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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

Case Number 338789

SHARON TAYLOR (now Radovich) Appellant

v

FRANK TAYLOR Respondent

APPELLANT'S BRIEF

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I. INTRODUCTION

This comes to the Court of Appeals from a Decree of Dissolution which was entered on May 21, 1985. The parties were not represented by counsel. The decree awarded one-half of the husband's retirement benefits to each of the parties. The award stated the retirement benefits were the sole and separate property of each of the parties and stated the wife's interest in the benefits was to be for 13 years. The husband was to receive one-half of the retirement benefits for 13 years and the "full amount" after that period of time.

The husband retired on December 31, 2014, having continued in the same job and under the same state pension program for the previous 29½ years. Upon retirement, in order to receive his pension benefits, Mr. Taylor was required to provide a court order which explained how the benefits were to be distributed, based on the language of the Decree of Dissolution. The order was to be in the mandatory form accepted by the Department of Retirement Systems (DRS).

The order was prepared and sent to Ms. Taylor (now Radovich) by Mr. Taylor's attorney for her signature and eventual entry by the court. The order had been approved by DRS and

awarded Ms. Radovich \$394.20 per month for the remainder of her life or Mr. Taylor's life. Ms. Radovich questioned the accuracy of the order under the rules of the DRS, the Washington Administrative Code and the Revised Code of Washington.

Ms. Radovich sought a legal opinion as to the sum and basis for the award to which she is entitled under the terms of the decree. She prepared her own proposed order in the mandatory form required by DRS and sent it to the DRS for approval. That form order was based on the language of the decree as she interpreted it. That form order awarded her \$3,371.71 per month from the retirement of Mr. Taylor which is one-half of the sum Mr. Taylor receives monthly but limited the payment to a period of 13 years. That time period reflected the portion of the time during which the Taylors were married and Mr. Taylor contributed to the retirement fund. The mandatory order was approved by the DRS as had been the order prepared by Mr. Taylor awarding Ms. Radovich \$394.20 per month.

The DRS indicated however that one of the two orders would need to be signed by the court, though both had been approved as to form by DRS, as there was a dispute as to what the language in

the decree actually meant and how the sums should be distributed.

The two proposed orders are set out below.

The order proposed by Ms. Radovich:

If Frank Taylor (obligor) receives periodic retirement payments as defined in RCW 41.50.500, the department of retirement systems shall pay to Sharon Taylor (Radovich) (obligee) (not applicable) dollars from such payments or fifty percent (50%) of such payments for a period of thirteen (13) years. If the obligor's debt is expressed as a percentage of his or her periodic retirement payment and the obligee does not have a survivorship interest in the obligor's benefit, the amount received by the obligee shall be the percentage of the periodic retirement payment that the obligor would have received had he or she selected a standard allowance. Said payments shall continue for a period of thirteen (13) years.

and the order proposed by Mr. Taylor:

If Frank Taylor (obligor) receives periodic retirement payments as defined in RCW 41.50.500, the department of retirement systems shall pay to Sharon Taylor (Radovich) (obligee) \$394.20 dollars from such payments or NA of such payments. If the obligor's debt is expressed as a percentage of his or her periodic retirement payment and the obligee does not have a survivorship interest in the obligor's benefit, the amount received by the obligee shall be the percentage of the periodic retirement payment that the obligor would have received had he or she selected a standard allowance.

Both parties refused to sign the other's proposed order. Ms.

Radovich therefore brought a motion to clarify and amend the decree as to the award of benefits alleging that her DRS order was the one which reflected the actual language of the decree and met

the requirements of the DRS mandatory order. Mr. Taylor alleged the same regarding his proposed order.

The Superior Court ruled that:

1. The sums accumulated from the time of the separation to the time of Mr. Taylor's retirement were his sole and separate property.
2. That Ms. Radovich should only receive the sum of \$394.20 per month as her proportionate share of the benefits contributed during the marriage.
3. Ms. Radovich shall receive the \$394.20 for the remainder of her life.
4. The court approved the order proposed by Mr. Taylor and approved by the DRS should be entered as the final order to distribute the pension benefits.
5. Ms. Radovich's request for attorney's fees was denied.

Ms. Radovich has appealed the entirety of the ruling by the Superior Court except the attorney's fees provision.

II. ASSIGNMENTS OF ERROR

1. The court erred in finding and ordering that the sums accumulated by Mr. Taylor from the Washington State Department of Retirement Systems (DRS) from the date of separation to the date of his retirement are Mr. Taylor's sole and separate property and therefore payable only to him. CP 197, II. 4-7.

2. The court erred in entering the order awarding Ms. Radovich the sum of \$394.20 per month from Mr. Taylor's

retirement benefits as her portion of his Department of Retirement Systems pension. CP 197, ll. 8-10, 13-21

3. The court erred in failing to award Ms. Radovich one half the sum of Mr. Taylor's monthly pension benefits from the time of his retirement for the following 13 years. CP 197.

4. The court erred in finding the language of the decree to be unambiguous and indicative of the intent of the parties.

5. The court erred in basing its decision on the results its order would have on the distribution of the retirement benefits and not on the intent of the parties at the time of the Decree.

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Do the entirety of contributions to the State of Washington Department of Retirement Systems Pension, contributed from the time of the separation of the parties in a dissolution action, to the time the pensioner retires, become the sole and separate property of the contributor and therefore only awarded to the pensioner? (Assignment of Error 1.)

2. Is the party awarded one half of the retirement benefits of the opposing party in a dissolution action entitled to one-half of the benefits of the pension valued at the time of the

dissolution or separation or one-half the benefits valued at the time of retirement? (Assignments of Error 1, 2, and 3.)

3. Is the recipient of one-half of the retirement benefits received as a property award entitled to only the proportionate share of the husband's retirement benefit accrued during the marriage as proposed in the mandatory DRS order by Mr. Taylor, or one half of the entirety of the benefits due upon retirement for a period of 13 years when awarded, as proposed by Ms. Radovich? (Assignment of Error 2.)

