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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY SC Court of Appeals
Court of Common Pleas

The Honorable J.C. Nicholson
Circuit Court Judge

Case No.: 2012-CP-10-8372
Appellate Case No. 2014-002450

Hattie Mae Greene Appellant

v.

Cindy M. Floyd Respondent

RECORD ON APPEAL

Volume II of II

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HATTIE GREENE CASE: AFFIDAVIT OF MARK E. SULLIVAN

I, Mark E. Sullivan, declare under penalty of perjury the following:

Qualifications

1. I am an attorney licensed to practice in North Carolina. I have been certified since 1989 as a family law specialist by the North Carolina Board of Legal Specialization. I am a retired Army Reserve JAG colonel and author of The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families (ABA, 2d Ed. 2011).
2. Since 1986, I have been a regular instructor at the Army JAG School (Charlottesville, VA) for military pension division, and I was named an Honorary Lifetime Faculty Member in 2002. In 2003, I began a regular rotation of teaching military pension division at the Naval Justice School in Newport, RI.
3. I served as a member of the Department of Defense panel of experts on revising the Former Spouses' Protection Act in 1997 and was also a member of the ABA President's Commission on Protecting the Rights of Servicemembers in 2003.
4. I am a past-chair of the Military Committee, ABA Section of Family Law, and I served as Director of the N.C. State Bar's Military Committee, which I helped form in 1981.
5. In 2002, I was awarded the Legion of Merit upon my retirement from the Army Reserve. The text of the award recognized me as "The Army's foremost expert in family law." I have also taught numerous bar association CLE programs on the topic, and I have been writing articles and teaching classes on military pension division since 1983.
6. I have been accepted as an expert for military pension division and given oral testimony in cases in Alabama, Ohio, and Maryland. I was recognized as a national expert in military pension division in a 2011 Minnesota Court of Appeals decision. In New York and South Carolina, I have provided expert testimony regarding military pension division calculations by means of an affidavit.
7. I have prepared military pension division orders for attorneys in 33 states.

8. In 2007, I wrote a successful appellate brief for an attorney in Tennessee in a military pension division and survivor benefits case, *Sullivan v. Sullivan*, 2008 Tenn. App. LEXIS 195.

Background

9. I was originally contacted by Cravens Ravenel, the attorney for Hattie Mae Greene, at the end of July 2012, in regard to the court's refusal to allow her reimbursement for the reduction in her share of her ex-husband's military pension. I have reviewed several packets of information from Mr. Ravenel's office, including court documents, the hearing transcript, correspondence and handwritten appeals by Ms. Greene. I have also spoken to Mr. Ravenel about the facts of the case and what he knows from his client. Based on this, it is my professional opinion that there was a significant omission in the court's Order of Separate Support and Maintenance dated October 15, 2002, and this was detrimental to Ms. Greene. Ms. Greene's attorney should have anticipated the problem, prepared an argument to address it, and asked the court in closing argument to order an indemnification clause to protect her client. She did not do this.

Facts: Greene v. Greene, Dorchester County, SC (2001-DR-18-124)

10. The relevant facts in this case are as follows –
 - a. The defendant, Mr. Greene, entered active duty in May 1978. The parties were married in October 1981. Mr. Greene retired in 1998 with twenty years of creditable service, 17 of which were marital.
 - b. The court divided Mr. Greene's Navy retired pay in an "Order of Separate Support and Maintenance" filed October 15, 2002. Cindy Floyd represented Ms. Greene, and W. Scott Palmer represented Mr. Greene. Judge William J. Wylie, Jr. presided at the May 14, 2002 hearing, and he signed the order.
 - c. The order makes no mention of an evidentiary hearing, testimony or evidence. The relevant sentences in the order read:

At the call of the case, this Court inquired as to whether any of the pending issues had been resolved, to which both parties, through their attorneys, replied in the negative. This court then heard arguments from both counsel, and then issued its ruling.

- d. The court granted 60% of the defendant's military retirement to his wife, Ms. Greene. The affiant has read the transcript of the court session, and his summary thereof is found at ATCH 1, which is incorporated herein.
- e. Recognizing that the retired pay center would only honor an award of 50%, the judge ordered Mr. Greene to make up the difference by paying the remaining 10% directly to the plaintiff each month. See Para. 9.c. (Military Retirement).
- f. Judge Wylie signed an order implementing this pension division ("Supplemental Order Division of Military Retired Pay") on November 8, 2002. This order directed the Defense Finance and Accounting Service (DFAS) to pay to Ms. Greene 60% of the "disposable retired pay" of defendant. This was found to be equivalent to \$798 per month, which means that the retired pay of defendant was \$1,330 monthly.
- g. The parties were divorced pursuant to a divorce decree which was signed October 24, 2003 by Judge Judy C. Bridges,
- h. Ms. Greene states that she has found that the share of retired pay sent from DFAS has diminished, and she has attempted to obtain relief from the court. Her most recent attempt was initiated in a Rule to Show Cause, which resulted in an Order Rule to Show Cause dated April 12, 2012. In that order, the court found that:
 - i. Defendant's retired pay is \$1,701 per month.
 - ii. Plaintiff's 60% share of that would be \$1,020.60.
 - iii. Defendant was being paid for a disability; his "disability benefit" was \$662 per month.
 - iv. This amount was deducted from his retired pay, leaving \$1,039 a month.
 - v. Plaintiff's 60% of this sum would yield \$623.40 a month.
 - vi. Plaintiff testified that she was currently receiving \$539.50, which is \$83.90 less than 60% of \$1,039.

- vii. The court found that plaintiff's entitlement was "based on the current retirement benefit of \$1,039."

Analysis – Contents of Court Orders

11. The court initially divided the pension of defendant in its "Order of Separate Support and Maintenance." The subsequent military pension division order ("Supplemental Order Division of Military Retired Pay") implemented the original decision. The problem with the military pension division in the court's initial order is that the court failed to order an *indemnification clause* in case the defendant elected to receive disability compensation and that choice resulted in a reduced share of the pension for plaintiff.

Analysis - Indemnification

12. Indemnification and disability payments are interrelated; they represent a common issue in military retired pay cases.
- a. When a military retiree (in this case, Mr. Greene) elects disability pay, this choice can have a detrimental effect on the funds received by the former spouse. And the consequence is without the consent of the former spouse.
 - b. The usual disability compensation received is money from the Department of Veterans Affairs. This VA disability compensation is paid to a veteran to compensate for his service-connected disabilities.
 - c. If the rating for his disabilities is less than 50%, then the election means that the same amount of money is taken out of from his retired pay. He receives a check for the VA disability compensation from the Department of Veterans Affairs, but he loses the same amount of money from his retired paycheck. In the end, however, the retiree is ahead – because the VA money is tax-free, whereas the military pension is taxed just as any other deferred compensation payment is.
 - d. Since this is a substantial potential problem for the former spouse of any military retiree, those who teach and write about this subject have for many years suggested the use of a reimbursement mechanism to avoid the problem of reduced payments without

the consent of the former spouse. There are cases going back to the 1980's addressing this problem. The inclusion of an indemnification clause in the court's order would require the retiree to reimburse the former spouse for any shortfall in her share of retired pay.

13. Here is an example of how disability pay would impact military pension payments for a spouse or former spouse:
 - a. Assume that the retiree gets \$2,000 a month for his military pension, with no election of Survivor Benefit Plan, and the pension is 100% marital. The judge awards 60% of the pension to the wife, made up of 50% from DFAS and 10% from the retiree. Each month the wife is supposed to receive \$1,000 from DFAS and \$200 from her former husband, for a total of \$1,200. This is what the judge intended - \$1,200 a month.
 - b. If the retiree elects receipt of VA disability compensation, however, and his rating is less than 50%, then there is a reduction. His payment from VA (assumed to be \$600 in this example) is deducted from his retired pay before it is divided. That means that DFAS will only send 50% of the net amount (called the "disposable retired pay") to the ex-wife.
 - c. This net amount is \$2,000 - \$600, or \$1400. Thus DFAS will send 50% of that amount (\$1,400), or \$700 a month, to the former spouse (not \$1,000 a month, as the court intended).
 - d. The court's inclusion of a *reimbursement clause*, however, would give any judge in the future who presided at an enforcement hearing the appropriate tool to use in compelling defendant to pay the difference due (\$300) to the former spouse.
14. If the judge in this case had included an indemnification clause in the court's division of military retired pay, this would ensure that Mr. Greene could not unilaterally deprive his former spouse of marital property given to her in a court order. The most likely way in which the judge would have been informed about this issue is for the wife's attorney to make that argument to the court.

