

**ORIGINAL**

No. 71119-9-I

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION I

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VICTOR SCHUBERT,

Appellant,

vs.

AMBER SCHUBERT,

Respondent.

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

Table of Authorities ..... ii

I. Issues in Reply ..... 1

II. Reply to Argument ..... 1

    1. Employment History of the Parties ..... 1

    2. Reason for Division of Community Property ..... 2

    3. Five Months of Unemployment ..... 3

    4. Amount of Maintenance ..... 4

    5. The Record on Appeal is Adequate ..... 4

    6. Award of Interest ..... 16

    7. Maintenance Award Based Upon Escalation Clause ..... 16

    8. The Duration of Maintenance Was Not Within the Range  
    of the Trial Court's Discretion ..... 19

    9. The Child Support Award Was an Abuse of Discretion  
    Based Upon Victor's Involuntary Unemployment ..... 20

    10. Sale of Newcastle Home ..... 23

    11. Award of Attorney's Fees Was Improper ..... 24

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Allemeier v. University of Washington</i> , 42 Wn. App. 465, 712 P.2d 306 (1985) .....	5, 6
<i>DewBerry v. George</i> , 115 Wn. App. 351, 62 P.3d 525, <i>rev. denied</i> , 150 Wn.2d 1006 (2003) .....	23
<i>Donovan v. Donovan</i> , 25 Wn. App. 691, 612 P.3d 387 (1980)	12, 13
<i>Favors v. Matzke</i> (1989) 53 Wash.App. 789, 770 P.2d 686 ....	7
<i>Leslie v. Verhey</i> , 90 Wn. App 796, 954 P.2d 330 (1998), <i>rev. denied</i> , 137 Wn.2d 1003 (1999) .....	21, 22
<i>Marriage of Blickenstaff</i> , 71 Wn. App. 489, 859 P.2d 646 (1993) .....	20, 21
<i>Marriage of Drlik</i> , 121, Wn. App. 269, 87 P.3d 1192 (2004) ..	15
<i>Marriage of Edwards</i> , 99 Wn.2d. 913, 665 P.2d 883 (1983) ...	18, 19
<i>Marriage of Estes</i> , 84 Wn. App. 586, 929 P.2d 500 (1997) ....	20
<i>Marriage of Landry</i> , 103 Wn.2d 807, 699 P.2d 214 (1985) ....	11
<i>Marriage of Ochsner</i> , 47 Wn. App. 520, 736 P.2d 292, <i>rev. denied</i> , 108 Wn.2d 1027 (1987) .....	19
<i>Marriage of Roark</i> , 34 Wn. App 252, 659 P.2d 1133 (1983) ...	11, 12
<i>Marriage of Rouleau</i> , 36 Wn. App. 129, 672 P.2d 756 (1983)	14

<i>Marriage of Valante</i> , 179 Wn. App 817, 320 P.3d 115 (2014)	10, 14, 19
<i>Marriage of Van Camp</i> , 82 Wn. App. 339, 918 P.2d 509, <i>rev. denied</i> , 130 Wn.2d 1019 (1996)	24
<i>Marriage of Wallace</i> , 111 Wn. App. 697, 45 P.3d. 1131 (2002), <i>rev. denied</i> , 148 Wn.2d. 1011 (2003)	11
<i>Marriage of Washburn</i> , 102 Wn.2d 168, 677 P.2d 152 (1984)	16, 17, 19
<i>Marriage of Wright</i> , 179 Wn. App. 257, 261, 319 P.3d 45 (2013)	13, 14, 18
<i>Marriage of Zier</i> , 136 Wn.App 40, 45, 147 P.3d 624 (2006)	11, 19
<i>Rekhi v. Olason</i> , 28 Wn. App. 751, 626 P. 2d 513 (1981)	10
<i>Scanlon v. Witrak</i> , 110 Wn.App. 682, 689, 42 P.3d 447 (2002)	10, 11, 19
<i>State v. Alexander</i> , 70 Wash. App. 608, 854 P.2d. 1105 (1993), <i>reconsideration filed, review granted</i> , 123 Wash. 2d. 1001, 868 P.2d. 871, <i>reversed</i> 125 Wash. 2d. 717, 888 P.2d. 1169	6

### Statutes

RAP 9.2	5, 6
RCW 26.09.080	3, 9
RCW 26.09.090	10, 11

RCW 26.09.140 .....	25
RCW 26.16.010 .....	2
RCW 26.16.020 .....	2
RCW 26.16.030 .....	2
RCW 26.19.011 .....	22
RCW 26.19.035 .....	21, 22
RCW 26.19.071 .....	20, 21

## **I. Issues in Reply**

1. The Appellant withdraws the assignment of error in the issue of non-modifiability of the maintenance award.
2. The Appellant withdraws the assignment of error regarding the trial court's failure to award interest.

