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

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

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In re the Marriage of:

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

**V.**

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

**NO. 32074-0-III**

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**RESPONDENT'S REPLY BRIEF/CROSS APPELLANT'S BRIEF**

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### **III. INTRODUCTION AND RELIEF REQUESTED**

This appeal involves a modification of a spousal maintenance order originally issued at the conclusion of a dissolution trial in 2010. Respondent and Cross-Appellant Scott Dannebring requests that this Court reverse the trial court's modification of this order, because Appellant and Cross-Respondent Barbara Dannebring<sup>1</sup> failed to demonstrate any changed circumstances which would justify the modification. Scott also asks that the Court affirm the denial of the Barbara's attorney's fees request before the trial court. Finally, Scott requests attorney's fees for this appeal.

### **IV. ASSIGNMENTS OF ERROR<sup>2</sup>**

A. The trial court erred when it found that Barbara had made good-faith efforts to seek additional employment and thus was not voluntarily underemployed. CP at 178 (¶10)

B. The trial court erred when it granted Barbara's petition to modify its spousal maintenance order, despite Barbara having failed to meet her burden of demonstrating a substantial change in circumstances. CP at 180-181.

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

<sup>2</sup> Scott concedes that the trial court erred in barring Barbara from bringing further petitions for modification. CP at 181 (¶3).

## V. STATEMENT OF THE CASE

A dissolution trial between the parties ended on October 5, 2010. In its oral ruling at the conclusion of trial, the trial court ordered Scott to pay spousal maintenance for five years. CP at 29-30. The first two and half years of maintenance were at \$3,500 per month. CP at 29 (ln 22). The court described this award as allowing Barbara to “continue down [the] road” of getting retrained by attending Seattle University. CP at 29 (ln 10-12). The final two and half years of maintenance were to be at \$1,000 per month to assist Barbara in making a “transition” to self-support. CP at 29-30. The trial court specifically considered the length of the marriage and the relative earnings of the parties in making this award. CP at 30 (ln 3-18). The trial court noted that with the pre-trial spousal maintenance she had already received, the trial court’s order would have the effect of giving Barbara seven and a half years of maintenance from Scott. CP at 30 (ln 2).

The trial court memorialized its order in a Decree signed on December 31, 2010 and filed on January 3, 2011. CP at 56-66. In that Decree, the trial court awarded approximately 50% of the community property to each of the parties and assigned substantially all the

community debt to Scott. CP at 57-59. The court also ordered that Scott's spousal maintenance payments to Barbara would decrease from \$3,500 per month to \$1,000 per month on May 1, 2013. CP at 60. No appeal was taken from this final decree.

On May 16, 2013, Barbara filed a Petition to Modify Spousal Maintenance. CP at 67-76. In her petition, Barbara alleged that the modification was justified because Barbara recalled the trial court stating that if she was unable to secure employment to support herself she could come back for modification. CP at 68. No such comment appears in the record. In her memorandum supporting the Petition, Barbara asked that the Court order the \$3,500 per month maintenance continue for an additional twenty-four months. CP at 76. Barbara also implied that she also wanted the two and a half years at \$1,000 a month to continue after this two year period. *Id.*, CP at 79. Finally, Barbara asked the Court to reserve for her the right to request lifetime maintenance. CP at 76.

In her declaration supporting her Petition, Barbara informed the Court that she had obtained her Master's Degree in June 2012 and that she had had a series of part-time teaching jobs. CP at 78, 80-83. Barbara's Financial Declaration filed concurrently with the Petition for Modification stated that she had over \$200,000 in deposits at banks. CP at 126 (¶4.2).

On July 19, 2013, Scott replied to Barbara's Petition. CP at 93-136. He pointed out to the Court that it did not appear that Barbara had made significant efforts to seek employment outside the Seattle area. CP at 133-134. Scott had to move to find gainful employment. CP at 132. Scott further raised the issue of Barbara's substantial assets at the time of the request for modification. CP at 134 (ln 11-12). At oral argument, Scott pointed out to the Court that all the issues raised in the modification had been addressed in the dissolution trial and that there were no changed circumstances justifying modification. CP at 165-166

On July 29, 2013 Barbara replied to Scott's response to her petition. CP at 151. Barbara asserted that the \$200,000 in bank deposits were for retirement. CP at 154. However, in addition to a cash payment for equity in the family home and 394,000 shares of stock, Barbara had been awarded 50% of four different retirement accounts in the dissolution decree. CP at 58 (¶3.3).

