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No. 52756-1

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

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In Re the Matter of:

Lila Fay Scholl,

Appellant,

vs.

Lee William Scholl,

Respondent.

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**OPENING BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

Table of Contents ..... i

Table of Authorities ..... ii

    Cases

    Statutes, Rules and Regulations

I    Introduction ..... 1

II   Assignments of Error .....

III  Statement of the Case

IV.  Argument,

    A.    Standard of Review ..... 3

    B.    Legal Principles Regarding Spousal Maintenance . 7

V.    Conclusion

VI.   Certificate of Service

**TABLE OF AUTHORITIES**

**Cases**

*In re Marriage of Bowen*,  
168 Wn. App. 581, 586, 279 P.3d 885 (2012) . . . . . 6, 7, 20

*DeRuwe v. DeRuwe*,  
72 Wn. 2d 404, 433, P.2d 209 (1967) 82

*In re Marriage of Hulscher*  
143 Wn. App. 708, 713, 180 P.3d 199 (2008) . . . . . 8

*Lambert v. Lambert*,  
66 Wn.2d 503, 508, 403 P.2d 664 (1965) . . . . . 7

*In re Marriage of Littlefield*,  
133 Wn.2d 39, 47, 940 P.2d 1362 (1997) . . . . . 7

*In re Marriage of Ochsner*,  
47 Wn. App. 520, 524-25, 736 P.2d 292 (1987) . . . . . 8, 13

*In re Marriage of Spreen*,  
107 Wn. App. 341, 346, 28 P.3d 769 (2001) . . . . . 7, 17

*In re Marriage of Stern*, . . . . . 16  
68 Wn. App. 922, 929, 846 P.2d 1387 (1983)

*In re Marriage of Tomsovic*,  
118 Wn. App. 96, 105, 74 P.3d 692 (2003) . . . . . 7

**STATUES, RULES AND REGULATIONS**

RCW 26.09.090(1) . . . . . 8, 13,15

RCW 26.09.140 . . . . . 15, 16

## **I. INTRODUCTION**

This appeal stems from the Order Re: Review entered in Pierce County Superior Court, dated November 16, 2018, which modified and reduced Lee Scholl's spousal support obligation and this appeal also stems from the decision entered in Pierce County Superior Court on December 3, 2018, which denied Lila Scholl's Motion for Reconsideration.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that a substantial change of circumstances occurred in the income of Lee Scholl justifying modification of spousal support.
2. The trial court erred in finding that Lee Scholl's change in employment was not within the contemplation of the parties.
3. The trial court erred in failing to address the financial ability of Lee Scholl to pay spousal support vis-à-vis the necessities of Lila Scholl.
4. The trial court erred in granting Lee Scholl's Order Re: Review and in failing to address how the spousal support ordered on November 16, 2018 equalized the income of the parties.
5. The trial court erred in failing to award attorney's fees to

Lila Scholl, as requested on November 16, 2018, and Lila Scholl should be awarded attorney's fees on appeal, based upon need and ability to pay.

### **III. STATEMENT OF THE CASE**

The trial court's decision, relating to the dissolution proceeding of Lila Scholl and Lee Scholl, was filed on July 27, 2017. (CP 33-37). The decision noted that Lila Scholl and Lee Scholl had been married from December 27, 1986 and had separated on July 5, 2015, resulting in a long-term marriage of 29 and 1/2 years. (CP 33). On the fourth and fifth pages of the July 27, 2017 decision, the trial court addressed spousal support. (CP 36-37).

Lila Scholl was awarded \$3,000 in spousal support, which would allow both parties to maintain the standard of living established during the marriage, while allowing Lee Scholl to meet his personal needs. (CP 37).

Lee Scholl's monthly net income was determined to be \$10,658, and Lila Scholl's net monthly income was determined to be \$4,397. Lila Scholl's extensive health issues were described by the trial court, and the court found that Lila Scholl was not voluntarily unemployed or underemployed, at age 61. (CP. 36-37). The length of Lee Scholl's spousal support obligation was indeterminate.

