

No. 32074-0-III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION THREE

In re the Marriage of: BARBARA DANNENBRING,

Appellant,

v.

SCOTT DANNENBRING,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR STEVENS COUNTY

The Honorable Allen C. Nielson

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Sixteen months after final orders were entered for her 29-year marriage, Barbara Dannenbring returned to the trial court that granted her divorce and asked that the court's five-year award of maintenance not be reduced from \$3,500.00 to \$1,000.00 a month after 30 months (as the 2011 orders had ordered) as she had not yet found full time employment. She also asked that the court reserve the issue of lifetime maintenance.

Over the objection of the Respondent, the trial court granted her request in part, finding that Ms. Dannenbring, through no fault of her own, continued to need a higher amount of support than initially ordered.

In granting Ms. Dannenbring's request, however, the court erred in three respects. First, it erred when it ordered Ms. Dannenbring would not be able to return to court for an amendment in the future. Second, it erred when it set the amount for the support at only \$2,500 monthly. Third, it erred in that it did not order Respondent to pay Ms. Dannenbring's attorney fees. Due to these errors, Ms. Dannenbring brings this appeal.

B. ASSIGNMENTS OF ERROR

1. The court erred with regard to Ms. Dannenbring's request to modify support, including when it estopped her from bringing further modification actions, when it failed to grant her \$3,500 a month in maintenance, and when it failed to reserve the issue of lifetime support.

2. The trial court erred when it did not order Mr. Dannenbring to pay Ms. Dannenbring's legal fees under RCW 26.09.140.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1. Is it error for a trial court to rule that a party is estopped from returning to family law court for any further modifications to spousal maintenance and/or post-secondary child support?

Issue 2. Is it error for the trial court to fail to reserve the issue of a lifetime spousal support award when the husband earned 7/8 of the wife's income, the marriage 29 years, and the wife is a displaced homemaker who is unable to obtain full time employment despite her best efforts?

Issue 3. Is it error for the trial court to reduce a spousal support award when there is a continued need and ability to pay for that support?

Issue 4. Is it error for the trial court to decline to order attorney fees to be paid under RCW 26.09.140 even though the party has shown the need and the other party has the ability to pay?

D. STATEMENT OF THE CASE

After a 29-year marriage, the parties in this case filed for and were given a divorce pursuant to a dissolution trial. (CP 45, 56-66) Orders were entered to dissolve the marriage on January 3, 2011. (CP 56-66, 40-55) At trial, the trial court found that Ms. Dannenbring was a displaced homemaker. (CP 45) The court also found that Ms. Dannenbring had abilities and education but that those skills and education were dated. (CP 45)

The court set an order for spousal support at that time. (CP 45-46) The award was for 60 months – \$3,500 a month for the first 30 months, and \$1,000 a month for the final 30 months. *Id.* In setting this award, the court found the parties’ 29-year marriage was a “significant statutory factor.” (CP 45) The court also found that Ms. Dannenbring had proved that she would complete a master’s degree in 2 ½ years, and would use her best efforts to re-enter the workforce after that. (CP 46) The court found that the route Ms. Dannenbring had taken to get back to the workforce and update her education was the “correct choice.” (CP 45-46)

As to Ms. Dannenbring’s chosen field of obtaining education in teaching English as a second language, the court found as follows (CP 46):

The Court finds, presently, in public school teaching, there are many applicants for every job out there. It’s a tough market. Just a year or two ago the market was the other way around. There was not enough teachers. And [the] market may well get worse. But the evidence shows, English as a second language instruction has a demand. There are jobs out there. So for thirty months, the spousal maintenance shall be \$3,500.00 a month to allow [Ms. Dannenbring] to continue in the direction she is going.

