

NO. _____

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*

PETITION FOR REVIEW

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IDENTITY OF PARTIES AND COUNSEL

TRIAL COURT:

131st Judicial District Court,
Bexar County, Texas

TRIAL JUDGE:

The Honorable Janet Littlejohn,
Presiding

APPELLEE/PETITIONER:

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STATEMENT OF THE CASE

- Nature of the Case:** This case arises from Doris Hagen’s motion to enforce and clarify her 1976 divorce decree ending her marriage to Petitioner Raoul Hagen. CR. 1. Doris sought an order: (1) holding Raoul in contempt for failing to pay her the percentage of his military retirement benefits required by the decree; (2) awarding her damages for the unpaid amounts; (3) clarifying of the decree to include VA disability benefits in the retirement benefits divided by the decree; and (4) fees and costs associated with her action. CR. 1-5.
- Trial Court:** The Honorable Janet Littlejohn, Presiding Judge of the 150th Judicial District Court, Bexar County, Texas
- Trial Court Disposition:** Following a non-evidentiary hearing, the trial court clarified that the division of Raoul’s military retirement pay in the 1976 decree “shall not include the amount awarded to Raoul Hagen as disability pay.” CR. 73.
- Court of Appeals:** Fourth Court of Appeals District, San Antonio. The opinion was authored by Justice Catherine Stone. The other panel members were Justice Phylis J. Speedlin and Justice Rebecca Simmons.
- Parties in the Court of Appeals:** Doris appealed the trial court’s order, asserting that the clarification order improperly modified the decree.
- Court of Appeals Disposition:** On August 1, 2007, the court of appeals issued its memorandum opinion *Hagen v. Hagen*, 2007 WL 2187107 (Tex. App. – San Antonio 2007, pet. filed Dec. 26, 2007) (mem. op.) (not desig. for publication), holding that *res judicata* bars Raoul’s collateral attack on the decree and reversed the trial court’s clarification

order. The court denied Raoul's motion for rehearing on November 7, 2007.

**Requested Disposition
from this Court:**

Petitioner seeks reversal of the Fourth Court of Appeals' judgment and resolution of the conflicting decisions of the intermediate appellate courts as to whether divorce decree provisions dividing military retirement benefits include division of subsequent VA disability benefits.

STATEMENT OF JURISDICTION

The Supreme Court of Texas has jurisdiction of this case under Government Code sections 22.001(a) (1), (2) and (6) because:

1. the court of appeals' conclusion that the divorce decree's division of "military retirement benefits" implicitly divided Raoul's VA disability benefits conflicts with this Court's decision in *Ex parte Johnson*, 591 S.W.2d 453, 455-56 (Tex. 1979), that such benefits are not property subject to division;
2. the court of appeals' holding that the trial court improperly modified the decree in clarifying that the VA disability benefits were not divided by the "military retirement benefits" provision conflicts with the decisions of the Corpus Christi Court of Appeals in *Ocker v. Ellis*, 2005 WL 1832835, at *2 (Tex. App. – Corpus Christi Aug. 4, 2005, no pet.) (mem. op.) (not desig. for publication), and the Amarillo Court of Appeals in *Matter of Marriage of Reinauer*, 946 S.W.2d 853 (Tex. App. – Amarillo 1997, pet. denied), where both courts held that VA disability benefits were not included in decretal provisions dividing military retirement benefits; and
3. the uncertainty for the large number of Texas military families as to the effect of their divorce decrees created by the courts of appeals' inconsistent treatment of VA disability benefits raises an important issue that this Court should resolve.

ISSUE PRESENTED

1. **Does the division of "military retirement benefits" in a divorce decree include VA disability benefits?**

I.

STATEMENT OF FACTS¹

The court of appeals' decision correctly sets forth the relevant facts except for Raoul's percentage of disability referenced in the third stipulation. Raoul is 100% disabled.

A. The provision of the decree at issue.

Raoul and Doris were divorced in February 1976, with the final decree being signed on May 7, 1976. The divorce decree awarded the following property to 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.

