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Court of Appeals
Division II
State of Washington
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No. 52756-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LILA FAY SCHOLL,

Appellant,

v.

LEE WILLIAM SCHOLL,

Respondent.

Appeal from the Superior Court for Pierce County
The Honorable G. Helen Whitener

Amended Brief of Respondent

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I. INTRODUCTION

The issue before the Court is whether the Trial Court appropriately found a substantial change in circumstances allowing a modification of spousal maintenance as authorized by RCW 26.09.170(1).

A. Standard of Review. Trial Court decisions in a dissolution action will seldom be changed upon appeal – the spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the Trial Court. *In re Marriage of Bowen*, 168 Wn. App. 581 279 P.2d 885 (2012); *In re Marriage of Landry*, 103 Wn. 2d 807, 699 P.2d 214 (1985). Trial Court Findings of Fact that are supported by substantial evidence will be upheld. *In re Marriage of Thomas*, 63 Wn. App. 658, 821 P.2d 1227 (1991). Evidence is substantial if it persuades a fair minded rational person of the truth of the finding. *In re Marriage of Spreen*, 107 Wn. App. 341, 28 P.3d 769 (2001).

The amount and duration of maintenance is for the trial court's discretion to be reversed on appeal only for manifest abuse. *In re marriage of Brossman*, 32 Wn. App. 560, 650 P.2d 246 (1982).

An Order modifying the spousal maintenance obligation is reviewed for substantial supporting evidence and for legal error. *In*

re the Marriage of Hulscher, 143 Wn. App. 708, 180 P.3d 199 (2008).

Substantial supporting evidence is evidence sufficient to persuade a fair minded, rational person of the truth of the determination. *Hulscher, supra*.

II. STATEMENT OF THE CASE

The parties were divorced by a final Decree entered on September 15, 2017 after a trial by affidavit before The Honorable G. Helen Whitener. (CP 38-47.) The Court issued a letter ruling which was incorporated into the final Decree as Exhibit A. (CP 33-37, 43-46.) The letter ruling was issued by the Court on July 27, 2017. (CP 33-37.)

A. Trial Court's Letter Ruling.

The Trial Court's letter ruling in part stated as follows:

II. Maintenance.

In Washington, the Court may grant a maintenance order in an amount and for a period of time the Court deems just. RCW 26.09.090(1); *In re Luckey*, 72 Wash. App. 201, 209, 868 P.2d 189 (1994). The Court must consider all relevant factors, including the financial resources of the parties after dissolution; their abilities to meet their needs independently; the duration of the marriage, the standard of living they established during their marriage; their ages, health and financial obligations, and the ability of one spouse to pay maintenance to the other. RCW 26.09.090(1)(a), (c), (d), (e), (f); *In*

re Marriage of Terry, 79 Wn. App. 866, 905 P.2d 935 (Div. 3 1995).

Maintenance is not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time. RCW 26.09.090(1)(c), (d). The Scholls have been married for over 29 ½ years. Mr. Scholl's income is roughly twice Ms. Scholl's income. His net monthly income is \$10,658 and Ms. Scholl's net monthly income is \$4,397. Ms. Scholl is 61 years old and has a Master's Degree in Human Resources, but has never worked in that field. Mr. Scholl is 58 years old and works as a Chief Engineer on a factory long-liner fishing boat. Mr. Scholl's goal is to retire at the age of 65 and Ms. Scholl is presently retired after working for over 40 years, entirely with the Armed Forces. Ms. Scholl has been treated for, and continues to be treated for, a number of medical ailments, including anxiety and panic attacks, arthritis, spinal surgery, a titanium disk in her lower neck, lymphocytic colitis, bilateral tinnitus, blepharochalasis of the right upper eyelid and she has received surgery for chronic sinusitis.

Maintenance is not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time. RCW 26.09.090(1)(c), (d). Mr. Scholl argues that there is no guarantee that he will be able to continue to work in his field of employment, however, if his ability to work becomes substantially impaired at a future date then that type of circumstance may justify a modification of the maintenance awarded to Ms. Scholl but that speculative action cannot be considered at this time. It is clear from the evidence presented that Ms. Scholl is not voluntarily unemployed or underemployed as given by her age, physical and emotional condition due to medial issues and her lengthy work history in the military that her ability to find employment appropriate to her skills and current physical condition is limited. Since

January 6, 2016 Ms. Scholl has received \$2,800 per month in maintenance. A just distribution requires spousal maintenance given the parties' net incomes and property distribution after 29 ½ years marriage. Spousal maintenance in the amount of \$3,000 is awarded to Ms. Scholl which allows both parties to maintain the standard of living established during the marriage while allowing Mr. Scholl to meet his personal needs. RCW 26.09.090(1)(a).

