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A. INTRODUCTION

This case is before the Court because the trial court, in a post-dissolution proceeding, failed to properly interpret and construe the parties' stipulated dissolution agreement when Respondent made her *MOTION FOR ENTRY OF DOMESTIC RELATIONS ORDER*,¹ and more specifically failed to properly characterize and determine the community property portion of the Appellant's CSRS benefits in which the Respondent was entitled to share.

The Appellant (hereinafter Greg) was an air traffic controller with the Federal Aviation Agency (FAA) for two years before the parties met and married in 1985, and for ten years after they separated. By virtue of that employment, Greg earned benefits pursuant to the Civil Service Retirement System (CSRS). They lived just under five years in Utah, just over seven years in Washington and one year in Idaho, with Greg working throughout the marriage and Tammy working throughout almost all of the marriage.

Both parties agreed to divide their community property² equally.³

¹ Which was made approximately eight years after the entry of the Decree.

² At the time of their dissolution, they owned a small parcel of property in Utah with some equity, and a residence in Washington that had been on the market for five months and was in foreclosure. Other than limited personal property, the bulk of their property was a savings account of approximately \$20,000 and the parties' retirements. Tammy's attorney wrote a letter clearly evidencing the parties' agreement to divide equally their community property, and that their separate property acquired while living together was not property subject to division with the other party.

They both agreed that all separate property acquired during their marriage, and all property acquired after their separation was each party's separate property in which the other did not share. The parties entered into a stipulated decree of dissolution that was drafted by Tammy's attorney and agreed to and signed by Greg acting pro se.

Eight years later, and one month after Greg opted for early retirement from the FAA, Tammy's new counsel wrote Greg a letter demanding "one-half of any and all retirement benefits that you receive"

After Hammermaster filed a motion to that effect, Greg filed a limited opposition asserting that Tammy was only entitled to one-half of the community property portion of Greg's CSRS benefits, and that the Decree of Dissolution contained ambiguous and contradictory provisions that should be interpreted and construed against Tammy. Greg argued that additional evidence and an actuary would be needed to determine the community property portion of Greg's FAA defined benefits retirement plan, and requested an order to that affect.

After a short hearing on the motion and a subsequent hearing on the presentation of the order, both with oral argument but without presentation of any testimony, the trial court entered an order providing

³ Except for a minor exception of real property equities that favored Tammy.

Tammy with one-half of 156/300's⁴ of all Greg's CSRS benefits. After an unsuccessful motion for reconsideration or alternatively a CR 60(b) motion for relief from judgment, Greg timely appealed to this Court.

Where two parties stipulate to a dissolution, the court is required to interpret any ambiguous or contradictory provisions of the decree against the drafter and should use extrinsic evidence clearly showing the intent of the parties' agreement to effectuate those intentions. The trial court erred in construing the decree to hold that the entirety of Greg's CSRS benefits earned from the date of their marriage to the date of the separation was community property subject to Tammy's one-half interest, including (1) Greg's benefits in lieu of social security, (2) benefits accrued while both parties lived and worked in a non-community property state, and (3) benefit increases resulting solely from Greg's employment and earnings after the parties separated.

B. ASSIGNMENTS OF ERROR⁵

(1) Assignments of Error

1. The trial court erred in failing to construe and interpret the parties' stipulated decree of dissolution using the proper rules of

⁴ Greg worked 300 months for the FAA, and the parties were married and living together for a total of 156 months.

⁵ The trial court's rulings and holdings were primarily from the Bench (oral) and are contained in the three Verbatim Report(s) of Proceedings.

construction.

2. The trial court erred in failing to construe contradictory or ambiguous provisions of the decree against the drafter (Respondent).

3. The trial court erred in holding that CSRS pension benefits in lieu of social security are community property, and in failing to remove the amount of those benefits from the benefits subject to division as community property.

4. The trial court erred in holding it was not necessary to appoint or allow the parties to obtain and submit an expert (actuarial) determination of the proper division of the community property portion of Greg's CSRS benefits.

5. The trial court erred in failing to apply the rule that property acquired in another jurisdiction takes the character of the funds used to acquire it.

6. The trial court erred in holding that pension benefits acquired in a non-community property jurisdiction are community property, and in failing to remove that portion of the Appellant's CSRS benefits attributable the four years and ten months that the parties' lived and worked in Utah, a non-community property state.

7. The trial court erred in awarding Respondent a share of Appellant's increased pension benefits accrued solely as a result his work

and increased earnings following the parties' separation when the stipulated decree expressly stated property acquired by either party after the date of their separation was each parties' separate property.

