ORIGINAL

In the

Supreme Court of the United States

JESS H. HISQUIERDO,

Petitioner,

v. No. 77-533

ANGELA HISQUIERDO,

Respondent.

Washington, D.C.
November 1, 1978

Pages 1 thru 69

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Wednesday, November 1, 1978

The above-entitled matter came on for argument at 11:06 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the Supreme Court
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAMES D. ENDMAN, ESQ., 311 South Spring Street, Suite 1116, Los Angeles, California 90013; on behalf of the Petitioner

ELINOR H. STILLMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; as amicus curiae

APPEARANCES:

HOWARD M. FIELDS, ESQ., Bennett and Fields, 624 South Grand Avenue, Suite 2620, Los Angeles, California 90017, pro hac vice, on behalf of the Respondent

HERMA HILL KAY, ESQ., School of Law, University of California (Boalt Hall), Berkeley, California 94720, as amicus curiae

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-533, Jess H. Hisquierdo versus Angela Hisquierdo.

Mr. Endman, you may proceed, I think.

ORAL ARGUMENT OF JAMES D. ENDMAN, ESQ.

ON BEHALF OF THE PETITIONER

MR. ENDMAN: Mr. Chief Justice and may it please the Court:

The within matter was commenced on January 9th, 1975 when the petitioner filed a petition for the dissolution of his marriage. This is equivalent to a divorce in other states.

The facts stated in his petition indicated that the parties were married in September 1958 and separated in July 1972. Prior to his marriage, the petitioner was working for the Atchison, Topeka and Santa Fe Railroad and had been so employed since June 1942.

In April 1975 he changed his employment to the Los Angeles Union Passenger Terminal. With over 30 years of railroad connected employment, the petitioner will be eligible for his retirement benefits when he reached age 60. He is presently 57 years of age.

The trial court was called upon to consider whether the future benefits are community property. It was the trial court's determination that there is no community interest in

petitioner's Railroad Retirement Fund.

The wife filed an appeal to the California District Court of Appeals, and the District Court of Appeals affirmed basing their opinion on the Supremacy Clause in the preemption of this field by Congress.

QUESTION: Under California law, setting aside the community property division, could the divorce court, after dividing the property, say I am going to give "X" dollars of alimony which will be paid out of the Retirement Fund when it becomes payable and under which it would be deferred presumably three years on your figures?

MR. ENDMAN: The rules of law as property division and the rules relating to spousal support, as we call it, which is equivalent to alimony, are completely different. Alimony or spousal support would be based solely on the needs and ability of the parties.

QUESTION: Well, I am assuming he found a need and the ability is the Fund.

MR. ENDMAN: I think then that under 42 USC 659, I think, or 28 USC 659 that that could be executed upon the Railroad Retirement Fund in order to enforce payment.

QUESTION: Notwithstanding any Federal statute?

MR. ENDMAN: Well, I think the Federal statute specifically allows the immunity of the exemption clause not to apply to the spousal support and child support provisions.

So if California made a provision for spousal support, then, of course, they could execute upon the Railroad Retirement Fund as well as any other property that --

QUESTION: As a practical matter, if you care to, would you suggest why that was not the solution to this problem, instead of having it go all the route up here?

MR. ENDMAN: Well, as a practical matter, both parties waived spousal support at the initiation of the proceedings in the trial courts.

QUESTION: You mean they wanted to have a lawsuit decided?

MR. ENDMAN: No, this issue -- the spouse waived her rights to spousal support. What the reason for Ms. Hisquierdo's attorney, I do not know, but --

QUESTION: They want to get more money in a specific way. They do not want it by the alimony route. Is that it?

MR. ENDMAN: That was their presumed intent. I do not know what went on in their mind. I think what they attempted to do was to try and get the house free and clear of any other obligations.

QUESTION: Well, may it not have been a reliance on their part -- on the proposition that the Retirement Benefit was community property and, therefore, that the claim for alimony would be less substantial or less compelling from the point of view of the wife?

MR. ENDMAN: As I recall, there was no attempt ever to obtain a pro rata payment. The sole attempt by the spouse's attorneys -- and they never put on any evidence to this effect, although they indicated in a trial brief that they intended to find the present actuarial value of the Railroad Retirement Benefits and offset that against the house, which was ultimately awarded to the husband in this case, and out of that house he is making payments to equalize the division.

But to my recollection there was no real attempt on their part to seek a pro rata share.

The District Court of Appeals, having affirmed the lower court, the petitioner -- or the respondent in this matter thereupon petitioned the California Supreme Court for hearing. Hearing was granted by the California Supreme Court and they reversed this matter, holding in effect that the field had not been preempted and petitioner's entitlement to Railroad Retirement Fund benefits could be subjected to the California Community Property laws.

Following that opinion, petitioner herein filed to this Court for a writ of certiorari pursuant to 28 USC 1257, sub-paragraph 3, contesting the validity of the California Community Property laws requiring equal division of community property in the Federal Retirement Act.

The issue presented in this case is whether in a

divorce proceeding the trial court can award any portion of the railroad-connected employee's future entitlement to benefits to anyone other than the employee.

We are really concerned with three inquiries in deciding the issue of preemption. First, does the Act of Congress touch a field in which the Federal interest is so dominant that the Federal system will be assumed to preclude enforcement of state laws?

Two, has Congress either explicitly or implicitly declared that the State Community Property laws are prohibited from regulating in this area?

And three, and even if Congress has not completely foreclosed the State legislation, is the State statute void because they actually conflict with a valid Federal act?

QUESTION: Mr. Endman, you say the question is whether the California State court can award any part of the retirement benefit. Would it make any difference if you rephrase the question to say: Is the California court entitled to treat pension benefits as community property?

MR. ENDMAN: I think partly true and partly incorrect. I think the -- whichever way California treats it, whether it is community property or separate property, the exemption statute makes it clear that they cannot touch at all -- and I will get into this in a short while -- but they cannot touch the railroad retirement benefits. So whichever way California

analogizes it, whether community or not, the area has been preempted by Congress.

QUESTION: Well, is it not possible that there might be a procedural impediment to the California courts directing disposition of particular Federal checks received by your client, but that it nonetheless might be entitled to treat the property which those checks embodied as community property for purposes of dividing the funds of the community upon dissolution of the marriage?

MR. ENDMAN: Well, I think the exemption statute states that the railroad retirement benefits are not subject to any legal process. And I submit that a divorce proceeding is a legal process.

The exemption statute provides that they are not subject to an anticipation. And if the court in a divorce proceeding provides that in the future he is going to get some benefits and, based on those future entitlement benefits, we are going to say that the other spouse is entitled to something right now or some outside monies, then they are anticipating this future entitlement.

QUESTION: Well, is not Mr. Justice Rehnquist's point that granted everything you say, does that necessarily mean you win your case?

MR. ENDMAN: I think if the trial court is prevented from taking into consideration the issue of Railroad Retirement

Fund --

QUESTION: Well, this is the next step. It is taken into consideration and maybe making your client discard something else, wholly apart from the inability to touch the benefit fund.

MR. ENDMAN: Well, I think this would be inconsistent with the prohibition against a legal process and any legal attempt on the part of the California courts to deal with the Railroad Retirement Fund.

QUESTION: Well, all I am suggesting -- and I think this is what Mr. Justice Rehnquist had in mind and I do not believe you have answered it -- is that all it is doing in adding up assets is drawing the benefit fund into the computation without touching it, but drawing on some other assets in determining the appropriate share of the community.

MR. ENDMAN: Well, that --

QUESTION: You say they cannot do this.

MR. ENDMAN: I say they cannot do this because that would amount to an anticipation that there will be a receipt of these benefits.

QUESTION: You mean they cannot do indirectly what they are prohibited by statute from doing directly, is that it?

MR. ENDMAN: Exactly.

QUESTION: Well, is not that a little simplistic in

a sense, counsel? Certainly after your client has deposited his check in the bank that he receives from the pension benefits and it becomes in a general fund in his bank account, it can be levied on, can it not?

MR. ENDMAN: I believe that there are cases for --

QUESTION: For alimony -- for alimony.

MR. ENDMAN: Oh, for alimony. Well, I do not contend that --

QUESTION: Well, no. I mean can not his bank account be garnished after the check has cleared and that check is in the bank?

