

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 * * * * *

3 EVA OLVERA,

4 Appellant,

5 vs.

6 JOSE OLVERA,

7 Respondent.
8

S.C. DOCKET NO: 38233
D.C. CASE NO: D 005709

9 **APPELLANT’S SUPPLEMENTAL MEMORANDUM**

10 Appellant, Eva Olvera, pursuant to NRAP 31(d), submits the following additional authorities.
11 The main issue in this appeal is whether this Court should order Jose to restore to Eva the sums he
12 is redirecting from her to himself by way of recharacterization of military retirement benefits as
13 “disability benefits.” AOB at 2; ARB at 7.
14

15 The *Reply Brief*, filed January 8, 2003, contains the prediction that still other authority would
16 join the national consensus in support of Eva’s position:

17 In the Opening Brief, we stated that “virtually every court that has ever examined
18 the question has come to exactly the same conclusion, and the very few contrary cases are
19 obviously distinguished on their dates, and facts.” AOB at 24. In the months that have
20 passed since the Opening Brief was filed, the appellate courts of two additional states have
21 lined up with that consensus; more, presumably, will do so after this brief is filed.

22 ARB at 13. As expected, additional authorities for this proposition have come to light since the
23 filing of the *Reply Brief*, which were not cited previously.

24 One of these, *Krapf v. Krapf*, 771 N.E.2d 819 (Mass. App. Ct. 2002), adds another state to
25 the list of those that have decided, by the decision of the highest appellate court to consider the
26 question, that a military retiree is not permitted to reduce sums being paid to a former spouse under
27 the terms of a final, unappealed divorce decree by choosing to subsequently waive retirement
28 benefits in favor of disability benefits. See AOB at 27-35; ARB at 13-20.

1 In *Krapf*, the parties had divorced in 1985, dividing the future military retirement benefits
2 expected to be paid to the husband. A post-decree order was entered in 1989.¹ In 1994, the husband
3 retired and began drawing retired pay, but in 1997 he applied for and received a partial disability
4 award, which he increased through 2000, greatly reducing the stream of monthly payments to the
5 wife. The husband refused to compensate the wife for the sums he had redirected to himself.

6 On appeal, the court confirmed that the husband's action "was a breach of . . . the covenant
7 of good faith and fair dealing," which the court held encompassed the duty "not to do anything that
8 would have the effect of destroying or injuring the other party's ability to receive the fruits" of the
9 divorce orders. *Id.* at 821-22. The husband was ordered to compensate the wife for all sums she
10 would have received if he had not taken the disability award. *Id.* at 824.

11 Other decisions recently coming to our attention go to less central aspects of the appeal. For
12 example, in *McLellan v. McLellan*, 533 S.E.2d 635 (Va. Ct. App. 2000), the court ruled that a final,
13 unappealed award to the wife that included consideration of the husband's disability benefits could
14 not be collaterally attacked by the husband years later. In so holding, the court rejected the
15 husband's claims that federal law provided any "subject matter jurisdiction" basis for such an attack
16 on the final divorce decree, and rejected the argument that there must be some sort of express
17 "indemnification" language to allow the wife to be compensated for sums the husband collects from
18 disability benefits. 533 S.E.2d at 637, 638 n.1.

19 Similarly, in *Price v. Price*, 480 S.E.2d 92 (S.C. Ct. App. 1996), the court held that once a
20 divorce decree was final and unappealed, the husband was not allowed to "unilaterally deprive Wife
21 of the property granted to her" by choosing to reduce the flow of payments based on a claim of
22 federal pre-emption under *Mansell*. *Id.* at 93.

23 These holdings go to the portions of the briefs claiming error in the district court's decision
24 that, as a matter of subject matter jurisdiction, it could not "do indirectly what the court cannot do
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26 ¹ In one notable analogy to the issues presented in this appeal, the reviewing court noted that the later order did
27 nothing to impugn the finality or legitimacy of the underlying divorce decree. 771 N.E.2d at 821, n.1.

1 directly” by ordering reimbursement to Eva, *see* ARB at 9-10, and discussing why Jose’s purported
2 analogy to Social Security law is disingenuous. ARB at 18-19.

3 Other decisions recently noted are part of the continuing stream of cases from states already
4 part of the consensus in this area, which are part of the public record but not printed in their states’
5 official reporters, apparently because they broke no new ground and were therefore not precedential.
6 *See In re Marriage of Harper*, 2000 Wash. App. LEXIS 333 (Wash. Ct. App. 2000) (requiring
7 compensation to wife for sums not paid to her by reason of husband’s post-divorce disability rating
8 increases, because such reduction in payments were “outside the contemplation of the parties” at the
9 time of divorce and so was “fundamentally unfair”). *See* AOB at 32.

