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Supreme Court of Texas.
Raoul Hagen, Petitioner,
v.
Doris J. Hagen, Respondent.
No. 07-1065.

January 14, 2009.

Appearances:

Ryan G. Anderson, McClenahan, Anderson & Stryker, P.L.L.C., San Antonio, Texas, for petitioner.

Gary A. Beahm, Gary A. Beahm, A Professional Corporation, San Antonio, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Phil Johnson and Don R. Willett.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will now hear argument in 07-1065 Raoul Hagen v. Doris Hagen.

MARSHALL: May it please the Court. Anderson will present argument for the petitioner. Petitioner has reserved 10 minutes for rebuttal.

ORAL ARGUMENT OF RYAN G. ANDERSON ON BEHALF OF THE PETITIONER

ATTORNEY RYAN G. ANDERSON: May it please the Court. I am Ryan Anderson. I am here on behalf of Petitioner, Raoul Hagen. This case really has a fairly simple issue at its core that the Court needs to resolve today and the key to that is the Family Code Provision Section 9.007 and whether or not the Trial Court modified, altered or changed the division of property when it entered its Clarification Order and the division of property that is at issue was the division of, and I'm quoting from the Decree, which was entered in 1976, "All Army retirement pay or military retirement pay." And what the Court clarified was what eventually came before the Court and the stipulated facts provide all the facts that this Court needs for this particular issue. 1992, Raoul retires. Again, they were divorced in 1976. He retires in '92. In 2003, he is determined to be 100% disabled and, accordingly, he applies for and receives VA benefits. Now there's an important distinction.

JUSTICE SCOTT A. BRISTER: Any hint of disability before or this is

just something that happened in 2003 or?

ATTORNEY RYAN G. ANDERSON: This was the first determination of disability that he had, yes.

JUSTICE SCOTT A. BRISTER: So it's a condition that developed.

ATTORNEY RYAN G. ANDERSON: A condition that came on or was finally diagnosed or determined. There is a set of procedures. Going through it would be rather long for the Court's time, but there's a set of, you go before a Board of medical doctors and they determine what your disability is. So in 2003, he is determined to be disabled and he elects, as he's required to in order to receive VA benefits, he has to waive his military retirement benefits. If you get X dollars of VA benefits, you have to waive the corresponding X dollars of military retirement benefits. So there's just no double-dipping.

JUSTICE SCOTT A. BRISTER: Why would you do that? Is there? What's your advantage to doing that?

ATTORNEY RYAN G. ANDERSON: Well, there, there's several advantages. The primary advantage or a primary advantage is VA disability benefits are not taxable.

JUSTICE SCOTT A. BRISTER: That's good enough.

ATTORNEY RYAN G. ANDERSON: So that, that gets you out of taxation, which we can all appreciate. Um, also, you get into the VA disability benefits and into that system, you're getting other medical-related disability benefits. So it's going into that system. So he does his waiver, as he's required, and his ex-wife, Doris, comes forward and she moves to enforce because the amount of retirement pay that had been divided under the 1976 Decree was reduced by the amount that he had to waive in order to receive the VA benefits. So Doris comes forward and she moves to enforce and wants clarification. She asks the Court to clarify, do these VA disability benefits, are they included in the military retirement pay that was, oh the property was divided back in 1976? And the Trial Court decided no. The Court of Appeals said wait a minute. You cannot go back and hold that the and collaterally attack that 1976 Decree, which, again, divided the property, Army retirement pay or military retirement pay based on subsequent Federal legislation, the Uniform Services Former Spouse Protection Act. Um, and here's, here's the important thing. This is the biggest problem with the Court of Appeals' opinion. Raoul never relied on that Act and didn't need to. That Act doesn't have, while that has far-reaching effects in all sorts of cases, it has nothing to do with this case and the reason it has nothing to do with this case is all Raoul was arguing when Doris sought clarification of the 1976 Decree, Raoul was arguing the property that was divided back in 1976 was Army retirement pay or military retirement pay. That's it. The clarification is does that include VA disability benefits? No. And that was decided by this Court prior to the USFSPA ever being enacted prior to the US Supreme Court case, the McCarty case, that gave rise to the legislation and I, I must apologize to the Court because I think I gave short shrift to one of its former opinions in the Burson case and I mention it in the case or in my briefing, but I think Justice Pope's opinion deserves a lot more consideration and Burson was decided in '79. So it was decided prior to all of this new Federal legislation coming in and Burson came up on this Court before this Court in a habeas corpus position and what happened there was a serviceman, a retired serviceman had the, gotten divorced. The decree divided his retirement pay and he elected to waive, subsequent to being determined to be disabled, elected to waive part of the retirement pay in order to receive the VA disability benefits and his wife said, wait a minute. You can't do that to me and sought to, you know, get rid of

