IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GLENN D. MCDERMOTT, Appellant/Cross-Respondent, v. KRISTEN JENKINSON-MCDERMOTT, Respondent/Cross-Appellant.	No. 38831-6-II UNPUBLISHED OPINION

Penoyar, C.J. — Glenn McDermott and Kristen Jenkinson-McDermott were formerly married. In 2007, they entered into a CR 2A agreement and their dissolution decree was entered. The CR 2A agreement and the dissolution decree awarded Jenkinson-McDermott an "interest in the husband's military pension equal to 50% of the husband's pension benefits earned between the date of marriage and the date of separation, July 26, 2006." Clerk's Papers (CP) at 17, 25. McDermott appeals the trial court's entry of a supplemental dissolution decree regarding the division of his military pension. The supplemental decree used the time rule method to calculate Jenkinson-McDermott's interest in McDermott's military pension. McDermott argues that the trial court should have used the hypothetical award method. Jenkinson-McDermott cross-appeals, arguing that the trial court erred in denying her motion to strike the declarations and exhibits McDermott filed in support of his motion for reconsideration. We affirm.

The Time Rule Method and the Hypothetical Award Method

Under the time rule method, which is the typical formula used to determine the total community share of a pension, "the community share is calculated by dividing the number of years

of marriage (prior to separation) by the total number of years of service for which pension rights were earned and multiplying the results by the monthly benefit at retirement." *In re Marriage of Rockwell*, 141 Wn. App. 235, 251-52, 170 P.3d 572 (2007); *In re Marriage of Greene*, 97 Wn. App. 708, 713, 986 P.2d 144 (1999). Under McDermott's proposed method, the hypothetical award method, Jenkinson-McDermott would be awarded 50 percent of the disposable military retired pay that McDermott would have received if he had retired on the separation date. McDermott's proposed method would also exclude the pension McDermott would have received for pre-marriage military service. Because McDermott served both before and after the marriage, the hypothetical award method would result in smaller payments to Jenkinson-McDermott.

FACTS

McDermott and Jenkinson-McDermott married on July 11, 1981. At the time, McDermott was on active duty in the United States Army, having entered the service on June 4, 1975, six years, one month, and seven days before marrying Jenkinson-McDermott. The couple separated on July 26, 2006.

On July 6, 2007, McDermott and Jenkinson-McDermott entered into a CR 2A agreement. McDermott continued on active duty rather than retiring at the time the parties entered into the agreement. The agreement awarded McDermott "[a]ll right title and interest in the husband's military pension not otherwise awarded to the wife herein." CP at 24. The Agreement awarded Jenkinson-McDermott:

> [A]n interest in the husband's military pension equal to 50% of the husband's pension benefits earned between the date of marriage and the date of separation, July 26, 2006. The cost of the SBP [Survivor Benefit Plan] shall be paid 100% from the wife's share of said pension benefits. To be accomplished by a separate

order and payable upon the husband's retirement.
CP at 25.

The agreement also awarded McDermott "[a]n interest in the wife's FERS [Federal Employee Retirement System] pension equal to 50% of the wife's pension benefits earned between the date of marriage and the date of separation, July 26, 2006, payable upon the wife's retirement." CP at 24. Under the agreement, McDermott-Jenkinson received "[a]ll interest in the wife's FERS pension not otherwise awarded to the husband." CP at 25.

The trial court entered the parties' dissolution decree. The provisions in the decree addressing McDermott's military pension contained the same language as the CR 2A agreement. The decree also used similar language to award McDermott a portion of Jenkinson-McDermott's pension benefits. The decree provided that both parties "shall execute all documents necessary to transfer the properties awarded in accordance with the decree." CP at 19-20.

