

No. 48066-2-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

José Ocasio-Santiago
(nka José Ocasio-Christian),
Appellant,

v.

Kimberley Rockwood
(fka Kimberley Ocasio),
Respondent/ Cross-Appellant.

BRIEF OF RESPONDENT/
BRIEF OF CROSS-APPELLANT

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ASSIGNMENTS OF ERROR

The trial court erred by finding there had been a substantial change in circumstances that warranted a reduction in spousal maintenance and a termination date thereof.

Finding of Fact 1, CP 453.

The trial court erred by reducing Ms. Ocasio – Santiago’s spousal maintenance to \$1,400 per month.

CP 453 at 2.

The trial court erred by ordering that the last spousal maintenance payment to Ms. Ocasio – Santiago would be made on February 1, 2016, after which it would terminate.

CP 453 at 3.

The trial court erred by revising the award of attorney’s fees that had been granted in favor of Ms. Ocasio – Santiago.

CP 453 at 4.

**I. ISSUES PERTAINING TO RESPONDENT'S
CLAIMED ASSIGNMENTS OF ERROR
ON CROSS-APPEAL**

- A. Did the trial court err by modifying the Decree of Dissolution when it (1) reduced the amount of Kimberley's spousal maintenance and (2) ordered that the last payment of spousal maintenance would be February 1, 2016?

- B. Did the trial court err by revising the attorney's fee award made to Kimberley?

I. STATEMENT OF THE CASE

The marriage of Appellant, José Ocasio-Santiago and Respondent/Cross-Appellant, Kimberley Rockwood¹, was dissolved by agreement on June 6, 2014. CP 111-19. At that time, Kimberly's and José's son, R.O., was two years of age. CP 77, 95.

BACKGROUND

José is a Lt. Col. in the United States Army, having served since 1990, first in the reserves. CP 6. At the time of the divorce, José's annual salary was \$131,910. CP 95.

Kimberley is employed by the Department of the Army as a civilian, working as a Supervisory Health Systems Specialist for the U.S. Army Public Health Command /Army Institute of Public Health (Health Promotion & Wellness, Health Promotion Operations). CP 23, 25.

At the time of the divorce, Kimberley's annual income was \$140,160, including spousal maintenance received from José. CP 95. See also CP 47-52. Without spousal maintenance, her annual income was \$110,676. CP 96.

¹ For clarity and ease of reference, the parties will be referred to by their first names in this brief. No disrespect to the parties or the Court is intended by doing so.

During the course of his service in the military, José sustained several combat-related injuries that required surgeries. CP 9. In January 2014, José was diagnosed with Stage IIB testicular cancer. CP 9. Between January 2014 and April 2014, José had successful surgery and chemotherapy. CP 9.

On April 21, 2014, José e-mailed his attorney and his command declaring, "I found out that I officially beat cancer." CP 312-13, 320.

On February 18, 2015, José's family physician confirmed that José had sustained several "combat injuries" and that he had undergone successful cancer surgery and chemotherapy between January 2014 and April 2014. CP 9. He stated that José's "medical conditions" had not "prevented him from executing his duties as an Army leader." CP 9. José was fit for duty. CP 9.

José was eligible to retire from the Army in November 2014. CP 54. However, because he had transferred his 9/11 G.I. Bill benefits to R.O., he was obligated to remain on active duty until February 2016. CP 5, 54.

Kimberley and José were able to reach agreement as to the terms of the dissolution after prolonged negotiations. CP 76 – 99, 100 – 110, 111 – 121; CP 15 (e-mail from José to Kimberley, offering a "very generous advantage" in the property division, with José stating it was "what

[Kimberley] deserve[d]"). Final agreed orders dissolving the marriage were entered on June 6, 2014. CP 76 – 99, 100 – 110, 111 – 121.

The final agreed order of child support reflects a monthly transfer payment of \$1,478.62. CP 82. The child support worksheet indicates a basic child support obligation of \$850.54, plus his proportionate share of child care, which is \$450 per month. CP 96, 145 (at lines 9, 11a). José agreed to a slight upward deviation (an extra \$178) because the parties' combined monthly net income exceeded \$12,000 and "in an attempt to equitably accommodate [Kimberley's] financial need, and **to honor her past involvement and assistance" with José's career path**, and because he has significant earning potential and the ability to accrue "lifetime benefits." CP 84 at para. 3.7 (emphasis added).

The final order of child support also states that the agreement to pay child support at that level was intended to continue until José "retires from military service in 2016." CP 82, 84.

As another element of the agreed dissolution, Kimberley was awarded spousal maintenance

agreed by the parties in order to address the need for health care and other expenses[.] Petitioner agrees to pay the respondent the sum of \$2,457.04 monthly on the first of every month beginning on June 1, 2014 until petitioner retires from military service.