or sought to hold him in contempt and he was jailed. And it comes up to this Court and what Justice Pope wrote and I think this is very important is, Justice Pope wrote, no. The division of retirement benefits does not include the division of Veterans Administration benefits. VA benefits are fundamentally different. They are under a federal statutory scheme that is not based on years of service. It's not an earned property right. What VA benefits are is it is a federal gratuity in order to compensate and assist disabled former service members to readapt to society, fundamentally different benefit. So dividing up retirement benefits does not divide up VA disabilities. It's, it would be a.

JUSTICE NATHAN L. HECHT: He--

ATTORNEY RYAN G. ANDERSON: Yes, sir.

JUSTICE NATHAN L. HECHT: He didn't quite write that. He said, "We now hold that a divorce decree cannot prohibit Burson from doing that which the federal law properly gave him a right to do." Well, of course, he was entitled to do that. The question is does the wife get part of it. It does, it wasn't, the issue in Burson was not whether he could do it or not. The question was what was the effect of it.

ATTORNEY RYAN G. ANDERSON: That was ultimately on the habeas corpus, but under Subsection 3 of that opinion, Justice Pope wrote, "The important fact which distinguishes this case from those cited above," which had to do with military retirement, "is that Burson after the divorce decree made an election to forego his Air Force disability benefits and to receive instead the disability benefits from the VA. VA benefits, unlike Air Force disability retirement benefits, are not divisible or assignable. They are not property." And that is the key distinction there.

JUSTICE NATHAN L. HECHT: How do you square Burson and Berry?

ATTORNEY RYAN G. ANDERSON: That's a really hard question and that's why you asked it. Um, I, I think the only way that you can fairly say and, and square them is, I think to the extent Berry is being read as going beyond the limited issue that came up in it, it's being read too broad and the Court's writings are being misinterpreted to a wrong effect. I think Berry came up on you give retroactive effect to the USFSPA because that is what the Court of Appeals held and I think if you read Berry to li---to address that limited issue, then I think you can leave Berry alone. If you're reading Berry to say VA benefits cannot be divided and that Berry actually changed the law, changed Burson and even before that, the Ramsey opinion, which was back in '72, which was a Writ Dismiss case. So it wasn't this Court's case, but it was some Texas law prior, then you would have to read that Berry overruled all of that and if, I, I think to the extent that that's what Berry is being held to, I think it's wrong. I don't think that's what Berry says. I, I think and, and I, I say that because I have read that case, especially over the last two days, again and again because the more I read Burson, the more these two don't seem to square, but I think the way you square you it is in Berry, they specifically note that the Court of Appeals based its holding on retroactive application of the Federal legislation. Everyone agrees that the Federal legislation has no retroactive applicability. So I think that's the only way that I can square them. I am about to be out of my time just because I've reversed most of it. Um, and I'll address it on rebuttal. The last point I would just leave the Court with, I do think that this is a very limited case and very narrow and that the issue is did the Court modify the '76 Decree when it said a division of military retirement benefits does not divide VA disability benefits and it

doesn't because they are fundamentally different. It would be like saying apples divides oranges. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Anderson. The Court will now hear from the Respondent.

