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

JOSEPH J. AUSTIN

Appellant

SILVANA DI GIACOMO  
Respondent.

**PETITIONER'S OPENING BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

1. The Commissioner erred in concluding that a lump sum payment Dr. Austin received after his employment had ended, providing him discretionary compensation for unused vacation time he accumulated over a period of years, was part of Dr. Austin's salary for computation of maintenance, contrary to the terms of the parties Separation Agreement, contrary to the terms of Dr. Austin's employment contract, and contrary to the nature of the deferred compensation.
2. The Commissioner erred in expanding the maintenance provisions of the parties' Separation Agreement beyond their plain meaning, instead of applying principals of strict construction in the contempt proceeding below.
3. The Commissioner erred in concluding that Dr. Austin intentionally disobeyed the maintenance provisions of the parties' Separation Agreement when he did not plainly violate those provisions, but in fact had complied with those provisions.
4. The Commissioner erred in finding that Dr. Austin was misleading about his job status and income, when the Commissioner's own statements and Order indicated that Dr. Austin's information was correct.
5. The Commissioner erred by concluding that Dr. Austin made several arguments in bad faith, when the arguments were simply not made or

based on tenable reasons.

6. The Commissioner erred in making an award of past due maintenance without making findings about the amounts actually due, and without stating for the record how the amounts were calculated, or how the Commissioner decided between competing statements of amounts paid.

7. The Commissioner erred in awarding attorneys' fees to Dr. Austin's opponent for contempt when in fact no contempt occurred, and the amount was manifestly unreasonable.

## **II. ISSUES PRESENTED**

1. Did the Commissioner abuse her discretion when she included a special benefit payment for unused vacation in a calculation for maintenance, when the terms governing maintenance clearly referred only to other elements of compensation (salary and bonus) and the payment was not “earned” as part of salary or bonus, but granted as a discretionary benefit by the employer at the end of nine years of work?
2. Did the Commissioner abuse her discretion when she found the Appellant in contempt for alleged violation of the maintenance terms of a dissolution Decree, but the Commissioner did not strictly construe or even apply the relevant terms of the Decree, and the evidence of Appellant's history of maintenance payments actually showed compliance with the Decree?
3. Did the Commissioner abuse her discretion when she found misrepresentation to occur about facts that were actually true?
4. Did the Commissioner abuse her discretion when there was no substantial evidence to support findings of bad faith in certain arguments presented by the Appellant?
5. Did the Commissioner abuse her discretion in awarding attorneys' fees?

### **III. STATEMENT OF THE CASE**

#### **A. Nature of the Case.**

This is the second time that Dr. Austin has found it necessary to address this Court. In the prior appeal, which was filed by Ms. DiGiacomo, this Court provided a cogent summary of this case:

Joseph Austin and Silvana DiGiacomo dissolved their marriage in 2000. The couple's five children were then all minors and resided with DiGiacomo in Italy. The parties agreed to an unusual arrangement for maintenance and support. Austin, a successful cardiac surgeon, pays DiGiacomo one-half his total gross income as maintenance, but receives a downward deviation to zero in his child support obligation. The payments do not decrease as the children reach majority age. Resulting annual payments to DiGiacomo, who has not worked outside her home since the dissolution, have ranged between approximately \$220,000 in 2000 to more than \$245,000 in 2005.

CP 45.

The subject of *this* appeal is an effort by Ms. DiGiacomo to seek, via contempt proceedings, additional maintenance that is not awarded to her by the parties' Separation Agreement and Dissolution Decree, and that is beyond some \$2.2 million that she has already received in maintenance over the last nine years. Unfortunately, in this case the Commissioner below made several errors that resulted in: 1) an erroneous award of \$34,672 in additional maintenance; 2) equally important to Dr. Austin, a finding of contempt that is unwarranted and an abuse of discretion; and 3) a substantial award of attorneys fees.

## **B. Facts Relevant to This Appeal**

The parties' Dissolution Decree incorporated their Separation Agreement ("Agreement") that stated the following calculation of maintenance:

### **VI. Maintenance**

6.1 Commencing with the month of February, 2000, the husband shall pay maintenance to the wife in an amount equal to 50% of the husband's total gross income, *as defined herein* . . . the term "gross income" is defined as the amount remaining from the husband's gross *salary* after deducting any and all pension contributions . . . social security taxes, and Medicare taxes . . . The husband's current employment contract provides for an *annual salary* in the amount of \$475,000 . . . [and] for a possible *bonus* of up to \$25,000 per year and, in the event the husband receives such a bonus, he shall pay 50% of the additional gross income, as defined herein, to the wife as additional maintenance.

