

The Burger Court Opinion Writing Database

McCarty v. McCarty

453 U.S. 210 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543
June 3, 1981

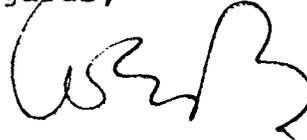
CHAMBERS OF
THE CHIEF JUSTICE

80-5, McCarty v. McCarty

Dear Harry:

I join.

Regards,

A handwritten signature in black ink, appearing to be "W. E. Burger", written in a cursive style.

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 2, 1981

RE: No. 80-5 McCarty v. McCarty

Dear Harry:

I'll await the dissent.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", written in dark ink.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 17, 1981

RE: No. 80-5 McCarty v. McCarty

Dear Bill:

Please join me in your dissent.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

Justice Rehnquist

cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 28, 1981

Re: No. 80-5, McCarty v. McCarty

Dear Harry,

I shall await the dissenting opinion
in this case.

Sincerely yours,

P.S.
/

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 16, 1981

Re: No. 80-5, McCarty v. McCarty

Dear Bill,

Please add my name to your
dissenting opinion.

Sincerely yours,

P.S.
1.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 29, 1981

Re: 80-5 - McCarty v. McCarty

Dear Harry,

Having examined the circulating draft by the author of Hisquierdo, I am content to join it.

Sincerely yours,



Justice Blackmun

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 29, 1981

Re: No. 80-5 - McCarty v. McCarty

Dear Harry:

Please join me.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 28 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5

Richard John

~~Patricia Ann~~ McCarty.
 Appellant,
 v.
 Patricia Ann McCarty.

On Appeal from the Court of Appeal of California for the First Appellate District.

[June —, 1981]

JUSTICE BLACKMUN delivered the opinion of the Court.

A regular or reserve commissioned officer of the United States Army who retires after 20 years of service is entitled to retired pay. 10 U. S. C. §§ 3911 and 3929. The question presented by this case is whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws.

I

Although *disability* pensions have been provided to military veterans from the Revolutionary War period to the present,¹ it was not until the War Between the States that Congress enacted the first comprehensive *nondisability* military retirement legislation. See Preliminary Review of Military Retirement Systems: Hearings before the Military Compensation Subcommittee of the House Committee on Armed Services, 95th Cong., 1st and 2d Sess., 5 (1977-1978) [Military Retirement Hearings] (statement of Col. Leon S. Hirsh, Jr., USAF, Director of Compensation, Office of the Assistant

¹See Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash. L. Rev. 227, 228-229 (1977). The current military disability provisions are 10 U. S. C. § 1201 *et seq.* (1976 ed. and Supp. III).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1981

Re: No. 80-5 - McCarty v. McCarty

Dear Chief:

I think perhaps it would be best if No. 80-5, McCarty v. McCarty, did not come down until the Court announces its decision in No. 80-251, Rostker v. Goldberg. I twice cite Rostker in McCarty and I would like to retain those two citations. I have spoken to Bill Rehnquist about this, and he tells me he has no objection to the case's going over. Bill, as you know, has written the dissent in McCarty.

Sincerely,

HAB.

The Chief Justice

cc: The Conference
Mr. Louis J. Cornio

STYLISTIC CHANGES

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

JUN 19 1981

Uncirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5

Richard John McCarty, Appellant, v. Patricia Ann McCarty.	}	On Appeal from the Court of Appeal of California for the First Appellate District.
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[June —, 1981]

JUSTICE BLACKMUN delivered the opinion of the Court.

A regular or reserve commissioned officer of the United States Army who retires after 20 years of service is entitled to retired pay. 10 U. S. C. §§ 3911 and 3929. The question presented by this case is whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws.

