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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS NO. 48698-9-II

STATE OF WASHINGTON

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

BY 
DEPUTY

In re the Marriage of
ROYAL M. FISH, SR.,
Appellant/Cross-Respondent,
and
LISA ANNE FISH,
Respondent/Cross-Appellant.

OPENING BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The court abused its discretion by ruling that the modification of Royal Fish's maintenance obligation should commence beginning June 1, 2015.
2. The court abused its discretion by acknowledging, but failing to expressly find that Royal Fish involuntarily lost his employment and employment income on December 5, 2014.
3. The court erred by concluding/finding that Royal Fish was not credible.
4. The court erred by finding that Royal Fish had the ability to pay maintenance from December 2014 to May 2015.
5. The court erred by finding in the Order on Show Cause re Contempt/Judgment, Paragraph 2.4 **Past Ability to Comply With Order**, which states:

ROYAL FISH had the ability to comply with the order as follows:

Royal Fish had the ability to comply with the order as follows, as set forth in the verbatim report of proceedings of the decision of the Honorable Jennifer A. Forbes, Kitsap County Superior Court dated January 15, 2016, is attached as **Exhibit "B"** and incorporated herein by this reference, as though fully set forth herein.

Royal Fish had funds with which to pay spousal support and willfully and intentional [sic] failed to pay spousal support to Lisa Fish.

6. The court erred by finding in the Order on Show Cause re Contempt/Judgment, Paragraph 2.5 **Present Willingness and Ability to Comply With Order** which states in pertinent part:

ROYAL FISH has the present ability to comply with the order as follows:

Royal Fish has sufficient financial resources to pay spousal maintenance owed to Lisa Fish in the total amount of \$19,000 plus accrued interest. (See **Exhibit B**, as though fully set forth herein).

7. The court abused its discretion in failing to award temporary maintenance to Royal Fish from January/February to May 2015 in an amount to equalize the parties' incomes.

8. The court abused its discretion by retaining jurisdiction on the maintenance issue, and only suspending rather than terminating Royal Fish's maintenance obligation.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court abuse its discretion by ruling that Royal Fish's maintenance obligation should be modified commencing June 2015 because that was when he raised the issue of not being able to work due to medical reasons, when he commenced this modification proceeding on January 21, 2015, because he had involuntarily lost his employment and employment income on December 5, 2014?

2. Did the court abuse its discretion by ruling that Royal Fish's maintenance obligation should be modified commencing June 2015 because that was when he raised the issue of not being able to work due to medical reasons, when the Social Security Administration found that he had become disabled on December 5, 2014, and he commenced this modification proceeding on January 21, 2015?

3. Did the court abuse its discretion by acknowledging that Royal Fish involuntarily lost his employment on December 5, 2014, as he had alleged in his petition, when the evidence was undisputed that his contract with Bay West, LLC officially ended, and his wages ended, on that date, but refused to make an express finding to that effect?

4. Does substantial evidence support the court's belief that Royal Fish was not credible because "he filed a petition saying he can't work" when he did not file such a petition, but rather filed a petition saying that he had involuntarily lost his employment and employment income?

5. Does substantial evidence support the court's finding that Royal Fish did not pay maintenance for the month of December, 2014?

6. Is the court's finding in Paragraph 2.4 of its Order on Show Cause re Contempt/Judgment supported by substantial evidence?
7. Is the court's finding in Paragraph 2.5 of its Order on Show Cause re Contempt/Judgment supported by substantial evidence?
8. Does substantial evidence support the court's finding that Royal Fish had the ability to pay maintenance from December 2014 to May 2015, when: (1) he involuntarily lost his employment on December 5, 2015; (2) he paid maintenance in December 2014; (3) the Social Security Administration found that he became disabled on December 5, 2014; (4) and the only monies he had from which to pay maintenance were the net sale proceeds he received from the sale of property awarded to him in the parties' Decree of Dissolution and a bonus, accrued vacation pay, and a tax refund from earnings which had previously been used to pay maintenance?
9. Did the court abuse its discretion by failing to award temporary maintenance to Royal Fish from January/February to May 2015 in an amount to equalize the parties' incomes?
10. Did the court abuse its discretion by retaining jurisdiction and suspending, rather than terminating, Royal Fish's maintenance obligation based on its belief that there was a potential he might go

back to work when there was no evidence that he might do so?

