

ORIGINAL

NO. 35297-4 II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARCEIL MULLAN

Appellant,

vs.

FREDERICK MULLAN

Respondent

COURT OF APPEALS
DIVISION II
07 MAY -7 PM 4:20
STATE OF WASHINGTON
BY *W*

BRIEF OF APPELLANT/CROSS RESPONDENT

James M Caraher
Attorney for Appellant/Cross Respondent
4301 South Pine Street, Suite 543
Tacoma, WA 98409
Tel: 253-627-6465
Fax: 253 475-1221

TABLE OF CONTENTS

I. REPLY	
A.	PROCEDURAL OBJECTIONS..... 1
B.	FACTS.....1
C.	ISSUES ON CROSS APPEAL.....2
D.	ARGUMENTS:.....2
1.	ARGUMENT RE: CROSS APPEAL.....2
2.	ARGUMENT RE: CONSTRUCTION OF DECREE.....7
E.	RESPONDENT/APPELLANT’S AUTHORITIES.....14
a.	CURMON.....14
b.	BAKALOV.....15
F.	RESTITUTION.....17
G.	RETROACTIVITY.....17
II. RESPONSE	
A.	MODIFICATION.....20
B.	SHOWING OF SUBSTANTIAL CHANGE.....24
C.	TRIAL COURT DISCRETION.....25
D.	UNANTICIPATED CHANGES.....53
III. CONCLUSION	
A.	CONCLUSION.....55

A. TABLES

I. Table of Cases:

Bulzomi v Department of Labor & Industries Wn App.
522, 525-526, 864 P.2d 996, 998 (1994).....1

Marriage of Jennings, 138 Wn. 2d 612, 625-26, 980 P.2d 1248
(1999).....6, 53

In re Marriage of Spreen, 107 Wn. App 341, 346, 28 P.2d 769
(2001).....6, 53, 57

In re Marriage of Kovacs, 121 Wn. 2d @ 801, 854
P.2d 629 (1999).....7

Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.
158 Wn.2d 603, 610, 146 P.3d 914, 918 (2006);7

Stone v. Svendsen v. Stock 143 Wn.2d 546, 555, 23 P.3d 455, 459 -
460 (2001);.....7

In re Marriage of C.M.C. 87 Wn. App. 84, 88, 940 P.2d 669, 670
(1997);7

Wagner v. Wagner 95 Wn.2d 94, 101, 621 P.2d 1279,
1283 (1980).....8, 21, 23, 26, 56, 57.

In re Marriage of Thompson 97 Wn. App. 873, 878,
988 P.2d 499;.....9

In re Marriage of Gimlett, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981);.....7

Kruger v. Kruger, 37 Wn.App. 329, 331, 679 P.2d 961 (1984).....9

Burbo v. Harley C. Douglass, Inc. 125 Wn.App. 684, 692, 106 P.3d 258, 263 (2005);10

Lewis v. City of Mercer Island, 63 Wn.App. 29, 32, 817 P.2d 408 (1991).....10

Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle, 62 Wn.App. 593, 602, 815 P.2d 284 (1991).....10

Lynott v. Nat' l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 684, 871 P.2d 146 (1994).....12

Hearst Communications, Inc. v. Seattle Times Co. 154 Wn.2d 493, 503-504, 115 P.3d 262, 267 (2005);.....12

City of Everett v. Estate of Sumstad, 95 Wn.2d 853, 855, 631 P.2d 366 (1981).....12

Wimberly v. Caravello 136 Wn.App. 327, 338, 149 P.3d 402, 409 (2006).....12

State v. Curmon 171 N.C. App 697, 615 SE 2d 417 (2005).....14, 15

<u><i>In State v Bakalov</i></u> 979 P2 799; 1999 UT45, 75; 979 (UT 1999).....	15, 16
<u><i>State v Sorensen</i></u> , 639 P2d 179, 180 (Utah 1981).....	16
<u><i>In re Marriage of Coyle</i></u> 61 Wn.App. 653, 657, 811 P.2d 244, 246 (1991);	21, 26
<u><i>In re Marriage of Ochsner</i></u> , 47 Wn App. 520, 524, 736 P.2d 292, <i>review denied</i> , 108 Wn 2d 1027 (1987).....	21.
<u><i>In re Marriage of Lindsey</i></u> , 101 Wn.2d 299, 302, 304, 678 P.2d 328 (1984).....	22
<u><i>Lambert v. Lambert</i></u> , 66 Wn.2d 503, 508-10, 403 P.2d 664 (1965);.....	23, 56
<u><i>Crosetto v. Crosetto</i></u> , 65 Wn.2d 366, 397 P.2d 418 (1964).....	23
<u><i>In re Marriage of Leslie</i></u> , 90 Wn App. 796, 802, 954 P.2d 330 (1998).....	24
<u><i>Soltero v. Wimer</i></u> 128 WApp. 364, 115 P.3d 393 (2005).....	45
<u><i>In re Marriage of Zander</i></u> , 39 Wn.App. 787, 790, 695 P.2d 1007 (1985).....	55
<u><i>Holaday v. Merceri</i></u> 49 Wn. App. 321, 331, 742 P.2d 127, 132 (1987).....	56, 57

In re the Marriage of Spreen v. Spreen 107 Wn.App. 341, 348-349, 28 P.3d 769,773 (2001).....6, 53, 57

Endres v. Endres, 62 Wn.2d 55, 58, 380 P.2d 873 (1963).....57

In re Marriage of Sheffer, 60 Wn.App. 51, 55-56, 802 P.2d 817 (1990);57

In re Marriage of Tower, 55 Wn.App. 697, 703-04, 780 P.2d 863 (1989);57

In re Marriage of Morrow, 53 Wn.App. 579, 584-89, 770 P.2d 197 (1989).....58

State v. Hescoek, 98 Wn.App. 600, 606, 989 P.2d 1251 (1999).....12

State v. Knowles, 46 Wn.App. 426, 430, 730 P.2d 738 (1986).....13.

In re Marriage of Getz 57 Wn.App. 602, 606, 789 P.2d 331, 333 (1990).....13, 14

Grant County Constructors v. E. V. Lane Corp., 77 Wn.2d 107, 459 P.2d 974 (1969).....12

First Nat'l Bank & Trust Co. v. United States Trust Co., 184 Wn. 212, 50 P.2d 904 (1935);..... 12

Brackett v. Schafer, 41 Wn.2d 828, 252 P.2d 294 (1953).....12.

Green River Valley Foundation, Inc. v. Foster 78 Wn.2d 245, *249,
473 P.2d 844, **847 (WASH 1970).....12

US West Communications, Inc. v. Washington Utilities and Transp.
Com'n 86 Wn.App. 719, 723, 937 P.2d 1326, 1329 (1997).....13.

Waste Management, 123 Wn.2d at 628, 869 P.2d 1034.....13

In re Marriage of Coyle 61 Wn.App. 653, *659, 811 P.2d 244, **247
(Wn.App.,1991).....21, 26

Lambert v. Lambert, 66 Wn.2d 503, 508-10, 403 P.2d 664
(1965);.....23, 56

Crosetto v. Crosetto, 65 Wn.2d 366, 397 P.2d 418 (1964).....23.

Marriage of Ochsner 47 Wn.App. 520, 736 P.2d 292 (1987).....21

Bartow v. Bartow, 12 Wn.2d 408, 121 P.2d 962 (1942).....23

STATUTES:

RCW 26.09.170.....20, 23, 55

COURT RULES

CR 12(b)(6).....4

CR 56.....4

I. REPLY

A. PROCEDURAL OBJECTIONS:

1. Respondent/Cross Appellant's Brief Fails to Make References to the Record.

In his introduction and elsewhere in his brief he fails to cite the record as required.

RAP 10.3 and 10.4 require that statements of fact contain references to the record.

(5) *Statement of the Case*. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. **Reference to the record must be included for each factual statement.** RAP 10.3 (a)(5); 10.4(f); *Bulzomi v. Department of Labor and Industries* 72 Wn App. 522, 525-526, 864 P.2d 996, 998 (1994) (Referencing former rule RAP 10.3(a)(4) requiring that "[r]eference to the record must be included for each factual statement").

The purpose of this rule is to assist the court in determining the veracity of the statements of fact in support of the arguments. Those sections of the brief which omit citations should be ignored.

