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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY    JH     
DEPUTY

NO. 51615-2-II

Court of Appeals, Division II  
of the State of Washington

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In re

Andrew Weiser, Appellant

and

Michelle Weiser, Respondent.

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**Opening Brief of Appellant**

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Forrest Law Office  
Kathleen A. Forrest  
Attorney for Appellant  
WSBA No. 37607

1303 Rainier Street  
Steilacoom, WA 98388  
(253)588-1011

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## **I. ASSIGNMENTS OF ERROR**

- A. The Court erred when it found that Andrew Weiser (hereafter “Andrew”)<sup>1</sup> failed to pay a portion of his Veterans Disability Income (VA disability) to Michelle Weiser, (hereafter “Michelle”) from August 2012 to December 2017.
- B. The Court erred when it divided the VA disability and prospectively ordered that Andrew pay Michelle 45% of his VA disability each month because the parties reached an agreed settlement in the dissolution.
- C. The Court erred when it ordered Andrew to pay Michelle’s attorney fees of \$7500 after she, the recipient of benefits, waited 6 years to prepare the pension order.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- A. Was the court’s award of a portion of Andrew’s VA disability through a judgment and future payments to Michelle an impermissible division under Federal law?
- B. Because the parties reached an “agreed settlement” in the dissolution, can the court enforce an indemnification clause and the division of VA disability contained in the Decree, even though is contrary to Federal and State law?
- C. Did the court commit error when it ordered Andrew to pay attorney fees in the exorbitant amount of \$7500 (for two hearings), when Michelle, the recipient of the retirement benefits, waited over 6 years to enter a pension order?

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<sup>1</sup> The parties will be referred to their first names in this brief.

### III. STATEMENT OF FACTS and PROCEDURE

The parties were married on May 9, 1992 and divorced on February 4, 2011. (CP 12) Andrew retired from the United States Army on October 1, 2010 after 20 years of service. (CP 84) The parties were married for 17 years (or 214 months) of Andrew's years of military service. (CP 84) In the Decree of Dissolution, each party was awarded 50% of the marital share of the military retirement. (CP 9) The parties do not dispute that this calculates to 45% of the military retirement. (CP 86)

Exhibit **A**<sup>2</sup> of the Decree of Dissolution, provides that Michelle was awarded the following:

One-half of the *community property portion* of the military retirement account in the husband's name. (CP 8,9)

Wife will receive 50% of the *community property portion* of the military retirement account in the husband's name. The community property portion shall be defined as the contributions and interest thereon from the date of marriage until the date of separation. (CP 8,9)

In the event the husband's military retirement benefit shall be reduced or offset by disability pay, such a reduction shall not reduce the amount the wife is entitled to receive each month under the terms of this order. (CP 8)

When Andrew began receiving his retirement in October 2010, he paid Michelle \$900-\$1000 each month, as it was his belief

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<sup>2</sup> There are no page numbers on the Exhibits attached to the Decree of Dissolution.

that this was her share of the military retirement. (CP 63-64) It was determined that the amount owed to Michelle was \$949.57, in 2010 and 2011, however.<sup>3</sup> (CP 63-65) A detailed accounting was exchanged between the parties and filed with the court. (CP 63-65). Any overage and underpayments with respect to *the military retirement* were resolved by agreement.

Andrew's military retirement was reduced in August 2012 because he received a disability rating of 30%. (CP 63-65) In August 2012, he began paying her one-half of the remaining amount of the military retirement, which was \$659.55.<sup>4</sup> (CP 62-65) There was no transfer of Andrew's VA disability of \$631.00 to Michelle from August 2012 to December 2017<sup>5</sup> until the entry of the order on January 26, 2018. (CP 96-98)

On September 20, 2017, a motion for judgment and entry of a military pension order was filed with the court.<sup>6</sup> (CP 57) This was

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<sup>3</sup> Andrew's payments to Michelle since October 2010 is not disputed and has been resolved under the order dated January 26, 2018 with the payment of \$21,000. The disputed issue is the inclusion of Andrew's VA disability in that payment which he started to receive in August 2012. The majority of the \$21,000 is a portion of Andrew's VA disability. (CP 96-98)

<sup>4</sup> Michelle began receiving payments of \$659.55 instead of \$949.57, beginning in August 2012. (CP 63-64)

<sup>5</sup> The date when Michelle filed a motion to recover her share of the VA disability payments was September 20, 2017.

