1993

# Caauwe v. Caauwe : Brief of Appellant

Utah Court of Appeals


Ellen Maycock; Kruse, Landa & Maycock; attorneys for appellant.
Robert L. Neeley; attorney for appellee.

930471-CA

**IN THE COURT OF APPEALS**

**FOR THE STATE OF UTAH**

| | | |
|---|---|---|
| DARYL GENE CAAUWE, | ) | |
| Defendant and Appellant, | ) | 930471-CA<br>Case No. ~~92-6703705-CA~~ |
| vs. | ) | |
| DEBRA KAY CAAUWE, | ) | Priority No. 15 |
| Plaintiff and Appellee. | ) | |

# BRIEF OF APPELLANT DARYL GENE CAAUWE

Appeal from Findings of Fact and Order on
Plaintiff's Petition to Modify Decree of Divorce
Entered by the Second Judicial District Court
for Davis County, State of Utah
Honorable W. Brent West
District Judge

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**IN THE COURT OF APPEALS**

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| DARYL GENE CAAUWE, | ) | |
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IN THE COURT OF APPEALS

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**BRIEF OF APPELLANT**
**DARYL GENE CAAUWE**

## JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to UTAH CODE ANN. § 78-2a-3(i) (Supp. 1992).

## ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

***Issue:*** Does federal law preclude a state court from treating "voluntary separation incentive pay" from the armed forces pursuant to 10 U.S.C. § 1175 as marital property subject to equitable division in a divorce modification proceeding brought by the former spouse?

*Standard of Review:* Questions of law are reviewed under a correction of error standard, giving no deference to the trial court. *Maxwell v. Maxwell*, 796 P.2d 403, 404 (Utah App. 1990).

***Issue:*** Are payments to defendant under the Voluntary Separation Incentive program nonmarital property acquired after the divorce?

***Standard of Review:*** Correction of error. *Maxwell*, 796 P.2d at 404.

***Issue:*** Did the Utah trial court have jurisdiction to modify the decree of divorce entered in South Carolina?

***Standard of Review:*** Correction of error. *Maxwell,* 796 P.2d at 404.

***Issue:*** Does the evidence support the trial court's findings that defendant has the ability to pay plaintiff's attorney's fees, and that plaintiff is in need of having her attorney's fees paid?

***Standard of Review:*** Abuse of discretion. *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah App. 1988).

## STATEMENT OF THE CASE

This appeal is from an order of the Second Judicial District Court for Davis County, State of Utah, the Honorable W. Brent West, granting plaintiff's petition to modify the decree of divorce.

## STATEMENT OF FACTS

In February 1971, defendant/appellant Daryl Gene Caauwe ("Daryl") enlisted in the United States Air Force. Tr. at 25. He married Debra Kay Caauwe ("Debra") on March 25, 1972. Tr. at 3. In 1974, Daryl left the Air Force to attend college; he reenlisted in March 1978. Tr. at 6. In 1982, the Caauwes moved to South Carolina when Daryl was stationed at Shaw Air Force Base. *Id.*

In 1991, Debra filed for divorce in South Carolina; Daryl was still on active duty as a noncommissioned officer in the Air Force. Tr. at 6. Based on the parties' stipulation, the court entered a decree of divorce on September 10, 1991. R. at 131-149. The decree awarded Debra an interest in 50% of Daryl's net disposable retired or retainer pay, to be paid by the Air Force directly to Debra pursuant to the Uniform Services Former Spouse Protection Act,

10 U.S.C. § 1408, upon Daryl's retirement. R. at 134, 135. The decree incorporated the parties' stipulation that Daryl would not "pursue any course of action that would defeat the Spouse's right to receive a portion of the full net disposable retired or retainer pay of the [defendant]" and not "take any action by merger of the military retirement pension so as to cause a limitation in the amount of the total net monthly retirement or retainer pay in which the [defendant] has a vested interest . . . ." R. at 137.