(CP 45-46.)

The Final Decree, Paragraph 13, states as follows:

Spousal support must be paid as described in Exhibit A. This Exhibit is attached and made part of this Order. Spousal support will end when either spouse dies, or the spouse receiving support gets married or registers a new domestic partnership, *unless* the Exhibit provides differently.

The Petitioner must pay spousal support as follows:

Amount:	Start date:	Payment schedule:
\$3000 each month	<u>08/01/2017</u> Date 1 st payment is due	<u>half on 6th and half on 21st</u> Day(s) of the month each payment is due (for example, "the 5 th ," "weekly," or "half on the 1 st and half on the 15 th ")
Termination: Spousal support will end when either spouse dies, or the spouse receiving support gets married or registers a new domestic partnership unless a different date or event is provided below:		
Other:		

The Court's decision is attached hereto as Exhibit A and fully incorporated herein by this reference.

Make all payments to the other spouse directly by direct deposit/transfer to a bank account identified by the receiving party.

The receiving party must notify the paying party of any address or account change.

(CP 40-41.)

B. Substantial Change in Circumstances.

The year following the entry of the Decree, Mr. Scholl filed a Petition to modify the spousal maintenance, alleging in Paragraph 6, Pages 2 and 3 of the Petition:

Should the court modify the monthly spousal maintenance amount?

Yes. I ask the court to modify spousal maintenance based on Washington state law. The monthly amount should be changed now because:

Change of Circumstances – There has been a substantial change in circumstances since the current order was signed:

The respondent was employed as a chief worked as Chief Engineer on a fishing boat. He was laid off from work in salary of approximately \$180,000 per year gross which was \$15,000 per month gross with a net monthly income determined by the court to be \$10,658. After having worked for Blue North Fisheries for approximately six years, the respondent returned from a fishing trip in Alaska to Dutch Harbor on or about December 8, 2017. He was terminated upon the boat arriving at the dock. Blue North Fisheries has refused to provide a reason for the termination. The respondent applied for unemployment with the State of Washington because

the boat is based out of Washington State and covered by the Washington State Employment Security Department even though it operates in Alaska. The Washington State Employment Security Department found that the termination was not as a result of misconduct by the respondent. As a result, the respondent was eligible for unemployment benefits effective December 10, 2017. The respondent is currently receiving unemployment benefits of \$713 a week gross with a net check of \$642 a week. The respondent has no other income.

The respondent is not able to pay spousal maintenance as the spousal maintenance amount of \$3,000 per month exceeds his net income of \$2,782 per month. Additionally, the respondent has received none of his share of the military retired pay nor any of the Federal Employees Retirement benefits. The petitioner continues to collect all of these benefits including the respondent's share of those benefits. This results in the petitioner having a net income in excess of the respondent. Her net income is approximately \$4,397 net per month without the payment of spousal maintenance due to the funds she is currently collecting. She is also eligible to collect her social security. This is a resource available to her that she has declined to collect \$1,075 per month. This is a sum she is voluntarily not collecting.

The respondent also married his wife Janet. After the time of the court's written decision, Janet suffered a cranial subdural hematoma. She was hospitalized and eventually had to be life flighted to Harborview to be cared for in a trauma center. As a result of her head injury she is unable to work. She has not qualified for social security disability but has made application. As a result, there is not a second income in the household of the respondent.

(CP 58-59.)

The Petition was filed on February 9, 2018, two months after Mr. Scholl lost his job on December 8, 2017. (CP 57-58.) The Petition requested that the Court modify spousal maintenance or alternatively, to suspend spousal maintenance and to provide offsets of his share of the military retired pay and the OPM FERS payments that he was awarded in the Decree but that Ms. Scholl continued to collect. (CP 59, 61, 63.)