MR. ENDMAN: I believe there is an exemption -- would apply to any creditors and would continue as long as it is in the bank.

Now there are cases cited by the respondent, which indicate in their briefs that the exemption extends with regard to Social Security Benefits even after the receipt of those benefits, and even after they are placed in a bank account, even after they are placed in a savings and loan account, at least up until such time as they are invested in some type of an investment other than just being readily available for his necessities and needs in life.

Now I think this would apply to any creditors including the spouse, other than the spouse's rights to spousal support or alimony, as most states call it, or child support.

QUESTION: Does your argument depend on equating a decree of a divorce court with the language "garnishment, attachment or other legal process" under 435 USC 231(m)?

MR. ENDMAN: Yes, with the other legal process portion of it, rather than the "garnishment or attachment".

QUESTION: Does not the most recent amendments -- do not the most recent amendments forbid garnishment to satisfy community property?

MR. ENDMAN: Prior to leaving Los Angeles, at least the supplement to our Code books indicated that --

QUESTION: Well, how about the 1977 amendments?

MR. ENDMAN: Well, I assume that would have been in the '78 supplement, and that still is contained as Mr. Justice Rehnquist indicated that "garnishment, attachment or other legal process or nor shall any attempt be made to anticipate those programs".

QUESTION: How long does this exemption last? He gets a check from the Retirement Board in 1936 and he put it in the bank. How long does it last?

MR. ENDMAN: I think under the cases that I indicated cited by the respondents, that exemption would last so long as it is in the bank available for his needs while he is alive, and currently even to the extent --

QUESTION: So it would last his lifetime.

MR. ENDMAN: Pardon?

QUESTION: It would last his lifetime.

MR. ENDMAN: It could last his lifetime as long as they are left in a bank or savings and loan type investment, where it is immediately available to him.

QUESTION: But the protection would disappear if he bought some real estate and sold it at a profit, and bought some more real estate? At what point does the protection disappear?

MR. ENDMAN: Well, I think the protection would disappear when the monies were placed into an investment. Now that I would think would be when he bought the first real estate that he was not living in.

QUESTION: Well, how about if he put it in a mutual fund?

MR. ENDMAN: A mutual fund?

QUESTION: Is that an investment?

MR. ENDMAN: I would consider that an investment.

QUESTION: Is that good or bad? Can he get to it or not?

MR. ENDMAN: I think that could be gotten to in a mutual fund investment, since it is no longer immediately available for his needs.

QUESTION: The difference between a mutual fund and the bank is --

MR. ENDMAN: I think a bank -- you can go that day

to the bank to get some money for food or groceries or what have you, and a mutual fund is a little more difficult, requiring some clearance.

QUESTION: Mr. Endman, is not the only issue before us as to who owns the Retirement Benefit before it is actually paid? That is the only issue. I do not think we even have the issue you discussed earlier of whether the judge in allocating property in the divorce case could take into account the fact that there is going to be a benefit sometimes down the road. That is not before us either.

MR. ENDMAN: No, that is -- no, as I say --

QUESTION: Who owns the benefit?

MR. ENDMAN: It is who owns the benefit at this point and whether the court can anticipate in receiving the benefit. As I pointed out in this case --

QUESTION: The question is whether it would be an anticipation within the meaning of the Federal statute to apply to Community Property law and say it is now owned half by the law. That is the whole case, is it not?

MR. ENDMAN: Right.

I submit to the court that under each of these inquiries, the State law will be an obstacle to the preemption of the Railroad Retirement Act.

First of all, the Railroad Retirement Act is an appeal in which the Federal interest is so dominant that the

Federal system will be assumed to preclude enforcement of state laws on the same subject.

We are actually here not dealing with any property right. What we have is a social insurance benefit to the same extent as Social Security as was stated in the case of Fleming versus Nestor. The property right arises with respect to pension plans by reason of a chosen action to wit the fact that an employee worked for a company and it is part an element of his compensation.

I realize that this court has stated in the case of Herb versus Pitcairn that this court's power over state judgments is to correct them only to the extent that they incorrectly adjudge Federal rights. I submit that this is just the case; that California has adjudged these non-contractual rights to be contractual rights.

Social Security benefits and Railroad Retirement Act benefits are essentially a part of the same social insurance scheme. Both systems are financed by a tax levied upon the payrolls of the employees and their employers. The proceeds therefrom are paid into the United States Treasury. Each year an amount equal to the benefits and administrative expenses are appropriated to a trust fund.

Furthermore, the Social Security Act is closely coordinated with the Railroad Retirement Act. Credits to the Social Security system may be transferred from railroad service.

Automatic adjustments are made to the Railroad Retirement system whenever the Social Security Act is amended. Adjustment for benefits under the Railroad Retirement Act are made whenever the employee is eligible for benefits under the Social Security Act.

QUESTION: Well, if one could demonstrate that the Railroad Retirement Act were contractual, would that hurt your case?

MR. ENDMAN: In this aspect, yes. I do not think it can be demonstrated because, using this fact as an example, Mr. Hisquierdo works for Santa Fe, he works for the LA Passenger Terminal; he does not work for the United States government. There was no contract between him and the United States to these benefits.

QUESTION: But he had to perform services for Santa Fe in order to acquire them.

MR. ENDMAN: He performed services in order to be eligible for the social insurance benefits. That is the foundation for the satisfaction of the eligibility requirements, just as in Social Security there has to be 40 quarters of work in order to qualify for Social Security. Yet this Court has said in Fleming versus Nestor that there are no contractual rights thereto; that what we are dealing with is a statutory right with no contractual elements involved.

QUESTION: Well, would you think under your Fleming

against Nestor analogy that Congress, after this man had worked 20 years for Santa Fe Railroad and had an accrued pension right, could simply declare that he no longer had such a right?

MR. ENDMAN: I do not think they can do that without running into some problems with the due process clause, but -- and probably some other political ramifications.

QUESTION: Sure, they are political then.

MR. ENDMAN: I submit that both the Social Security Act and the Railroad Retirement Act are part of the same social insurance scheme. Both were enacted pursuant to the power to spend money in aid of the general welfare. This power, I submit, is strictly a Federal matter and should be governed by Federal law without interference by the states.

QUESTION: But what money is Congress spending in this case?

MR. ENDMAN: Congress -- if the income is sufficient -- insufficient will by appropriations have to make funds. And this is, of course, one of the problems that -- in reading the newspapers that the Social Security is running into is that they are constantly raising the taxes to the point to support these funds.

QUESTION: Well, is there any indication that the Santa Fe cannot meet the burden of its pensions; that it is going to have to call on the government?

MR. ENDMAN: Well, this is not a Santa Fe pension.

What we are dealing with is the U. S. government pension and the question is whether the government will call upon Santa Fe.

QUESTION: You mean the pension checks actually come from the government?

MR. ENDMAN: Yes, I believe that is the way it is. I can only say I believe so because my client is not retired and I have no idea where the pension will eventually come from, but I believe it will be from the Railroad Retirement Board itself.

Since I wish to reserve some time for rebuttal, I just want to indicate that the scheme of the Railroad Retirement Act is full and complete; that if we look at Section 231a, sub-paragraphs (a) and (b), it is clear that the Railroad Retirement entitlements to an annuity are to the individual under that section.

If we look at sub-paragraph (c), we see that the spouse of the individual is covered by her -- by the spouse's annuity. If we look under paragraph -- sub-paragraph (d), we find that survivors, widows, widowers, children and parents also receive benefits.

Congress was explicit under 231d, sub-paragraph (c)(3)(B), that entitlement of the spouse of an individual to an annuity under 231a, sub-paragraph (c), shall end on the last day of the month preceding a judgment of absolute divorce.

This Court in dealing with National Service Life Insurance has spoken with the force and clarity that in directing the proceeds to belong to a named beneficiary under the life insurance that the states have no power to deal with those, that the area has been preempted.

QUESTION: Why do you say this Court spoke with force and clarity in Wissner?

MR. ENDMAN: Well, even though it was a divided opinion, the opinion itself says that they have spoken with force and -- that Congress has spoken -- excuse me. I apologize.

I submit that under the Railroad Retirement Act Congress has spoken with equal force and clarity that the annuity belongs to the individual and no other; that the spouse's annuity belongs to the spouse and no other; and because the spouse will lose the spouse's annuity by reason of a judgment of absolute divorce does not give that spouse the right to claim a portion of the individual's annuity.

