

No. 71119-9-I

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

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VICTOR SCHUBERT,

Appellant,

vs.

AMBER SCHUBERT,

Respondent.

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BRIEF OF APPELLANT

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## **I. Assignments of Error**

1. The trial court erred in concluding that the Husband, with an income of \$544 per week, had the ability to pay maintenance in a minimum amount of \$5,500 per month for four years.

2. After finding that the Husband was actively and earnestly seeking employment, the trial court erred in also finding, “Upon finalization of this matter, Respondent’s income will allow him [to] support himself similar to that enjoyed during the marriage [...]” (CP 568)

3. The trial court erred in failing to suspend maintenance during periods of time when the Husband was unable to pay due to unemployment.

4. The trial court erred in setting a formulaic escalation clause that did not relate to the need of the Wife.

5. The trial court erred in imputing income to the father for purposes of child support, where it found that he was actively and earnestly seeking employment.

6. The trial court erred in deviating upwards in its award of child support.

7. The trial court erred in not granting the Motion for Reconsideration regarding maintenance, child support, interest on lien, deduction of costs of sale and attorney fees award.

8. The trial court erred in failing to deduct the costs of sale from the parties' Newcastle, Washington home.

9. The trial court erred in failing to award interest on the Husband's lien against the Costa Mesa Home

10. The trial court erred in awarding attorney fees in the absence of an adequate record upon which to make such an award.

## **II. ISSUES**

1. Is it speculation to award maintenance based upon a party's potential employability, rather than the actual income of that party?

2. Does an award of maintenance based upon the "employability" of a party render the award impermissibly non-modifiable?

3. There no substantial evidence to support the trial court's contradictory finding that "Upon finalization of this matter," the Husband would have income to support himself in a manner similar to that enjoyed during the marriage.

4. Is an order of maintenance that orders a percentage of the Husband's future income unrelated to the need of the Wife?

5. Does the Wife have need for four years of maintenance where she is capable of employment, but no longer desires to work in the area of her training?

6. Where the trial court entered no findings of fact, is its upward deviation from the child support schedule unsupported?

7. Where the sale of the parties' Newcastle home was imminent, was it error to fail to deduct costs of sale when valuing the asset?

8. Where statutory interest is 12%, was it error to fail to award interest on the Husband's lien against the Costa Mesa home?

9. There no substantial evidence to support the trial court's determination of reasonableness of the Wife's attorney fees.

10. Where the Wife was awarded the majority of the assets and the Husband's income is not greater than the Wife's income, was it error to award \$50,000 of attorney fees to the Wife?

### **III. Statement of Facts.**

Victor Schubert and Ms. Schubert were married on April 1, 2000, and separated eleven and one-half years later, in December 2011. (CP 552 and 550) Two children were born issue of the marriage, Victor IV, age 5, and Madison, age 9. The parties agreed to a Final Parenting Plan (CP 552) after completion of a parenting evaluation. The children reside in a shared parenting residential schedule in which the children

reside with the father approximately 40% of the time (50% on school breaks and holidays and 35% during the school year and summer).

The parties met when Mr. Schubert was 36 years old and Ms. Schubert was 26 years old. Ms. Schubert had been a certified dental assistant for seven years. She also had an RDA certificate, an X-Ray certificate, and a coronal polishing certificate (RP Vol. 1, pg. 53, line 23). Mr. Schubert worked as a patent lawyer for DiscoVision/Pioneer in Costa Mesa, CA, where he had worked since 1992. The parties married in 2000.

After the children were born, Ms. Schubert ceased her employment. (CP 553) She was the primary parent of the children while Mr. Schubert continued to work and support the family.

In 2009, Mr. Schubert was hired by Intellectual Ventures in Seattle, Washington at a substantially increased income. (CP 555) The family relocated to Washington.

During the marriage, Ms. Schubert took classes towards her goal of becoming a registered nurse. (CP 554) But her enrollment in school was sporadic over eight years and she did not achieve the grades necessary for admission into a nursing program. (CP 554) She did not make an earnest academic effort. (CP 554) Instead, she incurred shockingly high bar tabs, ranging from a low of \$503 in one month to a high of \$2,290 in another month. (CP 554) That level of partying just

wasn't conducive to pursuing a college degree or succeeding in a nursing program. (CP 554)

Mr. Schubert continued to be steadily employed during the marriage, despite his own struggles with alcohol. CP 554 He completed an in-patient treatment program in 2011 and thereafter maintained his continuous employment. CP 554-555. For the last five years of marriage at Intellectual Ventures, he earned income of nearly \$500,000 per year. CP 555

The parties separated in 2011: 11 ½ years after they married. (CP 550 & 553) After a complete parenting plan evaluation, they agreed to a shared parenting schedule where the children reside with Mr. Schubert approximately 40% of the time (50% on school breaks and holidays and 35% during the school year and summer).

During separation, Mr. Schubert continued to work and support the family. Ms. Schubert completed her prerequisite classes in February 2012 and a required six month internship as a Certified Nurses Assistant (CNA). (RP Vol. 1, pg. 57, line 13-17) She worked for short stints as a nursing assistant at \$10 per hour. (RP Vol. 1, pg. 59, line 20). Ms. Schubert did not apply to nursing school in 2013 because her grades were too low. (RP Vol. 1, pg. 42, line 16 to pg. 43, line 11). At the time of trial, she was not working.

