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Court of Appeals No. 77729-7-I
King County Cause No. 98-3-04050-9 SEA

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

GEORGE CHIGI III, Petitioner,

and

CAMILLE DICLERICO (f/k/a CHIGI), Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

George Chigi, Appellant in the Court of Appeals, is the Petitioner before this Court. He asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this Petition.

II. DECISION BELOW

The Petitioner requests review of the Court of Appeals Division 1 opinion in case number 77729-7-I filed on July 29, 2019. A copy of the decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

This Court should accept review under Rule of Appellate Procedure 13.4(b)(1)-(2), as the Court of Appeals' decision is in conflict with decisions issued by the Supreme Court as well as decisions issued by the Court of Appeals. Specifically, the issues are:

1. Whether the Court of Appeals' decision is in conflict with *In re Marriage of Jennings*, 138 Wn.2d 612, 980 P.2d 1248 (1999), determining that the servicemember can only be required to pay equitable maintenance to the extent non-divisible VA disability reduces the former spouse's share of military retirement;
2. Whether the Court of Appeals' decision is in conflict with *State v. Evans*, 177 Wn.2d 186, 298 P.3d 724 (2013), *State v. Sweany*, 174 Wn.2d 909, 281 P.3d 305 (2012), and through them, *Howell v. Howell*, 137 S.Ct. 1400, 197 L.Ed.2d 718 (2017), which hold that once a court determines the meaning of a statute, "that is what the statute has meant since its enactment," so a state court cannot require a servicemember to pay the former spouse a share of non-divisible federal benefits like VA disability and Combat-Related Special Compensation;

3. Whether the Court of Appeals' decision is in conflict with *In re Marriage of Flannagan*, 42 Wn. App. 214, 709 P.2d 1247 (1985), *In re Marriage of Giroux*, 41 Wn. App. 315, 704 P.2d 160 (1985), which denied the application of *res judicata* regarding military retirement

even when no appeal was taken at the time of the previous order due to intervening changes in federal law;

4. Whether the Court of Appeals' decision is in conflict with *Clingan v. Dep't of Labor & Indus.*, 71 Wn. App. 590, 860 P.2d 417 (1993), which held that the post-dissolution order dividing an asset that did not exist at the time of the divorce was "void."

IV. STATEMENT OF THE CASE

At issue in this case is a set of post-dissolution conflicting orders issued as a result of Mr. Chigi's post-dissolution receipt of Combat-Related Special Compensation, a federal benefit awarded to Mr. Chigi as a result of being injured during combat that did not exist at the time of the parties' divorce and that is not divisible by a state court under federal law. Even though those conflicting orders were issued as part of a "review" of the dissolution decree, and even though one of the orders is now requiring Mr. Chigi to pay part of his non-divisible federal benefit to Ms. DiClerico, the trial court below held that any further review was precluded by *res judicata*. Mr. Chigi asks this Court to accept review of the decision, for there is no question that the current order, in effect, represents a modification of the parties' divorce decree and inappropriately requires Mr. Chigi to pay funds from a non-divisible federal benefit to his former spouse.

FACTUAL BACKGROUND

The parties were married on November 29, 1969, separated on December 31, 1998, and divorced without minor children on September

30, 1999. CP 1-6, 15-25. Their divorce was settled by agreement after a settlement conference earlier that year. CP 15-33.

At the time of their divorce, the parties were both 56 years old. CP 49-110, 244-298. Mr. Chigi had retired from the U.S. Army in 1991 and started working in Seattle for the federal government. CP 49-110, 244-298. In 1997, he learned that his position was going to be eliminated, causing him to seek a new position. CP 49-110, 244-298. He went to Fort McClellan, Alabama, but learned upon arrival that the base was scheduled to be closed. CP 49-110, 244-298. He was then reassigned to Fort Jackson, South Carolina, where he worked as an instructor/polygraph examiner at the Department of Defense Polygraph Institute. CP 49-110, 244-298. His income was about $52,176 per year. CP 49-110, 244-298.

Ms. DiClerico, on the other hand, did not leave Seattle with Mr. Chigi. CP 49-110, 244-298. When his position was eliminated, she decided she did not want to move any more, so she stayed while Mr. Chigi left. CP 49-110, 244-298. She had been working as a school nurse at Bellevue Community College in Bellevue, Washington, for about two years. CP 49-110, 244-298. They had no debts, other than their mortgage, and their vehicles were paid. CP 49-110, 244-298. Their children were both grown and educated, and neither of them had any college loans or other debts. CP 49-110, 244-298.

Both parties were able to stand on their own two feet and care for themselves, although Ms. DiClerico needed assistance paying the mortgage on their home. CP 49-110, 244-298. Mr. Chigi paid the mortgage each month while the divorce was pending, and then Ms. DiClerico took it over as part of their settlement agreement, which had Mr. Chigi switch from paying the $1,700 mortgage each month to paying her $2,000 maintenance each month. CP 15-25. After factoring in taxes, this maintenance provided her with the ability to pay the mortgage each month. CP 15-25, 49-110, 244-298.

As part of reaching settlement, the parties specifically agreed that "The wife has need for maintenance and the husband has the ability to pay as set forth in the Decree of Dissolution." CP 15-25.

In the Decree, the parties agreed that Ms. DiClerico should receive $2,000 maintenance per month until Mr. Chigi reached the age of 65 (May 9, 2008), which meant she would receive those funds for about nine years (totaling $208,000 over 8 years and 8 months). CP 15-25.

Their Decree then specified that upon Mr. Chigi's 65th birthday, the $2,000 per month would terminate and

> [T]he wife shall then receive an amount equivalent to one-half (1/2) of the net amount of the husband's current combined VA disability and military retirement, as maintenance, which shall be tax deductible by the husband and taxable to the wife, shall be non-modifiable, and shall terminate upon the wife's death. This provision shall not be affected by any change in the husband's current disability status. The calculation of the net amount shall be determined by subtracting all mandatory taxes and

> Survivor Benefit Premiums from the combined VA disability and military retirement payments.

