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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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HEIDI KAUFMAN,

Respondent,

v.

GEOFFREY KAUFMAN,

Appellant,

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BRIEF OF RESPONDENT HEIDI KAUFMAN

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David Corbett PLLC  
David Corbett  
2106 N. Steele St.  
Tacoma, WA 98406  
(253) 414-5235  
[david@davidcorbettlaw.com](mailto:david@davidcorbettlaw.com)  
Attorney for Respondent Heidi Kaufman

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## I. INTRODUCTION

On June 17, 2008, Appellant Geoffrey Kaufman (“Mr. Kaufman”) and Respondent Heidi Kaufman (“Ms. Kaufman”) executed a Property Settlement Agreement (the “Settlement Agreement”) as part of their effort to reach an agreed termination to their marriage of more than 22 years. CP 317-28. The Settlement Agreement, which was incorporated into the Decree of Dissolution (the “Decree”) issued by the Kitsap County Superior Court later that same day, divided the property of the parties and, in a separate section, awarded Ms. Kaufman maintenance. CP 319-20; CP 6-9. The monthly maintenance amount was set “in a sum representing 50% of the husband’s U.S. Navy VA waiver/disability.” CP 319; CP 7.

Ten years later, Mr. Kaufman contacted Ms. Kaufman and informed her that he would no longer be paying maintenance. CP 186-93, 329. Mr. Kaufman’s refusal to continue to pay maintenance led to renewed litigation, and ultimately to the trial court’s Decision on Motion for Enforcement dated April 25, 2019 (the “Decision”). CP 220-24.

In this appeal from the Decision, Mr. Kaufman’s argument for reversal essentially boils down to the claim that the maintenance provisions in the Decree were void when entered in 2008, and that therefore the trial court erred in enforcing those provisions in 2019. This argument is incorrect. Application of the relevant law to the facts show that the trial court did not err when initially awarding maintenance. Moreover, even if the Decree had been entered in error, the Decree was not void, and is thus *res judicata*. Finally, even if the Decree were initially

void for lack of subject matter jurisdiction, Mr. Kaufman is now precluded from challenging the trial court's initial determination that it did have jurisdiction. Accordingly, this Court should affirm the trial court's Decision enforcing the Decree. This Court should also award Ms. Kaufman her reasonable attorney's fees and costs incurred on this appeal, pursuant to RCW 26.18.160.

## **II. Ms. KAUFMAN'S RESTATEMENT OF THE CASE**

Mr. Kaufman and Ms. Kaufman were married on December 31, 1985 and separated on November 11, 2007. CP 2. During the course of the marriage, Mr. Kaufman served in the U.S. Navy, and became entitled to military retirement benefits. CP 330.<sup>2</sup> At some point before the Decree of Divorce was entered, Mr. Kaufman waived a portion of his military retirement in favor of veterans disability. CP 7, at ¶ 7.

To facilitate the termination of their marriage, Mr. Kaufman and Ms. Kaufman negotiated the Settlement Agreement, which they executed on June 17, 2008. CP 317-327. The Settlement Agreement contained a recital that each party had been represented by independent legal counsel, and noted that "Petitioner has been represented by Robert Beattie, and Respondent has been represented by C. Bayly Miller." CP 318. The Settlement Agreement also states as follows:

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<sup>2</sup> The detailed facts about the marriage, including the length of Mr. Kaufman's service in the Navy, how his service period overlapped with the period of marriage, and when Mr. Kaufman first waived some part of his retirement in favor of disability, are not readily apparent in the record on appeal.

It is the intent and understanding of both parties that the Court approve this Property Settlement Agreement as fair and equitable at the time it was entered into, thereby making the provisions herein final, binding, and enforceable, whether or not a Decree of Dissolution of Marriage is ultimately obtained by these parties . . . . The parties . . . understand and agree that, if a Decree of Dissolution of Marriage is obtained, the appropriate provisions of this agreement shall be incorporated in said Decree of Dissolution and given full force and effect thereby.

CP 325-326.

In Subsection III of the Settlement Agreement, entitled “division of property,” Mr. Kaufman and Ms. Kaufman specified how they wished to divide their property. Each was awarded a “[o]ne-half interest in [Mr. Kaufman’s] U.S. Navy retirement . . . pursuant to an Order for Division of Military Retirement.” CP 320. Subsection III of the Settlement Agreement makes no reference to, or division of, Mr. Kaufman’s disability payments. CP 320-321.

Spousal maintenance for Ms. Kaufman was treated in a distinct Subsection II of the Settlement Agreement. CP 319. Ms. Kaufman was awarded permanent, non-modifiable maintenance “in a sum representing 50% of the husband’s US Navy VA waiver/disability.” CP 319. The Settlement Agreement further provides that “[i]n the event the VA waiver/disability portion and payment increases (either as a result of COLAs or as the result of an increase in the VA portion to the detriment of the retainer pay), the wife shall be entitled to her proportionate increase.” CP 319.

On the same day as the parties executed the Settlement Agreement, the trial court entered both Findings of Fact and Conclusions of Law (“Findings”) and the Decree. CP 1-5; CP 6-9. The Findings, which were approved for entry by both Mr. Kaufman and his counsel, specifically state that “[t]he Court has jurisdiction to enter a decree in this matter.” CP 4, at ¶ 3.1. The Findings also state that “[m]aintenance should paid [sic] by the husband to the wife representing one-half of the husband’s current and continuing, as adjusted, United States VA waiver benefit.” CP 3, at ¶ 2.12.

The Decree, in turn, specifically relies on the Settlement Agreement to govern the division of property and obligations. CP 7, at ¶¶ 3.5. In the separate section on spousal maintenance, the Decree does not mention the Settlement Agreement, but does incorporate its terms almost word-for-word. CP 7-8 at ¶ 3.7. *Compare* CP 319-320.<sup>3</sup> Entry of the Decree was expressly approved by both parties and their respective counsel, as indicated by their signatures on the final page of the Decree. CP 9.

Roughly ten years after the entry of the Decree, Mr. Kaufman contacted Ms. Kaufman and informed her that he would no longer be paying maintenance. CP 186-93, 329. After informal efforts to resolve the resulting dispute broke down, Ms. Kaufman filed a Motion for Order

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<sup>3</sup> The only apparent difference between the maintenance provision in the Decree and the same provision in the Settlement Agreement is the commencement date given for the payments.

to Show Cause on Contempt (“Motion for Contempt”). CP 12-34.<sup>4</sup> In the hearing on the motion for contempt, the trial court held that it could not find Mr. Kaufman in contempt because of an ambiguity in the Decree’s treatment of spousal maintenance. CP 91. The trial court took the issue of enforcement under advisement, and then directed Ms. Kaufman to submit a formal motion and brief concerning the issue of enforcement. CP 91-92.

Ms. Kaufman complied with the trial court’s direction, and on about March 11, 2019 filed and served Petitioner’s Motion for Enforcement & Evidentiary Hearing, Declaration, and Memorandum of Law (“Motion to Enforce”). CP 93. Ms. Kaufman’s Motion to Enforce is substantially similar to her Motion for Contempt, and like it requested the trial court to enforce both the Settlement Agreement and the Decree. *Compare* CP 118-119 (conclusion to Motion to Enforce) *and* CP 33-34 (conclusion to Motion for Contempt).

As part of her Motion to Enforce, Ms. Kaufman submitted a declaration. CP 182-85. In it, she averred that “the change over from waiver to disability was anticipated” by the parties before they entered the

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<sup>4</sup> In preparing the Motion for Contempt, Ms. Kaufman’s trial counsel collaborated with Mr. Mark E. Sullivan, a member of the North Carolina Bar. A substantial part of the Motion for Contempt was based on Mr. Sullivan’s article, *Hurt v. Jones-Hurt and Military Pension Division: Missing the Mark*, published by the Maryland State Bar Association in Fall, 2018. *See* CP 50 (middle of page down, indicating collaboration with Mr. Sullivan). A copy of *Hurt v. Jones-Hurt and Military Pension Division: Missing the Mark*, is available on-line at <https://www.msba.org/content/uploads/sites/7/2018/10/Fall-2018-Newsletter-Family-Law-Section-MSBA-Online.pdf>.

Settlement Agreement. CP 183. According to Ms. Kaufman, the parties' shared intent was that she would receive lifetime unmodifiable maintenance in an amount equal to 50% of *either* the waiver amount *or* the possible future disability amount. *Id.*

By contrast, Mr. Kaufman declared that he "never agreed or intended the 'waiver-disability' to be defined as waiver and/or disability, merely the waiver portion." CP 163. Mr. Kaufman also submitted a declaration from his former trial counsel, Mr. Bayly Miller.<sup>5</sup> CP 198-200. Mr. Miller also advocated for an interpretation of the Decree according to which the 2018 change in Mr. Kaufman's disability rating had the effect of terminating Mr. Kaufman's obligation to pay maintenance. According to Mr. Miller, the increase in Mr. Kaufman's disability to 60%, and his resulting eligibility for both disability and retirement, with no waiver, meant that "Ms. Kaufman is still getting the benefit of what she bargained for in the decree" despite Mr. Kaufman's decision to stop paying maintenance. CP 199.<sup>6</sup>

Mr. Kaufman's trial counsel did, however, also argue that the maintenance provision in the Decree was void. CP 148-151. At no time,

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<sup>5</sup> Although Mr. Miller was not Mr. Kaufman's counsel of record during the trial court enforcement proceeding, he is once again Mr. Kaufman's counsel for this appeal.

<sup>6</sup> *See also* CP 145-148 (Mr. Kaufman's argument to the trial court that the court "should not enforce the Settlement Agreement because Respondent has met all of his obligations under the terms of the agreement").

however, did Mr. Kaufman bring a motion to vacate the Decree, whether based on CR 60(b)(5) or any other subdivision of that rule.

By Decision dated April 25, 2019, the trial court granted Ms. Kaufman's Motion for Enforcement. CP 220-224.<sup>7</sup> After acknowledging Ms. Kaufman's argument about *res judicata*, the trial court based its grant of the motion on its view that the "settlement agreement was a binding contract between the parties and is not void, or voidable, and is enforceable per the original terms." CP 224.

The trial court directed Ms. Kaufman's counsel to prepare an order and finding of facts to reflect the Decision, but before this could happen, Mr. Kaufman appealed and filed for bankruptcy protection. CP 226.<sup>8</sup> On September 17, 2019, Ms. Kaufman filed a Motion Under RAP 6.2(b) Questioning Whether Decision Referenced in the Notice of Appeal is Reviewable as of Right. On September 27, this Court's Commissioner entered a ruling finding that "[t]he order appealed from is appealable as a matter of right, despite the absence of findings of fact and conclusions of law."

Once Mr. Kaufman's bankruptcy was resolved, Ms. Kaufman filed and served a Motion and Declaration re: Presentation of Orders Pursuant

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<sup>7</sup> The trial court referred to the Motion for Enforcement as a "motion . . . for enforcement of a property settlement agreement *and decree of dissolution*" (CP 220 at lines 18-19).

<sup>8</sup> This Court may take judicial notice of Mr. Kaufman's bankruptcy proceedings, in Bankruptcy Case No. 2:19-bk-11970 (Bankruptcy Court for the Western District of Washington).

to RAP 7.2.<sup>9</sup> In her motion, Ms. Kaufman indicated her belief that the trial court would need the Court of Appeals' permission to reduce the amount of past-due support to judgment. Mr. Kaufman filed responsive materials, in which he asserted that Ms. Kaufman's motion "does not change the Decision now being reviewed by the Court of Appeals, so RAP 7.2(e) does not apply."<sup>10</sup> In its Order on Enforcement of Property Settlement Agreement and Decree of Dissolution, dated October 25, 2019, the trial court agreed with Mr. Kaufman that RAP 7.2(e) does not apply, and proceeded to enter judgment in Ms. Kaufman's favor for \$10,435.51 in past-due spousal support, and for \$10,000 in attorney's fees.<sup>11</sup>

### **III. ARGUMENT**

#### **A. Summary of the argument.**

The law governing the treatment of military retirement and veterans disability pay in the event of divorce—and the law relevant to the facts of this case, in particular—is complicated. However, Mr. Kaufman's arguments for reversal on appeal reduce to a relatively simple claim: Because the maintenance award was void from the start, the trial court erred in 2019 when it entered its Decision granting Ms. Kaufman's

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<sup>9</sup> This motion, Mr. Kaufman's response, the relevant declarations, and the trial court's resulting Order on Enforcement of Property Settlement Agreement and Decree of Dissolution, dated October 25, 2019, have not yet been included in the Clerk's Papers. Ms. Kaufman is including them in her Supplemental Designation of Clerk's Papers, to be filed at the same time as this Brief as per RAP 9.6(a).

<sup>10</sup> See Response to Petitioner's Motion for & Declaration Re: Presentation of Orders Pursuant to RAP 7.2, at p. 3. See also *supra*, note 8.

<sup>11</sup> See *supra*, note 8.

motion to enforce. Both the premise and the conclusion of Mr. Kaufman's argument are incorrect.

The trial court's decision to enforce the Decree was correct for three distinct reasons.<sup>12</sup> First, because the Decree did not divide Mr. Kaufman's disability benefits as community property, but rather simply took those benefits into account when determining maintenance, the Decree did not violate federal law, and certainly is not void. Second, even if the maintenance award violated federal law, the Decree was not void, because the trial court had both personal and subject matter jurisdiction.<sup>13</sup> Therefore, the Decree remained binding and enforceable as *res judicata*. Third, even if the trial court initially lacked subject matter jurisdiction, Mr. Kaufman is precluded from now challenging that jurisdiction by *Matter of Marriage of Brown* and the Restatement (Second) of Judgments.<sup>14</sup>

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<sup>12</sup> Consistent with RCW 26.09.070(6), Ms. Kaufman's motion to enforce sought enforcement of *both* the Settlement Agreement and the Decree. CP 118-119. Similarly, the Order can be construed as enforcing both the Settlement Agreement and the Decree. CP 220-224. On appeal, Ms. Kaufman focuses primarily on demonstrating the enforceability of the Decree, because this suffices to establish the propriety of the Order. However, Ms. Kaufman does address issues specific to contract enforcement in Section G (2) below, at p. 43.

<sup>13</sup> See *Marley v. Dep't of Labor & Indus. of State*, 125 Wn.2d 533, 541, 886 P.2d 189, 194 (1994) (superseded by statute on other grounds as stated in *Birrueta v. Dep't of Labor & Indus. of the State of Washington*, 186 Wn.2d 537, 549, 379 P.3d 120, 126 (2016)) (concluding that "a court enters a void order *only when it lacks personal jurisdiction or subject matter jurisdiction over the claim*") (emphasis added).

<sup>14</sup> See *Matter of Marriage of Brown*, 98 Wn.2d 46, 653 P.2d 602 (1982) (adopting Restatement (Second) of Judgments §12, and holding, based on facts very similar to those here, that the parties were precluded from contesting the issue of subject matter jurisdiction). A copy of the

Although reached by a different route, the conclusion remains that the Decree is properly enforceable as *res judicata*.

For any or all of these reasons, this Court should affirm the trial court's grant of the motion to enforce the Decree. In addition, as discussed in more detail in separate sections of this Brief, the Court should affirm the trial court's award of fees to Ms. Kaufman, and also award Ms. Kaufman her reasonable attorney's fees and expenses incurred in this appeal.

**B. This Court should conduct *de novo* review, and may affirm the decision of the trial court without adopting its reasoning.**

In this appeal, Mr. Kaufman does not challenge any facts, either such facts as were found when the trial court issued the Decree in 2008, or as may have been implicitly found by the trial court when it issued the Decision on appeal in 2019.<sup>15</sup> Moreover, Mr. Kaufman has effectively abandoned the argument he made to the trial court that the Decree's maintenance provision should be interpreted as authorizing him to stop paying maintenance.<sup>16</sup> Instead, Mr. Kaufman's only clear argument for

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Restatement (Second) of Judgments § 12 is attached to this Brief as

**Appendix A.**

<sup>15</sup> See, e.g., Appellant's Opening Brief, at p. 4, and pp. 8-36 (assigning no error to any finding of fact, identifying no factual issue, and making no argument about any fact found at any point in the trial court proceedings.

<sup>16</sup> Compare Appellant's Opening Brief, at pp. 8-36 (making no such argument) with CP 145-148 (making this argument to the trial court). If Mr. Kaufman attempts to raise any factual issue about the interpretation of the Decree in his Reply Brief, the Court should hold that he has waived any such issues. See, e.g., RAP 10.4(a) (an opening brief must contain assignments of error); and *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103

reversal of the Decision enforcing the Decree is that the maintenance provision in the Decree was void *ab initio*.

Mr. Kaufman did not bring a CR 60(b)(5) motion below, seeking to vacate the Decree as void. However, this case is now essentially in the same posture as if he had brought such a motion, and the trial court had denied it.<sup>17</sup> Accordingly, this matter is subject to *de novo* review.<sup>18</sup> Even if this Court were to determine that this appeal properly raises issues concerning the construction of the Decree, review of those issues would also be *de novo*.<sup>19</sup> In conducting its *de novo* review, this Court may of course affirm the trial court's decision to enforce the Decree without adopting the trial court's reasons: "where a judgment or order is correct, it

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P.3d 232, 239 (2004) (noting that "without argument or authority to support it, an appellant waives an assignment of error").

