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DIVISION II

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

JOSE OCASIO-SANTIAGO,
N/K/A JOSE OCASIO-CHRISTIAN
Appellant,

and

KIMBERLEY ROCKWOOD,
Respondent.

BRIEF OF APPELLANT

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ORIGINAL

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INTRODUCTION

This case deals with the divisibility of federal military pension benefits vis-à-vis federal military disability benefits in state court dissolution of marriage proceedings.

On one hand, a military spouse experiences frequent change-of-station moves, and this factor along with the pressures placed on the military spouse as a homemaker increase the spouse's difficulty in pursuing a career affording economic security, job skills and pension protection. In recognition of the unique status of the military spouse and that spouse's great contribution to national defense, Congress passed legislation to acknowledge, support and protect former military spouses by allowing division of certain, specifically defined, military retirement benefits.

On the other hand, it is impossible to overstate the service member's ultimate sacrifice of literally laying down life and limb in defense of the country. The physical and psychological injuries which result from combat and related military service activities demand special treatment. Determinations of disability which stem from a soldier's sacrifice for the national defense for purposes of entitlement to compensation are not at the discretion of the member. Each case of military disability is reviewed by boards of professionals who evaluate the

specific physical condition of the member. For these and other reasons, Congress has specifically treated military disability benefits as a personal entitlement for the former service member and excluded it from division and award to a former spouse in state court dissolution proceedings.

From this background, the parties in this case entered an agreed Decree of Dissolution which provided Kimberley Rockwood would receive 47% of Jose Ocasio's "net disposable military retired pay." In later proceedings, an order labeled "Clarifying Order" was entered which actually modified the original Decree of Dissolution such that Kimberley Rockwood's 47% included military disability benefits Jose Ocasio may receive instead of disposable military retirement pay in the future.

Jose Ocasio appeals the order which modified the original Decree because it violates federal law prohibiting division of federal disability benefits and because the subsequent order modified, rather than clarified, the original Decree of Dissolution.

ASSIGNMENTS OF ERROR

1. The trial court erred by entering an order which changed the definition of military retirement.

Order on Motion for Revision and
Clarifying Military Pension Division Order Paragraph 23.

2. The trial court erred by entering an order which prohibited “merger” and requiring indemnification for “merger” of disposable military retired pay.

Order on Motion for Revision and
Clarifying Military Pension Division Order Paragraph 15.

3. The trial court erred by entering an order which required “allotment” from Federal entitlements.

Order on Motion for Revision and
Clarifying Military Pension Division Order Paragraph 16.

4. The trial court erred by entering an order which required “direct payment” of other amounts.

Order on Motion for Revision and
Clarifying Military Pension Division Order Paragraph 17.

5. The trial court erred by entering an order which required separate payments to a Former Spouse.

Order on Motion for Revision and
Clarifying Military Pension Division Order Paragraph 18.

6. The trial court erred by entering an order which authorized additional payments of spousal maintenance.

Order on Motion for Revision and
Clarifying Military Pension Division Order Paragraph 20.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- I. Did the trial court err by ordering the division of benefits which federal law has specifically preempted from division by state courts?

Assignments of Error 1-6.

- II. Did the trial court err by entering a clarifying order which substantively modified the underlying Decree?

Assignments of Error 1-6.

STATEMENT OF THE CASE

1. Jose Ocasio is a service member in the United States Army. His entire military career has spanned approximately 26 years. He served as a reservist from 1990-1995 and then as an active duty officer from 1995-2016. His service computation for retirement is at approximately 21 years of service. By the time he retires at some point in 2016, he will have more than 252 months of total service.
2. Jose Ocasio and Kimberley Rockwood were married September 28, 1998. Jose and Kimberley separated October 1, 2013. CP 101 Jose and Kimberley's marriage overlapped Jose's career as an active duty service member during 180 months of marriage.
3. Kimberley and Jose entered an agreed Decree of Dissolution on June 6, 2014. CP 111
4. The June 6, 2014, agreed Decree of Dissolution awarded Kimberley 47% of the "Net Disposable Retired Pay" from Jose's military pension. CP 119.

In the section marked "Comments" related to the award of the military pension, the Decree stated: "Distribution based on net

¹ The parties are referenced by their first names throughout this brief as a convenience to the reader. No disrespect to either party is intended.

disposable retirement pay at time of service member retirement.”