After the divorce, Debra moved to Minnesota with the parties' two children. Tr. at 3. Daryl was transferred to Hill Air Force Base in Utah. Daryl remarried. Tr. at 24. The parties filed the South Carolina decree in Utah in May of 1992. When the youngest daughter, Tammy, came to Utah to live with Daryl, the parties agreed to modify the divorce decree to award Daryl custody and child support for Tammy. Tr. at 24, R. at 22-23. Accordingly, the Second District Court of Davis County entered an order on June 5, 1992, reflecting the change in Tammy's living arrangements. R. at 27-28. A few months later, the parties agreed to modify the South Carolina decree again--Debra released her interest in the house the parties owned in South Carolina and waived any right to alimony. In exchange, Daryl agreed to pay Debra $100 a month for nineteen months for her share of the equity in the South Carolina house, released Debra from any obligation for child support for Tammy (then 16 years old), and waived his interest in Debra's profit-sharing plan from her employer. R. at 29-31. Judge Memmott entered an order reflecting this agreement on August 17, 1992. R. at 32-33.

In December 1992, Daryl left the Air Force voluntarily. Daryl voluntarily left the Air Force based on his concern that he would be involuntarily separated and receive nothing. Instead, the Air Force found Daryl eligible for the Voluntary Separation Incentive (VSI) program under 10 U.S.C. § 1175. The VSI program was created by Congress in 1991 as part of a program to reduce the size of the armed forces by providing financial incentives to encourage members, who otherwise would face selection for involuntary separation, to leave

voluntarily. Under the VSI program, a member of the armed forces receives separation pay in annual installments for a period of time twice the length of his active duty service. The member must remain in a reserve component for the entire time. On December 31, 1992, Daryl was released from active duty and transferred to a reserve component. He received the first VSI installment on or about December 31, 1992. Since Daryl had more than seventeen years of creditable military service, he will receive annual payments of $9,473.17 for thirty-five years.

On December 11, 1992, Debra filed a petition to modify the divorce decree to award her 50% of the "early out" or incentive bonus Daryl received from the Air Force. An evidentiary hearing on the petition was held before the Honorable W. Brent West, Second Judicial District Court for Davis County, on April 23, 1993. On May 25, 1993, the court issued a written decision granting Debra's petition to modify the South Carolina divorce decree and ordering Daryl to pay Debra 50% of his annual net disposable VSI payments.

## SUMMARY OF THE ARGUMENT

Federal law precludes a state court from treating VSI payments as marital property subject to equitable division. In the absence of express legislation to the contrary, the federal statutory scheme of providing for payments of benefits to military personnel preempts state laws pertaining to community property or equitable division of property upon divorce. *McCarty v. McCarty,* 453 U.S. 210 (1981); *Mansell v. Mansell,* 490 U.S. 581 (1989). The Uniformed Services Former Spouse's Protection Act, 10 U.S.C. § 1408, which expressly permits state courts to treat military retired pay as marital property, does not apply to separation pay under 10 U.S.C. § 1175. Therefore, the trial court lacked authority to order Daryl to pay Debra 50% of his VSI payments.

Further, the trial court lacked jurisdiction to modify the South Carolina divorce decree to include Daryl's VSI payments as part of the marital estate.

The trial court also erred in awarding Debra attorney fees when the court failed to make the requisite findings of financial need of the receiving party and ability of the other party to pay.

## ARGUMENT

### I. FEDERAL LAW PRECLUDES A STATE COURT FROM TREATING VSI PAYMENTS AS MARITAL PROPERTY SUBJECT TO EQUITABLE DIVISION

In *McCarty*, 453 U.S. at 210, the Supreme Court held that the Supremacy Clause of the United States Constitution precluded a state trial court from dividing military retirement pay pursuant to California community property laws. Citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the court employed a two-step analysis. First, the court found that the wife's asserted right to her husband's military pay conflicted with the express terms of federal law. The court concluded that the statutory language indicates that Congress intended that military retired pay be the personal entitlement of the retiree. Second, the court concluded that the application of community property laws would frustrate the objectives of the federal military retirement scheme: to serve as an inducement for enlistment and reenlistment, to create an orderly career path, and to ensure a youthful military by providing an incentive to retire. Justice Blackmun, writing for the majority, recognized the plight of the ex-spouse of a military retiree, but stated Congress must decide whether to afford more protection to the former spouse of a retired service member: "[I]n no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." *Id.* at 236.

