

1986

# Vera L. Johnson v. Harold L. Johnson : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Scott W. Holt; Attorney for Plaintiff-appellant.

Steven M. Kaufman; David R. Hamilton; Farr, Kaufman & Hamilton; Attorney for Defendant-respondent.

---

## Recommended Citation

Brief of Respondent, *Johnson v. Johnson*, No. 860166.00 (Utah Supreme Court, 1986).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/1017](https://digitalcommons.law.byu.edu/byu_sc1/1017)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

STATE COURT  
**BRIEF**

UTAH  
DOCUMENT  
KFJ  
50  
.A10  
DOCKET NO. 860166-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

---

VERA L. JOHNSON, /

Plaintiff/Appellant, /

*860166-CA*

vs. /

Case No. 860037

HAROLD L. JOHNSON, /

Defendant/Respondent. /

---

**BRIEF OF DEFENDANT/RESPONDENT**

---

Appeal from the Second Judicial District Court of Davis County,  
The Honorable Rodney S. Page, District Judge

---

Steven M. Kaufman and  
David R. Hamilton  
FARR, KAUFMAN & HAMILTON  
Bamberger Square, Building 1  
205 26th Street, Suite 34  
Ogden, Utah 84401  
Telephone: (801) 304-5526  
Attorneys for  
Defendant/Respondent

Scott W. Holt  
Attorney at Law  
44 North Main, Suite 101  
Layton, Utah 84041  
Telephone: (801) 546-1264  
Attorney for  
Plaintiff/Appellant

**FILED**

**AUG 18 1986**

---

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

---

VERA L. JOHNSON, /  
Plaintiff/Appellant, /  
vs. / Case No. 860037  
HAROLD L. JOHNSON, /  
Defendant/Respondent. /

---

BRIEF OF DEFENDANT/RESPONDENT

---

Appeal from the Second Judicial District Court of Davis County,  
The Honorable Rodney S. Page, District Judge

---

Steven M. Kaufman and  
David R. Hamilton  
FARR, KAUFMAN & HAMILTON  
Bamberger Square, Building 1  
205 26th Street, Suite 34  
Ogden, Utah 84401  
Telephone: (801) 304-5526  
Attorneys for  
Defendant/Respondent

Scott W. Holt  
Attorney at Law  
44 North Main, Suite 101  
Layton, Utah 84041  
Telephone: (801) 546-1264  
Attorney for  
Plaintiff/Appellant

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	i
STATEMENT OF ISSUES PRESENTED FOR REVIEW . . . . .	1
STATEMENT OF THE CASE. . . . .	1
STATEMENT OF FACTS. . . . .	2
SUMMARY OF ARGUMENTS . . . . .	5
ARGUMENT . . . . .	6
I.        PLAINTIFF IS NOT AN "AGGREIVED" PARTY AND NECESSARILY ENTITLED TO ANY PORTION OF DEFENDANT'S RETIREMENT PURSUANT TO THE UNIFORM SERVICES FORMER SPOUSE PROTECTION ACT, 10 U.S.C. §1408 . . . . .	8
II.       PLAINTIFF IS ESTIPPED FROM RAISING THE ISSUE OF MILITARY RETIREMENT BENEFITS. . . . .	11
III.      PLAINTIFF DOES NOT SHOW A COMPELLING REASON THROUGH ANY SUBSTANTIAL CHANGE IN CIRCUMSTANCES TO JUSTIFY MODIFICATION OF THE DIVORCE DECREE . . . . .	18
IV.       THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETIONARY FUNCTION AND SHOULD NOT BE OVERTURNED. . . . .	20
CONCLUSION . . . . .	22