In April 2013, Mr. Schubert's position at Intellectual Ventures was eliminated. CP 555 He was not suited for the newly created position. (CP 570) He was able to negotiate a severance pay of 16 weeks, ending in August 2013. (CP 555) Mr. Schubert immediately set about seeking new employment. He retained four head hunters and used industry contacts and an employment coach. (CP 570) In all respects he was actively and earnestly seeking employment. (CP 570) The court found that jobs for Mr. Schubert are not plentiful because his Niche as a patented attorney is very narrow due to changes in the industry. (CP 570) But by the end of trial in June, he had not been successful in finding employment. (CP 570) He had still not found a job by August 1, 2013. (CP 543) His severance was consumed in August 2013 and thereafter, he had only unemployment compensation of \$544/week (CP 543)

At the time of trial, Ms. Schubert, age 39, had still made no effort to become employed. (CP 553) She was healthy and able to work. After moving to Washington State, she made no effort to register in Washington State as a dental hygienist, (RP 54: 4-8) which would require only the completion of several forms and completion of a HIV and AIDS class. (RP 54:9 to 55: 6). She did not submit applications for a dental assistant job just to see if she might receive a job offer. (RP 67, line 16-25) Instead, she applied for a job as a nursing assistant at

\$10 per hour rate. (RP 53, line 16-18) She worked intermittently; only two weeks in 2013 prior to trial. (RP 69, line 10-21, 72, line 9-10) The court found that Ms. Schubert was voluntarily underemployed. (CP 569)

It would take 2 years or less for Ms. Schubert to update her skills for employment as a dental hygienist. (RP 11, line 19-25) A dental assistant needs a high school diploma or a GED and a formal training program. (RP 83, line 18-25) But Ms. Schubert didn't want to be a dental assistant. (CP 554) At the same time, serious questions remained about whether she was making a serious effort to earn a nursing degree and prepare to support herself and the children. (CP 556)

Trial occurred from June 2, 2013, to June 9, 2013 (CP 495). The court entered Findings of Fact and Conclusions of Law on July 19, 2013. (CP 495)

Mr. Schubert filed a Motion for Reconsideration on August 1, 2013 (CP 525), supported by Mr. Schubert's Declaration (CP 541).

The court did not enter an order granting or denying Mr. Schubert's Motion for Reconsideration. Instead, the court entered Amended Findings of Fact and Conclusions of Law on August 22, 2013 (CP 549). The Decree of Dissolution was entered October 9, 2013 (CP

596), and was later amended on November 28, 2013 (CP 640). The Order of Child Support was entered on October 15, 2013 (CP 612).

The court ordered Mr. Schubert to begin paying maintenance of \$5,500 per month effective September 1, 2013, for a period of four years, plus an additional 25% of any annual income of any nature<sup>1</sup> in excess of \$225,000 for a period of eight years, and to pay Ms. Schubert's tuition and educational expenses for a period of four years. (CP 642) The trial court found that Mr. Schubert is "employable at a minimum level of \$225,000 per year." (CP 555) The court found Mr. Schubert to have "an earning ability of \$225,000 per year." (CP 570) Despite the fact that he was involuntarily unemployed, the court imputed income to Mr. Schubert of \$225,000 per year based upon an historical level of income pursuant to RCW 26.19.071(6)(b) (CP 569). The court imputed income to Ms. Schubert at the median level based upon census data due to a lack of sufficient work history or information under RCW 26.19.071, finding that Ms. Schubert is "presently underemployed in health care position, which will hopefully increase her opportunities to enter a nursing or technical health program." (CP 569)

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<sup>1</sup> Income to which the 25% formula includes, but is not limited to: "salary, bonuses, commissions, stock, stock options, stock warrants, stock awards, profit sharing, deferred compensation, 401(k) contributions or any matching contribution received from his employer for a period of eight years." (CP 642, Decree)

The trial court retained jurisdiction “over all disputes related to [25%] payment” (CP 643) and “other issues of when earnings are calculated, appropriate documentation, appropriate deductions from earnings, and other related issues” for application of the 25% escalation formula. (CP 581)

Finally, the court awarded attorney’s fees to Ms. Schubert of \$50,000 (CP 543), finding that Ms. Schubert had incurred attorney’s fees of \$93,213 as of May 24, 2013, prior to commencement of trial, and that she had paid \$21,073 (CP 571). The court found that Mr. Schubert had paid his attorney’s fees, totaling \$48,000 (CP 571).

The court divided the community property 54%-46% in favor of Ms. Schubert. Ms. Schubert received \$648,936 in total community property. Mr. Schubert received \$547,413 in community property; \$101,000 less that Ms. Schubert. (CP 653-654). See Appendix A, attached hereto. Ms. Schubert was awarded \$26,644 in separate property, and Mr. Schubert was awarded \$434,724 in separate property (CP 653-654).

