

FILED
COURT OF APPEALS

ORIGINAL

06 NOV -3 PM 4:59

STATE OF WASHINGTON

NO. 34856-0

BY jn
Clerk

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CAROL J. DUESTERBECK, nka

CAROL WALSH

Appellant,

vs.

BERNARD A DUESTERBECK

Respondent

REPLY BRIEF OF APPELLANT

James M Caraher

Attorney for Appellant

4301 South Pine Street, Suite 543

Tacoma, WA 98409

Tel: 253-627-6465

Fax: 253 475-1221

STATEMENT OF THE FACTS:

Mr Duesterback argues that because of his current circumstances and/or those of Mrs Duesterback-Walsh, he is entitled to take the property awarded to his former wife in their divorce decree and convert it to his own property.

His counsel argues that there were errors and injustices in the original findings and decree. She argues the property was not equitably divided and therefore, the trial court and this court are justified in denying Mrs Walsh a remedy as prescribed by RCW 26.09.170 and CR60(b)(11), as interpreted by *Jennings*, *Perkins* and other Washington cases.

Counsel for Mr Duesterbeck “guilts the lily” by stating that;

“Although Mr Duesterbeck wears hearing aids in both ears, he still has difficulty communicating in most environments.” Resp Brief page 3. She goes on to state he “suffers from profound hearing loss and constant pain from a dislocated shoulder”. Resp Brief page 7.

Despite this hyperbole, the Veteran’s Administration, the only authoritative medical source in this case, found, seven years after the divorce, that this “profound hearing loss” and “continuous pain in his shoulder” constituted only disability of 20%.

She goes on to argue that, “Even with the 10% reduction in Ms

Walsh's military retirement pay, Ms Walsh will continue to receive more than she would have received if Mr Duesterbeck's military retirement had not been characterized as 100% community property." Resp Brief page 10.

She argues that, "Based upon the totality of the circumstances, neither modification of the dissolution decree nor an award of spousal maintenance to Ms Walsh is necessary to overcome a manifest injustice."

She argues that; "Here, the results cannot be characterized as 'fundamentally unfair'." "Nor can the reduction in Ms Walsh's benefits be characterized as 'dramatic'." Resp. Brief page 9.

The issues of "fairness" or "equity" in the property division in the Duesterbeck's divorce was not before the trial court in this motion. Despite this Respondent urged these issues. He contends that the decree was unfair and therefore its property division provisions should be ignored or reformed. He had no motion before the court.

The property disposition provisions of a Washington divorce decree may not be revoked or modified, *unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state. RCWA 26.09.170. [Emphasis added]*

Both parties were satisfied with the property division entered in the

original decree, whether this was done pursuant to a pre-nuptial agreement or findings by the court is only a background distinction. Neither party appealed the decree which made this finding. Respondent is bound by the property division and precluded from now arguing that it was unfair or using that argument to defeat Petitioner's motion to reopen.

Provisions in a decree as to the custody, management, and division of the property should be final and conclusive upon the parties, subject only to the right of appeal. This legal principle is well established in Washington law. RCWA 26.09.170; *Cassutt v. Cassutt* 126 Wash. 17, 20, 217 P. 35, 36 (1923). Mr Duesterbeck did not appeal the decree.

The issue before the trial court was whether the fact of a loss of \$94.00 per month now, and potentially additional amounts in the future, brought about by irregularities extraneous to the decree, fairly supported Mrs Duesterbeck -Walsh's motion to set aside the decree and remedy these losses. The *Jennings* case said that it did.

The facts that there was a loss, the amount of the loss, its potential to increase in the future and the applicability of the doctrine of preclusion were undisputed in this case. These facts bring the matter squarely within the legal precedents established by *Jennings*.

In *In re Marriage of Jennings* 138 W2d 612, 625-626, 980 P.2d 1248, 1255 (1999), our Supreme Court considered a case with facts substantially the same as those present here.

In *Jennings*, supra, some years after the entry of the decree awarding wife 50% of her former husband's military retirement pay, but none of his military disability pay, the Veteran's Administration (VA) determined that husband's disability had worsened. Following the waiver by the husband of a portion of his retirement pay being paid by the Defense Accounting and Finance Service (DFAS), he received a dollar-for-dollar increase to his VA disability pay. This in turn reduced both his and his former wife's retirement pay. The former wife moved to vacate the decree under CR60(b)(11).