MARSHALL: May it please the Court, Mr. Beahm will present argument for the Respondent.

ORAL ARGUMENT OF GARY A. BEAHM ON BEHALF OF THE RESPONDENT

ATTORNEY GARY A. BEAHM: Good morning, ladies and gentlemen. My name is Gary Beahm and I feel like I have lived with these cases since 1976. I was a Captain in, in the Air Force in the early '70's. I've argued military retirement issues before this Honorable Court on three different occasions, this being the third one coming up, against my esteemed colleague, Jim Hagden. I've even had the, the dubious honor of being the only attorney in the State of Texas, who's ar-who has argued a military retirement case before this Honorable Court on both sides of the issue representing the.

JUSTICE DALE WAINWRIGHT: Did you win?

ATTORNEY GARY A. BEAHM: I lost both times. Now, now the funny thing about that was is I reversed the Court of Appeals in San Antonio twice and Hagden was here before and I can't remember which Justice it was, he said, "Well, Mr. Hagden, the next time we see you before this Court, will you be ordering the other side of the issue?" And, and, of course, Mr. Hagden says, "Well, it depends who pays me, that's, I'll be here." I would just like to address, this case is all about res judicata. That's, it's very, very simple.

JUSTICE NATHAN L. HECHT: Let me.

ATTORNEY GARY A. BEAHM: Yeah.

JUSTICE NATHAN L. HECHT: Ask you at the outset. Do you agree with Petitioner that a reason to elect VA benefits is because they're not taxable?

ATTORNEY GARY A. BEAHM: That's absolutely correct and, and, and that's, and that is a primary reason why, and, and if you look at the scenario.

JUSTICE NATHAN L. HECHT: And how does that with the, the military retirement is taxable when you get it?

ATTORNEY GARY A. BEAHM: Yes, it's a pay. It's like any other retirement plan. Uh, Counsel's right. A lot of these issues are going to go away. We have now in place, which is called CDRP, which is Combined Disability and Retire Pay. This has nothing to do with this case, but members now get both. They get both, all of their disability plus all of their disposable pay. Disposable pay is what is divided by, uh, by the DFAS, Defense Finance and Accounting Service and allows the former spouse to get her share of the retirement. So, a lot of these issues are going away, but they're not going away because there's another, there is another thing that is coming on the horizon that Hagden and I both have now started filing appeals on and it's called C, CRSC and it's Combat-Related Disability Pay and if you have not had it yet, you will because of all the cases coming out of Afghanistan and Iraq and that stuff, but that's not the big argument. I will get right to my particular thing today. This is res judicata. This is the same issues, maybe he cloaked it a little differently that we had in 1981. One of my cases I've cited and I guess I'm getting elderly, but is Hovermale v. Hovermale. Now, that Hovermale case came out when we had no military retirement. It was right after McCarty and many of you may

remember that we had, all of a sudden we didn't have any. We had all these cases in the '70 that divided military retirement and all of a sudden the Federal government, the US Supreme Court comes out and says it's not a divisible asset. It's, it's the, McCarty is the reason we have the USFSPA, the Former Spouses Protection Act title 10 US Code 1408. That's the thing that came up. That's the one that gave us the magic words "disposable pay." Disposable pay is a word of art. It means different things to different things, but basically it excludes VA disability. In this case, in 1976, when these parties got divorced, they and this case specifically says, he gets or my client gets all 50% or, or 1820. It's one - half of 1820 is of all, total pay. Contrary to clients. Yes.

JUSTICE PAUL JOHNSON: Did you say total pay or retirement pay?

ATTORNEY GARY A. BEAHM: It says all pay. I think that's the language. It was all pay. Now the interesting thing here is, and Counsel has said that there is a distinction between VA disability pay and, uh, and, uh, disposable pay. When you say gross pay, that includes VA disability pay and I, I've cite you to Jones v.

