ORAL ARGUMENT — 11/10/99
98-1220
HAVLEN V. MCDOUGALL

HIGDON: I am here on behalf of Mr. Havlen and basically the other servicemen that are similarly situated and have been for some time. Our position in this case is that the federal law prohibits the states from dividing military retirement that was not divided in a divorce or that was not treated, or otherwise reserved in an express provision in the divorce decree.

BAKER: The motion for summary judgment in the TC had other grounds, such as the family law statute of limitations, estoppel and latches, and those were argued in the CA. But if I understand your presentation here today, our task is limited to the application of the 1990 amendment to the facts of this case, is that correct?

HIGDON: That's correct.

GONZALES: You said express. Does the statute talk about express treatment? The word "express" doesn't appear in the federal statute.

HIGDON: The word "express" is not specifically specified in the federal statute. But the interpretations that have been given to that by the numerous state courts and state courts in other states that have interpreted the statute clearly indicate that they believe that the intent was that it be an express reservation in the statute. And that is implied from the wording of the statute itself where it says, Reserved to treat. And I think that the dissent of Chief Justice Walker in the *Walton* case certainly points that out, that he does not believe and I think that the majority of CA's in this state do not believe that it was intended to be a "de facto reservation" just because people become tenants in common. If that were the situation, then there would not be this window of opportunity, if you will, that Mrs. McDougal allowed to pass her by. She had many opportunities to file and to obtain a judgment that would "vest her rights" as *Trahan* said...

HANKINSON: You don't have any disagreement with the CA's position that an undivided asset creates a tenancy in common under Texas law?

HIGDON: Under Texas law, that's correct.

HANKINSON: At that point in time then when that co-tenancy is created, is a vested property right also created?

HIGDON: As one of the opinions discusses that people talk about vested property rights, but they consider them vested depending on which side of the coin your on and how they are interpreted.

HANKINSON: If I'm a co-tenant, if I own part of the property by a co-tenancy, why don't I have an ownership interest and an actual property right in that property at the moment the co-tenancy is created?

HIGDON: If that's the case, I'm not saying that that isn't what Texas law says...

HANKINSON: First of all, is that what Texas law provides?

HIGDON: That's what Texas law provides.

HANKINSON: So there is a property right at the point in time the co-tenancy is created?

HIGDON: Yes. But then you have to take into consideration, as I've attempted to point out in my various briefs, if that were the situation, then there would never have been this issue ever be raised. We would not be prohibited, would not have ever been prohibited from dividing property even after the *McCarty* case, or prior to the spousal protection act being passed. If that were the situation, then that vested property right would exist and we would not have been prohibited in the State of Texas from dividing those assets, much less dividing gross retirement benefits which Texas was dividing prior to the decision in *McCarty*.

HANKINSON: And why is that? I'm afraid I don't understand.

HIGDON: Before *Kirkham*, *Mora*, and *Busby*, Texas treated military retirement as a nondivisible asset because it wasn't a vested asset. After those cases, then we treated it and we are able to divide gross retired pay even to the extent of dividing disability retired pay and VA disability retired pay. Even in *Johnson* and *Bursum(?)*, in those two situations the court below divided the VA disability case. But this court in 1979 with the *Johnson* case held that that wasn't divisible because the federal statute didn't allow it. In 1981 when *McCarty* was decided, then all of a sudden we could no longer divide any kind of military retirement. Congress stepped up and said, No, this isn't right, and passed the spousal protection act. We went back dividing both the gross retired pay, which included disability retired pay. But we exempted out because this court had said, Federal law supersedes the issue of the VA disability. Then we continued to divide gross retired pay as this court decided in *Greer*. And then after the *Mansell* case, then all of a sudden this vested so-called right that Mrs. McDougal has shrunk to only disposable retired pay. And then that has shrunk as congress has changed the definition of what "disposable retired pay" is. There is at least 8-9 different types of former spouses in the State of Texas because of the definition of "disposable retired" pay changing from time to time since the passage of the spousal protection act in 1982.

