IN THE SUPREME COURT OF GUAM

MICHAEL C. HART,
Plaintiff-Appellant,

v.

LYNN E. HART,
Defendant-Appellee.

Supreme Court Case No. CVA07-009
Superior Court Case No. DM0332-98

OPINION

Cite as: 2008 Guam 11

Appeal from the Superior Court of Guam
Argued and submitted on February 20, 2008
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, JR., Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ALEXANDRO C. CASTRO, Justice *Pro Tempore*.

CARBULLIDO, J.:

[1] Plaintiff-Appellant Michael C. Hart (hereinafter "Michael"), appeals the Superior Court's grant of his motion which requested the court to clarify his Final Judgment of Divorce. This Final Decree of Divorce granted Michael a divorce from Defendant-Appellee Lynn E. Hart (hereinafter "Lynn") and contained an ambiguous provision that divided Michael's military retirement pay. For the following reasons, we affirm in part and reverse in part the judgment of the Superior Court and remand this matter for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On July 24, 1998, a Final Judgment of Divorce was granted to Michael divorcing him from Lynn. The Notice of Entry on the Docket for this final judgment was provided on July 29, 1998. The Final Judgment of Divorce incorporated the terms of the default Interlocutory Judgment of Divorce, which was also granted on July 24, 1998.

[3] Both parties agree on the following relevant facts: (1) Michael and Lynn were married on December 5, 1977; (2) Michael filed for divorce on Guam while he was stationed here with the Air Force; (3) Michael's promotion from Lieutenant Colonel (0-5) to Colonel (0-6) occurred after the parties' separation and the entry of the Final Judgment of Divorce; (4) Michael served in the Air Force for additional years after the separation and divorce, retiring in January 2007; and (5) Michael retired with 30 years of creditable service towards retirement pay.

[4] On November 1, 2006, Michael filed with the Superior Court a "Motion for Clarification Order" requesting the court clarify the provision in the Final Decree that provided Lynn with an interest in Michael's military retirement pay. Appellant's Excerpts of Record ("ER"), tab E

(Mot. for Clarification Order at 1). The provision covered by the motion states that "[w]ife shall receive 50% of 20 years interest in husband's U.S. Air Force retirement pension." Appellant's ER, tab B (Interlocutory J. of Divorce at 2).

[5] The Superior Court's Decision and Order of June 28, 2007 granted Michael's motion for clarification order and determined that the Final Judgment of Divorce provided Lynn a community property interest in Michael's retirement pay as increased by his post-separation promotion and additional years of service. The Superior Court also determined that the community interest in Michael's retirement equated to "20.33" years.[1] Appellant's ER, tab J (Decision and Order at 5). The Decision and Order was entered on the docket, and Michael timely filed this appeal. Neither party contested the Superior Court's jurisdiction over the motion for clarification. We ordered further briefing to allow the parties to address the Superior Court's jurisdiction over the motion.[2]

II. JURISDICTION

[6] The Final Judgment of Divorce was signed on July 24, 1998, and the Notice of Entry on the Docket was provided on July 29, 1998. Under the former Guam Rules of Appellate Procedure ("GRAP"), which were applicable in 1998, the thirty-day time period for appealing a final judgment began to run after the entry of the Notice of Entry on the Docket. *Sky Enter. v. Kobayashi,* 2002 Guam 24 ¶ 17. Neither an extension of time nor a notice of appeal was filed regarding the Final Judgment of Divorce. Therefore, the time for appealing the Final Judgment

[1] Without explanation, the Superior Court used "20.33" as the "years of service during marriage before separation" in the numerator of its apportionment equation. Appellant's ER, tab J (Decision and Order for Mot. for Clarification Order at 5). The 1998 Interlocutory Decree incorporated into the Final Decree was based on 20 years interest in husband's retirement pension.

[2] The Final Judgment of Divorce was entered on July 29, 1998, and the question arose as to whether the Superior Court had jurisdiction to modify a final decree of divorce many years after the time for appealing the final decree had expired.

of Divorce expired in August of 1998, and the judgment became a final judgment not subject to appeal. *See* Former Guam R. App. P. 4.

[7] After a final decree of divorce becomes final, a trial court may not modify the decree regarding property matters. *Puckett v. Puckett*, 136 P.2d 1, 5 (Cal. 1943); *Dupont v. Dupont*, 48 P.2d 677, 677 (Cal. 1935); *Mueller v. Walker,* 213 Cal. Rptr. 442, 444 (Ct. App. 1985); *see Moore v. Moore,* 456 P.2d 403, 405 (Ariz. Ct. App. 1969). The Superior Court and the parties did not explain under what rule or jurisdictional theory the Superior Court acted in interpreting the Final Decree. The jurisdictional issue presented in this case is the Superior Court's jurisdiction to interpret the Final Decree's statement regarding Lynn's community property interest in Michael's military retirement pay. "Jurisdictional issues may be raised by any party at any time or *sua sponte* by the court." *Rojas v. Rojas*, 2007 Guam 13 ¶ 5.

