101359-1

No. 83435-5-I

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

In re the Marriage of:

SCOTT LEE GRIEBEN,

Respondent,

v.

SHAWN SUZANNE AUSTIN,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

This petition concerns the intersection between two family laws—the spousal-maintenance statute (RCW 26.09.090) and the modification statute (RCW 26.09.170). The maintenance statute authorizes a dissolution court to award maintenance if doing so would be "just" after considering "all relevant factors." These factors include the recipient's age, health, and the parties' standard of living. Once a maintenance award is entered, the modification statute allows a trial court to modify it only "upon a showing of a substantial change in circumstances." The term "circumstances" is undefined. But, these statutes, when read together, mean that a modification court must consider the same relevant factors that determined the original maintenance award to determine whether a change has happened.

Division I rejected that reading, holding instead that a recipient must show a change in her bare financial necessities or the payor's financial capacity. Op. at 10-14. That narrow—and erroneous—interpretation resurrects an outdated conception of

alimony that the Legislature discarded long ago. It also clashes with *Washburn v. Washburn*, 101 Wn.2d 168, 677 P.2d 152 (1984), which recognized the effect of the Legislature's reforms. And it conflicts with Division II's opinion holding that a modification court should consider a broader set of "circumstances"—namely, the maintenance statute's factors for the initial award. *In re Marriage of Scholl*, 13 Wn. App. 2d 1027, 2020 WL 1930215 at *2, *4 (2020) (unpublished). This split leaves everyone to guess the right standard to apply to the hundreds of modification petitions decided annually. This Court needs to step in.

This Court should accept review also to provide clear rules for how a modification court determines what counts as "change" under RCW 26.09.170(1). On that issue, Division I gave license for trial courts to speculate about what was expected would happen in the future. Division I's permissive framework inadvertently allows gamesmanship among divorcing spouses. Spouses in divorce cases need clear rules when negotiating

settlements, and trial courts do too when drafting their findings and conclusions.

B. IDENTITY OF PETITIONER

The petitioner is Shawn Austin, who sought a modification of the dissolution court's maintenance award.

C. COURT OF APPEALS DECISION

Austin asks this Court to accept review of Division I's unpublished opinion ("Op."), filed on September 12, 2022. *See* A-5 through A-23.

D. ISSUES PRESENTED FOR REVIEW

1. Whether, on a petition to modify spousal maintenance under RCW 26.09.170(1), the factors listed in the maintenance statute, RCW 26.09.090(1), including the health of the recipient, are relevant "circumstances" to consider when a trial court decides if a "substantial change" has occurred since the original award.

2. Whether a dissolution court must find that its maintenance award contemplates a future event—such as the

recipient's worsening health or the payor's increase in income—for that future event to be excluded from counting as a "change" that would later justify modification under RCW 26.09.170(1).

E. STATEMENT OF THE CASE

(1) The Wife Received an Award of Spousal Maintenance in the Original Dissolution Case

Scott Grieben and Shawn Austin divorced in late 2014 after a 22-year marriage. CP 1-2, 5, 12. The couple raised two kids, following a traditional model—Grieben worked, and Austin did not. CP 35, 51. Once their children were grown Grieben petitioned for dissolution. CP 1, 35.

At the time, Austin struggled with her health. CP 52, 1447-49. Her conditions included hearing loss, an autoimmune disease, degenerative disc disease, migraines, and mental-health disorders. CP 1447-49. She had seen doctors for these conditions and participated in psychotherapy. *Id.*

Grieben earned $782,711 in 2012 through his businesses, but he swore that "there will not be the kind of money that has been generated the last two years." CP 79-80, 140. He attested in

June 2014 that his income in 2013 had been $385,000 and was on a similar pace in 2014—in line with his claims of decreasing income. CP 176.

When the parties agreed to settle, the dissolution court adopted their agreed findings and conclusions. CP 11-17. (The record contains no oral ruling.) The decree distributed the parties' property. CP 6-8. According to Grieben, Austin received property worth $1,632,059. CP 140. But the correct number, Austin later explained, was $1,005,060. CP 165-69. Grieben valued the property he received at $1,720,659, less $374,000 in equalizing payments, but the true value was $2,238,917, according to Austin. CP 140, 165-69, 183-240.

The decree also provided for spousal maintenance. CP 8. Grieben paid $8,300 monthly, with the amount declining until reaching zero at the end of 2021. *Id*. The only specific finding to justify this award was that Grieben "has a substantial income." CP 14. Otherwise, the findings merely quoted the factors in RCW 26.09.090(1)(b)-(f). CP 13-14. The findings said nothing about

the parties' standard of living during the marriage, about Austin's quality of life, her health, or her earning capacity. *Id.* The findings also said nothing about what the parties expected to happen in the future with their health, finances, and other circumstances. *Id.*

(2) After the Dissolution, the Wife Suffered Deteriorating Health, While the Husband Raked in $2.7 Million Despite Having Sworn to the Trial Court that His Income Would Go Down

After the divorce, Austin's preexisting health problems deteriorated, and she "developed several new medical conditions." CP 38. Her new conditions included myocardial infarction (death of heart muscle), fainting and falling spells, fibromyalgia (a musculoskeletal pain disorder), essential tremor (a neurological disorder resembling Parkinson's disease), essential myoclonus (involuntary muscle jerking), acute kidney injury, and cataracts. CP 28, 38; *compare also* CP 1447-49; *with* CP 524-27. Her fainting and falling resulted in her rotator cuff ripping from her bone. CP 38. By summer 2020, Austin's doctor found that "[m]any of her underlying conditions have arisen, or

worsened considerably, in the last 2-3 years." CP 28. Her doctor also certified that she needed a service dog. CP 174.

Meanwhile, Austin unexpectedly had to care for both her father, who became ill with cancer, and her stepmother, who suffered from dementia (both have since died, unfortunately). CP 242. While caregiving, Austin struggled to find work but took a part-time job selling windows. CP 37. She lost that position in early 2020 after two kidney failures led to her missing time. CP 37-38, 75. Her doctor then concluded that her conditions prevented her from working. CP 28, 39.

As Austin's health failed, Grieben earned $2.7 million in 2015-19 ($540,331.80 annually, on average). CP 140. Those earnings boosted his income by 40.35% above the 2013 level that he had reported in June 2014. *Compare* CP 140; *with* CP 176.

(3) The Trial Court Refused to Modify Maintenance

Austin petitioned the trial court in summer 2020 to modify spousal maintenance under RCW 26.09.170, claiming a change in circumstances. CP 19-22. She filed letters from her doctor and

hundreds of pages of medical records. CP 28, 39, 174, 352-1443, 1661-1822. Grieben conceded that the statutory factors in the maintenance statute, RCW 26.09.090(1), applied to Austin's request. CP 143 (stating that "[t]he factors set forth in the maintenance statute ... *are the same in a modification of maintenance as they are in an original proceeding*" (emphasis added)). And Austin agreed. CP 160-71.