B. FACTS:

Petitioner/cross appellant relies upon the initial statement of facts

except were specifically referenced here.

The introduction and subsequent statements of fact and argument by Respondent are “puffed” or misstated. There is an old saying, “Something boldly stated and steadfastly maintained is so!”

Repetitive statements of facts accurate or not do not change the law.

C. ISSUES ON CROSS APPEAL:

Judge Nelson found that maintenance awarded by Judge Stone was; “. . . *to be continuous and that the language in the decree provided for maintenance indefinitely.*” (2SCP, P 2, L 17 -19). She found that maintenance did not terminate when Mr Mullan turned 65. She denied respondent’s motion for summary judgement/dismissal and set a hearing instead to modify spousal maintenance.

D. ARGUMENTS:

1. ARGUMENT RE: CROSS APPEAL

Respondent/Cross Appellant argues:

1. Did Judge Nelson err in finding that Spousal Support continued after Respondent reach age 65?

NO.

2. Is Respondent/Cross Appellant entitled to an order reimbursing him for spousal support or attorney fees?

NO.

3. Did Judge Nelson retroactively modify spousal support?

NO.

4. **DID JUDGE NELSON ERR IN FINDING THAT SPOUSAL SUPPORT CONTINUED AFTER RESPONDENT REACH AGE 65?**

NO.

Maintenance did not terminated at age 65, when Mr Mullan voluntarily ceased support payments to Mrs Mullan while he continued his employment. (RP 73, L 19-25). He had not retired nor was he drawing social security. (RP 73, L 19-25). He had effectively cut Petitioner/Cross Appellant's support off. His actions were calculated at punishing Petitioner economically.

He made a pointed effort to effectuate a "accord and satisfaction" in the way in which the he drew the check. This action clearly indicated that he understood he had an ongoing obligation to pay spousal support. (RP, P73, L19 -25).

The Superior Court for Pierce County, in case # 97-3-00085-7, Katherine J. Nelson, J., on 2/17/2006 denied Respondent, Frederick Mullan's CR 12(b)(6) and/or CR 56 motions for summary judgement.

Judge Nelson found that, the trial Judge Waldo Stone, in the decree dated 2/17/98, had intended “. . . ***maintenance to be continuous and that the language in the decree provided for maintenance indefinitely.***” (2SCP, P 2, L 17 -19).

In the Findings of Fact ¶ 1.6, Judge Nelson finds: “The provision for spousal maintenance in the decree is and the obligation to pay spousal maintenance never ceased. It is clear that the trial court anticipated that maintenance would continue until modification or death with the need to adjust support with Respondent's retirement.” (RP, P213, L26 - P214, L2).

In her ruling she relied upon and cited portions Judge Stone's oral decision, findings of facts and decree entered after the trial of the Mullan's case. *Holaday v. Merceri* 49 Wn. App. 321, 742 P.2d 127(1987).

In his oral opinion, Judge Stone stated that;

“ . . . Ms Mullan is entitled to '*substantial maintenance*'. . .
“

* * *

“The maintenance will be 40 percent of gross, but not less than \$3,750 per month, and the \$3,750 is the \$90,000

divided by two and then divided by 12 months. So there's \$45,000 for her gross and \$45,000 for him gross.

*At age 65 -- again, I have no crystal ball -- **the maintenance will drop to one-half of his social security.** Both sides will be invited to move at that point for whatever modification appears to fit, and I don't know whether the modification should go up, down, or sideways or what. No crystal ball." (CP, P 31, L 23 - P32, L 7). (Emphasis added).*

In his Findings of Fact, Judge Stone found that: "Maintenance should be ordered because;" (CP, P 4, L 9).

The parties were married 6/14/62. (CP, P 2, L 13). *They were married 35 years during which time the Petitioner was primarily a house wife and mother. (CP, P 4, L 9).*

The Petitioner has been responsible for raising the parties three children , who were all adults at the time of the trial. (CP, P 4, L 11).

The Respondent has been the chief engineer on a fishing boat for 38 years. (CP, P 4, L 11; P72, L 10). He was at sea for "seven to maybe eight months" a year, "then down at the boat in Seattle. (RP, P91, L9-13). At the time of trial Judge Stone found Respondent was capable of earning more than \$90,000 per year. (CP, P 4, L 12).

In the Decree Judge Stone ordered:

3.7 SPOUSAL MAINTENANCE:

* * *

[X] The [X] husband . . . shall pay maintenance pay 40% of his gross earnings as chief engineer, but not less than \$3,700 per month as maintenance.

* * *

Maintenance shall be paid . . . [X] monthly. The first maintenance payment shall be due on 1/1/98. *The obligation to pay future maintenance is terminated: upon the death of either party. Maintenance shall not terminate upon remarriage of the Petitioner, but may be considered as any other change in circumstances would be in a motion to amend maintenance brought in accordance with the applicable statute.*

[X] Other: Maintenance payments shall be made until the Respondent reaches the age sixty-five (65) or earlier upon Respondent's retirement at *which time the court recommends maintenance be set at one-half of Respondent's social security benefit, off-set by one-half of Petitioner's social security Benefit, if any.* (RP, P13, L23-27, P14, L 1-5).

Judge Nelson's ruling that Judge Stone had ordered indefinite spousal maintenance is supported by a clear preponderance of the evidence. Her ruling that the spousal maintenance obligation did not cease

at age 65 was not an abuse of discretion. *In re Marriage of Jennings*, 138 Wn.2d 612, 625-26, 980 P.2d 1248 (1999); *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001).

The basis of Judge Nelson's decision is not manifestly unreasonable nor is it based on untenable grounds or untenable reasons. *In re Marriage of Kovacs*, 121 Wn. 2d at 801, 854 P.2d 629 (1999).

Her finding that the maintenance did not cease should be upheld on this appeal.

2. ARGUMENT RE: CONSTRUCTION OF DECREE

Judge Nelson ruled that the trial Judge Waldo Stone, in his decree 2/17/98, had found; “. . . *maintenance to be continuous and that the language in the decree provided for maintenance indefinitely.*” (2SCP, P 2, L 17 -19).

Mr. Mullan contends that this finding is error. He argues that; “By the clear terms of the decree, maintenance terminated when the husband reached age 65.” (Resp Brief Pg 16.)

This argument fails on a number of levels:

1. This language cannot be read in isolation thus making other terms of the decree and findings “ meaningless or superfluous.” *Ballard Square Condominium Owners Ass'n*

v. Dynasty Const. Co. 158 Wn.2d 603, 610, 146 P.3d 914, 918 (2006); *Stone v. Svendsen v. Stock* 143 Wn.2d 546, 555, 23 P.3d 455, 459 - 460 (2001); *In re Marriage of C.M.C.* 87 Wn. App. 84, 88, 940 P.2d 669, 670 (1997); *Wagner v. Wagner* 95 Wn.2d 94, 101, 621 P.2d 1279, 1283 (1980).

Judge's Stone's decree stated, in the pre-printed standardized form adopted by the clerk;

[X] Other: Maintenance payments shall be made until the Respondent reaches the age sixty-five (65) or earlier upon Respondent's retirement at which time the court recommends maintenance be set at one-half of Respondent's social security benefit, off-set by one-half of Petitioner's social security Benefit, if any. (RP, P13, L23-27, P14, L 1-5).

The provisions of the decree following the retirement language, “. . . at which time the court recommends maintenance be set at one-half of Respondent's social security benefit, off-set by one-half of Petitioner's social security Benefit, if any.” cannot be ignored as superfluous.

Judge Stone stated in his oral opinion:

“ . . . Ms Mullan is entitled to substantial maintenance, . . . ”

* * *

“The maintenance will be 40 percent of gross, but not less than \$3,750 per month, and the \$3,750 is the \$90,000 divided by two and then divided by 12 months. So there's \$45,000 for her gross and \$45,000 for him gross.

At age 65 - - again, I have no crystal ball “. . . ***the maintenance will drop to one-half of his social security.*** Both sides will be invited to move ***at that point*** for whatever modification appears to fit, and I don’t know whether the modification should go up, down, or sideways or what. No crystal ball.” (CP, P 31, L 23 - P32, L 7). (Emphasis added).

Respondent/Cross appellant’s proposed interpretation requires that the language following the term “recommendation” be constructed to terminate maintenance rather than referring the “***at that time***” language referring to future recalculation of the amount of spousal maintenance upon Mr. Mullan’s retirement.

