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RACHELL LYNETTE DANIELS, APPELLANT

v.

NATHANIEL HAMILTON DANIELS, JR, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 06-3-03543-6

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 enforced a series of agreed, unappealed, orders. The parties entered into an agreed Decree of Dissolution that provided a formula for equalizing the parties' retirement accounts. When the hierarchy for payment was insufficient for Nathaniel to receive his equalization payment, the parties subsequently agreed the payment should come from Rachell's military retirement. The Military Qualifying Order that was entered was not done to effectuate a division of Rachell's retirement, but rather to use the military retirement as a vehicle for Nathaniel to receive his equalization payment. This Court should affirm the order enforcing the Decree of Dissolution and requiring Rachell to pay Nathaniel his equalization payment.

Finding that Rachell is not required to pay the equalization payment would render an unappealed 2008 division of property, and unappealed 2013 order for equalization, no longer fair and equitable. It well within the trial court's broad discretion to enforce the Decree, and multiple agreements of the parties. This Court should affirm.

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

1. Did the trial court properly find Nathaniel was entitled to a judgment based on agreed, unappealed orders entered in 2008, 2013 and 2014?
2. Should this Court reject the invitation to find the trial court improperly ordered Rachell to indemnify Nathaniel when the evidence in the record demonstrates Rachell was ordered to pay Nathaniel an agreed upon equalization payment, not constituting indemnification?
3. Should this Court find Rachell is barred from collaterally attacking an agreed and unappealed 2008 Decree of Dissolution?
4. Should this Court find Rachel is barred from collaterally attacking an agreed and unappealed 2013 Order Enforcing the Decree of Dissolution?
5. Should this Court find Rachell is barred from collaterally attacking an agreed and unappealed 2014 Military Qualifying Order?
6. Should this Court award Nathaniel awarded attorney fees

when he has the need for assistance with his attorney fees, Rachell has the ability to pay her fees and his appeal is wholly frivolous?

B. STATEMENT OF THE CASE.

1. Procedure

On December 12, 2007, the parties reached a settlement of all issues, and entered into a agreed CR2A Agreement, that was put on the record before the Honorable Judge Felnagle. CP 248-276.

On June 19, 2008, Nathaniel¹ filed a Motion to Enforce the CR2A Agreement, and to Present Final Orders. CP 277-306.

Judge Felnagle adopted Nathaniel's proposed orders, over Rachell's objection, and the parties' marriage was dissolved July 18, 2008. CP 1-7, 8-14, 308. These orders were not appealed.

On August 3, 2012, Nathaniel filed a Motion and Declaration to Enforce the Decree, seeking entry of a Military Qualifying Order to effectuate the terms of the Decree of Dissolution. CP 16-26.

On January 17, 2013, Rachell filed her own Motion, agreeing she

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

owed Nathaniel \$146,191.30 and seeking entry of a Military Qualifying Order. CP 27-38.

On January 25, 2013, based partly on Rachell's agreement, Judge Felnagle entered an Order Enforcing the Decree and ruling that: 1) Rachell owed Nathaniel \$146,191.30, and 2) that the amount shall come from Rachell's military retirement. CP 47-49. This order was never appealed.

On January 8, 2014, an agreed Order effectuating Judge Felnagle's January 25, 2013 order was entered. CP 55-58. On the same date, an agreed Military Qualifying Order was entered, requiring Rachell to pay Nathaniel \$593.22 per month from her military retirement. CP 222-229. This order was never appealed.

On November 7, 2018, after his payments from DFAS stopped, Nathaniel filed a Motion for Contempt, and a Motion to Vacate, to Enforce or to Clarify the Decree of Dissolution. CP 59-61, 62-115.

On January 25, 2019, Judge Leanderson entered an order, enforcing the terms of the parties 2008 Decree of Dissolution entering a judgment against Rachell for \$127,193.86². CP 215-218. Rachell's motion to vacate was denied. Id.

