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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 32074-0-III

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION THREE

BARBARA DANNENBRING,

Appellant/Cross-Respondent,

v.

SCOTT DANNENBRING,

Respondent/Cross-Appellant.

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

The Honorable Allen C. Nielson

APPELLANT'S REPLY/RESPONSE TO CROSS-APPEAL

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TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

I. INTRODUCTION1

II. COUNTERSTATEMENT OF THE CASE.....1

III. ARGUMENT.....5

 A. THIS COURT SHOULD GRANT MS. DANNENBRING’S
 APPEAL WITH REGARD TO THE ISSUE OF RETURNING
 TO THE COURT AT A LATER DATE, IF NECESSARY.....5

 B. RESPONDENT/CROSS-APPELLANT CONFUSES HIS
 OPINION FOR THE COURT’S INTENTIONS.....5

 C: OTHER ARGUMENTS ARE WITHOUT MERIT.....8

IV. CONCLUSION13

Certificate of Service14

TABLE OF AUTHORITIES

Washington Court Cases

Bowman v. Bowman, 77 Wn. 2d 174, 459 P.2d 787, 788 (1969).....8-9

In re Marriage of Coyle, 61 Wn. App. 653, 811 P.2d 244 (1991).....11

In re Marriage of Rockwell, 141 Wn.App. 235, 170 P.3d 572 (2007)..7, 11

Spreen v. Spreen, 107 Wn. App. 341, 29 P.3d 769 (2001).....9

In re Marriage of Washburn, 101 Wn.2d 168, 677 P.2d 152 (1984).....11

Washington Constitution, Statutes and Court Rules

RCW 26.09.140.....13

I. INTRODUCTION

Scott Dannenbring files what he terms to be a Response and Cross-Appeal to Barbara Dannenbring's Appeal. Mr. Dannenbring's Response/Cross-Appeal, however, appears to be only a Cross-Appeal without specific delineation for a Response to Ms. Dannenbring's Appeal.

In essence, Mr. Dannenbring argues that the trial court erred when it agreed with Ms. Dannenbring and found that a substantial change in circumstances had occurred, resulting in the need to modify maintenance in Ms. Dannenbring's favor. As such, Mr. Dannenbring's Response to Ms. Dannenbring's Appeal (where she asserts that she should not have been precluded from asking for a modification in the future, that she should have received a larger increase in the maintenance modification, and that she should have been awarded attorney fees) is subsumed within his argument on his Cross Appeal that no modification to maintenance should have been awarded. Since the argument is the same, the Reply and Cross Response are presented together as one argument.

Mr. Dannenbring does concede certain points. For instance, Mr. Dannenbring agrees with Ms. Dannenbring that the trial court erred when it ruled that Ms. Dannenbring is barred from returning to the court for modification of maintenance. See Response/Cross Appeal at 1, n.2. In addition, Mr. Dannenbring agrees with Ms. Dannenbring that he has had

an increase in income since the dissolution trial. Id. at 10-11. He also concedes that the trial court recognized during the modification proceeding that it had ordered maintenance at the trial as it did because it expected Ms. Dannenbring to find employment. Id. at 8.

Mr. Dannenbring's concessions should result in the dismissal of his appeal, as they recognize factors that demonstrate why the trial court ruled as it did. The rest of Mr. Dannenbring's argument is also without merit, as he challenges the trial court's ultimate decision regarding maintenance, despite the fact that it was in the trial court's discretion to modify maintenance and it exercised that discretion when it ruled as it did, and extended maintenance at a higher level than \$1,000 a month (albeit at \$2,500 instead of the original \$3,500).

Mr. Dannenbring's concessions also should result in the granting of Ms. Dannenbring's appeal, since he concedes that not only is he making the same salary as before but that he actually is making a *larger* salary. Id. at 10-11. When factoring the trial court's determination that Ms. Dannenbring has not located permanent employment as the court anticipated at trial (and was the reason for the reduction in maintenance) with Mr. Dannenbring's increase in ability to pay, then the amount of maintenance should have remained at \$3,500.00 rather than reduced arbitrarily to \$2,500.00.

As to his request for fees, Mr. Dannenbring cites RCW 26.09.140 but states no financial need on his part for payment and therefore fails to satisfy the threshold requirement of proof needed for an award of fees to him under that statute.

