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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY W  
DEPUTY

MICHELE LYNN SNYDER, now WALPOLE, *Appellant*,

v.

MITCHELL HUGH SNYDER, *Respondent*.

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APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR &  
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in concluding the Separation Agreement as a whole reconciled any ambiguity that existed in the Separation Agreement effectively establishing that the Separation Agreement was clear on its face.
2. The trial court erred in not considering evidence outside of the Separation Agreement in determining the intent of the parties with respect to future payments to Ms. Walpole.
3. The trial court erred in not conducting an evidentiary hearing to ascertain the intent of the parties and the intent of the court as requested by Ms. Walpole.
4. The trial court erred in concluding that the future payments provided in paragraph 1(b) of the Separation Agreement were spousal maintenance.
5. The trial court erred in concluding the obligation terminated by operation of law when Ms. Walpole remarried.
6. The trial court erred in entering the Order and Judgment Re: Termination and Overpayment of Maintenance of January 3, 2008, granting Mr. Snyder's motion to terminate maintenance,

directing the Division of Child Support to cease collection of maintenance and refund any monies collected after entry of the order, and ordering Ms. Walpole to reimburse Mr. Snyder for maintenance actually paid from July 1, 2007 through January 31, 2008.

B. Issues Pertaining to Assignments of Error

1. Does ambiguity exist when future payments provided for by Section 1(b) of the Separation Agreement have the character of a property division but are designated as “maintenance?”  
(Assignment of Error 1)
2. Should the trial court consider evidence other than the face of the Separation Agreement in determining the intent of the parties as to future payments when the Separation Agreement is ambiguous? (Assignment of Error 1, 2, 3)
3. Should a trial court conduct an evidentiary hearing to determine the intent of the parties as to whether future payments provided in an agreement are spousal maintenance or a property division when an ambiguity exists in the written agreement? (Assignment of Error 2)

4. Are the future payments provided for by Section 1(b) of the Separation Agreement a property division non-modifiable and binding on the parties or spousal maintenance and support money terminable upon the remarriage of Ms. Walpole<sup>1</sup>?  
(Assignment of Error 3, 4, & 5)

## II. STATEMENT OF THE CASE

1. In May 2002, shortly after the parties separated, the parties had two mortgages against the family home. CP 5.
2. The first mortgage was incurred to purchase the family home and had a balance in May 2002 of \$233,000 with a payment of \$1568.31 per month. CP 5
3. The second mortgage was incurred in part to purchase commercial real property and had a balance in May 2002 of \$114,000 with a payment of \$971 per month. CP 6, 77.
4. At the time of separation, the parties were “upside down in the house by approximately \$40,000.” CP 76
5. During proceedings regarding temporary orders pending final dissolution, the trial court ordered Mr. Snyder to continue making

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<sup>1</sup> Ms. Snyder is also referenced as Ms. Dawson, and is now Ms. Walpole as a result of her marriage in 2007.

- the second mortgage payment of \$971 per month and awarded \$1500 per month in maintenance to Ms. Walpole separate. CP 20.
6. The parties entered into a "Separation Agreement" drafted by Mr. Snyder's attorney on September 4, 2002. CP 26-37.
  7. The Separation Agreement was incorporated into the parties' Decree of Dissolution on September 17, 2002. CP 23,-24.
  8. Paragraph 3 of the Separation Agreement states, "The parties desire to separate, to effectuate an amicable division of the property and liabilities, and to settle the other issues addressed herein." CP 26.
  9. Ms. Walpole was awarded the real property located at 8111 Deschutes Court SE, Olympia, Washington. CP 29. The property was worth less than was owed. CP 77.
  10. Mr. Snyder was awarded the investment real property located in Tumwater, Washington. CP 30. This property was owned free and clear at the time the divorce was final. CP 77.
  11. Payments from Mr. Snyder to Ms. Walpole are set forth in Section 1 of the Separation Agreement, titled "Spousal Maintenance". CP 27-28
  12. Section 1 "Spousal Maintenance" is broken down into four provisions designated (a) – (d). CP 27-28.

13. Under Section 1(a), Mr. Snyder was required to pay spousal maintenance to Ms. Walpole on a monthly basis from January 2002 through December 2004 in amounts that decreased on an annual basis. CP 27
14. Section 1(a) made no reference to the liabilities of the parties. CP 27.
15. The obligation to pay future maintenance under Section 1(a) was mandated to terminate upon the death of either party, the remarriage of Ms. Walpole, or after payment of the amounts required through December 2004, whichever occurred first. CP 27
16. Spousal maintenance set forth under Section 1(a) terminated by operation of the Separation Agreement after Mr. Snyder made his December 2004 payment. CP 113.
17. Section 1(b) set forth “additional spousal maintenance commencing September 1, 2002, in the amount of \$971 per month.” CP 27.
18. Section 1(b) states, “This spousal maintenance is necessary for the support of Michele Snyder’s household because of a second mortgage that encumbers the residence. CP 27.
19. Section 1(b) states, “This spousal maintenance shall continue according to the terms of the amortization schedule that applies to

this obligation even if Michele Snyder satisfies the obligation in any way including selling the resident, because the parties assume that she will replace it with an obligation to another lender.” CP 27-28

20. The amortization schedule referenced in the Separation Agreement requires a monthly payment of \$971.10 per month. CP 39.
21. Under the terms of section 1(b), “If Mitchell Snyder chooses to pay a lump sum to Michele Snyder in the amount of the principal balance due on the second mortgage obligation distributed to her, or if he should choose to directly pay to the lender the remaining principal balance due on the second mortgage, he may do so in lieu of further spousal maintenance. The amount so paid, in excess of \$971 during the month, shall not be considered to be spousal maintenance because it will extinguish the need for this component of spousal maintenance.” CP 28.
22. The second mortgage obligation on the real property located at 8111 Deschutes Court SE, Tumwater, Washington was not distributed to Ms. Walpole. Under paragraph the Separation Agreement, Ms. Walpole was obligated to pay “[t]he liabilities associated with the community real property distributed to her...

except for the second mortgage liability distributed to Mitchell Snyder below.” CR 32-33.