JUSTICE NATHAN L. HECHT: It says, "All Army retirement pay or military retirement."

ATTORNEY GARY A. BEAHM: That's gross pay.

JUSTICE NATHAN L. HECHT: Well why isn't that different from disability pay?

ATTORNEY GARY A. BEAHM: Because it includes, all pay includes disability pay. That's the, that's the language and that, and if you look at Jones, Jones v. Jones, that's a ca-and it's in my brief, that was a case where the parties divided gross pay and the wife goes back and or the former spouse goes back and, um, sues him because he had elected to take a VA disability pay. Well, she won on that case and the case was, well wait a minute. You're talking about, you know, but and that was this Antonio case, and it says, but you're also, but in Gallegos, which is another case, you said that you couldn't divide up disposable pay. I mean, VA disability pay. And they said yes, but that was a direct appeal. This case is res judicata and, you know, we are, you all have a judgment that says that she gets a percentage of gross pay.

JUSTICE PHIL JOHNSON: Well it says all retirement pay.

ATTORNEY GARY A. BEAHM: I'm saying there's, I'm saying that all retirement pay is gross pay.

JUSTICE PHIL JOHNSON: At the time that this judgment was entered, uh, there were, opposing counsel says and it's pointed out in his brief there were cases addressing VA disability and retirement, disability retirement and retirement, all three aspects, and this judgment simply says retirement.

ATTORNEY GARY A. BEAHM: What I'm saying is is that the case that, the word of art is total pay or gross pay and I'm telling you that our cases and the ones that I've cited include disability pay as part of the gross pay.

JUSTICE PHIL JOHNSON: But the question is what does this, what, what did this judgment say? It seems to me like what we're doing is simply trying to interpret this judgment and it says retirement pay.

ATTORNEY GARY A. BEAHM: It says, but if you read the cases on the definition of retired pay, retired pay means gross pay and that's what this Court, this is what the Third, uh, the District Courts, uh, the Courts of Appeals around this state have always said that, that retired pay, not disposable retired pay. Disposable retired pay has a special meaning, but when a Court awards a, uh, an award of, of retired pay or

gross pay, then that includes that VA disability pay. Now you cannot impinge on that member to go out and make an application for VA disability. I can't send an order to the VA and have it pay. Those are, those are exempt from those kind of arguments. But if I get a judgment for the unpaid portion of the military, of the pay, then I can go to other accounts that this doctor has in Hawaii and levy on those accounts or we can do other things with that particular money. I'm just asking the Court to do what it's done for the last 30 years and I'd also bring to the Court's attention the Baxter v. Ruddle, which is a court case right out of this. It's also cited in this brief, and that was a VA disability case and.

JUSTICE PHIL JOHNSON: Let me ask a question and the question comes up, is retirement pay either disability or simply retirement pay, disability retirement or retirement pay, is it pay?

ATTORNEY GARY A. BEAHM: Yes, it's, it is.

JUSTICE PHIL JOHNSON: Compensation for services rendered.

ATTORNEY GARY A. BEAHM: Yes, sir.

JUSTICE PHIL JOHNSON: And how about VA disability? Is it pay, compensation for services.

ATTORNEY GARY A. BEAHM: They call it pay.

JUSTICE PHIL JOHNSON: Who does?

ATTORNEY GARY A. BEAHM: Well, I'm saying, I mean, the statute calls it a pay. I mean, you know, but it's nontaxable.

JUSTICE PHIL JOHNSON: What statute? What statute?

ATTORNEY GARY A. BEAHM: I'm saying the VA statutes, the.

JUSTICE PHIL JOHNSON: It calls it VA, VA disability.

ATTORNEY GARY A. BEAHM: I mean, yeah, it's disability pay, yes.

