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No. 54219-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SUSAN KAY McCLAIN,

Appellant,

v.

MICHAEL FRANCIS LAVERGNE II

RESPONDENT

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

RESPONSIVE BRIEF OF RESPONDENT

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I. INTRODUCTION

The trial court correctly entered an order which vacated the Military Retirement Order entered by the Court on September 21, 2017. Michael Lavergne, hereinafter referred to as “Respondent”, was granted relief under CR 60(b)(1) from a Military Retirement Order drafted by Susan McClain, hereinafter referred to as “Appellant”, on November 16, 2018. An Amended Military Retirement Order was entered by agreement on December 13, 2019. Appellant has requested review of the Military Retirement Order entered December 13, 2019, the Trial Court’s decision to vacate the Military Retirement Order dated November 16, 2018, and the Trial Court’s Order on Clarification dated November 18, 2018. Appellant does not address the Trial Court’s Order on Clarification or the Military Retirement Order in her opening brief, except for an ancillary statement in the conclusion section. This brief responds only to the specific arguments made in the Argument section of the Appellant’s Brief.

II. ASSIGNMENTS OF ERROR

Issues Pertaining to Appellant’s Assignment of Error

1. Is the Appellant’s Notice of Appeal Timely? **No.**

2. Did the court properly vacate the Military Retirement Order under CR 60(b)(1)? **Yes.**
3. Was the decision to vacate the Military Retirement Order supported pursuant to CR 60(b)(1) by the evidence in the record? **Yes.**

III. STATEMENT OF THE CASE

A. Procedure

The parties were divorced on February 2, 2004, in the Circuit Court for Dale County, Alabama. The Decree ordered the Appellant was entitled to a Military Retirement Order which awarded her one-half of the marital portion of the Respondent's Military Retirement Order. A Military Retirement Order awarding the Appellant one-half of the Respondent's total retirement order was entered ex parte without notice to Respondent on September 21, 2019. CP 1-3.

Respondent filed a motion to vacate the September 21, 2017 Military Retirement Order on September 17, 2018. CP 108-126, 282 – 284. The Motion to Vacate was granted by the trial court on November 16, 2018. CP 203-205. The court granted the motion to vacate finding mistake and inadvertence. *Id.*

Appellant filed a motion to clarify the ruling of the court regarding an evidentiary hearing set by the court in the November 16, 2018 in order to determine the intent of the parties with regards to the Military Retired Pay Division Order to be entered by the court. CP 206-207.

The Trial Court entered an order which found that “both parties concur that the non-covered spouse shall not be awarded more than 50% of the marital portion of a retirement benefit. With this Finding, the Court further finds that the Petitioner shall be entitled to 50% of the marital portion of the Respondent’s disposal retirement payment and that results in the Petitioner being entitled to 25% of the total disposal retirement pay.” CP 230-231.

Appellant filed a motion for presentation of the Military Retirement Order currently in effect on November 19, 2019. CP 232. The Trial Court entered the Amended Military Retirement Order on December 13, 2019.

B. Facts

The parties were married on December 22, 1989 in Orting, WA. CP 127. The parties divorced on February 2, 2003 in Alabama. *Id.* At that time, the Respondent had served just over 13 years in the U.S.

Army. *Id.* In total, the Respondent served 28 years in the U.S. Army. *Id.*

The party's dissolution decree divided the military retirement benefit "pursuant to Alabama State Law." CP at 128. The Respondent believed at the time of the entry of the decree and to this day that the Appellant was entitled to no more than one-half of the benefit acquired during the marriage. *Id.* The Respondent testified in writing that the Appellant and the Respondent had numerous conversations at the time of divorce and subsequent to the divorce, close to the date of retirement, that the Appellant would be receiving half of the marital portion of the retirement benefit, or 25% of the total benefit. *Id.*

