

**FILED**

FEB 21 2012

COURT OF APPEALS  
STATE OF WASHINGTON  
BY \_\_\_\_\_

**DIVISION III COURT OF APPEALS  
STATE OF WASHINGTON**

**No. 296504**

**Spokane County Superior Court Case No. 09-3-01991-4  
The Honorable Gregory Sypolt  
Superior Court Judge**

**In Re the Marriage of**

**AMY BOWEN, PETITIONER**

**V.**

**JOE HARMON BOWEN, RESPONDENT**

**REPLY BRIEF**

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## I. Reply Facts

Mr. Bowen was in the Air Force for almost 15 years 3 months before he retired with a 30% medical disability. RP 240-241. At the time of trial Mr. Bowen explained that he was placed on 30% disability and “forced to retire” early. Id. He also indicated that by the time he retired he was a non-commissioned officer. RP 237-238. In his explanation of his retirement benefits he indicated that he “lost his retirement” because he did not qualify. RP 241. However, he then went on to explain that he also receives a “second component” to his retirement pay, besides the actual Air Force disability retirement pay, as follows; His attorney begins questioning him on direct examination -

*Q. Other than these disability awards, do you receive any money from the military?*

*A. No, sir.*

*Q. As far as the VA, can you explain that just a little bit more. You mentioned that's a separate component?*

*A. Yes, sir. They're not affiliated with my disability from the Air Force. The difference is, the Air Force will pay you a disability on one item that got you – non-deployable that got you removed from the Air Force or separated from the Air Force. The VA side of it is a Veteran's Administration. They will pay you a percentage based on everything wrong with you that incurred while you were on active duty and in the line of duty.*

*Q. Is that a form of retirement or is that a disability payment?*

*A. It's a disability.*

*Q. And they come, however, in the same check?*

*A. Because I did not retire, they have to subtract it from my Air Force disability. If I had retired, I would be able to get both separate.* (See RP 245 lines 1-20, emphasis added.)

As can be seen from Mr. Bowen's testimony he indicated that his retirement all comes in one check, implying that if it came in two checks one would have been regular retirement and the other disability. *Id.* More specifically he said that "If [he] had retired, [he] would be able to get both separate". RP 245, lines 19-20; emphasis added. In spite of this testimony, exhibit R-129 shows that his pay actually came in two check deposits; one in the amount of \$399.44 (entitled Ret. Pay) and the other for \$475.00 (entitled VA benefits). This evidence seems to completely contradict what he testified to that these payments were not in one payment.<sup>1</sup>

Other things in Mr. Bowen's testimony were also inconsistent with the public laws on military retirement and the evidence presented at trial. Historically, the U.S. Congress has passed two or three laws allowing for early retirement for those with less than 20 years of service, changing the 20 year threshold. These laws were either passed while Mr. Bowen was still an active military person, or were affective while he held that status. The first law is called the *Temporary Early Retirement Authority (TERA)*, which specifically reduced the amount of years for retirement to 15 years to decrease the number of military members by allowing 15 years for retirement. Another was the *National Defense Authorization Act or NDAA*, of January 2008; this Act afforded another way to retire at less than 20 years

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<sup>1</sup> The Appellant has moved to supplement the record with Exhibit R 129, but has in the interim attached the same as Appendix 1 hereto.

due to disabilities. Mr. Bowen retired in November 2008, and was an active member of the military for the years when the *TERA and NDAA* Acts were in force.

In another contradiction with Mr. Bowen's suggestion that his retirement was all disability, his checks show that his "disability" was taxed; however, *38 USC 5301(a)* makes all "disability payments" exempt from federal taxation. Exhibit R 132 clearly shows that part of his pay (designated by him as disability) was taxed. If Mr. Bowen's alleged disability payments were taxed, this flies in the face of both his testimony and federal law, and clearly seems to say that a portion of his pay was disposable retirement.

It should be noted that Mr. Bowen also became a Defense Department employee almost immediately after being separated from the Air force, as an air craft mechanic at Fairchild AFB. Exhibit P-1. This allowed him to receive credit for his military time toward a FERS pension with this new Federal employer. *See Public Laws 106-65 (1999)*. This then meant that Mr. Bowen could potentially increase his future pension with the Department of Defense (FERS) by using the party's community points from his years in service with the Air Force, which again was owned by the marital community. This also was not distributed by the lower court, nor considered, but is another inconsistency in this distribution. See again exhibit P-1 Mr. Bowen's federal civil pay check. It should be also noted that the failure of the court to deal with the FERS and credit from his military service may have deprived Ms.