23. Mr. Snyder was ordered to pay “[a]ll liabilities associated with the investment real property distributed to him, including but not limited to, any mortgages, liens, taxes, insurance or other liabilities related to the property.” CP 33.

24. The Separation Agreement states, “Mitchell Snyder shall hold harmless and indemnify Michele Snyder for all liabilities distributed to him. Mitchell Snyder shall also be responsible for all attorney’s fees and costs incurred by Michele Snyder in defending a collection action with respect to a liability distributed to him or in enforcing this hold harmless and indemnification provision.” CP 34-35.

25. Payments made to Ms. Walpole under Section 1 of the Separation Agreement were “non-modifiable under either paragraph...” CP 28.

26. Pursuant to Section 1(a), “The obligation to pay future maintenance under this paragraph shall be terminated upon the death of either party, the remarriage of Michele Snyder, or after payment of the amounts set out [therein], whichever occurs first.” CP 27.

27. Pursuant to Section 1(b), “The obligation to pay future maintenance under this paragraph shall be terminated upon the death of either party or after payment of the amounts set out [therein], whichever occurs first.” CP 28.
28. On March 27, 2003, Mr. Snyder filed a declaration with the court wherein he referenced his spousal maintenance obligation as “a substantial three year spousal maintenance support package...” CP 47. No mention was made of the \$971 monthly payment. CP 42-56.
29. Pursuant to a Petition to Modify Child Support filed in 2004, Mr. Snyder filed a declaration on February 3, 2005, stating, “Michele received two different types of spousal maintenance. I still pay her spousal maintenance under our settlement but this money is related to a property and debt division issue not child support. The spousal maintenance which I paid to her as ‘traditional’ spousal maintenance expired in December of 2004.” CP 60. Mr. Snyder also stated, “The only debt Michele received under the Decree was the mortgage on the family residence which was about \$1,500 a month.” CP 64.
30. In reply to Mr. Snyder’s February 3, 2005 declaration, Ms. Walpole referenced the \$971 per month payment to her as

“property distribution (which was also defined as spousal maintenance).” CP 77.

31. Ms. Walpole remarried in June 2007.<sup>2</sup>

32. On October 4, 2007, Mr. Snyder filed Mr. Snyder’s Motion to Terminate Spousal Maintenance wherein he sought to terminate future payments ordered pursuant to Section 1(b) of the Separation Agreement. In the motion, Mr. Snyder did not seek reimbursement for payments made to Ms. Walpole after her remarriage in June 2007. CP 105-111.<sup>3</sup>

33. On November 2, 2007, Ms. Walpole filed Petitioner’s Objection, Response and Requests for Relief, requesting a determination that the payments set forth in Section 1(b) of the Separation Agreement constitute a debt distribution, alternatively requesting an evidentiary hearing, and requesting an award of fees and costs in favor of Ms. Walpole. CP 112-118.

34. On November 9, 2007, Mr. Snyder filed Mr. Snyder’s Reply to Terminate Spousal Maintenance. There was no request for

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<sup>2</sup> This fact is inferred in the record, although not succinctly stated. It is stipulated that Ms. Walpole remarried on this date.

<sup>3</sup> This document was properly identified in the Designation of Clerk’s Papers and was properly numbered and transmitted as part of the Clerk’s Papers but is not separately identified in the Clerk’s Papers Index prepared by the Clerk of the Court.

reimbursement of payments made after Ms. Walpole's remarriage.  
CP 119-141.

35. The trial court heard argument on the motion calendar on  
November 13 2,007, at which time Ms. Walpole again requested  
an evidentiary hearing. RP 3.

36. The court issued a letter opinion on November 26, 3007. CP 142-  
144.

37. On January 3, 2008, the trial court entered an Order and Judgment  
re: Termination and Overpayment of Maintenance. CP 145-146.

38. On January 22, 2008, Ms. Walpole file her Notice of Appeal. CP  
147-153.

### III. ARGUMENT

A. The Separation Agreement is ambiguous because future payments provided for by Section 1(b) of have the character of a property division but are designated as "spousal maintenance".

If the divorce decree is unambiguous on its face, the meaning of the contract is determined from its language and not from parol evidence. *Messersmith v. Messersmith*, 68 Wn.2d 735, 739, 415 P.2d 82 (1966), citing *Boeing Airplane Co. v. Firemen's Fund Indem. Co.*, 44 Wn.2d 488, 268 P.2d 654, 45 A.L.R.2d 984 (1954). "If an ambiguity exists, the contract should be given a construction which makes it a rational and probable agreement, if it is open to such a construction." *Thompson v.*

*Thompson*, 82 Wn.2d 352, 356, 510 P.2d 827 (1973). An ambiguity exists if the future payments designated in an agreement are designated spousal maintenance but have the character of a property division. *Thompson*, at 357. In this regard, there is no magic in the use of terms such as alimony, maintenance, or property award. *In Re Marriage of Hadley*, 88 Wn.2d 649, 658, 565 P.2d 790 (1977).

