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NO. 53340-5-II

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

MICHAEL LEE TUPPER,

Appellant,

v.

DONNA LYNN TUPPER (N/K/A DONNA LYNN HAGAR)

Respondent.

Appeal from the Superior Court for Pierce County
Cause No. 05-3-00939-9

**BRIEF OF RESPONDENT DONNA LYNN TUPPER (N/K/A
DONNA LYNN HAGAR)**

Stephen A. Burnham
Barbara J. Kastama
CAMPBELL BARNETT, PLLC
317 South Meridian
Puyallup, WA, 98371
(253) 848-3513

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I. INTRODUCTION

Appellant Michael Tupper's appeal is a collateral attack on a 12-year-old property settlement, entered under an agreed Decree of Dissolution. He challenges a single part of a multi-layered property division, on grounds that are inconsistent with established Washington law.

Michael Tupper and Donna Hagar were married for 36 years prior to their divorce in 2006. Mr. Tupper was the financial provider for the entire marriage while Ms. Hagar was a provider at home. Ms. Hagar's attention to home duties and tasks facilitated Mr. Tupper's ability to work and provide for their family, so his income-earning ability was a community asset that was built up during the course of the marriage.

At the time of the divorce, both parties were near traditional retirement age. Ms. Hagar's lack of significant gainful employment made it unlikely she would find a job paying more than minimum wage. In contrast, Mr. Tupper had substantial earning power. The parties settled their divorce with an agreed entry of the Decree of Dissolution on September 21, 2006 which was based on and incorporated the terms of the parties

Memorandum of Agreement date September 12, 2006. The Memorandum of Agreement was reached after multiple mediation sessions. The trial court found the agreed Decree presented by the parties to be a just and equitable distribution of the parties' marital estate. The Decree awards Ms. Hagar a share of the parties' properties, including spousal maintenance and, upon Mr. Tupper's retirement, an income stream based upon 50% of his received Social Security payment.

Mr. Tupper did not seek reconsideration or take an appeal from the Decree entered in 2006. Instead, he allowed the Decree to remain in force for over 12 years, with the parties acting and relying upon it. He now objects to enforcement of Section 3.3, Sub-paragraph 10, regarding the post-retirement payments to Ms. Hagar. This is just one provision of a detailed decree which the trial court concluded to be a just and equitable division of the parties' marital estate. Following entry of the Decree the parties have made payments of money and transferred title to property as dictated by the Decree.

On October 3, 2018, Ms. Hagar brought a motion to enforce certain terms of the Decree including, without limitation, the post-retirement income stream required under Section 3.3 sub-

paragraph 10. On February 12, 2019, the Pierce County Court Commissioner granted Ms. Hagar's motion in substantial part, including ordering that Mr. Tupper pay Ms. Hagar under Section 3.3, sub-paragraph 10 pursuant to the Decree.

Mr. Tupper moved for revision, arguing that sub-paragraph 10 is an illegal division of his Social Security and therefore void and unenforceable. On March 8, 2019 Pierce County Superior Court Judge Kitty Ann Van Dornick denied Mr. Tupper's motion for revision. Mr. Tupper then filed this appeal based on the same legal theory rejected by the Superior Court Commissioner and Judge Van Dornick, that Section 3.3, sub-paragraph 10 of the Decree should be stricken as void as an illegal division of Mr. Tupper's Social Security benefits.

This Court should deny Mr. Tupper's appeal, confirm the order of the Superior Court and award Ms. Hagar her attorney fees and costs on this appeal. Mr. Tupper's appeal is untimely, coming more than 12 years after entry of the agreed Decree of Dissolution and substantial performance by the parties of their court-ordered obligations. He fails to establish any substantial change in circumstances that would allow him to modify the trial court's 2006 property award. Finally, and critically, he misinterprets

federal and Washington law regarding consideration of Social Security benefits in making a just and equitable division of all of the parties' property in assessing the fair and equitable division of the community estate.

II. STATEMENT OF ISSUES PRESENTED ON APPEAL

Appellant identifies six separate Assignments of Error in his brief, but fails to specify any issues pertaining to those assignments of error as required by RAP 10.3(a)(4). Mr. Tupper's failure to state his issues on appeal prejudices Ms. Hagar's ability to respond and Ms. Hagar reserves the right to reply to any issues the Mr. Tupper may ultimately raise in his reply brief or otherwise in this appeal. Despite this disability, Ms. Hagar submits that the issues on appeal are as follows:

- A. Whether Mr. Tupper's challenge to Section 3.3, subparagraph 10 of the Decree is barred by his failure to timely move for reconsideration or other relief from the Decree or file an appeal of the Decree within the timelines supplied by CR 59, 60 or RAP 5.2.
- B. Whether Mr. Tupper's challenge to Section 3.3, subparagraph 10 is barred by the invited error doctrine.
- C. Whether Mr. Tupper's challenge to Section 3.3, subparagraph 10 is barred by the equitable doctrines of laches, waiver, and equitable estoppel.