III. STATEMENT OF THE CASE

Royal and Lisa Fish¹ were married on October 26, 1979. The parties separated on February 19, 2013. Their children were grown and no longer dependent on either of them. The parties were married for 33 years. CP 322, 325; 01/04/16 RP 25, 93.

Lisa works for Safe Boats International, LLC. CP 898.

When Royal retired from the Navy in 1998, the Department of Veterans Affairs (V.A.) rated him at 60% disabled. 1/04/2016 RP 73, 85, 94. Royal suffers from (1) Multilevel Degenerative Disc Disease and Degenerative Arthritis of the lumbar spine, (2) Osteoarthritis Bilateral Hips, and (3) Degenerative Joint Disease in his knees. 1/04/2016 RP 94-95, 104-105. In 2000 or 2001, after Royal developed Transverse Myelitis at the T 10 spinal level, 1/04/2016 RP 95-96, the V.A. rated him at 90% disabled. 1/04/2016 RP 28, 73, 96, 155-156; CP 824-825, 912.

These are all degenerative diseases that get worse over time. 1/04/2016 RP 98-99, 115,156.

¹ For ease of consideration Royal Fish will be referred to as "Royal" and Lisa Fish will be referred to as "Lisa". No disrespect is intended to either party.

When the parties' separated, Royal was working on a contract basis with BayWest, LLC, as its Quality Control and Explosive Safety Officer, and as an unexploded Ordnance Technician, under its task order at Eglin Air Force Base, in Florida. 1/04/2016 RP 96-97. BayWest, LLC is an environmental cleanup company that clears explosive munitions from Federal installations (i.e. military bases) under Federal contracts through the Army Corp of Engineers. CP 814.

Lisa sought a temporary order equalizing the parties' incomes. 1/04/2016 RP 97. Applying the mandate of *In re Marriage of Rockwell*, 157 Wn.App. 449, 238 P.3d 1184 (2010), that in dissolving a long term marriage, the court must put the parties in roughly equal financial positions for the rest of their lives, the court granted temporary maintenance to Lisa in which it equalized the parties' net incomes. CP 900, 915; 01/04/16 RP 29-31.

Again, applying the mandate of *In re Marriage of Rockwell, supra*, when the parties mediated a settlement of their dissolution proceeding, they agreed that Royal would pay maintenance to Lisa in an amount which would equalize their incomes, based on what their incomes were at that time. CP 836, 841; 01/04/16 RP 96. This maintenance obligation was based on the current earnings of the

parties, CP 835, with the intent to “put the parties in roughly equal financial positions for the rest of their lives.” 1/04/2016 RP 97-99, 158; CP 814, 822, 825.

The Decree of Dissolution required Royal to pay Lisa maintenance in the amount of \$3,800 per month. CP 314, 332.

Royal's military retirement income was divided equally between the parties as an asset (but included as additional maintenance until the Order for Division of Military Retirement was processed by DFAS). CP 314; 330-331.

Both parties recognized that Royal's earnings were based on government contract work, and unless renewed, would end when his work under that contract ended. 01/04/16 RP 39, 98; CP 814. They also both recognized that Royal's health condition was degenerative and likely to get worse over time. 01/04/16 RP 35, 97-99. According to the Respondent's Trial Brief, CP 173:

Based on Royal's claims that his Bay West position was precarious and there likely would be no work available to him after June 2014, the parties agree that spousal maintenance could be reviewed upon either party's loss of income for involuntary loss of employment or for medical reasons.

Accordingly, Paragraph 3.7 of their Decree of Dissolution, entered on June 13, 2014, CP 333 provided in pertinent part:

Spousal maintenance may be reviewed earlier upon either party's loss of their employment income whether occurring as a result of involuntary loss of employment or for medical reasons with such circumstances constituting a substantial change of circumstance allowing said review.