If a decree is ambiguous, the reviewing court seeks to ascertain the intention of the court that entered it by using the general rules of construction applicable to statutes and contracts. *In re Marriage of Thompson* 97 Wn. App. 873, 878, 988 P.2d 499; *In re Marriage of Gimlett*, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981); *Kruger v. Kruger*, 37 Wn.App. 329, 331, 679 P.2d 961 (1984).

Mr Mullan, approaching retirement was an event clearly anticipated by Judge Stone. He avoids the temptation to fix spousal maintenance following retirement as speculative, in light of questions surrounding the amount, if any of Mr and Mrs Mullans’ social security

benefits.

By this language Judge Stone is providing guidance to the parties, leading them to attempt a resolution of maintenance calculations upon Mr Mullan's retirement.

A recommendation as to how spousal maintenance could be computed in the future is not the same as terminating maintenance already ordered.

Judge Stone awarded maintenance based upon the statutory standards. This award was indefinite. Mr Mullan's retirement would trigger the need for the parties or the court to reset the amount of spousal support not because of retirement but because Respondent/Cross Appellant's income would change substantially. This is the only reasonable way in which this provision of the decree can be read based upon this record. This substantial change did not occur and no other cognizable basis for reduction of the amount of spousal support exists.

When Judge Stone made this ruling it is presumed that he knew the law. *Burbo v. Harley C. Douglass, Inc.* 125 Wn.App. 684, 692, 106 P.3d 258, 263 (2005); *Lewis v. City of Mercer Island*, 63 Wn.App. 29, 32, 817 P.2d 408 (1991).

Judge Nelson found that the original award of spousal support was

indefinite in duration and did not terminate in May 2005 as contended by Respondent. In fact Petitioner's spousal support should have continued to accrue and she should have received a judgement for the past due amounts, based upon the unchanged factors found by Judge Stone.

Mr Mullan states in his brief states that; “. . . [He] did not perceive Judge's Stone's 'recommendation' that he pay a portion of his social security to Marceil after he turned age 65 as an ordered. Resp. Brief P10.

At the modification hearing Mr Mullan testified, “. . . my way of reading it, it stated when I was 65 or if I retired first, spousal maintenance was to cease, and then there was an adjustment when I drew Social Security. I did not start drawing Social Security until January of this year [2006].” RP 73, L20-25.

Washington continues to follow the “objective manifestation theory” of determining the meaning of court orders, statutes and contracts.

Under this doctrine the parties' intents are judged on what “reasonable men” would understand as a manifestation of the agreement or order, rather than on the unexpressed subjective intent of the parties. *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn.App. 593, 602, 815 P.2d 284 (1991).

The court should impute an intention, not of what Mr mullan

understood, but that corresponding to the reasonable meaning of the words used. *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). “. . . [T]he subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” *Hearst Communications, Inc. v. Seattle Times Co.* 154 Wn.2d 493, 503-504, 115 P.3d 262, 267 (2005); *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981).

A parties subjective intent is inadmissible under this rule of construction. *Wimberly v. Caravello* 136 Wn.App. 327, 338, 149 P.3d 402, 409 (2006).

Nonetheless, a subsequent court can examine a previous court's oral ruling to clarify a written order if the previous court's written order is ambiguous. *State v. Hescoek*, 98 Wn.App. 600, 606, 989 P.2d 1251 (1999).

“Courts should not find an ambiguity in order to construe the contract, and an ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole. *Grant County Constructors v. E. V. Lane Corp.*, 77 Wn.2d 107, 459 P.2d 974 (1969). Where provisions of the same transaction are clear but conflicting, the operative provisions prevail over the recitals. *Green River Valley Foundation, Inc. v. Foster* 78 Wn.2d 245, 249, 473 P.2d 844, 847 (1970); *First Nat'l Bank & Trust Co.*

v. United States Trust Co., 184 Wn. 212, 50 P.2d 904 (1935);
Brackett v. Schafer, 41 Wn.2d 828, 252 P.2d 294 (1953).”

Respondent’s reliance on *US West Communications, Inc. v. Washington Utilities and Transp. Com’n* 86 Wn.App. 719, 723, 937 P.2d 1326, 1329 (1997), is not well placed. This case involves a ruling by the Public Utilities Commission (PUD).

In that case a challenge was made to the interpret of a statute in the PUD’s ruling. The matter had been submitted for a ruling in part based upon an alleged ambiguity in the regulating statute.

In *US WEST*, the court did cite a rule of construction which has no applicability in this case.

It said,

“[I]f the statute at issue is ambiguous, the agency's interpretation of the statute is accorded great weight in determining legislative intent. *Waste Management*, 123 Wn.2d at 628, 869 P.2d 1034. However, absent ambiguity, there is no need for an agency's expertise in construing the statute. *Waste Management*, 123 Wn.2d at 628, 869 P.2d 1034.

Judge Nelson’s opinion ignores all of the other language in decree, findings and oral opinion. The cases cited by Respondent ignore construction rule that an ambiguity will not be found were none exists.

An ambiguous finding may be clarified by resort to the oral

opinion. *State v. Knowles*, 46 Wn.App. 426, 430, 730 P.2d 738 (1986).

In re Marriage of Getz 57 Wn.App. 602, 606, 789 P.2d 331, 333 (1990)

Reading the pleading in conjunction with the judge's oral opinion can eliminate any ambiguity. In re Marriage of Getz 57 Wn.App. 602, 605, 789 P.2d 331, 333 (1990).

**E. RESPONDENT/CROSS APPELLANT'S
AUTHORITIES**

a. Curmon.

The Curmon case does not support Mr Mullan's position that:

A "*recommendation*" is not a binding order continuing spousal maintenance after the husband turned age 65. *State v. Curmon* 171 N.C. App 697, 615 SE 2d 417 (2005).

In *Curmon* 171 NC at 699, the Defendant was convicted of three counts of first-degree arson and violating a domestic protective order after setting fire to the apartment occupied by of his former girlfriend and her then boy friend. At the time of the sentencing, the trial court recommended that he have no contact with his former girlfriend during the duration of

his incarceration. He appealed.

The issue argued by Mr Mullan's attorney relates to the interpretation given by that court to the phrase "recommendation of no contact", which Defendant Curmon contended was unconstitutional.

Curmon, supra has neither precedential value nor rational relation to this case.

Judge Stone clearly intended his recommendation relate to how the parties and a future court might resolve the question of how to fix maintenance when Mr Mullan's income dropped at his anticipated retirement at age 65 or sooner.

Judge Nelson found that the evidence supported the language that spousal maintenance was ". . . *continuous and that the language in the decree provided for maintenance indefinitely.*"

b. Bakalov.

Respondent also cites this case as supporting his subjective interpretation of this term in the decree.

In *State v Bakalov* 979 P2 799; 1999 UT45, 75; 979 (UT 1999). The defendant was convicted of rape in a second trial following a reversal

of his first conviction.

At the second sentencing, following Utah law, the Judge imposed an indeterminate sentence. Under Utah law the trial judge sentences the Defendant to prison, the number of years the Defendant will spend there is left to the unfettered discretion of the Board of Pardons. (Citation omitted).

In *Bakalov*, the trial court *recommended* to the Board of Pardons “. . .the Defendant never be paroled unless he is deported. . . .”

Bakalov, in his second appeal, contended this “recommendation” by the trial judge was unconstitutional because it was in excess of the sentence imposed following his first trial and therefore in violation of the Fifth Amendment of the U.S. Constitution as applied to state action through the Fourteenth Amendment. *State v Sorensen*, 639 P2d 179, 180 (Utah 1981).

The Utah Supreme Court held; “The trial court’s recommendation to the Board of Pardons “. . . is permissible” because the board has the statutory authority to sets the term of the sentence.

Judge Nelson found that spousal maintenance was continuous. This ruling is supported by the preponderance of the evidence and should not be

disturbed on appeal

F. IS RESPONDENT ENTITLED TO RESTITUTION?

NO.

Judge Nelson found that, the trial Judge Waldo Stone, in the decree dated 2/17/98, had intended “. . . *maintenance to be continuous and that the language in the decree provided for maintenance indefinitely.*” (2SCP, P 2, L 17 -19).

There is no basis for restitution.

