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NO. 50494-4-11

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

JOSEPH ANTHONY
Petitioner/Appellant,

v.

PENNEY ANTHONY
Respondent/Respondent.

APPELLANT'S REPLY BRIEF

Appeal from the Superior Court of Kitsap County,
Cause No. 15-3-00791-8
The Honorable Kevin D. Hull, Presiding Judge

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I. INTRODUCTION

The subject of this appeal is the spousal maintenance award entered during dissolution of the “long-term” marriage of Joseph and Penney Anthony. In a long-term marriage, the court's objective is to place the parties in roughly equal financial positions for the rest of their lives.¹

In this case, the maintenance award leaves the parties in grossly disparate financial positions, requiring Mr. Anthony, who is 50% disabled, to work overtime hours until he is 73 years old in order to be able to pay the ordered maintenance. This maintenance was ordered even though the trial court stated Mr. Anthony was not “obligated [to] work[] 60 hours a week”² and that it didn’t “think it’s fair to demand of Mr. Anthony that, you know, he continue to work 60 hour workweeks.”³ In contrast, Ms. Anthony will receive thousands of dollars in excess of her needs without working overtime.

The trial court abused its discretion by utilizing hypothetical numbers to project the parties’ incomes for 20 years, which numbers were based on erroneous assumptions and calculations, and basing its maintenance award on those hypothetical numbers. The trial court also

¹ *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007).

² RP 202, lines 19-20.

³ RP 215, lines 18-20.

awarded Ms. Anthony \$1,100 of Mr. Anthony's \$2,500 military retirement,⁴ but included 100% of the military retirement as part of Mr. Anthony's monthly income.⁵ Finally, the trial court abused its discretion by failing to fairly consider Mr. Anthony's ability to pay the maintenance ordered and still pay his own living expenses and obligations, awarding maintenance that Mr. Anthony cannot pay unless he continues to work overtime against his will.

In Washington, any award of maintenance must be "just" in light of the relevant factors.⁶ In determining a just award, the court must consider "all relevant factors."⁷ The ability to meet financial obligations while paying maintenance is one relevant factor,⁸ and the trial court failed to fairly consider this factor. "An award that does not evidence a fair consideration of the statutory factors results from an abuse of discretion."⁹

II. REPLY

A. **There was no stipulation that Ms. Anthony "needs" maintenance in the amount of \$2,500 per month.**

⁴ CP 115; CP 123.

⁵ CP 107, lines 114-24; CP 108, lines 1-7; CP 109, lines 11-13; CP 206, lines 20-22; CP 208, lines 6-17; CP 223, lines 10-14; CP 227, lines 5-9; 3/31/17 and 5/26/17 RP, page 15, lines 20-25; page 16, lines 1-12.

⁶ *Bulicek v. Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990).

⁷ RCW 26.09.090(1).

⁸ RCW 26.09.090(1)(f).

⁹ *Spreen v. Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769, 774 (2001) (citing *In re Marriage of Mathews*, 70 Wash.App. 116, 123, 853 P.2d 462 (1993)).

At page 24 of her Brief, Respondent cites the trial court's findings based on RCW 26.09.090 (a) - (e). However, Respondent cites no findings made regarding RCW 26.09.090 (f), because the court made no such findings.

Instead, Respondent asserts that "Mr. Anthony stipulated to Mrs. Anthony's need for spousal support in the amount of \$2,500 per month during trial."¹⁰ Mr. Anthony stated in his Petition for Dissolution that "[m]aintenance will be paid."¹¹ However, contrary to Respondent's assertion at page 25 of her Brief, Mr. Anthony certainly did not "stipulate" that Ms. Anthony "needed" \$2,500 per month in maintenance, as is clear when the language Respondent cites to support her assertion is put back into the context of Mr. Anthony's counsel's closing argument:

Well, first of all, the maintenance is based on need and ability to pay. It's been demonstrated there's a need of \$2,500, we'd ask the Court to adopt our 10 years of maintenance, beginning maintenance back in 2012 when he moved into the shop.

We've asked the Court to not include his overtime pay. And without his overtime pay his gross income is approximately 5,000 a month. And if he gives her 1,500 a month the next two years, he will have 3,500 a month and she will have 4,700 a month if she goes to work, if there's an income imputed to her. . . .

¹⁰ Respondent's Brief, page 25.

¹¹ CP 4, ¶1.10.