II. COUNTER STATEMENT OF THE CASE

Primarily Ms. Dannenbring relies on her original Statement of the Case as an accurate recitation of the facts below. However, she makes the following observations regarding Mr. Dannenbring's summary:

*Mr. Dannenbring implies throughout his briefing that the second tier of maintenance (which was to begin in May, 2013 and was to be \$1,000 a month rather than \$3,500 a month) was intended by the trial court to support Ms. Dannenbring only during her job search. This is not accurate. As the findings of fact and conclusions of law reflect, the trial court expected Ms. Dannenbring to be able to re-enter to the job market "in fairly short order" once her education was complete. (CP 46) In addition, Ms. Dannenbring actually completed her educational program *an entire year* ahead of schedule. (CP 78) She did not come to the trial court on her motion to modify until a year after she was unsuccessful at finding full time, permanent employment. *Id.* The trial court's ruling in 2013 that maintenance should increase due to Ms. Dannenbring's inability to locate permanent, full time employment since completing her education makes it

eminently clear that the trial court intended the phrase “fairly short order” to mean something less than a year (and likely intended it to be a month or two at the most, as that phrase is usually interpreted).

In fact, this appellate position regarding the trial court’s “intent” is new for Mr. Dannenbring. During modification proceedings, he declared under oath that “Judge Nielsen stated that the *higher maintenance* was to allow the petitioner to finish her degree in E.S.L. (English as Second Language) and *enough time to seek employment.*” (CP 131) (emphasis added) This is the opposite of his now-stated (and wrong) position.

*Mr. Dannenbring notes that no appeal was taken of the original dissolution action. This was because Ms. Dannenbring intended to make best efforts to meet the trial court’s expectations regarding her return to the work force (and in fact exceeded, by a year, the judge’s expectation regarding her education schedule). When her best efforts to find work were unsuccessful, she appropriately came back to the trial court due to a substantial change in circumstances unanticipated at the time of trial.

*In addition, Mr. Dannenbring attempts to rewrite the trial court’s ruling by stating that the second tier of maintenance was to assist Ms. Dannenbring in her transition to “self-support” – implying that this did not necessarily require that she find viable employment. Presumably he tries to interpret the ruling in this way so that he can make his argument that

trial court expected Ms. Dannenbring to deplete her life savings to support herself, rather than obtain full time work. But that is not the record, nor is it the law. It is just Mr. Dannenbring's argument throughout this case.

III. ARGUMENT

As noted above, Mr. Dannenbring does not respond specifically to Ms. Dannenbring's briefing but lumps together his cross-appeal with his response. In doing so, he (a) concedes – as he should – that the trial court erred when ruling that Ms. Dannenbring cannot return for subsequent modification, (b) argues his opinion as if it were the trial court's rulings (which is not the case), and (c) works to apply standard law to this case in a way that is incorrect and without merit.

A. THIS COURT SHOULD GRANT MS. DANNENBRING'S APPEAL WITH REGARD TO THE ISSUE OF RETURNING TO THE COURT AT A LATER DATE, IF NECESSARY.

As noted above, Mr. Dannenbring concedes that Ms. Dannenbring correctly appeals this part of the trial court's ruling. See Response/Cross-Appeal at 1, n.2. This part of Ms. Dannenbring's appeal must be granted.

B. RESPONDENT/CROSS-APPELLANT CONFUSES HIS OPINION FOR THE COURT'S INTENTIONS.

Mr. Dannenbring spends much of his brief arguing that it was anticipated that Ms. Dannenbring would not find work. This is not accurate. It is accurate that Mr. Dannenbring himself argued at the

original trial in 2010 that Ms. Dannenbring would not find work, and also argued that she should not go into her chosen field because (he believed) it would not prove fruitful. But that was not the court's opinion.

In fact, as noted in the Opening Brief, the trial court stated:

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.

(CP 46) (emphasis added) As the trial court said in its oral ruling on modification below and in response to Mr. Dannenbring's stated position, "Education for the sole purpose of education makes no sense." (CP 173)

Mr. Dannenbring also states that Ms. Dannenbring had \$200,000 for retirement that was intended to be her support if she did not find work. Response/Cross Appeal at 7. Mr. Dannenbring makes no citation to the record for this unsupportable and implausible argument.

As noted above, the trial court intended Ms. Dannenbring to find permanent, full time work to support herself – not that she would have to spend down her small savings and be left with no financial resources in her later years. And that would not have been the law, and would have been appealable error. "In a long term marriage of 25 years or more, the

trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives." *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007).

Here, Mr. Dannenbring's wealth and earning opportunity is unquestionably higher than that of Ms. Dannenbring. To encourage this Court to find that the trial court should have made Ms. Dannenbring deplete her few savings would be to invite the error that *Rockwell* and its progeny are specifically intending to prevent.

Again, just because Mr. Dannenbring had an opinion about how his ex-wife should be supported does not mean that the trial court agreed with him – and in this case, the trial court specifically and clearly did not so agree, or interpret the evidence as Mr. Dannenbring suggests.

