

1 MR. FOSTER: Yes, sir.

2 THE COURT: Please be seated.

3 RAY FOSTER

4 called by the Defendant at about 2:57 p.m. and sworn by the
5 Court, testified:

6 DIRECT EXAMINATION

7 BY MR. CELELLO:

8 Q You are Ray Foster?

9 A Yes, sir.

10 Q Ray, you heard Mr. Hahner go through in detail the terms --
11 the majority of the terms in the Divorce Consent Judgment of
12 Divorce. Is there anything that was covered that you feel is
13 different than what you had agreed to or what is reflected in
14 the Judgment of Divorce?

15 A No, sir.

16 Q And you did have an opportunity to review the Judgment both
17 personally and with me, correct?

18 A Yes, sir.

19 Q Do you feel that given all the facts and circumstances of
20 courtship, marriage, and now ultimately your divorce that the
21 provisions are fair and equitable?

22 A Yes, sir.

23 Q You're asking the Court to impose them?

24 A Yes, sir.

25 Q With respect to your military service, you began in February,

1 1987, correct?

2 A Yes, sir.

3 Q Ended in September, 2007?

4 A Yes, sir.

5 Q You retired in September, 2007 and at the time of your
6 retirement your pay grade was E-7 or Sergeant First Class,
7 correct?

8 A Yes, sir.

9 Q You have two war zone combat duties - November, 2003 through
10 April, 2004 and November, 2005 through November, 2006,
11 correct?

12 A Yes, sir.

13 Q You had also did time in what is classified somewhat as a war
14 zone, that being Turkey, hardship tour, et cetera, in 1992,
15 correct?

16 A Yes, sir.

17 Q And you do receive currently VA disability benefits based on
18 injuries that you sustained during the Iraq War, correct?

19 A Yes, sir.

20 MR. CELELLO: Nothing further, Your Honor.

21 THE COURT: If you wouldn't mind staying seated for
22 a moment. Mr. Hahner, did you have any questions?
23 Otherwise, I have a question for counsel about one of the
24 provisions.

25 MR. HAHNER: Okay.

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THE COURT: At the bottom of page 4, under the heading of "Pension and Retirement Benefits," the paragraph begins, "If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled."

And maybe I'm missing something, but isn't he receiving some disability benefits presently due to a partial disability?

MR. FOSTER: Yes, sir.

MR. HAHNER: He is, Your Honor, and I realize that that language looks strange. He's only receiving a partial disability as I understand it, even though he may be trying to receive a complete disability.

My understanding is, if he actually receives the complete disability, it may -- there's a way that he can defer some of his retirement benefits into disability benefits and they can't be -- they're exempted from what can be divided. Okay?

So, you know, the provision doesn't necessarily relate to the facts and circumstances as they exist now because he is already receiving some benefits which some of his military pay is -- is deflected to. And that's not going to be divided. But it's my understanding that it's possible that he might have some more that he might be able to defer

1 if he becomes totally disabled. So that's why that provision
2 is in there.

3 THE COURT: Okay.

4 MR. HAHNER: And I looked and stared at it long and
5 hard and at the materials that I've got on military benefits
6 and how they're divided and concluded that it should prob --
7 that clause should probably be in there even though it
8 doesn't appear to make total sense. It would make a lot more
9 sense if he wasn't currently disabled at all.

10 MR. CELELLO: See there's two separate -- there's
11 two separate pools that we're talking about. You have VA
12 disability retirement, which is a VA determination, and then
13 you have the military retirement, which is what this is --
14 this is addressing. And we are going to ask the Court to
15 recognize that -- that his VA disability is not subject to
16 division by the Court. And Mr. Hahner and I, I believe, both
17 -- both agree with that determination.

18 So this provision goes more toward -- this
19 provision addresses the military retirement portion. And
20 where that comes in is if he becomes disabled and they try to
21 transfer money over to defer to the VA disability, you can't.
22 In other words, if Mr. Foster were to defer \$500 a month from
23 his regular retirement over to the VA disability retirement
24 because the VA disability retirement is not subject to
25 taxation, then this says, no, we're going to ignore you

1 transferring that \$500 over. In other words, it's a
2 prevention from Mr. Foster in the future trying to defer.

3 Now, it also is my understanding that that whole
4 system goes out the door in '09 anyway. There is no longer a
5 deferral of benefits.

