

No. 38831-6-II
THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
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DEPUTY

GLENN DAVID MCDERMOTT

Appellant/Petitioner,

and

KRISTEN JENKINSON-MCDETMOTT

Respondent

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. Ronald E. Culpepper)

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	<u>Page(s)</u>
I. APPELLANT’S ASSIGNMENT OF ERROR.	1
II. ISSUES	1
A. Whether this Court should review the trial court’s construction of the meaning of the CR 2A Agreement and Decree of Dissolution de novo?	1
B. Should military pension benefits earned before marriage and after the separation of the parties be excluded in the method of calculating Ms. Jenkinson- McDermott’s pension award, when the Decree awards her 50% of Colonel McDermott’s pension benefits “earned before the date of marriage and the date of separation?	1
III. STATEMENT OF THE CASE.	1
IV. ARGUMENT	18
A. Standard of Review	18
B. The “Hypothetical Award” method correctly divides Colonel McDermott’s military pension pursuant to the Decree.	18
C. The record evidences the parties’ intent to utilize the hypothetical award method to exclude pre-marriage and post-separation military service from Ms. Jenkinson- McDermott’s pension award.	25
V. CONCLUSION	30

TABLE OF AUTHORITIES

Page(s)

STATE CASES

Cases:

In Re Marriage of Bulicek, 59 Wn. App. 630 (1990). 25, 26, 27

State v. Campbell, 125 Wn.2d 797, 888 P.2d 1185 (1995). 18

In Re Chavez, 80 Wn. App. 432, 909 P.2d 314 (1996). 18, 25, 26

In Re Gimlett, 95 Wn.2d 699, 629 P.2d 450 (1981) 18

MISCELLANEOUS

Garnishment Operations Defense Finance and
Accounting Service Cleveland, Ohio, *Uniformed
Services Former Spouses Protection Act Dividing
Military Retired Pay* 13, 19, 21

I. ASSIGNMENT OF ERROR

Did the trial court err when it entered the November 14, 2008 Supplemental Decree Re Division of Military Pension to award Ms. Jenkinson-McDermott pension benefits from Colonel McDermott's pension that were earned before marriage and after separation?

II. ISSUES

A. Whether this Court should review the trial court's construction of the meaning of the CR 2A Agreement and Decree of Dissolution de novo?

B. Should military pension benefits earned before marriage and after the separation of the parties be excluded in the method of calculating Ms. Jenkinson- McDermott's pension award, when the Decree awards her 50% of Colonel McDermott's pension benefits "earned before the date of marriage and the date of separation.

III. STATEMENT OF THE CASE

Colonel Glenn D. McDermott and Kristin Jenkinson-McDermott were married on July 11, 1981. (CP 122)

At the time of their marriage, Colonel McDermott was on active duty in the United States Army, having started his active duty service six years, one month and seven days prior to the parties' marriage. (CP 84) At

the time of their marriage, Ms. Jenkinson-McDermott was also employed by the Federal government. (CP 138)

On July 6, 2007, the parties entered into a CR 2A Agreement (hereinafter referred to as Agreement) which settled the issues in their dissolution proceeding. (CP 22-27) This Agreement was prepared by Ms. Jenkinson-McDermott's attorney and was signed by the parties and their respective attorneys. (CP 27)

Paragraph II(11) of this Agreement awarded Colonel McDermott an interest in Ms. Jenkinson-McDermott's Federal Civil Service (FERS) Pension as follows:

“An interest in the Wife's FERS pension equal to 50% of the Wife's pension benefits earned between the date of marriage and the date of separation, July 26, 2006, payable upon the Wife's retirement.” (CP 24)

Paragraph II(10) awarded Colonel McDermott his contingent military pension as follows:

“All right, title and interest in Husband's military pension not otherwise awarded to the Wife herein.” (CP 24)

Paragraph III(9) of the Agreement then awarded to Ms. Jenkinson-McDermott a portion of Colonel McDermott's military pension as follows:

“9. An interest in the Husband's military pension equal to 50% of Husband's pension benefits earned between the date of marriage and

the date of separation, July 26, 2006. The cost of the SBP shall be paid 100% from the Wife's share of said pension benefits. To be accomplished by a separate order and payable upon Husband's retirement." (CP 25)

Paragraph III(11) awarded to Ms. Jenkinson-McDermott her FERS pension as follows:

"11. All interest in Wife's FERS pension not otherwise awarded to the Husband." (CP 25)

The parties' Decree of Dissolution was subsequently prepared by Mr. McDermott's attorney. It was signed by both parties and entered on October 3, 2007. (CP 14-21)

Paragraph 3.2 of the Decree awarded property to Colonel McDermott and with regards to his military pension, subparagraph 10 utilized the same wording as paragraph II(10) of the CR 2A Agreement, i.e.,

"10. All right, title, and interest in Husband's military pension not otherwise awarded to the Wife herein." (CP 16)

Regarding Colonel McDermott's award of a portion of Ms. Jenkinson-McDermott's FERS pension, subparagraph 11 of the Decree utilized the same language from paragraph II(11) of the CR 2A Agreement and added additional language regarding the Survivors Benefit Plan Election and a separate order, i.e.,

