Cause No. 309657-III

COURT OF APPEALS, DIVISION 1II
OF THE STATE OF WASHINGTON

ROBIN JOHNSON/, Respondent /Appellant

v.

PETER JOHNSON, Petitioner/ Respondent

OPENING BRIEF OF APPELLANT

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509-835-5377
WSBA # 30613

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I. Introduction

This appeal arises from a commissioner's ruling to generally allow a modification to a maintenance provision in a divorce decree without a petition for modification having been filed; and, to not order responsibility on a VISA payment that was clearly the husband' s responsibility when the husband had also not provided sufficient proof of fulfilling his responsibility. Appellant had timely filed a motion to revise the commissioner's ruling, but the judge struck the hearing under the authority of the local rule for failure to follow a procedure dictated by a local rule that acted as a secondary jurisdictional bar. Remand is sought.

II. Assignments of error

1. It was error for Judge Triplet to strike the motion to revise, to not allow its continuance on April 19, 2012 and to not remedy the error in his June 12, 2012 order denying reconsideration.

2. Commissioner Valente erred in entering the order of February 28, 2012 and in determining that during the period from October 2003 until October 2005, the husband more than satisfied the maintenance obligation owed by paying household bills. The specific findings in error include:

a) It was error to determine that "the parties somehow entered into a mutual agreement that all of these benefits that Mr. Johnson was transferring to Ms. Johnson constituted in-kind payments and contributions towards the maintenance obligation"; CP 137 lns 20-24

b) It was error to find that such benefits being transferred to Ms. Johnson exceeded the $1,200 maintenance payment; CP 137 ln 24 – CP 138 ln 5.

c) It was error to conclude that Mr. Johnson paying $1,200 in maintenance in addition to the bills he paid would be a double payment to Ms. Johnson, and "absurd". CP 138 ln 2-5; 139 lns 1-5.

d) It was error in finding that "in lieu of making maintenance payments, Mr. Johnson made both halves of the house payment."

e) It was error to consider the use value of the home going to Ms. Johnson, as relevant to maintenance, with some form of value going to the wife of $1000, where, per the terms of the decree, the husband was required to make ½ of the mortgage payment. CP 137 ln 12-16; *cf* Decree at 3.4 CP 254.

f) It was error to determine that Ms. Johnson would have been worse off if she had received the $1200 per month and had to pay her responsibilities of ½ the house payment, utilities and the car payment. CP 138 lns 13-18; *cf* Findings of Fact at 2.11, CP 254.

g) It was error to determine that Ms. Johnson was responsible for the utilities payment. CP 138 ln 17 *cf* Findings of Fact at 2.11, CP 245-246.

h) It was error for the commissioner to conclude that the maintenance obligation of Mr. Johnson was more than satisfied for the period from October 2003 until October 2005. CP 138 lns 20-25.

i) It was error for the commissioner to not weigh, but ignore the facts that from October 2003- March 2005, the joint bill paying was being done by the husband from the joint account that was owned by the parties jointly, or as tenants in common per the decree and by law, that both parties put funds into this account, and to further ignore that the wife was paying the $260 Visa on behalf of the husband, as a rational, fair minded person would not have ignored the wife's contributions in reaching a conclusion.

j) Substantial evidence does not support the commissioner's conclusions conclude that the reasons Ms. Johnson did not complain to the court from 2003-2005 for not receiving the $1200 transfer was because she was getting a great deal, better than what she would have received under the decree. CP 138 ln 12-19.

3) a) Regarding the VISA, it was error for the commissioner to determine that he could not find Mr. Johnson in contempt, that he did not order specific performance, and that he could not determine a judgment regarding the VISA, because, although Mr. Johnson is clearly to pay the debt, he doesn't know what happened and there's no evidence before the court. CP 139 ln 14- 140 ln 5.

b) It was error for the commissioner to find that Ms. Rimov had made the "patently absurd suggestion" that Mr. Johnson should make payments at $260.00 a month in perpetuity, calling such suggestion "shocking and nonsensical". CP at 139 ln15-18.

c) It was error for the commissioner to conclude that the decree, requiring payments by Mr. Johnson on the Visa at $260/month, was "presumably" referring to the amount at the time of the decree that Mr. Johnson was suppose to pay off. CP 139 lns. 19-22.

d) It was error for the commissioner to conclude that because the amount of the Visa was not stated at the time of the decree, it was a "vital" missing fact, CP 139 lns 24-25, aparently precluding the the commissioner from ordering Mr. Johnson to make the payments at all.

e) It was error for the commissioner to conclude that because he could not determine the balance owed on the VISA at the time of the decree, he couldn't quantify Mr. Johnson's obligation, and therefore he couldn't enter a judgment. CP 140 lns 1-5.

f) 4) It was error to not award attorney fees to Ms. Johnson.

4) It was error to not find a judgment, and not apply interest on the judgment.

III. Issues Pertaining to Assignments of Error

A. Issues within the Commissioner's Ruling

1) Did the commissioner error by first finding the parties had somehow agreed to modify the decree, and then approving the modification in lieu of maintenance? Assignment of Error Section 2.

2) Did the commissioner error by allowing modification by

agreement, without a petition having been filed, rather than interpreting the decree and construing it, in determining if contempt had occurred? Assignment of Error Section 2.

3) Did the commissioner error in his factual finding that the financial benefits to Ms. Johnson of Mr. Johnson paying her bills exceeded the $1,200/month in maintenance owed (each month) from June 2003 – March 2005, as there was not substantial evidence supporting this finding? Assignment of Error sections 2 (b); (c); (e); (f); (g); (h).

4) Did the commissioner error by permitting a substitution of bill paying for maintenance, without a formal modification of the decree? Assignments of Error 2 (a); (c); (d); (e); (f); (g); and (h).

5) Did the commissioner impermissibly modify the decree when he presumed that where the decree ordered Mr. Johnson to pay "$260/month" at section 3.4, that was only meant to mean $260/month on the then existing debt at the time of the decree, when the decree did not so state, and the husband did not so testify? Assignments of Error Sections 3 (b); (c); (d).

6) Did the commissioner err when he based his determination to not find contempt, because there was insufficient evidence to determine if Mr. Johnson had paid his full responsibility or not, when the burden of proof was Mr. Johnson's? Assignment of Error 3 (e)

7) If the document required Mr. Johnson to pay $260/month on the

VISA, and he had never paid $260/month, but a balance on the VISA remained and the wife had been making the payments instead, did the commissioner abuse his discretion in not entering a judgment on the $260/month plus interest as requested by the wife? Assignment of Error 3 (a) – (e).

8) Did the commissioner error by not awarding attorney fees to Ms. Johnson? Assignment of Error (5).

B) Issues within the Judge's ruling, in striking the revision motion

1) Are the Spokane Local Rules LAR 0.7(d) regarding revisions invalid because they contravene constitutional, legislative, and state court rules directives?

2) Did the court have a duty to not follow the local rules if LAR 0.7 (d) if it is invalid?

3) In this case, did the court have a duty to, at the least, provide a continuance of the motion to revise, to avoid applying the invalid portion of the local rule?

