

FILED
Court of Appeals
Division II
State of Washington
8/13/2020 8:00 AM
No. 54219-6-11

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION 11

SUSAN KAY McCLAIN

Appellant,

MICHAEL FRANCIS LAVERGNE 11

Respondent,

REPLY BRIEF OF APPELLANT

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

TABLE OF CONTENTS

I. LEGAL AUTHORITY AND ARGUMENT

A. The Request for Appellate Review of the 11/16/2018 Order Altering Out-of-State Divorce Decree, the 12/14/2018 Order on Motin to Clarify 11/16/2018 Order Granting Motion to Vacate and the final judgement 12/13/2019 Mliitary Retired Pay Division Order is timely.....1-7

B. The Trial Court did not properly vacate the 9/21/2017 Military Retired Pay Division Order under CR 60(b)(1)7-11

C. There is no evidence in the court record to support the finding of mistake and inadvertence on the part of Mr. LaVergne 11-16

II. NO ATTORNEY FEES AND COSTS SHOULD BE AWARDED.. 16-17

III. CONCLUSION 17-19

TABLE OF AUTHORITES

CASES

<i>Behavioral Washington App. Sciences Inst.v.Great-West Life</i> , 84 Wn. App. 863, 870, 930 P.2d 933, 937 (1997)	1, 5, 7
<i>Fox v. Sunmaster Prods.</i> , 115 Wn. 2d 498, 504, 798, P.2d 808 (1990) ...	1-2
<i>Haller v. Wallis</i> , 89 Wn. 2d 539, 543, P.2d 1302 (1978)	8
<i>Norton v Brown</i> , 99 Wn. App. 118, 992 P.2d 1019 (1999)	7
<i>Wlasiuk v. Whirlpool Corp.</i> , 76 Wn. App.250, 884 P.2d 13 (1994)	1
<i>Wright Real Estate Servs. Inc. . Hill</i> , 208 WASH App. Lexis 2335 at *5-7 (unpublished non-binding decision)	2-4

RULES

RAP 1.2(a)	1, 7
RAP 2.2	1
RAP 2.4(b)	4
CR 60(b)(1)	6

I. LEGAL AUTHORITY AND ARGUMENT

A. The Request for Appellate Review of the Order Vacating Post-Dissolution Order Altering Out-of-State Divorce Decree is timely.

Mr. LaVergne relies upon RAP 2.2(a)(10) to assert that the deadline for filing an appeal of the order vacating the 9/21/2017 Military Retired Pay Division Order was 30 days after its entry. RAP 2.2, however, simply identifies those decisions of the Superior Court that may be appealed as a matter of right. It does not require that each of the enumerated orders must be appealed within 30 days in order to preserve the right to challenge those orders after final judgment is entered. The rules are interpreted liberally to promote justice and facilitate the decision of cases on the merits. *RAP 1.2(a); Behavioral Wash. App. Sciences Inst. v. Great-West Life*, 84 Wn. App. 863, 870, 930 P.2d 933, 937 (1997) An appeal from a final judgment brings up most pretrial orders. *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 884 P.2d 13 (1994). The rule “does not explicitly say what must be appealed to avoid loss of the right of review or other prejudice.” *Fox v. Sunmaster Prods.* 115 Wn. 2d 498, 504, 798 P.2d 808 (1990) citing *2A L. Orland, Wash. Prac. Rules Practice §3061, at 432 (1978)*. Nor is there any “indication of an attempt to abandon the final judgment rule as a central organizing principle”. *Id.* To the contrary, the rules contemplate that various kinds of decisions, specifically including earlier appealable orders,

will be reviewed in the appeal from the final judgment in the case. *Id.* The Supreme Court, in *Fox*, explained as follows:

“The general rule, set forth in RAP 2.4(a), says the court will review, at the instance of the appellant, "the decision or parts of the decision designated in the notice of appeal" ...RAP 2.4(b) expressly permits the appellate court to review any earlier order or ruling, "including an appealable order," regardless whether it is designated in the notice of appeal, if it prejudicially affects the decision designated in the notice....

