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COURT OF APPEALS
DIVISION II

2012 JUL 13 AM 11:23

STATE OF WASHINGTON

DEPUTY

NO. 42705-2-II

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

In re the Marriage of:

MARK WILLIAM STOHR,

Appellant,

and

HEIDI RIE STOHR,

Respondent.

REPLY BRIEF

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INTRODUCTION

Heidi does not dispute that just months after the dissolution, Mark's income decreased by more than 50%, leaving him without enough to pay his maintenance and child support obligation, much less support himself. She does not disagree that the trial court found that Mark's decreased income was adequate cause for a modification. And she does not disagree that the court actually increased Mark's maintenance obligation by at least \$113,000, and possibly much more.

The only answer – from the trial court and from Heidi – is that Mark got what he asked for. But Mark plainly did not ask the trial court to increase his maintenance obligation, although that is exactly what he got.

The court abused its discretion, increasing maintenance despite having found, as a threshold matter, that Mark's reduced income justified a modification. The court compounded this error by increasing the duration of maintenance, and by modifying many other terms in the decree related to maintenance. This Court should reverse.

REPLY STATEMENT OF THE CASE

Heidi does not dispute that Mark's income dropped dramatically, providing adequate cause to modify maintenance. CP 57-58, 93-95.¹ When Mark moved to modify in May 2009, his income had dropped by more than 50% since the decree was entered. CP 3, 21, 57. Mark's net monthly income – \$5,538 – was less than his maintenance and child support obligations. CP 12, 22, 57. Mark had been taking money out of savings to pay maintenance, but was "tapped out." CP 57.

Mark moved to modify maintenance, but not child support. CP 57-58, 93-95. Heidi did not refute Mark's decreased income or seek a modification. CP 71-80, 103-08, 109-17. The trial court found that Mark's decreased income was adequate cause for a modification. 7/1/09 RP 33.

The court orally modified maintenance in July 2009, but entered no written order. BA 5-6. The court made many changes to the maintenance provisions in the decree, most significantly ordering Mark to pay Heidi one-half of all his gross income – base

¹ Much of Heidi's statement of the case is responsive to Mark's argument § C (BA 23-26). BR 7-8. Mark responds in the argument section. *Infra*, Argument § B.

and commissions. BA 6.² The parties were in an out of court over the next 9 months, trying to work with the court's complicated maintenance formula. BA 6-9. No written orders were entered until June 2011. CP 148.

Heidi blames Mark, speculating that he delayed the entry of a written order because "his income had increased due to the receipt of commissions that he apparently no longer wanted to share with Heidi." BR 8 (citing 6/8/11 RP 25-26). That simply is not what happened. When the court orally ruled in July 2009, Mark's gross income was \$8,213.50 per month, less than half of the gross income used to calculate maintenance in the decree. CP 3, 21, 57, 216; 8/9/11 RP 31. Mark's income had not improved when the court issued a letter ruling in September 2009, or when the court issued another oral ruling in March 2010. BA 9; CP 118; 3/17/10 RP 12, 31.

Although Mark's income was no better by the 2010 hearing, he asked the trial court to cap the modified maintenance so that it could not exceed the amount under the decree. 3/17/10 RP 40-41. The court refused. *Id.* at 41-42.

² The court used \$90,000 as Mark's base income, although his base was \$82,500. 7/1/09 RP 36.

By the time the court entered written orders in June 2011, it was obvious that the modification would increase Mark's maintenance obligation. BA 9-11; 6/8/11 RP 24-25. Every maintenance year, whether Mark earned less or more than the income imputed under the decree, he would owe Heidi more. BA 9-11.

Mark asked the trial court to go back to the decree. 6/8/11 RP 24-25. The court flatly refused. *Id.* at 25. Mark again asked the court to cap maintenance so that it could not exceed the total award under the decree. 8/9/11 RP 29-31. The court again refused, stating among other things that Mark got what he wanted. 8/9/11 RP 35; CP 251.

Heidi compares Mark's base maintenance payment under the modified order to the total maintenance payment under the decree. BR 12. This is comparing apples to oranges. In the decree, maintenance was based on Mark's base income and estimated commissions. CP 3. The modification order separates base and commissions – Mark must pay Heidi 50% of their combined base income each month and 50% of any commission upon receipt. CP 146-47. It is thus "misleading" to compare Mark's

old all-inclusive maintenance payment to the modified base payment reflecting only part of the maintenance award. BR 12.

