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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 327001-III, consolidated with No. 331784-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

SANDRA JO GRAVELLE,
Petitioner/Respondent,
and
THOMAS LEE GRAVELLE,
Respondent/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Maryann C. Moreno, Judge

BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. The trial court's Order Denying Revision erroneously denied Mr. Gravelle's Petition to Modify Maintenance.
2. The trial court erred by determining that no basis existed to revise the court commissioner's Order re Petition to Modify.
3. The trial court misinterpreted and misapplied the law by holding that "a property division is generally not modifiable unless the whole agreement is totally unfair and inequitable" and applying this misinterpretation to the facts of the case. Report of Proceedings (July 17, 2014) (2RP) at 23, ll. 13-15.
4. The trial court erred by concluding that the division of Mr. Gravelle's disability pay did not render the agreement unfair and inequitable.
5. The trial court erred by failing to grant Mr. Gravelle's Petition to Modify Maintenance after finding that the maintenance provisions divided Mr. Gravelle's VA disability pay.
6. The trial court erred by failing to vacate the Decree's maintenance provisions, *sua sponte*, after finding that the maintenance provisions divided Mr. Gravelle's VA disability pay.

7. The trial court erred by denying Mr. Gravelle's Motion for Relief from the Decree's "Maintenance" provisions.

8. Substantial evidence does not support Finding of Fact 2.6:

Mr. Gravelle initially moved to modify the maintenance, acknowledging that this \$422 a month was maintenance. Commissioner Anderson analyzed whether or not this was a modifiable type of maintenance. She focused on the fact that this \$422 was intended to make an equal and equitable distribution of property. There was not much discussion that it was property or not property, maintenance or not maintenance.

Clerk's Papers (CP) at 217.

9. Substantial evidence does not support Finding of Fact 2.9:

Neither the Decree nor any of the documents presented to the court references a division of the VA disability or indicates the intent to divide VA disability benefits. There is no mention of VA disability at all.

CP at 218.

10. Substantial evidence does not support the finding that the trial court did not know whether the Decree's "Maintenance" provisions divided VA disability benefits. CP 218 (Finding of Fact 2.10); Report of Proceedings (November 21, 2014) (3RP) 5:19-20.

11. The trial court erroneously concluded that "[t]he lack of findings and conclusions to support maintenance is not fatal to the award." CP at 218 (Conclusion of Law 3.3).

12. The trial court erred by declining to decide whether the Decree was void.

13. The trial court erroneously concluded that Mr. Gravelle's motion was untimely.

14. The trial court erroneously denied Mr. Gravelle's motion for reconsideration.

15. Substantial evidence does not support the trial court's finding that no reason to grant reconsideration exists. CP 307.

Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion by denying Mr. Gravelle's motion to reduce or stop maintenance when the court failed to consider each of Mr. Gravelle's allegations of substantial change of circumstances?
2. Whether the trial court abused its discretion by denying Mr. Gravelle's motion to reduce or stop maintenance when the trial court misapplied the law regarding modification of property dispositions?
3. Whether the Order Denying Motion to Vacate Decree – CR60(b)(5) should be reversed and the Decree's maintenance provisions vacated where it is undisputed that the maintenance provisions divided Mr. Gravelle's VA disability pay and that the court, pursuant to federal and state law, lacked the power to divide it?
4. Whether the law of the case doctrine prohibits the trial court from finding that it does not know what property was divided by the Decree's maintenance provisions after it had previously found the Decree's maintenance provisions divided Mr. Gravelle's military disability pay?

5. Whether the trial court should have granted Mr. Gravelle's motion for reconsideration of the Order Denying Motion to Vacate Decree - CR 60(b)(5)?
6. Whether Mr. Gravelle should be reimbursed for the amounts he has paid Ms. Gravelle pursuant to the Decree's "Maintenance" provisions?

B. STATEMENT OF THE CASE

Thomas and Sandra Gravelle married in January 1981 and separated on September 3, 2009. Clerk's Papers (CP) 2. Mr. Gravelle is a retired Marine. *See* CP 10 (referencing Husband's United States Marine Corps (USMC) retirement). Ms. Gravelle worked during the marriage, accruing a retirement and a Thrift Savings Plan (TSP) account of her own. *See* CP 11 (referencing Wife's retirement and TSP account). At the time of separation, the parties had a house, two vehicles, a boat, a camp trailer, a utility trailer, some furniture, multiple retirement and TSP accounts, and Mr. Gravelle's military disability pay. CP 9-11. The parties also had more than \$235,000 in debt. CP 10.

Acting pro se, the parties filed a joint petition for dissolution of marriage, attaching a Separation Agreement to the petition. CP 1-12. The Separation Agreement assigned Ms. Gravelle \$26,300 of debt and awarded her one vehicle, the boat, the furniture, her retirement and TSP accounts, half of Mr. Gravelle's USMC retirement, half of the equity in the family

home, and maintenance. CP 9-11. The parties' remaining assets and debts were allocated to Mr. Gravelle. CP 9-11. The Separation Agreement had separate provisions for "Retirement Accounts" and "Maintenance." CP 10-11. The "Retirement Accounts" section stated:

3. RETIREMENT ACCOUNTS:

a. Respondent agrees to pay Petitioner one-half (1/2) of his USMC retirement. Respondent currently receives One Thousand Seven Hundred Eighteen and No/100 Dollars (\$1,718.00) per month. Respondent agrees to pay Petitioner the sum of Eight Hundred Fifty-Nine and No/100 Dollars (\$859.00) per month. Payment shall be made on the first day of each month by automatic payment to Petitioner's bank account.

b. Each year Respondent shall provide Petitioner verification of his USMC retirement pay, and as Respondent's USMC retirement pay may increase, payment to Petitioner shall increase accordingly to equal one-half (1/2) of Respondent's USMC retirement, and continue to be paid via automatic payment to Petitioner's bank account.

b. Respondent agrees to relinquish any entitlement to Petitioner's retirement and TSP account.

c. Petitioner agrees to relinquish any entitlement to Respondent's retirement and TSP account with current employer or any future employer.

