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Division II  
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**Court of Appeals, Div. II,  
of the State of Washington**

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In re Marriage of Weiser:

Andrew Weiser,

Appellant,

v.

Michelle Weiser,

Respondent.

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**Amended Brief of Respondent**

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## 1. Introduction

In what is essentially a contract case, Andrew Weiser, a military servicemember, filed for divorce from Michelle, his non-military wife, on the eve of his reaching 20 years of service for full retirement. Andrew and Michelle negotiated the terms of the divorce, reaching an agreement that provided Michelle with a permanent future stream of income from Andrew. The agreement was incorporated into the dissolution decree.

Andrew went on to a successful, six-figure second career. Michelle works as a paraeducator making less than \$20,000 per year. This disparity is typical of non-military spouses of servicemembers. Spouses of servicemembers are far less likely to participate in the labor market than the general working age population.<sup>1</sup> When employed, they earn an average of 26.8 percent less than their female peers in the general workforce.<sup>2</sup> They often are unable to advance their own careers due to the frequent interstate moves of a military family.<sup>3</sup> As a result,

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<sup>1</sup> The Council of Economic Advisors, Office of the President of the United States, *Spouses in the Labor Market 2* (May 2018) (available at <https://www.whitehouse.gov/wp-content/uploads/2018/05/Military-Spouses-in-the-Labor-Market.pdf>, last accessed Nov. 5, 2018).

<sup>2</sup> *Spouses*, at 3.

<sup>3</sup> Betsy Klein, *Ivanka Trump Spotlights Military Spouses' Employment Challenges*, CNN, Aug. 2, 2017 (available at <https://>

many, like Michelle, are left with little earning potential to support themselves and their children in the event of divorce.

After their first child was born with Cystic Fibrosis, Michelle and Andrew agreed that Michelle would remain home to care for the child while Andrew pursued his military career. Knowing that Michelle had sacrificed her own present and future earning capacity, Michelle and Andrew reached an agreement in the divorce that would provide a permanent future stream of income to Michelle. The agreement contemplated the possibility that Andrew might be found partially disabled in the future and provided that even if Andrew waived a portion of his retirement income in order to accept disability, his payments to Michelle under the agreement would not decrease.

After the divorce, Andrew was found partially disabled. He waived a portion of his military retirement in order to receive disability payments. He reduced his payments to Michelle, in violation of his agreement. The trial court correctly enforced the unambiguous agreement of the parties, finding the agreement permissible under state and federal law. This Court should affirm.

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[www.cnn.com/2017/08/02/politics/ivanka-trump-military-spouses-employment/index.html](http://www.cnn.com/2017/08/02/politics/ivanka-trump-military-spouses-employment/index.html), last accessed Nov. 5, 2018).

## **2. Statement of the Case**

### **2.1 For most of the 18-year marriage, Michelle Weiser was a stay-at-home mother, sacrificing her own earning potential to care for the couple's daughter who was born with Cystic Fibrosis.**

Michelle and Andrew have known each other since age 15. CP 72. Andrew entered the military on August 28, 1990. CP 62. They married on May 9, 1992, separated on March 17, 2010, and the divorce was granted on February 4, 2011. CP 1. Andrew officially retired from the military on October 1, 2010. CP 62.

During the marriage, Michelle stayed home with a family that grew to three children while Andrew pursued his military career. CP 72. Their first child was born with Cystic Fibrosis, making the military medical benefits vital but also requiring that Michelle further sacrifice any goals of a career or education. CP 72.

At the time of entry of the decree, Michelle was still a stay-at home mother of three with no history of meaningful employment and an earned income of \$0. CP 16, 211. Andrew was completing 20 years of military service and earning \$6,800 per month. CP 200. His 2011 tax return (the year after his retirement) reflected gross income exceeding \$188,000. CP 32.

**2.2 Andrew and Michelle negotiated the terms of their divorce, in which Andrew offered and agreed to provide Michelle with a permanent stream of income that could not be reduced.**

In May 2010, Andrew and Michelle negotiated the terms of the divorce. CP 73-76. Andrew offered to provide Michelle with a permanent income stream in an amount equal to her share of his military retirement. CP 76. He promised that even if he elected to receive disability, his payment to her “will not decrease.” CP 76. Andrew’s lawyer refined the language of the offer. CP 75. By the agreement of the parties, Michelle’s interest in the military retirement was set at the time of separation (and not the date of the divorce), such that her share of the military retirement was 45 percent. CP 9, 86.