8. The trial court erred in holding that the Appellant's Motion For Reconsideration was untimely when the motion was filed within ten days of entry the order, and was noted for a hearing in compliance with the Local Rule for noting motions.⁶

(2) Issues Pertaining to the Assignments of Error

1. Where parties have agreed to a stipulated dissolution that was entered as the decree, is a subsequent court required to interpret and construe the decree utilizing the general rules of contract construction? Assignments of Error 1, 2, 3

2. Where the decree of dissolution was drafted solely by counsel for one of the parties and has conflicting or contradictory provisions creating an ambiguity, did the trial court err in failing to construe the contradictory and ambiguous provisions in the decree against the drafting party? Assignment of Error 2

3. Where both spouses work during their marriage, with one spouse (Respondent) earning social security and the other (Appellant) increased CSRS benefits in lieu of social security, and the decree was to

⁶ Pierce County Local Rule 7(a)(2).

provide for an equal division of *only* community property, did the trial court err in failing to remove the CSRS benefits in lieu of social security from the amount of CSRS benefits to be divided as community property?

Assignments of Error 1, 3, 4

4. Where both spouses lived and worked over thirty-seven percent of their marriage in a non-community property state, and clear intent of the parties' stipulated decree was to exclude each parties' separate property acquired during marriage from the division of property, did the trial court err in failing to remove that portion of the Greg's CSRS benefits acquired by his work in a non-community property state?

Assignments of Error 1, 4, 5, 6

5. Where the parties' stipulated decree of dissolution provided that Appellant was awarded as his separate property "Any and all property acquired by the husband after the date of separation," did the trial court err in failing to remove that portion of Appellant's benefits solely attributable to his work and increased earnings obtained after the date of separation?

Assignments of Error 1, 2, 4, 7

C. STATEMENT OF THE CASE

The parties married on April 13, 1985, separated thirteen years and thirteen days later on April 26, 1998, and had their marriage dissolved

with a stipulated decree on May 18, 2000. CP 33. The parties lived in Utah from February, 1986 through June, 1988 and again from July, 1989 through November, 1991; a total of fifty-eight (58) months. They purchased real property in Utah that was held at the time of their dissolution. CP 18. They lived in Idaho for twelve (12) months, and in Washington eighty-six (86) months. CP 45.

The parties agreed to an essentially equal⁷ division of the parties' community property acquired while they were married and living together, CP 44, CP 18-19, and further agreed that neither would share in the other party's separate property acquired during their marriage. CP 44-45, 47-48.

In a November 9, 1999 letter, Tammy's attorney addressed the issue of whether a Labor and Industries settlement for an injury Tammy suffered during marriage was community property or separate property:

Whether these awards are divisible **or** contain a community component depends upon the nature or purpose of the award. . . . My reading of the case law is that injury award claims are deemed **separate or community** depending upon what character of the fund being reimbursed and the income producing capacity being made whole. . . . Damages for injury related expenses should be **community or separate** according to which fund incurs the expenses. Similarly, damages for lost wages and diminished earning capacity should partake of the same **community or separate character** as the wages and earning capacity they are intended to reimburse or make whole. See In the

⁷ Albeit, with a slightly unequal division of real property equity favoring Tammy.

Matter of the Marriage of Brown 100 Wash 2d 729 (1984).
[emphasis added]
CP 51.

Tammy's attorney then concluded: "Tammy's [L&I] settlement is her separate property not subject to division as community property." The decree she drafted did not include any part of Tammy's settlement as property subject to Greg's one-half interest. CP 51.

The dissolution decree drafted by Tammy's attorney included *inter alia* the following provisions:

The husband [Greg] is awarded as his separate property the following property: . . .

One-half (1/2) of any and all rights accrued by virtue of present, past or future employment of the husband including but not limited to pension, retirement, profit sharing, reserve vacation, sick leave, insurance coverage, social security benefits and the like for the length of the marriage;

Any and all property acquired by the husband after the date of separation, April 26, 1998.

. . .

The wife [Tammy] is awarded as her separate property the following property: . . .

One-half (1/2) of any and all rights accrued by virtue of present, past or future employment of the husband including but not limited to pension, retirement, profit sharing, reserve vacation, sick leave, insurance coverage, social security benefits and the like for the length of the marriage;

Any and all property acquired by the wife after the date of separation.