15. Such an indemnification clause need not be extensive or complicated. It can be as straightforward as:
 - >*The court intends that the wife will receive her pension share based on the full military retired pay of the husband, without reduction for disability payments.*
 - >*If the husband does anything that reduces the share or amount of his military retired pay given herein to the wife, then he shall promptly reimburse her for the loss.*
16. The former spouse would thus have a remedy in the trial court for reimbursement directly from the retiree, since the judge awarded her a share of *the military retirement*, not the defendant's *net pay after deductions*. She could petition the court for reimbursement through an order of enforcement. Price v. Price, 325 S.C. 379, 480 S.E.2d 92 (1996).
17. Since the court in April 2012 did not have the guidance of an order which contained an indemnification clause (stating what would happen if the defendant cut his ex-wife's share of the pension by electing VA disability compensation), the resulting Order Rule to Show Cause only gave Ms. Greene 60% of the net pay of Mr. Greene – not 60% of his military retirement.
18. Ms. Greene should have received \$1,020.60, consisting of \$539.50 from DFAS and the rest in the form of defendant's 10% of the 60% award, plus his indemnification payment, from the defendant himself.

Case Review

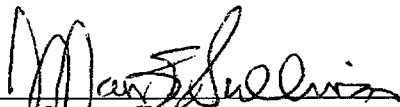
19. After reviewing the transcript of the hearing (ATCH 1), it is important to note that counsel for Ms. Greene should have argued for reimbursement on behalf of her client – an indemnification clause in case the pension suffered a reduction due to disability payments. The attorney failed to protect her client by not asking the judge for the indemnification clause that Ms. Greene needed. Her failure to educate the judge about the VA disability issue and the need for indemnification, and to request indemnification from the court as part of the order granted, was a breach of the duty of care required of a reasonably competent South Carolina attorney.
20. The attorney for Ms. Greene should have properly and fully informed the court of the need for an indemnification clause and the danger of harm to Ms. Greene's share of the military pension.

The attorney should have educated the judge about Mr. Greene's gaining an increased disability rating, as apparently occurred here. The attorney should have told the judge about the facts and the holding in Price v. Price. The attorney should have informed the judge of the impact of post-decree actions by Mr. Greene [accepting increased VA payments if his disability rating went up] upon Ms. Greene's share of the divided pension. If these things had been done, it is my opinion, with a reasonable degree of certainty, that the court would have granted relief for Ms. Greene in the form of an indemnification clause as the best way to protect her from destruction of part of her pension share due to the unilateral post-decree actions of Mr. Greene.

- 21. If the court heard such arguments and denied them, then it was incumbent on Ms. Greene's attorney to advise her on the state of the law in South Carolina and advise on an appeal.
- 22. I am over age 18 and am competent to testify to the matters stated herein.

This is the end of my affidavit.

Date: 10/31/12

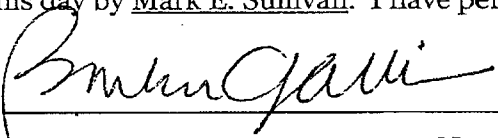


Mark E. Sullivan, Attorney at Law
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Phone: (919) 832-8507

STATE OF NORTH CAROLINA
WAKE COUNTY

Sworn to and subscribed before me this day by Mark E. Sullivan. I have personal knowledge of the identity of the principal.

Date: 10.31.12



....., Notary Public

(Official Seal)



My commission expires: 9.10.17

ATCH 1 to HATTIE GREENE CASE: AFFIDAVIT OF MARK E. SULLIVAN

SUBJECT: Trial transcript, Hattie Greene v. Joseph Greene, 01-DR-18-0124, Summerville (Dorchester Co.), S.C., May 14, 2002

1. The salient facts regarding my review of this transcript are:
 - a. The parties married 10/17/1981 and Mr. Greene ("husband") retired from the Marine Corps as an E-7 in June 1998, with about 17 years of creditable service during the parties' marriage. He was in the military for 20 years.
 - b. Ms. Greene ("wife") did not want a divorce because of loss of medical benefits, which would mean Tricare and also medical treatment on-base.
 - c. She testified that what her husband received for military pension payments was on the Financial Declaration that was filed with the court.
 - d. The judge had each declaration notarized during the 5/14/02 court hearing. The husband's declaration shows \$1,330 as retirement, with a "deduction" of about \$128 from retirement. This is likely his VA disability waiver. The VA waiver is an amount deducted from his military retired pay reflecting the existing of a service-connected disability and the receipt of VA disability compensation. That amount was, in 2002, deducted dollar-for-dollar against the military pension; it still is today if the VA rating is less than 50%. Increased disability ratings mean increase payments of VA disability compensation.
 - e. Wife claimed that husband was getting \$1,296 a month from his military retired pay. Husband said that he was getting \$1,163 after tax each month; he said he was getting either \$1,330 or \$1,500 before taxes.
 - f. Husband indicated that he had no health problems.
 - g. Ms. Floyd questioned Mr. Greene about medical coverage on page 117, and her questions/statements show that she had sufficient knowledge of the requirement that – for military medical coverage through Tricare – there had to be 20 years of marriage, 20 years of military service and an overlap of at least 20 years for these two.
 - h. Ms. Floyd initially declined to make a closing argument. Later on, in response to Mr. Palmer's argument, she made an argument which took less than a page of transcript text and was confined to the "girlfriend issue" involving Mr. Greene.
2. The time for argument on INDEMNIFICATION was at closing. Rather than waiving final argument, as Ms. Floyd initially did, or confining her summation to a response to Mr. Palmer in regard to Mr. Greene's "girlfriend," she should have argued that:
 - a. Wife was entitled to half of the marital share of the pension.
 - b. Her payment should come from DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio (the locations for DFAS Garnishment Operations), since the parties were married for over 10 years during which the husband performed 10 years of creditable military service.
 - c. The pension division should be set out in a military pension division order.

- d. Wife was entitled to an order that required husband to reimburse her for any disability deduction from his pension, since the VA election (and any increase in his VA rating) by husband would have an adverse effect on the wife's share of the pension. This election means a decrease in his disposable retired pay (gross retired pay - VA disability compensation = disposable retired pay).
- e. This was a serious omission, since it meant that the wife could not argue for this in her later attempt to obtain her full share of the pension. The indemnification issue was not addressed in the court's subsequent contempt decision. Without any guidance on this, the court has held that Ms. Greene is not entitled to any pay-back for the reductions which husband has caused due to his electing to receive VA disability compensation payments (or increased VA payments).

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2012-CP-10-8372

Hattie Mae Greene,

Plaintiff

v.

Cindy M. Floyd,

Defendant

SUPPLEMENTARY AFFIDAVIT OF
MARK E. SULLIVAN

I, Mark E. Sullivan, declare under penalty of perjury the following:

1. My qualifications are set out in the affidavit that I executed on October 31, 2012. That information and the statements of fact and professional opinion contained therein are confirmed and incorporated herein by reference.
2. I hereby state with a reasonable degree of certainty the following:
 - a. Ms. Cindy Floyd, the defendant herein, had a duty to request from the court in its Decree of Separate Maintenance an indemnification clause, replacement of "disposable retired pay" with total or gross retired pay, or both of these. The wording of the court's order was critical in providing the protections needed by the plaintiff herein as to post-decree shortfalls in her share of the military pension payments due from her ex-husband.
 - b. Ms. Floyd, the defendant, should have known that she needed to make such a request to the court, or to the ex-husband's attorney before the orders was signed and filed, in regard to the insertion of either or both of these. This was necessary to protect her client, the plaintiff herein, since these two approaches to the division of military retired pay were readily available to all attorneys in South Carolina at the time this case occurred – in 2002 – and earlier.

- c. Mr. James Long presented and published in May and September 2000 manuscripts for the South Carolina Bar Association which I have just this week been shown, and they deal specifically with the issue of military pension division and dealing with the prospect of disability compensation reducing the share of the former spouse, as happened in this case. They mention what must be done to protect the non-military spouse or former spouse, and they specifically state that the drafting attorney needs to employ language dividing total or gross retired pay and to include a reimbursement clause which requires pay-back by the military retiree if he chooses a disability payment that reduces the amount paid out in pension division. I received the two enclosed manuscripts, shown as Plaintiff's Affidavit Exhibit 1 and 2, on Monday, July 14, 2014. It is my belief that these were part of the common knowledge available to all South Carolina lawyers and judges in South Carolina who needed to learn about military pension division and the danger of disability payments.
- d. In light of the substantial military population in South Carolina, I am reasonably certain that the states trial judges would also avail themselves of such knowledge, and that a judge to whom such a request was made – for inclusion of total or gross retired pay, and/or for inclusion of an indemnification clause – would have given such a request favorable consideration and would have approved same.
- e. I stated in my 10/31/2012 affidavit at #20 on pp. 6-7, and I reiterate here, that if the defendant had told the judge about the issue of reduction of the military pension when there is a VA waiver, about the decision in the Price case and about the need for a remedy in the event of a VA election by Mr. Greene, it is

more likely that not that the court would have granted the relief requested for Ms. Greene and protected her share of the military pension.


