

1986

Vera L. Johnson v. Harold L. Johnson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

13-B

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TABLE OF CONTENTS

NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACT	2
STATEMENT OF ISSUES PRESENTED ON APPEAL	3
SUMMARY OF ARGUMENT	4
POINT ONE	4

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

POINT TWO	8
---------------------	---

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

POINT THREE	10
-----------------------	----

PLAINTIFF-APPELLANT WAS TIMELY IN HER RETURN
TO COURT TO REQUEST AN AWARD OF A PORTION OF THE
MILITARY RETIREMENT BENEFITS.

POINT FOUR	11
----------------------	----

PLAINTIFF-APPELLANT SHOULD RECEIVE COURT
ORDERED PAYMENTS DIRECTLY FROM THE MILITARY FINANCE
CENTER.

CONCLUSION	12
----------------------	----

STATUTES AND CASES CITED	ii
------------------------------------	----

CASES, STATUTES & AUTHORITIES CITED

FEDERAL STATUTE CITED

UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT 10 USCS SEC 1408 ET.AL.	1
---	---

CASES CITED

<u>BENNETT v. BENNETT</u> , 607 P.2d 839 (Ut 1980)	8
<u>de CARTERET v. de CARTERET</u> , 615 P.2d 513 (Wash App 1980)	9
<u>GORDON v. GORDON</u> , 659 SW2d 475 (Tex App 13 Dist 1983)	6
<u>HENN v. HENN</u> , 605 P.2d 10 (Cal 1980)	9
<u>McCARTY v. McCARTY</u> , 453 US 210, 69 L Ed. 2d 589, 101 Sct 2728	5
<u>SMITH v. SMITH</u> , 699 P.2d 448 (Wash 1983)	6
<u>SMITH v. SMITH</u> , 458 A.2d 711 (Del Fam Ct 1983)	6
<u>VERONIN v. VERONIN</u> , 662 SW.2d 102 (Tex App 3 Dist 1983)	7
<u>WALENTOWSKI v. WALENTOWSKI</u> , 672 P.2d 657 (NM 1983)	7
<u>WOODWARD v. WOODWARD</u> , 656 P.2d 431 (Ut 1982)	7

AUTHORITIES CITED

24 Am Jur 2d Sec 958 DIVORCE & SEPARATION	11
28 Am Jur 2d Sec 35 ESTOPPEL & WAIVER	9

IN THE SUPREME COURT
OF THE STATE OF UTAH

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

BRIEF OF PLAINTIFF - APPELLANT

STATEMENT OF NATURE OF THE CASE

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

DISPOSITION IN THE LOWER COURT

The lower court in the Judgment and Order signed December 12, 1985 and entered December 13, 1985 denied Plaintiff-Appellant's request for an allocation of Defendant - Respondent's military retirement benefits based upon the theory of estoppel. The Notice of Appeal was filed in the District Court on or about January 8, 1986. The Court ruled that since Plaintiff had failed to request an allocation of a portion of the military retirement benefits in the earlier Order to Show Cause heard in June of 1984, that she be

estopped from bringing the matter before the Court in the November, 1985 hearing. Plaintiff - Appellant believes the Court failed to apply the federal law correctly considering that the divorce was granted in January of 1982, and the Uniformed Services Former Spouses Protection Act was enacted in 1982 and made retroactive to June 26, 1981, the Defendant - Respondent retired in June of 1985, and the Plaintiff - Appellant sought relief in November of 1985, only three months later.

RELIEF SOUGHT ON APPEAL

That the Court award to the Plaintiff - Appellant a portion of Defendant - Respondent's military retirement income based upon the years that she was married to him while he was in active military service pursuant to the Uniform Services Former Spouse Protection Act.

STATEMENT OF FACT

The Plaintiff - Appellant had been married to the Defendant - Respondent for eighteen years and 10 months of his thirty-one total years in military service. The parties were granted a Decree of Divorce on January 22, 1982. The Court awarded the Plaintiff - Appellant \$500.00 per month as and for alimony. At the time of the divorce, the Defendant - Respondent was gainfully employed in the military. At the time the divorce was heard, Utah courts did not recognize unvested military retirement benefits as marital property subject to division; therefore, the issue of retirement benefits was not raised at the time of the parties' stipulation.

In 1984, Plaintiff - Appellant brought an action to enforce

the alimony provisions as the Defendant - Respondent was in arrears and the Court awarded a judgment to the Plaintiff - Appellant in June of 1984.

One year later, Defendant - Respondent retired from the military in June of 1985, with a total of thirty-one years of service. Plaintiff - Appellant was notified in July of 1985 that the Defendant - Respondent had retired from the military and that she might be eligible for a portion of his military retirement and benefits under the Uniformed Services Former Spouses Protection Act.

Plaintiff - Appellant filed an Order to Show Cause in November of 1985 for such relief and since the Defendant - Respondent was again delinquent in his alimony payments for a second judgment for alimony. Plaintiff - Appellant's motion requested that the Plaintiff - Appellant be awarded delinquent alimony and a portion of Defendant - Respondent's military retirement benefits based upon the years she was married to him while he was employed in military service. Plaintiff - Appellant asked the Court to terminate alimony if her request for military retirement benefits was granted.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether a former spouse is entitled to a portion of her husband's military retirement pursuant to the Uniformed Services Former Spouses Protection Act 10 USCS Sec. 1408 when the issue was not considered in the divorce action, since the divorce was granted before the Act was enacted but during the period made retroactive by

the Act.

