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DIVISION II

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STATE OF WASHINGTON

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No. 48066-2-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

JOSE OCASIO-SANTIAGO,
N/K/A JOSE OCASIO-CHRISTIAN
Appellant,

and

KIMBERLEY ROCKWOOD,
Respondent.

REPLY BRIEF OF APPELLANT

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APPELLANTS REPLY TO RESPONDENT'S RESPONSE

THE CLARIFYING MILITARY PENSION ORDER IS APPEALABLE.

A superior court order is not a final court order while there is a pending motion for revision. RCW 2.24.050 provides:

Revision by court.

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

Kimberley admits Jose timely filed a motion for revision of the Clarifying Military Pension Order. See Brief of Respondent/Cross-Appellant at page 11, citing CP 428-29; CP 127-27, 350-54. Since a motion for revision was made, it was not a final order or judgment to be appealed. After the Superior Court entered an Order on Revision on August 28, 2015, there was a final order which Jose could and did timely

appeal, as Respondent notes. Once a trial court decides an issue on revision, any appeal is from the trial court's decision. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004); *State v. Hoffman*, 115 Wn. App. 91, 101, 60 P.3d 1261 (2003). Under RCW 2.24.050, the fact that the Order on Revision did not specifically mention the Clarifying Military Pension Order does not change the fact that the order was not a final, appealable order, until after the Order on Revision was entered on August 28, 2015.

JOSE PROPERLY PRESERVED THE ISSUE FOR APPEAL

Jose appeals the trial court's adoption of Kimberley's proposed Clarifying Military Order. Jose properly preserved his objection by submitting his own proposed order.

Jose proposed an order which divided "disposable military retirement" as specifically defined in Federal law and as the language was originally used by the parties in the underlying decree.

Kimberley proposed, and the trial court adopted, an order which expanded and completely redefined military retirement to include "retired pay paid or to which Member would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective

deductions are applied. It also includes all amounts of retired pay Member actually or constructively waives or forfeits in any manner and for any reason or purpose, including, but not limited to, any waiver made in order to qualify for Veteran's Administration benefits, and any waive [sic] arising from member electing not to retire despite being qualified to retire. It also includes any sum taken by Member in addition to or in lieu of retirement benefits, including, but not limited to, exit bonuses, voluntary separation incentive pay, special separation benefit, or any other form of compensation attributable to separation from military service instead of or in addition to payment of the military retirement benefits normally payable to a retired member." Clarifying Military Pension Division Order filed June 24, 2015, Paragraph 23, CP 65.

No Washington case was located deciding whether submission of competing proposed orders was sufficient to preserve an issue for appeal. Cases involving jury instructions are somewhat instructive, although the comparison is inexact since there are specific rules governing submission of any objections to jury instructions. See, e.g., *CR 51*; *CrR 6.15*. The Supreme Court has held the appealing party's submission of proposed jury instructions, which the trial court rejected, preserved the issue for appeal even though the appealing party subsequently stated they had no objection to the instructions ultimately given. *Barrett v. Lucky Seven Saloon, Inc.*,

152 Wn.2d 259, 96 P.3d 386 (2004). In contrast, Division II held that the issue was not properly preserved for appeal when the appealing party “neither objected nor proposed changes to this instruction.” *State v. Bertrand*, 165 Wn.App. 393, 267 P.3d 511 (Wash.App. Div. 2 2011).

In this case, Jose submitted his own proposed order, which was rejected in favor of Kimberley’s erroneous proposed order. This is sufficient to preserve the issue for appeal.

EVEN IF NOT PRESERVED BELOW, THE ISSUE IS A MANIFEST CONSTITUTIONAL ERROR AND SHOULD BE REVERSED

Both recent and long standing cases hold that even if this court determines Jose did not object to the expansion and redefinition of military retirement, this court has discretion to decide whether to address an issue asserted for the first time on appeal. *Kut Suen Lui & May Far Lui v. Essex Insurance Company*, 2016 WL 3320769, at *6 (Wash. June 9, 2016); *In re Det. of Anderson*, 185 Wash. 2d 79, 85, 368 P.3d 162, 164 (2016); *State v. Scott*, 110 Wash.2d 682, 686–87, 757 P.2d 492 (1988). There is no distinction between civil and criminal cases. *State v. WWJ Corp.*, 138 Wash. 2d 595, 601-02, 980 P.2d 1257, 1260 (1999).

