**Appellate Case No. 338274-III**

**COURT OF APPEALS, DIVISION III**
**OF THE STATE OF WASHINGTON**

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In re:

Lee Mackessy, Appellant,

v.

Richard Allinger, Respondent.

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# Brief of Respondent

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## I. Table of Authorities

### Cases




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## Rules





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## II. Introduction

Mr. Allinger's military retirement was distributed in the Decree of Dissolution ("Decree"). The plain language of the Dissolution Decree awards to Mr. Allinger, "everything already taken." CP 8. At the time that that language was included in the Decree Mr. Allinger had "taken" his military retirement benefits and Ms. Mackessy had "taken" her military retirement benefits.

This conclusion is bolstered by the fact that both parties had similar military retirement benefits at stake and both had earned "points" towards military retirement during the marriage. The parties met while both were "active duty" service members. RP 37. They were both in the military in 1986 when they got married. RP 37.

Both parties earned military retirement points during the marriage from the date of marriage (November 1, 1986) until 1996. During this time both parties accrued substantially equal retirement points. Ms. Mackessy resigned her command in 1996. RP 39. The parties then separated in July 1998 and filed their dissolution action. Mr. Allinger had accrued barely 15 months more "community" points towards retirement than Ms. Mackessy at the time of separation.



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Similarly, the Decree is not a "complete" agreement. The parties made other agreements and disposed of other property and liabilities outside of the Decree. Each party had accrued unvested, and unlikely to vest, military retirement "points." Each party received the military retirement "points" they accrued before and during the marriage by agreement.

Both parties filed motions for summary judgment. Both motions were denied. A bench trial was conducted by Judge Michael Price. Judge Price denied the partition action in its entirety.



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## III. Argument

The party challenging a trial court's decision, [here Ms. Mackessy], has the burden of demonstrating that the trial court manifestly abused its discretion. In re Marriage of Griffin, 114 Wash.2d 772, 776, 791 P.2d 519 (1990). "Here, there is no evidence the court abused its discretion. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Littlefield, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). The court in this case applied the statute and case law to the facts before it and arrived at a reasonable decision. A court's decision is manifestly unreasonable if it is based on an incorrect legal standard. Id. There is no basis to find the trial court abused its discretion and this appeal is frivolous.

The appellate court is charged with the duty to review the trial court's findings of fact for substantial evidence. In re Marriage of Skarbek, 100 Wash.App. 444, 447, 997 P.2d 447 (2000). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." Bering v. Share, 106 Wash.2d 212, 220, 721 P.2d 918 (1986). Where the trial court has weighed the evidence, the reviewing court's role



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is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law. In re Marriage of Greene, 97 Wash.App. 708, 714, 986 P.2d 144 (1999). An appellate court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility." Here, the trial court's decision is based on the substantial evidence before it and the court did not abuse its discretion. This court should deny the appeal in its entirety.

"When the parties to a separation agreement dispute its meaning, the court must ascertain and effectuate their intent at the time they formed the agreement. Generally, this is true even when the separation agreement has been incorporated in a dissolution decree, because the parties' intent will be the court's intent. The intent of the parties is determined by examining their objective manifestations, including both the written agreement and the context within which it was executed." Boisen v. Burgess, 87 Wn. App. 912 (1997), review denied, 134 Wn.2d 1014 (1998); In re Marriage of Sievers, 78 Wash. App. 287 (1995); In re Marriage of Mudgett, 41 Wash. App. 337 (1985).

Thus, we determine the parties' intent by viewing the contract as a whole, which includes the subject matter and intent of the contract, examination of the circumstances surrounding its formation, subsequent



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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. In re Marriage of McCausland, 129 Wn. App. 390 (2005), reversed on other grounds, 159 Wn.2d 607 (2007); Adler v. Fred Lind Manor, 153 Wn.2d 331 (2004); Hollis v. Garwall, 137 Wn.2d 683 (1999); Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178.

As stated above, the court must ascertain and effectuate their intent at the time they formed the agreement. Here, Ms. Mackessy drafted all of the final documents, including the Decree. Ms. Mackessy was aware of the parties' assets and liabilities. Ms. Mackessy was aware of her own, and Mr. Allinger's, service in the military and the accrual of pension by them both. Ms. Mackessy negotiated an agreement wherein she received a home, car, her accrued retirement benefits, and no other substantial debts in exchange for Mr. Allinger taking all of the debt, his personal property and any accrued retirement benefits.

