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No. 101359-1

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

SCOTT LEE GRIEBEN,

Respondent,

and

SHAWN SUZANNE AUSTIN,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. Introduction.

Shawn Austin's petition for review of the Court of Appeals' unpublished opinion, which affirmed the trial court's denial of her petition to modify maintenance, continues her campaign to relitigate the parties' settlement and obtain a perpetual lien on the earnings of her ex-husband, respondent Scott Grieben, seven years after their divorce. Division I's recognition that the trial court did not abuse its discretion in finding petitioner had not proven a substantial change in circumstance that could justify modifying maintenance under RCW 26.09.170 comports with the statutes governing both maintenance and modification, conflicts with no case law, and raises no grounds for further review in this Court under RAP 13.4(b).

B. Restatement of Facts.

Stripped of petitioner's rancorous hyperbole, the relevant facts are accurately summarized below:

1. In 2014, the parties agreed to a disproportionate property division and 7 years of maintenance for the wife.

Respondent Scott Grieben and petitioner Shawn Austin married in 1991. (CP 12) Their younger son was age 17 and their older son was an adult attending college when they separated and Mr. Grieben filed a petition for dissolution in 2013. (CP 1, 82, 153) Mr. Grieben's business income had averaged $598,244 in the three years leading up to the parties' divorce in December 2014 (CP 140), and for the 15 months the dissolution action was pending he paid undifferentiated maintenance and child support of $10,000 (subsequently increased to $12,000) per month and all the adult son's educational costs. (CP 96, 100, 179)

Maintenance for Ms. Austin was a major issue in the dissolution action. (*See* CP 59-60, 81-83, 95-96, 100, 105-08) Ms. Austin, then age 52, had not worked outside the home since 1993 (CP 1445-47), and argued she should not be expected to work after the divorce and that her medical

conditions[1] severely limited "the types of training and work she can perform." (CP 1456)[2]

With Ms. Austin's issues in mind, the parties settled after a day-long mediation in late 2014. (CP 121-22) They agreed to split the proceeds from the sale of the family home, and agreed that Ms. Austin was entitled to a

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[1] The vocational assessment Ms. Austin relied upon summarized the significant health issues that impacted her ability to find remunerative employment (*See* CP 52, 1446-56), including an immune disorder that caused, and made her susceptible to, "mini strokes," hearing loss in both ears, "inner ear damage that resulted in severe balance issues," "chronic visual migraines," "Manic/Depressive Disorder," "symptoms of Attention Deficit Disorder," "bilateral Carpal Tunnel Syndrome," and "advanced degenerative disc disease (arthritis) in the cervical spine as well as the lumbar spine." (CP 1447-49)

[2] Ms. Austin's vocational consultant believed that if she were to work after divorce, she would require training "to be competitively employable in any suitable occupation" (CP 1453), and recommended that any employment be with a large employer mandated to provide Family Medical Leave because of her "various medical issues that impact her ability to work" (CP 1453), and "should limit walking and standing on uneven grounds" (CP 1448), "not require a high degree of social interactions" (CP 1448), and not be "highly repetitive in nature." (CP 1449)

disproportionate portion of the marital estate, the parties' only retirement account, and all their investment accounts (CP 7, 143), totaling well over $1,000,000. (CP 140) Mr. Grieben's property award consisted almost entirely of his interest in his separate business, and the parties' interest in the community business. (*See* CP 6-8, 140, 169)

In addition to a disproportionate property award and $374,000 denominated as "additional spousal maintenance" (CP 7-8, 140), the parties agreed that Mr. Grieben would also pay Ms. Austin a total of $625,200 in monthly maintenance over seven years, commencing November 2014. (CP 8, 139) By the time her maintenance terminated in November 2021, Ms. Austin would be almost 60, and Mr. Grieben—who had his own health issues (CP 83, 207)—would be almost 64. (*See* CP 1, 8) Mr. Grieben also agreed to pay 100% of the post-secondary and personal expenses of their adult sons (*see* CP 9, 153); the

older son, who is on the Autism spectrum, did not graduate from college until 2019. (CP 153)

2. In 2020, the wife petitioned to modify maintenance, claiming the parties' income "should be equalized for the rest of our lives."