“11. An interest in the wife’s Civil Service (Federal Employee Retirement System – FERS) pension equal to 50% of the wife’s pension benefits earned between the date of marriage and the date of separation, July 26, 2006. If Survivor Benefit Plan coverage is elected by the husband, the cost of the SBP shall be paid 100% from the husband’s share of said pension benefits. Said transfer to be accompanied by a separate order and payable upon the wife’s retirement.” (CP 16)

Paragraph 3.3 of the Decree awarded property to Ms. Jenkinson-McDermott and with regards to her FERS pension, subparagraph 10 utilized the same wording as paragraph III(11) of the CR 2A Agreement, i.e.:

“10. All interest in the Wife’s FERS pension not otherwise awarded to the Husband.” (CP 17)

Regarding Ms. Jenkinson-McDermott’s award of a portion of Colonel McDermott’s military pension, subparagraph 9 utilized the same language from paragraph III(9) of the CR 2A Agreement, i.e.:

“9. An interest in the husband’s military pension equal to 50% of the husband’s pension benefits earned between the date of marriage and the date of separation, July 26, 2006. The cost of the SBP shall be paid 100% from the wife’s share of said pension benefits. To be accomplished by a separate order and payable upon the husband’s retirement.” (CP 17)

After the October 3, 2007 Decree of Dissolution was entered, the parties’ attorneys went about preparing the separate orders referred to in

the Decree to divide Colonel's military pension and Ms. Jenkinson-McDermott's FERS pension.

The first "separate order" pertinent to this appeal was an order prepared by Ms. Jenkinson-McDermott's attorney to divide Colonel McDermott's pension. This order was sent to Colonel McDermott's attorney on December 3, 2007. (CP 30-31) A copy of the proposed order in its entirety can be found at Exhibit "B" to the October 3, 2008 Declaration of James P. Tomlinson in Support of Presentation of Supplemental Decree Re: Division of Military pension. (CP 32-36) This order proposed to divide Colonel McDermott's military pension by simply incorporating the language of paragraph III(9) of the CR 2A and paragraph 3.3(9) of the Decree into the following paragraphs:

"1. As set forth in the Decree of Dissolution of Marriage, the Respondent/Former Spouse, Kristin Jenkinson-McDermott, is awarded the right to receive 50% of the disposal retired pay from the military pension for the Petitioner/Member, Glenn David McDermott, earned between the date of marriage of the party [sic], July 11, 1981, and the date of the parties' separation, July 26, 2006." (CP 33)

"3(g). Amount of Payment to Spouse: 50% of retired/retainer pay of the Member earned between July 11, 1981 and July 26, 2006." (CP 34)

Colonel McDermott's attorney responded to Ms. Jenkinson-McDermott's attorney's December 3, 2007 letter and the proposed order

on April 4, 2008 (CP 37) and enclosed her own proposed "Supplemental Decree Re Division of Military Pension." (CP 181-186) This order was identical to Ms. Jenkinson-McDermott's December 3, 2007 proposed order with the exception that the following replaced paragraph 3(g) of Ms. Jenkinson-McDermott's order:

"g. Amount of Respondent/Former Spouse's Benefit: This Order assigns to Respondent/Former Spouse an amount equal to Fifty Percent (50%) of the Marital Portion of the Petitioner/Employee's Gross monthly military retired pay determined as of the Date of Separation (July 26, 2006). For purposes of calculating the Respondent/Former Spouse's share of Petitioner/Employee's benefit, the Marital Portion shall be determined by multiplying the Petitioner/Employee's Gross monthly military retired pay by a fraction (less than 1.0), the numerator of which is the Petitioner/Employee's total number of months of Creditable Service earned from July 11, 1981 to July 26, 2006, and the denominator of which is the total number of months of the Petitioner/Employee's Creditable Service accrued for Petitioner/Employee's entire military service. The marriage began on July 11, 1981. As of the Date of Separation, July 26, 2006, the Petitioner/Employee's military retired pay is valued at \$5,599 monthly. The Respondent/Former Spouse's share thereof is \$2,127.26.

In addition to the above amount, COLAs that are applied to military retirement benefits between the Date of Separation and the Petitioner/Employee's Retirement, shall be applied to adjust the Respondent/Former Spouse's share. Following the Petitioner/Employee's Retirement, the Respondent/Former Spouse's share shall

continue to be adjusted by any and all COLAs that apply to military retirement benefits.

With respect to the Respondent/Former Spouse's share of the Petitioner/Employee's Gross monthly military retired pay, such portion shall be calculated without regard to any amounts that the Petitioner/Employee elects to have withheld from the Petitioner/Employee's monthly military retired pay. Any amounts so withheld shall be deducted solely from the Petitioner/Employee's share of the monthly military retired pay. With respect to Survivor Benefit Plan (SBP) coverage, if the Respondent/Former Spouse elects to have this coverage, amounts for the SBP premium shall be deducted from the Respondent/Former Spouse's share of the monthly military retired pay." (CP 183) (Emphasis Added)

This proposed order would have awarded Ms. Jenkinson-McDermott 50% of Colonel McDermott's retired pay calculated as if he has actually retired on July 26, 2006, the date of separation. In other words, the \$2,127.26 figure was intended by Colonel McDermott, under this proposed order, to be Ms. Jenkinson-McDermott's "50% of Husband's pension benefits earned between the date of marriage and the date of separation, July 26, 2006," the agreed to award from the CR 2A Agreement and Decree.

