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No. 67825-6-I
(consolidated with No. 67921-0-I)

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

TAMI SUE REMICK,

Appellant,

v.

ENOCH THIJS REMICK,

Respondent.

2012 JUN 4 PM 11:52
COURT OF APPEALS
STATE OF WASHINGTON

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
(The Honorable Bruce Hilyer)

TAMI REMICK OPENING BRIEF

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ORIGINAL

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I. **ASSIGNMENT OF ERRORS**

1. **Maintenance:** The trial court erred in providing the maintenance awarded was not modifiable because there was no evidence or finding that the parties agreed to non-modifiable maintenance. Decree of Dissolution 3.7; Findings 2.12.
2. **Undifferentiated support:** The trial court erred in entering a child support order that refers to the child support, which was intended to be tax free to the recipient, as undifferentiated family support for both the recipient and the children. Findings 2.19; Order of Child Support 2.2 and 3.5; Decree of Dissolution 3.7.
3. **Child support as income:** The trial court erred in including in Appellant's income one-half the child support she was to receive from Respondent. Order of Child Support 2.2; Decree of Dissolution 3.12; Child Support Schedule Worksheet.
4. **Maintenance as income:** The trial court erred in including maintenance ordered, but not paid, as income to Appellant and in deducting maintenance ordered, but not paid from Respondent's income. Order of Child Support ¶¶ 2.2 and 2.3 and Child Support Worksheets.
5. **Respondent's Income:** The trial court erred in failing to include Respondent's recurring CBI bonus income and the recurring stock

award contract-related benefits as income to Respondent in the Child Support Worksheets. Order of Child Support ¶ 2.3 and Child Support Worksheets.

6. **Prohibiting child support adjustment for 4 years:** The trial court erred in prohibiting child support adjustments until March 2015. Order of Child Support 3.16.
7. **Apportioning child rearing expenses:** The trial court erred in failing to apportion the children's day care and special expenses in proportion to the parties' respective net incomes. Order of Child Support 3.15.
8. **Child support worksheets:** The trial court erred in not including child support worksheets from September 1, 2011 – August 31, 2012. Order of Child Support 2.2 and 2.3 and Child Support Schedule Worksheet
9. **Motion to clarify:**
 - a. **Undifferentiated support;** The trial court erred when it re-characterized the child support that was intended to be tax free to the Appellant as undifferentiated family support, which is taxable to the Appellant. Order on Motion to Clarify ¶ 1; Decree ¶ 3.7; and Order of Child Support 3.5

- b. Modification not clarification:** The trial court erred by adding a rent obligation that was not in the final dissolution decree and calling it a clarification. Order on Motion to Clarify, ¶ 2.
- c. Modifying property division:** The trial court erred by modifying the Dissolution Decree to include a rent obligation that effectively modified the property distribution in the final Dissolution Decree. Order on Motion to Clarify, ¶ 2.
- d. Modifying final orders while appeal is pending.** The trial court erred when it modified the Dissolution Decree and Child Support Order in its Order on Motion to Clarify because it lacked jurisdiction as the modified orders were being appealed. Order on Motion to Clarify.
10. **Appellate Sanctions:** The trial court erred when it sanctioned Appellant \$500 for failing to follow the Rules of Appellate Procedure because only the appellate court can sanction a party for failing to follow the Rules of Appellate Procedure.

II. ISSUES

1. Whether a trial court lacks statutory authority to make maintenance not modifiable if the parties did not agree that maintenance would be not modifiable.
2. Whether there are insufficient findings to support the trial court's ruling that Appellant's maintenance is not modifiable

3. Whether the trial court erred in both awarding undifferentiated support based on one-half the Respondent's net income after he paid tax on it and thereby requiring Appellant to pay tax on the same money again after she received it.
4. Whether the trial court erred in including the undifferentiated support in Appellant's income as it represented support for the children and it did not represent maintenance actually received as it is not includable in income pursuant to RCW 26.19.071(3).
5. Whether the trial court erred in reducing Respondent's income by the undifferentiated support he was required to pay for the children as it was not a deduction authorized by RCW 26.19.071(4).
6. Whether the trial court erred in failing to include Respondent's large recurring CBI bonus and stock award contract-related benefits in his income as it is required to be included in income by RCW 26.19.071(3)(f) and (r).
7. Whether the trial court erred when it overrode RCW 26.09.170(7)(a) and prohibited child support adjustments for 4 years.
8. Whether the trial court erred when it failed to include child support worksheets for the first year support was to be paid.
9. Whether the trial court erred when it violated RCW 26.19.080(3) and equally divided child expenses not included in the transfer payment

instead of allocating them in proportion to the parties' respective net incomes.

10. Whether the trial court erred when it modified the Dissolution Decree by re-characterizing the monthly payment stream to Appellant and by adding a rent obligation under the guise it was clarifying otherwise final orders.

11. Whether the trial court erred in modifying the property distribution provisions in the Dissolution Decree in violation of RCW 26.09.170(1) by requiring Appellant to pay rent for the family home she was occupying pursuant to a valid temporary order.

12. Whether the trial court erred in modifying the Dissolution Decree and Child Support Order after Appellant had timely appealed those orders and the trial court no longer had jurisdiction over the matter pursuant to RAP 7.2.

13. Whether Appellant is entitled to attorney fees and costs on this appeal based upon RAP 18.1 and RCW 26.09.140 – need and ability to pay.

III. INTRODUCTION

This is a straightforward appeal concerning several legal errors made by the trial court. First, the trial court was led into error by Respondent when he coaxed the trial court into ordering Respondent to

only pay one-half his *net* salary and RBI bonus to Appellant by telling the trial court that if it was called child support, then Appellant would not have to pay taxes on the amount received. After the trial court accepted Respondent's invitation, Respondent through a motion to clarify managed to make the monthly amounts Appellant was to receive taxable by calling them undifferentiated family support instead of child support. Second, Respondent also slipped into the final Dissolution Decree that he prepared a provision making maintenance not modifiable even though the parties never agreed that maintenance would not be modifiable.