CR 2.²

B. The stipulated facts regarding the payments at issue.

The parties have stipulated to the following relevant facts:

1. Raoul Hagen retired on September 30, 1992 (SCR at 1);

¹ The record on appeal consists of a one-volume Clerk's Record containing the relevant filings in the trial court, a single-volume Reporter's Record from the hearing during which the ruling challenged on appeal was made, and two Supplemental Clerk's Records containing the parties' stipulations as to relevant facts. References to the Clerk's Record will be cited as "CR [page number]". References to the Reporter's Record will be cited as "RR [page number]". References to the first Supplemental Clerk's Record will be cited as "SCR at p. ___[page number of the stipulation filing]" and to the second Supplemental Clerk's Record as "SSCR at ___ [page number]".

² The decree was not included in the Clerk's Record. However, the term at issue is not disputed.

2. Raoul Hagen's total monthly retirement compensation at that time was United States Army retirement pay and did not include any disability pay (SCR at 1);

3. In 2003, Raoul Hagen was determined to be 100% disabled by the Veterans Administration ["VA"] (SSCR at 1); and

4. Based on his disability, Raoul Hagen elected to convert 40% of his Army retirement pay to VA disability pay. Following Raoul Hagen's election, and beginning in December 2003, his monthly compensation was 60% in Army retirement pay and 40% VA disability pay. (SCR at 1)

C. Doris' request for clarification.

In the proceeding below, Doris asserted that Raoul failed to pay her the share of his retirement pay awarded to her in the divorce decree. CR 2. She also requested clarification of the decree to the extent necessary to determine whether Raoul had paid her as required by the decree. CR 2. Specifically, in order to determine whether Raoul complied with the terms of the decree, the trial court needed to determine whether the VA disability benefits received by Raoul were to be included in the military retirement pay apportioned under the decree. If the VA benefits are not included, it is undisputed that Raoul has fully complied with the decree.

D. The trial court's clarification of the decree.

The trial court determined that the decree did require clarification as it related to the issue regarding enforcement of the division of the retirement pay. CR 73. The trial court clarified the decree as follows:

IT IS ORDERED that the military retirement pay now being received by RAOUL HAGEN shall be divided according to the formula stated in the Original Decree of Divorce. The amount subject to this formula for division shall not include the amount awarded to RAOUL HAGEN as disability pay.

CR 73.

E. The court of appeals' decision.³

The Fourth Court of Appeals concluded that the above clarification constituted an impermissible collateral attack because it modified the decree by excluding the VA disability benefits from the division of the military retirement benefits. Curiously, the court devoted the majority of its opinion to a statute that Raoul did not rely upon and, as shown below, is irrelevant to the issues before the Court.

II.

SUMMARY OF THE ARGUMENT

Military retirement benefits are fundamentally different than VA disability benefits. Thus, the 1976 trial court's division of Raoul's military retirement benefits did not implicitly divide the VA disability benefits that he

³ The court of appeals' decision may be found behind tab 1 in the appendix to this petition.

later received. As a result, the current trial court's order clarifying that the division of the military retirement benefits did not include the VA disability benefits did not modify the decree, and is not an impermissible collateral attack barred by *res judicata*. The court of appeals was wrong. More important to this Court's consideration, the error impacts far more than Raoul, who faces contempt claims and claims for substantial monetary damages. The court of appeals' error casts uncertainty over the legal landscape controlling the many Texas military families whose marriages have already ended, or will end, in divorce. Just as Raoul here, those families will not know the effect of their divorce decrees. Moreover, given the conflicting decisions by the San Antonio, Amarillo, and Corpus Christi courts of appeals, the individuals' rights will depend upon the court of appeals district in which they find themselves. This Court should use this case to eliminate the uncertainty and to bring uniformity to Texas law as to the effect of the important decretal language at issue.

III.