The Court of Appeals, Div II, reversed the trial court's order vacating the decree as to its property provisions. In so doing, it stated;

We conclude that to set aside a final dissolution decree pursuant to CR 60(b)(11) a party must show more than a post-decree change in the value of assets. Here, Karen Jennings has shown only that one asset awarded to her has declined substantially in value. ***This is not an "extraordinary circumstance" within the meaning of CR 60(b)(11).***

In the Court of Appeals, Karen Jennings argued that if the court reversed the trial court order, this decision would *result in the subversion or nullification of property awards* whenever a former soldier's disability status was changed after entry of the final decree of dissolution.

This is the injustice prescribed by *Jennings* should have been the basis for the trial court to set aside the Decree. Failure of the trial court to use this standard constitutes an abuse of discretion.

In reversing the Court of Appeals and reinstating the trial court's order vacating, the Supreme Court in *Jennings* stated;

“. . . the intent of the trial court is nevertheless evident: to distribute to each of the parties one-half of the community asset identified as Respondent's military retirement which is unliquidated but payable monthly for the remainder of Respondent's life.

* * *

“. . . we conclude the trial court did not abuse its discretion in clarifying the original decree of dissolution under RCW 26.09.170 and *the trial court could reasonably conclude the drastic change in the status and amount of the monthly military retirement payments to Respondent constituted an "extraordinary circumstance" under CR60 (b)(11).*
[Emphasis added].

Mr Duesterbeck counsel shifts from her efforts to evoke sympathy

for him in his post dissolution life and attempts to distinguish *Jennings* from the facts of this case by arguing that not enough money is involved to reach the threshold of “extra ordinary circumstances” required to reopen under CR60(b)(11).

The trial court, Judge Grant, adopted these arguments in denied the motion to vacate, stating, in part, that:

“. . . [B]ased upon the files and records contained herein and *the economic circumstances of the parties*, petitioner’s loss of \$94.50 in monthly military retirement benefits . . . does not constitute an “extraordinary circumstances”, an “extreme unexpected situation” or result in a “manifest injustice” as required to vacate a Decree . . . pursuant to CR60(b)(11) or as contemplated by *Marriage of Jennings*. . .”

“. . . [P]etitioner’s request to replace the \$94.50 loss of her share of the monthly military pension with monthly spousal maintenance payments of an equal amount is denied . . . *The Court is unwilling to circumvent the federal law prohibition against dividing VA Disability benefits . . .*” [*emphasis added*].

Respondent’s trial attorney and the trial court, who relied upon his arguments, seek to avoid the binding effect of *Jennings* case by relying on distinguishing the amount of money lost by the former wife in the *Jennings* case as compared to that lost by Mrs Duesterbeck-Walsh. This de minimis

agreement is not the point on which the *Jennings* case turns.

CR 60(b)(11) and *Jennings* seeks to provide a remedy for a situation for which no other procedural remedy is available. See also, *In re Marriage of Knutson* 114 WApp. 866, 872-874, 60 P.3d 681, 685 - 686 (Div. 3,2003); *In re Marriage of Irwin*, 64 WApp. 38, 63, 822 P.2d 797 (Div. I, 1992) (quoting *In re Marriage of Yearout*, 41 WApp. 897, 902, 707 P.2d 1367 (Div. II, 1985)).

In *Jennings*, at 625, court held that:

“ . . . the “extraordinary circumstances. . . justified remedial action by the trial court **to overcome a manifest injustice could not have been contemplated by the parties or the court at the time of the 1992 decree.**

The Supreme Court in *Jennings* stated, at 627;

At the time of the decree, it was reasonable for the court to expect the \$813.50 payable to Petitioner would continue to be paid from that source for the remainder of Respondent's life.

Neither the court nor the parties anticipated at the time of the 1992 decree that, through transfer of pension benefits to disability benefits, the monthly retirement payments to Respondent would be reduced to \$272.90, with

the consequence that the \$813.50 payment to Petitioner would be reduced to \$136.00 per month. *Regardless of the reasons, the result was fundamentally unfair because it deprived Petitioner of her entitlement to one-half of a substantial community asset with her receiving \$677.50 per month less than the amount awarded her by the court.* It was therefore appropriate for the trial court, in ruling on the motion by Petitioner for modification or clarification, to **devise a formula which would again equitably divide the community assets** without requiring the monthly amount payable to Petitioner to be paid direct from the Respondent's military retirement.