Pensions may be divided by awarding 100% of the pension to one party and a compensating asset or marital lien to the other party. In re Marriage of Wright, 78 Wn. App. 230 (1995); DeRevere v. DeRevere, 5 Wn. App. 741 (1971). The parties agreed to award the possible military



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retirement accrued during the marriage to Mr. Allinger in two separate manners. First by Ms. Mackessy including language in the Decree, written by her own hand, stating that Mr. Allinger would receive, "Everything already taken." RP 64. It can also be ascertained that the parties by their agreement outside the Decree that they each intended to retain any benefit or debt in their name. RP 103-104.

Ms. Mackessy is the drafter of the Decree and Findings of Fact, and she is also the one who wrote in the language "everything already taken." RP 64, 95. Mr. Allinger testified that the parties specifically discussed their individual retirement "points" earned and each agreed that they would keep their own. RP 96. The phrase "everything already taken" was inserted by Ms. Mackessy into the Decree after the discussion regarding the military retirement "points" each had accrued. RP 96.

Ms. Mackessy had earned a Bachelor's of Science Degree, a Master's Degree in Science, and a Master's Degree in Business. RP 56-57. Ms. Mackessy's father is retired military receiving a retirement, and Ms. Mackessy's sister is a practicing attorney. RP 53. Ms. Mackessy is not an unsophisticated person and she is well educated.

Furthermore, Ms. Mackessy admits she knew she was earning military retirement points, and knew Mr. Allinger was earning military



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retirement points but she chose not to specifically include either in the Decree she drafted. RP 58.

Mr. Allinger points out that Ms. Mackessy never provided any accounting of her retirement "points" earned at trial or at any time at all. RP 86. Mr. Allinger alleged that the court could look at his "points" earned and Ms. Mackessy's "points" earned but she refused to provide any evidence whatsoever or her military retirement "points" accounting.

Judge Price, correctly concluded that, for many reasons, "It didn't amount to anything when they got divorced in December 1998. And so, Ms. Mackessy walked away from that retirement, and likewise, so did Mr. Allinger." RP 164. There is substantial evidence to support Judge Price's finding as detailed above. Furthermore, Ms. Mackessy testified that she did not believe Mr. Allinger would ever return to military service for a multitude of reasons. RP 53-54.

The Decree drafted by Ms. Mackessy includes all encompassing language that Mr. Allinger shall receive "Everything already taken." The language written into the Decree by Ms. Mackessy is clear on its face and unambiguous. Everything would necessarily include both tangible and intangible items including physical property, bank accounts, social security benefits, retirement, CD's, IRA's and "everything" else. It should



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be noted that the language drafted by Ms. Mackessy contains no exceptions or limitations. Thus, the retirement earned by Mr. Allinger was included in "everything."

Alternatively, as the court can see the Decree was not a complete agreement. The parties had other agreements that they made and adhered to. The parties did not list household goods, family photos, bank accounts, insurance policies, and so forth. RP 60-61 and 103-104.

Importantly the parties did not even list the student loans incurred during the marriage. These student loans were in excess of $18,000 but are not mentioned in the Decree. Nonetheless, Ms. Mackessy paid them because this is what they agreed to do between themselves. RP 62-63 and RP 103-104.

It is admitted by Ms. Mackessy that the Decree was not a complete agreement and that the parties made other agreements outside of the Decree. RP 63, lines 5-11. It is admitted by both parties that they divided tangible property and non-tangible property (bank accounts for example) outside of the formal Decree.

The only issue the parties don't agree on regarding the Decree and extraneous agreements is Mr. Allinger's retirement. Again, glaringly, Ms. Mackessy does not say that neither retirement was divided. Only that



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Mr. Allinger's retirement was not divided. The fact is that they were both divided, his to him and hers to her.

Ms. Mackessy also had accrued retirement points. Yet she did not ask the court to divide those, or other property that is not specifically mentioned in the Decree, like student loans, family photos, insurance policies, and so forth.

In essence, Ms. Mackessy is asking this court to believe that everything was divided by the parties, either in the Decree or by other agreement, except for Mr. Allinger's accrued retirement points that Ms. Mackessy never believed would amount to anything. This is quite a stretch of reasonableness and inconsistent with the facts. If Ms. Mackessy really wanted this court to divide both retirements, the only reasonable/equitable way to do that is to determine how many points each party earned during the marriage. Then add them up and divide in half with 50% to each party.

Here, Mr. Allinger provided his points earning history. Ms. Mackessy testified that she earned retirement until 1996 because Mr. Allinger was activated to Iraq and they could not both be activated so she quit. RP 39. Thus, both parties were earning retirement points from the date of marriage until 1996 when Mr. Allinger was activated to Iraq. (As a



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corrective note, Mr. Allinger was not activated to Iraq until 2003, after the parties separated and was deployed for 11 months 22 days.
(Ms. Mackessy's statements inconsistent with this are false.)