After entry of the dissolution decree, counsel for the parties began to negotiate the terms of a supplemental decree embodying alternately the time rule and hypothetical award methods for calculating the division of McDermott's military pension. The trial court heard argument on Jenkinson-McDermott's motion to present an order for a supplemental decree to divide McDermott's military pension. At the hearing, McDermott offered into evidence a proposed order dividing Jenkinson-McDermott's FERS pension; however, this proposed order had never been filed with the court and had not been submitted to the court as evidence before the hearing date. The trial court did not admit McDermott's proposed FERS order because it was not "part of the record submitted." Report of Proceedings (RP) at 30. The trial court then stated:

What I have to do here is try to discern the intent of the parties, and now their

> intent may be a little different today than when they signed this. At the time they signed this there was nothing about hypothetical retirement or what it might have been if history had been different. It was, I'm sure, based on what the actual salary was at the time they entered into the agreement. . . . The hypothetical award [method] . . . makes some sense logically, but I have no reason to think that was considered by the parties.

RP at 30-31.

The trial court then entered an order assigning to Jenkinson-McDermott the following:

> [A]n amount equal to Fifty Percent (50%) of the "Marital Portion" of the Petitioner/Employee's disposable retired pay determined as of the Date of Separation (July 26, 2006). For purposes of calculating the Respondent/Former Spouse's share of Petitioner/Employee's disposable retired pay, the "Marital Portion" shall be determined by multiplying the Petitioner/Employee's disposable retired pay by a fraction (less than 1.0), the numerator of which is the Petitioner/Employee's total number of months of Creditable Service earned from July 11, 1981 to July 26, 2006, and the denominator of which is the total number of months of the Petitioner/Employee's Creditable Service accrued for Petitioner/Employee's entire military service.

CP at 121-22.

McDermott filed a motion for reconsideration. McDermott-Jenkinson moved to strike various documents McDermott attached to his motion for reconsideration. McDermott-Jenkinson argued that a declaration and some exhibits were new evidence not submitted before the original hearing.

The trial court denied Jenkinson-McDermott's motion to strike and McDermott's motion for reconsideration. McDermott appeals and Jenkinson-McDermott cross-appeals.

ANALYSIS

I. Jenkinson-McDermott's Interest in McDermott's Military Pension

McDermott contends that the trial court erred when it entered the supplemental decree

regarding the division of his military pension because the correct method to divide his pension is the hypothetical award method. He asserts that "comparison of the two methods proposed to the trial court by the parties demonstrates that only the 'hypothetical award' method can award to Ms. Jenkinson-McDermott what was earned during the marriage and only the hypothetical award method can exclude the effect of pre-marriage and post-separation military service." Appellant's Br. at 24. He also asserts that "overwhelming evidence in the record reveals that subsequent to the preparation of the Agreement and Decree, the parties' actions did not evidence an intent that they would utilize the formula proposed by Ms. Jenkinson-McDermott, but in fact, evidenced an intent to utilize the . . . 'hypothetical award' formula." Appellant's Br. at 26. We disagree.

Here, the trial court interpreted its own decree and attempted to do so consistent with the parties' intent in entering into the separation agreement. If a decree is clear and unambiguous, there is nothing for the court to interpret. *In re Marriage of Bocanegra*, 58 Wn. App. 271, 275, 792 P.2d 263 (1990). If a decree is ambiguous, we apply the general rules of construction applicable to statutes and contracts to ascertain the intent of the court that entered the decree. *In re Marriage of Thompson*, 97 Wn. App. 873, 878, 988 P.2d 499 (1999). A writing is ambiguous if two different reasonable interpretations are possible. *See McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992).

"When the parties to a separation agreement dispute its meaning, the court must ascertain and effectuate their intent at the time they formed the agreement. Generally, this is true even when the separation agreement has been incorporated in a dissolution decree, because the parties' intent will be the court's intent." *In re Marriage of Boisen*, 87 Wn. App. 912, 920, 943 P.2d 682

(1997) (footnotes omitted). To determine the parties' intent, we examine their objective manifestations, including the written agreement and the context within which it was executed. *Boisen*, 87 Wn. App. at 920. One party's unilateral subjective belief about the meaning of a written agreement does not constitute evidence of the parties' intentions. *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 48, 17 P.3d 1266 (2001). "If the agreement has two or more reasonable meanings when viewed in context, the court must identify and adopt that which reflects the parties' intent. In [that] situation, a question of fact is presented, and an appellate court reviews the trial court's determination only for substantial evidence." *Boisen*, 87 Wn. App. at 920-21 (footnote omitted). Evidence is substantial if it is sufficient to persuade a fair-minded person of its truth. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

