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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

IN RE THE MARRIAGE OF BARBARA DANNENBRING AND
SCOTT D. DANNENBRING

BARBARA DANNENBRING,

Respondent,

v.

SCOTT DANNENBRING,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

More than six years have passed since Appellant Scott Dannenbring and Respondent Barbara Dannenbring were divorced. Mr. Dannenbring is a Certified Registered Nurse Anesthetist. Ms. Dannenbring was a stay-at-home mother. In light of his increased income, Mr. Dannenbring took all of the community debt and paid Ms. Dannenbring a hefty equalization payment. Mr. Dannenbring has taken on enormous debt to send the parties two children through college. Despite being ordered to pay one-eighth of that educational cost, Ms. Dannenbring has paid none. Mr. Dannenbring is now in serious student loan and credit card debt. He is 62 years old. He is working two jobs and still not making enough money to meet all of his expenses. Despite his lack of ability to pay, despite a late filing by Respondent of her request to modify the existing five-year maintenance award, and despite no change in circumstance between the last order and the current order, a court ordered Mr. Dannenbring to pay \$2000 per month to Ms. Dannenbring for approximately nine more years. He will be seventy years old when the current order ends. Mr. Dannenbring asks this court to vacate that order and dismiss this action.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

- 1: The trial court erred by denying Respondent's motion to dismiss.
- 2: The trial court erred when it found that a substantial change of circumstances supported modification of maintenance.
- 3: The trial court erred by ordering additional maintenance to Respondent.
- 4: The trial court erred by setting maintenance at \$2000.00 per month.
- 5: The trial court erred by setting maintenance until Respondent, who was aged 59 at the time of the decision, turned 68 and became eligible for social security.
- 6: The trial court erred when it entered finding of fact D in its February 16, 2016, Order
- 7: The trial court erred when it entered finding of fact E in its February 16, 2016, Order
- 8: The trial court erred when it entered finding of fact F in its February 16, 2016, Order
- 9: The trial court erred when it entered finding of fact B in its January 17, 2017, Findings
- 10: The trial court erred when it entered finding of fact F in its January 17, 2017, Findings
- 11: The trial court erred when it entered finding of fact G in its January 17, 2017, Findings
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- 14: The trial court erred when it entered conclusion of law D in its January 17, 2017, Findings

B. Issues Related to Assignments of Error

- 1: Where a court orders sixty months of maintenance and sets a clear starting payment date, but the order extraneously lists an incorrect termination date that is sixty-two months from the start, does the court lose jurisdiction when the actual sixty-month deadline passes where the parties operate under that schedule? (Assignment of Error 1)
- 2: Has a substantial change of circumstances occurred that warrants extending spousal maintenance where the changes to the spouse from the previous order are that the spouse is now working more, making more money and has fewer expenses? (Assignment of Error 2)
- 3: Does a court abuse its discretion when it orders nine years additional maintenance at \$2000 per month for a 62-year-old person to pay when that person's expenses already exceed their income and the other party has failed to meet their equitable obligations under a court order? (Assignments of Error 3, 4, and 5).
- 4: Are certain findings of fact supported by substantial evidence in the record? (Assignments of Error 6 through 14).

III. STATEMENT OF THE CASE

The parties' marriage was dissolved in January 2011. CP at 17-27. The parties' assets were divided evenly, with Mr. Dannenbring taking nearly all of the parties' debt. CP at 19-20. The court found that Mr.

Dannenbring earned \$9,724.17 net per month while Ms. Dannenbring earned \$1000 gross per month. Maintenance was awarded from Mr. Dannenbring to Ms. Dannenbring for 60 months. CP at 21-22. The purpose of the maintenance was to allow Ms. Dannenbring to complete a master's degree in English as a Second Language Instruction in two-and-a-half years and then use her best efforts to re-enter the job market. CP at 7. The court found that Ms. Dannenbring "had real potential to re-enter the job market in fairly short order." CP at 7. The court further found that there was a demand English as a second language instruction, Ms. Dannenbring's chosen field of study. CP at 7. The court noted that Ms. Dannenbring had knee problems and medical conditions. CP at 7.