In making its award of property, the court concluded:

[...] the Respondent has historically had very significant income, and there is no reason to expect that he will not continue to earn at a significant level. Upon finalization of this matter, Respondent’s income will allow him (*sic*) support himself in a manner similar to

that enjoyed during the marriage, while continuing to maximize his retirement accounts and increase his assets.” (CP 568)

In order to pay his own living expenses, maintenance, child support, and the mortgage on the Newcastle residence, Ms. Schubert had to consume all of his cash assets (CP 546). Based upon the court’s award of support, his lack of employment, and dwindling resources, Mr. Schubert had no choice but to list and sell the Newcastle residence. (CP 546) In awarding the Newcastle residence to Mr. Schubert, the court did not deduct the selling costs despite his request in his Motion for Reconsideration for deduction of costs of sale. (CP 526)

#### IV. ARGUMENT

a) **Trial Court Misapplied the Law in Award of Maintenance.** A trial court’s award of maintenance is reviewed for abuse of discretion. *In re Marriage of Mathews*, 70 Wash.App. 116, 853 P.2d 462 (1993). A court abuses its discretion if its decision is outside the range of acceptable choices based upon the facts and applicable legal standard. *Valente*, 320 P.3d at 117. It also abuses its discretion if the facts do not meet the correct standard. *Valente*, 320 P.3d at 117. A court necessarily abuses its discretion if its decision is based on an erroneous view of the law. *Scanlon v. Witrak*, 110 Wn.App. 682, 689, 42 P.3d 447 (2002). A trial court’s conclusions of law are reviewed *de novo*. *In re Marriage of Zier*, 136 Wn.App 40, 45, 147 P.3d 624 (2006).

a) Conjecture Does Not Support Conclusion that Husband has Ability to Pay Maintenance. An award of maintenance is based upon a trial court's consideration of statutory factors that include:

- 1) financial resources of the receiving spouse;
- 2) receiving spouse's age, health, and financial obligations;
- 3) time for the receiving spouse to acquire necessary education to obtain employment;
- 4) duration of the marriage;
- 5) standard of living during the marriage; and
- 6) ability of the payor spouse to meet his/her own financial needs and obligations while paying support.

RCW 26.09.090. In appropriate circumstances, the criterion listed in an applicable statute guides the trial court's discretionary act. *In re Parentage of Jannot*, 110 Wash.App. 16, 22, 37 P.3d 1265 (2002), *aff'd*, 149 Wash.2d 123, 65 P.3d 664 (2003).

When making an award, a trial court must take care that its support provisions are not based upon based upon conjecture or speculation about what might happen in the future. *In re Rouleau*, 36 Wn. App. 129, 131, 672 P.2d 756 (1983). That is, it may not engage in "economic forecasting, which is, at best, an inexact science." *In re Marriage of Peters*, 33 Wash.App. 48, 52, 651 P.2d. 262. It may also not make a nominal award solely to retain jurisdiction for future

modifications based upon a speculative potential change of circumstances. *Valente*, 320 P.2d at 117.

In *Rouleau*, the trial court awarded maintenance to a disabled spouse, speculating that the spouse might have greater financial need in the future as his health deteriorated. *Rouleau*, 36 Wn. App. at 132. The award of support was reversed because the record did not contain evidence to support the trial court's award. *Rouleau*, 36 Wn. App. at 132. Conjecture was not sufficient. *Rouleau*, 36 Wn. App. at 132.

In *Valente*, the trial court awarded nominal maintenance as a placeholder to preserve jurisdiction in case the payee spouse's health deteriorated and she needed to modify maintenance. This Court held that the trial court's finding that her health condition "may" worsen, was too speculative upon which to base an award of maintenance. *Valente*, 320 P.3d at 119. The award of maintenance was reversed.

In this case, the trial court found that Mr. Schubert was laid off in April 2013 and that he had 16 weeks of severance pay through August 2013. CP 555. It also found that Mr. Schubert was actively and earnestly seeking employment. CP 555 Until then, Mr. Schubert's only source of income until he became re-employed, was unemployment compensation benefits in the sum of \$544 per week. CP 543 Thus, Mr. Schubert's income for purposes of awarding maintenance was his

severance pay through August 2014 and thereafter his unemployment income of \$544 per week.

Nevertheless, the trial court concluded that Mr. Schubert had the ability to pay \$5,500 per month in maintenance for four years. It based its conclusion upon its finding that Mr. Schubert was employable at a minimum income of \$225,000 per year. The trial court misapplied the law when it ordered maintenance based upon Mr. Schubert's employability, rather than his actual income.

Mr. Schubert had the ability to pay the ordered amount of maintenance through August 2014. An award of maintenance through that period was appropriate. Thereafter, under RCW 26.09.170, a trial court has authority to suspend a maintenance obligation in the event that an obligor spouse becomes unable to pay. *In re Marriage of Drlik*, 121 Wash.App. 269, 87 P.3d 1192, Wash.App. Div. 3, 2004. In *Drlik*, the husband was stricken with brain cancer and he moved to modify the Decree. The trial court granted the motion to modify in part by suspending payment of spousal maintenance pending the Dr. Drlik's future medical and employment status. The Court of Appeals affirmed the statutory basis upon which the trial court suspended maintenance and held only that the trial court could not suspend maintenance indefinitely.

In this case, Mr. Schubert testified that it generally took approximately nine months to negotiate a position, once he had received an offer. (CP 544) The trial court should have suspended the maintenance obligation pending review/modification upon the earlier of his employment or nine months, whichever was sooner. In that way, the maintenance issue could be appropriately addressed based upon the actual ability to pay of the Husband.

