STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1651

In re the Marriage of: Thomas M. Dillahunt,
petitioner, Respondent,

vs.

Tami L. Mitchell, f/k/a Tami L. Dillahunt,
Appellant.

Filed June 24, 2019
Affirmed; motion denied
Klaphake, Judge*

Hennepin County District Court
File No. 27-FA-06-4968

Kathleen E. Rusler O'Connor, O'Connor Law and Mediation PLLC, Burnsville, Minnesota (for respondent)

Chris Zewiske, Ormond & Zewiske, Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bratvold, Judge; and Klaphake, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Tami L. Mitchell, f/k/a Tami L. Dillahunt, filed this appeal from the district court's division

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

of marital property following the dissolution of her marriage to respondent Thomas M. Dillahunt. She argues that the district court erred in its division of her military retired pay and in denying her request for attorney fees. Because the district court's findings of fact were not clearly erroneous and because it did not otherwise abuse its discretion in dividing the military retired pay and in denying Mitchell's request for attorney fees, we affirm. We also deny Dillahunt's motion to strike or, in the alternative, for permission to file a surreply brief.

DECISION

I.

Mitchell advances several arguments challenging the district court's division of her military retired pay. She argues that the district court erroneously included the nonmarital portion of her retired pay in the property division, applied the wrong valuation date, failed to use the correct formula when determining the amount of the parties' share of the retired pay, and failed to address her alternative formula proposal.

The district court has "broad discretion regarding the division of property," and its division of property "will only be reversed on appeal if the [district] court abused its discretion." *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). A district court abuses its discretion in dividing property if it resolves the matter in a manner "that is against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Division of retired pay is generally discretionary with the district

court. *Faus v. Faus*, 319 N.W.2d 408, 413 (Minn. 1982). "Appellate [courts] set aside a district court's findings of fact only if clearly erroneous, giving deference to the district court's opportunity to evaluate witness credibility. Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotations and citations omitted).

Military personnel who serve for a set number of years may retire with pay. *See* 10 U.S.C.A. §§ 3911-14, 3929 (2012) (Army officers and enlisted members). The amount of retired pay is determined by the number of years served and the rank at which the member retires. *See* 10 U.S.C.A. §§ 1409, 3961 (2012) (Army). Federal statutes carve out a portion of a veteran's retired pay that may be treated as marital property and is divisible between spouses in a dissolution, providing that state courts "may treat disposable retired pay" as marital property. 10 U.S.C. § 1408(c)(1) (2012). The term "disposable retired pay" includes gross retired pay minus certain deductions. 10 U.S.C. § 1408(a)(4)(A) (2012).

The district court used the coverture formula found in *Janssen v. Janssen*, 331 N.W.2d 752, 756 (Minn. 1983), to divide Mitchell's retired pay. In *Janssen*, the supreme court held that "a nonvested, unmatured pension [like the one at issue in this appeal] is marital property which can be divided in a marital dissolution proceeding." 331 N.W.2d at 753, 756. To calculate the marital portion of such retired pay, the supreme court adopted an approach that awards each spouse a

percentage of the retired pay "only if and when" the benefits are paid. *Id.* at 756. The supreme court held that the marital portion of a benefits payment "will be a fraction of that payment, the numerator of the fraction being the number of years (or months) of marriage during which benefits were being accumulated, the denominator being the total number of years (or months) during which benefits were accumulated prior to when paid." *Id.* (quotation omitted).

In this case, the parties were married in 1997, and dissolved the marriage in 2008. The parties entered into a Stipulation and Order Regarding Property Issues and agreed that Dillahunt should be awarded "one-half of the marital portion" of Mitchell's retired pay, but did not agree on how to determine the value of the marital portion. The district court concluded that the valuation date for the pension was the date of the Initial Case Management Conference, August 24, 2006, and applied the *Janssen* formula to Mitchell's retired pay as follows:

> To be sure, the parties were married from August 1997 to March 2008. That is 127 months. But, to determine the number of months of marriage accumulating the pension, the Court should use the valuation date—in August 2006 instead of the date of dissolution. So, the numerator of the *Janssen* formula is 108 months. The total number of months during which the benefits were accumulated prior to when paid is 240 months—or twenty years. [Mitchell] served in the U.S. Army for twenty years before retiring. So, the

> marital interest in the military pension is 108 over 240 or 45%. Under the Stipulated Order, [Dillahunt] is entitled to half of the marital interest of the military pension. Accordingly, [Dillahunt] is entitled to 22.5% of the military pension.

The district court then applied Dillahunt's 22.5% share to Mitchell's monthly retired pay of $3,696 and awarded him $831.60 per month.

Mitchell argues that, instead of applying the *Janssen* formula, the district court should have applied the "hypothetical retired pay" formula. The "hypothetical retired pay" formula that Mitchell proffers is identical to the *Janssen* formula except that, rather than using the value of the benefits when they are paid, it uses a hypothetical value calculated at some date prior to when the benefits are paid. Mitchell argues that the value of the pension should be that calculated as of the Initial Case Management Conference held on August 24, 2006, with a cost of living adjustment. Applying the "hypothetical retired pay" formula, Mitchell calculates Dillahunt's share of the retired pay at $317.90 per month, based on a value of $1,412.90 as of August 24, 2006.

In support of this argument, Mitchell cites an unpublished opinion from this court. That opinion is factually distinguishable from this case because the original judgment there included a *non-Janssen* formula for dividing military pension benefits, and that formula was never challenged. *Guggisberg v. Guggisberg*, No. A10-0562, 2011 WL 891026, at *1-5 (Minn.

App. Mar. 15, 2011), *review denied* (Minn. May 25, 2011). No such formula is found in the judgment at issue here. Further, not only is the method for dividing military retirement pay espoused by Mitchell found only in that unpublished opinion, unpublished opinions are not precedential. Minn. Stat. § 480A.08, subd. 3 (2018); *see Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993) (stating that "unpublished opinions are not precedential" and at best "can be of persuasive value").

Moreover, the relevant federal statute was amended after the unpublished opinion was filed. National Defense Authorization Act of 2018, Pub. L. No. 115-91, Title VI, § 624, 131 Stat. 1283, 1429-30 (2017). The amended statute states that it "shall apply with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation . . . that becomes final after December 23, 2016." § 624(c), 131 Stat. at 1430. Thus, if the parties' dissolution was final in 2008, the 2017 amendment to the statute would not apply. Here, however, while the dissolution was final in 2008, the division of the marital property was not finalized until 2018.

Finally, we note that the district court carefully reviewed both proposed formulas before deciding to apply the *Janssen* formula, and Mitchell has not established that any of the district court's underlying findings of fact were clearly erroneous or that the district court otherwise abused its discretion in its division of the retired pay.

II.

Mitchell contends that "[t]he District Court erred in denying [her] request for attorney fees based on [Dillahunt's] conduct and the parties' agreement."[1]

"A refusal to award attorney fees will not be reversed absent a clear abuse of discretion." *Kitchar v. Kitchar*, 553 N.W.2d 97, 104 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). Conduct-based attorney fees may be imposed "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2018). Conduct-based fees may be based on the impact that a party's behavior has had on the costs of the litigation regardless of the relative financial resources of the parties. *Dabrowski v. Dabrowski*, 477 N.W.2d 761, 766 (Minn. App. 1991). "While bad faith could unnecessarily increase the length or expense of a proceeding, it is *not* required for an award of conduct-based attorney fees under Minn. Stat. § 518.14, subd. 1." *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn. App. 2001). The requesting party bears the burden of establishing that

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[1] Minn. Stat. § 518.14, subd. 1 (2018), provides for the awarding of attorney fees that are "necessary to enable a party to carry on or contest the proceeding." Neither party has questioned whether section 518.14 also provides a substantive basis for an award of conduct-based attorney fees. *See Anderson v. Anderson*, No. A16-2006, (Minn. Aug. 6, 2018) (order) (questioning whether section 518.14 creates a substantive basis for an award of conduct-based attorney fees). For purposes of this appeal, we will assume without deciding that the statute does so.

the other party's conduct unreasonably contributed to the length or expense of the proceeding. *Id.* at 818.

In the Stipulation and Order Regarding Property Issues that followed the dissolution of the marriage, the parties agreed that "[i]n the event either party renders it necessary for the other party to seek enforcement of any of the provisions herein, the party who failed to comply with the terms of the Judgment and Decree shall be responsible for all reasonable attorney's fees and costs the other party incurred."

Mitchell requested that the district court award her conduct-based attorney fees for expenses she incurred due to Dillahunt's failure to pay two prior judgments, including a prior award of conduct-based attorney fees, and his "bad-faith litigation regarding division of [her] military retirement pay."

The district court denied Mitchell's request, determining that Dillahunt "did not unreasonably contribute to the length or expense of the proceedings." The district court acknowledged that Dillahunt "did not diligently submit an Order Dividing [Mitchell's] Military Pay to the Court," but determined that this lack of diligence did not unreasonably extend the proceedings because the parties' 2008 stipulated judgment regarding property "would not have permitted [Dillahunt] to submit an order [dividing the military pension] without [Mitchell's] agreement, and the parties' position on the military pension [was] so divisive." The district court concluded that Mitchell's allegations of "bad-faith

litigation" represented "reasonable disagreements between acrimonious parties during civil litigation."

The district court was familiar with the parties and their continuing conflict and was in the best position to evaluate whether Dillahunt's conduct unreasonably contributed to the time and expense of the proceeding. *See 650 N. Main Assn v. Frauenshuh, Inc.*, 885 N.W.2d 478, 494 (Minn. App. 2016) ("Because the district court is the most familiar with all aspects of the action from its inception through post trial motions, it is in the best position to evaluate the reasonableness of requested attorney fees." (quotation omitted)), *review denied* (Minn. Nov. 23, 2016). The district court made adequate findings and concluded that, although Dillahunt could have been more diligent in bringing his motion to divide the military retired pay, the parties' opposing positions and need to agree before submitting such a motion excused his delay.

Moreover, Mitchell has not established that the attorney-fees provision of the 2008 Stipulation and Order Regarding Property Issues applies. Because Dillahunt brought the motion to divide the military retired pay, he would be the party seeking enforcement of that provision and would not be required to pay attorney fees under the terms of the property stipulation. To the extent that Mitchell is seeking to enforce the prior judgments requiring that Dillahunt pay attorney fees, that action is not covered by the stipulation, which applies to costs incurred in enforcing the terms of that judgment and decree, and not subsequent

judgments. In sum, the district court's denial of attorney fees was within its discretion.

Mitchell also requests that this court award her "attorney fees and costs incurred in this appeal." "A party seeking attorneys' fees on appeal shall submit such a request by motion under Rule 127." Minn. R. Civ. App. P. 139.06, subd. 1. We deny Mitchell's current request because she did not file a Rule 127 motion and her request is therefore not properly before this court.

III.

Dillahunt filed a motion requesting that this court strike Mitchell's reply brief because it alleged new facts, raised new arguments that were not responsive to his brief, and attached in an addendum incomplete, misleading exhibits. In the alternative, Dillahunt requested permission to file a surreply brief.

