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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 35157-9-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

JANICE HULSCHER, Appellant

vs.

MARTIN HULSCHER, Respondent

RESPONDENT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION¹

Pursuant to *In re Marriage of Short*², the trial court concluded that a nonmodifiable maintenance provision in the parties' decree of dissolution had to be stricken because the parties did not enter into a "separation contract" as required by RCW 26.09.070(7). CP 383, 409. The trial court therefore determined the amount and duration of maintenance and awarded appellant Janice Hulscher 24 months of additional maintenance at \$1,500 a month. CP 409. Notably, by the time the trial court entered its final order on June 23, 2006, respondent Martin Hulscher had already paid Janice \$4,766.67 per month in spousal maintenance and child support since November of 2001, a period of over 4½ years. See CP 42, 409, RP 6/9/06 at 3.

Janice argues on appeal that the trial court erred by (1) applying the *Short* decision because the decree of dissolution was based upon the parties negotiated agreement and therefore constitutes a "separation contract" pursuant to RCW 26.09.070, and (2) by concluding that Martin proved a substantial change of circumstances sufficient to modify the maintenance award pursuant to RCW 26.09.170. Martin's position is that the trial court *properly* applied the *Short* decision because (1) the decree of

¹ The parties will be referred to herein by their first names to avoid confusion. No disrespect is intended.

² *In re Marriage of Short*, 125 Wn.2d 865, 890 P.2d 12 (1995).

dissolution, although reached by negotiated agreement, does not constitute a “separation contract” pursuant to RCW 26.09.070; and (2) pursuant to *Short*, the trial court was not required to find a substantial change of circumstances to “reconsider” the amount and duration of a nonmodifiable maintenance award. *See* RP (6/9/06) at 4-7. Additionally, the trial court properly found that the parties intended, as demonstrated by their subsequent statements and actions, that the decree could be modified, and further that such intent encompassed the spousal maintenance provision. CP 409; *see also* CP 100, 105-106.

Alternatively, even if the negotiated decree of dissolution could be deemed to constitute a “separation contract”, such “separation contract” was “unfair at the time of execution” as contemplated by RCW 26.09.070(3). It was unfair because (1) public policy disfavors a divorced wife being given a perpetual lien upon her divorced husband’s future earnings; (2) although both parties were only 44 years old when the decree was entered and Janice was capable of gainful employment, it imposed a patently unfair obligation upon Martin to pay Janice \$4,766.67 per month for the remainder of his life absent Janice’s death or remarriage; and (3) attorney G. Thomas Ryan prepared the dissolution documents on behalf of Janice even though he had been both parties’ “family attorney” for 20 years and even though Martin paid his fees and relied upon him to be fair;

see CP 106, and (4) although Martin did not have independent counsel, Mr. Ryan failed to inform him of the effect or meaning of the “nonmodifiable” maintenance provision, CP 143, and then agreed to represent Janice in the proceedings initiated by Martin for the purpose of voiding the patently unfair maintenance provision.

II. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

The parties were married in 1980 and separated on November 30, 2001. CP 12. They had two, sons. Ryan who was born in April 1983, and Kevin who was born in June of 1987. CP 2. During the marriage, Martin worked as a long shoreman. Janice initially worked as a pharmacy assistant. CP 76. After the children were born, the parties agreed that Janice would quit work to focus on raising the children. CP 76.

In 2001, the parties separated. Martin’s taxable income that year was \$145,510. CP 39. Following the parties’ separation, the parties amicably agreed that their sons would continue to reside with Janice and also agreed upon the amount of maintenance and child support that Martin would pay to Janice. *See* CP 15, 42, 72; RP (6/9/06) at 3. They agreed that Martin would continue to pay for Kevin to attend Bellarmine High School and participate in competitive tennis and for Ryan to continue

attending University of Puget Sound. CP 43. They agreed that Martin would pay the health insurance premiums for Janice and their sons. CP 40, 43. The parties, however, did not enter into a written separation contract. CP 12.

In 2002, 2003, and 2004 Martin's income increased substantially due to the amount of overtime hours that Martin worked to voluntarily pay maintenance and child support to Janice and to pay the expenses of their son's education and participation in competitive tennis. CP 39. On May 28, 2003, the parties signed agreed Findings of Fact and Conclusions of Law prepared by attorney Thomas Ryan on Janice's behalf. CP 11-22. Martin was not represented by independent counsel. He trusted Mr. Ryan, because he had been the family's attorney for many years. CP 106. Paragraph 2.7 of the Findings states: **"There is no written separation contract or prenuptial agreement."** CP 12. Paragraph 3.6 states, however, that "[t]he parties have agreed to this decree of dissolution and to the related findings of fact and conclusions of law, final parenting plan, and the final order of child support as part of an agreement to resolve the marriage dissolution, and these final pleadings create a contract between the parties." CP 15.