When presented with this issue, the court must balance competing interests. On the one hand, this court will not invite game-playing by litigants who acquiesce through silence and thus open the door to a flood

of unchecked appellate opportunities which should have been resolved below. *State v. Bertrand*, concurrence, 165 Wn.App. 393, 407, 267 P.3d 511 (Wash.App. Div. 2 2011). On the other hand, this court will not perpetuate serious injustice that could adversely affect public perceptions of the fairness and integrity of judicial proceedings. *State v. McFarland*, 127 Wash. 2d 322, 333, 899 P.2d 1251, 1255 (1995), as amended (Sept. 13, 1995). The court should also consider whether the newly raised Constitutional issue has a substantial likelihood of success on the merits in order to avoid wasting judicial resources. *State v. WWJ Corp.*, 138 Wash. 2d 595, 602-03, 980 P.2d 1257, 1261 (1999).

From that background RAP 2.5(a) states:

Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

RAP 2.5(a)(3) applies when an appellant shows both that (1) the error implicates a specifically identified constitutional right, and (2) the error is manifest, meaning it has practical and identifiable consequences to the litigant. *State v. Bertrand*, concurrence, 165 Wn.App. 393, 400, 267

P.3d 511 (Wash.App. Div. 2 2011), citing *State v. Grimes*, 267 P.3d 454, 165 Wn.App. 172 (Wash.App. Div. 2 2011) and *State v. O'Hara*, 167 Wash.2d 91, 98, 217 P.3d 756 (2009).

The error Jose claims here implicates a specific Constitutional right because the trial court's order is barred by the Federal preemption doctrine. Federal preemption is based on the "supremacy clause" of the United States Constitution. *U.S. Const. art. 6. Inlandboatmen's Union of the Pacific v. Department of Transp.*, 119 Wn.2d 697, 701, 836 P.2d 823, 826 (Wash. 1992). It is the Federal preemption doctrine that prohibits the expansion and redefinition of military retirement challenged here.

Relying upon 10 U.S.C. § 1408 and a number of United States Supreme Court cases, this court has previously held that Federal law preempts a state dissolution court from dividing a military pension as the trial court did in this case. *Perkins v. Perkins*, 107 Wn.App. 313, 318, 26 P.3d 989, (Wash.App. Div. 2 2001), citing, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802 (1979), *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981), and *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989). Hence, the error Jose identifies here implicates a specifically identified constitutional right.

The error Jose claims here is manifest because it has practical and identifiable consequences to Jose. Paragraph 23 of the Clarifying Military

Order as adopted by the trial court expands and redefines disposable military retirement to include benefits Congress specifically prohibited from division and distribution. Paragraphs 15, 16, 17, 18 and 20 in the Clarifying Military Pension Division Order require Jose to pay Kimberley directly the same percentage of the erroneously expanded and redefined definition of military retirement. Paragraph 20 in the Clarifying Military Pension Division Order authorized the trial court to order Jose to pay alimony (i.e., spousal maintenance) in the exact percentage of a “disability award” that Jose receives in lieu of retirement. Paragraphs 15, 16, 17, 18 and 20 are precisely the “dollar for dollar” award of disability benefits which specifically violate federal law. *Perkins v. Perkins*, 107 Wn. App. 313, 317-24, 26 P.3d 989 (2001) (court cannot circumvent Federal law by prospectively ordering the same percentage of maintenance from disability in lieu of retirement and calling it maintenance). Hence the error is manifest because it has practical and identifiable consequences to Jose.

Jose is not trying to argue from acquiescence and gain a procedural advantage by raising an argument for the first time on appeal. Jose proposed his own order without language violating Federal law, and on appeal, Jose is raising this Constitutional issue of substantial significance both to Jose individually and to all of the service members in the State of Washington who have a substantial interest in preserving the fairness of

the judicial proceedings as it relates to the division of military retirement and sacredness of disability benefits.