The arguments raised in Mitchell's reply brief do not exceed the scope of Dillahunt's responsive brief and constitute permissible rebuttal, and the documents included in her addendum are part of the record on appeal. Moreover, because Dillahunt addressed the issues raised in Mitchell's reply brief in his motion to strike and his reply to Mitchell's response to the motion to strike, and because Dillahunt had an opportunity at oral argument to address the reply brief, a surreply brief was not necessary. Dillahunt's motion to strike and for permission to file a surreply brief are therefore denied.

IV.

Mitchell raises two additional arguments. She contends that the district court "erred in finding it had subject matter jurisdiction [under the relevant federal statute] to order a division of the nonmarital portion of [her] military retired pay." Mitchell also contends that "[t]he District Court abused its discretion in considering [Dillahunt's] June 12, 2018 post-hearing letter without giving [her] an opportunity to submit responsive correspondence." We disagree. Our review of the record indicates that Mitchell consented to the district court's jurisdiction, and consent is one method of establishing jurisdiction under the federal statute. See 10 U.S.C. § 1408(c)(4) (2012). Moreover, she was not prejudiced by the posthearing letter. Mitchell has not established that the district court's findings of fact regarding jurisdiction were clearly erroneous or that the district court abused its discretion regarding the letter.

Affirmed; motion denied.

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT
In the Marriage of: Thomas Dillahunt, Petitioner, and Tami Mitchell, Respondent.	Case No. 27-FA-06-4968 **Findings of Fact, Conclusion of Law, and Order** (Filed Sep. 10, 2018)

This matter came before the Honorable Bridget A. Sullivan, Judge of District Court, on Post Final Decree Hearing on June 11, 2018 at the Family Justice Center, 110 South Fourth Street, Minneapolis, County of Hennepin, State of Minnesota.

Thomas M. Dillahunt ("Father") personally appeared and was represented by Deborah Dewalt, Esq.

Tami Lynn Mitchell ("Mother") personally appeared and was represented by Christopher Zewiske, Esq.

Based upon the files, proceedings and records herein, the Court makes the following:

Findings of Fact

1. The parties were married on August 15, 1997. The parties are parents of one minor child (the "child"): [redacted], born September 23, 2002.

2. The parties appeared before the Honorable Referee David Piper for an Initial Case Management Conference on August 24, 2006.

3. The parties' marriage was dissolved by a Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree dated March 19, 2008. Judgment was entered on March 26, 2008.

4. Father filed a Notice of Motion and Motion with the Court on February 23, 2018. In that motion, Father requested that the Court:

    a. Overrule the reports from the parenting consultant dated February 7, 2018, and February 9, 2018;

    b. Remove Lisa Kallemyn [sic] as the parties' parenting consultant for good cause shown;

    c. Direct that the parties obtain a brief focused evaluation by psychologist Kirsten Lysne with a written report and recommendations on the parenting time schedule and electronic communication provisions of the governing orders;

    d. Set a hearing to review and adjust the parenting time schedule and electronic communication provisions of the governing orders;

e. Rule that the parties' division of Respondent's military pension as set out in Conclusion No. 8 of the Stipulation and Order regarding property division entered on April 2, 2008, applies to 100% of the monthly benefit to which Respondent was entitled to receive upon her retirement from the military without reductions for joint survivor annuity option, waived disability benefit, or marital pro ration;

f. Order the Petitioner's Order to Divide Military Pension;

g. Determine the amount of back military pension payments due to Petitioner;

h. Determine the amount of interest and principal due to Respondent;

i. Permit Father to satisfy the amounts due to Respondent in Paragraph 5 by an offset against the amount due to Petitioner in Paragraph 4;

j. Set a reasonable payment plan for any amounts still due to a party after the offset; and

k. Provide other relief as the Court deems just and reasonable.

5. Father filed an Amended Notice of Motion and Motion on May 25, 2018. At that time, Father also filed an Order to Divide Military Pension to effectuate the division of Respondent's military pension pursuant to the parties' property decree.

6. On May 25, 2018, Mother filed Respondent's Notice of Motion and Motion with the Court. In that motion, Mother requested that the Court:

    a. Find Father in contempt of court by failing to obey the April 3, 2017 order;

    b. Reopen the November 3, 2017 4:41 p.m. judgment against Petitioner for $4,095.12 on the grounds of mistake, and clarify that judgment was entered on January 27, 2017 and interest began accumulating on January 27, 2017;

    c. Reopen November 3, 2017 4:07 p.m. judgment against Petitioner for $4,500 on the grounds of mistake, and enter a Judgment against Petitioner in favor of Respondent for $4,500.00 dated August 28, 2017, with interest to begin accumulating on August 28, 2017;

    d. Compel Petitioner to answer all of the Interrogatories and Request for Production of Documents served on him on August 28, 2017;

    e. Limit Petitioner's interest in Respondent's military retirement pay to a percentage of Respondent's "disposable retired pay" based on Respondent's formula;

    f. Order that payment of Petitioner's portion of Respondent's military retirement does not commence until after Petitioner pays Respondent money he owes to Respondent from the January 27, 2017 and April 3, 2017 orders;

    g. Require Petitioner to reimburse Respondent for attorney fees, court costs, mediation fees, travel expenses, and other expenses;

h. Require Petitioner to reimburse Respondent for parenting consultant fees incurred in 2017-2018 related to Petitioner's unreasonable requests for reconsideration of decisions or consideration of additional information; and

i. Provide other relief that the Court deems just and equitable.

7. At the hearing on June 11, 2018, the parties argued several issues before the Honorable Bridget Sullivan: (1) whether the Court should overrule the parenting consultant's decisions from February 7, 2018 and February 9, 2018; (2) what valuation is proper for Mother's military pension plan; and (3) whether Father should pay Mother's attorney fees. Mother also requested that the Court schedule a Hop-Hernandez hearing.

Parenting Consultant

8. In 2013, the parties agreed to an order appointing a parenting consultant ("PC Order"). The parties selected Lisa Kallemeyn as the parenting consultant ("PC").

9. The PC Order provides the PC authority to decide a wide range of issues including, but not limited to, awarding compensatory time if a parent interferes with custodial or access rights, deciding parenting issues that the parties did not contemplate, altering the access schedule, and requiring independent evaluations and psychological testing of the parties, their significant others, and/or child, and imposing consequences for non-compliance with court orders and/or PC decisions. (Stipulated

Order Appointing Parenting Consultant at 1–3). The PC's authority has limits. The PC does not have "the authority to decide financial issues or modification of custody." (Id. at 1).

10. If a party disagrees with PC's decision, the Paragraph 1(d) of the PC Order requires that a party provide written notice of a court hearing date within fourteen days of receiving the PC's written decision. (Id. at 3).

11. Since her appointment, the PC has issued five reports that have been filed with the Court. In the April 2017 report, the PC identified interference with video time as "a longstanding, ongoing situation." (Report of the Parenting Consultant, dated April 20, 2017 at 1). The PC awarded Mother two days of parenting time "as a result of the missed January parenting time." (Id.).

12. In May 2017, the PC issued another report at the request of Mother. The PC awarded Mother "*an additional* day" of parenting time because Father's new wife, Jodi Dillahunt, interrupted video chat time. (Report of the Parenting Consultant, dated May 2, 2017 at 1). To be sure, the PC identified "three incidents of bad behavior: Ms. Mitchell soliciting information from [redacted] about a possible new home, Ms. Dillahunt listening in on this chat, and then interrupting video chat time." (Id. at 2). In awarding Mother additional parenting time, the PC considered that the interference with video time was a pattern, not a "one-time event." (Id. at 3).

13. In January 2018, the PC reported on a missed call on New Year's Day. Of particular note, the PC

emphasized that "[l]ate or missed phone calls have been an ongoing problem." (Report of Parenting Consultant Regarding Telephone/Facetime Contact at 2). In addressing the seriousness of these missed calls, the PC noted that she was "not going to treat violations of 'informal' arrangements as strong as the court-ordered phone calls, and am not awarding any compensatory time or additional visitation day for this instance." (Id.). She concluded by adding that "[l]ate times will be treated from now on as they were in the past."

14. On February 7, 2018, the PC awarded Mother "*an additional* day" of parenting time in response to a late phone call with Mother. Mother and the child had a phone call scheduled for 7:30 p.m. CST. (Report of the Parenting Consultant, dated February 7, 2018 at 1). The standard video time is usually 8:30 p.m. CST. They did not talk until 8:42 p.m. CST. (Id.) The PC reasoned that she would not "interfere" with missed times based on informal agreements and, so, determined that Mother missed twelve minutes rather than an hour and twelve minutes. (Id.) In concluding that Mother should be awarded additional parenting time, the PC highlighted the "longstanding and ongoing acrimony between the parties" and that "[t]his incident occurred very close to [the PC's] previous report." (Id. at 2).

15. Shortly after the February 2018 report, Father asked the PC to reconsider her decision and provided the PC with additional information. The PC issued a supplement report on February 9, 2018. Again referencing the "long history of animosity toward each [party]," the PC emphasized that

"strict guidelines and consequences" were necessary. (Supplemental Report of Parenting Consultant, dated February 9, 2018 at 1). After considering the new information, the PC maintained her decision.

16. On February 23, 2018, Father filed a Notice of Motion and Motion that included notice of a court hearing date on June 11, 2018.

History of the Military Pension

17. Mother served in the United States Army from October 1, 1996 to October 1, 2016. She has the rank of Major and pay grade O-4. After her retirement in October 2016, Mother received her first payment of her military pension in November 2016. That gross amount of that payment was $3,696.00 per month. Mother also receives $1,534 per months [sic] in disability compensation. That disability compensation is not deducted from her military pension payments.

18. In January 2017, the parties agreed to modify Mother's child support obligations based on Mother's monthly income of $3,696, which is the entirety of Mother's military pension payments. Mother's child support obligation was set at $387 per month.

19. At the hearing, Mother stated that her disability rating on August 24, 2006, was forty percent. She also stated that her disability rating was currently ninety percent.

20. In a letter dated January 12, 2017, the Department of Veterans Affair [sic] informed Mother about her disability rating: 0% assigned for degenerative

arthritis, status post fractures, index and long finger, left hand, 10% assigned for degenerative arthritis, right wrist, 40% assigned for temporomandibular joint degeneration with bruxism, 10% assigned for urticarial, 30% assigned for insomnia disorder, 0% assigned for migraine headaches, 0% assigned for degenerative arthritis with iliotibial band friction syndrome, right knee, 0% assigned for menorrhagia with pelvic pain and dyspareunia, 0% assigned for sprain, left ankle, 10% assigned for hypothyroidism, 10% assigned for thoracic strain, 0% for allergic rhinitis, and 0% tendonitis, right ankle.