The separation agreement in this case is ambiguous on its face. The trial court acknowledged this in its letter opinion, which was incorporated into the Order and Judgment re: Termination and Overpayment of Maintenance. The trial court states, “An ambiguity arguably exists in this agreement and in the Decree, because on one hand the payments have the character of a property division and on the other hand they are designated as ‘maintenance.’” CP 143. There can be no more clear statement from the trial court that an ambiguity exists. The trial court’s determination that “[r]eading the Property Settlement Agreement [sic] as a whole, however, reconciles any ambiguity” is in error. An agreement ambiguous on its face cannot reconcile itself or it would not be ambiguous.

The ambiguities in the Separation agreement are plentiful. There are two types of maintenance set forth in the Separation Agreement. Neither type of maintenance references Mr. Snyder’s ability to pay. The

first type of maintenance was “traditional” maintenance set forth under Section 1(a), which was combined with the support obligation for the children. CP 27, 57-58. The first type of maintenance does not reference the need of Ms. Walpole or Mr. Snyder’s ability to pay. The obligation to pay this “traditional” maintenance terminated on the death of either party, the remarriage of Michele Snyder, or after payment of the amounts set out above, whichever occurs first. CP 27.

The second type of maintenance is tied specifically to the payment of the second mortgage. The amount of the second type of maintenance is \$971 payable according to the terms of the amortization schedule for the second mortgage. CP 27, 38-41. Ms. Walpole was specifically relieved of the second mortgage obligation in the Separation Agreement, which indicates that Ms. Walpole was simply a conduit for receiving and transferring the second mortgage payment on behalf of Mr. Snyder. CP 32-33. Greater ambiguity ensued, however, because the second mortgage is not specifically distributed to Mr. Snyder. CP 33. The Separation Agreement does indicate that Mr. Snyder is to pay all liabilities associated with the investment real property distributed to him, which would include the second mortgage encumbering the real property awarded to Ms. Walpole which the parties obtained to generate funds to purchase the investment property awarded to Mr. Snyder free and clear. CP 6, 77.

The second type of maintenance references that this “spousal maintenance is necessary for the support of Michele Snyder’s household because a second mortgage encumbers the property.” CP 27. The agreement states, “The spousal maintenance obligation shall continue according to the terms of the amortization schedule that applies to this obligation even if Michele Snyder satisfies the obligation in any way including selling the residence, because the parties assume that she will replace it with an obligation to another lender.” CP 27-28. In contradiction, Mr. Snyder has the ability to terminate maintenance at any time upon payment of the balance of the second mortgage either to Ms. Walpole or directly to the bank and without consideration of or regard for Ms. Walpole’s future need. CP 28. He is obligated to pay a set dollar amount, which will not be deemed “maintenance” if he pays it in a lump sum, which indicates the payments are not need-based at all, but property division payments disguised as maintenance.

Additionally, Mr. Snyder received all of the unencumbered assets, including 100% of his LEOFF retirement for his work as a firefighter, all but \$12,000 of his deferred compensation, and unencumbered commercial real property. Ms. Walpole received a used car, a home with \$40,000 negative equity, and \$12,000 from Mr. Snyder’s deferred compensation account. CP 77. This division is only fair and equitable on its face if the

\$971 per month future payments are part of a property division.

Otherwise, Mr. Snyder received all of equity in the parties' estate, save \$12,000 and a car, and Ms. Walpole received all of the debt incurred in part to purchase the investment real property awarded to Mr. Snyder with clear title.

There are multiple ambiguities in the Separation Agreement.

These ambiguities are not reconciled by reading the Separation Agreement as a whole. If anything, reading the document as a whole creates greater ambiguity. The trial court erred in determining that the ambiguity reconciled itself on its face.

B. The trial court failed to consider all the evidence in the record determine the intent of the parties as to whether future payments provided in an agreement are spousal maintenance or a property division.

When an ambiguity exists on the face of the agreement, whether an award is a property division or support depends on the circumstances and the intent of the parties. *Thompson* at 356; *Messersmith v. Messersmith*, 68 Wn.2d 735, 415 P.2d 82 (1966); *Millheisler v. Millheisler*, 43 Wn.2d 282, 261 P.2d 69 (1953). The fact that the order recites that the award is for respondent's care and maintenance does not require a holding that this particular portion of the decree attempts to award alimony to respondent.”

*Messersmith v. Messersmith*, 68 Wn.2d 735, 740 (1966), *citing Walls v. Walls*, 179 Wn. 440, 442 38 P.2d 205 (1934).

The trial court erred by not considering parol evidence in determining the intent of the parties. The court relied solely on a document it acknowledged was ambiguous to determine the intent of the parties. The trial court should have considered and weighed all evidence it had before it, including the statements against interest of both parties during their child support modification action when both indicated the Section 1(b) payments were property division.

The intent of the parties as to the future payments of \$971 was repeatedly memorialized in the trial court record more than two to four years prior to Mr. Snyder seeking to terminate the payments. On March 27, 2003, Mr. Snyder filed a declaration with the court wherein he referenced his spousal maintenance obligation as “a substantial three year spousal maintenance support package...” CP 47. No mention was made of the \$971 monthly payment. CP 42-56. Mr. Snyder filed another declaration on February 3, 2005, stating, “Michele received two different types of spousal maintenance. *I still pay her spousal maintenance under our settlement but this money is related to a property and debt division issue not child support.* The spousal maintenance which I paid to her as ‘traditional’ spousal maintenance expired in December of 2004.” CP 60

(emphasis added). Mr. Snyder also stated, “The only debt Michele received under the Decree was the mortgage on the family residence which was about \$1,500 a month,” which is an acknowledgement that the \$971 monthly payments were for his debt obligation on the second mortgage and not for maintenance. CP 64. In reply to Mr. Snyder’s February 3, 2005 declaration, Ms. Walpole referenced the \$971 per month payment to her as “property distribution (which was also defined as spousal maintenance).” CP 77.

