

FILED
COURT OF APPEALS

05 OCT -5 PM 1:47

STATE OF WASHINGTON

BY 12 LN
CLERK

NO. 34856-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

CAROL J. DUESTERBECK, Appellant

vs.

BERNARD A. DUESTERBECK, Respondent

BRIEF OF RESPONDENT

CAROL J. COOPER
WSBA #26791
Attorneys for Respondent
DAVIES PEARSON, P.C.
P.O. Box 1657
920 Fawcett Avenue
Tacoma, WA 98402
(253) 620-1500

ORIGINAL

TABLE OF CONTENTS

I.	STATEMENT OF THE ISSUE.....	1
II.	STATEMENT OF FACTS.....	1
III.	ARGUMENT.....	5
	A. A TRIAL COURT’S DENIAL OF A MOTION TO VACATE PURSUANT TO CR 60(B)(11) IS REVIEWED FOR AN ABUSE OF DISCRETION.....	5
	B. THE TRIAL COURT PROPERLY APPLIED THE STANDARD FOR DECIDING MOTIONS TO VACATE A DECREE OF DISSOLUTION AND A POST-DECREE REQUEST FOR SPOUSAL MAINTENANCE	6
	C. THE <i>JENNINGS</i> CASE IS EASILY DISTINGUISHED ON ITS FACTS.....	8
	D. FEDERAL LAW PROHIBITS STATE COURTS FROM ENTERING DISSOLUTION ORDERS THAT DIVIDE A VETERAN’S DISABILITY PENSION	10
IV.	ATTORNEYS FEES ON APPEAL.....	12
V.	CONCLUSION	12

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Barr v. MacGugan</i> , 119 Wn. App. 43, 46, 78 P.3d 660 (2003).....	5
<i>Gustafson v. Gustafson</i> , 54 Wn. App. 66, 75, 772 P.2d 1031 (1998).....	6
<i>Hammack v. Hammack</i> , 114 Wn. App. 805, 810, 60 P.3d 663 (2003).....	7
<i>In re Marriage of Yearout</i> , 41 Wn. App. 897, 902, 707 P.2d 1367 (1985).....	6
<i>Jennings v. Jennings</i> , 138 Wn.2d 612, 625-626, 980 P.2d 1248 (1999).....	passim
<i>Luckett v. Boeing</i> , 98 Wn. App. 307, 309, 989 P.2d 1144 (1999)	6
<i>Marriage of Furrow</i> , 115 Wn. App. 661, 673, 63 P.3d 821 (2003)	5
<i>Perkins v. Perkins</i> , 107 Wn. App. 313, 318, 26 P.3d 989 (2001)...	4, 10, 11
<u>Statutes</u>	
10 U.S.C. § 1408(c)(1).....	10
RCW 26.09.140	12
<u>Rules</u>	
RAP 18.1(c)	12

I. STATEMENT OF THE ISSUE

Did the Trial Court Abuse Its Discretion When It Denied Appellant's Motion to Modify a Dissolution Decree Based Upon a 10% Decrease in Appellant's Share of Respondent's Military Retirement Benefits Resulting from the Approval of Disability Benefits for the Respondent?

II. STATEMENT OF FACTS

The respondent, Bernard Duesterbeck, joined the Air Force on February 3, 1953. CP 59. On November 10, 1965, after serving over 12 and one-half years in the Air Force, Mr. Duesterbeck married the appellant, Carol J. Walsh (formerly Carol J. Duesterbeck). CP 59. Mr. Duesterbeck retired from the Air Force on April 1, 1979, after 26 years of total service. He then went to work for Boeing and retired from there in April of 1993. CP 60.

Mr. Duesterbeck divorced Ms. Walsh on June 18, 1998. CP 6-14. Exhibit A to the trial court's findings of fact and conclusions of law indicates that 100% of Mr. Duesterbeck's military retirement pension was characterized as community property. CP 5. Although Mr. Duesterbeck and Ms. Walsh were married during only 13 years, 4 months, and 21 days, of Mr. Duesterbeck's career in the Air Force,¹ CP 58, the dissolution

¹ Appellant states that the parties were married for 24 of the 26 years of Mr. Duesterbeck's years of service. Appellant's Brief at p. 3. This statement in counsel's

decree awarded Ms. Walsh a full 50% of his military retirement pay because it found that his military retirement was 100% community property. CP 10. The decree also awarded Ms. Walsh 50% of Mr. Duesterbeck's Boeing retirement benefits and the parties' home subject to a lien in favor of Mr. Duesterbeck in the amount of 45% of the gross equity in the home. CP 10-11.

