

No. 49496-5-II

STATE OF WASHINGTON COURT OF APPEALS, DIVISION II

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*In re:*

NATACHA MCFARLAND (fka HARVEY)

Respondent,

and

CONRAD HARVEY,

Appellant

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ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT

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REPLY BRIEF OF CONRAD HARVEY

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## I. REPLY ARGUMENT

Given the exhaustive nature of the briefing provided to this Court, there appears to be little left to address as the briefs filed to date more than adequately identify the legal issues present before this court and have cited essentially to the same authority. So as to avoid unnecessary reiteration of the same arguments previously raised, the following summary is offered without substantial reference authority but some reference to the record. The arguments that have been presented thus far in this appeal as to whether an substantial change in circumstances occurred boil down to essentially what was the dissolution trial court aware of at the time it awarded spousal maintenance. Notwithstanding the admission that Ms. McFarland had filed her complaint with the U.S. Army prior to trial and that information was before the trial court, the notion that Mr. Harvey had an obligation to disclose at trial the possibility that he might suffer some sort of consequence of such complaint five years after the entry date of the original decree is both unsupported in law and without merit on this appeal. Moreover, respondent's argument on page 8 of the responsive brief: "Ms. McFarland argues that Mr. Harvey failed to show a substantial change in 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.” is wholly unsupported in this record. *Opening [sic] Brief of Respondent*, page 8. In fact, the Findings and Recommendations of the Board of Inquiry were not issued until June 27, 2013 - nearly two years after trial. CP 73.

It is unrefuted in the record that Mr. Harvey had only four days advance notice of his separation from service after denial of his request for reconsideration. CP 40. His efforts to secure additional employment, pay maintenance through the month of May 2015 and seek termination/modification of his maintenance obligation are as equally unrefuted in this record. *Opening Brief of Appellant*, page 12. No substantive argument controverting the similarities of this proceeding to that of *In re Marriage of Spreen*, 107 Wn.App. 341, 28 P.3d 769 (Div. II, 2001) has been offered by respondent. No substantive argument has been offered by respondent as to the court commissioner *pro tempore*'s impermissible limitation of modifiability of the spousal maintenance obligation to that of the maintenance provision itself as opposed to the provisions of RCW 26.09.170(1).

Respondent makes considerable argument regarding the appellant's

ability to pay spousal maintenance during the pendency of the proceedings vis-a-vis his current spouse's income. *Respondent's Brief*, pages 13 - 17. Respondent's counsel, also makes a number of arguments attempting to relate factual information to this court herself without reference to the record. *See e.g.* dialogue regarding how much in attorneys fees the respondent has expended, *Respondent's Brief*, page 15. It would appear that the respondent is arguing that the court commissioner *pro tempore's* failure to follow RCW 26.09.170(1) and rather perceive the decree's maintenance provision as being controlled as to modification and/or termination was harmless error because the appellant's wife's income could have supported some sort of maintenance payment. "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *State v. Flora*, 160 Wn.App. 549, 554, 249 P.3d 188 (Div. I, 2011) *citing State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947) emphasis added. Nothing could be further from the truth in this matter as the court commissioner *pro tempore* ruling was gate keeping in nature given its erroneous finding that there was no adequate cause to proceed on the petition for

modification/termination.

As to the issues of contempt and attorney's fees, no specific findings of fact were made by the court commissioner *pro tempore* as to either party's income or financial resources available to them. Moreover, respondent's responsive argument to the first half of June 2015 maintenance not yet being past due<sup>1</sup> as a result of the change in my client's pay dates from while on active duty (15<sup>th</sup> and EOM) to the 10<sup>th</sup> and 25<sup>th</sup> while in state service is fundamentally flawed such that the decree's maintenance provision provides for maintenance payments to be paid "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." CP 7-8. Using the respondent's flawed logic, the appellant should have been held in contempt as well because he didn't make the payment from military pay.

## II. CONCLUSION

The respondent would have this court apply RCW 26.09.170(1) in such a painfully contorted fashion such that it would be an unrecognizable basis for relief allowable only in those circumstances where the obligor

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1

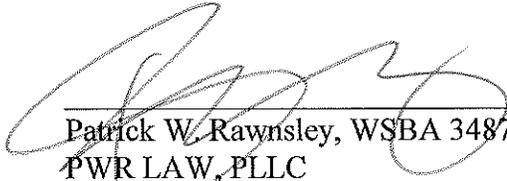
The respondent's contempt motion was filed on June 9, 2015. CP 21 - 24.

suffered a catastrophic injury through no fault of his or her own. Taking the respondent's logic to an extreme, any adverse employment action on the part of an obligor, which arguably arose prior to a trial, that might someday cause the obligor to lose his job, e.g being late to work, would preclude a maintenance modification action. Moreover, respondent's argument that as of the date of the court commissioner *pro tempore's* ruling that there was sufficient income in the obligor's household primarily from his new spouse is, in effect, obligating the appellant's current wife to pay the former spouse. Without much thought or effort, such a position appears contrary to the normal termination provisions of spousal maintenance as to a recipient spouse's subsequent remarriage under RCW 26.09.170(2).

Vacation of the Contempt Hearing Order and the Order Denying Adequate Cause & Judgment for Spousal Maintenance is appropriate under these circumstances for the reasons enumerated in the appellant's two briefs. This matter should then be remanded back to the trial court for further proceedings with specific instructions. Respondent's request for fees should be denied based on the need versus ability to pay provisions of RCW 26.09.140 as the appellant lacks the ability to contribute to same; the

petitioner reserves the right to file a financial affidavit consistent with  
RAP 18.1(c).

Respectfully submitted this 20<sup>th</sup> day of October, 2017.



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Of Attorneys for Appellant

## CERTIFICATE OF SERVICE

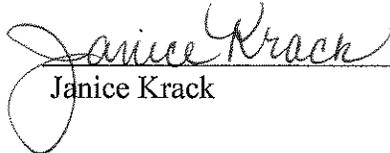
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am a paralegal for PWR LAW, PLLC, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served 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:

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DATED this 20<sup>th</sup> day of October, 2017.

  
\_\_\_\_\_  
Janice Krack

**PWR LAW, PLLC**

**October 20, 2017 - 3:47 PM**

**Transmittal Information**

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