CP 119.

5. On June 6, 2014, Kimberley and Jose entered an agreed Qualified Domestic Relations Order. This June 6, 2014, agreed Qualified Domestic Relations Order attempted to implement the Decree by dividing the military retirement. The agreed Qualified Domestic Relations Order attempted to assign to Kimberley “47% of the NET AMOUNT OF THE DISPOSABLE RETIRED PAY.”
6. The June 6, 2014, agreed Qualified Domestic Relations Order was sent to the Defense Finance and Account Service so Kimberley would receive her share of Jose’s military pension. In a letter dated October 24, 2014, DFAS rejected the June 6, 2014, agreed Qualified Domestic Relations Order and requested a clarifying order. CP 30.
7. On March 23, 2015, Jose filed a Petition to Modify Spousal Maintenance, or in the alternative, to Vacate the Decree of Dissolution entirely. CP 124.
8. On May 7, 2015, Kimberley filed a Motion to Enforce Decree of Dissolution and Present a QDRO. CP 336. In support of her motion, Kimberley filed a Proposed Clarifying Military Pension

Division Order to, ostensibly, clarify and enforce the Decree of Dissolution as it related to Jose's Military Pension. CP 32.

9. On May 20, 2015, Jose responded to Kimberley's Motion to Enforce Decree. CP 350. In conjunction with his response to Kimberley's motion, Jose filed a Proposed Order Directing Military Retired Pay to clarify and enforce the Decree of Dissolution as it relates to Jose's Military Pension. CP 40.
10. On May 22, 2015, Judge Gretchen Leanderson entered an order denying Kimberley's Motion to Enforce Decree and Enter QDRO for the purpose of consolidating the motion with Jose's Petition to Modify Maintenance or Vacate the Decree. Judge Leanderson's May 22, 2015, order stated: "The court finds that these matters should be heard all at once and that this decision indicates no opinion as to the merits of either parties' motion." CP 372.
11. On June 24, 2015, a court commissioner entered an order denying Jose's Petition to Modify Maintenance or Vacate the Decree. CP 423 – 424. On the same date, the same court commissioner entered the Clarifying Military Pension Division Order proposed by Kimberley. CP 60 – 66. Jose timely moved to revise the court commissioner's order. CP 427.

12. On August 28, 2015, Judge Gretchen Leanderson entered an order granting partial revision of the court commissioner's motion. Judge Leanderson revised the court commissioner by ordering a modification of spousal maintenance. Judge Leanderson did not vacate the Decree of Dissolution and left the Clarifying Military Pension Division Order intact. CP 452 – 453. Jose timely appealed Judge Leanderson's order on motion for revision. CP 454.

ARGUMENT

I. STANDARD OF REVIEW

This case involves interpretation and enforcement of a decree of dissolution. The interpretation of a dissolution decree is a question of law. *Chavez v. Chavez*, 80 Wn.App. 432, 435, 909 P.2d 314, review denied, 129 Wn.2d 1016 (1996). Questions of law are subject to de novo review by the appellate court. *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 730–31, 837 P.2d 1000 (1992).

In this case, Jose Ocasio filed a Petition to Modify Spousal Maintenance and a Motion to Vacate the Decree. A court commissioner denied Jose’s motion to vacate and the trial court did not modify that order. A court commissioner denied Jose’s Petition to Modify Spousal Maintenance, but the trial court revised that ruling and did in fact modify spousal maintenance. Jose has not assigned error to the denial of his motion to vacate or the trial court’s modification of the spousal maintenance obligation.

Kimberley Rockwood filed a separate motion to enforce the decree on the issue of the military pension. She filed a proposed Clarifying Military Pension Division Order. Jose agreed the decree should be clarified and filed his own proposed Order Directing Retirement Pay. A court commissioner approved Kimberley’s proposed Clarifying Military

Pension Division Order over Jose's proposed Order Directing Retirement Pay. Jose moved to revise. The trial court left the Clarifying Military Pension Division Order intact on revision. Jose then filed this appeal.