Despite the parties’ mutual intention that the \$971 per month payments related to property distribution and not maintenance, the trial court overlooked this strong evidence that was stated under penalty of perjury at a time when the character of future payments was not at issue. No reference was made to this evidence in the court’s order. CP 142-146. The trial court’s failure to consider and weigh this evidence, which makes clear the intent of the parties, is in error.

C. The trial court should have conducted an evidentiary hearing to determine the intent of the parties.

Ms. Walpole requested an evidentiary hearing so she would have an adequate opportunity to address the trial court from the stand as to her intent in agreeing to the provisions of the Separation Agreement and her understanding of the provisions. CP 118. Her request was impliedly

denied when the trial court chose to take the matter under advisement and issue a letter opinion without conducting an evidentiary hearing. RP 9; CP 142-144. The trial court apparently thought it did not have authority to conduct an evidentiary hearing. However, the trial court is a court of equity and an evidentiary hearing is an appropriate way for the trial court to obtain information and judge the credibility of the parties in determining the intent of the parties to an agreement. The trial court erred in not conducting an evidentiary hearing.

D. The future payments provided for by Section 1(b) of the Separation Agreement constitute a property division which is non-modifiable and binding on the parties and is not terminable upon the remarriage of Ms. Walpole.

Washington State “cases hold that the provisions of a divorce decree relative to alimony may be modified on a property snowing, even if the payments were provided for in an agreement between the parties; however, the disposition of property made either by a divorce decree or by agreement between the parties and approved by the court cannot be so modified.” *Thompson* at 354-355 (other citations omitted). These cases are in harmony with the general rule that where a provision of support is an integral and inseparable part of a property settlement, and a decree incorporates the agreement, the decree cannot be modified with respect to support. *Thompson*, at 356.

In *Thompson*, the future payments were tied to a real estate holding of the parties. The agreement and decree recited that it was the intent to equally divide the property of the parties. *Thompson*, at 358. “Ms. Walpole agreed and covenanted not to seek modification of the provision, an agreement itself inconsistent with the concept of alimony and manifesting an understanding that the provision for payments to Mr. Snyder was a part of the property settlement.” *Id.* The *Thompson* court indicated that using the word “alimony” when referencing the payments could not change the true nature of the agreement as manifested by its provisions as a whole and upheld the payments as a property division. *Thompson*, at 359.

In the present case, the payments in Section 1(b) are more clearly identifiable as a debt distribution than as spousal maintenance. This result is clear when the entire record is considered and not just the face of an admittedly ambiguous Separation Agreement. Both Ms. Walpole and Mr. Snyder declared under penalty of perjury more than three years after the agreement was entered into that they intended these payments to be part of a property and debt division issue. CP 60, 77. Because the Separation Agreement was ambiguous on its fact and with the parties’ intentions having been clearly stated under penalty of perjury characterizing future

payments as part of a property and debt division, the trial court erred in establishing that the payments were maintenance subject to termination.

The trial court set forth several factors that convinced it that the payments were maintenance, including:

The expressed intent of the parties in identifying the need for spousal maintenance necessary for the support of Michele Snyder necessitated because of the second mortgage, the assumption stated in paragraph 1(b) 'that she will replace it [the second mortgage] with an obligation to another lender,' the ability of Mr. Snyder to retire the second mortgage in lieu of paying further maintenance and the termination upon death of either party or the extinguishment of the second mortgage by Mr. Snyder.

CP 143. However, the payment structure of Section 1(b) and the provisions relied upon by the trial court have the unmistakable characteristics of a debt payment and not spousal maintenance. Mr. Snyder's payments in section 1(b) were tied directly to the payment of the second mortgage. The monthly payment to Ms. Walpole was exactly that of the second mortgage monthly payment. Mr. Snyder was obligated to pay the monthly payment based on the amortization schedule of the second mortgage. The total amount of the payments equaled the amortized amount due on the second mortgage. Mr. Snyder had the option to pay off the second mortgage balance in one lump sum at any time directly to the lender or to Ms. Walpole, whomever of the two he chose. The exercise of this option made it clear that the lump sum, minus

the \$971 monthly payment due in the month the lump sum was tendered, shall not be considered spousal maintenance.

Since a lump sum payment to the lender or Ms. Walpole in the exact amount of the balance of the second mortgage was not to be considered spousal maintenance, save \$971, under the provisions of the agreement, then by default it must be a payment pursuant to a property and debt distribution. This provision effectively gives Mr. Snyder unilateral control over whether the payment is spousal maintenance terminable upon the remarriage of Ms. Walpole, or a non-modifiable, non-terminable property distribution. Such a result is contrary to public policy.

Nonetheless, with the choice being given to Mr. Snyder, wrongfully so, Mr. Snyder declared under penalty of perjury on February 3, 2005 his intention that the payments set forth in Section 1(b) of the Separation Agreement were related to property and debt division. CP 60. He further acknowledged under penalty of perjury that the only debt Ms. Walpole received was the mortgage on the family residence which was about \$1,500 per month.<sup>4</sup> While the trial court overlooked these facts, it cannot be clearer that Mr. Snyder believed and in fact was obligated to make the second mortgage payment until it was paid in full and that the payments of

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<sup>4</sup> The monthly payment on the first mortgage was \$1568.31 per month. CP 5. The monthly payment on the second mortgage was \$971.10. CP 6, 77.

\$971 made to Ms. Walpole was month were for the second mortgage payment, which she was advancing on his behalf.

