

No. 42705-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

MARK WILLIAMS STOHR,

Appellant,

and

HEIDI RIE STOHR,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE EDWIN POYFAIR

BRIEF OF RESPONDENT

SMITH GOODFRIEND, P.S.

By: Valerie A. Villacin
WSBA No. 34515
Catherine W. Smith
WSBA No. 9542

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

Attorneys for Respondent

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I. INTRODUCTION

Only five months after the decree dissolving the parties' nearly 20-year marriage awarded Heidi, a homemaker, four years of spousal maintenance, Mark asked the court to modify his maintenance obligation, claiming that his commission-driven income, which the trial court had found was \$200,000, was reduced by half due to the economic downturn. Asserting that he had no commissions "in the pipeline," Mark asked the trial court to reduce his maintenance obligation and offered to equally share any commissions he did earn with Heidi. (CP 58) Having convinced the trial court to split his commissions with Heidi, Mark now complains of the trial court's decision. Now that his income is even greater than what the trial court found at the conclusion of the dissolution trial, Mark wants to "go back to the old plan." (CP 218; 6/8/11 RP 26)

While Mark throughout his appeals brief laments that he must now share his commissions with Heidi, he in fact has not complied with the trial court's modified maintenance award, and has refused to comply with the order that he himself asked for.

This court should affirm the trial court's maintenance award and award Heidi attorney fees for having to respond to this appeal.

II. RESTATEMENT OF FACTS

A. **After A Nearly 20-Year Marriage, The Trial Court Awarded Heidi, A Homemaker, Four Years Of Maintenance Based On Mark's "Substantial" Income.**

Respondent Heidi Stohr and appellant Mark Stohr, both now age 51, were married on February 18, 1989. (CP 2, 10, 93) They have two teenage children. (CP 4) They were divorced on December 31, 2008 after a trial before Clark County Superior Court Judge Edwin Poyfair. (CP 10, 18)

The trial court awarded Heidi four years of maintenance and a slightly disproportionate share of the community property (CP 11, 12), acknowledging the parties' disparate economic circumstances at the end of their long-term marriage. (CP 3) The trial court found that Heidi, then age 48, had been a homemaker during the marriage, and was homeschooling one of the children. (CP 3) Although the trial court recognized that Heidi had past work experience, it found she needed time to retrain before re-entering the job market. (CP 3) The trial court found that Mark earned a "substantial" gross annual income of \$200,000, or net monthly income of approximately \$11,667. (CP 3)

The trial court combined Heidi's maintenance with child support, awarding Heidi combined monthly support of \$6,000 for 24 months; \$5,000 for 12 months; and \$4,000 for 12 months. (CP 12) The "maintenance" portion of the combined support award was \$4,725 for 12 months; \$4,900 for 12 months; \$4,300 for 12 months; and \$3,200 for 12 months. (CP 12) The "child support" portion of the combined support award was based on the parties' net income, including Mark's payment of maintenance to Heidi. (See CP 12, 29-53) The trial court found Heidi had no income except for maintenance. (CP 21-22, 29-53) However, the trial court ordered that in July 2009, six months after entry of the decree, Heidi's monthly net income would be imputed at \$2,619 for purposes of child support.¹ (CP 3, 4, 21-22) In addition to the transfer payment, the trial court ordered Mark to pay 100% of the daughter's private school tuition. (CP 24)

On January 9, 2009, Mark filed a Motion for Reconsideration, challenging among other things the trial court's determination of his income. (CP 54-55) He asked the court to

¹ Although the Decree of Dissolution was entered on December 31, 2008, Mark's maintenance obligation was ordered to commence on July 1, 2008, six months earlier. (CP 12)

reconsider and decrease the “amount and duration of maintenance, and the amount of child support” on the grounds that Mark “does not earn \$200,000 per year.” (CP 54-55) To avoid further litigation, Heidi agreed to forego \$27,000 from the property awarded to her by the trial court in exchange for Mark withdrawing his motion for reconsideration. (CP 72, 80) The parties executed their agreement to that effect on January 16, 2009. (CP 80)

B. Five Months After Entry Of The Decree, Mark Sought To Modify His Maintenance Obligation, Claiming His Commission-Based Income Had Decreased.

