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No. 70415-0-I

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

JACQUELINE BERNI

Appellant-Petitioner,

v.

WILLIAM BERNI,

Respondent.

BRIEF OF RESPONDENT WILLIAM BERNI

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In the face of adverse rulings from two King County Court Commissioners and two reviewing King County Superior Court Judges, Appellant/Petitioner Jacqueline Berni brings this appeal. Despite the volumes of pages produced by both parties below and the extended argument in Appellant's Opening Brief, there is one simple issue that decides whether Appellant's appeal has merit, and that is: should gambling "winnings" (from slot machine play) as reported to the IRS for 2010 and 2011 be considered "earned income" for the purpose of calculating maintenance under subparagraph 2, of Article VII of the parties Separation Contract. (Appendix A sets forth the specific language in the Separate Contract controlling this case.) Appellant's strained interpretation of "earned income" ignores the fact that Respondent William Berni had offsetting slot machine losses reported on his federal tax returns for the same 2010 and 2011 tax years such that he had zero gain from these winnings for both years. If she is unable to use the reported slot machine winnings in her calculations as a part of what is meant by "earned income", Appellant is not able to show she is entitled to additional maintenance and her motion for additional maintenance is without merit for both years. Respondent in fact paid maintenance under Subparagraph 1 of Article VII in the total amount of \$9,000 for 2010, but he did not owe any maintenance under paragraph 2, because his earned income for 2010 did not exceed the threshold amount of \$75,000. He also

paid \$8,590 in maintenance for 2011, which was a slight overpayment under paragraph 2.

Regarding Appellant's complaints of intransience, Appellant/Petitioner waited two years from her Decree of Dissolution to commence discovery. Her initial contempt motion was found not timely as it related to a claim of maintenance for 2011, because it was filed on March 9, 2012 before Respondent even was required to deliver his 2011 tax return by April 16, 2012. Her motion also included a request for maintenance for the year 2009, which year was appropriately excluded for consideration by Judge Laura Gene Middaugh on review. Neither decision was appealed by Appellant. None of the two judges or two court commissioners below found Respondent to be in contempt.

Probably in recognition that Appellant Jacqueline Berni was never going to be satisfied and would continue to seek further motions for contempt or enforcement based on the procedural history in this case and to avoid or to reduce future motions, Commissioner Julia Garratt gave Appellant the unusual and exceptional post-dissolution power to subpoena Respondent's financial records, including the power to request certified copies of Respondent's tax returns from the IRS through the tax year 2016 at her cost. Even though the authority for such action, post-dissolution, is questionable and probably not supported by law, Respondent chose not to appeal, acceding to Commissioner Garratt's rationale for allowing Appellant to seek such relief.

Finally, Appellant did not bring her second motion for show cause claiming this new theory that gambling winnings should be included in earned income until December 7, 2012, despite the fact that she had the tax returns and the W-2G's showing slot machine winnings for both 2010 and 2011 by April 16, 2012. Nothing in later discovery had any effect on the calculations proposed by her latest motions.

Any difficulty in Respondent's ability to respond to Appellant's excessively broad and in many cases inexplicable discovery requests had to do in part with the fact that Appellant waited two years before making any request assuring that records were much more difficult to obtain.

The lower courts considered Appellant's request for fees and denied them, except \$1,500 she was awarded for attorney's fees during the first hearing before Commissioner Jeske as a result of Respondent's initial delay in delivering his 2010 federal tax return to Appellant when due. She was later awarded \$800 because Respondent included evidence in his Motion for Reconsideration that was ruled not appropriate. Both sums were paid by Respondent; neither party was awarded attorney's fees in any other of the proceedings below, yet Appellant's new request for attorney's fees includes fees for hearings which were not appealed and for hearings in which she did not prevail and should not have prevailed.

Respondent requests that this court affirm the decisions of the court below and award attorney's fees for having to defend an appeal without merit.

II. RESTATEMENT OF ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Should the term “earned income” in Separation Contract be interpreted to include slot machine winnings for purposes of determining maintenance owed, especially when the winnings were offset by losses?
2. Did the court commissioner and later reviewing superior court judge abuse their discretion in finding that Respondent William Berni was not in contempt based on the cumulative record?
3. Did the court commissioner and later reviewing superior court judge abuse their discretion in failing to award attorney’s fees to either party?
4. Should Respondent William Berni be awarded attorney’s fees for having to defend a frivolous appeal?

III. RESPONDENT’S RESTATEMENT OF CASE

A. **In 2010, Respondent William Berni Paid Spousal Maintenance As Required By The Separation Contract**

Paragraph 2 of Article VII Maintenance of the Separation Contract sets out the continuing maintenance obligations of Respondent William Berni [“Bill”]. Paragraph 2 states for “any calendar year through December 31, 2016, in which the Husband has earned income in excess of \$75,000, as reported on all W-2 forms, 1099s and Husband’s federal income tax return, he shall pay to Wife [Appellant Jacqueline Berni] as

maintenance an amount equal to fifty percent (50%) of his earned income in excess of \$75,000.” CP 26-27. Appendix A sets out the language in Article VII in full. The original Decree of Dissolution was entered on March 26, 2010. Bill paid maintenance of \$750.00 per month before and after the decree for a total of \$9,000 in 2010. CP 136-137. These payments were a continuation of pre-decree payments of \$750.00 while Bill was receiving unemployment and doing temporary maintenance and repair jobs for mostly family and his former employer during the pretrial portion of the case. CP 132. The monthly payments of \$750 through 2010 were required pursuant to paragraph 1 of the same Article VII Maintenance provisions. Appellant Jacqueline Berni [“Jaci”] adds up all income and unemployment compensation from January 1, 2010 to the end of the year to determine if maintenance is owed. On the other hand, she only credits from Bill’s \$750.00 payments from the date of the decree of dissolution on March 26, 2010. As shown in paragraph IV.B. below, the earned income threshold of \$75,000 was not reached in 2010.