The Findings state that "[m]aintenance should be ordered because the wife is in need of spousal maintenance and the husband has the ability

to pay.” They do not, however, indicate the amount or duration of agreed spousal maintenance. Paragraph 3.6.2 of the Findings requires Martin to provide health insurance for Janice “until [she] obtains medical insurance *from employment.*” CP 16 (emphasis added). The exhibits to the Findings of Fact and Conclusions of Law set forth the parties agreement regarding the division of property. CP 18-22.

The dissolution pleadings were not entered with the court until February 23, 2004. The decree addresses the amount and duration of spousal maintenance. CP 29-37. It provides in paragraph 3.7 as follows:

The Petitioner/husband shall pay spousal maintenance to the Respondent/wife in the amount of \$1,100 per week, minus the child support payment as calculated on a weekly basis. The total spousal maintenance has been calculated at 4.3 week per month basis as totaling \$4,766.67, minus the monthly child support paid by Kevin. The spousal maintenance shall terminate upon the death of either spouse. The spousal maintenance shall terminate upon the remarriage of the Respondent. Otherwise the spousal maintenance is not modifiable.

CP 31. The order of child support required Martin to pay \$1,218 per month in child support to Janice for Kevin, who was 16-years-old at the time the decree was entered. CP 3.

The parties son’ Kevin continued to reside with Janice pursuant to the parenting plan until December of 2004, at which point he moved in with Martin. *See* CP 40, 43. Nonetheless, Martin continued to pay spousal

maintenance and child support pursuant to the decree of dissolution and order of child support. CP 88. Martin voluntarily paid support for Ryan, who was living with Janice while attending UPS, in the amount of \$150 per month in addition to his tuition. CP 40, 43.

B. PROCEDURAL FACTS

On February 16, 2005, Martin moved to “vacate” or “modify” that portion of the decree pertaining to nonmodifiable spousal maintenance. CP 38-41, 89-97. Martin also petitioned for modification of child support given that Kevin was no longer living with Janice. CP 52-53. Martin’s motion to vacate was based upon the following factors:

(1) there was no “separation contract” as required by *In re Marriage of Short*; (CP 92-93, 97),

(2) the fundamental unfairness of Martin being required to continuously work substantial overtime (70 to 90 hours per week) to meet his spousal maintenance and other financial obligations; (CP 39, 61, 93),

(3) that Janice had refused to search for or obtain employment apparently under the belief that she had no obligation to do so; (CP 40, 60, 62, 94; *see also* CP 100-106),

(4) that Martin was not represented by independent counsel at the time of the dissolution and did not understand the meaning or effect of the “nonmodifiable” maintenance, and that, if he had understood it to

mean he would have to work substantial overtime to pay maintenance for the rest of his life, he would never have signed the dissolution documents; (CP 39, 61, 143)

(5) that Martin's younger son Kevin was now living with him despite the fact that Martin was still paying \$1,218 in monthly child support to Janice; (CP 40, 61) and

(6) that Janice was no longer in need of as much maintenance given her sale of the family home for a substantial profit in late May or early June 2005. CP 61-62, 64; *see also* CP 102-105, 111, 113.

In response, Janice requested that the court require Martin to continue to pay spousal maintenance at \$1100 per week and child support for Ryan at \$150 per week. CP 42-46, 71-77, 79. Janice asserted essentially that the decree of dissolution constituted a "separation agreement" and was therefore binding. *See* CP 83-84. Janice also asked that the court not impose any child support obligation on her for Kevin. CP 44, 73, 79, 81. She asked that the court consider Martin's new wife's income with respect to its consideration of Martin's ability to continue to pay spousal maintenance. CP 45, 74, 80; *see also* CP 150.

Martin's motion was initially heard by Commissioner Mark Gelman on July 26, 2005. The court denied Martin's motion to vacate the decree but agreed to "reopen" the issue of spousal maintenance. RP

(7/26/05) at 2, 8; *see also* CP 361. Commissioner Gelman's decision was based upon *In re Marriage of Short*. *See* RP 4/14/06) at 3-4. The court indicated that it would be "helpful" to have some kind of occupational evaluation to determine Janice's income earning potential and needed income documentation for Martin and his new wife. RP (7/26/05) at 3; *see also* RP (4/14/06) at 3. The court reserved ruling on the question of child support. RP (7/26/05) at 6. No orders were entered promptly after this hearing as required by local rules. *See* RP (4/14/06) at 2-7.

