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DIVISION II

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STATE OF WASHINGTON

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No. 39188-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

GREGORY SMITH, Appellant,

v.

TAMMY SMITH, Respondent.

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Reply Brief of Appellant Gregory Smith

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A. INTRODUCTION

Despite Respondent's unpersuasive attempt to characterize this appeal as an untimely attempt to vacate the parties' stipulated *DECREE OF DISSOLUTION* entered May 18, 2000, Br. of Resp't at 1, 5 – 10, it is clear that is before the Court because the trial court, in a post-dissolution proceeding, failed to properly interpret and construe the parties' stipulated dissolution agreement after Respondent made her *MOTION FOR ENTRY OF DOMESTIC RELATIONS ORDER* in 2008. Clearly and specifically, this appeal is of the *AMENDED DOMESTIC RELATIONS ORDER RE DIVISION OF RETIREMENT BENEFITS FROM FEDERAL EMPLOYEES RETIREMENT SYSTEM COURT ORDER ACCEPTABLE FOR PROCESSING (DR0)* (hereinafter "AMENDED DRO") (emphasis added) entered March 25, 2009, wherein the trial court 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 record clearly establishes that the parties' intentions was for an essentially equal division of *only* their *community property* acquired while they were married and living together. This was both expressly and implicitly made clear by Respondent's attorney in her November 9, 1999

and March 14, 2000 letters, CP 47–51,<sup>1</sup> see also 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.

Respondent’s argument that “Petitioner has not standing because he has not filed a Motion to Vacate the Decree,” Br. of Resp’t at 4-9, is based upon a false premise (he did move alternatively pursuant to CR 60(b), and a misunderstanding and misstatement of the case: Petitioner seeks to contest only the trial court’s *AMENDED DRO* filed March 25, 2009, which does not properly construe the parties’ stipulated decree.

**B. REPLY TO RESPONDENT’S ASSIGNMENTS OF ERROR AND COUNTERSTATEMENT OF THE CASE**

(1) Respondent’s Introduction and Assignments of Error

Respondent has not cross-appealed, and any assignment of error by her (see Assignments of Error #4 and #6, Br. of Resp’t at 3) should not be considered. *STATE v RAKOSKY*, 79 Wash.App. 229, fn. 4, 901 P.2d 364 (1995).

In her Assignments of Error, #1, Br. of Resp’t at 2, and Introduction, *Id.* at 1, the respondent falsely asserts that “The Petitioner . . . attempts to partially reopen the divorce . . . without moving for CR 60(b) relief to vacate the Decree.” Petitioner filed, on November 26, 2008

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<sup>1</sup> As a statement against her now claimed pecuniary interest in Greg’s CSRS pension, the

*PETITIONER'S MOTION TO SCHEDULE HEARING ON MOTION FOR RECONSIDERATION OF DRO, OR ALTERNATIVELY FOR RELIEF FROM JUDGMENT PURSUANT TO CIVIL RULE 60.* [emphasis added], CP 64, 69-71. The record is clear.

(2) Respondent's Statement of the Case

Respondent stated "The Petitioner filed an untimely motion for reconsideration..." Br. of Resp't at 3. This assertion is somewhat misleading in that Petitioner timely filed a *MOTION FOR RECONSIDERATION* on November 10, 2008, but did not file a *Note For Motion Docket* at that time. CP 66-67, 72-73.

Respondent further states that "The first hearing on this issue occurred on August 22, 2008 wherein the court granted the Respondent's request for the entry of a domestic relations order based on a certain formula." In fact, the court did not grant the Respondent's request for the domestic relations order (DRO) he presented at the hearing providing her one-half of Petitioner's total CSRS retirement,<sup>2</sup> and the court agreed with that part of Petitioner's limited opposition, CP 24-28, holding that the stipulated dissolution decree provision that Petitioner was awarded as his

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letters by the Respondent's attorney are not inadmissible hearsay. ER 804(b)(3).

<sup>2</sup> At the August 22, 2008 hearing Respondent's counsel stated: "I don't have an order that conforms with your ruling, and I'd like to rewrite the domestic relations order that reflect that, so can we present that at another time? Verbatim Report of Proceedings August 22, 2008 (RP Volume 1) at 17.

separate property “Any and all property acquired by the husband after the date of separation.” CP 26-27; RP V.1, p. 15 controlled over the contrary language of the decree which Respondent sought to incorporate in her proposed DRO.