I just don't think that there is any vested right until such time as there's a final judgment as *Trahan* indicated in the last of the *Tayhan* cases. Beyond that point if there was a vested property right, then federal law wouldn't have any affect on anything that was done. But in this particular situation, the congress has said that it doesn't apply. And in some states they even go so

far and I think even in California they go so far as to say that res judicata in some circumstances don't apply.

HANKINSON: Isn't that then a question of the competing interests between federal and state law? Isn't that really what's a issue in that instance?

HIGDON: I don't believe so.

HANKINSON: Separate and apart from military retirement benefits, putting aside all the different variations in the law that have occurred over time and the changes that have happened in Washington with respect to this, in Texas if a person has a co-tenancy in property does that person have a vested property right under Texas law?

HIGDON: They have a property right subject to the vestment. I wouldn't say that it is per se vested until there is adjudication of what that right is, because of all the other things that come into play. Whether or not there's been a repudiation as we require in Texas. Whether or not there are other circumstances, such as latches. Assuming that we go back to the TC, I still have a latches argument that could be made. I believe the CA decided wrongly, although I didn't bring it to this court, on the issue of the other matters that were before it in my summary judgment.

BAKER: If you haven't preserved those theories before this court, how can you raise them again if you go back on just this issue?

HIGDON: I believe that the issue, as I understood the CA's opinion, to the extent that latches would apply that my client has been detrimentally harmed by the time limit that was going on. My understanding of that decision was that I would be able to do that. If I'm in error, I'm in error.

BAKER: I understand what you're saying now. But this case presents the issue that we didn't reach in the _____ case?

HIGDON: Yes.

BAKER: And so we haven't written on this. And your view is we don't have the freedom to make a decision one way or the other. We're bound by what the 1999 amendment was and its purpose, and are therefore in your view required to decide based on *Knowles* and *Hennessy*, etc, is that right?

HIGDON: Yes. That's the sum and substance of my argument. I would say, as I pointed out, I just feel like that we have this flow starting before *Kirkham* and then in *Kirkham* on up that things have changed, and if we are going to talk about vested property rights in this particular asset. And I'm not saying that - and I'm admitting that this is a unique asset. Typically in divorce situations

retirement is treated as a unique asset. And although other assets may be divided unequally, almost universally, it is always treated as a unique asset.

ENOCH: When *McCarty* was decided was it in determination that federal law that preempted state community property law with respect to retirement benefits?

HIGDON: Only military retirement benefits. It said that congress had never given the states that right.

ENOCH: So as of the date of *McCarty*, there was no community interest in military retirement benefits?

HIGDON: That's my opinion. Yes.

ENOCH: So any divorce decree that was affected by state law that said, If you failed to allocate community property, you take it as tenants in common would have no effect on military retirement benefits as of *McCarty*?

HIGDON: Yes.

ENOCH: Any CA now that would hold that a divorce decree that said that any property not allocated specifically is awarded tenants in common could not have addressed military retirement benefits under the *McCarty* decision?

HIGDON: It's my opinion that if the benefit was not - during the *McCarty* era if they did not reserve or make some mention that because we're up in the air...

ENOCH: Well the divorce decree had to treat it. My question was a divorce decree that says, If we have not treated community property specifically, then it's divided tenants in common would not be affected because *McCarty* said you did not have a community interest in military retirement benefits?

HIGDON: At that point in time, yes. Although there have been cases that after that then turned around and divided (I can't cite the court to any at the moment) military retirement after the passage of the spousal protection act, where this military _____ is not specifically mentioned.

ENOCH: The spousal protection act, an amendment to the act that said, if the divorce decree originally had treated military assets, you could go back in and fix that, right?

HIGDON: Yes.

ENOCH: And the *Mansell* case came along before or after that amendment?

HIGDON: After, in 1989.

ENOCH: And the *Mansell* case took on the California SC for concluding generally that since it was a community property state all of their divorce decrees generally treated military retirement benefits as a residual matter and as a result you could open those up. Didn't *Mansell* address that very issue?

HIGDON: Yes.

ENOCH: And it said, No, you couldn't do it that way.