Following this hearing, Janice's deposition was taken in November 2005. *See* CP 99, 101-106, RP (11-1-05) at 4-43. Janice, however, refused to obtain the occupational evaluation that the court indicated would be helpful. CP 100-101. Martin filed a motion to clarify the duration of maintenance on March 14, 2006. CP 98. With such motion, Martin provided to the court the income information for him and his spouse that the court had requested at the July 26, 2005 hearing. CP 107-108.

Martin requested that the non-modifiable maintenance provision in the decree be "stricken" and that the court determine a reasonable duration of the maintenance award with graduated decreases over time, and that Janice be required to provide her own health insurance. CP 98. Martin abandoned his request for any credit for child support paid to Janice for

Kevin while Kevin was living with him, or for any post-secondary support for Kevin. CP 99. Martin asked that the spousal maintenance obligation completely end no longer than four years from the date of the decree, and that Janice be required to secure her own medical insurance within six months. CP 99-108.

In his request, Martin presented evidence that (1) Janice had no legitimate reason for no working, but that she simply believed she should not be required to work; CP 100-101, 141-142; *see also* CP 151; RP (5/8/06) at 26, (2) Janice had refused to obtain the occupational evaluation requested by the court; CP 100-101, 141; *see also* RP (5/8/06) at 16-17, (3) Janice did not have the financial need for maintenance that she purported to have; CP 102-105, 111, 113, 141-143, 145; *see also* RP (5/8/06) at 19, 24-25, (4) Martin and Janice had regularly deviated from the decree when the need arose and that neither of them had intended for spousal maintenance to continue permanently; CP 105-106, 140, 148, *see also* CP 362;³ and RP (5/8/06) at 17, (5) that Janice admitted that the amount of hours Martin was working was unreasonable; CP 107, and (6)

³ Janice's attorney, Thomas Ryan, states in his memorandum in opposition to Martin's motion that "[a]lthough *there may be some evidence that the parties intended to modify the spousal maintenance at some point in the future*, there is no evidence that the parties intended that the spousal maintenance be short term." CP 362. This admission by Mr. Ryan is significant because it demonstrates that neither parties intended for maintenance to be nonmodifiable, and thus, the trial court properly applied its discretion and determined the proper amount and duration of maintenance considering the relevant factors in RCW 26.09.090.

Martin had relied upon and trusted Mr. Ryan to treat the parties fairly in the dissolution documents given that Mr. Ryan had been the parties' attorney for almost 20 years and given that Martin was meeting with and paying Mr. Ryan. CP 106, 143; *see also* RP (5/8/06) at 6-11.

In her response, Janice asserted on one hand that she had "always been open to changes or variations from decree," and that she had "indicated to Marty that [she] was willing to change the spousal maintenance." CP 148. Janice proposed several options to the court as an alternative to denying Martin's request for modification altogether. CP CP 155-156. On the other hand, Janice asserted that she could not meet her expenses if the spousal maintenance was reduced and that the intent when the decree was written was that the maintenance would not end. CP 149-150.

Janice denied that she and Martin had planned for her to return to work. She indicated that she had nonetheless explored her employment options and that the expenses and time involved in obtaining an education "do not pencil out when I look at the length of my work life and the income from the employment." CP 152; *see also* RP (5/8/06) at 20. In any event, she asserted that any income from her work would be to "supplement" rather than "replace" her spousal maintenance income. CP

151. Janice opposed the termination of Martin's obligation to provide her with health insurance indefinitely. CP 151.

There was a hearing scheduled for April 14, 2006 regarding Martin's motion to clarify the amount and duration of spousal maintenance. Commissioner Gelman, however, expressed concern that there were no orders put in place after the July hearing, and therefore no further argument or decision was made at this hearing on Martin's motion to clarify. See RP (4/14/06) 2-14.

