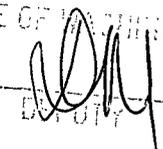


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COURT OF APPEALS
DIVISION II
2014 JUL 29 AM 9:50
STATE OF WASHINGTON
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No. 46142-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

DESTRY LOREN EDWARDS

Respondent,

v.

REBECCA ELIZABETH EDWARDS,

Appellant,

BRIEF OF APPELLANT

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I INTRODUCTION

The parties divorced Pro Se February 26, 2008. Ms. Edwards was awarded primary placement of their daughter, Kailyssa. Ms. Edwards and Kailyssa moved to the State of Virginia after the dissolution. In June 2011, Ms. Edwards moved back to Washington State. Ms. Edwards had to move back to Virginia to care for her ailing mother in June 2012. The parties reached a verbal agreement that when Ms. Edwards moved back to Virginia in June 2012, Kailyssa would fly back to Washington State and visit her father from July 13, 2012 to November 18, 2012. Kailyssa flew back to Washington State, but by the end of August 2012, she wanted to return home to her mother. Mr. Edwards refused to return Kailyssa back to Virginia. Ms. Edwards filed a motion for contempt to return Kailyssa to Virginia on September 14, 2012. CP. 35. Mr. Edwards filed a petition to modify the parenting plan and child support on September 20, 2012, claiming that Kailyssa was integrated into his home. Mr. Edwards did not serve Ms. Edwards with the petitions. Ms. Edwards' attorney accepted service on October 31, 2012. The court found adequate cause on Mr. Edwards's petition on November 21, 2012 and a Guardian ad Litem was appointed. The Guardian ad Litem made recommendations, and the parties settled the parenting plan on July 9, 2013 giving primary placement of Kailyssa to

Ms. Edwards. Various financial issues were not settled and a trial was held on December 13, 2013 and December 23, 2013. At the trial, Mr. Edwards testified the box awarding retirement to Ms. Edwards was not checked because Ms. Edwards received maintenance. Ms. Edwards testified that the maintenance she received was to purchase a car. Mr. Edwards further testified that Ms. Edwards did not receive retirement because she received most of the assets. The decree awarded \$48,915 in assets to Mr. Edwards and \$37,815 in assets to Ms. Edwards. Mr. Edwards agreed that the parties failed to award the retirement to any party in the decree under cross examination.

The court stated that there was no testimony controverting Mr. Edwards' claim why the parties left the box awarding maintenance unchecked. The court stated there was no testimony or evidence to indicate that this was not a provision under negotiation up until the final day and that the parties had agreed that Ms. Edwards would not receive a portion of Mr. Edwards' retirement in light of the final assignments of debt, assets and maintenance. The court would not modify the decree.

Ms. Edwards appeals the court's decision because the decree does not award the retirement to either party. Contrary to the court's ruling, the evidence and Ms. Edwards' testimony controverts Mr. Edwards' testimony

and the court should award the community share of the retirement to the parties as tenants-in-common.

The court also awarded back child support to Mr. Edwards for the months of July 2012 to November 2012. Ms. Edwards appeals the decision because it awarded child support to Mr. Edwards when Kailyssa was visiting Mr. Edwards and was awarded prior to the filing and serving of the petition for modification of child support. The court should not have ordered child support prior to the filing of the petition to modify the child support or prior to finding adequate cause.

II. ASSIGNMENTS OF ERROR:

1. The court erred by not awarding the community interest of the military retirement to Ms. Edwards.
2. The court erred by retrospectively awarding back child support prior to a petition to modify the child support.

III STATEMENT OF THE CASE

The parties entered a dissolution pro se February 26, 2008. CP 17. Ms. Edwards was awarded primary placement of the parties' minor child, Kailyssa. CP 14. Ms. Edwards moved to the State of Virginia during the summer of 2008. CP 14, Section VI Other Provisions. In June of 2011, Ms. Edwards moved back to Washington

State. CP 34. On June 13, 2012, Ms. Edwards moved back to Virginia to assist her ailing mother. CP 34. Ms. Edwards agreed that Kailyssa would visit with Mr. Edwards from July 13, 2012 until November 18, 2012. CP 34. This agreement fell apart and Ms. Edwards filed a motion for contempt action. CP 35. Mr. Edwards no longer agreed to return Kailyssa to Virginia. CP 37. Mr. Edwards filed a petition to modify child support on September 20, 2012. CP 38. Ms. Edwards' attorney filed an acceptance of service of the petition on October 31, 2012. CP.44. Adequate Cause was found on November 21, 2012. CP 55. Mr. Edwards had temporary placement with Ms. Edwards receiving visitation with Kailyssa. CP 63. The parties reached an agreed parenting plan with the mother receiving primary placement on July 9, 2013. CP 84. A trial concerning financial issues was heard on December 13, 2013 and December 23, 2013. CP 102. During the trial, Mr. Edwards stated he retired from the U. S. Navy on June 30, 2012. RP dated December 23, 2013, P.4 L. 13. Ms. Edwards was married to Mr. Edwards from July 21, 1995 until their divorce on February 26, 2008. CP 16.

