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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

NO. 34564-5-III

IN RE:

ROGER L. ALDRICH,

Petitioner/Appellant,

and

MARY BETH ALDRICH,

Respondent/Appellee.

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court commissioner of the Superior Court of Spokane County, (hereinafter commissioner), erred when entering her 05/09/16 oral ruling, [CP 247-272; CP 273-304], denying Mr. Aldrich's alternative requests to modify, terminate, or suspend, spousal maintenance ordered in the 06/04/10 decree of dissolution, [CP 20-30], and for other relief requested in his petition. [CP 31-36].

2. The commissioner also erred when, on 06/21/16, she entered paragraph 2.1 of "II. Findings of Fact" (hereinafter Findings) which erroneously provides, "[p]etitioner has failed to show a substantial change in circumstance or a factual or legal basis for any relief he has requested in his petition." [CP 216].

3. The commissioner also erred when, on 06/21/16, she entered paragraph 2.2 of the Findings which over states, "[t]he spousal maintenance award was very clearly spelled out by Judge O'Connor after a contested and Judge O'Connor made some very specific findings." [CP 216; CP 217].

4. The commissioner likewise erred when, on 06/21/16, she entered paragraph 2.3 of the Findings which erroneously represents, "Judge O'Connor found that this was a lifetime maintenance award based on specific things." [CP 217].

5. The commissioner further erred when, on 06/21/16, she entered

paragraph 2.4 of the Findings which states, “[t]he maintenance award was lifetime because of the nature that the parties found themselves back in 2010.” [CP 217].

6. The commissioner in turn erred when, on 06/21/16, she entered paragraph 2.5 of the Findings which erroneously states, “[m]aintenance was awarded because Judge O’Connor found that there was several circumstances that justified a lifetime award of maintenance.” [CP 217].

7. The commissioner also erred when, on 06/21/16, she entered paragraph 2.6 of the Findings which irrelevantly states, “[c]ompelling findings by Judge O’Connor where there was no question that Petitioner’s income earning capacity was greater than the \$60,000 salary which Judge O’Connor found Petitioner was currently earning in 2010.” [CP 217].

8. The commissioner likewise erred when, on 06/21/16, she entered paragraph 2.7 of the Findings which erroneously over-emphasizes, “[s]ince that time the evidence before the court shows that Petitioner’s income did in fact jump up significantly.” [CP 217].

9. The commissioner further erred when, on 06/21/16, she entered paragraph 2.8 of the Findings which erroneously under-emphasizes the fact, “[t]he letters the Court received to support the request for modification indicate that at one point Petitioner was making about \$140,000 working for CPPS that then was reduced to about \$110,000

then down to \$70,000.” [CP 217].

10. The commissioner further erred when, on 06/21/16, she entered paragraph 2.9 of the Findings which erroneously states, “Petitioner was then laid off not fired as counsel argued.” [CP 217].

11. The commissioner in turn erred when, on 06/21/16, she entered paragraph 2.9 [sic] of the Findings which is once more irrelevant and erroneously states, “[t]he distinction there is if Petitioner were fired from CPPS he wouldn’t be able to obtain any unemployment benefits.” [CP 217].

12. The commissioner also erred when, on 06/21/16, she entered paragraph 2.10 of the Findings which is irrelevant and erroneously states, “[i]f you are fired from your job you don’t usually get unemployment, you’ve got to be laid off.” [CP 217].

13. The commissioner also erred when, on 06/21/16, she entered paragraph 2.11 of the Findings which improperly states, “[s]o salary was found to be \$60,000 which Judge O’Connor found Petitioner was capable of earning significantly more and that has been borne out. Judge O’Connor was correct in these findings.” [CP 217].

14. The commissioner again erred when, on 06/21/16, she entered paragraph 2.12 of the Findings which misconstrues and erroneously states, “Judge O’Connor said petitioner had significant credentials, skills, training skills, and experience with the Federal

Government agencies, including the CIA, the Department of Defense.” [CP 217].

15. The commissioner equally erred when, on 06/21/16, she entered paragraph 2.13 of the Findings which again misconstrues and erroneously states, “[p]etitioner’s skills were marketable and Petitioner may choose to be an independent contractor or he may receive business ownership skill that would generate additional dividend income.” [CP 217].

16. The commissioner also erred when, on 06/21/16, she entered paragraph 2.14 of the Findings which again erroneously finds and misrepresents, “Judge O’Connor found specifically that petitioner at the time was underemployed and capable of higher income. [CP 218].

17. The commissioner again erred when, on 06/21/16, she entered paragraph 2.15 of the Findings which once more erroneously suggests and misrepresents that, “Judge O’Connor based her ruling on the fact that Petitioner’s future earning capacity was based on that training, experience and background.” [CP 218].

18. The commissioner further erred when, on 06/21/16, she entered paragraph 2.16 of the Findings which erroneously states, “Judge O’Connor’s award in the order section of her ruling stated that the \$2,500 per month monthly maintenance would be one-half of the husband’s current gross monthly salary so long as the husband remained employed

either directly or as an independent contractor.” [CP 218].

19. The commissioner also erred when, on 06/21/16, she entered paragraph 2.17 of the Findings which is misleading and inaccurately reflects, “[a]s petitioner sits here today he is still an independent contractor with CPPS.” [CP 218].