The appropriate standard of review is de novo because Jose has not assigned error to the denial of his motion to vacate or the granting of his petition to modify spousal maintenance; therefore, the trial court may only interpret or clarify the meaning of the decree's terms, which involves a question of law. *In re Marriage of Thompson*, 97 Wn.App. 873, 875-877, 988 P.2d 499 (1999).

II. THE TRIAL COURT ERRED BY ORDERING DIVISION OF BENEFITS WHICH FEDERAL LAW HAS SPECIFICALLY PREEMPTED FROM DIVISION BY STATE COURTS

Pensions are assets and community property subject to distribution in a marital dissolution. *DeRevere v. DeRevere*, 5 Wn. App. 741, 491 P.2d 249 (1971).

Federal law preempts state law regarding divisibility of certain elements of federal pensions. See e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979) (Congressional Railroad Retirement Act of 1979 preempted California's community property

scheme and prohibited a state dissolution court from giving the wife any part of husband's railroad pension). The preemption doctrine applies to military pensions, and absent a grant of Congressional authority, a state court is prohibited from dividing a military pension. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981).

In Response to *McCarty*, Congress adopted the Uniformed Services Former Spouses Protection Act (USFSPA) at 10 U.S.C. § 1408. USFSPA authorizes state courts to treat certain elements of military pensions as a divisible asset. But the authority granted by Congressional authority in USFSPA is also expressly limited by Congress within the very text of the Congressional grant of authority:

Subject to the limitations of this section, a court may treat **disposable retired pay** payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. 1408

10 U.S.C.A. § 1408(c)(1) (Emphasis added).

Thus, a Washington state dissolution court may only award a service member's former spouse a portion of the service member's military pension, which is defined by federal law as "disposable retired pay." *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989); *In re Marriage of Jennings*, 138 Wn. 2d 612, 629, 980 P.2d

1248, 1256 (1999), *as amended on denial of reconsideration* (Oct. 5, 1999). A Washington state dissolution court is prohibited from dividing any portion of a service member's military pension not defined as "disposable retired pay." *Perkins v. Perkins*, 107 Wn. App. 313, 317-24, 26 P.3d 989, 991-95 (2001). The principle that a state court may divide only "disposable retired pay" has been repeatedly and recently affirmed in this and other jurisdictions. See, e.g., *In re Marriage of Bowen*, 168 Wn. App. 581, 587-88, 279 P.3d 885 (2012); *Guerrero v. Guerrero*, 362 P.3d 432, (Alaska Supreme Court; 2015).

USFSPA specifically defines "disposable retired pay" and expressly excludes other benefits at 10 U.S.C.A. § 1408(a)(4) as follows:

The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

- (A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
- (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
- (C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's

name was placed on the temporary disability retired list); or
(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

10 U.S.C.A. § 1408(a)(4)

As a result, under USFSPA a Washington dissolution court may divide “disposable retired pay” between a member and a spouse. A Washington dissolution court may not divide any amount received by or paid to on behalf of a member which is listed in 10 USC 1408(a)(4)(A), (B), (C) or (D) because those amounts are not “disposable retired pay.”

This issue most frequently arises with respect to disability benefits. Ordinarily, disability benefits are a divisible community property asset to the extent the disability benefits replace community property retirement benefits. *In re Marriage of Geigle*, 83 Wn. App. 23, 30, 920 P.2d 251 (1996). But under USFSPA, federal disability benefits are excluded from the definition of “disposable retired pay” at 10 U.S.C.A. § 1408(a)(4)(B) and (C). Hence, federal disability benefits are not divisible assets even though they replace federal military retirement.

This does not mean that a Washington dissolution court must ignore federal disability benefits entirely. A Washington dissolution court may consider federal disability benefits as future economic circumstances

which affect a just and equitable distribution of property. *In re Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992), *aff'd*, 119 Wn.2d 438 (1992); *In re Marriage of Bowen*, 168 Wn. App. 581, 587-88, 279 P.3d 885 (2012). Moreover, when there is a substantial and unanticipated reduction of a Former Spouse's income because the divisible disposable military retired pay is converted post dissolution to non-divisible disability benefits, a Washington dissolution court may consider whether such change constitutes "extraordinary circumstances" which would warrant vacating and modifying the Decree under CR 60(b). *In re Marriage of Jennings*, 138 Wn. 2d 612, 980 P.2d 1248, (1999), *as amended on denial of reconsideration* (Oct. 5, 1999); *In re Marriage of Michael*, 145 Wn.App. 854, 188 P.3d 529 (Div. 2, 2008).