Things got even worse with the final orders Respondent prepared. Respondent's child support order purported to make child support not adjustable for four years, failed to include child support worksheets for the first year support was to be paid, and allocated child expenses equally instead of in proportion to the parties' true income. Respondent also failed to include his recurring CBI bonus and stock award contract-related benefits in his income figures, included deductions for the undifferentiated support he was to pay for the children from his income, and included the undifferentiated support Appellant was to receive for the children in her income.

As if this were not enough, Respondent then brought a motion to clarify and had the trial court do much more than modify the Dissolution

Decree and Child Support Order. Respondent had the trial court add a rent obligation against Respondent for using the family home that was not included in the original Dissolution Decree. And he got the trial court to re-characterize the non-taxable child support the trial court originally ordered at Respondent's invitation into taxable undifferentiated family support. All this when the trial court did not even have jurisdiction because the Dissolution Decree and Child Support Order were being appealed.

IV. **STATEMENT OF FACTS**

A. **Background.** The parties met on July 4th, 1999.¹ They began dating shortly after, and they moved in with each other in December of that year.² In the fall of 2000, while on a trip to Amsterdam, the couple became engaged.³ Enoch and Tami⁴ were married August 4, 2001.⁵ Tami graduated with a BA in Psychology from PLU.⁶ She became a counselor and social worker⁷ and Enoch was a Microsoft

¹ RP 79.

² RP 81:3-9.

³ RP 82:2-25.

⁴ The parties are referred to by first name not out of lack of respect, but because their last names were the same during the trial proceedings.

⁵ RP 73:9-10.

⁶ RP 75:8-18.

⁷ RP 89:7-10.

executive.⁸ They had two children who are both minors, Janneke and Greyson.⁹

Their marriage became irretrievably broken, and Tami filed to dissolve the marriage on July 24th 2010.¹⁰ During their marriage, Tami and Enoch made the mutual decision for Tami to interrupt her work career and stop working while the couple attempted a pregnancy.¹¹ Likewise after their first child was born, they agreed Tami would continue to interrupt her work career and be a stay-at-home mom.¹² Enoch, on the other hand, was the breadwinner and controlled the household finances.¹³ At Enoch's urging, Tami continued to not work and advance her career, stayed at home with the couple's children, and has not been re-employed.¹⁴ During this time, Tami's counseling license expired, and she now needs over 36 course hours to be eligible to reactivate her license.¹⁵ Enoch became a director at Microsoft and was earning wages, plus an RBI bonus that was paid quarterly and a large

⁸ RP 103:6-10.

⁹ RP 73:22-25.

¹⁰ RP 73:11-16.

¹¹ RP 87:17 – 88:1.

¹² RP 88:15 – 89:3.

¹³ RP 84:4 – 6.

¹⁴ RP 88:10- 89:6.

¹⁵ RP 89:20 – 25.

recurring annual CBI bonus.¹⁶ He had earned these bonuses for at least two years prior to the trial.¹⁷

B. The Case. The parties successfully agreed to a parenting plan at mediation.¹⁸ It was agreed Tami would continue to be the children's primary residential parent.¹⁹ The financial issues that are being appealed here went to trial without any agreement between the parties.²⁰

After a 4-day trial, the trial court divided the parties' property and liabilities, awarded Tami spousal maintenance that was not modifiable, made a provision for attorney fees, entered the parties' agreed parenting plan with only slight modifications, and awarded Tami child support.²¹ On July 22, 2011 the trial judge announced his oral ruling and initially awarded the family home to Tami.²² He ordered the parties' attorney fees and outstanding consumer debt be paid off with Enoch's retirement that was community property.²³ He divided the remaining community property 60% to Tami and 40% to Enoch.²⁴

¹⁶ RP 487:7 – 488:12.

¹⁷ RP 619:23 – 620:2.

¹⁸ CP 2, ¶ 2.7.

¹⁹ CP ___, Parenting Plan, recently designated. Brief will be amended to supply accurate citations to CP.

²⁰ CP 2, ¶ 2.7.

²¹ CP 2-5, ¶ 2.7 – 2.20; CP 14-22; CP ___, recently designated.

²² CP 140:21-22.

²³ CP 141:5-10.

²⁴ CP 142:1-7.

The trial judge also awarded maintenance and child support to Tami. For the first year he stated that he accepted Tami's attorney's proposal.²⁵ Tami's attorney's proposal was to divide Enoch's total gross income in half and award it to Tami as undifferentiated family support, requiring Tami to pay federal income taxes on the half she received, and thereby reducing the parties' combined tax obligations.²⁶ The trial court's oral ruling, however, suggested Enoch's *net* salary and quarterly RBI bonus be divided equally, but not his large annual CBI bonus.²⁷ The trial court's stated purpose behind this ruling was to provide more support to Tami in the first year so that she would not have to sell the family home because she probably could not afford it in the long term.²⁸ The trial court then awarded Tami \$4,000 in maintenance and \$2,000 in child support in the following two years.²⁹ And in the fourth and final year the trial court awarded Tami \$2,000 in maintenance and \$2,000 in child support.³⁰

After the oral ruling, Tami's attorney presented final documents for the trial court's entry. Tami's proposed final documents awarded the family home to Enoch because Tami could not afford the home on the

²⁵ CP 144:2-3.

²⁶ RP 852-54.

²⁷ CP 144:11-16.

²⁸ CP 144:6-11.

²⁹ CP 144:17 – 145:2.