The agreement disposed of the marital home, vehicles, bank and other accounts. CP 8-9. Michelle was to be named by Andrew as the survivor on his Survivor Benefit Plan. CP 9. Each would be responsible to pay any encumbrances on property awarded to that person. CP 10. In addition to the permanent income stream to Michelle, Andrew would pay \$2,000 per month in temporary maintenance beginning April 2010 with a final payment in September 2013. CP 10.

Andrew’s petition for divorce included the final agreement of the parties in an attachment titled Exhibit A. CP 187. The

agreement was incorporated into the final decree. CP 8. The agreement provided,

Wife will receive 50% of the community property portion of the military retirement account in the husband's name.

...

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.

Husband shall receive 100% of the separate property portion of the military retirement account in the husband's name.

CP 8.

### **2.3 Andrew elected to receive disability and reduced his payments to Michelle in violation of the agreement.**

Andrew began receiving his military retirement in October 2010 and began to pay Michelle what the parties believed to be her share. CP 62-63. In 2012, Andrew received a disability rating of 30% and started receiving VA disability payments in lieu of a portion of his retirement. CP 62-63. He reduced his payments to Michelle on the theory that the decree did not award Michelle any portion of the VA disability payments. CP 62-63.

In September 2017, Michelle moved for an order and judgment against Andrew for underpayment of the amount owed under the agreement. CP 57. She argued that the parties had an unambiguous contract requiring Andrew to pay to Michelle an amount that could not be reduced by Andrew's election to receive disability pay. CP 290, 292-93. Andrew responded that the decree should be invalid under *Howell*, arguing that a court could not order a retired servicemember to indemnify his expense for a disability waiver. CP 68-69.

The trial court determined that the agreement was enforceable and ordered Andrew to pay. CP 96-98. The trial court noted in its oral ruling, "it is an action that is permitted under the *Howell* ruling from my reading of it, given that they both negotiated this agreement." RP, Mar. 2, 2018, at 13. The trial court's written order included the following findings:

- (a) The parties reached an agreement to divide all of their property, pay maintenance, and pay child support.
- (b) The terms of their agreement were included in an attachment to the decree of dissolution and were adopted by the court.
- (c) By the terms of the agreement, the parties had anticipated that the husband would retire from the military and could, at some point in his life, waive a portion of his military retired pay and convert it to VA benefits.

(d) By the terms of their agreement, the husband agreed to reimburse the wife for any sum that she lost due to the waiver. He failed to do so.

...

(g) The agreement of the parties adopted by the court in the decree is unambiguous. The court will not go outside the four corners.

CP 96-97.<sup>4</sup>

The trial court's Judgment and Order reflects a judgment for \$1,500 in attorney's fees, in addition to \$5,000 in fees from the commissioner's ruling. CP 95; *see* CP 89. The record reflects that before the Judgment and Order was entered, Andrew agreed to an amount of \$21,000 for his underpayment, which he then paid to Michelle without entry of any order or judgment. CP 89. Nothing in the record indicates that Andrew reserved any right to challenge the amount of this voluntary settlement.<sup>5</sup>

Andrew appealed the trial court's Judgment and Order.

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<sup>4</sup> Andrew has not specifically assigned error to any of the trial court's findings of fact. As such, the findings are verities on appeal. *In re Marriage of Rounds*, \_\_\_ Wn. App. 2d \_\_\_, 423 P.3d 895, 898 (2018).

<sup>5</sup> Andrew's brief, in a footnote, claims, "The majority of the \$21,000 is a portion of Andrew's VA disability." Br. of App. at 3, n. 3. However, Andrew's only citation in support of this bald assertion is CP 96-98, the trial court's Judgment and Order, which does not say anything about the \$21,000. In regards to that Andrew's voluntary payment of the \$21,000 and of the first \$5,000 fee award in settlement of the dispute, there is no order or judgment for this Court to review.

### **3. Summary of Argument**

The trial court correctly determined that the agreement of the parties was valid and enforceable under state and federal law. Federal law prohibits a state dissolution court from dividing or distributing disability benefits but allows the court to consider the possibility of future disability payments as an economic factor in dividing property and providing for maintenance and support.

