IN THE
# ARIZONA COURT OF APPEALS
## DIVISION ONE

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In re the Matter of:

ANNE HUEY, *Petitioner/Appellee*,

*v.*

BRYAN B. HUEY, *Respondent/Appellant*.

No. 1 CA-CV 20-0547 FC
FILED 7-26-2022

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Appeal from the Superior Court in Maricopa County
No. FC2018-001203
The Honorable Justin Beresky, Judge

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED**

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## OPINION

Chief Judge Kent E. Cattani delivered the opinion of the Court, in which Judge Samuel A. Thumma joined. Judge Brian Y. Furuya concurred in part and dissented in part.

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**C A T T A N I**, Chief Judge:

**¶1** Bryan Huey ("Father") appeals the decree of dissolution ending his marriage to Anne Huey ("Mother"). In this opinion, we vacate the superior court's award of indefinite spousal maintenance and the court's implicit denial of Father's request for reimbursement of taxes paid on behalf of the community. In a contemporaneously filed memorandum decision, we address and reject Father's remaining arguments, including those raising parenting time and child support issues.

**¶2** The superior court awarded Mother spousal maintenance for an indefinite term based on mental health concerns that, at least as of the time of trial, prevented her from obtaining adequate employment to be self-sufficient. We hold that in this context, absent evidence of a *permanently* disabling mental health condition, an award of *indefinite* spousal maintenance is not an available option. Here, because the only evidence was that Mother's disabling mental health condition was not considered permanent, the court erred by awarding spousal maintenance for an indefinite term. We thus vacate the award and remand for the superior court to determine an appropriate, discrete period of maintenance.

**¶3** Although we affirm the superior court's denial of Father's reimbursement request for payment of certain post-petition community expenses, we vacate the court's denial of Father's request for reimbursement of 2018 state and federal tax payments made on behalf of the community while the case was pending in superior court, directing the court on remand to specifically address whether and to what extent Father's payment of Mother's share of post-petition taxes is subject to reallocation.

## FACTS AND PROCEDURAL BACKGROUND

**¶4** Father and Mother married in 2006 and have two minor children. In March 2018, Mother filed a petition for legal separation, which was later converted to a petition for dissolution. After a two-day trial, the

court entered the dissolution decree now at issue. As relevant here, the court found Mother was eligible for spousal maintenance and awarded her $2,500 per month, with an indefinite duration. Additionally, the court expressly denied Father's request for reimbursement of certain community expenses he paid while the dissolution proceedings were pending, and the court implicitly rejected Father's request for reimbursement of any portion of the 2018 tax payments he made on the community's behalf.

**¶5** Father timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

## DISCUSSION

### I. Spousal Maintenance.

**¶6** We review a spousal maintenance award for an abuse of discretion, which includes an error of law. *See Helland v. Helland*, 236 Ariz. 197, 202–03, ¶¶ 22–30 (App. 2014) (reviewing challenge of the underlying award to determine if it is supported by reasonable evidence); *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23 (App. 2004) (noting that an abuse of discretion can result from an error of law in the process of exercising discretion).

**¶7** More than 30 years ago, the Arizona Supreme Court observed that the aim of spousal maintenance "is to achieve independence for both parties and to require an effort toward independence by the party requesting maintenance." *Schroeder v. Schroeder*, 161 Ariz. 316, 321 (1989). That directive has been followed, and amplified, in subsequent years. *See, e.g.*, *Ames v. Ames*, 239 Ariz. 246, 251, ¶ 23 (App. 2016); *Gutierrez v. Gutierrez*, 193 Ariz. 343, 349, ¶ 24 (App. 1998); *Hughes v. Hughes*, 177 Ariz. 522, 523 (App. 1993); *Rainwater v. Rainwater*, 177 Ariz. 500, 503 (App. 1993). And although after *Schroeder*, courts have continued to award indefinite spousal maintenance, such awards appear to be less common, and they have been closely scrutinized in appellate opinions.[1]

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[1] *Compare Rainwater*, 177 Ariz. at 501–02 (affirming indefinite spousal maintenance award to working spouse of "$1900 per month for three years or until one year after completion of her B.A. degree, whichever should first occur, and $1200 per month thereafter till her death or remarriage"), *Gutierrez*, 193 Ariz. at 349, 351, ¶¶ 24, 36 (affirming "lifetime spousal maintenance" to working spouse who "was unable to work more than twenty-nine hours a week at her current job"), *and Brebaugh v. Deane*, 211 Ariz. 95, 97, ¶ 1 n.1 (App. 2005) (noting separate memorandum decision

**¶8** In this context, we address an issue of first impression: whether, post-*Schroeder*, the superior court is authorized to award indefinite spousal maintenance when the receiving spouse's inability to be self-sufficient is based on a non-permanent mental health condition. Under the circumstances presented here, we conclude that such an indefinite spousal maintenance award is improper.