## **II. Reply to Argument**

**1. Employment History of the Parties.** Amber argues that she did not have a college degree and had been out of the workforce during the marriage. Amber worked 5 ½ years as a dental assistant, including two years after the marriage. (RP 53:4-13) The Respondent spent 8 years taking college courses during the marriage. CP 554. Amber did not have to obtain college education to obtain a dental assistant certification. (RP 53:9-55:16)

Amber states that the trial court found it was not practical for Amber to return to work as a dental assistant because she wasn't licensed in the state of Washington. (Res. Br., pg. 5) What the trial court found was that Mr. William Skilling's testimony, in which he stated that the wife could be employed as a dental office manager earning \$70,000 per year, was not credible. (CP 553) The court found that Amber didn't want to return to work as a dental hygienist, and therefore, awarded her maintenance to become a nurse.

**2. Reason for Division of Community Property.** Amber misstates the facts when she states in her brief that Victor was awarded 60% of the “marital” estate,<sup>1</sup> as well as at page 8: “By the time of trial, the parties had amassed a marital estate of \$1.657 million [...]” The term ‘marital estate’ is a misnomer. There is community property under RCW 26.16.030 (which might commonly be called the “marital estate”), and there is separate property under RCW 26.16.010 and 26.16.020. The term ‘marital property’ is not found in the statute.

The trial court divided the community property 54%-46% in favor of Ms. Schubert based on historical earning disparity. Ms. Schubert received \$648,936 in total community property. Mr. Schubert received \$547,413 in community property, \$101,000 less than Ms. Schubert. (CP 653-654). See Appendix A to Appellant’s Brief. Ms. Schubert was awarded \$26,644 in separate property, and Mr. Schubert had returned to him \$434,724 in separate property acquired from prior to marriage. (CP 653-654).

Amber argues that “[...] the trial court awarded the wife maintenance” and “the husband a disproportionate share of the marital estate [...]” (Res. Br., pg. 8). The implication is that the court made a

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<sup>1</sup>“After awarding the husband almost 60% of the marital estate [...]” Res. Br. pg. 1. Amber misstates the record when she argues that “[t]he trial court awarded Victor 59.25% of the entire marital estate [...]” (Res. Br. pg. 8)

disparate award of property to Victor for the purpose of providing enough assets so Victor could pay maintenance while unemployed.

The trial court divided property in Amber's favor based upon the court's finding that Victor had an "earning ability of about \$225,000 per year" under RCW 26.09.080, which finding is not contested and is a verity on appeal. CP 569. But the court imputed an income of \$225,000 per year to Victor for payment of child support and maintenance, despite the fact that he was involuntarily unemployed.

The court did not state that the basis of its maintenance award was a disproportionate division of assets to Victor. If the court had intended to make such an award, the court should have also deducted sales costs and taxes on gain due by reason of the liquidation of assets to pay maintenance.

The court returned to Victor all of the separate property acquired by Victor prior to marriage during the trial based upon application of the factors under RCW 26.09.080, from which neither party took an appeal. In an eleven year marriage, it is expected that the parties would retain the property they acquired prior to marriage.

**3. Five Months of Unemployment.** Amber argues that Victor was only unemployed for only 34 days as of the date of trial and that the court was justified in assuming he'd return to work shortly. At trial in June 2013, the court found that Victor was unemployed, living on severance,

and it found that Victor would soon find employment (FF a.4, CP 555, CP 569). But in September 2013, Victor made the fact of his continued five months of unemployment known to the court in his Motion for Reconsideration. CP 525. The trial court did not rule on Victor's Motion for Reconsideration and did not consider Victor's September 2013 declaration.

