The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Lee Ann Pafford Dobson

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INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am the owner/operator of Dobson Law Firm, PLLC. I have owned my own practice since 1998 which was formerly known as Rikard & Dobson, PLLC. Now I practice primarily in the area of family law which includes divorce, child support, child custody, paternity and adoptions, however, my practice has included personal injury, traffic tickets, DUI's, shoplifting, bankruptcy, probate, collection cases and contract disputes. I have employed as many as three associates and three paralegals at the same time.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

I was licensed to practice law in Tennessee 1984 and my BPR No. is 11307.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I am licensed to practice law in the State of Tennessee. I have no other licenses to practice law in any other states. I did apply to take the bar exam in the State of Georgia in 1990 when my Husband's job moved us to Thomasville, Georgia, however, we moved back to Shelby County before the Georgia Bar Exam was administered, so I never sat for the exam.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No, never.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Upon graduation from the University of Florida in 1978, I moved to Hawaii with my parents. After two months, I was hired to teach sixth and seventh graders in Madison, Florida. I accepted the job on a Tuesday, flew out of Hawaii to Florida on a Wednesday and taught my first day of school that Friday. The next year, 1979, I taught fifth and sixth graders at Saint George's Day School here in Germantown, TN. In 1980, I worked as a collector for a loan company, took classes towards a master's degree and applied to law school. I graduated from the University of

Memphis Law School in 1984 and began a clerkship with Judge Mark Walker who was the Presiding Judge of the Court of Criminal Appeals. That position lasted for one year, after which I began work at the Law Firm of Dowden & Monroe from September 1985 until March 1989. I went to work for the Law Offices of John R. Johnson, III, P.C. At that time, my husband took a job in Thomasville, Georgia with Davis Water and since my extended family lived in that area and we had a small child, we moved from Memphis in December 1989 and I began work for the Law Firm of Whitehurst, Cohen & Blackburn. I applied for admission to the Georgia Bar, however, we moved back to Memphis before the exam was administered. We returned to Memphis in November 1990, I worked for Rice, Rice, Smith, Bursi, Veazey & Amundsen until October 1991. I returned to the Law Offices of John R. Johnson, III in October 1991, and continued to practice with his firm until April 1998 when I formed Rikard & Dobson, PLLC with my then partner, Richard Rikard. I became the Dobson Law Firm, PLLC January 1, 2011, and have owned my own business since that time.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

No period of unemployment for more than six months.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

The majority of my practice is in the area of family law. I practice in Chancery and Circuit Court handling divorces, custody, child support and adoptions, as well as Juvenile Court where I handle cases dealing with paternity, child support, and parenting time. My practice has also included personal injury cases, bankruptcy, probate, collection cases and contract disputes. Presently, about 95% of my cases are in the family law area.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

Upon graduation from the University of Florida in 1978, I moved to Hawaii with my parents. After two months, I was hired to teach sixth and seventh graders in Madison, Florida. The next year, 1979, I taught fifth and sixth graders at Saint George's Day School here in Germantown, TN. In 1980, I worked as a collector for a loan company, took classes towards a master's degree and applied to law school.

I graduated from the University of Memphis Law School in 1984 and began a clerkship with Judge Mark Walker who was Presiding Judge of the Court of Criminal Appeals. I learned appellate procedure and brief writing. I traveled to the three grand divisions in Tennessee and co-wrote many opinions. My experience working with the Court of Criminal Appeals lead to brief writing work for fellow attorneys.

After the one year allowed for clerks, I entered private practice with Dowden & Monroe. As a general practitioner, I handled numerous cases in General Sessions Court including auto accidents and contract law. I have tried more cases in General Sessions Court than I can count which included a negligence case where an employee installed a defective oil filter which allowed the oil to drain out and burn up a Nissan engine; and contract law cases including one where I sued a private school for failure to provide courses as advertised. I tried a personal injury case where a crop duster sprayed the wrong field and caused injuries to the family that lived there which resulted in damages paid to the family. I was co-counsel in a jury trial with William Monroe on a motorcycle accident lawsuit. I stayed at the Law Firm of Dowden & Monroe from September 1985 until March 1989.

I first worked for the Law Offices of John R. Johnson, III, P.C., in March 1989 until December 1989 at which time, my husband took a job in Thomasville, Georgia with Davis Water. Since my extended family lived in that area and we had a small child, we moved from Memphis to Thomasville, Georgia and I began work for the Law Firm of Whitehurst, Cohen & Blackburn. I applied for admission to the Georgia Bar, however, we moved before the exam was administered and returned to Memphis in November 1990. I then worked for Rice, Rice, Smith, Bursi, Veazey & Amundsen until October 1991.

I returned to the Law Offices of John R. Johnson, III in October 1991, and continued to practice with his firm until April 1998. During my practice with the Law Offices of John R. Johnson, III, I was co-counsel on several personal injury cases, including a train accident involving the death of a minor child. I handled conservatorship cases, guardian cases and probate matters here in Shelby County Tennessee. I also handled DUI cases, shoplifting cases, and domestic assault cases in General Sessions Criminal Court in Memphis, Tennessee. I was trained as a mediator and presided over numerous Federal Farm Bureau mediations that involved the governmental lending practices and farm subsidies.

I formed Rikard & Dobson, PLLC in 1998 with my then partner, Richard Rikard. I began my focus on family law issues, however, I continued to practice general law including negotiating a cell tower contract between Bell South and Capleville United Methodist Church. I also trained for five days to become a domestic relations mediator. I was a Rule 31 mediator but have allowed that accreditation to lapse.

I have handled Probate Court cases and was appointed as co-guardian in Shelby County with the mother of a five year old and we invested appropriately so that the child was able to graduate from college in the east. I am proud to say that this brilliant young man recently graduated from law school and is currently practicing law in California. I have handled, as co-counsel, probate cases in Rogers, Arkansas, Virginia Beach, Virginia, and Richmond, Virginia.

I have also been honored to serve as Special Judge, in City Court, General Sessions Criminal Court and Environmental Court. I was usually contacted directly by the sitting Judge, to fill in for the day during his or her absence. I cannot begin to list the dates of each and every appearance, nor the substance of each case presented to me due to the numerous occasions and lengthy dockets. I did received cufflinks emblazoned with the Seal of the City of Memphis as a reward for my willingness to serve.

I became the Dobson Law Firm, PLLC January 1, 2011, when my longtime partner married and moved to Texas. I continue to provide legal services and have made it my mission to inform my clients of all of their options and explain the legal process to them in terms they can understand. I believe every person deserves their day in court. Litigants need the most experienced and competent attorney they can afford. I have provided valuable and necessary services to my clients for the past thirty (30) years during my tenure as a lawyer.

My personal work habits are exemplary. I am usually in the office by 8:00 a.m. and do not leave before 5:00 p.m. I greatly enjoy solving puzzles and consider legal issues as puzzles to be understood and resolved creatively, within the bounds of the law, and with the maximum satisfaction possible to the litigants and lawyers.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

As a young lawyer clerking for the Criminal Court of Appeals, I co-wrote many published opinions. Due to my experience as a law clerk for Judge Walker, I was subsequently hired to write briefs to the Court of Appeals for other attorneys. I have also handled several cases on appeal with the Tennessee Court of Appeals in the context of divorce cases, one involving division of railroad retirement benefits and another involving the division of an insurance business.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I was trained as a mediator and presided over numerous Federal Farm Bureau mediations that

involved the governmental lending practices and farm subsidies. I have also been honored to serve as Special Judge, in City Court, General Sessions Criminal Court and Environmental Court. I was usually contacted directly by the sitting Judge, to fill in for the day during his or her absence. I cannot begin to list the dates of each and every appearance, nor the substance of each case presented to me. I did received cufflinks with the City of Memphis seal for my willingness to serve. I also trained for five days to become a domestic relations mediator. I was a Rule 31 mediator but have allowed that accreditation to lapse.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Throughout my practice of law, I have served numerous times as a Guardian Ad Litem in the Circuit, Chancery and Juvenile Courts of Shelby County. I have also been appointed as Guardian in cases requiring supervision of the investments and needs of minors. One special case to me is a young man, and his mother, that I became close with when he was five and his Mother was spending funds without court approval. I was appointed as co-guardian with the mother and we invested and appropriately conserved funds so that he was able to attend college in the east. I am proud to say that this brilliant young man recently graduated from law school and is currently practicing law in California.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I have donated my time and legal services to several women in Moriah House, an organization that helps women rehabilitate themselves from drug dependency to reconnect with their children. As co-founder and Board Member of Memphis Area Golden Retriever Rescue ("MAGRR"), an organization devoted to finding forever homes for lost, abandoned, and abused golden retrievers, I have served as their legal advisor for the past fourteen (14) years.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I submitted an application for the Part III Chancellor position that was open in the Fall of 2014 due to Kenny Armstrong being appointed to the Court of Appeals. I was not selected as one of the three names recommended to the Governor.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

I graduated from Heidelberg American High School in Heidelberg, Germany in 1974, and attended the University of Florida in the Fall of that year. I graduated in May 1978 with a degree in Bachelor of Arts and a Teaching degree. I taught school for one year in Madison, Florida and then taught school at St. George's Day School in Memphis, Tennessee. I began law school in the Fall of 1981 at the University of Memphis Law School and graduated in May 1984.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 59 years old and was born June 6, 1956 in Cherry Point, North Carolina.

16. How long have you lived continuously in the State of Tennessee?

I have lived continuously in the State of Tennessee since 1990.

17. How long have you lived continuously in the county where you are now living?

I have lived in Shelby County, Tennessee since 1990.

18. State the county in which you are registered to vote.

Shelby County, Tennessee.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I was not in the military, however, my father retired from the Marine Corps as a Colonel after thirty (30) years of service and my family traveled with him throughout his career in the military.

20. Have you ever pled guilty or been convicted or are now on diversion for violation of any

law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

I have had two complaints filed against me in my thirty (30) years of practice with the Board of Professional Responsibility. The first was in 1988 and that complaint was dismissed with no action. The second I believe, was in 1995, when I was given a private censure for an appearance of a conflict of interest. I filed a divorce for a woman who later reconciled with her husband, and she and her husband were represented in a personal injury lawsuit by an attorney within the firm, even though the divorce had not yet been dismissed.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of

trust in a foreclosure proceeding.

Yes. I was sued by an associate attorney, Misty D. Becker, in the dissolution of our employment agreement with my firm. The lawsuit was brought by Ms. Becker and filed in the Circuit Court of Shelby County, Tennessee under Docket Number CT-000085-08 on or about January 7, 2008. That lawsuit was resolved through mediation and an Order dismissing the case was entered on April 15, 2014. Ms. Becker is presently paying a judgment to me as a result of the settlement.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

I have been a member of Zonta International since 2001, which is a professional business women's association to advance the status of women worldwide. I have been the President, Secretary and Treasurer of said club within the past five (5) years. I am also a co-founder of the Memphis Area Golden Retriever Rescue, Inc. ("MAGRR") that was founded in 2000. I am currently on the Board of Directors and serve as legal counsel for the organization. We find homes for lost, abandoned, and abused golden retrievers.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

a. If so, list such organizations and describe the basis of the membership limitation.

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

I have been a member of the Memphis Bar Association and the Tennessee Bar Association in the

last ten (10) years.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

I have received a Certificate of Appreciation in Recognition of Outstanding Service as Special Judge in City Court. I have received the Order of the Barristers having exhibited excellence and high honor through the art of Courtroom advocacy. During my candidacy for Judge of Division III of Circuit Court, the lawyers of the Memphis Bar Association voted me "most qualified" for the position. I was also endorsed for this position by the Shelby County Republican party.

30. List the citations of any legal articles or books you have published.

None.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

I have taught "Preparation for the LSAT" and "The Law and You" through Continuing Education at the University of Memphis. In 2015, I have spoken at two seminars concerning the issue of Human Trafficking and will speak again in December. My topics have been the State Human Trafficking Task Force Reports and Legislative Developments to combat Human Trafficking in Tennessee.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

I was a candidate in the August 7, 2014 election for the position of Division III of the Circuit Court of Shelby County, Tennessee. Said position was due to the vacancy created by the retirement of Judge Karen R. Williams. My opponent was D'Army Bailey, a former Judge for nineteen (19) years. I was endorsed by the Republican Party even though the judicial candidates are to run without political affiliation. Despite the experience of my opponent, I was voted by the Memphis Bar Association as "most qualified" for the position for which I ran. I received over 61,000 votes in that election which unfortunately, did not result in my winning the position. Many other successful candidates on the ballot, did not receive the support of over 61,000 voters, but yet won their positions. I was delighted, as a first time candidate, to receive so many votes and so much support from the community at large. As you know, Judge Bailey passed

away after nine months on the bench creating this vacancy for which I am applying.

I also applied in the Fall of 2014 for the position of Chancellor for Part III. I was not selected as one of the three names recommended to the Governor.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached please see the case of *Sloat vs. Sloat* which was filed in Circuit Court on March 31, 2014. The work is 100 percent my own. In addition, see the case of *Cozart vs. Cozart*, which is an appellate brief filed with the Court of Appeals about 1998 and once again, the work is 100 percent my own.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I am seeking this position because I believe I have much to offer to the citizens of Memphis and Shelby County, Tennessee. I believe I have the necessary judicial temperament and knowledge, as well as the support of numerous lawyers and citizens as evidenced by votes when running as a candidate in the 2014 judicial election. I can and will treat everyone in the courtroom with patience, dignity and equality. I would be honored to serve my community and give back the grace I have received in life.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

The citizens of Shelby County desperately need free legal services in family law matters. We do not have a facility that can timely handle the overwhelming need and thus I have taken on pro bono work in the family law areas for citizens who are attempting to better themselves but do not have the financial means to address their legal needs in the area of family law. I have represented, primarily woman, in custody, child support, adoption, paternity, and divorce cases to help these clients in their quest for a better life. In my work with Zonta International, we have focused on advocacy and legislative skills to help stop human trafficking, abuse, and unplanned

pregnancies. I have spoken at seminars in Florida, Alabama and Mississippi advocating action by the members of our organization.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I would be honored to serve, and hope I am considered, for the position of Judge of Division III of the Circuit Court of the Thirtieth Judicial District at Memphis at Shelby County, Tennessee. The Circuit Court in Shelby County has nine Judges hearing cases. I believe my experience with domestic cases, which make up nearly one half of the cases filed in Shelby County, would be valuable to the other Judges and litigants alike. I am not politically motivated to seek this position but rather to serve the people, the county, the judicial system, the governor, and the state. I believe my thirty (30) years of legal experience, my patience and practical approach to dealing with people under stress, would be a benefit to the Circuit Court. The people of this County deserve a Circuit Court Judge who arrives on time, works hard and efficiently administers the cases before the Court.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

Through my work with Zonta International, we have focused on the aspect of human trafficking and advancing the status of women worldwide. Our local group has partnered with the Girl Scouts, the Girls Club, Inc., A Step Ahead, as well as The Exchange Club. If appointed as Judge of Division III, I would continue to work with these groups directly, and look forward, as a former teacher, to the programs and projects that educate young children about the law and encourage them to further their education. I believe education is the key to raising our children to new heights and encouraging them to be productive and law abiding citizens. I would consider it my duty to be as active in the community as my position would allow. I am open to supporting other worthy causes that benefit children and their education.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I was raised in a color-blind society of the military. We all lived in the same government housing, attended the same government schools on base, and had the same government income based on rank. I believe that Memphis needs to move past their racial divisiveness of the past to a more harmonious future based on equality. The Courts can help lead the way with Judges and Chancellors setting an example for the citizens of this County. I believe I have a talent to work with all people and to be fair and professional with those people. Although not a native Memphian, I have chosen to live here for the past thirty-five (35) years, and have many contacts and friends in this community. I look forward to the opportunity of serving and hope that I am

successful in helping to unify this community. I hope that you will recommend me as one of three (3) finalists to be presented to Governor Haslam so that I may shine as the next Judge of Division III of Shelby County, Tennessee.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

It is my sworn duty as a lawyer, officer of the Court and/or Judge, to uphold the laws of the State of Tennessee as presently written. It is immaterial whether I agree or disagree with the law. During my thirty (30) years of practice, I have represented clients to whom I thought the imposition of the law was unfair, and I have sought to change those results. Specifically, I represented a man who was divorced from his wife. The Wife was awarded legal custody of the two minor children of the marriage. The father obtained a job offer outside the United States, and the parents agreed that it would be a wonderful learning opportunity for the children to go with the father for the next two (2) years to another country. The parties signed a document that they prepared, attempting to give legal custody to the father, suspending child support, and had said document notarized. Two (2) years later, upon the father's return, the mother desired the children reside with her again, and sued the father for two (2) years of child support since they had never entered an Order with the Court. Unfortunately, the law states that once child support becomes due, it cannot be forgiven. Although the parties clearly agreed the children should live with the father overseas and suspend child support at that time, and because their notarized agreement was not filed with the Court, the purported change in custody was invalid. It seemed patently unfair to me that the father owed two years support since there was no dispute of the parties' intent. The father was ordered to pay the child support, with interest, even though mother agreed and allowed the children to live with their father but the rules of law had not been met.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Larry Rice, Attorney at Law,

B. Ronald D. Krelstein, Attorney at Law,

C. Michael and Lane Doyle, Lynn Doyle Flowers,

D. Laurel Niday,
E. Carey Woods, Divorce Referee,

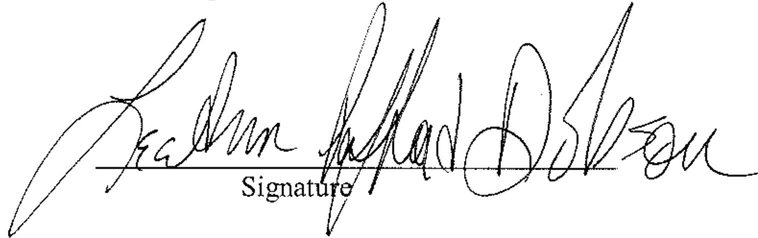
AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Circuit Court for the Thirtieth Judicial District at Memphis and Shelby County, Division III, of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: November 24, 2015.



Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

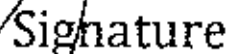
TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Lee Ann Pafford Dobson
Type or Print Name

[signature]
Signature



November 24, 2015
Date

11307
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

WENDY JANE SLOAT (OLSEN), Plaintiff, vs. **WESLEY BRIAN SLOAT,** Defendant.	* * * * * * * *	No. **CT-003523-05** **Division VIII**

REPLY BRIEF TO
MEMORANDUM OF LAW

I. BACKGROUND

The parties in this cause, Wendy Jane Sloat (Olsen) and Wesley Brian Sloat, were married July 26, 1986 and divorced February 1, 2006. The parties entered into a Marital Dissolution Agreement ("MDA") on January 6, 2006 (Exhibit 1), and the Agreement was filed with the Court on January 19, 2006. Said MDA was incorporated into the Final Decree of Divorce that was entered on February 1, 2006.

On or about December 5, 2012, the Plaintiff, Wendy Jane Sloat (Olsen), filed a Petition for Civil and Criminal Contempt and Clarifying Order.

II. ISSUE

The solitary question before this Honorable Court is to clarify the formula to be used to decide how to compute the division of the Defendant's military retirement benefits pursuant to the language of the MDA, page 7, paragraph 13, which specifically states:

'Wife shall receive one-half (1/2) of husband's military retirement **that accrued during the marriage."** [emphasis added]

The Plaintiff/Wife has prepared a Qualified Domestic Relations Order ("QDRO") using a marital fraction formula. Defendant/Husband has prepared a QDRO using the hypothetical formula. Neither will sign the other's Order. It is undisputed that said language is ambiguous and cannot be processed by the Defense Finance and Accounting Service ("DFAS") as written and as such, clarification is needed.

The specific issue is whether the parties intended the marital fracture formula be used or whether the hypothetical formula was intended to be used to determine Plaintiff's interest in Defendant's military retirement benefits.

III. LANGUAGE REQUIRED TO PROCESS DIVISION OF PROPERTY REGARDING MILITARY RETIREMENT PAY

The Department of Defense specifically addresses two formulas to compute an award of military benefits. In order to allow the Department of Finance and Accounting Service ("DFAS") to properly enforce a division of military retired pay, the division must be expressed as either a fixed dollar amount, or as a percentage of the disposable retired pay. 10 U.S.C.§1408(a)(2)(c).

The parties in this cause were divorced prior to the service member's retirement. DFAS notes, in Exhibit 2, page 6, of their guide on Dividing Military Retired Pay that:

"Most of our problems with award language have arisen in cases where the parties were divorced while the member was still performing military service. In these cases, the former

spouse's award was indeterminate at time of divorce since the member has not yet retired. Since the parties did not know how much longer the member would remain in military service after the divorce, a straight percentage award may not have been suitable. **Also, many States take the approach that the former spouse should not benefit from any of the member's post-divorce promotions or pay increases based on length of service after the divorce."**

[emphasis added]

DFAS has incorporated into Chapter 29 of the DoD FMR, Volume 7B the two formulas used to divide military retired pay.

The Department of Defense addresses the first award, marital fraction formula award where the numerator covers the period of the parties' marriage while the member was performing creditable military service and the denominator covers the member's total period of credible military service. (Exhibit 2, page 7).

The alternate computation approved by the Department of Defense is the hypothetical formula computation which is defined as follows:

"A hypothetical award attempts to define the property interest in the retired pay as if the member had retired at the time the court divided the member's military retired pay based upon the member's rank and years of service accrued to that point in time." DoD FMR, 7B, 29, 290213.

IV. LAW AND ARGUMENT

As I am sure this Court is aware, the Marital Dissolution Agreement is "a contract and as such, generally is subject to the rules governing construction of contracts." Johnson v. Johnson, 37 S.W.3d 892, 896 (Tenn. 2001). The basic issue in the interpretation of any contract is the intent of the parties. The intent of the contracting parties at the time of the execution of the Agreement is presumed to be that "specifically expressed in the body of the contract." Planters Gin Co. v. Fed. Compass & Warehouse Co., 78 S.W.3d 885, 890 (Tenn. 2002).

The plain language of the MDA in the case before your Honor *clearly* states the Wife "is to receive one-half (1/2) of Husband's military retirement that **accrued during the marriage**." [emphasis added]. From said language, it is certain the parties did not intend the Plaintiff to continue to accrue any benefits due to the Defendant's service in the military ***after*** the entry of the Final Decree of Divorce.

This Court can only enforce the contract which the parties themselves have made. McKee v. Continental Ins. Co., 234 S.W.2d 830,831 (Tenn. 1950); Pitt v Tyree Organization Ltd., 90 S.W.3d 244, 252 (Tenn. Ct. App. 2002) (citing McKee v. Continental Ins. Co., 191 Tenn. 413,234 S.W.2d (1951)). An MDA should be fairly and reasonably construed; however, the courts should avoid rewriting these agreements under the guise of "construing" them. Elliott v. Elliott, 149 S.W.3d 77, 84 (Tenn. Ct. App. 2004) (citing Duvier v. Duvier, No. 01A01-9311-CH-00506, 1994 WL 422465, at *3 (Tenn. Ct. App. July 19, 1995) (No Tenn. R. App. P. 11 application filed)). Furthermore, a division of marital property is not subject to modification. *See,* Towner v. Towner, 858 S.W.2d 888, 892 (Tenn. 1993).

In the case at bar, the plain language of the Marital Dissolution Agreement specifically states that Plaintiff's interest in Defendant's retirement benefits was to end at the time of the divorce. Plaintiff was to receive one-half (1/2) of Defendant's military retirement **accrued during the marriage**. [emphasis added]. Both the Plaintiff and Defendant can agree on the plain language and its meaning. Unfortunately, interpretation is where the parties disagree. The Plaintiff/Wife would have this Court use the Department of Defense marital fracture formula in interpreting the language. Unfortunately, under the DoD's marital fracture formula, the Plaintiff/Wife continues to receive benefits from the Defendant's post-divorce future promotions, post-divorce cost of living increases, and Defendant's post-divorce years of salary prior to his retirement. In essence, under this scenario, the Plaintiff/Wife would continue to receive benefits from Defendant's military career that she did not share or participate in, and has no right to receive.

It is the Defendant's position that the hypothetical formula award is what was intended by the clear language of the MDA. The hypothetical formula award is the **only** scenario that does not include post-divorce military service in its computations of the amount of retirement benefits Plaintiff/Wife should receive.

Plaintiff would have you look to Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001) in which the parties entered into a MDA and were also divorced prior to the Husband's retirement from the military. However, the language of the parties' MDA in Johnson stated that Wife "shall receive one-half of **all** military benefits due to Husband". [emphasis added]. Not surprisingly, the Tennessee Courts found that the language in the MDA that stated "all military retirement benefits" was unambiguous as used by the parties in the MDA.

The case before this Court did **not** use the words "all military benefits", nor did it leave open the question of when the benefits could or would have accrued. The case at bar *specifically* states that Wife is to receive one-half of Husband's military retirement that **accrued during the marriage**.

The Plaintiff and Defendant agree that the MDA does not state any current or present values for computation under either formula. Plaintiff's attorney maintains that since the MDA contains no reference to any hypothetical value, no years of military service, no specific military ranks, that the marital fraction was the intended formula. The MDA does not contain the number of months the parties were married that overlap the number of months the Defendant was in the military and that information is necessary for a marital fraction award. No information was contained in the MDA to prepare either formula award.

This Court will need to choose a formula and then the required information can be put in an Order that DFAS will recognize. Under the hypothetical formula award, pursuant to the Department of Defense, it is easy to compute the amount of retirement as of the date of divorce as all factors needed are known. Under the marital fraction formula, the length of the former Husband's service is unknown as he is still an active member of the service. To date the former Husband has served over eight years post-divorce.

If this Court does not use the hypothetical computation, then Plaintiff continues to receive benefits she did not earn. Since the divorce, the Defendant has been awarded numerous promotions, and when he does finally retire, the military will use the highest salary of his last three years prior to retirement in order to compute his retirement pay. ***Clearly,*** it was the intent of the parties at the time of the divorce that Plaintiff, who was

divorced from the Defendant in 2006, would **not** receive any award of future military benefits earned by the Defendant's over eight (8) years **post-divorce** service.

If the Defendant had the fortune of working for Federal Express as a pilot instead of the U.S. Military, the "hypothetical formula computation" is the one routinely used by Federal Express. They segregate the Wife's retirement at the time of the divorce and when the Husband reaches retirement age, she can then draw from her portion of the retirement account.

It is discriminatory to say that because the Defendant works for the military, and because Congress has seen fit not to segregate the Plaintiff's share from the Defendant's share, that a computation that stops the Plaintiff's benefits at the time of the divorce cannot be made. In fact, DFAS has set forth a formula that seeks to cap the benefits awarded to the non-member to an award for benefits accrued only during the marriage, and that is the hypothetical formula. The Department of Defense regulations set out the hypothetical award in order to arrest any future benefits accruing to Plaintiff **post-divorce**.

Defendant would further point out to this Court, under Tennessee law, assets of the marriage are to be divided as close to the date of the divorce as possible. T.C.A. § 36-4-121. The hypothetical formula is the proper formula that complies with Tennessee law.

Plaintiff's counsel would have this Court review Matthews v. Matthews, M2009-00413-COA-R3-CV (Tenn. Ct. App. 2010), where the parties were married 19.6 years during the husband's 28 year military career, wherein a little over 8 years was non-marital. The Court, in Matthews awarded the wife one-half of the military retirement benefits that were marital. The case further stated that any interest in retirement benefit,

vested or unvested that accrues during the marriage is marital property subject to division. The issue in Matthews was that husband was disputing wife obtaining a portion of marital pension during the years the parties were separated. The husband was erroneous in that assertion and this case does not apply to the case before this Court.

In Matthews citing Kendrick v. Kendrick, 902 S.W.2d 927, fn.17, the Court noted "in cases where the amount of the pension depends on years of service (such as in the military) and those years overlap the marriage, the ratio between the years of marriage during which the pension accrued and the total number of years of accrual gives us the **most common** formula calculating what proportion of the pension should be considered as marital property." However, just because it is the most common formula, does not mean it is the one that was intended or the one that fairly divides the retirement benefits under Tennessee law. If this Court uses the marital fraction formula, it goes against the specific language of this MDA and T.C.A. § 36-4-121 (b)(1)(A).

Plaintiff's attorney cites Hudson v. Lout, W2007-02704-COA-R3-CV (Tenn. Ct. App. 2008) in which the trial court was called upon to interpret the Marital Dissolution Agreement. The parties were divorced in 1993 while Mr. Lout was still an active member of the military. A written Order was prepared by the parties and entered by the trial court in September 1993 and said Order specifically provided in relevant part that Mrs. Hudson "is awarded half of the present value of the Defendant's military retirement as of May 27, 1993; the present value of the plaintiff's interest in defendant's military retirement is determined by the following fraction: 16/ __ x 50% total number of years of defendant's service in the military before retirement." So in that case, while the trial court gave an oral ruling awarding Ms. Hudson "half of the present value of Mr. Lout's military retirement

as of May 27, 1993, the trial court went on to define that by using the marital fraction formula and gave Ms. Hudson 28% of the Husband's pension.

Unfortunately, some twelve years later when Ms. Hudson attempted to collect the funds from the Defense Finance and Accounting Service, ("DFAS"), it was noted the language was insufficient to allow DFAS to directly disburse a payment to her. At this time, Mr. Lout was retired from the military and the parties had much discussion on how to revise the Order so that DFAS could in fact pay out retirement benefits to the Wife. The court noted there was no dispute in that case that the provision was ambiguous, at least to the extent that DFAS was unable to distribute benefits under its language.

"This dispute, as we perceive it, required the trial court to construe rather than amend the 1993 decree provision. Courts construe a judgment like any other written instrument. Blue Cross Blue Shield of Tennessee v. Eddins, 516 S.W.2d 76, 78 (Tenn. 1974)(citations omitted). The determinative factor is the intent of the rendering court as discerned from all parts of the judgment. *Id.* A judgment should be construed so as to give force and effect to every word of it, if possible, and make its several parts consistent, effective and reasonable." *Id.*

While the Husband in Hudson v. Lout, makes the same argument the Defendant, Mr. Sloat, makes in the case at bar, the significant difference in Hudson is that at the time of the divorce, the percentage was established by the trial court and the parties did not object to same. We have no such Order or award by this Court. Therefore, the Hudson case is not on point with the issue before this Court.

Plaintiff's counsel cites Richmond v Richmond, E2011-01687-COA-R3-CV (Tenn. Ct. App. 2012) which is also not on point as it contains the same flawed argument. The trial court ordered the marital fraction formula be used at the time of the divorce. The

parties divorced in 1999 and at that time, Wife was awarded "one-half of [h]usband's retirement with the United States Air Force up until the date of divorce." *Id.* In that case, when the parties divorced, the Husband had completed 17 years of service and he retired with 28 years of military service. In June 2011, the trial court did a computation using the marital fraction formula. That was **not** the issue on appeal. The formula was not contested and the Husband did not attempt to ask the court to use the hypothetical formula as outlined by DFAS. Therefore, the Richmond case does not apply with the facts before this Court.

The case cited by Plaintiff's counsel most closely on point is Franco v Franco, M2009-01562-COA-R3-CV (Tenn. Ct. App. 2011). In Franco the parties were divorced in 1995 after 13 years of marriage. The Husband had served in the military from August 1976 until August 2006, a period of 30 years. When Mr. Franco retired from the military, the DFAS interpreted the parties' agreement to require 50% of Mr. Franco's retirement pay to go Ms. Franco. Mr. Franco filed a Petition to Modify arguing that she was not entitled to 50% of his retirement benefits. The Husband argued that Ms. Franco was entitled to 50% of the retirement attributable to the 13 years the parties were married, but not the 30 years of military service by Mr. Franco. The matter was referred to a Special Master who found that under the terms of the agreement, the Wife was not entitled to 50% of Mr. Franco's full retirement but rather 50% of the retirement benefits that had accrued during the marriage. Based on that finding, the Special Master went on to do the computation pursuant to a marital fraction formula and found the wife was entitled to 23% of Mr. Franco's gross retirement pay. The special language of the agreement in the Franco case was: "[w]ife shall receive fifty percent (50%) of the [h]usband's military

retirement, upon his retirement, based upon a marriage that lasted more than thirteen (13) years." *Id.*

The Special Master, in giving his recommendations, found the agreement stated a formula not as clear as what should have been stated and, therefore, he applied the marital fraction formula, which is one of two formulas accepted by DFAS.

The court in Franco specifically noted that:

> "First the language of the agreement between the parties was that she was to receive 50% of the retirement based on the 13 year marriage. That language leads to the conclusion that the 13 year marriage factors into the amount of retirement benefits she is to receive. Second, if the parties had intended Ms. Franco to receive 50% of Mr. Franco's **entire** retirement benefits, then the phrase "based upon a marriage that lasted more than thirteen (13) years" is unnecessary. Also, given that Mr. Franco was in the service 5 years prior to the marriage and 12 years thereafter, it is difficult to understand why he would agree to give Ms. Franco 50% of his 30 year retirement benefits based on a 13 year marriage." *Id.*

The husband in the Franco case objected to the Special Master's report setting forth the formula as *res judicata*. The husband did not oppose the Special Master's findings at trial, nor did he request the hypothetical formula award.

The plain language of the MDA in the case before this Court states that the Plaintiff was to receive no benefits from Defendant's service in the military post-divorce. That language sets forth the intent to use the hypothetical formula award, not the marital

fraction. Furthermore, that intent is corroborated by the language of the Tennessee statute which is that "marital assets shall be divided as close to the date of divorce as possible." T.C.A. § 36-4-121.

Fry v. Fry, M2000-02969-COA-R3-CV (Tenn. Ct. App. 2001) was before the Court of Appeals two times. The first time was in December 2001 and again in September 2013. The issue was that the parties divorced and the Order specifically stated that " [w]ife is awarded one-half (1/2) of [husband's] pension through the U.S. Navy that has vested during the term of the marriage." The first Order drafted and submitted to DFAS was not accepted. The parties could not agree on what language should be in said Order, so the trial judge finally signed an Order that stated wife was entitled to a minimum of 50% of husband's Navy retirement. The court went on to state that if the husband completed a 20 year tour of duty and qualified for retirement, then the marital fraction would be used to decide the wife's portion of benefits. Unfortunately, the trial court went on to say if husband is promoted between the date of this Order and the completion of 20 years of duty, then the number will have to be adjusted to account for his promotion.

In Fry, the trial court's Order was appealed and the Court of Appeals specifically stated:

> "As we interpret the original order, it awarded the wife one-half of the pension – but only of that portion that accrued during the marriage. The original order was in accordance with the general rule announced by the courts of this state that only the portion of retirement benefits that accrue during the marriage are marital property subject to division. See Cohen

v. Cohen, 937 S.W.2d 823 (Tenn. 1996). Therefore, the ruling by the trial court was substantive and completely changed the agreement of the parties."

The case was remanded back to the trial court who took another stab at drafting an Order that was not acceptable to the parties and the matter went up on appeal again.

The second time, Mr. Fry appealed the trial court's Amended Final Decree, arguing that the Amended Final Decree significantly altered the original Final Decree of Divorce in that the original Final Decree awarded the wife only one-half of the husband's retirement that accrued during the parties' marriage. The Court of Appeals then inserted the marital fraction formula for computing the retirement. The trial court had used the marital fraction but had mistakenly used years instead of months in the computation and DFAS would still not accept the trial court's second stab at defining wife's portion of the retirement benefits.

The Court of Appeals remanded the case back to the trial court decreeing that wife was entitled to one-half of the military retirement pay that husband earned during the parties' marriage, and that the language of the decree would comply with the requirements of the Uniformed Services Former Spouses' Protection Act.