CP 18-19

When Greg questioned the language regarding his employment benefits, he was assured in a March 14, 2000 letter from Tammy's attorney that the language in the decree she drafted provided for a "division of retirement benefits . . . consistent with the law in this state which classifies retirement accrued during the marriage as community property."⁸ CP 47.

Greg was employed with the Federal Aviation Administration for twenty-four (24) months before the parties married, and he continued to work for the FAA for ten (10) years (or 120 months) after the parties separated. Greg retired from the FAA the first of May, 2008. CP 40-45. Greg's total number of months with the FAA (and upon which his retirement plan benefits are determined) is three hundred (300). The number of months worked by Greg while the parties were married and lived together in community property states (Washington and Idaho) totals ninety-eight (98). CP 55.

While the parties were married and living together, Greg worked in his job at FAA and did not accrue any social security benefits, while Tammy worked in jobs that did accrue social security benefits for her. CP 78.

⁸ This is a gross overstatement if not misleading statement of the law in Washington.

Greg's retirement benefit plan is a *defined benefits* plan (as opposed to a *defined contribution* plan), with the benefits differing for different years of employment and dependent upon the average income of the employee's highest three years earnings. CP 59. More specifically it is Civil Services Retirement System (CSRS) plan which includes additional benefits in lieu of Social Security. CP 79. That portion of Greg's retirement benefits which are in lieu of Social Security is believed to be approximately thirty percent (30%).⁹ CP 54-55.

After the parties had separated, Greg continued working as an air traffic controller for the FAA. In or about 2001, the FAA removed air traffic controllers from the GS ranking for determination of pay, and made substantial increases in the rate of pay for all air traffic controller employees regardless of their number of years of service, and required the employees to provide additional work services. This increase in Greg's pay, due solely to his employment and work after the parties' separation, significantly increased the calculated benefits of his CSRS plan. CP 51, 79.

⁹ The total Social Security portion of a CSRS retirement benefit varies based upon many factors and properly requires a specialist accountant or actuary to determine. Moreover, Greg served in the military for four (4) years before working for the FAA, and his retirement benefits may therefore be subject to a provision if the Civil Services Retirement System called the "Catch 62" which may effect future computations or recalculations of Greg's retirement benefits.

The basic annuity calculation takes the average of the highest three years' income figure and multiplies it by different percentages for three categories of years of employment: 1.5% for the first five years of service; 1.75% for the second five years of service; and 2.0% for years of service over ten years.¹⁰ Greg's benefits increased as a result of the fact that when he retired, his highest three-years' earnings average was greater than they were at the time he and Tammy separated. CP 41. The total amount of Greg's CSRS benefits which accrued annually after the parties separated is 0.25% to 0.50% percent greater than the amounts earned annually during the years of their marriage.

D. SUMMARY OF ARGUMENT

Because this case involves a subsequent court construction and interpretation of a stipulated decree of dissolution as opposed to a court determined decree of dissolution, this matter is not subject to the trial court's broad discretion in awarding property and should be reviewed *de novo*. The Decree of Dissolution must be resolved by properly interpreting and construing the language of the dissolution, determining

¹⁰ Because the trial court ruled at the outset against Greg's position that an expert was required to determine the community property portion of Greg's CSRS benefits, detailed information regarding the formula for determining the amount of those benefits was not introduced into the record. Greg did refer to the formula in his *Motion For Reconsideration*, CP 59,

the intent of the stipulating parties, and properly determining the community property portion of Greg's CSRS benefits.

It is a well-established rule in Washington that a dissolution agreement is to be interpreted and construed by the court using the same rules of construction or interpretation as other written agreements or contracts. Where the decree is drafted solely by the attorney for one party and the other *pro se* party has no part in drafting it, any ambiguity or contradictory provisions should be construed against the drafting party.

The decree includes provisions that are contradictory, inconsistent and ambiguous, as well as in violation of federal and state law. However, the agreement of the parties to only divide the community property and not divide the parties' separate property acquired during their marriage was clearly evidenced by the actions of the parties and by the express written statements of Tammy's attorney. Extrinsic evidence showing the intent of the parties is admissible and relevant to construing the stipulated decree.

A decree with language that is expressly assured to be "consistent with the law in the state which classifies retirement accrued during the marriage as community property" must be construed to make only the community property portion of employment benefits subject to the other spouse's community property share in any subsequently issued domestic

relations order for division of federal retirement benefits acceptable for processing.

