

No. 72148-8

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April 17, 2015COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTONCourt of Appeals  
Division I  
State of Washington

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In re the Marriage of:

CORRIE WEBER,

Respondent,

v.

BLAINE J. WEBER,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE TANYA L. THORP

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

When the parties divorced in March 2008, Blaine Weber had just come off a “high” of over \$500,000 in his annual income as an architect. The parties agreed to distribute a disproportionate share of the community property to Corrie Weber, including \$500,000 cash and a \$465,000 promissory note, and that Blaine would pay Corrie *modifiable* monthly maintenance of \$6,000 until February 2014, and then \$4,000 monthly until February 2017, when Blaine reached retirement age.

As a result of the Great Recession a year later, Blaine had negative income, and lacked the means to pay either maintenance or the promissory note. The parties had not agreed to nonmodifiable maintenance, and Blaine sought to terminate his maintenance obligation in 2009. A family law court commissioner found that Blaine had proved a basis for modification, but declined to terminate maintenance. Instead, the court modified Blaine’s maintenance obligation by suspending it for four months. Because of Blaine’s continued lack of income, the parties then agreed to extend the suspension for approximately two years. At the same time, Blaine’s lack of income also caused him to default on the promissory note, which triggered a default interest penalty of 12%,

causing Blaine to pay Corrie \$172,680 more in interest than anticipated under the agreement.

In 2011, the parties returned to court and a second commissioner found that Blaine proved a basis for a “downward” modification. The court reinstated Blaine’s maintenance obligation, but modified it by setting a minimum monthly payment of \$2,000, plus additional amounts based on a formula that capped his monthly payment at the amount under the parties’ original agreement. The court set a review hearing, but neither party pursued review.

Nearly 3 years later, Corrie claimed for the first time that the earlier orders had not in fact modified maintenance, and that Blaine’s obligation under the parties’ original agreement remained “whole.” Ignoring the plain language of the modification orders, the trial court concluded that Blaine still owed the maintenance that he had been relieved of under the earlier orders.

This Court should reverse and remand for entry of an order directing that Blaine is not required to “make up” maintenance payments, and that his maintenance obligation under the modification order is a minimum of \$2,000 and a maximum of \$4,000 until the obligation terminates in February 2017.

## II. REPLY ARGUMENT

- A. Once the court modified Blaine's maintenance obligation downward in 2009 and 2011, Corrie was no longer entitled to the full amount of maintenance under their original agreement. The trial court's interpretation concluding otherwise was error.**

Corrie's response brief is an irrelevant rehash of all the "wrongs" she alleges Blaine committed, including claims of an alleged (and disputed) affair that purportedly occurred when the parties were married, over 7 years ago. Corrie also complains of the "substantial disparity" between the parties' incomes, and the losses she suffered during the recession when Blaine was relieved of his maintenance obligation. But this is neither an initial maintenance determination nor a maintenance modification. Instead, the issue before this Court is whether the trial court improperly interpreted earlier unchallenged and final orders modifying Blaine's maintenance obligation. Corrie's exaggerated claims of poverty, and her deliberate distortion of the timeline of events in an effort to imply cause and effect are largely inaccurate, irrelevant, and solely intended to prejudice this court against Blaine.

For instance, Corrie implies that she was forced to sell her condominium at a loss due to the suspension of Blaine's

maintenance obligation. (Resp. Br. 32) But in fact, she sold her condominium one year *before* Blaine was relieved of maintenance. (See CP 323, 333) If, as Corrie claims, she was forced to pursue Section 8 housing after selling her condominium, it was unrelated to the suspension of maintenance, which occurred 12 months later. (Compare Resp. Br. 32 with CP 271, 333) Similarly, Corrie claims that Blaine purchased a \$1.2 million condo in November 2009 while his maintenance obligation was suspended. (Resp. Br. 7) But in fact, he acquired his interest in this condo around the time the parties had been negotiating their settlement agreement, and this interest was awarded to him under the parties' settlement agreement. (See CP 237, 324, 326)

The trial court erred in interpreting the 2009 and 2011 orders to require Blaine to "make up" for purportedly missed or underpaid maintenance that he was relieved of by the earlier orders. Because once the court modified Blaine's maintenance obligation "downward" (CP 270-71, 273-74), Corrie was no longer entitled to the full amount of maintenance under the parties' original agreement.

