)	L	65.00	---	65.00	L
Wooden hanging light	L	20.00	---	20.00	L
Area rugs (2)	L	25.00	---	25.00	L
Movie Screen	L	15.00	---	15.00	L
Movie Camera	L	35.00	---	35.00	L
Books	L	75.00	---	75.00	L
3-piece section shelves (wood)	L	15.00	---	15.00	L
Sleeping bags	L	---	---	---	L
Lantern (camp)	L	5.00	---	5.00	L
Fishing poles & reels	L	10.00	---	10.00	L
Scope/for 22	L	10.00	---	10.00	L
Plants	L	10.00	---	10.00	L
Plant pots/fertilizers/ tools	L	10.00	---	10.00	L
Ice Chest (cooler)	L	15.00	---	15.00	L
Igloo cooler (5 gal.)	L	10.00	---	10.00	L
Chaise Lounge	L	8.00	---	8.00	L
Shower pulsator	L	25.00	---	25.00	L
Ping Pong Table	L	30.00	---	30.00	L
Games & Puzzles	L	60.00	---	60.00	L
Piano Books	L	20.00	---	20.00	L
Portable TV	L	10.00	---	10.00	L
Metal storage shelves	L	50.00	---	50.00	L

<u>ITEM</u>	<u>HELD BY</u>	<u>VALUE EST. BY JOAN</u>	<u>VALUE EST. BY LYNN</u>	<u>FINAL VALUE</u>	<u>PARTY TO KEEP ITEM LYNN JOAN</u>
Hand tools &					
wheelbarrow	L	90.00	---	90.00	L
Mechanic tools	L	200.00	---	200.00	L
Garden tools	L	60.00	---	60.00	L
Ladders	L	25.00	---	25.00	L
Florescent light					
fixtures(new/tubes)	L	90.00	---	90.00	L
Building supplies	L	500.00	---	500.00	L
Unfinished Cupboards	L	20.00	---	20.00	L
Fence posts/metal	L	50.00	---	50.00	L
Hand Sander	L	15.00	---	15.00	L
Drill (3/8")	L	20.00	---	20.00	L
Drill Bits	L	20.00	---	20.00	L
Joint Planer (6")	L	90.00	---	90.00	L
Compressor	L	165.00	---	165.00	L
Router/bits &					
accessories	L	50.00	---	50.00	L
Vise	L	50.00	---	50.00	L
Weed Eater	L	10.00	---	10.00	L
Weed Sprayer	L	15.00	---	15.00	L

## Exhibit D

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

-----  
LYNN VINCENT TOONE,

Plaintiff,

vs.

RUBY JOAN TOONE, nka  
RUBY JOAN PARKHURST,

Defendant.  
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MEMORANDUM DECISION

Case No. 814019707

THIS MATTER IS BEFORE THE COURT upon a Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment and an Objection has now been filed to the proposed Order granting Summary Judgment in favor of the Plaintiff.

With respect to Objection No. 1, the language suggested by the Defendant would be inappropriate. Though the relief requested by the Defendant might be appropriate, it would require an evidentiary hearing to determine whether and what considerations, other than those contained in the Findings, were made by the trial judge in 1982 hearing relative to the distribution of property. For example, if the Court, at that time, determined to divide the property equally and gave consideration to some value in the military retirement, that would have to be determined with an evidentiary hearing and may never be subject to final determination.

Case No. 814019707

#56  
SEP 10 1996

By LKJ

Though it could be argued now, fifteen (15) years after the fact, that the Defendant should have a portion of the military retirement because it had value at that time and was not specifically apportioned pursuant to Woodward in the Divorce Decree, the Court would have to know all of the details of the distribution of property and considerations which were available at that time.

"The rule of *res judicata* precludes litigation of issues that could properly have been raised and applies to every question relevant to and following within the preview of the initial action with respect to matters of both claim or grounds of recovery and defense which could have been presented by the exercise of good diligence." 46 Am. Juris 2nd Judgments Sec. 26.

