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Court of Appeals
Division II
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No. 54219-6-II

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

SUSAN KAY McCLAIN

Appellant,

v.

MICHAEL FRANCIS LAVERGNE II

Respondent,

BRIEF OF APPELLANT

(AMENDED)

SUSAN KAY McCLAIN
Appellant/Pro Se
244 Easton Ave W
Eatonville WA 98328
253-888-5071

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I ASSIGNMENT OF ERROR

The Trial Court committed error in vacating the 9/21/2017 Military Retired Pay Division Order pursuant to CR60(b)(1) based on a finding that the Respondent mistakenly and inadvertently signed said order.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Can the 9/21/2017 Military Retired Pay Division Order be vacated pursuant to CR60(b)(1) based on a unilateral mistake and/or unilateral inadvertence by Respondent Michael Francis LaVergne II?

B. Is there sufficient evidence in the court record to support a Finding that the Respondent Michael Francis LaVergne II mistakenly and/or inadvertently signed the 9/21/2017 Military Retired Pay Division Order?

II. STATEMENT OF CASE

Appellant (hereinafter Susan) and Respondent (hereinafter Mr. LaVergne) were married in Orting, WA on December 22, 1989. They were divorced in the Circuit Court of Dale County, Alabama on February 2, 2004. (CP 132) As a part of that divorce proceeding, Susan and Mr. LaVergne entered into an October 8, 2003 Marital Dissolution Agreement which was filed with the Circuit Court of Dale County on December 9, 2003. (CP 46-

52) This agreement was incorporated into the Final Decree of Divorce. (CP 44-45) With regards to Mr. LaVergne's then contingent military retirement, at page 5, the agreement provided:

“Pensions/Retirements- Each party shall be entitled to keep any pension, 401K, retirement account or IRA in his or her own name, and the other party relinquishes any right, title or interest he or she may have in any pension, 401K, retirement account or IRA of the other party with the exception of the military retirement and husband stipulates that wife is entitled to a portion of the retirement under the laws of the state of Alabama”. (CP 50)

In 2004 the applicable Alabama statute regarding the division of pensions/retirements (Alabama Code section 30-2-51(b)) stated:

“ The judge at his or her discretion, may include in the estate of either spouse the present value of any future or current retirement benefits that a spouse may have vested interest in or may be receiving on the date the action for divorce is filed, provided that the following conditions are met: (1) The parties have been married for a period of 10 years during which the retirement was being accumulated. (2) The court shall not include in the estate the value of any retirement benefits acquired prior to the marriage including any interest or appreciation of the benefits. (3) The total amount of the retirement benefits payable to the non-covered spouse shall not exceed 50 percent of the retirement benefits that may be considered by the court”. (CP 62)

As of February 2, 2004, Mr. LaVergne would have served just over 14 years in the Army, and Susan was married to Mr. LaVergne for that amount of time. (CP 133)

At the time of the 2004 divorce, Susan did not know what her amount of Mr. LaVergne's military pension would be. All she knew was that she would get some portion of it. In her 11/13/2018 Responsive Declaration of Susan McClain (hereinafter "Responsive Declaration"), Susan stated that she and Mr. LaVergne did not discuss that she would only receive 50% of that portion of Mr. LaVergne's military retirement that was earned during the marriage. (CP 133)

In 2006, Susan and their four children moved back home to Washington. In her "Responsive Declaration" Susan stated that after this move Mr. LaVergne had little contact with the children and Susan until he too moved back to Washington in April 2017, to retire from the Army. (CP 133)

