

FILED  
IN SUPREME COURT  
OF TEXAS

APR 21 2008

NO. 07-1065

BLAKE HAWTHORNE, Clerk  
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IN THE SUPREME COURT OF TEXAS  
AUSTIN, TEXAS

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RAOUL HAGEN,  
*Petitioner*

v.

DORIS J. HAGEN,  
*Respondent*

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*On Petition for Review from the  
Fourth Court of Appeals at San Antonio, Texas*

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RESPONSE TO PETITION FOR REVIEW

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Submitted By:

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ATTORNEY FOR RESPONDENT

**IDENTITY OF THE PARTIES AND COUNSEL**

**TRIAL COURT:**

131<sup>st</sup> Judicial District Court,  
Bexar County, Texas

**TRIAL JUDGE:**

The Honorable Janet Littlejohn,  
Presiding

**APPELLEE/PETITIONER:**

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## STATEMENT OF THE CASE

Respondent agrees with the statement of the case made by Petitioner; however, Respondent requests that this Court deny the Petition for Review and affirm the Fourth Court of Appeals' decision to reverse the District Court's decision because the concept of *res judicata* does bar a collateral attack on an un-appealed divorce decree.

## STATEMENT OF JURISDICTION

Respondent would argue that the Supreme Court of Texas does lack jurisdiction of this case under Government Code sections 22.001(a)(1), (2) and (6) because:

1. the court of appeals' conclusion that the divorce decree's division of "military retirement benefits" implicitly divided Raoul's VA disability benefits is in accordance with cases before 1976 and up to the United States Supreme Court decision in *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), and the Texas Courts have been able to divide military disability pay. *Mora v. Mora*, 429 S.W.2d 660 (Tex.Civ.App.-San Antonio 1968, rehearing denied); *Miser v. Miser*, 475 S.W.2d 597, 81-82 (Tex.Civ.App.-Dallas 1971, rehearing denied). Indeed, gross military pay includes disability. See *Jones v. Jones*, 900 S.W.2d 786 (Tex.App. - San Antonio 1995, rehearing denied);
2. the court of appeals' holding that the trial court improperly modified the decree in clarifying that the VA disability benefits were not divided by the "military retirement benefits" provision is in accordance with *Berry v. Berry*, 786 S.W.2d 672 (Tex. - 1990, rehearing overruled), that a trial court may not amend, modify, alter or change the division of property made or approved in a decree of divorce or annulment;
3. there is no uncertainty in dividing current military retirement benefits and the law is clear that VA disability benefits are not now divisible since the issuance of *McCarty* and *Mansell* cases and there is no inconsistent treatment of VA disability benefits.

## ISSUE PRESENTED

**Whether or not the trial court had the authority to modify the parties' final, non-appealable divorce decree and causing Respondent to lose her portion of Petitioner's military retirement benefits previously awarded to her.**

## STATEMENT OF FACTS

Respondent agrees with the majority of the points made in Petitioner's statement of facts; however, in Respondent's clarification, she did not ask the trial court to determine whether the VA disability benefits received by Petitioner were to be included in the military retirement pay apportioned under the decree. As shown below, the trial court's modification of the parties' divorce decree, as it pertains to the military retirement benefits, did constitute an impermissible collateral attack and the Fourth Court of Appeals' decision should be upheld.

## SUMMARY OF THE ARGUMENT

The trial court should have awarded Doris her percentage in Raoul's total retirement and the Fourth Court of Appeals properly reversed the trial court's decision.

## ARGUMENT AND AUTHORITIES

Respondent adopts her earlier briefs as written both as an answer to the district court as well as the appellant's brief and is incorporated herein by reference.

At the time of the Hagen divorce, military retired pay and disability pay was an earned property right and subject to division. *Mora v. Mora*, 429 S.W.2d 660 (Tex.Civ.App.-San Antonio 1968, rehearing denied); *Miser v. Miser*, 475 S.W.2d 597, 81-82 (Tex.Civ.App.-

Dallas 1971, rehearing denied). Additionally, on April 19, 1972, the El Paso Court of Appeals in *Dominey v. Dominey*, 481 S.W.2d 473, addressed the problem of disability pay and found it to be an earned property right subject to the division orders and quoted *Mora* among other cases in that era. Opposing counsel brought to the attention of the Court *Cearley v. Cearley*, 544 S.W.2d 661, which further affirms the earlier Court's position that even though an individual has not retired from military service, it is an earned property right subject to the division of the Court.

