

**NO. 07-1065**

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**IN THE SUPREME COURT OF TEXAS  
AUSTIN, TEXAS**

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**RAOUL HAGEN,**  
*Petitioner*

v.

**DORIS J. HAGEN,**  
*Respondent*

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*On Petition for Review from the  
Fourth Court of Appeals at San Antonio, Texas*

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**RESPONDENT'S RESPONSE TO PETITIONER'S BRIEF ON THE MERITS**

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**ORAL ARGUMENT REQUESTED  
IF GRANTED TO PETITIONER**

**IDENTITY OF THE PARTIES AND COUNSEL**

**TRIAL COURT, 131<sup>st</sup> Judicial District Court, Bexar County, Texas:**

THE HONORABLE JANET LITTLEJOHN

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**STATEMENT OF THE NATURE OF THE CASE**

This is an appeal of an order dividing military retired pay. After looking at the evidence and hearing testimony and arguments of counsel, the Court ordered that Appellant was only entitled to the percentage of Appellee's disposable retired pay and did not have authority to award Appellant a percentage of Appellee's disability pay based on the language in the parties' Decree of Divorce. (RR 14) Appellant, Doris J. Hagen, appeals from that order.

APPELLANT'S ISSUE:

**ISSUE FOR REVIEW**

**THE TRIAL COURT ERRED IN  
NOT DIVIDING OR AWARDING  
APPELLANT A PORTION OF  
APPELLEE'S DISABILITY PAY AND  
IN DOING SO, MADE AN IMPERMISSIBLE  
MODIFICATION IN A FINAL,  
NON-APPEALABLE DIVORCE DECREE**

**STATEMENT OF FACTS**

This is an appeal from an enforcement action filed by Appellant to recover unpaid military retirement pay from Appellee. Doris and Raoul were orally pronounced divorced on February 11, 1976. The Divorce Decree was signed on May 7, 1976.

The Divorce Decree, on page 6, awarded Doris:

One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, IF, AS AND WHEN RECEIVED, and

The Divorce Decree, on page 6, also ordered Raoul:

To 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.

That is the only language regarding the division of Appellee's military retired pay. Subsequent to that award, Appellant received an amount less than the full one-half of the gross military retired pay. She received only the "disposable retired pay" from the Defense Finance and Accounting Service which deducted the amount of disability pay before applying the awarded formula. The shortfall, uncontroverted amount in question was \$33,236.97 plus 6% pre-judgment and post-judgment interest. (RR 14, line 24) The Court expressed a concern as to what the status of the law was on February 11, 1976, the date of divorce regarding the Court's authority to divide military disability pay. The undersigned attorney prepared a Response to those concerns and presented them to the Court at the date of trial. Further, there was no appeal made from this Decree and after 30 days from the entry of the Decree, it became final. There is no argument that this Decree was not void and certainly under the law at the time military disability pay was divisible under Texas Law, the concept of Res Judicata would prohibit a modification of this Decree. If the District Court's ruling were to stand, it would be an impermissible collateral attack on a final decree and also would amount to an impermissible modification of a final decree and as such would be contrary to Texas Law and certainly contrary to the Constitution of the United States. After the Trial Court made its' ruling, Appellant filed a Request for Findings of Fact and Conclusions of Law on August 1, 2006. (CR 0066) Appellant then filed a Notice of Past-Due Findings of Fact and Conclusions of Law on August 29, 2006. (CR 0069) There has never been a Findings of Fact filed that would indicate the reasons why the Trial Judge made the determination that she did.

### **SUMMARY OF THE ARGUMENT**

The Trial Court should have awarded Doris her percentage in Raoul's total retirement.

### **ARGUMENT AND AUTHORITIES**

#### **UNDER ISSUE FOR REVIEW**

As stated in Appellant's Response to Court's Concern, cases are clear that before 1976 and certainly up to the United States Supreme Court decision in *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104

L.Ed.2d 675 (1989), the Texas Courts have been able to divide military disability pay. *Mora v. Mora*, 429 S.W.2d 660 (Tex.Civ.App.-San Antonio 1968, rehearing denied); *Miser v. Miser*, 475 S.W.2d 597, 81-82 (Tex.Civ.App.-Dallas 1971, rehearing denied). Indeed, gross military pay includes disability. See *Jones v. Jones*, 900 S.W.2d 786 (Tex.App. - San Antonio 1995, rehearing denied).

As the Court is well aware, a trial court may not amend, modify, alter or change the division of property made or approved in a decree of divorce or annulment. It is limited to an order to assist in the implementation of or to clarify the prior order and make, alter or change the substantive division of property. Tex.Fam.Code §9.007; *Berry v. Berry*, 786 S.W.2d 672 (Tex. - 1990, rehearing overruled); *Jones v. Jones*, supra.

Additionally, on April 19, 1972, the El Paso Court of Appeals in *Dominey v. Dominey*, 481 S.W.2d 473, addressed the problem of disability pay and found it to be an earned property right subject to the division orders and quoted *Mora v. Mora* and *Kirkham v. Kirkham*, among other cases in that era.

Opposing counsel brought to the attention of the Court *Cearley v. Cearley*, 544 S.W.2d 661, which further affirms the earlier Court's position that even though an individual has not retired from military service, it is an earned property right subject to the division of the Court.

Lastly, the undersigned attorney has personally argued the concept of Res Judicata before the San Antonio Court of Appeals in *Hovermale v. Hovermale*, 636 S.W.2d 828, and stands as all of the above cited cases do that Res Judicata prevents a collateral attack on a final decree and therefore, this Court is without jurisdiction to make any changes in that final decree. As Appellant was awarded an interest in "all Army retired pay" and as this Divorce Decree is final, Res Judicata should apply and Appellant should be allowed to recover her share of Appellee's disability pay.

### **PRAYER**

WHEREFORE PREMISES CONSIDERED, Appellant urges that this Honorable Court reverse the decision of the Trial Court and remand this case back to the District Court for further hearing or conform the

Court's order so that it complies with the terms of the divorce decree entered into by the parties and award Appellant her share of unpaid military benefits.

Respectfully submitted,

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By: \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the above was served on ROBERT S. THOMPSON and RYAN G. ANDERSON in accordance with the Texas Rules of Civil Procedure on September 10, 2008.

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GARY A. BEAHM  
Attorney for Respondent

## APPENDIX

1. *Berry v. Berry*, 786 S.W.2d 672 (Tex. - 1990, rehearing overruled)
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