In this case, certainly the value of the military retirement could have and may have been considered by the Court. That the Court did not have jurisdiction to order distribution of military retirements did not preclude consideration of the value of the retirement or offsetting that with other property. If the Court did not then address the issue with respect to military retirement, and should do so now, it would have to relitigate each of those other property and support issues which have been raised, litigated, and ruled upon. In doing so, the rule of *res judicata* would be voided. It would be inappropriate to litigate this issue where it could have been raised then, but was not, because now it

could be only addressed independently without reassessing all of the other property which is subject to *res judicata*.

One of the reasons for the doctrine of *res judicata*, as well as the statute of limitations, and to some degree, laches, is to reach a point of finality in cases whereupon parties can rely upon what has been done. The language therefore requested by Defendant with respect to Objection No. 1 is denied.

With respect to Objection No. 2, relative to Paragraph 4 on page 4, the request is that the Court find when the statute of limitations began to run. The difficulty with this language is it can be argued that an evidentiary hearing would be necessary in order to determine when the Defendant became aware of the new statute or could or should have become aware. The presumption of law is that people become aware of public laws when they are passed. There was nothing argued relative to any incapacity or inability in the Defendant. Apparently, if she would show that she simply did not come across or have any reason to come across the law until recently, that does not toll any of the statute of limitations. The Court would find that the statute of limitations began to run when the statute became effective, or the Decree became final, whichever last occurred. The problem with when the law was passed and became effective after the Decree, is that it might be argued that (despite state law to the contrary) perhaps

the passage of the new statute was a change in circumstances. A passage of a statute, in and of itself, is not, however, a change of circumstances. The language of the federal statute which allows state courts to dictate the distribution of military retirement, even on a retroactive basis, is not state law. Whether that allows for retroactive application would depend not only on the statute but also on state law relative to modification of decrees. The Objection then is denied to the extent above addressed.

With respect to Objection No. 3, the Defendant is correct. The Court did, however, opine that, since principles of equity apply in divorce cases, and even though this is presented to the Court as a matter of law, equitable considerations would, based upon the affidavits and memoranda supplied, dictate that there should be finality to the judgment. The parties should be able to rely upon the decrees of the Court, and for the same reason that principles of equity may bar this type of action, the statute of limitations does likewise. As mentioned above, at least some relationship with respect to searching for finality, that principles based on *res judicata*, laches, estoppel, as well as statute of limitations have in common.

For the above reasons, Objection No. 4 is also somewhat well-taken. Though the Court did not conclude that, as a matter of law, *res judicata*, bars further action, the principles behind *res*

*judicata* and the reasons for it and the desires for finality, certainly affect this case. Though the Court's Findings do not mention military retirement as being adjudicated, the absence of the adjudication also makes applicable the doctrine of *res judicata*. To that extent, the Objection is sustained.

With respect to Objection No. 5, the Objection is mis-styled and the McCarty decision does not forbid state courts from adjudicating military retirements. Federal law simply did not recognize state courts' adjudication of the same. Federal law in that instance pre-empted state law and therefore the state courts did not have jurisdiction to adjudicate military retirements, but more specifically what they did not have is recognition by the Federal government of military retirements. The fact that there was no adjudication of military retirement does not mean that the matter was not *res judicata*. The decision in fact was decided, the Decree is *res judicata* and that does not allow the Court to go back and reopen the issue as the distribution of the parties' property was in fact done in finality.

The Defendant also objected to the proposed Order by the Plaintiff in total in that the Court did provide an opportunity to file a supplemental brief. The Court received the supplemental brief together with a Request for Reconsideration.



Defendant has argued that the Court should not, because this is a case of first impression in Utah, grant lightly Summary Judgment without considering evidence and facts as they relate to critical issues of law. The Defendant may understand that this case is not taken lightly and a summary disposition is not light treatment in any case.