In addition to the proposed Supplemental Decree Re Division of Military Pension with the new paragraph 3(g), Colonel McDermott's attorney also prepared a new proposed Qualified Court Order regarding

Ms. Jenkinson-McDermott's FERS pension. That order (CP 130 -134) included a paragraph 7 which in substance was identical to the paragraph 3(g) of Colonel McDermott's attorney's order. (CP 183) As with the proposed order regarding Colonel McDermott's military pension, this proposed order regarding Ms. Jenkinson-McDermott's FERS pension would have awarded Colonel McDermott a portion of Ms. Jenkinson-McDermott's FERS pension valued as if she had retired on the date of separation and excluded for pre-marriage years of federal service.

After Colonel McDermott's attorney sent her April 4, 2008 letter and proposed Supplemental Decree Re Division of Military Pension Order, Colonel McDermott did some further research of his own and realized that paragraph 3(g) of his order did not accurately reflect the CR 2A Agreement and Decree because it included in the calculation of his date of separation retirement pay six years and one month of creditable military service that Colonel McDermott had performed before the marriage which gave the Ms. Jenkinson-McDermott a percentage of a retirement benefit earned outside of the marriage. (CP 70 and CP 82)

On May 15, 2008, Ms. Jenkinson-McDermott's attorney wrote Colonel McDermott's new attorney¹. This letter enclosed the April 4,

¹ Colonel McDermott retained a new attorney who was more experienced in military pension law after he did his own research into the proposed orders. (CP 82)

2008 FERS order that had been prepared by McDermott's previous attorney. That order had been agreed to and signed by both Ms. Jenkinson-McDermott and her attorney. (CP 134)

Ms. Jenkinson-McDermott's attorney's May 15 letter also stated:

“As I communicated with Ms. Grady, Ms. Jenkinson only dispute with Ms. Grady's revision to the qualified order dividing Dr. McDermott's military pension is a request that you delete the full sentence at line 13, on page 2 that provides ‘the Respondent/Former Spouses share thereof is \$2,127.26.’ The balance of the order is acceptable. Neither Ms. Jenkinson nor I have the information necessary to determine whether the dollar amount calculated is appropriate. Inclusion of the formula is sufficient. Ms. Jenkinson's share of the retirement should be calculated by thy [sic] Defense Finance and Accounting Office-Retired Pay Operations at the time of retirement using the Department of Army's official computation of credible [sic] service for retirement pay entitlement.” (CP 39)

On October 3, 2008, Ms. Jenkinson-McDermott's attorney filed a Notice of Presentation of Supplemental Decree Re Division of Military Pension. (CP 1-2) Attached to this notice was a new proposed Supplemental Decree Re Division of Military Pension from Ms. Jenkinson-McDermott's attorney. Paragraph 3(g) of this new proposed order contained the same language as paragraph 3(g) of Colonel McDermott's former attorney's April 4, 2008 proposed order with the sole exception that, “The Respondent/Former Spouses share thereof is

\$2,127.26,” the sentence about which he had complained in his May 15th letter, was deleted. (CP 3-8)

Ms. Jenkinson-McDermott’s attorney filed his own declaration in support of the presentation motion. (CP 9-43) No declaration from Ms. Jenkinson-McDermott, however, was filed in support of this Notice of Presentation.

On November 5, 2008, Ms. Jenkinson’s attorney filed his second declaration. (CP 44-46) To this declaration was attached yet another new Supplemental Decree Re Division of Military Pension. (CP 47-51) Paragraph 3(g) of this new order contained the same language as paragraph 3(g) of Colonel McDermott’s former attorney’s April 4, 2008 proposed order with the exception that, as with the proposed order attached to the October 3, 2008 Notice of Presentation, “The Respondent/Former Spouse’s share thereof is \$2,127.26” was deleted. In addition, this new order also deleted, “as of the date of separation, July 26, 2006, the Petitioner/Employee’s Military Retired Pay is valued at \$5,599 monthly.”

On November 12, 2008, Ms. Jenkinson-McDemott’s attorney filed his third declaration (CP 59-60) and attached Ms. Jenkinson-McDermott’s third revised Supplemental Decree Re Division of Military Pension. (CP

61-66) This third revised order differed from the previous orders submitted by Ms. Jenkinson-McDermott in two respects:

First, in paragraph 1 of the order, “As set forth in the Decree of Dissolution of Marriage” was deleted and “of the Marital Portion” was added to the remaining sentence which read as follows:

“1. The Respondent/Former Spouse, Kristen Jenkinson-McDermott is awarded the right to receive 50% of the ‘Marital Portion’ of the disposable military retired pay of the Petitioner/Member, Glenn David McDermott, earned between the date of the marriage of the parties, July 11, 1981 and the date of the parties’ separation, July 26, 2006, as further set forth in paragraph 3(g) below.”

