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**B. INTRODUCTION**

1. **NATURE OF ACTION:** The Petitioner, Marceil Mullan, filed a petition on 10/26/05 seeking to clarify and/or modify the spousal maintenance provisions of her decree dissolution, entered 02/17/98, Judge Waldo Stone (ret.).

2. **SUPERIOR COURT:** The Superior court for Pierce County, No 97-3-00085-7, Katherine J. Nelson, J., on 2/17/2006 denied Respondent, Frederick Mullan's CR 12(b)(6) and/or CR 56 motions for summary judgement. In denying Respondent's motion the trial court found that, the trial Judge Waldo Stone, in making the decree dated 2/17/98, had intended ". . . *maintenance to be continuous and that the language in the decree provided for maintenance indefinitely.*" (2SCP, P 2, L 17 -19).

Judge Nelson ordered the maintenance modification ". . . be set for trial to determine how much maintenance should be paid to wife." (2SCP, P 2, L 14 - 15).

On 6/30/06 the case proceeded to trial. The parties had been married 37 years at the time of the decree. The Respondent had been the chief engineer on a fish processing boat, which sails out of Seattle for fishing in the Gulf of Alaska. The Respondent worked this job the entire length of the marriage. During the marriage the Petitioner was a house

wife and mother. The parties had three children, now grown.

Judge Stone awarded Petitioner 40% of Respondent's gross earnings with \$3,700 to be paid each month and the balance after settlement of the catch.

Respondent suspended spousal support when he turned age 65, although he continues to work.

In the clarification/modification hearing, Judge Nelson awarded Petitioner \$1,300 a month in spousal maintenance for the period of eighteen month, including the period during which Mr Mullan had terminated payments, (May 2005 until November 2006) and thereafter at the rate of \$377. per month or one half the difference between the sum of the parties social security benefits.

**C. ASSIGNMENTS OF ERROR**

**1. ERRORS RELATED TO FINDINGS OF FACT.**

ISSUE ONE. Did the trial court err in finding 1.7 when it failing to set forth a specific finding as to Respondent's present income ? (CP, P 214, L 3 -4).

YES

ISSUE TWO. Did the trial court err in failing to find that the

Respondent had the financial ability to pay substantial spousal maintenance?

YES

ISSUE THREE. Did the trial court err in finding 1.8 and 1.9 in failing to set forth Petitioner's income?

YES

ISSUE FOUR. Did the trial court err in finding 1.8 and 1.9 in failing to set forth factors demonstrating Petitioner's current financial needs and resources? (CP, P 214, L 5 - 9).

YES

ISSUE FIVE. Did the trial court committed error in finding that Respondent reaching the age of sixty-five while continuing to work as the determinative factor, without adequately considering other relevant factors established in Judge Stone's Findings of Fact, those factors testified about and those set forth in RCW 26.090.080. (CP, P213, L26- P214, L2).

YES

ERROR SIX. Did the trial court committed error in finding 1.10 that Respondent earned more than \$100,000 per year since the decree, which was substantially less than established by the

unrefuted evidence? (CP, P 214, L 10).

YES

ERROR SEVEN. Did the trial court commit error in finding 1.11 by awarded additional maintenance of \$1,300 per month for the period of May 2005 through November 2006 (18 months) and thereafter \$377 per month, without making any findings as to Petitioner's needs, age, health or other financial resources of either party as required by RCW 26.09.090? (CP, P 214, L 13).

YES.

ERROR EIGHT. Did the trial court committed error in finding 1.12, that both parties had financial resources available to meet the cost of litigation and attorney fees? (CP, P 214, L 16).

2. ERRORS OF LAW:

ERROR NINE. Did the trial court committed error by failing to consider the factors set forth in RCW 26.09.090 and other relevant factors including the history of the parties marriage as established by the testimony and case law in granting only a token amount of spousal maintenance?

YES

ERROR TEN. Did the court committed error by failing to establish either parties income as required by the “need and ability standard” established by the case law, RCW 26.09.090 and 26.09.170?

YES

ERROR ELEVEN. Did the trial court committed error by failing to apply the findings by Judge Stone as “verities” or the “law of the case”? (CP, P4, L 9 - 18).

YES

ERROR TWELVE. Did the trial court committed an error of law in refusing to allow Petitioner to cross examine Respondent concerning statements which he made that his income was declining? (RP, P101, L 5-19).

YES

ERROR THIRTEEN. Did the trial court committed an error when it refused to award attorney fees for Respondent’s tactical and intentional violation of the discovery rules? (CR, P198-203).

YES

**D. STATEMENT OF THE CASE:**

**1. FACTUAL BASIS FOR MODIFICATION:**

Petitioner, Marceil Mullan, (69 years of age) filed a motion to clarify and/or modify the spousal maintenance provisions of the Decree dated 2/17/98 after Respondent suspended the payment of spousal support May 25, 2005. (RP, P 38, L 18-19).

Mr Mullan (66 years of age) discontinued the payment of spousal support when he reached age 65. (RP, P 82, L 9). He was not drawing social security, so he assumed that he could cut Petitioner off from any maintenance. This action precipitated a significant impact on Petitioner financially. (RP, P 38, L15-18).

Mr Mullan continues to work as the chief engineer on the fishing boat, American No. 1, where he has for 38 years. (RP, P72, L 10). At the time of the original trial he testified that he would not work much longer. (RP, P101, L 5-7).

His income is determined by a guaranteed contract salary of \$400 a day or 2.5% of the catch, whichever is greater. (RP, P 94, L7).

Respondent testified that he earned \$201,000 (\$16,765 per month) in 2004 (RP, P 95, L 15-20), and \$135,593.(\$27,119. per month) through the first five months of 2005. (RP, P 95, L 15-20). Mr Mullan testified in

the modification hearing that he anticipated he should make \$250,000 (\$20,800 per month). in 2005. (RP, P76, L 17).

His unilateral action in May 2005 of discontinuing the spousal maintenance payment before he had applied for social security defeated the award of spousal maintenance. (RP, P38, L15 - P39, L10).

Petitioner requested attorney fees pendente lite. The court commissioner granted her \$2,500. The trial court declined to award her attorney fees at the conclusion of the case and for tactical discovery violations by defense counsel. (CP, P214, L 17).

Petitioner's motion to modify support arises from the 2/17/98 Findings of Fact and Decree of Dissolution of Marriage, entered by Judge Waldo Stone (ret.). Judge Stone served as pro tem judge. His court staff consisted of personnel assigned from other Pierce County Superior Court departments, including the stenographers, of which there were at least three. One stenographer produced a partial transcript which included Judge Stone's oral opinion. One had retired and could not find her transcription records. The third had left court reporting and moved out of state.