Another hearing was held on May 8, 2006. At this hearing, the language of an Order to be entered as a result of the July 26, 2005 hearing was initially worked out by the court and the parties' attorneys. RP (5/8/06) at 2-5. As a result, an order was entered that denied Martin's motion to vacate that was heard in July 2005. The order also provided as follows:

ORDERED that the Court finds per *In re Marriage of Short* and [RCW] 26.09.070(7) the decree is not a separate separation agreement and *the court will entertain the Petitioner's motion to modify the Decree*; it is further

ORDERED that the Court indicates it would be helpful for Respondent to provide an occupational expert report giving the Court information about Respondent's abilities and estimate of time for training; that discovery was not prohibited; that information about income of other adults in the household shall be disclosed; and *at the next hearing the Court will address* the following

issues: child support due by Respondent, the credit for overpaid child support requested by Petitioner, *and spousal maintenance.*

CP 375-376 (emphasis added).

At the May 8, 2006 hearing, the court also entertained Martin's motion to modify (i.e. determine) spousal maintenance. *See* (RP 5/8/06) at 6-33. The court required Martin to continue to pay spousal maintenance at the existing level for another four years, at seventy-five percent (75%) of the existing level for the next two years, and at fifty percent (50%) of the existing level for the following two years. RP (5/8/06) at 34; CP 383-384, 386. As part of its ruling the court concluded that (1) four years was a reasonable and adequate time for Janice to obtain a college degree or its equivalent, (2) it is not reasonable given Martin's age and line of work to require him to continue to work at the level that he has worked in the past; and (3) it is reasonable to assume that his income stream will start to decrease given the amount of overtime he has worked and his physical ability to work. RP 384.

Janice moved for revision of the trial court's Findings of Fact and Conclusions of Law to the extent they stated that the decree did not constitute a "separation agreement" and that the spousal maintenance was not permanent pursuant to a separation contract. RP 388, 394-407. Martin also moved for revisions to the Findings of Fact and Conclusions

of Law. RP 390-391. Judge Frank Cuthbertson heard the parties' motions to revise on June 9, 2006.

In a written ruling, Judge Cuthbertson affirmed Commissioner Gelman's ruling that the decree did not constitute a "separation contract" pursuant to *In re Marriage of Short* and RCW 26.09.070, and that modification of the spousal maintenance was the proper remedy. CP 408. Judge Cuthbertson found, in the alternative, that there was evidence showing an intent and a course of dealing that included modification of the spousal maintenance provision in the decree. CP 409. Judge Cuthbertson revised Commissioner Gelman's ruling regarding the specific amount and duration of maintenance. He awarded Janice \$1,500 per month for the next 24 months beginning May 1, 2006, and required Martin to continue to provide Janice medical insurance during the two year period of spousal maintenance or until she obtained insurance through employment. The court did not reach the issue of whether the decree was unfair or unjust at the time it was entered. CP 410.

Janice has appealed Commissioner Gelman's orders entered on both May 10, 2006, and May 16, 2006, and Judge Cuthbertson's ruling on the parties' motions for revisions entered June 30, 2006. CP 415-416.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY APPLIED THE *SHORT* DECISION BY STRIKING THE NONMODIFIABLE MAINTENANCE PROVISION AND BY DECIDING THE AMOUNT AND DURATION OF SPOUSAL MAINTENANCE

In the *Marriage of Short* case, the husband was ordered to pay the wife \$750 per month for 12 months with the option of paying this spousal maintenance in one accelerated lump sum, which the husband chose to do. *In re Marriage of Short*, 71 Wn. App. 426, 432, 859 P.2d 636 (1993). Subsequently, the trial court determined that the spousal maintenance award had been fully satisfied and provided in the decree that the maintenance award would be non-modifiable by either party for any reason. *Short*, 71 Wn. App. at 433. On appeal, the wife contended that the trial court abused its discretion by entering a non-modifiable maintenance award in the absence of a separation contract as provided in RCW 26.09.070(7). *Short*, 71 Wn. App. at 442. The Court of Appeals agreed and reversed the non-modifiable maintenance provision stating:

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.

Short, 71 Wn. App. at 443. The Supreme Court affirmed stating that “whenever a nonmodifiable maintenance award provision is stricken from a decree of dissolution, the amount and duration of the maintenance award *must be reconsidered*.” Notably, neither the Court of Appeals nor the Supreme Court suggested that, on remand, the wife would be required to show a substantial change of circumstances.