That annuity scheme is full; it is complete. It was made to -- it is exclusive of state interference and that state interference is excluded by reason of Section 231a and m which we have already talked about.

I submit that Congress has considered the possibility of termination of marriage by reason of Section 231m; that they have made provisions as they saw fit; that neither this Court nor California has any place second-guessing the wisdom

of Congress. If the spouse suffers a hardship as a result, it is most unfortunate but it is for Congress to correct.

MR. CHIEF JUSTICE BURGER: Mrs. Stillman?

ORAL ARGUMENT OF ELINOR H. STILLMAN, ESQ.

AS AMICUS CURIAE

MRS. STILLMAN: Mr. Chief Justice and may it please the court:

The decision here on review directs the California trial court in these divorce proceedings to apply California Community Property law to annuity payments if the petitioner is going to -- is expecting to receive under the Railroad Retirement Act when he retires.

The permitted result will be that the wife, the respondent, will be ordered a proportional interest in those payments either now through taking the interest -- the value of the interest out in other property, or at a later time through taking it out from the payments as they mature -- as they accrue.

We submit that this application of State law in either form conflicts with the Retirement Act. I think I would like to clarify at this point that the United States is not claiming that there is a preemption of the field of domestic law here. We look at this more narrowly, that there is simply a conflict between terms of this court and this particular application of California law to these annuity

payments which are a Federal deficit.

California is perfectly entitled to set up a scheme similar to this of its own and call it property and say it can be anticipated and treated under whatever categories it wishes. It simply cannot act on these Federal payments.

QUESTION: Mrs. Stillman, perhaps you can answer the question that your co-counsel and I are uncertain about, and that is: Do these pension payments comes in the form of a government check and, if so, is the government paying out money that was previously paid to it by Santa Fe?

MRS. STILLMAN: Your Honor, it comes out in the form from the U. S. Treasury. The -- under the Railroad Tax Act, the railroads are taxed, the individuals are taxed, and the money goes into the Railroad Retirement account so that the railroads' tax funds are mingled in that account. This man's benefits from the Santa Fe, so to speak, are not segregated in the account. The different railroads just pay into the fund at a certain tax rate.

I might say you were asking --

QUESTION: Employees do too?

MRS. STILLMAN: And employees do too, although after the '74 Act, employees only pay the amount on their earnings that they would pay under Social Security. That is all they pay.

The so-called Tier 2 benefit, which is the staff

pension on top of this basic Social Security benefit, this is paid entirely by railroad taxes. And I might say that when they wrote the '74 Act, because they had some transition provisions to preserve for some long-time employees some benefits that they were phasing out, and there was a cost of that phase out, Congress decided to let the U. S. Treasury take up that cost. And

QUESTION: Is the general scheme of the Act to make it self-financing?

MRS. STILLMAN: Yes, but in the sense that the -- but it is not a funded scheme. So it is like Social Security that it attempts to be self-financing, but basically present workers are paying in funds that present retirees are receiving. And there is no contribution of the worker that is segregated there, that is his contribution in which he has equity, although generally there are certain guarantees that eventual payouts would equal the amount that he had paid in in Social Security taxes to his survivors or whatever, if he has a current connection with the railroad.

I would like to emphasize though that our case does not really absolutely depend on the nature of this fund. What we are really relying on here is expressed terms of the Railroad Retirement Act; specifically, that the purpose of the Act originally and still is to protect these funds for the worker and to determine that they go to the worker alone.

And we are also relying on the expressed terms of Title 45, Section 231m, which is the anti-assignment clause.

QUESTION: When you say to protect these funds for the worker, do you think Congress really meant to cut that deep into the social policy of the states and that the state policy was to say that if the worker was married -- there was a marital community -- to exclude the wife from the benefit?

MRS. STILLMAN: Yes. We think Congress did cut this deep here and if I could, I could address the particular terms which I think show that intention, Mr. Justice Rehnquist.

First, the annuity payments are not to be made subject to legal process under any circumstances whatsoever.

QUESTION: Do you think that a divorce decree is legal process for those --

MRS. STILLMAN: We think that to allow a spouse to bring the worker's expected future annuity payments into the divorce action for adjudication, which is what she is doing, is in effect a subjectment of the legal process. And we think this is so whether the order that she seeks is to compel a transfer of the equivalent portion of the present value or in order to collect out of the funds -- out of the payments as they are later paid to her.

Second, we think that a court order --

QUESTION: Mrs. Stillman, on that point, do you go as far as the other counsel did and argue that the divorce

court may not even take into account in figuring out what would be a fair spousal award, the fact that such a benefit will in the future be available to the husband?

MRS. STILLMAN: We think the court is precluded from doing that by the anticipation clause and by this legal process clause.

QUESTION: Does this record show the value of this -- the annuity value of this as of the time --

MRS. STILLMAN: I do not believe the record shows it. It would be rather high because --

QUESTION: I should think so.

MRS. STILLMAN: -- he is two years away from retirement -- two or three years away from retirement.

QUESTION: That kind of an annuity would cost a very large sum of money. What would his payments be?

MRS. STILLMAN: It would greatly exceed the equity. I believe the equity in the house was approximately $12,500 total, and I am sure that it would be very difficult to take a proportional value of that pension out of that.

QUESTION: What is the amount that he is going to receive?

MRS. STILLMAN: The amount that he will receive?

QUESTION: Per month?

MRS. STILLMAN: I know that outside the record, Your Honor.

QUESTION: Well, we are outside the record for the moment since it is only a hypothetical. Tell me.

MRS. STILLMAN: I believe it is something in excess of $700 a month.

QUESTION: And that would cost for a man of age 60 close to $100,000 to buy that as a single premium annuity?

MRS. STILLMAN: It would be very high and there is the relationship between that and the equity that is available on the --

QUESTION: So you say the courts of California may not even take it into account when they divide it?

MRS. STILLMAN: No, Your Honor, we think that what they propose to do is to use that amount in a paper transaction here to offset other value in the community. We think that that is using it, that that is anticipating it, as it fits fair.

QUESTION: But your friend whose argument you are supporting said that they could have done this by way of alimony?

MRS. STILLMAN: That is true. And the reason they could do this by way of alimony, we think this would be true only since 1975 because in 1975 Congress by enacting in the Social Security Act, Section 459, which is an override provision that overrides the anti-attachment clauses such as this, said that there could be garnishment of such funds for alimony and child support. We think that is an --

QUESTION: So that when the amount of alimony is set by the judge --

MRS. STILLMAN: That is right.

QUESTION: -- he -- let us assume that the man was going to have no income whatsoever except his annuity --

MRS. STILLMAN: Correct.

QUESTION: -- and it is $700 a month, the court could say, well, you are going to be getting $700 a month, you can afford to pay so much for alimony?

MRS. STILLMAN: I think they can do that since 1975 --

QUESTION: Yes.

MRS. STILLMAN: -- because there is now a correct --

QUESTION: But to the extent that you can garnish it, he could take it into account?

MRS. STILLMAN: Certainly; yes. And that is a sensible reflection of the policy which Congress has now. I think probably they enacted -- it is a reasonable assumption that they enacted that statute in 1975 to avoid the harsh results that would otherwise --

QUESTION: But the statute also negatives the use of it for other purposes.

MRS. STILLMAN: It certainly does, because in 1977 they revised the -- they did not revise; they clarified the definition of alimony in the Social Security Act and expressly excluded community property settlements of the type of order

that would result in this divorce proceeding.

QUESTION: Well, did that by its terms apply to Railroad Retirement benefits?

MRS. STILLMAN: Well, that definition applies to this override provision which by its terms does apply to benefits under the Railroad Retirement Act, yes. It applied -- it overrode a number of Federal -- military pay, a number of them. It was a provision affecting any number of Federal benefits.

QUESTION: And was community property singled out? Is there any reason for it?

MRS. STILLMAN: Excuse me, Your Honor.

QUESTION: Why was community property singled out for special treatment in the last act?

MRS. STILLMAN: Well, that is a matter for Congress, Your Honor. It is a judgment that they are entitled to make.

QUESTION: There is no other reason in the history?