So we would ask the Court to adopt **our** maintenance award.¹²

As the Court noted, Mr. Anthony's proposed maintenance totaled \$78,000 and Ms. Anthony's proposed maintenance totaled \$540,000 over a 20-year period.¹³ During the hearing on Mr. Anthony's Motion for Reconsideration, the Court correctly stated that Appellant thought maintenance would be awarded, and added "[t]he fight was over for how long and **how much**."¹⁴ There was no "stipulation" that Ms. Anthony "needs" \$2,500 maintenance.

In fact, the evidence establishes -- and Mr. Anthony argued -- that Ms. Anthony does **not** need maintenance in the amount of \$2,500.¹⁵ Ms. Anthony testified at trial that her total monthly expenses would be "about \$2,500."¹⁶ She also testified that receiving \$2,500 maintenance and her share of Mr. Anthony's military retirement would give her \$3,600 per month,¹⁷ approximately \$1,100 more than she needed to pay **all** of her expenses,¹⁸ **without** her working. In contrast, without overtime pay, Mr. Anthony would net \$5,209.10 from all sources of income. His monthly expenses total \$4,315, leaving him only \$894 to pay \$2,500 in

¹² RP 187, lines 9-19; RP 188, lines 15-16 (emphasis added).

¹³ RP 216, lines 2-3 and lines 12-13.

¹⁴ 3/31/17 and 5/26/17 RP 39, lines 12-13.

¹⁵ CP 125-126; CP 211-212, Section 6; 3/31/17 and 5/26/17 RP, page 17, lines 3-11.

¹⁶ RP 167, lines 10-25; RP 168, lines 1-7.

¹⁷ RP 168, lines 15-19.

¹⁸ RP 168, lines 20-24.

maintenance, a **deficit** of \$1,606 per month.¹⁹ When asked during the trial if he could “possibly pay \$2,500 a month maintenance” while paying his bills, Mr. Anthony answered “No. No.”²⁰

Further, Mr. Anthony filed both a Motion for Clarification and a Motion for Reconsideration of the Court’s maintenance award.²¹ These Motions were filed because it is impossible for Mr. Anthony to pay the maintenance ordered unless he continues to work overtime until he is 73 years old, while he is 50% disabled. The Court specifically addressed this circumstance: “I don’t think it’s fair to demand of Mr. Anthony that, you know, he continue to work 60 hour workweeks.”²² At the hearing on the Motion for Clarification, the Court reiterated, “I think my expectation was that he wouldn’t be working overtime.”²³

Nevertheless, the Court imposed a maintenance obligation that requires Mr. Anthony to do exactly that. The maintenance award is not “just” and certainly does not put the parties in a “roughly equal” financial position for the rest of their lives.²⁴

B. The evidence presented by Mr. Anthony at trial regarding his ability to pay “a minimum of \$1,500” per month was based on him continuing to work overtime.

¹⁹ CP 123.

²⁰ RP 90, line 10-22.

²¹ See CP 115-116; CP 123-126; CP 200-215; CP 226-231.

²² RP 215, lines 18-20.

²³ 3/31/17 and 5/26/17 RP 27, lines 9-10.

²⁴ See CP 115-116; CP 123-126; CP 200-215; CP 226-231.

At page 26 of Respondent’s Brief, she asserts that “[t]he evidence presented by Mr. Anthony at trial indicated an ability to pay a minimum of \$1,500 monthly in spousal support.” On direct examination at the November 3, 2016 trial, Mr. Anthony testified about his Financial Declaration, which he had signed on October 29, 2016, **before he knew that the Court would not consider his overtime pay to calculate his maintenance obligation.**²⁵ Based upon what Mr. Anthony knew at the time he signed his Financial Declaration, he **included overtime** in his “Total Monthly Net Income,” and included proposed spousal maintenance in the amount of **\$1,500** per month.²⁶ Overtime income was listed as **\$2,086.00.**²⁷ With the overtime amount removed, Mr. Anthony’s Financial Declaration would have looked much different, and he certainly would not have had the ability to pay \$1,500 per month in maintenance:

- Instead of a total gross monthly income of **\$7,807,**²⁸ it would have been **\$5,721.**

- Instead of a total net monthly income **\$4,558,**²⁹ it would have been **\$2,472.11.**

²⁵ See CP 32-36.

²⁶ CP 33. *See also* RP 69, lines 21-25; RP 70, line 1.

²⁷ CP 33.

²⁸ CP 33.

²⁹ CP 33.