<sup>17</sup> Pursuant to RAP 2.5(a)(1), a party may raise lack of trial court jurisdiction for the first time on appeal. *A fortiori*, a party may raise this issue on appeal without having brought a formal CR 60(b)(5) motion in the trial court. *See also* *Timberland Bank v. Mesaros*, 1 Wn. App.2d 602, 606, 406 P.3d 719, 721 (2017) (noting that "a void order may be challenged for the first time on appeal on jurisdictional grounds"). However, as argued below, the scope of this concession is limited by the application of the Restatement (Second) of Judgments § 12.

<sup>18</sup> *See, e.g., Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 195, 312 P.3d 976, 982 (2013) (stating "whether a judgment is void is a question of law that we review *de novo*"); *and Jones v. Giles*, 741 F.2d 245, 247 (9th Cir. 1984) (applying federal law, and holding that "[a] . . . judge has no discretion in determining whether a judgment is void; it either is or it is not. Accordingly, we review *de novo*").

<sup>19</sup> *See, e.g., Chavez v. Chavez*, 80 Wn. App. 432, 435, 909 P.2d 314, *review denied*, 129 Wn.2d 1016, 917 P.2d 576 (1996) (holding that "[c]onstruction of a decree [of divorce] is a question of law").

will not be reversed merely because the trial court gave the wrong reason for its rendition.”<sup>20</sup>

C. The trial court did not err in awarding maintenance in the Decree, and therefore (1) the Decree is not void, and (2) the court did not err by enforcing it.

Federal law establishes two principles crucial to determining whether the trial court’s initial award of maintenance to Ms. Kaufman was in error, let alone void. The first principle is a prohibition: as a matter of federal law, no court may “treat . . . military retirement pay waived by the retiree in order to receive veterans' disability benefits” as “*property divisible upon divorce*.”<sup>21</sup> The second principle is a permission: “a family court . . . remains free to take account of the contingency that some military retirement pay might be waived . . . when it calculates . . . the need for *spousal support*.”<sup>22</sup>

Washington state courts are of course bound by *Mansell*’s prohibition on treating disability payments as “property divisible upon

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<sup>20</sup> *Ertman v. City of Olympia*, 95 Wn.2d 105, 108, 621 P.2d 724, 726 (1980). *See also* RAP 2.5(a) (stating in part that “[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground”).

<sup>21</sup> *Mansell v. Mansell*, 490 U.S. 581, 583, 109 S. Ct. 2023, 2025, 104 L. Ed. 2d 675 (1989) (emphasis added).

<sup>22</sup> *Howell v. Howell*, 137 S. Ct. 1400, 1406, 197 L. Ed. 2d 781 (2017) (citing to *Rose v. Rose*, 481 U.S. 619, 630–634, and n. 6, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987)) (emphasis added). As the citation to *Rose* shows, the permission to consider disability amounts when awarding maintenance is of roughly equal vintage as the prohibition on dividing disability payments as property, since *Rose* was decided two years before *Mansell*.

divorce.”<sup>23</sup> As a matter of state law, Washington courts also take advantage of the federal permission and consider disability payment amounts when deciding whether to award spousal maintenance.<sup>24</sup>

On its face, the Decree at issue here properly followed both federal and state law, giving due scope to both the prohibition and the permission. Neither the Decree nor the Settlement Agreement it incorporates anywhere states that it is treating Mr. Kaufman’s disability payments as community property. The Settlement Agreement does *not* divide the disability payments as property.<sup>25</sup> CP 320-321. Indeed, the disability payments are not mentioned *at all* in subsection “III. Division of Property” of the Settlement Agreement. *Id.*<sup>26</sup> The disability payments are, however, mentioned in the subsection of the Decree and the Settlement Agreement awarding Ms. Kaufman maintenance, but only to indicate the measure of

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<sup>23</sup> *Mansell*, 490 U.S. at 583. *See, e.g., In re Marriage of Kraft*, 119 Wn.2d 438, 444, 832 P.2d 871, 873 (1992) (noting that in *Mansell* “the Court addressed the question whether state courts may treat, as property divisible upon divorce, military retirement pay waived by the retiree in order to receive veterans' disability benefits . . . [and] held that state courts may not do so”).

<sup>24</sup> *See, e.g., In re Marriage of Kraft*, 119 Wn.2d at 447–48 (holding that “when 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”).

<sup>25</sup> *Compare Mansell*, 490 U.S. at 594-95 (holding that federal law “does not grant state courts the power to *treat as property divisible upon divorce* military retirement pay that has been waived to receive veterans' disability benefits”) (emphasis added).

<sup>26</sup> The sections of the Decree dealing with division of property simply incorporate the Settlement Agreement. CP 7, at ¶¶ 3.2-3.3.

the proper maintenance amount: “the husband shall pay the wife in the sum representing 50% of the husband’s U.S. Navy VA waiver/disability.”<sup>27</sup> CP 7, 319. Judging the express terms of the Decree and Settlement Agreement against *Mansell* and *Rose*, the trial court did not err in its award of maintenance to Ms. Kaufman.

Mr. Kaufman appears to believe that if this Court looks beyond the words used in the Decree and the Settlement Agreement, it will somehow be able to tell that the true intent of the parties and the trial court at the time of the Decree was to divide the disability payments as property.<sup>28</sup> It is certainly true that words are malleable, and money fungible, so hypothetically a decree *could* use facially permissible language regarding maintenance to accomplish the impermissible purpose of dividing military disability benefits as property. As this Court put it in *Perkins v. Perkins*, 107 Wn. App. 313, 324, 26 P.3d 989, 994 (2001), the prohibition on treating disability payments as divisible property stated by “*Mansell* cannot be circumvented simply by chanting ‘maintenance.’”

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<sup>27</sup> Compare *Rose*, 481 U.S. at 632 note 6 (reiterating that it was “logical to conclude that Congress ... thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals”). See also *In re Marriage of Kraft*, 119 Wn.2d at 447–48.

<sup>28</sup> See Opening Brief of Appellant, at pp. 14-17. However, because of the paucity of the record on review, and because Mr. Kaufman assigns no error to any findings of fact, it is difficult to see how this Court could properly look beyond the words actually used in the Decree and Settlement Agreement.

However, both the facts and the procedural posture of the Kaufmans' case are readily distinguished from those in *Perkins*. Crucially, in *Perkins*, it was clear from the face of the trial court's decree that it intended to evade the *Mansell* prohibition on treating military disability as property by awarding the non-military spouse "compensatory spousal maintenance":

The wife's community interest in the military retirement is 45% of the *entire* retirement . . . . *The wife should receive 45% of the disability portion (45% times \$482 equals \$216.90). Husband should pay to wife compensatory spousal maintenance in an amount which represents 45% of husband's total monthly compensation for disability. This is in addition to the 45% of the reduced military retirement that she is awarded.*<sup>29</sup>

The Court of Appeals was referring to this and similar passages in the trial court decree when it held that "[t]his was precisely the kind of dollar-for-dollar division and distribution that *Mansell* . . . prohibit[ed]", and that "*Mansell* cannot be circumvented simply by chanting 'maintenance.'"<sup>30</sup>

In this case, by contrast, neither the parties nor the trial court stated that Ms. Kaufman was entitled to a fixed share of the "*entire* retirement," where it was clear from the context that "*entire* retirement" encompassed

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<sup>29</sup> *Perkins*, 107 Wn. App. at 315–16 (quoting trial court decision) (italicized emphasis added by Court of Appeals) (underlined emphasis added). The trial court in *Perkins* also noted that "[b]oth the husband and wife suffered substantial injuries from the accident," a statement which lends further support to the view that the trial court believed wife had a vested interest in the disability payments. *Id.* at 316.

<sup>30</sup> *Id.*, at 324.

disability payments (“the disability portion”).<sup>31</sup> It is telling that when Mr. Kaufman purports to quote the *Perkins* decree at length, he omits the word “entire,” despite the fact that the Court of Appeals chose to italicize it.<sup>32</sup> Moreover, there is no reference to “*compensatory* spousal maintenance” in the Kaufman Decree or Settlement Agreement. There is thus no evidence on the face of the Decree of any intent to evade the *Mansell* prohibition, and no evidence from the context which would support imputing such an intent to the trial court.<sup>33</sup>

The procedural posture of this case at the time the Decree was entered was also significantly different from that confronting this Court *Perkins*. In *Perkins*, the trial court entered a decree of dissolution after a

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<sup>31</sup> Compare *Perkins*, 107 Wn. App. at 315-316 (the source of the quotes in the sentence attached to this footnote), with CP 7-8 (maintenance provision in the Decree) and CP 319-20 (distinct maintenance and division of property sections in Settlement Agreement).

<sup>32</sup> This happens twice. See Appellant’s Opening Brief, at p. 15 (third block paragraph from top of page) and p. 17 (third line from top on the left) (both using ellipsis to omit “entire”), with *Perkins*, 107 Wn. App. at 315

<sup>33</sup> The Kaufman Decree and Settlement Agreement are also clearly distinguishable from those at issue in *Mattson v. Mattson*, 903 N.W.2d 233 (Minn. Ct. App. 2017), review denied (Dec. 27, 2017). In *Mattson*, “the disability provision in the parties’ decree was unambiguously a property division. The parties’ decree specifically reserved the issue of spousal maintenance. It would be contradictory to both award and reserve maintenance” *Id.* at 240, note 7 (emphasis added). See also *id.* at 236 (framing the issue on appeal as whether disability pay could be divided as marital property). Thus, *Mattson* at least implicitly supports Ms. Kaufman’s position that the Decree and Settlement Agreement here properly complied with the *Mansell* prohibition. Compare Appellant’s Opening Brief at pp. 10-11.

bench trial.<sup>34</sup> As a result, in awarding maintenance it was bound to consider the factors listed in RCW 26.09.090.<sup>35</sup> The *Perkins*' trial court's failure to consider those factors—or to at least refer to them in explaining its award of “compensatory maintenance”—contributed to this Court's decision to reverse and remand.<sup>36</sup>

Here, by contrast, the Kaufmans presented the trial court with a Settlement Agreement which separately resolved both maintenance and property division issues. Under Washington law, “amicable agreements are preferred to adversarial resolution of property and maintenance questions . . . and the separation contract is binding upon the court unless

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<sup>34</sup> *Perkins*, 107 Wn. App. at 316 and note 2.

<sup>35</sup> RCW 26.09.090 states in pertinent part:

In a proceeding for dissolution of marriage . . . the court may grant a maintenance order for either spouse or either domestic partner . . . in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors . . . .

Some of the factors the court must consider include: the post-dissolution financial resources of the parties; their abilities to meet their needs independently; the duration of the marriage; the standard of living they established during their marriage; their ages, health and financial obligations; and the ability of one spouse to pay maintenance to the other. *See, e.g., In re Marriage of Williams*, 84 Wn. App. 263, 267–68, 927 P.2d 679, 681 (1996). The court's paramount concern in evaluating these factors is the economic condition in which the dissolution decree leaves the parties. *Id.*

<sup>36</sup> *See Perkins*, 107 Wn. App. at 327 (stating that “[n]othing said herein means that on remand the trial court may not award maintenance after considering the existence of an *undivided* disability pension as one factor (among many) bearing on the husband's ability to pay, and after entering proper findings of fact under RCW 26.09.090”) (emphasis in original).

it finds that the contract was unfair at the time of its execution.”<sup>37</sup>

Moreover, a party challenging a separation agreement as unfair at execution “must make such a challenge *before* the trial court's approval and entry of the decree.”<sup>38</sup> Any later challenge to its fairness at execution is time-barred.<sup>39</sup>

Both Mr. Kaufman and Ms. Kaufman signed the Settlement Agreement. CP 327. Both were represented by counsel during its negotiation (indeed, Mr. Kaufman was represented by the same attorney who is representing him in this appeal). CP 318, at line 22. The trial judge may well have thought it normal that at the conclusion of their 22-year marriage, the Kaufmans agreed that it was just and equitable to apportion roughly 50 percent of their anticipated future resources to each other.<sup>40</sup>

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<sup>37</sup> *Little v. Little*, 96 Wn.2d 183, 193, 634 P.2d 498, 504 (1981). *See also* RCW 26.09.070(3).

<sup>38</sup> *In re Marriage of Hulscher*, 143 Wn. App. 708, 717, 180 P.3d 199, 203 (2008) (citing *In re Marriage of Glass*, 67 Wn. App. 378, 390, 835 P.2d 1054 (1992)).

<sup>39</sup> *Id.* *See also Matter of Marriage of Gravelle*, 194 Wn. App. 1051, 2016 WL 3742162 at \*6 (unpublished). Although accurate statements of the law, Ms. Kaufman does not understand the limits on a challenge to the *fairness* of a family law settlement agreement stated in this paragraph to override the principle that a *void* decree can be challenged at any time. The issue of the alleged voidness of the Decree is discussed below, in Section D. But the authorities cited in footnotes 37 through 39 strongly support the claim that any other type of error (other than voidness) allegedly afflicting the Decree has been waived or is barred.

<sup>40</sup> *See, e.g., Matter of Marriage of Gravelle*, 194 Wn. App. 1051, 2016 WL 3742162 at \* 9 (unpublished) (noting that “[i]t is unsurprising that at the conclusion of their marriage of almost 29 years, the Gravelles' agreement as to what was just and equitable led them to apportion roughly 50 percent of their resources to each other”).

There was no apparent reason—at least no reason evidenced in the record now on appeal—for the trial judge to look behind the Settlement Agreement in an effort to discern if it was really intended to evade the *Mansell* prohibition to the detriment of Mr. Kaufman. Nor has Ms. Kaufman found any published Washington authority requiring a trial court to consider the factors set forth in RCW 26.09.090 if the parties have signed an agreement regarding maintenance, and the spirit of the law appears to be to the contrary.<sup>41</sup>

The bottom line is that the Decree here was facially compliant with *Mansell's* prohibition on treating disability payments as “*property divisible upon divorce*.”<sup>42</sup> This case is readily distinguishable—on both factual and procedural grounds—from *Perkins*, the case in which this court held that “*Mansell* cannot be circumvented simply by chanting ‘maintenance.’”<sup>43</sup> Accordingly, Mr. Kaufman has offered no valid argument for his assertion that the initial award of maintenance in the Decree was made in contravention of *Mansell* or other federal law. And

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<sup>41</sup> In *Kinne v. Kinne*, 82 Wn.2d 360, 363, 510 P.2d 814 (1973) the Washington State Supreme Court noted that “nothing in law, public policy or reason prohibits a former spouse from voluntarily and formally obligating himself or herself to do more than the law requires in providing support for a former spouse”). See also *Matter of Marriage of Gravelle*, 194 Wn. App. 1051, 2016 WL 3742162 at \* 9 (unpublished) (stating, in a case where there was a settlement agreement, that “[s]ince the 2009 decree found no unfairness and stated the parties' provisions for maintenance ‘should be approved,’ . . . there was no need for the court to grant a maintenance order under RCW 26.09.090(1)”).

<sup>42</sup> *Mansell*, 490 U.S. at 583 (emphasis added).

<sup>43</sup> *Perkins*, 107 Wn. App. at 324.

since violation of federal law is the only error alleged by Mr. Kaufman, it follows that the Decree was not *even* erroneous, and certainly not void. Finally, it also follows that the trial court did not err in 2019 by granting Ms. Kaufman’s motion to enforce the Decree’s maintenance provisions. Thus, if the Court accepts these arguments, it may affirm the decision on appeal without reaching the hypothetical issue of whether a decree entered in violation of *Mansell* is void, or merely voidable.<sup>44</sup>

**D.** Even if the trial court did err in awarding maintenance in the Decree, the Decree is not void, because the trial court had both personal and subject matter jurisdiction.

Even if the trial court initially erred by implicitly treating Mr. Kaufman’s disability as “property divisible upon divorce,” the Decree is not void.<sup>45</sup> Mr. Kaufman’s argument to the contrary rests on the following purported syllogism:

1. The Decree treats Mr. Kaufman’s military disability payments as property divisible upon divorce;
2. Under Washington state law, a state court decision entered without “the inherent power to make or enter the particular order involved” is void, and not merely voidable;
3. *Mansell* and its progeny strip state courts of their “inherent power” to treat military disability payments as property divisible upon divorce;

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<sup>44</sup> If the Court reaches this conclusion, this case will be resolved in a manner similar to that of *Matter of Marriage of Gravelle*, 194 Wn. App. 1051, 2016 WL 3742162 at \* 9 (unpublished) (choosing “not to reach the parties' debate over whether, if a decree divides veterans' disability benefits, it is void or only voidable”).

<sup>45</sup> *Mansell*, 490 U.S. at 583.