**G. DID THE TRIAL COURT RETROACTIVELY
MODIFY SPOUSAL MAINTENANCE?**

NO.

The authorities cited by Respondent/ Cross Appellant are not applicable because Judge Nelson found that the ordered by Judge Stone provided “. . . *maintenance [was] to be continuous and that the language in the decree provided for maintenance indefinitely.*” (2SCP, P 2, L 17 -19).

Therefor there is no retroactive modification. *Bowman v. Bowman*,

77 Wn 2d 174, 459 P.2d 787 (1969)).

The spousal maintenance order of Judge Stone was continuous and indefinite. Without a substantial change in circumstances it should have continued despite the fact Mr Mullan reached age 65 and did not retire or draw Social Security.

In this case, Mr Mullan was under a duty to pay spousal support to his former wife. When he turned sixty five, instead of retiring as he had testified at the dissolution trial, he continued to work as a chief engineer making a projected annual income of more than \$250,000 in 2006. (RP, P101, L 3 - 11).

Following his 65th birthday he did not retire or begin to draw social security. His obligation to pay 40% of his earnings to his former wife should have continued and Mrs Mullan should have been awarded a judgement for the unpaid maintenance at the time of Judge Nelson's ruling. Petitioner/Cross Respondent has appealed Judge Nelson's ruling in this regard.

It is unfortunate that much of the transcript of the trial before Judge Stone was lost by three of the four court reporters who transcribed this case. (RP, P , L). It was replete with statements by Mr Mullan and his

attorney that Mr Mullan could only work at most two more years. He was 58 years old at that time of the dissolution trial. (RP, P , L).

At the modification trial Respondent/Cross Appellant was asked about the statements during the dissolution trial concerning the duration of his work life. He stated;

RP 11/09/06:

MR. CARAHER:

Q. And at the last time at trial, you weren't sure you were going to work any longer either, were you?

MR. MULLAN:

A. Right.

Q. And you told the Court that the fishing industry was a crap shoot, and you may not make any more money or fish again?

A. Fishing industry is a crap shoot, Mr. Caraher.

Q. But every year, you have made an increase in pay?

A. It's going down now.

Q. When has it gone down? When has it ever gone down?

A. It is right now.

Q. When did it go down?

ME ROBINSON: OBJECTION, . . . He's arguing with the

witness.

THE COURT: Sustained.

This was one of many instances in which Mr Mullan refused to give accurate details about his income. At the time of his deposition he did not remember his annual income and that he could not even estimate his income for the past three years. (RP, P 91 - 92). But he did have a value for each automobile that Petitioner owned. (RP, P 85,88). The only difficulty with this testimony at the modification hearing is that these assets had been awarded to Petitioner eight years earlier in the original decree. They were not the basis for a modification.

II. RESPONSE OF PETITIONER/CROSS RESPONDENT

A. MODIFICATION: NO SHOWING OF A SUBSTANTIAL CHANGE IN CIRCUMSTANCES

In her findings, ¶ 1.5, Judge Nelson found, “The Petitioner filed a petition requesting relief under the decree or in the alternative, modification of spousal maintenance.” (CP, P213).

Petitioner/Cross Respondent maintains that “a substantial changes in circumstances not anticipated by the parties” has not occurred as

required by the statute to justify modification. RCW 26.09.170.

Modification, including termination, of maintenance requires proof of a **substantial, unanticipated change** in circumstances. *In re Marriage of Coyle* 61 Wn.App. 653, 657, 811 P.2d 244, 246 (1991); *In re Marriage of Ochsner*, 47 Wn App. 520, 524, 736 P.2d 292, *review denied*, 108 Wn 2d 1027 (1987).

In *Coyle* 61 Wn.App. at 659,

Our Supreme Court has held that the trial court “. . . merely determined maintenance should be terminated because Ms. Coyle had income sufficient to meet her needs. This was error under *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980), which held the proper test is whether a substantial change in circumstances which was not within the contemplation of the parties has occurred.

Even though Judge Nelson found that she was bound by the prior Findings of Facts (CP 213, ¶ 1.1, she went on to find that;

1.10 Both parties received assets in the property division with values of approximately \$300,000. Respondent has earned more than \$100,000 per year in the interim with petitioner receiving 40% and Respondent receiving 60%.”

1.11 “The Petitioner needs an additional \$1,300 per month from

June 2005 for a period of 18 months until 11/01/06.”

Thereafter, petitioner shall receive 50% of the difference between her social security and Respondent’s Social Security . . . “ (CP, 213).

Judge Stone awarded spousal maintenance indefinitely.

Respondent had testified at the time of trial, he wasn’t sure he was going to work any longer. . .”. (RP, P101, L 5 - 7). He was 58 at the time he testified.

He did not retire but continued to work at a trade which Judge Stone had found both parties had contributed equally to for 35 years. (CP, 4, L9 - 19).

During the entire duration of the marriage the Respondent was an engineer on a fishing boat and Petitioner a housewife and mother.

The original award was based upon the statutory factors including the parties earnings, their life style and the lack and loss of any ability by Petitioner to work. These factors have never changed.

Petitioner did grow older, she is now 69 years of age. She lost some of the money which she invested. She has a small partnership equity in a very modest home which she is purchasing and is in a **“committed**

relationship.” *In re Marriage of Lindsey*, 101 Wn.2d 299, 302, 304, 678 P.2d 328 (1984).

There is nothing present in this case establishing the basis for modification of the spousal support order entered by Judge Stone except hyperbole and innuendo raised by the Respondent in an effort to raise outmoded social indignation against a former wife.

There has been no substantial change in circumstances which were not contemplated at the time of the divorce.

In *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980); RCW 26.09.170 the court set out the rules governing this standard;

“ . . . maintenance or support may be modified by the court, but only upon the showing of a substantial change of circumstances that was not within the contemplation of the parties at the time the decree was entered. The phrase “change in circumstances” refers to the financial ability of the obligor spouse to pay vis-a-vis the necessities of the other spouse. *Bartow v. Bartow*, 12 Wn.2d 408, 121 P.2d 962 (1942

Nor has Respondent carry his burden of proof of a substantial

change of circumstances since the decree was entered. *Wagner v.*

Wagner 95 Wn.2d 94, 98, 621 P.2d 1279, 1282 (1980); *Lambert v.*

Lambert, 66 Wn.2d 503, 508-10, 403 P.2d 664 (1965); *Crosetto v.*

Crosetto, 65 Wn.2d 366, 397 P.2d 418 (1964).

**B. THERE HAS BEEN NO SHOWING OF
SUBSTANTIAL CHANGE**

A party moving to modify support bears the burden of showing a substantial unanticipated change in circumstances. *In re Marriage of Leslie*, 90 Wn App. 796, 802, 954 P.2d 330 (1998).

It is important to note that Judge Nelson after denying Respondent's motion to dismiss and/or for Summary Judgement set this matter for trial to determine how much maintenance should be paid. (SCP,P222, L 15-16).

Respondent/Cross Appellant never filed any pleading requesting that spousal maintenance be modified. Instead he stood on his challenge that the court had lost jurisdiction because spousal maintenance had terminated.

Mr Mullan's counsel is attempting to evoke the same sympathies and prejudices as he did at trial. He sees his "plight" as a financial obligation imposed unjustly by Judge Stone. He wants to be delivered from the unreasonable requirement of supporting his former wife, even

though she cannot support herself as a result of commitments made during their 35 year marriage.

He parades a string of statements designed to emotionally cloud the fact that he is making over \$200,000. annually. (RP, P 95, L 15-20 - P 96). He contends that his income is uncertain and actually falling, despite the fact that it has increased each and every year since the decree when it was \$90,000.

C. THE TRIAL COURT ABUSED ITS DISCRETION.

1. Basis for Court's Finding of Change

Judge Nelson entered the following findings:

- 1.4 “* * * Respondent made a payment purporting to be his final spousal support payment at that time (5/05) and *has paid nothing further.*” (CP, P213).
- 1.6 “The provision for spousal maintenance in the decree is and *the obligation to pay spousal Maintenance never ceased.* It is clear that the trial court anticipated that *maintenance would continue until modified. . .*” (CP, P213).
- 1.7 “The Respondent did not retire.” (CP, P214).
- 1.10 “*Both parties received assets in property division* with a

value of approximately \$300,000.

These findings state that Mr Mullan's ceased payment of his maintenance obligation in 5/05.