The Fry case shows the inherent problems with the courts choosing the most common marital fraction formula that does not reflect the langue of the MDA.

In the case of Cain v. Cain, M2011-00902-COA-R3-CV (Tenn. Ct. App. 2012) (attached as Exhibit 3), the husband was active duty military 2 years before he married. The parties divorced after 17 years of marriage. The trial court awarded as follows:

"...Wife is entitled to forty percent (40%) of the Husband's military retirement benefits, which benefits shall be computed

> as of October 1, 1987. The Wife shall not be entitled to any increase in the Husband's military retirement benefits, which benefits are earned by the Husband following October 1, 1987, as a result of the Husband's longevity with the military, increase in rank or benefit otherwise actually earned by the Husband; provided, however, that Wife shall share a like proportion in any cost of living or similar adjustment as computed following the Husband's retirement. Based upon twenty (20) years of active service and as computed as of October 1987..."

The sole issue for review by the appellate court is whether the trial court erred in construing the Final Decree to require that wife's share of husband' s military retirement pay be calculated each year based upon the amount husband would receive if he retired during that year with 20 years of military service.

The husband in Cain argued that the Final Decree provided wife's share of his military retirement pay is limited to the benefits that accrued during the parties' 17 year marriage, and should be calculated as if he retired on October 1, 1987.

The wife argued that her share of the husband's military retirement pay under the Final Decree is calculated each year based upon the amount husband would receive if he retired during that year having served 20 years in the military. The Court of Appeals, after reviewing the plain language of the Final Decree, disagreed with the trial court and ruled that the trial court erred in interpreting the Final Decree to award wife a perpetually increasing share of husband's military retirement pay.

The Court of Appeals stated:

("[O]nly pension rights accruing during the marriage will be considered marital property.") Thus, only seventeen out of the twenty years, or eighty-five percent (85%), of Husband's retirement pay was marital property. Wife's forty percent (40%) share was intended to come out of this 85% marital property portion of Husband's retirement pay. Accordingly, the trial court erred in interpreting Wife's share to include military retirement benefits that did not accrue during the parties' marriage."

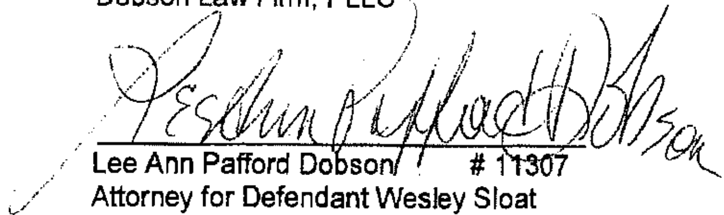
The most important issue this Court needs to look at is the intent of the parties, the plain language in the Marital Dissolution Agreement executed by the parties, and the fact that the Defense Finance and Accounting Service recognizes two formulas to compute the wife's retirement benefits. Only the hypothetical formula stops all accrual of benefits to wife as of the date of the divorce. In keeping with the laws of Tennessee, all marital property, including the retirement benefits, is to be valued as close as possible to the date of the divorce. T.C.A. § 36-4-121. Only the hypothetical formula does so. The marital fraction formula allows the wife, now ex-wife, to enjoy the benefits of the post-divorce promotions of the now ex-husband, and the added years of service. This is *clearly* not what was intended by the language of the MDA and by the law of the State of Tennessee.

V. CONCLUSION

This Court should approve the attached hypothetical formula award Qualified Domestic Relations Order that was drafted in compliance with the Marital Dissolution Agreement executed by the parties, and the plain language therein. Said Order is

attached as Exhibit 4, which will allow the Defense Finance and Accounting Service to process this Court's order and clarify the dispute between the parties. This is the **only** formula that will fulfill the intent of the parties as stated in the MDA and will allow DFAS to have the information to compute the hypothetical formula to award the ex-wife her portion of the benefits she earned during the parties' marriage. Any other formula used will allow the now ex-wife to enjoy the unjust enrichment of Defendant's post-divorce promotions and added years of service.

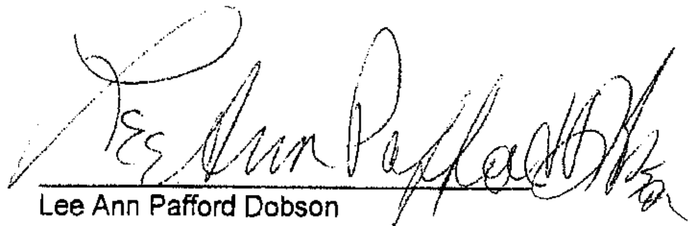
Respectfully Submitted,
Dobson Law Firm, PLLC



Lee Ann Pafford Dobson # 11307
Attorney for Defendant Wesley Sloat
7515 Corporate Centre Drive
Germantown, Tennessee 38138
(901) 754-9935

CERTIFICATE OF SERVICE

I, Lee Ann Pafford Dobson, do hereby certify that I have served a copy of the foregoing pleading by depositing same in the United States Mail, first class, postage prepaid, addressed to Bradley J. Cordts and Michelle J. Spears, Attorneys for Plaintiff, 6263 Poplar Ave., Suite 1132, Memphis, TN 38119, on this the 31st day of March, 20 14.



Lee Ann Pafford Dobson

<u>**EXHIBIT 1**</u>

MARITAL DISSOLUTION AGREEMENT

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

WENDY JANE SLOAT,

Plaintiff,

VS. NO. CT-003523-05 Division VIII

WESLEY BRIAN SLOAT,

Defendant.

FILED
FILED
JAN 19 2006
CIRCUIT COURT CLERK
BY ________ D.C.

MARITAL DISSOLUTION AGREEMENT

THIS AGREEMENT is made and entered into by and between Wendy Jane Sloat, hereinafter called "Wife", and Wesley Brian Sloat, hereinafter called "Husband."

WITNESSETH:

WHEREAS, the parties were married on July 26, 1986;

WHEREAS, two (2) children were born of this marriage, namely, Kenneth Russell Sloat, whose date of birth is March 16, 1989; and Natalie Erin Sloat, whose date of birth is January 26, 1991; and

WHEREAS, differences have arisen between the parties which are irreconcilable and a Complaint for Divorce has been filed by the Wife in the Circuit Court of Shelby County, Tennessee, under Docket Number CT-003523-05 and your Defendant, hereby waives further service of process

WJS B.S.

in this cause, and, further, hereby waives filing an Answer to the Complaint, and the parties make oath that at the time of their execution of this agreement Husband is a member of the United States Navy;

WHEREAS Wife has filed a Complaint for Divorce alleging irreconcilable differences in the courts of Shelby County, Tennessee, and Husband stipulates that the parties are entitled to a divorce on the grounds of irreconcilable differences and that this agreement represents a fair and equitable division of the parties' assets and liabilities and a fair, appropriate resolution of their parenting issues.

WHEREAS, both parties agree and stipulate that this Agreement makes full and adequate provision for the distribution of the property of the parties and the Permanent Parenting Plan makes appropriate provisions for the care, support and maintenance of the parties minor children; and

WHEREAS, both parties have full knowledge of and have made to each other a full disclosure of all separate and marital assets; and

WHEREAS, neither party at the time of this Agreement is under the influence of any intoxicant or drug, legal or illegal, nor is either party experiencing any mental problem(s) or conditions that would affect their judgment, other than the stress normally to be expected in a divorce; and

WHEREAS, Wife is represented by Beth Cocke, Attorney, and Husband is represented by Lee Ann Dobson, Attorney.

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS AND

AGREEMENT HEREIN SET FORTH, THE PARTIES DO AGREE AS FOLLOWS:

1. **CREDIT:** The parties hereto agree that, except with the express consent of the other, neither party shall charge or cause to be charged to the other party any purchases which either of them may make after this Agreement is entered into and shall not create any engagements or obligations in the name of or against the other, nor shall either party hereafter secure or attempt to secure any credit upon or in connection with the other. Each warrants that there are no charges on the other's credit that have not been fully revealed. If there are any such unrevealed charges, the party making those charges shall be responsible for the payment of them.

2. **WAIVER:** Except as provided in the terms and provisions of this instrument, each party waives all right, title and interest, consummate and inchoate, in and to the property and estate of the other, by way of expectancy or reversion or otherwise, including marital, insurance, contractual, and all other rights by way of dower, homestead, exemption, alimony or otherwise, in present or in expectancy, as to any and all property and estate of the other, and, each of the parties does hereby release and discharge the other from any and all control, claims, demands, actions, or causes of action, except as to the obligations imposed by this instrument or by the Court's decree, this being intended as a full, final, and complete settlement of the property, marital, and other rights of the parties hereto. Both parties waive any separate and distinct claim to any retirement and

WAS WKL

pension benefit of the other party, except as set out by this Agreement.

3. **NECESSARY DOCUMENTS:** Each party at the request of the other will promptly execute and/or deliver all documents which may be reasonably necessary to give full effect to this Agreement.

4. **NON-COMPLIANCE:** Should either party incur any expense or legal fees as a result of the breach of any portion of this Marital Dissolution Agreement by the other party, the Court shall award reasonable attorney's fees and suit expenses to the non-defaulting party. No breach, waiver or default of any of the terms of this Agreement shall constitute a waiver of any subsequent breach or default of any of the terms of this Agreement.

5. **SEVERANCE:** Should the Court hold that any portion of this Agreement is invalid, the remainder shall be in full force and effect to fulfill the intentions of the parties and the invalid portion shall be stricken from the Agreement or modified as the Court shall order.

6. **INCORPORATION, PERMANENT AND PENDENTE LITE:** In the event of a divorce, it is agreed by the parties that this Agreement shall be incorporated in the Final Decree, and that by its filing, the parties specifically consent to and authorize the entry of a Consent Order binding them to its terms. By the signing of this Agreement, the parties stipulate to these terms being enforceable as if they were, at the moment of signing, an order of this Court.

7. **VOLUNTARY EXECUTION:** Each party acknowledges that this

Agreement has been entered into of his or her own volition with full knowledge and information. In some instances, it may represent a compromise of disputed issues. Each believes the terms and conditions to be fair and reasonable under the circumstances. No coercion or undue influence has been used by or against the other party in making this Agreement. Each party acknowledges that no representations of any kind have been made to him or her as an enticement to enter into this Agreement, other than the representations set forth herein.

8. **MODIFICATION:** A modification or waiver of any of the provisions of this Agreement shall be effective only if made in writing; executed by both parties with the same formality as this Agreement; and approved by the Court, if such approval is required. Failure of either party at any time to insist upon strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature.

9. **TAX LIABILITIES:** Husband and Wife each represent and warrant to each other that all joint income tax returns filed during the marriage are in all respects, true, correct, and complete and that to the best of their knowledge, information and belief they fully and accurately reflect the income and deductions appropriate for those years.

10. **PERSONAL PROPERTY:** The parties have heretofore divided all other personal property and each shall retain title to the personal property now in his or her possession. Husband shall keep the refrigerator and Wife shall keep the washer and dryer. Each party hereto agrees to execute any documents necessary to divest his or her full title and interest

WS W.B.J.

in and to the property retained by the other party to the other party.

11. **AUTOMOBILES:** Wife shall receive the 2005 Honda CRV, and shall be responsible for any remaining indebtedness thereon and shall indemnify Husband and hold him harmless therefor. Husband does hereby release any and all right, title and interest in and to said automobile to Wife, and shall execute any necessary documents to effectuate said transfer.

Husband shall receive the 2005 Honda Accord, and shall be responsible for any remaining indebtedness thereon and shall indemnify Wife and hold her harmless therefor. Wife does hereby release any and all right, title and interest in and to said automobile to Husband, and shall execute any necessary documents to effectuate said transfer.

12. **REAL PROPERTY:** The parties own two parcels of real property as tenants by the entirety, one of which is located and situated at 8575 Stablemill Lane, Cordova, Tennessee 38016; and the other at 4709 Sweetwood Court, Virginia Beach, Virginia 23462.

Husband shall receive all right, title and interest in and to 8575 Stablemill Lane, Cordova, Tennessee and shall be responsible for all indebtedness secured thereby and shall indemnify Wife and hold her harmless therefor. Wife shall execute a quitclaim deed releasing her interest in and to said property.

The property located at 4709 Sweetwood Court, Virginia Beach, Virginia shall be sold, from the net proceeds (defined as the sales price less brokers' commission, closing costs, taxes and any other expenses associated with the sale), the parties shall pay the following marital debts:

WJS WBD

Burch Porter & Johnson	$ 3,000.00
MasterCard	$10,499.17
Citi	$ 650.00
Wife's Mother	$ 2,500.00

After these payments, Husband shall receive forty percent (40%) and Wife shall receive sixty percent (60%) of the remaining proceeds. Capital gains, if any, shall be pro rata according to the division of proceeds.

13. **BANK, INVESTMENT AND RETIREMENT ACCOUNTS:** The parties agree that each shall retain any bank accounts and life insurance policies, including cash values, which are presently in his or her name. Wife shall receive one-half (½) of Husband's military retirement that accrued during the marriage.

14. **MOVING EXPENSES:** Husband shall pay one-half (½) of any moving expenses incurred by Wife when she moves from 8575 Stablemill Lane, Cordova, Tennessee, when their home in Virginia closes. Husband's one-half share shall not exceed Eighteen Hundred and No/100 ($1,800.00). Said sum shall be paid from ~~the~~ his [handwritten: his, initialed] proceeds of the sale of the Virginia Beach, Virginia residence.

15. **CHILD CUSTODY, SUPPORT AND VISITATION.** See Parenting Plan.

16. **DEBTS:** The parties agree that each shall be individually and solely responsible for his or her respective debts, liabilities or expenses not specifically addressed by this Agreement, or incurred subsequent to this Agreement, or each party shall indemnify and hold each other harmless from such debts, liabilities and expenses respectively agreed payable by the other party. The parties further agree that in the future, neither shall incur any debts, liabilities or expenses in the name of the other.

[handwritten initials]

The parties agree that all indemnity provisions herein relating to the payment of third-party debts shall, for the purposes of the Bankruptcy Code, be construed as part of the child support provisions of this agreement and that all support agreements contained herein are based on the premise that all such third-party debts will be paid by the party undertaking to do so.

17. **ALIMONY:** Neither party shall pay alimony to the other.

18. **NON-DISCHARGE ABILITY:** The parties further acknowledge and agree that obligations herein for payment of certain debts and/or indemnification therefor are acknowledged by the parties to be an obligation for the support and maintenance of the party to whose benefit the indemnification and/or obligation to pay those certain debts extends, and that same is reasonable and necessary to meet that party's expenses of daily living. Such obligations would be charged against resources otherwise available to the receiving party for the purpose of daily living, and that, as such, the same are not dischargeable in Bankruptcy under either 11 U.S.C. Section 523(a)(5) or Section 523 (a)(15), as applicable. Husband and Wife agree that the incorporation of this Agreement into any Final Decree of Divorce entered in this cause evidences a stipulation by the parties to all facts necessary to a finding that any obligation of indemnification for payment of certain debts and created herein is an obligation in the nature of support, non-dischargeable in Bankruptcy pursuant to 11 U.S.C. Section 523. Husband and Wife further agree that the entry of a Final Decree of Divorce in this cause shall constitute a finding and adjudication by a Court of competent jurisdiction of the obligation's characterization as support and shall constitute res judicata and collateral estoppel as to

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WB A.

the question of non-dischargability in bankruptcy. Further, the parties agree that no payments made by either party to discharge any obligation for indemnification shall be deemed for income tax purposes deductible to the payor party or taxable income to the non-payor party.

17. **ATTORNEY'S FEES AND COURT COSTS:** Each party shall be responsible for his or her own attorney's fees incurred herein. Husband shall be responsible for any remaining court costs incurred herein.

IT IS FURTHER MUTUALLY AGREED that the parties hereto, exclusive of the terms and provisions of this instrument, each waive all right, title and interest, consummate and inchoate, in and to the property of the estate of the other by way of expectancy or reversion or otherwise, including marital, insurance, contractual, and all other rights by way of dower, homestead exemption, alimony or otherwise, in present or in expectancy as to any and all property in the estate of the Husband, and each of the parties does hereby release and discharge the other from any and all control, claims, demands, actions or causes of action, except as to the obligations imposed by this instrument, this being intended as a full, final and complete settlement of the property, marital and other rights of the parties hereto.

IT IS FURTHER UNDERSTOOD AND AGREED that this written agreement is to be entered or incorporated into any Final Decree of Divorce which may be entered in this cause, and enforced as a part thereof, subject to the approval of the Court.

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MEL

IT IS ACKNOWLEDGED that both parties hereto have read and thoroughly understand this Agreement, and that to have the full and faithful performance of this Agreement, both parties have bound themselves, their heirs, administrators, or assigns, and have affixed their signatures in their respective domiciles the day and year first above written.

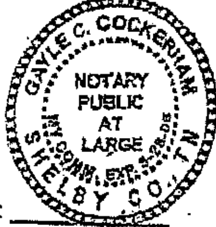
Husband

Wife

STATE OF TENNESSEE
COUNTY OF SHELBY

Before me, a Notary Public in and for said State and County, duly commissioned and qualified, personally appeared Wesley Brian Sloat, to me known to be the person described in and who executed the foregoing Marriage Dissolution Agreement, and acknowledged that he executed the same as his free act and deed.

WITNESS my hand and Notarial Seal at office this 6th day of January ~~2005.~~ 2006



Notary Public

My Commission Expires: ________

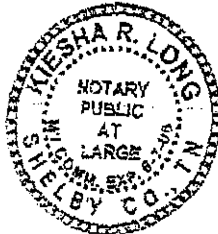
STATE OF TENNESSEE
COUNTY OF SHELBY

Before me, a Notary Public in and for said State and County, duly commissioned and qualified, personally appeared, Wendy Jane Sloat, to me known to be the person described in and who executed the foregoing Marriage Dissolution Agreement, and acknowledged that she executed the same as her free act and deed.