On July 30, 2013, the court heard argument on Barbara's petition. CP at 160-175. The Court modified the last 29 months of the maintenance from \$1,000 to \$2,500 per month. CP at 174-175. The Court also barred Barbara from bringing further petitions to modify. CP at 173-174. On October 22, 2013, the trial court entered written rulings which

memorialized its oral rulings. CP at 176-181. This appeal and cross-appeal followed.

## **VI. LAW AND ARGUMENT**

### **A. Barbara failed to show a substantial change in circumstances justifying modification of the spousal maintenance order.**

Once entered, a spousal maintenance award may be modified “only upon a showing of a substantial change of circumstances.” RCW 26.09.170(1) (emphasis added). The party seeking modification bears the burden of proving the substantial change in circumstances. The substantial change in circumstances must be one “that was not within the contemplation of the parties at the time the decree was entered.” *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980). Rulings on whether a party has demonstrated a substantial change in circumstances and modification in general are reviewed for abuse of discretion. *In re Marriage of Drlik*, 121 Wn. App. 269, 274, 87 P.3d 1192 (2004). A court abuses its discretion if its decision is “manifestly unreasonable or rests upon untenable grounds or reasons.” *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). A court also abuses its discretion when it applies the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

Courts have reversed modifications where parties have not demonstrated an unanticipated change in circumstances. *See, e.g. Wagner*, 95 Wn.2d at 100 (Change in assets contemplated in separation agreement not a basis for termination of maintenance). *In re Marriage of Coyle*, 61 Wn. App. 653, 659, 811 P.2d 244 (1991) (where there was no basis in fact supported by the record for finding of change in circumstances, modification was in error). Where Courts have allowed modifications of maintenance awards based upon underemployment or unemployment, there have been unforeseen health issues which prevented employment. *See, e.g., Bowman v. Bowman*, 77 Wn.2d 174, 175, 459 P.2d 787, 788 (1969). *Spreen v. Spreen*, 107 Wn. App. 341, 29 P.3d 769 (2001).

In the present case, Barbara's underemployment was contemplated and discussed by the parties and the court in fashioning the maintenance award. The fact that Barbara's underemployment has continued is not, in and of itself, a substantial change in circumstances justifying a modification of the maintenance award. Barbara's reliance on *Spreen v. Spreen*, 107 Wn. App. 341, 29 P.3d 769 (2001) to argue the opposite is misplaced. In *Spreen*, the party seeking modification presented competent evidence that her mental health had deteriorated to the point that she was "unemployable and fully disabled." *Id.*, 107 Wn. App. at 345. There is no

such allegation of unemployability in this case. To the contrary, Barbara contended and still contends that she is actively seeking employment, but through “no fault of her own” has not found gainful full-time employment. But Barbara’s difficulty in finding full-time employment was expressly contemplated by the trial court in its findings of fact. CP at 45-46.

Barbara was a reasonably healthy woman in her 50s who was underemployed at the time of trial in 2010. She remained a reasonably healthy woman in her 50s who was underemployed (with an additional Master’s degree) at the time of her petition for modification in 2013. This was after she had received an additional \$105,000 in maintenance payments from Scott. Finally, and perhaps most importantly, Barbara had over \$200,000 in cash on deposit in banks at the time of her petition for modification. This means that even if unanticipated circumstances had occurred, which they had not, Barbara still demonstrated no present need for additional funds beyond the \$1,000 per month she was scheduled to continue to receive from Scott for two and half more years. On these facts, there was no change in circumstances, let alone a substantial change, which would permit the Court to modify its maintenance award.

B. The trial court's original maintenance order precisely contemplated the situation which was present when Barbara requested modification.

At the hearing on the petition for modification, the trial court implied that it thought Barbara would be employed full-time by the time of the transition from \$3,500 to \$1,000 maintenance. CP at 172 (ln 9-14). However, this post-hoc statement of intent is not in accord with the trial court's written findings at the time of the dissolution decree. These findings were never appealed and are therefore verities now. The trial court's original findings related to spousal maintenance specifically referenced a two and half year period for school. CP at 46. The court went on to state, "Thereafter, she [Barbara] will be using her best efforts to re-enter the job market." *Id.* (emphasis added). Thus, the "transition" period of \$1,000 per month was intended to be a job-searching period which followed the \$3,500 a month maintenance period. This "transition" had barely begun when Barbara petitioned for modification. Despite its post-hoc statements, at the time of trial, the trial court did not contemplate that Barbara would be employed full-time by the time the maintenance was reduced. Since this lack of full-time employment was the sole basis for asserting a change in circumstances, and this underemployment was contemplated by the Court and the parties at the time of trial, it was error to modify the maintenance award based upon it.