[8] Michael styled his motion as a "Motion for Clarification Order," Appellant's ER, tab E (Mot. for Clarification Order at 1), but he does not cite to any Guam Rule of Civil Procedure that would allow this motion or explain how the Superior Court had jurisdiction to enter the order. In his one sentence statement of jurisdiction provided in the Opening Brief for this appeal, Michael makes no argument for the Superior Court's jurisdiction to rule on the motion.[3]

[9] The Superior Court stated in granting the motion that "[a]s the Final Judgment did not clearly specify the manner in which Defendant's share of the pension benefits would be determined and at what point in time such share is to be distributed, Plaintiff's motion for clarification is appropriate. See *Chavez v. Chavez*, 909 P.2d 314, 315 (Ct. App. Div.1996)." Appellant's ER, tab J (Decision and Order at 2). This is the only explanation provided by the

[3] GRAP Rule 13 requires that "[t]he appellant's brief must contain . . . a jurisdictional statement, including . . . the basis of the Superior Court's subject matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction." GRAP 13(a)(4)(A) (2007).

Superior Court for its jurisdiction to enter an order "clarifying" a final judgment. However brief, there is merit to the Superior Court's assertion.

[10] The Court of Appeals of Washington, in the *Chavez* case relied upon by the Superior Court, stated that "[i]f a [divorce] decree is ambiguous, it may be subject to a declaratory action to determine the parties' rights and liabilities. The decree in this case is clearly ambiguous because it does not specify how, and at what point in time, [husband's military] pension is to be divided in half." *Chavez v. Chavez*, 909 P.2d 314, 315 (Wash. Ct. App. 1996); *see also In re Marriage of Jennings*, 980 P.2d 1248, 1255 (Wash. 1999) (stating that when a divorce decree is ambiguous it can be subject to a declaratory action to ascertain the rights and duties of the parties). The use by Washington State courts of the declaratory judgment action to interpret a final divorce decree was explained in *In re Marriage of Mudgett,* 704 P.2d 169, 172 (Wash. Ct. App. 1985). The *Mudgett* court stated:

> The precise issue of whether a party to a dissolution may later bring an action for declaratory judgment to interpret the dissolution decree or any contract merged therein has not been decided by courts in Washington. However, courts in other jurisdictions have decided this issue. In Georgia, the court has held that "[a] declaratory judgment is an appropriate means of ascertaining one's rights and duties under a contract and decree of divorce." While the general rule is that such a proceeding is an inappropriate way to question a final judgment or decree that is clear and unambiguous, where language of a decree is ambiguous, construction of the effect of this language is a proper subject of a declaratory judgment action.

Id. (footnote and citation omitted) (quoting *Bache v. Bache,* 239 S.E.2d 677, 678 (Ga. 1977).

[11] While Washington State courts have adopted declaratory judgments as a method for trial courts to clarify ambiguous divorce decrees, including decrees that contain ambiguous provisions regarding military retirement pay, this court has not passed on the issue. However, requiring an interested party to request declaratory relief to interpret an ambiguous divorce decree is

appropriate, and we adopt this method. Our adoption is supported by three parallels between Washington and Guam law.

[12] First, Washington and Guam use the community property method to divide property on divorce. Wash. Rev. Code Ann. § 26.09.080 (West 2008); 19 GCA § 8411 (2005). Second, courts in Washington adopted the use of declaratory judgment actions regarding ambiguous divorce decrees into a rules of civil procedure based system that, like our system, is based on a framework of the Federal Rules of Civil Procedure. *Compare* Wash. Superior Court Civ. R., *and* Guam R. Civ. P., *with* Fed. R. Civ. P. Third, like the Washington trial courts, the Superior Courts of Guam are empowered to provide declaratory relief. *Chavez*, 909 P.2d at 315; 7 GCA § 26801 (2005).[4]

[13] Our adoption of the declaratory judgment method for interpreting ambiguous divorce decrees is further supported by the fact that California courts interpreting a declaratory judgment statute that is nearly identical to 7 GCA § 26801 determined that declaratory relief was available regarding divorce decrees.[5] *Putnam v. Putnam*, 125 P.2d 525, 526-27 (Cal. Dist. Ct. App. 1942)

[4] Title 7 GCA § 26801 states:

> Any person interested under a deed, will, or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over, or upon property, or with respect to the location of the natural channel of a water course, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the court having jurisdiction for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