10 Another division of the Washington Court of appeals issued a decision at about the same time
11 as *Harper*, apparently not published for the same reason, that involves facts amazingly similar to
12 those of this appeal. In *In re Marriage of Choat*, 2000 Wash. App. LEXIS 1288 (Wash. Ct. App.
13 2000), the parties had been married in 1951, and divorced in 1978. The husband had obtained a
14 partial disability award in 1983, but the wife did not find out about it until the sums being paid to
15 her dropped suddenly in 1998, when the husband’s disability rating was increased.

16 The court held that a final and unappealed pre-*McCarty*, pre-USFSPA divorce decree was
17 immune from any form of collateral attack by either party based upon any subsequent changes in
18 federal statutory or case law, whether or not they divided sums that would be non-divisible in a
19 current divorce because they were disability benefits.² Because the divorce decree had stated that
20 the wife was to receive a share of the *gross* retired pay, she was entitled to compensation for both
21 all sums the husband had redirected to himself as disability, *and* for the difference between gross and
22 (post-tax) disposable retired pay. *See* AOB at 25-35, 39-41; ARB 13-20; 20.

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25 ² The court’s language was: “Although we have no quarrel with Mr. Choat’s decision to waive his own one-half
26 share of the retired pay in exchange for greater disability benefits, we cannot countenance his having done so unilaterally
27 with respect to Mrs. Choat’s one-half share, to his financial benefit and her financial detriment. His unilateral waiver
cannot defeat her community interest in the military retired benefit. The record also shows that Mr. Choat improperly
deducted taxes from the total retired pay prior to determining Ms. Choat’s one-half share”

1 While we are not sure how we missed it earlier, there is at least one other decision supporting
2 the proposition, as did *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992), that a court can issue a
3 spousal support award, post-divorce, sufficient to ameliorate the impact on an innocent former
4 spouse whose “economic circumstances have deteriorated through no fault of her own” by reason
5 of the former husband’s post-divorce application for disability benefits in lieu of retirement benefits.
6 *See Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997). *See* AOB at 9, n.17; ARB at 17-18.

7 Like the Washington opinions referenced above, the Virginia Court of Appeals recently
8 issued an unpublished opinion in line with the consensus discussed in the briefs, enforcing its prior
9 decision in *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992), in *Hubble v. Hubble*, 2002 Va. App.
10 LEXIS 459 (Va. Ct. App. 2002). There, the court affirmed the lower court’s order that the wife was
11 to receive half of the amount that she would have received if not for the “husband’s unilateral and
12 unauthorized modification,” so as to restore the status quo existing before he elected to replace
13 retirement benefits with disability benefits. *See* AOB at 9, n.17; ARB at 17-18.

14 In short, our continuing research has expanded the list of states that have required former
15 spouses to be made whole by way of direct compensation for amounts of military retired pay that the
16 military spouse seeks to recharacterize, post-divorce, as disability benefits. That list now includes
17 Arizona, California, Florida, Idaho, Kansas,³ Maryland, Massachusetts, Missouri, New Jersey, New
18 Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and
19 Washington. Two others, Alaska and Nebraska, while not requiring direct compensation, have
20 indicated that other property should be distributed, or post-divorce alimony should be awarded, to
21 compensate the former spouse in such situations.

22 It is worth noting that the community property states have been the most adamant in requiring
23 full reimbursement to the former spouse when the military spouse attempts post-divorce
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26 ³ As discussed in detail in the briefs, Kansas is somewhat conflicted, requiring full compensation in *MacMeeken*
27 *v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990), but permitting an aberration in one case in *In re Marriage*
of Pierce, 982 P.2d 995 (Kan. Ct. App. 1999).

1 recharacterization of sums already awarded to the former spouse as her sole and separate property.⁴

2 There is no conflicting case from anywhere within the community property system.

3 This additional authority is respectfully submitted to this Court in the hope that it is useful
4 in resolution of this appeal.

5 Respectfully submitted,
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26 ⁴ The case law of Arizona, California, Idaho, New Mexico, Texas, and Washington is in full accord. There are
27 no contrary opinions from any community property state, but Louisiana, Nevada, and Wisconsin have not yet issued
28 formal opinions on the subject.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded via United States Postal Service, postage prepaid in full to:

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DATED this _____ day of June, 2003.

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