- D. Whether the trial court's consideration of Social Security benefits in its property distribution as agreed by the parties is consistent with Washington and federal law.
- E. Whether a decision holding section 3.3, sub-paragraph 10 of the Decree is void requires the case be remanded for reconsideration of all properties awarded to the parties under sections 3.2, 3.3, and 3.7 of the Decree.

III. STATEMENT OF THE CASE

This is a case resolved by the parties over a decade ago. The parties negotiated and reached agreement on division of their property through several mediation sessions that resulted in a signed Memorandum of Agreement, dated September 13, 2006. The Memorandum of Agreement had three sections: "Property Settlement"; "Spousal Maintenance" and "Other." CP 188-198. In the "Spousal Maintenance" section, the parties agreed that Ms. Hagar would receive \$1,925.00 every pay period until Mr. Tupper's retirement or Ms. Hagar's remarriage. The Memorandum of Agreement further provides under the section titled "Other" that upon retirement, Mr. Tupper would pay Ms. Hagar 50% of the amount of his Social Security payments. CP 196-198.

On September 21, 2006, the parties filed a "Verification re: Uncontested Dissolution" with the trial court, confirming that they agreed to the presented agreed findings of fact, conclusions of law,

entered on the same date. CP 146-147. The parties acknowledged in their presented Findings of Fact that the parties had a long-term marriage of 36 years, and that there was a disparity of income between them because Ms. Hagar was unemployed, and Mr. Tupper was employed full-time. CP 1-6 (Finding of Fact 2.12). The Decree of Dissolution provides for division of the marital estate, including an income stream until and unless she remarries. CP 7-13. Section 3.3 sub-paragraph 10 of the Decree addresses Mr. Tupper's obligations regarding the stream after his retirement:

Fifty percent (50%) of the husband's social security benefits (including disability benefits) upon the husband retiring or collecting them due to disability. These benefits shall be the net social security benefits which shall be calculated as the amount received by the husband less any deduction for the husband's Medicare coverage. No other deductions shall be allowed. The husband shall provide a copy of his annual social security statement each year to the wife. The husband shall make direct payment to the wife, via an electronic funds transfer to her bank account, within five days of the date of husband receives payment from social security.

CP 10 (Decree). *See also* CP 196-198 (Memorandum of Agreement).

After entry of the Decree, Mr. Tupper made efforts to perform his obligations. However, he was not able to comply with all requirements, including his obligation to pay Ms. Hagar her

share of the home equity within 60 days of the entry date of the Decree pursuant to Section 3.3, sub-paragraph 1. CP 174-187. As a result of his failure to pay, Ms. Hagar brought a motion to enforce the Decree on May 25, 2007. CP 148-173. The motion identified nine breaches of the Decree by Mr. Tupper including Section 3.3, sub-paragraph 10. Sub-Paragraph 10 required Mr. Tupper to provide Ms. Hagar with a copy of his annual Social Security statement. In his response to the motion, Mr. Tupper made no objection to enforcement of sub-paragraph 10 and in fact took affirmative action in compliance with sub-paragraph 10 of the Decree. CP 174.

Through the years that followed Mr. Tupper and Ms. Hagar operated under the terms of the Decree. In 2018, Ms. Hagar again went to court to enforce certain terms of the Decree, filing her motion and declaration for order to show cause on October 3, 2018. CP 14-25. In this motion Ms. Hagar sought orders and judgments under the Decree including:

1. Enter judgment against the Respondent, Michael Tupper, in the amount of \$66,092.74 for unpaid obligations as set forth in the parties' Divorce Decree and Promissory Note;
2. Order the respondent to pay to the petitioner one half of his American Funds 401(k) through a

QDRO and to produce and provide to the petitioner his retirement statements from September 18, 2006 to the present to verify compliance with the decree;

3. Order the respondent to pay to the petitioner one half of his Christmas Bonuses from 2008 to the present and to produce and provide to the petitioner his paystubs from October 1, 2006 to the present;
4. Order the respondent pay to the petitioner one half of his Social Security benefit and to produce and provide to the petitioner his Social Security benefit statements from January 1, 2012 to the present;
5. Enter judgment in the amount of \$1500 for attorney's fees and costs related to enforcing the Decree.

