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Court of Appeals No. 57168-4-II

CLIFFORD A. PORTER, APPELLANT

v.

PEGGY A. PORTER (nka HUCKSTADT), RESPONDENT

ANSWER TO PETITION FOR REVIEW

Superior Court of Pierce County
The Honorable Jennifer Andrews

No. 94-3-00930-2

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A. STATEMENT OF ISSUES

1. Should the Court accept review under RAP 13.4(b)

2. Did the Court of Appeals expand Washington's community efforts doctrine beyond the scope of prior Appellate Court decisions, particularly by *Pea, Bulicek*, *Hurd*, and *Chavez*?

3. Did the Court of Appeals expand Washington's community efforts doctrine beyond the scope intended by the Washington Supreme Court, particularly as described in *Short*?

4. Does federal law preempt the state court from including as community property military benefits that the service member acquired during a recall service that occurred years after the divorce.

B. STATEMENT OF THE CASE

The parties, Clifford Porter ("Clifford") and Peggy Huckstadt ("Peggy") divorced in Pierce County Superior Court on November 16, 1994. *CP 23*. The Decree of Dissolution does not specifically divide Clifford's Military Retired pay. *CP 23*. Paragraph 3.3 of the Decree states that Peggy "is awarded as her separate property the property set forth in the Separation Agreement". *CP 23*. The Separation Agreement attached and incorporated into the Decree states, "The parties agree that the amount of retirement benefits shall be determined at the time of divorce by a court with property jurisdiction over the subject". *CP 8*. However, the parties did not ask the Court to allocate any amount of retirement benefits to either party, "at the time of the divorce". It was not until November 24, 2003, after Clifford retired from the military in 2002 with a rank of Lieutenant Colonel, that a Military Qualifying Court Order ("MQCO") was entered by agreement, ordering that Peggy was to receive 30.25% of said disposable military retired pay, based

upon Clifford's rank at the time of his 2002 retirement. *CP 86, 33*.

It is undisputed that Clifford attended medical school during his marriage to Peggy, and while serving in active duty. *CP 85*. Cliff's rank at the time of his 2002 retirement was Lieutenant Colonel, based largely on community efforts during the parties' marriage, including obtaining his medical degree. *CP 98.*

Petitioner was recalled to military service in 2009, and continued active duty for 2 years, 11 months and 26 days. *CP 100*. During said period of recall, neither Clifford, nor Peggy, received his or her share of Clifford's military retired pay. *CP 156*. Clifford retired again on October 6, 2012, after a promotion to full Colonel. *CP 100*. Upon his retirement, the Department of Defense Finance and Accounting Service ("DFAS"), reinstated monthly retirement payments to Peggy, at a percentage of 30.25% of Cliff's total monthly benefit, pursuant to the 2003 MQCO. *CP 100-101*.

It was not until roughly nine (9) years later, that Clifford commenced legal action in Pierce County Superior Court, demanding that Peggy's portion of his military retired pay be reduced retroactively to 2012, that the percentage of Peggy's portion be reduced based upon the additional years of service, and that her pay be calculated based upon his rank of Lieutenant Colonel, rather than Colonel. *CP 156*.

On March 2, 2021, Clifford filed a "Motion to Clarify the 2003 Military Qualifying Court Order". His Motion states, in relevant part, "*Because DFAS does not automatically correct its calculation of the pro rata share each party receives under such circumstances, the Respondent has been overpaid for the period from January 2013 through the present. DFAS requires a Clarifying Order to correct the amount each party is to receive going forward. For these reasons, the Petitioner requests entry of a Clarifying Order and a money judgment for the overpayments made to the Respondent*". *CP 181-182*.

After receiving Peggy's Response to the Motion, Clifford

failed to confirm the hearing and did not pursue his motion. *RP 181-182*.

Nearly a full year later, on February 14, 2022, a new attorney appeared on Clifford's behalf, and filed a similar motion; however, this time, Clifford added a request to Vacate and Modify the MQCO, and further requested both pre-judgment interest and attorney's fees. *CP 85.*

At the March 18, 2022 hearing, Judge Andrews amended the MQCO based upon Cliff's total years of service (to account for his recall), but did not agree the award to Peggy should be frozen at his 2002 retired rank of Lieutenant Colonel. *RP 33*. Judge Andrews stated, "his previous years of service, including the years during which they were married, benefitted his ability to then move up, and so that is equitable, in my mind…". *Id*.

Judge Andrews retroactively amended the Order back to June 2020, based on evidence that Clifford's attorney began communicating with Peggy about the modification. *CP 208*.