CP 114-15, 104-05.

In addition, Kimberley was awarded forty-seven percent (47%) of José's "net disposable retirement pay" at the time of José's retirement. CP 119.

The initial QDRO pertaining to José's retired pay was entered by the Court on June 6, 2014. Sealed Financial Source Document (June 6, 2014).² It was drafted by José's attorney. Sealed Financial Source Document (June 6, 2014).³

Kimberley later testified that

Everything that was in the paperwork [referring to the final agreed dissolution orders] was what [José] proposed to me. He hired the lawyer. He filed for divorce. They submitted the terms to me. We went through it with mediation. I signed the joinder, and we completed the divorce without me even having any representation.

CP 183.⁴ José's attorney drafted the final pleadings. CP 76 – 99, 100 – 110, 111 – 121, 210.

The initial QDRO was not processed by the Defense Finance and Accounting Service (DFAS). CP 12, 30-31, 56-57. DFAS required a clarifying order specifying what was awarded to Kimberley. CP 12-13. DFAS was "unable to determine what [Kimberley was] awarded from [José's] military retired pay in the initial QDRO. CP 12. DFAS advised

² See Appellant's supplemental designation of clerk's papers.

³ See Appellant's supplemental designation of clerk's papers.

⁴ Kimberley did briefly have an attorney very early on in the proceedings. However, José was unhappy with that attorney and retained his own counsel instead, who assisted with negotiations and drafted the final agreed pleadings. CP 400.

Kimberley to “obtain a certified copy of a clarifying order awarding either a fixed amount or a percentage of [José’s] retired/retainer pay, or which provides a formula wherein the only missing element is the denominator (member’s years of service).” CP 12.

In October of 2014, Kimberley accepted the same position, but as an employee of the Department of the Army, rather than being a contract employee. That position became effective November 3, 2014. CP 23-25.

Petition to Modify Spousal Maintenance or Vacate Decree of Dissolution

On March 23, 2015, José filed a petition to modify the spousal maintenance award, or, in the alternative, vacate the decree of dissolution. CP 124 - 27.

José argued a substantial change in circumstances as the basis for seeking a change to the spousal maintenance awarded to Kimberley. CP 125 at para. 1.4. First, José claimed that due to “unforeseeable health related circumstances” he would not be able to retire from the military earlier than February 2016, or 12 months beyond the agreed upon term for spousal support. CP 125 at para. 1.4.

José next claimed that Kimberley had obtained permanent employment, health insurance and financial stability such that spousal maintenance was no longer warranted. CP 125 at para. 1.4. José sought

termination of his obligation to pay spousal maintenance as of the date of filing the petition, or March 23, 2015. CP 126 at para 1.5.

In the alternative, José argued that the decree should be vacated pursuant to Civil Rule (CR) 60(b) based on “Mistake, Newly Discovered Evidence and Other Reasons justifying relief from the operation of judgment.” CP 125 at para 1.04, CP 126 at para. 1.6.

Kimberley denied that there had been a substantial change in circumstances, disagreed that José was set to retire from the military at the time the parties signed the decree of dissolution, denied that José was set to retire 12 months beyond the agreed upon date to pay spousal support, denied that she had gained “permanent employment” that afforded her financial stability to the extent spousal support was no longer warranted. CP 334-35.

Motion to Enforce Decree of Dissolution, Presentation of QDRO and for Attorney’s Fees

On May 7, 2015, Kimberley sought enforcement of the Decree of Dissolution and entry of her proposed Clarifying Military Pension Division Order. CP 336, 33 – 39.

In response, José obtained counsel who prepared a Proposed Order Directing Military Retired Pay. CP 41 – 45. Rather than awarding Kimberley 47% of José’s disposable retired pay as agreed, this order

awarded Kimberley 50% of the disposable retired pay that accrued during the parties' marriage instead (meaning the date of marriage through the date of separation). CP 43.

José's Motion for Order Modifying and/or Vacating Decree of Dissolution

In response to Kimberley's motion, José also brought a motion to modify or vacate the Decree of Dissolution pursuant to his petition. CP 348-49; CP 124-27.

José argued that he was "literally dying and under significant emotional distress while attempting to negotiate with Kimberley" at the time he and Kimberley separated and that Kimberley took advantage of José's emotional strain, thereby obtaining a "one-sided settlement." CP 356.

In his motion, José repeated his argument that a substantial change of circumstances sufficient to justify modification of the spousal maintenance award to Kimberley had occurred. CP 346. Specifically, he argued that

1. Kimberley had obtained "more preferential hiring status" than she had at the time the Decree of Dissolution was entered (entitling her to medical insurance, a retirement plan, etc.).
2. Kimberley had tripled her savings in less than one year, further reducing her need for spousal maintenance.

