

Hagen v. Hagen

Tex.App.-San Antonio,2007.

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SEE TX R RAP RULE 47.2 FOR DESIGNATION
AND SIGNING OF OPINIONS.**MEMORANDUM
OPINION**

Court of Appeals of Texas,San Antonio.

Doris J. **HAGEN**, Appellant

v.

Raoul **HAGEN**, Appellee.

No. **04-06-00705-CV**.

Aug. 1, 2007.

From the 57th Judicial District Court, Bexar County,
Texas, Trial Court No. 1975-CI-09510,Janet P.
Littlejohn, Judge Presiding.

Gary A. Beahm, for Doris J. Hagen.
Robert S. Thompson, for Raoul Hagen.

Sitting: CATHERINE STONE, Justice, PHYLIS J.
SPEEDLIN, Justice, REBECCA SIMMONS, Justice.

MEMORANDUM OPINION

Opinion by CATHERINE STONE, Justice.

*1 Doris Hagen appeals the trial court's judgment that allowed her former husband, Raoul Hagen, to retroactively apply the Uniformed Services Former Spouses' Protection Act to collaterally attack their divorce decree. We hold that under Texas law, res judicata bars Raoul's collateral attack and we thus reverse the judgment.

BACKGROUND

This appeal concerns a divorce decree between Doris Hagen and Raoul Hagen. Raoul is retired from the United States Army and Doris is his former spouse. The parties were divorced in 1976 and the divorce decree 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.

Raoul retired on September 30, 1992, and his total monthly retirement compensation at that time was United States Army retirement pay and did not include any disability pay. In 2003, Raoul was determined to be 40% disabled by the Veterans Administration (VA); based on his disability, Raoul elected to convert 40% of his Army retirement pay to VA disability pay. Thereafter, Raoul received monthly compensation of 40% VA disability benefits and 60% Army retirement pay, with the divorce decree formula applied only to the Army retirement pay. Doris asserted that Raoul failed to pay her the share of his retirement pay awarded to her in the divorce decree. She requested clarification of the decree to determine whether Raoul had paid her as required by the decree. The trial court determined that the divorce decree required clarification regarding the division of the retirement pay. 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.

Doris appeals this clarification, arguing that the trial court erred in not dividing or awarding her a portion of Raoul's disability pay and in doing so, made an impermissible modification of a final, non-appealable divorce decree.

DISCUSSION

In *Mansell v. Mansell*, the United States Supreme Court held that the Uniformed Services Former Spouses' Protection Act (USFSPA) gave state courts the authority to treat disposable retirement pay as community property and expressly excluded veteran's disability pay from the definition of disposable retirement pay, thereby preempting state courts from including disability pay in any community property award. 490 U.S. 581 (1989). However, the question of retroactive application of the USFSPA was left open for state courts to determine under existing state law. *Id.* at 586 n. 5. While the Court allowed retroactive application of the USFSPA in *Mansell*, it based its decision on the California Court of Appeals'

prior determination that the retroactive application was appropriate under California law. *Id.* Unlike California, however, courts in Texas have held that under Texas law, res judicata bars a collateral attack on a final divorce decree. *Berry v. Berry*, 786 S.W.2d 672, 673 (Tex.1990). The Texas Supreme Court has held that divorce judgments are not vulnerable to collateral attack and has stated that "although a final judgment may be erroneous or voidable, it is not void and thus subject to collateral attack if the court had jurisdiction of the parties and the subject matter." *Id.*

*2 This court has previously used the *Berry* court's analysis when considering issues similar to the one presently before us. See *Jones v. Jones*, 900 S.W.2d 786, 787 (Tex.App.-San Antonio 1995, writ denied) (holding that the subsequent adoption of the USFSPA could not be used to collaterally attack the Jones' final divorce decree). When the parties in *Berry* divorced in 1980, the court entered an order granting the wife twenty-five percent of the gross amount of her husband's Air Force disability retirement pay, which the husband had elected to receive in lieu of military retirement benefits. *Berry*, 786 S.W.2d at 673. On June 8, 1987, as a result of a contempt action filed by the wife to enforce the decree, the trial court mandated payment pursuant to an agreed order. *Id.* On September 1, 1987, the husband elected to receive disability benefits from the Veterans Administration, thus waiving a portion of his Air Force disability pay and reducing the total amount he received from the Air Force. *Id.* The wife filed a motion to enforce the prior order when the husband reduced the amount he was paying her by the same percentage he was then receiving from the Veterans Administration. *Id.* When conducting its analysis, the Texas Supreme Court recognized that the *Mansell* court explicitly left the question of retroactive application of the USFSPA to state courts and permitted the retroactive application of the USFSPA only because the California Court of Appeals determined it was appropriate. *Id.* The *Berry* court recognized that any attempt to collaterally attack a final divorce decree under the same circumstances is barred by res judicata under Texas law and thus the subsequent adoption of the USFSPA could not be used to collaterally attack the Berrys' final divorce decree. *Id.*

In the absence of findings of fact and conclusions of law, the trial court's judgment will be upheld on any legal theory that finds support in the evidence of the law. *Jones*, 900 S.W.2d at 787. Here we have no findings of fact or conclusions of law, but current

Texas law does not support the trial court's judgment concerning a final unappealed divorce decree collaterally attacked by Raoul in response to Doris' motion to enforce the decree. Under Texas law, res judicata bars this collateral attack, and the trial court's judgment must be reversed under this legal theory. See *Berry*, 786 S.W.2d at 673; *Baker v. Donovan*, 199 S.W.3d 577, 580 (Tex.App.-Houston [1st Dist.] 2006, pet. denied); *Jones*, 900 S.W.2d at 788.

CONCLUSION

Res judicata bars a collateral attack on a final divorce decree and thus the USFSPA cannot be used retroactively to collaterally attack the Hagen's divorce decree. Accordingly, we reverse the judgment of the trial court and remand the cause to the trial court for further proceedings consistent with this opinion.

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COcker v. Ellis

Tex.App.-Corpus Christi,2005.