4. Therefore, the Decree in this case is void (and the Decision enforcing it erroneous).<sup>46</sup>

In Section C above, Ms. Kaufman showed that premise (1) is incorrect.<sup>47</sup>

As demonstrated below, the remainder of the purported syllogism also fails, because nothing in either Washington state law or federal law strips Washington superior courts of their subject matter jurisdiction over matters of divorce and maintenance. Because “a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim,” and because the trial court here had both personal and subject matter jurisdiction, the Decree is not void.<sup>48</sup>

1. *Dike v. Dike* has been clarified by the Washington State Supreme Court, and “a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim.”<sup>49</sup>

In the Decision on appeal, the trial court relied on the recent decision of the Alaska Supreme Court in *Gross v. Wilson*, 424 P.3d 390 (2018). CP 223-224. A key part of the holding in *Gross* is that

[a] judgment is not void merely because it is erroneous. Thus, even if the divorce decree was erroneous as a matter of federal law by including payment to [ex-wife] for the amount of [ex-husband’s military] disability benefits, the judgment might have been voidable if properly challenged, but it would not be void absent a lack of subject matter

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<sup>46</sup> See Appellant’s Opening Brief, at pp. 11-13, 17-18, and 27-30.

<sup>47</sup> To repeat, if the Court accepts Ms. Kaufman’s argument in Section C above, it may affirm on that basis alone, and need not proceed to consider either the argument about *res judicata* developed below or the argument about preclusion based on Restatement (Second) of Judgments § 12 presented in Section III E.

<sup>48</sup> *Marley*, 125 Wn.2d at 41 (italicized emphasis added).

<sup>49</sup> *Id.*

jurisdiction or a violation of due process.<sup>50</sup>

The *Gross* court further held that there was “no indication in the record” before it of any lack of subject matter jurisdiction or violation of due process.<sup>51</sup> Therefore, the decree at issue in that case was not void.<sup>52</sup>

Mr. Kaufman—who neither below nor on appeal denies that the trial court had *personal* jurisdiction—attempts to distinguish this part of *Gross* by claiming that there is a material difference between how Alaska law and Washington law define a “void” judgment.<sup>53</sup> To support this proposition, Mr. Kaufman cites to the following passage from *State ex rel. Turner v. Briggs*, 94 Wn. App. 299, 971 P.2d 581 (1999):

A void judgment is a “judgment, decree or order entered by a court which lacks jurisdiction of the parties or of the subject matter, *or which lacks the inherent power to make or enter the particular order involved....*”<sup>54</sup>

Mr. Kaufman proceeds to argue that because a lack of “inherent power to make or enter [a] particular order”—and not just a lack of personal or subject matter jurisdiction, as is true in Alaska—can render an order void in Washington, a Washington court confronting the facts of *Gross* would

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<sup>50</sup> *Gross*, 424 P.3d at 397.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Appellant’s Opening Brief, at pp. 11-13, 17-18, and 27-30.

<sup>54</sup> *Turner v. Briggs*, 94 Wn. App. at 302–03 (emphasis added). As Mr. Kaufman acknowledges, the material quoted in this excerpt from *Turner v. Briggs* comes from *Dike v. Dike*, 75 Wn.2d 1, 7, 448 P.2d 490 (1968) (itself quoting *Robertson v. Commonwealth of Virginia*, 181 Va. 520, 25 S.E.2d 352, 358 (1943)). See Appellant’s Opening Brief, at p. 12, note 36.

have had to declare decree at issue there to be void.<sup>55</sup> The clear implication is that the Kaufman Decree is void.<sup>56</sup>

Unfortunately for Mr. Kaufman, his reading of *Dike v. Dike*—to the effect that “lack[ of] the inherent power to make or enter [an] . . . order” is something *different from* a lack of subject matter jurisdiction—has been expressly rejected by this state’s Supreme Court in *Marley v. Dep’t of Labor & Indus. of State*, 125 Wn.2d 533, 886 P.2d 189, 194 (1994):

In *Dike v. Dike*, 75 Wash.2d 1, 448 P.2d 490 (1968), this court adopted a 3–part test to determine whether a court’s order is void.

“[W]here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt.”

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Although the test in *Dike* contains an additional element, it does not differ substantially from that advocated by the

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<sup>55</sup> Appellant’s Opening Brief, at p. 13. In his Appellant’s Opening Brief, Mr. Kaufman *nowhere* asserts that the trial court lacked subject matter jurisdiction to enter the Decree. Instead, he argues that the Decree was void for lack of *something other than* either personal or subject matter jurisdiction. This argument is new on appeal. Compare CP 151 at lines 15-18 (Mr. Kaufman’s trial court submission opposing the motion to enforce, asserting that the trial court did lack subject matter jurisdiction), with Appellant’s Opening Brief, at pp. 11-13. This argument is also at least an implicit concession of subject matter jurisdiction. The consequences of this concession are discussed below, at pp. 24-25.

<sup>56</sup> Mr. Kaufman states that “[i]n Washington, the division of Mr. Gross’s disability pay would have been a ‘void’ decision. The trial court erred in relying on *Gross* to make its decision.” Appellant’s Opening Brief, at p. 13. For this purported “error” to support reversal, however, Mr. Kaufman would have to show that *the Kaufman Decree* is void. Mr. Kaufman tries to close the loop, and makes this final necessary part of his argument, at pp. 17-18 of his Appellant’s Opening Brief.

Restatement. **The third element—the inherent power to enter the order—is a subset of subject matter jurisdiction, adopted by this court to account for the unique qualities of contempt orders.**

...  
Because the test in *Dike* does not differ in substance from that in the Restatement, we adopt the definition of a valid order set forth in the Restatement (Second) of Judgments § 1 (1982). **We also conclude that a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim.**<sup>57</sup>

Because *Marley's* conclusion that “a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim” has never been questioned or overruled by the State Supreme Court, it is binding on this Court in this appeal.<sup>58</sup>

If Mr. Kaufman could be held to his recent implicit concession that the trial court had subject matter jurisdiction at the time it entered the Decree, *Marley's* conclusion would be fatal to his appeal.<sup>59</sup> The Decree would not be void, and the decision to enforce it would be a proper

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<sup>57</sup> *Marley*, 125 Wn.2d at 538–41 (superseded by statute on other grounds as stated in *Birrueta v. Dep't of Labor & Indus. of the State of Washington*, 186 Wn.2d 537, 549, 379 P.3d 120, 126 (2016)) (emphasis added). Copies of Restatement (Second) of Judgments § 1 and § 11 (which is referenced and incorporated in § 1 as adopted by *Marley*) are attached to this Brief as **Appendices B** and **C**, respectively.

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> There is no suggestion anywhere in the record, or in Appellant's Opening Brief, that the trial court lacked *personal* jurisdiction over Mr. Kaufman. In the trial court's Findings of Fact and Conclusions of Law, entered at the same time as the Decree, the trial court expressly found personal jurisdiction over Mr. Kaufman. CP 2. This unchallenged finding of fact regarding *personal jurisdiction* is thus a verity on this appeal. *See, e.g., Mills v. W. Washington Univ.*, 170 Wn.2d 903, 906 note 1, 246 P.3d 1254 (2011) (unchallenged findings of fact are verities on appeal).

application of *res judicata*.<sup>60</sup> However, since subject matter jurisdiction usually cannot be established by consent or created by waiver, the argument to this point *may* not show that the trial court in fact had subject matter jurisdiction.<sup>61</sup> But it does show that Mr. Kaufman’s reasons for asserting that the Decree is void are incorrect, even if the Decree were entered in error.<sup>62</sup>

2. Overwhelming authority from both Washington and other states supports the conclusions that the trial court here had subject matter jurisdiction to enter the maintenance provision in the Decree, and that the Decree is therefore not void.

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<sup>60</sup> The elements and implications of *res judicata* are discussed in more detail below, at pp. 39-42.

<sup>61</sup> The impact of Mr. Kaufman’s first concession of subject matter jurisdiction, occurring in 2008 when he stipulated to entry of the Decree, is discussed separately below at pp. 35-39.

<sup>62</sup> Another reason why Mr. Kaufman’s argument for voidness fails is that he engages in a sleight-of-hand moving from the actual text of *Perkins* to the implication that *Perkins* holds that trial courts lack the “inherent power” to divide disability payments. *See* Appellant’s Opening Brief, at pp. 14-18 (concluding by transitioning from a discussion of *Perkins* to repeating the claim that “[w]here a court . . . lacks the inherent power to make or enter the particular order, its judgment is void”). In fact, the *Perkins* court did not confront any issue of *res judicata*, made no holding about the trial court’s subject matter jurisdiction, and nowhere states that a trial court “lacks the inherent power” to divide disability payments. *See Perkins v. Perkins*, 107 Wn. App. 313, 26 P.3d 989 (2001). *Perkins* does quote *Mansell* to the effect that the USFSPA “does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans’ disability benefits,” but this is not a statement about a state court’s “inherent power[s].” *Id.* at 321 (quoting *Mansell*, 490 U.S. at 594–95, 109 S.Ct. 2023). As discussed below at pp. 31-35, the *Mansell* court itself clearly did not regard this as a statement about the subject matter jurisdiction of state courts.

Quite apart from Mr. Kaufman’s recent concession of subject matter jurisdiction, the *Marley* decision and other state-law authorities overwhelmingly support the conclusion that the trial court here did have subject matter jurisdiction to enter the Decree, and that therefore no part of the Decree was void.

In Washington, Superior courts are granted broad original subject matter jurisdiction by Wash. Const. art. IV, § 6.<sup>63</sup> Specifically included in this grant is jurisdiction over “all matters . . . of divorce.”<sup>64</sup> Exceptions to this broad jurisdictional grant “are to be narrowly construed.”<sup>65</sup> Crucially, “[i]f the *type of controversy* is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.”<sup>66</sup> Here, the controversy about the Decree and the specific issue of maintenance are clearly of the “type” committed to superior court’s jurisdiction with regard to “all matters . . . of divorce.”<sup>67</sup> The trial court had subject matter jurisdiction, and therefore the Decree was not void.

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<sup>63</sup> See, e.g., *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 206, 258 P.3d 70, 74 (2011).

<sup>64</sup> Wa. Const. art. IV, § 6.

<sup>65</sup> *Cole*, 163 Wn. App. at 206.

<sup>66</sup> *Cole*, 163 Wn. App. at 209 (citing to *Marley*, 125 Wn.2d at 539) (emphasis added).

<sup>67</sup> See *Marley*, 125 Wn.2d at 539 (asserting that the “focus must be on the words ‘type of controversy’”) (citing to Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, 1988 B.Y.U.L.Rev. 1, 28). See also Wa. Const. art. IV, § 6.

Abundant other Washington authorities support the conclusion that the trial court here had subject matter jurisdiction to issue the maintenance provision in the Decree. Perhaps the most relevant of these authorities is *Matter of Marriage of Brown*, 98 Wn.2d 46, 653 P.2d 602 (1982), where the State Supreme Court agreed that a division of military retirement pay at odds with the decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) “*should be regarded as an error of law rather than a lack of subject matter jurisdiction.*”<sup>68</sup> But many other Washington cases also give Ms. Kaufman’s position substantial support.

For example, in *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996), the State Supreme Court summarized and applied *Marley* as follows:

The distinction between a decision which exceeds jurisdiction and one which exceeds statutory authority was recently discussed by this court in the context of a worker's

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<sup>68</sup> *Marriage of Brown*, 98 Wn.2d at 48 (emphasis added). Ms. Kaufman acknowledges that *Marriage of Brown* could support a counterargument, which might go something like this: “*Marriage of Brown* focused explicitly on ‘*pre-McCarty* retired pay division[s].’ 98 Wn.2d at 48 (emphasis added). By saying that *pre-McCarty* erroneous decisions were not void, it was implicitly stating that *post-McCarty* erroneous decisions would be void. If *post-McCarty* erroneous decisions are void, so, too, should be *post-Mansell* erroneous decisions, such as the one [allegedly] at issue here.” Clearly, however, *Marriage of Brown* did not hold that any *post-McCarty* erroneous decision would be void. And the fact that *Marriage of Brown* considered it to be relevant to its discussion of subject matter jurisdiction that “there is nothing in *McCarty* which prevents state courts from considering [retirement pay] as a factor within the totality of circumstances surrounding dissolution” strongly supports the inference that the Supreme Court did not see *McCarty* as impinging on state court subject matter jurisdiction, either in the past or in the future. *Id.*, at p. 49.

compensation award. *Marley v. Department of Labor* 125 Wash.2d 533, 886 P.2d 189 (1994). In *Marley*, the court rejected the argument that an order outside the relevant statutory mandate is void, reasoning that such an analysis transforms mistakes as to statutory construction, *i.e.*, errors of law, into jurisdictional issues. *Id.* at 541, 886 P.2d 189. The court said that a court has subject matter jurisdiction where the court has the authority to adjudicate the *type of controversy* in the action, and that it does not lose subject matter jurisdiction merely by interpreting the law erroneously. *Id.* at 539, (citing and quoting Restatement (Second) of Judgments § 11 (1982)).<sup>69</sup>

Moreover, Washington law is clear that “appellate courts should ‘use caution when asked to characterize an issue as ‘jurisdictional’ or a judgment as ‘void.’”<sup>70</sup> The consequences of a court acting without subject matter jurisdiction are “draconian and absolute.”<sup>71</sup> This is because “[a] void judgment may be vacated at any time”—even, potentially, in a case like this, ten years after Mr. Kaufman and his current counsel stipulated to the entry of the judgment at issue.<sup>72</sup> Thus, all of the policy reasons favoring finality of judgments join with the clear text of the state

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<sup>69</sup> *Moen*, 129 Wn.2d at 545. See also *In re Smalls*, 182 Wn. App. 381, 387–88, 335 P.3d 949, 952 (2014) (stating that “[a] court does not lack subject matter jurisdiction merely because it may lack authority to enter a given order”).

<sup>70</sup> *In re Marriage of McDermott*, 175 Wn. App. 467, 479–80, 307 P.3d 717, (2013).

<sup>71</sup> *Id.* at 479 (citing to *Cole*, 163 Wn. App. at 205, 258 P.3d 70).

<sup>72</sup> See *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 325, 877 P.2d 724, 728 (1994). See also CP 9 (showing Mr. Kaufman’s current counsel’s signature on the Decree which Mr. Kaufman now claims was void *ab initio*). The principle that a void judgment may be vacated at any time is subject to the qualification articulated in the Restatement (Second) of Judgments § 12 (1982), as discussed below at pp. 35-39. A copy of the Restatement (Second) of Judgments § 12 is attached to this Brief as **Appendix A.**

Constitution, logic, and the cited precedent in supporting the conclusion that the trial court here had subject matter jurisdiction, and that the Decree was not void.<sup>73</sup>

State law authority from outside Washington also strongly supports the view that the *Mansell* prohibition does not strip state courts of subject matter jurisdiction to enter what may be erroneous decisions regarding disability benefits. The Alaska Supreme Court provided a useful summary of the “majority rule” on this issue, in a footnote to *Gross* which Mr. Kaufman appears to have overlooked:

In *Cline v. Cline*, we stated that “the USFSPA bars state courts from exercising subject matter jurisdiction over more than fifty percent of a recipient's military retirement benefits.” But . . . *Cline* is . . . inconsistent with our general understanding of subject matter jurisdiction, which we have defined as “the legal authority of a court to hear and decide a particular type of case.” In short, a court either has subject matter jurisdiction and can hear the case, or it does not and cannot. *Cline*'s suggestion that a state court can hear a divorce case but has subject matter jurisdiction over only some of the relevant assets is an anomaly in our jurisdiction jurisprudence.

**A majority of state courts that have addressed the issue treat the USFSPA and *Mansell* as a rule of substantive federal law, and not a jurisdictional matter. See Brett Turner, 2 Equitable Distribution of Property § 6:6 & n.21 (3d ed. Nov. 2017 update) (citing cases from California, North Carolina, Pennsylvania, South**

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<sup>73</sup>See Restatement (Second) of Judgments § 12 (1982), comments a-c (analyzing some of the trade-offs between finality and validity). See also *Shoop v. Kittitas Cty.*, 108 Wn. App. 388, 396, 30 P.3d 529, 533 (2001), *aff'd on other grounds*, 149 Wn.2d 29, 65 P.3d 1194 (2003) (noting that “[b]y creating a trial court with subject matter jurisdiction that cannot be whittled away by statutes, the [state] constitution provides the foundation for an independent and coequal judicial branch of state government”) (emphasis added).

**Carolina, and Virginia). For the reasons discussed here, we adopt this majority rule, and disavow *Cline's* holding that the USFSPA and *Mansell* affect the subject matter jurisdiction of state courts.<sup>74</sup>**

Two recent decisions from appellate courts of other states coming to the same conclusion are briefly surveyed in the footnote to this sentence, and a copy of Brett Turner, *2 Equitable Distribution of Property* § 6:6 (4<sup>th</sup> ed. 2019) is attached as **Appendix D** to this Brief.<sup>75</sup>

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<sup>74</sup> *Gross*, 424 P.3d at 398 and note 34 (internal citations omitted, bold emphasis added).