3. He could not retire from the U.S. Army “due to the need for continuing medical care for his cancer diagnosis and other injuries.”

CP 346.

José also disagreed with Kimberley’s proposed Clarifying Military Pension Division Order, arguing that it awarded Kimberley 47% of his “overall retirement, or 47% of “all of” his retirement. CP 351.⁵

On May 22, 2015, Judge Leanderson denied Kimberley’s motion without prejudice to enforce the decree of dissolution and enter the Clarifying Military Pension Division Order. CP 372, 373-74. She did that in order for the motion to be heard together with José’s motion to adopt his proposed Order Directing Military Retired Pay and the motion on his petition to vacate or modify the decree of dissolution by a Court Commissioner. CP 372, 373-74.

A Court Commissioner Approved Kimberley’s Proposed Clarifying Military Pension Division Order and Denied José’s Motion to Vacate or Modify the Decree of Dissolution.

Court Commissioner Diana Kiesel approved Kimberley’s proposed Clarifying Military Pension Division Order on June 24, 2015. CP 69-75. The order specifies that Kimberley is to receive “an amount equal to Forty

⁵ In the interim, Kimberley had brought a motion for summary judgment on the issue of vacation or modification of the decree of dissolution. The record on appeal does not include the motion itself or the order; it does include José’s responsive declaration and responsive legal memorandum filed in opposition to Kimberley’s motion. CP 132-56, 215-23.

Seven Percent (47%) of [José's] disposable military retired pay[.]” CP 70, at para. 6.

Commissioner Kiesel also found there had been no substantial change in circumstances related to the award of spousal maintenance to Kimberley, and awarded Kimberley attorney's fees incurred by responding to José's motion. CP 424.

José's Motion for Revision

On July 2, 2015, José brought a motion for revision, seeking the following relief:

1. His motion to vacate or modify the Decree of Dissolution should be granted;
2. The court should find there was a substantial change in circumstances justifying modification of the Decree of Dissolution; specifically due to Kimberley's change in employment status.
3. Kimberley's request for attorney's fees should be denied; and

With respect to the Clarifying Military Pension Division Order,

4. Kimberley should receive fifty percent (50%) of José's disposable retired pay that accrued during the marriage (from the date of marriage through the date of separation).

CP 428-29.

Judge Leanderson heard José's motion for revision on August 28, 2015. RP (August 28, 2015). She declined to vacate the decree of dissolution but found and ordered as follows:

1. There was a substantial change in circumstances.
2. Effective September 1, 2015, Kimberley's spousal maintenance would be reduced to \$1,400 per month.
3. The last spousal maintenance payment would be made on February 1, 2016, at which time spousal maintenance would terminate.
4. Each party would pay their own attorney's fees, including the fees awarded at the June 24, 2015 hearing.

CP 452-53.

The order on revision is silent as to José's motion to revise the Clarifying Military Pension Division Order. CP 452-53. In addition, there was no oral argument devoted to the Clarifying Military Pension Division Order at the August 28, 2015 hearing. RP (August 28, 2015). Judge Leanderson's oral ruling did not mention the Clarifying Military Pension Division Order. RP (August 28, 2015).

José appeals Judge Leanderson's denial of his motion to revise the Clarifying Military Pension Division Order. CP 454-64.

Kimberley cross-appeals Judge Leanderson's revision of her spousal maintenance and attorney's fees awards. CP 452-53.

II. ARGUMENT

A. THE CLARIFYING MILITARY PENSION DIVISION ORDER IS NOT APPEALABLE.

1. The Clarifying Military Pension Division Order was not timely appealed.

RAP 2.2(a)(1) provides that “a party may appeal from . . . [t]he final judgment entered in any action or proceeding[.]”

RAP 5.2(a) partly provides:

(a) Notice of Appeal. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within . . . 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed[.]

José bases his appeal solely on the Court’s entry of the Clarifying Military Pension Division Order, entered by the Court on June 24, 2016. Br. of Appellant; CP 454-64.

In his Motion for Revision, among other relief requested, José sought revision of the Clarifying Military Pension Division Order. CP 428-29; CP 124-27, 350-54.⁶

The hearing on José’s motion for revision occurred on August 28, 2015. RP (Aug. 28, 2015). There was no reference whatsoever to the Clarifying Military Pension Division Order by either party in their oral arguments or by the Court in her oral ruling. RP (Aug. 28, 2015). In

⁶ José also sought revision of the order on his motion for vacation or modification of the Decree of Dissolution as it pertained to spousal maintenance and the award of attorney’s fees to Kimberley. CP 348-49, 355-62.

addition, the Order on Revision does not make any reference to the Clarifying Military Pension Division Order. CP 423-24. Therefore, appeal taken from this aspect of the order granting revision is improper. RAP 2.2(a)(1).

