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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By.....

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

**COURT OF APPEALS  
IN AND FOR THE STATE OF WASHINGTON-  
DIVISION III  
(Spokane County Superior Court, Cause # 09-3-02276-1)**

**In re the Marriage of:**

**SANDRA JO GRAVELLE  
Petitioner/Appellee**

**v.**

**THOMAS LEE GRAVELLE,  
Respondent/Appellant**

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**BRIEF OF APPELLEE/RESPONDENT  
Sandra Jo Gravelle**

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## II. ASSIGNMENTS OF ERROR

None.

## III. STATEMENT OF THE CASE

The parties were married for nearly 29 years at the time they divorced. CP at 2. During their marriage, Mr. Gravelle pursued a military career. The Gravelle's moved approximately ten times in 20 years which prevented Mrs. Gravelle from earning her own pension(s). RP at 10, CP at 117. Retiring members of the military receive numerous benefits that include:

- (a) Full lifetime pension. 10 USC
- (b) A Thrift Savings Plan (TSP) 37 USC 211
- (c) A Survivor Benefit Plan (SBP) which Mr. Gravelle waived. 10 USC 73
- (d) A VA disability pay for service-connected disabilities. 38 USC 11*et seq.*
- (e) Free health care for "service-connected" ailments. *Id.*
- (f) Tri-Care - Health insurance costing \$20/month. 10 USC 1076
- (g) Commissary and Full Base privileges. 10 USC 54

After leaving the military, Mr. Gravelle went into law enforcement. He worked for the Spokane Police Department, Airway Heights Police Department, and later the Department of the Interior. CP at 56. Each job paid well and included *additional pension plans and retirement savings accounts* (i.e. PERS and 457-Deferred Compensation Plan, FERS, and a civilian TSP). CP at 10. Mrs. Gravelle stayed home while their three children were young, but later worked clerical jobs. RP at 6. In 2008, the

year before the parties divorced, Mr. Gravelle was diagnosed with Parkinson's Disease, but he continued to work. CP at 56. At the time of divorce (2009), Mr. Gravelle earned substantially more than his wife. RP at 13. This was the position of the parties at the time of divorce.

The parties entered into an agreed and notarized "Settlement Agreement" in September 2009. Mr. Gravelle joined in the Petition and signed all pleadings. Three months later, the parties entered into an *Amended* Settlement Agreement re-affirming their agreement and expanding the maintenance and retirement provisions. CP at 10, 20, and 31. Mr. Gravelle admits that he agreed to these Property Settlements. CP at 55. Both the Commissioner Anderson and Judge Moreno found that the property division was fair and equitable at the time it was entered into. CP at 127 (Anderson), RP at 22 (Moreno on Revision), CP at 265 (Moreno on CR60). There is no mention *whatsoever* of Mr. Gravelle's VA disability in any pleading or settlement. CP at 2, 10, 19, 41, 47.

The military pension was divided equally. Mrs. Gravelle received her Thrift Savings Plan. CP at 10. Mr. Gravelle kept all his other retirement assets (i.e. PERS and 457-Deferred Compensation Plan, FERS, and a civilian TSP). CP at 10, 61. The parties also agreed to lifetime maintenance of \$422/month. CP at 11. The parties included three provisions that the maintenance was both non-modifiable and non-

terminable. CP at 22, 32. The debt division was roughly equal, although Mr. Gravelle disputes this. CP at 9-10. Mr. Gravelle's calculation of debt division fails to offset the mortgage and vehicle debt with their value. CP at 7. His math error was acknowledged by Mr. Nelson at the initial hearing on June 18, 2014. CP at 162.

For five years, Mr. Gravelle took no action to vacate the Decree of Dissolution. During that time, however, he accepted the benefits of the settlement by liquidating some, or all, of the pension assets awarded to him. CP at 201; CP at 165. These undivided assets are now beyond the reach of the court. Mr. Gravelle also deducted his payments as "maintenance paid" on his tax return. RP at 3.