MRS. STILLMAN: I cannot say, Your Honor, why exactly they decided to stop at alimony and child support, although I think a reasonable view would be that, when you are dealing with alimony and child support, you are dealing with actual need. And Congress is doing a balancing here. There is a protection --

QUESTION: When you separate community property, you are dealing with need too, are you not?

MRS. STILLMAN: Well, not necessarily, no. If --

QUESTION: Well, in this case this woman needs something.

MRS. STILLMAN: It is not established that she needs it.

QUESTION: Well, does she not?

MRS. STILLMAN: She has her own earnings. She works and she will have Social Security benefits.

And I might say, just on that point -- I would like to make this clarification for the record -- the amicus brief now and the respondent both said that she would be -- that the petitioner would be entitled to take his entire Railroad Retirement benefit and then claim a divorce spouse's benefit, based on her earnings under the Social Security Act.

We think that would -- it would be ill-advised of him to try that because if gets an award of -- a benefit under the Social Security Act, there is an offset provision in the Railroad Retirement Act which would require that his railroad benefit be reduced to the amount that he was --

QUESTION: Well, Mrs. Stillman, I do not think the need or anything else is involved in this. I think the same statute applies to a movie actor as it applies to a laborer.

MRS. STILLMAN: Certainly.

QUESTION: Is that not right?

MRS. STILLMAN: Although movie actors would not be

covered by this Act, but we would just say that Congress has a policy here that they have made an inroad into this protection that they have established for these payments. And they have only gone so far as making it for alimony and child support. They have not gone further to extend it to community property settlements.

We would say or call to the Court's attention also that H. R. 8771, which was described in our brief at page 23 and has now been enacted as Public Law 95-366, in the Civil Service Retirement and Disability Program Congress has now gone further for that program and done essentially what the respondent wants the Court to allow to have done by application of State law to this statute.

QUESTION: Does not 659 though just refer to garnishment?

MRS. STILLMAN: No, this is something else, Your Honor.

QUESTION: I do not mean the section you immediately just cited, but --

MRS. STILLMAN: Yes.

QUESTION: -- 659 which is, as I understand it, the '75 amendment.

MRS. STILLMAN: Refers only to garnishment, but we think that a reasonable interpretation of the Act in the light of that now is that it would be acceptable to consider alimony

since it can be garnished.

QUESTION: Well, but then it is not entirely accurate to say that the '75 Act by its terms applies to the treatment of community property, is it, in railroad retirement --

MRS. STILLMAN: Oh, but the '75 Act was, as I said, clarified by a re-definition of alimony in 1977, which applies specifically to the term alimony in that statute. And they defined alimony to exclude community property because there had been some uncertainty on the parts of some of the courts.

QUESTION: And you are still talking about it under the umbrella of alimony, are you not -- or rather of garnishment, are you not?

MRS. STILLMAN: That is true, Your Honor.

QUESTION: And if the award of community property is not garnishment, then that statute, I take it, would not apply?

MRS. STILLMAN: That is true, but we think that there still could be no anticipation. Are you talking now about taking into account --

QUESTION: Well, that is a different argument, is it not?

MRS. STILLMAN: Yes, Your Honor.

We would say simply that Congress has these other options, and the option that they chose in this recent retirement -- Civil Service Retirement Program was to allow

garnishment out of Civil Service pensions for community property awards, as well as divorce and as alimony judgments.

Now, Congress may wish to extend that to this Act. It might -- there might be good policy reasons for them to do it, but we simply think that that is a matter for Congress to decide and not a matter that should be engrafted onto the statute by State law.

We think that the court recognized that in the case of Free v. Bland when it said: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."

Therefore, we submit -- the United States submits that the judgment of the Supreme Court of California should be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Fields?

ORAL ARGUMENT OF HOWARD M. FIELDS, ESQ.

ON BEHALF OF THE RESPONDENT

MR. FIELDS: Mr. Chief Justice and may it please the court:

The issue in this case is simply as Mr. Justice Rehnquist has stated: whether the California courts in applying California family law doctrines relating to community property may include in the total amount of assets acquired during the marriage but prior to separation the present value of the

petitioner's Railroad Retirement benefits to the extent that they are attributable to employment during the marriage.

The issue is not one of a contractual interest and, indeed, the United States acknowledges on page 7 of its brief that that issue is irrelevant to the case before the Court.

QUESTION: Under the Railroad Retirement Act, what happens if this man dies before he reaches age 60?

MR. FIELDS: Well, at this point, Mr. Chief Justice, the respondent would be entitled to nothing. She would not be entitled to the survivor's benefit and she --

QUESTION: Well, what happens to the money? We know they are divorced.

MR. FIELDS: It remains in the fund -- the trust fund.

QUESTION: It is forfeited -- it is escheated to the fund, in other words?

MR. FIELDS: Exactly.

QUESTION: But if they had remained married, she would have received part of it?

MR. FIELDS: She would receive a survivor's benefit; she would not receive a spouse benefit.

QUESTION: In other words, it is a joint in survivorship annuity in effect?

MR. FIELDS: Yes.

If on remand and the decision of the Supreme Court

is affirmed, the petitioner -- the respondent will not be claiming a 50 percent interest in petitioner's benefits. She would be entitled only to 50 percent of the community property interest, that being the amount which is attributable to employment during the marriage. That amount in this case would be less than 20 percent as it respects respondent.

As is pointed out by the respondent's brief, the court is not required to give respondent 50 percent or even 20 percent of the benefits to respondent as they are received by the petitioner because the court can award an alternative item of community property or can award to the spouse a portion of the Railroad Retirement benefits after they are received.

In answer to Mr. Justice Rehnquist's question earlier, in the case as to whether or not the funds could be garnished or executed upon, once the funds are in the bank account -- at least, one court, the Superior Court in Pennsylvania in Commonwealth versus Berfield, cited in the respondent's -- in the amicus brief filed by the National Organization for Women, shows that in that case the court decided that the funds could be garnished once those funds were in the hands of the petitioner or in that case as they were in the hands of the bank.

QUESTION: Generally speaking, California's domestic relations law and how it is administered is none of our business, but tell me whether the California courts still have jurisdiction to grant alimony in this case or to reexamine

this case, depending on the outcome -- to reexamine the case in California, depending on the outcome of this appeal?

MR. FIELDS: In this case, Mr. Chief Justice, for reasons unknown to me, that the attorney who tried the case did waive spousal support and I believe that on remand the respondent would not be entitled to claim any more spousal support.

You correctly stated, technically the issue of family law doctrines, as they are applied in California, is really not an issue in this Court. It is not something to be determined by this Court.

This Court stated in United States versus Yazell that both the theory and the precedents of this Court teach us solicitude for state interest. Particularly in the field of family and property arrangements, they should be overridden by Federal courts only where clearance, substantial interest of the national government, which cannot be served consistently with respect for such interest, will suffer major damage if the State law is applied.

We submit that Congress has not acted clearly in declaring that State law should be preempted and that there is no interest of the national government which will suffer major damage if the State law is applied.

In Wissner versus Wissner there was a clear intent of the national government in protecting the morale of the

servicemen in making life insurance available to them at a reasonable cost. This was --

QUESTION: How could you read this statute that would allow us to do that?

MR. FIELDS: Excuse me, Mr. Justice Marshall?

QUESTION: How would you read this statute that says you just cannot do this and say, yes, you may do it?

MR. FIELDS: I do not believe there is a statute saying that California cannot do this. We submit that neither 231n or 231d clearly states that California cannot do what California has done in this case.

QUESTION: Well, that is what I am waiting for you to explain it and do more than just say so.

MR. FIELDS: With regard to the issue of anticipation, anticipation is really a word of art. We submit that 231m, the exemption from execution statute, was merely an exemption from execution statute which has to be read in light of the circumstances under which the Act was passed. This was in 1935 and the --

QUESTION: Well, what do you think anticipation means?

MR. FIELDS: It is a word of art taken out of spendthrift trusts. If you read that just the way that petitioner believes it should be read, you can also argue that the respondent is anticipating that the husband will

receive these benefits, but the husband himself is anticipating that he too will receive these benefits at some time in the future. By the petitioner's own reading of that statute, this Court has to conclude, we believe, that the petitioner himself cannot anticipate those benefits.

It is merely a word of art.

QUESTION: Yes, but the statute is not a word of art. The statute says you cannot collect.