Mr. Allinger alleged they had earned similar points and that if they were to be divided that only the minute portion (the difference in the points earned by him versus the points earned by her during the marriage) would be divisible by the court in any event.

Therefore the only "points" that could even be before the court are approximately 16 months of earned "points" between the time Ms. Mackessy resigned in 1996 and the parties filed for divorce in July 1998. Thus, Ms. Mackessy brought this case allegedly to divide only 16 months of points earned in a 20+ year career of Mr. Allinger. This equates to 6.66% that could be deemed community and 3.33% that Ms. Mackessy is apparently requesting.

It would seem absurd, and frivolous, to spend this amount of time and money for 3% of a former spouse's retirement 17 years after the Decree was entered. This action was pursued simply to harass Mr. Allinger, a decorated veteran who served his country and became disabled and unable to work as a result of his service to the United States. This court should award fees to Mr. Allinger for responding to this appeal.



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The absurdity of Ms. Mackessy's request was not lost on the trial court. Ms. Mackessy never believed Mr. Allinger would stay in the military or earn a retirement from the military. RP 53-54. Mr. Allinger was activated after September 11, 2001, and eventually retired from military service with 90% disabled status. RP 91. At the time of trial Mr. Allinger received $2,253 in military retirement. RP 89. Ms. Mackessy's request is equal to 3% of $2,253 or $67.59 per month. The case appears frivolous/harassment given Ms. Mackessy's asserted income of over $100,000 annually, as any retirement benefit from Mr. Allinger would be de minimis.

Given the record in this case, and Ms. Mackessy's continued refusal to disclose her military retirement points for division, it appears this case has been promoted simply to harass Mr. Allinger.

Ms. Mackessy's reliance on two cases from California is unwarranted and not relevant. First, the California courts were not interpreting Washington statute or Washington case law. Next, the statute or case law that the California appellate court was interpreting is not disclosed. What relevance is a California Appellate case unless is it interpreting Washington statute? The obvious answer is that it has zero relevance.



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In Huddleson, the court found that the wife, "...had not waived her rights in the pension because she did not know what her rights were with respect to it..." Huddleson v. Huddleson, 187 Cal.App. 3d 1564 (1986). Here, Ms. Mackessy knew what her rights were as she had the exact same pension from her military service. Thus, the Huddleson case is useless and irrelevant as "precedent".

Ms. Mackessy's reliance on the Norton case is similarly misplaced. The Norton case is also UNPUBLISHED. In re Marriage of Norton, Not Reported in Cal.Rptr.3d (2006). RAP 10.4(h) refers to GR 14.1. GR14.1(b) states:

> (b) Other Jurisdictions. A party may cite as an authority an opinion designated "unpublished," "not for publication," "non-precedential," "not precedent," or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.

On the face of the Norton case it states "California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts." The rule (attached) prohibits the use of the unpublished case as precedent. Thus, this court should not even consider Norton as it is unpublished and prohibited as precedent.



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## IV. Conclusion

Mr. Allinger respectfully requests this court to uphold the decision of the trial court as it was not an abuse of discretion by the trial court to find waiver, estoppel, and that the parties agreed to each keep their own retirement.

Mr. Allinger respectfully requests attorney fees for responding to this appeal as Ms. Mackessy has significant ability to pay and Mr. Allinger has a need for an award for fees. Additionally, this appeal is frivolous and this court has authority to award fees in a frivolous appeal.

Dated: 6/6/16

Respectfully submitted,

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 6th day of June, 2016 I deposited a copy of the attached *Brief of Respondent* with Eastern Washington Attorney Services, Inc. directed to:

Brant L. Stevens
222 W. Mission Ave. #25
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I instructed Eastern Washington Attorney Services, Inc. to deliver, copy receive and file said document with the Division III Court of Appeals for the State of Washington.

Dated: 6/6/16

Joanne M. McAtee,
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# 2016 California Rules of Court

Rule 8.1115. Citation of opinions

**(a) Unpublished opinion**

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

**(b) Exceptions**

An unpublished opinion may be cited or relied on:

(1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(Subd (b) amended effective January 1, 2007.)

**(c) Citation procedure**

A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

**(d) When a published opinion may be cited**

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

Rule 8.1115 amended and renumbered effective January 1, 2007; repealed and adopted as rule 977 effective January 1, 2005.

Advisory Committee Comment

A footnote to a previous version of this rule stated that a citation to an opinion ordered published by the Supreme Court after grant of review should include a reference to the grant of review and to any subsequent Supreme Court action in the case. This footnote has been deleted because it was not part of the rule itself and the event it describes rarely occurs in practice.