- f. While I stated in my deposition that I could not predict the actions that any single judge might have taken, I stand by the statements made in this affidavit, especially in light of the further reading and research which I have done into the state of knowledge of lawyers and judges in South Carolina in 2000 and afterwards, as a result of the submission of these two manuscripts to me.
- g. Based on this, it is my professional opinion that a judge would have granted either or both of these requests if they had been made by the defendant in this case, that the state of the law and of legal knowledge in South Carolina among bench and bar in 2002 was such that lawyers and judges should have known about the dangers of disability elections post-divorce, and that it is more likely than not that the trial court judge in such a case would have taken action to provide a remedy for unilateral post-divorce reductions of military retired pay due to the rules about VA waivers. I said that in my October 2012 affidavit and I stand by that professional opinion.

h. I state these matters to a reasonable degree of professional certainty.

3. I am over age 18 and am competent to testify to the matters stated herein.

This is the end of my affidavit.

Date: July 21, 2014



Mark E. Sullivan, Attorney at Law
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STATE OF NORTH CAROLINA

WAKE COUNTY

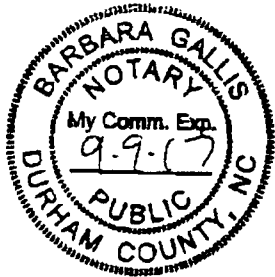
Sworn to and subscribed before me this day by Mark E. Sullivan. I have personal knowledge of the identity of the principal.

Date: July 21, 2014

Barbara Gallis
....., Notary Public

(Official Seal)

My commission expires: 9-9-17



STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

HATTIE MAE GREENE,)

Plaintiff,)

vs.)

JOSEPH GREENE,)

Defendant.)

IN THE FAMILY COURT
CASE NUMBER: 2001-DR-18-124

**ORDER OF
SEPARATE SUPPORT
AND MAINTENANCE**

2002 OCT 15 PM 1:18

FILED
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

DATE OF HEARING:	MAY 14, 2002
PRESIDING JUDGE:	THE HONORABLE WILLIAM J. WYLIE, JR.
PLAINTIFF'S ATTORNEY:	CINDY FLOYD, ESQUIRE
DEFENDANT'S ATTORNEY:	W. SCOTT PALMER, ESQUIRE
COURT REPORTER:	DINAH DeCELL

This matter came before me pursuant to a Summons and Complaint, which was accompanied by a Notice of Motion and Motion for Temporary Relief, wherein the Plaintiff sought pendente lite relief, in the form of child custody and support, alimony, spousal support, equitable distribution, and attorney's fees. A temporary hearing was held in this matter on June 19, 2001, which resulted in a Temporary Order signed by the Honorable Nancy Chapman McLin.

Both parties were present at the May 14th hearing, and were represented by their respective counsel of record. At the call of the case, this Court inquired as to whether any of the pending issues had been resolved, to which both parties, through their attorneys, replied in the negative. This Court then heard arguments from both counsel, and then issued its ruling.

FINDINGS OF FACT:

Based upon the evidence and testimony presented to me, and record, I find and conclude as follows:



BWPH 2116.123 (Greene)
Cindy Floyd
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Greene v. Greene; 2001-DR-18-124

1. That the Plaintiff is a citizen and resident of the County of Charleston, State of South Carolina.
 2. That the Defendant is a citizen and resident of the County of Dorchester, State of South Carolina.
 3. That the parties are husband and wife, having been married on October 17, 1981 in Charleston, South Carolina.
 4. That two (2) children were born of this marriage, namely: Lankencia Green, date of birth, December 14, 1976; and Joseph Greene, Jr., date of birth, August 11, 1984.
 5. Based upon the evidence and my review of the file, I find that jurisdiction and venue are proper and the parties and subject matter are properly before me.
 6. That the Plaintiff should be granted custody of the parties' minor son, with reasonable visitation granted unto the Defendant, to be conducted in accordance with the "Standard Visitation Schedule", attached hereto and incorporated herein, and subject to restrictions voted;
 7. That the Defendant should be obligated to pay child support directly to the Plaintiff, pursuant to the DSS Guidelines, and as set forth on the enclosed Guidelines Worksheet, which is incorporated into this Final Order. The Defendant's monthly child support obligation shall be \$300.00. The first payment of child support under this Order shall be due commencing July 15, 2002, and shall be payable directly to the Plaintiff. However, should the Defendant be at least five (5) days late in making a payment, Plaintiff shall be given leave to file an affidavit with the Clerk of Court, attesting to the late payment, and shall serve a copy to Defendant, whose child support payments shall thereafter be made through the Clerk of Court with the required 5% service charge.
- This child support award shall terminate as of August 12, 2002, the date the parties child**



BWPH 2116.123 (Greene)
Cindy Floyd
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reached the age of majority, and, therefore, became emancipated.

8. That the parties should each pay one-half (1/2) of the son's college expenses (tuition, room and board, books, fees) not covered by scholarships, grants, loans and other financial aid. Further, that the parties should pay for these expenses before the deadline for tuition payments each semester;

9. **Marital Property**: That all marital property should be divided 60/40 in favor of the Plaintiff, due to the Defendant's marital misconduct.

a. **Marital Home**: The Plaintiff should remain in the marital home, but should pay all costs associated with the home. The marital estate consists of the marital component of both parties' retirements and the equity in the marital home, which I find to be \$25,000.00, calculated from the fair market value (FMV) of the home, of \$66,500.00 less the total of the two (2) mortgages, equaling \$41,500.00. The Defendant's valuation of the marital home is rejected, as the Defendant admitted his figure was "speculation". Therefore, the Defendant shall be entitled to forty (40%) percent of the equity of \$25,000.00, equaling \$10,000.00. The parties shall, within sixty (60) days of the date of the signing of this Order, effectuate the division of the property identified as constituting the marital estate;

b. **Parties' Retirement**: The Plaintiff, as of the date of filing, had a 401(k) profit sharing plan with Quest Diagnostics, with a value of \$4,777.70. The parties shall divide this account, with sixty (60%) percent, or \$2,866.62 to the Plaintiff, and forty (40%) percent, or \$1,911.08 to the Defendant. The Defendant shall be paid his forty (40%) percent of that retirement within sixty (60) days of the date of this Court Order. That, payment should be made by Qualified Domestic Relations Order (QUADRO);



Greene v. Greene; 2001-DR-18-124

c. Military Retirement: The Defendant receives a military retirement check. I find it is appropriate to award sixty (60%) percent of the Defendant's military retirement to the Plaintiff, allowing the Plaintiff to retain forty (40%) percent of each monthly payment. Since the Navy Finance Center will not pay the Plaintiff more than fifty (50%) percent, it is appropriate that the Defendant shall execute any paperwork necessary to arrange for the retirement to be divided, and fifty (50%) percent paid to the Plaintiff. The Defendant shall then be responsible for supplementing the Navy Finance Center's check of fifty (50%) percent of the retirement, by an additional ten (10%), and payable to the Plaintiff each and every month, beginning October 15, 2002, and being due no later than the 15th of each month thereafter;

c. Personal Property: The personal property shall be divided so that the Defendant receives his military items and documents, including his DD214, title to his car, and his stereo.

10. That the Plaintiff's claim for alimony should be denied, as she has greater income than the Defendant;

11. That each party should pay their own attorney's fees;

12. That retroactive distribution of retirement is denied.

CONCLUSIONS OF LAW:

I hereby conclude by ordering the following relief:

1. That the Plaintiff is hereby granted a Decree of Separate Maintenance, from the Defendant;

2. That the Plaintiff is hereby granted custody of the parties' minor son, with reasonable visitation granted unto the Defendant;

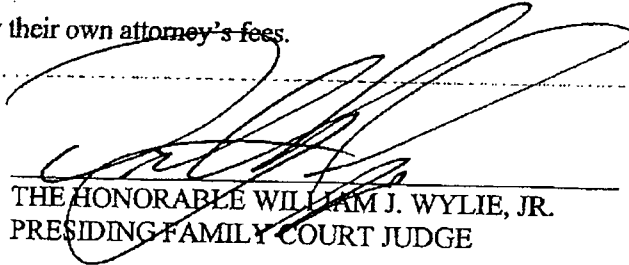


Greene v. Greene; 2001-DR-18-124

3. That the Defendant shall pay child support as set forth herein;
4. That the parties shall each pay one-half (1/2) of the son's college expenses as set forth herein;
5. That all marital property shall be divided 60/40 in a manner as set forth in the findings of fact. The parties shall have sixty (60) days from the date of the signing of this Order to effectuate the property division;
6. That the personal property shall be divided as set forth herein;
7. That each party shall pay their own attorney's fees.

AND SO IT IS ORDERED.

October 11, 2002


THE HONORABLE WILLIAM J. WYLIE, JR.
PRESIDING FAMILY COURT JUDGE

CINDY M. FLOYD

ATTORNEY AT LAW

2850 ASHLEY PHOSPHATE ROAD
NORTH CHARLESTON, SC 29418
TELEPHONE (843) 572-5000
FAX (843) 764-3603

November 5, 2002

The Honorable William J. Wylie, Jr.
Family Court Judge
212 Daming Way
Box 4
Summerville, SC 29483

Subject: Hattie Mae Greene vs. Joseph Greene, Sr.
2001-DR-18-124

Dear Judge Wylie:

I am enclosing the Supplemental Order Division of Military Retired Pay in the above matter. If it meets with your approval, please have the clerk return two certified copies to this office in the envelope provided. I will insure that the Defendant receives a copy.

