

1980

Charles N. Bennet v. Donna Mae Bennett : Respondent's Petition For Rehearing and Brief In Support thereof

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHARLES N. BENNETT, :
Plaintiff-Appellant, :
 :
-vs- : CASE NO. 16268
 :
DONNA MAE BENNETT, :
Defendant-Respondent. :

RESPONDENT'S BRIEF

RESPONDENT'S PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

Appeal from the Judgment of the
District Court of Davis County
The Honorable H. Maurice Harding, Judge

J. VAL ROBERTS, ESQ.
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FILED

MAR 10 1980

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHARLES N. BENNETT, :
Plaintiff-Appellant, :
-vs- : CASE NO. 16268
DONNA MAE BENNETT, :
Defendant-Respondent. :

RESPONDENT'S BRIEF

PETITION FOR REHEARING

The Defendant-Respondent, DONNA MAE BENNETT, hereafter referred to as the RESPONDENT, hereby petitions this Honorable Court for a rehearing of the judgment rendered on February 20, 1980, wherein this Court set aside its October 19, 1979, per curiam decision sustaining the Lower Court property settlement, reversed the judgment of the Lower Court and remanded for proceedings concerning property distribution between the parties.

RELIEF SOUGHT ON REHEARING

The Respondent seeks reversal of the decision of the Supreme Court of the State of Utah as the same is contained in

the decision rendered February 20, 1980, and to have the decision of the Utah Supreme Court of October 19, 1979, reinstated. In the alternative, Respondent prays for either an evidentiary hearing before the said Utah Supreme Court in its exercise of equitable jurisdiction or that the matter be remanded to the Lower District Court for a full hearing on the new evidence contained in Exhibit "A" of this brief.

ARGUMENT

POINT I

THE TRIAL COURT WAS PERSUADED THAT THE ONLY ASSET OF THE MARRIAGE THAT WAS AVAILABLE FOR IMMEDIATE SALE AND DIVISION BETWEEN THE PARTIES AT THE TIME OF TRIAL WAS THE FAMILY DWELLING. THE COURT'S REFUSAL TO CONSIDER THE \$15,682.00 PAYROLL DEDUCTIONS AS AN ASSET IN THE POSSESSION OF THE APPELLANT ONLY IF HE WITHDRAWS THEM AT LEAST ONE MONTH PRIOR TO RETIREMENT AS AN ASSET AVAILABLE AT TIME OF TRIAL FOR DISTRIBUTION WAS NOT ERROR. (EMPHASIS SUPPLIED.) THE ORIGINAL DECISION OF THIS HONORABLE COURT'S SUSTAINING THE TRIAL COURT'S AWARD SHOULD BE REINSTATED.

It is agreed by all concerned that the only way Appellant could make the cash value of his contributions available for either himself or to be divided between the parties on October 25, 1978, would be to withdraw the \$15,682.00 he has paid in by payroll deduction prior to

April 7, 1984, or one month before becoming eligible to retire.

All parties, counsel, witness and the trial court agree that to make the Appellant's paid-in contributions immediately available for distribution would totally destroy Appellant's 37-year retirement.

What is not agreed and the basis for this appeal is the fact that in making a division of marital assets, the trial court refused to consider either the Appellant's \$15,682.00 of contributions or the matching amount held by the U. S. Government as an asset available for immediate distribution.

The request to have Appellant's cash contributions treated as one of two assets which the court should consider was made by Appellant's counsel (R-90, L's 19-30 and R-91, L's 1-2).

MR. VLAHOS: "Maybe I'm missing something, Your Honor, but that's not the way I heard the testimony from anybody in that regard.

"My understanding is that the other money was put into retirement fund and he could not touch it, had no control over it, and it went to his heirs, (referring to the Government matching account) or towards his annuity. And that's the way I understood Mrs. Woods' testimony. (Material in brackets inserted for clarification).