See also, CP 314. When the final orders were entered in their dissolution proceeding, Royal had been working fifty (50) hours per week. 1/04/2016 RP 99. His maintenance obligation of \$3800 per month was calculated on what he was earning at that time. 1/04/2016 RP 153-154; CP 314, 815.

During the first week of September, 2014, his overtime stopped. Even though he was only working forty (40) hours per week, and had lost \$2,500 per month in income, he continued to pay his maintenance obligation. 1/04/2016 RP 99-100; CP 815.

Royal's contract and wage compensation ended when the field work he was performing as part of Bay West's task order was completed on Friday, December 5, 2014. 1/04/2016 RP 100-101; CP 158-159; CP 191-192, 885-886. This was an involuntary loss of employment and employment income. 1/04/2016 RP 157; CP 192-193, 203, 834-835, 885-886.

Even after Royal knew that he was going to involuntarily lose

his employment, he paid maintenance for the month of December, 2014. 1/04/2016 RP 130, CP 829.

When Royal involuntarily lost his employment and employment income on December 5, 2014, Bay West hoped that it could put Royal back to work, 1/04/2016 RP 102, and continued to provide Royal with his insurance benefits for 90 days until March 5, 2015, at which time Royal was put on inactive status and his insurance benefits ended. CP 158-159, 192-193, 885-886.

After waiting through the Christmas holidays to see if Bay West might have another job for him, Royal initiated this Petition for Modification on January 21, 2015, based on his involuntary loss of employment and employment income. CP 4, 801. His income was insufficient to meet his monthly expenses. CP 815, 364-368.

Although Royal testified that he did not seek any other job opportunities after he was involuntarily terminated on December 5, 2014, 1/04/2016 RP 145-146, there is no evidence that any other job opportunities were available---particularly for someone with Royal's rather unique job skills. Bay West did not communicate any other job opportunity to Royal after December 5, 2014, 1/04/2016 RP 103, 155, 170; and has had no open positions for a person with Royal's job classifications since his termination. CP 159, 886.

Royal had no earnings after December 5, 2014. He did receive a bonus in the amount of \$622.99 on March 13, 2015 for his work in 2014. He also received his accrued vacation pay in the amount of \$3,927.28 and his income tax refund for 2014 in the amount of \$13,157.00, on May 29, 2015, for his work and earnings in 2014. 1/04/2016 RP 101-102, 119-120, 155, 835; CP 338.

His only other income was his \$750.00/month in military retirement income which had been awarded to him as an asset in the Decree of Dissolution, CP 314; 330-331, and his disability income in the amount of \$1857.34/month, totaling \$2,607.34 per month. This income was not sufficient to meet his monthly expenses, CP 364-368---much less, to pay maintenance of \$3800 per month. 1/04/2016 RP 106.

Royal's health situation continued to deteriorate. He could not climb or help load trucks. 1/04/2016 RP 103-106, 127. As a result, Royal had his health condition re-evaluated. 1/04/2016 RP 107. In June of 2015, Royal notified the court and Lisa that he could not find other employment due to medical reasons, and that his doctor had advised him that he would "not be able to work in any capacity in the future" and that he was "permanently disabled." CP 825, 835.

On August 17, 2015, the Social Security Administration found that Royal was 100% disabled, and thus unable to work as of December 5, 2014. 1/04/2016 RP 111, 116; CP 776. The trial judge recognized the difficulty inherent in obtaining such a determination, and found the Social Security Administration's finding "compelling." CP 220; See also, 2/19/2016 RP 9.

42 U.S.C.A. § 1382c(3)(A) defines a "disabled" individual, as

... an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

42 U.S.C.A. § 1382c(3)(B) goes on to state:

For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the

preceding sentence (with respect to any individual), work which exists in the national economy” means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Pursuant to 42 U.S.C.A. § 423, and as reflected in CP 776:

To qualify for disability payments, you must be disabled for five full calendar months in a row. The first month you are entitled to benefits is June 2015.²

Accordingly, the Social Security Administration awarded Royal an additional disability payment of \$2,185 per month beginning June of 2015, 1/04/ 2016 RP 114, even though it found that he had been disabled since December 5, 2014. He did not receive those payments until after August 23, 2014. CP 776-777.