Findings and Conclusions About a Marriage and Final Divorce Order were entered on September 15, 2017. (CP 48-56, 38-47). The

trial court's decision, filed on July 27, 2017, was attached to the Final Divorce Order. (CP 43-47).

As to assets awarded by the trial court, other than unvalued retirement accounts, neither party received a significant award of community assets. Lila Scholl was awarded the family home, with an appraised value of \$395,000, subject to a mortgage of \$333,985. (CP 44-45).

A substantial unidentified amount of debt was to be shared equally by the parties. (CP 45).

On February 9, 2018, Lee Scholl filed a Petition to Modify Spousal Maintenance Order. (CP 57-60). On that same date, Lee Scholl filed a Motion to Suspend Spousal Maintenance. (CP 61-62).

A hearing was held on March 27, 2018, regarding suspension of spousal maintenance. The hearing was held based upon the Declarations and Sealed Financial Source Documents filed by the parties. The Court entered an Order Re: Spousal Maintenance, which provided that effective February 1, 2018, Lee Scholl's payment of spousal maintenance would be suspended, except the amount of the OPM payment received by Petitioner, representing Respondent's share of the retirement, due to the non-voluntary unemployment of Respondent. (CP 104-105). As part of the March 27, 2018 Order Re: Spousal Maintenance, Respondent was to provide Petitioner with his first month paystub upon obtaining employment, and Petitioner would

be permitted to move the Court to modify the spousal maintenance, based on Respondent's re-employment. A review hearing was to be scheduled. (CP 104-105).

The review hearing to address the Order Re: Spousal Maintenance was scheduled for July 30, 2018. On July 26, 2018, Respondent filed Sealed Financial Source Documents, which included two earnings statements from Young Brothers, Ltd. (CP 30-32). The first earnings statement was for the period beginning April 1, 2018 and ending April 15, 2018. The second earnings statement was for the period beginning April 16, 2018 and ending April 30, 2018. The gross earnings for this period was \$14,515.32.

On July 30, 2018, the court entered an Order on Review Hearing. A finding was entered that the Respondent did not comply with notification of re-employment requirements of the March 27, 2018 Order. Respondent was ordered to pay \$3,000 in spousal support for the month of April, 2018. Among other things, Respondent was ordered to pay spousal maintenance for May, 2018 through September, 2018, in the amount of 40 percent of his gross overtime of \$3,000, and was required to provide financial information regarding his employment for May, 2018 through August, 2018, inclusive. The Order provided that the Court shall review the Respondent's actual income for the months in question and reserves the ability to adjust spousal maintenance for those months at the September, 2018

review hearing. (CP 117 - 118). The Petitioner was awarded \$325 for legal fees.

On August 15, 2018, Petitioner, Lila Scholl filed Petitioner's Motion to Enforce Final Divorce Order and Enter Judgments.(CP 119-121).

On October 18, 2018, the Court Commissioner entered an Order on Review Re: Spousal Support. (CP 194-196). In the Order on Review Re: Spousal Support, the Court Commissioner did not find a significant change in circumstances as to the income of Respondent and the court reinstated spousal maintenance of \$3,000, per month, commencing May 1, 2018.

On October 1, 2018, the Respondent filed a Motion for Revision. (CP 197-208). The Motion for Revision was heard by the trial court on November 16, 2018. An Order Re: Review was entered by the trial court, providing that the Respondent shall pay spousal maintenance in the amount of forty (40%) of his overtime pay going forward prospectively, with payment on the 15<sup>th</sup> of the month. This Order is effective May 1, 2018. (CP 215-215).

Petitioner's Motion for Reconsideration was filed on November 26, 2018. (CP 216), with Petitioner's Brief in Support of Reconsideration (CP 217-251). On December 3, 2018, the trial court filed its decision, providing that Respondent is not required to file a response, and Petitioner's Motion for Reconsideration is denied. (CP

252).

On December 13, 2018, the Petitioner filed her Notice of Appeal to the Court of Appeals, Division II, relating to the Order Re: Review, which was filed on November 16, 2018, and the Decision on Petitioner's Motion for Reconsideration. (CP 253-259).