These provisions make it clear that a party does not automatically lose the right to appellate review of either "appealable orders" or partial "final judgments" by failing to file a notice of appeal within 30 days. Indeed, in this particular the Rules of Appellate Procedure were specifically designed to eliminate "a trap for the unwary" which existed under the prior rules "in that a failure to appeal an appealable order could prevent its review upon appeal from a final judgment". *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 134, 750 P.2d 1257, 756 P.2d 142 (1988). "RAP 2.4(b) solved the problem by including prior appealable orders within the scope of review." *Adkins*, at 134.

A party cannot always know, when the first adverse "appealable order" in a case is entered, if review of that decision will ever be necessary. Quite possibly some subsequent order will render an adverse decision moot, or the party will ultimately prevail on remaining issues or recover against other parties.”

Fox v. Sunmaster Prods., 115 Wn.2d 498, 505, 798 P.2d 808, 812 (1990)

More recently, in a case similar to the one at bar, Division I held that where the appeal was filed within 30 days of the final judgment, the appellate court could properly review prior orders, even those that were immediately appealable, if they prejudicially affected the final judgment. *Wright Real*

Estate Servs., Inc. v. Hill, 2018 Wash. App. LEXIS 2335, at *5-7

(unpublished non-binding decision) The court reasoned as follows:

“Wright argues this court does not have jurisdiction to hear the appeals of the order granting motion to vacate and order denying motion for reconsideration because Terry untimely appealed. Terry argues these orders are reviewable as part of his appeal of the order reinstating the default judgments. We agree with Terry.

Typically, a party must file an appeal within thirty days after the court enters the order the party wants reviewed. *See* RAP 5.2(a). However, litigants do not need to appeal every appealable order and can instead wait to appeal the final order or judgment. *Fox v. Sunmaster Prods. Inc.*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990). A final order or judgment “finally determines the rights of the parties in the action.” *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 255, 884 P.2d 13 (1994).

Under RAP 2.4(b) an “appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.” Under this rule, “[i]f a timely notice of appeal is filed from that decision, the appellate court will review prior orders and judgments, *even those which were immediately appealable*, if they prejudicially affect the final judgment.” *Franz v. Lance*, 119 Wn.2d 780, 781, 836 P.2d 832 (1992) (citing *Fox*, 115 Wn.2d at 505). A prior order prejudicially affects the final judgment “if the order appealed cannot be decided without considering the merits of the previous order.” *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 21 P.3d 1157 (2001).

Here, the trial court entered the default judgments against Terry on June 6, 2016 and August 9, 2016. Instead of immediately appealing, Terry moved to vacate both judgments and litigation continued. It was not until July 7, 2017, when the court granted Wright's motion to reinstate

the default judgments, that the parties' rights were finally determined in the action. Terry appealed shortly thereafter on July 13, 2017.

Both the order granting motion to vacate and order denying motion for reconsideration are reviewable as part of this court's review of the final order under RAP 2.4(b), because they prejudicially affect the final order. The orders were entered before this court accepted review, and the reinstatement of the default judgments hinges on the propriety of the underlying order to vacate with the bond term. Accordingly, under RAP 2.4(b), review of both the order granting motion to vacate and order denying motion for reconsideration fall within the scope of review of the final order (the order reinstating the default judgments).”

Id. Similarly, in the case at bar, Susan timely filed the notice of appeal challenging not only the final judgment, the Military Retired Pay Division Order entered on December 13, 2019, but also the two other orders that were appealable as a matter of right but which clearly prejudicially affected the final order that changed Susan’s pension award of 50% of Mr. LaVergne’s total retirement to 50% of the marital portion of Mr. LaVergne’s retirement. The correctness of the final judgement, the 12/13/2019 Military Retired Pay Division Order and specifically paragraph 5 of said order which changed Susan’s award, cannot be decided without considering the merits of the two orders entered previous to it: the 11/16/2018 Order Vacating the Post-Dissolution Order Altering Out-of-State Divorce Decree and the 12/14/2018 Order on Motion to Clarify 11/16/2018 Order Granting Motion to Vacate. The orders are inextricably tied to the final order. Although RAP 2.4(b) specifically allows the Court to consider orders that have **not** been