Respondent stated “Because of a *typographical error*, an amended domestic relations order was signed by the court and filed on March 25, 2009.” Respondent recognized that the original DRO presented and signed by the court on October 31, 2008 provided incorrect Employee Information requiring more than a mere correction of a “typographical error,” and thus she prepared and sent not a “corrected,” but an *AMENDED DOMESTIC RELATIONS ORDER RE DIVISION OF RETIREMENT BENEFITS FROM FEDERAL EMPLOYEES RETIREMENT SYSTEM COURT ORDER ACCEPTABLE FOR PROCESSING (DRO)* (emphasis added) to Petitioner’s counsel for his signature and approval as to form. Specifically and critically, the *AMENDED DRO* properly amended the critical portion of the Order establishing the months of creditable service during the marriage and the employee’s total creditable service, to “The Employee has performed more than (13 years) (156 months) of creditable service during the marriage of the parties. The Employee has performed Twenty-five (25) years of creditable service in total,” CP 113, from “(15 years) 180 months”

and “more than Thirty (30) years” in the DRO filed on October 31, 2008. CP 32. The *AMENDED DRO* also amended the Former Spouse Information to “Former Spouse was married to the Employee for at least **156 months (13 years).**” [Emphasis in original], CP 114, from “**(15 years) 180 months.**” [Emphasis in original] CP 33. Such significant and multiple changes hardly qualify as “a typographical error.” The pertinent fact is that the original DRO submitted on October 31, 2008 did not comply with the Court’s August 22, 2008 ruling, RP V.1, pp. 12, 15-16, and it required an amended order which was not filed until March 15, 2009.

C. ARGUMENT IN SUPPORT OF REPLY

(1) Petitioner Did Have Standing and Also He Filed a CR 60(b) Motion (in the alternative).

Respondent’s argument that Petitioner does not have standing because he (allegedly) did not file a motion under civil rule 60(a) is without merit because Petitioner did in fact file such a motion (albeit in the alternative, and albeit it sought vacation of the trial court’s October 31, 2008, not the 2000 *DECREE*). CP 64-80.

Respondent’s argument based on the assertion that “The Petitioner’s complaint is not with the present ruling of the trial court, but with the Findings of Fact signed by the trial court when the Decree of

Dissolution was originally filed on May 18, 2000” Br. of Resp't at 5, is also without merit because she fails to recognize that Petitioner does not seek to vacate the *DECREE*, but only to seek a properly construed DRO based upon the *DECREE* as was entered in 2000.<sup>3</sup>

Petitioner has consistently argued that the stipulated *DECREE OF DISSOLUTION (DCD)* filed May 18, 2000, (“*DECREE*”), CP17-23, contained contradictory provisions, was ambiguous, and therefore required proper construction based on that decree when ruling on the Respondent’s motion for a proposed DRO. When a court subsequently issues a DRO that requires interpretation and construction of a previously entered decree of dissolution, a party has standing to appeal court’s decision reflected in the subsequent order. *See, CHAVEZ v. CHAVEZ*, 80 Wash.App. 432, 909 P.2d 314 (1996). Even if Respondent’s argument regarding proper application of CR 60(b) hit the mark (which Petitioner does not admit), it simply is the wrong mark.

The qualified DRO requested by Respondent in her original May 6, 2008 motion, CP 1-2, and in her revised August 6, 2008 *MOTION FOR ENTRY OF DOMESTIC RELATIONS ORDER*, cp 7-8, specifically requested “entry of a Domestic Relations Order as permitted and provided

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<sup>3</sup> Thus, Respondent’s application of *Thurston v. Thurston*, Br. of Resp't at 6-7, *Hammack v. Hammock* and *Hulscher v. Hulscher*, Br. of Resp't at 8, is both irrelevant and misplaced.

in that certain Decree of Dissolution.” CP 1 and 7. The DRO issued by the court admittedly required interpretation of the *DECREE*. RP V.3, p. 14.<sup>4</sup> Granted that the *FINDINGS OF FACT AND CONCLUSIONS OF LAW(FNFCL)*, CP 142-149, (“*FINDINGS*”) are likewise inconsistent with the *DECREE*, it is the *DECREE* that properly controls the construction of the requested DRO, and Petitioner has not, and has no need to seek to vacate the *DECREE* or *FINDINGS* in order to appeal the *AMENDED DRO*. Petitioner has standing to do so.