The figures on Mr. Anthony's Financial Declaration, projections of amounts based upon what he knew before trial, do not "indicate[] an ability to pay a minimum of \$1,500" maintenance to Ms. Anthony **without him continuing to work overtime**, particularly where his own after-separation living expenses totaled **\$3,995.00**.³⁰

Contrary to Respondent's assertion, Mr. Anthony presented no evidence at trial indicating that he had an ability to pay \$1,500 monthly maintenance **if he quit working overtime**. The \$1,500 proposed maintenance was based on Mr. Anthony continuing to work overtime, which he told the Court in no uncertain terms that he did not want to do.³¹

Ms. Anthony's arguments that the trial court did not abuse its discretion in awarding maintenance for 20 years beginning at \$2,500 per month because of a "stipulation" and evidence presented at trial by Mr. Anthony are factually baseless.

C. The trial court made no findings regarding Mr. Anthony's ability to pay the maintenance ordered and still pay his own expenses and obligations.

The Court noted that it "must look at" the factors set out in RCW 26.09.090, then set out the statutory factors without comment or analysis, then stated: "[t]he Court finds that upon examination of the above factors

³⁰ CP 35.

³¹ See RP 46, lines 15-25; RP 47, lines 1-25; RP 48, lines 3-11.

Mrs. Anthony should be awarded spousal support for 20 years, starting at \$2,500 per month[.]”³²

Respondent asserts that “the court made a finding that Mr. Anthony has the ability to pay spousal support,”³³ but provides no citation to the record where this finding may be located. In fact, there is no written or oral finding that Mr. Anthony has the ability to pay the amount of maintenance ordered while paying his own expenses and obligations, and it certainly is not clear from the record that the court considered Mr. Anthony’s ability to pay the maintenance while paying his own expenses and obligations.

Mr. Anthony requested the court to “clarify the maintenance award in relation to the parties’ incomes and their portions of the military retirements and the husband’s overtime,”³⁴ specifically, to clarify “whether the maintenance includes Ms. Anthony’s retirement income, as it was included in Mr. Anthony’s income” and “how Mr. Anthony will pay the maintenance and his own expenses, without working overtime.”³⁵ The court did not clarify its maintenance award during the hearing on the Motion for Clarification. Instead, it instructed Mr. Anthony’s counsel to

³² CP 184, ¶¶ 3, 4.

³³ Respondent’s Brief, page 26.

³⁴ CP 98; CP 107-110.

³⁵ CP 10.

provide it with “orders with the amounts and the information **you** believe are appropriate.”³⁶ Thereafter, the court entered Ms. Anthony’s orders.

During the hearing on Mr. Anthony’s Motion for Reconsideration, the court stated that it had “outlined all the factors that one has to look at in determining maintenance”³⁷ and had “analyzed maintenance under the statute.”³⁸ Simply reading the statutory language into the record does not support a finding that the court fairly considered Mr. Anthony’s ability to pay the maintenance while paying his own expenses and obligations, and there are no facts whatsoever in the record that support a finding that the court “analyzed” Mr. Anthony’s ability to pay the maintenance ordered.

D. The trial court failed to fairly consider Mr. Anthony’s ability to pay the ordered maintenance and still pay his own living expenses.

Respondent’s conclusion that there was no abuse of discretion in determining the maintenance award because the trial court “considered RCW 26.09.090(a) - (e)” is contrary to law which requires that the court also consider RCW 26.09.090(f). “The maintenance order shall be in such amounts and for such periods of time as the court deems just . . . after considering **all** relevant factors[.]”³⁹ “The trial court must consider **all** of

³⁶ 3/31/17 and 5/26/17 RP 31, lines 16-17 (emphasis added).

³⁷ 3/31/17 and 5/26/17 RP 36, lines 22-24.

³⁸ *Id.*, page 48, lines 4-5.

³⁹ RCW 26.09.090.

the statutory factors[.]”⁴⁰ Here, there is nothing in the record to support a conclusion that the trial court fairly considered RCW 26.09.090(f). Simply reading the statutory language into the record or “analyzing” maintenance under the statute cannot be characterized as fair “consideration” of Mr. Anthony’s ability to pay.

RCW 26.09.090(f) requires the court to consider “the ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse seeking maintenance.”⁴¹ The trial court’s oral “consideration” of this factor is set out in full below:

Factor F, "the ability of the spouse or partner from whom maintenance is sought," that's Mr. Anthony, "to meet his needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance."

So, you know, Mr. Anthony is going to move on. As I've indicated, he earns a significant income. But I think that it's fair to say that maybe not in the short term but in the long term that's going to be reduced. I don't think it's fair to demand of Mr. Anthony that, you know, he continue to work 60 hour workweeks. So I'm kind of -- I'm keeping that in mind.