## **2. BASIS FOR AWARD OF MAINTENANCE:**

Judge Stone, in granting spousal maintenance, stated in its oral opinion:

“ . . . Ms Mullan is entitled to substantial maintenance, . . . ”

\* \* \*

*“The maintenance will be 40 percent of gross, but not less than \$3,750 per month, and the \$3,750 is the \$90,000 divided by two and then divided by 12 months. So there’s \$45,000 for her gross and \$45,000 for him gross.*

*At age 65 - - again, I have no crystal ball - - the maintenance will drop to one-half of his social security. Both sides will be invited to move at that point for whatever modification appears to fit, and I don’t know whether the modification should go up, down, or sideways or what. No crystal ball.”* (CP, P 31, L 23 - P32, L 7). (Emphasis

added).

In his Findings of Fact, Judge Stone found that: “Maintenance should be ordered because;” (CP, P 4, L 9).

The parties were married 6/14/62. (CP, P 2, L 13). They were married 35 years during which time the Petitioner was primarily a house wife and mother. (CP, P 4, L 9).

The Petitioner has been responsible for raising the parties three children , who were all adults at the time of the trial. (CP, P 4, L 11).

The Respondent has been the chief engineer on a fishing boat for 38 years. (CP, P 4, L 11; P72, L 10). He was at sea for “seven to maybe eight months” a year, “then down at the boat in Seattle. (RP, P91, L9-13). At the time of trial Judge Stone found Respondent was capable of earning more than \$90,000 per year. (CP, P 4, L 12).

At the time of the clarification/modification hearing Respondent testified that , at the trial in the dissolution, he wasn't sure that he would work any longer and that he would only work until age 65, if even that long. (PR, P101, L5-11).

The Petitioner was found to be “. . . without job skills or training.” Judge Stone found that “retraining would not significantly improve her employability.” (CP, P 4, L 12- 13).

Judge Stone found the Parties had acquired significant assets, (CP, P 4, L 14) which at the time of trial, Judge Stone, found to have net equity of more than \$600,000. (CP, P 4, L 11) of which \$400,000 was real property. (RP, P16 - 20). He awarded Petitioner \$120,000 of the real estate net equity. (RP, P19) Respondent was awarded two homes with net equity of \$280,000. (RP, P16).

Judge Stone found the parties total retirement account to be about \$92,000. (RP, P16 - 20). He awarded Petitioner a \$54,000 in retirement

accounts and Respondent the balance of \$38,000. (RP, P16).

Judge Stone found that Petitioner had the need for maintenance and the Respondent has the ability to pay maintenance at the rate of 40% of his gross earnings but not less than \$3,750 per month. (CP, P 4, L 14-15).

Judge Stone found;

Payments in this amount (\$3,750) were to continue until the Respondent reach the age of sixty-five (65) or earlier upon retirement. At that time the court (Judge Stone) recommended maintenance drop to one-half of his gross social security offset by one-half of her social security, if any. Either party was entitled at that time to request a review of maintenance at any time. (CP, P 4, L115-18).

In his oral opinion, Judge Stone stated that when Mr Mullan reaching the age of 65, he didn't know whether the modification of spousal maintenance should go up, down, or sideways or what. (CP 32).

Mr Mullan testified at trial before Judge Stone that he was 62 years of age and that he would not be working much longer, because of his health and difficult work conditions. (RP, P 101, L 5-7).

### **3. CLARIFICATION/MODIFICATION: HISTORY**

Mr Mullan turned 65 on 5/21/05. He continued to work under a

contract as the chief engineer on the same fishing boat on which he had worked for 38 years. (RP, P 72, L 7 - 17). He takes care of the boats machinery. (RP, P72, L 11-14). He works from January through October or November each year. (RP, P42, L 1-7).

In 2004 his earnings were \$201,000 or \$16,765 per month. (RP, P 95, L 15). In 2005 he was received a share of 2.5% of the catch or drew a contract guarantied salary of \$400 a day, whichever was greater. (RP, P 94, L 7-10).

Through the first five months of 2005, when he suspended payments to the Petitioner, he had earned \$135,593, or \$27,000 per month gross. (RP, P96, L 2-18). He testified that he would earn \$250,000 in 2005. (RP, P76, L 17)

In June 2005, he sent a support check for \$22,425 purporting to be his "final alimony payment " obligation under the decree and representing 50% of his catch through May 2005. (RP, P 73, L 19-25; P 38, L 22).

He had not applied for social security and Petitioner received no payments from him after May 2005. (RP, P73, L 20)

This action by Respondent suspended all maintenance to Petitioner under the Decree.

**4. OPERATIVE PROVISIONS OF THE DECREE:**

The 2/17/98 Decree provides, in part:

[X] The [X] husband . . . shall pay 40% of his gross earnings as a chief engineer, but not less than \$3,750.00 per month as maintenance. Maintenance shall be paid . . . [X] monthly.

The first maintenance payment shall be due on 1/1/98. *The obligation to pay future maintenance is terminated: upon the death of either party. Maintenance shall not terminate upon remarriage of the Petitioner, but may be considered as any other change in circumstances would be in a motion to amend maintenance brought in accordance with the applicable statute.*

[X] Other: Maintenance payments shall be made until the Respondent reaches the age sixty-five (65) or earlier upon Respondent's retirement at which time the court recommends maintenance be set at one-half of Respondent's social security benefit, off-set by one-half of Petitioner's social security Benefit, if any. (RP, P13, L23-27, P14, L 1-5).

**5. FACTUAL BASIS:**

The same statutory factors must be considered in addressing the

petition for modification of spousal support as those factors considered in the original award. They are set forth by statutory. If the trial court does not properly address these statutory factors it abuses its discretion and the result is unjust and error.

*a. The Financial Resources of the Party Seeking*

*Maintenance: Rcw 26.09.090 (a).*

Petitioner, Marceil Mullan testified in the modification hearing concerning her financial resources. She testified that following the dissolution she had sold the home awarded to her and moved to the Indiana. (RP, P26, L 11). She had lived in Indian for seven and a half years. (RP, P 26, L 13).

There she purchased a modular home with a partner, John McClure, whom she had known since high school. (RP, P26, L 14-20).