In 2014, Mr. Gravelle brought a Petition to Modify Maintenance. The Petition, Motion, Financial Declaration, and Declaration all asked the court to eliminate *both* of his payment obligations, (a) ½ the military retirement and (b) the \$422.00 maintenance. Mr. Gravelle's petition alleged that he is "physically and mentally unable to work." CP at 51. Mr. Gravelle filed no evidence supporting his assertions. The Petition repeatedly references payment of "maintenance." CP at 50-54. There is no mention of VA disability in his Petition or Motion. He does not suggest that his VA disability was "divided." CP at 81-82; CP at 83. In fact, his Declaration states he pays Mrs. Gravelle "half my VA disability *as a*

*maintenance agreement.*” CP at 55. At hearing, Mr. Gravelle again argued that *both* the military retirement and the \$422/month payments to Mrs. Gravelle were modifiable “maintenance.” CP at 50. Mr. Gravelle did not address the three non-modifiability provisions in the Amended Property Settlement. He based his argument on an alleged “change of circumstances” pursuant to 26.09.170. CP at 110-116. Mr. Gravelle explained that the \$422.00 payment was clearly maintenance, not a property division, because the \$422.00 didn’t decrease/increase as Mr. Gravelle’s VA disability decreased/increased. Therefore, the \$422.00 had to be maintenance. CP at 116, Transcript Line 13.

In contrast, Mrs. Gravelle filed a Response to Petition stated:

*“This is non-modifiable, non-terminable maintenance in lieu of property division. CP at 84.*

Mrs. Gravelle opposed modification for five reasons:

(1) It is inequitable to rewrite the Decree after *five years*. She argued that Mr. Gravelle, having liquidated some/all the assets awarded to him, he now wants the remaining streams of income. CP at 118.

(2) She argued the parties had agreed to “maintenance in lieu of property division” to equalize or offset Mr. Gravelle’s receipt of the bulk of the retirement/pension assets. CP at 118. In support of this argument Mrs. Gravelle cited the Rockwell and Kim cases which confirm the policy

that parties to a long-term marriage should be left, *at the time of dissolution*, in roughly equal positions. *In re Marriage of Rockwell*, 141 Wn. App. 235, 239, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055, 187 P.3d 752 (2008); *Marriage of Kim* 179 Wn.App. 232 (2014); *review denied at* 180 Wn.2d 1012 (Wash. 2014).

(3) Mrs.Gravelle reminded the court that *both* Settlement Agreements (Sept 2009 and Nov 2009) include several provisions making maintenance non-modifiable. CP at 119 citing CP at 44, 47.

(4) Assuming, however, that maintenance was modifiable, Mrs. Gravelle argued that Mr. Gravelle had presented insufficient evidence of inability to work. She indicated that his income and resources are sufficient to meet his needs and still pay maintenance. Mrs. Gravelle disputed the numbers and math in Mr. Gravelle's Financial Declaration. Mr. Gravelle was cohabitating with a fiancée who earned \$4,600/month. CP at 59. Mr. Gravelle's Financial Declaration denied that his fiancée contributed to his household, but, he claimed food for three. CP at 60. Mr. Gravelle double-dipped by claiming his vehicle payment twice<sup>1</sup>. CP at 60, 61. He indicated an intent to file Bankruptcy which would eliminate much of his debt. CP at 61. Mr. Gravelle has both TriCare (\$20.00 month) and VA health care which cover all medical expenses. CP at 60.

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<sup>1</sup> As an expense under section 5.5 and as a debt under section 5.11

Mr. Gravelle claimed \$632 in FICA/Social Security on his Financial Declaration.<sup>2</sup> As a matter of law, both VA disability and military retirement income are exempt from FICA/Self-employment tax. 26 USC 3102. After correcting his errors and/or excessive expenses, Mr. Gravelle's need is \$932 and his income is \$1352, even after paying full maintenance. CP at 57. In contrast, Mrs. Gravelle argued she needs maintenance because she nets, after maintenance, about \$1350.00. Her need is \$2458. CP at 86.

