

FILED  
Court of Appeals  
Division II  
State of Washington  
7/15/2019 4:19 PM  
No. 51615-2-II

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

---

In re Marriage of Weiser:

**Andrew Weiser,**

Appellant/Cross-Respondent,

v.

**Michelle Weiser,**

Respondent/Cross-Appellant.

---

**Supplemental Brief of Respondent/Cross-Appellant**

---

Kevin Hochhalter  
WSBA # 43124  
Attorney for Respondent

with Charles E. Szurszewski  
WSBA # 8300

Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008  
kevin@olympicappeals.com

Connolly Tacon & Meserve  
201 5<sup>th</sup> Ave SW, Suite 301  
Olympia, WA 98501-1063  
chucks@olylaw.com  
kkayne@olylaw.com

## Table of Contents

1. Introduction.....	1
2. Assignments of Error.....	2
3. Supplemental Statement of the Case.....	3
3.1 Michelle accepted Andrew’s invitation to move to vacate the decree under CR 60(b)(11) and <i>Jennings</i> . ....	3
3.2 The trial court denied Michelle’s motion. ....	4
4. Argument.....	5
4.1 This Court reviews denial of a motion to vacate for abuse of discretion.....	5
4.2 The trial court correctly determined that the unambiguous agreement of the parties is valid and enforceable under state and federal law. ....	5
4.3 If this Court holds that enforcement of the agreement was improper, the Court should remand for reconsideration of Michelle’s motion to vacate under CR 60(b)(11) and <i>Jennings</i> . ....	6
4.4 Because the trial court did not provide independent reasoning for denying Michelle a remedy for the SBP issue, that issue should also be addressed on remand. ....	9
4.5 Michelle continues her request for an award of attorney’s fees on appeal.....	10
5. Conclusion .....	10

## Table of Authorities

### Cases

<i>Haley v. Highland</i> , 142 Wn.2d 135, 12 P.3d 119 (2000) .....	5
<i>Howell v. Howell</i> , __ U.S. __, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017) .....	6, 8
<i>In re Marriage of Gravelle</i> , Nos. 32700-1-III, 33178-4-III (July 7, 2016) .....	6
<i>In re Marriage of Jennings</i> , 138 Wn.2d 612, 980 P.2d 1248 (1999) .....	7, 8
<i>In re Marriage of Kraft</i> , 119 Wn.2d 438, 832 P.2d 871 (1992) .....	8
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997) .....	5
<i>In re Marriage of Perkins</i> , 107 Wn. App. 313, 26 P.3d 989 (2001) .....	6, 8

### Statutes

RCW 26.09.080 .....	8
RCW 26.09.090 .....	8
RCW 26.09.140 .....	10

### Rules

CR 60(b) .....	7, 8
----------------	------

## **1. Introduction**

In his opening brief in this appeal, Andrew argued that Michelle's remedy for his failure to live up to his own promises embodied in the decree should have been to bring a motion to vacate under CR 60(b)(11) and *In re Marriage of Jennings*, 138 Wn.2d 612, 980 P.2d 1248 (1999). *See* Br. of App. at 11. Michelle accepted Andrew's invitation and brought a motion to the trial court to vacate the decree and reopen the issues of maintenance and division of property in light of Andrew's receipt of disability pay.

The trial court denied Michelle's motion to vacate because it had already granted her relief by enforcing the decree and therefore saw no reason to vacate. Michelle appealed the decision so this Court could consider the issues together.

The trial court was correct to enforce the agreement of the parties. The agreement appropriately considered Andrew's potential receipt of disability pay and crafted a fair division of property and provision for maintenance and support without dividing or distributing disability benefits. To the extent the agreement and the trial court's order enforcing it were valid, the trial court cannot be said to have abused its discretion in its subsequent decision not to vacate the decree and reopen these issues.

However, if this Court reverses the trial court's enforcement order, the grounds for the trial court's denial of Michelle's motion to vacate were untenable, and this Court should remand for reconsideration of Michelle's motion to vacate.

## **2. Assignments of Error**

1. If this Court reverses the trial court's enforcement of the original agreement and decree, the trial court abused its discretion in denying Michelle's motion to vacate under CR 60(b)(11) and *Jennings*.
2. The trial court abused its discretion in denying Michelle a remedy for the parties' failure to properly name Michelle as beneficiary under the Survivor Benefit Plan as required by the decree.