The Decree stated that Ms. Edwards would receive 25% of the military retirement for 12 years under Section 3.3, Page 3. CP. 16. Mr. Edwards testified that they did not check this box concerning

retirement because he paid maintenance of \$425 per month for four years. RP dated December 13, 2013, P.52 L.4. Mr. Edwards also testified that all assets were skewed in Ms. Edwards favor. RP dated December 13, 2013, P. 55 L. 5. Mr. Edwards agreed that he was awarded \$48,915 of the assets and Ms. Edwards was awarded \$37,845 of the assets. RP dated December 13, 2013, P. 55, L. 15. Ms. Edwards testified that the \$425 in maintenance was used to pay for a car. RP dated December 13, 2013, P. 35 L. 23. Ms. Edwards did not receive retirement and was expecting to be paid retirement. RP dated December 23, 2013, P. 36, L. 15. Ms. Edwards was expecting to receive 31% of the military retirement. RP dated December 23, 2013, P. 42 L. 9. After the testimony the court found there was insufficient basis to modify the Decree of Dissolution CP 113, P. 7, L. 4. The court determined that it heard very specific testimony from the petitioner about the reason the provision was left unchecked in the final Decree. The court determined this testimony was not controverted. CP 113, P.7, L. 7. The court stated that Ms. Edwards provided no testimony or evidence to indicate that this was not a provision under negotiation up until the final day, and that the parties had agreed that Ms. Edwards would not receive a portion of Mr. Edwards' retirement in light of the final assignment of debt, assets and

maintenance. CP 113, P. 7, L. 8. The Decree does not award retirement to either party. CP 17 and RP dated December 13, 2013, P. 54, L.9. The Finding of Facts and Conclusion of Law do not mention the parties' military retirement CP 16.

Mr. Edwards was awarded back child support from July 2012 through November 2012 in the amount of \$1,260. CP 132B, P. 7, L. 11. A motion to reconsider the court's decision was filed on March 3, 2014. CP 135. The motion to reconsider was denied on March 28, 2014. CP 137.

IV. SUMMARY OF ARGUMENT.

In dissolutions, all assets are before the court for disposition. If an asset is not disposed of in a decree the asset becomes an asset between the parties as tenants-in-common. The court stated that the parties agreed that Ms. Edwards would not receive a portion of Mr. Edward's retirement in light of final assignment of debt, assets, and maintenance. The court erred by stating there was no evidence controverting that Ms. Edwards agreed not to receive her portion of the military retirement. Ms. Edwards testified 1) that the maintenance was for the purchase of a car so she could transport their child. 2) Mr. Edwards received \$11,100 more in

assets than Ms. Edwards. 3) The decree does not award the military retirement to any party. The court determined that the clause in the Decree awarding the retirement was not valid and was not modifying the decree. The decree did not award the retirement to any party. The court should have treated the retirement as a separate action and awarded the community interest of the military retirement to the parties as tenants-in-common.

The court awarded pre-petition back child support to the father. Back child support can only be awarded to the date of the filing of the petition to modify support. The court awarded back child support for the months of July through November 2012. The petition was filed on September 20, 2012 and was not perfected until October 31, 2012. Adequate cause was not found until November 21, 2012. The court improperly awarded back child support to the father.

V. **ARGUMENT:**

1. The court erred by not awarding her community interest of the military retirement to Ms. Edwards.

In a marriage dissolution proceeding, all the parties' property, both community and separate, is before the court, *In re*

Marriage of Griswold, 112 Wn.App. 333, 48 P.3d 1018 (2002),
reconsideration denied, review denied 148 Wn.2d 1023, 66 P.3d 637.

Interpretation of a decree is a question of law that is reviewed de novo. *In re Marriage of Thompson*, 97 Wn.App. 873, 877, 988 P.2d 499 (1999). If a decree is unambiguous, there is nothing for the court to interpret. *In re Marriage of Bocanegra*, 58 Wn.App. 271,275, 792 P.2d 1263 (1990).

