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JUN 25 2012

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DIVISION III
STATE OF WASHINGTON
By _____

No. 304205

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

IN RE: THE MARRIAGE OF

DONALD REINI,

Petitioner-Appellant,

and

DEBRA KYLE-REINI,

Respondent.

BRIEF OF APPELLANT

Katherine George
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Attorney for Appellant

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I. INTRODUCTION

Donald Reini, a 51-year-old construction worker, must pay \$500 a month of his hourly wages to his ex-wife even though she owns a profitable business and makes more money than he does. Although permanent awards of spousal maintenance are disfavored in this state, the trial court ordered Mr. Reini to pay for the rest of his life, until his ex-wife dies or remarries. Even if he loses his employment, which typically happens every winter due to seasonal layoffs, Mr. Reini *still* must pay spousal maintenance (at half the normal rate). And once Mr. Reini becomes old enough to receive Social Security income, he must pay part of that income as spousal maintenance, on top of the existing maintenance, until death.

In ordering the permanent financial support of Ms. Kyle-Reini, the trial court failed to account for her superior economic position after the divorce. The court's division of property strongly favored Ms. Kyle-Reini, giving her full ownership of the couple's house and an espresso business which grosses more than \$150,000 a year, plus a \$20,165 judgment against Mr. Reini. By contrast, Mr. Reini was awarded some vehicles, tools, household goods, an empty 401(k) account, and some of his pension. Despite this imbalanced distribution, and contrary to the evidence, the trial

court concluded that Ms. Kyle-Reini needs support and that Mr. Reini is financially able to provide it. In sum, because the trial court's decision is not supported by the facts or the law, and because Mr. Reini is unable to support Ms. Kyle-Reini financially, this Court should reverse the judgment and instruct the trial court to remove spousal maintenance and the \$20,165 judgment from the dissolution decree.

Alternatively, this Court should order a new trial because Mr. Reini did not receive a fair trial. Ms. Kyle-Reini's attorney admittedly did not provide trial exhibits to Mr. Reini until the day of trial, despite a local court rule requiring that exhibits be provided a week in advance. This placed Mr. Reini at a heightened disadvantage because, as a pro se litigant who could not afford an attorney, he was not expecting any exhibits to be introduced, did not offer any exhibits of his own, and did not realize until after trial that he was entitled to see exhibits in advance. In light of the prejudicial effect of the violation, the trial court erred by denying Mr. Reini's timely motions to reconsider and vacate the judgment.

In sum, this Court should reverse the judgment based on both substantive and procedural errors. Mr. Reini should not be required to pay spousal maintenance or the \$20,165 judgment. At

the very least, he should have a new trial. Mr. Reini also seeks an award of costs and attorney fees for this appeal.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred by adopting the Decree of Dissolution (sections 1.3, 3.2, 3.3, 3.4, 3.7 and 3.15 and Exhibits A, H and W), improperly awarding spousal maintenance and an unfair share of property to Ms. Kyle-Reini.

2. The trial court erred by adopting the Findings of Fact and Conclusions of Law (sections 2.8 to 2.12, 2.21 and 3.8 and Exhibits A, H and W), wrongly stating that "Maintenance should be ordered because the Wife has the need and Husband has the ability to pay."

3. The trial court erred by adopting its September 5, 2011 memorandum opinion as part of its findings and conclusions. The opinion incorrectly states that Mr. Reini's retirement withdrawal was "unbeknownst to his wife," describes property values incorrectly, divides property unfairly and awards spousal maintenance improperly.

4. The trial court erred by denying Mr. Reini's motion for a new trial and for reconsideration of the maintenance award.

5. The trial court erred by denying Mr. Reini's motion for relief from judgment based on newly discovered evidence.

Issues Pertaining to Error

1. Does a trial court abuse its discretion when it awards spousal maintenance to a spouse who is capable of supporting herself and who has more income than the other spouse?

2. Does a trial court abuse its discretion by requiring permanent spousal maintenance when finding that the receiving spouse is in good health and not disabled, and when the receiving spouse owns a stable and growing business?

3. Does a trial court abuse its discretion by awarding to one spouse both permanent spousal maintenance and full ownership of the couple's income-producing business?

4. Does a trial court abuse its discretion by ordering spousal maintenance without comparing one spouse's gross income to the other spouse's gross income, and without comparing one spouse's net income to the other spouse's net income, when the relative incomes of the parties are a key consideration under the maintenance statute?

5. Does a trial court commit an error of law by considering allegations of misconduct when making decisions

under RCW 26.09.080 and RCW 26.09.090, when both statutes say that the court “shall, without regard to misconduct” make decisions?

6. Does a trial court err by denying a motion for a new dissolution trial when the wife’s attorney failed to comply with a rule requiring pre-trial disclosure of trial exhibits, when the husband had no attorney, when the husband saw the wife’s exhibits for the time on the day of trial, and when the husband introduced no exhibits of his own as a result of the attorney’s failure to comply with the rule?

7. Does a trial court err by denying relief from a judgment awarding spousal maintenance, when the court is presented with newly discovered evidence that the maintenance-receiving spouse told a lender she has a larger income than previously disclosed, when the newly disclosed income is larger than the income of the spouse who must pay maintenance, and when the spouse seeking relief could not have discovered the evidence sooner?

III. RELEVANT FACTS

A. Mr. Reini Had No Attorney At Trial and The Volume of Evidence Was Lopsided as a Result.

After 22 years of marriage, Don Reini petitioned for dissolution in 2007. CP 155-156. Initially, he borrowed money to pay an attorney. CP 88. But Mr. Reini could not afford legal fees and, in July 2008, he began representing himself in the dissolution proceedings. CP 200. Mr. Reini went through trial without an attorney. RP (August 9, 2011) at 61. By contrast, Ms. Kyle-Reini had counsel throughout all proceedings in this case. CP 13-286.

Mr. Reini's plight is common in Washington, according to a June 15, 2012 order of the Washington Supreme Court adopting APR 28, which provides for limited license legal technicians in family law cases. Attachment 1. The order says:

We know that there is a huge need for representation in contested cases where court appearances are required. We know further that *pro se litigants are at a decided disadvantage in such cases, especially when the adverse party is represented.*

Id., pp. 9-10 (italics added).

Here, all 58 of the exhibits admitted at trial were introduced by the respondent, Ms. Kyle-Reini. CP 147-149. Mr. Reini did not introduce a single exhibit. *Id.*; CP 151 ("Mr. Reini presented no tangible evidence"). As a pro se litigant, he did not realize that exhibits were needed. CP 201. He "thought it would be sufficient

just to testify,” and “assumed that the respondent, Debra Reini, also planned to rely on testimony alone.” *Id.*

Mr. Reini’s self-directed testimony fills 14 pages of the trial transcript. RP 74-82, 169-173. By contrast, the opposing attorney’s cross examination of Mr. Reini lasted six times as long, filling 86 pages of the transcript. RP 83-168. Mr. Reini has no legal training. CP 200.

B. Opposing Counsel Did Not Disclose Exhibits Before Trial.

Mr. Reini did not see his ex-wife’s exhibit list or proposed exhibits until the day of trial. CP 200. After trial, Mr. Reini learned that Local Civil Rule 40(e) required disclosing exhibits a week before trial and attempting to agree on admissibility. *Id.* During the October 2011 hearing on entry of final dissolution orders, Mr. Reini brought up the rule violation and asked the judge for a continuance. RP (October 14, 2011) at 43. Superior Court Judge James Lust said he was not allowed to treat Mr. Reini differently because he was pro se, and that it was too late for Mr. Reini to raise the LCR 40(e) issue. *Id.* at 45. The court signed the dissolution decree and related orders that day. *Id.*

Mr. Reini timely filed a motion for a new trial based in part on the lack of pretrial disclosure of exhibits. CP 180, 200-201. In a declaration supporting the motion, Mr. Reini said:

Trial in this matter was held on August 9, 2011. Under Local Civil Rule 40(e)(1), I was entitled to receive a copy of the respondent's likely exhibits the week before trial. This did not happen. Counsel for Debra Reini did not provide exhibits in advance, nor did he ask me to agree on which exhibits were admissible.

Id. The motion was denied without a hearing. CP 203.

C. Ms. Kyle-Reini Kept Both the House and the Business, Which Were the Major Assets Subject to the Court's Distribution.

1. The value of the home was disputed.

One of the couple's major assets was a house and three acres of land at 441 Valley View Road in Yakima. CP 163-166. Mr. Reini estimated that this real property was worth about \$190,000. CP 7, 161; Ex. 1, p. 7. He testified that the house is in a beautiful area with views of the river and mountains, and argued that the value was "quite a bit" higher than the \$114,000 which Ms. Kyle-Reini asserted. RP 63, 232; CP 161. The record shows that comparable properties in the same area were valued at \$149,000 to \$173,000. CP 109-122.