MR. FIELDS: No. The statute does not say the wife cannot collect. And you also have --

QUESTION: Well, why was the statute amended in '75?

MR. FIELDS: The '75 amendment merely states -- are you talking about --

QUESTION: Surplusage.

MR. FIELDS: We do not believe that the '75 amendment was directed to the wife, who we believe to be --

QUESTION: Well, how about the '77?

MR. FIELDS: The '77 amendment regarding garnishment expressly -- it does not recognize a community interest, but you have to look in light of the purpose of the enactment of that legislation.

Congress was trying to combat welfare recipient increases -- increases in the rate of the welfare roles because husbands were -- and fathers were able to avoid their support obligations.

And under the '77 amendment, Congress determined that it would waive the sovereign immunity in order to permit the states to have the recipient of welfare benefits assigned those benefits.

QUESTION: It did not raise it out of the community property, did it?

MR. FIELDS: No, it did not. There is really no --

QUESTION: It could have, but it did not.

MR. FIELDS: It could have, Justice Marshall, but --

QUESTION: But you recognize that it did prohibit, did you not? You never recognized that it does prohibit it?

MR. FIELDS: It prohibits garnishment of the Retirement Funds by the respondent, but that statute does not prohibit --

QUESTION: No. My question was that it did not take out community property. So they left it in and you mistakenly said that is right, but you did not really mean to say that.

MR. FIELDS: I meant to -- we submit, Mr. Justice Marshall, that Congress was only addressing that one problem, that problem of fathers and husbands evading their support obligations rather than their community property obligations.

There is absolutely no history in the legislature that Congress intended to prohibit wives from obtaining any type of benefit --

QUESTION: Except they said no legal proceeding.

MR. FIELDS: Well, legal proceeding is also, we contend, a word of art.

QUESTION: It has certain exceptions like divorce.

MR. FIELDS: Yes, but the mere adding up of an asset in a community --

QUESTION: Well, if divorce is not a legal proceeding, why do you lawyers charge fees? I mean take a simple way of looking at it.

MR. FIELDS: Well, the divorce is a legal proceeding, but the aspect of adding up this benefit as a community property asset is really not a legal process per se.

QUESTION: Could I just follow up on one thought. Mr. Justice Marshall asked you what in your view the word "anticipated" meant, and I did not understand your answer.

MR. FIELDS: My answer was that, again, this was a word included in an exemption statute, enacted during the Depression. It was, we believe, taken out of context, out of the language of the spendthrift trust. And if we follow through on petitioner's argument that the court cannot evaluate the community interest in this benefit because the respondent would be anticipating that benefit, it must also be concluded that the petitioner himself is anticipating that benefit.

QUESTION: Well, but that may be a reason why their interpretation -- I am asking you what your interpretation of

the word is. Do you have -- or do you think it is just redundant?

MR. FIELDS: I believe that it is redundant; that it was inserted in there by someone who was drafting that particular --

QUESTION: You do not think it means anything more than the preceding clause which refers to a garnishment attachment and other legal process?

MR. FIELDS: No. I personally do not believe it means anything more than that. And there is no history, especially as indicated in the hearing -- the 1935 hearing report cited in our brief, that Congress intended by that statute to preempt --

QUESTION: Well, your answer is it is totally redundant?

MR. FIELDS: It is totally redundant. There is no intent that Congress intended to preempt State family law concepts.

QUESTION: Would it possibly also be speculative since Mrs. Stillman said that if he died before reaching age 60, the whole fund is wiped out? That is, there is no fund; there is no asset anymore.

MR. FIELDS: Well, that is correct, Mr. Chief Justice. If he dies before age 60, the amount of his contributions to the fund would be forfeited.

QUESTION: Well, the redundancy, if there is one, is really between the prohibition against anticipation and the statutory requirement for benefits, service, time and so forth, rather than the statutory prohibition against anticiipation and the statutory prohibition against garnishment, is it not?

MR. FIELDS: Yes, we believe so.

As is brought out in the respondent's brief and in the two amici briefs filed on her behalf, this Court does not under established law presume an intent where no intent exists.

There is no indication anywhere in the legislative history thoroughly discussed in the briefs that Congress intended to preempt State community property law.

The existence of the spouse's benefit cited by the petitioner in his brief does not imply that Congress intended to preempt state community property law. The mere existence of that spouse's benefit is an interesting question in itself. We believe that it was enacted in 1951 in response to the demands of the railroaders, who had traditionally been receiving an amount of benefits far in excess of Social Security.

By 1950, however, Congress had amended the Social Security Act so that there was an average benefit increase of 77 percent. At this point, the railroaders who had been -- who were receiving less than Social Security recipients and the railroads themselves, which were upset that they were

contributing greater amounts of money into the Railroad Retirement Fund than Social Security recipients, employers would be contributing, that greater benefits were in order.

We believe that the existence of the spouse's benefit was merely an explanation for Congress' intent to provide greater benefits in order to make the Railroad Retirement recipients receiving more than Social Security recipients.

The fact that the spouse's benefit terminates upon divorce merely supplements Section 231d, because at the conclusion of the marriage there is no spouse. The spouse receives a separate benefit, separate and apart from her husband.

She receives a separate check. This could be a good explanation for why the court -- why the Congress determined that the spouse's benefit terminates upon divorce. Congress did not determine that the spouse is not -- is precluded under the Supremacy Clause from establishing any community property interests in husband's right to receive Federal Railroad Retirement benefits.

To conclude that Congress by enacting House Bill 8771 in which -- which was signed by President Carter on September 15th and enacted as Public Law 95-366, it recognizes that Congress can, in effect, affirm the California Supreme Court decision in this case. It is merely in support of respondent's argument that what California is doing does not

conflict Congressional intent. 8771 was enacted in order -- in recognition of -- by Congress of the greater needs that are present in today's society by older divorced women. Congress is receptive to this point of older divorced women.

QUESTION: But that legislation, if I have it identified correctly, is specifically applicable only to Civil Service retirees, is it not?

MR. FIELDS: Yes. Yes, Mr. Justice Stewart; that is correct.

QUESTION: You just meant it illustrates that Congress could do this if it wanted to?

MR. FIELDS: Yes.

But as pointed out by the brief filed on behalf of members of Congress, one of the objections posed during a period in which Congress was considering this piece of legislation was that community property and state domestic relations law is really an area of state concern, not an area of Federal concern.

In the area of family law, this Court frequently defers to state law in that regard. It is simply not a Federal ...it is not an area of Federal involvement. To accept the respondent's argument as further advanced by the United States, which I might add was contradicted this morning by Mrs. Stillman, the point that the California court cannot take into account alimony, this is contradicted on pages 22 and 23

of the brief filed on behalf of the United States, in which the United States is really advancing the argument that the Federal government should somehow get involved in needs of the divorce spouse's --

MR. CHIEF JUSTICE BURGER: We will resume at 1:00.

(Whereupon, a luncheon recess was taken.)

MR. CHIEF JUSTICE BURGER: Has your friend, has Mr. Fields completed?

MRS. STILLMAN: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well. Then, Mrs. Kay, you may proceed when you are ready.

ORAL ARGUMENT OF HERMA HILL KAY, ESQ.

AS AMICUS CURIAE

MRS. KAY: Thank you, Mr. Chief Justice and may it please the court:

As Mr. Fields said to the court this morning, the only issue before this court in this case is whether California may list under the heading of community assets arising from this marriage the present value of Mr. Hisquierdo's right to receive in the future benefits attributable to his work during the marriage and payable from the Railroad Retirement Act.

QUESTION: In your view, if the judge simply said, perhaps to himself first, "I am going to take into account that there is about $100,000 asset here, contingent upon the man's surviving", take it into account, not anticipated in the sense

that word is used as a word of art, would you think that he could properly do that?

MRS. KAY: Yes, Your Honor. That is exactly what the California Supreme Court said could be done in pension cases and in re marriage ground, where the court said that we no longer had to wait for pension rights to vest. It was enough if there was a right attributable to work performed during the marriage could be taken into account.

QUESTION: But then, what if the gentleman died, either a week before or a year after?

MRS. KAY: Well, Your Honor, if the gentleman died --

QUESTION: After it vested -- after it vested?