Based on Ms. Dannenbring's two-and-a-half-year plan, the court split maintenance into two parts. For the first 30 months (the time her schooling was anticipated to last) Ms. Dannenbring would receive \$3500 per month. CP at 7, 21. Thereafter, she would receive \$1000 per month for the remaining 30 months to help her "transition." CP at 7, 21. Maintenance was to be paid semi-monthly with half of each monthly payment due on the first and fifteenth of each month. CP at 21. The first payment was set for October 1, 2010. CP at 21.

Based on the sixty-month schedule alone, the final payment of the first thirty-month period would be due on March 15, 2013.¹ The final payment of the second thirty-month period would have been due on September 15, 2015. While the decree is clear that the intent is for sixty months of total maintenance, the decree states erroneously that the end of the first thirty-month period is April 30, 2013 instead of March 30, 2013. CP at 21. The same mistake is made regarding the second thirty-month period, ultimately saying that the final period ends in November rather than September. CP at 21. Specifically, the decree states in pertinent part:

Maintenance shall be at \$3500.00 per month for thirty (30) months, through April 30th, 2013, and then on May 2013 the maintenance shall reduce to \$1,000.00 per month for an additional thirty (30) months, through November 30, 2015.

The first maintenance payment shall be due October 1, 2010

CP at 21. The decree was prepared by Ms. Dannenbring's counsel and bears her counsel's footer. CP at 17-27. The decree is not signed by Mr. Dannenbring. CP at 27.

¹A court may take judicial notice of the calendar. *Kelliher v. Investment & Securities Co.*, 177 Wash. 82, 30 P.2d 985 (1934). Under the decree, the first six months would have payments for October 2010, November 2010, December 2010, January 2011, February 2011, and March 2011. The process would continue monthly for an additional two years (24 months) until March 15, 2013.

The decree further ordered post-secondary support for the parties' two children. Specifically, section 2.2 of the child support order requires the parties to share post-secondary expenses for the children, with the father paying seven-eighths of the cost and the mother bearing one-eighth of the cost.

After entry of the decree, Mr. Dannenbring has taken out parent plus loans to cover both of his children's college educations, totaling approximately \$270,000. CP at 143. With interest, the total is closer to Approximately \$295,000. CP at 143. Ms. Dannenbring has never paid any portion of her share of the costs. CP at 44. Ms. Dannenbring has the ability to pay costs because she admits she has over \$116,135 cash on hand. CP at 485.

To meet his expenses, Mr. Dannenbring works two jobs. CP at 475. He works a 14 day, 24/7 on-call shift each month in Enterprise, Oregon. He works his second job in La Grande, Oregon, which is a three-hour commute from his home to work ten or more straight hours. CP at 475. Between his two jobs, he has little time to see the children whom he is putting through college. CP at 475.

On May 16, 2013, Ms. Dannenbring filed a petition to modify the maintenance award. Ms. Dannenbring argued that her failure to find full

time employment constituted a substantial change in circumstances warranting modification of the award.

The matter went to hearing on July 30, 2013. The court found that Ms. Dannenbring had not reached the income level that was anticipated by the court at the time of the decree, which established a substantial change in circumstance. CP at 30. The court found that “the spousal maintenance will be increased from \$1000 to \$2500 per month for this second thirty (30) month period.” CP at 30.

Looking to set an effective date for the change, the court asked of the parties when the change from \$2500 to \$1000 was to have taken place under the original order. RP at 17. Ms. Dannenbring and Mr. Dannenbring both correctly recognized that the first \$1000 payment was to be made in April 2013. RP at 17. No one asserted that the change was to occur in May 2013. *See* RP at 17-18.

The modification order stated that “Spousal maintenance is increased to \$2500.00 per month with a start date of June 1, 2013 for the increase to begin and will continue for the remainder of the second thirty (30) month period of the original order on maintenance.” CP at 32.

The court made no findings about Ms. Dannenbring’s hopes or prospects for finding employment in this second maintenance award. *See* CP at 28-33. Instead, the court ordered found “good cause to order that

there will be no further increases in spousal support and the Court forecloses that possibility. When Barbara Dannenbring's spousal maintenance ends at the end of the second thirty (30) month period, it will end finally without ability for Barbara Dannenbring to seek another modification." CP at 30.

