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REBECCA RIGHTMYER, RESPONDENT

v.

CHRISTOPHER RIGHTMYER, APPELLANT

Appeal from the Superior Court of Thurston County
The Honorable Anne Hirsch

No. 15-3-01452-9

BRIEF OF RESPONDENT

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INTRODUCTION

The sole issue on appeal is whether the trial court properly exercised its broad discretion when it vacated an unjust and inequitable property division. The parties entered into an agreed Decree of Dissolution that awarded Rebecca 50 percent of the marital portion of his military retirement or approximately 27 percent of Chris' total pension. It was both parties' expectation Rebecca would receive her share of the military pension, as evidenced by Chris' agreement to pay Rebecca if DFAS "could not". Nonetheless, as a result of a reduction of Chris' disposable retirement pay, Rebecca received \$0. Chris has refused to pay her directly. This Court should affirm the order vacating the property division.

Finding Rebecca did not receive the benefit of the bargain and that the division of property was no longer fair and equitable was well within the trial court's broad discretion. The parties were married 14 of the 26 years Chris spent in the military. Rebecca dedicated herself to supporting Chris' education and career, at the expense of her own. The total division of property took into account the fact that Rebecca would be receiving 27 percent of Chris' military pension. It is neither just nor equitable that Chris receive the property awarded to him in the decree, and now 100 percent of his military benefit as well. This Court should affirm.

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the marital share of a military pension is awarded to the non-service member spouse at dissolution, but is subsequently reduced to \$0, is it well within the trial court's broad discretion to find the division of property contained in the decree is no longer fair and equitable?
2. Should this Court reject the invitation to find the trial court improperly ordered Chris to indemnify Rebecca when there is no evidence in the record to support such a claim?
3. Should this Court find the trial court properly applied the reasoning in Howell v. Howell, when that case squarely addressed how to reach a just and equitable division of property after an award of a military benefit to a non-member spouse has been eliminated or reduced and converted to a non-divisible federal benefit?
4. Should this Court award Rebecca be awarded attorney fees when she has the need for assistance with her attorney fees, Chris has the ability to pay her fees and his appeal is frivolous?

B. STATEMENT OF THE CASE.

1. Procedure

The parties were divorced in Thurston County cause number 15-3-021563-9 on April 28, 2016. CP 9-13.

On April 27, 2018, Rebecca¹ filed a Motion and Affidavit for an Order to Show Cause, asking Chris to show cause why the trial court should not relieve her from the judgment entered in the parties' Decree of Dissolution, pursuant to CR 60(b), specifically the property division. CP 15-36. She also requested the court modify her spousal maintenance award. Id.

On May 22, 2018, Commissioner Indu Thomas granted Rebecca's relief pursuant to CR 60(b)(6) and set aside the property division, finding it was no longer just and equitable. CP 54-55, 81. The court denied her request to modify spousal maintenance². Id. There was no finding of wrongdoing by either party. Id.

Chris filed a timely Motion for Revision. CP 56-57.

On July 20, 2018, the Honorable Anne Hirsch denied Chris'

¹ Pursuant to RAP 10.4(e), I will refer to the parties by their first names. No disrespect is intended.

² Rebecca did not appeal this ruling.

Motion to Revise, allowing the case to proceed to trial for a determination of a just and equitable division of property. CP 115-116.

Chris filed a timely notice of appeal. CP 140-145.

2. Facts

The parties married on June 29, 2001, and separated October 22, 2015. CP 2. The parties were married just over 14 years. CP 2. Chris retired from the military on November 17, 2017, after serving 26 years in the military. CP 32, 50.

Rebecca's focus during her marriage was to support Chris, and his career as a soldier. CP 21. Due to Chris' military career, the parties moved frequently, and Rebecca was never able to establish her own permanent career. CP 22. During their marriage, she worked part-time and cared for the parties' son, while Chris was able to advance his career, attend college and earn a college degree. CP 21, 22.

The parties had the following community assets³:

2.8 Community Property

The parties have the following real or personal community property:

1. Real property located at 17346 Topaz Loop SE, Yelm, WA 98597;
2. 2003 Toyota Highlander;
3. 2003 Ford F-350;
4. 2005 Jeep Wrangler;
5. Miscellaneous personal property and household furnishings;
6. Edward Jones Roth IRA in the name of the wife;
7. Edward Jones IRA in the name of the husband;
8. Mutual Fund through _____;
9. Wife's employment benefits including but not limited to retirement, pension, 401k, IRA, social security, vacation, sick leave, and the like that accrued value during the marriage; and
10. Husband's employment benefits including but not limited to retirement, pension, 401k, IRA, social security, vacation, sick leave, and the like that accrued value during the marriage.