MRS. KAY: If the gentleman dies or, indeed, in a private pension case if he leaves employment and is no longer entitled under the private plan to any benefits, then the court has to retain jurisdiction on the theory that there is insufficient evidence on which to value the plan. And the court can do that and does do it quite commonly.

QUESTION: You mean, the continuing jurisdiction of the domestic --

MRS. KAY: Of the divorce court; that is correct, Your Honor, so that as and when the benefits become payable, the court will then know exactly what can be allocated to each spouse. So that if, for example, in this case it were difficult to value Mr. Hisquierdo's rights in the Railroad

Retirement benefits, the court could retain jurisdiction until 1981 when he is scheduled to retire -- could then award the wife, as Mr. Fields said, 20 percent of the share of the benefits, and could order Mr. Hisquierdo to pay them.

Now I would like to add that that is not to say that the court could order the Railroad Retirement Board to pay them. It is not even to say that you could attach those benefits in Mr. Hisquierdo's hands. It is merely to say the court could make an order to Mr. Hisquierdo that this amount be paid to his wife.

That is commonly done, Your Honor, and indeed has been done, contrary to the argument that Mrs. Stillman made this morning in cases arising under the predecessor to Section 231m, namely, Section 231-1 to the Railroad Retirement Act, where in several cases the courts took into account the value of the Railroad Retirement benefits in both alimony and child support situations, and said that those benefits can be payable even though the specific benefits may not be payable, an order can be entered against --

QUESTION: Well, but this does not involve alimony or child support.

MRS. KAY: That is correct, Your Honor; it does not.

QUESTION: It involves whether or not California can consider this community property. And that is the only issue, is it not?

MRS. KAY: I absolutely agree with you, Your Honor. I think the 1974 amendment, the 1975 amendment and '77 definitional amendment are totally irrelevant to the question of Congressional intent in this case.

We are not relying on any need on the part of the wife. We are relying on her rights as an owner of this property.

QUESTION: Right.

QUESTION: Mrs. Kay, is another way of stating this, you say the question is whether this -- the present value of the pension could be listed as a community asset. Could it also be correct to say that the issue is whether, when that present value is listed, shall it be listed as a husband asset or as a joint asset? Is not that another way of stating the same issue?

MRS. KAY: Well, not under California practice, Your Honor. It is true that when you file in the California court for dissolution of marriage, you have two separate forms. The petitioner lists the community assets from marriage. They are not usually listed as husband's assets or wife's assets; they are simply listed as community assets.

So in this case, as indeed happened in this very proceeding, the wife would list under community assets husband's Railroad Retirement benefits. That does not mean that they belong to the husband and not to the wife. It means that they

have been attributed to his labor during the marriage.

QUESTION: No. But would it not be your view that if the government is correct here -- and, of course, that has not been decided -- that all that would mean would be that this particular asset would be treated in the total picture as an asset belonging to the husband? It could still be taken into account by the judge in making whatever alimony or support or --

MRS. KAY: No, Your Honor. It would not be treated as an asset belonging to the husband. It would be treated, if you please, as an asset generated by the husband's work during marriage.

QUESTION: Well, if it is community property?

MRS. KAY: That is correct if it is community property.

QUESTION: As Mr. Justice Stevens said, if the government is correct in this case, then it is the husband's asset and it is not community property.

MRS. KAY: Oh, I beg your pardon, Your Honor. If the government is correct, then it is not a community asset at all. The government has corrected as separate property, and separate property is not subject to division upon dissolution under California law, so would not be listed at all.

QUESTION: Is it not -- may not -- maybe I am just terribly ignorant about California law -- it would mean that

the California judge could not even taken into consideration the separate property in deciding what --

MRS. KAY: That is correct. The trial court judge could take into account separate property only for the purpose of establishing an alimony award --

QUESTION: But he could do that?

MRS. KAY: -- not for the purpose of dividing the community property.

QUESTION: Well, I understand. But he could do that?

MRS. KAY: Yes, he could do that.

QUESTION: Because I think your opponent said he could not, and I just wanted --

MRS. KAY: No, I do not -- I did not understand my opponent to say that, Your Honor.

QUESTION: Well, I guess I did misunderstand and that is why I am trying to get help.

MRS. KAY: I think one fundamental point that has been overlooked here -- the Chief Justice put a stinger on it early this morning by asking why it made a difference whether the defendant spouse took this property as community property or as an alimony award. The difference it makes is that alimony awards are traditionally modifiable, can be terminated.

Alimony rights are subject to the discretion of the trial court. Community property rights are not. So that there is a great deal more security involved for the defendant spouse

under the community property laws in being able to say this asset is property right and not simply an alimony award.

QUESTION: Alimony awards are also taxable generally, I believe.

MRS. KAY: I beg your pardon?

QUESTION: Are not alimony awards generally taxable to the recipient?

MRS. KAY: They are generally taxable to the recipient; that is correct, Your Honor.

QUESTION: But now, if you are correct and if this property, the present value of the expectancy, is therefore properly includable as property of the community, and there is a division of that property, half and half on the dissolution of the marriage, then what happens if two weeks after the husband becomes eligible for the retirement benefits, he dies?

MRS. KAY: Well, Your Honor, that is the question of valuation.

QUESTION: Well, it is, but now we are talking about the present value, which --

MRS. KAY: That is correct.

QUESTION: -- is, let us say, $20,000 or 40 and that is divided in half. And the wife on the dissolution of the marriage, therefore, gets half of that, $10,000 or whatever it is; then a week after the husband becomes eligible -- he does live long enough to become eligible but he promptly dies,

she still has the $10,000?

MRS. KAY: No, Your Honor, in the case that you pose, the cause of the uncertainty of his living until the pension --

QUESTION: But he has lived. In my hypothesis he has lived that long.

MRS. KAY: What I am saying is that the trial court, who has acted presumably before the husband has lived to the time of your hypothetical --

QUESTION: Yes.

MRS. KAY: -- the trial court,realizing that the husband might die, could and very likely would simply not order the payment to the wife at the time of dissolution of $10,000, but would retain jurisdiction, and would then simply begin ordering the husband to pay to the wife as and when the benefits become due, 20 percent of each monthly payment. So that when he died, since the Fund would then, as you said this morning, revert to the Treasury, there being no children involved in this case, then the wife would have nothing further against what she could assert a community interest.

QUESTION: But if you are correct, the judge would not have to do that.

MRS. KAY: Well, Your Honor --

QUESTION: If this is community property, it is an asset.

MRS. KAY: That is correct. But the burden --

QUESTION: It is not income, it is an asset.

MRS. KAY: That is correct.

QUESTION: And the judge, if you are correct, could simply order a division of half to the wife on dissolution of the marriage with a present value of the expectancy?

MRS. KAY: Yes, Your Honor, he could do that. All I am --

QUESTION: And if she got that, then she could keep it?

MRS. KAY: Oh, that is absolutely right.

QUESTION: No matter what happened.

MRS. KAY: All I am saying is that assumes that the valuation is certain enough to be divided at the time of the divorce. It would have to be discounted under actuarial practices to take account of his wife's expectancy.

QUESTION: Well, I am assuming all the discounting and the probabilities --

MRS. KAY: Well, if that is true, Your Honor --

QUESTION: -- and if you end up with a value of $20,000 and you divide it in two.

MRS. KAY: That is true, Your Honor. She is left out.

QUESTION: Well, there again as a practical matter, and it is beyond our jurisdiction, it is a matter for California.

As a practical matter, certainly the judge would not be unaware, and if he was, some of the counsel would make him aware of the fact that this was a highly speculative asset --

MRS. KAY: That is correct.

QUESTION: -- and he would hardly ascribe any fixed value to it. But does that not also suggest -- and again, this is not our business -- that the Railroad Retirement pension or any other similar pension is the subject to be dealt with under alimony, not under community property?

MRS. KAY: Well, Your Honor, I do not think so. As people spend more of their working time accumulating benefits towards retirement, and especially as you talk about families where there is only one spouse working outside the home, towards the end of the lengthy marriage, it is very likely that the rights in the pension or the future expectations in the pension will be the single largest item of community property.

And if one takes account of that as alimony, as the California Supreme Court said in the Phillipson case, it really leaves the dependent spouse to the mercy of the divorce court and not to the dignity of the community property award.

