Supreme Court No. 98127-2
Court of Appeals No. 51019-7-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Marriage of:

Steven Ray Holloway, Appellant,

vs.

Toni Justice (Formerly Holloway), Respondent

Pierce County Superior Court

Cause Nos. 12-3-04654-8

The Honorable Judge Shelly K. Speir

Petition for Review

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I. IDENTITY OF PETITIONER

Steven Ray Holloway, the appellant below, asks this Court to review the decision of Division II of the Court of Appeals referred to in Section II.

II. DECISION OF THE COURT OF APPEALS

Steven Ray Holloway seeks review of the unpublished opinion, filed on May 7, 2019, in In re the Marriage of Steven Ray Holdaway v. Toni Justice (formerly Holdaway), in COA No. 51019-7-II reconsideration granted on October 8, 2019 by way of amending the opinion, but not changing the opinion in terms of the outcome, reconsideration of that decision was denied on December 27, 2019. A copy of the Unpublished Opinion, the Order Granting Motion for Reconsideration and Order Amending Opinion, and the Order Denying Motion for Reconsideration are attached in Appendix A.

III. ISSUE PRESENTED FOR REVIEW

> Is a definition of a substantial change of circumstances, which reads that "A substantial change in circumstances includes a fact that is unknown to the trial court or an unanticipated fact that arises after entry of the decree." used in a maintenance modification case to allow the court to consider extrinsic evidence to interpret an unambiguous decree, in conflict with the rule upheld by this Court and other decisions of the Court of Appeals, that if a decree is unambiguous, it cannot be interpreted by bringing in extrinsic

evidence to show a substantial change of circumstances to modify maintenance?

IV. STATEMENT OF THE CASE

On December 14, 2012, Steven Holloway filed a Petition for Dissolution of Marriage. (CP 50-54) In paragraph 1.10, Maintenance, it read:

> There is a need for maintenance as follows:
>
> The wife has a financial need and the husband has the ability to pay. Short-term maintenance should be awarded. The wife should receive $1000 per month maintenance for 36 months. (CP 53)

On February 11, 2013 the respondent, Toni Justice (formerly Holloway) filed a Response. (CP 55-58) In response to paragraph 1.10, Maintenance, she stated: "Husband has the ability to pay short-term maintenance wife should receive $1100 per month for 48 months from the date of divorce." (CP 57)

On May 14, 2013, the Decree of Dissolution of Marriage was filed with the court. (CP 68-72) In regard to maintenance the decree stated in paragraph 3.7:

> The husband shall pay the wife $1100 per month for 48 months. The first payment shall be due on [*the following was hand written and interlineated by Ms. Justice in the paragraph*] the first day of the month following the final divorce decree and continue for 48 months. Petitioner will continue to pay respondent $1100 until divorce is final. Respondent is receiving Military housing allowance for

> him and I until we are divorced those funds are provided to support the service member and his family that I am still respondent's legal spouse, not the person he lives with. (CP 71)

On April 28, 2017, the respondent, Toni Justice, filed a Motion for Order for Extension of Spousal Maintenance Awarded to Respondent per Decree of Dissolution filed May 14, 2013. (CP 73-77) Her basis for extending maintenance was that even though she was employed full-time, she did not have enough money to live on and therefore she still needed spousal maintenance. (CP 74-75) It was her understanding that Mr. Holloway was going to retire in 4 years and so the 48 months of spousal maintenance was basically supposed to end when he retired from the military which would give her military retirement pay. However, she now understood that he was not going to retire after 20 years, but had chosen to remain in the military and as a result she needed maintenance to continue until he retired. (RP 75)

Mr. Holloway responded that the decree was clear and unambiguous and since it was clear on its face, it needed no further interpretation. He denied that there was ever any agreement beyond 4 years of maintenance at $1100 a month. (CP 87)

In Ms. Justice's strict reply declaration, to prove that there was an agreement, she provided an email from Mr. Holloway dated June 1, 2012

(6 months before the dissolution petition was filed) wherein he stated: "I am only obliged to pay 5 years spousal support and we are at 4 years separation, but I said I would pay that amount we talked about until I get out." (CP 109, 121) In the email, in describing what he recalls of the agreement at that point he states:

> This is what I remember.
> 753. Monthly until I get out.
> 25% of my retirement pay and TSP when I get out, as long as you don't remarry if you remarry no military pay, but you can have all the TSP upon my death.
> 20% of my life insurance upon my death if you agree to an amount of yours to me and of course we have the stuff in writing of a will. I'm going before you so no need to worry there. This crap here is going to put me in my grave. (CP 122)

Continuing in her reply declaration, Ms. Justice acknowledges that "this agreement, of course morphed into something different as the court can see from the Decree." (CP 109)

In replying to Mr. Holloway's comment that the decree was clear on its face, Ms. Justice states:

> I don't disagree with Mr. Holloway that the Decree is clear on its face. I am not attempting to clarify an ambiguity in the decree. I am not trying to "re-write" the decree, as Mr. Holloway alleges. (CP 113)

She then continues that if the decree stated that maintenance was to continue until Mr. Holloway retired, then she would not have had to bring the current action to modify maintenance based upon a substantial change

in circumstances due to his retirement. (CP 113)

The motion on the requested extension of maintenance was heard on June 29, 2017. The commissioner denied the motion for modification finding that there was no substantial change of circumstances. (CP 153-154) A motion for revision was timely filed by Ms. Justice .(July 21, 2017 RP 4-5) (CP 155-156)

The motion for revision was heard on August 4, 2017. (August 4 2017 RP 1) Judge Speir, granted the motion, ordered maintenance to continue in the amount of $700 a month until Mr. Holloway retires from the military. (CP 194-196) In so doing Court stated:

> THE COURT: Thank you. I guess the thing that is most persuasive to the Court is the e-mail. I think it's very clear from the e-mail that the parties had reached an agreement about what kind of maintenance would be provided and for how long.
>
> The fact that the length of time that maintenance would be paid was not tied to retirement in the Decree, I don't think is determinative. I think what happened is a person, based on an agreement, proceeded, assuming that that agreement never changed. I think that's what Ms. Justice did. (August 4, 2017 RP 28)
> …..
> And so, I think this decision to retire in 2019, or whatever the date may be now, is a substantial change in circumstances. I think that completely opens up the arrangement that the parties -- or that Ms. Justice thought she had. (August 4, 2017 RP 29)