CP 2.

The parties reached an agreed settlement, resolving their dissolution, without trial. CP 22. This agreed, negotiated, settlement awarded the community property as follows: Chris was awarded the real property located in Yelm, the Ford F-350, the Jeep Wrangler, his personal property and household furnishings, Roth IRA in his name, and, "all rights by virtue to the husband's employment benefits, including, but not limited to retirement, pension, 401(k), IRA, social security, vacation, sick leave, and the like (including the husband's Thrift Savings Plan), except as awarded to the wife above." CP 10.

³ There are no values in the record associated with the separate or community assets of the parties.

Rebecca was awarded the 2003 Toyota Highlander, personal property and household furnishings, Roth IRA in her name, “all rights by virtue to the wife’s employment benefits, including, but not limited to retirement, pension, 401(k), IRA, social security, vacation, sick leave, and the like” a portion of Chris’ military pension, as follows:

3.15 Other

1. The following portion of husband’s military pension: The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is 171 months of marriage during the member’s creditable military service, divided by the member’s total number of months of creditable military service. If DFAS cannot pay the wife directly, the husband shall pay this amount directly to the wife each month, along with a copy of the statement from DFAS.

CP 10, 13. The provision contained in the parties’ Decree specifically provides Chris is to pay Rebecca if DFAS “cannot”. Id.

The agreed-upon division of debts and assets was a “comprehensive agreement” taking into account all debts, assets and spousal maintenance. CP 1-8, 38. Rebecca believed a just and equitable division of debts and assets included her receiving the marital portion of Chris’ military pension. She viewed her portion of Chris’ military pension as her “nest egg” for future financial income. CP 22, 120.

Subsequent to the entry of the parties Decree of Dissolution, Rebecca learned her portion of Chris’ military retirement was reduced to

\$0.00 as a result of a reduction in Chris' disposable military retired pay, a fact not known to her at the time she agreed to the property division. CP 17, 23, 36. Rebecca would not have agreed to the maintenance and property division, had she known her share of Chris' military retirement would subsequently be reduced to zero. CP 22, 120.

In denying Chris' motion for revision, Judge Hirsch ruled:

I don't believe it is disputed as to what the parties each bargained for and received under the terms of the negotiated agreement, and the agreement was, among other things, that Ms. Schiffman receive half of the applicable military retirement.

7/20/18 RP 15. The Court goes on to say:

Ms. Card argues about the savings clause that was included in the agreed dissolution. Ms. Schiffman didn't receive maintenance. She didn't receive the house. Mr. Rightmyer, if the Court were to deny this request to set aside, I think, frankly would have a windfall that neither party contemplated at the time they entered into their agreement.

The Court's responsibilities under 26.09.080 is to enter orders that are fair and equitable to both parties. If the Court did not affirm the Commissioner today, the decree wouldn't be fair and equitable to both of the parties. It would be fair to Mr. Rightmyer, but Ms. Schiffman would not be receiving the benefit of what she bargained for and

what the parties both contemplated in the decree.

I am mindful of the requirements of Howell. I think that the Howell decision gives state courts the ability to do what they need to do in cases such as this, and to the limited extent of the property division, the Court is going to allow the parties to move forward. I am not revising the Commissioner.

7/20/18 RP 15-16.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT GRANTED REBECCA'S MOTION TO VACATE PURSUANT TO CR 60(b).

On appeal, the reviewing court reviews the superior court's ruling, not the commissioner's. State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). All commissioner rulings are subject to revision by the superior court. RCW 2.24.050; see also CONST. art. IV, § 23. On revision, the superior court reviews both the commissioner's findings of fact and conclusions of law de novo based upon the evidence and issues presented to the commissioner. In re Marriage of Moody, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999); State v. Wicker, 105 Wn.App. 428, 433, 20 P.3d 1007 (2001) . Once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's. State v.

Hoffman, 115 Wn.App. 91, 101, 60 P.3d 1261 (2003).