WITNESS my hand and Notarial Seal at office this 16th day of December 2005.

Kiesha R. Long
Notary Public

My Commission Expires: 6-7-06



WJS

WBS

EXHIBIT 2

GUIDANCE ON DIVIDING MILITARY RETIRED PAY

Disclaimer- this publication is intended to provide guidance only, and is not legally binding. Legal authority may be found at Title 10, United States Code, Section 1408, and the DoD Financial Management Regulation, Volume 7B, Chapter 29, available at https://comptroller.defense.gov/fmr/current/07b/Volume_07b.pdf

GUIDANCE ON DIVIDING MILITARY RETIRED PAY

GARNISHMENT OPERATIONS
DEFENSE FINANCE AND ACCOUNTING SERVICE (DFAS)
CLEVELAND, OHIO

DFAS-HGA/CL
P.O. BOX 998002
CLEVELAND, OH 44199-8002
1-888-332-7411
FAX 1-877-622-5930 OR
1-216-522-6960
Website http://www.dfas.mil/garnishment/retiredmilitary.html

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UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (DIVIDING MILITARY RETIRED PAY)

I. HISTORY.

The Uniformed Services Former Spouses' Protection Act (USFSPA) was passed by Congress in 1982. The USFSPA gives a State court the authority to treat military retired pay as marital property and divide it between the spouses. Congress' passage of the USFSPA was prompted by the United States Supreme Court's decision in *McCarty v. McCarty* in 1981.[1]

The *McCarty* decision effectively precluded state courts from dividing military retired pay as an asset of the marriage. Justice Blackmun, writing for the majority, stated that allowing a state to divide retired pay would threaten "grave harm to 'clear and substantial' federal interests."[2] Accordingly, the Supremacy Clause of Article VI preempted the State's attempt to divide military retired pay. Congress, by enacting the USFSPA, clarified it's intent that State courts have the power to divide what can be the largest asset of a marriage.

With the passage of the USFSPA, Congress took the opportunity to set forth various requirements to govern the division of military retired pay. Congress sought to make a fair system for military members, considering that their unavailability and deployment status often exposes them to difficulties with civil litigation. Therefore, if a member is divorced while on active duty, the requirements of the Servicemembers Civil Relief Act (SCRA)[3] must be met before an award dividing military retired pay can be enforced under the USFSPA.[4] Additionally, the USFSPA contains its own jurisdictional requirement for the division of retired pay as property.[5] It limits the amount of the member's retired pay which can be paid to a former spouse to 50% of the member's disposable retired pay (gross retired pay less authorized deductions).[6] It requires that the parties must have been married 10 years or more while the member performed at least 10 years of service creditable towards retirement eligibility before a division of retired pay is enforceable under the USFSPA.[7] It specifies how an award of military retired pay must be expressed.[8] It also provides a former spouse with a means of enforcing an alimony and/or child support award.[9]

II. DOCUMENTS NEEDED TO APPLY FOR DIVISION OF MILITARY RETIRED PAY.

The USFSPA defines a "court order" dividing military retired pay enforceable under the Act as a "final decree of divorce, dissolution, annulment, or legal separation issued by a court, or

[1] McCarty v. McCarty, 453 U.S. 210 (1981)
[2] Id. at 232.
[3] *See* Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 et seq.
[4] 10 U.S.C. §1408(b)(1)(D).
[5] 10 U.S.C. § 1408(c)(4).
[6] 10 U.S.C. § 1408 (e)(1).
[7] 10 U.S.C. § 1408 (d)(2).
[8] 10 U.S.C. § 1408 (a)(2)(C).
[9] See 10 U.S.C. § 1408(a)(2)(B); 10 U.S.C. § 1408(d)(1).

a court ordered, ratified, or approved property settlement incident to such a decree."[10] This also includes an order modifying a previously issued "court order."

Since military retired pay is a Federal entitlement, and not a qualified pension plan, there is no requirement that a Qualified Domestic Relations Order (QDRO) be used. As long as the award is set forth in the divorce decree or other pertinent court order in an acceptable manner, that is sufficient. It is also not necessary to judicially join the "member's plan" as a part of the divorce proceeding. There is no Federal statutory authority for this. The award may also be set forth in a court ratified or approved separation agreement, or other court order issued incident to the divorce.

In order to submit an application for payments under the USFSPA, a former spouse needs to submit a copy of the applicable court order certified by the clerk of court, along with a completed application form (DD Form 2293).[11] Instructions, including designated agent names and addresses, are on the back of the DD Form 2293. The Defense Finance and Accounting Service (DFAS) is the designated agent for all uniformed military services. The Form and instructions can be downloaded from our DFAS website at www.dfas.mil/garnishment/retiredmilitary.html.

III. . USFSPA REQUIREMENTS WHEN THE FORMER SPOUSE HAS APPLIED FOR DIRECT PAYMENTS THROUGH DFAS

A. Servicemembers Civil Relief Act.

The provision of the SCRA that has primary application to the USFSPA and the division of military retired pay is the section concerning default judgments against active duty service members. This section requires that if an active duty defendant fails to make an appearance in a legal proceeding, the plaintiff must file an affidavit with the court informing the court of the member's military status. The court shall appoint an attorney to represent the interests of the absent defendant.[12] A member has 90 days after separation from active duty service to apply to a court rendering a judgment to re-open a case on SCRA grounds.[13] Thus, this provision of the SCRA does not apply to a member with an active duty divorce where the member has been retired for more than 90 days.

B. Requirements that Apply to Retired Pay as Property Awards Only (not child support or alimony)

(1) The 10/10 requirement.

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[10] 10 U.S.C. § 1408(a)(2).

[11] Department of Defense Financial Management Regulation (DoDFMR), volume 7B, subparagraph 290401.A. Available over the Internet at https://comptroller.defense.gov/fmr/current/07b/Volume_07b.pdf.

[12] 50 U.S.C. App. § 521(b).

[13] 50 U.S.C. App. § 521(g)(2).

This is a "killer" requirement. For a division of retired pay as property award to be enforceable by direct payments under the USFSPA, the former spouse must have been married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable towards retirement eligibility.[14] This requirement does not apply to the Court's authority to divide military retired pay, but only to the ability of the former spouse to enforce the award by direct payments from DFAS. This is a statutory requirement for direct payments, and not a personal right of the member that can be waived. Although this requirement was probably included in the USFSPA to protect members, we have had more complaints about it from members than from former spouses. Assuming that a member intends to meet his or her legal obligations, the member would rather have DFAS pay the former spouse directly as it would lessen contact with the former spouse. Also, if DFAS pays the former spouse directly, the former spouse's USFSPA payments would be reported on her or his own Form 1099-R, instead of all taxable retired pay being reported on the member's Form 1099-R.

If we cannot determine from the court order whether the 10/10 requirement has been met, we will ask the former spouse to provide a copy of the parties' marriage certificate. A recitation in the court order such as, "The parties were married for 10 years or more while the member performed 10 years or more of military service creditable for retirement purposes" will satisfy the 10/10 requirement, unless the marriage certificate shows otherwise.

(2) USFSPA Jurisdiction.

The USFSPA's jurisdictional requirement is found in 10 U.S.C. § 1408(c)(4). This is another "killer" requirement. If it is not met, the former spouse's application for direct payment of retired pay as property under the USFSPA will be rejected. For a court to have the authority to divide military retired pay, the USFSPA requires that the court have "(c)(4)" jurisdiction over the military member in one of three ways. One way is for the member to consent to the jurisdiction of the court. The member indicates his or her consent to the court's jurisdiction by taking some affirmative action with regard to the legal proceeding, such as filing any pleading in the case.[15] Simply receiving notice of filing of the divorce complaint or petition is not sufficient. Consent is the most common way for a court to have (c)(4) jurisdiction over a member.

The other ways for the court to have (c)(4) jurisdiction is for the member to be a resident of the State at the time of divorce other than because of his or her military assignment, or for the court to find that the member was domiciled in the particular State at the time of the divorce. Now, the key with regard to domicile is that the court makes this determination, and it should be noted in the divorce decree.

IV. LANGUAGE DIVIDING MILITARY RETIRED PAY.

[14] 10 U.S.C. § 1408(d)(2).

[15] See Baka v. United States, 74 Fed. Cl. 692,698 (2006). See also DoDFMR, vol. 7B, subparagraph 290604.A.3.

A. Fixed dollar amount or percentage awards.

The amount of a former spouse's award is entirely a matter of state law. However, in order for the award to be enforceable under the USFSPA, it must be expressed in a manner consistent with the USFSPA, and we must be able to determine the amount of the award. The USFSPA states that for a retired pay as property award to be enforceable, it must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay.[16] **Additionally, pursuant to the Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Chapter 29, paragraphs 290607 and 290608, ,** if the parties are divorced prior to the member's receiving retired pay, the court order may (but is not required to) state a retired pay as property award as an acceptable formula or as a percentage of a hypothetical retired pay amount. We consider formula and hypothetical awards to be types of percentage awards.

For a fixed dollar amount award, a monthly amount needs to be provided in the court order. If a fixed dollar amount award is used, the former spouse would not be entitled to any of the member's retired pay cost of living adjustments (COLAs).[17] Because of the significant effect of COLAs over time, it is infrequent that an award is stated as a fixed dollar amount. The more common method of expressing the fomer spouse's award is as a percentage of the member's disposable retired pay. This has the benefit to the former spouse of increasing the amount of the former spouse's award over time due to periodic retired pay COLAs.

All percentage awards are figured using a member's disposable retired pay, which is a member's gross retired pay less authorized deductions.[18] The authorized deductions vary based on the date of the parties' divorce.[19] The principal deductions now include retired pay waived to receive VA disability compensation, disability retired pay, and Survivor Benefit Plan (SBP) premiums where the former spouse is elected as the former spouse beneficiary. Since the United States Supreme Court has ruled that Congress authorized the division of only disposable retired pay, not gross retired pay,[20] the regulation provides that all percentage awards are to be construed as a percentage of disposable retired pay.[21]

If the amount of the former spouse's award is expressed as a dollar amount or percentage of disposable retired pay less the amount of some other obligation (e.g., the amount of the Survivor Benefit Plan premium or the former spouse's child support obligation), the entire award is unenforceable. This type of award language does not meet the statutory requirement of a fixed dollar amount or percentage. Also, tying a former spouse's award to some other figure that is subject to change, such as the SBP premium, renders the former spouse's award indeterminate. Indeterminate awards cannot be established in the retired pay system.

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[16] 10 U.S.C. §1408(a)(2)(C).

[17] DoDFMR, Vol. 7B, Subparagraph 290601.C. provides for automatic COLAs only for awards expressed as a percentage of disposable retired pay.

[18] 10 U.S.C. § 1408(a)(4)(amended 1986, 1990).

[19] DoDFMR, Vol. 7B, Paragraph 290701 provides a list of the authorized deductions by divorce date.

[20] Mansell v. Mansell, 490 U.S. 581.

[21] DoDFMR, Vol. 7B, Paragraph 2906016. D.

Similarly, set-offs against the former spouse's award are not permitted.[22] Although the award language may be acceptable, if another provision of the court order requires that another amount be set-off from the former spouse's share, such as an SBP premium or other financial obligation that the former spouse owes the member, the set-off is unenforceable. This is because there is no provision in the USFSPA that authorizes enforcement of a set-off against the former spouse's retired pay as property award. State courts have authority to divide military retired pay only as set forth by the USFSPA.[23] Thus, state court provisions not in accordance with the USFSPA are unenforceable.

There is no magic language required to express a percentage or fixed dollar award. All the court order needs to say is the following:

Example 1: "The former spouse is awarded _______ percent [or dollars per month] of the member's disposable military retired pay."

(Note: blanks in the examples represent numbers that must be provided to us in the court order.)

B. Introduction to formula and hypothetical retired pay awards.

Most of our problems with award language have arisen in cases where the parties were divorced while the member was still performing military service. In these cases, the former spouse's award was indeterminate at time of divorce since the member has not yet retired. Since the parties did not know how much longer the member would remain in military service after the divorce, a straight percentage award may not have been suitable. Also, many States take the approach that the former spouse should not benefit from any of the member's post-divorce promotions or pay increases based on length of service after the divorce. These awards were often drafted in such a way that we could not determine the amount of the award. This caused the parties to have to go back to court and obtain a clarifying order.

A proposed regulation was issued in 1995 that allowed for (but did not require) the use of formula and hypothetical retired pay awards to divide military retired pay when the parties were divorced prior to the member's becoming eligible to receive retired pay.[24] Although this proposed regulation was never finalized, it provided the basis for our review of these types of awards and the basic procedures for computing them. We have refined the procedures since then, and they are now incorporated into Chapter 29 of the DoDFMR, Volume 7B.[25] We discuss these procedures below. In addition, we provide examples of acceptable award language below. These examples are also set forth in our sample Military Retired Pay Division Order, which is included as Appendix A to this Instruction, and also included as Appendix A to Chapter 29 of the DoDFMR.[26]

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[22] DoDFMR, Vol. 7B, Paragraphs 290610, 290903.

[23] Mansell, 490 U.S. at 581, illustrates the general principal that state courts may deal with military retired pay only in accordance with the provisions of the USFSPA.

[24] Former Spouse Payments From Retired Pay, 60 Fed. Reg. 17507 (1995) (to be codified at 32 C.F.R. pt. 63)(proposed Apr 5, 1995).

[25] DoDFMR, Volume 7B, Paragraphs 290607 (formula awards) and 290608 (hypothetical retired pay awards).

[26] DoDFMR, Volume 7B, Appendix A (Figure 1).

C. Formula awards.

A formula award is usually expressed in terms of a marital fraction, where the numerator covers the period of the parties' marriage while the member was performing creditable military service, and the denominator covers the member's total period of creditable military service. The former spouse's award is usually calculated by multiplying the marital fraction by ½ or 50%. However, the parties can provide a different percentage. Since a formula award works out to a percentage of disposable retired pay, we consider it to be a type of percentage award, and as such it would automatically include a proportionate share of the member's COLAs.[27]

If the court order provides a variable that is incorrect, the parties need to get the variable corrected by the court. We cannot change a number specifically stated in the order. If a court order provides a formula award and also provides all the variables necessary to compute the formula, we will complete the calculation as is using those variables provided in the order. If the order provides a percentage award, and also states the formula the court used to determine the percentage, we will set up the percentage as provided in the order regardless of how the court determined it.

The following comments pertain to cases where the court order uses a formula award that requires us to provide a variable before completing the computation.

1. For members qualifying for an active duty retirement, the numerator of a marital fraction is usually the total period of time from marriage to divorce or separation while the member was performing creditable military service. If the court order requires us to compute a formula award dividing an active duty retirement, then the court order must provide us with the numerator of the fraction, expressed in terms of whole months.[28] If the numerator is expressed in terms of years or days, we will convert it to months by rounding down to the nearest whole month, and dropping any odd days or partial months. **Failing to provide the number to be used in the numerator will cause the court order to be rejected.**

We will supply the denominator in terms of whole months of creditable service for multiplier purposes, and then work out the formula to determine the former spouse's award as a percentage of disposable retired pay. We will carry out all computations to six decimal places.

Example 2. The following language is an example of an acceptable way to express an active duty formula award:

> **"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying ____% times a fraction, the numerator of which is ______ months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service."**

[27] DoDFMR, Volume 7B, Subparagraph 290601.C.
[28] DoDFMR, Volume 7B, Subparagraph 290607.B.

For example, assume that the parties' marriage lasted exactly 12 years (or 144 months) during the member's military service. If the parties have agreed to use 50% as the percentage element of the formula, assume that the active duty formula award is "50% times a fraction, the numerator of which is 144 months divided by the member's total number of months of creditable military service." If the member serves for a total of 25 years (or 300 months) and then retires, then the former spouse would receive ½ x (144/300) = 24.0000% of the members disposable retired pay.

2. If the court order provides a formula award to divide a reserve retirement, then the court order must provide us with the numerator of the marital fraction, expressed in terms of reserve retirement points earned during the marriage.[29] For such orders, **failing to provide the numerator expressed as reserve points earned during the marriage will cause the court order to be rejected.** We will supply the member's total reserve retirement points for the denominator, and carry out the computation to six decimal places.

Example 3. The following language is an example of an acceptable way to express a reserve retirement formula award.

"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying ____% times a fraction, the numerator of which is _______ reserve retirement points earned during the period of the marriage, divided by the member's total number of reserve retirement points earned."

D. Hypothetical retired pay awards.

(1) Introduction. A hypothetical retired pay award (or hypothetical award) is an award expressed as a percentage of a hypothetical retired pay amount that is different from the member's actual retired pay. If the court order uses a hypothetical award, it is usually figured as if the member had retired on the date of separation or divorce. Some jurisdictions use hypothetical awards to divide military retired pay. A hypothetical award does not give the former spouse the benefit of any of the member's pay increases due to promotions or increased service time after the divorce. Since a hypothetical award also works out to a percentage of disposable retired pay, hypothetical awards are a type of percentage award, and as such would automatically include a proportionate share of the member's COLAs.[30]

The basic method for computing military retired pay is to multiply the member's ***retired pay base*** times the ***retired pay multiplier***.[31] The standard ***retired pay multiplier*** is the product of two and one-half percent (i.e., .025) times the member's years of creditable service.[32] For example, the retired pay multiplier for an active duty member who serves 20 years will be 50% (.025 x 20 = 50%); the retired pay multiplier for an active duty member who serves 25 years will

[29] Id.
[30] DoDFMR, Volume 7B, Subparagraph 290601.C.
[31] DoDFMR, Vol. 7B, Paragraph 030102.
[32] Id. at Subparagraph 030102.D.

be 62.5% (.025 x 25 = 62.5%) The years of creditable service for a reservist are computed by dividing the reserve retirement points on which the award is to be based by 360.[33]

Additionally, for members who entered military service on or after August 1, 1986, who are under the age of 62, and who elect to participate in the CSB/REDUX retirement system, their retired pay multiplier is reduced one percentage point for each full year of service less than 30, and 1/12th of one percent for each full month.[34] Their retired pay is recomputed using the standard multiplier when the member attains age 62.