Second, the first paragraph of paragraph 3(g) remained identical to Ms. Jenkinson-McDermott’s second November 5, 2008 proposed Order. However, the second and third subparagraphs of paragraph 3(g) were deleted from the order, so that it only read as follows:

“g. Amount of Payment to Spouse: This Order assigns to Respondent/Former Spouse an amount equal to Fifty Percent (50%) of the Marital Portion of the Petitioner/Employee’s Gross monthly military retired pay determined as of the Date of Separation (July 26, 2006). For purposes of calculating the Respondent/Former Spouse’s share of Petitioner/Employee’s Gross monthly military retired pay, the “Marital Portion” shall be determined by multiplying the

Petitioner/Employee's disposable retired pay by a fraction (less than 1.0), the numerator of which is the Petitioner/Employee's Creditable Service earned from July 11, 1981 to July 26, 2006, and the denominator of which is the total number of months of the Petitioner/Employee's Creditable Service accrued for Petitioner/Employee's entire military service. The marriage began on July 11, 1981."

Along with his declaration, Ms. Jenkinson-McDermott's attorney filed a Memorandum wherein for the first time he argued that it was the intent of the CR 2A Agreement to award Ms. Jenkinson-McDermott 50% of the "marital portion" of Colonel McDermott's military retirement valued as of the date of his actual retirement, not the date of separation. (CP 56) No declaration from Ms. Jenkinson-McDermott was filed in support of this Memorandum and argument.

On the same day, November 12, 2008, Colonel McDermott filed two declarations in opposition to the first and second orders proposed by Ms. Jenkinson-McDermott (the third order could not be specifically addressed, since it was not received until November 12). Colonel McDermott testified that it was his understanding that the CR 2A Agreement intended to divide the actual dollar amount of his pension earned from the date of marriage to the date of separation, that his former wife would not receive any benefit from his continued service in the

military after the divorce, and that this was a factor in his decision not to retire at the time the Decree was entered. (CP 68)

In support of his argument, Colonel McDermott relied upon the Defense Finance and Accounting Service (DFAS) publication Uniformed Services Former Spouses Protection Act Dividing Military Retired Pay, (CP 108-112) which explained the methodology used by DFAS in calculating what it called a “hypothetical award” of a military pension. This publication informed the trial court that a hypothetical award was an award based on a retired pay amount different from the service member’s actual retired pay and that it was most often determined as if the service member had retired on the date of separation or the date of divorce. (CP 108) It further stated that unlike the formula award, the hypothetical award does not give a former spouse the benefit of any of the member’s pay increases due to promotions or increased service time after the divorce. (CP 108)

Utilizing this DFAS hypothetical award method, Colonel McDermott proposed a Qualified Order Re Military Retired Pay, which at paragraph 2 contained language which would allow DFAS to determine Colonel McDermott’s hypothetical retired date of separation pay. The proposed order also excluded Colonel McDermott’s six years and one month of pre-marriage military service from his years of creditable service

thereby allowing DFAS to calculate Ms. Jenkinson-McDermott's percentage award of that retired pay earned and value between the date of marriage and date of separation. It read as follows:

"2. Retired Pay Awarded to Former Spouse: The Respondent/Former Spouse, Kristen Jenkinson-McDermott, shall be awarded fifty percent (50%) of the disposable military retired pay the Petitioner/Member, Glenn D. McDermott, should have received had Glenn D. McDermott retired with the rank of Colonel with 19 years 10 months of creditable service on July 26, 2006. Glenn D. McDermott's active duty base pay for calculation of the Respondent/Former Spouse's award herein is \$7,634.10." (CP 114)

In addition to this Memorandum, Colonel McDermott presented the trial court his exhibit, Calculation of Retired Pay As of July 26, 2006 (Date of Separation) (CP 200). This exhibit illustrated to the trial court the dollar amount that Ms. Jenkinson-McDermott would receive from Colonel McDermott's pension valued at the date of separation using all of his creditable military service to that date versus the lesser dollar amount she would receive if Colonel McDermott's pre-marriage, 6 years 1 month, service were excluded from the pension valuation and award.²

² This exhibit showed Ms. Jenkinson-McDermott receiving \$980.80 more each month if Colonel McDermott's pre-marriage service was included in his date of separation retired pay calculation. This calculation was not correct and was corrected for the Court during Colonel McDermott's motion for reconsideration by filing a corrected calculation, which showed the increased amount to be \$299.23. (CP 201) However, the fact and point remains: any order that includes Husband's pre-marriage military service in its calculation of Ms. Jenkinson-McDermott's award gives her an additional monetary award based solely on the pre-marriage, separate service of Colonel McDermott.

