

72148-8

72148-8

No. 72148-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

CORRIE WEBER,

Respondent,

v.

BLAINE J. WEBER,

Appellant.

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

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BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

LAW OFFICES OF CARL T.
EDWARDS, P.S.

By: Valerie A. Villacin
WSBA No. 34515
Ian C. Cairns
WSBA No. 43210

By: Carl T. Edwards
WSBA No. 23316

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

216 First Avenue South, Suite 315
Seattle, WA 98104
(206) 467-6400

Attorneys for Appellant

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I. INTRODUCTION

When they divorced in 2008, Blaine and Corrie Weber agreed that Blaine¹ would pay Corrie modifiable maintenance until February 2017, starting at \$6,000 per month, to be reduced to \$4,000 per month in March 2014. A year later during the Great Recession, Blaine had no means of paying either maintenance or the nearly half million dollar promissory note he had executed in Corrie's favor, which carried a penalty of double interest if he defaulted. Two family court commissioners agreed that the unprecedented economic crash constituted "a substantial change of circumstances" warranting a "downward" modification of maintenance. The court thus suspended Blaine's maintenance obligation for two years, and thereafter reduced Blaine's maintenance obligation to a minimum monthly payment of \$2,000, plus additional amounts based on a formula that capped his maintenance payment at the amounts under the parties' agreement.

By February 2012, Blaine's income had rebounded and he was able to pay the maximum amount required under the modification order. In March 2014, Blaine reduced his monthly

¹ The parties are referred to by their first names for clarity only; no disrespect is intended.

maintenance payment to \$4,000 based on the modification order capping his obligation at the monthly amount under the parties' original agreement. Despite the earlier modification orders, which she had not appealed, Corrie objected, claiming Blaine still owed "arrears" that had allegedly accrued when he paid less than the amounts under the original agreement. The trial court agreed, holding that Blaine was required to "make up" the payments he "missed" after the court modified his maintenance obligation.

The trial court ignored the language of the modification orders, which make no mention of "make up" payments or "arrears." Moreover, the trial court ignored that the reason Blaine's maintenance obligation was modified "downward" was due to the economic crash that also impacted his ability to timely pay the "equalizing" note to Corrie. As a consequence of Blaine's default on the note, Corrie received more in escalated interest when the note was paid in 2013 than she "missed" in maintenance.

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.

II. ASSIGNMENT OF ERROR

The trial court erred in requiring Blaine to “make up” for maintenance payments that were reduced under orders modifying his maintenance obligation. (Appendix A: CP 394-95) (Appendix B: CP 392-93)

III. STATEMENT OF THE ISSUES

1. Where a court modifies a decree by suspending and reducing the maintenance obligation without reserving deferred maintenance, is the obligor required to later “make up” for those reduced payments?

2. Where because of an unprecedented economic crash a husband defaults on a promissory note in favor of his ex-wife, and as a consequence pays more in escalated interest on the note than he “missed” in maintenance payments after the court modified his maintenance obligation, do the equities weigh against requiring the husband to “make up” the “missed” maintenance payments?

IV. STATEMENT OF THE CASE

A. Blaine and Corrie agreed to a modifiable maintenance provision that required Blaine to pay maintenance to Corrie in declining amounts until 2017 when he reached retirement age.

After a 33-year marriage, Corrie Weber filed for dissolution of her marriage to Blaine Weber on January 3, 2007. (CP 231-32) On March 13, 2008, the parties reached a Property Settlement Agreement (the “Agreement”), which was incorporated into a decree of dissolution entered the next day. (CP 231-62) The Agreement required Blaine to “pay spousal maintenance to [Corrie] in the sum of \$6000 per month for 72 months commencing March 1, 2008 and ending February 28, 2014. [Blaine] shall pay spousal maintenance to [Corrie] in the sum of \$4000 per month for 36 months commencing March 1, 2014 and ending February 29, 2017,” when Blaine would presumably retire, at age 65. (CP 234) The parties agreed that Blaine’s maintenance obligation could be modified. (CP 221); *see also* RCW 26.09.170(1) (unless otherwise stated, maintenance is modifiable upon showing a substantial change in circumstances).

