

No. 35200-5-III

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION THREE

FILED

JAN 24 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

BARBARA DANNENBRING,

Respondent,

v.

SCOTT DANNENBRING,

Appellant.

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

The Honorable Allen C. Nielson

RESPONDENT'S AMENDED RESPONSE BRIEF

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A. SUMMARY OF ARGUMENT

This is a maintenance case for a 29-year marriage. The original 2011 decree stated that maintenance would be paid “through November 2015.” In 2013, Ms. Dannenbring filed a petition to modify maintenance. The trial judge granted her motion in part, establishing a maintenance increase from \$1,000 to \$2,500 to take effect June 1, 2013, and to run through the date of the “original order of maintenance.” The trial court also ruled that Ms. Dannenbring could not file any subsequent petitions to modify. Both sides appealed, and this Court affirmed the modification, recognizing the trial court’s discretion. It *also* ruled, however, that the law permitted Ms. Dannenbring to file additional petitions. Specifically, this Court cited to Ovens v. Ovens, 61 Wn. 2d 6, 9, 376 P.2d 839 (1962), and stated: “If Ms. Dannenbring finds she still needs maintenance *after the fixed term ends*, she can petition for modification.” In re Marriage of Dannenbring, 186 Wn. App. 1001, *8-*9 (2015) (emphasis added).

On October 30, 2015, Ms. Dannenbring filed a petition to modify maintenance – a month before the term stated in the decree ended. At the time that she filed her petition, Mr. Dannenbring still owed at least \$3,000 to Ms. Dannenbring in maintenance. Mr. Dannenbring filed a motion to dismiss, alleging that maintenance ended on September 15, 2015. The trial judge denied the motion, and granted the petition to modify.

Mr. Dannenbring's main contention here is that the trial court erred when it held that it had jurisdiction over the petition. He claims that the court erred when using November 30, 2015 as the "fixed term" for when maintenance ended because, he alleges, (a) payments were to be complete by September 15, 2015, and (b) his failure to pay past due maintenance was not an actual "failure to pay" but a self-help withholding by him for postsecondary education costs that he allegedly incurred and for which Ms. Dannenbring allegedly owed him. He does not address the court's ruling that any additional time allowed Ms. Dannenbring to review payments and decide if she needed to request modification. While he tries to reframe these issues on appeal – and states that the parties agree that he was up to date on his payments (a statement Ms. Dannenbring disputes), the bottom line is this: Mr. Dannenbring seeks, after the fact, to change the "fixed term" for maintenance despite the fact that he was in arrears at the time, all to avoid Ms. Dannenbring's maintenance petition. He should not succeed.¹

¹ He also alleges that this maintenance order is reversible because (a) there has been no substantial change in circumstances (a claim ignoring, *inter alia*, Ms. Dannenbring's health issues in addition to her inability to find sustaining work), (b) the award is manifestly unreasonable (a claim that ignores, *inter alia*, that it is only \$2,000 a month, less than the amount this Court already approved in the earlier appeal, in a lengthy marriage), and (c) the trial court erred in its findings (all tied to the earlier arguments, and a conclusion with which Ms. Dannenbring disagrees).

B. COUNTER TO ASSIGNMENTS OF ERROR

1. The court properly denied Appellant's Motion to Dismiss the Petition to Modify Maintenance.
2. The trial court acted within its discretion when it found that a substantial change in circumstances justified maintenance modification.
3. The trial court acted within its discretion when it modified Ms. Dannenbring's maintenance both in terms of length and amount.
4. The trial court's findings of fact and conclusions of law were proper, and were a proper exercise of its discretion.
5. Mr. Dannenbring should pay Ms. Dannenbring's fees.

C. COUNTER TO ASSIGNMENTS OF ERROR

Counter to Issue 1. When a decree states that the maintenance term is "through November 2015," does the time for seeking modification of that maintenance order extend through the end of November of 2015?

Counter to Issue 1. When a party admits that he has not paid the entire maintenance amount due and owing pursuant to a decree at the time that a petition to modify maintenance is filed, is he barred from claiming that the term of maintenance has expired?

Counter to Issue 1. When the trial court reasons that additional time between maintenance payments and the end of the maintenance term will allow the receiving spouse to evaluate if she must bring a petition to extend maintenance and to determine that all payments have been made, does that resolve the question of a potential ambiguity?

Counter to Issue 1. Does a party's failure to object to language of a maintenance term being "through November 2015" prevent him from being able to complain about that language at a later date in a way that prejudices the other party because he has "unclean hands" due to delay?

Counter to Issue 2. Can a trial court's ruling about a substantial change in circumstances be affirmed as a proper exercise of the court's discretion when the receiving spouse, *inter alia*, (a) is still not financially self-supporting, (b) was in a car accident that prevented her from working, (c) had knee surgery which prevented her from working, and (d) has a deteriorating standard of living, and when the paying spouse has increased his income at least another \$2,000 from the last modification in 2013?

Counter to Issue 2. Is it an abuse of discretion for the trial court to implement a Court of Appeals' ruling which allows a receiving spouse to petition to modify maintenance if the receiving spouse is still not able to be financially self-supporting?

Counter to Issue 3. Is it manifestly unreasonable for a trial court to order additional maintenance in the amount of \$2,000 per month when, *inter alia*, the paying spouse's net monthly income is \$13,992 and when the receiving spouse's income is only \$2,800 a month, requiring her to use her savings that the trial court had intended for her retirement?

Counter to Issue 4-9. Does a party need to give specific objections in order for a responding party to be able to address the legal argument?

Additional. Should Appellant be responsible for Appellee's fees?

D. COUNTER TO STATEMENT OF THE CASE

After a 29-year marriage, the parties in this case filed for and were given a divorce pursuant to a dissolution trial, and orders were entered on January 3, 2011. (CP 1-27) At trial, the trial found that Ms. Dannenbring was a displaced homemaker, that she had abilities and education, but that those skills and education were dated. (CP 6) The court set an order for spousal support at that time. (CP 5-6) The award was for 60 months – \$3,500 a month for the first 30 months, and \$1,000 a month for the final 30 months. *Id.* It was made “through November, 2015.” (CP 21)

In setting this award, the court found the parties' 29-year marriage was a "significant statutory factor." (CP 6) The court found that the route Ms. Dannenbring had taken to get back to the workforce and update her education was the "correct choice." (CP 6-7)

The court found that spousal support was "also just based upon the disproportional earning capacity of Petitioner and Respondent, with Respondent earning \$9,724.17 net per month as compared to Petitioner's annual gross income of \$12,000.00 based upon her work at \$16.00 per hour as a nanny." (CP 7)

In its oral ruling at that time, the court also had ruled that Mr. Dannenbring should sell one of the two homes that he had because the family's expenses could not justify this kind of luxury:

Mr. Dannenbring cannot, now that the divorce is final, have two homes. In other words, that's part of my thinking here is to set up a situation where he's going to have to fish or cut bait about whether he stays here or goes down there [to Oregon] because it does seem – exorbitant's the wrong word because that's not what's going on. It's based on necessity. You're living there because you have to. You need a second home. But on the other hand, I can't sanction or allow to continue one party having two homes, in effect. So that was another part of my rationale here that at some point in the very near future that second home payment, one way or another, would no longer need to be made.

