# Duesterbeck v. Duesterbeck

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UNPUBLISHED OPINION

Carol J. Duesterbeck[1] appeals from the trial court's denial of her CR 60(b) motion to vacate and/or modify her dissolution decree from Bernard A. Duesterbeck. Even though the trial court's ruling effectively reduces her award of Bernard's military retirement pay while increasing his disability benefits, we affirm.

FACTS

In 1953, Bernard entered the United States Air Force (USAF). In 1965, he married Carol. In 1979, after 26 years of service, Bernard retired from the USAF. In 1998, Bernard and Carol divorced.

Under the dissolution decree, the trial court found that Bernard's military retirement pay from the USAF was community property. As such, the trial court awarded Carol a "50% interest in husband's military retirement pay from the United States Air Force."[2] CP at 10. Her 50 percent interest equaled $936.45 per month.

In 2005, Bernard requested additional medical services from the United States Department of Veterans Affairs (VA) as a result of problems with hearing loss and problems with a permanent shoulder injury. The VA recognized that Bernard was 20 percent disabled and thereafter increased his disability benefits. But, by increasing his disability benefits, the VA simultaneously decreased his military retirement pay under applicable government regulations.[3] Without notice, the 50 percent interest in Bernard's military retirement pay awarded to Carol decreased by $94.50 per month to $841.95 per month.

Thereafter, Carol filed a motion under CR 60(b)(1) and CR 60(b)(11) to set aside the dissolution decree and to award her spousal maintenance equal to $94.50 per month. She also asked the trial court to "provide a mechanism to address possible future conversions of retirement benefits." CP at 27.

Based in part on the parties' economic circumstances, the trial court denied Carol's motions, stating in part that:

[P]petitioner's loss of $94.50 in monthly military retirement benefits resulting from respondent's qualifying for a 20% VA Disability Pension does not constitute an "extraordinary circumstance," an "extreme unexpected situation" or result in a "manifest injustice" as required to vacate a Decree of

Dissolution pursuant to CR 60(b)(11) or as contemplated by Marriage of Jennings, 138 Wn.2d 612, 980 P.2d 1248 (1999).

CP at 38-39. The trial court also stated, "The Court is unwilling to circumvent the federal law prohibition against dividing VA Disability benefits by ordering a dollar-for-dollar replacement in the form of spousal maintenance." CP at 39. Carol appeals.

ANALYSIS

I. Standard of Review

Under RCW 26.09.170(1)(b), a trial court may not vacate or modify the provisions of any divorce decree as to property disposition "unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state."

Here, CR 60(b) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(11) Any other reason justifying relief from the operation of the judgment.

CR 60(b)(1), (11).

"A dissolution decree may be vacated for extraordinary circumstances to overcome a manifest injustice." In re Marriage of Hammock, 114 Wn. App. 805, 810, 60 P.3d 663, review denied, 149 Wn.2d 1033 (2003). "The operation of CR 60(b)(11) is 'confined to situations involving extraordinary circumstances not covered by any other section of the rule.'" Hammock, 114 Wn. App. at 809 (quoting State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). The extraordinary circumstances "must relate to irregularities extraneous to the action of the court." In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). Motions under CR 60(b) to vacate or modify the provisions of a divorce decree as to property disposition are addressed to the sound discretion of the trial court. In re Marriage of Curtis, 106 Wn. App. 191, 196, 23 P.3d 13, review denied, 145 Wn.2d 1008 (2001); In re Marriage of Burkey, 36 Wn. App. 487, 489, 675 P.2d 619 (1984).

And we will not disturb a trial court's decision absent a showing of a clear abuse of discretion. Morgan v. Burks, 17 Wn. App. 193, 197, 563 P.2d 1260 (1977). "A [trial] court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds, including an erroneous view of

the law." In re Marriage of McCausland, 129 Wn. App. 390, 406, 118 P.3d 944 (2005), review granted in part, 157 Wn.2d 1008 (2006).