The court found that spousal support was “also just based upon the disproportional earning capacity of Petitioner and Respondent, with Respondent earning \$9,724.17 net per month as compared to Petitioner’s annual gross income of \$12,000.00 based upon her work at \$16.00 per hour as a nanny.” (CP 46)

In its oral ruling at that time, the court also had ruled that Mr. Dannenbring should sell one of the two homes that he had because the family's expenses could not justify this kind of luxury:

Mr. Dannenbring cannot, now that the divorce is final, have two homes. In other words, that's part of my thinking here is to set up a situation where he's going to have to fish or cut bait about whether he stays here or goes down there [to Oregon] because it does seem – exorbitant's the wrong word because that's not what's going on. It's based on necessity. You're living there because you have to. You need a second home. But on the other hand, I can't sanction or allow to continue one party having two homes, in effect. So that was another part of my rationale here that at some point in the very near future that second home payment, one way or another, would no longer need to be made. (CP 34)

Despite this reasoning from the trial court, Mr. Dannenbring kept ownership of the home in Washington, receiving \$1,300.00 a month from it as rental income at least by 2013. (CP 139)

On May 16, 2013, Ms. Dannenbring filed a petition to modify the order of spousal support. (CP 67-69). She noted her unsuccessful efforts at obtaining full time employment despite successfully completing her master's degree as the court had intended for her to do. (CP 77-84, 85-123, 146-150) Her income from employment was low – \$8,569.00 gross wages in 2010, \$144.00 gross wages in 2011, and \$16,684 gross wages in 2012. This was substantially less than the \$12,000 annual net income the court had calculated at the time for Ms. Dannenbring, for purposes of the final orders entered on January 3, 2011.

Respondent objected to the petition for modification. (CP 131-137, 165-170, Docket Nos. 89-91) He primarily argued against the petition on the basis that Ms. Dannenbring had not used best efforts to obtain employment and/or that the trial court had ordered maintenance in 2011 for purposes of allowing her to complete her education but not for purposes of having her obtain employment. *Id.*

Contained in the objection, however, was the evidence that Mr. Dannenbring's net monthly income had increased from \$9,724.17 per month to \$11,595.61 per month. (CP 138) This was an increase of nearly \$2,000.00 *a month* in net income for the Respondent. This resulted in an increase in income for Respondent of \$24,000 net income a year, so that his net income was now \$139,147 a year, compared to Ms. Dannenbring's gross income, from wages, of only \$16,684 (and that was for 2012 only). This meant Mr. Dannenbring's net earned income was at least \$122,463 more than Ms. Dannenbring's income. This did not include the \$1,300 a month from the rental property in Colville, which resulted in another \$15,600 of annual income to him, for a total of \$137,463 *more* net income a year than Ms. Dannenbring. (CP 131-137) This calculation was made without regard to the parties' investments that were divided equally at the divorce (which Ms. Dannenbring had been forced to liquidate, but which Mr. Dannenbring had been able to maintain due to his other resources).

The trial court rejected Mr. Dannenbring's objections regarding whether Ms. Dannenbring had used best efforts to find employment, or whether the purpose of the maintenance was only to allow her to complete her education. As stated by the trial court, not only had Ms. Dannenbring not increased his salary as much as the court had anticipated, CP 172, but that she had made proper efforts, and the court's intent in 2011 was for her to be able to obtain employment:

Now [counsel for Respondent] makes an argument, judge, the focus here a few years ago was on education. It wasn't on employment. But I, my recollection is that the education for the sole purpose of education makes no sense. In other words, it was a means to an end. The education, gaining a Master's degree in English as a Second Language was step one for Ms. Dannenbring to then be able to increase her salary over and above what it was at that particular time. And so I – and then secondly, I don't find that she's acted in bad faith here. At least from her materials, when I read them, she has made a real effort. She completed her education, which was no small feat, and then she has, according to the materials, made a real effort to find work.

(CP 172)

The trial court also noted that Mr. Dannenbring had actually and significantly *increased* his net income between the time of trial and 2013:

Now I want to say, though, Mr. Dannenbring, as his biography would suggest here a couple years ago, proved to be every bit as energetic and successful in the job market as he had been up to that point. And he took a very difficult circumstance at the time and has made it work.

(CP 172)

Thus the trial court did order that there should be an increase in maintenance due to a substantial change in circumstances unanticipated at the time of trial.