José would otherwise have had to appeal from the Clarifying Military Pension Division Order itself, entered by the Court on June 24, 2015. CP 423-24.

José filed his Notice of Appeal on September 23, 2015. CP 454-64. Therefore, José's appeal is untimely and not properly before this Court.

This Court should decline to consider José's appeal.

2. **José's arguments that (a) dividing José's military retired pay versus his disability pay and (b) that the Clarifying Military Pension Division Order impermissibly modify the underlying Decree were not raised below.**

An appellant cannot raise an alleged error for the first time on appeal unless it is manifest and affects a constitutional right. RAP 2.5(a), (a)(3).

RAP 2.5(a) provides:

- (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:
 - (1) lack of trial court jurisdiction,

- (2) failure to establish facts upon which relief can be granted, and
- (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

José's arguments regarding (a) the division of military retired pay versus disability pay and (b) an impermissible modification of the decree were not raised below, and are therefore not properly before this Court.

RAP 2.5.

These arguments related to the Clarifying Military Pension Division Order were not raised in José's motion for revision. CP 427-33.

This Court should decline to address José's appeal on this basis as well.

B. IN THE ALTERNATIVE, IF THIS COURT DOES DEEM JOSÉ'S APPEAL TO BE PROPERLY TAKEN, THIS COURT SHOULD NOT DISTURB THE CLARIFYING MILITARY PENSION DIVISION ORDER.

1. Standard of review.

This court reviews language in a QDRO de novo. *Gimlett v. Gimlett*, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981).

This Court construes a decree and QDRO “as a whole, giving meaning and effect to each word, and interpreting words using their ordinary meaning.” *Stokes v. Polley*, 145 Wn.2d 341, 346-47, 37 P.3d 1211 (2001).

2. The Clarifying Military Pension Division Order does not Divide José’s Disability Benefits.

José argues the Clarifying Military Pension Division Order improperly divides his disability benefits. Br. of Appellant at 14; CP 60-66.

The Clarifying Military Pension Division Order partly provides:

4. Assignment of Benefits: The Member assigns to the Former Spouse an interest in the Member’s **disposable military retired pay**. The Former Spouse is entitled to a direct payment in the amount specified below and shall receive payments at the same time as the Member.

* * * *

6. Amount of Payments.

This Order assigns to Former Spouse an amount equal to Forty Seven Percent (47%) of the Member’s **disposable military retired pay** under the Plan as of his benefit commencement date.

CP 70 (emphasis added). The Clarifying Military Pension Division Order also provides

15. Merger of Benefits and Indemnification: The Member agrees not to merge the Member’s disposable military retired pay with any other pension and not to pursue any course of action that would defeat the Former Spouse’s right to receive a portion of the disposable military retired pay of the Member. . . . If the Member becomes employed or otherwise has his military pension merged, which employment or other condition causes a merger of the

Member's disposable military retired pay, the Member will pay to the Former Spouse directly the monthly amount provided in Paragraph 6, under the same terms and conditions as if those payments were made pursuant to the terms of this order.

CP 72.

The Clarifying Military Pension Division Order also provides

23. **Definition of Military Retirement:** For the purposes of interpreting this Court's intention in making the division set out in the Order, 'military retirement' includes retired pay paid or to which Member 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. It also includes all amounts of retired pay Member actually or constructively waives or forfeits in any manner and for any reason or purpose, including, but not limited to, any waiver made in order to qualify for Veteran's Administration benefits and any [waiver] arising from member electing not to retire despite being qualified to retire. It also includes any sum taken by Member in addition to or in lieu of retirement benefits, including, but not limited to, exit bonuses, voluntary separation incentive pay, special separation benefit, or any other form of compensation attributable to separation from military service instead of or in addition to payment to the military retirement benefits normally payable to a retired member.

CP 65. José argues that this paragraph purports to impermissibly divide any potential disability pay he may elect to receive. Br. of Appellant at 21. However, this provision does not *divide* José's disability pay, it merely *defines* the term "military retirement," which includes both retired pay and disability pay. CP 65.

José argues that “a state court is prohibited from dividing a military pension.” Citing *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.ed.2d 589 (1981). Br. of Appellant at 15. However, he goes on to state “a Washington state dissolution court may only award a service member’s former spouse a portion of the service member’s military pension, **which is defined by federal law as ‘disposable retired pay.’**” Br. of Appellant at 15, citing *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L.Ed.2d 675 (1989); *In re Marriage of Jennings*, 138 Wn.2d 612, 629, 980 P.2d 1248, 1256 (1999), *as amended on denial of reconsideration*.