Bowen from the receipt of inexpensive lifetime health insurance as well. *See 5 USC 8901.*

Finally, Mr. Bowen did not really contest the idea that this was a vastly disproportionate distribution other than to say it was close to an even split, even though it was not. (See Opening Brief of Appellant arguing that if his retirement was community, then it was at least a 90%/10% distribution and if not it was a 70%/30% distribution). He also did not respond to the notion that the court is to consider the factors in RCW 26.09.080 to determine a proper equitable distribution. These factors include, but are not limited to consideration of both the receipt of community property and/or separate property in its decision, and the fact that the Appellant was left to primarily care for the children and was unemployed. The Appellant feels that even if all his pay was disability, this distribution disregarded the factor outlined in the statutes and was an abuse of discretion.

## **II. Law and Argument**

- A. It is inaccurate to say that the military requires all service men to have 20 years before they can retire.

In their response the Respondent indicates that you cannot retire from the military unless you have 20 years, citing *10 USC 8911* for this proposition. First, the statute used by Mr. Bowen is for commissioned officers and not for regular non-commissioner Air Force members. Therefore it is not applicable to this case based on its purpose alone. At the same time, there have been codes and laws passed by congress to allow for members of the armed forces

to retire as early as 6 years or more, rather than 20 years. For example, the *Temporary Early Retirement Authority (TERA)*, which was in force when Mr. Bowen enlisted, allows for early retirement with 15 years for a reduced retirement pay of between 30 and 40% of the serviceman's pay. *See 10 U.S.C. § 1186 and § 1293; See also § 4403, Pub. L. No. 102-484, 106 Stat. 2315, 2702 (1992), as amended by Pub. L. No. 104-106, § 1504(c)(3), 110 Stat. 514 (1996).* [It is noteworthy to note that Mr. Bowers retired with approximately 38% of his pay]. Also, the *National Defense Authorization Act or NDAA (Pub.L. No. 105-85, § 522(a), 111 Stat. 1629, 1734 (1997), codified at 10 U.S.C. § 10216(a))* was actually passed January 1, 2008, the year that Mr. Bowen retired in November of that year. This act allowed for disabled veterans with 15 years of service and at least a 10% disability to retire early. *Id.* Mr. Bowen had a 30% disability and 15 years and 3 months of service. RP 240-241. The *NDAA* also allowed a service man to apply for reclassification of his disability as combat related with his branch of the service. *See NDAA generally.*

Of most significant importance is that in addition to the above two laws *10 USC 1174 – 1176* also allowed for an enlisted man to receive separation pay if they are forced to retire early. This separation pay is disposable and not disability pay, and is based on years in service and is distributable under that Act. *Id.*

It is incorrect to indicate that 20 years of service was always required for a military person to receive disposable post military pay upon retirement.

There were a number of ways that Mr. Bowen's pay from the military is distributable as "retirement" pay. The court seemed to not take into consideration the inconsistencies in Mr. Bowen's reasoning that all his pay was non-disposable disability pay.

B. There were substantial inconsistencies in Mr. Bowen's testimony that put in question his entire explanation of his retirement benefits as all disability.

Mr. Bowen's testimony at trial, his explanation of his retirement benefits, the exhibits at trial showing his deposits and the law on these issues were inconsistent and seemed to go against a finding that his pay was non-disposable.

Some of those inconsistencies were:

- He said he only receives one check for all his retirement, however, at the same time if he received regular retirement he would be receiving two separate checks. RP 245. A look at his bank account Exhibit 125 shows that he does receive two different federal checks, with one being deposited in August 2009 for \$762.22, and his other VA check for the \$1,140.00, which would imply that he is receiving regular retirement. (See also Exhibit R129 part of the confidential financial folder in this Superior Court case).

-His Retirement pay summary shows that he not only had a 30% disability pay rating, but this summary shows that he is receiving funds called Basic Pay, which is based on this years in service, or 15 years, 03 months. Why would this have to be put on his pay summary if his years in service did not matter in determining his retirement pay? See Exhibits P-2 & R132.