On January 9, 2019, an Agreed Order was entered striking Exhibits 1 and 2 of Respondent's Motion for Revision. (CP 260-262). Exhibits 1 and 2 to Respondent's Motion for Revision were stricken from the record.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

The Court reviews a modification of spousal support for substantial supporting evidence and legal error. *In re Marriage of Hulscher* 143 Wn. App. 708, 713, 180 P.3d 199 (2008). "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, 586, 279 P.3d 885 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Bowen*, 168 Wn. App. at 586. "A decision is manifestly unreasonable 'if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable

grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *Bowen*, 168 Wn. App. at 586-87 (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

**B. Legal Principles.**

A decree respecting maintenance may be modified only upon a showing of a substantial change of circumstances. RCW 26.09.170(1)(b). The phrase “change of circumstances” refers to a “substantial and material change in the condition and circumstances of the parties, occurring since the entry of the decree, relative to the factors of (1) the necessities of the divorced wife and children, and (2) the practical and realistic ability of the ex-husband to meet the obligations so imposed.” *Lambert v. Lambert*, 66 Wn.2d 503, 508, 403 P.2d 664 (1965); *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001). A “substantial change in circumstances” is a fact that is unknown to the trial court at the time it entered the original parenting plan or an unanticipated fact that arises after entry of the original plan. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 105, 74 P.3d 692 (2003). “The determination whether a substantial and material change has occurred which justifies modification of maintenance or support is within the discretion of the trial court, and will not be reversed on appeal absent abuse of discretion.” *In re*

*Marriage of Ochsner, 47 Wn. App. 520, 524-25, 736 P.2d 292 (1987).*

RCW 26.09.090(1) provides a non-exhaustive list of factors for the trial court to consider when awarding maintenance:

- (a) The financial resources of the party seeking maintenance . . .;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage . . .;
- (d) The duration of the marriage . . .;
- (e) The age, physical and emotional condition, and financial obligations of the spouse . . . seeking maintenance; and
- (f) 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.

The same factors are reviewed by the trial court in a spousal support modification proceeding. Of primary importance in the maintenance award are the parties' economic positions following the dissolution. *DeRuwe v. DeRuwe, 72 Wn. 2d 404, 433, P.2d 209 (1967).*

- 1. The trial court erred in finding that a substantial change of circumstances occurred in the income of Lee Scholl, pursuant to RCW 26.09.170(1).**

RCW 26.09.170(1) provides that the provisions of any decree affecting maintenance may be modified only on a showing of a substantial change of circumstances. Substantial evidence must support a factual determination, with the record containing sufficient

evidence to persuade a fair minded rational person of the truth of that determination. *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918, (1986).

Lee Scholl had gross earnings in 2017 of \$160,419.66, based upon his 2017 W-2. Sealed Financial Source Documents (CP 19). Utilizing Lee Scholl's 2017 W-2, his gross monthly income was \$13,368.31, his monthly deductions totaled \$2,292.92, resulting in net income of \$10,675.39. In the trial court's decision, dated July 27, 2017, Lee Scholl's net income was set at \$10,658, per month. It should be noted that the trial court did not address that the payment of spousal support by Lee Scholl would reduce his tax liability. Conversely, the payment of spousal maintenance payment to Lila Scholl would increase her tax liability and reduced her net monthly income.

In the trial court's Order on Review of Spousal Support, entered on October 18, 2018, no determination was made by the trial court as to the Scholls' gross monthly income and net monthly income. (CP 194-196). In its oral ruling, the trial court stated that with its ruling in July, 2017, the court's intent was to equalize the income of this long-term marriage. (VRP 15). In order to make a determination of equalizing incomes, it would first be necessary to make specific findings relating to Lee Scholl's gross income and his net income.

In her Declaration filed on October 16, 2018, Lila Scholl addressed the gross earnings of Lee Scholl for the period of time from April 1, 2018, through September 30, 2018. (CP 269). Based upon Lee Scholl's pay statements with the dates of April 1, 2018 through September 30, 2018, Lee Scholl's gross income from his employment was \$74,153.98. (CP 269). Sealed Financial Source Documents (CP 31-32). (CP 226-234).