## TABLE OF AUTHORITIES

### CASES

<u>American Savings and Loan Association v. Blomquist,</u> 445 P.2d 1 (Utah, 1968) . . . . .	14
<u>Bennett v. Bennett,</u> 607 P.2d 839 (Utah, 1980) . . . . .	9, 15
<u>de Carteret v. de Carteret,</u> 615 P.2d 513 (Wash. App., 1980) . . . . .	11, 13
<u>Celebrity Club, Inc. v. Utah Liquor Control Commission,</u> 602 P.2d 689 (Utah, 1979) . . . . .	16
<u>Despain v. Despain,</u> 610 P.2d 1303 (Utah, 1980) . . . . .	19, 21
<u>Englert v. Englert,</u> 576 P.2d 1275 (Utah, 1978) . . . . .	9
<u>Fletcher v. Fletcher,</u> 610 P.2d 1218 (Utah, 1980) . . . . .	21
<u>Foulger v. Foulger,</u> 626 P.2d 412 (Utah, 1980) . . . . .	19
<u>Gordon v. Gordon,</u> 659 S.W.2d 475 (Tex. App. 13 Dist., 1983) . . . . .	11
<u>Henn v. Henn,</u> 605 P.2d 10 (Cal., 1980) . . . . .	11
<u>Jacobsen v. Jacobsen,</u> 703 P.2d 303 (Utah, 1985) . . . . .	12
<u>Johnson v. Johnson,</u> 560 P.2d 1132 (Utah, 1977) . . . . .	21
<u>Jorgensen v. Jorgensen,</u> 599 P.2d 510 (Utah, 1979) . . . . .	21
<u>Kessimakis v. Kessimakis,</u> 580 P.2d 1090, (Utah, 1978). . . . .	13, 21
<u>Land v. Land,</u> 605 P.2d 1248 (Utah, 1980) . . . . .	20
<u>Leaver v. Grose,</u> 610 P.2d 1262 (Utah, 1980) . . . . .	17, 18
<u>In Re Marriage of Hagy,</u> 581 P.2d 598 (Wash. App., 1978) . . . . .	15, 16

<u>McCarty v. McCarty,</u> 453 US 210 (1981)	. . . . . 4, 5, 8, 9, 10
<u>Mendenhall v. Kingston,</u> 610 P.2d 1287, (Utah, 1980)	. . . . . 13
<u>Myser v. Myser,</u> 589 P.2d 277 (Wash. App., 1979)	. . . . . 15
<u>Smith v. Smith,</u> 458 A.2d 711 (Del. Fam. Ct., 1983)	. . . . . 8, 9
<u>Thompson v. Thompson,</u> 709 P.2d 360 (Utah, 1985)	. . . . . 19, 21
<u>Turner v. Turner,</u> 649 P.2d 6 (Utah, 1982)	. . . . . 21
<u>Walentowski v. Walentowski,</u> 672 P.2d 657 (N.M., 1983)	. . . . . 11
<u>Wallace v. Wallace,</u> 671 P.2d 711 (Or. App. 1983)	. . . . . 10, 11
<u>Woodward v. Woodward,</u> 656 P.2d 431 (Utah, 1982)	. . . . . 6, 9

#### STATUTES

10 U.S.C. §1408	. . . . . 4, 5, 8, 20
Utah Code Ann. §30-3-5.	. . . . . 18

IN THE SUPREME COURT OF THE STATE OF UTAH

---

VERA L. JOHNSON, /  
Plaintiff/Appellant, /  
vs. / Case No. 860037  
HAROLD L. JOHNSON, /  
Defendant/Respondent. /

---

BRIEF OF DEFENDANT/RESPONDENT

---

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I

Is the plaintiff entitled to a portion of the defendant's military retirement benefits pursuant to 10 U.S.C. §1408?

STATEMENT OF THE CASE

Plaintiff has sought post-divorce relief for arrearages in alimony payments and for a portion of the defendant's military retirement benefits after previously appearing before the trial court after the decree had been entered for arrearages in child support. The lower court denied the plaintiff's request for a portion of the defendant's military retirement benefits on the grounds that the plaintiff was estopped from asserting the claim

due to the fact that she had previously appeared before the court approximately one (1) year before raising post-divorce issues.