The record revealed that Mr. Scholl was diligent in responding to his loss of employment. After losing his job, Mr. Scholl immediately commenced seeking employment. (CP 65.) Mr. Scholl applied with numerous fishing boats since his 25 year career had been primarily with fishing boats. (CP 65.) Mr. Scholl contacted past employers. (CP 65.) Mr. Scholl networked with past crewmembers. (CP 65.) Mr. Scholl applied with many employers, including Clipper Seafoods, Trident Seafoods, Iquiqueros Coastal Villages Fishing, Foss Tug and Marine, Manson Dredge, Olympic Tug and Barge, Glacier Seafoods, Hawaii Tug and Barge, and the huge corporation of Saltchuk. (CP 66.) Mr. Scholl looked at a dredge job on the East Coast of the United States which would require a relocation. (CP 66.) Mr. Scholl searched for any oil jobs down in the Gulf Coast which would also require him to relocate. (CP 66.) Mr. Scholl did not receive one interview as a

result of applications. (CP 66.) It was not a good time to be applying for fishing jobs as the fishing boats were out to sea with full crews. (CP 66.) The fishing industry would not hire Mr. Scholl's position midseason unless there was some kind of unusual turn of events. (CP 66.) Regardless, Mr. Scholl applied for any open jobs that he could. (CP 66.)

Mr. Scholl checked daily job boards to look for any new jobs posted. (CP 66.) Mr. Scholl put together a resume that he used for his submissions. (CP 66-67.) Mr. Scholl was concerned that age discrimination was a factor at play since he was nearly 60 years old and worked in a physically demanding field on fishing boats. (CP 97.) Mr. Scholl applied for other jobs outside the industry such as a Fed Ex driver, City of Anacortes Maintenance Department, a towing company, Washington State Ferries, and many others. (CP 97-98.)

Mr. Scholl updated his Financial Declaration, with his household expenses totaling almost \$5,000 a month, even after making severe cuts. (CP 67, 70-77.) Mr. Scholl could not continue to pay spousal maintenance and service the debts that he was required to pay. (CP 67, 70-77.) Mr. Scholl was falling behind in paying his bills. (CP 67.) Mr. Scholl cashed out an IRA that he was awarded in the divorce to pay Petitioner spousal maintenance in January 2018. (CP 17, 67.) After losing his job, Mr. Scholl's only

income was unemployment which totaled \$2,782 per month. (CP 5, 70-71.) Commencing March 2018, Mr. Scholl began receiving \$390.80 net income from the military retirement pay which increased his monthly net income to \$3,172.80. (CP 99.)

When the Petition was filed, Ms. Scholl's monthly income exceeded Mr. Scholl's. (CP 68.) At the time the Decree was entered, the Court found Ms. Scholl's monthly income to be \$4,397. (CP 46.) Mr. Scholl's monthly income at the time he filed his Petition was \$2,782. (CP 5, 68.) Additionally, Ms. Scholl was eligible to collect her Social Security of \$1,097 effective with her approaching 62nd birthday. (CP 68.) With his Petition, Mr. Scholl filed copies of his unemployment letter from the State of Washington, Employment Security Department (CP 3), his unemployment pay statement (CP 6), and his job search log extending from December 15, 2017 through January 26, 2018. (CP 8-14.) Mr. Scholl provided the Court with a copy of his 2017 W-2 wage and tax statement (CP 19) and his Financial Declaration. (CP 70-77.)

Ms. Scholl filed her Financial Declaration and Responsive Declaration to Mr. Scholl's Motion. (CP 78-95.) Ms. Scholl never filed a Response to the Petition to Modify Spousal Maintenance.

C. Court Proceedings.

The Court granted Mr. Scholl's Petition to modify spousal maintenance at the initial hearing on March 27, 2018 and entered the following Order:

1. The Decree of Dissolution is modified in Section 13 regarding the payment of spousal maintenance. Effective February 1, 2018, the payment of spousal maintenance is suspended except to the amount of the OPM payment received by Petitioner representing Respondent's share of the retirement, due to the non-voluntary unemployment of the Respondent.
2. Upon the Respondent obtaining employment, he shall provide to the Petitioner his employment contract (if applicable) or first month's paystub upon receipt. The Petitioner may move the court to modify the spousal maintenance based upon the re-employment of the Respondent effective with the first of the month for which he is re-employed.
3. The OPM and FERS supplemental annuity payments collected by petitioner shall be offset against any future spousal maintenance obligation.
4. Each party may do discovery into obligations of each including license status.
5. Respondent to use good faith efforts to find employment.
6. A review hearing date shall be scheduled during the month of June 2018 on a mutually selected date.

(CP 104-105.)