4. Was the language of the decree awarding the division of pension benefits unambiguous and reflect the intent of the parties? (Assignment of error 1,2 and 3)

III. STATEMENT OF THE CASE

Frank Taylor and Sharon Taylor (now Sharon Radovich) were married on July 6, 1962 and separated on October 1, 1983. A Decree of Dissolution of Marriage was entered on May 21, 1985. Mr. Taylor was employed by the State of Washington for the last 13 years of the marriage and was contributing to a PERS 1 retirement program for that 13-year period. He continued to work for Washington State and contributed to the PERS 1 program until December 31, 2014 when he retired. CP 16-19.

The decree awarded the retirement benefits as follows:

The following property is the sole and separate property of the Petitioner [Sharon Radovich]: . . . One half of [Frank Taylor's] retirement benefits for 13 years.

CP 13, II. 1-5.

The following property is the sole and separate property of [Frank Taylor]: . . . Half of retirement benefits for 13 years and full amount after that period of time.

CP 13, II. 12-19.

The Petition for Dissolution of Marriage provided:

We have agreed that our property will be divided as follows:

3. Retirement Benefits, Douglas County P.U. D. Half to Petitioner for 13 years after Respondent retires.

CP 3, II. 15-22

Upon retirement, Mr. Taylor was required to submit a mandatory order containing specific provisions directing the DRS to distribute the proceeds of his retirement benefits in a manner prescribed by DRS. That exact language is set out in RCW 41.50.500 and WAC 415-02-510 and -670. CP 11-14. The language in the DRS order is to reflect the awarded retirement benefits in the Decree of Dissolution. The order was to be entered by the Superior Court and forwarded to DRS before distributions could be made to the parties.

The parties disagreed on the mandatory form of the order to be entered by the Superior Court and required by DRS. Mr. Taylor's order would distribute the sum of \$394.20 per month to Ms. Radovich and Ms. Radovich's proposed order would distribute the sum of \$3,371.71 to her per month. Each party submitted an order in the mandatory form required by DRS. Both mandatory forms were approved by DRS pursuant to RCW 41.50.500, WAC 415-02-510. DRS would not distribute the funds until the Superior Court had signed an order adopting one or the other,

Neither party would agree to the proposed order of the other. It was therefore necessary to obtain an order of the Superior Court which could be sent to DRS directing it as to how the retirement benefits would be divided. The order was to be based on the court's dissolution decree entered 29 years earlier. The difference in the sums was based on the proposal of Mr. Taylor based on 156 months of marriage and service with the State of the 530 months of accrual of benefits and 13 years of marriage while he accrued benefits in the PERS I program.. The Taylor order provided Ms. Radovich \$394.20 per month for her lifetime or that of Mr. Taylor.

The order proposed by Ms. Radovich would provide her one-half of the monthly benefits due Mr. Taylor at the time of his

retirement, December 2014, or \$3,371.71 per month for a period of 13 years or until the death of either of the parties. The court was to rule on which of the orders was intended by the parties at the time of the decree May 21, 1985.

Ms. Radovich filed a Motion for Entry of Amended Property Division Award of Retirement Benefits (CP 17-25) seeking entry of her proposed order. Mr. Taylor answered and requested entry of his proposed order. CP 17-25. The motion was argued with the court ruling that the proposed order of Mr. Taylor should be entered. Mr. Taylor's attorney prepared the Findings of Fact, Conclusions of Law and a final order. They were provided to Ms. Radovich's attorney who prepared his own documents for presentation. No agreement could be made and eventually final documents were prepared including provisions from both attorneys with the judge striking or accepting the Findings and Conclusions which included language that was agreed between the parties and language proposed by each party but without agreement of both. CP 199-205. The parties had agreed to the Order Amending Decree. CP 196-198.

The order awarded the retirement benefits accumulated from the time of separation to the time of his retirement as the separate

property of Mr. Taylor. Ms. Radovich was awarded the sum of \$394.20 per month as her portion of the retirement benefits of Mr. Taylor and the remainder of the monthly benefits to Mr. Taylor or \$6,349.51 of the total benefit of \$6,743.43. Ms. Radovich is to receive her sum for the remainder of her life. The order required by DRS and proposed by Mr. Taylor was adopted and awarded the benefits as set out above. CP 192, ll. 8-21.

The order proposed and approved by DRS would have awarded Ms. Radovich one-half the entirety of Mr. Taylor's retirement benefits on a monthly basis upon his retirement for a period of 13 years.

IV. SUMMARY OF ARGUMENT

Appellant Sharon Radovich argues that the Findings of Fact, Conclusions of Law, and Order Amending Decree are contrary to the case law, RCW 41.50.500, and WAC 415-02-510 provisions. That the findings and conclusions made by the court do not support the final ruling arrived at by the court, that the intent of the parties was reflected in the order proposed by Mr. Taylor and adopted by the court.

Specifically the finding and conclusions that designate the sums accrued from the time of separation of the parties to Mr.

Taylor's retirement as his sole and separate property and therefore not payable to his former spouse is not supported by case law in Washington State.

The retirement benefits are to be valued at the time of disbursement and not as of the time of separation or divorce.

That the evidence presented to the court as to the intent of the parties supports an award of Ms. Radovich's and not the order adopted by the court.

The award is made as a property award and not a lien which required one half of the benefits to be awarded to Ms. Radovich.

The court attributed the 13-year period found in the decree as (CP 201, ll. 4-10, 13-17, and CP 203, ll. 7-9) the basis for determining the intent of the parties some 30 years ago. The 13-year language in fact compensates Ms. Radovich for the 13 years of marriage and employment and not the proportion of the total benefits Mr. Taylor is to receive after retirement.

The court attributes a "conscience decision" (CP 201, ll.13-17) made by the parties to determine the intent as to how the retirement benefits are to be distributed without any findings as to how that intent was determined or as to how the conscience

decision was made other than the language of the decree itself which is the issue in this case.

The opinion stated that the intent is determined by the four corners of the document (decree) and indicates that parol and extrinsic evidence may also be used to make the determination. CP 201, II. 11-12 and CP 203, II. 1-2. The court cites nothing but the allegedly non-ambiguous language of the decree itself as the only basis for its decision. The matter was referred to the Court because DRS was unable to tell from the language of the decree which of its approved orders to sign. That assumes an ambiguity in the decree.