21. In a Rating Decision by the Colorado Division of Veterans Affairs dated September 28, 2017, the Department of Veterans Affairs stated that (1) service connection for plantar fasciitis of the right foot is granted with an evaluation of 30 percent; (2) evaluation of right knee degenerative arthritis with patellofemoral syndrome is increased from 0 percent disabling to 10 percent; (3) evaluation of right ankle tendonitis is increased from 0 percent disabling to 10 percent; (4) evaluation of menonhagia is increased from 0 percent disabling to 10 percent; (5) evaluation of hypothyroidism is continued at 10 percent disabling; and (6) a decision on alpha gal syndrome is deferred. The document provided to the Court was redacted.

22. In March 2008, the Judgment and Decree reserved the property settlement. (Judgment and Decree at 20). A month later, the parties agreed to divide Respondent's interest in a U.S. Army Retired Pay Plan. Paragraph 10 of the Findings of Fact of the

Stipulation and Order Regarding Property Issues (Stipulated Order) stated:

> 10. Each of the parties have retirement accounts in his or her own name. The description and value thereof is set forth in Exhibit A attached hereto. In addition, Respondent has an interest in a US Army Retired Pay Plan which the parties agree should be divided so as to award to Petitioner one-half of the martial portion of said plan. (Stipulation and Order Regarding Property Issues, dated April 2, 2008 at 2).

23. Father was responsible for drafting the Order Dividing Respondent's Military Pay. The Stipulated Order states:

> 6. **MILITARY RETIRED PAY**. Petitioner's attorney shall be responsible for the drafting of an Order Dividing Respondent's Military Pay. The Order Dividing Respondent's Military Pay shall be sent to Respondent's attorney for approval as to form and content prior to submitting it to the Court for entry. The Court shall specifically retain jurisdiction over the parties to establish or maintain the Order Dividing Military Pay. (Id. at 8).

24. Prior to Father's motion, the parties did not submit an Order to Dividing Respondent's Military Pay. When Father filed his amended motion on May 25, 2018, he filed a Military Retire Pay Order.

Contempt

25. On May 17, 2018, the Court signed an Order to Show Cause and Appear that ordered Father to appear at the hearing on June 11, 2018, and to show cause as to why the Court should not enter an Order finding him in Contempt of Court. Father was served a copy of the Order to Show Cause and Appear on May 18, 2018. Mother did not file the Order to Show Cause and Appear until June 21, 2018.

26. At the June 11, 2018 hearing, the parties requested a contempt hearing. An Order to Show Cause hearing was set for July 24, 2018. On July 19, 2018, the parties agreed to cancel the Order to Show Cause hearing because Father has paid the attorney fee judgment in full. The Court canceled the hearing.

Conclusions of Law

Parenting Consultant's Decision

27. The standard for reviewing parenting consultant decisions is unsettled law. Kerr v. Kerr, 2013 WL 11859116 at *4 (Minn. Ct. App. May 6, 2013) ("Appellate courts have not yet considered the amount of deference, if any, that a district court must provide to a parenting consultant's decision implicating a child's best interests."). Even when the parties agree to a parenting consultant, a district court maintains the authority to decide parenting time. Minn. Stat. § 518.175. A court shall modify a parenting time order if it is in the child's best interest and does not change their primary

residence. Minn. Stat. § 518.175, subd. 5. This Court agrees with the Minnesota Court of Appeals in Kerr. When reviewing the PC's decision, the Court "must ensure that such decisions are in the best interests of the children." Id. at *5 (citing Kaiser v. Kaiser, 186 N.W.2d 678, 683 (Minn. 1971)).

28. In Minnesota, it is settled law that the party seeking modification of a previous order granting parenting time bears the burden of establishing that the modification is in the child's best interest. Griffin v. Van Griffin, 267 N.W.2d 733, 735 (Minn. 1978). Here, although Father is appealing the PC's decision, compensatory parenting time would modify the previous order granting parenting time. Accordingly, this Court finds that Mother must show that a modification is in the child's best interest.

29. After review of record in this case, including the PC's reports, this Court finds that the PC's decision is in the best interest of the child for two reasons. First, a lack of "stringent consequences" could harm the child's relationship with both parties. As the PC noted, the parties have a "long history of animosity towards each other." The PC reasoned that, "if [she] did not follow through with a consequence," the problem between the parties would continue to get worse. In her January report, which provides context for the PC's February decision, the PC emphasized that it is time to "assure that Dylan and her mother maintain a close relationship."

30. Second, the Court considers the weight of the PC's recommendation in favor of the child's best

interest. In determining whether the PC's decision is in the best interest of the child, this Court considers "the recommendation of the parenting consultant as a third party neutral." To be sure, Minnesota law does not require that the Court give that decision deference. Kerr, 2013 WL 11859116 at *5. But, in a case where the PC has extensive history with the parties—dating back to 2013 and five reports—the Court finds that PC's experience with the parties provides her context and, accordingly, the Court weighs that experience favorably.

31. In sum, the Court finds that the PC's decision to award Mother one compensatory day of parenting time is in the best interest of the child. As a result, the Court finds that it will not reverse the PC's decision.

Removal of Parenting Consultant

32. This Court first determines the standard for the removal of a parenting consultant. Petitioner argues that a court has the authority to remove a PC based on the best interests of the child or for other legitimate non-best-interests related reasons. Respondent contends that a parenting consultant can only be removed for good cause. The Court agrees with Petitioner.

33. Under Minnesota law, a court may remove a parenting consultant either in the best interest of the child or for "legitimate non-best-interests-related reasons." In Szarzynski v. Szarzynsk [sic], the court considered the standard for removal of a parenting consultant. 732 N.W.2d 285 at 293 (Minn. Ct. App.

2007). Like this case, the petitioner in Szarzynski argued that the standard was good cause. The Minnesota Court of Appeals found that "good cause" applied to "parenting-time expediter[s]," which are "creature[s] of statute." Id. In contract [sic], nonstatutory parenting consultants are "distinct" from those statutory "parenting-time expediters." Id. The Szarzynski court concluded that a parenting time consultant may be removed for either "good cause" or in the best interest of the child. Id. at 293–94 ("Because there can be legitimate reasons to remove or replace a parenting consultant that do not directly bear on the child's best interest (*e.g.*, illness of the consultant), to preclude a court from removing a parenting consultant for legitimate non-best-interest-related reasons would be absurd.").

34. Petitioner's position, however, does not justify the removal of the PC because he does not prove that removal of the PC would satisfy either of those reasons. Father contends that the PC's decision is "the result of a pattern of the PC's bias against Petitioner and unfair tendency to make decisions based on insufficient information resulting in decisions that are not in the child's best interest." To support his position that the PC is unfair, Father points to two statements in the PC's January 2018 report. The first is the PC's statement that "[i]t is time to start loosening some of the phone call requirements." The second is her statement that she is "not going to treat violations of 'informal' arrangements as strongly as the court-ordered phone calls, and [is] not awarding any compensatory time or additional visitation day for this instance." The Court disagrees. Those statements do

not show that the PC is unfair. Instead, the PC's reasoning shows that her remedies are measured—rather than "overly harsh" for three reasons.

35. First, the PC is consistent in her approach to informal arrangements. In the January report, the PC was setting the parties' expectation for how she would handle violations of informal arrangements. The incident that instigated the February reports is a violation of "court-ordered times." (February 7, 2018 Report at 1). In other words, the PC expressed her willingness to be lenient with violations of informal arrangements but did not intend to extend that courtesy to violations of court-ordered times. In the February incident, Mother alleged that she lost one hour and 12 minutes of the chat time. But because the change in time—which contributed to an hour of the lateness—was based on an informal agreement, the PC declined to interfere with the informal arrangement. This is consistent with the PC's decision in the January report.

36. Second, the PC's decision is consistent with her warning in the January 2018 report. In that report, she advised the parties that "[l]ate times will be treated from now on as they were in the past." (January 18, 2018 Report at 2). In the past, the PC has awarded Mother compensatory parenting time for violations of court-ordered time. See (May 2, 2017 Report at 1). Given the acrimonious history between the parties and the PC's prior decisions, the PC alerted the parties that violations of court-ordered time could lead her to award compensatory parenting time.

37. Third, the proximity of the February 2018 incident to the January report contributed to the PC's decision about the severity of the consequence. In the February 7, 2018 report, the PC highlighted that the incident "occurred very close to [her] previous report." (February 7, 2018 Report at 2). The PC's decision to factor in the recency of the January incident was reasonable, and does not show that the PC is biased.

38. Accordingly, this Court finds that it should not remove the PC because Petitioner has not shown that removal of the PC would be in the best interest of the child or that it would serve a legitimate non-best-interest-related reason.

Father's Portion of Mother's Military Pension

39. The parties do not dispute that Respondent must pay Petitioner half of the marital portion of her military pension. Additionally, the parties agree on the following aspects about Respondent's military pension plan: (1) Respondent's Survivor Benefits Plan (SBP) premiums should not be deducted from the "gross" retired pay because Petitioner is not her beneficiary; and (2) Petitioner's interest should include a Cost of Living Adjustment. Instead, the parties disagree on the size of that Father's interest in the pension. To determine Petitioner's amount of the military pension, the Court determine [sic] the valuation date of the pension, the size of the marital portion of the pension, and the formula to divide the pension.

40. First, the valuation date is the date of the Initial Case Management Conference. The Honorable

Judge James T. Swenson issued a standing order in 2003 that stated, "The statutory valuation date in the Fourth Judicial District shall remain the Initial Case Management Conference as announced when the case management program began." This is consistent with Minnesota law. See Minn. Stat. § 518.58, subd. 1. Here, the Court held an ICMC on August 24, 2006. Accordingly, the valuation date is August 24, 2006.

41. Next, the Court considers the size of the marital portion of the military pension. Father is only entitled to "one-half of the marital portion" of the pension, as opposed to a portion of the entire pension. To determine the marital portion of the pension, the Court looks to the Uniformed Services Former Spouses Protection Act (USFSPA). 10 U.S.C. § 1408.

42. USFSPA allows a court to treat disposable retired pay "as property of the member and his spouse in accordance with the law of the jurisdiction of such court." "Disposable retired pay" is the total monthly retired pay minus certain deductions. See 10 U.S.C. § 1408(a)(4)(A). The relevant deduction here is amounts deducted from the retired pay "as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38." Id. One such required waiver is for duplicative payments, such as disability compensation, under title 35. See 38 U.S.C. § 5305.

43. Here, Mother contends that her disability compensation should not be included in the marital portion of the pension. To be sure, generally, disability compensation of a military pension is not "among

the military benefits that may be divided as marital property." Mattson v. Mattson, 903 N.W.2d 233, 241 (Minn. Ct. App. 2017); see also 10 U.S.C. § 1408(4)(A).[1] But that limitation only applies if the disability compensation is received "as a result of a waiver of retired pay." 10 U.S.C. § 1408(4)(A). To determine whether Mother's disability compensation is excluded from marital property, the Court must determine whether Mother's disability compensation is received as a result of a waiver.