They find that his obligation to pay maintenance never ceased.

Judge Nelson then goes on to modify spousal support despite never fixing the ability of Mr Mullan to pay or Mrs Mullan's needs.

The fact that Mrs Mullan may have received assets at the time of the decree is not a proper factor for the substantial reduction in spousal maintenance which Judge Nelson ordered. (CP, P-, L-).

In re Marriage of Coyle 61 Wn.App. 653, 659, 811 P.2d 244, (1991).

“. . . [T]he court merely determined maintenance should be terminated because Ms. Coyle had income sufficient to meet her needs. This was error under *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980), which held the proper test is whether a substantial change in circumstances which was not within the contemplation of the parties has occurred. Here, the court's first letter decision found there was no substantial change of circumstances which was not contemplated by the parties. That determination was not reversed in its second letter decision. Rather, the court based its determination on its belief ***Ms. Coyle had sufficient income without maintenance to meet her needs.***

This later determination is not supported by the record and constitutes an abuse of discretion. Termination of spousal maintenance for Ms. Coyle was error.

Judge Nelson amplified some of her reasons for her ruling in her oral opinion ;

“I believe that her short fall of approximately \$1,300 should be paid.”

In the future, past November of ‘06, I recognize the ***increasing age*** and ***potential disabilities, the lack of a contract,*** and the fact that ***at some point, neither party should be expected to work in order to provide the other with spousal maintenance*** in view of the fact that ***she does share expenses with another person*** and that ***she has been gifted land as well as other things.*** So the \$377, actually, is my calculation of half the difference of the Social Security. . . .” (RP, P124, L20 - P 125, L6).

* * *

“. . . it should have been clear that at some point, 40% percent of his ***earnings was [sic] going to be stopped*** and/or replaced by a much lower figure. That’s basisally the rationale.” (RP, P 125, L16-19).

Judge Nelson cited “***increasing age***” as a basis for finding that there has been a substantial unanticipated change of circumstances.

This fact is one which could be clearly anticipated by a reasonable

man. This reasoning is arbitrary and unsupported.

Judge Nelson next states that “*potential disabilities*” loom. Who’s? What ? Where? When? These matters, although testified to, generally were not supported in any way by Mr. Mullan with medical testimony. In fact he is working and will continue to work. This finding of “potentiality” is not a substantial change which could not have been anticipated at the time of the decree. This reasoning is arbitrary and unsupported by the record.

Judge Nelson next states that Respondent’s “*lack of a contract*” is the basis for continuing spousal maintenance as ordered by Judge Stone.

Mr Mullan’s contract did not terminate at the end of the fishing season of 2006. There was no testimony to that effect.

Ex 18 is a copy of a contract form prepared for 2003 and re-executed in 2004 and 2005. (RP, P93, L1-240). Mr Mullan works on a one year contract. There will be no determination until the new contract is signed at the end of the season as it has been in each of his past 38 years he has served as a chief engineer. If the court is retroactively retiring Mr Mullan he still has not paid maintenance for more than a year.

This reasoning is arbitrary and unsupported by the record.

Judge Nelson stated that *“neither party should be expected to work in order to provide the other with spousal maintenance”*.

Judge Stone found that this expectation was appropriate given all of the statutory factors present in this case. Particularly regarding the Petitioner, who had not worked during the marriage, was unable to be employed and had no income other than that which she shared with her husband.

This reasoning is arbitrary and unsupported by the record.

Judge Nelson next found that Petitioner *“does share expenses with another person”*.

Perhaps this is the fly in the ointment. Our legislature has provided that this result can be circumscribed by the divorce court upon specific direction. Judge Stone gave such direction, recognizing that this marriage had required unique investments by both parties. Petitioner is the one without an economic engine to carry her through the rest of her life. She has spent her matrimonial and life experience currency.

Petitioner’s relationship with Mr McClure did not advance Petitioner’s economic circumstances in any material way. She pays very little for the emotional support she finds with him. It is not the

unanticipated substantial change required by our courts.

Judge Nelson's reasoning is arbitrary and unsupported by this record.

Judge found it significant in her oral opinion the fact that Petitioner had "*she has been gifted land as well as other things*".

The land together with the modular home built on it resulted in an equity to Petitioner of less than \$25,000.

It is not reasonable to hold that the sale of one house and the purchase of another, under these facts is a basis for modification.

This reasoning is arbitrary and unsupported by the record.

The termination of this statement , i.e. "*as well as other things*" is totally unsupported by any evidence in this case.

Next, Judge Nelson finds that Mr Mullan's "*earnings were going to be stopped*". There is no support for this statement anywhere in the record.

This reasoning is arbitrary and unsupported by the record.

Finally Judge Nelson found that; "*[b]oth parties received assets in property division* ".

Respondent/Cross Appellant argued both then and now that:

- a. “In light of the significant assets already awarded to the wife, and the significant assets she had acquired since the divorce, the trial court properly reduced the maintenance award.”
- b. “The trial court [Judge Nelson] found that the wife had already received \$300,000 in assets as part of the property division.”

Judge Nelson appears to have accepted these arguments advanced by Respondent. This is not a valid basis for reduction or modification of spousal support without more.

c. Respondent Allegations of Unanticipated Changed Circumstances.

Respondent raises the following arguments in support of the court’s ruling reducing spousal support, even though he made no such motion and there are no facts to support a finding of a substantial, unanticipated change in circumstances.

This allegations are designed to address his ability to pay spousal maintenance or evoke sympathy. In either event they do not constitute any change since the decree justifying a modification.

Respondent's Allegation: 1

- “Even though nothing preventing her Marceil choose not to work”: (Resp. Brief, P 8):
- (RP, P34, L 24).

FACTS:

Judge Stone found that “The Petitioner is without job skills or training. Retraining will not significantly improve her employability..” (CP P4, L13). At the time of trial she was 61 years of age.

She is now 69 and has the same health problems and lack of training. It is not reasonable to contend that she could work. Yet, Respondent continued to pound this issue. (RP, P 39 -40).

These facts have not changed since the prior trial except both parties are older and Mr Mullan earns much more money. The industry which Mr Mullan to decry as failing, continues to produce greater and greater earnings each year. (RP, P 72, L 17-20; P 73, L9-12). while his

income soars each and every year over the past eight years. (CP, P , L).

Respondent's Allegation: 2

- “Respondent has no home”: (RP 74, 15; 84, L1);
- “Respondent can not afford to buy home”: (Resp. Brief, P 8);
- “Respondent has to live with son because he has no home to come home to”: (Resp. Brief, P 8, 25).
- “He lives on fishing vessel”: (Resp. Brief, P 8);
- “He is forced to live with less than people did after Katrina”: (Resp. Brief, P 8);
- “Continues to work so he can save to build home for himself”: (Resp. Brief, P 9)

FACTS:

These statements are disingenuous and not supported by the evidence. Mr Mullan could live in one of his rentals during the brief periods when he is home, but chooses not to. (RP, P 99, L 21). More importantly, Mr Mullan's life aboard the fishing vessel has remained unchanged since he started 38 years ago.

He was awarded two homes, which he chooses to rent out instead of living in them or using their substantial equity to purchase a new home. (RP, P 99, L 19 - 21).

Judge Stone endeavored to divide the parties property 50/50. (RP 24, L 23). Mr Mullan was awarded \$280,000 worth of property in the 1997 decree. (RP 84, L1). It included the equities in two houses adjacent to the family home in the old Town District of Tacoma. (RP 84, L1).

At the time of trial he still owned these homes which he used as rentals. (RP 74, L1).

Mr Mullan testified that he continued to own the two home awarded to him in the decree. He stated that they were now worth \$465,000. (RP 97, L 9-15). He did admit that with the land and the value for which he insured them they were worth \$731,000. (RP, P98, L 1-25).

Mr Mullan is not forced to live with his son but that he chooses not to live in one of his homes or sell them and buy another home. (RP, P99, L 19- 24).

Instead, he chooses to live on the vessel were he preforms maintenance work when it is in port in Seattle. (RP 91, L 11 - 13). He stays at his youngest sons home during these four to six week periods off

during the summers. (RP 84, L 1- 3). While at his sons home he travels to see his daughter and grandchildren. (RP 84, L 3-6)

Mr Mullan stated at the modification hearing that he choose not to live in one of these homes or apartments for the short periods of time he is off the vessel. (RP, P99, L 19-21).

