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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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**Reply 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. INTRODUCTION

The issue before the court is whether the trial court had the authority under federal *and* state law to redefine “disposable retired pay” and require that Andrew pay 45% of his VA disability to Michelle because a “negotiated settlement” was reached in their dissolution.<sup>1</sup>

This case is not about the circumstances surrounding the marital discord that led to the dissolution, nor is it about Michelle’s alleged inability to find work and subsequent financial circumstance. Andrew and Michelle have been devoted and caring parents to their children during the marriage and after it. While Andrew does not discount Michelle’s contributions, under our laws he is entitled to 100% of his VA disability. Michelle was not an abused spouse nor was she denied access to an attorney or our courts to seek relief. In fact, she was awarded spousal maintenance, 100% of the proceeds from the sale of the marital residence, and took on minimal responsibility on paying marital debt. Michelle’s failure to take responsibility and seek relief timely, should also be an important factor for this court to consider.<sup>2</sup> The allegations raised in Michelle’s

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<sup>1</sup> Andrew appeals the Order on Revision entered by the trial court dated March 2, 2018. (CP 96-98)

<sup>2</sup> The court should also consider her willful failure to prepare the military pension order timely, waiting over six years.

brief are irrelevant to the legal issue before the court and only cloud issue in this appeal.

There is no dispute that the parties entered a Decree by agreement. There is no dispute that his Decree contained an indemnification clause, and that the trial court *enforced* this indemnification clause, specifically violating federal law. Case law cited in Michelle's brief is crystal clear with regard to the prohibition of a state to order payment of VA disability to a former spouse. Because they entered an agreed decree, its enforcement is subject to the same laws if they went to a trial.

Requiring Andrew to pay Michelle 45% of his VA disability is an unacceptable outcome, depriving him of disability benefits to which he is entitled as his separate benefit under our established state and federal laws.

**A. Andrew did not reach a voluntary settlement when he abided by the trial court order in paying Michelle \$21,000.00.**

Michelle misleads this court by arguing that the merits of Andrew's appeal is diminished because the parties reached a "voluntarily settlement" when Andrew paid \$21,000.00 to Michelle.<sup>3</sup>

The trial court order provides for the following:

The Respondent is awarded \$21,000 for the underpayment of the Respondent's share of the Petitioner's military pension

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<sup>3</sup> The trial court order does note the transfer of \$21,000.00. (CP 96-98)

through December 31, 2017. This amount was paid in full on January 19, 2018. (CP 96-98) (1 RP 9-10)

Andrew appeals the trial court's order requiring him to indemnify Michelle for the reduction in her share of his military retirement and the record is clear that he objected to this Michelle's motion.<sup>4</sup> (CP 96-98) (1 RP 9-11).

Upon threat of motions to enforce, contempt proceedings and ongoing garnishments through his employer, Andrew abided by the trial court's order and paid \$21,000.00 to Michelle in past due amounts of retirement and VA disability. (CP 96-98) Andrew works abroad and would be unable to maintain his security clearance if he did not pay this judgment<sup>5</sup>. Part of this amount is 45% of the share of Andrew's VA disability<sup>6</sup>. He continues to be required to pay Michelle 45% of his VA disability each month. (CP 82-86) Because the trial court's order is preempted by federal law, Andrew has paid \$19,422.00 in excess of Michelle's entitlement as of December 31, 2017.<sup>7</sup> Andrew seeks the recoupment of these funds in this appeal from August 2012 to January 2018 as noted in his opening brief.

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<sup>4</sup> It should be noted that Andrew is not appealing the Decree of Dissolution (original decree) entered on February 4, 2011, as alleged in Michelle's brief. He is appealing the trial court's denial of his revision on March 2, 2018.

<sup>5</sup> There is nothing in the record to support this fact. Andrew provides this information for this court to respond to Michelle's allegation that an agreement was reached.

<sup>6</sup> Andrew's first VA disability payment was in August 2012 in the amount of \$664.00. I calculate this portion as follows: August 2012 through December 2017 (65 months) X 45% of VA disability (\$298.80) = \$19,422.00.

<sup>7</sup> A proportion of the \$21,000 payment was VA disability. (CP 72-76)

Andrew's compliance with a trial court's order does not signify that an agreement was reached by the parties thereby making his appeal of the trial court's decision moot. The parties agreed on the amount owed, *after* the trial court ruled that Andrew was required to abide by the indemnification clause. (1 RP 11) The mathematical calculation of an agreed amount owed after a ruling does not demonstrate acquiescence by Andrew with regard to the enforcement of the indemnification clause. Consequently, his payment to Michelle of past due retirement should not impact the merits of this appeal.