(CP 506)

Despite this reasoning from the trial court, it is undisputed that Mr. Dannenbring has kept ownership of the home in Washington, receiving at least \$1,300.00 a month as rent for it.²

No appeal was taken of the January 2011 final orders.

On May 16, 2013, Ms. Dannenbring filed a petition to modify the order of spousal support, and the trial court ruled in her favor. (CP 32-33) At that time, it was learned that Mr. Dannenbring's net monthly income had increased from \$9,724.17 per month at the time of trial to \$11,595.61 per month. (CP 512) This was an increase of nearly \$2,000.00 *a month* in net income for the Respondent in just two years. This resulted in an increase in income for Respondent of about \$24,000 net income a year, so that his net income was now \$139,147 a year.³ This calculation was made without regard to the parties' investments that were divided equally at the divorce (which Ms. Dannenbring had been forced to begin liquidating, but which Mr. Dannenbring had been able to maintain due to his other resources).

² Mr. Dannenbring claims this low rent is the amount paid, even though this home has a potential monthly rental value of \$1,800 to \$1,900. (Memorandum re Modification/Fees filed December 19, 2016, at page 7 (CP ___), and accompanying exhibit (CP 717-738).

³ This did not include the \$1,300 a month from the rental property in Colville. *Id.*

As stated by the trial court, not only had Ms. Dannenbring not increased her salary as much as the court had anticipated, but that she had made proper efforts, and the court's intent in 2011 was for her to be able to obtain employment – not just to get education for education's sake:

Now [counsel for Respondent] makes an argument, judge, the focus here a few years ago was on education. It wasn't on employment. But I, my recollection is that the education for the sole purpose of education makes no sense. In other words, it was a means to an end. The education, gaining a Master's degree in English as a Second Language was step one for Ms. Dannenbring to then be able to increase her salary over and above what it was at that particular time. And so I – and then secondly, 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 the materials, made a real effort to find work.

(RP 16).

The court also found that Mr. Dannenbring had actually *increased* his net income between the trial and 2013, *id.* Thus the trial court ordered an increase in maintenance for the second 30 months due to a substantial change in circumstances. *Id.* The court also ordered, however, that Ms. Dannenbring could not return to the court for any further modifications.

(RP 16-17) The trial court gave no reason for this ruling.

Both parties appealed the trial court's order. This Court affirmed the modification, recognizing the trial court's discretion.

As to initial facts, the Court concluded as follows:

- In the decree, the trial court considered correct factors, including: Mr. Dannenbring’s “earnings and earning capacity,” as well as Ms. Dannenbring’s age, financial resources, the time needed for her to finish her education and find teaching employment, the marriage’s duration and her physical condition, *id.* at *2;
- Also in the decree, the trial court “decided the first amount [\$3500 monthly] was just as it allowed Ms. Dannenbring to finish her master’s degree and the next lower amount [\$1000 monthly] would assist her in her transition from displaced homemaker to working professional,” and that the first amount ran “through April 2013” with the second amount running “through November 2015,” *id.*;
- Ms. Dannenbring petitioned the trial court on May 16, 2013, to modify support to “continue the \$3500 payments for an additional two years and to reserve her right to request lifetime maintenance,” explaining her “unsuccessful efforts to find full-time employment despite having earned her master’s degree about a year earlier” *id.*;
- The court granted the motion over Mr. Dannenbring’s objection, finding that “while Ms. Dannenbring had increased her salary, this amount was ‘not as much as [the court] had anticipated that she would be able to increase it,’” *id.*;
- The trial court “recognized Mr. Dannenbring had worked hard to increase his monthly earnings by \$2,000 to \$3,000 in the wake of the dissolution,” *id.* at *3;
- The trial court “increased Ms. Dannenbring’s maintenance for the remaining 29 months from \$1,000 to \$2,500 per month but did not reserve the lifetime maintenance issue,” *id.*;

As to its holding, the Court of Appeals:

- set out standard maintenance law, including Bowman v. Bowman, 77, Wn. 2d 174, 459 P.2d 787 (1969), a case where the trial court “believed the wife would eventually become self-supporting” and so ordered only two years of maintenance but later increased maintenance when it found that the “anticipated” situation for the wife had not “materialized, through no substantial fault of the wife,” and the trial court’s ruling was upheld, *id.* at 4;

- recognized that, once the trial court has found a substantial change in circumstance per statute, then the “only limitation placed on the trial court’s ability to award maintenance is that the amount and duration, considering all relevant factors, be just,” *id.* at 5;
- held that “substantial evidence supported the trial court concluding Ms. Dannenbring’s circumstances have changed sufficiently to warrant modification of her maintenance,” and for the trial court to conclude that (a) she had not acted in bad faith and that (b) the case was similar to the Bowman decision, cited above, *id.* at 5-6;
- held that the trial court did not abuse its discretion by increasing maintenance, given all statutory factors and factual considerations, and given that “substantial evidence supports the court’s finding of an unanticipated substantial change in circumstances.” *Id.* at 7.

The Court of Appeals reversed *on only one ground*: it ruled that the law permitted Ms. Dannenbring to file additional petitions. In re Marriage of Dannenbring, 186 Wn. App. 1001, *1 (2015).

The Court also ruled that the trial court did not err by not reserving lifetime maintenance as an issue, *specifically because* Ms. Dannenbring could, by law, return to the court on a new petition to modify. *Id.* at *8-9. The Court pointed out law that maintenance can be reviewed at “the end of the fixed period” if there is a showing of need and a showing that “the evidentiary expectation upon which the trial judge premised his finding has not, in fact, materialized.” The Court of Appeals concluded by stating: “If Ms. Dannenbring finds she still needs maintenance *after the fixed term ends*, she can petition for modification.” *Id.* (emphasis added).