I have forwarded a copy to the Defendant's attorney.

Thank you very much for your attention in this matter, I remain,

Respectfully yours,

Cindy M. Floyd
Cindy M. Floyd

CMF/mjm

Encl: As Stated

BWPH 2116.123 (Greene)
Cindy Floyd
303

Appendix 192

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE FAMILY COURT OF THE
FIRST JUDICIAL CIRCUIT

CASE NO: 2001-DR-18-124

HATTIE MAE GREENE,)
)
Plaintiff,)
)
-versus-)
)
JOSEPH GREENE, SR.,)
)
Defendant.)

SUPPLEMENTAL ORDER
DIVISION OF MILITARY RETIRED PAY

Cindy M. Floyd
2002-05-13 PM 3:42
Clerk of Court

DATE OF HEARING:
TRIAL JUDGE:
PLAINTIFF'S ATTORNEY:
DEFENDANT'S ATTORNEY:
COURT REPORTER:

May 14, 2002
William J. Wylie,
Cindy M. Floyd
W. Scott Palmer
Dinah DeCell

This order is a supplement to the Order of Separate Support and Maintenance and deals with division of military retirement pay. The matter came before this court with the filing of the Notice of Motion and Motion for Temporary Relief, Summons and Complaint on January 25, 2001. The Defendant was duly served. The Plaintiff asked for an Order of separation, an order requiring the Defendant to vacate the marital home, granting the Plaintiff possession of the marital home and furnishings, awarding custody of the minor child, requiring the Defendant to pay child support, requiring the Defendant to pay alimony, equitably distributing property and debts, restraining orders and an award of attorney fees. The Defendant filed an answer and counterclaim. The Plaintiff filed a reply. A temporary hearing was held on June 19, 2001. The Plaintiff, Defendant and their attorneys were present for the hearing.

The court makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

1. The Joseph Greene is a member of the Armed Forces of the United States. His identifying data are as follows:

Full Name: Joseph Greene
Social Security Number: 251-23-6399
Branch of Service: USMC
Date of Birth: 10/17/57

2. The Plaintiff's identifying data are as follows:

Full name: Hattie Mae Greene
Social Security Number: 248-23-0972
Date of birth: 9/30/57

3. The parties were married on October 17, 1981, and they continuously remain married.

4. The Defendant began military service in May 1978. Therefore, the period of the marriage coincides with at least 10 years of military service in the Armed Forces of the United States that is creditable for retirement purposes.

5. This court is a court of competent jurisdiction exercised in accordance with the laws of the State of South Carolina. This court has exercised jurisdiction over the Defendant in accordance with the laws of the State of South Carolina and Title 10, United States Code Section 1408(c)(4), in that the residency requirements for bringing an action in this State were met.

6. In accordance with the laws of the State of South Carolina, the final order of separate support and maintenance entered by this Court in this matter treats a portion of the Plaintiff's entitlement to receive military retired pay as property of the parties. This order is issued pursuant to the Final Order and Decree of Divorce constitutes a part of the Final Order, being wholly incorporated therein by reference. The purpose of this order is to further define the Plaintiff's property interest in the military retired pay and to secure the right of the Plaintiff to receive the retired pay directly from the applicable military finance office pursuant to Title 10, United States Code section 1408.

7. For purposes of this order the Defendant's military retired pay is defined as "disposable retired pay" as this term is defined in Title 10, United States Code

section 1408(a)(4).

8. The Plaintiff will receive 60% of the amount of disposable retired pay. This includes yearly pay increases for cost of living.

9. This order may be amended in the future to comply with the requirements of the applicable law and regulations to assure that the Plaintiff will be eligible to receive the property awarded in this action.

CONCLUSIONS OF LAW

1. Principles and considerations governing equitable distribution of property are governed by Section 20-7-471, et seq., Code of Laws of South Carolina, 1976, as amended.

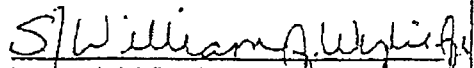
2. Payment of retired pay in compliance with court orders is governed by Title 10, United States Code, Section 1408.

THEREFORE IT IS SO ORDERED:

a. The Plaintiff is awarded 60% of the Defendant's military retired pay including any future increases. The dollar amount at the time of this order is \$798.00.

b. This court retains jurisdiction to supervise and enforce the payment of the Defendant's military retired pay to the Plaintiff as provided herein and to amend this order as may be necessary to ensure that it qualifies as a court order within the meaning of Title 10 United States Code Section 1408.

AND IT IS SO ORDERED.


William J. Wylie, Jr., Judge, Family Court
of the First Judicial Circuit

Summerville, South Carolina

November 8, 2002



CONTINUING LEGAL EDUCATION

Cool Tips from the
Hottest Domestic Law
Practitioners II

May 19, 2000

**MILITARY RETIREMENT
MYTHS AND MALPRACTICE TRAPS**

James G. Long III, Esquire

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**MILITARY RETIREMENT
MYTHS & MALPRACTICE TRAPS**

- A. 10 year rule

- B. Post Divorce Actions by Member
 - 1. Disability
 - 2. Early Outs – voluntary separation incentive
 - 3. Employment with federal government

- C. Cost of Living Increases & Taxes

- D. Survivor's Benefit Plan (SBP)
 - 1. Malpractice Trap
 - 2. 50% Rule
 - 3. Remarriage Suspension

- E. Decree Checklist
 - 1. Jurisdiction
 - 2. Date of marriage and date of service if close
 - 3. Certified copies within 90 days
 - 4. Indicate whether it is property or support
 - 5. Have spouse sign their form
 - 6. DO NOT FORGET THE SBP

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE FAMILY COURT FOR THE
FIFTH JUDICIAL CIRCUIT
CASE NO. [REDACTED]

[REDACTED]

Plaintiff,

vs.

[REDACTED]

Defendant.

BARBARA A. SCOTT
99 SEP 21 AM 11:21
C.C.P. - G.S.
& FAMILY COURT

DECREE OF DIVORCE

Presiding Judge: Henry T. Woods
Date of Hearing: [REDACTED]
Plaintiff's Attorney: James G. Long, III
Defendant's Attorney: Pro Se
Court Reporter: Karen Tracy

This action was commenced by the service of a Summons and Complaint wherein the Plaintiff seeks a divorce and approval of a Complete Support And Property Settlement Agreement executed between the parties. The Defendant filed an Answer in which he joined in the Plaintiff's request for relief. Each party has filed and served a Financial Declaration pursuant to the Family Court Rules.

This matter came before me on [REDACTED] for a final hearing. Present and appearing at the hearing were the Plaintiff and her attorney, James G. Long, III, Esquire, and the Defendant, who was *pro se*.

At the call of the case, counsel for the Plaintiff announced to the Court that the parties had entered into a Complete Support And Property Settlement Agreement ("Agreement") which resolves all of the issues arising out of the dissolution of the parties' marriage with the exception of divorce. The Agreement is attached hereto and incorporated herein. The Court thereupon questioned the

Defendant about his desire to proceed *pro se* and is satisfied that the Defendant understands his right to an attorney and that he has voluntarily chosen to waive that right.

Prior to the testimony of the parties, this Court made an earnest effort to reconcile the parties but such effort was unavailing. I find that reconciliation is not possible.

Based on the pleadings, the financial declarations, and the testimony of the parties, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Both parties are citizens and residents of the County of Richland, State of South Carolina, and have been for more than three months prior to the commencement of this action.
2. The parties are Husband and Wife having been lawfully married on [REDACTED] in the State of [REDACTED]. From their marriage, two children have been born [REDACTED] (age 20) and [REDACTED] (age 18). No other children have been born from this marriage and none are expected.
3. The parties last resided together as Husband and Wife in the County of Richland, State of South Carolina.
4. This Court has in personam jurisdiction over the parties and jurisdiction over the subject matter of this action. Venue is proper before this Court.
5. The parties separated on or about August 10, 1998, and have lived separate and apart without intervening cohabitation since that time. The parties' separation was corroborated by the testimony of an independent witness. I find and conclude that the Plaintiff is entitled to and is hereby granted a divorce, a vinculo matrimonii, on the statutory ground of one year continuous separation without intervening cohabitation.

6. The parties entered into a Complete Support And Property Settlement Agreement dated [REDACTED], 1999, wherein all matters arising out of the marital relationship were resolved with the exception of the entitlement to divorce. The Agreement is attached hereto and incorporated herein.

7. The Plaintiff has been represented by James G. Long, III, Esquire. I find that the Plaintiff is satisfied with her representation and fully understands the nature and purpose of this hearing.