* * *

As a result of the Veteran's Administration finding that the Respondent's disability had worsened and the resulting decrease in the amount of Respondent's retirement pay received by the Petitioner, there are extraordinary circumstances requiring a vacation of the Decree of Dissolution under the provisions of CR 60b(11). [Emphasis added].

Both the trial court and Respondent failed to address three issues raised by Mrs Duesterbeck-Walsh.

1. Neither addressed the fact that the actions of DFAS in redistributing the retirement pay allowed Mr Duesterbeck to circumvent the court's decree and convert to his own,

property awarded to his former wife, long after all procedural remedies were gone. He is effectively being assisted in placing her property in his own pocket. These are clearly “. . . *irregularities which are extraneous to the action of the court* , “ *justifying CR60(b)(11) relief.*

2. Neither addressed the cumulative effect of the withholding \$97.50 per month in depriving Mrs Duesterbeck-Walsh of a substantial amount of property over her lifetime. Her loss of more than \$1,100 per year or \$11,700 in ten years, assuming no increase in Mr Duesterbecks’ disability rating, constitutes “. . . ‘extraordinary circumstances’, an ‘extreme unexpected situation’ or results in a ‘manifest injustice’ as required to vacate a Decree pursuant to CR60(b)(11) or as contemplated by *Marriage of Jennings*. . .”

3. Neither addressed the preclusive effect upon Petitioner’s remedy, if more, or all, of Petitioner’s Retirement were taken by DFAS in the future due to a progression of Mr Duesterbeck’s disability rating.

Each of these issues make this more than a \$97.50 loss. The potential, upon Mr Duesterbecks’ reclassification for her to loose all of this significant asset are present.

CR60(b)(11) IS INTENDED TO REMEDY INJUSTICES NOT COVERED BY OTHER RULES:

CR 60(b)(11) allows relief from a judgment for “[a]ny other reason

justifying relief from the operation of the judgment.” This rule is identical to the Federal Rule of Civil Procedure 60(b)(6). The United States Supreme Court has held that this rule “vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.” *Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 390, 93 L.Ed. 266, 277 (1949). However, “extraordinary circumstances” must be shown to gain relief under federal rule 60(b)(6). *Ackermann v. United States*, 340 U.S. 193, 200, 71 S.Ct. 209, 212, 95 L.Ed. 207, 211 (1950).

Washington has applied a similar standard to CR 60(b)(11) motions. Use of the rule “should be confined to situations involving extraordinary circumstances not covered by any other section of the rule . . .” *State v. Keller*, 32 WApp. 135, 140, 647 P.2d 35 (Div. I, 1982). The circumstances must relate to “irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.” *Flannagan v. Flannagan* 42 WApp. 214, 221, 709 P.2d 1247, 251 - 1252 (Div. II, 1985); *Keller*, 32 Wash.App. at 141, 647 P.2d 35, quoting *Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 W2d 756, 758, 415 P.2d 501 (1966). See also *In Re Adoption of Henderson*, 97 W2d 356, 360, 644 P.2d 1178 (1982).

In re Marriage of Flannagan, 42 WApp. 214, 221, 709 P.2d 1247 (Div. II, 1985), the court said; “The circumstances must relate to ‘irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings. *Jennings v. Jennings* 91 WApp. 543, 546, 958 P.2d 358, 360 (Div. II, 1998).

Divorce actions and proceedings are governed by equitable principles. *Harris v. Harris* 63 W2d 896, 902, 389 P.2d 655, 658 - 659 (1964). A clear equitable principle is that ‘no one ought unjustly to enrich himself at the expense of another.’ 4 *Am.Jur.* 508, 509, § 20; *Cone v. Ariss* 13 W2d 650, 654, 126 P.2d 591, 593 (1942).

If the result of denying Mrs Duesterbeck-Walsh’s motion is inequity and injustice is the reasonable exercise of discretion not compelled to the result of granting a remedy. Is denial of a remedy not unreasonable and untenable? Is the denial of relief contrary to existing legal authority? All of these questions should be answered, yes!

ABUSE OF DISCRETION STANDARD:

An appellate court will overturn a trial court’s exercise of discretion when the party challenging the ruling demonstrates that the trial court’s decision is *manifestly unreasonable, based on untenable grounds, or*

made for untenable reasons. In re Marriage of Peterson, 80 WApp. 148, 152, 906 P.2d 1009 (1995), review denied, 129 W2d 1014 (1996).

The appellate court must determine whether the trial court made an error of law and whether the findings of fact are supported by substantial evidence. *Peterson* 80 WApp. at page 153; *In re Marriage of Stern*, 68 WApp. 922, 929, 846 P.2d 1387 (Div. I, 1993).