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.**MEMORANDUM OPINION**

Court of Appeals of Texas,Corpus Christi-Edinburg.
Su Anne **OCKER**, Appellant,

v.

Jimmy Lee **ELLIS**, Appellee.

No. 13-04-071-CV.

Aug. 4, 2005.

On appeal from the 36th District Court of Aransas County, Texas, Michael E. Welborn, J.

Douglas F. Ocker, Attorney at Law, Houston, for appellant.

Deborah R. Sundermann, Attorney at Law, Mark H. Giles, Law Office of Mark Giles, Corpus Christi, for appellee.

Before Chief Justice VALDEZ and Justices HINOJOSA and RODRIGUEZ.

MEMORANDUM OPINION

Opinion by Chief Justice VALDEZ.

*1 Appellant, Su Ann Ocker, contests the trial court's determination that a 1979 divorce decree granting her a division of appellee's retirement benefits did not include disability pay. She also appeals her denial of attorney's fees and court costs. See TEX. R. CIV. P. 131. We affirm the judgment of the trial court.

I. Facts and Procedural History

Appellant and appellee, Jimmy Lee Ellis, were divorced in 1979. Their divorce decree included a specific division of appellee's retirement benefits. Appellee later qualified for disability benefits through the Veteran's Administration (VA). Appellee's VA disability benefits offset payments from his retirement benefits. In 2003, appellee sought and received from the trial court a clarification that his disability pay did not fall under the divorce decree's definition of retirement benefits. Appellant now contests this clarification in eleven issues on

appeal, all of which ultimately turn on whether the trial court erred in finding the 1979 divorce decree did not intend retirement pay to include VA disability pay. If the trial court did err, as appellant claims, she further argues that the 2003 decree modified, not just clarified, the 1979 divorce decree in violation of res judicata. Finally, appellant seeks attorney's fees and court costs.

II. Analysis

Appellant contends that the trial court contradicted itself by declaring the 1979 divorce decree a non-voidable judgment, then making a material modification by holding that appellee could deduct his VA disability compensation from his gross retirement pay before calculating appellant's apportioned share.

When interpreting property divisions in divorce decrees, Texas courts follow an established procedure. Wilde v. Murchie, 949 S.W.2d 331, 333 (Tex.1997). If the decree, when read as a whole, unambiguously describes the property's disposition, the court effectuates the order following the literal language used. *Id.* 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.* Even after expiration of its plenary jurisdiction, a trial court may clarify or enforce a divorce decree. See McGehee v. Epley, 661 S.W.2d 924, 926 (Tex.1983). The courts may enter orders of "clarification" to enforce compliance with insufficiently specific divorce decrees. TEX. FAM. CODE ANN. § 9.008(b) (Vernon 2004). The 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 petitioner to get such an order modifying or altering divorce decrees is therefore 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 parties' 1979 divorce decree states in relevant part the following:

*2 ... 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.

The primary issue is whether the above paragraph contemplated VA disability income as a part of his retirement benefits. The divorce decree offers no definition of the term "retirement benefits," nor is there any contemplation of "disability benefits." A careful reading of appellant's brief offers no explanation as to why appellee's VA disability benefits should be included in the calculation of her portion of his retirement benefits. See TEX. R. APP. P. 38.1(h).

Case law supports appellee's assertion that VA disability income is not included in a retirement benefits calculation. Indeed, it has never been considered community property. See Ex parte Johnson, 591 S.W.2d 453, 455-56 (Tex.1979) ("Veterans Administration benefits are not divisible or assignable. They are not property."); see also In re Marriage of Reinauer, 946 S.W.2d 853, 857-58 (Tex.App.-Amarillo 1997, writ denied); Patrick v. Patrick, 693 S.W.2d 52, 54 n. 1 (Tex.App.-Fort Worth 1985, writ ref'd n.r.e.); Ramsey v. Ramsey, 474 S.W.2d 939, 940-41 (Tex.Civ.App.-Eastland 1971, writ dismissed).

We conclude that the 1979 divorce decree did not contemplate, and could not legally contemplate, the inclusion of VA disability benefits in an apportionment of community property. The consequential defeasance of appellant's share is irrelevant. See Ex parte Burson, 615 S.W.2d 192, 196 (Tex.1981) (holding Burson could not be held in contempt for sheltering his disability income from alimony payments by electing to waive his Air Force disability, which was community property, in favor of VA disability, which was not).

Because the court's modification of the relevant wording in the divorce decree merely clarified the decree by expressly excluding VA disability benefits, to which appellant never had a right, we find no merit in appellant's claims of a res judicata violation. See TEX. FAM. CODE ANN. § 9.008(b) (Vernon 2004).

Given that appellant has failed to prevail on any substantive grounds for appeal, we decline to award appellant attorney's fees and court costs. See TEX. R. CIV. P. 131, 141.

III. Conclusion

We affirm the judgment of the trial court.

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(Cite as: 946 S.W.2d 853)



Matter of Marriage of Reinauer
Tex.App.-Amarillo,1997.

Court of Appeals of Texas.Amarillo.
In the Matter of the MARRIAGE OF James Richard
REINAUER and Margaret Ann Reinauer.
No. 07-96-0013-CV.

March 13, 1997.
Order Granting Rehearing in Part May 22, 1997.
Second Rehearing Overruled July 8, 1997.

Former wife sought to enforce divorce decree awarding her part of former husband's military retirement benefits. The 222nd Judicial District Court, Deaf Smith County, David Wesley Gulley, J., entered judgment for former wife, and former husband appealed. The Court of Appeals, Quinn, J., affirmed in part and reversed and remanded in part, holding that term "retirement benefits," as used in divorce decree, did not include former husband's Veteran Affairs (VA) disability benefits. Former husband moved for rehearing. The Court of Appeals, Quinn, J., held that: (1) trial court did not modify decree by interpreting unqualified term "retirement pay" to mean gross pay, but (2) award of interest amounted to modification of property division.

Rehearing granted in part and overruled in part; ordered accordingly.