This is not to say that Kimberley and other former spouses have no remedy. The existing framework of Washington law protects both the rights of service members and former spouses. Washington law allows the court to vacate a decree and reallocate the property division and spousal maintenance if disability benefits are an extra-ordinary circumstance which creates a substantial economic disparity. *In re Marriage of Jennings*, 138 Wn. 2d 612, 980 P.2d 1248 (1999). Kimberly argues extensively from *Jennings*, but as in *Perkins*, her reliance is misplaced because *Jennings* requires careful consideration of both parties' future economic circumstances ***at the time the disability benefits create a substantial economic disparity***. Significantly, *Perkins* distinguishes *Jennings* on that very basis:

[T]he question discussed in *Jennings* is different from the question presented here. The question discussed in *Jennings* was whether state law afforded the wife a remedy when, years after the original decree, the husband waived most of the service pension that the trial court had properly divided and distributed in its original decree. The question presented here is whether the trial court violated federal law when it entered its original decree. The question presented here was not discussed in *Jennings* because the *Jennings* trial court had fully complied with

federal law at the time it entered its original decree. We conclude that Deanna's reliance on Jennings is misplaced.

Perkins v. Perkins, 107 Wn. App. 313, at 327-28 (2001)

Hence, even if the court determines Jose did not fully object to the language below, this is a manifest Constitutional error because it directly violates the United States Constitution as articulated in *Perkins*. The court should exercise discretion to correct the error pursuant to RAP 2.5(a)(3).

THE CLARIFYING MILITARY PENSION ORDER DOES IMPROPERLY DIVIDE JOSE'S DISABILITY AND OTHER BENEFITS

Kimberley argues that Paragraph 23 of the Clarifying Military Pension Order “does not *divide* Jose’s disability pay, it merely *defines* the term “military retirement,” which includes both retired pay and disability pay.” Brief of Respondent at 15. Kimberley admits that Paragraph 15 of the Clarifying Military Pension Order requires Jose to pay Kimberley if he “receives disability pay in lieu of his retired pay.” Brief of Respondent at 18. Kimberley admits that the Clarifying Military Pension Order requires Jose to pay Kimberley “compensatory maintenance in lieu of any disability pay.” Brief of Respondent at 16. Kimberley attempts to justify these provisions with extensive analysis of *Jennings*. But this didactic exercise in semantics fails here just as it did in *Perkins*. (“*Mansell* flatly

prohibits a state dissolution court from dividing, and then distributing any part of, a veteran's disability pension. ... We hold that *Mansell* cannot be circumvented simply by chanting "maintenance." *Perkins v. Perkins*, 107 Wn. App. 313, 321 and 324, 26 P.3d 989, 991-95 (2001)).

As shown above, *Perkins* distinguished *Jennings* on the basis of whether the original order properly divides only disposable military retirement as defined in Federal law, or, whether the original court order prospectively mandates a service member to pay a specific percentage of potential future disability benefits. It is a violation of Federal law when an original order prospectively requires a former service member to pay precisely the same percentage of disability benefits as of disposable military retirement, without considering the respective post-dissolution economic circumstances of both parties at the time the disability benefits are actually received.

Kimberley points out that Paragraph 6 of the Clarifying Military Pension Division Order only assigns 47% of Jose's "disposable military retired pay." This is acceptable. Although at the trial court level Jose disputed the percentage, on appeal Jose and did not assign error to Paragraph 6.

But Paragraphs 15, 16, 17, 18, 20 and 23 in the Clarifying Military Pension Division Order must be stricken. This is an original order, made

before the service member has actually received any disability benefits. Paragraphs 15, 16, 17, 18, 20 and 23 prospectively order Jose to pay Kimberley the same percentage of any disability benefits he potentially receives as of disposable military retirement without any consideration of the post-dissolution economic circumstances of both parties after the disability award.

