

No. 49496-5-II

STATE OF WASHINGTON COURT OF APPEALS, DIVISION II

In Re:

NATACHA MCFARLAND (fka HARVEY),

Respondent,

and

CONRAD HARVEY,

Appellant.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT

OPENING BRIEF OF NATACHA MCFARLAND

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I. INTRODUCTION

The spousal maintenance award is an invaluable tool to assist an unemployable spouse with survival. This is especially true when you have a long-term marriage with a spouse that has been disabled throughout the marriage. That is the case here. Mr. Harvey had been a commissioned officer of the United States Army for the majority of the parties' marriage. Ms. McFarland was disabled throughout the marriage and the trial court determined that she was permanently disabled at trial. Due to this disability, the trial court had to consider a proper spousal maintenance award to ensure her survival.

The trial judge clearly contemplated and determined that Mr. Harvey would bear the responsibility of assisting with his wife's survival, through spousal maintenance, up to the point that she would receive her marital portion of Mr. Harvey's retirement from the United States Army. This was how the trial judge attempted to ensure Ms. McFarland's survival given her medical conditions. Despite the efforts of the trial judge, Mr. Harvey has taken it upon himself to stop paying the spousal maintenance ordered by the trial court.

Mr. Harvey argues that his current situation is somehow due to the behaviors of Ms. McFarland and because of that, she should suffer the consequences of poverty. However, Mr. Harvey's early departure from his service in the Army is solely due to his own behaviors. The military determined that his behavior was unbecoming an officer and he was given a choice to either accept a reserved retirement or to be dishonorably discharged. This choice, although Mr. Harvey has preserved the retirement, was a choice of actions solely made by Mr. Harvey. Ms. McFarland never had a choice regarding whether she would like to survive or not. Mr. Harvey has made that choice for her. Mr. Harvey had years of prior notice that he likely would be discharged from the military, and he neither disclosed this information to the trial court or Ms. McFarland, nor

did he make any efforts to alleviate the impact of that discharge when it was to occur. These parties have been in court on several occasions between the time the Amended Petition was filed in 2012 and the time that Ms. McFarland filed her Motion for Contempt in 2015. At no time did Mr. Harvey inform the trial court, or Ms. McFarland, of the impending circumstances of his discharge from service. He further did nothing to preserve funds so that he could continue to meet his obligation as outlined by the trial court in the Amended Decree of Dissolution.

The reality of the situation for Ms. McFarland is that she cannot survive without the spousal maintenance award being paid to her. Since Mr. Harvey has determined that he is no longer paying maintenance, Ms. McFarland has been evicted from her home and has been forced into homelessness. Mr. Harvey's failure to comply with the Amended Decree, and his resorting to self-help, is an act of contemptuous behavior. The Commissioner *pro tempore* did not err in determining that Mr. Harvey, in resorting to self-help and not paying his maintenance payment, was in contempt. Mr. Harvey has not demonstrated that he cannot make the maintenance payment, as ordered by the trial court in the Amended Decree of Dissolution.

II. STATEMENT OF THE CASE

These parties, in 2011, had a day-long trial after two separate mediations to resolve their Dissolution. At trial, there was testimony regarding Ms. McFarland's medical conditions suffered throughout the marriage. Mr. Harvey challenged her ability to work in the future, despite her being disabled throughout the marriage. Testimony proved at trial helped the trial judge conclude that Ms. McFarland was permanently disabled and would not be able to secure work in the future due to her many medical conditions. CP 55, CP 59. The initial Decree of Dissolution was entered after the point in time that the parties had been married for 20 years. CP 54. This was to ensure that Ms. McFarland would be able to access full military benefits allowable for a spouse under the Uniformed Services Former Spouse Protection Act ("USFSPA") 20/20 rule, including, most

importantly, medical benefits. CP 17. At that time, the trial judge also established a guideline for spousal maintenance to be paid from Mr. Harvey to Ms. McFarland. CP 7-8, CP 54. This was found to be necessary to ensure the basic survival of Ms. McFarland going forward. The trial court, at that time, could not determine the length of time that maintenance should be paid, as testimony from Mr. Harvey was not clear about his entitlements from the Army and when his ability to collect retired pay would occur. CP 55.

At the time of trial, Ms. McFarland had knowledge that she had filed a formal complaint with the military due to Mr. Harvey raping her during the marriage. Mr. Harvey knew that the military had started a formal investigation against him, but did not share that with the trial court. CP 48, CP 55. Mr. Harvey, for the next 4 years, was embroiled in an investigation, court action and a subsequent ruling and appeal of that ruling in regard to his service in the US Army. CP 48. The complaint made by Ms. McFarland was not the precipitating event that caused Mr. Harvey's GOMOR (General Officer Memorandum of Reprimand) to occur. Mr. Harvey was "forced" from the military due to his behavior of having extramarital relations with Ms. McFarland and another woman. CP 43, CP 60, CP 62-63. His behavior was determined to be conduct unbecoming a commissioned officer. This factor is relevant, as Mr. Harvey's own behavior had placed him the position he found himself in, having to choose between a dishonorable discharge and a retired reserve designation.