CP 15-25. At the time, Mr. Chigi was receiving military retirement with a VA disability waiver, which meant that he received the same amount of money that he would have received just by retiring from the military, but part of it was made up from funds from the VA. CP 49-110, 244-298. Mr. Chigi had retired with a rank of W-4 and 28 years of service, which put his retired pay at about $2,323 per month (about $1,500 net after taxes and the Survivor Benefit Plan premium) with $667 of that coming from the VA. CP 49-110, 244-298. Therefore, it was anticipated that, after Cost of Living Adjustments each year until Mr. Chigi turned 65, Ms. DiClerico's half of his combined VA disability and retirement would be under $2,000. CP 49-110, 244-298. Nothing was indicated in the Agreement to suggest otherwise. CP 49-110, 244-298.

The parties then agreed that this maintenance amount would be secured by life insurance policies totaling no less than $275,277. CP 15-25. Assuming Mr. Chigi lived past retirement, this covered the $208,000 that would be paid to Ms. DiClerico between the date of their Decree (September 30, 1999) and Mr. Chigi's 65th birthday (May 9, 2008). CP 15-25. Thereafter, Ms. DiClerico remained covered by the life insurance policy (still worth $275,277) as well as the Survivor Benefit Plan, which entitles her to 55% of Mr. Chigi's base military retired pay upon his death, as well as his federal civil service survivor annuity. CP 15-25.

In sum, the parties agreed to divide the value of their assets as of the date of separation, with each keeping the remainder. CP 15-25. Mr. Chigi was awarded all interest in his military retirement, excepting Ms. DiClerico's interest in the Survivor Benefit Plan, and all interest in his VA disability benefits, "free and clear of any claim by the wife." CP 15-25. The only exception was that Ms. DiClerico was to receive an "amount equivalent to" one-half of his "current combined VA disability and military retirement" as maintenance. CP 15-25. However, it was made clear that this "shall not be affected by any change in the husband's current disability status." CP 15-25.

Post-Divorce Payments

From the date the divorce was finalized to Mr. Chigi's 65th birthday, he paid Ms. DiClerico $2,000 each month without fail. CP 49-110, 244-298. When he turned 65 and payments shifted to one-half of his "current combined VA disability and military retirement," he began making payments to her of $2,208 per month based on his calculations of what he received at that time. CP 49-110, 244-298. Ms. DiClerico said nothing about it until almost a year later. CP 49-110, 244-298.

On June 13, 2008, the VA determined that Mr. Chigi was 100% "permanently and totally disabled." CP 49-110, 244-298, 389-594. His VA doctors further concluded that he was "unable to work due to his service connected disability/disabilities." CP 49-110, 244-298. As part of this determination, the VA advised him that he might be eligible for

Combat-Related Special Compensation, a new type of compensation paid by the Department of Defense in reimbursement for injuries military members sustained during combat. CP 49-110, 244-298.

Changes in 2009

In 2009, many things changed. CP 49-110, 244-298. It took until April of 2009 for the VA to adjust Mr. Chigi's payments despite the earlier determination of his increased disability rating. CP 49-110, 244-298, 389-594. He also learned that the VA still had him listed as "married," which had resulted in a slight overpayment to him that was corrected in July of 2009. CP 49-110, 244-298, 389-594. His VA benefits were then reduced effective October of 2009 to correct the overpayment. CP 49-110, 244-298, 389-594. Finally, and of particular importance to this matter, Mr. Chigi followed the VA's recommendation and applied for Combat-Related Special Compensation due to injuries he received while in combat during service (he had been shot in the head, hand, and right tricep; he began suffering from PTSD, degenerative joint and disc disease, cervical spondylosis, headaches, foot injuries, tinnitus, fractured bones (feet, wrist, ribs, nose, jaw, skull), and hearing loss). CP 49-110, 244-298, 389-594. Thereafter, Mr. Chigi began receiving Combat-Related Special Compensation payments in addition to his military retirement and VA disability payments. CP 49-110, 244-298, 389-594.

As all of these changes occurred, Mr. Chigi did his best to calculate what Ms. DiClerico was owed and paid her. CP 49-110, 244-

298. However, in July of 2009, Ms. DiClerico filed a Motion for Contempt, alleging that Mr. Chigi owed her $1,768.23 in underpaid maintenance. CP 40-41, 49-110, 244-298. This led to a series of hearings about two main issues: first, what was owed for back support, and second, what was owed going forward. CP 49-110, 244-298. Only this second issue is relevant to the current matter.

2009/2010 Court Proceedings

On September 8, 2009, the court held that Mr. Chigi was "not in contempt due to the confusion in calculating payments, and the finding that there was no bad faith." CP 49-110, 244-298. The court then continued the hearing for 60 days so that everyone could obtain information about any "reduction in combined VA and military retirement benefits." CP 49-110, 244-298. The court held that "[i]f the benefits were reduced in any way due to the receipt of CRSC [combat-related special compensation], then the wife is entitled to ½ of the total benefits, currently 3142.78 without reduction. Any CRSC benefits that do not reduce what would have been awarded to the wife are awarded to the husband." CP 49-110, 244-298. Mr. Chigi believed that this decision was correct, for if his CRSC did reduce what Ms. DiClerico was meant to receive, then she should have been made whole. CP 49-110, 244-298.

On March 19, 2010, the continued hearing was held (it had been continued by agreement a few times beforehand for various reasons). CP 49-110, 244-298. At issue in that hearing was how the parties were to

calculate taxes considering that maintenance payments were to be taxable to Ms. DiClerico, but a large portion of the funds Mr. Chigi received were not taxable in general. CP 49-110, 244-298. The resulting court order from that hearing was as follows:

> The husband shall pay the wife one half of the funds received without offset for taxes from his CRSC & VA disability and military retirement payments each month.

CP 49-110, 244-298. Ever since, Mr. Chigi has been making payments to Ms. DiClerico, but as his benefits and payment amounts have shifted and settled, it has become clear that the effect of the 2010 order on payments as they stand today is that Ms. DiClerico is getting 50% of all CRSC, VA Disability, and military retirement despite the plain language in the Decree and the 2009 order. CP 49-110, 244-298. This was not clear in 2010, as the payments were shifting: the VA was adjusting Mr. Chigi's disability rating, he began receiving the CRSC, the VA fixed the error causing an overpayment, and his military retired pay decreased as his VA disability increased. CP 49-110, 244-298.