#### STATEMENT OF FACTS

The parties were divorced pursuant to a Decree of Divorce that was signed and entered on February 3, 1982 by the Honorable J. Duffy Palmer, District Court Judge. (R 27-29) The parties had been married March 17, 1963 and the term of the marriage encompassed eighteen (18) years and ten (10) months of the thirty-one (31) total years that defendant spent in military service. The Decree of Divorce incorporated the terms of a Stipulation and Property Settlement Agreement (R 21-22) that the parties entered into on December 28, 1981. The decree provided in relevant part as follows:

That the defendant be and hereby is ordered to pay the plaintiff the sum of \$400.00 per month as and for alimony, same to commence January 1, 1982, with said sum to increase to \$450.00 per month commencing October 1, 1982, and on April 1, 1983, said sum shall increase to \$500.00 per month.

3. That the plaintiff be and she is hereby awarded all household furniture and furnishings she has in her possession; the 1978 Lincoln Continental Mark V and her personal belongings and effects.

4. That the defendant be and hereby is awarded the Pontiac automobile; the furniture and furnishings in his possession, and his personal belongings and effects.

5. That the defendant be and hereby is ordered to assume and discharge all marital debts and obligations



in the approximate amount of \$12,000.00 and each party is ordered to assume and discharge any debts he may have incurred separately since August 13, 1981, the date of separation. (R 27-29)

Neither the divorce decree nor the Findings of Fact and Conclusions of Law (R 24-26) made mention of the military retirement that the defendant would obtain upon the termination of his military career; however, the Findings of Fact at paragraph 6 (R 25) noted, "that the plaintiff is a well and able bodied person; that the defendant is also a well and able bodied person." In paragraph 4 of the Findings of Fact it noted "that during said marriage, the parties herein have accumulated various items of personal property."

Subsequent to the divorce, the plaintiff filed a "Verified Affidavit in Support of Order to Show Cause" (R 30-32) and obtained an Order to Show Cause in re Contempt (R 33) requiring the defendant to appear and show cause why he should not be found in contempt for failure to make certain alimony payments. The Order to Show Cause was originally heard before the Honorable Rodney S. Page, District Court Judge of the Second Judicial District, on June 21, 1984. The plaintiff was granted a judgment against the defendant, which was later reduced to an Order and Judgment (R 38-39) in the sum of \$3,400.00 and defendant was further required to pay \$200.00 in attorney's fees and costs of \$19.00 and ordered to continue to pay alimony at the rate of \$500.00.

The Congress of the United States enacted the Uniformed Services Former Spouses Protection Act with an effective date of February 1, 1983. The Act was undertaken in response to McCarty v. McCarty, 453 US 210 (1981), which was decided prior to the instant parties' original divorce. The plaintiff here made no claim for relief with regards to the defendant's military retirement benefits in the 1984 Order to Show Cause hearing, despite the fact that the effective date of the legislation was after the entry of the decree of divorce.

In September of 1985 the plaintiff once again filed a Verified Affidavit in Support of Order to Show Cause (R 40-41) and obtained an Order to Show Cause in re Contempt (R 42) requiring the defendant to appear and answer why he should not be found in contempt for failure to make certain alimony payments. The affidavit contained no allegations of claim or grievance with regard to the military retirement benefits; however, the matter was heard by stipulation at the time of hearing on November 14, 1985 (See transcript page 3 through 4) and was met with defendant's counter-evidence to the fact that he had suffered a change of circumstances mandating a reduction in the alimony award.

The Court found that the defendant was in arrears in alimony in the sum of \$1,119.00 and that plaintiff was entitled to a total delinquency judgment in the sum of \$4,500.00 (R 46); further the Court found that the defendant's income had decreased

since his retirement from the military in June of 1985 from \$2,300.00 per month to \$1,700.00 per month (R 47). The Court concluded that the reduction in pay of 21 percent entitled the defendant to an equal reduction in the alimony payment from \$500.00 to \$391.00 per month. (R 46-48) The Court further determined that the plaintiff was entitled to a continuing alimony, despite defendant's allegations of cohabitation. Finally, the Court ruled that the plaintiff was estopped from bringing a claim against the defendant for a portion of his military retirement benefits which had been accumulated during his 31 years of military service.