The trial court found the house and land had a net value of only \$12,653 in light of encumbrances and Ms. Kyle-Reini's photo exhibits showing the property in a "dilapidated condition." CP 162, 165. The property was awarded entirely to Ms. Kyle-Reini. *Id.*

2. The couple's only income-producing asset, an espresso business which grosses more than \$150,000 a year, was awarded to Ms. Kyle-Reini.

Another major asset also awarded to Ms. Kyle-Reini was On the Go Espresso, a Yakima business which Mr. Reini helped develop. CP 165; RP (August 9, 2011) at 63, 222. On her 2010 tax return, Ms. Kyle-Reini reported \$157,131 in gross receipts and \$106,144 in gross profit (after paying the cost of goods sold) from the business. Ex. 3, Schedule C. Similarly, her 2009 tax return showed \$160,064 in gross business receipts and \$109,333 in gross profit. Ex. 4, Schedule C. Ms. Kyle-Reini has run the business since 1993. CP 16. She testified that the espresso business was growing, and that gross receipts had increased while the cost of goods had decreased from 2005 to 2010. RP (August 9, 2011) at 221, 228. Nevertheless, the trial court treated this asset as having "a negative value of \$16,070," based in part on a \$33,780 debt which Ms. Kyle-Reini had paid off prior to trial. CP 165. The trial court awarded 100 percent of the business to her. *Id.*

3. Deprived of any interest in the house or business, Mr. Reini was ordered to pay \$20,165 to Ms. Kyle-Reini. His major awarded asset was a motorcycle.

In addition to the real property and income-producing business, Ms. Kyle-Reini was awarded a \$20,165 cash lien to be paid by Mr. Reini, plus household goods valued at \$3,500, a car and a truck, a \$500 timeshare, half of the community interest in Mr. Reini's Teamsters pension, and the entire \$4,327 balance of his PERS 2 retirement. CP 165. By contrast, Mr. Reini was awarded household goods valued at \$2,000, two Harley Davidsons (one valued at \$20,000; the other worthless), a share of the Teamsters pension, two trailers valued at \$3,500 and \$12,500, and other items (tools, firearms and a camera) collectively valued at \$7,000. CP 163.

Although Mr. Reini initially asked to be awarded half the equity in the house, he told the judge at trial that he was not asking for the house or the espresso business. CP 8; RP (August 9, 2011) at 237. Rather, he asked to be awarded his retirement funds and to avoid paying spousal maintenance or a lien. RP at 65, 237. He testified that because of his limited earnings and inability to find better employment, a cash lien "would serve no purpose other than just to break me." RP 65.

4. Some assets were converted during the marriage.

Much of the cross-examination of Mr. Reini dealt with property which was no longer in the couple's possession and not available for distribution by the trial court. CP 83-168. The following former assets were converted to cash well before the marriage was dissolved:

- Two jet skis, which Mr. Reini sold in 2006 (RP 116-117);
- Most of Mr. Reini's PERS 2 retirement plan (CP 160) (he withdrew \$52,784 and put the \$4,327 balance in a money market);
- A \$1,200 Roth 401(k) fund from Mr. Reini's former job with Chinook Lumber (RP 158-159) (explaining that he cashed it out and "didn't have the option to keep it" because it "wasn't vested");
- Two farm lots, sold in 2005 for \$97,000 (RP 97-99); and
- A tractor and forklift sold in 2006 (RP 120-121, 234).

Although Mr. Reini testified that the jet skis were sold and the 401(k) was cashed out, the trial court included those items on the list of assets awarded to Mr. Reini. CP 163.

In closing arguments, Ms. Kyle-Reini's attorney argued that this is "a classic wasting of an asset case." RP 239. Although Mr. Reini testified that his wife consented to his PERS 2 retirement withdrawal (RP 103), the attorney argued that Mr. Reini wasted

assets by cashing out the retirement and making “substantial” purchases, including a \$29,000 motorcycle. RP 69, 239.

Mr. Reini admitted making “bad decisions” during the marriage, noting that he has apologized “100 times” for buying the motorcycle. RP 170-171. He said withdrawing the retirement money was a mistake, but “that’s in the past.” RP 65. The court found that the retirement money was applied to “community indebtedness owing to John Deere for the purchase of farm equipment.” CP 160.

Mr. Reini argued that money spent prior to the couple’s 2007 separation is irrelevant, partly because it was used to cover community expenses. RP 234. “There is no residual...I have no funds. I have virtually nothing.” RP 231.

D. The Court Awarded Permanent Maintenance to Ms. Kyle-Reini Although Her Monthly Income Exceeds Mr. Reini’s.

1. The evidence established that Mr. Reini grosses \$2,550 a month on average and has minimal disposable income.

Mr. Reini has no education beyond high school, limiting his earning capacity. CP 83. In a 2007 declaration at the outset of the case, Mr. Reini reported a monthly net income of \$2,287 at Chinook Lumber, falling well short of his monthly expenses. *Id.* When

declaring bankruptcy in 2008, Mr. Reini reported having only \$50 “cash on hand” and \$100 in his checking account. Ex. 1, p. 8.¹

At the dissolution trial last summer, Mr. Reini stated that he worked in construction the last three years, and that each winter he was laid off for three to four months. RP (August 9, 2011) at 65. He said in his opening argument:

I have no means nor ability to pay anyone any money. I live paycheck to paycheck. Yesterday I had eleven dollars in the bank, total, to my name. I have tried to find other work to no avail....

I have no assets. I don't possess the house or the business. I am lucky if I make thirty thousand [a year].

Id. at 65.

Mr. Reini testified that he is paid \$20 an hour by KM Quincy Construction and averages about 35 hours of work each week. *Id.* at 108. The trial court concluded, based on that testimony, that Mr. Reini “will gross \$3,000 per month” when employed. CP 162. Mr. Reini also testified that, in the winters when he is laid off from construction work, he receives about \$1,200 a month in unemployment compensation. RP (August 9, 2011) at 108.²

¹ His most valuable property was a 2007 GMC truck. Ex. 1, p. 11. He reported \$342,033 in debts. Ex. 1, p. 26.

² Mr. Reini did not testify in detail about his expenses, but said household expenses are about \$400 a month and he pays about \$550 a month for a car,

However, the trial court referred only to Mr. Reini's *maximum* gross income in its decision awarding maintenance, and did not calculate Mr. Reini's *average* gross income when seasonal unemployment is taken into account. CP 162.

When averaging \$3,000 a month for nine months of employment with \$1,200 a month for three months of unemployment per year, Mr. Reini's true gross income is \$2,550 a month. And that does not account for deductions from pay. Mr. Reini's net monthly income from construction work, after deductions, was not established at trial.

2. The trial court was urged to award spousal maintenance based on what Mr. Reini allegedly *could* earn, rather than what he *does* earn.

In closing arguments at trial, Ms. Kyle-Reini's attorney criticized Mr. Reini for giving up a higher-paid job as a jail corrections officer. RP 240. The attorney argued that a higher income should be imputed to Mr. Reini, as in a child support case.

Id. The attorney told the court:

The maintenance issue may be the only way we get paid. It gives him the incentive to go get a job and do something.

sharing the car and a house with his fiancée. RP 108, 167. In his 2007 financial declaration, he estimated \$3,480 in monthly household expenses. CP 83.

CP 241. Thus, Ms. Kyle-Reini encouraged the court to award maintenance that is beyond Mr. Reini's present financial means, as a way of compelling him to "go get" a new job.

3. Ms. Kyle-Reini's financial status was sketchy.

Early in this case, Yakima County Superior Court Commissioner Lani-Kai Swarnhart stated, "I must say that the financial status of these parties is a little mysterious..." RP (October 16, 2007) at 3. At a March 31, 2008 hearing, Commissioner Swarnhart questioned Ms. Kyle-Reini's handling of the On the Go Espresso revenues. RP 34.

Certainly her check register suggests that each and every personal expense that she has, she writes out of the business account....

I mean it does seem like from a hundred and eighty eight thousand dollars [\$188,000] gross to a negative eight...is a pretty big leap.

Id. (italics added). The Commissioner was referring to a 2007 tax return in which Ms. Kyle-Reini claimed a net loss of \$8,000 despite her espresso business grossing more than \$180,000. *Id.* at 27.

At the same hearing, Mr. Reini's attorney described evidence that Ms. Kyle-Reini was able to pay attorney fees and other bills while maintaining a steady account balance. The attorney argued, "This woman has had money from day one." RP

28. "She's got control of all the assets." RP 32. The espresso stand in Yakima "does really well." RP 29. The Commissioner agreed: "Mrs. Reini does have the most income-producing asset that these parties have." RP 35.

In a written decision in which the Commissioner ordered Ms. Kyle-Reini to take over the business debt payments from Mr. Reini, the Commissioner said:

Wife has filed her 2007 income tax return and bank statements documenting earnings and expenses related to the operation of the Yakima business. In 2007, this business grossed \$182,208. Her tax returns show a loss of \$8,454 and depreciation of \$20,720. She has a payroll of more than \$40,000, despite that she works in the business. This would appear somewhat excessive. Her recent bank statements for the business suggest that she is able to meet expenses and maintain a balance.