After the hearing, Mr. Chigi's health declined rapidly and has continued to decline ever since. CP 49-110, 244-298. He was diagnosed with cancer, leukemia, kidney failure, and depression. CP 49-110, 244-298. Additionally, he faced continuing issues from being wounded twice in combat, which gave him horrid dreams and flashbacks from Vietnam that he still suffers from to this day. CP 49-110, 244-298. He was diagnosed with PTSD, which manifested as severe depression and

anxiety. CP 49-110, 244-298. Further, he suffers still from a long-term back injury resulting from his parachute collapsing in Vietnam, which caused him to fall 30-35 feet to crash land on a hard, packed runway. CP 49-110, 244-298.

He understood from the 2009 order that payments not part of CRSC would belong to him, and thus continued making payments per the current calculations in the 2010 order. CP 49-110, 244-298. Ms. DiClerico since has made it clear that she expects half of all Mr. Chigi's benefits regardless of whether they are referenced in the Decree or not. CP 49-110, 244-298.

As a result, the payments to Ms. DiClerico have increased dramatically over the years such that she went from receiving $2,000 per month per the Decree to almost $4,500 per month in total income and tax free benefits. CP 49-110, 244-298. His extensive medical issues increased the price of his life insurance premiums, which further increased the cost of the benefit to Ms. DiClerico. CP 49-110, 244-298.

Included below are charts summarizing the payments as required by the plain language in the Decree as well as actual payments made to Ms. DiClerico. CP 49-110, 244-298.

Payments as Required per the Plain Language in the Decree

The chart below shows the amount Mr. Chigi received each year for VA disability from 1999-2017, the amount he received in retired pay (after waiving a portion in order to receive VA disability), and the amount

Ms. DiClerico would receive per the plain language in the Decree (one half of the net VA disability and retired pay). CP 49-110, 244-298, 389-594. In 2008, after her maintenance terminated, she would have gone from receiving $2,000 per month maintenance to roughly $1800-$1900 per month. CP 49-110, 244-298. Further, this chart shows that Mr. Chigi's receipt of CRSC does not decrease the combined retired pay and VA disability he otherwise receives. CP 49-110, 244-298, 389-594.

Date	VA Disability	Retired Pay (after VA waiver)	Total Paid to Me:	Camille's Maintenance per the Decree's Plain Language:
1999 – Before CRSC	$667.00	$1,718.63	$2,385.63	$2,000 taxable
1/2000 – Before CRSC	$682.00	$1,763.27	$2,445.27	$2,000 taxable
1/2001 – Before CRSC	$705.00	$1,825.85	$2,530.85	$2,000 taxable
1/2002 – Before CRSC	$609.00	$1,987.65	$2,596.65	$2,000 taxable
1/2003 – Before CRSC	$633.00	$2,000	$2,633.00	$2,000 taxable
1/2004 – Before CRSC	$709.00	$2113.45	$2,822.45	$2,000 taxable
1/2005 – Before CRSC	$917.00	$2,006.42	$2,923.42	$2,000 taxable
1/2006 – Before CRSC	$596.88	$2,387.25	$2,984.13	$2,000 taxable
1/2007 – Before CRSC	$558.43	$2,511.79	$3,070.22	$2,000 taxable
1/2008 – Before CRSC	$345.95	$2,757.73	$3,103.68	$2,000 taxable
5/2009 – After CRSC	$2,823.00	$789.55	$3,612.55	$1,806.28 non-taxable
8/2010 – After CRSC	$2,673	$892.47	$3,565.47	$1,782.74 non-taxable
1/2011 – After CRSC	$2,673.00	$892.47	$3,565.47	$1,782.74 non-taxable
1/2012 – After CRSC	$2,769.00	$890.57	$3,659.57	$1,829.79 non-taxable
1/2013 – After CRSC	$2,816.00	$906.21	$3,722.21	$1,861.12 non-taxable
1/2014 – After CRSC	$2,858.24	$920.12	$3,778.36	$1,889.18 non-taxable
1/2015 – After CRSC	$2,906.83	$935.64	$3,842.47	$1,921.24 non-taxable
1/2016 – After CRSC	$2,906.83	$875.09	$3,781.92	$1,890.96 non-taxable
1/2017 – After CRSC	$2,915.55	$1,024.15	$3,939.70	$1,969.85 non-taxable

Payments as Actually Made to Ms. DiClerico per the 2010 Order

The chart below compares the payments required by the plain language of the Decree compared to payments actually made to her per the 2010 order and the overage each month. CP 49-110, 244-298, 389-594.

Year	Payments to Camille per the Plain Language of the Decree	Payments to Camille per the 2010 Order	Funds to Camille above what the Decree requires
1999	$2,000 taxable	N/A	**N/A**
2000	$2,000 taxable	N/A	**N/A**
2001	$2,000 taxable	N/A	**N/A**
2002	$2,000 taxable	N/A	**N/A**
2003	$2,000 taxable	N/A	**N/A**
2004	$2,000 taxable	N/A	**N/A**
2005	$2,000 taxable	N/A	**N/A**
2006	$2,000 taxable	N/A	**N/A**
2007	$2,000 taxable	N/A	**N/A**
2008	$2,000 taxable	N/A	**N/A**
2009	$1,806.28 non-taxable	N/A	**N/A**
2010	$1,782.74 non-taxable	$3,119.24 non-taxable	**$1,336.50 per month**
2011	$1,782.74 non-taxable	$3,103.14 non-taxable	**$1,320.50 per month**
2012	$1,829.79 non-taxable	$3,214.29 non-taxable	**$1,384.50 per month**
2013	$1,861.12 non-taxable	$3,269.11 non-taxable	**$1,407.99 per month**
2014	$1,889.18 non-taxable	$3,318.30 non-taxable	**$1,429.12 per month**
2015	$1,921.24 non-taxable	$3,374.38 non-taxable	**$1,453.14 per month**
2016	$1,890.96 non-taxable	$3,344.38 non-taxable	**$1,453.42 per month**
2017	$1,969.85 non-taxable	$3,427.62 non-taxable	**$1,457.77 per month**

In 2017, after Ms. DiClerico made it clear that she did not agree to allow Mr. Chigi to keep any part of his benefits that do not otherwise decrease what she was supposed to receive per the Decree, Mr. Chigi filed a Motion for Clarification/Review/to Vacate Maintenance Orders and Enforcing Decree of Dissolution. CP 49-110, 230-298. In that motion, he requested via several alternate means that, simply put, the court review the calculations as set forth in the 2010 order in light of the facts and Decree's plain language. CP 230-243. Specifically, he noted that he was not asking for any back adjustments or back payments, but rather that the amount be adjusted and corrected going forward. CP 49-110, 244-298.