I

Although *disability* pensions have been provided to military veterans from the Revolutionary War period to the present,¹ it was not until the War Between the States that Congress enacted the first comprehensive *nondisability* military retirement legislation. See Preliminary Review of Military Retirement Systems: Hearings before the Military Compensation Subcommittee of the House Committee on Armed Services, 95th Cong., 1st and 2d Sess., 5 (1977-1978) [Military Retirement Hearings] (statement of Col. Leon S. Hirsh, Jr., USAF, Director of Compensation, Office of the Assistant

¹ See Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash. L. Rev. 227, 228-229 (1977). The current military disability provisions are 10 U. S. C. § 1201 *et seq.* (1976 ed. and Supp. III).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 26, 1981

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 80-5, McCarty v. McCarty

Seven cases have been held for McCarty:

(1) No. 79-1469, Cose v. Cose: Relying on Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), the Alaska Supreme Court held in Cose that Army retired pay is not property divisible upon divorce pursuant to Alaska's equitable property division statute. There is some question whether the petition is jurisdictionally out of time. The Alaska Supreme Court denied rehearing on July 19, 1979. On Sept. 17, the last day for filing a petition, petitioner applied for an extension of time, which Bill Rehnquist denied on Sept. 21. Petitioner then reapplied to the Alaska Supreme Court for rehearing. On Dec. 19, the court entered an order reinstating its previous judgment solely in order to facilitate a timely petition for certiorari. It entered a "supplemental mandate" to this effect on Dec. 20. Petitioner filed this petition on March 19, 1980, 91 days after Dec. 19 and 90 days after Dec. 20.

Because the result in this case is consistent with McCarty, I consider it unnecessary to determine whether the petition is timely. I shall vote to deny.

(2) No. 80-291, Miller v. Miller: In Miller, the Montana trial court granted respondent ex-wife a 38.5% share of petitioner ex-husband's Air Force retired pay; in addition, the court held that the ex-wife's heirs could inherit her interest in the retired pay if she predeceased her ex-husband. The Montana Supreme Court affirmed, reasoning that the military retirement statutes did not contain any provisions similar to those deemed controlling in Hisquierdo.

Miller is inconsistent with McCarty; indeed, McCarty explicitly disapproved of the Montana Supreme Court's conclusion in Miller that the heirs of an ex-spouse may inherit her interest in the retired pay. Slip op. at 23. I shall vote to GVR in light of McCarty.

(3) No. 80-578, Milhan v. Milhan: Milhan is noted in footnote 11 of McCarty. In In re Marriage of Milhan, 13 Cal.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 1, 1981

80-5 McCarty v. McCarty

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 28, 1981

Re: No. 80-5 McCarty v. McCarty

Dear Harry:

In due course I will circulate a dissent in this case.

Sincerely,



Justice Blackmun

Copies to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: JUN 16 1981

Recirculated: _____

No. 80-5 McCarty v. McCarty

JUSTICE REHNQUIST, dissenting.

The Court's opinion is curious in at least two salient respects. For all its purported reliance on Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), the Court fails either to quote or cite the test for pre-emption which Hisquierdo established. In that case the Court began its analysis, after noting that States "lay on the guiding hand" in marriage law questions, by stating:

"On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. Wetmore v. Markoe, 196 U.S. 68, 79 (1904)." 439 U.S., at 581.

The reason for the omission of this seemingly critical sentence from the Court's opinion today is of course quite clear: the

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Stevens

From: Mr. Justice Brennan

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5

Richard John McCarty, Appellant, v. Patricia Ann McCarty.	}	On Appeal from the Court of Ap- peal of California for the First Appellate District.
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[June —, 1981]

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN and JUSTICE STEWART join, dissenting.

The Court's opinion is curious in at least two salient respects. For all its purported reliance on *Hisquierdo v. Hisquierdo*, 439 U. S. 572 (1979), the Court fails either to quote or cite the test for pre-emption which *Hisquierdo* established. In that case the Court began its analysis, after noting that States "lay on the guiding hand" in marriage law questions, by stating:

"On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. *Wetmore v. Markoe*, 196 U. S. 68, 79 (1904)." 439 U. S., at 581.

The reason for the omission of this seemingly critical sentence from the Court's opinion today is of course quite clear: the Court cannot, even to its satisfaction, plausibly maintain that Congress has "positively required by direct enactment" that California's community property law be pre-empted by the provisions governing military retired pay. The most that the Court can advance are vague implications from tangentially related enactments or Congress' *failure* to act. The test announced in *Hisquierdo* established that this was not enough

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 29, 1981

Re: 80-5 - McCarty v. McCarty

Dear Harry:

Please join me.

Respectfully,



Justice Blackmun

Copies to the Conference