"If you are talking about equities, Your Honor, I would suggest to the Court that 38,000 net equity, plus 15,682, (Appellant's paid-in contributions) comes out \$53,682. Divide that by two, is 26,841. Subtract from that portion 15,682, which my client has in his possession, leaving a claim of 11,159. And if the Court is taking that position, then I think that would be equity." (Emphasis supplied). (Material in brackets added for clarification).

The trial court rejected the claim of Plaintiff's counsel that the \$15,682.00 of Plaintiff's contributions was money that Appellant then had in his possession. The Lower Court was eminently correct in considering only the \$38,000.00 estimated equity in the family dwelling as immediately available for distribution. The court made the following observations (R-89, L's 24-27):

THE COURT: "Thirty-eight thousand is the net equity in the home. Divide that between the two of you, that's \$19,000.00 each. And deduct from that the retirement, \$15,682.00, that's \$3,318.00. That's the difference there."

That the \$15,682.00 paid into the Civil Service Retirement System by Appellant had a dollar value of \$15,682.00 is

irrefutable. That the money was not at that time, and is not today, in the Appellant's possession is also indisputable notwithstanding the erroneous claims of Appellant's counsel.

It is also an absolute that Appellant had, and has today and will have until one month prior to May 7, 1984, the right to make the \$15,682.00 of his paid-in contributions available for immediate distribution. The right to exercise control over his personal contributions is an incident of ownership which had at trial, and has today, a present value.

The right to direct to heirs or to receive as an annuity the \$15,682.00 held by the Federal Government in a retirement fund which Appellant has never seen and has no control over is also an incident of ownership which Appellant has and had at time of trial. If such ownership had been considered by the court in the same light as the Appellant's paid-in contributions, the following property award would have resulted:

Equity in home	\$38,000.00
Appellant's retirement contributions	15,682.00
U. S. Government matching fund available only as death or annuity	<u>15,682.00</u>
TOTAL property to be divided	\$69,364.00
\$69,364.00 divided by 2 equals	<u>\$34,682.00</u>

Respondent's award (all the home) (R-92, L-5)	\$38,000.00
Less Appellant's lien of \$5,000.00	<u>5,000.00</u>
TOTAL to Respondent	<u>\$33,000.00</u>

Had the trial court believed the erroneous claim made by Appellant's counsel that the Appellant had his paid-in contributions of \$15,682.00 in his possession (R-90, L's 29-30) and thus available for immediate division between the parties, the following division would have been proper:

1. A lien to Appellant for \$19,000.00 on family residence.
2. Equity award to Respondent \$19,000.00, family residence.
3. Cash award to Respondent \$7,891.00 from Appellant's retirement contributions.
4. Appellant's retirement \$7,891.00 on deposit in his retirement account.

TOTAL equity to each party	\$19,000.00
TOTAL cash to each party	\$ 7,891.00
GRAND TOTAL cash and lien to each party	\$26,891.00

The problem is that to consider both the equity in the family dwelling and the cash value of the Appellant's contributions equally available for immediate distribution would

destroy at least half, if not all, of the value of the Appellant's 37 years of Federal Civil Service unless he were to be ordered to borrow \$7,891.00 from other sources to pay to Respondent in lieu of withdrawing half of his retirement contributions.

Working within the limitations of the assets and the facts before it, the trial court chose to preserve both the family dwelling and the full value of Appellant's Federal retirement without imposing the hardship of additional debt on the Appellant, and that determination should be reinstated and sustained by this Honorable Court.

The confusion is apparently caused by the attempt by Appellant to persuade the trial court that Appellant should be awarded one-half of the equity in the parties' home together with one-half the cash value of his contributions to the Federal Civil Service retirement and then be allowed to withdraw the entire cash value of his contributions to retirement again beginning May 7, 1984. Appellant does not object to having his cash contributions included in the property settlement even though, as argued orally by his counsel before this court, Appellant has never seen them, if those contributions are counted once on October 25, 1978, for 50% of their value and again on May 7, 1984, for 100% of their value. The fact

is that should Appellant die before May 7, 1984, or retire (R-76, L's 1-3) on that date, his paid-in contributions would be counted one and a half times and the value of the U. S. Government account would also go to someone other than his wife of 37 years had the trial court done equity by the definition offered by Appellant's counsel at pages 90 and 91 of the trial record.