During the same time period from April 1, 2018 through September 30, 2018, Lee Scholl received unemployment benefits of \$1,926. (CP 269). Additionally, Lee Scholl received the sum of \$459.77, as his portion of Lila Scholl's military retirement. Sealed Financial Source Documents (CP 29). Lee Scholl also received the sum of \$226.59, per month, from the United States Office of Personnel Management, for his portion of Lila Scholl's Federal Employee's Retirement System Retirement. (CP 238).

Based upon Lee Scholl's pay statements and earnings from Lila Scholl's retirement plans, Lila Scholl prepared a schedule of gross earnings of Lee Scholl, which was attached to her Declaration, dated October 16, 2018. (CP 277-278). The relevant portions of this appeal relate to payments made from April 1, 2018 through September 30, 2018. As noted, Lee Scholl's average gross monthly income from April 1, 2018 through September 30, 2018, was \$12,676.07. During this same time period, he was receiving the sum

of \$686.36 from his community interest in Lila Scholl's retirement plans. Lee Scholl's total gross monthly income for the time period from April 1, 2018 through September 30, 2018, was \$13,362.43. (CP 278). It should be noted that Lila Scholl's calculations for Lee Scholl's earnings takes into account the overpayment of income to Mr. Scholl of earnings by his employer.

As stated earlier, based upon Lee Scholl's 2017 W-2, Lee Scholl's gross monthly income for 2017 was \$13,368.31. Sealed Financial Source Document (CP 19). His net monthly income after deducting allowable deductions, based upon his 2017 W-2 was \$10,675.39. Lee Scholl's gross income for the period from April 1, 2018 through September 30, 2018, is virtually identical to his gross earnings for the calendar year 2017. Based upon Lee Scholl's earning statement for the period ending September 30, 2018, Lee Scholl's net income for the period from April 1, 2018 through September 30, 2018, was \$9,283.59. (CP 234). Adding on the retirement benefits received by Lee Scholl, would put his net income at \$9,969.95, even without considering the tax benefit he would receive as a result of paying spousal support.

The trial court erred in failing to address the Scholl's gross and net monthly income. Based up on the evidence before the trial court, there was no substantial change justifying the modification and therefore, the modification was unreasonable and an abuse of

discretion.

**2. The trial court erred in determining that Lee Scholl's change in employment was not contemplated at the time of the entry of the Decree of Dissolution.**

A court may modify a maintenance award when the moving party shows a substantial change in circumstances that the parties did not contemplate at the time of the decree of dissolution. *Wagner v. Wagner*, 95 Wn. 2d 94, 98, 621 P.2d 1279 (1980). In its decision filed on July 27, 2017, the trial court stated as follows:

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 future date, that that type of circumstance may justify a modification of the maintenance awarded to Mrs. Scholl, but that speculative action cannot be considered at this time. (CP 37).

At the time of the entry of the Final Divorce Order, Lee Scholl was employed by Blue North Fisheries, in the maritime field. Sealed Financial Source Documents (CP 19). After being terminated by Blue North Fisheries, for an undisclosed reason, Lee Scholl was hired by Young Brothers, Ltd., again in the maritime field. The employment with Young Brothers, Ltd. provides similar employment and similar income for Lee Scholl

As stated in the trial court's July 27, 2017 decision, it was Lee Scholl's goal to retire from the fisheries industry at age 65. The lateral change of employment, at comparable earnings, was not a change

that was unanticipated by the parties.

Lee Scholl's termination by Blue North Fisheries, and returning to work with Young Brothers, Ltd. was not a circumstance that substantially impaired Lee Scholl's ability to work in the maritime industry. The trial court's determination that Lee Scholl's change in employment was not contemplated or anticipated by the parties is error.

