IN THE SUPREME COURT OF TEXAS

NO. 07-1065

RAOUL HAGEN, PETITIONER,

v.

DORIS J. HAGEN, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued January 14, 2009

JUSTICE BRISTER, joined by JUSTICE O'NEILL and JUSTICE MEDINA, dissenting.

The Court says this divorce decree did not divide VA disability pay, and even if it did it is binding because it was voidable rather than void. I disagree on both counts.

I would also try a little harder to find an alternative to today's judgment, which allows an ex-husband to cut off a community asset awarded to his ex-wife. We should remand for Doris Hagen to pursue further proceedings; because the Court instead renders judgment against her, I respectfully dissent.

I. Did This Decree Divide VA Disability Pay?

Military retirement pay and Veterans Administration disability pay have different purposes and pedigrees.[1] Were we writing on a clean slate, I might agree that this decree dividing retirement pay did not divide VA disability pay. But we are not writing on a clean slate.

This Court held in 1990 in *Berry v. Berry* that a decree dividing military retirement pay *did* divide VA disability pay that arose later.[2] In *Berry*, we required a veteran to keep paying 25 percent of his total benefits to his ex-wife even after most of those benefits were converted to VA disability pay. The Court says that decree did not divide VA disability pay, but merely required that "the wife was to be paid an amount computed on the husband's gross retirement pay before deductions."[3] That is not what we said at the time, explicitly stating that the lower courts erred by "refusing to enforce the final divorce decree with respect to Veterans Administration disability benefits."[4] And to avoid admitting that *Berry* divided VA disability pay, the Court reinterprets it as a provision for alimony, which Texas courts cannot award.[5] The *Berry* decree effectively divided VA disability pay, no matter how hard the Court tries to deny it.

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[1] *See McCarty v. McCarty*, 453 U.S. 210, 211-12 (1981).

[2] 786 S.W.2d 672, 674 (Tex. 1990).

[3] ___ S.W.3d___,___.

[4] *Id*. at 672.

[5] *See Stubbe v. Stubbe*, 733 S.W.2d 132, 133 (Tex. 1987) ("Court ordered alimony, available in most other jurisdictions, is not available in Texas as it contravenes Texas public policy.").

The decree in *Berry* divided "Air Force disability retirement pay" while the decree here divided "Army Retirement Pay,"[6] but "disability retirement pay" is defined as "retirement pay,"[7] and the statute providing for it applies to all branches of the armed forces.[8] Because both decrees divided "retirement pay," it is hard to see why the decree in *Berry* divided VA disability pay but the decree here did not. Indeed, that was the precise conclusion of the court of appeals.[9]

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[6] The decree here awarded Doris Hagen:

> One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, IF, AS, AND WHEN RECEIVED, and the Petitioner RAOUL HAGEN shall be a Trustee of the One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, for the use and benefit of DORIS J. HAGEN, and shall pay the same immediately upon each receipt of the same, to DORIS J. HAGEN.

The decree in *Berry v. Berry* provided:

> The parties agree that husband's Air Force Disability Pay ("Retirement Pay") is Community Property of husband and wife . . . . Husband shall . . . disburse to Wife monthly, as received, at a bank or other address of her choice, twenty-five percent (25%) of said Retirement Pay computed on the gross amount thereof before any deductions.

[7] *See* 10 U.S.C. § 1201(a) ("***Retirement.***--Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical *disability* incurred while entitled to basic pay or while absent as described in subsection (c)(3), the Secretary may *retire* the member, with *retired pay* computed under section 1401 of this title . . . .") (emphasis added); *see also Ex parte Burson*, 615 S.W.2d 192, 193 (Tex. 1981) (referring to "Air Force disability retirement pay" as "military retirement pay"); *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970) (holding military disability pay should be treated as military retirement pay).

[8] *See* 10 U.S.C. § 1201(c).

[9] ___ S.W.3d___,___.

The Court says the decree here is different because it did not divide "gross" retirement pay, as the *Berry* decree did. But this decree awarded Doris Hagen a portion of "*all* Army Retirement Pay." How can "all retirement pay" mean something less than "gross retirement pay"? Does "all income" mean less than "gross income"? Or "all sales" less than "gross sales"? The Court's hypertechnical distinction between "all" and "gross" may lead to problems in many areas of the law.

The Court finds it significant that in *Berry* a monthly pay stub included figures for gross retirement pay and then a deduction for VA disability pay. But this observation depends on an anachronism: the statute deducting VA disability pay from gross retirement pay was enacted in 1982,[10] several years *after* the divorce decrees in *Berry* and this case. Whatever was meant by "gross" or "all" retirement pay in either decree, it did not include a statutory construct that existed only in the future.

At the time these decrees were signed, any military retirement pay (whether standard retirement pay or disability retirement pay) had to be waived dollar-for-dollar to receive VA disability pay.[11] If the *Berry* decree dividing retirement pay included amounts later waived to receive VA disability pay, then so did this decree. We must either follow *Berry* or overrule it. For the reasons stated next, we should overrule it.