On January 2, 2019, Rachell filed her own Motion to Vacate. CP

² Reduced from \$146,191.30.

116-127.

Rachell filed a timely notice of appeal. CP 213-218.

2. Facts

The parties were scheduled for trial on Rachell's Petition for Dissolution on December 10, 2007. CP 263-276. Rachell failed to appear for trial, and the matter was set over for two days for her to appear. CP 266, 272-275. Rachell appeared for trial on December 12, 2007, but the parties reached an agreement without the necessity of a trial. CP 248-262.

Both Rachell and Nathaniel gave formal proof, on the record and under oath regarding the terms of their agreement. Id. The relevant terms of their agreement is as follows:

Mr. Lutz: We are still going to have Steve Kessler value those two retirement accounts, correct?

Mr. Daniels: Yes.

Mr. Lutz: If either party disagrees with that value, at their own expense, they may have it valued by another person.

Mr. Daniels: Yes, sir.

Mr. Lutz: And we still are going to add up the six retirement accounts, and our desired result is that you and your wife each would receive one half of the value, except you cannot have any of her military retirement she can't have any of your federal employees retirement, correct?

Mr. Daniels: Yes, sir.

Mr. Lutz: Okay. In the event that either your federal retirement orders military retirement is so valuable that we are not able to affect the fifty-fifty division of those six retirement accounts using the retirement account only, then we will divide the equity in the house in a different way that would achieve that result; is that correct?

Mr. Daniels: Yes, sir.

Mr. Lutz: So, more money would be allocated to one spouse to effectuate that fifty-fifty division, correct?

Mr. Daniels: Yes, sir.

Mr. Lutz: We already put on the record how we are dividing up the house, did we not? Yes, okay. So, the only way that there's a difference in how we are dividing up the house is, in the event, as I've just said, we can achieve the fifty-fifty just using the six retirement accounts by themselves, correct?

Mr. Daniels: Yes, sir.

Mr. Lutz: Everything else I said before stance. Okay. And in the event that the complete equity in the home being given to one spouse still does not achieve a result fifty-fifty with those six retirement accounts, then the mutual fund account that's in the wife name would be divided to achieve that. And if we still do not achieve a fifty-fifty result we would leave it at that, meaning that were given preeminence to not dividing the military retirement we are not dividing the first account. Do you agree with that?

Mr. Daniels: Yes, sir.

CP 235-237.

Rachell refused to sign final orders, and Nathaniel brought a Motion to Enforce their agreement. CP 277-306. Judge Felnagle rejected Rachell's allegation that the CR2A should not be enforced, specifically finding:

1. Ms. Daniels was represented by counsel at trial and had the benefit of his advice.
2. The settlement was fair, attempting to reach a 50/50 split.
3. Ms. Daniels had the opportunity to know or should have known the value or approximate value of her retirement accounts.
4. Ms. Daniels rejected the option she today asked the Court to impose.
5. The agreement contemplated the fact that one or both of the retirement accounts would be greater in value than the other.
6. Ms. Daniels said under oath and on the record she agreed to the settlement.

CP 307-308. Judge Felnagle signed the Decree of Dissolution, dissolving the parties' marriage. CP 8-14. The Decree of Dissolution provided the parties' retirement accounts would be divided as follows:

Retirement Accounts (Husband and Wife's Roth IRA, Husband and Wife's TSP, Husband's FERS and Wife's Military Retirement). The martial portion of the husband's

FERS and the marital portion of the wife's military retirement shall be valued at present value. The parties shall share the cost of valuing the husband's FERS and the wife's military accounts using Steven Kessler, C.P.A. (total approximate cost for both is \$350). If either party does not agree with Steven Kessler's valuation, that party has 30 days to obtain an independent evaluation at their own expense. If this option is not exercised within the 30 days it is deemed waived.