CP 14-25.

Mr. Tupper responded to Ms. Hagar's motion by disputing her allegations and, for the first time in the then 12-year history of the case, a claim that Section 3.3, sub-paragraph 10 was unenforceable because it was a "direct division" of Mr. Tupper's Social Security benefits. CP 81-103.

In her Reply Memorandum, Ms. Hagar made several arguments for enforcement of the Decree including:

- (1) Mr. Tupper's challenge of the Decree was untimely under CR 59, 60 or RAP 5.2;

(2) It would be unjust to set aside a portion of the Decree at this time;

(3) The Decree was not subject to modification under Washington law and if it was Mr. Tupper failed to meet his burden of showing a substantial change in circumstances; and

(4) The consideration of Social Security benefits in making an overall just and equitable division of the parties' assets is within the authority of Washington courts under the legal authorities of *In re Marriage of Zahm*, 138 Wn.2d 213, 219, 978 P.2d 498 (1999) (citing 42 U.S.C. § 407(a) of the Social Security Act and its interpretation of *Hisquierdo v. Hisquierdo* 439 U.S. 572, 590, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979)). CP 104-111.

On February 12, 2019, Commissioner Craig Adams granted Ms. Hagar's motion in substantial part, and ordered that Mr. Tupper pay Ms. Hagar "pursuant to the Decree ..." CP 129-130. Mr. Tupper filed a motion for revision and on March 8, 2019, Pierce County Superior Court Judge Kitty Ann Van Dornick denied Mr. Tupper's motion for revision. CP 131-141 and CP 142-143.

Mr. Tupper then filed this appeal, arguing that the trial court erred because Section 3.3, sub-paragraph 10 of the Decree

should be stricken as void as an illegal division of Mr. Tupper's Social Security benefit.

IV. ARGUMENT

A. Standard of Review.

The law favors the amicable settlement of disputes, and is inclined to view them with finality. *Snyder v. Tompkins*, 20 Wash. App. 167, 173, 579 P.2d 994, *review denied*, 91 Wash. 2d 1001 (1978). A stipulation disposing of property in a dissolution is subject to court approval. *Monroe v. Monroe*, 27 Wn.2d 556, 561, 178 P.2d 983 (1947). A stipulation that has been approved by the trial court will not be disturbed unless there is a clear and manifest abuse of discretion. *Baird v. Baird*, 6 Wn. App. 587, 591, 494 P.2d 1387 (1972). Only if fraud, mistake, misunderstanding or lack of jurisdiction is shown will a judgment by consent be reviewed on appeal. *Washington Asphalt Co. v. Harold Kaeser Co.*, 51 Wash. 2d 89, 91, 316 P.2d 126 (1957).

There is not a clear and manifest abuse of discretion. The court entered the Decree in 2006 as requested by the parties, based upon their settlement agreement, and the parties have operated under the Decree ever since.

B. The Decree is Binding and Cannot be Revised Now, Following 12 Years of Performance and Reliance.

In putting forth its defense against enforcement, Mr. Tupper is attacking the underlying Decree itself and arguing that the Decree as written should not be enforced. The Court should disregard Respondent's attempt to circumvent the terms of the Decree, which the Court has inherent powers to enforce. *In re Cave*, 26 Wash. 213, 221 66 P. 425 (1901). If Mr. Tupper seeks to invalidate the parties' agreed Decree, the proper avenue was through a request for reconsideration through CR 59, a request for relief from judgment through CR 60, or a timely appeal under the timeline provided in RAP 5.2. Mr. Tupper's appeal is untimely under the applicable civil and appellant rules.

1. Mr. Tupper Failed to Seek Reconsideration or Appeal the 2006 Decree, and Cannot Now Seek to Set It Aside.

Mr. Tupper failed to seek reconsideration of the Decree under CR 59 in a timely manner or timely file an appeal of the Decree under RAP 5.2. And Mr. Tupper has failed to challenge the Decree in the time periods required by CR 60(a) and (b)(1) – (3) and to present any evidence to support relief from the Decree under CR 60(b)(4) – (11).

In fact, the only source of relief Mr. Tupper seeks is entry of an order under CR 60(b)(5) vacating a single portion of the Decree, but this request is not supported by the facts of this case or Washington law. In an unpublished opinion dealing with a nearly identical Social Security provision that was similarly relied upon by the parties for over a decade, Washington's Court of Appeals found that the party seeking to void the payments based on a percentage of his Social Security

could have brought a direct appeal to challenge the Social Security provision of the dissolution decree within 30 days of its entry. RAP 5.2. But he did not. He cannot avoid the consequences of that failure by resort to CR 60(b)(5).