#### SUMMARY OF ARGUMENTS

The plaintiff assumes the position that the Uniformed Services Former Spouses Protection Act, 10 U.S.C. §1408, automatically requires the court to allow a former spouse a proportionate interest in retirement benefits. The Act does not specifically mandate that a former spouse be awarded a portion of the military retirement benefits. Legislative history behind the legislation indicates that the retroactive application of the same was designed to assist "aggrieved parties" who were divorced after McCarty v. McCarty, 452 US 210 (1981). Plaintiff herein is not a "wronged" party. She received the lion's share of the assets and was debt free pursuant to the terms of the Stipulation and Property Settlement Agreement as incorporated into the Decree of Divorce. The trial court in the November 1985 hearing noted,

in the reporters transcript (T 34), that it appeared that consideration was taken as to the asset of the military retirement benefits during the time of the Stipulation and Property Settlement Agreement. That being the case, the division of the assets conformed with Woodward v. Woodward, 656 P.2d 431 (Utah, 1982) in that the asset was considered in the total division of property rights and debt responsibilities of the parties. Thus, there was no harm inflicted upon the plaintiff that required implication of the congressional act to "undo" the divorce decree.

Two years after the entry of the original Decree of Divorce, the plaintiff appeared before the court on a show cause hearing concerning the defendant's arrears in alimony payments. The show cause hearing was heard in May of 1984, two years after the effective date of the involved legislation. At that time, the plaintiff sought no relief to modify the Decree of Divorce in requesting a portion of the defendant's military retirement benefits, despite the fact that she was aided by counsel. The plaintiff's failure to bring any potential claim at that time estopped her from asserting it in 1985 at her second post-divorce proceeding regarding arrearages in alimony. The plaintiff is estopped not simply by the lapse of time, but by the implication of the principles of equitable estoppel, waiver and laches; further, the Stipulation and Property Settlement Agreement entered into between that parties included a recitation that "the

parties hereto agree that the foregoing is an equitable settlement of the property rights, alimony, and other demands that each of said parties have or has had, one against the other, and in the event the defendant is awarded a decree of divorce, each consents to the stipulation, in substance and effect be incorporated and become a part of said decree." (R 22)

In the show cause hearing of November 1985, plaintiff failed to present to the court a material change in circumstances of a compelling nature that required a modification of the original Decree of Divorce. In fact, the only substantial change in circumstances presented at the November 1985 show cause hearing was with regards to the reduction in defendant's income of twenty-one percent (21%). The resultant reduction in income of defendant caused the court to reduce his alimony obligation to plaintiff by twenty-one percent (21%). Without the presence of compelling facts indicating a change in the circumstances, the trial court found no basis for modifying the Decree of Divorce concerning the issue military retirement.

The decision of the trial court was based upon facts and evidence presented therein and referenced to the earlier proceedings before that court; specifically, the 1984 show cause hearing concerning the arrearage of support and the original Decree of Divorce, which was based upon a Stipulation and Property Settlement Agreement of the parties. Consequently, the lower court's determination denying plaintiff a portion of

defendant's military retirement benefits was proper and should be upheld.

## ARGUMENT

### POINT I

PLAINTIFF IS NOT AN "AGRIEVED" PARTY AND NECESSARILY ENTITLED TO ANY PORTION OF DEFENDANT'S RETIREMENT PURSUANT TO THE UNIFORM SERVICES FORMER SPOUSE PROTECTION ACT, 10 U.S.C. §1408

In response to McCarty v. McCarty 453 US 210 (1981), the Congress enacted the Uniformed Services Former Spouses Protection Law, Public Law 97-252. The essence of the Act is to give the state courts the ability to include in a property distribution of divorce proceedings military retirement benefits. The Act specifically provides in Sec. (c)(1):

"...a Court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

It should be noted at the outset that the language of the statute is not compulsive and states "may" be free to choose the particular application of the benefits as marital property or nonmarital property. In Smith v. Smith, 458 A.2d 711 (Del. Fam. Ct., 1983), the court was confronted with a similar situation to the one at hand and the committee report which accompanied the bill, page one, as follows:

The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in McCarty v. McCarty, 458 (453) US 210 101 S. CT. 2728 69 L.Ed.

2d 589 (1981). The bill would accomplish their objective by permitting federal, state and certain other courts, consistent with the appropriate laws, to once again consider military retire pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation.