The overriding principle in determining if discretion has been abused, is the necessity that the trial court applied the correct general principles of law to a specific set of facts. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L.Rev. 635, 643 n. 19 (1971) (citing Kenneth Kulp Davis, *Discretionary Justice: A Preliminary Inquiry* 17 (1969)); *In re Jannot* 110 WApp. 16, 19, 37 P.3d 1265, 1266 (Div. 3,2002).

That was not done in this case. The *Jennings* case laid out the factual pattern requiring that this decree be vacated and a new remedy fashioned. What was to be remedied was not an awarding of maintenance per se, but the rectification of an injustice whereby Petitioner was deprived of property by “irregularities external to the preceding”. If the trial court had granted the vacation and reached the point of addressing remedies,

maintenance was but one option. What Mrs Duesterbeck-Walsh was asking is that the property taken by Mr Duesterbeck, the identified injustice here, be remedied. Whether that was accomplished through an award of maintenance, property division or a property equalization payment was never reached.

Instead the trial court got sidetracked by arguments about post decree character and the amount of the monthly loss.

This argument is the same as made to the trial court and is not the proper basis in our law for an exercise of the trial court's discretion nor does it follow the clear legal precedence set forth by our court in Jennings and Perkins cases.

STARE DECISIS: A PREDICTABLE OUTCOME

A basic function of our legal system is to provide rules by which people may guide their conduct in society, to the end of providing predictability of the outcome. It is essential, in fulfilling this purpose that the law be reasonably certain, consistent and predictable. In this respect, stare decisis serves an important and valid function.

In *In re Stranger Creek*, 77 W2d 649, 653, 466 P.2d 508, 511 (1970), our court stated:

Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office. *House v. Erwin* 81 Wash.2d 345, 348, 501 P.2d 1221, 1222 (1972); *Keene v. Edie* 131 W2d 822, 831, 935 P.2d 588, 593 (1997). That is so because we endeavor to honor the principle of stare decisis, which “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720, *reh'g denied*, 501 U.S. 1277, 112 S.Ct. 28, 115 L.Ed.2d 1110 (1991). On the other hand, as we noted in *State ex rel. Washington State Fin. Comm. v. Martin*, 62 Wash.2d 645, 665, 384 P.2d 833 (1963), “the rules of law should be … adaptable to the society they govern.” “Much as we respect the principle of *stare decisis*, we cannot yield to it when to yield is to overthrow principle and do injustice. Reluctant as we are to depart from former decisions, we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle.” *deElche*, 95 W2d at 247, 622 P.2d 835 (quoting *Schramm*, 97 Wash. at 318, 166 P. 634 (citation omitted)).

The trial court did not follow the legal authority set forth in Jennings and the other authorities cited. Its decision is untenable. This court

should reverse.

Respectfully submitted this 3rd day of November 2006.

A handwritten signature in cursive script that reads "James Caraher". The signature is written in black ink and is positioned above a thin horizontal line.

James M Caraher

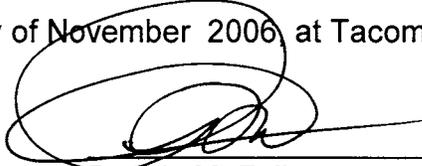
WSBA #2718

Attorney for the Appellant

1 on the following person[s]:

2 Ms. Carol Cooper
3 Attorney at Law
4 *Davies Pearson, P.C.*
5 PO Box 1657
6 920 Fawcett Ave
7 Tacoma, WA 98402
8 253.620.1500

9 SIGNED this 3rd day of November 2006 at Tacoma WA.

10 

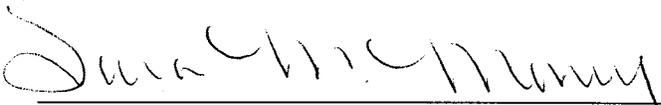
11 Pennie M. Faiivae

12 STATE OF WASHINGTON)
13) SS.
14 COUNTY OF PIERCE)

15 I certify that I know or have satisfactory evidence Pennie M. Faiivae is the person who appeared before
16 me and said person acknowledged that he/she signed this instrument and acknowledged it to be his/her
17 free and voluntary act for the uses and purposes mentioned in the instrument.

18 Dated: 11/3/06



19 

20 NOTARY PUBLIC in and for the State of Washington

21 Residing at Tacoma

22 My commission expires: 7/30/07