³⁰ CP 145:3-7.

support ordered by the trial judge.³¹ Tami's attorney also proposed that Tami receive one-half Enoch's gross salary and RBI bonus and not his net salary and RBI bonus because she would have to pay the income taxes on the amounts she would receive if they were characterized as undifferentiated support.³²

Enoch's attorney then led the trial court into error by complicating the trial court's oral ruling. Enoch's attorney proposed alternative final documents.³³ Enoch's Response to Tami's Notice of Presentation included Enoch's willingness to accept the family home.³⁴ Enoch's proposed documents were riddled with legal error. For instance, Enoch's attorney slipped a provision into Enoch's proposed decree of dissolution that stated the maintenance the trial court awarded would not be modifiable in amount or duration.³⁵

The errors in the maintenance provisions Enoch proposed continued. In presenting his proposed final orders, Enoch intended to award Tami one-half Enoch's net salary and RBI bonus, but for Tami to not have to pay the income tax on the amounts she received. In Enoch's Response to Notice of Presentation, Enoch's counsel stated

³¹ CP __; Notice of presentation; recently designated.

³² CP __; Notice of presentation; recently designated.

³³ CP __; Response to notice of presentation; recently designated.

³⁴ CP __; Response to notice of presentation; recently designated.

³⁵ CP 11, ¶ 3.7: CP __, Response to notice of presentation, recently designated.

The Court ordered Ms. Remick receive 50% of Mr. Remick's net income, plus one-half his RBI, not gross. We understand Ms. Remick is concerned about her paying taxes again on it. Therefore, if we call it all child support (and not maintenance) we do reach the correct result...If Mr. Remick pays 100% of the taxes and Tami pays 0 taxes (which categorizing as child support would give him no credit for maintenance paid, and her "maintenance would not be taxable)...Our method, of undifferentiated child support, is the most logical method of accomplishing the Court's stated goal.³⁶

The maintenance provisions in the Decree also provided Enoch "shall pay undifferentiated support for the wife and children" to Tami "in the amount on one-half [Enoch's] net salary and RBI bonus immediately when received for One (1) year beginning September 1, 2011 through August 31, 2012."³⁷ It further provided that "During this one-year period, the entire amount shall be considered child support for tax planning purposes."³⁸ Finally, it provided "All amounts received by wife pursuant to this paragraph shall be fully taxable to her and full (sic) deductible to husband beginning September 1, 2012."³⁹ The undifferentiated support Enoch was to pay Tami prior to September 1, 2012 was intended not to be taxable to Tami.

Enoch's counsel's proposed child support order further confused the undifferentiated support that was supposed to be paid in the first year,

³⁶ CP ___; Response to notice of presentation, recently designated (emphasis added).

³⁷ CP 11; ¶ 3.7. CP ___; Response to notice of presentation, recently designated.

³⁸ *Id.*, emphasis added.

³⁹ *Id.*, emphasis added.

In Paragraph 3.5 Enoch’s proposed language stated Enoch “shall pay undifferentiated family support for the children and wife as set forth in the Dissolution Decree, Paragraph 3.7.”⁴⁰ There was no separate allocation for payments made to support the children and payments to support the wife.⁴¹ As explained in the argument section, this created a federal income tax problem and unintentionally made the entire amounts Tami was to receive from Enoch in the first year taxable to her because the undifferentiated support was for both the wife and the children and there was no separate allocation for the children.

The legal errors continued in Enoch’s proposed child support order. In Paragraph 3.15, Enoch proposed the payments for the daycare, educational and agreed extracurricular activities expenses not included in the transfer payment be equally split, despite the fact Enoch received the CBI bonus and stock awards and did not have to share either of them with Tami.⁴² Then, in ¶ 3.16, Enoch proposed the child support not be reviewable by adjustment until March 2015 although this provision was never ordered by the trial court in its oral ruling.⁴³ Enoch also never provided child support worksheets for the first year; rather, in ¶ 3.2, he stated his income was only “one-half monthly net income” and ignored

⁴⁰ CP 16-17, ¶ 3.5 (emphasis added).

⁴¹ *Id.*

⁴² CP 18, ¶3.15

⁴³ CP 19; ¶3.16

the fact he received his entire CBI bonus and stock awards over and above the net salary and RBI bonus he was proposing he share with Tami.⁴⁴ In the child support worksheets he provided for years 2 and 3 as well as year 4, he also failed to include his CBI bonus or stock awards as income in the child support worksheets—he simply ignored it—despite him having received them both consistently for at least the prior two years.⁴⁵ Finally, in ¶ 3.3, he included in Tami’s income for child support purposes the entire undifferentiated family support paid for her and the children’s support when he stated in ¶ 3.3 Tami’s actual income was “one-half father’s monthly income.”⁴⁶

Tami replied to Enoch’s proposed documents and clearly documented her objections to Enoch’s proposed final documents.⁴⁷

Despite Tami’s protestations, the trial court chose to enter Enoch’s error-laden final documents. To be sure, the trial court entered a Decree that made Tami’s maintenance not modifiable and seemingly provided for non-taxable child support equal to one-half Enoch’s net salary and RBI bonus.⁴⁸ Unfortunately, the trial court entered a child support order that provided Tami was to receive undifferentiated family

⁴⁴ CP 15, ¶ 3.2.

⁴⁵ CP 23-32; Child support worksheets: RP 619:23 – 620:2.

⁴⁶ CP 15-16; ¶ 3.3

⁴⁷ CP ____; reply to proposed documents, recently designated.