West Headnotes

[1] Divorce 134 ⚡ 252.3(4)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.3 Particular Property or Interests and Mode of Allocation

134k252.3(4) k. Insurance, Retirement, or Pension Rights. Most Cited Cases

Divorce 134 ⚡ 254(1)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k254 Judgment or Decree

134k254(1) k. In General. Most Cited

Cases

Trial court had authority, before *McCarty* decision and before enactment of Uniformed Services Former Spouses' Protection Act (USFSPA), to divide husband's military retirement benefits; accordingly, that portion of divorce decree was valid and enforceable. 10 U.S.C.A. § 1408.

[2] Courts 106 ⚡ 100(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
McCarty decision, holding that military retirement pay is not subject to division as a community asset, does not apply retroactively.

[3] Divorce 134 ⚡ 199.7(10)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k199.7 Constitutional and Statutory Provisions

134k199.7(7) Retroactive Operation

134k199.7(10) k. Property Distribution.

Most Cited Cases

(Formerly 134k4)

Uniformed Services Former Spouses' Protection Act (USFSPA) did not apply retroactively and, thus, did not preclude alleged division of Veteran Affairs (VA) disability benefits in divorce decree that became final before USFSPA went onto effect. 10 U.S.C.A. § 1408.

[4] Divorce 134 ⚡ 254(1)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k254 Judgment or Decree

134k254(1) k. In General. Most Cited

Cases

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Term "retirement benefits" as used in divorce decree, included military retirement pay that was based on former husband's years of service, even though former husband was forced to retire by reason of disability; conversely, term excluded former husband's Veteran Affairs (VA) disability benefits, given to him to facilitate his readjustment to civilian life, even though he waived some retirement benefits in order to receive the disability benefits. 38 U.S.C.A. §§ 1201, 3001, 5305.

[5] Divorce 134 ↪ 169134 Divorce134IV Proceedings134IV(N) Judgment or Decree134k169 k. Construction and Operation in General. Most Cited Cases

Term used in divorce decree must be interpreted in reference to entire judgment and with purpose of giving effect to all the court has written, and effect of decree must be declared in accordance with literal language used; most importantly, construction derived must comport with the law, meaning that the term cannot be read in manner achieving an illegal result.

[6] Divorce 134 ↪ 255134 Divorce134V Alimony, Allowances, and Disposition of Property134k255 k. Conclusiveness of Adjudication.Most Cited Cases

Term, "retirement pay," as used in divorce decree, connotes earned property right accrued by reason of years of service or deferred compensation earned during each month of service.

[7] Divorce 134 ↪ 252.3(4)134 Divorce134V Alimony, Allowances, and Disposition of Property134k248 Disposition of Property134k252.3 Particular Property or Interests and Mode of Allocation134k252.3(4) k. Insurance, Retirement, or Pension Rights. Most Cited Cases

Mere gifts or discretionary payments made for purposes other than as compensation earned during employee-spouse's tenure are not "retirement pay or benefits" divisible upon divorce.

[8] Divorce 134 ↪ 282134 Divorce134V Alimony, Allowances, and Disposition of Property134k278 Appeal134k282 k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases

Former husband preserved error, in dividing Veteran Affairs (VA) disability benefits, by consistently arguing to trial court that such benefits were not retirement pay within meaning of divorce decree.

[9] Divorce 134 ↪ 255134 Divorce134V Alimony, Allowances, and Disposition of Property134k255 k. Conclusiveness of Adjudication. Most Cited Cases

Distinction between military retirement benefits, as that term is generally used in divorce decrees, and gratuities was established years before divorce of parties who later disputed meaning of that term, and, therefore, court could consult later reiterations of those principles in interpreting decree, despite former wife's contention that it was inappropriate to consult cases decided after her divorce decree was entered.

[10] Divorce 134 ↪ 261134 Divorce134V Alimony, Allowances, and Disposition of Property134k260 Enforcement of Order, Judgment, or Decree134k261 k. In General. Most Cited Cases

Court that issued divorce decree retained jurisdiction to enforce property division, particularly in light of former husband's continuous and systematic contacts with the state, even though neither former spouse lived in that county when enforcement action began. V.T.C.A., Family Code § 3.70(c).

[11] Divorce 134 ↪ 261134 Divorce134V Alimony, Allowances, and Disposition of Property134k260 Enforcement of Order, Judgment, or

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Decree

134k261 k. In General. Most Cited Cases

Former wife could seek to enforce divorce decree awarding her part of former husband's military retirement benefits any time within two years after former husband's interests in such benefits matured; moreover, as benefits were paid in installments, each installment triggered its own limitations period. V.T.C.A., Family Code § 3.70(c).

[12] Divorce 134 ⚡ 282134 Divorce134V Alimony, Allowances, and Disposition of Property134k278 Appeal

134k282 k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases

Alleged error in modifying property division could be raised, to the extent that trial court lacked jurisdiction to modify judgment, for the first time on appeal.

[13] Divorce 134 ⚡ 254(1)134 Divorce134V Alimony, Allowances, and Disposition of Property134k248 Disposition of Property134k254 Judgment or Decree134k254(1) k. In General. Most CitedCases**Divorce 134 ⚡ 254(2)**134 Divorce134V Alimony, Allowances, and Disposition of Property134k248 Disposition of Property134k254 Judgment or Decree134k254(2) k. Modification or Vacation.Most Cited Cases

Property division can be clarified and can be subject to order in aid of property division but cannot be altered substantively after it is final. V.T.C.A., Family Code § 3.71(a, b).

[14] Divorce 134 ⚡ 254(1)134 Divorce134V Alimony, Allowances, and Disposition of Property134k248 Disposition of Property134k254 Judgment or Decree134k254(1) k. In General. Most Cited Cases**Divorce 134 ⚡ 254(2)**134 Divorce134V Alimony, Allowances, and Disposition of Property134k248 Disposition of Property134k254 Judgment or Decree134k254(2) k. Modification or Vacation.Most Cited Cases

Divorce decree that granted former wife a percentage of former husband's "retirement pay," without limiting that term in any way, referred to gross monthly pay, including cost of living increases; accordingly, decree was clarified, as opposed to modified, by postdivorce order stating that former wife's share was to be based on gross monthly pay, including cost of living increases. V.T.C.A., Family Code § 3.71(a, b).