Mr. Holloway filed a motion for reconsideration on August 14,

2017. (CP 197-211) The motion was heard on September 22, 2017. (September 22, 2017 RP 1) In the hearing counsel for Ms. Justice reaffirmed that they did not believe there was any ambiguity in the decree. (September 22, 2017 RP 13, 15) The Court denied the motion, based on her prior findings that the parties assumed that Mr. Holloway would retire in 4 years and his failure to do so was a substantial change of circumstances. (CP 225-226) (September 22, 2017 RP 25-26)

A Notice of Appeal was filed on October 17, 2017. (CP 227-234) The Court of Appeals reversed the trial court on an issue regarding attorney fees and affirmed the trial court in regard to its decision to modify maintenance in a decision issued on May 7, 2019. A motion for reconsideration of the order affirming the trial court's modification of maintenance was "granted" on October 8, 2019 by amending the prior ruling to include a footnote, but the court did not change the ruling in their original opinion. In response to a second motion to reconsider, the court denied the motion for reconsideration by order dated December 27, 2019. The orders and the unpublished opinion of the Court of Appeals are attached hereto as Appendix A.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE THE COURT OF APPEALS DIVISION II

DETERMINATION THAT AN UNAMBIGUOUS DECREE PROVISION AWARDING MAINTENANCE IS SUBJECT TO INTERPRETATION BASED UPON THE TAKING OF NEW EVIDENCE FROM 6 MONTHS BEFORE THE DECREE WAS FILED AS WELL AS BASED UPON THE SUBJECTIVE UNILATERAL UNDERSTANDING OF ONE PARTY REGARDING WHAT SHE BELIEVED THE PROVISION MEANT AS THIS IS IN DIRECT CONFLICT WITH LONG-ESTABLISHED LEGAL PRECEDENT THAT AN UNAMBIGUOUS DECREE IS NOT SUBJECT TO INTERPRETATION AND THAT A DECREE WILL NOT BE REWRITTEN BASED UPON A UNILATERAL UNDERSTANDING OF ONE OF THE PARTIES WHEN THE DECREE IS CLEAR ON ITS FACE.

RAP 13.4, Discretionary Review of Decision Terminating Review, under (b) Considerations Governing Acceptance of Review states in relevant part as follows:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals;

In the appellate court's ruling, they cited the law as follows:

> RCW 26.09.170(1) governs the modification of spousal maintenance. Under RCW 26.09.170(1)(b), the superior court may modify maintenance only when the moving party has shown a "substantial change of circumstances." A substantial change in circumstances includes a fact that is unknown to the trial court or an unanticipated fact that arises after entry of the decree. In re Marriage of Tomsovic, 118 Wn. App. 96, 105, 74 P.3d 692

(2003). (at 5)

Based upon this statement of law, the court provided the following analysis and decision:

> Here, the superior court found that the parties anticipated that Justice would receive maintenance until Holloway retired and that Holloway would retire in 2017, 4 years after the dissolution was finalized. It was not anticipated that Holloway would remain in the military past 20 years of service. As a result, the superior court found that Holloway's decision not to retire constituted a substantial change in circumstances.
>
> Because Holloway's change in retirement date was unanticipated at the time of the original decree, the superior court did not abuse its discretion by concluding that a substantial change of circumstances occurred. Accordingly, we affirm the superior court's order granting revision and modifying maintenance. (at 5)

The problem with the above analysis is that it is based upon a mistake regarding the law. The case referenced by the Court of Appeals, *Marriage of Tomsovic*, 118 Wn. App. 96, 74 P.3d 692 (2003) dealt with a parenting plan modification. The page referenced by the Court of Appeals is 105 and the section quoted below is on pages 105-106. It reads as follows:

> In In re Marriage of Hoseth, 115 Wash.App. 563, 569–70, 63 P.3d 164 (2003), petition for review filed No. 73779–7 (Wash. Mar. 28, 2003), this court interpreted for the first time the Legislature's intent in enacting the provisions for a minor modification under RCW 26.09.260(5). Citing RCW 26.09.260(1), a major modification subsection, we held that the trial court must base its determination of a substantial

> change in circumstances on facts unknown to the court at the time of the prior decree or plan or arising since entry of the decree or plan. We also held that unknown facts include those facts that were not anticipated by the court at the time of the prior decree or plan. Hoseth, 115 Wash.App. at 571, 63 P.3d 164. Implicit in Hoseth is the understanding that the threshold finding of a substantial change in circumstances is the same for either a major or a minor modification of the residential schedule. Principles of statutory construction support this interpretation. (at 105-106)

This quote clearly deals with the modification statute for a parenting plan.

Section 1 of the statute, RCW 26.09.260 reads as follows:

> (1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, *upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party* and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan. (Emphasis added)

The italicized portion of the above statute makes clear that for a parenting plan to be modified it must be based upon a substantial change of circumstances and "facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan." A substantial change of circumstances is not given a new definition, it is merely a requirement of the statute to modify a parenting plan that the substantial change of circumstances must be one that is based upon facts that

have arisen since the original parenting plan was entered and that were unknown to the court at the time of the entry of the decree or parenting plan. Essentially, there must be a substantial change of circumstance and the additional requirements, the additional requirements were not made a part of any new definition of what constitutes a substantial change of circumstances.

This is where the Court of Appeals, Division II, became confused, they took a case dealing with a parenting plan, with specific statutory requirements for presenting a substantial change of circumstances to the court, and adopted that as a part of the definition of a substantial change of circumstances. This was not at all what the case of *Marriage of Tomsovic* was saying. It was only clarifying that a substantial change of circumstances must exist in both a major and the minor modification of a parenting plan. It did not say that if something was unknown to the court at the time a particular order or decree was entered, that that information in and of itself would be a substantial change of circumstances, only that the substantial change of circumstances presented to modify a parenting plan must be one that had arisen since the original parenting plan was entered or was unknown to the court at the time it was entered.