Grieben moved to dismiss. Though the parties had agreed the factors in the maintenance statute applied, the court ignored them. *Compare* 12/4/20 RP 1-25; *with* CP 143; *and* CP 160-61. The court considered just two circumstances—"the financial needs of the recipient [Austin]," and whether "[Grieben's] income has increased." *Id.* at 20, 22. The court considered Austin's health only in connection with her "financial needs." *Id.* at 22. The court dismissed Austin's petition. CP 280.

(4) Division I Held the Maintenance Statute Does Not Apply When Determining Whether Circumstances Have Changed, and the Court Speculated About What the Parties Had Contemplated Would Happen

Division I affirmed. On appeal, Grieben reversed himself,

now arguing that the factors set out in the maintenance statute do *not* apply to the threshold determination under the modification statute. *See* Br. of Resp't at 17-24. The panel agreed: "the [trial] court used the correct legal standard when it evaluated whether there was a substantial change in circumstances under RCW 26.09.170 without conducting an analysis of RCW 26.09.090." Op. at 14. The panel affirmed the trial court's construction of the maintenance statute—the relevant "circumstances" are only "'the financial needs of the recipient'" and "'the financial ability of the obligator.'" *Id.* at 12 (quoting record). But the panel mentioned neither this Court's opinion in *Washburn* nor Division II's decision in *Scholl*, 2020 WL 1930215. Having rejected a spouse's worsened health as an independent ground for modification, the panel brushed aside Austin's medical problems because her employment prospects had always been "bleak." Op. at 18.

Next, the panel acknowledged the rule that a "change" occurs under RCW 26.09.170(1) when the circumstances

presented in a modification petition were "not within the contemplation of the parties at the time the decree was entered." Op. at 11 (citing *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980)). But the panel rejected Austin's argument "that the trial court could only determine what the parties contemplated if it was expressly stated in the dissolution court's findings of fact." Op. at 16-17. The panel believed that it could rely on the raw evidence in the record and on the dissolution court's general findings from 2014, which had merely recited verbatim the factors in RCW 26.09.090(1) without specifying any facts of this individual case. Op. at 17. Based on this loose framework for gleaning whether a "change" occurred, the panel said that all the changes had been "anticipated." *Id.* at 18.

This timely petition followed.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

While a trial court has discretion whether to modify spousal maintenance, this petition presents questions about the

legal framework that curbs that discretion. This Court decides *de novo* the correct legal standard for a trial court to apply when exercising its discretion. *Gildon v. Simon Prop. Grp., Inc*., 158 Wn.2d 483, 493, 145 P.3d 1196 (2006) (citation omitted).

(1) This Court Should Review Whether a Spouse's Health and Other Non-Financial Circumstances Are Circumstances that a Trial Court Must Consider When Deciding Whether to Modify Spousal Maintenance

This Court should grant review under RAP 13.4(b)(1) and (2) to bring the Court of Appeals' conflicting interpretations of the modification statute into alignment with *Washburn* and with the Legislature's liberalization of spousal maintenance.

(a) Division I Narrowed Spousal Maintenance to a Tool Only for Meeting a Spouse's Bare Financial Needs, Contrary to *Washburn*

A survey of Washington alimony law's history shows the conflict between Division I's narrow conception of spousal maintenance and this Court's broad view of it in *Washburn*, 101 Wn.2d 168. Washington once had a "strong public policy" holding that "a wife is *not* entitled to support when she has no

need for the support." *Holloway v. Holloway*, 69 Wn.2d 243, 252, 417 P.2d 961 (1966) (collecting cases) (emphasis added). The term "need" meant *financial* need—the bare requirements for subsistence. For example, in *Baker v. Baker*, 80 Wn.2d 736, 498 P.2d 315 (1972), the trial court properly awarded alimony because the wife had "*financial* need for additional support until such time as she can be trained for future employment." *Id.* at 745 (emphasis added). By contrast, in *Holloway*, the wife had no "need" because "she was working and supporting herself." 69 Wn.2d at 253-54 (emphasis added).

In line with this once-strong policy, the recipient spouse had to show a change in financial need when seeking an increase in alimony. *E.g.*, *Gordon v. Gordon*, 44 Wn.2d 222, 226-227, 266 P.2d 786 (1954). Even if the payor spouse's income skyrocketed, no modification could lie without an increase in the recipient's financial need. *Id.* The recipient spouse also had to show that "there is no other practicable way of meeting the financial problem." *Id. at 227.* A difference in standards of living

did not justify a modification: "A former wife may not obtain additional alimony on the theory that such is in keeping with her former husband's present station in life." *Id.* at 228. But Washington law later changed.

In 1973, the Legislature enacted the Dissolution Act, overhauling Washington's divorce laws. *See* Laws of 1973, 1st Ex. Sess., ch. 157. The Legislature liberalized maintenance, allowing trial courts to order it whenever it would be "just" in view of "all relevant factors," including seven factors defined by statute. *Id.* § 9(1), (1)(a)-(f), *codified at* RCW 26.09.090(1), (1)(a)-(f). These factors included non-financial considerations, such as the age and health of the spouse who seeks maintenance. *Id.* § 9(1)(e), *codified at* RCW 26.09.090(1)(e). In a repudiation of *Gordon*, 44 Wn.2d at 228, which had admonished that maintenance is not a method for equalizing standards of living, the Legislature directed the courts to consider "[t]he standard of living established during the marriage." *Id.* § 9(1)(c), *codified* at RCW 26.09.090(1)(c). These factors are non-exclusive; the trial

court may also consider relevant non-statutory factors. *In re Marriage of Khan*, 182 Wn. App. 795, 800, 332 P.3d 1016, 1018 (2014). The maintenance statute's factors remain unchanged. *Compare* Laws of 1973, 1st Ex. Sess., ch. 157, § 9, *with* RCW 26.09.090.

After these reforms, *Washburn* surveyed the new maintenance statute and concluded that "maintenance is not just a means of providing bare necessities." 101 Wn.2d at 179. Instead, the statute featured "extremely flexible provisions." *Id.* This realization in *Washburn* marked a sea change from the "strong policy" of old. Maintenance transformed into "a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." *Id.* The Legislature's new multi-faceted framework for maintenance meant that "a demonstrated capacity of self-support does not automatically preclude an award of maintenance." *Id.* at 178. Thus, the restrictions in *Gordon* and other cases were no more.

Division I's decision conflicts with this interpretation of

RCW 26.09.090 in *Washburn*. Despite Austin citing *Washburn*, Division I did not explain how its decision squared with it. Perhaps Division I assumed that *Washburn* was limited to the initial award of maintenance, while this case came on review of a modification order. But Division I did not say so, and there is no principled reason to treat the circumstances for modification as narrower than those for the initial award.