HIGDON: It was dealing predominantly with the issue of a disability in that particular situation. And the issue was whether or not the interpretation of this spousal protection act included only disposable, that is after taking off survivor's benefit plan premiums, disability, VA waivers and other things that are covered in this statute, federal taxes at one point in time, whether that is what the statute says or whether you could continue to divide gross retired pay as the courts had been doing up to that point in time. And the SC said that you can only treat disposable because that's what the statute says. And then they had a collateral issue of the res judicata, which they said, We're not treating because it isn't before us. And when it went back then the court then determinated whether or not the res judicata barred _____ _____.

ENOCH: But didn't the SC say that the California decrees had to treat those assets?

HIGDON: That particular issue wasn't before the SC, as I understand it. It was only the issue of whether disposable retired pay applied or not.

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RESPONDENT

LAWYER: I think in *Buys v. Buys*, this court gave direction as to its feelings on this issue of tenancy in common, a vested property right, and whether or not the ex spousal law is controlling. First of all, we have a transition of this ex spousal law that did start in 1981. The changes that we're talking about regarding trying to limit partition suits didn't happen until 1990. There is an inherent difference as to how California and how Texas view military retirement. There is a proceeding in California where military retirement is not really divided until such time as the member actually retires. The case is reopened to get to a mathematical formula. Texas abandoned that procedure about 1976. And now, we have a property right that even though a member may not have been retired, we can divide his military retirement pay due to a mathematical formula.

The question here is simply before the court, is did that court reserve the military retirement for future partition simply by not mentioning it in the original decree? Which they did not.

ABBOTT: If that were permissible why could the statute not have been written without using the word "decree?" In other words, the same purpose and the same end that you want to achieve would have been achieved if the statute read, If divorce, dissolution, annulment, etc., leaving out the word "final decree of" by including the word "decree", why does that not make it absolutely _____ that it show up in the decree to ensure that all parties understand what is being divided here?

LAWYER: I would say simply because of the _____ why did they add the words "or reserves to treat?" And that's what I am saying.

ABBOTT: But reserves to treat also means that in the decree there will be the reservation to treat, because reserves to treat is subsidiary to what actually occurs in the decree itself.

LAWYER: That is the ultimate issue. Does the failure to simply name or divide that asset, does that spring forth in other kind of case?

ABBOTT: It just seems to me that an argument could be made that it would not have to be set out in the decree if the statute itself did not reference the decree. And I'm just wanting to hear your best argument why inclusion of the word "decree" in the statute itself...

LAWYER: I really don't have an answer for that. These cases are interesting. We have the benefit of hindsight that when these cases - in the 1970's often as evidenced by the number of partition suits that we had in the 1980's, military retirement really wasn't considered a true property asset by the courts even though it was defined. It wasn't until 1983 that we had this rash of partition cases that would come up and divide up the military retirement pay. If you look at the decrees that are drawn up today in the division _____ of military retirement are so precise and so specific. In the old days if any mention was given at all it was very cursory.

ABBOTT: Based upon what you just said, being that the decrees that are drafted today are so precise, it would be easy and common to go ahead and specify this in the decree itself?

LAWYER: Absolutely. And I cannot imagine if you have military retirement, which is the biggest, single asset of any one particular parties, assets that are being divided, I cannot imagine in today's court in a court in Texas where that would ever not be divided.

O'NEILL: Other than the CA's opinion in this case, is there any authority across the nation that would support your position, or in fact are all the decided cases, all be they a few to the contrary?

LAWYER: I would say that Mr. Higdon is right in his brief - probably the landslide of the cases are contrary with this particular position.

OWEN: What do we do about the federal code? We are bound by that aren't we?

LAWYER: Yes, we are bound by the federal code to the extent, and it does allow us to divide up that...

OWEN: It specifically says though in subsection 7, that if you have a decree that was before June 1981, that a subsequent amendment after that date it says, to provide for a division of retired pay is unenforceable. How do we deal with that?

LAWYER: It's again back to the language "reserves to treat."

OWEN: I'm talking about the federal code separate and apart from the statute. The code is very specific isn't it?

LAWYER: But that section is unenforceable, but you have to read it with §4 of 1408 that says, either treats or reserve to treat. If it doesn't reserve to treat it, then it is an unenforceable action.