It is undisputed that these parties were in a 29-year marriage with a hugely disparate income, in which Ms. Dannenbring maintained the family household so that Mr. Dannenbring could further his financial career. These were appropriate factors for the trial court to consider both when setting maintenance at the dissolution trial and in determining whether to modify maintenance generally in 2013.

In the aftermath of the divorce, two things happened that the court did not anticipate and that were a substantial change in circumstances: (a) Ms. Dannenbring (a middle-aged woman with little work history and with

health issues) was unable to find permanent full-time work despite her best efforts and despite the court's expectation that she would, and (b) Mr. Dannenbring's income increased.

Part and parcel to those circumstances was the unanticipated (at the time of trial) continued downturn in the employment market, and all other factors listed in the Opening brief (incorporated herein). Ms. Dannenbring presented expert testimony at both the trial and the modification hearing, and the trial court found that expert testimony to be credible. (CP 46, 190-191) Under these circumstances, and based on the court's findings, it was proper to continue support at the same rate as before, or higher. As noted in Ms. Dannenbring's appeal, and given the court's findings, the proper result would have been to keep amounts at the same level since the same factors existed at the time of the trial, with the one difference being that Mr. Dannenbring could afford the maintenance *even more easily*, given his increase in income. Certainly there is no ground for Mr. Dannenbring's appeal that, in his opinion, the court should have reached a different result.

C. OTHER ARGUMENTS ARE WITHOUT MERIT.

The remainder of Mr. Dannenbring's argument is without merit.

First, Mr. Dannenbring argues that the trial court could not find a substantial change in circumstances with regard to unemployment because the cases relied on by the trial court and Ms. Dannenbring (*Bowman v.*

Bowman, 77 Wn. 2d 174, 175, 459 P.2d 787, 788 (1969) and *Spreen v. Spreen*, 107 Wn. App. 341, 29 P.3d 769 (2001)) involve unemployment due to unforeseen health issues and so are not on point.

This argument is not well taken, and not how the trial court viewed the evidence. In fact, the trial court stated that the *Bowman* case was “very, very close to what I have here” and noted the situation in *Bowman* – that the unemployment after dissolution was unexpected by the court, just as it was unexpected by the trial court in this case. (CP 172) The court also rejected Mr. Dannenbring’s complaint that Ms. Dannenbring should live off her savings, noting that the purpose of the employment was for Ms. Dannenbring to find work and to have her obtain the education for the sake of the education “makes no sense.” (CP 173)

Appellate decisions are to be used by analogy and for precedential value. Requiring precise facts to be equal in each case before applying appellate precedent would do away with a major purpose of the appellate system. This argument should be rejected.

Second, Mr. Dannenbring argues that this situation of a year-long job search was “precisely” what the trial court expected. This is not an accurate reading of the record, as outlined above. Of note was the trial court’s finding that Ms. Dannenbring would find work in “fairly short order” after finishing her education, which she did a year early in an effort

to meet all financial needs. When Ms. Dannenbring did not find that job in “fairly short order” as expected – or even during the whole year after graduation – she appropriately returned to the court for modification relief.

To the extent that the phrase “fairly short order” was not defined in the original ruling in 2010, the trial court confirmed in its 2013 ruling that the phrase should be read as normally understood (i.e., “right away”) when it granted Ms. Dannenbring’s modification petition. Mr. Dannenbring’s objection should be denied.

Third, Mr. Dannenbring alleges that Ms. Dannenbring did not act in good faith because she chose a field where there was a “dearth” of opportunities for her field (according to Mr. Dannenbring, and contrary to the expert testimony and the trial court’s ruling in 2010). He does not make any citation to the record in support of his assertion. Similarly he makes no citation to the record that she can find work in other fields, even though she is trained in ESL.

It was the court that found that ESL was a field with opportunity for employment, partly based on the expert testimony present to it at trial. (CP 46) The trial court also found that Ms. Dannenbring had made best efforts to locate full time, permanent employment. (CP 173) (“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 materials, made a real effort to find work”).

It is within the trial court’s discretion to make these findings. Absent abuse of discretion, they will stand on appeal. Mr. Dannenbring disagrees, but does not allege abuse of discretion. His argument must fail.

Fourth, Mr. Dannenbring incorrectly states that his income is not relevant to the inquiry. “The phrase ‘change of circumstances’ refers to the financial ability of the obligor spouse to pay vis-à-vis the necessities of the other spouse.” *In re Marriage of Coyle*, 61 Wn. App. 653, 658, 811 P.2d 244 (1991). The triggering phrase is “uncontemplated,” not whether one change or the other has occurred. “Maintenance is not merely a means of providing bare necessities; rather, it is a flexible tool by which the parties’ standards of living may be equalized for an appropriate period of time.” *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). In the case of a long-term marriage over 25 years (such as this one), it is for the remainder of their lives. *Rockwell*, supra, 141 Wn. App. at 243.