JUSTICE PHIL JOHNSON: It (unintelligible) excuse me.

ATTORNEY GARY A. BEAHM: I'm sorry.

JUSTICE PHIL JOHNSON: Does the VA statute call it disability pay?

ATTORNEY GARY A. BEAHM: Oh, yes, yes. I'm, I'm telling you that it is a pay, but I'm not trying, I'm not making the argument that this court in some fraction has a right or that my clients have a right to go against this disability, I mean this VA disability. I can't do anything. I can't prevent him from making an election to take this pay, but he does it at his peril, is what I'm saying. If you have an order that awards you a, sum of all of the retirement to go back in and, and if you elect if you make this election, remember he made this 30 years after this divorce decree and this woman, my client's 83 years of age and you can imagine the impact it has on her monies for this, you know, for this, this period of time, uh, to allow him to go back and, and take this economic advantage because now not only does he not have to pay, uh, his former spouse any portion of his retired pay, but he gets it tax free. A case in mind that I've got coming up on this very and this CDRSC, this combat-related pay is the same deal. My client in that case was getting \$2,000 a month for a full colonel's part of her, that pay. He waives his pay to take this combat-related disability pay. Her pay goes from \$2,000 a month to \$200 a month. She has to sell her house and move in with her mother in North Carolina. Now, I think courts have to be fair. We have to apply the law, but there, there's got to be some equities in these things.

JUSTICE DON WILLET: How do you reconcile Berry and Burson?

ATTORNEY GARY A. BEAHM: Well I'm saying that Berry is a, is a case of res judicata. I'm saying it's res judicata. Now, what, what is collaterally attacked? What can you collaterally attack? You can collaterally attack a void judgment, but you can't collaterally attack a voidable judgment.

JUSTICE NATHAN L. HECHT: But Burson is just like this.

ATTORNEY GARY A. BEAHM: Well so is, so is Berry.

JUSTICE NATHAN L. HECHT: So what, so what's the answer to Don Willett's question then.

ATTORNEY GARY A. BEAHM: Well I'm saying that those were direct appeals too. I believe Burson was a direct appeal and not a.

JUSTICE NATHAN L. HECHT: Well Burson's a habeas.

ATTORNEY GARY A. BEAHM: Well, I mean, but it's still, all right, but at any rate, I'm saying that we, we don't, you know. If we go back, if you look at, if you look at the language in Baxter v. Ruddle, which is a Supreme Court Case 19, out of Texas here, 1990 and this is after. This is after Burson and this is after Mitchell and all those other VA cases, but I'm saying, the, it, it, it, it talks about res judicata and that's and that's the issue. It may be, it may be a, um, um, a voidable case. It may have been that the, that the Court made a mistake when they, when they made that judgment, but they made that judgment and the respondent or the.

JUSTICE PHIL JOHNSON: You lost me on that. The Court may have made a mistake when it did what?

ATTORNEY GARY A. BEAHM: It may have been voidable. I'm saying it may have been a voidable judgment.

JUSTICE PHIL JOHNSON: Are you talking about the judgment in this case?

ATTORNEY GARY A. BEAHM: No, I'm talking, no, I'm talking, well, yes, it could be any, any case that's, that's where res judicata is involved, uh, uh, 1976 case. I mean, I'm talking about Baxter v. Ruddle is what I'm talking about okay.

JUSTICE NATHAN L. HECHT: I take the Petitioner's position to be sure, it's res judicata. It just doesn't include VA benefits.

ATTORNEY GARY A. BEAHM: No, but I'm saying that, we're saying that it includes all benefits. It includes all of the, I mean, by the very definition of it and all these cases are involving VA disability. I mean, this Court's ruled on this umpteen times since 1970 or 1981 and I'm saying that in Baxter v. Ruddle, I don't know. I've never seen it set aside.

CHIEF JUSTICE WALLACE B. JEFFERSON: What, what case says all retirement benefits includes VA benefits?

