

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVA OLVERA,  
Appellant,  
vs.  
JOSE OLVERA,  
Respondent.

No. 38233

**FILED**

OCT 29 2003

JANETTE L. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

Eva Olvera appeals the district court's order denying her motion to enforce against her former husband, Jose Olvera, certain provisions contained in their decree of divorce. Eva alleges that Jose improperly diminished her community property interest in his military retirement benefits by voluntarily waiving a portion of his retired pay in favor of non-taxable disability benefits. The district court denied Eva's substantive claims for relief after concluding that the disposition of community property in the divorce decree was prohibited by the then-applicable federal law.

On appeal, Eva asserts that the district court erred because: (1) her community property interest in Jose's retirement benefits entitles her to the sum she would have received but for Jose's waiver of those benefits; (2) her community property interest entitles her to 41.2% of Jose's "gross" retirement benefits, rather than 41.2% of his net retired pay as determined by the district court; and (3) she is entitled to be named as Jose's Survivor Benefit Plan beneficiary. We agree that the district court erred with regard to Eva's first two contentions; however, we conclude that the district court did not abuse its discretion when it declined to name Eva as Jose's Survivor Benefit Plan beneficiary.

First, the district court erred when it concluded that Eva was not entitled to recoup her community portion of the retirement benefits that she would have received under the 1979 divorce decree but for Jose's subsequent waiver of his retired pay benefits. The district court relied upon the Uniformed Services Former Spouses Protection Act ("USFSPA")<sup>1</sup> and the United States Supreme Court's decision in Mansell v. Mansell,<sup>2</sup> neither of which were in effect when the parties' community property was divided in the 1979 divorce decree. Even if the USFSPA and the Mansell opinion were applicable to the divorce decree, Eva would still be entitled to recoup the sums she had lost as a result of Jose's waiver because, while the United States Supreme Court has clearly prohibited the division of military disability benefits upon divorce,<sup>3</sup> the Court has not prohibited states from allowing former spouses to recoup the amounts they would have received but for a post-decree waiver of retired pay.<sup>4</sup> We recently

---

<sup>1</sup>See 10 U.S.C. § 1408 (2003).

<sup>2</sup>490 U.S. 581 (1989).

<sup>3</sup>Id. at 594-95.

<sup>4</sup>See, e.g., Harris v. Harris, 991 P.2d 262, 265 (Ariz. Ct. App. 1999) (holding that military retiree would not be permitted "to transform retirement benefits constituting community property to [other, non-retirement] benefits constituting separate property" and, therefore, that the retiree's former spouse was entitled to sum she would have received but for the retiree's post-decree waiver of retired pay (quoting In re Marriage of Gaddis, 957 P.2d 1010, 1012 (Ariz. Ct. App. 1997)) (quoting McNeel v. McNeel, 818 P.2d 198, 200 (Ariz. Ct. App. 1991)); In re Krempin, 83 Cal. Rptr. 2d 134, 139 (Cal. Ct. App. 1999) (holding that "Mansell does not apply to post-judgment waivers of retirement pay because it held only that disability benefits could not be divided 'upon divorce'" (quoting Mansell, 490 U.S. at 583)); Johnson v. Johnson, 37

*continued on next page . . .*

addressed this issue in Shelton v. Shelton,<sup>5</sup> and held that a military retiree "cannot escape his contractual obligation by voluntarily choosing to forfeit his retirement pay" and therefore, that the retiree's former spouse was entitled to the sum she would have received under the original property settlement agreement. While the reasons for Jose's waiver are understandable, waiver nevertheless diminished Eva's community property award. Accordingly, the district court erred when it concluded that Eva was not entitled to recoup the amount she lost as a result of Jose's waiver of retired pay.