(5) At hearing, Mrs. Gravelle, through counsel, noted that terminology was tricky:

“I want to be careful not to misconstrue, I want to be careful in terms of *pension* and *property division* and *maintenance*.” CP at 117.

But, Mrs. Gravelle still argued that *Untersteiner* case allows the parties:

“to do something that maybe the court couldn't do in terms of the VA disability” \*\*\* “[The parties can] enter into an agreement and be bound by it as long as it's not unfair the date it was entered, and it's an enforceable contract.” CP at 120.

The court denied the Petition to Modify as to both payments.

Commissioner Anderson's oral ruling was incorporated into the Order

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<sup>2</sup> Mr. Gravelle had initially put the \$632 under “taxes” but crossed it out. This too would have been an invalid claim as VA disability is non-taxed and his total taxable retirement after paying Mrs. Gravelle would have been about \$12,000. His taxes would be *de minimis*.

Denying Modification. CP at 103-104. Commissioner Anderson made three findings. First, she found that:

“this is not a maintenance that can be modified under these current circumstances.” CP at 127

Second, the Commissioner also ruled that the \$422 payment was a division of the VA disability. CP at 128. This part of the ruling was reversed by Judge Moreno on November 21, 2014 (CP at 267). Third, the Commissioner found that Mr. Gravelle was on notice of his Parkinson’s disease and its long-term effects when he entered into the Settlement Agreements so his condition did not constitute a changed circumstance. CP at 127.

Mr. Gravelle moved to revise Commissioner Anderson’s denial of Modification. CP at 105. On revision, Mr. Gravelle again insisted that both the military retirement and the \$422/month payment are maintenance. CP at 103. His Motion to Revise states:

“The portion of the Order which is sought to be revised... The denial of the respondent’s request to modify maintenance. The court’s determination that the maintenance awards were property division.” CP at 105.

On Revision, Mr. Gravelle did not claim that his VA Disability was “divided.” Rather, he renewed his claim that *both* payments (retirement and the \$422.00) were modifiable maintenance:

It was Mr. Gravelle's position at that [initial] hearing, *and now*, that that *regardless of how [the payments] were titled* they were both maintenance. RP at 2, Line 22-24

Mr. Gravelle did not address the fact that neither the Decree nor the Settlement Agreements mentions VA disability much less divides the VA disability, although he did dispute that *Untersteiner* allows the parties to divide the VA disability. RP at 17. Mr. Gravelle restated that that he "is disabled" and "unable to work." RP at 5, Line 13-18. No evidence of disability or inability to work was presented. Mr. Gravelle argued that his sole source of income is the military retirement and disability. RP at 6, Line 6. Mr. Gravelle acknowledged he had liquidated \$28,000 from his job with Airway Heights Police Department. He did not explain where his other retirement assets had gone. RP at 6, Line 6-16.

In opposition to Mr. Gravelle's Motion to Revise, Mrs. Gravelle again argued that the parties had entered into an agreed property settlement that included non-modifiable maintenance *in lieu of* property division." RP at 11, Line 22. Citing *Untersteiner*, she speculated that the parties "divided the VA disability by contract" by "couching it in terms of maintenance." RP at 11, Lines 5 & 10. The emphasis was that the Settlement Agreement constituted a binding property settlement agreement pursuant to RCW 26.09.070 and *Marriage of Glass*, 67

Wn.App. 378, 835 P.2d 1054 (1992). RP at 12, Line 1-12. The intent was to put them on “the same footing.” Mrs. Gravelle indicated the agreement was fair at the time it was entered pursuant to RCW 26.09.070. RP at 11, Line 17. She indicated Mr. Gravelle’s desire to rewrite the settlement after five years should be barred by equity. RP at 13. Finally, even if the payments were *modifiable* maintenance, Mr. Gravelle had still not established a substantial change in circumstances.