*In re*014 Wash. App. Lexis 1075 (2014) (unpublished).¹ Likewise, this Court should not allow Respondent to untimely attack the parties' agreed Decree.

The parties agreed to entry of a decree that provided Ms. Hagar with payments based upon a percentage of Mr. Tupper's Social Security payments upon his retirement. If, as Mr. Tupper urges, this Court were to decide more than 12 years later that Ms. Hagar is not entitled to receive the amount provided in Section 3.3,

¹ Pursuant to GR 14.1, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the Court deems appropriate.

sub-paragraph 10 of the Decree, it would require a full redistribution of the parties' marital estate – or simply leave Ms. Hagar without a significant portion of the consideration she is agreed to receive and Mr. Tupper agreed to provide under the Decree. This would be unfair to Ms. Hagar, as she has been living and planning under the terms of their Decree for the past 12 years.

The Court should affirm the trial court. Mr. Tupper could have sought to revise the Decree years ago. He should not be allowed to benefit from the Decree for 12 years and then reject it at the time that additional payments come due.

2. Accrued Amounts Under the Decree are Absolute and Fixed.

As to those amounts already accrued under the parties' Decree, “the rights and liabilities of the parties become absolute and fixed at the time provided in the decree for their payment, and to this extent the judgment is a final one.” *Shibley v. Shibley*, 181 Wash. 166, 169-179, 42 P.2d 446 (1935) (citing *Harris v. Harris*, 71 Wash. 307, 128 P. 673 (1912)). Further, even if the decree were modifiable, it would only be so as to installments accruing subsequent to the petition for modification and only upon a showing of a substantial change in circumstances. RCW

26.09.170(1). As to those payments which have already come due, Mr. Tupper is simply too late to appeal those amounts.

C. The Invited Error Doctrine Bars Mr. Tupper From Evading His Obligations under the 2006 Decree.

The invited error doctrine precludes judicial review of any error where the complaining party engaged in some affirmative action by which he knowingly and voluntarily set up the error. *In re Marriage of Morris*, 176 Wn. App. 893, 900, 309 P.3d 767 (2013). In 2006, Mr. Tupper asked the trial court, and it agreed, to enter the stipulated decree containing a provision that he was to provide income to Ms. Hagar equal to half of his Social Security benefits upon his retirement.

Now, over a decade later, Mr. Tupper seeks to evade this obligation by appealing the trial court's refusal in 2019 to vacate the provision that he requested that the trial court enter in 2006. Mr. Tupper is not permitted to complain of "error" that he induced the trial court to commit. *State v. Marks*, 90 Wn. App. 980, 987, 955 P.2d 406, *review denied*, 136 Wn.2d 1024 (1998) ("In any event, Mr. Marks helped to create the very situation that he now complains of and we conclude that he should not be permitted to

benefit from it.”). On this ground, the Court should affirm the trial court.

D. Mr. Tupper’s Appeal is Barred by the Equitable Doctrines Laches, Equitable Estoppel and Waiver.

1. Mr. Tupper’s Appeal is Barred by Laches.

Laches bars a cause of action if: (1) the plaintiff was aware or should have been aware of the facts constituting the cause of action; (2) commencement of the action was unreasonably delayed; and (3) the defendant is damaged by the delay. *Parentage of Hilborn*, 114 Wn. App. 275, 278, 58 P.3d 905 (2002). Here, all three requirements are met:

Mr. Tupper’s delay in raising his issue regarding Social Security payment was unreasonable. Since Mr. Tupper agreed to sub-paragraph 10 in a settlement agreement, and requested that the trial court enter the agreed Decree based on that settlement agreement, there is no question that he knew of the provision. Indeed, he provided his Social Security statements to Ms. Hagar in 2007, in compliance with the Decree. CP 176-178. Moreover, cases relied upon now by Mr. Tupper to argue that the provision is void either pre-date the Decree or were published soon thereafter: *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d. 1 (1979); *In re Marriage of Zahm*, 138 Wn.2d 213, 978 P.2d

498 (1999); and *In re Marriage of Rockwell*, 141 Wn.2d 235, 170 P.3d 498 (2007). Despite all this, he waited over 12 years to claim that the provision was “void.”