7 GCA § 26801 (2005).

[5] Title 7 GCA § 26801 originated from Guam Code of Civil Procedure § 1060. 7 GCA § 26801, Source. Section 1060 of the Guam Code of Civil Procedure originated in California Code of Civil Procedure § 1060. Guam Code Civ. Proc. § 1060, Foreword (1953). Title 7 GCA § 26801 is identical to the original California section 1060, which was adopted as Guam's section 1060. *Compare Blakeslee v. Wilson*, 213 P. 495, 496 (Cal. 1923) (quoting original

(explaining that declaratory relief under California Code of Civil Procedure § 1060 was available to determine rights of parties under a separation agreement that was incorporated into the decree of divorce). Cases interpreting the California statute that was the source of our code section are persuasive. *See Cruz v. Cruz*, 2005 Guam 3 ¶ 9.

[14] Because Washington State and Guam share the community property method of dividing property on divorce, have similar rules of civil procedure, and provide the declaratory judgment power to the trial court, our adoption of the declaratory judgment method to interpret ambiguous divorce decrees is appropriate. Furthermore, this determination is supported by the use of a nearly identical statute in California to declare rights under decrees of divorce. We, therefore, adopt the declaratory judgment method to interpret ambiguous divorce decrees and find that the Superior Court had jurisdiction under 7 GCA § 26801 to interpret the ambiguous military retirement provision of the Final Decree of Divorce in this case.

[15] The Superior Court did not rely on 7 GCA § 26801 when it clarified the final judgment of divorce, and Michael did not cite to this law in his motion. However, this court "may affirm the judgment of a lower court on any ground supported by the record." *Ceasar v. QBE Ins. (Int'l), Ltd.*, 2001 Guam 6 ¶ 8; *see also Perfect 10, Inc. v. Visa Int'l Serv. Ass'n,* 494 F.3d 788, 794 (9th Cir. 2007) ("The court may . . . affirm on any ground supported by the record even if the district court did not consider the issue."); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 874 (9th Cir. 1987) ("We may affirm the [trial court] on any ground supported by the record, even if the ground is not relied on by the [trial court].").[6]

California Code of Civil Procedure § 1060), *with* 7 GCA § 26801; GCCP § 1060. California section 1060 continues to be the law in California though it has been subject to minor changes starting in 1965. *See* Cal. Civ. Pro. Code § 1060 (West 2007).

[6] In the interest of judicial economy, we will treat the Motion for Clarification Order as an action for declaratory judgment made pursuant to 7 GCA § 26801. *Cf. Young v. Young*, 723 P.2d 12, 13 n.1 (Wash. Ct. App. 1986).

[16] With the Superior Court's jurisdiction to interpret the ambiguous divorce decree established, we now examine the court's jurisdiction to divide military retirement benefits in a divorce under 19 GCA § 8411.[7] In 1982, Congress enacted the Uniformed Services Former Spouses Protection Act ("USFSPA") in order to allow state court's to divide military retirement benefits on divorce.[8] 10 U.S.C.A. § 1408 (Westlaw through P.L. 110-247 (excluding P.L. 110-234 and 110-246) approved June 20, 2008). The legislation was in response to the United States Supreme Court's ruling in *McCarty v. McCarty*, 453 U.S. 210 (1981).[9] *In re Marriage of Smith*, 56 Cal. Rptr. 3d 341, 344 (Ct. App. 2007). In *McCarty*, the Court determined that federal law preempted state courts from granting a community property interest in military retirement benefits. 453 U.S. at 234-36. Title 10 U.S.C. § 1408 states that "a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."[10] 10 U.S.C.A. § 1408(c).

[17] Due to 10 U.S.C. § 1408(c), the Superior Courts of Guam have jurisdiction to treat military retirement pay in accordance with Guam's community property laws. Furthermore, the Superior Courts have jurisdiction to divide community property upon the dissolution of

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However, in the future, a party, in order to avoid dismissal for lack of jurisdiction, should request clarification of an ambiguous divorce decree by clearly filing an action for declaratory judgment under 7 GCA § 26801.

[7] Title 19 GCA § 8411 states in relevant part that "[i]n case of the dissolution of marriage by decree of a court of competent jurisdiction, the community property . . . shall be equally divided between the parties." 19 GCA § 8411(b) (2005).

[8] Title 10 U.S.C. § 1408(a) defines court as "any court of competent jurisdiction of any State . . . [and] Guam." 10 U.S.C.A. § 1408(a)(1)(A).

[9] 2 Brett R. Turner, *Equitable Distribution of Property* § 6:3 at 13-14 (3d ed. 2005) ("If ever an Act of Congress has directly overruled a Supreme Court decision, *McCarty* is the decision and the USFSPA is the Act.").