IV. ARGUMENT

A. The Court Abused Its Discretion By Commencing The Modification As Of June, 2015 Because That Was When Royal Fish Raised The Issue Of His Inability To Work.

In *Spreen v. Spreen*, 107 Wn.App. 341, 346, 28 P.3d 769 (2001), this Court held:

We review a modification order for substantial supporting evidence and for legal error. *In re Marriage of Stern*,

² Coincidentally, June 2015 is the date the court used to commence the modification.

68 Wash.App. 922, 929, 846 P.2d 1387 (1993). Substantial evidence supports a factual determination if the record contains sufficient evidence to persuade a fair-minded, rational person of the truth of that determination. *Bering v. SHARE*, 106 Wash.2d 212, 220, 721 P.2d 918 (1986).

RCW 26.09.170(1) provides in relevant part:

Except as otherwise provided ... the provisions of any decree respecting maintenance or support may be modified:(a) Only as to installments accruing subsequent to the petition for modification....

In a situation warranting modification of child support or alimony, the court may make the modification effective either as of the time of filing the petition or as of the date of the decree of modification, or as of a time in between, but it may not modify the decree retroactively. *In re Marriage of Shoemaker*, 128 Wash. 2nd 116, 121, 904 P.2d 1201 (2000); *In re Marriage of Drlik*, 121 Wn.App. 269, 279, 87 P.3d 1192(2004)

However, a trial court's discretion in the exercise of its equitable powers to set the commencement date is not unfettered. The trial court's power can only be exercised within the "framework of established 'equitable principles'." *In re Marriage of Shoemaker*, 128 Wash. 2nd at 123. As previously noted, Paragraph 3.7 of their

Decree of Dissolution, entered on June 13, 2014, CP 333, provided
in pertinent part:

Spousal maintenance may be reviewed earlier upon either party's loss of their employment income whether occurring as a result of involuntary loss of employment or for medical reasons with such circumstances constituting a substantial change of circumstance allowing said review.

The evidence is undisputed that Royal involuntarily lost his employment and his employment income on December 5, 2014, resulting in the substantial change of circumstances contemplated by the decree. CP 192-193, 885-886; 1/04/2016 RP 22-24, 35, 98-99. When he was not re-hired, as he had hoped, Royal commenced this Petition for Modification on January 21, 2015, based on his "involuntary loss of employment" and his corresponding "loss of [his] employment income". CP 4, 801.

Since Royal testified that he hoped to be rehired after being terminated from his job, the court below found that Royal was not "credible". According to the court, CP 220-221:

Interestingly, Mr. Fish had taken the position early on or in his testimony ---which was somewhat contradictory, which is one of the reasons his credibility is hard for me to accept--- that when he no longer was

working at his place of employment that he would---didn't go and seek benefits because he thought he would get rehired, so then he filed a petition saying he can't work. So I don't really find it believable that he truly was not able to find employment; however, his disability, I think has been established.

The court, however, was mistaken. Royal did not file a petition for modification "saying he can't work". Rather he alleged that he had "lost his employment income as a result of an involuntary loss of employment", which was a substantial change of circumstances, as provided in Paragraph 3.7 of the Decree of Dissolution. CP 4.

After filing his petition, Royal was re-evaluated, and it was determined that he was 100% disabled and unable to work. CP 825, 835. The Social Security Administration then found that he had been disabled since December 5, 2014, CP 776, the same day he had lost his job with Bay West.

But, whether Royal could find employment *after* he involuntarily lost his employment and employment income on December 5, 2014, is immaterial. That was not the basis for his modification. The fact that the Social Security Administration subsequently found that he was disabled and could not work as of

that same date, CP 776, was the reason he could not find employment *after* he involuntarily lost his employment and employment income.

These were not facts based on his credibility. 2/19/2016 RP 8-9; CP 216, 221.