The court found that basing an award on 31 years of contributions to a retirement account is not fair and equitable (CP 202, II. 8-10 and CP 204, I. 6) while DRS has approved such an award pursuant to mandatory RCW and WAC provisions.

Though the court has indicated that this ruling complies with the case law of the State of Washington, it is the position of Appellant Radovich that this decision regarding the nature of the post separation contributions to retirement and the award of the sum from those contributions is in direct contradiction with Washington law.

V. ARGUMENT

The entirety of this appeal is based on the interpretation of the following provisions of the dissolution proceeding entered In May of 1984 between these parties. The decree awarded the retirement benefits as follows:

The following property is the sole and separate property of the Petitioner [Sharon Radovich]: . . One half of [Frank Taylor's] retirement benefits for 13 years.

CP 13, II. 1-5.

The following property is the sole and separate property of [Frank Taylor]: . . . Half of retirement benefits for 13 years and full amount after that period of time.

CP 13, II. 12-19.

The Petition for Dissolution of Marriage provided:

We have agreed that our property will be divided as follows:

...

3. Retirement Benefits, Douglas County P.U. D. Half to [Sharon Radovich] for 13 years after [Frank Taylor] retires.

CP 3. II. 15-22.

A. Separate Nature of Contributions to Retirement Benefits

The Superior Court found and ordered in the Findings of Fact and Conclusions of Law and Order Amending Decree that:

In the Findings of Fact:

Contributions to the retirement account made after the parties separated were the separate property of Mr. Taylor not Ms. Radovich.

CP 201, II. 23-24.

In the Conclusions of Law:

The sums Mr. Taylor contributed to the retirement account from the time of separation to the time of Mr. Taylor's retirement are the separate property of Mr. Taylor, and Ms. Radovich has no interest in those sums.

CP 203, II. 12-14.

In the Order Amending Decree:

The sums accumulated by Frank Taylor in his retirement account with the Washington State Department of Retirement Systems from the date of separation of the parties on November 1, 1983 until his date of retirement December 31, 2014 are his sole and separate property.

CP 197, II. 4-7.

RCW 26.16.140 states:

When spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each.

Despite the statute cited above, the decree of dissolution awarded one half of Mr. Taylor's retirement benefits to each party as their sole and separate property. CP 13, II. 5-18. One half the retirement benefits therefore became the sole and separate property of each party. The court's findings and conclusions that

the benefits after separation and dissolution were the separate property of Mr. Taylor and therefore payable only to him are incorrect. The award of the retirement benefits and the funds contained therein are the separate property of each party. Post dissolution retirement benefits may be awarded to the spouse of the pensioner and are not necessarily the separate property of Mr. Taylor. In re Marriage of Bullichek, 59 Wn. App. 630, 638, 800 P.2d 394 (1990).

Similarly, In re Marriage of Adams, 64 Cal. App. 3d 181, 134 Cal. Rptr. 298 (1976), the court found that the increase in retirement benefits after separation was not due from solely the separate efforts of the husband but was in fact enhanced by the many years of community efforts as well. Thus the increases were not to be treated as separate property.

As in In re Marriage of Adams, *supra*, the prospective increase in retirement benefits due to increased pay after separation is founded in those 22 years of community effort.

In the case of Farver v. Department of Retirement Systems of Washington, 97 Wn.2d 344, 644 P.2d 1149 (1982), the retirement benefits of a state trooper were awarded to the parties in a specific percentage and not payable until the pensioner retired.

If, however, the pensioner didn't retire when he could, the wife was entitled to one-half the benefits accrued thereafter. The court stated at page 346:

Pension and other retirement plans are unique property rights. They are in the nature of deferred compensation. As such they are not mere expectations but are vested rights possessed by employees. Wilder v. Wilder, 85 Wash.2d 364, 534 P.2d 1355 (1975), Payne v. Payne, 82 Wash.2d 573, 512 P.2d 736 (1973), DeRevere v. DeRevere, 5 Wash. App. 741, 491 P.2d 249 (1971); W. de Funiak & M. Vaughn, Principles of Community Property § 68 at 149 (2d ed. 1971).

It is a fundamental principle of community property law that since both spouses participate in the community, both are entitled to share in its reward. See Cross, The Community Property Law in Washington, 49 Wash. L. Rev. 733, 764 (1974); see Reppy, Community and Separate Interests [97 Wn.2d 347] in Pensions and Social Security Benefits After Marriage of Brown and ERISA, 25 U.C.L.A. 417 (1978). The non-employee (non-member) spouse, then, has a property interest in the employee or participant spouse's retirement plan.

Though the Farver case dealt with benefits awarded in a dissolution case, the suit involved a probate after the death of one of the parties. The legal principles remain the same and the award of pension benefits become the separate property of the person to whom they are awarded.

Thus, pursuant to the decree, the distributed property became Phyllis Berling's separate property. See Barkley v. American Sav. Bank & Trust Co., 61 Wash. 415, 112 P. 495 (1911); Washington State Bar Ass'n, Community Property Desk Book § 37.29 (1977). Her property right to the

judicially specified percentage of John's income from retirement benefits was subject to the State's statutes governing the descent and distribution of property. RCW 11.04.025.

Farver, 97 Wn.2d a 348.

For the case at bar the pertinent authorities are WAC 415-02-510 and RCW 41.50.500.

While there was separate property awarded, one-half the retirement benefits were awarded as separate property to the wife. The court awarded and characterized all of the retirement benefits accruing to the husband from the time of separation to the time of retirement as solely the separate benefits of the husband based on the language of the decree. The cases above belie that finding.

Farver, 97 Wn.2d at 347 states:

Consistent with this principle the trial judge, in the dissolution action between Phyllis and John Berling, awarded a specified percentage of the income from John's retirement benefits to Phyllis for as long as he received such benefits.

Thereby the award was for post dissolution as well as that accrued before the dissolution. In the case at bar, the decree indicated a limit on the receipt of payments to Ms. Radovich to 13 years as opposed to as long as Mr. Taylor received his benefits. CP 13, II. 4 & 18-19.