Finally, we may affirm where the trial court reaches the right result, but for the wrong reason. Hoflin v. City of Ocean Shores, 121 Wn.2d 113, 134, 847 P.2d 428 (1993); see also Tropiano v. City of Tacoma, 105 Wn.2d 873, 876-77, 718 P.2d 801 (1986) (this court can affirm the trial court on any correct grounds within the pleadings and proof).

II. Trial Court's Decision

Carol argues that the trial court erred in denying her relief under CR 60(b)(1) and CR 60(b)(11). We disagree.

Specifically, Carol claims that the trial court erred by ruling that a decrease of $94.50 per month in the amount of Bernard's military retirement pay awarded to her was "not sufficient enough to warrant any other remedy" under CR 60(b)(11). Br. of Appellant at 13. She continues:

The amount of money lost because of this particular reevaluation of Mr[.] Duesterbeck's disability should not play the determinative [role] which the trial court attributes to it.

A loss of $94.50 per month for twelve months is $1,134[,] annually. In a ten[-]year period this would constitute a loss of $11,340. This is substantial. And if the amount of disability is increased, this loss will be greater.

This "amount of the loss" solution for determining application of CR 60(b)(11) remedies is illusionary.

Br. of Appellant at 13-14.

In support of her argument, Carol relies on In re Marriage of Jennings, 138 Wn.2d 612, 628, 980 P.2d 1248 (1999), wherein our Supreme Court concluded that extraordinary circumstances existed under CR 60(b)(11) to vacate and modify a dissolution decree as it related to division of the husband's military retirement pay. Under the original dissolution decree in Jennings, the wife was "entitled to fifty percent (50%) of the gross retirement pension and shall be paid the sum of not less than Eight Hundred Thirteen dollars and Fifty cents ($813.50) per month commencing with the month of September, 1991." Jennings, 138 Wn.2d at 615.

At the time the trial court entered the decree, the husband had waived a certain amount of his military retirement pay in favor of disability benefits. Jennings, 138 Wn.2d at 615. Thus, the decree also stated that "[t]he portion of the retirement pay waived by the [husband] in order to receive disability compensation from Veteran's Affairs, is not divisible by the Court and as such should be awarded to the [husband] as his sole and separate property under provisions of Federal Law."

Jennings, 138 Wn.2d at 615.

After the trial court entered the decree, the VA determined that the husband's disability had worsened. Jennings, 138 Wn.2d at 615. Thereafter, the VA changed the husband's disability status, increasing his disability benefits from $318.00 to $2,285.00 per month, while simultaneously decreasing his military retirement pay from $2,139.00 to $272.90 per month. Jennings, 138 Wn.2d at 615. Because of the reduction in the husband's monthly military retirement pay, the wife's monthly military retirement payment from her husband's source was reduced from the original $813.50 to $136.00. Jennings, 138 Wn.2d at 617.

The wife then filed a show cause motion requesting the trial court to either: (1) vacate the dissolution decree under CR 60; (2) modify the decree to provide her with maintenance payments equal to one-half of the husband's disability payments; or (3) clarify the decree to require the husband to pay her no less than $813 per month. Jennings, 138 Wn.2d at 617-18.

The trial court found extraordinary circumstances that justified setting aside the original dissolution decree under CR 60(b)(11). Jennings, 138 Wn.2d at 618. Thus, the trial court ordered the husband to pay the wife "non-modifiable compensatory spousal maintenance" in an amount representing 50 percent of the husband's total monthly compensation for disability and retirement. Jennings, 138 Wn.2d at 618-19.

We reversed and remanded the case for reinstatement of the original dissolution decree. In re Marriage of Jennings, 91 Wn. App. 543, 958 P.2d 358 (1988), rev'd, 138 Wn.2d 612 (1999). But our Supreme Court reversed, affirming the trial court's award of compensatory spousal maintenance. Jennings, 138 Wn.2d at 629. Our Supreme Court noted that "there were extraordinary circumstances in this case which justified remedial action by the trial court to overcome a manifest injustice which was not contemplated by the parties at the time of the [original] decree." Jennings, 138 Wn.2d at 625.