ATTORNEY GARY A. BEAHM: I'm going to say, uh, Bax-um, Jones v. Jones will say that and, and, and it will cite back to those cases that, you know, that indicate that. And also look at the language in the, in the, in the tracing language in the, in the Hovermale case because it was cited in the Baxter v. Ruddle cases and that was where we were, it was a contempt case that involved all retirement pay. It went through a three-panel court in San Antonio. Uh, Judge Peoples was the judge in the case and, um, I think it, it's, and, and like I said, it was, it was decided in Baxter v. Ruddle, but, again, it's we're continuing that this is a collateral attack on a final judgment and, um, we, we think it's, it's not permissible and my client should be allowed to leave or, or have this case go back to the, to the state court and, and get what relief she's entitled to.

JUSTICE PHIL JOHNSON: Counsel, let me ask a question.

ATTORNEY GARY A. BEAHM: Yes, sir.

JUSTICE PHIL JOHNSON: Can the government simply suspend and cut off the retirement pay either disability or regular retirement pay.

ATTORNEY GARY A. BEAHM: I don't understand the question. I don't.

JUSTICE PHIL JOHNSON: Do they have a, does the government have an obligation to continue that pay, uh, or can it just, is it a gratuity?

Is it pay at the convenience of the government?

ATTORNEY GARY A. BEAHM: No, sir. I think once he qualifies for it and he's entitled to it.

JUSTICE PHIL JOHNSON: How about disability? The VA disability?

ATTORNEY GARY A. BEAHM: I would, I'm, again, I'm not sure that if a guy would come back. I mean, there are different, different types of VA disability. For example, a guy could be on temporary disability retired list where that might be subject to review. I'm assuming, uh, and I don't have any knowledge of that, but I'm assuming once there's a final award, it is a final award unless there was some fraud or something that was per---

JUSTICE PHIL JOHNSON: But we don't know that one?

ATTORNEY GARY A. BEAHM: No.

JUSTICE PHIL JOHNSON: Your position is (unintelligible).

ATTORNEY GARY A. BEAHM: No, and I'm not saying and there's a bunch of cases. I mean, we're not saying that, that this member could not go out and do that. This Court, the Trial Court can't go order him to, uh, uh, you know, to pay her anything on the disability, but he, the Court can order her, uh, order him to, um, to pay her X number of dollars out of, out of other funds or whatever and that's, and that's our argument.

JUSTICE DON R. WILLETT: What's the dollar difference in what your client receives?

ATTORNEY GARY A. BEAHM: Uh, it was, um, there for awhile it was down to just almost 60% less. Now it's gone back up.

JUSTICE DON R. WILLETT: What does that translate to in dollars?

ATTORNEY GARY A. BEAHM: Well, it was \$30,000 is that we've sued for. That, that was the differential. Now what is interesting in this case is is that subsequent, in 190-in 2004, the Federal government came out with this CDRP, combined disability and retired pay and they did it for the reason that in private accounts, in the private, uh, business, you had a right to have both VA disability or disability plus your retirement plans. Why should you have to give up part of your retirement plan to get, uh, to get the disability? So they allowed a member to do both, to get both of those. When they did that, the disposable retired pay, which is the part that the, that the former spouse gets, basically stayed the same and it will, they're factoring that in. In 2014, it will be 100% across the board. So some of these issues are going away, except as I previously mentioned into this combat-related disability pay, which is a totally different issue. That's it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

JUSTICE NATHAN L. HECHT: What about the equities, Mr. Anderson? I mean, I know, I know your client's, uh, disability was not voluntary, but it does look like he's getting more money, makes an option. He gets more money, his former spouse gets less.

