

**FILED**

**AUG 13 2014**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON**

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**BARBARA DANNENBRING,  
Appellant/Cross-Respondent**

**V.**

**SCOTT DANNENBRING,  
Respondent/Cross-Appellant**

**NO. 32074-0-III**

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**CROSS APPELLANT'S REPLY BRIEF**

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**II. TABLE OF AUTHORITIES**

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### III. INTRODUCTION

In her response to Scott Dannenbring's cross-appeal, Barbara Dannenbring<sup>1</sup> fails to distinguish the cases cited by Scott which demonstrate that the trial court erred as a matter of law when it modified its maintenance award to Barbara. Barbara failed to demonstrate the "substantial change in circumstances" required by RCW 26.09.170(1). Incredibly, Barbara now argues that Scott's increase in earnings, which occurred post-dissolution, was alone a change in circumstances which justified increasing the maintenance award. *See* Reply Br. of Appellant at 12 Barbara cites no law or other authority for this proposition. Instead she misstates and confuses the law regarding awards of maintenance and modification of maintenance to arrive at the legally unsupportable position that Barbara ought to be entitled to a lifetime share of Scott's earnings, despite an unappealed finding that Barbara is capable of self-support. This Court should reject Barbara's attempts to rewrite the law in this area. It should also reverse the trial court's granting of modification of the maintenance award and award Scott attorney's fees for this appeal.

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<sup>1</sup> For ease of reference this brief will again use the parties' first names.

#### IV. ARGUMENT IN REPLY

##### A. Barbara misstates the law regarding maintenance and modification of maintenance.

In an apparent attempt to confuse the central issue in this case, whether she demonstrated a “substantial change in circumstance” sufficient to justify modification of an unappealed maintenance award, Barbara argues that she is entitled to lifetime maintenance. To support her claim for lifetime maintenance, Barbara quotes a line out of context from *Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007). She then asserts that this Division I Court of Appeals case and its “progeny” (uncited by Barbara) stand for the proposition that a spouse in a long-term marriage is entitled to a maintenance award of a share of the lifetime earnings of the other spouse. *See* Reply Br. of Appellant at 11. This is a completely inaccurate statement of the law.

*Rockwell* was not a maintenance case. It was case about a disparate award of community property; maintenance is not even mentioned in the opinion. The court in *Rockwell* made the unremarkable comment, in dicta, that after a long-term marriage, the goal of the trial court, in *dividing community property*, is to “place the parties in roughly equal financial positions for the rest of their lives.” *Rockwell*, 141 Wn. App. at 243. This comment had nothing to do with maintenance awards. Rather it was

made to explain why, given the relative earning capacities and health of the parties in *Rockwell*, a 60-40 split in an award of community property was justified. *Id.*

*Rockwell* has no “progeny” as to maintenance awards. Our Supreme Court’s statements about lifetime maintenance where a former spouse is capable of self-support remains the law: “It is not the purpose of the law to place a permanent responsibility upon a divorced spouse to support a former wife indefinitely.” *Berg v. Berg*, 72 Wn. 2d 532, 534, 434 P.2d 1 (1967) (affirming a seven-year two step maintenance award after a 20 year marriage); *see also Lockhart v. Lockhart*, 145 Wash. 210, 212-13, 259 P. 385, 386 (1927)(“It is not the policy of the law, nor is it either just or equitable, that a divorced wife be given a perpetual lien upon her divorced husband's future earnings”).

Between its pre-trial and post-trial rulings, the trial court in this matter granted Barbara more than seven years of support from Scott. It was an abuse of discretion to modify this maintenance ruling absent a change in circumstances which were unanticipated at trial. Barbara’s continued underemployment was not such a circumstance.

B. Barbara misreads the plain text of the trial court's ruling at trial.

The trial court's decree and findings were quite explicit and clear about the maintenance award. It was justified by Barbara's need to obtain an education for two and half years and the necessity of a transition period to full self-support thereafter. *See* CP at 45-46, 60. Nowhere in the decree or the findings is there any suggestion that Barbara would have the discretion to remain voluntarily underemployed and would then have the discretion to seek additional maintenance based upon that underemployment. The difficulty Barbara might encounter in finding employment was specifically contemplated by the court in fashioning the maintenance award. Barbara did not appeal the maintenance award. As soon as the lower amount of maintenance started, Barbara moved to modify the award without any demonstration that significant facts had changed since trial. On these facts, the trial court erred in modifying the maintenance award.

C. Barbara failed to distinguish cases which require unanticipated circumstance beyond mere unemployment to obtain a modification.