When Susan found out in April 2017 that Mr. LaVergne was going to retire, she asked Mr. LaVergne what needed to be done to insure that she received a portion of his disposable military pay. (CP 134 "Responsive Declaration") Mr. LaVergne told Susan that he would take care of it, that she need not do anything and that she would hear from DFAS. (CP 134) Susan believed Mr. LaVergne and initially did nothing. (CP 134) Mr. LaVergne retired in the summer of 2017 (CP 128) and began receiving his full retirement in August 2017 (CP 138-139). Susan received nothing. (CP 137-138). When Susan began to suspect that Mr. LaVergne was receiving

his retirement, she called DFAS and learned how to initiate the process of receiving her portion of Mr. LaVergne's retirement by submitting an application (DD Form 2293), along with certified copies of the court pleadings that gave her a portion of Mr. Lavergne's retirement. (CP 134) Following these instructions, Susan mailed DFAS her application and the Alabama Decree and Marital Dissolution Agreement. (CP134-135) Susan then received an August 14, 2017 letter from DFAS (Ex.A to Susan's "Responsive Declaration") which told her that her application could not be approved because:

"The court order submitted awards you retirement base [sic] on the Laws of Alabama, which figure is not readily apparent and cannot be calculated by this agency. Please be advised that military retirement is a statutory entitlement that has no accrued value prior to the member's retirement. Therefore, you must provide this agency a certified copy of an amended or clarifying court order that provides for payment as a fixed amount or payment as a percentage of the member's actual disposable military retired/retainer pay. Payment may also be expressed as a formula if the only missing element is the member's total credible years of service (denominator)." (Emphasis added) (CP 135; 145)

After Susan received the August 14, 2017 DFAS letter, she called DFAS to get more help and was told that she should get an order signed by her and Mr. LaVergne that gave her a specific percentage of Mr. LaVergne's retirement and that the percentage could be 50%, but no more than 50%. (CP 135) With this information, Susan's then husband Paul

Dunn prepared two (2) proposed Military Retired Pay Division Orders for Mr. LaVergne to consider. Version #1 gave Susan 50% of Mr. LaVergne's entire disposable retirement and 50% of the REDUX \$30,000 lump sum payment that Mr. LaVergne elected and received a year after the 2004 divorce. (CP 135) Version #2 of the Military Retired Pay Division Order gave Susan only the 50% of Mr. LaVergne's disposable Military retirement. (CP 135; 179-183)

On September 13, 2017, Susan sent both versions of the order by text message to Mr. LaVergne. (Ex. B to Susan's "Responsive Declaration") (CP 135-136; CP 148-149) On September 20, 2017 Mr. LaVergne signed Version #2 of the Military Retired Pay Division Order that gave Susan 50% of his disposable military retirement pay. (CP 136 "Responsive Declaration") After receiving the signed order from Mr. LaVergne, Susan told Mr. LaVergne that she would enter the order in court the next day. (CP 136 "Responsive Declaration") On September 21, 2017 the Military Retired Pay Division Order was entered by the court. (CP 1-3)

Susan sent a certified copy of the 9/21/2017 Military Retired Pay Division Order to DFAS. (CP 136) On October 17, 2017, Susan received a letter from DFAS (Ex. C to Susan's "Responsive Declaration") (CP 151-152) approving her application and indicating that her first payment would be received on or about January 1, 2018. (CP 136; CP 151-152). Mr.

LaVergne also received a letter from DFAS dated October 17, 2017 (Ex. D to Susan's "Responsive Declaration") which specifically told him:

"We have received an application from Susan McClain for payment of 50% of your retirement/retainer pay based on the enclosed documents" (Emphasis added) (CP 136; CP 154)

On December 29, 2017, DFAS deposited to Susan's Bank of America account her first payment in the sum of \$1,094.29. (CP 136-137; CP 156-157) Because this amount was not the full 50% of Mr. LaVergne's retirement that she should have received pursuant to the 9/21/2017 Military Retired Pay Division Order, Susan sent a text to Mr. LaVergne on January 3, 2018 regarding her payment being less than the 50% that was agreed upon and reminding Mr. LaVergne that he was required to pay her the 50% as they had agreed. (Ex. F to Susan's "Responsive Declaration") (CP 159: CP 137) Mr. LaVergne did not reply to this text message indicating that he did not owe the money to Susan (CP 137).