20. The commissioner once more erred when, on 06/21/16, she entered paragraph 2.18 of the Findings that erroneously represents, “[t]he petition might have been filed in that small period of time between when petitioner was laid off and when he was offered a contract again from CPPS as an independent contractor.” [CP 218]

21. The commissioner also erred when, on 06/21/16, she entered paragraph 2.19 of the Findings which is mere bald assertions, unsupported speculation and supposition and which, in effect, inaccurately reflects the clear and undisputed facts, when averring, “[b]ut it is highly interesting and highly suspicious that Petitioner is laid off again, laid off as opposed to being fired or terminated, because that does preserve the ability to receive unemployment benefits and then Petitioner is offered the position with the same agency as an independent contractor because that then does leave open to pick and choose how often Petitioner would like to work for them because it is either at the discretion of CPPS or Petitioner’s discretion how often Petitioner chooses when they’re offering Petitioner work at the rate of \$1,000 per day per event.”

[CP 218]

22. The commissioner also erred when, on 06/21/16, she entered paragraph 2.20 of the Findings which in turn inaccurately reflects the clear and undisputed facts, when averring, “[a]t \$1,000 per day, per event, Petitioner would only need to work five days at an event, per month, to equal the \$60,000 that Judge O’ Connor found was Petitioner’s salary back in 2010 at which Petitioner was underemployed for purposes of the bare minimum spousal maintenance that she warded.” [CP 218].

23. The commissioner further erred when, on 06/21/16, she entered paragraph 2.21 of the Findings which erroneously reflects, “[a]t this point in time the circumstance indicate petitioner is still employed with CPPS.” [CP 218].

24. The commissioner likewise erred when, on 06/21/16, she entered paragraph 2.22 of the Findings which unfairly distorts the facts and inaccurately reflects, “[w]hen Petitioner has a contract that offers Petitioner independent contract status by the language of Judge O’Connor’s findings, specifically where she said as long as you remain employed either directly or indirectly or as an independent contractor Petitioner is still employed under the terms of the decree of dissolution.” [CP 218].

25. The commissioner then erred when, on 06/21/16, she entered paragraph 2.23 of the Findings which erroneously speculated and

concluded, “[f]or current purposes then of modifying maintenance Petitioner’s current circumstance fall directly within those previous circumstances that Judge O’Connor envisioned occurring when Judge O’Connor crafted her ruling, she understood the needs of Ms. Aldrich were significant and would be something that she would need assistance for the remainder of her life which is why she ordered lifetime spousal maintenance and maintenance would be secured by life insurance because of her significant need. And she also envisioned the other changing nature of Mr. Aldrich’s employment.” [CP 219].

26. The commissioner also erred when, on 06/21/16, she entered paragraph 2.24 of the Findings which erroneously concluded, “[f]or these reasons there has not been a showing of a substantial change in circumstances. Petitioner’s income may have changed in the way Petitioner earns it, or the way petitioner chooses to earn it, but Petitioner is still employed. . . . Petitioner still has the exact same ability the judge O’Connor found six year ago.” [CP 219].

27. The commissioner also erred when, on 06/21/16, she entered para-graph 2.25 of the Findings when transcribing and incorporating therein the court’s earlier erroneous oral ruling entered on 05/08/16. [CP 219].

28. The commissioner further erred when, on 06/21/16, she entered paragraph 3.1 of “III. Conclusions of Law” to the erroneous effect,

“[t]he Petitioner has failed to show a substantial change of circumstances or factual or legal basis for any of the relief he has requested under In re: Marriage of Coyle, 61 Wn. App. 653; 811 P. 2d 244 (1991), review denied; In re: Marriage of Barnett, 63 Wn. App. 385; 818 P. 2d 1382 (1991); In re: Marriage of Matthews, 70 Wn. App. 116; 853 P. 2d 462 (1993); In re: Marriage of Drlik, 121 Wn. App. 269; 87 P. 3d 1192 (2004); RCW 26.09. 170(1) or the authorities cited in said cases or otherwise in the petition or argument.” [CP 219].

29. The commissioner equally erred in when, on 06/21/16, she entered paragraph 3.2 of “III. Conclusions of Law” when transcribing and incorporating therein the court’s erroneous oral ruling entered 05/08/16. [CP 219].

30. In turn, the commissioner also erred when, on 06/21/16, entering paragraph 4.1 of the “IV. Order” (hereinafter Order) denying “[t]he Petition for modification of the decree regarding spousal maintenance.” [CP 220].

31. In turn, the commissioner also erred when, on 06/21/16, she entered paragraph 4.2 of the Order denying “[t]he Petition for termination of spousal maintenance.” [CP 220].

32. Also, the commissioner further erred when, on 06/21/16, she entered paragraph 4.3 of the Order denying “[t]he Petition for suspension of spousal maintenance.” [CP 220].

33. The commissioner again erred when, on 06/21/16, she entered paragraph 4.4 of the Order denying “[a]ll requests in the petition.” [CP 220].

35. The commissioner also erred when, on 06/21/16, she entered paragraph 4.5 of the Order allowing the Respondent to note a hearing on “the family law docket for an order awarding her fees and costs under a need and ability to pay analysis.” [CP 220].