ARGUMENT AND AUTHORITIES

A. The issue presented is important to Texas military families, and Texas jurisprudence.

At first blush, it might seem a stretch to argue that the interpretation of one provision in a divorce decree entered more than 30 years ago is important to Texas jurisprudence. However, two important factors render the issue very important, and thus worthy of this Court's attention. First, the large military population in Texas, scattered between Fort Bliss (El Paso), Fort Hood (Killeen), Fort Sam Houston (San Antonio) and many points in between, in addition to the many retired military families who return to Texas, ensures that issues regarding military benefits are sure to continue to be addressed by Texas courts. Second, at least three intermediate appellate courts have addressed the issue raised in this petition, and they have not reached consistent results. Consequently, there is already confusion in Texas law as to the status of VA disability benefits, at least as far as their inclusion in decretal provisions dividing "military retirement benefits", and that confusion is likely to increase without guidance from this Court. Rather than allowing the issue to fester, this Court should take this opportunity to reaffirm the fundamental differences between military retirement benefits and VA disability benefits and clarify the effect of those differences on the

apparently common language in divorce decrees dividing military (or Army or Navy or Air Force) retirement benefits.

Given the San Antonio Court of Appeals' failure to follow this Court's earlier explanation that VA benefits are not the same as retirement benefits and its resulting split from the earlier holdings of the Amarillo and Corpus Christi courts, there is a clear need for this Court's unequivocal guidance. Clarification from this Court as requested by Petitioner will provide military families and their counsel with certainty in drafting divorce decrees and ensure uniform treatment throughout the State. Given all of their sacrifices, they deserve that much from this Court.

B. The court of appeals was wrong.

The court of appeals was confronted with a straightforward issue presented in a stipulated set of facts – whether the decree's division of “military retirement pay” included the VA disability benefits that Raoul subsequently received upon becoming disabled. Under the well-defined rules of construction that this Court has provided, the plain language of the decree should have resolved that issue. To put the issue in context, and not intending to lecture this Court on its own jurisprudence, Raoul presents a very brief outline of the rules for clarifying and enforcing divorce decrees and

determining whether a clarification order modifies the decree, and thus is improper outside the confines of a direct appeal of that decree.

If the decree, when read as a whole, unambiguously describes the property's disposition, the court effectuates the order following the literal language used. *Wilde v. Murchie*, 949 S.W.2d 331, 333 (Tex. 1997). If the decree is ambiguous, however, the court must interpret the judgment by reviewing both the decree as a whole and the record to ascertain the property's disposition. *Id.* Courts may enter orders of "clarification" to enforce compliance with insufficiently specific divorce decrees. Tex. Fam. Code Ann. § 9.008 (b) (Vernon 2004). Courts, however, "may not amend, modify, alter, or change the division of property" set out in the decree. *Id.* § 9.007 (a). Any order that does so is unenforceable. *Id.* § 9.007 (b). Any attempt by a party to get such an order modifying or altering divorce decrees is an impermissible collateral attack and must be denied on grounds of *res judicata*. See *Baxter v. Ruddle*, 794 S.W.2d 761, 762-63 (Tex. 1990).

The court of appeals held that the clarification order constituted an improper collateral attack on the decree and was thus barred by *res judicata*. The court could only reach this holding by concluding that the decree's division of "Army retirement pay" or "Military retirement pay" included the VA disability benefits from the outset, a conclusion that both ignores the

fundamental differences between such benefits and conflicts with the holdings of two other Texas courts of appeals. The court of appeals' holding is both wrong and creates undesired uncertainty in Texas law.

In a case involving remarkably similar language, the Corpus Christi Court of Appeals held that VA disability benefits were not included in the apportionment of Navy retirement benefits. *See Ocker v. Ellis*, 2005 WL 1832835, at *2 (Tex. App. – Corpus Christi Aug. 4, 2005, no pet.) (mem. op.) (not desig. for publication)⁴. In *Ocker*, the decree, signed in 1979, provided:

... Respondent shall pay to Petitioner, as her interest in said **[U.S. Navy] retirement benefits**, an amount equal to one-half (1/2) of six and one-half (6 1/2) divided by the total number of years served for retirement purposes, multiplied by the monthly retirement benefit paid, if and when said benefit is paid, six and one-half (6 1/2) being the number of years that parties were married to each other and residents of the State of Texas.