CP 94. Thus, the court indicated that, notwithstanding the tax return claiming a loss, the cash flow was sufficient to support Ms. Kyle-Reini.

In November 2009, Ms. Kyle-Reini reported to the Bankruptcy Court that her monthly "take-home" pay was \$1,970. CP 139. In this case in January 2011, Ms. Kyle-Reini again reported that her "net" monthly income from the espresso business was \$1,970. CP 104. The only evidence of her gross income was

a 2007 financial declaration in which she stated that her gross *and* net income was \$2,000 a month. CP 17.³ She did not testify at trial as to her gross monthly income from the business. RP (August 9, 2011) at pp. 174-226.

While she admitted that she paid her personal car expenses with money from the business, Ms. Kyle-Reini did not explain the extent to which she uses business receipts as personal income. RP 185. As to the profit margin, she said, "I don't understand that part...I just give my books to the bookkeeper." RP 176.

4. The trial court ordered permanent financial support of Ms. Kyle-Reini.

The court's final decree requires Mr. Reini to pay \$500 a month in spousal maintenance when he is employed, and \$250 a month when he is unemployed, terminating only upon the death of either party or the remarriage of Ms. Kyle-Reini. CP 162, 169. The dissolution decree also states that, in addition to those monthly amounts, "upon receipt of social security Husband shall pay as maintenance the sum of 50% of the difference between what he is receiving in social security and what the Wife is receiving in social security." CP 169. "This maintenance portion shall not expire at

³ In the 2007 financial declaration, Ms. Kyle-Reini stated that her "gross" income was \$2,000 a month. CP 17. But she used the same figure as her "net" income, stating \$2,000 a month is what she receives after business expenses. *Id.*

the end of 10 years, but will continue until the death of either party.”

Id.

5. Ms. Kyle-Reini had stated on a July 2011 credit application that her gross income is \$3,000 a month, but did not disclose that information to Mr. Reini or the court.

After trial, Mr. Reini heard that his ex-wife had acquired a new car. CP 202. At the October 14, 2011 hearing on entry of final orders in this case, he “questioned how she could obtain financing for a new car in light of her claimed need for spousal maintenance,” and asked for a continuance of the hearing in order to explore the question. *Id.*; RP (October 14, 2011) at 43. The court denied the continuance, but Ms. Kyle-Reini’s attorney agreed to provide a copy of her credit application. RP 46-47. Apple Valley Honda faxed a copy of the application to the attorney on the same day it was requested. CP 230 (showing an October 14 time stamp).

The application shows that Ms. Kyle-Reini claimed a **monthly income of \$3,000** from On the Go Espresso. CP 230. In signing the application, she certified that the information was “true, correct and complete.” CP 230-231. This application shows that her gross income is higher than Mr. Reini’s average gross income of \$2,550. *Id.* The \$3,000 monthly gross also is 50 percent higher than the \$2,000 monthly gross which she had reported to the court.

In other words, her financial position is better than Mr. Reini's, and considerably better than what the court was told.

It appears Ms. Kyle-Reini was aware that revealing her true income could jeopardize spousal maintenance. In a declaration filed in the trial court on October 31, 2011, Ms. Kyle-Reini said that when she estimated her gross income for the credit application, she "asked the salesman about it (the income)" and "*he said it would be alright because it was just for them.*" CP 229 (italics added).

Although the dealer made the credit application available on October 14, 2011, Ms. Kyle-Reini's attorney waited until October 27, 2011 to mail a copy to Mr. Reini. CP 202, 230, 248. That delay in disclosure prevented Mr. Reini from using the credit application to support his motion for reconsideration of the spousal maintenance order. CP 180 (the motion was filed October 24, 2011); CR 59(b) (a motion for reconsideration must be filed within 10 days of the judgment).

6. Mr. Reini sought reconsideration of the maintenance award, pointing out that his net pay is less than Ms. Kyle-Reini's net pay.

Mr. Reini timely moved for reconsideration of the maintenance award within 10 days of the October 14, 2011

judgment, before he received the credit application. CP 180. In a declaration in support of the motion, Mr. Reini attested:

My typical take-home pay is only about \$2,100, after taxes, when I am employed. My work is seasonal and I typically work only nine months a year. When I am not employed during the winter, I receive about \$1,080 a month in net unemployment benefits. Thus, my average monthly take-home pay is \$1,845.

CP 201.

Mr. Reini further explained:

This Court's memorandum opinion dated September 5, 2011, states that I am expected to 'gross \$3,000 per month' when working in construction and receive \$1,200 a month while unemployed. That is my gross income. My actual income is different because taxes, and Washington State Labor and Industries payments, are withheld from my pay.

CP 202. Thus, although Mr. Reini's average monthly gross income is \$2,550, his actual take-home pay averages only \$1,845 a month.

CP 182. Because the court failed to consider his net income of \$1,845, as compared to the higher \$1,970 in net pay reported by Ms. Kyle-Reini, reconsideration was warranted, the motion said.

CP 186-187.

As noted above, the motion also raised the issue of the LCR 40(e) violation. The motion was denied.

E. The Trial Court Denied the CR 60 Motion For Relief from Judgment Without Issuing a Show-Cause Order.

After the trial court denied reconsideration, on November 1, 2011, Mr. Reini finally received from Ms. Kyle-Reini's attorney the July 2011 credit application on which she claimed to gross \$3,000 a month. CP 235, 242. Based on that newly discovered evidence, Mr. Reini brought a motion for relief from judgment pursuant to CR 60. The motion said in part:

Newly discovered evidence shows that on July 1, 2011, while this Court's decision on dissolution was pending, respondent Debra Kyle-Reini stated on a credit application that her monthly income is \$3,000. That is 50 percent more than the \$2,000 monthly income which she had reported to this Court, and which was the basis for awarding spousal maintenance to Ms. Kyle-Reini. The \$3,000 a month exceeds the income of Petitioner Donald Reini, who should not be required to subsidize the living expenses of an ex-spouse who is financially better off than he is. Accordingly, pursuant to CR 60(b), Mr. Reini seeks relief from judgment based on newly discovered evidence, misrepresentation or misconduct, and irregularity in obtaining an order. This Court should issue an order for Ms. Kyle-Reini to appear at a hearing and show cause why the Court should not vacate the Decree of Dissolution, Findings of Fact and Conclusions of Law, and Memorandum Opinion in light of the new evidence.

CP 233-234. The motion also renewed the argument that the attorney's LCR 40(e) violation warranted a new trial. CP 238.

At a hearing on the motion, Judge Lust said he was addressing the merits and would not issue a show-cause order. RP (November 18, 2011) at 51. At the hearing, Ms. Kyle-Reini's attorney argued that Mr. Reini is not entitled to relief because he could have discovered the information in the credit application before trial. RP 53. Regarding the attorney's failure to disclose trial exhibits a week before trial, he did not deny it, and said, "I've never seen that happen in any case" since LCR 40(e) was adopted in 2010. *Id.* The attorney said the rule has "never been implemented" from a "practical standpoint." RP 56. The court denied the motion. CP 251.

IV. ARGUMENT

A. Standard of Review.

"The party who challenges a maintenance award or a property distribution must demonstrate that the trial court manifestly abused its discretion." *In re Marriage of Marzetta*, 129 Wn.App. 607, 624, 120 P.3d 75 (2005), overruled on other grounds, *McCausland v. McCausland*, 159 Wn.2d 607 (2007), quoting *In re Marriage of Williams*, 84 Wn.App. 263, 267, 927 P.2d 679 (1996). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable

reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47 (1997). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the acceptable legal standard. *Id.* at 47. A decision is based on untenable reasons if it is based on an incorrect standard or if the facts do not meet the requirements of the correct standard. *Id.* A decision is based on untenable grounds if the factual findings are unsupported by the record. *Id.*

In deciding spousal maintenance, a trial court abuses its discretion when it does not base its maintenance award upon a fair consideration of the statutory factors under RCW 26.09.090. *Marzetta*, 129 Wn.App. at 624. RCW 26.09.090 says the court "may" grant spousal maintenance, based on the following:

The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently...;

(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 or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner 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.

“Of primary concern are the parties’ respective economic positions following dissolution.” *Marzetta*, 129 Wn.App. at 624, citing *In re Marriage of Washburn*, 101 Wn.2d 168, 181, 677 P.2d 152 (1984) (bold added). When determining spousal maintenance issues, the court necessarily considers the division of property. *Marzetta* at 626; *In re Marriage of Rink*, 18 Wn.App. 549, 552-53, 571 P.2d 210 (1977); RCW 26.09.090(a). The court’s decision on maintenance “is governed strongly by the need of one party and the ability of the other party to pay an award.” *Marzetta* at 624, quoting *In re Marriage of Foley*, 84 Wn.App. 839, 845-46, 930 P.2d 929 (1997).