<sup>75</sup> See *Edwards v. Edwards*, 19A-DR-509, 2019 WL 3436971, at \*1–3 (Ind. Ct. App. July 31, 2019) (considering challenge to enforcement of divorce decree which had arguably treated military disability pay as divisible property, and holding that “the trial court unquestionably had subject matter jurisdiction to entertain issues related to the civil matter of the division of Edwards' and Valerie's assets pursuant to a dissolution proceeding. Whether the trial court applied the correct law in this case, be it federal or state law, is a question of legal error, not a question of subject matter jurisdiction”); and *Matter of Marriage of Williams*, 307 Kan. 960, 970-71, 417 P.3d 1033, 1042 (2018) (concluding that “as to subject matter, Kansas district courts are courts of ‘competent jurisdiction’ under the USFSPA and the USFSPA does not limit, but rather recognizes, that subject-matter jurisdiction”). But see *Matter of Marriage of Babin*, 56 Kan. App. 2d 709, 713, 719, 437 P.3d 985, 988, 991 (2019) (asserting that “[t]he matter of division of military pay is an issue of federal preemption and jurisdiction,” and concluding that “military disability compensation is not among the military benefits that may be divided as marital property, and the district court lacked jurisdiction to enforce such a division of property”) (emphasis added). *Babin* concerned a timely appeal of the entry of a decree, and thus was not confronted with the issue of *res judicata*. *Id.* at 713. It also nowhere cites *Matter of Marriage of Williams*, 307 Kan 960 (2018). In light of the Kansas Supreme Court’s endorsement of the view that “*Mansell* and the subsequent proceedings eliminate ‘any remaining possibility that the holdings in *McCarty* and *Mansell* are rules of subject matter jurisdiction,’” *Babin* appears to have been wrongly decided (or at least incorrectly worded) as a matter of Kansas law. See *Matter of Marriage of Williams*, 307 Kan. at 976. But see also *Mattson v. Mattson*, 903 N.W.2d 233, 241 (Minn. Ct. App. 2017), review

3. The U.S. Supreme Court’s decision in *Mansell*, and the subsequent history of that case, indicate that the USFSPA was not intended to strip state courts of subject matter jurisdiction.

The text of the U.S. Supreme Court’s decision in *Mansell* and the subsequent history of that case provide compelling evidence that the USFSPA is not intended to strip state courts of any sort of subject matter jurisdiction. The overheated argument in Appellant’s Opening Brief concerning footnote 5 to *Mansell* cannot obscure the fact that this footnote—understood in context—is devastating to Mr. Kaufman’s position in this appeal.<sup>76</sup>

Footnote 5 to *Mansell* states as follows:

In a supplemental brief, Mrs. Mansell argues that the doctrine of *res judicata* should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. 5 Civ. No. F002872 (Jan. 30, 1987). **Whether the doctrine of *res judicata*, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction.** The federal question is therefore properly before us.<sup>77</sup>

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*denied* (Dec. 27, 2017) (rejecting a *res judicata* argument and holding a decree in violation of *Mansell* and *Howell* to be “simply unenforceable”). Ms. Kaufman submits that on this issue, *Mattson* would have been decided differently under Washington law, particularly under *Matter of Marriage of Brown*, 98 Wn.2d 46, 653 P.2d 602 (1982) and the Restatement (Second) of Judgments § 12, as discussed below at pp. 35-39.

<sup>76</sup> See Appellant’s Opening Brief, at p. 30 (asserting, with no argument or analysis whatsoever, that it is “an egregious mischaracterization” of *Mansell*’s footnote 5 to see in it a recognition that “even erroneous rulings may be enforced through *res judicata*”).

<sup>77</sup> *Mansell*, 490 U.S. at 587, note 5 (bold and italicized emphasis added).

Thus, the U.S. Supreme Court, armed though it was with both the text of USFSPA and the Constitutional mandate of the Supremacy Clause, nonetheless asserted that *it had no jurisdiction to decide the res judicata effect of the California judgment before it*. The Supreme Court would not and could not have said this if it believed that the USFSPA was intended to affect the scope of state court subject matter jurisdiction in divorce proceedings.<sup>78</sup>

The subsequent history of *Mansell* bears out this reading of footnote 5.<sup>79</sup> The U.S. Supreme Court remanded *Mansell* to the California state court “for further proceedings not inconsistent with this opinion.”<sup>80</sup> The California state court responded by affirming the original trial court decision which had refused to relieve Mr. Mansell of his obligation to pay Ms. Mansell one-half of his military disability pay, on the grounds that the initial decree was *res judicata*.<sup>81</sup>

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<sup>78</sup> See, e.g., *Matter of Marriage of Williams*, 307 Kan. 960, 975–76, 417 P.3d 1033, 1044 (2018) (noting that the U.S. Supreme Court in *Mansell* stated “in a footnote that there remained a possibility the judgment could not be reversed under California state law of res judicata. . . . [and that] [b]y acknowledging this possibility, the Supreme Court implicitly recognized the USFSPA did not limit state court subject-matter jurisdiction; if the Act had the effect of depriving a state court of subject-matter jurisdiction, then res judicata would not protect the judgment”).

<sup>79</sup> As the Kansas Supreme Court mentioned in *Williams*, on remand “[t]he California state court walked through the door opened by [*Mansell’s*] footnote 5.” *Williams*, 307 Kan. at 976.

<sup>80</sup> *Mansell*, 490 U.S. at 595.

<sup>81</sup> *In re Marriage of Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227 (Cal. Ct. App. 1989) (hereinafter referenced as “*Mansell II*”).

In justifying its decision, the California court emphasized the distinction between federal “preemption occurring when a congressional enactment expressly or impliedly prohibits the states’ exercise of jurisdiction over certain subject matter,” and “that type of superseding which occurs where state law and federal law are so inconsistent that state law must ‘give way’ because it impedes the accomplishment and execution of Congress’ full purposes and objectives.”<sup>82</sup> The court continued its analysis as follows:

The distinction between the two types of preemption is significant. Where Congress exercises its plenary power to deprive state courts of jurisdiction over a particular subject, state court judgments purporting to exercise jurisdiction over the preempted subject are ‘nullities and vulnerable collaterally.’ Where, as in *McCarty*, a court interprets Congress’ actions as ‘superseding’ or ‘overriding’ state law, this judicial finding of conflict does not necessarily imply a withholding of subject matter jurisdiction, although the enforcement of conflicting state judgments may be avoided by direct appeal.<sup>83</sup>

The court then concluded that “no withholding of subject matter jurisdiction, express or implied, could be found” in *either McCarty or Mansell*.<sup>84</sup> Specifically, the court held that “to the extent that *Mansell v.*

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<sup>82</sup> *Mansell II*, 265 Cal. Rptr. at 232.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* The reasoning and the wording of the California Court of Appeals here—like that of the Kansas Supreme Court in *Matter of Marriage of Williams*, 307 Kan. 960, 975–76, 417 P.3d 1033, 1044 (2018) (discussed *supra* at note 74)—undermines any claim that the focus of *Mansell* footnote 5 on “*pre-McCarty* settlements” supports an argument that *post-McCarty*, or *post-Mansell*, state court decisions in violation of the USFSPA are void. See also *In re Marriage of Hayes*, 228 Or. App. 555, 566, 208 P.3d 1046, 1053 (2009) (stating, with no restriction as to time, that “the enforcement of the terms of a property settlement agreement that

*Mansell* is law of the case herein, it has no impact on the question of subject matter jurisdiction.”<sup>85</sup>

The final piece of the puzzle regarding the U.S. Supreme Court’s understanding of the jurisdictional impact of the USFSPA and *Mansell* is provided by the fact that Mr. Mansell appealed the decision in *Mansell II* to the U.S. Supreme Court, which denied review.<sup>86</sup> As explained in detail in by the Kansas Supreme Court in *Williams*, the U.S. Supreme Court’s words and actions thus combine to “eliminate any remaining possibility that the holdings in *McCarty* and *Mansell* are rules of subject matter jurisdiction.”<sup>87</sup>

Because the U.S. Supreme Court does not understand the USFSPA as depriving state courts of subject matter jurisdiction in divorce cases,

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has been reduced to judgment is entirely consistent with the Supreme Court’s conclusion in *Mansell* that an analogous issue—whether the doctrine of *res judicata* prevents a property settlement from being reopened—presents a ‘matter of state law over which [the Supreme Court has] no jurisdiction’”).

<sup>85</sup> *Mansell II*, 265 Cal. Rptr. at 232.

<sup>86</sup> *Mansell v. Mansell*, 498 U.S. 806, 111 S. Ct. 237, 112 L. Ed. 2d 197 (1990).

<sup>87</sup> *Matter of Marriage of Williams*, 307 Kan. at 976 (citing to 2 Turner, Equitable Division § 6:6. See also *White v. White*, 731 F.2d 1440, 1442–43 (9th Cir. 1984) (noting that the U.S. Supreme Court’s earlier dismissal of the appeal from *In re Marriage of Sheldon*, 124 Cal.App.3d 371, 177 Cal.Rptr. 380 (1981) for want of a substantial federal question “operate[d] as a decision on the merits on the challenges presented in the statement of jurisdiction,” which included the issue of whether “federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law?”).

because the Washington state Constitution grants superior courts jurisdiction over “all matters . . . of divorce,” and because Washington law is clear that “appellate courts should use caution when asked to characterize an issue as ‘jurisdictional,’” this Court should conclude that the trial court here had subject matter jurisdiction to enter the Decree.<sup>88</sup> Because the trial court also indisputably had personal jurisdiction over the parties, *even if the Decree was entered in error*, it was not void.<sup>89</sup>

**E. Even if the trial court initially lacked subject matter jurisdiction, application of the Restatement (Second) of Judgments § 12 precludes Mr. Kaufman from relitigating that issue.**

As discussed above at page 27, in *Matter of Marriage of Brown*, 98 Wn.2d 46, 653 P.2d 602 (1982), this state’s Supreme Court agreed that a division of military retirement pay at odds with the decision in *McCarty* “should be regarded as an error of law rather than a lack of subject matter jurisdiction.”<sup>90</sup> This strongly supports the conclusion that the trial court here had subject matter jurisdiction to enter the Decree, even if the Decree were at odds with *Mansell*. But the State Supreme Court in *Matter of Marriage of Brown* also offered an alternative basis for refusing to re-open

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<sup>88</sup> *In re Marriage of McDermott*, 175 Wn. App. at 479–80.

It may be useful to again emphasize that this argument does not depend on Mr. Kaufman having recently conceded subject matter jurisdiction. However, the fact that Mr. Kaufman *has* conceded subject matter jurisdiction in Appellant’s Opening Brief is a factor that should strengthen this Court’s confidence that subject matter jurisdiction exists.

<sup>89</sup> See *Marley, Marley* 125 Wn.2d at 541.

<sup>90</sup> *Marriage of Brown*, 98 Wn.2d at 48 (emphasis added).

the judgments before it: “*the parties are precluded from contesting the issue of subject matter jurisdiction before the court.*”<sup>91</sup> Precisely the same argument applies here, as well, so even if the trial court initially lacked jurisdiction to enter the Decree, Mr. Kaufman is now precluded from contesting jurisdiction.<sup>92</sup>

This result follows from our state Supreme Court’s adoption of the Restatement (Second) of Judgments § 12 (1982).<sup>93</sup> That section of the Restatement reads as follows:

When a court has rendered a judgment in a contested action, *the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation* except if:

- (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
- (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of

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<sup>91</sup> *Matter of Marriage of Brown*, 98 Wn.2d at 50.

<sup>92</sup> The underlying doctrine here is briefly explained in 14A Wash. Prac., Civil Procedure § 35:22 (3d ed.) (citing to *Res Judicata and Jurisdiction: The Bootstrap Doctrine*, 53 Harv. L. Rev. 652 (1940)). The doctrine derives from decisions of the U.S. Supreme Court. *See, e.g., Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377, 60 S. Ct. 317, 320, 84 L. Ed. 329 (1940) (expressing the doctrine in a nutshell by stating that a “court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action”) (citing to *Stoll v. Gottlieb*, 305 U.S. 165, 171, 172, 59 S.Ct. 134, 137, 83 L.Ed. 104).

<sup>93</sup> *See Matter of Marriage of Brown*, 98 Wn.2d at 49-50 (stating “ we believe the appropriate test to be followed in contesting subject matter jurisdiction is set forth in Restatement (Second) of Judgments § 12 (1982)”).

a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.<sup>94</sup>

Applying § 12 to two cases involving “property settlements which included a division of military retired pay,” and which were “stipulated to by the parties and were unappealed,” the State Supreme Court held that none of the exceptions to preclusion listed by the rule applied.<sup>95</sup>

As in *Matter of Marriage of Brown*, this case also involves a Settlement Agreement (and a Decree) “stipulated to by the parties and . . . unappealed.”<sup>96</sup> Moreover, the Findings of Fact approved by both of the Kaufmans, and incorporated into the Decree, specifically state that the trial court had jurisdiction. CP 4 at ¶ 3.1, CP 6. The entry of the Decree thus qualifies as the “render[ing of] a judgment in a contested action.”<sup>97</sup>

None of the exceptions to preclusion apply. As demonstrated above in Section C, there is a strong argument that the trial court here *did*

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<sup>94</sup> Restatement (Second) of Judgments § 12 (1982) (emphasis added). *See also Matter of Marriage of Brown*, 98 Wn.2d at 50.

<sup>95</sup> *Id.*, 98 Wn.2d at 48.

<sup>96</sup> *Id.* Compare CP 2 at ¶ 2.7, CP 7, CP 317-327.

<sup>97</sup> Restatement (Second) of Judgments § 12. *See also Matter of Marriage of Brown*, 98 Wn.2d at 48; and *Chicot Cty. Drainage Dist.*, 308 U.S. at 377–78 (asking “whether respondents having failed to raise the [jurisdictional] question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit,” and answering that “[s]uch a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, ‘but also as respects any other available matter which might have been presented to that end’”).

*not err at all.* As demonstrated above in Section D, is also at least a very strong argument that even if the trial court erred, it did not lack subject matter jurisdiction. Wash. Const. art. IV, § 6 specifically confers on the superior courts of this state jurisdiction over “all matters . . . of divorce.”<sup>98</sup> Thus, there is no basis for concluding that “[t]he subject matter of the action was so plainly beyond the court’s jurisdiction that its entertaining the action was a manifest abuse of authority.”<sup>99</sup>

There is also no basis for claiming that “[a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government.”<sup>100</sup> There simply is no other tribunal or agency whose authority is implicated by the Decree or the Decision. CP 6-8, CP 220-224. Neither the Decree nor the Decision imposes any obligation on any government agency, or even requires Mr. Kaufman to pay Ms. Kaufman out of funds originating from the federal government. CP 224, at lines 3-4. Finally, there is no reason whatsoever for thinking that the Decree “was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction.”<sup>101</sup>

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<sup>98</sup> Wa. Const. art. IV, § 6.

<sup>99</sup> Restatement (Second) of Judgments § 12

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

Thus, “[w]hen the circumstances in this case are measured against the principles in section 12, the parties are precluded from contesting the issue of subject matter jurisdiction before the court.”<sup>102</sup>

**F. Either because the Decree was not void, or because Mr. Kaufman is precluded from disputing jurisdiction, or both, the Decree is *res judicata*, and the trial court did not err by entering the Decision to enforce it.**

*Res judicata* is a doctrine of claim preclusion that bars relitigation of a claim that has been determined by a final judgment.<sup>103</sup> “*Res judicata* applies to matters that were actually litigated and those that ‘could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.’”<sup>104</sup> *Res judicata* is intended to prevent piecemeal litigation and to ensure the finality of judgments.<sup>105</sup> The

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<sup>102</sup> *Matter of Marriage of Brown*, 98 Wn.2d at 50. This conclusion does not in any way depend on Mr. Kaufman’s *recent* concession of subject matter jurisdiction, indicated by his failure to challenge subject matter jurisdiction in his Appellant’s Opening Brief (where Mr. Kaufman challenges something he considers to be different from subject matter jurisdiction, namely, “the inherent power to make or enter the particular order involved”). See Appellant’s Opening Brief, at pp. 11-13. This recent concession is at least arguably not powerful enough to overcome the authority holding that lack of subject matter jurisdiction may be raised at any time. The argument here depends instead on the holding of *Matter of Marriage of Brown*, the Restatement (Second) of Judgments § 12, and the fact that Mr. Kaufman in 2008 stipulated to the entry of Findings and Conclusions specifically stating that the trial court “has jurisdiction to enter a decree in this matter.” CP 4, at ¶ 3.1.

<sup>103</sup> *Storti v. Univ. of Wash.*, 181 Wn.2d 28, 40–41, 330 P.3d 159 (2014).

<sup>104</sup> *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 891–92, 1 P.3d 587 (2000) (quoting *Kelly–Hansen v. Kelly–Hansen*, 87 Wn. App. 320, 328–29, 941 P.2d 1108 (1997)), *review denied*, 146 Wn.2d 1016, 51 P.3d 87 (2002).

<sup>105</sup> *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005).

doctrine of *res judicata* promotes judicial economy, efficiency, and fairness to litigants.<sup>106</sup>

The threshold requirement of *res judicata* is a valid and final judgment on the merits in a prior suit.<sup>107</sup> In order to be a judgment on the merits, it is not necessary that the litigation be determined on the merits in the strict sense of those words.<sup>108</sup> “It sufficient that the status of the action was such that the parties might have had their suit disposed of, if they had properly presented and managed their respective cases.”<sup>109</sup>

Here, there has never been any dispute that the trial court had personal jurisdiction over the parties. And the arguments above in Sections D and E establish that *either* the trial court had subject matter jurisdiction to enter the Decree, *or* that Mr. Kaufman is now precluded from challenging subject matter jurisdiction.<sup>110</sup> Mr. Kaufman never

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<sup>106</sup> *Storti*, 181 Wn.2d at 40, 330 P.3d 159.