The Agreement also required Blaine to execute a \$465,000 promissory note to Corrie, to be paid in four annual installments

with interest accruing at 6 percent per year beginning February 8, 2009. (CP 235) Blaine was required to make monthly interest payments to Corrie between February 2009 and August 2009 and quarterly interest payments thereafter. (CP 236) According to the terms of the Agreement, if Blaine missed a principal payment, interest on the unpaid balance doubled to 12 percent per year. (CP 236) The parties agreed that Blaine's obligation to Corrie on the principal and interest for this note was "expressly not maintenance." (CP 236) Thus, unlike the agreed maintenance, Blaine's obligation for this nearly half a million dollar note was not modifiable.² In fact, the reason Blaine specifically negotiated to make maintenance modifiable was he recognized that to meet his obligation on the note, he would have to generate more than \$150,000 of additional income to meet both his property and maintenance obligations. (CP 221)

² While maintenance may be modified "on a proper showing," the disposition of property in a divorce decree cannot be modified. *Thompson v. Thompson*, 82 Wn.2d 352, 510 P.2d 827 (1973).

B. Blaine could not make the agreed maintenance payments during the Great Recession. The trial court modified Blaine's maintenance obligation by suspending it for two years while Blaine had no income, and reducing it by a formula thereafter.

When the parties divorced, Blaine was 56 years old and a principal in the architectural firm Weber Thompson. (CP 219) The parties based their agreement on Blaine's income, which ranged between \$368,544 and \$514,958 during the years leading up to their 2008 divorce. (CP 220) At the time, Weber Thompson was successful and profitable due to the continuing boom of real estate development. (CP 219, 222) But Weber Thompson was hit especially hard by the Great Recession. (CP 221-22, 264, 268) Blaine's income "disappeared" by mid-2008, and then became negative when the principals of Weber Thompson were required to make capital calls to cover business expenses. (CP 222-23) By mid-2009, Weber Thompson had laid off 80% of its employees and was struggling to stay afloat. (CP 222) Blaine had neither income nor savings to pay maintenance. (CP 223) Nor could he make the first payment on the promissory note, due August 2009, thus triggering the increased 12 percent interest rate. (CP 223)

Blaine filed a petition to terminate maintenance in March 2009. (CP 223) On June 26, 2009, Commissioner Ponomarchuk

acknowledged the court's discretion to modify maintenance, found that Blaine met his burden to prove a "grounds/basis for modification," and modified Blaine's obligation by suspending it for four months:

Obligor has made a showing of grounds/basis for modification. The court denies the request to terminate maintenance but will suspend the maintenance for the months of June, July, August and September 2009, pursuant to the authority set forth in Drlick, 121 Wn. App. 269 (2004).

(Appendix C: CP 270-71) Commissioner Ponomarchuk continued trial on Blaine's petition to terminate maintenance to September 25, 2009, to allow "review [of] the maintenance suspension:"

The Court will review the maintenance suspension on September 25, 2009 and is continuing the trial to that date. The obligor shall provide updated financial information to the Petitioner's counsel and court. The obligor shall provide profit + loss statements, balance sheets, cash disbursements postings for all principles [sic], project backlog, 2Q-09 report on compilation of financial statements and through Sept 15, 2009.

(CP 271)

Over the next two years, the parties agreed to extend the maintenance suspension and continue the trial through a series of stipulations. (CP 224, 303-320) During that period, Blaine continued to "earn" negative income: negative (\$236,666) in 2009,

negative (\$11,706) in 2010, and negative (\$31,753) in 2011. (CP 223, 268)

On July 29, 2011, after finding “a basis to modify the maintenance downward,” Commissioner Smith ordered Blaine to pay a minimum of \$2,000 and 50% of any amount he earned over \$6,000 for each month beginning August 2011:

(5) 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.

(Appendix D: CP 273-74) Commissioner Smith further ordered that the monthly maintenance payments “shall not exceed the terms of the original settlement agreement.” (CP 274) In other words, while Blaine was required to pay a minimum of \$2,000 per month, his monthly maintenance obligation was capped at \$6,000 until February 2014, and \$4,000 thereafter until his obligation terminated in February 2017. No mention was made in this order of any arrears owed by Blaine during the period that Commissioner Ponomarchuk suspended his maintenance obligation. Neither

party appealed this order, which set a review hearing for a year later, in July 2012. (CP 274)

C. The trial court later required Blaine to “make up” for his reduced payments under the modification orders.

Blaine had defaulted on his first annual unmodifiable payment of the promissory note to Corrie, which had been due in August 2009. (CP 223) To stop the accruing interest, which had doubled from 6 to 12 percent, Blaine took out a \$200,000 second mortgage and a \$300,000 business loan to pay the note. (CP 226) On September 12, 2013, Blaine paid Corrie \$591,648.81, including \$231,537.13 in interest – an additional \$172,680 in interest over and above the \$55,800 in interest he anticipated paying when the parties originally entered the Agreement. (CP 225-26)