**B. Andrew properly preserved the issue in the appeal.**

Motions to enforce judgment are reviewed *de novo* where the evidence consists of only declarations and affidavits. Lavigne v. Green, 106 Wash.App. 12, 16, 23 P.3d 515 (2001).

A motion to enforce and enter judgment was filed by Michelle; thus, the evidence considered in this appeal consist of affidavits and declarations. The trial court did not evaluate any additional evidence or oral testimony. Therefore, this court stands in the same shoes as the trial court and reviews its judgment *de novo*. Veith v. Xterra Wetsuits, LLC, 144 Wn. App. 362, 365, 183 P.3d 334 (2008).

1. Andrew objected to the requirement of reimbursement to Michelle.

Andrew objected to the trial court ordering that he had a duty to reimburse and indemnify Michelle. (CP 87-88, 62-66) (1 RP 5-7) Andrew has no direct obligation to reimburse Michelle for any financial loss resulting from his election of VA benefits because the language in the Decree does not order this. (CP 1-10) While the Decree does indemnify Michelle, its enforcement is constrained by federal law and the omission of language requiring Andrew to reimburse Michelle. The pertinent part in the Decree is as follows:

“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 the order.***” (CP 9-10)

Here, Andrew is not required to make payments to Michelle, the Decree only states that she is awarded part of the military pension. The parties were represented by their respective counsel, and it is presumed that the attorneys were aware that the governing federal agency Department of Finance and Accounting Services (DFAS), would not pay out VA disability. Still, no language was included in the Decree requiring Andrew to pay monies to make up for this loss. Where does this burden lie? Michelle argues that “Andrew offered to provide Michelle with a permanent stream of income” in an amount equal to her 45 percent share of his military retirement.” (Brief of Respondent page 17) She writes “He promised that even if he elected to receive disability, his payment to

her 'will not decrease.'" (Brief of Respondent page 17). ***Again, there is nothing in the record reflecting this intent, explicit or implicit, or that Andrew would make any direct payment to Michelle, except for a monthly spousal maintenance of \$2,000.00 ordered in the Decree.*** (CP 10). The language merely says that the reduction shall not reduce her amount. (CP 9) Andrew was not ordered to pay Michelle any part of his VA disability, *until* the trial court went beyond its authority and ordered this reimbursement.

Michelle's assertion throughout her brief that there was no distribution or division of "anything" when the trial court ordered that Andrew pay part of this VA disability to her, is simply inaccurate. The trial court went beyond the language and the "four corners" of the agreement and required Andrew to pay Michelle his VA disability.

"Pending (and in addition to) funds being paid directly to Respondent pursuant to the military retirement order, Petitioner shall pay to Respondent the full amount to which she is entitled as listed in Exhibit A in the decree of dissolution. That is defined as 45% of what would be the former wife's share of disposable retired pay after deduction of the SBP cost with the full amount of the VA waiver added before the total is multiplied by 45%." (CP 96-98, 82-86)

In "holding Andrew to his promise," the trial court enforced the indemnification clause, requiring Andrew to reimburse Michelle, specifically violating federal law.

C. **Because the trial court is barred by the federal preemption doctrine, Andrew's issue on appeal is a manifest constitutional error.**

Federal preemption is based on the "supremacy clause" of the United States Constitution. U.S. Const. art.6 Inlandboatmen's Union of the Pacific v. Department of Transp., 119 Wn.2d 697, 701, 836 P.2d 823, 826 (Wash. 1992). The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." US Const, art. VI, cl 2 (emphasis added). Federal Law preempts state law where Congress has intended to foreclose any state regulation in the subject matter regardless of whether state law is consistent or inconsistent with federal standards. Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1594-1595; 191 L.Ed. 2d 511 (2015).

When a state law is preempted by federal law, the state law is "without effect." Maryland v. Louisiana, 451 U.S. 725, 746; 101 S.Ct. 2114; 68 L.Ed. 2d 576 (1981). While state law governs the division of marital property in a dissolution, "[when] the application of community property law conflicts with the federal military retirement scheme" it is completely preempted. McCarty v. McCarty, 453 U.S. 210, at 220-223; 101 S.Ct. 2728; 69 L.Ed 2d 589 (1981) *citing*

Hisquierdo, 439 U.S. 572, 581; 99 S.Ct. 802; 59 L.Ed. 2d 1(1979). See also Ridgway v. Ridgeway, 454 U.S. at 54, citing McCarty, *supra* and Hisquierdo, *supra* and stating that “[n]otwithstanding the limited application of federal law in the field of domestic relations generally..., this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, *rights and expectancies* established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights.” (emphasis added).