The problem with a hearing is the Court would not be benefited by evidence as to what occurred in the 1982 hearing other than what it has already received by way of affidavit. It has certainly been apprised of the fact that the Court did not specifically consider the military retirement, that the Defendant did not plead for military retirement or share the military retirement, that whether she did not do so because she was advised not to do so, is unknown to her or to the Court, nor would the Court be benefited by testimony by her counsel as to that issue as that can be supplied by affidavit and has not been so supplied.

The deeper problem, however, is that the Court would have to relitigate and re-adjudicate all of the property issues which were adjudicated in the 1982 hearing. That would require a total reevaluation of all the distribution of the property including perhaps the distribution of the retirement of which the Plaintiff has been relying and anticipating. That throws out all of the reasons for statute of limitations and equitable considerations in

favor of finality and reliance. It is given that the Defendant was not informed about the change in federal law and that she received no actual knowledge about the change in federal law until 1995. The Court would not be benefited by any testimonial information thereon with respect to a hearing as it is not a fact in dispute. Nor is it disputed that she acted within reasonable time after she found out about the 1983 statute. That, however, does not resolve any of the issues. The fact that the military retirement was vested when the parties were married in 1979 but not payable for two (2) more years is not a fact in dispute either.

Should the Court consider this matter to be a 60(b) motion, with respect to mistake, inadvertence, surprise, excuse, neglect, newly discovered evidence, fraud, or service of process matters, such an action would have to be brought within three (3) months under 60(b). With respect to whether the judgment is void, satisfied, released, discharged, or reversed or otherwise vacated, such may be brought later and on an independent action. Subsection 7 of 60(b) provides and allows for any other reasons justifying relief or modification of judgment. "The Rule, of course, does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court." There is, however, simply no allegation of fraud involved here nor does the Court

believe that 60(b) controls the issue and allows an independent action by way of petition to modify to be brought and thereby circumvent statute of limitations, principles relative to domestic actions, including change of circumstances, equitable considerations such as laches and estoppel.

The Defendant further correctly points out that the Court may reserve jurisdiction relative to property issues and does not negate an application of statute of limitations. But even if it did, based upon all the evidence the Court has before it, and apparently the Court would not benefit by the evidence except perhaps with respect to the parties' personal financial situations, equitably the Court would be unwilling to provide the relief requested.

The cases cited by the Defendant relative to the Court's authority and discretion in making equitable property divisions, all property which was on a later date of which property was unknown or undisclosed over some reason not entirely adjudicated is unquestioned. Whether at the time of the Decree this property was, unquestionably by federal law, independent and separate property of the Plaintiff, the fact that the Court did not mention or attempt to divide it does not now leave it open to further division at a later time and principles of *res judicata* apply to all the other

property involved and this then would have to be divided absent any consideration of that property which has already been divided.

Certainly the Court recognizes the limited application of Green v. Green, and Gardner v. Gardner, cited by the Defendant and that military retirement should be considered in dividing assets to the parties, further that Woodward can apply now directly to marital property.

The Defense opined and argued that because domestic actions specifically are equitable and subject to equitable remedies, and the statute of limitations is a matter of law, that the defense of laches is the only defense that can be asserted. As interesting a theory as that is, the defense can cite no law in support of that position. Certainly judgments which come out of a divorce action are subject to application of law and subject to statute of limitations execution. Section 30-3-5 of the Utah Code Annotated relative to the Court's continued jurisdiction, does not negate the application of statute of limitations. Again, no law is cited for that theory.

Defendant is correct, however, in that the issue of laches may not have applicability without having an evidentiary hearing. That would be true but for the fact the Defendant has also requested summary disposition in her favor which exposes Defendant then to a summary disposition against her for the same reasons. If the facts

are not an issue for a counter motion for summary judgment, they certainly can't be argued to be an issue with respect to Plaintiff's Motion for Summary Judgment. Though the Defendant is correct that laches cannot be imputed to one who is ignorant of the facts, the issue specifically implied here is whether the Defendant is ignorant, not of the facts, but of the law and certainly a knowledge of the law is imputed to the parties, otherwise the defense of not knowing the law could always be raised.