I'm assuming that the income is going to be reduced as we go forward not necessarily increased.⁴²

⁴⁰ *In re Marriage of Khan*, 182 Wn. App. 795, 800, 332 P.3d 1016 (2014) (citing *In re Marriage of Washburn*, 101 Wn.2d 168, 179–80, 677 P.2d 152 (1984)).

⁴¹ *Id.* (citing RCW 26.09.090).

⁴² RP 215, lines 10-23.

The trial court's written Findings of Fact provide no hint of what facts or figures the court considered in arriving at its conclusion that "Mrs. Anthony should be awarded spousal support for 20 years, starting at \$2,500 per month and decreasing by \$500 every 5 years."⁴³

The evidence before the trial court did not support this finding. In making the maintenance award, the court ignored the financial information provided by Mr. Anthony and the economic condition in which the court's maintenance award would leave Mr. Anthony. Had the trial court actually considered the financial evidence before it, it would have known that it was impossible for Mr. Anthony to pay the amount of maintenance awarded while paying his own living expenses -- unless he continued to work overtime, which the court itself stated was not "fair." Another word for "fair" is "just."⁴⁴ The maintenance award is not fair and it is not just.

Instead of fairly considering Mr. Anthony's post-separation expenses, the court focused on its hypothetical (and incorrect) projected figures for income of the parties over 10 years to determine maintenance.

E. The trial court based the maintenance award on hypothetical incomes projected for ten years, and the hypothetical incomes are based on several errors.

Immediately before the trial court ruled on distribution of property and maintenance, it stated:

⁴³ CP 184, ¶¶ (3), (4).

⁴⁴ Webster's New College Dictionary (2005) at 509 and 777.

Both parties, I think, have an obligation to the extent possible to mitigate the financial circumstances of the relationship. And so both parties have that obligation -- hang on one second -- but that doesn't mean that Mr. Anthony has to work 60 hours a week. As I do the math, just I like to do kind of in my own mind kind of hypotheticals and whatnot, although I have real numbers here.

For example, if over the next ten years instead of grossing 115,000 a year, Mr. Anthony were to gross 85,000 a year, so \$30,000 less per year because he decides to work less, that still is a total gross income of \$850,000 over the next ten years. That would take him to 63, at which point he may be contemplating retirement or whatnot.

If Ms. Anthony -- and we will talk about her employment situation -- but if she were to work a minimum wage job -- well, actually I did \$10 an hour, minimum wage will likely increase -- but at \$10 an hour, full time, over the next ten years that would be \$200,000 gross income.

So we're talking about even if Ms. Anthony were to work for ten years at a minimum wage job and Mr. Anthony were to decrease his hours and his gross income were to decrease 30,000 a year, we're still talking about over the next ten years a difference of \$650,000 of income.

There's no doubt, there's no question that Mr. Anthony is in a far better position to generate income than Ms. Anthony. And that will continue to be the case. And that actually will never change.

...

What I'm -- what I'm awarding is this: For the next five years maintenance will be \$2500 per month, that will be for five years; five years following that maintenance will be at 2,000 a month; five years following that maintenance will be at 1,500 a month; and five years following that, it will be at 1,000 a month.

So I am ordering 20 years of maintenance and that's because of what *Rockwell*, and that -- what *Rockwell* tells me is I have to do my best to put the parties in roughly equal financial positions for the rest of their lives.⁴⁵

As set out in detail in Mr. Anthony's Motion for Clarification, Motion for Reconsideration, and the Opening Brief in these proceedings, the maintenance award is based on incorrect "hypothetical" incomes for the next ten years.⁴⁶ The combination of errors upon which the trial court based its hypothetical figures resulted in a finding that there was a "ten years difference of \$650,000 of income." In fact, after the errors are corrected, the difference in the parties' projected income over a period of ten years is not \$650,000, but \$296,120.⁴⁷

F. The *Hilsenberg* case was decided before RCW 26.09.090 was adopted, and is distinguishable on the facts.

Citing Mr. Anthony's Financial Declaration, Respondent states that "[t]he evidence presented by Mr. Anthony at trial" indicated his net monthly income was \$4,558.11.⁴⁸ But in fact, Mr. Anthony's Financial Declaration, submitted **before** trial, indicates that **with overtime** in the amount of \$2,086⁴⁹ and deducting proposed spousal maintenance in the

⁴⁵ RP 202, lines 21-25; RP 203, lines 1-25; RP 204, line 1; RP 216, lines 14-25.

