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**Court of Appeals, Div. II,
of the State of Washington**

In re Marriage of Weiser:

Andrew Weiser,

Appellant/Cross-Respondent,

v.

Michelle Weiser,

Respondent/Cross-Appellant.

**Second Supplemental Brief of Respondent/Cross-Appellant,
Regarding Res Judicata**

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1. Introduction

By order dated December 9, 2019, this Court required the parties to file supplemental briefing, “addressing whether res judicata prevents the reopening of the decree of dissolution or the settlement agreement in this case.” The short answer is “yes.” The settlement agreement, embodied in the decree, was a final judgment, valid when it was entered, and entitled to finality. The trial court was correct to enforce the terms of the agreement and decree as a final judgment.

Andrew’s supplemental brief avoids this issue entirely, and instead raises for the first time an argument that the original decree was invalid for lack of subject-matter jurisdiction. This argument is misplaced because the superior court has subject-matter jurisdiction over all dissolution cases and the issues of division of property and spousal support. Because this is not an issue of subject-matter jurisdiction, it cannot be raised for the first time at this late date. The Court should disregard Andrew’s “jurisdictional” arguments.

The decree was a final judgment, valid at the time it was entered. Andrew has not demonstrated grounds to reopen the decree under CR 60. The matter is res judicata, entitled to finality. The trial court was correct to enforce the terms of the decree. This Court should affirm.

2. Supplemental Argument

2.1 Res judicata bars reopening the decree and settlement agreement in this case. The trial court was correct to enforce the decree and agreement as a judgment entitled to finality.

Michelle's Brief of Respondent argued,

Because the trial court's order merely enforced the terms of the existing agreement, Andrew's appeal of the trial court order is nothing more than an attempt to collaterally attack the original decree. But if the original decree was in error, Andrew could have timely appealed it immediately after it was entered. He did not. Alternatively, instead of unilaterally reducing his payments to Michelle in breach of the agreement, Andrew could have moved to vacate the order in 2012 under Mansell. Again, he did not. Because Andrew has not timely challenged the validity of the decree, it is entitled to finality.

Amend. Br. of Resp. at 25-26.

In his Reply Brief, Andrew admitted that his challenge was actually a collateral attack on the original settlement agreement and dissolution decree: "Andrew does not argue that requiring him to pay Michelle part of his disability was a modification. He argues that this division [the settlement and decree] was illegal and an improper division of his VA disability." Reply Br. of App. at 14. Nevertheless, he did not respond to the question of finality.

In ordering supplemental briefing on this issue, this Court gave Andrew the opportunity to address it. Instead, he argues—for the first time ever—that the decree is not merely erroneous, but somehow rendered void by federal preemption. This is nothing more than a newly-minted argument designed specifically in an attempt to avoid the principle of finality of judgments. Andrew’s argument is both wrong and untimely. The original decree was, right or wrong, a final judgment. Andrew did not appeal the decree or demonstrate grounds to reopen it. The trial court was correct to enforce it. This Court should affirm.

“Res judicata, or claim preclusion, is intended to prevent piecemeal litigation and ensure the finality of judgments.” *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). Finality of judgments is “a central value in the legal system.” *Shandola v. Henry*, 198 Wn. App. 889, 895, 396 P.3d 395 (2017). Res judicata is frequently applied by trial courts to dismiss claims that are identical to claims that have already been litigated and decided previously. *See Spokane Research*, 155 Wn.2d at 99. The same principle of finality also requires that a court’s decision, once final, should not be reopened except under extreme circumstances. *Shandola*, 198 Wn. App. at 895 (“CR 60(b) provides a balance between finality and fairness by

listing limited circumstances under which a judgment may be vacated.”).

This Court previously considered the tension between finality of judgments and retroactivity of a change in the law in *Marriage of Flannagan*, 42 Wn. App. 214, 709 P.2d 1247 (1985). *Flannagan* involved decrees entered during “the *McCarty* period,” when the law regarding divisibility of military retirement “[had] been modified three times in the [prior] 12 years.” *Flannagan*, 42 Wn. App. at 219. In holding that the trial courts should have considered CR 60 motions under the extraordinary circumstances of the see-saw changes in the applicable law, the court took great care to emphasize “the importance of finality and the limited nature of our deviation from the doctrine [in this case].” *Id.* at 218.

It should be noted that *Flannagan*, unlike this case, involved the question of whether a **change in the law** should be applied retroactively to reopen a final decree. No such concern is present here. As Andrew himself argues, the legal basis of *Howell* was in place at the time of the original decree in this case. The law has not changed. There are no extraordinary circumstances justifying reopening of the final decree.

The *Flannagan* court also emphasized that a CR 60 motion must be brought “within a reasonable time.” *Flannagan*, 42 Wn. App. at 222. The original decree was entered in February

2011. CP 1. Andrew elected VA disability in 2012. CP 62-63. Yet he has never sought to reopen the decree under CR 60, even though he clearly believes it is in error. Instead he simply chose to disobey. It is far too late now for him to argue that there are extraordinary circumstances that would justify reopening the decree.

The doctrine of res judicata applies when the matters have been, or in the exercise of reasonable diligence could have been, decided in the prior judgment. *Phillips v. Hardwick*, 29 Wn. App. 382, 386, 628 P.2d 506 (1981). As Andrew has pointed out, the law was the same back in 2011. Through reasonable diligence, both parties could have known the state of the law. Unlike in *Flannagan*, there is no reason here to believe that the issues could not have been decided in the original decree.