**3. The trial court erred in failing to address the financial ability of Lee Scholl to pay spousal support vis-à-vis, the necessities of Lila Scholl in meeting her day-to-day needs.**

The phrase "change of circumstances" refers to the financial ability of the obligor to pay vis-à-vis the needs of the recipient. *In re Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (1987). Pursuant to RCW 26.09.090, the trial court is required to consider various factors when determining whether and how much spousal maintenance to award. One factor is the ability of the obligor from whom maintenance is sought to meet his needs and financial obligations while meeting the needs of the party seeking maintenance. In its oral ruling, the trial court acknowledged that it must consider RCW 26.09.090(1)(f), but the trial court fails to address Lee Scholl's ability to pay spousal support or Lila Scholl's financial need.

Lee Scholl's net monthly income for the period from April 1, 2018 through September 30, 2018, from earnings and retirement is

described above and totals \$9,969.95. After payment of Lee Scholl's share of Lila Scholl's military retirement, Lila Scholl receives the sum of \$2,405.97, per month from her military retirement. Sealed Financial Source Documents (CP 24). After the payment of \$226.59 to Lee Scholl for his interest in her Federal Employees Retirement System Retirement, Lila Scholl receives the sum of \$381.90 on a monthly basis. Sealed Financial Source Documents (CP 26). Combining Lila Scholl's military retirement and her Federal Employee's Retirement System Retirement, Lila Scholl has net income of \$2,787.06, per month.

Lila Scholl filed a Financial Declaration, which outlines her expenses. (CP 78-84). Lila Scholl's monthly expenses as outlined in her Financial Declaration totaled \$5,852. (CP 78). The mortgage payment on the real property awarded to Lila Scholl is \$2,258, per month, which alone is comparable to her net monthly income. (CP 81). Lila Scholl also outlined her debt in her Financial Declaration which established monthly debt of \$1,300, and total debt obligation, excluding her mortgage, in the sum of \$53,646. (CP 82). Based upon Lila Scholl's net income of \$2,787.06, and monthly expenses of \$5,852, Lila Scholl has a deficit of \$3,064.94, per month.

In his Financial Declaration filed on February 9, 2018, Lee Scholl claimed that he had total monthly net income of \$2,782. (CP 70). Lee Scholl also claimed that he had monthly expenses of

\$7,143. (CP 70). As noted in his Financial Declaration, Lee Scholl acknowledges that he has additional income from his current wife in the sum of \$1,700. (CP 72). Even if the trial court had considered Lee Scholl's obligations, at face value, Lee Scholl still had sufficient net income to continue his spousal support payment of \$3,000, per month.

The trial court's failure to both provide findings, pursuant to RCW 26.09.090(1)(f) was error. The failure to address the financial ability of Lee Scholl to meet his obligations and to pay spousal support to Lila Scholl and the failure to address the needs of Lila Scholl was manifestly unreasonable.

**4. The trial court erred in failing to address how the spousal support ordered on November 16, 2018 accomplished the intent to equalize the incomes of the parties.**

In its oral decision, delivered on November 16, 2018, the trial court stated that it was the trial court's intent to equalize the income of the parties in this long-term marriage. (VRP 15). The Order Re: Review, dated November 16, 2018, provides that the Respondent shall pay spousal maintenance in the amount of 40 percent of his overtime pay going forward prospectively, with payment on the 15<sup>th</sup> of the month for the prior month.

As provided above, the evidence provided to the trial court established that Lee Scholl's net income for the time period being addressed was \$9,969.65. Lila Scholl's net income during the same

time period was \$2,787.06.

The structure of the Order entered on November 16, 2018, is illusory, based upon the court's intent to equalize the income of the parties. As provided in the Declaration of Lila Scholl, dated October 16, 2018, Lee Scholl's current employment is no different than the employment that he previously had, specifically relating to having six weeks at work and then six weeks off. The trial court's order permits Lee Scholl to pay no spousal support, during any month that he is not working, even though he may have earned substantial and significant income the month before, prior to taking his standard leave time. Lee Scholl's gross annual income will not change, but based upon the November 16, 2018 order, his spousal support obligation will decrease.

Additionally, Lee Scholl has total control of his overtime, if any, he intends to work. Lee Scholl could manipulate his schedule to ensure that he pays the least amount of spousal support, pursuant to the current order.

This court reviews a modification order for substantial supporting evidence and for legal error. *In re Marriage of Stern*, 68 Wn. App. 922, 929, 846 P.2d 1387 (1983).