⁴⁶ See CP 107-CP 110; CP 206-212; Appellant's Opening Brief, pages 13 - 17.

⁴⁷ See Appellant's Opening Brief, pages 13-17.

⁴⁸ Respondent's Opening Brief, page 28.

⁴⁹ CP 33, Paragraph A.

amount of \$1,500,⁵⁰ Mr. Anthony's net monthly income would be \$4,558.11.⁵¹ From this amount, Mr. Anthony would have to pay his own living expenses, which total \$3,995 on his Financial Declaration.

However, Mr. Anthony testified at trial that he did not want to continue to work 60-hour weeks. The Court agreed that he was not required to do so, and removed overtime from its projected income figures that it utilized to determine the maintenance award.

Without citing the record or providing any calculations, Respondent asserts that if Mr. Anthony worked a normal 40 hours per week, a \$2,500 monthly maintenance payment would "exceed his income by \$463.89 for the first five years." Based on Mr. Anthony's calculation, after paying his own living expenses, he would have only \$894.10 to pay the \$2,500 maintenance ordered for the first five years.⁵²

Nevertheless, based on the *Hilsenberg* case,⁵³ Respondent argues that "there is no manifest abuse of discretion because there is substantial evidence that the trial court properly considered RCW 26.09.090(f)[.]"⁵⁴ In fact, the trial court merely read the language of RCW 26.09.090(f) into

⁵⁰ CP 33, Paragraph B.

⁵¹ CP 32.

⁵² See CP 430-432; CP 442-445. These calculations were considered by the trial court during proceedings on Mr. Anthony's Motion for Reconsideration. See CP 253, listing Declaration of Jan Rinker as evidence considered by the court. The calculations are included in Ex. B to Ms. Rinker's Declaration.

⁵³ *Hilsenberg v. Hilsenberg*, 54 Wn.2d 650, 344 P.2d 214 (1959).

⁵⁴ Respondent's Opening Brief, page 28.

the record, and utterly failed to consider Mr. Anthony's actual ability to pay the maintenance ordered while paying his own living expenses and obligations. Respondent's reliance on *Hilsenberg* is misplaced.

First, *Hilsenberg* was written in 1959, fourteen years before RCW 26.09.090 was enacted. The *Hilsenberg* court was not required to consider the statutory factors that every trial court must now consider when deciding whether to award maintenance, for how long, and how much.

Second, the facts in *Hilsenberg* were very unusual: the husband owned a business interest in a Seattle Skipper's Sea Food Restaurant and received income from a lessor's interest in the Restaurant. He also earned a salary as manager of a hotel, and in addition, **received "rent-free living accommodations and two free meals per day."**⁵⁵ The decree required Mr. Hilsenberg to pay child support, alimony, mortgage payments on the family home, and insurance premiums, plus a sum of approximately \$11,000 for community debts and the wife's legal expenses.⁵⁶ He argued on appeal that "during the first two years after the divorce, he will not have enough money available out of his current income to pay all of his obligations."⁵⁷ The Supreme Court wrote:

⁵⁵ *Id.* (the husband conceded that "because of the ages of the children" [eight, seven, six and five years], it was "not feasible for [the wife] to seek employment").

⁵⁶ *Id.*

⁵⁷ *Id.*

In view of the value of the property awarded to appellant, the trial court did not consider this facet of the matter to be of particular significance. We agree.

Assuming, arguendo, that appellant's current income will not be sufficient to meet all of his obligations during the two years immediately following the divorce, and that payment of these obligations out of his current income will leave little or nothing for his personal living expenses; nevertheless, after the expiration of the first two years, appellant will have approximately \$4,438, yearly, to spend as he sees fit.

Furthermore, a cursory glance at the property awarded to appellant shows that his award includes at least \$13,200 in liquid assets, namely, the account receivable and the bank account; that from these assets alone appellant should be able to pay all obligations imposed upon him by the court which do not reoccur yearly.⁵⁸

The *Hilsenberg* husband received property valued at \$133,053.48, and the wife's property award totaled only \$36,317. As the *Hilsenberg* court noted, the husband "will have \$4,438 to spend for himself. Respondent will have \$9,600 with which to care for a family of five."⁵⁹ Washington law has changed considerably in the half century since *Hilsenberg* was written. Unlike the *Hilsenberg* husband, Mr. Anthony does not receive compensation that includes free living accommodations and two free meals a day and certainly will not have more than twice as much money "to spend for himself" as Ms. Anthony will have under the maintenance award.