After the initial hearing, Mr. Scholl did find employment. (CP 109.) At the review hearing on July 30, 2018, the Court ordered Mr. Scholl to pay spousal maintenance to the Petitioner in the amount of 40% of his gross overtime up to \$3,000.00 per month, offset by the OPM retirement. (CP 117-118.) Mr. Scholl was not able to timely submit materials to the Court for this review hearing as he was out to sea. (CP 109.) However, his wife provided the Court with information as to his new employment, specifically that he was earning \$33.61 an hour, which projected to a \$5,825.70 gross monthly income, which after deductions resulted in a new monthly income of \$4,403.07. (CP 109.) The Court recognized that Mr. Scholl's base income would not support a \$3,000 monthly spousal maintenance payment so the Court focused on Mr. Scholl's overtime income to determine the appropriate spousal maintenance payment. (CP 118.) At the July 30, 2018 hearing, the Court did have before it copies of Mr. Scholl's earnings statements from his new employer, Young Brothers, Ltd., out of Honolulu, Hawaii. (CP 30-32.)

3. At the next review hearing on October 18, 2018, the Court Commissioner did not find a significant change in circumstances as to the income of Mr. Scholl and therefore

reinstated the spousal maintenance of \$3,000.00 per month subject to offsets due to the retirement incomes. (CP 194-196.)

On revision of the October 18, 2018 Court Order, the Trial Judge, on November 16, 2018, revised the Court Commissioner's Order, requiring Mr. Scholl to pay spousal maintenance in the amount of 40% of his overtime income (CP 214-215.) The Court stated in its oral ruling that "I believe this Court's intent was to equalize the income of this long-term marriage." VRP 15. And the Court did exactly that. (CP 214-215.)

The Trial Court denied Ms. Scholl's Motion for Reconsideration. (CP 252.) This appeal followed.

III. ARGUMENT

Modification of spousal maintenance is authorized by RCW 26.09.170(1), which states as follows:

Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

Maintenance awards can only be modified upon a showing of a substantial change in circumstances not within the parties' contemplation at the time of the dissolution decree. *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001); see also RCW 26.09.170(1). The change must have been one "that was not within the contemplation of the parties at the time the decree was entered." *In re Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (1987). "The phrase 'change in circumstances' refers to the financial ability of the obligor spouse to pay vis-à-vis the necessities of the other spouse." *Id.* at 524. Regarding the financial ability of the obligor spouse, "[a] former wife may not obtain additional alimony on the theory that such is in keeping with her former husband's present station in life." *Gordon v. Gordon*, 44 Wn. 2d 222, 228, 266 P.2d 786 (1954).

The party petitioning for modification bears the burden of demonstrating the change of circumstances. In determining whether she or he has met this burden, "the basic test, absent the most exceptional circumstances, 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). Determining whether

there has been the required change in conditions and circumstances, is a question addressed to, and that rests within, the sound discretion of the trial Court. *Gordon*, 44 Wn. 2d at 226. “Unless it can be said that the trial Court has abused its judicial discretion in this regard, its exercise thereof will not be disturbed.” *Id.* at 227.

The phrase “change in circumstances” refers to the financial ability of the obligor spouse to pay *vis-à-vis* the necessities of the other spouse. *In re Marriage of Ochsner*, 47 Wn. App. 520, 736 P.2d 292 (1987).

The Trial Court addressed the very situation of Mr. Scholl’s employment in its letter ruling issued at the time of the divorce and incorporated into the Decree.

Mr. Scholl argues that there is no guarantee that he will be able to continue to work in his field of employment, however, if his ability to work becomes substantially impaired at a future date then that type of circumstance may justify a modification of the maintenance awarded to Ms. Scholl but that speculative action cannot be considered at this time.

(CP 47.)

The Court stated specifically that a change in work status at a future date was speculative and would not be considered at trial, but that a change in his work status may justify a modification of the maintenance awarded to Ms. Scholl. This is exactly what happened. Mr. Scholl lost his job, losing a monthly net income of \$10,658, and

was unable to find work, necessitating a Petition to Modify the spousal maintenance. The Petition was granted at a time when Mr. Scholl had not been employed for almost 4 months. Mr. Scholl subsequently gained employment with a job paying \$33.61 an hour which translated to a net monthly income of \$4,403.07, substantially less than one-half of the net monthly income of \$10,658 he earned at the time of the divorce. (CP 109, 187.) The Court rightfully recognized that the hourly rate would not support a spousal maintenance payment of \$3,000.00 per month. However, the Court also recognized that Mr. Scholl would earn substantial income with overtime while at sea so the Court fashioned a spousal maintenance obligation that attached to the overtime that he earned, requiring Mr. Scholl to pay 40% of his gross overtime as spousal maintenance to Ms. Scholl with no upper limit. Mr. Scholl would be responsible for the taxes generated by the overtime income. Since Mr. Scholl's monthly base income was similar to Ms. Scholl's monthly income, the award of the overtime basically kept the parties' incomes equal.