Ms. Hagar will suffer damage if the Court grants Mr. Tupper relief from the Decree. Mr. Tupper’s delay in only now bringing this matter forward deprives Ms. Hagar of the bargain she struck with Mr. Tupper when they settled their dissolution in 2006 and further deprives her of the opportunity to negotiate alternate terms for their marriage dissolution. They agreed at that time to a fair and equitable distribution of all of the property accumulated during their long marriage and provision of spousal maintenance to Ms. Hagar. Now, Mr. Tupper wants to evade his agreement to provide income to Ms. Hagar upon his retirement. This is a key provision, because Mr. Tupper has far superior financial earning power compared to Ms. Hagar, who did not work outside the home during their long marriage. Since property must be distributed equitably, it unfair to go back to just one piece of the property distribution scheme without considering all of the assets that were in the decree. Nor will a remand for a “do-over” remedy this prejudice, because a trial court could reasonably determine that it

would be inappropriate or impossible to fairly divide the 2006 property holdings in 2019.

Mr. Tupper's delay is not justified, unreasonable and Ms. Hagar will be prejudiced. The equitable defense of laches applies, and bars this appeal.

2. Mr. Tupper's Appeal is Barred by Equitable Estoppel.

The Washington Supreme Court recognized equitable estoppel "as entitled to the distinction of being one of the greatest instrumentalities to promote the ends of justice which the equity of the law affords." *Code v. London*, 27 Wn.2d 279, 283, 178 P. (2d) 293 (1947). In application it forecloses one from denying his own expressed or implied admission, which has in good faith, and in pursuance of its purpose, been accepted and acted upon by another. *Id.* The doctrine applies when the facts show (1) acts, statements, or admissions inconsistent with a claim subsequently asserted, (2) action or change of position on the part of the other party in reliance upon such acts, statements, or admissions, and (3) a resulting injustice to such other party, if the first party is allowed to contradict or repudiate his former acts, statements, or admissions. *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000)

(quoting *Board of Regents v. Seattle*, 108 Wn.2d 545, 551-554, 741 P.2d 11 (1987)). Equitable estoppel must be shown by “clear, cogent, and convincing evidence.” *Id.* at 35 (quoting *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994)). Acquiescence in the findings of a court is a ground for an equitable estoppel. *In re Miller*, 26 Wn.2d 202, 210, 173 P.2d 538 (1946).

Mr. Tupper’s actions and agreements meet all the requirements for this Court to apply equitable estoppel to deny his request to vacate the Decree. His argument for relief is inconsistent with his original agreement to pay Ms. Hagar pursuant to the Decree in 2006. The parties’ agreements were reached after multiple sessions of mediation with Eberle-Reid Services resulting in their September 13, 2006 Memorandum Agreement that was incorporated into the Decree by reference. CP 13 and CP 196-198. Their Mediation Agreement includes Mr. Tupper’s agreement to pay Ms. Hagar “50% of his monthly Social Security payment upon retirement.” CP 197. Mr. Tupper admits that he agreed to the terms of the Mediation Agreement and the Decree which include his obligation to pay Ms. Tupper 50% of his Social Security payment upon retirement. CP 174-175. Sections 3.3 and 3.7 of the

Decree are essentially restatements of the parties' Memorandum of Agreement. Mr. Tupper acknowledged his performance regarding the Decree's provisions related to his Social Security without objection. CP 176.

This record is clear and cogent evidence of Mr. Tupper's agreement and Ms. Hagar's acceptance of this payment as a material part of their agreement to enter the Decree and be bound by its terms. There can be no doubt the Mr. Tupper expected Ms. Hagar to rely on his agreement to pay her from his Social Security payment pursuant to the Decree and the Memorandum of Agreement upon which it is based. Ms. Hagar's motions to enforce the Decree, including its provisions for spousal maintenance and payment based on a percentage Mr. Tupper's Social Security, are clear evidence of her reliance. The detriment to Ms. Hagar is obvious and without dispute, although an exact measurement of the value of this element of the parties' martial settlement is unknown. The Court can by inference or judicial notice conclude that Ms. Hagar will suffer detrimental impacts if Mr. Tupper is relieved of his payment obligations under Section 3.3, sub-paragraph 10.