This misunderstanding of the law by the Court of Appeals presents dire consequences for jurisprudence in the State of Washington. The rule of law regarding decrees that are unambiguous was clearly stated in

another Division II case of *In re Marriage of Smith*, 158 Wn. App. 248, 241 P.3d 449 (2010) wherein the court stated:

> When an agreement is incorporated into a dissolution decree, we must ascertain the parties' intent at the time of the agreement. In re Marriage of Boisen, 87 Wash.App. 912, 920, 943 P.2d 682 (1997), review denied, 134 Wash.2d 1014, 958 P.2d 315 (1998). In such a situation, the parties' intent generally will be the court's intent. Boisen, 87 Wash.App. at 920, 943 P.2d 682. If the language of the decree is unambiguous, there is no room for interpretation. In re Marriage of Bocanegra, 58 Wash.App. 271, 275, 792 P.2d 1263 (1990), review denied, 116 Wash.2d 1008, 805 P.2d 813 (1991). Normally, we are limited to examining the provisions of the decree to resolve issues concerning its intended effect. Gimlett, 95 Wash.2d at 705, 629 P.2d 450.
>
> The general rules of construction that apply to statutes, contracts, and other writings also apply to findings, conclusions, and decrees. Callan v. Callan, 2 Wash.App. 446, 448–49, 468 P.2d 456 (1970). We read a decree in its entirety and construe it as a whole to give effect to every word and part, if possible. Stokes v. Polley, 145 Wash.2d 341, 346, 37 P.3d 1211 (2001); Callan, 2 Wash.App. at 449, 468 P.2d 456. (at 255-256)

The above quote makes it clear that the rules of general statutory construction and contracts applies equally to decrees. In addition to that, if the language in the decree is unambiguous is not subject to interpretation. These principles are well established in the common law of the State of Washington. But these principles of law are essentially overturned by the ruling of the Court of Appeals in the Holloway case.

In the above quoted material, the case of *In re marriage of*

Bocanegra, 58 Wn. App. 271, 792 P.2d 1263 (1990) is cited as authority for the fact that "If the language of the decree is unambiguous, there is no room for interpretation". (at 255) This was a case from Division III of the Court of Appeals. In brief, the case dealt with a division of property in a decree of dissolution of marriage that gave the wife maintenance of $500 a month and in addition to that awarded her the cost-of-living increases in Mr. Bocanegra's military retirement. When Mr. Bocanegra tried to argue that it only meant that it was to apply to her 50% share of the military retirement, the court ruled that the decree was unambiguous and that it ordered that she receive all cost-of-living increases. It based its authority for this on the case of *Byrne v. Ackerlund*, 108 Wash.2d 445, 739 P.2d 1138 (1987) a State Supreme Court case which will be discussed further below.

However, for purposes of tracing this precedent, the *Byrne* court based its authority for this proposition on the case of *In re Marriage of Mudgett*, 41 Wn. App. 337, 704 P.2d 169 (1985). In that case, the parties entered into a dissolution decree that awarded the wife the family home and gave the husband a lien which was to be paid when the home sold. When the home did not sell when the ex-husband thought it should, he brought an action to partition the property and requested that the home be sold so that he could collect his lien. He advised the court that he believed

that the house would be sold when their daughter was no longer living in the home. The court ruled that since the decree was clear on its face, there was no ambiguity and Mr. Mudgett's subjective belief was a unilateral mistake rather than an ambiguity. In so deciding, the court quoted the case of *Loeb Rhoades, Hornblower & Co. v. Keene*, 28 Wn. App. 499, 624 P.2d 742 (1981). The court also referenced the case of *Seattle-First Nat'l Bank v. Earl*, 17 Wn. App. 830, 565 P.2d 1215 (1977) as further support for that. The *Seattle-First Nat'l Bank* case stated the following:

> It is a longstanding rule that courts cannot, and ought not, make a contract for the parties which they did not make for themselves or impose upon one party an obligation which was not assumed. Puget Sound Power & Light Co. v. Shulman, 84 Wash.2d 433, 439, 526 P.2d 1210 (1974); Grant County Constructors v. E. V. Lane Corp., 77 Wash.2d 110, 121, 459 P.2d 947 (1969); Nowoj v. Mulalley, 1 Wash.App. 939, 943, 465 P.2d 194 (1970). This lease is a complete and accurate integration of the terms mutually agreed upon during negotiations. There is no basis for reformation because the lease accurately reflects the agreement of the parties. Carlson v. Druse, 79 Wash. 542, 140 P. 570 (1914). The language, "cost of living figures for the City of Spokane," is not ambiguous thus, the rules of construction relative to ambiguous instruments are not applicable. The parties are governed by the language of their agreement. Grant County Constructors v. E. V. Lane Corp., supra. (at 835)

Again, in the Holloway case, it was mutually agreed that the language in the decree regarding maintenance was clear and unambiguous.

The above quote from *Smith* further cites as authority the case of

Gimlett v. Gimlett, 95 Wn.2d 699, 629 P.2d 450 (1981) a Supreme Court case that made clear that general rules of construction that apply to contracts and statutes apply to decrees of dissolution of marriage. (See pages 704-705).

The *Gimlett* case along with the Smith case also cited the case of *Callan v. Callan*, 2 Wn. App. 446, 468 P.2d 456 (1970), a court of appeals case from Division I, involving a petition to modify maintenance. There the former husband was ordered to pay $250 a month maintenance for 5 years. There were 2 different clauses in the decree dealing with the conditions needed for ongoing maintenance, and the court held that this ambiguity required the court to examine the document itself, rather than looking to external evidence, to reach a determination. So even when an ambiguity was found, the document itself was to be reviewed before going to extrinsic evidence. However, the court also recognized the rule that if a judgment is unambiguous, there is no room for construction. In citing the law the court stated:

> The interpretation or construction of findings, conclusions and judgments presents a question of law for the court. Ormachea v. Ormachea, 67 Nev. 273, 217 P.2d 355 (1950); Fogel Refrigerator Co. v. Oteri, 391 Pa. 188, 137 A.2d 225 (1958). *If the judgment is unambiguous, there is no room for construction.* Imo Oil & Gas Co. v. Charles E. Knox Oil Co., 120 Okl. 13, 250 P. 117 (1926); Colvig v. RKO General, Inc., 232 Cal.App.2d 56, 42 Cal.Rptr. 473 (1965). If, however, the judgment is ambiguous, then the court

> seeks to ascertain the intention of the court entering the judgment or decree. The general rules of construction applicable to statutes, contracts and other writings are used with respect to findings, conclusions and judgment. O'Keefe v. Aptos Land & Water Co., 134 Cal.App.2d 772, 286 P.2d 417, 54 A.L.R.2d 462 (1955). (at 448-449 emphasis added)

Again, it is clear that if a judgment is unambiguous there is no room for construction or interpretation.

The case cited for this is *Imo Oil & Gas Co. v. Charles E. Knox Oil Co.*, 120 Okla. 13, 250 P. 117, (1926). In this case the Supreme Court of Oklahoma dealt with a case where the petitioner and the defendant had previously been to court and a judgment had been entered granting the defendant a lease interest in 10 acres of land and the plaintiff retained their interest in the adjoining 150 acres. The plaintiff attempted to argue that the purpose of the judgment was simply to protect the defendant's interest in well number 1, that he was drilling at the time, and they should not be drilling any other wells. They insisted that the court journal should be reviewed to verify that. The Court stated that they would only consider what the court specifically ordered, i.e., everything that followed "it is by the court ordered, adjudged, and decreed" (at 118). They held that the language of that order was plain and unambiguous and therefore they would not consider anything prior to that in the court journal and that the unambiguous order was basically not subject to interpretation by admitting

evidence beyond the judgment itself.