Ms. Dannenbring appealed the court's ruling, seeking an even larger increase in maintenance. *In re Marriage of Dannenbring*, 186 Wn. App. 1001, *1 (2015) (unpublished). Mr. Dannenbring cross appealed, arguing that there was no basis to modify the existing award. *Id.* at *1. Mr. Dannenbring conceded on appeal that Ms. Dannenbring was not barred from further petitions notwithstanding the court's language to the contrary. *Id.* at *1.

This Court affirmed the trial court's modification of the maintenance award in an unpublished opinion filed February 19, 2015. *Id.* Based on Mr. Dannenbring's concession, the court "remand[ed] for the superior court to strike the language barring future maintenance modification petitions." *Id.*

On October 30, 2015, Ms. Dannenbring filed the petition that gave rise to the instant action. CP at 34-38. Again, she argued that the duration of the marriage and her continued need warranted modification of the second maintenance award. CP at 35-36.

Mr. Dannenbring moved to dismiss the action for want of jurisdiction. CP at 41-43. He argued that because he had made 120 timely payments over sixty months, with the last payment on September 15, 2015, that maintenance was closed. CP at 44-45. He argued that Ms. Dannenbring's petition was untimely. CP at 42. The matter was heard on February 9, 2016, and the court denied Mr. Dannenbring's motion. CP at 152-56.

Despite the fact that her income had more than doubled from \$1390 per month during the first modification, to \$2800 per month net in this action, CP at 419, Ms. Dannenbring again sought permanent maintenance. After a hearing on December 20, 2016, the court issued its findings. An order followed on March 17, 2017.

Despite the fact that the previous order evidenced no anticipation of Ms. Dannenbring returning to full employment, the current order found that her failure to return to full employment was a basis for modification. Further, the court found that maintenance would be necessary even if Ms. Dannenbring was fully employed. The order required Mr. Dannenbring to pay an additional \$2000 per month in maintenance until Ms. Dannenbring turned 68. At the time of the order, Ms. Dannenbring was 59 years old. As a result, Mr. Dannenbring will be 70 years old and nearly fifteen years

removed from the dissolution by the time maintenance ends. This appeal followed.

IV. ARGUMENT

A. The Present Petition Was Not Timely Because Maintenance Terminated Prior to Its Filing

[I]f there is no modification during the term of the alimony award and no appeal to the failure to modify, the obligation is forever extinguished when met in full. *Brown v. Brown*, 8 Wn. App. 528, 530, 507 P.2d 157 (1973). In other words, when a maintenance award terminates for any reason, modification is no longer available. See *Mason v. Mason*, 40 Wn. App. 450, 698 P.2d 1104 (1985) (modification not timely after maintenance obligation terminated by receiving party's remarriage).

The clearest reading of the decree of dissolution is that the end date for maintenance was when Mr. Dannenbring made his final payment on September 15, 2015. The first order on modification did not extend this deadline. In light of the fact that Mr. Dannenbring timely made all of his semi-monthly payments, he satisfied his obligation on time. As a result, the October 30, 2015, filing of the present petition was untimely.

1. The trial court erred when it held that the term of maintenance lasted through November 2015.

Determination of the meaning of a decree or order is a question of law that is reviewed de novo. *In re Marriage of Thompson*, 97 Wn. App. 873, 878, 988 P.2d 499 (1999). “If a decree is ambiguous, the reviewing court seeks to ascertain the intention of the court that entered it by using the general rules of construction applicable to statutes and contracts.” *Thompson*, 97 Wn. App. at 878 (citing *In re Marriage of Gimlett*, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981)). Even the court that issued an order cannot change it without a showing that justifies reopening a judgment. *Id.* (citing RCW 26.09.170(1)). In other words, “An ambiguous decree may be clarified, but not modified.” *Id.*

The decree is ambiguous. Both the decree and its findings establish a sixty-month maintenance period with thirty months at \$3500 and thirty months at \$1000. CP at 7, 21. However, the decree references specific ending months that are greater than thirty months from their start dates. It is undisputed that the first payment was due October 1, 2010. CP at 21. It is self-evident that if a person make two payments in October, two in November, two in December, and so on, that the sixtieth (30 month) payment will fall on March 15. Despite the fact that the thirtieth month is March, the decree says that the \$3500 payments will continue through April

30. In other words, the decree says thirty months, but the April 30th date makes the first part of the payment thirty-one months. The most obvious explanation is that the drafter of the decree (Ms. Dannenbring's attorney) failed to count the starting month (October) as one of the months of payment despite the fact that the decree clearly has payments beginning October 1st. The same error is repeated regarding the second thirty months.