*b. Award Founded Upon "Employability" Effectively Renders Maintenance Non-Modifiable.* RCW 26.09.170 (1) provides that the provisions of any decree respecting maintenance or support may be modified. In order to modify an award of maintenance, the petitioning party must show a substantial change of circumstances that was not contemplated at the time the decree was entered. RCW 26.09.170; *In re Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (1987) (Husband's declining income was substantial change in circumstances warranting modification of maintenance). Although parties may separately agree to make a maintenance award nonmodifiable, a trial court may not write a non-modifiable maintenance provision into a decree of dissolution. RCW 26.09.070(7); *In re Marriage of Short*, 125 Wn.2d 865, 876, 890 P.2d 12 (1995).

The trial court's order in this case effectively makes the payment of maintenance nonmodifiable as it relates to Mr. Schubert's financial ability to pay. No matter how much Mr. Schubert may be unable to actually find employment, he will remain "employable" at a minimum of \$225,000 per year. Definition of "employable" is "able qualified to work and available for hire." Being "employable" requires an employer to generate income. Mr. Schubert has never been self employed or in private practice. He is dependent upon an employer.

If Mr. Schubert accepts a full-time position of employment at less than \$225,000 per year, it could be argued that he is still employable at the minimum level of \$225,000 per year. If no employer offers him a position at all, there is no change in circumstances, because while he remains unemployed, he is still employable at the assumed level set by the court.

Under the non-modifiable maintenance and support order in this case, there is no way for a future reviewing court to ever properly consider the nature of Mr. Schubert's resources when evaluating his ability to pay support. The reason is that the trial court did not consider what would happen if Mr. Schubert did not become re-employed, nor did it consider what would happen as Mr. Schubert's resources were depleted by the payment for his own financial needs and the payment of Ms. Schubert's maintenance and child support. The court made no

findings or conclusions about this. The court made no findings or conclusions about whether the court actually intended the maintenance obligation to be in effect a property award in lieu of maintenance.

Did the court intend to Mr. Schubert to pay support from property and not from income, which would in effect be a property award in lieu of maintenance?

c) *Contradictory Finding is Unsupported by Substantial Evidence.* An appellate court reviews a finding of fact for substantial evidence. *In re Custody of A.F.J.*, 179 Wn.2d 179, 184, 314 P.3d 373 (2013). Substantial evidence is sufficient if it persuades a fair-minded person of the truth of the declared premise. *Custody of A.F.J.*, 179 Wn.2d at 184. In this case, the trial court first acknowledged that Mr. Schubert had been laid off, receiving 16 weeks of severance. CP 555. It also found upon conclusion of the testimony, that Mr. Schubert was actively and earnestly seeking employment. CP 555. In neither the motion for reconsideration or trial, did anyone contest that Mr. Schubert was not employed and had no income from employment. To the contrary, the evidence was undisputed that after the severance funds were consumed, Mr. Schubert had only his unemployment compensation for income and that he was being forced to sell his home in order to meet his maintenance obligation.

Despite this evidence, the trial court found, “The Respondent has historically had very significant income, and there is no reason to expect that he will not continue to earn at a significant level. *Upon finalization of this matter*, Respondent’s income will allow him [to] support himself similar to that enjoyed during the marriage [...]” (CP 568) [emphasis added]. No substantial evidence supports the Court’s findings. Indeed, these findings are contradicted by the Court’s earlier findings that Mr. Schubert had been laid off and had not yet found employment despite his diligent efforts. (CP 555)

The spouse from whom maintenance is sought must have “[t]he ability ... to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.” RCW 26.09.090(f). That being so, and since, in order to continue to earn his salary, appellant himself must be fed, clothed, and lodged, at least sufficiently so that his efficiency will not be impaired, his necessities must be considered as well as the necessities of respondent and the children. *Bungay v. Bungay*, 179 Wash. 219, 222-224, 36 P.2d 1058, 1060 (Wash.1934).

It is difficult for this Court to determine what factors the trial court considered in evaluating Mr. Schubert’s ability to pay. The trial court appears to have speculated that Mr. Schubert would be employed in a short period of time, if not by the “finalization of this matter.”

A court considering a future modification petition by Mr. Schubert will not be able to determine whether there has been a substantial change of circumstances unanticipated by the trial court if Mr. Schubert continues to be involuntarily unemployed after a significant period of time, during which period Mr. Schubert will have had to consume his liquid assets and then go on to sell investment assets and withdraw funds from retirement accounts thereby incurring significant tax losses as a result. Mr. Schubert will have no avenue for redress by modification if the assumptions on which maintenance was based prove to be untrue over time. The trial court's formula would appear to anticipate every future eventuality. The trial court reserved jurisdiction, not to review Mr. Schubert's financial situation, but solely for the purposes of resolving disputes over the automatic application of the 25% escalation clause relating to determination of appropriate documentation and the appropriate deductions from income. (CP 582)

The depletion of savings and investments for the payment of one's own financial needs and for the payment of maintenance and child support is devastating. Once the body begins to consume itself, the decline is rapid.

To the extent that the trial court concluded that Mr. Schubert had the ability to pay maintenance based upon its conjecture that Mr.

Schubert would have at least \$225,000 annual income by finalization of this matter, it was error. The award should be reversed and the issue remanded to the trial court for consideration of Mr. Schubert's actual ability to pay.