CP at 10-11 (emphasis original). The "Maintenance" provision stated:

4. MAINTENANCE:

- a. Respondent agrees to pay monthly maintenance to Petitioner in the sum of Four Hundred Twenty-Two and No/100 Dollars (\$422.00). Payment to Petitioner shall be made on the first day of each month via automatic payment into Petitioner's bank account.
- b. The obligation to pay future maintenance is terminated upon the death of either party.

CP at 11.

The parties signed an Agreement to Amend Separation Agreement on November 14, 2009. CP 46-47. The "Retirement Accounts" provision was revised to clarify that Mr. Gravelle would provide verification of his USMC retirement at the beginning of each year and that he would continue paying retirement even if he remarried. CP 46. It also indicated that Mr. Gravelle's obligation to pay half of his USMC retirement terminated if either party died or Ms. Gravelle remarried. CP 46. The "Maintenance" section was revised to read that maintenance would be increased in an amount equal to any decrease in Mr. Gravelle's USMC retirement pay:

MAINTENANCE.

Section a. To remain the same.

Section b. *In the event Respondent's monthly USMC retirement shall decrease, Respondent agrees to increase monthly maintenance payment to Petitioner by amount retirement pay is decreased.*

Respondent's monthly maintenance and retirement payment obligation to Petitioner shall not decrease, however, it may increase according to above Retirement Accounts paragraph, Section b.

In the event Respondent remarries, Respondent agrees to continue to pay Petitioner the monthly maintenance payment according to the Separation Agreement and this Agreement to Amend Separation Agreement.

Obligation to pay future monthly maintenance payments shall only be terminated if Petitioner remarries, or upon the death of either party.

CP at 47 (emphasis added). The trial court entered a Decree of Dissolution that incorporated both separation agreements on December 7, 2009. CP 34-47.

In 2014, Mr. Gravelle asked the court to either terminate or reduce the amounts awarded to Ms. Gravelle in the Decree's "Retirement Accounts" and "Maintenance" provisions. CP 81-82; CP 116 (Report of Proceedings (June 18, 2014) (1RP) 9). In support of his motion, Mr. Gravelle's declaration stated that, pursuant to the "retirement" and "maintenance" provisions, he had been required to pay Ms. Gravelle one-half of his USMC retirement and one-half of his VA disability as maintenance. CP 55-56. He asked the court to terminate his maintenance obligation because (1) he was diagnosed with Parkinson's Disease in 2008; (2) he was forced into medical retirement by the Airway Heights

Police Department; (3) he was denied social security disability; (4) he fell 30 feet into a ravine and suffered a burst fracture of his L-1 vertebrae in September 2012; (5) he had to have 5 vertebrae fused together; (6) he is physically and mentally unable to work; and (7) his only income is one-half his retirement pay and one-half his VA disability pay. CP 56. Mr. Gravelle's Financial Declaration confirmed his net monthly income was only \$653.85 and his monthly expenses exceeded \$1,800.00. CP 58-61.

In response, Ms. Gravelle filed an Asset and Liability List, admitting that she receives one-half of Mr. Gravelle's VA disability pay:

	(W)	(H)
Home		190,000
mort		<171,000>
USMC	1/2	1/2
VA	1/2	1/2
TSP - Aush		* unknown
TSP - wife	* 19,000	
PERS (paid)		* unknown
H57		* unknown
2000 Chevy Tahoe	* 5,000	
2002 Chevy Truck		* 5,000
Tools		
Debts	26,300	38,800
	11,000 equal pmt	
Net distrib	-15,300	-19,800
ION		* POST-DECREE
BOAT		* 2014 FHV Unknown.
Substantially equal position at time of decree.		

CP at 99.

At the hearing on Mr. Gravelle's motion, Mr. Gravelle argued that he should not have to pay one-half of his monthly VA disability pay because VA disability pay is "something that would not of otherwise been divisible by the court if the parties had proceeded to a trial." CP at 112 (IRP at 5). He further argued that a substantial change of circumstances had occurred and justified modification of the "Retirement Accounts" and "Maintenance" provisions because Mr. Gravelle had been diagnosed with

Parkinson's Disease in 2008, suffered a broken back in 2012 that left him disabled and unable to work, and his income was reduced to only half his military retirement and VA disability pay. CP 113-14 (IRP 6-7).

Ms. Gravelle agreed that the Decree's "retirement" and "maintenance" provisions were "two types of maintenance . . . there's the military pension and there's the VA disability." CP 117 (IRP at 10). She claimed the parties could divide Mr. Gravelle's VA disability pay even if the Court could not divide it. CP 120 (IRP 13). And she argued that the maintenance provisions were non-modifiable property divisions and that Mr. Gravelle's changed circumstances did not justify modification in any event. CP 119-121 (IRP 12-14).

The court commissioner found that the Decree's "Retirement Accounts" and "Maintenance" provisions were not maintenance but property divisions of Mr. Gravelle's military retirement and VA disability pay:

[THE COURT:] And when I look at the terms of the decree and the terms of those two separation agreements that talk about the military pension and the VA disability a couple of things strike me. With regard to the military pension the language in the settlement agreement that refers to the military pension is I'll refer to as retirement account and the parties divided that retirement account, it's a property division. It indicates that they would be sharing it equally, and the language in there indicates that. . . .

CP at 125 (1RP at 18);

Going onto the maintenance section where it talks about the \$422 that piece is referring to the VA disability that Mr. Gravelle receives each month. And again, the language while it refers to it as being maintenance in essence is dividing an asset. It's dividing the property that was at the time incurred by both parties. I was persuaded by the language that appeared several times in the second amended property settlement agreement that talks about the obligation to pay future monthly maintenance payments shall only be terminated if petitioner remarries or upon the death of either party. That indicates that both parties realized that was not going to be modified. That piece of the dissolution was set in stone because it was dividing an asset.