At issue is the question of how should the trial court value an asset for which Appellant paid 5% to 7% of his salary and which had a cash value on October 25, 1978, of \$15,682.00 but which Appellant does not have in his possession and can only possess by destroying something of even greater value in expectancy?

The latitude historically afforded trial courts in dealing with complicated matters of this kind is broad enough to sustain the decision of the Lower Court in this case.

POINT II

THE RETIREMENT OFFICER IN THE CIVILIAN PERSONNEL OFFICE AT HILL AIR FORCE BASE, MARGARET S. WOODS, WAS CALLED AS RESPONDENT'S WITNESS IN THE TRIAL. THE WITNESS VOLUNTEERED STATEMENTS BEYOND HER COMPETENCE. THE TRIAL JUDGE OBSERVED HER Demeanor AND ASSESSED THE VALUE TO BE ATTACHED TO THE VARIOUS PARTS OF HER TESTIMONY INCLUDING THAT HAVING TO DO WITH THE PRESENT VALUE OF APPELLANT'S FEDERAL CIVIL SERVICE RETIREMENT.

Margaret S. Woods, though called as Respondent's witness, volunteered much information to favor Appellant even when she lacked specific knowledge of the facts at issue. Mrs. Woods' actions came as a surprise to Respondent and her counsel, but were correctly weighed by the trial judge. At page 73, line 11 of the trial record, we find:

Q "Now, can you tell us what the present grade and step of Charles Bennett is?"

A "I can, sir."

* * *

Q "What is his annual salary before exemptions and deductions?"

A "Effective October 5th of '78 -- effective October 5th, it would be \$18,254.00. But I must say one thing, sir."

Q "Go ahead."

A "In behalf of Mr. Bennett, I'm sure that Mr. Bennett was not aware of his new increase, because we had no publicity on Hill Field, because the President signed it at a late date. And Mr. Bennett, the employee -- copies have not been distributed to the employees as of today." (Emphasis supplied.)

Q "You are essentially saying, as of today he had no official notification of the changes?"

Again at page 77, line 15:

A "Mr. Bennett would not be authorized to retire until age fifty-five, which would be May 7th of 1984, would be the earliest possible date that he could retire."

Q "What would be those monthly benefits on that date?"

* * *

THE COURT: "She may answer."

A "Well, based on his current salary, of course, which could either go up, or he could be hit in RIF and it could go down, speculating, he would receive about \$1070 per month, less his health insurance, if he stayed with Alliance. That's currently about \$28.00 per month. Of course, that's subject to change. So his take-home, about 1042 per month." (Emphasis supplied.)

The willingness of the witness to offer gratuitous testimony favorable to Appellant was correctly assessed by the trial judge who was in a position to observe her demeanor and to give the proper weight to her evidence. This Honorable Court should reinstate its prior decision sustaining the trial court's division of marital assets.

POINT III

THE QUESTION OF THE PRESENT VALUE OF THE APPELLANT'S \$1,042.00 PER MONTH OF FEDERAL CIVIL SERVICE RETIREMENT WHERE THE FIRST PAYMENT IS DEFERRED TO MAY 7, 1984, SHOULD NOT BE DECIDED ON THE CONTRADICTORY AND DEMONSTRABLY BIASED TESTIMONY OF RESPONDENT'S WITNESS. UNBIASED EXEERT TESTIMONY IS AVAILABLE (SEE EXHIBIT "A") AND WOULD HAVE BEEN CALLED AT TRIAL HAD THERE BEEN ANY INDICATION FROM PRIOR INTERVIEWS OF THE BIAS OF MARGARET WOODS. WHILE NOT APPARENT FROM

THE MERE WRITTEN RECORD THE BIAS WAS AP-
PARENT TO THE TRIAL JUDGE.