By February 2012, Blaine’s income had rebounded so that he was paying the maximum amount of \$6,000 per month under the modification order – the amount the parties had agreed Blaine would pay until February 2014 under the terms of their original Agreement. (CP 225) Consistent with the terms of the Agreement, Blaine reduced his maintenance payment to \$4,000 starting in March 2014, which was the maximum owed under the modification order. (CP 226, 234: “The husband shall pay spousal maintenance

to the wife in the sum of \$4,000 per month . . . commencing March 1, 2014”) Corrie objected, asserting that despite the earlier modification orders, arrearages has accrued since June 2009 when Blaine’s maintenance obligation was first modified: “When maintenance was reinstated, you were to resume paying maintenance to me from the arrears until your total maintenance obligation . . . was paid in full.” (CP 280-82) Corrie claimed Blaine still owed her nearly \$172,000 in underpaid maintenance after the court modified maintenance. (CP 281)

On May 2, 2014, Blaine filed a declaratory action, seeking clarification and a determination that he was not required to “make up” maintenance payments the court had reduced in its 2009 and 2011 modification orders. (CP 203-16) The parties appeared before King County Superior Court Commissioner Bonnie Canada-Thurston on May 16, 2014. Although Commissioner Ponomarchuk’s 2009 order suspending Blaine’s maintenance obligation specifically “granted” the petition for modification because Blaine had “made a showing of grounds/basis for modification,” Commissioner Canada-Thurston found that it “was not a modification of the maintenance order.” (Appendix A: CP 394-95) Commissioner Canada-Thurston concluded that the court

could not now “retroactively” nullify Blaine’s maintenance obligation during the period maintenance was suspended, and that maintenance continued to accrue during the suspension. On June 6, 2014, King County Superior Court Judge Tanya Thorp (“the trial court”) affirmed the commissioner’s ruling. (Appendix B: CP 392-93)

Blaine appeals. (CP 389-91)

V. ARGUMENT

A. **The trial court erred by ignoring the language of the modification orders and relying on inapposite case law to hold that Blaine must “make up” maintenance payments he could not afford while his maintenance obligation was reduced.**

Interpretation of a court order, even if ambiguous, is a question of law, reviewed de novo. *Gimlett v. Gimlett*, 95 Wn.2d 699, 705, 629 P.2d 450 (1981); *see also Chavez v. Chavez*, 80 Wn. App. 432, 435, 909 P.2d 314 (“Construction of a decree is a question of law.”), *rev. denied*, 129 Wn.2d 1016 (1996). The reviewing court attempts to ascertain the intention of the court entering the original order by “using general rules of construction applicable to statutes, contracts and other writings.” *Gimlett*, 95 Wn.2d at 704-05. “Normally the court is limited to examining the provisions of the

decree to resolve issues concerning its intended effect.” *Gimlett*, 95 Wn.2d at 705.

Here, the trial court erred in interpreting the modification orders to require Blaine to “make up” for payments that he missed while his obligation was reduced by court order. Once the court modified maintenance in 2009 and 2011, Corrie was no longer entitled to the full amount of maintenance under the parties’ original agreement. That Blaine is no longer required to pay the amount of maintenance under the parties’ original agreement is evident by the fact that there is no language in the modification orders 1) requiring Blaine to “make up” suspended payments, 2) mentioning or establishing “arrears,” or 3) extending maintenance beyond its original term ending February 2017 to ensure that Corrie received the full amount of maintenance under the original agreement. The trial court’s order interpreting the modification orders otherwise conflicts with the language and context of the modification orders finding a basis to modify maintenance “downward,” with the plain meaning of “suspend,” and with the underlying goal of maintenance to equalize the parties’ financial position for an appropriate period of time.

- 1. Corrie was no longer entitled to the full amount of maintenance under the parties' original agreement once the trial court found a basis to "modify the maintenance downward."**

Once the court found a basis to "modify the maintenance downward" and directed that the modified maintenance "shall not exceed the terms of the initial settlement agreement" (CP 273-74), Corrie was no longer entitled to the full sum of maintenance under the parties' original Agreement. Indeed, the terms of the order anticipated that the maintenance ultimately paid to Corrie would be *less* than the terms of the parties' original Agreement, but under no circumstances could it be more. (*See* CP 273-74)

Maintenance is modifiable upon a showing of "a substantial change of circumstances," RCW 26.09.170(1), precisely because the statute "recognizes that circumstances of the parties may change after the entry of the decree." *Marriage of Moody*, 137 Wn.2d 979, 990, 976 P.2d 1240 (1999). Here, the Agreement contained no clause making maintenance non-modifiable and thus Corrie had no absolute right to the amount of maintenance provided for in the original Agreement. By agreeing to a modifiable maintenance award, Corrie expressly assumed the risk that a substantial change of circumstances – such as the unprecedented crash in the real

estate market – would result in her receiving less than the amount originally called for in the Agreement. *Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (“In the absence of a provision in a separation agreement to the contrary, maintenance or support may be modified by the court”), *rev. denied*, 108 Wn.2d 1027 (1987).