CP 34-35 or 77-78, emphasis added, "%" symbol included as a quote. Dr. Austin and Overlake Hospital ("Overlake") executed the "current employment contract" referenced in the Agreement in June, 1999, several months before the Parties' dissolution. That contract, and the specific provisions related to salary and bonus were before the commissioner below. See the Contract at CP 258-274, and especially Exhibit C to the contract ("Compensation and Benefits") at CP 162-163. Said Exhibit C set forth the components of compensation in three separate sections: 1)

section C.1 - "Base Compensation" or salary in the amount of \$475,000, consistent with Par. 6.1 of the Separation Agreement; 2) section C.2, "Bonus" in the maximum amount of \$25,000, consistent with Par. 6.1 of the Separation Agreement; and 3) section C.3 - "Benefits", not mentioned in the Separation Agreement (section C.3). The separate benefits section specified, among other things, the maximum amount of vacation or paid time off Dr. Austin was allowed to take each year. CP 163; see also Declaration of Brian Read, Par. 6 at CP 154.

Under the terms of the Separation Agreement, Dr. Austin paid over \$2.2 million in maintenance over the next nine years. Declaration of Dr. Austin, CP 276, lines 23-25. This total is consistent with the range of payments this Court noted in the quote above from the prior Appeal. CP 45. However, early in 2009 Dr. Austin received word that his employment with Overlake would not be renewed when the contract terminated at the end of June, 2009. CP 277, lines 3-5. At this point, according to Dr. Austin, he informed Ms. DiGiacomo that he might lose his job. CP 278, lines 10-11; CP 277, lines 3-5. That June, Dr. Austin's attorney informed Ms. DiGiacomo's attorney that after June, 2009, it was possible that Dr. Austin would have a significant drop in income or perhaps not be working. The attorney did not say that Dr. Austin definitely would not be working. CP 60; CP62, second full paragraph, beginning

“As you know....”. Nonetheless, Ms. DiGiacomo understood that Dr. Austin was not working after June, 2009. CP 140, lines 425-24; CP 141, line 1. When she later learned that Dr. Austin was working, she brought the subject motion for contempt in January, 2010, seeking maintenance from June, 2009, through January, 2010, apparently feeling that if Dr. Austin was working, he must be concealing income from her. CP 55, lines 21-24, CP 56, lines 1-5. She did not request information about relevant income before January, 2010.

As it turned out, Dr. Austin did obtain employment with a new entity after June, 2009, but he did not receive any income as compensation – his employer paid only his expenses as a surgeon. This was due to the fact that Dr. Austin’s right to actual income with the office was to await increased patient volume that did not materialize between June 2009 and January 2010. CP 279, lines 17-28; CP 280, lines 1-9; CP 280, lines 26-28; CP 281, lines 2-3. The only relevant income for the instant motion below was a special payment Dr. Austin received from Overlake for accumulated unused vacation time. RP, p. 23, lines 56. This special payment of \$67,581.25 by Overlake was entitled “paid time off – cash out”, i.e. payment for vacation time that Dr. Austin had *not* used during his years with Overlake. CP 154, lines 7-12. There had been no other payment so named in Dr. Austin’s nine years with Overlake. Prior

payments for vacation time *actually* used had been included in Dr. Austin's salary as paid time off. See CP 154, lines 4-6, and CP 159-160. Overlake did not include the special payment for unused vacation as part of Dr. Austin's salary, but as an additional discretionary benefit. See Declaration of Brian Read, Par. 7, CP 154, lines 8-16.

In January 2010, without making any request for Dr. Austin to provide information concerning his income, or the lack of it, since June, 2009, Ms. DiGiacomo obtained an Order to Show Cause why Dr. Austin should not be held in contempt for failure to pay maintenance from June, 2009, through January, 2010. Without notice to Dr. Austin's attorney or the Court, Ms. DiGiacomo immediately issued subpoenas to Overlake Hospital, Dr. Austin's former employer, for all records of compensation paid between 2005 and 2009, a much longer period than that covered in the Order to Show Cause. Ms. DiGiacomo received these records in January, 2010. CP 157. She felt that she was able to calculate the amount of maintenance that might be due from Overlake with these records. CP 296, lines 13-25; CP 297, lines 1-3.

### **C. The Hearing On The Order to Show Cause**

Despite the above contract provisions and argument based on them, at the hearing on the Order to Show Cause the Commissioner ordered:

- Judgment against Dr. Austin for Maintenance from June, 2009, to January, 2010, in the sum of \$34,671.82. The “paid time off cash out” was substantially all (97 percent) of this award (50 percent of \$67,581.25 = \$33,790.63 = 97.45 percent of \$34,671.82). Order at Par. I.C., CP 164; RP, p. 23, lines 5-6; p. 27, lines 14-24. There is no explanation in the findings as to why the court awarded an additional \$881.19. This award added to maintenance payments of at least \$109,928 that Dr. Austin had already made in 2009. RP, p. 30, lines 15-23. <sup>1</sup>

- A Finding of Contempt for intentionally failing to pay maintenance required under the Separation Agreement, with accompanying Judgment for Attorney Fees in the sum of \$11,000.00;

- A Finding that Dr. Austin intentionally concealed income from Ms. DiGiacomo and tried to mislead her with respect to his job and salary, specifically:

. . . the husband intentionally tried to mislead [Ms. DiGiacomo] into thinking that he lost his job and was not going to be owing any maintenance; or if owing any, it was going to be something less than what he had paid in the past.”