In negotiating the divorce, the parties anticipated the possibility that Andrew might elect disability payments in the future. They accounted for that possibility by requiring that Andrew would provide a permanent stream of income to Michelle, which he promised not to reduce on account of any disability election. The agreement did not divide or distribute Andrew's disability payments. The agreement was a permissible determination of what was fair and equitable in distributing the parties' property and providing for maintenance and support. The trial court was correct to enforce the agreement.

Andrew's arguments misconstrue the trial court's order, treating it as a modification when, in fact, the trial court merely enforced the already existing, valid decree and agreement. Andrew's collateral attack on the original decree and agreement is procedurally improper, and this Court cannot provide the

remedy he seeks. Andrew makes other, secondary arguments that are generally irrelevant and fail on their merits.

The trial court's attorney fee award in favor of Michelle was proper. Andrew fails to show any abuse of the trial court's discretion. Andrew's request for attorney's fees on appeal is not supported by any recognized statutory or equitable grounds. This Court should award attorney's fees on appeal to Michelle under RCW 26.09.140 because of the extreme economic disparity between the parties.

## **4. Argument**

### **4.1 Standard of Review**

“When an appeal is taken from an order denying revision of a court commissioner's decision, we review the superior court's decision, not the commissioner's.” *In re Marriage of Williams*, 156 Wn. App. 22, 27, 232 P.3d 573 (2010).

Because this case involves interpretation and construction of a written agreement between the parties, the standard of review is mixed. Interpretation of a written agreement—that is, determining the intent of the parties—is generally a question of fact. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 667-68, 801 P.2d 222 (1990). Construction of the agreement—that is, determining the legal effect of the agreement—is generally a question of law. *Id.* at 663.

Findings of fact are reviewed for substantial evidence. *In re Marriage of Valente*, 179 Wn. App. 817, 831, 320 P.3d 115 (2014). Unchallenged findings of fact are verities on appeal. *In re Marriage of Rounds*, \_\_\_ Wn. App. 2d \_\_\_, 423 P.3d 895, 898 (2018).

The trial court made the following findings of fact regarding the agreement of the parties:

- (a) The parties reached an agreement to divide all of their property, pay maintenance, and pay child support.
- (b) The terms of their agreement were included in an attachment to the decree of dissolution and were adopted by the court.
- (c) By the terms of the agreement, the parties had anticipated that the husband would retire from the military and could, at some point in his life, waive a portion of his military retired pay and convert it to VA benefits.
- (d) By the terms of their agreement, the husband agreed to reimburse the wife for any sum that she lost due to the waiver. He failed to do so.

...

- (g) The agreement of the parties adopted by the court in the decree is unambiguous.

CP 96-97. Andrew has not assigned error to any of these findings of fact. They are verities on appeal.<sup>6</sup>

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<sup>6</sup> However, Michelle assigns error to the use of the word “reimburse” in finding (d). *See* below at 23, n. 9.

**4.2 The trial court correctly determined that the unambiguous agreement of the parties is valid and enforceable under state and federal law.**

Federal law does not prohibit a court from considering a servicemember's VA disability benefits as a factor relevant to the distribution of property or an award of maintenance or support. Here, the parties anticipated the possibility that Andrew would receive disability benefits and reached an agreement that would provide a permanent income stream for Michelle that would not be reduced. The agreement was a permissible determination of what was fair and equitable in distributing the parties' property and providing for maintenance and support. The order did not divide or distribute anything; it merely held Andrew to his own promise. The trial court was correct to enforce the agreement.

**4.2.1 Federal law allows a state court to consider a servicemember's disability benefits as a factor relevant to the distribution of property or an award of maintenance or support.**

"The Federal Government has long provided retirement pay to those veterans who have retired from the Armed Forces after serving, *e.g.*, 20 years or more. It also provides disabled members of the Armed Forces with disability benefits. In order to prevent double counting, however, federal law typically insists that, to receive disability benefits, a retired veteran must give

up an equivalent amount of retirement pay. And, since retirement pay is taxable while disability benefits are not, the veteran often elects to waive retirement pay in order to receive disability benefits.” *Howell v. Howell*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 1400, 1402-03, 197 L.Ed.2d 781 (2017).

In the 1981 case of *McCarty v. McCarty*, the U.S. Supreme Court held that state courts could not consider any portion of military retirement as community property. *Howell*, 137 S.Ct. at 1403 (citing *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981)). Congress responded in 1982 by passing the Uniformed Services Former Spouses’ Protection Act, 10 U.S.C. § 1408. *Howell*, 137 S.Ct. at 1403.