<sup>107</sup> *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004).

<sup>108</sup> *Necessity of valid final judgment on merits*, 14A Wash. Prac., Civil Procedure § 35:23 (3d ed.).

<sup>109</sup> *Pederson v. Potter*, 103 Wn. App. 62, 70, 11 P.3d 833, 837 (2000). *See also Chicot Cty. Drainage Dist.*, 308 U.S. at 377–78 (applying *res judicata* to issue of jurisdiction where party had “failed to raise the question in the proceeding to which they were parties”).

<sup>110</sup> Indeed, Ms. Kaufman submits that the preceding arguments establish *both* that the trial court had subject matter jurisdiction, *and* that Mr. Kaufman is precluded from now challenging jurisdiction. Put slightly differently, the Decree was not void, but even if it were, Mr. Kaufman is now precluded from relitigating jurisdiction. *See Marley*, 125 Wn.2d at 541 (concluding “that a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim”), *and Matter of Marriage of Brown*, 98 Wn.2d at 49-50 (adopting Restatement

appealed the Decree. Therefore, the threshold requirement of treating the Decree as *res judicata* has been met.

Once the threshold requirement is satisfied, *res judicata* will apply to bar any subsequent challenge to the judgment where there is a concurrence of identity in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made.<sup>111</sup> Mr. Kaufman makes no effort to deny that these additional elements of *res judicata* are satisfied here.<sup>112</sup> The additional requirements plainly *are* satisfied in this case, where the issue on appeal is Ms. Kaufman’s ability to enforce the Decree against her ex-husband. Moreover, the maintenance provisions in the Decree are properly subject to *res judicata*, because the Settlement Agreement incorporated into the Decree bars the modification of maintenance.<sup>113</sup>

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(Second) of Judgments § 12, and concluding that “the parties are precluded from contesting the issue of subject matter jurisdiction”).

<sup>111</sup> *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011).

<sup>112</sup> See Appellant’s Opening Brief, at pp. 27-30 (where the only argument against the application of *res judicata* is the claim that the maintenance provisions in the Decree were void ab initio).

<sup>113</sup> See CP 7-8 (Decree) and CP 319 at lines 12-14 (Settlement Agreement) (both stating that maintenance “shall continue until either party’s death; otherwise spousal maintenance shall be non-modifiable”). See also RCW 26.09.070(7) (stating in pertinent part that “[w]hen the separation contract so provides, the decree may expressly preclude or limit modification of any provision for maintenance set forth in the decree”); and *In re Marriage of Hulscher*, 143 Wn. App. 708, 717, 180 P.3d 199, 203–04 (2008) (holding that the “trial court erred when it modified the . . . nonmodifiable spousal maintenance provision embodied in their decree of dissolution”).

For all of these reasons (including the reasons spelled out in Sections D and E above), the Decree is *res judicata*, and so too is the non-modifiable maintenance provision incorporated in the Decree. The trial court did not err by entering the Decision granting the motion to enforce the Decree.

**G. Mr. Kaufman’s remaining arguments do not show reversible error by the trial court.**

The fundamental issue posed by an appeal subject to *de novo* review is not whether every argument raised by the respondent below was correct, or whether the trial court relied on appropriate authority in reaching its decision, or even whether the trial court properly explained its conclusion.<sup>114</sup> The issue is whether the Decision on appeal reached the correct determination of the issues presented. Several of Mr. Kaufman’s arguments ignore this key point, and thus fail to identify any reversible error by the trial court.

1. The trial court did not commit reversible error by relying on the Alaska Supreme Court’s decision in *Gross v. Wilson*.

For the reasons explained above at pages 21-25, Mr. Kaufman fails to show that *Gross v. Wilson* would have been differently decided under Washington law.<sup>115</sup> Even were this Court to find some other legal error in *Gross*, it would not be true that “[t]he trial court erred [in a way requiring

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<sup>114</sup> This argument is not weakened if there is some aspect of this matter that is subject to review for abuse of discretion.

<sup>115</sup> Compare Appellant’s Opening Brief, at pp. 8-13.

reversal] in relying on *Gross* to make its decision.”<sup>116</sup> The *Gross* decision is in no way *necessary* to any of the layered arguments above to the effect that: (1) the maintenance provisions in the Decree complied with the *Mansell* prohibition; (2) even if the Decree were in violation of the *Mansell* prohibition, the Decree was not void, because the trial had both personal and subject matter jurisdiction; and (3) even if the Decree were initially void, Mr. Kaufman is precluded from contesting jurisdiction. The trial court’s reliance on *Gross* could not in itself be a proper basis for reversal.

2. Mr. Kaufman’s contract arguments are irrelevant to the proper disposition of this case on appeal.

To this point, Ms. Kaufman has not directly addressed Mr. Kaufman’s claims about the enforceability of the Settlement Agreement *considered as a contract*.<sup>117</sup> This is because the Settlement Agreement was not *just* a contract, but was also incorporated into the Decree, which was a judgment of the superior court. Even if a contract is void if in violation of public policy, a judgment is void *only* if the court that enters it “lacks personal jurisdiction or subject matter jurisdiction over the claim.”<sup>118</sup>

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<sup>116</sup> *Id.*, at p. 13 (material in brackets added).

<sup>117</sup> *See, e.g.*, Appellant’s Opening Brief at pp. 18-27.

<sup>118</sup> *Compare Hammack v. Hammack*, 114 Wn. App. 805, 810-811, 60 P.3d 663, 66 (2003), cited in Appellant’s Opening Brief at p. 28, *with Marley*, 125 Wn.2d at 541 (concluding “that a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim”).

Mr. Kaufman cites to no authority, and Ms. Kaufman is aware of none, treating a judgment as an “instrument” that could be rendered *void* if it were “intimately connected” to a void contract.<sup>119</sup> In *Hammack*, a judgment incorporating a property settlement was vacated when the ex-wife brought as timely motion under CR 60(b)(11) to vacate the decree due to exceptional circumstances.<sup>120</sup> The *Hammack* court did not find the decree at issue there to be void. And here, Mr. Kaufman has never raised an “exceptional circumstances” argument, or otherwise asked for relief under CR 60(b)(11).<sup>121</sup> His argument on appeal fails because the Decree was not void.

The fact that the Decree was not void, coupled with the doctrine of *res judicata*, suffices to show that the trial court Decision on appeal was not issued in error.<sup>122</sup> Ms. Kaufman’s Motion to Enforce extensively

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<sup>119</sup> *Hammack*, 114 Wn. App. at 811.

<sup>120</sup> *Id.* at 808 (CR 60(b)(11) motion was timely). The exceptional circumstances in *Hammack* involved the fact that the husband had induced the wife to enter a one-sided property settlement in return for an implicit promise that he would not seek child support. The husband then went back on the agreement and sought child support. *Id.* at 807-808. Given these facts suggesting “manifest injustice,” this Court unsurprisingly affirmed the trial court’s vacation of the property settlement. *Id.* at 810-11.

<sup>121</sup> Because Mr. Kaufman did not make a motion under CR 60(b)(11) below, he should not be allowed to do so through the backdoor on appeal. As a result, this Court need not decide whether Mr. Kaufman could possibly bring such a motion within a “reasonable time.” *See, e.g., In re Marriage of Thurston*, 92 Wn. App. 494, 500, 963 P.2d 947, 949 (1998) (noting that “a CR 60(b)(11) motion must be brought within a “reasonable time”).

<sup>122</sup> If necessary, this assertion should be supplemented by Ms. Kaufman’s argument in the alternative that even if the Decree were initially void, Mr.

argued for the application of *res judicata* (a doctrine which only applies to judgments, not to contracts), and expressly asked that both the Settlement Agreement and the Decree be enforced. CP 107-112, 118. The Decision at the very least acknowledges that the issue of *res judicata* had been raised. CP 221.<sup>123</sup> Finally, even if the best reading of the Decision were that it only enforces the Settlement Agreement, and not the Decree, this Court can and should affirm on the alternative grounds that the Decree itself was properly enforceable as *res judicata*.<sup>124</sup>

Of course, if this Court agrees that the maintenance provisions in the Decree properly complied with *Mansell's* prohibition on treating veteran's disability payments as "property divisible on divorce" (as argued above in Section III C), then the same is true of the maintenance provisions in the Settlement Agreement. This Court should then directly affirm the trial court's holding that the Settlement Agreement was valid and binding.<sup>125</sup>

3. Whether or not Ms. Kaufman will continue to receive 50% of Mr. Kaufman's retirement is also irrelevant to the proper disposition of this appeal.

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Kaufman is now precluded from relitigating subject matter jurisdiction by the application of Restatement (Second) of Judgments § 12.

<sup>123</sup> Appellant's Opening Brief, at pp. 6-7, appears to err in asserting that the trial judge made the statement about *res judicata*, as opposed to Ms. Kaufman's trial counsel.

<sup>124</sup> See, e.g., *Ertman*, 95 Wn.2d at 108. See also RAP 2.5(a) (stating in part that "[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground").

<sup>125</sup> *Mansell*, 490 U.S. at 583.

Appellant’s Opening Brief assigns no error to any finding of fact made by the trial court in its Decision enforcing the Decree. Specifically, no error is assigned to the trial court’s determination that “the aggregate amount of the VA Waiver/Disability is but a means by which they agreed on a figure for spousal maintenance.” CP 223.<sup>126</sup> Nor does Mr. Kaufman on appeal *explicitly* repeat his argument below that the terms of the Decree authorized him to cease paying maintenance. CP 163, 199. Mr. Kaufman has effectively abandoned this argument on appeal.

Therefore, it is unclear why Mr. Kaufman devotes most of the final four pages of his Appellant’s Opening Brief (pp. 32-35) to arguing that reversal of the Decision on appeal would allow Ms. Kaufman to continue to receive 50% of Mr. Kaufman’s military retirement. Perhaps it is a way of arguing that the Decree—implicitly found by the Decision to have been unambiguous—was unfair or inequitable when basing permanent maintenance on the amount of disability.<sup>127</sup> However, any such argument is untenable, since a party challenging a separation agreement as unfair at execution “must make such a challenge *before* the trial court’s approval

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<sup>126</sup> Ms. Kaufman submits that this determination is at least in part a finding of fact about the parties’ intent. *See supra*, at pp. 5-6 and CP 182-85, 198-200.

<sup>127</sup> The trial court’s determination that the Settlement Agreement “is enforceable per the original terms” (CP 224 at line 7) is at least an implicit finding that the Settlement Agreement’s maintenance provision was unambiguous, and had the meaning attributed it to Ms. Kaufman, rather than the meaning attributed to it by Mr. Kaufman’s initial trial counsel. CP 199, lines 9-18.

and entry of the decree.”<sup>128</sup> Any later challenge to its fairness at execution is time-barred.<sup>129</sup> Thus, the final section of Appellant’s Opening Brief also fails to identify any reversible error in the trial court’s Decision enforcing the Decree.

**H. This Court should affirm the trial court’s award to Ms. Kaufman of \$10,000 in attorney’s fees and costs.**

In the Decision on appeal, the trial court indicated that it would “award attorney’s fees [to Ms. Kaufman], per the terms of the settlement agreement.” CP 224. On October 25, 2019, the trial court entered an Order on Enforcement of Property Settlement Agreement and Decree of Dissolution, in which it granted Ms. Kaufman judgment for \$10,000 in attorney’s fees and costs.<sup>130</sup>

This Court should affirm the trial court’s decision to award Ms. Kaufman \$10,000 in lawyer’s fees and costs. This Court should affirm the fee award based on RCW 26.18.160.<sup>131</sup> That statute states:

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<sup>128</sup> *In re Marriage of Hulscher*, 143 Wn. App. 708, 717, 180 P.3d 199, 203 (2008) (citing *In re Marriage of Glass*, 67 Wn. App. 378, 390, 835 P.2d 1054 (1992)).

<sup>129</sup> *Id.* See also *Matter of Marriage of Gravelle*, 194 Wn. App. 1051, 2016 WL 3742162 at \*6 (unpublished).

<sup>130</sup> Ms. Kaufman has included the Order on Enforcement of Property Settlement Agreement and Decree of Dissolution in her Supplemental Designation of Clerk’s Papers, to be filed on the same day as this Brief, as per RAP 9.6(a). However, this order has not yet been paginated for the CP.

<sup>131</sup> The trial court refers to this statute as one of its bases for awarding fees in the Order on Enforcement of Property Settlement Agreement and Decree of Dissolution, at p. 5 of 6. See also *Ertman*, 95 Wn.2d at 108 (stating that “where a judgment or order is correct, it will not be reversed merely because the trial court gave the wrong reason for its rendition”).

In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.<sup>132</sup>

Here, Ms. Kaufman was the prevailing party below, and is therefore “entitled” to recover her reasonable costs and fees.<sup>133</sup>

**I. This Court should award Ms. Kaufman her reasonable attorney’s fees and expenses incurred in this appeal.**

Pursuant to RAP 18.1(b), Ms. Kaufman requests an award of the reasonable attorney’s fees and costs she has incurred in defending against Mr. Kaufman’s appeal. RCW 26.18.160, as quoted above, also “applies to attorney fees on appeal,” and does not require the prevailing party to make a showing of relative financial need.<sup>134</sup> If this Court awards appellate fees, Ms. Kaufman will timely submit a fee affidavit pursuant to RAP 18.1(d).

**IV. CONCLUSION**

The trial court did not err in 2008 when it accepted the Settlement Agreement negotiated by the parties and their counsel and incorporated that

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<sup>132</sup> RCW 26.18.160. *See also* RCW 26.18.010 (stating in part that “[t]he legislature finds that there is an urgent need for vigorous enforcement of child support and maintenance obligations”).

<sup>133</sup> *See, e.g., Matter of Marriage of Miller*, 50907-5-II, 2018 WL 4471484, at \*2 (Wash. Ct. App. Sept. 18, 2018) (unpublished) (holding that “[t]he plain language of RCW 26.18.160 requires the trial court to award costs including reasonable attorney fees to . . . the prevailing party”).

<sup>134</sup> *See Hunter v. Hunter*, 52 Wn. App. 265, 273–74 and note 5, 758 P.2d 1019, 1025 (1988)

Settlement Agreement into the Decree. In particular, the provision in the Decree providing for lifetime, non-modifiable maintenance to Ms. Kaufman did not violate *Mansell's* prohibition against treating disability payments as divisible community property. Even if the maintenance provision did violate *Mansell*, this would have rendered the Decree merely voidable, not void. And finally, even if the Decree were void initially, Mr. Kaufman is precluded, by the application of *Matter of Marriage of Brown* and the Restatement (Second) of Judgments § 12, from now contesting the trial court's determination that it had subject matter jurisdiction. For any or all of these reasons, the Court should affirm the trial court's 2019 Decision enforcing the Decree. The Court should also award Ms. Kaufman her reasonable attorney's fees and expenses incurred in this appeal.

DATED this 28<sup>th</sup> day of October 2019.

By David J. Corbett  
David Corbett, WSBA No. 30895  
David Corbett PLLC  
2106 N. Steele St, Tacoma, WA 98406  
(253) 414-5235  
[david@davidcorbettlaw.com](mailto:david@davidcorbettlaw.com)  
Attorney for Respondent Heidi Kaufman

**CERTIFICATE OF SERVICE**

I certify that on October 28, 2019, I emailed the foregoing Brief of Respondent Heidi Kaufman to Mr. C. Bayly Miller, counsel for Appellant Geoffrey Kaufman, at his email address of [mcbmiller@earthlink.net](mailto:mcbmiller@earthlink.net). Mr. Miller has previously agreed to accept service by email in this matter.

Dated this 28th day of October 2019.

By: David A. Corbett  
David Corbett

# **APPENDIX A**

## Restatement (Second) of Judgments § 12 (1982)

Restatement of the Law - Judgments | October 2019 Update

Restatement (Second) of Judgments

Chapter 2. Validity of Judgments

Topic 3. Subject Matter Jurisdiction

### § 12 Contesting Subject Matter Jurisdiction

[Comment:](#)

[Reporter's Note](#)

[Case Citations - by Jurisdiction](#)

**When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:**

- (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or**
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or**
- (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.**

*Concerning relief from a default judgment on the ground of lack of subject matter jurisdiction, see §§ 65- 66. Concerning relief from a judgment in a contested action, see § 69 et seq.*

#### **Comment:**

*a. Finality and validity.* A court may be called on to resolve the question of its own subject matter jurisdiction in the course of an adjudication. If the question is raised during the pendency of the action and a decision is reached that the court lacks jurisdiction, the action is dismissed. Ordinarily there will be no occasion for the issue again to be drawn in question, for the person seeking an adjudication presumably will pursue a remedy in some other forum that will be competent to adjudicate the matter. But the issue of subject matter jurisdiction may be resolved in favor of the court's authority. This can happen either when the issue is raised and so decided, or when no objection to subject matter jurisdiction is made and the court proceeds to judgment on the merits. In any case, the problem is then whether the determination of jurisdiction is conclusive in subsequent litigation.