As a direct response to the Supreme Court's decision in *McCarty* that federal law completely preempted the application of state community property law to military retirement pay, Congress enacted the Uniformed Services Former Spouse's Protection Act (USFSPA), 10 U.S.C. § 1408 (Supp. 1993). The USFSPA has two basic parts: First, the act authorizes state courts to treat military retirement pay as property divisible upon divorce of the retiree. 10 U.S.C. § 1408(c)(1) (Supp. 1993) provides: "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." Second, the USFSPA creates a mechanism for the federal government to make direct payments to former military spouses who present state court orders for payment of child support, alimony, or payments connected to the treatment of retired pay as marital property. 10 U.S.C. § 1408(d) (Supp. 1993).

The USFSPA applies to "retired pay"--pay received by a member of the armed forces upon retirement. In order to be eligible for retirement, a member must have a minimum of twenty years of creditable active service in the armed forces. A member who is involuntarily discharged with less than twenty years of active service is entitled to separation pay under 10 U.S.C. § 1174 (Supp. 1993). The USFSPA does not apply to separation pay. *Kuzmiak v. Kuzmiak*, 222 Cal. Rptr. 664 (Cal. App. 1986) (the definition of "disposable retired pay" does not include separation pay).

In *Mansell*, 490 U.S. 581, the only United States Supreme Court decision to apply the USFSPA, the court strictly construed the act to exclude military retirement pay waived by the retiree in order to receive veteran's disability benefits as property divisible upon divorce. The court found that the legislative history, as a whole, indicated that, while Congress intended to create new benefits for former spouses, it also intended to place limits on state courts designed to protect military retirees, and that to adopt the former spouse's view would "thwart the

obvious purposes of the Act." *Id.* at 594. Again, the court noted that, although it realized its decision might harm many former spouses where retirees elected to receive disability benefits in lieu of retirement pay, it was up to Congress to change the language of the statute.

On December 5, 1991, Congress enacted temporary legislation designed to downsize the Armed Forces by providing personnel not yet eligible for retirement with a financial incentive to leave the armed forces. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. 102-190, §§ 661(a)(1) and 662(a)(1), 105 Stat. 1394-1396 (1991). (Codified at 10 U.S.C. §§ 1174a and 1175). R. at 64. The legislation implements a program containing two options for those who elect to separate voluntarily in order to avoid the possibility of selection for involuntary separation: Under the first option, the member receives a lump sum as separation pay, and under the second option, the member receives separation pay in the form of an annuity. The House conference report discusses the purpose of the legislation:

> The conferees take this action because of their concern over the effect of strength reductions during the next few years on our men and women in uniform and their families. The conferees especially recognize that this drawdown in strength is different from previous drawdowns because it affects people who are the product of an all volunteer force. Therefore, the conferees would provide these temporary authorities as tools to assist the military Services in selectively reducing, on a voluntary basis, that portion of the career personnel inventory that is not retirement eligible. The conferees believe that these authorities would give a reasonable, fair choice to personnel who would otherwise have no option but to face selection for involuntary separation, and to risk being separated at a point not of their own choosing.

H.R. CONF. REP. NO. 102-311, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 1112.

In a letter to all members of the armed forces regarding the new program, the Secretary of Defense, Dick Cheney, wrote:

> We seek to accomplish the reduction in the size of the armed forces through means other than involuntary separation, to the maximum extent consistent with maintaining at all times a capable, ready force. We will reduce the number of personnel recruited into the armed forces, encourage early retirements of retirement-eligible personnel, and take other management measures. But even after we make effective use of these measures, we must still reduce the size of the armed forces by many thousands more people to achieve the planned, smaller force. We want to minimize involuntary separations in doing so.
>
> Consistent with the policy of avoiding involuntary separation, the Department of Defense has developed a program of financial incentives to encourage eligible military personnel to volunteer to leave the armed forces.

