

COA No. 29650-4-III

FILED

NOV 28 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

JOE H. BOWEN,

Respondent,

v.

AMY A. BOWEN,

Appellant.

BRIEF OF RESPONDENT

Kenneth H. Kato, WSBA # 6400
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Spokane, WA 99201
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I. COUNTER-STATEMENT OF ASSIGNMENTS OF ERROR

A. The trial court properly determined Joe H. Bowen's disability income was all disability pay, not retirement pay, and therefore indivisible.

B. The trial court did not err in its property distribution.

C. The trial court did not err by imputing income to Amy A. Bowen because she was voluntarily unemployed.

II. COUNTER-STATEMENT OF THE CASE

The Bowens married on September 14, 1996. (CP 545; RP 336). They separated in August 2009 and a petition for dissolution was filed that month. (CP 545; RP 696). The case proceeded to trial in 2010. (RP 8).

The court determined Mr. Bowen's disability income was all disability pay and was indivisible:

Then we have the retirement and/or disability income. I know you disagreed on whether or not all of that or some of it is attributable to military disability and, such is not within the division possibilities here.

...

Here's what I'm doing now on that. I'm remembering the testimony of Mr. Bowen. To the extent that, since he was found to be disabled, he's then disqualified from military retirement. So that puts him in the category where he can't get that guaranteed income as a serviceperson who fulfills his years of service in

order to qualify for that retirement. So I'm finding it's all beyond the reach of the Court. So it's not awardable. (RP 747, 749).

The court awarded Mr. Bowen property valued at \$42,238.50 and awarded Ms. Bowen \$23,403.50. (CP 571-574). Each had incurred attorney fees of approximately \$20,000 and the court ordered they would pay their own fees. (CP 567-69; RP 756-58).

Finding she was voluntarily unemployed, the court imputed income to Ms. Bowen for purposes of child support. (CP 559, 539-41). She appealed. (CP 578).

III. ARGUMENT

A. The trial court properly determined Mr. Bowen received all disability pay, which is indivisible.

As noted in its oral decision, the court remembered Mr. Bowen's testimony. (RP 749). Mr. Bowen was disability separated from the Air Force, which determined his disability was not likely to change in the near future so he could not continue a level of work commensurate with his rank and recommended a 30% disability separation. (RP 237, 240). Mr. Bowen lost a retirement:

I would have been given a 50-percent retirement. Because I did not get a retirement, I got a disability; I only receive 30-percent disability separation. (RP 241).

He had served in the military 15 years and 3 months to the day. (RP 241). To get military retirement, he had to continue service through 20 years or more. He thus did not qualify for retirement. (*Id.*). Mr. Bowen's disability payment was "based on 30 percent at the rank [he] held at how many years" and equaled "\$1,140 and some cents total before anything is pulled." (*Id.*).

Mr. Bowen further explained that VA was a separate component of disability:

[VA is] 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. (RP 245).

VA is a disability payment, not retirement. (*Id.*). The Air Force and VA disability payments come in the same check. (*Id.*). Because Mr. Bowen did not retire, VA disability had to be subtracted from his Air Force disability. If he had retired, he would have been able to get both separately. (*Id.*).

On cross examination, Mr. Bowen confirmed that none of his military disability income was retirement pay:

Mr. Bowen: Mrs. Bowen is not disabled. I am disabled. It affects my future employment of what I can retain as

work. If you read the Armed Forces Former Spouses' Protection Act, it tells you the only thing dividable is disposable income. Disability pay is considered non-disposable income.

Counsel: And is any portion of what you receive from the government a retirement?

Mr. Bowen: Absolutely none. (RP 308).

There was no testimony to the contrary.

Persons who serve in the military for an extended period, usually at least 20 years, are entitled to retirement pay. See, e.g., 10 USC § 8911 *et seq.* They are also entitled to disability benefits if they become disabled as a result of military service. 38 USC § 1131. Under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC § 1408, disposable retired military pay is subject to division as community property in a Washington dissolution proceeding. *In re Marriage of Jennings*, 138 Wn.2d 612, 980 P.2d 1248 (1999). Military disability, however, does not qualify as disposable retired pay and is therefore not subject to distribution. *In re Marriage of Kraft*, 119 Wn.2d 438, 448, 832 P.2d 871 (1992); *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed.2d 675 (1989).

Here, Mr. Bowen received no military retirement pay as he did not serve the requisite 20 years. Rather, he was disability

separated at a 30% disability. That 30% disability amounted to \$1140/month. Ms. Bowen argues that only 30% of the \$1140 is disability pay so the remaining 70% is retirement pay and divisible. Her argument is contrary to fact and law as it is undisputed that Mr. Bowen receives no retirement pay and all of it is disability pay. Military disability pay is simply not subject to distribution. *In re Marriage of Jennings*, 138 Wn.2d at 629. The court did not err by refusing to divide and distribute Mr. Bowen's disability pay.