In *Ochsner*, the husband was ordered to pay his ex-wife \$600 per month in maintenance during her lifetime. Two years later, he moved to modify maintenance because his business income had declined. This Court affirmed the trial court’s order reducing the husband’s maintenance to \$400 per month, with an escalation clause – similar to the one here – that increased his obligation to a maximum of \$600 per month (the original amount ordered) if his income increased over a certain amount. *Ochsner*, 47 Wn. App. at 526. Because the trial court had authority to modify the husband’s maintenance obligation and found the husband’s financial setback was a substantial change in circumstance warranting modification, the ex-wife was no longer entitled to the amount of maintenance previously ordered. *Ochsner*, 47 Wn. App. at 526.

Because maintenance in this case, like in *Oschsner*, was also modifiable, it is unlike the situation in *Marriage of Glass*, 67 Wn. App. 378, 835 P.2d 1054 (1992), where the parties expressly agreed maintenance would be non-modifiable “*in duration or amount.*” In *Glass*, the trial court granted a year grace period for payment of maintenance because of the husband’s unforeseen financial setbacks. However, because maintenance was non-modifiable, this Court held the wife was entitled to receive the “full sum” of the agreed non-modifiable maintenance award, and the trial court only had authority to “adjust the payment schedule” to provide the husband with “some sorely needed temporary relief.” *Glass*, 67 Wn. App. at 390. This Court held that any equitable relief must be “fashioned in such a manner that the full award will be paid within the time contemplated by the initial decree.” *Glass*, 67 Wn. App. at 391.

Here, once the court modified maintenance downward, Corrie was no longer entitled to the full sum of maintenance previously agreed by the parties, and the trial court erred in finding that Blaine was required to “make up” for those payments that were reduced after the court entered its modification orders.

2. Blaine was not required to “make up” maintenance during the period that his obligation was “suspended” when he had negative income.

The trial court’s finding that Commissioner Ponomarchuk’s 2009 order suspending maintenance “was not a modification of the maintenance order” (CP 393, 394-95) is wrong. The 2009 order clearly (and correctly) states that “maintenance is not non-modifiable and the court has discretion to modify,” and “the Petition for Modification of maintenance is granted.” (CP 270, 271) The 2009 order thus modified maintenance by suspending the obligation until further order of the court. (CP 270-71)

The trial court apparently (and incorrectly) believed that the fact that Blaine’s maintenance obligation was “suspended” meant that those amounts that would have been paid during that period would be owed later. (See CP 392-95) Where a term is undefined, courts give it its “plain and ordinary meaning, which can be derived from a dictionary.” *Lee v. Metro Parks Tacoma*, __ Wn. App. __, ¶ 7, 335 P.3d 1014 (2014). Merriam-Webster’s Online dictionary defines “suspend” as:

[1] : to force (someone) to leave a job, position, or place for a usually short period of time as a form of punishment

[2] : to stop (something) for a usually short period of time

[3] : to make (something) happen later : to delay (something)

Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/suspend> (last visited December 8, 2014). RCW 46.04.580, which deals with vehicle licenses, also defines suspend to mean “invalidation for any period [] until reinstatement.”

The language and context of the modification orders make clear that Blaine’s maintenance obligation was “suspended” consistent with the second definition in Merriam-Webster and RCW 46.04.580, *i.e.*, the obligation was “invalid” until reinstated without any expectation that it be “made up” at an unspecified later date. For instance, Merriam-Webster offers the example of a player “suspended from the team for missing too many practices.” *Merriam-Webster.com*, <http://www.merriam-webster.com/dictionary/suspend> (Example 1). Suspended players do not later play extra games to make up for the games missed; they simply return to the team when the suspension is over.