Property takes the character of the funds used to acquire it. Employment benefits accrued while the parties resided and worked in a non-community property state is not community property when acquired and is the separate property of the employee. Pension benefits accrue from day to day and year to year, and are separate and community property in proportions according to the character of the hypothetical earnings used to “purchase” the benefits. Complicated defined benefit plans (such as the CSRS plan) that base the pension on the highest three years earnings average multiplied by different fractions depending on the year of employment in which it accrues, require an expert valuation to determine the separate or community property character of the funds.

Where social security is a parties’ separate property not subject to a spouses’ community property interest, and a federal employee’s benefits include a substantial component in lieu of social security which the employee would otherwise have accrued, construction of a stipulated decree of dissolution requires removing the in-lieu-of-social security portion of the benefits.

Where parties resided and worked in a non-community property state (Utah) for over 37% of their marriage, proper determination of the

community property portion of the benefits requires removal of the years the parties lived in Utah.

Where a pension is a defined benefits plan utilizing variable percentages based on the particular years of service times the employees highest three years average earnings, and the employee's earnings increased substantially after the parties separated, determination of the community property portion and the separate property portion of the benefits requires an expert or actuary, and cannot be determined by a simple time calculation using years of marriage over years of total service.

The determination of Greg's Civil Service Retirement System benefits in which only the community property portion is subject to Tammy's interest requires: (1) removal of the benefits-in-lieu-of-social security; (2) removal of that portion accrued while the parties resided in a non-community property state; and (3) removal of that portion attributable to Greg's increased earnings obtained long after the parties separated and their marriage dissolved. An expert accountant or actuary is appropriate to make those determinations.

E. ARGUMENT

(1) Standard of Review

Interpretation of a decree is a question of law reviewed de novo. *Stokes v. Polley*, 145 Wn.2d 341, 346, 37 P.3d 1211 (2001). Where the

trial court decided the decree, the court employs the same rules of construction used for statutes and contracts in order to determine the court's or parties' intent. *See Id.*

(2) The Trial Court Erred In Failing To Interpret And Construe The Parties' Stipulated Decree Of Dissolution Utilizing The Proper Rules For Construction And Interpretation

In this case, the trial court was called on to construe the Decree of Dissolution in issuing a domestic relation order acceptable for processing. In doing so, the trial court was required to interpret as well as construe the parties' stipulated decree. Where a judgment is ambiguous,¹¹ a reviewing court seeks to ascertain the intention of the court entering the original decree by using general rules of construction applicable to statutes, contracts and other writings. *Callan v. Callan*, 2 Wn. App. 446, 468 P.2d 456 (1970). Doing so is not a question of fact, but is a question of law for the court.¹² *Leavy, Taber, Schultz & Bergdahl v. Metropolitan Life Ins. Co.*, 20 Wn. App. 503, 504, 581 P.2d 167 (1978). *In re Marriage of Gimlett*, 95 Wn.2d 699, 629 P.2d 450 (1981). Where the decree was stipulated and drafted by one of the parties, the court should determine the intent of the parties.

¹¹ And even when not ambiguous, *see Berg*, which expressly "reject[ed] the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible."

¹² In this case, it is the same for both the trial court in a post-dissolution proceeding, and for this court in reviewing the trial court's ruling.

As an aid in ascertaining the intent of contracting parties, a court may admit extrinsic evidence relating to the entire set of circumstances under which the contract was formed, including the subsequent conduct of the contracting parties and the reasonableness of the parties' respective interpretations. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

Extrinsic evidence of the circumstances surrounding the formation of a contract is admissible to ascertain the intent of the contracting parties regardless of whether or not the meaning of the contract language is plain and unambiguous on its face. *Id.* The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties. *Corbin, The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. QUAR. 161, 162 (1965)); *In re Estates of Wahl*, 99 Wn.2d 828, 830-31, 664 P.2d 1250 (1983); *In re Estate of Curry*, 98 Wn. App. 107, 113, 988 P.2d 505 (1999), *Stranberg v. Lasz*, 115 Wn. App. 396, 408 (2003).

Greg presented the trial court with two letters by Tammy's attorney that were written before Greg signed off on the stipulated decree prior to presentation in 2003. In the November 9, 1999 letter addressed to Greg's (withdrawing) attorney, Tammy's attorney addressed the issue of whether a Labor and Industries settlement for an injury Tammy suffered during marriage was community property or separate property, CP 50, and

stated: “Whether these awards are divisible **or** contain a community component depends upon the nature or purpose of the award.” CP 51 [emphasis added]. Tammy’s attorney then wrote:

My reading of the case law is that injury award claims are deemed **separate or community** depending upon what character of the fund being reimbursed and the income producing capacity being made whole. . . . Damages for injury related expenses should be **community or separate** according to which fund incurs the expenses. Similarly, damages for lost wages and diminished earning capacity should partake of the same **community or separate character** as the wages and earning capacity they they are intended to reimburse or make whole. See In the Matter of the Marriage of Brown 100 Wash 2d 729 (1984). [emphasis added]
CP 51.