designated in the notice of appeal, a party who properly designates all orders she seeks to have reviewed in the notice should not be penalized and placed in a worse position than an appellant who fails to include them in a notice of appeal. Susan timely appealed the final judgment that changed her awarded portion of Mr. LaVergne's military retirement from 50% of the total retirement awarded to her in the agreed 9/21/2017 Military Retired Pay Division Order to 50% of only the portion of the retirement earned during the parties' marriage. The final judgment in this case and the entitlements awarded thereby to Susan were based directly upon the 11/16/2018 order to vacate and the 12/14/2018 order clarifying the 11/16/2018 order to vacate. Where the entitlement to relief under the final order is based on earlier appealable rulings and the previous orders prejudicially affect the final order and review of them all is proper. *Behavioral Sciences Inst., supra* at 863. Consequently, Susan has timely appealed the 12/13/2019 Military Retired Pay Division Order and the two orders upon which it depends and which are set forth in Susan's Notice of Appeal.

Mr. LaVergne further argues that in her opening brief, Susan did not discuss the 12/13/2019 Military Retired Pay Division Order which at paragraph 5 of that order reduced Susan's award of retirement pay from the 50% that was agreed to in the 9/21/2017 Military Retired Pay Division Order to 25%, a reduction which was consistent with and required by the Trial Court's 11/16/2018 Order Granting Respondent's Motion to Vacate

Post-Dissolution Order Altering Out-of-State Divorce Decree and its subsequent 11/16/2018 Order on Motion to Clarify 11/16/2018 Order Granting Motion to Vacate. This argument/assertion is simply not true.

First, given the procedural history, it is clearly evident that the 12/13/2019 Military Retired Pay Division Order and specifically paragraph 5 only exist because of the Trial Court's prior orders and that the reasons why those orders should be reversed are the same reasons why changing Susan's military retirement award in paragraph 5 from 50% to 25% should be reversed. That being said, Susan did articulate this obvious argument in her opening brief.

"The case law regarding vacating an agreed order based on CR 60(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. (emphasis added)

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 (sic) 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 CR 60(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." (pages 20-21 of Susan' Brief of Appellant.) (emphasis added)

Clearly, the 12/13/2019 Military Retired Pay Division Order and how and why it has reduced Susan's agreed award of 50% of Mr. LaVergne's total military retirement pay should be considered in this appeal. To fail to do so would simply fail to promote justice and fail to facilitate the decision of this case on its merits. See RAP 1.2(a); Behavioral Wash. App. Sciences Int. vs Great-West Life, 84 Wn. App. 863, 870, 930 P. 2d 933 (1997).

B. The Trial Court did not properly vacate the 9/21/2017 Military Retired Pay.

In support of his argument that the Trial Court properly applied the case law regarding mistake, Mr. Lavergne cited Norton v. Brown, 99 Wn. App. 118, 992 P.2 1019. (1999). **Norton** is clearly factually distinguishable. **Norton** involved the vacating of a default judgement, not an agreed court order where contract principles apply to the determination of whether to vacate an agreed order based on mistake. Because the default judgement was not an agreed order, the contract principles regarding unilateral mistake were not applicable and thus never addressed by **Norton**.

Mr. LaVergne next argues, without explanation, that the cases cited by Susan in her opening brief in support of the legal principle that an agreed court order, which the 9/21/2017 Military Retired Pay Division Order was,

is contractual in nature and therefore, cannot be vacated based on a unilateral mistake are distinguishable. Susan's cases are on point and support the legal argument that the 9/21/2017 Military Retired Pay Division Order cannot be vacated based on the Trial Court's finding that only Mr. LaVergne made a mistake or was inadvertent in signing the agreed and unambiguous 9/21/2017 Military Retired Pay Division Order.

Mr. LaVergne next argues, again without explanation and without citation of legal authority, that "CR 60 is equitable in nature, not contractual, and thus differing standard (sic) apply to the application of its subparts." (page 12 of Mr. LaVergne's brief). What differing standards? As previously noted, the agreed 9/21/2017 Military Retired Pay Division Order was contractual in nature. *Haller v. Wallis*, 89 Wn. 2d 539, 543, 573 P.2d 1302 (1978). As a result, under contract principles, Mr. LaVergne's alleged unilateral mistake could not have been used as the basis for vacating the 9/21/2017 Military Retired Pay Division Order. To find otherwise would allow every agreed order to be potentially vacated simply because a party to that order had "buyer's remorse" and claimed to have mistakenly signed the order.