In this case, the trial court determined that the clause that the section under 3.3 of the decree was invalid concerning the military retirement.CP.113 P.7, L.6. However, there is no section awarding retirement to any party. RP dated December 13, 2013, P. 54, L.14.

Interpretation by the reviewing court must be based on the intent of the parties as reflected in the language of the Decree. *Byrn v. Auckerlaund*, 108 Wn.2d at 455. However, a dissolution decree may only be clarified, not modified. *Thompson*, at 878. The court may not add to the terms of the agreement or impose obligations that did not previously exist. *Byrn*, at 455. The court may not rely on general considerations of abstract justice when interpreting the provisions of a dissolution decree. *Id.*” A clarification requires some clause or order within the decree. *Thompson*, at 878. A decree is modified when

rights given to one party are extended beyond the scope originally intended, or reduced. A clarification, on the other hand, is merely a definition of rights already given, spelling them out more completely if necessary. *In re Marriage of Greenlee*, 65 Wn.App, 703, 710, 829 P.2d 1120, review denied, 120 Wn.2d 1002, 838 P.2d 1143 (1992).

Even if the court was allowed to look at the surrounding circumstances or subsequent conduct of the parties, it can only be looked at as to a clarification. *Thompson*, at 878. A clarification requires some clause or order within the decree.

In this case, there is no ambiguous order to clarify. There is simply no order disposing of the property. Since the court may not clarify an order that does not exist in the decree, the community share of the military retirement is now owned as tenants in common.

Under Washington law, the portion of a pension earned during the marriage by Washington residents is community property. *Wilder v. Wilder*, 85 Wash.2d 364, 366, 534 P.2d 1355 (1975)

It is a well settled law that community property not disposed of by the divorce court is held by the parties as tenants in common. *Yeats v. Estate of Yeats*, 90 Wash.2d 201, 580 P.2d 617

(1978); *Seals v. Seals*, 22 Wn.App 652, 590 P.2d 1301(1979); *In re Marriage of Monaghan*, 78 Wn.App. 918,929, 899 P.2d 841 (1995).

In *In re Marriage of de Carteret v de Carteret*, 26 Wn.App. 907, 615 P.2d 513 (1980), Ms. de Carteret obtained a default decree. *Id* at 908. At the time of the entry of the decree, both parties accumulated retirement from their employment. *Id* at 908. Ms. de Carteret's retirement was smaller than Mr. de Carteret's retirement. *Id* at 908. Although Ms. de Carteret was aware of the retirement funds prior to entry of the default decree she made no mention to her attorney and consequently the decree failed to dispose of the retirement. *Id.* at 908. The trial court determined that the retirement was inadvertently omitted and Ms. de Carteret should have raised the issue at the time of the entry of the decree. *Id.* at 908. Also, Ms. de Carteret was awarded a disproportionate share of the community's personal property. *Id.* at 908. The appellate court determined that the decree of dissolution did not purport to dispose of the parties' retirement benefits either expressly or by reference. *Id.* at 908. Accordingly, the appellate court found the inadvertent omission of the retirement could not be supported by implication. *Id.* at 908. The court held that to the extent community funds or efforts were used to obtain the retirement benefits, each party owned an undivided interest therein.

Id. at 909. The court also held that the trial court's finding of a disparity in the divorce courts original division of property cannot be used as a basis for readjusting the parties' relative co-tenancy interests. *Id.* at 909. The appellate court stated the issues were beclouded because the request for partition of the undistributed property was improperly addressed in the "divorce" court along with the Ms. de Carteret's request for increased support. The partition action should have been made the subject of an "independent action". However, the appellate court treated it as an independent action.

In this case, the Findings of Fact and Conclusion of Law and the Decree of Dissolution do not dispose of the military retirement between the parties. The Decree does not include the retirement under the Schedule A section of the decree. There is mention of the military retirement in the Decree under 3.3, Property Awarded to the Wife. However, this box was not checked and the court determined that this provision was not valid. The court should determine this as an independent action for the military retirement.

Partition of the asset requires two steps: (1) determination of the value of the asset, and (2) an opportunity for a co-tenant to rebut the presumption of equal ownership. The value of the property is based on the nature of the asset at the time of the partition action.

Yeats, 90 Wn2d. at 206; *Carson v. Wellstadter*, 65 Wn.App. 880,884, 830 P.2d 676 (1992). The rebuttable presumption is that the parties hold the property as tenants in common and intend to share equally. *Monaghan*, 78 Wn.App at 929.