The modular home was financed and placed upon land which was a gift from Mr McClure's family. There was a balance owing against the home and property of \$72,000. (RP, P 27, L 9). Petitioner's opinion of the fair market value of the house and property was \$125,000 of which she owned 50%. (RP, P19, L17 - 25). That value reflected various improvements which Petitioner and Mr McClure had made. (RP, P 28, L 5 - 7).

She continued to own vehicles awarded to her in the decree and a

1998 Chrysler van that she had purchased. (RP, P 31, L 21). These vehicles had a total value of \$14,000. (RP, P 32, L 1 - 14).

She presently has a retirement fund worth \$127, 000. (RP, P 32, L 18). This fund originated from the proceeds of the sale of the family home following the divorce. (RP, P 32, L 20 - 21).

The other account she had received in the divorce was worth \$16,000. at the time of this trial. (RP, P 33, L 3 - 5). Her household furnishings and jewelry had been awarded to her in the marriage and were worth a total of about \$12,000, now. (RP, P 33, L 22 - P 34, L 21).

At the time of the modification her total resources were about \$200,000. (RP, P 34, L 24).

At the time of this hearing Petitioner, now 69 years of age, draws social security of \$ 1,200 gross (RP, P57, L 18) and interest and dividends of \$370 gross per month which were reinvested in the fund. (RP, P 55, L 21 - 23).

She has no other sources of income. (RP, P 38, L 14). The loss of her spousal support significantly impacted her standard of living. (RP, P 38, L 17). She received the last check in June 2005, it contained the notation "final alimony payment". (RP, P 38, L 20 - 25).

She had anticipated that the spousal support would continue until

Respondent stopped working and started drawing social security. (RP, P 39, L 1 - 8). He was still working at that time and continues to this day. (RP, P 38, L 25 - 25).

Mr McClure, her partner in the home, does not make direct contributions to her financial condition. They split the rent and living expenses (RP, P 35, L 17 - 18). He receives \$860 social security a month (RP, P 36, L 4). and make a small amount (\$300 per month) working part time at an auto parts store and sells a small amount of produce raised on his land. (RP, P 36, L 4 - 6). His annual income is \$21,000 or \$1750 per month. (RP, P 36, L 9).

The trial court did not make any finding about Petitioner's financial resources. She had the same or less in the way of assets and Respondent continued to reap the benefits of the business developed by the parties during they stated from scratch in 1962.

***b. Time Necessary to Acquire Sufficient Education or Training: RCW 26.09.090 (b).***

Judge Stone had found at the time of the dissolution action that Petitioner was “. . .without job skills or training. Retraining will not significantly improver her employability.” (CP, P 4, L 12 - 13).

At the modification hearing Petitioner testified that her present

income consisted of her Social Security Benefits of \$1,213. per month. (RP, P 64, L 6 - 8). She received interest and dividends from her retirement account of \$668 per month. (RP, P 56, L 10). There was no other evidence of employment.

At 69 she had no ability to earn an income. Mr Mullan continued to reap the rewards of both of their investments in his fishing career.

c. **Standard of Living Established During the Marriage: RCW 26.09.090 ©.**

Judge Stone found that the parties had acquired significant assets and had an established life style during the marriage. (CP, P 4, L 14).

During their marriage the Petitioner had been primarily a housewife and mother. (CP, P 4, L 10). She had been responsible for raising the parties three children. (CP, P 4, L 11).

The Respondent was and had been the chief engineer on a fishing boat. (CP, P 4, L 11). The trial court found in 1998 that he was capable of earning more than \$90,000. (CP, P 4, L 12).

Mrs Mullan's participation in furthering Mr Mullan's career was not lost on Judge Stone. He made it clear that this had been a partnership between the parties. (RP, P31, L14-17). "[M]arriage is a shared enterprise, a joint undertaking . . . in many ways it is akin to a partnership." *Washburn*

v. *Washburn* 101 Wn. 2d 168, 181-182, 677 P.2d 152, 160 (Wash.,1984).

***d. Duration of the Marriage: RCW 26.09.090 (d).***

The parties were married June 14, 1962. They had separated in January 1997 and were divorced in February 1998. (CP, P 2, L 13 - 16). The total time of the marriage was 37 years.

All parties including Judge Stone had anticipated that Respondent would only continue to work until he reached the age of sixty-five. Respondent himself made this contention. Now that he has determined to work longer, petitioner who was a partner in building his career should be allowed to continue to participate in his earnings.

The petition to modify spousal support was brought 10/26/05. At that time the parties had been divorced eight years.

***e. The Age, Physical and Emotional Condition, and Financial Obligations of the Spouse Seeking Maintenance: RCW 26.09.090 (e).***

Petitioner was 69 years of age at the time of the modification hearing. (09/21/37). (RP, P 37, L 25).

At the modification hearing Petitioner testified that she suffers from degenerative disc disease which prevents her from standing or sitting for long periods of time. (RP, P 39, L 11 - 17). She also suffers from

rheumatoid arthritis which causes pain in her lower back and legs, causing her difficulty walking. (RP, P 39, L 18 -25).

Judge Stone found no physical limitations at the time of the trial.

*f. The Ability of the Spouse Paying Maintenance While Meeting Those of the Spouse Seeking Maintenance: RCW 26.09.090 (f).*

At the time of the divorce, 2/17/98, The Respondent was 57 years of age. ( 5/21/40). The Respondent is now 66. (RP, 82, L9). He continues to work as chief engineer on the same fishing boat as he did during the marriage. (RP, P101, L 3 - 4).

In the Decree, the court awarded property to the Petitioner valued at \$233,213. The Respondent was awarded property worth \$378,253.(CP, P 18, L 34). The financial resources available to Respondent today are worth \$830,000. (RP, P97 - 103).

At trial in 1998, Respondent contended that the nature of his duties, his physical and mental health and the difficult conditions under which he worked, combined with his advancing age, dictated that he was not going to work any longer. (RP, P101, L5 - 7). He consistently maintains that his earnings were decreasing and that his income was falling because of the capricious nature of fishing. (RP. P 8, L 8 - 15). Despite his predictions of

impending doom, both during the trial and at the modification hearing, his income has more than doubled and he performs the same job as he did throughout the marriage. He has worked under an annual contract for 38 years. (RP, P 93, L 1-24).

Mr Mullan earned \$103,768 in 1998; \$130,668 in 1999; \$157,898 in 2000; \$149,002 in 2001; \$174,139 in 2002; \$168,409 in 2003; \$201,000 in 2004, and should make \$250,000 in 2005. (CP, P 76 - 17). In addition he now draws \$1,947 in social security. (RP, P76, L 19 - 22).