A resort to traditional canons of construction supports the conclusion that the decree intended the last payment of the first thirty months to be on March 15, 2013. For instance, [a]ppellate courts construe ambiguities against the drafter of a document." *Riss v. Angel*, 80 Wn. App. 553, 557, 912 P.2d 1028 (1996) (citing *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 690, 871 P.2d 146 (1994)). Ms. Dannenbring, through her attorney, prepared the decree. The decree is not signed by Mr. Dannenbring. Accordingly, the ambiguity should be resolved in Mr. Dannenbring's favor.

Additionally, the parties performed the obligation with an understanding that April 1st, 2013, was the first payment of the second thirty-month period. It is uncontested in the record that Mr. Dannenbring made a \$1000 payment for April 1st. When asked by the trial court when the new period had begun at a July 30, 2013, hearing Ms. Dannenbring said "April." RP at 17.

In short, both the findings and the decree are explicit that a total of 60 months maintenance was ordered in two thirty-month periods. The parties operated under that understanding. Any assertion that the parties did not understand the timeline only came after Ms. Dannenbring had filed her petition late. Accordingly, the first thirty-month period ended in March and the last payment under the decree was due on September 15, 2015.

2. The first modification order did not change the duration of maintenance

The first modification order was entered on October 22, 2013. It explicitly refers to the second thirty-month period of the original order, not some new order:

Spousal maintenance is increased to \$2500.00 per month with a start date of June 1, 2013 for the increase to begin and will continue for the remainder of the second thirty (30) month period of the original order of maintenance.

CP at 32 (emphasis added). The order portion above also makes clear that only the increase is happening on June 1, 2013: “The spousal support increase to \$2500 from \$1000.00 per month will take effect June 1, 2013.” CP at 30. This is also consistent with the court’s oral ruling. Again, the parties agreed that the new payments had started on April 1. RP at 17. When counsel for Mr. Dannenbring expressed that retroactive application of the court’s ruling to April 1 would be a hardship, the court set the date at

June 1st because it “would be midway between the petition and today.” RP at 18. Again, there was nothing suggesting that June 1 would restart a new thirty-day period.

Despite the clear language in the order that the thirty-month period was “of the original order of maintenance,” the trial court in the present action denied Mr. Dannenbring’s motion to dismiss by concluding that a new, thirty-day term began June 1, 2013. CP at 154. The court never references its modification order or its “original order” language. Again, interpretation of an order is a legal question that this court reviews de novo, and a court is not allowed to change its own orders without going through the process of reopening judgment. *Thompson*, 97 Wn. App. At 878. Accordingly, Mr. Dannenbring asks this court to hold that the court erred when it held that the term of maintenance had been modified to extend beyond the original sixty-month period.

3. Mr. Dannenbring timely paid his maintenance

It is uncontested in the record that Mr. Dannenbring timely made all of his maintenance payments when they came due from October 1st effective date of the order to the last payment on September 15. CP at 44. Ms. Dannenbring’s only challenge to Mr. Dannenbring’s payment involves back maintenance incurred as part of the July 30, 2013, modification order. *See* CP at 452.

At the time of the July 30, 2013, modification order, Mr. Dannenbring had already paid his \$1000 for each of June and July of 2013. By increasing the amount to \$2500 per month effective June 1, 2013, it meant that Mr. Dannenbring now owed an additional \$3000 for those months.

At the same time that the court was ruling on the maintenance issue, the court was also addressing Ms. Dannenbring's outstanding child support. CP at 30-32. Ms. Dannenbring has never paid any portion of the children's post-secondary costs or their post-majority medical costs. CP at 44. She admits that she has \$116,135.00 in the bank. CP at 485. Ms. Dannenbring sought to modify her outstanding obligation, which at the time of the July 30, 2013, hearing was \$3438.23, a larger amount than the \$3000 back payment. CP at 57. The court never ordered a judgment against either party. *See* CP at 28-33. As both issues were resolved at the same time, they should offset. Indeed, the court has made that offset official in its most recent order. CP at 412, 416. In other words, Mr. Dannenbring owes no further maintenance from the decree or first modification despite making no further payments on those obligations after September 2015.

