

1992

Hilde Snitchler v. Robert G. Montgomery : Brief of Appellant

Utah Court of Appeals

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Brian Florence; Attorney for Plaintiff/Appellee.

Donald C. Hughes; Attorney for Defendant/Appellant.

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DOCKET NO. 920138 IN THE UTAH COURT OF APPEALS

STATE OF UTAH

HILDE SNITCHLER

Plaintiff/Appellee,

VS.

ROBERT G. MONTGOMERY,

Defendant/Appellant.

BRIEF OF DEFENDANT/APPELLANT

) Court of Appeals No. 920138-CA
) Trial Court No. 850737455

AN APPEAL FROM AN ORDER OF THE SECOND JUDICIAL DISTRICT COURT OF
DAVIS COUNTY; JUDGE DOUGLAS CURNABY

ARGUMENT PRIORITY CLASSIFICATION: (16)

BRIAN FLORENCE
ATTORNEY PLAINTIFF/APPELLEE
818 - 26TH STREET
OGDEN, UT 84401

DONALD C. HUGHES
ATTORNEY FOR DEFENDANT/APPELLANT
298 - 24TH STREET, #125
OGDEN, UT 84401

MAY 26 1992

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter as a domestic relations matter, pursuant to UCA 78a-2a-3(h).

STATEMENT OF ISSUE

Issue: Was the trial court correct in overturning the prior negotiated QDRO of the parties without a compelling reason or even a change of circumstances?

Standard of Review: A stipulated order negotiated with the aid of counsel and reviewed and approved by the court should not be lightly over turned but only for compelling reasons. Land v. Land, 605 P.2d 1248 (Utah 1980); Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974). The conclusions of law may be assessed for correctness without deference to the trial court. State v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah 1990).

DETERMINATIVE LAW

To upset a prior divorce decree a change of circumstance must be found. Kessimakis v. Kessimakis, 580 P.2d 1090 (Utah 1978). A stipulated settlement is not to be lightly overturned. A decree can not be changed just because one of the parties now regrets the decision. Land v. Land, 605 P.2d 1248, (Utah 1980). The reason to change a stipulated, reviewed order must be compelling and not just because one party is upset about value. Mitchell v. Mitchell, 527

STATEMENT OF THE CASE

A. Nature of the case.

This is an appeal from an order entered in the Second District Court by Judge Douglas Cornaby granting a petition to modify the retirement provisions of a prior divorce decree that had been modified by stipulation of the parties through negotiation of counsel and approval of the court.

B. Course of proceedings.

A divorce decree was entered that contained provisions that sought on its face to put into effect the Woodward provisions. The decree was modified by stipulation to correct perceived errors in the original order. The parties through counsel negotiated a new Qualified Domestic Relations Order to take advantage of a partial lump sum distribution prior to the federal civil service elimination of partial lump sum retirement benefits. Plaintiff/Appellee filed the present petition to modify said order and to return to the provisions of the prior QDRO.

C. Disposition at trial court.

Judge Cornaby granted the petition finding that Defendant/Appellant had misrepresented the facts of the retirement. The court ordered that Plaintiff/Appellant receive a percentage portion of each monthly Civil Service retirement check.

STATEMENT OF FACTS:

a. The parties were divorced in 1985. The divorce decree provides for a division of the retirement benefits of the parties. (See Divorce Decree of December 16, 1985.)

b. In 1986 the parties by stipulation modified the retirement provisions of the divorce decree.(See Stipulation and Order In Re Modification of Decree of January 8, 1986.)

c. The Civil Service Office of Personnel Management, announced the termination of participants right to take part of their retirement as a lump sum prior to receiving regular monthly payments. Retirees had to actually retire before December 1, 1990 or else lose the right to take the lump sum option. Mr. Montgomery determined that he desired to take the lump sum option. (Transcript Page 21 Line 21.)

d. In October of 1989 Mr. Montgomery approached Mrs. Montgomery about both of them agreeing to allow the other to take their retirement partially through a lump sum. Mrs. Montgomery informed him she had already taken her retirement, but agreed to allow him the same right. She signed a document (Defendant's Exhibit 1) consenting that Mr. Montgomery take a portion of his retirement using the lump sum option prior to receiving monthly payments. (Transcript Page 28 Line 15; Page 12 Line 24.)

e. Mr. Montgomery informed Mrs. Montgomery that if she did not agree to his taking a partial lump sum portion of his retirement he could not retire at that time. He informed her that

he would have to work approximately 10 additional years before retiring in order to earn enough additional retirement benefits to pay her the \$400 a month previously ordered if he was going to keep the standard of living he wanted in retirement. (Transcript Page 24 Line 8ff; Page 8 Line 18ff; Page 34 Line 19-24.)

f. Mr. Montgomery filed the documents requesting retirement and the payment of his lump sum as part of his retirement benefits. He was informed by Civil Service that the Qualified Domestic Relations Order on file would have to be modified before his request could be granted. (Transcript Page 23 Line 15.)

g. In the summer of 1990 the parties through counsel began negotiation of a stipulation to modify the existing QDRO. The parties had no direct contact except through counsel. (Transcript Page 9 Line 8.)

h. Mr. Montgomery never told the former Mrs. Montgomery that if she accepted a portion of the lump sum that Mr. Montgomery would receive no further retirement benefits. The former Mrs. Montgomery upon advice of her counsel and after her independent investigation of her rights opted to execute the stipulation that became the basis of the court's order modifying the Qualified Domestic Relations Order. (Transcript Page 11 to Page 13.)

i. Mr. Montgomery retired and processed his claim for benefits in accordance with the QDRO agreed upon by the parties and reduced to an order by the court.

j. Mrs. Snitchler shortly thereafter informed Civil

Service that the lump sum retirement benefit should not be allowed. The lump sum was only recently partially received by Mr. Montgomery. He has tendered to Mrs. Montgomery her portion of the retirement benefits under the lump sum. She has refused to accept it. (Transcript Page 38 Line 8.)

k. Mr. Montgomery cannot go back to work and lacks the income to live on if required to now pay his former spouse \$400.00 per month. Mr. Montgomery relied to his detriment on Mrs. Montgomery's execution of the stipulation and order. He retired based upon the order. He cannot now get his job back. He has planned his retirement on the income he negotiated to receive. (Transcript Page 24 Line 8ff.)

l. Mrs. Montgomery brought the present action to modify the QDRO to give her monthly benefits.