Corrie does not dispute that this Court must review *de novo* the trial court's decision interpreting the 2009 and 2011 orders.

*Gimlett v. Gimlett*, 95 Wn.2d 699, 705, 629 P.2d 450 (1981) (discussed App. Br. 11-12). Because review is *de novo*, this Court must make its own independent determination of the intent of these orders, and is not required to defer to the trial court's interpretation. See *Gimlett*, 95 Wn.2d at 705; *Davenport v. Washington Educ. Ass'n*, 147 Wn. App. 704, 715-16, ¶ 13, 197 P.3d 686 (2008) (*de novo* review is made without deferring to the trial court's reasoning or result), *rev. granted*, 166 Wn.2d 1005 (2009). In interpreting these orders, this Court must ascertain the court's intention by "using general rules of construction applicable to statutes, contracts and other writings." *Gimlett*, 95 Wn.2d at 704-05.

Corrie's claim that the 2009 and 2011 orders left the "total amount of maintenance due to Corrie [ ] whole, except the actual timing of the payments" (Resp. Br. 16) is unsupported by the plain language of both orders. After finding that Blaine "has made a showing of grounds/basis for modification," the 2009 court suspended Blaine's maintenance obligation until further review. (CP 271) When the parties returned to court in 2011 after stipulating to the continued suspension of Blaine's maintenance

obligation for two years, the court once again found “a basis to modify the maintenance downward.” (CP 273)

The 2011 order made no reference to any arrearages purportedly owed for the period that Blaine’s maintenance obligation was suspended. (See CP 273-74) Nor did it purport to extend “the actual timing of the payments” to guarantee Corrie a full 108 months of maintenance. (See CP 273-74) Instead, the court reinstated Blaine’s monthly maintenance obligation, and reduced it from \$6,000 under the parties’ original agreement to \$2,000, with an escalator that increases his monthly obligation as his income increases and capped the amount so that it did not “exceed terms of the original settlement agreement.” (CP 274)

Corrie claims that the provision limiting Blaine’s maintenance obligation so that it did not exceed the terms of the original settlement meant that he was still required to pay the full amount of maintenance. (Resp. Br. 17-18) However, under that interpretation, Blaine was granted no modification at all, which is wholly inconsistent with the plain language of the order giving Blaine a “downward” modification. (See CP 273; see also CP 271)

The provision capping Blaine’s maintenance obligation to the terms of the original settlement agreement was linked to the

monthly payment, not the maintenance obligation as a whole. This provision contemplated that under the court's escalator formula, Corrie may receive *less* than the monthly maintenance payment under the original decree, but she could not receive more:

The Court modifies the maintenance obligation to \$2000 per month beginning August 2011. Further, if Mr. Weber receives a draw of more than \$6000 per month, he shall pay to Mrs. Weber as additional maintenance 50% of the amount over \$6000 such that if he received \$10,000 his maintenance obligation for that month shall be \$2000 + \$2000 but maintenance shall not exceed terms of the original settlement agreement.