CP at 126-27 (1RP at 19-20);

MR. NELSON: Your Honor, the court though is making a specific finding that what is referred to as maintenance was in fact a division of my client's military disability pay?

THE COURT: Yes.

CP at 128 (1RP at 21). The commissioner also found no substantial change of circumstances after considering only Mr. Gravelle's Parkinson's disease diagnosis and denied Mr. Gravelle's motion. CP 127 (1RP 20).

Mr. Gravelle moved to revise the commissioner's ruling. CP 105-06; RP (July 17, 2014) (2RP) 2. He argued that the commissioner's ruling should be revised because: (1) the Decree's retirement and maintenance provisions were both maintenance awards; (2) the maintenance awards were not supported by findings on statutory factors of need and ability to

pay; (3) Mr. Gravelle's circumstances had changed substantially, e.g., his Parkinson's disease had progressed more rapidly than anticipated, he suffered a broken back, became disabled, and was no longer able to work; (4) his sole source of income was his military retirement and VA disability pay; and (5) the award of Mr. Gravelle's VA disability pay was "not divisible by the court under federal law." 2RP 2-9. He asked the trial court to revise the commissioner's ruling, terminate his obligation under the "maintenance" provision, and reduce the "retirement" provision to \$850 per month. 2RP 8, 9.

Ms. Gravelle opposed revision. 2RP 9. She again admitted the parties divided Mr. Gravelle's military pension and his VA disability pay and argued that the division could not be modified:

The second thing that they did was divide the VA disability. That's the one that would not be able to be divided by the court but the parties could do so.

2RP 10-11. Ms. Gravelle claimed that *Untersteiner*, 32 Wn. App. 859 (1982), permitted the parties to divide Mr. Gravelle's VA disability pay by agreement. 2RP 16. Mr. Gravelle responded that *Untersteiner* allowed parties to *agree* to do something that *state* law would not authorize, but not something prohibited by *federal* law, which governs the division of VA disability pay. 2RP 17.

After reviewing the court record, the trial court found that Mr. Gravelle's "original pleading identifies for the court what that maintenance piece is and he identifies that as his VA disability benefit. And so that -- that became clear as to, then, what those retirement accounts were and what was being separated and gave me some good indication of what was being contemplated by the parties." RP at 22. Based on this finding, the court concluded that the "Retirement Accounts" and "Maintenance" provisions were not maintenance but a property division of Mr. Gravelle's USMC retirement and VA disability pay and denied Mr. Gravelle's motion on the ground that the division was not unfair or inequitable:

You folks apparently believed that dividing up the two retirement accounts, the disability and the retirement, was a fair and equitable way to do that. I -- I did not see any indication on the final documents that there was any analysis made with regard to Mrs. Gravelle's need for maintenance and Mr. Gravelle's ability to pay. Generally courts don't sign lifetime maintenance agreements unless one of the parties -- the party receiving the maintenance has a significant need for it. And there's -- there's just no way to analyze this under a maintenance theory. The parties earmark how they are dividing their property and call it what they want to call it for income tax purposes, and we allow that kind of thing all the time. Parties are free to do that. But it's very clear that this was not a maintenance award, that it was a property division.

Even without that language, a property division is generally not modifiable unless the whole agreement is totally unfair and inequitable, and I can't see that from the face of it. It looks as if you folks were dividing things pretty equally and

pretty evenly. So for those reasons I think that Commissioner Anderson's call was the right one and I'm going to deny the request to modify, or I should say revise.

2RP at 22-23.

The trial court's decision was formalized by a general written Order Denying Revision that incorporated the court's oral ruling and specifically included the finding that "the VA and military pension were divided as prop[erty] division." CP at 130 (alteration added). Mr. Gravelle appealed this order. CP 132-137.

Based on the court's decision that Mr. Gravelle's VA disability pay had been divided, Mr. Gravelle moved to vacate the Decree's "maintenance" provisions as void and asked that Ms. Gravelle reimburse him for the amounts of VA disability pay paid to her. CP at 184-90.

Ms. Gravelle opposed Mr. Gravelle's motion to vacate, arguing that the judgment was not void. CP 193, 195-96. She also argued for the first time and contrary to the trial court's Order Denying Revision that the parties did not divide Mr. Gravelle's VA disability pay but merely "considered" it in awarding permanent, non-modifiable maintenance. CP 196-200.

After hearing oral argument on Mr. Gravelle's motion to vacate and contrary to its Order Denying Revision, the trial court found "[t]here

was not much discussion about whether the \$422 maintenance payment was property or not property, maintenance or not maintenance” when the commissioner considered Mr. Gravelle’s petition to modify or terminate maintenance. CP at 217 (Finding of Fact (FF) 2.6). The Court also found that it could consider VA disability pay in dividing property or awarding maintenance, CP 217 (FF 2.7), and that “[n]either the Decree nor any of the documents presented to the Court references a division of the VA disability or indicates the intent to divide VA disability benefits. There is no mention of VA disability at all.” CP at 218 (FF 2.9). Also contrary to its Order Denying Revision, the court decided, based on only the Decree of Dissolution, that it did not know whether Mr. Gravelle’s VA disability pay was divided; it concluded that Mr. Gravelle’s motion was untimely and that he understood his rights when he signed the Decree; and it declined to decide whether the Decree’s “Maintenance” provisions were void or voidable:

Nowhere in the decree is a division of the VA disability referenced. That could mean that this \$422 is not a division of the VA disability, or that could mean that these parties were savvy enough to understand that they shouldn’t use the term “VA disability” in a court document. But for whatever reason, the - - and again, there’s nothing in any of the documents that were presented to the court that indicates that we are dividing up the VA disability benefits and this is how we’re going to do it. It

doesn't talk about that at all. So whether it is indeed a division of the VA disability benefits, I don't know.