REBUTTAL ARGUMENT OF RYAN G. ANDERSON ON BEHALF OF PETITIONER

ATTORNEY RYAN G. ANDERSON: Absolutely true. Absolutely true and there is, that's just the facts of the case and there's nothing, there are no indications. This is a very thin record and that's why I think the issue before this Court is so narrow that there is no indication that this was done in bad faith or in malice or anything. He's disabled. A medical board found him disabled and in order to receive these VA benefits, he is required to waive it. Once you enter in to that, you can't do anything. Um, and, you know, as far as the equity of

the situation is concerned, I think there are two points to bring up. One is this Court recently pointed out and in the insurance coverage case from the, um, car wreck, um, bad facts made bad law. It's what we always hear and while certainly we're all here to ultimately do justice, I think we have to be very careful about how we go about it, um, especially this Court where your pronouncements on the law are a stone that sets forth ripples that affect everything else and I think that's why this particular case is a very, very narrow case. There may be something else, um, and the Court hasn't asked about this, but if you look at what other states are doing, courts recognize that this can have an adverse impact on the former spouse. Courts aren't immune to it, but that is an issue that hasn't really been developed in this case and so I don't think there's anything; as the Appellate Attorney I couldn't really argue the equities of this other than the only applic--

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JUSTICE NATHAN L. HECHT: It seems to me the, if the parties thought about this ahead of time, uh, as clearly as the issue is focused now, they could have made, uh, uh, arrangements for this eventuality.

ATTORNEY RYAN G. ANDERSON: Absolutely and that brings a great point on Baxter. I, as I say in my briefing, I agree on almost everything that is said regarding res judicata by opposing counsel. In the Baxter case, the critical thing there is the divorce decree at issue grants a half of all right title and interest and then they do their formula, to the gross US Army retirement and/or disability benefits and/or VA disability benefits. Now, we could argue that, wait a minute, the Court didn't have authority to divide VA disability benefits and they don't under Texas law, but that wasn't challenged at the time. So under res judicata that's an incorrect judgment, but you can't come back later and collaterally attack it. But that's not what we're doing here. What we're doing here is we had a clarification request and so we're just trying to determine what does it mean when a court divides all, excuse me, the phrase is so important, all Army retirement pay or military retirement pay. That's the narrow issue we're addressing and back in 1976, it doesn't say anything about VA disability benefits. So we have to decide and counsel argues about terms of art, well this all means gross pay or this means total pay. It doesn't say that and I don't see anything in the cases that I've read that say when this term is used, it really means this. And so if you're a trial court trying to decide how to clarify this order, if necessary, but I can't alter it. I can't modify it. I can't change it. So what I'm trying to do is define what did the Court divide. What property was divided back in 1976. Back in 1976, the law in Texas was VA disability benefits could not be divided. So in light of that law, I think it would be, I, I think it would be completely improper 30 years later to say well wait a minute, the Court must have implicitly divided VA disability benefits when it wrote "All Army retirement pay or military retirement pay" because then we're going to have to and find, implicitly find that the Court violated the law back then.

JUSTICE HARRIET O'NEILL: Is there a trend among other states as to where they've gone on this?

ATTORNEY RYAN G. ANDERSON: No is, is the honest answer and you can look at all of the states and there's a pretty good ALR out there. I can get the cite, uh, you'd be interested in it and courts are going everywhere and the reason more often than not that the courts are going everywhere is when they're trying to figure out what do you do about these former spouses that money is disappearing from? How do we protect

them or whatever vested interests they might have. It all comes down to equitable principles.

JUSTICE HARRIET O'NEILL: So there is no, you say the cases are everywhere?

ATTORNEY RYAN G. ANDERSON: Right, when I say everywhere.

JUSTICE HARRIET O'NEILL: Because you'd have to agree that uniformity on this issue among the states would be something to strive for.