By February 2018, Mr. LaVergne still had not told Susan how he was going to pay her for the back payments she had not received from August through November 2017 and pay her back for what he owed her from the partial payments she received in December 2017 and February 2018. (CP 137) On February 14, 2018, Susan emailed Mr. LaVergne asking how he planned to pay her back and whether he would use his tax refund. (CP 137) Mr. LaVergne emailed back on February 14, 2018 stating "as far

as taxes, I'm paying the feds this year so there will be no tax refund. It may have been different if I could have claimed the kids, but...". (Ex. G to Susan's "Responsive Declaration") (CP 137; CP 161)

By March 2018, Susan still had not received the money that she believed Mr. LaVergne owed her for August through November 2017 and the partial payments. (CP 137-138) Susan again contacted Mr. LaVergne, this time with a text message dated March 15, 2018 telling Mr. LaVergne that he had promised to pay her. (CP 138) By the time this text message was sent, Susan was receiving and DFAS was deducting from Mr. LaVergne's retirement \$1171.62 per month, considerably more than the \$970/25% Mr. LaVergne would later claim to be owed to Susan pursuant to the 9/17/2017 Military Retired Pay Division Order. (CP 137) Mr. LaVergne replied that Susan was getting child support and retirement pay and that he could not afford to pay anymore. Mr. LaVergne made mention in his reply about Susan receiving more than 25% of his retirement. (Ex. H to Susan's "Responsive Declaration") (CP 138; CP 164)

On April 13, 2018, Susan filed her Motion for Order for: Enforce QDRO and Decree Order and Compel Proof wherein she sought payment for the back retirement payments and partial retirement payments that she believed were owed to her under the 9/21/2017 Military Retired Pay

Division Order. Susan also sought proof of Mr. Lavergne's total disposable retired pay amount. (CP 56 - 58)

After Mr. LaVergne received the October 17, 2017 DFAS letter notifying him that Susan would receive 50% of his retirement and after having \$1,094.29 deducted from his retirement payment by DFAS instead of the \$970 which was 25% of his retired pay and then the \$1,171.62 and finally \$1,970 (50% of Mr. Lavergne's disposable retirement pay) (CP 137), Mr. Lavergne did nothing about the supposedly altered 9/21/2017 Military Retired Pay Division Order until Susan filed her April 13, 2018 Motion to Enforce QDRO and Decree Order/ Compel Proof (CP 138). It was not until Mr. Lavergne filed his June 15, 2018 Declaration of Michael LaVergne in response to Susan's motion that for the first time Mr. LaVergne alleged that Susan should be receiving \$970 (25% of his retirement) and not \$1,970 (50%). (CP 61-63; CP 138-139;) Nowhere in this declaration did Mr. LaVergne allege that he had mistakenly or inadvertently signed the 9/21/2017 Military Retired Pay Division Order.

On September 17, 2018, Mr. LaVergne filed his Declaration of Michael LaVergne II in support of his motion to vacate the 9/21/2017 Military Retired Pay Division Order. (CP 127-131) In this declaration for the first time Mr. LaVergne alleged that Susan had materially changed the court order that Mr. LaVergne claimed he had signed and that she "....

appears to have altered the order after I signed it". (CP 131) Nowhere in this declaration did Mr. LaVergne allege that he mistakenly or inadvertently signed the 9/21/2017 Military Retired Pay Division Order.

In his Respondent's Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree (CP 108- CP126), Mr. LaVergne asserted the following as the only basis for vacating the 9/21/2017 Military Retired Pay Division Order under CR60(b):

- 1) Mistake on the part of the Commissioner Craig Adams for signing the September 21, 2017 Military Retired Pay Division Order (CP 112-113).
- 2) Irregularity in obtaining judgement (CP 113)
- 3) Newly discovered evidence that could have been discovered before (CP 113)
- 4) Fraud (CP 114-115)
- 5) Misrepresentation (CP 115)
- 6) Misconduct of an adverse party (CP 115)
- 7) Any other reason justifying relief from the operation of the judgement (CP 116)

In response to Mr. LaVergne's Motion to Vacate, Susan filed her November 13, 2018 Responsive Declaration of Susan McClain (CP 132-164), the declarations of Dinah P. Rhodes (CP 187-189) and Lee Border (CP 184-186), both of whom are Alabama practicing family law attorneys who stated their opinions on the enforceability of an agreed Alabama order that awarded to a non-covered spouse more than the 50% marital portion of a pension/retirement, a November 13, 2018 declaration of Paul Dunn who explained that he prepared the 9/21/2017 Military Retired Pay Division

Order (CP 179-183), and Susan's Memorandum in Opposition to Vacate (CP 165-178).