REPLY ARGUMENT

A. The court erroneously increased Mark's maintenance based on his decreased income.

Increasing maintenance was "outside the range of acceptable choices." BA 17 (citing *In re Marriage of Horner*, 151 Wn.2d 884, 893-94, 93 P.3d 124 (2004)). It was uncontested that Mark's income dropped by more than 50%. CP 56-69, 93-95. Heidi did not articulate a changed circumstance of her own or seek a modification. CP 71-80, 103-08, 109-17. The trial court correctly found that Mark's decreased income was adequate cause for a maintenance modification. 7/1/09 RP 33, 43; CP 145; *In re Marriage of Ochsner*, 47 Wn. App. 520, 524-25, 736 P.2d 292 (1987). It was thus an abuse of discretion to increase maintenance. This Court should reverse.

In *Marriage of Spreen*, this Court reversed a maintenance modification that "arbitrarily limit[ed] maintenance to one additional year," where the evidence was that the wife would be unable to work for at least 18 months to two years. *In re Marriage of Spreen*, 107 Wn. App. 341, 345-47, 28 P.3d 769 (2001)). There,

the changed circumstance was that the wife's medical condition did not improve as anticipated, but got worse. **Spreen**. 107 Wn. App. at 346. The modification did not go far enough to account for the wife's changed circumstances. 107 Wn. App. at 347-48.

This modification is even more out of step with the changed circumstances. Although the trial court originally intended to decrease Mark's maintenance obligation, it became apparent that the court's maintenance calculation would do the opposite. BA 19-20. But the court refused to cap maintenance at the amount ordered under the original decree, stating that Mark got what he asked for. 8/9/11 RP 35. As discussed in the opening brief and below, Mark obviously did not ask to pay Heidi more, which is exactly what he got. BA 19-20; *Infra*. Argument D.

Heidi does not persuasively distinguish **Spreen**, conclusively stating that "[t]here is no similar error here." BR 22-23. The error in **Spreen** was that the modification was not substantial enough to address the changed circumstances supporting the modification. 107 Wn. App. at 347, 349. The error here is worse – this is not an issue of whether the court went far enough to help Mark – the court increased Mark's maintenance obligation having found that his income had dropped.

And contrary to Heidi's assertion, Mark never argued that the trial court was "required" to decrease his maintenance obligation "once he asked for modification." BR 19. Mark's point is that where the only changed circumstance was his dramatically decreased income, and where Heidi did not seek a modification, the trial court abused its discretion by increasing maintenance. BA 17-18.

Finally, although Heidi suggests that Mark owed her more because he made more, she does not challenge the lengthy and detailed analysis in the opening brief demonstrating that Mark's maintenance obligation increased even when he earned less. *Compare* BA 9-12, 21-22 *with* BR 21. And when Mark earned more, he owed Heidi 68% more than he would have owed her under the decree. *Id.*

The court's error is perhaps best illustrated by looking at the potential windfall to Heidi for the last maintenance year, July 2011 through June 2012. BA 22-23. That year, Mark would have owed Heidi \$38,400 under the original decree. CP 12. Assuming he makes \$200,000 – the same amount used to calculate maintenance in the decree – Mark would owe Heidi \$98,427.50

under the modified order. BA 22-23. Thus, even if his income stayed the same, his maintenance obligation increased 2.5 times.

There is no rational reason for dramatically increasing Mark's maintenance obligation. This Court should reverse.

B. More errors abound.

The trial court erred in several more regards, significantly compounding the damage done by the maintenance increase. BA 23-26.³ For the most part, Heidi fails to directly respond, speculates about the trial court's rationale, or repeats her refrain that Mark got what he asked for. BR 7, 8 n.2, 9, 10 n.5, 24-25. This Court should reverse.

To calculate Mark's base maintenance obligation, the court used an income of \$90,000 – Mark's base income of \$82,500 plus \$7,500 apparently to account for some commission income. 7/1/09 RP 36, 43-44. The court also ordered Mark to pay Heidi 50% of all commissions, defining commissions as any income above \$82,500. CP 146-47; 3/17/10 RP 42-43. Heidi does not disagree that the court plainly double-counted \$7,500.

³ Heidi incorrectly asserts that Mark "does not claim that these errors are a basis for reversal on their own." BR 22 n.8 (citing BA 27). While the erroneous maintenance increase plainly had the greatest financial impact on Mark, he never suggested that these additional errors are not themselves reversible.

Heidi responds that Mark agreed to use \$90,000 “for purposes of calculating a ‘base’ amount of maintenance.” BR 7. That is beside the point – the error is not using \$90,000 to calculate the “base” maintenance payment, but double-counting \$7,500. Mark did not agree to pay Heidi the same amount twice – first as part of the base maintenance obligation and again as part of the commission split. 7/1/09 RP 43-44; CP 118.