- Mr. Bowen indicated that he was able to receive Spousal Benefit Pay (SBP) for his monthly amount which seems inconsistent with the idea that this pay could not be distributed to anyone but himself. See RP 241 – 243.

- Mr. Bowen indicated that only one of the payments was “tax free”, which is consistent with the statute that disability pay is non-taxable. RP 242 & 38 USC 5301(a). Yet, the other pay was in fact taxed as indicated in his pay stub from the military. Disability pay is not supposed to be taxed, ipso facto, one of his pay sources was not disability pay. See 38 USC 5301(a) *supra*.

Mr. Bowen indicated that he receives his pay from the military, based on his time in service and he only receives one check for it all. The evidence shows that that is not the case, that there were two deposits, which the court did not address. Additionally, his own pay records indicate that his pay was calculated based on his years in service, besides the “other amount” he receives from the Air Force. He even testified that if he was receiving two checks that one would be for disability pay and the other would be regular retirement. At the same time his bank records show that he did in fact receive two pay checks, contradicting his testimony. Then he indicated that since he was only receiving disability pay, it was not taxable, consistent with the law on this issue, however, the trial exhibits show that he was taxed for a portion of this monthly payment.

All in all, these inconsistencies paint a picture that is both incomplete, and inconsistent with the law on retirement pay versus disability pay. Since he separated early involuntarily, it seems more logical that he in fact received

two kinds of pay, one which was disposable and one that was not. This alone should at least suggest that a remand would be appropriate to straighten out this problem.

- C. It does not seem that the trial Judge used the factors at RCW 26.09.080 to award the parties property in this matter.

*RCW 26.09.080* states as follows,

“In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to: (1) The nature and extent of the community property; (2) The nature and extent of the separate property; (3) The duration of the marriage or domestic partnership; and (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

A division of assets and liabilities in a dissolution is reviewed for an abuse of discretion. *In re Marriage of Kraft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1992). All property, community and separate, is before the court for distribution. *In re Marriage of Stachofsky*, 90 Wash.App. 135, 142, 951 P.2d 346 (1998). A property division made will be reversed on appeal if there is a manifest abuse of discretion." *In re Marriage of Muhammad*, 153 Wash.2d 795, 803, 108 P.3d 779 (2005). A trial court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *Qwest Corp. v. City of Bellevue*, 161 Wash.2d 353, 369,

166 P.3d 667 (2007). While the trial court " is not required to divide community property equally," if its dissolution" decree results in a patent disparity in the parties' economic circumstances," the decision should be reversed because the trial court will have committed a manifest abuse of discretion. *In re Marriage of Rockwell*, 141 Wash.App. 235, 243, 170 P.3d 572 (2007). Although the RCW 26.09.080 lists are a non-exclusive set of factors that the trial court must consider when distributing the marital property (See *In re Zahm*, 138 Wash.2d 213, 978 P.2d 498 (1999) the underlying purpose of this law was to replace the concept of fault and substitute marriage failure or irretrievable breakdown as the basis for a decree dissolving a marriage. See *In re Marriage of Clark*, 13 Wash.App. 805, 808, 538 P.2d 145 (1975) (quoting Hon. Nancy Ann Holman, *A Law in the Spirit of Conciliation and Understanding: Washington's Marriage Dissolution Act*, 9 Gonzaga L.Rev. 39 (1973)); see also *In re Marriage of Little*, 96 Wash.2d 183, 192, 634 P.2d 498 (1981). Failure to consider these factors in the distribution of property presumes that the decision was made out of passion rather than weighing the factors required. *Urbana v. Urbana*, 147 Wn.App. 1, 195 P.3d 959 (2008).

In this case, virtually all the factors of import weigh in favor of the appellant, as follows:

1. Nature and extent of community property: Her portion of property was minimal compared to Mr. Bowen's award. If we do not consider the retirements Mr. Bowen received she only received about 30%,

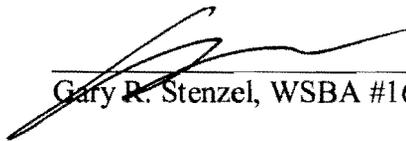
however if a portion of the retirement was community, she only received about 10%.