[15] Divorce 134 ⚡ 254(1)134 Divorce134V Alimony, Allowances, and Disposition of Property134k248 Disposition of Property134k254 Judgment or Decree134k254(1) k. In General. Most CitedCases**Divorce 134 ⚡ 254(2)**134 Divorce134V Alimony, Allowances, and Disposition of Property134k248 Disposition of Property134k254 Judgment or Decree134k254(2) k. Modification or Vacation.Most Cited Cases

Divorce decree that was silent as to whether wife should receive interest on her share of husband's retirement pay was modified, as opposed to clarified, by postdivorce order providing for such interest; accordingly, provision for interest was void for lack of jurisdiction. V.T.C.A., Family Code § 3.71(a, b).

*855 Thomas J. Purdom, Lubbock, Rex W. Easterwood, Hereford, for appellant.

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Underwood Wilson Berry Stein & Johnson, P.C., James E. Wester, Ginger P. Nelson, Amarillo, for appellee.

Underwood, Wilson, Berry, Stein & Johnson, James W. Wester, Ginger P. Nelson, Amarillo, Bass, Higdon & Hardy, Inc., James N. Higdon, San Antonio, for appellant on motion for rehearing.

Law Offices of Thomas J. Purdom, Thomas J. Purdom, Lubbock, Law Offices of Rex Easterwood, Rex Easterwood, Hereford, for appellee on motion for rehearing.

Before BOYD, C.J., and DODSON and QUINN, JJ. QUINN, Justice.

James Reinauer (Reinauer) appealed from a "Final Judgment" enforcing a prior divorce decree and awarding Margaret Ann Reinauer Cowan (Cowan) a portion of his military retirement benefits. Through four points of error he asked whether the trial court erred in 1) actually dividing disability as opposed to retirement benefits, 2) failing to grant his plea to jurisdiction, 3) failing to deny recovery since same was barred by the statute of limitations, and 4) modifying a final divorce decree. We affirm in part and reverse and remand in part.

Background

Reinauer and Cowan were divorced on August 20, 1979. In the decree terminating their marriage, Cowan was awarded a portion of Reinauer's military retirement benefits.^{FN1} The applicable provision read:

FN1. Since no one argued otherwise, we presume that the judgment became final and nonappealable within thirty days after its issuance in August of 1979.

It is the finding of the Court that ... Reinauer ... is an officer on active service in the United States Navy, and that as such, he accrues potential *retirement income benefits*, which may, or may not ripen into actual *retirement income*, since the completion of twenty ... years of service is a prerequisite to such actual vesting of retirement pay benefits. The Court finds and decrees that the accrual and entitlements under such *military retirement plan* which relate to Petitioner's service during the marriage of the parties is Community Property, and that the parties are each entitled to one-half of such benefits, *if and when paid*, as are attributable to such service-years during marriage, the court finds that Petitioner completed eleven ... service years during marriage.

If, therefore, the said [Reinauer] shall continue in the military service until he accrues actual *retirement pay benefits*, it is Decreed that such *retirement pay* shall be paid to the parties hereto as follows:

(1) One-half of the 'Community Interest' ... shall be paid to ... [Cowan] and the balance of such pay shall be paid to ... [Reinauer].

(2) The 'Community Interest' is, and shall be, that fraction of the *retirement pay* in which the denominator of the fraction is [Reinauer's] total service years at retirement and the numerator is eleven....

'It is not intended hereby to require Petitioner to remain on active military duty, and if he shall fail to complete 20 service years, then this provision of the Judgment shall impose no duty on him with respect to military *retirement pay*, but if he completes 20 or more service years, and receives actual *retirement pay*, then he shall be, and is hereby Ordered to receive, for the benefit of [Cowan] and in order to effectuate the terms of this Judgment, [Cowan's] community interest in such *retirement benefits*. [Reinauer] is further Ordered to deliver to [Cowan] within ten days of his receipt of such actual *retirement pay*, her community interest in such *retirement payments*.'

(Emphasis added).

Some years after the divorce, Reinauer began to experience physical ailments and underwent medical examination. As a result of same, he was found to be 20% disabled, and the Navy placed him on temporary disability*856 retirement.^{FN2} Thereafter, he received a letter from the "Retired Pay Department" of the Navy welcoming him "to the retired roll" and informing him that his "disability retired pay account" had been established. Additionally, several options were extended with regard to the pay he could receive during his temporary retirement. While one option included a percentage of his disability as an element in the overall formula, he selected a method founded solely upon the number of years he served in the military.

FN2. By that date, Reinauer had served slightly over twenty years in the service.

Apparently, Reinauer's condition deteriorated. In April of 1992, he was assigned a 40% disability. Moreover, the Secretary of the Navy "approved the recommendation of the Physical Evaluation Board that [he] be permanently retired because of physical

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disability.” He again was given several options concerning the manner in which his post-service pay could be calculated. And, he selected “ the nondisability” formula which, like before, calculated his future benefits solely upon the number of years he served.

Incidentally, the nondisability formula was offered him because he had accrued a sufficient number of years in the military to voluntarily retire.^{FN3} But before he could execute the requisite papers to voluntarily end his relationship with the Navy, the latter placed him on permanent disability retirement under 10 U.S.C. § 1201 et. seq.^{FN4} Indeed, had he had a choice, he would have opted to serve for a full 28 years, as allowed by federal law.

FN3. According to 10 U.S.C. § 6323, a naval officer was entitled to voluntarily retire, with the consent of the United States President, after 20 years of service.

FN4. Section 1201 of the United States Code states that:

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay ... is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title ...

Furthermore, it was recognized long ago that retirement under § 1201 was rather involuntary. Busby v. Busby, 457 S.W.2d 551, 554 (Tex.1970).