8. The Defendant has elected to proceed *pro se*. I find that the Defendant is educated with a high school degree and a two-year Associate's Degree. He is articulate and is able to understand and evaluate this Agreement. He is well capable of representing himself in this action, has voluntarily chosen to do so, and understands the nature and purpose of this hearing.

9. I find that the Agreement attached hereto represents the complete and final Agreement of the parties and that each party fully understands the terms, conditions, and obligations contained therein.

10. I find that each party has freely and voluntarily entered into this Agreement and neither party is under any duress or coercion.

11. I find that the parties have exchanged financial declarations and that each party is satisfied that the other party has made a complete and accurate disclosure of his or her income and assets and that each party has reviewed enough financial information to make an informed decision about the terms and conditions of this Agreement.

12. I find that neither party is under the influence of alcohol or drugs which would impair his or her ability to enter into a complete agreement of the issues before this Court or which would impair his or her ability to understand the terms and conditions of this Agreement.

13. I find that each party has negotiated this Agreement over a reasonable length of time and that each party desires that the Court approve this Agreement and make it the Order of this Court, enforceable by the contempt powers of this Court.

14. I find that this Agreement is fair and equitable and hereby is approved and adopted as the Order of this Court to be fully enforceable by the contempt powers of this Court.

15. Pursuant to this Agreement, I make the following findings about the Defendant's military retired pay:

a. The Wife shall receive each month 50% of the Husband's military retired pay as the Wife's sole and separate property payable from the Husband's disposable retired or retainer pay and that the Wife shall further receive 50% of any future cost of living increases in his retired or retainer pay, computed from the gross sum thereof. It is contemplated that future cost of living adjustments will be granted by the United States Government, by means of which the gross military retirement benefits specified above will increase, thus raising the amount being paid to the Wife. Military retirement includes retired pay paid or to which the Husband would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied except for deductions because of the election to provide a survivor benefit annuity to the Wife.

b. The Wife is and shall be deemed as the irrevocable beneficiary of the survivor Benefit Plan (SBP) through the Husband's military retirement as the former spouse of the Husband, and the Husband shall execute such paperwork as is required to make or extend the election of the Wife as said beneficiary, and shall do nothing to reduce or eliminate that benefit to the Wife. The Husband has elected the former spouse only option and has selected as the base amount the full

amount of the monthly retired pay and that he shall take no action to change this election in the future.

c. The payments from the Husband's retired or retainer pay have been awarded to the Wife pursuant to the South Carolina Equitable Apportionment Statute and shall continue during the joint lives of the parties regardless of the future marital status of either of them and shall terminate only upon the death of either the Wife or the Husband.

d. The appropriate military pay center shall pay the Wife's share of the Husband's retired or retainer pay set forth herein directly to the Wife, to the extent permitted by law, at the same time as the Husband receives his retired or retainer pay, and that this Agreement is intended to qualify under the Uniform Services Former Spouses Protection Act, 10 U.S.C. § 1408, et seq. with all provisions to be interpreted to make the Decree qualify.

e. If direct payment is not made to the Wife by the military pay center for any month after September 1, 1999, the Husband shall pay the Wife's share of the Husband's retired or retainer pay directly to the Wife by the 5th day of each month in which the military pay center and/or allotment fails to do so, commencing on September 1, 1999.

f. If the Husband takes any action that prevents, decreases, or limits the collection by the Wife of the sums to be paid hereunder, by application for the award of disability compensation, combination of benefits with any other retired pay, waiver for any reason, including as a result of other Federal service, or in any other way, he shall make payments to the Wife directly in an amount sufficient to neutralize, as to the Wife, the effects of the action taken by the Husband.

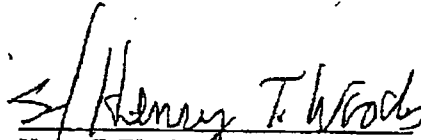
g. The Family Court shall retain jurisdiction to enter such further Orders as are necessary to enforce the award to the Wife of the military retirement benefits awarded herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. The Plaintiff is hereby granted a divorce, a vinculo matrimonii, on the statutory ground of one year continuous separation without intervening cohabitation.
2. The Agreement of the parties, attached hereto, is hereby incorporated into this Decree and is hereby approved and adopted as the Order of this Court, to be fully enforceable by the contempt powers of this Court.
3. The Defendant's military retired pay shall be divided and paid as set forth in

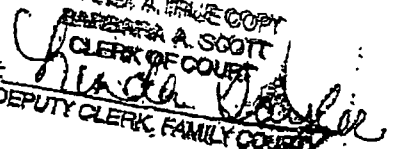
~~Paragraph 15 hereinabove.~~

IT IS SO ORDERED.


Henry T. Woods
Presiding Judge, Family Court
Fifth Judicial Circuit

September 21, 1999

Columbia, South Carolina

ATTEST A TRUE COPY
BARBARA A. SCOTT
CLERK OF COURT
BY:  (61)
DEPUTY CLERK, FAMILY COURT

JAMES G. LONG III
PARTNER

DIRECT DIAL
803-253-8224
jgl@ppa.com

DATE

DFAS - Cleveland Center
Code LF - Room 1417
Garnishment Operations Directorate
~~Post Office Box 998002~~
Cleveland, Ohio 44199-8002

Re: _____ vs. _____
C/A No.: _____

Dear Sir:

I represent _____. Enclosed is a certified copy of the Decree Of Divorce in the above-referenced matter. On page ____ of the Decree, (spouse's name), Social Security Number _____, is awarded (percentage of award or exact dollar amount) of (member name)'s, Social Security Number _____, military retired pay. Also enclosed is a completed Application For Former Spouse Payments From Retired Pay. Please commence disbursements directly to Ms. (spouse's name) as soon as possible.

Ms. (spouse's name)'s current address is _____.

If you have any questions, please do not hesitate to contact me directly. My direct dial telephone number is (803) 253-8224. Thank you for your assistance.

Very truly yours,

James G. Long, III

JGL/krs
Enclosure

JAMES G. LONG III
PARTNER

DIRECT DIAL
800-253-8224
JLONG@NPR.COM

DATE

Retired Pay Office
DFAS - CL
Attn.: Code FR
Post Office Box 99191
Cleveland, Ohio 44199-1126

Re: _____ vs. _____
C/A No.: _____

Dear Sir:

I represent _____ in the above-referenced matter. Enclosed herein is a certified copy of the Decree of Divorce in the above-referenced matter. The service member's Social Security Number is _____.

Ms. (spouse's name) deems an election as a former spouse beneficiary to the survivor benefit plan as set forth in the Divorce Decree.

Ms. (spouse's name)'s address is _____. If you have any questions, please do not hesitate to contact me. My direct dial number is (803) 253-8224.

Very truly yours,

James G. Long, III

JGL/krs

Attachments

I deem an election as a former spouse beneficiary to the survivor benefit plan.

(spouse's signature)

APPLICATION FOR FORMER SPOUSE PAYMENTS FROM RETIRED PAY
(Please read instructions on back before completing this form.)

*Form Approved
 OMB No. 0730-0008
 Expires Sep 30, 2001*

The public reporting burden for this collection of information is estimated to average 16 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Service, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

FOR OFFICIAL USE

PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS. RETURN COMPLETED FORM TO THE APPROPRIATE SERVICE ADDRESS LISTED ON BACK.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 USC 1408; EO 9397.

PRINCIPAL PURPOSE(S): To request direct payment through a Uniformed Service designated agent of court ordered child support, alimony, or division of property to a former spouse from the retired pay of a Uniformed Service member.

ROUTINE USE(S): Information provided will be disclosed to the retired member for verification and comment. Additionally, it may be disclosed to state social service agencies for human services benefit entitlement purposes; to the Internal Revenue Service, and state and local taxing authorities for income tax purposes.

DISCLOSURE: Voluntary; however, failure to provide requested information may delay or make impossible processing this direct payment request.

1. APPLICANT IDENTIFICATION	2. SERVICE MEMBER IDENTIFICATION
a. NAME (As appears on court order) (Last, First, Middle Initial)	a. NAME (Last, First, Middle Initial)
b. CURRENT NAME (Last, First, Middle Initial)	b. SOCIAL SECURITY NUMBER
c. SOCIAL SECURITY NUMBER	c. BRANCH OF SERVICE
d. ADDRESS (Street, City, State, ZIP Code)	d. ADDRESS (Street, City, State, ZIP Code) (If known)

3. REQUEST STATEMENT

I request direct payment from the retired pay of the above named Uniformed Service member based on the enclosed court order.

I request payment of:

(1) Child support in the amount of \$ _____ per month.

(2) Alimony, spousal support or maintenance in the amount of \$ _____, or _____ percent of disposable retired pay per month.

(3) A division of property in the amount of \$ _____, or _____ percent of disposable retired pay per month.