But then the court (a) did not order an amount commensurate to need and instead ordered that maintenance should be increased to \$2,500 a month rather than the \$3,500 a month that had been ordered in the past 30 months; (b) ordered that Ms. Dannenbring would not be allowed to return to court for any other modification for support; and (c) ordered that neither party would receive attorney fees. (CP 172-173, 176-181)

The court made these rulings for no articulated reason other than in response to Mr. Dannenbring's desire to be done with the issue:

But when I back up and look at this, I don't agree that the \$3,500 should continue for the remaining 30 months, but I do believe that it should be at \$2,500. In other words, a \$1,500 increase over the \$1,000 that I had ordered. And I think with that additional \$1,500 per month with the \$1,000, that's \$2,500 in effect, that would then allow her to continue to live at the same level and continue in her efforts.

Now [counsel for Respondent] says well judge, what, are we going to come back here in two years and go through all of this again and the answer to that is no. That I will put language in this order that there will be no further increases in the spousal support.

(CP 173-174)

The court then denied attorney fees as requested by Mr. Webster, and ultimately denied fees to Ms. Dannenbring in its written order (though never articulated a specific reason for denying fees to her). (CP 173, 179)

This appeal followed. (CP 182-189)

E. ARGUMENT

Issue 1: The court erred in certain aspects of its ruling with regard to Ms. Dannenbring's request to modify support, including when it estopped her from bringing any further modification actions, when it failed to grant her request for \$3,500 a month in maintenance, and when it failed to reserve the issue of lifetime support.

In awarding maintenance, the trial court must consider the following statutory factors: (1) the financial resources of the party seeking maintenance, including separate or community property apportioned to him or her; (2) the time needed to acquire education necessary to obtain employment; (3) the standard of living during the marriage; (4) the duration of the marriage; (5) the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet his or her needs and obligations while providing the other spouse with maintenance. RCW 26.09.090; *In re Marriage of Williams*, 84 Wn. App. 263, 267-68, 927 P.2d 679 (1996).

A purpose of spousal maintenance is to support a spouse until the spouse becomes self-supporting. *In re Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). “The court's paramount concern is the economic condition in which a dissolution decree leaves the parties.” *In re Marriage of Williams*, 84 Wn.App. at 268.

An award of maintenance is within the broad discretion of the trial court. *In re Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990). An award of maintenance that is not evidenced by a fair consideration of the statutory factors constitutes an abuse of discretion. *In re Marriage of Mathews*, 70 Wn.App. 116, 123, 853 P.2d 462, *review denied*, 122 Wn.2d 1021 (1993). Appellate courts have found that an award does not evidence a fair consideration of the statutory factors when it deems the award substantively irreconcilable with fair consideration of the factors, see, e.g, *Mathews*; or when the record reveals unwarranted reliance on other, nonstatutory factors. See, e.g., *In re Marriage of Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001).

When, *inter alia*, the disparity in earning power is great, appeal courts must closely examine a maintenance award “to see whether it is equitable in light of the post-dissolution economic situations of the parties.” *In re Marriage of Sheffer*, 60 Wn. App. 51, 56, 802 P.2d 817 (1990).

A party may seek modification of spousal support if there has been a substantial change of circumstances unanticipated at the time of trial. RCW 26.09.170; *Spreen*, 107 Wn. App. at 346. This is an open avenue to family law courts, which are courts of equity and continuing jurisdiction, and the trial court must apply proper statutory factors on a modification petition, just as it did at the time of dissolution. Thus, for example, a party can appeal a court's modification of a spousal support order that involved consideration of non-statutory factors. *Spreen*, 107 Wn. App. at 346 (order of one year of maintenance was reversed and remanded because it appeared that the trial court took into consideration non-statutory factors when limiting the award). And while a court may limit an order of support to a specific time period if it is using proper process, this is due to the fact that a party has the option to return to the family law court on another occasion if the need for support continues, and pursuant to RCW 26.09.090 and .170. See *Spreen*, supra, 107 Wn. App. at 350-351. As noted in *Spreen*, a maintenance order is not appealable as unfairly limiting in terms of time frames (*if* proper factors were considered) – *unless* the court were also to order that the new order of support was “non-modifiable” – because a party is always free to return to the court under the statute for modification, as needed. See *id.* at 351.

Applying the above factors to this case shows that the trial court, though correct in granting of Ms. Dannenbring's petition for modification, committed certain errors in its order.

First, the court erred when it ruled that Ms. Dannenbring would be "estopped" from filing any other modification petition in the future. This is exactly what *Spreen* counsels against – i.e., an order of spousal support cannot be "non-modifiable" because the law allows for modification if statutory requirements are properly set. *Spreen*, 107 Wn. App. at 351. On this ground alone, the trial court must be reversed.