Tammy’s attorney then concluded: “Tammy’s [L&I] settlement is her separate property not subject to division as community property.” CP 51. The decree she subsequently drafted did not include any part of Tammy’s settlement as property subject to Greg’s one-half interest.

The second letter by Tammy’s attorney, on March 14, 2000 addressed to Greg, asserted that the language regarding Tammy’s award of one-half of Greg’s employment benefits correctly identified only the community property accrued during the marriage:

The language “Petitioners’ rights accrued by virtue of present, past or future employment . . . and the like,” is fairly standard language regarding the division of retirement benefits. This provision is consistent with the law in the state which classifies retirement accrued during

the marriage as community property.
CP 47.

In fact, her language—besides being inconsistent, ambiguous and contradictory¹³—did not properly define or distinguish the community property from the separate property portions of Greg’s CSRS benefits:

One-half (1/2) of any and all rights *accrued by virtue of present, past or future employment* of the husband *including* but not limited to pension, retirement, profit sharing, reserve vacation, sick leave, insurance coverage, *social security benefits* and the like *for the length of the marriage*;
CP 19 [emphasis added].

That the language she used was in fact not consistent with the law in Washington, and is in violation of Federal law (42 U.S.C. § 407(a) of the Social Security Act (Act)) which expressly forbids transfer or reassignment of Social Security benefits, does nothing to diminish the expressly and repeatedly stated intent of the parties (and the drafter of the decree) to distinguish between community and separate property components of property acquired or accrued during the marriage, and to only divide the community property components. Both letters viewed separately or together clearly evidence that the parties intended only to share in their community property, and that any separate property that the

¹³ This provision is internally inconsistent (or at least ambiguous), referring to both all future employment and the length of the marriage, and it contradicts the provision that awarded Greg “Any and all property acquired by the husband after the date of separation, April 26, 1998.” CP 18-19.

parties had accrued during their marriage was not subject to the interest of the other.

The trial court did recognize that (1) Tammy was not entitled to an interest in Greg's benefits accruing by virtue of all Greg's past, present and future employment, and (2) for the length of the marriage (as opposed to the date of separation). Unfortunately, the trial court failed to recognize and remove Greg's other separate property portions of the pension benefits, and thus failed to properly interpret and construe the parties' stipulated decree and failed to effectuate the parties' intentions.

In that this court interprets the Decree of Dissolution *de novo*, it must determine the intent of the parties and construe it in accordance with proper rules of construction and interpretation. Construction of an ambiguous dissolution decree is a question of law requiring the application of general rules of statutory and contract construction to determine from the decree as a whole the intent of the parties. *See, In re Marriage of Gimlett*, 95 Wn.2d 699. Even if there is no ambiguity, the court should properly consider the extrinsic evidence to determine the intent of the parties. *Berg*, 115 Wn.2d 657; *Stranberg*, 115 Wn.App. at 408-409.

Because Tammy's attorney drafted the stipulated decree, any ambiguity is construed against her. *See Greer v. Northwestern Nat'l Ins.*

Co., 109 Wn.2d 191, 201, 743 P.2d 1244 (1987). This is particularly appropriate where the drafter, an attorney, assured Greg, acting *pro se*, that the decree provided for an equal sharing of only the community property portion of his CSRS benefits, and where, as here, the clear intent of the parties to only divide the community property and none of the separate property that the parties accrued or acquired during their marriage is unquestionably evidenced.

Thus, in construing the Decree of Dissolution, only the community property portion of Greg's CSRS benefits should be subject to Tammy's community property interest. The trial court's award of one-half of 156/300's of Greg's benefits to Tammy does not accomplish this and must be reversed. The trial court failed to properly ascertain the intention of the parties and therefore failed to properly construe the stipulated decree.

(3) The Trial Court Erred In Characterizing The Entirety Of Greg's CSRS Retirement Plan Benefits As Community Property

The trial court failed to effectuate the parties' clear intention to separate the community and separate property components and divide only the community property portion of Greg's CSRS benefits acquired during their marriage when it characterized the entirety of those benefits as community property and established Tammy's one-half share subject only

to reduction using a fractional interest based on the total time the parties were married and lived together and Greg's total time of service.