Courts of appeal review a trial court's denial of a CR 60(b) motion for a manifest abuse of discretion. Haley v. Highland, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). A trial court abuses its discretion when its “decision is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’ ” Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting Associated Mortgage Investors v. G.P. Kent Constr. Co., 15 Wn. App. 223, 229, 548 P.2d 558 (1976)). The abuse of discretion standard is also violated when a trial court bases its decision on an erroneous view of the law. Id. at 684.

RCW § 26.09.080 (2008) provides:

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

(1) The nature and extent of the community

property;

(2) The nature and extent of the separate property;

(3) The duration of the marriage or domestic partnership; and

(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

CR 60(b)(6) provides:

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons...[t]he judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

CR 60 was designed to deal with problems arising under a judgment that has continuing effect, where a change in circumstances after the judgment is rendered makes it inequitable to enforce the judgment. 4

L. Orland, Wash.Prac., Rules Practice § 5713, at 545 (3d ed. 1983). Cf. In Re Marriage of Giroux, 41 Wn.App. 315, 322, 704 P.2d 160 (1985).

- a. It is irrelevant whether Chris acted to reduce his disposable military retired pay.

Chris argues that the trial court abused its discretion “by finding [he] ‘waived’ and/or ‘converted’ his military pension to disability pension.” Br. Of Appellant at Page 10. This argument is wholly without merit, unsupported by the record, and contrary to the trial court’s oral ruling.

Whether Chris’ deliberately waived his military pension in lieu of VA disability, or whether it was initiated by the military is irrelevant in determining whether the parties’ division of debts and assets is fair and equitable, pursuant to RCW 26.09.080, or whether the Decree should have prospective application pursuant to CR 60(b)(6), the only issues before the trial court. Judge Hirsch did not find that, but for Chris’ action, she would not have granted the CR 60 motion, which seems to be Chris’ argument. The issue then, and the issue now, is whether in light of the elimination of a significant asset awarded to Rebecca, the division of property is just and equitable. In her oral ruling, Judge Hirsch made it clear Rebecca did not get what she bargained for when found the terms of the parties’ property division was no longer fair and equitable citing RCW 26.09.080. 7/20/18

RP 16.

While language regarding the conversion of the disposable military pay to disability pay was included in the trial court's order, it clearly was not the basis for Judge Hirsch's ruling. CP 115-116, 7/20/18 RP 16. The trial court's ruling is clear and unequivocal in stating that the division of debts and assets was no longer just and equitable. Judge Hirsch made no finding of bad faith, she did not admonish Chris for the reduction in his disposable military retired pay and did not order Chris to pay Rebecca's attorney fees. Judge Hirsch's ruling was based solely on the unbalanced nature of the debts and assets after the elimination of Rebecca's share of the military pension. This is not an untenable or unreasonable basis for vacating the property division.

There is no evidence in the record, nor does Chris cite to any that supports his argument that but for the finding Chris' waived his disposable military retired pay to receive disability, the Court would have denied Rebecca's Motion to Vacate. Thus, Chris' argument fails.

b. The trial court did not order indemnification.

Chris next argues the trial court “felt bad” for Rebecca, when it realized she would not be receiving any of Chris’ retirement pay, and that was the basis for granting the relief she requested⁴. This argument is speculative and is not supported by the record.

The trial court did not order Chris to indemnify Rebecca. There is no evidence in the record that the trial court was persuaded by passion or prejudice in reaching its decision. Instead, the record demonstrates the trial court gave careful consideration to the facts, and the law, and ruled accordingly.

2. THE TRIAL COURT PROPERLY CONSIDERED THE RECENT U.S. SUPREME COURT DECISION IN HOWELL V. HOWELL.

In In re Marriage of Mansell, 490 U.S. 581, 588–89, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), the Supreme Court held that “disposable military retirement pay” is subject to division in a dissolution, but the language of the Uniformed Services Former Spouses' Protection Act⁵

⁴ Chris argues the trial court is attempting to indemnify Rebecca by granting her Motion to Vacate. The trial court made no such ruling, and beyond granting the Motion to Vacate the division of debts and assets for further proceedings, the trial court granted no other affirmative relief. CP 115-116.

⁵ 10 U.S.C. § 1408 (2017), et. seq.