B. The Trial Court Failed to Apply The Maintenance Statute Fairly.

1. The first factor was not considered.

The first consideration under RCW 26.09.090 is “the financial resources of the party seeking maintenance,” in this case Ms. Kyle-Reini. RCW 26.09.090(1)(a). The resources to be considered include the property awarded to her and her ability to meet her own needs independently. *Id.* Thus, the analysis begins with the fact that Ms. Kyle-Reini was awarded full ownership of the couple’s only income-producing asset – the espresso business – providing gross profits of more than \$100,000 a year.⁴ The award of the business to Ms. Kyle-Reini ensured that she could meet her own needs independently.

Moreover, Ms. Kyle-Reini has a gross income of \$3,000 a month, which is the same as Mr. Reini grosses during the nine months of the year when he is employed in construction, and which is more than his average gross when accounting for seasonal unemployment. It makes no sense to conclude that a person who grosses \$3,000 a month has a need for financial support, while at the same time concluding that a person who grosses the same or

⁴ The couple once owned a second espresso business in Quincy, Wash., called Daily Brew, but that enterprise failed and was taken over by the prior owners. RP (March 31, 2008) at 20 (Mr. Reini and Ms. Kyle-Reini “both signed a deed in lieu of foreclosure” on the Quincy stand); *Id.* at 26 (the Quincy business “started going downhill as soon as the Microsoft and Yahoo buildings were built and all the construction labor left town”); CP 160-161.

less each month does not need support. Both cannot be true. If \$3,000 a month is enough to support a person, then Ms. Kyle-Reini does not need maintenance, and if it is *not* enough to support a person, then Mr. Reini is equally in need of maintenance and should not be the one paying it.⁵

The same reasoning applies if the court relies on Ms. Kyle-Reini's claimed take-home pay of \$1,970 a month, instead of her \$3,000 monthly gross, in considering her financial resources. Comparing apples to apples, so to speak, she still makes more than Mr. Reini does. His average take-home pay in recent years has been \$1,845 a month. If \$1,970 a month is an inadequate level of financial resources, as the court impliedly found, then Mr. Reini needs support even more than she does.

Moreover, in addition to the business, Ms. Kyle-Reini was awarded full ownership of the house and land, a major asset which she could sell if necessary to meet her financial needs. And the court awarded to her two vehicles and a \$20,000 lien, providing additional resources to support herself (although Mr. Reini cannot

⁵ The trial court should have reconsidered its maintenance decision upon receiving the newly discovered evidence of the \$3,000 gross income. But even if Ms. Kyle-Reini is correct that Mr. Reini could have learned about it sooner, the trial court still erred by failing to inquire about Ms. Kyle-Reini's gross income at trial. RCW 26.09.090 requires considering the relative financial circumstances of *both* parties. The trial court's decision cited Mr. Reini's gross income only.

afford to pay the lien). When the property division is unequal in favor of the wife and when the wife is able to work full-time, as in this case, a court may deny maintenance. *In re Marriage of Luckey*, 73 Wn.App. 201, 209-210, 868 P.2d 189 (Div. 3 1994). Here, the unequal award of the business, house and \$20,165 cash to Ms. Kyle-Reini negate the conclusion that she needs monthly cash support from her ex-husband.

The trial court's decision does not reflect any consideration of the wife's superior financial resources after the divorce. The memorandum opinion discusses only Mr. Reini's income, and says nothing about Ms. Kyle-Reini's larger income or her demonstrated ability to support herself. In fact, the court cited no evidence in support of the conclusion that "the wife has a need" for maintenance, nor does the record support such a conclusion. The party seeking maintenance must demonstrate a need for support. *In re Marriage of Rouleau*, 36 Wn.App. 129, 132, 672 P.2d 756 (1983). Ms. Kyle-Reini failed to prove such a need. The evidence shows she does not need maintenance because she has a stable and growing business which grosses more than \$150,000 a year, and because she nets \$2,000 a month from the business.

2. The second factor was not considered.

The next consideration in deciding spousal maintenance is 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.” RCW 26.09.090(1)(b). This statutory factor illustrates that spousal maintenance is supposed to be a temporary bridge to self-sufficiency, not a permanent substitute for it. This Court has said, “The purpose of spousal maintenance is to support a spouse, typically the wife, **until she is able to earn her own living** or otherwise becomes self-supporting.” *Luckey*, 73 Wn.App. at 209, citing *In re Marriage of Irwin*, 64 Wn.App. 38, 55, 822 P.2d 797 (1992) (bold added). “It is not the policy of the law to place a permanent responsibility upon a divorced spouse to support a former wife; she is under an obligation to prepare herself so that she might become self-supporting.” *Cleaver v. Cleaver*, 10 Wn.App. 14, 20, 516 P.2d 508 (Div. 1 1974) (emphasis added). It is a long-established rule that, when a wife is capable of earning a living, “she is not to be granted a perpetual lien...on her divorced husband’s future earnings.” *Endres v. Endres*, 62 Wn.2d 55, 56, 380 P.2d 873 (1963). Yet that is what happened here.

Although permanent maintenance awards are disfavored in this state, “Courts have approved awards of lifetime maintenance in a reasonable amount when it is clear the party seeking maintenance will not be able to contribute significantly to his or her own livelihood.” *In re Marriage of Mathews*, 70 Wn.App. 116, 124, 853 P.2d 462 (Div. 3 1993). Here, the court awarded lifetime maintenance to Ms. Kyle-Reini even though she is presently supporting herself with income from the espresso business and even though she testified that the business is growing. There was no evidence suggesting that Ms. Kyle-Reini suffers from any permanent disability rendering her incapable of making a living. In fact, Ms. Kyle-Reini already has an income-producing business which has employed her for many years, so she does not need to prepare herself for employment.

The trial court made no finding about the time necessary for Ms. Kyle-Reini to overcome the purported need for maintenance. Nothing in the record reflects any consideration of a time limit. On the contrary, the court ordered Mr. Reini to pay maintenance until one of the parties dies, without explaining what makes this case so extraordinary as to depart from the longstanding policy against permanent maintenance. In sum, if the trial court had fairly

considered the time needed for self-sufficiency under RCW 26.09.090(1)(b), there would be no maintenance award because Ms. Kyle-Reini already has the means to support herself.

3. Mr. Reini cannot meet his own needs and also pay \$500 a month to Ms. Kyle-Reini.

In deciding spousal maintenance, a court also must 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.” RCW 26.09.090(1)(f). Here, the trial court concluded that Mr. Reini “has the ability to pay” based solely on his gross monthly income, which is not an accurate measure of his available funds. In truth, after deductions are taken from his \$20 hourly wages, Mr. Reini takes home \$2,100 a month when working in construction and an average of \$1,845 a month when accounting for seasonal unemployment. That is not enough to meet his own needs, as evidenced by Mr. Reini’s bankruptcy and his testimony that he had only \$11 in cash at the time of trial. If he cannot handle his own bills, he cannot afford to support Ms. Kyle-Reini for the rest of his life.

The fallacy of the trial court’s reasoning is obvious. If it was somehow true that Mr. Reini’s gross of \$2,550 a month and net of

\$1,845 a month was adequate to support both his own needs and those of Ms. Kyle-Reini, it cannot also be true that Ms. Kyle-Reini needs financial support herself. She makes more money than he does. Shifting \$500 a month from his coffers to hers only aggravates the disparity.

Also, in awarding maintenance permanently, the trial court failed to consider the likelihood that Mr. Reini will face greater periods of unemployment as he grows older. Construction is a physically demanding job associated with high injury rates. And construction work is highly susceptible to economic slumps. According to the latest report by the U.S. Department of Labor Bureau of Labor Statistics, construction employment has shown little change since reaching a low in January 2011, and declined by 28,000 jobs in May 2012. Attachment 2.⁶ There was no evidence that Mr. Reini has any special ability to stay employed as an older worker in an unstable field. In fact, the trial court anticipates that Mr. Reini will be unemployed, and ruled that he must pay \$250 a month even when he is not working.

In its memorandum decision, the trial court stated that Mr. Reini gave up a job with a “respectable salary,” suggesting that his

⁶ The report is available at <http://www.bls.gov/news.release/pdf/empsit.pdf>.

past employment is relevant to his financial abilities. But there was no evidence that Mr. Reini has the option of returning to his former job. On the contrary, Mr. Reini testified that he has tried to find better work to no avail. It is an abuse of discretion to award maintenance based on speculation that the paying spouse will be able to obtain a better job. *Morgan v. Morgan*, 59 Wn.2d 639, 643, 369 P.2d 516 (1962) (maintenance cannot be based on “the conjectural possibility of a future change in circumstances”).

Ms. Kyle-Reini had urged the court to impute a higher income to Mr. Reini based on the former jail guard salary, and even suggested that maintenance should be used to compel Mr. Reini to get a better job. This is backwards thinking. Under RCW 26.09.090(1)(b), it is the spouse “seeking maintenance” – Ms. Kyle-Reini – whose ability to obtain new employment is relevant. This is because the purpose of maintenance is to support a non-working spouse until she acquires the skills to work, not to ensure that she never has to work. Moreover, unlike the child support statute, RCW 26.19.071(6), which directs the court to impute income when a parent is voluntarily under-employed, the maintenance statute does

not call for imputation.⁷ If the Legislature intended for courts to consider voluntary unemployment or under-employment in determining spousal maintenance, it would have said so.

