

NOT FOR PUBLICATION

NO. 26793

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

SUZANNE LYNETTE BIENVENUE, Plaintiff-Appellant
MICHAEL ROGER BIENVENUE, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 99-1479)

KHAMARAO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe and Foley, JJ.)

Plaintiff-Appellant Suzanne Lynette Bienvenue (Suzanne) appeals from the August 3, 2004 Amended Decree Granting Absolute Divorce (Amended Divorce Decree) entered in the Family Court of the First Circuit.¹

Suzanne and Defendant-Appellee Michael Roger Bienvenue (Michael) were married on August 20, 1981. Michael retired from the United States Navy on September 30, 1995, after twenty years of service. The Decree Granting Absolute Divorce (Divorce Decree) was entered on June 13, 2001. In Bienvenue v. Bienvenue, 102 Hawai'i 59, 72 P.3d 531 (App. 2003), this court vacated parts of the Divorce Decree and remanded with instructions.

On September 2, 2004, after the family court entered the Amended Divorce Decree on August 3, 2004, Suzanne filed a notice of appeal.² This case was assigned to this court on March 23, 2005.

¹ Judge Christine E. Kuriyama presided.

² Effective August 13, 2004, Plaintiff-Appellant Suzanne Lynette Bienvenue filed a motion for reconsideration. The motion is deemed to have been denied on November 11, 2004. The prematurely filed notice of appeal is deemed to have been filed immediately thereafter on November 11, 2004. Hawai'i Rules of Appellate Procedure Rule 4(a) (Supp. 2006).

NOT FOR PUBLICATION

In Bienvenue, this court stated, in relevant part:

In this case, (1) Suzanne filed a proposed decree; (2) Michael expressly disagreed with specific provisions in Suzanne's proposed decree; (3) after a hearing on a motion to set attended by the attorneys for both parties, the court entered an order noting that there was no dispute regarding the division and distribution of any personal property other than "retirement"; (4) the parties stated on the record, and the family court approved, a final settlement agreement resolving the case; (5) in the final settlement agreement, the parties expressly resolved some issues created by Michael's express disagreements and did not expressly reserve the final division of any property of the parties for further hearing, decision, and order; and (6) the family court entered a divorce decree containing more details regarding the division and distribution of the personal property.

In this appeal, the question is whether the family court was authorized to insert some of those additional details in the Divorce Decree.

The Divorce Decree stated, in relevant part:

5. *Retirement Funds.*

. . . .

b) *Defendant's Military Retirement.*

. . . .

Beginning the first (1st) day of the first (1st) month after the effective date of divorce and continuing for so long as both parties shall live, the [Non-Service Member] . . . shall receive a portion of each payment of military disposable retired or retainer pay to which [the Service Member] . . . is entitled.

The Non-Service Member's monthly percentage share shall be **thirty-five percent (35%)**

. . . .

Disposable retired or retainer pay is defined by Title 10, United States Code Section 408(a)(4), and for these purposes shall be the gross retired or retainer pay to which the Service Member is entitled less only amounts which:

. . . .

(3) in the case where the Service Member is entitled to retired pay under Chapter 61 of Title 10, U.S.C., an amount which is equal to the amount of retired pay of the Service Member under that Chapter computed using the percentage of the Service Member's disability on the date when the Service Member was retired (or the date on which

his (the Service Member's) name was placed on the temporary disability retired list)

NOT FOR PUBLICATION

. . . .

If other deductions from gross monthly retired or retainer pay are made, the Non-Service Member's portion of each payment of disposable retired or retainer pay shall be increased so that the Non-Service Member receives what she would have received had those other deductions not occurred.

The Service Member has agreed not to merge his retired pay with any other pension, nor to waive any portion of his retired pay in order to receive disability pay. He has further agreed not to pursue any course of action, which would defeat, reduce or limit the Former Spouse's right to receive her share of the Service Member's retired pay as ordered herein. The Service Member further agrees that if there is any diminution, deduction or cessation of the amount paid to the Non-Service Member hereunder, due to an act or omission of the Service Member, then he shall personally pay directly to the Non-Service Member the exact amount which is not being paid directly to her by the United States Navy (branch of service) and the Service Member is designated as a constructive trustee in that regard.