⁴⁸ CP 11; Decree of Dissolution ¶ 3.5 & CP 15; Order of Child Support ¶ 3.2

support for the children and wife without a separate allocation as to each.⁴⁹ The trial court's confusion and consternation was obvious. In the signed Decree, ¶ 3.7, the trial court crossed out the word "net" that preceded the word salary and handwrote in the word "gross."⁵⁰ In the Child Support Order, ¶ 3.5, the trial court initially crossed out the word "net" before the word income and handwrote in the word "gross," but then crossed out the interlineation "gross" and handwrote in the phrase "net, but not less than \$6,000/mo."⁵¹

The trial courts errors continued throughout the signed Child Support Order. Without attaching child support worksheets, the trial court improperly found Enoch's actual monthly income, ¶ 3.2, was "one-half monthly net income" and ignored Enoch's CBI bonus income he had consistently received for at least the last two years.⁵² It included in Tami's monthly net income, ¶ 3.3, "one-half the father's net income"⁵³ despite the award being characterized as child support in the signed Findings of Fact and Conclusions of Law⁵⁴ and despite the Child Support Order, ¶ 3.5, providing that the award was to support not only Tami, but

⁴⁹ CP 16; Order of Child Support ¶ 3.5

⁵⁰ CP 11; Decree of Dissolution ¶ 3.7

⁵¹ CP 16; Order of Child Support ¶ 3.5

⁵² CP 15; Order of child support ¶¶ 2.2, 3.2.

⁵³ CP 15-16, Order of child support ¶ 3.3.

⁵⁴ CP 5, ¶2.19

also the children (and thus at least a portion was child support).⁵⁵ The trial judge also equally divided child expenses not included in the transfer payment in ¶ 3.15 despite Enoch receiving the entire recurring CBI bonus income and stock awards that should have been included in his income.⁵⁶ Finally, the signed Child Support Order, ¶ 3.16, seemingly prohibited child support adjustments until March 2015.⁵⁷

On October 16, 2011 Enoch then moved to “clarify” the proposed orders he drafted and the trial judge signed.⁵⁸

On October 17, 2011 Tami timely appealed the trial court’s signed Findings of Fact and Conclusions of Law; Dissolution Decree, and Child Support Orders.⁵⁹

After Tami filed her appeal, and without this Court’s leave, the trial court “clarified” the final orders Enoch drafted and that Tami appealed.⁶⁰ On November 2, 2011 the trial court modified the child support and maintenance provisions under the guise they were being clarified and stated Enoch was to pay Tami \$6,000 per month as *undifferentiated support* (no longer child support) that included one-half his net pay including his RBI beginning November 2011 through

⁵⁵ CP 16; Order of child support ¶ 3.5

⁵⁶ CP 18; Order of child support ¶ 3.15

⁵⁷ CP 19; Order of child support ¶ 3.16

⁵⁸ CP 33-81, Motion to clarify and for fees and sanctions.

⁵⁹ CP 82-106, Notice of appeal.

⁶⁰ CP 178-80, Order on motion to clarify.

September 2012.⁶¹ The trial judge also modified the property division by requiring Tami to pay Enoch \$3,750 as reasonable rent for occupying the family home from September 1, 2011 – October 15, 2011.⁶² Prior to the final orders being entered on September 16, 2011, Tami was lawfully occupying the family home pursuant to temporary orders.⁶³

Tami timely appealed the trial court's order that modified the September 16, 2011 orders.⁶⁴ This appeal was consolidated with Tami's appeal of the final orders.

Then the parties disputed whether the full trial verbatim report of proceedings needed to be prepared. Enoch brought a successful motion in the trial court.⁶⁵ The trial court ordered Tami to prepare the entire verbatim report of proceedings.⁶⁶ The trial court also assessed Tami \$500 in sanctions for failing to follow the Rules of Appellate Procedure.⁶⁷

Tami timely appealed this trial court order. This Court consolidated this appeal with the other two appeals, but did not assign it a separate case number because it dealt with preparing the record, which could be dealt with by motion. Tami brought a motion before this Court

⁶¹ *Id.*

⁶² CP 179, Order on motion to clarify.

⁶³ CP ___, Temporary Order, recently designated.

⁶⁴ CP ___; appeal; see recently filed designation of clerks papers

⁶⁵ CP ___; see recently filed designation of clerks papers.

⁶⁶ CP ___; Order; see recently filed designation of clerk's papers.

⁶⁷ CP ___; Sanctions; see recently filed designation of clerks papers.

challenging both the need for the verbatim report of proceedings as well as the trial court's authority to sanction her for allegedly violating the RAPs. Ultimately, this Court's Commissioner did not disturb the trial court's decision to require Tami to prepare the entire verbatim report of proceedings because the trial court was in the best position to know whether the entire verbatim report was needed, but the Commissioner did defer ruling to this panel on the \$500 sanction award.

V. ARGUMENT

1. **The Trial Court Could Not Make Maintenance Not Modifiable Because The Parties Did Not Agree.**

a. **Standard of Review:**

Review in this case is de novo. This is a case involving statutory construction as it relates to a trial court's authority to make maintenance not modifiable in a dissolution decree. The court's interpretation of statutes related to the Dissolution Decree is a legal question that is reviewed de novo.⁶⁸ "Marriage dissolution is a statutory proceeding and the jurisdiction and authority of the courts is prescribed by the applicable statute, the dissolution of marriage act, RCW 26.09."⁶⁹ Resolving this issue requires statutory interpretation and is, therefore, reviewed de

⁶⁸ *In re Smithe-Bartlett*, 95 Wn. App. 633, 636, 976 P.2d 173, 176 (1999).

⁶⁹ *In re Marriage of Moody*, 137 Wash. 2d 979, 987, 976 P.2d 1240, 1244 (1999)

novo.⁷⁰ Here the trial court erred when it acted contrary to the authority granted it pursuant to RCW 26.09.070 and 26.09.170. As such, review is de novo and this Court must reverse the trial courts' decision.

