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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTINA BROMUND nka KRISTINA HENRICKSON, Petitioner/Respondent, -vs- KURT E. BROMUND, Respondent/Appellant.	**DOCKET NO. 47602-2019** Ada County Case No. CV-DR-0816162

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Gerald F. Schroeder, District Judge presiding.

ATTORNEYS FOR APPELLANT
John A. Miller
Boise Law Group
250 S. 5th St., Suite 850
Boise, Idaho 83702
john@boiselawgroup.com

ATTORNEYS FOR RESPONDENT
Kevin E. Dinius
Sarah Hallock-Jayne
Dinius & Associates, PLLC
5680 E. Franklin Road, Suite 130
Nampa, Idaho 83687
efile@diniuslaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

State Rules

I.
STATEMENT OF THE CASE

A. Nature of the Case

The parties in this matter, Kristina Bromund (hereinafter "Respondent") and Kurt Bromund (hereinafter "Appellant"), were married on October 26, 1990.[1] Appellant later joined the military on March 18, 1991, where he continued his active duty service until April 30, 2018 when he retired. [2] On November 17, 2008, a *Judgment and Decree of Divorce* (hereinafter "Decree") was entered by default.[3] The dispute, and the underlying basis of Appellant's appeal herein, centers on the division of Appellant's military retirement benefits and the formula by which Respondent's share was to be determined.

B. Course of Proceedings

Respondent filed a *Complaint for Divorce* (hereinafter "Complaint") on August 27, 2008.[4] Paragraph 10. **RETIREMENT ASSET**, of the Complaint read as follows:

> Plaintiff should be awarded her community interest share of Defendant's *eventual* military retirement benefits.[5] Her share should be determined by the following formula:
>
> $$\frac{\text{Number of days of the marriage}}{\text{Number of days of Defendant's active duty}} \times \frac{1}{2} \times \text{Net disposable retirement benefit}$$
>
> The Court should retain jurisdiction over this subject matter until such time as this asset is successfully allocated pursuant to a domestic relations or equivalent order, if necessary. The parties should be required to keep each other mutually current on mailing addresses so that they may smoothly effectuate the distribution of this asset promptly upon its inception. Defendant should be required to keep Plaintiff timely apprised of the effective date of his retirement from the military.[6]

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[1] R., p. 7.
[2] R., p. 39.
[3] R., pp. 19-27, 39.
[4] R., p. 7-17.
[5] R, pp. 9-10, emphasis added.
[6] *Id.*

In the Complaint, Respondent prayed for Judgment that the separate and community property, including the community share of military retirement benefits, of the parties be divided between them.[7] The default Decree was entered on November 17, 2008. Paragraph 9. "**RETIREMENT ASSET**" ordered as follows:

> Plaintiff is awarded her community interest share of Defendant's *eventual* military retirement benefits.[8] Her share of said benefit shall be determined by the following formula:
>
> $$\frac{\text{Number of days of the marriage}}{\text{Number of days of Defendant's active duty}} \times \frac{1}{2} \times \text{Net disposable retirement benefit}$$
>
> The Court should retain jurisdiction over this subject matter until such time as this asset is successfully allocated pursuant to a domestic relations or equivalent order, if necessary. The parties should be required to keep each other mutually current on mailing addresses so that they may smoothly effectuate the distribution of this asset promptly upon its inception. Defendant shall keep Plaintiff timely apprised of the effective date of his retirement from the military.[9]

On August 8, 2018, Respondent caused to be filed a *Motion for Contempt* regarding Appellant's failure to comply with the Decree.[10] Specifically, the Appellant refused to provide Respondent with his current address or the effective date of his retirement from the military as required pursuant to the Decree.[11] According to the Appellant he retired from active military duty on April 30, 2018.[12]

Although, not appearing in the Clerk's Record on Appeal, Appellant filed a *Motion for Entry of Order Clarifying Division of Military Retirement* and a memorandum in support thereof on January 2, 2019. Respondent filed an *Opposition to Motion for Order Clarifying Division of*