Mr. Gravelle timely filed on August 12<sup>th</sup>, 2014 his *first* Notice of Appeal of the denial of his Petition to Modify Maintenance.<sup>3</sup> CP-132. Shortly thereafter, Mr. Gravelle attempted to attack his obligation to make the \$422 payment by a different route, a Motion to Vacate pursuant to Civil Rule 60(b)(5). CP-184. Mr. Gravelle’s brief presumed the VA disability was divided, which is in violation of federal law, and therefore, the \$422 maintenance obligation should be vacated. CP at 207.

Mrs. Gravelle’s brief opposed vacating the Decree for three reasons. First, there is a distinction between “division” of the VA disability and “considering it.” Second, the Motion was not timely. Third, there were strong policy considerations in favor of “finality.”

The Motion was argued before Judge Moreno on November 21, 2014. Judge Marino indicated that:

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<sup>3</sup> COA #327001-III

I think I understand this a bit better than I did the first go-around. I had a chance to go back through the entire file and refresh my memory. And of course I appreciate the quality of briefing here and the argument. *It's become very clear and concise as to what the law is and what the facts are.* CP at 264.

Judge Moreno explained that Commissioner Anderson's ruling was "being interpreted a little bit differently than how it was intended." CP at 266.

Judge Moreno believed that Commissioner Anderson had focused on modifiability of maintenance rather than an impermissible property division of VA disability. Judge Moreno denied relief and entered

Findings in support of her Order:

2.1 The parties had a long term marriage: 28 years.

2.2 The parties filed a joint Petition for Dissolution with Separation Agreement attached. *There is no indication the parties did not know their rights.*

2.3 The face of the Separation Agreement *appears to be equitable.* The Respondent got the bulk of the investments and the savings. *The Petitioner received an offset to make things equal.*

2.4 This motion is brought 5 years after entry of the Decree. Mr. Gravelle has significant issues and desperately needs the money he pays in maintenance.

2.5 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.

2.6 The court does not have the authority to order VA disability divided. These benefits belong to the Serviceman and are his. However, the court can “consider” VA disability pursuant to *In re Marriage of Kraft*, and its progeny, in dividing property or in awarding maintenance.

2.8 *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.*

Mr. Gravelle timely filed his *second* Notice of Appeal<sup>4</sup> which was consolidated with the first appeal.

#### **IV. SUMMARY OF REPLY ARGUMENT**

The parties knowingly and willingly entered into a binding property settlement agreement pursuant to RCW 26.09.070. The settlement put both parties in roughly equal positions. Non-modifiable permanent maintenance is an integral part of the global settlement. Mr. Gravelle accepted the bulk of the retirement assets, including his VA disability, and Mrs. Gravelle received permanent non-modifiable maintenance to offset and equalize the settlement. This property settlement was fair and equitable at the time it was entered into. Therefore the settlement is presumptively binding.

Even though the VA disability was not divided, the parties are still free to consider the VA disability pursuant to the *Kraft* case as an

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<sup>4</sup> COA #331784-III

economic factor of the parties in awarding maintenance. The parties considered several factors, including the VA disability, to determine the amount of maintenance.

Nevertheless, Mr. Gravelle's argument that his \$422.00 maintenance should be modified or vacated is predicated on the presumption that the VA disability was, in fact, divided. Although federal law forbids the courts from dividing the VA disability, neither the Findings, Decree, nor Settlements mention the VA disability. The court has no authority to insert terms into a Decree or Settlement that do not exist. Parol evidence bars consideration of self-serving conclusory statements made years later, particularly when they contradict the plain language of the Settlement Agreements.

Mr. Gravelle accepted the benefits of the settlement by liquidating some/all of the retirement assets awarded to him. Those assets are now beyond the reach of the court, to Mrs. Gravelle's prejudice.

Mr. Gravelle was on-notice of the terms of the settlement in 2009 and was obligated to bring a motion to vacate earlier than five years post-Decree. There is a strong public policy in favor of finality and settlement should be enforced as is.