ATTORNEY RYAN G. ANDERSON: Absolutely and then maybe what is at issue in the forthcoming legislation that Counsel addressed. The Congress may have decided, wait a minute, we need to clean this up, but as far as right now, there isn't. I could not divine any trend other than where I did see any sort of trend were in cases that long recognized alimony and so these payments were treated as alimony rather than property division and, unfortunately, that can't apply to Texas because we didn't have alimony for so long. So while we might look at some of the equitable discussion in there and it might be helpful, ultimately it doesn't really resolve it because it's a fundamentally different issue. Here, what we're stuck with trying to figure out is what property was divided and our trial, trial court can't alter that and that's what res judicata prohibits. We can't alter whatever property is divided so we get back to all retirement, Army retirement pay or military retirement pay and ultimately we're stuck with is that property? Does that include VA benefits? And what we've got is Justice Pope's decision in Burson, which says that's not even property. So it can't be divided and I think.

JUSTICE DALE WAINWRIGHT: So then responding to the initial question in, on rebuttal about equities.

ATTORNEY RYAN G. ANDERSON: Uh-huh.

JUSTICE DALE WAINWRIGHT: Uh, you drew a distinction between, uh, in some occasions justice and the law. Um, are there instances when you think justice should trump the law?

ATTORNEY RYAN G. ANDERSON: Well, I think that's what.

JUSTICE DALE WAINWRIGHT: Obviously, we hope almost all the time they completely overlap.

ATTORNEY RYAN G. ANDERSON: Sure, we, we want.

JUSTICE DALE WAINWRIGHT: But sometime, sometimes the equities might suggest something different than the, the law.

ATTORNEY RYAN G. ANDERSON: Ab---

JUSTICE DALE WAINWRIGHT: Can you think of a situation involving parties like this where you, if you were the judge, would say justice should trump the law as to these types of benefits. A lady that is just so bad off or so elderly or lives in a shoe, pick a circumstance.

ATTORNEY RYAN G. ANDERSON: I, I think the way I would answer that and I'm not being cagey and I will be glad to follow up and get more specific is that's why we have equitable powers in courts because I, I think that's where the rule of law, everyone recognizes the black letter of law. Sometimes it leads to a harsh result. Sometimes we just have to accept that. In one case we will accept a harsh result because this rule of law is going to be better for the vast majority of situations and we all know that that happens. But equitable powers permit courts to come forward and try to remedy them when they see fit. Now in a situation like this, the problem with that and I'm not saying the problem of applying that because I think that's appropriate, but here we don't have a record to consider that. I, I would be, I would be doing my client a disservice to try and argue the equity because I don't know the whole situation. I don't know his former wife's

situation. This record is devoid of all of that. We know that she's getting less money than she once did. We also know that my client is 100% disabled and, presumably, requires benefits to help him cope with that.

JUSTICE DON R. WILLETT: When did it become permissible to substitute VA disability pay for retirement pay?

ATTORNEY RYAN G. ANDERSON: For him in specific or the legislation?

JUSTICE DON R. WILLETT: No, generally.

ATTORNEY RYAN G. ANDERSON: And opposing Counsel's much more of an expert on this. I, I think that the VA disability stuff and the required waiver is longstanding. I, I think that goes back.

JUSTICE DON R. WILLETT: Prior to '76?

ATTORNEY RYAN G. ANDERSON: Yeah, I think that goes back in the maybe prior to the '70's because I think the Ramsey case, which was '72, you know, and if Counsel can answer that, I'm glad to cede a second of time to him on that, but, um, because I think it's, I think it's a good issue, but what we know is he is required to waive it and I think to the extent, you know, the equity how to do that, I think the proper thing would be decide and I'm out of time so I want, I'm just going to finish this point for you. I think we have to resolve this point. I don't think the trial court altered the Decree in clarifying that it didn't include VA disabilities. Whether there is something else that could properly be done, I think that goes back to the trial court and then maybe we're back up here in a year arguing whether that was the proper thing, but we will have a factual record then. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. And this trial is submitted and that concludes the arguments for this morning and the Marshall will adjourn the Court.

2009 WL 151210 (Tex.)