**¶9** The record showed that Mother earned over $90,000 per year in a managerial position as recently as 2015. But based on evidence that Mother was currently unemployed due to major depression and an anxiety disorder caused by Father's "repetitive and severe constant demeaning of her over the course of the marriage," the superior court found that Mother was "unable to be self-sufficient through appropriate employment." *See* A.R.S. § 25-319(A)(2). The court elected an indefinite duration because it was "unable to find that Mother has or will have the ability to achieve financial independence." *Cf.* A.R.S. § 25-319(B)(9).

**¶10** We accept the superior court's discretionary determination that Mother is currently unable to be self-sufficient. But the expert testimony on which the court relied in imposing an *indefinite* award did not establish that Mother's disabling condition would permanently prevent her from meeting her own needs. To the contrary, when the court asked whether the expert "consider[ed] [Mother's condition] to be a permanent disability," the expert responded, "No." Although the expert agreed that the duration of Mother's inability to work remained uncertain, he stated clearly that Mother's disability was *not* considered permanent. Accordingly, and given evidence of Mother's prior earning capacity, the

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affirming wife's entitlement to indefinite spousal maintenance, but remanding for the trial court "to resolve the amount of monthly maintenance" consistent with the opinion), *with Leathers v. Leathers*, 216 Ariz. 374, 377–78, ¶¶ 14–16 (App. 2007) (remanding award requiring husband to pay wife "one-half of the value of any Social Security old age benefits that he received," because it was unclear whether "the trial court took into consideration that wife would likewise be drawing Social Security benefits in her own name"), *Kelsey v. Kelsey*, 186 Ariz. 49, 50, 54 (App. 1996) (reversing award of "permanent spousal maintenance" where "the trial court's thorough consideration of this aggressively-lawyered and complicated maintenance issue contained some clear errors and omissions, requiring retrial"), *and Hughes*, 177 Ariz. at 523 ("We remand because the trial court did not make findings sufficient to sustain an award of indefinite duration.").

record does not support an indefinite spousal maintenance award based on her current mental health diagnosis.

**¶11** We acknowledge that spousal maintenance awards are presumptively modifiable, and that if we were to affirm the indefinite award, Father could seek a modification if Mother's condition improves. *See* A.R.S. § 25-327(A); *see also Rainwater*, 177 Ariz. at 504 (citing *Schroeder*, 161 Ariz. at 323). But an indefinite spousal maintenance award places the burden on the paying spouse to show a change in circumstances sufficient to warrant ending or modifying the award. *Rainwater*, 177 Ariz. at 504. And although Father would in theory be able to seek modification of an indefinite award if Mother's mental health improved, in practice, it would place Father in the untenable position of having to decide whether to challenge Mother's subsequent mental health condition without ready access to mental health records and with a relatively limited basis from which to assess a change in circumstances. Moreover, placing the burden on Father would create a likelihood of multiple challenges based on perceived changes in Mother's mental health condition, even if an initial challenge is unsuccessful.

**¶12** In contrast, a fixed-term award places the burden on the receiving spouse to show a change in circumstances warranting extending the award as the fixed term comes to an end. *Id.* And here, if Mother's mental health condition does not improve—even after being removed from the situation that arguably caused the condition—she will be much better situated to offer evidence (or to decide in the first instance whether to proffer updated mental health evidence) to establish a basis for extending a fixed-term award. *See id.* Thus, after the court imposes a fixed-term award on remand, the subsequent burden properly falls on Mother to demonstrate circumstances showing why a transition toward financial independence should be further delayed to justify future modification.[2]

**¶13** Our dissenting colleague acknowledges the *Schroeder* framework under which spousal maintenance claims are analyzed but

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[2] Under these circumstances, a fixed-term award is necessarily based on an expectation that Mother's mental health condition will improve such that she is able to return to work during that time period. The superior court on remand should include an express statement to that effect to ensure the record remains clear that Mother may establish a future change in circumstances justifying extension of the award by showing that her condition has not resolved.