Mrs. Gravelle should be awarded attorney's fees upon appeal.

Note regarding issues not before the court on appeal:

Both appeals address the \$422.00 maintenance payment only. The argument that the military retirement should end appears to have been abandoned upon appeal and will not be addressed in legal argument. Likewise, the question whether the parties can *privately* agree to “divide” the VA disability is not before the court. This issue is not before the court for review because the court found the VA disability had not been divided.

V. **REPLY ARGUMENT**

A. **The standard of review of findings of fact is “whether there was substantial evidence to support the finding.”**

Findings of fact are reviewed on a “substantial evidence” standard.

There is substantial evidence if “a fair minded, rational person of the truth” would make such a finding. *Bering v. SHARE*, 106 Wn.2d 212 (1986). Mr. Gravelle appeals Finding 2.6, 2.9, 2.10:

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.

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.

2.10 The court's adopts the official transcript of the hearing as a supplemental finding of the court, attached as Exhibit A. CP at 216.

These findings are reasonable in that they are factually supported by the face of the pleadings as agreed and signed by the parties five years ago.

**B. Standard of review of discretionary decisions is reviewed on an "abuse of discretion standard."**

Once the trial court made the findings that the VA disability was not divided and that the settlement was fair and equitable, Judge Moreno's denial of Mr. Gravelle's motions to revise and/or vacate are reviewed on appeal for an "abuse of discretion" standard. A trial court's decision is manifestly unreasonable only if it takes a view no reasonable person would take. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010)

**C Although division of VA disability is forbidden, the parties may consider it as an economic circumstance when awarding maintenance.**

Mr. Gravelle wants the court to eliminate his \$422.00 maintenance obligation, either by modification under RCW 26.09.170 or pursuant to CR60(b)(5). His argument is predicated on the presumption that the VA disability has been *divided*. Federal law forbids courts from dividing VA disability. 10 U.S.C. 1408 (U.S.F.S.P.A.). Mr. Gravelle's argument rests primarily on conclusory statements that the VA disability "was divided."

He points to both Commissioner Anderson's initial ruling that the maintenance was a division of Mr. Gravelle's VA disability pay and Judge Moreno's similar ruling on revision. His reliance on these rulings are misplaced because both decisions were clarified and reversed by Judge Moreno on November 21<sup>st</sup>, 2104 when she denied Mr. Gravelle's CR60(b)(5) motion. CP at 216, CPat 265 *et seq.*

At the hearing on Mr. Gravelle's motion to vacate, Judge Moreno indicated that Commissioner Anderson's ruling had been misconstrued in a manner not intended by the court. Addressing the confusion over terminology and characterization, she went on to reconcile the earlier revision ruling with her current ruling. CP at 266. Namely, there is a distinction between (a) an outright property division of the VA disability, and (b) a global property settlement that awards non-modifiable maintenance that *considers* VA disability. Finding 2.9 states that the VA disability had *not* been divided or even mentioned. The plain language found on the face of the Settlement Agreements and the Decree support this conclusion. CP at 267. This reasoning is sound; the court cannot consider parol evidence inconsistent with the plain language of the settlement:

"[Parol evidence], however, is admitted not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating

the meaning of the words employed. \*\*\* It is the duty of the court to declare the meaning of what is written, and not what was intended to be written." *In re Marriage of Sievers*, 897 P.2d 388, 78 Wn.App. 287 (1995).