Retirement income is properly characterized, as deferred compensation for past services and thus any portion of retirement income that was earned during the existence of community is divisible upon dissolution. *In re Marriage of Kollmer*, 73 Wn.App. 373, 870 P.2d 978 (1994). Community share of pension is calculated by dividing the number of years, or months, of marriage by the total years, or months, of service. *Chavez v. Chavez*, 80 Wn.App. 432, 909 P.2d 314 review denied 129 Wn.2d 1016, 917 P.2d 576 (1996).

The military retirement that Mr. Edwards earned during the marriage is clearly an asset that is now owned by both parties as tenants in common.

This case is not similar to *Martin v. Martin*, 20 Wn.App. 686,581; P.2d 1085 (1978), where the court refused to award retirement to the wife because the wife accepted the benefits of the insurance protection, the premiums of which were being paid from the

pension. *Id.* at 690. Ms. Edwards has not received any benefits from the retirement.

Even though the court stated that the parties agreed that Ms. Edwards would not receive a portion of the retirement based on the distribution of the debts, assets and maintenance, the evidence does not support this conclusion. Ms. Edwards testified that the maintenance she received was to pay for a car. Mr. Edwards stated he should receive the retirement because Ms. Edwards received most of the assets. Mr. Edwards received \$48,915 and Ms. Edwards received \$37,815 in assets. The court's conclusions do not reflect the record. Even if the court found that the testimony, assets, liability and maintenance were skewed in Ms. Edwards favor, this evidence is not relevant because the retirement is a separate cause of action. See *In re Marriage of de Carteret, Id. at 909*. Ms. Edwards should receive her proportional share of the community military retirement.

Since the Findings and the Decree do not dispose of the military retirement, Ms. Edwards is entitled to her community share of the retirement as tenants-in-common. The parties married on July 21, 1995, and divorced on February 26, 2008. Mr. Edwards was in the military during the entire time of the marriage. Therefore, Ms.

Edwards is entitled to 151 months the parties were married, divided by the 240 months that Mr. Edwards was in the service, divided by 2 or 31.5% of Mr. Edwards' military retirement. Mr. Edwards receives \$1,745 per month in retirement. $\$1,745 \times .315 = \549.68 . Ms. Edwards is entitled to \$549.68 per month. Ms. Edwards is entitled to back pay with interest from Mr. Edwards' retirement and the court should remand the matter back to the trial court to determine Ms. Edwards share of the retirement plus interest.

1. The court erred by retrospectively awarding back child support prior to petition to modify the child support.

RCW 26.09.170 states:

1) Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition 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

The court ordered back child support from Ms. Edwards to Mr. Edwards for the time period July 13, 2012 through November 21, 2012. The court based this on the parties' worksheets in which Mr. Edwards' share was \$252. However, the order prior to the filing of the petition to modify support ordered Mr. Edwards to pay child support.

Awarding back support before the date of petition for modification is not appropriate because retrospective modifications are generally not allowed, as child support payments become vested judgments as they accrue. RCW 26.09.179; *Hartman V. Smith*, 100 Wn.2d 766, 768, 674 P.2d 176 (1984); *Schafer v. Schafer*, 95 Wn.2d 79, 80, 621 P.2d 721 (1980).

In this case, the 2008 Order of Child Support ordered Mr. Edwards to pay child support to Ms. Edwards. In September 2012 Mr. Edwards filed a petition for modification of a parenting plan and order of child support, but did not serve Ms. Edwards with the petition. Ms. Edward's attorney filed an Acceptance of Service of this petition on October 31, 2012. The court awarded back child support to Mr. Edwards when there was no petition allowing the court to award back child support.

The court should vacate the judgment awarded to Mr. Edwards for the months of July-October 2012.

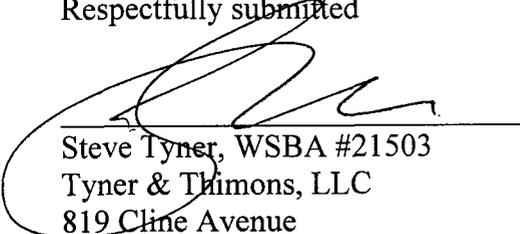
VI. **CONCLUSION:**

The court erred by not awarding the community interest of the parties military retirement to Ms. Edwards. The court should award Ms. Edwards her proportional share of military retirement. The Decree does not award the military retirement to any party. It is still a community asset that needs to be distributed by the court.

Mr. Edwards was awarded child support prior to filing the petition and prior to finding of adequate cause. There should not be any back child support during this time frame.

DATED this 24th day of July, 2014.

Respectfully submitted



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