

**ORIGINAL**

NO. 34856-0

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY YN  
DEPUTY

CAROL J. DUESTERBECK, nka

CAROL WALSH

Appellant,

vs.

BERNARD A DUESTERBECK

Respondent

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BRIEF OF APPELLANT

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B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Petitioner's motion to vacate, modify and/or clarify the decree of dissolution entered June 18, 1998, under existing law.
2. The trial court erred in finding that petitioner's loss of \$94.50 in monthly military retirement benefits resulting from respondent's qualifying for 20% VA Disability Pension did not constitute an "extraordinary circumstance", an "extreme unexpected situation" or result in "manifest injustice" necessary to vacate the decree pursuant to CR60 (b)(11).
3. The trial court erred in applying the legal principles announced in Marriage of Jennings and Marriage of Perkins v. Perkins in denying petitioner relief.
4. The trial court erred in ruling that to grant Petitioner's requested relief in the form of an award of spousal maintenance would "circumvent the federal law prohibition against dividing VA Disability Benefits".

5. The trial court erred in holding that petitioner's loss was not sufficient enough to warrant any other remedy pursuant to CR60(b)(11) and the *Jennings* case.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does Cr60(b)(11) provide a post dissolution remedy to a spouse whose property award included one half of the community share of the other spouses military retirement which is reduced by the former spouses waiver of retirement benefits for VA disability benefits?

YES

2. Does Cr60(b)(11) and the *Jennings* decision require that the former wife loose more than 10% of her retirement award before the court can grant relief?

NO

3. Do either the *Jennings* or the *Perkins* bar the trial court from granting relief including spousal maintenance in order to equalize a property division inequality created by a loss of a portion of the ex-spouses retirement benefits under

these circumstances?

NO

4. Does res adjudicata effectively bar a reconsideration of this remedy if the retiree's disability rating is again increased, to 50%, 80% or even 100%?

YES

#### D. STATEMENT OF THE CASE

The parties were married on 11/10/65. CP2, L4. They were divorced on 6/18/98, after a 33-year marriage. CP 9, L6.

Mr Duesterbeck retired from the United States Air Force in April, 1979, after 26 years of service. CP 17, L 16. The parties were married for 24 of Mr Duesterbeck's 26 years of military service. CP 51, L24. In the Decree each party received 50% of the military retirement pursuant to a community property agreement which they executed in 1967. CP 52, L1-3.

Under the terms of the Decree, Mrs Duesterbeck was awarded "4. 50% interest in husband's military retirement pay from the Air Force . . . ". CP 10, L 24-25. At that time Mrs Duesterbeck's interest represented ". . . \$936.45. CP 27, L 6.

When Mr Duesterbeck began receiving his retirement and Mrs Duesterbeck began receiving the sum of \$936.45. from the Defense Finance and Accounting Service (DFAS). She received this amount until June 1, 2005, when the amount which she received was reduced by the (DFAS) without notice by \$94.50 per month. CP 27, L 9-12. She currently receives \$841.95 per month. CP 27, L 13-14. This is slightly more than a 10% reduction in benefits.

After inquiry, the reason for the reduction in her share of her former husband's retirement pay was the waiver of retirement pay by Mr Duesterbeck so that he could receive Veteran's Administration Disability Benefits. He waived a portion of his retirement pay (20%) for a dollar for dollar exchange for disability benefits. CP 27, L15-18.

In April 2005, Mr Duesterbeck was approved for a 20% VA disability ". . .as the result of profound hearing loss and a dislocated shoulder he suffered while serving as a flight engineer in the Air Force." CP 52, L5-7.

At the time of the motion, Mr Duesterbeck proceeds to parade out a host of "life's reasons" why he should be justified in taking property awarded to Mrs Duesterbeck by the divorce court. CP 45, L 6- P 46, L7.

Mrs Duesterbeck has not responded "in kind" by reciting a litany of poor decisions and misadventures undertaken by Mr Duesterbeck. This property was awarded to her and she should not have to defend her life or have her values and virtues weighted as Mr Duesterbeck wishes. The issues deserve to be reviewed as the parties found themselves at the time of the dissolution and the court awarded them each assets as their "separate property". CP 7, L20.

Nor does she attempt the tactic that is now part and parcel of the dissolution litigation arsenal - attacking the opponents character. In the decree she was awarded this property, which now has been unjustly taken from her. She is entitled to have it returned without entering into a justification of her life or taking on the mantle of a "character assassin".