The Act permitted state courts to treat “disposable retired pay” as community property divisible upon divorce, but excluded from such treatment any amount waived in exchange for disability benefits. *Howell*, 137 S.Ct. at 1403; 10 U.S.C. § 1408. The U.S. Supreme Court confirmed in *Mansell* that state courts are prohibited from treating disability benefits as community property or dividing those benefits at divorce. *Howell*, 137 S.Ct. at 1403-04 (citing *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989)).

In *Howell*, the U.S. Supreme Court was faced with the question of whether a state court that had divided “disposable retired pay” at the time of an initial divorce decree could later

modify the decree to compensate the former spouse for the loss of “disposable retired pay” that had been waived in exchange for disability benefits. *Howell*, 137 S.Ct. at 1402. The Court held that the state court’s compensatory modification order that the servicemember “reimburse” or “indemnify” his former spouse was an impermissible division of the disability benefits. *Id.* at 1405-06. The Court noted, however, that a state court, “when it first determines the value of a family’s assets, remains free to take account of the contingency that some military retirement pay might be waived, or ... take account of reductions in value when it calculates or recalculates the need for spousal support.” *Id.* at 1406.

The Washington Supreme Court reached a similar result 25 years earlier in *In re Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992). In *Kraft*, the court reconciled the prohibitions of federal law with RCW 26.09.080, which requires the court to dispose of the parties’ property in a “just and equitable” manner:

[W]hen making property distributions or awarding spousal support in a dissolution proceeding, **the court may regard military disability retirement pay as future income to the retiree spouse and, so regarded, consider it as an economic circumstance of the parties.** In particular, the court may consider the pay as a basis for awarding the nonretiree spouse a proportionately larger share of the community property where equity so requires.

The court may not, however, divide or distribute the military disability retirement pay as an asset.

*Kraft*, 119 Wn.2d at 447-48 (emphasis added).

This Court clarified further in *In re Marriage of Perkins*, 107 Wn. App. 313, 26 P.3d 989 (2001): “In short, according to *Kraft*, a Washington dissolution court may not divide or distribute a veteran’s disability pension, but it may consider [the veteran’s] entitlement to an undivided veteran’s disability pension as one factor relevant to a just and equitable distribution of property [or] to an award of maintenance.”

*Perkins*, 107 Wn. App. at 322-23.

In *Perkins*, the servicemember waived 40 percent of his retirement in exchange for disability payments prior to the divorce. *Perkins*, 107 Wn. App. at 315. The trial court distributed 45 percent of the reduced military retirement to the wife and ordered the husband to pay the wife “compensatory spousal maintenance in an amount which represents 45 percent of husband’s total monthly compensation for disability.” *Id.* at 316. The appellate court, after reviewing *McCarty*, *Mansell*, and *Kraft*, stated the central issue as follows:

In light of these authorities, the key question here is whether the trial court divided [the husband’s] disability pension and distributed part of it to [the wife]; or, alternatively, whether the trial court merely considered the *undivided* disability pension

as one factor tending to show [the husband's] post-dissolution ability to pay maintenance.

*Perkins*, 107 Wn. App. at 323 (italics in original).

Analyzing the language of the divorce decree, the *Perkins* court held that the trial court had made an improper division and distribution of the disability benefits when it expressly ordered the husband to pay the wife 45 percent of his disability pay. *Perkins*, 107 Wn. App. at 323-24. But, significantly, in reversing and remanding the case for a redistribution of property and reconsideration of maintenance, the *Perkins* court noted that the trial court could still properly award the wife a dollar amount of maintenance equal to 45 percent of the disability pay, so long as it arrived at that number in the proper manner: “The trial court may, if in its view equity so requires, distribute the parties’ property in the same manner in which it did initially. What is required is that it arrive at its decision as to what is just and equitable under all the circumstances after considering the military disability retirement pay in the manner we here explain.” *Perkins*, 107 Wn. App. at 328.

In short, federal law prohibits a state court from dividing or distributing disability pay, but it does not prohibit a state court from considering disability pay as a factor relevant to the distribution of property or an award of maintenance or support.