These circumstances remain unchanged and Respondent continues to “gild the lily “ in these statements in order to glean favor with the court.

Respondent’s Allegation: 3

- “Respondent is compelled to continue his dangerous work”: (Resp. Brief, P1);
- “Respondent has been forced to work past normal retirement age”: (Resp. Brief, P1).

FACTS:

Respondent has been employed in the same job, in the same industry for thirty eight years. (CP, P72, L 10). He is not a deck hand. He is a chief engineer , he takes care of machinery. (CP, P 72, L 13).This is a mater of choice. (RP, P , L).It is obviously very lucrative.

Judge Stone, in his oral opinion stated,

“I respect the fact that Mr Mullan works hard.” (CP, P 11, L 9).

* * *

“At any rate, Ms. Mullan is entitled to substantial maintenance, but she isn’t entitled to all the benefits that he might gain by spending ten months a year aboard ship and is reading magazines and watching television and getting his shaving gear on shore or what ever he gets.” (CP, P 11 L 18-22).

The nature of his job has changed little over his 38 year career. It has remained virtually unchanged during the past eight years. He continues to build on experience and knowledge, the foundation of which was built during his 35 year marriage to Petitioner. During the marriage he acquired skills that now allow him to earn \$250,000 a year and he does not want to share these earnings with the woman who was his hand maid to this success.

Mr Mullan chooses to continue to work as a chief engineer. (RP, P 99, L 25).

These facts remain unchanged as to Mr Mullan’s work life.

Respondent’s Allegation: 4

- “No significant increase in earnings”: (RP 97).

- “No longer has ability to pay spousal maintenance”: (Resp. Brief, P 9)

Mr Mullan’s income was found to be \$90,000 or \$7,500 per month at the time of the decree. (CP, P4, L12). In 2005 his annualized income was \$324,000 or \$27,000 per month gross. (RP, P96, L2-16). This is a 360% increase in Mr Mullan’s income.

On his Financial Declaration filed 6/30/06 he set his gross income forth at \$15,280. He provided no proof of this figure which had to be an annualization at best because there is no indication that it included a percentage of the annual catch which is determined in December.

Since the decree Mr Mullan has earned \$1,232,500. His 60% of that figure is \$739,500.(RP P100, L11-24). That is an average of \$154,063 per year.

These statements are contrary to the verified facts from the record which indicate that Mr Mullan has enjoyed substantial increases in his earnings. This evidence belies any substantial change in circumstances.

Respondent’s Allegation: 5

- “Unable to provide for his own old age”: (Resp. Brief, P1);

- “Unable to save largely due to maintenance payment”:
(Resp. Brief, P 8);
- “Unable to save for significantly for retirement”: (Resp. Brief, P8)

FACTS:

Mr Mullan has been making significant income from his profession as an engineer, Social Security and rental income not to mention investment returns. He see a way to attempt to take a second “bite” out of the apple.

He attempts to draw attention to the sum of money he has paid in the past for maintenance yet ignores the even large sums that he has had during this same period of time. However, comparing income is not the appropriate factor under the statute. Some people earn larger incomes than others. The issue here is has there been any real and substantial change in the circumstances of the parties justifying modification, even if that is the properly procedural remedy.

Mr Mullan’s contract, which he renews each year produces a guaranteed income of \$96,000 for eight month fishing, and \$120,000 for ten months fishing. CP 94, L 7-10. Mr Mullan had made \$201,000 in

2004, or \$16,765 a month (RP, P 95, L 15). and \$135,000 during the first five months of 2005 or \$27,000 per month. (RP, P 96, L 14 - 17).

Mr Mullan started drawing social security in January 2006 at the rate of an additional \$23,364. or \$1,947 per month. (RP, P 76, L 19-23).

He also realizes more than \$1,111 per month rental income. (RP, P 75, L 21-230), and \$1,947 from Social Security. (RP, P 76, L 19 - 21).

Mr Mullan did not file a Financial Declaration in the modification proceeding until 6/30/06, the first day of trial. In that Declaration he disclosed for the first time a gross monthly income of \$15,280. or a net of \$11,864. (CP, P-----). These figures for the first six months of 2006 were not for a full year and did not include a percentage of the catch which is paid at the end of the season. (RP, P 43, L 1).

Mr Mullan states that what he doesn't expend on living expenses, he is "...putting away for my retirement." (RP, P 100, L 23-24).

In addition to his real estate holdings Mr Mullan has been able to deposit \$60,000 in his 401 K and start a Roth IRA. (RP, P 103 -105).

This does not warrant a finding of a substantial change in circumstances since the parties had the same pattern of spending and savings during their marriage.

Respondent's Allegation: 6

- “Works 17 hour days, 7 days a week, 24 hours a day”:
(Resp. Brief, P 8).
- “Has to spends most of the year on vessel”: (Resp. Brief, P
8)

FACTS:

Judge Stone, in his oral opinion, acknowledged the same life aboard the vessel that Mr Mullan testified to in the modification hearing.

“Mr Mullan lives a pretty plain life out on a boat. He spends a lot less on himself. He spends ten month a year aboard ship. He reads magazines and watches television.” (CP, P31, L9-31)

In his Findings, Judge Stone found that; “The Respondent is and has been the chief engineer on a fishing boat for many years”. (CP , P4, L11).

Respondent endeavors to create the impression that a industry he has been employed in for 38 years is difficult and dangerous. This is why he is paid the big money.

Yet, all of these factors were present at the time of the decree. There have been no substantial changes in these circumstances. Clearly none other than Respondent choosing to continue to earn more than \$200,000 per year as a chief engineer.

His requests to “cut him some slack” is not the way in which

society has chosen to provide for the silent partner to the marriage union, particularly when she has forgone all materialistic endeavors to provide her husband with family and home.

Respondent's Allegation: 7

- "I've had other surgeries." (RP, P83, L4).
- "I've had previous surgery on my back": (Resp. Brief, P 9)

FACTS:

Respondent mentioned his back, left and right knees and a joint in his finger, but there was no statement concerning the status of these injuries, when they occurred or if they had or would have any effect on his work life, or whether they predated the divorce. (CP, P 83).

There was no testimony as to whether these injuries were work related for which benefits were available, nor was any medical testimony or documentation offered.

Mr Mullan testified that he had back surgery for a herniated disk about twelve years ago. (RP 82, L15). This predate the decree.

Judge Stone acknowledged this problem and the fact Mr Mullan had money awarded to him set aside in the event of further back surgery.

(CP, P25,L 3-7). Judge Stone awarded him these proceeds of \$8,824 as his separate property for this purpose. (CP, P 24, L24). No testimony was offered as to the use of these funds.

There has been no change in circumstances owing to any of these health conditions, in fact Respondent does his job. (RP, P 83, L 15).

Spousal maintenance is modifiable. It should be set on the facts at the time of the hearing not some future projection. Entertain projections and self serving predictions leads to abuse.

The following allegations are designed to suggest that Petitioner/Cross Respondent does not have a need for any further spousal support.

Respondent's Allegation: 8

- “Marceil no longer has need for spousal support”: (Resp. Brief, P 7 - 8).

FACTS:

Subsequent to the divorce Mrs Mullan had an income of \$3,700 per month, or 40% of Mr Mullan's crew share, which ever was larger.

Following cessation of spousal maintenance payments from

Respondent her income has fallen to \$1200. from Social Security. (RP, 35, L 9 -10). She also has a modest income from her investments of \$668 per month average. (RP, P56, L 10-14).

She did

Respondent's Allegation: 9

"Received nearly half a million dollars": (Resp. Brief, P 1)

FACT:

1. Amount of Maintenance Paid under the Decree in the Past.

Respondent/Cross Appellant repeatedly point out that he paid his former wife nearly half a million dollars since the date of the decree (2/17/98). (Resp Brief Pg1, 9).

Judge Stone found that Petitioner's efforts in the marriage and her contribution to Respondent's family, home and professional skills and standing were worth 40% of his future earnings and once he retired 50% of the difference between their social security benefits. He awarded her ". . . **40% of his gross earnings as chief engineer, but not less than \$3,750 per month as maintenance**". This was the amount allowed to meet her monthly living expenses. (RP P13).

Between 1998 and 2005, a period of eight years Mr Mullan earned \$1,232,500. (RP P7100, L9). This is a great deal of money to some and not so much to others.