Respondent contract guarantees \$400 a day. (RP, P 94, L 7- 10).

Respondent is on the boat rent and board free seven or eight months each year. When it comes into port in Seattle, he stays on the boat and works. (RP, P 91, L 12). When he is not on the boat he stays with his son or travels. (RP, P75, L 9 - 10).

He does not chooses to live in either of the two homes he owns in North Tacoma. (RP, P 99, L 12 - 21).

At the time of his deposition, Mr Mullan did not know, nor would he estimate his annual income. (RP, P91 - 92). Mr Mullan remains elusive about his income (RP, P 994 - 96); and the value of his other assets. (CP, P 97 - 99) .

Since the dissolution, Respondent has earned \$1,232,500 while

fishing. He has paid Petitioner 40% of this sum or \$493,000. He has retained \$739,500 for himself, this is 60% of his earnings. (RP, P100, L 6 - 16). What he has not spent he puts away for retirement. (RP, P 100 - 101).

In the modification proceeding Judge Nelson found that: “ The maintenance contemplated by Judge Stone was to be continuous, subject to modification when Respondent started drawing social security. (SCP, P 32, L 2 - 7; P 4, L16 -19).

Judge Stone specifically held that remarriage of either party would not terminate spousal support but would be one factor for the court to consider at the time of modification. (CP, P 13, L 26).

Judge Stone, in his oral opinion stated, “. . . I don’t think I’m the only judge, and I would think that it would be almost insulting in this day of women’s lib, or whatever you want to call it, to automatically assume that a female who remarries or maintains a common household or something betters herself financially.

\* \* \*

That’s why I’m unwilling to crank in these things that everything stops if she does this or [that]. . .” (CP, P33, L 3).

Judge Nelson made no findings that any other person contributed to

Petitioner's financial needs.

**E. ARGUMENT:**

**1. APPEAL STANDARDS: ABUSE OF DISCRETION**

The standard for reversing a trial court's ruling on a petition to modify spousal maintenance following a decree is an abuse of discretion standard. *In re Marriage of Jennings*, 138 Wn.2d 612, 625-26, 980 P.2d 1248 (1999); *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Kovacs*, 121 Wn. 2d at 801, 854 P.2d 629 (1999).

A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standards. It is based on untenable grounds if the factual findings are unsupported by the record. It is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield* 133 Wn.2d 39, 46-47, 940 P.2d 1362, 1366 (1997); *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citing

Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d ed.1993)), *review denied*, 129 Wn.2d 1003, 914 P.2d 66 (1996).

The determination of abuse of discretion the Appeals Court reviews the order “for substantial supporting evidence and for legal error.”

*Spreen*, 107 Wn. App. at 346, 28 P.3d 769 (citing *In re Marriage of Stern*, 68 Wn. App. 922, 929, 846 P.2d 1387 (1993)).

Substantial evidence supports a factual determination if the record “contains sufficient evidence to persuade a fair-minded, rational person of the truth of that determination.” *Spreen*, 107 Wn. App. at 346, 28 P.3d 769 (citing *Bering v. Share*, 106 Wn. 2d 212, 220, 721 P.2d 918 (1986)).

The court reviews those findings of fact to which the appellant has assigned error. *In re Marriage of Drlik* 121 Wn. App. 269, 274-275, 87 P.3d 1192, 1194 (Wn. App. Div. 3,2004); *In re Contested Election of Schoessler*, 140 Wn. 2d 368, 385, 998 P.2d 818 (2000) (citing *State v. Hill*, 123 Wn. 2d 641, 647, 870 P.2d 313 (1994)).

In *Spreen*, 107 Wn. App. at 340-41, a motion for post modification of spousal maintenance, the Court of Appeals found that the trial court had abused its discretion by ignoring the statutory standards and applying an arbitrary limitation on the duration of spousal maintenance.

“[A]fter citing these statutory factors, the court turned to other, nonstatutory factors to justify only one additional year of maintenance. First, the court stated that six years of maintenance was all that Marie was “entitled to.” CP at 83. But the court did not base this on Alan's ability to pay, Marie's need in light of her medical condition, or any other recognized factor. Thus, the court's six-year limit on maintenance is unfounded and arbitrary. Washington law does not limit how long a spouse may receive maintenance but allows a court to order maintenance “for such periods of time as the court deems just.” RCW 26.09.090. What is a reasonable length of time for a divorced spouse to become employable and provide for his or her own support, so that maintenance can be terminated, depends on the particular facts and circumstances of each case. *Endres v. Endres*, 62 Wash.2d 55, 58, 380 P.2d 873 (1963). In some cases, a lifetime award of maintenance may even be just. See *In re Marriage of Sheffer*, 60 Wn. App. 51, 55-56, 802 P.2d 817 (1990); *In re Marriage of Tower*, 55 Wn. App. 697, 703-04,

780 P.2d 863 (1989); *In re Marriage of Morrow*, 53 Wn.

App. 579, 584-89, 770 P.2d 197 (1989).

Judge Nelson stated in her oral opinion, “. . . I believe that her short fall of approximately \$1,300 should be paid.

In the future, past November of ‘06, I recognize the increasing age and potential disabilities, the lack of a contract, and the fact that at some point, *neither party should be expected to work in order to provide the other with spousal maintenance in view of the fact that she does share expenses with another person and that she has been gifted land as well as other things*. So the \$377, actually, is my calculation of half of the difference of the Social Security payments if only Social Security was being paid.

Now, if Mr Mullan is capable of working and decides to work, then he’ll be able to keep those work profits without further in roads other than the \$377 per month.” RP, P 124, L 20 - P125, L 11).

\* \* \*

*. . . it should have been clear that at some point, 40% of his earnings was going to be stopped and or replaced by a much lower figure.*

*That’s basically the rationale.*

Spousal maintenance is not merely designed to allow the former spouse to survive, but to meet her needs until she can rehabilitate herself financially and equalize the financial “playing field”.

At trial, Judge Stone found that Petitioner had no marketable skills and that retraining would not change this fact. She is now 69 years of age and has significant health problems.

Petitioner’s financial declaration shows no allowance for either savings or retirement after the spousal support was discontinued. (CP, P32).

While receiving spousal maintenance, Petitioner had been able to invest \$1,800 toward her retirement. (RP, P 58, L20-22).

Judge Stone found Mr Mullan’s success attributable to the joint, yet diverse, efforts of both parties. The fact Mr Mullan has now exceeded his expected retirement age, Judge Nelson finds that these factors are no longer valid and that if Mr Mullan chooses to continue to work he can exclude his former wife from participation in earning potential which she helped him create.