For members entering military service before September 8, 1980, the ***retired pay base*** is the member's final basic pay. This figure would be determined by the pay table in effect at the time of retirement, and would be based on the member's rank and years of service for pay purposes.[35] For members entering military service after September 7, 1980, the retired pay base is the average of the member's highest 36 months of basic pay.[36] This is known as the high-3 amount. This will usually be the last 36 months prior to retirement. The retired pay computation is rounded down to the next lower multiple of $1.[37] For example, $1,501.75 would be rounded down to $1,501.

A hypothetical retired pay amount is computed the same way as a member's actual military retired pay, but based on variables that apply to the member's hypothetical retirement. The necessary variables are shown as blanks in the following examples of acceptable award language. The principal problem we find with hypothetical awards is that one or more of the necessary variables for the hypothetical retired pay computation are often left out of the court order. Therefore, to be able to **compute a hypothetical award, these variables must be provided to us in the applicable court order. Failure to do so will cause the court order to be rejected because we cannot compute the award.**

For members entering military service before September 8, 1980, the hypothetical retired pay base is generally the member's basic pay at the hypothetical retirement date. Parties can obtain the basic pay amounts by looking at the military basic pay tables. Basic pay tables are available at the DFAS Web site at www.dfas.mil/militarypay/militarypaytables.html. Attorneys should be able to obtain the basic pay figure either from the member or from the applicable pay table.

For members entering military service after September 7, 1980, the hypothetical retired pay base would normally be the average of the member's highest 36 months of basic pay prior to the hypothetical retirement date. This information is specific to each member. The pay information can be obtained from either the member during discovery or from his pay center by subpoena. **The Garnishment Operations Directorate does not have access to this pay information.** It must be included in the court order dividing military retired pay.

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[33] Id. at Subparagraph 010301.F.
[34] Id.
[35] Id. at Subparagraphs 030102.A through C.
[36] Id. at Subparagraph 030108.C.
[37] Id. at Subparagraph 030109.A.

For members who elect to retire under the CSB/REDUX retirement system, we will compute the member's hypothetical retired pay amount using the standard retired pay multiplier, and not the reduced CSB/REDUX multiplier, unless the court order directs us to do otherwise. Thus, the former spouse's award will normally not be reduced as a result of the member's electing to receive a Career Status Bonus (CSB) and a reduced retired pay amount.

The hypothetical retired pay amount is a fictional computation, in that the member often does not have the required 20 years of creditable service necessary to be eligible to receive retired pay on the date his or her retired pay is divided. Hence, we are computing a retired pay amount as if the member would have been eligible to retire on that date. .

Also, a member who retires with less than 20 years of creditable service may have a reduction factor applied to his or her retired pay computation.[38] (This reduction factor is completely different than CSB/REDUX factor listed above.) But the only time we would apply a reduction factor to the hypothetical retired pay calculation is if a reduction factor was actually used to compute the member's military retired pay. In that case, we would apply the same reduction factor to both computations.

(2) Example of a hypothetical retired pay calculation. We will convert all awards of a percentage of a hypothetical retired pay amount into a percentage of the member's actual disposable retired pay according to the following method.

(a) First, we will calculate the hypothetical retired pay amount. Assume that the court order awarded the former spouse 25% of the retired pay of an E-6 with a ***retired pay base*** of $2,040 and with 18 years of service retiring on June 1, 1999. The member actually retires on June 1, 2002. The member's hypothetical ***retired pay multiplier*** would be computed as: .025 x 18 years of service = .45 (or 45%). His hypothetical retired pay would be .45 x $2,040 (retired pay base) = $918.00.

(b) Next, unless the court order directs otherwise, we will apply retired pay cost-of-living-allowances (COLAs) to the hypothetical retired pay amount up to the member's actual retirement date to find a "present value" of the hypothetical retired pay as of the member's actual retirement date. The addition of the COLAs does not result in the former spouse benefiting from the member's additional service time or promotions after the hypothetical retirement date. It simply provides the former spouse with the COLA amount he or she would have received had the member actually become eligible to receive retired pay on the hypothetical retirement date.[39]

In our example, the member would have been eligible for the following COLAs had he retired on June 1, 1999[40]:

December 1, 1999   1.7% $918.00 x 1.017 = $933.00

[38] Id. at Subparagraph 030110.A.

[39] See DoD Report to Congress Concerning Federal Former Spouse Protection Laws, page 72, dated September 5, 2001, available at http://prhome.defense.gov/spouserev.html.

[40] See DoDFMR, Vol. 7B, Chapter 8, Subchapter 0804.

December 1, 2000	3.5%	$933.00 x 1.035 = $965.00
December 1, 2001	2.6%	$965.00 x 1.026 = $990.00.

Thus, if the member had retired on the hypothetical retirement date (June 1, 1999), his hypothetical retired pay would have been worth $990.00 per month at the time he actually retired on June 1, 2002.

(c) We will then convert the former spouse's award to a percentage of the member's actual disposable retired pay by multiplying the percentage awarded the former spouse times a fraction. The member's hypothetical retired pay is the numerator of the fraction, and the member's actual retired pay is the denominator.

In our example, assume that the member later retired on June 1, 2002, as an E-7 with a retired pay base of $3,200.40 and 23 years of creditable service. The member's actual retired pay multiplier would be .025 x 23 years= .575. His gross retired pay would be .575 x $3,200.40 = $1,840.00. The court order awarded the former spouse 25% of the retired pay of an E-6 with a retired pay base of $2,040 and with 18 years of service retiring on June 1, 1999. However, the former spouse's actual award percentage would be: 25% times $990/$1,840 = 13.4510%. We would set up 13.4510% in the retired pay system.

While the percentage has been reduced from 25% to 13.4510%, the amount the former spouse would receive is the amount intended by the court. This is because the lower percentage would be multiplied times the higher dollar amount of the member's actual disposable retired pay. For example, in this case assume that the member's disposable retired pay is equal to his gross retired pay. Twenty-five percent of $990 is $247, which equals 13.4510% of $1,840. The retired pay system would apply 13.4510% to the member's actual disposable retired pay each month to determine the amount the former spouse receives. The former spouse would automatically receive a proportionate share of the member's cost of living adjustments (COLAs).[41]

For CSB/REDUX members, we would compute the former spouse's initial percentage using the member's reduced retired pay amount as the denominator of the fraction. We would implement this percentage in the retired pay system effective through the month the member attains age 62. We would also calculate the former spouse's percentage using the retired pay amount the member would have received had the member not elected CSB/REDUX. We would also set this lower percentage up in the retired pay system effective on the first day of the month after the member attains age 62, which is also the effective date of the re-computation of the member's retired pay to the amount the member would have received had the member not elected CSB/REDUX.[42] This adjustment prevents the former spouse from receiving more than the amount intended in the court order.

(3) **Examples of active duty hypothetical awards.** The following are examples of acceptable active duty hypothetical awards.

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[41] See DoDFMR, Vol. 7B, Paragraph 290601.C.
[42] DoDFMR, Vol. 7B, Subparagraph 030111.B.

Example 4. The following language is acceptable for all active duty members, regardless of service entry date.

"The former spouse is awarded ____% of the disposable military retired pay the member would have received had the member retired with a retired pay base* of <u>$ (dollar amount)</u> and with _______ years of creditable service on ________."

***The retired pay base is a base pay figure. As noted on page 9 above, the retired pay base is the final basic pay at retirement** for members entering military service before September 8, 1980, and the "high-3" amount for member's entering military service on or after September 8, 1980.

Example 5. If a member entered military service before September 8, 1980, the following language is also acceptable because we can determine the member's retired pay base by simply looking at the pertinent military pay table.

"The former spouse is awarded ____% of the disposable military retired pay the member would have received had the member retired with the rank of ________ and with _______ years of creditable service on ________."

The court order may direct us to calculate a hypothetical retired pay amount using the pay tables in effect at the time the member becomes eligible to receive military retired pay instead of the pay table in effect at the time the court divides military retired pay. If this is the case, then the court order dividing an active duty member's military retired pay must provide us with: 1) the percentage awarded the former spouse, 2) the member's rank to be used in the calculation, and 3) the years of creditable service to be used in the calculation.

We will make the hypothetical retired pay calculation using the basic pay figure from the pay table in effect at the member's retirement for the rank and years of service given in the court order, regardless of whether the member entered military service before September 8, 1980, or on or after September 8, 1980.

Example 6. The following language is an example of an acceptable active duty hypothetical award based on the pay tables in effect at the member's retirement.

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the rank of ________ and with _______ years of creditable service."

(4) Examples of reserve hypothetical awards. The following are examples of acceptable reserve hypothetical awards.

Example 7. The following language is acceptable for all reserve members, regardless of service entry date.

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base of <u>$(dollar amount)</u> and with _______ reserve retirement points on _______."

Example 8. The following language is also acceptable for reservists who entered military service before September 8, 1980.

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on ____________, with the rank of _______, with _______ reserve retirement points, and with _______ years of service for basic pay purposes."

If the court order directs us to calculate a hypothetical retired pay amount using pay tables in effect at the time the member becomes eligible to receive retired pay, the court order must provide us with: 1) the percentage awarded the former spouse, 2) the member's rank to be used, 3) the reserve retirement points to be used, and 4) years of service for basic pay purposes.

We will make the hypothetical retired pay calculation using the basic pay figure from the pay tables in effect at the member's retirement for the rank and years of service given in the court order, regardless of whether the member entered military service before September 8, 1980, or on or after September 8, 1980.

Example 9. The following language is an example of an acceptable reserve hypothetical award based on the pay tables in effect at the member's becoming eligible to receive military retired pay.

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on the date he [or she] attained age 60, with the rank of ________ , with _______ reserve retirement points, and with _______ years of service for basic pay purposes."

E. Examples of unacceptable former spouse award language.

Problems with award language usually occur when the parties are divorced prior to the member's becoming eligible to receive military retired pay. The examples given below represent common mistakes we see in court orders attempting to divide military retired pay.

(1) "The former spouse is awarded one-half of the community interest in the member's military retired pay."

Here, we are not told how to calculate the community interest. Nor are we provided with any of the variables necessary to make such a calculation using either a formula or hypothetical retired pay award.

(2) "The former spouse is awarded one-half of the member's military retirement that vested during the time of the marriage."

Military retired pay is a federal entitlement, which a member either qualifies for or does not. It does not vest in any way prior to the member's retirement. As with the above example, we are not provided with any information as to how to calculate the amount of the former spouse's award.

(3) "The former spouse is awarded one-half of the accrued value of the member's military retirement benefits as of the date of the divorce."

This example is similar to example (2) above. As with example (2), since military retired pay is a statutory entitlement, it has no accrued value prior to the member retiring. Again, we are not provided with any information as to how to calculate the amount of the former spouse's award.

(4) "The former spouse shall be entitled to 42% of the member's military retirement based on the amount he would have received had he retired as of the date of the divorce."

This appears to be intended as a hypothetical award, but it does not provide us with any of the variables needed to calculate a hypothetical retired pay amount. Since we do not have access to the member's military service information, there is no practical way for us to obtain the needed information ourselves.

(5) "The former spouse is awarded a portion of the member's military retired pay calculated according to the Bangs formula."

Here, the court order presumes that we are familiar with that State's laws and know what the Bangs formula is. We are not able to research individual cases to resolve ambiguities in court orders. Also, the court order does not provide us with any of the necessary variables.

(6) "The former spouse is awarded an amount equal to 50% of the member's disposable retired pay less the amount of the Survivor Benefit Plan Premium."

The amount of the former spouse's award must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay, or as an acceptable formula or hypothetical award. This award does not meet that requirement. However, if the court order awarded the former spouse 50% of the member's disposable retired pay, but then later in the order it stated that the amount of the Survivor Benefit Plan (SBP) premium would be deducted from the former spouse's share, we could honor the case at 50%. The provision concerning the SBP premium would be unenforceable since Federal law provides that the SBP premium must be deducted from the member's retired pay.[43]

F. Correcting deficient awards.

[43] 10 U.S.C. § 1452(a)(1); DoDFMR, Vol. 7B, Paragraph 450601.

If we are not able to determine the amount of the former spouse's award from the information provided in the court order, the former spouse has two alternatives. One alternative is for the former spouse to obtain a new court order clarifying the former spouse's retired pay as property award by expressing it in an acceptable manner. The other alternative is for the former spouse to provide us with any missing information by submitting a notarized agreement with the required information signed by both the former spouse and member.[44] If the parties wish, they may provide us with the fixed dollar amount or percentage of disposable retired pay the former spouse is to receive. We are including our standard notarized agreement form as Appendix B of this Instruction for that purpose. The parties may want to consult their attorneys before executing any such agreement in lieu of a clarifying order.

IV. ACKNOWLEDGEMENT.

This handout is prepared by the Garnishment Operations Directorate, Defense Finance and Accounting Service, Cleveland Center. It may be freely circulated, but not altered without permission. Revised January 29, 2012.

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[44] DoDFMR, Vol. 7B, Subparagraphs 290607.B. and 290608.E.

APPENDIX A

STATE OF ____________
COUNTY OF ___________

COURT OF ______________
CASE NO. _________

____
PETITIONER

MILITARY RETIRED PAY DIVISION ORDER

____
RESPONDENT

THIS CAUSE CAME BEFORE THE UNDERSIGNED JUDGE UPON THE PETITIONER/RESPONDENT'S CLAIM FOR A DISTRIBUTION OF THE RESPONDENT/PETITIONER'S MILITARY RETIRED PAY BENEFITS. THE COURT MAKES THE FOLLOWING:

FINDINGS OF FACT:

1. The Petitioner's Social Security Number is ___________ and current address is ____.

2. The Respondent's Social Security Number is ___________ and current address is ____.

3. The Parties were married on _________. Their marital status was terminated on __________ pursuant to a(n) __________________________ entered in __________ County, State of __________. This current order is entered incident to the aforementioned order.

4. The parties were married for a period of ten or more years during which time the Petitioner/Respondent performed at least ten years of creditable military service.

5. If the military member was on active duty at the time of this order, Respondent/Petitioner's rights under the Servicemembers' Civil Relief Act, 50 U.S.C App. 501-548 and 560-591, have been observed and honored.

6. This court has jurisdiction over the Respondent/Petitioner by reason of [choose those that apply] (A) his or her residence, other than because of military assignment, in the territorial jurisdiction of the court, during the [divorce, dissolution, annulment, or legal separation]

proceeding, (B) his or her domicile in the territorial jurisdiction of the court during the [divorce, dissolution, annulment, or legal separation] proceeding, or (C) his or her consent to the jurisdiction of the court.

CONCLUSIONS OF LAW:

1. This court has jurisdiction over the subject matter of this action and the parties hereto.

2. Petitioner/Respondent is entitled to a portion of Respondent/Petitioner's United States military retired pay as set forth herein.

IT IS THEREFORE ORDERED THAT:

[Choose and complete one of the following. Blanks in the examples represent numbers that must be provided to us in the court order. Please note that all awards expressed as a percentage of disposable retired pay, including formula hypothetical awards, will automatically include a proportionate share of the member's cost-of-living adjustments (COLAs) unless this order states otherwise. Also, hypothetical retired pay amounts will be adjusted for all retired pay COLAS from the hypothetical retirement date to the member's actual retirement date, unless this order states otherwise.]

[Retired member] **"The former spouse is awarded ___ percent [or dollar amount per month] of the member's disposable military retired pay."**

[Active duty formula] **"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is ______ months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service."**

[Reservist formula] **"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _______ reserve retirement points earned during the period of the marriage, divided by the member's total number of reserve retirement points earned."**

[Active duty hypothetical calculated as of time of division, for all members regardless of service entry date] **"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired with a retired pay base of $_______ and with _______ years of creditable service on ________."**

[Active duty hypothetical calculated as of time of division; may only be used for members entering service before 9/1/80] **"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired with the rank of ________ and with _______ years of creditable service on ________."**

[Active duty hypothetical calculated as of member's actual retirement date "The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the rank of ________ and with _______ years of creditable service."

[Reservist hypothetical calculated as of time of division, for all members regardless of service entry date] "The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base of $_______ and with _______ reserve retirement points on _______."

[Reservist hypothetical calculated as of time of division; may only be used for members entering service before 9/1/80] "The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on ____________, with the rank of _______, with _______ reserve retirement points, and with _______ years of service for basic pay purposes."

[Reservist hypothetical calculated as of the date the member becomes eligible to receive retired pay] "The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on the date he [or she] attained age 60, with the rank of ________, with _______ reserve retirement points, and with _______ years of service for basic pay purposes."

This _______ day of ____________, 200__.

____
JUDGE

APPENDIX B

NOTARIZED STATEMENT OF THE PARTIES CLARIFYING THE COURT ORDER DIVIDING MILITARY RETIRED PAY

WE, THE UNDERSIGNED, MUTUALLY AGREE TO DIVIDE THE MILITARY RETIRED PAY, AS PROPERTY, IN THE FOLLOWING MANNER. THIS AGREEMENT CLARIFIES THE FINAL COURT ORDER ENTERED ON

____.
DATE OF COURT ORDER AND NAME/LOCATION OF COURT

THE FORMER SPOUSE, ____ IS ENTITLED TO RECEIVE:
NAME OF NON-MILITARY SPOUSE

______________% OF MEMBER'S DISPOSABLE MILITARY RETIRED PAY.
PERCENTAGE

OR

$______________ PAID MONTHLY FROM THE MEMBER'S DISPOSABLE RETIRED PAY.
SPECIFIC AMOUNT

THE PARTIES ACKNOWLEDGE THAT THIS AGREEMENT IS IRREVOCABLE EXCEPT BY SUBSEQUENT COURT ORDER. THEY ALSO AGREE THAT THE DEFENSE FINANCE AND ACCOUNTING SERVICE (DFAS) WILL MAKE PAYMENTS DIRECTLY TO THE FORMER SPOUSE FROM THE MEMBER'S DISPOSABLE RETIRED PAY. THE PARTIES ALSO UNDERSTAND THAT COST OF LIVING INCREASES (COLAS) CAN ONLY BE MADE ON AWARDS EXPRESSED AS A PERCENTAGE. COLAS CANNOT BE MADE ON AWARDS EXPRESSED AS A SPECIFIC AMOUNT.