B. In 2011, Respondent William Berni Paid Spousal Maintenance As Required By The Separation Contract

Jaci also was paid \$8,590 maintenance in 2011. She does not contest these maintenance payments made by Bill for 2011. CP 219. According to the terms of the Separation Contract, Bill was required to make his maintenance payment for the calendar year of 2011 by the end of February 2012. But as an accommodation to Jaci, he made advance

payments of \$710.00 per month from June 2011 through December 2011. CP 96; CP 134-135. He also advanced by direct deposit to Jaci's bank account the lump sum of \$3,610 on January 4, 2012. *Id.* Any final payments due after his tax returns were filed was to be paid by May 1 according to paragraph 2. On April 30, 2012, Bill deposited \$10.00 directly to Jaci's bank account, CP 200, for an overpayment of \$6.28 in 2012. CP 100; CP 135.

C. Brief Procedural History — Two Year Delay To Bring Motions

The Decree of Dissolution herein was entered on March 26, 2010. The parties entered into a Separation Contract after a CR2A agreement was reached during a full mediation with Howard Bartlett. CP 126. Jaci waited almost a full two years before filing a Motion for an Order of Show Cause on March 9, 2012. *Id.* By taking so long, it made obtaining many records much more difficult and some were no longer available. For example, Wells Fargo Bank no longer had certain images available and Verizon did not have records available after 18 months had passed. CP 126. Subparagraph 2 of Article VII of the Separation Contract sets out a formula requiring husband to pay maintenance when his earned income is in excess of \$75,000 as reported by Bill's W-2's, 1099's, and his federal income tax returns, commencing April 1, 2010. (See a copy of Article VII Maintenance as Appendix A for quick review, the full Separation Contract is at CP 18-29.) Note that contrary to the representation in Jaci's Brief at 4, the Separation Contract was not drafted by Bill's Attorney, but was

drafted by Jaci's attorney as can be shown by the CROSTA AND BATEMAN pleading paper (Jaci's law firm through the dissolution decree). CP 18-29; CP 230. Although the final decree is not in the court papers, it appears that Mr. Crosta prepared the Separation Contract, Findings and Decree and Bill and his attorney (the undersigned) were responsible for presenting the documents to the court. CP 230.

1. **First Hearing Before Commissioner Jeske on March 30, 2012 – No Contempt Found.** At the first family court hearing on March 30, 2012, Commissioner Jacqueline Jeske stated there was not a preponderance of evidence to show that Bill was in bad faith or willfully failed to comply with the court's order on the cumulative record. CP 167. She also found that it was premature to request contempt for 2011, or that it certainly was at the time the motion was filed, pointing out that it was not even April yet. CP 169. Commissioner Jeske was very impressed that Bill advanced maintenance payments to Jaci when he was not obligated to do so. She stated: "And that's such a contrary act and conduct to a demonstration of bad faith it really weighs against the type of thing she [Jaci] is expressing." CP 169. She went on to say that it did not mean that she would always believe Bill, "but it does mean that it's very indicative to this Court that there's no willfulness involved here in trying to engage in bad faith. I just simply don't find it consistent with the type of conduct that would indicate that." CP 169. Commissioner Jeske further stated that she was not persuaded that Bill failed to make maintenance payments

based on 50 percent in excess of earned income over \$75,000.

The issue of whether discovery would show maintenance might be owed for 2009, 2010, and 2011 was reserved by the Court in paragraph 3.5 of the Order on Show Cause. CP 109. In the same order at paragraph 3.6., the Court found that “Respondent is not in contempt,” CP 109, and at paragraph 3.9, the Civil Penalty does “not apply because no contempt was found.” CP 110.

a. Gambling Winnings Not Considered Earned Income by Commissioner Jeske. Commissioner Jeske went on to order Bill to disclose his gambling winnings as reported on his W-2G’s on the theory that they were part of or attached to Bill’s tax returns. The issue of gambling winnings was not part of Jaci’s calculations for maintenance in her first request, but the issue came up as a part of Jaci’s discovery requests. During the hearing, Jaci’s counsel requested W-2G forms (IRS form for reporting gambling winnings). During the initial hearing on March 30, 2012 before Commissioner Jeske, the following colloquy took place:

THE COURT: Is she entitled to gambling income under the decree? I believe it said "earned income."

MS. COLBERG: It is earned income, but, your Honor, it's a form — it's a W2 that —

THE COURT: So then

why does she — MS.

COLBERG: -- she

didn't receive,

THE COURT: -- **why is she entitled to that information?**

MS. COLBERG: **Certainly just to verify the total sources of income.** If it was gambling income — all she has is the line item on the deductions, she doesn't have anything to verify that the source of income was what it was.

THE COURT: Okay.

(Bold emphasis provided) CP 158-159. Later in discussing Bill's requirement to provide "gambling attachments" for his tax return, the Commissioner stated that Bill should provide them "even though she's not entitled to a payment based on income that's not earned income." CP 176.

b. Bill Was Ordered To Pay \$1,500 To Jaci Because He Failed To Give Her His 1040 for 2010 by April 15. The year 2010 was the year of the decree and division of assets. Jaci was awarded \$61,000 from Bill's IRA. Bill could not get Jaci to advise whether she had rolled over the \$61,000 to her IRA or had taken out a cash distribution so that he could make note of it on his tax return. CP 96. The Commissioner awarded Jaci \$1,500 in attorney's fees based on Bill's refusal to turn over his 2010 federal tax return until Jaci told him whether she had rolled over or cashed out the \$61,000, which \$1,500 was paid. CP 138; CP 179; CP 298. This award was not appealed.