<sup>6</sup> A petition for modification was filed by Michelle which was later dropped.

over 5 years after Andrew began receiving VA disability. Michelle argued that she was entitled to her share of the VA disability because she viewed the “agreement” in the Decree as a contract, thus, the laws of this state did not apply in her circumstance. (CP 72-76, 57) On January 26, 2018, the court ordered that Michelle was entitled to a judgment for her portion of the VA disability and it divided the VA disability, prospectively, ordering that Andrew continue to pay Michelle one-half of this VA disability by a revision court. (CP 96-98) This transfer payment was not considered spousal maintenance; but rather, a division of Andrew’s VA disability and the “enforcement of the contract” entered by the parties. (CP 96-98)

Michelle also filed a petition to modify child support in addition to her motion; she subsequently dropped her petition to modify child support. (CP 54-56). The court ordered Andrew to pay attorney fees of \$5000 after it ruled that Andrew pay 45% of this VA disability and that he pay her 45% of the VA disability from August 2012 to December 2017. (CP 96-98, 82-86) Andrew filed a motion to revise the court’s ruling and this was denied on March 2, 2018. (CP 99-113) The court affirmed the Commissioner’s ruling and ordered attorney fees of \$1500. (CP 96-98) Total, the court ordered \$7500.00 in attorney fees. (CP 99-113)

## IV. ARGUMENT

### A. Standard of Review

The interpretation of language of a Decree of Dissolution and QDRO is a question of law; thus, this court review the language *de novo*. Gimlett v. Gimlett, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981). This court has held that the review of a lower court's decision regarding the intent and construction of a Decree purporting to divide a military pension should be *de novo*. Marriage of Chavez, 80 Wn. App. 432, 435 909 P.2d 314 (1996). This court reviews *de novo* whether a trial court's ruling rests on an erroneous understanding of the law. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

### **B. The Decree and Military Pension Order requires Andrew to pay Michelle a combined sum of military retirement and his Veterans disability, violating Federal and State law.**

Federal and State law prohibits state courts from entering orders that divide a VA disability and from distributing by any means any part of such disability pension. Perkins v. Perkins, 107 Wn. App. 313, 318, 26 P.3d 989 (2001) (court held that spousal maintenance in an amount equal to the disability benefit is

prohibited because it "indirectly" awards the VA disability benefit to former spouse).

In Perkins the court specifically held that a state court could neither order the service member to pay his or her spouse a portion of each monthly payment as the service member received it, nor could it value the pension and grant the spouse an offsetting award of other assets, such as a dollar-for-dollar award of maintenance. Perkins, 107 Wn. App. at 319-327. (trial court awarded the wife maintenance in an amount equal to 45% of the husband's veteran's disability pension)

The United States Supreme Court has addressed state orders which divide military retirement to be calculated without regard to a service member's disability benefits. McCarty v. McCarty, 453 U.S. 210, 235, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), (court held that federal law pre-empted state law regarding the division of military retired pay). Mansell v. Mansell, 490 U.S. 581, 109 S.Ct. 2023, 104 L. Ed. 675 (1989) (court held that state courts cannot divide military retirement pay that is waived in exchange for disability benefits, but that state courts were authorized to divide only "disposable retired pay").

Recently, in 2017, United States Supreme Court reversed an Arizona court order requiring the husband to "indemnify" the wife for her portion of the husband's military retirement that was reduced by the husband's waiver in Howell v. Howell, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017). Once again, the state court's action in indemnifying a former spouse for the reduction of the former spouse's share of retirement benefits due to a VA waiver was reversed.

Here, the court explicitly ordered that Andrew reimburse and indemnify, dollar-for-dollar, Michelle, for her portion of the military retirement that was reduced by the VA waiver in August 2012. Not only was Andrew required to reimburse Michelle from August 2012 to December 2017, but he was required to pay her 45% of this amount moving forward. He was also required under the military pension order to continue to indemnify his former spouse if he chose to waive additional amounts of his retirement for VA disability in future years. (CP 84-85)

The court did not use Andrew's receipt of VA disability as a "factor" to determine if maintenance should be paid, nor did the court do an analysis of whether the impact of the reduction justified the modification or vacation of the Decree under CR 60(b). Here,

the court prospectively ordered a direct percentage of the VA disability (45%) to be paid by Andrew to reimburse Michelle for this reduction. This is contrary to our state court's holding in Perkins, the U.S. Supreme Court's holdings in Mansell and Howell and is a blatant violation of Federal law.

Michelle argues that because the Decree contained language requiring reimbursement for any reduction by agreement, the court should enforce the "contract" reached by the parties. However, the fact that the parties agreed to final orders in a dissolution in lieu of a trial does not make the indemnification clause a permissible order to divide VA disability. The courts in Mansell, and Howell, stated bluntly that court orders containing an indemnification clause are invalid and unenforceable. Specifically, the Howell court noted that "Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted." Howell, 137 S.Ct. at 1406.