Further, the report provided that, Page 5:

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

The Smith court noted, with regards to this language, "Congress clearly felt that spouses agrieved as a result of McCarty should have a chance to rectify this situation" through the retroactive application of the law. The key element therein is that of "spouses agrieved". The Smith court permitted the spouse to modify the decree of divorce and obtain a portion of the military retirement benefits. The situation at bar finds a plaintiff who is not "agrieved"; rather, the decision of the district court in adopting the Stipulation and Property Settlement of the parties at the time of the decree should comport with with then operative law with regards thereto. See Englert v. Englert, 576 P.2d 1274 (Utah, 1978) and Bennett v. Bennett, 607 P.2d 839 (Utah, 1980). The Bennett pronouncement of not considering nonvested pension rights was overturned by Woodward v. Woodward, op. cit. Even in light of the Woodward decision, the property distribution of the parties herein appeared to contemplate the defendant's military retirement, as noted by the

District Court Judge at page 34 of the reporter's transcript wherein he indicated as follows:

As to the question of retirement, the Court finds that the parties were divorced in 1983; that they entered into a stipulation for the divorce at that time and the Court assumes that they considered all the parties' property in their 18 years of marriage together. I think that is reflective of the fact that there was an alimony awarded of a substantial amount which was of an unlimited duration.

Accompanying the significant alimony award is the fact that the defendant undertook all of the marital debts, which were of a sum of approximately \$12,000.00.

In Wallace v. Wallace, 671 P.2d 711 (Or. App. 1983) the Oregon court was confronted with an appeal by the spouse of a retired Navy officer. The property settlement denied the spouse a forty-five percent (45%) interest in the husband's retirement pension. The court indicated at page 714 that:

After McCarty, but before the Act became effective, this court stated that a spouse's military retirement pension, while not divisible, can be considered in awarding support or making property divisions...The act permits, but does not require, state courts to consider military retirement payments as marital property.

The court concluded that evidence of the husband's military retirement pension was considered in establishing the amount of alimony payable to the wife and thus an allocation of a portion of the benefits was not required. The circumstances at hand are identical to that of the Wallace matter and mandate support of the district court ruling.



Plaintiff, in her brief, cites cases wherein the parties were permitted to modify the decree of divorce and receive a portion of the spouse's military retirement benefits. It appears that the large body of those cases involved community property states wherein it is well established that property which is not mentioned in the decree of divorce results in a tenancy in common between the parties in that asset. Henn v. Henn, 605 P.2d 10 (Cal., 1980), Walentowski v. Walentowski, 672 P.2d 657 (N.M., 1983), Gordon v. Gordon, 659 S.W.2d 475 (Tex. App. 13 Dist., 1983), de Carteret v. de Carteret, 615 P.2d 513 (Wash. App., 1980). The courts in each of those circumstances dealt with an asset that required specific resolution after the decree of divorce. Further, in each of the above cases, as cited by plaintiff, there was no indication that the court had considered the military retirement in awarding alimony or other division of properties, as was specifically noted in the Wallace, op. cit. As previously indicated in the instant case, it appears from the stipulation, pleadings, orders and comments of the court (see reporter's transcript page 34) that the military retirement benefits were considered by the parties and the court at the original Decree of Divorce.

#### POINT II

PLAINTIFF IS ESTOPPED FROM RAISING THE ISSUE OF  
MILITARY RETIREMENT BENEFITS

The court found that the plaintiff was estopped from asserting a claim for the military retirement benefits. (R 47) Estoppel can undertake several forms; it is basically an equitable principle that is called into effect in several different respects in this particular matter.

A. RES JUDICATA

The plaintiff was before the court on two separate occasions before making a request for an allocations of the military retirement benefits. The original divorce proceeding permitted the plaintiff an opportunity to have the matter heard; further, the plaintiff appeared before the court in May of 1984 with the opportunity to litigate the question of modification with regards to military retirement benefits. The May 1984 appearance was after the effective date of the involved legislation and was brought with the assistance of counsel. In neither of the above-mentioned occasions did the plaintiff assert a claim for a portion of the defendant's military retirement benefits. In Jacobsen v. Jacobsen, 703 P.2d 303 (Utah, 1985), the Utah Supreme Court determined that an action by a former husband against a former spouse to reconvey a partial interest in real property was prohibited by res judicata. The parties were divorced in 1977, after Mr. Jacobson had conveyed an interest in property to Mrs. Jacobson and alleged that she had promised to reconvey half of the interest of that property back to Mr. Jacobson after conclusion of litigation between Mr. Jacobson and his first wife.