On October 30, 2015, Ms. Dannenbring filed another petition for modification of maintenance, due to health and financial reasons, to which Mr. Dannenbring responded. (CP 34-40)

In her Petition, Ms. Dannenbring requested lifetime maintenance – the issue that the Court of Appeals had reserved for her if she filed a new petition (see Dannenbring at *9) – and she presented evidence to the trial court that she required this maintenance due to many factors:

- She was 58 years old (59 at the time of hearing), which all but eliminated her window of time to enter the workforce with the success that the trial court had intended at the time of the decree;
- Though her income had increased since the 2013 modification, it was only \$2,800 net a month at the time of the hearing (CP 335);
- Her monthly expenses were \$4,068 at the time of hearing, which significantly exceeded her monthly income (CP 483);
- She had to use her bank deposits to make ends meet on her \$2800 a month salary (CP 336);
- She was rear ended in 2015, resulting in physical injuries, and she required knee surgery in 2015 – all circumstances that impacted her ability to work at all, and then to obtain employment at an appropriate salary and which caused her to have to rely on bank deposits (CP 336-337);
- She could only afford to rent a modest apartment in Seattle, where she worked, with stairs that caused her difficulty due to her knee problems (CP 337-338);
- Her 2006 car (one she purchased, used, from Mr. Dannenbring in 2011) was not as reliable as it once was, and was not fully repaired due to her lack of finances (CP 337);
- She had continued to look for work, with 75 applications (CP 336);

- For retirement, she would have only a small pension and social security, as well as dwindling bank deposits (CP 336)

Early on, Ms. Dannenbring outlined for the trial court the efforts that she made to find work, and the time that she was forced to not work due to the accident and the knee surgery. (CP 523-526, CP 527) Later, Ms. Dannenbring filed a report from her vocational expert Ruth Johnson. (CP 533-539) Ms. Johnson was able to track Ms. Dannenbring's efforts to seek work since the last modification order. (CP 534-538) Included in that report was an exploration of how other work is not available, CP 535-537, and how Ms. Dannenbring had to stay in the Seattle area due to her contract with the Bill Gates Foundation related to a grant that she received from the Foundation. (CP 534)

Mr. Dannenbring objected to a continuation of maintenance. His materials showed, however, that he had increased his monthly income *yet again*. In evaluating his materials (a challenge in itself due to his secrecy), Ms. Dannenbring was able to deduce that Mr. Dannenbring's monthly income had increased almost **\$2,400** a month—from \$11,595.61 in 2013 (at the last modification) to at least **\$13,992.00 a month** now.⁴ (CP 419)

⁴ The trial court made this net calculation, using November 2016 pay stubs. (CP 419, at fn 3) As with the 2013 calculation, this calculation did not include the \$1,300 a month from the rental property in Colville. *Id.*

On January 26, 2016, two months after he had filed his Answer to the Petition to Modify Maintenance, Mr. Dannenbring filed a Motion to Dismiss the Petition, asserting that the “through November 2015” decree language was not effective because maintenance payments under the first two orders were complete as of September, 2015. He claimed that Ms. Dannenbring had to have filed her petition prior to her October 30, 2015 filing date (and made this claim even though he did not assert jurisdiction as a defense in his Answer). (CP 41-43)

In his Motion to Dismiss, Mr. Dannenbring alleged that he had paid all maintenance on time, and by September 15, 2015. (CP 43)

But this was wrong – Mr. Dannenbring even later filed a motion seeking to offset “unpaid maintenance in the amount of \$1,750” from post-secondary support that he claimed to be owed. (CP 59 at paragraph 3.4) Thus, there is no dispute that Mr. Dannenbring failed to pay *at least* \$1,750 of maintenance owed by October 30, 2015 (when the petition for modification was filed). See CP 56-57; Appellant’s Opening Brief at 15.⁵

⁵ It is also undisputed that Mr. Dannenbring billed Ms. Dannenbring for the \$5,000 total still owed for October and November (CP 50), which shows his belief that he owed additional maintenance for those months, but did not claim that amount for any offset.

Ms. Dannenbring objected to this Motion to Dismiss, pointing out that Mr. Dannenbring did not preserve this claim in his Answer, that he still owed her maintenance, and that he had failed to object at any time in the past to this alleged inaccuracy and therefore did not have the “clean hands” necessary to make this equitable argument now. (CP 50-55)

The trial court denied Mr. Dannenbring’s Motion to Dismiss. The court referenced the language in the decree, the 2013 modification, and the Court of Appeals’ decision, and found a consistency in those orders for a fixed term “through November, 2015.” It pointed to the Court of Appeals’ ruling, which stated that “[i]f Ms. Dannenbring finds that she still needs maintenance after the fixed term ends, she can petition for further modification.” (CP 154) (emphasis in original)

The trial court ruled that the decree terms resulted in a fixed term of payment for the second term ending October 31, 2015 (since it began, according to the 2011 decree, on May 1, 2013). (CP 154, at note 1). As to the “through November 2015” language, it held:

But the November 30, 2015 fixed term was not questioned by the Respondent [Mr. Dannenbring] *and it affords the Petitioner time to see if all payments were made, and to determine if the total payments were adequate.*

(CP 154, at footnote 1) (emphasis added)

Once the Motion to Dismiss was denied, the parties engaged in discovery. At the time of hearing, Ms. Dannenbring's circumstance had not changed (except that she was a year older and was now working .80 of a lower paying teaching job, earning \$2800 net monthly). As to Mr.

Dannenbring, Ms. Dannenbring was able to adduce the following:

- His income had significantly increased again – Ms. Dannenbring made an estimate of about \$300,000 in gross income for the year 2016, based on statements through October 2016 and extrapolating income for the next two months, including holiday income and overtime (Memorandum re Modification/Fees filed December 19, 2016, at pages 5-6 (CP __ - __) and accompanying exhibit) (CP 710-716);
- He failed to claim income for his household, despite the fact that his new significant other was living in his house, along with her adult son and his family, thus underreporting household income and expenses (since contribution to expenses likely would be included in a reporting of the income of other household members) (CP 341; CP 425 at footnote 5);
- Mr. Dannenbring's expenses remained basically the same as they had been in 2013, based on his self-reporting, none of which could be verified by Ms. Dannenbring due to lack of production of discovery (Memorandum re Modification/Fees filed December 19, 2016, at pages 5-6 (CP __ - __));
- Mr. Dannenbring's reporting of post-secondary expenses for the parties' children did not add up and, even if it did, his alleged expenditure of \$269,274 in funds borrowed through school loans was nearly \$100,000 more than what the trial court ordered at the time of the decree (Id. at 5-6);
- Mr. Dannenbring's alleged repayment of federal funds could not be discerned because he blacked out all bank records and made the tracing an impossible task (Id. at 6 and CP 68-141);