After agreeing to waive his challenge to the trial court's maintenance award, Mark paid his maintenance obligation for only two months – February and March. (CP 57) In April 2009, Mark paid a little more than one-third of his maintenance obligation – \$1,777, rather than the \$4,725 he owed. (CP 57) On May 8, 2009, only five months after the decree of dissolution was entered, Mark moved to modify his maintenance obligation. (CP 70)

As in his earlier, withdrawn, motion for reconsideration, Mark claimed that his income was less than the amount found by the trial court. (*Compare* CP 54 *with* CP 57) In support of his motion, Mark attached an email he had received from his company on January

13, 2009 – three days before he agreed to waive his challenge to the maintenance award – stating that due to the economic downturn there “will be no salary increases this year.” (CP 59) Mark also attached three reports describing the impact of the economic downturn on the capital equipment market in which Mark was employed. Two of those reports pre-dated entry of the Decree of Dissolution. (CP 60-67) Mark proposed that his maintenance be “reduced from \$4,725 to \$1,000 per month plus one half of all commissions (amounts received in excess of base salary).” (CP 70)

Because Mark had failed to file a petition to modify his maintenance obligation, the trial court declined to consider his motion. (See CP 81-83) On June 10, 2009, Mark filed a petition to modify his maintenance obligation. (CP 93) In his petition, Mark proposed that he pay even less maintenance than in his motion. (*Compare* CP 70 *with* CP 94) Mark now asked that his maintenance obligation be “reduced from \$4,725 to \$500 per month, plus one-half of all commissions (amounts received in excess of base salary).” (CP 94) In the alternative, Mark asked that he “pay one-half of his net paystubs upon receipt to [Heidi] to

satisfy his combined child support and maintenance obligation.”
(CP 101)

In resisting the petition, Heidi noted that Mark had claimed throughout the dissolution proceedings that he earned less income than he actually earned. (CP 73) At trial, for example, Mark claimed he would only earn \$160,000 in 2008, “due to the economy.” (CP 73, 110) In fact, Mark earned \$208,000 in 2008 – even more than the trial court found he would earn. (CP 73) Heidi conceded that Mark’s income fluctuated, as it was largely commission-based, but asserted that by the end of the year his income would “increase dramatically” when he is paid commissions. (CP 73)

During the marriage the parties saved money during those months when Mark earned commissions to pay bills during those months when Mark had no commissions. (CP 104) Heidi asserted that Mark’s situation was no different than it had been throughout the parties’ marriage. (CP 104, 110) In fact, when Mark filed his petition to modify maintenance, he had already saved \$35,000 in an “emergency fund” and invested an additional \$15,000. (CP 104) Despite these available funds, Mark refused to pay his full

maintenance obligation, and embroiled the parties in litigation seeking to reduce it. (CP 72, 104, 110-11)

C. The Trial Court Adopted Mark's Proposal That His Income, Including Any Future Commissions, Be Divided Equally Between The Parties.

On July 1, 2009, the parties appeared before Judge Poyfair, who had presided over the dissolution trial, on Mark's petition to modify maintenance. The trial court found adequate cause for Mark's petition due to the "adjustment" in Mark's income. (7/1/09 RP 33) During this hearing, Mark agreed that it would be "fair" to find his annual base income was \$90,000. (7/1/09 RP 43-44) Mark also renewed his proposal to split with Heidi half of his income, including any commissions, to meet both his maintenance and child support obligations. (7/1/09 RP 44-45)

The trial court agreed that maintenance should be modified to equalize the parties' incomes, while recognizing that Mark's income fluctuated. Although Mark complains about it on appeal (App. Br. 23), the trial court accepted Mark's agreement that his income should be established at \$90,000 for purposes of calculating a "base" amount of maintenance. (7/1/09 RP 43-44; CP 118) The trial court also ruled, as Mark suggested, that his

commissions be split equally between the parties. (7/1/09 RP 44-45, 60; 3/17/10 RP 30) The trial court used a tax rate of 15% in calculating Mark's net base income as his effective tax rate after deductions. (7/1/09 RP 53-54, 58; 3/17/10 RP 11-12)²