The parties had been named as defendants in an action over the title of the property several years prior to the divorce proceeding and Mr. Jacobson was dismissed from that case upon his representation that he had no interest in the land. Mrs. Jacobson was subsequently awarded the entire interest in the property two (2) years prior to the divorce. The divorce was resolved upon stipulation, wherein Mrs. Jacobson received the entire interest in the land. Mr. Jacobson subsequently complained that he had been induced to sign the property settlement agreement upon the condition that the former spouse would promise to reconvey the interest in the property. The trial court determined that his action was barred by res judicata. The court repeated the language of Mendenhall v. Kingston, 610 P.2d 1287, 1289, wherein it said:

Where there has been an adjudication, it becomes res judicata as to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and had determined in the other proceeding. 703 P.2d at 305.

The court further noted that the principle had application in and stated:

This court is clearly committed to the proposition that in order to modify a prior decree, the moving party must show a substantial change in circumstances. In the absence of such a showing, the decree shall not be modified in a matter previously litigated and incorporated therein cannot be collaterally attacked in the face of the doctrine of res judicata. 703 P.2d at 305 from Kessimakis v. Kessimakis, 580 P.2d 1090, 1091 (Utah, 1978).

In the instant case, the Decree of Divorce should not be modified because the plaintiff had a "fair opportunity to present and have determined" the issue of any claims in the military retirement of defendant.

B. WAIVER

The doctrine of waiver is a further application of the principle of estoppel. In American Savings and Loan Association v. Blomquist, 445 P.2d 1 (Utah, 1968), the Utah Supreme Court was confronted with a mortgage foreclosure action and was required to determine whether the plaintiffs had waived the contents of a default notice through a subsequent letter. In determining that there had been no waiver in that circumstance, the court defined waiver at page 3 as follows:

A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit or advantage, a knowledge of its existence and an intention to relinquish it. It must be distinctly made although it may be express or implied.

In the instant case, the case of the plaintiff and failing to proceed on a claim for military retirement benefits amounted to implied waiver. The plaintiff was possessed of the knowledge that the defendant would receive retirement pay after his completion of his military service. The fact that the military service was not completed until June of 1985 was of no significance and the plaintiff not was required to wait until the expiration of the military service.

In the Court of Appeals of Washington, Myser v. Myser, 589 P.2d 277 (Wash. App., 1979), an ex-wife of a retired Air Force officer sought to be declared a co-tenant of the husband's military pension payments which he had been receiving since the time of the divorce. The parties had been divorce pursuant to a property settlement agreement which provided for child support and support for Mrs. Myser. The stipulation and property settlement agreement provided that there was a "full and complete settlement of all their property rights..." The trial court dismissed Mrs. Myser's second action on the following grounds:

1. The court lacked jurisdiction to declare the parties tenants in common with respect to the retirement pension fund;
2. Mrs. Myser waived any claim in regard to that fund by virtue of the property settlement agreement;
3. Mrs. Myser was estopped to assert any claim against the pension payment because of the property settlement agreement; and
4. The terms of the agreement made pension funds the separate property of Mr. Myser. 589 P.2d at 278.

The Washington Court went on to discuss the applicability of military retirement benefits which at that time was basically in line with the Utah Supreme Court holding in Bennett v. Bennett, op. cit. Further, in the Myser case, in tracing the history of Washington decisions, the court noted that in In Re Marriage of

Hagy, 581 P.2d 598 (Wash. App., 1978) the court had found that where it was the intention of the parties at the time of the property settlement agreement in the divorce decree to provide a full and complete settlement of their property rights, there would be no reopening of the proceeding. In the case at hand, the stipulation and property settlement agreement, paragraph 10 (R 22) provides as follows:

That the parties hereto agree that the foregoing is an equitable settlement of the property rights, alimony, and other demands that each of said parties may have or have had, one against the other, and in the event the defendant is awarded a decree of divorce, each consents that the stipulation, in substance and effect, may be incorporated and made a part of said decree.