- His lack of production of bank records except those favorable to him made tracing of all expenses an impossible task (Id.);
- Mr. Dannenbring had a potential windfall of \$131,274 in student loans that apparently were not used on the adult children's expenses (since the adult children had stated that they paid for their own living expenses), leaving an open question of what Mr. Dannenbring spent on post-secondary expenses as he alleged (Id.);
- The \$1300 that Mr. Dannenbring claimed to receive in rent for his Colville home (the home he was supposed to sell) is \$500-\$600 less a month than it may be expected to receive (Id. at 7);

Mr. Dannenbring's financial declaration, filed December 16, 2016,

stated the following:

- He listed a net income of \$13,992.57, which did not include the \$1,300 rent for the Colville home (which he listed on a separate page but did not claim in overall income (CP 170, 171);
- He stated that his monthly debt was \$14,647.96 (CP 170), but that debt included \$2,001 monthly deduction for voluntary retirement deposits (CP 171) and \$1,847 for the monthly mortgage on the Colville home (which created a windfall of debt since he did not also include the rental income of \$1,300 as income) (CP 171)

If accounting for the \$1,300 rental income in the overall income amount as an offset to the claimed mortgage debt, Mr. Dannenbring's claimed monthly income increased to \$15,292.57, which gave him a net income of \$644.61. When also removing as a mandatory deduction the voluntary retirement contributions of \$2,001 a month, Mr. Dannenbring netted a total of \$2,645.61 a month in income – and this total was based solely on his representations in his 12/16/16 financial declaration.

At the December 20, 2016 hearing, Ms. Dannenbring pointed out – and this was uncontested – that Mr. Dannenbring typically has more federal tax held back than he actually pays at the end of the year, which allowed him to receive refunds at the end of the year in amounts of \$17,000 and \$18,000 (for 2013 and 2014), which also is income for which he was not accounting. (RP 40) (CP 706-07 and 592-09) (Attachment 16). For 2015, the refund was \$12,000. *Id.*; CP 610-49 (Attachment 17).

The trial court granted Ms. Dannenbring’s maintenance petition. (CP 407-424) It noted the Court of Appeals’ remand, and reiterated the purpose of the maintenance. It found that while Ms. Dannenbring’s income had modestly increased, Mr. Dannenbring’s net income had steadily increased. It found that both parties reported monthly debt, but that Mr. Dannenbring owns two homes and two cars. It found that Ms. Dannenbring’s modest apartment, her used and unrepaired car, her lack of ability to work due to injuries and a knee replacement; and her dwindling bank accounts that she had to use to pay monthly expenses – a situation made “all the more important” because she has only a small teacher’s pension and little social security for retirement. It also found the lack of post-secondary loan information about who made payments or where the money went, and held that “the Total Loan Balance, without more documentation, is disproportionate to the education costs.” (CP 418-421)

It also found a lack of information from Mr. Dannenbring – i.e., what the balance on the main home mortgage was, or what income other adult members of his household earned. (CP 420; CP 421 at note 6)

It then held that the goal for Ms. Dannenbring “to become fully self-supporting – that goal has yet to be realized.” It also held that Mr. Dannenbring “has the financial ability to help pay for the necessities of his former spouse.” (CP 421) And it was particularly concerned about Ms. Dannenbring’s use of her “dwindling” bank accounts to support herself:

The Court did not contemplate that Barbara Dannenbring, in 2016-2017, would have to use her retirement, namely her bank deposits, in order to meet monthly expenses. And, it was not contemplated that Scott Dannenbring would continue to have increased income and substantial property holdings. These make for a substantial change in circumstances.

(CP 421-422)

The court also found that Ms. Dannenbring has limited financial resources, is “only now verging” on full time employment, and that the “standard of living” for her “since her separation and then dissolution has “gradually deteriorated:” (CP 422)

She was married for 29 years, a long-term marriage. She finds herself eight years short of Social Security. Mr. Dannenbring has net income to not only meet his needs, but also to provide a reasonable maintenance.

(CP 422)

The trial court then recited Ms. Dannenbring's financial woes of not only being short funds to meet expenses but also needing "a reliable car," and needing "this help to avoid depleting her retirement funds." It held that "this will continue even when she is able to work full-time." It then ruled that \$2,000 a month in maintenance was a "reasonable amount" and should continue until Ms. Dannenbring turned 68 years old. (CP 422)

This appeal followed.

E. ARGUMENT

Issue 1: The trial court correctly ruled that the language "through November 2015" in the decree allowed Ms. Dannenbring to file a petition to modify maintenance on October 30, 2015.

In his Opening Brief, Mr. Dannenbring sets out standard caselaw related to modification of maintenance. He accurately cites the law, but misapplies it to this case.

In fact, his recitation of Brown v. Brown, 8 Wn. App. 528, 530, 507 P.2d 157 (1973) – in which he cites language that the maintenance obligation must be "met in full" before it is "forever extinguished," see Opening Brief at 10 - should end this inquiry. **It is undisputed that Mr. Dannenbring owed back support at the time that Ms. Dannenbring filed her petition to modify maintenance on October 30, 2015.** Mr. Dannenbring himself later brought a motion to offset unpaid maintenance from what he claimed to be post-secondary expenses that he had incurred

and that Ms. Dannenbring owed him. There is no exception for the self-help measures that Mr. Dannenbring used here when refusing to pay maintenance owed before the end of the term (i.e., “through November 2015”). The outstanding maintenance still owed means that the obligation was not “met in full” for purposes of prohibiting Ms. Dannenbring from filing a petition to modify vis-à-vis Brown, supra.

The remainder of his argument on this issue also fails. Again, he cites to case law but then misapplies the facts of this case to that law. In each instance, he errs.

For example, he states general law regarding interpretation of court orders; leaps to the conclusion that the decree is “ambiguous” because the term of maintenance is “through November 2015” even though he believes that his payments were complete by October 1, 2015; claims the “most obvious explanation” is that the “drafter of the decree (Ms. Dannenbring’s attorney) failed to count the starting month” when calculating 60 months; states that contract law means that the matter should be read against the drafter; and concludes that, therefore, the term ended in October 2015, despite the plain language of the decree (as well as the language of the 2013 order amending that decree). Opening Brief at 11-13.

This argument ignores the trial court’s ruling that the “November 30, 2015 fixed term ... affords the Petitioner time to see if all payments

were made, and to determine if the total payments were adequate.” (CP 154, at footnote 1) This ruling from the trial court – interpreting its own order – should end inquiry into the end date of the maintenance’s “fixed term” (just as Mr. Dannenbring failure to make all maintenance payments should end it). But Mr. Dannenbring does not cite to this language. He relies instead on his preferred suppositions. This is unreasonable.