Under the time rule method, as noted above, "the community share is calculated by dividing the number of years of marriage (prior to separation) by the total number of years of service for which pension rights were earned and multiplying the results by the monthly benefit at retirement." *Rockwell*, 141 Wn. App. at 251-52. Under McDermott's proposed method, the hypothetical award method, Jenkinson-McDermott would be awarded 50 percent of the disposable military retired pay[1] that McDermott would have received if he had retired on the date of separation. McDermott's proposed method would also exclude the pension benefits McDermott would have received as a result of pre-marriage military service.

In *In re Marriage of Bulicek*, 59 Wn. App. 630, 632, 800 P.2d 394 (1990), the trial court

[1] Retired pay is calculated by multiplying the retiree's total creditable service years by .025; this number, which is the retired pay multiplier, is then multiplied by the retiree's base pay. *See* 10 U.S.C. §§ 1401-1414.

used the time rule method to divide the husband's pension. On appeal, the husband, who continued to work after separation, argued that the trial court should have valued and apportioned the pension at the time of trial so that the wife would not receive a portion of his post-separation retirement pension contributions. 59 Wn. App. at 636. Division One of this court noted that the couple had been married 22 years before separation; the husband's "advancements and pay raises during that time came as a direct result of community effort and performance. . . . [T]he prospective increase in retirement benefits due to increased pay after separation is founded on those 22 years of community effort." *Bulicek*, 59 Wn. App. at 638. The court then stated:

> We acknowledge that [the husband's] retirement fund may receive proportionately higher future contributions based upon his career longevity and anticipated increases in annual pay. We further acknowledge that the formula utilized for division of future retirement benefits could result in [the wife's] sharing in those increases. However, far from condemning this apportionment method, we specifically approve it as a means of recognizing the community contribution to such increases.

Bulicek, 59 Wn. App at 638-39.

Similarly, Division One rejected the subtraction method and used the time rule method to divide a federal pension in another case where the distribution of a pension in a dissolution was in dispute. *Rockwell*, 141 Wn. App. at 254. Furthermore, in *In re Marriage of Chavez*, 80 Wn. App. 432, 437, 909 P.2d 314 (1996), we disagreed with the argument that the wife's share of the husband's military pension should be based on the salary he was receiving at the time of divorce, noting that "[the husband's] argument fails to distinguish retirement benefits attributable to salary increases from those benefits attributable to additional years of service following divorce. The community share includes the former but not the latter." *Chavez*, 80 Wn. App. at 437. We

concluded that the wife's share of the pension should not be increased due to the additional service credits the husband earned after the divorce; "[h]owever, increases in pension benefits based on a retiree's higher salary at the time of retirement should be included in the community share." *Chavez*, 80 Wn. App. at 437. These cases illustrate the tendency of courts to use the time rule method to divide pensions, as the method recognizes community property division principles.

The provision at issue awards Jenkinson-McDermott "[a]n interest in the husband's military pension equal to 50% of the husband's pension benefits earned between the date of marriage and the date of separation, July 26, 2006." CP at 17. The provision is ambiguous, and this confusion is caused by imprecise drafting. The phrase "earned between the date of marriage and the date of separation" could be interpreted as defining the community portion of the benefit or the dollar amount of the benefit to be divided.

McDermott argues that the evidence does not support the trial court's finding that the parties intended to divide McDermott's military pension under the time rule method, as is usually done. First, McDermott acknowledges that "the record before this Court does not indicate that [the hypothetical award method] was discussed at the time of settlement or at the time [of entry] of the Decree, but that does not change the parties' intent." Appellant's Reply Br. at 17.