B. Is the Award of Retirement Benefits to be Valued at Separation or Retirement?

The Superior Court has ruled in this case that Ms. Radovich is entitled only to the sum calculated as one-half the benefits accrued during the time she was married to Mr. Taylor and he contributed to the DRS fund. That sum is \$394.20 per month. It is the contention of Ms. Radovich that she is entitled to one half the monthly benefits Mr. Taylor is to receive upon his retirement or \$3,371.71. The difference is based on which order the Superior Court adopts.

Ms. Radovich's position is confirmed by the case of In re Marriage of Moore, 99 Wn. App.144, 993 P.2d 271 (1999), which is exactly on point. In that case the court found that the decree entered in 1982 gave Ms. Moore (now Kirk) a 50 percent interest in the community portion of the pension benefits. The community interest was determined to be 87percent of the total pension of Mr. Moore. Thirteen years after the decree was entered, when Mr. Moore was ready to retire, he offered Ms. Kirk one-half the value of the community interest in the pension. He valued that sum as of 1985, the date of the dissolution as opposed to its value as of 1998 when he retired.

Ms. Kirk moved the court for an order declaring she was entitled to her share of the retirement benefits at its current value in 1998 and not at the 1985 value. Ms. Kirk prevailed at trial and Mr. Moore appealed. Division III of the Court of Appeals affirmed the trial court's decision.

The Moore case, 99 Wn. App. at 146-148 provides:

Mr. Moore contends the court effectively awarded Ms. Kirk a lien against his pension because the decree was silent on any award of increases in value. He argues that the value of Ms. Kirk's interest did not, therefore, increase between the date of the award and the disbursement. It was worth \$21,390.74 in 1985, and that is what it is worth now. His authority for this contention is In re Marriage of Young. In that case, the court held that a lien on property imposed incident to equitable division of property with a deferred obligation to pay does not accrue interest. In re Marriage of Young, 44 Wash. App. 533, 536, 723 P.2d 12 (1986). Mr. Moore takes this to mean that no property interest with deferred payment increases in value during the period of deferment. This is wrong.

The court's intention here is easily discernible by comparing its award of the interest [993 P.2d 273] in the home to the pension award. The 1985 order contains a lien on the family home in favor of Ms. Kirk, and sets forth the terms and conditions for payment of the lien. But the court's order includes no language which would create a lien on the pension.

It awarded Ms. Kirk an interest in the pension corresponding to half the community interest in the pension's then present value. Ms. Kirk's interest in the future retirement benefits became her separate property upon entry of the decree. Farver v. Department of Retirement Sys. 97 Wash.2d 344, 348, 644 P.2d 1149 (1982). During the marriage, issues and profits of separate property are separate property. In re Marriage of Elam, 97 Wash.2d 811, 816, 650 P.2d 213 (1982); Hamlin v. Merlino, 44 Wash.2d

851, 858, 272 P.2d 125 (1954). The increase in value after dissolution, therefore, belongs to Ms. Kirk, absent a contrary expression in the decree. Puckett v. Puckett, 41 Wash. App. 78, 82-83, 702 P.2d 477 (1985) (surviving child entitled to increased value of life insurance policy her father was ordered to take out as part of property settlement).

Moore further states:

The trial court appropriately concluded that Ms. Kirk owned a percentage of the pension proceeds, not just a lien, and was entitled to the present value when the pension proceeds were disbursed.

Moore, at 147-48.

C. Award of Proportional Share of Service Credit or One Half of Entire Benefit.

In the case at bar the receipt of the benefits was limited to the 13-year period corresponding to the 13 years of marriage and employment of Mr. Taylor. CP 3, II. 21-22, CP 13, II. 4-5 & II. 18-19. That 13-year provision compensates Mr. Taylor for the time he worked after the dissolution by limiting the time Ms. Radovich receives the one half of the benefits she was awarded to the 13 years. The order entered by the court only allows her the proportionate amount of the benefits accumulated during the marriage and is contrary to case law and DRS regulations. The 13-year provision is required and approved by DRS in the proposed order of Ms. Radovich. That theory and requirement is found in the

mandatory language of the order provided by Ms. Radovich and approved by the DRS as set out below.

If Frank Taylor (obligor) receives periodic retirement payments as defined in RCW 41.50.500, the department of retirement systems shall pay to Sharon Taylor (Radovich) (obligee) (not applicable) dollars from such payments or fifty percent (50%) of such payments for a period of thirteen (13) years. If the obligor's debt is expressed as a percentage of his or her periodic retirement payment and the obligee does not have a survivorship interest in the obligor's benefit, the amount received by the obligee shall be the percentage of the periodic retirement payment that the obligor would have received had he or she selected a standard allowance. Said payments shall continue for a period of thirteen (13) years. RCW 41.50 500, WAC 415.02.510.

The origin for the order proposed by Ms. Radovich and required by the DRS is found in its publication How Can a Property Division Affect My Retirement Account? Quotations from that publication based on WAC 415-02-510 and RCW 41.50.500 are set out below.

Can the Amount Awarded to My Ex-Spouse Be Limited to the Amount I Earned During Marriage?

How the property division is written determines what portion of your monthly retirement benefit will be awarded your ex-spouse. The order can limit your ex-spouse's share to a percentage of the service credit earned during the period of your marriage if the order uses the formula specified in WAC 415-02-500(15).

See Example #1.

How Can a Property Division Affect My Retirement Account, at page 2.

It is the position of Ms. Radovich that the order does not set out the “percentage of the service credit earned during the marriage” It cannot as at the time of the dissolution Mr. Taylor was working and continued to work for many years thereafter. The 13 years can therefore only indicate the years of marriage. The wife may in this case receive post dissolution benefits due to her community efforts as set out in In re Marriage of Bullichek, 59 Wn. App. 630, 800 P.2d 394 (1990). That contingency is set out in the language that follows and awards a percentage of the total benefit.

If the order does not use this formula [Example 1], your ex-spouse will be awarded a percentage of your total benefit. See Example 2

EXAMPLE #1:

Share of Benefit Earned During Marriage Period

John Doe earned 300 months of service while married. He has a total of 400 months of service credit when he retires. His monthly benefit before applying the terms of the order is \$2000. The order awards 50% of his benefit to his ex-spouse and uses the formula in WAC 415-02-500(15) to limit the ex-spouse’s share to what was earned during the marriage.