Even if this Court believed review was an abuse of discretion, reversal is still required. A trial court abuses its discretion when it makes a decision based on “untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion.”⁷¹ Here, the trial court's failure to follow the applicable statutes and case law would be an untenable ground or untenable reason requiring reversal under an abuse of discretion standard.

b. The Trial Court Did Not Have Statutory Authority To Make Maintenance Not Modifiable Unless The Parties Agreed

The trial court did not have statutory authority to make maintenance not modifiable absent the parties' consent. The only authority in the marital dissolution statutes that permits a trial court to make maintenance not modifiable is RCW 26.09.070(7). It reads:

When the separation contract so provides, the decree may expressly preclude or limit modification of any provision for maintenance set forth in the decree. Terms of a separation contract pertaining to a parenting plan for the children and, in the absence of express provision to the contrary, terms providing for maintenance set forth or incorporated by reference in the decree are automatically modified by modification of the decree.

⁷⁰ *In re Marriage of Drlik*, 121 Wash. App. 269, 276, 87 P.3d 1192, 1195 (2004)

⁷¹ *In re Marriage of Sheffer*, 60 Wash. App. 51, 53, 802 P.2d 817, 819 (1990)

RCW 26.09.170(1), dealing with modifications to support or maintenance in a dissolution decree, explicitly references RCW 26.09.070(7) as the only exception to support or maintenance provisions being modifiable.

Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified:...

Both this Court and our Supreme Court have interpreted these statutes in the same way.

It is clear from RCW 26.09.070(7) and .170(1) that the Legislature did not intend to empower the trial courts to limit or preclude the modification of a spousal maintenance award in the absence of an express and written agreement to that effect, freely and voluntarily entered into by the parties.⁷²

Here, the Dissolution Decree, ¶ 3.7, provides “maintenance shall be non-modifiable in amount or duration.”⁷³ According to *Short* and *Hulscher*, the trial court could only make maintenance not modifiable if the parties had an expressed agreement to that effect.

c. The Trial Court Expressly Found There Were No Agreements Between The Parties To Make Maintenance Not Modifiable.

The trial court expressly found the parties had no agreements regarding maintenance being not modifiable, and the trial court erred

⁷² *In re Marriage of Short*, 71 Wn.App. 426,443, 859 P.2d 636 (1993),aff'd In part and rev on other grounds, 125 Wn.2d 865,890 (1995). *See, also, In re Marriage of Hulscher*, 143 Wn.App. 708, 714-15 ,180 P.3d 199 (2008). (“Thus, ... *Short* stands for the proposition that a trial court may not *sua sponte* enter nonmodifiable maintenance provisions, absent an express agreement by the parties.)

⁷³ CP 11; Decree of Dissolution 3.7

when it *sua sponte* made the maintenance not modifiable. In its Findings of Fact and Conclusions of Law, ¶ 2.7, the trial court correctly found

The parties entered into an agreed Permanent Parenting Plan on June 29, 2011...Other than this agreement, there is no written separation contract or prenuptial agreement.⁷⁴

There are no other findings in the trial court's Findings of Fact and Conclusions of Law finding any other express agreements between the parties.⁷⁵ Moreover, there was no mention about maintenance not being modifiable in the trial court's oral ruling.⁷⁶ Finally, there was no evidence at trial that there were any agreements between the parties regarding maintenance. Enoch is invited to point to any finding, ruling or evidence suggesting otherwise.

d. Remand To Reconsider Maintenance Is Required.

Once the provision making maintenance is stricken from the Dissolution Decree, this Court must remand the case to the trial court to reconsider maintenance and support. "As a matter of law, that whenever a nonmodifiable maintenance award provision is stricken from a decree of dissolution, the amount and duration of the maintenance award must

⁷⁴ CP 91.

⁷⁵ CP 90-97.

⁷⁶ Trial court's oral ruling attached to Notice of Presentation CP ____ (recently designated).

be reconsidered.”⁷⁷ Maintenance must, therefore, be remanded to the trial court for reconsideration.

2. Respondent’s Recurring Large CBI Bonus And Stock Awards Must Be Included in the Child Support Worksheets.

a. Standard of Review

This Court should overturn a child support award if Appellant demonstrates that the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons.⁷⁸ Here, the trial court failed to follow RCW 26.19.071(3) that directs the court on how to calculate Respondent’s income for child support purposes. The trial court’s decision, therefore, is based on untenable grounds and for untenable reasons. The trial court’s child support determination should, therefore, be reversed and remanded back to the trial court for a correct determination in accordance with RCW 26.19.071(3).

b. This Court Was Required To Include Respondent’s Bonus Income And Contract Related Benefits In His Gross Income For Child Support Purposes.

The trial court was required to include Enoch’s Recurring Large CBI bonus income and his stock award contract related benefits in his gross income for child support purposes. It is this state’s public policy related to child support to accomplish two goals: First, to “insure that every

⁷⁷ *Short*, 125 Wash. App. at 876

⁷⁸ *In re Marriage of Peterson*, 80 Wash. App. 148, 152, 906 P.2d 1009, 1011 (1995)

child support order meets the child's basic needs and provides additional financial support commensurate with the parents' income, resources and standards of living;”⁷⁹ and second, “to equitably apportion the child support obligation between both parents.”⁸⁰ To meet these two important public policy goals, the legislature in RCW 26.19.071 dictated the way courts are to calculate parents’ income for child support purposes.⁸¹ RCW 26.19.071(3) explicitly provides that monthly gross income for child support purposes “*shall* include income from any sources, including...contract related benefits...[and]...bonuses.”⁸² Here, the trial court erred by failing to include in Enoch’s income for child support purposes his large, recurring, annual CBI bonus and his stock awards that are contract related benefits.