The parties' initial Decree of Dissolution was entered November 11, 2011. CP 201. In that Decree, the trial court did not designate a specific length of time that Mr. Harvey would pay spousal maintenance to Ms. McFarland. The language allowed for a maintenance award that would enable Ms. McFarland to get from the time of trial to the time that her portion of Mr. Harvey's military retirement would be paid to her. CP 7-8. An Amended Decree of Dissolution was entered almost

a year later, on September 20, 2012. CP 5-20. In the Amended Decree, the language regarding the Spousal Maintenance was not altered from the initial Decree of Dissolution. CP 7-8.

On June 1, 2015, Mr. Harvey had not paid his court ordered monthly spousal maintenance amount of \$3,500.00. CP 22-23, CP 92-94. Because Mr. Harvey customarily paid the entirety of the transfer at the beginning of each month, Ms. McFarland knew something was wrong. CP 22. Ms. McFarland, aside from the maintenance award, receives only \$632.00 per month gross in Social Security funds. CP 62, CP 168. Without the spousal maintenance payment, she could not pay her bills. Because of this action by Mr. Harvey, Ms. McFarland's landlord immediately started an eviction process against her. CP 62, CP 66-67. She was evicted from her home and become homeless due to Mr. Harvey's behaviors. CP 104. Ms. McFarland provided to the trial court redacted information regarding the eviction proceeding against her. CP 66-67. It was redacted because Ms. McFarland is in the Address Confidentiality Program due to Mr. Harvey's domestic violence, perpetrated against her throughout their marriage. Ms McFarland suffered immensely at the hands of Mr. Harvey during their marriage and does so now financially due to his ongoing behavior. CP 99-101, CP 106-107.

Mr. Harvey, despite the Decree being clear about his payment being "... payable on the first and second pay dates of each month via direct allotment from Mr. Harvey's military pay to an account of Ms. Harvey's choosing..." never set up an allotment. CP 7. He would simply pay the entirety of the \$3,500.00 by a deposit into Ms. McFarland's account in the beginning of each month. CP 22. Ms. McFarland knew right away something was wrong when she had not received the funds into her account. Ms. Harvey filed a Motion for contempt on June 9, 2015. CP 21-24. The Motion for Contempt was filed because contact with Mr. Harvey's attorney made it clear that Mr. Harvey would not be paying any more in spousal maintenance that month. CP 23. He did not until we entered an agreed stipulation that he would pay at least \$550.00 each month for June, July

and August 2015, until discovery could be completed and matter could be heard by the court. CP 92-94. Mr. Harvey has continued to pay an absolutely minimal amount of maintenance each month, such that Ms. McFarland has been in extreme poverty for the past two (2) years while this matter has been pending. CP 168.

III. ARGUMENT

A. Standard of Review

The standard for modifying a spousal maintenance award is provided by RCW 26.09.170(1), which allows the trial court to "modify a maintenance award when the moving party shows a substantial change in circumstances that the parties did not contemplate at the time of the dissolution decree." *In re Marriage of Spreen*, 107 Wn.App. 341, 346, 28 P.3d 769 (2001). Ms. McFarland argues to the Court that the issue of Mr. Harvey's military discharge was considered by the trial court, in the context that the trial court contemplated a date uncertain for maintenance to end. Section 3.7 of the Parties Amended Decree of Dissolution states, in relevant part:

The husband shall pay maintenance to the wife in the amount of \$3,500.00/mo, payable on the first pay date of each month via direct allotment from Mr. Harvey's military pay to an account of Ms. Harvey's choosing. This shall be paid by Mr. Harvey beginning in November 2011 and shall be paid each and every month through the month in which the wife receives the first check from the husband's Military retired pay.

Furthermore, if the Court finds that the trial judge did not contemplate these circumstances of Mr. Harvey's forced retirement at the time of the entry of the award of spousal maintenance, it is solely due to Mr. Harvey failing to disclose that information. The trial court clearly did not outline a time certain, because Mr. Harvey would not provide information to the trial court at the time of trial as to when he would retire. He was vague, despite the inquiry of the trial judge. It seems more plausible now that Mr. Harvey did not know when he would actually leave his military service due

to the pending military investigation; however, he did not even inform the trial court of this possibility at the time of trial. Clearly, Mr. Harvey knew that he was being investigated. His failure to raise this issue with the trial court at the time of trial should not now give him the ability to utilize the results of the findings of the military to cause harm to Ms. McFarland.