It is true that an appellate court will “seek to ascertain the intention of the court entering the judgment or decree” if there are questions about a particular provision, and will use “general rules of construction applicable to statutes, contracts and other writings used with respect to findings, conclusions and judgment.” Callan v. Callan, 2 Wn. App. 446, 448-449, 468 P.2d 456 (1970). But “[t]hese rules include the rule that the intention of the court is to be determined from all parts of the instrument, and that the judgment must be read in its entirety and must be construed as a whole so as to give effect to every word and part, if possible.” *Id.*, 2 Wn. App. at 449 (citations omitted).

The authorities above cited refer to two canons of construction, here particularly pertinent (1) that the court is not confined to ascertaining the meaning of a single word or phrase without regard to the entire judgment, and, if necessary, the judgment roll, and (2) that provisions in a judgment that are seemingly inconsistent will be harmonized if possible. *It is not to be assumed that a court intended to enter a judgment with contradictory provisions and thus impair the legal operation and effect of so formal a document.*

Id. at 449 (emphasis added). See also Better Fin. Solutions, Inc. v. Transtech Elec, Inc., 112 Wn. App. 697, 712 n.40, 51 P.3d 108 (2002) (“[w]here one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more rational construction must prevail”) (quotations omitted).

The trial court’s interpretation of the phrase “through November 2015” (as giving Ms. Dannenbring time to see if all payments were made and to determine if total payments were adequate) not only is a reasonable one that “harmonizes” the decree provisions, but it is, in fact, a ruling from the trial court itself regarding intent, and should be decisive. See Atlantic Coast L. R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 300, 90 S. Ct. 1739 (1970) (Court should accept trial court’s interpretation of earlier order as “controlling” for “certainly the District Judge is in the best position to render an authoritative interpretation of his own order”). This interpretation is also consistent with the Court of Appeals opinion – which the trial court cited in its order denying the Motion to Dismiss – i.e., that “if Ms. Dannenbring finds that she still needs maintenance after the fixed term ends, she can petition for further modification.”

Mr. Dannenbring’s argument on this issue also ignores case law that places the burden on parties to object at presentments or to be held to the terms of the court order – especially in a case like this one, where there

is no appeal and many years have passed since the entry of the order. Cf. e.g., Goncharuk v. Barrong, 132 Wn. App. 745, 748, 133 P.3d 510 (2006) (Appellant waived the right to object to court’s findings by stipulating to their “form and content” when entered). There is no allegation that rules for presentment were improperly followed. This argument is waived.

Moreover, “[a]s a general rule, an appellate court will consider only those issues properly presented to the trial court” and “[f]ailure to afford the trial court the opportunity to rule on asserted error will usually constitute waiver of the right to assert that error on appeal.” Seidler v. Hansen, 14 Wn. App. 915, 918, 547 P.2d 917 (1976). In Seidler, a party objected to certain language within proposed orders, but did not object at the trial court level to the lack of five-day notice for presentment of the proposed orders, required under CR 52(c). The appellate court found that she could not appeal the five-day notice issue because it was not an issue that she brought to the trial court in time for the court to correct it. Here, a similar circumstance has occurred, as Mr. Dannenbring did not bring this issue to the trial court’s attention until after he allegedly paid his last maintenance payment, according to his calendar and interpretation. Mr. Dannenbring’s counsel specifically stated that he had not wanted to spend his client’s money on asking for a correction from the court. See RP 26 (“we would be required to come in and spend our client’s money on a

nunc pro tunc. And that's all that really needs to be done there is a *nunc pro tunc*"). Changing an order *nunc pro tunc* (i.e., dating it backwards) is an equitable remedy, see In re Cuebas v. Arredondo, 223 U.S. 376, 377, 32 S. Ct. 277 (1912), and Mr. Dannenbring's failure to bring this solution to the court at an appropriate time makes the remedy unavailable now.

And Mr. Dannenbring's argument regarding the "drafter of the document" being held responsible is off the mark. First, the cases cited by Mr. Dannenbring has to do with specific areas of the law (insurance law and restrictive covenants) where the drafter has a superior position as a practical matter, something that did not occur here. In fact, the parties here were attempting to put in place the trial court's ruling, not negotiate terms, making the "drafter of the document" reasoning suspect in a case like this one. The undersigned has not found a case where this rule applies to the memorializing of court orders after trial. If this rule *were* to apply in such circumstances, then no lawyer would ever volunteer to go through the time and expense of drafting orders only to have language held against their clients at a later date. This argument must fail.

In any case, the principle cannot apply here because the trial court "harmonized" any potential ambiguity by giving meaning to every part of the contract, as the law requires and as discussed above. After reading the trial court's ruling, it makes clear that there is no ambiguity. And even if

Mr. Dannenbring's one legal position regarding the "drafter" were the only one to be considered (with this Court rejecting all other law and the trial court's own reasoning), it is an argument that cannot be made by Mr. Dannenbring due to his failure to (a) raise the issue earlier and (b) make all the maintenance payments before the Petition was filed.

As to the timing of complaints: Ms. Dannenbring argued below, and argues here, that Mr. Dannenbring was prohibited from making his complaint regarding the "through November 2015" language because he did not raise it properly. A person seeking equity must come into court with clean hands. See In re Marriage of Buchanan, 150 Wn. App. 730, 737, 207 P.3d 478 (2009); see also Pierce County v. State, 144 Wn. App. 783, 832, 185 P.3d 594 (2008) ("[A] person must come into a court of equity with clean hands"). In other words, "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." Portion Pack, Inc. v. Bond, 44 Wn. 2d 161, 265 P.2d 1045 (1954). As noted earlier, a *nunc pro tunc* remedy (as Mr. Dannenbring suggested below) sounds in equity and so Mr. Dannenbring may not raise it – at least for the purposes of barring Ms. Dannenbring from filing a petition to modify – when he chose not to file a motion for *nunc pro tunc* relief that did not impinge on

Ms. Dannenbring. As noted earlier, the appellate court normally will not consider an issue not raised below, as this one was not, from the original decree. The trial court *also* noted Mr. Dannenbring's failure to bring this claim forward in a timely way. (CP 154, at note 1) ("But the November 30, 2015 fixed term was not questioned by the Respondent...")

The doctrine of laches applies here. The doctrine is "derived from the familiar maxim that equity aids the vigilant, not those who slumber on their rights." Arnold v. Melani, 75 Wn. 2d 143, 148, 449 P.2d 800 (1968). "A person defensively asserting laches must establish (1) the claimant had knowledge of the facts constituting the cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay on the part of the claimant in commencing the action; and (3) damage to the person asserting laches." In re Marriage of Dicus, 110 Wn. App. 347, 357, 40 P.3d 1185 (2002). Here, Mr. Dannenbring knew or should have known of the alleged issue of which he now complains, and unreasonably delayed in bringing it to the trial court's attention, to Ms. Dannenbring's detriment (if he were to be successful). Neither this Court nor the court below should be subject to such gamesmanship, and Mr. Dannenbring should be stopped from making the claim he attempts to assert here.