But again, the parties entered into this agreement. Certainly the court can consider the benefits. According to *Kraft*, it is something that is before the court and it can be considered in a maintenance award. I don't find there to be a lack of findings and conclusions to support maintenance here, because oftentimes when people present agreed orders we don't necessarily have findings. . .

THE COURT: So I don't find that that's a fatal flaw in any event. So for all of those reasons, I'm not going to grant the motion.

I think we have a timeliness issue here as well. These documents were entered into in 2009. We're now at 2014. Both parties, I presume, understood their rights. There's no indication they did not understand their rights going into this. So for those reasons, I'm not going to vacate the order. Whether it's voidable or void, I'm not making a finding that it's either.

RP (November 21, 2014) (3RP) at 5; CP at 223-24.

Mr. Gravelle moved for reconsideration on multiple grounds: (1) before Mr. Gravelle's motion for relief from judgment, the parties both admitted on the record that Mr. Gravelle's VA disability pay had been divided; (2) the trial court previously relied on Mr. Gravelle's declaration to find that his VA disability pay had been divided; (3) the trial court's finding that it did not know whether Mr. Gravelle's VA disability pay was divided is contrary to the record; (4) the court lacks authority to divide VA disability pay even if the parties agree to divide it; (5) the Decree did not

“consider” Mr. Gravelle’s VA disability pay for purposes of awarding maintenance; and (6) a motion to vacate a void judgment can be brought at any time. CP 227-37. The court denied Mr. Gravelle’s motion for reconsideration without oral argument. CP 307. Mr. Gravelle appealed the trial court’s order denying his motion for relief from judgment and its order on reconsideration. CP 308-21.

C. ARGUMENT

1. The trial court erroneously denied Mr. Gravelle’s motion to reduce or stop maintenance by failing to consider each of Mr. Gravelle’s allegations of substantial change of circumstances.

If the Decree’s “Maintenance” provisions are spousal maintenance, then the trial court erred by failing to analyze each substantial change of circumstance asserted by Mr. Gravelle in support of his motion to modify maintenance. A court may modify a decree’s maintenance provisions only upon a showing of a substantial change of circumstances. RCW 26.09.170(1)(b). In the context of maintenance, “[t]he phrase ‘change of circumstances’ refers to the financial ability of the obligor spouse to pay vis-a-vis the necessities of the other spouse.” *In re Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (1987). Whether a substantial change of circumstances justifying modification has occurred is reviewed

for an abuse of discretion. *Fox v. Fox*, 87 Wn. App. 782, 784, 942 P.2d 1084 (1997).

In *In re Marriage of Lee*, the Court of Appeals remanded an order denying a request to modify child support orders where the trial court failed to examine each ground supporting the petitioner's request for modification. 57 Wn. App. 268, 273-77, 788 P.2d 564 (1990).

Like the trial court in *Lee*, the trial court here failed to consider each substantial change of circumstances asserted by Mr. Gravelle in support of his motion. It considered only whether Mr. Gravelle's Parkinson's disease diagnosis in 2008 constituted a substantial change of circumstances. It entered no specific findings and did not consider whether a substantial change of circumstances was established where the undisputed evidence showed: (1) Mr. Gravelle was forced into medical retirement by the Airway Heights Police Department; (2) he was denied social security disability; (3) he fell 30 feet into a ravine and suffered a burst fracture of his L-1 vertebrae in 2012; (4) he had to have 5 vertebrae fused together; (5) he is disabled and unable to work as a result of his back injury; and (7) as a consequence of his forced retirement, his income had decreased to \$653 per month.

A substantial decline in income qualifies as changed circumstances. *Ochsner*, 47 Wn. App. at 525. Thus, because Mr. Gravelle's income substantially declined from wages associated with gainful employment to only one-half his military retirement and VA disability pay, Mr. Gravelle asserted at least one meritorious ground for modifying maintenance. If the Decree's "Maintenance" provisions are, in fact, spousal maintenance, then the trial court erred by considering only one of the several grounds Mr. Gravelle asserted in support of his motion to reduce or stop maintenance and by concluding no basis existed to revise the commissioner's ruling. Its decision should be remanded for consideration of all asserted substantial changes of circumstances.

2. The trial court erroneously denied Mr. Gravelle's motion to reduce or stop maintenance by misinterpreting and misapplying the law regarding modification of property dispositions.

If the Decree's "Maintenance" provisions did not award maintenance but divided property, then the trial court misinterpreted and misapplied the law on revision to determine whether the "Maintenance" provisions should be vacated or modified. A trial court may vacate or modify a divorce decree's property disposition if "the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." RCW 26.09.170(1)(b). The trial court's decision is

generally reviewed for abuse of discretion. *In re Marriage of Knutson*, 114 Wn. App. 866, 871-72, 60 P.3d 681 (2003). “A [trial] court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds, including an erroneous view of the law.” *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 174-75, 34 P.3d 877 (2001).

The trial court here concluded that the Decree’s “Maintenance” provisions did not award maintenance but divided property (i.e., Mr. Gravelle’s VA disability pay). It then stated that “a property division is generally not modifiable unless the whole agreement is totally unfair and inequitable.” 2RP at 23, ll. 13-15. Based on this statement of the law, the trial court concluded that the agreement appeared fair and equitable and denied Mr. Gravelle’s motion. This conclusion results from misinterpreting and misapplying the law and is, therefore, erroneous as a matter of law.

The trial court also erroneously concluded that the division of Mr. Gravelle’s VA disability pay did not render the whole agreement totally unfair and inequitable. First, *In re the Marriage of Leslie* shows that void portions of a Decree can be vacated while leaving the remainder of the Decree in effect. 112 Wn.2d 612, 618, 772 P.2d 1013 (1989) (vacating only that portion of a default Decree that exceeded the relief requested in

the petition). So, here, the “whole agreement” need not be unfair or inequitable before the offending portion of the agreement can be vacated.