So while military disability benefits paid in lieu of military retirement benefits are economic circumstances the court may consider, a Washington dissolution court is prohibited from treating or dividing disability benefits in the same manner as disposable retired pay. The United States Supreme Court ruled:

For the reasons stated above, we hold that the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits.

Mansell v. Mansell, 490 U.S. 581, 594 - 595, 109 S. Ct. 2023, 2032, 104 L. Ed. 2d 675 (1989).

Washington Appellate Division I interpreted *Mansell* as follows:

The court may not, however, divide or distribute the military disability retirement pay as an asset. It is improper under *Mansell* for the trial court to reduce military disability pay to present value where the purpose of ascertaining present value is to serve as a basis to award the nonretiree spouse a proportionately greater share of the community property as a direct offset of assets.

...

Mansell flatly prohibits a state dissolution court from dividing, and then distributing any part of, a veteran's disability pension. It makes no difference whether the division and distribution are implemented by awarding part of the future income stream that is the pension itself; by finding present value and making an offsetting award of other assets; or by awarding "maintenance." We hold that *Mansell* cannot be circumvented simply by chanting "maintenance."

Perkins v. Perkins, 107 Wn. App. 313, 321 and 324, 26 P.3d 989, 991-95 (2001). (Emphasis original; internal footnotes, citations and quotation marks omitted).

In short, it is reversible error for the trial court to attempt to divide federal disability benefits which Congress specifically excluded from the definition of "disposable retirement pay" by USFSPA at 10 U.S.C.A. § 1408(a)(4). It is reversible error for the trial court to require a service

member to pay federal disability benefits directly to a former spouse in the form of maintenance, allotment, direct payment or any other form of distribution to the former spouse.

Paragraph 6 of the June 24, 2015, Clarifying Military Pension Division Order provides, “This Order assigns to Former Spouse an amount equally to Forty-Seven Percent (47%) of the Member’s disposable military retired pay under the Plan as of his benefit commencement date.”

Paragraph 6 mirrors the original agreed Decree of Dissolution and QDRO entered by the parties which limits the division of benefits to “disposable military retired pay, and Paragraph 6 divides only benefits which Congress has authorized to be awarded to a former spouse. Hence, Paragraph 6 paragraph is acceptable.

But Paragraph 23 of the June 24, 2015, Clarifying Military Pension Division Order violates federal law. Paragraph 23 states:

Definition of Military Retirement: For the purposes of interpreting this Court’s intention in making the division set out in the Order, “military retirement’ includes retired pay paid or to which Member would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied. It also includes all amounts of retired pay Member actually or constructively waives or forfeits in any manner and for any reason or purpose, including, but not limited

to, any waiver made in order to qualify for Veteran's Administration benefits, and any waive [sic] arising from member electing not to retire despite being qualified to retire. It also includes any sum taken by Member in addition to or in lieu of retirement benefits, including, but not limited to, exit bonuses, voluntary separation incentive pay, special separation benefit, or any other form of compensation attributable to separation from military service instead of or in addition to payment of the military retirement benefits normally payable to a retired member.

Clarifying Military Pension Division Order filed June 24, 2015, Paragraph 23, CP 65 (Emphasis added).

The definition of disposable retired pay set forth in 10 U.S.C.A. § 1408(a)(4)(B) specifically excludes and prohibits division of any amounts deducted to offset amounts received under Chapter 38. By redefining and purportedly dividing as "military retirement" all amounts payable to Jose Ocasio under "Chapter 38" and amounts he "actively or constructively waives ... to qualify for Veteran's Administration benefits," the Clarifying Military Pension Division Order directly and unambiguously violates the federal statute.

The definition of disposable retired pay set forth in 10 U.S.C.A. § 1408(a)(4)(C) specifically excludes and prohibits division of any amounts deducted to offset amounts received under Chapter 61. By redefining and purportedly dividing as "military retirement" all amounts payable to Jose

Ocasio under “Chapter 61,” the Clarifying Military Pension Division Order directly and unambiguously violated the federal statute.