In support of his argument that there was a genuine mistake by both Mr. LaVergne and Susan when they signed the 9/21/2017 Military Retired Pay Division Order, Mr. LaVergne further claims "...the record is replete, as is the brief of the Appellant, that she believed the Alabama Decree

awarded her half of the total value of the military benefit.” (page12 of Mr. LaVergne’s brief). In making this argument, Mr. LaVergne fails to cite any portion of the court record or any portion of Susan’s opening brief that supports this argument. The obvious reason for the lack of citations is the fact that there is nothing in Susan’s 11/13/2018 Responsive Declaration of Susan McClain or in Susan’s opening brief that says she believed the Alabama Decree awarded her half of Mr. LaVergne’s total retirement. On the contrary, the record is replete with declaration testimony not supporting this argument. In Mr. LaVergne’s two (2) declarations in support of his motion to vacate, Mr. LaVergne repeatedly alleged that Susan knew that she was only entitled to one half of the marital portion of his retirement. (CP 128 lines 1-6; lines 9-11; CP 129 lines 7-8; CP 131 lines 3-7; CP 190 lines 21-24; CP 191 lines 1-3; lines 12-13; CP 192 lines 22-24; CP 193 line 22; lines 24/25; CP 194 lines 1-2; CP 195 lines 1-4; lines 24/25; CP 196 lines 1-5). In her 11/13/2018 declaration, Susan denied these allegations that she and Mr. LaVergne had discussions about what they knew about the wording in the pension section of their Marital Dissolution Agreement. (CP 133 lines 5-10) And of course, the Trial Court never found that there was a genuine misunderstanding between Susan and Mr. LaVergne regarding the 9/21/2017 Military Retired Pay Division Order. The Trial Court opined that only Mr. LaVergne misunderstood the order. (CP 225 lines 15-16)

In support of the Trial Court's findings regarding his inadvertence, Mr. LaVergne argues that he "...articulated time and again, as did his counsel, that he would have never signed the order had he understood its terms to mean a division of more than 50% share of his disposable retirement pay." (page 13 of Mr. LaVergne's brief). It is important to note that what Mr. LaVergne does not say here and what he did not say in either of his declarations in support of his motion to vacate, is that he misunderstood the terms of the order that he signed. In his two (2) declarations, Mr. LaVergne used this argument to support his claim of fraud and his claim that the 9/21/2017 Military Retired Pay Division Order was not the order he agreed to and signed. As noted in Susan's opening brief, Mr. LaVergne never alleged in any pleading that he mistakenly/inadvertently signed the 9/21/2017 Military Retired Pay Division Order or that he misunderstood it. What he alleged was fraud and that Susan had changed the order that he had signed.

"I looked at the Washington Order. Instead of the order confirming the Alabama Order requiring Susan would receive 50% of the marital share of my Disposable Military Retirement as per the Alabama Divorce Order, Susan's new Washington Order gave her 50% of all of my military retirement.

The order Susan presented for this Court's signature does not look like the one I signed. Susan (sic) order materially changed the Alabama Court Order" (CP129 lines 11-17)."

Lastly, Mr. LaVergne argues that the Trial Court had the authority to consider whether one party's mistake or inadvertence (Mr. LaVergne's) could form the basis for its decision to vacate the 9/21/2017 Military Retired Pay Division Order. (page 13 of Mr. LaVergne's brief) Apparently here, Mr. LaVergne has abandoned his unsupportable argument that there was a genuine mistake by both him and Susan and now argues that his alleged unilateral mistake can be the basis for vacating the 9/21/2017 Military Retired Pay Division Order. For the reasons stated and the case law cited in section III(A) in Susan's opening brief, this argument is not legally supportable.

C. There is no evidence in the court record to support the Trial Court's findings of mistake and inadvertence on the part of Mr. Lavergne.