Yet, although the Social Security Administration found that Royal was disabled as of December 5, 2014, CP 776, the court indicated in her oral ruling, that she would not commence the modification until June, 2015, because that was when Royal first raised the issue of his disability with the court, 1/4/2016 RP 143-144; CP 221-222, 824-825. Section 2.2 of the Findings/Conclusions On Petition for Modification of Spousal Support states, CP 215:

The Decree of Dissolution, entered on June 13, 2014, at Paragraph 3.7 shall be modified due to the fact that, commencing June, 2015, the issue of not being able to work due to medical reasons was raised in this court.

This was an abuse of the court's discretion. Its reason for using this date to commence the modification is untenable, and/or based on an incorrect legal standard. *Spreen v. Spreen, supra*.

The fact that Royal did not raise the issue of his inability to work until June, after he had been re-evaluated and found to be

incapable of working, CP 825, 835, is of no consequence, and was thus not a proper basis for exercising the court's discretion as to when the modification should commence. Royal's disability had nothing to do with his credibility, as the court found, 2/19/2016 RP 8-9, 11; CP 216, 221, or the reason he filed his Petition, CP 4, 801. Rather, it established why he could not resume working, as he had hoped when he filed his Petition.

The evidence was undisputed that on December 5, 2014, Royal involuntarily lost his employment and employment income. This was the basis for his Petition for Modification. CP 4, 801. When the court was confronted with this omission from her findings, she responded, 02/19/2016 RP 10-11:

THE COURT: I'm not saying he necessarily didn't involuntarily lose his job as alleged. I'm just not convinced that he didn't have any other alternatives and that he was not employable. What I was focusing on is kind of the second part of the paragraph that identifies medical reasons or circumstances. I guess maybe I didn't word that in the clearest way, but my belief is that I can't just simply ignore this finding of Social Security that he is disabled.

MR. BERRY: Right.

THE COURT: It feels like that is something that, his credibility aside, is itself -- has its own weight with the Court.

But the finding by Social Security Administration that Royal was disabled as of December 5, 2014, CP 776, established that Royal “didn't have any other alternatives and that he was not employable”, as of December 5, 2014, notwithstanding his hope at the time that he could return to work.

The court thus abused its discretion by acknowledging that Royal involuntarily lost his employment on December 5, 2014, but refusing to make an express finding to that effect---even though that was the very basis upon which the petition for modification was based. CP 4, 801.

Accordingly, the court's decision to commence the modification of his spousal maintenance obligation in June of 2015, because that was when he first raised the issue of his medical disabilities with the court, was error and an abuse of the court's discretion. CP 221-222.

Notwithstanding the fact that the undisputed evidence established that Royal involuntarily lost his employment and his employment income on December 5, 2014, and that the Social Security Administration found that he was disabled as of that same date, since Royal's maintenance obligation could not be modified

until he filed his Petition for Modification, RCW 26.09.070(1)(a), the modification of that obligation should have commenced on January 21, 2015. And, it is respectfully submitted, that this Court should so find.

B. Royal Fish Did Not Have The Ability To Comply With The Existing Maintenance Order After December 5, 2012, And Should Not Have Been Found In Contempt For Failing To Do So.

But based on that commencement date, the court found that Royal owed Lisa maintenance from December 2014 through May of 2015, that Royal had the ability to pay maintenance, and that he was thus in contempt for failing to pay her maintenance, CP 222:

And the modification is going to commence as of June 2015. So he owes back maintenance from December through basically May of 2015.

And I do find that he had the ability to pay. He sold a home. Mr. Fish received tax returns. Mr. Fish chose to spend his money on himself and not to pay his obligations on maintenance. Which, by even his own account, would have included the month of December, which is prior to his petition to modify.

So from the court's perspective, it appears to the court that he had the ability to pay his maintenance, he failed to pay and I will find him in contempt for his failure to pay from December and then until May.

See also, 234-237. This too was error.

As previously discussed, Royal did pay maintenance for the month of December. 1/04/2016 RP 130, CP 829, contrary to the court's finding. Thus, the trial court's finding that Royal did not pay maintenance for December, 2014 is not supported by substantial evidence.³

Similarly, the court's finding that he had the ability to pay maintenance from December, 2014 (which he did pay), or from January 2015 until May 2015, is not supported by substantial evidence.

As previously discussed, Royal's maintenance obligation was based on the parties' earnings. CP 836, 841; 01/04/16 RP 96. Royal had no earnings after he involuntarily lost his employment and employment income on December 5, 2014.