36. Finally, the commissioner erred when, on 06/21/16, she entered paragraph 4.6 of the Order transcribing and incorporating therein the court’s erroneous oral ruling entered on 05/08/16. [CP 220].

B. ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR.

1. Whether, based on the record, the commissioner manifestly abused her discretion when denying Mr. Aldrich’s petition to modify and/or terminate spousal maintenance under the decree of dissolution issued 06/04/10, [CP 20-30], and for other relief requested in his petition? [See, Assignments of Error nos. 1 through 36].

2. Whether, based on the record, Mr. Aldrich was entitled to a suspension of his spousal maintenance payments under In re: Marriage of Drlik, 121 Wn. App. 269; 87 P. 3d 1192 (2004). [See, Assignments of Error nos. 1 through 36].

3. Whether, based on the record, there is a basis to allow Respondent to note a hearing on the family law docket for an order awarding her fees and costs under a need and ability to pay analysis.

[See Assignments Nos. 1 through 36].

C. STATEMENT OF THE CASE

1. Factual Background. On 09/01/15 Roger Aldrich, in accordance with RCW 26.09170(1), filed a petition [CP 31-36] seeking modification of the spousal maintenance provisions of his decree of dissolution entered on 06/4/10 [CP 20-30]. As the petition also indicated, Mr. Aldrich sought alternative relief including suspension of his maintenance obligation. [CP 31-36]. These facts are beyond dispute.

Mr. and Ms. Aldrich were married on 04/11/81. [CP 9]. They separated on 30/10/08. [CP 9]. The marriage was dissolved on 06/04/10. [CP 20 – 30].

According to the decree, Mr. Aldrich is to pay a base of \$2,500 per month as lifetime spousal maintenance. [CP 22; 29-30]. As the decree states, the \$2,500 monthly maintenance was half of his then current gross monthly salary. [CP 29]. The decree also indicates so long as Mr. Aldrich remained employed either directly or as an independent contractor in addition to the \$2,500 monthly spousal support for any month in which he earned in excess of his \$5,000 gross salary, he was to pay 35% of his gross monthly income in excess of \$5,000. [CP 29]. Additionally, the decree also provided if Mr. Aldrich acquired an ownership interest in a business he would pay 35% of any increase in gross monthly income flowing from any ownership interest. [CP 29]. Mr. Aldrich has not acquired

any interest in any business nor does he foresee any such development. [CP 41]. These facts are beyond dispute.

As also set forth in the decree, Mr. Aldrich was to secure the maintenance with an insurance policy based on Ms. Aldrich's average life expectancy. [CP 22; CP 29]. These facts are also beyond dispute.

Notwithstanding the above, Mr. Aldrich is no longer able to earn the income he once earned (i.e., \$5,000 gross per month) and a substantial change in circumstances has thus occurred since the decree. [CP 33-36; CP 40-44; CP 45-52; CP 53-59; CP 66-72; CP 74-88; CP 89-95; CP 118-129; CP 163-178; CP 188-199].

Presently, Mr. Aldrich is 68 years old. [CP 38; CP 164]. When the decree was entered, he was 62, [CP 20; CP 38], and employed by the Center For Personal Protection and Safety (hereafter referred to as CPPS). [CP 41; CP 48; CP 51; CP 92; CP 95; CP 164]. As of 8/01/15 he is no longer employed at CPPS, [CP 41; 48; CP 51; CP 59; CP 66; CP 76; CP 92; CP 95; CP 164; CP 178; CP 189; CP 199], as his position was eliminated due to company financial problems. [CP 41-43; CP 55; CP 57; CP 59; CP 164; CP 165; CP 166; CP 174; CP 176; CP 178; CP 189-199]. In fact, he was not the only person whose position with CPPS was eliminated. [CP 41; CP 164; CP 189]. Others included the president, the chief operating officer, the facilities manager, the receptionist, and three account executives in the sales division. [CP 41; CP 164; CP 189]. These

facts are also beyond dispute.

As a consequence of Mr. Aldrich's involuntary separation from CPPS, he applied for unemployment. [CP 43-44; CP 72; CP 75; CP 76; CP 123; CP 164; CP 189]. As Mr. Aldrich testified, he understood he could expect approximately \$664 per week unless he earned any money from self-employment. [CP 41; CP 189]. These benefits are substantially less than the \$5,000 gross a month he earned with CPPS at the time of the decree. [CP 29]. These facts are also beyond dispute.

Due to this substantial change in Mr. Aldrich's financial circumstances, Mr. Aldrich is unable to abide by the maintenance provisions set forth in the decree through non-exempt income. [CP 33-36; CP 40-44; CP 45-52; CP 53-59; CP 66-72; CP 74-88; CP 89-95; CP 118-129; CP 163-178; CP 188-199.]. These facts are also beyond dispute.

Mr. Aldrich's separation from employment with CPPS was not his voluntary choice nor for misconduct. [CP41-43; CP 55; CP 57; CP 59; CP 75-76; CP 123; CP 164-166; CP 174; CP 176; CP 178; CP 192-199]. Rather, as Mr. Aldrich continually, in good faith, informed Ms. Aldrich, his future separation was likely, given CPPS' financial difficulties. [CP 41-43; CP 165-166.]. For example, as Mr. Aldrich shared with Ms. Aldrich, on 2/27/15 he was informed:

. . . As you are well aware, the current economy is posing challenges for everyone. We need to be financially responsible and proactive as we face this challenge.