The third point raised by the defense is that because the military retirement benefits earned during the marriage were not payable until a later event, they are more properly divided when that event occurs. That type of approach to these cases would lead the property distributions open for a long period of time. Absent an order to that effect, it would be inappropriate for the Court to allow the same. Certainly to some degree the Court's jurisdiction continues as the children become older and as the parties' alimony and support need to be adjusted when those changes occur, the Court can exercise its jurisdiction. But the military retirement benefits existed and were extant at the time of the Decree. The parties knew of them, and because of the status of the law or their understanding of the status of the law, did not apparently raise the issue at that time, does not allow them to be raised at later

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time when the law change and the parties become aware of the change in the law.

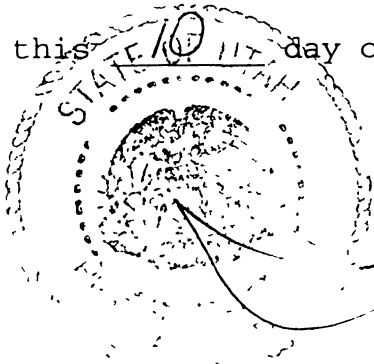
The case in Marchant wherein the Court is said to have erred with respect the distribution of retirement benefits at the time of the divorce rather than the point of distribution of the benefits later, is inappropos. In that case, because there was inability to place a reasonable or realistic value of the retirement benefits, it would have been better to distribute them at a later time. But the Order for later distribution must have been in effect for that to become effective at the time of the Decree. In this case, there was no order for a later distribution mentioned at all, and to raise it now after some fifteen (15) years have passed would not only be inequitable but contrary to whole concept of litigation in order to resolve with some degree of finality the dispute between parties.

As harsh as this remedy may appear, the aim of finality in litigation is beneficial. Parties live and rely upon decrees, in this case it can be assumed that the Plaintiff has relied on and expected military retirement in total, and to suggest now that it should be divided in half (1/2) may benefit the Defendant largely but certainly would work to the great detriment of the Plaintiff. Though there is no specific evidence or testimony on that issue, and that is one of the facts which Defendant argues would be heard

in addressing a hearing, it could only be so after the Court determines that such a hearing would be appropriate. Based upon the law cited by the parties and in consideration thereof, such a hearing is denied.

The Motion for Reconsideration is denied. The Objection to the proposed Findings has been addressed and both overruled in part and sustained in part as above addressed. Counsel for the Plaintiff is directed to prepare another Order granting Summary Judgment consistent with this Memorandum Decision.

DATED this 10 day of September, 1996.



BY THE COURT

JUDGE GORDON J. LOW  
FIRST DISTRICT COURT

TOONE v. TOONE  
#814019707  
Page 13

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, Lynn Vincent Toone v. Ruby Joan Toone, Case no. 814019707, postage prepaid, this 10 day of September, 1996, to the following:

MARLIN GRANT, ESQ.  
88 West Center  
P.O. Box 525  
Logan, Utah 84323-0525

GEORGE W. PRESTON, ESQ.  
Preston & Chambers  
31 Federal Avenue  
Logan, Utah 84321

  
\_\_\_\_\_  
Deputy Court Clerk



## Exhibit E

George W. Preston, #2643  
PRESTON & CHAMBERS  
Attorney for Plaintiff  
31 Federal Avenue  
Logan, UT 84321  
(801) 752-3551

FIRST DISTRICT COURT  
OF CACHÉ COUNTY

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY  
STATE OF UTAH

LYNN VINCENT TOONE,

Plaintiff,

vs.

RUBY JOAN TOONE, nka  
RUBY JOAN PARKHURST,

Defendant.

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**AMENDED ORDER GRANTING  
SUMMARY JUDGMENT FOR PLAINTIFF**

8140  
Civil No. 19707

This matter came on before the court on May 15, 1996, upon the petition of the Defendant, Ruby Joan Toone, through her attorney, Marlin Grant, for division of retirement benefits. The petition was answered by the Plaintiff through his attorney, George W. Preston. On or about January 18, 1996, the Plaintiff filed a Motion for Summary Judgement, which Motion was answered by the Defendant and the Defendant filed a Counter-Motion for Summary Judgment.