The trial court first heard this matter on November 14, 2008. (11/14/08 RP 3) When the issue of intent was raised in argument, Colonel McDermott's attorney offered the FERS Qualifying Court Order that had been prepared by Colonel McDermott's former attorney and which had been signed and agreed to by Ms. Jenkinson-McDermott and her attorney. The order was offered as evidence that both parties intended that Ms. Jenkinson-McDermott's percentage of Colonel McDermott's military pension should be based on his retired pay valued at the date of his separation and not his actual retirement date and that his pre-marriage service should be excluded from the calculation, just as Ms. Jenkinson-McDermott's FERS pension order had awarded Colonel McDermott his percentage on the FERS retirement valued at the date of separation, excluding her pre-marriage service. (11/14/08 RP 23-24). Although the trial court acknowledged looking for this order in the court file since it had been referred to by both parties' counsel (CP 39; 69) it refused to admit the FERS order into evidence when it was offered. (11/14/08 RP 29; 30-31) In spite of recognizing that its duty was to "try to discern the intent of the parties" when they signed the CR 2A Agreement (11/14/08 RP 30), the trial court ignored a critical document evidencing the intent of the parties. Even though the trial court then found that Colonel McDermott's hypothetical award approach "makes some sense logically," it found "no

reason to think that was considered by the parties.” (11/14/08 RP 30-31)
The trial court then signed and entered Ms. Jenkinson-McDermott’s revised third proposed Supplemental Decree Re Division of Military Pension, finding it the “traditional” formula and the one used most frequently. (11/14/08 RP 23)

On November 24, 2008, Colonel McDermott timely filed his Motion for Reconsideration. (CP 135) In support of this motion, Colonel McDermott filed a declaration (CP 125-26) attaching the signed copy of the FERS Qualifying Court Order that had been agreed to and signed by Ms. Jenkinson-McDermott and her attorney. (CP 130-134) Also filed was the declaration of Colleen Grady, Colonel McDermott’s former attorney (CP 177-178), which attached the Supplemental Decree Re Division of Military Pension that she revised from the first Military Order prepared by Ms. Jenkinson-McDermott’s attorney. (CP 181-186)

In addition to the above, Husband filed his Petitioner’s Supplemental Memorandum which attached a memorandum filed in a Thurston County Superior Court case that involved identical issues to those issues presented in this case. (CP 190-201) This was done to provide the trial court with an additional real life illustration of the effect of including pre-marriage and post-separation service in the calculation of dividing a military pension.

Ms. Jenkinson-McDermott moved to strike from the record the FERS order among other pleadings and evidence filed by Colonel McDermott. (CP 167)

Colonel McDermott's Motion for Reconsideration was heard on January 9, 2009. The trial court denied Ms. Jenkinson-McDermott's motion to strike the pleadings and exhibits submitted by Colonel McDermott in support of his motion, including the FERS order that had been agreed to by Ms. Jenkinson-McDermott and her attorney. (01/09/09 RP 45)

The trial court further acknowledged that there was a dollar affect on an award to Ms. Jenkinson-McDermott if the hypothetical award method were utilized (01/09/09 RP 39), but concluded that while Husband's "formula does make some sense, but the more traditional approach which has been approved by the Court of Appeals also makes some sense." (01/09/09 RP 45) The trial court further found, "It's not absolutely clear to me what the parties had in mind when they signed the CR 2A Agreement, but the proposal Mr. Schmit makes is a somewhat new formula. It seems more likely to me that the 'traditional formula' is the one people had talked about." (01/09/09 RP 45) The motion for reconsideration was denied. (CP 222-223)

Colonel McDermott then timely filed his Notice of Appeal on February 5, 2009. (CP 226-235)

IV. ARGUMENT

A. Standard of Review.

In entering the November 14, 2008 Supplemental Decree Re: Division of Military Pension, the trial court was asked to determine the intent of the parties in entering their CR 2A Agreement and the intent and effect of the Decree of Dissolution, which incorporated the CR 2A Agreement language. Determining the construction and intent of the Decree was a question of law for the trial court. See *In Re Gimlett*, 95 Wn.2d 699, 629 P.2d 450 (1981). The issue of the construction and intent of a decree is reviewed de novo. *State v. Campbell*, 125 Wn.2d 797, 888 P.2d 1185 (1995). This court has held that the review of a lower courts decision regarding the intent and construction of a Decree purporting to divide a military pension should be de novo. *In Re Chavez*, 80 Wn. App. 432, 909 P.2d 314 (1996). Therefore, the trial court's decision regarding the intent and construction of the Decree which resulted in the entry of the Supplemental Decree proposed by Ms. Jenkinson-McDermott should be also reviewed de novo.

B. The "Hypothetical Award" method correctly divides Colonel McDermott's military pension pursuant to the Decree.

To understand the significance of limiting Ms. Jenkinson-McDermott's award to only those military retirement benefits earned during the marriage, it is first necessary to understand the method of calculating military retired pay.