R. at 64.

The two types of financial incentives--the lump sum or SSB payments, and the annuity or VSI payments--have features in common with involuntary separation pay under § 1174. The amount of payment is based on the member's basic pay at time of separation, and on the member's years in service. The member is required to serve in the Ready Reserves. The main difference between "voluntary" separation pay under § 1174a and "involuntary" separation pay under § 1174 is the percentage applied to reach the amount of pay--"voluntary" separation pay is 15% of the product of the basic pay and the number of years, while "involuntary" separation pay is 10%. Under § 1175(e)(1), the member receives an annual payment for twice the number of years of service of the member. The member must remain in a reserve component for the entire length of time he or she receives the payments. The payment equals 2.5% of the product of the basic pay and the years in service. *Id.*

Neither §§ 1174a or 1175 mention the USFSPA or divisibility of the payments in the event of divorce. *Mansell* and *McCarty* make it clear that, in the absence of express federal legislation, a state court lacks the authority to treat separation pay as marital property. Congress's failure to provide for division of the payments in the event of divorce indicates that Congress intended that the payments be considered the separate property of the military

member. To treat the payments otherwise would frustrate the legislative objective of reducing the size of the military by avoiding involuntary separations. Accordingly, the trial court erred in this case in dividing the payments.

## II. THE TRIAL COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO MODIFY THE SOUTH CAROLINA DECREE OF DIVORCE.

The trial court never recited any basis for asserting subject matter jurisdiction to modify the South Carolina decree of divorce to include Daryl's VSI payments. Debra also never asserted basis for such jurisdiction. The South Carolina decree was simply filed in Davis County, without even being "domesticated" as required by UTAH CODE ANN. § 78-22a-1 *et seq.*

Debra styled the proceeding in which she sought to divide the VSI pay as a petition to modify. Daryl did not raise the issue of jurisdiction and the trial court indicated that it was enforcing the South Carolina decree, rather than modifying it. In fact, the court found that the full faith and credit clause prohibited modification of the decree to apply the *Woodward*[1] formula. However, it is clear that the trial court modified the South Carolina decree rather than enforcing it. The court awarded Debra 50% of something that did not exist at the time of the divorce. It did so without any authority.

The fact that the parties consented to previous modifications of the South Carolina decree in Utah does not confer jurisdiction upon the court. Utah courts have repeatedly held that subject matter jurisdiction cannot be conferred upon a court by consent or waiver and that a judgment can be attacked for lack of subject matter jurisdiction at any time. *E.g., Van Der Stappen v. Van Der Stappen,* 815 P.2d 1335 (Utah App. 1991); *Crump v. Crump,* 821 P.2d 1172 (Utah App. 1991), *cert. granted,* 843 P.2d 516 (Utah 1992).

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[1] *Woodward v. Woodward,* 656 P.2d 431 (Utah 1982), established a formula for the division of retirement benefits, depending upon years of marriage and years of employment.

## III. THE TRIAL COURT'S FINDING THAT DARYL HAS THE ABILITY TO PAY DEBRA'S ATTORNEY'S FEES IS NOT SUPPORTED BY THE EVIDENCE

A trial court must base its decision to award attorney's fees upon evidence of financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the fees. *Crockett v. Crockett,* 836 P.2d 818, 821 (Utah App. 1992).

Here, the trial court concluded that Daryl has the ability to pay Debra's attorney's fees based on its finding that Daryl is employed at Wal-Mart, earning a comparable wage to Debra ($6.95 an hour), and that his wife is gainfully employed and enlisted with the Air Force. R. at 168. However, the court failed to make any findings regarding Daryl's or his wife's expenses, nor is there any evidence in the record concerning Daryl's expenses. Thus, findings as to Daryl's income and expenses are insufficient to support a finding that he has the ability to pay attorney's fees.

## CONCLUSION

Federal law precludes a state court from treating VSI payments as marital property subject to equitable division. In the absence of express legislation to the contrary, the federal statutory scheme of providing for payments of benefits to military personnel preempts state laws pertaining to community property or equitable division of property upon divorce. *McCarty,* 453 U.S. 210; *Mansell*, 490 U.S. 581. The Uniformed Services Former Spouse's Protection Act, 10 U.S.C. § 1408, which expressly permits state courts to treat military retired pay as marital property, does not apply to separation pay under 10 U.S.C. § 1175. Therefore, the trial court lacked authority to order Daryl to pay Debra 50% of his annual net disposable VSI payments.