2. On Bill's Motion for Reconsideration, Commissioner

Jeske Further Clarified The Meaning of Earned Income. Bill filed a Motion for Reconsideration, Clarification and CR60, arguing that Commissioner Jeske committed error by including the year 2009 to be within the scope of the Article VII maintenance provision. Bill also requested clarification regarding whether certain employment benefits were to be included in earned income. Unfortunately, the issue of whether gambling winnings were to be considered a part of earned income was not directly before Commissioner Jeske. By Memorandum Opinion dated May 25, 2012, Commissioner Jeske denied Bill's request to exclude 2009 from maintenance calculations, but did clarify that employer reimbursement for work related costs such "as gas or travel to perform job duties, or work related cell phone usage" "shall be excluded from the definition of earned income". CP 43. She also found "vacation funds" were excluded from earned income. CP 43-44. She went on to say, "[t]hus trust or other unearned income is not relevant to this [maintenance] provision." CP 44. Obviously Commissioner Jeske felt that there were other unnamed categories that would not be included within the definition of earned income, but Jaci's claim for maintenance based on W-2G Slot machine winnings was not formerly presented until December 7, 2012, when she filed her Motion To Enforce, For Contempt, and Judgments. CP 7-96.

3. On Bill's Motion for Revision Judge Middaugh Removed The Calendar Year Of 2009 From Maintenance

Consideration – Which Was Not Appealed. Bill’s Motion for Revision was heard before the The Honorable Laura Gene Middaugh, King County Superior Court Judge on August 2, 2012. CP 48-49. Judge Middaugh found that Respondent William Berni was not responsible for maintenance for 2009. This decision was not appealed by either party.

4. On January 25, 2013, A Second Hearing Before Commissioner Garratt Was Held – No Contempt, No Maintenance Based on Gambling Winnings, And No Award of Attorney’s Fees Were Found. On January 25, 2013, Jaci’s second post dissolution Motion To Enforce, For Contempt, and Judgment was brought before Commissioner Julia Garratt. Jaci’s counsel conceded that she had received Bill’s 2009 tax return IRS transcript, but argued she was entitled to “all the schedules”. Commissioner Garratt pointed out that Judge Middaugh had ruled that no maintenance was owed for 2009. Counsel argued that she was not arguing for maintenance but for disclosure, to which Commissioner Garratt stated:

But it doesn’t make any sense. Why should he have to produce records for 2009 when there’s no income that would be produced from that? I mean we’re talking about going back almost four years now. ... But if 2009 is off the chessboard, I mean, what’s the point?

Counsel’s response was “[t]hey agreed to it.” Transcript of Second Hearing - Commissioner Garratt, dated January 25, 2013, at 12.

a. No One Gets Rich On Slot Machines Play – Gambling

Winnings Held Not Earned Income. In discussing whether gambling is to be considered income, Commissioner Garratt pointed out that such winnings are not concerted earned income by the IRS and that nobody gets rich over slot machines. Disregarding her assumption that Bill had a great deal of gambling losses to offset winnings, she stated: “But under the circumstances, I’m not finding the gambling winnings to be considered earned income.” Hearing Transcript, dated January 25, 2013, p 13. And further “by taking out the calculation of gambling income, I don’t find that there’s any maintenance owed for 2010 and 2011.” Id. p. 14. Commissioner Garratt made a specific finding in her order of January 25, 2013 at paragraph 2.6 that “gambling winnings are not considered earned income.” CP 285.

b. Contempt Not Found. Regarding allegations of contempt, Commissioner Garratt stated: “I certainly am not holding Mr. Berni in contempt based on the Court’s reviewing the information at hand.” Hearing Transcript, dated January 25, 2013, p 14.

c. Jaci Was Granted Post-Dissolution Subpoena Power Of Bill’s Financial Institutions. In granting Jacqueline Berni subpoena authority, Commissioner Garratt stated:

It’s not the responsibility of Mr. Berni to produce these additional records. He is to produce what is spelled out in the separation contract, which is the W-2 forms, the 1099s, and his scheduled income tax forms.

Hearing Transcript January 25, 2013, p. 14. Regarding the scope of the

subpoena, Commissioner Garratt stated:

If she thinks that there's something out there that is not being appropriately reported on the tax returns, then she has the ability to seek that out. But it's not [Mr. Berni's] responsibility to pay for this [discovery].

Id. p. 15. She went on to explain her rationale as follows:

But I foresee, based on the amount of documentation that I've reviewed for this hearing, if I don't allow subpoena power I certainly see there being some belief that he is somehow secreting or hiding funds that should have been reported to the IRS. And I think that it would be appropriate under the circumstances.

The subpoena authority was limited to financial records. Id. at 15. Even though Commissioner Garratt assumed that both parties would seek review of her decision, Bill chose to abide by the Commissioner's unusual grant of subpoena power and did not to seek review.

5. Jaci's Motion for Review Before Judge Spector To Reverse Commissioner's Garratt's Decision That Gambling Winnings Were Earned Income Was Denied. The Honorable Julie Spector, King County Superior Court Judge heard Jaci's Motion for Revision on March 13, 2013.

Let me ask you a question, because I listened very carefully to Commissioner Garratt. And her analysis was that gambling income, which is the 1099-G or W-G, she did not find that to be earned income under the law for the reasons that she stated on the record. So why is that an error? I mean, that's really the sole issue.

Hearing Transcript, dated March 13, 2013, p. 6. Judge Spector further

commented about Commissioner Garratt's analysis as a "very reasoned analysis". Id. at 7. She obviously had listened to the hearing before Commissioner Garratt and was familiar with the case. By order filed on March 14, 2013, she denied Jaci's Motion For Revision without further written comment. CP 324-325. By order dated, April 26, 2013, Judge Spector also denied Jaci's Motion for Clarification and Reconsideration. It is from these Orders that Jaci brings this appeal.