Since 1989, VA disability pay has been excluded from the definition of disposable retired pay and thereby, pre-empted state courts from including disability pay in a community property award. *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). But as correctly noted by the appellate court, under Texas law, *res judicata* bars a collateral attack on a final, un-appealed decree of divorce. *Berry v. Berry*, 786 S.W.2d 672 (Tex. - 1990, rehearing overruled).

As the Court is well aware, a trial court may not amend, modify, alter or change the division of property made or approved in a decree of divorce or annulment. It is limited to an order to assist in the implementation of or to clarify the prior order and make, alter or change the substantive division of property. As the circumstances in the *Berry* case are identical to the facts at hand, the Court of Appeals in the past has used the *Berry* court's analysis when considering similar issues. *Jones v. Jones*, 900 S.W.2d 786 (Tex.App. - San Antonio 1995, rehearing denied).

Additionally, the undersigned attorney has personally argued the concept of *res judicata* before the San Antonio Court of Appeals in *Ex Parte Hovermale*, 636 S.W.2d 828, and stands as all of the above cited cases do that *res judicata* prevents a collateral attack on a final decree and therefore, this Court is without jurisdiction to make any changes in that final decree. As Respondent was awarded an interest in "all Army retired pay" and as this Divorce Decree is final, *res judicata* should apply and Respondent should be allowed to recover her share of Petitioner's disability pay.

The undersigned attorney also argued the preemption doctrine in *Hovermale* decided on June 30, 1992 in San Antonio, Texas. The *Hovermale* case fell almost immediately after the *McCarty* and *Mansell* decisions were rendered by the U.S. Supreme Court and held that a decree ordering a division of military retirement pension is void and that a district court is preempted from making an award of military retirement pay in a divorce decree. The concept of finality of judgment of *res judicata* precludes parties from re-litigating issues that were or could have been raised in that action. Nor are the *res judicata* consequences of a final un-appealed judgment on the merits altered by the facts that a judgment may have been wrong or rested on legal principles subsequently overruled in another case. See *Federated Department Stores v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). A judgment merely voidable because it is based on an erroneous view of the law is not open to a collateral attack. To hold otherwise, as indicated in the *Moitie* court would result in creating elements of uncertainty and confusion and in undermining the conclusive

characteristics of judgments, consequences which are the very purpose of the doctrine of *res judicata* to avert.

Lastly, retroactivity, as indicated in the *Hovermale* case, includes the following factors which the courts have considered in determining to what extent a judicially changed rule of law should be given retroactive operation: 1) the degree to which the prior rule may have been justifiably relied on, especially where matters of property or contract law are involved, 2) the degree to which the newly announced rule can be effectuated without being applied retroactively, and 3) the likelihood that retroactive operation of the overruling decision may substantially burden the administration of justice. In determining to what extent, if any, an overruling decision is to be given retroactive effect, the crucial date is generally the date of the overruling decision. Here, all cases cited by the Petitioner are dated years after the date of the Hagen divorce.

There is an obvious and substantial inequitable result that would derive from the retroactive application. As indicated in the *Hovermale* case, the principle of this retroactive application would affect the objectives of Congress only minimally, compared to the potentially destructive effect upon the settled jurisprudence of our State. Additionally, the principles of *res judicata* and finality of judgments would become little more than historical fact, and the relatively settled areas of jurisdiction and family law would be rendered incomprehensible. See *Hovermale* at 836.

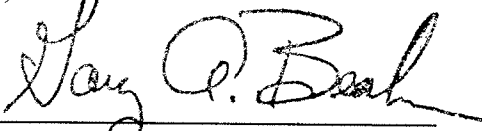
**CONCLUSION AND PRAYER**

The trial court erred in modifying the parties' final, un-appealed divorce decree and the Fourth Court of Appeals properly reversed the trial court's decision under the concept of *res judicata*.

WHEREFORE PREMISES CONSIDERED, Respondent urges that this Honorable Court affirm the decision of the Fourth Court of Appeals and deny RAOUL HAGEN's Petition for Review and grant Respondent such other relief to which she is entitled.

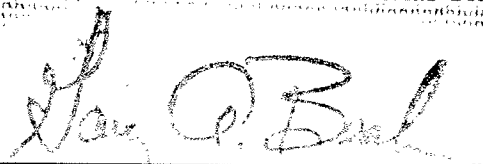
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the above was served on ROBERT S. THOMPSON and RYAN G. ANDERSON in accordance with the Texas Rules of Civil Procedure on April 21, 2008.

  
GARY A. BEAHM