

FILED
IN SUPREME COURT
OF TEXAS

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NO. 07-1065

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IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

RAOUL HAGEN,
Petitioner

v.

DORIS J. HAGEN,
Respondent

*On Petition for Review from the
Fourth Court of Appeals at San Antonio, Texas
Cause No. 2006-CI-18587*

PETITIONER'S REPLY BRIEF ON THE MERITS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Raoul Hagen files this reply to Respondent Doris Hagen's Brief on the Merits. The parties are referred to by their first name.

Raoul agrees with the majority of the arguments asserted in Doris' brief on the merits. He agrees that *res judicata* prevents collateral attacks on final judgments, that trial courts cannot modify a judgment once it has become final, and that the trial court's authority is limited to orders implementing or clarifying a final judgment. Raoul also agrees that Texas courts have long been able to divide military disability benefits in divorce proceedings. All are correct statements of Texas law. None, however, addresses whether the court of appeals erred in holding that the trial court modified the divorce decree by clarifying that Raoul's Veterans Administration ["VA"] disability benefits were not included in the decree's division of military retirement pay.

This Court has recognized, at least implicitly, that VA disability benefits are legally distinct from military disability benefits. *See Ex parte Burson*, 615 S.W.2d 192, 196 (Tex. 1981) (ordering release of party who had been held in contempt for refusing to pay a portion of his VA disability benefits to his ex-spouse under terms of divorce decree dividing Air Force disability benefits) (orig. proceeding); *Ex parte Johnson*, 591 S.W.2d 453, 455-56 (Tex. 1979) ("Veterans Administration benefits are not divisible or assignable. They are not property."). Lower appellate courts have more fully explained the distinction. *See Matter of Marriage of Reinauer*, 946 S.W.2d

853, 858-59 (Tex. App. – Amarillo 1997, pet. denied) (explaining that military disability benefits were an earned property right accrued by reason of years of service and thus were part of the serviceman’s retirement pay and subject to division; whereas, VA disability benefits were a gratuity based upon a service-related disability and holding that decretal language dividing “retirement pay” did not divide VA disability benefits); *Ocker v. Ellis*, 2005 WL 1832835, at *2 (Tex. App. – Corpus Christi Aug. 4, 2005, no pet.) (holding that decretal language dividing U.S. Navy retirement benefits did not divide the retired serviceman’s VA disability income) (mem. op.) (not desig. for publication).

Doris fails to recognize the distinction between military and VA disability benefits, as is reflected in citing of cases addressing the divisibility of military disability benefits in support of her argument that the trial court implicitly divided the VA disability benefits when it divided Raoul’s “military retirement pay” more than 30 years ago. *See Mora v. Mora*, 429 S.W.2d 660, 663 (Tex. Civ. App. – San Antonio 1968, writ dism’d) (addressing the divisibility of military retirement benefits without mention of disability benefits); *Miser v. Miser*, 475 S.W.2d 597, 599 (Tex. Civ. App. – Dallas 1971, writ dism’d) (recognizing that this Court had previously held that Air Force disability retirement benefits were community property subject to division); *Jones v. Jones*, 900 S.W.2d 786, 788 (Tex. App. – San Antonio 1995, writ denied) (the court appears to have addressed Army

disability benefits but does not address their divisibility); *Dominey v. Dominey*, 481 S.W.2d 473, 475 (Tex. Civ. App. – El Paso), *cert. denied*, 409 U.S. 1028 (1972) (addressing the divisibility of Navy disability benefits, not VA disability benefits). In *Dominey*, the court recognized the distinction between military disability benefits and VA disability benefits. *See id.*, 481 S.W.2d at 475 (quoting favorably from *Ramsey v. Ramsey*, 474 S.W.2d 939 (Tex. Civ. App. – Eastland 1972, writ dismissed), which recognized the different nature of VA disability benefits)).¹

The decree did not expressly divide Raoul’s VA disability benefits.² Nor could the trial court have implicitly divided such benefits when it divided Raoul’s “military retirement pay” as they were not subject to division at that time and are a fundamentally different type of benefit. While military disability benefits might have been divided implicitly in the decree, that point is irrelevant to the instant case involving VA disability benefits. Because the decree does not expressly divide the VA disability benefits at issue and could not have implicitly divided the VA disability benefits, the trial court’s order clarifying that the VA disability benefits are not included in the military retirement pay that Raoul must divide

¹ This Court also cited *Ramsey* favorably in its opinion in *Johnson*. *See id.*, 591 S.W.2d at 455.

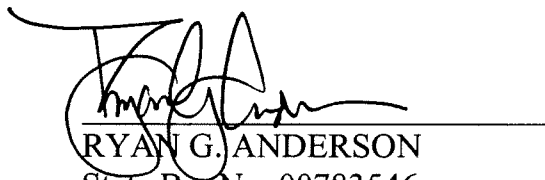
² The provision at issue awarded Doris:

One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, IF, AS, AND WHEN RECEIVED, and the Petitioner RAOUL HAGEN shall be a Trustee of the One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, for the use and benefit of DORIS J. HAGEN, and shall pay the same immediately upon each receipt of the same, to DORIS J. HAGEN.

with Doris does not alter or modify the decree and thus is not barred by *res judicata*. The court of appeals' erroneous holding to the contrary must be corrected and this issue clearly and conclusively resolved by this Court. Otherwise, a retired servicemembers' property rights and potential liability in contempt proceedings depends upon the court of appeals district in which they find themselves.

WHEREFORE, PREMISES CONSIDERED, Appellee RAOUL HAGEN respectfully requests that this Court grant his Petition for Review and, upon doing so, reverse the court of appeals and affirm the trial court's order clarifying the decree, and such other relief to which he is be entitled.

Respectfully submitted,



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**COUNSEL FOR PETITIONER
RAOUL HAGEN**

CERTIFICATE OF SERVICE

On the 10th day of October, 2008, a true and correct copy of the foregoing document has been served upon:

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ATTORNEY FOR RESPONDENT



RYAN G. ANDERSON