II. Can a Court Divide Disability Pay Before Disability Occurs?

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[10] *See* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982).

[11] *See* Veterans Benefits Act, Pub. L. No. 85–857, 72 Stat. 1231 (1958) (codified at 38 U.S.C. § 5305).

Federal law prohibits division of VA disability pay upon divorce.[12] But because we construed the *Berry* decree to apply to VA disability pay and that decree was not appealed, we held the decree could not be collaterally attacked as it was voidable rather than void.[13]

It is generally true that a divorce decree cannot be collaterally attacked on the ground that it improperly divided community property.[14] But any decree can be collaterally attacked if the court issuing it had no jurisdiction.[15] The decree in *Berry* falls under both rules.

Many cases discuss whether a judgment is void or voidable, but in fact a judgment can be both. If a plaintiff with no standing obtains a judgment for negligent infliction of emotional distress, the decree is both voidable (negligent infliction is not a valid claim) and void (standing is jurisdictional). If a defendant fails to appeal a default judgment by a court with neither personal jurisdiction nor proper venue, the judgment is again both void and voidable. If an appellate court issues an advisory opinion that misinterprets the law, its judgment is both void and voidable. In all these cases, the judgment can be collaterally attacked because it is void, even if the ground that renders it voidable cannot be reached.

I agree the *Berry* decree was voidable because it divided VA disability pay in violation of federal law. But it was also void because it divided VA disability pay before any disability existed,

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[12] 38 U.S.C. § 5301(a)(1); *McCarty v. McCarty*, 453 U.S. 210, 211-12 (1981); *Ex Parte Burson*, 615 S.W.2d 192, 196 (Tex. 1981).

[13] 786 S.W.2d 672, 673.

[14] *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003); *Baxter v. Ruddle*, 794 S.W.2d 761, 762–63 (Tex. 1990).

[15] *Reiss*, 118 S.W.3d at 443.

or anyone knew whether one ever would. Res judicata applies to issues that "were raised or could have been raised in the first action."[16] When a veteran's disability arises 27 years after divorce (as was the case here), it could not possibly have been raised in the divorce because no one knew then if any disability would ever occur, much less when it would begin or how extensive it would be.

Courts cannot decide hypothetical claims.[17] Doing so violates the constitutional provisions for separation of powers and open courts.[18] A judgment dividing VA disability pay when no disability has yet occurred is void under the rules of both ripeness and standing.[19] Ripeness prohibits suits involving "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."[20] Standing prohibits suits by those who are not personally aggrieved,[21] as would be true when a person's ex-spouse suffers a disability after divorce.[22] Both ripeness and

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[16] *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 86 (Tex. 2008).

[17] *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008).

[18] *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004); *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001); *see* TEX. CONST. art. I, § 13 & art. II, § 1.

[19] *See Inman*, 252 S.W.3d at 304-05 (noting that, for standing, the claimant's alleged injury must not be "hypothetical"); *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 232 (Tex. 2001) ("The ripeness doctrine avoids premature adjudication on a hypothetical set of facts.").

[20] *Perry v. Del Rio*, 66 S.W.3d 239, 250 (Tex. 2001) (quoting 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532, at 104 (2001 Supp.)); *see also Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000).

[21] *Inman*, 252 S.W.3d at 304-05.

[22] *Cf.* TEX. FAM. CODE § 3.101 ("Each spouse has the sole management, control, and disposition of that spouse's separate property."); *Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008) (stating that "personal injury claims are the separate property of each spouse").

standing are components of subject-matter jurisdiction,[23] and thus can be raised in a collateral attack.[24]

Of course, divorce decrees often divide future retirement benefits if, as, and when received, including military retirement pay.[25] But pensions are a form of deferred compensation earned during marriage, and at the time of divorce constitute a contingent interest in property.[26] By contrast, post-divorce VA disability payments are not "earned" during marriage and "are not property."[27]

"Neither this Court, nor the trial court, has the power to counsel a legal conclusion on a hypothetical or contingent set of facts."[28] At the time of the divorce here and in *Berry*, the prerequisite for VA disability pay — a disability — was hypothetical. Other branches of government may decree that disability pay arising after divorce should be shared with a former spouse, but the

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[23] *McAllen Med. Ctr.*, 66 S.W.3d at 231 (noting "the constitutional requirement that the court of appeals have subject-matter jurisdiction, and both ripeness and standing are necessary components of that jurisdiction").

[24] *See Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008); *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000).

[25] *Shanks v. Treadway*, 110 S.W.3d 444, 446 (Tex. 2003); *Cearley v. Cearley*, 544 S.W.2d 661, 663 (Tex. 1976).

[26] *Cearley*, 544 S.W.2d at 665.