B. The Commissioner Did Not Err by Refusing to Modify or Terminate Spousal Maintenance

“Modification of spousal maintenance is appropriate where the moving party presents evidence establishing that there has been a substantial change in circumstances not within the parties’ contemplation at the time the maintenance was ordered. RCW 26.09.170(1)(b); *Waaner v. Waaner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980); *In re Marriage of Ochsner*, 47 Wn.App. 520, 524, 736 P.2d 292 (1987). A change in circumstances occurs upon a change in the financial ability of the obligor spouse to pay in comparison with the need of the other spouse. *Ochsner*, 47 Wn.App. at 524. A voluntary reduction in income will not constitute a change in circumstances warranting modification absent a “substantial showing of good faith.” *Lambert v. Lambert*, 66 Wn.2d 503, 510, 403 P.2d 664 (1965).

We will not disturb the trial court’s determination regarding substantial change in circumstances absent an abuse of discretion. *Lambert*, 66 Wn.2d at 508. A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *In re Marriage of Fiorito*, 112 Wn.App. 657, 664, 50 P.3d 298 (2002). A decision is based on untenable grounds if “the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *Fiorito*, 112 Wn.App. at 664. “Substantial evidence

supports a factual determination if the record contains sufficient evidence to persuade a fair minded, rational person of the truth of that determination.” *Bering v. SHARE*. 106 Wn.2d 212, 220, 721 P.2d 918 (1986). The court also reviews modification orders to determine whether substantial evidence supports the trial court’s findings. *In re Marriage of Hulscher*, 143 Wn.App. 708, 713, 180 P.3d 199 (2008); *In re Marriage of Drilik*, 121 Wn.App. 269, 274, 87 P.3d 1192 (2004). The Commissioner *pro tempore* in this matter did not abuse his discretion. His decision was not manifestly unreasonable, nor was it based on untenable grounds or reasons.

Initially, Mr. Harvey’s Petition for Termination/Modification of Spousal Maintenance did not cite the Amended Decree which was entered September 20, 2012. That Amended Decree is the controlling Order in this matter. Ms. McFarland did not argue that the language in the Amended Decree was different from the language in the initial Decree because it is not; however, the Amended Decree was entered most recently and that is the Decree that should be referenced. This does become relevant, however, when it is considered that the first Decree of Dissolution was entered on November 1, 2011 and the General Officer Memorandum of Reprimand (GOMOR) was issued against Mr. Harvey on September 8, 2011, which was prior to the trial in this matter. Mr. Harvey did not disclose this information at the parties’ dissolution trial. Furthermore, the Amended Decree of Dissolution was entered on September 20, 2012, almost a year later, and at no time did Mr. Harvey raise this ongoing military legal action against him prior to the entry of the Amended Decree of Dissolution being entered.

The parties Amended Decree of Dissolution, Section 3.7 states:

The Husband shall pay maintenance to the wife in the amount of \$3,500.00/mo, payable on the first and second pay dates of each month.

The husband shall pay maintenance to the wife in the amount of \$3,500.00/mo, payable on the first pay date of each month via direct allotment from Mr. Harvey's military pay to an account of Ms. Harvey's choosing. This shall be paid by Mr. Harvey beginning in November 2011 and shall be paid each and every month through the month in which the wife receives the first check from the husband's Military retired pay.

Husband shall obtain and/or maintain life insurance—naming the wife as beneficiary—in an amount equal to his maintenance obligation. For example, if he retires from the military exactly eight years from the date of the entry of this decree, then at present his policy would be for \$336,000... Husband shall make wife co-owner of this policy. This is to ensure that the policy remains in effect, with no lapses or changes, until the time that the policy may be discontinued.

Maintenance shall be modifiable and shall terminate upon any of the following: 1) husband's retirement from the military as stated in this paragraph; 2) death of either party; or 3) wife's remarriage.

Maintenance can be reviewed if a party shows a substantial change in circumstance given the following concerns: 1) The start date of husband's military retirement versus when his activity duty pay ends; and 2) the wife's ability to get medical coverage given her monthly income."

Mr. Harvey argued to the trial court, that due to his recent departure from the military, his spousal maintenance shall be terminated based on the language of the Decree. Ms. McFarland argues, as the Commissioner recognized, the trial court's intent with regard to the language regarding termination of spousal maintenance due to retirement was only to occur once Ms. McFarland had been receiving her portion of the military retired pay. (*Court's Decision entered July 26, 2016, Pages 5 and 6.*)

Ms. McFarland argues that Mr. Harvey failed to show a substantial change of circumstances since the entry of the Decree, as the issue of his departure from the military prior to his receiving retirement pay was contemplated at the time the Decree was entered.

RCW 26.09.170 guides the Court in actions to modify Spousal Maintenance after the entry of the Decree. It states in relevant part:

“RCW 26.09.170

Modification of decree for maintenance or support, property disposition — Termination of maintenance obligation and child support — Grounds.