44. Whether disability compensation requires a waiver is determined by the disability rating of the party. Generally, 38 U.S.C. § 5305 requires a person in the Armed Forces to waive a portion of their retired pay "equal in amount" to disability compensation. 38 U.S.C. § 5305. But, under the Concurrent Retirement and Disability Pay (CRDP), that member of the Armed Forces can avoid that waiver—and as a result is entitled to both retired pay and disability compensation. To qualify for the exemption in the CRDP, a member of the Armed Forces must have a disability rating that is higher than 50%. 10 U.S.C. § 1414(a)(2).

45. Under the CRDP, Mother is entitled to receive her retired pay and disability compensation without waiving a portion of the retired pay equal to that disability compensation. When Mother retired

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[1] Mother also argues that "***all*** court orders and property agreements requiring indemnification for reduction in the marital portion of retired pay due to waiver to receive VA disability compensation" are void. Her argument does not apply to the Stipulated Order because, as discussed above, the Stipulated Order does not require that Mother pay Father the portion of the pension offset by a waiver received for disability compensation.

from the Armed Forces, her disability rating exceeded 50%. There is no dispute that Mother receives her retired pay and disability compensation without an offset.

46. But Mother argues that Father should not benefit from the increase in her disability rating. In 2006, Mother's disability rating was 40%. So, if Mother had retired in 2006, she would have had to waive a portion of her retired pay equal to her disability compensation. Although Mother's disability rating is different in 2018 than it was in 2006, it is the amount of disability compensation that Mother actually receives—not the amount she theoretical [sic] could have received in 2006—that is excluded by federal law. Although, as Mother states, she had "the right on August 25, 2006 to make the unilateral election" for disability compensation, she did not make such an election on that date. Captain Crane's assessment is consistent with this conclusion. Accordingly, this Court finds that Mother's disability compensation should not be excluded from the marital portion of the pension.

47. At the hearing, Mother raised a concern that the disability rating could be reassessed and, as a result, her disability rating could drop below 50%. If that were to happen, Mother would have to waive a portion of her retired pay equal to her disability. If such an event were to occur, Mother could request that this Court deduct the offsetting waiver amount from her payment.

48. Because Mother did not designate Father as her SBP beneficiary, the SBP premiums deducted from Mother's military retire pay are not deductible

from Mother's gross retired pay for the purposes of determining Father's interest in her military retire pay.

49. Finally, now that the Court has established the valuation date of the pension and the marital portion of the pension, the Court must determine the formula to use to divide the pension. Mother contends that the Court should use the "hypothetical retired pay" formula in the USFSPA. Father argues that the Court should use the coverture formula from Janssen. The Court finds that the coverture formula should be used here.

50. The "hypothetical retired pay" formula was added to the USFPA [sic] in 2017. Under the "hypothetical retired pay" formula, in dissolution cases that occur prior to a member's retirement, the 2017 version of the USFSPA requires that the total monthly retired pay is "the amount of retired pay to which the member would have been entitled using the member's retired pay base and years of service on the date of the decree of divorce" including a cost-of-living adjustment. 10 U.S.C. § 1408(a)(4)(B).[2]

51. To be sure, if the parties' facts were set in 2018 rather than 2008, the "hypothetical retired pay" formula would govern. But because the USFSPA was amended between the date of the final decree and Father's motion, this Court considers whether the amended version of USFSPA controls. It concludes that it does not.

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[2] There is a different formula for retired pay for non-regular service, but neither party argues that chapter 1223 applies to Mother. See 10 U.S.C. § 1408(a)(4)(B)(ii); see also 10 U.S.C. § 1223.

52. The amended version of the USFSPA, which requires application of the "hypothetical retired pay" formula, does not apply to Mother's pension because the parties agreed on the division of the pension in 2008 by stipulation. True, Father never provided the Court with an Order Dividing Military Pay. But stipulations are binding on the parties. Furthermore, the valuation date of the military pension is August 24, 2006. Because the USFSAP [sic] did not require the "hypothetical retired pay" formula until over a decade after the valuation date and stipulation of the parties, this Court finds that it does not have to apply that formula.

53. Because USFSPA did not require the "hypothetical retired pay" formula in 2006, the Court uses the coverture formula. Under that formula, when the present value of a pension is uncertain, then a court may "[a]pportion[ ] the future benefits only if and when they are paid" using the formula in Janssen v. Janssen. 331 N.W.2d 752, 756 (Minn. 1983). The Janssen formula is the number of months of marriage during which benefits were being accumulated over the total number of months during which benefits were accumulated prior to when paid. Id.

54. Before the Court uses the Janssen formula, it must determine whether the present value of the pension is uncertain. The Court concludes that the value of the pension on August 24, 2006 was uncertain for two reasons. First, on August 24, 2006, the parties could not have valued Mother's pension with a "hypothetical retired pay" formula because that formula did not exist. Second, the

parties did not know what Mother's disability rating would be when she retired. As the facts here show, Mother's disability rating could fluctuate based on developments after August 2006. As Mother concedes, some of her disability ratings were set for review by the Department of Veteran Affairs because they were "temporary" conditions. In sum, the parties could not have determined Mother's disability rating at retirement in August 2006. Because Mother's disability rating was uncertain, the present value of the military pension was uncertain. As discussed above, the marital portion of Mother's pension depends on Mother's disability rating. Accordingly, the Court finds that the value of the pension on August 24, 2006, was uncertain.

55. To be sure, the parties were married from August 1997 to March 2008. That is 127 months. But, to determine the number of months of marriage accumulating the pension, the Court should use the valuation date—in August 2006—instead of the date of dissolution. So, the numerator of the Janssen formula is 108 months. The total number of months during which the benefits were accumulated prior to when paid is 240 months—or twenty years. Mother served in the U.S. Army for twenty years before retiring. So, the marital interest in the military pension is 108 over 240 or 45%. Under the Stipulated Order, Father is entitled to half of the marital interest of the military pension. Accordingly, Father is entitled to 22.5% of the military pension.

56. In sum, this Court finds that Father is awarded 22.5% of Mother's military pension, or $831.60 per month, in addition to cost-of-living adjustments.

Retroactive Payments

57. Mother contends that Father is not entitled to retroactive payments of his marital portion of the pension for two reasons. The first reason is that the statute of limitations bars Father's action. The second is that the doctrine of laches precludes retroactive payments.

58. The statute of limitations does not bar retroactive payments to Father. Minn. Stat. § 541.04 mandates that "[n]o action shall be maintained upon a judgment or decree of a court of the United States, or of any state or territory thereof, unless begun within ten years after the entry of such judgment." Minn. Stat. § 541.04. Judgment was entered in this case on March 26, 2008. But, the payment of the military pension was reserved in the dissolution. Instead, the parties agreed to the military pension by stipulation filed on April 2, 2008. Using either date, Father had until at least March 26, 2018, to fall within the ten-year period of Minn. Stat. § 541.04. Because Father filed his motion on February 23, 2018 and Mother was served with a copy of the Notice of Motion on February 27, 2018, the Court finds that Father began this action before within ten years of judgment.

59. Laches is "such negligence in bringing an action or otherwise asserting one's right as will preclude him from obtaining equitable relief." Corah v. Corah, 75 N.W.2d 465, 357 (Minn. 1956). "It is well

settled in [Minnesota] that a party is barred by laches when the delay is so long and the circumstances of such character as to establish a relinquishment or abandonment of rights." Id.

60. Father argues that laches does not apply if the delay caused no harm or prejudice to the other party. But, Father does not respond to Mother's position that Father's delay prejudiced her in two ways. The first is that the she has already paid federal and state income taxes on the military pension payments from 2016 through 2017. To be sure, Mother is prejudiced if she had to make retroactive payments of the military pension without adjustments for federal and state income taxes that she paid on Father's portion.

61. Mother's second, and more compelling, reason is that Mother pays child support based on an income that assumes that she receives the entirety of her monthly pension. At the time that the parties agreed to the child support payments in January 2017, Father knew about Mother's pension payments. The parties used those pension payments as Mother's income. Father has received child support payments in the amount of $387 per month. If Father received his portion of the military pension, Mother's income would be lower and, as a result, her child support obligations would also decrease. Because Mother paid higher child support amounts from October 1, 2016 through 2017 than she would have if Father received his portion of the pension, this Court finds that Mother would be prejudiced by retroactive payments.

62. Because Mother would be prejudiced by retroactive payments of Father's portion of the military pension, the Court finds that the doctrine of laches precludes retroactive payments.

63. The extent to which Father's negligence forfeits his rights is limited to the payments of the military pensions in 2016 through 2017. During that time, Mother paid federal and state taxes and paid higher child support because Father did not submit an order to divide the military pension. Father knew of Mother's pension payments. He does not present a reason for his delay. But, it would be unfair for this Court to determine that Mother must make payments on Father's marital portion of the military pension beginning in 2018. Mother is not prejudiced by an outcome because, as Father noted in the hearing, Mother can motion this Court to modify child support.

64. In addition to an award of Mother's military pension, Father also requests that this Court award the Father interest on the pension payments from 2016 through 2018. Minn. Stat. § 549.09 adds interest from the time of the award until judgment is finally entered to the award. Minn. Stat. § 549.09, subd. 1(a). The Minnesota Court of Appeals found "no reason" that this interest would not apply to an award of money in a dissolution action. Riley v. Riley, 385 N.W.2d 883, 888 (Minn. Ct. App. 1986). But, because this Court finds that retroactive payments are precluded by the doctrine of laches, there is no retroactive payments to accrue interest.

Psychological Evaluation

65. When the parties agreed to a PC in 2013, that agreement provided the PC with the authority to decide whether to "[r]equire independent and psychological testing of the parties, their spouses/significant others, and/or child." In his motion, Father requests that this Court circumvent the PC's authority by ordering a brief focused evaluation and written report by psychologist Kirsten Lysne. Mother argues that Father must present his request to the PC before the Court can decide it.[3] The Court agrees with Mother.

66. The PC Order requires the parties to "present [disputed issues] to the PC for resolution." Father did not use the PC to resolve his dispute over the brief focused evaluation and written report. Courts favor stipulation "as a means of simplifying and expediting litigation, and to bring resolution to what frequently has become an acrimonious relationship between the parties." Shirk v. Shirk, 561 N.W.2d 519, 521 (Minn. 1997). This Court will not undermine the "sanctity of binding contracts" by circumventing the process that the parties agreed upon. Id. Accordingly, Father's request for a brief focused evaluation with a written report should be denied by [sic] Father did not attempt to bring the issue to the PC prior to raising it before the Court.

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[3] To support her position, Mother references a quote from Grodnick v. Velick that the Court was unable to find. No. A 1241382, 2012 WL 4856202 (Minn. Ct. App. Oct. 15, 2012). The quotation does not appear in Grodnick nor does it appear on a search of the quotation in Westlaw.

Conduct-Based Attorney Fees

67. Minn. Stat. § 518.14 allows a district court to award attorney fees and costs against a party "who unreasonably contributes to the length or expense of the proceedings." These conduct-based fees may be awarded "based on the impact a party's behavior has had on the costs of the litigation regardless of the relative financial resources of the parties." Dabrowski v. Dabrowski, 477 N.W.2d 761, 766 (Minn. Ct. App. 1991).