This is precisely what was awarded to Kimberley – 47% of José’s **disposable retired pay**. CP 70 at para. 6 (“This Order assigns to Former Spouse . . . Forty Seven Percent . . . of the Member’s **disposable military retired pay**[.]” Emphasis added.). It does not award her any interest in a military pension or in any disability pay.

The Clarifying Military Pension Division Order does allow Kimberley to seek *compensatory maintenance* in lieu of any disability pay José might elect to receive in the future. CP 72 at para. 15. This is permitted under federal and Washington law.

In *Marriage of Jennings*, the wife was awarded \$813.50 per month from her former husband’s “military retirement.” *Jennings*, 138 Wn.2d at

614-15. After the decree was entered by the trial court, the Department of Veteran's Affairs "worsened" the husband's disability status. The effect of this reclassification was to significantly decrease his military retired pay and significantly increase his disability pay. This reduced the wife's portion of the military retired pay from \$813.50 to \$136.00. *Jennings*, 138 Wn.2d at 617.

On the wife's motion, the trial court ordered that the wife "shall continue to receive one-half of Respondent's military retirement." *Jennings*, 138 Wn.2d at 618. The trial court achieved this by vacating the decree of dissolution and entering an amended decree, finding "[b]ecause the property division which originally gave [the wife] one half of [the husband's] military retirement has been reduced from \$813 a month to \$136 a month, **an award of compensatory spousal support is appropriate.**" *Jennings*, 138 Wn.2d at 620 (emphasis added).

The Court of Appeals reversed the trial court, remanding the matter to the trial court, ordering that the original decree of dissolution be reinstated. *Jennings*, 138 Wn.2d at 621.

However, the Washington Supreme Court ruled that awarding the wife a sum of compensatory maintenance to make up for the shortfall in retired pay was not error and did not find this was an impermissible modification of the decree of dissolution. *Jennings*, 138 Wn.2d at 626.

In this case, paragraph 15 of the Clarifying Military Pension Division Order achieves the same result in the event José receives disability pay in lieu of his retired pay. CP 72. This is not an impermissible division of assets, nor does it contravene any federal law pertaining to military disability benefits. *Id.*

3. The Clarifying Military Pension Division Order is not an Impermissible Modification of the Decree.

DFAS specifically requested clarification of the first military benefits division order. CP 470-76. DFAS advised

The language in the court order is unacceptable since we cannot determine what you have been awarded from the member's military retired pay. . . . The order does not provide us with any information as to how to calculate what you have been awarded. Therefore, you must obtain a certified copy of a clarifying order awarding either a fixed amount or a percentage of the member's retired/retainer pay[.]

CP30. The Decree awarded Kimberley 47% of José's net disposable retired pay. CP 119. The Clarifying Military Pension Division Order awards Kimberley "an amount equal to Forty Seven Percent (47%) of the Member's disposable military retired pay under the Plan as of his benefit commencement date." CP 70.

By stating "an amount equal to" 47% of José's disposable military retired pay, it allows this award to be achieved in accordance with *Jennings*, 138 Wn.2d 612. Therefore, the Clarifying Military Pension

Division Order does not contravene governing federal law, Washington law, nor is it an impermissible modification of the decree of dissolution. The Clarifying Military Pension Division Order should not be disturbed.

4. José's Argument Pertaining to the "Indemnification Language" was not Properly Preserved for Appeal

José argues that the indemnification language in the Clarifying Military Pension Division Order modifies rather than clarifies the decree of dissolution. Br. of Appellant at 26.

As already argued above, this argument was not raised below in any manner or to any degree, and cannot be raised for the first time on appeal. RAP 2.5(a).

C. KIMBERLEY IS ENTITLED TO SPOUSAL MAINTENANCE AS PROVIDED FOR IN THE ORIGINAL DECREE OF DISSOLUTION.

1. Standards of review.

Motion for Revision

Once a trial court makes a decision on revision, any appeal is from the trial court's decision, not the court commissioner's. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004); *State v. Hoffman*, 115 Wn. App. 91, 101, 60 P.3d 1261 (2003).

Finding of Substantial Change in Circumstances

A trial court's determination of whether a substantial change of circumstances warrants modification is reviewed by this court for abuse of discretion. *Fox v. Fox*, 87 Wn. App. 782, 784, 942 P.2d 1084 (1997).

Modification of Spousal Maintenance

Generally, a trial court can modify an award of spousal maintenance if the moving party shows a substantial change in circumstances that the parties did not contemplate at the time of the dissolution decree. *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980).