In support of his argument, Mr. Chigi also explained that the Combat-Related Special Compensation was intended to compensate

those injured during combat, that it is not retirement or VA disability, and that it was not awarded in any way to Ms. DiClerico as part of the Decree. CP 49-110, 244-298. He further indicated that he is currently having problems paying for needed medical care caused by those injuries because of the large amount of funds he has to pay to Ms. DiClerico each month. CP 49-110, 244-298.

2017 Court Proceedings

On November 2, 2017, the trial court denied Mr. Chigi's request for review/clarification/to vacate. VRP 62-65 (11/2/17 Hearing).

Mr. Chigi timely filed his Notice of Appeal on 12/4/17. CP 374-85. The Court of Appeals upheld the trial court's decision in an opinion issued on July 29, 2019. Appendix A. Mr. Chigi thereafter timely filed this Petition for Review.

V. ARGUMENT

A. The Court of Appeals' decision is in conflict with *In re Marriage of Jennings* by upholding a court order that requires a former spouse to be paid half of all VA disability, Combat-Related Special Compensation, and military retired pay beyond what was required in the parties' divorce decree.

Despite the issuance if *Howell v. Howell* by the United States Supreme Court in 2017, this Court has not addressed its position articulated in *Marriage of Jennings*, 138 Wn.2d 612, 980 P.2d 1248 (1999) regarding the appropriate remedy when a former spouse's share of military retired pay is reduced as a result of the servicemember's post-

dissolution receipt of VA disability. *Id.* There, this Court held that compensatory maintenance should be paid by the husband to the wife in order to compensate the wife only to the extent her share of military retirement had been reduced. *Id.*

In this case, the decision below violates both *Jennings* and *Howell.* Regarding *Jennings*, this Court required compensatory maintenance from any source of funds to the ex-wife only to the extent her appropriate share of retirement was decreased by the receipt of VA disability. In this case, Mr. Chigi is required to pay half of all benefits combined regardless of what Ms. DiClerico was to receive in the initial divorce decree.

Regarding *Howell*, no such work-arounds as described in *Jennings* are allowed, and the division of either VA disability or Combat-Related Special Compensation is not allowed – not directly, and not as a make-up or work-around in the form of compensatory maintenance.

Specifically, like most forms of disability or personal injury compensation, neither VA disability nor CRSC are subject to division by a court order or as part of a divorce. VA disability is specifically exempted from division as part of a divorce per 10 U.S.C. § 1408, and CRSC is specifically exempted from division as part of a divorce per 10 U.S.C. § 1413a(g). This is unsurprising, as disability and personal injury compensation are typically awarded as separate property to the injured person in "compensation for lost future wages." *In re Marriage of Nuss*,

65 Wn. App. 334, 343, 828 P.2d 627 (1992). Our own courts have long held that it is only when disability replaces community property retirement that the court can equitably compensate the lost share of retirement to the other spouse with direct payments. *Id.*

However, in this case, Mr. Chigi was awarded both his military retirement and his VA disability. The parties' Decree simply used the combined amount of VA disability and military retired pay Mr. Chigi received each month as a formula to determine what maintenance Mr. Chigi would pay upon turning 65. Of course, if he took some action to unilaterally decrease what that formula would require him to pay, then equity would reasonably have him make up that difference, but that is not the case here as there is no reduction.

B. The Court of Appeals' decision is in conflict with *State v. Evans*, *State v. Sweany*, which hold that once a statute is interpreted, its interpretation applies retroactively to its enactment, and *Howell v. Howell*, which holds that federal statute precludes state courts from dividing VA disability or Combat-Related Special Compensation.

Washington law recognizes that when a statute has been interpreted, its meaning and intent does not change between "enactment and judicial interpretation, no matter what happens in-between." *Darkenwald v. Emp. Sec. Dept.*, 183 Wn.2d 237, 252, 350 P.3d 647 (2015); *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013); *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012). In fact, when federal law previously changed in the 1980s regarding military retirement,

our courts specifically endorsed correcting past orders to account for what was right and equitable by vacating orders under CR 60(b)(11). *See in re Marriage of Flannagan*, 42 Wn. App. 214, 220-21, 42 Wn. App. 214 (1985); *In re Marriage of Giroux*, 41 Wn. App. 315, 704 P.2d 160 (1985) addressed further below.

In this case, the United States Supreme Court has recently held that it is inappropriate for courts to include language like in the 2010 order even long after an order was put in place. In *Howell v. Howell*, the parties were divorced in 1991 while the husband still served in the military. *Howell v. Howell*, 137 S. Ct. 1400, 1402 (2017). In expectation of his future retirement, the parties divided his retired pay with half going to the wife each month once he retired. *Id.* He retired in 1992, and the wife began receiving her share of his retired pay each month without reduction. *Id.* After 13 years, however, his disability increased, which cut her pay in half. *Id.* She took the matter to court in Arizona, which required the husband to make up the difference by paying her directly each month. *Id.*

The Arizona Supreme Court affirmed, noting that the decision did not contravene federal laws against dividing disability pay because the husband was neither required to rescind his election to receive disability funds nor was he required to pay his wife directly from disability funds. *Id.*

The United States Supreme Court's primary emphasis on review was that the Uniformed Services Former Spouse Protection Act, which

gives state courts the power to divide military retirement in divorces, only allows state courts to divide "disposable retired pay" as part of a divorce, and retired pay waived to receive VA disability is expressly excluded from the definition of "disposable retired pay." *Id.*; 10 U.S.C. § 1408(a)(4)(B). Therefore, state courts are preempted by federal law from dividing disability. *Id.* at 1402.