Respondent's witness, Margaret Woods, testified somewhat reluctantly that Appellant would receive the sum of \$1,042.00 per month beginning at age fifty-five on May 7, 1984. (R-77). Exhibit "A" attached to this brief states that the value of that monthly benefit measured as of the date of trial was \$75,821.00. Appellant, as of October 25, 1978, had contributed a mere \$15,681.00 to that present value. If only the contributions of Appellant are taken into account in making division of the marital assets in this case, Appellant will, in effect, take for \$15,681.00 what any other person would have had to pay \$75,821.00 for on October 25, 1978.

The present value of Appellant's benefit of \$75,821.00 is made more certain than that of a non-governmental employee because it is based on the power of the Federal Government to levy current taxes. On the other hand, the investment of the \$75,821.00 by a private individual would be subject to the investment uncertainties of private pension funds.

Even if the funds needed to generate a monthly income of \$1,042.00 with the first payment not due until age fifty-five, or six years hence, could be invested at a guaranteed long-term rate equal to the rate today for six-month money market certi-

ficates, i.e., 13%, it would still require \$41,507.00 invested as of October 25, 1978, to provide the \$1,042.00 per month income which Appellant will receive from his Federal Civil Service retirement at age fifty-five. (Exhibit "A").

The practical certainty that Appellant will begin drawing \$1,042.00 per month six years hence, at age fifty-five, is illustrated by the present value of Appellant's \$1,200.00 per month, age 65, retirement benefit at 8%. It is \$28,902.00, and at 13% a mere \$10,693.00 or some \$5,000.00 less than his October 25, 1978, contributions. (Exhibit "A").

The trial court properly took into account the present value of Appellant's retirement benefits and exercised proper discretion in awarding Appellant \$5,000.00 as a lien on the parties' only other asset, the family residence, the lien being awarded for other than economic reasons. Respondent's share of \$33,000.00, while not equal to Appellant's in dollar value, recognizes basic emotional and family needs, and should be affirmed by this Honorable Court.

POINT IV

THE QUESTION OF WHEN THE PRESENT VALUE OF ANY EXPECTANCY OR PROMISED BENEFIT IS ENCOMPASSED BY THE LANGUAGE OF ENGLERT V. ENGLERT, (1978) UTAH 576 P2d 1274, 1276 MAY BE A MATTER TO BE DETERMINED ON A CASE BY CASE BASIS. IN THE

CASE AT BAR, THE POSSESSORY INTEREST OF THE APPELLANT IN HIS RETIREMENT IS AS ABSOLUTE AS IS THE PARTIES' POSSESSORY INTEREST IN THE \$38,000.00 EQUITY WHICH ONE APPRAISER ESTIMATED TO BE IN THE FAMILY RESIDENCE.

The present value of Appellant's \$1,200.00 per month retirement benefit at age 65 is \$28,902.00, whereas a lessor monthly benefit of \$1,042.00 taken 10 years sooner has a value today of \$75,821.00 or nearly three times more. Retirement at age fifty-five with 37 years of Federal service is for all practical purposes certain. (Exhibit "A").

When a current money market, six-month interest rate is used and retirement is deferred to age 65, the present value of Appellant's \$1,200.00 per month retirement benefit shrinks to a mere \$10,693.82 or \$5,000.00 less than the amount paid in by Appellant as of October 25, 1978. (Exhibit "A").

The Appellant's retirement benefits are totally in his control and discretion; and were this an estate or inheritance tax case revolving around a private annuity, the Appellant would, as a matter of law, be said to have a taxable possessory present interest in the entire \$75,821.00 present value. When the Appellant, in the future exercise of his unfettered discretion, begins to receive a monthly retirement check in excess of \$1,000.00 per month while the Respondent must look forward to

10 more years of daily labor, the question of whether Appellant possessed the present value of the amount necessary to purchase his retirement benefit on October 25, 1978, will be as academic as the question of whether or not the parties possessed the estimated equity in the family residence on the same date.

If one can possess the promise of the Federal Government to pay the face value of its bonds, treasury bills, or other evidences of Governmental obligation, then it is respectfully urged that Appellant possesses, in the case at Bar, the present value of his Federal Civil Service retirement.