(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 except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(2) Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance.”

Based on the language outlined in RCW 26.09.170(1), Ms. McFarland argues that Mr. Harvey would only be eligible for relief from his obligations from the date that he filed his Petition. He filed his Petition for Termination/Modification of Spousal Maintenance on June 16, 2015 and an Amended Petition on June 29, 2015.

Mr. Harvey goes on to argue in his opening Brief that he was informed in June of 2013 that the military had intended to either force him out of the service or to take retired reserve. Mr. Harvey then proceeded to pursue reconsideration of that recommendation, and ultimately was unsuccessful; however, in the meantime, he did nothing to ensure that his maintenance obligation would be met if ultimately, he would have been forced out of the military. He did not save funds for payment of his spousal maintenance; actually, quite the opposite. Mr. Harvey made large purchases just prior to his discharge, and also, based on his Financial declaration filed on

February 18, 2016, he appears to have purchased another vehicle during the pendency of the modification action. This was occurring as Ms. McFarland was literally living in her vehicle and had resources under the poverty level. Mr. Harvey is claiming he couldn't pay her while simultaneously making large, extravagant purchases.

Furthermore, Mr. Harvey did not appeal the language in the Decree of Dissolution that did not outline a specific timeline for the length that maintenance should be paid. He has raised this issue incessantly with the trial court in this modification matter, but did not challenge it at the time of the entry of the Decree of Dissolution, or a year later when the Amended Decree was entered. At the time of trial, due to Mr. Harvey's inconsistencies and lack of information, the trial judge did not know how many years Mr. Harvey had left in the military before he could retire. Because of this, the Judge was clear in her ruling regarding the length of time that maintenance should be paid. The Amended Decree outlines, section 3.7, paragraph one, "...This shall be paid by Mr. Harvey beginning November 2011 and shall be paid each and every month through the month in which the wife receives military retired pay." It was the intent of the trial judge that Ms. McFarland would not have a lapse in financial support. This is clarified even further by the next paragraph in regard to Mr. Harvey maintaining a life insurance policy, naming Ms. McFarland as the beneficiary, in an amount equal to his maintenance obligation. That policy was not to be changed, or allowed to lapse. The trial court wanted to ensure that Ms. McFarland would be financially supported due to her being permanently disabled, without determining that there was a specific amount of time that maintenance should be paid. It was clear that Ms. McFarland would never be able to financially support herself and was completely reliant upon Mr. Harvey. Given the fact that she is a victim of domestic violence at his hands, and now has a Domestic Violence Order for Protection to protect her from him until the year 2036, his behavior is even more egregious. This is just one more action by Mr. Harvey to control and abuse Ms. McFarland. Although the statute does not recognize

financial abuse as an act of domestic violence, this has been a very real display of abuse by Mr. Harvey for years toward Ms. McFarland.

Whenever awarding spousal maintenance, the court must consider the following:

RCW 26.09.090

Maintenance orders for either spouse or either domestic partner—Factors.

(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

Ms. McFarland was found to be permanently disabled at the time of trial in 2011. She has no ability to rehabilitate herself and enter the workforce. Without her maintenance award, she is destitute, as she has experienced since Mr. Harvey stopped paying his spousal maintenance. Ms. McFarland has been evicted from her home and has had to live in her vehicle and on the couches of friends. This is even more complicated by the fact that Ms. McFarland is extremely fragile

physically due to her medical complications. Mr. Harvey's behavior cannot be tolerated, nor excused. He has no health concerns that would preclude him from being fully employed at a position where he is earning a substantial income, except for his own refusal to do so.

C. Mr. Harvey Has Not Shown That He Has Made Efforts to Secure Employment That Would Enable Him to Continue to Pay Maintenance as Ordered by the Trial Judge

Ms. McFarland argues to the Court that Mr. Harvey has provided little to no information that supports that he could not find employment upon his discharge from the military that would enable him to meet his obligation in regard to spousal maintenance to Ms. McFarland. Mr. Harvey's discharge and subsequent behaviors have created his financial circumstances at this time. Ms. McFarland argues that, if the Court believes Mr. Harvey's assessment of his financial circumstances, he has purposefully created his situation to attempt to justify relief by no longer paying Ms. McFarland's spousal maintenance. The Court in *Lambert v. Lambert*, 66 Wn.2d 503, 403 P.2d 664 (1965) recognized that Mr. Lambert's behavior directly caused his economic circumstance, and because of that, he should not be granted relief from his obligations. "But in his ill-fated efforts to revive his practice, Lambert incurred monthly expenses exceeding his employee salary and remained delinquent in his support obligations." *Lambert*, 66 Wn.2d at 505. The court held that such a "[v]oluntary reduction in income or self-imposed curtailment of earning capacity, absent a substantial showing of good faith, will not constitute such a change of circumstances as to warrant a modification." *Lambert*, 66 Wn.2d at 510.