Our Supreme Court found that the decree was ambiguous and "subject to a declaratory action to ascertain the rights and duties of the parties." Jennings, 138 Wn.2d at 625 (quoting Byrne v. Ackerlund, 108 Wn.2d 445, 453, 739 P.2d 1138 (1987)). Our Supreme Court then concluded that: (1) the trial court did not abuse its discretion in clarifying the original dissolution decree under RCW 26.09.170; and (2) the trial court could reasonably conclude that the drastic change in the status and amount of the military retirement payments to the husband constituted an extraordinary circumstance under CR 60(b)(11). Jennings, 138 Wn.2d at 625-26.

Our Supreme Court also noted:

At the time of the decree, it was reasonable for the court to expect the $813.50 payable to [the wife] would continue to be paid . . . for the remainder of [the husband's] life.

Neither the court nor the parties anticipated at the time of the . . . decree that, through transfer of pension benefits to disability benefits, the monthly retirement payments to [the husband] would be reduced to $272.90, with the consequence that the $813.50 payment to [the wife] would be reduced to $136.00 per month. Regardless of the reasons, the result was fundamentally unfair because it deprived [the wife] of her entitlement to one-half of a substantial community asset with her receiving $677.50 per month less than the amount awarded her by the court.

Jennings, 138 Wn.2d at 627.

Based on the reasoning in Jennings, we agree with Carol that a decrease of $94.50 per month in the amount of Bernard's military retirement pay awarded to her could be "significant." Br. of Appellant at 13. After all, the court in Jennings did not define these terms. And it would be unwise to attach these terms to specific dollar amounts. What may be significant or substantial in one case, may be insignificant or insubstantial in another case.

But we do not agree with Carol that extraordinary circumstances in this case justified remedial action by the trial court under CR 60(b)(11).

First, as in Jennings, there is no evidence in the record to suggest that Bernard intended to deprive Carol of her share of the community asset, i.e., 50 percent of his military retirement pay, awarded in the dissolution. In fact, Bernard stated in his declaration:

I am living hand to mouth. . . . I live alone in a small trailer (approximately 332 square feet) in Yuma, Arizona. I have no other home. I have approximately $40,000 remaining in a 401K. . . . I am 75 years old.

Our only child . . . is suffering from stage four breast cancer. Our daughter is not married and has no other means of support. . . . As a result of [her] situation, I have helped her financially as much as I can.

CP at 44-45.

Second, unlike in Jennings, the dissolution decree in this case was not ambiguous and did not need clarification. Paragraph 3.13 of the dissolution decree in part provided:

The petitioner wife is entitled to direct payments of 50% of husband's disposable retired pay from the United States Air Force from the Defense Finance and Accounting Service (DFAS) because the parties were married for more than 10 years during which the husband performed at least 10 years of service creditable in determining his eligibility for retired pay.

CP at 8-9. Exhibit A of the dissolution decree provided to Carol a "50% interest in husband's military

retirement pay from the United States Air Force along with the right to remain the beneficiary of the Survivor Benefit Program benefits currently selected under that program." CP at 10-11.

Based on these figures, it is readily apparent that the trial court did not award Carol a personal judgment against Bernard for not less than $936.45 per month, regardless of the amount of his military retirement pay. Instead, the trial court awarded Carol a percentage interest in a fluctuating fund, however little or much that might be.[4]

Third, unlike in Jennings, the dissolution decree in this case did not indicate that the court and the parties contemplated that Carol would receive not less than $936.45 per month. The decree did not include any other language that, should Bernard's disposable military retirement pay be reduced, such deductions would not affect Carol's monthly entitlement. And paragraph 10 of the military qualifying court order,[5] filed the same day as the dissolution decree, specifically stated:

Disposable Retired Pay: The term disposable retired pay shall mean the total monthly retired pay to which a member is entitled less amounts that: . . .