IV. ARGUMENT

A. Standards Of Review

1. **The Trial Court's Interpretation of Maintenance Provisions In Separation Contract Are Reviewed De Novo.** The language of a Separation Contract that is incorporated into a decree of dissolution is reviewed de novo. *In re Marriage of Smith*, 158 Wn. App. 248, 255, 241 P.3d 449 (2010). The parties intent at the time of the agreement must be ascertained when the agreement is incorporated into the decree as it was here. Id. Interpretation of the terms of contract is a question of law and are reviewed de novo. *Knipschild v. C-J Recreation, Inc.*, 74 Wn. App. 212, 215, 872 P.2d 1102 (1994)

2. **Whether The Superior Court Holds A Party In Contempt Is Reviewed For Abuse Of Discretion.** This Court reviews

the trial court's denial of contempt for abuse of discretion. *Stablein v. Stablein*, 59 Wn.2d 465, 466, 368 P.2d 174 (1962). The decision whether contempt is warranted is within the trial court's sound discretion. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or its discretion is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

3. Whether The Superior Court Awards Attorney's Fees Is Reviewed For Abuse Of Discretion. The burden is on the person challenging to show the trial court's decision not to award attorney's fees was "clearly untenable or manifestly unreasonable." *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994).

B. For 2010, Without Including Slot Machine Winnings, It Cannot Be Shown That Respondent Owes Maintenance For Earned Income In Excess Of \$75,000 And Therefore No Additional Maintenance Is Owed.

To assert that Bill owed maintenance on earned income in excess of \$75,000 for 2010, Jaci took Bill's total income of \$261,347 as reported on line 22 of his 1040 federal income tax return for 2010. CP 12; CP 145. Included in that total figure is \$10,988 in unemployment compensation line 19 and \$48,322 in Form W-2G winnings line 21. *Id.* (Note that unemployment compensation is not considered earned income per the IRS, see paragraph V.B.1. below and Jaci was provided maintenance from

unemployment compensation in paragraph 1, VII of the Separation Contract. Paragraph 1 by its terms only applied to 2010 and further documents fact that Bill was unemployed at the time. CP 26.) To the total income figure of \$261,347 reported on Bill's 1040, Jaci added all bank deposits from his temporary side jobs which amounted to \$18,987.66 without any deductions for cost of goods, supplies or materials. She basically added up all Bill's 2010 checking account deposits from Wells Fargo and Bank of America Bank and treated the gross deposits as earned income. CP 12; CP 132. She deducted Bill's IRA withdrawals and his new spouse's income, which resulted in an income figure of \$125,543.66. CP 12. For reasons set out below, Bill is not contesting Jaci's treatment of his total banking deposits as income for purposes of this appeal as Jaci still cannot show maintenance has been unpaid for 2010 as shown below.

If Bill's unemployment compensation and gambling winnings are not considered earned income, then Bill's earned income for 2010 is \$66,233.66 which means that paragraph 2, Article VII (earned income in excess of \$75,000) does not apply as the \$75,000 threshold has not been reached.

Even if Bill's unemployment compensation is considered earned income, the total would be \$77,221.66. Jaci concedes that Bill made support payments of \$750.00 per month for nine months or \$6,750.00, CP 12, which is way more than is needed to cover her 50% share of the excess of \$75,000. (Actually, Bill paid \$750 per month for the entire year of

2010 or \$9,000, but Jaci only gives him credit for 9 months of post dissolution payments even though she includes all 12 months of pre-and post-dissolution income.) In other words, she would be entitled to \$1,110.83 as her 50% and she was paid \$6,750. The courts below were correct and Bill owes no additional maintenance for 2010.

C. Gambling Winnings Simply Do Not Fit The Ordinary, Usual, And Popular Meaning and Intent Of The Words “Earned Income” By Any Reasonable Definition.

To succeed in her interpretation that Article VII of the Separation Contract requires inclusion of all gross income without regard to deductions, unless specifically excluded, she simply ignores the word “earned”. Thus, if Bill has interest or dividends, which would be reported on 1099 INT or DIV, Jaci considers the income to be “earned income”, because they are not expressly excluded. If Bill is paid \$10,000 for a small construction job and his costs of materials, supplies and subcontractors, if any, come to \$7,000, Jaci’s position is that Bill has to include all \$10,000 as “earned income” and not the amount that he actually earned or \$3,000.

In determining the parties’ intent in Washington, intention is imputed from “the reasonable meaning of the words used,” “the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used”, and the “words in a contract” are given “their ordinary, usual, and popular meaning unless the entirety of the agreement

clearly demonstrates a contrary intent.” *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

1. The Dictionary Definition of “Earned Income” Clearly Establishes That The Common Meaning Is Income From Wages Or Services From Work. The “ordinary, usual and popular” meaning of “earned income” is well established. In *Webster’s Third New International Dictionary* 714 (Unabridged 1999), the word “earn” is defined as “to receive as equitable return for work done or services rendered: accredited to one as remuneration.” “Earned income” is defined as “income (as wages, salary, professional fees, or commissions) that result from personal labor or services of an individual.” *Id.* Similarly in the *New Oxford American Dictionary* 545 (3rd ed. 2010), “earned income” is defined as “money derived from paid work.” Finally, in *The American Heritage Dictionary* 561 (5th ed 2011) “earn” means “[t]o gain especially for the performance of service, labor, or work”.

In *Black’s Law Dictionary* 456 (5th ed. 1979), “earned income” is defined as “[i]ncome (e.g. wages, salaries, or fees) derived from labor, professional service, or entrepreneurship as opposed to income derived from invested capital (e.g. rents, dividends, interest).” In a later edition of *Black’s*, “earned income” is defined as “[m]oney from one’s own labor or active participation; earnings from services.” *Black’s Law Dictionary* 767 (Deluxe 7th ed. 1999). From reading all these dictionary definitions, the only reasonable conclusion is that the words “earned income” have a

common meaning limited to work or services. Certainly, the “ordinary, usual, and popular”, or reasonable meaning of “earned income” would not include slot machine jackpots.

2. The IRS Definition For "Earned Income" Means Income From Work Or From Running A Business. Article II subparagraph 2 uses the phrases "earned income" "as reported" by "all W-2 forms, 1099s and Husband's federal income tax return". Since the parties are using IRS tax forms to determine earned income, it would seem logical and reasonable to look to the IRS to determine what is meant as "earned income". “Contractual language also must be interpreted in light of existing statutes and rules of law.” *Tanner Elec.Cooperative v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); *Bort v. Parker*, 110 Wn. App. 561, 573, 42 P.3d 980 (2002). According to the IRS, earned income is defined as:

What is Earned Income?