[27] *Ex parte Burson*, 615 S.W.2d 192, 194 (Tex. 1981) ("Veterans Administration benefits . . . are not property."); *see* 38 U.S.C. § 5301.

[28] *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 853 (Tex. 2000).

courts cannot.[29] Accordingly, *Berry* incorrectly held that such a decree was voidable rather than void.

III. Can Waived Retirement Pay Be Recovered?

In most states, a divorce court can order alimony or child support paid from VA disability benefits.[30] But in community-property states like Texas (as already noted), a divorce court cannot divide VA disability pay because it is not assignable property.[31] This problem can be mitigated when disability occurs *before* divorce by considering VA disability pay in dividing all the other property between the spouses in a manner that is just and right.[32] But when disability occurs *after* divorce, a just-and-right division of retirement benefits may be rendered neither just nor right by allowing one party to cut off the other's share of those benefits.[33]

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[29] *See, e.g.*, *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998) ("Under the separation of powers doctrine, courts are without jurisdiction to issue advisory opinions because such is the function of the executive department, not the judiciary.").

[30] *See Rose v. Rose*, 481 U.S. 619, 630-32 (1987); *Murphy v. Murphy*, 787 S.W.2d 684, 685 (Ark. 1990); *Allen v. Allen*, 650 So. 2d 1019, 1020 (Fla. Dist. Ct. App. 1994); *In re Marriage of Anderson*, 522 N.W.2d 99, 102 (Iowa Ct. App. 1994); *Wingard v. Wingard*, 11 Pa. D. & C.4th 343, 345 (1991).

[31] *See* 38 U.S.C. § 5301(a)(1).

[32] *See* TEX. FAM. CODE § 7.001; *U.S. v. Stelter*, 567 S.W.2d 797, 798 (Tex. 1978); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 17 n.14 (Tex. App.—Waco 2002, no pet.); *Rothwell v. Rothwell*, 775 S.W.2d 888, 892 (Tex. App.—El Paso 1989, no writ); *see also* Maj. Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 MIL. L. REV. 40, 116 (2001) (noting that when disability exists at time of divorce, "courts grant former spouses a form of support or property in lieu of what their share of the retired pay would have been if not for the disability determination").

[33] *See* Michael T. Flannery, *Military Disability Election and the Distribution of Marital Property Upon Divorce*, 56 CATH. U. L. REV. 297, 302 (2007); Brad M. LaMorgese & Robert E.

"In most states, if a former service member unilaterally waives retired pay to receive VA disability pay, the courts will not stand idly by."[34] Surely that should be the rule in Texas too.

The decree here did not just award Doris part of Raoul's retirement pay; it also appointed him trustee of those funds for her use and benefit. As a result, it is hard to see how his decision to waive those funds did not breach his fiduciary duty as her trustee.[35] Nor is it clear why converting retirement pay to VA disability pay did not constitute conversion; while "money can be converted only if it is specifically identified and held in trust,"[36] this money was.

Of course, any judgment against Raoul could not be collected from his disability payments because they are exempt.[37] And they remain exempt after receipt so long as they are held in a form "readily available as needed for support and maintenance . . . and have not been converted into

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Holmes, Jr., *Division of Retirement Benefits: The Impact of Federal Preemption on Women in Texas*, 7 TEX. J. WOMEN & L. 207, 226 (1998) (describing this as "yet another inequity women in Texas are asked to bear").

[34] Bradley, *supra* note 32, at 116.

[35] TEX. PROP. CODE § 114.001; *see, e.g.*, *Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995); *Henry I. Siegel Co., Inc. v. Holliday*, 663 S.W.2d 824, 831 (Tex. 1984); *Hamm v. Drew*, 18 S.W. 434, 436 (Tex. 1892); *Votzmeyer v. Votzmeyer*, 964 S.W.2d 315, 325 (Tex. App.—Corpus Christi 1998, no pet.); *Ex parte Rodriguez*, 636 S.W.2d 844, 846 (Tex. App.—San Antonio 1981, no writ).

[36] *Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008).

[37] 38 U.S.C. § 5301(a)(1).

permanent investments."[38] But if Raoul has other assets or funds from which such a judgment could be collected, there is no reason to prevent Doris from trying.[39]

While Doris pleaded conversion and breach of fiduciary duty in the trial court, she briefed neither when she appealed the trial court's dismissal of her case. But she was relying on the continued validity of *Berry v. Berry*, under which she should prevail unless we overrule it. "When, as here, a party presents her case in reliance on precedent that has been recently overruled, remand is appropriate."[40] Accordingly, rather than rendering judgment against Doris, I would overrule *Berry* and remand in the interest of justice for her to pursue alternate means.[41]

Scott Brister
Justice

OPINION DELIVERED: May 1, 2009

[38] *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962).

[39] *See* Bradley, *supra* note 32, at 117-22.

[40] *Twyman v. Twyman*, 855 S.W.2d 619, 626 (Tex. 1993).

[41] *See* TEX. R. APP. P. 60.3.