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[7] R., pp. 7-17.
[8] R., p. 21, emphasis added.
[9] R., pp. 21-22.
[10] R., pp. 28-29.
[11] R., pp. 28-29, 42.
[12] *Id.*

Military Retirement on February 28, 2019.[13] Following a hearing on the same, the magistrate entered an *Order Clarifying Division of Military Retirement* (hereinafter "Order") on March 12, 2019.[14] The Magistrate Court made a finding that the formula utilized for valuing the community interest in Appellant's military retirement benefits as written in the Decree was the "time rule method," which was an approved method for apportioning the benefits at the time the decree was entered in 2008.[15]

On April 18, 2019, the Appellant filed a Notice of Appeal, appealing the same and identified a single issue on appeal: "The Magistrate Court's characterization and division of Petitioner's[sic] military retirement pay in such a manner as to award his former spouse that portion of his retirement pay attributable to his increase in rank after the date of the divorce."[16] On October 18, 2019, in its *Opinion on Appeal*, the District Court affirmed the magistrate's March 12, 2019 Order.[17] On November 27, 2019, Appellant filed his *Notice of Appeal* to this Court.[18]

II.
ISSUES ON APPEAL

A. Did the Magistrate err in concluding that military retirement benefits earned after the date of divorce are a divisible community property asset?[19]

B. Did the Magistrate err in concluding that the amendment to 10 U.S.C. § 1408, which became effective after entry of the decree but before the Appellant's retirement from the military, did not define the portion of the

[13] Not in the Clerk's Record on Appeal.
[14] R., pp. 30-33, 59-62.
[15] R., p. 31. "Conversely, '[t]he time rule values the community interest in the retirement benefits as one-half of the fraction of the years of the community service under the plan, divided by the total years of service.'" *Borley v. Smith*, 149 Idaho 171, 184-185, 233 P.3d 102, 115-116 (2010) (quoting *Hunt v. Hunt*, 137 Idaho 18, 21, 43 P.3d 777, 780 (2002)).
[16] R., pp. 34-35.
[17] R., pp. 41-46.
[18] R., pp. 48-50.
[19] March 12, 2020, *Brief of Appellant*, p. 4.

military retirement that constitutes community property?[20]

C. Did the District Court err in concluding that the amendment to 10 U.S.C. § 1408 does not apply to a decree of divorce entered prior to the date of the statute's amendment when the military member is still on active duty after the amendment?[21]

D. Did the Magistrate error in holding the decree of divorce reflected the parties' mutual intent regarding division of Appellant's military retirement was harmless error?[22]

III.
STANDARD OF REVIEW

A. Standard of Review.

On appeal of a decision rendered by a District Court, acting in its appellate capacity, the Supreme Court will directly review the District Court's decision to determine whether it correctly decided the issues presented to it on appeal. *Borley v. Smith*, 149 Idaho 171, 223 P.3d 102 (2010); *Idaho Dept. of Health and Welfare v. Doe*, 148 Idaho 124, 219 P.3d 448 (2009). In *Lohman v. Flynn,* the Idaho Supreme Court articulated the standard of review as follows:

> When reviewing the decision of a district court acting in its appellate capacity over the magistrate division, the Supreme Court reviews the magistrate judge's decision independently of, but with due regard for, the district court's intermediate appellate decision. See *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000); *Balderson v. Balderson*, 127 Idaho 48, 51, 896 P.2d 956, 959 (1995). The findings of fact by the magistrate judge will be upheld by this Court if they are supported by substantial, competent evidence in the record. *Id.* With respect to the trial court's conclusions of law, this Court exercises free review. *Id.*
>
> The lower court's discretionary decisions will be upheld on appeal absent a showing that the court abused its discretion. *Quiring v. Quiring*, 130 Idaho 560, 563, 944 P.2d 695, 698 (1997). When an exercise of discretion is reviewed on appeal, the Court inquires: (1) whether the lower court rightly perceived the issue

[20] *Id.*
[21] *Id.*
[22] *Id.*

> as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by exercise of reason. *Id.* (citations omitted).

Lohman v. Flynn, 139 Idaho 312, 78 P.3d 379 (Idaho 2003).