For these reasons, Respondent's reliance on *Jennings* is misplaced. This case is in fact exactly like the erroneous order in *Perkins* because it prospectively orders Jose to pay Kimberley precisely the same percentage of disability as disposable military retirement. The Clarifying Military Pension Order should be reversed by striking Paragraphs 15, 16, 17, 18, 20 and 23 in the Clarifying Military Pension Division Order.

APPELLANTS RESPONSE TO CROSS-APPEAL

STANDARD OF REVIEW

A former spouse challenging the trial court's decision in a dissolution action must show a manifest abuse of discretion. *In re Marriage of Bowen*, 168 Wn.App. 581, 586, 279 P.3d 885, 888 (2012); *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985). Respondent agrees and cites *Fox v. Fox*, 87 Wn. App. 782, 784, 942 P.2s 1084 (1997) specifically on the issue of modifications of support. Brief of Respondent at 20.

“An abuse of discretion exists only when no reasonable man would take the position adopted by the trial court.” *Morgan v. Burks*, 17 Wn.App. 193, 198, 563 P.2d 1260, 1262 (1977). Abuse of discretion occurs only if a decision was manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Katare*, 175 Wash.2d 23, 35, 283 P.3d 546 (2012); *In re Marriage of Littlefield*, 133 Wash.2d 39, 46–47, 940 P.2d 1362 (1997). In other words, the trial court’s decision need not be the decision that would have been reached by the reviewing court — it need only be defensible.

**THERE WAS A SUBSTANTIAL CHANGE TO SUPPORT
MODIFICATION OF THE SPOUSAL MAINTENANCE AWARD**

Kimberly correctly cites RCW 26.09.170 as the statute controlling modification of spousal maintenance. Kimberly correctly states RCW 26.09.170 requires the court to find a substantial change in circumstance before modifying the spousal maintenance award. In this case, the trial court did expressly find that there was a “substantial change in circumstances that warrants a reduction in spousal maintenance and termination date.” CP 453. Hence, the court clearly applied the correct standard and the court’s ruling was not based upon untenable grounds or for untenable reasons.

Since the court applied the correct standard and found, in exercise of its broad discretion, that Jose had shown the required substantial change, the only question is whether there is substantial evidence so support the trial court's findings. The appellate court should uphold the trial court's findings of fact if supported by substantial evidence. *In re Marriage of McDole*, 122 Wash. 2d 604, 610, 859 P.2d 1239, 1242 (1993); *Chapman v. Perera*, 41 Wash.App. 444, 704 P.2d 1224 (1985). Evidence is substantial if it persuades a fair-minded, rational person of the truth of the finding. *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001).

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING THAT THERE WAS A SUBSTANTIAL CHANGE REGARDING THE LONGEVITY OF KIMBERLY'S JOB

One substantial change to support the modification of spousal maintenance was the fact that when spousal maintenance was ordered in the original agreed Decree there was concern over the stability of Kimberly's job. The trial court noted this in its oral ruling. CP 125. There is substantial evidence to support this proposition.

Jose testified in his affidavit that prior to the divorce Kimberly was working for the US Army as a civilian in a contract position. He explained that as a military spouse she had preferential hiring for contracts and the concern she would lose that preferential hiring status was one

reason supporting the spousal maintenance. CP 358. Kimberly testified in her deposition, which was filed and relied upon by the trial court in these proceedings, that “when I was married to Jose, I had what was called military spouse preference. That’s a priority for hiring. And when the divorce was final and I was a contract employee, I lost the military spousal preference and still wasn’t back in the government system”. CP 168 Jose submitted a letter from a Nurse Psychotherapist documenting that prior to the divorce Kimberly had a documented psychiatric disability and that her condition would benefit from change in her position. CP 3.

The concerns about Kimberly’s job status as a contract employee were resolved after the Decree of Dissolution was entered. Kimberly testified in her deposition that her status improved from “contract employee” and she was “reinstated in the government system” in November 2014. CP 169.

Kimberly asserts that her net income as a contract employee (pre-Decree) and reinstated to the government system (post-Decree) is about the same and asserts that her finance “have not improved such that spousal maintenance is no longer warranted.” Brief of Respondent at 28. But the record contradicts her argument.