Earned income includes all the taxable income and wages you get from working or from certain disability payments.

- **There are two ways to get earned income:**

You work for someone who pays you

or

You own or run a business or farm

Taxable earned income includes:

- Wages, salaries, tips, and other taxable employee pay;

- Union strike benefits;
- Long-term disability benefits received prior to minimum retirement age;
- Net earnings from self-employment if:
 - You own or operate a business or a farm or
 - You are a minister or member of a religious order (see Special Rules page for more information);
 - You are a statutory employee and have income. (See definition of statutory employee on our Helpful Definitions and Acronyms for EITC page).

Examples of Income that are Not Earned Income:

- Pay received for work while an inmate in a penal institution
- Interest and dividends
- Retirement income
- Social security
- Unemployment benefits,
- Alimony
- Child support.

<http://www.irs.gov/Individuals/What-is-Earned-Income%3F> Note that the IRS does not consider unemployment benefits to be considered “earned income”. While slot machine winnings are not listed in the specific examples above as specific exceptions, those examples are not exclusive and slot machine earnings are not generated from working "for someone who pays you" or owning or running “a business or farm”. (While all income sources have to be disclosed while determining child support, the income sources of “gifts and prizes” are excluded from gross income for purposes of child support. See RCW 26.19.071(4)(c).) Clearly the IRS would not consider slot machine winnings to be considered “earned income”. The separation contract here does not use all income as Jaci seems to argue but restricts income to “earned income”.

D. For 2011, Without Including Slot Machine Winnings, It

Cannot Be Shown That Respondent Owes Additional Maintenance For Earned Income In Excess Of \$75,000 After Crediting Maintenance Payments Timely Made.

1. Using Jaci's Computations For 2011, Bill Overpaid Maintenance To Jaci In The Amount of \$5,491. Using the same methodology as she did for Bill's 2010 earned income, Jaci took Bill's gross income from his 1040 federal income tax return from 2011 or \$251,350. From that amount, she subtracted his spouse's income and his IRA withdrawals to reach a figure of \$113,024. CP 14. This figure includes \$31,806 W-2G slot machine winnings. CP 148. If the \$31,806 slot machine winnings are excluded from Jaci's calculations, Bill's total earned income for 2011 would be \$81,218 or \$6,218 in excess of \$75,000 for which Bill would be required to pay 50% or \$3,109.00.

Jaci concedes that Bill paid \$8,590 in maintenance for 2011. CP 290. According to her calculations, she was overpaid \$5,491.

2. Using Actual Earned Income From Bill's Full Time Employment With The State Liquor Board For 2011, Bill Overpaid Maintenance To Jaci In The Amount of \$6.28 For 2011. In 2011, Bill was in his first full year as Director of Distribution for the State Liquor Board. He had no other earned income. Determination of maintenance was easily shown by his liquor board W-2 and his earning statement. Using his state earning statement for the year 2011, Bill's earned income was \$92,167.44 for 2011. CP 135. Subtracting \$75,000 from that figure and multiplying by 50 percent means that Bill owed Jaci maintenance of

\$8,582.72. This was the year Bill made advance maintenance payments. He commenced paying Jaci \$710.00 per month from June to December of 2011 and he paid \$3,610 to Jaci on January 4, 2012, all in advance of the end of February 2012 due date. CP 96. (These advance payments by Bill made before being required were the actions which so impressed Commissioner Jeske at the first hearing where no contempt was found. CP 169.) With a timely payment of \$10.00 on April 30, 2012, Bill overpaid maintenance to Jaci in the amount of \$6.28, using the correct methodology. CP135.

E. Slot Machine Losses Were Greater Than Bill's Winnings For 2010 And 2011.

Frequent players of slot machine at casinos use casino issued player cards to keep track of their cumulative winnings and losses. CP 133, Fn 1. Going to casinos was a main source of entertainment for both Jaci and Bill when they were married. Id.

1. Bill Had Cumulative Losses In Excess Of Winnings in 2010. In 2010, Bill had cumulative losses of \$59,963.05 at the Tulalip Resort Casino as reflected on his Players Rewards Club account Statement, dated January 16, 2011. CP 192. He is entitled to deduct his losses up to the amount of his winnings and no more. "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions." 26 U.S.C. §165(d). Bill was entitled to and did take the full \$48,322 loss deduction on his 2010 1040 federal income tax

return. CP 147. In other words, Jaci seriously wants the courts to support her position that she should receive half of the funds reported on W-2G's as winnings without considering that he lost at least as much as he won as reported on his federal income tax returns. Her interpretation cannot be a reasonable interpretation of what is included in "earned income". It is an absurd result.

2. Bill Had Cumulative Losses in Excess Of Winnings in 2011. Similarly, in 2011, Bill reported W-2G winnings of \$31,806, which Jaci is claiming she entitled to count as earned income. But in 2011, according to his Players Club Account with the Tulalip Resort Casino, his cumulative slot machine losses in 2011 were \$40,320.05. CP 193. Again he was able to and did deduct up to the amount of his winnings or \$31,806. CP 150.

3. Slot Machine Jackpots Are Reported To The IRS As Winnings Not Income. It is a small point, but it should be noted that the on the face of the W-2G form, it states that it is reporting "Certain Gambling Winnings" and does not mention the word "income". See Appendix B. <http://www.irs.gov/pub/irs-prior/fw2g--2010.pdf>. Throughout her materials, Jaci characterized these winnings as income without consideration of the word "earned". The IRS uses the term

“winnings” not “income”, and the W-2G winnings should not be considered income, much less earned income herein.

4. The Separation Contract, Article VII Only Mentions W-2's, 1099's, Not W-2G's.

a. It Does Not Follow That The Failure To Exclude Slot Machine Winnings In The Separation Contract Means That They Are Included In Earned Income. One of the contract interpretations that Jaci has maintained throughout is that if the income source is not excluded, then it must be included in “earned income”. Under her theory, if Bill won the lottery, she would be entitled to half because it would be reported on a W-2G. If Bill had a debt in excess of \$600 cancelled, he would receive a 1099 C (Cancellation of Debt).