At trial, Enoch admitted he regularly received a commitment based incentive “CBI” bonus once a year in a lump sum.⁸³ For 2009 and 2010 Enoch received this CBI bonus.⁸⁴ Enoch also testified about contract employee stock purchase plan (ESPP) benefits,⁸⁵ and the trial court found

⁷⁹ RCW 26.19.001; *In re Marriage of Leslie*, 90 Wash. App. 796, 803, 954 P.2d 330 (1998)

⁸⁰ RCW 26.19.001.

⁸¹ *In re Marriage of Ayyad*, 110 Wash. App. 462, 467-68, 38 P.3d 1033, 1036 (2002)

⁸² RCW 26.19.071(3)(f) and (r); and *Ayyad*, 110 Wash. App. at 467-68.

⁸³ RP 489; 16-20

⁸⁴ RP 617-18

⁸⁵ RP 622:12 – 624:12

Enoch had stock awards.⁸⁶ Pursuant to the mandatory language in RCW 26.19.071(3), the trial court must include this recurring CBI bonus, the stock awards, and the ESPP proceeds in Enoch's gross income for child support purposes.⁸⁷ The trial court erred when it failed to include these income amounts in Enoch's gross income for child support purposes.

There was no deviation in the child support order for nonrecurring income.⁸⁸ That is because there was no basis to conclude the CBI bonus, stock awards, or ESPP proceeds were not recurring. RCW 26.19.035(2)(c) requires written findings of facts and conclusions of law that support the deviation.⁸⁹ These findings are absent from the child support order. Moreover, there was no evidence Enoch had not received these amounts for the past two years. The basis to deviate is set forth in RCW 26.09.075(1)(b) and is based on a review of the last two calendar years. Here, Enoch admitted he received his large, annual CBI bonus each of the previous two years.⁹⁰ It should have been included in his gross income for child support purposes.

⁸⁶ CP 97.

⁸⁷ *Ayyad*, 110 Wash. App. at 468.

⁸⁸ CP 101, ¶3.7

⁸⁹ *Choate v. Choate*, 143 Wash. App. 235, 242, 177 P.3d 175, (2008)

⁹⁰ RP 617-18

3. The Trial Court Could Not Prohibit Child Support Adjustments For More Than 24 Months.

The trial court erred when it attempted to prohibit child support adjustment for more than 12 months. The legislature has specifically provided in RCW 26.09.100(2) that provisions in a dissolution decree for periodic adjustment or modification

shall not conflict with RCW 26.09.170 except that the decree may require periodic adjustments or modifications of support more frequently than the time periods established pursuant to RCW 26.09.170.

The trial court can allow adjustments more frequently than the adjustments provided in RCW 26.09.170, but cannot make them less frequent. RCW 26.09.170(7)(a) specifically allows child support adjustments every 24 months. Here, the trial court's signed child support order attempted to prohibit adjustments until March 2015 – almost 4 years after it was entered.⁹¹ This was obvious and patent error. Reversal is required.

4. The Court Failed To Apportion Daycare and Special Child Expenses In Proportion to The Parties' Respective Net Incomes

The trial court erred when it did not apportion child expenses not included in the transfer payment to the parties in proportion to their income. RCW 26.19.080(3) requires the trial court to allocate all

⁹¹ CP 18; 3.16 Periodic Adjustment

extraordinary child expenses in proportion to the parents' respective income. It states

Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic child support obligation

RCW 26.19.080(3) has been interpreted as mandatorily requiring courts to apportion the child expenses not included in the child support worksheets and transfer payments in proportion to the parents' incomes. The reported cases deal primarily with long distance transportation expenses and have interpreted the word "shall" in RCW 26.19.080(3) as requiring the courts to apportion the expenses in the same proportion as the basic child support obligation."⁹² Because day care and special child rearing expenses are in the same sentence as the illustrative examples long distance transportation costs, the same rule that applies to long distance transportation costs should apply to the day care and other special child rearing expenses that are not included in the child support worksheets and transfer payment. Contrary to this mandatory requirement, the trial court's signed child support order equally split the

⁹² *In re Marriage of Katare*, 125 Wn.App. 813,833, 105 P.3d 44 (2005)("this statutory language is mandatory")

children's daycare and special child rearing expenses such as educational expenses and agreed-upon extracurricular activities.⁹³

This error was caused by the trial court's failure to include in Enoch's income his large recurring CBI bonus, his stock awards, and his ESPP proceeds that he did not have to split with Tami. Once these amounts are properly calculated into Enoch's child support, then the percentages of income to each parent will be accurate and the appropriate percentage of these expenses can be properly calculated by the trial court after remand.

5. The Trial Court Erred When It Did Not Include Child Support Worksheets For September 2011 To August 2012 In Its Child Support Order

The trial court erred as a matter of law when it set support for the first year (September 1, 2011 – August 31, 2012) and failed to attach child support worksheets. In 1988, the legislature required child support worksheets be filed by the courts when previously they were optional.⁹⁴ Moreover, trial courts have no discretion to ignore any part of the child support worksheets.⁹⁵ Here, Enoch's counsel did not provide the trial court a completed child support worksheet as he was required to do

⁹³ CP 16; 3.15 Payment for expenses not included in the Transfer payment

⁹⁴ RCW 26.19.035(4) (formerly RCW 26.09.020(4)); and *Sacco v. Sacco*, 114 Wash. 2d 1, 3, 784 P.2d 1266 (1990); *Wilson v. Wilson*, 165 Wn.App. 333, 341, 267 P.3d 485 (2011) ("using child support worksheets, based on statewide guidelines, is mandatory"); and *In re Marriage of Sievers*, 78 Wn.App. 287, 305, 897 P.3d 388 (1995) ("RCW 26.19.035(3) requires that worksheets be filed in every proceeding in which child support is determined. There are no exceptions.")