**4.2.2 Andrew and Michelle anticipated the possibility that Andrew would receive disability benefits and reached an agreement that would provide a permanent income stream for Michelle that could not be reduced.**

In an unchallenged finding of fact, the trial court here determined that Andrew and Michelle “had anticipated that the husband would retire from the military and could, at some point in his life, waive a portion of his military retired pay and convert it to VA [disability] benefits.” CP 97 (Finding of Fact (c)). There is no indication in the record that the parties did not understand the law as set forth above.

In negotiating the terms of the divorce, Andrew and Michelle were entitled to engage in the same sort of inquiry as the trial court could have engaged in had they gone to trial. As set forth above, Andrew and Michelle could consider the potential for future disability benefits as a factor relevant to the distribution of their property or to an award of maintenance or support. That is what they did.

Washington follows the “objective manifestation” theory of contracts, determining the intent of the parties by focusing on the objective manifestations of the agreement, not on the unspoken subjective intent of one party or another. *Hearst Comms., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). In an unchallenged finding, the trial court found

that the agreement here was unambiguous. CP 97 (Finding of Fact (g)). The mutual intent of the parties was clear.

Andrew offered to provide Michelle with a permanent income stream in an amount equal to her 45 percent share of his military retirement. CP 76. He promised that even if he elected to receive disability, his payment to her “will not decrease.” CP 76. In the final language of the agreement, “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 (emphasis added). The parties intended to provide Michelle with a permanent income stream **that could not be reduced** by any future disability election by Andrew.

Unlike the improper decree in *Perkins*, nothing in the agreement here assigns to Michelle any interest in Andrew’s potential disability pay. Nothing in the agreement attempts to divide or distribute Andrew’s potential disability pay. In fact, the agreement expressly states that Andrew “shall receive 100% of the separate property portion of the military retirement.” CP 8. Under federal law, disability pay is Andrew’s separate property. This provision ensures that the disability pay is not divided or distributed. It all remains Andrew’s separate property.

However, the parties considered the potential future disability pay as a factor relevant to the distribution of their

property and provision for maintenance and support, and determined that Andrew should provide a permanent stream of income to Michelle that could not be reduced by any future disability election by Andrew.

**4.2.3 The agreement was a permissible determination of what was fair and equitable in distributing the parties' property and providing for maintenance and support.**

By statute, Washington favors “amicable settlement of disputes” attendant to separation and divorce. RCW 26.09.070. In arriving at a settlement agreement, parties are not limited to the same rules as a trial court would be in crafting a decree. An agreement distributing property or providing for maintenance is binding upon the court unless the court finds that the agreement was unfair at the time of its execution.<sup>7</sup> *Id.*; *In re Marriage of Little*, 96 Wn.2d 183, 193, 634 P.2d 498 (1981). In other words, an agreement does not need to be “just and equitable.” Parties can agree to a settlement that a court would not have ordered, so long as the agreement is not unfair.

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<sup>7</sup> A party challenging a separation agreement as unfair at execution “must make such a challenge before the trial court’s approval and entry of the decree.” *In re Marriage of Hulscher*, 143 Wn. App. 708, 717, 180 P.3d 199 (2008). Andrew did not challenge the agreement as unfair at execution and did not appeal the original decree. He cannot now be heard to argue that the agreement was unfair.

Similarly, “nothing in law, public policy or reason prohibits a former spouse from voluntarily and formally obligating himself or herself to do more than the law requires in providing support for a former spouse.” *Untersteiner v. Untersteiner*, 32 Wn. App. 859, 864, 650 P.2d 256 (1982). In other words, parties may agree to maintenance that the court could not order. For example, an agreement may preclude or limit modification of any provision for maintenance. RCW 26.09.070(7).

Along these lines, the trial court held that the agreement here was permissible under federal law because it was the agreement of the parties. Even if a court could not have ordered the terms that Andrew offered and agreed to, nothing in law or public policy at either the state or federal level could prohibit Andrew from voluntarily binding himself to provide Michelle with a permanent income stream that could not be reduced by a future election of disability pay.

This Court recently approved of a similar agreement in the unpublished case of *In re Marriage of Gravelle*, Nos. 32700-1-III, 33178-4-III (July 7, 2016).<sup>8</sup> In *Gravelle*, the parties negotiated a separation agreement under which the wife would receive half of the husband’s military retirement and the

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<sup>8</sup> *Gravelle* is cited as persuasive authority only, per GR 14.1(a).

husband would pay monthly maintenance to the wife in the amount of \$422—exactly one-half of the husband’s disability benefits. *Gravelle*, slip op. at 3-4. The maintenance section further provided that if the husband’s retirement decreased, he would increase his monthly maintenance by the same amount, so that his “monthly maintenance and retirement payment obligation to Ms. Gravelle shall not decrease.” Slip op. at 4.