The ex-spouses benefit will be calculated as follows:
 $300/400 \times 0.50 \times \$2,000.00 = \$750.00$

EXAMPLE#2:

Share of Total Benefit

John Doe earned 300 months of total service while married. He has a total of 400 months of service credit when he retires. His monthly benefit before applying the terms of the order is \$2,000. The order awards 50% of his benefit to his

ex-spouse and *does not* limit the ex-spouse's share to what was earned during the marriage.

The ex-spouse's benefit will be calculated as follows:

$$0.50 \times \$2,000.00 = \$1000.00$$

How Can a Property Division Affect My Retirement Account, at page 3.

The benefit should be characterized and calculated as in Example 2 and limited to 13 years as is called for in the provision set out directly below.

Can Monthly Payments Be Made for a Limited Period of Time?

A property division order can limit your obligation to a certain period of time. If the order does not specify a time limit, payment will continue until you die or your ex-spouse dies, whichever occurs first.

How Can a Property Division Affect my Retirement Account, at page 3.

It is not the position of Ms. Radovich that the 13-year period in the decree does not indicate a percentage of service credit while married and therefore she should receive one half of the entire benefit plan but that it limits the sum to one half the benefit for a period of 13 years as set out in the publication above.

The publication goes on to provide the following language regarding monthly benefits at page 3:

What Salary Will Be Used to Calculate My Monthly Benefit?

Your monthly benefit is determined at the time you retire. If your property division awards a percent of your monthly benefit to your ex spouse, your ex-spouse will receive the designated percent of your monthly benefit. This is true even though your salary at the time of dissolution may be lower than your salary at the time of retirement. If your property division awards a specific dollar amount to your ex-spouse, the specified amount will be deducted from your benefit at retirement.

D. Ambiguity , Intent, Equitable Division and Interpretation.

While the court in its own findings indicates it is only to interpret the meaning of the decree and not modify it, the court proceeds to make numerous findings not only to intent but also as to the increases in the value of the pension at the time of disbursal, the sufficiency of the compensation, the distribution of the assets and contributions and the equity and proportionality of the award. Many but not all of these findings have nothing to do with interpreting the decree or are not based on any discernible evidence and are set out below.

At Finding of Fact 17 the court found:

To base the retirement to be awarded on an additional 31 years that Mr. Taylor worked is not fair and the parties understood that.

CP 201, II. 21-22.

At Finding of Fact 20 the court found:

The Department of Retirement Systems determined the value of the retirement account as of the date the parties separated and also at the date Mr. Taylor retired. The value of Ms. Radovich's portion of Mr. Taylor's account increased from the date of separation to the date of Mr. Taylor's retirement and such increase sufficiently compensated her for the payments delayed for 31 years.

CP 202, II. 3-7.

At Finding of Fact 21 the court stated:

To distribute one half of the total monthly benefits at the time of retirement to Ms. Radovich would result in a significantly disproportionate distribution, which would not be a fair and equitable distribution of assets.

CP 202, II. 8-10.

And, at Conclusion of Law 11, the court ruled:

The distribution of retirement funds is fair and equitable.

CP 204, I. 11.

In a case very similar to the one at bar, the court stated

We disagree with George's argument that this disposition of pension rights was unjust or inequitable. An award of pension rights on a percentage, as-received basis is to be encouraged. Such disposition avoids difficult valuation problems, shares the risks inherent in deferred receipt of the income, and provides a source of income to both spouses at a time when there will likely be greater need for it. We acknowledge that George's retirement fund may receive proportionately higher future contributions based upon his career longevity and anticipated increases in annual pay. We further acknowledge that the formula

utilized for division of future retirement benefits could result in Janet's sharing in those increases. However, far from condemning this apportionment method, we specifically approve it as a means of recognizing the community contribution to such increases.

In re Marriage of Bullichek, 59 Wn. App 630, 638-639, 800 P.2d 394 (1990).

Though the legal arguments set out above all deal with the reasons why the proposed order of each party should be accepted or rejected, the court was really charged with only one question: To determine which order should be entered based on the intent of the parties at the time of the dissolution. That task was specifically stated by the court in this matter:

I want to stress that I'm not going to worry about what DRS does with the court's decision; that's their business. The court's business today is to figure out what the parties meant and what the court meant 30 years ago last month when they signed this decree.

RP 6/17/15 at 25, ll. 17-21.

I'm not making any changes to the decree. I'm simply interpreting it as best I can now, as I said, 30 years later.

RP 6/17/15 at 26, ll. 4-6.

The language that the court is to use to determine the intent is found in the decree:

The following property is the sole and separate property of the Petitioner [Sharon Radovich]: . . One half of [Frank Taylor's] retirement benefits for 13 years.

CP 13, II. 1-5.

The following property is the sole and separate property of [Frank Taylor]: . . . Half of retirement benefits for 13 years and full amount after that period of time.

CP 13, II. 12-19.

The Petition for Dissolution of Marriage provided:

We have agreed that our property will be divided as follows:

...

3. Retirement Benefits, Douglas County P.U. D. Half to [Sharon Radovich] for 13 years after [Frank Taylor] retires.

CP 3. II. 15-22

The court went on to provide:

I think case law is clear in the state of Washington that I'm supposed to look at what's called the four corners of the document, okay? That means I'm supposed to attempt to interpret this as best I can just based on this document, not on other evidence from outside -- we call that parol evidence, or extrinsic evidence -- unless, unless there are certain things. And I don't think I have to go outside this document to interpret it

RP 6/17/15 at 26, II. 8-15.

This portion of the decision is found in the findings and conclusions at CP 201, II. 11-12 and CP 203, II. 1-2. If in fact the court relied only on the four corners of the document, the court then reversed itself in the same document when it stated that despite

whether the language in the document is ambiguous that parol evidence is admissible in Washington. CP 203, II. 3-6.

Whether or not the court used parol or extrinsic evidence or just the four corners of the document, it was the task of the court to determine what the intent of the parties was at the time of the decree. The court certainly must look at the entire record of the dissolution proceeding to determine what that intent was. The language contained in the decree which seems to be the operative language is the meaning of the term "13 years" cited above. If the term refers to the amount of time Mr. Taylor worked and contributed to the retirement plan and was married to Ms. Radovich for purposes of the sum to be paid to her monthly the proposed order of Mr. Taylor should be adopted. If however the 13 years applies to the time Ms. Radovich is to receive one half of Mr. Taylor's entire benefits then Ms. Radovich's order must be adopted. CP 201, II. 4-10 & CP 201, II. 13-17.