1. The Dissolution Decree Did Not Constitute a Separation Contract Pursuant to RCW 26.09.070.

From the plain language of RCW 26.09.070, it is clear that the Legislature did not intend for negotiated and agreed upon decrees of dissolution to constitute separation contracts. Subparagraph (1) allows parties to a marriage to enter into a separation contract providing for maintenance of either of them, the disposition of property owned by both or either of them, and a parenting plan and support for their children. Such a contract does not require court approval or involvement and may be done prior to filing a petition for dissolution or decree of legal separation. Subparagraph (2) of RCW 26.09.070 refers to parties to a “separation contract” living “separate and apart *without* any court decree”, and, thereby, indicates that a “separation contract” is not the same as a negotiated decree of dissolution. Subparagraph (3) refers to the effect of a “separation contract” on the court when the parties *later* petition the court

for dissolution or a decree of legal separation, and thereby indicates that a “separation contract” is a document entered into *prior* to the entry of any decree of dissolution. Subparagraph (4) gives the court the ability to determine that a “separation contract” was unfair at the time of execution, and then make orders in the decree for maintenance or the disposition of property or the discharge of obligations that is different than contained in the “separation contract.”

Pursuant to subparagraph (6), a “separation contract” must either be set forth in the decree of dissolution, or filed in the action, or made an exhibit and incorporated by reference. The statute obviously contemplates that a “separation contract” is a document distinct from the decree of dissolution itself otherwise it could not be “set forth in the decree” or “filed in the action” or “made an exhibit” or “incorporated by reference.” Subparagraph (7) allows a decree to preclude or limit modification of any provision for maintenance “[w]hen the separation contract so provides.” Conversely, a decree cannot contain a nonmodifiable maintenance provision when, as here, there is no “separation contract” providing for such a provision. Subparagraph 8 allows the parties by mutual agreement to terminate a “separation contract.” Parties, however, cannot by mutual agreement terminate a decree of dissolution that has been entered by the court. For all the reasons set forth above, a negotiated and agreed upon

decree of dissolution does not constitute a “separation contract” as contemplated by RCW 26.09.070. The trial court properly so held.

2. After Properly Striking the Nonmodifiable Maintenance Provision from the Decree, the Trial Court Properly Determined Spousal Maintenance; It was Not Required to Find a Substantial Change of Circumstances.

Our supreme court in *Short* held that, when a decree of dissolution contains a non-modifiable maintenance provision and there is no “separation contract”, the proper remedy is for the trial court to “strike” the nonmodifiable maintenance provision in the decree and determine the amount and direction of maintenance that should be awarded. *Short*, 125 Wn.2d at 876. That is precisely what the trial court did here, and thus its decision should be affirmed.

Contrary to Martin’s argument, there was no requirement that the trial court find a substantial change in circumstances. Because the nonmodifiable provision must be stricken pursuant to *Short*, the trial court was required to determine the amount and duration of maintenance applying the factors set forth in RCW 26.09.090. The trial court’s decision must be affirmed on appeal absent a manifest abuse of discretion. *See, e.g., In re Marriage of Wright*, 78 Wn. App. 230, 237, 896 P.2d 735 (1995). Manifest abuse of discretion exists when no reasonable person

would have ruled as the trial court did. *In re Marriage of Nicholson*, 17 Wn. App. 110, 114, 561 P.2d 1116 (1977). Here the trial court did not manifestly abuse its discretion when it awarded maintenance at \$1,500 per month for an additional 24-month period extending from May 1, 2006 through May 1, 2008. Janice was capable of obtaining employment and had already received monthly maintenance and child support in the amount of \$4,766.67 since the parties separated in 2001.

B. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT THE PARTIES INTENDED THAT THE SPOUSAL MAINTENANCE PROVISION COULD BE MODIFIED

As an alternative basis to support its decision striking the non-modifiable maintenance provision, the trial court found that the parties intended that the decree could be modified, and that such intent encompassed the spousal maintenance provision. CP 409 *see also* CP 100, 105-106. Janice did not challenge the trial court's factual finding in this regard, and thus, it is a verity on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.2d 611 (2005). In any event, there is substantial evidence to support this finding. *See Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (factual findings are reviewed for substantial evidence). Janice testified in her deposition that she and Martin had agreements outside the decree of dissolution and they had discussed on an

informal basis that they would be mindful of future issues such when Martin retired or if he became disabled. CP 105, RP (11-1-05) at 18. Janice further testified that she and Martin anticipated that she would generate retirement income and that at some point in the future they would discuss how long the maintenance would continue. CP 106, RP (11-1-05) at 24. Based upon this testimony, there was substantial evidence to support the trial court's finding that there was "intent and a course of dealing that included modification of the spousal maintenance provisions of the decree." CP 409. Because the parties did not actually intend that maintenance would continue at the same level for the remainder of Martin's life, absent Janice's death or remarriage, the court properly declined to enforce the decree as a "separation contract." *See Sea-Van Investments Associates v. Hamilton*, 125 Wn.2d 120, 881 P.2d 1035 (1994) (an enforceable contract requires a meeting of the minds on the essential contractual elements).