IV. Statement of the Case

Mr. and Mrs. Johnson entered into a petition for legal separation on May 30, 2003. CP 2, ln 1. Both parties appeared pro se. *Id.* They filed a decree of legal separation on October 17, 2003. CP 2, ln 3. The decree of legal separation was turned into a decree of divorce on March 26, 2004 by

motion. CP 2, ln 20-25. All documents entered and filed in the Superior Court throughe the decree of dissolution were entered and filed by agreement. See CP 1, ln 25 – 2 ln 1; CP 139 ln 22-25.

The decree of legal separation has been construed by the Superior Court in a related (but not appealed) motion, that the term of maintenance to Mrs. Johnson at $1200/month was agreed to be for 7 years. CP 11 lines 21-23. The decree of legal separation ordered that the maintenance was ordered to begin in June 2003. CP 2, ln 8- 10 and CP 255.

Not until March of 2005, did Mr. Johnson actually begin to make maintenance payments. CP 12, ln 9. He made maintenance payments of $1,200/month from March 2005 until ½ of May 2011. CP 12 and see CP 19 lines 9-10. In May 2011, he made a ½ month payment and included a note with the payment telling Mrs. Johnson that he was done with the obligation to pay maintenance. CP 20 ln 5 and ln 23 and CP (from 5/31/11 supplemental).

Ms. Johnson nearly immediately filed a motion for contempt, on May 31, 2011. CP 3, ln 7-10.

The court denied the request, explaining that the payments were only to last for seven years per the Findings. CP 20 lns 22-23. But, the court noted that it did not know if the full amount of maintenance owed to Ms. Johnson had been paid, specifically, the maintenance payments not transferred from June 2003 – until March 2005. CP 20 ln 4 – 12.

Following that memorandum decision, Ms. Johnson filed another motion for contempt on January 26, 2012 requesting a judgment for the unpaid maintenance, unpaid Visa payments with reimbursement to Ms. Johnson, and interest. CP 17 – 30.

Ms. Johnson explained that the parties had forestalled the beginning of maintenance payments until their house had sold because Mr. Johnson had purchased another house during the separation and he did not have funds enough to pay two mortgages, all the bills and Ms. Johnson's maintenance too. CP 20. In consideration for her forbearance on collecting the maintenance, she had shown that they continued to share bank accounts and pooled their resources and paid bills for each other, both bills listed in the decree and other bills as well, and she also transferred funds to Mr. Johnson too. CP 20; CP 44-99.

Mr. Johnson claimed that the agreement when they left the court house with the separation decree was that he would continue to pay her ½ of the mortgage in lieu of that portion of maintenance. CP 32 ln 10-12. And, he would also continue to pay the household bills until the house sold. CP 32 lines 10-25. But in his declaration, he does not claim that these additional bills were in lieu of additional maintenance too. In fact, the bills were being paid from the joint checking account, See CP 61-99. This joint account was not awarded in the findings or decree to one person or another. The joint bank account continued to be held by the parties

jointly, with each owning 1/2. See Decree at 3.2 and 3.3 CP 253-254 . This pooling of resources is exactly how Ms. Johnson also explained it. CP 20. It is also how the bank account appears. See CP 61-99.

Additionally, per the Findings of Fact at 2.11, CP245, Mr. Johnson was supposed to pay the household bills, in any event, including the "phone, utilities, food, clothing" at $778/month. Mr. Johnson was ordered to pay $260/month on the VISA. CP 254, Decree at 3.4. Mr. Johnson never made this monthly payment. CP 41 5-11; CP 38 ln 1-22. Ms. Johnson had made all the payments. CP 21- 19; CP 38. There was no ending date for Mr. Johnson to stop paying $260/month, so it would have needed to be paid until nothing more was owed.

Mrs. Johnson calculated interest on the liquidated judgment for the unpaid maintenance and the unpaid Visa payments. She gave credit to Mr. Johnson for having paid maintenance beyond the seven years, from March 2010 through May 2011, and applied these payments as credits to the most delinquent arrearages first. After applying the credits, Mrs. Johnson requested a judgment in the amount of $7,200 in maintenance, and $20,046 in interest on the unpaid maintenance. CP 21 lns 1-7. She also requested $4,000 in attorney fees. CP 22 lns 3-11.

The commissioner found that Ms. Johnson had more than received an equivalent amount of benefit before the house sold, to equal more than

the $1,200/month in maintenance, and therefore excused Mr. Johnson of any judgment for anything. CP 25 lns 20-25.

Mr. Johnson did not provide the math calculations on the amounts he had paid on the bills that would otherwise have been Ms. Johnson's responsibility. *See* CP 32-37. He did not acknowledge nor specifically deny credit for supplies she paid for the both of them. *See generally* CP 2-38. Neither did he give her any credit, for the amounts she had paid for expenses like the dog and the VISA. CP 31-38 compared to CP 20 and CP 44-99; Petition for Legal Separation at 1.15, CP 239.

The commissioner denied all relief. CP140, ln 20-22.

The revision court declined to review the issue and struck the hearing after attorney for Ms. Johnson did not call the hearing in as ready two days before the hearing before noon. CP 206 lns 8-12. The hearing had been set by order of the court. CP 147

On March 9, 2012 , Ms. Robin Johnson timely filed and served her motion to revise the commissioner's order and set the hearing within the 30 day window of local rule 0.7 (a). The first time set for hearing was continued by Judge Tompkins when Judge Triplet was on vacation and not available. CP 2 ln 20 - 3 ln 2. Attorney for Ms. Johnson again called the matter in as ready before Judge Triplet at the next set time, only to learn that Judge Triplet was off the bench with the flu and that the matter would be re-assigned to another judge. CP 150 ln4-6. The substituting judge

Clark on revision then also declined to hear the matter and Judge Triplet's judicial clerk requested another order of continuance, which was entered by late Friday. CP 154 ln 16 – 155 ln 7.

But, Ms. Johnson failed to call in the hearing before noon on Tuesday, April 17, 2012, due to a calendaring error, making contact with the court by 2:00 p.m. instead. CP 150, 10-14. She was informed then by the judicial assistant, Mary Bennett, that the Judge had already stricken several revisions previously scheduled for that Thursday, not called in by noon on Tuesday of that week and expected the same result for this one. CP 155 lns 9-12.

Attorney for Ms. Johnson immediately filed a motion to continue the revision hearing, requesting a hearing as soon as possible from Ms. Bennett, and before the end of day, received a hearing time of 9:00 a.m. on Thursday, April 19th, a time set prior to the previously ordered revision hearing of 1:30 p.m. the same day. CP 13-16.

At the hearing for continuance, Judge Triplet explained that he consistently strikes all revision motions, per local rule 0.7 (d), where their status is not called in by noon, two days prior to the Thursday 1:30 hearings. April 19, 2012 RP at 10. He further explained that the motion to continue could not revive that which had already been stricken on Tuesday. *Id.*

Petitioner Robin Johnson moved for reconsideration under CR 59 (a)(1) and (8) claiming an irregularity of the proceedings of the court

preventing a party from having a fair hearing and claiming error in law occurring at the hearing on the motion to continue on April 19th or occurring at the striking of the motion on April 17, 2012 at noon. CP 153 – CP 163.