Ms. Walpole's need referenced by the trial court is also directly tied to the second mortgage or some speculative mortgage with an unknown balance in the future. The agreement assumes on its face that if Ms. Walpole has no second mortgage, she has no need. In contrast, it assumes she will have a second mortgage in the future, which is speculative at best, without consideration as to the balance of a second mortgage. This does not contemplate future need. This constitutes a property debt obligation disguised as maintenance. Additionally, the maintenance made no reference to the husband's ability to pay, and thus it appears that maintenance was not intended because it was in no way connected to Mr. Snyder's ability to pay.

The trial court also relied on the provision in the agreement that states:

Furthermore, on default by Michele Snyder in excess of 60 days, a provision under Section 3.1 of the Agreement allows the Court to order the resident to be sold under such terms as they are set by the Court. ”

CP 143-144. However, the trial court overlooks the effect of a sale of the home as it relates to the second mortgage Mr. Snyder was obligated to pay. If the house sold, the second mortgage would have been paid at

closing out of necessity. Ms. Walpole would have effectively paid Mr. Snyder's second mortgage obligation out of her proceeds from the sale of the home awarded to her. This was considered in structuring the section 1(b) payments which allowed Mr. Snyder to reimburse Ms. Walpole for her payment of his second mortgage obligation. Any payments made to Ms. Walpole after the second mortgage was paid in full constitute reimbursement for payment of Mr. Snyder's debt. This is consistent with the other provisions of the future payments, because the future payments only cease when Mr. Snyder has paid amount of the second mortgage in full. The minute he paid off the second mortgage, whether directly to the lender in a lump sum, to Ms. Walpole in a lump sum, or in installments pursuant to the amortization schedule, the intent was that section 1(b) payments were intended to pay off the second mortgage.

The trial court wrongfully concluded, "None of the provisions or features cited by the Petitioner... are inconsistent with a maintenance obligation." CP 144. Then, the trial court admitted "the same arguments made [in the court's letter opinion] can apply to a determination that the obligation was in fact a distribution of property." CP 144. The court states, "Perhaps the greatest indicator that it is maintenance is the paragraph under section 1(b) that terminates the obligation for future spousal maintenance upon the death of either party." The trial court could

not be more wrong. The greatest indicator that the future payments are not maintenance is the declarations of the parties stating that they are not for maintenance. The court simply refused to acknowledge, consider, or weigh this information. Lastly, the court relied on the fact that “the parties and the Court identified the payment as spousal maintenance.” However, the trial court’s consideration of this factor is not appropriate under *Hadley. Hadley*, at 658.

All of the above factors taken together clearly show the payments required in Section 1(b) are for the purpose of Mr. Snyder paying off the second mortgage incurred by the parties during their marriage and not to provide Ms. Walpole with maintenance. Both parties declared under penalty of perjury that the payments were not maintenance but were part of a property and debt division. Ms. Walpole is not and was not obligated at any point under the separation agreement or the decree of dissolution to pay the second mortgage. Instead she was simply a conduit through which Mr. Snyder’s obligation to pay the second mortgage passed. He was required to pay the full amount of the second mortgage, whether in a lump sum at his option or in monthly payments.

If Ms. Walpole sold the home causing the second mortgage to be paid with the equity awarded to her in the property distribution, Mr. Snyder was required to reimburse her the full cost of the balance of the

second mortgage that she paid off on his behalf. She would have had no option in selling the home but to have the proceeds applied to the second mortgage to clear title for the benefit of the buyer thereby advancing the payment on behalf of Mr. Snyder and requiring reimbursement from him under the hold harmless provisions of the separation agreement and the decree of dissolution.

Had the payments in Section 1(b) been intended as maintenance, they would have been included in Section 1(a) (creating the need for only one maintenance section) and not tied directly to the payment of a debt implied distributed to him.

The payments set forth in Section 1(b) of the Separation Agreement constitute a debt distribution final upon entry of the decree and non-modifiable and non-terminable by the court. The payments set forth in Section 1(b) are not future maintenance payments.

E. Attorney Fees

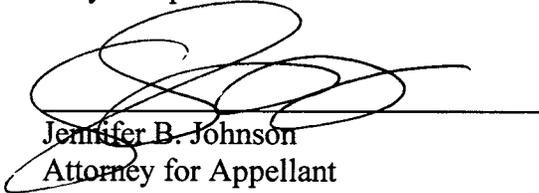
Ms. Walpole seeks attorney fees under the hold harmless provision of the Decree of Dissolution and RCW 26.09.140, which states, “Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal an attorney fees in addition to statutory costs.” Ms. Walpole and Mr. Snyder clearly and concisely stated their intentions in 2005 when they both indicated under

penalty of perjury that the Section 1(b) payments were part of a property and debt division, which is non-modifiable and not subject to termination. Mr. Snyder denounced that the payments were for spousal maintenance. Yet, Mr. Snyder filed an action five months after Ms. Walpole remarried seeking to terminate the future payments. This action is unnecessary

#### IV. CONCLUSION

Ms. Walpole respectfully requests that the Court of Appeals reverse the trial court's determination that the future payments in Section 1(b) of the Separation Agreement are spousal maintenance, order, adjudge and decree that the payments are part of a property division, and thus, not subject to termination, vacate the Order and Judgment Re: Termination and Overpayment of Maintenance, reinstate the future payments retroactive to July 1, 2007, and award attorney fees to Ms. Walpole.

Respectfully submitted this 7<sup>th</sup> day of April 2008.

  
Jennifer B. Johnson  
Attorney for Appellant  
WSBA #28227

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APR - 7 2008

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

SUPERIOR COURT OF  
THURSTON COUNTY

In Re

Snyder,

Petitioner,

Snyder,

Respondent.