(b) are deducted . . . as a result of a wavier of retired pay required by law in order to receive compensation under Title 5 or Title 38.

CP at 16-17 (emphasis added).

Thus, the result of the subsequent offsets, which reduced Carol's share by $94.50 per month, was not outside the parties' contemplation at the time the trial court entered the decree and is not fundamentally unfair.[6]

Fourth, although Carol notes that "[t]he division of the military retirement in the Duesterbeck's divorce proceeding was a conformation of a prenuptial agreement reached between the parties," Br. of Appellant at 6-7, she relies on no relevant parts of the record for this proposition. If anything, we agree with Bernard that the parties did not enter into a prenuptial agreement. After all, the dissolution decree clearly states, "There is no written separation contract or prenuptial agreement." CP at 2.

Fifth, although Carol notes that "[o]nce divided by the court this asset becomes the sole separate property of . . . Mrs. Duesterbeck," she relies on no legal authority or relevant parts of the record for this proposition. Br. of Appellant at 8. In the absence of argument or authority to support it, this court will not consider an issue raised on appeal. RAP 10.3(a)(5); Am. Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

Absent any of the extraordinary circumstances identified in Jennings or in her brief, Carol has merely shown that one asset awarded to her has declined in value by $94.50 per month. And while

this decline in value may be significant, she has not shown how this decline in value is manifestly unjust to her.[7] See Hammock, 114 Wn. App. at 810.

Therefore, with no extraordinary circumstances or manifest injustice before it, there was no reason for the trial court to vacate or modify the dissolution decree under CR 60(b)(1) and CR 60(b)(11).[8] And, consequently, there was no reason for the trial court to rely on In re Marriage of Perkins, 107 Wn. App. 313, 26 P.3d 989 (2001), and to devise a formula that would again divide the community assets.

In conclusion, we hold that the trial court did not abuse its discretion in denying Carol's motions under CR 60(b)(1) and CR 60(b)(11) to vacate or modify the dissolution decree. We do not award attorney fees.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.

1. She is now known as Carol Walsh.

2. The trial court also awarded Carol: (1) the family home, subject to a 45 percent lien in favor of Bernard; and (2) 50 percent of Bernard's Boeing Company retirement benefits.

3. See 10 U.S.C. § 1408(a)(4)(B); 38 U.S.C. § 1110; 38 U.S.C. § 1131; see also Mansell v. Mansell, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed. 2d 675 (1989); In re Marriage of Jennings, 138 Wn.2d 612, 616-17, 980 P.2d 1248 (1999). Under the government regulations, Bernard was required to waive retirement benefits in favor of allocation to disability benefits.

4. In her motion under CR 60(b) before the trial court, Carol appeared to claim that the trial court awarded her a personal judgment against Bernard for $936.45 per month. But she did not support this claim with any citation to the relevant parts of the dissolution decree.

5. Carol has not provided us with the full order. She has included only the first three pages of the military qualifying court order. And these pages do not include the signature page of this order. Nevertheless, the first page does show that the order was filed in open court on June 18, 1998.

6. Because of the facts in this case, we do not address the issue where a husband repeatedly manipulates his military retirement pay as to slowly and methodically deprive his spouse of retirement benefits.

7. In fact, Carol has remarried. And, according to Bernard, she "has her husband's income, her half of my net disposable retirement income, her half of my Boeing pension and her own social security income to live on. [Her] financial situation is much better than mine." CP at 45. And Bernard noted in his declaration that she "has failed to reveal her income or her husband's income or supply any documentation regarding the same." CP at 46.

8. In Peste v. Peste, 1 Wn. App. 19, 25, 459 P.2d 70 (1969), we stated, "To permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora's Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses. The uncertainties which would result would be devastating."