SUMMARY OF ARGUMENTS

POINT I

An order for retirement was negotiated. The proposition presented to Mrs. Snitchler was accept a portion of the partial lump sum payment now or Mr. Montgomery must wait about ten years to accumulate enough retirement benefits to achieve the standard of living for retirement he wants.

There is no substantial change of circumstance. there is no compelling reason to overturn a stipulated decree.

POINT II

There was no misrepresentation. A misrepresentation is an act of untruth or concealment. Mrs. Snitchler acted on the advice of her counsel after her own independent investigation. Neither Mrs. Snitchler nor her counsel say they relied on Mr. Montgomery or his counsel.

Mrs. Snitchler chose some money now rather than wait for a monthly income stream in the future. There is no evidence that Mr. Montgomery misrepresented anything to her.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN OVERTURNING A STIPULATED ORDER.

The fundamental, telling fact of the present case is that the parties entered a voluntary stipulation negotiated through counsel that was received and approved by the court. The parties in the present case never spoke with each other after October of 1989. All of the negotiations that took place from September through November of 1990 were done through the parties respective counsel.

The general rule is that once a matter is litigated and resolved it is *res judicata*. The court in *Land v Land* 605 P.2d 1248 (Utah 1980) after observing that the rules of equity apply to divorce matters said:

... when a decree is based upon a property agreement, forged by the parties and sanctioned by the court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction

of the court where a property settlement has been incorporated into the decree, and the outright abrogation of the provisions of such an agreement is only to be resorted to with great reluctance and for compelling reasons. (Citations deleted.)

The Utah Court has consistently said a finality must be given to matters previously settled. In the present case there is a stipulation entered by the parties. The stipulation contains specific language that this is a final and complete resolution of all matters relating to retirement between the parties. Mrs. Snitchler knew and understood that this was the intent of the stipulation. (Transcript Page 33 Line 22 to Page 34 Line 9.)

The initial proposed stipulation presented to Mrs. Snitchler for her consideration, Plaintiff's Exhibit 1, essentially gave the lump sum amount to Mr. Montgomery and gave Mrs. Snitchler her approximately \$400.00 per month. The stipulation accepted by Mrs. Snitchler waives her right in the monthly payments and grants her a percentage in the partial lump sum. There was no misunderstanding of the import or intent of the stipulation. Both Mrs. Snitchler and her counsel understood the two options. (Transcript Page 14 Line 10 - 18.)

Nothing has changed in the circumstances of the parties since the entry of the new QDRO. The full effect and intent of the stipulation was carried out. Mr. Montgomery retired based upon the stipulation. There must be some change of circumstance to justify a modification.

The Utah Supreme Court strongly stated the necessity of a change of circumstance in *Kessimakis v Kessimakis*, 580 P.2d 1090

(Utah 1978).

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 circumstance. In the absence of such a showing, the decree shall not be modified and the matters previously litigated and incorporated therein cannot be collaterally attacked in face of the doctrine of res judicata. Consequently, [the] attempt to challenge the equity of the original decree cannot be tolerated.

In the present case the stipulation and the subsequent order did exactly what the parties anticipated it would. Mrs. Snitchler was entitled to exactly what she bargained for. But for, her own complaint to the Office of Personnel Management and her subsequent dissatisfaction with the bargain she struck she would have received exactly what she was promised. (Transcript Page 38 Line 8.)

When Mr. Montgomery finally received his lump sum payment he tendered the 27% amount as agreed. Mrs. Snitchler has and is still refusing to take the payment. (Transcript Page 6 Line 25 to Page 7 Line 2; Page 38 Line 15.)

Mrs. Snitchler had no obligation to sign the stipulation and allow Mr. Montgomery to retire and take the partial lump sum retirement option. Mr. Montgomery in 1989 had explained to her and as did his counsel later through Mr. Kunz that Montgomery would not retire early if he had to pay \$400.00 per month. The choice presented to Mrs. Snitchler was take a lump sum now or wait perhaps as many as ten years to receive anything. There was an extreme time dead line. If the papers were not completed by November 30, 1990 the option was gone forever. She chose to sign the

stipulation and take a portion of the lump sum and waive any right to the monthly payments. (Transcript Page 36 Line 18 to Page 37 Line 1.)

Nothing has changed since the parties negotiated the new order except Mrs. Snitchler has become dissatisfied with her bargain. She now wants to go back and get more after Mr. Montgomery has irretrievably altered his position by retiring in reliance on the order agreed to by the parties.

It would be unjust in the extreme to allow Mrs. Snitchler to go back on her word. The plain language of the stipulation and order waives any right to future monthly payments. Both she and her attorney understood that was the meaning of the documents. She got exactly what she bargained for.

This is a case where the parties entered a stipulation that was negotiated by counsel and approved by the court. Its full, understood intent was carried out. Mrs. Snitchler wants a modification simply because of dissatisfaction with the amount of money. She understands that if she can get a percentage of the monthly payments in an amount of \$400.00 per month rather than a percentage of the lump sum she is likely to make much more from the labor of her ex-husband. The difficulty is that Montgomery retired now, only because of her inducement to limit what she received to a percentage of the lump sum.

The reason to change a stipulated, court reviewed and approved order must be compelling and not just because one party is upset about value. *Mitchell v Mitchell*, 527 P.2d 1359 (Utah 1974).

When the parties have had the opportunity to have a determination of their issues then they become res judicata. The doctrine also applies to divorce decrees. *Jacobson v Jacobson*, 703 P.2d 303 (Utah 1985).

It should also be noted that no where in the court's ruling do the words "substantial change of circumstance" occur. (Transcript Page 46 Line 23 to Page 52.)

POINT II

THERE WAS NO MISREPRESENTATION.

The trial court found that Mr. Montgomery misrepresented the facts to his ex-wife. The trial court hangs the whole modification on a misrepresentation. The court states its finding as follows:

And I think in that process, the defendant deliberately misrepresented to both -- to the plaintiff what the benefit was, and never at any time was it conveyed to the plaintiff what the actual entitlement was, that is, that there was a lump sum payment of the 29,774 plus the \$1776 per month. Apparently that's not even determined until March 14th, 1991 when Mr. Montgomery signs the document at that time agreeing that that's what he is to receive. (Transcript Page 49 Line 15 - 22.)