reaches a different conclusion here in large part based on the holding in *Rainwater*, in which this court rejected a paying spouse's argument that indefinite maintenance could only be awarded "to a spouse who is 'permanently unable to be self-sustaining.'" 177 Ariz. at 503. But the decision to affirm an indefinite award in *Rainwater* turned not on the permanence of a particular condition, but instead on the receiving spouse's ultimate earning potential in relation to the standard of living established during the marriage. *Id.* *Rainwater* in fact confirmed that "the transition toward independence [is] a principal objective of maintenance under 25-319(B)," and that "maintenance orders, whenever possible, should promote a transition toward financial independence." *Id.*; *see also id.* at 502 (further noting that the maintenance award at issue was to be reduced from payments totaling $22,800 to $14,400 per year after no more than three years or when the receiving spouse received her B.A. degree, whichever came first).

**¶14** Of particular significance, in *Rainwater* there was no suggestion that the receiving spouse could realistically achieve independence, even if employed. The court noted that at the time of dissolution, the receiving spouse was a 41-year-old secretary who was working to earn a college degree. *Id.* at 501. The evidence showed that she was only capable of earning $20,000 per year, *id.* at 502, which was insufficient to sustain her in the standard of living the couple had enjoyed during the marriage. *Id.* at 504. And the court found that, even after completing her college degree, her earning potential would only increase to approximately $27,000—still far short of meeting her reasonable needs. *See id.* at 502, 504.

**¶15** Here, in contrast, the record does not support a finding that Mother's mental health issues will forever prevent her from becoming financially independent. Mother testified that, until the onset of her disabling mental health condition, she earned over $90,000 per year, which would be more than sufficient to cover the approximately $60,000 (the combination of Mother's current spousal maintenance and disability benefits) the superior court deemed necessary to cover Mother's reasonable needs. Thus, unlike the spouse receiving maintenance in *Rainwater*, Mother can potentially earn a significant income (if her mental health improves).

**¶16** Our dissenting colleague notes that the superior court retains significant discretion in determining the parameters of a spousal maintenance award, and he asserts that we are substituting our judgment for that of the superior court. But our holding is that the superior court

lacks authority to impose an indefinite award under these circumstances; thus, there is no discretion to exercise in this context.

**¶17** Our dissenting colleague further notes that no case law or statute requires the conclusion we reach here. But our decision is consistent with the principles announced in *Schroeder*, which is the relevant controlling authority from our supreme court, and nothing precludes us, as a matter of first impression, from clarifying that an indefinite spousal maintenance award cannot be based on a non-permanent mental health condition.

## II. Division of Property: *Bobrow* Reimbursement.

**¶18** Father contends that the superior court abused its discretion by failing to reimburse him for numerous community expenses he paid in accordance with temporary orders during pendency of the dissolution proceedings. Under *Bobrow v. Bobrow*, 241 Ariz. 592 (App. 2017), post-petition expenditures paid by one spouse with separate property to service community debt are not presumptively gifts to the community, and the paying spouse thus is generally entitled to reimbursement. *Id.* at 596–97, ¶¶ 19–20. The superior court may account for such payments in a variety of ways to achieve an equitable property division, *see Hammet v. Hammet*, 247 Ariz. 556, 561, ¶ 26 (App. 2019), and the court may, in appropriate circumstances, retroactively apply such payments as temporary spousal maintenance, *see Barron v. Barron*, 246 Ariz. 580, 591, ¶ 43 (App. 2018), *vacated in part (¶¶ 24–30) on other grounds*, 246 Ariz. 449, 452, ¶ 21 (2019).

**¶19** In mid-2018, the superior court entered temporary orders (as agreed by the parties) requiring that (1) Father pay certain community expenses related to the marital residence, the parties' insurance, and the parties' 2018 quarterly tax payments "[o]n a temporary basis," and (2) Father pay Mother $1,000 per month (later increased to $1,500 per month) in temporary spousal maintenance effective May 2018. At trial, the parties disputed whether the court should retroactively adjust the amount of temporary spousal maintenance and likewise disputed whether the court should reimburse Father for his payment of those community expenses—although Mother agreed that the 2018 tax payments should be reallocated. The superior court ultimately ordered Father to make an additional lump-sum payment of $20,000 in retroactive spousal maintenance for the period beginning January 2019 and concurrently denied his reimbursement request, reasoning that Father was ordered to pay the residence and insurance expenses "in the context [of] an appropriate award of spousal

maintenance early in this case." The court did not mention reallocation of the 2018 tax payments.