The first step in determining a service member's retired pay for a member who entered military service before 1980, as did Colonel McDermott, is to determine the final active duty base military pay at the time of retirement. (CP 109-110) Base pay, in turn is determined by two components, i.e., the number of years in military service and the service member's rank at the time of retirement. The greater the number of years of service, the higher the base pay. Likewise, the higher the rank of a service member at the time of retirement, the greater the base pay and longevity tends to lead to an increase in rank. Therefore, the number of years of military service before, during and after a marriage such as in this case, are critical components to determining the amount of base pay.

Once a service member's base pay is known, it is then multiplied by what the Defense Financial and Accounting Service (DFAS) calls the "retired pay multiplier." This multiplier is simply the number of years of creditable service to the date of one's retirement multiplied by 2.5%, which is the service credit awarded to a service member for each year of creditable military service. The end result of this calculation is the service

member's retired pay. As an example, utilizing the 2006 base pay chart that was provided to the trial court (CP 118) and assuming Colonel McDermott had actually retired in 2006 with the rank of colonel with over 26 years of creditable service, his base pay at retirement would have been \$8,004. His retired pay then would have been:

$$\$8,841.30 \times .525 (26 \text{ years} \times .025) = \$5,746.85 \text{ Retired Pay}$$

Therefore, the number of years of service before during and after a marriage, such as in this case, are also critical to determining a service member's retired pay.

How then were Colonel McDermott's years of service important for this case and a determination of what method to divide his military retired pay? Colonel McDermott had six years, one month and seven days of active duty service before marriage. (CP 84) Those years of service would be a part of Colonel McDermott's total years of service when he retires. Including those years would obviously then increase the total years of service which would just as obviously increase Colonel McDermott's ultimate retirement benefit. However, because obviously those years were before this marriage, they should not be included in an order that determines Ms. Jenkinson-McDermott's 50% interest in retirement benefits that Colonel McDermott earned between the date of marriage and July 26, 2006, the date of separation.

In addition to the issue of Colonel McDermott's pre-marriage years of service, there are also the years of service after July 26, 2006. Colonel McDermott remains on active duty and will have an as yet undetermined number of years of post-separation active duty that will increase his eventual retired pay upon his retirement. As with his pre-marriage active duty, Colonel McDermott's post-separation active duty should not be included in an order that determines Ms. Jenkinson-McDermott's military retirement award.

Colonel McDermott presented to the trial court a method of awarding Ms. Jenkinson-McDermott the benefits earned during the marriage, without including his pre-marriage and post-separation years of service. This was the "hypothetical award" that was described in the Uniformed Services Former Spouses Protection Act Division of Military Retired Pay publication prepared by DFAS. (CP 108-112)

Utilizing the "hypothetical award" method, Colonel McDermott presented to the trial court an order which contained the appropriate language for the hypothetical award. The operative paragraph of that order read as follows:

"The Respondent/Former Spouse, Kristen Jenkinson-McDermott, shall be awarded 50% of disposal retired pay the Petitioner/Member, Glenn D. McDermott, should have received had Glenn D. McDermott retired with the rank of colonel with 19

years, 10 months of creditable service on July 26, 2006. Glenn D. McDermott's active duty base pay for calculation of Respondent's award herein is \$7,634.10." (CP 97)

With this order, upon Colonel McDermott's retirement, DFAS would then be able to take the above paragraph and calculate Colonel McDermott's hypothetical retired pay as if he had actually retired on July 26, 2006. DFAS would do this by multiplying his years of creditable service from the date of marriage to the date of separation (19 years, 10 months) (CP 84) times .025, which would produce the "retired pay multiplier." The retired pay multiplier would then be multiplied by Colonel McDermott's base pay at the hypothetical retirement date (7/26/06), which according to the 2006 base pay chart, would have been \$7,634.10 for a colonel with over 18 years of service retiring in 2006. This formula then would produce Colonel McDermott's hypothetical retired pay as of July 26, 2006, (\$3,785.23) calculated with only those years of service earned during the marriage.

$$\begin{aligned} & \$7,634.10 \times (.025 \times 19.8333 \text{ years}) = \$3,785.23 \\ & \text{Retired pay earned during marriage to date of separation} \end{aligned}$$

DFAS would then take \$3,785.23, apply the appropriate annual cost of living allowances from 2006 through the actual date of Colonel McDermott's retirement. DFAS would then convert Ms. Jenkinson-McDermott's award to a percentage of Colonel McDermott's actual

retired pay, by multiplying Ms. Jenkinson-McDermott's 50% award times a fraction, the numerator of which would be the July 26, 2006 retired pay (\$3,785.23) with COLAs applied to the date of retirement and the denominator of which would be Colonel McDermott's actual gross retired pay on the day of his actual retirement. This would then give Ms. Jenkinson-McDermott her new percentage of all future retirement received by Colonel McDermott.

Using this methodology by DFAS would award to Ms. Jenkinson-McDermott precisely what was bargained for and agreed to in the CR 2A Agreement and ordered by the court in the Decree, i.e., 50% of Colonel McDermott's military retirement benefits earned between the date of marriage and the date of separation, without any impact on this award for service performed before marriage and after separation.