Clifford appealed. The Court of Appeals upheld the trial

court’s decision on August 8, 2023, holding, consistent with *Bulicek v. Bulicek*, 59 Wn.App. 630, 800 P.2d 394 (1990), that the community portion of Clifford’s military retired pay included his salary increase during his recall service that was founded on community efforts. *See Decision*, page 10.

C. ARGUMENT

1. **THE COURT SHOULD DENY PETITION FOR REVIEW**

To obtain this court's review, the Appellant must show (1) that the Court of Appeals’ decision conflicts with a decision of the Supreme Court, (2) with a published Court of Appeals decision, (3) that this decision calls into a question a law under the United States or Washington Constitution, or (4) the Petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

In the present case, the Court of Appeals, Division II, applied instructive case precedent set forth in *Bulicek v. Bulicek*, 59 Wn.App. 630, 800 P.2d 394 (1990), finding that

"without the prior years of service and prior rank of Lieutenant Colonel, Clifford likely would not have reached the rank of full Colonel solely during the three years he served during the mandatory recall to service period. Under these narrow circumstances, Clifford's salary increases during the recall to service period were based on the community's efforts…Clifford's salary increases from the recall to military service from 2009 to 2012 are not stripped of their foundation on community efforts merely because he had an earlier voluntary retirement and was subject to a mandatory recall to military service". *See Decision*, page 10.

Clifford does not argue that Division II's decision is in ***conflict*** with any Supreme Court or published Court of appeals case. Instead, he argues that the Appellate decision expanded Washington's community efforts doctrine beyond the scope intended by prior appellate court decisions. It appears then, that while not specifically cited, Clifford's Petition was filed pursuant to RAP 13.4(b)(2). Clifford

fails, however, to distinguish between conflicting decisions and a decision that "expands the scope" beyond what may have been intended in prior decisions.

Rather, Clifford argues that the Court should be treating his recall retirement benefits as a brand-new, post-separation asset. Clifford has continued to label this as his "second retirement" in court pleadings, even though Peggy has argued, and both Courts below have acknowledged, that Clifford only has one military retirement account. If the period of service up to 2009 and the recall service had been bifurcated, thereby providing Clifford with a new and subsequent retirement account, then neither Clifford's, nor Peggy's retirement benefits from the prior service would have been paused during Clifford's period of recall. Clifford has failed to provide any evidence or even legal authority, that any retirement benefits earned based upon his recall service, is a new post-separation asset.

Clifford's unsupported belief that he acquired a new post-separation asset provides the foundation for his argument that the Court of Appeals should not have considered the community efforts doctrine in *Bulicek*, *Chavez*, *Pea* and other cases.

2. **THE COURT OF APPEALS DID NOT MISAPPLY OR INCORRECTLY EXPAND THE COMMUNITY EFFORTS DOCTRINE**

Clifford argues, incorrectly, that "Pea and its progenies with regard to the community efforts doctrine based their decisions on several important factors, including the following: (a) the presumption that post-separation salary increases are separate property, (b) the employee spouse's unilateral control over distribution of the deferred pension, and (c) difficulties of valuations of military pensions". *See Petition for Review*, Page 12. Peggy disagrees and so did the Court below.

(a) Post-Separation Increases to Retirement Have Routinely Been Treated as Founded by Community Efforts

In the present case, the Court of Appeals did consider the effect of post-separation pay increases based upon post-separation earnings and pay increases:

> Clifford argues this distinction should take this case outside of the line of cases that included post-divorce salary increases in the community portion of the pension, and therefore, Clifford's salary increases during the recall, which occurred years after the divorce, should be excluded. We do not find Clifford's distinction persuasive in this context. Clifford does not cite to any case that suggests that salary increases from a mandatory recall to military service after divorce cannot be founded upon community efforts. We decline to adopt Clifford's argument for such a distinction in this context.

See Decision, page 11. Clifford states his belief that the Court of Appeals failed to consider that his salary increase occurred 16 years after separation and years after the first retirement. He suggests that his military promotion and salary increase could have

accounted for his years in private practice outside of the military. However, no evidence of this contention was ever submitted. Further, Courts have previously found that the number of years that deferred compensation was received post separation or post-retirement, is immaterial. In *In re Marriage of Bulicek*, 59 Wn.App. 630, 800 P.2d 394 (1990), the Court found it was not an abuse of discretion for the Court to allocate pension benefits on an as-received basis, even after acknowledging that the husband “may receive proportionately higher future contributions based upon his career longevity” and that “the formula utilized for division of future retirement benefits could result in [the wife’s] sharing in those increases”. *Id*. The Court “specifically approve[d] it as a means of recognizing the community contribution to such increases”, even though it was unknown at the time of trial whether the husband would retire in 1 year or 10 years.