Specifically, the Service Member has further agreed to indemnify the Former Spouse for any breach of this provision by himself by paying personally and directly to the Former Spouse (Non-Service Member) the difference between the initial percentage or amount of the marital portion [102 Hawai'i at 67] of the Service Member's net disposable retired pay which was originally allocated to the Non-Service Member prior to any reduction thereof, and the reduced percentage or amount which is paid to the Non-Service Member subsequent to any breach or other change thereof which was caused by an act of the Service Member.

. . . .

If, at any time after he retires, the Service Member voluntarily causes a reduction in his gross retired or retainer pay, and thereby deprives the Non-Service Member of a part or all of her benefits conferred by this Section, the Service Member shall be deemed to have created a constructive trust for the Non-Service Member's benefit under Federal and all applicable State law. The Family Court shall have continuing jurisdiction to enforce the trust, and make all orders necessary to implement the trust.

The Court shall retain jurisdiction over the Service Member's military retired/retainer pay for so long as the parties both shall live. The Court shall also have the authority to make every just and equitable order not inconsistent with the other provisions [102 Hawai'i at 68] herein, and not inconsistent with the Uniformed Services Former Spouses' Protection Act, as amended, or any other applicable law. The Court shall also have specific authority to make any orders it deems just and equitable as a result of the income tax consequences which flow from the division and distribution of the retired/retainer pay.

NOT FOR PUBLICATION

The Court shall also have continuing jurisdiction to make every order reasonably necessary to implement and accomplish the direct payment to the Non-Service Member by the Service Member or, if permitted by law, the United States Government, of her percentage share of the Service Member's military retired/retainer pay, including the right to advise the Service Member or the United States Government of the precise amount or percentage of the Service Member's disposable military retired/retainer pay to be payable to the Non-Service Member.

The Family Court of the First Circuit shall retain jurisdiction over all of the matters as described in this section so as to insure the full completion of and compliance with the provisions of this agreement ongoing for so long as the parties both shall live. This shall include retention of personal jurisdiction over both the parties hereto as well as retention of ongoing subject matter jurisdiction over the retirement plan(s), and both the parties hereto irrevocably consent to same. This shall specifically include but not be limited to making any amendments to the provisions contained herein which may be required by the administrators of the Retirement Plan(s) described herein as a pre-requisite to commencing payment of benefits due to the Non-Service Member. Any such amended orders shall be deemed to be in the nature of enforcement proceedings as opposed to subsequent property division. The Court shall also have the authority to make every just and equitable order not inconsistent with the other provisions herein, and not inconsistent with any other applicable law. The Court shall also have specific authority to make any orders it deems just and equitable as a result of the income tax or other consequences which flow from the division and distribution of the retirement pay. Furthermore, this retention of jurisdiction by the Family Court of the First Circuit shall include but not be limited to the Court's ability to recharacterize the division of any retirement awards which are initially made in favor of a Non Service Member but which are not ultimately received by the said Non-Service Member; or which are not honored, paid or enforced by the Service Member and/or his retirement plan, and/or said plan's administration. The said recharacterization may include but not be limited to the Court's ability to ex post facto either: enter an award of alimony and/or to order the reconfiguration or reallocation of other assets so as to place the Non-Service Member in a position equal to that she would have been if she actually received her retirement share as originally ordered.

Neither Plaintiff nor Defendant will do or cause to be done any act which will cause this provision to be null and void and this order shall be the final order pertaining to division of the Service Member's military retired/retainer pay.

102 Hawai'i at 65-68, 72 P.3d at 537-40 (underscore added).

NOT FOR PUBLICATION

In Bienvenue, this court vacated the underscored parts of the Divorce Decree quoted above and stated, in relevant part, as follows:

3.