Order, Par. 3.11, CP 199; RP, p. 25, lines 2-6.

- A Finding that Dr. Austin made three arguments in bad faith:

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<sup>1</sup> Dr. Austin made payments each pay period between \$7,457 and \$8171, depending on his paycheck, for a total of either \$109,928 or \$110,118 in 2009 based on *salary* received (CP 146, lines 6-16, and CP 131, lines 19-22 ).

i) that there was a maintenance cap; ii) that income for maintenance was related only to employment as a cardiac surgeon at Overlake, and iii) that the former spouse had “access to all documents.”

The Commissioner issued this Order despite the relevant provisions of the Separation Agreement, and despite the fact that one of the arguments she derogated was not actually made by Dr. Austin or his counsel, and the others were true or substantiated. Dr. Austin moved for reconsideration, where he pointed out the following:

1. The payment Dr. Austin received in 2009 after his contract ended for cash out of unused paid time off was not included in the definition of salary in the Separation Contract, and therefore at the very least Dr. Austin had a good faith belief that he was not obligated to pay Petitioner 50 percent of that amount. CP 77-78, CP 131, lines 27-28; CP 132, lines 3-9. Consistent with this good faith belief, Overlake Hospital denominated the special payment for unused vacation a benefit, separate from salary and bonus. Again, Declaration of B. Read, CP 154, lines 8-16, CP 100, lines 8-16.

2. There was no evidence that the former spouse made any request for documentation of Dr. Austin’s income before she filed the Order to Show Cause for Contempt, or before she issued subpoenas to Overlake Hospital and other entities in January, 2010. See also Dr. Austin’s

Declaration, CP 131, lines 27-28; CP 132, lines 3-9. Also, Ms. DiGiacomo's attorney received the necessary information from Overlake Hospital the same month she requested them by subpoena, i.e. January, 2010. Thus there did not appear to be any basis for finding bad faith in disclosure of income. As noted above, Ms. DiGiacomo admitted that once she had the documents from the subpoena, she could calculate the amount that she felt Dr. Austin owed her. CP 296, at lines 13-25; CP 297, lines 1-3.

3. Dr. Austin's reference in his Declaration that subject income was based solely on his salary at Overlake *was* relevant, since that was the only salary before the Court in this motion. Despite all the subpoenas she issued and taking Dr. Austin's deposition, Ms. DiGiacomo presented no evidence to the court that Dr. Austin had any source of income during the relevant period other than the income from Overlake. These included subpoenas to Dr. Austin's accountant (CP 178, lines 27-28), to Overlake (CP 157), to Dr. Austin's bank, producing applicable statements (CP 217).

In spite of the above arguments, the Commissioner reconsidered only one item in her original Order. In the Order on Reconsideration, the Commissioner appeared to agree with the parties that only salary as a cardiac surgeon at Overlake was relevant to her Order, and thus any comment by the Commissioner on other sources of income from the

practice of medicine was not relevant to her Order. Despite this new Finding, the Commissioner did not retract her contradictory finding that Dr. Austin argued in bad faith that only his salary as a cardiac surgeon at Overlake Hospital was relevant.

From these proceedings, Dr. Austin appealed.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

A trial court's rulings dealing with contempt are generally reviewed for abuse of discretion. *Schuster v. Schuster*, 90 Wn.2d 626, 630, 585 P.2d 130 (1978). A trial court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, or based on untenable reasons.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). In the review of findings and conclusions, the appellate court determines whether the trial court's findings of fact are supported by substantial evidence, i.e. a "sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation." *Landmark Dev., Inc. v. City*

of *Roy*, 138 Wn.2d 561, at 573, 980 P.2d 1234 (1999). An absence of findings will be taken as a negative finding on the issue. *Peoples Nat. Bank of Washington v. Birney's Enterprises, Inc.*, 54 Wn. App. 668, 670, 775 P.2d 466 (1989). Questions of law are reviewed de novo. *In re M.B.*, 101 Wn. App. 425, at 454, 3 P.3d 780 (2000).