The trial court erred in awarding Debra attorney's fees because there is no evidence to support the requisite finding that Daryl has the ability to pay. The court failed to make any findings, nor is there any evidence in the record, regarding Daryl's expenses. A finding that Daryl is employed is inadequate to support a conclusion that Daryl has the ability to pay attorney's fees.

Daryl respectfully requests that the Court of Appeals reverse the decision of the trial court awarding Debra 50% of Daryl's military separation pay and ordering payment of Debra's attorney's fees.

**DATED** this 10 day of November, 1993.

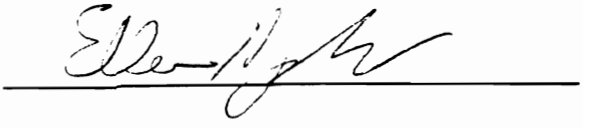
**KRUSE, LANDA & MAYCOCK**
A Professional Corporation
Eighth Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2034

By _____
**ELLEN MAYCOCK**
Attorneys for Defendant/Appellant

## CERTIFICATE OF SERVICE

I hereby certify that I mailed four true and correct copies of the foregoing **BRIEF OF APPELLANT DARYL GENE CAAUWE** to the following, postage prepaid. this 10th day of November, 1993:

Robert L. Neeley, Esq.
2485 Grant Avenue, Suite 200
Ogden, UT 84401



## ADDENDUM INDEX

1. Decision dated May 25, 1993
2. Findings of Fact and Order on Plaintiff's Petition To Modify Decree of Divorce dated June 23, 1993, entered June 24, 1993

Tab 1

IN THE SECOND DISTRICT COURT, STATE OF UTAH
COUNTY OF DAVIS

| | | |
|---|---|---|
| Debra Kay Caauwe, | : | DECISION |
| Plaintiff, | : | Civil No. 926703705 |
| vs. | : | |
| Daryl Gene Caauwe, | : | |
| Defendant. | : | |

The issue is whether the Plaintiff is entitled to 50% of the Defendant's Voluntary Separation Incentive Pay from the military.

Pursuant to the parties Divorce Decree, the Plaintiff was entitled to 50% of the Defendant's monthly retirement. After approximately 17 plus years, the Defendant voluntarily elected to forgo his retirement. He took advantage of the military's Voluntary Separation Incentive Program. The Plaintiff contends that the Voluntary Separation Incentive Pay program was taken, by the Defendant, in lieu of his military retirement benefits. As such, she claims a 50% interest in his Voluntary Separation Incentive Pay.

On the other hand, the Defendant claims that his Voluntary Separation Incentive Pay is separate and distinct from his military retirement benefits. He contends that the Voluntary Separation Incentive Pay program has a different purpose than

military retirement and should be treated differently. He further claims that the Voluntary Separation Incentive Pay is personal property acquired after the marriage. It is not marital property subject to distribution to the Plaintiff.

The Court finds for the Plaintiff. The Divorce Decree is dispositive. Paragraph 4K of the decree states ... that the Defendant agrees not to merge the (Defendant's) retired or retainer pay with any other pension, and not to pursue any course of action that would defeat the (Plaintiff's) right to receive a portion of the full net disposable retired or retainer pay of the (Defendant) (emphasis added.) The (Defendant) further agrees not to take any action by merger of the military retirement pension so as to cause a limitation in the amount of the total net monthly retirement or retainer pay in which the (Defendant) has a vested interest, and, therefore, the (Defendant) will not cause a limitation of the (Plaintiff's) monthly payments as set forth above. The Divorce Decree further provides that if the Defendant breaches the agreement, he will indemnify the Plaintiff by making direct monthly payments to the Plaintiff in the amount provided in Paragraph 4C of the decree. Those payments are to be made under the same terms and conditions as if those payments were made pursuant to Paragraph 4C. Paragraph 4C of the decree gives the Plaintiff a 50% interest in the Defendant's net disposable retired or retainer pay. See

paragraph 4F of the Divorce Decree for a definition of "net disposable.")