State courts are preempted, and have always been, by federal law to order a veteran to indemnify a former spouse suing for disability pay. Howell v. Howell, 581 US \_\_\_\_; 137 S. Ct. 1400, 1404; 197 L.Ed. 2d 781 (2017). citing 10 U.S.C 1408 (c)(1) (defining “disposable retired pay” as a property that a state may choose to include as a divisible upon divorce) and 10 U.S.C 1408(a) (4)(A)(ii) (stating that amounts deducted from disposable retired pay in order to receive disability pay are not to be counted as such property). While the Uniform Services Former Spouse Protection Act (USFSPA) granted the state court the authority to divide retired pay, this grant of authority was over only a limited portion of such benefits. Howell, 137 S.Ct. at 1405-1406.

The issue here implicates a Constitutional right because the trial court order enforced the indemnification clause, an action

denounced under federal law. Id. at 1406. Federal law and this court have previously ruled that a state court is barred from including VA disability pay in the division of a military pension, and the trial court did just that in this case. Perkins v. Perkins, 107 Wn.App. 313, 318, 26 P. 3d 989, Wash.App. Div. 2 2001), citing, Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S. Ct. 802 (1979), McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728 1981), and Mansell v. Mansell, 490 U.S. 581, 109 S. Ct. 2023 (1989).

The issue raised by Andrew is manifest because it has caused practical and identifiable consequences. The trial court redefined “disposable retired pay” to include his VA disability and ordered that Michelle would receive 45% of the military pension, *to include the VA disability portion*. This ruling resulted in the loss of benefits and income to Andrew he earned during his 20-year military career as a United States Army Ranger. Therefore, this is a manifest Constitutional error, having practical and identifiable consequences, directly violating the United States Constitution.

**D. The trial court did not modify the Decree or award compensatory maintenance; it enforced an illegal provision requiring dollar for dollar reimbursement of VA disability.**

Michelle correctly notes that this court may not divide or distribute a veteran’s disability pension. In re Marriage of Perkins, 107 Wn.App. 313, 26 P.3d 989 (2001). While she acknowledges that federal law prohibits a state court from dividing VA disability, she fails

to explain how requiring Andrew to pay Michelle 45%, by including the VA disability in “disposable retired pay” is not “indemnification” and a permissible distribution under the law. Indemnification is defined as the following:

the act of making another "whole" by paying any loss another might suffer. This usually arises from a clause in a contract where a party agrees to pay for any losses which arise or have arisen.<sup>8</sup>

The indemnification clause in the Decree essentially requires that Michelle is paid 45% of his VA disability pension.<sup>9</sup> The relevant provision orders the following:

Petitioner shall pay to Respondent the full amount to which she is entitled as listed in Exhibit A in the decree of dissolution. That is defined as 45% of what would be the former wife’s share of disposable retired pay after the deduction of the SBP cost with the full amount of the VA waiver added before the total is multiplied by 45%. (CP 9-10)

Here, not only did the trial court indemnify Michelle for the reduction in retirement, it ordered Andrew to pay a “dollar for dollar” amount of VA disability to Michelle, a remedy strictly prohibited by the ruling in Perkins. Perkins, 107 Wn.App. 313, 317-24 (Federal law cannot be circumvented by ordering the same percentage of maintenance from disability in lieu of retirement). The court based this award by finding that an

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<sup>8</sup> <https://definitions.uslegal.com/c/contract-indemnification/>

<sup>9</sup> The Decree does not provide from whom she would receive this payment, the enforcing agency, DFAS, or from Andrew.

agreement was reached and, as a result, Andrew had to pay her monies, regardless of whether the language in the Decree itself required this to be paid.<sup>10</sup> (CP 96-98) (1 RP 9-11) Michelle characterizes the monies owed as not a reimbursement or maintenance, but Andrew's obligation to follow through on his promise. The relevant portion of the trial court order is as follows:

The agreement of the parties adopted by the court in the decree is unambiguous. The court will not go outside of the four corners. (CP 96-98, 1 RP 9-11)

The glaring deficiency here is that the trial court assumes the state had the authority to order reimbursement of funds it had no vested authority to give. Howell 137 S.Ct at 1405. (citing 38 USC 5301 (a)(1), emphasizing that the state courts never had authority to "vest" an interest in these benefits in someone other than the veteran; thus monies that is the separate property of the veteran under federal law, cannot be enforced when a state court had no authority to do this in the first place.) Perhaps if the Decree contained language that showed the intent to award Michelle a permanent stream of income, this could have addressed the impact of the financial loss when the reduction became effective. The Decree did not provide for this, however.