On November 14, 2018, Mr. LaVergne filed his Declaration of Michael LaVergne II in Strict Reply wherein he reiterated that he signed an order that gave Susan 50% of her marital share of his retirement (i.e., 25% of the total retirement) and that she had committed fraud in altering the order to award herself 50% of his entire retirement. (CP 190-202)

Mr. LaVergne's Motion was heard on November 16, 2018 by the Honorable Judge Elizabeth Martin. After hearing argument from counsel, the Trial Court found no fraud by Susan, i.e., no alteration of the 9/21/2017 Military Retired Pay Division Order as alleged by Mr. LaVergne in his Motion/Memorandum and supporting declarations. (CP 223) Instead the Trial Court based its decision to vacate the 9/21/2017 Military Retired Pay Division Order on Mr. LaVergne's mistake "...and maybe inadvertence as well, I mean I don't think he understood what he was signing...". (CP 223 lines 12-14; CP 225 lines 14-16) As a result of this ruling an Order Granting Respondent's Motion to Vacate was entered which listed Mr. LaVergne's mistake and inadvertence as the basis for vacating the 9/21/2017 Military Retired Pay Division Order. (CP 203-205)

On December 14, 2018, the Trial Court entered an Order on Motion to Clarify the November 16, 2018 Order Granting Motion to Vacate which

in part ordered that “A Military Pay Division Order shall be prepared consistent with this ruling”, the ruling being that Susan was entitled to 25% of Mr. LaVergne’s retirement (her ½ of the 50% marital portion). (CP 230-231)

On December 13, 2019, the Trial Court entered a Military Retired Pay Division Order (CP 25-29) that at paragraph 5 awarded Susan 25% of Mr. Lavergne’s retirement pay. It also at paragraph 7 provided that “the issue of past overpayment or underpayments, if any, are reserved to this court”. (CP 27)

On January 6, 2020, Susan McClain timely filed the Notice of Appeal. (CP 254-266)

III. ARGUMENT

The Trial Court committed error in vacating the 09/21/2017 Military Retired Pay Division Order pursuant to CR 60 (b)(1) based on a finding that Respondent Michael LaVergne II mistakenly and inadvertently signed said order.

A. Unilateral mistake cannot be the basis to vacate the 9/21/2017 Military Retired Pay Division Order.

An agreed decree or order such as the Military Retired Pay Division Order in this case is contractual in nature. *Haller v. Wallis*, 89

Wn.2d 539, 543, 573 P.2d 1302 (1978).

Where a contract is unambiguous, as the award to Susan of “. . . 50% of the members disposable Military retired pay” is, a court must enforce the contract’s terms according to their plain meaning. *Syrovoy v. Alpine Resources, Inc.*, 122 Wn.2d 544, 551, 859 P.2d 51 (1993).

Absent fraud, deceit, or coercion, none of which the Trial Court found in this case, a voluntary signatory, which Mr. LaVergne clearly was, is bound to a signed contract (agreed order) even if the signatory is ignorant of its terms. *Yakima County Fire Protection Dept. No. 12 vs. City of Yakima*, 122 Wn.2d 371, 395, 853, P.2d 245 (1993).

A unilateral mistake, which is what the Trial Court found when it opined that Mr. LaVergne did not understand what he signed, will not invalidate a contract (agreed order) unless under what is known as “snap-up doctrine”, the other party to the contract (Susan) knew of the other party’s (Mr. LaVergne’s) mistake and unfairly exploited the mistaken party’s error. *Gill v. Waggener*, 65 Wn. App. 272, 276, 828 P.2d 55 (1992); *Leitz v. Hansen Law Offices, PSC*, 166 Wn. App. 571, 579, 271 P.3rd 899 (2012). As discussed in B below, given that Mr. LaVergne never alleged or argued that he mistakenly signed the 9/21/2017 Military Retired Pay Division Order or that he misunderstood the order and given that there are no facts in the court record that support that he mistakenly signed the

9/21/2017 Military Retired Pay Division Order or that Susan knew of a mistake that according to Mr. LaVergne never existed, the “snap-up doctrine” cannot be applied to this case to allow the 9/21/2017 Military Retired Pay Division Order to be vacated based on unilateral mistake.