**4. Amount of Maintenance.** Amber argues that the trial court reduced the amount of support that Victor had previously been paying to Amber based upon the reduced earning capacity of \$225,000 per year. Victor had been paying the mortgage of \$7,300 per month for the family home occupied by Amber pending trial, plus maintenance of \$3,500 and child support of \$1,596 to Amber. The court maintained a level of maintenance needed by Amber by substituting her future rent payment of \$2,500 for the previous higher mortgage payment Newcastle. The trial court did not reduce maintenance based upon a lower income as much as it continued to provide support to Amber by covering her new housing of \$2,500, plus \$3,500, and adding child support of \$2,000 per month.

**5. The Record on Appeal is Adequate.** Amber argues in her brief that Victor did not provide an adequate record on appeal. She argues in her brief that "[t]he husband challenges the trial court's fact-based and discretionary decisions on maintenance, child support, property, and

attorney fees, made after a 5-day trial, without providing a verbatim report of the entire trial proceedings.” (Rsp. Br. pg. 1, emphasis added).

The challenged finding of fact was the finding that the Appellant/Husband would earn significant income in the future.<sup>2</sup> All relevant portions of the verbatim Report of Proceedings were provided for review by this court.

Amber misstates the law when she argues that the “Appellant’s failure to provide an adequate record for review is fatal to his appeal.” (Rsp. Br. pg. 12, emphasis added). Appellant is not required to provide the transcript of the trial unrelated to the appeal. Much of the verbatim trial transcript concerned the character of the Costa Mesa property and the four accounts containing separate property existing at the time of marriage. The verbatim transcript regarding employment for both parties was provided for review on appeal.

The Appellant provided the relevant portion of the verbatim Report of Proceedings which in this case is sufficient and adequate.

Amber relies on *Allemeier v. University of Washington*, 42 Wn. App. 465, 473, 712 P.2d 306 (1985), and RAP 9.2 (b) for the proposition that “Appellant has the burden of perfecting the record so that this Court

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<sup>2</sup> *Amending Findings of Fact and Conclusions of Law*, p. 26, line 19: “In this matter, the Court finds that the respondent has historically had very significant income and there is no reason to expect that he will not continue to earn at a significant level.” (CP 568)

has before it all of the evidence relevant to the issues he intends to raise.”  
(emphasis added) The key term is “relevant.”

Remedies for an inadequate record do not necessarily include the affirmation of the lower court’s decision per se. RAP 9.2 provides that if the party seeking review refuses to provide the additional parts of the verbatim report of proceedings, the party seeking the additional parts may provide them at the party’s own expense or apply to the trial court for an order requiring the party seeking review to pay for the additional parts of the verbatim report of proceedings.

The failure of a party to provide an adequate report of proceedings regarding disputed findings of fact, as required by RAP 9.2(b), where review of the findings is sought, results in the appellate court accepting the findings as verities. *State v. Alexander*, 70 Wash. App. 608, 854 P.2d. 1105 (1993), reconsideration filed, review granted, 123 Wash. 2d. 1001, 868 P.2d. 871, reversed 125 Wash. 2d. 717, 888 P.2d. 1169.

*Allemeier v. University of Washington*, supra, is distinguishable on its facts. Amber’s reliance on that case is misguided. In that case, the Plaintiff assigned error to the court taking evidence of statements made in a settlement letter as an admission by party opponent. The letter was not offered into evidence. The Plaintiff did not provide a verbatim report of proceedings related to the offer and the objection, and the court did not

view the statements made in context with the rest of the evidence presented to determine if there was any prejudice. The issue turned on the statements made at trial. Those statements would have been represented in the verbatim report of proceedings, which was not before the court.

Amber's argument that the record on appeal is inadequate is disingenuous because it implies the existence of other evidence in the record that differs from the Findings of Fact or might provide a different context or meaning. A respondent claiming that an issue should not be considered because of an inadequate record on appeal must apprise the court of the significance of the missing portion of the trial court record in relation to the issue. *Favors v. Matzke* (1989) 53 Wash.App. 789, 770 P.2d 686. Amber does not point to any evidence that might exist in the record that may yield another context or additional information to contradict the Findings of Fact upon which Victor relies in this appeal.

Victor relies upon the Findings of Fact. The trial court accepted Victor's testimony, which was uncontroverted at trial. Victor testified, and the court found, that his position at Intellectual Ventures was eliminated in April 2013 (CP 555); that he negotiated a severance pay of 16 weeks, ending in August 2013 (CP 555); that he immediately sought employment, retained headhunters, used industry contacts, and an employment coach (CP 570); that he actively and earnestly sought employment (CP 570); and

that his opportunities for employment were reduced because his niche as a patent attorney was narrow and there were changes in the industry (CP 570). There is nothing else in the verbatim report of proceedings regarding Victor's employment that the court did not include in the Findings of Fact and which Victor did not accept as verities upon appeal.