The problem poses a sharp conflict of basic policies. The principle of finality has its strongest justification where the parties have had full opportunity to litigate a controversy, especially if they have actually contested both the tribunal's jurisdiction and issues concerning the merits. Yet the principle of finality rests on the premise that the proceeding had the sanction of law, expressed in the rules of subject matter jurisdiction. As long as the possibility exists of making error in a determination of the question of subject matter jurisdiction, the principles of finality and validity cannot be perfectly accommodated. Questions of subject matter jurisdiction must be justiciable if the legal rules governing competency are to be given effect; some tribunal must determine them, either the court in which the action is commenced or some other court of referral. If the question is decided erroneously, and a judgment is allowed to stand in the face of the fact that the court lacked subject matter jurisdiction, then the principle of validity is compromised. On the other hand, if the judgment remains indefinitely subject to attack for a defect of jurisdiction, then the principle of finality is compromised.

The essential problem is therefore one of selecting which of the two principles is to be given greater emphasis. Traditional doctrine gave greater emphasis to the principle of validity, at least when judgments of tribunals of limited jurisdiction were concerned, asserting that a judgment of a court lacking subject matter jurisdiction was “void” and forever subject to attack. That doctrine was, however, limited by several concessions to the principle of finality. These concessions were expressed in the rules that a judgment of a court of general jurisdiction imported its own validity; that a judgment was presumed valid if valid on its face; and that a judgment not void on its face was avoidable only by suit in equity, wherein relief might be denied—and the judgment thus accorded finality—if the applicant unduly delayed in seeking relief or if there were intervening equities. See Chapter 5.

The difficulties with traditional doctrine were twofold. First, it was internally contradictory both in tenor and detail, asserting the principle of validity in unqualified terms but admitting the qualifications suggested above. Second, it resolved the problem of primacy between validity and finality in terms that did not, at least overtly, refer to other interests that might determine which of the two principles was given greater effect in a specific situation. If the principles of finality and validity are recognized as both being fundamental, then the only sensible way of choosing between them would appear to be in terms of such other interests.

The modern rule on conclusiveness of determinations of subject matter jurisdiction gives finality substantially greater weight than validity, for the reasons stated in Comment *c*. It gives different weight to finality when the tribunal is one of limited legal capacity, see Comment *e*, and when the parties have not contested the action, i.e., in the case of a default judgment. See Comment *f*.

*b. Traditional doctrine.* As noted above, the traditional doctrine was that a judgment of a court shown to have lacked subject matter jurisdiction was “void.” The doctrine posed difficulty chiefly because, if taken literally, it subverted the principle of finality. This difficulty was compounded by the fact that, under generally prevailing procedural rules, the question of subject matter jurisdiction is not subject to the important door-closing procedural rules that apply to other kinds of issues in litigation. Generally prevailing procedural rules require that issues concerning the merits be tendered in the pleadings or in the pre-trial order, or, at the latest, at trial; if an issue is not so tendered, opportunity is lost to assert it in connection with the claim in litigation. See §§ 18- 20. Issues concerning notice and territorial jurisdiction must be tendered at an even earlier stage when the defendant contests the action; if such an issue is not tendered in a special appearance or first appearance, the defendant is treated as having submitted to the court's authority and having surrendered the opportunity to assert the objection. See § 10. A challenge to the court's subject matter jurisdiction, however, is free from these requirements. Under prevailing procedural rules, the issue is not lost by failure to plead it, nor is it surrendered by a party, either plaintiff or defendant, who appears in the action and litigates on the merits.

The peculiar procedural treatment accorded the issue of subject matter jurisdiction has at least two important consequences. One is to create pressure in favor of classifying as questions of “jurisdiction” various issues that could equally be regarded as “merely” procedural. See § 11, Comment *e*. This is because so classifying an issue transforms it into one that may be raised belatedly, and thus permits its assertion by a litigant who failed to raise it at an earlier stage in the litigation. The classification of a matter as one of jurisdiction is thus a pathway of escape from the rigors of the rules of *res judicata*. By the same token

it opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment.

The special treatment of the issue of subject matter jurisdiction is also an obstacle to a rational theory as to when the right to litigate the issue should finally terminate. If the issue can be raised for the first time on appeal, it requires little more to say that it may also be raised by collateral attack at any time. If it can be raised for the first time by collateral attack, it requires little more to say that the issue may also be raised in collateral attack even if it was raised and decided in the original proceeding. That is, if the issue does not become *res judicata* under the usual rules, it is difficult to see why the issue should ever become *res judicata* until it has been decided by another court having jurisdiction to determine the jurisdiction of the court in which the judgment was rendered.

This was very nearly the effect of the traditional rule with respect to the issue of subject matter jurisdiction. At least theoretically, a judgment remained open to attack on the ground of lack of subject matter jurisdiction until the issue was actually adjudicated in another forum whose jurisdiction was beyond dispute. In effect, the issue of its own jurisdiction was one that a tribunal could not put to rest under the principle of *res judicata*. The end result is that in principle the question of subject matter jurisdiction could be conclusively resolved only by a two instance procedure, the first to determine the merits and the second to determine whether that determination was valid. The development of the modern rule on the matter has been essentially a problem of how far to go in receding from this position.

*c. Subject matter jurisdiction actually litigated in original action.* When the question of the tribunal's jurisdiction is raised in the original action, in a modern procedural regime there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion. The force of the considerations supporting preclusion is at least as great concerning determinations of the issue of jurisdiction as it is with respect to other issues. See § 27. Beyond this, there is virtually always available a procedure by which to obtain review of the original tribunal's determination of the issue, either by appeal or by injunction or extraordinary writ. Thus, the opportunity for an independent determination of the issue of subject matter jurisdiction that was protected in traditional doctrine remains available under the rule that the tribunal's determination of its own competency is *res judicata*. At the same time, applying the rule of preclusion considerably reduces the vulnerability of the judgment to subsequent attack and thus furthers the policy of finality.

It should be recognized that the rule of issue preclusion is itself subject to qualifications. See § 28, particularly Subsections (1), (2), and (5). Thus, if the issue of subject matter jurisdiction was raised and determined, but it also appears that there has been substantial change in the applicable legal context, see § 28(2)(b), or that the exercise of jurisdiction infringes a substantial public interest, see § 28(5)(a), then relitigation of the issue is warranted. The circumstances referred to in Subsections (1) and (2) of this Section represent the public interests relevant in determining whether relitigation of an issue of subject matter jurisdiction should be permitted.

**Illustrations:**

1. B, who is obliged to A under a contract, commences a proceeding in a special court given authority by statute to modify contract obligations in instances of extreme economic necessity. A objects to the court's subject matter jurisdiction on the ground that the authority given it violates constitutional limitations on interference with contract obligations. The issue is resolved against A and judgment thereafter is rendered against him. A takes no appeal even though review by appeal is provided. A may not subsequently relitigate the issue of the court's subject matter jurisdiction.

2. P brings an action in federal district court, based on diversity jurisdiction, against D, an organization that P asserts should be treated as a corporation for diversity purposes. D asserts that the court lacks jurisdiction because it should be treated as an unincorporated association and that, as such, it is a co-citizen of P. The issue is resolved in favor of P and judgment on the merits is thereafter rendered in P's favor, from which no appeal is taken. D may not subsequently avoid the judgment by relitigating whether it was of diverse citizenship from P.

*d. Subject matter jurisdiction not expressly determined.* Even if the issue of subject matter jurisdiction has not been raised and determined, the judgment after becoming final should ordinarily be treated as wholly valid if the controversy has been litigated in any other respect. The principle to be applied in this situation is essentially that of claim preclusion, particularly the proposition that a judgment should be treated as resolving not only all issues actually litigated but all issues that might have been litigated. See § 8(1). Under the adversary system of procedure, a court ordinarily is required and authorized to determine only the issues that are raised by the parties. Therefore, unless one of the parties raises the issue of subject matter jurisdiction, the court has no occasion to consider it. This scheme is not invariably adhered to, particularly in the federal courts where the tradition is strong that the court should look to the question of subject matter jurisdiction on its own initiative. Nevertheless, even in federal court the controversy may go forward to a determination on the merits without an inquiry into the question of subject matter jurisdiction.

When this has occurred, two different approaches can be taken to the situation. One is to say that the issue of subject matter jurisdiction remains wholly open and the judgment therefore is indefinitely subject to attack on that ground. This was the traditional view, still adhered to at least nominally in some decisions and expressed in the proposition that subject matter jurisdiction may not be “conferred” by consent, waiver, or estoppel. The other approach is to say that the issue of subject matter jurisdiction, like questions of notice, territorial jurisdiction, and those concerning the merits, is implicitly resolved by the act of entering judgment. On this view, the entry of judgment should be taken as equivalent to actual litigation of the issue of subject matter jurisdiction and hence result in its becoming res judicata.

With respect to this second approach, however, it must be recognized that there is a practical difference between the issue of jurisdiction being actually adjudicated and its being only implicitly adjudicated. The fact that the issue has been actually litigated signifies that the parties' attention (and, more significantly as a practical matter, the attention of the court and counsel) has been specifically directed to the question. If there is then a failure to seek review of the determination of the issue, it may be assumed that the determination was at least arguably correct or that its erroneous determination was a matter *de minimis*. In either event, there is reason to be confident that the public interest in the observance of limitations on jurisdiction has not been substantially violated.

In contrast, when the issue of subject matter jurisdiction has been only implicitly resolved through a judgment on the merits, and then is raised through an attack on the judgment, it signifies that the adversary system failed to bring forward a highly relevant issue in the original proceeding. If the belated contention about lack of jurisdiction could be rejected out of hand on its merits, the question of its being res judicata would not have much practical significance. It is when the belated contention about subject matter jurisdiction indeed has some substantial merit, rather, that the application of the rules of res judicata has real effect and hence poses a genuine dilemma. The question is whether to permit, in the interest of securing conformity to the rules of jurisdiction, the revival of a question that attentive counsel should have raised in the first instance. The situation is therefore not simply one of relitigation; to the contrary, it partakes of some aspects of a challenge to subject matter jurisdiction following a default judgment. See Comment *e*.

The interests primarily at stake in resolving this question are governmental and societal, not those of the parties. By hypothesis the parties had earlier opportunity to litigate the question of jurisdiction and thereby to protect their interest in the observance of the rules governing competency. They also had their day on the merits, even if before a body whose authority is now in doubt. To allow one of them to raise the question of subject matter jurisdiction after judgment is in the effect to make him a public agent for enforcing the rules of jurisdiction. But the public interest, though substantial, also has its protectors in other litigants on other occasions, who will have opportunity and incentive to object to the excess of authority if it is repeated.

The question therefore is whether the public interest in observance of the particular jurisdictional rule is sufficiently strong to permit a possibly superfluous vindication of the rule by a litigant who is undeserving of the accompanying benefit that will redound to him. The public interest is of that strength only if the tribunal's excess of authority was plain or has seriously disturbed the distribution of governmental powers or has infringed a fundamental constitutional protection.

The underlying consideration in resolving such situations is essentially the same as when the issue was actually litigated in the first action. Preclusion should therefore apply unless the losing party should be afforded opportunity to reopen the controversy, by reason of the circumstances referred to in Subsections (1) and (2).

**Illustration:**

3. S sues M under a worker's compensation statute. M defends on the ground that the injury did not occur during the course of S's employment but does not dispute the jurisdiction of the tribunal. Judgment is for S. M may not subsequently attack the judgment on the ground that the tribunal lacked subject matter jurisdiction because S was not an employee of M.

*e. Tribunal having inadequate capability for considering jurisdictional questions.* If the court whose jurisdiction is in question was not one that could consider and decide a challenge to its jurisdiction on an adequately informed basis, different considerations are involved. The policies favoring finality over validity presuppose that fair opportunity is available to contest subject matter jurisdiction in the court whose jurisdiction is in question. Virtually all systems of procedure, even those governing tribunals of very limited or specialized jurisdiction, permit the question of subject matter jurisdiction thus to be raised. Generally, the rules also afford opportunity for appellate review, through extraordinary writ if not otherwise, of the first instance court's determination of its subject matter jurisdiction. Furthermore, all courts of general jurisdiction and most courts of restricted or limited jurisdiction now have legally trained judges who can grasp the intricacies of jurisdictional issues and thus resolve them on an adequately informed basis.

This sort of procedural facility, however, is not always provided in courts of limited jurisdiction. Their rules of procedure sometimes make appellate review difficult or burdensome. There remain courts and administrative tribunals staffed by judges untrained in law or whose jurisdiction is so narrow as to be nearly ministerial. The opportunity to challenge subject matter jurisdiction in such a forum may therefore be inadequate. When this is so, a challenge to subject matter jurisdiction may properly be permitted through subsequent attack on the judgment.

The traditional rules regarding this problem made a distinction between courts of record and courts not of record or between courts of general jurisdiction and courts of limited jurisdiction. Judgments of courts of record or of general jurisdiction were

presumed to have been based on proper subject matter jurisdiction. This presumption was fortified by restrictive evidentiary rules, for example that the judgment itself was unimpeachable evidence of the jurisdictional facts. By contrast, judgments of courts not of record or of limited jurisdiction were impeachable by extrinsic evidence on the question of subject matter jurisdiction.

This distinction is no longer serviceable in modern context. Most tribunals now keep records that are treated as at least *prima facie* accurate. More important, many tribunals of restricted jurisdiction, for example the federal district courts and specialized tribunals such as tax courts, are not inferior in stature and technical competence to trial courts having general jurisdiction. The proper distinction in modern context, therefore, is whether the court involved is one in which a challenge to subject matter jurisdiction could be given substantially the same quality of consideration that is available in a trial court of general jurisdiction.

*f. Default judgment.* When judgment has been entered by default by a tribunal lacking competency to adjudicate the matter, the considerations in favor of supporting the judgment are somewhat weaker. The party against whom judgment was entered has had an opportunity to litigate, for he has been notified of the action and could have appeared in it. A default judgment can be treated as implicitly adjudicating the question of subject matter jurisdiction, see Comment *d*, just as it is treated as a determination of the merits of the claim. See §§ 18- 20. If a default judgment is accorded this effect, the summoned party is obliged to appear in the original action and litigate his objection to subject matter jurisdiction then and there. However, it may have been clear that the tribunal lacked jurisdiction and therefore that its summons was not one that the summoned party should have to obey.

Under traditional doctrine, the party is given the procedural options of objecting to subject matter jurisdiction in the action itself or of asserting his objection by attack on the judgment at a later stage. If he chooses the latter alternative, he is governed by the limitations on obtaining relief from a judgment. These include the requirement that he may have to make his attack in the court where the judgment was entered and that he may be denied relief if there have been intervening interests of reliance on the judgment. See Chapter 5. This may well be regarded as an appropriate balancing of risk and convenience among the parties. The plaintiff has a burden of selecting a forum whose subject matter jurisdiction he can be entirely sure of only after he has obtained actual enforcement of his judgment; the defendant has the opportunity of objecting to subject matter jurisdiction up until that point is reached, unless other interests have intervened.

There are very few modern decisions involving default judgments attacked for lack of subject matter jurisdiction where the result, whether sustaining or rejecting the attack, is not also explicable on other grounds. Cases sustaining attack often also involve a lack of notice, which makes the judgment objectionable on even more fundamental grounds. See § 2. On the other hand when notice has been adequate but there have been intervening reliance interests, the challenge to subject matter jurisdiction is frequently refused. The remaining decisions seem best explained by reference to the solicitude shown to applicants for relief from default, wherein the lack of jurisdiction is comparable to irregularity in notice. Compare § 2 and see § 65.

### Reporter's Note

(§ 15, Tent. Draft No. 6.) This Section is a counterpart of § 10 of the first Restatement. It accords with the first Restatement in recognizing that the principle of finality generally has primacy over that of validity. It differs from the first Restatement in several respects. It distinguishes between two situations—actual litigation, including litigation on the merits without the issue of subject matter jurisdiction having been raised, and default judgments—and accords different weight to finality in each situation. The present formulation takes advantage of intervening perspective on [Stoll v. Gottlieb](#), 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938), reh. denied, 305 U.S. 675, 59 S.Ct. 250, 83 L.Ed. 437 (1938), the leading modern case, in articulating the factors that conduce to allowing a belated attack on subject matter jurisdiction.

*Comments a and b.* For general analysis of the competition between the interests of finality and validity, see [Durfee v. Duke](#), 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963); [Stoll v. Gottlieb](#), 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938), reh. denied, 305 U.S. 675, 59 S.Ct. 250, 83 L.Ed. 437 (1938). For analysis of this question and illumination of the transition from the traditional doctrine to the modern rule, see Boskey and Braucher, *Jurisdiction and Collateral Attack*, 40 Colum.L.Rev. 1006

# **APPENDIX B**

## Restatement (Second) of Judgments § 1 (1982)

Restatement of the Law - Judgments | October 2019 Update

Restatement (Second) of Judgments

Chapter 2. Validity of Judgments

### § 1 Requisites of a Valid Judgment

[Comment:](#)

[Reporter's Note](#)

[Case Citations - by Jurisdiction](#)

**A court has authority to render judgment in an action when the court has jurisdiction of the subject matter of the action, as stated in § 11, and**

**(1) The party against whom judgment is to be rendered has submitted to the jurisdiction of the court, or**

**(2) Adequate notice has been afforded the party, as stated in § 2, and the court has territorial jurisdiction of the action, as stated in §§ 4 to 9.**

#### **Comment:**

*a. Rationale.* A fundamental element of procedural fairness is that a tribunal presuming to adjudicate a controversy have legal authority to do so. One aspect of the question of authority is whether the tribunal is empowered to adjudicate the type of controversy that is presented. This is conventionally referred to, and is referred to herein, as the question of subject matter jurisdiction. See § 11. Another aspect of the question concerns the authority of the tribunal in relation to that of tribunals created by political sovereigns of territorially coordinate authority, such as the states in our federal system and nations in the international community. This is referred to as the question of territorial jurisdiction. See §§ 4 to 9. Authority in the latter respect, unlike that regarding subject matter jurisdiction, may be conferred simply by a party's submission to the court by litigating on the merits. See § 10.