V. Argument

A. Relevant standards of review

The portions of the issues regarding interpreting, modifying or clarifying a decree, are questions of law that are reviewed de novo. See *In re Marriage of Thompson,* 97 Wn.App. 873, 877, 988 P.2d 499 (1999); *Chavez v. Chavez,* 80 Wn.App. 432, 435, 909 P.2d 314, *review denied,* 129 Wn.2d 1016 (1996); *McDonald v. State Farm Fire and Cas. Co.,* 119 Wn.2d 724, 730-31, 837 P.2d 1000 (1992).

A trial court's findings of fact are reviewed for substantial evidence. *In re G.W.-F.,* 285 P.3d 208, 211 (Div. 1, September 17, 2012); *Wilson v. Wilson*, 165 Wn.App. 333, 340, 267 P.3d 485 (2011). Substantial evidence is sufficient evidence to persuade a rational, fair-minded person of the finding's truth. *Bering v. SHARE,* 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed,* 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987); *Sunnyside Valley Irr. Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003); *In re Marriage of Hulscher,* 143 Wn.App. 708, 713, 180 P.3d 199 (Div. 2, 2008); *See also Katare v. Katare*, 175 Wn.2d 23, 35, 283 P.3d

546 (August 16, 2012) ("The trial court's findings of fact will be accepted as verities by the reviewing court so long as they are supported by substantial evidence.").

The appellate court defers to the trier of fact for resolving conflicting testimony, evaluating the evidence's persuasiveness and assessing the witnesses' credibility. *See Thompson v. Hanson,* 142 Wn.App. 53, 60, 174 P.3d 120 (2007); *In re Marriage of Greene,* 97 Wn.App. 708, 714, 986 P.2d 144 (1999); *see also, Wilson v. Wilson*, 165 Wn.App. at 340 (weighing of the evidence).

Conclusions of law are reviewed de novo. Findings of Fact must support the trial court's conclusions of law. *Wilson v. Wilson*, 165 Wn.App. 333, 340, 267 P.3d 485 (2011). For example, determining if an equitable principle applies as a defense, given the factual findings, is a conclusion of law. *See In re Marriage of Zier,* 136 Wash.App. 40, 45, 147 P.3d 624 (2006)(explaining that an appellate court reviews a trial court's conclusions of law de novo to determine if they are supported by the findings of fact.)

A trial court's decisions in a contempt proceeding are reviewed for an abuse of discretion. *Moreman v. Butcher,* 126 Wn.2d 36, 40, 891 P.2d 725 (1995). A trial court abuses its discretion if it is based on untenable grounds or reasons. *In re Marriage of Myers,* 123 Wn.App. 889, 892-93, 99 P.3d 398 (2004).

B) The commissioner erred by not applying the decree as written to determine a judgment amount of maintenance, but instead, found the parties had somehow agreed to modify the decree and approved the modification in lieu of maintenance, without a petition being filed, or finding and applying any specific equitable principle to justify not enforcing the decree.

The court was asked to interpret the decree and determine a judgment amount against Mr. Johnson for unpaid maintenance at $1,200/month from June 2003 – March 2005. Instead, the court found that an informal modification, by agreement, had occurred and that Ms. Johnson was more than compensated with benefits in lieu of the $1,200 in maintenance owed. CP 137 ln 5 – 138 ln 25. Was this an abuse of discretion? Short Answer: Yes, because the court did not have authority to ratify an informal modification of the decree.

A trial court has no authority to modify a decree without conditions justifying reopening the decree. RCW 26.09.170(1); *Stokes v. Polley*, 145 Wn.2d 341, 37 P.3d 1211 (2001); *Kern v. Kern,* 28 Wn.2d 617, 619, 183 P.2d 811 (1947). And, a court may not modify maintenance payments retroactively, prior to the time a petition to modify is filed. RCW 26.09.170(1); *Bowman v. Bowman,* 77 Wn.2d 174, 177, 459 P.2d 787 (1969); *In re Marriage of Olsen,* 24 Wn.App. 292, 295, 600 P.2d 690 (1979); see also *Pace v. Pace,* 67 Wn.2d 640, 409 P.2d 172, 173 (1965). Unpaid support becomes vested judgments as each falls due, and the aggrieved spouse can recover such by any lawful means. *In re Marriage of*

Chapman, 34 Wn.App. 216, 220-221, 660 P.2d 326 (1983)(*modifying or conditioning collection or extinguishing what is owed is not permissible*); *see also, McGrath v. Davis,* 39 Wn.2d 487, 489, 236 P.2d 765 (1951); *In re Marriage of Sanborn*, 55 Wn.App. 124, 127, 777 P.2d 4 (1989); *Valley v. Selfridge,* 30 Wn.App. 908, 913 n. 2, 639 P.2d 225 (1982); *In re Marriage of Olsen,* 24 Wn.App. 292, 295, 600 P.2d 690 (1979).

In defining "modify," Division 1 has stated: "A decree is modified when rights given to one party are extended beyond the scope originally intended, or reduced." *In re Marriage of Thompson*, 97 Wn.App. 873, 878, 988 P.2d 499 (1999). Division 3 in *In re Marriage of Drlik*, has relied on a general use dictionary to discern the meaning of modify since RCW 26.09 does not define it.

> mod·i·fy ... 4a: to make minor changes in the form or structure of: alter without transforming ... b: to make a basic or important change in: ALTER ... 5: to change the form or properties of for a definite purpose ... ~ vi: to undergo change syn see CHANGE
>
> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1452 (1993).
>
> The dictionary definition of "modify" is broad, and synonymous with the equally broad terms "alter" and "change." In comparison, the relevant meaning of "suspend" includes "to set aside or make temporarily inoperative ... to defer till later ... to withhold for a time on specified conditions." WEBSTER'S, *supra,* at 2303.

121 Wn.App. 269, 277, 87 P.3d 1192, 1195-96 (Div. 3 2004); *cf* RCW 26.09.004.

Pet this definition of modify, did the court allow an impermissible modification to the decree regarding maintenance when it found an agreement to modify and approved the agreement to modify?

The Decree of Dissolution at 3.7 states that the husband shall pay $1,200.00 maintenance. CP 2 ln 7-10; CP 255. Maintenance was to be paid monthly, directly to the wife. CP 2 ln 16-17, CP 255. The first maintenance payment shall be due on June 1, 2003. *Id.* Nowhere does the decree suggest that the husband could just pay the wife's portion of her liabilities, and pay his financial responsibilities that benefited her and call it good. See CP 252-258.

There is no ambiguity that the decree of dissolution required a maintenance transfer payment of $1,200/month from Mr. Johnson to Ms. Johnson. There was no dispute of fact that the husband did not transfer to the wife $1,200 in cash, at any time, between June 2003 and March 2005.See CP 32 ln 25; CP 12.