In support of his argument that the court record contains evidence to support a finding of mistake and inadvertence, Mr. LaVergne argues in his two (2) declarations in support of his motion to vacate, that he "...frequently discussed the fact he never would have signed the order if it had or he understood the document to award more than half of the marital portion of the retirement benefit." (page 14 of Mr. Lavergne's brief). Again, as previously noted, Mr. LaVergne used this argument, not to show that he mistakenly/inadvertently signed the 9/21/2017 Military Retired Pay Division Order, but to support his allegation of fraud, wherein he alleged that the order that he did sign gave Susan 50% of her marital share of his

retirement (CP 140 lines 17-19) and that he believed Susan changed the order after he signed it. (CP 194 lines 2-3) As noted in the Trial Court's 11/16/2018 ruling on Mr. LaVergne's motion to vacate, the Trial Court did not find fraud nor did the Trial Court find that Susan had changed the order Mr. LaVergne alleged that he signed. Instead, the Trial Court found that Mr. LaVergne made a mistake in signing the 9/21/2017 Military Retired Pay Division Order, that there was ".....maybe inadvertence, as well." and that the Trial Court did not think Mr. LaVergne understood what he was signing. (CP 225 lines 11-16) Yet nowhere in either of his two (2) declarations did Mr. LaVergne say that he mistakenly or inadvertently signed the 9/21/2017 Military Retired Pay Division Order that clearly and unambiguously gave Susan 50% of his total retirement and nowhere in his two (2) declarations did he say that he did not understand the 9/21/2017 Military Retired Pay Division Order. On the contrary, Mr. LaVergne made it clear in his two (2) declarations that he knew what Susan was entitled to under Alabama law with regards to his military retirement, which was 50% of the portion earned during the marriage, not 50% of the total retirement. (CP 128 lines 1-6; lines 9-11; CP 129 lines 7-8; CP 131 lines 3-7; CP 190 lines 18-19; 21-24; CP 197 lines 2-4) Yet with this evidence in the court record, the Trial Court found mistake and inadvertence and held the belief that Mr. LaVergne did not understand a clear and unambiguous award to

Susan of 50% of his total military retirement in the 9/21/2017 Military Retired Pay Division Order that the Trial Court found Mr. LaVergne signed.

Mr. LaVergne references in his brief "...My apologies to the Court if I calculated **that** incorrectly," apparently suggesting that this is evidence of mistake. (CP 193 lines 19-20) (emphasis added) The "that" to which Mr. LaVergne was referring was the calculation of 50% of the marital share of his retirement. What Mr. LaVergne was apologizing for in his 11/19/2018 strict reply declaration was his incorrect statement in his 9/17/2018 declaration regarding the date of the parties' Alabama Divorce, which he claimed to be Feb 2, 2003, which if true would have resulted in just over 13 years of service during the marriage (CP 127 lines 20-21). Susan in her 11/13/2018 declaration pointed out Mr. LaVergne's mistake on the date of the divorce and corrected it to Feb 2, 2004, which resulted in just over 14 years of a marital share of the retirement. (CP 132 lines 18-23, 133 lines 1-2). In making this apology to the Trial Court, Mr. LaVergne was not apologizing for mistakenly or inadvertently signing an order that gave Susan 50% of his retirement.

Mr. LaVergne further argues, correctly this time, that in order for the Trial Court to find mistake, it would have to find that there was a genuine misunderstanding between both Susan and him. (page 14 of Mr. LaVergne's brief). However, Mr. LaVergne then makes the disturbingly false claim that the Trial Court found a genuine misunderstanding between Mr. LaVergne

and Susan (page 14 of Mr. LaVergne's brief) when it is clear from the Trial Court's ruling that it found a mistake and inadvertence on the part of only Mr. LaVergne, with no mention of Susan at all. (CP 223 lines 12-14; CP 225 lines 14-16) In making this false claim, Mr. LaVergne further argues, without citing any part of the court record, that the Trial Court's decision was based on Susan's repeated statements that she knew the Alabama Decree awarded her 50% of Mr. LaVergne's total pension, an argument which is again not supported by the court record as demonstrated in Section B.