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<sup>10</sup> The trial court correctly notes that Andrew did not agree to actually pay Michelle, but only that an agreement was reached. (CP 96-98) (1 RP 9-11)

Consequently, the trial court's redefinition of retired pay as including VA disability directly violated well-established Washington law, prohibiting a "dollar for dollar" offset.

**E. VA disability may be considered a financial circumstance when making a just and equitable distribution, but reimbursement is prohibited.**

A state court may consider disability pay as a financial circumstance in making a just and equitable distribution, *so long as* it does not displace the requirement under federal law. For example, Washington law allows the court to vacate a decree, modify a maintenance provision or reallocate the property division if the financial loss resulting from waiver is an extraordinary circumstance which creates a substantial economic disparity. In re Marriage of Jennings, 138 Wn. 2d 612, 980 P. 2d 1248 (1999).

The issue in Jennings is different from the one presented in this case. In Jennings, the issue was whether state law afforded the wife a remedy when, years after the original decree, the husband waived *most* of the service pension distributed in its original decree. Here, the issue is whether the trial court violated federal law when it enforced a Decree by redefining "disposable retired pay" as including VA disability and requiring a "dollar for dollar" reimbursement to the former spouse.

While Jennings has not been overruled, Howell, prohibits the consideration of disability pay as a reason to order an offset of the marital property, after the fact, because it has the same effect of displacing the federal law. Howell 137 S.Ct at 1405-1407. The only remedy under Howell is for parties to negotiate a division or property and spousal maintenance in contemplation of a veteran's election of benefits. Still, this does not include an indemnification clauses nor did it include a dollar for dollar award of VA disability.

Andrew admits that even in light of the ruling in Howell, state courts are not completely divested of adequately addressing a property settlement when a veteran makes the election. Arguably, Jennings still allows a state court to consider the impact of the financial loss at the time of the reduction, after a decree is entered. If the economic disparity is significant when considering the financial circumstances of the parties, remedies could include an equitable redistribution of the marital property, or compensatory maintenance for a limited duration to allow the former spouse to recover from this loss.

Here, had Michelle addressed the economic disparity in August 2012<sup>11</sup>, the month when the retirement was reduced, it would have bolstered her position. At that time, a state court could have

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<sup>11</sup> Andrew started receiving VA disability and reduced his payment to Michelle starting that month.

ordered an equitable remedy such as maintenance under the law at that time. Seeking relief over five years after, and after Andrew became engaged to be married, the reduction likely hampered Michelle's ability to show that the economic disparity warranted an additional award of maintenance after this period of time. For this reason, Michelle strategically chose to seek relief by asking for the direct distribution of a portion of the VA disability because this was her only alternative.

**F. Andrew did not argue that the trial court modified the Decree.**

Andrew does not argue that requiring him to pay Michelle part of his disability was a modification. He argues that this division was illegal and an improper division of his VA disability.

Andrew raised the issue of a "modification" to point out that a remedy was available for Michelle to address the issue of the reduction in 2012. Michelle requested reimbursement from Andrew's VA disability *over five years* after the reduction for an unknown reason. It is believed it was her understanding that the VA disability, was, in fact, separate property. Still, the burden is on Michelle, not Andrew, to request a modification if she believed that the economic disparity was so great, that an equitable redistribution was necessary. She failed to raise this issue timely because the parties

had a mutual understanding that Andrew's VA disability is the separate property of Andrew. Because she would have had the heavy burden to show the economic disparity **from five years ago** (to 2012 when the retirement was reduced) in 2017, she did not file for a modification. Instead, Michelle filed a motion to enforce an indemnification clause, seeking relief that is contrary to established case law.

