BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
CLIFFORD C. SNIDER)

For Appellant: Paul Camera
Attorney at Law

For Respondent: Bruce W. Walker
Chief Counsel

Brian W. Toman
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 Of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Clifford C. Snider against proposed assessments of additional personal income tax in the amounts of $1,464.45 and $1,098.04 for the years 1970 and 1971, respectively.

The issue presented is whetner amended section 5118 of the California Civil Code governs property rights (the earnings of appellant husband while living separate and

apart from his wife) acquired prior to the amendment's effective date but not finally adjudicated until thereafter. If so, the earnings constituted his taxable separate property. If not, the earnings were community property, and thereby taxable one-half to each spouse.

Appellant and his ex-wife were married on August 2, 1964, but separated on June 22, 1970. The interlocutory judgment of dissolution of marriage was entered January 25, 1972, and became final 60 days thereafter on March 27, 1972. On that latter date the superior court reserved jurisdiction to determine all questions concerning the property rights of the parties. Such property rights were determined on September 29, 1972, and modified on November 27, 1972.

Prior to March 4, 1972, section 5118 of the Civil Code provided that earnings and accumulations of a wife living separate and apart from her husband were her separate property. However, the earnings and accumulations of a husband living separate and apart from his wife were considered to be community property of the spouses. His earnings were his separate property only where earned after the rendition of the interlocutory judgment of dissolution of marriage. (Civil Code, §§ 5110 and 5119, subd. (b).) Consequently, the income in question was received by appellant when, under then existing law, it: was taxable one-half to his wife as community property. Effective March 4, 1972, however, section 5118 was amended to provide that earnings and accumulations of either spouse' while living separate and apart from the other were separate property. Thus, if the amendment is to be applied retroactively under the facts of this appeal, the earnings constitute appellant's taxable separate property.

In filing his 1970 and 1971 returns, for the period he was separated from his wife appellant reported one-half of his earnings from his dental practice, attributing the other one-half thereof to his wife as community property income. Respondent thereafter attributed all of the earnings during 1970 and 1971 to appellant as his separate property, and issued its proposed assessments on that basis. Respondent concedes, however, even if it prevails in this appeal, that the assessment for the year 1970 will be adjusted to include only appellant's earnings after June 22, 1970 as appellant's separate property, inasmuch as he was not separated from his wife until that date.

In 1975, the district court of appeal, in litigation specifically involving the issue of the retroactivity of the amendment, held that the change in the law was not to be applied retroactively. (In re Marriage of Bouquet, 119 Cal. Rptr. 67 (1975).) In accordance with that holding, the earnings in question would constitute community property. However, on March 19, 1976, after the husband in that litigation appealed, the California Supreme Court reversed the district court's decision and held that section 5118 was to be applied retroactively, and consequently that such earnings constituted the husband's separate property. (In re Marriage of Bouquet, 16 Cal. 3d 583 [128 Cal. Rptr. 427, 546 P.2d 1371] (1976).)

In support of his position, appellant originally relied upon the holding by the district court of appeal, in Bouquet, prior to the reversal. Subsequent thereto, however, appellant has argued that the California Supreme Court impliedly held, in Bouquet, that the amendment's retroactivity should be restricted to instances where the property rights of the spouses had not been finally adjudicated as of the date of its decision on March 19, 1976. Since appellant's rights to the property were finally adjudicated prior to March 19, 1976, appellant therefore urges that he properly treated one-half of the earnings after the separation as community property.

Because of the subsequent California Supreme Court decision in Bouquet, respondent maintains that it properly issued the proposed assessments on the ground that prior to March 4, 1972 (the effective date of the amended section), appellant and his wife's property rights concerning the earnings were not finally adjudicated. Respondent urges that it was decided by the supreme court, in Bouquet, that, under such circumstances, the amendment would apply.

Thus, the critical determination is whether, in applying the amendment retroactively, it is to be applied only to property rights not finally adjudicated as of March 19, 1976, the date of the Bouquet decision, or whether it is to be applied to property rights not finally adjudicated prior to March 4, 1972, the effective date of the amendment, even though finally adjudicated by March 19, 1976.

For reasons explained below, we agree with respondent's position that under the holding in Bouquet, the latter view is correct. Consequently, since appellant's

rights to the property in question were finally adjudicated after March 4, 1972, but prior to March 19,. 1976, we conclude that appellant's earnings while living separate and apart from his wife during 1970 and 1971 constituted his taxable separate property.

In Bouquet, in applying the amendment retroactively, the California Supreme Court specifically stated, "that amended section 5118 governs all property rights, whenever acquired, that have not been finally adjudicated by a judgment from which the time to appeal has lapsed." (16 Cal. 3d at 594.) (Emphasis added.) The underlying issue was the same in Bouquet as in this appeal, specifically whether the husband's earnings while living separate and apart from his wife prior to the effective date of the amendment (March 4, 1972) were his separate property or community property. The factual chronology in that case was strikingly similar, i.e., the parties separated prior to the amendment's effective date and the property rights in question were finally adjudicated thereafter.