ENOCH: But reserve to treat in your view presupposes that there was a community interest in the military retirement benefits prior to the *McCarty* decision?

LAWYER: And there were.

ENOCH: But if *McCarty* says that in community property states the spouse has no interest in the military retirement benefits, then any divorce decree that did not specifically treat military retirement benefits but simply had a residuary clause that said, If there is any community property out there we haven't divided, they take it as tenancy in common, could not have applied to military retirement.

LAWYER: That's probably right.

ENOCH: And if that were the case, then any post spousal protection act that says, If the judgment treated the property, you can go back and amend it to now get military retirement? If that were the case, then none of those judgments that simply had a residuary clause in it, they were decided prior to *McCarty* could not have treated military retirement benefits?

LAWYER: But they did.

ENOCH: I think you agree that *McCarty* says that in community property states military retirement benefits are not community property, the spouse has no interest in it?

LAWYER: But from the *McCarty* case it says there is a property right. The ex spousal law was designed primarily to correct whatever ambiguities there were in the *McCarty* case. And it sprung forth from there this concept that this is a treatable piece of property that can be divided. That's what caused the problems with the decrees that were awarding all of the property to the

member during this hiatus between the time of *McCarty* and the ex spousal law. The problem comes up is that what happened with the cases that didn't treat where the courts say, well if we don't have jurisdiction, we don't have jurisdiction so we're going to just leave that in _____ and not divide it. Well as soon as the espousal law was passed partition suits were filed and partition suits divided the property. So that property right sprung forth from the 1981 case.

ENOCH: Then *Mansell* came along and raised the question that this statute, talking about treating, could not be applied blanket in community property states who argued that even though the decree was silent as a matter of law in community property states military retirement benefits would be set in tenants in common. So didn't *Mansell* raise the question that you can't use your argument to say that all these decrees treated military retirement benefits?

LAWYER: I don't think so. I would agree with Mr. Higdon in the extent that I think *Mansell* was talking about, you have questions of VA disability and what is disposable pay and what can you divide and what can't you not divide. And it stood for the position that you cannot divide VA disability because it's treated by a different statute and is removed from this military retirement pay. I may be skirting the issue, but I don't think that that stood for that position, that this now becomes solely the dictate of the federal court that we can't divide up this military pay in accordance with Texas law.

GONZALES: You've got this federal bar to opening up these decrees that occurred before 1981. In order to get over that bar you've got to find that the issue of the military retirement benefits had been treated in the decree in some fashion?

LAWYER: Or reserved to be treated.

GONZALES: Let's say that here in Texas under your argument if the decree is silent because by operation of law the man or woman hold the property as tenants in common it's been treated. And then you've got it seems to me another group of decrees where expressly the parties have indicated how to deal with this property. What is left? What kind of decrees would then not be able to avoid the bar here in Texas?

LAWYER: If you're talking about a pre-1981 decree that is silent on military retirement pay, all of those are open to be divided.

GONZALES: Because they are treated by operation of law according to your argument?

LAWYER: Unless a latches or some other defense that we're not here on today...

GONZALES: Right. And then you've got the other group. Let's say where the parties have expressly treated, having expressed that with military retirement benefits?

LAWYER: How would they have dealt with it outside making a division order on the property, because there is no other way of treating it in a divorce but dividing up pursuant to a formula based on the rank, number of months.

GONZALES: Would there be any decrees that would be barred?

LAWYER: I can't imagine any that would be affected by it. It's a simple issue that, and we're talking about really a very finite number of decrees that were entered before 1981 and it's just the question of simply, tenants in common, and wouldn't be a bar to a petition...

ABBOTT: Well in essence because of that, because we do have the tenancy in common basically this statutory provision has no effect in Texas?

LAWYER: Exactly right. Well it has effect but we're saying we have complied with the statute, that we have reserved to treat this particular asset by a later division order.

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REBUTTAL

HIGDON: A question that was asked of Mr. _____ dealt with the express treatment of the reservation in the decree, and I would refer the court to the *Hennessy* case out of New Mexico, which was attached to my appendix, which does say, We emphasize that the statute requires the decree to reserve to treat (and the word "decree" is italicized there) a portion of the pension as property of the nonmilitary spouse. And I would maintain that clearly this language would not have been in the order if it did not imply and direct that such a express reservation occur before you could just have this de facto situation.