Rather than reconcile with the modern conception of spousal maintenance, Division I relied on the outdated notion of alimony hinging on the recipient spouse's basic "necessities." This legal error stems from Division I not only ignoring *Washburn*, but also relying on older Court of Appeals opinions that committed the same oversight. *See* Op. at 11 (citing *Fox v. Fox*, 87 Wn. App. 782, 784, 942 P.2d 1084 (1997); *In re Marriage of Ochsner*, 47 Wn. App. 520, 524-25, 736 P.2d 292 (1987)). In *Fox*, the Court stated that "the phrase 'substantial change of circumstances' refers to the financial ability of the obligor to pay vis-à-vis the needs of the recipient." 87 Wn. App.

at 784 (citing *Ochsner*, 47 Wn. App. at 524). But the *Fox* Court considered neither *Washburn* nor the 1973 legislative reforms, relying instead on *Ochsner*. Which was a problem: *Ochsner* did not analyze *Washburn* or RCW 26.09.090 either. Instead, *Ochsner* cited a case from 80 years ago that said, "the change of circumstances contemplated has reference, as in the first instance, to the financial ability of the husband to pay and the necessities of the wife." *Bartow v. Bartow*, 12 Wn.2d 408, 412, 121 P.2d 962 (1942). Thus, the outdated conception of alimony hinging on financial need—a notion that the Legislature killed off, as *Washburn* recognizes—continues to persist, like a zombie, in Court of Appeals opinions.

It is time for this Court to grant review of a spousal-maintenance case to clarify that bare "financial need" is no longer the predicate for a maintenance order, whether it be the initial award or a modification order. Even if a generous property award or an initial maintenance award meets a spouse's subsistence-level financial needs, as Grieben contended here,

that spouse's quality of life and her standard of living crater (thanks to physical disability and skyrocketing expenses) when her health unexpectedly fails. But Division I's opinion, like the pre-1973 principles that inform it, fails to see that the maintenance and modification statutes work together to assist a spouse in that predicament. The Court of Appeals needs this Court's instruction to stop relying on the antiquated notions of alimony that predated the Dissolution Act of 1973.

(b) Division I's Decision Conflicts with the Plain Language of RCW 26.09.170

This Court's cases on statutory interpretation also justify review under RAP 13.4(b)(1). Division I performed no analysis of the statute's words, despite Austin's briefing on the topic. *Compare* Op. at 1-19; *with* Br. of Appellant at 21, 23-24; *and* Reply Br. at 15-18. Instead, Division I relied only on the Court of Appeals' older decisions in *Fox* and *Ochsner*, as discussed above. That extratextual interpretation of RCW 26.09.170(1) conflicts with the plain-language rule for interpreting statutes. *See* RAP 13.4(b)(1); *Fed. Home Loan Bank of Seattle v. Credit*

Suisse Sec. (USA) LLC, 194 Wn.2d 253, 258, 449 P.3d 1019 (2019) (reaffirming that a statute's "plain language is "the bedrock principle of statutory interpretation").

In particular, the dictionary definition of "circumstances" exposes Division I's interpretive error. The Legislature has not defined "circumstances" in RCW 26.09.170. *See* RCW 26.09.004 (definitions section). "When no statutory definition is provided, words in a statute should be given their common meaning, which may be determined by referring to a dictionary." *Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wn.2d 835, 842-43, 64 P.3d 15 (2003). One definition of "circumstance" is "a condition, fact, or event … determining another: an essential or inevitable concomitant." *Circumstance*, *Merriam-Webster's Collegiate Dictionary* 225 (11th ed. 2014). Another definition is "[a]n accompanying or accessory fact, event, or condition …." *Circumstance, Black's Law Dictionary* 306 (11th ed. 2019). Under these definitions, the common meaning of "circumstance" allows only one reasonable reading of RCW 26.09.170(1). That

is, a trial court must look at the conditions and facts essential to the initial maintenance award. Put another way, "all the relevant factors," RCW 26.09.090(1), are the "circumstances" to consider.

This interpretation makes logical sense. A court cannot determine whether a "change" has occurred unless it has an accurate reference point. Without comparing the present with the circumstances that the trial court had to consider at the time of the original decree, the court cannot determine whether the newly presented facts were "contemplated at the time the original order of support was entered." *In re Marriage of Scanlon & Witrak*, 109 Wn. App. 167, 34 P.3d 877 (2001).

But Division I's opinion tells trial courts to ignore all the changes to the circumstances that were once relevant to the maintenance award, except the recipient's basic financial necessities and the obligor's ability to pay. That construction of RCW 26.09.170(1) violates the interpretive rule against reading things into a statute that are not there. *Cerrillo v. Esparza*, 158

Wn.2d 194, 201, 142 P.3d 155 (2006) (citation omitted). And it fails to harmonize with RCW 26.09.090 and the Legislature's purposes for maintenance. *See Credit Suisse*, 194 Wn.2d at 258-59, 262 ("related sections," "purpose"). Review is warranted.

(c) Confusion Reigns in the Lower Courts

Division I's narrowing of the grounds for maintenance also creates a rift within the Court of Appeals' own decisions, justifying review under RAP 13.4(b)(2). In *Scholl*, Division II stated that "[t]o modify a maintenance obligation, the court considers the same nonexclusive factors in RCW 26.09.090(1)(a)-(f) that apply to the determination of an initial maintenance obligation." 2020 1930215 at *4. With that legal framework, Division II reviewed the trial court's order to determine whether it properly considered RCW 26.09.090(1)(f) when deciding a modification request. Division II concluded it had. *Scholl*, 2020 WL 1930215 at *4-5.

While *Scholl* and Division I's opinion here were unpublished, their divergence underscores the need for review.

Trial courts and the bar can only guess as to which statutory interpretation is correct. Indeed, Grieben's position changed over time in this case. At the trial court, his experienced attorney conceded in written submissions that the .090 statutory factors applied to Austin's modification petition. CP 143. But once the trial court applied a different standard focused narrowly on financial need, Grieben switched his argument on appeal. *See* Br. of Resp't at 17-24. That makes sense from the perspective of advocacy, but it shows that both the trial court and Division I strayed from the understanding of family-law specialists. This Court's guidance is needed.

Division I's opinion here also reveals tension within Division I's own precedents. Before, Division I held that "financial need is *not* a prerequisite to a maintenance award." *In re Marriage of Wright*, 179 Wn. App. 257, 269, 319 P.3d 45 (2013) (emphasis added). As Division I realized, a trial court may award maintenance even in "high-asset cases." *Id.* Accordingly, the court affirmed a maintenance award despite the lack of

evidence of the recipient's "financial need." *Id.* at 269. But now Division I says that a recipient must show a change in her financial need to obtain increased maintenance. Op. at 12-14. Though *Wright* concerned an original award, not modification, the difference in procedural timing does not matter. After all, nothing in RCW 26.09.170(1) suggests that maintenance withers over time into a provision only for bare financial necessities.

Division I's opinion here also conflicts with *In re Marriage of Spreen*, 107 Wn. App. 341, 28 P.3d 769 (2001), although the panel tried to reconcile the two. In *Spreen*, Division I applied the .090 factors when reviewing a modification. *Id.* at 347. But here, Division I recast *Spreen* as creating a two-step process for modification decisions—first, determining whether there is a substantial change in the recipient's basic necessities, and second, if yes, applying the .090 factors to decide on a new amount and duration. Op. at 13-14. This cramped reading of *Spreen* again erects a hurdle to maintenance—showing financial need—that does not exist.

Only this Court can resolve the conflicts within the Court of Appeals' opinions and clarify which are right.