Contrary to Amber's implications to this court, there is no other contradictory evidence. There is no reason that Victor should incur the additional expense of ordering that record in order to satisfy Amber's misstatement that the rule requires "verbatim report of the entire trial proceedings."

Amber mischaracterizes Victor's challenge to the finding of future significant income when she asserts that "it" is "the crux to his entire challenge to the maintenance award [...]" (Rsp. Br. pg. 13). Victor's argument in the opening Brief of Appellant, properly stated, is that the court is speculating in its finding of fact that his future income will allow him "to support himself similar to that [lifestyle] enjoyed during the marriage" and that "he will [...] continue to earn at a significant level." This finding cannot be supported by any evidence because, Victor's future is yet unknown.

Historical earning capacities and the court's perception of future earning potential are factors for the court to consider in making its division

of property under RCW 26.09.080. It is quite different for the court to award maintenance based upon the speculation about a spouses future income at a time when he has none. The court should not award maintenance based upon a speculative guess about the obligor's future employment where that spouse is involuntarily unemployed. A maintenance award should be based upon a party's present employment and ability to meet his or her own needs, as well as provide support to a spouse. Where it can be shown that the current circumstances or present reality of that spouse's situation is not of his own creation and entirely outside his control, income should not be imputed and maintenance should not be ordered.

There are no past or present facts upon which the court could base a finding of fact for the speculation of future income or future events. The court's own findings contradict its findings based upon the trial in June 2013, in which the court states that Victor is unemployed and is diligently looking for work. Victor filed a Motion for Reconsideration offering his testimony by Declaration in September 2013 that his severance had run out in August 2013, and that after five months of unemployment, he had received no offers of employment. The court failed to consider the Motion for Reconsideration.

The conclusion of law that Victor challenges is that he can pay maintenance based upon the speculation of future income. This speculation is unsupported by evidence, because there is no evidence about the future.

Amber argues that the court's decision should be affirmed based upon the court's reliance on its broad discretion in awarding maintenance and property division. Victor's appeal is based upon an error of law (considering an inappropriate factor or considering a speculative legal standard). An error of law is an abuse of discretion. *Scanlon v. Witrak*, 110 Wn.App. 682, 689, 42 P.3d 447 (2002); *Marriage of Valante*, 179 Wn. App 817, 320 P.3d 115 (2014). The trial court's conclusion of law, that Victor has an ability to pay \$5,500 per month in maintenance and \$2,000 per month in child support while he is involuntarily unemployed, is reviewable by this court *de novo* because it is an error of law.

Amber cites the rule of *Rekhi v. Olason*, 28 Wn. App. 751, 626 P. 2d 513 – (1981), regarding the court's broad discretion. Victor argues that the court erroneously applied the law when it concluded that he had an ability to pay maintenance while still unemployed and even after his severance ran out. The court did not apply the standard of RCW 26.09.090 (f), which requires the court to consider as one factor the ability of the payor to meet his own financial needs and obligations while paying support. The evidence and findings of fact are uncontroverted that Victor

had no ability to pay, or at the very least, an equal ability to Amber to pay—namely, no income.

Amber cites *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d. 1131 (2002), *rev. denied*, 148 Wn.2d. 1011 (2003), for her statement that the trial court “is in the best position to determine what is fair, just, and equitable.” But where the findings of fact are not challenged, and the challenged finding is based on speculation about the future, this court can review the record *de novo* to determine whether the statutory factors of 26.09.090 were appropriately applied.

Amber cites *Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985), for the proposition that “[t]he spouse who challenges” the trial court’s decision “bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.” The trial court’s error law in awarding maintenance is an abuse of discretion by the court, *Scanlon v. Witrak*, and the trial court’s conclusions of law are reviewed *de novo*. *Marriage of Zier*, 136 Wn.App 40, 45, 147 P.3d 624 (2006).

Amber relies upon *Marriage of Roark*, 34 Wn. App 252, 253, 659 P.2d 1133 (1983). After 28 years of marriage, Mr. Roark had been laid off; however, he continued to receive an income from his railroad retirement under federal law, which the court, in 1983, had no jurisdiction to consider as property. The court did hold that the railroad retirement income could

be considered for the purposes of an award of maintenance. The railroad retirement pay was \$600 per month and the pension was awarded 100% to Mr. Roark as property but the court ordered him to pay from the retirement pay one-half of that amount, \$300 per month. *Roark* is inapposite to this case.