The above cases clearly demonstrate, that if a judgment or decree is unambiguous, there is no room for construction or interpretation of the decree. The court will not recognize a unilateral understanding of one party as to the interpretation of the decree and will not rewrite the decree if its language is clear on its face. This is precedent that is nearly 100 years old (the case cited from Oklahoma) and has been adopted by the State of Washington and utilized for the last 50 years at least. This has been consistently followed by the State Supreme Court and all divisions of the Court of Appeals.

Basically, if the language in the decree is unambiguous, it is not subject to interpretation. The general rules of construction apply equally to decrees as it does to statutes and contracts. If that rule is now going to be changed to allow every unambiguous decree, statute, and contract to be opened up for the taking of new evidence to interpret them because the court did not have knowledge of every nuanced negotiation that may have occurred prior to the entry of the unambiguous decree, statute, or contract; what kind of finality and stability is any decree, statute, or contract, going to have? There will be no finality as any time anyone can come up with anything to cast any shadow of a doubt on what was meant, even though the plain language is unambiguous, anything and everything is now open

and subject to interpretation and reinterpretation.

For example, the facts in the *Smith* case are illustrative of the impact that such a decision would have. In the *Smith* case, when the parties entered into their decree of dissolution, it awarded the wife,

> [o]ne-half (1/2) of any and all rights accrued by virtue of present, past or future employment of the husband including but not limited to pension, retirement, profit sharing, reserve vacation, sick leave, insurance coverage, social security benefits and the like for the length of the marriage. (at 253)

When Mr. Smith retired, his wife's attorney wrote a letter to him to get her share of his retirement. When Mr. Smith did not respond an action was brought to obtain the wife's one-half share of the retirement. Mr. Smith objected to the order dividing his retirement based upon the failure to calculate his Social Security equivalency, the fact that he earned part of the retirement in Utah which is a separate property state, and because part of the retirement benefits he ultimately enjoyed were based upon a pay raise that occurred after the dissolution of marriage.

Mr. Smith argued that the decree was ambiguous and, in his effort to show that, he presented letters that had been sent between Ms. Smith's attorney and his attorney showing that the parties attempted to characterize certain property as community and separate. The purpose being to show that there was an intent to maintain property that was community from that

which was separate.

The court in *Smith* upheld the trial court in its retirement division determination. In so doing they determined that that the decree was not ambiguous and the court refused to consider "extrinsic evidence at the expense of the agreed findings." (at 257)

However, if the analysis utilized by the Court of Appeals in Mr. Holloway's case were applied to the Smith case, the issue of retirement would have needed to be completely relitigated. Since the letters contained information that was not available to the court in entering the original decree, that would therefore be a substantial change of circumstances since the retirement proceeds that were sought to be divided included things that could be construed to have had a separate property origin.

This would further open the door to courts considering party's subjective understandings of unambiguous language in decrees. For example, In the case of *Byrne v. Ackerlund*, 108 Wn.2d 445, 739 P.2d 1138 (1987), the parties entered into a dissolution decree that awarded the husband, Mr. Ackerlund, the family home and gave Ms. Byrne a judgment for $2500 secured by a lien interest in the home as well as a one half interest in the proceeds of the home over $16,500 that was "payable upon the voluntary or involuntary transfer or disposition of said realty" (at 446) When the property did not sell within 10 years, Ms. Byrne brought an

action for declaratory judgment, basically seeking to have the property sold so that she could get her money. The court held that since the decree was unambiguous, that is, it gave Ms. Byrne a lien interest in the property which was not payable to her until the property was sold, it did not give her the right to force a sale. Even though that meant that she may never get her money if the property never sold.

In support of this the court cited *In re Marriage of Mudgett*, 41 Wash.App. 337, 704 P.2d 169 (1985) referenced above. The *Byrne* court continued stating:

> In Mudgett, 41 Wash.App. at page 341, 704 P.2d 169, the Court of Appeals held there was no ambiguity in a separation contract which made the former husband's lien on a residence payable " '... when the residence is sold.' " The court did not speculate on whether such plain language might be construed as granting the lienholder the right to force a sale. As in Mudgett, the problem here is not one of ambiguity but rather unilateral mistake. *The fact that Byrne may have believed the effect of her agreement to be different than it actually is does not justify the court in setting aside or rewriting the contract for her.* See Vance v. Ingram, 16 Wash.2d 399, 411, 133 P.2d 938 (1943). (at 454 emphasis added)

Again, if the analysis used in Mr. Holloway's case were applied to the *Byrne* case, then a subjective belief would always be the basis for substantial change of circumstances because a subjective understanding or belief is something that the court never has before it to consider. As a result, this would automatically become a fact that the court did not have

before it. Therefore, this would be a substantial change of circumstances because one party believed that if the property did not sell within a reasonable period of time, then that would be a substantial change of circumstances which should allow her to force the sale of the property. Thus, the impact of this decision would be to basically overturn and throw out decades of established jurisprudence in the State of Washington.

VI. CONCLUSION

For the foregoing reasons, the Supreme Court must accept review and reverse the Court of Appeals and Trial Court's determination that an unambiguous provision in the decree can be interpreted based upon the taking of new evidence to substantiate a subjective unilateral belief as to what the clear language of the decree really meant. The Supreme Court and every Division of the Court of Appeals have unanimously held that if a provision of the decree is unambiguous it is not subject to interpretation. As a result, this Court must accept review and correct the clear error made by Division II of the Court of Appeals.

Respectfully submitted on January 27, 2020.

Clayton R Dickinson, WSBA No. 13723
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that on January 27, 2020 I emailed a copy of Appellant's Petition for Review to:

Stacey Swenhaugen
stacey@sophiampalmerlaw.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Fircrest, Washington on January 27, 2020.

Clayton R Dickinson, WSBA No. 13723
Attorney for Appellant

Appendix A

Filed
Washington State
Court of Appeals
Division Two

May 7, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEVEN HOLLOWAY, Petitioner, v. TONI JUSTICE (fka HOLLOWAY), Respondent.	No. 51019-7-II UNPUBLISHED OPINION

Lee, J. — Steven Ray Holloway appeals the superior court's order modifying spousal maintenance for his former wife, Toni Justice. Holloway also appeals the superior court's order awarding Justice attorney fees. We affirm the superior court's order modifying maintenance, but we reverse the superior court's order awarding Justice attorney fees and remand for further proceedings consistent with this opinion.