Mr. Harvey did not come to this court in good faith in an effort to modify his maintenance as outlined in the parties' Decree of Dissolution. He certainly did not do it prior to resorting to self-help and ceasing the major source of income that Ms. McFarland relies on to survive. The record is extremely bare in regard to efforts by Mr. Harvey to obtain employment such that his maintenance

obligation could be maintained. Furthermore, as the Court also recognized in *Lambert*, Mr. Harvey has continued to incur increasing monthly expenses, thus to make it appear as though he is unable to pay his monthly spousal maintenance obligation. This is addressed in full in the section regarding contempt.

D. Mr. Harvey's Financial Information Shows his Ability to Maintain Spousal Maintenance to Ms. McFarland

In the parties' Final Child Support Order, entered in 2011, Mr. Harvey's income was calculated at \$10,781.00 per month gross for purposes of calculating child support. That is only a \$400.00 per month difference from the last financial declaration that Mr. Harvey filed with the trial court in support of his Petition for Termination/Modification of Spousal Maintenance. At this time, he no longer has the \$1,389.00 monthly child support obligation. His household income has not changed greatly from the time of the entry of the Decree, except, that his 2015 tax return shows us that he made significantly more than in 2012, 2013 and 2014.

Mr. Harvey has filed Financial Declarations with the trial court, in response to the contempt motion, and also to support his modification action. The first one was filed on June 16th, 2015. At that time, he claimed to be making \$5,514.00 gross per month. He also stated initially that his current wife was not working and thus he was responsible for all of the household expenses. In his declaration, filed on June 16, 2015 in support of his Petition, Page 3, Line 22, he made the following statements:

“ I have filed a copy of my Financial Declaration with the court.”

“My monthly expenses are approximately **\$4,626.32.**”

“My wife Kulleen is not working at this time.”

“She is a customs broker but has not been employed for this past year.”

“Prior to receiving notification that I would be released from active duty, we had anticipated that I would be transferred to the East Coast with the Army.”

-“Kulleen had secured a job but since I was not transferred she is now left without a job.”

“As the court can see, I am not able to meet my monthly living expenses given the significant decrease in my income.”

“Kulleen and I are drawing from retirement funds to make ends meet.”

“I simply do not have the ability to pay Natacha spousal maintenance.”

“Her allegations against me have resulted in the loss of my position in the Army, loss of my income and ultimately, my inability to continue to pay her spousal maintenance.”

In that Declaration, Mr. Harvey did not expound on what retirement funds he was drawing from, but clearly, he discussed having access to undisclosed funds that he was using to pay his expenses, which included a new truck and a trailer that he purchased just prior to leaving the Army.

Mr. Harvey filed a second financial declaration on January 25, 2106, where for the first time, he disclosed that he was receiving disability income in the amount of \$1,680.00 per month. He had not disclosed this to the trial court previously. He also did not disclose any lump sum payment that he had received, although now he claims that is how he was able to pay May 2015 spousal maintenance. He has yet to disclose that amount. Mr. Harvey also then disclosed that his wife was working again and that their combined household gross income is \$13,027.00 per month, and he claimed that his expenses are \$4,898.50 per month. This was approximately \$600.00 more than his expenses were in June 2015. At that time, he included a \$500.00 education expense that has yet to be fully explained.

Mr. Harvey filed a third financial declaration on February 18, 2016. In this declaration, filed three weeks after the previous one, his expenses went up again, to \$5,873.50 per month, or an additional \$975.00 in three weeks. His food expenses went up \$250.00, from \$700.00 in January to \$950.00 in February. His transportation expenses (specifically vehicle payments) went up from

\$442.50 to \$792.50; thus, he presumably had purchased another vehicle in this three week period, still claiming that he could not afford to pay Ms. McFarland her court-ordered spousal maintenance.

Also of note, some of his personal expenses doubled, such as \$150.00 for clothing and \$100.00 for hair care. Again, he claimed a \$500.00 expense for educational purposes, however, has yet to explain it or to provide evidence that it was actually incurred. Also, there is an additional \$250.00 for what appears to be a payment into his current wife's 401k. Mr. Harvey literally believes it is appropriate to expend \$250.00 per month into to his current wife's IRA, but feels that paying court-ordered spousal maintenance to his disabled spouse of 20 years, whom he abused, is unjust somehow. He also, for the first time, disclosed a USAA Mastercard and Star Card that he claimed to have almost \$4,000.00 in outstanding balances. But, by far, the most unbelievable statement by Mr. Harvey in that Financial Declaration was that he claims to have paid \$150,000.00 in attorney fees. Clearly, he had funds to pay an exorbitant amount of attorney fees, but not to pay Ms. McFarland her court-ordered spousal maintenance. Mr. Harvey is simply not believable in his claims. He argued at trial that he had paid \$50,000.00 in attorney fees at that time. I have represented Ms. McFarland throughout her dissolution action, along with a Thurston County Domestic Violence Protection Order proceeding, a Domestic Violence Protection Order action filed in King County by the parties' daughter with the help of Mr. Harvey, two Domestic Violence Protection Order anti-harassment actions filed in Pierce County by Mr. Harvey (who represented himself in that action), another Domestic Violence Protection Order action in Pierce county filed by Mr. Harvey, who again represented himself, several post-decree hearings in Thurston County, for some of which Mr. Harvey also represented himself. Mr. Harvey has ensured that Ms. McFarland is expending what little money she had been receiving from him in attorney fees to defend herself from his ongoing barrage of legal action. With me representing her in all of these actions, she still