### **Issues Relating to Assignments of Error**

1. Under *Jennings*, a veteran's election of disability pay can create "extraordinary circumstances" justifying vacation of a divorce decree to reopen the division of property and provision for maintenance. If this court reverses the trial court's enforcement order, there would be extraordinary circumstances to vacate the decree. Should this Court remand to the trial court to reconsider Michelle's motion to vacate? (assignments of error 1 and 2)

### **3. Supplemental Statement of the Case**

#### **3.1 Michelle accepted Andrew's invitation to move to vacate the decree under CR 60(b)(11) and *Jennings*.**

In his Brief of Appellant, Andrew faulted Michelle for not moving to vacate the agreement and decree under CR 60(b) and *In re Marriage of Jennings*, 138 Wn.2d 612, 980 P.2d 1248 (1999). *See* Br. of App. at 11. Andrew appeared to argue that a motion to vacate was the proper remedy for his breach of the agreement. Hoping to bring the issue fully to this Court as part of the already-existing appeal (*see* CP 588-89), Michelle filed in the trial court a "Petition for Modify or Clarify a Decree of Dissolution" based on CR 60(b)(11). CP 549-50.<sup>1</sup>

In her supporting declaration, Michelle recounted the original agreement, Andrew's breach, and her successful motion to enforce the agreement. CP 531-32. She noted Andrew's argument on appeal that she should have brought a motion under CR 60(b) and *Jennings*. CP 533. She asked the trial court to vacate the portions of the decree dealing with maintenance and Andrew's military retirement, and in their place make a new, long-term maintenance order. CP 534. She also asked the trial court to address the fact that she was not properly named

---

<sup>1</sup> Her supporting declaration also mentioned *Jennings* and attached a copy of the opinion for the trial court's consideration. CP 539-48.

as beneficiary under Andrew's Survivor Benefit Plan as required by the original decree. CP 533, 534, 550, 589-90.

### **3.2 The trial court denied Michelle's motion.**

In response to Michelle's motion, Andrew argued, among other things, that the trial court should deny the motion because Michelle had already been compensated for his breach through the order enforcing the agreement. *See* CP 556-57.

The trial court denied Michelle's motion. CP 626-27. The trial court appeared to accept Andrew's argument that there were no grounds to vacate when the agreement was already being enforced: "It appears to this judicial officer that your separation contract, which was incorporated into your decree by agreement, is detailed and specific, and the intent, frankly, is clear. So although I understand the argument, I do not think that there is a basis to vacate the decree." RP, April 4, 2019, at 23.

This Court granted permission for entry of a written order. After the written order was entered, Michelle appealed. This Court consolidated Michelle's appeal with the existing appeal and set a schedule for supplemental briefing.

## **4. Argument**

### **4.1 This Court reviews denial of a motion to vacate for abuse of discretion.**

Denial of a motion to vacate under CR 60(b) is reviewed for abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Id.* at 47.

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

In her Brief of Respondent, Michelle argued that the trial court's order enforcing the parties' agreement was correct and should be affirmed. Br. of Resp. at 11. Although federal law prohibits state courts from dividing or distributing military disability pay as community property, courts **may** consider military disability pay as an economic factor relevant to

determining a fair and equitable distribution of property or award of maintenance or support. Br. of Resp. at 11-15 (citing, e.g., *Howell v. Howell*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017); *In re Marriage of Perkins*, 107 Wn. App. 313, 26 P.3d 989 (2001). That is precisely what the parties did in reaching their agreement that would provide Michelle a permanent income stream that could not be reduced on account of disability. Br. of Resp. at 16-18. The agreement was a permissible determination of what was fair and equitable, enforceable by Washington courts. Br. of Resp. at 18-21 (citing as persuasive authority *In re Marriage of Gravelle*, Nos. 32700-1-III, 33178-4-III (July 7, 2016)).

Michelle maintains that the trial court's order enforcing the original agreement was valid and should be affirmed. But if this Court disagrees and reverses that order, vacation of the decree under CR 60(b)(11) and *Jennings* would still be a viable remedy to deal with Andrew's reduction of payments to Michelle.

**4.3 If this Court holds that enforcement of the agreement was improper, the Court should remand for reconsideration of Michelle's motion to vacate under CR 60(b)(11) and *Jennings*.**

The trial court denied Michelle's CR 60(b) motion because she already obtained a remedy through enforcement of the parties' unambiguous agreement. With the agreement being enforced, Michelle was no longer suffering any loss from

Andrew's disability and therefore could not prove the kind of change of circumstances necessary to justify vacation of the decree under CR 60(b)(11).

But if this Court reverses the trial court's enforcement order, the parties would return to their status before the order, in which Andrew's payments to Michelle had been significantly reduced due to Andrew's receipt of disability pay.<sup>2</sup> *Jennings* provides an alternative remedy for this situation.

In *Jennings*, the original decree had divided the husband's military retirement, \$1,038 per month to the husband and \$813 per month to the wife. *In re Marriage of Jennings*, 138 Wn.2d 612, 614, 980 P.2d 1248 (1999). Subsequent to the decree, the husband's disability rating increased, resulting in a reduction of the wife's payments to \$136 per month. *Id.* at 620. The wife moved to vacate the decree, and the trial court found that the reduction created extraordinary circumstances justifying vacation of the decree under CR 60(b)(11). *Id.* at 618.

---

<sup>2</sup> The record is not entirely clear on the amount of the reduction, but there are some clues. Andrew calculated that the agreement called for him to pay Michelle as much as \$949.57 per month or, after reductions for disability, as little as \$614.70. CP 63. He also said that at some point he was paying her only \$581.01 per month. CP 63. Michelle does not endorse these numbers. Ultimately, the parties settled the amount of Andrew's underpayment for a compromised sum of \$21,000. CP 89.