His only other income was his \$750.00/month in military retirement income which had been awarded to him as an asset in the Decree of Dissolution, CP 314; 330-331, and his disability income in the amount of \$1857.34/month, totaling \$2,607.34 per

³ Notwithstanding the court's oral ruling, the Court's Order on Show Cause re Contempt/Judgment reflects a judgment for nonpayment of maintenance from January 1, 2015 through May 31, 2015. CP 234.

month.

This income was not sufficient to meet his monthly expenses, CP 364-368---much less, to pay maintenance of \$3800 per month.1/04/2016 RP 106.

His Bank of America bank records show that his beginning checking account balance as of December 30, 2014 was only \$3,376.22. CP 502. His savings account balance was \$233.46. CP 506.

His NFCU Bank statements show that his beginning balance on December 27, 2014 for both his checking and savings accounts was \$1,363.86. CP 610.

On January 13, 2015, Royal was wired the net sale proceeds in the amount of \$53,062.19 from the sale of a lot in Belfair (not a home) he had been awarded in the Decree of Dissolution, CP 330, 506; 1/04/2016 RP 118-119. Royal used these funds to meet his monthly living expenses and to pay his debts, including the attorney fees he had incurred in his dissolution proceedings.⁴ CP 506-507; 1/04/2016 RP 159.

⁴ Royal also used a portion of these net sale proceeds to purchase a home on July 1, 2015, 1/04/2016 RP 133; CP 753-760, which reduced his monthly housing expenses. 1/04/2016 RP 134-135, 159-160; Compare CP 364-368 and CP 788-792.

In addition, he received his bonus on March 13, 2015 for his work with Bay West in 2014 in the amount of \$622.99. He received his accrued vacation pay in the amount of \$3,927.28 and his income tax refund for 2014 in the amount of \$13,157.00, on May 29, 2015, 1/04/2016 RP 101-102, 119-120, 155, 835; CP 338. But these monies were all derived from his earnings in 2014 which had already been used to pay maintenance for that full year.

Accordingly, the use of such funds to pay maintenance would constitute impermissible "double-dipping". The only monies which Royal had available which would not have constituted "double-dipping" was his disability income of \$1857.34/month.

In *In re Marriage of Barnett*, 63 Wash. App. 385, 818 P.2d 1382 (1991), a couple separated after 44 years of marriage. The court awarded Mrs. Barnett a \$100,000 lien against the couple's salvage business as a means of distributing to her half its value. The court also awarded her \$500 per month maintenance for the rest of her life, payable from the monthly proceeds of scrap metal sales. The reviewing court found that the maintenance award was effectively a distribution of assets. *Id* at 386. The award of both the lien and maintenance payments, therefore, was duplicative, and was held to be an abuse of discretion. *Id* at 388.

Our review of the record indicates the maintenance award was an attempt to distribute Mrs. Barnett's share of the business as realized through the future sale of salvage. That distribution had, however, already been effected by the \$100,000 lien to Mrs. Barnett for one half of the value of the salvage business. In effect, the same property was distributed twice. This was error.

By the same token, Royal Fish was not required to use the net sale proceeds of the Belfair lot or the half of his military retirement income, he had been awarded in the dissolution to pay maintenance.

Thus, in *In re Marriage of Mathews*, 70 Wn.App. 116, 124-125, 853 P.2d 462 (1993), the Court held:

But the QDRO operates to transfer to Mrs. Mathews one-half of his retirement (or disability) income. The effect of the indefinite maintenance order is to require Mr. Mathews to pay maintenance out of his remaining retirement or disability income. This is not only an abuse of discretion, it is clear error.

For the same reason, Royal was not required to use his accrued vacation pay, his bonus, and/or his income tax refund derived from work and income he had earned in 2014, and from which he had already paid his maintenance obligations in 2014, to pay maintenance again from those same monies in 2015.

The use of such funds to pay maintenance would constitute impermissible “double-dipping” because it would be distributing the same property twice through the property and the maintenance awards.

The disability pay he received from the military was inadequate to pay maintenance of \$3,800 per month.

