

No. 13-20-00118-CV

In the Court of Appeals for the Thirteenth
 Court of Appeals District, Corpus Christi,
 Texas

FILED IN
 13th COURT OF APPEALS
 CORPUS CHRISTI/EDINBURG, TEXAS
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 KATHY S. MILLS
 Clerk

Sharon H. Windham
Appellant

v.

William M. Windham, Jr.
Appellee

Appeal from the 343rd District Court of
 Aransas County, Texas, No. A-18-0209-CV

Response OF APPELLEE

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Other Authorities

None

Statement of the Case

Appellee agrees with the Appellants statement

ORAL ARGUMENT STATEMENT

Due to the relatively straightforward nature of this case, the Appellee believes that there would be no benefit to the courts understanding by conducting oral arguments.

ISSUES PRESENTED

- I. Texas law forbids trial courts from issuing post-divorce orders that amend, modify, or alter the terms of a final divorce decree. On 12 June 2001, nearly six months after the 343rd Judiciary District Court issued the initial final decree, it signed a Qualified Domestic Relations Order (QDRO) that awarded a Survivor's Annuity and extensively modified the unambiguous statement for payment of a retirement benefit to the Appellant along with ignoring the specific requirement for the retention of all future benefits by the Appellee.

- II. At this point and not later, as the Appellant counsel contends, the trial court erred as a matter of law by amending, altering, or modifying the express terms of the divorce decree.

- III. Did the Trial Court deny all subsequent requests for re-consideration by the Appellant due to the realization that requirements contained within the original divorce decree had already been satisfied and family assets properly divided?

INTRODUCTION

The Appellee submits that the Introduction contained in the Appellant's Brief contains inaccuracies. The trial court awarded Sharon only a portion of William's retirement accrued as of the date of the divorce decree ("Decree"). *Compare* CR.82–83 [T2] *with* CR.79–80 [T2]. This clearly precludes that the entirety of William's post retirement earnings from being subject to division after the December 12th, 2000 date of the Decree. It is correct to assert that the Trial Court was only petitioned with regard to the inclusion of a Survivor's Annuity during the January 2017 proceedings, however; the QDRO included a cost of living benefit CR.57 [T3] to the Appellant as well as an erroneous formula that awards 50% of the entire retirement that William was not entitled to as of the date of the decree, but compiled through acquiring additional pay increases and promotions earned during an additional 11 years of continuous employment post-divorce. The court was correct in stating Sharon had received all monies due as part of the division of family assets.

STATEMENT OF FACTS

A. Background Facts

- Civil Service Retirement System (“System “) allows federal employees to contribute during their careers and, upon retirement, receive monthly payments for the remainder of their lives.
- As of the date of the decree William had not met all requirements to entitle him to a retirement; therefore, William would have only received a lump sum payment of his contributions in which Sharon was entitled to 50%.
- Since the Appellee retains all increase as specified under H-4 of the Decree and the subject retirement was part of the Decree negotiations, the referred “Berry” formula cannot apply. *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex)

B. Posture

The Appellant's counsel provides an extensive argument that deals with the verbiage contained within the QDRO while ignoring the substance of the Divorce Decree. As stated by the Appellant's counsel, Texas law forbids trial courts from issuing post-divorce orders that amend, modify, or alter the terms of a final divorce decree; however, that is exactly what happened on 12 June 2001 when the Trial Court issued a QDRO that amended, altered and modified the plain language requirements of the negotiated and approved Divorce Decree. The order failed to properly divide the employee retirement benefits provided under the U.S. Civil Service Retirement System as required by the administrator for the retirement plan participant and as a result provided a disproportionate share of benefits to the Appellant in contrast to the intent of the parties and the Court, in excess of that awarded by the Divorce Decree. Both parties in this case were represented by licensed attorneys in the State of Texas and both parties agreed on the substance and verbiage of the Divorce Decree. The "Decree" was not contested by either party. *Cox v. Carter*, 145 S.W.3d 361 (Tex) App.—Dallas 2004) only provides part of the total answer. The appeals court agreed with the divorce decree verbiage that the entitlement may be calculated as of the date of the decree without benefit of credit for any pension benefits and accrued services rendered after a divorce, those