Fifteen months before the parties had agreed maintenance was to terminate, Ms. Austin sought to modify maintenance, asking the trial court to "modify the current spousal maintenance award such that Mr. Grieben's and my income are equalized for the rest of our lives." (CP 130)

Ms. Austin alleged that her "numerous health issues [ ] have either worsened considerably since the date of the decree or [ ] have arisen since the date of the decree, which prevent me from obtaining or maintaining meaningful employment." (CP 36-37) Ms. Austin also alleged that she "believe[d] that Scott's financial situation has improved considerably since the date of the decree, despite the expectation at the time the decree was entered that his

income would *decline* considerably." (CP 37, emphasis in original)

Mr. Grieben moved to dismiss (CP 138), asserting the parties had expected that after maintenance terminated Ms. Austin would live off the assets she was awarded from the disproportionate division of their marital estate, and denying Ms. Austin's assertion that the parties ever expected her to be fully employed. (CP 154) To the contrary, after the divorce Ms. Austin had neither obtained training, sought employment, or been employed, except for a few weeks in 2019 when she worked "9-10 hours a week." (CP 37) Mr. Grieben also pointed out that, far from "improv[ing] considerably," his average 3-year income was down from $598,244 in 2014 to $457,302 in 2019. (CP 140)

Mr. Grieben also questioned Ms. Austin's need for continued maintenance. In 2018, she had liquidated assets valued at $1,782,110 (CP 122, 154)—more than the value of

property she had been awarded in 2014 (CP 140, 169)—including nearly $1 million held with Merrill Lynch and likely income-producing. (*See* CP 154, 270) Ms. Austin's July 2020 financial declaration revealed that even after liquidating almost $1.8 million in assets, she still had $939,446.10 in "stocks, bonds, CDs, and other liquid financial accounts" (CP 115), and she had recently purchased a condominium, free and clear, with a value of $750,878. (CP 154, 170)

3. Division I affirmed the trial court's dismissal of the wife's modification petition in an unpublished opinion.

Thurston County Superior Court Judge Christine Schaller ("the trial court") dismissed Ms. Austin's petition because she failed to show a substantial change in circumstances to warrant modifying spousal maintenance; that is, a change "not contemplated by the parties at the time that the order was entered . . . either in the financial needs of the recipient or the financial ability of the obligor,

and any change has to be one that is continuing and not something that is a shorter transitory change." (12/4/2020 RP 20) Division I affirmed in an unpublished opinion.

Division I held the trial court did not abuse its discretion in finding that "Grieben's income did not constitute a substantial change of circumstances" because substantial evidence supported its finding that Mr. Grieben's "income has not increased to any degree that would be considered a substantial change in circumstances, and in fact it does not appear that it has increased really one way or the other." (Op. 14)

Division I also rejected Ms. Austin's argument that there has been a substantial change as it relates to her financial needs, because substantial evidence supported the trial court's finding that "Austin had significant health conditions at the time the parties separated and divorced, and anyone who wouldn't contemplate that their medical conditions might get worse and not better, that doesn't

seem realistic, especially since some of these things had been chronic or things that she had been dealing with for a significant period of time." (Op. 15-16) Division I noted that while petitioner's "health may have worsened since the decree, it did not substantially change the circumstance related to the anticipated challenges she would face trying to find employment. Austin presented this concern in 2014 and the parties came to agreement when maintenance was ordered." (Op. 18)

C. This Court should deny review because statutory and case law have long required that the moving party must first establish a substantial change in circumstances warranting modification of maintenance.

As she did in the lower courts, petitioner conflates the standards for deciding if maintenance may be modified under RCW 26.09.170 with those governing how maintenance should be modified, and in what amount and duration, under RCW 26.09.090, contrary to statutory and

case law. Her petition presents no issue for further review in this Court.

RCW 26.09.170 was enacted in 1973 containing the provision that it still contains today, and on which Division I relied in affirming the trial court's dismissal: a maintenance award may be modified "only upon a showing of a substantial change of circumstances." RCW 26.09.170(1) (Op. 14-19). RCW 26.09.170 superseded an earlier statute that provided maintenance "may be modified by the court from time to time as circumstances may require," and incorporated the "judicial overlay" to that earlier statute "allowing modification 'only upon a showing of a substantial change of circumstances.'" *Wagner v. Wagner*, 95 Wn.2d 94, 98, n.1, 621 P.2d 1279 (1980). As this Court explained (and confirmed) in *Wagner,* requiring a showing of a substantial change in circumstance before a trial court may modify maintenance prevents "an unwarranted invitation to continue litigation"

that would allow "a later judge to radically change a carefully drawn agreement" "even if the circumstances were the same as the day the final agreement was signed." 95 Wn.2d at 99-100.