With regards to inadvertence, the "evidence" Mr. LaVergne has argued that supports the Trial Court's finding are his statements that ".....he never would have signed the Order as it was expressed had he understood it that way." (page 15 of Mr. LaVergne's brief). Again, these statements were used by Mr. LaVergne to support his argument of fraud and of Susan allegedly altering the order Mr. LaVergne alleges he signed that awarded Susan 50% of the marital portion of his pension, allegations which the Trial Court rejected.

Nothing argued in section IV. C of Mr. LaVergne's brief in any way supports his argument that there was sufficient evidence in the court record to support the Trial Court's finding that Mr. LaVergne mistakenly and inadvertently signed the 9/21/2017 Military Retired Pay Division Order which gave Susan 50% of Mr. LaVergne's total retirement, an order that

Mr. LaVergne has claimed in all of his pleadings that he did not sign. (CP 129 lines 11-17; CP 131 lines 8-11; CP 190 lines 17-21; CP 191 lines 4-5; CP 194 lines 1-4; CP 195 line 24/25; CP 196 lines 1-5)

The above of course raises the fundamental and obvious questions regarding the Trial Court's findings in its 11/16/2018 Order Granting Respondent's Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree. Can Mr. LaVergne be found to have mistakenly and inadvertently signed an order that Mr. LaVergne repeatedly alleged he did not sign, an allegation that was rejected by the Trial Court? The obvious answer is no. Could Mr. LaVergne have misunderstood the 9/21/2017 Military Retired Pay Division Order and its clear and unambiguous award of 50% of Mr. LaVergne's retirement when he repeatedly claimed to know that Susan was only entitled to 50% of the marital portion and when on 9/13/2017 he received by text message a copy of the proposed order to review, the receipt of which Mr. LaVergne never denied in his declarations and which, contrary to Mr. LaVergne's assertion at page 5 of his brief, legibly awarded Susan 50% of his total retirement? (CP 135 lines 16-23; CP 136 lines 1-2; CP 144). The obvious answer to this question is no. It is respectfully submitted that there was no evidence to support the Trial Court's findings of unilateral mistake and inadvertence on the part of Mr. LaVergne in signing the 9/21/2017 Military Retired Pay Division Order which clearly and unambiguously awarded Susan 50% of Mr. LaVergne's

military retirement. Because the Trial Court's subsequent 12/14/2018 Order on Motion to Clarify 11/16/2018 Order Motion to Vacate, which Mr. LaVergne misquotes at page 3 of his brief (see Order at CP 230-231) and 12/13/2019 Military Retired Pay Division Order are inextricably tied to the 11/16/2018 order vacating the agreed 9/21/2018 Military Retired Pay Division Order and because neither would exist had the Trial Court not vacated the 9/21/2017 Military Retired Pay Division Order, the Trial Court also abused its discretion in entering these two (2) subsequent orders, both of which changed Susan's retirement award to 50% of Mr. LaVergne's total retirement to 25% of the retirement (50% of the marital portion).

II. NO ATTORNEYS FEES AND COSTS SHOULD BE AWARDED

There is no basis for an award of attorney fees and costs against Susan. Susan's appeal of the Trial Court's abuse of discretion in vacating the agreed 9/21/2017 Military Retired Pay Division Order and in entering the subsequent orders pursuant to that ruling/order to vacate is not frivolous. Susan's appeal of the final judgement in this matter, the 12/13/2019 Military Retirement Pay Division Order, was timely as was her appeal of the 11/16/2018 Order Granting Respondent's Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree and of the 12/14/2015 Order on Motion to Clarify 11/6/2018 Order Granting Motion to Vacate.

Moreover, Susan does not have the ability to pay attorney fees to Mr. LaVergne. Susan is disabled and at the time of the 11/16/2018 hearing on Mr. LaVergne's motion to vacate, Susan and her four children were living on the \$1940 she was receiving from Mr. LaVergne's retirement (now reduced by half (1/2)), \$750 disability, \$140 in food stamps and \$1200 child support for her then 17 year old daughter Kaitlynn (support subsequently terminated). (CP 32: CP 143). Susan clearly has no ability to pay attorney's fees or costs.