I certify that any request for current child and/or spousal support is not being collected under any other wage withholding or garnishment procedure authorized by statute. Furthermore, I certify that the court order has not been amended, superseded or set aside and is not subject to appeal. As a condition precedent to payment, I agree to refund all overpayments and that they are otherwise recoverable and subject to involuntary collection from me or my estate, and I will notify the appropriate agent (as listed on back) if the operative court order, upon which payment is based, is vacated, modified, or set aside. I also agree to notify the appropriate agent (as listed on back) of a change in eligibility for payments. This includes notice of my remarriage, if under the terms of the court order or the laws of the jurisdiction where it was issued, remarriage causes the payments to be reduced or terminated; or notice of a change in eligibility for child support payments by reason of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payments from retired pay. I hereby acknowledge that any payment to me cannot lawfully exceed 50 percent of the member's disposable retired pay which is gross retired pay minus deductions such as those authorized or required for income tax, Federal indebtedness, or disability reasons; that my payments may not exceed any lesser amount or percentage specified by court order; and that any court-ordered percentage must be construed as a percentage of disposable retired pay.



CONTINUING LEGAL EDUCATION

HOT TIPS
FROM THE BEST
DOMESTIC LAW
PRACTITIONERS

September 15, 2000

THE TRICKS AND TRAPS OF MILITARY
DISABILITY

James G. Long III, Esquire

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THE TRICKS AND TRAPS OF MILITARY DISABILITY

The General Rules for Military Disability Benefits in Divorce:

1. The South Carolina Family Court does not have authority to apportion or award disability benefits in an action for equitable distribution or divorce.

Mansell v. Mansell, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989)

2. Disposable retired pay is the total monthly retired or retainer pay to which the retired military member is entitled to receive less deductions for the following:

- Money owed to the US Government for overpayments of retired pay
- Survivor benefit plan premium if so chosen by the military member

10 U.S.C.A. § 1408(a)(4).

3. Disposable retired pay does not include disability benefits.
4. If the military member receives a disability award, the amount of disposable retired pay is reduced by the amount of the disability award.
5. The military retired pay center in Cleveland, Ohio or DFAS as it is formally known will not pay directly to a former spouse more than 50% of the total amount of disposable retired pay of the member. 10 U.S.C.A. § 1408(c)(1). Therefore, the military retired pay center will almost never be in a position to pay disability benefits directly to a former spouse.
6. Disability benefits are not taxable to the recipient.
7. Disposable retired pay is taxable income to the recipient including the former spouse for the amount she is awarded and receives.
8. It is common and highly likely that a portion of the military member's military retirement benefits will include disability benefits.
9. A retired military member can and often will request that the Veterans Administration reevaluate his or her disability rating. If the disability award is increased, the military member's disposable retired pay will decrease. This is a somewhat common occurrence.

TYPICAL FACTUAL SCENARIOS FOR ATTORNEY

Scenario Number One:

Frank and Cindy Smith have been married 30 years. Frank receives total military retirement in the amount of \$1,500.00 per month as follows: \$1,350.00 in disposable retired pay and \$150.00 in disability benefits. Frank and Cindy divorce. Cindy is awarded 50% of Frank's military retirement.

Issues for the Lawyer:

1. How much money does Cindy receive each month in retirement benefits?
 - \$675.00 ($\$1,350.00 \times 50\%$)
2. How can Cindy avoid having her monthly benefit reduced if and when Frank seeks to increase his disability award?
 - Compare Price v. Price, 325 S.C. 379, 480 S.E.2d 92 (Ct. App. 1996) with Tirado v. Tirado, Op. No. 3150 (S.C. Ct. App. filed April 10, 2000) (Shearouse Adv. Sh. No. 14 at 57) (April 15, 2000).
 - Include specific language in the Agreement or Order similar to sample paragraph 5
 - Indicate a specific minimum dollar amount for Cindy to receive; however, this could complicate the COLA calculation and the 50% rule could come into play.

Scenario Number Two:

Tom and Susan Jones have been married 15 years. Tom has served in the Army for the entire marriage having entered service after their honeymoon. Tom and Susan divorce. Susan is awarded 37.5% of Tom's military retirement.

Issues for the Lawyer:

1. What future problems can Tom create for Susan?
 - Seek an award of disability
 - Special packages for early retirement
 - Future Federal employment (military retired pay is reduced for military members who work for the Federal government as civilians)

2. What can Susan's lawyer do to maximize the amount of benefits she receives?

- Use a very broad definition of military retired pay similar to sample paragraph 2 in the Agreement or Decree
- Include language in the Agreement or Decree addressing early out provisions and future federal employment similar to sample paragraph 3
- Include a specific minimum dollar amount for Cindy to receive
- Reserve or receive alimony

3. How can Tom protect his rights under federal law?

- Avoid broad definitions of military retired pay in the Agreement or Decree
- Insist upon a waiver of alimony
- Try the case

Issue for Court:

Should the trial court address these potential issues and, if so, what are the options for the Judge?

- Reservation or nominal award of alimony
- Establish a minimum dollar amount of retirement for the spouse to receive
- Award the spouse a portion of any early retirement package

**Sample Language to be Used in a Decree or
Agreement Relating to Military Retirement and Disability**

1. The Wife shall receive each month 50% of the Husband's gross military retired pay as the Wife's sole and separate property payable from the Husband's disposable retired or retainer pay and that the Wife shall further receive 50% of any future cost of living increases in his retired or retainer pay, computed from the gross sum thereof. It is contemplated that future cost of living adjustments will be granted by the United States Government, by means of which the gross military retirement benefits specified above will increase, thus raising the amount being paid to the Wife. For the purposes of interpreting this Court's intention in making the division set forth in this Order, "Military Retirement" includes retired pay paid or to which the Husband would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code, before any taxable, statutory, regulatory, or elective deductions are applied except for deductions because of the election to provide a survivor benefit annuity to the Wife.

2. Military retired pay is the total gross amount of retired pay for which the Husband is eligible, except for deductions applied because of the election to provide a survivor benefit annuity to the Wife, and military retired pay shall include any sum forfeited or excluded from the Husband's disposable retired pay because of an award of disability benefits to the Husband or the Husband's employment with the Federal government or the Husband's receipt of other governmental retirement benefits.

3. Any sum taken by the Husband in addition to or in lieu of retirement benefits, including but not limited to exit bonuses, voluntary separation incentive, special separation benefit, early retirement or any other compensation shall be paid to the Wife in an amount equal to a [percentage of the sum received by the Husband]. If this sum is not paid by the appropriate military pay center, the Husband shall pay the sum directly to the Wife.

4. The appropriate military pay center shall pay the Wife's share of the Husband's retired or retainer pay set forth herein directly to the Wife, to the extent permitted by law, at the same time as the Husband receives his retired or retainer pay, and this Agreement is intended to qualify under the Uniform Services Former Spouses Protection Act, 10 U.S.C. § 1408, et seq. with all provisions to be interpreted to make the Decree qualify. Any amount owed to the Wife herein which is not paid by the appropriate military pay center shall be paid directly to the Wife by the Husband.

5. If the Husband takes any action that prevents, decreases, or limits the receipt by the Wife of the sums to be paid herein from the appropriate military pay center, by application for the award of [additional] disability compensation, combination of benefits with any other retired pay, waiver for any reason, including as a result of other Federal service, Federal employment, or the receipt of Federal or Civil Service Retirement, forfeiture for any reason, or in any other way, he shall make payments to the Wife directly in an amount sufficient to neutralize, as to the Wife, the effect of the action taken by the Husband.

6. If direct payment is not made to the Wife by the military pay center for any month after [date _____], the Husband shall pay the Wife's share of the Husband's retired or retainer pay directly to the Wife by the 5th day of each month in which the military pay center and/or allotment fails to do so, commencing on [date _____].

7. The payments from the Husband's retired or retainer pay have been awarded to the Wife pursuant to the South Carolina Equitable Apportionment Statute and shall continue during the joint lives of the parties regardless of the future marital status of either of them and shall terminate only upon the death of either the Wife or the Husband.

8. The Family Court shall retain jurisdiction to enter such further Orders as are necessary to enforce the award to the Wife of the military retirement benefits awarded herein.

480 S.E.2d 92, 325 S.C. 379, Price v. Price, (S.C.App. 1996)

*92 480 S.E.2d 92

325 S.C. 379

Shirley D. PRICE, Respondent,
v.
Charles G. PRICE, Jr., Appellant.

No. 2605.

Court of Appeals of South Carolina.
Submitted Oct. 1, 1996.
Decided Dec. 16, 1996.

Former wife sought to have husband held in contempt and compelled to make payments as required by property settlement agreement and divorce decree. The Richland County Court, Leslie K. Riddle, Family Court Judge, held former husband in contempt and ordered him to continue to pay equitable apportionment payments and to pay arrearages. Former husband appealed. The Court of Appeals, Hearn, J., held that: (1) trial court could not award wife the part of military retirement pay that husband waived in order to receive increased veterans' disability pay, but (2) former husband's agreement to pay specified percentage of gross retirement benefit including disability pay was enforceable.

Affirmed in part, reversed in part.

1. DIVORCE \S 252.3(4)
134 —
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(4) Insurance, retirement, or pension rights.
S.C.App. 1996.