Even though the order did not expressly divide retirement but allowed the husband to pay from any source he chose, the Supreme Court held that this was just "semantics and nothing more." *Id.* at 1406. Of specific concern to the Court was that the husband's direct payments "mirror[ed] the waived retirement pay, dollar for dollar." *Id.* They held that, "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted." *Id.* In sum, state courts are not allowed to require a service member who receives disability pay to make up lost funds to the former spouse as a work-around.

In this case, Mr. Chigi agreed to make up lost pay due to VA disability, but he never agreed to pay his CRSC to Ms. DiClerico – the court ordered it. As such, the court's order "displaces the federal rule" and stands "as an obstacle to the accomplishment and execution of the purposes and objectives of Congress" – that those injured during combat receive special compensation for their injuries that cannot be required to

be paid to a former spouse and cannot be divided. CRSC is specifically exempt from court order per 10 U.S.C. § 1413a(g), which means that the state court has no authority to divide CRSC – not per its own provisions and not per the USFSPA as discussed in *Howell.*

C. The Court of Appeals' decision is in conflict with *In re Marriage of Flannagan and Marriage of Giroux*, both of which addressed CR 60 motions filed after the deadline and without allowing arguments of *res judicata* due to intervening changes in federal law regarding military retirement that occurred since issuance of the previous order.

Flannagan and *Giroux* were both issued the last time federal law changed dramatically regarding a state court's ability to divide military retirement, and in both of those cases, the requirements of *res judicata* were set aside in favor of resolving the issues fairly in light of changes in federal law. *See In re Marriage of Flannagan*, 42 Wn. App. 214, 220-21, 42 Wn. App. 214 (1985); *In re Marriage of Giroux*, 41 Wn. App. 315, 704 P.2d 160 (1985). Even though Washington has previously endorsed the work-around approach to federal law regarding military benefits, as set forth in *Marriage of Jennings*, 138 Wn.2d 612 (1999), that approach is not valid per *Howell.* Washington law recognizes that when a statute has been interpreted, its meaning and intent does not change between "enactment and judicial interpretation, no matter what happens in-between." *Darkenwald v. Emp. Sec. Dept.*, 183 Wn.2d 237, 252, 350 P.3d 647 (2015). In fact, when federal law previously changed in the 1980s regarding military retirement, our courts specifically endorsed

correcting past orders to account for what was right and equitable by vacating orders under CR 60(b)(11). *See in re Marriage of Flannagan*, 42 Wn. App. 214, 220-21, 42 Wn. App. 214 (1985); *In re Marriage of Giroux*, 41 Wn. App. 315, 704 P.2d 160 (1985). Since Mr. Chigi is only asking that this Court uphold the parties' Decree per its plain language, it is not only fair to do so, but appropriate, legally, to vacate the order.

D. The Court of Appeals' decision is in conflict with *Clingan* as it upholds a decision that divides non-divisible federal benefits that did not exist at the time of the parties' dissolution.

Clingan held that an order is void that purports to award benefits that did not exist at the time of the dissolution. *Clingan v. Dep't of Labor & Indus.*, 71 Wn. App. 590, 593-94, 860 P.2d 417 (1993). In *Clingan*, the parties were divorced in 1987, and years later, the wife argued that the husband's disability benefits were "omitted" from the divorce and should be divided and awarded to her. *Id.* On review, the Court of Appeals noted that the disability was not omitted because it was noted in the property settlement, but even still, the wife had no right to receive it then or later because the disability benefits were "a statutory entitlement personal to [the husband] and could not be divided in a property settlement." *Id.* The court specifically noted that even if his disability had been included in the property settlement, "that division would have been void." *Id.* at 594. Therefore, the later order was voided by the Court of Appeals, and the original property division was upheld. *Id.*

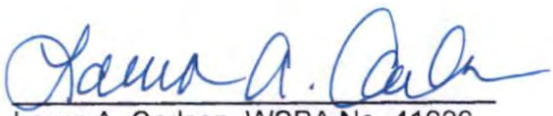
In this case, not only was Mr. Chigi not receiving Combat-Related Special Compensation when the parties' divorced, but the program itself did not exist until years later. Per the specific terms of *Clingan*, an order dividing the asset that did not exist at the time of divorce is void.

CONCLUSION

For the reasons set forth above, Mr. Chigi respectfully requests that this Court reverse the trial court's decision and remand for entry of appropriate orders.

DATED: August 28, 2019.

CARLSEN LAW OFFICES, PLLC



Laura A. Carlsen, WSBA No. 41000

PROOF OF SERVICE

Piper L. Bliss certifies as follows:

On August 28, 2019, I served upon the following persons a true and correct copy of this Motion by placing the same in an envelope, with the proper postage affixed thereon, and sent via U.S. Mail as well as electronic mail to:

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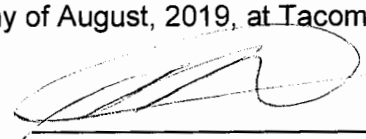
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED AND DATED this 28th day of August, 2019, at Tacoma, WA.



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Client Name: George Chigi

Case Number: Court of Appeals No. 77729-7-I

Date Submitted: 7/5/19

Appendix A

FILED
7/29/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Marriage of GEORGE CHIGI III, Appellant, and CAMILLE DICLERICO, f/k/a CAMILLE CHIGI, Respondent.	No. 77729-7-I UNPUBLISHED OPINION FILED: July 29, 2019

VERELLEN, J. — George Chigi and Camille DiClerico dissolved their marriage in 1999 and litigated a clarification of the spousal maintenance provision of the dissolution decree in 2009 and 2010. In 2017, Chigi moved to clarify that provision. Because Chigi seeks to relitigate the same issues he already litigated to final judgment in 2010, the court properly denied his motion under the doctrine of issue preclusion.

As an alternative to clarification, Chigi moved under CR 60(b)(11) to vacate the court's 2010 order. Motions to vacate must be brought within a reasonable time of a triggering event warranting vacation. Because Chigi fails to show he brought his motion within a reasonable time, the court did not abuse its discretion by denying his motion to vacate.