To further illustrate the financial impact of the orders that were proposed and specifically the impact of including Colonel McDermott's pre-marriage service in the order entered by the trial court, a comparison of the calculation of what his retired pay would have been at the date of separation, July 26, 2006, both including his pre-marriage service and excluding his pre-marriage service is a part of the record. (CP 201) Including his pre-marriage service, Colonel McDermott had 26 years of creditable service to the date of separation and at his rank of colonel, his

base pay would have been \$8,841.30 at retirement and Ms. Jenkinson-McDermott's award would have been \$2,191.85.

However, if Colonel McDermott's pre-marriage service of 6 years, 1 month and 7 days were excluded from the calculation, as we believe the Agreement and Decree intended, he would have had 19 years, 10 months of creditable service earned during the marriage, which would result in a colonel's base pay of \$7,634.10 and an award to Ms. Jenkinson-McDermott of \$1,892.62. This demonstrates that including Colonel McDermott's pre-marriage service would give Ms. Jenkinson-McDermott \$299.23 more per month than if his pre-marriage service were not included, as we believe the Decree intended and further demonstrates why the method to be adopted must exclude Colonel McDermott's pre-marriage years for the calculation of Ms. Jenkinson-McDermott's pension award.

The comparison of the two methods proposed to the trial court by the parties demonstrates that only the "hypothetical award" method can award to Ms. Jenkinson-McDermott what was earned during the marriage and only the hypothetical award method can exclude the effect of pre-marriage and post-separation military service. The fact that the hypothetical award method is complicated or new or not traditional, does

not belie the fact that it awards precisely the amount to which the parties agreed and for which they bargained for.

C. The record evidences the parties' intent to utilize the hypothetical award method to exclude pre-marriage and post-separation military service from Ms. Jenkinson-McDermott's pension award.

It is evident from the trial court's ruling on November 14, 2008 and January 9, 2009 that it felt compelled to adopt an order that divided Colonel McDermott's retirement under the "traditional formula." While not stating so, that the trial court may have relied on *In Re Marriage of Bulicek*, 59 Wn. App. 630, 800 P.2d 394 (1990), a case cited by Ms. Jenkinson-McDermott in support of her argument that the trial court should adopt her proposed order with its formula, which awarded Ms. Jenkinson-McDermott a percentage of the actual retired pay received by Colonel McDermott. While the *Bulicek* formula has been recognized as the traditional method used to divide military pensions, it obviously is by no means the only formula or method for dividing a military pension recognized by DFAS. The "hypothetical award" method was probably not in existence at the time of the *Bulicek* ruling in 1990, and in any event was clearly not addressed in its decision. It was most likely not in existence in 1996 when *In Re Chavez*, 80 Wn. App. 432, 909 P.2d 314 (1996) was decided, which is the other case cited by Ms. Jenkinson-McDermott in

support of her order and *Chavez* also clearly did not address the “hypothetical award” method in its decision. However, that fact that the “hypothetical award” is a new or complicated method is not a valid reason to reject it in a case where its application results in a division of Colonel McDermott’s military retired pay consistent with the parties’ intention and the Decree.

The overwhelming evidence in the record reveals that subsequent to the preparation of the Agreement and Decree, the parties’ actions did not evidence an intent that they would utilize the formula proposed by Ms. Jenkinson-McDermott, but in fact, evidenced an intent to utilize the DFAS “hypothetical award” formula. Admittedly, neither party called what they were proposing at the time the “hypothetical award” formula, but the end result was exactly that.

The very first order prepared after the Agreement and Decree was Ms. Jenkinson-McDermott’s attorney’s First Supplemental Decree Re Division of Military Pension, which was sent to Colonel McDermott’s attorney on December 3, 2007. All this order did was reiterate the language of the Agreement and Decree regarding the division of Husband’s pension. No where in this order is there any reference to the *Bulicek* formula. Consequently, as of December 3, 2007 Ms. Jenkinson-

McDermott and her attorney did not intend to use a *Bulicek* formula, since it was conspicuously absent from their proposed order.

The next correspondence between the parties was key, because on April 4, 2008 Colonel McDermott's attorney enclosed in her letter her own proposed order for the division of the military pension. In this order, at paragraph (g), Ms. Grady included language which intended to divide Colonel McDermott's military retired pay as of the date of separation, not as of the date of his actual retirement, which would have been the "traditional" *Bulicek* formula. In addition, the order contained the value of Colonel McDermott's retired pay as of the date of separation and also Ms. Jenkinson-McDermott's awarded share of the date of separation retirement. Without calling it so, paragraph (g) of Ms. Grady's order was an expression of the DFAS "hypothetical method" award.

Also consistent with the "hypothetical award" method were the additional paragraphs to paragraph 3(g), which provided for the application of COLAs to Ms. Jenkinson-McDermott's date of separation award, the same method followed by DFAS in implementing a hypothetical award. All of the language in the letter and proposed orders reveal a clear intent that Ms. Jenkinson-McDermott receive only her fair share of Colonel McDermott's military pension earned during the marriage, excluding the pre-marriage and post-separation years of service.