Mr. Dannenbring also states that the court's modification of the 2011 decree in 2013 should not create a different result – i.e., the "through

November 2015” language should not be given meaning, according to Mr. Dannenbring. But the 2013 modification actually lists June 1, 2013 as the starting date of the second 30 months – which would take the parties to the end of November, 2015 – and that counting of months should apply, at least for purposes of the timeline by which to file a petition to modify.

In addition, as noted by the trial court, since the second term of maintenance was to begin on May 1, 2013 (according to the decree), then the fixed term in regards to payment would end on October 31, 2015. (CP 154, at footnote 1) But Mr. Dannenbring is fixated instead on the dates by which he claims to have finished all payments (a claim that is not true, as stated throughout and as conceded by Mr. Dannenbring). Taken to its logical conclusion, Mr. Dannenbring’s position is that a paying spouse could prevent amendment to a maintenance order just by paying early and no longer owing any maintenance. This is not how the law functions.

In the end, Mr. Dannenbring did not make full payment, so it is a pointless exercise for him to engage in these “what if” hypotheticals. He attempts to justify his lack of payment on the basis that he alleged Ms. Dannenbring owed him for her portion of the funds he alleged to have paid for the post-secondary expenses of the parties’ adult children. But there is no self-help measure in the law, and there certainly is not one that ultimately justifies the extinguishing of the other party’s right to modify

maintenance. Under this scenario, we circle back to equity, laches and Mr. Dannenbring's "unclean hands." He cannot engage in self-help measures without court order and claim that the actual court order should be truncated – and amended – both to create a term shorter than stated and to allow self-help measures that were never court-approved.

His argument in this regard, Opening Brief at 14-17, makes no sense. He even cites to the principle of equity and "clean hands" to justify his position against Ms. Dannenbring. In essence, his position is that Ms. Dannenbring should not be able to file a petition to modify maintenance because he should be able to pick and choose when to withhold those payments. The issue decided in Brown, supra, was not whether the paying spouse had paid all of the maintenance due except some that he was holding back as a form of self-help. The issue in Brown was whether all maintenance payments were made.

Here, those maintenance payments were not paid. It was a choice that Mr. Dannenbring made. He could have forced a contempt action and defended it with these alleged self-help measures, or filed for that relief. He could have filed in court to enforce the post-secondary support order itself (something the court invited him to do, and something that he still has not done). As noted by the trial court, it is unclear what monies Mr. Dannenbring had spent on these costs, or when. See Order (CP 421) (Mr.

Dannenbring clearly incurred \$1,750 in post-secondary expenses, and “*may have incurred more, if properly documented*” (emphasis added). The “may have” language and the issue regarding documentation show that self-help measures are improper – actual proof is required. In the meantime, before there is a court order resolving these issues, through an offset or contempt, there are still monies outstanding for purposes of calculating when a petition to modify maintenance could be filed.

Issue Two: The trial court did not abuse its discretion when it ruled that there had been a substantial change in circumstances.

A party may seek modification of spousal support if there has been a substantial change of circumstances. In re Marriage of Spreen, 107 Wn. App. 341, 346, 28 P.3d 769 (2001). The issue is “[c]ould and should the facts now relied upon as establishing a change in circumstances have been presented to the court in the previous hearing?” Lambert v. Lambert, 66 Wn. 2d 503, 509, 403 P.2d 664 (1965). Rulings on whether a party has shown a substantial change in circumstances are reviewed for abuse of discretion. See In re Marriage of Drlik, 121 Wn. App. 269, 274, 87 P.3d 1192 (2004). A court abuses its discretion if its decision is “manifestly unreasonable or rests upon untenable grounds or reasons.” Davies v. Holy Family Hosp., 144 Wn. App. 483, 497, 183 P.3d 283 (2008).

Here, the trial court recognized that Ms. Dannenbring still was not self-supporting as the court intended, and was in a car accident and had knee surgery since the 2013 modification, making her unemployed and impacting her ability to find the work she needed to be self-supporting. In the meanwhile, Mr. Dannenbring had increased income *yet again*, by about \$2,400 *more* a month. Mr. Dannenbring had gone from making \$9,724 a month in 2011 to \$11,595 in 2013, to \$13,992 in 2016, an overall increase of \$4,268 net a month. This too was a substantial change.

Mr. Dannenbring's argument is essentially that Ms. Dannenbring is unable to show a substantial change in circumstances because the trial court had ruled that she could not petition again and this ruling showed that the court no longer had any intention for her to become financially self-sufficient. This conclusion is contrary to this Court's ruling in the first appeal, where it held that, "in the [first] modification" hearing, "[t]he trial court continued to reason Ms. Dannenbring can work and support herself independently..." and that "[t]he court modified her maintenance [in the first modification] to suit Ms. Dannenbring's current needs *while giving her additional time to become self-supporting.*" In re Marriage of Dannenbring, 186 Wn. App. 1001, *8-9 (2015) (emphasis added). While the Court did hold, correctly, that the trial court erred when it prohibited Ms. Dannenbring from filing further petitions, it also held that the court

did *not* err in failing to reserve lifetime maintenance as a future petition issue *because* Ms. Dannenbring could file a petition later, if needed:

While Ms. Dannenbring is in her mid-50s and has limited work experience, she now has a master's degree in English as a second language. She was awarded 50 percent of the community assets in the dissolution and virtually no liabilities. The court modified her maintenance to suit Ms. Dannenbring's current needs while giving her additional time to become self-supporting. *If Ms. Dannenbring finds she still needs maintenance after the fixed term ends, she can petition for further modification.*

In re Marriage of Dannenbring, supra, at *8-9 (emphasis added).