accretions were not part of a community estate subject to a just and right division. Since future benefits and accrued services are not part of a community's estate, then likewise only those earned entitlements at the time of the Divorce Decree can be considered. This dramatically changes the Appellant's ability to consider the 50% to mean that portion of the Appellee's entire retirement. The Civil Service Retirement System first considers high three year's salary and total years served which would clearly fall under the umbrella of all increases. In addition, computations for retirement contain percentages for each year worked and early years are factored at a much lower percentage than follow-on years. Currently, the U.S. Office of Personnel Management (OPM) does not have a formula to establish retirement benefits at less than twenty-five years employment; likewise the referred "Berry" formula contains total years served without consideration for accredited retirement percentages earned, high three salaries, age penalties or credited unused sick leave, all of which are clearly part of increases gained after the date of the Decree. Since "all increases" as specified under paragraph H-4 of the Divorce Decree are the property of the Appellee, then what is the value of the Civil Service Retirement ("as entitled") at the time of the Decree? Simply this, the value of the plan to both the Appellant and the Appellee was the amount paid into the plan as of the date of the decree without benefit of any interest. That amount was not definitized in the Divorce Decree due to the moving target created as

additional contributions were made by the Appellee up to the 20 December 2000 date of the Final Decree; however, it should have been specified within the original QDRO. Based on these facts, it is reasonable to say that the entire QDRO of 12 June 2001 “amended, modified, altered, and changed the division of property made or approved in the decree of divorce or annulment”. It is also reasonable and legal to say that the Trial Court used all discretion to remedy this situation, once recognized, by issuing the Final Order and stating that the Appellate “has received all retirement monies due to her under the Decree.” CR. 83-83 {T1} .

Due to the gross differences between the Divorce Decree of 2000 and the QDRO of 2001, the Appellant was paid amounts as a monthly annuity that totaled far in excess of the entitlement. Title 5 USC limits disbursement of monies until you actually retire or resign. This requirement should never be considered a legal reason that an annuity based on the entire retirement was assigned. Obviously, “a portion” could be divided into a series of payments until the distribution of assets were satisfied, similar to a “not to exceed” payment. The QDRO did not serve its intended purpose and ignored the fact that “the Divorce Decree is King” as it was described in *Cox v. Carter*, 145 S.W.3d 361 (Tex)

ARGUMENT

During the course of the Appellant's arguments, there is constant referral to the "rule of law"; however, in every case mentioned the rule of law is what is negotiated in the Divorce Decree. Since the original Divorce Decree issued by the Trial Court is unambiguous and contains the verbiage necessary to narrow the scope of the Appellant's entitlement, it is essentially the rule of law. What did not happen, in the original QDRO of 2001, is to consider the OPM guidance and US Codes applicable to this particular divorce scenario. Standard formulas published by OPM do not work since they use many attributes of the Appellees entire Civil Service time including those gained as entitlements after the date of the Decree. The original QDRO was not only incorrect in the award of a Survivor's annuity, but also incorrect in its fictional formula used to award a "portion" of the Appellees retirement benefit. Essentially, the QDRO was entirely incorrect. All subsequent attempts by the Appellant at getting a new QDRO issued were simply efforts at renegotiating an almost twenty-year old divorce. The Trial Court absolutely made the correct decision in issuing the Final Order and not considering the Appellants motion to issue a new QDRO as the Appellate had "received all monies due her under the Decree".

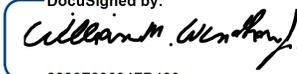
CR 83-83 {T1}.

PRAYER

I pray that this Court will stand with the Trial Court's Final Order and support a lawful Divorce Decree that was mutually negotiated almost twenty years ago.

Respectfully Submitted,

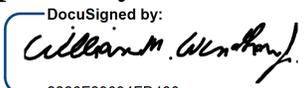
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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)((3), I certify that, excluding those parts allowed to be excluded, the foregoing Brief of Appellee contains 12 pages and 1,888 words.

Respectfully Submitted,

/s/ 
William M. Windham Jr.

CERTIFICATE OF SERVICE

I certify that on July 31, 2020, the foregoing has been transmitted in accordance with the requirements of the Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure, addressed as follows:

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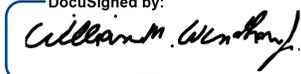
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