⁵⁸ *Hilsenberg*, 54 Wn.2d at 652, 344 P.2d 2145 (emphasis added).

⁵⁹ *Hilsenberg*, 54 Wn.2d at 653, 344 P.2d 214.

Unlike the *Hilsenberg* Court, the trial court was required to consider the statutory factors set out in RCW 26.09.090 and make a “just” decision, attempting to place the parties in “roughly equal financial conditions” after the marriage was dissolved. This requires consideration of Mr. Anthony’s ability to pay his own expenses while paying maintenance to Respondent, which the court either considered and gave it no weight or did not consider his ability to pay at all. No matter which is the case, *Hilsenberg* provides no guidance whatsoever in this case.

G. The trial court’s maintenance award constitutes an abuse of its discretion.

An appellate court will find an abuse of discretion “if the trial court bases its award or denial of spousal maintenance on untenable grounds or for untenable reasons.”⁶⁰ A court’s decision “is based on untenable grounds if the factual findings are unsupported by the record.”⁶¹ A maintenance award “that does not evidence a fair consideration of the statutory factors results from an abuse of discretion.”⁶²

1. The maintenance award is based on untenable grounds.

There are **no** facts in the record that support the hypothetical income figures upon which the trial court based its maintenance award.

⁶⁰ *In re Marriage of Terry*, 79 Wn. App. 866, 869, 905 P.2d 935 (1995).

⁶¹ *Grandmaster Sheng-Yen Lu v. King Cty.*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002).

⁶² *Spreen v. Spreen*, 107 Wn. App. 341, 349, 28 P.3d 769 (2001).

There are numerous facts in the record that show the hypothetical income figures are based on errors made by the trial court.⁶³

2. The maintenance award does not evidence a fair consideration of Mr. Anthony's ability to pay the amount of maintenance ordered while paying his own living expenses.

At the conclusion of the trial, the court read the statutory language of RCW 27.09.090(f) into the record, speculated that Mr. Anthony's income might not be reduced "in the short term" (in spite of the fact that Mr. Anthony testified during trial that he did not want to continue working overtime), and stated that his income would be reduced "in the long term,"⁶⁴ but did not discuss or even refer to Mr. Anthony's actual income or living expenses in making its maintenance decision.⁶⁵ At no time did the court discuss Mr. Anthony's ability to pay the amount of maintenance ordered.⁶⁶ The court's written Findings regarding maintenance include the statutory language and a single sentence stating: "[t]he Court finds that upon examination of the above factor Mrs. Anthony should be awarded

⁶³ See Appellant's Opening Brief, Sections 2(a), (b), and (c), pages 13-17; CP 107-CP 110; CP 206-212.

⁶⁴ See RP 105, lines 2-7. Respondent's counsel asked Mr. Anthony whether he agreed that his income as a truck driver had "increased every year, 2013, 2014, and 2015," which are years following the parties' separation.

⁶⁵ RP 215, lines 10-25; RP 216, line 1.

⁶⁶ RP 217, lines 7- 20.

spousal support for 20 years, starting at \$2,500 per month and decreasing by \$500 every 5 years.”⁶⁷

The results of the maintenance award leave the parties nowhere near “roughly equal financial positions,”⁶⁸ which was supposed to be the trial court’s “objective.” The maintenance award requires Mr. Anthony, who is 50% disabled, to work overtime long past retirement age. Ms. Anthony will never be required to work overtime, can begin collecting social security based on her marriage to Mr. Anthony⁶⁹ when she turns 62 (unless she remarries),⁷⁰ and can earn her own social security if she works for a maximum of 10 years.⁷¹ Under the maintenance award, even without collecting any social security, Ms. Anthony will have received “excess net income” of \$442,640 after twenty years, while Mr. Anthony will have a deficit of \$161,900 after twenty years.⁷²

H. Ms. Anthony is not entitled to an award of attorney’s fees.

At page 31 of her Brief, Ms. Anthony asserts that she is

⁶⁷ CP 184, ¶¶ (3), (4).

⁶⁸ CP 211-212, ¶ 6; CP 430-432; CP 442-CP 449.

⁶⁹ See RP 156, lines 18-20.

⁷⁰ See <https://www.ssa.gov/planners/retire/divspouse.htm> (“If you are divorced, but your marriage lasted 10 years or longer, you can receive benefits on your ex-spouse’s record (even if they have remarried) if: you are unmarried; you are age 62 or older; your ex-spouse is entitled to Social Security retirement or disability benefits; and Your ex-spouse is entitled to Social Security retirement or disability benefits; and The benefit you are entitled to receive based on your own work is less than the benefit you would receive based on your ex-spouse’s work.”)