Therefore, we affirm.

FACTS

Chigi and DiClerico married in 1969.[1] Chigi served in the Army in Vietnam from 1967 to 1968 and again in 1970.[2] He retired from military service in 1991.[3] Chigi petitioned for dissolution of his marriage in 1998.[4] The court granted a decree of dissolution in 1999.[5]

In the decree, the court awarded Chigi 100 percent of his Veteran's Administration (VA) disability benefits and his military retirement.[6] It awarded DiClerico spousal maintenance in two phases. During phase 1, which lasted until Chigi turned 65, he would pay DiClerico $2,000 per month.[7] During phase 2, which lasts until DiClerico's death, Chigi must pay a monthly amount "equal to one-half (1/2) of the net amount of [Chigi's] current combined VA disability and military retirement as maintenance, which . . . shall be non-modifiable."[8] Neither party appealed the decree.

In May of 2008, Chigi turned 65, and the parties entered phase 2 of the maintenance decree.[9] In July of 2009, DiClerico moved to hold Chigi in contempt

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[1] Clerk's Papers (CP) at 5.

[2] CP at 255.

[3] CP at 245.

[4] CP at 6.

[5] CP at 23.

[6] CP at 16.

[7] CP at 20.

[8] Id.

[9] CP at 248.

because of underpaid maintenance.[10] Chigi argued the underpayments were inadvertent and resulted from contemporaneous changes to his VA disability and military retirement benefits and from beginning to receive combat-related special compensation (CRSC) benefits.[11] The court ordered Chigi to repay DiClerico, and it scheduled a hearing to consider the reasons for apparent reductions in Chigi's benefit payments, including his receipt of CRSC.[12] In March of 2010, the court ordered Chigi to "pay [DiClerico] one half of the funds received without offset for taxes from his CRSC & VA disability and military retirement payments each month."[13] Chigi did not appeal or seek to revise this order.

Through mid-2017, Chigi paid DiClerico a monthly amount equal to one-half the sum of his VA disability and military retirement benefits, including his CRSC benefits.[14] In August of 2017, Chigi moved to clarify or vacate the 2010 order.[15] The court denied his motion to clarify, concluding it was barred as res judicata, and it denied his motion to vacate as untimely.[16]

Chigi appeals.

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[10] CP at 40-41.

[11] CP at 55.

[12] CP at 385.

[13] CP at 216.

[14] See CP at 296-98 (spreadsheets of monthly payments).

[15] CP at 230, 240.

[16] CP 371-72.

ANALYSIS

We review de novo the conclusion that a matter was precluded as res judicata.[17] Res judicata "is designed to 'prevent relitigation of already determined causes and curtail multiplicity of actions.'"[18] Unfortunately, "'[r]es judicata' is not a precise term," and it sometimes encompasses the distinct doctrines of claim preclusion and issue preclusion.[19] Because the crux of the parties' dispute here focuses on a single issue rather than a multiplicity of issues within a larger claim, the most natural interpretation of the court's ruling is that issue preclusion barred Chigi's motion.

Issue preclusion, also called collateral estoppel, "'prevents relitigation of an issue after the party estopped has had a full and fair opportunity to present its case.'"[20] As the party asserting the doctrine, DiClerico must prove:

> (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to . . . the earlier

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[17] Weaver v. City of Everett, 4 Wn. App. 2d 303, 313, 421 P.3d 1013, review granted, 192 Wn.2d 1001, 430 P.3d 251 (2018); see Niemann v. Vaughn Comty. Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005) ("[T]he question of whether equitable relief is appropriate is a question of law.").

[18] Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (quoting Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 395, 429 P.2d 207 (1967)).

[19] Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 327, 941 P.2d 1108 (1997).

[20] Weaver, 4 Wn. App. 2d at 314 (emphasis omitted) (internal quotation marks omitted) (quoting Barr v. Day, 124 Wn.2d 318, 324-25, 879 P.2d 912 (1994)).

> proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.[21]

First, both the 2010 and 2017 proceedings involve the same issue: whether Chigi's CRSC benefit amounts should be included when calculating spousal maintenance under the terms of the 1999 dissolution decree. And both arguments rely on the premise that CRSC is neither a VA disability benefit nor a military retirement benefit as contemplated by the spousal maintenance agreement. In 2010, Chigi argued that DiClerico's maintenance payments should equal one-half of Chigi's military retirement and VA disability benefits, excluding CRSC benefits.[22] In 2017, he argued that DiClerico's maintenance payments should equal "one-half of VA disability and military retirement," excluding CRSC benefits.[23] Chigi made the same evidentiary argument in both 2009 and 2017, contending CRSC benefits had no effect on his VA disability and military retirement benefits.[24] In both 2010 and 2017, the court could examine Chigi's VA disability and military retirement benefit payments before and after the start of his CRSC benefits. The only

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[21] In re Marriage of Pennamen, 135 Wn. App. 790, 805, 146 P.3d 466 (2006) (alteration in original) (quoting Christensen v. Grant County Hosp., 152 Wn.2d 299, 307, 96 P.3d 957 (2004)).

[22] CP at 144-45.

[23] CP at 234-35.

[24] Compare CP at 54 (arguing in 2009, "[M]y CRSC pay does not in any way reduce my VA [d]isability or military retirement pay.") (boldface omitted), with CP at 252 (arguing in 2017, "[T]he CRSC does not decrease my military retired pay at all, as the combined amount of my VA disability and retired pay is generally the same (but for [c]ost of [l]iving [a]djustments that happen every year that cause minor increases) before and after I started receiving CRSC.") (boldface omitted).

difference was that the 2010 court had months of records to examine and the 2017 court had years of records. Chigi raised the same issue in 2017 already resolved in 2010.