(2) This Court Should Review Whether a "Substantial Change" Must Be Determined Based on the Trial Court's Original Findings or Instead May Be Inferred from Evidence Favoring the Other Party

For a new condition to count as a "change" in RCW 26.09.170(1), it must have been "not within the contemplation of the parties at the time the decree was entered." *Wagner*, 95 Wn.2d at 98 (citations omitted). But neither the statute nor *Wagner* specifies the framework for determining what the parties had contemplated. Here, Division I held that a trial court could look at a single piece in the record (a 2014 vocational evaluation of Austin) to determine what the parties contemplated would happen in the future. Op. at 17 (citing *Morgan v. Morgan*, 59 Wn.2d 639, 643, 369 P.2d 516 (1962)). And Division I endorsed the use of "findings" that merely quote the statutory factors rather than saying anything specific about the parties' situation. *See id.* (approving findings that merely quoted the factors set out in RCW 26.09.090(1)). This Court should review this part of

Division I's opinion under RAP 13.4(b)(1) and (2).

Division I's framework invites trial courts to speculate about what the original dissolution court and the parties had expected would happen in the future, contrary to *Morgan*. In *Morgan*, this Court cautioned that alimony "cannot be based upon the conjectural possibility of a future change in circumstances." 59 Wn.2d at 643. Logically, then, a change in circumstances could not reasonably have been contemplated in the original decree if the parties or the court would have had to speculate about its occurrence. Of course, *Morgan* has otherwise been superseded by RCW 26.09.090. But it remains good law on how speculation cannot be the basis for future maintenance payments. After all, nothing in that legislation suggests that trial courts should conjecture. Rather, the modification statute allows the courts and the parties to account for future events about which they could only speculate during the original case. Unexpected future events are what the maintenance statute is for.

Still, Division I misread *Morgan* as allowing a reviewing

court to scour the record for evidence of what the parties *might* have contemplated in the original dissolution. *See* Op. at 17 (citing *Morgan*, 59 Wn.2d at 643). That reading turns *Morgan* on its head. This Court held that the trial court's award of future maintenance was an abuse of discretion because there was "neither evidence in the record *nor* a finding of fact to support an alimony award on such a conjectural basis." 59 Wn.2d at 643 (emphasis added). *Morgan* did not say that maintenance may stand only on bits of evidence alone without the trial court *also* making adequate findings about the future. *See id.* Division I's expansion of *Morgan* leaves parties to guess which pieces of evidence shaped the maintenance award and which did not.

Division I's opinion also conflicts with the discussion in *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004) on the findings necessary when a trial court applies statutory factors in a family-law setting. While *Horner* concerned Washington's Child Relocation Act, RCW 26.09.405-.560, its reasoning applies with equal force here. This Court decided that

"*[i]deally*, trial courts will enter findings of fact on each factor." *Id.* at 895. Otherwise, a trial court's decision may be sustained only when "substantial evidence [is] presented on each factor" and "the trial court's findings of fact and oral articulations reflect that it considered each factor." *Id.* at 896. Here, the 2014 vocational evaluation was insufficient, for two reasons. First, there was no trial to create "substantial evidence." Grieben put the report in the record six years later. CP 1444-56. Second, Grieben points to no discussion in the trial court—oral or written—about how the report informed the application of the statutory factors to future events (*i.e.*, the possibility of Austin's health deteriorating). Yes, Division I pointed to the trial court's findings. Op. at 17. But those findings merely quoted the statutory factors verbatim. *Compare* CP 13-14; *with* RCW 26.09.090(1). That kind of "conclusory" parroting of statutory factors is not enough. *Horner*, 151 Wn.2d at 897. Rather, the trial court's findings or oral ruling must reveal "the trial court's application of the facts to the [statutory] factors." *Id.* But here,

the trial court's rote quotations in 2014 did not apply the statutory factors to the facts to reveal whether an anticipated deterioration in Austin's health was a basis for the original maintenance award. CP 13-14. Division I's opinion does not square with *Morgan* or *Horner*.

Nor does it align with *In re Marriage of Valente*, 179 Wn. App. 817, 823-27, 320 P.3d 115 (2014), which held that an award of maintenance based on the anticipated future worsening of a medical condition must be based on evidence *and* appropriate findings about the likelihood of deterioration. In *Valente*, the Court held that a physician's testimony about the progression of a spouse's multiple sclerosis did not suffice because the trial court "did not make any findings as to the likelihood or degree to which [the spouse's] condition might worsen." *Id.* at 826. Thus, contrary to Division I's view here, it is not enough for the record to have included evidence that *could* have supported specific findings. Without "specific findings regarding the certainty that those hardships are likely to occur," a trial court

lacks the authority award maintenance payments based on those possible future hardships. *Id.* at 827. Austin briefed *Valente*, but Division I did not explain how its opinions are consistent.

This Court should grant review and hold that, in accord with *Morgan*, *Horner*, and *Valente*, a modification court may find a change was contemplated at the time of the original decree only if the dissolution court anticipated the change in specific findings applying the statutory factors or in an equivalent oral discussion that satisfies the *Horner* test. Otherwise, a modification court can only speculate, as Division I did, about whether the original maintenance award accounted for the change presented in the modification petition.

Division I's approach invites the sort of gamesmanship that Grieben employed here. He downplayed his 2012 income when opposing maintenance in 2013-14, but then in 2020 he urged the trial court to use his 2012 earnings as the benchmark. CP 78-80, 140, 142-43, 176. He also downplayed Austin's health back in 2013-14, not mentioning it except to protest her medical

expenses. CP 77-85, CP 176-80. But now he claims that her health always was a serious problem. Grieben can make these shifting arguments of convenience only because nothing in the dissolution court's findings holds him to his sworn statements in 2013-14. Spouses and dissolution courts need clear rules for drafting findings that spell out the future events that a maintenance award is meant to anticipate. Clear rules will curb litigation shenanigans and make it easier for modification courts to determine whether a "change" has happened.

(3) <u>These Issues Are Important for Washingtonians But Have Evaded this Court's Review</u>

RAP 13.4(b)(4) also favors review. This Court has not interpreted RCW 26.09.090 since *Washburn*, 101 Wn.2d 168. And since *Wagner*, 95 Wn.2d 94, it has not addressed what RCW 26.09.170 means when a party seeks modification of spousal maintenance. As *Washburn* has faded further into the past, the Court of Appeals has lost sight of which principles of alimony law belong in the dustbin. Of course, this Court does not review many family-law cases. But for most Washingtonians, Title 26

RCW holds more importance than perhaps any other part of Washington law. Indeed, Washington's superior courts decide hundreds of maintenance-modification petitions every year.[1] This Court's guidance is necessary.

G. CONCLUSION

For these reasons, Austin asks this Court to accept review.

This document contains 4,971 words, excluding the parts of the document exempted from the word county by RAP 18.17.

DATED this 11th day of October 2022.

Respectfully submitted,

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[1] *See* Washington State Administrative Office of the Courts, *Superior Court Annual Caseload Reports*, https://www.courts.wa.gov/caseload/?fa=caseload.showIndex&level=s&freq=a.