Kimberly’s gross income went up by about \$700 per month and she now enjoys various benefits of government employment. Compare,

CP 47 and CP 95.¹ Kimberly also testified she was not able to save when she was a contract employee, but that after she was reinstated to the government system she was able to save \$4,000 per month after she was reinstated to the government system. CP 194 – 195. By her own admission she was able to increase the cash balance in her savings account by at least \$40,000 post-Divorce after being reinstated in the government system. CP 194-195.

The fact Kimberly's employment had stabilized so she no longer faced uncertainty as a newly divorced contract employee without preferential hiring status. Her financial circumstances had improved by at least \$700 per month gross income and to the point she was saving \$4,000 per month (after paying all her bills). These facts are substantial changes and there is substantial evidence to support the trial court's finding.

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING THAT THERE WAS A CONCERN KIMBERLY WOULD BE LEFT WITHOUT HEALTH CARE INSURANCE

The Decree of Dissolution specifically references the need for health care as one reason for the original agreement to spousal maintenance. CP 104, 115. Jose testified in his affidavit that prior to the

¹ CP 47 is Kimberly's paystub in 2015, almost 4 years post-Dissolution. At the top, right of the CP 47, just under "Pay Date", Kimberly's annual salary is shown as \$119,275. Divided by 12 months results in gross income of \$9,939.58 per month. CP 95 is the first page of the child support worksheet and shows at the time the Dissolution Decree was entered Kimberly's gross income was \$9,223 per month. Hence an increase in her gross income of \$700 per month.

divorce “Kimberly was also ineligible for medical benefits after our divorce because of her employment status. This has also changed with her new classification.” CP 359.

Kimberly testified in her deposition that she was “reinstated in the government system” in November 2014. CP 169. Kimberly testified in her deposition she now has health insurance and the premium now that she is back in the government system is only \$100 per month. CP 189-190.

Since the original Decree itself specifically references health care as one reason for the spousal maintenance agreement and since Kimberly obtained healthcare at a very reasonable cost after the Decree there has been a substantial change in circumstance. There is ample evidence in the record to support this finding. This court should not disturb the trial court’s exercise of its broad discretion finding there has been a substantial change in regard to health care.

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING THAT THERE WAS A CHANGE REGARDING THE ANTICIPATED RETIREMENT DATE

The Decree of Dissolution originally required Jose to pay spousal maintenance “until [Jose] retires from military service.” CP 104-105, 114-115. After the Decree was entered then length of time Jose anticipated remaining in the military changed.

Jose testified in his affidavit that “I intended to leave the military as soon as I was eligible to do so, which was in November of 2014. I would have processed out by February of 2015.” CP 359. Jose submitted a letter from his chain of command supporting the fact that originally he was eligible to retire in November 2014. CP 5. Jose’s time in service, and hence the anticipated date for spousal maintenance to end, was extended for two reasons: Jose had transferred GI Bill benefits (free college) to their son and, Jose was under continuing medical evaluation and treatment.

Jose testified in his affidavit that he elected to transfer his GI Bill benefits to their son, which was a benefit to both parties, but otherwise he was free to retire. CP 417. The letter from Jose’s chain of command showed he became ineligible to retire at his original date of November 2014, and would have to wait until at least February 2016 because he had transferred his GI Bill benefits (free college) to Jose and Kimberly’s son (R.L.O.). CP 5.

Jose also submitted a letter dated February 18, 2015, regarding his military medical status. As of February 2015, the month Jose originally hoped to be completed out-processing and fully retired, his medical status was still such that he could not retire from the military. The letter states:

LTC Ocasio has had a number of combat injuries that have impacted his lower back, ears, foot, and shoulder. ...

He also has current foot and shoulder injuries under treatment. For his shoulder he will likely have surgery in the fall of 2015. At this time we are pending results from consultation with Podiatry specialists.

He continues to be monitored by Oncology specialists for any signs of remission.

He is thus presently fit for duty. Future profiling is possible the evolution of treatment for his foot and shoulder. AR 40-501 allows for up to 12 months on temporary profile prior to permanent profiling. Medically, under these circumstances all treatments are generally conducted while in military service, until a Medical Evaluation Board would be required per AR 40-501. I believe that LTC Ocasio may achieve a level of care and health that would allow for continued service, or will have adjustments to his permanent profile, within this time period ending February of 2016.