The court's ruling also addressed how the *Perkins* case reconciled the apparent conflict between a) the federal prohibition against dividing VA disability and (b) Washington law that property divisions are to be fair and equitable:

In Marriage of Kraft, a 1992 case, the Washington Supreme Court sought to harmonize Mansell's requirement "not to treat military disability retirement pay as divisible" with RCW 26.09.080's requirement "to make an equitable distribution in light of the parties' post-dissolution economic circumstances." It stated:

[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. It is improper under Mansell for the trial court to reduce military disability pay to present value where the purpose of ascertaining present value is to serve as a basis to award the nonretiree spouse a proportionately greater share of the community property as a direct offset of assets. *Perkins v. Perkins*, 107 Wn.App. 313, 26 P.3d 989 (2001), citing *Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992)

So, while the Gravelles could not divide Mr. Gravelle's VA disability, they were, nevertheless, free to *consider* the VA disability (as well as the other retirement assets) as an economic factors when negotiating non-modifiable maintenance as a part of a global settlement. CP at 267. The court ruled that this is what the parties did. The court will enforce such settlements.

Mr. Gravelle's briefing in Section 3 is, therefore, inapplicable in light of Finding 2.9.<sup>5</sup>

**D. The parties may enter into a binding contract to make maintenance non-modifiable even though the court cannot. If a party of a non-modifiable maintenance agreement enters into a fair and equitable agreement, upon a motion to modify the court need not consider each allegation of changed circumstances because the original agreement is binding.**

Mr. Gravelle misstates the court's duty to address all allegations of changed circumstances. Mr. Gravelle suggests that clauses providing for non-modifiable maintenance are not binding. This is not true.

It is a strongly held Washington policy of family law that parties are encouraged to settle their legal issues among themselves. These settlements or contract shall be binding upon the court unless it finds..."

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<sup>5</sup> It is noteworthy that Mr. Gravelle suggests that federal "concurrent receipt" law explains why the parties used the term maintenance instead of property division. This discussion only applies to the military retirement not the \$422.00 which is a fixed amount.

that the settlement contract was unfair at the time it was executed.” RCW

26.09.070(3):

- 1.) The parties to a marriage or a domestic partnership, in order to promote the amicable settlement of disputes attendant upon their separation or upon the filing of a petition for dissolution of their marriage ...may enter into a written separation contract providing for the maintenance of either of them, the disposition of any property owned by both or either of them....
- 2.) \*\*\*
- 3.) If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage ...the contract... shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties ...that the separation contract was unfair at the time of its execution. RCW 26.09.070

The parties *expressly agreed* to make the \$422.00 maintenance *non-modifiable* several three times in their Settlement Agreements:

1. The obligation to pay maintenance is terminated upon the death of either party. Settlement Agreement, CP at 44.
2. Respondent's monthly maintenance and retirement payment obligation to Petitioner shall not decrease, however it may increase according to the Retirement Accounts paragraph, section B. Amended Settlement Agreement CP at 47.
3. The obligation to pay future monthly maintenance payments shall only be terminated if Petitioner remarries, or upon the death of either party. Amended Settlement Agreement, CP at 47.

Moreover, “a party's change of mind, remorse, or second thoughts does not make a settlement agreement disputed.” *Lavigne v. Green*, 106 Wn.App. 12, 17, 23 P.3d 5515 (2001). The reasoning behind this policy is clear:

"To permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora's Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses." *Marriage of Burkey*, 36 Wash.App. at 489, 675 P.2d 619 (citing *Peste v. Peste*, 1 Wn.App. 19 (1969)).

Addressing the modifiability issue, the court has acknowledged that there is a distinction between “what courts may do and what the parties may do *by agreement* and what the courts can do with respect to the modifiability of maintenance. *In re Marriage of Hulscher*. 143 Wn.App. 708, 714-15, 180 P.3d 199 (2008) is instructive:

*The court may not impose non-modifiability, but the parties may agree to do so. Id. If the contract precludes the modification of maintenance absent mutual consent, then the court lacks jurisdiction to modify the contract if it was fair at the time of execution.' In re Marriage of Glass*, 67 Wn.App. 378, 390-92, 835 P.2d 1054 (1992).