____

____
MEMBER FORMER SPOUSE

MEMBER'S SOCIAL SECURITY NUMBER: ______________________

BEFORE ME APPEARED, ________________________________ AND SHOWING PROOF OF IDENTIFICATION (BY DRIVER'S LICENSE/GOVERNMENT/MILITARY ID) AND SIGNED HIS/HER NAME AT THE PLACE INDICATED ABOVE.

SWORN BEFORE ME THIS ____________________ DAY OF

____________________, __________

____
NOTARY PUBLIC

BEFORE ME APPEARED, ________________________________ AND SHOWING PROOF OF IDENTIFICATION (BY DRIVER'S LICENSE/GOVERNMENT/MILITARY ID) AND SIGNED HIS/HER NAME AT THE PLACE INDICATED ABOVE.

SWORN BEFORE ME THIS ____________________ DAY OF

____________________, __________

____
NOTARY PUBLIC

EXHIBIT 3

CASE LAW – CAIN V. CAIN

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 6, 2012 Session

GREGORY LEE CAIN v. BONNIE JEAN (WHITE) CAIN

Direct Appeal from the Chancery Court for Montgomery County
No. DI-87-0057471 John H. Gasaway, III, Judge

No. M2011-00902-COA-R3-CV - Filed April 4, 2012

This appeal requires us to construe a provision of the parties' 1987 divorce decree with respect to the amount of Bonnie Jean White Cain's ("Wife") share of Gregory Lee Cain's ("Husband") military retirement benefits. After thoroughly reviewing the record, we conclude that the trial court erred in interpreting the 1987 divorce decree. Accordingly, we reverse and remand this matter to the trial court for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

DAVID R. FARMER, J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

H. Reid Poland, III, Franklin, Tennessee, for the appellant, Gregory Lee Cain.

Jonathan E. Richardson, Nashville, Tennessee, for the appellee, Bonnie Jean Cain.

MEMORANDUM OPINION[1]

The relevant facts in this matter are undisputed. Husband entered active duty in the United States Army in 1968. On July 15, 1970, the parties were married. After

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[1]Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

approximately seventeen years of marriage, the parties were divorced by a Final Decree of Divorce entered on December 21, 1987. The Final Decree provides, in pertinent part, that:

> The Court is of the opinion that the Husband's military retirement benefits are marital property and as such are subject to division by this Court. It is the finding of the Court that the Wife is entitled to forty percent (40%) of the Husband's military retirement benefits, which benefits shall be computed as of October 1, 1987. The Wife shall not be entitled to any increase in the Husband's military retirement benefits, which benefits are earned by the Husband following October 1, 1987, as a result of the Husband's longevity with the military, increase in rank or benefit otherwise actually earned by the Husband; provided, however, that Wife shall share a like proportion in any cost of living or similar adjustment as computed following the Husband's retirement. Based upon twenty (20) years of active service and as computed as of October, 1987, the Husband's gross military retirement pay is One Thousand Two Hundred Sixty and 30/100 Dollars ($1,260.30) per month, with a Federal tax deduction of One Hundred Fifty-One Dollars ($151.00) per month, for a net pay of One Thousand One Hundred Nine and 30/100 Dollars ($1,109.30). The Wife is therefore entitled to Four Hundred Forty-Three and 72/100 Dollars ($443.72) per month from the Husband's military retirement benefits, plus forty percent (40%) of any cost of living or such other adjustment to the Husband's retirement pay. The Wife's portion of the military retirement benefit shall be paid by allotment, and the Husband shall execute the necessary documents to effectuate the same.

The Final Decree was not appealed.

On April 1, 1993, after more than twenty four years of service, Husband retired from the military. Subsequently, Husband became one hundred percent (100%) disabled and opted to receive disability benefits from the Veterans Administration rather than retirement pay. As a result of Husband's waiver of retirement benefits, Wife received significantly reduced payments for a short period of time, and eventually stopped receiving payments altogether.[2]

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[2]As previously explained by this Court in *Hillyer v. Hillyer*, 59 S.W.3d 118 (Tenn. Ct. App. 2001):

> Federal law provided a mechanism by which a former spouse of a military retiree could receive his or her share of the retirement pay directly from the military. An election to receive disability benefits reduces the amount of retirement pay by the amount of the disability payment, thereby automatically reducing the direct payment to the former spouse.

(continued...)

On January 10, 2003, Wife filed a petition for contempt alleging that Husband never paid any of the cost of living adjustments as required under the Final Decree, and that Husband impermissibly modified the trial court's division of marital property in the Final Decree by opting to receive disability benefits. In response, although conceding that his receipt of disability benefits was an impermissible modification of the Final Decree, Husband argued that there was a mathematical error in the Final Decree regarding the amount of Wife's share of his monthly retirement pay. Specifically, Husband argued that Wife's share of his monthly retirement pay should have been $377.16, and not $443.72, because only the benefits that accrued during the parties' seventeen year marriage were classified as marital property.[3] On February 19, 2004, after conducting a hearing, the trial court corrected the mathematical error in the Final Decree pursuant to Rule 60.01 of the Tennessee Rules of Civil Procedure,[4] ordered Husband to pay arrearages based on the corrected calculation, and denied the petition for contempt.[5]

On March 19, 2004, Wife filed a motion to amend and to make additional findings of fact. In support of her motion, Wife argued that she was entitled to "40% of [Husband's] retired pay, and that percentage should be taken and computed upon each year's pay, for a soldier of [Husband's] rank with 20 years of service." Further, Wife attached several exhibits demonstrating the amount of arrearages Husband owed according to her calculations, along with several military pay tables showing the basic pay someone with Husband's rank would receive if they retired during that given year. On March 15, 2011, after protracted litigation, the trial court entered an order adopting the Wife's proposed findings and calculations in full, ordered the parties to calculate the amount of arrearages

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[2](...continued)
Id. at 120 n.4 (internal citations omitted).

[3]The $377.16 amount is 17/20, or eighty-five percent (85%), of $443.72.

[4]Rule 60.01 of the Tennessee Rules of Civil Procedure provides in part:

> Clerical mistakes in judgments, orders or other parts of the record, and errors therein arising from oversight or omissions, may be corrected by the court at any time on its own initiative or on motion of any party and after such notice, if any, as the court orders.

We note that while Husband states in his brief that the trial court made the correction pursuant to Rule 60.02, our review of the record reveals otherwise. The trial court merely stated that it was making the correction pursuant to Rule 60. Although the trial court did not specifically cite to Rule 60.01, it is apparent from the transcript of the hearing that the trial court relied upon Rule 60.01 to correct the mathematical error in the Final Decree.

[5]Judge James E. Walton entered the Final Decree in 1987. However, a different judge, Judge John H. Gasaway, III, interpreted the Final Decree at issue on appeal.

owed according to Wife's methodology, and ordered Husband to pay all amounts owed within a reasonable time. Husband timely filed a notice of appeal to this Court.

Discussion

The sole issue for our review, as restated, is whether the trial court erred in interpreting the Final Decree to require that Wife's share of Husband's military retirement pay be calculated each year based upon the amount Husband would receive if he retired during that year with twenty years of military service. Thus, our duty on appeal is limited to construing the Final Decree. "The interpretation of a judgment is a question of law." *Pruitt v. Pruitt*, 293 S.W.3d 537, 544 (Tenn. Ct. App. 2008) (citation omitted). Courts construe judgments like any other written instrument. *Blue Cross-Blue Shield of Tennessee v. Eddins*, 516 S.W.2d 76, 78 (Tenn. 1974) (citation omitted). The determinative factor is the intent of the rendering court as discerned from all parts of the judgment. *Id.* Furthermore, a judgment should be construed so as to give "force and effect to every word of it, if possible, and make its several parts consistent, effective and reasonable." *Id.*

On appeal, Husband argues that the Final Decree clearly provides that Wife's share of his military retirement pay is limited to the benefits that accrued during the parties' seventeen year marriage, and should be calculated as if he retired on October 1, 1987. On the other hand, Wife argues that her share of Husband's military retirement pay under the Final Decree is calculated each year based upon the amount Husband would receive if he retired during that year having served twenty years in the military.

We begin by noting that the Final Decree provides that "Wife is entitled to forty percent (40%) of the Husband's military retirement benefits, which benefits shall be computed as of October 1, 1987." The trial court, however, adopted Wife's position that her share of Husband's military retirement pay was to be calculated each year based upon the amount Husband would receive if he retired during that year after serving twenty years in the military. After reviewing the plain language of the Final Decree, we cannot agree with the trial court's construction requiring a yearly determination of the amount of Wife's share. The Final Decree clearly states that Husband's retirement pay "shall be computed as of October 1, 1987," resulting in liquidated net amount of $1,109.30 per month, from which Wife receives her monthly share. Therefore, the trial court erred in interpreting the Final Decree to award Wife a perpetually increasing share of Husband's military retirement pay.[6]

Moreover, the trial court construed the Final Decree to allow Wife to benefit from

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[6]The only increase Wife is entitled to under the Final Decree is forty percent (40%) of any cost of living adjustment to Husband's retirement pay.

twenty years of Husband's service in the military. As mentioned above, the parties were married for approximately seventeen years. The reason the Final Decree calculates retirement pay based on twenty years of service is due to the fact that, at the time of the divorce, Husband had yet to complete the requisite twenty years of service in order for his pension to vest. During the marriage, however, Husband only accrued seventeen years worth of his military retirement benefits. It is well settled that only military retirement benefits that accrued during the marriage are considered marital property. Tenn. Code Ann. § 36–4–121(b)(1)(A) ("during the course of the marriage up to the date of the final divorce hearing"); Tenn. Code Ann. § 36–4–121(b)(1)(B) ("accrued during the period of the marriage"); *Snodgrass v. Snodgrass*, 295 S.W.3d 240, 247-49 (Tenn. 2009); *Cohen v. Cohen*, 937 S.W.2d 823, 830 (Tenn. 1996); *Kendrick v. Kendrick*, 902 S.W.2d 918, 926 (Tenn. Ct. App. 1994) ("[O]nly pension rights accruing during the marriage will be considered marital property."). Thus, only seventeen out of the twenty years, or eighty-five percent (85%), of Husband's retirement pay was marital property. Wife's forty percent (40%) share was intended to come out of this 85% marital property portion of Husband's retirement pay. Accordingly, the trial court erred in interpreting Wife's share to include military retirement benefits that did not accrue during the parties' marriage.

Conclusion

For the foregoing reasons, we reverse and remand this matter to the trial court to calculate all amounts owed, including those for cost of living adjustments, consistent with this Opinion. Husband shall be credited with such amounts he has paid thus far. Costs of this appeal are taxed to the Appellee, Bonnie Jean White Cain, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE

EXHIBIT 4

MILITARY QUALIFYING COURT ORDER NAVY ACTIVE
USING HYPOTHETICAL FORMULA AWARD

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

WENDY JANE SLOAT,
Current married name: OLSEN

Plaintiff,

V.

No.: CT-003523-05
Div. VIII

WESLEY BRIAN SLOAT,

Defendant.

MILITARY QUALIFYING COURT ORDER
NAVY ACTIVE

IT IS HEREBY ORDERED AS FOLLOWS:

1. **Acknowledgment:**

The parties acknowledge that Wesley Brian Sloat is currently earning a military retirement benefit based on his service in the United States Navy. The parties further agree that his Former Spouse, Wendy Jane (Sloat) Olsen, has an interest in such military retirement benefits, and shall receive from Wesley Brian Sloat's gross disposable military retired pay an amount as set forth below.

2. **Continued Cooperation of the Parties:**

The Member (as defined in paragraph 3 herein) agrees to cooperate with the Former Spouse to prepare an application for direct payment to the Former Spouse (as defined in paragraph 4 herein) from the Member's retired or retainer pay pursuant to 10 U.S.C. Section 1408. The Member agrees to execute all documents that the United States Military may require to certify that the gross disposable military retired pay can be provided to the Former Spouse. The Former Spouse agrees to notify Defense Finance and Accounting Services ("DFAS") about any changes in the Military Qualifying Court Order or

the order affecting these provisions of it, or in the eligibility of any recipient receiving benefits pursuant to it.

3. **Member Information:**

The "Member" as referred to herein is WESLEY BRIAN SLOAT
Address: 7551 Lindberg Drive
Alexandria, VA 22306

4. **Former Spouse Information:**

The "Former Spouse" as referred to herein is WENDY JANE (SLOAT) OLSEN
Address: 2321 Huntland Hills Road
Cookeville, TN 38506

5. **Duration of Marriage Acknowledgment:**

The Member and the Former Spouse acknowledge that they have been married for a period of more than ten (10) years during which time the Member performed more than ten (10) years of creditable military service. The parties were married from July 26, 1986 to February 01, 2006. The Member performed creditable military service from January 02, 1991 to February 01, 2006.

6. **Assignment of Benefits:**

The Court assigns to the Former Spouse an interest in the Member's gross disposable military retired pay. The Former Spouse is entitled to a direct payment in the amount specified below and shall receive payments concurrent with the Member.

7. **Observance of Member's Rights Under the Servicemembers' Civil Relief Act ("SCRA"):**

The Member's rights under SCRA (10 U.S.C. 50 App.501 et seq.) were observed by the Court as evidenced by his presence at the proceedings and the presence of his legal counsel at the proceedings.

8. **USFSPA Jurisdiction (10 U.S.C. 1408(c)(4):**

The Member and Former Spouse intend that this Order qualify under the USFSPA, 10 U.S.C. Section 1408 and following. The jurisdictional requirements of 10 U.S.C. Section 1408 have been complied with, and this Order has not been amended, superseded, or set aside by any subsequent order. This Court has the authority to divide military retired pay under the USFSPA's jurisdictional

requirement since the Member consents to the jurisdiction of this Court. All provisions shall be construed and modified to the extent necessary in order to qualify as a Military Qualifying Court Order.

9. Amount of Benefits to be Paid to the Former Spouse:

This Order hereby awards to the Former Spouse an amount equal to fifty percent (50%) of the disposable military retired pay the Member would have received had the Member retired with a retired pay base of five thousand nine hundred fourteen dollars and twenty-seven cents ($5,914.27) and with fifteen (15) years and one (1) month of creditable service as of February 01, 2006 (entry date of Final Decree), as ordered in parties' Marital Dissolution Agreement filed on January 19, 2006.

In addition to the above, the Former Spouse shall not receive a proportionate share of any post-retirement cost of living adjustments ("COLA") made to the Member's benefits on or after the date of his retirement.

10. Survivor Benefit Plan ("SBP") Protection for Former Spouse:

There is no election for Survivor Benefit Plan ("SBP") Protection for the Former Spouse under this Order. Thus, no SBP coverage shall be provided under the terms of this Order.

11. Duration of Payments:

The monthly payments set forth under Section 9 shall commence to the Former Spouse as soon as administratively feasible following the commencement of Member's gross disposable retired pay and shall cease at the Member's death, and to the extent permitted under the law, irrespective of the future marital status of either of them.

12. Overpayments:

The Former Spouse agrees that any future overpayments to her are recoverable and subject to involuntary collection from her estate.

13. Merger of Benefits and Indemnification:

The Member agrees not to take any action by merger of the military retirement pension with another pension so as to cause a limitation in the amount of the gross disposable retired pay in which the Member has a vested interest and thereby causing a limitation of the Former Spouse's monthly payments as set forth above. If the Member becomes employed and has his military pension merged, or such employment or other condition causes a merger of any portion of the Member's disposable military retired pay, the Member will pay to the Former Spouse directly the monthly amount provided in Section 9, under the same terms and conditions as if those payments were made pursuant to the terms of this Order directly from DFAS.

14. Direct Payment By Member:

If in any month, direct payment is not made to the Former Spouse by DFAS (or appropriate military pay center) pursuant to the terms of this Order, Member shall pay the amounts called-for above directly to Former Spouse by the fifth day of each month in which the military pay center fails to do so, beginning on the date that Former Spouse would have otherwise been entitled to commence her payments. This includes any amounts received by the Member in lieu of disposable retired pay, including but not limited to, any amounts waived by Member in order to receive Veterans Administration (i.e. disability) benefits or any amounts received by Member as a result of an early-out provision, such as Voluntary Separation Incentive ("VSI") pay or Special Separation Benefit ("SSB").

15. Actions by Member:

If Member takes any action that prevents, decreases, or limits the collection by Former Spouse of the sums to be paid hereunder, he shall make payments to Former Spouse directly in an amount sufficient to neutralize, as to Former Spouse, the effects of the actions taken by Member.

16. **Submission of Information:**

The parties acknowledge that the following items must be sent by the Former Spouse to DFAS-Cleveland Site, DFAS-HGA/CL, located at P.O. Box 998002, Cleveland, Ohio 44199-8002. The Member agrees to provide any of this information to the Former Spouse at the Former Spouse's request and to make all necessary efforts to obtain any of this information that the Former Spouse is unable to obtain.

a) A copy of this military QDRO that divides retired disposable pay and any decree that approves this Order certified within ninety (90) days immediately preceding its service on the applicable military pay center for the United States Navy.

b) A completed DD2293 form.

17. **Continued Jurisdiction:**

The Court shall retain jurisdiction to establish and/or maintain the qualified status of this Order, and to effectuate the original intent of the parties as stipulated herein. The Court shall also retain jurisdiction to enter such further orders that are just, equitable and necessary to enforce, secure and sustain the benefits awarded to the Former Spouse, in the event the Member and/or the DFAS fail to comply with any or all of the provisions contained herein. Such further orders may also include, but not be limited to, *nunc pro tunc* orders or orders that "recharacterize" the benefits awarded under the military to apply to benefits earned by the Member under another plan, as applicable, or orders that award spousal or child support, to the extent necessary to carry out the intentions and provisions of this Order.