<http://www.irs.gov/uac/Form-1099-C,-Cancellation-of-Debt>, and since it was not expressly excluded in paragraph 2, Article VII, then it is included as “earned income”. Based on this strict interpretation that everything not enumerated is included, then it could be just as reasonably argued that since W-2G's, 1099 INT's, 1099 DIV's and 1099 C's are not expressly enumerated in paragraph 2, of Article VII, and therefore these sources of income were not meant to be included as “earned income”.

W-2's report to the IRS wages and salaries, <http://www.irs.gov/uac/Form-W-2,-Wage-and-Tax-Statement>, and 1099's report independent contractor work. <http://www.irs.gov/Businesses/Small-Businesses-%26-Self-Employed/Forms-and-Associated-Taxes-for-Independent-Contractors>. Actual work is reported on regular W-2's and 1099's, which is another argument why slot machine winnings are not included within the scope of the meaning earned income.

b. The Phrase “all W-2 forms, 1099s” Means Amounts Reported From Earned Income Only And Does Not Mean Forms Reporting Other Sources Of Income That Are Not Earned Income. Another position argued by Jaci is that the phrase “all W-2 forms, 1099s” from the paragraph 2, Article VII basically modifies the term “earned” income in such a way that “earn” has no meaning. Her view is that the phrase means “all forms” includes every source of income reported in specialized W-2's and 1099's. In other words if Bill has received W-2G, 1099 INT, 1099 DIV, 1099 C forms and so on regardless of the source of specialized income represented by the form abbreviations, Jaci argues that they all would be included in the term “all forms” from paragraph 2, Article VII. Jaci would add up all the income represented on these specialized forms for purposes of maintenance calculation. This

interpretation makes the word “earned” superfluous. An interpretation of a contract “which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.” *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980).

Jaci’s interpretation further ignores the objective circumstances and context of the parties at the time the parties entered into the Separation Contract on March 24, 2010. CP 29. Bill was officially terminated from his job with Alaska Distributors on April 10, 2009. CP 136. He was on unemployment through the final decree of dissolution and remained on unemployment until he was hired by the State Liquor Board in May of 2010. CP 136. While on unemployment, Bill was forced to take temporary repair and maintenance jobs. CP 92. Any W-2’s or 1099’s received during this time of unemployment would be for part time work. It was even contemplated that he might become a registered contractor, which term is referred to in paragraph 1 of Article VII. CP 26.

Since Bill only had part time jobs at the time the Separation Contract was negotiated and signed, the phrase “all W-2 forms and 1099’s” more objectively referred to all his W-2’s and 1099’s from earned income from “all” his part time work. The determination of intent of the parties in viewing the Separation Contract takes in to account the

“circumstances surrounding the making of the contract” and “the reasonableness of respective interpretations advocated by the parties”. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990), citing *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973). Bill’s interpretation that “all W-2’s” and 1099’s related only to those forms received from his earned income from work or running a business would seem more reasonable than Jaci’s interpretation that earned income is defined by all forms regardless of the source of income. Jaci’s interpretation is overly strained and simply not reasonable or rational.

F. Bill Substantially Complied With Discovery Requests Despite Jaci’s Two Year Delay In Making Her Requests.

Petitioner waited two years to bring to her Motions for more records and alleging maintenance owed. First as to specific items requested in Commissioner Jeske's Order on Family Law Motion: Re Enforcement and Clarification of Decree, Bill complied. He provided a declaration from the trustee of his parents' trust that the \$11,000 payment in 2009 was a loan from his parent's trust in response to Commissioner Jeske’s inquiry; he paid \$1,500 attorney's fees awarded to Jaci by Commissioner Jeske for his failure to provide his 2010 tax return in timely fashion; he was ready and able to complete any life insurance application presented to him. CP 183.

However, two years later some of the records she requested were no longer available or certainly more difficult to obtain.

G. Determination Of Maintenance Owed Became Greatly Simplified After Bill Obtained Full Employment In May of 2010.

From March of 2009 when Jaci filed her Petition for Dissolution through May of 2010, Bill's life was exceedingly stressful. He was going through a very litigious pretrial proceedings with Jaci. He was the primary care taker for his mother, who was dying of cancer and did die on May 1, 2010. CP 92. He was looking for a job. He had to find a place to live. In May of 2010, Bill was hired as the Director of Distribution for the State Liquor Board. CP 132; CP 136. Since May of 2010, Bill's only job was with the state liquor board. (Bill recently took a full time job with King County.) He had a new family with two adopted young children. CP 137.

After May of 2010 he no longer needed side jobs and could depend on full time work with the state, which meant he could use his W-2 and earning statement to calculate maintenance simply as he did in 2011. In other words, other than the slot machine winnings, all the questions and suspicions raised by Jaci in her requests for discovery below and on appeal is old history and relate to events prior to May of 2010. CP 92. In spite of the simplification of Bill's work life, Commissioner Garratt recognized that Jaci still had suspicions and gave her future subpoena power to check on Bill at her costs. Hearing Transcript January 25, 2013, p. 15. This was a practical

resolution to allow Jaci additional discovery at her own costs so that future enforcement motions would be minimized or eliminated. Bill accepted the Commissioner's decision by his failure to appeal.