Appellant asserts that the award to Ms. Walsh of 50% of Mr. Duesterbeck's military retirement pension was a "confirmation of a prenuptial agreement reached between the parties." Appellant's Brief at p. 7. There is no evidence, however, that there was a pre-nuptial agreement between the parties. In fact, paragraph 2.7 of the Findings of Fact and Conclusions of Law specifically states that "[t]here is no written separation contract or prenuptial agreement." CP 2.

After the dissolution, Ms. Walsh remarried and currently lives with her new husband in a home in the Gem Heights neighborhood of Puyallup. CP 45. In addition to one-half of Mr. Duesterbeck's military retirement pay, and one-half of Mr. Duesterbeck's Boeing retirement pay, Mr. and Mrs. Wash have Ms. Walsh's own social security benefits and Mr. Walsh's income with which to pay their living expenses. CP 45.

brief at page 3 is erroneous as shown in Mr. Duesterbeck's Supplemental Declaration. CP 59-60.

Mr. Duesterbeck, on the other hand, never remarried after the divorce, and currently lives in a 332 square foot trailer. CP 44. He is now 73 years old and has profound hearing loss as a result of his service as a flight engineer in the Air Force. CP 45. He also has constant pain in his shoulder from a dislocation injury suffered during his years of military services. CP 45. Although Mr. Duesterbeck wears hearing aids in both ears, he still has difficulty communicating in most environments. CP 45.

Seven years after the divorce, in April of 2005, Mr. Duesterbeck was approved for a 20% Veterans Administration disability. Mr. Duesterbeck had requested additional medical services from the Veterans Administration as a result of his hearing loss and problems he was having with his shoulder. CP 45. As a result of this request for help, he was approved for VA disability benefits. CP 45. This resulted in an approximately 10% decrease in the military retirement benefits that were paid directly to Ms. Walsh pursuant to the decree of dissolution and a military qualifying court order. *See* CP 16-17.

On November 28, 2005, Ms. Walsh filed a motion requesting that the court set aside the decree of dissolution and award her spousal maintenance in an amount sufficient to compensate her for the military retirement benefits that she lost when Mr. Duesterbeck began receiving

disability benefits. CP 25-30. Ms. Walsh based her motion upon CR 60(b)(1) and (11). CP 25.

In support of her motion, Ms. Walsh filed a financial declaration with the court. CP 31-36. In her declaration, however, she failed to list the income of her new husband under Paragraph 3.5, which requests the income of "other adults in her household." CP 33. Ms. Walsh listed in her Financial Declaration as a monthly expense a \$420 monthly payment to Sylvan Learning Center, CP 36, which is an expense for a grandchild from another marriage. CP 46.

Mr. Duesterbeck opposed the motion on the following grounds:

(1) CR 60(b)(1) does not apply because the decree of dissolution was entered seven years prior to the motion to vacate, and motions pursuant to subsection (1) of CR 60(b) must be brought within one year;

(2) The *Jennings* decision does not require the court to vacate the judgment because it is easily distinguished on its facts;

(3) The facts here do not satisfy the standard for granting relief from a judgment pursuant to CR 60(b)(11); and

(4) The *Perkins* case is not applicable because it involved an appeal from a dissolution decree and not a motion to modify a decree

based upon a conversion of military retirement benefits to disability benefits after the decree of dissolution. CP 51-57.

Based in part upon the economic circumstances of the parties, the trial court denied Ms. Walsh's motion. The court specifically found that Ms. Walsh's loss of \$94.50 in monthly military retirement benefits did not constitute an "extraordinary circumstance" or result in a "manifest injustice" such as would require relief pursuant to CR 60(b)(11) or as contemplated by *Marriage of Jennings*. CP 38-39. Ms. Walsh filed a timely notice of appeal.

III. ARGUMENT

A. A TRIAL COURT'S DENIAL OF A MOTION TO VACATE PURSUANT TO CR 60(B)(11) IS REVIEWED FOR AN ABUSE OF DISCRETION

Civil Rule 60(b)(11) grants the court *discretion* to vacate an order for "[a]ny other reason justifying relief from the operation of the judgment." *Marriage of Furrow*, 115 Wn. App. 661, 673, 63 P.3d 821 (2003); *see also Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003) (the standard of review for a decision under CR 60(b) is abuse of discretion). A court abuses its discretion if its decision is based on untenable grounds or reasoning. *Luckett v. Boeing*, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999).

Here, the trial court's reasons for denying Ms. Walsh's motion to vacate were twofold. First, the trial court considered the economic circumstances of the parties, and, second, the trial court found that Ms. Walsh's loss of \$94.50 in monthly retirement benefits did not constitute an "extraordinary circumstance" or an "extreme unexpected situation" and did not result in a "manifest injustice." CP 38-39. These grounds for denying the motion to vacate are not untenable, and therefore, the trial court did not abuse its discretion. *See Lockett*, 98 Wn. App. at 309.