In discerning the legislative intent relative to the retroactive application of the amendment, the supreme court, in Bouquet, laced great weight upon a California Senate resolution whereby a "letter of legislative intent" written by Assemblyman James A. Hayes, the author of the amendment, was printed in the Journal of the Senate. The letter provided, in part:

> It was my intention as the author of AB 1549, [the amendment in question] and the argument I used in obtaining passage of the measure by the Assembly and Senate of the California Legislature, that this amendment to Section 5118 of the Civil Code (Family Law Act) would govern the determination of the property rights of the parties under the same rules applied by the California Supreme Court Case of Addison v. Addison, 62 Cal. 2nd 588 [sic., 5581, 43 Cal. Rptr. 97 (1965). In other words, the courts, on or after the effective date of AB 1549 (March 4, 1972) must construe the status and the division of the property of the parties by the law then in effect, without regard to whether the status of the property of the parties or the division of such property might have been differently determined or divided had a judgment been made on March 3, 1972, or at

> any time prior thereto. The intention was to supersede the prior law and to have the new law retroactively apply to all cases decided on and after March 4, 1972. (16 Cal. 3d at 589, fn. 5.)

This letter clearly refers to an intention to have the new law retroactively apply to all cases decided on and after March 4, 1972. The supreme court in Bouquet stressed that while the letter was irrelevant to the extent that it merely reflected the personal views of the assemblyman, it was relevant in indicating legislative intent because it shed light on the legislative history of the amendment. In the letter, Hayes observed that he argued before the Assembly, in securing passage, that the legislation should have such retroactive effect. The supreme court said the letter lends "support to the retroactive application of the amendment through the light it sheds upon legislative debates." (16 Cal. 3d at 590.) The supreme court also strongly emphasized that the letter was relevant because it was printed pursuant to an adopted motion to publish it as a "letter of legislative intent."

The supreme court also emphasized that the prior law was subject to strong constitutional challenges because it blatantly discriminated against the husband during periods of separation, During such periods the earnings of the wife were her separate property while those of the husband belonged to the community. The court pointed out that such unequal treatment based upon sex-based classifications had been recently held to be inherently suspect.

Relying upon the probative value of the letter, the resolution adopting it, and the Legislature's appreciation of the probable unconstitutionality of the former law, the supreme court indicated that the amendment should be given the retroactive effect urged by Assemblyman Hayes. Moreover, the supreme court also concluded that such retroactivity was constitutional. (See also Addison v. Addison, 62 Cal. 2d 558 [43 Cal. Rptr. 97, 399 P.2d 8971 (1965).) Consequently, the legislation should be applied retroactively in the manner now contended by respondent.

Appellant relies upon the established rule of law that a statute should be given the least retroactive effect that its language reasonably permits. (Corning Hospital

District v. Superior Court, 57 Cal, 2d 488 [20 Cal. Rptr. 621, 370 P.2d 325] (1962).) However, irrespective of such a rule, in Bouquet it was clearly indicated that the amendment in question should be retroactively applied to the degree urged by respondent.

Appellant also emphasizes that inasmuch as the trial judge in the earlier marriage dissolution proceeding equally divided the community property between appellant and his ex-wife, including appellant's earnings during their separation, the issue of the nature of such earnings is a matter already adjudged. Consequently, appellant contends that respondent should be bound by the determination in the former proceeding under one of the aspects of the doctrine of "res adjudicata."

Under this Particular aspect of the doctrine, often referred to as collateral estoppel, an issue essential to a judgment previously rendered, which issue was actually litigated and determined by a court having jurisdiction of the subject matter and over the person of the parties, may not be relitigated by the same parties, or those in privity with them. (See Casad, Res Judicata, (1976 ed.) § 5-1, p. 122 et seq.) Moreover, it has been recognized, under certain conditions, that persons not parties, nor in privity with the parties, to the former action, may also be bound by the resolution of a particular issue in a prior proceeding. (See Casad, supra, § 5-41 et seq., p. 182 et seq.) It appears, however, that with respect to the present issue of the extent of retroactivity of the legislation, respondent is not the type of non-party to the prior litigation who would be bound by any prior determination.

In any event, there are two well established exceptions which also govern in this appeal, which render the doctrine of collateral estoppel inapplicable. First, when there has been a significant change in the "legal climate" between the time of the earlier ruling and the later proceeding, the application of the principle of collateral estoppel is properly denied. (See Commissioner v. Sunnen, 333 U.S. 591 [92 L. Ed. 898] (1948); Casad, supra, §§ 5-3, 5-4, pp. 125-130.) Second, the person contending that collateral estoppel applies must establish that the particular issue was actually litigated and decided in the prior proceeding, (See Casad, supra, § 5-24, et seq., p. 158 et seq.)

As already noted, when reporting his tax liability appellant regarded the earnings in question as community property. When the divorce proceeding was initiated, the earnings were community property under the law. During the course of the litigation the law was changed but, as far as the record before us indicates, appellant did not thereafter argue before that court that the legislation be *given* retroactive effect. Moreover, section 3 of the Civil Code provides that no part of that code is retroactive, unless expressly so declared.

Because of these factors, no showing has been made that the issue of retroactivity was actually considered by the superior court, and, if so, that it was considered other than merely incidentally in an entirely different legal climate. After that court had divided the property of the spouses, a significant intervening change in the legal climate occurred. Specifically, the Bouquet decision intervened. We conclude that the doctrine of collateral estoppel should not apply.

For the foregoing reasons, we must sustain respondent's position.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good causing appearing therefor,

Appeal of Clifford C. Snider

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 1859.5 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Clifford C. Snider against proposed assessments of additional personal income tax in the amounts of $1,464.45 and $1,098.04 for the years 1970 and 1971, respectively, be and the same is hereby modified to reflect, as conceded by respondent, deletion of tax on the earnings of appellant prior to the time he was living separate and apart from his wife in 1970. In all other respects, the action of the Franchise Tax Board is sustained,

Done at Sacramento, California, this 16th day of August, 1979, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member