In sum, the evidence does not support the conclusion that Mr. Reini is able to pay spousal maintenance. He is broke and stuck in a \$20-an-hour job associated with seasonal layoffs. It is untenable to find his income sufficient to support two people while at the same time finding that Ms. Kyle-Reini's higher income is insufficient for one person. The trial court abused its discretion by failing to fairly consider Mr. Reini's financial abilities under RCW 26.09.090(1)(f).

C. To the Extent That Alleged Misconduct Was Considered, It was Improper.

Both the maintenance statute, RCW 26.09.090, and the statute governing property division, RCW 26.09.080, state that courts shall make decisions "without regard to misconduct." Before 2008, RCW 26.09.090 said maintenance decisions shall be "without regard to *marital* misconduct," but the word "marital" was removed.

⁷ Even if it was appropriate to apply a child support statute to support of a spouse, Mr. Reini's past income should not be imputed because he is working full-time and there is no evidence that he chose a lower-paying job in order to reduce spousal maintenance. RCW 26.19.071(6) says a court "shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation."

Laws 2008, ch. 6, §1012 (*italics added*). This change illustrates a legislative intent to prohibit courts from considering any kind of misconduct, not just of an intimate or “marital” nature, when deciding maintenance. It is consistent with the move to “no fault” divorces.

There are no published opinions construing the amended language regarding misconduct. The only case addressing the application of the former language, “without regard to marital misconduct,” is *In re Marriage of Foran*, 67 Wn.App. 242, 834 P.2d 1081 (Div. 1 1992). In that case, the Court held that a court may consider evidence of a husband’s physical and emotional abuse of a wife, notwithstanding the RCW 26.09.080 and RCW 26.09.090 prohibition against considering marital misconduct, if the abuse is relevant to permissible considerations about economic circumstances. *Foran* at 258-259. In that case the wife was unable to work due to post-traumatic stress syndrome caused by the abuse. *Id.*

Here, Ms. Kyle-Reini’s attorney spent most of the trial eliciting testimony about Mr. Reini’s alleged wasting of assets. In essence, he asked the court to punish Mr. Reini for making bad financial decisions such as withdrawing retirement money and

quitting the jail job. Although the trial court did not expressly refer to misconduct in its orders, the decision to award maintenance to Ms. Kyle-Reini despite her higher income and larger share of property impliedly embraces her reasoning. It is hard to imagine why a court would order a lower-paid spouse to support a higher-paid spouse, if not to atone for perceived misconduct.

First, there was no misconduct. There is no evidence that Mr. Reini wasted assets out of malice or to keep them out of his wife's reach. On the contrary, he testified – and the court found – that he used the retirement money to pay community debts. And while the motorcycle purchase upset Ms. Kyle-Reini, the motorcycle was still available for distribution as a community property, so it was not a lost asset. Mr. Reini had a right to spend community money on the vehicle. RCW 26.16.030. The award of the bike to Mr. Reini was more than offset by the award of all other major assets to Ms. Kyle-Reini.

Even if Ms. Kyle-Reini did not consent to withdrawing the PERS 2 money, which was disputed, she failed to establish how it was relevant to the parties' economic circumstances after the divorce. If the \$52,784 had remained in the retirement fund, the couple would have had to find some other way to pay off the farm

equipment debt. It is not clear how the withdrawal affected the net balance of assets and liabilities. Even if the \$52,784 had been wasted, which was not proven, the award of the \$20,165 lien, the income-producing business, the house and 3 acres of land to Ms. Kyle-Reini more than compensated for the 50 percent share (\$26,392) which she might have drawn from the fund.

In sum, to the extent that the trial court's decision was based on alleged misconduct during the marriage, it was improper. There was no misconduct, but even if there was, RCW 26.09.090 and .080 prohibit consideration of misconduct in awarding maintenance and distributing property. The alleged wasting of assets was really just a shifting of assets within the community. And while wiser decisions could have been made, that is not a valid reason to permanently saddle Mr. Reini with \$500 monthly support payments to an ex-wife who is fully capable of supporting herself. *State ex. rel. Lloyd v. Superior Court of King County*, 55 Wn. 347, 353, 104 P. 771 (1909) (spousal maintenance may not be imposed as a penalty).

D. The Maintenance Award Here is Like Similar Unfair Awards that Were Reversed.

This Court has reversed maintenance awards in similar situations. In *Mathews*, 70 Wn.App. at 123, this Court reversed a maintenance award which resulted in the husband having a net income of \$1,000 a month while the wife would have \$1,855 per month, finding that the RCW 26.09.090 factors were not fairly considered. The husband netted \$2,800 a month as a firefighter, and was ordered to pay half of that - \$1,400 a month – in spousal maintenance until the wife died, remarried or obtained a full-time job, in addition to paying for the wife’s health insurance for three years and education expenses for three years. *Id.* at 120, 123. The wife had a part-time job, and also had proceeds from sale of the house which the court awarded primarily to her, as means of additional support. *Id.* at 123-124.

In ordering the \$1,400 monthly payments, the trial court had cited testimony that the husband sometimes earned extra income by moonlighting, but this Court noted that there was no evidence that he was still doing so. *Id.* at 123. And while the trial court cited the wife’s poor health in awarding permanent maintenance, this Court said: “But the court did not find Mrs. Mathews’ health problems prevented her working. Indeed, the court’s order that Mr.

Mathews pay tuition for Mrs. Mathews' retraining conflicts with such a finding." *Id.* at 124.

Here, as in *Mathews*, the maintenance award places Mr. Reini at a severe economic disadvantage. The award reduces his monthly net income from \$2,100 to \$1,600 when he is working, and from \$1,080 to \$830 when is unemployed. At the same time, the award increases Ms. Kyle-Reini's monthly net income from \$2,000 to \$2,500 during most of the year and to \$2,250 during the winter. The resulting disparity – leaving him with \$900 to \$1,420 less disposable income per month than she will have - is even greater than the \$800-a-month disadvantage which this Court found to be unfair in *Mathews*. For that reason, and because the chance of Mr. Reini getting a better job is just as speculative as the moonlighting was in *Mathews*, reversal is equally warranted here.

In *In re Marriage of Wright*, 78 Wn.App. 230, 233, 896 P.2d 735 (Div. 2 1995), the trial court awarded to the wife most of the equity in the home and a 50 percent interest in the couple's two retirement funds. The wife appealed the decision to deny spousal maintenance. *Id.* This Court affirmed the decision because the wife had an income of \$1,700 a month, plus sufficient training and education to support herself, and because the unequal property

distribution “substantially improved” her financial position. *Id.* at 238. Spousal maintenance is similarly inappropriate here, where Ms. Kyle-Reini already has her own income, full ownership of the house, more than half of the remaining retirement money, and many years of experience in managing an espresso business.

E. The Lien Also Is Unfair.

Under RCW 26.09.080, “the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties...as shall appear just and equitable after considering all relevant factors.” The mandatory factors include: 1) the nature and extent of community property; 2) the nature and extent of separate property; 3) duration of the marriage; and 4) “the economic circumstances of each spouse...at the time the division of property is to become effective.” RCW 26.09.080. The last factor is dispositive regarding the \$20,165 lien. If economic circumstances are fairly considered, the lien is neither just nor equitable, because Mr. Reini lacks the means to pay it.

Mr. Reini testified that he had virtually nothing in his bank account. He lives from paycheck to paycheck, barely scraping by. To pay a \$20,165 lien, he would have to give up **more than an entire year’s net pay** (\$26,100, less \$5,250 in maintenance

payments, is \$20,850). It is not equitable to require one spouse of extremely limited means to devote an entire year's net pay to the other spouse, particularly when the receiving spouse was awarded the couple's income-producing business. Therefore, this Court should reverse the award of the lien.

F. If This Court Does Not Order Elimination of Spousal Maintenance and the Lien, It Should Order a New Trial.

Yakima County Superior Court LCR 40(e)(1) says:

The week prior to trial, counsel for all parties shall provide a copy of their likely exhibits to all counsel. Counsel shall endeavor to agree on which exhibits are admissible.

The parties are supposed to notify the court at the commencement of trial which exhibits are agreed to. LCR 40(e)(4). Here, the only party to introduce exhibits was Ms. Kyle-Reini, and it is undisputed that she failed to provide her exhibits to Mr. Reini before trial.

Thus, Mr. Reini, who was already at a disadvantage as a pro se litigant opposing a represented party, had the added problem of unfair surprise. He showed up at trial without any idea of what evidence would be offered against his interests, and without any opportunity to formulate a defense against such evidence.