Thus, the plaintiff effectively, and with knowledge of the existence of military retirement benefits, waived her rights to any other property claims against the defendant.

C. ESTOPPEL.

Justice Maughn in Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689 (Utah, 1979) determined that the Liquor Control Commission's denial of a license to a private club where it had previously represented that the club was in compliance with statutes concerning location within 600 feet of any public or private school specifically set forth the elements of equitable estoppel as:

1. An admission, statement or act inconsistent with the claim afterwards asserted;

2. Action by the other party on the faith of such admission, statement, or act; and
3. Injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. 602 P.2d at 694

In this case, the defendant consented to a Stipulation and Property Settlement Agreement wherein he and plaintiff mutually agreed to release all claims; further, the plaintiff brought no action against the defendant post-divorce to seek a portion of military retirement benefits by bringing to the court's attention an arrearage in alimony. Defendant acted on the acts and omissions of the plaintiff by agreeing to satisfy certain sums of alimony, pay debts and ultimately terminate his military service. The injuries received by defendant were through the assumption of an increased portion of the debt and payment of a substantial sum of alimony per month which may not otherwise have been assessed, together with the latter reduction in available monthly income from termination of service in the military. The elements of equitable estoppel as applied in the State of Utah are present to prohibit the plaintiff from bringing an action to collect a portion of the defendant's military retirement benefits.

D. LACHES.

The final derivative of the estoppel concept that is available to the defendant in this circumstance is the notion of

laches. The Utah Supreme Court in Leaver v. Grose, 610 P.2d 1262 (Utah, 1980) set forth the two elements of laches to be:

1. A lack of diligence of on the part of the plaintiff;  
and
2. An injury to the defendant owing to such lack of  
diligence.

In Leaver, the Court found that laches was not applicable to the real estate claims regarding restrictive covenants, but noted at page 1264 that:

The doctrine of estoppel has application when one, by his acts, representations or conduct or by his silence when he ought to speak induces another to believe that certain facts exist and such other relies thereon to his detriment.

The analysis herein is similar and the acts and resultant injury are identical to that indicated in the section above with regards to equitable estoppel or estoppel in pais.

### POINT III

PLAINTIFF DOES NOT SHOW A COMPELLING REASON THROUGH ANY  
SUBSTANTIAL CHANGE IN CIRCUMSTANCES TO JUSTIFY  
MODIFICATION OF THE DIVORCE DECREE

30-3-5 U.C.A. 1953, as amended, provides in part that:

The Court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support, maintenance, and health and dental care, or the distribution of the property as shall be reasonable and necessary.

With the ability to modify a decree of divorce, the trial courts in any given circumstance must determine in which



situations a decree may be modified. In order to modify the decree of divorce, the moving party must "show the trial court a substantial change in the circumstances since the decree of divorce." Thompson v. Thompson, 709 P.2d 360 (Utah, 1985). In the cases involving property, the Utah Supreme Court has frequently been asked to determine if the same can be modified. In Foulger v. Foulger, 626 P.2d 412 (Utah, 1980), the wife sought modification of the award to her former husband of a fifty percent (50%) lien interest in the marital home. The trial court permitted modification due to certain financial hardship circumstances but was reversed by the Supreme Court on appeal. The Court stated at page 414 that:

...where the property disposition is the product of an agreement and stipulation between the parties, and sanctioned by the trial court. Such a provision is the product of an agreement bargained for by the parties. As such, a trial court should subsequently modify such a provision only with great reluctance, and based upon compelling reasons.

The Court failed to find any compelling reason for the modification in Foulger where the decree of divorce was based upon a stipulation and property settlement agreement entered into between the parties.