[10] June 25, 1981 is the day prior to the Supreme Court's ruling in *McCarty*. 453 U.S. at 210.

marriage. 48 U.S.C.A. 1424-1(d) (Westlaw through P.L. 110-247 (excluding P.L. 110-234 and 110-246) approved June 20, 2008); 7 GCA §§ 3105 and 4101 (2005); 19 GCA § 8411. Therefore, the Superior Court had jurisdiction in this matter.

[18] We have jurisdiction over this final declaratory judgment rendered by the Superior Court. 48 U.S.C. § 1424-1(a)(2); 7 GCA §§ 3107 and 3108(a) (2005).[11]

III. STANDARD OF REVIEW

[19] In its Decision and Order, the Superior Court made three determinations that are implicated in this appeal. The court first provided a declaratory judgment regarding its construction of the ambiguous Final Decree of Divorce. The court then characterized Michael's military retirement pay, including the increase in pay due to the post-separation additional years of service and promotion, as containing a community property interest. Finally, the court used an apportionment method to divide mixed property. We will review and discuss separately the court's construction of the Final Decree of Divorce, its characterization of the property interest, and the apportionment method utilized, including in each separate discussion the relevant standard of review.[12] Our analysis starts with declaratory judgment and ends with apportionment

[11] Due to Rule 58(b)(2)(B), Rule 58's requirement of a separate document is satisfied by the Decision and Order in this case. Guam R. Civ. P. 58(b)(2)(B) (2007).

[12] Both parties abandoned any pretense of articulating in their briefs what standard of review applied to the community property issues in this case. GRAP Rule 13 states that "appellant's brief must contain . . . for each issue, a concise statement of the applicable standard of review . . . ." GRAP 13(a)(9)(B). Furthermore, if "the appellee is dissatisfied with the appellant's statement . . . of the standard of review," the appellee should explain why appellant's statement is ineffective. GRAP 13(b)(5). Providing a list of possible standards for the court to choose from and apply itself does not comply with Rule 13.

IV. DISCUSSION

A. Declaratory Judgment

[20] When a Superior Court confronts a declaratory judgment action involving a possibly ambiguous divorce decree, the court's first step is to determine whether the final decree is actually ambiguous. *See Byrne v. Ackerlund*, 739 P.2d 1138, 1142-43 (Wash. 1987); *Chavez*, 909 P.2d at 315. If the language of the divorce decree is not ambiguous, a declaratory judgment action is not proper. *Byrne*, 739 P.2d at 1142. As with other written instruments, the court begins by looking at the plain meaning of the decree in order to determine whether ambiguity exists. *See Wasson v. Berg*, 2007 Guam 16 ¶ 10 ("[T]he intent of the parties to a contract is generally, and whenever possible, restricted by the plain meaning of the contract terms."); *People v. Lau,* 2007 Guam 4 ¶ 14 ("The inquiry into whether a statute is ambiguous begins with looking at the plain meaning of the language in question, and, when looking at the language, the court's task is to determine if the language is plain and unambiguous."). "'Where a judgment is ambiguous, a reviewing court seeks to ascertain the intention of the court entering the original decree by using general rules of construction applicable to statutes, contracts and other writings.'"[13] *Chavez*, 909 P.2d at 315-16 (quoting *In re Marriage of Sager*, 863 P.2d 106, 110 (Wash. Ct. App. 1993)); *see also In re Marriage of Smith*, 56 Cal. Rptr. 3d at 344.

[21] "Construction of a decree is a question of law." *Chavez*, 909 P.2d at 315. We review questions of law *de novo*. *Lamb v. Hoffman*, 2008 Guam 2 ¶ 11; *see also Chavez*, 909 P.2d at 315 ("[A question of law] is reviewed de novo."); *cf Leon Guerrero v. Moylan*, 2000 Guam 28 ¶

[13] *See also* 46 Am. Jur. 2d *Judgments* § 74 (West 2007) ("As a general rule, judgments are to be construed like other written instruments, and the legal effect of a judgment must be declared in light of the literal meaning of the language used. The unambiguous terms of a judgment, like the terms in a written contract, are to be given their usual and ordinary meaning. The determinative factor in interpreting a judgment is the intention of the court, as gathered, not from an isolated part thereof but from all parts of the judgment itself.") (footnotes omitted).

8 ("A divorce decree incorporating a settlement agreement is simply a consent decree. Decisions interpreting a consent decree and the agreements underlying them are reviewed *de novo.*").[14]

[22] The plain meaning of the portion of the Decree that covers Michael's retirement pay unambiguously provided Lynn with only twenty years of interest in the pay. In its declaratory judgment, the Superior Court erred in altering this unambiguous part of the provision of the Final Decree that divided Michael's retirement pay. The original Final Decree provided Lynn with half of "20 years interest" in the retirement pay. Appellant's ER, tab B (Interlocutory J. of Divorce at 2). However, the Superior Court used "20.33" years of interest in its apportionment equation. Appellant's ER, tab J (Decision and Order at 5). This change in the plain meaning of the Decree was an alteration. A final decree of divorce "is not subject to modification through a declaratory action." *Byrne*, 739 P.2d at 1144. Therefore, we find this portion of the Superior Court's judgment is in error, and on remand, the court is directed to use the appropriate "20" years of interest and not "20.33."