While Mr. Roark had income from which he could pay maintenance: namely, his railroad retirement income, Victor did not. *Roark* is distinguishable on its facts in this regard. The court in *Roark* did not order a spouse with no income to pay maintenance. Based upon the court's award of \$300 per month in maintenance from his railroad retirement income of \$600 per month, the comment by the court that the husband's future employment prospects were favorable constitutes dicta, and was related to a property award favorable to the wife, not an award of maintenance.

Amber cites *Donovan v. Donovan*, 25 Wn. App. 691, 697, 612 P.3d 387 (1980). That case is not applicable, and is distinguishable on its facts. Amber argues that Mr. Donovan was also unemployed when the court ordered him to pay maintenance. But Mr. Donovan was employed but on uncompensated temporary medical leave. The court ordered the husband to pay to the wife \$350 per month for the first 12 months, and \$250 per month for the second 12 months. The husband argued that he had no income. The court stated: "We all assume that [Mr. Donovan] will return to work very

expeditiously, and if not, then you will have a different ballgame on our hands, and you folks are going to be back in court [...].”

Mr. Donovan was employed and on medical leave, and would return to his full-time position as an airline pilot. Victor is involuntarily unemployed, and had still received no offers of employment after five months of unemployment. In *Donovan*, there was no proof that Mr. Donovan would not be returning to work within a known period of time based upon his medical condition. Victor does not know when he might receive an offer of employment. The niche for his skill in licensing patents is narrow.

Amber relies on *Marriage of Wright*, 179 Wn. App. 257, 261, 319 P.3d 45 (2013). The facts in that case are distinguishable, and the holding is inapposite to this case. In *Wright*, Dr. Wright owned his own medical practice, which generated substantial goodwill income every year. The court concluded that from his thriving medical practice that would generate to him \$4 million during the term of maintenance awarded by the court. The parties in *Wright* were married for 30 years and had eight children. The estate acquired by the parties, was \$17 million. Dr. Wright challenged the award of maintenance on the argument that the wife had no need for maintenance because of her millions in wealth from the division of property. Dr. Wright did not argue in that case, as Victor argues in this case, that he had no income.

The issue in *Wright* is clearly not, as it is in this case, the inability of the obligor spouse to meet his own needs and financial obligations in addition to paying support. The issue in *Wright* was whether Mrs. Wright needed maintenance at all because of the substantial wealth awarded to her.

In this case, Victor is an attorney who has worked as an employee for large companies handling patent licensing issues. He has no private practice and he has no passive goodwill income. If he started his own private practice, it could be years before he could generate an income of \$225,000.

Amber references *Marriage of Valante*, arguing that the trial court's maintenance award was not a placeholder, as it was in *Valante*. That is true, because the maintenance paid by Victor in this case was \$5,500, which is not a placeholder amount.

She also argues that the maintenance was not based upon conjecture, as it was in *Marriage of Rouleau*, 36 Wn. App. 129, 131, 672 P.2d 756 (1983), because Victor had only been unemployed for 34 days and was only into 5 weeks of his 16-week severance package at the time of trial. But in Victor's Motion for Reconsideration, filed in September 2013, there had been five months of unemployment and his 16-week severance package had been totally consumed. The maintenance award and Victor's ability to pay maintenance were based upon conjecture over Victor's future. He had still not received an offer of employment and by September 2013, the length of his unemployment was not brief. The litigation had

ended with the trial in June 2013. Victor had been diligently searching for employment over many months and still had not found a job by the time the court entered amended orders in October 2013.

Amber argues that the trial court's findings of fact were based upon clear evidence "that the husband's employment would be brief, and that once the litigation was completed he could focus his efforts to regain employment [...]." (Rsp. Br. pg. 19). But the court did not rule on Victor's Motion for Reconsideration, in which he brought to the court's attention the extended period of unemployment and his lack of success in finding a job. The court should have considered these facts and granted the Motion for Reconsideration.