In addition to the trial court providing an inaccurate post-hoc reading of its prior order, it misapplied the law on change of circumstances. In one of the cases the trial court cited in its ruling, there were unanticipated circumstances which prevented gainful employment. In *Bowman v. Bowman*, 77 Wn.2d 174, 175, 459 P.2d 787, 788 (1969), the party seeking modification had health problems which prevented her from working or getting additional education. There were no such facts in the current case. In the other case cited by the trial court, *Ovens v. Ovens*, 61 Wn.2d 6, 9, 376 P.2d 839, 842 (1962), the issue relevant to the present matter was whether it was appropriate to fix an automatic end to maintenance when it appeared there might be an ongoing need. The Supreme Court held that a fixed term was allowable because there was the ability to seek modification later. *Id.* *Ovens* does not stand for the proposition which the trial court presumably cited it for: if there was some evidence at the original trial that there might be ongoing needs, one need not demonstrate the statutorily required change in circumstances and present additional need to obtain a modification. In fact, *Ovens* specifically cites the requirement for “changed conditions.” *Ovens*, 61 Wn.2d 6 at 9. There were no changed conditions in this case.

C. Barbara failed to show that her lack of earnings was in good faith.

Our Courts have held that “self-imposed curtailment of earning capacity, absent a substantial showing of good faith, will not constitute such a change of circumstances as to warrant a modification.” *Lambert v. Lambert*, 66 Wn.2d 503, 510, 403 P.2d 664, 668 (1965). In *Lambert*, the person seeking modification voluntarily took a job in a low-paying business despite having other opportunities. *Id.* Similarly, Barbara voluntarily entered into a field which she knew had a dearth of jobs. Since finishing her schooling in June 2012, Barbara has predictably only held sporadic part-time positions. CP at 80-81. Yet, Barbara has demonstrated no efforts to seek employment in other areas she might be qualified. Instead she remains voluntarily underemployed and has made no discernible efforts to seek employment in other fields where she might earn more money. This hardly meets the good faith effort contemplated by *Lambert*. On the facts before the trial court it was error to find good faith sufficient to justify a modification of the maintenance award.

D. Scott’s current earnings are irrelevant to the question of modification.

Contrary to Barbara’s suggestion, the fact that Scott has increased his income since dissolution is not a justification for continued maintenance. Our courts have been clear that a party may not seek an increase in

maintenance based solely upon the other spouse's better circumstances after dissolution; there must be a showing of changed circumstances and additional need. *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's petition for modification did not contain any demonstration of additional need beyond what was before the trial court in the 2010 trial.

E. The trial court did not err in failing to reserve the issue of lifetime maintenance.

While the trial court erred in barring Barbara from bringing additional motions to modify the maintenance award, it did not err in refusing to reserve the issue of lifetime maintenance. Barbara made no showing in the modification action that she has the need for lifetime maintenance. In addition, the trial court found at trial, and Barbara did not appeal, that Barbara has the ability to become self-supporting. *See* CP at 45. Thus, lifetime maintenance was unwarranted then and it is still unwarranted.

F. The trial court properly denied Barbara's attorney's fees request.

RCW 26.09.140 permits trial courts to award attorney's fees in their discretion in family law matters. There is no statutory or case law

requirement that the Court give a reason on the record for denying an attorney's fees request. The trial court was well within its discretion to deny Barbara's requests for attorney's fees. Based upon her financial declaration, Barbara had assets to pay her attorney's fees. This was reason enough to deny the request.

G. Scott requests attorney's fees for this appeal.

RCW 26.09.140 permits this court to award attorney's fees in its discretion. Barbara has apparently decided that she will continue to litigate this matter until she either obtains a lifetime maintenance award to which she is not entitled or she exhausts her options for requesting it. Barbara's petition for modification had no basis in fact. It was based upon a misremembering of oral comments by the trial court. Scott incurred substantial fees in defending against the unjustified petition. He now has incurred additional fees to correct the trial court's erroneous ruling on modification. Barbara had \$200,000 on deposit at banks at the time of the petition for modification; she can afford to pay Scott's attorney's fees for defending against a modification petition which never should have been brought.

## VII. CONCLUSION

For the reasons given above, Scott Dannebring 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 7th day of April, 2014.

WEBSTER LAW OFFICE PLLC

A handwritten signature in black ink, appearing to read "Loyd Willaford", written over a horizontal line.

Loyd Willaford, WSBA #42696

Attorney for Scott Dannebring

**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 7<sup>th</sup> day of April, 2014, I caused to be served a copy of the Respondent's Reply Brief/Cross Appellant's Brief via US Mail and and/or email to the persons hereinafter named:

Ms. Gloria Finn-Porter  
Attorney for Appellant/ Cross Respondent  
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Kelly King, Legal Assistant