In 2017, the Appellant told the Respondent that a retirement order would need to be entered in Washington. *Id.* The Respondent indicated he would sign a Military Order if it reflected the Alabama Decree. *Id.* Appellant's partner, a non-lawyer, prepared the document. *Id.* Appellant provided a copy to the Respondent and it did not appear to change the language of the Alabama Order, so the Respondent signed the Order. *Id.* The Respondent was informed the order was entered with DFAS and would begin transferring the Appellants share to her directly. *Id.* at 129. The Appellant began

receiving 50% of the total benefit. *Id.* The Respondent testified that the order did not look like the one he signed. *Id.* The Respondent also testified that the Appellant denied any wrongdoing and that it must have been somebody else's fault. *Id.* The Respondent testified in support of his motion that all of the parties knew that the Alabama Order controlled. *Id.* at 131. Further, the Respondent testified that he had worked hard for the US Army, had earned more than half of it after the Appellant and the Respondent divorced and that he would have never signed any order to the contrary. *Id.*

The Appellant was invited to and had knowledge that the Respondent was retiring from the military in 2017. CP 134. The Appellant had her husband, Paul Dunn, a non-lawyer, draft a Military Retirement Order shortly thereafter. CP 135. The original version of the order was sent via text message. *Id.* Of note, the copies provided by the Appellant to the trial Court of these messages were unclear and illegible. The Appellant alleged the Respondent knew the order gave the Appellant a total of 50% of his retirement benefit.

The Respondent testified in his strict reply that the parties never had an agreement regarding an increased amount. CP 190. The Respondent testified he would have never signed a document which provided fifty percent of disposable retirement income to the

Appellant. CP at 191. The Respondent testified that although he received some communications from DFAS, that some of them were hard to understand. CP at 193. The Respondent apologized to the court if there was a miscalculation of the amount. *Id.* The Respondent stated he believed the Appellant changed the order after it was signed, but if he had understood what the Appellant claimed to have written, he would never have signed the order. CP at 192.

The Respondent argued in support of his motion to vacate that the parties acknowledged at the time of signing that both parties understood the order could not award the Appellant more than 50% of the marital portion of the retirement order and that should be considered when interpreting the Military Retirement Order, although the Appellant argues the contrary. CP 193.

The Respondent, through counsel, at the hearing on the Motion to Vacate held on November 16, 2018, argued that all applicable provisions of CR 60 would authorize the vacation of the decree including inadvertence, mistake and fraud. CP at 211. The court articulated “I understand that it is his (Respondent) that was not was agreed to, and he didn’t understand that what this meant.” CP at 212. This statement referred specifically to the terms of the Military Retirement Order. The court further questioned counsel for the

Appellant “Isn’t there a question as to what they agreed? He clearly believed they agreed to something else.” CP at 214.

The Court, in its ruling vacating the decree, framed the issue as follows, “ Isn’t the issue, though, what the parties – what the decree meant and what the parties agreed to at the time of the divorce in 2004?” CP. At 222. Further, the court ruled “But I believe there to be a mistake, and I think there needs to be an evidentiary hearing as to what was meant by the decree, and that the order, whatever it is to be, should be consistent with what was intended by the parties at the time that the decree was entered.” CP 228. The parties then entered an order which reflected the courts ruling.

The Appellant then filed a motion to clarify the court’s ruling. The court conducted a hearing on the same and ordered a Military Retirement Order be entered which gave the Appellant 50% of the marital portion of the disposable retirement order.

IV. LEGAL AUTHORITY AND ARGUMENT

A. The Appellant’s Request for Appellate Review of the motion to Vacate is not timely.

The issue here is whether the Appellant’s notice of appeal is timely. The Appellant raised three issues in the notice of appeal including the order vacating the decree, the order on clarification, and

the entry of the Military Retirement Order. An aggrieved party may appeal from an order granting or denying a motion to vacate a judgement. *RAP 2.2(a)(10)*. An aggrieved party may seek discretionary review of any act of the superior court not appealable as a matter of right. *RAP 2.3(a)*. A notice of appeal must be filed within of 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed. *RAP 5.2(a)*, *Schaefco, Inc. V. Columbia River Gorge Comm'n*, 121 Wn.2d 266, 367 (1993). A notice of discretionary review must be filed within 30 days after the act of the trial court that the party filing the notice wants reviewed. *RAP 5.2(b)*. The appellate court will only under extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal because the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time. *RAP 18.8(b)*. In contrast to the liberal application of the Rules of Appellate Procedure, *RAP 18.8(b)* requires a narrow application. *Beckman v. Department of Social and Health Services*, 102 Wn.App. 687, 693 (2000).