It is hard to imagine how the trial court reached the conclusion that Mr. Montgomery misrepresented anything to his ex-wife. The court focuses on the problem. How could the defendant misrepresent something in October of 1989 when he was not even informed until March 14, 1991.

When pressed for what the misrepresentation was, the court

responded,

The misrepresentation goes clear back to the time on October 10th of 1990 when they were signing the agreement where the representation was that the total retirement was \$29,774. And that was a total lump sum settlement. And so she had a 20 -- in effect, a certain percentage of that. and that was a misrepresentation. All right. That's all. (Transcript Page 51 Line 20 to Page 52 Line 1.)

This makes no sense. In October of 1989 they met to each sign the necessary papers for the other to take the partial lump sum retirement option. Mrs. Snitchler signed the paper and informed Mr. Montgomery that she had already obtained hers without his signature. Defendant's Exhibit 1 is the document she signed. There is nothing arcane or obscure about it. It is the request for retirement that every Civil Service employee including Mrs. Snitchler had to sign.

The Office of Personnel Management sent back Mr. Montgomery's request with the statement that there was an existing Qualified Domestic Relations Order that had to be modified first before Montgomery could be allowed the partial lump sum option. (Transcript Page 23 Line 15 - 19.)

No where does Mrs. Snitchler's make the allegation that Mr. Montgomery told her that the partial lump sum was all the retirement she would receive. There is no evidence for the court's finding of a misrepresentation. She affirmatively states what the October 1989 government document was for. "The reason for this paper was that he could receive his lump sum just as I, and there was no other comments." (Transcript Page 32 Line 2 - 3.)

The misrepresentation was said to begin at the meeting in

front of the notary when the parties were to sign each other's documents for the partial lump sum distribution. Mrs. Snitchler informed Montgomery that he did not have to sign because she already had her lump sum. (Transcript Page 31 Line 1 - 8.) After that time the parties had no further conversations.

Mrs. Snitchler thereafter only communicated with her ex-husband through counsel. She made her decision as to whether or not to sign a new QDRO based upon her consultations with her attorney. Neither Mrs. Snitchler nor her counsel relied on Mr. Montgomery nor his counsel for any understanding of anything. The stipulation its self clearly says that she will not receive anything from the future monthly payments. She admits to understanding this fact as well. (Transcript Page 12 Line 24 to Page 13 Line 1.)

It is hard to believe that she did not understand that Mr. Montgomery was going to receive a monthly amount for retirement in addition to the lump sum annuity. She had only recently gone through the same retirement process. (Transcript Page 31 Line 1 - 8.)

Mrs. Snitchler never makes the allegation that Mr. Montgomery told her anything one way or the other. These people simply did not talk. It cannot be claimed that the misrepresentation was made vicariously through counsel. Mrs. Snitchler relied on her own counsel who made his own independent investigation of the facts and advised her accordingly. (Transcript Page 10 Line 13 to Page 13 Line 4.)

Not even Mr. Kunz claims to having received false or misleading information from opposing counsel. So where is the misrepresentation. The strongest statement made by Mr. Kunz, is that "after that conversation (with government retirement officers) that I had a brief conversation with Mr. Hughes wherein I think I informed him of the information I had received from Washington." (Transcript Page 12 Line 8 - 11.)

Mrs. Snitchler had at her command all of her own retirement package, which would have included Defendant's Exhibit 1, anything she cared to request from the Hill Air Force Base Personnel Office, anything she cared to request from the Civil Service Office of Personnel Management, any advice she cared to request from her counsel. The source of the information upon which Mr. Kunz relied in giving his advice was Washington. "[A]nd that stipulation was prepared in accordance with the information that Washington had provided me..." (Transcript Page 13 Line 8.) How can it be said Mr. Montgomery misrepresented anything to her? The stipulation in unmistakable terms states that Mrs. Snitchler by signing the stipulation waives all rights in any and all annuities or monthly payments. It is important to note that no where is there language in the stipulation that would lead to the conclusion that Mr. Montgomery was not going to get regular monthly payments.

The ultimate decision to sign and induce Mr. Montgomery to take an early retirement was Mrs. Snitchler's. Mrs. Snitchler had an absolute right not to sign the stipulation. Had she chosen not to, the pre-existing QDRO would have remained in force and effect.

The difference would have been that Mr. Montgomery would have continued working and accumulating retirement benefits until his retirement would have reached a level on which he felt he could retire comfortably and still pay his ex. Had she decided the monthly payment of approximately \$400.00 per month was more important than getting her share of the partial lump sum now she could have simply not signed the stipulation.

Mrs. Snitchler is trying to get the best of both worlds at Mr. Montgomery's expense. She would not have received retirement benefits now unless she agreed to the stipulation. If there has been a misrepresentation it is Mrs. Snitchler. She promised a division of the retirement benefit and got counsel and the court as well as Mr. Montgomery to go along. Now she wants to rescind her promise after Mr. Montgomery has changed his position and retired.

The present case is an incident where the trial court overturned a stipulated and court approved modification to a divorce decree. It is inconceivable that Mr. Montgomery could have misrepresented anything to his ex-wife. The simple fact is they did not speak. The parties both had the same employer namely Hill Air Force Base. Mrs. Snitchler went through the same retirement process herself just before she signed the government's standard form for spousal consent to the partial lump sum distribution. She knew the people in personnel. She had gotten the forms necessary to get her own retirement benefits. How could the trial court find Montgomery misrepresented anything to her?

But even if something Mr. Montgomery said could be construed

to be a misrepresentation the Office of Personnel Management did not accept the simple signature without a new qualified domestic relations order replacing the one they had on file.

Mrs. Snitchler made an intelligent decision based on considerations such as her health and that of her ex-husband as to whether she should take a substantial lump sum payment now or wait for possibly ten years to begin receiving a monthly payment. She chose the immediacy of the lump sum in consultation with her attorney. She induced Mr. Montgomery to retire.

Mr. Montgomery radically changed his position by leaving his employment and retiring. He did so on the basis of the promises made by his ex in the stipulation and in reliance on the court's order made pursuant to the stipulation. Mr. Montgomery would not have retired but for his ex-wife's promises.