Trial court lacked authority under Uniformed Services Former Spouses' Protection Act (USFSPA) to award former wife portion of military retirement pay that former husband waived in order to receive increased veterans' disability pay. 10 U.S.C.A. § 1408.

2. HUSBAND AND WIFE \S 278(1)
205 —
205VIII Separation and Separate Maintenance
205k277 Separation Agreements
205k278 Requisites and Validity
205k278(1) In general.
S.C.App. 1996.

Property settlement agreement obliging husband to pay wife specified percent of gross military retirement benefits including disability pay was enforceable, even though trial court itself could not have divided the disability pay. 10 U.S.C.A. § 1408.

3. DIVORCE \S 249.2
134 —
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k249.2 Stipulations and agreements of parties.
S.C.App. 1996.

Terms of final property settlement agreement, once approved, are binding on the parties and court, except for those matters over which court obtains continuing jurisdiction.

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480 S.E.2d 92, 325 S.C. 379, Price v. Price, (S.C.App. 1996)

4. HUSBAND AND WIFE ¶279(6)
205 —
205VIII Separation and Separate Maintenance
205k277 Separation Agreements
205k279 Construction and Operation
205k279(6) Performance or breach.

S.C.App. 1996.

Husband breached obligations under property settlement agreement by unilaterally reducing wife's equitable apportionment of benefits acquired during the marriage.

5. EQUITY ¶54
150 —
150I Jurisdiction, Principles, and Maxims
150I(C) Principles and Maxims of Equity
150k54 Application and operation in general.

S.C.App. 1996.

Equity does not permit a party to defeat justice by asserting violation of public policy, statute, or illegality of agreement in order to insulate the party from his own wrong.

[325 S.C. 380] Thomas J. Leclair, of Gergel, Burnett, Nickles, Grant & Leclair, Columbia, for appellant.

Nathaniel Roberson, Columbia, for respondent.

HEARN, Judge:

Charles G. Price, Jr. appeals the trial judge's finding of contempt and order requiring him to continue to pay equitable apportionment payments to his former wife and arrearages. We affirm in part and reverse in part. (FNI)

FACTS AND PROCEDURAL HISTORY

Shirley D. Price (Wife) and Charles G. Price, Jr. (Husband) were divorced in February 1994. The divorce decree merged a Complete Property Settlement Agreement, signed by the parties in December 1993. As part of the Agreement, Husband agreed to pay Wife \$328 per month from his total military retirement benefits. A portion of this amount included disability pay.

[325 S.C. 381] Beginning July 1995, Husband reduced his payments to \$128 per month, having waived a portion of his retirement pay in order to receive increased disability pay. (FN2) Wife then *93 filed a rule to show cause, summons, and complaint, requesting the court to: (1) hold Husband in contempt for failing to comply with the Agreement by failing to make monthly payments, (2) compel Husband to make monthly payments as equitable apportionment of property as required by the Agreement and divorce decree, and (3) require Husband to pay attorney fees and costs. On August 9, 1995, Husband filed his answer and counterclaim, seeking a reduction in the amount of his monthly payments as equitable apportionment of property. He also sought an order requiring the parties to pay their own attorney fees and costs.

[1] At trial, the judge found Husband in contempt for "intentional disregard" of the parties' divorce decree, ordered Husband to resume monthly payments of \$328, and ordered Husband to pay arrearages of \$800, together with \$500 as attorney fees and costs. On appeal, Husband argues the trial judge erred in ordering him to pay Wife as equitable apportionment of property a portion of the monthly military retirement pay he waived in order to receive increased veterans' [325 S.C. 382] disability pay. Specifically, Husband cites *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), for the proposition that courts do not have the authority to treat as property divisible upon divorce military retirement pay waived in order to receive veterans' disability benefits. We agree, but affirm in part and reverse in part.

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480 S.E.2d 92, 325 S.C. 379, *Price v. Price*, (S.C.App. 1996)

ANALYSIS

[2] Prior to their divorce, the parties signed a Complete Property Settlement Agreement, which merged with the parties' divorce decree. In the Agreement, Husband expressly promised to pay Wife thirty-four percent of the Husband's gross military retirement benefits each month, including any accretions. Husband also expressly agreed to remain "directly responsible" to pay this sum on a monthly basis. The Agreement specifically provided that the provisions could not be modified except in writing, by mutual consent, and with court approval.

The judge who issued the parties' divorce decree held the Agreement to be "fair and equitable" and found both parties well-educated, intelligent, represented by counsel, and understanding of the Agreement's terms. The Agreement was thus incorporated into the court order.

We find the Agreement plainly shows that the parties intended it to be a final settlement of their obligations concerning alimony and property division. Moreover, this Agreement was executed in 1993, well after issuance of the *Mansell* decision.

[3] Except for those matters over which a court retains continuing jurisdiction, terms of a final property settlement agreement, once approved, are binding on the parties and the court. *Moseley v. Mosier*, 279 S.C. 348, 352, 306 S.E.2d 624, 627 (1983); *Croom v. Croom*, 305 S.C. 158, 160-61, 406 S.E.2d 381, 382-83 (Cl.App.1991). Here, as in *Croom*, the parties specifically agreed that the Agreement was non-modifiable, except by their mutual consent. Under these circumstances, Husband could not unilaterally deprive Wife of the property granted to her pursuant to the Agreement.

*94. [325 S.C. 383] Although the Agreement did not define "gross monthly military retirement pay," the record shows the parties calculated this amount using a figure that included disability pay. While we recognize that *Mansell* does not permit a state court to treat military disability benefits as property subject to equitable distribution, we do not believe the decision can be used by Husband to undermine the Agreement approved by the court. Given the fact that Husband agreed, after *Mansell*, to pay Wife a percentage of his gross monthly military retirement pay, which included disability pay, he should not be permitted to complain that the family court erred in enforcing the terms of the Agreement.

[4] [5] We hold Husband breached his obligations under the Agreement by unilaterally reducing Wife's equitable apportionment of benefits acquired during marriage. Equity does not permit a party to defeat justice by asserting violation of public policy, statute, or illegality of agreement in order to insulate the party from his own wrong. *Chapman v. Citizens and Southern Nat'l Bank of South Carolina*, 302 S.C. 469, 482, 395 S.E.2d 446, 454 (Cl.App.1990). Therefore, we hold that Husband must resume monthly payments of \$328 to Wife as her share of equitable apportionment, together with all arrearages and attorney fees. (FN3) We do not believe, however, that Husband's actions rose to the level of contempt. Accordingly, we reverse that portion of the family court order.

AFFIRMED IN PART, REVERSED IN PART.

CONNOR and STILWELL, JJ., concur.

FN1. We decide this case without oral argument pursuant to Rule 215, SCACR.

FN2. The Uniformed Services Former Spouses' Protection Act allows retired service members to waive a portion of their retirement pay in order to receive veterans' disability pay. 10 U.S.C.A. § 1408 (West Supp.1995). The Act specifically defines "disposable retired pay" to exclude, *inter alia*, military retirement benefits waived in order to receive veterans' disability payments. § 1408(a)(4)(B). In *Mansell v. Mansell*, the Supreme Court declared that disability benefits may not be equitably divided in a divorce proceeding. 490 U.S. 581, 594-95, 109 S.Ct. 2023, 2031-32, 104 L.Ed.2d 675 (1989). While the Act allows state courts to treat *disposable* retired pay as divisible property, courts do not have the authority to treat *total* retired pay as divisible property. *Id.* at 589, 109 S.Ct. at 2028-29. To the extent former military spouses can receive disposable

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retired pay, this amount is limited to fifty percent. § 1408(e)(1); *Mansell*, 490 U.S. at 585, 109 S.Ct. at 2026-27.

We note that at the time the parties entered the Agreement in 1993, Husband was receiving gross military retirement benefits of approximately \$1,000 monthly. Following his waiver, he continued to receive the same amount of total benefits, although a far greater percentage of these benefits were derived from disability pay. Because disability benefits are exempt from federal, state, and local taxation, military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. *Mansell*, 490 U.S. at 583-84, 109 S.Ct. at 2025-26.

FN3. We note that Husband previously made these payments directly and may continue to do so.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Luz C. Tirado (n/k/a Cruz-Garcia),

Appellant,

v.

Angel M. Tirado,

Respondent.

Appeal From Richland County
Barry W. Knobel, Family Court Judge

Opinion No. 3150
Heard March 8, 2000 - Filed April 10, 2000

AFFIRMED

Wesley W. Bales, of Columbia, for appellant.

Eddye L. Lane, of Columbia, for respondent.