The present value of all six retirement accounts shall be totaled and divided such that the end result is each party receives one-half of the present value of the marital portion. In the division of such accounts, neither the husbands nor the wife's military retirement accounts shall be divided. Rather the spouse with the greater valued accounts shall pay to the other spouse first out of their ½ portion of their 401k, then out of their ½ portion of their IRA, then out of their ½ portion of the equity in the Oklahoma home, then out of their ½ portion of the savings bonds to reach the ½ division. If the wife's retirement accounts are valued higher than the husbands, and she has exhausted the funds out of all of the sources previously listed, any amounts remaining due shall come from her share of the First Command Mutual Funds. Either party may have 30 days from the date of Steven Kessler's valuation, or from their own independent valuation, whichever is later, to opt to cash out the other party from a source other than those listed here. If this option is not exercised within the time period described, it is deemed waived. Marital portion is defined as the period from the date of marriage until the date of separation.

CP 9-10, 11. These orders were not appealed.

On August 3, 2012, Nathaniel filed a Motion for an Order

Enforcing the Decree of Dissolution and for entry of a Qualified Domestic Relations Order³ based on Rachell's refusal to effectuate the transfer of monies to Nathaniel to equalize the parties' retirement accounts. CP 16-26.

In response, Rachell agreed she owed Nathaniel \$141,191.30, and not only did not oppose Nathaniel's request to divide her military retirement, she made her own motion to the court asking the trial court adopt *her* proposed Military Qualifying Order. CP 27-33. Rachell agreed that in order to effectuate the terms of the Decree of Dissolution, Nathaniel should be awarded a portion of her military retirement. CP 30. However, she disagreed that it should be a lump sum, and should instead be monthly payments. CP 30, 35-38.

In her January 17, 2013 Declaration, Rachell states, "I agree with Nathan [sic] that the [sic] because of the differences between the valuation of our retirements that there are insufficient funds in the remaining retirement assets to comply with the court's original order.

³ The reference to a Qualified Domestic Relations Order was in error, as it was a military retirement, and not an ERISA plan. The request should have been for a Military Qualifying Order.

Specifically I agree that utilizing the court's formula in the order of dissolution for division of the retirement assets would require me to transfer to Nathan [sic] \$146,191.30 from my proportional share of the retirement assets in exchange for retaining my military retirement including the portion earned during my marriage in its entirety." CP 30.

On January 25, 2013, Judge Felnagle entered an order finding Rachell owed Nathaniel \$146,191.30, and based on Rachell's agreement, and the term of the Decree of Dissolution. CP 48. He further ordered, pursuant to her agreement, that the funds should come from Rachell's military retirement. CP 48. An order effectuating that agreement was entered January 8, 2014. CP 223-229. This order was never appealed.

That order specifically requires:

The member agrees that in the event that DFAS is unable to pay the former spouse the full amount of \$593.22 due to 10 USC 1408 limiting provision of 50% of total retirement benefits payable the former spouse, because of any voluntary election she may have made in conjunction to her military pension including but not limited to acceptance of lump-sum retirement election of veterans disability benefits, to pay the former spouse the difference between any amount received from DFAS and the amount awarded

the former spouse of monthly maintenance.

CP 225

The order further provides:

Continuing Jurisdiction: the court shall retain jurisdiction to enter such further orders as are necessary to enforce the award of the former spouse of the portion of the member's military retired pay awarded herein, including the recharacterization thereof as a division of civil service or other retirement benefits, or to make an award of alimony or spousal maintenance in the sum of benefits payable in the event that member fails to comply with the provisions contained herein requiring said payments to the former spouse by any means, including the application for disability award or military or government regulations or other restrictions interfere with payments to the former spouse as set forth herein, or if the member fails to comply with the provisions contained herein requiring said payments to the former spouse, or if the adjustment of the percentages or amount ordered herein should be required, or if she fail to obtain life insurance protecting the former spouse.

The court hereby retains jurisdiction to entertain a motion for maintenance, alimony or other award of money to compensate the former spouse for any ammunition in the amount he receives as his portion of the member's disposable retired pay.