Attorney for Appellant
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APPENDIX

RCW 26.09.090 Maintenance orders for either spouse or either domestic partner—Factors. (1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance. [2008 c 6 § 1012; 1989 c 375 § 6; 1973 1st ex.s. c 157 § 9.]

Part headings not law—Severability—2008 c 6: See RCW 26.60.900 and 26.60.901.

RCW 26.09.170 Modification of decree for maintenance or support, property disposition—Termination of maintenance obligation and child support—Grounds. (1) Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(2) Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance.

(3) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the person required to pay support for the child.

(4) Unless expressly provided by an order of the superior court or a court of comparable jurisdiction, provisions for the support of a child are terminated upon the marriage or registration of a domestic partnership to each other of parties to a paternity or parentage order, or upon the remarriage or registration of a domestic partnership to each other of parties to a decree of dissolution. The remaining provisions of the order, including provisions establishing parentage, remain in effect.

(5)(a) A party to an order of child support may petition for a modification based upon a showing of substantially changed circumstances at any time.

(b) The voluntary unemployment or voluntary underemployment of the person required to pay support, by itself, is not a substantial change of circumstances.

(6) An order of child support may be modified at any time to add language regarding abatement to ten dollars per month per order due to the incarceration of the person required to pay support, as provided in RCW 26.09.320.

(a) The department of social and health services, the person entitled to receive support or the payee under the order, or the person required to pay support may petition for a prospective modification of a child support order if the person required to pay support is currently confined in a jail, prison, or correctional facility for at least six months or is serving a sentence greater than six months in a jail, prison, or correctional facility, and the support order does not contain language regarding abatement due to incarceration.

(b) The petition may only be filed if the person required to pay support is currently incarcerated.

(c) As part of the petition for modification, the petitioner may also request that the support obligation be abated to ten dollars per month per order due to incarceration, as provided in RCW 26.09.320.

(7) An order of child support may be modified without showing a substantial change of circumstances if the requested modification is to modify an existing order when the person required to pay support has been released from incarceration, as provided in RCW 26.09.320(3)(d).

(8) An order of child support may be modified one year or more after it has been entered without a showing of substantially changed circumstances:

(a) If the order in practice works a severe economic hardship on either party or the child;

(b) If a child is still in high school, upon a finding that there is a need to extend support beyond the eighteenth birthday to complete high school; or

(c) To add an automatic adjustment of support provision consistent with RCW 26.09.100.

(9)(a) If twenty-four months have passed from the date of the entry of the order or the last adjustment or modification, whichever is later, the order may be adjusted without a showing of substantially changed circumstances based upon:

(i) Changes in the income of the person required to pay support, or of the payee under the order or the person entitled to receive support who is a parent of the child or children covered by the order; or

(ii) Changes in the economic table or standards in chapter 26.19 RCW.

(b) Either party may initiate the adjustment by filing a motion and child support worksheets.

(c) If the court adjusts or modifies a child support obligation pursuant to this subsection by more than thirty percent and the change would cause significant hardship, the court may implement the change in two equal increments, one at the time of the entry of the order and the second six months from the entry of the order. Twenty-four months must pass following the second change before a motion for another adjustment under this subsection may be filed.

(10)(a) The department of social and health services may file an action to modify or adjust an order of child support if public assistance money is being paid to or for the benefit of the child and the department has determined that the child support order is at least fifteen percent above or below the appropriate child support amount set forth in the standard calculation as defined in RCW 26.19.011.

(b) The department of social and health services may file an action to modify or adjust an order of child support in a nonassistance case if:

(i) The department has determined that the child support order is at least fifteen percent above or below the appropriate child support amount set forth in the standard calculation as defined in RCW 26.19.011;

(ii) The department has determined the case meets the department's review criteria; and

(iii) A party to the order or another state or jurisdiction has requested a review.

(c) If incarceration of the person required to pay support is the basis for the difference between the existing child support order amount and the proposed amount of support determined as a result of a review, the department may file an action to modify or adjust an order of child support even if:

(i) There is no other change of circumstances; and

(ii) The change in support does not meet the fifteen percent threshold.

(d) The determination of whether the child support order is at least fifteen percent above or below the appropriate child support amount must be based on the current income of the parties.

(11) The department of social and health services may file an action to modify or adjust an order of child support under subsections (5) through (9) of this section if:

(a) Public assistance money is being paid to or for the benefit of the child;

(b) A party to the order in a nonassistance case has requested a review; or

(c) Another state or jurisdiction has requested a modification of the order.

(12) If testimony other than affidavit is required in any proceeding under this section, a court of this state shall permit a party or witness to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means, unless good cause is shown. [2020 c 227 § 13; 2019 c 275 § 2; 2010 c 279 § 1; 2008 c 6 § 1017; 2002 c 199 § 1; 1997 c 58 § 910; 1992 c 229 § 2; 1991 sp.s. c 28 § 2; 1990 1st ex.s. c 2 § 2; 1989 c 416 § 3; 1988 c 275 § 17; 1987 c 430 § 1; 1973 1st ex.s. c 157 § 17.]

Effective date—2020 c 227 §§ 3-13: See note following RCW 26.09.320.

Findings—Intent—2020 c 227: See note following RCW 26.09.320.

Rule-making authority—2020 c 227: See RCW 26.09.916.

Part headings not law—Severability—2008 c 6: See RCW 26.60.900 and 26.60.901.

Short title—Part headings, captions, table of contents not law—Exemptions and waivers from federal law—Conflict with federal requirements—Severability—1997 c 58: See RCW 74.08A.900 through 74.08A.904.

Severability—Effective date—Captions not law—1991 sp.s. c 28: See notes following RCW 26.09.100.

Effective dates—Severability—1990 1st ex.s. c 2: See notes following RCW 26.09.100.

Effective dates—Severability—1988 c 275: See notes following RCW 26.19.001.

Severability—1987 c 430: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1987 c 430 § 4.]

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Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of SCOTT LEE GRIEBEN, Respondent, and SHAWNA SUZANNE AUSTIN, Appellant.	No. 83435-5-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — Shawna Austin filed a motion to modify spousal maintenance arguing that there had been a substantial change of circumstances to warrant increasing maintenance for two reasons—first, that her health had worsened, and second, Scott Grieben's income had substantially increased. The commissioner dismissed the motion, Austin moved to revise, and the trial court denied that motion. Because Austin failed to establish a substantial change of circumstances that were not previously contemplated by the parties at the time the decree was entered, we affirm.

FACTS

Grieben and Austin married in 1991 and separated in 2013, the same year

Grieben filed a petition for dissolution of marriage.[1] Throughout the duration of the marriage, Austin acted as a stay-at-home parent. Grieben generated income from the businesses he co-owned with a business partner, Tri-Tec Communications, Inc., ("TTC"), and Tri-Tec Networks LLC ("TTN"). TTC is a company that sells and installs large phone systems for business and government agencies. In the three years prior to the parties' dissolution, Grieben's average annual income was $598,244.[2] To support her request for maintenance, Austin provided a vocational evaluation from September 2014 that discussed personal factors affecting Austin's potential future employment. The evaluator concluded that Austin, who was 52 at the time, had not worked in over 21 years and would need retraining to be competitively employable in any suitable occupation.