Mr. Johnson claims they made an agreement of trading maintenance for bill paying, or at least for the house payment bill paying, as they walked out of the court house on October 23, 2012. CP 32 ln 10-11. The commissioner found that the husband paid bills for the wife listed both in and out of the decree. CP 137. And the commissioner found that the bills the husband paid on behalf of the wife was of greater value than $1,200 in maintenance. The court then concluded that because either the

bills paid on behalf of the wife, or the wife's total benefits package was more than $1,200, her maintenance obligation had been more than fulfilled. CP 138 ln 20-25.

Ms. Johnson disputes these findings, as not supported by substantial evidence. See Assignments of Error 2 a – i, supra. A rational, fair minded person would have added up the bills that Ms. Johnson was to pay, per the decree, that the husband paid out of the joint account, and would have noticed they never equaled $1,200. See Decree at 4, compared to CP 32 – 37. At most, those liabilities amounted to $1008.75/month, from June 2003 until March 2005. Those liabilities were:

"Half Mortgage Payment $653/monthly

Car Payment $284.61 monthly

Car Insurance $71.14 monthly"

See CP 255, Decree at 4, compared to CP 32-37.

A fair- minded person would have also noticed that the other living expenses the husband lists at CP 32-37 that he claims were the wife's bills, were actually his responsibility per the Findings of Fact and Conclusions of Law at pg 4 section 2.11. While the husband had agreed in the Findings that he would pay the phone and utilities as his own liabilities, Mr. Johnson lists those costs as payments also made in lieu of the wife's

maintenance, i.e. phone bills (Qwest) and power bills (Inland Power). CP 32 – 37.

Furthermore, there was no dispute that until March 2005 when the house sold, that Ms. Johnson had paid the $260/month VISA payment on behalf of the husband,. See e.g. CP 38; CP 40 lns 3-10. When the court appeared to ignore this inconvenient truth, there is a lack of weighing of the evidence and lack of acknowledgment of the undisputed financial contribution made by Ms. Johnson towards Mr. Johnson from June 2003 – March 2005, that made calculating any potential credit to be given to Mr. Johnson an impossibility.

A rational, fair-minded person could therefore not conclude that the debit and credit values to the wife that were in variance of the findings and decree, provided the wife an overall benefit that exceeded the $1,200/month maintenance payment throughout the period of June 2003 – March 2005.

The only manner in which a $1,200 benefit to the wife could be found would be to conclude that the financial responsibilities, as set forth in the findings and the decree, could be ignored, and the parties agreed that the $1,200 maintenance would be justified by calculating the total benefit to the wife in all manner of benefits – including the use value of the whole home. And, in fact, that is how the commissioner came to the

conclusion he did. *See* CP 137 ln 20 - CP 138 ln 25. Such conclusion rests on an untenable basis. The conclusion was error.

The commissioner seemed to equate the "duty of maintenance" to substitute for what the actual order of maintenance required. *See* CP 138 lns 8-9. RCW 26.18.020 (2) defines "Duty of maintenance" means the duty to provide for the needs of a spouse or former spouse or domestic partner or former domestic partner imposed under chapter 26.09 RCW. But allowing maintenance to be fulfilled any old way, despite its glorified rhetoric, *see* CP 138, lns 8-18, was permitting an impermissible modification.

The trial court allowed transformation of the clearly stated $1,200 cash payment of maintenance into payment of the wife's bills for 21 months, whatever they might be, and gave the husband credit even for those bills the husband was responsible to pay anyway, per the findings and the decree. This was an impermissible modification of the maintenance provision of the decree of dissolution.

An impermissible modification could be a very minor change in the form of maintenance. Even paying the wife's bills out of the joint checking account, even if they exactly equaled $1,200, could be considered a modification, since it changed the form of maintenance from allowing the wife to exercise her own discretion, freedom and responsibilities with cash in hand, to the husband retaining all financial

control. But to allow not only bills paid on behalf of the wife as substitution for maintenance, but to also allow the amount of bills to be any amount and of any kind, including credit to the husband for bills the husband was suppose to pay separately as part of the inclusive maintenance calculation, is unquestionably an impermissible major modification of maintenance. The court did not have such discretion..

In conclusion, the commissioner impermissibly allowed a retroactive modification of maintenance, without a petition for modification filed by Mr. Johnson, allowing Mr. Johnson to pay whatever amount he happened to pay towards Ms. Johnson's bills and his own bills that may have benefited Ms. Johnson, for 21 months, out of a joint account, to substitute for maintenance.

C. The commissioner impermissibly modified the decree when interpreting that where the decree ordered Mr. Johnson to pay "$260/month" at section 3.4, that only meant "$260/month on the then existing debt at the time of the decree". Assignments of Error Sections 3 (b); (c); (d).

Because courts are not allowed to assume a meaning in a decree that creates an ambiguity when the language is otherwise plain on its face, the commissioner should not have added to the plain terms of the decree with his presumption, that created a modification.

The interpretation of a dissolution decree is a question of law. *Kruger v. Kruger,* 37 Wn.App. 329, 331, 679 P.2d 961 (1984). Therefore, this

court should consider de novo, the interpretation of the decree provision at issue. The rules applicable to the interpretation of statutes and contracts apply to interpretation of a dissolution decree; therefore, if the language of a decree is clear, the court will not construe it, but if the language is ambiguous, the court will construe it to give effect to the intent of the court that entered it. *Kruger,* 37 Wn.App. at 331, 679 P.2d 961.

If a decree is unambiguous, there is nothing for the court to interpret, *In re Marriage of Bocanegra,* 58 Wn.App. 271, 275, 792 P.2d 1263 (1990). Then the court must construe it as written, giving effect to each clause. *Smith v. Continental Cas. Co.,* 128 Wn.2d 73, 84, 904 P.2d 749 (1995). An ambiguous decree may be clarified, or interpreted, but not modified. RCW 26.09.170(1); *See also, Stokes v. Polley*, 145 Wn.2d 341, 37 P.3d 1211 (2001) (citing *Thompson*, 97 Wn.App at 878, 988 P.2d 499); *In re Marriage of Greenlee,* 65 Wn.App. 703, 710, 829 P.2d 1120, *review denied,* 120 Wn.2d 1002 (1992).

A writing is ambiguous if it is fairly susceptible to more than one reasonable interpretation. *Smith v. Continental Cas. Co.,* 128 Wn.2d 73, 84, 904 P.2d 749 (1995). If the order is ambiguous, the reviewing court applies the general rules of construction applicable to statutes, contracts, and other writings to ascertain the intent of the court that entered the decree. *In re Marriage of Fox*, 58 Wn.App. 935, 795 P.2d 1170 (1990).