Second, Mr. Gravelle advised the trial court that federal law prohibits the division of VA disability pay. Congress intended VA disability pay to reach the veteran and no one else. *In re Marriage of Kraft*, 119 Wn.2d 438, 443, 832 P.2d 871 (1992). In *Kraft*, our Supreme Court addressed how a dissolution trial court contemporaneously honors the prohibition against dividing VA disability pay and RCW 26.09.080’s requirement that property be divided in a “just and equitable” manner. *Id.* at 444. The *Kraft* Court held that, when making property distributions or awarding maintenance in a dissolution proceeding, the trial court may consider VA disability pay as an economic circumstance of the parties, but it may not divide or distribute the VA disability pay as an asset. *Id.* at 447-48. As a matter of law, then, it was not just or equitable to divide Mr. Gravelle’s VA disability pay.

The trial court’s conclusion that it was not unjust or inequitable to divide Mr. Gravelle’s VA disability pay should be reversed. The prohibited division of Mr. Gravelle’s VA disability pay was a basis for revising the commissioner’s ruling.

Moreover, the trial court's statement of the law is contrary to RCW 26.09.170(1)(b), which governs modification or vacation of a Decree's property dispositions. RCW 26.09.170(1)(b) does not require the trial court to determine whether the whole agreement is unfair or inequitable. It requires the court to determine whether conditions exist that justify reopening a judgment under the laws of this state.

A court order dividing VA disability pay is prohibited by Washington law, is void, and will be vacated. *See, e.g., Perkins v. Perkins*, 107 Wn. App. 313, 318, 328, 26 P.3d 989 (2001) (vacating division and distribution of veteran's disability pension, which violated federal law). CR 60(b), which allows courts to vacate prior judgments, is one such law allowing courts to reopen dissolution decrees. *In re Marriage of Shoemaker*, 128 Wn.2d 116, 120, 904 P.2d 1150 (1995); *Knutson*, 114 Wn. App. at 871-72. By failing to correctly interpret and apply RCW 26.09.170(1)(b), the trial court failed to properly consider whether the division of Mr. Gravelle's VA disability pay justified reopening the Decree and erroneously concluded that no basis existed to revise the commissioner's ruling. The trial court's decision should be reversed and remanded for proper consideration of this issue.

Alternatively, because the underlying facts in the record are undisputed, this court should review the issue as a matter of law, reverse the trial court's ruling on revision, and grant Mr. Gravelle's request to terminate the Decree's "Maintenance" provisions. This court may also raise jurisdictional issues *sua sponte*. RAP 2.5(a). The rule against dividing VA disability pay is a jurisdictional issue. The chief reason for this Court to raise an issue *sua sponte* is its obligation to decide cases in accordance with applicable law.

In *Maynard Inv. Co., Inc. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970), the court held it would "not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent." *See also, Obert v. Environmental Research & Dev. Corp.*, 112 Wn.2d 323, 333, 771 P.2d 340 (1989) (court raised applicability of statute *sua sponte*); *State v. Danforth*, 97 Wn.2d 255, 257, 643 P.2d 882 (1982) (same).

The finding that Mr. Gravelle's VA disability pay was an asset divided by the Decree's maintenance provisions has not been challenged. It is a verity on appeal. *In re Santore*, 28 Wn. App. 319, 323, 623 P.2d 702 (1981). In accordance with the federal and state law prohibiting the division of VA disability pay, as discussed below, this court should decide

Mr. Gravelle's motion to reduce or stop maintenance consistent with that law. This Court should hold that the division of Mr. Gravelle's VA disability justifies reopening the Decree, reverse the trial court's order on revisions, and vacate the Decree's "Maintenance" provisions.

3. The Order Denying Motion to Vacate Decree – CR60(b)(5) should be reversed and the Decree's "Maintenance" provisions vacated where it is undisputed that Mr. Gravelle's VA disability pay was divided and the court had no power to divide it.

The Decree's maintenance provisions dividing Mr. Gravelle's military disability pay should have been vacated as void. Courts have a nondiscretionary duty to vacate void judgments. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991). Thus, an order denying a motion to vacate a decree as void is reviewed de novo. *In re Marriage of Wilson*, 117 Wn. App. 40, 45, 68 P.3d 1121 (2003). The question here is whether the trial court had the power to divide Mr. Gravelle's VA disability pay, not whether the Decree is erroneous. *See Metropolitan Federal Sav. & Loan Ass'n of Seattle v. Greenacres Memorial Ass'n*, 7 Wn. App. 695, 700, 502 P.2d 476 (1972) (distinguishing void judgments from merely erroneous or voidable judgments). Because a CR 60(b)(5) motion is a direct attack upon the Decree and the recitals in the Decree are not conclusive, want of jurisdiction may be brought to the attention of the

court by facts outside of the record. *Dane v. Daniel*, 28 Wn. 155, 165, 68 P. 446 (1902); *Peyton v. Peyton*, 28 Wn. 278, 310-11, 68 P. 757 (1902).

CR 60(b)(5) states that the trial court may relieve a party from judgment upon a showing that the judgment is void. A judgment is void if the court lacked the inherent power to grant certain relief contained in the particular order. *Long v. Harrold*, 76 Wn. App. 317, 319, 884 P.2d 934 (1994). The U.S. Supreme Court has held that state courts lack the power to divide VA disability pay. *Mansell v. Mansell*, 490 U.S. 581, 594-95, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

By way of background, in 1981, the United States Supreme Court prohibited state courts from dividing military retirement pay in dissolution of marriage matters because Congress intended military retirement pay to reach the veteran and no one else. *Kraft*, 119 Wn.2d at 443 (citing *McCarty v. McCarty*, 453 U.S. 210, 232-235, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981)).