For the above reasons, Mr. LaVergne's request for attorney's fees and costs should be denied.

III. CONCLUSION

Susan filed her Notice of Appeal to the Court of Appeals, Division II by Petitioner Susan Kay McClain on January 6, 2020, including in her Notice of Appeal the following orders to appeal.

1. 12/13/2019 Military Retired Pay Division Order.
2. 11/16/2018 Order Granting Respondent's Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree.
3. 12/14/2018 Order on Motion to Clarify 11/16/2018 Order Granting Motion to Vacate.

Susan's Notice of Appeal was filed within thirty (30) days of the entry of the final judgement in this matter, the 12/13/2019 Military Retired Pay Division Order and was therefore timely filed with regards to that order. Because both the 11/16/2018 Order Granting Respondent's Motion to Vacate Post-Dissolution Order Altering Out-of-State Divorce Decree and

the 12/14 2018 Order on Motion to Clarify 11/16/2018 Order Granting Motion to Vacate prejudicially affect the 12/13/2019 Military Retired Pay Division Order, those two (2) orders are also properly and timely before the Court for appellate review.

Moreover, the Trial Court abused its discretion and erred in entering the 12/13/2019 Military Retired Pay Division Order. As fully discussed in Susan's Brief of Appellant and as discussed herein, the Trial Court, on 11/16/2018, erred as a matter of law when it vacated the parties' agreed 9/21/2017 Military Retired Pay Division Order based on a finding that only Mr. LaVergne mistakenly and inadvertently signed said order. The Trial Court also erred when it made its finding of unilateral mistake and inadvertence because the evidence in the court record simply did not support mistake and inadvertence by Mr. LaVergne. Because all three (3) of the orders listed in Susan's Notice of Appeal are a result of the Trial Court's 11/16/2018 erroneous and unsupported findings of mistake and inadvertence which resulted in vacating the parties' agreed and unambiguous 9/21/2017 Military Retired Pay Division Order, all three (3) orders must be reversed so that Susan can resume receiving 50% of Mr. LaVergne's total retirement to which the parties agreed. However, as suggested in section IV. Conclusion of Susan's Brief of Appellant, amending the 12/13/2019 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 II) disposable retired pay." and to change the last sentence of paragraph 7 to read "The issue of past underpayments are reserved to the Court." should help facilitate correcting the payment to Susan by DFAS. In addition, there are sections of the 12/13/2019 Military Retired Pay Division Order which are not found in the parties' 9/21/2017 Military Retired Pay Division Order and which are meant to benefit both parties which is another reason why amending rather than voiding the 12/12/2019 Military Retired Pay Division Order is logical.

If amending the 12/13/2019 Military Retired Pay Division Order is not possible, the obvious alternative is to enter such orders as are necessary to make it clear to DFAS that the parties' 9/21/2017 Military Retired Pay Division Order is no longer vacated, that it remains in full force and effect and that Susan is to re-commence receiving direct payments from DFAS of 50% of Mr. LaVergne's retirement. However, under either approach, the issue of underpayments to Susan should then be resolved after Susan begins to receive her 50% payments from DFAS.

DATED this 12th day of August, 2020

Respectfully Submitted



SUSAN KAY MCCLAIN
Appellant/Pro se
244 Easton Ave. W
Eatonville, WA 98328

SUSAN MCCLAIN - FILING PRO SE

August 12, 2020 - 9:35 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54219-6
Appellate Court Case Title: Susan Kay McClain, Appellant v Michael Francis Lavergne, II, Respondent
Superior Court Case Number: 17-3-03594-6

The following documents have been uploaded:

- 542196_Briefs_20200812213512D2980176_9445.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Appellant reply 081220.pdf

A copy of the uploaded files will be sent to:

- jchaffee@mckinleyirvin.com
- spage@mckinleyirvin.com

Comments:

Sender Name: Susan McClain - Email: Susankm30@yahoo.com
Address:
244 Easton Ave W
Eatonville , WA, 98328
Phone: (253) 888-5071

Note: The Filing Id is 20200812213512D2980176