The trial court orally ordered Heidi to pay half of the daughter's private school tuition, which had previously been Mark's sole responsibility. (7/1/09 RP 64-66; CP 24) Later, at Mark's request, the trial court also ordered Heidi to be equally responsible for half of the parents' share of post-secondary support for the parties' children - instead of in proportion to their income, as ordered under the original child support order. (CP 24, 275)

No written order was entered after the July 1, 2009 hearing. Instead, Mark continued to raise new issues and delay entry of a written order. (CP 121) It became evident that the reason for Mark's delay was that his income had increased due to the receipt of commissions that he apparently no longer wanted to share with Heidi. (See CP 6/8/11 RP 25-26) Despite his pleas of poverty, Mark earned \$230,738 in 2010 – \$30,000 more than the trial court

² As he did below, Mark claims on appeal that his "tax bracket was 23%," not 15%. (App. Br. 23-24, *citing* 3/17/10 RP 12) But the trial court apparently did not find his claim credible.

originally found he would earn in entering the decree of dissolution two years earlier. (CP 216) In fact, Mark had already earned \$147,079 by June 2011, (CP 212), and was on track to earn well over \$200,000 by year end.

An order was finally entered on June 17, 2011, *nunc pro tunc* to June 5, 2009³ – two years after the initial modification hearing and multiple other hearings where Mark continued to re-litigate the modification of maintenance on the terms he had proposed. (CP 261, 265) This order clarified and refined the formula articulated by the trial court at the initial modification hearing. The trial court ordered the modification to commence in May 2009, when Mark first sought modification. (CP 262) The trial court extended the duration of maintenance by three months in order to address the fact that Mark’s maintenance obligation was being reduced as it was based on income of \$90,000, and not \$200,000. (See CP 121-22, 262)

³ Mark complains that the trial court “erroneously ruled that the modification would take effect when Mark first moved to modify (as opposed to when the court entered the written orders).” (App. Br. 25) But Mark asked that his maintenance obligation be modified “NUNC PRO TUNC to the date [he] previously filed his earlier Motion to Modify maintenance obligation.” (CP 95) See *Marriage of Pollard*, 99 Wn. App. 48, 55, 991 P.2d 1201 (2000) (modification may be effective upon date of filing petition or date of entry of modification order, or anytime in between).

For purposes of maintenance and child support, the trial court found Mark's net monthly income was \$6,375 from May 2009 through May 2010, then \$5,700 thereafter.⁴ (CP 263) The trial court imputed monthly net income to Heidi of \$1,672 – more than the \$1,500 she actually earned⁵ – starting July 2009. (CP 123, 263)

To calculate maintenance, the trial court first established child support. The trial court ordered that child support would be based on the parties' combined monthly net income as found by the trial court. (CP 263, 264, 266-70) Each party's proportionate share of child support would then be deducted from their net incomes. (CP 263, 266-70) After child support is deducted, Mark was ordered to pay as maintenance to Heidi, one-half of the difference between his net income and Heidi's, to equalize their incomes as maintenance. (CP 263, 266-70) The trial court ordered that this

⁴ The reduced net income was to take into account Mark's move to Oregon, which subjected his income to additional state income tax. (CP 263)

⁵ Mark complains that the trial court's decision to reduce Heidi's imputed income was "unsupported" (App. Br. 24), but Heidi offered to provide proof of her actual wages at least twice. (CP 123; 3/17/10 RP 13) The trial court did not require proof of her paystubs, apparently finding her assertions credible in light of Mark's claims about the economic downturn.

base maintenance to Heidi would be “nontaxable support.” (CP 262; 7/1/09 RP 60)

After this base maintenance is paid, if Mark receives any commissions, he is to pay half of the gross commission to Heidi. (CP 264) The commissions are taxable to her and deductible to him. (CP 264) The trial court rationalized that by awarding Heidi half of the gross (instead of net) commission, Mark could deduct the amount paid to her from his income and receive a tax refund at the end of the year. (3/17/10 RP 37-38, 41-42) The trial court agreed with Heidi’s concern that awarding her half of the net commission would impose a “double tax” on her because she would be taxed immediately upon receipt, and then taxed again when she claimed the amount received as income. (3/17/10 RP 33-36)

D. The Trial Court’s Award Reduced The Amount Of Maintenance That Heidi Would Receive Each Month, But In Months Mark Earns Commissions, Heidi Would Receive Additional Maintenance.