In response, Congress passed the “Uniformed Services Former Spouses’ Protection Act,” 10 U.S.C. § 1408, effective February 1, 1983, (the “USFSPA”), which gave state courts the power to divide only “disposable retired pay.” The term “disposable retired pay” is the total

monthly retirement pay less, for example, any amount received on account of disability. 10 U.S.C. §1408(a)(4)(C).

The United States Supreme Court interpreted the USFSPA to prohibit dividing a military retiree's VA disability benefits because such amounts could not be considered "disposable retired pay." *Mansell*, 490 U.S. at 581–82. Washington's Supreme Court further held in *Kraft* that, while the trial court could *consider* VA disability pay in determining the economic circumstances of the parties and as one factor relevant to an award of maintenance, the trial court could not "divide or distribute the military disability retirement pay as an asset." 119 Wn.2d at 447-48. Washington's Court of Appeals explained, "It makes no difference whether the division and distribution are implemented by awarding part of the future income stream that is the pension itself; by finding present value and making an offsetting award of other assets; or by awarding 'maintenance.'" *Perkins*, 107 Wn. App. at 324. "*Mansell* cannot be circumvented simply by chanting 'maintenance.'" *Id.*

Despite lacking the power to do so, the trial court here divided Mr. Gravelle's VA disability pay. The language of the "Maintenance" provisions implies that it was dividing Mr. Gravelle's VA disability pay. The trial court, nevertheless found that, on its face, the Decree "appears to

be equitable to both sides.” *See* 3RP 3:5. But dividing VA disability pay is inequitable as a matter of law. *See Perkins*, 107 Wn. App. at 322-23, 26 P.3d 989 (2001) (noting that court may not divide VA disability pay but may only consider such pay as one factor relevant to just and equitable division of property or award of maintenance provided that it follows state-law rules).

In addition to the language of the Decree’s “Maintenance” provisions, the Declaration of Thomas L. Gravelle expressly stated that the “Maintenance” provisions divided his VA disability pay. Ms. Gravelle’s Asset and Liability List also stated that Mr. Gravelle’s VA disability pay had been divided. The undisputed evidence in the record, therefore, shows the Decree divided Mr. Gravelle’s VA disability pay. 23B Am. Jur. Pl. & Pr. Forms Trial § 261 (Statements of counsel are not evidence and should be disregarded to the extent that they are not supported by evidence).

Indeed, on revision of the commissioner’s ruling, the trial court found, that the Decree had divided Mr. Gravelle’s VA disability as property based on the Decree’s language and Mr. Gravelle’s declaration. This finding has not been challenged and is, therefore, a verity on appeal. *Santore*, 28 Wn. App. at 323. The trial court, however, contradicted this unchallenged finding by finding on Mr. Gravelle’s motion for relief from

judgment that the trial court did not know whether the Decree's "Maintenance" provisions divided Mr. Gravelle's VA disability pay. 3RP 5:19-20. This latter finding was error. The finding is not supported by the record, and the law of the case rule under the collateral estoppel doctrine precludes relitigating previously resolved issues. *In re Marriage of Trichak*, 72 Wn. App. 21, 23-24, 863 P.2d 585 (1993). The latter finding also erroneously ignores the facts outside the Decree that may be and were brought to the court's attention to establish lack of jurisdiction.

Based on the language in the Decree's "Maintenance" provisions, the evidence in the record, the unchallenged finding that Mr. Gravelle's VA disability pay was divided, and the federal and state law holding that dissolution trial courts lack the power to divide VA disability pay, this Court should hold that the trial court did not have the power to divide Mr. Gravelle's VA disability pay and that those provisions of the Decree that divide VA disability pay are void.

The Court should so hold even though the Decree is based on separation agreements. A signed, written agreement is binding on the parties. CR 2A; *Baird v. Baird*, 6 Wn. App. 587, 589, 494 P.2d 1387 (1972). However, an agreement disposing of property in a dissolution case is subject to court approval. *Munroe v. Munroe*, 27 Wn.2d 556, 561, 178

P.2d 983 (1947). Parties cannot, by agreement, give the court power to order something that the court does not have power to order. *Washington Local Lodge No. 104 of Intern. Broth. of Boilermakers, Iron Ship Builders and Helpers of America v. International Broth. of Boilermakers, Iron Ship Builders and Helpers of America*, 28 Wn.2d 536, 544, 183 P.2d 504 (1947); *Miles v. Chinto Min. Co.*, 21 Wn.2d 902, 903, 153 P.2d 856 (1944). The separation agreements here did not give the court power to divide Mr. Gravelle's VA disability pay. The court, regardless of the separation agreements, lacked the power to divide Mr. Gravelle's VA disability pay.

a. The trial court's Findings of Fact 2.6 and 2.9 and Conclusion of Law 3.3 are erroneous.

Although this Court reviews de novo the trial court's Order Denying Motion to Vacate Decree – CR60(b)(5), the trial court's order includes findings of fact and conclusions of law. The order's findings should be superfluous. Nevertheless, Mr. Gravelle addresses his assignments of error to the challenged findings to preserve his objections to them.

Findings of fact are ordinarily reviewed for substantial evidence, which is a sufficient quantum of evidence in the record to persuade a fair-

minded person of the truth of a declared premise. *Burrill v. Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002).

Substantial evidence does not support Finding of Fact 2.6, which states that the commissioner who decided Mr. Gravelle's motion to modify maintenance analyzed whether maintenance was modifiable but did not really discuss whether the "Maintenance" provisions were property or maintenance:

Mr. Gravelle initially moved to modify the maintenance, acknowledging that this \$422 a month was maintenance. Commissioner Anderson analyzed whether or not this was a modifiable type of maintenance. She focused on the fact that this \$422 was intended to make an equal and equitable distribution of property. There was not much discussion that it was property or not property, maintenance or not maintenance.

CP at 217.