The trial court's own reasoning at the second modification ruling comports with the Court of Appeals' holding. It reiterated the purpose of the maintenance from the time of the 2011 decree and the ruling from the Court of Appeals that Ms. Dannenbring could seek modification if she still needed maintenance; it found that while Ms. Dannenbring's income had modestly increased, Mr. Dannenbring's net income had steadily increased. It found that both parties reported monthly debt, but that Mr. Dannenbring owns two homes and two cars. It found, in contrast, Ms. Dannenbring's modest apartment, her used and unrepaired car, her lack of ability to work due to injuries and a knee replacement; and her dwindling bank accounts that she had to use to pay monthly expenses – a situation made “all the more important” because she has only a small teacher's pension and little social security for retirement. (CP 418-421)

It also found the lack of post-secondary loan information regarding who made payments or where the money went, and held that “the Total Loan Balance, without more documentation, is disproportionate to the students’ education costs.” (CP 418-421)

It also found a lack of information from Mr. Dannenbring – i.e., what the equity in his Oregon home was, or what income other adult members of his household earned. (CP 420; CP 421 at note 6) It was able to discern \$229,715 of equity in the Colville home. (CP 420)

It then held that the goal for Ms. Dannenbring “to become fully self-supporting – that goal has yet to be realized.” It also held that Mr. Dannenbring “has the financial ability to help pay for the necessities of his former spouse.” (CP 421) And it was particularly concerned about Ms. Dannenbring’s use of her “dwindling” bank accounts to support herself:

The Court did not contemplate that Barbara Dannenbring, in 2016-2017, would have to use her retirement, namely her bank deposits, in order to meet monthly expenses. And, it was not contemplated that Scott Dannenbring would continue to have increased income and substantial property holdings. These make for a substantial change in circumstances.

The court also found that Ms. Dannenbring has limited financial resources, is “only now verging” on full time employment, and that the “standard of living” for her “since her separation and then dissolution has “gradually deteriorated.” (CP 422)

She was married for 29 years, a long-term marriage. She finds herself eight years short of Social Security. Mr. Dannenbring has net income to not only meet his needs, but also to provide a reasonable maintenance.

(CP 422)

The trial court then recited her financial woes of not only being short funds to meet monthly expenses but also needing “a reliable car,” and needing “this help to avoid depleting her retirement funds.” It also held that “this will continue even when she is able to work full-time.” It then ruled that \$2,000 a month in maintenance was a “reasonable amount” and should continue until Ms. Dannenbring turned 68 years old. (CP 422)

It noted this Court’s ruling that it did not need to reserve the issue of lifetime maintenance at the first modification due to Ms. Dannenbring’s ability to return to court if she still needed maintenance. (CP 418-419)

In light of these rulings, Mr. Dannenbring’s position has no merit.

Moreover, Ms. Dannenbring had more change in circumstances than only being unable to become self-sufficient. She also was the victim of a car accident, in which she suffered injuries, and had knee surgery, all requiring periods of unemployment. Her employability window of time was closing. As the Court of Appeals noted, she had argued that “a good chance exists she will not become self-supporting given her age and lack of work history.” In re Marriage of Dannenbring, supra, at *8.

Unfortunately, despite her efforts and given all the circumstances, she did need maintenance extended. The trial court recognized the need, recognized Mr. Dannenbring's increased ability to pay, and ruled that a substantial change of circumstances existed. This was within the court's discretion, and was not error.

Mr. Dannenbring also complains about Ms. Dannenbring's list of efforts to find employment, and claims that she gave no reason for staying in Seattle. She did, however, outline her efforts to find employment, and she provided the court with information regarding her contract with the Bill Gates Foundation which afforded her better employment opportunities but also contractually obligated her to a certain area of the country. See Report of Vista Counseling; CP 336. There were no objections to these documents, or representations, and Ms. Dannenbring can proffer that she produced the contract to Mr. Dannenbring in discovery (thus putting his lack of objection in context). These complaints are without merit.

It is notable that Mr. Dannenbring did not raise this issue before the trial court below – i.e., whether the trial court's failure to reserve Ms. Dannenbring's ability to file additional petitions meant that the court no longer was concerned about whether she was self-supporting in the future. Not only does the trial court's ruling negate that assumption, but any issue not raised below will not be heard on appeal. RAP 2.5(a); Seidler, supra.

Indeed, the opposite could be true – i.e., the trial court ruled that there should be no more petitions to modify because it believed that Ms. Dannenbring would have sufficient additional maintenance to make her way without additional help. By not asking the question at the hearing in 2016, Mr. Dannenbring waives the ability to raise it now.

Issue Three: The trial court did not abuse its discretion when it ruled a continuation of maintenance in the amount of \$2,000 a month until Ms. Dannenbring reaches the age of 68.

A purpose of spousal maintenance is to support a spouse until the spouse becomes self-supporting. In re Marriage of Luckey, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). “The court's paramount concern is the economic condition in which a dissolution decree leaves the parties.” In re Marriage of Williams, 84 Wn. App. 263, 268, 927 P.2d 679 (1996). When, *inter alia*, the disparity in earning power is great, appeal courts must closely examine a maintenance award “to see whether it is equitable in light of the post-dissolution economic situations of the parties.” In re Marriage of Sheffer, 60 Wn. App. 51, 56, 802 P.2d 817 (1990).

Mr. Dannenbring essentially complains that he is poor, and that he is “drowning in debt” due to the student loans of the adult children (an issue that he did not prove to the trial court with any degree of confidence, as the trial court noted, CP 421), and that he ended up responsible for the debt from the divorce, making the maintenance unreasonable.

First, at no time does Mr. Dannenbring address his failure to be forthcoming with the court (a problem at the trial court noted in its ruling) on such things as the equity in his current home or the use of school loans.

Second, if Mr. Dannenbring were “drowning in debt” as he claims, he would not be putting \$2,000 a month into voluntary retirement accounts – instead, he would be catching up on his alleged debt. It brings further into question his lack of candor with regard to the value of his homes, cars and his interactions with the student loans that were more than \$100,000 over the decree’s expectation (as stated earlier in the Facts section).

Third, as noted earlier, it is a fact that Mr. Dannenbring listed the Colville home mortgage as a debt but did not list the \$1,300 rental income in the “plus” column, making this an imbalance. While the trial court did not make this finding, and its finding is not an abuse of discretion, this Court should be aware of this mathematical issue.

Fourth, it was before the trial court that Mr. Dannenbring received significant income tax refunds in 2013 and 2014, and documents showed a refund in 2015.

Fifth, Mr. Dannenbring reported none of the income of the other individuals living in his home, a fact that concerned the trial court and brings into question the legitimacy of Mr. Dannenbring’s claim that all his monthly expenses belonged to him.

Sixth – with regard to the debt from the 2011 decree – it should be noted that the community debt was paid off at the time of trial, and that Mr. Dannenbring received only his individual debt that he had incurred since the separation. (CP 5-6, 11, 13) Ms. Dannenbring’s separate debt was much less (CP 6), and so the debt from the dissolution was much less for her. But Mr. Dannenbring was made responsible for his *own* debt.

The trial court expressed concern that Ms. Dannenbring had to use her savings, intended for retirement, to support herself. The court ordered \$2,000 a month to Ms. Dannenbring –the same amount Mr. Dannenbring has used monthly to build up his retirement. Mr. Dannenbring’s financial declaration let the court know that part of Mr. Dannenbring’s lack of income was due to the fact that he put about \$2,000 a month into 401(k) or 403(b) retirement accounts. He had been doing this post-divorce, all while Ms. Dannenbring had been forced to deplete her savings that were meant for her retirement. The maintenance award of \$2,000 a month is not an abuse of the court’s discretion.