Pension benefits accrue from day to day and year to year. *Leonard v. City of Seattle*, 81 Wn.2d 479, 503 P.2d 741 (1972); WASHINGTON COMMUNITY PROPERTY DESKBOOK, Wash. State Bar Assoc. 3d ed 2003, at 3-46. The benefits are properly apportioned into separate and community property according to the character of the hypothetical earnings used to "purchase" them. *Id.*, citing Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 WASH. L. REV. 13, 49 (1986). When these benefits are determined by calculations involving factors such as the employee's three highest year earnings average, differing percentages for the particular years of service, utilizing a pure time apportionment—as the trial court did—is not appropriate. *Id.*

Likewise, when benefits accrue during changes in residence between separate and community property states, the benefits should properly be apportioned as both separate and community property, *see In re Marriage of Jacobs*, 20 Wn.App. 272, 579 P.2d 1023 (1978), and cannot be properly characterized entirely as community property. *See* WASHINGTON COMMUNITY PROPERTY DESKBOOK, *supra*, at 3-

47.¹⁴ Moreover, the Civil Service Retirement System did not provide for contributions to social security, but substituted increased pension benefits in lieu of social security that properly is Greg's separate property. The trial court failed to effectuate the parties' intention to separate the community and separate property components of the property the parties acquired during marriage and divide only the community property portions when it awarded the entirety of Greg's CSRS benefits subject only to a time based fractional reduction of 156 over 300.

(4) The Trial Court Erred In Failing To Remove The Social Security Component Of Greg's CSRS Retirement Plan Benefits, And Failing To Allow Calculating Of The Appropriate Reduction By An Expert

In *In re Marriage of Zahm*, 138 Wn.2d 213, 978 P.2d 498 (1999) the Washington Supreme Court ruled that federal law preempted the division of Social Security benefits at dissolution:

42 U.S.C. § 407(a) of the Social Security Act (Act), . . . forbids transfer or reassignment of "[t]he right of any person to any future payment under this subchapter" While the Act does permit reassignment of social security benefits to pay for alimony or child support, it categorically excludes any similar payment obligation in conformity with a community property settlement, equitable distribution of property, or other division between spouses or former spouses. 42 U.S.C.A. § 659(i)(3)(B)(ii).

¹⁴ The Deskbook "Practice Tip" states that "Valuation of the community and separate interests in a defined benefit pension plan may be necessary. . . . A lawyer should consult an actuary for this purpose." This is precisely what Greg requested the court to order before determining the benefits subject to Tammy's community property interest.

In 1979, the United States Supreme Court held the federal constitution's supremacy clause preempted California's community property laws. *Hisquierdo v. Hisquierdo*, 439 U.S.572, 590, 99 S. Ct.802, 59 L. Ed.2d 1 (1979). The judicial application of California's community property laws, therefore, could not supplant the terms of the federal Railroad Retirement Act of 1974, 88 Stat.1305, § 45 U.S.C. 231 (Railroad Retirement Act). *Hisquierdo*, 439 U.S. at 590. In its analysis, inter alia, the Supreme Court analogized between Railroad Retirement Act benefits and federal social security benefits holding, inasmuch as both benefits are the products of noncontractual agreements, they are fundamentally similar. *Hisquierdo*, 439 U.S. at 574-75. The Supreme Court ultimately held Railroad Retirement Act benefits are not subject to distribution as property in a dissolution proceeding. *Hisquierdo*, 439 U.S. at 590. Given the Supreme Court's assertion of an affinity between Railroad Retirement Act benefits and federal social security benefits in *Hisquierdo*, we conclude social security benefits themselves are not subject to division in a marital property distribution case. *Zahm*, at 219.

As a federal employee of the FAA, Greg was enrolled in the Civil Service Retirement System. Thus there was no contribution to or accrued benefits from social security, but he did receive increased “pension” benefits in lieu of social security. Just as the U.S. Supreme Court analogized between Railroad Retirement Act benefits and federal social security benefits, the courts should analogize the CSRS benefits in lieu of social security and federal social security. Although there is no Washington case directly addressing the issue of whether CSRS benefits

in lieu of social security is community or separate property,¹⁵ in *In the Matter of the Marriage of Rockwell*, 141 Wn.App. 235 (2007), the trial court deducted the value of one spouse's CSRS benefits in lieu of Social Security benefits from the value of her pension, and did not include the other spouse's social security in determining the property settlement. In addressing the petitioner's argument that the trial court improperly compensated Carmen for the fact that her federal pension is in lieu of social security, Division I of the Court of Appeals stated:

The law does not permit the court to value and distribute social security benefits. *In re Marriage of Zahm*, 138 Wn.2d 213, 219, 978 P.2d 498 (1999) (citing 42 U.S.C. § 407(a) of the Social Security Act and its interpretation under *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979))). In particular, the trial court cannot calculate a future value of those monies and award that value as a precise property offset as part of its property distribution. *Zahm*, 138 Wn.2d at 217. *Rockwell*, at 243.