FACTS

In May 2013, the superior court entered a decree of dissolution for Holloway and Justice's marriage. The decree required Holloway to pay Justice spousal maintenance, stating, "The husband shall pay the wife $1100 per month for 48 months." Clerk's Papers (CP) at 70. Four years later, Justice began proceedings to modify the spousal maintenance provision in the dissolution decree.

A. MOTION FOR MODIFICATION

In April 2017, Justice filed a motion to modify the dissolution decree and extend spousal maintenance. Justice claimed that there had been a substantial change in circumstances because Holloway had decided not to retire from the military in 2017, contrary to her understanding that he would retire at that time. If Holloway had retired, Justice would have begun receiving a portion of Holloway's retirement benefits when the maintenance payments expired.

Justice supported her assertion with two emails: one in which Holloway stated that he would pay maintenance "until I get out" and another stating that Holloway entered the military in 1997, to show that 2017 marked 20 years of service in the military for Holloway. CP at 121. In December 2016, Holloway notified Justice that he was "not retiring yet" from the military and implied that he would not be retiring until summer 2019. CP at 125. Justice requested that spousal maintenance be extended until the date Holloway retired from the military. Holloway objected to the modification.

A superior court commissioner denied Justice's motion to modify spousal maintenance. Specifically, the commissioner found that no substantial change in circumstances had occurred.

B. ATTORNEY FEES

On June 27, prior to the Commissioner's ruling, Justice filed a reply declaration to Holloway's declaration. In her reply declaration, Justice requested that she be awarded attorney fees. It appears that Holloway made a motion to strike the request for attorney fees.[1]

[1] There is no motion to strike in the record before this court. The hearing before the commissioner was not transcribed and provided to this court. Therefore, if Holloway made an oral motion to

On June 29, the commissioner granted Holloway's motion to strike Justice's request for attorney fees in her reply and denied Justice's request for attorney fees without prejudice.

C. MOTION FOR REVISION

Justice filed a timely motion for revision of the commissioner's order denying Justice's motion to modify spousal maintenance. Justice also filed a timely motion for revision of the commissioner's order regarding attorney fees. In her motion for revision, Justice stated,

> Commissioner Ahrens erred by ordering that Petitioner's motion to strike Respondent's strict reply declaration re: request for attorney's fees is granted, but Respondent's request for attorney's [fees] is denied without prejudice. This order should be revised.

CP at 155-56.

On July 21, the superior court held a hearing on the motion for revision. As the hearing began, Holloway stated, "I've got a preliminary motion to strike provision or a section of Ms. Justice's strict reply declaration. . . . It's the section that's titled, Request for Attorney's Fees." Verbatim Report of Proceedings (VRP) (July 21, 2017) at 2. There was some confusion expressed by the trial court about whether they were talking about the motion for revision of the Commissioner's ruling. Justice explained,

> I can answer that. What initially happened is Commissioner Ahrens had granted [Holloway's] motion to strike that portion of the strict reply, but also said it doesn't preclude [Justice] from bringing a motion for attorney's fees separately. So, of course, if the Court wants to leave that ruling in place, we may bring a motion for attorney's fees separately. But we're asking that the Court include our request for attorney's fees today in the interest of judicial economy and have all of our requests for relief heard at the same time.

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strike the request, this court does not have a record of it. However, the Commissioner's order clearly rules on a motion to strike.

VRP (July 21, 2017) at 5. The superior court apparently decided to consider Justice's statement as a request for attorney fees and offered Holloway additional time to respond to the request. The superior court entered a written order denying Holloway's motion to strike Justice's request for attorney fees. The superior court also provided a schedule for filing additional declarations regarding attorney fees and continued the hearing on the motions for revision.

On August 4, the superior court granted the motion for revision. The superior court found that Holloway's "decision to remain on active duty service beyond twenty years" was a substantial change in circumstances. CP at 195. The superior court ordered spousal maintenance to be continued in the amount $700 per month until Holloway retired from the military. The superior court also awarded Justice attorney fees. Holloway filed a timely motion for reconsideration, which the superior court denied.

Holloway appeals the superior court's modification order and award of attorney fees to Justice.[2]

ANALYSIS

A. MODIFICATION OF MAINTENANCE

Holloway argues that the superior court abused its discretion by finding that there was a substantial change in circumstances that justified modification of maintenance. We disagree.

[2] Justice argues that Holloway has not timely appealed the superior court's order on attorney fees because he should have appealed the superior court's July 21, 2017 order. However, only final judgments are appealable without filing a motion for discretionary review. No final judgment was entered in this case until the superior court denied reconsideration of its August 4 order on revision. *See* RAP 2.2(a). Therefore, Holloway can properly challenge the July 21, 2017 order as part of his appeal of the revision order in this case. RAP 2.4(b).

We review the superior court's modification of maintenance for an abuse of discretion. *In re Marriage of Ochsner*, 47 Wn. App. 520, 524-25, 736 P.2d 292, *review denied*, 108 Wn.2d 1027 (1987). The superior court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Ochsner*, 47 Wn. App. at 525.

RCW 26.09.170(1) governs the modification of spousal maintenance. Under RCW 26.09.170(1)(b), the superior court may modify maintenance only when the moving party has shown a "substantial change of circumstances." A substantial change in circumstances includes a fact that is unknown to the trial court or an unanticipated fact that arises after entry of the decree. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 105, 74 P.3d 692 (2003).

Here, the superior court found that the parties anticipated that Justice would receive maintenance until Holloway retired and that Holloway would retire in 2017, 4 years after the dissolution was finalized. It was not anticipated that Holloway would remain in the military past 20 years of service. As a result, the superior court found that Holloway's decision not to retire constituted a substantial change in circumstances.

Because Holloway's change in retirement date was unanticipated at the time of the original decree, the superior court did not abuse its discretion by concluding that a substantial change of circumstances occurred. Accordingly, we affirm the superior court's order granting revision and modifying maintenance.

B. ATTORNEY FEES

Holloway also argues that the superior court exceeded its statutory authority by considering the merits of the request for attorney fees in a motion to revise the commissioner's ruling. We agree.

RCW 2.24.050 provides authority for the superior court to revise commissioner rulings. Under RCW 2.24.050 requires that "[s]uch revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner." Therefore, a superior court may not consider additional evidence when considering a motion to revise a commissioner's ruling. *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999).