18. **Taxes:**

The Former Spouse shall be liable for any federal, state or local income taxes associated with her assigned share of the disposable military retired pay.

19. **Discovery:**

The Member hereby waives any privacy or other rights as may be required for Former Spouse to obtain information relating to Member's date and time of retirement, last unit assignment, final rank, grade and pay, present or past retired pay, or other such information as may be required to enforce the award made herein, or required to revise this Order so as to make it enforceable.

20. **Notice of Pending Retirement:**

The Member shall be required to notify the Former Spouse, in writing, within thirty (30) days prior to his actual date of retirement. Such notice shall indicate his intentions to retire and his elected benefit commencement date. The notice shall be sent via regular, first class mail. For this purpose, the Former Spouse shall notify the Member of any changes in her mailing address.

21. **Delayed Retirement:**

In the event the Member elects to delay his effective date of retirement beyond the date on which he could commence his monthly retired pay, and later receives retroactive payments upon his actual benefit commencement date that are attributable to the six (6) year retroactive limitation interval, the Former Spouse shall be entitled to a "pro-rata" share of such retroactive payments based on the provisions set forth above defining her assigned share of the Member's retired pay. If, for any reason, the DFAS does not make the required retroactive payments to Former Spouse in accordance with the provisions contained herein, then Member shall be required to make direct payments to Former Spouse as he receives such retroactive payments in order to carry out the terms of this Order.

22. Additional Awards:

For the purposes of interpreting this Court's intention in making the division set out in this Order, "military retirement" includes gross disposable retired pay paid or to which Member would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Title 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied. For purposes of calculating the Former Spouse's share of the benefits awarded to her by the Court, the marital property interest of the Former Spouse shall also include a pro-rata share of all amounts the Member actually or constructively waives or forfeits in any manner and for any reason or purpose, including, but not limited to, any waiver made in order to qualify for Veterans Administration or disability benefits. It also includes a pro-rata share of any sum taken by Member in lieu of or in addition to his disposable retired pay, including, but not limited to, exit bonuses, voluntary separation incentive pay (VSI), special separation benefit (SBB), or any other form of retirement benefits attributable to separation from military service. Such pro-rata share shall be based on the same formula, percentage or amounts specified in Section 9 above, as applicable. In the event that the DFAS will not pay the Former Spouse directly all or a portion of the benefits awarded to her herein, then Member shall be required to pay her directly in accordance with the terms and provisions set forth in section 14 above.

IT IS SO ORDERED:

____
JUDGE

____
Date

Approved as to Form:

____
Wendy Jane (Sloat) Olsen, Former Spouse

____
Wesley Brian Sloat, Member

____
Jennifer S. Kiesewetter (#020161)
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IN THE COURT OF CIVIL APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JAMES R. COZART,

Plaintiff/Appellant,

v. No. **02A01-9810-CV-00285**

LYNN ANNE COZART,

Defendant/Appellee.

BRIEF OF THE APPELLEE

ORAL ARGUMENT REQUESTED

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RIKARD & DOBSON, P.L.L.C.
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ATTORNEY FOR APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellee, **Lynn Anne Cozart**, files this, her response to the issues presented for review, as follows:

I. THE TRIAL COURT DID NOT ERR IN ITS ENTRY OF THE FINAL DECREE OF DIVORCE ON SEPTEMBER 3, 1998, WHICH DIVIDED THE HUSBAND'S DEFERRED COMPENSATION FROM NATIONWIDE INSURANCE COMPANY AND THE EXTENDED EARNINGS BENEFITS, ALSO KNOWN AS THE VALUE OF THE BUSINESS, AND IN DEFERRING SAME TO THE TIME OF "DRAW DOWN".

II. THE TRIAL COURT DID NOT ERR IN THE AWARDS TO THE WIFE NOR LEAVE THE HUSBAND WITH INSUFFICIENT FUNDS ON WHICH TO LIVE.

   A. THE TRIAL COURT DID NOT ERR IN REQUIRING HUSBAND TO PAY $425.00 PER MONTH FOR THIRTY (30) MONTHS IN REHABILITATIVE ALIMONY TO THE WIFE.

   B. THE COURT DID NOT ERR IN REQUIRING THE HUSBAND TO PURCHASE THE WIFE AN AUTOMOBILE AT HIS COST.

III. THERE WAS NO THIRD ISSUE ON APPEAL BY APPELLANT.

IV. THE TRIAL COURT DID NOT ERR IN DENYING THE HUSBAND THE RIGHT TO BORROW AGAINST CASH VALUE OF HIS LIFE INSURANCE POLICIES.

V. THE COURT MADE A PROPER AND EQUITABLE DIVISION OF THE ASSETS UNDER THE CIRCUMSTANCES.

STATEMENT OF THE CASE

This is a divorce case filed by **James R. Cozart** for an absolute divorce from his wife, **Lynn Anne Cozart**. **Lynn Anne Cozart** answered the Complaint for Divorce and filed a Counter-Complaint for Divorce. The Husband entered a stipulation admitting grounds of adultery for said divorce.

There were two (2) children born of the marriage, ages 11 and 7 at the time of the divorce. The parties married October 15, 1982 and separated on or about October 31, 1996.

This case was tried in the Circuit Court of Shelby County, Tennessee, before the Honorable James F. Russell on July 8 and 9, 1998, and the parties were divorced by Final Decree of Divorce entered on September 3, 1998.

This case comes before the Court of Appeals on appeal by **James R. Cozart**, and response by **Lynn Anne Cozart**. The case is on appeal as of right pursuant to Tennessee Rules of Appellate Procedure 4.

During their marriage, the parties accumulated certain marital property, including a marital home, a business, some investments, two (2) automobiles, and various items of furniture and furnishings.

STATEMENT OF THE FACTS

The parties were married on October 15, 1982 and eventually separated on October 31, 1996, a marriage of sixteen (16) years (TR Vol.1, p.6; TR Vol.4, p. 251). Two (2) children were born of this marriage, namely Jessica Anne Cozart, age 11, born May 29, 1987, and Kendall Mary Cozart, age 7, born March 31, 1991 (TR Vol.1, p.3; TR Vol.4, p.251). This is the third (3rd) marriage for James R. Cozart and the second (2nd) marriage for Lynn Anne Cozart (TR Vol.1, p.6; TR Vol.4, p.251).

On February 18, 1997, Appellant, James R. Cozart, filed a Complaint for Divorce against his wife, Lynn Anne Cozart (TR Vol.1, p.2). Appellee, Lynn Anne Cozart, then filed an Answer and Counter-Complaint for Divorce on March 12, 1997 (TR Vol.1, p.6). Appellant, James R. Cozart, stipulated to grounds of adultery and said Stipulation was filed on April 1, 1998 (TR Vol.1, p.34).

At the time the divorce was granted on September 3, 1998, James R. Cozart, was fifty-five (55) years old and Lynn Anne Cozart, was forty-one (41) years old (TR Vol.1, p.2; TR Vol.4, p.251). The health of James R. Cozart is basically good except that he is diabetic which limits his ability to obtain additional life insurance coverage, other than what is provided by his employer, Nationwide Insurance Company (TR Vol.4, p.251). The health of Lynn Anne Cozart, is good (TR Vol.4, p.251).

Appellant, James R. Cozart, has a college degree and the Appellee, Lynn Anne Cozart, has a high school diploma, with some college hours (TR Vol.4, p.251).

At the time of the entry of the Final Decree, Appellee, Lynn Anne Cozart, was enrolled in a special degree program at Crichton College (TR Vol.4, p.251, 252).

The parties own real property located at 1113 Colonial Road, Memphis, Shelby County, Tennessee. Said property was acquired shortly after the parties moved to Memphis in the spring of 1983 (TR Vol.4, p.252). The fair market value of the marital residence, $68,500, was agreed upon by the parties and is reflected in Trial Exhibit 2. The mortgage on the house at the time of trial was $41,015, leaving an undisputed equity of $27,485 (TR Vol.4, p.252). Said marital asset was awarded to Lynn Anne Cozart.

During the course of the marriage, the parties accumulated various household furniture and furnishings which the parties divided to their mutual satisfaction, however, the value of said items is listed in the Trial Affidavits submitted to the lower court (Trial Exhibits 7, 12). Appellant, James R. Cozart, received personal property appraised at $8,590.50, and the Appellee, Lynn Anne Cozart, received personal property appraised at $6,867 (TR Vol.4, p.254). Further, Appellant, James R. Cozart, has a Nationwide IRA valued at $37,174, and Appellee, Lynn Anne Cozart, has a 401K plan through her employment with Behavior Technology valued at $1,640 (TR Vol.4, p.255). Additionally, the Appellant, James R. Cozart, has a life insurance policy with his employer, Nationwide Insurance Co., in the face amount of $123,940 with a cash surrender value of approximately $11,819 (Trial Exhibit 6). Additionally, there is $20,000 life insurance coverage through Nationwide which is a term policy and has no cash surrender value (TR Vol.4, p.256). Appellee, Lynn Anne Cozart, has a life insurance policy through

Nationwide Insurance Company in the face amount of $59,536 with a cash surrender value of $9,536 (TR Vol.4, p.256).

In 1983, shortly after the parties married, they moved to Memphis, Tennessee, at which time the Appellant, James R. Cozart, learned of the opportunity to become a Nationwide Insurance agent and began the Cozart Insurance Agency. Appellee, Lynn Anne Cozart, became partially licensed as an insurance agent and has devoted her full time, probably plus some, to the development of this business (TR Vol.4, p.258).

During their move to Memphis, the parties lost all of their personal belongings through theft and were paid approximately $25,000 in insurance proceeds for that loss. They used said money and the severance money from Mr. Cozart's former employer, to live on while building the Cozart Insurance Agency (TR Vol.4, p.258, 259). In preparation for the divorce, to which Mrs. Cozart had no knowledge, Mr. Cozart required Mrs. Cozart to quit working at the agency and demanded that she obtain a job elsewhere (TR Vol. 3, p.150). Mrs. Cozart did so at his request, not realizing that a divorce was imminent. Further, prior to the divorce, Appellant, James R. Cozart, purchased a brand new vehicle. The testimony given at trial was that the parties agreed each of them would receive a new vehicle. However, Appellant, James R. Cozart, planned and bought his vehicle prior to the filing of the divorce, leaving his Appellee/wife and their two (2) children with an extremely old and run-down vehicle with high mileage and no working air conditioning (TR Vol.3, p.147-150).

In the course of running, owning and operating the Cozart Insurance Agency, there were two (2) benefits accruing to the owners of said business. The first benefit, **Extended Earnings Benefits**, that Nationwide Insurance offers to its agents, determines the value of the agency at the time the agent decides to leave the agency, dies, or becomes disabled, or wants to terminate the business. This is done by Nationwide to make it clear that the book of business of the agency belongs to Nationwide Insurance and not to the agent (TR Vol.4, p.259). The **Extended Earnings Benefits**, or value of the business, has been set by Nationwide Insurance Company. The parties agreed and stipulated at trial that the value of the business, as set by Nationwide, was $154,830 (TR Vol.4, p.259, 260; Trial Exhibits 6, 12).

The other compensation or benefit provided by Nationwide and earned through the Cozart Insurance Agency is referred to as the **Deferred Compensation Plan**. This Plan is similar to a pension plan. At the agent's age of sixty-five (65), the **Deferred Compensation Plan** had a present value of $134,423. If this Plan was paid out at Appellant's current age, which was fifty-five (55) at the time of trial, the Plan would be valued at $99,770, based on the formula developed by Nationwide administrators (TR Vol.4, p.260).

Both parties agreed and stipulated at trial that the Appellee, Lynn Anne Cozart, should be entitled to fifty percent (50%) of each of these benefits, the **Extended Earnings Benefits** (value of the business) which, at the time of trial, was $154,830.00 and Mrs. Cozart was entitled to $77,415 of those benefits and the

Deferred Compensation Plan which, at the time of trial, was $99,770 and Mrs. Cozart was entitled to $39,885.

The lower court ordered that the Airstream trailer, which the parties agreed had a value of $3,000, be sold and said sum be used for repairs on the marital house. To date, said trailer has not been sold and no repairs have been completed.

The lower court further ordered that the Nationwide IRA in the amount of $37,174, shall be divided equally between the parties pursuant to a Qualified Domestic Relations Order (hereinafter "QDRO"), which has not been completed at this time.

Additionally, the lower court ordered that Appellee, Lynn Anne Cozart, should retain ownership of her 401K funds through her employer and that the Credit Union account of approximately $1,500, should be awarded to Appellee, Lynn Anne Cozart. The Credit Union account has not been paid to Appellee as of the time of this appeal.

Visitation and custody were not an issue at trial and the Appellee, Lynn Anne Cozart, was awarded custody of the two (2) minor children, and the Appellant, James R. Cozart, received liberal and reasonable visitation with the two (2) minor children (TR Vol. 4, p. 262).

The lower court took note that the Appellant, James R. Cozart, purchased a relatively new vehicle shortly before the parties' separation and that, all things being equal, the court would order the parties simply exchange vehicles, however, the court also considered that a pick-up truck may not be suitable for the Appellee and the two (2) minor children. Therefore, it was ordered that within thirty (30) days of

the entry of the Final Decree, the Appellant, James R. Cozart, was to make arrangements for Appellee, Lynn Anne Cozart, to have a new vehicle in the suggested form of a mini-van. Said vehicle was to be furnished **at no cost** to Appellee, by the family business, the Cozart Insurance Agency (TR Vol. 4, p.266-267).

The Appellee, Lynn Anne Cozart, was further awarded rehabilitative alimony in the amount of $425 per month for a period of thirty (30) months beginning August 1, 1998, so she could return to school and obtain her college degree (TR Vol.4, p.269). Said alimony did not begin until October 1, 1998, due to numerous motions of the Appellant to alter or amend the ruling of the Court.

Appellant, James R. Cozart, due to his unilateral desire to leave the marriage, was also ordered to pay one-half (½) of the Appellee's attorney fees to Lee Ann Pafford Dobson, the amount awarded being $3,668.48 (TR Vol.1, p.86; Final Decree).

ARGUMENT

Appellee, Lynn Anne Cozart, would respond to Appellant's issues as follows:

I **THE TRIAL COURT DID NOT ERR IN ITS ENTRY OF THE FINAL DECREE OF DIVORCE ON SEPTEMBER 3, 1998, WHICH DIVIDED THE HUSBAND'S DEFERRED COMPENSATION FROM NATIONWIDE INSURANCE COMPANY AND THE EXTENDED EARNINGS BENEFITS, ALSO KNOWN AS THE VALUE OF THE BUSINESS, AND IN DEFERRING SAME TO THE TIME OF "DRAW DOWN".**

The parties agree, according to T.C.A. 36-4-121(b)(1)(A), the property is to be valued as of the date, as near as reasonably possible, to the date of the final divorce hearing date. There has never been any dispute during this case about the amount owed to Appellee, Lynn Anne Cozart, from the both the **Extended Earnings Benefits** and the **Deferred Compensation Plan**. The problem has consistently been in determining how Appellant, James R. Cozart, would pay to Mrs. Cozart her one-half (½) interest in these "accounts". Mr. Cozart testified that he was unable to pay Mrs. Cozart in monthly installments due to his other financial obligations and the trial court agreed with Mr. Cozart. It is apparent from the trial court's ruling that the court attempted to give Mr. Cozart a "break" in delaying payment of Mrs. Cozart's one-half (½) interest in the agency until the time of "**draw down**" by Mr. Cozart. Appellant, Mr. Cozart is asking this Court to affix one-half (½) of the present day value in those accounts and be able to hold those for, as he states, some "ten (10) to twenty (20) years" after disbanding the agency and be allowed to keep Appellee, Lynn Cozart's interest in the **Extended Earnings Benefits** and **Deferred Compensation** accounts, without any interest accumulating on same or without any benefits accruing.

The Trial Court, in attempting to reconcile these opposite opinions, found that these plans did not come under the protection of T.C.A. 36-4-121(b)(1)(A) and instead, held that

> "Mrs. Cozart clearly made a substantial, if not equal, contribution to the development of that business. As to both the **Extended Earnings Benefits** and the security compensation plan, (known as the **Deferred Compensation Plan**) each is to be divided one half to Mrs. Cozart and one half to Mr. Cozart. There will be no requirement of a periodic payment. The Court cannot order Mr. Cozart to pay what he does not have to give."
>
> "Because Mrs. Cozart will not receive anything until Mr. Cozart is entitled to draw down those benefits, and because, as to value, she may run the risk of decrease or she may enjoy the benefit of an increase, therefore, the Court orders that she shall receive her 50 percent as to value as to each of those amounts as they may exist at the time of the drawdown, whenever that may be." [emphasis added, TR Vol.4, p.267-269]

The Final Decree further requires that this is to be accomplished through a QDRO, however, counsel has since learned that this cannot be accomplished through this means. The case before this Court does not present an **evaluation** issue. This case presents a **payment** issue. We referred the lower court to the case of Brock v. Brock, 941 S.W. 2d 896, (Tenn. App. 1996), which **clearly** states that property is to be valued as of a date as near as reasonably possible to the final divorce hearing date. Id. at 902. Brock also addresses "buy out" options. The facts in Brock involved a closely held family corporation which was marital property. Chancellor Howard N. Peoples ordered the stock of the family corporation divided 50% to the husband and 50% to the wife. At trial, the husband was insistent upon maintaining control of all the shares of stock and the Chancellor could not find a

way to allow the husband to keep control of all the stock, as husband did not possess other liquid assets to offset wife's interest in stock, and still divide the marital property in an equitable manner. He awarded the wife 50% of the stock, however, he gave the husband the "option" of purchasing said stock from the wife within sixty (60) days of the hearing at $15 per share, the price at which the stock was trading on the date of the divorce. The husband appealed, disputing, among other things, the price of the per-share buy out. The Court of Appeals stated that there was no error in fixing the price of $15 per share as the "option" was granted as an **accommodation** to the husband.