Respondent testified that he had paid his former wife \$493,000 during this eight year period. Petitioner received \$41,507 or \$3,459 per month in 1998; \$52,267 or \$4,356 per month in 1999; \$63,159 or \$5,263 per month in 2000; \$59,600 or \$4,966 per month in 2001; \$69,657 or \$5,805 per month in 2002; \$67,364 or \$5,614 per month in 2003; \$80,400 or \$6,700 per month in 2004; \$100,000 or \$8,333 per month in 2005. (RP, P 76, L 19-22).

During this same period of time Mr Mullan received \$739,500, just from his fishing shares. (RP P100, L11-24).

Judge Stone found that Petitioner was entitled to 40% of Respondent's earning for her contribution to their union. Mr Mullan doesn't think that is fair. Judge Nelson doesn't think that is fair. But the law protects the interests of the former wife to be secure economically based on 37 years of invested effort and sacrifice, every bit as onerous as Respondent's. But he does not want to pay his debt to her.

Our law provides that the needs of the wife are to be reasonably

provided for upon dissolution. Mr Mullan retained his significant earning capacity for as long as he wishes to apply it. Petitioner has no say in that decision. Petitioner should be entitled to a return on her investment unless a substantial change, not anticipated by the parties occurs. No such change has occurred once Judge Nelson found that Judge Stone intended that maintenance be continuous.

Respondent's Allegation: 10

- “Marceil moved to Indiana”: (Resp. Brief, P 7).
- “Marceil purchased half interest in modular home”: (Resp. Brief, P 7)

FACTS:

Judge Stone anticipated the fact that either of these parties might find a *“committed intimate relationship”*. *Soltero v. Wimer* 128 WApp. 364, 115 P.3d 393 (2005). He provided in the decree that remarriage would not automatically terminate spousal support, but would only be one factor in the consideration if a substantial unanticipated change in circumstances had occurred. (CP, P13; P 33, L2-13).

He previewed this provision in his oral statement.

“ . . . [I]t would be almost insulting . . . to automatically assume that a female who remarries or maintains a common household or something automatically betters herself financially.” (CP, P33, L3-7).

There has been no showing by Respondent that Petitioner/Cross Respondent had bettered herself by sharing living costs with another.

Judge Nelson finding reducing Mrs Mullan's maintenance is an abuse of discretion because Mr Mullan did not carry his burden of proof.

Mrs Mullan and Mr McClure share there living expenses half and half. (RP, P35, L17-18).

They purchased a modular home together. (RP, P 26, L23-24).

It was financed with a mortgage for \$72,000 for which each are responsible for half. Her half of the mortgage payment is \$300. per month. (RP, P 27, L5-11).

The modular home was placed upon a seven acre lot in Liberty, Indiana given to Petitioner and Mr McClure by his brother . (RP, P 27, L13-18).

The total value of this property and home is \$125,000 less the

obligation of \$72,000 leaving a gross equity of \$53,000. Her one half of this gross equity would be \$26,500. This is obviously not a wind fall.

At the time of the decree, Mrs Mullan was awarded 50% of the community property after a 37 year marriage. (RP, P , L). Her share was similar to Respondent's, \$280,000.

Although the parties had invested some money in retirement much was spent on accumulating property and raising a family. Judge Stone recognized this in his oral opinion. (CP, P23, L 7-15).

Respondent's Allegation: 11

- "Marceil does not have need because of significant assets already awarded to her in decree": (Resp. Brief, P 22)

FACTS:

Judge Stone knew what assets Petitioner received when he awarded spousal support. Those assets without more does not furnish the change of circumstances necessary in this case.

One of the assets which she received was the family home located next to the two home awarded to the Respondent. It was subject to a mortgage of \$140,000. (RP, P28, L17-18). She sold it in 1999 realizing a

net profit of \$105,000. (RP, P28, L13-18).

The proceeds of the sale were deposited into a retirement account resulting in a current retirement account worth \$127,000. (RP, P32, L 18-21).

She was also awarded a retirement/investment account which had been worth \$68,000. She used some of this fund to meet living expenses and landscaping around her home. (RP, P 33, L 3-11).

The jewelry awarded to her in the divorce had a value of \$10,000. (RP, P34, L 20 -21).

She was also awarded her automobiles. Petitioner/Cross Respondent estimated her present net worth at around \$200,000. (RP, P34, L 24). This is less than at the time of the Divorce but was not advanced by Petitioner as a condition justifying modification.

The assets awarded to Petitioner/Cross Respondent have decreased modestly since the decree, about \$24,000.

Mr McClure has an income of \$860 per month from Social Security and about \$300 per month which he earns working part time as a counterman at a local parts store. He paid tax on about \$21,000 in 2005. (RP, P36, L 3-9).

Petitioner testified that her standard of living was significantly impacted by Respondent's cessation of spousal maintenance payments in 5/05. (RP, P38, L 17).

She also testified that her health was declining and that she was having difficulty walking. (RP, P39, L 22-25).

Respondent's Allegation: 12

"Former wife bought antique cars": (Resp. Brief, P 23).

FACTS:

This statement is unsupported by anything in the record.

**D. PETITIONER'S OBJECTION RE: RESPONDENT'S
ATTEMPT TO AVOID DISCLOSING HIS INCOME**

During his deposition on 6/21/06, Respondent/Cross Appellant made every effort to hide his income by failing to provide documentation and citing lack of memory for his inability to recall his earnings, even from the current years. (RP, P 92, L 2 - 16).

He did not submit a current Financial Declaration until the day of trial when it was too late to question it.

An income of more than \$200,000 was important for Petitioner/
Cross Respondent to establish because it is a clear progression and
demonstrates a growing earning pattern which Mr Mullan established
through out his career. It was also necessary to establish his ability to
continue to pay maintenance in light of the court's choice to precede in
this way.

This pattern was anticipated by Judge Stone in his 1998 Decree.
He awarded Mrs Mullan a percentage of Mr Mullan's income to allow for
both the downside which he predicted and the up side Mrs Mullan felt was
likely in the future.

There has been no substantial change in Mr Mullan's ability to pay
spousal maintenance since the decree. (CP 4, L12).

He cites his frailties and the capriciousness of the fishing industry
and implies that they are fleeting. He has now been in the industry for 38
years.

The following exchange occurred in the trial before Judge Nelson.

MR. CARAHER:

Q. . . . Mr Mullan, you don't know what you made in
2005, . . . ?

A. Probably not exactly, no, because I don't remember.

* * *

Q. You couldn't even give me an estimate?

A. I don't recall.

Q. 2004, you couldn't recall?

A. I don't remember. RP 91, L24 - 92, L8.

When he was shown Ex 38, a copy of his contract with his employer, it bore the signing date June 05. (RP, P93, L1). The forms previous date of 2003 was lined out on the form. This was his current contract. (RP, P93, L 22-24). The terms of the 2003 thru 2005 contract were identical. Ex 38; (CP 93, L 1- 16).

The contract stated that Mr Mullan was eligible for a crew share percentage of “. . . 2.5% percent or \$400 a day, whichever is greater”. RP 94, L7-10.

The contract's base rate language produces a guaranteed income of \$96,000 for eight month fishing, and \$120,000 for ten months fishing. CP 94, L 7-10.

Mr Mullan had made \$201,000 in 2004, or \$16,765 a month (RP, P 95, L 15). and \$135,000 during the first five months of 2005 or \$27,000

per month. (RP, P 96, L 14 - 17).

Mr Mullan started drawing social security in January 2006 at the rate of an additional \$23,364. or \$1,947 per month. (RP, P 76, L 19-23).

This income is in addition to his earnings from fishing and his rentals.

Mr. Mullan did not file a Financial Declaration in the modification proceeding until 6/30/06, the first day of trial. In that declaration he disclosed for the first time a gross monthly income of \$15,280. or a net of \$11,864. (RP, P 192 - 193). These figures for the first six months of 2006 were not for a full year and did not include a percentage of the catch which is paid at the end of the season. (RP, P 43, L 1- 7).

The trial court refused to fix Respondent's income as supported by his own testimony. In the Findings of Facts dated 09/05/06 at ¶ 1.7 Judge Nelson deleted the language from the proposed findings, “. . . [Mr Mullan] continues to earn substantial income from his commercial fishing where he earned in excess of \$200,000 in 2006.” (CP, 214, L 3-4).