(b) Employee Control over Timeline of Deferred Payments Not Relevant

Clifford next argues that the Court of Appeals failed to consider that "Pea and its progenies" based their decisions on the employee spouse's unilateral control over distribution of the deferred pension. The Court of Appeals did not agree with Clifford's distinction between military retirement benefits and other government or private benefits through employers who could not subject the employee to mandatory recall. He cites to no authority to support his contention, and Peggy's Responsive Appellate Brief thoroughly analyzed the line of cases to point out that no court has ever based a retirement division award upon whether the employee or service member had any control over the timeline of deferred payments.

In *In re Marriage of Pea,* 17 Wn.App. 728, 566 P.2d 212 (1977), the husband had served in the military for approximately 18 years at the time of the divorce. The question before the Court was whether the Court had the ability to

allocate any portion of the husband's expected military retired pay, an entitlement not guaranteed to him until he had served a full 20 years. The Court found that, " 'that retirement pay, even though benefits are not presently available, is held to be deferred compensation and subject to equitable distribution under RCW 26.09.080'. *Wilder v. Wilder*, 85 Wash.2d 364, 534 P.2d 1355 (1975). *Id*. The word "control" does not appear in the Court's opinion and no other iteration appears to guide the Court's analysis.

In re Marriage of Bulicek, 59 Wn.App. 630, 800 P.2d 394 (1990), involved a private, non-military pension. While the husband had a vested pension, he had no plans to retire soon. Similar to Clifford, he challenged the use of the straight percentage formula that would entitle his wife to post-divorce increases, as his anticipated earning potential and employer contributions would be proportionately much higher at the end of his career verses during the marriage. The Court's analysis did not turn on whether the husband had control over his future

earning capacity or increases that would affect his pension value. Instead, the Court considered factors relevant to a just and equitable distribution, and found it was not an abuse of discretion for the Court to allocate pension benefits on an as-received basis, even after acknowledging that the husband "may receive proportionately higher future contributions based upon his career longevity". Like in Pea, the husband's "control" over his retirement date did not factor into the trial court's decision, whatsoever.

The *Bulicek* opinion provided an analysis of similar holdings in numerous California state cases, also cited by Clifford in his moving Court of Appeals brief. Likewise, *In re Marriage of Freiberg,* 57 Cal.App.3d 304, 311, 127 Cal.Rptr. 792, 797 (1976) and *In re Marriage of Adams*, 64 Cal.App.3d 181, 184, 134 Cal.Rptr. 298, 301 (1976) did not consider the husband's control, as a part of its analysis in awarding post-separation increases. In *Freiberg*, the Court rationalized the formula method of allocation presents benefits to each spouse

and risks to the receiving spouse. In that case, "the husband expressed his intention to remain in service for a number of years. Assuming his future basic pay will be increased, postponing the date of retirement will benefit him as well as the wife. *Freiberg*, 57 Cal.App.3d 304.

In *Adams*, there was a discussion of the fact that husband controlled his retirement date (and as a result, the maturation of his pension), but it did not turn the Court's decision about post-separation increases being allocated to the Wife. Instead, the husband's control was relevant to the wife's choice to receive retirement benefits after the husband retired, verses at the time of the divorce. "Here, wife agreed to wait until husband retired and to take her share at that time. We find nothing wrong with this and believe it was a decision she was entitled to make, particularly since husband had decided to continue working." *Adams*, 64 Cal.App.3d 18. In that case, both parties had a form of control. In this case, Peggy has none. Clifford argues it is not fair for Peggy to share in the increases he received from

2009 to 2012 because he lacked control over his return to service, but Peggy had no form of control either. Because Clifford's was a military pension, Peggy never had the choice to receive her benefits at the time of the divorce. She had to wait until Clifford retired. Then, like Clifford, she lost her monthly allotment for three years when Clifford returned to service. The loss of control to both parties in the present case, shouldn't benefit only Clifford, and the *Adams* court certainly doesn't stand for such a proposition.

Next, Clifford relies on *Chavez v. Chavez*, 80 Wn.App. 432, 436, 909 P.2d 314 (1996), which likewise fails to turn on the servicemember's control. After finding ambiguity in the Decree, the Court turned its analysis to the post-decree salary increases, holding that "the fact that a retiree's final pension is calculated upon a salary that is unknown at the time the income is deferred is a normal and anticipated feature of this type of deferred compensation program". *Chavez*, 80 Wn.App. 432. The husband's "control" was not a factor in the Court's

decision.