When an agreement of the parties, including agreed spousal maintenance, is incorporated in a dissolution decree, a reviewing court must ascertain the parties' intent at the time the agreement was made. *Byrne v. Ackerlund*, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987); *Boisen v. Burgess*, 87 Wn. App. 912, 920, 943 P.2d 682 (1997).

Importantly, a decree of dissolution, entered into by agreement and signed by the parties and any attorneys, constitutes a separation contract. *Marriage of Glass*, 67 Wn. App. 378, 835 P.2d 1054 (1992); see also 19 Kenneth W. Weber, *Washington Practice: Family and Community Property Law*, § 19.8 n.3 at 408-09 (1997) ("[i]f the decree has been

signed by both parties as a stipulated instrument, it may be considered to also constitute a separation contract.").

2. There was not a substantial change in circumstances sufficient to support modification of the award of spousal maintenance.

RCW 26.09.170 partly provides

(1) Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment . . . only upon a showing of a substantial change of circumstances.

The change of circumstances must be a change **that the parties did not contemplate at the time of the dissolution decree.** RCW 26.09.170(1); *See also In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001) (emphasis added).

In support of his motion to vacate or modify the decree of dissolution, José argued that the decree was negotiated when he was undergoing chemotherapy, which resulted in a “grossly one-sided” division of property. CP 341-42. He also argued that Kimberley had obtained “more preferential hiring status” since the divorce was finalized. CP 342.

José also argued that he learned that he cannot retire due to his need for ongoing medical care related to his cancer diagnosis and other

injuries, meaning his spousal maintenance obligation could be indefinite.
CP 342.

Finally, José argued that Kimberley’s spousal maintenance was based on his Basic Housing Allowance, which was \$1,400 per month rather than \$2,457.04. CP 342. Judge Leanderson adopted that argument, even though José had provided no evidence in the record to support it.

Each of José’s arguments is not supported by any evidence in the record and not a circumstance unanticipated at the time of finalizing the dissolution. His arguments therefore fail.

a. José’s health had stabilized by the time this dissolution was finalized.

José argues that the parties negotiated the terms of their divorce while he was “undergoing chemotherapy[.]” CP 341. This is unsupported by the record. In fact, by the time the dissolution was finalized, José’s chemotherapy was behind him and he had been declared cancer free.

José underwent cancer surgery and chemotherapy between January 2014 and April 2014. CP 9. A letter from José’s physician indicated that José’s “medical conditions” had not “prevented him from executing his duties as an Army leader.” CP 9. He concluded that José was fit for duty. CP 9. He further stated that José was being monitored for any signs of

remission, which were not apparent as of the date of the letter, February 18, 2015. CP 9.

Importantly, the record indicates the majority of negotiations between Kimberley and José occurred long before José's cancer diagnosis. CP 400 (October 15, 2013 email where in José states, "where are we on the divorce paperwork?"), 401 – 403.

On April 21, 2014, José e-mailed his attorney and command declaring, "I found out that I officially beat cancer." CP 312-13, 320.

The final agreed dissolution orders were entered on June 6, 2014. CP 110-10, 111-21.

Importantly, José was represented by counsel throughout the negotiations and finalization of the dissolution. CP 76 – 99, 100 – 110, 111 – 121, 210. His health had stabilized by the time the dissolution was finalized.

b. Unfairness is not a basis to modify an agreed award of spousal maintenance.

Kimberley disagrees that this agreed maintenance award is unfair. Similar to this case, in *Marriage of Hulscher*, the husband argued on appeal (or as in this case, on revision) that the agreed maintenance award to his former wife was unfair at the time of execution. 143 Wn. App. 708,

717, 180 P.3d 199 (2008). However, the husband waited a year after the decree of dissolution was entered to claim unfairness. *Id.*

This Court held that a party must raise such a claim *prior to* the trial court's approval and entry of the agreed decree. *Hulscher*, 143 Wn. App. at 717; RCW 26.09.070(3), (7); *Glass*, 67 Wn. App. at 390 ("[i]f such a challenge were to be allowed years later, at the time of a modification proceeding, the provisions of RCW 26.09.070(3) and (7) would be rendered meaningless.") Therefore, this Court held that Hulscher's claim that the spousal maintenance provision was unfair at the time of execution was time-barred. *Hulscher*, 143 Wn. App. 717.

In this case, the Decree of Dissolution was entered on June 6, 2014. CP 111-21. José brought his motion to vacate or modify the agreed Decree of Dissolution on May 20, 2015, approximately one year later. CP 348-49, 341-47.

Therefore, this Court should find that José's request to modify the agreed spousal maintenance award on the basis of unfairness is time barred.