Next, McDermott asks us to consider the subsequent actions of the parties to infer the parties' intent at the time they signed the dissolution decree; however, the parties have not actually agreed on the correct method to divide the pension. The relevant intent is the intent at the time McDermott and Jenkinson-McDermott formed the agreement, not their intent after the

entry of the dissolution decree. The subsequent negotiations of the parties do not establish their previous intent. Additionally, even if McDermott subjectively believed the dissolution decree used the hypothetical award method to divide his pension, his unilateral subjective belief is not evidence of the parties' intentions.

McDermott also argues:

> The acceptance by Ms. Jenkinson-McDermott and her attorney of the FERS order prepared by [McDermott's counsel] is the clearest evidence of the intent of the parties with regards to the meaning of the CR 2A Agreement and Decree as it applied to the division of Colonel McDermott's military pension. In both the Agreement and the Decree, the language for dividing Ms. Jenkinson-McDermott's FERS pension and the language for dividing Colonel McDermott's military retired pay were identical. Therefore, since Ms. Jenkinson-McDermott agreed that the Agreement and the Decree intended to divide her FERS pension as of the date of separation, excluding benefits that she earned prior to marriage, then the intent of the Agreement and the Decree regarding the division of Colonel McDermott's military retirement had to have been the same.

Appellant's Br. at 28-29. However, this order was never entered with the trial court.

Further, Jenkinson-McDermott argues that she "intended to use the time rule method in the FERS pension order, just as she intended to use the time rule method in the military pension order." Resp't's Br. at 24. Notably, Jenkinson-McDermott's counsel wrote McDermott's counsel and stated:

> The agreement was to give [McDermott] an interest based on 50% of that portion of your pension earned between the date of your marriage and the date of the separation, July 26, 2006, not the date of the entry of the Decree, October 3, 2007. Paragraph 7 needs to be revised to provide that [McDermott] will receive 50% of the Marital portion of the Gross Monthly Annuity [Jenkinson-McDermott] receives, with the Marital Portion being determined by multiplying the Gross Monthly Annuity by a [fraction], the numerator of which is the number of months of service between the date of marriage and the date of separation, and the denominator being the total months of service.

CP at 30-31. Thus, the FERS qualifying court order, which the trial court never entered, is not helpful in determining the parties' intent regarding McDermott's military pension.

It is true that the parties could have chosen to divide the pension using a method other than the time rule method. However, there is nothing in the dissolution decree or the settlement agreement to infer that the parties meant to award Jenkinson-McDermott 50 percent of the disposable military retired pay McDermott would have received had he retired with the rank of Colonel with 19 years, 10 months of creditable service on July 26, 2006. Without such language in the dissolution decree or the settlement agreement, the logical inference is that the parties intended to divide the pension using the traditional time rule method. We have already noted that the time rule method is generally accepted and applied, and it is consistent with general community property division principles. The parties, acting through their attorneys, likely expected that the trial court would interpret and implement their decree consistent with common practice and the law. Accordingly, we conclude that there was substantial evidence to support the trial court's finding that the time rule method was the correct method to divide McDermott's pension.

II. Motion to Strike

Since Jenkinson-McDermott has prevailed, we need not address whether the trial court erred in denying her motion to strike.

III. Attorney Fees

McDermott-Jenkinson requests attorney fees on appeal under RCW 26.09.140. Under RCW 26.09.140, "the appellate court may, in its discretion, order a party to pay for the cost to

the other party of maintaining the appeal and attorney's fees in addition to statutory costs." In awarding attorney fees on appeal, we examine the merit of the issues on appeal and the parties' financial resources. *In re Marriage of Griffin*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990). The court must balance one party's needs against the other party's ability to pay. *In re Marriage of Coons*, 53 Wn. App. 721, 722, 770 P.2d 653 (1989). The party requesting the attorney fees must make a showing of financial need. *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985). We have reviewed the parties' financial declarations and deny Jenkinson-McDermott's request for attorney fees. She is financially able to pay her attorney and doing so would not be a critical hardship.

Affirmed.

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

Penoyar, C.J.

We concur:

Armstrong, J.

Worswick, J.