The husband sought to vacate the maintenance provisions, arguing that they impermissibly divided his disability benefits. *Gravelle*, slip op. at 6. The trial court denied his motion to vacate, holding that the agreement and decree did not divide the disability, but merely considered it in determining an appropriate amount of maintenance. Slip op. at 6-7.

After analyzing the law under *Mansell*, *Kraft*, and *Perkins*, the appellate court affirmed:

In a long term marriage ... the trial court’s objective is to place the parties in roughly equal financial positions for the rest of their lives. It is unsurprising that at the conclusion of their marriage of almost 29 years, the Gravelles’ agreement as to what was just and equitable led them to apportion roughly 50 percent of their resources to each other. By providing for spousal maintenance in a dollar amount that accomplished that sharing—with no reference to veterans’ disability benefits—the Gravelles accomplished what *Kraft* and *Perkins* recognize they could legally accomplish, and in the proper manner.

*Gravelle*, slip op. at 20.

Similarly, the agreement here accomplished a fair division of property and provision for maintenance and support without dividing or distributing disability benefits. The Gravelles' agreement provided that the payments from husband to wife "shall not decrease" on account of a decrease in the military retirement. Slip op. at 4. The operative provision of the agreement between Andrew and Michelle is strikingly similar: "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 (emphasis added).

Both agreements considered the potential disability pay in determining a fair result. Both agreements achieved the result without impermissibly dividing or distributing the disability pay. Both agreements complied with *Howell*, *Mansell*, *Kraft*, and *Perkins*. The agreement and the decree in this case were valid under state and federal law. The trial court was correct to enforce the agreement. This Court should affirm the trial court's judgment and order.

#### **4.3 Andrew's arguments fail on their merits.**

Andrew fundamentally misunderstands what the trial court did in its order. In hopes of bolstering his argument, he

misconstrues the order, treating it as a modification of the decree when all it actually did was enforce the valid decree and agreement that Andrew himself proposed and then subsequently breached. What Andrew really disagrees with is that original decree and agreement, but his collateral attack is procedurally improper. This Court cannot grant the relief he seeks. Andrew makes other, secondary arguments that are entirely without merit. The trial court was correct to enforce the valid decree and agreement. This Court should affirm.

#### **4.3.1 Andrew's brief misconstrues the trial court's order.**

Andrew's arguments on appeal are all founded on the fallacious premise that the trial court ordered him to pay Michelle a portion of his disability pay. *E.g.*, Br. of App. at 7. Andrew is wrong. The trial court did not order Andrew to do anything that he had not already voluntarily agreed to do. The trial court's order enforcing Andrew's agreement did not divide or distribute Andrew's disability pay, just as the agreement itself did not. Andrew does not—and cannot—point to any language in the agreement that impermissibly divides or distributes disability pay. The trial court's Judgment and Order merely enforced an agreement that is valid under state and federal law.

Contrary to Andrew's first assignment of error, the trial court did not find that Andrew failed to pay a portion of his

disability to Michelle. Rather, the trial court found, “By the terms of their agreement, the husband agreed to reimburse the wife for any sum that she lost due to the waiver. He failed to do so.” CP 97 (Finding of Fact (d)). Andrew did not assign error to this finding.<sup>9</sup> The finding explains that Andrew made a promise in the original agreement and then failed to live up to it. Neither the finding nor the original agreement require any division or distribution of the disability pay.

The gist of Andrew’s complaint on appeal is that the trial court’s Judgment and Order imposed some new requirement on him that is improper under federal law. But the trial court did not order anything new. The trial court merely enforced a valid, existing decree and agreement. Andrew never appealed the decree and has not moved to vacate it. Without any procedurally proper challenge to the decree, the trial court was bound to respect the decree as a final judgment and enforce it according to its terms.

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<sup>9</sup> To the extent this finding of fact may have been inartfully written, Michelle assigns error. Because the agreement itself does not speak in terms of “reimbursement,” use of that word is not supported by evidence in the record. Rather, the agreement provides that Andrew will make ongoing monthly payments to Michelle that “shall not [be] reduce[d].” CP 8. A more accurate rendering of the finding would read, “By the terms of their agreement, the husband agreed that his monthly payments to the wife would not be reduced due to a waiver. He breached his agreement when he reduced his payments.”