Also, in an e-mail José sent to Kimberley on December 28, 2013, *prior to* being diagnosed and treated for cancer, José stated, "So immediately you have the very generous advantage . . . which is what you

deserve now. . . This is a generous deal.” CP 15. Unfairness is not mentioned in this e-mail.

In *Hulscher*, the parties had agreed that the maintenance at issue would be non-modifiable. *Hulscher*, 143 Wn. App. at 716-17. In this case, agreed spousal maintenance was not non-modifiable; however, the parties did agree to a specific period of time during which maintenance would be paid to Kimberley. The decree provides at paragraph 3.7

the petitioner shall pay \$2457.04 maintenance. Maintenance shall be paid monthly. The first maintenance payment shall be due on (date) June 1, 2014.

The obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance **unless otherwise specified below**:

As agreed by the parties in order to address the need for health care and other expenses the petitioner agrees to pay the respondent the sum of \$2457.04 monthly on the first of every month beginning on June 1, 2014 **until petitioner retires from military service**.

CP 114 – 15 (emphasis added). In this case, the agreed decree states that maintenance would terminate upon death or remarriage **unless specified otherwise**. The decree specifies otherwise. CP 114 – 15.

The agreed decree provides that José’s obligation to pay spousal maintenance will continue until his retirement from military service. CP 114 – 15. Therefore, *Hulscher* is applicable here. *Hulscher*, 143 Wn. App.

717. José cannot now claim that the maintenance he agreed to pay Kimberley, with the assistance of counsel, is now unfair.

This court should vacate the order on revision.

c. José's claim that the period of time until his retirement could be indefinite is unsupported by the record.

On revision, José argued he risks having to pay Kimberley spousal maintenance indefinitely as currently provided in the Decree of Dissolution. CP 416. Nothing in the record supports this claim, and José's claims and arguments related to this issue are inconsistent throughout the record.

First, José voluntarily transferred his 9/11 G.I. Bill benefits to R.O., voluntarily obligating himself to remain on active duty until February 2016. CP 5, 54.

In his petition to modify or vacate the agreed decree of dissolution, José claimed he was planning to retire in February 2015. CP 125. However, in February of 2015, José had voluntarily accepted a two year command due to his voluntary transfer of his 9/11 G.I. Bill to R.O. CP 5. In addition, this memorandum from José's command also states that he was free to "submit his retirement request immediately" if he were to revoke the transfer of the 9/11 G.I. Bill benefits or if R.O. were not to use

them. CP 5. Therefore, José is in no way obligated to remain in the Army indefinitely.

Kimberley's agreed award of spousal maintenance should be reinstated at the amount initially ordered, and it should continue, as agreed, until José's retirement. CP 114-15.

d. The agreed order of spousal maintenance was not entirely based on José's Basic Housing Allowance.

José overstated the relationship between his Basic Housing Allowance and the agreed spousal maintenance to be paid to Kimberley. At oral argument on José's motion for revision, his attorney argued that José's Basic Housing Allowance had been reduced to \$1,400 per month. RP 13. This claim is unsupported by the record. In fact, Kimberley provided the only evidence in the record to contradict José's claim. CP 409. José's current Basic Housing Allowance was, in fact, \$2,148. CP 409. Therefore, there was no substantial change in circumstances in this regard as well.

Nonetheless, Judge Leanderson appeared to rely on the unsupported claim by José's attorney and reduced Kimberley's spousal maintenance to \$1,400 per month, and for a shortened duration. CP 452.

e. Kimberley's finances have not improved such that spousal maintenance is no longer warranted.

José also claims that Kimberley's "permanent employment" justifies the termination of her spousal maintenance. CP 125 at para. 1.4.

The decree of dissolution does provide that spousal maintenance was agreed "in order to address the need for health care and other expenses[.]" CP 115. However, Kimberley did not obtain a new, better paying job – she now works for the Department of the Army instead of being a contract employee, but in the same capacity. CP 23, 25.

When the dissolution was finalized, Kimberley's net monthly income was \$7,378.00. CP 395. Now that she is an employee of the Department of the Army, her monthly net income is \$7,267.67 – a decrease. CP 395. José provided nothing in the record to contradict this.

José is essentially arguing that the agreed spousal maintenance was based on need versus ability to pay, and Kimberley no longer has the need for spousal maintenance. RCW 26.09.140. However, given the fact that José's and Kimberley's incomes were fairly close to one another (Kimberley's gross income was \$1,769.50 less per month than José's; CP 95) at the time of the dissolution,⁷ that argument makes no sense. CP 95.

⁷ As of June 6, 2014, José's monthly gross income was \$10,992.50 (gross monthly income plus Basic Housing Allowance); CP 95, lines 1 a. plus 1 3. Kimberley's monthly gross income, without spousal maintenance, was \$9,223.00. CP

José also suggests that the upward deviation in the child support transfer payment is due to José providing for “expenses Kimberley might incur” for R.O. CP 360.