A court, however, is not to discern an ambiguity by imagining a variety of alternative interpretations. A decree or statute is ambiguous only if it can be reasonably interpreted in more than one way, not by conceiving alternatives. *See McCausland v. McCausland,* 159 Wn.2d 607, 615, 152 P.3d 1013 (2007)(citing *Am. Cont'l Ins. Co. v. Steen,* 151 Wn.2d 512, 518, 91 P.3d 864 (2004); *State v. Watson,* 146 Wn.2d 947, 954, 51 P.3d 66 (2002); *Telepage, Inc. v. City of Tacoma,* 140 Wn.2d 599, 608, 998 P.2d 884 (2000)). *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles,* 148 Wn.2d 224, 239–40, 59 P.3d 655 (2002). In construing a contract, "[i]t is the duty of the court to declare the meaning of what is written, and not what was intended to be written." *Berg v. Hudesman,* 115 Wn.2d 657, 669, 801 P.2d 222 (1990) *(quoting J.W. Seavey Hop Corp. v. Pollock,* 20 Wn.2d 337, 348–49, 147 P.2d 310 (1944)). If a writing itself is not ambiguous, the inquiry ends with the plain language and the court must assume the writing means exactly what it says. *See State v. Salavea,* 151 Wn.2d 133, 142, 86 P.3d 125 (2004).

As an aid in elucidating the meaning of the words employed, extrinsic evidence is admissible to ascertain the parties' intent, "where the evidence gives meaning to words used in the contract." *Hollis v. Garwall,* 137 Wn.2d 683, 695, 974 P.2d 836 (1999) ("extrinsic evidence illuminates what was written, not what was intended to be written."); *Berg,* 115

Wn.2d at 669, 801 P.2d 222; *Watkins v. Restorative Care Center, Inc.* 66 Wn.App. 178, 191-192, 831 P.2d 1085, 1092 (Wn.App., 1992). Extrinsic evidence for this purpose includes (1) the situation of the parties at the time the instrument was executed, (2) the circumstances under which the instrument was executed, and (3) the subsequent conduct of the contracting parties. *See Berg,* 115 Wn.2d at 668–69; *Fox*, 58 Wn.App. 935; *Watkins v. Restorative Care Center*, Inc. 66 Wn.App. 178, 191-192, 831 P.2d 1085, 1092 (1992).

However, unilateral and subjective beliefs about the impact of a written contract do not constitute evidence of the parties' intent. *Olympia Police Guild v. Olympia,* 60 Wn.App. 556, 559, 805 P.2d 245 (1991) *(citing Dwelley v. Chesterfield,* 88 Wn.2d 331, 335, 560 P.2d 353 (1977)); *Watkins,* 66 Wn.App. at 191-192. Analysis begins with the text of the statute or contract. *See McCausland v. McCausland,* 159 Wn.2d 607, 615, 152 P.3d 1013 (2007). The court can not resort to statutory construction principles, even when the appellate court believes the legislature, ordering court, or parties intended something else but did not adequately express it. *Am. Cont'l Ins. Co. v. Steen,* 151 Wn.2d 512, 518, 91 P.3d 864 (2004) (citing *State v. Watson,* 146 Wn.2d 947, 954, 51 P.3d 66 (2002)); *McCausland* 159 Wn.2d at 615.

Generally, words in a written agreement are given their "ordinary, usual, and popular meaning unless the entirety of the agreement clearly

demonstrates a contrary intent." *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262, 267 (2005); *McCausland,* 129 Wn.App. at 402.

Here the court was asked to find Mr. Johnson in contempt and to enter a judgment for not paying $260/month on the VISA.

In order to do that, the court had to "strictly construe the order" alleged to have been violated. And then, the facts must constitute a plain violation of the order. *In re Marriage of Humphreys,* 79 Wash.App. 596, 599, 903 P.2d 1012 (1995).

The court had to strictly construe section 3.4 of the decree, where the husband was to pay $260/month on a VISA. In no part of the decree, findings or petition, was the amount of debt on the VISA quantified. Is the VISA payment ambiguous? Or, does it only become ambiguous by imagining and contemplating possible meanings and interpretations, outside the plain terms, due to subjective intent of the court, not the plain terms used? Ms. Johnson requested a finding of contempt and a judgment as if the words were clear on the face of the document, without ambiguity. Mr. Johnson had never paid the $260/monthly debt. Instead, Ms. Johnson had always paid the debt on his behalf, and she requested a finding of contempt, specific performance going forward and a judgment for past amounts paid by her instead of Mr. Johnson. CP 17 -18; *see* CP 21 lns 20-22 (requesting to make the payments directly, hence forth).

The court could allow extrinsic evidence to determine the intent of what is written. What needed to be determined? At 2.11 of the Findings of Fact, CP 245, where the Visa is referenced again at a payment of $260/month, its character is found as the husband's separate liability, so the character did not need to be construed. The court wondered if the VISA on which Mr. Johnson was to pay was ambiguous, so extrinsic evidence could have been admitted to determine what VISA was referenced in the decree.

Mr. Johnson claimed that there were two VISA cards at the time of the divorce, but does not claim to have made monthly payments on either one. CP 38 lns 1-21. Robin references that there was only one VISA card. CP 21 lns 7-26. The court did not find there were two VISAs, only that Mr. Johnson should have been making payments at $260/month on a VISA that had a significant balance. CP 139 lns 11-12. The commissioner acknowledged that Mr. Johnson, "clearly is obligated to pay" for the Visa with $260/month payments. CP 139, ln 14.

The commissioner did not make a finding whether Mr. Johnson had made the payments. In other words, the court refused to take the next step and determine if Mr. Johnson had violated the order. Clearly, he had. The undisputed evidence showed that Mr. Johnson had never made monthly payments at $260/month. See e.g. CP 38 and CP 40-41.

A court not only has the right, but it has the duty to make its decrees effective and to prevent evasions thereof by enforcement. *Goodsell v. Goodsell*, 38 Wn 2d 135, 138, 228 P.2d 155, 157 (1951). By the terms of the dissolution agreement, any part of the agreement can be enforced by "specific performance and injunction in any court of competent jurisdiction" so long as the decree is not modified while being enforced. *In re of Marriage of Greenlee* 65 Wn.App. 703, 710, 829 P.2d 1120, 1124 (1992); *Goodsell,* 38 Wn.2d at 138.

The commissioner erred in not perceiving the plain meaning of the words utilized or determining, specifically, if the provision was ambiguous to be construed, and then in not fulfilling its duty to enforce the decree.

The commissioner did not appear to notice exactly what the plain terms of the decree were, nor did he make a conclusion on whether the plain terms created an ambiguity. The court found paying $260/month *into perpetuity* is "shocking and nonsensical" and "patently absurd". See CP 139 lns 15-18. However, the comments were gratuitous, since neither Ms. Johnson nor Ms. Rimov suggested that the $260/month payment would continue into perpetuity. See CP 122 ln 14; CP 139 ln 14-18 and see CP 21 lns 7-25.

Instead of focusing on what was written in the decree, or if an ambiguity existed and why, the court skipped that fundamental platform

and ventured into error. Without perceiving or interpreting the decree as written, the commissioner began (impermissibly) conceiving alternatives, other scenarios of what the parties must have intended, and what the court must have intended, rather than what was written. The court concluded that the parties must have intended that Mr. Johnson only pay $260/month on the debt then owing at the time of the decree. CP 139 ln 21. But with that conclusion, the court added to the decree, modified it, and attempted to fix the decree to what it believed must have been the intention of the parties, rather than interpreting and enforcing the decree as written. Such is error.