68. After considering the record and history of this case, the Court finds that Father did not unreasonably contribute to the length or expense of the proceedings. The parties appeared before the Court because of Father's disagreement with the PC's decision. Because the PC Order provides for district court review, Father's request for such a hearing does not "unreasonably" contribute to the length or expense of the proceedings.

69. Mother contends that she should receive conduct-based fees because of [sic] Father contributed to the length and expense of the proceedings related to the military pension. To be sure, Father did not diligently submit an Order Dividing Respondent's Military Pay to the Court. But the Stipulated Order also states that such an order "shall be sent to Respondent's attorney for approval as to form and content prior to submit it to the Court for entry." As the parties stated at the hearing, the parties have had discussions about the size of Father's portion of the military pensions over the past few years. The parties have been unable to reach an agreement outside of court. Because the

Stipulated Order would not have permitted Father to submit an order without Mother's agreement, and the parties' position on the military pension is so divisive, this Court finds that Father did not unreasonably contribute [sic] the length and expense of the proceedings related to the military pension.

70. The remainder of Mother's reasons for conduct-based fees do not support a finding that Father "unreasonably contribute[d] to the length or expense of the proceedings." Instead, Mother's allegations represent reasonable disagreements between acrimonious parties during civil litigation. Accordingly, this Court finds that Father's actions did not unreasonably contribute to the length or expense of the proceedings and, as a result, Mother is not entitled to conduct-based fees.

NOW, THEREFORE, based upon the files, proceeding herein, the Court makes the following:

Order

1. Father's motion to overrule the Report of Parenting Consultant dated February 7, 2018 and the Supplemental Report of Parenting Consultant dated February 9, 2018 is DENIED.

2. Father's motion to remove Lisa Kallemyn [sic] as the parties' parenting consultant is DENIED.

3. Beginning July 1, 2018, Father shall be awarded 22.5% of Mother's military pension monthly payments, including cost-of-living adjustments.

4. Father's motion to award Father with retroactive payments of his portion of the military pension

from October 1, 2016, along with judgment rate interest, is DENIED.

5. Father's motion for an order directing the parties to obtain a brief focused evaluation by psychologist Kirsten Lysne with a written report is DENIED.

6. Mother's request for conduct-based fees covering attorney fees, travel expenses, and other expenses is DENIED.

7. Mother's request for reimbursement of parenting consultant fees incurred in 2017-2018 related to Father's request for reconsideration of the PC's decision is DENIED.

8. All other provisions of prior and consistent orders shall remain in full force and effect.

9. **Attorneys Using E-Filing**. When e-filing into this case, attorneys shall email a courtesy copy to 4thJudgeBurnsStaff@courts.state.mn.us.

10. **Service**. Service of a copy of this order shall be made upon pro-se parties by first class U.S. mail at their last known addresses, or to attorneys by e-service, which shall be due and proper service for all purposes.

It is so ordered . . .

Dated: September 10, 2018

Bridget A. Sullivan
Judge of District Court

STATE OF MINNESOTA

IN SUPREME COURT

A18-1651

In re the Marriage of:

Thomas M. Dillahunt,

Respondent,

vs.

Tami L. Mitchell, f/k/a Tami L. Dillahunt,

Petitioner.

ORDER

(Filed Sep. 17, 2019)

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Tami L. Mitchell for further review be, and the same is, denied.

Dated: September 17, 2019

BY THE COURT:

/s/ Lorie S. Gildea
Lorie S. Gildea
Chief Justice

1. 10 U.S.C. § 1407 (2006) provides:

10 U.S.C. § 1407. Retired pay base for members who first became members after September 7, 1980: high-36 month average

(a) Use of Retired Pay Base in Computing Retired Pay.—The retired pay or retainer pay of any person entitled to that pay who first became a member of a uniformed service after September 7, 1980, is computed using the retired pay base or retainer pay base determined under this section.

(b) High-Three Average.—[T]he retired pay base or retainer pay base of a person under this section is the person's high-three average determined under subsection (c). . . .

(c) Computation of High-Three Average for Members Entitled to Retired or Retainer Pay for Regular Service.—

(1) General rule.—The high-three average of a member entitled to retired or retainer pay . . . is the amount equal to—

(A) the total amount of monthly basic pay to which the member was entitled for the 36 months (whether or not consecutive) out of all the months of active service of the member for which the monthly basic pay to which the member was entitled was the highest, divided by

(B) 36.

2. Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (2017) provides:

10 U.S.C. § 1408. Payment of retired or retainer pay in compliance with court orders

(a) Definitions.—In this section:

(1) The term "court" means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and

(D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved

property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

. . .

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) (A) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which—

. . .

(iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(B) For purposes of subparagraph (A), in the case of a division of property as part of a final decree of divorce, dissolution, annulment, or legal separation that becomes final prior to the date of a member's retirement, the total monthly retired pay to which the member is entitled shall be—

(i) in the case of a member not described in clause (ii), the amount of retired pay to which the member would have been entitled using the member's retired pay base and years of service on the date of the decree of divorce, dissolution, annulment, or legal separation, as computed under section 1406 or 1407 of this title, whichever is applicable, increased by the sum of the cost-of-living adjustments that—

(I) would have occurred under section 1401a(b) of this title between the date of the decree of divorce, dissolution, annulment, or legal separation and the time of the member's retirement using the adjustment

provisions under section 1401a of this title applicable to the member upon retirement; and

(II) occur under 1401a of this title after the member's retirement; or

. . .

(5) The term "member" includes a former member entitled to retired pay under section 12731 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) Effective Service of Process.—For the purposes of this section—

. . .

(c) Authority for Court To Treat Retired Pay as Property of the Member and Spouse.—

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution,

annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

3. 10 U.S.C. § 1409 (2006) provides:

10 U.S.C. § 1409. Retired pay multiplier

(a) Retired Pay Multiplier for Regular-Service Nondisability Retirement.—In computing—

(1) the retired pay of a member of a uniformed service who is entitled to that pay . . .—

. . .

the retired pay multiplier (or retainer pay multiplier) is the percentage determined under subsection (b).

(b) Percentage.—

(1) General rule.—Subject to paragraphs (2) and (3), the percentage to be used under subsection (a) is the product (stated as a percentage) of—

(A) 2 $^1/_2$, and

(B) the member's years of creditable service (as defined in subsection (c)).

. . .

(c) Years of Creditable Service Defined.—In this section, the term "years of creditable service" means the number of years of service creditable to a member in computing the member's retired or retainer pay (including $^1/_{12}$ of a year for each full month of service that is in addition to the number of full years of service of the member).

4. 130 STAT. 2164 PUBLIC LAW 114–328, Section 641 (Dec. 23, 2016) provides:

SEC. 641. USE OF MEMBER'S CURRENT PAY GRADE AND YEARS OF SERVICE AND RETIRED PAY COST-OF-LIVING ADJUSTMENTS, RATHER THAN FINAL RETIREMENT PAY GRADE AND YEARS OF SERVICE, IN A DIVISION OF PROPERTY INVOLVING DISPOSABLE RETIRED PAY.

(a) IN GENERAL—Section 1408(a)(4) of title 10, United States Code, is amended—

(1) by redesignating subparagraphs (A), (B), (C), (D) as clauses (i), (ii),(iii),(iv), respectively;

(2) by inserting "(A)" after "(4)";

(3) in subparagraph (A), as designated by paragraph (2), by inserting "(as determined pursuant to subparagraph (B)" after "member is entitled"; and

(4) by adding at the end the following new subparagraph:

"(B) For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be—

"(i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by

"(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the

court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.".

(b) APPLICATION OF AMENDMENTS.—The amendments made by subsection (a) shall apply with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation involving a member of the Armed Forces to which section 1408 of title 10, United States Code, applies that becomes final after the date of the enactment of this Act.

5. Minnesota Statute 518.003 (2006) provides:

518.003 DEFINITIONS.

Subdivision 1. **Scope.**

For the purposes of this chapter and chapter 518A, the following terms have the meanings provided in this section unless the context clearly requires otherwise.

Subd. 3b. **Marital property; exceptions.**

"Marital property" means property, real or personal, including vested public or private pension plan benefits or rights, acquired by the parties, or either of them, to a dissolution, legal separation, or annulment proceeding at any time during the existence of the marriage relation between them, or at any time during which the parties were living together as husband and wife under a purported marriage relationship which is annulled in an annulment proceeding, but prior to the date of valuation under section 518.58, subdivision 1.

All property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses in a form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. Each spouse shall be deemed to have a common ownership in marital property that vests not later than the time of the entry of the decree in a proceeding for dissolution or annulment. The extent of the vested interest shall be determined and made final by the court pursuant to section 518.58. If a title interest in real property is held individually by only one spouse, the interest in the real property of the nontitled spouse is not subject to claims of creditors or judgment or tax liens until the time of entry of the decree awarding an interest to the nontitled spouse. The presumption of marital property is overcome by a showing that the property is nonmarital property.

"Nonmarital property" means property real or personal, acquired by either spouse before, during, or after the existence of their marriage, which

(a) is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse;

(b) is acquired before the marriage;

(c) is acquired in exchange for or is the increase in value of property which is described in clauses (a), (b), (d), and (e);

(d) is acquired by a spouse after the valuation date; or

(e) is excluded by a valid antenuptial contract.

6. Minnesota Statute 518.58 (2006) provides:

518.58 DIVISION OF MARITAL PROPERTY.

Subdivision 1. **General.**

Upon a dissolution of a marriage, an annulment, or in a proceeding for disposition of property following a dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property and which has since acquired jurisdiction, the court shall make a just and equitable division of the marital property of the parties without regard to marital misconduct, after making findings regarding the division of the property. The court shall base its findings on all relevant factors including the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party. The court shall also consider the contribution of each in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker. It shall be conclusively presumed that each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife. The court may also

award to either spouse the household goods and furniture of the parties, whether or not acquired during the marriage. The court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference, unless a different date is agreed upon by the parties, or unless the court makes specific findings that another date of valuation is fair and equitable. If there is a substantial change in value of an asset between the date of valuation and the final distribution, the court may adjust the valuation of that asset as necessary to effect an equitable distribution.

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT

Thomas M. Dillahunt,

Petitioner,

vs.

Tami L. Dillahunt n/k/a Mitchell

Respondent.

Transcript of The Proceedings

Court File No. 27FA-06-4968

The above-entitled matter came before the Honorable Bridget Sullivan, Judge of District Court, at the Government Center, Minneapolis, Minnesota, on June 11th, 2018.

* * * *

APPEARANCES

Deborah Dewalt, Attorney at Law, appeared on behalf of Petitioner;

Christopher Zewiske, Attorney at Law appeared on behalf of the Respondent, who was personally present.

* * * *

[2] * * * PROCEEDINGS * * *

THE CLERK: This is the case in the marriage of Thomas M Dillahunt and Tami Lynn Mitchell

case number 27FA064968, parties please note your appearances.

THE COURT: Okay.

PETITIONER: Thomas Dillahunt.

MS. DEWALT: My name is Deborah Dewalt and I'm here on behalf of Mr. Dillahunt.