The trial court's failure to present its findings as to how the Order Re: Review entered on November 16, 2018, equalizes the income of the parties is error and is not supported by the evidence

before the trial court. The trial court's decision is manifestly unreasonable and untenable, based upon the current situation of the parties.

5. **Lila Scholl should have received an award of attorney's fees at the trial court level and should receive an award of attorney's fees at the Appellate level.**

RCW 26.09.140 provides 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.

See *In Re Marriage of Spreen*, 107 Wn. App. 341, 351:

Under RCW 26.09.140, the court may award attorney fees to either party in a maintenance action. In determining whether it should award fees, the court considers the parties' relative need versus ability to pay. *In Re Marriage of Shellenberger*, 80 Wn. App. 71, 87, 906 P.2d 968 (1995). The Court of Appeals reviews this decision for abuse of discretion. *In Re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995).

The Court of Appeals will reverse an attorney fees award if the decision is untenable or manifestly unreasonable. *In Re Custody of Salerno*, 66 Wn. App. 923, 926, 833 P.2d 470 (1992).

At the hearing on Lee Scholl's Motion for Revision, Lila Scholl requested attorney's fees of \$2,500. A Declaration of Attorney's Fees was filed on November 13, 2018, establishing the fees incurred by Lila Scholl (CP 211-213). (VRP 12). The trial court's decision entered on July 27, 2017, established that Lila Scholl received minimal assets, assumed substantial debt and is incapable of employment. (CP 38-47). Lila Scholl's Financial Declaration also describes her monthly financial deficit. (CP 78-84). Conversely, Lee Scholl has earnings to pay Lila Scholl's attorney's fees. The trial court erred in failing to award attorney's fees to Lila Scholl, based upon need and ability to pay.

Lila Scholl also requests that she be awarded attorney's fees on appeal, pursuant to RCW 26.09.140. The above analysis applies to the request for fees on appeal.

#### **V. CONCLUSION**

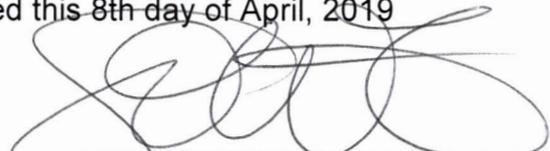
In conclusion, Lila Scholl is requesting that the Court of Appeals decide as follows:

- (1) That a substantial change in circumstances does not exist in Lee Scholl's income that justifies a modification of Lee Scholl's spousal support obligation, and Lee

Scholl's Petition to Modify Spousal Support should be dismissed.

- (2) That Lee Scholl's change in employment was a change that was contemplated at the time of the entry of the Final Divorce Order, and Lee Scholl's Petition to Modify Spousal Support should be dismissed.
- (3) That the trial court's failure to address the financial ability of Lee Scholl to meet his needs and pay spousal support and the trial court's failure to address Lila Scholl's financial condition and needs was error and should be remanded for further determination.
- (4) That the trial court's determination that the terms of the November 16, 2018 Order on Review equalized the income of the parties is error and the case should be remanded for further determination.
- (5) That the trial court erred in failing to award attorney's fees to Lila Scholl and fees should be awarded to Lila Scholl on appeal.

Respectfully submitted this 8th day of April, 2019

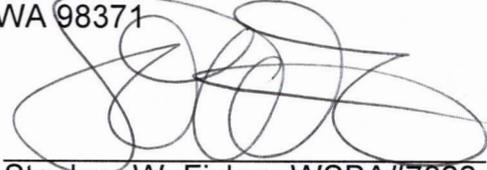


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**CERTIFICATE OF SERVICE**

I certify that on the 8th day of April, 2019, I delivered via email a true and accurate copy of the foregoing Opening Brief of Appellant:

Hillary Holmes  
Attorney for Respondent  
317 South Meridian  
Puyallup WA 98371

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line, positioned above the printed name of the signatory.

Stephen W. Fisher, WSBA#7822  
Attorney for Appellant

**STEPHEN W. FISHER, PLLP**

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**Transmittal Information**

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