Based on low CPPS sales of products and services over the last several months, I'm forced to implement cost cutting procedures beginning March 1, 2015 to reduce the monthly CPPS budget for the next 90 days. At the end of 90 days, I will re-evaluate our financial position, based on sales, and hopefully, be able to remove cost cutting measures. One of those cost cutting measures is to reduce the monthly work hours, and thus pay of CPPS Executive Personnel by 25%. Thus, as of March 1, your current salary will be reduced from \$140,000 to \$105,000, with a corresponding reduction in monthly salary from \$11,666 per month to \$8,750 per month. Your workweek will also be reduced from 40 hours to 32 hours. Should you have any questions, please don't hesitate to talk with me at your convenience. . . .

[CP 41-43; CP 55; CP 165; CP 174; CP 192-197]. These facts are equally beyond dispute.

Despite this reduction in Mr. Aldrich's salary, Mr. Aldrich continued to make the maintenance payments from his separate assets awarded in the divorce, [CP 20-30], and refrained from filing for modification, hoping CPPS would soon turn around. [CP 42; CP 165-167]. However, on 5/08/15, as Mr. Aldrich shared with Ms. Aldrich, he was also informed:

. . . [W]ith the continuation of depressed sales of products and services, additional cost cutting procedures had to be implemented within the company. As a result, I've had to make a very difficult but necessary decision to eliminate positions within the company. I'm sorry to have to inform you that the position of Chief Communications Officer with the annual salary of \$140,000.00 will be eliminated effective June 01, 2015. A new position of Senior Advisor of Training has been created and I can offer it to you with an annual salary of \$70,000. If you decline the offer, you will be involuntarily terminated effective June 01, 2015. You will be eligible to apply for unemployment benefits. I realize that this will be a difficult decision, but urge you to

consider accepting the new position. Please respond to this offer by close of business, May 15, 2015. .

[CP 42-43; CP 57; CP 165-166; CP 176; CP 198.]. These facts are equally beyond dispute.

On 5/11/15 Mr. Aldrich accepted CPPS' offer of a lesser position and reduction in income yet continued to pay Ms. Aldrich her payments in full, still hoping CPPS would soon turn around. [CP 42-43; CP 166; CP 191]. Yet, sadly, as of 8/01/15, contrary to the commissioner's erroneous belief, [CP 217], Mr. Aldrich was no longer an employee of CPSS, [CP 59; CP 164; CP 178; CP 189; CP 192; CP 199], which relocated to Renton, VA. [CP 189]. Thus, Mr. Aldrich no longer has the financial ability to pay maintenance as ordered in the decree without using exempt resources awarded in the decree. [CP 33-36; CP 40-44; CP 45-52; CP 53-59; CP 66-72; CP 74-88; CP 89-95; CP 118-129; CP 163-178; CP 188-199]. Mr. Aldrich was not "laid off" as the commissioner erroneously concluded. [CP 217]. Nor was Mr. Aldrich "fired" as the commissioner erroneously stated. [CP 217]. Rather, his position, as with many other persons with the CPPS, was "eliminated." [CP 41; CP 192; CP 199]. And no attorney alleged Mr. Aldrich was "fired." Thus, Mr. Aldrich is also unable to maintain the insurance required by the decree without also using exempt resources awarded to him in the decree. [ID]. These facts are also beyond dispute.

Given Mr. Aldrich's age, gender, background, skills, training, experience and work history, no employment exists that Mr. Aldrich can seek which will pay him the same \$5,000 gross monthly income he earned with CPPS at the time of the decree. [CP 43; CP 46-52; CP 89-95; CP 166]. In fact, as Ms. Johnson's unrebutted vocational evaluation indicates, at best, all things considered, Mr. Aldrich is only capable of employment at \$10.00 per hour as a security guard. [CP 46-52; CP 89-95]. These facts are equally beyond dispute.

Despite the above, ever the optimist, since the elimination of Mr. Aldrich's position, [CP 192; CP 199], Mr. Aldrich attended seminars, applied for employment through Work Source, attended a Veteran's benefit seminar, attended resume writing seminars, and worked with unemployment regarding resumes and job search skills. [CP 167; CP 189; CP 190]. He also managed to work one day as an Independent Contractor for CPPS in August 2015 earning a gross of \$1,000, [CP 190], and in January 2016 he managed to secure a role as an Independent Contractor on an "as needed basis" until 06/30/16. [CP 189; CP 194]. Yet, the contract [CO 194-196] had not been fulfilled. [CP 189-190; 191]. These facts are beyond dispute.

In sum, Mr. Aldrich's position with CPPS was "eliminated", [CP 41; CP 192; CP 199], along with several other employees. [CP 41; CP 59; CP 164; CP 178; CP 189; CP 190]. And at the conclusion of CPPS' lease in

September 2015, CPPS moved its operations to Reston, Virginia, in an effort to reduce company debt and increase sales. [CP 189]. Mr. Aldrich was not asked to follow. [CP 189]. These facts are beyond dispute.