In upholding the trial courts removal of the benefits in lieu of social security from the valuation of her pension, the Court ruled:

[T]he trial court properly considered and compensated for the social security benefits that Carmen would have received, but for her federal pension.
Id.

Implicit in Washington's rulings related to the property division of

¹⁵ Other jurisdictions have addressed the need to remove that portion of a CSRS retirement provided to the employee in lieu of social security, before dividing the community property portion of a spouse's CSRS retirement benefits.

retirement plans is that where appropriate the court should divide the benefit into its component parts that are either community or separate property, and that the time and place of acquisition, *see Leonard v. City of Seattle*, 81 Wn.2d 479, as well as the nature of the component, *see Jacob and Rockwell*, are proper or necessary factors in doing so.

Because Tammy will receive Social Security benefits earned during the parties marriage with which Greg will not share, and Greg will not receive Social Security, but instead will receive increased CSRS benefits in lieu of Social Security, and because Social Security benefits are a party's separate property not subject to a division of the parties' community property, that portion of Greg's CSRS benefits received in lieu of Social Security must properly be calculated and removed from the community property component of Greg's retirement benefits subject to Tammy's one-half interest.

(5) The Trial Court Erred In Failing To Classify That Portion Of Greg's CSRS Retirement Benefits Accrued When He And Tammy Were Working And Living In Utah, A Non-Community Property State, As Greg's Separate Property

Washington has long accepted the principle that the character of property is determined under the law of the state in which the couple is domiciled at the time of its acquisition. *Rustad v. Rustad*, 61 Wn.2d 176, 179, 377 P.2d 414 (1963); *In re Estate of Gulstine*, 166 Wash. 325, 328, 6

P.2d 628 (1932); Restatement (Second) of Conflicts 258 (1971). Pension benefits are deferred income, accruing from day to day and year to year. *Leonard*, supra. As such, pension benefits which accrue during a term of employment are characterized in the same way as the income earned during that term of employment. Thus, a trial court correctly characterizes that percent of the federal pension as the employee's separate property when the parties had been domiciled in non-community property states. *See Jacob*, supra. Separate property retains its separate character when it is brought into Washington, unless it is commingled with community property. *Rustad v. Rustad*, supra at 179; *In re Estate of Gulstine*, supra at 328; *see also*, Restatement (Second) of Conflicts 259 (1971); *Marriage of Landry*, 103 Wn.2d 807, 699 P.2d 214 (1985). In that the future benefits only accrued during the marriage, there was no commingling.

In a defined benefits plan such as Greg's CSRS plan, where the accumulation of benefits result from the particular year of service, benefits accrued during the parties' residence and work in Utah, a separate property state, are properly characterized as Greg's separate property, and not subject to the parties agreement to only divide the community property portion of the Greg's CSRS benefits. Thus the trial court erred when it held that 156 months out of Greg's 300 months CSRS service was

community property, instead of the 98 months that the parties resided in community property states.¹⁶

(6) The Trial Court Erred In Failing To Determine And Classify As His Separate Property That Portion Of Greg's Retirement Benefits Based Upon His Increases In Benefits Resulting From His Work And Events After The Date Of The Parties' Separation

The parties' stipulated decree specifically provided that all property either party acquired after the date of separation was that party's separate property. Although the ambiguous and internally inconsistent language of another provision (of the stipulated decree drafted by Tammy's attorney) identifying a community property interest in "all rights accrued by virtue of . . . future employment of the husband including . . . social security benefits and the like during the length of their marriage" arguable contradicts this, there are a number of reasons which preclude Tammy from having any CSRS benefits resulting from Greg's continued FAA employment and work after the parties separated.