(USFSPA) specifically defines “disposable” to exclude military retirement pay waived in order to receive veterans' disability payments. Under the USFSPA and Mansell, military retirement benefits are considered community property subject to distribution in a marital dissolution in Washington; military disability benefits are not subject to distribution. See also In re Marriage of Jennings, 138 Wn.2d 612, 629, 980 P.2d 1248 (1999). But courts may consider a spouse's entitlement to an undivided veteran's disability pension as one factor relevant to a just and equitable distribution of other property and as one factor relevant to maintenance. In re Marriage of Perkins, 107 Wn.App. 313, 322–23, 26 P.3d 989 (2001).

In In re Marriage of Kraft, 119 Wn.2d 438, 447-48, 832 P.2d 871 (1992), our Supreme Court reconciled federal preemption when it comes to disability benefits with RCW 26.09.080, which requires the court to dispose of the parties' property in a “just and equitable” manner:

[W]hen making property distributions or awarding spousal support in a dissolution proceeding, the court may regard military disability retirement pay as future income to the retiree spouse and, so regarded, consider it as an economic circumstance of the parties. ... 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.

Id. at 447-48. And the court reiterated later in its opinion:

The trial court in a marriage dissolution action may consider military disability retirement pay as a source of income in awarding spousal or child support, or generally as an economic circumstance of the parties justifying a disproportionate award of community property to the nonretiree spouse. The trial court may not, however, divide and distribute the disability pay or value it and offset other property against that value. In the present case, the trial court reduced the military disability pay to present value and then offset assets against it by awarding to Mrs. Kraft a proportionately larger share of the community property. This is not a permissible way of considering military disability retirement pay under the Mansell holding.

Id. at 451.

In Perkins, the parties were married 21 years. Id. at 315. Jeffrey Perkins served 22 years in the Air Force, 20 of those years he was married to Deanna. Id. When he retired from the Air Force, Jeffrey was eligible to receive a taxable military pension. Id. He was also eligible to receive a non-taxable disability pension that equaled 40 percent of his service pension, but only if he waived the same percentage of his service pension. Id. Jeffrey opted to waive 40 percent of his service pension, instead

receiving a 60 percent taxable service pension, and 40 percent non-taxable disability pension. Id.

After a bench trial, the trial court awarded the wife compensatory spousal maintenance, in a dollar-for-dollar offset of the amount her share of the military pension was reduced. Id. at 317. Jeffrey appealed the trial court's decision, arguing the trial court violated federal law by dividing and distributing his veteran's disability pension. Id.

Division II of this Court conducted a detailed analysis, starting with three state-law propositions:

(1) When disability benefits replace future compensation (e.g., postdissolution wages), they are not distributable at a dissolution trial. Future compensation is not distributable because it is not on hand at trial, so when disability benefits replace such compensation, they are treated in the same fashion.

(2) When disability benefits replace compensation earned but deferred during marriage (e.g., retirement benefits), they are distributable at a dissolution trial. As we stated in Marriage of Geigle, 'If ... a party would be receiving retirement benefits but for a disability, so that disability benefits are effectively supplanting retirement benefits, the disability payments are a divisible asset to the extent they are replacing retirement benefits.'

(3) Even when disability benefits are not

distributable at a dissolution trial, they remain a future economic circumstance that the trial court should consider when distributing the parties' property.

Id. at 317-318. The Court recognized a long line of federal precedent set forth in Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the Uniformed Services Former Spouses' Protection Act (USFSPA), and Mansell v. Mansell that held a state court is precluded from dividing a veteran's disability pension, preempting the second of the state-law propositions set forth above. Id. at 321.

However, consistent with the subsequent ruling announced in Howell, this Court harmonized this long line of federal precedent, with existing state-court precedent that allows a trial court to *consider* a spouse's entitlement to an undivided veteran's disability pension as one factor relevant to a just and equitable division of property under RCW 26.09.080, and as one factor relevant to an award of maintenance under RCW 26.09.090.

This Court reversed and remanded the order of compensatory maintenance, finding that even though it was labeled as "maintenance" it was "precisely the dollar-for-dollar division and distribution that Mansell and Kraft prohibit." Id. at 324. At the same time, this Court recognized that even in light of Mansell and Kraft, the trial court might still award the

wife a dollar amount of maintenance amounting to 45 percent of the disability pay⁶. Quoting Kraft, it stated:

[T]he trial court may, if in its view equity so requires, distribute the [parties'] property in the same manner in which it did initially. What is required is that [it] arrive at its