CP 226. This order was entered by agreement of the parties. CP 55-

57. This order was never appealed.

Nathaniel began receiving payments directly from DFAS in December 2016. CP 65. Between December 2016 and February 2018, he

received 15 payments, totaling \$8898.30. Id. In February 2018, Nathaniel received a letter from DFAS stating “The member is currently in a suspended pay status or the maximum percentage of disposable income is being remitted for an order served prior to your order. Funds will be remitted as soon as they become available.” CP 97. Nathaniel attempted to discuss the issue with Rachell, but she refused to address the matter outside of court. CP 66, 113, 115.

Nathaniel filed multiple motions, seeking alternative relief. CP 59-61, 62-115. Specifically he requested the court find Rachell in contempt for failing to comply with the terms of the Decree of Dissolution, Enforce the Decree by requiring Rachell to pay amounts owed directly to Nathaniel, vacate the property and spousal maintenance award and awarding spousal maintenance, or granting a judgment for amounts owed less, those already paid. Id.

In response, Rachell filed her own Motion to Vacate the retirement provision of the July 8, 2008 Decree of Dissolution, and the January 25, 2013 Order on Motion for Enforcement and the January 8, 2014 Military Retired Pay Division Order. CP 116-117. Her request was based on CR 60(b)(4), CR 60(b)(6) and CR 60(b)(11). Id.

Judge Leanderson enforced the 2008 agreed Decree of Dissolution, and 2013 and 2014 agreed court orders, and reduced Rachell’s outstanding

amount owed to judgment. CP 215-218.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED IT'S DISCRETION WHEN IT ENFORCED THREE PRIOR AGREED ORDERS AND ENTERED A JUDGMENT.

“Having before it at the outset a cause cognizable in equity, the court retain[s] jurisdiction over the subject matter and the parties to be affected by its decree for all purposes—to administer justice among the parties according to law or equity.” Yount v. Indianola Beach Estates, Inc., 63 Wn.2d 519, 524–25, 387 P.2d 975 (1964). The superior court unquestionably has authority to enforce property settlements. RCW 26.12.010. It further has the authority to use “any suitable process or mode of proceeding” to settle disputes over which it has jurisdiction, provided no specific procedure is set forth by statute and the chosen procedure best conforms to the spirit of the law. RCW 2.28.150. Indeed, “ ‘[w]hen the equitable jurisdiction of the court is invoked ... whatever relief the facts warrant will be granted.’ ” Ronken v. Bd. of County Comm'rs, 89 Wn.2d 304, 313, 572 P.2d 1 (1977) (quoting Kreger v. Hall, 70 Wn.2d 1002, 1008, 425 P.2d 638 (1967)) (alteration in original).

Court's of appeal review the trial court's exercise of its equitable authority for abuse of discretion. In re Foreclosure of Liens, SAC

Downtown Ltd. P'ship v. Kahn, 123 Wn.2d 197, 204, 867 P.2d 605 (1994).
“A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.” Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). An error of law constitutes an untenable reason. Id.;
Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Here, the trial court simply enforced its prior orders. In 2008, Rachell and Nathaniel entered into a stipulated agreement determining how their assets would be divided. Based on that agreed formula, Nathaniel is entitled to an equalizing payment. By 2012, when Rachell had failed to pay him, Nathaniel asked the Court to award him the equalization payment from the only asset available, Rachell's military retirement. Rachell *agreed* her military retirement would be the *vehicle* from which Nathaniel would receive his equalization payment.

By entering a judgment for the amount due, the trial court exercised its broad authority to “administer justice” and ensure equity between the parties- and to enforce its own judgments, specifically the agreed, and unappealed 2013 and 2014 orders.

Nonetheless, Rachell argues by entering a judgment requiring Rachell to pay the equalizing payment, the trial court improperly divided Rachell's military retirement, a benefit she no longer receives. Br. Of

Appellant at 10. This argument is wholly without merit and completely ignores the facts and procedural history of this case.