has not incurred \$150,000.00 in attorney fees.

Mr. Harvey then filed a fourth Financial Declaration on June 3, 2016. At that time, he furthered that he was no longer employed. He provided a letter from April 18, 2016 outlining that the position with the State of Washington, obtained after he left the military, was terminated effective April 30, 2016. Once again, Mr. Harvey provided no further information as to his efforts to secure employment sufficient to enable him to meet the obligation of paying Ms. McFarland her court-ordered spousal maintenance. Mr. Harvey's behaviors remain extremely questionable based on the fact that he was able to locate and secure employment with the state within approximately two weeks of being discharged from the military, but he was allegedly unable to find a job approximately a year ago when we had the final hearing on these matters. Mr. Harvey is a healthy man who was enlisted in the Army for the majority of his working life thus far. He was able to obtain significant training and schooling while in the military; however, he is failing to translate his experience and education to the civilian world.

Also, based on the last financial information Mr. Harvey had supplied to the trial court, his household was earning more money in 2016 than it had earned in 2015. The last information he provided showed that he was receiving \$1,680.00 in VA disability pay as well as \$644.00 per week for unemployment compensation. Once \$644.00 is multiplied by 4.33 weeks, Mr. Harvey was earning \$2,788.52 per month in unemployment, for a total amount of \$4,468.52 while being unemployed. Mr. Harvey disclosed that his current wife earns \$5,833.00 per month. He did not provide any information to show the accuracy of that number. Thus, Mr. Harvey's household was earning \$10,301.52 per month at the time of the hearing before the trial commissioner. He also claimed at that time that his household expenses were now \$6,551.32 a month. This is an increase once again of \$677.82 per month since the time of his filing his previous Financial Declaration. Since filing his petition for modification in June 2015, until June 2016, his expenses had allegedly

gone up from \$4,626.32 to \$6,551.32 per month. This is an increase of \$1,925.00 per month during the course of that year, despite his claim that his income had supposedly diminished and that he was unable to find employment. Mr. Harvey is simply not credible. His most recent Financial Declaration stated that he expends \$800.00 a month for food and meals eaten out. That is just slightly less than the entire monthly income of Ms. McFarland. Also, there are alleged Roth IRA and 401K contributions for his wife in the amount of \$350.00 per month. Even if these expenses are valid, which Ms. McFarland does not believe, there is still a surplus of \$3,836.00 each month in Mr. Harvey's household.

In sharp contrast, Ms. McFarland has just \$1,180.00 gross and \$818.63 net income per month. This includes the \$550.00 per month that Mr. Harvey decided he would pay after Ms. McFarland's contempt action was filed against him. Ms. McFarland clearly has an ongoing need for spousal maintenance and Mr. Harvey clearly has the ability to pay the spousal maintenance as ordered in the Amended Decree of Dissolution. This financial hardship that Mr. Harvey has created for Ms. McFarland is his means of ongoing victimization of my client, since he can no longer physically abuse her.

E. The Commissioner Did Not Err in Finding Mr. Harvey in Contempt

Mr. Harvey argued that he should not be found in contempt because he could not pay spousal maintenance from June 2015 forward, due to him being discharged from the military. He went on to explain that the trial court should modify the maintenance award going back to May 2015 because he was discharged from the military at the end of April 2015. Mr. Harvey's argument failed before the trial commissioner and fails now.

Mr. Harvey, as argued before the trial commissioner, paid the full amount of maintenance in May 2015, after he had already been discharged from the military. Mr. Harvey had actually applied, interviewed, been offered a job and began working for the State of Washington, all prior to only paying partial maintenance in June 2015. Mr. Harvey failed to demonstrate why he was able to pay maintenance in May 2015 but then not the following months. Furthermore, the trial court made requests of the parties to provide financial information for review in making its determination. On March 22, 2016, Mr. Harvey was ordered to file and serve his 2015 tax return by April 18, 2016. Mr. Harvey did that on April 5, 2016.