First is recognition of the parties' clear intention to distinguish separate property components from community property, even if acquired during their marriage, and preclude them from the divisible property. CP 50-51. The second is that the provisions awarding each party "Any and all

¹⁶ On remand, the use of a simple fractional determination of benefits, whether 98/300 or 156/300, should not be used to determine the community property portion of Greg's

property acquired . . . after the date of separation” is unambiguous and absolute. Finally, contract language is to be interpreted most strongly against the party who drafted the contract. *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966); *Neiffer v. Flaming*, 17 Wn.App. 443, 447, 563 P.2d 1300 (1977). Again, this rule particularly applies when the drafter is an attorney and the other party is *pro se*.

Fundamental concepts of “community property” warrant against Tammy’s sharing in Greg’s increased pension benefits resulting from his work during his subsequent marriage, and contradict the recognition that pension benefits accrue from day to day. *Leonard, supra*. Awarding Tammy an increased portion reduces the community property that was actually earned and acquired during Greg’s subsequent marriage.

Increases in retirement benefits occurring after separation should not be treated as separate property if the increase was enhanced by community efforts over many years. *In re Hurd*, 69 Wn.App. 38, 848 P.2d 185 (1993). Conversely, if the increase is not the result of enhancement by the community effort, but solely the result of the employee’s work after the parties had separated, then the ex-spouse is not properly entitled to any portion of the increase. The *Hurd* court stated: “Therefore, the present value of Mr. Hurd's monthly pension should be

CSRS benefits (as established in other sections of this brief).

determined assuming Mr. Hurd's retirement as of the date of dissolution, rather than at some future date.”

Greg’s retirement is a defined benefit plan based upon the calculation utilizing the number of years worked, specified percentages for different years worked, and the average of the three highest years of income. Greg’s affidavit establishes that all air traffic controllers received a considerable pay increase *after* the parties separated regardless of their years of service. CP 40-42. That pay increase resulted solely from Greg’s work and effort made after the parties’ separation and is thus his separate property. Thus that pay increase, which in turn significantly increased his retirement benefits, should be excluded from the calculation of that portion of his retirement benefits to which Tammy has an interest as one-half of the community property. Tammy is not entitled to a windfall resulting solely from Greg’s efforts and earnings obtained after the parties’ separation, first, because that is the proper application of Washington law, and second, because it would contravene the clearly stated provision of the parties’ stipulated decree that such property is Greg’s separate property.

- (7) The Trial Court Erred In Ruling That Greg’s Motion For Reconsideration Was Untimely Because He Did Not Note The Motion At The Time of Filing

The issue of this ruling by the trial court is likely inconsequential given the circumstance at bar, however Greg asserts that his *Motion For Reconsideration*, filed within ten days of the entry of judgment was timely and hereby incorporates into his appeal the argument and authorities found in *PETITIONER'S MOTION TO SCHEDULE HEARING ON MOTION FOR RECONSIDERATION OF DRO, OR ALTERNATIVELY FOR RELIEF FROM JUDGMENT PURSUANT TO CIVIL RULE 60, CP 64-71*, and *PETITIONER'S REPLY TO OPPOSITION MEMORANDUM TO MOTION FOR RECONSIDERATION OF DRO, . . .*, CP 99-104.

F. CONCLUSION

When parties to a stipulated decree of dissolution clearly establish, as herein, that they intended to share equally in only the community property component of their property acquired during their marriage, the court in a post dissolution proceeding is required to construe the decree in conformity with that intent. When an attorney for one party drafts a decree approved by the other spouse acting *pro se* and without the benefit of legal counsel, drafts contradictory and ambiguous provisions in the decree, but assures the other party that the decree only provides for sharing of the community property, the decree should be construed and interpreted against the drafting party.

When a court is called on to order a post dissolution domestic relations order dividing an employees Civil Service Retirement System benefits, a simple time based fractional division of the pension does not properly determine the community property portion of those benefits.

CSRS benefits in lieu of social security, benefits accruing when the parties resided over thirty-seven percent of the marriage in a non-community property state, and that portion of the benefits accruing solely as a result of the increased highest three years' annual earnings that the employee earned eight years after the parties separated are not properly characterized as community property, and should properly be removed from the employee's benefits in order to determine the community property component of those benefits.

Dated this 30th day of October, 2009.

Respectfully submitted,



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CERTIFICATE OF
SERVICE

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BY _____
DEPUTY

I, C. Keith Stump, under penalty
of perjury hereby declare that
I have hand delivered to the office of the
following individual a complete true
copy of the "Brief of Appellant
Gregory Smith" and all necessary papers
in the Court of Appeals, Division II of the
State of Washington case # 39188-1-11,
In re the Marriage of Gregory Smith, Appellant,
v. Tammy Smith, Respondent:

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