As a result of being characterized as disabled, Reinauer was directed to apply for disability benefits from the Department of Veteran Affairs (VA). He did so. But to receive same, the law required him to waive a portion of his naval benefits. He did that as well. Consequently, his gross disability retirement compensation consisted of monies from the Navy computed under 10 U.S.C. §§ 1201 and 1401 and from the VA as per 38 U.S.C. §§ 3101 et. seq.

Upon discovering that her ex-husband had “ retired,” Cowan moved the trial court to award her a percentage of Reinauer's benefits. The primary dispute below lay in whether the Navy and VA payments came within the scope of “ retirement pay”

as contemplated in the 1979 divorce decree. That is, the trial court was asked to determine whether his disability retirement compensation was “ retirement pay” under the decree, and therefore, payable in part to Cowan. It held that it was.

Point of Error One

[1] In his first point of error, Reinauer asserted that the trial court erred in granting judgment which apportioned both his disability retired pay and Veterans Affairs disability compensation. We overrule the point as to the monies from the Navy but sustain it as to the VA funds.

[2] First, to the extent Reinauer suggested that McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) nullified the provision of the divorce decree apportioning military retirement, he was mistaken. Though the United States Supreme Court held in McCarty that military retirement was not subject to division as a community asset, the decision lacked retroactive application. Segrest v. Segrest, 649 S.W.2d 610, 613 (Tex.1983), cert. denied, 464 U.S. 894, 104 S.Ct. 242, 78 L.Ed.2d 232 (1983). That is, it had no affect upon judgments which were final and non-appealable before McCarty issued. Id. So, that part of the divorce decree at bar which divided Reinauer's retirement benefits was, and is, enforceable*857 since the decree became final and nonappealable several years before McCarty.

[3] Second, though the United States Congress attempted to overrule McCarty via the Uniformed Services Former Spouses' Protection Act (USFSPA)^{FN5}, Richard v. Richard, 659 S.W.2d 746, 748 (Tex.App.-Tyler 1983, no writ), that statute also lacked retroactive application. According to the Texas Supreme Court, it too could not be invoked to collaterally attack a judgment which had become final and non-appealable before its passage. Berry v. Berry, 786 S.W.2d 672, 673 (Tex.1990); Jones v. Jones, 900 S.W.2d 786, 787-88 (Tex.App.-San Antonio 1995, writ denied). And, again, because the decree at bar became final years before the USFSPA went into effect, that statute was, and is, not controlling.^{FN6} Third, before McCarty, Texas recognized prospective military retirement benefits as a community asset subject to division. Carroll v. Carroll, 544 S.W.2d 661, 665-66 (Tex.1976); Busby v. Busby, 457 S.W.2d 551, 553-54 (Tex.1970) (dealing with disability retirement payments). It did so because they were tantamount to contingent

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property rights. *Id.* Thus, the trial court acted lawfully when, in 1979, it awarded Cowan a percentage of Reinauer's eventual military retirement.

FN5. 10 U.S.C. § 1408.

FN6. This conclusion also vitiates Reinauer's argument that the USFSPA prevented the trial court from apportioning disability retirement. Though Congress stated that the "disposable retired pay" subject to division excluded sums "equal to the amount of retired pay of the member under ... [10 U.S.C. §§ 1201 *et seq.*] using the percentage of the member's disability on the date when the member was retired," the declaration is of no import. Again, the act had no retroactive effect, *Berry v. Berry*, 786 S.W.2d 672, 673 (Tex.1990) and *Jones v. Jones*, 900 S.W.2d 786, 787-88 (Tex.App.-San Antonio 1995, writ denied) upon final judgments.

[4][5] Fourth, whether the government payments received by Reinauer were properly divided depended upon the construction given the phrase "retirement pay" in the 1979 decree. Thus, we must decide what was meant by the court in using the aforementioned phrase. This, in turn, obligates us to interpret the term in reference to the entire judgment and with the purpose of "giving effect to all the court has written." *Point Lockett West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex.1987). So too must we declare its effect in accordance with the literal language used. *Barnard v. Barnard*, 863 S.W.2d 770, 772 (Tex.App.-Fort Worth 1993, no writ). Lastly, and most importantly, the construction derived must comport with the law; that is, the term cannot be read in a manner achieving an illegal result. See *id.* at 774 (holding that a construction which correctly applies the law must be adopted).

[6][7] In applying the foregoing rules to the situation at hand, we are not without guidance. For instance, retirement pay, as per *Busby* and *Cearley*, connotes an earned property right that accrued by reason of years of service or deferred compensation earned during each month of service. *Acosta v. Acosta*, 836 S.W.2d 652, 654 (Tex.App.-El Paso 1992, writ denied); *Whorrall v. Whorrall*, 691 S.W.2d 32, 37 (Tex.App.-Austin 1985, writ dismissed); see *Cearley v. Cearley*, 544 S.W.2d at 665 (holding the payments to be community property and divisible because they

were a form of deferred compensation earned during each month of military service); *Busby v. Busby*, 457 S.W.2d at 552 (comparing the military retirement pay to an earned property right accruing by reason of years in military service). In other words, the payment must, at the very least, be a form of compensation accruing to the individual due to his years of service with the employer. Discretionary payments made for purposes other than as compensation earned during an employee's tenure do not satisfy these criteria and, thus, are not retirement pay or benefits. See *Whorrall v. Whorrall*, 691 S.W.2d at 37-38 (holding that a payment given to induce one's early retirement was not part of his "retirement" because it was discretionary, unique, and not earned during the employee's tenure). Nor do mere gratuities or gifts from one's employer satisfy the requisite criteria. *Ex parte Johnson*, 591 S.W.2d 453, 454-55 (Tex.1979); see *Busby v. Busby*, 457 S.W.2d at 552 (acknowledging that military retirement was divisible upon *858 divorce since, among other things, it was not a mere gift from the government).