[23] Though the portion of the Decree covering retirement pay is unambiguous regarding the community's years of interest in Michael's military retirement pay, the remainder of the provision is ambiguous, because "it does not specify how, and at what point in time [Michael's] pension is to be divided in half."[15] *Chavez*, 909 P.2d at 315. Therefore, the Superior Court

[14] In *Leon Guerrero v. Moylan*, this court dealt with a settlement agreement that was incorporated into a divorce decree. *Leon Guerrero*, 2000 Guam 28 ¶ 8. We used rules of construction for contracts to interpret the consent decree according to the parties' intent. *Id.* ¶ 16.

[15] The ambiguity in the Final Decree in this case is doubly problematic, because the Defense Finance and Accounting Service ("DFAS") cannot determine from the ambiguous terms covering Michael's military retirement pay what portion to directly pay Lynn. *See* Defense Finance and Accounting Service Garnishment Operations, Uniformed Services Former Spouses' Protection Act, Dividing Military Retired Pay at 3-7 (Aug. 7, 2007), *available at* http://www.dfas.mil/garnishment/military/speech8.pdf (providing an explanation of the USFSPA and how a final decree should be drafted in order to allow for payment by DFAS under the USFSPA).

properly determined that the ambiguous decree was subject to a declaratory judgment action regarding the provision covering Michael's military retirement pay.

B. Characterization

[24] Characterization is generally the first step in the process of dividing property on divorce. *See Sattler v. Mathis*, 2006 MP 6, 2006 WL 897140, at *5; 19 GCA § 8411 (providing jurisdiction for court to divide community property only); 19 GCA § 6101 (2005) (defining community and separate property).[16] Characterization of property in a marital dissolution action is the determination by the trial court of what property owned by the parties is separate or community property. *See In re Marriage of Lehman*, 955 P.2d 451, 459 (Cal. 1998). A trial court's characterization of property as community or separate is reviewed *de novo*. *Sattler*, 2006 WL 897140, at *5; *In re Marriage of Chumbley,* 74 P.3d 129, 131 (Wash. 2003); *Lehman*, 955 P.2d at 459-60.

[25] The Superior Court characterized Michael's military retirement pay, including the increases due to post-separation additional years of service and promotion, as containing a community interest. Therefore, the characterization questions presented are whether the Superior Court erred in treating retirement pay as being subject to characterization as community property in general, and whether the court erred in characterizing the military retirement pay, including the increase in pay due to the post-separation promotion and additional years of service, as containing a community interest. Reviewing *de novo* the Superior Court's characterization of Michael's military retirement pay, for the following reasons, we find no error.

[16] *See also* 33 Cal. Jur. 3d *Family Law* § 754 ("Because the court generally has jurisdiction to divide only the community estate, consisting of the community and quasi-community assets and liabilities, it must first characterize the property by determining the nature of the property of the parties for each item of property the parties cannot agree to divide themselves.").

[26] Michael, for good reason, does not contest that his military retirement benefits can be characterized as community property and are divisible in divorce.[17] The right to retirement benefits is a property interest, and to the extent that the interest derives from employment during the marriage, it is a community asset.[18] *Lehman*, 955 P.2d at 454; *see* 19 GCA § 6101(b) ("*Community property* means property acquired by either spouse during marriage which is not separate property."). As a community property asset, the right to military retirement benefits is a property interest that may be characterized as community property under 19 GCA § 6101 and divided in the dissolution of a marriage under 19 GCA § 8411. Therefore, the Superior Court correctly determined that Michael's military retirement pay could be characterized as community property and divided on divorce.

[27] Michael's challenges to the Superior Court's judgment, however, were not directed at the general treatment of military retirement pay as community property. Michael argues that the increase in his retirement pay due to his post-separation promotion from Lieutenant Colonel (O5) to Colonel (O6) and additional years of service are separate property that cannot be characterized as community property. Michael's main argument is that New Mexico case law should be followed because "Chapter 6 of 19 GCA . . . . [was] primarily adopted from the New Mexico Property Law." Appellant's Opening Brief, p. 7. Citing *Franklin v. Franklin*, 859 P.2d 479 (N.M. 1993), Michael argues that New Mexico courts would not include the promotion and additional years as community property. However, for the following reasons, Michael's characterization arguments are unavailing.