Here, Commissioner Ponomarchuk’s 2009 order reducing Blaine’s maintenance obligation by suspending it does not require payment of deferred maintenance, calculation of “make-up”

payments, enforcement or interest on maintenance “arrearages,” or extension of the maintenance term to make up the difference between maintenance originally anticipated in the Agreement and the amount Blaine actually paid. (CP 270-71) Commissioner Ponomarchuk’s order did not modify the dates at which Blaine’s maintenance would drop to \$4,000 per month, or when it would terminate entirely. (CP 270-71)

Commissioner Smith’s subsequent 2011 order also did not require Blaine to “make up” for those court-ordered (and later agreed) suspended payments. (*See* CP 273-74) Instead, Commissioner Smith devised a detailed formula that *prospectively* required Blaine to pay maintenance of at least \$2,000, and made no mention of any arrears predating the order. (CP 273-74) As in the 2009 order, Commissioner Smith’s order did not modify the dates at which Blaine’s maintenance would drop to \$4,000 per month, or when it would terminate entirely. (CP 273-74) Indeed, the order specifically directed that the modified maintenance “shall not exceed terms of the original settlement agreement.” (CP 274)

The trial court erred in finding that the 2009 order suspending Blaine’s maintenance obligation did not modify

maintenance, and requiring Blaine to “make up” for those missed payments.

3. **Requiring Blaine to make up maintenance payments that he could not afford would be contrary to the purpose of maintenance, which is to equalize the parties’ financial positions for an appropriate period of time.**

Ordering Blaine to make up payments he could not afford also conflicts with the purpose of maintenance, which is to equalize the financial positions of the parties for an appropriate period of time – not guarantee payment of a sum certain. *Marriage of Wright*, 179 Wn. App. 257, 269, ¶ 23, 319 P.3d 45 (2013) (“Maintenance is ‘a flexible tool’ for equalizing the parties’ standard of living for an ‘appropriate period of time.’”) (emphasis added), *rev. denied sub nom.* 180 Wn.2d 1019 (2014); *rev. denied sub nom.* 180 Wn.2d 1016 (2014) (citing *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984)). Maintenance is not awarded as a matter of right, but based on the paying spouse’s ability to pay. *Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994); RCW 26.09.090(1)(f).

Here, the parties agreed that Blaine would equalize the parties’ financial positions by paying maintenance through February 2017, when Blaine reached retirement at age 65, and

calculated the initial payment amounts on Blaine's income while the real estate economy was still booming. (CP 234) After the economy crashed, two family court commissioners modified maintenance to equalize the parties' positions based on current circumstances – when Blaine had no income, he paid no maintenance; when his income returned, his payments resumed with a minimum payment that was a half to a third of the original maintenance obligation, with additional amounts based on a formula.

There is nothing “unconscionable” (CP 395) about that result or an interpretation of the modification orders, which equalizes the parties' financial condition over the agreed period after their divorce. What would be unjust is to push Blaine's maintenance obligation past his retirement after he depleted his savings and incurred substantial debt to pay his obligations to Corrie. (CP 226, 324) *See Luckey*, 73 Wn. App. at 210 (trial court appropriately entered low maintenance award because obligor was “approaching retirement”). The language and context of the modification orders, as well as the underlying purpose of maintenance, make clear that neither order intended Blaine to make up “missed” maintenance payments.

4. The trial court and Commissioner Canada-Thurston relied on inapposite case law and the mistaken belief that the 2009 and 2011 orders did not “modify” maintenance.

The trial court misread two cases to hold that Blaine must “make up” the missed payments. The trial court also mistakenly held that Blaine sought an impermissible retroactive modification of his maintenance obligation based on the mistaken belief that the 2009 and 2011 orders had not already “modified” that obligation. This Court should reverse the trial court’s erroneous interpretation and application of the law.

The trial court erroneously held that *Marriage of Drlik*, 121 Wn. App. 269, 87 P.3d 1192 (2004), was “the law of the case” and required Blaine to make up the “suspended” payments. As an initial matter, the “law of the case” doctrine governs the binding effect of an appellate decision on subsequent proceedings in the trial court. *Roberson v. Perez*, 156 Wn.2d 33, 41, ¶ 21, 123 P.3d 844 (2005) (“the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.”). It has no application where, as here, there has been no appellate decision. *Worden v. Smith*, 178 Wn. App. 309, 324, ¶ 33,

314 P.3d 1125 (2013) (“to trigger application of the law of the case doctrine, there must generally be a prior appellate court decision in the same case.”) (internal quotation omitted).

To the extent there is any “law of the case,” it is that the maintenance under the parties’ original settlement agreement is modified “downward” and Corrie is no longer entitled to the full amount under the Agreement. If Corrie believed that maintenance could not be modified, or that she was entitled to arrears accrued prior to the 2011 order, she should have raised that by appealing the 2011 order. *Marriage of Trichak*, 72 Wn. App. 21, 24, 863 P.2d 585 (1993) (unchallenged decree of dissolution was law of the case). Her claim, three years later, that her maintenance could not be modified is too late.