Despite Mark’s repeated claims in his brief that the trial court’s formula “increased” his maintenance obligation, it in fact significantly decreased his obligation and the maintenance available to Heidi each month, as shown by the following chart:

<u>Date</u>	<u>Original Maintenance</u>	<u>Modified Maintenance (Base)</u>
May - June 2009	\$4,725	\$2,313
July - September 2009	\$4,900	\$1,800
October 2009 - May 2010	\$4,900	\$1,734
June 2010	\$4,900	\$1,472
July 2010 - June 2011	\$4,300	\$1,666
July 2011 - June 2012	\$3,200	\$1,666
July 2012 - September 2012	\$0	\$1,666

(CP 12, 273)

Mark's chart on page 10 of his brief is misleading, as it assumes that Mark both receives commissions every month and pays half of those commissions to Heidi every month. In most months, Heidi would receive only the base maintenance. Therefore, the trial court's order leaves Heidi, who had been out of the work force for 10 years before the divorce, with substantially less guaranteed income each month than was awarded to her in the decree. In the months when Mark receives a commission, there is no "windfall" to Heidi (App. Br. 21, 22), nor is there any "financial damage" to Mark. (App. Br. 28) Both parties equally benefit from the commission – in those months when Heidi would receive more than the (reduced) base maintenance award, Mark too would receive greater income.

Mark complains that he would receive less than Heidi because she was awarded one-half of the “gross” commission, whereas he would have to immediately pay taxes on his half. (App. Br. 21) But this ignores the fact that he will be able to deduct half the gross commission from his income as maintenance, providing him with a substantial tax benefit that would likely result in a significant refund at the end of the year. (See 3/17/10 RP 37-38, 41-42) Meanwhile, Heidi would have to claim her half of the gross commission and pay taxes on it later. As the trial court recognized, its order left the parties in similar circumstances – sharing the burden during lean months and the benefit during months when commissions are paid. But despite the trial court’s intention, and although it was Mark’s suggestion, Mark did not pay one-half of his commissions to Heidi. Mark admitted that under the trial court’s order, Mark owed Heidi for substantial commissions that he received, but not paid to Heidi. (See CP 207, 220; see also 8/9/11 RP 36-37, 39-40) At the hearing on June 8, 2011, Mark’s counsel stated that Mark still owed Heidi \$57,000. (6/8/11 RP 10, 12)⁶

⁶ In his declaration, however, Mark stated that he owed amounts of \$49,429 and \$91,000 to Heidi. (CP 207)

Unable to control if and when Mark would pay Heidi her share of the commissions, Heidi faced not only less available income, the trial court also imposed upon Heidi the additional obligation of paying half of the daughter's private school tuition from her reduced maintenance. (CP 275) Heidi was also made responsible for half of the parents' share of post-secondary support (CP 275) even though her earning capacity, compared to Mark's, was significantly less.

Both parties moved for reconsideration. The trial court denied Mark's "request to reconsider the equalization of income between the parties [] as the Court based its rulings on Petitioner's request to accommodate the fluctuations in his income." (CP 320) The trial court also denied Mark's request "to limit the adjusted income of maintenance to the amount first ordered in the dissolution trial [because] the Petitioner had the advantage of the Court reducing his imputed base income to \$90,000 which was done at Petitioner's request, based upon Petitioner's own assertions that his income would fluctuate." (CP 320) The trial court also denied Heidi's request to include Mark's commissions in his net income for purposes of calculating their total child support

obligation, even though commissions are “income” under RCW 26.19.071(3)(c). (CP 321)

Mark appeals. (CP 255)

III. RESPONSE ARGUMENT

A. This Court Should Decline To Review Mark’s Challenge To The Maintenance Award Because He Invited Any Claimed “Error.”

This court must reject Mark’s challenge to the trial court’s order modifying maintenance because Mark himself asked for the relief he challenges on appeal, to accommodate his fluctuating income. As the trial court recognized, “What Mr. Stohr got, for all intents and purposes, is what Mr. Stohr requested this Court to do and this Court did.” (8/9/11 RP 35) Thus, to the extent there was any error, (and, as demonstrated below, there was not), Mark invited the error.