Second, the court erred when it limited Ms. Dannenbring's new order of spousal support to \$2,500 a month rather than ordering that she continue to receive the \$3,500 a month that she received at the conclusion of the trial in 2010. The court had entered that order of spousal support on the basis that Ms. Dannenbring had limited financial resources and Mr. Dannenbring had great financial income. As the trial court noted at that time, Ms. Dannenbring's income at trial of \$12,000 a year was 1/8 of the income of Mr. Dannenbring, justifying the maintenance award. The court expected that Ms. Dannenbring would have made her way back into the work force by the time that order dissipated, and ruled in the modification that she had not made the progress initially hoped for. This then should have resulted in the same level of support, not an arbitrarily lower amount.

In fact, the net income disparity between the parties at the time of the modification petition was even greater than it was at the time of the trial court's ruling at the dissolution trial. This should have resulted in the continuing of maintenance at least at previous levels of \$3,500 a month.

Specifically, and as noted in the Summary of the Case above: Mr. Dannenbring's monthly income went from a net income of \$9,724 in 2010 to a net income of \$11,595 in 2013 (which does not include monthly rent income of \$1,300 on the house he decided not to sell). This is nearly \$2,000 more a month than he was found to have at the trial.

Ms. Dannenbring, in contrast, had essentially the same income as before, and for 2012 only (i.e., \$16,684 gross compared to \$12,000 net a year).

In fact, when including the rental income, Mr. Dannenbring has a total of *\$137,463 more net income a year* than Ms. Dannenbring.

This shows great disparity between the parties' financial resources for this 29-year marriage where Ms. Dannenbring was a stay-at-home parent whose contribution to the community allowed Mr. Dannenbring to put himself in the income earning position where he finds himself today.

And the trial court found that Ms. Dannenbring's lack of success in finding permanent, full time employment was not due to lack of intention or effort on her part, making the disparate finances that much more stark.

The court already had evaluated these financial circumstances at the time of trial and found that \$3,500 a month was an appropriate amount of maintenance. With facts remaining essentially the same, and with Ms. Dannenbring unable to find permanent work yet, the trial court should have continued maintenance at least in the amount ordered at trial. Reducing it by \$1,000, when Ms. Dannenbring's net income is either the same or less than it was at the time of trial, and Mr. Dannenbring's net income is \$2,000-\$3,000 more a month, is an abuse of discretion.

This is especially true because there was nothing in the trial court's ruling that indicated any statutory factor that would result in an amount different than the amount reached at the original dissolution trial. Instead it appeared that the trial court made the ruling under the theory that this was all Ms. Dannenbring deserved. This is an improper application of a nonstatutory factor and so should result in a reversal here.

As noted above, a court abuses its discretion in an order of spousal support if it either uses a nonstatutory factor in determining the amount or if it is unclear what standard it used in setting that amount. See, *supra*. Because there is no explanation here of why the court reached the result it did other than to inaccurately state this would place her where she was (it did not), and because it appeared that the court was doing so in order to placate Respondent, these cases apply here and reversal is warranted.

In truth, the original order of maintenance was low, given the disparity between the parties' earning income potential at the time of the dissolution and given all other relevant statutory factors, including the length of this 29-year marriage. But Ms. Dannenbring took to heart the trial court's belief that she would be able to make her way back to the work force from being a displaced homemaker (as the court found her to be). Through no fault of her own, she has not succeeded. The trial court found her to be credible with regard to her efforts to find work, and her financial circumstances. The court also acknowledged the success of Mr. Dannenbring in increasing his income substantially since the time of trial. The error is not in these findings but in the application of these findings to the case at hand. If disparity is greater now than it was in 2011, and if Ms. Dannenbring continues to need to use best efforts to change her financial situation, then the amount that the trial court found to be reasonable before should, at a minimum, continue to be reasonable now, and the order for spousal support should maintain at the previous level of \$3,500 a month.

Finally, the trial court erred in not reserving the issue of lifetime maintenance. This is, in fact, the kind of case where lifetime maintenance would be reasonable. And while Ms. Dannenbring has every hope that her employment situation will turn around, there is a good chance that it will not, given her age and her historical lack of engagement in the work force.