IV.
ARGUMENT

The Appellant's Brief identified his four (4) issues on appeal. However, the Argument section of Appellant's Brief appears to diverge from the four (4) issues on appeal as previously stated therein. Rather than attempt to guess Appellant's intent, Respondent has structured this response argument by addressing each of the four (4) issues Appellant specifically stated were on appeal.

A. The Magistrate Court did not err in concluding that military retirement benefits earned after the date of divorce were a divisible community property asset.

The Magistrate Court properly determined that the "time rule method" for calculating the value of Appellant's military retirement benefits at the time the Decree was entered and as set forth in Respondent/Petitioner's Complaint for Divorce was in accordance with the law at the time the Decree was entered.[23] Appellant's appeal seems to be an attempt to go back and litigate the division of community interest in his *eventual* military retirement benefits. Both the Complaint and the Decree expressly provided for the division of future ("eventual") military retirement benefits earned after the divorce as a divisible community property asset.[24] The Appellant's opportunity to contest the formula for calculating the value of his eventual military retirement benefits would have been after he acknowledged service of Respondent/Petitioner's

[23] *Hunt v. Hunt*, 137 Idaho 18 at 22, 43 P.3d 777 at 781 (2002), wherein the Idaho Supreme Court approved the time rule method, "the magistrate acted within the applicable rules and did not abuse its discretion by choosing to apply the time rule instead of the accrued benefits method."
[24] R., pp. 9-10, ¶¶ 9, 10; p. 13; p. 21-23, ¶¶ 8, 9.

Complaint for Divorce. For reasons known only to Appellant, he did nothing to challenge or contest any provision or relief requested in the Complaint for Divorce and on November 17, 2008, the *Decree* mirroring the same was entered pursuant to an *Order for Default*.[25] Likewise, Appellant did not timely move to set aside or appeal the final Decree. Only *after* his retirement, and Respondent's attempt to enforce the Decree as it relates to the payment of her community interest in his military retirement pay, did the Appellant decide he wanted to change the language in the Decree to benefit himself based on the 2017 National Authorization Act.

Title 1, Chapter 16 of the Idaho Code sets forth the powers of the courts to "amend and control its processes and orders, so as to make them conformable to law and justice." I.C. § 1-1603. This is supported by relevant case law holding "a divorce decree is final and "no jurisdiction exists to modify property provisions of a divorce decree."[26] Furthermore, "every court has the authority to enforce its orders as issued."[27]

The Decree entered in this matter on November 17, 2008 ordered, adjudged and decreed as follows:

> 9. RETIREMENT ASSET. Plaintiff is awarded her community interest share of Defendant's ***eventual*** military retirement benefits. Her share of said benefit shall be determined by the following formula:
>
> $$\frac{\text{Number of days of the marriage}}{\text{Number of days of Defendant's active duty}}[28] \times \frac{1}{2} \times \text{Net disposable retirement benefits}$$

The Decree included an *Exhibit to Decree* which further described the community property to be divided between the parties, to include the "Community share of military

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[25] R., pp. 7-27.
[26] *Vierstra v. Vierstra*, 153 Idaho 873, 880, 292 P.3d 264, 271 (2012).
[27] *Id.*
[28] R., p.21.

retirement benefits."[29] Based on the relevant Idaho Code and supporting case law as cited, the Magistrate Court had the authority to enforce its own Decree in this matter, including the division of the community interest share of Appellant's *eventual* military retirement benefits.

With regard to the overall tenor of Appellant's argument and the relief sought by his appeal, it is important for the Court to consider how the doctrine of res judicata applies to the division of military retirement pay in this matter. Res judicata is defined as, "a thing adjudicated. Once a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again."[30]

Here, both the Magistrate and District courts concluded that the military retirement benefits were lawfully divided in accordance with the law at the time the final Decree was entered on November 17, 2008. Additionally, because the Appellant made no attempt to timely appeal the November 17, 2008 judgment, the decision therein is final. Thus, the benefits at issue in this matter were already lawfully and validly divided.[31] The Appellant is precluded from getting a second bite at the apple just because the law changed to his benefit years after the fact.