By the court presuming what Mr. Johnson was suppose to pay, the court had effected a modification to the terms of the decree. Then the court still could not conclude what a judgment amount should be, because at the time of the hearing, neither party was prepared to defend compliance with a modified provision they could not have and did not anticipate. The evidence presented by the parties that was intended to prove something different, was not conducive to determining compliance with a decree that had been modified sua sponte. So the court concluded it could do nothing, without enforcing the decree at all. *See* CP 139 ln. 14-CP 140 ln 5. This also was an abuse of discretion.

Had the court focused on the violation of the plain terms of the order, the court could have compelled performance with an order requiring

Mr. Johnson make the VISA payments and provide coercive sanctions, including payment of Ms. Johnson's attorney fees and pre-judgment interest.

It is Mr. Johnson's responsibility to prove obligations were met as an affirmative defense. *See Martin v. Martin,* 59 Wn.2d 468, 472-476, 368 P.2d 170, 172 - 174 (1962). The burden of proof of payments rests upon the husband, *see Id.* at 472 -73. Where an obligation is based on simple calculations, and a defense is payment, the payor assumes the risk of "any failure by reason of indefiniteness." *Id at 472.*

When Mr. Johnson acknowledged never making one monthly payment on the ordered $260/month payment and did not provide proof of compliance under either the plain terms or the court's modification, Mr. Johnson does not meet his burden of proof for any defense, or even offer a rational defense. He should have been found in contempt.

In Summary, whether under the plain terms of the decree or the modified decree interpretation of the commissioner, the husband did not produce sufficient proof of compliance when the undisputed evidence shows he never made the $260/month payment. The court should have found the husband in contempt or, at the least, ordered that the husband begin to pay $260/month on the VISA. It should have also given damages to Ms. Johnson, with the judgment in the amount requested. Remand is requested.

D. If the court had entered a judgment, pre-judgment interest should have also been ordered.

Ms. Johnson had requested the court enter judgment on the amount of interest accrued from unpaid maintenance owed from June 2003 – March 2005. CP 18 and CP 25-26.

The question on the right to interest is a question of law. Each installment of spousal maintenance becomes a separate judgment and bears interest from the due date. *In re Marriage of Sanborn*, 55 Wn.App. 124, 129-130, 777 P.2d 4 (1989); *Valley v. Selfridge,* 30 Wn.App. 908, 913, 639 P.2d 225 (1982). A court has no power to provide for payment of overdue maintenance without interest. *Sanborn*, 44 Wn.App at 127 (citing *Lambert v. Lambert*, 66 Wn.2d 503, 510, 403 P.2d 664 (1965)); *see also* RCW 4.56.110(3) (interest on judgments); *In re Marriage of Glass*, 67 Wn.App. 378, 835 P.2d 1054 (1992) (holding "that a court has no power to decline to award the full amount of statutory interest due on a judgment for overdue child support and/or spousal maintenance.")

Ms. Johnson had provided precise calculations on the amount of interest owed for unpaid maintenance on an excel spread sheet. By these calculations, $20,046 of interest was owed on unpaid maintenance. CP 25-26. Mr. Johnson did not object to the calculation. See CP 31-38. On

remand, Ms. Johnson would ask that the unopposed calculation be entered as a judgment by the trial court.

Interest was also requested to be entered as a judgment for the unpaid VISA payments, also calculated at 1% per month or 12% per annum, for a total of $9,487.40 owed in interest on the unpaid VISA. CP 22, lns 1-2, 25, 26, 28, 29.

Generally, interest on damages begins to run when judgment is formally entered by a trial court. *State Dept. of Corrections v. Fluor Daniel, Inc.* 160 Wn.2d 786, 790-91, 161 P.3d 372 (2007). But, prejudgment interest is allowed at the statutory judgment interest rate, when a party to the litigation retains funds rightfully belonging to another and the amount of the funds can be calculated with precision and without reliance on opinion or discretion, i.e., the amount is "liquidated". *Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998), *corrected on denial of reconsideration,* 966 P.2d 305; *See also*, RCW 4.56.110; RCW 19.52.020.

Before the commissioner, Mr. Johnson did not object to the interest rate, to the application of interest, nor to the calculation of the interest. Of course without entering a judgment, there was no reason to apply an interest rate. But, on any remand, if and when a judgment is to be entered, Ms. Johnson requests that this court direct the trial court to enter pre and post judgment interest.

E. The provision in the Spokane County Local Rule on which Judge Triplet relied is invalid because it contravenes constitutional, legislative and state court rules directives, and should not govern the dismissal of a motion to revise.

Judge Triplet determined that the provisions of Spokane County local rule 0.7(d) are not invalid because they do not contradict or contravene any specific statute and noted that Ms. Johnson did not cite any language in the local rule that did either. CP 209 lns 7-15. With all due respect, the court misapplied the gauge in determining if a local rule contravenes statutory, constitutional or state court rule rights. The gauge is broader than a direct, in your face, contradiction.

The right to seek revision of a commissioner's order is of constitutional magnitude. *State v. Wicker*, 105 Wn.App. 428, 432, 20 P.3d 1007 (2001), and it is also a statutory right. RCW 2.24.050. The Supreme Court has found no need to promulgate any court rule to implement RCW 2.24.050 statewide, thus no Washington Court Rule discusses further implementation of RCW 2.24.050.

Our Supreme Court's General Rule 7 (b) specifies that "[a]ll local rules shall be consistent with rules adopted by the Supreme Court, and shall conform in numbering system and in format to these rules to facilitate their use." Thus, if the state superior court rules do not discuss implementation of RCW 2.24.050, beyond the legislatures' requirements, it is inconsistent and beyond the authority of counties to create local rules to further govern

RCW 2.24.050. If local rules are promulgated at all regarding RCW 2.24.050, the local rule is already inconsistent with the Supreme Court's rules – going where the Supreme Court did not go and the county rules regarding revision thus do not have the ability to conform to the numbering system of the State Court rules, because there is no state court rule counterpart. Generally, however, where a county has promulgated rules for revision to manage the specific revision process differently than a normal motion, the error is harmless and provides assistance for parties to conform to the local processes. *See generally* CP 164-202 for local rules mentioning "revision" in Washington State. But, where a county implements local rules regarding RCW 2.24.050, the county cannot create additional procedural requirements that act like additional jurisdictional bars, beyond RCW 2.24.050, before the court will consider revising a court commissioner.

The only jurisdictional and procedural requirements of RCW 2.24.050, must be limited to RCW 2.24.050 and case law interpreting RCW 2.24.050. Those procedural rules are that a motion to revise must be filed within 10 days of a commissioner's order and that no additional evidence can be considered by the judge that was not before the commissioner. RCW 2.24.050; See also *Perez v. Garcia,* 148 Wn.App. 131, 543, 198 P.3d 539 (2009); *Robertson v. Robertson*, 113 Wn.App. 711, 715, 54 P.3d 708 (2002); *In re Marriage of Balcom and Fritchle*, 101 Wn.App. 56, 58, 1 P.3d 1174 (2000).