MR. ZEWISKE: Christopher Zewiske, Z-E-W-I-S-K-E, here on behalf of the respondent, Tami Mitchell, who is seated – present and seated to my left.

THE COURT: Okay. Who –

RESPONDENT: Tami –

THE COURT: Are you?

RESPONDENT: Tami Mitchell.

THE COURT: Sorry, didn't mean to interrupt you.

RESPONDENT: That's okay.

MR. ZEWISKE: Good morning, Your Honor.

RESPONDENT: Good morning.

THE COURT: Hang on a second. So, all right. I think this was the – Mr. Dillahunt's motion. And [3] obviously you filed a response of motion. And then there was – you filed the motion –

RESPONDENT: Yes, Your Honor.

THE COURT: I guess I'm just trying to figure out who's going to –

MS. DEWALT: We should start, Your Honor.

THE COURT: That's what I thought.

MR. ZEWISKE: We have no objection to that.

THE COURT: And –

MR. ZEWISKE: It's their –

THE COURT: He's representing –

MR. ZEWISKE: Motion.

THE COURT: You, right? Okay. Just want –

MR. ZEWISKE: Yes.

THE COURT: To make that clear. Okay. Go ahead.

MS. DEWALT: Well, Your Honor, we are here today on two sets of issues.

THE COURT: Yes.

MS. DEWALT: One is related to the parties daughter [redacted] who's going to be 16 in September and the other is related to the property issue and I would like to start with the property issue.

And one thing that this court probably has noticed is, is this has been a very litigious case.

[4] THE COURT: Oh, yeah, it's –

MS. DEWALT: There have been –

THE COURT: Think it's probably –

MS. DEWALT: On –

THE COURT: Case I've seen since I've been doing this for the last 7 months.

MS. DEWALT: Motions brought nearly every year by Ms. Mitchell and on this particular issue, Your Honor, I believe that Ms. Mitchell is using a technique which is called "flooding," and what that means, Your Honor; on the table in front of me in this red folder are the motion papers which my client has filed.

And they are – consist of his affidavit, a memorandum of law, an affidavit of – a one or two page affidavit from his wife, and an affidavit from our expert Mr. Tom Use [sic], who is I believe in the twins area – twin cities area, recognized as our top pension expert.

On the other side, in this blue folder, Your Honor, are the submissions that we have received from Ms. Mitchell including, five days ago, a reply affidavit. It asks for new relief and raises new facts which we, under the rules, have no opportunity to respond to unless this court permits a –

THE COURT: Mm-hmm.

[5] MS. DEWALT: A response.

THE COURT: Mm-hmm.

MS. DEWALT: Or strikes the motions. So in this context, Your Honor, the parties have most of the litigation in the last 10 years has had to do with the party's child, [redacted].

There have been things –

THE COURT: I can see that.

MS. DEWALT: That have been delayed because of that. Ms. Mitchell up until recently was employed by the U.S. army. She's a lawyer, I believe. She spent time in the criminal division.

My client is the sole bred [sic] winner for his family. He's been employed managing various departments at CostCo [sic] and currently manages a Taco Bell.

So the little disparity in economic resources. So we are here today asking the Court to approve the order to divide military pension, which Mr. Use has drafted and are some basic facts that are important for the Court to know.

The parties were married for 10 years. Ms. Mitchell retired about 10 years later when she had 20 years with the military. She retired and is receiving, as of September 1st, 2017, a pension benefit of $3,696.

[6] In addition, she is receiving a VA disability benefit of $1,534. There is no reduction in the military pension benefit for the disability benefit. There is no disagreement that Ms. Dillahunt – or Ms. Mitchell is entitled to the entire VA disability benefit and there is no disagreement that that disabilities underlying that

benefit include some disabilities that occurred during the marriage and some that occurred after the marriage, okay?

So really what's the issue – at issue, is the division of this $3,696 pension benefit.

THE COURT: Can I ask you, why wasn't this all decided as a part of the judgment and decree?

MS. DEWALT: Well, Your Honor, it was. The judgment and decree says that Mr. Dillahunt is entitled to 1 half of the marital portion of the pension. And there were some preliminary discussions about an order.

There was never any order entered, as far as I can tell. There was never any final language agreed upon. And while it is certainly best practices among family lawyers for orders to divide pensions to be done within a certain period of time of time after the decree, the reality, Your Honor, is that sometimes it's not done.

And I have assisted people with drafting QDROs [7] that were 15, 20, years after entry of the decree. Some lawyers are better at implementation, some clients are better at implementation.

What is clear is this – this court has continuing jurisdiction over the division of this asset.

THE COURT: Okay.

MS. DEWALT: Okay? So here's what the problem is with the parties is that the language of the

decree is it exactly what I said. Fifty percent of the marital portion of the military pension.

In Minnesota, that language is susceptible of a particular meaning because of the Janssen case, which says; if you have an unvested pension, you use the coverture formula. So you take the total number of the years of service, as the bottom of a fraction.

The top of the fraction is the total number of years of the marriage, times the pension benefit when it's received, times the percentage awarded to the other party.

That is the order which Mr. Use [sic] has drafted. Now, there is an issue as to when – what is the marital portion and we would acknowledge, Your Honor, that there are 3 possible interpretation [sic] of that.

One would be the date of the divorce, which would [8] be March – just a minute I have it here in my notes; March 26, 2008. Another date, the one – the statutory date, would be September 9th, 2007, and –

THE COURT: What do you mean statutory date?

MS. DEWALT: Pretrial conference. The –

THE COURT: Okay.

MS. DEWALT: Day of –

THE COURT: Got it.

MS. DEWALT: The first –

THE COURT: Got it, got it.

MS. DEWALT: Scheduled pretrial –

THE COURT: Got it. I'm sorry.

MS. DEWALT: Conference. And the third date would be the date of the ICMC. And there is no evidence before this court as to what was in the ICMC order. So technically, that would be [sic] put us back to the pretrial date. But it doesn't –

THE COURT: You need to, like, you know, no comments from them.

MS. DEWALT: For the purpose of my argument, Your Honor, Mr. Dillahunt would accept which ever those dates that the Court –

THE COURT: Okay.

MS. DEWALT: Finds governs those dates, all right? That isn't the arena of big dispute.

[9] THE COURT: Okay.

MS. DEWALT: What is in dispute, Your Honor, is Ms. Dillahunt wants this court to reduce Mr. Dillahunt's 50 percent for a disability benefit, for the disabilities attributable to the time of the marriage, even though she's actually receiving VA disability benefits for them.

THE COURT: Help me understand that a little bit.

MS. DEWALT: Pardon?

THE COURT: I'm not quite sure I understand what your characterization of her argument is. She's saying her –

MS. DEWALT: She's saying –

THE COURT: Half of the – of the retirement, of her pension should be reduced because of a disability she suffered during the marriage.

MS. DEWALT: Correct.

THE COURT: Okay.

MS. DEWALT: Even though, in actuality, she's getting the – 100 percent of the disability –

THE COURT: Right.

MS. DEWALT: Benefit of 100 percent of all of her disability.

THE COURT: Got that.

[10] MS. DEWALT: All right? So I think that's really kind of our key issue here, Your Honor. And there is absolutely no support for her position. She's going to tell you that it has to do with a lot of military law. But even the military law does not dictate the result that she's arguing for.

Because of the huge, immense, factual difference that she's actually getting the disability benefit. And I'm here to say that if it were the case, that somehow, under existing military law, she would not be getting a

disability benefit for that 40 percent disability she claims occurred during the marriage.

We might be having a different discussion. But she's receiving it and unlike some other military situations where the pension is reduced by the amount the disability benefit, Ms. Mitchell plans to receive both 100 percent of her military pension and the entire disability benefit.

So all of this comes down to a very simple point, Your Honor. There is no reason for the Janssen coverture formula, to not apply in this case. And much of the military law that Ms. Mitchell is going to argue for, correctly understood, does not dictate what she's arguing for.

And Mr. Use [sic] goes into that in some detail in his [11] affidavit and I'm not going to repeat all of that –

THE COURT: Okay.

MS. DEWALT: For the Court. There is, I think, also – this court is to equity by the parties, the property division for the parties was to be fair and equitable.

And this is the result that Ms. Dillahunt [sic] is arguing for; her formula, which she says must be applied because the pension was only partially vested, would leave my client with $133.94 per month. Remember, this was a marriage that was half of the military service.

THE COURT: Right.

MS. DEWALT: She would then receive about 3300 – excuse me $3,560. That doesn't strike the balance of being fair and equitable in my view or in my client's view which is probably more important.

The result of – let's say that would adopt Mitchell's position that the correct date would be June 24, 2006, the date of the ICMC conference in this case, in that case, my calculation which I would be the first to say will ultimately need to be recalculated by the army when it actually effectuates the order to divide pension, but my estimation, if you will, is that my client's share is $729.68.

[12] That would be 50 percent of 10 years over 20 years of $3,696. That's kind of approaching something that sounds a little bit more fair, Your Honor.

THE COURT: Okay.

MS. DEWALT: It – it – it gives Ms. Mitchell considerable credit for putting in those extra 10 years, it gives her credit for the 10 years where she was fortunate enough to advance and have higher earning as she progressed through her career.

Again, $133,730. She's still left with a significant pension. I want to say, too, because there's going to be some talk I'm sure about while it should be calculated what it would have been at the time of the decree.

Well, Your Honor, at the time of the decree, if I understand the law on military pensions correctly, Ms. Mitchell only had 10 years in. If she had retired on the valuation date, whatever it is, we wouldn't be here

because she would have been entitled to no retirement, all right?

THE COURT: Uh-huh.

MS. DEWALT: So this is the whole conundrum of dividing, at one point, a pension with the occurrence of many year before it actually goes into pay stubs.

[13] And the only VEB items that we have on that, in Minnesota, is the Janssen case. Now Mr. Zewiske is probably going to talk about a couple of other cases, where there were other formulas used, and you'll see that Mr. Use in his affidavit points out that in both of those cases, the parties had agreed to something different. They had agreed to different formulas.

In this case, the formulation of the parties, that is in the decree is 50 percent of the marital portion of the pension. You can almost lift those words right out of Janssen.

So that's why we're here saying Mr. Use has considered all of the arguments that Ms. Mitchell has made, we're asking you to adopt his order to divide pension. It's a straight forward, fair interpretation of the decree.

The result of that, Your Honor, will be that Ms. Mitchell will owe my client some back pay. Ms. Mitchell in her reply affidavit points out that they are [sic] child support is based on the full amount of child support.

* * *

[23] MR. ZEWISKE: Thank you, Your Honor. Let me start by correcting a couple of things. One, the [24] pension benefits started on November 1st, 2016, not November, 2017, as stated by Ms. Dewalt. Two, the ICMC was August 24th, 2016, not June 24th, 2016. This becomes important later on – Mr. Use's [sic] – 2006, I'm sorry, not 2016. So August 24th, 2006.