This is exactly what was argued before the Trial Judge on the Motion for Revision. It was clear that the Court's intent at the time of the divorce was to more or less equalize the incomes of the parties. (CP 47, VRP 15.) Hence, the \$3,000 monthly payment of spousal maintenance in the divorce which resulted in a \$7,658

monthly income to Mr. Scholl and a \$7,397 monthly income to Ms. Scholl. (CP 47-48, 184-185.) Since Mr. Scholl was now earning only \$33.61 an hour, he proposed that he pay 40% of his gross overtime pay as spousal maintenance. (CP 184.) At the \$33.61 hourly income, Mr. Scholl's net monthly income was \$4,295, compared to Ms. Scholl's monthly income of \$4,397. (CP 187.) The Court, on the Motion for Revision, ruled that the Court's intent was to equalize the income of this long term marriage and this is exactly what the Court did.

At the revision hearing the Trial Court had before it financial information from Mr. Scholl, including his earning statements, his bank records, his Financial Declaration, his employment contract, and his federal retirement benefit income of \$226.59 per month. The Court also had financial information submitted by Ms. Scholl. The Court had before it substantial supporting evidence to make its ruling. The Trial Court Judge was the same judge that heard the dissolution of marriage proceeding and therefore was very familiar with the facts of the case. The Court gave its oral opinion on revision as follows:

THE COURT: All right. This case was before me, I believe, back in 2017. My decision, which was a written decision, five pages, was dated July 27, 2017.

In regard to maintenance, I indicated in my decision that Mr. Scholl argues that there is no guarantee that he will be able to continue to work in his field of employment. However, if his ability to work becomes substantially impaired at a future date, then that type of circumstance may justify a modification of the maintenance awarded to Ms. Scholl but that speculative action cannot be considered at this time.

In regards to a request to modify maintenance post-dissolution, there must be a change of circumstances, and I believe the proper test, the Court indicates, is whether a substantial change in circumstances, which was not within the contemplation of the parties, has occurred. We go back to RCW 26.09.090 which are the factors the Court has to consider in regards to maintenance, and I believe subsection (f) is what is relevant in regards to this revision and that is the ability of the spouse, or domestic partner in this case, the spouse, from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance. If I remember correctly, this is a long-term marriage, and I ordered spousal maintenance; and I believe it might have been indefinite. . . .

THE COURT: However, in regards to my decision based on how I wrote it, it is clear that I did contemplate in the event the working circumstances changed for Mr. Scholl that the Court could reconsider modification of the maintenance award given to Ms. Scholl. After reviewing the pleadings in this case and assessing RCW 26.09.090, I'm going to find that there is substantial change in circumstances requiring a modification of the maintenance order. I believe this Court's intent was to equalize the income of this long-term marriage. Maintenance is indeterminate; and if circumstances should change, I'm quite sure we'll be back here again.

The calculations proposed by the moving party will be used. Counsel, if you can prepare an order.

(VRP 14-15.)

The Court then entered the Order awarding Ms. Scholl 40% of Mr. Scholl's gross overtime wages. (CP 214-215.)

The *Hulscher* case holds that an Order modifying the spousal maintenance obligation is reviewed for substantial supporting evidence and for legal error. *Hulscher, supra*.

The Court had before it the following substantial supporting evidence:

1. Undisputed evidence that Mr. Scholl was terminated from his previous employment where he was earning \$10,658 net income per month. (CP 57-59, 65.)
2. Correspondence from the Employment Security Department approving unemployment benefits starting December 10, 2017. (CP 3.)
3. Verification that Mr. Scholl was receiving only \$2,782 monthly unemployment income during the four months after he was terminated at which time he filed his Petition and the Court entered its initial ruling. (CP 6, 67.)
4. Mr. Scholl's Financial Declaration. (CP 70-77.)