Although somewhat different factually than the instant case, courts around the country have uniformly held that *McCarty* and *Mansell* are not retroactive.[32] Interestingly enough, Appellant relies heavily on these earlier cases in his brief but neglects to address this issue of

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[29] R., p. 23.
[30] Res judicata, BLACK'S LAW DICTIONARY (2d ed. 1910).
[31] See *Shelton v. Shelton*, 78 P.3d 507 (Nev. 2003), cert. denied, 541 U.S. 960 (2004) (stating federally preempted benefits can be divided on a theory of res judicata; relying expressly on the post-remand decision in *Mansell*); *In re Marriage of Curis*, 9 Cal. Rptr. 2d 145 (Cal. Ct. App. 1992); *Evans v. Evans*, 541 A.2d 648 (Md. Ct. Spec. App. 1988); *In re Zrubek*, 149 B.R. 631 (Bankr. D. Mont. 1993).
[32] See, e.g., *In re Chandler*, 805 F.2d 555 (5th Cir. 1986), cert. denied, 481 U.S. 1049 (1987); *Armstrong v. Armstrong*, 696 F.2d 1237 (9th Cir. 1983), cert. denied, 464 U.S. 933 (1983); *Brown v. Robertson*, 606 F. Supp. 494 (W.D. Tex. 1985); *Ford v. Ford*, 783 S.W.2d 879 (Ark. Ct. App. 1990); *Allcock v. Allcock*, 437 N.E.2d 392 (Ill. Ct. App. 1982); *Toupal v. Toupal*, 790 P.2d 1055 (N.M. Ct. App. 1990); *Baxter v. Ruddle*, 794 S.W.2d 761 (Tex. 1990); *In re Marriage of Reinauer*, 946 S.W.2d 853 (Tex. Ct. App. 1997), on reh'g in part, (May 22, 1997); *Elliott v. Elliott*, 797 S.W.2d 388 (Tex. Ct. App. 1990); *Berry v. Berry*, 870 S.W.2d 846 (Tex. Ct. App. 1989), judgment rev'd, 786 S.W.2d 672 (Tex. 1990), writ granted, (Mar. 28, 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah Ct. App. 1990).

retroactivity. Similarly, there is nothing in *Howell* that suggests that the Supreme Court intended to invalidate or otherwise render unenforceable prior valid judgments.[33] Applying the December 23, 2016 National Defense Authorization Act (NDAA) of 2017 ("2017 NDAA") amendment retroactively to final decrees of divorce would create serious public policy implications as discussed herein. It remains undisputed that, prior to the passage of the 2017 NDAA, it was within the magistrate's discretion to divide military retirement benefits according to the "time rule," as was done in this case.

B. The Magistrate did not err in concluding that the amendment to 10 U.S.C. § 1408, which became effective after entry of the decree but before the Appellant's retirement from the military, did not define the portion of the military retirement that constitutes community property.

In his appeal brief, Appellant contends there is a dispute between the parties as to the definition of the military retirement pay asset. In support of his appeal, the Appellant relies heavily on U.S. Supreme Court case *Howell v. Howell*.[34] However, the Appellant's reliance on *Howell v. Howell* to support his argument for the retroactive application of 2017 NDAA Sec. 641(b) to the final decree of divorce entered in this case more than ten (10) years ago is misplaced, as it is akin to comparing "apples to oranges." In *Howell v. Howell*, the U.S. Supreme Court held that where a veteran waives retirement pay to receive ***service-related disability benefits***, federal law preempts state courts from ordering the veteran to indemnify their divorced spouse for the loss of that spouse's portion of the veteran's retirement pay.[35] Here, the issue has nothing to do with service-related disability benefits which, Respondent acknowledges are not

[33] *Howell v. Howell*, 137 S. Ct. 1400 (2017).
[34] 137 S.Ct. 1400, 197 L.Ed. 2d 781 (2017).
[35] *Id.*

considered to be community property.[36]

C. The District Court correctly concluded that the amendment to 10 U.S.C. § 1408 does not apply to a decree of divorce entered prior to the date of the statute's amendment when the military member is still on active duty after the amendment.