Here, the Navy compelled Reinauer to leave active duty. Though his severance was involuntary, it was nonetheless done pursuant to statute expressly authorizing the Secretary of the Navy to "retire" officers "with retired pay." 10 U.S.C. § 1201. In comparison, the 1979 decree sought to divide his "retirement" pay or benefits. One can easily see that the literal language of the decree comported with the nature of the action undertaken by the Secretary; that is, the navy "retired" him while the court divided his "retirement pay."

Additionally, the compensation given Reinauer under § 1201 had been held to be an earned property right accrued by reason of years of service rather than a gift or gratuity. *Busby v. Busby*, 457 S.W.2d at 552-54. That it may be labeled "disability retirement pay," or the like, mattered not given its substantive nature. Nor was the fact that it arose due to his forced retirement of consequence. See *id.* at 554 (holding that benefits paid due to Busby's involuntary retirement under § 1201 were subject to the same rule applicable to payments made for voluntarily retiring). Thus, having satisfied the requisite indicia, the monies paid Reinauer by the Navy were, and are, "retirement pay" within the scope of the 1979 decree. Yet, the same cannot be said of his payments from the VA. They were given him as a means of facilitating his readjustment to civilian life. 38 U.S.C.

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§ 3001. More importantly, the courts of this State characterized them as a gratuity based upon a service-connected disability rather than an earned property right due to years of service. *Ex parte Johnson*, 591 S.W.2d at 455; *Ramsey v. Ramsey*, 474 S.W.2d 939, 940-41 (Tex.Civ.App.-Eastland 1971, writ *dism'd*). And, because the payment of same lay within the discretion of Congress (which discretion may be extended or revoked at will), *id.*; *Milliken v. Giverson*, 332 F.2d 122, 123 (1st Cir.1964) *cert. denied*, 379 U.S. 1002, 85 S.Ct. 723, 13 L.Ed.2d 703 (1965), they were, and are, not even considered property. *Ex parte Burson*, 615 S.W.2d 192, 194 (Tex.1981). So, they fail to satisfy the indicia of retirement pay and cannot be said to have been encompassed by the 1979 decree.

[8] Cowan would disagree with our determination *vis-a-vis* the VA funds. For instance, she first alleged that Reinauer waived his complaint regarding division of the VA benefits. Supposedly, “[n]either the transcript nor the statement of facts contain[ed] any evidence of a motion, objection, or request at trial regarding” same. Yet, our perusal of the record disclosed that from the inception of the hearing to enforce the 1979 Decree, he consistently argued that the trial court could not apportion his “disability.” So too did he present evidence showing that a portion of the disability in dispute consisted of his VA benefits. Having been presented to and argued before the trial court, the question was preserved for appeal.

[9] Next, Cowan suggested that because the Texas Supreme Court's decision in *Johnson* issued several months after the 1979 decree became final, its teachings had no effect upon our interpretation of that decree. She was again mistaken. The purposes underlying the VA disability payments were simply acknowledged by the Supreme Court in *Johnson* but actually established years before by the United States Congress. Moreover, having the purposes they did, they fell outside the scope of retirement compensation as declared years earlier in *Bushy* and *Cearley*. Finally, the rule reiterated in *Johnson* was first pronounced in *Ramsey v. Ramsey*, 474 S.W.2d 939 (Tex.Civ.App.-Eastland 1971, writ *dism'd*), five years before the Reinauers were divorced.

FN7. Nor can Cowan find much succor in the intermediate appellate court decision of *Ex parte Johnson*, 583 S.W.2d 660 (Tex.Civ.App.-Waco, 1979, no writ) if for no other reason than the fact that the Supreme

Court implicitly overruled it in *Ex parte Johnson*, 591 S.W.2d 453 (Tex.1979).

Nor can we accept her notion that she was entitled to both a percentage of the retirement benefits he actually received and those waived to secure VA disability. It may well be that the 1979 Decree did “not exclude [from the retirement benefits awarded her] any benefits waived ... to receive VA disability benefits.” But, the trial court in 1979 certainly did not award her an interest in *859 pure disability payments for it could not without violating the then applicable law. Rather, her interest consisted of nothing more than a proportionate share of the retirement benefits paid to him. FN8 And, federal statute now codified at 38 U.S.C. § 5305 granted him the privilege to waive those benefits in order to receive true disability. *Ex parte Burson*, 615 S.W.2d 192, 196 (Tex.1981). So, by invoking that privilege, his obligation to Cowan effectively decreased in direct proportion to the amount of retirement benefits he waived. *Id.*

FN8. Again, the Decree read that she was entitled to a percentage of “such benefits if and when paid.” (Emphasis added).

Point of Error Two

In point of error two, appellant argued that the trial court erred in overruling his special appearance. We disagree and overrule the point.

[10] Though neither party lived in Texas when Cowan first moved to enforce the decree in October of 1993, the record nevertheless revealed continuous and systematic contacts between Reinauer and the State. For instance, and aside from the fact that a district court in Deaf Smith County, Texas granted the divorce, he had lived in Deaf Smith County or Austin, Texas until entering the Navy in 1967. Thereafter, Deaf Smith County was designated as his “home of record” throughout his stay in the military and up to May of 1992. And though he moved to Albuquerque, New Mexico sometime in the early 1990's, he swore to the county clerk of Deaf Smith in September of 1992 that Deaf Smith was his residence, voted in this State's elections as late as November of 1992, represented to the Internal Revenue Service (under oath) in June of 1993 that Deaf Smith County was his home, owned (at the time Cowan sought enforcement) real estate in Deaf Smith County and rental property in Corpus Christi, Texas,

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maintained an agent in Texas to assist in the rental of his Corpus Christi property, maintained a partnership interest in (and thereby had a right under Texas law to control and operate) a general farming partnership that conducted business in Deaf Smith County, maintained the registration of at least one motor vehicle in Deaf Smith, acted as the co-executor of his mother's will which was undergoing probate in Deaf Smith, appeared in the Deaf Smith County Courthouse to recant his Texas voter registration in March of 1994, and traveled frequently to Deaf Smith County. These contacts amply supported the conclusion that Reinauer voluntarily submitted himself to the benefits extended and restrictions imposed by Texas law.