The decision in *In re Marriage of Hurd*, 69 Wn. App. 38, 43, 848 P.2d 185 (1993), overruled in part by *In re Estate of Borghi*, 167 Wash.2d 480, 482, 219 P.3d 932 (2009), is likewise distinguishable. The Court there, did not award the wife's share of the pension on an as-received basis, so there was question about which date was more appropriate to calculate a present-day value. Such an analysis lacks application to the present case. More relevant, as a Seattle police officer, the husband received a significant salary increase after separation, but before the dissolution was finalized. The decision turned on the fact that the court found the salary increase was born on community efforts during the marriage. The award of the husband's salary increase did not turn on the Husband's control.

Finally, Clifford relies upon another California case, *In Re Marriage of Gillmore*, 29 Cal.3d 418, 423, 174 Cal.Rptr. 493, 496, 629 P.2d 1, 4 (1981), for the proposition that, "It is a

settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse." *Id*. at 496. Clifford manipulates and perverts this rule of law, without providing any context, by implying the inverse is true – that if he does not have control, he therefore can defeat Peggy's community interest. Neither *Gillmore*, nor any other case, makes such a determination.

Gillmore involves a private, non-military pension. The issue in this case, much like the *Adams* case, is whether the trial court erred in deferring payments and in failing to order an immediate transfer of the wife's portion. The Court discussed the fact that "a unilateral choice to postpone retirement cannot be manipulated so as to impair a spouse's interest in those retirement benefits." *Id*. The Court further stated, "Although [the employee spouse] has every right to choose to postpone the receipt of his pension and to run that risk, he should not be able to force [the non-employee spouse] to do so as well." *Id*.

Again, this case is not about giving Peggy a choice about

when to receive her portion while Clifford continues to work. *Gillmore* is simply not applicable here, and it certainly does not support Clifford's argument, that just because he lost control over his date of retirement by his recall to service, he should defeat or manipulate Peggy's community interest.

(c) Lack of Valuations Problems Not Relevant

Finally, Clifford argues that the Court of Appeals failed to distinguish the present case to *Bulicek* due to the "lack of valuation problems". Concerns about valuation are relevant to the trial court's disposition of pension benefits. Bulicek, 59 Wn. App. at 636-37. (See Decision). However, the Court of Appeals correctly recognized that the present issue before the Court on review is not the disposition of pension benefits; but rather, how to interpret the Decree. Peggy likewise argued that while the avoidance of difficult valuation problems is one of many reasons cited to promote the use of the as-received approach, the Court does not mandate the inverse, that where there are not difficult valuation problems, the Court find a

different method of dividing a pension. In the present case, there is no dispute about whether to determine a present-day value of Clifford's pension plan, as Clifford is not asking the Court to do so. Despite the fact that there may be fewer valuation problems at this date, as Clifford's final retirement occurred over 10 years ago, the court here is not required to change the as-received formula to cut out Clifford's post-separation pay increases. This issue is simply

not relevant to the court's determination of whether Clifford's salary increases were founded on community efforts.

2. Time-Rule Already Applied; *In re Short* Not Relevant

Clifford, for the first time in his Petition for Review, argues pursuant to *In re Marriage of Short*, 125 Wash.2d 865 890 P.2d 12 (1995), the Court of Appeals failed to apply the "time-rule" method to properly characterize separate and community unvested stock options, thereby ensuring the non-employee spouse cannot benefit from post-separation assets.

Clifford's argument is misguided. While *Short* focused

on determining when unvested stock options were considered acquired by a spouse, cases involving retirement or pension distributions have never required such an inquiry. In applying the time-rule method to the question of pension characterization, "generally, the community share of a pension is calculated by dividing the number of years of marriage prior to separation by the total number of years of service for which pension rights were earned and multiplying the results by the monthly benefit at retirement; this is known as the "time rule method." RCW26.09.080; *In re Marriage of Rockwell*, 141 Wash.App. 235, 170 P.3d 572 (2007). The monthly benefit percentage awarded to Peggy has already been computed in this matter. Her 2003 percentage share was initially calculated based upon Clifford's years of service through the date of his first retirement, and then the formula was amended at the Superior Court level in 2021 to account for his additional years in recall service.

The time rule method was recognized as “the correct formula to determine the community share” of the total pension credits earned by the retiree, in *Marriage of Chavez*, 80 Wash.App. at 434, 436, 909 P.2d 314. The Court there also cited *Bulicek*'s conclusion that “increases in pension benefits based on a retiree's higher salary at the time of retirement should be included in the community share.” *Id.*

In deciding the present case, Division II of the Court of Appeals applied the correct legal standard in *Bulicek* and *Chavez*. To assert *Short* is somehow more relevant and controlling over the present case, is simply not supported by any factual similarity.