The Decree and Military Pension Order in the instant case are *court orders* that impermissibly divide the VA disability and orders Andrew to reimburse Michelle, dollar-for-dollar, 45% of his

VA disability. It is irrelevant whether the parties entered final orders resulting from a trial or by agreement.

**C. Michelle failed to utilize the available remedy to reopen the Decree to address the reduction of her portion of the military retirement under CR 60(b).**

The court in Perkins and Howell also held that a state court could account for the future reduction in military retirement as a *factor* in ordering a disproportionate property division or calculating the need for spousal maintenance. Perkins, 107 Wn. App., at 319-327. That court stated:

[A] Washington dissolution court may not divide or distribute a veteran's disability pension, but it may consider a spouse's entitlement to an undivided veteran's disability pension as one factor relevant to a just and equitable distribution of property under RCW 26.09.080 and as one factor relevant to maintenance under RCW 26.09.090. . .

In Howell, the U.S. Supreme Court recognized that the state court would continue to have the authority to make a just equitable distribution of property or to modify support.

We recognize, as we recognize in Mansell, the hardship that Congressional preemption can sometimes work on divorcing spouses. But we note that a family court, *when it first* determines that value of family assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal maintenance. Howell, 137 S. Ct. at 1406. (emphasis added)

It is acknowledged in Howell and Perkins that state courts continue to have the statutory authority to make a just and equitable distribution of property and/or modify the support provisions under WA RCW 26.09.170, before dividing the assets or calculating support, and through a post-dissolution motion. Here, in the parties' dissolution Michelle was awarded spousal maintenance and a disproportionate share of the assets:

**Michelle:**

100% interest of the Real Property if she refinanced within 3 years.  
50% of the funds in the Thrift Savings Plan  
50% of the community portion of the military retirement  
41 months of spousal maintenance at \$2000 per month. (CP 9-10)

**Andrew:**

50% of the military retirement  
50% of fund in Thrift Savings Plan (CP 8)

It is not stated in the Findings of Fact whether the parties contemplated Andrew's receipt of VA disability in the disproportionate property division and spousal maintenance award.<sup>7</sup> (CP 11-23) Here, the parties arguably took into account the contingency of Andrew's waiver of retirement and agreed to an

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<sup>7</sup> Both parties were represented by legal counsel. The parties paid 100% of the marital debt from the funds in the Thrift Savings Plan and divided the remaining amount. It appears that Michelle received a disproportionate share of the marital assets and she was awarded spousal maintenance and child support. (CP 62-64, 8-10)

offset (the disproportionate share of property) in lieu of going to trial.

Alternatively, Michelle could have sought relief under a modification action under Civil Rule 60(b), to request a modification of support or a reallocation of the property division. Under this remedy, a state court is authorized under RCW 26.09.170 to order relief based on the consideration the post-dissolution economic circumstances of the parties. Washington law allows the court to reopen the Decree and determine if the reduction due to the VA waiver, creates a substantial economic disparity at the time the VA disability *is actually received*. Marriage of Jennings, 138 Wn.2d 612, 980 P.2d 1248 (1999). (Washington court held that there were extraordinary circumstances under CR 60(b) to justify compensatory maintenance when the former spouse's retirement was reduced from \$813.50 to \$136.00) (emphasis added).

Andrew started receiving VA disability in August 2012. At this time, Michelle was employed and received \$2000 in spousal maintenance, her share of military retirement, occupied the marital residence and received funds from the parties' Thrift Savings Plan. It is unclear as to the reason Michelle waited over 5 years to address reimbursement from the reduction. Did she wait 5 years because she knew that a court would find that Michelle's post-

economic circumstance did not justify a modification of support or reallocation of property when her retirement was reduced by \$300? Did Michelle fail to bring a motion to reopen the Decree in 2017 because a court would find that her post-dissolution economic circumstance did not justify an additional award of maintenance? One can presume that a reasonable person, with the assistance of competent legal counsel, would take action within a reasonable timeframe as soon as the former spouse's share of retirement was reduced. Waiting over 5 years to address this issue is just not reasonable and leads one to believe that her decision was a strategic one or that she was concealing information that showed that additional support was not warranted.

Not only did the court order a lump sum transfer payment of 45% of Andrew's VA disability from August 2012 to December 2017, it prospectively ordered Andrew to pay the precise percentage 45% of his VA disability *without finding* that there was a substantial economic impact as a result of the waiver. This award was a dollar-for-dollar award of Andrew's VA disability to his former spouse, contrary to Federal law<sup>8</sup> and in direct opposition to the rulings in Perkins and Howell. The language indemnifying Michelle

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<sup>8</sup> Uniformed Services Former Spouses' Protection Act 10 U.S.C.S § 1408 (c)(1), permits only the division of "disposable retired pay" and *specifically excludes* veterans' disability payments. U.S.C.S. § 1408 (a)(4). (emphasis added)

from any reduction and reimbursement language should be reversed and stricken from the Military Pension Order.