> **"Equity did not require the trial court to grant husband an option of any kind. There was no reason to deprive wife of this very valuable asset except on the fairest of terms to her."**

Id. at 903. The Appeals Court went on to remark that

> **"The trial court's judgment would have been fair and equitable even in the absence of an option."**

Id. at 903.

The Brock case appears to be directly on point with the case at bar, wherein a family business is to be divided and Mr. Cozart refuses to pay Mrs. Cozart one half of said business and Mr. Cozart does not possess other liquid assets to offset Mrs. Cozart's interest in the agency. The trial court found that Mr. Cozart could not make installment payments and, therefore, ordered an "option" where payment would be at the time of draw down and Mrs. Cozart would have no choice but to assume the risk of decrease or enjoy the benefit of an increase. Mrs. Cozart would then be entitled to one half of the value of the agency at **that** time, which could be

more than $77,415 or less than that amount. The Court ruled that the assets were not vested and could not be divided at this time (TR Vol.5, p.40) and, therefore, fashioned an "option" and **now**, Mr. Cozart is disputing the "option" given to him. We believe the Final Decree should be amended to award Mrs. Cozart a **judgment** against Mr. Cozart in the amount of $77, 415.00, plus post-judgment interest until said sum is paid in full.

As to the security compensation plan, (**Deferred Compensation Plan**), there was once again absolutely no dispute at trial that the amount owed to Appellee, Lynn Cozart, was $49,885, however, we have a similar problem in that a QDRO cannot be entered in order to divide this asset. Once again, we are left with the option of either rendering a judgment against Mr. Cozart for same, which the court found untenable, or, as the trial court ruled, to allow Mrs. Cozart one-half (½) of the value of this plan at the time of draw down.

The Appellant cites the unreported case of Gilliam v. Gilliam , (#01A01-9609-CV00414, Tenn. App., April 18, 1997), which was included in Appellant's brief, for the proposition that the assets shall be divided at the time of the divorce. That case went on to state that awarding the wife one-third of husband's benefits at the time he became vested was in error because post divorce assets would be included in the award. Unfortunately, Gilliam does not resolve the issue of division of the benefits in that case or the case at bar. The Court of Appeals in Gilliam remanded the case to the trial court for "a new decree with respect to a division of this asset."

The Appellant also cites the unpublished case of Poyner v. Poyner, (#01A01-

9503-CH-00116, Tenn. App., Nov. 9, 1995) however, in that case, the wife alleged it was error to fail to divide husband's pension. The Court of Appeals agreed and discussed two methods of **evaluating** a pension - (1) present cash value where the court calculates same and gives the pension to the one who earned it and awards marital property of equal value to the other spouse, and (2) retained jurisdiction which divides the pension at the time of maturity. This Court in Poyner found there was no proof of present cash value and remanded the case to the lower court with the instruction to award to wife **some** portion of the pension.

In the unpublished case of Malik v. Malik, 1996 WL 560257, tried before the Honorable George H. Brown, Jr., in Division Six of the Circuit Court of Shelby County, Tennessee, the wife was awarded 40% of husband's retirement and pension accounts. The husband was employed by the University of Tennessee, which did not allow at least one of the numerous retirement accounts to be divided by a QDRO. Judge Brown ordered the husband to do three (3) things - (1) to pay to the wife 40% of all accounts that **could** be divided by a QDRO; (2) **cash out** entirely all accounts that could be liquidated to satisfy the obligation; and (3) for any remaining amount owed, **borrow** against husband's remaining accounts and to pay the loan proceeds to wife to satisfy the remaining balance of the 40% due. Upon appeal, the Court of Appeals upheld Judge Brown's ruling, finding that

> **"In order to accomplish equity and justice and in order to carry out the court's previous award to Plaintiff of 40% of all retirement funds accumulated during the marriage plus an amount equal to the actual earnings of said funds thereafter, the court orders the Defendant, Kafait U. Malik, to pay to the Plaintiff, Susan K. Malik, an amount equal to 40% of the amounts in all of the**

> **defendant's...retirement funds accumulated during the parties' marriage."**

<u>Id</u>. The Court of Appeals also upheld the trial court's order that husband was to cash out entirely, as soon as possible, the funds in certain other accounts to pay the award. The Court of Appeals further held it was proper to order the husband to borrow against, to the fullest extent possible, as soon as possible, the other accounts and pay said proceeds to wife to satisfy the remaining outstanding 40% of the retirement funds.

In reaching their decision in <u>Malik</u>, the Court of Appeals cited another unpublished case, <u>Boyd v. Boyd</u>, 1993 WL 8379. In <u>Boyd</u> there was an award from a retirement account that was not divisible by a QDRO. The lower court ordered the husband to pay wife a percentage of his retirement benefits. The <u>Boyd</u> case was tried on June 3, 1991, and the Chancellor made oral findings and as a result, disagreements arose as to the interpretations of the ruling. A further hearing was held some ten (10) months later on April 28, 1992, and a Final Decree was entered on May 11, 1992, approximately eleven (11) months after the case was tried. The parties agreed that the figure of $7,000 was to be paid to the wife, however, the husband sought to reverse the award since he was employed by the State of Tennessee and the pension funds from the state are exempt from execution. This argument was not persuasive. The Court of Appeals affirmed the award of $7,000 to the wife, which represented her interest in the husband's retirement plan. Due to the delay in the entry of the Final Decree, the Chancellor awarded interest payments for the time period from the date of the hearing until the entry of the Final

Decree. In the Court of Appeals, husband sought relief from what he characterized as "post-judgement interest". The Court of Appeals found the assessment to be **pre-judgment** interest, which is discretionary, and upheld the assessment of same against the husband. The Court of Appeals went on to discuss post-judgment interest and further noted that

> **"Interest is computed on every judgment from the day on which the court returns a verdict."**

in accordance with T.C.A. §47-14-122.

Neither of the cases cited above by Appellant applies to the issue before this Court. The proof of present day value of both the **Extended Earnings Benefits** (value of the Cozart Agency) and the **Deferred Compensation Plan** was agreed to by and between the parties at trial. The problem arose when there were no other marital assets to award to wife to offset the award of these assets to the husband. The trial judge attempted to carve out a hybrid of the two methods espoused in Poyner by acknowledging the present day value but fixing the amount to be divided at the time of drawn down by the Appellant which could result in more or less than the present day value of said assets.

Appellee, Lynn Anne Cozart, asked the trial court to order Appellant, James Cozart, to name her as beneficiary of the **Extended Earnings Benefits**, as well as the **Deferred Compensation Plan** until such time as she is paid in full. This was requested due to the fact that Appellant, James Cozart, has threatened to sell the agency or retire and has stated that he would choose the **longest** payout option to keep Appellee, Lynne Cozart, from getting her portion of said funds. Nationwide

offers the "buy back" of the agency, **Extended Earnings Benefits,** in annual installment options, ranging from three (3) years to ten (10) years, split payments, annuity type options, and in a lump sum payment. Further, according to Nationwide, the option must be chosen prior to cancellation of the agency agreement and cannot be changed after cancellation of the agency agreement.

We ask this Court to require Appellant, James Cozart, to select the lump sum payout option allowed by Nationwide which is the fastest return. Further, by ordering Appellant, James Cozart, to name Appellee, Lynn Cozart, as beneficiary of both the agency, **Extended Earnings Benefits** and the **Deferred Compensation Plan**, it will ensure that Mrs. Cozart obtains the funds that the trial court awarded to her. We request that Mrs. Cozart be awarded a judgment for her interest in these marital assets.

II THE TRIAL COURT DID NOT ERR IN THE AWARDS TO THE WIFE NOR LEAVE THE HUSBAND WITH INSUFFICIENT FUNDS ON WHICH TO LIVE.

Mr. Cozart goes through a rather complicated expense computation in his brief, to attempt to show he is unable to pay what the lower court ordered. However, his Pre-Trial Affidavit only showed a $422 deficit. We respectfully remind this Court that Mrs. Cozart is receiving no money for her interest in the agency, **Extended Earnings Benefits**, or the **Deferred Compensation Plan** and unlike Mr. Cozart, Mrs. Cozart is not in control of her own income. She is employed by a company and is not able to adjust her earning capacity commensurate with her expenses. Mr. Cozart, on the other hand, has a successful insurance agency that has historically earned more money in each succeeding year.

The expenses listed by Mr. Cozart in this brief, are **not** the expenses listed in his Pre-Trial Affidavit (Trial Exhibit 6). Specifically, the Trial Affidavit showed Mr. Cozart is paying $220 per month as his portion of the private school expenses, **now** in his brief, he lists $300 per month. Further, we object to the $550 per month listed in the brief for college expenses for J.J. Cozart (a child from Mr. Cozart's previous marriage). Mr. Cozart testified at trial that the cost for the schooling was $3,780 per year and that he had already paid that amount in **cash** to J.J. Cozart from money stored in a **cash box** that he kept in his home (TR Vol.3, p.9). Even if J.J. Cozart continues in college, the annual obligation is $3,780, and when divided over a twelve (12) month period, this results in a monthly expense of $315 per month, **not** $550 as listed in his brief.

Mr. Cozart's constant refrain throughout this divorce has been that he cannot afford to pay what the trial court ordered. In spite of all the mathematical computations he has done, none reflect the post-divorce tax breaks that have been given to Mr. Cozart by the trial court's ruling. Mr. Cozart's figures are based on his 1997 tax return, which does not take into account his 1998 tax status. In 1997, Mr. Cozart was only allowed to claim one (1) child as a tax deduction, however, in 1998, the trial court allowed Mr. Cozart to claim the tax deduction for <u>both</u> children, which will afford him a higher monthly net income. Further, the 1998 tax laws also bring in a new deduction which we believe allows a $500 dependent deduction which, in addition to the child deduction, results in a $1,500 annual tax deduction for all three (3) of Mr. Cozart's children (one child from a previous marriage). Additionally, in 1998, Mr. Cozart will have a larger amount of alimony to claim as a deduction than he did in 1997.

Additionally, Mr. Cozart testified at trial that he will be entitled to receive $108.38 per month in retirement benefits from Champion Corporation, beginning June 1, 1998, which was **not** included in Mr. Cozart's Pre-Trial Affidavit or the computations in his brief.

Therefore, all of these tax deductions, increased earnings and retirement payments will result in a higher net income for Mr. Cozart in the 1998 tax year and succeeding years. The trial court's ruling was proper.

A) THE TRIAL COURT DID NOT ERR IN REQUIRING HUSBAND TO PAY $425.00 PER MONTH FOR THIRTY (30) MONTHS IN REHABILITATIVE ALIMONY TO THE WIFE.

The trial court awarded Appellee, Lynn Cozart, the sum of $425 per month for a period of thirty (30) months as rehabilitative alimony. Unfortunately, this amount is only $100 more per month than the $325 she was already receiving prior to the trial in this cause. Therefore, Mrs. Cozart ended up with a **greater** monthly shortfall than she had prior to the trial.

The criteria in awarding alimony is based largely on the need of the requesting spouse, the ability of the obligor spouse to pay and relative fault. In this case the need was demonstrated by the proof at trial. The proof was that a college degree was necessary in order for Mrs. Cozart to be afforded promotions and raises through her employer. The testimony of Mrs. Cozart was that she needed $425 per month for a period of thirty-six (36) months in order to obtain her degree, however, she was only awarded $425 per month for thirty (30) months. It should be noted that in her Trial Affidavit, Mrs. Cozart showed a $2,000 per month deficit **without** the cost of college but **with** temporary alimony. Mr. Cozart's affidavit only showed a $422 deficit including a payment of $325 for alimony which was ultimately increased only $100 per month in the Final Decree.

We also remind this Court that Mr. Cozart filed this divorce and entered a stipulation that he was guilty of adultery during the marriage. Therefore, we urge this Court to uphold the lower court's ruling and sustain the rehabilitative alimony award of $425 per month for a period of thirty (30) months.

B) THE COURT DID NOT ERR IN REQUIRING THE HUSBAND TO PURCHASE THE WIFE AN AUTOMOBILE AT HIS COST.

The trial court found that Appellant, James Cozart, purchased a brand new 1996 Ford Eddie Bauer F-150 truck shortly before the parties separation. There was much dispute at trial as to the equity in said vehicle. Appellant's affidavit (Trial Exhibit 6) showed a negative equity of $1,000 and in Appellee's Affidavit, showed a positive equity of $3,974.72 (Trial Exhibit 12). Within two (2) weeks of trial, the 1996 Ford Eddie Bauer F-150 truck was sold by Appellant, James Cozart, resulting in a net profit of $6,000. The trial court found that the Appellee, Lynn Cozart, and the two (2) minor children were in "**dire need**" of a new vehicle. Mr. Cozart was able to pay $6,000 from the sale of his vehicle toward a new vehicle for his wife, leaving him with a car payment for sixty (60) months at an extremely reasonable interest rate. Pursuant to the terms of the Final Decree of Divorce, Mrs. Cozart did give the title to the 1989 Dodge Ram to Mr. Cozart and he has chosen not to sell said vehicle and retains same. Additionally, Mr. Cozart has leased another vehicle for his own purposes.

The trial court ordered that the note on Mrs. Cozart's vehicle was to be paid from the family business, the Cozart Insurance Agency, not from Mr. Cozart's net income as he now attempts to argue to this court. The proof at trial showed the need of the award of this vehicle to the wife and children and the husband's ability to pay same through the business, therefore we submit the trial court did not err in this decision.

III THIS ISSUE WAS NOT LISTED BY APPELLANT IN HIS ORIGINAL OUTLINE BUT IS BRIEFED BY APPELLANT AS ISSUE THREE AND IS BRIEFED AS ISSUE FIVE IN APPELLEE'S BRIEF.

IV THE TRIAL COURT DID NOT ERR IN DENYING THE HUSBAND THE RIGHT TO BORROW AGAINST CASH VALUE OF HIS LIFE INSURANCE POLICIES.

We believe the trial court did not err and acted properly in its decision of this issue. The undisputed testimony at trial was that Mr. Cozart is a diabetic and is **unable** to obtain any additional life insurance coverage on his life. The face value of policy number N990008721 through Nationwide is $123,940, with a cash surrender value of approximately $11,819. There is additionally $20,000, also through Nationwide, which is a term policy and has no cash surrender value. Mr. Cozart was ordered to name the two (2) minor children as irrevocable beneficiaries of these policies, for the total sum of $155,759. Should this Court modify the trial court's decision and allow Mr. Cozart to borrow against said policies, then the child support obligation is no longer wholly guaranteed until the youngest child reaches age eighteen (18). Due to Mr. Cozart's health (being diabetic) and his age (56 years), this leaves the children unprotected and at risk. It is the duty of this Court to protect the interests of these children and to do otherwise would be unconscionable.

The Appellee would ask why Mr. Cozart would want or need to borrow against these assets. If he is doing so to pay the Appellee, we would still find that encroaching upon the protection of the children. The sum of $11,819 would not go

far toward the $77,415 due Mrs. Cozart for her interest in the **Extended Earnings Benefits** and the $49,885 for her interest in the **Deferred Compensation Plan**, although it would pay her attorney fees in full and part of the rehabilitative alimony. There is no other asset from which to guarantee the payment of Mr. Cozart's child support obligation. Therefore, we urge this Court to uphold the trial court's ruling and prohibit Mr. Cozart from borrowing against said policies.

V. THE COURT MADE A PROPER AND EQUITABLE DIVISION OF THE ASSETS UNDER THE CIRCUMSTANCES.

Appellee, Lynn Anne Cozart, submits the following summary of the division of marital assets made by the trial court:

Summary of Division of Marital Assets

	Value	Husband	Wife
Family home 1113 Colonial Memphis, TN	$27,485.00		$27,485.00
Personal property in Mr. Cozart's possession	8,590.50	8,590.50	
Personal property in Mrs. Cozart's possession	6,367.00		6,367.00
Airstream trailer	3,000.00	3,000.00	
Jon boat	500.00	500.00	
Van	1,880.00	1,880.00	

IRA	37,174.00	18,587.00	18,587.00
401K (Mrs. Cozart)	1,640.00		1,640.00
Credit union	1,500.00		1,500.00
Proceeds from sale of Mr. Cozart's truck	6,000.00	6,000.00	
Total	$94,136.50	$38,557.50	$55,579.00

Appellee, Lynn Cozart, is presently receiving no funds whatsoever from the **Extended Earnings Benefits** (value of the business), or from the **Deferred Compensation Plan**. And although Mrs. Cozart has received approximately $17,000 more in the division of assets, she has received no liquid assets and is being forced to wait for her interests in the business. Mrs. Cozart was awarded insufficient funds with which to pay her debts including college tuition, attorney fees or any car note. Therefore the division of the marital property as set forth above is equitable under the circumstances and should not be disturbed upon appeal.

CONCLUSION

We respectfully urge this Court to uphold the lower court's Final Decree of Divorce. We submit that said ruling was made with full knowledge of all of the facts that the Appellant has raised on appeal and in light of the numerous motions and hearings since the entry of the Final Decree of Divorce, it is clear that the trial court believes that the Appellant, James R. Cozart, has the ability and the means to carry out the orders of the trial court. We submit that there have been no errors made and ask this Court to affirm the lower court's decision.

Respectfully submitted,

RIKARD & DOBSON, P.L.L.C.

By: ______________________________

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CERTIFICATE OF SERVICE

I, Lee Ann Pafford Dobson, do hereby certify that I have served a copy of the foregoing pleading by depositing same in the United States Mail, first class, postage prepaid, addressed to Charles A. Sevier, Attorney for Appellant, 200 Jefferson Avenue, Suite 975, Memphis, Tennessee 38103, on this the _____ day of _____ _______________, 19_____.

____
Lee Ann Pafford Dobson