In fact, it appears from the record that the issues were actually decided in the original decree. Both parties knew the state of the law. They knew that Andrew might elect disability payments in the future. They accounted for that possibility by requiring that Andrew would provide a permanent stream of income to Michelle, which he promised not to reduce on account of any disability election. The agreement did not divide or distribute Andrew's disability payments. The agreement was a permissible determination under *Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992), and *Marriage of Perkins*, 107 Wn. App.

313, 26 P.3d 989 (2001), of what was fair and equitable in distributing the parties' property and providing for maintenance and support. The doctrine of res judicata and the principle of finality of judgments applies here. The decree was valid when it was entered. The trial court was correct to enforce it.

The principle does not change even if the trial court made an error of law in entering the original decree. The California Court of Appeals ably summarized the principles of finality of judgments when *Mansell v Mansell* returned to that court on remand:

If the court, in the exercise of its jurisdiction enters a decree affecting property rights contrary to statute, the court is guilty of error of judgment. Neither does such error render void the decree nor does the fact that the error may appear upon the face of the judgment itself indicate its nullity. An erroneous decree which is not void on its face is forever binding and conclusive upon the parties named, upon the status defined, or upon the property described, unless upon motion seasonably made it be vacated or upon appeal it be reversed.

In re Marriage of Mansell, 217 Cal.App.3d 219, 230 (1989).

Thus, there are two ways to correct legal error in a judgment: a timely appeal or a timely (and well-grounded) motion to vacate. Andrew has done neither. Res judicata bars this Court from granting him the relief he seeks. This Court should affirm the trial court's order.

2.2 This Court should disregard Andrew’s newly-minted “jurisdictional” arguments.

Contrary to Andrew’s arguments, federal preemption of a particular issue does not deprive a state court of subject-matter jurisdiction. It simply requires the state court to follow federal law at the time judgment is entered. *Ridgway v. Ridgway*, 454 U.S. 46, 54-55, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981). Contrary to Andrew’s assertions, no federal precedent deprives a state court of subject-matter jurisdiction over domestic relations and family property law. The *Ridgway* court specifically acknowledged “the limited application of federal law in the field of domestic relations.” *Id.* at 54 (citing *McCarty v. McCarty*, 453 U.S. 210, 220). The “necessary consequence” of a conflict is simply that a state divorce decree must comply with federal law. *Id.* at 55 (“A state divorce decree ... must give way to clearly conflicting federal enactments”). The *Ridgway* court said nothing about subject-matter jurisdiction.

None of the authorities cited in Andrew’s supplemental brief even hint that a state court judgment might be rendered void by federal preemption, except where the Congressional act expressly deprives state courts of jurisdiction over the subject-matter and vests that jurisdiction in the federal courts. *See, e.g., Kalb v. Feuerstein*, 308 U.S. 433, 438-42, 60 S.Ct. 343, 84 L.Ed. 370 (1940) (the Frazier-Lemke Act expressly removed from state

court jurisdiction the subject matter of the property of a farmer-debtor who had petitioned for bankruptcy).¹ There is no such Congressional act here. The USFSPA does not affect the subject-matter jurisdiction of state courts.

The California court in *Mansell* reached the same conclusion:

Neither in *McCarty* nor in *Mansell v. Mansell* did the [U.S.] Supreme Court refer to subject matter jurisdiction over retirement or disability pay. Indeed, the *McCarty* court characterized the question before it, not as whether a state court had jurisdiction to divide military retirement benefits, but rather whether it could do so pursuant to state, rather than federal, law. The holding in *McCarty* that federal law pre-empted state law in this area

¹ It must be emphasized that *Kalb v. Feuerstein* **does not** stand for the proposition argued by Andrew, that “any attempt by a state court to get around the operation of federal law is subject to collateral attack.” Supp. Br. of App. filed Dec. 23, 2019, at 3-4. Rather, the *Kalb* decision was specific to the particular federal law at issue—bankruptcy law—which specifically removed the subject matter from state court jurisdiction, thus opening the door to collaterally attack the particular state court judgment in that case. The *Kalb* court noted that this was a special exception to the general rule that even an erroneous judgment is final if it is not timely appealed: “It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity, and is not thereafter subject to collateral attack. But Congress ... may, by specific bankruptcy legislation, create an exception to that principle.” *Kalb*, 308 U.S. at 438-39. The *Kalb* exception does not apply here because no Congressional act deprives state courts of subject-matter jurisdiction over the division of property or provision for spousal support.

simply meant that state courts were bound to apply federal law in determining the character of military pension benefits. There was no divestiture of jurisdiction.

Mansell, 217 Cal.App.3d at 228.

At worst, the original decree here might have been an error of law, but Andrew did not appeal it, and the decree became final. Again, the California court in *Mansell* ably illustrated the applicable principles in a similar situation:

Where a statute specifically inhibits an act, it is error for the court to do the thing prohibited. But, if the Constitution has conferred upon a court the power to deal with the subject matter and if jurisdiction over the parties has been acquired pursuant to the exercise of due process, its judgment is valid and it is conclusive, however erroneous, unless reversed on appeal.

Mansell, 217 Cal.App.3d at 229-30. Even if the original decree was in error, it was not appealed. It is a valid and conclusive judgment of the rights of the parties. The trial court was correct to enforce the decree. This Court should affirm.

3. Conclusion

The doctrine of res judicata and finality of judgments bars the relief Andrew seeks in this appeal. If he wanted to avoid the requirements of the decree, he should have appealed it in 2011 or sought to vacate after his disability in 2012. He did neither. He cannot show extraordinary circumstances justifying

reopening the final judgment after so much time. Even if it was legal error (Michelle still contends it was not), it is final and binding on the parties. The trial court was correct to enforce the decree. This Court should affirm.

Respectfully submitted this 6th day of January, 2020.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on January 6, 2020, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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