**G. A trial court's enforcement of a contract must be within the bounds of the law.**

Michelle argues that because the Decree was a "contract," enforcement by trial court was justified even if the contract violated state and federal laws. Our courts are constrained by the law in enforcing an illegal contracts. Bankston v. Pierce County, 301 P.3d 495, 174 Wn. App. 932 (2013) (court holding that contracts that are illegal are void). An agreement is only valid to the extent that it can be enforced under our laws. RCW 26.09.070 permits parties to enter into "amicable settlements" and may be enforced as a signed separation agreement or if it is memorialized in a court order. Morris v. Maks, 69 Wn. App. 865, 868 (1993); Stottlemyre v. Reed, 35 Wn. App. 169, 171 (1983). Not only do the rules of contract law apply, but RCW 26.09.070 (6) states:

Terms of the contract set forth or incorporated by reference in the decree may be enforced by **all remedies available** for the enforcement of a judgment, including contempt, and are enforceable as contract terms.

As the statute indicates, either party has the ability to utilize “all remedies available” under the law to address the enforcement of the judgment. Michelle is correct in that she may seek enforcement of contracts through all remedies available, such as her motion filed with the trial court. Just the same, Andrew is utilizing this right under the statute in objecting to the enforcement of this illegal provision based on its violation of our law.

An example of our court’s duty to abide by the law in enforcement of contracts is illustrated in the case of prenuptial agreements. With these agreements, our courts are guided by the law and taking meticulous steps to determine the validity and legality of a prenuptial agreement. Most often, these agreements are prepared with the assistance of counsel to ensure compliance with the law, and are enforceable, *only if* the agreement meets the procedural and substantive requirements required under our law. In re Marriage of Foran, 67 Wn. App. 242, 249, 834 P.2d 1081 (1992) Prenuptial agreement can be challenged, and are frequently stricken for various reasons if a court found that the agreement to be illegal and therefore unenforceable. In re Marriage of Matson, 107 Wn.2d 479, 482, 730 P.2d 668 (1986) In re Estate of Crawford, 107 Wn.2d 493, 501, 730 P.2d 675 (1986). The burden is on the party enforcing

the agreement to show that it is a valid agreement. Crawford, 107 Wn.2d at 496.

Michelle's argument that our courts should enforce contracts regardless of its legality and limitations under our laws discounts the primary function of our court system: to resolve disputes within the bounds of the law. Here, with the assistance of counsel, the parties drafted a contract that awards Michelle 50% of the marital portion of Andrew's military retirement regardless of whether he receives VA disability. Still, the agreement unambiguously states that while Michelle is awarded 45% of the retirement, it unambiguously provides that Andrew is not required to pay any amount toward this financial loss.

Second, the Decree does not contain language indicating the agreed intent that Andrew provide a "permanent stream of income" to Michelle through payment of VA disability. The Decree does not place any burden on Andrew to make up for the financial loss resulting from DFAS's refusal to enforce the state court order; it simply states that Michelle is awarded a share of the military pension. Andrew has no burden to ensure payment because the Decree simply does not require this. Guided by federal law, DFAS will not pay out any portion of VA disability to Michelle, because federal law prohibits this. Because of this, the court went outside of the four corners of the agreement in the Decree and presumed that Andrew

was to pay out his VA disability, and reimburse Michelle, giving rise to this appeal. (1 RP 9-11)

Michelle relies on an unpublished case predating the unanimous decision in Howell to justify her argument that she is entitled to an award of Andrew's VA disability.<sup>12</sup> In Gravelle, the veteran filed a motion to modify a maintenance provision that was agreed through a subsequent amendment to his original decree after his receipt of VA disability. In re marriage of Gravelle, Nos. 32700-1-III, 33178-4-III (July 7, 2016). Arguing that the maintenance obligation was an improper offset, prohibited under Perkins, the veteran in that case asked the court to terminate his maintenance obligation.

In our case, there was not even a requirement that Andrew pay maintenance or other monies to Michelle after his maintenance obligation terminated in September 2013. There was only the requirement, ordered by the trial court to reimburse Michelle through his VA disability, which is prohibited. In Gravelle, the court reiterated that there was no division of VA disability, but only a separate maintenance provision the parties agreed to in their agreed amendment. Gravelle, slip op. at 6. Consequently, it denied the husband's request to modify the existing maintenance provision.

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<sup>12</sup> Gravelle has no precedential value, nor is it binding on the court. RAP 14.1

This case is different from Gravelle because Michelle asked that Andrew pay her part of the VA disability, pursuant to her presumption that Andrew had the affirmative duty under in the Decree. Additionally, Michelle did not seek a modification of maintenance provision (there was no provision to modify) to address an economic disparity, as the veteran did in Gravelle.

