

SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

*divorce → military
retirement pension
pay*

CYNTHIA G. BURNETTE (LAPOINTE),
Appellant,

CA 97-04

vs.

ORDER

MONTE H. BURNETTE,
Appellee.

This is an appeal from a Memorandum Opinion entered on April 22, 1997, by the Honorable Eugene Jones, Associate Tribal Judge. Judge Jones in his Memorandum Opinion denied the Appellant's application for an order determining a specific amount of Appellee's military retirement benefits under the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. 1408.

The record shows that the parties were married to each other on November 17, 1978, and were divorced from each other on November 27, 1990. During the twelve years of marriage the Appellee served that entire time in the military.

At the time of the divorce the parties entered into an agreement whereby the Appellant agreed not to claim alimony, but reserved her claim to a share of Appellee's military benefits upon his retirement.

After serving twenty years in the Marine Corps, the Appellee retired and is presently receiving a military pension. Appellant applied for a spousal share of the retirement benefits pursuant to the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. 1408. The Defense Finance and Accounting Center denied Appellant's application for a portion of the retirement benefits because the divorce decree did not provide for payment of a fixed percentage of disposable retirement pay.

Because of the denial, Appellant filed her motion for an order specifying a fixed amount of spousal support pursuant to the parties agreement. After hearing, Judge Jones denied the requested relief on the ground that military pay "was available for division" at the time of the divorce and that the parties failed to include an amount in the settlement agreement. Judge Jones further concluded that the original decree which allotted the property was final, conclusive, and not subject to subsequent modification.

OPINION

Judge Jones' perception of the facts and legal conclusions are clearly erroneous. The parties agreed specifically that Appellant would not claim alimony at the time of the divorce, but would reserve her claim for spousal support when the Appellee retired from the military. In relying on case law as a guide, the trial court ignored the intent of the parties' settlement agreement. The intent of the agreement was to preserve rather than waive the Appellant's rights to a portion of the military retirement benefits. The language of the reservation is clear--"The parties mutually agree that the Plaintiff (Appellant) does not and will not waive any rights she may have under the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. 1408. Should the Plaintiff decide to exercise her rights, the parties further agree that the Defendant retains his right to contest Plaintiff's election." (emphasis supplied)

That reservation is clear. It allows the Appellant to assert her rights to spousal support when the Appellee retires from the military service and is contrary to the trial court's statement

that "Military retirement pay was available for division in the marital estate" On the contrary, retirement pay was not immediately available because the Appellee had not yet retired. In 1990, Appellee's retirement pay was an expectancy that would be available when the Appellee retired. The Defense Financing and Accounting Center does not determine the amount of Appellant's claim but defers to the court for a determination in the divorce decree and the trial court should have determined the exact amount that Appellant was entitled to. Buick v. Boyd, 37 Cal. App. 508. Smith v. Smith, 51 N.W. 2 276. The cited cases hold that parties may by stipulation withdraw property issues from the court's consideration and reserve the issues for subsequent action. That is precisely what occurred in this case and the trial court's order denying Appellant's motion to establish a definite amount of Appellant's claim must be reversed and remanded to the trial court for a hearing on the merits of Appellant's claim.


ORDER

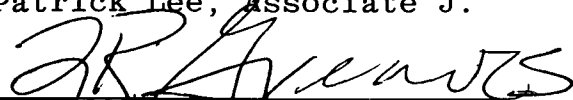
Wherefore it is ORDERED that the Memorandum Opinion including the denial of Plaintiff's motion to clarify is hereby VACATED.

It is further ORDERED that the case is remanded to the trial court with specific instructions to hear and determine the Appellant's claim under the Uniformed Services Former Spouse's Protection Act.

Done this 20 day of October, 1998.

BY THE COURT:


Patrick Lee, Associate J.


Leroy Greaves, Associate J.

ATTEST:


Clerk

(SEAL)