In addition to her proposed order dividing Colonel McDermott's military pension, Ms. Grady also proposed a qualified court order dividing that portion of Ms. Jenkinson-McDermott's FERS pension earned from July 11, 1981 (the date of marriage) to July 26, 2006 (the date of separation) and specifically indicated that Colonel McDermott's award for this period of time was \$771.56. This award was based on a calculation made by Ms. Jenkinson-McDermott's retirement department of what her pension benefit would have been if she had retired as of the date of separation, July 26, 2006. In other words, this proposed FERS order was the Office of Personnel Management's equivalent of the DFAS "hypothetical award" method and was similar in intent to the method enunciated in paragraph (g) of the military order that Ms. Grady had also prepared. Rather than reject this FERS division proposed by Ms. Grady as not being consistent by the Agreement and Decree, Ms. Jenkinson-McDermott and her attorney approved the method by signing the order.

The acceptance by Ms. Jenkinson-McDermott and her attorney of the FERS order prepared by Ms. Grady is the clearest evidence of the intent of the parties with regards to the meaning of the CR 2A Agreement and Decree as it applied to the division of Colonel McDermott's military pension. In both the Agreement and the Decree, the language for dividing Ms. Jenkinson-McDermott's FERS pension and the language for dividing

Colonel McDermott's military retired pay were identical. Therefore, since Ms. Jenkinson-McDermott agreed that the Agreement and the Decree intended to divide her FERS pension as of the date of separation, excluding benefits that she earned prior to marriage, then the intent of the Agreement and the Decree regarding the division of Colonel McDermott's military retirement had to have been the same. Subsequent correspondence further reinforced this conclusion.

In response to Ms. Grady's April 4, 2008 letter and proposed military pension order, Ms. Jenkinson-McDermott's attorney wrote on May 15, 2008 that the language in paragraph (g) of the order was acceptable, except for one sentence:

"The Petitioner/Former Spouse's share is
\$2,127.26."

Since paragraph (g) of Ms. Grady's proposed military retirement order was an expression of the "hypothetical award" method, Ms. Jenkinson-McDermott's attorney's May 15, 2008 letter accepted that method as the method to be used by DFAS in implementing the Agreement and Decree. His only request was that DFAS calculate the hypothetical award rather than it being stated in the order. This letter provides for the corroborating evidence that the intent of the parties will best be implemented by applying the hypothetical award method.

Further evidence that Ms. Jenkinson-McDermott intended to exclude post-separation years of service is found in paragraph (g) of the proposed order filed by her attorney on October 3, 2008 in support of the motion for presentment. It used the same language in Ms. Grady's first proposed military order with the sole exception that, "The Petitioner/Former Spouse's share is \$2,127.26" was omitted. This further evidenced the parties' intent to calculate the division of the pension by assuming that Colonel McDermott retired as of the date of separation. That intent can best be implemented by applying the hypothetical award method.

V. CONCLUSION

Both the Agreement and Decree awarded Colonel McDermott all of his military pension "not otherwise awarded" to Ms. Jenkinson-McDermott.

Both the Agreement and Decree only awarded to Ms. Jenkinson-McDermott 50% of Colonel McDermott's pension benefits "earned between the date of marriage and the date of separation, July 26, 2006."

Including the six years that Colonel McDermott served in the military before marriage will naturally increase any award to Ms. Jenkinson-McDermott and would clearly be a benefit not earned during the marriage.

The overwhelming evidence as shown in correspondence and orders proposed to implement the parties' Decree reveals that both parties intended to divide their respective federal pensions on the same basis, excluding years of service before marriage and after the date of separation.

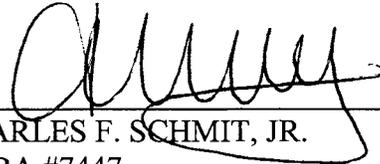
The hypothetical award formula set forth in the order presented to the trial court awards to Ms. Jenkinson-McDermott precisely what the parties intended, i.e., 50% of the benefits earned from the date of marriage to the date of separation and excluding Colonel McDermott's pre-marriage and post-separation service.

The trial court found that Colonel McDermott's hypothetical award method made sense and it does. It makes sense because to do otherwise does not. Why should Ms. Jenkinson-McDermott receive more of Colonel McDermott's pension because of military service he performed before he ever met and married Ms. Jenkinson-McDermott? How can that be sensible, let alone fair and equitable?

The trial court erred in rejecting the hypothetical award method of dividing Colonel McDermott's military pension as set forth in paragraph (2) of his proposed order (CP 97). That is the method that should be adopted by this Court and the order entered by the trial court should be vacated. The fact that the hypothetical award method is new or

complicated does not negate the fact that it is the correct method for this case.

RESPECTFULLY SUBMITTED this th27 day of July, 2009.



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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by the law firm of Morton McGoldrick, P.S.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted the document(s) entitled: **Appellant’s Brief** on the following person(s).

James Tomlinson
Davies Pearson
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- U.S. Mail
- Telecopier
- Messenger – via office messenger

DATED this 27th day of July, 2009, at Tacoma, Washington.

Susan K. Toma

Susan K. Toma

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 DIVISION II
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