Civil rules are applicable to dissolution trials. RCW 26.09.010. It is irrelevant that the respondent's attorney James

Kennedy had yet to observe the local rule being implemented. As an officer of the court, he had an ethical duty to follow the rules, heightened by his awareness that the opposing party lacked counsel. To ignore the rule was to deprive Mr. Reini of a fair trial. Courts have long recognized the need to prevent trial by ambush. See Fed. Rule of Civ. Proc. 37(c)(1) (preventing a party from using any witnesses or information that, without substantial justification, was not disclosed before trial).

It also is irrelevant that Mr. Reini did not object to the lack of disclosure until after the trial. He brought it up before the dissolution orders were entered, and he also raised the issue in a timely motion for reconsideration. An issue is preserved for appeal if it is raised in a motion for reconsideration. *Rotta v. Early Industrial Corp.*, 47 Wn.App. 21, 23-24, 733 P.2d 576 (1987); *Newcomer v. Masini*, 45 Wn.App. 284, 287, 724 P.2d 1122 (1986).

Mr. Reini was prejudiced by the lack of pretrial disclosure. If Mr. Kennedy had provided his client's exhibits and asked Mr. Reini to agree as to their admissibility, as required, that would have alerted Mr. Reini that he needed to offer exhibits of his own.⁸ As it

⁸ He could have, for example, brought in his bank statements showing a minimal cash balance.

was, Mr. Reini expected both parties to rely solely on testimony, and showed up at trial without any documentary evidence – resulting in a lopsided presentation. At a minimum, he could have prepared to cross examine Ms. Kyle-Reini about the 58 exhibits which the court admitted. Because the rule violation resulted in unfair surprise, the trial court erred by denying a new trial.

G. Mr. Reini Should Receive Attorney Fees.

RCW 26.09.140 authorizes this Court to “order a party to pay for the cost to the other party of maintaining the appeal and attorneys’ fees in addition to statutory costs.” Such awards are discretionary, after considering the financial resources of the parties. RCW 26.09.140. Here, Mr. Reini has had to borrow money to pay for this appeal. Because of his limited resources and the unfair nature of the process and decision below, this Court should order Ms. Kyle-Reini to pay his fees and costs.

V. CONCLUSION

For the foregoing reasons, the Court should reverse the dissolution decree and related findings and conclusions and remand this matter with instructions to remove spousal maintenance and the \$20,165 lien from the decree. Alternatively, this court should vacate the decision and order a new trial. The

Court should award Mr. Reini costs of this appeal including reasonable attorney fees pursuant to RCW 26.09.140.

Dated this 22nd day of June 2012.

RESPECTFULLY SUBMITTED,

HARRISON, BENIS & SPENCE LLP

By: 
Katherine George, WSBA No. 36288
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on June 22, 2012, I caused a copy of the Brief of Appellant and Report of Proceedings to be delivered by U.S. mail to the following:

W. James Kennedy, WSBA #4648
Thorner, Kennedy and Gano, P.S.
Chestnut Legal Building
101 South 12th Avenue
Yakima, Wash., 98907
Attorney for Respondent Debra Kyle-Reini


KATHERINE A. GEORGE

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE ADOPTION OF NEW)
APR 28—LIMITED PRACTICE RULE FOR)
LIMITED LICENSE LEGAL TECHNICIANS)
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ORDER

NO. 25700-A-1005

The Practice of Law Board having recommended the adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, and the Court having considered the revised rule and comments submitted thereto, and having determined by majority that the rule will aid in the prompt and orderly administration of justice;

Now, therefore, it is hereby

ORDERED:

That we adopt APR 28, the Limited Practice Rule for Limited License Legal Technicians. It is time. Since this rule was submitted to the Court by the Practice of Law Board in 2008, and revised in 2012, we have reviewed many comments both in support and in opposition to the proposal to establish a limited form of legal practitioner. During this time, we have also witnessed the wide and ever-growing gap in necessary legal and law related services for low and moderate income persons.

We commend the Practice of Law Board for reaching out to a wide spectrum of affected organizations and interests and for revising the rule to address meritorious concerns and suggestions. We also thank the many individuals and organizations whose suggestions to the language of the rule have improved it. The Limited License Legal Technician Rule that we adopt today is narrowly tailored to accomplish its stated objectives, includes appropriate training,

CLERK

FILED
SUPREME COURT
STATE OF WASH.
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BY RONALD R. CARPENTER

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financial responsibility, regulatory oversight and accountability systems, and incorporates ethical and other requirements designed to ensure competency within the narrow spectrum of the services that Limited License Legal Technicians will be allowed to provide. In adopting this rule we are acutely aware of the unregulated activities of many untrained, unsupervised legal practitioners who daily do harm to “clients” and to the public’s interest in having high quality civil legal services provided by qualified practitioners.

The practice of law is a professional calling that requires competence, experience, accountability and oversight. Legal License Legal Technicians are not lawyers. They are prohibited from engaging in most activities that lawyers have been trained to provide. They are, under the rule adopted today, authorized to engage in very discrete, limited scope and limited function activities. Many individuals will need far more help than the limited scope of law related activities that a limited license legal technician will be able to offer. These people must still seek help from an attorney. But there are people who need only limited levels of assistance that can be provided by non-lawyers trained and overseen within the framework of the regulatory system developed by the Practice of Law Board. This assistance should be available and affordable. Our system of justice requires it.

I. The Rule

Consistent with GR 25 (the Supreme Court rule establishing the Practice of Law Board),¹ the rule² establishes a framework for the licensing and regulation of non-attorneys to engage in discrete activities that currently fall within the definition of the “practice of law” (as defined by GR 24)³ and which are currently subject to exclusive regulation and oversight by this Court. The rule itself authorizes no one to practice. It simply establishes the regulatory framework for the

¹ http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr25

² <http://www.wsba.org/Lawyers/groups/practiceoflaw/2006currentruledraftfinal3.doc>

³ http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr24

consideration of proposals to allow non-attorneys to practice. As required by GR 25, the rule establishes certification requirements (age, education, experience, pro bono service, examination, etc.),⁴ defines the specific types of activities that a limited license legal technician would be authorized to engage in,⁵ the circumstances under which the limited license legal technician would be allowed to engage in authorized activities (office location, personal services required, contract for services with appropriate disclosures, prohibitions on serving individuals who require services beyond the scope of authority of the limited license legal technician to perform),⁶ a detailed list of prohibitions,⁷ and continuing certification and financial responsibility requirements.⁸

In addition to the rule, we are today acting on the Practice of Law Board's proposal to establish a Limited License Legal Technician Board.⁹ This Board will have responsibility for considering and making recommendations to the Supreme Court with respect to specific proposals for the authorization of limited license legal technicians to engage in some or all of the activities authorized under the Limited License Legal Technician Rule, and authority to oversee the activities of and discipline certified limited license legal technicians in the same way the Washington State Bar Association does with respect to attorneys. The Board is authorized to recommend that limited license legal technicians be authorized to engage in specific activities within the framework of – and limited to – those set forth in the rule itself. We reserve the responsibility to review and approve any proposal to authorize limited license legal technicians

⁴ Exhibit A to January 7, 2008 submission from the Practice of Law Board to the Supreme Court, Proposed APR 28(C) (*hereafter* Proposed APR 28).

⁵ APR 28(D)

⁶ APR 28(E)

⁷ APR 28(F)

⁸ APR 28(G) and (H)

⁹ Exhibit B to January 7, 2008 submission from the Practice of Law Board to the Supreme Court (*hereafter* Regulations)

to engage in specific activities within specific substantive areas of legal and law related practice, and our review is guided by the criteria outlined in GR 25.

Today we adopt that portion of the Practice of Law Board's proposal which authorizes limited license legal technicians who meet the education, application and other requirements of the rule be authorized to provide limited legal and law related services to members of the public as authorized by this rule.¹⁰

II. The Need for a Limited License Legal Technician Rule

Our adversarial civil legal system is complex. It is unaffordable not only to low income people but, as the 2003 Civil Legal Needs Study documented, moderate income people as well (defined as families with incomes between 200% and 400% of the Federal Poverty Level).¹¹

One example of the need for this rule is in the area of family relations which are governed by a myriad of statutes. Decisions relating to changes in family status (divorce, child residential placement, child support, etc.) fall within the exclusive province of our court system. Legal practice is required to conform to specific statewide and local procedures, and practitioners are required to use standard forms developed at both the statewide and local levels. Every day across this state, thousands of unrepresented (pro se) individuals seek to resolve important legal matters in our courts. Many of these are low income people who seek but cannot obtain help from an overtaxed, underfunded civil legal aid system. Many others are moderate income people for whom existing market rates for legal services are cost-prohibitive and who, unfortunately, must search for alternatives in the unregulated marketplace.