Even if, *arguendo*, the Decree is void, Mr. Tupper is still estopped from now challenging its validity. Equitable estoppel provides that even though a decree is void, a party who procures such a decree or consents to it is estopped to question its validity where he has obtained a benefit therefrom, or has concurrently invoked the court's jurisdiction in order to gain affirmative relief. *Svatonsky v. Svatonsky*, 63 Wn.2d 902, 389 P.2d 663 (1964); *Bauer v. Bauer*, 5 Wn. App. 781, 791-94, 490 P.2d 1350 (1971). Mr. Tupper participated in the proceedings, approved the terms related to his Social Security and received benefits including ownership of the family home. He is estopped from now repudiating the Decree.

3. Mr. Tupper's Appeal is Barred by Waiver.

A party to a dissolution proceeding may waive jurisdictional objections by participating in the court proceedings. *In re Marriage of Maddix*, 41 Wn. App. 248, 251, 703 P.2d 1062 (1985). Mr. Tupper participated in all proceedings leading up to the entry of the agreed Decree including confirming his agreements regarding payments based on his Social Security. He further participated in the enforcement action by Ms. Hagar in

2007 and performed under the Decree's prescriptions by providing Ms. Hagar with his Social Security statements. These actions all support application of the equitable doctrine of waiver. Washington law supports waiver of jurisdictional defects and is consistent with Washington law on equitable estoppel. In these circumstances waiver applies to bar his request for relief under CR60(b)(5).

E. The Trial Court's Property Award is Consistent with Washington and Federal Law.

1. The Trial Court Did Not Award or Assign Mr. Tupper's Social Security Benefits to Ms. Hagar.

As Mr. Tupper states, federal law and the supremacy clause prevent Washington courts from directly transferring, assigning, or dividing a person's Social Security benefits in a dissolution proceeding. Brief of Appellant at 7; *Rockwell*, 141 Wn. App. at 244-45; *In re Marriage of Zahm*, 138 Wn.2d 213, 219, 978 P.2d 498 (1999) (citing 42 U.S.C. § 407(a) of the Social Security Act and its interpretation under *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590, 99 S.Ct. 802, 59 L. Ed. 2d 1 (1979)). Specifically, a trial court is prohibited from placing a numerical value on a party's Social Security benefits, or ordering and offset of a predetermined

dollar amount of those benefits as an award of property to the other spouse:

Here, the trial court did not conduct the kind of valuation of benefits prohibited under *Hisquierdo*. The trial court neither computed a formal calculation of the value of petitioner's social security benefits nor offset a formal numerical valuation into the court's property division via a specific counterbalancing property award to respondent. Thus, the reasoning in *Hisquierdo* does not control the result in the case before us.

Zahm, 138 Wn.2d at 221.²

There is a crucial distinction between adjusting property division so as to directly or indirectly (by offset) allow invasion of benefits; and making a general adjustment in dividing marital property on the basis that one party, far more than the other can reasonably expect to enjoy a secure retirement. The agreed provision herein did not value the Social Security payments and give Ms. Hagar an offsetting property award. Compare *Hisquierdo*, 439 U.S. at 588 (“[Respondent] seeks an offsetting award of *presently* available community property to compensate her for her interest in petitioner's expected benefits. As petitioner's counsel bluntly put it, respondent wants the house.” (emphasis

² Congress has legislatively overruled the holdings in *Hisquierdo* and *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), by making railroad and military retirement benefits subject to community property law. See *Herald & Steadman*, 355 Ore. 104, 112, 322 P.3d 546 (2014) (citing 45 U.S.C. § 231m(b)(2) and (10 U.S.C. § 1408(c)(1)).

added)). Here, like in *Zahm*, the trial court did not purport to make a direct transfer, assignment or division of Mr. Tupper's Social Security benefit. In fact, it made no finding on the future value or monthly payment that may have been due Mr. Tupper. The agreed provision herein did not place a dollar value the Social Security payments, nor did it provide that Ms. Hagar would receive an offsetting dollar-for-dollar property award. *Compare Hisquierdo*, 439 U.S. at 588 (“[Respondent] seeks an offsetting award of *presently available community property* to compensate her for her interest in petitioner's expected benefits. As petitioner's counsel bluntly put it, respondent wants the house”). It did not require that the benefits themselves be divided at the source; i.e., as a regular deduction from his benefit check, nor did it attempt to require the federal government to pay an amount directly to Ms. Hagar.

As Mr. Tupper acknowledges, Washington permits a trial court to consider the possibility that one or both parties may receive Social Security benefits. Brief of Appellant at 8-9; *Zahm*, at 138 Wn.2d at 219. Here, the Decree provides for non-modifiable spousal maintenance until either Ms. Hagar remarries or Mr. Tupper retires. Upon his retirement,

The husband shall make direct payment to the wife, via an electronic funds transfer to her bank account, within five days of the date husband receives payment from social security.