Just adjudication requires not only that the tribunal have authority in the matter but also that the parties have opportunity to offer proof and legal arguments in support of a claim or defense. This entails a requirement of fair notice. A plaintiff, as the initiator of an action, has knowledge of the proceeding and the identity of the forum in which it is brought. No independent effort to give him notice of the action is therefore necessary, although the requirement of fair notice applies with respect to defenses or counterclaims asserted against him. The traditional means of notice in actions against a defendant present within the jurisdiction is the summons, or summons accompanied by a copy of the complaint. At one time, a defendant in a proceeding concerning property could be given “constructive” notice by seizure of the property, publication, or similar procedure. The presumption was that actual notice would come home to persons addressed through these procedures, although it was sometimes conceded that the procedures were ceremonial rather than practically effective. Under modern interpretations of the Due Process Clause,

however, a more exacting notice requirement has been established. It is now required that the notice procedure be one likely to result in actually informing interested persons, or others who could represent them, of the pendency of the proceeding. See § 2. Functionally, the requirement of notice has precedence over the requirement that the court have subject matter and territorial jurisdiction, because the opportunity to participate afforded by notice includes the opportunity to question matters of jurisdiction.

The notice requirement, while of Constitutional stature, establishes a qualified right in a party who is entitled to notice. A party who does not appear in an action and suffers a default judgment retains the right to challenge the judgment on the ground of noncompliance with the notice requirement. See §§ 2 and 3. But a party who appears may complain of such noncompliance only if he does so at the threshold of the litigation and in accordance with the procedure specified for doing so. See § 10.

The requirement of territorial jurisdiction establishes a right that is similarly qualified. Within the American federal system, the Constitution imposes limitations on the territorial jurisdiction of the states and many of the states have imposed further limitations on themselves by decisional and statutory law. In the international community comparable limitations are recognized under general principles of law. See *Restatement, Second, Conflict of Laws* §§ 3, 24, 56. But whether a territorial jurisdictional requirement emanates from the Constitution or from another legal source, it is a requirement whose non-observance generally may be waived by a party. Waiver may be accomplished by prior agreement to submit to the jurisdiction of a designated court, by intentional submission to a court's jurisdiction after an action has been commenced, or by failure to employ the proper procedure for objecting to territorial jurisdiction when appearing in an action. On the other hand, if the party has not appeared in an action he may raise the question by subsequent attack on the judgment. See § 10.

The requirement of subject matter jurisdiction stands on different footing. Broadly speaking, an objection to subject matter jurisdiction may be taken at any time during an action, even on appeal, and may be taken after the action has become final under a wider variety of circumstances than the objection to territorial jurisdiction. This is not to say, however, that a judgment is always a nullity if in retrospect it appears that the court rendering the judgment lacked subject matter jurisdiction. Generally speaking, a court has jurisdiction to determine its jurisdiction. It is to say, however, that the lack of subject matter jurisdiction is a ground for objection to a tribunal's exercise of judicial authority and that in some circumstances it is a ground that may be invoked after judgment for the purpose of holding the judgment to be a nullity. See § 12.

*b. Scope.* The rules of this Chapter apply to federal and state courts, to courts of general jurisdiction and to ones of limited or restricted jurisdiction, and, with the qualifications stated in § 83, to administrative tribunals engaged in adjudication. See § 83. The Constitutional limitation on the territorial jurisdiction of state courts and state administrative tribunals within the federal system is a corollary of the fact that the states are legally defined as territorial entities. Further limitations imposed by the states themselves express their policies concerning convenience in litigation and allocation of the use of their judicial resources. Limitations on territorial jurisdiction of federal courts within the United States are a matter of Congressional policy, although it has been argued that there is some minimum requirement of convenient forum implied by the Due Process Clause of the Fifth Amendment. With respect to litigation with international elements, the rules of territorial jurisdiction are shaped in part by reference to similar considerations. See § 4.

### Reporter's Note

(§ 4, Tent. Draft No. 5.) This is a counterpart of first Restatement § 4. It departs from the first Restatement in terminology, using the term “subject matter jurisdiction” instead of “competency” to refer to the rules prescribing a court's authority with respect to the types of controversies it may adjudicate. Compare *Restatement, Second, Conflict of Laws* § 24, Comment *f*, § 92, and § 105, using the term “competence” to refer to such authority and, at least in some instances, other aspects of a court's authority as well. See *id.* § 105, Comment *b*. It seems useful to distinguish clearly between the rules governing the types of controversy a court may hear from those determining its territorial jurisdiction because of the important difference in the timing with which objections may be raised to subject matter and territorial jurisdiction respectively. However, it must also be recognized that in certain situations the distinction is problematic. See Introductory Note to Chapter 2 and Reporter's Note to § 11, Comment *b*.

# APPENDIX C

## Restatement (Second) of Judgments § 11 (1982)

Restatement of the Law - Judgments | October 2019 Update

Restatement (Second) of Judgments

Chapter 2. Validity of Judgments

Topic 3. Subject Matter Jurisdiction

### § 11 Subject Matter Jurisdiction

[Comment:](#)

[Reporter's Note](#)

[Case Citations - by Jurisdiction](#)

**A judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action.**

#### Comment:

*a. Rationale and Scope.* The authority of courts derives from constitutional provisions or from statutory provisions adopted in the exercise of a legislative authority, express or implied, to establish courts and to provide for their jurisdiction. Article III of the United States Constitution calls for a Supreme Court and authorizes the creation of inferior federal courts and also defines the kinds of proceedings that Congress may authorize them to entertain. Article I of the Constitution has been construed to confer on Congress a further authority to create other tribunals and to invest them with jurisdiction of disputes arising from matters within the authority of Congress to regulate. State constitutions typically create the principal elements of a judicial system and permit the legislature to create other judicial and administrative tribunals.

All courts and tribunals in the federal system are of restricted jurisdiction, in that they have subject matter jurisdiction only of such proceedings as are expressly or impliedly consigned to them. This is a consequence of the legal structure of American federalism, in which the authority of the Federal Government is itself restricted to matters delegated to it by the Constitution. In contrast, the principal trial court in state court systems is a court of general jurisdiction, i.e., it has authority to adjudicate any justiciable controversy that is not exclusively consigned to some other tribunal. A comparable general appellate jurisdiction may be reposed in the state's highest appellate court. But such general jurisdictional authority has its source in the state constitution and hence is consistent with the principle that authority to adjudicate is dependent on provision of law.

The provisions of law investing a court or other tribunal with authority to adjudicate a type of controversy are referred to as the rules of subject matter jurisdiction and sometimes as rules of “competency” or “competence.” In some usages, the latter term includes not only rules referring to the kinds of controversies that a court may adjudicate but also rules specifying how service

of process is to be effected. See [Restatement, Second, Conflict of Laws § 105](#), Comment *b*. As used in this Restatement, the term “subject matter jurisdiction” refers only to the kinds of controversies a court may adjudicate; problems of service of process are given distinct attention. See §§ 2 and 3. It is important, however, to distinguish the concept of subject matter jurisdiction from that of territorial jurisdiction.

*b. Territorial jurisdiction contrasted.* When a court exercises jurisdiction based on a relationship to a thing or a status, see §§ 6 to 8, it may be said that the thing or status is the “subject matter” of the adjudication. This is a convenient way of indicating that the claims involved can be conceived as relating to a res and that the res can be considered as being in the court's custody. Thus, what is indicated by the reference to the “subject matter” is the existence of a relationship between the claim under adjudication and the forum that justifies the exercise of jurisdiction, i.e., a question of territorial jurisdiction.

This usage can result in confusion, however, owing to the fact that the term “subject matter jurisdiction” is also commonly used as the synonym of the term “competence.” The confusion can be partly dispelled by recognizing the differences in the source and functions of the rules governing a state's territorial jurisdiction over a res and the rules of subject matter jurisdiction. See Introduction to Chapter 2. The rules of subject matter jurisdiction of a court are generally prescribed by the political authority that has created the court. (However, a superior political authority may impose limits on that authority. Thus, state law rather than federal law invests a state's courts with authority to adjudicate particular types of controversies, but federal law through preemption may supersede that authority). The prescriptions of subject matter jurisdiction express divisions of functions among the organs of that government, separating courts from other branches of government and differentiating one court from another. Questions of subject matter jurisdiction are therefore matters of the organic law of the government involved, state or federal. In contrast, the rules of territorial jurisdiction have their primary source in the rules that define the political authority of the state itself. In the international community these are rules of mutual recognition and comity; in our federal system they are embodied in the Constitution. By its own law, however, a state may refrain from exercising the full range of territorial jurisdiction that the Constitution permits. See § 4, Comment *d*. The purpose and effect of these rules is to establish boundaries on the authority of state judicial systems in adjudicating transactions having interstate elements.

*c. Jurisdiction to determine jurisdiction.* Whether a court whose jurisdiction has been invoked has subject matter jurisdiction of the action is a legal question that may be raised by a party to the action or by the court itself. When the question is duly raised, the court has the authority to decide it. A decision of the question is governed by the rules of *res judicata* and hence ordinarily may not be relitigated in a subsequent action. See § 12. Thus, a court has authority to determine its own authority, or as it is sometimes put, “jurisdiction to determine its jurisdiction.”

*d. Timing of challenge to subject matter jurisdiction.* The procedural rules governing the time when a challenge to subject matter jurisdiction may be made have an important effect on the consequences of such a challenge. Under generally prevailing procedural rules, the question of a court's subject matter jurisdiction may be raised at any time before the judgment has become final. Thus, it may be raised not only at the threshold of the action, as the question of territorial jurisdiction must be, but during or after trial in the trial court, or on appeal, or in some circumstances by post-trial motion to set aside the judgment. (The circumstances under which a judgment may be attacked after it has become final, by independent action or through a motion for extraordinary relief or the like, are considered in Chapter 5.)

In this respect the question of subject matter jurisdiction is very different from the question of territorial jurisdiction or one of regularity of notice. See § 10. This difference has been explained by the fact that an objection to subject matter jurisdiction is in some sense more fundamental than objections to territorial jurisdiction or notice, in that a court is powerless to decide a controversy with respect to which it lacks subject matter jurisdiction. But such an analysis would require that a court's decision as to its own subject matter jurisdiction could not be accorded conclusive effect, contrary to the established rule in that regard. See § 12. It would also require that a judgment be forever vulnerable to attack in subsequent proceedings, on the ground that the court by which it was rendered had lacked jurisdiction. Furthermore, it would take for granted that the presently prevailing rule on timing of an objection to subject matter jurisdiction is required in the nature of things, and would thus make it impermissible to foreclose objections to subject matter jurisdiction after judgment in the trial court.

A more satisfactory analysis of the treatment of the objections to subject matter jurisdiction is simply historical. The proposition that the subject matter jurisdiction of a court could be questioned in an attack after judgment originally found expression in the English common law courts in cases dealing with judgments of courts of limited jurisdiction. It was reinvigorated in early decisions of our federal courts in the course of cases involving their own jurisdiction, which was then new and regarded with some hostility. In these contexts, the interest of securing rigorous adherence to jurisdictional limitations was a strongly predominant policy consideration. It was one that therefore could appropriately be given precedence over the interest of fairness that would otherwise dictate that a challenge to subject matter jurisdiction ought to be unavailable unless raised before trial on the merits. In modern context, the relative weight of these interests has shifted. See § 12. It may well be that procedural rules of the future will be reformulated to require that objections to subject matter jurisdiction be raised before trial on the merits, thus expressing a policy approaching that now applied to objections to territorial jurisdiction. See § 10. However, except for the rules governing extraordinary relief from a judgment that has become final, Chapter 5, the question of time limitations within which a challenge to competency may be made is one of procedure and beyond the scope of this Restatement.

*e. Subject matter jurisdiction and “mere error.”* There is a strong tendency in procedural law to treat various kinds of serious procedural errors as defects in subject matter jurisdiction. This is because characterizing a court's departure in exercising authority as “jurisdictional” permits an objection to the departure to be taken belatedly. See Comment *d*. This, in turn, permits a serious blunder to be remedied despite tardy objection. Thus, if the defect in the proceedings is treated as a matter of the court's subject matter jurisdiction, then under various circumstances it can be a basis for arresting the proceedings through injunction or extraordinary writ, for complaint on appeal even though the matter was not raised in the trial court, or for relief from, or other attack on, the judgment after it has become final. If, however, the defect is “mere error,” procedural or substantive, none of these possibilities for attacking the judgment is ordinarily available.

The expansion of the scope of the term “jurisdiction” for procedural purposes of the foregoing kind may be expedient. Such questions are beyond the scope of this Restatement. What is important to recognize is that quite different considerations are involved in defining the term “jurisdiction” for purposes of according finality to a judgment in a proceeding that has already run its course. In that context, “jurisdiction” should be given a narrowly defined scope.

Manifest defects in subject matter jurisdiction can be distinguished from matters concerning the merits and procedure, but such defects are rarely encountered and still more rarely are troublesome. It is clear that a justice of the peace court cannot grant a divorce, and that a federal court cannot entertain what is plainly a common law tort action between citizens of the same state. The difficult problems are encountered when the issues on which the court's subject matter jurisdiction depends are not so clearcut. Thus, if the court has jurisdiction of actions of more than a specified amount, there can be uncertainty in whether a particular claim exceeds that amount. The problem can be particularly difficult when the issue determining subject matter jurisdiction parallels an issue going to the merits; when a procedural provision governing the proceeding is arguably classifiable as a “jurisdictional” requirement that must be observed if the proceeding is to have effect; or when the transaction that is in litigation can be characterized in alternative ways, only one of which falls within the tribunal's competency. Difficulty in distinguishing subject matter jurisdiction and “mere error” is encountered when a court of limited jurisdiction lacks competency of cases involving “real property” and a replevin action is brought in which it is contended that the chattel has become affixed to and part of real property; or when a statute requires that no action be brought on a claim against a municipality unless the claim has been previously submitted to the city and it is contended that compliance with the claim procedure is a prerequisite to exercise of jurisdiction. The question often arises in administrative tribunals, for example when the subject matter jurisdiction of a worker's compensation tribunal is limited to claims involving “employees” and it is disputed whether a claimant is an employee or an independent contractor.

In all such situations, the matter in question can plausibly be characterized either as going to subject matter jurisdiction or as being one of merits or procedure. The line between the categories is not established through refinement of terminology but through the cumulation of categorizing decisions into a pattern. The establishment of pattern is complicated by the fact that the distinction between subject matter jurisdiction and merits or procedure has significance in contexts other than that concerning

## **APPENDIX D**

## 2 Equit. Distrib. of Property, 4th § 6:6

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### Chapter 6. Specific Types of Property

#### § 6:6. Other military service benefits: federal law—Supreme court cases

#### References

##### West's Key Number Digest

- West's Key Number Digest, [Divorce](#) 713
- West's Key Number Digest, [Divorce](#) 804

#### The Holding In *McCarty*

The first step in understanding the divisibility of benefits outside the scope of the USFSPA is to understand the holding in *McCarty v. McCarty*.<sup>1</sup> *McCarty* was not a broad holding in legal terms: the court addressed a single narrow issue. The issue was, in the Court's own words, “whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state *community property laws*.”<sup>2</sup> The holding of the case was, in the Court's own words, that “the application of *community property law* conflicts with the federal military retirement scheme.”<sup>3</sup> Thus, *McCarty* on its face barred division of military retirement benefits by state courts under only one theory: the law of community property.<sup>4</sup>

#### The Dismissal in *Sheldon*

Soon after *McCarty* was decided, the Supreme Court actually recognized one theory of law under which state courts can divide military retirement benefits. In the immediate wake of *McCarty*, the most substantial question posed was whether the Court's decision was retroactive. Most state courts held before *McCarty* that division of military retirement benefits was permitted by federal law, and a very substantial number of final judgments would have been invalidated if *McCarty* had full retroactive effect. As discussed in § 6:3, the state courts immediately began to hold, even before adoption of the USFSPA, that *McCarty* was not retroactive and that pre-*McCarty* orders dividing military retirement benefits remained valid.

This issue was presented to the Supreme Court in *In re Marriage of Sheldon*<sup>5</sup> when the husband filed a petition for certiorari asking the court to review a California decision holding expressly that *McCarty* was not retroactive. The petition presented the following question:<sup>6</sup>

Does federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law?