## **B. Argument of Issues**

**1. The Commissioner abused her discretion when she included the \$61,581.25 for “paid time off - cash out” in “income” for purposes of determining maintenance. If the Commissioner applied any legal standard, it was not stated and does not agree with Washington law. Given the contract at issue, her conclusion is both manifestly unreasonable and based on untenable reasons.**

A separation agreement is a contract and a party may not escape its terms. *In re Marriage of Thach*, 29 Wn.App. 672, at 675, 630 P.2d 487 (Wash. App. Div. 3 1981); RCW 26.09.070(5). A party to a contract is entitled to the benefit of their bargain, i.e., whatever net gain the party would have made under the contract. The party is not, however, entitled to more than he or she would have received under the contract terms, even if breach has occurred. See *Platts v. Arney*, 50 Wn.2d 42, at 46, 309 P.2d 372 (Wash. 1957). The specific terms control over the general terms. *Diamond B. Constructors, Inc. v. Granite Falls School District*, 117 Wn. App. 157 (2003); *Adler v. Fred Lind Manor*, 153 Wn.2d 331 (2004). If the intent of the parties to a contract and the meaning of the written terms

can be determined after viewing the contract as a whole and in context, there is no need to resort to rules regarding ambiguous terms. *Forrest Marketing Enterprises, Inc. v. State Dep't. of Natural Resources*, 125 Wn. App. 126 (2005).

Given the above legal standards, under any reasonable interpretation of the Separation Agreement in this case, the special payment for accumulated unused vacation (“paid time off, cash out”) is simply not included in gross income as defined in the Separation Agreement, and therefore is not part of the calculation of maintenance. At the time of their dissolution, the parties referred to the applicable employment agreement that divided compensation into three components: salary (base compensation), bonus, and benefits. CP 162-163. The Separation Agreement stated that maintenance was to be computed with reference to only two of these items, salary and bonus, and these were specifically quantified in agreement with the employment contract, i.e. \$475,000 per year salary and a possible \$25,000 per year bonus. Ms. DiGiacomo was to be paid maintenance equal to 50 percent of *those amounts, i.e. the amounts of salary and bonus fixed by the employment contract with Overlake*, less certain specified deductions. *Any extra benefits Dr. Austin might receive were not included.* CP 34-35 or 77-78. In other words, for the purposes of determining future maintenance, the

Separation Agreement defined the more general term “gross income” to mean two specific items, salary and bonus; no more and no less. For Ms. DiGiacomo, the salary and bonus provisions comprise the benefit of her bargain. Any additional payment Dr. Austin might some day receive for other benefits, such as *unused* vacation, was outside the calculation.

In the context of their dissolution in the year 2000, less than a year after Dr. Austin signed his contract with Overlake, these terms made ultimate sense. Ms. DiGiacomo gained a generous amount of maintenance with some certainty as to its terms. The amounts were specified. She or her accountant could look at a check or payment record and determine if 50 percent had been paid. There was no further calculation of used or unused benefits that had to be made. Thus, the context of the parties’ Separation Agreement, especially when viewed in light of the referenced employment contract with Overlake, indicates that the maintenance provisions defining gross income mean exactly what they say – gross income for maintenance is defined as salary plus bonus, less applicable deductions.

In addition, the maintenance terms recognized the fact that at the time of the dissolution, at least with reference to the employment contract, there was no question of deferred compensation assets for the dissolution court to divide. Indeed, the rights to deferred compensation for sick leave

or vacation did not even exist yet, since the employment contract was less than a year old at the time of the dissolution. Had such rights existed then, they would have been an asset to divide, not future salary for maintenance. Accrued vacation pay is a form of deferred earning, similar to sick leave. They are benefits, and if vested or matured, they must be allocated in a dissolution action. *In re Marriage of Williams*, 84 Wn.App. 263, at 271, 927 P.2d 679 (Wash. App. Div. 3 1996). Deferred earnings not subject to forfeiture are "vested". If the deferred earnings may be received immediately, they are "matured". *In re Marriage of Hurd*, 69 Wn.App. 38, at 45, 848 P.2d 185 (Wash. App. Div. 1 1993). Therefore, by electing not to take all the vacation he was entitled to under the terms of his contract, Dr. Austin was unwittingly, as a matter of grace by Overlake, accumulating an asset that he might receive in the future after his contract ended. Deposition of Dr. Austin, CP110, lines 8-16; consistent with Mr. Read's Declaration, CP 154, at Par. 7. That asset was accumulated long after the Decree of Dissolution was entered and therefore is beyond question Dr. Austin's separate property. In any event, it was never included in the specifically quantified salary and bonus provisions of the Separation Agreement.