QUESTION: Is it not true, Mrs. Kay, that California for a long time has treated insurance annuities paid by private insurance companies as community property rather than alimony?

MRS. KAY: That is correct, Your Honor. And we also treat goodwill attributable to legal practice as community

property even though it cannot be sold by the lawyer.

Now it may be worth emphasizing what the issues are in this case, now that I think we have discussed what the issues are not. The issue in this case is whether the United States Congress in enacting the Railroad Retirement Act has indicated in clear and direct terms an intent to supersede state law.

The only two sections of the Railroad Retirement Act that are relied on either by the petitioner or by the government in expressing that clear intent are the anti-assignment provisions of Section 231m and the termination of the spousal benefit in the Railroad Retirement Act itself.

The anti-assignment provision has been mentioned earlier this morning. We believe that that provision, borrowed language from spendthrift trust ideas, it was meant to protect the worker against his own failure to provide for himself. It was to protect the worker against the claims of creditors. Under California law the Supreme Court has made it clear that the wife claiming as an owner does not claim as a predator, and that there is no anticipation or assignment involved in awarding to her property that is her own.

While it is true that there is a Federal question that this Court must decide as to whether that rule has been superseded, I do not believe anyone has suggested that there is a different definition of the legal terms, "assignment" or "anticipation" for the purpose of Federal law and state law.

Therefore, in this Court's long-standing practice of refusing to interfere with the state domestic relations law and in refraining from promulgating a Federal law of domestic relations, this Court ought to leave the content of that definition to state law.

There have been a series of cases in which the Court has looked at the question of Federal preemption of state community property laws. Those cases are cited in all the briefs in this case.

QUESTION: But the government says this is not a preemption case.

MRS. KAY: Your Honor, I do not understand the government to say it is not a preemption case.

QUESTION: I heard the government say that this morning, standing right where you are.

MRS. KAY: Yes. They rely on their brief on the Wissner case which is a preemption case.

The Wissner case involved the National Service Life Insurance policy, which was a policy of formal property that was created by Congress for the benefit of --

QUESTION: Well, I understand the government's position to be that there is a specific statute that does not say preemption or anything else. It merely says that this money that comes from the Retirement Board shall not be used for these purposes. And that is not preemption anyway. That

just says a prohibition.

MRS. KAY: Well, Justice Marshall, the only two provisions the Railroad Retirement Act, that they rely on to say that, are the anti-assignment provision and the failure to provide a benefit for divorced spouses. And neither of those two provisions, we submit, has anywhere near the clear Congressional intent as the language used in the Wissner case, where Congress said "this beneficiary and no other shall get the proceeds."

QUESTION: Well, does this apply --

MRS. KAY: I beg your pardon?

QUESTION: Do these provisions apply to all divorce actions all over the country?

MRS. KAY: Does what apply?

QUESTION: Or is it limited to community property?

MRS. KAY: I am sorry, I did not hear you.

QUESTION: Well, does the decision in this case apply to all 50 states or not?

MRS. KAY: No, Your Honor, it will apply only to the eight community property states --

QUESTION: Why?

MRS. KAY: -- because only in the eight community property states is the wife treated as a co-owner of property as and when it is acquired.

And moreover, it may not apply in those community

property states that have not yet arrived at the position that California has come to In Marriage of Brown, and has not yet decided that it will award pension rights unless they are vested.

QUESTION: So it would apply to a maximum of eight, but most certainly not all eight?

MRS. KAY: That is correct, Your Honor.

Now the cases that this Court has decided earlier, dealing with the question of preemption, began with the case of Wissner versus Wissner and, as I indicated, the Court had made very clear in that case that there was only one beneficiary of the policy, and the beneficiary was the person selected by the serviceman, and that beneficiary and no other would be allowed to have the proceeds of the policy.

There is nothing like any such statement in the Railroad Retirement Act, which is before the Court today.

QUESTION: Well, there is nothing speculative about the value of a life insurance policy, is there? It has a cash value on any given day and, upon death while the policy is still enforced, it has a face value measurable.

But how would you advise a judge to place a value on this retirement annuity?

MRS. KAY: Well, Your Honor, the question of how this retirement annuity is valued, I submit, is not before the Court.

QUESTION: No, I know it is not, but there are some practical aspects to this case which we have all been exploring, and they are very important to the ultimate resolution of the problem perhaps.

So how would you tell the judge if he said, "Now will you, counsel, tell us how to value this" -- there being no survivorship rights here?

MRS. KAY: Yes. Well, Your Honor, in California practice a great amount of money, I understand, is spent on actuarial consultants who attempt to place a value on these intangible property rights and --

QUESTION: But how do you do that on an annuity which will terminate on the instant of the death of this man?

MRS. KAY: Well, you look, for example, at mortality tables indicating how long he is likely to live.

QUESTION: Well, but what if he steps off of the curb and get hits by a truck, the mortality table is not going to help.

MRS. KAY: That is right, but actuaries, I understand, are able to take account of factors of that kind and, at any event, the California courts are saved by the fact that if the actuarial figures are not sufficient in the discretion of the court to make an immediate award, all the court need do is retain jurisdiction.

So that provides a very practical back-up which the

court can fall back on.

In this case, the court would only have to wait until 1981 to find out whether Mr. Hisquierdo gets hit by a car as he steps off the curb.

QUESTION: Do your California courts face similar problems in valuing purely private pension rights?

MRS. KAY: Absolutely, Your Honor, and that was one of the major arguments In Marriage of Brown against the position that the court took.

And it was because the court felt that it had to carry out the strong State law policy of preserving the community property interest as against the more speculative alimony award that the court decided that it was necessary to define community property interests in that case.

So we do know how difficult it is to value these kinds of things in California, but nevertheless the courts are facing this problem as a practical matter everyday.

Now, in the case following Wissner, which also involved the question of Federal preemption in the case of Free versus Bland, there was again an effort to borrow money on the Federal credit, and in that case this Court decided that the husband in a community property state buying co-owner bonds with his wife with the right of survivorship were allowed to overcome the contrary Texas rule, which would have said that the spouses could not agree in effect to convert what was

community property into survivorship property that would belong to the owner.

The court overcame the contrary state law interest in that case because of the necessity to raise money in the public credit. But in a case following Free versus Bland, written by Mr. Justice White, Yiatchos against Yiatchos, the Court refused to permit that prior holding in Free against Bland to be used by a husband in the State of Washington to defraud his wife of her community property interests.

In that case, the husband had invested something like $15,000 worth of community funds as to which he was the sole manager and bonds naming his brother as a survivor. And after his death, the wife in effect said, "My community property rights have been taken away by the conjunction of this Court's holding him free and the husband's managerial rights under State law."

And this Court said we will not allow the Federal provisions here to be used as an instrument of fraud to take away the wife's rights. The Court used a Federal definition of fraud, but in looking to the content of the wife's rights, it looked to State law to define her property rights.

So that it did admit that even in a case where pre-emption was otherwise clear, the wife's rights under State community property law would be preserved.

QUESTION: But did not that case say quote: "The

survivorship provision is a Federal law which must prevail if it conflicts with State law"?

MRS. KAY: Yes, Your Honor, but the Court also --

QUESTION: The very language they used.

MRS. KAY: But the Court also said that it would seem obvious that the bonds may not be used as a device to deprive the widow of property rights, which she enjoys under Washington law and which would not be transferable by her husband but for the survivorship provisions of the Federal bonds.

So the Court was willing to admit in that case that the strong Federal interest which it had found in Free against Bland must itself give way to Federal doctrine filled with the content of State property law to prevent the wife from being defrauded of her rights by an unscrupulous husband.

What I am suggesting is that this Court has even in that context adhered to its long-standing practice of not trying to write for the country a Federal domestic relations law, but rather has conceded that State law should be followed to the extent possible, were it not necessary to protect the Federal interest.

The statement that was made --

QUESTION: Mrs. Kay, let me interrupt just a second.

MRS. KAY: I beg your pardon.

QUESTION: You are saying that you are avoiding the

Congress writing a Federal domestic relations law. But really you are arguing that you do not want this property to be subject to any domestic relations law. You want it to be the dignity of the community property law, rather than the mercy of the divorce court to be controlling, as I remember your --

MRS. KAY: Well, Your Honor, in California we speak of community property law as domestic relations law. Community property exists only between persons who are legally married to each other. And in order to have that kind of property, one has to enter into a valid marriage.