There is some merit to Michael's disagreement with the sentence in subsection 5.b of the Divorce Decree that "[t]he Service Member has agreed not to merge his retired pay with any other pension, nor to waive any portion of his retired pay in order to receive disability pay." First, Michael did not agree to this. Second, the coverage of the sentence is excessive to the extent it applies to Michael's sixty-five percent share of his retired pay. Suzanne has an interest only in her Linson v. Linson, 1 Haw.App. 272, 618 P.2d 748 (1980) thirty-five percent share of Michael's retired pay. The remaining sixty-five percent belongs to Michael. The challenged sentence must be amended in the spirit of the sentence that follows it, to wit: "[Michael] has further agreed not to pursue any course of action, which would defeat, reduce or limit the Former Spouse's right to receive her share of the Service Member's retired pay as ordered herein."

4.

Michael's disagreement with the provision in subsection 5.b stating that he has agreed to indemnify Suzanne for any breach of his duty to pay Suzanne her Linson share of his military retirement by paying her the difference caused by breach is without merit. In his response to Suzanne's proposed decree, Michael expressly did not object to the generally applicable indemnification provision. This specific indemnification provision is a reasonable, nonsubstantive enforcement provision.

5.

There is no merit to Michael's disagreement with the provision in subsection 5.b pertaining to "a constructive trust." This provision is a reasonable, nonsubstantive enforcement provision.

102 Hawai'i at 70-71, 72 P.3d at 542-43.

According to Suzanne,

On remand MICHAEL argued that, if he qualified for military or veterans' disability benefits post-divorce, and if he elected to receive those benefits in lieu of military disposable retired or retainer pay, he could not be required to reimburse SUZANNE or hold her harmless with regard to the resulting loss of military retirement benefits she would suffer because of his election. He argued that he never agreed to make good her loss in such a case. He argued that imposing such a requirement would violate the federal Uniformed Services Former Spouses' Protection Act. 10 U.S.C. § 1408 ("USFSPA"). He argued that, even though the ICA had approved the constructive trust and indemnification provisions of the *Divorce Decree*, those provisions could not make him financially responsible for any loss of benefits suffered by SUZANNE if he made a post-divorce election to receive military or

NOT FOR PUBLICATION

veterans' disability benefits in lieu of military retired or retainer pay.

Although this court's opinion in Bienvenue did not vacate any part of the following paragraph from the Divorce Decree, the family court, in its Amended Divorce Decree, amended it by adding the parts that are underlined, and deleting the parts within brackets:

If, through the voluntary actions of the Service Member, [other] deductions from Service Member's disposable [from gross] monthly retired or retainer pay are made, [the Non-Service Member's portion of each payment of disposable retired or retainer pay shall be increased so that the Non-Service Member receives what she would have received had those other deductions not occurred] the Service Member shall owe the Non-Service Member the difference between the amount equivalent to 35% of the Service Member's disposable retired at [sic] or retainer pay as it exists at that time and the amount actually received by the Non-Service Member. As noted above, diminution resulting from Service Member's receipt of disability is deduction from Service Member's gross retired or retainer pay and thus is not covered hereunder.

Although this court's opinion in Bienvenue vacated only the first sentence of the following paragraph from the Divorce Decree, the family court, in its Amended Divorce Decree, amended it by adding the parts that are underlined, and deleting the parts within brackets:

The Service Member [has agreed not to merge his retired pay with any other pension, nor to waive any portion of his retired pay in order to receive disability pay. He has further agreed not to] shall not pursue any course of action, which would defeat, reduce or limit the [Former Spouse's] Non-Service Member's right to receive her 35% share of the Service Member's disposable retired or retainer pay as ordered herein. The Service Member further agrees that, if due to an act or omission of the Service Member, there is any diminution, deduction or cessation of the [amount paid to the Non-Service Member hereunder, due to an act or omission of the Service Member, then he] Non-Service Member's percentage share of the Service Member's disposable retired pay, other than through one of the above-listed deductions from gross pay, then the Service Member shall personally pay directly to the Non-Service Member the exact amount which is not being paid directly to her by the United States Navy [branch of service] and the Service Member is designated as a constructive trustee in that regard.