The better course of action would be for the court to order spousal support in the amount of \$3,500 a month, and with lifetime maintenance reserved, with a requirement in that order (as Ms. Dannenbring suggested) that Ms. Dannenbring will inform the court if her financial circumstances change.

The great disparity in monthly income, and in income potential between the parties, makes this the kind of case that the appellate court should “examine closely.” See *Sheffer*, 60 Wn. App. at 56. As such, Ms. Dannenbring asks the Court to remand this matter to the trial court so that the court (a) omit its estoppel against Ms. Dannenbring from bringing any further modification actions, (b) increase the amount of maintenance to the \$3,500 set in the past under the same circumstances, and (c) reserve the matter of lifetime maintenance.

Issue 2: The Trial Court Erred in Failing to Order Mr. Dannenbring to Pay Ms. Dannenbring’s Attorney Fees.

Under RCW 26.09.140, the court may award attorney fees to either party in a maintenance action. *Spreen*, 107 Wn. App. at 351. In determining whether it should award fees, the court considers the parties’ relative need versus ability to pay. *Id.* The appellate court reviews this decision for an abuse of discretion. *Id.*

Here, the trial court recognized the disparity between the parties' income, the Respondent's greater earning ability, and Ms. Dannenbring's continuing need for support. Yet it made no analysis of whether these findings also should result in an award of attorney fees under RCW 26.09.140. Fees either should have been awarded, or that the court should have given articulable reasons of why it was not making such an award. This court ruled at the end of the dissolution trial that Mr. Dannenbring was required to pay for half of Ms. Dannenbring's legal fees at that time. (CP 47) And the disparity in income is even greater now than it was at that time, thus making it an abuse of discretion for the trial court to fail to order fees for this petition. At a minimum, it is an abuse of discretion for the trial court to fail to articulate reasons for denying Ms. Dannenbring's requested fees, under the facts and record of this case.

Issue 3: This Court Should Order Mr. Dannenbring to Pay Ms. Dannenbring's Attorney Fees.

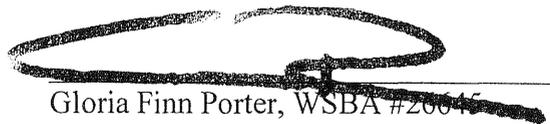
Pursuant to RCW 26.09.140 and RAP 18.1, Ms. Dannenbring asks that this Court order Mr. Dannenbring to pay Ms. Dannenbring's attorney fees on this appeal. To make such an order, the Court of Appeals will examine the arguable merit of the issues on appeal as well as the financial resources of the respective parties. *In re Marriage of CMC*, 87 Wn.App. 84, 89, 940 P.2d 669 (1997).

Ms. Dannenbring will provide a financial affidavit in a timely manner, as required by RAP 18.1, to demonstrate her need for her fees to be paid. In addition, she points to Mr. Dannenbring's financial affidavit as evidence that Mr. Dannenbring has the ability to pay her fees. The merits of her appeal are set forth above, and justify an order of fees at this level.

F. CONCLUSION

For the foregoing reasons, Ms. Dannenbring asks that this Court remand this matter to the trial court with instructions to (a) omit reference to estopping Ms. Dannenbring from bringing further modification actions; (b) amending its new maintenance order so that Ms. Dannenbring receives \$3,500 a month in maintenance rather than \$2,500; (c) reserving for future consideration any motion by Ms. Dannenbring for lifetime support; and (d) ordering attorney fees to be paid by Mr. Dannenbring for the costs of bringing the petition for modification of spousal support. In addition, Ms. Dannenbring asks that this Court order Mr. Dannenbring to pay for her attorney fees on this appeal.

Respectfully submitted this 6th day of February, 2014.



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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BARBARA DANNENBRING)
)
 Appellant) COA No. 32074-0-III
vs.) No. 09-3-00189-0
)
SCOTT DANNENBRING) PROOF OF SERVICE
)
 Respondent)
_____)

I, Gloria Finn Porter, counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 6, 2014, I served the attached Opening Brief upon the following by mailing a true and correct copy of the same by U.S. mail, postage prepaid, to:

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Dated this 6th day of February, 2014.



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