(2) The *DECREE* Is Ambiguous and Has Contradictory Provision.

Respondent argues that “The Decree is not ambiguous” despite the obviously contradictory provisions in the *DECREE* recognized by the trial court when it ruled that despite “the language of ‘Acquired during the marriage. . . . I am still satisfied that because of the provision of the earnings after separation as being confirmed to husband that it was appropriate for me to end as I did . . . at the time of separation as opposed to . . . when the actual entry of the dissolution decree was entered, . . .” RP V.3 p. 14.

Respondent begins her argument with improper citation to a 1970

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<sup>4</sup> Where the court stated “I looked very closely at whether setting forth a qualified domestic relations order given the language [in the *DECREE*] of “Acquired during the marriage.”

Court of Appeals case that was effectively overturned by the Washington Supreme Court ruling in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).<sup>5</sup> Since *Berg*, the process of construction of a contract, (or of a Decree, which requires application of contract rules of construction), does not require an ambiguity in order to consider evidence of the parties' intent. Extrinsic or parol evidence can always be used to place the context and interpret the words of the contract so that the intent of the parties may be understood. Ambiguity is not a prerequisite to the admission of extrinsic evidence, *Id.*, at 669, *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 743, 844 P.2d 1006 (1993). Thus, the court should properly determine the parties' intentions in order to draft the qualified DRO, even if there was no ambiguity.

However, the court need not reach that issue because the *DECREE* is clearly ambiguous. Where, as here, you have a decree has one provision clearly stating “*Any and all* property acquired by the husband after the date of separation, April 26, 1998” (emphasis added), is his separate property, CP 17-18, and another provision stating “The wife is awarded *as her separate property* . . . [o]ne-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

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<sup>5</sup> Petitioner's cite to *Callan, Br. of App't at 15*, on the other hand was not improper.

leave, insurance coverage, social security benefits and the like for the length of the marriage;” (emphasis added), CP 18-19, it is difficult to conceive how no ambiguity can be argued. Amounts of a pension is property that is accrued day by day. Petitioner’s pension amount accrued after the parties separated and were divorced. The *DECREE* awards Petitioner “any and all” of the property he acquires after the parties’ separation as his separate property on one hand, and awards one-half of that same property to Respondent. Clearly, an award that add up to 150% of anything, can only add up to an obvious ambiguity.

Respondent attempts to disregard the clear ambiguity in the *DECREE* by focusing solely on the wording in the *FINDINGS*. Br. of Resp’t at 11 and 14-16. This is contrary to proper rules of construction.

(3) The *DECREE* cannot be harmonized to remove the ambiguity.

Again, Respondent relies solely on the pre-*Berg* cases *Callon*, *Gimlett*, and *Byrne*, Br. of Resp’t at 11-12, to attempt to prevent a proper determination of the parties’ intent. As previously noted, the cardinal rule of interpretation or construction is to effectuate the parties’ intent. (Or, had the decree been disputed, the court’s intent.) Br. of App’t at 16.

In that the Respondent’s attorney’s letters to Petitioner, CP 47-51, make it absolutely clear that the parties agreed to divide only their

“community property” and none of their “separate property,” and that Respond expressly assured Petitioner that her language in the *FINDINGS*, CP 47, and *DECREE*, CP 48, were “consistent with the law in this state,” it is obvious why Respondent seeks to limit the inquiry to the *FINDINGS*. However, an “answer” to what was the parties’ intention, which relies on only one document and disregards the clear contradiction in the other document is not a proper analysis.

Respondent first cites and quotes a rule of construction that establishes “all parts of of the instrument, and that the judgment must be read in its entirety and must be construed as a whole so as to give effect to every word . . . .” which ends with the comment “It is not to be assumed that a court intended to enter judgment with contradictory provisions . . . .” Br. of Resp’t at 11. Whether that same assumption can be made of the drafter of the decree is speculative at best, particularly where it is obvious that Respondent’s former attorney incorrectly assured Petitioner that the decree was consistent with the laws of Washington regarding community property, and convinced Petitioner that her client would have no interest in any of his property acquired after the parties’ separation by including the provision “The husband is awarded as his separate property ... [a]ny and all property acquired by the husband after the date of separation, April 26, 1998.” As sole drafter of the documents, Respondent should not be able

to obtain a DRO that changes that provision to “any and all property *except his subsequently accrued pension* acquired by the husband after the date of separation.”