A review of the transcript of Commissioner Anderson's oral ruling confirms that she did *not* analyze whether the Decree's "Maintenance" provisions were "a modifiable type of maintenance" and that she spent the majority of her ruling discussing whether the "Retirement Accounts" and "Maintenance" provisions concerned property or maintenance.

The Commissioner found that the Decree's "Retirement Accounts" and "Maintenance" provisions were not maintenance but divisions of property, and, for those reasons, the provisions could not be modified. CP

287-89 (1RP 18-20). She said the Decree's terms concerning Mr. Gravelle's military pension and VA disability pay divided property. CP 287-88 (1RP 18-19). While the Commissioner acknowledged that the parties referred to or treated the division of Mr. Gravelle's military retirement and VA disability pay as maintenance for tax purposes, she concluded that the division of the retirement and VA disability pay was a property division. CP 288 (1RP 19). The record does not support Finding of Fact 2.6 and should, therefore, be set aside.

Similarly, the record does not support Finding of Fact 2.9. That finding provides that neither the Decree nor any other document presented to the court references a division of VA disability pay:

Neither the Decree nor any of the documents presented to the court references a division of the VA disability or indicates the intent to divide VA disability benefits. There is no mention of VA disability at all.

CP at 218.

While the Decree does not specifically mention VA disability pay, the language of the Decree's "Maintenance" provisions reveals the intent to divide VA disability pay. Those provisions state that maintenance will increase proportionally to any decrease in Mr. Gravelle's military retirement. When the parties divorced, the law still required a disabled military retiree to waive all or part of his military retirement pay to receive

VA disability pay. *Kraft*, 119 Wn.2d at 443. So an increase in VA disability pay simultaneously decreased a retiree's military retirement pay. In 2004, Congress adopted the Concurrent Retirement and Disability Pay program, which phased out the VA disability offset completely in 2014. 10 U.S.C. §1414. Beginning in January 2014, eligible military retirees began to receive both full military retirement and full VA disability pay. *Id.*

The Gravelles were divorced during the phase out period, so if Mr. Gravelle's VA disability pay increased from the date of divorce to January 2014, then the amount of retirement pay he and Ms. Gravelle divided would have decreased. *See* 10 U.S.C. § 1408(a)(4)(B); 38 U.S.C. § 1110; 38 U.S.C. § 1131; *see also Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989); *In re Marriage of Jennings*, 138 Wn.2d 612, 616–17, 980 P.2d 1248 (1999). To guard against this decrease, the Decree's "Maintenance" provisions contained an escalation clause that automatically increased maintenance in an amount equal to one-half the decrease of Mr. Gravelle's military retirement. So, while the Decree did not explicitly reference VA disability pay, it divided Mr. Gravelle's VA disability pay under the guise of maintenance. Even if substantial evidence supports the finding, "a trial court may not divide a veteran's disability pension and award part of it to the nondisabled spouse, even if

the court labels its award as ‘maintenance.’” *Perkins*, 107 Wn. App. at 327.

The trial court also found that the Findings, Conclusions, Decree, and separation agreements attached thereto did not mention VA disability pay, but it nevertheless found that the trial court merely considered Mr. Gravelle’s VA disability pay when awarding maintenance. Because the final orders did not mention VA disability pay, no evidence shows the court that entered the Decree considered Mr. Gravelle’s VA disability when awarding Maintenance. The finding that the court merely considered Mr. Gravelle’s VA disability pay when granting Ms. Gravelle maintenance is not supported by substantial evidence.

Finally, the trial court erroneously concluded that “[t]he lack of findings and conclusions to support maintenance is not fatal to the award.” CP at 218 (Conclusion of Law 3.3). A court may award maintenance after considering several facts regarding the obligee spouse’s need and the obligor spouse’s ability to pay. RCW 26.09.090(1). While specific written findings on each factor are not required, the court’s oral articulations must reflect that the court properly considered those factors. Where such oral articulations are absent, a maintenance award cannot stand. *See In re Marriage of Sheffer*, 60 Wn. App. 51, 57-58, 802 P.2d

817 (1990) (remanding maintenance award where record showed trial court failed to adequately consider all statutory factors).

Here, there is no evidence in the record that the trial court considered any of the statutory maintenance factors when it initially awarded maintenance. In fact, the trial court (when considering Mr. Gravelle's motion to modify maintenance) found, "I did not see an indication on the final documents that there was any analysis made with regard to Mrs. Gravelle's need for maintenance and Mr. Gravelle's ability to pay. Generally courts don't sign lifetime maintenance agreements unless one of the parties -- the party receiving the maintenance has a significant need for it. And there's -- there's just no way to analyze this under a maintenance theory." 2RP 22.

The court may consider VA disability pay when awarding maintenance only if it follows state-law rules regarding maintenance. Because the record is void of any consideration of the statutory maintenance factors, the maintenance award cannot stand. *Perkins*, 107 Wn. App. at 322-23.

5. The trial court erroneously concluded that Mr. Gravelle's CR 60(b)(5) motion was untimely because a motion to vacate a void judgment can be brought at any time.

The court erred by denying Mr. Gravelle's motion to vacate as untimely. Conclusions of law are reviewed de novo. See *In re Marriage of Leslie*, 112 Wn.2d 612, 618–20, 772 P.2d 1013 (1989).

A motion to vacate a void judgment may be brought at any time. *Id.*; *State ex rel. Campbell v. Cook*, 86 Wn. App. 761, 767, 938 P.2d 345 (1997).

In *Leslie*, the former husband moved for relief from that portion of a default dissolution that required him to pay medical expenses. 112 Wn.2d at 613. The medical expenses provision exceeded the relief requested in the former wife's petition for dissolution and agreed upon in the parties' separation agreement. *Id.* The trial court denied the former husband's request, and the Court of Appeals affirmed on the basis that the former husband's motion was untimely under CR 60(b)(5) because he waited at least 8 years before taking action. *Id.* at 616-17.