Nor can we forget that statute vested the 222nd Judicial District Court with continuing authority "to enforce the property division." Tex. Fam.Code Ann. § 3.70(c) (Vernon 1993).^{FN9} That authority, according to one court, encompassed both subject-matter and personal jurisdiction over the property divided in and persons bound by the divorce decree. Dechon v. Dechon, 909 S.W.2d 950, 955 (Tex.App.-El Paso 1995, no writ). And, if for nothing else, § 3.70(c) evinced this State's continuing and substantial interest in resolving disputes like that at bar.

^{FN9} Though the statute was enacted several years after the Reinauers were divorced, the legislature gave it retroactive effect. Dechon v. Dechon, 909 S.W.2d 950, 957 (Tex.App.-El Paso 1995, no writ).

In sum, the record contained evidence sufficiently illustrating Reinauer's continuous and systematic contacts with this State. So too did it illustrate that the exercise of jurisdiction over his person would not offend traditional notions of reasonableness. Consequently, the trial court did not abuse its discretion in denying his special appearance. See CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex.1996) (indicating that the decision to grant or deny a special appearance lies within the trial court's discretion).

Point of Error Three

In his next point of error, Reinauer contended that the trial court erred in refusing to hold that the relief Cowan sought was barred by the statute of limitations. We again disagree and overrule the point.

[11] At the time the 1979 Decree was signed, the

Reinauers' interests in the military*860 retirement benefits had yet to mature. Nonetheless, the interests were not mere expectancies but contingent interests in future property, Cearley v. Cearley, 544 S.W.2d at 663-66, or choses-in-action. Duv v. Duv, 896 S.W.2d 373, 376 (Tex.App.-Amarillo 1995, no writ) (likening a contingent interest in future property to a chose-in-action). Given this, Cowan was entitled to enforce their division at any time within two years after her ex-husband's interests matured. Id.; Tex. Fam.Code Ann. § 3.70(c).

Additionally, that the matured interests would be paid in installments also affected the manner in which limitations would apply. In short, limitations would accrue as to each installment. Gonzales v. Gonzales, 728 S.W.2d 446, 448 (Tex.App.-San Antonio 1987, no writ). As each installment was paid, Cowan had to sue to recover her share within two years of the date of payment. So, by postponing suit until October 23, 1993, all she lost was the right to recover her proportion of the monies distributed before October 23, 1991.

Point of Error Four

In his final point of error, Reinauer proposed that the trial court violated § 3.71(a) of the Texas Family Code by substantively amending the division of the property originally declared in the 1979 Decree. We disagree and overrule the point since it was never preserved for review.

One complaining of error in a judgment must first bring that error to the trial court's attention before it can be raised on appeal. Tex.R.App. Proc. 52(a); Strahan v. Davis, 872 S.W.2d 828, 836 (Tex.App.-Waco 1994, writ denied); Metromedia Long Distance, Inc. v. Hughes, 810 S.W.2d 494, 499 (Tex.App.-San Antonio 1991, writ denied); see Demler v. Demler, 836 S.W.2d 696, 700 (Tex.App.-Dallas 1992, no writ) (holding that the appellant waived her objection that the judgment incorrectly omitted the attorney's fees awarded her because it was not first raised in a motion for new trial or to correct, modify or reform the judgment). Here, the record fails to reveal that Reinauer brought his complaint regarding violation of § 3.71(a) to the trial court's attention. The allegation went unmentioned in his motion for new trial.¹³ Nor was it alluded to in any other motion or objection filed by Reinauer. Consequently, it was waived.

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FN10. Reinauer did generally aver in his new trial motion that the court “erred in dividing the disability pay” and in “signing a judgment which did not conform to the rulings previously made by the court.” Yet, none touched upon the specific ground of improperly modifying a final judgment as required by Rule 52(a) of the Rules of Appellate Procedure.

Accordingly, we reverse the judgment to the extent that it purports to award Cowan an interest in Reinauer’s Veteran Affairs disability benefits and remand the cause to the trial court for recalculation of the sums due Cowan in conformance with this opinion. In all other things, the judgment is affirmed.

On Motion for Rehearing

[12] James Reinauer moved for rehearing. Only the first point mentioned in his motion warrants discussion by the court. In it, he argued that he preserved his allegations concerning the trial court’s purported modification of the judgment contrary to § 3.71 of the Texas Family Code. If for no other reason, he suggested, the modification occurred when the court had no jurisdiction to do so. Thus, the act was purportedly void and, as such, could be raised for the first time on appeal. We agree. To the extent that the court lacked jurisdiction to do what it did, the error could be raised on appeal without first presenting it to the court below. Spradley v. Hutchison, 787 S.W.2d 214, 216 (Tex.App.-Fort Worth 1990, writ denied); H.E. Butt Grocery Co. v. Bev, Inc., 808 S.W.2d 678, 679 (Tex.App.-Corpus Christi 1991, writ denied) (stating that there are no particular preservation or briefing requirements imposed on a party raising jurisdictional challenges).

Next, regarding the substantive claim itself, Reinauer averred that the judgment from which this appeal was taken improperly modified the 1979 decree. That is, the trial court allegedly lacked jurisdiction to declare, approximately sixteen years later, that the interest of his ex-wife, Margaret Cowan, in the retirement benefits be calculated*861 in reference to his “[g]ross retirement pay received monthly,” including “cost of living increases.” So too did it allegedly err in ordering him to pay her “interest from the date any payment is due at the rate of ten percent ... per annum.” Because each supposed change occurred after the court lost plenary power over the 1979 edict, none could be effectuated. We disagree in part and

agree in part.