It seems impermissible, then, for a local rule to cause automatic dismissal of a motion to revise for failure to call in the hearing before noon, two days prior to the hearing time. Under Spokane's local rules, failure to call in the status of the hearing creates secondary jurisdictional bars to the review of a commissioner's order. In this case, the jurisdictional bars even applied to an ordered continuance of the hearing that had been caused by the court due to the court's own scheduling demands and conflicts. Such bars and impediments to hearing matters of state constitutional and statutory import, that are not already guided by the State Court Rules, must be invalid and should not control any decision by a Judge.

No appellate decision has addressed if failure to call a hearing into the judicial officer at a set time prior to the revision hearing, which otherwise dismisses a motion to revise, is permissible or whether it is an invalid local rule. Only Yakima and Spokane counties have such revision hearing procedures. See CP 201 and Spokane County LR 0.7 (d). No Washington appellate case (found) discusses review of any local rules that control the implementation of revision motions that contain additional deadlines.

The constitutional right that is to be preserved and not contradicted by statute or local rules is a right provided by Washington State's constitution, Article 4, section 23:

> There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

State v. Smith, 117 Wn.2d 263, 268, 814 P.2d 652 (1991).

RCW 2.24.050 sets forth the specific revision procedure to provide and manage this constitutional right:

> "All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge."

When all acts of court commissioner shall be subject to revision, the "shall" is imperative and generally operates to create a duty. *Smith*, 117 Wn.2d. at 271 (*citing Emwright v. King Cy.*, 96 Wn.2d 538, 544, 637 P.2d 656 (1981); and *State ex rel. Nugent v. Lewis,* 93 Wn.2d 80, 82, 605 P.2d 1265 (1980)).

Case law routinely emphasizes the right to review of a commissioner's order by the Superior Court. *Id. (citing In re Bellanich*, 43 Wn.App. 345, 349, 717 P.2d 307 (1986)); *In re B.S.S.*, 56 Wn.App. 169, 170, 782 P.2d 1100 (1989), *review denied,* 114 Wn.2d 1018, 791 P.2d 536 (1990)).

The right to review of a commissioner's decision to a judge is especially important due to the Superior Court judge's scope of review being greater than appellate review. The scope of review by a revising court includes authority to determine its own facts based on the record before the commissioner, de novo, and not merely whether substantial evidence supports the commissioner's findings. *See In re Marriage of Dodd*, 120 Wn.App. 638, 644, 86 P.3d 801 (2004); *State v. Wicker*, 105 Wn.App. 428, 20 P.3d 1007 (2001). And the loss of the right to revise is presumptively prejudicial, "because no presumption of reliability can be accorded to judicial proceedings that never took place." *State v. Wicker*, 105 Wn.App. at 433. In *State v. Wicker*, the loss of the right to revise due to an attorney's lack of timely filing the notice to revise is considered "ineffective assistance of counsel" and such caused reversal and remand to the Superior Court for a revision hearing. *Id.* at 434.

Local Rules are not allowed to supersede or be inconsistent with state court rules or statutes. CR 82.5 states that "[e]ach court by action of a majority of the judges may from time to time make and amend local rules

governing its practice not inconsistent with these rules. Local rules shall be numbered and indexed in a manner consistent with the numbering and index system for the Civil Rules."

In analyzing whether an impermissible inconsistency exists between local ordinances and state statutes, the gauge is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. *Weden II v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998) (*quoting* "'an ordinance is in conflict if it forbids that which the statute permits'") *citation omitted.* Spelling out the vice versa, where the statutes permits or licenses that which the local rules constricts, forbids or prohibits, the local rule is deemed invalid.

No case found discusses a local rule impinging on the time requirements of the revision statute, RCW 2.24.050. However, discussing a similar issue of local rules not allowed to impinge on the timing provided of a state court rule, in *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991), the gauge is described therein as: "The statute grants a valuable right to a litigant; a local rule cannot restrict the exercise of that right by imposing a time requirement different from the statute. " *Id. (quoting In re Marriage of Lemon*, 118 Wn.2d 422, 424, 823 P.2d 1100 (1992)).

Here, the local rule 0.7 of Spokane County impinges on the right to revise and imposes time and action requirements amounting to jurisdictional

hurdles different from the statute and in addition to the statute. If the time and action requirement are not met, of conferring with counsel and then phoning in the status of the hearing two days prior to the hearing, the motion to revise is automatically dismissed – stricken, usually without any means for its revival. See CP 209 lns 9-12; 210 lns 15-20; and Spokane LR 0.7(d).

F. Where a local rule is invalid, the court has a duty to not enforce it.

In Harbor Enterprises, Inc., 116 Wn.2d 283, 293, 803 P.2d 798 (1991) where a local King County Rule had a different time standard than what the state statute required for filing an affidavit of prejudice, our Supreme Court simply notes that "the local rule would not control because its provision conflicts with the statute." Similarly, local rules must not be inconsistent with rules adopted by the Supreme Court. *Id. (citing Sate v. Chavez,* 111 Wn.2d 548, 554, 761 P.2d 607 (1988)). It also explains that a local rule which conflicts with a statute is negated. *Harbor*, 116 Wn.2d at 293.

Similarly, our state Supreme Court in *Marine Power & Equipment Co., Inc., v. Industrial Indemnity Co.*, 102 Wn.2d 457, 687 P.2d 202 (1984) declined to create a rule or exception by case law that clearly contravenes the legislative intent on the timeliness of an affidavit of prejudice.

A local rule that creates excessive traps for the unwary on timeliness, for each continued hearing, ordered hearing, and noted hearing, is a local rule with impermissible control. The U.S. Supreme Court in *Colgrove, v. Battin,* 413 U.S. 149, 93 S.Ct. 2448 (1973) observes that rules with substantive results or basic procedural innovations which "bear on the ultimate outcome of the litigation", are of as great an import to litigants as substantive doctrine. Noting that such rules should be reserved to higher than local powers of creation (not to be allowed in local rules). *Colgrove, v. Battin*, 413 U.S. 149, 164 n.23, 93 S.Ct. 2448 (1973)(*citing Miner v. Atlass*, 363 U.S., 641,650 (1960).

Here, failure of Ms. Johnson's attorney to call in one of the many scheduled, then continued revision hearings, whether noted or ordered, caused the entire matter to be dismissed. This court has a duty to not allow the local rule to control when it acts as a substantive bar per *Colgrove*, *supra,* or to negate the directive of the local rule, or invalidate it when it contravenes the constitution of Washington, statutes, or Washington Court Rules per *Harbor, supra*. Such substantively procedural matters are reserved to higher than local court rules.

The court failed its duty to uphold the statutory rights and state constitution by implementing enforcement of the local rule. In so doing, it abused its discretion. The appellate court must remand to protect Ms. Johnson's right to her revision hearing.