(CP 273-74) In other words, under the parties' original agreement, Blaine's monthly obligation could not exceed \$6,000 per month between August 1, 2011 (the date the formula went into effect) and February 28, 2014, and could not exceed \$4,000 per month between March 1, 2014 and February 29, 2017, at which time his obligation would terminate. (CP 234)

There is no support for Corrie's claim that she was entitled to "recoup" the maintenance that the trial court had suspended in the 2009 order. (Resp. Br. 18) In modifying maintenance in 2009, the court declined to terminate maintenance, which had been Blaine's request as his income was then negative. (See CP 21, 271) Instead,

the court suspended his obligation “pursuant to the authority set forth in *Drlik*, 121 Wn. App. 269 (2004).” (CP 271)

Contrary to the trial court’s determination, the holding in *Marriage of Drlik*, 121 Wn. App. 269, 278, 87 P.3d 1192 (2004) to which the 2009 court referred was that a court has authority to modify maintenance by suspending it, rather than merely terminating the obligation, and not that suspended payments must be made up. (CP 393) (App. Br. 21) Suspending maintenance, the *Drlik* court recognized, allowed the trial court to “retain jurisdiction until payments resume or the obligation is terminated,” which was not otherwise possible if maintenance was simply terminated. *Drlik*, 121 Wn. App. at 277-78. The *Drlik* court acknowledged different definitions of what it means to “suspend” maintenance, including “set[ting] it aside or mak[ing] [it] temporarily inoperative” or “temporarily defer[ring] or delay[ing] payment.” 121 Wn. App. at 277.

In this case, viewing both the 2009 and 2011 orders together, it is clear that the former definition was intended. The 2009 court intended to “set aside” Blaine’s maintenance obligation, or make the obligation “temporarily inoperative” during the four months that the 2009 order had originally ruled, and during the additional

20 months that the parties stipulated to continue the suspension. Both the 2009 court and the parties recognized that Blaine could not pay even a nominal amount of maintenance when he had negative income. By “setting aside” Blaine’s maintenance obligation during this period, the 2009 court acknowledged that Blaine lacked the resources to pay maintenance – one of the tenets of maintenance (RCW 26.09.090(1)(f)) – but reserved its jurisdiction to further modify maintenance if his financial situation improved, as it in fact did. When the parties returned to court in 2011, the court modified Blaine’s obligation downward after reinstating it for the same reason that the 2009 court suspended it in the first place – Blaine’s negative income which resulted in substantial losses, and which forced Blaine to liquidate assets awarded to him in the settlement agreement.<sup>1</sup>

If, as Corrie claims, Blaine still owed maintenance under the parties’ original agreement during that period of suspension, the 2011 order would reference arrearages owed, or would include a

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<sup>1</sup> As Corrie notes in her response brief, Blaine’s financial situation was so compromised he sought (unsuccessfully) to vacate the parties’ property agreement. (Resp. Br. 8) In affirming the trial court’s decision denying his CR 60 motion, this Court recognized that the “economic environment and its widespread and devastating impact are unusual and, at least in recent years, unprecedented,” which caused Blaine’s financial situation. *Marriage of Weber*, 162 Wn. App. 1001 (2011 WL 1947728).

judgment. Alternatively, if it intended that Blaine was to pay a full 108 months of maintenance, the 2011 order would have provided for an extension of the termination date under the original agreement from February 29, 2017 to a later date. Instead, the 2011 order is silent on those issues.

In interpreting a decree, the reviewing court is “limited to examining the provisions of the decree to resolve issues concerning its intended effect.” *Chavez v. Chavez*, 80 Wn. App. 432, 436, 909 P.2d 314 (1996), *rev. denied*, 129 Wn.2d 1016 (1996) (*citations omitted*). The court cannot add terms to a decree under the guise of interpretation. *See e.g. Marriage of Mudgett*, 41 Wn. App. 337, 341, 704 P.2d 169 (1985).

An extension of the maintenance term would “add terms” to the order, as well as conflict with the existing language of the order. Under the parties’ original agreement, it was expected that Blaine would only be required to pay maintenance to Corrie over the nine years following their dissolution, concluding in February 2017 – around the time Blaine reached age 65 and retired. (CP 234) If, as Corrie urges, the “actual timing of the payments” was extended so that Blaine could “make up” for the payments he “missed” while his maintenance obligation was suspended, Blaine would be obligated

to pay support for two years longer than anticipated, and after Blaine planned to retire. And an order extending the term of the maintenance would not be a “downward” modification, but an “upward” modification, as it would extend the term of Blaine’s maintenance obligation. This would be contrary to the express terms of the order limiting maintenance to “the terms of the initial settlement agreement,” (CP 274), which included a definitive end date of February 2017. (CP 234) *See e.g. Marriage of Glass*, 67 Wn. App. 378, 391, 835 P.2d 1054 (1992) (increasing the duration of maintenance, even if the amount of maintenance remains the same, is still a modification) (*described in App. Br. 15*).

