

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

PHILIP KURTIS CHAPMAN

Appellant

vs.

JUDY KAY CHAPMAN

Respondent

Appeal from an Order of the Superior Court of Sacramento

Honorable Steven M. Gervercer

Case N. 01FL06530

RESPONDENT'S BRIEF

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ISSUES PRESENTED

Did the Court have the authority to order a constructive trust over Philip Chapman's (hereinafter referred to as Appellant) Combat Related Special Compensation, hereinafter referred to as "CRSC"). Did the court have the power to order a constructive trust over Appellant's CRSC to enforce the parties stipulated Judgment that Judy Kay Chapman, (hereinafter referred to as Respondent) would receive a stipulated sum of moneys each and every month in settlement of the division of the parties community property.

SUMMARY OF FACTS

A. Appellant served in the United States Navy for over twenty years. Appellant was awarded military retirement upon his discharge from the Navy. Appellant and Respondent divorced and a dissolution of marriage judgment, with an attached 16 page Marital Settlement Agreement (MSA) was attached thereto and made a part of the judgment by reference. The MSA awarded Respondent her community property share of Appellant's military retirement pay in the amount of \$475.00 per month.

The MSA further orders Appellant to pay to Respondent the amount of \$275.00 per month as and for spousal support, and such support is to continue until Mrs. Chapman's death, remarriage, Mr. Chapman's death or further order of the court.

The issue of attorney fees and costs are part of the MSA and provide that should any litigation be commenced between the parties concerning the MSA, the prevailing party shall be entitled to reasonable attorney fees. The other issues in the Judgment are not raised on this appeal and therefore will not be addressed herein

III DISCUSSION

A. The Trial Court Applied The California Remedy Of A Constructive Trust To Effectuate The Intent Of The Parties When They Both Discussed And Entered Into The MSA.

The trial court's order should be affirmed and the appeal denied.

The trial court did not divide Appellant's CRSC as community property.

The trial court in this case ordered that the parties MSA expressed the intent of the parties regarding the amount of moneys the Respondent is to receive as her share of the community property and as spousal support. The MSA was made part of a court order prior to the Appellant being awarded CRSC (CT6.) Therefore CSRC could not have been considered in the dissolution action in which the MSA was signed by both parties. The parties community property did include a portion of Appellant's military retirement in the sum of \$475.00 per month. Post judgment the Appellant was required to waive his military retirement in order to receive CRSC payments which are tax free, (See 10 U.S.C. Section 1413a(b)(2). Other jurisdictions that have addressed this issue have held that the military spouse who, post-judgment, unilaterally elected to take part of his retirement pay as CRSC benefits was required to compensate the non-military spouse according to the terms of the settlement agreement; however, the funds could come from any source that the military spouse chose (Megee v. Carmine (2010) 290 Mich. App. 551, 575, Hillard v. Hillard (2012) 733 S.E.2d 176.)

The cases cited in Appellant's Brief are cases that refer to family law

cases and court orders that were made prior to the military spouse waiving his military retirement and electing to receive CRSC. Those cases do not apply to the situation like the one here where there is a post judgment waiver and award of CSRC..

The majority of family law cases in other jurisdictions decided in the situation where the military spouse has waived military retirement in order to receive CRSC post a dissolution of marriage judgment, have ruled that the intent of the parties in making their Marital Settlement Agreement was to be given effect and enforced. Those jurisdictions found that a proper way of doing this was by imposing a constructive trust over the CRSC moneys and allowing the supporting spouse to use whatever source of moneys were available, including CRSC moneys, to pay the prior stipulated to court order for the prior division of community property. E.g. In re Marriage of Krempin, 70 Cal.App.4th 1008, 83 Cal.Rptr.2d 134, 143 (1999); In re Marriage of Warkocz, 141 P.3d 926, 929-30 (Colo.Ct.App. 2006); Black v. Black, 842 A.2d 1280, 1285 (Me.2004); Shelton v. Shelton, 119 Nev. 492, 78 P.3d 507, 509-10 (2003); Whitfield v. Whitfield, 373 N.J.Super. 573, 862 A.2d 1187, 1192 (2004); Hadrych v. Hydrych, 140 N.M. 829, 149 P.3d 593, 597 (N.M.Ct.App 2006). Resare v. Resare, 908 A.2d 1006, 1009-10 (R.I.2006).

Appellant relies in part on The United States Supreme Court case of Mansell v. Mansell (1989) 490 U.S. 581. However that case refers to a pre-dissolution waiver of benefits, and does not imply that a post-dissolution waiver need be treated the same way. See, e.g. Krempin, 83 Cal.Rptr.2d at 139. Appellant argues that equity must follow the law, and that the law precludes the court from treating CRSC as community property; therefor the

court does not have the authority to use an equitable remedy to correct the intentional act of the Appellant in greatly defeating a court ordered marital settlement agreement.

Because Appellant and Respondent entered into a marital settlement agreement prior to Appellant waiving his military retirement in order to receive CSRC, Respondent had a vested right in her ordered share of the parties marital community property. That is a family law court order enforceable under California Family Law Code section 290: “A judgement or order made or entered pursuant to this code may be enforced by the court by execution, the appointment of a receiver, or contempt, or by such other order as the court in its discretion determines from time to time to be necessary.” (In re Marriage of Schofield (1998) 62 Cal.App.4th 131, 135.) The court shall also “shall make whatever orders are necessary or appropriate to ensure that each party receives the party’s full community property share in any retirement plan, whether public or private.” (Family Code Section 2610; Schofield, supra, 62 Cal.App.4th 131 at p. 135.)