Until he began receiving the additional disability payment from the Social Security Administration beginning around August 23, 2015, CP 776-777, his income was not even sufficient to meet his monthly living expenses. CP 364-368.

Accordingly, the court’s findings in its Order on Show Cause re Contempt/Judgment in Paragraphs 2.4 and 2.5⁵ are not

⁵ Paragraph 2.4 **Past Ability to Comply With Order** states:

ROYAL FISH had the ability to comply with the order as follows:

Royal Fish had the ability to comply with the order as follows, as set forth in the verbatim report of proceedings of the decision of the Honorable Jennifer A. Forbes, Kitsap County Superior Court dated January 15, 2016, is attached as **Exhibit “B”** and incorporated herein by this reference, as though fully set forth herein.

Royal Fish had funds with which to pay spousal support and willfully and intentional [sic] failed to pay spousal support to Lisa Fish.

supported by substantial evidence.

For each of these reasons, it was error to find Royal in contempt for failing to pay maintenance to Lisa from December 2014, or from January 2015, through May 2015.

Inability to comply with a maintenance order is a valid defense to contempt. RCW 26.18.050(4). See also, *Britannia Holdings Ltd. v. Greer*, 127 Wash.App. 926, 933-934, 113 P.3d 1041(2005). And so it is here.

C. The Court Erred And Abused Its Discretion By Refusing To Award Royal Maintenance From January/February 2015 through May 2015.

As previously discussed, given the fact that this was a long term marriage, and applying the mandate of *In re Marriage of Rockwell, supra*, when the parties mediated a settlement of their dissolution proceeding, they agreed that Royal would pay maintenance to Lisa in an amount which would equalize their

Paragraph 2.5 **Present Willingness and Ability to Comply With Order** states in pertinent part:

ROYAL FISH has the present ability to comply with the order as follows:

Royal Fish has sufficient financial resources to pay spousal maintenance owed to Lisa Fish in the total amount of \$19,000 plus accrued interest. (See **Exhibit B**, as though fully set forth herein).

incomes, based on what their incomes were at that time. CP 836, 841; 01/04/16 RP 96. This maintenance obligation was based on the current earnings of the parties, CP 835, with the intent to “put the parties in roughly equal financial positions for the rest of their lives.” 1/04/2016 RP 97-99, 158; CP 814, 822, 825. The Decree of Dissolution required Royal to pay Lisa maintenance in the amount of \$3,800 per month. CP 314, 332.

When Royal involuntarily lost his employment and his employment income on December 5, 2014, he filed his Petition for Modification on January 21, 2015. CP 3-8. In his Petition, Royal requested that the court require Lisa to pay maintenance to him. CP 5.

Royal’s only income was his disability income in the amount of \$1857.34/month, not including the \$750 per month in military retirement income which had been awarded to him as an asset in the Decree of Dissolution, CP 314; 330-331. Even with the inclusion of his military retirement income, his income was not sufficient to meet his monthly expenses of \$3,590.44. CP 364-368.

On the other hand, Lisa’s gross monthly income was \$4,583.33, not including the \$750 per month in military retirement income, CP 60, which had been awarded to her as an asset in the

Decree of Dissolution, CP 314; 330-331.

Thus, to equalize the parties' gross monthly incomes, Lisa should have been ordered to pay temporary maintenance to Royal in the amount of \$1,362.995 or \$1,363 per month from January/February, 2015 until June 1, 2015 when the Social Security Administration awarded Royal an additional disability payment of \$2,185 per month, 1/04/ 2016 RP 114, thereby substantially reducing the disparity between the parties' gross monthly incomes.⁶

The court erred and abused its discretion by failing to make this award. CP 223.

D. The Court Erred And Abused Its Discretion By Suspending Rather Than Terminating Royal Fish's Maintenance Obligation.

In its Order on Modification of Spousal Support, CP 232-233, the court ordered in pertinent part:

The court is retaining jurisdiction on this issue of spousal maintenance. The court modified spousal maintenance to require no transfer payment from Petitioner, Royal Fish, to Respondent, Lisa Fish, at this time. However, Respondent, Lisa Fish, shall have the ability to bring a motion to review, revise, and/or modify this order if

⁶ Contrary to the court's comment, CP 223, Lisa's gross monthly income is still greater than Royal's by more than \$500 even after he received this disability payment from the Social Security Administration.

there is a substantial change in Respondent's [sic] economic circumstances, due to employment.