B. THE TRIAL COURT PROPERLY APPLIED THE STANDARD FOR DECIDING MOTIONS TO VACATE A DECREE OF DISSOLUTION AND A POST-DECREE REQUEST FOR SPOUSAL MAINTENANCE

Despite its broad language, the use of CR 60(b)(11) "should be confined to situations involving extraordinary circumstances not covered by any other section of the rule." *Gustafson v. Gustafson*, 54 Wn. App. 66, 75, 772 P.2d 1031 (1998); *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). Before a dissolution decree may be vacated there must be extraordinary circumstances such that vacation of the decree is necessary to "overcome a manifest injustice." *Hammack v. Hammack*, 114 Wn. App. 805, 810, 60 P.3d 663 (2003) (citing *Jennings v. Jennings*, 138 Wn.2d 612, 625-626, 980 P.2d 1248 (1999)).

Here, the current physical and financial circumstances of the parties are such that a 10% reduction in Ms. Walsh's military retirement benefits does not constitute an "extraordinary circumstance" and does not create a "manifest injustice" that can be overcome only by vacating the decree and awarding spousal maintenance to Ms. Walsh. In addition, the property disposition in the dissolution decree was such that a 10% reduction in Ms. Walsh's military retirement benefits does not constitute an "extraordinary circumstance" or create a "manifest injustice" that can be overcome only by vacating the decree and awarding spousal maintenance to Ms. Walsh.

Ms. Walsh's physical and financial circumstances are both substantially better than Mr. Duesterbeck's. Ms. Walsh lives in a nice home in Puyallup, in which she and her new husband have a substantial equity interest; whereas Mr. Duesterbeck lives in a 332 square foot trailer and does not own any real property. CP 44-46. Mr. Duesterbeck suffers from profound hearing loss and constant pain from a dislocated shoulder as a result of his years of military service. CP 45.

Ms. Walsh receives not only one-half of Mr. Duesterbeck's military retirement pay and one-half of his Boeing pension, she receives her own social security benefits and shares her living expenses with her new husband. CP 45. On the other hand, Mr. Duesterbeck has to pay all

his living expenses with only his income. Nonetheless, on his limited income he is still attempting to provide financial assistance to the parties' only child who is suffering from stage four breast cancer and has not been able to work. CP. 45. Ms. Walsh on the other hand has not rendered any financial support to the parties' daughter. CP 45.

At the time of the dissolution, the parties assets were split essentially equally, with the exception of the parties' real property, in which Ms. Walsh was award a 10% *greater* interest than Mr. Duesterbeck. Based upon the totality of the circumstances, neither a modification of the dissolution decree nor an award of spousal maintenance to Ms. Walsh is necessary to overcome a manifest injustice.

C. THE JENNINGS CASE IS EASILY DISTINGUISHED ON ITS FACTS

In the *Jennings* case, the husband and wife were married “for the *entire length* of the service member’s active duty. . . .” *Jennings v. Jennings*, 138 Wn.2d 612, 615, 980 P.2d 1248 (1999). The trial court found that the wife was entitled to 50% of the husband’s gross military retirement pension. *Jennings*, 138 Wn.2d at 615. Here, in contrast, Mr. Duesterbeck and Ms. Walsh were only married for approximately one-half of Mr. Duesterbeck’s years of military service.

After the decree of dissolution was granted in the *Jennings* case, the Department of Veterans Affairs determined the husband's disability had worsened and changed his status. It increased his disability benefits from \$318 per month to \$2,285 per month and decreased his retirement benefits from \$2,139 to \$272.90 per month. The husband also began receiving Social Security disability benefits in the amount of \$1,200 per month.² *Jennings*, 138 Wn.2d at 615-616. As a result, the wife's monthly payments were reduced from \$813.50 per month to \$136.00 per month.

In concluding that there were "extraordinary circumstances" sufficient to grant relief under CR 60(b)(11), the *Jennings* court noted that the result was "fundamentally unfair" because of the "dramatic reduction" in the monthly payments the wife was to receive as her one-half share of a community asset. *Jennings*, 138 Wn.2d at 624-627. Here, the result cannot be characterized as "fundamentally unfair." Nor can the reduction in Ms. Walsh's benefit be characterized as "dramatic."