⁶ Further supporting its ruling, the Perkins Court cites a number of cases from around the country that hold federal law does not preclude state courts from considering a nondivisible military benefit when making a just and equitable award of property, in awarding spousal maintenance, or setting child support. See Clauson v. Clauson, 831 P.2d 1257, 1263 (Alaska 1992) (“We ... hold that federal law does not preclude our courts from considering, when equitably allocating property upon divorce, the economic consequences of a decision to waive military retirement pay in order to receive disability pay.”); McMahan v. McMahan, 567 So.2d 976, 980 (Fla. 1st DCA 1990) (notwithstanding Mansell, state courts may consider the impact of veterans' disability payments in determining the “entire equitable distribution scheme ... in an effort to do equity and justice to both [parties]”); Jones v. Jones, 7 Haw.App. 496, 780 P.2d 581, 584 (Haw. Ct. App. 1989) (“Neither Hawaii's rule ... nor federal law precludes the family court, when dividing property and debts in a divorce case, from considering as one of the relevant circumstances ... a party's time-of-divorce right to receive veterans' and military disability pay post-divorce in the same way that the family court considers each party's ability or lack of ability to earn and receive income postdivorce.”), cert. denied, 71 Haw. 668, 833 P.2d 900 (1989); Bewley v. Bewley, 116 Idaho 845, 780 P.2d 596, 598 (Idaho Ct.App.1989) (“We do not interpret Hisquierdo to bar unequal awards of community property in all cases where nondivisible federal benefits are involved. But any inequality must be based upon bona fide considerations other than dissatisfaction with the federal scheme.”); Strong v. Strong, 300 Mont. 331, 8 P.3d 763, 769 (Mont 2000) (A court “may consider VA disability benefits in the same way it considers each party's ability to earn income post-dissolution as an import factor in achieving an equitable property division[.]”); Weberg v. Weberg, 158 Wis.2d 540, 463 N.W.2d 382, 384 (Ct.App.1990) (trial court may consider veterans' disability payments as a factor in assessing ex-husband's ability to pay spousal maintenance); but see Billeck v. Billeck, 777 So.2d 105 (Ala. 2000) (“When a trial court makes an alimony award based upon its consideration of the amount of veteran's disability benefits, the trial court essentially is awarding the wife a portion of those veteran's disability benefits; and in doing so ... violate[s] federal law.”)

decision as to what is just and equitable under all the circumstances after considering the military disability retirement pay in the manner we here explain.

Id. at 328.

In Howell v. Howell, 581 U.S. ____, 137 S.Ct. 1400, (2017), in anticipation of the husband’s eventual retirement, and consistent with the parties' settlement agreement, the divorce decree awarded the wife half of the husband's future military retirement pay. In re Marriage of Howell, 238 Ariz. 407, 361 P.3d 936, 937 (2015). The husband retired a year later, and half of his retirement pay went to his ex-wife. Howell, 137 S.Ct. at 1404. Thirteen years later he qualified for and elected to receive disability benefits, which required him to waive a portion of the retirement pay he shared with his former spouse, thereby reducing the amount she received each month. Id.

The former spouse asked the Arizona family court to enforce the original decree and restore the value of her share of retirement pay. Id. The family court did so, and the Supreme Court of Arizona affirmed, reasoning that Mansell did not control because the veteran made his waiver after, rather than before, the divorce and because the family court simply ordered the veteran to “reimburse” his former spouse for the reduction of her share of military retirement pay. Id.

The US Supreme Court reversed, reasoning that the reimbursement award at issue was still a “portion of military retirement pay that [the

service member] waived in order to obtain disability benefits” Howell, at 1405-06. and that a state court could not “avoid Mansell by describing the family court order as an order requiring [the veteran] to ‘reimburse’ or to ‘indemnify’ [a former spouse], rather than an order that divides property.” Howell, at 1406. It noted that the temporal difference relied on by the Arizona Supreme Court “highlight[ed] only that [the veteran's] military retirement pay at the time it came to [his former spouse] was subject to later reduction” and that “[t]he state court did not extinguish (and most likely would not have had the legal power to extinguish) that future contingency.” Id. at 1405. The Supreme Court concluded: “Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted.” Id. at 1406.

Even the Howell court itself, recognized the inequity of ignoring indivisible military compensation:

We recognize, as we recognized in Mansell, the hardship that congressional pre-emption can sometimes work on divorcing spouses. See 490 U. S., at 594. *But we note that a family court, when it first determines the value of a family’s assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take*

account of reductions in value when it calculates or recalculates the need for spousal support. See Rose v. Rose, 481 U. S. 619, 630–634, and n. 6 (1987); 10 U. S. C. §1408(e)(6) (2017).