To reiterate, as Mr. Aldrich stated, after his position at CPPS was “eliminated”, he immediately began working with Work Source seeking another job at a minimum of \$60,000 per year to allow him to continue to earn enough to continue maintenance payments at \$2,500 per month. [CP 189]. He spent the majority of August 2015 at Work Source attending seminars with such topics as “Creating an Updated Resume”, “Cover Letter Writing”, “Interviewing”, and learning how to search for and apply for jobs on the internet. [CP 185]. He also filed for unemployment in August 2015, to receive \$664.00 per week, [CP 41; CP 72; CP 75-76; CP 189], and contrary to the commissioner’s erroneous statement, “[i]f you are fired from your job you don’t usually get unemployment, you’ve got to be laid off”, [CP 217], Mr. Aldrich was neither “fired” nor “laid off.” [CP 41; CP 192; CP 199]. Indeed, his position was “eliminated” by CPPS. [CP 41; CP 192; CP 199]. These facts are beyond dispute.

Shortly thereafter, due to a lack of response to his job applications, Mr. Aldrich began working as an Independent Contractor for CPPS and secured a contract as an Independent contractor on an “as needed basis” from January 2016 to June 2016, [CP 194], to reduce the amount of money he had to withdraw from savings each month to meet

his maintenance obligation, [CP 168-171; CP 189-196], and to preserve his unemployment benefits. [CP 190]. He could easily have proceeded to exhaust his benefits but elected not to do so. [CP 190]. These facts are also beyond dispute.

In fact, CPPS was the only company that could offer employment with Mr. Aldrich's outdated skills but only on an "as needed basis." [CP 189]. On the other hand, if Mr. Aldrich continued with unemployment there would be less money on average and he would exhaust all benefits. [CP 189] Yet, on the other hand, contrary to the commissioner's statements Mr. Aldrich could earn "\$1,000 per day" per event "five days per month", {CP 218}, as demonstrated, working for CPPS as an Independent Contractor is no guarantee of work per month nor payment. [CP 168-171; CP 189-196]. These facts are without refutation.

In fact, despite his efforts, Mr. Aldrich earned only \$20,500 in gross income in the 8 months since his position at CPPS was eliminated and was only actually paid \$15,000 as of May 2016, [CP 189], equating to \$1,875 per month. Yet, Mr. Aldrich continued to maintain his payments to Ms. Aldrich at \$2,500 depleting assets to do so. [CP 189].

Mr. Aldrich's skills are exactly why finding employment in the Spokane area, at even \$60,000 per year is so difficult. [CP 189] The only employer in the area who has consistent need of Mr. Aldrich's skills, especially at 68 years old, is the DOD. [CP 189] However, having retired

from the Air Force and Federal Civil Service, [CP 1-7; CP 15] Mr. Aldrich would be unable to work for either of those previous employers without forfeiting the current retirements Ms. Aldrich and he share. [CP 189]. Indeed, Ms. Aldrich receives more than half of the income from those retirements on a monthly basis. [CP 189] These facts are equally beyond dispute.

In short, CPPS offered to utilize Mr. Aldrich services on an “as-needed basis” from January 01, 2016 through June 30, 2016 as an Independent Contractor. [CP 194-196]. As of August 01, 2015 Mr. Aldrich was not a CPPS employee. [CP 192-199]. As an Independent Contractor he was supposed to receive \$1,000 for each day of work, without compensation for travel days and reimbursed for travel expenses. [CP 194-196] By accepting this arrangement, Mr. Aldrich avoided exhausting all of his unemployment benefits as well as withdrawing \$2,500 per month from savings to pay maintenance. [CP 168-171; CP 189-196; CP 190]. These facts are equally beyond dispute.

As Mr. Aldrich testified, he has sought employment at EWU, Gonzaga, Fairchild Education Center and several state agencies without success. [CP 190]. His 1976 Master’s Degree is not considered current enough for the Fairchild Education Center to hire him as a part-time instructor in their evening college program. [CP 190]. There is no evidence to the contrary.

The math is simple. Since Mr. Aldrich's position with CPPS was eliminated, there is no guaranteed employment income to share with Ms. Aldrich on a monthly basis, [CP 40-44; CP 63; CP 66-72; CP 163-167; CP 188-189], as provided for in the decree. [CP 20-30]. If Mr. Aldrich is required to continue to pay \$2,500 per month maintenance, plus the insurance premium of \$422 per month, he would expend \$2,922 per month. Yet, as the record demonstrates, Mr. Aldrich only receives \$3,313 net per month from his two retirements. [CP 190]. After maintenance, this leaves Mr. Aldrich a mere \$391.00 per month to live on. [CP 190]. Meanwhile, as the record demonstrates, Ms. Aldrich has approximately \$7,000 monthly. [CP 190]. And, contrary to the commissioner's erroneous belief maintenance is not subject to modification if Mr. Aldrich, though without his base employment, remained employed as an Independent Contractor, [CP 218], the decree actually provides that, Mr. Aldrich would pay 35% of any excess income beyond his base salary of \$5,000 gross a month, earned as an Independent Contractor. [CP 29]. To suggest otherwise, suggests an absurdity, as under such logic, Mr. Aldrich could lose his primary employment (as occurred here), become an Independent Contractor for the Spokesman Review delivering newspapers, "as needed" by the Spokesman Review, yet there would still be no modification. [CP 218]. Indeed, it is beyond argument, Mr. Aldrich does not have "the exact same ability that Judge O'Connor found six years

ago.” [CP 219].