Andrew faults the trial court for not considering the disability pay as a factor in determining property distribution or maintenance. Br. of App. at 7-8. But this sort of consideration was already done by Andrew and Michelle in negotiating the original agreement, as permitted by *Howell*, *Mansell*, *Kraft*, and *Perkins*. The trial court was not asked to modify or vacate the decree, only to enforce the already valid agreement of the parties.

*Howell* allows a court—or the parties—in their first analysis of the family assets, “to take account of the contingency that some military retirement pay might be waived.” *Howell*, 137 S.Ct. at 1406. That is what Andrew and Michelle did when they negotiated their agreement. The trial court must be permitted to enforce such an agreement.

*Howell* prohibits the assignment or vesting of any interest in the disability pay to the spouse. *Howell*, 137 S.Ct. at 1405-06. Neither the original agreement nor the trial court’s order assigns any interest to Michelle. The agreement expressly specifies that Andrew retains 100% of the separate property portion of his retirement—which would, by federal law, include his disability payments.

*Howell* prohibits a court from ordering a modification that restores, dollar-for-dollar, a portion of retirement pay lost due to a postdivorce waiver. *Howell*, 137 S.Ct. at 1406. The trial court’s

order is not a modification. It merely enforces the scheme that the parties validly put in place at the time of divorce.

Despite these prohibitions, *Howell* expressly allows a court to “take account of reductions in value” when considering a modification, just as it allows a court to “take account,” at the time of divorce, of a potential future waiver. *Howell*, 137 S.Ct. at 1406. This combination of prohibitions and allowances leaves the law in the same state as described by the courts of this state in *Kraft* and *Perkins*: “A Washington dissolution court may not divide or distribute a veteran’s disability pension, but it may consider [the veteran’s] entitlement to an undivided veteran’s disability pension as one factor relevant to a just and equitable distribution of property [or] to an award of maintenance.” *Perkins*, 107 Wn. App. at 322-23.

Andrew and Michelle properly considered the potential future waiver when they negotiated the original agreement. The trial court’s recent order did not modify the agreement. The trial court merely enforced a valid agreement. This Court should affirm.

#### **4.3.2 Andrew’s collateral attack on the decree and the agreement is procedurally improper.**

Because the trial court’s order merely enforced the terms of the existing agreement, Andrew’s appeal of the trial court

order is nothing more than an attempt to collaterally attack the original decree. But if the original decree was in error, Andrew could have timely appealed it immediately after it was entered. He did not. Alternatively, instead of unilaterally reducing his payments to Michelle in breach of the agreement, Andrew could have moved to vacate the order in 2012 under *Mansell*. Again, he did not. Because Andrew has not timely challenged the validity of the decree, it is entitled to finality. The trial court was correct to enforce the agreement. This Court should affirm.

#### **4.3.3 Andrew's secondary arguments fail on their merits.**

In addition to the two, major, substantive issues presented in Andrew's brief, his argument raises some secondary arguments, not logically attached to any requested relief, that simply have no merit. This Court can safely disregard these secondary arguments.

There was no reason for Michelle to seek to modify, vacate, or reopen the decree. The decree and agreement already provided for the relief she sought. The decree and agreement required Andrew to make monthly payments to Michelle that could not be reduced by a disability waiver. Andrew violated the decree and agreement. No modification was necessary to obtain the relief Michelle sought. All that was necessary was for the trial court to enforce the decree and agreement. That is the relief

Michelle appropriately sought and received. Andrew's argument that Michelle could have sought modification is irrelevant.

Michelle sought to enforce the decree and agreement within the 6-year statute of limitations for breach of a written agreement. An agreement incorporated into a decree is enforceable as a contract. RCW 26.09.070. Andrew's suggestion that Michelle delayed enforcement for some nefarious purpose is entirely speculative and unsupported by the record. Andrew does not attempt to cite to any evidence. He does not attempt to link his accusation to any legal argument or authority for any remedy. Andrew's baseless accusations are irrelevant, offensive, and entirely without merit.