CP 9

Kimberly tacitly admits Jose's ability to retire was delayed.

Kimberly states: "The fact Jose may remain in the military longer should not result in a termination of my maintenance now, because it was still supposed to last until he retired." CP 390

Kimberly argues since Jose voluntarily acted to cause an extension of retirement that this should not be a basis for maintenance. Brief of

Respondent at page 26-27. But not all changes in circumstances must be involuntary to support a modification of maintenance. A voluntary change in circumstance may be the basis for a modification of support so long as the voluntary change is made in good faith. *Fox v. Fox*, 87 Wn.App. 782, 787, 942 P.2d 1084 (Wash.App. Div. 1 1997) (denying modification because voluntary reduction of income was not found to be in good faith at the time, but specifically noting in Footnote 4: “our opinion should not be construed as precluding [Obligor] from ever obtaining a modification of his maintenance obligation upon a showing of a substantial change in circumstances resulting from a good faith, voluntary reduction in income.”)

Here, even though Jose voluntarily elected to stay in the military longer, the actions were taken in good faith. He transferred his GI Bill benefits, which amounts to free college, to their mutual son R.L.O. This is clearly a good faith act which benefits both Jose and Kimberly and their son R.L.O. Since this voluntary act was in good faith, the fact that it resulted in a delay of his ability to retire may be considered as a substantial change in circumstance.

Jose also chose to stay in the military service to continue diagnosis and treatment of his medical conditions arising during military service. There is simply no way, and Kimberly does not even argue, that Jose

conjured up the combat injuries affecting his lower back, ears, foot, and shoulder (not too mention his continuing treatment for cancer), as part of a nefarious scheme to modify spousal maintenance. These injuries which resulted in an extension of his military service. The plan fact is Jose's medical treatment for combat related injuries, as well as continued monitoring of his cancer, was another reason he was unable to retire as early as he anticipated when they entered a Decree. There is ample evidence in the record to support the fact that his retirement date was extended for medical reasons and it was well within the trial court's discretion to find that his decision to stay in the military, although voluntary, was in good faith. Hence the delay in his retirement was a substantial change in circumstances which supported modification of spousal maintenance by establishing an end date rather than leaving it open ended until Jose retired.

THE MODIFICATION OF SPOUSAL MAINTENANCE SHOULD BE AFFIRMED

As shown above, there is ample evidence in the record to support the trial court's finding of a substantial change in circumstance.

Kimberly's employment position stabilized, she increased her gross monthly earnings by \$700 per month, and she was able to save \$4,000 per month after paying her bills. Kimberly had access to health care insurance

after being reinstated to the government position, which was a circumstance specifically mentioned within the Decree of Dissolution as one reason for the original spousal maintenance award. Jose's retirement date when maintenance would have ended, was extended for good faith reasons of Jose's transfer of GI Bill benefits (free college) to their son and Jose's longer than anticipated treatment for combat related injuries and cancer. All of these points are clearly supported by the record and particularly in combination, strongly support the trial court's exercise of discretion to modify the amount of spousal maintenance and establish an ending date.

THE DENIAL OF ATTORNEY FEES AT TRIAL SHOULD BE AFFIRMED.

This court reviews attorney fee awards for abuse of discretion. *Bay v. Jensen*, 147 Wn.App. 641, 660, 196 P.3d 753, (Wash.App. Div. 2 2008); *Dice v. City of Montesano*, 131 Wn.App. 675, 128 P.3d 1253, (Wash.App. Div. 2 2006); *In re Marriage of Bobbitt*, 135 Wash.App. 8, 29-30, 144 P.3d 306 (2006). The party challenging the award must show that the court used its discretion in an untenable or manifestly unreasonable manner. *In re Marriage of Mattson*, 95 Wash.App. 592, 604, 976 P.2d 157 (1999).