Appellant argues that the Decree must comply with the requirements of the 2017 NDAA regarding the formula for determining the division of the entitlement.[37] However, Appellant ignores 2017 NDAA, Sec. 641(b) which provides:

> Application of Amendments.--The amendments made by subsection (a) shall apply with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation involving a member of the Armed Forces to which section 1408 of title 10, United States Code, applies that becomes final ***after*** the date of the enactment of this Act. (emphasis added).

Plainly stated, the 2017 NDAA's amendment to 10 U.S.C. § 1408 applies ***only*** to decrees of divorce that become final ***after*** the date of the enactment of the Act, which became law on December 23, 2016.[38] Appellant ignores the explicit language in 2017 NDAA as stated above, that the "frozen benefits rule" does not affect the Decree entered in this case.[39] According to the Senate Armed Services committee's report, it was the committee's intent that the amendment to 10 U.S.C. § 1408 to modify the computation of the division of military retired pay in a divorce decree would *not* affect existing divorce settlements.

Part II-Other Matters

> **Use of member's current pay grade and years of service, rather than final retirement pay grade and years of service, in a division of property involving disposable retired pay (sec. 642)**
>
> The committee recommends a provision that would amend section 1408 of title

[36] *Mansell v. Mansell*, 490 U.S. 581 (1989). The U.S. Supreme Court held that federal law prevents state courts from dividing veteran's or military disability benefits under a theory of community property or equitable distribution. 490 U.S. at 594-95.
[37] Later as revised in Section 624 of the NDAA of 2018.
[38] https://www.congress.gov/114/plaws/publ328/PLAW-114publ328.pdf, December 23, 2016, 130 STAT. 2164.
[39] https://www.congress.gov/114/plaws/publ328/PLAW-114publ328.pdf, December 23, 2016.

> 10, United States Code, to modify the division of military retired pay in a divorce decree to the amount the member would be entitled based upon the member's pay grade and years of service at the time of the divorce rather than at the time of retirement with the spousal share of the retired pay computed on the retired pay as adjusted by the annual increases in military pay. This provision is *prospective* only and *would not affect existing divorce settlements*. (emphasis added).[40]

Likewise, the House of Representatives Conference Report 114-840, provided that the amendment to 10 U.S.C. § 1408 that "would be prospective only and would not affect existing divorce settlements."[41]

While the law may have evolved in the interim, the fact is the revision relied upon by Appellant was not intended to apply retroactively. To do so would be tantamount to allowing thousands of decrees to be litigated anew, and this was not the intention of the revision. In this case, the divorce was finalized pursuant to the Decree entered years before the 2017 NDAA or its Section 624 revision in 2018. Thus, the Court in this matter was within its jurisdiction to honor the formula for calculating the division of the *eventual* military retirement benefits as set forth in the Decree. Both the magistrate and district courts properly determined Respondent's community property share of the disposable military retirement benefits at issue would be calculated using the time rule method.[42]

Test for Retroactivity.

The Supreme Court decision in *Landgraf v. USI Film Products* sets forth a two-part test to resolve questions of statutory retroactivity.[43] "The first is the rule that 'a court is to apply the law in effect at the time it renders the decision.'"[44] "The second is the axiom that '[r]etroactivity is not favored in the law,' and its interpretative corollary that 'congressional enactments and

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[40] *https://www.congress.gov/114/crpt/srpt255/CRPT-114srpt255.pdf, p. 168.*
[41] *https://asc.army.mil/web/wp-content/uploads/2019/03/NDAA-17.pdf, pp. 1056-57.*
[42] Number of days of marriage / Number of days of Respondent's active duty: 6,597 X 1 / 9,905 2 = 33%
[43] *Landgraf v. USI Film Products*, 511 U.S. 244 at 280 (1994).
[44] *Id.* (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)).

administrative rules will not be construed to have retroactive effect unless their language requires this result.'"[45] *Id.*

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.[46]

Here, 2017 NDAA Sec. 641(b)'s unambiguous language and the corresponding committee and conference reports regarding the same establish that Congress "expressly prescribed the statute's reach" – to decrees of divorce finalized *after* December 23, 2016.[47] Therefore this Court need not "resort to judicial default rules" to determine whether 2017 NDAA applies retroactively the parties' 2008 Judgment and Decree of Divorce.[48] The Appellant cannot satisfy the first prong of *Landgraf*'s two-part test.