Mr. Montgomery's position is forever altered to his detriment by Judge Cornaby's modification. He can not go back to work but is stuck in living on an income that does not meet his needs because of the court altering a stipulation that was negotiated at arms length and in good faith.

It appears that the court was determined to reach a result the law would not allow and therefore found a misrepresentation. There is simply no evidence of a misrepresentation. Equity requires that Mr. Montgomery be restored to the benefit of his bargain. The cost to him of upholding the trial court's decision is simply too great.

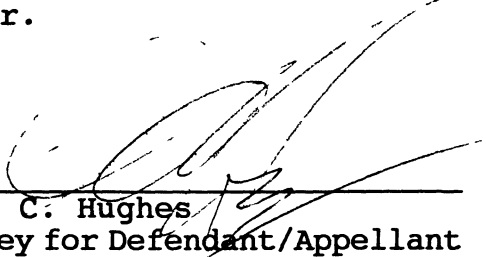
CONCLUSION

There is no change of circumstance to justify a modification of the decree. To change a negotiated arms length counsel negotiated order there must be a compelling reason.

There was no misrepresentation. A misrepresentation implies an act or statement made to mislead or some how deceive. In this case the record is barren of any such allegations.

Mr. Montgomery desires the court to reverse the trial court and restore the negotiated Qualified Domestic Relations Order to force and effect and allow him to pay his ex-wife the percentage of the lump sum the two of them bargained for.

Dated this 22 day of May, 1992.



Donald C. Hughes
Attorney for Defendant/Appellant

MAILING CERTIFICATE

THE UNDERSIGNED HEREBY CERTIFIES, that they have caused a true and correct copy of the foregoing document to be served upon the following person(s), by placing same in the United States Postal Service, postage pre-paid, May 22, 1992:

Brian Florence
818 26th Street
Ogden, UT 84401



LEGAL ASSISTANT

APPENDIX

we have since been able to correct that. They have
returned those amounts to Mr. Montgomery.

THE COURT: What amounts?

MR. HUGHES: The amounts they were taking. They were
collecting out of his monthly retirement. They were taking
approximately about, I guess, almost a third of his monthly
retirement to pay back that lump sum amount. He has since
had that restored, I think as of December.

We're in a position to pay her the \$8100
immediately, and he can do that and is proposed to do that.

THE COURT: Out of money he's got, you mean?

MR. HUGHES: Right; which would represent the amount of
her percentage of the lump sum share that she was to receive.
He has the ability now to pay that. That's been resolved.

So that's what we're going to present, your Honor,
that these people negotiated a result that achieved that
result, and both, Mr. Montgomery in particular, radically
modified his position where he can't go back to where things
were before. And we're asking the Court to just -- they're
stuck with the agreement they've entered into.

THE COURT: Now, Mr. Florence, I understand when you
filed this, there was the claim being made that they weren't
going to pay anything to your client.

MR. FLORENCE: That's correct.

THE COURT: And your client's now taking the position

2 MR. FLORENCE: Well, no. She does not want the 8100.
3 She made an agreement to settle for the lump sum agreement.
4 But when she made that agreement, she was under the
5 impression that neither he nor she if he elected to take the
6 lump sum payment would be entitled to an additional monthly
7 annuity retirement payment beyond that. She knowingly made
8 that election.

9 But after she made the election and after she could
10 not get her \$8100, it was then that she discovered not only
11 did he get his portion of the lump sum retirement but he is
12 also getting a monthly annuity, something that she did not
13 believe was possible when she made the agreement in the first
14 place. Had she known that was the case, she would not have
15 made the agreement that she did.

16 THE COURT: Okay. Thank you. Call your first witness.

17 MR. FLORENCE: Thank you. I call Mr. Kunz.

18 PAUL T. KUNZ,
19 called as a witness at the request of Plaintiff,
20 having been first duly sworn, was examined and
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. FLORENCE:

24 Q Would you state your name and give a business
25 address, please.

Unit, Suite 300, 2005 Washington Boulevard,
2 Ogden, Utah.

3 Q And you are a lawyer licensed to practice law in
4 the state of Utah?

5 A I am.

6 Q And have been for many years?

7 A Yes. For 35 years.

8 Q Mr. Kunz, did you in the course of your profession
9 have an occasion to meet with and advise Hilde B. Montgomery
10 Snitchler?

11 A Yes, I did.

12 Q And did that occur sometime during the middle of
13 1990?

14 A Yes. I believe she first called me in August of
15 1990, and we met, I believe, the first time in regard to the
16 matter in September of 1990.

17 Q When she met with you, what was her concern?

18 A She told me that her husband had agreed that when
19 she retired from the government that she could receive a lump
20 sum settlement, which she had received. She informed me that
21 her husband approached her and asked her if she would consent
22 to his taking a lump sum settlement, and that he had to take
23 it within a certain date or that he couldn't do it. And he
24 said that -- She said that Mr. Hughes had prepared a
25 stipulation in regard to the payment of the lump sum

1 settlement to her husband and that she wanted me to review
2 that and see if that was in her interest to sign that or not
3 sign it. And if she did sign it, then the order that he
4 prepared with it would be the qualified domestic relations
5 order that would be sent to the government and dispose of the
6 matter.

7 Q Did you review a stipulation for her?

8 A Yes. I received a -- Excuse me-- letter from
9 Mr. Hughes dated September 11th, 1990. I received a document
10 marked "Stipulation For Qualified Domestic Relations Order"
11 bearing the date of August blank at the signature along with
12 a qualified domestic relations order, both of them marked
13 "original" in the event that we elected to use them. I have
14 them here in my file.

15 Q And in that regard, let me show you what also been
16 marked at Plaintiff's Exhibit 1 and ask you if that is the
17 copy of the stipulation that was sent to you.

18 A Yes. That is the copy of the stipulation that was
19 also either sent to me or to Mrs. Snitchler.

20 Q Was the stipulation identified as Plaintiff's
21 Exhibit 1 ever signed by anyone?

22 A No, this was not signed by anyone.

23 Q Did that stipulation in addition to allowing
24 Mr. Montgomery to receive his lump sum preserve for
25 Mrs. Snitchler a portion of his monthly retirement benefit?