3. **There are No Federal Pre-Emption Issues with Regard to Post Separation Military Recall Salary Increases; Howell Distinguished**

The USFSPA allows state courts to consider “disposable retired ... pay” as community or marital property. *Former 10 U.S.C. § 1408 (c)(1)*; *Howell v. Howell*, 581 U.S. 214137 S.Ct.

1400, 197 L.Ed.2d 781 (2017). The USFSPA defined " 'disposable retired ... pay,' " as "the total monthly retired ... pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title)." Former 10 U.S.C.§ 1408(a)(4).

Howell relates to states' treatment of veteran disability benefits and is not applicable to the present case. In *Howell,* the non-military spouse was awarded half of veteran-spouse's military retirement. More than a decade later, the Department of Veterans Affairs determined the service-member 20 percent disability rating, at which point he elected to waive a portion of his retirement pay in order to begin collecting disability benefits. This reduced the funds awarded to the non-military spouse under the original decree. The United States Supreme Court found that states are prohibited from increasing the amount a divorced spouse receives each month from a veteran's retirement pay in order to " 'reimburse' " or "indemnify the

divorced spouse for the loss caused by the veteran's [disability] waiver.” 137 S. Ct. at 1402, 1406.

In the present case, Clifford’s recall to service has nothing to do with a waiver of retirement benefits in lieu of disability pay. Clifford has not waived benefits. His benefits increased due to a promotion founded on community efforts. The *Howell* case does not come close to addressing that issue. Clifford states “there is nothing in the USFSPA that allows states to treat benefits earned during a recall to service, long after the divorce decree was entered”. Clifford is incorrect. USFSPA defines disposable retirement pay as “the total monthly retired ... pay to which a member is entitled”, excepting of course Veteran Disability Benefits, per *Howell*. As Clifford is entitled to salary increases due to his service recall, Washington Courts are not restricted under USFSPA from treating his salary increases as community property. Likewise, there is nothing in the *McCarty v. McCarty*, 453 U.S. 210, 222, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) opinion that restricts a

state Court from consideration of post separation recall salary increases that are founded on community efforts. See also, *CP 33*, which denotes within the four corners of the initial MQCO, a paragraph “interpreting this court’s intention…” and clarifying that “military retired pay includes retired pay paid or to which Member would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provision of Chapter 38 or Chapter 61 of Title 10 of the United States Code…”. Authority for retired service members to be recalled to active duty is included in Title 10. In 2003, Clifford was aware, or should have been aware, that upon his retirement, he was subject to recall at any time and the MQCO signed by the parties and the Court 20 years ago, quite expressly includes the potential for salary increases as the result of a recall.

D. CONCLUSION.

The Court should not grant review pursuant to RAP 13.4(b), because Clifford has not shown (1) that the Court of

Appeals decision conflicts with a decision of the Supreme Court, or (2)with a published Court of Appeals decision, (3) that this decision calls into a question a law under the United States or Washington Constitution, or (4) that the Petition involves an issue of substantial public interest that should be determined by the Supreme Court. The Decision of the Court of Appeals is consistent with analogous Washington cases, and contrary to Clifford's argument, does not contradict Federal law or question a constitutional right. Finally, while Clifford maintains this is a matter of first impression for Washington courts, it is not a foregone conclusion that it involves an issue of "substantial public interest". This court should consider whether further analysis and determination of this issue is likely to benefit the public. The nature of a military recall is such that, as Clifford has pointed out, is beyond a service-member's control. As such, review of how post-separation salary increases in military recall are to be divided, is unlikely to inform future actions and behaviors of the general public. It is

not as though the Supreme Court's decision on this issue will deter a future service member from ever being recalled to duty, because that future service member has no ability to control whether he or she is recalled at all.

E. WORD COUNT COMPLIANCE CERTIFICATION

In reliance upon Microsoft Word software, which calculates the number of words in a Word document, this author certifies that this document contains 4,262 words, exclusive of words contained in the appendix, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (but inclusive of text boxes, footnotes and endnotes).

DATED: October 6, 2023.

LAW OFFICE OF SOPHIA PALMER, PLLC

STACEY SWENHAUGEN, WSBA No. 41509
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that I caused to be transmitted via U.S. Mail, postage prepaid, transmitted via the Appellate Court on-line portal, and/or emailed, a copy of the foregoing BRIEF OF RESPONDENT on the 6th day of October, 2023, to the following counsel of record at the following address:

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Cheryl L. Faul (Oct 6, 2023 12:37 PDT)

Cheryl Faul

2023.10.06 Answer to Petition for Review (1)

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