Judge Stone found Petitioner’s need for spousal support to be 40% of Mr Mullan’s increasing earnings. Built one year upon the next. The fact that he choose to continue to work beyond the age of 65 years of age should not

disenfranchise Mr Mullan's life style.

An award of maintenance that is not based upon a fair consideration of the statutory factors constitutes an abuse of discretion. *Matter of Marriage of Crosetto* 82 Wn. App. 545, 558, 918 P.2d 954, 960 (1996); *Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462.

These statutory factors and procedures limit a court's range of discretion. *In re Marriage of Watson* 132 Wn. App. 222, 230, 130 P.3d 915, 918 (2006) (modification of parenting plan); *In re the Custody of Halls*, 126 Wn. App. 599, 606, 109 P.3d 15 (2005). *Thus, a court abuses its discretion if it fails to follow the statutory procedures or modifies . . . for reasons other than the statutory criteria. Halls*, 126 Wn. App. at 606, 109 P.3d 15(a parenting plan ). Statutory construction is a question of law requiring de novo review. *In re the Marriage of Caven*, 136 Wn. 2d 800, 806, 966 P.2d 1247 (1998).

Mrs Mullan assignment of errors one through twelve consist of instances in which the court failed to apply the statutory factors set forth in RCW 26.09.090 or in Judge Stone's decree or failed to make findings and/or ignored substantial proof of such facts.

Findings of fact must be sufficiently specific to permit meaningful

review. *In re LaBelle* 107 Wn. 2d 196, 218-219, 728 P.2d 138, 151 - 152 (1986) (involuntary commitment proceedings); *State v. Holland*, 98 Wn.2d 507, 517, 656 P.2d 1056 (1983) (juvenile declination hearing).

While the degree of particularity required in findings of fact depends on the circumstances of the particular case, they should at least be sufficient to indicate the factual bases for the ultimate conclusions. *Groff v. Department of Labor & Indus.*, 65 Wn. 2d 35, 40, 395 P.2d 633 (1964); *State v. Russell*, 68 Wn. 2d 748, 415 P.2d 503 (1966). The purpose of the requirement of findings and conclusions is to insure the trial judge ‘has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.’ *State v. Agee*, 89 Wash.2d 416, 421, 573 P.2d 355 (1977), quoting *Roberts v. Ross*, 344 F.2d 747, 751 (3d Cir.1965)

Findings must be made on matters ‘which establish the existence or nonexistence of determinative factual matters . . .’. *In re LaBelle*, at 219, 728 P.2d 138. The process used by the decision maker should be revealed by findings of fact and conclusions of law. *Hayden v.*

*Port Townsend*, 28 Wn. App 192, 622 P.2d 1291 (1981). Statements of the positions of the parties, and a summary of the evidence presented, with findings which consist of general conclusions drawn from an 'indefinite, uncertain, undeterminative narration of general conditions and events', are not adequate. *Weyerhaeuser v. Pierce County* 124 Wn.2d 26, 35-36, 873 P.2d 498, 503 (1994); *State ex rel. Bohon*, 6 Wn. 2d at 695, 108 P.2d 663.

## **2. MODIFICATION FACTORS: POST DISSOLUTION**

**RCW 26.09.170** provides, in part, that;

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

\* \* \*

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

**RCW 26.09.090** provides in part;

The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard

to marital misconduct, after considering all relevant factors including but not limited to:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, . . . ,
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

RCW 26.09.090 does not expressly state that it applies to maintenance modification. Nor does RCW 26.09.170, the modification statute, state what factors the court should use when modifying maintenance.

Modification cases primarily address whether substantial evidence supports a finding of changed circumstances. Nevertheless, once the court finds that changed circumstances warrant a modification, the issues of amount and duration are the same as in the original dissolution. *Spreen* 107 Wn. App. at 347, 28 P.3d at 772.

In establishing an adequate amount of spousal support ... a court can consider everything having a legitimate bearing on present and prospective matters relating to the lives of both parties. Some of the circumstances that are applicable to the case at bar are the needs of the parties, the abilities of the parties to meet such needs, property owned, obligations to be met, as well as the ability to earn and actual earnings.

Proper grounds may always be presented for the purpose of modifying an award of spousal support . But the applicant must show the economic situation of the parties has changed since it is the economic relation which is to be affected by the proposed modification . *In re Marriage of Myers* 54 Wn. App. 233, 239, 773 P.2d 118, 122 (1989).

In this case Petitioner has lost spousal support because Respondent chose to work beyond his 65 birthday and was not drawing social security. This created a cessation of maintenance not anticipated by either the parties

or the trial court. Mrs Mullan's financial situation significantly changed despite all of the other conditions which had warranted substantial and long term spousal maintenance found by Judge Stone. The factors found by Judge Stone to support the original spousal support are still present.

While maintenance was to continue after his retirement the court and all of the parties anticipated that Mr Mullan would then only be drawing social security. Judge Stone found that when Mr Mullan stopped fishing, and began drawing social security, there would need to be a modification. The premise was that this event would result in a substantial reduction in his income. He had already found that Mr Mullan had no employability. Judge Stone did suggest a possible resolution when Mr Mullan turned 65 years of age, then the parties would divide their social security benefits, but that he did not have a "crystal ball". (CP, P 32, L 1 - 7).

Judge Stone made other findings required by the statute in support of his order of life long spousal support. (CP, P 4, L 9 - 18).

He demonstrated the permanency of maintenance by ordering that only death of a party would cause it to cease. (CP, P 13, L 24 - 27). He specifically stated that remarriage would not be a reason for terminating maintenance, but would be considered as any other factor in a modification.

This specific decretal language to continue alimony past remarriage fulfills the language of RCW 26.09.170(2); *In re Marriage of Roth* 72 Wn. App. 566, 570, 865 P.2d 43, 45 (1994); *Matter of Marriage of Williams*, 115 Wn.2d 202, 205-10, 796 P.2d 421(1990).

“ The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just.” *In re Marriage of Luckey*, 73 Wn.App. 201, 209, 868 P.2d 189 (1994); *In re Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990).

Judge Nelson made no findings concerning Petitioner’s earnings. She did not find that Mr McClure made any contribution to Mrs Mullan’s financial circumstances. There were no facts to support such a finding, if it had been made. This did not stop Respondent’s attorney from pursuing this line. (RP, P 104, L 15-18; P 118, L19 - P119, L 14).