Rachell agreed she owed Nathaniel the money in 2013, and never appealed that order. While the Decree of Dissolution provides that neither parties' federal retirement accounts will be divided, Rachell agreed in 2013 that the money owed to Nathaniel should come from her military retirement. CP 30. The hierarchy in the Decree of Dissolution provides the spouse with the greater valued account will pay the other as follows:

...first out of their ½ portion of their 401k, then out of their ½ portion of their IRA, then out of their ½ portion of the equity in the Oklahoma home, then out of their ½ portion of the savings bonds to reach the ½ division. If the wife's retirement accounts are valued higher than the husbands, and she has exhausted the funds out of all of the sources previously listed, any amounts remaining due shall come from her share of the First Command Mutual Funds.

CP 9-11. The Decree does not provide that if those funds are exhausted, the equalization is no longer owed.

In addition, Judge Felnagle specifically found that based on the agreement of the parties, and the formula contained in the Decree of Dissolution, "The wife owes the husband \$146,191.30 pursuant to the Decree of Dissolution." CP 48. The trial court did not abuse its discretion when it enforced the prior unappealed orders of the court.

2. THE TRIAL COURT DID NOT ORDER
INDEMNIFICATION IN VIOLATION OF 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 Act⁴ (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).

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

⁴ 10 U.S.C. § 1408 (2017), et. seq.

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.

The Court in In re the Marriage of Perkins, 107 Wn. App 313, 315 26 P2d 989 (2001), 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 had already 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 pay⁵. Quoting Kraft, it stated:

⁵ 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

[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 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.

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.”)

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, 107 S.Ct. 202, 995 L.Ed.2d

599 (1987), 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 had already adopted in Kraft and Perkins.

In A Change in Military Pension Division: The End of Court-Adjudicated Indemnification - Howell v. Howell⁶, 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, including *express contractual indemnification* which is what the parties did here. Id. at 1082-1086 (emphasis added).

Here, the trial court did not order Rachell indemnify Nathaniel. But, even if it had, it would have been enforcing the *agreed* 2014 Military Qualifying Order that contained an *agreed upon* indemnification clause.

⁶ 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.

Unlike in Howell⁷, the court order here contains an *agreed upon* indemnification clause, requiring Rachell to pay Nathaniel \$593.22 if DFAS did not pay him directly. This clause was negotiated and agreed to by the parties and was not ordered by the trial court, thus is not prohibited by Howell.

Further, Rachell *agreed* in 2008 to the formula for equalization. She *agreed* in 2013 she owed \$146,191.30. She *agreed*, and specifically requested that her military retirement be used as the *vehicle* for the payment of the \$141,191.30. At no time did the trial court order indemnification in violation of Howell. Rather, the trial court simply enforced the 2008 *agreed* Decree of Dissolution, the *agreed* 2013 order that included Rachell's agreement she owed \$141,191.30 and the 2014 *agreed* Military Order that said she would pay Nathaniel directly if DFAS did not do so.

Unlike Howell, this is not a trial court ruling requiring Rachell indemnify Nathaniel. Rather, this is a case where Nathaniel is entitled to an equalizing payment, based on a prior agreement, and order of the Court, and the parties *agreed* the payment would come from Rachell's military retirement. Now that DFAS is no longer paying Nathaniel directly, Rachell

⁷ 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.

needs to make the payments as determined by the trial court.

Nonetheless, Rachell argues that the language of the orders “shows that the court and the parties intended to divide Bond’s military retirement.” Br. Of Appellant at 15. Her argument completely ignores the procedural history of this case, and Rachell’s own declaration that she agrees she owes Nathaniel \$143,191.30 and that the only asset she has to pay it from was her military retirement.