**¶20** Father asserts that the superior court could not permissibly deny reallocation of his post-petition residence and insurance payments under *Bobrow* while concurrently ordering an additional $20,000 in retroactive spousal maintenance. But *Bobrow* permits the superior court to account for such post-petition payments by (if appropriate) applying them as a retroactive award of temporary spousal maintenance. *See Barron*, 246 Ariz. at 591, ¶ 43. And here, the court exercised its discretion to deny reallocation precisely because those payments formed a part of what the court deemed "an appropriate award of temporary spousal maintenance early in this case." Even considering the additional $20,000 payment ordered, given the financial disparity between Father and Mother, the superior court did not abuse its discretion by also applying Father's post-petition payments of residence and insurance expenses as retroactive spousal maintenance. *See id.*; *see also* A.R.S. § 25-318.

**¶21** As to the 2018 tax payments, however, the court erred. Father paid the taxes at issue—totaling nearly $10,000—in accordance with the August 2018 temporary orders. Although the temporary orders did not indicate whether the tax payments would later be subject to reallocation, there is no evidence that Father intended the payments to be a gift to Mother. To the contrary, in the joint pretrial statement, both Mother and Father agreed that the 2018 tax payments should be reallocated: Father proposed a 50%–50% split, while Mother urged a 28%–72% division proportional to their respective incomes that year. Although the court can account for Father's payment of Mother's portion of the 2018 tax payments in various ways to achieve an equitable division of the community's assets, *see Hammet*, 247 Ariz. at 561, ¶ 26, the superior court here did not explain why Father's payment of this community expense should not be reimbursed (at least to some degree) or how it was otherwise accounted for in the property division. Accordingly, we vacate the implicit denial of reimbursement as to 2018 tax payments and remand for the court to address this issue.

## CONCLUSION

**¶22** For the foregoing reasons, we vacate the superior court's award of spousal maintenance to Mother for an indefinite term and remand for further proceedings to reduce the duration of the award to a specified and limited time consistent with this opinion. We further direct the court

on remand to address the *Bobrow* issue presented by Father's 2018 tax payments. In all other respects, we affirm.

**F U R U Y A, J.**, dissenting in part, concurring in part:

**¶23** I respectfully dissent as to the majority's reversal of the superior court's award of indefinite spousal maintenance. In all other respects, I concur with the majority's opinion.

**¶24** In my view, and as concerns the court's award of indefinite spousal maintenance, "[t]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason." *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571 (1985) (quotation omitted).

**¶25** The court may award spousal maintenance for any of the five reasons listed in A.R.S. § 25-319(A), which include an award to a requesting spouse who it finds is "unable to be self-sufficient through appropriate employment." In determining the duration of spousal maintenance, the court must consider all relevant factors under A.R.S. § 25-319(B), which include a spouse's "earning ability and physical and emotional condition." While "the transition toward independence [is] a principal objective of maintenance under 25-319(B)," the court may nevertheless award "indefinite maintenance when it appears from the evidence that independence is unlikely to be achieved." *Rainwater v. Rainwater*, 177 Ariz. 500, 503 (App. 1993). Such a determination is necessarily dependent upon the given facts of the case at hand.

**¶26** Here, the court granted Mother, then 49 years old, indefinite spousal maintenance after finding she was "unable to be self-sufficient through appropriate employment" and that Mother did not have—nor was capable of achieving—financial independence. In my view, such findings are supported by the record. Mother sought disability income after her mental health diagnosis and stopped working at American Express in 2015—her former employer of ten years. Mother's disability income from social security amounted to approximately $2,500 per month, whereas Father's gross monthly income for 2019 exceeded $16,000 per month. The court heard testimony from Mother and her treating psychiatrist, Dr. Henry Schulte, that she was incapable of returning to work at the time of trial because of her disorder and that it was unknown when—or if—she could ever go back to work. Such evidence expresses uncertainty of duration, and not necessarily impermanence.

**¶27** Father asserts, and the majority agrees, Mother is not entitled to an indefinite spousal maintenance award absent evidence she would definitively remain permanently disabled. The majority observes that the record does not contain evidence establishing Mother's disability is permanent. But while it is true this record does not prove Mother's disability is conclusively and irreversibly permanent, there was evidence her disability is both immediately operative and of indefinite duration. Further, the evidence did establish that it is uncertain whether she will ever recover sufficiently to again support herself through employment. The court specifically asked Dr. Schulte, "[i]s it unknown the duration of whether and if [Mother] could ever go back to work?" Dr. Schulte responded affirmatively. There is no question Father disagreed with this conclusion and presented his own evidence to minimize Mother's diagnosis and prognosis. In view of such evidence, I believe it far from clear that Mother's disability is "non-permanent." And it is the province of the superior court to weigh and resolve any factual disputes. *See Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, 151, ¶ 18 (2018) ("The resolution of conflicting evidence is uniquely the province of the juvenile court, and this rule applies even when sharply disputed facts exist." (cleaned up)). *See also Lehn v. Al-Thanayyan*, 246 Ariz. 277, 284, ¶ 20 (App. 2019) ("On appeal, we do not reweigh the evidence but defer to the family court's determinations of witness credibility and the weight given to conflicting evidence.").