* * *

[32] MR. ZEWISKE: As to the money, so there are actually 3 disputes as to the money. One, what is the date of valuation? So Ms. Dewalt indicated that the ICMC order for whatever reason was not ascertainable, it is. I went down to the – the first floor today, the Court can pull it up. There is no specific date mentioned in the ICMC order.

THE COURT: Okay.

MR. ZEWISKE: Okay? The ICMC was held on August 24th, 2006. There was a standing order issued by judge Swenson in 2001 that the ICMC date shall be the valuation date for the purposes of dissolution. My –

THE COURT: Okay.

MR. ZEWISKE: Client attached that to her [33] pleadings. In addition, if the Court looks at the property settlement of the parties and that was attached as an exhibit, exhibit C to her affidavit, property settlement dated April 2nd 2008, shows August 24th, 2006 as the valuation date for every asset that's listed.

There is –

THE COURT: Are you –

MR. ZEWISKE: Actually one asset that is I think before the valuation date because that was the statement they could get, but before August 24th. Other than that, there's no evidence before this court that there should be another date. There was no –

THE COURT: Okay.

MR. ZEWISKE: Argument in the judgment and decree that there should another date, which would be the basis for either the date of dissolution or to the date of the pretrial settlement conference, right? Or some other –

THE COURT: Okay.

MR. ZEWISKE: I could argue. So that's the first issue. We believe it's August 24th, Mr. Use's [sic] proposed order does not use August 24th, it uses June 24th. I don't know where he got that date. He then says September 12th, which is the date of the [34] order, I think that's what he was going from, the date of the ICMC order. And I think it was actually September 11th, but – so there's those dates.

Then there's the pretrial, then there's the date of dissolution.

The second issue is, and this is where we get, I think, into the nitty gritty of what the judgment and decree was actual valuing, right? There are two ways to divide a pension, right?

One, is to come up with the present value as of the date of dissolution, right? That can be done. There's a second way. To do a Janssen formula, which is the numerator over the denominator times whatever the numbers are, right?

THE COURT: Mm-hmm.

MR. ZEWISKE: And that then includes her post marital increase. So the issue here becomes what were the parties actually valuing when they did a property settlement order that said 50 sent [sic] of the marital value. Now, I think Ms. Dewalt is right, if you're going to use Janssen, that's the formula you use, and she's using the wrong dates, Mr. Use [sic] has used the wrong dates but the question is, could this pension have been valued as of that date? As of the date of valuation? And it can.

[35] My client has shown in her affidavit you can get to a number. Now, part of that number is, the disability she had at the time of the dissolution, which was 40 percent.

THE COURT: Why is that?

MR. ZEWISKE: She had dissolution from active service or disability from active service. And the – so under federal law, the disability is offset against the pension.

Now, what has happened subsequently, since the entry of 2008 stipulation and the date of valuation August 24, 2006, is that Ms. Dillahunt or Ms. Mitchell has

become additionally disabled. She's gone from 40 percent to 90 percent disabled.

That disability is post date valuation. So in essence what Mr. Dillahunt would have the Court do today is give him a win fall [sic] for, and again, her calculation of benefits increases because of her additional years in.

So her top three years at the time of the dissolution and her top three years now are different. So that's a non marital increase not a marital increase. He would be receiving a benefit because she's worked longer.

In addition, because the disability became [36] greater, he's receiving a benefit. So he's receiving the extra money that the disability payment would have offset against the retirement payment; that's federal law, there wasn't a choice at the time.

Now, why are we here? Because in 2008, there was an order that said this is how we're going to draft this but there was no agreement, right? So 50 percent of the marital value. The petitioner was told to draft the agreement. I don't know why that was agreed upon but it was.

We're 10 years later and the first agreement offered was a month ago.

Now, Mr. Dillahunt knew at the time this was drafted and he signed. He knew in 2011, he knew in 2016, and he obviously knows now that these things had to be done.

Had we drafted this in 2008, you would have had a number that number was ascertainable as a payment; that would have been the simplest and easiest way to do it.

There's no longer any formula, you don't figure it out at the time she leaves the military in 20 years, you do it at the time. That formula's pretty simple. It's the years of marriage over the years of her service at the time and there was an ascertainable number that you can multiply that by, right? Because [37] there is a coverture formula there.

She had 10 extra months in the military prior to her marriage. So it's about 91 percent of the value of her pension at that time. That's ascertainable then and it's ascertainable now.

The disability portion of that, might have been a part of it but it has to be part of the formula because if she drops below 9 – or 50 percent disability, the federal government could say, you have to offset. That's still a requirement.

So if her disabilities, some of which are temporary, and she's at 90 percent right now. Some of those may disappear. She may be go – may go below 50 percent, which then means if the disability that she receives – and I'm going make up a number for the Court for this discussion – is $500, that $500 is offset against her pension amount.

That was – that was the situation at the time when they made their agreement. Now, what are we

talking about, again, why are we here. And again, my client argues within her affidavit, the doctrine of laches, he – he's – he's asking for a retroactive application of this back to the date of her first payment, November 1st, 2016; and he gives a number of arguments why he didn't do it: I couldn't afford to. [38] I didn't have an attorney at the time. I didn't know about it.

Expect, he did know about it. And he knew about it and that's in my client's affidavit. She let him know 6 months before she was going into retirement, she let him know a month. We did a mediation and we came to this court in January of 2017 or December of 2016 and the Court issued an order where he agreed he would be getting documentation together.

He didn't do it. I mean, here we are a year and – and a – 3 months later. Frankly, it should have been done in 2008, we wouldn't be having this problem now.

So the doctrine of laches does apply as my client set out in her memorandum pretty clearly. And the excuses that he uses are all undermined if the Court looks at their case law which is the WC – WACM case.

Which one of the things in there is poverty is not an excuse to doing this. You know, you don't get to come in – has there been prejudice? Yes. There definitely has been prejudice because we're spending money here arguing about this, right?

My client will have to go back two years if this court says, hey look it, we're going to put it in place 2 years and go at an amount, right? Everything has to

[39] be fixed it's a huge problem. It's not a small problem, there's prejudice. Frankly, he's coming in and arguing equity while he sat on his hands for 10 years to get this done.

There certainly is a solid laches argument on this case, in addition to the fact that you don't even have to choose Tom Use's [sic] numbers. Like I said, you can present – you can value that pension as of the date of valuation.

There is a number for the value that she would receive at the time. There is a number because we know she's completed her 20 years, so it's ascertainable.

There's a number for disability. There's a number of for the years marriage. And there's a number for her total service at that time. All of those numbers can be put in.

So the Court offers a Janssen formula on an unvested pension at the time, by the time 2008 rolled around, she would have been vested. She would have been over 10 years. Or right at the number.

RESPONDENT: There's – there's no vesting until I hit the 20.

MS. DEWALT: Twenty years.

MR. ZEWISKE: Okay. So – but there was still a number that could have been ascertained.

[40] RESPONDENT: The hypothetical retirement.

MR. ZEWISKE: Yes. We believe that it's appropriate to order that. So I – I did want to go over some – we agree on the judgment numbers, so my client put in her response to affidavit that the judgment number – she was fine with what the petitioner offered and that was 4340 on the property judgment from 1/27/17 so that's principle plus interest through July lth [sic] or through June 30th, I guess.

THE COURT: Mm-hmm.

MR. ZEWISKE: And 464256 as of June 30th, 2018 on the attorney fee award. So that was a dispute, I think, in the motions it's an agreement here.

As to the attorney fee award, there is an order to show cause. Attorney fees are able to be held in contempt. He owes my client over $8,500 from a 2017 property problem. Wherein $4,000 was awarded to my client, and the 4500 in attorney fees was awarded.

The attorney fees is collectible through this method. He has been served with the order to show cause. We would ask that he has notice that he hasn't paid them. He hasn't paid anything.

THE COURT: Was it – but you didn't file that order, right? Or –

MR. ZEWISKE: I –

[41] THE COURT: He's –

MR. ZEWISKE: I have it here with me. He –

MS. DEWALT: No. Wait –

MR. ZEWISKE: I have the –

THE COURT: He –

MR. ZEWISKE: I have –

THE COURT: He was –

MR. ZEWISKE: The original has to be served. He was served.

THE COURT: Okay. But you didn't file, like, an affidavit of service, did –

MR. ZEWISKE: I have –

THE COURT: You?

MR. ZEWISKE: Them both here. I brought them with me.

THE COURT: Okay.

MR. ZEWISKE: And I will hand them to the Court. Well, I have original order and I wanted to get – make sure the Court had it back.

THE COURT: We don't need to hand it to me, just file them.

MR. ZEWISKE: Okay. I will do that. Old practice was to make certain that the Court had the original back.

THE COURT: Oh. I –

[42] MR. ZEWISKE: So I am fine either way. But –

THE COURT: Well, we were told never to accept originals so –

MR. ZEWISKE: So whatever the situation, he has notice of the issue. He seemingly has the ability to pay because he's been paying an attorney and he's been paying for other things that are laid out in my client's affidavit.

We would ask that the Court say, you have notice. We want to move forward. This is, in essence a Hop hearing. And the Mohadi hearing would be the second half. The Court can basically order that to take place at any time.

Certainly the Court can give 30 days if it likes. But, you know, it's been over a year and 0 payments have been made. Now, this again is a property issue. And there is a lot of finger pointing in affidavits, both ways, I understand that.

But a lot of the finger pointing from the petitioner's side is, well, somehow this was my client's fault that this wasn't taken care of, both as to this issue and as to other issues.

And I – I don't know how that's the case. One of the – the issue that we were back here last year [43] was on a piece of Hawaii time share that was supposed to be divided.

Well, we have a $4,000 judgment, now that hasn't been paid either. This could have been done 10 years ago. This is why we're asking for attorney fees in this

case. Because basically, if this had been done 10 years ago, we wouldn't be having these issues now.

Theoretically, there are back and forths between the parties and their counsel, back in 2008. Now, you know, I've laid out in my affidavit and she has laid out in her affidavit, the amounts we're asking for. The total attorney fees she's asking for are about 5500 to 6 grand. And the cost she's incurred in having to travel here for this hearing is about 3100 bucks for mediation on these very issues.

There is a provision, which referee Moses noted in the last order that she issued in 2017 on this same issue. April 2nd, 2008, as part of the property, conclusion 8 that frankly, if you are the cause, of – of us having to come back here you are responsible for the attorney fees and costs of having to do it.

That was the basis for referee Moses decision in January of 2017, I think it should be the basis for this court's decision now.

One other thing, and this goes to the financial [44] issue now. If there is an ambiguity, right? That either the terms of the property settlement as to the division of the property are ambiguous or they're not ambiguous, if there is an ambiguity, I think this court then has to decide whether it wants to hear evidence on that issue other than what we've heard today.

Because there was no trial in this. There was a property settlement stipulated to by the parties. If the Court can determine, and maybe this Court doesn't

have enough information right now to know whether you could determine the value at the time of 2006, well, I think my client has put in enough information to have the Court make that decision or that it should do a Janssen formula maybe there should be some sort of evidentiary hearing on the issue of whether or not, you know, this was possible with testimony and those types of things because that's what would have happened then.