Nothing in either the 2009 order or 2011 order suggests that the trial court intended to keep Corrie’s original maintenance award “whole,” or to extend the term of the maintenance obligation. Instead, the opposite is true, as the 2011 order clearly states that the maintenance obligation is to be modified “downward.” (*See CP 273-74*)

The 2009 and 2011 orders intended to change Blaine’s maintenance by *reducing* it. The orders did not merely impose a “temporary moratorium” on his obligation such that “the full award will be paid within the time contemplated by the initial decree,”

which would have been anticipated if the maintenance obligation was not modifiable as was the case in *Glass*, 67 Wn. App. 378, discussed in the opening brief at page 15. Instead, both the 2009 and 2011 courts found that Blaine proved a basis for downward modification and entered orders changing Blaine's maintenance obligation by reducing the amount he owed under the parties' original agreement.

**B. The trial court's "interpretation" improperly modified the 2009 and 2011 final orders.**

The trial court erred in interpreting the 2009 and 2011 orders to conclude that Blaine's maintenance obligation under the parties' original agreement was somehow left "whole." In doing so, the trial court improperly modified those orders retroactively.

A trial court cannot modify an order under the guise of clarifying or interpreting it. *See Marriage of Christel & Blanchard*, 101 Wn. App. 13, 22, 1 P.3d 600 (2000). A clarification is "merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary," whereas a modification "occurs when a party's rights are either extended beyond or reduced from those originally intended in the decree." *Christel/Blanchard*, 101 Wn. App. at 22. In this case, despite the

fact that both the 2009 and 2011 orders clearly granted Blaine's request to modify his maintenance obligation "downward," the trial court improperly modified those orders by interpreting them in a way that deprived Blaine of the modification those orders granted. (CP 392-93, 394-95)

Corrie apparently argues that the trial court had authority to deprive Blaine of his previously granted modification based on the false premise that the 2009 and 2011 orders were "temporary" because they contemplated further review. (*See* Resp. Br. 15-16) But the fact that the trial court retained jurisdiction to review the efficacy of its rulings made the orders no less final. *See e.g. Marriage of Possinger*, 105 Wn. App. 326, 337, 19 P.3d 1109 (trial court has authority to make a final permanent parenting plan containing an interim residential schedule that was subject to further order of the court), *rev. denied*, 145 Wn.2d 1008 (2001). Indeed, the court "retains jurisdiction" of all court-ordered maintenance orders, which are subject to review through modification until the obligation terminates. *Heuchan v. Heuchan*, 38 Wn.2d 207, 213, 228 P.2d 470 (1951).

The 2009 order suspending maintenance is not significantly different than the order suspending maintenance in *Marriage of*

*Drlik*, 121 Wn. App. 269, 87 P.3d 1192 (2004), from which the husband appealed as a final order. There, the trial court had entered an order modifying maintenance by suspending “such maintenance effective April 1, 2002 until further order of the court.” *Drlik*, 121 Wn. App. at 274. The *Drlik* court properly treated the order as final regardless of the fact that the court contemplated further review.

The 2011 order modifying maintenance was also final, and is no different from the order in *Marriage of Ochsner*, 47 Wn. App. 520, 736 P.2d 292, *rev. denied*, 108 Wn.2d 1027 (1987) from which the wife appealed as a final order. The *Ochsner* order reduced the husband’s obligation and retained jurisdiction for a review hearing following the filing of the parties’ 1986 tax returns the following year. As the *Ochsner* court noted, “the court did not defer its decision, but rather, retained jurisdiction for a limited period of time in order to review and determine the efficacy of its ruling. Nothing in the modification statute [ ] precludes this sort of procedure. It has been held, moreover, that the jurisdiction of the court entering a decree of dissolution is continuing as to maintenance.” 47 Wn. App. at 527.