⁹⁵ *In re Marriage of Simpson*, 57 Wn.App. 677, 681, 790 P.2d 177 (1990) ("A trial court, as we have noted, has no discretion to ignore any part of the worksheet")

pursuant to RCW 26.09.035(3).⁹⁶ The trial court was led into error when it signed Enoch's proposed child support order without a child support worksheet for the first year.⁹⁷ The first child support worksheet is for September 1, 2012 – August 31, 2014 (CP 22), but the child support order was signed September 16, 2011 (CP 20) and child support was to commence September 1, 2011(CP 17, ¶ 3.9). There is, thus, no child support worksheet for the first year.

6. Child Support Payments Are Not Income and Cannot be Included in Child Support Worksheets

The trial court erred by including the child support Tami was to receive as income when calculating her child support. RCW 26.19.071(3) does not list child support received as income for child support purposes. Moreover, a child's custodian receives support money as a trustee and not in his or her own right.⁹⁸ Because the funds that are to support the children are not Tami's funds they should not be characterized as income to her for child support purposes. The trial court, in its Dissolution Decree, ¶ 3.7, explicitly characterized the entire support Tami was to

⁹⁶ CP ___, Enoch's Proposed Child Support Order Attached To His Response to Notice of Presentation, recently designated.

⁹⁷ CP 21-23 (Note the first child support worksheet is for September 1, 2012 – August 31, 2014, but the child support order was signed September 16, 2011 and child support was to commence September 1, 2011, ¶3.9 CP 17)

⁹⁸ *Fuqua v. Fuqua*, 88 Wash. 2d 100, 105, 558 P.2d 801, 804 (1977)

receive as child support.⁹⁹ The Child Support Order, ¶ 3.5, also clearly indicated at least an unallocated portion of the monthly payment was support for the parties' children.¹⁰⁰ It was error to include the support intended for the children, whatever amount that may have been, in Tami's income for child support purposes.

7. The Trial Court Should Not Have Included In Tami's Income The Maintenance The Trial Court Ordered, But Which Tami Did Not Receive

Not only should the trial court not have included the portion of the undifferentiated support that was intended to support the children, but it should also not have included the portion that was intended to support Tami because it was only ordered and not received. RCW 26.29.071(3) makes clear that only maintenance "actually received" be included as income. At the time the trial court entered the Child Support Order, Tami had not received the support that was intended for her. The trial court should have, therefore, not included that amount in her income. Similarly, the trial court erred in deducting the support it ordered for Tami from Enoch's income. RCW 26.19.071(5)(f) only allows deductions to Enoch's income for court ordered maintenance to the extent actually paid. When the trial court entered its Child Support Order Enoch had not paid this support to Tami. The support for Tami was ordered, but

⁹⁹ CP 11.

¹⁰⁰ CP 16.

neither received nor actually paid. To be sure, “RCW 26.09.090(1)(a) thus directs a trial court to calculate the need for spousal maintenance only after it has determined the parties' child support obligations.”¹⁰¹ This statute does not “require that the trial court, after already taking child support into consideration, recalculate child support after a maintenance amount is determined.”¹⁰²

Division two recently addressed these two statutes and the requirement for calculating child support and maintenance. In *Wilson*, the petitioner argued that the trial court “erred by not deducting the spousal maintenance payments that the court ordered him to pay Pamela from his income and by not including it as her income.”¹⁰³ Former RCW 26.19.071 (and the current RCW) “is silent as to whether a trial court must consider spousal maintenance that has been ordered but has not yet been paid or received.”¹⁰⁴ Current RCW 26.19.071 still uses the term “actually received” for income included in gross income and “actually paid” for determination of net income.¹⁰⁵ The court harmonized this statute with the maintenance statute, 26.09.090, and held that the trial court was correct in not deducting from the payor’s income the

¹⁰¹ *Wilson v. Wilson*, 165 Wn.App. 333, 342, 267 P.3d 485, 490 (2011)(emphasis added)

¹⁰² *Id.*

¹⁰³ *Id.* at 342

¹⁰⁴ *Id.* at 343

¹⁰⁵ RCW 26.19.071

maintenance ordered but not actually paid and in not including in the payee's income maintenance ordered but not actually received.¹⁰⁶ The court further concluded that RCW 26.09.090(1) requires the court to calculate the need for maintenance "only *after* it has determined the parties' child support obligations. This statutory directive requires the trial court to consider the impact of child support on the ability of the payor to pay maintenance, before ordering maintenance."¹⁰⁷ The petitioner was unable to cite any authority stating that a court must consider maintenance at the same time it considers child support.¹⁰⁸ Here, the trial court should have excluded the undifferentiated support in its entirety as both a deduction from Enoch's income and from including it in Tami's income. Part was for the children and the other part was for Tami but not actually received or paid.

8. The Trial court erred in referring to Appellants award, ½ respondents' net salary and RBI income, as undifferentiated support.

The trial court was led into error at least twice by Enoch and his counsel in characterizing the \$6,000 monthly payments that were to be paid to Tami. The confusion started when Enoch's counsel drafted a Dissolution Decree that referred to the monthly payment as entirely child

¹⁰⁶ *Wilson*, 165 Wash. App. at 342

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 343

support and represented to the trial court that would justify awarding Tami only one-half Enoch's income.¹⁰⁹ Then, in the simultaneously drafted Child Support Order Enoch's counsel referred to the payment stream as undifferentiated family support for both the wife and the children.¹¹⁰

Enoch's counsel either did not understand the tax implications between child support and undifferentiated child support or intentionally led the trial court into error. Enoch's Response to Tami's Notice of Presentation specifically stated that if the trial court were to award Tami only one-half Enoch's *net* income as opposed to one-half his *gross* income, then Enoch would make sure the payment stream would not be taxable to Tami. So, in the Dissolution Decree Enoch's counsel lived up to his word and made the payment stream based on Enoch's *net* income not taxable to Tami. In the Child Support Order, however, Enoch's counsel made the payment stream taxable to Tami. "[I]n the case of unallocated or undifferentiated support for a wife and children, all of the support is taxable to the wife and deductible by the husband."¹¹¹ The trial court based the monthly payment stream to Tami on Enoch's net income. Presumably, then, it should have been non-taxable to Tami.