HEARN, C.J.: This is an appeal from a family court order declining to hold Angel Tirado (Husband) in contempt and refusing to require him to reimburse Luz C. Tirado (Wife) for monies paid to him as military disability pay. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Wife were married in December 1968 and divorced in February 1994. At the time of the divorce, Husband was retired from the military with a disability rating of 10%, and received retirement benefits of \$1,157.00 per month. The decree of divorce approved and incorporated a settlement between the parties whereby Husband agreed to pay Wife one-half of his "military retirement pay," to begin immediately upon sale of the marital residence. Pursuant to the agreement, the Defense Finance and Accounting Service (DFAS) was to disburse the payments directly

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to Wife each month from Husband's retirement account.¹

Following the divorce DFAS commenced sending Wife a monthly check for \$578.50. Over the next four years, Wife consistently received her monthly payments, occasionally realizing slight increases in the amount due to cost of living allowances. In early 1998, however, Husband was declared 40% disabled, a significant increase from his previous impairment rating of 10%. Thereafter, on April 1, DFAS notified Wife that future disbursements from Husband's retirement account would decrease in accordance with Husband's recently-increased disability status.² As a result, Wife's DFAS check for the month of April 1998 reflected a reduced payment, from \$591.98 to \$483.48. The next month DFAS again reduced the amount of Wife's check to \$444.48.

~~When Husband refused to reimburse Wife for the deductions, Wife filed a complaint seeking a finding of contempt against Husband and an order directing him to reimburse her for her portion of the diverted retirement funds. Ultimately, the family court issued an order refusing to grant the relief requested by Wife.~~

LAW/ANALYSIS

I. Military Retirement Benefits

Wife argues the family court erred in failing to order Husband to reimburse her for the reduction in her DFAS check attributable to Husband's increased disability rating. We disagree.

It is well settled in this state that military retirement benefits accrued during marriage are subject to equitable apportionment. See Freeman v. Freeman, 318 S.C. 265, 268, 457 S.E.2d 3, 5 (Ct. App. 1995); Price v. Price, 325 S.C. 379, 383, 480 S.E.2d

¹ The parties' agreement erroneously referred to DFAS as the "Military Retired Pay Center."

² Veterans receiving retirement pay may apply for disability benefits if they are rendered disabled as a result of military service. However, "[i]n order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay." Mansell v. Mansell, 490 U.S. 581, 583 (1989). Since disability benefits are exempt from federal, state, and local taxes, military retirees prefer, when possible, to waive retirement pay in favor of disability benefits in order to increase their after-tax income. Price v. Price, 325 S.C. 379, 383, 480 S.E.2d 92, 94 (Ct. App. 1996) (citing Mansell, 490 U.S. at 583-584). Accordingly, because DFAS calculates Wife's one-half share of Husband's retirement pay and sends it directly to her, Husband's post-divorce waiver of retirement pay in favor of increased disability benefits resulted in an automatic, corresponding reduction in Wife's DFAS check.

TIRADO v. TIRADO

92, 94 (Ct. App. 1996). Here, Husband and Wife entered into a voluntary separation agreement which the family court incorporated into the final divorce decree. The relevant portion of the agreement states:

The Husband receives military retirement pay on a monthly basis. The Husband agrees that one-half (½) of this military retirement pay should be paid monthly directly to the Wife from the Military Retired Pay Center, beginning immediately after the marital residence has been sold. . . . The parties to this agreement shall immediately notify the Military Retired Pay Center of the sale of the marital residence and therefore of the need for the Center to begin ~~making monthly payments of one-half (½) of the military retirement pay to the Wife.~~

In Price, this court specifically held that a husband may not subvert his agreed-upon settlement obligations to his former wife by waiving military retirement pay in favor of disability benefits. See Price, 325 S.C. at 383, 480 S.E.2d at 94 (recognizing that while the Supreme Court has held a state court may not treat military disability benefits as property subject to equitable apportionment, a party cannot use this holding "to undermine [an] [agreement approved by the [family] court") (discussing Mansell v. Mansell, 490 U.S. 581, 594-595 (1989)); cf. Fisher v. Fisher, 319 S.C. 500, 505, 462 S.E.2d 303, 305 (Ct. App. 1995) (finding husband's unilateral decision to accept voluntary separation incentive payments to avoid risking an involuntary discharge before reaching the mandatory service requirements for Navy retirement did not bar wife's prior settlement claim to 20% of his "military retirement benefits"; court stated that a "husband cannot, by his voluntary act of changing the plan under which he will receive his post-military service payments, divest [a] wife of her rights" as contemplated under a prior court-approved settlement agreement).

Husband contends, and the trial court found, that our prior opinion in Price v. Price, 325 S.C. 379, 480 S.E.2d 92 (Ct. App. 1996), is distinguishable. We agree.

There are important distinctions between the facts of this case and those presented in Price. In Price, the agreement stated the wife would receive 34% of the husband's "gross monthly military retirement pay" whereas here, the agreement afforded Wife one-half of Husband's "military retirement pay." Thus, the court in Price noted that although the agreement therein did not define "gross monthly military retirement pay," the record indicated that the parties calculated the amount owed using a figure that included disability pay. The opinion further stated: "Given the fact that Husband agreed, after Mansell, to pay Wife a percentage of his gross monthly military retirement pay, which included disability pay, he should not be permitted to complain that the family court erred in enforcing the terms of the agreement." Price,

TIRADO v. TIRADO

325 S.C. at 383, 480 S.E.2d at 94. This is not the case here where, at the time the parties reached their agreement, Husband was receiving 10% of his gross monthly retirement pay in the form of disability benefits and this portion was excluded from the Wife's 50% share. Furthermore, unlike in Price where the husband directly paid the wife her share of the retirement benefits, here DFAS made the payments to Wife. Thus, we hold that the facts of this case are distinguishable from those in Price and that under Mansell Wife is not entitled to any portion of Husband's increased disability pay.

II. Contempt

Wife further contends the family court erred in failing to find Husband in contempt. ~~We disagree.~~

Contempt is a consequence of the willful disobedience of a court order. See Henderson v. Henderson, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989); American Fed. Bank FSB v. Kateman, 335 S.C. 273, 276, 516 S.E.2d 1, 2 (Ct. App. 1999). A willful act is one "done voluntarily and intentionally with the specific intent . . . to fail to do something the law requires to be done . . ." Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988) (quoting Black's Law Dictionary 1434 (5th ed. 1979)). A finding of contempt, therefore, must be reflected in a record that is "clear and specific as to the acts or conduct upon which such finding is based." Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982).

A decision on contempt rests within the sound discretion of the trial court and is subject to reversal only for abuse or where the decision is based on a finding that is without evidentiary support. Padgett, 296 S.C. at 83, 370 S.E.2d at 875; Kateman, 335 S.C. at 278, 516 S.E.2d at 3. Here, the family court found Husband was not in contempt of court. We agree, as the record contains no court order upon which to base a contempt finding. Not only had no court previously ordered Husband to reimburse Wife for the deductions, the divorce agreement itself charged DFAS, not Husband, with the responsibility of making the payments to Wife.

Moreover, in our view the record presents no evidence indicating Husband intentionally claimed increased disability in order to prevent Wife from receiving her share of his military retirement benefits. See Price, 325 S.C. at 383, 480 S.E.2d at 94 (reversing family court's finding of contempt on similar facts). In the absence of such evidence or a prior court order directing Husband to reimburse Wife, the family court did not abuse its discretion in declining to find Husband in contempt. See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) ("An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support.").

TIRADO v. TIRADO

III. Attorney Fees

In the conclusion to her brief, Wife requests reasonable attorney fees and costs. The question of attorney fees is not preserved for our review. See Rule 207(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal."); Gamble v. International Paper Realty Corp. of South Carolina 323 S.C. 367 n.1, 474 S.E.2d 438 n.1 (1996) (same); First Sav. Bank v. McLean 314 S.C. 361,363, 444 S.E.2d 513, 514 (1994) (issues not argued or supported by authority are deemed abandoned and will not be considered on appeal). Moreover, in light of our disposition of the merits of this appeal, attorney fees would not be warranted.

For the foregoing reasons, the decision of the family court judge is

~~AFFIRMED.~~

STILWELL and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson
Circuit Court Judge

Case No.: 2012-CP-10-8372
Appellate Case No. 2014-002450

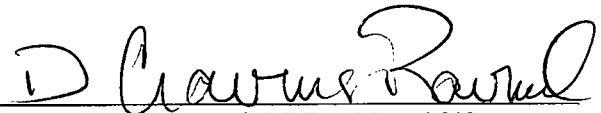
Hattie Mae Greene Appellant

v.

Cindy M. Floyd Respondent

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g), SCACR the undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and does not contain any other material.



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April 7th, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson
Circuit Court Judge

Case No.: 2012-CP-10-8372
Appellate Case No. 2014-002450

Hattie Mae Greene Appellant

v.

Cindy M. Floyd Respondent

PROOF OF SERVICE

I, Tricia Ruggiero, paralegal to D. Cravens Ravenel, attorney for the Appellant, do hereby certify that I have this 9th day of April 2015, served a copy of the Record on Appeal upon counsel for Respondent by delivering via U.S. Mail, first class postage pre-paid, to said counsel at the following address:

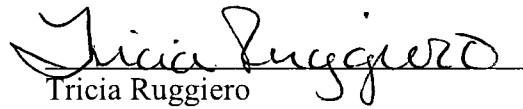
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