Under the doctrine of invited error, a party cannot complain about an alleged error at trial that he set up himself. **Dependency of K.R.**, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). The invited error doctrine prohibits a party from setting up an error, then relying on the purported error to gain relief on appeal. **Willapa Trading Co., Inc. v. Muscanto, Inc.**, 45 Wn. App. 779, 787, 727 P.2d 687

(1986). For this reason alone, this court should affirm the trial court's decision.

B. This Court Should Decline Review When Mark Has Neither Stayed Nor Complied With The Orders He Challenges On Appeal.

Despite Mark's histrionics bemoaning his "increased" maintenance obligation, and as obvious by a close review of the wording of his brief, he has never actually *paid* Heidi half of the substantial commissions that he has earned. Instead, he ignores the trial court order, and still "owes" Heidi maintenance – half his commissions – that he agreed she should be entitled. (See App. Br. 10-11, 21; CP 207, 220-21; 6/8/11 RP 10, 12; 8/9/11 RP 36-37, 39-40)

Mark has never sought to stay the trial court's order, and should not be allowed to pursue his appeal of an order that he has unilaterally chosen to ignore. See *Pike v. Pike*, 24 Wn.2d 735, 742, 167 P.2d 401 (1946) (dismissing appeal when appellant failed to comply with decree). Mark should not be allowed to pursue his appeal while defying compliance with the court's order without supersedeas or stay. This court should decline to review this

appeal on this basis.⁷ But even if this court reviews the trial court's maintenance decision, as argued below, it should affirm, as it was well within the trial court's discretion given the circumstances of the case.

C. Standard Of Review.

A trial court's ruling on a motion to modify spousal maintenance is discretionary and will not be reversed absent an abuse of discretion. *Marriage of Ochsner*, 47 Wn. App. 520, 524-25, 736 P.2d 292, *rev. denied*, 108 Wn.2d 1027 (1987). Once the trial court found that changed circumstances warranted a modification, the factors to be considered to establish the amount and duration of the maintenance are the same as for the original maintenance award. *Marriage of Spreen*, 107 Wn. App. 341, 347, fn. 4, 28 P.3d 769 (2001).

The court must consider the following factors in determining an award of maintenance:

⁷ A party may include a motion in a brief, which if granted, would preclude hearing the case on the merits. RAP 10.4(d); RAP 17.4. Heidi will provide information outlining Mark's payment history with her RAP 18.1(c) Financial Affidavit, as it will show the substantial commissions that Mark has received that he has not paid to Heidi, and is also relevant to Mark's ability to pay Heidi's attorney fees on appeal compared to her need for her fees to be paid under RCW 26.09.140.

- (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;
- (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(1). The only limitation on the trial court's determination of the amount and duration of maintenance is that, in light of the relevant factors under RCW 26.09.090, the award must be "just." ***Marriage of Luckey***, 73 Wn. App. 201, 209, 868 P.2d 189 (1994).

D. The Trial Court Did Not Abuse Its Discretion In Modifying Maintenance To Equalize The Parties' Incomes.

The trial court did not abuse its discretion when it modified maintenance to accommodate Mark's fluctuating income. Spousal maintenance is a "flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." ***Marriage of Washburn***, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). The trial court's order, entered at appellant's request, seeks to place the parties in substantially equal economic circumstances after a long term marriage, to allow the wife time to re-enter a job market from which she had been absent for 10 years before the parties divorced. The award was well within the trial court's discretion. See ***Marriage of Rockwell***, 141 Wn. App. 235, 243, ¶ 12, 170 P.3d 572 (2007) (after a long term marriage, "the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives"), *rev. denied*, 163 Wn.2d 1055 (2008).