Since Mr Duesterbeck suffers from hearing loss which is generally progressive in nature, it can be anticipated that the disability will be increased with time.

Mrs Duesterbeck requests that the court grant her relief and award her compensatory spousal support in the amount of \$94.50 or more per month together with cost of living and other increases to place her upon the same post dissolution financial footing that she would have been had

the property not been taken from her.

Further, the court should award Mrs Duesterbeck a judgement for the property payments due her, but now delivered to her former husband. He has received this money with full knowledge that it was the property of his former wife. He has not acted equitably. He does not have clean hands.

The amount which Mrs Duesterbeck actually received has been short \$94.50 per month for the months June 1, 2005, to December 1, 2005, or a total of seven months or \$661.50. Plus \$46.31 interest . These amounts should be reduced to judgement.

#### E. SUMMARY OF THE ARGUMENT

1. DO THE "EXTRAORDINARY CIRCUMSTANCES"  
ADDRESSED BY THIS MOTION LIE IN THE  
IMPROPER TAKING OF MRS DUESTRBECK'S  
PROPERTY AS OPPOSED TO THE DOLLAR  
AMOUNT TAKEN?

YES

The division of the military retirement in the Duesterbeck's

divorce proceeding was a conformation of a prenuptial agreement reached between the parties. The Respondent agreed to this division and should be estopped from asserting a different claim. *Witzel v. Tena* 48 W2d 628, 632, 295 P.2d 1115, 1118 (1956).

Mr Duesterbeck's conduct precludes him from asserting a vested right under the doctrine of equitable estoppel. *Markley v. Markley* 31 W2d 605, 613, 198 P.2d 486, 490 (1948).

Equitable estoppel is defined in 3 Pomeroy's Equity Jurisprudence, 5th Ed., 189, § 804:

'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.'

The doctrine of equitable estoppel or estoppel *in pais* is applied “. . . where justice forbids that one speak the truth in his own behalf.” *Code v. London*, 1947, 27 Wash.2d 279, 178 P.2d 293.

Under Washington law military retirement pay is subject to division as community property in a marital dissolution proceeding. RCW

26.09.080; 10 USC1408, (A)(6)©; *Marriage of Perkins v. Perkins*, 107 Wn. App. 313, 317, 26 P.3d 989 (2001); *In re Marriage of Jennings*, 138 W2d 612, 616, 980 P.2d 1248. VA Disability Benefits, while not divisible by the court may be taken into consideration as income in determining the economic circumstances of the parties and in setting spousal support, among other things. *Perkins*, supra.

Once divided by the court this asset becomes the sole separate property of the Mrs Duesterbeck. To allow this property to be retaken and placed into Mr Duesterbeck's pocket, regardless of value, violates both her constitutional rights and equity. Wash. State Const. Art. 1, § 3.

When Mr Duesterbeck waived his retirement benefits in lieu of disability benefits, he knew that his action would deprive Mrs Duesterbeck of property which the court had awarded to her, redirecting it to himself.

His actions defeat the intention of the court in making its division of property under RCW 26.09.080 as expressed in the decree.

2. DID THE TRIAL COURT ABUSE ITS DESECRATION  
OR COMMIT AN ERROR OF LAW IN FAILING TO  
FOLLOW CONTROLLING PRECEDENCE IN

DENYING PETITIONER'S REQUESTED RELIEF  
UNDER CR60 (B) (11) AND *JENNINGS*?

YES

Mrs Duesterbeck sought relief from her final decree of divorce citing *CR60 (b)(11)* and the *Jennings* case, supra..

**CR60 (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

\* \* \*

(11) Any other reason justifying relief from the operation of the judgment.

Motions for vacation or relief from a judgment under CR60(b) are matters addressed to the sound desecration of the trial and will not be disturbed absent a clear abuse of discretion. *Morgan v. Burks*, 17 WApp. 193, 197, 563 P.2d 1260 (1977). The discretion is abused when based on untenable grounds or reasons. *In re Marriage of Tang*, 57 WApp. 648, 653, 789 P.2d 118, 122 (1990); *Flannagan v. Flannagan* 42 WApp. 214, 222-223, 709 P.2d 1247, 1252 (1985); *Davis v. Globe Machine Mfg. Co., Inc.*, 102 W2d 68, 77, 684 P.2d 692 (1984).