The court ruled that for an offset to deprive the court of jurisdiction would be unfair to Ms. Dannenbring. CP at 155 n.2. However, this does not follow from basic equity jurisprudence. A family law court sits in

equity. *In re Marriage of Langham*, 153 Wn.2d 553, 568, 106 P.3d 212 (2005). “[A] person who comes into an equity court must come with clean hands.” *Income investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940). “Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy.” *Id.*

Here, Ms. Dannenbring has staunchly refused to pay any of her outstanding child support. In none of her declarations does she state she has paid any. In fact, she expresses a continuing intention not to pay her support obligation. CP at 343. Indeed, she says she is “in no position financially to pay” her court ordered obligation, CP at 343, despite the fact that she has \$116,000 in the bank. CP at 485. While Ms. Dannenbring has refused to make any payments for the benefit of her children, Mr. Dannenbring has financed approximately \$270,000 in loans for their benefit, paid maintenance to the tune of over \$250,000 (not counting the current order on appeal), and additionally took all community debt, and had to pay Ms. Dannenbring a \$96,000 equalization payment.

There is no question that Mr. Dannenbring has complied with both the spirit and letter of the court’s orders while Ms. Dannenbring willfully refuses to meet her obligation. Accordingly, as a family law court sits in

equity, it would be fair for the offset of Ms. Dannenbring's unpaid support obligation to divest the court of jurisdiction.

In light of the foregoing, Mr. Dannenbring asks this court to rule that the trial court erred in denying his motion to dismiss and to hold that support terminated with the final payment of September 15, 2015. Accordingly, Ms. Dannenbring's present petition was too late. *Brown*, 8 Wn. App. at 530.

B. The Present Modification is Not Supported by a Substantial Change in Circumstance

Modification of a maintenance award shall only be had "upon a showing of a substantial change of circumstances." RCW 26.09.170. The burden of proof of establishing the substantial change in circumstances rests with the party seeking the modification. *Corson v. Corson*, 46 Wn.2d 611, 614-15, 283 P.2d 673 (1955). That party must show the change has occurred since that last order fixing maintenance. *Id.* They must additionally show that the change was not contemplated at the time of the entry of that order. *In re Marriage of Coyle*, 61 Wn. App. 653, 657, 811 P.2d 244 (1991) (citing *In re Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (1987)). A change in circumstances involves either a change in the obligor's ability to pay or a change in the obligee's need. *Ochsner*, 47 Wn. App. at 524. However, the obligor's increased ability to pay alone is

not sufficient change to warrant modification. *Gordon v. Gordon*, 44 Wn.2d 222, 228, 266 P.2d 786 (1954). A finding of substantial change in circumstances is reviewed for abuse of discretion. *Ochsner*, 47 Wn. App. at 525. “An abuse occurs where the court’s decision is entered on grounds either manifestly unreasonable or clearly untenable.” *Id.*

An obligee does not have the right to automatic review at the end of a term of maintenance. *In re the Marriage of Spreen*, 107 Wn. App. 341, 350, 28 P.3d 769 (2001). A party seeking to extend the term of maintenance must still demonstrate a change in circumstances. *Id.* at 351. However, where a trial court fixes a term based on specific evidentiary expectation and that expectation does not materialize, as long as the obligee can show continued need, the failed expectation is a change of circumstances warranting review. *Ovens v. Ovens*, 61 Wn.2d 6, 376 P.2d 839 (1962). Accordingly, where a court order anticipates a party’s being self-supporting in two years, that anticipation does not materialize, and the failure to be self-supporting is not the fault of the party, the changed circumstances warrant modification. *Bowman v. Bowman*, 77 Wn.2d 174, 175-77, 459 P.2d 787 (1969).

At the time of the original decree of dissolution, the court’s clear anticipation was that Ms. Dannenbring would return to school, graduate with a degree, and gain employment sufficient to meet her needs. The

dissolution findings are rife with expressions of this expectation. CP at 6-7. The court found that Ms. Dannenbring would “complete a master’s degree in two and one half (2 1/2) years. Thereafter, she will be using her best efforts to re-enter the job market.” CP at 7. The court found “real potential to re-enter the job market in fairly short order.” CP at 7. The court set the first 30 months of maintenance to accomplish the schooling and the second thirty months “to assist in transition” to work. CP at 7.