Mr. Dannenbring’s assertion requires an assumption both that Ms. Dannenbring’s circumstances are not substantially changed from trial (as they are, see details outlined above) and that his circumstances are *not* substantially changed from the trial – when they are.

Mr. Dannenbring's increase in income was not anticipated by the trial court, based on the testimony that Mr. Dannenbring provided. Mr. Dannenbring works two jobs now, rather than just one. He did not sell the marital home as ordered and so has two homes now, and not just one. It is undisputed that he now has rental income from one of his two homes while Ms. Dannenbring is only able to afford to rent an apartment. Mr. Dannenbring has used his years of work that Ms. Dannenbring created for him (during their 29-year marriage) to his advantage, and now attempts to use it to Ms. Dannenbring's disadvantage. Thus, not only have Ms. Dannenbring's circumstances changed since the 2010 trial, but so have Mr. Dannenbring's circumstances. On the basis of Mr. Dannenbring's circumstances alone, this court would have been justified in increasing maintenance and Mr. Dannenbring's request for relief on this ground should be denied.

Fifth, Mr. Dannenbring objects to Ms. Dannenbring's request for lifetime maintenance to be reserved, but already has conceded that the trial court erred in preventing Ms. Dannenbring from returning to court for a subsequent modification. Response/Cross Appeal at 1, n.2. Thus, by definition, lifetime maintenance is reserved, and is not denied.

Sixth, Mr. Dannenbring states that there is no law that requires a court to give reasons for denying a request for fees. However, the statute

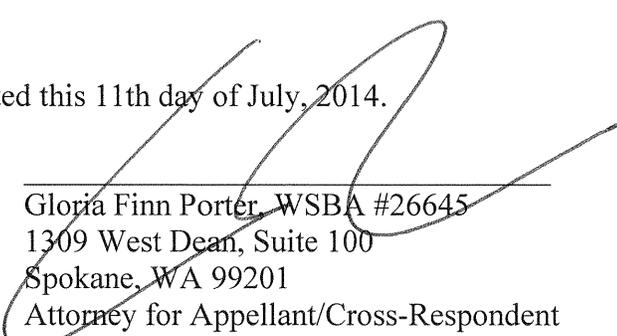
in this case allows for fees in the court's discretion based on ability to pay versus need. Ms. Dannenbring made a proper request for fees under RCW 26.09.140. Not exercising discretion, however, is an abuse of discretion. Without more, this Court cannot say what the trial court decided regarding fees and therefore a remand is proper to determine fees.

Finally, Mr. Dannenbring asks for fees on appeal under RCW 26.09.140, but cites to no financial need. He complains that the petition for modification was "unjustified" yet must concede that Ms. Dannenbring was the prevailing party in part on that petition. He also has conceded that at least one of Ms. Dannenbring's appeal issues (regarding whether she is prevented from returning to the court for a modification) is correct and the trial court should be reversed on that point. His request for fees has no merit, and should be denied.

IV. CONCLUSION

For the foregoing reasons, Ms. Dannenbring asks that this Court deny Mr. Dannenbring's cross appeal and grant the relief requested in her Opening Brief.

Respectfully submitted this 11th day of July, 2014.



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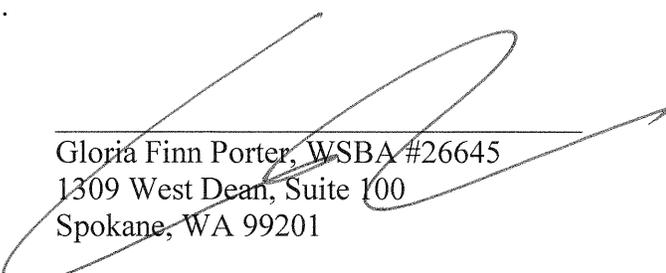
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BARBARA DANNENBRING)	
)	
Appellant/Cross-Respondent,)	COA No. 32074-0-III
vs.)	No. 09-3-00189-0
)	
SCOTT DANNENBRING)	PROOF OF SERVICE
)	
Respondent/Cross-Appellant.)	
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I, Gloria Finn Porter, counsel for the Appellant/Cross-Respondent herein, do hereby certify under penalty of perjury that on July 11, 2014, I served the attached Reply/Response to Cross Appeal 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 11th day of July, 2014.



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