Mark's appeal is based on the entirely false premise that, once he asked for modification, the trial court was required to *decrease* his maintenance obligation. (See App. Br. 17) First,

once a basis for modification of maintenance is established, the original maintenance award may be modified in any respect, including granting relief requested by the respondent. See e.g. ***Marriage of Scanlon and Witrack***, 109 Wn. App. 167, 171-72, 34 P.3d 877 (2001) (discussing child support modification). Heidi did not have to file her own petition to modify maintenance even if the trial court's award resulted in affirmative relief that favored Heidi. (App. Br. 26)

Second, the trial court's order in fact *decreased* Mark's maintenance obligation, not increased it, by as much as two-thirds, in those months when Mark does not receive commissions. (See § II.D, *supra*)

In any event, whether the trial court's order resulted in Heidi receiving more maintenance than she would have under the original decree is irrelevant. Mark claims that because his reason for bringing the petition to modify maintenance was his "dramatically reduced income," the trial court was required to decrease his maintenance obligation. (App. Br. 18) But the trial court did not find that Mark's income was "dramatically reduced"—only that there had been an "adjustment in his income." (7/1/09 RP

33) As Heidi pointed out, and as the trial court recognized, while Mark's income might appear reduced, he in fact could (and did) earn more income later based on his commissions. (CP 73, 104, 110) Accordingly, to accommodate these fluctuations, the trial court in its discretion awarded Heidi maintenance in a way that tied to Mark's fluctuating income, just as Mark requested. That Mark's income *increased* rather than decreased, which resulted in Mark owing Heidi more maintenance does not make the trial court's decision erroneous.

The trial court was not required to decrease Mark's maintenance obligation, nor was the trial court required to limit the modified maintenance to the amount originally ordered. See ***Scanlon and Witrack***, 109 Wn. App. at 171-72 (once a basis for modification is found, support can be changed in anyway). Instead, having been invited *by appellant* to do so, the trial court was entitled, in its discretion, to make a "just" award of maintenance in light of the circumstances that the parties found themselves at the end of their "long-term" marriage." ***Luckey***, 73 Wn. App. at 209. This discretion includes making other decisions related to the

modification of maintenance that the husband claims “compounded” the trial court’s alleged error. (App. Br. 23-26)⁸

“Of primary importance in the maintenance award are the parties’ economic circumstances.” **Marriage of Spreen**, 107 Wn. App. 341, 348, 28 P.3d 769 (2001) (App. Br. 18). “[T]he standard of living of the parties during the marriage and the parties’ post dissolution economic condition are paramount concerns when considering maintenance and property awards in dissolution actions.” **Marriage of Estes**, 84 Wn. App. 586, 593, 929 P.2d 500 (1997) (*citations omitted*).

In **Spreen**, this court reversed a modification award that it held was “unfounded and arbitrary” because it failed to provide maintenance to the wife for an adequate duration to accommodate her “worsening depression and bipolar disorder,” when the husband had the undisputed ability to pay maintenance. 107 Wn. App. at 346, 348. There is no similar error here. The trial court’s order modifying maintenance to provide the wife with support

⁸ While husband complains of these alleged errors, he does not claim that these errors are a basis for reversal on their own. (See App. Br. 27) Instead, his sole challenge on appeal is the fact that the order modifying maintenance resulted in the potential of increasing his maintenance obligation. But in any event, the trial court’s decisions were supported by the evidence and within its discretion.

commensurate with the husband's income was within its discretion, and was neither unfounded nor arbitrary.

Here, the trial court stated that it was trying to "do equity amongst the parties" in modifying maintenance. (8/9/11 RP 35) The trial court was faced with a situation where Heidi's need for maintenance was unchanged from the time of the decree of dissolution. Heidi had not worked outside of the home for 10 years, and needed to retrain before reentering the job market. Until then, Heidi's earning capacity was substantially limited. At the same time, Mark continued to have the same capacity to earn "substantial income" as he had in the past. But the trial court recognized that because Mark's income was commission-driven, there were some months he would receive less income and some months where he would receive significantly more income. Therefore, *at Mark's suggestion*, the trial court awarded maintenance in such a way that would equalize the parties' standard of living for the maintenance period. **Washburn**, 101 Wn.2d at 178-79; **Estes**, 84 Wn. App. at 593 ("Maintenance may serve to equalize the parties' standard of living for an appropriate period of time"). Its decision was fair, just,

and took into consideration the parties' disparate economic circumstances at the end of their long term marriage.