In this case, the only issue argued in the appellate brief of the Appellant is the issue of the motion to vacate. The order on motion to vacate was granted on November 16, 2018. This issue is

appealable as a matter of right pursuant to RAP 2.2(a)(10). RAP 5.2(b) requires a notice to be submitted within 30 days. It is uncontroverted that the notice of appeal relating to the motion to vacate was outside the prescribed time period. No exception to the filing of the notice of appeal under 3.2(e), 5.2(d) – (f) or any other statute provide for an extension. The Appellant has not requested an extension pursuant to RAP 18.8(b), but such a request would fail. There is no articulable basis for an extension under this exception. Because the appellant failed to timely file her notice of appeal, the matter must be dismissed.

The Appellant raised two other issues in the notice of appeal that were not discussed in the Appellant's brief. The first relates to a motion to clarify the motion to vacate. This motion seeks only to clarify an ancillary ruling about the terms of an amended QDRO, not the underlying motion to vacate. This act is not a final judgment and is not appealable as a matter of right. The Appellant could have filed a notice of discretionary review but is bound by the same 30-day filing window. It is again uncontroverted that the Appellant did not file the notice within that timeframe. The Notice must be dismissed.

Finally, the Appellant seeks review, but does not discuss, the Military Retirement Order entered in December of 2019. The

Appellant, without citing to any authority, articulates the appeal was timely filed, and the filing window should be based upon that date. However, RAP 2.2 and RAP 2.3 clearly outline a different timeliness standard. The Appellant has not articulated in any meaningful way the reason why the court committed an error in adopting the terms of the amended Military Retirement Order. Because the Respondent failed to address this issue, the court should not consider it. See *generally, Holland v. City of Tacoma*, 90 Wn.App. 533, 538 (1998) articulating that passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.

B. The Court properly vacated the September 2017 Military Retirement Order under CR 60(b)(1).

CR 60(b)(1) allows the court, upon motion of an aggrieved party, may relieve the aggrieved party of the final judgement or order due to mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or an order. *CR 60(b)(1)*. The appellate court reviews the trial court's motion to vacate a judgment under CR 60(b) for an abuse of discretion. *In re the parenting and support of C.T.*, 193 Wn.App. 427, 434 (2016). To determine whether the trial court abused its discretion, the court must find that the exercise of discretion was manifestly unreasonable, based on untenable

grounds, or based upon untenable reasons. *Id.* Thus, the trial courts decision will only be disturbed if the decision rests on facts unsupported in the record or was reached by applying the wrong legal standard or even when using the correct legal standard, the trial court adopted a view that no reasonable person would take or arrived a decision outside the range of acceptable choices. *Id.* at 435. The vacation of a judgment under CR 60(b) is within the trial courts discretion and it will only be overturned if it plainly appears it has abused that discretion. *Id.* It appears the Appellant is arguing that the court abused its discretion by applying mistake and inadvertence and those findings were not supported by the evidence in the record. The evidentiary record issue is addressed in paragraph c, *infra*.

The court has addressed the issue of mistake frequently in the context of insurance cases. The court has held that a misunderstanding can form the basis for the vacation of an order when there is a genuine misunderstanding between the parties. *Norton v. Brown*, 99 Wn.App. 118, 124 (1999) (indicating that a misunderstanding between a defendant and his insurance regarding the filing of answering a summons and complaint qualified as a mistake under CR 60(b)(1)). The kind of mistake justifying relief under CR 60(b)(1) occurs when there is a genuine

misunderstanding. *Id.* Inadvertence is not defined by CR 60(b)(1) but case law has given it its plain meaning. *In re Marriage of Worthley*, 198 Wn.App. 419, 426 (2017). Inadvertence is the lack of care or attentiveness.