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[17] *See* Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield*, 168 Mil. L. Rev. 40, 56 n.85 (2001) ("All states now have clearly ruled that military retired pay is divisible for property settlement purposes [in divorce]. The primary exception is Puerto Rico.")

[18] As one treatise has stated, "Almost all states now hold that retirement benefits of all types, vested or unvested, constitute property." 1 Brett R. Turner, *Equitable Distribution of Property* § 5:9 at 272 (3d ed. 2005).

[28] Guam precedent supports the Superior Court's characterization of Michael's retirement pay. The Appellate Division of the District Court of Guam affirmed a Superior Court's division of military retirement benefits in *Sablan v. Sablan,* 1979 WL 15117 at *1-2 (D. Guam App. Div. Feb. 15, 1979).[19] In *Sablan*, the court approved the use of an apportionment equation by the Superior Court to divide the husband's military retirement pay that placed the length of the marriage in the numerator and the total length of the husband's military service in the denominator. 1979 WL 15117 at *1. The court in *Sablan* also used the military member's total final retirement pay as the multiplier. *Id.* The equation in *Sablan* was adopted from *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974). *Sablan,* 1979 WL 15117 at *1.[20] The case before this court today differs slightly from the facts in *Sablan*, because, in *Sablan*, the military spouse was already retired at the time of divorce. However, the "*Fithian* formula," affirmed in *Sablan*, *id.*, originated in a case where the formula included retirement pay "as he receives them." *Fithian*, 517 P.2d at 450-51 (overruled on other grounds by *In re Marriage of Brown*, 126 Cal. Rptr. 633, 641-42 n.14 (Cal. 1976)).

[29] This court does not divert from precedents set by the Appellate Division of the District Court of Guam unless reason supports deviation. *In re Camacho*, 2006 Guam 5 ¶ 51 n.10. The precedent set in *Sablan* supports the Superior Court's characterization of Michael's entire retirement pay as received, including the increases in pay due to promotion and additional years,

[19] Any argument that *Sablan* was overruled by the later issued Supreme Court opinion in *McCarty* would lack merit, because "law treating military retirement pensions as community property is no longer preempted [by Federal Law in accordance with *McCarty*]. The Act's legislative history clearly indicates Congress' intent to abrogate all applications of the *McCarty* decision." *In re Marriage of Buikema,* 188 Cal. Rptr. 856, 857 (Ct. App. 1983). Neither party cited to *Sablan.*

[20] The complete equation multiplied one half times the total retirement pay times the fraction represented by the length of marriage in the numerator and the total length of military service in the denominator. *Sablan,* 1979 WL 15117 at *1. The *Sablan* court affirmed the award of less than the "*Fithian* formula" result due to "extreme cruelty" by the wife. *Id.* at *1.

as containing a community property interest. Michael's argument for following New Mexico case law, even if valid, would likely not provide sufficient reason to deviate from *Sablan*, but, his argument also lacks merit.

[30] Michael's argument for following New Mexico case law lacks merit, because he made an error in his comparison of statutes. Michael compares 19 GCA § 6101(a)(1) to, according to him, an identical New Mexico statute, "NMSA 1978 sec. 40-3-8(A)(1)." Appellant's Opening Brief, p. 8. Title 19 GCA § 6101(a)(1) states that "[*s*]*eparate property* means . . . property acquired by either spouse before marriage or *after entry of a decree of dissolution of marriage*." 19 GCA § 6101(a)(1) (second emphasis added). Property acquired "while living separate and apart from the other spouse" is defined as separate property by 19 GCA § 6101(a)(2).[21] In this case, the Superior Court used the parties' separation date to characterize the property under 19 GCA § 6101(a)(2). *See* Appellant's ER, tab J (Decision and Order at 5 (using "years of service during marriage before *separation*" in the numerator (emphasis added))).

[31] Michael did not contest the Superior Court's use of the separation date to characterize the property, and he actually uses in his "correct calculation" a numerator that includes the "years of service during marriage before separation." Appellant's Opening Brief, p. 6. Therefore, Michael has made a comparison to the wrong statute for this case. The New Mexico statute selected for comparison by Michael does not contain a provision that is similar to 19 GCA § 6101(a)(2). *See Stephens v. Stephens*, 595 P.2d 1196, 1197-98 (N.M. 1979) (quoting paragraph (a)(2) of "Section 40-3-8, N.M.S.A. 1978" as "property acquired after entry of a decree entered pursuant to Section

[21] Title 19 GCA § 6101(a)(2) states that "*Separate property* means . . . property and earnings of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse." 19 GCA § 6101(a)(2).

40-4-3 NMSA 1978 unless the decree provides otherwise"). Title 19 GCA § 6101(a)(2) instead appears to have come from California law.