The court refused to hear the case, but it did not simply deny the petition. Instead, it dismissed the petition for want of a substantial federal question.<sup>7</sup> *A dismissal for want of a substantial federal question is an adjudication on the merits*, and it carries the same precedential value as a full opinion.<sup>8</sup> *Sheldon* is therefore legal precedent at the Supreme Court level establishing that the ruling in *McCarty* does not apply retroactively and that decisions which erroneously divide preempted benefits *are not void for lack of subject matter jurisdiction*.<sup>9</sup>

Two important points flow logically from the Supreme Court's recognition that *McCarty* was not retroactive. First, contrary to the mistaken holdings of a minority of state courts, *McCarty* did not hold that state courts lack subject matter jurisdiction to divide military benefits. If that had been the Court's holding, then all pre-*McCarty* state court orders dividing military benefits would have been absolutely void. By holding that those orders remained valid, *Sheldon* recognized that the courts did have subject matter jurisdiction to render them. There is further no language in *McCarty* suggesting any jurisdictional flaw in the decision below. That decision was reversed only because the substantive state law of community property was preempted by the substantive federal law of military retirement benefits. The lower courts did not err in assuming jurisdiction over the issue; they erred in applying state substantive law rather than federal substantive law in deciding that issue.

Second, if the holding in *McCarty* does not invalidate final state orders, then there *is* at least one theory under which military benefits can be divided by state divorce courts: the law of res judicata. Initial division of military benefits must be made under federal substantive law, which requires that the benefits be awarded only to the service member and not to the former spouse. If the service member requests that the state court apply federal substantive law, and the state court instead applies state substantive law, *McCarty* requires that the state court decision be reversed. But if the service member never raises the issue—if he or she allows the state court to enter an erroneous order dividing military benefits under state substantive law, as happened in most of the pre-*McCarty* cases—*Sheldon* recognizes that *McCarty* does not support reversal of the state court judgment. Federal *substantive* law controls the issue, but under either federal or state procedural rules, a decision which is based upon the wrong substantive law cannot be collaterally attacked after it becomes final. *Sheldon* was the first indication from the United States Supreme Court that state court orders dividing military benefits on a theory of res judicata would not be reversed.

### **The Holding in *Mansell***

The second step in understanding the divisibility of benefits outside the scope of the USFSPA is to understand the holding in *Mansell v. Mansell*.<sup>10</sup> *Mansell* is a difficult case to understand because the Court limited its own holding in two crucial footnotes and because the end result of the litigation was materially different from the result suggested by the Supreme Court's published opinion.

The parties in *Mansell* were divorced in California in 1979. Both spouses signed a property settlement agreement which expressly divided that portion of the husband's military retirement pay which he had waived in order to receive veterans' disability pay. The agreement was incorporated into a divorce decree, which became final under California law. Four years later, the husband filed a motion to reopen the decree, arguing for the first time that the waived retirement benefits could not be divided as a matter of federal law. Without addressing whether the decree could be reopened four years after the fact, and without determining whether the husband had waived his objection by contract, the California courts denied relief in an unpublished opinion, suggesting that federal law permitted state courts to treat disability benefits as community property.<sup>11</sup>

On appeal, the United States Supreme Court reviewed only the holding below that federal law allowed state courts to treat the benefits at issue *as community property*. To make clear the limited scope of its review, the Court added two important footnotes to its opinion. The first footnote addressed the wife's argument that division was allowed on a theory of res judicata. In its entirety, the footnote provided: <sup>12</sup>

In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. 5 Civ. No. F002872 (Jan. 30, 1987). *Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction*. The federal question is therefore properly before us.

Thus, because the California courts had not ruled upon the issue of res judicata, the court refused to consider that issue at all. In other words, it chose to review only the actual basis for the decision below and not an alternative basis (res judicata) which the state court declined to use.

Nevertheless, the emphasized passage is strongly worded and fully consistent with the Court's dismissal of the petition for certiorari in *Sheldon*. Res judicata is more than a theory permitted by federal law; it is “a matter of state law over which [the federal courts] have no jurisdiction.” <sup>13</sup> The only problem with res judicata, on the facts of *Mansell*, was that the California decision under review did not clearly rely upon it. Had the California courts done so, the emphasized language suggests that the petition for certiorari in *Mansell* would have been dismissed for lack of a substantial federal question, just like the petition for certiorari in *Sheldon*.

The second footnote addressed the possible argument that aside from res judicata, division was also permitted by the state substantive law of contracts because the husband had *agreed* to the division of the benefits at issue. The husband argued that the agreement was irrelevant because a specific federal statute provided that military service members could not contractually assign their military benefits to creditors. In its entirety, the footnote provided: <sup>14</sup>

Because we decide that the Former Spouses' Protection Act precludes States from treating as community property retirement pay waived to receive veterans' disability benefits, we need not decide whether the anti-attachment clause, § 3101(a), independently protects such pay. *See, e.g., Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987); *Wissner v. Wissner*, 338 U.S. 655, 70 S. Ct. 398, 94 L. Ed. 424 (1950).

Because the court did not reach the antiattachment clause, it did not consider whether military benefits can be divided by state courts under the law of contracts. Note also that the first case cited, *Rose v. Rose*, <sup>15</sup> held that the antiassignment clause does not prevent assignments to a former spouse for purposes of child support because Congress intended veteran's disability benefits to support the disabled veteran and his or her family. By citing *Rose*, the court recognized but refused to resolve the potential argument that any family member of the service member should not be considered to be a creditor for purposes of antiassignment provisions.

The issue addressed by *Mansell* was therefore the same issue of law presented by *McCarty*: whether federal law “precludes States from treating *as community property*” the benefits at issue. <sup>16</sup> Confirming the consistent reading of *McCarty* by state courts, the Court expressly stated that its holding applied to equitable distribution law as well. <sup>17</sup> The court's holding was that

federal law “does not grant state courts the power to treat *as property divisible upon divorce* military retirement pay that has been waived to receive veterans' disability benefits,”<sup>18</sup> the broader language reflecting the court's recognition that federal law prevents state courts from treating military benefits as any form of community or marital property in the absence of supporting federal legislation.

The sentence which followed the above statement of the court's holding is extremely important. The Supreme Court could have directed that the benefits at issue simply not be divided. But the court did not do that. There were three potential theories upon which the benefits at issue could have been divided: *res judicata*, contract law, and community property law. The California courts had invoked the third and broadest of these theories, without ruling upon the other two. Because the Supreme Court had rejected the third theory, the first two theories remained to be ruled upon. *The Mansell litigation was by no means over*. The court therefore held: “The judgment of the California Court of Appeal is hereby reversed, and the case is remanded for further proceedings not inconsistent with this opinion.”<sup>19</sup>

Upon remand, the California Court of Appeals refused to construe the Supreme Court's published opinion to prevent division of the benefits at issue under any conceivable theory. The Court had ruled on only one theory, community property, and left the other two theories open for consideration upon remand. “The Supreme Court's [opinion] does not change the question on review; it merely requires that we view it from a different perspective.”<sup>20</sup> Addressing the first theory, *res judicata*, the California Court of Appeals held upon remand that the benefits at issue were *still* properly divided because the 1979 divorce decree was immune from collateral attack. In other words, upon remand, the California Court of Appeals accepted the *res judicata* argument expressly left open by footnote 5 in the Supreme Court opinion. “[U]nder California law, there was, and is, no basis to reopen the settlement.”<sup>21</sup>

The reader must understand that the end result of the decision upon remand was to reach *the exact same end result* as the decision which the Supreme Court had just reversed. The only difference was the supporting theory: *res judicata* as opposed to community property. The husband immediately filed a second petition for certiorari, styled in the alternative as a petition for a writ of mandamus, arguing that the California courts were refusing to follow the Supreme Court's published opinion. *But the petition was summarily and unanimously denied*.<sup>22</sup>

The Supreme Court's denial of the husband's *second* petition for certiorari in *Mansell* is one of the most important facts in all of the *Mansell* litigation. It shows that footnote 5 in the *Mansell* opinion is more than mere words. The Court did not merely state in the abstract that division of military benefits under state law principles of *res judicata* was outside the scope of federal appellate jurisdiction; it refused to reverse *or even review on the merits* a state court decision applying those principles. It reached this result even though the net effect of the second California decision was to reach (under a different supporting theory) the exact same end result as the first California decision—a decision which the Supreme Court had reversed in a published decision. Together with footnote 5 in the published opinion, the Court's denial of review is a very strong statement that division of military benefits on a theory of *res judicata* is not prohibited by federal law.

The postremand proceedings in *Mansell* also eliminate any remaining possibility that the holdings in *McCarty* and *Mansell* are rules of subject matter jurisdiction. The husband's entire argument upon remand in *Mansell* was that the original order was void for lack of subject matter jurisdiction. The second California decision expressly disagreed:<sup>23</sup>

[S]ubject matter jurisdiction was vested in the superior court when the final decree was entered. While under the reasoning in *McCarty* the court should have applied federal rather than state law in determining the character of the retired pay, it was within the court's jurisdiction to make that characterization, right or wrong. The judgment was therefore not void for want of subject matter jurisdiction.

We do not consider this holding to be in conflict with *Mansell v. Mansell*, as we do not agree with Husband that the Supreme Court therein held state courts to be without subject matter jurisdiction where military disability pay is concerned. Rather, the Supreme Court's holding was quite narrow: FUSFSPA does not alter, with regard to non-disposable retired or retainer pay (including the pay at issue herein), the already-existing federal statutory structure which, according to *McCarty*, preempts state community property law. To the extent that *Mansell v. Mansell* is law of the case herein, it has no impact on the question of subject matter jurisdiction.

If *McCarty* and *Mansell* did involve subject matter jurisdiction, the husband in *Mansell* would have been right; the original order dividing benefits outside the scope of the USFSPA *would* have been void. The Supreme Court's unanimous refusal to hear the case a second time, and its sudden acquiescence in a result which it had so recently reversed, combined with the language of footnote 5 of the published opinion, suggest strongly that the Supreme Court agreed with the courts of California. *McCarty* and *Mansell* state a rule of substantive federal law, and not a rule of subject matter jurisdiction.

A strong majority of state courts have recognized, often in reliance upon postremand history of *Mansell*, that the doctrine of *McCarty* and *Mansell* is a rule of federal substantive law only.<sup>24</sup> A minority of state courts persist in holding to the contrary.<sup>25</sup> Not one of these cases has shown any awareness of the postremand proceedings in *Mansell*. The second California opinion is a ringing declaration that *McCarty* and *Mansell* do not involve subject matter jurisdiction. The Supreme Court's acceptance of that opinion, even though it reached an end result which was rejected in the court's published opinion in the case, almost certainly establishes that the California position is correct.

### ***Howell v. Howell***

The most recent Supreme Court decision on military service benefits, *Howell v. Howell*,<sup>26</sup> relates mostly the question of indemnity, and it is therefore discussed in § 6:11.

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#### Footnotes

- 1 [McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589, 2 Employee Benefits Cas. \(BNA\) 1502 \(1981\).](#)
- 2 [McCarty v. McCarty, 453 U.S. 210, 211, 101 S. Ct. 2728, 59 L. Ed. 2d 589, 2 Employee Benefits Cas. \(BNA\) 1502 \(1981\).](#)
- 3 [McCarty v. McCarty, 453 U.S. 210, 223, 101 S. Ct. 2728, 59 L. Ed. 2d 589, 2 Employee Benefits Cas. \(BNA\) 1502 \(1981\).](#)
- 4 As discussed further below, the state courts uniformly assumed and the Supreme Court ultimately expressly stated in *Mansell* that “community property law” as that term was used in *McCarty* encompasses the law of the equitable distribution and probably any other substantive property division theory based upon the notion that retirement pay is property of both the service member and his or her spouse. Conspicuously absent from *McCarty*, however, is any discussion of theories permitting division of military benefits based upon the voluntary consent of the member (the law of contracts) or based upon the service member's voluntary failure to appeal a prior adverse decision (the law of res judicata).
- 5 [In re Marriage of Sheldon, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380, 3 Employee Benefits Cas. \(BNA\) 1108 \(4th Dist. 1981\).](#)
- 6 [White v. White, 731 F.2d 1440, 1443 \(9th Cir. 1984\), quoting 50 U.S.L.W. 3869 \(1982\).](#)

7 Sheldon v. Sheldon, 456 U.S. 941, 102 S. Ct. 2002, 72 L. Ed. 2d 462, 3 Employee Benefits Cas. (BNA) 1670 (1982).

8 Hicks v. Miranda, 422 U.S. 332, 344, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975); *see also* White v. White, 731 F.2d 1440, 1443 (9th Cir. 1984); Evans v. Evans, 75 Md. App. 364, 541 A.2d 648 (1988) (both specifically recognizing the precedential effect of the dismissal in *Sheldon*).

9 “Recognizing that the word ‘jurisdiction’ has been used by courts, including this Court, to convey ‘many, too many, meanings,’ we have cautioned, in recent decisions, against profligate use of the term. Not all mandatory ‘prescriptions, however emphatic, are ... properly typed jurisdictional.’” *Union Pacific R. Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Cent. Region*, 558 U.S. 67, 130 S. Ct. 584, 596, 175 L. Ed. 2d 428, 187 L.R.R.M. (BNA) 2673, 158 Lab. Cas. (CCH) P 10130 (2009), *quoting* *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510, 126 S. Ct. 1235, 163 L. Ed. 2d 1097, 97 Fair Empl. Prac. Cas. (BNA) 737, 87 Empl. Prac. Dec. (CCH) P 42264 (2006) (citations omitted). State court decisions treating *McCarty* as jurisdictional are another example of improper profligate jurisdictional holdings. *McCarty* held only that the federal substantive law of military retirement benefits preempted the state substantive law of community property and equitable distribution. It did not hold that state courts lacked jurisdiction over military retirement benefits or that such benefits could not be divided under theories of law (e.g., *res judicata* or contract law) other than the law of community property and equitable distribution.

10 *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 10 Employee Benefits Cas. (BNA) 2521 (1989).

11 This description of the first California decision is based upon the facts recited in the Supreme Court opinion, *Mansell v. Mansell*, 490 U.S. 581, 585–586, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 10 Employee Benefits Cas. (BNA) 2521 (1981).

12 *Mansell v. Mansell*, 490 U.S. 581, 586 n.5, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 10 Employee Benefits Cas. (BNA) 2521 (1989) (emphasis added).

13 *Mansell v. Mansell*, 490 U.S. 581, 587 n.5, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 10 Employee Benefits Cas. (BNA) 2521 (1989).

14 *Mansell v. Mansell*, 490 U.S. 581, 587 n.6, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 10 Employee Benefits Cas. (BNA) 2521 (1989). The statute cited by the court has since been recodified at 38 U.S.C.A. § 5301(a).

15 *Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987).

16 *Mansell v. Mansell*, 490 U.S. 581, 587 n.6, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 10 Employee Benefits Cas. (BNA) 2521 (1989).

17 “The language of the [USFSPA] covers both community property and equitable distribution States, as does our decision today.” *Mansell v. Mansell*, 490 U.S. 581, 585 n.2, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 10 Employee Benefits Cas. (BNA) 2521 (1989).

18 *Mansell v. Mansell*, 490 U.S. 581, 594–595, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 10 Employee Benefits Cas. (BNA) 2521 (1989) (emphasis added).

19 *Mansell v. Mansell*, 490 U.S. 581, 595, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 10 Employee Benefits Cas. (BNA) 2521 (1989).

20 *In re Marriage of Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227, 231 (5th Dist. 1989).

21 *In re Marriage of Mansell*, 217 Cal. App. 3d 219, 235, 265 Cal. Rptr. 227, 236 (5th Dist. 1989).

22 *Mansell v. Mansell*, 498 U.S. 806, 111 S. Ct. 237, 112 L. Ed. 2d 197 (1990).

23 *In re Marriage of Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227, 232 (5th Dist. 1989).

24 *See In re Marriage of Curtis*, 7 Cal. App. 4th 1, 9 Cal. Rptr. 2d 145 (1st Dist. 1992) (rule of *McCarty* and *Mansell* is one of substantive law and not subject-matter jurisdiction); *Judkins v. Judkins*, 113 N.C. App. 734, 441 S.E.2d 139 (1994) (jurisdictional provision of the USFSPA involves personal jurisdiction and not subject-matter jurisdiction); *Wagner v. Wagner*, 564 Pa. 448, 768 A.2d 1112 (2001) (same); *Coon v. Coon*, 364 S.C. 563, 567, 614 S.E.2d 616, 617–618 (2005) (federal law “supplants state domestic-relations law pursuant to the Supremacy Clause of the United States Constitution, but it does not preempt state-court subject-matter jurisdiction”); *McLellan v. McLellan*, 33 Va. App. 376, 533 S.E.2d 635 (2000) (noting that under 10 U.S.C.A. § 1408(e)(5), an order paying out more benefits than the USFSPA permits is not void on its face solely for that reason).

- 25                    See *In re Marriage of Akins*, 932 P.2d 863 (Colo. App. 1997) (erroneously allowing jurisdiction under the USFSPA to be raised for the first time on appeal); *In re Marriage of Tucker*, 226 Cal. App. 3d 1249, 277 Cal. Rptr. 403 (4th Dist. 1991); *In re Marriage of Pierce*, 26 Kan. App. 2d 236, 240, 982 P.2d 995, 998 (1999) (“Mansell makes it perfectly clear that the state trial courts have no jurisdiction over disability benefits”); *Sola v. Bidwell*, 980 S.W.2d 60 (Mo. Ct. App. W.D. 1998), as modified, (Oct. 27, 1998).
- 26                    *Howell v. Howell*, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017).

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