At the first modification, the findings supported a showing of changed circumstances because Ms. Dannenbring had not become self-supporting. As the court put in its findings, “Ms. Dannenbring has not been able to increase [her salary] as much as the Court anticipated at the time of trial.” CP at 29. Further, based on expert testimony and a detailed timeline by Ms. Dannenbring, the court found that the lack of self-sufficiency was not in bad faith. CP at 30.

The court’s findings on modification stand in stark contrast to the findings on the dissolution. Nowhere in the findings does the court anticipate future employment or self-sufficiency for Ms. Dannenbring. There is no talk of quick return to full employment. Instead, the order purported to stop all further modifications. CP at 30. While a court cannot order that a maintenance award is not subject to modification, *In re Marriage of Short*, 71 Wn. App. 426, 859 P.2d 636 (1993) aff’d in part,

rev'd on other grounds in part 125 Wn.2d 865, 890 P.2d 12 (1995), the court's attempt to do so is compelling evidence of the court's intent to fix the term irrespective of Ms. Dannenbring's future success. Accordingly, the rule from *Ovens* and *Bowman* does not apply here.

The court's oral ruling confirms this view. The court only stated that Ms. Dannenbring would "continue in her efforts" for the remainder of the term of maintenance. RP at 16. The court's oral ruling never expresses any anticipation that Ms. Dannenbring would be successful in her efforts. There too, the court suggests that there will be no further modifications. RP at 16-17. Again, while the court cannot fully bar Ms. Dannenbring from seeking a modification, it surely can express that its award is not contingent on her being fully employed in the future.

There is no general exception to the requirement that a party show changed circumstances to modify a maintenance award. Absent evidence from the trial court that its ruling was made in anticipation of future employment, there is no basis to modify the award.

The trial court, in its most recent findings, the court concludes that "The goal was for Barbara Dannenbring to become fully self-supporting – that goal has yet to be realized." CP at 421. The court further concluded that it was not contemplated that Ms. Dannenbring would need to use her bank deposits to meet monthly expenses. CP at 422. This is effectively the

same conclusion, which is that Ms. Dannenbring is not yet self-sufficient. These conclusions are the sole basis in the court's orders/findings supporting a substantial change in circumstances. Again, there is nothing in the record to establish these anticipations at the time of the entry of the original order.

In support of the first modification, Ms. Dannenbring filed a financial declaration evidencing \$4000 in monthly expenses and the court found she had \$1390 in monthly income. For this modification, Ms. Dannenbring's declaration shows \$2800 in net monthly income and \$3359.75 in monthly household expenses. CP at 483, 487. In other words, Ms. Dannenbring's financial condition is substantially changed for the better and her need is significantly less between the last two modifications. Accordingly, there is no unanticipated change that has occurred from the October 22, 2013, entry of the previous modification and the petition date of October 30, 2015.

Further, Ms. Dannenbring presented in the last hearing extensive evidence of her efforts to find new work. She offered the declaration of an expert and described in detail her efforts to find work from dissolution to that hearing date. In her updated declaration filed November 30, 2015, Ms. Dannenbring only identifies that she has worked part time at City University of Seattle, and part time at Seattle Public Schools. She fails to identify any

efforts to find additional work. Accordingly, the record does not support a finding that work is unavailable to her. Indeed, no such finding is in the record. Additionally, Ms. Dannenbring fails to justify why her work range is limited to the expensive city of Seattle when Mr. Dannenbring has had to move to find work.

Mr. Dannenbring asks this court to find that to find otherwise was an abuse of discretion, vacate the present order, and dismiss this case.

C. The Present Order is an Abuse of Discretion Because it is Manifestly Unreasonable

Maintenance is “not awarded as a matter of right.” *In re Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797 (1992) (citing *Friedlander v. Friedlander*, 80 Wn.2d 293, 494 P.2d 208 (1972)). Instead, the burden rests with the party seeking maintenance to establish the basis for maintenance by preponderance of the evidence. *Koon v. Koon*, 50 Wn.2d 577, 581, 313 P.2d 369 (1957). The purpose of maintenance is to support a spouse until that spouse is able to earn a living or otherwise become self-supporting. *Irwin*, 64 Wn. App. at 55.

Maintenance “shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors.” RCW 26.09.090(1). Relevant factors include:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

RCW 26.09.090(1).