In these circumstances, the trial court's decision to increase the duration of maintenance by a mere three months was also within the court's discretion. By reducing Mark's income from \$200,000 to \$90,000 for purposes of maintenance and child support, the order substantially reduced the base support Heidi would receive each month. Accordingly, to accommodate that reduction, an increase in the duration of maintenance was appropriate.

The duration of maintenance was also properly tied to Heidi's need for time to retrain. Less than six months after the dissolution decree was entered, while it was intended for Heidi to focus on retraining efforts, Mark dragged Heidi back into court for further litigation that has now been ongoing for more than 3 years. Under all of these circumstances, a *de minimis* increase in the duration of maintenance was not an abuse of discretion.

Mark also complains that "the maintenance award no longer decreases over time to account for Heidi's increasing self-sufficiency." (App. Br. 25) But regardless of any "increasing self-

sufficiency,” it is of little dispute that Heidi will never earn anywhere near the income of Mark.

Finally, Mark ignores the fact that the trial court’s orders provided him with significant benefits related to his child support obligation. Because the trial court declined Heidi’s request to include Mark’s commissions in his income for purposes of calculating child support, Mark pays substantially less in child support than he should be required to under the child support guidelines.

As Mark concedes in his brief (App. Br. 9), his income is in fact substantially greater than the \$90,000 base income that was used to calculate child support. Mark earned \$230,738 in 2010 – 15% more than the trial court found when the decree of dissolution was entered. (CP 216) Mark was also on track to earn even more in 2011. (CP 216) Based on Mark’s imputed income at \$90,000, total support for the parties’ children was established at \$2,118. (CP 268) Had the trial court included commissions in Mark’s income, as required by RCW 26.19.071(3)(c), total support for the parties’ children would have been at least \$2,880. RCW 26.19.020.

This court should affirm the trial court's order modifying maintenance. The amount of the maintenance ties directly with Mark's income, allowing the parties to share in the burdens and rewards of Mark's commission-based employment for a short term after their long marriage. This award neither created a "windfall" for Heidi nor caused "financial damage" to Mark. Instead, it was a "just" award that was within the trial court's discretion to make.

E. This Court Should Award Heidi Attorney Fees.

This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; **Leslie v. Verhey**, 90 Wn. App. 796, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). This court should award attorney fees to Heidi because she has the need for fees and Mark has the ability to pay. RAP 18.1; RCW 26.09.140 (court may award fees considering the financial resources of the parties on any appeal). This court also should award attorney fees to Heidi because Mark's claims on appeal are without merit because any error was invited by Mark. **Marriage of Healy**, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied*, 100

Wn.2d 1023 (1983) (an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees).

IV. CONCLUSION

Notwithstanding that Mark's sole challenge on appeal is to the trial court's acceptance of his proposal to equally divide his commissions with Heidi, the trial court's maintenance decision was well within its discretion. Mark points to no legal errors with the trial court's decision. He did not obtain his desired outcome because he is earning more money than he predicted when he first sought to modify maintenance, and his claim on appeal that the maintenance award "financially damage[s]" him (App. Br. 28) is simply false. This court should affirm the trial court's maintenance award, and award attorney fees to Heidi on appeal.

Dated this 11th day of June, 2012.

SMITH GOODFRIEND, P.S.

By: 
Valerie A. Villacin
WSBA No. 34515
Catherine W. Smith
WSBA No. 9542

Attorneys for Respondent

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STATE OF WASHINGTON

BY _____
DEPUTY

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 11, 2012, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Shelby R. Frost Lemmel Masters Law Group PLLC 241 Madison Ave Bainbridge, WA 98110-1811	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Charles D. Gazzola Gazzola & Hull PC 208 SW 1st Ave Ste 340 Portland, OR 97204-3532	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

DATED at Seattle, Washington this 11th day of June, 2012.



Victoria K. Isaksen