The Supreme Court reversed. It said, "To the extent a default judgment exceeds relief requested in the complaint, that portion of the judgment is void." *Id.* at 618. After reviewing other Washington appellate decisions that held void dissolution decrees could be vacated irrespective of the lapse of time, the *Leslie* court held that a party does not waive his right to challenge a void judgment merely because of time lapse

or compliance with a void judgment. *Id.* at 618-19. It then held that the decree was void to the extent it awarded relief in excess of the petition and the parties' separation agreement. *Id.* at 620.

Just as a default Decree is void to the extent it awards relief in excess of a petition, a Decree is void to the extent it divides VA disability pay. *Mansell*, 490 U.S. at 594-95. Although Mr. Gravelle brought his CR 60(b)(5) motion five years after the Decree was entered, his motion is not untimely because a motion to vacate a void judgment can be brought at any time, regardless of lapse of time. The trial court's decision to the contrary to should be reversed.

6. The trial court should have granted Mr. Gravelle's motion for reconsideration in light of the evidence showing the Decree's maintenance provisions divided Mr. Gravelle's VA disability pay.

The trial court erroneously denied Mr. Gravelle's motion for reconsideration. "We review a trial court's denial of a motion for reconsideration for abuse of discretion." *Kleyer v. Harborview Med. Ctr.*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or 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.

In re Marriage of Fiorito, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002).

It is an abuse of discretion to deny a motion for reconsideration where the order is contrary to the evidence. *Palmer v. Jensen*, 132 Wn.2d 193, 198, 937 P.2d 597 (1997).

Mr. Gravelle moved the court to reconsider its decision denying his motion for relief from judgment. He argued that reconsideration should be granted for irregularity, insufficient evidence, substantial justice, and because the decision was contrary to law. CR 59(a), provides in pertinent part:

On the motion of the party aggrieved, . . . any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

...

(7) That there is no evidence or reasonable inference from the evidence to justify . . . the decision, or that it is contrary to law; [or]

. . .

(9) That substantial justice has not been done.

(Alteration added).

The trial court denied Mr. Gravelle's motion without a hearing and without entering findings of fact or conclusions of law, aside from finding that no basis justified reconsideration. This finding is not supported by the evidence, and the trial court's denial of reconsideration was outside the range of acceptable choices given the facts and applicable law.

Reconsideration will be granted under CR 59(a)(7) where the decision is contrary to law. *Singleton v. Naegeli Reporting Corp.*, 142 Wn. App. 598, 612, 175 P.3d 594 (2008). Reconsideration will be granted under CR 59(a)(9) only when the order being reviewed is clearly unsupported by substantial evidence. *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 769, 260 P.3d 967 (2011).

As set forth above, the undisputed evidence in the record shows the Decree, in fact, divided Mr. Gravelle's VA disability pay. And the law expressly prohibits the division of a military retiree's VA disability pay and allows a party to move for relief from a void order at any time. Thus,

not only was the trial court's decision unsupported by substantial evidence, but it was also contrary to the law. Therefore, the trial court had multiple bases for reconsideration and abused its discretion when it denied the motion to reconsider Mr. Gravelle's motion for relief from judgment.

6. Mr. Gravelle should be reimbursed for the VA disability pay he has made pursuant to the void Decree.

The trial court did not address Mr. Gravelle's request for reimbursement because it denied his motion to vacate the Decree's maintenance provisions. In *In re Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985), the Court of Appeals affirmed vacation of a dissolution decree, in part, because the decree failed to conform to the parties' stipulation and the decree provided more relief than the petition requested. It then awarded reimbursement to the husband for child support payments he made pursuant to the void decree despite a 5-year lapse of time between entry of the dissolution decree and the husband's motion to vacate it. *Id.* at 499. It did so because the strong weight of authority compels reimbursement of monies paid pursuant to a void decree:

The United States Supreme Court has stated the rule that "[w]hat has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution." *United States v. Morgan*, 307 U.S. 183, 197, 59 S.Ct. 795, 802, 83 L.Ed.

1211 (1939). Section 74 of *Restatement of Restitution* (1937) provides in part at 302-03:

A person who has conferred a benefit upon another in compliance with a judgment . . . is entitled to restitution if the judgment is . . . set aside, unless restitution would be inequitable....

See In re Anacortes, 81 Wn.2d 166, 170, 500 P.2d 546 (1972). This principle has been generally followed by other courts. *See, e.g., Monckton v. Linkbelt Corp.*, 505 F.Supp. 96, 97 (D.Del.1981); *Alexander Hamilton Life Ins. Co. v. Lewis*, 550 S.W.2d 558, 559 (Ky.1977); *Murdock v. Blake*, 26 Utah 2d 22, 484 P.2d 164, 168 (1971); *Levy v. Drew*, 4 Cal.2d 456, 50 P.2d 435, 436 (1936). Because we find this decree void, Mr. Hardt should be reimbursed for payments made pursuant to it.

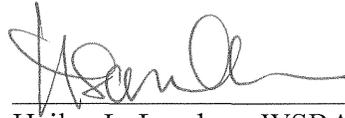
Hardt, 39 Wn. App. at 499.

Consistent with *Hardt* and the cases upon which it is based, the Court here should award Mr. Gravelle reimbursement of the disability pay he paid Ms. Gravelle pursuant to the void portions of the Decree. Justice requires it.

D. CONCLUSION

Based on the foregoing, Mr. Gravelle respectfully requests that the trial court's orders be reversed, that the Decree's "Maintenance" provisions be vacated as void, and that he be reimbursed for the VA disability payments he made to Ms. Gravelle.

Respectfully submitted on June 15, 2015.

A handwritten signature in cursive script, appearing to read "Hailey L. Landrus".

Hailey L. Landrus, WSBA #39432
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, Hailey L. Landrus, do hereby certify under penalty of perjury that on June 15, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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