H. The Delay Caused By Motions To Remove The Year 2009 Caused Delay In Discovery.

Bill found it necessary to challenge Commissioner Jeske's ruling that allowed Jaci to back to 2009 to calculate maintenance, the year preceding the decree of dissolution. Jaci had previously brought multiple pre-trial motions during 2009 and issued multiple subpoenas duces tecum for Bill's cell phone records, checking accounts, credit card accounts and to anyone who offered Bill part time work. She repeated some of these same requests for 2009 in these current post-dissolution proceedings. CP 67-68; CP 138-139. Bill's motion for reconsideration was not successful with regard to excluding 2009 as determined by Commissioner Jeske's memorandum order signed May 25, 2012. CP 41-46. Bill successfully sought revision which was heard before Judge Middaugh on August 2, 2012. CP 48-49. Approximately four and half months went by before there was a final determination that Bill was not accountable for 2009 maintenance. As a result, the scope of discovery was up in the air until 2009 was taken out of the equation. In spite of Judge Middaugh's ruling, Jaci has pursued her requests for 2009 discovery in the second hearing before Commissioner Garratt. In questioning Jaci's counsel about her continued requests for discovery from 2009, Commissioner Garratt

stated it “doesn’t make sense” and “what’s the point?” Transcript of Second Hearing - Commissioner Garratt, dated January 25, 2013, at 12. Bill was not found in contempt and further discovery by him was not ordered. To the extent that Jaci is maintaining her appeal for information going back to 2009 (in essence re-litigating pre-trial issues) is further demonstration of the lack of merit of this appeal.

I. Discovery Limited to January, February and Part of March 2010.

“Article VI states that Husband shall pay maintenance to the Wife commencing April 1, 2010, as follows:” CP 26. After Judge Middaugh ruled that 2009 was no longer to be considered, then the only relevant discovery were for the months in 2010 preceding the decree of dissolution, or January, February, and March through March 26, 2010. Jaci received the Bank of America, Wells Fargo, and Visa statements for those months by May 6, 2012. CP 64. Her intransigence claims are mostly based on the fact that she did not receive April (post-decree) statements, which included about 7 or 8 pre-decree days in March. CP 70-71. CP 89. In other words, the few days between March 18 or 19, the last day on Bill’s March 2010 statements through the date of the decree or March 26, 2010, which days would be shown on April statements. Bill was forced to re-open his Wells Fargo account to be able to access his old account records to avoid excess

fees. CP 79. Because of the delay in the request, Verizon no longer had records available to its customers for early 2010. CP 68; CP 139.

J. Jaci Made Unreasonable And Outrageous Discovery Requests.

A review of Jaci's discovery requests demonstrate conduct that can be charitably described as overbroad, permissibly invasive, and indiscriminating. For example, she asked for an "undisclosed Lease (and Rental) Agreement for Plaza 44 Apartments, 4509 194th St. SW, Apt. 2, Lynnwood, WA 98036," but Whitepages.com showed that a "William D. Berne" (not Berni) lives at 4509 194th St. SW, Apt 210, Lynnwood, Washington. CP 139. These questions were number 17 and 18 in Jaci's specific discovery requests. CP 205. She also asked for all loan documents for Bill's present home even though the house was not on the market and certainly not purchased until after the Decree. CP 139-140. Probably the most objectionable request was at number 23 where she asked for all agreements regarding character and ownership of assets, "all Community Property Agreement, Separate Property Agreement, Marital Property Agreement and Pre-nuptial Agreement. Documents such as these are available through his attorney, Doug Dunham." CP 206. These document requests had nothing to do with any calculation of maintenance, were outside the scope of discovery, and had everything to do with

harassment and a post dissolution invasion of privacy. Bill answered Petitioner's Specific Request on May 8, 2012 while Bill's Motion for Reconsideration was still pending. CP 140; CP 203-210.

K. Neither Court Commissioner Abused Their Discretion By Not Finding Bill In Contempt.

Although technically when “an appeal is taken from an order denying revision of a court commissioner's decision,” the appellate courts review is of the superior court not the court commissioner, *In re Marriage of Williams*, 156 Wn. App. 22, 27, 232 P.3d 573 (2010), but where the revision is denied, the superior court is not required to enter findings and the oral findings of the court commissioner are adopted by the revision court. *Id* at 27-28. Although this appeal is from Judge Spector’s denial of revision (and reconsideration/clarification) and the oral findings of Judge Garratt, the first hearing before Commissioner Jeske on March 30, 2012 is relevant because all the proceedings were a continuation of that hearing. Commissioner Jeske stated that she was going to “deny the request for contempt”, that “there is not a preponderance of the evidence”, and “I just simply cannot reach that conclusion based on the cumulative record.” CP 167. At the second hearing on January 25, 2013, Commissioner Garratt stated that “I certainly am not holding Mr. Berni in contempt based on the

Court's reviewing the information at hand." Hearing Transcript - Garratt, dated January 25, 2013 at 14.

On revision, Judge Spector correctly stated that the "sole issue" on review was whether gambling income should be considered earned income and noted that Commissioner Garratt found that it was not. Judge Spector asked "why is that error?" Transcript of Hearing – Spector at 6. Judge Spector characterized Commissioner Garratt's analysis as "a very, you know, reasoned analysis". Id at 7. Judge Spector denied Jaci's Motion For Revision without any additional findings by order dated March 13, 2013. CP 324-325. Jaci brought a motion for clarification and/or reconsideration, which was denied by order signed on April 26, 2013. CP 322. Four judicial officers below waded through the voluminous record of banks statements, W-2, tax returns, and declarations and none found Bill in contempt. A determination of contempt is "within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *In re Marriage of Mathews*, 70 Wn. App. 116, 126, 853 P.2d 462 (1993). On appellate review, there must be a clear showing of abuse of discretion in other words the exercise of discretion must have been "manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482

P.2d 775 (1971); *In re Marriage of Williams*, supra at 27. The failure to find Bill in contempt certain was not a manifest abuse or decided on untenable grounds of for untenable reasons, but Bill would urge that the finding would have been the correct decision on a review de novo.