NO. 01-3-01454-5

TRANSCRIPT OF  
COURT PROCEEDING

VERBATIM REPORT

BE IT REMEMBERED that this day on the 13<sup>th</sup> of November, 2007, the above-entitled and numbered cause came on for hearing before the Honorable John Jarrett, Commissioner, County of Thurston, Olympia, Washington.

APPEARANCES

FOR THE PETITIONER:

Jennifer Johnson, Attorney at Law

FOR THE RESPONDENT:

Steve Foster, Attorney at Law

Olympia, Washington

**COPY**

1 COURT: Snyder. Mr. Foster, Ms. Johnson. Mr. Foster?

2 MR. FOSTER: I think the first issue I think we need to address  
3 is the issue Ms. Johnson raises procedurally. This should have been done by a petition or an order to  
4 show cause as opposed to the way that I did it.

5 COURT: Ms. Johnson?

6 MS. JOHNSON: I do believe that is the case because this matter  
7 was finalized several years ago your honor and the matter now comes back before the court simply on  
8 a motion. However I would also indicate that my client is here and Mr. Snyder is here. It seems like  
9 we have a difficult time getting the parties into the court at the same time and so my client would  
10 waive the procedural objection to proceed today to get a ruling from the court.  
11

12 COURT: Certainly.

13 MR. FOSTER: The issue then is very narrow and it pertains to  
14 whether the maintenance be terminated upon her remarriage, the petitioner's remarriage last June. The  
15 paragraph B of the September 17<sup>th</sup> property settlement agreement indicates that the future maintenance  
16 would terminate upon the death of either party. It does not mention any word about remarriage so  
17 consequently 26.09.170 our position is by operation law then maintenance is terminated. And  
18 26.09.172 states unless otherwise agreed in writing or expressly provided in the decree the obligation  
19 to pay future maintenance is terminated upon the death of either party or the remarriage of the party  
20 receiving the payments. Then I cite some case law that indicates that courts have held that  
21 maintenance terminates upon death by either party or the remarriage of the party receiving it unless the  
22 decree contains specific language or manifestly clear unmistakable statements revoking the  
23 termination of provision contained in RCW 26.09.170 must be stately expressed and not implied or  
24 left to inference. Citing *In Re: Marriage of Rufener* in terminating maintenance the court found that in  
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1 order to repeal the mandatory termination language contained in RCW 26.09.170 a separation  
2 agreement must specifically include language which states the effect of a maintenance obligation  
3 should the receiving party remarry. Citing the *Marriage of Rufener* upon remarriage of the wife the  
4 court found (inaudible) RCW 26.09.172 (inaudible) express provision means use of the word  
5 remarriage. Here neither the dissolution of marriage or any other agreement provides that maintenance  
6 is to continued if remarriage. And the responding declaration memorandum rather there's an issue that  
7 this was property and not maintenance. But it couldn't be more clear in the operative paragraph  
8 (inaudible) I think it refers to maintenance I think it refers to maintenance as spousal maintenance of  
9 twelve or fourteen times that is not property clearly. It is what it says it is. It is maintenance and it  
10 should terminate per RCW 26.09.170.  
11

12  
13 COURT: When I reviewed this matter and maybe I just  
14 missed it. I didn't see from either party how it was treated for income tax purposes.

15 MR. FOSTER: My client's been deducting...

16  
17 COURT: Well is that part of the record and I just missed  
18 it?

19 MR. FOSTER: That is not part of the record. The income  
20 information has come up in another issue but it's not here.

21  
22 COURT: Okay. Ms. Johnson?

23 MS. JOHNSON: Thank you your honor. Well I agree that the  
24 issue is whether or not this is maintenance and whether or not if it is maintenance it terminates. And I  
25 don't disagree that if in fact this were maintenance it would terminate upon the remarriage of my  
26 client. I think that the statute in case law is quite clear that interprets it. However in this particular  
27 situation what we have here is not maintenance and Mr. Foster and I have both cited a case *Millheisler*  
28

1 Smith and it clearly indicates, and I want to just quote this. It says it clearly appears the portion there  
2 of which appellant complains of is an integral part of the property division...

3 COURT: Before you go there you also in your response  
4 asked for a fact finding hearing.

5 MS. JOHNSON: I did.

6 COURT: Okay is that pursuant to statute?

7 MS. JOHNSON: The request for an evidentiary hearing?

8 COURT: Yes.

9 MS. JOHNSON: I don't, I think the court can equitably schedule  
10 an evidentiary hearing if the court determines it doesn't have enough evidence before it to determine  
11 the intent of the parties. It seems statutorily, pardon me, the case law is pretty clear that if there, if in  
12 looking at the courts finding of facts and conclusions of law and the decree the court can't specifically  
13 ascertain whether it was truly a property distribution or a spousal maintenance regardless of what it's  
14 called then the court can proceed with an evidentiary hearing. Although I don't have a specific  
15 authority for the court.  
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19 COURT: In this case it's clearly called maintenance.

20 MS. JOHNSON: It is.

21 COURT: We all agree on that. So you have some  
22 rationale or reasons why it is in fact property division and not maintenance.  
23

24 MS. JOHNSON: Absolutely I do. Your honor it's interesting  
25 actually that Mr. Snyder brings this matter before the court now because back in 2005 when this matter  
26 was before the court on child support Mr. Snyder was asking for the court to give a (inaudible)  
27 interpretation to that \$971.00 a month. And he filed under penalty of perjury on February 2, 2005 a  
28

1 declaration with respect to that says I still pay her quote spousal maintenance under our settlement but  
2 this money is related to property and debt division issue.