An award of maintenance is reviewed for abuse of discretion. *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). A maintenance award, in light of its amount and duration, must be just. *Id.* at 178. Of primary importance in the maintenance award are the parties' economic positions following the dissolution. *Spreen*, 107 Wn. App. at 348.

The present order of maintenance is unjust. The original order of maintenance was set to last five years and was half \$3500 and half \$1000. At the time of its entry, Ms. Dannenbring made \$1000 per month. CP at

419. At the time of the modification order, that had increased only to \$1390 per month, CP at 419, and Ms. Dannenbring's household expenses in her July 15, 2013 financial declaration were \$4025.92. At that point, \$2500 per month was ordered and the duration of maintenance was maintained.

At the time of the present order, Ms. Dannenbring's income has more than doubled to \$2800 per month. CP at 483. Her residential expenses have diminished to \$3359.75, CP at 487. In other words, Ms. Dannenbring's monthly shortfall has diminished from approximately \$2600 per month to \$559.75 per month. Additionally, she is now working at .8 of full time in her chosen profession. CP at 335. This is a profession which Mr. Dannenbring opposed training her for at trial as lacking opportunities for income. CP at 475.

Over the same duration, while Mr. Dannenbring's income has increased, his expenses have exploded and now consume all of his income and more. At the time of the dissolution, Mr. Dannenbring made \$9724 per month. At the time of the modification, he made \$11,595, CP at 419. However, his financial declaration at the time showed expenses per month totaling \$10,209. Presently, Mr. Dannenbring makes \$13,992 per month, CP at 419, but his costs are now \$14,647.96 per month. CP at 170, 419. The main driver of these increased costs is Mr. Dannenbring's payments for the loans he took out for the children's school, which totals \$3831 per

month. CP at 173. As a result, Mr. Dannenbring has extensive credit card debt which totaled \$33,119.45 at the time of hearing. CP at 177. Unlike Ms. Dannenbring, Mr. Dannenbring does not have cash accounts to pay the debt. CP at 172. In short, Mr. Dannenbring is downing in debt and has a monthly shortfall of \$655.39.

While Mr. Dannenbring has retained the family home, even if Mr. Dannenbring had sold the home, it would not give him a monthly surplus of income. Mr. Dannenbring pays 1857.00 per month for the mortgage. CP at 173. He receives \$1300 in income. CP at 172. Accordingly, it is a net loss of \$557.00 per month. Again, his deficit is \$655.39 per month. Removing that mortgage payment does not make him solvent enough to pay maintenance.

As a result of the court's order, Ms. Dannenbring will enjoy a \$1440.25 monthly surplus while Mr. Dannenbring's monthly shortfall grows to \$2655.39. The outcome is simply unjust.

The fact that this order's duration is also almost twice as long as the original order also shows its injustice. The original order was for five years (60 months). The present order's effective date was May 5, 2016. Ms. Dannenbring is set to turn 68 in 2025. CP at 3. The term of maintenance, therefore, is effectively nine years.

Mr. Dannenbring was born July 23, 1955. He is more than two years older than Ms. Dannenbring. Accordingly, the court's order requires Mr. Dannenbring to pay maintenance until he is 70. As it is, Mr. Dannenbring's work requires him to commute on icy roads for three hours to get to work. CP at 475-76.

Given the unworkable and unsustainable financial situation Mr. Dannenbring is already in, the court erred by concluding that he had an ability to pay maintenance. The court further erred by awarding maintenance in an amount unmoored from Ms. Dannenbring's alleged need and which gives her a dramatic surplus per month. The court further erred by awarding the maintenance for one-and-a-half times the original duration, without regard for Mr. Dannenbring's ability to work. In short, the court's order is simply unworkable and makes no sense in the context and history of this case. Accordingly, Mr. Dannenbring asks this court to vacate the order.

D. The Following Findings of Fact Are Not Supported By Substantial Evidence

An appellate court reviews findings of fact for substantial evidence. *Miles v. Miles*, 128 Wn. App. 64, 69, 114 P.3d 671 (2005). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth." *Id.*

1. Finding of Fact D (February 16, 2016, Order)

This finding is more of a conclusion of law. Additionally, the finding is incorrect that the petition was timely filed and that the decree ordered maintenance to run through November 30, 2015, as established in Section A above.