Id. at 1406 (emphasis added). The Howell court specifically recognized that a state court can make provisions for maintenance, or a disproportionate award of property to reach a just and equitable division of assets when there is an indivisible federal benefit, reasoning Washington Courts have already adopted in Kraft and Perkins.

In A Change in Military Pension Division: The End of Court-Adjudicated Indemnification - Howell v. Howell⁷, Eliza Grace Lynch analyzes the Howell decision and its impact on family law cases where a military pension is subject to division. Indeed, the focus of this law review article is to point out the uncertainty the Howell decision creates and to offer possible remedies for practitioners and judges alike.

Ms. Lynch identifies five possible remedies to the Howell indemnification prohibition: 1) alimony/spousal maintenance, 2) res judicata, 3) express contractual indemnification, 4) the “extraordinary remedy” of reopening a previously settled or adjudicated division of marital/community property and 5) a present-value offset. Id. at 1082-

⁷ Lynch, Eliza Grace, A Change in Military Pension Division: The End of Court-Adjudicated Indemnification - Howell v. Howell Mitchell Hamline Law Review: Vol. 44: Iss. 3 , Article 8.

1086.

The Decree of Dissolution here, unlike in Howell⁸, contains an indemnification clause, requiring Chris to pay Rebecca the marital share of his military pension if DFAS did not pay her directly. This clause was negotiated and agreed to by the parties and was not ordered by the trial court. Either the indemnification clause is enforceable, and Chris should pay Rebecca the sum she is entitled to, or the indemnification clause is unenforceable, and the division of debts and assets should be rebalanced, per the trial court's order.

Reaching a just and equitable result after the reduction or elimination of a military pension awarded to a non-member spouse is squarely the issue decided in Howell. Thus, Judge Hirsch's reliance on the reasoning therein to allow a rebalancing of property is wholly appropriate and applicable to the instant case and is consistent with Washington precedent regarding same. The trial court did not act unreasonably, base its decision on untenable grounds, or misapply the law. The ruling announced in Howell is consistent with precedent already set out in Washington case law that allows a trial court to consider a non-divisible federal benefit as a factor in crafting a just and equitable division of property.

⁸ The Howell court only addressed indemnification ordered by the trial court. It did not address or prohibit parties from *agreeing* to indemnification in the event disposable military pay is reduced. Thus, the parties can contract around the Howell decision and agree to dollar-for-dollar indemnification.

It is Rebecca's position that if the indemnification clause is unenforceable and that in addition to granting her Motion to Vacate, the trial court *should* have also vacated the maintenance award, or at least allowed her to pursue maintenance in conjunction with a rebalancing of debts and assets, as contemplated by the Howell decision.

Nonetheless, Chris urges this Court to ignore precedent, and allow an inequitable division of property to stand. Chris argues that Rebecca agreed to receive a percentage of any "disposable retired pay," that amount was ultimately determined to be zero by DFAS and therefore the reasoning in Howell does not apply, because Rebecca received exactly what she bargained for. Br of Appellant at 17. Chris ignores the fact that DFAS *specifically requires the phrase* "disposable retired pay" to be used in court orders, or it will not enforce the property division. See 10 U.S.C. § 1408(a)(2)(C) (2017).

But Chris ignores the language contained in the decree that protected Rebecca in the event DFAS would not pay her directly, instead claiming that because he has zero disposable military retired pay, Rebecca gets nothing. The decree contained a standard indemnification clause that was intended to ensure Rebecca received 50 percent of the marital portion the military pension Chris would have been entitled to, notwithstanding any subsequent reductions. It was never the intent of the parties that Rebecca would receive \$0 of Chris' military pension.

Citing Mansell and Howell, Chris argues that the trial court here essentially engaged in the same reasoning as the Arizona trial court reversed in Howell, and erred by “attempting to fashion a work around in order to indemnify Rebecca.” Br of Appellant at 21. This argument is wholly without merit, unsupported by the record as no such order was entered by the trial court, and ignores the framework for reaching a just and equitable result set forth in Howell.