It is unclear from the record below whether the *present* payment for unused vacation was either vested or matured, or even a right. The

uncontroverted evidence suggests that instead, the payment was a matter of policy *grace* from Overlake. Again, see Declaration of Brian Read, CP 154 at lines 4-7, stating that the cash out for unused vacation was a matter of policy, and not a part of the employment contract. The earnings summaries are consistent with Mr. Read's statements. CP 159-160. Those summaries indicate that in any regular year (in the summaries for 2005 through 2008), Overlake figured salary of \$450,000 per year based on 2080 hours of work, that is 40 hours per week full time for 52 weeks, plus bonus.<sup>2</sup> In 2009, Dr. Austin worked one-half year, and received some payments into July. His total regular and vacation hours, plus two weeks of medical education hours, total 29 weeks and four days, roughly one-half year of work plus education hours. Ms. DiGiacomo received payment for these salaried hours, plus the bonus paid, as she was entitled. Then Dr. Austin received a benefit for nearly two months of time that he neither worked nor took vacation. This was over and above his salary or bonus, and clearly was not part of the one-half year that he worked. So before any payment for deferred compensation above his salary, Ms. DiGiacomo had received payment for salary and bonus less authorized deductions for one-half year of work by her ex-husband. That was the benefit of her

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<sup>2</sup> Dr. Austin noted that his salary had been reduced from \$475,000 to \$450,000 when his first five year contract was renewed. CP 276, lines 15-19 and CP 106, lines 17-25, CP 107, line 1.

bargain. She had no right to have yet more included in maintenance, and the Commissioner abused her discretion in finding that she did. If the Commissioner applied any legal standard to reach her result, it did not conform to Washington principles of the laws of contract or deferred compensation after or during marriage.<sup>3</sup> The Commissioner, then, ignored the proper legal standards, and her decision was based on untenable reasons, and is manifestly unreasonable.

**2. The commissioner abused her discretion by finding Dr. Austin in contempt for actions actually authorized by the Decree. In doing so, the Commissioner failed to strictly construe the maintenance provisions of the decree and failed to consider that there was no evidence of a plain violation of Decree. Thus her decision was based on untenable grounds and untenable reasons, and is manifestly unreasonable.**

The applicable statutory definition of contempt is set forth at RCW 7.21.010(1)(b), i.e. the "*intentional* disobedience of any lawful judgment, decree, order, or process of the court" (emphasis added). The intent requirement was a specific addition to the contempt statute in the 1983 revisions (compare prior law at the repealed RCW 7.20.010). Consistent with this intent requirement, Washington common law provides that when a party is accused of contempt through disobedience of

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<sup>3</sup> The apparent manner of the Commissioner's calculations is discussed in the next section, which shows that she adopted Ms. DiGiacomo's figures without reference to or strict construction of the Separation Agreement.

an order or decree, the court must *strictly construe* the relevant order or decree and determine whether the alleged contemptuous conduct is a *plain* violation. See *Johnston v. Beneficial Mgmt. Com.*, 96 Wn.2d 708, 713, 638 P.2d 1201 (1982); *State v. International Typographical Union*, 57 Wn.2d 151, 158, 356 P.2d 6 (1960); *In Re Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). The purpose of this "strict construction rule" is to protect parties from contempt proceedings based on violation of orders that are ambiguous, unclear, or actually permit the alleged contemptuous conduct. See *Graves v. Duerden*, 51 Wn. App. 642, 647-48, 754 P.2d 1027 (1988); *Trummel v. Mitchell*, 156 Wn.2d. 653, at 674, 131 P.3d 305 (2006), where the Court vacated a contempt finding after noting that nothing in the order specifically prohibited the alleged contemptuous conduct. The strict construction requirement is consistent with the principle that "[t]he court's contempt power must be used with great restraint" because it "uniquely is 'liable to abuse.'" *State ex rel. Daly v. Snyder*, 117 Wn. App. 602, 606, 72 P.3d 780 (2003) (citing *In re M.B.*, 101 Wn. App. 425, 439, 3 P.3d 780 (2000) rev. denied sub nom, *In re Hansen*, 142 Wn.2d 1027 (2001); and quoting *Int'l. Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)) rev. denied, 151 Wn.2d 1005 (2004).

As stated above, this case involves a Separation Agreement that

clearly limits the funds subject to maintenance to the salary (base compensation) and bonus components of Dr. Austin's compensation under his employment contract with Overlake. No other funds should have been the basis of the Commissioner's award, by the terms of the Separation Agreement. Analysis of the basic computations of the Commissioner's award, however, shows that there was a failure to even apply the terms of the Separation Agreement, much less strictly construe it.<sup>4</sup> The Commissioner's calculation appears to be based on the figures provided in Ms. DiGiacomo's Reply Declaration at CP 145, starting at line 23. There Ms. DiGiacomo reports "gross income" as the figure of \$324,144.85 according to the Overlake Hospital earnings statement for 2009 (see CP 251 or 159). Of course, the use of the term "gross income" is misleading, since it ignores the Separation Agreement's definition of gross income (CP 34-35, Sec. 6.1 of the Agreement) in reference to the Overlake contract. Ms. DiGiacomo offers no explanation as to why she is using data for the entire year when her Motion and Order to Show Cause are specifically limited to the period June, 2009, to January, 2010. In any event, Ms. DiGiacomo then subtracts, from her flawed statement of gross income, the amounts for deductions allowed under the Separation

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<sup>4</sup> The computations must be wrested from the record below, since the Commissioner did not include the proper findings in her ruling.