Lastly, as Mr. Aldrich testified, his initial salary with CPPS from March 2009 through 2011 was all a small, start-up company at the time, based on sales of products and services could afford. [CP 191]. Every subsequent pay increase due to increased company profits was immediately communicated and appropriately shared with Ms. Aldrich. [CP 191]. Similarly, in 2015 as CPPS lowered Mr. Aldrich’s salary, he also communicated this information. [CP 191] Significantly, though CPPS’s cash flow problems in 2014 and 2015 precluded Mr. Aldrich from receiving a full salary each month, he nevertheless continued to pay Ms. Aldrich her share of the monthly salary he was owed, and not receiving, often withdrawing funds from savings to do so. [CP 41; CP 63; CP 65; CP 191]. This resulted in CPPS owing Mr. Aldrich almost \$70,000.00 in back pay when his position was eliminated on 08/01/15. [CP 191] This amount is yet to be repaid to Mr. Aldrich by CPPS. [CP 63; CP 65; CP 191] These facts are beyond dispute.

In contrast, the record before the commissioner clearly established beyond all question Ms. Aldrich, enjoys a financially stable lifestyle and can independently support herself at a comfortable standard of living. For example, Ms. Aldrich has little if any debt. [CP 104-107; CP 108-113]. Likewise, she resides in a \$236,000 home with no mortgage. [CP 105; CP 107; CP 110]. She spends \$800 in food and supplies solely

for herself each month. [CP 110]. She spends \$4,800 a year on clothes, [CP 111], \$2,400 a year on hair care, [CP 111], \$2,400 a year on recreational activities, [CP 111], and \$14,400 a year on gifts! [CP 111]. She also maintains \$106,557 on deposit in banks, [CP 110]. And, her bank statements show a running balance of \$47,000 from August 2015 to December 2015, [CP 131-CP 139], and \$60,000 to \$67,000 from September 2015 through January 2016. [CP 140-160]. By the same measure, her 2015 tax return indicates an adjusted gross income of \$201,039, [CP 202-203], and \$138,441 for 2014. [CP 204]. Whereas, Mr. Aldrich's adjusted gross income for 2015 was only \$56,174. [CP 209-214]. These facts are beyond dispute.

2. Procedural History. In light of the forgoing changed circumstances, in accordance with the provisions of RCW 26.09170(1), Mr. Aldrich, on 09/01/15, filed his verified petition for modification of maintenance, and other specified relief, [CP 31-36] concerning the decree of dissolution entered 06/04/10. [CP 20-30]. He specifically asked to terminate any further payments or to lower any further payments, or to shorten the term of maintenance or to suspend any further payments as well as other relief. [CP 35]. A hearing was held on 05/09/16. [CP 215; CP 247-272]. At the conclusion of the hearing, Mr. Aldrich's petition was denied outright. [CP 247-272]. To this same affect, on 06/21/16 Findings of Fact, Conclusions of Law and an Order were entered. [CP 216-246].

Insofar as neither party sought reconsideration nor revision, this appeal follows. On 07/01/16 a notice of appeal was timely filed. [CP 273-304].

D. STANDARD OF REVIEW

RCW 2.24.050 makes clear a revision of a commissioner's decision is unnecessary. The statute provides:

Unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

See also, In re: Marriage of Robertson, 113 Wn. App. 711, 713; 54 P. 3d 708 (2002); State v. Mollichi, 132 Wn.2d 80, 93; 936 P. 2d 408 (1997).

On appeal, both errors of fact and errors of law associated with the commissioner's ruling are reviewed de novo. As this Division has stated, when a trial court's decision on a petition for modification is based on evidence other than oral testimony, this Court reviews de novo the factual issues and matters as to whether a substantial change of circumstances has occurred not contemplated when the decree was entered. In re Marriage of Jarvis, 58 Wn. App. 342, 346; 792 P.2d 1259 (1990) citing, In re Marriage of Hunter, 52 Wn. App. 265, 268; 758 P.2d 1019 (1988), review denied, 112 Wn.2d 1006 (1989). See also, In re: Marriage of Langdom v. Kolde, 153 Wn. 2d 553, 559; 106 P. 3d 212 (2005) citing this Division's opinion in In re: Marriage of Hilborn, 114 Wn.

App. 275, 278; 58 P. 3d 905 (2002). See also, State v. Horrace, 144 Wn.2d 386, 392; 28 P.3d 753 (2001); See also, State v. Cauthron, 120 Wn.2d 879, 887; 846 P.2d 502 (1993); State v. Dunn, 125 Wn. App. 582, 690; 105 P.3d 1022 (2005).