In this case, the 2011 court set a review hearing for a year after its order was entered, presumably to “review and determine the efficacy of its ruling.” (CP 274); *Ochsner*, 47 Wn. App. at 527. The fact that neither party sought review of the court’s order did not make the order any less final. *See e.g. Marriage of Adler*, 131 Wn. App. 717, 726, ¶ 19, 129 P.3d 293 (2006) (a parenting plan that includes a provision for review was final if the provision was not invoked), *rev. denied*, 158 Wn.2d 1026 (2007). Because the 2009 and 2011 modification orders were final, the trial court could not modify the orders to deprive Blaine of the “downward” modification he was granted.

In fact, the practical effect of the court’s order on appeal was to make the maintenance obligation nonmodifiable even though the parties here did not agree to a nonmodifiable maintenance award. Maintenance can only be made nonmodifiable by the parties’ agreement, and a court otherwise has no authority to order maintenance to be nonmodifiable. RCW 26.09.170(1); *Marriage of Short*, 125 Wn.2d 865, 876, 890 P.2d 12 (1995) (court cannot order a nonmodifiable maintenance obligation).

Remarkably, and despite the fact that the court had entered the 2009 and 2011 modification orders, the trial court erroneously

concluded that *Blaine* sought a “retroactive” modification of his maintenance obligation by bringing this declaratory action. (CP 392-93, 394-95; *see also* Resp. Br. 12) But when Blaine brought this action, his maintenance obligation had already been modified by the 2009 and 2011 orders. (CP 270-71, 273-74) The only reason Blaine brought the declaratory action was because Corrie took the position that the 2009 and 2011 orders did not in fact modify the maintenance obligation, despite their plain language, and that Blaine was still obligated to pay the full amount of maintenance under the parties’ original agreement. Because the parties disputed the intent of the orders modifying Blaine’s maintenance obligation, he appropriately brought a declaratory action “to ascertain the rights and duties of the parties” under the order. *Byrne v. Ackerlund*, 108 Wn.2d 445, 453, 739 P.2d 1138 (1987).<sup>2</sup>

Contrary to Corrie’s claim, Blaine was not required to “argue the parties’ current respective financial positions” when he brought his declaratory action. (Resp. Br. 13) Nor is there any basis for Corrie’s claim that Blaine “sought outright termination of the obligation to pay maintenance outlined in the PSA.” (Resp. Br. 15)

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<sup>2</sup> Although the trial court denied Blaine’s motion for a declaratory judgment, it acknowledged that “there was a reasonable basis to bring this motion and ask for this clarification.” (6/06/14 RP 9)

Blaine had already been granted a downward modification of his continuing maintenance obligation based on the parties' financial circumstances at the time the 2009 and 2011 modification orders were entered. When he brought his declaratory action, Blaine was not asking the trial court to modify his maintenance obligation. Instead, Blaine was asking the court to confirm that the earlier orders had indeed already modified his maintenance obligation downward. (See CP 203-16) Thus, the parties' current economic circumstances were irrelevant.

Further, there is no basis for Corrie's claim that Blaine's declaratory action was brought to "prejudice any possibility of Corrie requesting modification extending spousal maintenance in the future." (Resp. Br. 15) Regardless of the trial court's determination on Blaine's motion, the maintenance obligation would have remained modifiable *if* Corrie could show a basis for modification. However, under no circumstances could the trial court retroactively modify the earlier orders, which had already granted Blaine a downward modification. *Wilburn v. Wilburn*, 59 Wn.2d 799, 801, 370 P.2d 968 (1962) ("modification of a divorce decree which directs payments for child care or alimony may not operate retroactively").

