

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 1269

MARY JANE SMITH LYSSY (WHITE)

VERSUS

HAROLD JAMES LYSSY

Judgment rendered June 8, 2007.

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Appealed from the
Family Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 149,070
Honorable Annette Lassalle, Judge

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HAROLD JAMES LYSSY

* * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing, J. concurs and assigns reasons.

Hughes, Jr. concurs for reasons assigned by Downing, J.

PETTIGREW, J.

Harold James Lyssy and Mary Jane Smith Lyssy (later, White) ("Ms. White") were married on January 18, 1969. On February 6, 1986, after nearly eighteen years of marriage (198 months), the parties were divorced pursuant to a judgment of the Domestic Relations Court in Orleans Parish.

During the existence of his marriage, Mr. Lyssy acquired retirement benefits attributable to his service in the military that were subject to the community property regime. Members of the armed services are eligible to retire after completing twenty years of service. The gross amount of a retiree's monthly benefit is based upon the length of time in the service and grade at retirement. After twenty-four (24) years (288 months) of service, Mr. Lyssy retired from the United States Marine Corps on August 31, 1992, having attained the grade of O-3E. Thereafter, Mr. Lyssy began drawing his full retirement.

On November 6, 2003, Ms. White instituted the instant action seeking a judicial partition of the aforementioned military retirement benefits, which she claimed remained undivided by mutual agreement. Following a trial of this matter on January 12, 2005, the Family Court of East Baton Rouge Parish issued written reasons for judgment on February 15, 2005, and ruled that Mr. Lyssy's affirmative defenses of prescription and estoppel did not apply to the obligation of Mr. Lyssy to partition his retirement benefits and that said obligation still existed. The Family Court thereafter heard testimony from the court-appointed Special Master, Ron Cartier, C.P.A.

Mr. Cartier explained that upon his retirement from the military, Mr. Lyssy was presented with two options. Mr. Lyssy could either retire and receive disability benefits,¹ or retire and be paid based upon his years of military service. Mr. Lyssy chose the latter option, of receiving retirement pay equivalent to 60 percent of his gross pay at the rank Mr. Lyssy attained at the time of his retirement according to his years of service, thereby waiving his rights to disability pay. Although Mr. Lyssy does not receive any actual

¹ The military considers Mr. Lyssy to be disabled due to his diabetes.

disability benefits, Mr. Cartier testified that as a result of his disability, Mr. Lyssy does receive a tax exemption equivalent to 40 percent of his gross pay at the rank he attained at the time of his retirement. This means that Mr. Lyssy must pay taxes on the differential between 60 percent and 40 percent of his gross pay.

Mr. Cartier further explained that Ms. White was entitled to a portion of Mr. Lyssy's disposable income as defined by the federal government, and that Mr. Lyssy was entitled to a credit for his payment of the federal and state income taxes on the retirement benefits he had already received. Based upon his calculations, Mr. Cartier testified that Ms. White possessed a 34.375 percent community interest in the retirement funds already received by Mr. Lyssy. According to the figures submitted by Mr. Cartier, the Family Court concluded that after subtraction of the federal and state income tax credits due Mr. Lyssy, Mr. Lyssy owed Ms. White the sum of \$88,187.16. The Family Court accepted the accuracy of Mr. Cartier's calculations and adopted said calculations in its judgment, which ordered Mr. Lyssy to pay Ms. White the sum of \$88,187.16. With respect to future retirement benefits, the Family Court directed Mr. Lyssy to pay Ms. White 34.375 percent of his disposable pay as defined by the United States Military.

Thereafter both parties submitted differing versions of a Qualified Domestic Relations Order ("QDRO") with respect to the partition of Mr. Lyssy's prospective military retirement benefits. As a result of these pleadings, the Family Court issued additional written reasons on August 5, 2005, ordering the parties to sign and submit a QDRO which grants to Ms. White a 34.375 percent interest in Mr. Lyssy's disposable military retirement pay and any increases thereto that Mr. Lyssy may receive as a result of cost-of-living adjustments, etc. These additional written reasons further ordered that Mr. Lyssy's pay grade of O-3E be listed in the QDRO, and provided that Ms. White could enjoin Mr. Lyssy from making any changes in his retirement that would limit or reduce Ms. White's 34.375 percent interest in the disposable portion of the plan.