6 MR. HAHNER: It's a mechanism for trying to prevent
7 dissipation of retirement benefits that she might be entitled
8 to. That's -- that's why it's in there, even though he's
9 already -- and we're acknowledging that the retirement -- or
10 the disability benefits he's getting are not marital property
11 because that's the correct statement of the law right now at
12 least in this state. So that's why that's in there that way.

13 THE COURT: All right, but, Mr. Foster, you do
14 acknowledge that if you were to defer any of your current
15 military retirement pay or convert it to disability pay, or
16 if your military retirement pay were reduced because the
17 level of your disability pay was increased, you acknowledge
18 this Court's ability to enforce payment to Ms. Foster the
19 level of benefits that she would be entitled presently from
20 your retirement pay?

21 MR. FOSTER: Yes.

22 THE COURT: Is that a correct statement?

23 MR. CELELLO: That's correct, Your Honor.

24 MR. HAHNER: That's correct.

25 MR. CELELLO: It's a goofy provision. I mean I

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understand it, but it's a goofy provision.

THE COURT: I understand. I just want to make sure everybody is on the same page.

That I think was the only question that I did have I'm sorry ... I'm a little confused as well about the survivor benefits. As long as the parties understand, it doesn't matter whether or not I'm confused about it. But presently if something were to happen to you, something unfortunate that --

MR. FOSTER: All my benefits would go to her.

THE COURT: All right.

MR. FOSTER: And I want them to go to my kids. See what I'm saying? I want my benefits -- if something was to happen to me, I want my benefits to go to my children.

THE COURT: All right.

MR. FOSTER: Not to her to just distribute the way she wants.

THE COURT: All right.

MR. FOSTER: I wouldn't -- I'm going to take her -- I want to take her off and put my kids on that survivor benefit plan so if something does happen to me, that an equal amount goes to all my children.

MR. HAHNER: Now, here's -- here's -- I don't see the problem with it, but Congress specifically exempted the portion of retirement pay that's used to provide survivor

1 benefits to an ex-spouse. The minute that those benefits are
2 given to somebody else, that money that's dedicated to paying
3 for those survivor benefits from the retirement benefits
4 becomes a divisible retirement benefit. So that's why we've
5 got it both ways.

6 You know, I'm not suggesting that he has to take
7 her off or that he has to continue the benefits. But there
8 is a consequence if he chooses to pay for those survivor
9 benefits from his military pay and takes Mrs. Foster off as
10 the beneficiary. Because then that \$121 becomes a divisible
11 item.

12 So we're not -- you know, he can -- he can pick and
13 choose what he wants to do.

14 THE COURT: But if he takes her off --

15 MR. HAHNER: Correct.

16 THE COURT: -- she may see some increase in her
17 monthly benefit?

18 MR. HAHNER: Right.

19 THE COURT: But if something -- if he were to have
20 an untimely death, she wouldn't receive anything from that
21 point forward.

22 MR. HAHNER: Once he's taken her off, no. And to
23 that extent, once he takes her off, then it is extinguished.

24 THE COURT: All right. And she understands that?

25 MR. HAHNER: Yes.

1 THE COURT: Okay.

2 MR. HAHNER: So there may be a point where she no
3 longer has an interest in those survivor benefits.

4 THE COURT: That's the way I was seeing it. I
5 wanted to make sure that she had the same understanding.

6 MR. HAHNER: Yep, yep.

7 THE COURT: So that I know that her agreement is
8 knowing and voluntary.

9 All right, that's all I have.

10 Mr. Hahner, did you have questions for the witness?

11 MR. HAHNER: I -- I don't believe so, Your Honor.

12 THE COURT: Mr. Foster, you may be excused with the
13 thanks of this Court and the People of the State of Michigan
14 for your service to the country.

15 THE WITNESS: Thank you.

16 (At about 3:06 p.m. - witness excused)

17 THE COURT: And, I'm sorry, Mr. Celello, I didn't
18 ask if you had any follow ups with regard to the Court's
19 questions, but I'm assuming you didn't.

20 MR. CELELLO: No, Your Honor, thank you.

21 THE COURT: Anything further then?

22 MR. HAHNER: Not from the Plaintiff.

23 MR. CELELLO: No, Your Honor. At this time I would
24 go ahead and withdraw the counter-claim. And the only other
25 issue is I believe on the record we're asking that the Court