[32] Guam Civil Code § 155(a)(2), the identical precursor to 19 GCA § 6101(a)(2), was enacted by Public Law 15-113 on March 20, 1980. Guam Pub. L. 15-113 (March 20, 1980). The compiler of law stated regarding 19 GCA Chapter 6 that "[t]he final version of this Chapter was taken from California law since the prior Guam law also cam [*sic*] from California and this amendment was merely to bring the Guam law of Community Property up to date (at the time)." Title 19 GCA, Chapter 6, Note. California Civil Code section 5118 was amended in 1972, *Marvin v. Marvin*, 557 P.2d 106, 115 n.7 (Cal. 1976), to read that "'[t]he earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse,'" *In re Marriage of Bouquet*, 546 P.2d 1371, 1372 n.1 (Cal. 1976) (quoting Civil Code § 5118).

[33] Comparing section 5118 to section 6101(a)(2) of our code in light of the timing of the enactment of the source of section 6101 and the note by the compiler, it is obvious that California Civil Code section 5118 is the source of 19 GCA § 6101(a)(2), the relevant characterization statute for this case. We have stated that we find persuasive California cases interpreting a California statute that was the source of our code section. *See Cruz*, 2005 Guam 3 ¶ 9. The relevant provisions of section 5118 remain in the California code today, though now codified as California Family Code section 771.[22] The relevant part of California Family Code §

[22] California Family Code section 771 states in relevant part that "[t]he earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse." Cal. Family Code § 771(a) (West 2000). According to the Law Revision Commission Comment to section 771, "[s]ection 771 continues former Civil Code Section 5118 without change." Cal. Family Code § 771, Comment (West 2000).

771 is identical to former section 5118, which, in turn, is the source of and nearly identical to our code section 6101(a)(2).

[34] The Supreme Court of California cited to section 771 in *Lehman*, 955 P.2d at 454, when it determined that "a nonemployee spouse who owns a community property interest in an employee spouse's retirement benefits owns a community property interest in the latter's retirement benefits as enhanced." *Id.* at 460. Though *Lehman* involved increases in retirement pay due to early retirement incentives, *id.* at 453, the court explained that the enhancement was "no different from an enhancement effected through 'additional years of service,' 'increase in earnings,' or 'increase in age' - which is uncontestedly a community asset." *Id.* at 460 (quoting *In re Marriage of Adams*, 134 Cal. Rptr. 298, 302 (Ct. App. 1976)).

[35] The California Supreme Court, under a code section that shares a common source as section 6101(a)(2), has characterized retirement pay as enhanced as containing a community property interest. Therefore, we find *Lehman* to be persuasive for our determination regarding the characterization of Michael's retirement pay. *See Cruz*, 2005 Guam 3 ¶ 9. Furthermore, *Lehman* is compelling even without resort to the lineage of our code, because the court's reasoning is cogent. While discussing the characterization of the enhanced retirement benefits as containing a community property interest, the court explained that "[h]usband's right to retirement benefits, which accrued, in part, during marriage before separation, underlies the right to the enhancement, which is derivative thereof." *Lehman*, 955 P.2d at 460. We adopt this reasoning from *Lehman* and apply it to this case.

[36] Michael's right to military retirement benefits accrued in part during the marriage and the increase in retirement pay due to his additional years of service and promotion are derivative from the years of service and promotions attained prior to his separation from Lynn. Stated

plainly, Michael did not attain his promotion to Colonel without serving at a lower rank during the marriage, and he did not reach thirty-years of service without serving twenty prior to separation. Michael's service during the marriage underlies his post-separation promotion and additional years of service, which enhanced his retirement pay.

[37] The Superior Court's characterization determination is supported by the District Court Appellate Division's ruling in *Sablan*, California case law interpreting the source of our statute, and the compelling reasoning from *Lehman*. Therefore, we find that the Superior Court did not err in characterizing Michael's retirement pay as increased by his post-separation promotion and additional years of service as containing a community property interest. We now turn to the Superior Court's choice of apportionment method.

C. Apportionment

[38] Apportionment is used "[w]hen a trial court concludes that property contains both separate and community interests." *In re Marriage of Gowan*, 62 Cal. Rptr. 2d 453, 456-57 (Ct. App. 1997). When property contains both separate and community interests, it may be referred to as mixed property. *See Sattler*, 2006 MP 6, 2006 WL 897140, at *4. Apportionment and apportionment method equations define the community's interest in mixed property. *See id.*; *Gowan*, 62 Cal. Rptr. 2d at 456-57. Apportionment is an "intermediary step . . . [that] comes after the asset is characterized, but before it is divided." *Sattler*, 2006 MP 6, 2006 WL 897140, at *4.