The Employees Retirement Income Security Act of 1974 makes the 100% vesting of non-Governmental retirement benefits mandatory under the facts here present no matter which vesting schedule is applied. In a future case, will such 100% vested benefits which the employee has the total right to withdraw both as to his and his employers contributions be fully part of a marital property division while only the personal contributions of a Governmental employee may be considered without error?

What of an employee covered by a completely non-contributory retirement plan into which he has personally paid nothing but has a 100% vested benefit which he may elect to receive the day after the trial court following the February 20th decision in the case at Bar finds he has no possessory

interest and does not include in the division of marital property? Suppose the monthly benefit to be the same \$1,042.00 and the hypothetical husband or wife to be fifty-five years of age with 37 years of service as in the instant case.

On the issue of whether the Appellant's monthly retirement in six years from the trial date is property possessed by the parties, such a value, which has been determined to be \$75,821.00, is no less in possession of the parties than the "estimate of value" of the parties' dwelling which gives rise after subtracting the mortgage debt to the alleged equity of \$38,000.00.

According to Ballentine's Law Dictionary, Third Edition, at page 85, "To appraise" is to "estimate value." As applied here, it is what the parties' home might have sold for had it been put on the market at the time the appraisal was given.

It appears from the trial record that there were as many different estimates of value of the parties' dwelling as there were appraisers. (R-5, L's 1-15).

Counsel urges that the present value of Appellant's monthly retirement benefit of \$1,042.00 is a certain figure of \$75,821.00; and regardless of how many enrolled actuaries apply the 8% investment figure and the 1971 group annuity male mortality table, it will always be the same.

If the parties possess the estimated equity in their dwelling, they must possess the mathematical certainty of the present value of Appellant's monthly retirement benefits and not just what Appellant has contributed.

Stated another way, if the parties have any greater value in the marital dwelling than the \$12,500.00 principal for which it was purchased (R-34), so, surely, do they possess the greater value of Appellant's retirement than the \$15,681.00 which Appellant had contributed as of the trial date. (R-80).

CONCLUSION

It is respectfully submitted to this Honorable Court that the question of the present value of Appellant's retirement is a matter of \$75,821.00 as valued in today's dollars, and Respondent is entitled to have a rehearing with an opportunity to argue the issues of possession, life expectancy, assured rates of investment return, and the use of the 1971 group annuity, male mortality table to this Honorable Court in the exercise of its equitable jurisdiction; or, in the alternative, to have a full evidentiary hearing on the issues of present value and possession at the trial court level.

Respectfully submitted,

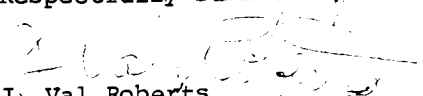

J. Val Roberts
Attorney for Defendant-Respondent



EXHIBIT "A"
March 3, 1980

Mr. J. Val Roberts
Attorney at Law
43 East 500 South
Bountiful, Utah 84010

Dear Mr. Roberts:

Per your request, we have calculated the actuarial present value of benefits for a 49 year old male as of October 25, 1978. In making our calculations, we have relied upon the retirement benefits that were contained in your letter to our firm dated March 3, 1980.

Based upon this data the present value of benefits are as follows:

<u>Retirement Age</u>	<u>Monthly Benefit</u>	<u>Present Value</u>	
		<u>8%</u>	<u>13%</u>
55	\$1,042.00	\$75,821.00	\$41,507.48
65	\$1,200.00	\$28,902.92	\$10,693.82

Our calculations have been made using the 1971 Group Annuity male mortality table, at both 8% and 13% compounded annual interest rates.

Sincerely,

Scott C. Morgan
Assistant Actuary

wn

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed on this 10th day of March, 1980, TWO true and correct copies of the above and foregoing Respondent's Brief, by posting same in the U. S. mails, postage prepaid and addressed to the following counsel of record, to-wit:

Pete N. Vlahos, Esq.
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Verne A. Roberts
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