2. Community property distribution: Also nothing was done to insure that Mr. Bowen did not benefit unjustly from the community years in service through a federal FERS enhancement.
3. Nature and extent of separate property: In this case if the Appellant is wrong and Mr. Bowen's retirement is all his separate property then that too increased the property he received, since ostensibly he received a lifetime benefit from being in the service during the marriage, and she would be left with nothing for the future.
4. Duration of the marriage: Moderate, certainly not a short term marriage.
5. Economic circumstances the parties would be left, including which party would be left to care for the children: This factor more than the other seems to mitigate in Ms. Bowen's favor for not receiving a lesser portion than Mr. Bowen. She was unemployed at the time of the divorce, seeking employment in another state. See Exhibits R112 & R114, and See e.g. RP 340-344, wherein Ms. Bowen basically testified that she was not only unemployed but was a "stay-at-home" mom. Meanwhile Mr. Bowen was left without having to care for the children, with a nice retirement from the military, and a good Defense department job doing the things he learned in the military while they were married. All of which seem particularly important in an

equitable distribution. It seemed clear that the court should have at least tried to insure that Ms. Bowen was in at least a similar position.

In this case Ms. Bowen received only about 28% of the overall community property, and Mr. Bowen received the other 72% if we say that all his pay was non-disposable. Although Ms. Bowen understands that it is in the discretion of the Judge to order a distribution that he sees is proper, however, when there is no indication that the Judge applied the standards of the statute and its elements, the distribution is would seem to not be justified. It does not matter what the parties advocates say about the distribution, if it does not appear that the Judge had the statutory factors in mind or did not apply them to this case, the ruling seems to be made without the law in mind and was likely error. We ask that this decision either be vacated or remanded for further litigation on these issues, taking into consideration the factors under RCW 26.09.080, federal laws on military retirement, the inconsistencies in Mr. Bowen's testimony, and the situation that the parties would be left in at the time of the divorce.

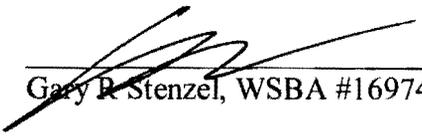
Respectfully submitted this 17<sup>th</sup> of February 2012.

  
\_\_\_\_\_  
Gary R. Stenzel, WSBA #16974

Declaration/Affidavit of Mailing

I Gary R Stenzel hereby state under penalty of perjury that I placed a copy of this brief with the US mail on the date of February 20<sup>th</sup>, 2012 and before this was done, I emailed opposing counsel a copy of this brief on the date of February 17<sup>th</sup>, 2012. Address I sent this copy:

Ken Kato  
Attorney at Law  
1020 N Washington  
Spokane, WA 99201

  
\_\_\_\_\_  
Gary R. Stenzel, WSBA #16974

Appendix 1

Exhibit R129



03648.24Y0.J5565246957.03.01.3477

JOE H BOWEN
18411 S STENTZ RD
SPANGLER WA 99031-9523

Account number and date stamp: 03/15/10

PAGE 1

Summary table with columns for amounts and counts. Values include 1,139.10, 36, 3,097.14, 5, 2,684.15, .00, 726.11.

Please examine immediately and report if incorrect. If no report is received within 60 days, the account will be considered correct.

Fee summary table with columns for This Statement and This Year's Statements. Values are 0.00 for all categories.

Note: Fee reversals/refunds made by USAA will not reduce the totals on this chart.

AS OF 1/31/09, NON-USAA VISA CARDS MAY NO LONGER BE USED FOR OVERDRAFT PROTECTION OR TO MAKE CASH ADVANCES TO YOUR ACCOUNT. MAKE CHANGES ON USAA.COM (KEYWORD: OVERDRAFT).

DEPOSITS AND OTHER CREDITS

Table of deposits and credits with columns: DATE, AMOUNT, TRANSACTION DESCRIPTION. Includes entries for ACH CREDIT and INTEREST PAID.

CHECKS

Table of checks with columns: DATE, CHECK NO., AMOUNT. Includes entries for checks dated 03/15, 02/16, and 02/16.

OTHER DEBITS

Table of other debits with columns: DATE, AMOUNT, TRANSACTION DESCRIPTION. Includes entries for DEBIT CARD PURCHASE and POS DEBIT.

