

[J-118-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

AMY L. WAGNER,	:	No. 28 W.D. Appeal Dkt. 2000
	:	
Appellee	:	
	:	Appeal from the Order of the Superior
	:	Court entered on 6/4/99 at No. 1223 PGH
v.	:	1998 reversing the Order of the Court of
	:	Common Pleas of Butler County entered
	:	on 5/29/98 at F.C. 94-90006-D.
MICHAEL F. WAGNER,	:	
	:	
Appellant	:	Argued: September 12, 2000

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: APRIL 18, 2001

I join the majority's disposition, but note my agreement with those courts which have concluded that Section 1408(c)(4), 10 U.S.C., although couched in terms of jurisdiction over the military member, operates as a limitation upon the subject matter jurisdiction of state courts over the pension of a military member. See, e.g., Steel v. United States, 813 F.2d 1545 (9th Cir. 1987); Delrie v. Harris, 962 F. Supp. 931, 934 (W.D. La. 1997); Sola v. Bidwell, 980 S.W.2d 60, 66 (Ct. App. Mo. 1998); In re Akins, 932 P.2d 863, 866 (Ct. App. Colo. 1992). See generally Kristine D. Kuenzli, Uniformed Services Former Spouses' Protection Act: Is There Too Much Protection for the Former Spouse?, 47 A.F. L. REV. 1, 18 (1999)(stating that "[w]hen Congress enacted the USFSPA, it limited the subject matter jurisdiction of state courts over military retirement pay to those instances in which personal jurisdiction existed over the military member [according to a series of jurisdictional requirements]"). This conclusion derives from the

fact that Section 1408(c) is itself the source of the state court's substantive jurisdiction over the subject matter (military pensions); the express limitations which are prescribed, therefore, are most appropriately construed as circumscribing the subject matter jurisdiction which is conferred, in absence of evidence of some contrary legislative intent. Thus, as stated by one court,

Congress has in effect both permitted state courts to consider what status to accord military pensions in the context of dissolution proceedings and prescribed the manner by which personal jurisdiction must be obtained over the military member who is a party to such proceedings before they may apply the substantive laws of their states to that particular asset.

In re Booker, 833 P.2d 734, 739 (Colo. 1992).

Viewed as such, waiver principles are inapplicable to the jurisdictional inquiry as defined under Section 1408(c)(4). Accord Akins, 932 P.2d at 867 (stating that "[t]he question whether a trial court acquires jurisdiction over a military member's pension is governed not by state rules of in-personam jurisdiction or procedure, but rather by the specific terms of the USFSPA"). Therefore, in cases in which a military member neither resides nor is domiciled within the territorial jurisdiction of the state court, the primary jurisdictional question becomes whether the military member has consented to the court's jurisdiction pursuant to Section 1408(c)(4)(C). See generally id. at 867.

Concerning this issue, it has been noted that "courts are split over whether specific consent is necessary or whether a general implied consent can be used to confer jurisdiction." Mark E. Sullivan, Military Pension Division: Crossing the Minefield, 31 FAM. L.Q. 19, 30 (Spr. 1997). While many jurisdictions deem a general appearance sufficient to constitute consent to the court's jurisdiction, see id. (citing cases); Kuenzli, Uniformed Services, 47 A.F. L. REV. at 19 (same), I agree with the majority's interpretation that, in employing the concept of consent to the state court's jurisdiction

with an eye toward affording a degree of protection in favor of military members against forum shopping on the part of non-member spouses, see generally Akins, 932 P.2d at 867, Congress more likely envisioned something more than the entry of appearance by counsel to defend against discovery in a divorce action. Accord id. at 867-68 (stating that “the statutory language [of Section 1408(c)(4)] requires some form of affirmative conduct demonstrating express or implied consent to general in-personam jurisdiction”); Booker, 833 P.2d at 740 (citing cases). Cf. generally Flora v. Flora, 603 A.2d 723, 725 (R.I. 1992)(stating that “[w]e do not find a sufficient basis, in the legislative history of the USFSPA or in the case law, to persuade us that implied consent can meet the consent requirements of §1408(c)(4)”).

In summary, I join the majority’s reasoning with respect to the question of whether Husband/Appellant consented to the common pleas court’s jurisdiction for purposes of Section 1408(c)(4)(C). With respect to the remaining legal issues involved, I find the rationale of the common pleas court, the Honorable George H. Hancher, to be correct and would incorporate it here.