It is also significant to note, that maintenance that was ordered here, terminated on September 30, 2013. Andrew was not required to pay maintenance beyond September 30, 2013, nor was there contemplation by the parties of a future modification as there was no language allowing for the modification of that maintenance. In Gravelle, the maintenance obligation was existing, ongoing, and appeared to compensate the former spouse for the reduction in retirement. Based on these reasons, Michelle's reliance on this case is misplaced and it has no persuasive value as an unpublished case.

#### **H. Attorney Fees**

1. The court should reverse the \$5,000.00 and \$1,500.00 award to Michelle and award Andrew fees for the cost of his appeal.

Michelle should be required to pay Andrew's attorney fees. Michelle failed to prepare the military pension order, for six years,

and the parties have had to re-litigate these issues. As the recipient of the military retirement, it was her obligation to prepare the order that would allow her to receive the benefits awarded to her.<sup>13</sup> Michelle was represented by an attorney in her dissolution case and it is presumed she was made aware of the necessity of doing this. Consequently, Andrew incurred substantial attorney fees for having to address the underpayment of the military retirement and the enforcement of an illegal indemnification clause. Also, because Andrew had to pay Michelle's fees, he was required to pay for the preparation of the pension order, something Michelle was obligated to prepare.

More important, Andrew also seeks attorney fees for Michelle's willful failure to acknowledge the status of the law with respect to the impermissible division of VA disability pay. Not only did she have access to legal counsel during the dissolution, she had one in filing seeking enforcement of the indemnification clause. Had Michelle sought relief in August 2012 timely, and had she taken steps to prepare the pension order, most, if not all of these issues could have been addressed without litigation.

This court should reverse of the fees of \$5,000.00 and \$1,500.00 awarded by the trial court. Andrew should not have had

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<sup>13</sup> The fact that Michelle was obligated to prepare the pension order is not disputed. The trial court order states that because of her inability to secure funds to prepare this document, she failed to do this for six years.

to pay for Michelle's foot-dragging and intransigence. Attorney fees for his appeal should be awarded to Andrew as well.

## II. CONCLUSION

If this court does not reverse the trial court ruling, it will be in violation of well-established law and therefore not compliant with preemptive federal law. Requiring Andrew to pay part of his VA disability is unjust and deprives him of the disability benefits to which he is entitled under the law. While it is not disputed that an agreement was reached, the law must be followed in enforcing the agreement. Following Michelle's line of reasoning, parties would not seek out court orders in memorializing their agreements if the law was not relevant. While the decree provides that the parties agreed on Michelle receiving her full share of the military retirement, the unambiguous language does not impose a duty on Andrew to ensure that she is compensated for this loss.

This case is also one of lost opportunity. Michelle had the ability to seek a remedy in August 2012 when the reduction became effective through maintenance and perhaps a disproportional division of assets, but she failed to do this for an unknown reason. While the court in Jennings, opened the door for state courts to order equitable remedies such as an indemnification clause, the decision in Howell put the nail in the coffin for these work-arounds.

For these reasons, Michelle is only entitled to the portion of disposable retired pay remaining after VA disability is excluded. There is no right or entitlement to anything else. Andrew respectfully requests that the court reverse court's ruling on the issue raised in his appeal. Andrew also asks for fees for the cost of this appeal based on as well as the reversal of the two attorney fee awards of \$1,500.00 and \$5,000.00.

Submitted by:



Attorney for ANDREW WEISER  
Kathleen A. Forrest  
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 Reply Brief** and this is Proof of Service on the following persons:

Opposing Counsel

Kevin Hochhalter  
Olympic Appeals, PLLC  
4570 Avery Ln SE C-217  
Olympia, WA 98503  
kevin@olympicappeals.com

Email

Charles E. Szurszewski  
Connelly, Tacon, & Meserve  
201 5<sup>th</sup> Ave., Suite 301  
Olympia, WA 98501  
chucks@olylaw.com

Email

THE UNDERSIGNED declares under penalty of perjury of the State of Washington that this Appellant Reply Brief and Declaration of Service was served on counsels for MICHELLE WEISER listed above by email and addressed on January 10, 2019.



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Kathleen A. Forrest #37607  
Attorney for ANDREW WEISER

**FORREST LAW OFFICE PLLC**

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Address:  
PO BOX 88702  
STEILACOOM, WA, 98388-0702  
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