Here, Justice specifically raised the issue of attorney fees in her motion to revise the Commissioner's ruling. Therefore, the superior court could not consider additional evidence in revising the Commissioner's ruling. If the superior court determined that it was appropriate to revise the Commissioner's ruling denying Justice's request for attorney's fees, then the superior court should have remanded Justice's request for attorney's fees back to the Commissioner for consideration. Because the superior court considered additional evidence, the superior court erred. Therefore, we reverse the superior court's order awarding Justice attorney fees and remand for the superior court to determine attorney fees based on the evidence that was before the commissioner at the time the commissioner made its ruling.

ATTORNEY FEES ON APPEAL

In her "Conclusion," Justice states, "Further, pursuant to RAP 18.1 and RCW 26.09.140 Respondent requests her reasonable attorney's fees and costs." Amended Br. of Resp't at 31.

However, RAP 18.1(b) provides, "[t]he party must devote a section of its opening brief to the request for the fees or expenses." Here, Justice has failed to comply with RAP 18.1. Accordingly, we deny her request for attorney fees on appeal.

We affirm the superior court's order modifying maintenance, but we reverse the superior court's order awarding Justice attorney fees and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, C.J.

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

October 8, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Steven Holloway, Petitioner, v. Toni Justice (fka HOLLOWAY), Respondent.	No. 51019-7-II ORDER GRANTING MOTION FOR RECONSIDERATION, AND ORDER AMENDING OPINION

Petitioner, Steven Holloway, filed a motion for reconsideration of this court's unpublished opinion filed on May 7, 2019. After review of the motions and the records, it is hereby

ORDERED that the motion for reconsideration is granted and we amend our opinion as stated below.

The court amends the opinion as follows:

On page 4 of the opinion under the "ANALYSIS" "A. MODIFICATION OF MAINTENANCE" section, the following text shall be inserted as a footnote at the end of the first sentence of that section:

> Holloway also argues that the superior court erred in considering extrinsic evidence to interpret an unambiguous provision in the dissolution decree. However, the principles and cases Holloway relies on are inapplicable to this case because, here, the superior court did not *interpret* the dissolution provision; rather the superior court *modified* the dissolution provision based on a motion to modify spousal maintenance.

IT IS SO ORDERED

PANEL: Jj. Maxa, Lee, Melnick

Lee, J.

We concur:

Maxa, C.J.

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

May 7, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEVEN HOLLOWAY, Petitioner, v. TONI JUSTICE (fka HOLLOWAY), Respondent.	No. 51019-7-II UNPUBLISHED OPINION

Lee, J. — Steven Ray Holloway appeals the superior court's order modifying spousal maintenance for his former wife, Toni Justice. Holloway also appeals the superior court's order awarding Justice attorney fees. We affirm the superior court's order modifying maintenance, but we reverse the superior court's order awarding Justice attorney fees and remand for further proceedings consistent with this opinion.

FACTS

In May 2013, the superior court entered a decree of dissolution for Holloway and Justice's marriage. The decree required Holloway to pay Justice spousal maintenance, stating, "The husband shall pay the wife $1100 per month for 48 months." Clerk's Papers (CP) at 70. Four years later, Justice began proceedings to modify the spousal maintenance provision in the dissolution decree.

A. MOTION FOR MODIFICATION

In April 2017, Justice filed a motion to modify the dissolution decree and extend spousal maintenance. Justice claimed that there had been a substantial change in circumstances because Holloway had decided not to retire from the military in 2017, contrary to her understanding that he would retire at that time. If Holloway had retired, Justice would have begun receiving a portion of Holloway's retirement benefits when the maintenance payments expired.

Justice supported her assertion with two emails: one in which Holloway stated that he would pay maintenance "until I get out" and another stating that Holloway entered the military in 1997, to show that 2017 marked 20 years of service in the military for Holloway. CP at 121. In December 2016, Holloway notified Justice that he was "not retiring yet" from the military and implied that he would not be retiring until summer 2019. CP at 125. Justice requested that spousal maintenance be extended until the date Holloway retired from the military. Holloway objected to the modification.

A superior court commissioner denied Justice's motion to modify spousal maintenance. Specifically, the commissioner found that no substantial change in circumstances had occurred.

B. ATTORNEY FEES

On June 27, prior to the Commissioner's ruling, Justice filed a reply declaration to Holloway's declaration. In her reply declaration, Justice requested that she be awarded attorney fees. It appears that Holloway made a motion to strike the request for attorney fees.[1]

[1] There is no motion to strike in the record before this court. The hearing before the commissioner was not transcribed and provided to this court. Therefore, if Holloway made an oral motion to

On June 29, the commissioner granted Holloway's motion to strike Justice's request for attorney fees in her reply and denied Justice's request for attorney fees without prejudice.

C. MOTION FOR REVISION

Justice filed a timely motion for revision of the commissioner's order denying Justice's motion to modify spousal maintenance. Justice also filed a timely motion for revision of the commissioner's order regarding attorney fees. In her motion for revision, Justice stated,

> Commissioner Ahrens erred by ordering that Petitioner's motion to strike Respondent's strict reply declaration re: request for attorney's fees is granted, but Respondent's request for attorney's [fees] is denied without prejudice. This order should be revised.

CP at 155-56.

On July 21, the superior court held a hearing on the motion for revision. As the hearing began, Holloway stated, "I've got a preliminary motion to strike provision or a section of Ms. Justice's strict reply declaration. . . . It's the section that's titled, Request for Attorney's Fees." Verbatim Report of Proceedings (VRP) (July 21, 2017) at 2. There was some confusion expressed by the trial court about whether they were talking about the motion for revision of the Commissioner's ruling. Justice explained,

> I can answer that. What initially happened is Commissioner Ahrens had granted [Holloway's] motion to strike that portion of the strict reply, but also said it doesn't preclude [Justice] from bringing a motion for attorney's fees separately. So, of course, if the Court wants to leave that ruling in place, we may bring a motion for attorney's fees separately. But we're asking that the Court include our request for attorney's fees today in the interest of judicial economy and have all of our requests for relief heard at the same time.

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VRP (July 21, 2017) at 5. The superior court apparently decided to consider Justice's statement as a request for attorney fees and offered Holloway additional time to respond to the request. The superior court entered a written order denying Holloway's motion to strike Justice's request for attorney fees. The superior court also provided a schedule for filing additional declarations regarding attorney fees and continued the hearing on the motions for revision.