Second, Chigi appears to argue the 2010 order was not a final judgment on the merits.[25] He argues, as a general matter, "the principles of res judicata and collateral estoppel do not apply to maintenance that has been ordered by the court."[26] But this misunderstands the nature of a motion to clarify a spousal maintenance decree. When a court clarifies a dissolution decree, it issues a declaratory judgment.[27] A declaratory judgment is an appealable final judgment.[28] Chigi contends that when calculating spousal maintenance, the language of the decree does not support adding the amount of CRSC benefits he receives.[29] But the court concluded otherwise in 2010.[30] Chigi did not appeal that ruling. The 2010 clarification order was a final judgment.[31]

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[25] See Appellant's Br. at 25; Reply Br. at 13 (arguing res judicata "do[es] not apply to maintenance that has been ordered by the court").

[26] Reply Br. at 13.

[27] See Byrne v. Ackerlund, 108 Wn.2d 445, 453, 739 P.2d 1138 (1987) (a dissolution decree "may be subject to a declaratory action to ascertain the rights and duties of the parties").

[28] Lakewood Racquet Club, Inc. v. Jensen, 156 Wn. App. 215, 223, 232 P.3d 1147 (2010); RCW 7.24.010 (declaratory judgments "shall have the force and effect of a final judgment or decree").

[29] Appellant's Br. at 22-23.

[30] CP at 216.

[31] Chigi cites to In re Marriage of Cook, 28 Wn. App. 518, 521, 624 P.2d 743 (1981), and In re Marriage of Roorda, 25 Wn. App. 849, 853, 611 P.2d 794 (1980), to argue maintenance decrees are always modifiable. But this argument

Third, there is no dispute that Chigi and DiClerico are the same parties in both proceedings.

Fourth, Chigi will suffer no injustice. Precluding a party from litigating an issue works an injustice where that party would be deprived of the opportunity to fully and fairly litigate it.[32] Chigi fully briefed and argued this precise issue before the court in 2009 and 2010.[33] Although Chigi argues additional evidence would now benefit his argument,[34] the presence of additional evidence does not distinguish the legal issue before the court in 2009 and 2010 from the issue presented in 2017.

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overstates the significance of both cases. In both Cook and Roorda, the parties seeking modification of child support decrees were statutorily authorized to do so. Cook, 28 Wn. App. at 520-21 ("The statutory provision allowing for modification of a divorce decree represents a departure from the common law res judicata rule.") (citing Roorda, 25 Wn. App. at 843); Roorda, 25 Wn. App. at 852-53 (citing RCW 26.09.260 to explain statutes allow departure from the common law rules on finality). Here, Chigi states he "is not asking to modify" and is seeking only clarification. Reply Br. at 13. Neither the modification statutes nor related case law are applicable.

[32] Weaver, 4 Wn. App. 2d at 316 (quoting Barr v. Day, 124 Wn.2d 318, 324-25, 879 P.2d 912 (1994)).

[33] RP (Sept. 8, 2009) at 6-7, 11-12 (both parties arguing about the effect of CRSC benefits on Chigi's maintenance payments to DiClerico); RP (Mar. 19, 2010) at 22-46 (arguing the tax implications of Chigi's receipt of CRSC benefits); CP at 139-47 (Chigi's 2010 trial brief arguing why CRSC amounts do not and should not affect maintenance payments).

[34] See RP (Nov. 2, 2017) at 52 (arguing "that over probably the last 18 years, VA disability and military retirement [benefits] were not impacted because [Chigi] started receiving [CRSC]. [And] we couldn't show that before because the change had just happened.").

In 2009 and 2010, Chigi enjoyed a full and fair opportunity to litigate the significance of his CRSC benefits, and the court issued a final declaratory judgment on the matter. He did not appeal. Issue preclusion now applies. The court properly estopped him from relitigating this issue.

In the alternative, Chigi moved to vacate the 2010 order under CR 60(b)(11). The court denied his motion as "barred by res judicata" and "[e]ven if res judicata did not apply, laches would apply as it has been more than [seven] years since the court's ruling on this issue."[35]

Although the court was correct that res judicata in the form of issue preclusion estopped Chigi's motion to clarify, CR 60 provides a mechanism to reopen a final judgment.[36] Whether an equitable doctrine, such as laches, applies is a question of law we review de novo.[37]

A party asserting laches must show (1) inexcusable delay by the movant and (2) prejudice to the nonmovant resulting from the delay.[38] Courts may not "presume prejudice merely from the fact of a delay."[39] As the party asserting

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[35] CP at 371-72.

[36] In re Marriage of Shoemaker, 128 Wn.2d 116, 120, 904 P.2d 1150 (1995).

[37] Niemann, 154 Wn.2d at 374.

[38] Auto. United Trades Org. v. State, 175 Wn.2d 537, 542, 286 P.3d 377 (2012) (quoting State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d 226, 241, 88 P.3d 375 (2004)). Laches previously had a third element requiring proof of the movant's knowledge or of a reasonable opportunity for the movant to have discovered his cause of action. Id. at 542 n.3 (quoting Buell, 80 Wn.2d at 522).

[39] Clark County Pub. Util. Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 849, 991 P.2d 1161 (2000).

laches, DiClerico must "show whether and to what extent" she has been prejudiced by the delay itself.[40] DiClerico does not address how the seven-year delay prejudiced her.[41] Because DiClerico fails to meet her burden, the court erred by concluding laches applied.

This error is immaterial, however, because CR 60(b) contains its own time requirements, and Chigi failed to meet them. The parties reasonably understood the court's ruling as also concluding Chigi's motion to vacate was untimely.[42]

We review a decision to grant or deny a CR 60 motion for abuse of discretion.[43] A CR 60(b)(11) motion must be brought "within a reasonable time," but if the party seeking relief "is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases."[44] Chigi contends we should find a seven year delay reasonable "[i]n light of the deathly illnesses he has

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[40] Id. at 849.

[41] See Resp't's Br. at 33.

[42] See Appellant's Br. at 25; Resp't's Br. at 31. During the court's oral ruling on laches, it explained, "[S]even years would not be a reasonable time under CR 60. And I can't see any exception under CR 60." RP (Nov. 2, 2017) at 62.

[43] Shoemaker, 128 Wn.2d at 120-21.