Amber puts an interesting twist on *Marriage of Drlik*, 121, Wn. App. 269, 87 P.3d 1192 (2004), arguing that "[t]he appellate court held that while the trial court the trial court could suspend maintenance, there was no evidence that the husband would ever regain the ability to pay of [*sic*] maintenance, and that therefore, a suspension of maintenance 'indefinitely' was inappropriate." That is not the holding of *Drlik*. The holding of *Drlik* is that the court could definitely suspend maintenance while the husband was stricken with brain cancer and unable to work, but the court could not suspend maintenance indefinitely. The matter was remanded to the trial court.

Amber goes on to argue that the court intended that Victor pay maintenance from his severance package and from his "disproportionate

award of assets.” (Rsp. Br. pg. 30). The court made no such finding or conclusion. The court’s award made no finding that it anticipated or expected Victor to deplete his assets in order to pay maintenance during the period of unemployment. The trial court made no adjustments for costs or the payment of taxes related to the liquidation of assets. Had the court intended that Victor pay maintenance from the liquidation of assets, the costs of sale and taxes incurred as a result would have and should have been included in the property division.

Speculation, or conjecture, is an opinion formed without proof or sufficient evidence. There is no substantive evidence in the record about Victor’s future ability to obtain new employment. The only evidence in the record is that Victor’s niche in patent licensing was growing narrower, and that he was unlikely to receive in the future the level of income he had received at Intellectual Ventures.

**6. Award of Interest.** Appellant’s assignment of error regarding the trial court’s failure to award interest is withdrawn, because Amber sold the Costa Mesa residence and Victor was paid. The issue is moot.

**7. Maintenance Award Based Upon Escalation Clause.** Amber argues that the maintenance award of 25% of the husband’s gross income in excess of \$225,000 is not an escalation clause. She relies on *Marriage of Washburn*, 102 Wn.2d 168, 677 P.2d 152 (1984) to argue that this type of percentage maintenance award is allowed because maintenance

is a “flexible tool” to equalize the parties’ standard of living for an appropriate period of time. Her reliance is misplaced.

In *Washburn*, the court awarded compensation to a former wife, recognizing her contribution to the former husband’s education. When one spouse supports another spouse through a professional school, there is a mutual expectation of future financial benefit to the community. But if the marriage ends before that benefit can be realized, the circumstance is a relevant one which must be concerned in making a fair and equitable division of property and liabilities or a just award of maintenance. Where assets of the parties are insufficient to permit compensation to a spouse who supported the student spouse through school, to be affected entirely through a property division, a supplemental award of maintenance is appropriate.

Victor had completed his law school education and had been practicing law for many years before he met and married Amber. This case is not a case of compensatory maintenance. Amber went to school throughout the marriage in anticipation that she would increase her income by attending nursing school.

Amber argues that the \$5,500 in maintenance and \$2,000 in child support per month was inadequate to meet her needs, and therefore, the court was justified in awarding 25% of Victor’s income in excess of \$225,000 per year. However, Amber makes no reference to the record, findings, or conclusions to support this argument. In fact, the trial court

found that Amber's need was \$3,500 per month, which is what she had received during the pendency of the action. The court added \$2,500 per month, which the court found would be her future rent, and \$2,000 per month in child support based upon an imputed income to Victor of \$225,000 per year.

Amber tries to distinguish *Marriage of Edwards*, 99 Wn.2d. 913, 665 P.2d 883 (1983), on the basis that the support award in that case was child support, not maintenance. Amber argues that maintenance is different from child support because maintenance is not based solely on need. She relies on *Marriage of Wright*, supra, when she states that the only limitation on maintenance is that the award be just. Under the facts of this case, where Victor is unemployed, Amber's need was the basis of the maintenance award. In *Wright*, there was no percentage maintenance award at issue.

At page 24 of the Respondent's Brief, Amber goes on to make the unsupported argument that the trial court recognized that the parties will be in disparate financial circumstances after the marriage, and thus was justified in awarding additional maintenance in the form of an escalation clause. Regardless of what the court's intentions may have been in awarding additional maintenance in the form of an escalation clause, the rule of *Edwards* holds that the court cannot set a support award based upon a percentage that does not include a ceiling or some way to not exceed the need for which support was awarded in the first place.