5. Mr. Scholl's search logs confirming his search for new employment. (CP 8-14.)

6. Paystubs confirming his new income of \$33.61 per hour once he found employment. (CP 31-32.)

7. Employment contract entered into by Mr. Scholl and his new employer. (CP 185.)

The evidence submitted by Mr. Scholl was substantial and complete.

There was no legal error by the Trial Court. The Trial Court in the divorce proceeding opined that if Mr. Scholl's ability to work became substantially impaired at a future date, then that type of circumstance may justify a modification of the maintenance award but that speculative action would not be considered at that time. In other words, it would take a substantial change in circumstances, unforeseen by the Court at the time of the entry of the Decree, before a modification of the maintenance may be justified. This is what occurred. There was no legal error by the Trial Court. This decision rests within the sound discretion of the Trial Court. *Gordon, supra.*

IV. ATTORNEY'S FEES

Attorney's fees are authorized pursuant to RCW 26.09.140 which states as follows:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

The Court did award Ms. Scholl \$325 in fees. (CP 117-118.)

Both parties have approximately equal financial resources to pay their attorney's fees. The Court's award to Ms. Scholl of 40% of Mr. Scholl's overtime was to equalize the income of the parties. (VRP 15.) The Decree awarded Ms. Scholl approximately 77% of her military retirement, the majority of her Civil Service retirement, the majority of her Thrift Savings Plan, one-half of the Pacific Pension Trust, the Vanguard Prime Money Market Fund, the Masters, Mates and Pilots Individual Retirement Account, and one-half of the Key Bank IRA. (CP 44.) Mr. Scholl was awarded approximately 23% of Ms. Scholl's military retirement, his community interest in the Civil Service retirement, his community

interest in the Thrift Savings Plan, one-half of the Pacific Pension Trust, the Vanguard Prime Money Market Fund, the Masters, Mates and Pilots Individual Retirement Account, and one-half of the Key Bank IRA. (CP 44.) Ms. Scholl was awarded the family residence located at Browns Point with no lien awarded to Mr. Scholl. (CP 44.) The parties are on equal financial footing. No attorney's fees should be awarded.

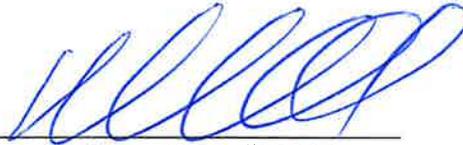
V. CONCLUSION

Mr. Scholl properly filed a Petition to Modify Spousal Maintenance after losing his job that paid him a monthly net income of \$10,658. The Trial Court in the divorce proceeding properly recognized that a future loss of employment by Mr. Scholl may justify a modification of spousal maintenance. The Court did suspend spousal maintenance at the initial hearing on modification since Mr. Scholl had been unemployed the previous four months. After gaining new employment, but earning only \$33.61 an hour, the Court properly found that this basic hourly rate would not support a \$3,000.00 monthly spousal maintenance payment but that since overtime would be a substantial component of Mr. Scholl's new income, the Court fashioned a percentage of 40% of the gross overtime earned by Mr. Scholl to determine the monthly support obligation. No attorney fees were awarded since the parties received

similar property awards in the Decree and each party had similar incomes due to the spousal maintenance award.

The Trial Court's ruling should be affirmed.

Respectfully submitted this 29th day of October, 2019.



Daniel W. Smith, WSBA #15206
Attorney for Respondent

No. 52756-1-II

COURT OF APPEALS, DIVISION II
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Certificate of Service

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DECLARATION OF SERVICE

I, **Kimberly E. Wailes**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed by **Campbell Barnett PLLC**, and that on today's date, October 28, 2019, I served in the manner indicated by directing delivery to the following individuals:

- legal messenger**
- email**
- hand delivery**
- U.S. Mail**

Stephen W. Fisher
6314 19th Street West, Suite 8
Fircrest, WA 98466
steve@fircrestlaw.com

Dated this 28th day of October, 2019.

By _____
Kimberly E. Wailes

DECLARATION OF SERVICE

I, **Kimberly E. Wailes**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed by **Campbell Barnett PLLC**, and that on today's date, October 30, 2019, I served in the manner indicated by directing delivery to the following individuals:

- legal messenger**
- email**
- hand delivery**
- U.S. Mail**

Stephen W. Fisher
6314 19th Street West, Suite 8
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steve@fircrestlaw.com

Dated this 30th day of October, 2019.

By 
Kimberly E. Wailes

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