[13] A trial court has the inherent power to issue orders “necessary to carry ... [a prior] judgment into execution in a manner which [is] consistent with the provisions and finality of the judgment.” Schwartz v. Jefferson, 520 S.W.2d 881, 888 (Tex.1975). So too may it, in matters subject to the Texas Family Code, issue orders “in aid ... or in clarification of ... prior order [s].” TEX.FAM. CODE ANN. § 3.71(a) (Vernon 1993). Yet, neither grant empowers it to substantively alter an allocation of property ordered in a decree over which its plenary jurisdiction expired. Schwartz v. Jefferson, 520 S.W.2d at 888; TEX. FAM. CODE ANN. § 3.71(b) (stating that an order issued under § 3.71 which has that effect “is beyond the power of the divorce court to enter and is unenforceable”); see Valencia v. Valencia, 792 S.W.2d 565, 566-67 (Tex.App.-El Paso 1990, no writ) (noting that the court cannot, via a clarification order, impose an obligation to pay where no such obligation previously existed).

[14] Here, in dividing the community estate in 1979, the trial court ordered that one-half of the “community interest” in Reinauer’s “retirement pay” be paid to Cowan. Of note is the absence of any phraseology limiting the scope of the term “retirement pay.” The court did not mention anything about granting her only a fraction of that pay remaining after deductions, if any, were taken. See Pierce v. Pierce, 850 S.W.2d 675 (Tex.App.-El Paso 1993, writ denied) (wherein the spouse’s interest in the asset was a “net” interest since the court ordered that various deductions first be taken). Nor did it include language declaring that the “retirement pay” was to be calculated in reference to a specific sum of money accruing on a particular date. Rather, it used the term in an unambiguous way, and because of that, the verbiage must be literally construed. Barnard v. Barnard, 863 S.W.2d 770, 772 (Tex.App.-Fort Worth 1993, no writ).²² In other words, as long as Reinauer receives retirement pay from the military, that is, pay in the form of compensation accruing due to his years of service with the military, Cowan is entitled to her fractional portion of the *entirety*. Moreover, as that pay rises and falls her fractional interest remains the same (though the amount actually received may rise and fall); this is so as long as the rise or fall is attributable to an increase or decrease in the compensation accruing Reinauer due to his years of service. To read the provision differently would be tantamount to ignoring the literal language of the

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court.^{FN2}

FN1. Incidentally, in construing an unambiguous judgment, we cannot turn to the court's expressions outside the judgment for guidance. Bullock v. Regular Vet. Ass'n, 806 S.W.2d 311, 315 (Tex.App.-Austin 1991, no writ). Consequently, Reinauer's effort to have us consider the court's comments in a letter issued to the parties before judgment must be rebuffed.

FN2. And though an ancient proverb attributes to lawyers the ability to change white to black, we cannot do so. A directive that X is awarded "a one-third ownership interest in an apple pie" does not mean a one-third of the pie remaining after the government or anyone else takes a bite from it.

Consequently, by stating, in 1995, that Cowan's interest is to be calculated in reference to the "[g]ross retirement pay received monthly" the trial court merely reiterated that which it ordered back in 1979, i.e., she is entitled to her share of the entirety. Similarly, by factoring into the equation "any cost of living increases" affecting retirement pay, the court again did nothing other than assure that Cowan received her share of all the community asset known as retirement pay. In neither case were Reinauer's obligations changed nor the judgment's dictates substantively modified. See Dechon v. Dechon, 909 S.W.2d 950, 956-58 (Tex.App.-El Paso 1995, no writ) (holding that the inclusion of the word "gross" in a later order when describing the spouse's interest in retirement benefits*862 did not constitute an alteration of the judgment).^{FN3} Thus, the court did not exceed its jurisdiction or violate common or statutory law concerning the finality of judgments.

FN3. We are not unmindful of the Supreme Court's suggestion in McGhee v. Epley, 661 S.W.2d 924 (Tex. 1983) that a later inclusion of the term "gross" could be a substantive change. Yet, we conclude that the El Paso Court of Appeal in Dechon v. Dechon, 909 S.W.2d 959 (Tex.App.-El Paso 1995, no writ) accurately stated why McGhee was inapplicable and adopted that reasoning. In short, McGhee failed to consider, in its curt and unanalyzed opinion, the changes wrought by the legislature in § 3.71 of the

Texas Family Code; so too does it derive a rather nonsensical result when literally applied. Dechon v. Dechon, 909 S.W.2d at 956-58.

[15] Yet, the same cannot be said of its attempt to award Cowan interest on her share of the retirement until delivered by Reinauer. That particular obligation appeared nowhere in the original decree. Nor did it implicitly arise from some voluntary contractual obligation of Reinauer.^{FN4} In short, it substantively modified his duties imposed by the 1979 decree regarding the payment of retirement benefits. Since the alteration occurred long after its plenary jurisdiction over the decree dissipated, the action exceeded the trial court's jurisdiction.^{FN5}

FN4. Thus, unlike post-judgment interest, we are unable to even say that it was implicitly a part of the 1979 judgment. See Jarrin v. Sam White Oldsmobile Co., 929 S.W.2d 21, 25 (Tex.App.-Houston [1st Dist.] 1996, writ denied) (stating that post-judgment interest, being mandated by statute, is recoverable even though unmentioned in a final judgment).

FN5. This is not to say that the court is prohibited from awarding Cowan pre-judgment interest upon those sums *adjudicated* as accrued but unpaid. That question is not before us.

Accordingly, we grant that part of Reinauer's motion for rehearing which questions that portion of the judgment ordering him to pay Cowan "interest from the date any [retirement] payment is due at the rate of ten percent (10%) per annum until paid." That provision is redacted from the judgment, and the latter is so reformed. As to the other grounds for rehearing, same are overruled.FN6

FN6. Incidentally, to the extent that Reinauer believed that the trial court erred in failing to condition the award of appellate attorney's fees upon a successful defense of the judgment on appeal, we find the condition implicit in the judgment. Spiller v. Spiller, 901 S.W.2d 553, 560 (Tex.App.-San Antonio 1995, writ denied); Robinson v. Blagg & Dev. Co. v. Pettigrew, 737 S.W.2d 110, 112 (Tex.App.-Tyler 1987, no writ).

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