In any event, *Drlik* does not support the trial court’s decision. In *Drlik*, the trial court “suspended” a husband’s maintenance indefinitely after he became ill with brain cancer. 121 Wn. App. at 274. The *Drlik* court noted that “the relevant meaning of ‘suspend’ includes ‘to set aside or make temporarily inoperative, to defer till later, to withhold for a time on specified conditions,’” and later stated “suspending maintenance is to temporarily defer or delay payment of the obligation until a later time.” 121 Wn. App. at

277. But *Drlik* did not actually reach, let alone resolve, the question here – whether “suspended” maintenance must be made up at a later date absent language to that effect – because it held that the trial court erred by suspending, rather than terminating, the husband’s maintenance in the face of his terminal illness. 121 Wn. App. at 279.

Even if it is not clear which definition of suspend was intended by Commissioner Ponomarchuk in the 2009 order – whether the order intended “to set aside or make temporarily inoperative” Blaine’s maintenance obligation or whether the order intended to only “temporarily defer or delay payment of the obligation until a later time,” it was clear that the court in 2011 intended that the maintenance obligation was “set aside” or “inoperative” during the suspension period because it makes no mention of any arrears purportedly owed by the husband for the two years prior to entering its order when he did not pay maintenance.

The trial court likewise erred in relying on *Abercrombie v. Abercrombie*, 105 Wn. App. 239, 19 P.3d 1056, *rev. denied*, 144 Wn.2d 1019 (2001), for the proposition that Blaine sought an “unconscionable” and “impermissible retroactive modification of

maintenance.” (CP 395; 6/6/14 RP 26 (trial court: this is “in all practicality, retroactively modifying a maintenance award”)) The trial court erroneously found that “the order of 2009 . . . was not a modification of the maintenance order.” (CP 360-61) In fact, both the 2009 and 2011 orders expressly stated that they were modification orders. (CP 270 (“Order on Modification of Maintenance”; “The Petition for Modification of Maintenance is granted.”), CP 273-74 (order entered “on Mr. Weber’s petition to modify maintenance”; “The Court modifies the maintenance obligation”)) Because the 2009 and 2011 orders had *already* modified maintenance, Blaine was not seeking “an impermissible retroactive modification of maintenance.”

Blaine sought only clarification of the 2009 and 2011 orders, which is the appropriate method for resolving the parties’ dispute over their meaning. *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969) (“A clarification . . . is merely a definition of the rights which have already been given”). Clarifying the orders does not run afoul of *Abercrombie*’s prohibition on retroactive modification of maintenance because it does not extend or reduce the parties’ rights “beyond the scope originally intended.” *Rivard*, 75 Wn.2d at 418.

This Court should reject the trial court's erroneous interpretation and application of Washington law.

B. Equity supports Blaine's interpretation of the modification orders – because of the economic crash, Corrie received more in additional interest on her note than she would have received had Blaine been able to afford maintenance.

The reason the courts modified Blaine's maintenance obligation "downward" in 2009 and 2011 was that the economic crash made it impossible for him to fulfill his maintenance obligation *and* pay the note owed to Corrie, which carried penalties that Blaine could not avoid since property, unlike maintenance, cannot be modified. *Thompson v. Thompson*, 82 Wn.2d 352, 510 P.2d 827 (1973). Even accepting Corrie's position that the Agreement guaranteed payment of a "sum certain," she has received that amount – and more. As a result of the economic crash, Blaine defaulted on his promissory note to Corrie, triggering escalated interest. Corrie received more in additional interest than she would have received had the economy remained stable, and Blaine made the note payments and his original maintenance payments. This Court should reverse the trial court's requirement that Blaine "make up" for payments he has in effect already paid.

An award of maintenance must be “just.” RCW 26.09.090; *see also* RCW 26.09.080 (property divisions must be “just and equitable). Had Blaine’s income remained stable, as the parties originally anticipated, Blaine would have paid Corrie \$171,916 in maintenance under the original agreement and \$55,800 in interest on the promissory note. (CP 225, 227) 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 provision. Blaine paid Corrie \$231,537 in interest, \$175,737 more than she would have received had the economy not crashed, and *more* than the \$171,916 in “missed” maintenance payments. (CP 226) Blaine was only able to pay that additional interest by taking out a \$300,000 second mortgage and a \$269,500 business loan, obligations he will be paying off for years to come. (CP 226)

Ruling that Corrie is now entitled to \$171,916 in “make up” maintenance payments, in addition to the extra \$175,737 in interest she received, would be an inequitable windfall neither party contemplated at the time of the Agreement or when the courts modified maintenance in 2009 and 2011. *Columbia Asset Recovery Grp., LLC v. Kelly*, 177 Wn. App. 475, 487, ¶ 23, 312 P.3d 687

(2013) (over \$1 million windfall was “antithetical to equity”). This Court should rule, consistent with the equities, that Blaine is not required to pay Corrie for “missed” maintenance payments after paying her more than she originally expected to receive under the Agreement.