By taking advantage of the military's Voluntary Separation Incentive Pay program, the Defendant has attempted to eliminate entirely the Plaintiff's interest in his retirement benefits. Under the divorce decree, he agreed not to do that. He agreed not to pursue any course of action that would defeat or limit her interest in his military retirement. As such, he is required to pay her the equivalent of her 50% interest in his net disposable retirement pay. However, the Defendant did not earn a full retirement from the military. Instead, he substituted, in its place, the Voluntary Separation Incentive Pay program. Both programs are similar. They both use base salary and length of service to determine the amount of benefit. Since the Court can't determine from the evidence what 50% of the Defendant's net disposable retirement pay would be, the Plaintiff is awarded a 50% interest in the Defendant's net disposable Voluntary Separation Incentive Pay.

In addition, the Court is enforcing a South Carolina Divorce Decree. The decree states that the Plaintiff will receive a 50% share of the Defendant's full retirement. The decree makes no provision for application of the Woodward formula that might have been applicable had it been a Utah Divorce Decree. Full faith and credit requires enforcement of the South

Carolina decree without modification under the Woodward Formula.

Finally, the Plaintiff is awarded her costs and attorney's fees of $1,000.00 for having to bring this Petition to enforce the Divorce Decree. She has prevailed. The Defendant has the financial ability to pay Plaintiff's fees. The Plaintiff is in financial need of having her attorney's fees paid. The fees are reasonable.

Plaintiff's attorney will please prepare Findings of Facts, Conclusions of Law and and Order consistent with this ruling.

DATED this 25TH day of May, 1993.

Signed W. Brent West
W. Brent West
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Decision to Robert L. Neeley, Attorney for Plaintiff, at 2485 Grant Avenue., Suite 200, Ogden, Utah 84401, and to Brent E. Johns, Attorney for Defendant, at 2411 Kiesel Avenue, Suite 101, Ogden, Utah 84401-2391, postage prepaid, dated this 25th day of May, 1993.

Signed
Deputy Court Clerk

Tab 2

ROBERT L. NEELEY #2373
Attorney for Plaintiff
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Telephone: 621-3646

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| DEBRA KAY CAAUWE, Plaintiff, | ) | FINDINGS OF FACT AND ORDER ON PLAINTIFF'S PETITION TO MODIFY DECREE OF DIVORCE |
| vs. | ) | |
| DARYL GENE CAAUWE, | ) | Judge: |
| Defendant. | ) | Civil No. 926703705 |

WBW

That hearing on Plaintiff's Petition to Modify Decree of Divorce, having come on regularly for hearing, before the Honorable W. Brent West, District Court Judge, on the 23rd day of April, 1993. Plaintiff, Debra Kay Caauwe, was personally present and represented by her attorney, Robert L. Neeley; and defendant, Daryl Gene Caauwe, was personally present and represented by his attorney, Brent E. Johns. The plaintiff and defendant having been sworn and testified; and the Court having received exhibits from the respective parties; and being fully advised in the matter; hereby enters the following Findings of Fact and Order on Plaintiff's Petition to Modify Decree of Divorce:

1. That plaintiff obtained a Decree of Divorce from defendant on or about the 7th day of September, 1991, in the Family Court of the Third Judicial Circuit, County of Sumter, State of South Carolina.

2. Pursuant to paragraph 4(c). of the Divorce Decree,

plaintiff was to receive 50% of defendant, Daryl Gene Caauwe's net disposable retire or retainer pay in connection with defendant's military retirement benefits acquired from the United States Air Force.

3. That pursuant to paragraph 4(k) of the Decree of Divorce, defendant agreed not to merge the members retired or retainer pay with any other pension, and not to pursue any course of action that would defeat the spouses right to receive a portion of the full net disposable retired or retainer pay of the member. The member agreed not to take any action by merger of the military retirement pension so as to cause a limitation in the amount of the total net monthly retirement or retainer pay in which the member has a vested interest and, therefore, the member should not cause a limitation of the spouses monthly payments as set forth above. The member agreed to indemnify the spouse for any breach of this paragraph.