The final order of child support states the parties’ combined monthly net income exceeded \$12,000 and “in an attempt to equitably accommodate [Kimberley’s] financial need, and **to honor [Kimberley’s] past involvement and assistance” with José’s career path**, and because [José] has significant earning potential and the ability to accrue “lifetime benefits” he agreed to an upward deviation from the basic transfer payment calculation. CP 84 at para. 3.7 (emphasis added).

The final order of child support also states that the agreement to pay child support at that level was intended to continue until José “retires from military service in 2016.” CP 82, 84. On revision, José argued that the only reason he included this language in the child support order was because his “attorney at the time advised [him] that without language explaining the upward deviation, the court would not likely sign off on the order of child support.” CP 360. He further stated, “This is the only reason that language is included for a 2016 retirement date.” CP 360.

The final agreed order of child support reflects a monthly transfer payment of \$1,478.62. CP 82. The child support worksheet indicates a basic child support obligation of \$850.54, plus his proportionate share of

child care, which is \$450 per month. CP 96, 145 (at lines 9, 11a).

Therefore, the transfer payment is deviated upward only slightly - \$178.

CP 96, 145 (at lines 9, 11a). This, too, does not give Kimberley any kind of unfair financial advantage over José.

D. THE TRIAL COURT'S DENIAL OF THE AWARD OF ATTORNEY'S FEES TO KIMBERLEY SHOULD BE REVERSED.

Attorney fee awards are reviewed for abuse of discretion. *In re Marriage of Estes*, 84 Wn. App. 586, 594, 929 P.2d 500 (1997), citing *In re Bulicek*, 59 Wn. App. 639-40, 800 P.2d 394 (1990).

However, because the Order on Revision was improperly granted, the underlying award of attorney's fees initially made to Kimberley should be reinstated.

E. KIMBERLEY SHOULD BE AWARDED ATTORNEY'S FEES FOR THE NECESSITY OF RESPONDING TO JOSÉ'S APPEAL.

RCW 26.09.140 provides:

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

Kimberley had to respond to José's petition and motion to modify or vacate the decree of dissolution. The record indicates there was no basis to grant the relief sought by José. Kimberley has also had

to respond to José's appeal, brought improperly. She should be awarded her reasonable attorney's fees for the necessity of responding to José's appeal and bringing her cross-appeal.

José also argues that due to the level of spousal maintenance he agreed to pay Kimberley, she had been able to amass a significant amount in savings, further reducing her need for spousal maintenance. CP 359. Any funds Kimberley was able to save have been depleted through litigating the motion for modification or vacation of the decree, the motion for revision and this appeal. RP 4; CP 394.

III. CONCLUSION

José did not preserve the issue of the propriety of the Clarifying Military Pension Division Order for appeal. Although the basic argument about the proper derivation of Kimberley's share of José's retired pay was included in José's motion for revision, he did not argue the issues of that order being an impermissible modification of the decree or an impermissible division of José's disability pay. Those issues were raised for the first time on appeal.

In addition, there was no mention whatsoever of the Clarifying Military Pension Division Order at the argument of José's motion for

revision, nor was there any reference to it by Judge Leanderson. There is no reference to it in the Order on Revision.

Therefore, the Court's adoption of the Clarifying Military Pension Division Order should be affirmed.

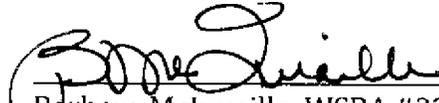
José's motion for revision was granted without sufficient legal basis. The trial court's finding of a substantial change in circumstances sufficient to reduce and ultimately terminate Kimberley's spousal maintenance is unsupported by the record.

If this Court were to affirm José's claim that this decree is unfair completely defeats the ability for parties such as José and Kimberley to negotiate the terms of their dissolutions in earnest.

The trial court erred by revising the order on modification or vacation of the decree of dissolution. That ruling should be reversed and remanded for reinstatement of Kimberley's spousal maintenance award and for calculation and entry of a judgment for any unpaid spousal maintenance having accrued during the pendency of this appeal.

DATED this 29th day of April, 2016.

RESPECTFULLY SUBMITTED,


Barbara McInville, WSBA #32386
Attorney for Kimberley Rockwood

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by the e-filing portal, and delivered a copy of this document via e-mail to the following:

Daniel Cook
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Signed at Tacoma, Washington on this 29th day of April, 2016.


Barbara McInville

HELLAND LAW GROUP PLLC

April 29, 2016 - 3:22 PM

Transmittal Letter

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