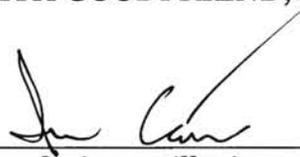
VI. CONCLUSION

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.

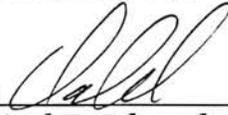
Dated this 8th day of December, 2014.

SMITH GOODFRIEND, P.S.

LAW OFFICES OF CARL T.
EDWARDS, P.S.

By:  _____

Valerie A. Villacin
WSBA No. 34515
Ian C. Cairns
WSBA No. 43210

By:   _____

Carl T. Edwards
WSBA No. 23316

Attorneys for Appellant

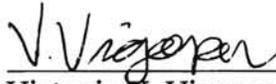
DECLARATION OF SERVICE

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

That on December 8, 2014, I arranged for service of the foregoing 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 checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-File
Carl T. Edwards Law Offices of Carl T. Edwards, P.S. 216 First Avenue South, Suite 315 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Philip C. Tsai Tsai Law Company, PLLC 2101 4th Ave., Ste. 1560 Seattle, WA 98121-2352	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 8th day of December, 2014.



Victoria K. Vigoren

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FAMILY DEPARTMENT OF
JUDICIAL ADMINISTRATION
KING COUNTY, WASHINGTON

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re:
Corrie Weber

Petitioner/Plaintiff,

vs.

Blain Weber

Respondent/Defendant.

No. 07-3-00384-7 SEA

ORDER

Clerk's Action required:

THIS MATTER came before the undersigned Judge/ Commissioner on Motion for:
Declaratory Relief filed by the Respondent, both
parties represented by counsel;

it is hereby ORDERED that ~~the Order of 2009~~ ^{the} ~~was not a modification of~~ ^{the} ~~the Maintenance Order to that~~ ^{end} ~~end the "sum suspended"~~ ^{did not under any circum-} ~~stances eliminate or nullify his~~ ^{original} ~~obligation under the PSA~~

Motion
Calend

Dated _____

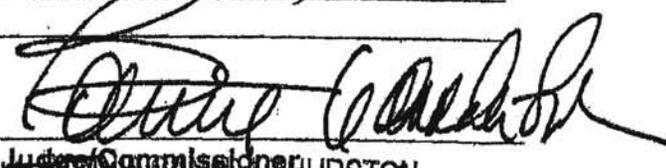
Judge/ Commissioner

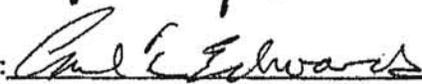
ORDER

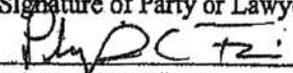
At the original and
final TBA trial the court
made the authority to retroactively
modify the maintenance back to
the date of filing of the
modification that court did
not. In this court to may
any change retroactively
to the PSA would not only
be unconstitutional, it would
violate the terms of arms
length bargaining that set
up the PSA and would be
analogous to retroactive
an impermissible structural
modification of maintenance
similar to *CD* as stated
in *Abicombel* 105 W.A. App.
239, 2001.

~~The issue of the issue~~

~~Atty gets denied~~

Dated: 5/16/2014 
Justice (Commissioner) THURSTON

Presented by: 
Signature of Party or Lawyer/WSBA No.
Carl T. Edwards WSBA 23316
Print or Type Name Attorney for
Blaise Weber

Signature of Party or Lawyer/WSBA No.

Print or Type Name WSBA # 27632

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF KING**

In re the Marriage of:

CORRIE WEBER,

and

BLAINE J. WEBER,

Petitioner,

Respondent.

NO. 07-3-00384-7 SEA

ORDER DENYING MOTION FOR
REVISION

THIS MATTER, having come regularly before the undersigned Judge, the Petitioner, Corrie Weber, appearing by and through her attorney of record, Philip C. Tsai of TSAIL LAW COMPANY, PLLC, the Respondent, Blaine J. Weber, appearing by and through his attorney, Carl T. Edwards, the court having reviewed the records and files herein, NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Respondent's Motion for Revision is DENIED.