Agreement, for an erroneous total of \$145,349.82 in maintenance due for 2009 (CP 146 at line 3). Ms. DiGiacomo then supplies her figure for the total maintenance that Dr. Austin *did* pay for 2009 - \$109,928 (CP 146, line 15).<sup>5</sup> If that amount (\$109,928) is subtracted from Ms. DiGiacomo's figure for total maintenance allegedly due (\$145,349.82), the remaining balance is \$35,421.82 - the first figure the Commissioner used. RP, p. 28, line 7. This computation is generally consistent with the round figures Ms. DiGiacomo's attorney used in his general reckoning at RP, p. 11, lines 5 - 11. To arrive at the actual figure used in the Commissioner's judgment, the Commissioner then subtracted an additional \$750 from the \$35,421.82, to correct for a deduction, for the total amount due in her calculation of \$34,671.82.

The first problem with this reckoning is that it does not strictly construe the Separation Agreement. As discussed above, the Agreement provides that gross income consists of salary (base compensation) and bonus as defined in the Overlake contract; no additional benefits or payments are included. The Overlake earnings summary shows that in a regular year, Ms. DiGiacomo was paid according to these terms, i.e., 50 percent of salary and bonus. The earnings summary shows that

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<sup>5</sup> This figure substantially agrees with Dr. Austin's reckoning of \$110,128 paid. CP 131, lines 19-22.

compensation is based on 2080 hours per year, or a 52 week year of 40 hour weeks, the total amount paid each year was the salary of \$450,000 plus bonus (in the years 2005-2009 the salary before bonus has been modified to \$450,000 per year from \$475,000, as indicated by Dr. Austin (CP 276, lines 18-19). The summaries also indicate that in 2009 Dr. Austin received payment for something outside his salary and bonus, since the hours paid are equivalent to nearly nine months of work, and it is understood that Dr. Austin worked only six months. In his uncontroverted testimony, Mr. Bean identified the extra amount paid as deferred compensation for unused vacation. When the Commissioner added this extra item - a separate, policy oriented benefit provided by Overlake outside of salary and bonus – to her calculation of maintenance, she ignored strict construction of Dr. Austin’s employment contract and the parties’ Separation Agreement.

In addition, there is no plain violation of the Separation Agreement since, according to Ms. DiGiacomo, Dr. Austin *did* make regular payments with each pay period in 2009 that appear to comply with his duty to make payments based on 50 percent of his salary and bonus, less authorized deductions. Again, see CP 146, lines 6-16. Ms. DiGiacomo did not complain that *any* of these payments were below the 50 percent of salary or bonus in each pay period, much less the payments made in June

of 2009, the beginning of the period in question. Ms. DiGiacomo did not allege, nor did the Commissioner find that in Dr. Austin's payments in June 2009, or even for all of 2009, was there any pattern of short payments or miscalculations that could show any intentional violation of the Separation Agreement. This is because there was no such pattern or intent. Instead, what is clear is that for the period in question (and indeed for all of 2009 had that issue been raised) in order for the Commissioner to find Dr. Austin in contempt, she had to include Overlake's discretionary benefit payment for unused vacation as part of gross income under the Separation Agreement. This was error; it was misleading and wrong as a matter of law for Ms. DiGiacomo to urge that it could be included; and without including that special payment, there was no plain violation of the Separation Agreement and therefore no contempt of court. Dr. Austin had at the very least a good faith belief that his payments complied with the Separation Agreement, absolving him from contempt.

Clearly, the Commissioner did not strictly construe the Separation Agreement and there was no plain violation of the maintenance provisions. If she applied a legal standard, it was not correct under the strict construction rule; the facts in the record do not support the Court's conclusions; her decision on contempt is therefore manifestly unreasonable, *and* based on untenable grounds *and* untenable reasons.

**3. The evidence below does not show any intentional concealment of income or misleading information about job and salary, and the Commissioner's own ruling and statements support this view.**

- a. There was no concealment of income.

The only income relevant to this proceeding is the income from Overlake Hospital. There is no evidence before the Court of any other source of income. Every time Dr. Austin made a maintenance payment, he impliedly represented that that payment comprised 50 percent of his salary and bonus in that pay period. Ms. DiGiacomo made no argument that there was any pattern of short payments after June, 2009, or even during any portion of 2009, that these implicit representations were incorrect. She made no request for information until the Order to Show Cause was filed, and then the evidence indicates that the necessary payment information was given to Ms. DiGiacomo's attorney in response to subpoenas in January, 2010, within 30 days of the Order to Show Cause and many months before the hearing. In addition, Ms. DiGiacomo admitted in deposition that she could determine the amount due, and apparently did so for the purposes of the Order to Show Cause based on information received from Overlake in January, 2010. See CP 144, lines 19-24, CP 145, lines 21-24, and CP 146, lines 1-16. Thus the necessary information was disclosed when Ms. DiGiacomo requested it, and she first

requested it by subpoena, without proper notice, without having made any prior request upon Dr. Austin.

b. Information about job and salary was correct.