B. The trial court did not err in its property distribution as it was fair and equitable.

The court should strive to make an equitable division of property. RCW 26.09.080; *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), *review denied*, 114 Wn.2d 1002 (1990).

Ms. Bowen contends the property division was grossly disproportionate when liabilities are taken into consideration. The court awarded her assets valued at \$23,403.50 and awarded Mr. Bowen assets valued at \$42,238.50. (CP 571-74). Ms. Bowen also had debts of \$22,165, consisting of \$940 in miscellaneous bills incurred after separation; \$20,000 in attorney fees; and \$1,225 in GAL fees. (CP 568). But she has failed to take into consideration

the \$10,646.94 already paid to her by order of the court from the Thrift Savings Plan of \$22,341.13 that was in the trust account of Mr. Bowen's lawyer. (RP 280, 518). She also received \$716 from that account for the children's dentist. (RP 517). Moreover, Mr. Bowen owed his lawyer as much as Ms. Bowen owed hers, *i.e.*, \$20,000 in fees. (CP 567, 569; RP 756-58). Mr. and Mrs. Bowen were in the same situation with respect to attorney fees.

Although military disability pay cannot be divided and distributed, the court can nevertheless consider it as a source of income in awarding spousal or child support. See *In re Marriage of Kraft*, 119 Wn.2d at 451. This is exactly what the court did here. It took into account Mr. Bowen's military disability pay in awarding child support and in awarding Ms. Bowen maintenance of \$400/month for 12 months. (CP 540, 568). When everything is taken into consideration, it is clear the court's final division of the property, even with liabilities, was indeed fair, just, and equitable under all the circumstances. *Baker v. Baker*, 80 Wn.2d 736, 745-46, 498 P.2d 315 (1972). *In re Marriage of Tower*, 55 Wn. App. at 700. The court did not err.

C. The trial court properly imputed income to Ms. Bowen because she was voluntarily unemployed.

Under RCW 26.19.071(6), the court must impute income to a parent who is voluntarily unemployed. “The court shall determine whether the parent is voluntarily underemployed or unemployed based upon that parent’s work history, education, health, and age, or any other relevant factor. *Id.* Income shall not be imputed, however, for an unemployable parent. *Id.*, *In re Marriage of Blickenstaff*, 71 Wn. App. 489, 496-97, 859 P.2d 646 (1993). Whether Ms. Bowen was voluntarily unemployed is a factual finding that will be upheld if supported by substantial evidence. *In re Marriage of Mattson*, 95 Wn. App. 592, 599, 976 P.2d 157 (1999). Here, an abundance of evidence supports the trial court’s finding.

Ms. Bowen had a 4-year college degree in Mexican-American Studies and went to school another two years getting her California teaching credentials. (RP 419-420, 563). She had been a stay-at-home mom since 2004. (RP 340). Upon coming to Spokane, Ms. Bowen had worked for a time as a substitute teacher in the Liberty and Cheney School Districts. (RP 561-66). Ms. Bowen voluntarily resigned her position at Liberty in November 2009. (RP 565). She had no physical problems keeping her from working. (RP 562). She did not get her certification to teach in Washington even though she had received help from others in

preparing to take the tests. (RP 118). She did take one of three tests, but did not pass. (RP 514). She had basically given up trying to get a teaching job in Washington as the prospects were not good and she wanted to relocate to Oregon and find a job there. (RP 420, 422-23, 430-34). Ms. Bowen did not look for any work outside the teaching profession. (RP 562).

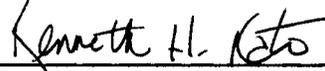
When a wife was capable of employment and chose to stay at home to care for the children, the court has found her to be voluntarily unemployed. *In re Marriage of Jonas*, 57 Wn. App. 339, 340, 788 P.2d 12 (1990). That is our case. A parent is voluntarily unemployed when the unemployment is brought about by one's free choice and is intentional rather than accidental. *In re Marriage of Blickenstaff*, 71 Wn. App. at 493. Ms. Bowen chose to be unemployed of her own free will. Substantial evidence supports the court's finding that she was voluntarily unemployed. *In re Marriage of Mattson*, 95 Wn. App. at 599. The court properly imputed income to her.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bowen respectfully urges this Court to affirm the decision of the trial court.

DATED this 28th day of November, 2011.

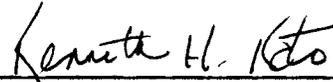
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on November 28, 2011, I served a true and correct copy of the Brief of Respondent by hand delivery on Gary R. Stenzel, Attorney at Law, 1304 W. College Ave., Spokane, WA 99201.



Kenneth H. Kato