ORDER DENYING MOTION FOR REVISION

TSAIL LAW COMPANY, PLLC
2101 Fourth Avenue, Suite 1560
Seattle, WA 98121
206.728.8000

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CLERK OF SUPERIOR COURT
KING COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re the Marriage of:
CORRIE WEBER,

Petitioner,

and
BLAINE J. WEBER,

Respondent.

NO. 07-3-00384-7 SEA
ORDER ON MODIFICATION
OF MAINTENANCE

I. BASIS

This Order is based upon the ~~findings and conclusions signed by the Court~~ below.

II. ORDER

It is Ordered:

The Petition for Modification of Maintenance is granted. ~~The Order Modifying Maintenance signed by the Court on this date or dated _____ is incorporated by reference as part of this Order.~~

~~Attorney fees, other professional fees and costs shall be paid as follows. Blaine Weber is awarded all fees and costs incurred in this action.~~

* See Page 2

Dated: June 26, 2009



Judge/Commissioner
LEONID PONOMARCHUK

1
2 Presented by:

Approved for entry:
Notice of presentation waived:

3
4 

5 LuAnne Perry, WSBA #20008
6 Attorney for Respondent

Philip C. Tsai

Philip C. Tsai, WSBA #27632
Attorney for Petitioner

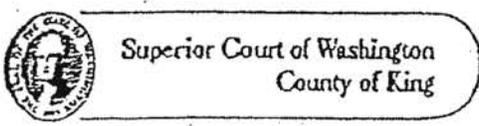
7
8 * The maintenance is not non-modifiable and the
9 Court has discretion to modify:

10 Obligor has made a showing of grounds/basis for
11 modification. The court will suspend the maintenance
12 for the months of June, July, Aug and September 2009,
13 Pursuant to the authority set forth in Drisk, 121, Wn. App. 269 (2004)
14 The Court will review the maintenance ~~modification~~
15 suspension on September 25, 2009 and is continuing the
16 trial to that date. The obligor shall provide updated
17 financial information to the ^{Petitioner's counsel and} court, ~~within~~. The obligor
18 shall provide profit + loss statements, Balance sheets
19 Cash disbursements postings for all principals, project
20 backlog, 2Q -09 report on compilation of Financial
21 statements and through Sept 15, 2009.

22 Both parties request for fees is denied.
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MICHAEL BUGNI & ASSOC.

FAM 01



Superior Court of Washington
County of King

Corrie Weber
Pet.
and
Blaine Weber
Res.

07-3-00384-7 SEA

No. TBA Maintenance
~~ORDER ON FAMILY LAW MOTION~~

RE: _____

Clerk's Action Required

THE ABOVE-ENTITLED COURT, HAVING HEARD A MOTION Trial by affidavit
on Mr. Weber's petition to modify maintenance
obligation and the Court having heard argument of
Counsel

IT IS HEREBY ORDERED

① Motion to strike Dec. of First Messenger dated
July 26 2011 and TBA brief filed July 26 is granted.
Respond shall pay \$147.50 as a sanction

② Court ~~will~~ shall find a basis to modify the maintenance
downward.

③ Court will impute income to Mr. Weber in the amount

Date: _____

SEE NEXT PAGE

FAMILY COURT COMMISSIONER

Presented By: _____

Copy Received: _____

Attorney For Petitioner

Attorney For Respondent

of \$100,000 per year. Court will impute income to Mrs. Weber in the amount of the median income for her age. This case involves a 33 year marriage and an original 9 year spousal maintenance obligation. *leg*

(4) The Court recognizes that draws to Mr. Weber may not be income. *beginning August of 2011. leg*

(5) The Court modifies the maintenance obligation to \$2,000 per month. Further, if Mr. Weber receives a draw of more than \$6,000 per month,

he shall pay to Mrs. Weber as additional maintenance 50% of the amount over \$6,000, such that: if he received \$10,000, his maintenance obligation for that month shall be \$2,000 + \$2,000 but maintenance shall not exceed terms of the original settlement agreement. *leg*

(6) Mr. Weber is awarded \$295 in fees due to the appearance of counsel on July 22, 2011. *on the FMC. leg*

(7) This matter shall be reviewed in July of 2012. If Mr. Weber has income not just draws then it may be brought sooner on the Family Law Motions Calendar. *leg*

(8) Quarterly updates re: financial documents in June 2009 order shall be provided by both parties including Mrs. Weber's job search efforts. *leg*

Date: July 29, 2011

[Signature]
JUDGE/COURT COMMISSIONER LORI K. SMITH

PRESENTED BY:
[Signature]
Attorney For: Petitioner
WSOA #27632

APPROVED:
[Signature] 2018
Attorney For: Mr. Weber