1 A Yes, it did. It retained whatever benefit she
2 previously had under the prior domestic relations order and
3 was to release only to him as I understood and read it the
4 lump sum provision.

5 Q Did you question the legality or permissibility of
6 that arrangement?

7 A Yes. I was concerned about that because it didn't
8 appear to me that \$8100 which was the proposed share of the
9 lump sum was reasonable in relationship to the alternative of
10 receiving a monthly benefit of \$400 per month.

11 Q What inquiry, if any, did you make concerning the
12 permissibility of entering into the first stipulation?

13 A Well, I told Mrs. Snitchler that I couldn't approve
14 entering into such a stipulation unless I found out more
15 about it. And I told her that I was not familiar with the
16 government retirement programs, that I did understand that
17 the employee paid in certain amounts himself as a
18 contribution and that the government made contributions and
19 that I would suppose that you could withdraw your own
20 contributions, but that I wasn't certain. And before
21 entering into any such agreement, I thought we should contact
22 the government personnel.

23 And at that time, I asked her the names of people
24 she dealt with at Hill Field, and she gave me the names of
25 some parties. And I talked to them, and I did not get any

1 satisfaction.

2 So I made a later appointment with her, and it was
3 on October 12th, 1990, my telephone log shows. And I called
4 Hill Field again and asked them for the people that I would
5 contact to find out more information on this. And I received
6 a telephone number for the Office of Personnel Management
7 court order benefits section in Washington, D.C.

8 And I called the first number and talked to a
9 person there that did not give me any satisfaction but
10 referred me to the second number. My log shows that I talked
11 17 minutes to the party at the second number. And I informed
12 that party of the Social Security numbers of the two parties
13 which I had in the order and stipulation and the general
14 circumstances, and that my concern was, umm, if the person
15 consented to the lump sum distribution, would it affect the
16 monthly retirement benefit distribution.

17 Based on that information -- And I had my phone on
18 a speaker phone where Mrs. Snitchler could also hear this
19 person. Based on the information that I received, I came to
20 the conclusion that there was no alternative, that both
21 parties either had to accept the lump sum benefit or both
22 parties had to accept the monthly benefit, that one party
23 could not pull out the lump sum and then the secondary party
24 or the spouse party go on with her benefits. But it was my
25 understanding that upon acceptance of the lump sum benefit,

1 there were no further benefits. And I inquired with the
2 parties dealing with back and forth and had Mrs. Snitchler
3 hear that, and was satisfied that's what they told us.

4 Q And was it then based upon that understanding that
5 both you and Mrs. Snitchler signed the new stipulation
6 providing for a \$8100 lump sum payment to her in exchange for
7 any other claim to monthly payments?

8 A Yeah. My recollection is that after that
9 conversation, that I had a brief conversation with Mr. Hughes
10 wherein I think I informed him of the information I had
11 received from Washington. And that based upon that
12 information, the original stipulation which he had sent me
13 stating that Mr. Montgomery would receive the lump sum and it
14 would not affect her monthly, that they would not go along
15 with that.

16 And then it's my recollection that after having
17 that information, that is when the second stipulation which
18 you've not presented in evidence was given to me. And then
19 Mrs. Snitchler and I sat down and discussed it. And I
20 explained to her that "It's my understanding that if you go
21 with the lump sum, neither one of you will receive any
22 monthly payments, that they make you go strictly one way or
23 the other and that we don't have any alternative."

24 And my recollection is she says "Well, if that is
25 the case, he had consented for me to take out my lump sum. I

1 feel that I'm sort of honored-bound to let him do it. "

2 But I was very concerned about exchanging \$8100
3 cash for \$400 a month for so long as his retirement could
4 continue.

5 Q In fact, alternately a stipulation was signed, was
6 it not?

7 A Yes. A second stipulation was prepared by
8 Mr. Hughes, was sent to my office. I reviewed it, and that
9 stipulation was prepared in accordance with the information
10 that Washington had provided me and of which information I
11 had also informed Mr. Hughes, I believe, before that
12 stipulation was prepared.

13 Q Okay. Presumably that stipulation is in the file.

14 Mr. Kunz, had you known that in addition to
15 receiving the lump sum payment benefit Mr. Montgomery would
16 have been entitled to go on receiving monthly retirement
17 payments, would you have agreed to sign the stipulation along
18 with Mrs. Snitchler?

19 A No. I never would have recommended that she sign
20 it because I was very disturbed and she was very disturbed.
21 We just couldn't reconcile the mathmatics of it of 8100 as
22 against 400 a month, you know, maybe for life.

23 And then when she came in later and told me she
24 hadn't received it, that's when I told her that I recommended
25 that she see you or someone that had dealt with these orders

1 and was maybe familiar with them.

2 Q Thank you.

3 I would move for admission of Exhibit 1.

4 MR. HUGHES: No objection, your Honor.

5 THE COURT: It may be admitted.

6 (Whereupon, Plaintiff's Exhibit 1 was admitted.)

7 MR. FLORENCE: I have no further questions of Mr. Kunz.

8 CROSS-EXAMINATION

9 BY MR. HUGHES:

10 Q If I understand what you've indicated to
11 Mr. Florence, the difference between the first stipulation
12 and the second one is the first one says that Mrs. Snitchler
13 waives her right to anything in the lump sum but is going to
14 get a payment as an annuity later on. And the one that was
15 ultimately signed, she waived her rights in the annuity and
16 takes the lump sum in the percentage. Is that the
17 fundamental difference between the two?

18 A That's the fundamental difference between the two.

19 Q Let me show you what I've had marked as Defendant's
20 Exhibit Number 1. Did your client ever show you that or
21 indicate to you that she had previous to coming to you had
22 entered and signed an agreement on behalf of Mr. Montgomery?

23 A No. I have never seen the document which you
24 present to me before. My client had told me that she had
25 made a commitment in regard to the lump sum.