*d. Escalation Formula Unrelated to Need is Error.* A court may include an escalation clause in a maintenance order. *In re Marriage of Ochsner*, 47 Wn.App. 520, 526, review denied, 108 Wn.2d 1027 (1987). However, automatic escalation provisions in dissolution decrees are unenforceable unless the provision reflects both the needs of the recipient and a ceiling on the total amount of support. *In re Marriage of Stoltzfus*, 69 Wn.App. 558, 560, 849 P.2d 685 (citing *Edwards*, 99 Wn.2d at 918-19), See *In re Marriage of Coyle*, 61 Wn.App. 653, 659-60, review denied, 117 Wn.2d 1017 (1991); *In re Marriage of Edwards*, 99 Wn.2d 913 (1983). The *Edwards* order by Judge Winsor was:

This appeal arises from the child support and maintenance schedule ordered by Judge Winsor. That order requires that Robert pay \$1,450 per month for the years 1981, 1982 and 1983 in undifferentiated maintenance and support. An additional amount of 20 percent of any bonus Robert receives or 20 percent of any increase in salary must also be paid. Robert's maintenance payments cease at the end of 1983. Commencing in 1984, his payments are 32 percent of his net income. This amount represents support for his

three children. The order reduces Robert is required to pay as each child reaches majority.

*Edwards* held at page 915:

We hold that percentage awards are valid so long as the judge properly considers the statutory criteria. In addition, the trial judge must set a maximum dollar amount, relating to the children's need, above which the support award cannot rise.

And at page 918 – 919:

It is true, however, that an open-ended percentage of income support award may not necessarily relate to the child's support needs. Thus, a limitation on the concept is needed. In fashioning such awards, the trial judge should determine a maximum amount of child support that would be reasonable and needed in the future and set that amount as a ceiling above which the support payments cannot rise. In setting the maximum, the trial judge should consider all the relevant factors suggested in *Childers v. Childers*, 89 Wash.2d 592, 575 P.2d 201 (1978), as well as changes in the custodial parent's ability to pay. We believe this ceiling should be liberally construed so that children of the marriage benefit equally from the prosperity of both parents.

The court ordered Mr. Schubert to pay monthly maintenance to Ms. Schubert of \$5,500 per month for 48 months, commencing September 1, 2013, which amount is based upon Mr. Schubert's "earning ability" of about \$225,000 per year (CP 642, and Decree of Dissolution, 3.7). This applies regardless of how little or how much Mr. Schubert actually earns. Plus, the court ordered that in addition to the monthly maintenance payment, in the event that Mr. Schubert received earnings of any type from employment in excess of \$225,000 per year, then he shall

pay to Ms. Schubert 25% of those gross earnings for a period of eight years. The eight year duration for the 25% was added in the Amended Findings of Fact (CP 570 while the first version of the Findings of Fact didn't reference a time period other than the 4 years awarded for the \$5,500 payment. (CP 517) The court added the 8 year term in the Amended Findings of Fact. (CP 570)

In the Amended Decree, the court retained jurisdiction over any disputes related to this percentage payment (CP 642-643). To clarify, the court provided in its Amended Findings of Fact and Conclusions of Law: "This court will retain jurisdiction of issues of when earnings are calculated, appropriate documentation, appropriate deductions from earnings and other related issues." The Decree provided that Ms. Schubert could seek application of the percentage to Mr. Schubert's "excess" earnings in the event that there are any disputes in application of the formula. (CP 570) The court retained jurisdiction only to resolved factual disputes about Mr. Schubert's future gross income to which the percentage would be applied.

By its terms, the payment of maintenance under the formula provided in the Decree was to apply automatically to Mr. Schubert's income. It appears that the formula applied regardless of whether Mr. Schubert is actually receiving zero income or whether he is receiving income in excess of \$225,000 per year. The court's findings do not

reflect whether the court considered Mr. Schubert's ability to meet his own financial needs, and the findings do not reflect whether the court considered if maintenance might ever exceed Ms. Schubert's financial needs. Mr. Schubert's Motion for Reconsideration objected to the court's use of an escalation clause. The court did not enter an order granting or denying the Motion for Reconsideration other than to enter the Amended Findings of Fact.

e)        The Duration of Maintenance is Excessive. What period of time is *reasonable* for respondent to achieve gainful employment, so that the payment of alimony can be terminated? In making this determination, each case rests upon its particular facts and circumstances. *Roberts v. Roberts*, 51 Wash.2d 499, 319 P.2d 545 (1957), and case cited. Support is appropriate for the period of time required for rehabilitation of the Wife to self support. A statutory factor is the time necessary for the spouse who is seeking maintenance to acquire sufficient education or training to enable that spouse to find employment appropriate to the skill, interests, style of life, and other circumstances of that spouse. 20 WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW, (§ 34.5).

The eight year percentage of income award constitutes a lien on the husband's future earnings for a time period nearly as long as the marriage itself. Mr. Schubert relies on the rule that, when a wife has the ability to earn a living, she is not to be granted a perpetual lien of alimony on her divorced husband's future earnings. *Lockhart v. Lockhart*, 145 Wash. 210, 259 P. 385 (1927). Accord, *Morgan v. Morgan*, 59 Wash.2d 639, 369 P.2d 516 (1962); *Warning v. Warning*, 40 Wash.2d 903, 247 P.2d 249 (1952). When Ms. Schubert has returned to work and is self supporting, the maintenance should stop.

Four years is an excessive period of time when Ms. Schubert can return to work now in as little as two years time. The 25% award of Mr. Schubert's income over \$225,000 for 8 years is excessive in an 11-year marriage.