It is clear that Judge Stone intended to provide Petitioner with spousal support as a means for her to met her financial obligations during the remainder of her life. He found that she worked as a housewife and mother during a 37 year marriage. She relinquished her own career and aspiration to support her husband in his chosen field, the commercial fishing industry.

Petitioner invested the only currency she possessed, her onerous labors in the financial prospects of Mr Mullan as a fisherman. That investment cannot be disavowed now. She has no way of recovering the life that investment had produced. This was a partnership in every sense of the word. They both worked hard for 35 years and were rewarded economically. *Washburn v. Washburn* supra, 101 Wn. 2d 168, 181-182, 677 P.2d 152, 160 (1984).

His success and her sacrifice are supported in the record and comments of the trial judge. He intended to have Petitioner receive the benefits of Respondent's fishing income until he retired. Those earnings would then be replaced with social security benefits.

Judge Stone made it clear that spousal support would continue after Mr Mullan's retirement, which all parties anticipated would be no later than age 65.

He said,

*"Both sides will be invited to move at that point [ Respondent's 65 birthday] for whatever modification appears to fit, and I don't know whether the modification should go up, down, or sideways or what."*

### **3. STATUTORY STANDARDS: SPOUSAL SUPPORT**

Washington law provides, in part;

### **26.09.090. Maintenance orders for either spouse--Factors**

(1) In a proceeding for dissolution of marriage, . . . , the court may grant a maintenance order for either spouse. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, after considering all relevant factors including but not limited to:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;
- © The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

The award of maintenance , like the division of property, is within the discretion of the trial court. *In re Marriage of Nicholson*, 17 Wn. App. 110, 561 P.2d 1116 (1977). The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just. *In re Marriage of Morrow*, 53 Wn. App. 579, 585,

770 P.2d 197 (1989). Factors listed in RCW 26.09.090 include the financial resources of each party; the duration of the marriage and standard of living during marriage; and the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance , as well as the time needed by the spouse seeking maintenance to acquire education for appropriate employment.

The record indicates that (job) rehabilitation is not an issue here. The reality is that Janet does not live on income close to the income that supported the couple's standard of living during marriage and will likely never achieve the post-dissolution economic level of George. *Bulicek v. Bulicek* 59 Wn App. 630, 633-634, 800 P.2d 394, 396 (1990)

The reality is "that women still earn approximately 60% of what men do and that traditional female jobs tend to pay less than traditional male jobs." Washington Family Law Deskbook § 29.5 (1989). Further, in discussing the effects of no-fault and other equality-directed reforms in divorce law, one author noted:

"Most judges appear to view the law's goal of equality as a mandate to place an equal burden of support on men and women without regard to *the fact that the parties' capacities to support that burden are clearly unequal by virtue of their*

*differing experiences during marriage.*" Weitzman, *The Divorce Revolution* 183 (1985); *Bulicek v. Bulicek* 59 WApp. 630, 634, 800 P.2d 394, 397 (1990). [Emphasis added].

The court said in the case of *In re Marriage of Washburn*, 101 Wn. 2d 168, 179, 677 P.2d 152 (1984);

[T]he duration of the marriage and the standard of living established during marriage must also be considered, making it clear that maintenance is not just a means of providing bare necessities, **but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time.** [Emphases added.]

The post-dissolution economic position of the parties "is a paramount concern in determining issues of property division and maintenance." *In re Marriage of Morrow*, 53 WApp. 579, 586, 770 P.2d 197 (1989) (quoting *In re Marriage of Washburn*, 101 Wn. 2d at 181, 677 P.2d 152).

Mr Mullan testified that he needed 100% of his post-65 earnings to pay toward retirement and building a home to live in after retirement. RP, P100, L23 -24; P 83, L24- P84, L 1). Mrs Mullan had exactly the same needs and monthly expenses of \$4,061. Per month. (CP, P32, 35).

The *Washburn* court dealt with a 10-year marriage and the division of property and an award of maintenance to a party who had put her spouse through professional school. While recognizing that such a party obviously **could be financially self-sufficient**, maintenance was appropriate to allow

the party "to share, temporarily, in the lifestyle which he or she helped the student spouse to attain." *Washburn*, 101 Wn. 2d at 179, 677 P.2d 152.

Similarly, in *Bulicek*, supra at pages 634-635, the court focused on the post-dissolution relative economic positions of the parties. It said;

Here, George will be in a position to support a lifestyle more comparable to the lifestyle enjoyed by the couple during marriage than will Janet, given their relative earning powers. The trial court correctly perceived that Janet would be in need of more than temporary support. ***The court provided a thoughtful resolution of the maintenance and pension issues that allows Janet a continuous stream of income.***

Whether the maintenance lasts 1 year or 13 years is George's choice. ***He is free to retire when he wishes.*** These parties were married for 26 years. George's income at trial was nearly three times larger than Janet's. Considering the relevant statutory factors, including the pre-dissolution standard of living of the parties and their relative post-dissolution status, it was well within the trial court's discretion to award maintenance to Janet in the amount and for the duration provided in its decree. [Emphasis added]

#### **4. POST DISSOLUTION MODIFICATION OF SPOUSAL SUPPORT**

RCW 26.09.090 does not expressly state that it applies to maintenance *modification*. Nor does RCW 26.09.170, the modification statute, state what factors the court should use when modifying maintenance.

Modification cases primarily address whether substantial evidence supports a finding of changed circumstances. Nevertheless, once the court finds that changed circumstances warrant a modification, the issues of amount and duration are the same as in the original dissolution. *Spreen* 107 Wn. App. at 347, 28 P.3d at 772.

**5. ERROR: LIMITING CROSS EXAMINATION**

During his testimony before Judge Nelson and in the original trial Mr Mullan had attempted to paint a bleak outlook for his future earnings and for his longevity in the fishing industry.

Petitioners attorney asked the following questions and Respondent replied:

BY MR CARAHER:

Q. And the last time at trial, you weren't sure you were going to work any longer either, were you?

(BY MR MULLAN)

A. Right.

Q. And you told the Court that the fishing industry was a crap shoot, and you may not make any more money or fish again?

A. Fishing industry is a crap shoot, Mr Caraher.

Q. But every year, you've made an increase in pay?

A. It's going down now.

Q. When has it gone down? When has it ever gone down?

A. It is right now.

Q. When did it go down?

MR ROBINSON: Objection, Your Honor, He's arguing with the witness.

THE COURT: Sustained.