**¶28** In any case, neither Father nor the majority cite any authority that one must be permanently disabled to qualify for indefinite spousal maintenance. I cannot discern either statute or case law where proof that a spouse is permanently disabled is required as a necessary precondition of an indefinite spousal maintenance award. *See* A.R.S. § 25-319(B) (stating the superior court, among things, need only consider the "physical and emotional *condition* of the spouse seeking maintenance" in determining the duration of a spousal maintenance award) (emphasis added); *In re Marriage of Hinkston*, 133 Ariz. 592, 593–94 (App. 1982) (noting it was "proper for the trial court to consider [wife's] undisputed medical condition and the effect it might have on her future ability to sustain herself" in awarding indefinite spousal maintenance). Indeed, to the contrary, the *Rainwater* Court appears to have rejected this argument. 177 Ariz. at 503 (rejecting husband's argument "that indefinite maintenance can be awarded only to a spouse who is 'permanently unable to be self-sustaining'").

**¶29** In the absence of contrary authority, I believe the law does not require Mother to prove her disability is necessarily and irreversibly permanent to qualify for an award of indefinite spousal maintenance.

Rather, Mother was required to present evidence that her "independence is unlikely to be achieved." *Id.* This she did, and I believe the court did not abuse its discretion in granting that award here without receiving evidence of permanence.

**¶30** The majority states that *Rainwater*'s principles turn on a spouse's ability to be "self-sustaining," versus a focus on "permanent[] disab[ility]." I do not disagree that the meaning of "self-sustaining" is of critical import to the *Rainwater* decision, but note that in the context of this case, the question of ability to be "self-sustaining" is inseparably fused with the nature of Mother's disability. Here, the court found Mother was unable to sustain herself because of her disability, and further it is not certain when—*or even if*—she would ever be able to return to work to be self-sustaining. As such, I find *Rainwater* applicable and compelling.

**¶31** I also respectfully disagree that *Rainwater* is factually distinguishable from the instant case in any relevant manner. For instance, the majority observes the spousal maintenance award in *Rainwater* was structured to incentivize the receiving spouse to pursue further education and obtain better employment by reducing the amount of the award after the passage of no more than three years, something absent from Mother's award in this case. However, such incentivization would be inapplicable and inappropriate in this case. Here, Mother did not need encouragement to seek education to pursue more lucrative employment. Instead, the court's finding was that her disability prevented employment that would allow Mother to achieve necessary levels of self-sufficiency. Thus, the salient fact shared by both cases is that the permanent awards constituted "a prediction by the trial court that one spouse will never be able to independently approximate the standard of living established during marriage, and that the other spouse will remain financially able to contribute to the first spouse's support." *Id.* at 505. In this case, as in *Rainwater*, after consideration of the evidence of record, the court predicted that, for the foreseeable future and no matter what measures Mother takes, she will not be able to independently achieve the standard of living that had been established during her marriage.

**¶32** The majority also maintains *Rainwater* is distinguishable because the spousal maintenance award in that case was predicated on evidence that even after improving her education, the receiving spouse would not be able to earn sufficient income to be self-sustaining on the level enjoyed during her former marriage. The majority points to evidence in this case of Mother's most recent salary in 2015, which was $93,000, arguing that "Mother is capable of earning a significant income if her mental health

improves." But the record is also clear that Mother lost her $90,000+ annual income more than six years ago due to her disability. And nothing in this record establishes Mother would be capable of earning an equivalent income in Iowa, after being removed from the workforce for such an extended period.

**¶33** Further, setting aside concerns of whether Mother's former salary could sufficiently establish her ability to independently approximate the standard of living established during the marriage—considering Father's yearly earnings, which in 2019 were approximately $192,000—validity of the majority's critique depends upon the premise that Mother's mental health, at the very least, is likely to improve. If Mother's mental health is not at least likely to improve, her salary from more than half a decade ago would be entirely irrelevant, since it would be unlikely to be obtained in the future. But any assumption that Mother's condition is likely to improve contradicts the superior court's findings.