Appellant argues that California usually awards personal injury awards to the injured spouse. That is basically true, but California Family Code Section 2603(b) provides that the court must award only at least 50% of such awards to the injured spouse. The court can award 50% or less of the personal injury award to the non-injured spouse.

In Bandini v. Bandini, 935 N.E.2d 253, in circumstances similar to those in this case, it was decided that a military spouse may not, by a post-decree waive retirement and unilaterally elect to receive disability or CSRC pay instead, voluntarily and unilaterally defeating or reducing the benefits previously awarded to the former spouse.

It is to be noted that many states have concluded that a former spouse's vested interest in military retirement pay may not be unilaterally diminished by the military spouse's post-decree waiver of retirement pay in favor of disability benefits. E.g. *Surratt v. Suratt*, 85 Ark. App. 267, 148 S.W.3d 761, 767 (2004); *In re Marriage of Neilen and Magrini*, 341 Ill.App. 3d 863, 275 Ill.Dec. 369, 791 N.E.2d 844, 849 (2003); *Black*, 842 A.2d at 1286; *Hadryck*, 149 P.3d at 598; *Hadge v. Hadge* 197 P.3d 511, 515-16.

It is clear that the majority of states have found an equitable or Code Section remedy to enforce marital settlement agreements made part of a family law judgment in situations where a military spouse elected post judgment to waive those assets upon which the marital settlement agreement was made in order to receive CSRC that is not divisible as community property. That was done in this case. The Court in *McLellan v. McLellan* (VA.Ct.App. 2000) 33 Va. 376, held that the MSA must be construed according to the intent of the parties as expressed in the contract..

The same analysis must be applied here. The parties agreed that the MSA was intended to "effect a substantially equal division" of community assets. (Exhibit 1, P. 2, lines 2-5; P.5. lines 5-6; P.7., lines 11-13); and Mrs. Chapman shall take Mr. Chapman's "community property share of [his] military retirement pay in the amount of \$475.00 per month." Exhibit 1. P.4. lines 1-5.)

PREJUDICE

Neither the Judgment of Dissolution nor the Ruling on Submitted Matter after long cause hearing was prejudicial to Appellant

The Judgment of Dissolution incorporated the Marital Settlement Agreement that was bargained for in good faith and agreed to by both

parties. That is not prejudicial to either party. The Ruling on Submitted Matter did not divide community property. Community property had already been divided, and this Ruling was to enforce the Judgment of Dissolution and give to Respondent her bargained for share of community property to which she has a vested right per the Judgment.

The RULING ON SUBMITTED MATTER AFTER LONG CAUSE HEARING ON APRIL 26, 2015 is founded on accepted California Law and is proper under the facts submitted. An equitable remedy is proper in this case as previously stated supra.

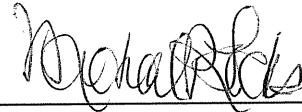
CONCLUSION

Under both law and equity, the trial court's Order was correct. Federal law is consistent with the Court's order. It would violate Federal law to vacate a valid legal court order that was issued prior to the law allowing a disabled military veteran to waive military retirement to receive CSRC. Appellant and Respondent bargained in good faith to reach a Marital Agreement satisfactory to both of them. In so doing, the parties agreed that Respondent would have a monthly monetary sum as her share of the parties community property, and Appellant would have his share of the community property. The court in equity ordered that Respondent was entitled to her share of the community property that was previously awarded in a Family Law court order. It did not divide the parties community property. It did enforce the court order that had previously divided the community property. The imposition of a constructive trust that will adhere to money received by Appellant as disability benefits, (Marriage of Krempin, supra, 70 Cal.App.4th at p. 1021). Such an award does not offend the USFSPA, (10 U.S.C. Section 1408) so long as Appellant remains free to

satisfy the obligation with assets other than the CRSC benefits. In this case Appellant is free to use other assets in order to satisfy the decision.

This Court should deny the appeal and affirm the Trial Court's Order and further affirm the Ruling on Submitted Matter After Long Cause Hearing on April 26, 2015.

Dated: July 12, 2016

A handwritten signature in black ink, appearing to read "Michael R. Locks", written over a horizontal line.

MICHAEL R. LOCKS
Attorney for Respondent
JUDY KAY CHAPMAN

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Respondent's Responsive Brief contains words according to the program used to create this document.

Dated: July 12, 2016

A handwritten signature in black ink, appearing to read "Michael R. Locks", written over a horizontal line.

MICHAEL R. LOCKS
Attorney for Respondent
JUDY KAY CHAPMAN

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PROOF OF SERVICE

I am a citizen of the United States of America. My business address is 11213 Bold River Court, Rancho Cordova, California 95670. I am over the age of 18 years and not a party to the within action. On the date set forth below, I served the enclosed document(s) described herein:

RESPONDENT'S BRIEF

On July 12, 2016, I served the foregoing document described as RESPONDENT'S BRIEF upon the following by placing a true copy thereof in sealed envelopes in the United States Post Office in Rancho Cordova, California addressed as follows:

1 Copy by FedEx

WALZER MELCHER LLP
Steven K. Yoda
5941 Variel Avenue
Woodland Hills, California 91367

Electronically Filed:

CALIFORNIA COURT OF APPEAL
Third Appellate District

1 Copy by FedEx

Clerk or Honorable Steven M. Gervercer
Dept. 121
Superior Court of California
County of Sacramento
William R. Ridgeway Family Relations
3341 Power Inn Road
Sacramento, CA 95826

Electronically Filed:

SUPREME COURT OF CALIFORNIA

Executed on July 12, 2016 at Sacramento, California

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Michael R. Locks