1 A No, I didn't. After she married, I don't recall,
2 it was right after she turned 55, she called me to sign a
3 document to obtain her lump sum. And at that time, I think
4 it was around '87, she says -- I says "Well, if you'll sign a
5 document so I can obtain my lump sum." She said she wouldn't
6 at that time. So I just dropped the issue. Then this early
7 retirement come about --

8 Q Let me before you get to that. Have you ever
9 signed anything on her behalf?

10 A No, I haven't.

11 Q Do you know how she would obtain that without your
12 signature?

13 A I do not know.

14 Q Did you at some point learn that if you were going
15 to take a lump sum option that was going to terminate as of
16 December 1st, 1990, that you had to retire before December
17 1st?

18 A No, never.

19 Q No. Did you ever learn there was going to be a
20 cutoff, the government was going to cut off as an option --

21 A Yes. As of the 1st of December, 1990. That was
22 the last lump sum payments they were going to authorize.

23 Q And in 1989, did you approach Mrs. Snitchler to
24 execute the documents to allow you to do that?

25 A Yes.

1 page; is that correct?

2 A Yes.

3 MR. HUGHES: I would move for admission of Exhibit
4 Number 1, your Honor.

5 MR. FLORENCE: No objection.

6 THE COURT: It may be admitted.

7 (Whereupon, Defendant's Exhibit 1 was admitted.)

8 Q (By Mr. Hughes) Now, you heard Mr. Kunz discuss
9 the negotiations that went on. Did you approach me sometime
10 in July or August about changing the qualified domestic
11 relations order to allow you to do the lump sum?

12 A Well, yes.

13 Q Okay. And why did -- Why wasn't this document
14 Number 1 enough?

15 A O.P.M. sent back a letter and said I had to modify
16 the divorce decree, existing decree, to allow it.

17 Q You have had to change the domestic relations they
18 had?

19 A Yes.

20 Q And you heard Mr. Kunz testify that the first set
21 of documents sent over let you take the 400 sum -- gave the
22 \$400 out of the other. But the one we actually signed that
23 they agreed to she took her percentage of the lump sum and
24 agreed to waive the rest. That was your ultimate
25 understanding and agreement, wasn't it?

1 A Yes. It was always the understanding.

2 Q Okay. Now, you could have worked for 10 more
3 years, you say?

4 A I could have worked indefinitely, actually.

5 Q Now, you've explained to me a couple times. Would
6 you do that to the Court why would you have worked 10 more
7 years?

8 A I retired early though I was of age, and I was
9 allowed 60 percent what they call -- I could have worked
10 until I built up to 82 percent. That would have given me
11 82 percent of my total retirement at 2 percent a year, so I
12 had to work another 10 or 11 years at that time.

13 Q And that --

14 A That's what I advised her.

15 Q That between the 60 percent and the 82 percent was
16 \$400 a month approximately, isn't it?

17 A Yes.

18 Q Is that how you calculated that, to pay her \$400 a
19 month and meet your living expenses, you would have to work
20 that additional 10 years?

21 A Yes.

22 Q Was that part of your discussions with her, that
23 she could get the lump sum now or she's going to have to wait
24 to get anything until the 10 years run?

25 A Yes, totally. The children understand. I just

1 "Defendant."

2 A "Defendant by agreement signed the release of said
3 funds to the plaintiff."

4 Q Okay. Thank you.

5 A I agreed that she could take her 6- or 7- or 8,000.
6 I don't know how much she got in a lump sum.

7 Q Now, when she signed the agreement for you to get
8 your lump sum payment, that which has been marked as the
9 second sheet in Defendant's Exhibit 1, that was dated, was it
10 not, on October the 10th of 1989?

11 A October 9th actually.

12 Q Okay. That's your signature there?

13 A Well, the notary. She put the wrong date down. I
14 don't know what her problem was.

15 Q In any event, that was signed in 1989?

16 A Yes.

17 Q Now, the lump sum benefits and the amounts and the
18 annuities that's attached to that, those weren't provided
19 until March of 1991, were they? She couldn't have known
20 those figures and those amounts or even that they existed in
21 1989.

22 A She received the same information that I did to get
23 her retirement.

24 Q Tell me, Mr. Montgomery, how she can sign a
25 document in 1989 and know what's contained in a document

1 A Yes. We met there, and he told me that he wanted
2 to get his lump sum if I agreed on it. Now, since I had
3 fought for my lump sum -- In fact, he didn't ever sign
4 anything for it. And I have a stack of papers this big that
5 I needed, umm, witnesses that he refused to sign it and so
6 on. And I had to go through all that trouble, and I had to
7 have that notarized. So I did get my lump sum without his
8 signature.

9 Q Let me show you on the document there that you've
10 signed. I presume you got page 1 as part of the packet of
11 materials?

12 A No, I don't have it. And when we were at the
13 credit union dated the 10th of October in '89, I asked them
14 if I could have a copy of it. And the lady notary had it and
15 was going to copy it, and he ripped it out of her hands. I
16 don't have anything. And he would not let me have it,
17 either.

18 Q All right. So you're saying that since that time,
19 you've never seen a copy of this kind of agreement?

20 A That's right.

21 Q All right. I won't ask you anymore questions about
22 that one.

23 You were ultimately informed by your ex-husband
24 that this wasn't sufficient, weren't you, that the actual
25 divorce decree had to have some amendments to it in order to

1 allow him to get the lump sum?

2 A The reason for this paper was that he could receive
3 his lump sum just as I, and there was no other comments.

4 Q But ultimately you learned that that wasn't
5 sufficient, that he couldn't get that lump sum based on that
6 paper?

7 A I was never concerned about it because that was
8 supposed to be it. I agreed for him to let him have the lump
9 sum, and that was it.

10 Q Ultimately you went to Mr. Kunz for what reason?

11 A Because about half a year after he had retired, I
12 hadn't received anything. And I was told when I called
13 Washington that he had received half of his lump sum. And,
14 umm, during --

15 Q I don't want to get ahead.

16 A During the conversation, it came out that he wasn't
17 entitled to any lump sum since I was having a claim on his
18 retirement.

19 Q Let's take it a step at a time. He retired in
20 November of 1990?

21 A '90.

22 Q I'm asking you about events when you went to see
23 Mr. Kunz in July or August of 1990. Do you remember that?

24 A Uh-huh (affirmative).

25 Q When you first went in?

1 A Yes.

2 Q Were you informed or had there had to be some sort
3 of agreement between you and Mr. Montgomery that the judge
4 would sign allowing the government to deal with the
5 retirement? Do you remember that?