**C. The modified orders were consistent with the intent underlying the parties' original agreement for Blaine to share a portion of his income with Corrie for the 9 years following their dissolution.**

It was not up to the trial court to attempt to place the parties “in roughly equal financial positions for the remainder of their lives” while interpreting the earlier orders modifying Blaine’s maintenance obligation. (Resp. Br. 24-25) Corrie claims that requiring Blaine to “make up” maintenance that he did not pay during years in which he had negative income – an obligation from which he was relieved under the modification orders – would conform to the “terms of the bargained for spousal maintenance in the PSA,” and the “policy enumerated” in *Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007) and *Marriage of Wright*, 179 Wn. App. 257, 319 P.3d 45 (2013), *rev. denied sub nom.* 180 Wn.2d 1019, *rev. denied sub nom.* 180 Wn.2d 1016 (2014) (Resp. Br. 24-25) But the orders modifying Blaine’s maintenance obligation already conformed with the underlying intent of the parties’ original settlement agreement.

When they divorced, the parties agreed that Blaine would provide support to Corrie for the 9 years following their dissolution. (*See* CP 234) Maintenance under the original agreement (as well as

the disproportionate division in favor of Corrie) had been premised on Corrie sharing a portion of Blaine's income, which had been as high as \$515,000 the year before the divorce, in decreasing amounts to terminate in 2017, the year Blaine planned to retire at age 65. (CP 17-19, 234, 326-27)

Consistent with that agreement, Blaine paid the full amount of maintenance from March 2008 through May 2009, when the 2009 order suspended his obligation because he no longer had any income to share, having gone from \$515,000 income in 2007 to (negative \$236,666) in 2009. (CP 20-22, 270-71)<sup>3</sup> Over the next two years, while Blaine continued to have negative income, Corrie also received no maintenance under the 2009 order and the parties' stipulations, as there was no income to share. (CP 270-71, 303-18) Under the 2011 order, Blaine's maintenance obligation was reinstated, to provide Corrie with at least \$2,000 in monthly maintenance to a maximum of the amounts originally agreed - \$6,000 through February 2014, and \$4,000 thereafter through February 2017. (CP 234, 273-74) Thus, the modified orders fulfilled

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<sup>3</sup> The negative income was a result of capital calls. (CP 20)

the intent of parties' original agreement –giving Corrie a share of Blaine's post-decree income for nine years.

Corrie complains of the “substantial disparity” between the parties' current incomes. (Resp. Br. 26) But the reality is that the parties had always anticipated a disparity in their incomes - which is why in addition to maintenance, Corrie received a disproportionate share of the community property. For instance, when the parties entered their original settlement agreement in 2008, Blaine earned a gross monthly income of \$42,000 in the year prior to their agreement, and the parties agreed that Blaine would pay Corrie \$6,000 in monthly maintenance, decreasing to \$4,000 per month in 2014. (See CP 18, 234) Corrie makes much over the fact that Blaine's income “rebounded significantly” in the years after his maintenance obligation was modified (Resp. Br. 19), but ignores that this “rebound” occurred after three years of negative income: 2009 (negative \$236,666); 2010 (negative \$11,706); 2011 (negative \$31,753). (CP 21)

Even before 2009, Blaine's income had dropped from \$514,958 in 2007 to \$46,085 in 2008 (CP 21), yet Blaine paid Corrie \$72,000 a year maintenance under the parties' original agreement until May 2009, when the trial court suspended his

obligation. (CP 271) And since February 2012, when Blaine's income fully recovered, he has paid the maximum amount under the parties' agreement. (CP 23)