The evaluation provided an overview of Austin's many chronic and long-term medical conditions and how they impacted her ability to work. Austin was diagnosed with an autoimmune disease such that her rheumatologist advised her not to sit too long so that blood clots would not develop and cause a mini stroke, which she had a history of due to the condition. She also had hearing loss in both ears and a related surgery caused inner ear damage resulting in severe balance issues. Because of this condition, she was provided with a disabled parking permit, and the evaluator opined that "appropriate employment

[1] Scott and Shawna have two children together, and at the time of the dissolution, one child was 17 and one was a college student. Financial support for the children is not at issue.

[2] Grieben's annual income was $782,711 in 2012, $416,510 in 2013, and $595,510 in 2014.

environments should limit walking and standing on uneven ground or for prolonged periods of time."

Austin also had chronic visual migraines. She sustained about 10-15 ocular migraines a year over the previous 40 years ranging in duration from 24 hours to a few days, possibly requiring a few days of bedrest. Additionally, since 1989, Austin was diagnosed with Bipolar II, which is a manic/depressive disorder, coupled with an anxiety disorder with panic attacks and social phobia features. The evaluator explained that as the anxiety attacked could be profound and debilitating, a person with such a disorder may do best in a work environment that does not require a high degree of social interactions—such as group presentations, teaching, sales representation, or interaction with the media. Two years prior to the evaluation, Austin was reporting symptoms of Attention Deficit Disorder and was taking medication to relieve some of the symptoms. Even on medication, she still had trouble reading and focusing on content.

Austin also was reported to have bilateral Carpal Tunnel Syndrome, severe in her right dominate hand and moderate in her left hand, and she also had issues with chronic left shoulder tendonitis. Finally, the evaluation discussed her advanced degenerative disc disease in her cervical and lumbar spine and disc bulge in her lumbar spine. As a result, the evaluation suggested that Austin not enter into an occupation that is highly repetitive in nature or that required her to lift more than 10 pounds.

Though Austin was at the time qualified for entry level, low skill or unskilled occupations, the evaluator advised that these positions required people

to be on their feet moving about all day and that would not be appropriate for Austin given her balance issues as well as her low back issues.

The evaluator focused on shorter training programs given Austin's age of 52 because longer school programs may not be worth the time and money "given the short time she would be working before retirement age" and the fact she "would be at a serious disadvantage to obtain employment based on her expected age of 57-58 once school is completed." However, even shorter programs for occupations with labor markets that are either balanced or in demand in King County identified by the evaluator still raised concerns.[3] All the occupations involved computer keyboard use and that Austin may have difficulty in a job that requires high levels of repetitive hand use, awkward postures, and forceful pinching.

At minimum, Austin would need to upgrade her office skills to obtain an entry level position and would require training to be able to work in physically appropriate work. However, the evaluator acknowledged Austin's "number of medical conditions that limits the types of training and work she can perform." The evaluator noted that "Austin may require time off work, above and beyond the normal time off for medical issues associated with her Bipolar II disorder, anxiety/panic disorder and migraines. These also could interrupt training and therefore, it is expected she will require more time than usual to meet the requirements of training."

[3] The evaluator identified five occupations with projected growth for consideration with the estimated salaries ranging from $29,965.58 to $56,686.75: receptionist, general office clerk, executive secretary, human resource assistant, or social service aid.

The evaluator wrote,

> In addition, it will be important that Ms. Austin be employed by an employer who employs over 50 employees as they are required by law to provided[sic] Family Medical Leave. Ms. Austin may need to use this benefit for various medical issues that impact her ability to work, as an avenue to maintain her employment. A smaller employer may not be able to afford the extra time off from work and she could risk losing her job in such a situation.

After a day-long mediation, the trial court entered agreed final dissolution orders in December 2014. Though the parties dispute the valuation of the divided assets, those orders were not appealed. Even assuming Austin's description is correct, she was awarded more than one million dollars.

Additionally, the court ordered the following spousal maintenance:

> The husband shall pay to the wife the sum of $8,300 per month in spousal maintenance, beginning with the month of December 2014. Maintenance shall continue through November 2019. From December 2019 through November 2020, spousal maintenance shall be $6,300 per month. For December 2020 through November 2021, maintenance shall be $4,300 per month. Maintenance shall terminate with the final payment in November 2021. Maintenance shall terminate on the death of either party (except as stated below) or the remarriage of the wife.
>
> As additional spousal maintenance, husband shall pay the sum of $3,700 per month beginning in December 2014. This maintenance payment shall continue through November 2020, or until a total of $374,000 has been paid to the wife. This maintenance payment shall terminate on the death of either party except that this particular obligation shall constitute a lien on the husband's estate in the event of his death prior to termination of this obligation. This specific maintenance payment shall survive the wife's remarriage.

The court ordered maintenance for the following reasons:

> the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life and other attendant circumstances;

> the duration of the marriage;
>
> the ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse seeking maintenance;
>
> the age, physical and emotional condition and financial obligations of the party seeking maintenance;
>
> the past, present and future earning or economic capacity of each party, including the earning or economic capacity of each spouse that was enhanced, diminished or foregone during the marriage; and
>
> the standard of living each spouse will experience after dissolution of the marriage.
>
> The petitioner has the ability to pay maintenance as follows: He has a substantial income from Tri-Tec Communications, Inc.

On July 31, 2020, Austin filed a petition to modify spousal maintenance. She included a declaration of her primary physician, her own declaration, and multiple pages of medical records and financial documents. She claimed that there had been two substantial changes of circumstances to warrant the modification.

The first substantial change she alleged was that her medical conditions contemplated in the 2014 dissolution order had worsened considerably. In addition, she claimed that new health problems arose. Her new health conditions included myocardial infarction (death of heart muscle due to lack of oxygen), fainting and falling spells, fibromyalgia (a musculoskeletal pain disorder), essential tremor (a neurological disorder with effects resembling Parkinson's disease), essential myoclonus (involuntary muscle jerking), acute kidney injury, and cataracts. She stated that she suffered from three falls, resulting in two

black eyes and her rotator cuff being ripped from her bone.

Although it is unclear when she started, Austin declared that she had lost "recently, until late 2019" her job working part-time selling windows, earning $15.00 per hour. Austin claims that when she wrote her employer saying she was having challenges with various health issues, the employer responded by saying it was best to put her employment on pause so that she could take the time needed to recover.[4] Austin alleges she cannot work at all. She submitted a letter from her primary care doctor who declared that many of Austin's underlying conditions had arisen or worsened within the past two to three years and that she has "multiple chronic medical issues, a few of which I list below, which render her unable to hold down regular employment."[5] She stated that she did not qualify for Social Security Disability Insurance because she had not worked meaningfully outside the home since 1994. She also explained that she did not qualify for Supplemental Security Income because of her assets.