Although Mark estimated that his federal income tax bracket was about 23%, the trial court ordered him to use a 15% tax bracket to calculate maintenance. 3/17/10 RP 12, 31; CP 146. Heidi argues that the court “apparently did not find [Mark’s statement] credible.” BR 8 n.2. This is not a credibility issue. The court made no such finding, and it is Heidi’s speculation that is incredible. In 2009, the 15% federal income tax bracket topped out at about \$34,000 for a single person. www.irs.gov/pub/irs-prior/i1040-2009. Where Mark’s salary was \$82,500, it is extremely unlikely that his adjusted gross was \$34,000 or less, particularly where he could not deduct maintenance. No evidence supports the court’s application of a 15% tax bracket.

Although Mark’s employer deducts 30% from his gross commissions each month, the court ordered Mark to pay Heidi 50%

of his gross commissions. 3/17/10 RP 36; CP 145-47. Month to month, this was an obvious hardship for Mark. If, for example, he earned a \$10,000 commission, he would pay Heidi \$5,000, and be left with only \$2,000 after tax withholdings. 3/17/10 RP 36.

Heidi responds that “the trial court agreed with [her] concern” that using the net commissions would double tax Heidi. BR 11 (citing 3/17/10 RP 33-36). Heidi reads too much into the court’s colloquy with counsel. *Id.* It is not at all clear what the court’s rationale was, except that the court seemed to think Mark would recoup his losses with a large tax refund. 3/17/10 RP 37-38. Even if that were the case, Mark could not keep up month-to-month. 6/8/11 RP 14.

Although the decree permitted Mark to deduct all maintenance from his income, on modification the court refused to let Mark deduct maintenance paid from his base income. CP 12, 145; 7/1/09 RP 60. Heidi does not respond.

The court also erroneously entered the modification *nunc pro tunc*, adding 12% interest on arrearages dating back to May 2009. CP 147-48. This was unwarranted – Mark paid Heidi as much as he could, and was current on maintenance under the decree. 6/8/11 RP 10-11, 13-16. In fact, he had paid more than he owed

under the decree, but could not keep up with the modified – increased – maintenance amount. *Id.*

Again, Heidi argues that Mark got what he wanted, where his June 2009 modification “petition” asked the trial court to enter a modification order *nunc pro tunc* to Mark’s May 2009 “motion” to modify. BR 9 n.3; CP 95. Mark did so because the trial court rejected his motion to modify, ruling that the proper form was a petition. CP 81-83. When the court finally entered orders two years later, Mark plainly argued that the trial court should not retroactively modify support. 6/8/11 RP 10-11, 13-16.

The court also erroneously decreased Heidi’s imputed income without any evidence whatsoever. BA 24-25. Heidi did not disclose her income. BA 25. Her attorney speculated that Heidi’s income was less than the amount imputed in the decree because Heidi worked in the same industry as Mark. 07/1/09 RP 22-23. But Heidi is a technician; Mark’s commissions decreased because his sales decreased. CP 56-57, Supp. CP at 328.

Heidi speculates that the trial court “apparently [found] her assertions credible,” and states that she offered to prove her income. BR 10 n.5. Again, Heidi did not testify about her income.

Her attorneys' "assertions" are not evidence. ***State v. Grover***, 55 Wn. App. 923, 937, 780 P.2d 901 (1989).

The maintenance award no longer decreases over time to account for Heidi's increasing self-sufficiency. *Compare* CP 12 and 22 *with* CP 145-46. Heidi's only response is that she will never earn as much as Mark. BR 24-25. This does not explain yet another departure from the decree that benefits Heidi to Mark's detriment.

Finally, Heidi spends most of her time on two non-issues. She argues that the trial court had discretion to increase the maintenance term by three months, but Mark did not claim otherwise. *Compare* BR 24 *with* BA 23-26. She complains that Mark "ignores" that the child support calculation "provided him with significant benefits," but this is not an issue on appeal. Mark repeatedly informed the court that he was not asking to modify child support. *Compare* BR 25 *with* CP 57-58; 6/8/11 RP 17-18. And the modification increased child support. *Compare* CP 12 *with* CP 156.

In sum, the trial court made many errors, all of which were inconsistent with the finding that Mark's decreased income justified a maintenance modification. This Court should reverse.