NOT FOR PUBLICATION

In this appeal, Suzanne argues as follows:

The changes engrafted onto this provision expressly allow MICHAEL to elect military or veterans' disability benefits post-divorce with no liability to SUZANNE whatsoever for the resulting loss of benefits she would experience. Thus, although SUZANNE's 35% share would be reduced by MICHAEL's election of disability benefits (a consequence which is unavoidable in light of applicable federal law), he also would have no obligation to pay her directly the exact amount which is not being paid by the Navy (a further consequence which is not unavoidable under federal law). This outcome results notwithstanding the language of the original *Divorce Decree*, language which was not vacated by the ICA, to the effect that MICHAEL agreed not to pursue any course of action which would defeat, reduce or limit SUZANNE'S share of his retired pay, and that if there was any diminution, deduction, or cessation of the amount paid to SUZANNE, due to an act or omission on his part, he would directly pay her the amount not being paid to her by the Navy.

(Emphasis in the original).

Although this court's opinion in Bienvenue did not vacate any part of the following two paragraphs from the Divorce Decree, the family court, in its Amended Divorce Decree, amended them by adding the parts that are underlined, and deleting the parts within brackets:

[Specifically, t]The Service Member [has further agreed to] shall indemnify the [Former Spouse] Non-Service Member for any breach of this provision by himself by paying personally and directly to the [Former Spouse] Non-Service Member the difference between [the initial percentage or or the amount of the marital portion of the Service Member's net disposable retire pay which was originally allocated to the Non-Service Member prior to any reduction thereof, and the reduced percentage or amount which is paid to the Non-Service Member subsequent to any breach or other change thereof which was caused by an act of the Service Member] the amount Non-Service Member actually receives and the amount which represents 35% of the Service Member's disposable retired or retainer pay as it exists at that time.

If, at any time after he retires, the Service Member voluntarily causes a reduction in his disposable [gross] retired or retainer pay (other than through receipt of disability) and thereby deprives the Non-Service Member of [a part or all of her benefits conferred by this Section] her 35% share of the Service Member's disposable retired or retainer pay as it exists at te [sic] time, the Service Member shall be deemed to have created a constructive trust for the Non-Service Member's benefit [under] in the amount of the difference between 35% of the Service Member's disposable retired or retainer pay, as it exists at the time, and the amount which the Non-Service Member actually receives, as pursuant to Federal and all applicable State law.

Suzanne further argues that

The effect of these changes was to alter those provisions to reflect MICHAEL'S position that he should not be required to reimburse SUZANNE, or to otherwise compensate her for the loss of disposable retired or retainer pay if MICHAEL elected military or veterans' disability benefits post-divorce. These changes fundamentally changed the scope and effect of both the indemnification and constructive trust provisions. Prior to their amendments they provided SUZANNE with the possibility of direct recourse against MICHAEL personally if he voluntarily made such an election and thereby reduced the dollar value of the **Linson** formula share of MICHAEL'S disposable retired or retainer pay post-divorce. After the amendments, she was left with no recourse against MICHAEL if a disability election left her with reduced pension benefits, or even if she was left with no benefits.

On October 13, 2004, the family court entered Findings of Fact and Conclusions of Law which state, in relevant part:

FINDINGS OF FACT

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23. At present, Michael is neither receiving or eligible for disability, but he does have a pending claim for disability.

24. The Decree, as amended, includes language which indemnifies Suzanne should Michael waive any portion of the Linson formula share to which she is entitled, but does not preclude Michael from waiving to receive disability pay or require him to reimburse Suzanne for any change in the amount she receives due to his disability-based waiver.

CONCLUSIONS OF LAW

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C. Enactment of the Former Spouse's Protection Act (USFSPA), granted States the limited power to divide military retirement.