Amber makes the unsupported argument that monthly maintenance of \$5,500 per month was the minimum amount of support needed by the wife, relying on *Marriage of Ochsner*, 47 Wn. App. 520, 736 P.2d 292, *rev. denied*, 108 Wn.2d 1027 (1987). In that case, the husband's maintenance award was set at \$400 per month, with an increase based upon the husband's corporation's gross receipts, with a ceiling set at a maximum of \$600, as established in the original order. Amber argues that *Ochsner* is applicable based upon her unsupported conclusion that the trial court found that \$5,500 per month was the minimum amount of maintenance needed by the wife. The court set no ceiling in this case, as it did in *Ochsner*.

The trial court's award of a 25% escalation clause was an abuse of discretion because the decision was outside the range of acceptable choices based upon the facts and the applicable legal standard. *Valante*, 320 P.2d, and *Edwards*, *supra*. It is an abuse of discretion if the court's decision is based upon an erroneous view of the law, and the trial court's conclusions of law are reviewed de novo. *Scanlon v. Witrak*, *supra*, and *Marriage of Zier*, *supra*.

**8. The Duration of Maintenance Was Not Within the Range of the Trial Court's Discretion.** Amber argues that based upon *Washburn*, the court could order maintenance for whatever period of time the court felt appropriate. Maintenance in an eleven-year marriage should clearly be applied for the purposes of rehabilitation to a position of employment. In this case, Amber had the ability to return to work as a

dental hygienist by apply to the state for a dental assistant certificate. The court found that she did not want to work as a dental hygienist, and gave her maintenance for four years so that she could go to school to become a nurse. But even Amber's expert, Janice Reha, testified that Amber could go back to work as a dental hygienist after two years and earn \$40,000 per year.

The court in *Marriage of Estes*, 84 Wn. App. 586, 929 P.2d 500 (1997), remanded the issue of duration of maintenance.

**9. The Child Support Award Was an Abuse of Discretion Based Upon Victor's Involuntary Unemployment.** Amber points out that under RCW 26.19.071 (6), the court can impute income to a voluntarily unemployed parent, based upon historical earnings. The statute requires that when imputing income, the parent must be voluntarily unemployed. In this case, Victor is involuntarily unemployed, and is diligently seeking employment.

Amber cites *Marriage of Blickenstaff*, 71 Wn. App. 489, 859 P.2d 646 (1993), to support her argument that the court can impute income to an "employable" parent. The phrase in *Blickenstaff*, "Income shall not be imputed for an unemployable parent," is dicta. Amber's corollary from the *Blickenstaff* dicta is that if a parent should not have income imputed to them if they are "unemployable," then income can be imputed to an "employable" parent. It is an interesting twist on the language of

*Blickenstaff*, but it is not the holding of *Blickenstaff*. This is not the law under RCW 26.19.071 (a).

Her argument brings up the crux of the issue before this court. Whether a spouse is employable depends upon whether employers exist to employ that spouse. In *Blickenstaff*, the spouse was not employable because he was incarcerated, and argued that his incarceration was involuntary unemployment. The court disagreed, holding that the spouse in *Blickenstaff* was voluntarily unemployed because it was a situation of his own creation.

Victor is not incarcerated. While he may be “employable,” the fact remains that Victor an employer has to hire him so that he can generate income.

The trial court imputed income to Amber in the Findings of Fact, and it is an error of law to not include that imputed income in the child support worksheets, as pointed out in Appellant’s Brief at page 28. There is no error to assign to the trial court’s findings, because the trial court’s findings included an imputed income to Amber. On remand, the court should include the imputed income in the worksheets based upon the uncontested and unchallenged finding of fact imputing income to her. RCW 26.19.035 requires worksheet to accompany the child support order and they should reflect the findings of fact.

Amber makes the argument that the court’s award of child support, \$300 greater than the calculation, is not a deviation, citing *Leslie v. Verhey*,

90 Wn. App 796, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). RCW 26.19.011 (4) defines deviation as any child support amount that differs from the standard calculation. RCW 26.19.035 sets forth the standards for application of the child support schedule. It is provided in subsection (2) thereof, that written Findings of Fact upon which a support determination is based shall include the reasons for deviation from the standard calculation.

Victor did assign error to the trial court's deviation in its award of child support in excess of the standard calculation. Victor clearly identified an assignment of error to the award of child support above the standard calculation, and stated as an issue the fact that the trial court failed to enter a finding of fact in its upward deviation from the standard calculation of child support schedules. *Leslie* clearly states that the court is permitted to "exceed" the maximum amount of support provided by the schedule, which is a "deviation." The court may only exceed the standard calculation based upon written findings of fact. The trial court's award in *Leslie* was vacated and remanded because its findings and conclusions did not evidence a comprehensive examination.