See CP 9. (Decree). This provision was part of an overall distribution of a sizeable estate to equalize the property awarded to the parties and provide for appropriate spousal maintenance. Had the parties simply picked two figures based upon an accountant's estimation that would have been payable as further property division when the husband and wife began receiving Social Security, there would not be a challenge.³

The agreed Decree, when viewed in the circumstances of its creation, is consistent with Washington and federal law, and should be affirmed.

^{3 3} The Oregon Supreme Court also pointed out that Social Security benefits are an integral part of family financial and retirement planning. *Herald & Steadman*, 355 Ore. at 115. Spouses that disentangle their financial affairs after a lifetime's array of shared financial decisions,

can scarcely be viewed as the equivalent of "creditors, tax gatherers, and all those who would 'anticipate' the receipt of benefits." *Cf. Hisquierdo*, 439 US at 575. Instead, they typically are economic partners in determining how their collective resources are consumed in the present and marshaled for future use, including use in retirement

Herald & Steadman, 355 Ore. at 115. Like Washington, Oregon permits consideration of Social Security benefits in fashioning an equitable property division. *Id.* at 199. Its opinion in *Herald & Steadman* is contains a thorough explanation of the majority and minority approaches to consideration of Social Security benefits.

2. The Parties' Memorandum of Understanding Reflects Their Intent to Provide for Post-Retirement Maintenance to Ms. Hagar.

As the *Zahm* court recognized, the prohibition against assignment of Social Security benefits in section 407(a) of the Social Security Act does not apply to alimony or child support payments:

At issue here is the interplay between RCW 26.09.080 and 42 U.S.C. § 407(a) of the Social Security Act (Act), the latter of which forbids transfer or reassignment of “the right of any person to any future payment under this subchapter” While the Act does permit reassignment of social security benefits to pay for alimony or child support, it categorically excludes any similar payment obligation in conformity with a community property settlement, equitable distribution of property, or other division between spouses or former spouses. 42 U.S.C.A. § 659(i)(3)(B)(ii).

Zahm, 138 Wn.2d at 219. The Memorandum of Agreement identified the amount of pre-retirement maintenance in the “Spousal Maintenance” section. It then inartfully provided for post-retirement income to Ms. Hagar in the section titled “Other.” CP 196-197. That this was the parties’ intent is consistent with the facts. Ms. Hagar did not work during the parties’ long marriage, and the parties acknowledged the financial disparity between them as a result.

3. Federal Law Does Not Preempt the Trial Court's Property Division.

As Mr. Tupper points out, a court may relieve a party from a final judgment *if* the entering court lacked jurisdiction. Brief of Appellant at 14. He is mistaken, however, in his insistence that the trial court lacked jurisdiction in 2006 to enter the agreed Decree containing sub-paragraph 10.

The Washington Constitution specifically grants superior courts original jurisdiction in divorce matters: Under article IV, section 6, superior courts are granted

original jurisdiction ... of all matters of probate, divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.

Wash. Const. art. IV, § 6; *see also In re Marriage of Buecking*, 179 Wn.2d 438, 450, 316 P.3d 999 (2013) (citing Wash. Const. art. 4, § 6). Therefore, it was within the trial court's subject matter jurisdiction to enter a decree of dissolution.

Mr. Tupper devotes substantial argument to the premise that the U.S. Supreme Court's decision in *Howell v. Howell*, 137 S. Ct. 1400, 197 L. ed. 2d 781 (2017), "completely preempts" the trial

court's 2006 property distribution. Brief of Appellant at 10 – 15.
Mr. Tupper misinterprets and misapplies *Howell*.

The regulation of domestic relations is traditional the domain of state law. *Hillman v. Maretta*, 569 U.S. 483, 490, 133 S. Ct. 1943, 1950, 186 L. Ed. 2d 43, 53 (2013). There is therefore a “presumption against pre-emption” of state laws governing domestic relations. *Id.* (quoting *v. Egelhoff*, 532 U. S. 141, 151, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001)). Accordingly, family and family-property law must do “major damage” to “clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.” *Id.* at 491 (quoting *Hisquierdo*, 439 U. S. at 581). That said, that family law is not entirely insulated from conflict pre-emption principles, and the U.S. Supreme Court has recognized that state laws “governing the economic aspects of domestic relations . . . must give way to clearly conflicting federal enactments.” *Ridgway v. Ridgway*, 454 U. S. 46, 55, 102 S. Ct. 49, 70 L. Ed. 2d 39 (1981)