Meanwhile, during those years in which Blaine had negative income and could not pay maintenance, he was forced to liquidate all of his assets except for his interest in the condominium that he was awarded in the dissolution, which at the time of his declaratory action had a net equity of (negative \$118,500), to meet his own needs. (CP 322, 325) Blaine also had to borrow \$569,500 to finally pay off the note owed to Corrie, including \$172,680 in default interest at 12% per annum. (CP 327)<sup>4</sup> Blaine must pay this loan and its attendant interest from income over the next couple of years before he retires in 2017. (CP 327-28) Because Blaine had no income for nearly 4 years, he has suffered losses that he must attempt to recoup in these last years before his retirement, even though the parties anticipated that he would use those years to shore up his own retirement accounts. Instead, Blaine's retirement

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<sup>4</sup> Because his financial situation had been so seriously compromised by the economic downturn, Blaine sought unsuccessfully to also modify the property award, including the note owed to Corrie, which had been premised on him being awarded his interest in his firm, which was valued at \$700,000 at the time of settlement in 2008, but was worth only \$148,000 a year later. *See Marriage of Weber*, 162 Wn. App. 1001 (2011 WL 1947728).

accounts were only worth a little over \$100,000 at the time of the declaratory action in 2014. (CP 324) Rather than building his retirement during his final years of employment, Blaine is paying off substantial debt. (CP 327-28)

Corrie claims that she “suffered greatly when she had no maintenance coming in,” (Resp. Br. 20), but this ignores that she received an additional \$172,680 in default interest. (CP 24) Had Blaine’s income remained stable as the parties originally anticipated, Blaine would have paid Corrie an additional \$171,916 in maintenance and \$55,800 in interest on the promissory note. (CP 23-24, 25) However, because Blaine’s income disappeared from 2009 to 2011, he could not pay maintenance or the promissory note, automatically triggering the note’s increased interest penalty. (CP 23-24) As a result, Blaine paid Corrie \$231,537 in interest, \$175,737 more than the \$55,800 she would have received had the economy not crashed, and *more* than the \$171,916 in “missed” maintenance payments. (CP 23-24, 25)

Even if *Rockwell* and *Wright* were to apply in this situation, the parties have been in “roughly equal financial circumstances” since the decree was entered. While Blaine may have more income than Corrie, he has a much larger hole to dig out from because of

the maintenance he paid when he could not afford it, the default interest he paid because he could not timely pay the note, and the loans he had to take to meet his expenses during what is now called the Great Recession.

**D. This Court should deny attorney fees to Corrie.**

An award of attorney fees to Corrie is unwarranted under RCW 26.09.140 as she does not have the need and Blaine does not have the ability to pay her fees. If this Court reverses the trial court, Corrie will continue to receive monthly maintenance of \$4,000 for the next two years, in addition to the over \$500,000 in cash she received at the time of the dissolution, and the \$693,000 in default interest and principal she received when Blaine paid off the note. If this Court affirms, Corrie's resources would be even greater.

Blaine does not have the ability to pay Corrie's attorney fees. While Blaine's income indeed rebounded in 2012 and 2013, this was only after he lost over \$400,000 to negative income in the preceding three years. (CP 20) During this protracted "Great Recession," Blaine was forced to liquidate almost all of his assets that were awarded to him in the parties' original agreement in order to pay substantial capital calls to keep his firm afloat. (CP 20) From his current monthly income, Blaine must not only pay

maintenance to Corrie, but also \$2,000 per month on the loans that he secured to pay off the note and default interest, as well as substantial balloon payments. (CP 327) In the two years he has left before retiring, Blaine must attempt to save for retirement while paying the huge debts he incurred during those years his income was reduced. (CP 327)

This Court should deny Corrie's request for attorney fees.

### III. CONCLUSION

This Court should reverse and remand for entry of an order directing that Blaine is not required to "make up" maintenance payments, and that his maintenance obligation under the modification order is a minimum of \$2,000 and a maximum of \$4,000 until February 2017, terminating thereafter.

Dated this 17 day of April, 2015.

SMITH GOODFRIEND, P.S.

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**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 April 17, 2015, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
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**DATED** at Seattle, Washington this 17<sup>th</sup> day of April, 2015.



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Victoria K. Vigoren