The trial court in this case did not enter any written finding of fact stating its reasons for deviating above the standard calculation. It only included a conclusion of law stating: "The children are in need of this level of support and the husband has the ability to pay this amount." (CP 615) Amber's argument that no error was assigned is a parsing of the language.

The court entered no findings of fact as a basis for the children's need above the standard calculation.

**10. Sale of Newcastle House.** Amber argues that there was no evidence that the sale of the Newcastle house was imminent. At the time of entry of the Amended Decree, Victor argued in his Motion for Reconsideration that because of the court's high award of maintenance and child support and Victor's continuing unemployment, the sale of the Newcastle house was imminent. (CP 525) The court did not rule on Victor's Motion for Reconsideration.

Victor requested at trial no or a low award of maintenance and child support. He testified that he would attempt to keep the home and pay the mortgage out of his existing separate assets. Because of the trial court's high award of maintenance and child support as set forth in the Amended Decree and Order of Child Support, Victor had no choice but to list the Newcastle residence for sale.

Amber's argument, citing *DewBerry v. George*, 115 Wn. App. 351, 362, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003), that the "[t]rial court's credibility findings are not subject to review on appeal," is misplaced because the trial court didn't rule on Victor's Motion for Reconsideration. The court made no finding about credibility and did not consider the argument or the credibility of the statements. The matter should be remanded for the court to consider the facts existing at the time

of the Motion for Reconsideration in September 2013, prior to entry of the Amended Decree of Dissolution in October 2013.

**11. Award of Attorney's Fees Was Improper.** Amber argues that the award of attorney's fees was reasonable because the court awarded attorney's fees payable to the wife's attorney in the amount of one-half of her actual fees, which was the same amount that the husband incurred. Amber makes the assumption that this amount was ostensibly reasonable, because the husband, himself a lawyer, could aid in the preparation of his case, and therefore, his fees must be reasonable.

A comparison of one party's fees to another party's does not determine reasonableness. The court must look to the detail of the fees incurred in order to determine reasonableness. Amber cites *Marriage of Van Camp*, 82 Wn. App. 339, 340, 342, 918 P.2d 509, *rev. denied*, 130 Wn.2d 1019 (1996) for the proposition that the only requirement is that the award be equitable. But the *Van Camp* court did consider both the computations and records introduced into evidence by the Van Camps' experts and in fact, it used many of the Lodestar factors in calculating a reasonable fee by rejecting duplicate work.

In this case, none of the actual hours incurred by Amber's attorneys were entered into evidence. Amber had multiple attorneys and paralegals, creating duplication of effort. The issue of an award of attorney's fees based upon the assignments of error and the issues addressed in Appellant's opening brief raises the issue of an award of attorney's fees based upon

ability to pay, lack of income in a property award, and the absence of any record upon which a court could make a determination. The issue set forth in the Appellant's brief is that the majority of the community assets and the lack of husband's income made it an error to award \$50,000 in attorney's fees. Victor challenges the court's decision to award attorneys' fees under RCW 26.09.140, as that statute requires the court to determine the reasonableness of the fees incurred.

Respectfully submitted this 18<sup>th</sup> day of August, 2014.

A handwritten signature in black ink, appearing to read "Mark D. Olson", written in a cursive style.

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Mark D. Olson, WSBA #9656  
Counsel for Appellant

ORIGINAL

No. 71119-9-I

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION ONE

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VICTOR SCHUBERT,

Appellant,

vs.

AMBER SCHUBERT,

Respondent.

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DECLARATION OF SERVICE OF REPLY BRIEF OF APPELLANT

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COURT OF APPEALS  
STATE OF WASHINGTON

GREGORY HARDGRAVE declares:

I am a paralegal for counsel of record for the Appellant, Victor J. Schubert.

That on the 18<sup>th</sup> day of August, 2014, I caused to be served upon Ms. Catherine W. Smith and Ms. Valerie A. Villacin, of Smith Goodfriend P.S., 1619 8<sup>th</sup> Ave. N, Seattle, WA 98109-3007, a true and complete copy of the following:

- Reply Brief of Appellant

Said Reply Brief of Appellant was served upon Ms. Smith and Ms. Villacin via ABC Messenger Service.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 18<sup>th</sup> day of August, 2014, at Seattle, Washington.



Gregory Hardgrave  
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