Howell does not support Mr. Tupper's preemption argument. First, as he concedes, *Howell* involved the Uniformed Services Former Spouses Protection Act (“USFSPA”), and not the Social Security Act. The USFSPA authorizes States to treat

veterans' "disposable retired pay" as community property divisible upon divorce, 10 U.S.C. §1408, but expressly excludes from its definition of "disposable retired pay" amounts deducted from that pay "as a result of a waiver . . . required by law in order to receive" disability benefits, §1408(a)(4)(B)." *Howell*, 137 S. Ct. at 1402. In *Howell*, a husband and wife divorced, and an Arizona trial court entered an order awarding the wife 50% of the husband's future Air Force retirement pay, which she began to receive when he retired the following year. *Howell*, 137 S.Ct. at 1404. About 13 years later, the Department of Veterans Affairs determined that the husband was partially disabled due to an earlier service-related injury. *Id.* In order to receive military disability benefits, the husband elected to waive an equivalent amount of his military veteran's retirement pay. *Id.* After the wife petitioned to enforce the original order, the Arizona court entered an order restoring her share of the husband's retired pay. *Id.*

The United States Supreme Court held that the Arizona court could not order the husband to indemnify his divorced spouse for the loss of her portion of his retirement pay resulting from his waiver. The *Howell* court noted that "[r]egardless 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 pre-empted." *Howell*, 137 S.Ct. at 1406.

Howell is not apt. First, it addresses a different statutory schema, that allows for distribution of retirement benefits as community property but expressly excludes any waiver of such retirement pay disability in order to receive military disability benefits.

Second, what *Howell* prohibited is the state court's attempt to backfill a property award by requiring the husband to "reimburse" or "indemnify" his ex-wife for the loss of her portion of his retirement pay resulting from his waiver:

Neither can the State avoid *Mansell* by describing the family court order as an order requiring [the husband] to "reimburse" or to "indemnify" [the wife], rather than an order that divides property. The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e., to restore that portion of retirement pay lost due to the postdivorce waiver. And we note that here, the amount of indemnification mirrors the waived retirement pay, dollar for dollar. 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.

Howell, 137 S. Ct. at 1406 (emphasis added). Here, this matter does not involve a property award of military retirement pay, a subsequent reduction due to a disability waiver, or a “dollar-for-dollar indemnification.” *Howell* is simply not relevant.⁴

F. Attorney Fees Should be Awarded to Ms. Hagar on Appeal.

Ms. Hagar requests award of fees incurred in responding to this appeal. RAP 18.1; RCW 26.09.140.

V. CONCLUSION

The time for Mr. Tupper to attack the terms of the Decree was in 2006, shortly after the Decree was entered, and not 12 years later, when Ms. Hagar has been living on and relying on the terms of the Decree to plan for her future. The parties agreed that this distribution was just and equitable, and the trial court agreed when it entered their Decree. Further, amounts that have already come due under the Decree become fixed upon accruing and cannot now be attacked. Further, while the parties agreed to a provision that

⁴ It also bears pointing out that the *Howell* court acknowledged 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.

Howell, 137 S. Ct. at 1406.

equalized their income post-retirement, that income stream is not coming from the Social Security Administration, but rather from Mr. Tupper's bank account after Social Security is received. To declare that Ms. Hagar is not entitled to these funds would require that the entire distribution of assets in the Decree be completely revised – a process that is not just or reasonable 12 years down the road.

Respectfully submitted this 17th day of September, 2019.

CAMPBELL BARNETT, PLLC

/s/ Stephen A. Burnham

Stephen A. Burnham, WSBA# 13270

/s/ Barbara J. Kastama

Barbara J. Kastama, WSBA #16789

317 South Meridian

Puyallup, WA 98371

P: 253-848-3513

F: 253-845-4941

E: steveb@campbellbarnettlaw.com

E: barbarak@campbellbarnettlaw.com

Attorneys for Appellant Donna Hagar

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed by the law firm of CAMPBELL BARNETT PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

On September 17, 2019, I served one true and correct copy of the foregoing document with this Declaration of Service on the following parties via the method(s) indicated:

Counsel for Respondent:

Rainer A. Frank
McKinley & Irvin, PLLC
1201 Pacific Avenue, Suite 2000
Tacoma, WA 98402

Legal Messenger
 E-Service:
frank@mckinleyirvin.com

DATED this 17 September 2019.

/s/
Lynell Bonnes,
Legal Assistant

CAMPBELL BARNETT PLLC

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Puyallup, WA, 98371
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