⁷¹ See Appellant’s Opening Brief, page 18 fn 76.

⁷² CP 449.

entitled to recover damages and attorney fees under RAP 18.9(a) based on Mr. Anthony's failure to comply with the Rules of Appellate Procedure and/or uses the Rules of Appellate Procedure to delay enforcement of maintenance provisions and to cause Mrs. Anthony to incur significant attorney fees in two post-trial motions and the instant appeal.

RAP 18.9 is titled "Violation of Rules," and RAP 18.9(a) is titled "Sanctions." Under RAP 18.9(a),

The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party[.]

Emphasis added.

This Court has not on its own initiative ordered Mr. Anthony or his counsel to pay terms or compensatory damages to Ms. Anthony or to the Court itself based on his use of the RAPs for delay or for a failure to comply with the RAPs. Ms. Anthony has not filed a motion seeking sanctions against Mr. Anthony either for use of the RAPS for delay or for failure to comply with the RAPS. On this procedural basis alone, the Court should deny the request for "damages and attorney fees" under RAP 18.9(a).

Further, Ms. Anthony fails to identify any failure of Mr. Anthony to comply with the RAPS. In contrast, Mr. Anthony has been forced twice

to file motions to strike Ms. Anthony's Brief for her failure to comply with the RAPs, thereby incurring additional attorney's fees.

Finally, Ms. Anthony characterizes the purpose of "two post-trial motions and the instant appeal" as Mr. Anthony's use of the RAPs to "delay enforcement of maintenance provisions and to cause Mrs. Anthony to incur significant attorney fees."

Mr. Anthony filed a Motion for Clarification, seeking explanation from the trial court regarding several issues growing out of its oral rulings at trial, upon which the parties did not agree., including the language of the QDRO prepared by Ms. Anthony's counsel.⁷³ In her Response to the Motion for Clarification, Ms. Anthony insisted that the QDRO as her counsel had drafted it was "exactly what the Court ordered."⁷⁴ Mr. Anthony sought clarification of these issues in order to create final orders that correctly reflected the court's rulings, as his counsel explained to the trial court:

THE COURT: . . . I provided an oral decision following trial, and that's why we're here today is there's been a motion filed to clarify and whatnot.

. . .

MS. RINKER: . . . I don't think we're going to present the orders today because we need them clarified. And I would like -- I'd ask the Court to lower that for presentment, because there's a lot of errors in what I perceive as her

⁷³ See CP 97-111.

⁷⁴ CP 142.

documents. I'd have to go through them and point out the errors.

THE COURT: Okay. Well, what I want you to do is argue your respective position, what I want you to do is present orders you think I should sign.⁷⁵

“A clarification of a dissolution decree is ‘merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary.’”⁷⁶ “A court may clarify a decree by defining the parties' respective rights and obligations, if the parties cannot agree on the meaning of a particular provision.”⁷⁷ The parties did not agree on the interpretation of the trial court’s rulings on the issues set out in the Motion for Clarification, and under Washington law, Mr. Anthony was entitled to seek clarification of the oral rulings in motion proceedings. The purpose of the Motion for Clarification was not to “delay enforcement of maintenance provisions and to cause Mrs. Anthony to incur significant attorney fees.”

The trial court provided no clarification of its rulings.⁷⁸ Instead, it told the parties to submit proposed final orders “consistent with my decision, and if there’s some ambiguity, put in the amounts that you think

⁷⁵ 3/31/17 and 5/26/17 RP 3, lines 16-18; RP 4, lines 7-15.

⁷⁶ *In re Marriage of Christel*, 101 Wn. App. 13, 22, 1 P.3d 600 (2000) (quoting *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969)).

⁷⁷ *Id.*

⁷⁸ See 3/31/17 and 5/26/17 RP, page 54, lines 16-19 (“We asked for a motion for clarification. I have not agreed to her final documents. You didn’t rule on the motion for clarification, but you entered them.”)

are appropriate.”⁷⁹ The trial court signed and entered the proposed final orders prepared by Ms. Anthony.

Mr. Anthony therefore filed a Motion for Reconsideration, as he was entitled to do under CR 59,⁸⁰ which was denied with one exception.⁸¹ Mr. Anthony was thereafter entitled to an “appeal as of right” pursuant to RAP 2.2, which he timely filed. There is no basis for sanctions against Mr. Anthony under RAP 18.9(a).