**¶34** The majority relies on the expert's acknowledgement that Mother's disability was not permanent. But Dr. Schulte did not testify that Mother's condition will undoubtedly improve. When viewed as a whole, the expert's testimony can just as readily be taken as an expression that the permanence of Mother's condition is unknown and its future duration and effect uncertain. That the expert did not view Mother's disability as "permanent"—perhaps in the same indisputably verifiable sense that loss of a limb is a "permanent disability"—does not necessarily mean Mother's condition was not debilitating, or that it could not last Mother the rest of her life, or that one must assume that Mother's condition will improve. Beyond the question of whether mental health disabilities of the kind at issue in this case are ever capable of such precise and certain prognosis, it should be the unique and proper province of the superior court to resolve such questions after fully weighing the evidence presented. *Alma S.*, 245 Ariz. at 151, ¶ 18. Though Father opposed it, I believe the court's finding is supported by sufficient evidence, and that it is beyond our prerogative to reweigh that evidence. *Lehn*, 246 Ariz. at 284, ¶ 20.

**¶35** Furthermore, absent agreement to the contrary—as is the case here—"maintenance awards are modifiable." *Rainwater*, 177 Ariz. at 503 (citing *Schroeder v. Schroeder*, 161 Ariz. 316, 323 (1989)); *see also* A.R.S. §§ 25-317(F)–(G), -319(C), and -327(A). An indefinite award "does not lock long-term maintenance irrefutably into place" but rather "places the burden on the paying spouse to prove a later change in circumstances sufficiently substantial to warrant shortening the duration of the award." *Rainwater*, 177 Ariz. at 504; *see also* A.R.S. § 25-327(A). Thus, Father would be able to obtain

modification if he later demonstrated a "substantial and continuing" change in circumstances. *See* A.R.S. § 25-327(A).

**¶36** The majority notes Mother has more ready access to the information and documentation that could be used to establish a substantial and continuing change in circumstances, since it is her medical condition that is at issue. However, nothing in statute or our case law suggests that such concerns preclude the validity of an award of indefinite spousal maintenance. Instead, per A.R.S. § 25-319(A), it is for the superior court to exercise its "broad discretion" in determining Mother's "need for maintenance," *Hinkston*, 133 Ariz. at 594, as well as to determine in what amount, for how long, and to whom the burden should fall to demonstrate substantial and continuing change in circumstances, A.R.S. § 25-319(B); *Rainwater*, 177 Ariz. at 504–05.

**¶37** Though it may be easier for Mother to obtain the documentation establishing a change of circumstances as to her condition, nevertheless, I believe the decision to allocate the burden of seeking modification properly rests with the superior court and we should owe the court appropriate deference in that decision. *See Rainwater*, 177 Ariz. at 505 (citing *Oppenheimer v. Oppenheimer*, 22 Ariz. App. 238, 243 (1974) (illustrating that the "burden of seeking modification of an award of spousal maintenance may be placed on either party, in the discretion of the trial court")). Although it certainly could have elected to do otherwise, I do not believe the superior court abused its discretion in allocating this burden to Father, given the evidence in this record. *See id.* at 505 ("An award until death or remarriage is a prediction by the trial court that one spouse will never be able to independently approximate the standard of living established during marriage, and that the other spouse will remain financially able to contribute to the first spouse's support. When, as in this case, that finding is supported by the evidence, we find no inequity in placing the burden on the paying spouse to later prove that a substantial and continuing change of circumstances has occurred.").

**¶38** In closing, a great many debilitating mental health conditions may be incapable of prognosis with medical certainty as "permanent," but nevertheless could be reasonably regarded as likely life-long impairments. The majority's opinion will now require evidence that a disability be definitively permanent as a prerequisite to an award of indefinite spousal maintenance. I fear this forecloses the superior court's exercise of discretion to award indefinite spousal maintenance when confronted with such situations. I disagree that because one may be unable to establish with medical certainty that a disability is "permanent," it means the court

necessarily must assume that disability is transient and likely to improve. Rather, I believe that when confronted with evidence of a serious disability of indefinite duration, the superior court should have discretion to determine if that evidence sufficiently establishes the likelihood that the disabled spouse will never be able to be independently self-sustaining, thereby justifying an award of indefinite spousal maintenance.

**¶39** Thus, on this record, I would affirm the superior court's award of indefinite spousal maintenance to Mother.

AMY M. WOOD • Clerk of the Court
FILED: JT