In Despain v. Despain, 610 P.2d 1303 (Utah, 1980), the Court again determined that there was no compelling change in the circumstances such to modify a decree of divorce in regards to a trust; more specifically where the moving party had entered into

a release with regards to the property. In so holding the Court stated at pages 1305-1306:

This issue was most recently before the Court in Land v. Land (605 P.2d 1248, (Utah, 1986)) wherein we observed that the outright abrogation of the provisions of a property settlement agreement is to be resorted to with great reluctance and only for compelling reasons.

In this case, there is no substantial change in the circumstances of a compellingly sufficient nature to modify the decree as sought by the plaintiff. The trial court determined that the only compelling change in circumstances was the fact that the defendant's income had decreased by 21 percent (R 47). As a direct result of the defendant's loss of income from \$2,300.00 to \$1,700.00 per month, his obligations for alimony was reduced by an equal percentage, from \$500.00 to \$391.00 per month. (R 48-57) There was no evidence brought to the court that there had been any other change in circumstances of the parties specifically sufficient enough to award the plaintiff an interest in the defendant's military pay. The fact that 10 U.S.C. 1408 (c)(1) provides that "a spouse may be entitled" to a portion of the military retirement benefits does not create the facts in this particular circumstance to justify a modification of the original Decree of Divorce.

#### POINT IV

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETIONARY  
FUNCTION AND SHOULD NOT BE OVERTURNED

In order for the plaintiff to be successful on her appeal, she must "show the evidence clearly preponderates against the findings or that the trial court has abused its discretion." Thompson v. Thompson, 709 P.2d 360, 362 (Utah, 1985), citing Fletcher v. Fletcher, 610 P.2d 1218 (Utah, 1980) and Turner v. Turner, 649 P.2d 6 (Utah, 1982).

In Despain v. Despain, op. cit. the Court at page 1305-6, in confirming a position previously stated in Jorgensen v. Jorgensen, 599 P.2d 510 (Utah, 1979), Kessimakis v. Kessimakis, 580 P.2d 1090, (Utah, 1978), Johnson v. Johnson, 560 P.2d 1132 (Utah, 1977), that:

in the formulation of the original decree and any modifications thereof; the trial court is vested broad discretionary powers, which may be disturbed by an appellant court only in the presence of clear abuse thereof.


Herein the trial court noted that prior consideration in the original decree with regards to the substantial alimony award payable on a continuing basis from the defendant to the plaintiff (see reporter's transcript page 34) together with the contents of the stipulation and finally the failure of the plaintiff to bring her claim when she had previously been before the court on other occasions estopped the plaintiff from asserting a claim for a portion of the defendant's military retirement benefits. This determination by the trial court was based upon a reasonable interpretation of the evidence as presented to the court and

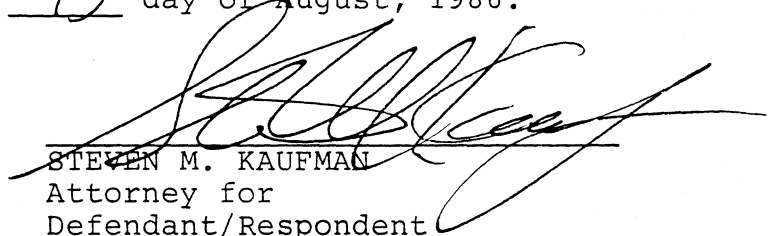
supported by the contents of the record and therefore should not be overturned.

CONCLUSION

It is evident from the foregoing discussion and the undisputed facts which were before the trial court that the plaintiff's claim for a portion of the defendant's military retirement benefits were properly denied and that the lower court's ruling should be affirmed.

RESPECTFULLY submitted this 15 day of August, 1986.

  
\_\_\_\_\_  
DAVID R. HAMILTON  
Attorney for  
Defendant/Respondent

  
\_\_\_\_\_  
STEVEN M. KAUFMAN  
Attorney for  
Defendant/Respondent

CERTIFICATE OF MAILING

I, DAVID R. HAMILTON, hereby certify that I have mailed four (4) true and correct copies of the foregoing Brief of Defendant/-Respondent, postage prepaid, to Scott W. Holt, Attorney for Plaintiff/Appellant, 44 North Main, Suite 101, Layton, Utah 84041, this 18 day of August, 1986.

  
\_\_\_\_\_  
DAVID R. HAMILTON