As a matter of law, the Trial Court erred in vacating the 9/21/2017 Military Retired Pay Division Order based on Mr. LaVergne’s unilateral mistake.

Under the same above analysis, inadvertence cannot be the basis to vacate the 9/21/2017 Military Retired Pay Division Order.

Because CR 60(b)(1) does not define “inadvertence”, the term is to be given its “plain and ordinary” meaning as ascertained from a standard dictionary. *In Re Marriage of Worthley*, 198 Wn. App. 419, 426, P.3d 859 (2017). Websters Dictionary defines inadvertence as “a lack of care or attentiveness”. As discussed in B below, like “mistake”, Mr. LaVergne never alleged or argued that he lacked care or was inattentive when he signed the 9/21/2017 Military Retired Pay Division Order or that he was inadvertent. As a result, as a matter of law the Trial Court erred in vacating the 9/21/2017 Military Retired Pay Division Order based on CR 60(b)(1) “inadvertence”.

B. There is no evidence in the court record to support the Trial Court’s

findings that Respondent Michael LaVergne II mistakenly and inadvertently signed the 9/21/2017 Military Retired Pay Division Order.

In reaching its decision to vacate the 9/21/2017 Military Retired Pay Division Order based on mistake “and maybe inadvertence, as well.” (CP 225, lines 14-15), the Trial Court in support of these findings stated, “I mean, I don’t think he understood what he was signing...” (CP 225, lines 15-16), meaning the 9/21/2017 Military Retired Pay Division Order that Mr. LaVergne II signed. However, simply stated, there is no evidence in the court record to support these findings or the Trial Court’s conclusion that Mr. LaVergne did not understand what he signed.

Mr. LaVergne filed three (3) pleadings in support of his motion to vacate the 9/21/2017 Military Retired Pay Division Order: (1) his 9/17/2018 Respondent’s Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree (CP 108-126), (2) his 9/7/2018 Declaration of Michael LaVergne II ; (CP 127-131) and (3) his 11/14/2018 Declaration of Michael LaVergne in Strict Reply (CP 190-202). In addition, as the Trial Court noted, Mr. LaVergne also brought up vacating the 9/21/2017 Military Retired Pay Division Order at the June 21, 2018 hearing before Commissioner Adams. A review of the above pleadings along with the 6/15/2018 Declaration of Michael LaVergne (CP 59-75) will show that Mr. LaVergne never claimed to have inadvertently or mistakenly signed the

9/21/2017 Military Retired Pay Division Order. His claim before the Trial Court has remained that after he signed the 9/21/2017 Military Retired Pay Division Order, Susan fraudulently altered the 9/21/2017 Military Retired Pay Division Order to change the retirement award from 50% of the marital portion of retirement to 50% of his entire retirement, a claim of fraud that the Trial Court rejected (CP 223).

In Mr. LaVergne's 6/15/2018 declaration in response to Susan's 4/13/2018 Motion for Order to enforce QDRO and Decree Order and Compel Proof (CP 56-58), he raised for the first time, after claiming Susan had wrongfully received 6 months of retirement payments, his issue that pursuant to Alabama code section 30-2-51(b), Susan should have received 25% of his retirement instead of the 50% ordered in the 9/21/2017 Military Retired Pay Division Order (CP 62: lines 17-25; 63 lines 1-2). However, nowhere in this declaration did Mr. LaVergne indicate that he mistakenly or inadvertently signed the 9/21/2017 Military Retirement Pay Division Order nor did he allege any fraud on Susan's part, although in argument before Commissioner Adams, Mr. LaVergne's attorney for the first and only time alleged that Susan had forged Mr. LaVergne's signature on the 9/21/2017 Military Retirement Pay Division Order (CP 91; line 1). That forgery allegation later turned into the fraud allegation found in Mr. LaVergne's motion to vacate the 9/21/2017 Military Retired Pay Division