In addition to improperly redefining “disposable retired pay” as “military retirement” which included disability benefits deducted under title 38 and 61, the Clarifying Military Pension Division Order ordered Jose to pay the exact same percentage of disability benefits he receives under title 38 or 61 directly to Kimberley if she did not receive those amounts from the appropriate military pay center. This erroneous order is found in multiple paragraphs of the Clarifying Military Pension Division Order:

Paragraph 15: If “other condition causes a merger of the Member’s disposable military retired pay, the Member will pay to the Former Spouse directly the monthly amount provided in Paragraph 6.”
CP 63

Paragraph 16: If “the amount paid by the military pay center to Former Spouse is less than the amount specified above, Member shall initiate an allotment to Former Spouse in the amount of such difference.”
CP 63

Paragraph 17: If “direct payment is not made to spouse by the appropriate military pay center, and no federal entitlement exists against which such an allotment as set forth in section 14 may be initiated or for whatever reason full payment by allotment is not made in that month, or if the amount paid through the allotment is insufficient to pay the difference specified above, Member shall pay the

amounts called for above herein directly to Former Spouse by the fifth day of each month in which the military pay center and/or allotment fails to do so.”
CP 63

Paragraph 18: “If Member takes any action that prevents, decreases, or limits the collection by Former Spouse of the sums to be paid hereunder, he shall make payments to Former Spouse directly in an amount sufficient to neutralize, as to Former Spouse, the effects of the actions taken by Member.”
CP 63-64

Paragraph 20: “The Court shall retain jurisdiction to enter such further orders as are necessary to enforce the award to spouse of the military retirement benefits awarded herein, including ... to make an award of alimony (in the sum of benefits payable plus future cost of living adjustments) in the event that Member fails to comply with the provisions contained above requiring said payments to Former Spouse by any means, including the application for a disability award...”
CP 64

Kimberley’s Clarifying Military Pension Division Order erroneously redefined and included as divisible amounts deducted under title 38 and title 61 in Paragraph 23. Since the federal military pay center would, presumably, not honor Paragraph 23 which violates federal law, Kimberley also included paragraphs 15, 16, 17, 18 and 20 in the Clarifying Military Pension Division Order which erroneously require Jose to make the payments which violate federal law directly to

Kimberley. Paragraph 20 of Kimberley's Clarifying Military Pension Division Order also authorized the trial court to order Jose to pay alimony (i.e., spousal maintenance) in the exact percentage of a "disability award" that Jose received in lieu of retirement. Paragraphs 15, 16, 17, 18 and 20 are precisely the "dollar for dollar" award of disability benefits which specifically violates federal law. *Perkins v. Perkins*, 107 Wn. App. 313, 317-24, 26 P.3d 989, (2001) (trial court order for husband to pay former spouse amount equal to a percentage of disability benefits that would have been paid as retirement benefits was "precisely the kind of dollar-for-dollar division and distribution that *Mansell* and *Kraft* prohibit").

This case should be remanded, and Paragraph 23 of Kimberley's Clarifying Military Pension Division Order which defines military retirement in violation of federal law, and Paragraphs 15, 16, 17, 18 and 20 which require payments to Kimberley directly or through other means in circumvention of federal law must be stricken.

Alternatively, the Order Directing Military Retired Pay proposed by Jose on May 20, 2015, should be entered. CP 40 – 45. Paragraph 11 of Jose's proposed Order Directing Military Retired Pay correctly states: "Former Spouse shall receive a portion of the Service Member's total Disposable Retired Pay." Jose originally requested, in conjunction with his motion to vacate the Decree, that a fractional approach be stated as

Kimberley's share; however, in light of the trial court's denial of the motion to vacate, Jose's proposed Order Directing Military Retired Pay could be entered with the specific 47% amount stated in paragraph 11.

Regardless of which option is chosen, this court should remand this case to the trial court for entry of an order consistent with federal law.

III. THE TRIAL COURT ERRED BECAUSE THE ORDER LABELD CLARIFYING WAS ACTUALLY AN IMPERMISSIBLE MODIFICATION OF THE UNDERLYING DECREE

A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment. RCW 26.09.170(1); *Kern v. Kern*, 28 Wn.2d 617, 619, 183 P.2d 811 (1947); *In re Marriage of Thompson*, 97 Wn.App. 873, 878, 988 P.2d 499 (1999); *In re Marriage of Greenlee*, 65 Wn.App. 703, 710, 829 P.2d 1120, review denied, 120 Wn.2d 1002 (1992).