Recognizing the difficulties that a ballooning population of unrepresented litigants has created, court managers, legal aid programs and others have embraced a range of strategies to

¹⁰ Exhibit E to January 7, 2008 submission from the Practice of Law Board to the Supreme Court (Family Law Subcommittee Recommendation as adopted by the Full Practice of Law Board)

provide greater levels of assistance to these unrepresented litigants. Innovations include the establishment of courthouse facilitators in most counties, establishment of courthouse-based self-help resource centers in some counties, establishment of neighborhood legal clinics and other volunteer-based advice and consultation programs, and the creation of a statewide legal aid self-help website. As reflected most recently in a study conducted by the Washington Center for Court Research,¹² some of these innovations – most particularly the creation of courthouse facilitators – have provided some level of increased meaningful support for pro se litigants.

But there are significant limitations in these services and large gaps in the type of services for pro se litigants. Courthouse facilitators serve the courts, not individual litigants. They may not provide individualized legal advice to family law litigants. They are not subject to confidentiality requirements essential to the practitioner/client relationship. They are strictly limited to engaging in “basic services” defined by GR 27.¹³ They have no specific educational/certification requirements, and often find themselves providing assistance to two sides in contested cases. Web-based self-help materials are useful to a point, but many litigants require additional one-on-one help to understand their specific legal rights and prerogatives and make decisions that are best for them under the circumstances.

From the perspective of pro se litigants, the gap places many of these litigants at a substantial legal disadvantage and, for increasing numbers, forces them to seek help from unregulated, untrained, unsupervised “practitioners.” We have a duty to ensure that the public

¹¹ Washington Supreme Court Task Force on Civil Equal Justice Funding, *Civil Legal Needs Study* at 23 (fig. 1), <http://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf>

¹² George, Thomas, Wang, Wei, Washington’s Courthouse Facilitator Programs for Self-Represented Litigants in Family Law Cases (Washington State Center for Court Research, March 2008) <http://www.courts.wa.gov/wscsr/docs/Courthouse%20Facilitator%20Program.pdf#xml=http://206.194.185.202/texis/search/pdfhi.txt?query=center+for+court+research&pr=www&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=0&order=r&cq=&id=480afa0a11>

¹³ http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr27

can access affordable legal and law related services, and that they are not left to fall prey to the perils of the unregulated market place.

III. Specific Concerns and Responses

A number of specific issues that have been raised both in support of and in opposition to this rule deserve additional discussion and response.

Proponents have suggested that the establishment and licensing of limited license legal technicians should be a primary strategy to close the Justice Gap for low and moderate income people with family related legal problems. While there will be some benefit to pro se litigants in need of limited levels of legal help, we must be careful not to create expectations that adoption of this rule is not intended to achieve.

By design, limited license legal technicians authorized to engage in discrete legal and law related activities will not be able to meet that portion of the public's need for help in family law matters that requires the provision of individualized legal representation in complex, contested family law matters. Such representation requires the informed professional assistance of attorneys who have met the educational and related requirements necessary to practice law in Washington. Limited purpose practitioners, no matter how well trained within a discrete subject matter, will not have the breadth of substantive legal knowledge or requisite practice skills to apply professional judgment in a manner that can be consistently counted upon to meet the public's need for competent and skilled legal representation in complex legal cases.

On the other hand, and depending upon how it is implemented, the authorization for limited license legal technicians to engage in certain limited legal and law related activities holds promise to help reduce the level of unmet need for low and moderate income people who have relatively uncomplicated family related legal problems and for whom some level of individualized advice, support and guidance would facilitate a timely and effective outcome.

Some opposing the rule believe that limited licensing legal technicians to engage in certain family related legal and law related activities poses a threat to the practicing family law bar.

First, the basis of any regulatory scheme, including our exercise of the exclusive authority to determine who can practice law in this state and under what circumstances, must start and end with the public interest; and any regulatory scheme must be designed to ensure that those who provide legal and law related services have the education, knowledge, skills and abilities to do so. Protecting the monopoly status of attorneys in any practice area is not a legitimate objective.

It is important to observe that members of the family law bar provide high levels of public and pro bono service. In fact, it is fair to say that the demands of pro bono have fallen disproportionately on members of the family law bar. As pointed out in the comments to the Practice of Law Board's proposal, young lawyers and others have been working for years to develop strategies to provide reduced fee services to moderate income clients who cannot afford market-rate legal help. Over the past year, these efforts have been transformed into the Washington State Bar Association's newly established Moderate Means program,¹⁴ an initiative which holds substantial promise to deliver greater access to legal representation for greater numbers of individuals between 200% and 400% of the federal poverty guideline being provided services at affordable rates.

In considering the impact that the limited licensing of legal technicians might have on the practicing family law bar it is important to push past the rhetoric and focus on what limited license legal technicians will be allowed to do, and what they cannot do under the rule. With

¹⁴ <http://www.wsba.org/Legal-Community/Volunteer-Opportunities/Public-Service-Opportunities/Moderate-Means-Program>

limited exception,¹⁵ few private attorneys make a living exclusively providing technical legal help to persons in simple family law matters. Most family law attorneys represent clients on matters that require extended levels of personalized legal counsel, advice and representation – including, where necessary, appearing in court – in cases that involve children and/or property.

Stand-alone limited license legal technicians are just what they are described to be – persons who have been trained and authorized to provide technical help (selecting and completing forms, informing clients of applicable procedures and timelines, reviewing and explaining pleadings, identifying additional documents that may be needed, etc.) to clients with fairly simple legal law matters. Under the rule we adopt today, limited license legal technicians would not be able to represent clients in court or contact and negotiate with opposing parties on a client's behalf. For these reasons, the limited licensing of legal technicians is unlikely to have any appreciable impact on attorney practice.

The Practice of Law Board and other proponents argue that the limited licensing of legal technicians will provide a substantially more affordable product than that which is available from attorneys, and that this will make legal help more accessible to the public. Opponents argue that it will be economically impossible for limited license legal technicians to deliver services at less cost than attorneys and thus, there is no market advantage to be achieved by creating this form of limited practitioner.

No one has a crystal ball. It may be that stand-alone limited license legal technicians will not find the practice lucrative and that the cost of establishing and maintaining a practice under this rule will require them to charge rates close to those of attorneys. On the other hand, it may be that economies can be achieved that will allow these very limited services to be offered at a

¹⁵ See, e.g., the All Washington Legal Clinic (<http://www.divorcelowcostwa.com>)

market rate substantially below those of attorneys. There is simply no way to know the answer to this question without trying it.

That said, if market economies can be achieved, the public will have a source of relatively affordable technical legal help with uncomplicated legal matters. This may reduce some of the demand on our state's civil legal aid and pro bono systems and should lead to an increase in the quality and consistency of paperwork presented by pro se litigants.

Further, it may be that non-profit organizations that provide social services with a family law component (e.g., domestic violence shelters; pro bono programs; specialized legal aid programs) will elect to add limited license legal technicians onto their staffs. The cost would be much less than adding an attorney and could enable these programs to add a dimension to their services that will allow for the limited provision of individualized legal help on many cases – especially those involving domestic violence. Relationships might be extended with traditional legal aid programs or private pro bono attorneys so that there might be sufficient attorney supervision of the activities of the limited license legal technicians to enable them to engage in those activities for which “direct and active” attorney supervision is required under the rule.

Some have suggested that there is no need for this rule at all, and that the WSBA's Moderate Means Program will solve the problem that the limited licensing of legal technicians is intended to address. This is highly unlikely. First, there are large rural areas throughout the state where there are few attorneys. In these areas, many attorneys are barely able to scrape by. Doing reduced fee work through the Moderate Means program (like doing pro bono work) will not be a high priority.

Second, limited licensing of legal technicians *complements*, rather than competes with, the efforts WSBA is undertaking through the Moderate Means program. We know that there is a huge need for representation in contested cases where court appearances are required. We know

further that pro se litigants are at a decided disadvantage in such cases, especially when the adverse party is represented.¹⁶ Limited license legal technicians are not permitted to provide this level of assistance; they are limited to performing mostly ministerial technical/legal functions. Given the spectrum of unmet legal needs out there, Moderate Means attorneys will be asked to focus their energy on providing the help that is needed most – representing low and moderate income people who cannot secure necessary representation in contested, often complex legal proceedings.

Opponents of the rule argue that the limited licensing of legal technicians presents a threat to clients and the public. To the contrary, the authorization to establish, regulate and oversee the limited practice of legal technicians within the framework of the rule adopted today will serve the public interest and protect the public. The threat of consumer abuse already exists and is, unfortunately, widespread. There are far too many unlicensed, unregulated and unscrupulous “practitioners” preying on those who need legal help but cannot afford an attorney. Establishing a rule for the application, regulation, oversight and discipline of non-attorney practitioners establishes a regulatory framework that reduces the risk that members of the public will fall victim to those who are currently filling the gap in affordable legal services.

Unlike those operating in the unregulated marketplace, limited license legal technicians will practice within a carefully crafted regulatory framework that incorporates a range of safeguards necessary to protect the public. The educational requirements are rigorous. Unlike attorneys, legal technicians are required to demonstrate financial responsibility in ways established by the Board. There is a testing requirement to demonstrate professional competency

¹⁶ See, e.g., *In re the Marriage of King*, 162 Wn.2d 378, 404-411 (2007) (Madsen, J., dissenting).

to practice, contracting and disclosure requirements are significant, and there will be a robust oversight and disciplinary process. This rule protects the public.