It has often been said that the purpose of maintenance is to support a spouse until she is able to earn her own living or otherwise becomes self-supporting. 20 WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW, §34.1. *In re Marriage of Irwin*, 64 Wn.App. 38, 55, 822 P.2d 797, 806 (1992).

The purposes for which maintenance is awarded include:

- a) transitional maintenance;

- b) rehabilitative maintenance;
- c) compensatory maintenance; and,
- d) disability maintenance.

The court has held that maintenance is not a matter of right. *In re Marriage of Olsen*, 24 Wash.App. 292, 299, 600 P.2d. 690 (1979). Maintenance is intended to provide support for rehabilitation or transition. Support is not intended to build an estate. The 25% provision awarded by the trial court, in this case without a cap, has the potential of providing a windfall should the Husband actually land a high paying position of employment. The trial court remarked in the findings regarding property division that because of Mr. Schubert's superior earning capacity, Ms. Schubert was awarded \$101,000 more (54% of the total community) than Mr. Schubert. Providing a share of future earnings without a cap could amount to a double award if the court does not impose a cap on the maintenance provision.

Maintenance in this case should involve transitional maintenance because the testimony is undisputed that Ms. Schubert can return to her former career as a dental hygienist either immediately because jobs are available and employers are willing to train on the job or at least within two years of updating skills and retraining to make her a more attractive candidate for employment.

At the time of marriage in 2002, Ms. Schubert had been employed as a dental assistant for about six years before marriage earning \$15 per hours (RP page 53:8-15) which is \$31,200 per year. She had a California dental hygienist certificate, a RDA certificate, an X-ray certificate and a coronal polishing certificate. (RP page 53:20-23) After moving to Washington State, she made no effort to register in Washington state with a dental certification, (RP 54: 4-8) which would require only the completion of several forms and completion of a HIV and AIDS class. (RP 54:9 to 55: 6). She did not submit applications for a dental assistant job just to see if she might receive a job offer. (RP 67, line 16-25) Instead, she applied for a job as a nursing assistant at \$10 per hour rate. ((RP Vol. 1, pg. 59, line 20) She worked intermittently; only two weeks in 2013 prior to trial. (RP 69, line 10-21, 72, line 9-10) The court found that Ms. Schubert was voluntarily underemployed.

Ms. Schubert completed prerequisite courses required for entry into entering nursing school in February 2012 and she completed her required six months of employment in the healthcare setting so that she was eligible to apply for nursing school. (RP 57: 7, 59-21). But Ms. Schubert did not apply to nursing school in 2013 because her grades in

three required courses were too low (RP 60:3 to 61:4), and she would have to retake three classes. (RP 63:9-13).

William Skilling testified that the Petitioner could obtain a dental assistant license in Washington State for a nominal \$40 fee and that jobs were available immediately using the same skills she used for 7 years as a dental assistant in California. (RP 92, line 15 to 93, 1-5) A dental assistant needs only a high school diploma or a GED and a formal training program. (RP 83, line 18-25) He testified that dentists provide on-the-job training in their offices, but in any event, Ms. Schubert needed no additional retraining in order to secure employment immediately. (RP 94 line 22) He testified that 80% of employed dental assistants do not have Associate's Degrees. Mr. Skilling found open positions, and found that the WOIS median salary range for dental assistance was around \$43,000 per year. (RP 98, line 7-8) None of these positions were front office or managerial positions.

In this case, the trial court made no findings about the duration of time it would take for Ms. Schubert to obtain the education necessary to become re-employed. Jan Reha, Ms. Schubert's expert, testified that would need retraining to make herself more marketable as a dental hygienist which would not require more than 2 years. (RP 11, line 19-25)

But Ms. Reha testified that once she is registered, she can apply for a job and she wouldn't need a degree or more courses. A dentist could hire her. (RP 36, line 1 - 14) Ms. Schubert testified that she need only register and take a 7 hour HIV/AIDS course in or to apply for work as a dental hygienist. (RP 54, line 9 – 55, line 16) Ms. Reha testified that to complete a medical program to be a medical technician, two years, full time is required to get a degree. (RP 45, line 23 to 46 line 14 )

The trial court made no findings about what the Wife could expect to earn after retraining. Jan Reha, testified that Ms. Schubert could earn \$27,000 starting and up to \$36,000 per year as a dental assistant. (RP 22, line 8-15) The court did not account for Ms. Schubert's income upon reemployment in its award of maintenance. Finally, the trial court made no findings about Ms. Schubert's expenses, except to say that her rent would be \$2,000 per month. (CP 581-582)

Regardless of whether or not one believes re-employment as a dental assistant takes 2 years to brush up skills or if employment can be had immediately, it is undisputed that employment as a dental hygienist will take less than the 4 year term of maintenance awarded by the court intended for a position of employment in nursing that, indisputably, Ms. Schubert will not be able to obtain because she doesn't qualify to for

admission to nursing school because of her low grades (three courses have less than 2.75 GPA) ((RP 42, line 16 to 43, line 15) and because there are no nursing jobs available now. (RP 13, Line 1-5) The alternative careers as a medical technician won't pay a sufficiently higher level of income to justify the cost of four years of tuition and the opportunity costs of four years of lost wages. (RP 49, line 14 to 51, line 13)

f) Child Support. The court imputed income to father when he was involuntarily unemployed. (CP 581) However, the worksheets approved by the court do not reflect imputed income pursuant to the Findings. (CP 621) For Ms. Schubert, the worksheets reflect the receipt of a maintenance payment of \$5,500 per month, with a net monthly income of \$4,932 per month, but the imputed income was not included at line 1(f) of Part I. (CP 621)