The second substantial change Austin alleged was the increase in Grieben's finances. According to Austin, "[t]he Court should take [Grieben's] 2013 income of $416,000 as the baseline. His 2019 income of $537,701 represents a $115,701 annual increase. . . ." Austin also alleged that Grieben's net worth was 79 percent higher than her net worth. Austin, considering Grieben's financial position as opposed to her own, argued that Grieben

[4] The only documentation of this conversation between Austin and her employer is Austin's summary of it in an email to her attorney that she included as an exhibit to her declaration. The actual emails to and from her employer were not in the record.

[5] The list includes health issues discussed in the 2014 vocational evaluation as well as health issues such as "tremor," which she identified as having since 2018.

"therefore received more than *four times* what [Austin] received over the last five years from work income that was only made possible from the work and sacrifice both parties contributed to the marital community over the 22 years the parties were married." She asked the court to therefore equalize their incomes.

Grieben responded by filing a motion to dismiss. Grieben argued that Austin's medical conditions were contemplated at the time of the dissolution and, thus, there was no substantial change warranting modification of spousal maintenance. He also argued that there was no substantial change to his finances stating that his average annual income from 2012-2014 was $598,244, but his average annual income from 2017-2019 was $457,302, which was a substantial decline.[6]

Austin filed a response and contended that she should receive a lifetime spousal maintenance award.

A commissioner heard and granted Grieben's motion to dismiss. In September 2020, Austin filed a motion for revision of the commissioner's ruling. After hearing argument and considering all of the documents provided, the court first addressed the assertion that Grieben's income increased to a degree that would have risen to the level of a substantial change in circumstances. The court noted that the findings entered in December 2014 specifically indicated that Grieben had a substantial income from TTC and that was how he would be able

[6] He further stated that his own health had deteriorated as a brain tumor survivor, and he had recently been diagnosed with prostate cancer and would be undergoing cryotherapy treatment. On appeal, he does not rely on his health issues as a basis to deny the motion for modification.

to afford to pay the significant and substantial spousal maintenance that was awarded to Austin. The court considered his income from 2015-2019 and determined "[h]is 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 another." The court reasoned that the parties knew at the time they agreed to the dissolution decree that Grieben's income fluctuated year to year. In light of the foregoing, the court found that there was not a substantial change of circumstances as it related to Grieben's income, and it would not be a basis to grant or allow a modification of spousal maintenance.

The court then addressed whether there was a substantial change as to the financial needs of Austin due to her health conditions. The court noted that Austin was awarded a significant amount of assets and spousal maintenance and was not working at the time of dissolution. She had significant health conditions at the time the parties separated and dissolved their marriage, and the assertion that the parties did not contemplate her conditions could worsen was unrealistic, especially considering that some of her conditions were chronic or conditions she dealt with for a significant period of time. The court stated that it was not clear if the parties anticipated she was going to secure full-time employment where she was going to be able to support herself in the lifestyle she had become accustomed to. The court posited that the parties contemplated she might choose to work to support her income, but she would be able to live off of the assets provided from the dissolution. The court acknowledged that

she had sold some of her assets, but she still had a large amount remaining. It stated, "The fact that you sell one asset that might be producing income to have an asset that doesn't produce income is not a substantial change. That is a choice." The court found that there had not been a substantial change in circumstances regarding her financial need, and it denied the motion to revise the commissioner's ruling.

Austin appeals the court's denial of the motion to revise the commissioner's ruling.

DISCUSSION

On appeal, this court reviews the superior court's ruling on a motion to revise, not the commissioner's ruling. In re Marriage of Fairchild, 148 Wn. App. 828, 831, 207 P.3d 449 (2009); RCW 2.24.050. This court reviews the trial court's decision concerning modification of the dissolution decree for abuse of discretion. In re Marriage of Shellenberger, 80 Wn. App. 71, 80, 906 P.2d 968 (1995). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). "In determining whether the trial court abused its discretion in ordering modification, this court reviews the order 'for substantial supporting evidence and for legal error.'" In re Marriage of Drlik, 121 Wn. App. 269, 274, 87 P.3d 1192 (2004) (quoting Spreen v. Spreen, 107 Wn. App. 341, 346, 28 P.3d 769 (2001)).

Legal Standard

Austin contends that the trial court applied the wrong legal standard to

Austin's modification petition. We disagree.

A trial court abuses its discretion when it "'applies the wrong legal standard,' or bases its ruling on an erroneous view of the law." Gildon v. Simon Prop. Grp., Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) (citing Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). The correct legal standard is a matter that the appellate courts decide de novo, in addition to the statutory interpretation of the statutory provisions in RCW 26.09. Gildon, 158 Wn.2d at 494; Drlik, 121 Wn. App. at 276.

A decree involving spousal maintenance may only be modified upon a showing of a substantial change of circumstances not within the contemplation of the parties at the time the decree was entered. Wagner v. Wagner, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980); RCW 26.09.170(1)(b). The phrase "change of circumstances" refers to the financial ability of the obligor to pay vis-a-vis the needs of the recipient. Fox v. Fox, 87 Wn. App. 782, 784, 942 P.2d 1084 (1997) (citing In re Marriage of Ochsner, 47 Wn. App. 520, 524-25, 736 P.2d 292 (1987)). The determination of whether a substantial change of circumstances justifying modification has occurred is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. Id. (citing Lambert v. Lambert, 66 Wn.2d 503, 508, 403 P.2d 664 (1965); In re Marriage of Ochsner, 47 Wn. App. at 524-25, 736 P.2d 292 (1987).

The trial court noted that "This is not an initial award of spousal maintenance. This is a Petition to Modify what was set forth in a final decree, and the decree and findings were entered on December 9, 2014 by agreement of

the parties." The court then acknowledged that it had

> to determine whether or not there has been a substantial change of circumstances under the requirements for spousal maintenance to determine whether or not the case would go on. . . . A substantial change of circumstance for the purposes of spousal maintenance must be one that was not contemplated by the parties at the time that the order was entered, and it must be – the change must be 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.

Austin argues that the trial court applied the wrong legal standard because it failed to consider factors in RCW 26.09.090 in conjunction with RCW 26.09.170. She cites no authority supporting the assertion that a trial court, when finding that the party seeking modification has not established a substantial change in circumstances, must nevertheless address factors in RCW 26.09.090.

Except as otherwise provided in RCW 26.09.070(7), provisions of any decree respecting maintenance may be modified only upon a showing of a substantial change of circumstances. RCW 26.09.170(1). RCW 26.09.090 provides that in a proceeding for dissolution of marriage, or in a proceeding for maintenance following dissolution of marriage, the court may grant a maintenance order and that order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

> (1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to

> misconduct, after considering all relevant factors including but not limited to:
>
> (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
>
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
>
> (c) The standard of living established during the marriage or domestic partnership;
>
> (d) The duration of the marriage or domestic partnership;
>
> (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
>
> (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

However, the trial court need not consider these factors in deciding whether or not to modify spousal maintenance—it only needs to consider these factors if it decides that substantial change warrants modification. See Fox, 87 Wn. App. at 784; Spreen, 107 Wn. App. at 347. In Fox, the court did not reach the RCW 26.09.090 factors because it did not find substantial change of circumstances warranting modification under RCW 26.09.170; Fox, 87 Wn. App. at 784. In Spreen, the court only reached the RCW 26.09.090 factors after it decided there was a substantial change of circumstances warranting modification under RCW 26.09.170; Spreen, 107 Wn. App. at 347. The court in Spreen added that "once the court finds the changed circumstances warrant a modification, the issues of amount and duration are the same as in the original dissolution." Id. at 347 n.4. In the instant case, the court found the substantial

circumstances did not warrant a modification, and therefore it did not need to reach the issues of the amount and duration of new spousal maintenance.