4. The issue before the above-entitled Court is whether plaintiff, Debra Kay Caauwe, is entitled to 50% of Defendant's Voluntary Separation Incentive Pay from the United States Air Force.

5. Defendant took advantage of the United States Air Force's Voluntary Separation Incentive Program, and plaintiff contends that the Voluntary Incentive Program was taken, by the defendant, in lieu of his military retirement benefits, and as such, she claims a 50% interest in his Voluntary Separation Incentive Pay. The defendant claims that his Voluntary Separation Incentive Pay is separate and distinct from his military retirement

benefits. Defendant contends the Voluntary Separation Incentive Pay Program has a different purpose and military retirement and should be treated differently. Defendant further claims that the Voluntary Separation Incentive Pay is personal property acquired after the marriage and is not marital property subject to distribution to the plaintiff.

6. The Court finds by taking advantage of the Military Voluntary Separation Incentive Program, the defendant has attempted to eliminate entirely the plaintiff's interest in his retirement benefits. Under the South Carolina Divorce Decree, defendant agreed not to do that. Defendant agreed not to pursue any course of action that would defeat or limit plaintiff's interest in defendant's military retirement.

7. Under the Decree of Divorce, defendant is required to pay plaintiff the equivalent of plaintiff's 50% in his net disposable retirement pay. However, the defendant did not earn a full retirement from the United States Air Force. Instead, defendant substituted, in its place, the Voluntary Separation Incentive Pay Program.

8. The Court finds both programs are similar. The Court finds that both programs use base salary and length of service to determine the amount of benefit.

9. Under the Voluntary Separation Incentive Pay Program, the United States Air Force computed defendant's base pay of $1,779.00 and multiplied the same by 213 months as defendant was credited with serving 17 years and 9 months effective military

service and multiplied the same by 15% to arrive at a lump sum benefit payment of $56,839.05. The Court received this information based upon Stipulation of the parties pursuant to information provided by response to plaintiff's Subpoena Duces Tecum.

10. Defendant however elected an annual annuity of $9,473.17 which was arrived at by the United States Air Force multiplying defendant's base pay of $1,779.00 X 213 months X 2.5% to arrive at an annual installment annuity of $9,473.17.

11. Since the Court cannot determine exactly from the evidence what 50% of defendant's net disposable would be, the plaintiff is awarded a 50% interest in the defendant's net disposable voluntary separation pay. Defendant is ordered to pay plaintiff, Debra Kay Caauwe, 50% of the amount received on or about January, 1993, believed to be approximately $7,000.00 as per the testimony of defendant. Judgment is granted to plaintiff against defendant, Daryl Gene Caauwe, for the sum of $3,500.00 for plaintiff's share of defendant's initial payment.

12. Hereafter, plaintiff is to receive 50% of the net annual annuity payment from each of the remaining 34 annual installment payments of $9,473.17.

13. As the Court is enforcing its South Carolina Decree of Divorce which provides that plaintiff shall receive a 50% portion of defendant's full retirement, the Decree makes no provision for application of the Utah Woodward Formula that might have been applicable had it been a Utah Divorce Decree.

14. Full faith and credit requires enforcement of the

South Carolina Decree without modification under the Utah Woodward Formula.

15. That plaintiff is awarded her cost and attorney fees of $1,000.00 for having to bring this Petition to enforce the Decree of Divorce, and accordingly, judgment is granted in favor of plaintiff and against the defendant for the sum of $1,000.00.

16. The Court finds that plaintiff is gainfully employed at Wal-Mart earning $6.95 per hour and averaging between 32 to 38 hours per week with a net pay of approximately $373.00 each two weeks.

17. The Court finds that defendant is likewise employed at Wal-Mart earning a comparable wage to plaintiff but in addition, has remarried and his wife is gainfully employed and enlisted with the United States Air Force.

18. The Court finds that defendant has the financial ability to pay plaintiff's attorney's fees, that plaintiff is in financial need of having her attorney fees paid and the fees are reasonable and proper.

DATED this 23RD day of June, 1993.

W. BRENT WEST
District Court Judge

APPROVED AS TO FORM:

BRENT E. JOHNS
Attorney for Defendant

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