Another concern that has been raised is that attorneys will be called upon to underwrite the costs of regulating non-attorney limited license legal technicians against whom they are now in competition for market share. This will not happen. GR 25 requires that any recommendation to authorize the limited practice of law by non-attorneys demonstrate that “[t]he costs of regulation, if any, can be effectively underwritten within the context of the proposed regulatory regime.” The Practice of Law Board’s rule expressly provides that the ongoing cost of regulation will be borne by the limited license legal technicians themselves, and will be collected through licensing and examination fees. Experience with the Limited Practice Board demonstrates that a self-sustaining system of regulation can be created and sustained. The Court is confident that the WSBA and the Practice of Law Board, in consultation with this Court, will be able to develop a fee-based system that ensures that the licensing and ongoing regulation of limited license legal technicians will be cost-neutral to the WSBA and its membership.

IV. Conclusion

Today’s adoption of APR 28 is a good start. The licensing of limited license legal technicians will not close the Justice Gap identified in the 2003 Civil Legal Needs Study. Nor will it solve the access to justice crisis for moderate income individuals with legal needs. But it is a limited, narrowly tailored strategy designed to expand the provision of legal and law related services to members of the public in need of individualized legal assistance with non-complex legal problems.

The Limited License Legal Technician Rule is thoughtful and measured. It offers ample protection for members of the public who will purchase or receive services from limited license legal technicians. It offers a sound opportunity to determine whether and, if so, to what degree

the involvement of effectively trained, licensed and regulated non-attorneys may help expand access to necessary legal help in ways that serve the justice system and protect the public.

IT IS FURTHER ORDERED:

- (1) That a new rule, APR 28, as attached hereto is adopted.
- (2) That the new rule will be published in the Washington Reports and will become

effective September 1, 2012.

DATED at Olympia, Washington this 15th day of June, 2012.

Madsen, C. J.

Chambers, J.

J. M. Johnson

Wiggin, J.

Stevens, J.

Gonzalez, J.

Transmission of material in this release is embargoed until
8:30 a.m. (EDT) Friday, June 1, 2012

USDL-12-1070

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THE EMPLOYMENT SITUATION — MAY 2012

Nonfarm payroll employment changed little in May (+69,000), and the **unemployment rate** was essentially unchanged at 8.2 percent, the U.S. Bureau of Labor Statistics reported today. Employment increased in health care, transportation and warehousing, and wholesale trade but declined in construction. Employment was little changed in most other major industries.

Chart 1. Unemployment rate, seasonally adjusted, May 2010 – May 2012

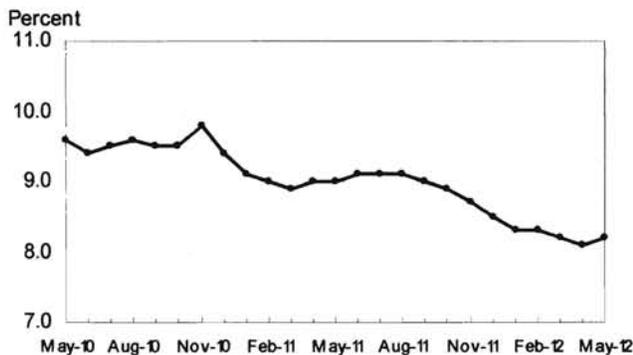
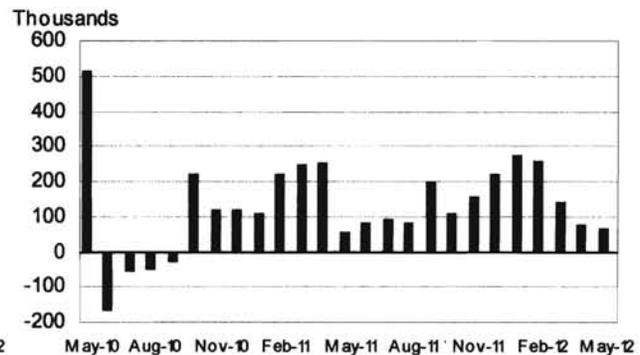


Chart 2. Nonfarm payroll employment over-the-month change, seasonally adjusted, May 2010 – May 2012



Household Survey Data

Both the **number of unemployed persons** (12.7 million) and the **unemployment rate** (8.2 percent) changed little in May. (See table A-1.)

Among the **major worker groups**, the unemployment rates for adult men (7.8 percent) and Hispanics (11.0 percent) edged up in May, while the rates for adult women (7.4 percent), teenagers (24.6 percent), whites (7.4 percent), and blacks (13.6 percent) showed little or no change. The jobless rate for Asians was 5.2 percent in May (not seasonally adjusted), down from 7.0 percent a year earlier. (See tables A-1, A-2, and A-3.)

The number of **long-term unemployed** (those jobless for 27 weeks and over) rose from 5.1 to 5.4 million in May. These individuals accounted for 42.8 percent of the unemployed. (See table A-12.)

The **civilian labor force participation rate** increased in May by 0.2 percentage point to 63.8 percent, offsetting a decline of the same amount in April. The **employment-population ratio** edged up to 58.6 percent in May. (See table A-1.)

The number of persons employed **part time for economic reasons** (sometimes referred to as involuntary part-time workers) edged up to 8.1 million over the month. These individuals were working part time because their hours had been cut back or because they were unable to find a full-time job. (See table A-8.)

In May, 2.4 million persons were **marginally attached to the labor force**, up from 2.2 million a year earlier. (The data are not seasonally adjusted.) These individuals were not in the labor force, wanted and were available for work, and had looked for a job sometime in the prior 12 months. They were not counted as unemployed because they had not searched for work in the 4 weeks preceding the survey. (See table A-16.)

Among the marginally attached, there were 830,000 **discouraged workers** in May, about the same as a year earlier. (The data are not seasonally adjusted.) Discouraged workers are persons not currently looking for work because they believe no jobs are available for them. The remaining 1.6 million persons marginally attached to the labor force in May had not searched for work in the 4 weeks preceding the survey for reasons such as school attendance or family responsibilities. (See table A-16.)

Establishment Survey Data

Total **nonfarm payroll employment** changed little in May (+69,000), following a similar change in April (+77,000). In comparison, the average monthly gain was 226,000 in the first quarter of the year. In May, employment rose in health care, transportation and warehousing, and wholesale trade, while construction lost jobs. (See table B-1.)

Health care employment continued to increase in May (+33,000). Within the industry, employment in ambulatory health care services, which includes offices of physicians and outpatient care centers, rose by 23,000 over the month. Over the year, health care employment has risen by 340,000.

Transportation and warehousing added 36,000 jobs over the month. Employment gains in transit and ground passenger transportation (+20,000) and in couriers and messengers (+5,000) followed job losses in those industries in April. Employment in both industries has shown little net change over the year. In May, truck transportation added 7,000 jobs.

Employment in **wholesale trade** rose by 16,000 over the month. Since reaching an employment low in May 2010, this industry has added 184,000 jobs.

Manufacturing employment continued to trend up in May (+12,000) following a similar change in April (+9,000). Job gains averaged 41,000 per month in the first quarter of this year. In May, employment rose in fabricated metal products (+6,000) and in primary metals (+4,000). Since its most recent low in January 2010, manufacturing employment has increased by 495,000.

Construction employment declined by 28,000 in May, with job losses occurring in specialty trade contractors (-18,000) and in heavy and civil engineering construction (-11,000). Since reaching a low in January 2011, employment in construction has shown little change on net.

Employment in **professional and business services** was essentially unchanged in May. Since the most recent low point in September 2009, employment in this industry has grown by 1.4 million. In May, job losses in accounting and bookkeeping services (-14,000) and in services to buildings and dwellings (-14,000) were offset by small gains elsewhere in the industry.

Employment in other major industries, including **mining and logging, retail trade, information, financial activities, leisure and hospitality, and government**, changed little in May.

The **average workweek for all employees** on private nonfarm payrolls edged down by 0.1 hour to 34.4 hours in May. The manufacturing workweek declined by 0.3 hour to 40.5 hours, and factory overtime declined by 0.1 hour to 3.2 hours. The average workweek for **production and nonsupervisory employees** on private nonfarm payrolls was unchanged at 33.7 hours. (See tables B-2 and B-7.)

In May, **average hourly earnings for all employees** on private nonfarm payrolls edged up by 2 cents to \$23.41. Over the past 12 months, average hourly earnings have increased by 1.7 percent. In May, average hourly earnings of private-sector **production and nonsupervisory employees** edged down by 1 cent to \$19.70. (See tables B-3 and B-8.)

The change in total nonfarm payroll employment for March was revised from +154,000 to +143,000, and the change for April was revised from +115,000 to +77,000.

The Employment Situation for June is scheduled to be released on Friday, July 6, 2012, at 8:30 a.m. (EDT).