Respondent first argues that Petitioner improperly raises issues about separate and community property, and then quotes from a case recognizing that in reviewing a court drafted decree that “the status of property as community or separate is not controlling . . . [because e]ven if the trial court mischaracterizes the property, the allocation will be upheld as long as it is fair and equitable.” Br. of Resp't at 16-17. This is not a review of whether the trial court’s qualified DRO is “fair and equitable,” it is a review of whether the trial court’s qualified DRO accurately effectuated the intention of the parties when they filed the stipulated decree. Using the proper rules of construction, the trial court failed to do so. Respondent misplaces her reliance on *In re Marriage of Bulicek*, 59 Wn.App. 630, 800 P.2d 394 (1990), and *In re the Marriage of Williams*, 84 Wn.App. 263, 927 P.2d 679 (1996), both of which rest on the conclusion that the trial court’s division of property was fair and equitable, and in *Williams, Id.* at 269, the court expressly noted that certain portions of his pension was the employee spouses separate property. Neither case involved a stipulated decree.

The stipulated *DECREE* that Petitioner signed off on made a

simple and plain and clear statement that any and all property he acquired after April 26, 1998 was his separate property. Properly construing the *DECREE* with the fundamental rule of construction that it should be construed against the drafter, requires that the conflict between the provisions be resolved by a DRO that removes any portion or increase in his pension after their separation as Petitioners, and not subject to Respondent's community property share.

In a New Mexico Court of Appeals case addressing the post separation increases in the employee's pension similar to the issue herein, the court, after being asked to follow the holding in *Bolicek*, declined to do so. *Franklin v. Franklin*, 116 N.M. 11, 859 P.2d 479 (1993). Recognizing that use of the same formula as in *Bolicek* would invade the separate property component of the respondent's (therein) pension, the appellate court upheld the trial court's application of an income adjustment that factored in Husband's salary average at the time of divorce rather than the salary average that was actually applied to calculate Husband's share of the Plan upon his retirement. In order to effectuate the parties' (herein) intention of a DRO that would preserve Petitioner's separate property component of his pension as his own and not subject to Respondent's community property share, this court should likewise require an actuarial determination of the community property share of Petitioner's pension.

(4) Social Security and Pension Payments *In Lieu of* Social Security Is Critical To The Determination of the Amount of Petitioner's Pension In Which Respondent Has A Community Property Share.

Again, it was only until the trial court entered the *AMENDED DRO* that Petitioner could contest an order improperly construing their stipulated *DECREE*. Petitioner was specifically assured that the decree both properly classified the parties separate and community property, he was specifically assured that any separate property was his separate property and that Respondent would have no interest in it.

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, and in *In the Matter of the Marriage of Rockwell*, 141 Wn.App. 235 (2007), the Court of Appeals upheld the trial court's deduction from the value of one spouse's CSRS benefits in lieu of Social Security benefits from the value of her pension, and which did not include the other spouse's social security in determining the property settlement. By the time of the parties' (herein) stipulated decree, Washington recognized that Social Security is not community property subject to division in a property division. By the time the Respondent sought a DRO construing the parties' agreed property division, Washington court's had recognized that CSRS benefits in lieu of

social security it is not properly subject to the community property share of the non-employee spouse. Any uncertainty or ambiguity as to whether the stipulated decree gave Respondent a share of the CSRS pension benefits in lieu of social security should properly be construed against Respondent.

(5) Respondent Is Not Entitled to Award of Attorney's Fees.

Respondent did not seek an award of attorney fees below and cannot claim fees for the first time on appeal. *In re Marriage of Williams, Supra*. Additionally, in that Respondent was awarded such a substantial portion of Petitioner's sole source of income (i.e., his CSRS pension), it is unlikely that Respondent, who additionally has social security and/or disability income, *see* Respondent's attorney's letter regarding her client's L & I claim, CP 50-51, can show an appropriate need.

D. CONCLUSION

Respondent admitted and recognized that the *DECREE* was ambiguous, and recognizes that rules of construction, including intent of the parties is required to effectuate a proper DRO. The trial court failed to separate the community property and separate proportion portions of the Petitioner's pension. The "practice tip" 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." found in the

WASHINGTON COMMUNITY PROPERTY DESKBOOK, Wash. State  
Bar Assoc. 3d ed 2003, at 3-46-47, should have been allowed by the trial  
court as requested by Petitioner.

Dated this 15<sup>th</sup> day of March, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Keith Stump", written over a horizontal line.

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