Second, the district court erroneously concluded that Eva was only entitled to 41.2% of Jose's net, or disposable, retired pay, rather than 41.2% of Jose's gross retirement benefits. The district court ignored the plain language of the 1988 order, which clarified the scope of Eva's community property interest granted in the 1979 divorce decree. A vested right cannot be defeated by a retroactive application of subsequently adopted laws. Therefore, the district court erred when it applied the USFSPA, which prohibits the division of a retiree's gross retired pay,<sup>6</sup> to defeat a community property right that was vested at the time of the 1979

---

*... continued*

S.W.3d 892, 897 (Tenn. 2001) (holding that the former spouse of a military retiree was entitled to recoup the amount she would have received under the divorce decree but for the retiree's post-decree waiver of retirement benefits).

<sup>5</sup> 119 Nev. \_\_\_, \_\_\_ P.3d. \_\_\_ (Adv. Op. 56, Oct. 29, 2003)

<sup>6</sup> 10 U.S.C. § 1408(a)(4) (2003); Mansell, 490 U.S. at 588.

divorce decree.<sup>7</sup> Moreover, while Jose attacks the 1988 order as being in conflict with then-existing federal law, Jose never appealed that order and, accordingly, waived his ability to make that argument. Therefore, since the 1988 order unambiguously grants Eva an interest in 41.2% of Jose's gross retirement benefits, we conclude that Eva is entitled to recoup from Jose, as permitted by the statute of limitations,<sup>8</sup> the difference between the sum paid to her by the pay center and the sum she was entitled to under the 1988 order. We remand this matter to the district court so that it may determine the amount Eva is entitled to receive.

Finally, the district court properly concluded that Eva is not entitled to be named as Jose's Survivor Benefit Plan beneficiary. Contrary to Eva's assertions, the Survivor Benefit Plan designation is not an omitted asset because Eva had no legal right to the Survivor Benefit Plan designation at the time of the divorce decree. This conclusion is further evidenced by the fact that Jose only received the benefit as a result of his voluntary election and the fact that Jose has paid for the benefit from his own portion of his retirement benefits. While the district court reached this result by unnecessarily resorting to the doctrine of equitable estoppel, we affirm the result reached by the district court.<sup>9</sup> Accordingly, we

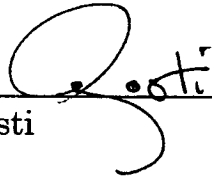
---

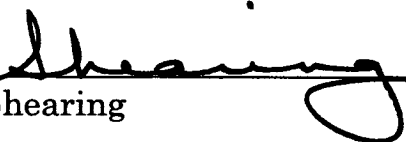
<sup>7</sup>See Harrison v. Rice, 89 Nev. 180, 184 n.5, 510 P.2d 633, 636 n.5 (1973); Black's Law Dictionary 1402 (5th ed. 1979) (citing American States Water Service Co. v. Johnson, 88 P.2d 770, 774 (Cal. Ct. App. 1939) (noting that vested rights "may not be interfered with by retrospective laws")).

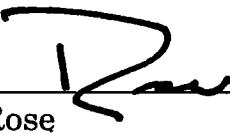
<sup>8</sup>See NRS 11.190.


<sup>9</sup>See Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) (stating that "[i]f a decision below is correct, it will not be  
*continued on next page . . .*


ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

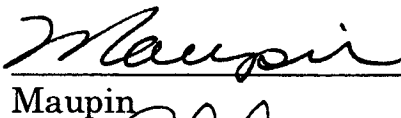
  
\_\_\_\_\_, C.J.  
Agosti

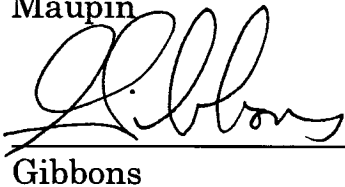
  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Gibbons

\_\_\_\_\_  
*... continued*

disturbed on appeal even though the lower court relied upon the wrong reasons").

cc: Hon. Lisa Brown, District Judge, Family Court Division  
Law Office of Marshal S. Willick, PC  
Radford J. Smith  
Clark County Clerk