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Holloway appeals the superior court's modification order and award of attorney fees to Justice.[2]

ANALYSIS

A. MODIFICATION OF MAINTENANCE

Holloway argues that the superior court abused its discretion by finding that there was a substantial change in circumstances that justified modification of maintenance. We disagree.

[2] Justice argues that Holloway has not timely appealed the superior court's order on attorney fees because he should have appealed the superior court's July 21, 2017 order. However, only final judgments are appealable without filing a motion for discretionary review. No final judgment was entered in this case until the superior court denied reconsideration of its August 4 order on revision. *See* RAP 2.2(a). Therefore, Holloway can properly challenge the July 21, 2017 order as part of his appeal of the revision order in this case. RAP 2.4(b).

We review the superior court's modification of maintenance for an abuse of discretion. *In re Marriage of Ochsner*, 47 Wn. App. 520, 524-25, 736 P.2d 292, *review denied*, 108 Wn.2d 1027 (1987). The superior court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Ochsner*, 47 Wn. App. at 525.

RCW 26.09.170(1) governs the modification of spousal maintenance. Under RCW 26.09.170(1)(b), the superior court may modify maintenance only when the moving party has shown a "substantial change of circumstances." A substantial change in circumstances includes a fact that is unknown to the trial court or an unanticipated fact that arises after entry of the decree. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 105, 74 P.3d 692 (2003).

Here, the superior court found that the parties anticipated that Justice would receive maintenance until Holloway retired and that Holloway would retire in 2017, 4 years after the dissolution was finalized. It was not anticipated that Holloway would remain in the military past 20 years of service. As a result, the superior court found that Holloway's decision not to retire constituted a substantial change in circumstances.

Because Holloway's change in retirement date was unanticipated at the time of the original decree, the superior court did not abuse its discretion by concluding that a substantial change of circumstances occurred. Accordingly, we affirm the superior court's order granting revision and modifying maintenance.

B. ATTORNEY FEES

Holloway also argues that the superior court exceeded its statutory authority by considering the merits of the request for attorney fees in a motion to revise the commissioner's ruling. We agree.

RCW 2.24.050 provides authority for the superior court to revise commissioner rulings. Under RCW 2.24.050 requires that "[s]uch revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner." Therefore, a superior court may not consider additional evidence when considering a motion to revise a commissioner's ruling. *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999).

Here, Justice specifically raised the issue of attorney fees in her motion to revise the Commissioner's ruling. Therefore, the superior court could not consider additional evidence in revising the Commissioner's ruling. If the superior court determined that it was appropriate to revise the Commissioner's ruling denying Justice's request for attorney's fees, then the superior court should have remanded Justice's request for attorney's fees back to the Commissioner for consideration. Because the superior court considered additional evidence, the superior court erred. Therefore, we reverse the superior court's order awarding Justice attorney fees and remand for the superior court to determine attorney fees based on the evidence that was before the commissioner at the time the commissioner made its ruling.

ATTORNEY FEES ON APPEAL

In her "Conclusion," Justice states, "Further, pursuant to RAP 18.1 and RCW 26.09.140 Respondent requests her reasonable attorney's fees and costs." Amended Br. of Resp't at 31.

However, RAP 18.1(b) provides, "[t]he party must devote a section of its opening brief to the request for the fees or expenses." Here, Justice has failed to comply with RAP 18.1. Accordingly, we deny her request for attorney fees on appeal.

We affirm the superior court's order modifying maintenance, but we reverse the superior court's order awarding Justice attorney fees and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, C.J.

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

December 27, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEVEN RAY HOLLOWAY, Respondent, v. TONI JUSTICE (fka HOLLOWAY), Appellant.	No. 51019-7-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Steven R, Holloway, filed a motion for reconsideration of this court's unpublished opinion filed on October 8, 2019. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Maxa, Lee, Melnick

LEE, A.C.J.

LEE, ACTING CHIEF JUDGE

Statutes

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated Title 26. Domestic Relations (Refs & Annos) Chapter 26.09. Dissolution Proceedings--Legal Separation (Refs & Annos)

West's RCWA 26.09.170

26.09.170. Modification of decree for maintenance or support, property disposition--Termination of maintenance obligation and child support--Grounds

Effective: July 28, 2019

Currentness

(1) Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(2) Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance.

(3) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the parent obligated to support the child.

(4) Unless expressly provided by an order of the superior court or a court of comparable jurisdiction, provisions for the support of a child are terminated upon the marriage or registration of a domestic partnership to each other of parties to a paternity order, or upon the remarriage or registration of a domestic partnership to each other of parties to a decree of dissolution. The remaining provisions of the order, including provisions establishing paternity, remain in effect.

(5)(a) A party to an order of child support may petition for a modification based upon a showing of substantially changed circumstances at any time.

(b) An obligor's voluntary unemployment or voluntary underemployment, by itself, is not a substantial change of circumstances.

(6) An order of child support may be modified one year or more after it has been entered without a showing of substantially changed circumstances:

(a) If the order in practice works a severe economic hardship on either party or the child;

(b) If a child is still in high school, upon a finding that there is a need to extend support beyond the eighteenth birthday to complete high school; or

(c) To add an automatic adjustment of support provision consistent with RCW 26.09.100.

(7)(a) If twenty-four months have passed from the date of the entry of the order or the last adjustment or modification, whichever is later, the order may be adjusted without a showing of substantially changed circumstances based upon:

(i) Changes in the income of the parents; or

(ii) Changes in the economic table or standards in chapter 26.19 RCW.

(b) Either party may initiate the adjustment by filing a motion and child support worksheets.

(c) If the court adjusts or modifies a child support obligation pursuant to this subsection by more than thirty percent and the change would cause significant hardship, the court may implement the change in two equal increments, one at the time of the entry of the order and the second six months from the entry of the order. Twenty-four months must pass following the second change before a motion for another adjustment under this subsection may be filed.

(8)(a) The department of social and health services may file an action to modify or adjust an order of child support if public assistance money is being paid to or for the benefit of the child and the department has determined that the child support order is at least fifteen percent above or below the appropriate child support amount set forth in the standard calculation as defined in RCW 26.19.011.

(b) The department of social and health services may file an action to modify or adjust an order of child support in a nonassistance case if:

(i) The department has determined that the child support order is at least fifteen percent above or below the appropriate child support amount set forth in the standard calculation as defined in RCW 26.19.011;

(ii) The department has determined the case meets the department’s review criteria; and

(iii) A party to the order or another state or jurisdiction has requested a review.