This rule is long standing. In 1973, the court found similarly:

In short, a court asked to modify this decree can find upon its face and upon the face of the agreement no reason to disregard the *plainly expressed intent of the parties* that the payments provided for therein are an *integral part of the*

*settlement of their property rights. As such, they are not subject to modification. Marriage of Kinne, 510 P.2d 814, 82 Wn.2d 360 (Wash. 1973)*

Judge Moreno and Commissioner Anderson both found, pursuant to RCW 26.09.070, that the Settlement Agreement and Amended Settlement agreements adopted “a roughly equal property division” which appeared “fair and equitable at the time it was entered.” Therefore, the settlement is presumptively binding and enforceable even though it included a non-modifiability terms that the court itself could not have imposed..

Upon finding that the settlement was fair and equitable and should, therefore, be enforced, the court did not err in failing to address each of Mr. Gravelle’s individual claims for relief under his “substantial change of circumstances” argument. Had the settlement been unfair, or the maintenance modifiable, the case *In re Marriage of Lee* (cited by Mr. Gravelle) might apply and the court would have been obligated to address each allegation of changed circumstances.<sup>6</sup> The settlement should be enforced as written.

**E. The absence of findings in support of the maintenance are not fatal to the maintenance provisions.**

Where the parties agreed to maintenance in lieu of property settlement or as a factor to put the parties on equal footing after a long-

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<sup>6</sup> Parenthetically, Mr. Gravelle’s assertions of inability to work due to disability are speculative because no evidence of inability to work is before the court.

term marriage, then the requirement for findings is relaxed. *In re Marriage of Hulscher*, 180 P.3d 199, 143 Wn.App. 708 (2008). The policy reasons are clear. The parties to a dissolution are not schooled in legalese, but they are well informed of their own assets, liabilities, and economic conditions. Since the parties are presumed to be acting knowingly and voluntarily, the need for findings is minimized.

In contrast, where a court, a stranger, a governmental authority, is imposing its will on parties, findings are mandated as a matter of due process to avoid overreach or the appearance of impropriety. These concerns do not exist when they contract amongst themselves. In *Hulscher*, the court enforced a property settlement incorporated in the Decree with no “substantive” findings of need or ability to pay. In *Hulscher*, the court enforced a similar settlement despite boilerplate findings:

The final pleadings signed by the parties constitute that agreement and the parties have asked that the Court adopt their agreement. *In re Marriage of Hulscher*, 180 P.3d 199, 143 Wn.App. 708 at 711 (2008).

Compare the Gravelle Findings of Fact and Conclusion of Law,

Finding 2.7

“The separation agreement was executed on September 3<sup>rd</sup>, 2009 and an agreement to Amend Separation Agreement was executed November 14, 2009 and is incorporated herein.

The separation agreement should be approved.” CP at 20.

Finding 2.12

Maintenance shall be paid as set forth in the Separation Agreement and the agreement to Amend Separation Agreement.

And Conclusion of Law 3.4 indicates:

that “the court should...consider or approve provision for maintenance of either spouse. *The distribution of property and liabilities as set forth in the Decree is fair and equitable.*

RCW 26.09.070 does not require specific findings justifying non-modifiable maintenance. Settlements will be upheld if they are fair and equitable at the time of entry.

**F. Mr. Gravelles has a duty to bring his statutory challenge within a reasonable time.**

Motions to vacate under CR 60 (b)(1,2,3) must be brought within one year. However, the courts have also imposed an equitable requirement that motions to vacate under CR60 must be still brought within a reasonable time. There must be a good reason for delay. *Plouffe v. Rook*, 135 Wn.App. 628, 147 P.3d 596 (2006); The Plouffe court ruled that motions to vacate void judgments under CR 60(b)(5) must be brought within a reasonable time, citing *Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wash.App. 280, 673 P.2d 634 (1983), review granted, 101 Wash.2d 1001, review dismissed, 103 Wash.2d 1024 (1984).

In *Allison*, the defendant Boondock was properly served and had notice of the action and request for relief. These facts are closer to the case at bar.