Without specifically stating, after a lengthy discussion of parol evidence, the court came to these Findings and Conclusions at Finding 13:

The number "13" is used twice in the decree. The number "13" and the reference to it twice in the decree is important because it gives the Court a context, a basis for

saying that there is no ambiguity. The number "13" and the reference to it twice is really helpful and a reason why the Court can say that the Decree is unambiguous on its face. The number reflects that Mr. Taylor worked for a state entity and contributed to the state retirement system for a period of 13 years while married to Ms. Radovich and before they separated.

CP 201, II. 4-10.

Finding 15 provided:

Both parties made a conscious decision that the award would be based on Mr. Taylor's contributions of community property, his income for 13 years that he was working and they further decided that, after they were divorced, any of his contributions to the retirement would be his. The reference to 13 years are based on those contributions of marital income to Mr. Taylor's retirement account.

CP 201, II. 13-17.

Finding 16 provided:

The parties recognized that Mr. Taylor had worked for the public entity for 13 years, made contributions of community property, and she would be entitled to half of those contributions of community property.

CP 201, II. 18-20.

The court goes on to state in Conclusion of Law 5:

The intent of the parties was that they made a conscious decision to base Ms. Radovich's award on Mr. Taylor's contributions of community property, his income for the 13 years that he was working and married to Ms. Taylor (now Radovich).

CP 203, II. 7-9.

Conclusion 6 provided:

The parties decided that any contributions Mr. Taylor made after they were separated would be his separate property and the court so concludes.

CP 203, II. 10-11.

Conclusion 7 provided:

The sums Mr. Taylor contributed to the retirement account from the time of separation to the time of Mr. Taylor's retirement are the separate property of Mr. Taylor, and Ms. Radovich has no interest in those sums.

CP 203, II. 12-14.

Ambiguity is the entire reason that the DRS required the matter to be sent to the Superior Court for a determination of which of the orders it would sign. Whether parol or extrinsic evidence is used is immaterial.

Ambiguity exists in a contract where two or more reasonable interpretations are possible. Wm. Dickson Co. v. Pierce County, 128 Wn. App. 493-94, 116 P.3d 409 (2005). Whether a contract is ambiguous and the legal effect of a contract are in general, questions of law. Syrovoy v. Alpine Res. Inc., 68 Wn. App. 35, 39, 841 P.2d 1279 (1992). Thus, summary judgment can be appropriate if a court finds that the interpretation of the contract does not depend on extrinsic evidence or if only one reasonable inference can be drawn from the extrinsic evidence.

Dice v. City of Montesano, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006).

Under the “context rule” the fact finder determines the parties’ intent by viewing the contract as a whole, the subject matter and objective of the contract, the subsequent acts and conduct of the parties to the contract and the reasonableness of the respective interpretations advocated by the parties

Scott Galvanizing, Inc. v. NW. Enviro Services, Inc., 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993).

If, after viewing the contract in this manner, the fact finder cannot determine the parties’ intent, it may construe the remaining ambiguities against the drafter.

Felton v. Menan Starch Co., 66 Wn.2d 792, 797, 405 P.2d 585 (1965).

More specifically in the case of a dissolution decree the court has ruled:

Generally we give words in a written agreement their “ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d. 493, 504, 115 P.3d 262, 267 (2005). To determine the parties’ intent in a written agreement, we employ the context rule, as articulated in Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990), *see also* Adler v. Fred Lind Manor, 153 Wn.2d 331, 351, 103 P.3d 733 (2004).

Under the context rule, extrinsic evidence is admissible to aid in ascertaining the parties’ intent “when the evidence gives meaning to words used in the contract.” Hollis v. Garwall, 137 Wn.2d 683, 695, 974 P.2d 836 (1999) (citing Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 189, 840 P.2d 851 (1992) (“[e]xtrinsic evidence illuminates what was written, not what was intended to be written.”))

Thus, we determine the parties intent by: viewing the contract as a whole, which includes the subject matter and the intent of the contract, examination of the circumstances

surrounding its formation, subsequent acts and conduct of the parties, the reasonableness of the respective interpretations advanced by the parties, and statements made by the parties during preliminary negotiations, trade usage, and/or course of dealing. Adler, 153 Wn.2d at 351.

Extrinsic evidence may be used whether or not the contract language is ambiguous. Hudesman, 115 Wn.2d at 669. However, extrinsic evidence may not be used “(1) to establish a party’s unilateral or subjective intent as to the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, or modify the written word.” W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 495, 7 P.3d 861 (2000) (citing Hollis, 137 Wn.2d at 695-96).

A contract may be either severable or entire, depending upon the parties’ intent. State v. Plaggemeier, 93 Wn. App. 472, 482, 969 P.2d 519 (1999). When determining the parties’ intent, we “do not concern ourselves with unexpressed subjective intent, only objective manifestations of intent.” State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003).

In re Marriage of McCausland, 129 Wn. App. 390, 402-03, 118 P.3d 944 (2005), rev’d on other grounds, 159 Wn.2d 607 (2007).

The case of In re custody of EATW., 168 Wn.2d 335, 227 P.3d 1284 (2010), deals with the question of interpretation and ambiguity at page 344:

If a statute is susceptible to more than one reasonable interpretation, it is considered ambiguous, Wingert v. Yellow Freight Sys., Inc., 146 Wash. 2d 841 (2002). However, a statute is not ambiguous merely because we may conceive of different interpretations. State v. Tili, 139 Wash.2d 107.

It is the position of the Appellant, Ms. Radovich, that it is impossible for the court to determine the intent of the 13-year

provisions by simply relying on the provisions of the decree, without resorting to extrinsic evidence. The DRS was unable to do so in deciding which of the two orders to sign based on the same order the Superior Court was asked to interpret.