A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds, including an

erroneous view of the law. *McCausland v. McCausland* 129 WApp. 390, 406, 118 P.3d 944, 953 (Div. 2,2005); *In re Marriage of Fiorito*, 112 WApp. 657, 50 P.3d 298 (2002).

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CR60 (b) (11) is an appropriate remedy for vacating a dissolution decree upon a finding of extraordinary circumstances to overcome a manifest injustice. *Hammack v. Hammack* 114 WApp. 805, 810, 60 P.3d 663, 665 (2003); *In re Marriage of Jennings*, 138 W2d 612, 625-26, 980 P.2d 1248 (1999); *In re Marriage of Burkey*, 36 WApp. 487, 490, 675 P.2d 619 (1984).

CR60 (b)(11) applies to situations "involving extra-ordinary circumstances not covered by any other section of the rules. ". *In re Marriage of Jennings*, supra; *Marriage of Perkins v. Perkins*, 107 Wn. App. 313, 317, 26 P.3d 989 (2001); *In re Marriage of Knutson* 114 WApp. 866, 872-873, 60 P.3d 681, 685 (2003); *In re Marriage of Irwin*, 64 WApp. 38, 63, 822 P.2d 797 (1992) (quoting *In re Marriage of Yearout*, 41 WApp. 897, 902, 707 P.2d 1367 (1985)). "Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings." *Yearout* 41 WApp. at 902, 707 P.2d 1367 (citing *State v. Keller*, 32 WApp. 135, 141, 647 P.2d 35 (1982)); see also *Irwin*, 64 WApp. at 63, 822 P.2d 797.

In *Hammack v. Hammack* 114 WApp. 805, 810, 60 P.3d 663, 666 (2003), Division 2 said,

“We compare this case with two other cases which were found to contain extraordinary circumstances. First, we look to *In re Marriage of Thurston*, 92 WApp. at 494, 963 P.2d 947. In *Thurston*, the appellate court affirmed the trial court's vacation of the property settlement because the husband failed to meet a material condition supporting the property division. *Thurston*, 92 WApp. at 503, 963 P.2d 947. Secondly, the case of *Knies v. Knies*, 96 WApp. 243, 979 P.2d 482 (1999), shows the court's willingness to expand "extraordinary circumstances." Br. of Resp't at 11. In *Knies*, the court modified the dissolution decree when the husband was placed on disability status and received disability pay, which he denied to the wife. *Knies*, 96 WApp. at 251, 979 P.2d 482. The court found that the husband was circumventing the property settlement agreement and was denying the wife's one-half interest in the husband's pension, making this an extraordinary circumstance. *Knies*, 96 WApp. at 250, 979 P.2d 482.

In this case, Mr Duesterbeck voluntarily choose to waive a portion of his retirement pay to place it beyond the reach of his former wife, thus denying her an interest in a substantial asset awarded to her in the divorce.

## F. ARGUMENT

### 1. CR60 (b)(11) MOTION

Our Supreme Court has addressed the circumstances present here in the case of *Marriage of Jennings*, 138 W2d 612, 613, 980 P.2d 1248 (1999). In that case;

The question . . . is whether the Thurston County Superior Court properly modified its decree of dissolution under Court Rule (CR) 60(b)(11) because the portion of military retirement benefits awarded to a wife as her community share of her husband's unliquidated military retirement benefits was significantly reduced when a substantial portion of the military retirement benefits payable to her former husband was allocated to disability benefits not subject to division in a marital dissolution.

In the *Jennings* case at 627, this court held that the former husband had placed the wife's community share of retirement pay beyond her reach, depriving here of a portion of a substantial community asset.

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. (Emphasis added).*

In her ruling, Judge Grant, finds that the amount of money lost by Mrs Duesterbeck, in this current round of disability ratings, is “not sufficient enough to warrant any other remedy pursuant to CR60(b)(11) and *Jennings*.” CP38, L25- P39, L2.

Although the *Jennings* court, *supra*, does use superlative such as “*significant*”(617), “*dramatic reduction*”(623) or “*change*” (625) in its description of the amount of money lost in writings its opinion, these words are not terms of art and have no special meaning in the law.