The obligation of Petitioner, Royal Fish, to pay maintenance to Respondent, Lisa Fish, shall continue subject to the terms and conditions of this order of modification through the date that Petitioner, Royal Fish, reaches the age of 66, as set forth in the Decree of Dissolution, paragraph 3.8 entered on June 13, 2014. At such time that Royal Fish reaches age 66, his obligation to pay spousal maintenance is terminated.

However, since Royal's disability had been established by the Social Security Administration as of December 5, 2014, CP 776, the court's indefinite suspension of Royal Fish's spousal maintenance obligation because she did not "really believe that Mr. Fish can't work" and did not "really believe that Mr. Fish is not going to not work", CP 223, based on its unsupported belief that "there was a potential that he would go back to work", CP 224, is error and an abuse of the Court's discretion.

The court's beliefs were based upon the court's perception of fault and/or prejudice, not evidence. According to the court, CP 223-224:

But there is a finding by Social Security that he's not going to work. And if he is

going to actually not work because he is not able to work, then I don't think I really have a choice but to modify maintenance. I think it's what I would be expected in the law to do. But he is not a credible witness on this issue. He's played a lot of games with the court historically, and in his testimony, he was very inconsistent. His testimony changed in what he was doing, and why he was doing it, depending on what suited him at the moment. And as I heard his testimony, I basically would have ruled against him until the Social Security Administration finding was entered into the evidence.

So because of that, and because I think there's a potential he will go back to work, I am going to reserve the right to Ms. Fish to re-visit the issue of maintenance.

As previously discussed, the court's concern about Royal's credibility, and her perception about his inconsistent testimony, is based upon her confusion about the fact that he based his petition for modification on the undisputed evidence, and the fact, that he involuntarily lost his employment and his employment income on December 5, 2014. CP 4.

After he lost his employment, he was re-evaluated by the Department of Veteran's Affairs, CP 835, and the Social Security Administration who both found that he was disabled and unable to work as of December 5, 2014. CP 776.

But Royal's disability was not the basis of his petition for modification. Rather, it was the reason he could not resume working after involuntarily losing his employment.

Moreover, neither Royal's involuntary loss of his employment and employment income, nor the Social Security Administration's finding that Royal was disabled, turned on his credibility.

In sum, there is no evidence to support the court's beliefs that Mr. Fish could work, or that he was going to work, or that "there's a potential he will go back to work." Since there is no evidence to support these beliefs, if they are regarded as findings, they lack substantial evidence.

In the absence of any evidence to support such beliefs, one is left with the conclusion that the court's beliefs are based on prejudice, or its perception of "fault", which are prohibited factors in considering maintenance. RCW 26.09.090; Compare, *In re Marriage of Muhammad*, 153 Wash.2d 795, 108 P.3d 779 (2005).

In a case directly on point, this Court held *In re Marriage of Drlik*, 121 Wash.App. at 279 that

because the evidence in the record does not support the trial court's finding that John Drlik is not without hope to return to work, the trial court erred in ordering an indefinite suspension of maintenance.

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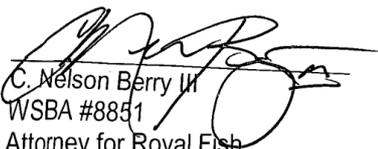
STATE OF WASHINGTON

I certify that on the 8th day of July, 2016, I caused a copy of
the foregoing Appellant/Cross-Respondent's Opening Brief to be
mailed by first class mail, postage prepaid, to the
Respondent/Cross-Appellant at the following address:

Lisa Anne Fish
3501 Rodgers St.
Bremerton, Washington 98312

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

Dated this 8th day of July, 2016, at Seattle, Washington.


C. Nelson Berry III
WSBA #8851
Attorney for Royal Fish
Appellant/Cross-Respondent