In this case, Jose filed a motion to vacate the Decree seeking, in part, to change the specific percentage amount awarded to Kimberley Rockwood from 47% to a fractional division as approved by *In re Marriage of Bulicek*, 59 Wn. App. 630, 638-39, 800 P.2d 394 (1990). CP 124 – 127; 341 – 347. The court commissioner and trial court denied Jose

Ocasio's motion to vacate the Decree and maintained the specific 47% award to Kimberley Rockwood. CP 423 – 424; 453. Jose's challenge on appeal is not the percentage amount of the award but that the court, having denied his motion to vacate the Decree, is clearly precluded from modifying the Decree in an order labeled as a "clarifying" order.

In contrast to modification, an ambiguous decree may be clarified. *Thompson*, 97 Wn.App. at 878. Whether a dissolution decree is ambiguous is a question of law subject to de novo review, *In re Chavez*, 80 Wn.App. 432, 435, 909 P.2d 314, review denied, 129 Wn.2d 1016 (1996).

In this case, Kimberley filed a motion on May 7, 2015, to enforce the Decree and present a QDRO. CP 336. In support of her motion, Kimberley filed a letter from DFAS indicating the QDRO previously entered could not be implemented. CP 30 – 31. In support of her motion, Kimberley also filed a proposed Clarifying Military Pension Division Order. CP 32 – 39. Based upon the letter from DFAS, Jose conceded a clarifying order should be entered and in fact submitted his own proposed Order Directing Military Pay on May 20, 2015. CP 40 – 45.

The problem arises because Kimberley's proposed order, which was adopted by the court, substantively modified the underlying Decree instead of simply clarifying the Decree.

The original agreed Decree specifically and unambiguously awarded Kimberley “47% Net Disposable Retired Pay.” The comments to this award stated: “Distribution based on net disposable retirement pay at time of service member retirement.” CP 119. This Decree was approved and signed by both parties. Similarly, the original QDRO approved and signed by both parties limited Kimberley’s interest to 47% of “net disposable retirement pay.” As argued by Jose in his motion to vacate, the 47% did not actually reflect one-half of the community interest in his retirement. CP 351. Nevertheless, the court commissioner and trial judge both declined to modify the agreement of the parties.

Reasonable minds cannot differ with respect to the award in the original Decree. Kimberley’s share is clearly limited to 47% of “disposable retirement pay.” “Disposable retirement pay” is a specific statutory term defined in the Congressional grant of authority allowing a state dissolution court to award a portion of a service member’s pension to a former spouse. There is nothing ambiguous about the award in the Decree. To be ambiguous, a Decree must be “fairly susceptible to two different, reasonable interpretations.” *Wm. Dickson Co. v. Pierce County*, 128 Wn.App. 488, 493–94, 116 P.3d 409 (2005). But here “disposable retirement pay” is clearly defined in statute and is not susceptible to two different, reasonable interpretations. If a Decree is ambiguous, the

reviewing court seeks to ascertain the intention of the court that entered it using the general rules of construction applicable to statutes and contracts. See *In re Marriage of Gimlett*, 95 Wn.2d 699, 704–05, 629 P.2d 450 (1981); *Kruger v. Kruger*, 37 Wn.App. 329, 331, 679 P.2d 961 (1984). But here, the intent of the parties is clear: Kimberley receives 47% of Jose’s “net disposable retirement pay at time of service member retirement.”

A clarifying order explains or refines rights already given. *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969). A clarifying order is unlike a modification, amendment, or alteration, which must be accomplished under CR 59, CR 60 or some other exception to preclusion. *Kemmer v. Keiski*, 116 Wn. App. 924, 933, 68 P.3d 1138, 1143 (2003). Paragraph 23 of Kimberley’s order redefines military retirement to include disability benefits, which not only violates federal law, but was in no way contemplated, considered, agreed or allowed by the original Decree. Hence, despite being labeled as clarifying, Kimberley’s “Clarifying Military Pension Division Order” is actually an impermissible modification of the original Decree and must be reversed. RCW 26.09.170(1); *Kern v. Kern*, 28 Wn.2d 617, 619, 183 P.2d 811 (1947); *In re Marriage of Thompson*, 97 Wn.App. 873, 878, 988 P.2d 499 (1999).