On the other hand, in terms of reviewing an exercise of discretion in the context of a termination or modification of spousal maintenance, the standard is whether there has been a manifest abuse of discretion. See, In re Marriage of Jennings, 138 Wn.2d 612, 625-26; 980 P.2d 1248 (1999); In re Marriage of Drlik, 121 Wn. App. 269, 274-75; 87 P.3d 1192 (2004); In re Marriage of Coyle, 61 Wn. App. 635, 638; 811 P.2d 224, review denied, 117 Wn.2d 1017 (1991). The trial court, or in this case the commissioner, will be deemed to have abused discretion when the commissioner acts on untenable grounds or for untenable reasons, or has erroneously interpreted, misapplied, or chosen to ignore the governing law. Gordon v. Gordon, 44 Wn.2d 222, 226-27; 266 P.2d 786 (1954); State v. Robinson, 79 Wn. App. 386, 396-97; 902 P.2d 652 (1995); In re Marriage of Tang, 57 Wn. App. 648, 654; 789 P.2d 118 (1990). Similarly, a refusal to exercise discretion is equally an abuse of discretion. Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 321; 976 P. 2d 643 (1999). In other words, a misapplication, or a failure or refusal to follow the governing law constitutes a manifest abuse of discretion warranting reversal on appeal. Id; see also, In re: Marriage of Spreen,

107 Wn. App. 341, 346; 28 P.3d 769 (2001).

E. ARGUMENT

1. In light of the fact that, Mr. Aldrich demonstrated, unequivocally for purposes of RCW 26.09.170 (1), there was a "substantial change in circumstances" justifying the relief he requested, the commissioner manifestly abused her discretion when denying Mr. Aldrich's request, to modify and/or terminate and/or suspend spousal maintenance under the decree of dissolution and for other relief requested in his petition. [Issues no. 1 and no. 2].

In light of the foregoing described substantial economic and financial changes, the proof presented to the commissioner fully supported Mr. Aldrich's 09/01/15 petition for modification of the decree of dissolution re: spousal maintenance. RCW 26.09.170(1). As aptly stated in In re Marriage of Coyle, 61 Wn. App. 653, 658; 811 P.2d 244 (1981), the phrase "change in circumstances" refers to the financial ability of the obligor spouse (i.e., Mr. Aldrich) to pay via-a-via the necessities of the spouse receiving maintenance (i.e., Ms. Aldrich).

Here, the facts clearly demonstrated, a "change in circumstances" not otherwise contemplated at the time the decree was entered on 06/04/10. Id. Indeed, while the evidence illustrated Mr. Aldrich was technically an "Independent Contractor" with CPPS, on an "as needed basis" from January 2016 through June 30 2016, [CP 194], CPPS lacks the financial ability to even begin to pay monies owed in terms of back pay totaling nearly \$70,000, [CP 63; CP 65; CP 191] nor has CPPS

honored a promissory note given to Mr. Aldrich. [CP 63; CP 65]. Nor is Mr. Aldrich able, with any guarantee, or any certainty to rely on a regular and continuous flow of work and income as an Independent Contractor, [CP 191; CP 194], the commissioner's unsupported speculation and suppositions aside. Simply put, Mr. Aldrich cannot pay Ms. Aldrich what he does not in fact have himself. The commissioner's erroneous decision suggesting otherwise was in no sense founded on even an indicia of proof contained in the record.

Compounding this clear error of fact, the commissioner in turn violated the strictures of In re Marriage of Mathews, 70 Wn. App. 116, 125; 853 P. 2d 468, review denied, 122 Wn.2d 1027 (1993), and In re Marriage of Barnett, 63 Wn. App. 385, 388; 818 P.2d 1382 (1991) that a court cannot require Mr. Aldrich to pay maintenance out of those assets which he has previously been awarded by the court, even though to date Mr. Aldrich has elected to do so. Such a ruling amounts to the same property being awarded twice and constitutes clear error by the commissioner. Id.

Coupled with the additional, relevant factors in RCW 26.09.090, Mr. Aldrich's obligation must be modified and/or terminated. A court should not place a permanent obligation of spousal maintenance on the obligor. See, RCW 26.09.090; see also, In re Marriage of Coyle, at 657; Untersteiner v. Untersteiner, 32 Wn. App. 859, 863; 650 P.2d 256 (1982);

Cleaver v. Cleaver, 10 Wn. App. 14, 20; 516 P.2d 508 (1973).

Hence, as a matter of law, absent an agreement of non-modifiability, there always is an ability to seek modification, even if the obligation was once deemed "lifetime." RCW 26.09.070(1); RCW 26.09.070(7). Yet, here, in essence, a permanent obligation was maintained by the commissioner when the commissioner repeatedly speculated and erroneously supposed the decree was beyond modification, [CP 216-217; CP 219], even in the face of unrebutted substantially changed circumstances.

In so framing the issues the commissioner failed to heed RCW 26.09.090's requirement that among the controlling factors governing spousal maintenance, the court must take into account (1) the financial resources of the party seeking maintenance including the separate or community property apportioned to that spouse and the latter's ability to meet that party's needs independently of the assets of the other spouse, and (2) the ability of the obligor spouse to meet that party's own financial needs and obligations while meeting those of the obligee spouse seeking maintenance. And, in this regard, a de novo review demonstrates Ms. Aldrich, (as the obligee), is actually in a much more positive and financially stable position than Mr. Aldrich (the obligor). It is beyond dispute Ms. Aldrich has little to no debt. [CP 104-107; CP 108-113]. It is equally beyond dispute Ms. Aldrich resides in a \$236,000 home which

she owns free and clear. [CP 105; CP 107; CP 110]. It is also beyond dispute Ms. Aldrich also spends \$800 in food and supplies each month solely on herself. [CP 110]. Furthermore, it is beyond dispute Ms. Aldrich spends \$4,800 a year in clothes, [CP 111], \$2,400 a year on hair care, [CP 111], \$2,400 a year on recreational activities, [CP 111], and \$14,400 a year on gifts! [CP 111]. Indeed, Ms. Aldrich's bank statements show a running balance of \$47,000 from August 2015 to December 2015, [CP 131-139], and \$60,000 to \$67,000 from September 2015 to January 216. [CP 140-160]. It is equally beyond dispute Ms. Aldrich had no need to cash at least three maintenance checks sent to her by Mr. Aldrich prior to the filing of the petition. [CP 191] It is also beyond dispute Ms. Aldrich's 2015 tax return indicates an adjusted gross income of \$201,039. [CP 202-203].