The cases cited above articulate that mistake or inadvertence deal with either a misunderstanding, lack of care, or inadvertence. The Appellant argues the Respondent is not able to argue this issue because this genuine misunderstanding was a “unilateral mistake.” The cases cited by Appellant do not directly touch on CR 60(b)(1) and are thus distinguishable. CR 60 is equitable in nature, not contractual, and thus differing standards apply to the application of its subparts.

In the case at bar, the court did find mistake and inadvertence. Mistake and inadvertence are reasons for the court to vacate a judgment. The court record shows the trial judge opined that the Respondent clearly did not know what he was signing and that he was mistaken as to its terms. Additionally, 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. Clearly, there was a genuine misunderstanding regarding what the terms of the Military Retirement Order were to be. The court framed the

issued perfectly when it related the issue back to the original decree. This same analysis applies to inadvertence. The court didn't error as a matter of law in applying inadvertence. Inadvertence is defined as a lack of care or attentiveness. The Respondent 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.

In short, the Appellant's argument that the trial court erred as a matter of law in applying mistake or inadvertence is incorrect. The Court has the authority to consider whether one parties' mistake or inadvertence forms a basis to vacate an order of the court.

C. There was evidence to support the finding of mistake and inadvertence on the part of the Respondent.

As discussed above in Section B, *supra*, the trial court's decision to vacate under CR 60(b)(1) will only be disturbed if the court abused its discretion. *C.T.* at 434. The court abused its discretion when it applies the wrong legal standard or there were not facts in the record to support the conclusion of the court. The court did not apply the wrong legal standard as discussed above in Section B, *supra*. The Appellant argues next that there were not facts in the record to

support the trial court's decision, and therefore the trial court abused its discretion.

The Appellant frequently argues there was no statement of fact or argument regarding mistake or inadvertence. This statement however is factually inaccurate. In all of his declarations to the court on the matter, the Respondent 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. In fact, he went so far as to apologize to the court in his pleadings if there was a miscalculation on his part. The pleadings are rife with his statements regarding both parties understanding the amount of the benefit and his understanding of the benefit. The narrative the Respondent would not have signed the document had he understood it stands for the proposition at the very least there was inadvertence.

In order to find mistake, the trial court had to find there was a genuine misunderstanding between the parties. The court found this. The court's decision was based upon the Appellant's repeated statements that she knew the Alabama decree awarded her fifty percent of the total benefit, and the repeated statements from the Respondent that the Alabama decree awarded him fifty percent of

the martial portion of the benefit. Even though the Respondent believed the Appellant knew otherwise, her position to the court was to the contrary. The court found the Respondent made a mistake in the calculation of the percentage and vacated the order.

The court also found inadvertence. The Respondent testified he never would have signed the order as it was expressed had he understood it that way and apologized to the court for any mistake. Counsel for the Respondent argued at the hearing that both mistake and inadvertence applied.

In summation, although the Appellant does not like these facts, they support the Trial court's position that there was both a genuine misunderstanding (mistake) and that the Respondent inadvertently signed the military retirement order.

V. ATTORNEY FEES AND COSTS

The Respondent respectfully requests costs and attorney fees pursuant to RAP 18.9. The Appellant should pay terms to the Respondent, in an amount to be proven by fee and cost affidavit because the Appellant has filed a frivolous appeal. It is the high of frivolity to file an appeal a year after the deadline to file such an appeal runs. Thus, the court should order attorney fees and costs in favor of the Respondent.

VI. CONCLUSION

The court should dismiss the appeal for failure to timely file the notice of appeal. The trial court applied the correct legal standards in vacating the Military Retirement Order under CR 60(b)(1) and the decision was supported by evidence in the record. The court did not abuse its discretion and its ruling should be affirmed.

Dated this 15th day of June 2020.



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CERTIFICATE OF SERVICE

I certify that on July 15, 2020, I caused a true and correct copy of this Brief of Petitioner to be served on the following in the manner indicated below.

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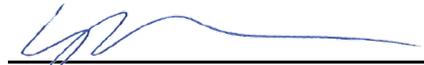
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