6 A No. I was told that since he had already received
7 half of the lump sum, I could not automatically go back to
8 the \$400 a month.

9 Q We're talking about before he retired. We're
10 talking about before while he's still working, before he
11 received anything back in August of 1990.

12 A Uh-huh (affirmative).

13 Q Do you remember me mailing you some documents and
14 asking you to sign that?

15 A Yes.

16 Q All right. And you took those to Mr. Kunz; is that
17 correct?

18 A Yes.

19 Q And in those, then, do you remember ultimately
20 signing one of those documents that Mr. Kunz and I exchanged?

21 A Uh-huh (affirmative).

22 Q Let me show you a copy of what's in the file. The
23 first paragraph there, it makes a statement that this is an
24 attempt to resolve all of the retirement issues that exist
25 between you and Mr. Montgomery, doesn't it?

1 A Yes.

2 Q And that's what you were negotiating with your
3 ex-husband, wasn't it, a way of getting out of each other's
4 way permanently and forever, that neither one of you were
5 going to come back again? This is the end of everything.
6 The two of you are going to do this agreement. You get your
7 rights. He gets his, and then you're done. That's what it
8 says, this document?

9 A Yes.

10 Q On the next page over there, it indicates that
11 you're going to get the lump sum of 27 percent or
12 approximately \$8100 we calculated, but whatever 27 percent
13 comes out. And then it says that's all you get, that you
14 waive any future right to any annuities or any other claims
15 on his benefits of any kind. That's what it says in that
16 document, doesn't it?

17 A Yes; because all we knew was there was \$30,000, and
18 we didn't know anything more than that.

19 Q Did Mr. Montgomery tell you if you weren't willing
20 to do the lump sum, he was probably going to have to work
21 another 10 years to make his lifestyle to meet with what he
22 should be?

23 A He mention -- He never mentioned 10 years, but he
24 said he would have to work a long time.

25 Q But you were aware considering this document that

1 Who did you work for before you retired?

2 THE WITNESS: Hill Field.

3 THE COURT: Also the U.S. government, then?

4 THE WITNESS: Yes.

5 THE COURT: And when you retired, did your lump sum --
6 when you took your lump sum, was there also a monthly payment
7 to you?

8 THE WITNESS: No. I knew nothing but the lump sum. I
9 had only worked there for barely six years.

10 THE COURT: I see.

11 THE WITNESS: And my retirement was only \$6,000.

12 THE COURT: Okay.

13 THE WITNESS: And there was no question at all.

14 THE COURT: All right. Go ahead.

15 Q (By Mr. Hughes) The date that you signed this
16 agreement was November 2nd, 1990, wasn't it?

17 A Yes.

18 Q In fact, we got right down to the wire where we --
19 I think you were present when I was talking to Mr. Kunz
20 saying either we do it now or we're done. I mean do it now
21 or there's not time to take the option. You were aware of
22 that time pressure, weren't you?

23 A Yes.

24 Q And you elected to sign this document and take the
25 money?

1 A Yes; because he wanted his lump sum.

2 MR. HUGHES: That's all I have of her, your Honor.

3 CROSS-EXAMINATION

4 BY MR. FLORENCE:

5 Q Mrs. Snitchler, have you received any retirement
6 benefits by reason of your ex-husband's employment at Hill
7 Air Force Base?

8 A No.

9 Q Haven't received monthly payments or any lump sum
10 payments; is that correct?

11 A No.

12 Q When he had you sign that paper on October 10th of
13 1989 agreeing to allow him to take the lump sum payment, did
14 you know that in addition to that, he would be receiving
15 approximately \$1700 per month as a retirement benefit?

16 A No, I didn't.

17 Q Had you known that, would you have signed an
18 agreement waiving any monthly annuity?

19 A Absolutely not.

20 Q When he had you sign that document, the document on
21 October 10th, 1989, was this attached to it, any document
22 that explained the alternative annuities and what he would
23 get if he didn't take a lump sum or what he would get if he
24 did take a lump sum?

25 A The paper in '89?

1 Q Yes.

2 A I didn't get to see it. He held it down so I could
3 sign it, and I never did get a copy or anything.

4 Q Thank you.

5 That's all.

6 REDIRECT EXAMINATION

7 BY MR. HUGHES:

8 Q You indicated that you did make a complaint to
9 O.P.M. in Washington, is that correct?

10 A Yes.

11 Q And that's what instigated Mr. Montgomery having to
12 pay back a part of the claim on his lump sum, wasn't it?

13 A I don't know anything about that. But if he has to
14 repay it or anything, that's possibly true. I don't know.

15 Q You don't want the \$8100 now?

16 A I would like to go back to my \$400 a month.

17 MR. HUGHES: That's all I have, your Honor.

18 MR. FLORENCE: Nothing further.

19 THE COURT: You may step down.

20 MR. HUGHES: We have nothing further, your Honor.

21 MR. FLORENCE: Can I argue it just very briefly, your
22 Honor?

23 THE COURT: Certainly.

24 MR. FLORENCE: When these folks were divorced, the
25 divorce decree said the plaintiff, that is, Mrs. Snitchler

1 informed that it was not legal, that you couldn't do both.
2 Mr. Hughes contends those were the two proposals that were
3 available to them.

4 If you look at Plaintiff's Exhibit 1, even if she
5 would have accepted that, she would have been better off than
6 they're trying to make her today. That would have preserved
7 for her one-half of 55 percent of his retirement benefit. If
8 we use these figures, he is getting 1776 per month. She is
9 entitled to one-half of 55 percent or 27 1/2 percent of \$1776
10 which is in excess of \$400 per month. It is closer to \$500
11 per month.

12 If she would have accepted that, believing that she
13 could have, she would be better off now with that proposal
14 than just walking away with \$8100. That's better than \$8100.
15 They didn't because they were informed that it was illegal.
16 Couldn't be done. And based upon that, she elected the
17 other.

18 We submit that the recalculations must be done.
19 It's too bad that Mr. Montgomery has made that sacrifice, but
20 she has made it, as well. She can't be expected to sacrifice
21 all those years of marriage now just because of his
22 sacrifices, as well.

23 THE COURT: Thank you.

24 By way of asking a question on Defendant's
25 Exhibit 1, page 3 at the top, Option A, I take it what that

1 means, counsel, is that he would have received \$1,914 if he
2 had not filed for the alternative annuity; is that correct?