G. **In this case, if Judge Triplet had provided a continuance of the motion to revise, the impermissible local rule provision could have been side stepped.**

Both CR 6 (b) and LAR 0.7 (d) allowed for the remedy of a continuance. Granting a continuance of the motion to revise hearing would have saved the matter from the impermissible dismissal.

CR 6 specifies that a court may, whether under the court rules or order of a court, allow a period enlarged "if request therefore is made before the expiration of the period originally prescribed, or as extended by a previous order." The burden of the movant is higher, to "excusable neglect", if the period specified by previous order has expired. Here, CR 6 allowed the court to continue Ms. Johnson's hearing, despite the court having already stricken it from the hearing calendar, because the original period prescribed by the order of continuance had not yet expired.

Additionally LAR 0.7 (d) states that continuances are to be freely granted. "The Judge scheduled to conduct the hearing shall approve *any* order of continuance."

Judge Triplet denied Ms. Johnson's request for a continuance because he understood the local rule already operated to strike the hearing at noon, two days prior to the hearing, and Ms. Johnson's attorney did not confer with opposing counsel about another continuance prior to noon, two days prior to the hearing. CP 208, lns 2-9.

Judge Triplet's analysis identifies yet another jurisdictional hurdle in the Spokane County local rule on revision, even to a parties' utilization of continuances for the hearing, where on the surface of the local rule "[t]he Judge scheduled to conduct the hearing shall approve any order of continuance." But, in fact, per Judge Triplet's reading of the local rule, a party must have conferred with opposing counsel about the continuance request prior to noon, two days before the hearing, rather than before the scheduled hearing. Such is error for the same reasons previously stated regarding this local rule, and the continuance should have been granted to save this action from an impermissible dismissal.

Ms. Johnson respectfully requests that this court remand for a revision hearing.

H. Attorney Fees Should Be Granted on Appeal and on Remand

1. Attorney Fees are Requested for this Appeal

Under RAP 18.1, a party must request fees and costs in its opening brief for the appellate court to consider awarding them. Ms. Johnson asks for attorney fees for this appeal.

RCW 26.09.140 allows the appellate court, in its discretion, to order a party to pay the other party his or her attorney fees on appeal from a dissolution proceeding. Factors to consider for making such an award include the parties' relative ability to pay and the merits of the appeal. *In*

re Marriage of Leslie, 90 Wash.App. 796, 807, 954 P.2d 330 (1998); *In re Marriage of Sanborn*, 55 Wn.App. 124, 130, 777 P.2d 4 (1989).

RCW 26.09.140 provides in part:

> "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 and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment."

RCW 26. 09.140

Ms. Johnson will be filing a financial declaration and an affidavit of need showing her need for attorney fees and her inability to pay them.

Attorney fees are required as sanctions in any prevailing contempt action for maintenance owed. RCW 26.18.160 provides: In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees.

If the appellate court determines Ms. Johnson is the prevailing party in the contempt action, it should also award fees under RCW 26.18.160. That should include if either a judgment is ordered or a specific performance remedy implemented.

Ms. Johnson should also be entitled to fees under section 3.6 of her decree when she has had to bring an action related to the lack of payment by Mr. Johnson on the VISA. This court should order the fees under that provision as well, if the other fee theories do not provide recovery for all the attorney fees incurred by Ms. Johnson.

2. Attorney Fees Should be Granted On Remand.

The awarding and amount of attorney fees under an RCW Title 26 procedure does rest in the discretion of the trial court, and an appellate court will only interfere with an award where the trial court's decision was unreasonable or untenable. *Abel v. Abel,* 47 Wn.2d 816, 819, 289 P.2d 724 (1955).

Attorney fees should have been ordered at the trial court under RCW 26.09.140. RCW 26.09.140 allows the court to order one party to a marriage dissolution action to pay attorney fees and costs to the other party for "enforcement or modification proceedings after entry of judgment." *McCausland v. McCausland,* 159 Wn.2d 607, 621, 152 P.3d 1013 (2007). The decision to award fees under RCW 26.09.140 is discretionary and is not based solely on the prevailing party, but can be based upon a consideration that balances the needs of the spouse seeking fees against the ability of the other spouse to pay. *See In re Marriage of*

Moody, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999); *In re Marriage of Terry*, 79 Wn.App. 866, 871, 905 P.2d 935 (1995).

Here, Ms. Johnson had provided evidence to the trial court that she was in dire financial straits with looming student loans, zero income, and inability to get a job. CP 22 lns 17- CP 23 ln 4. In contrast, Mr. Johnson was in a financial position where he had recently stopped making $1,200/month maintenance, showing ability to make substantial income. The court should have made a finding and determination on attorney fees under 20.09.140, rather than ignoring the subject.

Attorney fees also should be ordered on the contempt action on remand. On remand, the trial court should find Mr. Johnson in contempt – at least for something - and should order payment of Ms. Johnson's attorney fees by Mr. Johnson. At the trial court, Robin had requested $4000 under various theories. CP 22 lns 3 -11. Attorney fees are required as sanctions in any prevailing contempt action for maintenance owed. RCW 26.18.160 provides: In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. Therefore, attorney fees should be ordered under the contempt statute for unpaid maintenance once that has been established.

Ms. Johnson requested attorney fees for the lack of payment on the $260/month VISA. Per the parties' decree at section 3.6, attorney fees are

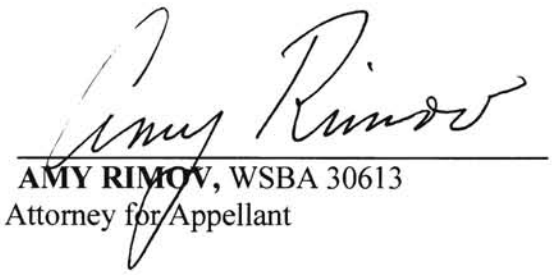
ordered for any collection action relating to the liabilities ordered to be paid. Clearly, this action was an action to enforce payment of the liability owed by Mr. Johnson and attorney fees should have been ordered for requiring Mr. Johnson to be ordered, by specific performance, to pay the VISA. On remand, this court should order the trial court to assess fees under this provision as well.

Ms. Johnson does not seek overcompensation, or double dipping for attorney fees. But with the plethora of qualifying statutes and legal theories under which she requests fees, like double health insurance, she asks for her attorney fees to be paid in full, not more.

VI Conclusion

Appellant requests that this court determine Spokane's local rule is invalid where the court must strike the revision hearing if a practitioner fails to call in the status of the hearing timely, and remand for the revision hearing to occur. Alternatively, Appellants requests that this court find material error in the commissioner's ruling, which modified the decree instead of enforcing it, which also requires remand. Finally, Appellant requests attorney fees be ordered now, and on remand.

Respectfully submitted this 7th day of January, 2013.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 7th day of January 2013, the within document described as Opening Brief of Appellant was delivered to the following persons in the manner indicated:

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Court of Appeals, Division III Clerk's Office 500 N Cedar St Spokane, WA 99201	Via Hand Delivery [X] Via United States Mail [ ] Via Federal Express [ ] Via Facsimile Transmission [ ] Via Electronic Mail [ ]

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