Id. (emphasis added). The Corpus Christi court held that the above paragraph did not include the retired serviceman's VA disability income as part of the retirement benefits being divided. *See id.* The court explained that the decree did not define the term "retirement benefits" and did not indicate that there had been any contemplation of "disability benefits" at the time the decree was signed. *Id.* As a result, the court concluded that the decree did not include the VA disability benefits in the property division.

⁴ For the Court's convenience, the *Ocker* decision may be found behind tab 2 in the appendix to this petition.

The court of appeals supported its holding with this Court's case law addressing the property status of VA benefits, which had never been considered community property under Texas law. *Id.* (citing *Ex parte Johnson*, 591 S.W.2d 453, 455-56 (Tex. 1979) ("Veterans Administration benefits are not divisible or assignable. They are not property.") and others). Because the VA disability benefits were not expressly apportioned in the decree, and could not be presumed to have been implicitly apportioned given the legal status of such benefits when the decree was entered, the clarification expressly excluding the VA disability benefits did not alter the property division, and thus was not prohibited by *res judicata*. *See id.*

The Amarillo Court of Appeals reached the same conclusion with respect to similar decree language in *Matter of Marriage of Reinauer*, 946 S.W.2d 853 (Tex. App. – Amarillo 1997, pet. denied)⁵. There, the court of appeals held that VA benefits were not “retirement pay” subject to division as community property in a divorce proceeding. *Id.* at 858. The court's discussion is particularly instructive because the court addressed the nature of both VA disability benefits and military disability benefits before concluding that military disability benefits were subject to division but VA disability benefits were not. *See id.* at 858-59. As the court explained, the

⁵ For the Court's convenience, the *Reinauer* opinion may be found behind tab 3 of the appendix to this petition.

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. *See id.* at 858. In contrast, the VA disability benefits were a gratuity based upon a service-related disability, and not an earned property right. *See id.* Because the benefits were not retirement pay, they were not encompassed by the decree. *See id.* In so holding, the court explained that the trial court could not have divided such "pure disability payments" under the then-applicable law, which further supported its conclusion that the court's division of "retirement pay" did not include the VA disability benefits. *See id.* at 859.

It bears noting that neither the *Ocker* nor *Reinauer* courts relied upon the USFSPA in reaching their decisions. *Ocker* does not even mention the act, and *Reinauer* dismisses its impact based on its lack of retroactivity. *See id.*, 946 S.W.2d at 857. Simply put, the USFSPA is irrelevant to the issues raised herein. In contrast, the San Antonio Court of Appeals devoted a substantial part of its opinion to the Act, despite its irrelevance to the issue actually before it.

This Court should use this opportunity to embrace the logic of the *Ocker* and *Reinauer* decisions and clarify for Texas military personnel and their spouses that military retirement benefits do not include VA disability benefits when they are being apportioned in a divorce proceeding. Such

clarity will enable the parties to draft decretal provisions that are clear and uniformly enforceable.

IV.

CONCLUSION AND PRAYER

Given the parties' dispute, the trial court properly clarified the decree by explaining that the provision dividing "Army Retirement Pay or Military Retirement Pay" did not divide Raoul's VA disability benefits. Such a clarification does not alter the decree. There is nothing in the record or in Texas case law that supports Doris' position (and the court of appeals' decision) that the VA disability benefits were included in the division provision. Because the decree did not divide the VA disability benefits, the trial court's clarification explaining that such benefits are not to be included in the division of the retirement pay does not alter the decree and thus cannot constitute a collateral attack on the decree prohibited by *res judicata*. This Court should take this opportunity to correct the court of appeals' error and bring much-needed clarification and certainty to the status of divorce decree provisions dividing retirement benefits for the State's military personnel and their families. They deserve clear law that is applied consistently throughout the State. The current court of appeals' decision denies them that.

WHEREFORE, PREMISES CONSIDERED, Appellee RAOUL HAGEN respectfully requests that this Court grant his Petition for Review and such other relief to which he is be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 26th day of December, 2007, a true and correct copy of the foregoing document has been served upon:

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