In paragraph 1.10, the Judge Nelson did find;

“Respondent has earned more than \$100,000 per year in the interim with petitioner receiving 40% and Respondent receiving 60%”. (RP, P 214, L 11-12).

This finding of fact bears no relation to the actual testimony. It finds an income 100% lower than that shown by the *undisputed* evidence. (RP, P 95 - 96).

Mr Mullan has not shown any unanticipated substantial change in establishing the threshold for modification of the decree. In fact, his income has more than doubled since the \$90,000 income found by Judge Stone. The reduction granted by Judge Nelson is unsupported and therefore an abuse of discretion. *In re Marriage of Jennings*, 138 Wn.2d at 625-26; *In re Marriage of Spreen*, 107 Wn. App. at 346.

H. UNANTICIPATED CHANGES ALLEGED BY RESPONDENT:

Respondent sold the same arguments at the modification hearing that he had at the trial before Judge Stone. Judge Stone cut through these tactics and recognized that this was a long term relationship (35 years) and that their partnership had allowed the Respondent to advance himself in a trade while Petitioner supported his career, working behind the scenes, and raised their family. Judge Stone saw this as a partnership in every sense of the word.

Respondent promoted himself in his trade, gaining experience,

networking, pay increases and otherwise bettering himself as a chief engineer. Petitioner on the other hand left behind education, work experience, networking, pay increases, except those which came vicariously through her husband and partner.

Judge Stone stated in his oral opinion:

“They’re (parties) to be commended for accumulating quite a bit of property. . . .” (CP 23, L9).

“ . . . I got them each within a couple thousand dollars of \$280,000 which got us close to being even.” (CP 33, L16-18).

Judge Stone stated in his findings that;

“The parties have been married 35 years during which time the Petitioner has been primarily a housewife and mother.” (CP 4, L9).

“The Petitioner was responsible for raising the parties three children. . . .” (CP 4, L11).

“The Petitioner is without job skills or training.” (CP 4, L12).

“Retraining will not significantly improve her employability.” (CP 4, L13-14).

“The parties have acquired significant assets and the parties have

an established life style.” (CP 4, L14).

“Petitioner has the need for maintenance and the Respondent has the ability to pay maintenance at the rate of 40% of his gross earnings but not less (than) \$3,750 per month” (CP 4, L15-16).

Respondent hoped to have a second bite at the apple and have a new judge negate the previous findings.

In rearguing the facts Mr Mullan’s counsel ignored the binding effects of Judge Stone’s previous findings and the modification standards set out in RCW 26.09.170.

Respondent was required to prove by a preponderance of the evidence that there had been a material change in circumstances since the decree which could not have been anticipated by the parties at the time of the decree. *Holaday v. Merceri* 49 Wn App. 321, 742 P.2d 127 (1987).

G. CONCLUSION

A spousal maintenance decree may be modified following the filing of a Petition for Modification (RCW 26.09.170). A modification or termination of spousal maintenance may only occur upon the showing of a

substantial change of circumstances. RCW 26.09.170. This modification may be made only upon an *uncontemplated* change of circumstances occurring since the former decree. *In re Marriage of Zander*, 39 Wn.App. 787, 790, 695 P.2d 1007 (1985).

The determining issue is:

“Could and should the facts now relied upon as establishing a change in the circumstances have been presented to the court in the previous hearing?” *Lambert v. Lambert*, 66 Wn 2d 503, 509, 403 P.2d 664 (1965).

Whether such a change has occurred rests within the sound discretion of the trial judge and will only be reversed upon a showing of a manifest abuse of that discretion. *Lambert*, at 508, 403 P.2d 644.

The court hearing the modification petition should also examine the original dissolution proceedings in order to determine whether or not a substantial change in circumstances has occurred. *Holaday v. Merceri* 49 Wn App. at 327.

In *Wagner v. Wagner* 95 Wn.2d 94, 98, 621 P.2d 1279, 1281 - 1282 (1980), our Supreme court held that.

“Neither the trial court nor the Court of Appeals found the

existence of a substantial change of circumstances which was not within the contemplation of the parties. ***The trial court decided only that the conditions of the parties did not warrant continuation of alimony.*** The Court of Appeals found substantial changes of circumstances, but all were within the contemplation of the parties at the time the decree was entered. Mr. Wagner never argues otherwise. Thus, unless the parties by their agreement established an independent test which abolished the generally accepted prerequisite, **the alimony should not have been modified.** *Holaday v. Merceri* 49 Wn. App. 321, 331, 742 P.2d 127, 132 (1987).

In *Spreen v. Spreen* 107 Wn.App. 341, 28 P.3d 769 (2001), the trial court was reversed for relying on factors which were unfounded and arbitrary.

“But after citing these statutory factors, the court turned to other, nonstatutory factors to justify only one additional year of maintenance. ***First, the court stated that six years of maintenance was all that Marie was “entitled to.” CP at 83. But the court did not base this on Alan's ability to pay, Marie's need in light of her medical condition, or any other recognized factor. Thus, the court's six-year limit on maintenance is unfounded and arbitrary.*** Washington law does not limit how long a spouse may receive maintenance but allows a court to order maintenance “for such periods of time as the court deems just.” RCW 26.09.090. What is a reasonable length of time for a divorced spouse to become employable and provide for his or her own support, so that maintenance can be terminated, depends on the particular facts and

circumstances of each case. *Endres v. Endres*, 62 Wn.2d 55, 58, 380 P.2d 873 (1963). In some cases, a lifetime award of maintenance may even be just. See *In re Marriage of Sheffer*, 60 Wn.App. 51, 55-56, 802 P.2d 817 (1990); *In re Marriage of Tower*, 55 Wn.App. 697, 703-04, 780 P.2d 863 (1989); *In re Marriage of Morrow*, 53 Wn.App. 579, 584-89, 770 P.2d 197 (1989)

1. Affirm the trial court's ruling that spousal maintenance was permanent and impose a judgement for the past due spousal support.
2. Reverse the trial court's error for its failure to make a finding as to the amount of Respondent's present income.
3. Reverse the trial court's error in modifying spousal support without establishing a substantial change in circumstances occurring since the divorce.
4. Reverse the trial court's error in failing to consider the relevant statutory factors which had or had not substantially changed since Judge Stone's findings and decree were entered.
5. The court should reverse Judge Nelson's ruling reducing

Spousal Maintenance and set Spousal Maintenance at 40 percent of Mr. Mullan's gross annual income as provided for by Judge Stone.

6. Reverse the trial court's error in failing to allow Petitioner's attorney to fully examine Mr Mullan with regard to his income, and discovery abuses.
7. Reverse the trial court's error in failing to award attorney fees based upon the need and ability standard and for respondents failure to make discovery.

Dated this 7th day of May 2007.

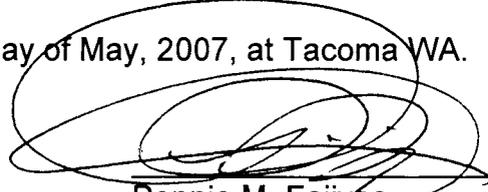
A handwritten signature in cursive script that reads "James M. Caraher". The signature is written in black ink and is positioned above the printed name and title.

James M Caraher WSBA #2817

Attorney for Petitioner/Cross Respondent

1 Office of the Clerk
2 Court of Appeals, Division II
3 950 Broadway, Ste 300
4 Tacoma, WA 98402

5 SIGNED this 7th day of May, 2007, at Tacoma WA.

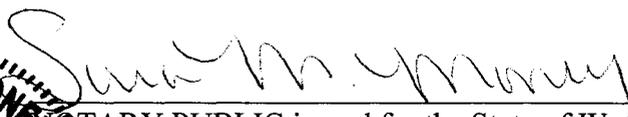
6 
7 Pennie M. Faiivae

8
9 STATE OF WASHINGTON)
10) SS.
11 COUNTY OF PIERCE)

12 I certify that I know or have satisfactory evidence Pennie M. Faiivae is the person who
13 appeared before me and said person acknowledged that he/she signed this instrument and
14 acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in the
15 instrument.

16 Dated: 05/07/07



17 
18 NOTARY PUBLIC in and for the State of Washington
19 Residing at Tacoma
20 My commission expires: 7/30/07