The trial court ordered the husband to pay compensatory spousal maintenance to make up the difference. *Id.* at 618-19.

The Washington Supreme Court held that the trial court had reasonably concluded that the change in status and amount of the payments constituted an extraordinary circumstance sufficient to trigger CR 60(b)(11). *Jennings*, 138 Wn.2d at 625-26. Although the ultimate remedy of compensatory maintenance is now questionable under *Howell*, the principle remains that a reduction in the amount paid under a decree, due to a change in disability status, constitutes an extraordinary circumstance under CR 60(b)(11).

Thus, if this Court reverses the trial court's enforcement order, Michelle has sufficient grounds under CR 60(b)(11) and *Jennings* to vacate the original decree. The trial court would then have the task of considering the economic status of the parties—including Andrew's receipt of undivided disability payments—and all other relevant factors under RCW 26.09.080 and RCW 26.09.090, to determine a fair and equitable division of property and provision for maintenance and support, as permitted by *Howell*, *Kraft*, and *Perkins*. *See Howell*, 137 S.Ct. at 1406; *In re Marriage of Kraft*, 119 Wn.2d 438, 447-48, 832 P.2d 871 (1992); *Perkins*, 107 Wn. App. at 322-23.

If this Court reverses the trial court's enforcement order, the trial court's reasons for denying Michelle's CR 60(b) motion

disappear. The trial court's decision would be based on untenable grounds or untenable reasons and would be an abuse of discretion. If that is the case, this Court should reverse the denial and remand for the trial court to reconsider Michelle's CR 60(b) motion in light of the "extraordinary circumstances" that would exist in absence of the trial court's enforcement order.

**4.4 Because the trial court did not provide independent reasoning for denying Michelle a remedy for the SBP issue, that issue should also be addressed on remand.**

Michelle's CR 60(b) motion had also requested a remedy for the parties' failure to properly name her as a "former spouse" beneficiary of Andrew's military retirement as was required under the original decree. Because neither spouse took the proper steps to change the beneficiary designation within one year of the divorce (apparently due to mutual mistake, both parties believing at the time that it had already been done), the military would no longer make the change without some further action. Michelle requested the court correct for this mutual mistake as part of vacating and reconsidering the decree.

The trial court did not specifically address this request in either its oral or written decisions, except to say that her motion to vacate was denied. Without any reasoning on the record to support it, this decision is an abuse of discretion. This Court

should remand this issue to the trial court for further consideration.

#### **4.5 Michelle continues her request for an award of attorney's fees on appeal.**

In her Brief of Respondent, Michelle requested an award of attorney's fees on appeal under RCW 26.09.140. Br. of Resp. at 29-30. Michelle continues that request for her cross-appeal. She has financial need. Andrew has the ability to pay. 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.

In the alternative, if this Court reverses the enforcement order, the Court should also reverse the trial court's subsequent denial of Michelle's motion to vacate the decree under CR 60(b)

and remand to the trial court to reconsider the motion. Without the enforcement order, there are extraordinary circumstances justifying vacating the decree under CR 60(b)(11).

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 15<sup>th</sup> day of July, 2019.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Attorney for Respondent  
kevin@olympicappeals.com  
Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008

## **Certificate of Service**

I certify, under penalty of perjury under the laws of the State of Washington, that on July 15, 2019, 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.

Charles E. Szurszewski  
Connolly Tacon & Meserve  
201 5<sup>th</sup> Ave SW, Suite 301  
Olympia, WA 98501-1063  
chucks@olylaw.com

Kathleen Ann Forrest  
2420 Bristol Ct SW  
Olympia, WA 98502-6004  
kathleenforrestlaw@gmail.com

Patrick Rawnsley  
PWR Law, PLLC  
1411 State Ave NE, Ste 102  
Olympia, WA 98506  
pat@pwr-law.com

DATED this 15<sup>th</sup> day of July, 2019.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Attorney for Respondent  
kevin@olympicappeals.com  
Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008

# OLYMPIC APPEALS PLLC

July 15, 2019 - 4:19 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51615-2  
**Appellate Court Case Title:** Andrew Weiser, Appellant/Cross Respondent v. Michelle Weiser, Respondent/Cross Appellant  
**Superior Court Case Number:** 10-3-00739-4

### The following documents have been uploaded:

- 516152\_Briefs\_20190715161736D2521633\_2671.pdf  
This File Contains:  
Briefs - Respondents/Cross Appellants - Modifier: Supplemental  
*The Original File Name was Brief - Respondent supp 2019-07-15.pdf*

### A copy of the uploaded files will be sent to:

- admin@forrestlawoffice.com
- chucks@olylaw.com
- kathleenforrestlaw@gmail.com
- pat@pwr-law.com
- tammie@pwr-law.com

### Comments:

---

Sender Name: Kevin Hochhalter - Email: kevin@olympicappeals.com  
Address:  
4570 AVERY LN SE STE C-217  
LACEY, WA, 98503-5608  
Phone: 360-763-8008

**Note: The Filing Id is 20190715161736D2521633**