¹⁰⁹ CP 11, ¶3.7

¹¹⁰ CP 16, ¶3.5

¹¹¹ *Bay v. C.I.R.*, 68 T.C.M. (CCH) 396 (T.C. 1994).

What may have been innocent confusion then became more treacherous when Enoch filed his Motion for Clarification. Ultimately, Enoch and his counsel managed to get the trial court to clarify the Dissolution Decree and Child Support Order by re-characterizing the monthly payment stream from child support to “undifferentiated support.”¹¹² It, thus, became taxable to Tami. The tax effect was not calculated as a deduction into her net income for child support purposes. This was clearly error.

9. The Trial Court Erred When It Purportedly Clarified Its Final Orders Because It Did More Than Clarify Its Prior Orders, It Modified Them

The trial court abused its discretion in entering its Order on Motion to Clarify by ordering a modification and not a clarification. A motion to clarify is “merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary.”¹¹³ “A modification, on the other hand, occurs when a party’s rights are either extended beyond or reduced from those originally intended in the decree.”¹¹⁴ “A court may clarify a decree by defining the parties’ respective rights and obligations, if the parties cannot agree on the

¹¹² CP 179, ¶1.

¹¹³ *In re Marriage of Blanchard and Christel*, 101 Wn.App. 12, 22, 1 P.3d 60 (2000)(citing *Rivard v. Rivard*, 75 Wn.2d 415, 418, 151 P.2d 677 (1969))

¹¹⁴ *Blanchard*, 101 Wash. App. at 22

meaning of a particular provision.”¹¹⁵ Here, the trial court erred when it imposed a rent obligation that was not in the original Dissolution Decree. Specifically, it ordered Tami to pay Enoch \$3,750 rent for the family home.¹¹⁶ This obligation was not in the Dissolution Decree; rather, it was added by the Order on Motion to Clarify. As such, it was a modification and not a clarification.

The trial court also erred because this previously non-existent obligation operated to alter the property distribution in the Dissolution Decree. RCW 26.09.170(1) prohibits trial courts from altering property distribution provisions in a Dissolution Decree. Because the newly-created payment from Tami to Enoch altered the 60/40 property division originally ordered by the trial court, it impermissibly modified the property division and was error.

The trial court’s Order on Motion to Clarify also re-characterized Tami’s income stream from non-taxable child support into taxable undifferentiated support. This modified Tami’s rights and increased her obligations by transferring the obligation to pay taxes from Enoch, as he originally proposed and that was originally adopted by the trial court, to Tami.¹¹⁷ The trial court exceeded its authority and did more than clarify

¹¹⁵ *Id.*

¹¹⁶ CP 179, ¶2.

¹¹⁷ *Bay v. C.I.R.*, 68 T.C.M. (CCH) 396 (T.C. 1994)

the Dissolution Decree and Child Support Order; it modified them. It was led into reversible error.

10. The Trial Court Lacked Jurisdiction To Clarify Or Modify The Dissolution Decree Or Child Support Order Because They Had Both Been Appealed When The Court Entered Its Order.

The trial court was without jurisdiction to enter its Order on Motion to Clarify. RAP 7.2(a) transfers jurisdiction to the appellate court once it accepts review. Here, Tami timely appealed the Dissolution Decree and Child Support Order on October 17, 2011.¹¹⁸ This was an appeal of final orders to the intermediate appellate court and was, thus, an appeal as a matter of right; and this Court accepted review once the Notice of Appeal was signed and filed.¹¹⁹ Because this Court had accepted review on October 17, 2011, the trial court was without authority on November 3, 2011 to clarify or modify the Dissolution Decree or Child Support Order.¹²⁰ Accordingly, the trial court's November 2, 2011 Order on Motion to Clarify is void.

11. Tami Is Entitled To Her Attorney Fees On Appeal Based on RAP 18.1 And RCW 26.09.140

RAP 18.1(a) allows appellate attorney fees to a party who has the right to attorney fees under applicable law. RCW 26.09.140 allows

¹¹⁸ CP 82.

¹¹⁹ RAP 6.1

¹²⁰ See CP 178 for Order on Motion to Clarify entry date.

courts to award attorney fees to a party in a marital dissolution proceeding based on need and ability to pay. Here, Enoch has the superior ability to pay and Tami has a need for fees. Enoch is the one who must only pay one-half his net salary to Tami. This amount may very well be taxable to Tami and deductible by Enoch. Enoch gets to keep for himself his large, recurring CBI bonus, his stock awards, and his ESPP contract-related benefits. Based on this, Enoch has a superior ability to pay and Tami has the need for fees. A financial declaration will be filed in accordance with RAP 18.1(d).

DATED this 13 day of August, 2012.

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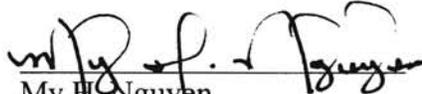
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of Tami Remick's Opening Brief to the following:

Office of the Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Catherine Wright Smith Smith Goodfriend, P.S. 1109 - 1st Avenue, Suite 500 Seattle, WA 98101-2988	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Natalie de Maar Law Offices of Natalie de Maar 9 Lake Bellevue Drive, Suite 103 Bellevue, WA 98005	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email

DATED this 13th day of August, 2012 Seattle, Washington.


My H. Nguyen
Legal Assistant