What Mr. Harvey's tax return disclosed was that Mr. Harvey had earned \$89,800.00 in 2015; an average of \$7,483.33 per month. At that time, it was also discovered that Mr. Harvey's wife earned income that year in the amount of \$32,780.00, or approximately \$2,731.67 per month. That meant for 2015, Mr. Harvey's household had a total combined income of \$122,130.00 or \$10,177.50 per month. Despite this, Mr. Harvey determined that he would stop paying court-ordered spousal maintenance to Ms. McFarland, as of June 1, 2015. Due to his refusal to pay outside of an agreement for a reduced amount, an agreement was reluctantly reached wherein Mr. Harvey would pay \$550.00 per month for the Months of June, July and August 2015, in anticipation of a hearing being had by August 2015. (*Stipulation and Agreed Order Continuing Hearing entered June 30, 2015.*) He refused to pay any more than that, and the August hearing never went forward as planned. The agreed Order was clear that the agreement would not prejudice either party in the pursuit of the modification and reduction of pay or the contempt action for failure to pay.

Mr. Harvey argued that Ms. McFarland's contempt action was premature; however, he made it clear, through discussion, that he would not pay the entire monthly maintenance award. At the time the contempt was filed, he had already failed to pay one-half of the maintenance award on the first day of the month. Because Mr. Harvey was employed by the Army, his pay dates were the

first and fifteenth of every month. Military members typically receive their pay earlier if their pay dates fall on a weekend or holiday. It was clear to Ms. McFarland that Mr. McFarland did not intend to pay her as he had historically done of the month in full each month

Mr. Harvey, for the first time on appeal, argues that his pay dates had changed and were now the 10th and the 25th, as he was employed by the State of Washington at that time and no longer serving in the Army. However, it was clear the trial court intended the pay days for maintenance to correspond with the military pay days, as the payments were to be as follows: “...*The husband shall pay maintenance to the wife in the amount of \$3,500.00/mo, payable on the first pay date of each month via direct allotment from Mr. Harvey’s military pay to an account of Ms. Harvey’s choosing.*” The only person that knew that Mr. Harvey had been discharged from the military and had obtained employment with the State of Washington was Mr. Harvey. A change of date in when the maintenance shall be paid would properly have been before the court on a Petition to Modify, or Mr. Harvey could have asked the trial court to review the maintenance award, which was clearly contemplated in the Decree, had Mr. Harvey filed such a petition prior to any change in either his income or his employment; however, he did not. Instead he resorted to self-help, to the detriment of only Ms. McFarland.

Mr. Harvey did not file his petition for modification until June 16, 2015, after he failed to pay the June maintenance payment. He then filed an Amended Petition on June 29, 2015, continuing to be in contempt of court orders as he had not paid the entire \$3,500.00 maintenance award at any time in June 2015. Also, as we have seen via the amount of the judgment in the Order Denying Adequate Cause & Judgment for Spousal Maintenance entered on September 9, 2016, Mr. Harvey failed to pay the entire amount from June 2015 through September 2016. He still has not paid those amounts and remains in contempt.

F. Ms. McFarland was Entitled to Fees in the Superior Court and Requests Them in This Matter

Ms. McFarland argues that the trial commissioner did not err in ordering Mr. Harvey to pay \$7,000.00 in attorney fees related to the contempt action, as well as for the Petition for Modification. Mr. Harvey argues that the trial commissioner only granted fees under the contempt matter, but could not discern the amount of the fees associated with the contempt action versus those associated with the modification. However, that is not what the trial commissioner ruled. Although he did not distinguish the amount of award for each the contempt and the Petition on Modification, he clearly awarded the fees for both actions, but did not designate a specific portion of the award of attorney fees to one matter or the other. The Court's Decision, page 6, the third full paragraph, states:

“The Petitioner is awarded \$7,000.00 in attorney fees. This is based upon the finding of contempt of the Respondent and the significant differential in incomes of the parties concerning the Respondent’s Petition to Terminate/Modify Spousal Maintenance. The two issues are so intertwined that the Court is unable to distinguish the efforts devoted to each issue. The Petitioner has the financial need for contribution of payment to attorney fees and the Respondent has the financial ability to pay. The total amount of attorney fees asserted by Petitioner is not granted because the court finds the Petition to Terminate/Modify Spousal Maintenance was not baseless or brought without merit. The Petitioner has incurred significant fees in his own legal representation.”

Clearly the trial court completed an analysis under RCW 26.09.140 to determine that Ms. McFarland has a need for fees and Mr. Harvey has the ability to pay fees. The trial court never makes a finding that any of the fees were due to the finding of contempt against Mr. Harvey. The

attorney fees that were awarded were included in the Contempt Order Hearing as a judgment and condition to purge contempt.