The court, having considered the matter carefully, as a result of the submission by the parties of uncontested facts, which the court acknowledges as follows:

1. That Plaintiff and Defendant were married on June 20, 1958.
2. The parties were divorced on July 6, 1981. The Divorce Decree reserved for trial at a later date the issue of the division of real and personal property.

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3. A hearing for the division of personal property was held on July 9, 1982 before the honorable VeNoy Christoffersen.

4. Thereafter the court on or about December 17, 1983 entered a Supplemental Judgment and Decree dividing the assets of the parties, including, but not limited to, personal property, automobiles, real estate, retirement benefits, alimony, and lump sum payments by the Plaintiff to the Defendant.

5. The Plaintiff entered military service in May of 1958 and retired in 1969 and thereafter served with the Military Reserves and Air National Guard for eleven years, ultimately retiring in 1976. The Plaintiff's military retirement was earned as of 1976, but is not payable until the Plaintiff reaches age 60 on May 3, 1998.

6. The Congress of the United States enacted Public Law 97-252 on September 8, 1982, to become effective on February 1, 1983, and was entitled the Uniformed Services Former Spouses Protection Act and was codified under United States Code, Title 10, Section 1408.

7. An amendment to the act was passed by Congress making the Act retroactive to June 26, 1981.

8. The act recognizes the right of state courts to distribute military retirement or retainer pay to a spouse or former spouse. The act itself does not provide for an automatic entitlement to the former spouse of a portion of the member's pay.

9. The Supreme Court of the State of Utah decided the case of Woodward v. Woodward on November 4, 1982, approximately four months after the hearing to determine a division of property rights and approximately 1 1/2 months prior to the entry of a Supplemental Decree by the District Court of Cache County.

10. The Defendant filed a Petition for Modification of the Supplemental Decree on or about October 23, 1995.

11. The Plaintiff's Motion for Summary Judgment addresses the following issues: 1) Whether or not the action brought by the Defendant is beyond the statutes of limitations; 2) Whether or not the Defendant has waived or relinquished any claim she may have to the Plaintiff's military retirement; 3) Whether or not the Defendant is entitled to a portion of the military retirement under the decisions of Woodward v. Woodward and Throckmorton v. Throckmorton.

12. The Defendant replied to Plaintiff's Motion for Summary Disposition and made a Cross-Motion for Summary Disposition alleging as follows: 1) That the doctrine of res judicata did not bar the modification; 2) That the Defendant was not guilty of laches nor is estopped from asserting her claims; 3) That the Throckmorton v. Throckmorton case decided by the Court of Appeals in 1988 was inapplicable to this case; 4) That there has been a substantial change in circumstances; 5) That the statute of limitations does not apply to divorce proceedings in cases where the court maintains equitable powers to correct or equitably adjust divorce judgments; and 6) That the trial court's Supplemental Decree evidenced a clear intent to divide all of the parties' assets on an equal basis.

13. Each party replied to the memorandums submitted by the other parties, and the court having taken the matters into consideration, and having in court received statements of uncontested facts by the parties as proffers of evidence to be admitted, and the court having reviewed the memorandums of the parties and having orally indicated the court's decision to the parties, to which the Defendant objected, Plaintiff submitted an Order, which Defendant objected to and the Court having issued a Memorandum Decision, it is hereby ORDERED and ADJUDGED as follows:

1. That Plaintiff's Motion for Summary Judgment is hereby granted.

10. The Defendant filed a Petition for Modification of the Supplemental Decree on or about October 23, 1995.

11. The Plaintiff's Motion for Summary Judgment addresses the following issues: 1) Whether or not the action brought by the Defendant is beyond the statutes of limitations; 2) Whether or not the Defendant has waived or relinquished any claim she may have to the Plaintiff's military retirement; 3) Whether or not the Defendant is entitled to a portion of the military retirement under the decisions of Woodward v. Woodward and Throckmorton v. Throckmorton.