(1) The USFSPA authorizes State Courts to divide ONLY the "disposable" retired or retainer pay.

(2) "Disposable" retired or retainer [pay] is the amount left after four types of deductions One of these deductions is the amount of any disability pay

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D.

(1) To the extent the indemnification clause goes further than allowing Suzanne her proportional share of Michael's disposable retirement pay, whatever that might be at any particular time, it is inconsistent with the Court's opinion which noted Michael's non-agreement to sharing disability and which approved the indemnification clause as a guarantor of Suzanne's

NOT FOR PUBLICATION

receipt of her percentage share of Michael's "disposable" retired or retainer pay.

(2) While Michael could perhaps agree, as part of a settlement, to reimburse Suzanne if he received disability, he did not do so.

The above indicates that, on remand, the family court concluded (1) Suzanne was awarded 35% of Michael's "military disposable retired or retainer pay," (2) Michael's "military disposable retired or retainer pay" does not include future disability pay, if any, and (3) if and when Michael reduces his "military disposable retired or retainer pay" by waiving a portion of his retired pay in order to receive disability pay, Michael will be required to pay Suzanne 35% of his "military disposable retired or retainer pay," which does not include his disability pay. Based on these conclusions, the family court (1) did not comply with the instructions stated by this court in Bienvenue, and (2) amended parts of the Divorce Decree that this court did not vacate. For the following reasons, we conclude that the family court reversibly erred.

Michael's right to "military disposable retired or retainer pay" was not prospective when the Divorce Decree was entered. Michael retired on September 30, 1995. When the Divorce Decree was entered, the amount of Michael's "military disposable retired or retainer pay" was an actual dollar amount. In effect, the Divorce Decree ordered Michael to pay 35% of that actual dollar amount, plus any subsequent increases, to Suzanne. It is that actual dollar amount, plus any subsequent increases, that is protected by the following part of the Divorce Decree:

NOT FOR PUBLICATION

[The Service Member] has further agreed not to pursue any course of action, which would defeat, reduce or limit the Former Spouse's right to receive her share of the Service Member's retired pay as ordered herein. The Service Member further agrees that if there is any diminution, deduction or cessation of the amount paid to the Non-Service Member hereunder, due to an act or omission of the Service Member, then he shall personally pay directly to the Non-Service Member the exact amount which is not being paid directly to her by the United States Navy (branch of service) and the Service Member is designated as a constructive trustee in that regard.

Specifically, the Service Member has further agreed to indemnify the Former Spouse for any breach of this provision by himself by paying personally and directly to the Former Spouse (Non-Service Member) the difference between the initial percentage or amount of the marital portion [102 Hawai'i 67] of the Service Member's net disposable retired pay which was originally allocated to the Non-Service Member prior to any reduction thereof, and the reduced percentage or amount which is paid to the Non-Service Member subsequent to any breach or other change thereof which was caused by an act of the Service Member.

If Michael causes that actual dollar amount, plus any subsequent increases, to be decreased, Suzanne can collect from Michael's non-disability retirement pay the amount due her. If Michael's non-disability retirement pay is insufficient, Suzanne shall have "the possibility of direct recourse against MICHAEL personally if he voluntarily made such an election and thereby reduced the dollar value of the **Linson** formula share of MICHAEL'S disposable retired or retainer pay post-divorce."

Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the Amended Decree Granting Absolute Divorce entered on August 3, 2004 and the Findings of Fact and Conclusions of Law entered on October 13, 2004 are

NOT FOR PUBLICATION

vacated, and this case is remanded for compliance with the instructions stated by this court in Bienvenue v. Bienvenue, 102 Hawai'i 59, 72 P.3d 531 (App. 2003), without making any changes to parts of the Divorce Decree that were not vacated by this court in Bienvenue.

DATED: Honolulu, Hawai'i, February 24, 2005.

On the briefs:

Robert M. Harris
for Plaintiff-Appellant.


Chief Judge


Associate Judge


Associate Judge