(c) If incarceration of the parent who is obligated to pay support is the basis for the difference between the existing child support order amount and the proposed amount of support determined as a result of a review, the department may file an action to modify or adjust an order of child support even if:

(i) There is no other change of circumstances; and

(ii) The change in support does not meet the fifteen percent threshold.

(d) The determination of whether the child support order is at least fifteen percent above or below the appropriate child support amount must be based on the current income of the parties.

(9) The department of social and health services may file an action to modify or adjust an order of child support under subsections (5) through (7) of this section if:

(a) Public assistance money is being paid to or for the benefit of the child;

(b) A party to the order in a nonassistance case has requested a review; or

(c) Another state or jurisdiction has requested a modification of the order.

(10) If testimony other than affidavit is required in any proceeding under this section, a court of this state shall permit a party or witness to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means, unless good cause is shown.

Credits

[2019 c 275 § 2, eff. July 28, 2019; 2010 c 279 § 1, eff. June 10, 2010; 2008 c 6 § 1017, eff. June 12, 2008; 2002 c 199 § 1; 1997 c 58 § 910; 1992 c 229 § 2; 1991 sp.s. c 28 § 2; 1990 1st ex.s. c 2 § 2; 1989 c 416 § 3; 1988 c 275 § 17; 1987 c 430 § 1; 1973 1st ex.s. c 157 § 17.]

OFFICIAL NOTES

Part headings not law--Severability--2008 c 6: See RCW 26.60.900 and 26.60.901.

Short title--Part headings, captions, table of contents not law--Exemptions and waivers from federal law--Conflict with federal requirements--Severability--1997 c 58: See RCW 74.08A.900 through 74.08A.904.

Severability--Effective date--Captions not law--1991 sp.s. c 28: See notes following RCW 26.09.100.

Effective dates--Severability--1990 1st ex.s. c 2: See notes following RCW 26.09.100.

Effective dates--Severability--1988 c 275: See notes following RCW 26.19.001.

Severability--1987 c 430: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1987 c 430 § 4.]

Notes of Decisions (517)

West's RCWA 26.09.170, WA ST 26.09.170
Current with IM 976 (Ch. 1) of the 2020 Regular Session of the Washington Legislature.

End of Document

West's Revised Code of Washington Annotated Title 26. Domestic Relations (Refs & Annos) Chapter 26.09. Dissolution Proceedings--Legal Separation (Refs & Annos)

West's RCWA 26.09.260

26.09.260. Modification of parenting plan or custody decree

Effective: July 26, 2009

Currentness

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

(3) A conviction of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070 shall constitute a substantial change of circumstances for the purposes of this section.

(4) The court may reduce or restrict contact between the child and the parent with whom the child does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

(a) Does not exceed twenty-four full days in a calendar year; or

(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or

(c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

(6) The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

(7) A parent with whom the child does not reside a majority of the time and whose residential time with the child is subject to limitations pursuant to RCW 26.09.191 (2) or (3) may not seek expansion of residential time under subsection (5)(c) of this section unless that parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation.

(8)(a) If a parent with whom the child does not reside a majority of the time voluntarily fails to exercise residential time for an extended period, that is, one year or longer, the court upon proper motion may make adjustments to the parenting plan in keeping with the best interests of the minor child.

(b) For the purposes of determining whether the parent has failed to exercise residential time for one year or longer, the court may not count any time periods during which the parent did not exercise residential time due to the effect of the parent's military duties potentially impacting parenting functions.

(9) A parent with whom the child does not reside a majority of the time who is required by the existing parenting plan to complete evaluations, treatment, parenting, or other classes may not seek expansion of residential time under subsection (5)(c) of this section unless that parent has fully complied with such requirements.

(10) The court may order adjustments to any of the nonresidential aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child. Adjustments ordered under this section may be made without consideration of the factors set forth in subsection (2) of this section.

(11) If the parent with whom the child resides a majority of the time receives temporary duty, deployment, activation, or mobilization orders from the military that involve moving a substantial distance away from the parent's residence or otherwise would have a material effect on the parent's ability to exercise parenting functions and primary placement responsibilities, then:

(a) Any temporary custody order for the child during the parent's absence shall end no later than ten days after the returning parent provides notice to the temporary custodian, but shall not impair the discretion of the court to conduct an expedited or emergency hearing for resolution of the child's residential placement upon return of the parent and within ten days of the filing of a motion alleging an immediate danger of irreparable harm to the child. If a motion alleging immediate danger has not been filed, the motion for an order restoring the previous residential schedule shall be granted; and

(b) The temporary duty, activation, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a

motion is filed to transfer residential placement from the parent who is a military service member.

(12) If a parent receives military temporary duty, deployment, activation, or mobilization orders that involve moving a substantial distance away from the military parent's residence or otherwise have a material effect on the military parent's ability to exercise residential time or visitation rights, at the request of the military parent, the court may delegate the military parent's residential time or visitation rights, or a portion thereof, to a child's family member, including a stepparent, or another person other than a parent, with a close and substantial relationship to the minor child for the duration of the military parent's absence, if delegating residential time or visitation rights is in the child's best interest. The court may not permit the delegation of residential time or visitation rights to a person who would be subject to limitations on residential time under RCW 26.09.191. The parties shall attempt to resolve disputes regarding delegation of residential time or visitation rights through the dispute resolution process specified in their parenting plan, unless excused by the court for good cause shown. Such a court-ordered temporary delegation of a military parent's residential time or visitation rights does not create separate rights to residential time or visitation for a person other than a parent.

(13) If the court finds that a motion to modify a prior decree or parenting plan has been brought in bad faith, the court shall assess the attorney's fees and court costs of the nonmoving parent against the moving party.

Credits

[2009 c 502 § 3, eff. July 26, 2009; 2000 c 21 § 19; 1999 c 174 § 1; 1991 c 367 § 9. Prior: 1989 c 375 § 14; 1989 c 318 § 3; 1987 c 460 § 19; 1973 1st ex.s. c 157 § 26.]

OFFICIAL NOTES

Applicability--2000 c 21: See RCW 26.09.405.

Intent--Captions not law--2000 c 21: See notes following RCW 26.09.405.

Severability--Effective date--Captions not law--1991 c 367: See notes following RCW 26.09.015.

Severability--1989 c 318: See note following RCW 26.09.160.

Notes of Decisions (276)

West's RCWA 26.09.260, WA ST 26.09.260
Current with IM 976 (Ch. 1) of the 2020 Regular Session of the Washington Legislature.

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Appellate Court Case Title:	In Re Steven Ray Holloway Appellant v Toni Justice, Respondent
Superior Court Case Number:	12-3-04654-8

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