HANKINSON: Of the cases that you cite to us from other jurisdictions, is the New Mexico case the only one in which the law is comparable in a state to Texas in terms of this operation of law principle?

HIGDON: Louisiana also treats and they have both...

HANKINSON: The same way in terms of the same operation of law effect?

HIGDON: Yes. And I believe also California cases are the same vein. It's just that the difference from Texas and California is that California also has a statute that allows them to go back in and reopen these cases, but they also have some statute of limitations of their own. That was another interesting thing that...

HANKINSON: But California has the same underlying way of treating by law undivided assets?

HIGDON: Yes. That's my understanding of their position.

HANKINSON: Any other states besides California, New Mexico and Louisiana?

HIGDON: I think that the state of Washington which is a community property state also does the same thing. But I do not have any cases out of the State of Washington. Some of the states around like Idaho has one, but they have their own statutes of limitations so they decided the cases on their own statute of limitations or on a latches situation, which we don't allow here from that standpoint.

HANKINSON: I'm just trying to identify the states that would deal with this underlying issue of interpreting the statute in light of the property law comparable to Texas.

HIGDON: Louisiana and New Mexico and California for sure. Especially the states of Louisiana and New Mexico and there are at least five cases out of the State of Louisiana that all rule the same way. Two of them being federal DC cases and two or three of them being state court cases.

GONZALES: If this decree had contained a residuary clause, would your argument be that the military retirement benefits had or had not been treated?

GONZALES: If it contained a residuary clause like the *Buys* case, I wouldn't be here.

GONZALES: So the decree does not necessarily have to expressly mention the term "military retirement benefits?"

GONZALES: I do not believe it does. I believe that the family law practice manual uses some very global language now and it just talks about "retirement benefits" or something to that nature, and that's sufficient to pull it in. And there are cases in our state, which I didn't cite because they weren't relevant to the issue before the court, that discussed that situation. Some fairly recent cases because these are still being brought before the court. And contrary to what Mr. Bain says, he and I both have cases on both sides of this issue or clients on both sides of this issue waiting the outcome of whatever we do here that will undoubtedly be brought or not brought depending on what this court does with this particular issue.

BAKER: If the court comes out contrary to your viewpoint what are you going to tell the clients that you represent on the other side?

HIGDON: Well I would like to ask that of Mr. Bain. But I have already discussed that with those clients and have advised them that I am here on this particular issue. And that depending on what happens, that case will have to go away if I'm in Mr. Bain's situation.

O'NEILL: If the residuary clause merely expresses what the common law does anyway,

aren't we elevating _____ over substance by requiring that?

HIGDON: I don't believe so since the federal statute specifically deals with this. We have in Texas amended the family code several times to try and clarify some of these issues as well as to make it clear as to exactly what we are and we aren't doing in that regard. I think that in this particular situation it is a unique asset and the federal government has tried to make it somewhat uniform nationwide and that's the reason why they have done it the way they have. And my personal opinion is, that I think that some of our cases in the State of Texas and elsewhere have been wrong, we come back to the issue of whether or not just how important res judicata is. Because *Trahan* is a case in point. Here he happened to be at the wrong place and the wrong time. Every time that he got before the court it just so happened another event happened and changed his window of opportunity and improved Mrs. Trahan's window of opportunity. Because certainly in that situation, he was before the court at least I think there are four different decisions involving Mr. Trahan out of the Austin court and this court, and he just happened to be on the - he was here on one point and then they passed the spousal protection act, as this court was remanding the case to the TC, and then he was barred by res judicata. And yet, he comes back in 1990 and says, Well now that the federal statute says that I'm only required to pay her up to 1992, and this court said, You are barred by res judicata. So the same thing applies with Mrs. McDougal. I just think that in that situation we've got the federal statute and we are either going to say yes it's the law of the land, or not it isn't. And I believe the State of Texas at this point is the only one and if we don't uphold the federal bar, then we're going to stand alone among all the other states.