As a result of these written reasons, a QDRO was submitted to and signed by the Family Court on November 8, 2005. On November 17, 2005, Mr. Lyssy filed a Motion for New Trial based on alleged problems contained in the QDRO. Following a hearing on

January 31, 2006, the Family Court denied Mr. Lyssy's motion, and Mr. Lyssy has appealed.²

In connection with this appeal, Mr. Lyssy asserts that the Family Court erred in awarding to Ms. White a portion of his past and future military retirement benefits based on his contention that federal law prohibits treating military disability as community property. In addition, Mr. Lyssy urges that the Family Court committed legal error in failing to grant a new trial on the basis of newly-discovered evidence that Mr. Lyssy contends could not be obtained prior to trial.

With respect to his initial assignment of error, Mr. Lyssy claims that in partitioning his military retirement benefits, the Family Court granted to his former wife a percentage of his retirement far in excess of the "disposable retired pay." Mr. Lyssy urges that only the portion of his retirement benefits that is taxable should be considered "disposable pay" and subject to community partition.

The Family Court squarely addressed this issue in written reasons issued in connection with its denial, on February 3, 2006, of Mr. Lyssy's Motion for New Trial. The Family Court pointed out that at the trial of this matter, it had appointed a C.P.A., Mr. Cartier, to assist the parties and the court in evaluating the evidence. Noting that it had accepted the conclusions of Mr. Cartier at the time of trial, the Family Court reaffirmed that it had no reason to subsequently doubt said conclusions. The Family Court opined that where the documents in evidence support the court's judgment, a new trial cannot be granted on the ground that said judgment is contrary to the law and evidence.

Additionally, the Family Court noted that "[o]ne of the reasons given . . . [by Mr. Lyssy in support of his request for a new trial] is that there has been a discovery of new law, which his former counsel failed to find during the trial, that would support the granting of a new trial." The Family Court opined that:

[I]t is clear that Mr. Lyssy has obtained new counsel who is trying to present law which Mr. Lyssy's former attorney could have presented. Not only is this law not "new," but it is distinct from evidence which would be considered grounds for a new trial. Mr. Lyssy should not be afforded a new

² We have been advised that during the pendency of this appeal, Ms. White passed away.

trial based on the fact that he has obtained new counsel who would have argued his case differently using different law. Therefore, as there is no new evidence to be brought forward, the motion for new trial cannot be granted on this ground.

The Family Court further observed that pursuant to La. Code Civ. P. art. 1973, it also had the discretion to grant a new trial in instances where the failure to do so would result in a miscarriage of justice. Noting that at the beginning of Mr. Lyssy's memorandum in support of a new trial, he stated, "The parties in this matter agree on the law that is applicable. They just disagree on its interpretation." The Family Court ruled that "[a] disagreement on the interpretation of law rendered by the Court is not a ground to grant a new trial."

We find no manifest error in the determinations made by the Family Court, and conclude that the aforementioned assignments of error are without merit.

Accordingly, we hereby affirm the judgment of the Family Court. All costs associated with this matter shall be taxed to defendant, Harold James Lyssy.

We issue this memorandum opinion in compliance with Uniform Rules – Court of Appeal, Rule 2-16.1B.


AFFIRMED.

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VERSUS
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DOWNING, J., concurs and assigns reasons



The majority reaches the correct result. However, insofar as the majority suggests that neither the trial court nor we are required to decide matters on applicable law, whether or not such law was presented during the trial of the matter, I disagree. Under La. C.E. art. 202, “[a] court, whether requested to do so or not, shall take judicial notice of the laws of the United States, of every state, territory, and other jurisdiction of the United States” Further, La. C.C.P. art. 1972 clearly states that a new trial is mandatory where the verdict or judgment appears clearly contrary to the law or evidence. This provision is not limited to the law argued.

Even so, Mr. Lyssy’s assignments of error address whether the trial court erred in awarding Mrs. Lyssy a portion of his “disability retirement” and, alternatively, whether information from the Defense Finance and Accounting Service constituted newly discovered evidence sufficient to warrant the granting of a new trial.

As the majority notes, Mr. Lyssy elected to receive retirement pay based on his years of military service. He declined his other option, which was to receive disability benefits. Since Mr. Lyssy was at no time receiving “disability retirement”

pay, I conclude his arguments are inapplicable and that he has failed to demonstrate error by the trial court.

I also find no error in the trial court's denial of a new trial. The "newly discovered evidence" tended to show that Mr. Lyssy was receiving disability benefits. As such, it appears to contradict the evidence presented at trial, and there is no showing that facts supporting this evidence could not have been produced at trial.

Accordingly, I agree with the majority in affirming the trial court judgment.