Without actually discussing the cases, Barbara dismisses the fact that cases where courts have affirmed modification of maintenance based upon underemployment have all involved involuntary health issues precluding employment, rather than mere unemployment. *See* Appellant's Reply Br.

at 8-9 citing *Bowman v. Bowman*, 77 Wn.2d 174, 459 P.2d 787 (1969); *Spreen v. Spreen*, 107 Wn. App. 341, 28 P.3d 769 (2001).

In fact, there is an important legal principle at work in those cases. Health issues which preclude employment can be documented via objective evidence. But it is exceedingly difficult to ascertain why someone was not hired for employment despite applying for work. It could be through no fault of their own, or it could be that they were merely going through the motions of application to avoid a reduction in maintenance. For this reason, our courts have required more than mere assertions of underemployment to modify a maintenance award.

Modifying a maintenance award disturbs the finality of a dissolution. This is why a “substantial change in circumstances” is required to obtain modification. *See* RCW 26.09.170(1) (emphasis added). Before a court grants modification based upon the alleged unforeseen circumstance of continued underemployment, it ought to require some objective evidence of actual interference with the ability to work beyond a party’s mere assertions that they were not hired despite making application.

In the present case, the trial court found that Barbara had made a good faith effort to look for work despite the fact that she did not look outside her newly chosen field and despite the fact that Barbara provided minimal evidence that she looked beyond the Seattle area for work. Under

similar circumstances, our Supreme Court reversed a modification of maintenance. *See Lambert v. Lambert*, 66 Wn.2d 503, 510, 403 P.2d 664, 668 (1965)(modification inappropriate where underemployment was voluntary despite other opportunities). Barbara's only explanation for her underemployment was that all of her prospective employers have engaged in illegal age discrimination. CP at 171. She provided no evidence beyond mere speculation to show that this was true.

D. Despite Barbara's conclusory statements to the contrary, Scott's increased earnings are not a basis for modification.

In his opening brief, Scott cited a Supreme Court opinion directly on point with regard to the issue of increased earnings of a spouse as the sole basis for modification. *See Gordon v. Gordon*, 44 Wn.2d 222, 227-28, 266 P.2d 786, 789 (1954) ("A former wife may not obtain additional alimony on the theory that such is in keeping with her former husband's present station in life.") Barbara completely ignored this opinion and instead argues that statutory language involving consideration of a spouses' ability to pay as a criteria of changed circumstance means that an increase in one spouses' income can be the sole basis for modification. Barbara points to no court which has taken this position as to the modification statute.

In the course of this argument Barbara mischaracterizes the court's ruling as to the family home. *See* Appellant's Reply at 12. Scott was not ordered to sell it. He was ordered to make an equalization payment for the equity in the home, either by selling it, or making the payment to Barbara himself. *See* CP at 51. He chose to make the equalization payment to Barbara. The fact that Scott chose to keep the home by working another job does not entitle Barbara to a share of his increased earnings.

Allowing a spouse to petition for modification based solely upon an increase in the other spouses' earnings would undermine the finality of dissolutions. It would open the door to treating maintenance as if it were a right to future earnings, rather than as a flexible tool to assist in a transition to self-support. It would also penalize parties, like Scott, who work hard to improve themselves under the difficult circumstance of a dissolution.

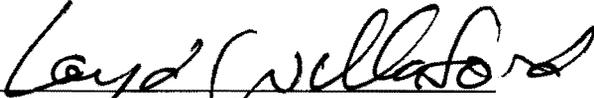
## **VII. CONCLUSION**

Barbara failed to meet her burden of demonstrating a "substantial change in circumstances" which would justify modifying the maintenance award she received following trial. The trial court's ruling otherwise was an abuse of discretion because there was insufficient evidence to support the ruling and the Court appeared to apply the wrong legal standard.

Accordingly, Scott requests that this Court reverse the trial court's modification of its maintenance order, affirm the denial of attorney's fees before the trial court, and award Scott attorney's fees on this appeal.

Submitted this 12<sup>th</sup> day of August, 2014.

WEBSTER LAW OFFICE PLLC

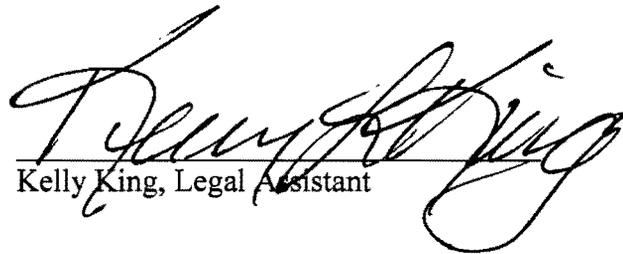
  
Loyd Willaford, WSBA #42696  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is a person of such age and discretion to be competent to serve papers.

That on the 12<sup>th</sup> day of August, 2014, I caused to be served a copy of the Cross Appellant's Reply Brief via US Mail to the persons hereinafter named:

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