V. BILL SHOULD BE AWARDED ATTORNEY'S FOR HAVING TO DEFEND A FRIVOLOUS APPEAL PURSUANT TO RAP 18.1(b) And RAP 18.9(a)

For an award of attorney's fees to be made on appeal the party requesting has to have authority and appropriate grounds. *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). RAP 18.1(b). An appellate court may award attorney's fees for the filing of a frivolous appeal. RAP 18.9(a). Jaci brought her initial motion to hold Bill in contempt for failure to pay maintenance before it was timely (Motion filed on March 9, 2012 before 2011 federal tax return was due on April 16, 2012 or final payment was due by May 1, 2012 per Separation Contract). Commissioner Jeske found certain employee benefits such as employee reimbursed expenses and vacation pay not to be considered to be earned income, which Jaci did not appeal even though it controverted her two arguments: (1) if income is not expressly excluded, it is included, and (2) monies reported by "all forms" are included regardless of source or appropriate deduction. During the colloquy regarding Jaci's request for

the W-2G forms, it was apparent that Commissioner Jeske would have ruled right then and there that W-2G winnings would not be considered earned income, yet 8 months later Jaci filed a new motion for contempt for failure to pay maintenance asserting that W-2G winnings should be included. Commissioner Garratt held that slot machine winnings were not considered earned income and Judge Spector, by denying Jaci's Motion for Revision and later Consideration and Clarification, agreed with Commissioner Garratt. "An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). Bill believes that "reasonable minds" would find that there is "no possibility of reversal" on this appeal on the issue of whether W-2G winnings should be included in earned income.

Jaci's Motion for Revision of Commissioner Garratt's findings that gambling winnings were not earned income, that Bill was not in contempt based on the cumulative record, and that attorney's fees were not awarded were reviewed by Judge Spector de novo. "On revision, the superior court reviews both the commissioner's findings of fact and

conclusions of law de novo based upon the evidence and issues presented to the commissioner.” *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). As Commissioner Garratt pointed out, Jaci’s attempts to seek further discovery for the year 2009 made no sense and she could not see the point. Certainly it is not enough to find some issues to be frivolous. All issues must be found to be frivolous. *In re Marriage of Lee*, 176 Wn. App. 678, 693, 310 P.3d 845 (2013). But two court commissioners below and two superior court judges on revision failed to find Bill in contempt. It is hard to see how reasonable minds could find that there is a possibility of reversal for manifest abuse regarding the lower court’s refusal to hold Bill in contempt. Bill’s position is that the appeal as a whole is frivolous and fees should be awarded to him.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the courts’ decisions below and award Bill reasonable attorneys’ fees and costs.

Respectfully submitted this 23rd day of December, 2013.

CRANE DUNHAM, PLLC

By 

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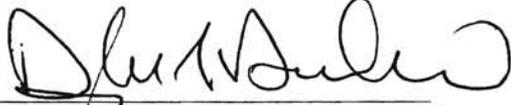
Attorneys for Respondent William Berni

CERTIFICATE OF SERVICE

I certify that on December 23, 2013 the foregoing BRIEF OF RESPONDENT WILLIAM BERNI was filed in the Court of Appeals, Division I and e-mailed to counsel below as well as a copy was given to ABC Messenger for delivery to:

Laura Christensen Colberg
Michael W. Bugni & Associates
11300 Roosevelt Way NE, Suite 300
Seattle, WA 98125-6228

DATED this 23rd day of December, 2013

By: 
Douglas S. Dunham, WSBA No. 2676

Appendix A

VII. MAINTENANCE

The Husband shall pay maintenance to the Wife commencing April 1, 2010, as follows:

1. The Husband shall pay the sum of \$750.00 per month on the first day of each month, commencing April 1, 2010, and continuing through and including December 1, 2010, so long as the Husband is still eligible for Unemployment benefits, regularly employed, or a licensed contractor.

2. In any calendar year through December 31, 2016, in which the Husband has earned income in excess of \$75,000.00, as reported on all W-2 forms, 1099s, and Husband's federal income tax return, he shall pay to the Wife as maintenance an amount equal to fifty percent (50%) of his earned income in excess of \$75,000.00 (e.g., in a year in which the Husband has earned income in the amount of \$125,000, he shall pay maintenance to the Wife in the amount of \$25,000). The maintenance obligation as determined under the terms of this subparagraph shall be paid to Wife by the end of February following the calendar year in question. The Husband shall provide the Wife with full and complete copies of all W-2 forms, 1099 forms by the end of February and his federal income tax return on or before April 16 of each year, through April 16, 2017, and in the event the documents reveal that the Husband did not pay the full amount of maintenance for the prior year in February, the remaining balance, if any, shall be paid in full on or before May 1 of each year. For purposes of determining the maintenance obligation as set forth herein, the Husband's earned income does not include any amount the Husband may withdraw from a 401(K) Plan or retirement plan, and further does not include any income earned by an individual with whom the Husband may file a joint federal income tax return.

3. Maintenance shall be deductible by the Husband and taxable income to the Wife for purposes of federal income tax.

4. Maintenance shall not be subject to modification for any reason whatsoever, either as to amount or duration.

5. The term of the maintenance obligation ends on December 31, 2016, provided, however, that the maintenance payable with respect to calendar year 2016, if any, and delivery of documents pertaining to income earned in 2016, shall occur in 2017 on the dates hereinabove specified.

6. Maintenance terminates on the death of the Recipient, but maintenance shall not terminate on remarriage of either party.

Appendix B

CORRECTED (if checked)

OMB No. 1545-0238

2010
Form W-2G
Certain
Gambling
Winnings

This information is being furnished to the Internal Revenue Service.

Copy B

Report this income on your federal tax return. If this form shows federal income tax withheld in box 2, attach this copy to your return.

PAYER'S name, address, ZIP code, federal identification number, and telephone number	1 Gross winnings	2 Federal income tax withheld
	3 Type of wager	4 Date won
	5 Transaction	6 Race
	7 Winnings from identical wagers	8 Cashier
WINNER'S name, address (including apt. no.), and ZIP code	9 Winner's taxpayer identification no.	10 Window
	11 First I.D.	12 Second I.D.
	13 State/Payer's state identification no.	14 State income tax withheld
Under penalties of perjury, I declare that, to the best of my knowledge and belief, the name, address, and taxpayer identification number that I have furnished correctly identify me as the recipient of this payment and any payments from identical wagers, and that no other person is entitled to any part of these payments.		
Signature ►		Date ►

Form **W-2G**

Department of the Treasury - Internal Revenue Service