However, Mr. Gravelle cites, *Matter of Marriage of Leslie*, 112 Wn.2d 612 , 772 P.2d 1013, (1989) in support of his position that his motion after five years is timely. In *Leslie*, the wife entered a default Decree that awarded relief (i.e. suport and maintenance) in excess of the pleadings. Mr. Leslie had no notice of the terms of the decree, making the decree a void judgment. In contrast, Mr. Gravelle participated in the process by signing all pleadings. He negotiated the terms of the settlement over a period of months. He signed both Settlement Agreement and Amended Settlement Agreement. Mr. Gravelle knew of all the terms of the settlement where. Although Mr. Gravelle states that his settlement includes a void division of his VA disabilty but the court did not agree. Therefore, Mr. Gravelle was on notice that he needed to act.

**G. RCW 26.09.071 and equity do not permit Mrs. Gravelle to reimburse Mr. Gravelle for maintenance payments.**

RCW 26.09.171 only allows modification of maintenance payments accruing subsequent to the Petition for Modification of Maintenance. This bars Mr. Gravelle's recovery of maintenance payments made between 2009 and 2014. Therefore, even if the court elects to

modify maintenance, Mr. Gravelle can only recover payments from March 1<sup>st</sup>, 2014 onward.<sup>7</sup>

If the court vacates the maintenance provision, principles of equity suggest recovery should not be allowed. Mr. Gravelle has reaped the benefits of the settlement and it would greatly prejudice Mrs. Gravelle if she is ordered to repay the previously unchallenged maintenance payments. She justifiably and in good faith relied on the terms of a settlement agreement that doesn't mention VA disability and she should not be harmed for her reliance.

**I. Mrs. Gravelle is entitled to an award of fees upon appeal.**

Pursuant to RAP 14.1, Mrs. Gravelle respectfully asks for an award of attorney's fees and costs on appeal if she prevails and the court deems it appropriate.

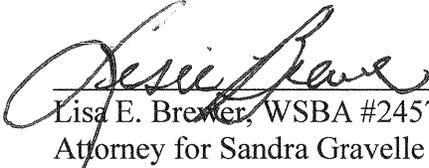
**VI. CONCLUSION**

Judge Moreno's November 21, 2014 ruling should be affirmed. After 29 years of marriage, Mrs. Gravelle negotiated and entered into an agreed Settlement Agreement that included a \$422 non-modifiable maintenance payment to offset Mr. Gravelle's receipt of the bulk of the retirement assets. There was no mention whatsoever of his VA disability in any of

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<sup>7</sup> Actual recover amount would need to consider Mr. Gravelle's improper underpaying of Mrs. Gravelle by failing to implement the COLA on the military retirement and improperly withholding taxes.

the pleadings or settlements nor was it divided. According to the terms of the settlement, it was awarded to him as “his retirements” as required by federal law. The parties may have “considered” the VA disability as an economic circumstance of the parties when awarding maintenance but they did not divide it. Nevertheless, after five years, Mr. Gravelle now claims that the \$422/month maintenance payment is either (a) modifiable due to an *alleged* substantial change of circumstances or (b) void as a forbidden division of his VA disability. He seeks to re-write the entire settlement effectively shifting virtually all assets, certainly those remaining, into his column. This will leave Mrs. Gravelle significantly impoverished. The global settlement is binding under RCW 26.09.070 even though the Settlement made maintenance permanent and non-modifiable. Washington law support finality by enforcing settlements that are fair and equitable at the time of execution. **Respectfully submitted on August 14, 2015**

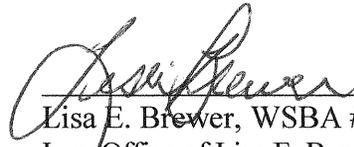
  
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**AFFIDAVIT OF SERVICE (RAP 18.5(b))**

I, Lisa E. Brewer (WSBA #24579), do hereby certify under penalty of perjury of the laws of the State of Washington that on August 14<sup>th</sup>, 2015, I personally delivered a true and correct copy of Responsive Brief of Sandra Gravelle to the following:

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