2. Whether a divorce court can deny consideration of such an issue upon the theory of equitable estoppel.

SUMMARY OF ARGUMENT

The Uniformed Services Former Spouses Protection Act requires state courts to consider a division of military retirement based upon the number of years married once said spouse has met the requirement for eligibility under the Act. Congress fully intended the former spouses to return to court and have the court apply the Act to those divorce cases which were decided before the law was enacted but after McCarty was decided. The Act placed no time requirements upon when a former spouse must return to court to request such a division.

In the instant case, the former spouse was notified that her husband was retiring and that she was eligible pursuant to the Act and needed to modify the Decree of Divorce accordingly.

The lower court erred in that it misapplied the doctrine of equitable estoppel and held that Plaintiff - Appellant failed to raise that issue when she sought a judgment for alimony arrearage a year prior to Defendant - Respondent retiring, and therefore, Plaintiff - Appellant's request to modify the decree, apportioning Defendant - Respondent's retirement in lieu of further alimony was barred.

ARGUMENT

POINT ONE

PLAINTIFF - APPELLANT IS ENTITLED TO A PORTION OF THE

DEFENDANT - RESPONDENT'S RETIREMENT AS PER PUBLIC LAW 97-252,
UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (10 U.S.C.S. SEC.
1408).

The Uniformed Services Former Spouses Protection Act, enacted by Congress in 1982, overruled, for the most part, the effect of McCarty v. McCarty, 453 US 210, 69 L Ed. 2d 589, 101 Sct 2728. In the 1981 McCarty case, the United States Supreme Court held that upon dissolution of a military officer's marriage, a state court was precluded by federal law from dividing military nondisability retired pay pursuant to state property laws. Federal statute 10 USCS Sec. 2771, indicates that Congress intended retired pay to be a personal entitlement.

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

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

later date.

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

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

On motion of the wife to reopen an eighteen month old judgment to permit additional evidence and argument, the Family Court in Smith v. Smith, 458 A.2d 711, (Del. Fam. Ct. 1983) held that the wife's motion in view of the Uniformed

Services Former Spouses Protection Act, to reopen would be granted, since the decision to reopen was a decision to permit the wife to present her case under Delaware law as it existed before McCarty and to do otherwise would be to carve out a category of people whose cases were decided between June 25, 1981 and September 9, 1982 and deprive them of substantial property interest which other similarly situated litigants have been awarded.

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

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

The Supreme Court of Utah upheld the trial Court's award of a portion of the husband's retirement benefits that accrued during

marriage, notwithstanding the husband was not entitled to such benefits until he worked fifteen additional years.

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

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

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

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

Based upon the interest of Congress and the holdings of other states in similar factual situations, the Court erred in denying Plaintiff-Appellant a hearing to allocate her entitlement to Defendant-Respondent military benefits under the Uniformed Services Former Spouses Protection Act, which law was mandated by Congress and made applicable to the state courts.

POINT TWO

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

Broadly speaking the essential elements of estoppel are: (1) Conduct which amounts to a false

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

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

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

In Henn v. Henn, 605 P.2d 10 (Cal 1980), the wife's failure to assert her community property rights to the husband's military retirement pension during divorce proceedings did not collaterally estop her from asserting her right to the pension in a later action. A finding by the trial court in de Carteret v. de Carteret, 615 P.2d 513 (Wash App 1980) that the

omission of retirement funds of the husband and wife from the dissolution decree was inadvertent could not support the conclusion that the husband received the funds by implication, in that the decree of dissolution did not purport to dispose of the parties' retirement benefits, either expressly or by reference.

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

POINT THREE

THE PLAINTIFF-APPELLANT WAS TIMELY IN HER RETURN TO COURT TO REQUEST AN AWARD OF A PORTION OF THE MILITARY RETIREMENT BENEFITS.

Under McCarty, the controlling case at the time the divorce was heard in January of 1982, military retirement benefits were not divisible marital property and therefore not included in the property disposition.

The military retirement benefits were also not at issue at the hearing on the Plaintiff - Appellant's Order to Show Cause for delinquent alimony in June of 1984 as the Defendant - Respondent did not retire until one year later in June of 1985. The sole purpose of the June, 1984 Show Cause hearing was to enforce the alimony provisions of the Decree of Divorce entered in January of 1982. The Plaintiff - Appellant was notified in July of 1985 that she might be

eligible for a portion of Defendant - Respondent's military retirement benefits and filed an Order to Show Cause requesting an award of a portion of said benefits within four months of the notification.

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

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

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

POINT FOUR

PLAINTIFF - APPELLANT SHOULD RECEIVE COURT ORDERED PAYMENTS DIRECTLY FROM THE MILITARY FINANCE CENTER.

The Defendant - Respondent has fallen into arrears in alimony payments on two previous occasions. It has been necessary for the Plaintiff - Appellant to file actions to bring the Defendant - Respondent before the Court to protect her source of support. If the Court upholds her right to receive direct payments from the

military finance center, Plaintiff - Appellant's right to support will be protected without the necessity of future court action.

CONCLUSION

Plaintiff-Appellant is clearly entitled to one half of eighteen years ten months of thirty-one years of Defendant-Respondent's military retirement together with such other entitlements Plaintiff-Appellant may be entitled to. The Court erred in denying consideration of such an award under a theory of estoppel. Other states have considered this issue and have held that Plaintiff-Appellant is entitled to such second award as has been requested by Plaintiff-Appellant since that was the the intent of Congress.

RESPECTFULLY submitted this ____ day of June, 1986.

SCOTT W. HOLT, Attorney for
Plaintiff-Appellant

CERTIFICATE OF MAILING

I, Scott W. Holt, hereby certify that I have mailed four (4) true and accurate copies of the foregoing Brief of Plaintiff-Appellant to the attorney for the Defendant-Respondent, Steven M. Kaufman, at 205 - 26th Street, #34, Ogden, Utah 84401-2902.

Scott W. Holt