*Drastic* is defined in Webster’s New World Dictionary, 3<sup>rd</sup> College Ed. as “1. of or connected with drama. 2 a) having the characteristics of a drama . . . b) filled with action, emotion, striking qualities; vivid, striking, etc.”

The *Jennings* court, at page 627, refer to the military retirement benefit as a “. . . *substantial* community asset”.

The amount of money lost because of this particular reevaluation of Mr Duesterbeck’s disability should not play the determinative roll which the trial court attributes to it. If she waits for a larger reduction she would be accused of “sleeping on her rights”, and precluded from seeking a remedy. The remedy should address the injustice to Mrs Duesterbeck

which is the loss of a substantial property interest.

Although, Mrs Duesterbeck's loss is less per month than that lost in *Jennings*, this does not mean that it is an insubstantial loss of property for Mrs Duesterbeck.

A loss of \$94. 50 per month for twelve months is \$1,134. annually. In a ten year period this would constitute a loss of \$11,340. This is substantial. And if the amount of disability is increased, this loss will be greater.

This "amount of the loss" solution for determining application of CR60(b)(11) remedies is illusory.

This ruling, if unchallenged, could result in a total loss to Mrs Duesterbeck of all of her property interest in her share of the retirement awarded to her in the divorce. If Mr Duesterbeck is re-rated and found to have a higher percentage or even total disability, there will be no remedy available to Mrs Duesterbeck, since she has sought relief in this motion. She will be forever foreclosed by the doctrine of preclusion which prevents her from seeking this same relief a second time.

That is not fairness or justice.

In her decision, Judge Grant, states:

The court is unwilling to circumvent the federal law

prohibitions against dividing VA Disability benefits by ordering a dollar-for-dollar replacement in the form of spousal maintenance . . .”

The *Jennings* court addressed the remedy requested by Mrs Duesterbeck at page 627,

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.

The *Jennings* court, at page 628, denotes this remedial payment as “*compensatory spousal maintenance*”.

We interpret the June 5, 1996 amended order as imposing upon Respondent a direct obligation to pay Petitioner as compensatory spousal maintenance the sum of \$746.00 per month so long as Respondent is entitled to military pension payments or disability payments or both.”

Judge Grant also cites the case of *Marriage of Perkins v. Perkins*, 107 Wn. App. 313, 317, 26 P.3d 989 (2001) as the basis for being “...unwilling to circumvent the federal law prohibition against dividing VA benefits by ordering a dollar-for dollar replacement in the form of spousal maintenance . . .”

Judge Grant misapplies *Perkins* to the facts of this case.

In *Perkins* at page 315, the Court of Appeals, Div. 2, addressed the question: Whether the trial court violated federal law by awarding the wife permanent compensatory spousal maintenance in the amount of 45% of the husband's veterans disability pension in granting the original decree between the parties. The court found that it had but remanded the case with directions.

The *Perkins* ' court began its decision by stating at page 991,

“We begin with three state-law propositions. (1) When disability benefits replace future compensation (e.g., post-dissolution wages), they are not distributable at a dissolution trial. Future compensation is not distributable because it is not on hand at trial, so when disability benefits replace such compensation, they are treated in the same fashion.[fn5] (2) When disability benefits replace compensation earned but deferred during marriage (e.g., retirement benefits), they are distributable at a dissolution trial. As we stated in *Marriage of Geigle*, "If . . . a party would be receiving retirement benefits but for a disability, so that disability benefits are effectively supplanting retirement benefits, the disability payments are a divisible asset to the extent they are replacing retirement benefits." [fn6] (3) ***Even when disability benefits are not distributable at a dissolution trial, they remain a future economic circumstance that the trial court should***

*consider when distributing the parties' property.*  
*(Emphasis added).*

The Perkins' Court, *supra*, said at page 992,

Federal law preempts the second proposition with respect to a veteran's disability pension. Federal law prohibits a state dissolution court from dividing such a pension, and from distributing *by any means* any part of such pension, according to *Hisquierdo v. Hisquierdo*,<sup>FN8</sup> [439 U.S. 572, 99 S.Ct. 802, 59 LED.2d 1 (1979)], *McCarty v. McCarty*,<sup>FN9</sup> [453 U.S. 210, 101 S.Ct. 2728, 69 LED.2d 589 (1981)], the Uniformed Services Former Spouses' Protection Act (USFSPA),<sup>FN10</sup> [10 U.S.C. § 1408(c)(1)], and *Mansell v. Mansell*.<sup>FN11</sup> [490 U.S. 581, 109 S.Ct. 2023].