C. **IN ANY EVENT, THE NONMODIFIABLE MAINTENANCE PROVISION WAS PATENTLY UNFAIR AND UNJUST AT THE TIME IT WAS ENTERED**

Pursuant to RCW 26.09.070(4), if a court in an action for dissolution of marriage finds that a separation contract was unfair at the time of its execution, it may make orders for the maintenance of either

party exercising its discretion pursuant to RCW 26.09.090. See *Hansen v. Hansen*, 24 Wn. App. 578, 581, 602 P.2d 369 (1979). Here, although the trial court did not make this finding, this Court may affirm the trial court on any basis supported by the record. *Redding v. Va. Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994). Here, the record supports the conclusion that the non-modifiable maintenance provision in the decree of dissolution was unfair at the time of execution.

1. Public Policy Disfavors a Perpetual Lien Upon a Divorced Spouse's Earnings

The law is well established that public policy disfavors placing a permanent responsibility for spousal maintenance upon a former spouse. *In re Marriage of Coyle*, 59 Wn. App. 653, 811 P.2d 244 (1991); *Berg v. Berg*, 72 Wn.2d 532, 434 P.2d 1 (1967); *Hogberg v. Hogberg*, 64 Wn.2d 617, 619, 393 P.2d 291 (1964). As stated in *Hogberg*:

Alimony is not a matter of right. When the wife has the ability to earn a living, it is not the policy of this state to give her a perpetual lien on her divorced husband's future income.

Hogberg, 64 Wn.2d at 619. The reasons for this policy include the valid goals of disentangling the divorcing spouses and setting each on a road to self sufficiency. *Coyle*, 59 Wn. App. at 634. Our appellate courts have stated repeatedly: **"It is not the policy of the law, nor is it either just or**

equitable, that a divorced wife be given a perpetual lien upon her husband's future earnings." *Mason v. Mason*, 40 Wn. App. 450, 698 P.2d 1104 (1985) (quoting *Lockhart v. Lockhart*, 145 Wash. 210, 212-213, 259 P. 385 (1927)).

2. Janice Was Only Forty-Four at the Time the Decree Was Entered and Was Capable of Gainful Employment; Thus, the Amount and Duration of Maintenance in the Decree Was Patently Unfair and Unjust

Janice was only forty-four years old and had previously worked as a pharmacy assistant at the time the decree was entered. CP 76. The parties' oldest son was in college and their younger son was 16 years old. CP 2. There was no evidence presented that Janice was not capable of gainful employment.

Despite the parties' separation in 2001, Janice made no real effort to obtain an education or to become employed, apparently believing that Martin was required to support her for the rest of her life. Under these circumstances, the provision in the decree awarding Janice non-modifiable monthly maintenance in the amount of \$4,766.67 and requiring Martin to provide her with health insurance until she obtained medical insurance from her own employment was patently unfair and unjust. Based upon the maintenance provision, Janice had no incentive or obligation to become

employed. This is clearly contrary to the public policy goal of disentangling divorcing spouses and putting them each on a road to self-sufficiency. *See Coyle*, 59 Wn. App. at 634.

3. Martin Did Not Have Independent Counsel and Reasonably Relied Upon the Parties' Family Attorney of 20 Years Who Failed to Inform Martin of the Effect of a Nonmodifiable Spousal Maintenance Provision

Attorney Tom Ryan, who drafted the decree of dissolution on Janice's behalf, had been the parties' attorney for 20 years. Although Martin trusted Mr. Ryan to be fair, Mr. Ryan did not inform Martin of the effect of a nonmodifiable maintenance provision. This circumstance reinforces that the maintenance provision was unfair and unjust at the time of execution.

IV. CONCLUSION

Based upon the foregoing, Martin respectfully requests that the Court of Appeals

(1) affirm the trial court's decision striking the non-modifiable maintenance provision in the decree based upon *In re Marriage of Short*;

(2) affirm the trial court's determination of the amount and duration of spousal maintenance;

(3) affirm the trial court's factual finding that the parties did not intend for spousal maintenance to be non-modifiable; and alternatively,

(4) conclude that there is substantial evidence in the record that the non-modifiable spousal maintenance provision in the decree was unfair and unjust at the time of execution.

DATED this 16th day of August, 2007.

DAVIES PEARSON, P.C.


CAROL J. COOPER, WSB #26791
Attorneys for Respondent