Under RCW 26.09.140, the court may award attorney fees to either party in a maintenance action. In determining whether the court should award fees, the court considers the parties' relative need versus ability to pay. *In re Marriage of Schellenberger*, 80 Wn. App. 71, 87, 906 P.2d 968 (1995). The Court will reverse an attorney fee award if the decision is untenable or manifestly unreasonable. *In re Custody of Salerno*, 66 Wash.App. 923, 926, 833 P.2d 470 (1992). Ms McFarland is asking the Court to reaffirm her award of attorney fees, as awarded by the trial commissioner *pro tempore*. Further, she is asking this Court to award her attorney fees for responding to this appeal. The Court has the authority to award fees under RAP 18.1(a) and RCW 26.09.140. The Court may exercise discretion to award attorney fees on appeal after considering the financial need of the requesting party, the other party's ability to pay, and the arguable merits of the issues raised on appeal. *In re Marriage of Pennamen*, 135 Wn.App. 790, 807-08, 146 P.3d 466 (2006). Ms McFarland argues that given Mr. Harvey's household income in comparison to hers, Mr. Harvey should be ordered to pay her attorney fees.

Trial courts must actively assess the reasonableness of all attorney fee awards and may not simply accept the amounts stated in fee affidavits. *Berryman v. Metcalf*, 177 Wn.App. 644, 657, 312 P.3d 745 (2013), review denied sub nom., *Berryman v. Farmers Ins. Co.*, 179 Wn.2d 1026, 320 P.3d 718 (2014). The trial court generally considers the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Id.* at 660.

Trial courts must exercise their discretion on articulable grounds, making a record sufficient to permit meaningful review. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 415, 157 P.3d 431 (2007). This generally means

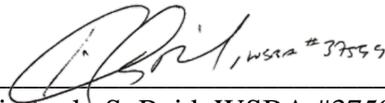
that the trial court "must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question." *SentinalC3, Inc. v. Hunt*, 181 Wn.2d 128, 144, 331 P.3d 40 (2014); see also *Mahler*, 135 Wn.2d at 435. If the trial court does not make findings of fact and conclusions of law supporting the attorney fees award, the preferred remedy is to remand to the trial court for entry of proper findings and conclusions. *Berryman*, 177 Wn.App. at 659. The trial commissioner in this action clearly outlined in his ruling that he was awarding fees due to the disparity of incomes in the households of the parties. The findings should be considered sufficient for purposes of denying this appeal.

CONCLUSION

For all of the aforementioned reasons, Ms. McFarland respectfully requests that this Court dismiss the appeal of Mr. Harvey. This is purely an attempt by Mr. Harvey to forgo his obligation to Ms. McFarland, despite the trial court's orders. The trial court considered Ms. McFarland's ability to work at the time of trial and awarded maintenance that was necessary for her health and well-being. The trial judge considered that given her permanent disability, Ms. McFarland would never be able to financially survive without the assistance of Mr. Harvey paying maintenance. The trial judge crafted an award of maintenance that was designed to get Ms. McFarland to the point that the parties were to receive their portions the military retirement earned through Mr. Harvey's military service. The trial court made this determination based on the factors outlined in the statute. Mr. Harvey refuses to accept his obligation to Ms. McFarland, his former wife of 20 years, and wishes to be free of future obligations to her so that he can live comfortably. That is not an option for Ms. McFarland. The trial court reviewed the information and testimony at trial and made a determination which allowed for a review in this circumstance. Despite that, Mr. Harvey unilaterally decided he would fail to comply with the Decree and would not follow the proper procedure to obtain the relief that he has now received through self-help and denying my client her

court-ordered maintenance payments. As case law outlines, a substantial change of circumstances that could not be contemplated at the time of entry of the Decree is necessary to modify a maintenance award in a final decree. Ms. McFarland argues that even if there has been a change in circumstances for Mr. Harvey, first, it was contemplated at trial, or would have been if Mr. Harvey had disclosed that information to the trial judge, and second, he has not shown that a *substantial* change of his financial circumstances has occurred. Based on this, Ms. McFarland asks the court to deny Mr. Harvey's Appeal, to affirm the decision of the trial court and to award Ms. McFarland attorney fees for this action.

DATED this 3rd day of August, 2017.



Kimberly S. Reid, WSBA #37599
The Law Offices of Kimberly S. Reid, PLLC
Attorney for Respondent

CERTIFICATE OF SERVICE

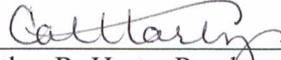
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am the paralegal to Kimberly S. Reid, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Email and first-class United States mail, postage prepaid, to the following:

Patrick W. Rawnsley
PWR LAW, PLLC
1411 State Avenue NE, Suite 201
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pat@pwr-law.com and janice@pwr-law.com

DATED this 3rd day of August, 2017.



Catlyn R. Hartz, Paralegal to
Kimberly S. Reid
Attorney for Respondent

THE LAW OFFICES OF KIMBERLY S. REID, PLLC

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