C. Heidi did not seek affirmative relief or show changed circumstances, so should not get more maintenance.

Heidi does not disagree with the following, demonstrating that she received a substantial maintenance increase as a result of Mark's dramatic income reduction:

- ◆ For 2009 and 2010, Heidi would receive almost \$30,000 more under the modification, even though Mark's average annual income was \$25,000 less. BA 9-10.
- ◆ In just the first quarter of 2011, Heidi would have \$30,000 more under the modification than she would get for the entire year under the decree. CP 207; BA 27.
- ◆ Even if Mark made no more commissions for the remainder of 2011, Heidi would be guaranteed another \$13,328 – her 50% share of Mark's base income. CP 153, 207.
- ◆ For July 2009 through 2011, Heidi would get a \$73,000 maintenance increase. BA 27.
- ◆ Assuming arguendo that Mark earns \$200,000 in 2012 – the total income used to calculate maintenance in the decree – Heidi would get \$40,000 more under the modification than under the decree. *Id.*
- ◆ Heidi's total maintenance increase will be at least \$113,000 – 50% of the total maintenance awarded under the decree – and possibly much more. *Id.*

Again, Heidi does not disagree that she gets a dramatic increase, but takes issue with Mark's characterization of this increase as a "windfall." BR 26. Heidi's circumstances had not changed when Mark moved to modify, yet the court gave her more maintenance even though Mark earns less. That is a windfall by any definition.

Heidi's reliance on **Scanlon** is entirely misplaced. BR 20 (citing **In re Marriage of Scanlon and Wittrack**, 109 Wn. App. 167, 171-72, 34 P.3d 877 (2001)). There, 11 years after the decree was entered, the husband moved to modify his child support obligation, claiming that the parties' incomes had changed. **Scanlon**, 109 Wn. App. at 170-71. The wife sought many modifications to the original support order, including increased child support. 109 Wn. App. at 171. The mother ultimately prevailed at the trial-court level. *Id.*

On appeal, this Court rejected the father's argument that the trial court could not grant the mother relief because she did not show a substantial change in circumstances. *Id.* The Court held that "once a basis for modification has been established," the court may grant relief requested by either party. *Id.* at 171-72. The court nonetheless reversed, where neither the commissioner nor the trial court (on revision) addressed whether there were changed circumstances supporting a modification. *Id.* at 174.

Scanlon is inapposite. Unlike the mother in **Scanlon**, Heidi did not seek a modification. *Id.* at 171. And in **Scanlon**, the lower courts did not address changed circumstances. *Id.* at 174. Here, the trial court found that Mark's decreased income was a changed

circumstance justifying a maintenance modification, but increased his maintenance obligation.

In any event, Mark does not argue that there are no circumstances in which the court could reasonably modify a maintenance obligation in favor of the responding party. His point is simply that where the modification is based solely on his reduced income, and where Heidi did not show substantially changed circumstances or seek affirmative relief, increasing maintenance is an abuse of discretion.

D. Heidi's technical arguments are meritless.

Heidi asks this Court to decline review under the invited-error doctrine, claiming that "Mark himself asked for the relief he challenges on appeal." BR 15. Mark plainly did not ask the trial court to increase his maintenance obligation, yet that is exactly what happened. Heidi does not disagree. This argument is meritless.

Although she does not say, Heidi apparently relies on Mark's statement to the trial court (2.5 years before the modification order) that he had previously offered to split his net base income and commissions 50/50 with Heidi. BA 20; BR 15-16. Mark, who was unrepresented at the time, plainly made this statement in the

context of discussing with the judge ways to reduce his maintenance obligation. BA 20 (citing 7/01/09 RP 33-34, 36-37, 43). When Mark realized that this calculation could increase his maintenance, he asked the court to cap maintenance so that it could not exceed the amount in the decree. BA 21 (citing 3/17/10 RP 41). Mark plainly was not inviting the court to increase maintenance. BR 15-16.

Heidi also asks this Court to decline review because Mark has not sought to stay or supercede the modification order. BR 16-17. A party does not lose his right to appeal because he cannot afford to comply with a court order.

The only authority Heidi cites is inapposite. BR 16 (citing ***Pike v. Pike***, 24 Wn.2d 735, 742, 167 P.2d 401 (1946)). ***Pike*** holds that the appellate court has discretion to dismiss an appeal where the appellant "has done more than disobey the judgment," taking some affirmative act that makes executing the judgment "impossible." ***Pike***, 24 Wn.2d at 741-42. There, the mother removed the children from the jurisdiction and concealed them, making it impossible to execute custody provisions in the decree. *Id.* Even so, the appellate court refused to dismiss the appeal, giving the mother time to comply with an interlocutory trial-court

order requiring the children's return to their father. *Id.* at 742-43. **Pike** does not remotely suggest that failing to supercede a judgment forecloses the right to appeal.

In short, this Court should reach the merits and reverse.

CONCLUSION

It is undisputed that the trial court increased maintenance, despite having correctly found that Mark's income reduction was adequate cause for a maintenance modification. This was an abuse of discretion along with many additional errors. This Court should reverse.

RESPECTFULLY SUBMITTED this 12th day of July, 2012.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 12th day of July 2012, to the following counsel of record at the following addresses:

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