Order: ie. that Mr. LaVergne signed the 9/21/2017 Military Retirement Pay Division Order, but that Susan subsequently altered the award provision. What Mr. LaVergne alleged about the 9/21/2017 Military Retirement Pay Division Order was:

“The order Commissioner Adams signed cannot change the Alabama Divorce Decree. Further, the order Commissioner Adams signed occurred after DFAS adopted and announced nationwide the new “Frozen Benefit” rule, consistent with the above calculations and over payments to Susan. The court did not intend for Susan to benefit from my additional 14 years of service after the divorce.”
(CP 63; lines 3-7)

Regarding Susan’s responsibility for alleged over payments of Mr. LaVergne’s military retirement that she had received, Mr. LaVergne only said that:

“Susan knows, or should have known, that she was receiving a disproportionately high monthly payment out of my retirement.”
(CP 64: lines 5-6)

In Mr. LaVergne’s 9/17/2018 Respondent’s Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree (CP 108-126), Mr. LaVergne, through counsel, set forth the statement of facts which Mr. LaVergne believed supported his motions. If Mr. LaVergne did not understand the 9/21/2017 Military Retired Pay Division Order or mistakenly or inadvertently signed it, as the Trial Court subsequently found, surely the Statement of Facts would have contained facts/allegations to support his mistake, misunderstanding or inadvertence. However, a reading of the Statements of Facts shows no such facts/allegations.

As expected, Mr. LaVergne's 9/17/2018 Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree also set forth Mr. LaVergne's legal argument on why the 9/21/2017 Military Retired pay Division Order should be vacated, listing seven (7) basis under CR 60(b):

1. Irregularly in obtaining judgement (Cp 113)
2. Newly discovered evidence that could not have been discovered before (CP 113)
3. Misrepresentation (CP 115)
4. Misconduct of an adverse party (CP 115)
5. Any other reason justifying relief from the operation of the judgment (CP 116)
6. Fraud (CP 114-115)
7. Mistake (CP 112-113)

Of note is the fact that Mr. LaVergne did not include inadvertence as a basis. Why? The obvious answer is because Mr. LaVergne did not inadvertently sign the 9/21/2017 Military Retired Pay Division Order. Of equal importance, the "mistake" argued by Mr. LaVergne in his 9/17/2018 Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree was not his mistake in signing the 9/21/2017 Military Retired Pay Division Order but allegedly Commissioner Adams' mistake in signing the 9/21/2017 Military Retired Pay Division Order. There is nothing in Mr.

LaVergne's 9/17/2018 Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree that supports the Trial Court's findings of mistake, inadvertence, and Mr. LaVergne's misunderstanding about the 9/21/2017 Military Retired Pay Division Order.

In his 9/17/2018 Declaration of Michael LaVergne II (CP 127-140), there are no allegations by Mr. LaVergne that he inadvertently signed the 9/21/2017 Military Retired Pay Division Order. There is no allegation that he mistakenly signed it. There is no allegation that he misunderstood what he claimed to have signed or that he misunderstood Alabama law with regards to a division of retirement/pension in an Alabama divorce when he signed the 9/21/2017 Military Retired Pay Division Order. In fact, his declaration is replete with statements about his knowledge prior to signing the 9/21/2017 Military Retired Pay Division Order that Susan was entitled under Alabama law to no more than 50% of his retirement earned during their marriage. (CP 128 lines 1-6; 131 lines 2-7) Instead, Mr. LaVergne's declaration focused on his allegations of fraud and how Susan allegedly changed the 9/21/2017 Military Retirement Pay Division Order he had signed, again allegations that the Trial Court rejected. Mr. LaVergne's 9/17/2018 Declaration of Michael LaVergne II does not support the Trial Court's findings of mistake and inadvertence and its belief that Mr.

LaVergne misunderstood the 9/21/2017 Military Retired Pay Division Order.