[39] The Supreme Court of the Commonwealth of the Northern Mariana Islands has confronted the issue of what standard of review to apply to a trial court's apportionment of retirement benefits. *Id.* at *4-5. While ultimately determining that a more deferential standard than *de novo* review would be applied to the trial court's apportionment of mixed property, the

Sattler court noted that "[a]pportionment would seem to be a more factual inquiry than asset characterization . . . . [and] seems to lie in the middle ground between *de novo* and discretionary review standards." *Id.* at *4-5. The *Sattler* court applied the same more deferential standard of review to apportionment as the level of review applied to the trial court's division of community property, the abuse of discretion standard. *Id.* at *5. California courts also apply the more deferential abuse of discretion standard to a trial court's selection of an apportionment method. *Lehman*, 955 P.2d at 461. This is also the same standard of review that California courts use to review a trial court's division of community property. *In re Marriage of Quay*, 22 Cal. Rptr. 2d. 537, 540 (Ct. App. 1993).

[40] The Superior Court is in the best position to select the proper apportionment method to divide retirement benefits. *See Sattler* 2006 MP 6, 2006 WL 897140, at *5. Therefore, the Superior Courts of Guam will be allowed discretion in choosing an apportionment method. In determining our standard of review for the Superior Court's exercise of this discretion, we follow *Sattler* and the California courts and apply a more deferential standard of review to the Superior Court's selection of apportionment method that is also the same standard we apply to the Superior Court's division of community property. This court stated in *Sinlao v. Sinlao*, 2005 Guam 24, that:

> [W]e hold that, pursuant to 19 GCA § 8414, the trial court's division of property may be revised on appeal even where the trial court's action does not amount to an abuse of discretion. This authority to revise is to be used sparingly, however, and only where the trial court's division results in *manifest unfairness*.

Id. ¶ 10 (emphasis added).

[41] A Superior Court's selection of an apportionment method is, therefore, reviewed under the manifest unfairness standard from *Sinlao*. "Whatever the method that it may use, however,

the superior court must arrive at a result that is 'reasonable and fairly representative of the relative contributions of the community and separate estates.'" *Lehman*, 955 P.2d at 461 (quoting *In re Marriage of Poppe*, 97 Cal. App. 3d. 1, 11 (Ct. App. 1979)).

[42] In apportioning Michael and Lynn's community property interest in the military retirement benefits, the Superior Court used the time rule. Under the time rule method of apportionment, "the community property interest in retirement benefits is the percentage representing the fraction whose numerator is the employee spouse's length of service during marriage before separation . . . and whose denominator is the employee spouse's length of service in total." *Id.* at 454-55.[23] Using the time rule "is not unreasonable when the 'amount of the retirement benefits is substantially related to the number of years of service.' . . . Moreover, the *result* of the time rule is not unreasonable when the 'relative contributions of the community and separate estates' are accounted for." *Id.* at 461 (quoting *Poppe*, 97 Cal. App. 3d. at 8, 11).

[43] The Superior Court's use of the time rule to define and then divide the community's interest in the mixed property did not result in manifest unfairness in this case. The amount of Michael's military retirement pay is substantially related to the number of years he served. Furthermore, by using twenty years of service before separation in the numerator and thirty years of total service in the denominator, the result of the time rule will also account for the relative contributions of the community and separate estates. Therefore, the Superior Court did not err in using the time rule.

[23] The time rule equation in *Lehman* used to calculate the non-employee spouses interest in the retirement benefit as enhanced included the following steps: (1) determining the community property percentage from a fraction that included the years of employment during the marriage before separation in the numerator and the years of total service in the denominator; (2) multiplying this fraction by 1/2; and (3) multiplying the product of step (2) by the total retirement pay including the enhancements. 955 P.2d at 453-54, 461-62.

V. CONCLUSION

[44] We hold that the Superior Court had jurisdiction to provide declaratory relief under 7 GCA § 26801 regarding an ambiguous Final Decree of Divorce. Furthermore, we hold that the Superior Court correctly characterized Michael's military retirement pay, which included increases in pay due to post-separation additional years of service and a promotion, as containing a community property interest, and we affirm the Superior Court's use of the time rule method of apportionment to assign the community its interest in the mixed property. Because the Superior Court impermissibly altered the Final Decree by using "20.33" instead of "20" in its apportionment equation, we reverse that part of its Declaratory Judgment. Therefore, we **AFFIRM** in part and **REVERSE** in part the judgment of the Superior Court and **REMAND** this matter to the Superior Court for further proceedings consistent with this opinion.

ALEXANDRO C. CASTRO

ALEXANDRO C. CASTRO
Justice *Pro Tempore*

F. PHILIP CARBULLIDO

F. PHILIP CARBULLIDO
Associate Justice

ROBERT J. TORRES, Jr.

ROBERT J. TORRES, JR.
Chief Justice