Contrary to Austin's assertion, the court used the correct legal standard when it evaluated whether there was a substantial change in circumstance under RCW 26.09.170 without conducting an analysis under RCW 26.09.090.

Substantial Change in Circumstances

Under RCW 26.09.170, the burden of demonstrating the required change of circumstances to warrant modifying maintenance is on the party seeking modification. Lambert, 66 Wn.2d at 508.

A. Grieben's Financial Ability

The court did not abuse its discretion when it found Grieben's income did not constitute a substantial change of circumstance.

The court considered his average income from 2015, the year after the final decree was entered, to 2019. It stated, "His 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." It recognized at the time the decree was entered, the parties knew what Grieben's financial circumstances were, they knew he had a substantial income, and that his income fluctuated.

Austin argues that Grieben's income "rocketed upward" relative to inflation. This is not supported by the record.

In the original December 2014 findings of fact and conclusions of law, one of the reasons the court ordered maintenance was because Grieben had the

ability to pay because "[h]e has a substantial income from Tri-Tec Communications, Inc." In the three years prior to the parties' dissolution, Grieben's average annual income was $598,244. From 2015 to 2019, Grieben's average annual income was about $540,332. Grieben's average income had actually decreased $57,912 after the 2014 decree was entered.

Austin also argues that Grieben has the ability to pay because he has the ability to liquidate his interest in TTC. We need not address the feasibility of that proposition because Austin's argument is based on substantial change of circumstances and not Grieben's ability to pay, and the parties in 2014 were aware of his interest in TTC when they agreed to the maintenance award in the decree.

The court did not abuse its discretion in finding there was no substantial change in circumstance as it relates to Grieben's financial ability to pay spousal support.

B. Austin's Financial Need

Austin contends that the court abused its discretion when it found that Austin's new and worsening medical conditions did not constitute a substantial change that would warrant modification. We disagree.

Austin argues that "the court ignored the uncontroverted evidence that Austin suffered from new health problems." However, the court prefaced its ruling with the following statement:

> First of all, I would like the parties to know that I have spent a significant amount of time reviewing all of the materials that were submitted for the purposes of the hearing in front of the Commissioner and any of the materials that were submitted for the

> Motion to Revise. I also, of course, reviewed the initial Findings of Fact and Conclusions of Law and the Decree of Dissolution and have given a lot of thought to this case.

The court also observed 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.

Austin further argues that her preexisting conditions worsened beyond what the parties had contemplated at the time of dissolution constituting a substantial change of circumstances. Specifically, she argues that the vocational evaluation done in 2014 contemplated that she would be able to work, but her new medical conditions prevented her from doing so.

The trial court reasoned that in 2014 the parties had contemplated her health conditions worsening because Austin had not been working at the time of dissolution, she was awarded a significant amount of assets, and a significant amount of spousal maintenance. She already had significant health conditions at the time, and it was likely that they anticipated her conditions could worsen. It stated that it was not clear whether the parties anticipated her securing a full time job, but it was clear the parties clearly anticipated that she would be able to choose to work to supplement her income, and she could live off the assets provided from the dissolution. Further, the court noted that although Austin sold some of her income-generating assets, that was not a substantial change—that is a choice she made.

Austin argues, without any supporting authority, that the trial court could

only determine what the parties contemplated if it was expressly stated in the dissolution court's findings of fact. We find this argument unpersuasive. See Morgan v. Morgan, 59 Wn. 2d 639, 643, 369 P.2d 516 (1962) (concluding there was neither evidence *in the record* nor a finding of fact to support an alimony award on such a conjectural basis) (emphasis added). The dissolution court's findings of fact included basing maintenance on "the age, physical and emotional condition and financial obligations of the party seeking maintenance" and

> the past, present and future earning or economic capacity of each party, including the earning or economic capacity of each spouse that was enhanced, diminished or foregone during the marriage . . .

The record included the 2014 vocational evaluation.

It is undisputed that Austin suffered from several chronic and long-term health issues that limited her ability to work. The 2014 vocational evaluation confirmed that Austin could not work in the entry level, unskilled positions she was qualified to do because of her health issues. The evaluation confirmed she required retraining to be competitive enough to be employable. However, the evaluation acknowledged that her health issues could interrupt any training. More importantly, the evaluation acknowledged that Austin's health issues may require her to take time off work "above and beyond the normal time off" and that it was important for her to be employed by an employer with more than 50 employees so they would be required by law to provide her Family Medical Leave. Otherwise, a smaller employer may not be able to afford the extra time off from work and Austin could risk losing her job in such a situation. It was reasonable for the trial court to conclude that the parties in 2014 contemplated

that Austin's health issues could worsen based on the number of chronic and long-term health issues that was known in 2014. And though the trial court found that it was not clear whether the parties anticipated her securing a full time job, the vocational evaluation provided a bleak outlook of Austin being able to secure or maintain any regular employment because of her health issues. While her 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.

Further, Austin contends that her expenses are now more than her income because she sold some of her income-producing assets in order to buy a condo before selling her house. As the trial court observed, this was a choice she made, and not a substantial change in circumstances. Even after selling some of her assets, one of the reasons she does not qualify for Supplemental Social Security Income is because of the amount of assets she possesses. Austin did not establish a substantial change of circumstances in her financial need that justified a maintenance modification. She instead argues that the court should award maintenance such that her income and Grieben's income are "equalized."

A trial court is not required to place former partners in an equal position for the rest of their lives. Matter of Marriage of Leaver, 20 Wn. App. 2d 228, 241, 499 P.3d 222 (2021). The objective of placing the parties on equal footing is permissible but not mandatory. Id. Austin had the opportunity to go to trial at the time of dissolution, but instead, after mediation, agreed with the proposed

maintenance and distribution of assets in the dissolution decree. 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. The trial court did not abuse its discretion.

Attorney Fees on Appeal

Austin requests attorney fees under RCW 26.09.140 regardless of whether she is the prevailing party. RCW 26.09.140 provides that "[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs." Considering all the circumstances, we decline to award Austin attorney fees.[7]

We affirm.

Coleman, J.

WE CONCUR:

[7] Austin, who submitted a financial declaration under RAP 18.1(c), filed a motion asking this court to compel Grieben to also file a financial declaration. RAP 18.1(c) provides "[i]n any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses," a party must timely file a financial declaration for his or her resources to be considered. Grieben did not request attorney fees. Because we do not award either party attorney fees, we deny Austin's motion to compel.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals Cause No. 83435-5-I to the following:

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Original E-filed with:
Court of Appeals Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 11, 2022 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

October 11, 2022 - 2:01 PM

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