So that in its regulation of the rights between husband and wife, California has established a community property regime. It has also permitted alimony awards to be made to either spouse. And indeed, the interdependence of those two factors is very important because, depending on the amount of community property awarded, the court may vary the alimony award.

So that if, for example, in this case the wife is awarded 20 percent of the Railroad Retirement benefits as community property, the court will take that into account in determining how much spousal support, if any, she should get. And, of course, on the facts of this case, that is not the point since the wife waived alimony, but if you take a different case in which the wife did not waive alimony, the court would

take those two factors into account, and the amount of community property received would go towards both diminishing her future need for support and, in this case, since it comes out of the husband's Railroad Retirement benefits, his ability to pay.

QUESTION: Yes, but my brother Stevens' point is that community property law is property law. It is not confined to divorce situations.

MRS. KAY: But it is confined to married people, Your Honor.

QUESTION: Certainly, but it is applicable in terms of inheritance and bequests and all sorts of other property transactions and concepts. And if you are correct, the division of the community property is wholly unrelated to need. It would be true if both of these people were millionaires.

MRS. KAY: That is correct, Your Honor.

QUESTION: It is wholly unrelated to need.

MRS. KAY: That is correct. I have never contended anything else.

QUESTION: And alimony, by contrast, has to do with -- or spousal support, as you call it in California, has to do with need and ability to pay.

MRS. KAY: That is right.

QUESTION: And community property has nothing whatsoever do with either.

MRS. KAY: That is correct, Your Honor. But it still, I submit, has to do with domestic relations law as it relates to the property law -- the property rights of persons who are married to each other. And it is not, I submit, simply a suggestion that has nothing to do with that particular kind of interaction, because the whole sweep of California domestic relations law is based around the idea of community property.

For example, I am sorry this case is not cited in my brief, because I did not know you were going to make this argument, but in deciding the case of Marvin versus Marvin, which has attracted a great deal of publicity, the California Supreme Court expressly refused to apply community property concepts to persons living in non-marital cohabitation. The court said we will enforce contracts, but they are not married and, therefore, community property law does not apply.

And I submit that that is the correct evaluation of the policy underlying State law.

QUESTION: Community property really depends upon the concept of the contribution of each of the partners to the marriage, whereas alimony depends on the need of the partners after the marriage is dissolved?

MRS. KAY: That is absolutely right, Your Honor. And it seems to me again that, therefore -- that the point that

is made throughout the brief of the United States, namely, that this Court might be willing to create exceptions if need could be shown, is really totally irrelevant to the argument that we are making and is also, I think, totally irrelevant to the question of Congressional intent to preempt;the fact that an exception might be applied to exemption laws or to spend-thrift laws and, indeed, even written in now to some of the government benefit provisions has nothing to do with this case at all.

QUESTION: Well, I did not understand the government to be saying in its brief what you understand it to be saying. My perception of it was that the government simply conceded that, of course, in determining whether and to what extent and to what amount to grant an alimony award, a spousal support award, the court may consider the ability to pay of the husband. And part of that ability to pay depends upon his expectancy of a retirement. That is all it said.

MRS. KAY: That is right, Your Honor, but the point I am making is that the government then throughout its brief at four or five points contrasts what it refers to as the mechanical division of property and the community property laws with this need on the theory, I think, that it is better to relegate the spouse to the alimony award rather than to accord her the dignity of the property right.

What I am suggesting is --

QUESTION: Well, maybe what the government says in its brief lies in the eye of the beholder, but I did not -- I read it a little differently.

MRS. KAY: Well, I hope upon reflection, Mr. Justice Stewart, you have reason to read it differently again.

In conclusion, I would like to say that this case does not involve a far-reaching principle. It does not involve an effort to interfere with what the government is trying to do in the Railroad Retirement Act.

It merely simply refers to the right of a state court in its domestic relations law to take account of the equal contributions by both spouses to the marriage and their right to rely upon the expectation of having that labor fulfilled when the marriage is dissolved.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Kay. You have a few minutes left, counsel.

REBUTTAL OF JAMES D. ENDMAN, ESQ.

ON BEHALF OF THE PETITIONER

MR. ENDMAN: Yes, Your Honor.

Mr. Chief Justice and gentlemen of the Court:

I would again like to indicate to the Court that an offset of other community property will be just as damaging to the annuitant as taking of other part of the exact annuity.

I would also like to clarify one point, that even

though we use the word "annuity" here, we are not talking of it the same as a life insurance type annuity. We are talking of Congressional acts --

QUESTION: Simply because the statute does not apply to life insurance annuity and it does apply here, is that it?

MR. ENDMAN: No, I believe it is more than that, Mr. Chief Justice.

QUESTION: What else?

MR. ENDMAN: What we have here is a situation identical to Social Security, that those who are presently working are paying a tax under the Railroad Retirement Tax Act that goes into the government and then is appropriated to take care of those who are presently retired. There is no purchase situation involved here as we would have in a life insurance contract situation; that there is no contract involved here. It is merely a welfare type program providing that those who work are --

QUESTION: Well, do you mean that a recipient -- the railroad retiree does not have a contractual right to recover the payments?

MR. ENDMAN: His rights, should he die prematurely, would extend only to a Code section that provides that --

QUESTION: I am talking about during his lifetime. Suppose they did not pay it? He could force the payment, could he not?

MR. ENDMAN: Well, under the -- yes, he would have the right to --

QUESTION: Well, he would run into the decision of Fleming against Nestor, would he not, if he tried that?

MR. ENDMAN: Yes. That is what I was referring to. As this Court stated in the Fleming case, I submit is the exact same situation that we are dealing with in Railroad Retirement; that they are part of that same exact scheme.

QUESTION: It is a statutory entitlement until the statute is amended?

MR. ENDMAN: Yes.

The Congress, with regard to Section 231m, if they intended to limit the assignment provisions only to creditors, could have provided, as they did in National Service Life Insurance, that only creditors shall be prohibited from garnishment attachment, et cetera.

But they did not put that word in. They intended to be much broader.

We simply put -- we submit that there is a conflict between the Federal law and the community property laws; that it is a physical impossibility within this scheme to give part of the proceeds to the annuitant under the Code and then take away part of it. It is impossible to give him his entire statutory due.

I would like to also indicate that it is my

understanding that, even though Railroad Retirement will apply to the eight community property states, I understand that there are other states that have equal division requirements; as an example, I believe Illinois -- I was contacted by an attorney -- has just passed such a statute.

So this statute will extend beyond just the community property states.

I think the effect of the statute will also apply not only to Railroad Retirement, but because Social Security is the same scheme; as goes Railroad Retirement, so will probably Social Security, and there are some cases, I understand, pending regarding pension plans under the ERISA Program, whether they also too would be involved.

I would also like to point out that under the Ylatchos case, referred by the amicus for NOW, that in that case it involved the ability of the husband in that case to take community funds, put them into savings bonds and thus defraud his wife.

The Railroad retiree does not have that ability to move around to his annuity funds or there can be no frauds involved unless we were to say that by taking a railroad job, he is trying to deprive his wife of that railroad annuity.

And thus, I do not think that that Yiatchos case applies to this situation.

QUESTION: Well, I suppose the California courts would say that he had worked on the railroad for 40 years and had a pension, and she had worked at home raising kids and keeping house for 40 years, that if he simply walks off with a major asset that is accrued from his income during that time, that is a form of fraud.

MR. ENDMAN: I do not see that as being a fraud. That is an accumulation of a property right. And if it is separate property, for instance, a case I recently had involved a man who had inherited property, which was a substantial portion of what these people had. He had worked on that property that he had inherited and under California law that is separate property and the fact that he was worth probably a millionaire -- at least, he admitted to being a millionaire -- had nothing to do with the fact that she got no part of it, but it could be taken into --

QUESTION: But the question is whether it is separate property or not, is it not?

MR. ENDMAN: Well, that would be up to the State to decide whether --

QUESTION: Yes. And here the State has said it is not separate property.

MR. ENDMAN: Right. The State has said it is community property. What we submit is because of the conflict involved that even if it is community property, the State has

no right to touch it.

Any further questions? I thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 1:34 p.m., the above-entitled case was submitted.)