On 11/14/2018, Mr. LaVergne filed his Declaration of Michael LaVergne II in Strict Reply. (CP 190-202) Again, this declaration made no mention of mistake or inadvertence. Instead, Mr. LaVergne continued his allegations of fraud and his allegation that Susan had somehow altered the 9/21/2017 Military Retired Pay Division Order stating:

“I never signed an order giving Susan 50% of my disposable Retirement. I signed an order giving Susan 50% of her marital Share of my retirement.” (CP 190; line 17-19)
“Still I believe that Susan changed the order after I signed it.”
(CP 194: line 2-3)

The declaration made no mention that Mr. LaVergne did not understand what he signed or did not understand the amount of retirement to which he believed Susan was entitled. Instead, Mr. LaVergne stated, “the only thing I know for sure, and have known for many years now, is Susan’s share of my retirement was limited to 50% of the marital share.” (CP 193 lines 18-20). Mr. LaVergne’s 11/14/2018 Declaration of Michael LaVergne in Strict Reply does not support the Trial Court’s findings of mistake and inadvertence and its belief that Mr. LaVergne did not understand the 9/21/2017 Military Retired Pay Division Order or did not understand to what he believed Susan was entitled.

No other pleadings were before the Trial Court on 11/16/2018 when it made its ruling to vacate the 9/21/2017 Military Retired Pay Division Order and given the above, it is evident that the Trial Court had no evidence/alleged facts on which to base its findings of mistakes and inadvertence on the part of Mr. LaVergne and no evidence/alleged facts that could support the belief that Mr. LaVergne misunderstood the 9/21/2017 Military Retired Pay Division Order that he signed. Without such evidence/alleged facts, the Trial Court's decision to vacate the 9/21/2017 Military Retired Pay Division Order based on mistake and inadvertence must be reversed.

IV. CONCLUSION

The case law regarding vacating an agreed order based on CR60(b)(1) unilateral mistake or inadvertence does not support the Trial Court's November 16, 2018 Order Granting Respondent's Motion to Vacate Post-Dissolution Order altering Out-of-State Divorce Decree, the December 14, 2018 Order on Motion to Clarify November 16, 2018 Order Granting Motion to Vacate and the December 13, 2019 Military Retired Pay Division Order, all of which have reduced Susan's agreed award of 50% of Mr.

LaVergne's disposable Military retired pay as set forth in the 9/21/2017 Military Retired Pay Division Order.

In addition, the facts in the court record do not support the Trial Court's findings that Mr. LaVergne mistakenly and inadvertently signed the parties' agreed 9/21/2017 Military Retirement Pay Division Order or that Mr. LaVergne misunderstood that Order when he signed it.

It is therefore respectfully submitted that the Trial Court erred both in law and fact in vacating the 9/21/2017 Military Retired Pay Division Order pursuant to CR60(b)(1) and its orders must be reversed so that Susan can resume receiving 50% of Mr. LaVergne's disposable retired pay to which the parties agreed. In order for that to happen, Susan will need an order that will notify and direct DFAS to discontinue the current 25% payments to Susan and re-commence the 50% payments. It is suggested that the best approach to so notify and direct DFAS is to have two (2) orders entered by the Trial Court: one order indicating that the November 16, 2018 Order Granting Respondent's Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree and the December 14, 2018 Order on Motion to Clarify November 16, 2018 Order Granting Motion to Vacate have been reversed and are no longer in effect. The second order would need to amend the December 13, 2019 Military Retired Pay Division Order to change paragraph 5 to read "The former spouse (Susan McClain) shall

be awarded 50% of the Member's (Michael LaVergne) disposable retired pay" and to change the last sentence of paragraph 7 to read "The issue of past underpayments are reserved to this Court". Susan can then send both orders to DFAS along with her DD Form 2293 Application for Former Spouse Payments from Retired Pay which should cause DFAS to recommence Susan's 50% payments. The issue of underpayments to Susan should then be resolved after Susan begins to receive her 50% payments from DFAS.

DATED this 15 day of June, 2020.

Respectfully submitted



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