BY MR CARAHER:

Q. Didn't go down through May, did it?

A. Pardon?

Q. Didn't go down through May, did it?

MR ROBINSON: Your Honor –

THE COURT: Sustained. I just sustained the argumentative line of questioning. Move on.

\* \* \*

Cross examination is an integral part of both criminal and civil judicial proceedings. *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960); 5 K. Tegland, Wash.Prac., *Evidence Law & Practice* § 245 (2d ed. 1982).

Preclusion of cross examination on a legitimate issue calls into

question the fact-finding process and requires that the competing factors be more closely examined. *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980). Termination of cross examination based on improper objection by the trial court can constitute error. *Baxter v. Jones* 34 Wn. App. 1, 3-4, 658 P.2d 1274, 1276 (1983)(landlord-tenant action). Where a party has been denied this right, our court has not hesitated to reverse. *State v. Robbins* 35 Wn. 2d 389, 396, 213 P.2d 310, 315 (1950); *State v. Aid*, 55 Wash. 302, 104 P. 275, 33 L.R.A.,N.S., 946; *State v. Beaton*, 106 Wash. 423, 180 P. 146.

In *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) our Supreme Court stated;

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, *when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-*

*examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.* (See *In State v. Mak* 105 Wn. 2d 692, 711, 718 P.2d 407, 420 - 421 (1986); *State v. Knapp*, 14 Wn. App. 101, 107-08, 540 P.2d 898 (1975); ER 611).

In *Hodgins v. Oles* 8 Wn. App. 279, 283, 505 P.2d 825, 828 - 829 (1973) the court stated that; “The reasons behind the necessity of according a party his right to cross-examine adverse witnesses is demonstrated in 5 J. Wigmore, *Evidence*, s 1368 (3d ed. 1940) at page 33: ‘The fundamental feature is that a witness, on his direct examination, discloses but a part of the necessary facts. That which remains suppressed or undeveloped may be of two sorts, (a) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (b) the facts which diminish the personal trustworthiness of the witness.

By sustaining this line of cross examination the Petitioner was limited in the scope of testing Respondent’s vagueness regarding his earnings and the future prospects for continuing to work.

Both his earnings and his testimony at the prior trial were essential to clarifying Judge Stone’s intention as set forth in the decree. This was

particularly true in light of the absence of a complete transcript of the first trial.

**6. ATTORNEY FEES: DISCOVERY VIOLATIONS**

On 2/01/06 Petitioner Served her First Interrogatories and Request For Production on Respondent. On 1/31/06 Respondent filed his responses. (CP, P199, L 1 - 18).

**INTERROGATORY NO. 25:** Provide the names, addresses and telephone numbers of those persons known to you to have information and/or knowledge relevant to this action.

**ANSWER:** *“To be provided in Respondent’s Witness List.”*

**INTERROGATORY NO. 26:** Have you obtained any written or recorded statements from anyone concerning the issues of this action? [ ]

Yes [ ] No. If so, for each such statement state:

- a) The name and address of the person who took the statement;
- b) The name and address of the person who made the statement;
- c) Whether the statement is in written form;
- d) The name and address of the person who has custody of the statement;
- e) The substance of the statement.

ANSWER: *No answer given.* (CP, P 199, L 8-16).

Prior to the discovery cut off, Respondent never provided a witness list and never amended or supplemented his answers to discovery as required by CR 26 (e) (1).

On 06/15/06 the Respondent made motion to take telephonic testimony of the parties' daughter, Kristina Soul. (CP, P 200, L 4).

On 06/16/06 the Judge Nelson denied Petitioner's motion to strike witness Kristina Soul because of Respondent's failure to disclose her as witness. (CP, P198 -203).

On 06/23/06 the telephonic deposition of Kristina Soul was taken. In her deposition, Ms Soul acknowledged that her father, Respondent asked to write a statement for the case. (CP, P 200, L 10 - 13).

Mrs Soul testified that she had prepared the written statement on 11/08/05 at 1:10 and 7 seconds p.m. (CP, P 200, L 15).

During her telephonic deposition testimony she was referring to this statement while being examined as a witness and without disclosing this fact to Plaintiffs counsel. (CP, P 200, L 17 - 22).

When this was discovered, Mrs Soul testified that she had provided this statement to Respondent's attorney, Mr Robinson on 11/09/05 the day after it was written. (CP, P 200, L 20 - 24).

Mrs Soul did not provide her mother, Petitioner, with a copy of this statement or otherwise inform her of its content. (CP, P200, L 23 -24).

At the time Mr. Robinson and his client signed the responses to Petitioner's discovery they had in their possession the written statement of Kristina Soul, which under CR 26 they were required to identify and disclose the content thereof. Their failure to do so was intentional and to gain the tactical advantage by attempting to force the Petitioner to face her daughter as a hostile witness at the last minute, exposing her to the greatest psychological distress and distract her counsel from preparation of her case.

The trial court did not allow Mrs Soul to testify but denied any attorney fees for the time spent by Petitioner's attorney in deposing this witness at the last minute, briefing the issue and arguing it to the court.

In *Allied Financial Services, Inc. v. Mangum* 72 Wn. App. 164, 168-169, 864 P.2d 1, 3 (1993) the court held, in the context of CR 37 sanctions,

“. . . the trial court does not abuse its discretion by excluding testimony as a sanction **when there is a showing of intentional or tactical nondisclosure, willful violation of a court order, or other unconscionable conduct.** *Fred Hutchinson Cancer Research Cntr. v. Holman*, 107 Wn. 2d 693, 706, 732 P.2d 974 (1987); *Alpine*

*Indus., Inc. v. Gohl*, 30 Wn. App. 750, 760, 637 P.2d 998, 645 P.2d 737 (1981).

Where pretrial discovery rules have been violated, the court may penalize the offender under CR 37. *See* Trautman, *Discovery in Washington*, 47 Wash.L.Rev. 409, 436 (1972). However, a trial court should not exclude testimony unless there is a showing of intentional or tactical nondisclosure, or a willful violation of a court order, or the conduct of the miscreant is otherwise unconscionable. *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970); *B. F. Goodrich Tire Co. v. Lyster*, 328 F.2d 411 (5th Cir.1964); 2 L. *Orland, Wash. Prac.* s 175 (1972, Supp.1974); 4 *J. Moore, Federal Prac.* s 37.03 (1969); Annot., 27 A.L.R.2d 737 (1953).