If this Court were to accept Rachell’s argument, and reverse the trial court, it would result in a windfall to Rachell as it would mean a significant economic circumstance would now be unaccounted for in the overall division of debts and assets and spousal maintenance award as it was agreed to in 2008. Further, Rachell continues to receive monthly benefits, at least equal to her prior disposable military retired pay. Had Rachell’s military retirement been reduced (or eliminated) prior to the dissolution, neither the parties’ nor the trial court would have simply ignored this economic circumstance. Cases such as Perkins, supra, allow the trial court to consider all debts and assets, even if the court does not have the authority to divide the asset and to make provisions for a spouse in the event of an indivisible military benefit such as the one that Rachell currently receives.

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 prohibition⁸. However, Howell *does not* preclude state courts from considering the non-divisible benefit, or more importantly, from allowing parties to contract around its indemnification prohibition as Rachell and Nathaniel did here.

3. RACHELL'S CLAIMS ARE BARRED BY RES JUDICIATA.

Res judicata ensures the finality of decisions. Camer v. Seattle Sch. Dist. No. 1, 52 Wn. App. 531, 534, 762 P.2d 356 (1988), cert. denied, 493 U.S. 873, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989). Res judicata, or claim preclusion, prohibits the relitigation of claims and issues that were

⁸ 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)

litigated, or could have been litigated, in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. Id. Res judicata also requires a final judgment on the merits. Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 860, 726 P.2d 1 (1986); State v. Drake, 16 Wn. App. 559, 563–64, 558 P.2d 828 (1976).

In her 2018 law review article, Ms. Lynch identifies *Res Judicata* as a bar to collateral attacks made on pre-Howell judgments:

The second potential remedy regarding indemnification and the division of waived military retired pay is the doctrine of res judicata. Res judicata is defined as, “a thing adjudicated. Once a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again.” The Supreme Court has noted that “the res judicata consequences of a final, un-appealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.”¹¹⁸ Accordingly, if military and/or disability benefits are divided in violation of Mansell (and now Howell), but the servicemember fails to timely appeal, the decision is final. Thus, the benefits at issue are lawfully and validly divided. Moreover, courts around the country have uniformly held that McCarty and Mansell are not retroactive. Likewise, there is nothing in Howell that suggests that the Supreme Court intended to invalidate or otherwise render unenforceable prior valid judgments.

Cite. Similarly, once the opinion in McCarty, 453 U.S. 210, was announced, Washington courts refused to apply it retroactively, finding it was not applicable retroactively to an unappealed property settlements. In re Marriage of Brown, 98 Wash.2d 46653 P.2d 602 (1982).

Here, the parties 2008 Decree of Dissolution was never appealed, and is a final order not subject to collateral attack. Rachell tried in 2008 to get the trial court to invalidate the CR2A as it related to the division and equalization of the military retirement. Judge Felnagle rejected Rachell's request – a ruling Rachell did not appeal.

Similarly, the 2013 order establishing the amount Rachell owed, and that it would be paid from her military retirement was never appealed and is not subject to collateral attack.

Finally, like Washington court's interpretation of McCarty, nothing in the Howell decision indicates that the U.S. Supreme Court intended that it have retroactive application to unappealed settlement agreements.

3. NATHANIEL 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 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)).

Rachell’s argument on appeal is meritless and continues a long history of litigious actions refusing to effectuate agreements or prior orders of the court.

Nathaniel 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. Nathaniel will comply with RAP 18.1 should this Court award fees on appeal.

D. CONCLUSION.

The trial court properly exercised its broad discretion when it entered a judgement based on the unappealed 2008 agreed Decree, and agreed, and unappealed 2013 and 2014 orders enforcing that Decree. Nathaniel requests the Court affirm the trial court order establishing a judgment, and award him reasonable attorney fees.

DATED: August 27, 2019

LAW OFFICE OF SOPHIA M. PALMER, PLLC,



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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I caused to be transmitted via U.S. Mail, postage prepaid, transmitted via the Appellate Court on-line portal, and/or emailed, a copy of the foregoing BRIEF OF RESPONDENT on the 27^h day of August, 2019, to the following counsel of record at the following address:

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