3 COURT: Where is that declaration?

4 MS. JOHNSON: It is February 2, 2005. It was for a hearing  
5 scheduled for February 8, 2005 and it's on page two line four through seven.  
6

7 COURT: I have not looked at that.

8 MS. JOHNSON: I have a conformed copy so I'm not sure exactly  
9 what day it was filed on so I apologize.

10 COURT: What's the heading again?

11 MS. JOHNSON: It's declaration of respondent Mitch Snyder  
12 regarding financial information.  
13

14 COURT: I have it filed February 3, 2005. And what  
15 portion are you referring to?

16 MS. JOHNSON: Your honor I'm referring to page two and  
17 beginning at the left of which is enumerated line between and four and five. It says I still pay her  
18 spousal maintenance under our settlement but this money is related to a property and debt distribution  
19 issue, or division issue not child support. And then he goes on to say the spousal maintenance I pay to  
20 her as quote traditional maintenance expired December 2004. There's a clear intent by Mr. Snyder  
21 that the current amount being paid is not in fact traditional maintenance and the law does not allow for  
22 a difference between traditional maintenance and non-traditional maintenance unless we truly  
23 understand it as a property division which is what Mr. Snyder had coined it as. I have additional  
24 information that's part of the record if the court would like to hear that as well as to why it is a debt  
25 division.  
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1 COURT: Well obviously the laboring belongs to you to  
2 convince me to facts of this case really identify the language in the decree or in the property separation  
3 agreement as property division as opposed to maintenance so go ahead.

4 MS. JOHNSON: So additionally your honor actually Mr. Snyder  
5 filed that response in February 2005 and my client filed a reply declaration and again I would point out  
6 specifically pages one and two of that and I start line thirteen of page two and my client writes and it  
7 was undisputed. All records from our divorce will clearly indicate that I received no cash. I was left  
8 with no cash left available in a checking, savings or retirement account. He received all of the liquid  
9 assets including 100% of our retirement account and all but \$12,000.00 of the deferred compensation  
10 accounts. I receive no cash until he retires or dies in parenthesis. And the commercial property at the  
11 time of the divorce was owned free and clear. I was left with a home that was worth less then I owed  
12 due to the fact that all of our debts were wrapped into the home that she was awarded. The huge  
13 burden of the second mortgage added no value to our home nor did it create any security. So in  
14 fashioning their settlement agreement the parties this says, she goes on and says Mitch offers that I was  
15 provided with a substantial amount of money. Again I was left with two children, two mortgages and  
16 zero cash. He defines a quote substantial amount \$1,300.00 in spousal maintenance, \$700.00 in child  
17 support and \$971.00 in property distribution parenthesis which was also defined as spousal  
18 maintenance for a total of \$2,971.00. The bottom line is that my client, Mr. Snyder agreed to take on  
19 the second mortgage and pay it in full. That's because my client was awarded nothing and the only  
20 way to create any equity or fair and equitable distribution of the debts and assets in this case was to  
21 ensure that Mr. Snyder paid the second mortgage. That's creating some built in equity for my client.  
22 It's quite clear when you look at the property settlement agreement that was entered into by the parties  
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1 that it is directly, this \$971.00 a month is directly tied to the second mortgage if nothing else. The  
2 dollar amount is the exact amount of the payment on the second mortgage.

3 COURT: Ms. Johnson is it your argument that it's  
4 maintenance in lieu of property?

5 MS. JOHNSON: No. My argument frankly your honor is that it's  
6 a property division disguised as spousal maintenance.  
7

8 COURT: Why doesn't maintenance in lieu of property  
9 work under your argument?

10 MS. JOHNSON: Well it's just more crystal clear under the case  
11 law that if it's a property distribution that it is not subject to being modified or being terminated. And  
12 I'm just more comfortable with this actually being a property distribution. And *Millheisler* makes it  
13 very clear and I quoted it, I put it in my response to this action that the fact that the order recites that an  
14 award is for respondent's care and maintenance does not require a holding that this particular portion  
15 of the decree actually attempts to award alimony to the respondent. In other words just because  
16 someone calls it one thing doesn't mean that's actually what it is. And in this situation, the case law  
17 also goes on to say okay you have to look at the indicia of whether it's maintenance or whether it's  
18 more indicia of property distribution and to me it's clearly a property distribution. To the point that  
19 the settlement agreement says that he can choose to pay the second mortgage off in a lump sum at any  
20 time. And if he does that then it's not spousal maintenance. So if he makes the monthly payment  
21 using her essentially just as a conduit for payment of the second mortgage then it's going to be deemed  
22 spousal maintenance under the settlement agreement. But if in fact Mr. Snyder goes ahead and pays  
23 off that entire obligation then it's not going to be spousal maintenance in any respect which clearly  
24 indicates it was his obligation to pay the debt distribution. Further...  
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1 COURT: Where's that language in the separation  
2 agreement? That he can pay it off at any time and then he's relieved of any further spousal  
3 maintenance obligation.

4 MS. JOHNSON: It says on page three of the separation agreement  
5 beginning on the second line with is enumerated line three, if Mitchell Snyder chooses to pay a lump  
6 sum to Michelle Snyder in the amount of the principle balance due on the second mortgage obligation  
7 distributed to her or if he should choose to pay directly to the lender the remaining balance due on the  
8 second mortgage he may do so in lieu of further spousal maintenance and the amount so paid in excess  
9 of \$971.00 of that month or the month shall not be considered to be spousal maintenance because it  
10 will extinguish the need for this component of spousal maintenance. So Mr. Snyder had the option as  
11 to whether or not to pay the debt or whether to pay maintenance. The monthly obligation was directly  
12 was exactly what the second mortgage was. And if my client sold the home which would have  
13 necessitated pay off the second mortgage from the proceeds clear title Mr. Snyder was still obligated to  
14 make that payment based on the amortization schedule in a monthly amount based on an amortization  
15 schedule until it was paid in full. Which effectively is my client fronting the money to pay off the  
16 second mortgage and him reimbursing her so she would get something out of the property and debt  
17 distribution that he parties had during the marriage. And why it's so important when we talk about  
18 when he got the retirement account and he got the commercial property at the time he had been a  
19 firefighter for twenty years and received none of the retirement.  
20  
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24 COURT: If he was obligated to pay the \$971.00 as  
25 maintenance but could terminate it by essentially paying the mortgage wouldn't that just go to her  
26 ongoing need for the maintenance under the language of the separation contract?  
27  
28