In this case, with respect to attorney fees at trial, Kimberly argues only that the motion for revision as it relates to modification of maintenance was wrongly granted. Without citation any analysis or citation to any authority, Kimberly concludes that since she alleges the modification of maintenance was wrong, the denial of attorney fees must also be wrong. But the decision to modify maintenance is separate and distinct from the decision to not award attorney fees.

In light of the broad discretion given to trial courts whether to award, or deny, attorney fees, Kimberly's mere assertion that since spousal maintenance was wrongly modified (which Jose strongly disputes as discussed above) does not create an automatic presumption the denial of attorney fees was also wrong. Kimberly's request regarding the denial of attorney fees at trial is insufficient to reverse the trial court's order. *Thweatt v. Hommel*, 67 Wash.App. 135, 148, 834 P.2d 1058, review denied, 120 Wash.2d 1016, 844 P.2d 436 (1992) (Attorney fee awards require more than bald request.); *Austin v. U.S. Bank of Wash.*, 73 Wash.App. 293, 313, 869 P.2d 404, review denied, 124 Wash.2d 1015, 880 P.2d 1005 (1994) (Argument and citation to authority are.).

NO ATTORNEY FEES SHOULD BE AWARDED ON APPEAL.

When determining whether to award attorney fees, the court generally must balance the needs of the spouse requesting them against the

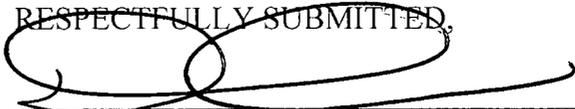
ability of the other spouse to pay. *In re Marriage of Trichak*, 72 Wash.App. 21, 26, 863 P.2d 585 (1993); *In re Marriage of Crosetto*, 82 Wn.App. 545, 563, 918 P.2d 954 (1996). On appeal, the court must examine the merits of the issues raised. *Leslie v. Verhey*, 954 P.2d 330, 90 Wn.App. 796 (Wash.App. Div. 1 1998) *State ex rel. Stout v. Stout*, 89 Wash.App. 118, 127, 948 P.2d 851, 855 (1997) (citing *In re Marriage of Griffin*, 114 Wash.2d 772, 779-80, 791 P.2d 519 (1990)).

In this case, the issues raised by Jose were not frivolous and clearly had arguable merit. As shown above, the prospective dollar-for-dollar requirement for Jose to pay Kimberly the same percentage of disability and other non-divisible benefits violates Federal law and is an issue of Constitutional magnitude. This is clear contrary to Washington law as set forth in *Perkins*. Because this error occurs in an original decree, without consideration of the post-dissolution economic circumstances of the parties, it is not saved by *Jennings* even though Kimberly may have opportunity to argue *Jennings* in the future depending but only when the court has before it the actual facts regarding amount of retirement and any disability benefits waived and the resulting post-dissolution economic circumstances of the parties. Thus, the issue raised by Jose is clearly with significant and substantial merit.

Furthermore, neither party is in a better position to pay attorney fees. Both parties earn in excess of \$100,000 per year and their incomes are relatively similar. See, e.g., *Matter of Marriage of Booth*, 791 P.2d 519, 114 Wn.2d 772 (Wash. 1990) (finding that incomes were “similar” when there was a 64% and 36% differential in the incomes of the parties). Arguably, in light of all the spousal maintenance Jose has paid Kimberly in the years prior to modification, enabling her to save \$4,000 per month for a total in excess of \$80,000, Kimberly is in the better financial situation to pay her own fees. For all of these reasons, Kimberly’s request for attorney fees on appeal should be denied.

DATED this 27 th day of June 2016.

RESPECTFULLY SUBMITTED,



FAUBION, REEDER, FRALEY & COOK PS
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Attorney for Appellant

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STATE OF WASHINGTON

DECLARATION OF TRANSMITTAL BY AP
DEPUTY

I certify under penalty of perjury that on the 27th day of June 2016,

I transmitted a copy of this APPELLANT'S REPLY BRIEF to the
individuals and via the method(s) designated below:

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Dated at University Place, Washington this 27 day of June 2016.

Sally DuCharme
Sally DuCharme, Legal Assistant