At page 8 of her Brief, Ms. Anthony acknowledges that the QDRO she drafted “contained an error” and “would result in an overpayment of the LTI account to Ms. Anthony,” exactly as Mr. Anthony had argued in his Motion for Clarification. This appeal was necessary, in part, because of Ms. Anthony’s insistence that the QDRO was drafted correctly and the trial court’s refusal to clarify its oral ruling followed by its adoption of Ms. Anthony’s proposed orders. Ms. Anthony’s assertion that the post-trial motions and this appeal were filed for the purpose of delaying enforcement of maintenance provisions and to cause Mrs. Anthony to incur significant attorney fees” is specious.

Finally, Ms. Anthony requests attorney fees on appeal pursuant to RCW 26.09.140, and asserts that she “has provided a financial affidavit as

⁷⁹ 3/31/17 and 5/26/17 RP, page 30, lines 10-13; CP 159.

⁸⁰ CP 200-215.

⁸¹ CP 234.

required under RAP 18.1(c),” citing the Financial Declaration she filed in the trial court on November 5, 2015.⁸²

A financial declaration filed in the Superior Court pre-trial is not the Financial Affidavit required under RAP 18.1(c), which must be “submitted . . . in support of the fee request” in the party’s brief.⁸³ Ms. Anthony has been receiving maintenance and her share of the military retirement since the trial court entered final orders, and the Financial Declaration submitted 2-1/2 years ago no longer reflects her financial situation. “Attorney’s fees on appeal will be denied where the record is devoid of evidence as to the relative needs and abilities of the parties to pay attorney’s fees **during the time the appeal was pending.**”⁸⁴

The Court should deny Ms. Anthony’s request for attorney’s fees.

III. CONCLUSION

Mr. Anthony requests this Court to vacate the maintenance award and remand for recalculation of maintenance using correct figures with instruction that the trial court fully and fairly consider Mr. Anthony’s ability to pay maintenance while paying his own expenses and obligations.

⁸² Respondent’s Brief, page 31 (citing CP 9-14).

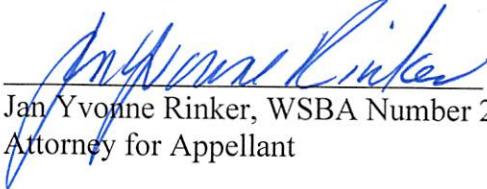
⁸³ *O’Neal v. Legg*, 52 Wn. App. 756, 762, 764 P.2d 246 (1988). *See also Spreen v. Spreen*, 107 Wn. App. 341, 351-352, 28 P.3d 769 (2001) (ex-spouse sought attorney fees on appeal based on RCW 26.09.140, but “did not comply with RAP 18.1(c), which requires her to submit an affidavit of financial need at least 10 days before oral argument. This failing precludes an attorney fees award.”).

⁸⁴ *In re Marriage of Ochsner*, 47 Wn. App. 520, 529, 736 P.2d 292, 297 (1987) (citing *In re Marriage of Young*, 44 Wash.App. 533, 538, 723 P.2d 12 (1986)).

Ms. Anthony also asks the Court to remand for proceedings before a different judge because Judge Hull would “exercise discretion on remand regarding the very issue that triggered the appeal and has already expressed an opinion as to the merits,”⁸⁵ refused to clarify any of his rulings, and denied reconsideration where Mr. Anthony showed that the maintenance award was based on incorrect figures for the parties’ projected 10-year incomes.

DATED this 19th day of March, 2018.

Respectfully submitted,


Jan Yvonne Rinker, WSBA Number 21493
Attorney for Appellant

⁸⁵ *State v. McEnroe*, 181 Wn.2d 375, 386, 333 P.3d 402 (2014).

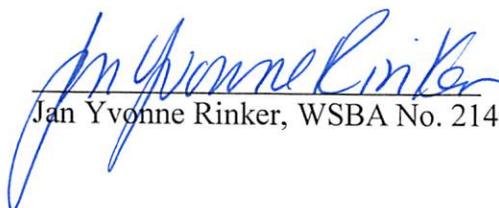
CERTIFICATE OF SERVICE

Jan Yvonne Rinker hereby certifies under penalty of perjury under the laws of the State of Washington that on the 19th day of March, 2018, I electronically delivered a true and correct copy of the Appellant's Reply Brief to which this certificate is attached to both of the following:

laura@newbrylaw.com

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Signed at Gig Harbor, Washington this 19th day of March, 2018.


Jan Yvonne Rinker, WSBA No. 21493

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