3 MR. MONTGOMERY: Yes. There's a reduced annuity, your
4 Honor.

5 THE COURT: That's what I say. In other words, as it
6 is, he gets \$138 less a month for the right to take \$30,000
7 in cash?

8 MR. HUGHES: Right.

9 MR. MONTGOMERY: Yes.

10 THE COURT: The Court will make the following findings
11 and decision in this matter:

12 And as I am doing so, I won't repeat everything
13 that's been done in the file. We recognize there was a
14 divorce in 1985. We recognize that the plaintiff was to
15 receive some of defendant's retirement based on the Woodward
16 Formula. We recognize that there is a modification that's
17 dated January the 8th of 1986, wherein, that was stated to be
18 \$400 per month. We have the November 15th, 1990, document
19 entitled "Stipulation For Qualified Domestic Relations
20 Order." I also have plaintiff's exhibit from this hearing
21 today which is the first proposal that was apparently
22 recently given to her. It's unsigned but bears a blank date
23 of August 1990, and that's during the negotiations between
24 she and her attorney Paul Kunz.

25 Apparently, there was some kind of an agreement

... the parties that was made in 1989, apparently October
2 10th, wherein, they each agreed to cash out their retirement
3 and take a lump sum payment. Page 3 -- Page 2 of that
4 document, it's listed as Number 3 at the top, but it actually
5 is the second page of Defendant's Exhibit 1, talks about the
6 alternative annuity. And under Option 2, it says "Alternate
7 Annuity With Lump Sum Payment." "Monthly to you" is blank.
8 In fact, the whole document is blank. The only thing that's
9 there, of course, is the signatures. By those signatures,
10 Mrs. Snitchler was agreeing "I freely consent to this
11 alternative annuity election including the level of survivor
12 benefits shown above." And, of course, there are no survivor
13 benefits shown above. They're all left blank.

14 So the only thing she was agreeing to at that time
15 according to this document was the alternative election which
16 meant, as we then look at the third page of that same
17 document, it meant monthly if you exercise the regular
18 annuity Option 1A, it sent \$1914 a month to the defendant and
19 nothing to the survivor.

20 Going down to Option 2, "Alternative Annuity With
21 Lump Sum Payment" which is what he apparently currently is
22 receiving \$1,776 per month with a lump sum entitlement of
23 \$29,774.17.

24 The Court recognizes that the plaintiff in signing
25 the stipulation in the file that was actually dated November

1 2nd, 1990, did so expecting to receive as the stipulation
2 provided a certain amount from each of those as payments were
3 made.

4 The facts have shown that the defendant received
5 \$17,000 and kept the entire amount, that the plaintiff never
6 received anything under it. That when inquiries were finally
7 made, she then became aware that the annuity, the Option 2
8 alternative annuity, was the \$29,774 plus \$1776 per month.

9 Now, her former counsel has been before the Court
10 and testified, and he's testified that both he and she
11 understood that the lump sum settlement was the entire
12 benefit the defendant was to receive and that they had agreed
13 to abide by that, which was the 30,000, and she would get
14 \$8100 of it.

15 And I think in that process, the defendant
16 deliberately misrepresented to both -- to the plaintiff what
17 the benefit was, and never at any time was it conveyed to the
18 plaintiff what the actual entitlement was, that is, that
19 there was a lump sum payment of the 29,774 plus the \$1776 per
20 month. Apparently that's not even determined until
21 March 14th, 1991, when Mr. Montgomery signs the document at
22 that time agreeing that that's what he is to receive.

23 And I recognize that there is some unfairness in
24 the way I'm ruling to the defendant because he did make a
25 decision to retire early based on the agreement of the

1 plaintiff. And I don't believe that she can have both the
2 \$8500 and the \$400 per month. And he did retire early. But
3 I think she is entitled to and to have the stipulation set
4 aside because of the misrepresentation. And as I do so, it's
5 always hesitating when we set aside a stipulation because
6 they ought to be upheld whenever possible. But under these
7 circumstances, it can't be, meaning I can't.

8 So I think she is entitled to the entire amount of
9 his lump sum retirement, and she's entitled to what she
10 bargained for which was a certain percentage of his
11 retirement, 27 percent of his retirement. And his retirement
12 is 1776, and she ought to be willing to settle for that. I
13 think the figure is 27 percent of that amount per month.
14 And, of course, that has to begin with the month of
15 December 1990 since that was when the retirement was.

16 That will be the order of the Court. Defendant
17 will draw the order. Any questions?

18 MR. FLORENCE: The only question I have, your Honor, I'm
19 sure it will take some time to notify the retirement office
20 so that they can begin sending her share directly. We would
21 ask that Mr. Montgomery be required to reimburse her for the
22 months of December of '90 through such time as that becomes
23 effective, however many months.

24 THE COURT: That is implied in the order.

25 MR. FLORENCE: Thank you.

2 as to the back amounts, how it's going to be paid at this
3 time, but it certainly is on an ongoing basis in the meantime
4 of \$400 per month ought to be paid by him beginning with this
5 month.

6 MR. FLORENCE: Thank you.

7 MR. HUGHES: My understanding of it it's the
8 misrepresentations?

9 THE COURT: That's the basis for my ruling, yes.

10 MR. HUGHES: And he got the lump sum in July and was
11 jumped on by O.P.M. in August. And this action -- present
12 action was filed a few days after he got the notice from
13 O.P.M. So we only have that lump sum amount for a matter of
14 a week or so before she was refusing to take it. And from
15 then until here today that she take that?

16 THE COURT: Yes. I haven't found that, but I suppose
17 that's a factual matter that's there.

18 MR. HUGHES: The misrepresentation will be that he
19 didn't explain to her --

20 THE COURT: The misrepresentation goes clear back to the
21 time on October 10th of 1990 when they were signing the
22 agreement where the representation was that the total
23 retirement was \$29,774. And that was a total lump sum
24 settlement. And so she had a 20 -- in effect, a certain
25 percentage of that. And that was a misrepresentation.

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All right. That's all.

MR. FLORENCE: Thank you, your Honor.

(Whereupon, the court proceedings were concluded.)

* * * * *