Chris argues that this Court should stop its analysis at Mansell and find that even if a non-member spouse receives \$0 as a result of waived (or reduced) disposable military retired pay, no other consideration should be given to the non-member spouse for her loss or reduction in income because the benefit is non-divisible by the trial court. This argument is contrary to RCW 26.09.080, Kraft, Jennings, and Howell, and should be summarily rejected by this Court.

Howell states that the USFSPA preempts a *state court* from ordering a retired servicemember to indemnify a former spouse for a reduction in their share of the retiree's military pension when the retiree elects to receive disability compensation from the Department of Veterans Affairs (VA), resulting in the waiver of an equal amount of military retired pay. This ruling prohibited a long-standing practice by state court judges of ordering indemnification in the event a non-member spouse's portion of his or her military pension was reduced. It has left attorneys and judges

alike confounded about how to fashion a just and equitable result in light of this new prohibition⁹. However, Howell does not preclude state courts from considering the non-divisible benefit, or from allowing parties to contract around its indemnification prohibition.

Chris also argues that because the law favors “amicable Agreements,” this Court should reverse and uphold the Decree of Dissolution. Rebecca’s agreement was to receive 50 percent of the marital portion of Chris’ military pension. The parties agreed that if DFAS could not pay her directly, Chris would make the payments to her, with the intent she would always receive her share of the military pension regardless of any reductions in Chris’ disposable military retired pay. Rebecca did not agree to receive \$0 of Chris’ military pension.

Not only does Chris’ analysis ignore the substantial financial impact the reduction in value of this asset to \$0 has on Rebecca’s overall economic circumstance, but he also ignores the fact that the award of this asset was taken into consideration in the overall fairness of their original property division. Chris calls the marital portion of his military pension a

⁹ See Col. Mark E. Sullivan, The Death of Indemnification, North Carolina Legal Assistance for Military Personnel (April 12, 2018), <https://www.nclamp.gov/publications/silent-partners/the-death-of-indemnification/> (last visited May 5, 2019); Laura Morgan, Circumventing a Trial Court’s Ruling, Family Lawyer Magazine (March 22, 2018), <https://familylawyermagazine.com/articles/circumventing-a-trial-courts-ruling/> (last visited May 5, 2019)

“relatively small” part of the parties’ full settlement, but it represents approximately 54 percent of his military pension. This is not an insignificant amount.

Finally, Chris’ argument ignores there are valid, legal reasons to invalidate, vacate or modify an agreement reached by the parties. Judge Hirsch properly exercised her discretion and vacated the division of debts and assets. This Court should uphold her decision.

3. REBECCA SHOULD BE AWARDED
ATTORNEY FEES.

Pursuant to RAP 18.1, this Court may award attorney fees if authorized by applicable law. RCW § 26.09.140 (2011) provides that the court may “from time to time after considering the financial resources of both parties” order a party to pay reasonable attorney fees. When considering the financial resources of both parties, the court balances the financial need of the requesting party against the other party's ability to pay. In re Marriage of Pennamen, 135 Wn. App. 790, 807–08, 146 P.3d 466 (2006).

RAP 18.9 authorizes an award of fees against a party who files a frivolous appeal. See Kearney v. Kearney, 95 Wn. App. 405, 417, 974 P.2d 872 (1999). An appeal is frivolous if there are “ ‘no debatable issues upon which reasonable minds might differ, and it is so totally devoid of

merit that there was no reasonable possibility' of success." In re Recall of Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quoting Millers Cas. Ins. Co. of Tex. v. Briggs, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)).

Chris' argument on appeal is meritless. The trial court did not improperly consider Chris' actions in granting Rebecca's CR 60(b) motion, the trial court did not indemnify Rebecca and properly found the division of property is no longer fair and equitable.

Rebecca requests this Court exercise discretion under this authority, consider the arguable merit of Chris' issues on appeal, and the financial resources of the parties and award her reasonable attorney fees for defending this appeal.

D. CONCLUSION.

The trial court properly exercised its broad discretion when it vacated a property division that was not fair and equitable. Rebecca requests the Court affirm the trial court order vacating the division of debts and assets, below and allow the parties to proceed to trial on those issues.

DATED: May 15, 2019

LAW OFFICE OF SOPHIA M. PALMER, PLLC,



SOPHIA M. PALMER, WSBA No. 37799
Attorney for Rebecca Schiffman

Certificate of Service:

The undersigned certifies that on this day she delivered email and Courts.Wa.Gov electronic service to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/15/19 
Date Signature

LAW OFFICE OF SOPHIA M. PALMER

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