Ms. Walsh has remarried whereas Mr. Duesterbeck has not. Thus, Ms. Walsh now shares her living expenses with her new husband; whereas Mr. Duesterbeck, on the other hand must pay all his own living expenses. The decree of dissolution characterized Mr. Duesterbeck's military retirement pay as 100% community property and awarded Ms. Walsh one-

² Notably, Mr. Duesterbeck does not receive Social Security disability benefits, unlike the husband in *Jennings*.

half of it to Ms. Walsh even though the parties' were married for only one-half of Mr. Duesterbeck's military service. Even with the 10% reduction in Ms. Walsh's military retirement pay, Ms. Walsh will continue to receive more than she would have received if Mr. Duesterbeck's military retirement had not been characterized as 100% community property. Finally, the 10% decrease in Ms. Walsh's retirement pay cannot be equated to the 83% reduction in the wife's military retirement pay in *Jennings*.

D. FEDERAL LAW PROHIBITS STATE COURTS FROM ENTERING DISSOLUTION ORDERS THAT DIVIDE A VETERAN'S DISABILITY PENSION

It is well-established that federal law prohibits a state dissolution court from dividing a veteran's *disability* pension, and from distributing *by any means* any part of such *disability* pension. *Perkins v. Perkins*, 107 Wn. App. 313, 318, 26 P.3d 989 (2001) (citing United States Supreme Court cases); 10 U.S.C. § 1408(c)(1) This means that a dissolution court can neither order the veteran to pay his or her spouse a portion of each monthly payment as the veteran receives it, *nor* value the pension and grant the spouse an offsetting award of other assets, *nor* order maintenance in an amount that is a dollar-for-dollar substitute for a division of the retiree's military disability pension. *Perkins*, 107 Wn. App. at 319-327.

A dissolution court, however, can regard military disability retirement pay as future income to the retiree spouse and, so regarding, consider it as an economic circumstance of the parties. *Perkins*, 107 Wn. App. at 321. More specifically, the dissolution court

may consider the pay as a basis for awarding the nonretiree spouse a proportionately larger share of the community property where equity so requires. *The court may not, however, divide or distribute the military disability retirement pay as an asset.*

Perkins, 107 Wn. App. at 321.

Mr. Duesterbeck acknowledges that the *Perkins* case is not directly applicable here. *Perkins* involved the appeal of a dissolution decree that effectively divided military disability benefits in violation of federal law by awarding wife permanent compensatory spousal maintenance in the amount of one half of the community portion of the husband's military disability retirement benefits.

Here, in contrast, the issue is whether the trial court abused its *discretion* when it declined to award maintenance to Ms. Walsh in an amount sufficient to replace the 10% decrease in the military retirement benefits that she was awarded at trial. To find an abuse of *discretion*, this Court must find that the trial court's decision was based upon *untenable* grounds. The trial court, however, did not exercise its discretion on untenable grounds. Rather, it properly considered the totality of the

circumstances, including the economic situation of the parties, and concluded that the 10% decrease was not an “extraordinary circumstance” justifying the reopening of the property disposition in the decree. Nor did it create a “manifest injustice” that could be overcome only by vacating the decree and awarding spousal maintenance.

IV. ATTORNEYS FEES ON APPEAL

Pursuant to RCW 26.09.140, the Court of Appeals may award attorneys fees to Mr. Duesterbeck based upon his financial need and upon Ms. Walsh’s ability to pay. Pursuant to RAP 18.1(c), Mr. Duesterbeck will serve upon the attorney for Ms. Walsh and file with this court a financial affidavit no later than 10 days prior to the date this case is set for hearing. Mr. Duesterbeck should be awarded his attorney’s fees pursuant to RCW 26.09.140 based upon his financial need and Ms. Walsh’s ability to pay, as Mr. Duesterbeck expects to be established by the financial affidavits of the parties.

V. CONCLUSION

Based upon the foregoing, Mr. Duesterbeck respectfully requests that this court affirm the trial court’s order denying Ms. Walsh’s motion to vacate and her request for spousal maintenance.

DATED this 4th day of October, 2006.


CAROL J. COOPER, WSB #26791
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2006, I caused a copy of the original of **Brief of Respondent** to be delivered to the below listed at their respective addresses:

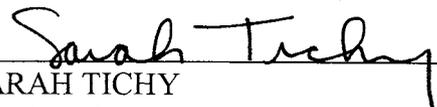
VIA LEGAL MESSENGER

James M. Caraher
Attorney at Law
4301 South Pine St., Ste. 543
Tacoma, WA 98409

Attorney for Appellant

FILED
COURT OF APPEALS
06 OCT -5 PM 1:47
STATE OF WASHINGTON
BY 
DEPUTY

DATED this 4th day of October, 2006.


SARAH TICHY
Legal Assistant to Carol J. Cooper