The case of Joint Venture Fourplay v. Loisti, Court of Appeals, Division I, No. 64038-1-I (May 3, 2011), specifically states:

Loisti also argued that the trial court violated the parol evidence rule by considering additional evidence. Under that rule, Washington courts may consult extrinsic evidence of the circumstances under which the contract was made to aid interpretation, but not to show a party's unilateral intent, intent independent of the contract or to contradict or modify the contract as it was written. Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1990),

That case is exactly on point as to the duty of the court to consider extrinsic evidence under which the contract was made. Under the requirement set out above, the court must look to the circumstances under which the contract was made. There is one piece of evidence which is not unilateral and which the court seems to have completely ignored. That piece of evidence not only clarifies the intent of the parties but clarifies the meaning of the "13 year" provision found by the court to be unambiguous. CP 201, II. 4-13.

At Finding of Fact 9 the court states in part:

The Court is not concerned with what the Department of Retirement Systems does with the court's decision. The Court is to determine what the parties meant and what the court meant 30 years ago when the decree was entered.

CP 200, II. 19-21.

And, at Finding of Fact 10:

The motions question the interpretation of a decree, specifically, the meaning of the words written in the decree that award a portion of Mr. Taylor's retirement to Ms. Radovich. This is a property award which can't be modified. The original decree's award of retirement benefits is a property award which can't be modified.

CP 200, II. 22 -25.

While the court in its own findings indicates it is only to interpret the meaning of the decree and not modify it, the court proceeds to make numerous findings not only to intent but also as to the increases in the value of the pension at the time of disbursal, the sufficiency of the compensation, the distribution of the assets and contributions and the equity and proportionality of the award. Many but not all of these findings which have nothing to do with interpreting the decree or are not based on any discernible evidence are set out below

Finding of Fact 17:

To base the retirement to be awarded on an additional 31 years that Mr. Taylor worked is not fair and the parties understood that.

CP 201, II. 21-22.

Finding of Fact 20:

The Department of Retirement Systems determined the value of the retirement account as of the date the parties separated and also at the date Mr. Taylor retired. The value of Ms. Radovich's portion of Mr. Taylor's account increased from the date of separation to the date of Mr. Taylor's retirement and such increase sufficiently compensated her for the payments delayed for 31 years.

CP 202, II. 3-7.

Finding of Fact 21:

To distribute one half of the total monthly benefits at the time of retirement to Ms. Radovich would result in a significantly disproportionate distribution, which would not be a fair and equitable distribution of assets.

CP 202, II. 8-10.

And, at Conclusion of Law 11, the court ruled:

The distribution of retirement funds is fair and equitable.

CP 204, I. 11.

In a case very similar to the one at bar the court stated

We disagree with [appellant's] argument that this disposition of pension rights was unjust and or inequitable. An award of pension rights on a percentage, as-received basis is to be encouraged. Such a disposition avoids difficult valuation problems, shares the risks inherent in deferred receipt of the income, and provides a source of income to both spouses at a time when there will likely be greater need for it. We acknowledge that [appellant's] retirement fund may receive proportionately higher future contributions

based upon his career longevity and anticipated increases in annual pay. We further acknowledge that the formula utilized for division of future retirement benefits could result in [respondent's] sharing in those increases. However, far from condemning this apportionment method we specifically approve it as a means of recognizing the community contribution to such increases.

In re Marriage of Bullichek, 59 Wn. App. 630, 638-639, 800 P.2d 394 (1990).

Not only is the court not tasked with making those rulings but there is no basis of facts or evidence upon which to base the opinion and findings. Most if not all are immaterial to the ruling the court was to make. It is also not for the DRS to decide what is fair and equitable but only to distribute the funds in the manner called for by the Decree of Dissolution according to its rules and regulations, whether those rules and the decree is fair or not. It was the job of the trial court 30 years ago to enter the decree and determine whether it was fair and equitable.

The award of property as fair and equitable is to be determined by the trial court or court entering the decree. That was done 30 years ago and was not modifiable and was not appealed. For the present superior court to make any findings with regard to the fairness or equity of the decree is inappropriate and beyond its ability to do.

In a proceeding for dissolution of marriage the court is to make a fair and equitable division of property based on

1. The nature and extent of the community property.
2. The nature and extent of the separate property.
3. The duration of the marriage.
4. The economic circumstances of each spouse at the

time the property is to become effective. RCW 26.09.080.

The court admits that this is a property award and not subject to modification:

This is a property award which can't be modified. The original decree's award of retirement benefits is a property award which can't be modified.

CP 200, ll. 24 -25.

Despite the fact that the decree was entered 30 years prior this court has ruled on the statutory provisions determined by the original court pursuant to RCW 26.09.080 which can only constitute a modification of the earlier decree.

To base the retirement to be awarded on an additional 31 years that Mr. Taylor worked is not fair and the parties understood that.

CP 201, ll. 21-22.

To distribute one half of the total monthly benefits to at the time of retirement to Ms. Radovich would result in a

significantly disproportionate distribution, which would not be a fair and equitable distribution of assets.

CP 202, II. 8-10.

The provisions to be interpreted which appear in the decree are set out earlier in this brief, but for emphasis and comparison with the rulings in this case, the operative fact as to the intent seminal question of this case what does 13 years mean. The decisive information as to what the “13 year” provision means and what was intended by the parties 30 years ago is found in the petition for dissolution as it relates to the language in the decree.

Those quotes are set out below.

The decree awarded the retirement benefits as follows:

The following property is the sole and separate property of the Petitioner [Sharon Radovich]: . . . One half of [Frank Taylor’s] retirement benefits for 13 years.

CP 13, II. 1-5.

The following property is the sole and separate property of [Frank Taylor]: . . . Half of retirement benefits for 13 years and full amount after that period of time.

CP 13, II. 12-19.

The Petition for Dissolution of Marriage provided:

We have agreed that our property will be divided as follows:

...

3. Retirement Benefits, Douglas County P.U. D. Half to [Sharon Radovich] for 13 years after [Frank Taylor] retires.

CP 3. II. 15-22.

The provisions set out above give clear meaning to the question of what the “13 years” means which is the determination the court was to make. The question of intent is answered above. It means Ms. Radovich is to receive one half the retirement benefits of Mr. Taylor for a period of 13 years after he retires. CP 200 II. 20-21. The proposed order of Ms. Radovich should be adopted.