In *Barci v. Intalco Aluminum Corp.* 11 Wn. App. 342, 348, 522 P.2d 1159, 1163 (1974) and in *Talley v. Fournier*, 3 Wn. App. 808, 479 P.2d 96 (1970), the trial court's refusal to allow a witness to testify was affirmed where the counsel had stated that only two witnesses had been subpoenaed to testify and then called a previously undisclosed third witness . The failure to disclose the witness was denounced as an unfair trial tactic, and the excluded testimony from that witness was held to be within the discretion of the trial court.

The *Barci* court, *supra* at 349-350 went on to say, “[A]mong the

factors that are material to a trial court's decision to exclude or allow testimony from a witness who was unobtainable and was undisclosed either until just before trial commenced or during the course of trial are (a) the presence or absence of good faith attempts by the proponent of the witness to comply with the rules of discovery, (b) the availability or knowledge of the witness's existence at an earlier time, (c) the circumstances of the proponent at the time of the securing of the witness, . . . , (d) the materiality of the proposed testimony to the proponent, (e) the extent of surprise to the opponent, (f) the availability of opportunity to the opponent to depose the witness, (g) the availability of opportunity to the opponent to prepare for cross-examination, (h) the opportunity to the opponent to secure contradicting witnesses, (i) the prejudice presented to a proponent or opponent's case if a continuance is granted, (j) the impact upon both parties of the expenses of delay, and (k) *the ability of an imposition of costs upon a proponent to remedy any hardship imposed upon an opponent by the late calling of a witness.* *Plonkey v. Superior Court*, 106 Ariz. 310, 475 P.2d 492 (1970); *Smith v. Babcock*, 157 Mont. 81, 482 P.2d 1014 (1971); *Fredrickson v. Louisville Ladder Co.*, 52 Wis.2d 776, 191 N.W.2d 193 (1971). In *Jones v. Atkins*, 120

Ga.App. 487, 490, 171 S.E.2d 367, 369 (1969); See Anno., 27 A.L.R.2d 737 and 4 Moore's Federal Practice (2d Ed.) 1254, s 26.19(4). *Exclusion is proper only where a party deliberately withholds the names of his witnesses. See Ceco Steel Products Corp. v. H. K. Porter Co., D.C., 31 F.R.D. 142. [Emphasis added].*

Similar in wording to CR 11, CR 26(g) authorizes an award of costs and attorney fees as a sanction for a party's failure to comply with the rules of discovery. CR 26(g) provides that an attorney or party who signs a "request for discovery or response or objection thereto" certifies that to the best of his [or her] knowledge, information, and belief formed after a *reasonable inquiry* it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) *not unreasonable* or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance. *Clipse v. State* 61 Wn. App. 94, 98, 808 P.2d 777, 778 - 779 (1991).

If tactical advantage is sought or intransigence is established, the financial resources of the spouse seeking the fees are irrelevant. *Matter of*

*Marriage of Crosetto* 82 Wn. App. 545, 564, 918 P.2d 954, 963 (1996);  
*Morrow*, 53 Wn. App. at 590, 770 P.2d 197.

#### **7. ATTORNEY FEES ON APPEAL**

Under RCW 26.09.140, the court may award attorney fees to either party in a maintenance action. In determining whether it should award fees, the court considers the parties' relative need versus ability to pay. *In re Marriage of Shellenberger*, 80 Wn. App. 71, 87, 906 P.2d 968 (1995). We review this decision for abuse of discretion. *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995).

Respondent has the ability to pay attorney fees. He precipitated this matter by attempting to effect an “accord and satisfaction” by writing a check which purported to be his “Final Alimony Payment”.

#### **F. CONCLUSION:**

The legislature has directed interspousal relations out of the age of fault and masculine dominance. A wife is no longer equated with chattel.

The statutes should lead us toward a system in which partnership principles are applied. A wife’s role is no longer viewed as subservient and less valuable because of her dedication to children and the hearth.

Judge Stone sought to equate the Mullan’s marriage to a business

partnership, equal but differing rolls. The arguments of Respondent's counsel and now the decision of Judge Nelson send us back to placing an arbitrary cap on the non-earning spouses investment made during the marriage. "Enough is enough" without regard to the need and ability. These old tendencies have crept into this case and constitute an abuse of discretion.

The factors set out in the statutes and the findings by Judge Stone should not be undone. Petitioner's roommate, who splits the living expenses and does not enhance Petitioner's financial well being and has limited income should not and does not change the statutory standards or Judge Stone's findings on this issue.

The focus should remain that the earnings of Mr Mullan are entwined in the parties marital history. The trial court eliminated Petitioner's spousal support by ignoring Mr Mullan's ability to pay spousal maintenance and Mrs Mullan's continued need for it.

Continued spousal maintenance should not be relegated to a standard of survival. It should be a continuation of the standard set by Judge Stone based upon the statutorily recognition of the factors and the financial reality of how these parties lived during their partnership.

This court should reverse the trial court for both abuse of discretion and errors of law. Petitioner should continue to receive spousal support of

This court should award Petitioner her attorney fees for discovery abuses and on appeal.

Respectfully submitted this 31<sup>st</sup> day of January 2007.

  
James M Caraher  
WSB #2817

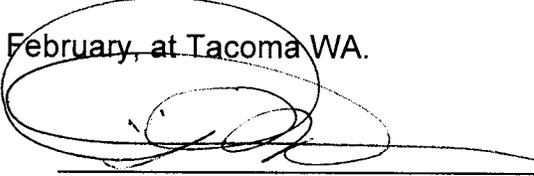


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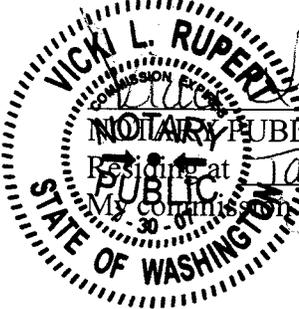
11 SIGNED this 1<sup>st</sup> day of February, at Tacoma WA.

12   
13 \_\_\_\_\_  
14 Pennie M. Faiivae

15 STATE OF WASHINGTON )  
16 ) SS.  
17 COUNTY OF PIERCE )

18 I certify that I know or have satisfactory evidence Pennie M. Faiivae is the person who  
19 appeared before me and said person acknowledged that he/she signed this instrument and  
20 acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in the  
21 instrument.

22 Dated: 02/01/07

23   
24 \_\_\_\_\_  
25 Vicki L. Rupert  
26 NOTARY PUBLIC in and for the State of Washington  
27 Residing at Tacoma  
28 My commission expires: 7-30-07

AFFIDAVIT OF SERVICE -2-

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