Paragraphs 15, 16 17, 18 and 20 of Kimberley's "Clarifying Military Pension Division Order" could potentially be acceptable if they simply prevented ministerial, clerical or other administrative errors from shorting Kimberley a portion of "Disposable Retired Pay." Indeed, Paragraph 15 of Jose's May 20, 2015, proposed Order Directing Military Retirement Pay prevented Jose from interfering with Kimberley receiving her share of "Disposable Retired Pay." CP 44. Paragraph 15 of Jose's proposed Order required Jose to hold any amounts of Kimberley's "Disposable Retired Pay" which he erroneously received in trust for Kimberley. Jose's proposed safeguard in Paragraph 15 is acceptable because it is limited to "Disposable Retired Pay." Jose's Paragraph 15 ensured Kimberley would not be shorted her portion of "Disposable Retired Pay" and thus simply clarifies the rights originally granted to the parties in the original agreed Decree of Dissolution.

But Paragraph 23 of Kimberley's order modifies the terms of the Decree by changing the award to Kimberley from "47% net disposable retirement pay" to include disability benefits as "military retirement." Kimberley's Paragraphs 15, 16, 17, 18, and 20 are extensions of the error in Paragraph 23, which is a modification of the Decree. These provisions are therefore also not acceptable clarifications of the Decree.

CONCLUSION

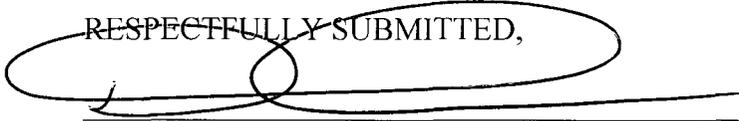
The trial court may only divide disposable military retirement benefits as authorized by Congress in the Uniformed Services Former Spouse Protection Act (USFSPA). The trial court may not divide military disability benefits, which are excluded from the definition of “disposable retirement pay” by USFSPA at 10 U.S.C.A. § 1408(a)(4). The June 24, 2015, Clarifying Military Pension Division Order left intact by the August 28, 2015, Order on Motion for Revision violated federal law by including disability benefits in the definition of military retirement.

The form of the order originally entered and sent to DFAS was rejected, so clarification by way of an order in a form acceptable to DFAS is appropriate. But this does not give either party the right to change the substantive terms originally agreed upon in the Decree of Dissolution. Indeed, the court commissioner and trial court specifically rejected Jose’s request to vacate and modify the Decree from 47% to a fractional interest approach. In the absence of conditions warranting reopening the Decree, Kimberley is not permitted to use a document labeled “Clarifying Order” to materially change the substantive terms of the agreed Decree. When entering a “clarifying” order acceptable to DFAS for processing, Kimberley is limited to the original award of 47% of “net disposable retirement pay.”

This case should be remanded to eliminate Paragraphs 15, 16, 17, 18, 20 and 23 from the Clarifying Military Pension Division Order. Or, Kimberley's Clarifying Military Pension Division Order should be replaced with Jose's May 20, 2015, proposed Order Directing Military Retired Pay revised to state 47% instead of a fractional approach.

DATED this 16 th day of February 2016.

RESPECTFULLY SUBMITTED,


FAUBION, REEDER, FRALEY & COOK PS
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Attorney for Appellant

DECLARATION OF TRANSMITTAL

I certify under penalty of perjury that on the 18th day of February 2016, I transmitted a copy of this APPELLANT'S BRIEF to the individuals and via the method(s) designated below:

Original delivered to: Court of Appeals, Division II Clerk's Office 950 Broadway, Suite 300 Tacoma, WA 98402-4427	Transmitted via: <input type="checkbox"/> First-Class US Mail <input type="checkbox"/> Facsimile to _____ <input type="checkbox"/> Email to coa2filings@courts.wa.gov <input checked="" type="checkbox"/> Legal Messenger for Hand Delivery
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Dated at University Place, Washington this 18 day of February 2016.



 Sally DuCharme, Legal Assistant