In spite of the above, if analysis of the second prong of the *Landgraf* test were necessary, the Appellant would likewise be unsuccessful. The Supreme Court in *Lindh v. Murphy*, notes that the test for retroactivity "whether the new provision attaches new legal consequences to events completed before its enactment."[49] A retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability." [50] This inquiry is be guided by "considerations of fair notice,

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[45] *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)).
[46] *Id.* at 280.
[47] *Id.*
[48] *Id.*
[49] *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994).
[50] *Sturges v. Carter*, 114 U.S. 511, 519 (1885); see *Lohf v. Casey*, 330 F. Supp. 356, 359 (D. Colo. 1971) (retroactive legislation "take[s] away or impair rights acquired under prior law or * * * creates new disabilities with respect to

reasonable reliance, and settled expectations."[51]

Lastly, Appellant's 11th hour argument that the District Court's interpretation of the 2017 NDAA is inconsistent with the full language of the statute because the Decree was not the "final" order dividing military retirement is wholly unpersuasive. To bolster his case, the Appellant contends that the "final" order dividing military retirement was the entry of the *Order Clarifying Division of Military Retirement*, which course, was *after* the amendment was enacted. One might argue that the only reason Appellant sought clarification from the Magistrate Court to begin with was to find a path around the limitation of retroactive application of the amendment to decrees entered prior to December 23, 2016. Regardless, it is clear from the *Order Clarifying Division of Military Retirement* that the underlying final Decree remained unchanged. The subsequent "clarification" did nothing to modify or amend the effect or validity of the "time rule" formula to calculate Respondent's community property share of the disposable military retirement benefits upon Appellant's eventual retirement.

D. The Magistrate did not error in holding the decree of divorce reflected the parties' mutual intent regarding division of Appellant's military retirement was harmless error.

The Appellant takes issue with the Magistrate's Order, wherein the Court mistakenly made the finding that the parties intended to utilize the time rule method as evidenced in the stipulated Judgment. It is clear from the record that the Decree was entered by default and not by stipulation. The District Court properly concluded:

The mischaracterization does not affect the outcome.

See I.R.C.P. 61:

Harmless error. No error in either the admission or the exclusion of

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past transactions"), aff'd, 466 F.2d 618 (10th Cir. 1972).
[51] *Landgraf*, 511 U.S. at 270.

> evidence and no error or defect in any ruling or order or in anything done or omitted by the court or any of the parties is ground for granting a new trial or setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The judgment was consistent with the formula set forth in the complaint. The Appellant was served with the complaint and did not contest the formula.

V.

ATTORNEY FEES ON APPEAL

Respondent is entitled to her attorney fees and costs associated with this appeal pursuant to Idaho Code § 12-121, Idaho Rules of Family Law Procedure 901-909, and all other applicable state law.

VI.

CONCLUSION

For these reasons, Respondent asks this Court to deny Appellant's appeal and affirm the Magistrate Court's March 12, 2019 *Order Clarifying Division of Military Retirement* and the District Court's Opinion on Appeal, dated October 18, 2019.

DATED this 9th day of April, 2020.

DINIUS LAW

/s/ Kevin E. Dinius
By:_____
Kevin E. Dinius
Sarah Hallock-Jayne
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 9th day of April, 2020, I filed the foregoing electronically through the iCourt Idaho eFiling System, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the notice of electronic filing:

John A. Miller
BOISE LAW GROUP
250 S. 5th St., Suite 850
Boise, ID 83702

☐ US Mail
☐ Overnight Mail
☐ Hand Delivery
☐ Facsimile - No. (208) 388-1300
☒ E-file – *John@BoiseLawGroup.com*

/s/ Kevin E. Dinius

for DINIUS LAW

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