That's where there's an ambiguity. We don't believe there's an ambiguity. We think that the value is set, ascertainable at the time and should [sic] awarded as my client has set out in her affidavit. Thank you.

THE COURT: Okay. Now its your turn.

MS. DEWALT: I'm going –

THE COURT: Thank you.

MS. DEWALT: To go backwards.

[45] THE COURT: Sure.

MS. DEWALT: Okay? In terms of, you know, attorneys' fees, for coming back here because somebody didn't do what they were supposed to do. You know, there was an order that my client gets 50 percent of the military pension. He didn't get anything as of November 1st, 2016, either party could have drafted an order to divide the military pension so where – where is the line? He was supposed to draft the order.

THE COURT: Didn't Mr. Zewiske just tell me it said in the order he was going to – he was supposed to –

MS. DEWALT: Well, there's an order –

THE COURT: Draft it?

MS. DEWALT: Here today, Your Honor, and I – I just want to say something. You know, Ms. Mitchell has a very detailed, very rule, very law oriented approach. But there's been delays on her behalf, too.

I mean, why did she come back 10 years on a Hawaii time share? Why – why did it become important in 2017, when it wasn't important for the prior 10 years?

Why did she not go ahead and draft a proposed order to divide pension? Why did she not voluntarily give my client 50 percent of the marital portion if she [46] deemed fit?

I think, Your Honor, there's only 2 years left, about 2 years, 2 and a quarter maybe where these parents are bound together by a child who's 18 years old.

There's been an awful lot of beating each other up in this case. My client had a basis in this proceeding also to ask for attorneys' fees. If anything, on – at various times based on need and conduct, but it's time for these party to lay down the – the – the things that they're beating each other up with.

So we made a deliberate decision, not just with this proceeding but back on an appeal that we won. Not

only not to ask for any based attorneys' fee but also not to ask for costs and disbursements. And we are not asking for attorneys' fees here today.

And, Your Honor, we are urging the Court not award either side attorneys' fees. My client attempted to resolve the pension issue. It was pretty clear early on that there was an disagreement. We got a motion date. We went to mediation. We tried to resolve it. We're here today with the same dispute we started out with.

THE COURT: Okay. Let's talk about the [47] pensions. I'm not going to have time – I think I –

MS. DEWALT: Can I just go really quick, Your Honor?

THE COURT: Yeah. I don't need to hear any more about the PC or –

MS. DEWALT: Well, there's one thing I do want to say about the PC, in connection with the PC is that this court has jurisdiction and it's optional whether you go to the PC or the Court but I do want to say this; with regard to doctor Lisne, my client is willing to pay for the written report. I believe that Mr. Zewiske said that that was the objection and he'll take care of it.

THE COURT: Okay.

MS. DEWALT: The parties chose not to do a pension valuation in 2008. And again, my understanding of military law is they – if they had valued that

pension as of that date, if she had terminated employment with the military as of the pertinent date, would have been 0.

So it was – it – it's clearly the intent for my client to get something.

THE COURT: Oh, no. I get it.

MS. DEWALT: And there's a lot of speculation about this 40 percent disability rating, 90 percent [48] disability rating. I believe that there may have been an injury at the time of the divorce, I don't believe there was any specific rating, at least I haven't seen anything.

But otherwise, the parties did not reach an agreement on the language for an order. Both of them had an option to duke this out earlier on, as is the case so many, many times it isn't until you get to the point where it makes a difference that people start paying attention to it.

THE COURT: The way that Mr. Zewiske's formula, correct, I mean we should use the ICMC date of August 24th.

MS. DEWALT: And, Your Honor, I think we've been pretty open in –

THE COURT: Okay. Okay.

MS. DEWALT: Acknowledging that's a possible interpretation of the Court. Mr. Zewiske is of the opinion that it's a controlling interpretation. So it's

based on her earnings record as of that date, in proration to the total payment.

What's being asked for, Your Honor, though, is kind of a double. They want both their idea plus Janssen. So they want to limit the amount of the – the earnings to the earning's record in which the [49] monthly benefit is based to what it was on the valuation date.

They want to go back and do a disability rating for something on which there was no disability rating, there is no and it is known that it is a separate benefit.

And I do believe, if you look carefully at Mr. Use [sic] affidavit, she qualifies for the – what will change is – he addresses this issue of future change in disability rating.

So then they also want to take the Janssen formula and apply it so they – which is double dipping, quite frankly, Your Honor.

The Janssen formula attempts to approximate the value and isolate the value of the marital portion of the pension with this coverture formula, but if you're going to say we're going to limit it to what it was on the date of the marriage, you've already isolated it.

So you don't have to double isolate it. The reason they get such a small number, Your Honor, is they look at the monthly benefit as of the valuation date, and then they also apply the coverture formula.

And they also apply a disability rating which actually did not exist on the date of the marriage and they want to apply that retroactively.

[50] Event new formula that the military sets, Your Honor, would not apply the coverture formula and it would not apply the disability rating at the time the order's entered it applies the disability rating and whether or not it's required to be waived or not is applied at the time of retirement.

THE COURT: Okay.

MS. DEWALT: And I – I know this sounds like a lot of gobbledy gook, Your Honor. And I –

THE COURT: No it doesn't.

MS. DEWALT: I apologize for it. Its a highly technical field but I think that's another reason why we should rely on Mr. Use [sic], who is a very experienced Minnesota expert.

And while Ms. Mitchell may have given advice to soldiers, she was giving advice to soldiers. And so she was looking for the most aggressive possible resolution and certainly with regard to her own pension benefit that's what she's looking at.

I took a slightly different approach and I asked Mr. Use [sic], here's what I've got in the decree, with this language alone and your 30 years of writing quattros [sic] in order to divide pensions, is this language susceptible, the meaning, without going any further; his answer was, yes, it is.

[51] THE COURT: Okay.

MS. DEWALT: On the contempt, Your Honor, a hope hearing – a hop hearing is an evidentiary hearing which this court is not scheduled for today and which am not prepared for today. She has to prove failure and we have to prove good faith effort. We're basing this morning there was no payment.

And again, Your Honor, we might not have come up with an order until now but there's been an ongoing discussion about this pension and an offer to use the pension to make good the judgments or the orders for monetary rewards that Ms. Mitchell has.

And Mr. Zewiske is shaking his head but actually, the offer is attached in as an exhibit to Mr. Dillahunt affidavit! As of October 1st, 2017, I said my client wants to use his share of the pension to get your – to make good with your client.

My understanding is that that was Tom's position earlier on. He couldn't afford an attorney, Your Honor, there's a gap in time there.

THE COURT: Okay. But so I'm going to defer this to – or let judge Bernhard [sic] decide whether or not – what he want to do with the scheduling such a hearing but, your position is that even though the Court ordered your client to pay, I forgot what it was [52] $4,500?

MR. ZEWISKE: Yeah.

THE COURT: Ordered him to pay $4,500, he doesn't have to pay that as long as he makes an offer to offset it – this payment with this pension dispute that he has.

MS. DEWALT: Your Honor, my client did not have the ability the to make payments on the judgment and also he offered a viable plan to get her paid. That's why we're here today, Your Honor, is to get this resolved so things can be squared away with these parties.

THE COURT: Okay. Real briefly, I'm sorry, I just have – I have a call at 11:00 so I apologize.

MR. ZEWISKE: I –

THE COURT: I think I can get –

MR. ZEWISKE: I can do 2 minutes.

THE COURT: Okay.

MR. ZEWISKE: Okay. As to the last issue, my client has offered evidence that he could have paid the judgments, he didn't; he chose to pay other things – paid attorneys, paid other debt. And that's fine, he can certainly do that, but that was a choice he made. That's in the affidavit.

PC, definitely not optional. If you come to this [53] court with a motion and say I want to modify child support and you have a PC in the judgment and decree, the Court's going to say, go to the PC first; that's not an option thing. We don't believe that that is appropriate

to come here first. These things are determinable by the PC.

Three, the reason that the Court ordered him to do these things, that was an agreement of the parties, we came to him in 2016 before she went into pay status and offered him a deal to settle this case.

We mediated the issue, and then we brought it to the Court, the Court said you have to do this. Still didn't do anything. As to the pension and disability, I think, without getting in too much, I just want to explain one thing quickly because the Court seemed like there was had a little confusion there.

If my client is less than 50 percent disabled, there is an offset against the pension she receives. There is evidence that she was disabled at the time of the dissolution. That is one of the issues that the parties were arguing about at the time.

THE COURT: But there has been no offset, yet. Correct?

MR. ZEWISKE: Yet. Because now – because once she went over 50 percent, the offset went away; [54] that is federal law.

Federal law controls federal pensions, that's the Matson case. So that was the issue. And if this court says, well, look it, on the date of valuation, were going to value this pension, she would have been 40 percent disabled at that time and that would have been part of the discussion.

Now, because some of the disabilities are temporary, person went to the military, they can be withdrawn. And she could fall below 50 percent again. That has to be referenced in the order. Because if she falls below 50 percent, she would have an offset coming out of her pension again.

So in a year, if the military says; you are 50 percent better than you were so you're now 40 percent disabled again, they would offset that amount. That has to be part of the discussion here. This is one of the reasons there was no agreement, that and the fact that he never got anybody to do it.

But there is arguments between the counsel at the time. So the formula is easy, right?

THE COURT: Okay.

MR. ZEWISKE: In terms of the date of valuation, date of marriage, the date of valuation, over date of start in the military, to date of [55] valuation, that's a coverture formula. It's an extra 10 months. It turns out to be about 91 percent of the value on the date of valuation. That's an ascertainable number. So that's why I mentioned the coverture formula.

I'm not, you know, my client had and different formulas in her pleadings, I'm telling the Court right now that that is a formula that can be done, it indicates an extra 10 months because that's how much longer she was in before the marriage and that's a 91 percent value of the total at the time, and represents the marital value of her pension at that time.

The post marital value is her increased years of service, right? Which increases the amount of the pension, and in addition, increased the disabilities that she received after that. I have nothing further, Your Honor.

THE COURT: Okay. All right. Thank you very much. I'll take this under advisement.

MR. ZEWISKE: Do you want something from us in terms of the hop hearing? Are you – you said you were going to give it to judge Burns, I mean, do you want a letter saying what we would like to see on that?

THE COURT: You know, I think he would [56] appreciate that.

MR. ZEWISKE: Okay.

THE CLERK: File something with the court and file that, order to show cause in the service.

MR. ZEWISKE: I will do that.

THE COURT: Okay. Thank you.

(The proceedings were adjourned.)

[57] STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

I, Rachael N. Johnson, Court Reporter, hereby certify that the foregoing pages are a true and correct transcript of my stenographic notes taken relative to the afore-mentioned matter on the 12th day of

December, 2018, in the City of Minneapolis, County of Hennepin, and State of Minnesota, before the Honorable Bridget Sullivan, Judge of District Court.

SIGNED THIS 12th DAY OF December, 2018.

/s/ Rachael N. Johnson
Rachael N. Johnson
Court Reporter
Hennepin County, Minnesota