In sum, the commissioner failed to appreciate Mr. Aldrich's present economic turn for the worse looked backwards to the decree, and infused her own suppositions and speculation as to what was intended and presented at trial six years ago without any evidence in the record to corroborate such supposition and speculation. In doing so the commissioner ignored RCW 26.09.170(1) and RCW 26.09.090 and the evidence presented. Consequently, this Court should now reverse the challenged and erroneous decisions and ruling of the commissioner below. RAP 12.2. There has been a manifest abuse of discretion. See,

State v. Robinson, 79 Wn. App. 386, 396-97; 902 P.2d 652 (1995); In re Marriage of Tang, 57 Wn. App. 648, 654; 789 P.2d 118 (1990).

2. The commissioner's failure to also even consider granting Mr. Aldrich's request for a suspension of his spousal maintenance payments was also an abuse of discretion. [Issue no 2]

The commissioner also failed to even consider the possibility of a suspension in maintenance payments until such time as Mr. Aldrich could obtain a turnaround in his bleak financial position after elimination of his employment with CPPS, although highly unlikely at his age with his skills and talents. [CP 40-43; CP45-52; CP 89-95; CP163-167; CP 188-191] This failure to even discuss or analyze Mr. Aldrich's request for such a suspension was equally a failure to exercise any such discretion. As this Division has stated, a failure to exercise discretion is equally an abuse of discretion. Bowcutt v. Delta, supra. And, at a minimum, such a suspension, on these facts, was appropriate. In re: Marriage of Drlik, 121 Wn. App. 269; 87 P. 3d 1192 (2004).

Indeed, as the commissioner indicated at paragraph 2.18 of her written decision, "the petition might have been filed in that small period of time between when petitioner was laid off and when he was offered a contract again from CPPS as an independent contractor", [CP 218], yet, as the contract illustrates it finished on June 30, 2016, less than a month after the hearing. [CP 194-196] the fact Mr. Aldrich was not "laid off" aside.

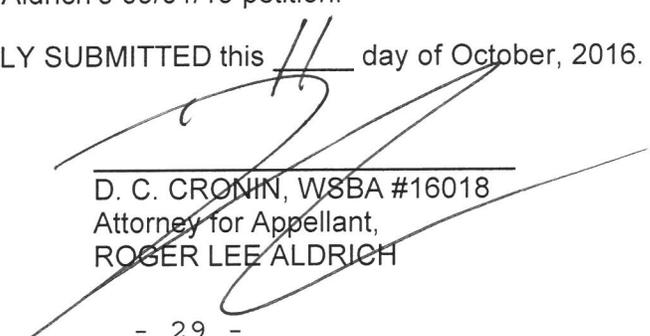
3. The commissioner's grant of an opportunity for Ms. Aldrich to request fees based on a need and ability to pay analysis is not supported by the record and is thus an abuse of discretion. [Issue no. 3]

As the commissioner's written decision indicates, Ms. Aldrich may note a hearing on the family law docket for an order awarding her fees and costs under a need and ability to pay analysis. [CP 220]. Yet, as the record clearly illustrates, as argued above, it is Mr. Aldrich who has the need and Ms. Aldrich who has the ability to pay. And at every step of the litigation Ms. Aldrich delayed. [CP 114-116; CP 188]. Fees, if awarded to any party, should be awarded to Mr. Aldrich. RAP 18.1. And, Mr. Aldrich seeks reimbursement of his full attorney's fees and costs. A fee affidavit/declaration and a financial statement will be submitted pursuant to RAP.18.01 as herein directed and as allowed by RCW 26.09.140.

F. CONCLUSION

Based upon the foregoing points and authorities, Roger Aldrich, respectfully requests the challenged decision and rulings which were erroneously entered by the commissioner on 05/09/16 and 06/21/16, be reversed and, this matter remanded with specific instructions to grant the relief requested in Mr. Aldrich's 09/01/15 petition.

RESPECTFULLY SUBMITTED this 11 day of October, 2016.



D. C. CRONIN, WSBA #16018
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ROGER LEE ALDRICH

Declaration of Service

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington THAT ON THIS DATE declarant personally placed in the services of Eastern Washington Attorney Services for filing the original of the document entitled: Appellant's Opening Brief in Court of Appeals Cause No. 34564-5-III at:

Court of Appeals of the State of Washington, Division III
Clerk of the Court
500 N. Cedar Street
Spokane, WA 99201

AND THAT ALSO ON THIS DATE declarant placed in the services of Eastern Washington Attorney Services for service of the document entitled: Appellant's Opening Brief in Court of Appeals Cause No. 34564-5-III for service upon all other parties, namely HEATHER HOOVER, Attorney for Respondent/ Appellee at her business address:

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DATED this 11 day of October 2016.



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