The Commissioner found in her Order that that the husband supplied misleading information about his “job and salary” CP 165, Par. 3.11. Since there are no specific findings in the Order about this conclusion, the Commissioner’s oral statements provide the only explanation:

And I find on the basis of the record before me that the husband intentionally tried to mislead [Ms. DiGiacomo] into thinking that he had lost his job and was not going to be owing any maintenance; or if owing any, it was going to be something less than what he paid in the past.

The Commissioner’s quoted statements describe precisely what *did* actually happen. The Commissioner did not find any maintenance owing for anything but monies from Overlake (and then for monies improperly included in maintenance calculations) because Dr. Austin *did* lose his job and received no further income other than payments from Overlake. There obviously can be no finding of intentionally misleading a party when the statements made are true. The Commissioner’s ruling on this point is based on untenable grounds and untenable reasons.

**4. There can be no bad faith found for arguments that are either justified or based on honest mistake as to rights or duties.**

Bad faith is defined as "actual or constructive fraud" or a "neglect or refusal to fulfill some duty ... not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Black's Law Dictionary, 127 (5th rev. ed. 1979), quoted in *State v. Sizemore*, 48 Wash. App. 835, 837, 741 P.2d 572, *review denied*, 109 Wn.2d 1013 (1987).

The Commissioner below found bad faith by Dr. Austin raising three arguments. First, the Commissioner believed that Dr. Austin had argued for a cap on maintenance. CP 165, Par. 3.11; RP at p. 25, lines 16-20. Dr. Austin never stated this; he never argued it. He did state that he had paid over \$2 million in maintenance over the last nine years and that in 2009, when he tried to negotiate an alternate arrangement with Ms. DiGiacomo, he did not want to continue working with the ardor required in this profession under the same maintenance terms. As it was, Dr. Austin did then locate work as a surgeon, but he received only reimbursement for expenses since he was not able to bring in the anticipated volume of business. CP 277, lines 1-15. Despite issuing subpoenas to his new employer and Overlake, obtaining their records and

Dr. Austin's bank records (*See Sealed Financial Records at CP 217*), and taking their depositions, there is no evidence Dr. Austin had earned any income in the relevant time period except that from Overlake. He did not argue that if he received income in the future from his medical work that he would not have to pay further maintenance. There was no mention of a lifetime cap by Dr. Austin. Indeed, his statements show that he views maintenance as a continuing obligation based upon future salary. As to stating the amount of maintenance he has paid already, it is both justified and important to have that fact before the court, since maintenance is based on economic fairness, and the Court should know why he feels that the maintenance paid is, in total, more than fair to his former spouse. The Commissioner's finding concerning a maintenance cap argument is not supported by any credible evidence and is based on untenable grounds.

Second, the commissioner also found that Dr. Austin's statements that the "income provision was related only to Overlake Hospital" was raised in bad faith. CP 165, Par. 3.11. As it turned out, this was the fact in this case; there was no other income from any other source considered. Even if there had been other sources of income, and there were not, Dr. Austin was simply stating [his current view of] the literal terms of the Separation Agreement. [If he was mistaken, that is not bad faith.] At most, the statement was hypothetical, and the Commissioner noted in her

ruling that both parties had included material that was not germane to the issues presented.

The Commissioner also found that Dr. Austin's argument that Ms. DiGiacomo had necessary access to documents to determine his obligation was also made in bad faith. In fact, Ms. DiGiacomo's own statements show that she was able to calculate the amount she felt was due by referring to the earnings statements from Overlake that were supplied to her in January, 2010 with payments that she did receive. CP 145-146; see Exhibit A to Decl. of Brian Read at CP 156 or 249; and Ms. DiGiacomo's statements in her deposition at CP 296, lines 13-24; CP 297, lines 1-3. As to other possible income, the Commissioner specifically ruled that outside of the Overlake payments for 2009, there was no other income before the Court based on the scope of the Order to Show Cause. RP, p. 29, lines 14-25; p. 30, lines 1-17. There can be no bad faith where the argument is correct, or even when it is colorably correct and only states a mistaken belief as to a right or duty.

None of the Court's findings concerning the three arguments in this section were supported by the evidence. Nor are any of them necessary in order to resolve the issue raised in the Order to Show Cause, i.e. maintenance due from June, 2009 to January, 2010. The Commissioner's findings as to these three arguments are based on

untenable grounds and manifestly unreasonable.