The law remains unchanged. In particular, Division I's unpublished opinion does not conflict with this Court's decision in *Washburn v. Washburn*, 101 Wn.2d 168, 677 P.2d 152 (1984) (Petition 11), where the issue was whether the trial court should *award* maintenance in the first instance, rather than whether to *modify* an agreed maintenance award. As Division I noted, whether "the final dissolution 'equalized' the parties is of no matter in this appeal. The only question before us is if the trial court, based on this record, abused its discretion in concluding that Austin did not establish a substantial change of circumstances to warrant a modification of maintenance." (Op. 19)

Petitioner complains that Division I ignored *Washburn* in favor of the "older Court of Appeals opinions" *Fox v. Fox*, 87 Wn. App. 782, 942 P.2d 1084 (1997) and *Marriage of Ochsner*, 47 Wn. App. 520, 736 P.2d 292 (1987), *rev. denied*, 108 Wn.2d 1027 (1987) (Petition 15). Although petitioner's claim that neither *Fox* nor *Ochsner* considered the "1973 legislative reforms" (Petition 16-17) is particularly misplaced because both cases were not only decided after enactment of the 1973 Dissolution Act, but after *Washburn,* Division I properly relied on these decisions because, unlike *Washburn,* they both address modification of a maintenance award, not an initial award of maintenance. (*See* Op. 15)

Division I's opinion that the "change of circumstances" in RCW 26.09.170 "refers to the financial ability of the obligor to pay vis-à-vis the needs of recipient" (Op. 11) also does not justify further review by this Court. (Petition 17) Division I's interpretation of RCW 26.09.170

in its unpublished opinion is wholly consistent with published decisions from all three Divisions of the Court of Appeals. *See Fox,* 87 Wn. App. at 784 (Div. I); *Spreen v. Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (Div. II 2001)[3]; *Marriage of Coyle*, 61 Wn. App. 653, 658, 811 P.2d 244 (Div. III), *rev. denied*, 117 Wn.2d 1017 (1991). There is no "confusion" in the lower courts (Petition 20) as to the proper standard for modifying maintenance.

Absent "changed conditions which could not have been anticipated, it is not the office of a petition for

[3] Division II's unpublished opinion in *Marriage of Scholl,* No. 52756-1-II, 2020 WL 1930215 at *2, *4 (April 21, 2020) (Petition 20) (cited per GR 14.1) does not raise grounds for further review. Notwithstanding RAP 13.4(b)(2) requires a claimed conflict with a *published* decision of the Court of Appeals, the unpublished opinions in *Scholl* and this case are also wholly consistent. In *Scholl,* Division II rejected the wife's appeal of an order reducing the husband's maintenance obligation after first addressing the wife's challenge to the trial court's finding of a substantial change in circumstances. Like Division I, Division II held "the phrase 'change in circumstances' refers to the financial ability of the obligor spouse to pay vis-à-vis the necessities of the other spouse." 2020 WL 1930215 at *2 (quoting *Ochsner,* 47 Wn. App. at 524).

modification to rewrite the agreement of the parties relative to an alimony award." *Crosetto v. Crosetto*, 65 Wn.2d 366, 368, 397 P.2d 418 (1964). If, as petitioner claims, the "change of circumstances" under RCW 26.09.170 required exhaustive consideration of the factors for an award of maintenance under RCW 26.09.090, and that as a consequence "a trial court must look at the conditions and facts essential to the initial maintenance award" (Petition 18-20), *every* maintenance award, whether entered by agreement or after trial, would be subjected to de novo review whenever a party sought to modify maintenance. This is not, and should not be, the law.

The courts below properly rejected petitioner's bid to modify maintenance for what it was—an attempt to renegotiate the settlement the parties had reached in 2014 resolving the issues arising from the dissolution of their marriage. Division I's unpublished opinion is wholly

consistent with the strong policy in favor of finally resolving the spouses' obligations to one another when a decree of dissolution is entered. *See Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985).

For the same reason, petitioner's assertion that a court "could only determine what the parties contemplated if it was expressly stated in the dissolution court's finding of fact" (Petition 10, 23-28) is no grounds for further review. None of the cases cited support petitioner's argument that Division I's unpublished opinion warrants further review (Petition 28), as each addresses the trial court's obligation in the first instance to make findings that support a *litigated* decision in a family law case.

The requirement petitioner proposes is not only unsupported by the case law. It would place a significant, and unwarranted, burden not only on parties who agree to decrees containing a maintenance award, but on trial courts making maintenance awards in the first instance.

That neither the parties, nor a trial court, possess a crystal ball to precisely foretell the futures of divorcing spouses is not grounds for modification. Petitioner's argument that a trial court must make predictive (and perfectly prescient) "findings" of the parties' anticipated circumstances whenever maintenance is agreed or awarded, made with no statutory or case law authority, does not warrant consideration in this Court.

D. Conclusion.

This Court should deny review of Division I's unpublished opinion affirming the trial court's discretionary decision finding petitioner had not shown a substantial change of circumstances justifying modification of the parties' agreed 7-year maintenance award.

I certify that this answer is in 14-point Georgia font and contains 2,518 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 15th day of November, 2022.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 15, 2022, I arranged for service of the foregoing Answer Petition for Review, to the Court and to the parties to this action as follows:

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DATED at Everett, Washington this 15th day of November, 2022.

/s/ Victoria K. Vigoren

Victoria K. Vigoren

SMITH GOODFRIEND, PS

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