The language also clarifies the provision in the decree and gives meaning to the provision which states in Ms. Radovich’s award “for 13 years” and in Mr. Taylor’s award “for 13 years and the full amount after that period of time.” CP 13, II. 4 & 18-19. Both parties were intending the award to be made for “**13 years after retirement. . .**” (Emphasis added.) That is the reason that the 13-year period is mentioned in the decree though in a less ambiguous form.

The language also indicates to the DRS which form of the order is to be used and which manner of distribution is appropriate. It is clear that the distribution falls under example #2 set out below which gives Ms. Radovich one half of the total benefits and limits

them to 13 years as required by the time limit provision set out below at pages 2-4 of the publication:

Can the Amount Awarded to My Ex-Spouse Be Limited to the Amount I Earned During Marriage?

How the property division is written determines what portion of your monthly retirement benefit will be awarded your ex-spouse. The order can limit your ex-spouse's share to a percentage of the service credit earned during the period of your marriage if the order uses the formula specified in WAC 415-02-500(15).

See Example #1.

If the order does not use this formula [Example 1], your ex-spouse will be awarded a percentage of your total benefit. See Example 2

EXAMPLE #1:

Share of Benefit Earned During Marriage Period

John Doe earned 300 months of service while married. He has a total of 400 months of service credit when he retires. His monthly benefit before applying the terms of the order is \$2000. The order awards 50% of his benefit to his ex-spouse and uses the formula in WAC 415-02-500(15) to limit the ex-spouse's share to what was earned during the marriage.

The ex-spouses benefit will be calculated as follows:
 $300/400 \times 0.50 \times \$2,000.00 = \$750.00$

EXAMPLE#2:

Share of Total Benefit

John Doe earned 300 months of total service while married. He has a total of 400 months of service credit when he retires. His monthly benefit before applying the terms of the order is \$2,000. The order awards 50% of his benefit to his ex-spouse and *does not* limit the ex-spouse's share to what was earned during the marriage.

The ex-spouse's benefit will be calculated as follows:
 $0.50 \times \$2,000.00 = \1000.00

Can Monthly Payments Be Made for a Limited Period of Time?

A property division order can limit your obligation to a certain period of time. If the order does not specify a time limit, payment will continue until you die or your ex-spouse dies, whichever occurs first.

What Salary Will Be Used to Calculate My Monthly Benefit?

Your monthly benefit is determined at the time you retire. If your property division awards a percent of your monthly benefit to your ex spouse, your ex-spouse will receive the designated percent of your monthly benefit. This is true even though your salary at the time of dissolution may be lower than your salary at the time of retirement. If your property division awards a specific dollar amount to your ex-spouse, the specified amount will be deducted from your benefit at retirement.

The provisions not only clarify the actual intent of the parties but also contradict the Conclusions of Law entered by the Court. The Court's Findings, Conclusions and Order purportedly comport with the rulings in the Moore case. In both fact and law, this court ruling contradicts the rulings in Moore. These findings also contradict the requirements of the DRS set out above.

Conclusion of Law 9A provides:

Compensation for the increase in value of the retirement benefits over the 30 years since the decree is captured in the increased value of the monthly payments calculated by DRS and comports with the ruling in In re the Marriage of Moore, 99 Wn. App. 144, 993 P.2d 271 (Div. 3, 1999).

CP 203, II. 15-18.

Conclusion of Law 9B provides:

The basis of Ms. Radovich's property right to part of Mr. Taylor's retirement account is: her separate property and all of the interest that accrued on her separate property interest in Mr. Taylor's retirement account. This comports with the ruling in In re the Marriage of Moore, 99 Wn. App. 144, 993 P.2d 271 (Div. 3, 1999).

CP 203, II. 19-22.

VI. ATTORNEY'S FEES

Appellant, Sharon Radovich, further requests the award of attorney's fees on appeal in a reasonable sum. This request is based on the provisions on RAP 18.1 and the provisions of RCW 26.09.140 allowing attorney's fees in dissolution actions and on appeal.

VII. CONCLUSION

Appellant Sharon Radovich seeks reversal of the Superior Court's Order adopting the Department of Retirement Systems Order proposed by Frank Taylor:

If Frank Taylor (obligor) receives periodic retirement payments as defined in RCW 41.50.500, the department of retirement systems shall pay to Sharon Taylor (Radovich) (obligee) \$394.20 dollars from such payments or NA of such payments. If the obligor's debt is expressed as a percentage of his or her periodic retirement payment and the obligee does not have a survivorship interest in the obligor's benefit, the amount received by the obligee shall be the percentage of the periodic retirement payment that the obligor would have received had he or she selected a standard allowance.

Said order was adopted by the court after approval by the DRS and replace it with the order approved by the DRS and proposed by Sharon Radovich:

If Frank Taylor (obligor) receives periodic retirement payments as defined in RCW 41.50.500, the department of retirement systems shall pay to Sharon Taylor (Radovich) (obligee) (not applicable) dollars from such payments or fifty percent (50%) of such payments for a period of thirteen (13) years. If the obligor's debt is expressed as a percentage of his or her periodic retirement payment and the obligee does not have a survivorship interest in the obligor's benefit, the amount received by the obligee shall be the percentage of the periodic retirement payment that the obligor would have received had he or she selected a standard allowance. Said payments shall continue for a period of thirteen (13) years.

The court should reject and ignore or overrule any of the Findings and Conclusions that do not directly relate to the intentions of the parties or specifically comport with the provisions of the mandatory orders approved by the DRS and proposed by the parties as those issues are either immaterial to the court's consideration or are unsubstantiated in law or fact. Those issues are set out below:

1. The nature and determination as to the separate and community nature of the benefits.

2. That the decree awarded a property right and not a lien.
3. The inability of the court to modify the original Decree.
4. The increase in value over time of an award of property.
5. The decree's language was unambiguous.
6. The use of parol evidence in determining the meaning of a document.
7. The amount and nature as separate or community property.
8. The calculations of the Department of Retirement Systems regarding the amounts the parties would receive.
9. The fair and equitable nature of the award of each of the orders.

The court should award attorney's fees on appeal to the appellant Sharon Radovich in a reasonable sum pursuant to RAP 18.1.

DATED this 1st day of July, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dan Evich", written over a horizontal line.

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