Mr. Dannenbring’s records were incomplete – the trial court itself expressed concern, as noted above. The burden of production of financial evidence is on the party making the assertion about his finances. See In re Marriage of Gainey, 89 Wn. App. 269, 274-75, 948 P.2d 865 (1997). His failure to do so should result in the dismissal of this claim.

Mr. Dannenbring speaks about the issues with the Colville home, Opening Brief at 25. But he forgets that Ms. Dannenbring challenged the amount of rent he received, pointed out that he did not produce discovery related to that “rent,” and received from the trial court a valuation of the home (gone unchallenged here) that the equity in the home is \$229,715. This is compounded by the fact that Mr. Dannenbring failed to release the information about equity in his Oregon home – it was “blacked out.” (CP 420) His complaints are not well taken, proof was his responsibility under Gainey, and what little information that he did provide was challenged by Ms. Dannenbring and questioned by the trial court.

It is undisputed that he has a net monthly income of \$13,992 – not including the \$1,300 monthly rent of the Colville home – with two homes and cars. Ms. Dannenbring lives in a modest Seattle apartment on \$2800 net a month. She has had health issues and insufficient funds, and her expected retirement funds are dwindling because she must spend them on current living expenses. It was in the court’s discretion to order as it did.

Mr. Dannenbring also complains that now Ms. Dannenbring can afford her stated minimum expenses. But she needs a new car, and an apartment (not even a house) that accommodates her health needs. This is an issue of standard of living, which the trial court held had “deteriorated.” (CP 422) Issuance of maintenance under these circumstances was just.

Mr. Dannenbring also complains about the length of maintenance under this new order. But this Court made clear that the trial court could consider longer maintenance. Ms. Dannenbring worked hard to comply with the trial court's orders and expectations, and at all times she acted in good faith. But she was a displaced homemaker who is able to work but not be self-supporting. The parties had a 29-year marriage with the career of one party taking precedence over the career of the other party. Having maintenance decided over a period of time, in order to see if the displaced spouse is able to become self-supporting, is a reasonable approach and, at a minimum, is within the trial court's discretion to do. There is no error.

Issue Four: The assignments of error are general rather than specific, making any response impossible and Ms. Dannenbring objects to this section on that basis.

Mr. Dannenbring makes assignments of error to whole paragraphs, but does not cite to a specific sentence or holding to which he objects. Ms. Dannenbring objects to this generalized approach. To the extent that the specific objections are contained with the brief itself, Ms. Dannenbring points the Court to the specific responses that she has made above.

As to Mr. Dannenbring's objection to whether a finding of fact is a conclusion of law (or vice versa), Ms. Dannenbring notes that this Court does not typically elevate form over substance. See, e.g., Sloan v. Horizon Credit Union, 167 Wn. App. 514, 520-21, 274 P.3d 386 (2012).

To answer some specific questions:

The specific math regarding unpaid maintenance is not as relevant as the fact that it was owed. But it appears that Mr. Dannenbring attempts to change what he owed, or when, and it is significant that he has made more than one representation regarding what is owed. The parties agree that at least \$3,000 was owed. Respondent's Brief at 15.

As to whether Ms. Dannenbring "filed" her bank records – there was no objection to Ms. Dannenbring's representations at the trial level. She presented the evidence under sworn statement. Ms. Dannenbring's salary had only just increased, and her depletion of savings had to do with earlier years, as well as the months that she could not work due to health issues – all of which was presented pursuant to sworn testimony. Again, Mr. Dannenbring did not object, nor did he take her deposition. But the parties did exchange discovery. Failure to object below results in waiver.

As to Mr. Dannenbring's records regarding student loans – Ms. Dannenbring briefed the inconsistencies and Mr. Dannenbring's refusal to provide full documentation. See e.g., Memorandum re Modification/Fees filed December 19, 2016 (CP ___ - ___); CP 343-348. This objection should be denied. Ms. Dannenbring disputes that "perfect tracing evidence" is required, as Mr. Dannenbring claims. But this record was replete with inconsistencies which remain.

As to Ms. Dannenbring's deteriorating standard of living – to object to this ruling is to not give a fair reading of the evidence. Ms. Dannenbring stated in her declarations the issues she had with her living situation, and how she has had to keep costs down in order to have what little money she can for retirement. Her salary is required to support her in the Seattle area and she described how her living conditions suffered due to the little money that she had. This objection should be rejected.

Issue Five: This Court Should Order Mr. Dannenbring to Pay Ms. Dannenbring's Attorney Fees

Fees can be ordered under RAP 18.1 and RCW 26.09.140. RCW

26.09.140 provides:

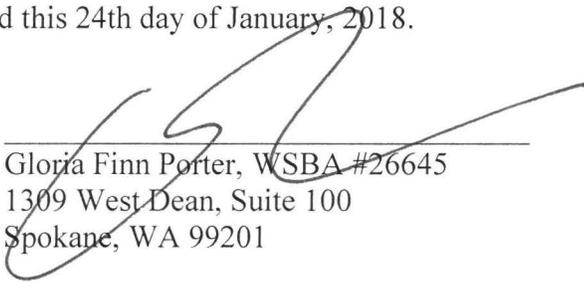
The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter. . .

To make such an order, the Court of Appeals will examine the arguable merit of the issues on appeal as well as the financial resources of the respective parties. In re Marriage of CMC, 87 Wn. App. 84, 89, 940 P.2d 669 (1997). Ms. Dannenbring will provide a financial affidavit in a timely manner, as required by RAP 18.1, to demonstrate her need for her fees to be paid. The merits of her defense of Mr. Dannenbring's appeal are set forth above, and justify an order of fees at this level.

F. CONCLUSION

For the foregoing reasons, Ms. Dannenbring asks that this Court to affirm the trial court below and to order Mr. Dannenbring to pay her fees.

Respectfully submitted this 24th day of January, 2018.



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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BARBARA DANNENBRING)
)
 Respondent) COA No. 35200-5-III
vs.) No. 09-3-00189-0
)
SCOTT DANNENBRING) PROOF OF SERVICE
)
 Appellant)
_____)

I, Gloria Finn Porter, counsel for the Respondent herein, do hereby certify under penalty of perjury that on January 24, 2018, I served the attached Amended Response Brief upon the following by mailing a true and correct copy of the same by U.S. mail, postage prepaid, to:

Joseph W. Brown, Esq.
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Dated this 24th day of January, 2018.



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