**D. Andrew should be awarded attorney fees based on the arguable merit of the issues on appeal under RAP 18.1<sup>9</sup> and RCW 26.09.140.**

RCW 26.09.140 provides that "[u]pon 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 cost". In exercising that discretion under that statute, this court should consider "the arguable merit of the issues on appeal and the financial resources of the respective parties." Johnson v. Johnson, 107 Wn. App . 500,505,27 P.3d 654 (2001).

Andrew seeks attorney fees and costs associated with the filing of this appeal. RCW 26.09.140<sup>10</sup> Attorney fees can be awarded when they are authorized by contract, statute, or some recognized ground for equity. In re the Matter of Kourtney Scheib,

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<sup>9</sup> If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court.....under RAP 18.1.

<sup>10</sup> 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." RCW 26.09.140

160 Wn.App. 345, 249 P.3d 184, 188 (2011), citing Mellor v. Chamberlin, 100 Wash.2d 643, 649, 673 P.2d 610 (1983).

The court should award fees to Andrew for the cost and legal fees of this appeal. The court should consider the well-established case law as stated in this brief, Michelle's access to competent legal counsel, and her willful failure to seek relief timely under CR 60(b) with the court under Jennings. This case is one of many cases involving the reduction of military retirements due to a VA waiver and the existing case law make it starkly clear that VA disability cannot be divided and awarded to a former spouse. The court's division of VA disability and its prospective mandate that Andrew pay Michelle 45% of this disability is a blatant violation of Federal and State law. He seeks attorney fees based on the arguable merits and necessity of this appeal.

This court should also consider that Michelle, the recipient of the military benefits, was required to prepare the pension order. Michelle argues that she did not have the financial resources to prepare one pension order, yet she could retain counsel to represent her in the dissolution, and waited over 5 years to bring

her motion and seek a judgment for the VA disability<sup>11</sup>. It is not disputed that Andrew paid Michelle each month what he believed was her share of the military retirement. The legal cost of preparing the pension order paled in comparison to the legal fees incurred in resolving the parties' dissolution in 2010. Did Michele wait 6 years to enter a pension order to avoid having to address the issue of indemnification and her receipt of VA disability?

In light of the spousal maintenance paid to Michelle, she argued that she did not have the funds to prepare a pension order. Still, in spite of Michelle's foot-dragging and failure to prepare the appropriate orders, Andrew was ordered to pay Michelle attorney fees of \$5000 by the commissioner and \$1500 by the revision court. Andrew was also required to respond to Michelle's child support modification petition, to include a response and discovery. The fees awarded to Michelle should be reversed.

Andrew is not seeking fees based on financial need as he earns more income than Michelle; his request is based on the

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<sup>11</sup> Michelle was employed, received \$2000 per month in spousal maintenance, child support, funds from the Thrift Savings Funds, and her share of the military retirement in August 2012.

significant and substantial merits of this appeal. Andrew will submit his financial affidavit as proscribed by rule.

## V. CONCLUSION

Andrew respectfully requests that:

1. The language indemnifying Michelle from any reduction due to a VA waiver is reversed and stricken from the Military Pension Order and Decree of Dissolution.
2. The order requiring that Andrew prospectively pay Michelle 45% of his VA income is reversed.
3. The order requiring Andrew to pay Michelle a portion of his VA disability from August 2012 to the present is reversed.
4. The order requiring that Andrew pay attorney fees in the amount of \$5000 and \$1500 is reversed.
5. The appeals court should also award Andrew attorney fees for the necessity of filing this appeal and arguable merits of the appeal.

Submitted by:

Kathleen A. Forrest #37607

Attorney for ANDREW WEISER

Kathleen A. Forrest #37607

Forrest Law Office

PO Box 88702

Steilacoom, WA 98388

Kathleen A. Forrest, being first duly sworn oath, deposes and says: that on the date given below, I served a copy of **Appellant Brief** and this is Proof of Service on the following persons:

Opposing Counsel

Attorney for Michelle Weiser (x) US Mail  
Charles E. Szurszewski  
Connelly, Tacon, & Meserve  
201 5<sup>th</sup> Ave., Suite 301  
Olympia, WA 98501

THE UNDERSIGNED declares under penalty of perjury of the State of Washington that this Appellant Brief and Declaration of Service was served on counsels for MICHELLE WEISER listed above by deposit in the US Mail, Postage prepaid and addressed on August 27, 2018.

Kathleen A. Forrest #37607  
Kathleen A. Forrest #37607  
Attorney for ANDREW WEISER