RCW 26.19.071(6) provides that the court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The trial court found that Mr. Schubert had been laid off by his employer and that he was diligently searching for employment. (CP 555) It was error for the court to impute income to Mr. Schubert. The court cited RCW 26.19.170(6)(b) which provides

that in the absence of a parent's actual earnings, the court shall impute, if voluntarily unemployed, based on full-time earnings at the historical rate of pay. It is contradictory for the court to find that Mr. Schubert is laid off and diligently searching for work, thus involuntarily unemployed, and then apply RCW 26.19.170(6)(b) and impute income. There was nothing in the record and no finding that Mr. Schubert was purposely unemployed to avoid his child support obligation.

The court also deviated upward, the child support transfer payment from the standard calculation of \$1,703.23 to a transfer payment of \$2,000 per month, without supporting that amount with written findings of fact. The court did not consider the *Daubert/Rusch* factors. The Findings only state " The temporary Order of Child Support is modified slightly to reflect child support transfer payment in the amount of \$2,000 per month." (CP 569) The worksheets reflect that the combined net incomes of the parties is \$18,321 and exceed the economic table. (CP 621)

There are no findings supporting a deviation of child support above the standard calculation. Mr. Schubert pays 80% of all of the educational, camps and summer camps, extracurricular activity expenses and uninsured medical expenses. The financial declarations

of the parties do not reflect any extraordinary or unusual expenses. Trial Exhibits no. 91 and No. 202 **Appendix B** attached hereto.

The percentage of shared expenses ordered by the court for shared expenses and uninsured medical expenses (80% father and 20% mother) also differed from the worksheet calculations, which showed at Part 1, line 6, that the Father should pay 73.1% and the Mother 26.9%. (CP 621)

*McCausland v. McCausland*, 159 Wash.2d 607, 152 P.3d 1013 (2007) involves a case where the trial court made no findings of fact to support child support at an amount that exceeds the economic table. The court held that the trial court should, at a minimum, consider the *Daubert/Rusch* factors when entering written findings of fact. The case was remanded.

The upward deviation of the child support obligation above the standard calculation without written findings when the father is involuntarily unemployed is error.

g) Costs of Sale. Mr. Schubert asked the court in his Motion for Reconsideration to deduct costs of sale for the Newcastle house. (CP 525) Based on the court's orders of maintenance and child support of \$7,500 per month plus 80% of the children's expenses and all of Ms.

Schubert's tuition at time when he had no income, the Husband had no choice to but sell the Newcastle home immediately. He was not able to obtain possession of the home until September 1, 2013 and he listed the home after he prepared it for sale immediately. He never moved back into the house. (CP 546)

Costs of sale are only deductible if a sale is imminent and necessary. *In re Marriage of Stenshoel*, 72 Wn. App. 800, 866 P.2d 635 (1993); *In re Marriage of Berg*, 47 Wn. App. 754, 737 P.2d 680 (1987).

Costs of sale were estimated to be \$108,000 which is 10 % (7.5% for commission, 2% for excise tax, and .5% for other closing costs). (CP 546) The property division should be amended by 46% of that sum payable by Ms. Schubert to Mr. Schubert.

h) Interest of Separate Property Lien Against the Costa Mesa Property. Statutory interest on marital liens is mandatory unless the court enters findings justifying a lower interest rate. *In re Marriage of Harrington*, 85 Wn. App. 613, 631, 935 P.2d 1357 (1997); *In re Marriage of Knight*, 75 Wn. App. 721, 721, 880 P.2d 71 (1994); *Stenshoel*, 72 Wn. App. at 811.

The trial court awarded Mr. Schubert a lien against property awarded to Ms. Schubert representing Mr. Schubert's down payment contribution from separate property payable by August 2015, a period of two years. (CP 644) The court did not provide for interest on the lien. Mr. Schubert requested that the court establish interest on the lien in his Motion for Reconsideration. The Decree did not provide for a judgment summary including statutory interest rate. The court did not rule on the Motion for Reconsideration other than to enter the Amended Decree of Dissolution. (CP 640) It was error not to award interest to Mr. Schubert on the property lien and the issue should be remanded.

i) Attorney Fees. An appellate court reviews an award of attorney fees for abuse of discretion. *Estrada v. McNulty*, 98 Wn. App. 717, 723, 988 P.2d 492 (1999). In order to review the award, the trial court must provide an adequate record. *Estrada*, 98 Wn. App at 723.

The party seeking fees bears the burden of proving the reasonableness of the fees. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). Counsel must provide contemporaneous records documenting the hours worked, including the number of hours worked, the type of work performed, and the category of attorney, who performed it. *Mahler*, 135 Wn.2d at 433.

From this evidence, a trial court must take an active role in determining the reasonableness of attorney fee awards. *Mahler*, 135 Wn.2d at 434. It must use the lodestar method of determining an appropriate award of attorney fees. Under the lodestar method, the trial court must determine a reasonable number of hours worked and exclude from it any wasteful or duplicative hours. *Mahler*, 135 Wn.2d at 434. It must then multiply those hours by the reasonable hourly fee. *Mahler*, 135 Wn.2d at 434.