The Perkins' court goes on to state, at 321;

Although federal law preempts the second of our state-law propositions, it does not preempt the third. In *In re Marriage of Kraft*, a 1992 case, the Washington Supreme Court sought to harmonize *Mansell's* requirement “not to treat military disability retirement pay as divisible” with RCW 26.09.080's requirement “to make an equitable distribution in light of the parties' post-dissolution economic circumstances.”

\* \* \*

[T]he trial court in a marriage dissolution action may consider military disability retirement pay as a source of income in awarding spousal or child support, or generally

as an economic \*322 circumstance of the parties justifying a disproportionate award of community property to the nonretiree spouse. *The trial court may not, however, divide and distribute the disability pay or value it and offset other property against that value.* In the present case, the trial court reduced the military disability pay to present value and then offset assets against it by awarding to Mrs. Kraft a proportionately larger share of the community property. This is not a permissible way of considering military disability retirement pay under the *Mansell* holding.<sup>FN32</sup> [N32. *Kraft*, 119 Wash.2d at 451, 832 P.2d 871 (emphasis added). See also *Clauson v. Clauson*, 831 P.2d 1257, 1263 (Alaska 1992).

See also, *In re Anderson* 138 P.3d 1118, 1121, \_\_\_ P3d \_\_\_ (2006).

The *Perkins* case at 322-23, reconfirms the continuity of the *Jennings* case, *supra*,

In short, according to *Kraft*, a Washington dissolution court may not divide or distribute a veteran's disability pension, but it may consider a spouse's entitlement to an *undivided* veteran's disability pension as one factor relevant to a just and equitable distribution of property under \*323 RCW 26.09.080, and as one factor relevant to an award of maintenance under RCW 26.09.090, provided of course that it follows the usual state-law rules for applying those statutes.

The Perkins court at 326-27, distinguishes the issue presented to it from that present in Jennings saying;

As can be seen, the question discussed in *Jennings* is different from the question presented here. The question discussed in *Jennings* was whether *state* law afforded the wife a remedy when, years after the original decree, the husband waived most of the service pension that the trial court had properly divided and distributed in its original decree. The question presented here is whether the trial court violated *federal* law when it entered its *original* decree. The question presented here was not discussed in *Jennings* because the *Jennings* trial court had fully complied with federal law at the time it entered its original decree.

The trial court misapplies both the *Jennings* and the *Perkins* cases when it rules that federal law prohibits the remedy being sought by Mrs Duesterbeck.

The *Perkins* ' court holds, at 327 that;

Nothing said herein means that on remand the trial court may not award maintenance after considering the existence of an undivided disability pension as one factor (among many) bearing on the husband's ability to pay, and after entering proper findings of fact under RCW 26.09.090.

\* \* \*

We remand for redistribution of property and debts, and for reconsideration of maintenance. On remand, the trial court may redistribute and reconsider based on the record already made, or it may in its discretion take more evidence. On remand, the trial court may, if in its view equity so requires, distribute the [parties'] property in the same manner in which it did initially. What is required is that [it] arrive at its decision as to what is just and equitable under all the circumstances after considering the military disability retirement pay in the manner we here explain.

#### G. CONCLUSION

The military retirement benefits were a substantial asset of the Duesterbeck's community. A portion of this property award was undone by the post dissolution change in the status of the benefits. This change was initiated by Mr Duesterbeck who choose to waive a portion of his retirement in lieu of disability benefits. He did so with knowledge that this action would divert property owned by Mrs Duesterbeck into his pocket.

Mrs Duesterbeck stands to loose more of these benefits in the future with no recourse if the relief requested here is denied.

These facts constitute "extraordinary circumstances" within the meaning of both CR60(b)(11) and *Jennings* and *Perkins* cases as the basis for reopening final decrees, without eroding the doctrine of finality. This

result also does substantial justice and places the parties in the position in which they would have been but for this unforeseen event.

The remedy lies in restoring Mrs Duesterbeck's property through compensatory maintenance, i.e. a sum of money which will restore her interest in the full retirement originally awarded to her.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of August, 2006.

A handwritten signature in cursive script, reading "James M Caraher", is written over a horizontal line.

James M Caraher (WSBA #2817)

Attorney for Mrs Walsh