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13. Each party replied to the memorandums submitted by the other parties, and the court having taken the matters into consideration, and having in court received statements of uncontested facts by the parties as proffers of evidence to be admitted, and the court having reviewed the memorandums of the parties and having orally indicated the court's decision to the parties, to which the Defendant objected, Plaintiff submitted an Order, which Defendant objected to and the Court having issued a Memorandum Decision, it is hereby ORDERED and ADJUDGED as follows:

1. That Plaintiff's Motion for Summary Judgment is hereby granted.

2. That Defendant's Petition for Modification of the Divorce Decree is hereby dismissed with prejudice. Defendant's Counter-Motion for Summary Judgment is denied.

3. As a matter of law, the court has determined that the principles of laches and estoppel are inappropriate in this case.

4. The court, as a matter of law, determines that the action brought by the Defendant is beyond the period of limitations. Therefore, the Defendant is barred from bringing this action under the provision of Title 78-12-22 Utah Code Ann. 1953 (As Amended). The statute of limitations begins to run from the time of the rendition and entry of the judgment in this case, which was on July 6, 1981 or the effective date of the Federal Uniformed Services Spouse Protection Act on February 1, 1983.

5. The court further concludes that the rendition of the case of Woodward v. Woodward on November 4, 1982 may have given the Defendant a claim for military benefits under the Uniformed Services Former Spouses Protection Act of September 8, 1982, with an effective date of February 1, 1983 which was later made retroactive to June 2, 1981. However, the court concludes that the action brought by the Defendant was not within the eight year period of limitations for either the date of the entry of the Decree of Divorce on July 6, 1981, nor the hearing for the division of property held on the July 7, 1982 nor the entry of the Supplemental Decree on December 16, 1982.

6. The court further concludes that, as a matter of equity, the Defendant's filing of the petition fourteen years and four months after the entry of the Decree of Divorce does not entitle the Defendant to relief from this court in the form of a Modification of the Decree of Divorce nor a separate action in equity. The parties should be able to rely on a Decree of a Court, and for the same reason that principles of equity may bar this type of action, the statute of limitations does likewise.

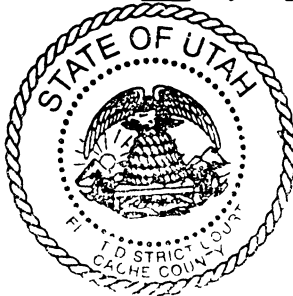
7. The court concludes as a matter of law that there has been no change of circumstances between the parties since the entry of the decree which would warrant a modification of the decree and that the change of a substantial change in circumstances by the Defendant has not been shown

8 The court further concludes that the principals behind the doctrine of res judicata affect this case The Court's findings do not mention military retiremenet and the absence of the adjudication makes the doctrine of res judicata applicable to this case to the same extent as if the retirement benefits were mentioned

9 The court concludes that the matter is res judicata, as the matter has been once judicially decided and has been authoritatively and finally settled by the decision of a court, although military retirement was not specifically addressed in the decree

10. Each party shall pay their own costs of court and attorney's fees

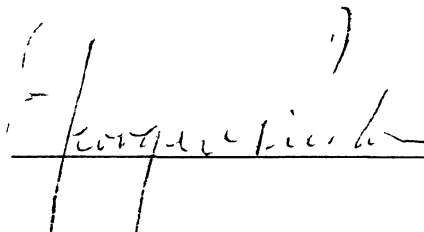
DATED this 25<sup>th</sup> day of September, 1996.



  
\_\_\_\_\_  
District Court Judge

#### MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing AMENDED ORDER GRATING SUMMARY JUDGMENT FOR PLAINTIFF to the Defendant's attorney, Marlin Grant, OLSON & HOGGAN, 88 West Center, P O Box 525, Logan, UT 84323-0525 on this 17 day of September, 1996

  
\_\_\_\_\_