A court may not accept the fee affidavits of counsel. *Mahler*, 135 Wn.2d at 434-35. The absence of an adequate record requires a remand of the award. *Mahler*, 135 Wn.2d at 435.

It was error for the court to make an award of attorney fees to Ms. Schubert when the court did not have before it any evidence to determine the reasonableness of Ms. Schubert's attorney fees. The trial court did not provide a clear record upon which the appellate court can decide that the fee decision was appropriate. Ms. Schubert sought an award of fees at trial and she bears the burden of proving the reasonableness of the fees. *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 150, 859 P.2d 1210 (1993).

Under RCW 26.09.140, the trial court must indicate on the record the method used to calculate the award of attorney fees. *In re Marriage*

*of Foley*, 84 Wn.App. 839 (1997). In calculating a fee amount the trial court may consider: (I) the factual and legal questions involved, (ii) the time necessary for preparation and presentation of the case, and (iii) the amount and character of property involved. *In re Marriage of Ayyad*, 110 Wn.App. 462, 467, *review denied*, 147 Wn.2d 1016(2002). The trial court may consider the difficulty of litigation, including the time required to try the case and the size of the record, in awarding attorney fees in a dissolution action. *In re Morrow*, 53 Wn.App. at 591. Proof of fees incurred is necessary to support an award. *In re Marriage of Estes*, 84 Wn.App. 536 (1997).

Ms. Schubert provided no information concerning her attorney fees in response to interrogatories and production of documents, objecting that information related to her attorney fees were attorney/client work product. (RP 79:13- 4)

Petitioner's Trial Exhibit 90 admitted by Ms. Schubert at trial contained only invoice balances and no itemization of work done or hourly rates. (RP 80:1-11)

The narrative fee declaration of counsel, Gail R. Wahrenberger, was conclusory and offered no detail or itemization of fees. Stokes Lawrence had multiple attorneys and paralegals working on Ms. Schubert's case which raised the specter of duplication of services. (CP 482)

The court cannot make such a determination of reasonableness of fees without the itemization of the Ms. Schubert's attorney fees and costs, which she declined to provide. The record did not provide any detail. The Findings did not indicate the method used by the court to calculate the reasonableness of the fees or the need of the Wife or ability of the Husband to pay.

An assumption of the reasonableness of the Wife's fees should not be based on the amount of the Husband's expenses. This is speculative.

Mr. Schubert's attorney fees were \$48,000. Mr. Schubert provided all of the evidence tracing his separate property that he brought into the marriage. He appraised the Costa Mesa house separating the value of land purchased before marriage and the improvements made after marriage. He also traced multiple investments that existed prior to marriage. Mr. Schubert's attorney participated in the same temporary hearings as Ms. Schubert's attorneys who declare that fees for the temporary hearing were over \$20,000. A contributing factor to Ms. Schubert's high attorney fees may be the duplication of effort of the two attorneys charging \$395 per hour and \$315 per hour and the paralegals charging \$210 per hour. Without the detail, it is not possible to determine. The narrative fee declaration complains about having to

prepare for trial just to have the trial date continued. It was the Ms. Schubert who requested the trial continuance.

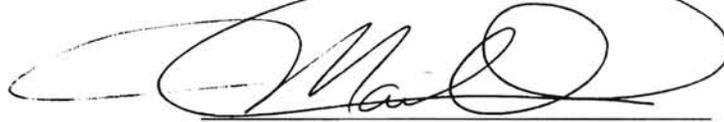
Through all of this, Mr. Schubert went through the same discovery, depositions, mediation sessions and trial and total attorney fees were substantially less than Ms. Schubert's

The trial court ordered Mr. Schubert to pay \$50,000 toward Ms. Schubert's attorney fees of \$93,213 of which the court found Ms. Schubert had only been able to pay \$21,073. (CP 571) The court made no finding of the reasonableness of these fees. The court had no itemization from which to make such a determination. The court necessarily engages in speculation without the information required to determine reasonableness of fees and need for fees under RCW 26.09.140.

#### **V. Conclusion**

The court's award of maintenance should be reversed and remanded. The court's award of child support and property division as to costs of sale and interest on Mr. Schubert's lien should be reversed and remanded and the award of attorney fees should be vacated.

Respectfully submitted this 28<sup>th</sup> day of April, 2014.

A handwritten signature in black ink, appearing to read 'Mark D. Olson', written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the left.

Mark D. Olson, WSBA #9656  
Counsel for Appellant

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No. 71119-9-I

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION ONE

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VICTOR SCHUBERT,

Appellant,

vs.

AMBER SCHUBERT,

Respondent.

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DECLARATION OF SERVICE OF BRIEF OF APPELLANT

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HAILEY GARTEN declares:

I am a paralegal for counsel of record for the Appellant, Victor J. Schubert.

That on the 2<sup>nd</sup> day of May, 2014, I caused to be served upon Ms. Catherine W. Smith and Ms. Valerie A. Villacin, of Smith Goodfriend P.S., 1619 8<sup>th</sup> Ave. N, Seattle, WA 98109-3007, a true and complete copy of the following:

- Brief of Appellant

Said Brief of Appellant was served upon Ms. Smith and Ms. Villacin via ABC Messenger Service.

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

DATED THIS 2<sup>nd</sup> day of May, 2014, at Seattle, Washington.

A handwritten signature in black ink, appearing to read "Hailey Garten", written over a horizontal line.

Hailey Garten  
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