**5. Since there was no contempt below, the Commissioner incorrectly ordered Dr. Austin to pay Ms. DiGiacomo's attorneys' fees. The Award of Fees and Costs Should Be Reversed.**

The record below and the Commissioner's use of improper legal standards show that the finding of contempt was an abuse of discretion. For reasons discussed above, Dr. Austin's payments of maintenance in 2009 complied with his maintenance obligations. There was no intentional violation of the Decree; the Commissioner did not comply with the strict construction and plain violation rules for determining contempt; she was factually and legally incorrect on other issues as well. Accordingly, it was an abuse of discretion for the court to order payment of \$11,000 in fees and costs under RCW 7.21.030(3). The amount was clearly excessive for a motion that required only one brief appearance in court, and did not raise any novel or unusual issues of law.<sup>6</sup>

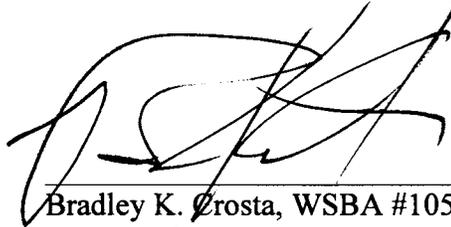
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<sup>6</sup> Ms. DiGiacomo raised an additional side issue that did not become part of the Commissioner's order, but should be mentioned – use of maintenance to support the parties' children. Several times Ms. DiGiacomo asserts that all maintenance is used solely to support the children or that any reduction in maintenance will leave the children without adequate educations. CP 142, lines 19-25, CP 148, lines 1-2. This suggests two things: 1) that Ms. DiGiacomo must have other assets for her own support, as she has not worked since the marriage (compare CP 42); and more important, 2) she fails to mention (a) other community funds set aside for the children's college, to be used even before maintenance, as well as (b) the separate obligation of the parents to pay post-secondary support pursuant to prior Court Order should the other funds in clause (a) be insufficient. Both of those funding sources are separate from maintenance. CP 46, at second full paragraph and at note 1. Furthermore, the parents' obligation for post-secondary support expires when each child reached 23 (CP 46, at note 1), and as of this November, all but two of the children will have reached age 23. See birthdates at CP 14.

**V. CONCLUSION**

The Appellant, Dr. Joseph Austin, respectfully asks that this Court reverse the trial court Commissioner's award of maintenance, affirm that Dr. Austin utilized the proper standard in computing and paying maintenance, reverse the Commissioner's findings of contempt, concealment and bad faith as factually and legally incorrect, and vacate the judgment and award of fees and costs under RCW 7.21.030(3).

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of October, 2010.



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Attorney for Appellant



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Kenneth G. Christensen, WSBA #13454  
Attorney Associated on the Brief

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

In Re the Marriage of	)	NO. 65628-7-I
	)	
JOSEPH J. AUSTIN, M.D.,	)	DECLARATION OF SERVICE
	)	OF APPELLANT'S OPENING
Appellant,	)	BRIEF
and	)	
	)	
SILVANA M. DI GIACOMO,	)	
	)	
Respondent.	)	
_____	)	

Kieran M. McKee certifies and declares:

I am the legal assistant of Bradley K. Crosta, Crosta and Bateman, attorney of record for Appellant Joseph J. Austin, M.D., in the above-captioned proceeding, and I make this declaration based upon my personal knowledge and belief. I am over the age of eighteen, have personal knowledge of the facts herein, and am competent to testify regarding the same. On October 18, 2010, I mailed via United States First Class Mail, postage prepaid, the original and one copy of the Appellant's Opening

DECLARATION OF SERVICE BY MAILING  
OF APPELLANT'S OPENING BRIEF - 1

Brief to the Clerk, Court of Appeals, and a true and correct copy of the Appellant's Opening Brief to Respondent Silvana M. DiGiacomo's attorney at the addresses below:

Clerk  
Court of Appeals  
One Union Square  
600 University Street  
Seattle, WA 98101

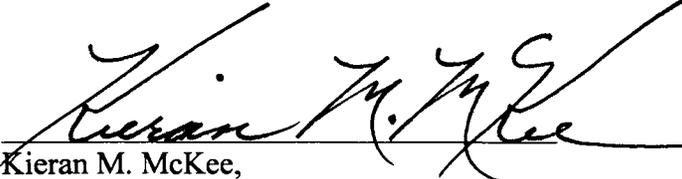
and

Mr. Alan Dermody  
Anderson Fields & McIlwain  
207 E Edgar St  
Seattle, WA 98102

There are no other necessary parties to this appeal.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 18th of October, 2010.

  
Kieran M. McKee,  
Legal Assistant to Bradley K. Crosta  
Attorney for Appellant