[44] CR 60(b). Chigi argues he moved within a reasonable time because "CR 60 itself allows a greater time period of review for a person suffering from a disability." Appellant's Br. at 25. But Chigi cites no authority for the proposition that the word "disability" in CR 60(b) means all legally cognizable disabilities. The rule uses "disability" only as a synonym for the two conditions listed in the sentence: being a minor or being a "person of unsound mind."

faced since 2010."[45] Chigi explained to the trial court he was depressed, suicidal, diagnosed with cancer, and suffered other medical maladies after 2010.[46]

Chigi does not explain why these unfortunate medical conditions wholly prevented him from filing his motion to vacate before 2017. Chigi's evidence of suicidal ideation, which is not from a medical expert, documents resultant incapacitation for only four weeks in 2009.[47] The sole evidence from a medical expert does not state that any of Chigi's symptoms rose to the level of an "unsound mind" that prevented him from directing his attorney to file a motion to vacate.[48] Nothing in the record indicates the trial court abused its discretion by finding he did not have a disability as contemplated in CR 60(b). Indeed, Chigi described himself in July of 2010 as exercising regularly, including swimming several days each week, and biking on those days he did not swim.[49] And in 2015, Chigi stated, "All in all, I am well," despite symptoms from his chronic stomach problems, anemia, and heart troubles.[50] Chigi's own descriptions of his physical and mental condition do not establish he was completely unable to file a motion to vacate within a reasonable time of entry of the 2010 clarification order.

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[45] Appellant's Br. at 28.

[46] CP at 253.

[47] CP at 303.

[48] CP at 300.

[49] CP at 329.

[50] CP at 325.

Chigi also contends he filed his motion to vacate within a reasonable time because of a change in the law. CR 60(b)(11) is a "catch-all provision intended to serve the ends of justice in extreme, unexpected situations . . . when no other subsection of CR 60(b) applies."[51] The extraordinary circumstances must be extraneous to the proceeding, such as when an appellate court decision changes the law on which the judgment rests.[52] A court should not measure the reasonableness of time passed based only on the lapse between judgment and filing.[53] Rather, the relevant measure of time is between a "triggering event for the motion" and the filing of the CR 60(b)(11) motion itself.[54]

Chigi argues his 2017 motion to vacate was timely because Howell v. Howell, which the United States Supreme Court decided in 2017, changed the law underlying the 2010 order.[55] Howell held that state courts may not distribute or divide military service-related disability benefits in a dissolution decree.[56] But this decision did not change the law relevant to the court's 2010 order.

Neither the 1999 dissolution decree nor the 2010 order actually distributed or divided Chigi's CRSC benefits or VA disability benefits.[57] The dissolution

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[51] Shandola v. Henry, 198 Wn. App. 889, 895, 396 P.3d 395 (2017).

[52] Id. at 895-96.

[53] In re Marriage of Thurston, 92 Wn. App. 494, 500, 963 P.2d 947 (1998).

[54] Id.

[55] ___ U.S. ___, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017).

[56] Id. at 1405.

[57] CP at 16, 216.

decree awarded those benefits solely to Chigi.[58] And the spousal maintenance agreement, as clarified by the 2010 order, requires that Chigi use the amount of his total CRSC benefits, VA disability, and military retirement benefits to calculate his maintenance payments to DiClerico.[59] Which monies he uses to pay that amount is entirely his decision. Howell is not apt.[60]

Even if the dissolution decree or 2010 order distributed Chigi's disability benefits, Howell still would not constitute a change in the law. In 1989, the Supreme Court held in Mansell v. Mansell that state courts lacked the authority to divide monies received from tax-exempt military disability benefits.[61] This was the law when the trial court entered its 2010 order clarifying Chigi's dissolution decree. If the 1999 dissolution decree or the 2010 order divided Chigi's service-related disability benefits, then an appeal would have been warranted at those times. But Chigi did not appeal either the dissolution decree or the 2010 order. Because Howell did not constitute a relevant change in the law and Chigi fails to

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[58] CP at 16.

[59] See CP at 20 (calculating maintenance payments based on "an amount equal to" half of Chigi's VA disability and military retirement payments); see also Appellant's Br. at 33 ("The parties' [dissolution decree] simply used the combined amount of VA disability and military retired pay Mr. Chigi received each month as a formula to determine what maintenance Mr. Chigi would pay upon turning 65.").

[60] Indeed, the Supreme Court explained that a maintenance scheme like that here is acceptable under the law. See Howell, 137 S. Ct. at 1406 (noting that a family court "remains free to take account of the contingency that some military retirement pay might be waived, or . . . take account of reductions in value when it calculates or recalculates the need for spousal support").

[61] 490 U.S. 581, 594-95, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).

demonstrate a disability as contemplated by CR 60, he does not show the court abused its discretion by concluding seven years was not a reasonable delay.

Chigi contends the court erred by awarding DiClerico $2,500 in attorney fees.[62] We review an award of attorney fees for abuse of discretion.[63] He argues the court abused its discretion by making its fee award without any findings of fact or statutory citations.[64] His argument is contradicted by the record because the court's written and oral orders provided a reasoned basis for the award.[65] Moreover, Chigi does not challenge the basis of the court's fee award. He fails to show the court abused its discretion by awarding attorney fees.

DiClerico seeks attorney fees on appeal.[66] A party may be entitled to fees on appeal where authorized by applicable law.[67] DiClerico contends she is entitled to fees because RCW 26.18.160 authorizes them.[68]

RCW 26.18.160 allows an award of costs and attorney fees to the prevailing party "[i]n any action to enforce a support or maintenance order." Chigi brought the instant action in 2017 to "request[ ] that the Decree be enforced per its

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[62] CP at 372.

[63] Matter of Marriage of Crosetto, 82 Wn. App. 545, 563, 918 P.2d 954 (1996).

[64] Appellant's Br. at 36.

[65] CP at 372; RP (Nov. 2, 2017) at 66-68.

[66] Resp't's Br. at 41.

[67] RAP 18.1(a).

[68] Resp't's Br. at 42-43.

actual terms."[69] Because DiClerico is the prevailing party in an enforcement action, she is entitled to fees upon compliance with RAP 18.1.

For the foregoing reasons, we affirm.

WE CONCUR:

[69] CP at 230.

CARLSEN LAW OFFICES

August 28, 2019 - 12:45 PM

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