#### **4.4 The trial court did not abuse its discretion in awarding attorney's fees to Michelle.**

Andrew's brief asks this Court to reverse the trial court's award of attorney's fees to Michelle but fails to present any relevant authority or argument. *See* Br. of App. at 15. Instead, he complains about Michelle's alleged failure to prepare a "pension order," which has nothing to do with the trial court's decision or with this appeal.<sup>10</sup> This Court should disregard Andrew's arguments and should affirm the award.

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<sup>10</sup> Andrew does not explain, but a pension order is a court order that must be presented to the appropriate military department if a former spouse wishes to have her portion of the military retirement sent

Trial courts have broad discretion in determining whether to award attorney's fees under RCW 26.09.140. *Fernau v. Fernau*, 39 Wn. App. 695, 708, 694 P.2d 1092 (1984). A trial court that appropriately considers the parties' financial circumstances does not abuse its discretion. *Id.*

Here, the trial court ordered Andrew to pay Michelle's attorney's fees because Michelle had a need for contribution to fees and Andrew had the ability to pay. CP 97 (Finding of Fact (h)). Andrew did not assign error to this finding and appears to agree that it is true. The trial court did not abuse its discretion in awarding Michelle attorney's fees under RCW 26.09.140. This Court should affirm the award of attorney's fees.

**4.5 This Court should deny Andrew's request for attorney's fees on appeal and should instead award attorney's fees to Michelle.**

In any proceeding under Chapter 26.09 RCW, "The court from time to time **after considering the financial resources of both parties** may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees

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directly to her instead of to the retired servicemember. *See* 10 U.S.C. § 1408(d). Nothing in the original decree required Michelle to prepare a pension order. *See* CP 8-10. Preparation of a pension order has nothing to do with Andrew's promise to make monthly payments to Michelle that could not be decreased by a disability waiver.

or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.” RCW 26.09.140 (emphasis added).

The statute continues, “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 attorneys’ fees in addition to statutory costs.” RCW 26.09.140. The touchstone for an award on appeal is still the financial circumstances of the parties. *See, e.g., In re Marriage of Davison*, 112 Wn. App. 251, 259-60, 48 P.3d 358 (2002) (the primary issues on appeal were without merit, but the respondent still had to demonstrate financial need in order to receive an award of fees); *In re Marriage of Booth*, 114 Wn.2d 772, 779-80, 791 P.2d 519 (1990) (where the issues had merit, the court declined to award fees because both parties were financially able to pay their own attorneys). Fees on appeal will not be awarded unless the parties submit the financial affidavits required by RAP 18.1(c). *E.g., Johnson v. Johnson*, 107 Wn. App. 500, 505, 27 P.3d 654 (2001) (the court declined to award fees because it could not consider the financial circumstances of the parties without the required affidavits).

The merits of the case come into play to ensure that a party with financial need will not be rewarded for bringing a frivolous appeal. *See Fernau*, 39 Wn. App. at 708 (in determining whether to award fees under the statute, the court considered whether the appeal was frivolous).

Andrew brings a novel request for an award of fees in his favor even though he has vastly superior financial resources. His rationale is that he believes his appeal has such obvious merit that he should be compensated for having been forced to bring it in the first place. Andrew provides no authority for such an award.

There is no applicable contract, statute, or recognized ground in equity to support Andrew's request. Andrew does not cite to any case in which attorney's fees were awarded under RCW 26.09.140 in circumstances similar to his request. After diligent search, Michelle has found none. The request has no merit. This Court should decline to award fees on appeal to Andrew.

Instead, this Court should award Michelle her fees on appeal. She has financial need. Andrew has the ability to pay. Michelle will submit the required financial affidavit. Considering the financial circumstances of the parties and the merit of Michelle's arguments, this Court should exercise its discretion to award Michelle her attorney's fees on appeal.

## **5. Conclusion**

The trial court was correct to enforce the original agreement of the parties, which was valid under state and federal law. The agreement did not divide or distribute Andrew's disability pay. The agreement was a permissible determination of what was fair and equitable in distributing the parties' property and providing for maintenance and support. The trial court was correct to enforce the agreement. This Court should affirm.

This Court should also affirm the trial court's award of attorney's fees to Michelle, deny Andrew's request for fees on appeal, and instead award Michelle her attorney's fees on appeal.

Respectfully submitted this 5<sup>th</sup> day of November, 2018.

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## **Certificate of Service**

I certify, under penalty of perjury under the laws of the State of Washington, that on November 5, 2018, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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