2. Finding of Fact E (February 16, 2016, Order)

This finding is also a conclusion of law as it interprets an order. Additionally, it is incorrect for the reasons stated in Section A above. Further, this court did not “invite” modification but merely restated in *Dannenbring*, 186 Wn. App. 1001, that the petition was still available.

3. Finding of Fact F (February 16, 2016, Order)

Total payments due under the decree as modified in 2013 were \$177,000. That is calculated by $30 \times \$3500$ (Oct. 2010 through March 2013) + $2 \times \$1000$ (April and May 2013) + $28 \times \$2500$ (June 2013 through Sept. 2015). The court’s calculation would require payments through 62 months or would have required retroactive payments prior to June 1, which was the modification order effective date.

4. Finding of Fact B (January 19, 2017, Findings)

This finding is a conclusion of law and misstates the meaning of the earlier orders as described in Section A above. Further, the finding

miscalculates the effect of the modification order, which was effective June 1, 2013, two months after the change in amount of payment.

5. Finding of Fact F (January 19, 2017, Findings)

This finding is not supported by substantial evidence. Ms. Dannenbring failed to file her bank records to establish how the bank deposits were used. At the time of the hearing, Ms. Dannenbring had not used said deposits to pay outstanding credit card and medical debt. CP at 487. Further, Ms. Dannenbring's household expense shortfall per month was \$559.75, CP at 483, 487. However, the alleged diminishment of her account over the prior three years greatly exceeds that. The only evidence in the record to support this conclusion are Ms. Dannenbring's self-serving and vague statements. Indeed, the absence of evidence to support these statements is shown by the lack of citations in the finding as compared to findings regarding Mr. Dannenbring's assets.

6. Finding of Fact G (January 19, 2017, Findings)

Mr. Dannenbring provided his testimony, supporting ledgers, bank statements, loan statements, tuition statements, and the declarations of the two students to support his payment of educational expenses. The court's fundamental misunderstanding here is of the method by which loans are dispersed to schools and then to students. This is revealed by the court's

statement that “[n]o records show Mr. Dannenbring’s payments directly to the University of Washington or Digipen.”

As was established in the declarations of Mr. Dannenbring and the two students, student loan money is dispersed to the educational institution first. CP at 167, 458, 477. Then, any remaining funds are dispersed to the students for living expenses. CP at 167, 458. The records establish that Mr. Dannenbring incurred the loans, that they were dispersed to the institutions, and that costs were paid. Accordingly, there is not substantial evidence to support the court’s conclusion.

Additionally, to the degree the court is seeking perfect tracing evidence, its decision is an error under this court’s recent decision in *Schwarz v. Schwarz*, 192 Wn. App. 180, 368 P.3d 173 (2016).

7. Conclusion of Law B (January 19, 2017, Findings)

The conclusion does not follow from the record of the earlier proceeding. Further, substantial evidence does not support Mr. Dannenbring’s ability to pay when his expenses exceed his income.

8. Conclusion of Law C (January 19, 2017, Findings)

The court’s conclusion does not follow from the record of the earlier proceeding as expressed in Section B above.

9. Conclusion of Law D (January 19, 2017, Findings)

The court's finding regarding Ms. Dannenbring's deteriorating standard of living is not supported in the record. Ms. Dannenbring has only ever increased her income since leaving the marriage. The \$1200 to \$1300 value stated by the court includes debt servicing for debts that could easily be paid by existing cash assets. As such they only serve to artificially inflate Ms. Dannenbring's monthly liabilities.

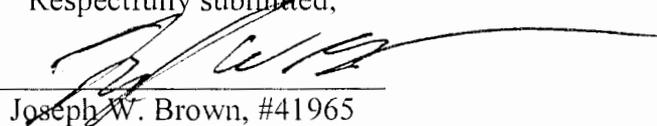
Additionally, the fact that the court now finds that Ms. Dannenbring's need will persist even when she reaches full time employment goes to show how the original employment plan that was opposed by Mr. Dannenbring but pursued by Ms. Dannenbring has failed. Mr. Dannenbring should not be required to pay permanent maintenance because of post-separation choices of Petitioner.

V. CONCLUSION

Appellant respectfully asks this court to vacate the order below and dismiss this action.

August 31, 2017.

Respectfully submitted,



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