1 MS. JOHNSON: No. And the reason why is because he still had  
2 the obligation to pay it even if the obligation wasn't there. In other words if she sold the house under  
3 this separation agreement if she sells the house then the proceeds have to pay off the second mortgage  
4 anyway and he would still be obligated to reimburse her the exact amount of the mortgage. He was  
5 obligated to do that regardless if the obligation was there or not. So it wasn't really tied to her need.  
6 Because if she sells the house and the second mortgage goes away he still has to reimburse her which  
7 again indicates that she's really a conduit to pay the second mortgage. And Mr. Snyder is now coming  
8 back and trying to change his position from what it was in 2005. It just seems to be a matter of  
9 convenience that when it suits him one way it's a property distribution as he declares under penalty of  
10 perjury what his intent was. And now that it's no longer convenient now Mr. Snyder would have the  
11 court believe it's exactly the opposite of what he previously argued.  
12  
13

14 COURT: All right. Let me hear from Mr. Foster.

15 MR. FOSTER: The next paragraph specifically states it is for  
16 her financial need and that she needs this maintenance. There's no ambiguity in our reply  
17 declaration...  
18

19 COURT: What about Ms. Johnson's argument sort of  
20 putting the foot on the other shoe. If she was to sell the house she wouldn't have any need but he  
21 would still be obligated to...  
22

23 MR. FOSTER: She would still need that money for her housing.  
24 For her overhead.

25 COURT: Because of the language in the contract that said  
26 if she sold the house she would obviously reinvest in another house?  
27  
28

1 MR. FOSTER: Yes. And I don't see any ambiguity here. And it  
2 does say if he pays anything more than \$971.00 per month that he doesn't, that there won't be  
3 maintenance. But it's maintenance. It's clearly, I don't know I counted it twelve or fourteen times in  
4 that paragraph. And in our reply...

5 COURT: Ms. Johnson's argument is I think well taken to  
6 that extent anyway. But just because you call it maintenance doesn't necessarily make it maintenance.  
7

8 MR. FOSTER: Well I wasn't Mr. Snyder's lawyer at the time. I  
9 don't know what the intent for this was. All I can do is read it and it's clear reading it's called  
10 maintenance and I don't think she can collaterally attack the decree now by saying it was really  
11 property because they were treating it as maintenance and income.  
12

13 COURT: How much is left on the, how many payments on  
14 the \$971.00? Not that that's germane to the issue.

15 MR. FOSTER: Approximately twenty years.

16 COURT: Twenty years. So it's not an insignificant issue.  
17

18 MR. FOSTER: It's a huge amount of money.

19 COURT: So if there was not a remarriage then of course it  
20 would continue to be made like in any other maintenance case.

21 MR. FOSTER: Yes. The marriage is why we're here today.

22 COURT: Okay. I hope this is the only time that I'll do this  
23 but I'll take this matter under advisement so that I can read the cases more closely and certainly in  
24 preparation for this I did not have that opportunity and this is to important an issue of course. And  
25 frankly I don't know what the answer is so let me do that.  
26

27 MS. JOHNSON: Thank you.  
28

COURT:

Thank you.

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CERTIFICATE

STATE OF WASHINGTON                    )  
  )  
COUNTY OF Thurston County        )                    SS

I, Shanna Church, hereby certify:

That I have listened to the record produced by electronic recording device in the matter of Cause 01-3-01454-5 Snyder v Snyder and have reduced the same to typewritten form.

That the foregoing 10 pages constitutes a transfer of record made by electronic recording device and reduced to typewritten form by myself and that said transcript contains a complete, true and accurate transcript of said proceedings to the best of my ability.

IN WITNESS WHEREOF I HAVE UNTO HERE SET MY HAND March 26, 2008.

  
\_\_\_\_\_  
Shanna Church

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COURT OF APPEALS  
DIVISION II

03 APR -7 PM 2: 58

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

In re the Marriage of:

MICHELE LYNN SNYDER,

Appellant,

vs.

MITCHELL HUGH SNYDER,

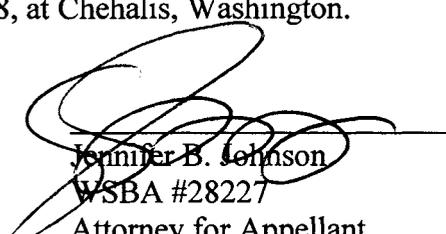
Respondent.

No.: 37271-1-II

DECLARATION OF  
SERVICE

I, Jennifer B. Johnson, hereby declare under penalty of perjury under the laws of the State of Washington that on April 7, 2008, I caused to be hand-delivered a true and correct copy of the Petitioner's Opening Brief to the Court of Appeal of the State of Washington, Division II (RAP 5.3(a)) to Mitchell Snyder's attorney of record, Stephen A. Foster's office located at 701 evergreen Plaza, 711 South Capitol Way, Olympia, Washington 98501. A copy of the Transcript of Court Proceeding was also delivered to Mr. Foster with the brief.

Signed this 4<sup>th</sup> day of April 2008, at Chehalis, Washington.

  
Jennifer B. Johnson  
WSBA #28227  
Attorney for Appellant