

NO. 35157-9-II

**STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II**

In the Marriage of
MARTIN HULSCHER,

Respondent,

v.

JANICE HULSCHER,

Appellant.

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REPLY BRIEF OF APPELLANT

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ARGUMENT

1. The trial court erred in its application of *Short* and the Respondent ignored those authorities acknowledging that a separation contract can be contained in the parties' Findings of Fact and Conclusions of Law and the Decree of Dissolution of Marriage and need not be a separate document.

Respondent Martin Hulscher ("Martin") failed to acknowledge those authorities cited by the Appellant Janice Hulscher ("Janice") in her opening brief which permit parties in a dissolution of marriage action to set forth the terms, within the language and text of their Findings and Decree, a non-modifiable spousal maintenance agreement. These authorities do not call for a separate document entitled "Separation Contract" for there to be an enforceable agreement for non-modifiable spousal maintenance.

As cited in the Janice's opening brief, *In re Marriage of Glass*, 67 Wn. App. 378, 835 P.2d 1054, approves of the means by which the parties' entered into the non-modifiable spousal maintenance agreement in their divorce. In footnote 13 of the *Glass* opinion, the court stated:

Although we find no formal "separation contract" in the record for this appeal, the decree of dissolution of marriage, which was signed by both parties, as well as their respective attorneys, was entered by agreement of the parties and the decree itself sometimes refers to itself as the parties' "property settlement agreement."

Glass, p. 390.

Once the parties have agreed to non-modifiable spousal maintenance, the court lacks the power to set it aside:

A separation contract which precludes or limits the court's power to modify an agreed maintenance award, once approved by the court and embodied into a decree is to be enforced in accord with its terms. RCW 26.09.070(7). Except in cases where the contract was unfair at the time of its execution, such provisions are to be enforced

by our courts. RCW 26.09.070(3). *In re Marriage of Yearout*, 41 Wn. App. 897,901, 707 P.2d 1367 (1985). Although Robert has not argued in this appeal that these parties' separation contract was unfair at the time it was executed, the time for such a challenge has expired in any event. Any such challenge must be made prior to the entry of the decree by which the separation contract is approved by the court. RCW 26.09.070(3), (7). If such challenges were to be allowed years later, at the time of a modification proceeding, the provisions of RCW 26.09.070(3) and (7) would be rendered meaningless.

Glass, p. 390.

As the parties in *Glass* did, the Hulschers made the following references to their separation agreement in their final documents:

FINDINGS OF FACT: ¶ 2.7, 2.12, 2.20.4, 3.3 and 3.6
CP 11 - 17

DECREE OF DISSOLUTION: ¶ 3.7, 3.14.1 CP 29-37

The Hulschers made it clear to the court that there was no separate, stand alone written separation agreement. However, they also made it clear in their Findings of Fact and Conclusions of Law that their final papers constituted that agreement:

There is no written separation contract or prenuptial agreement. The parties have reached an agreement on the terms of the settlement of this marriage dissolution action. The final pleadings signed by the parties constitute that agreement and the parties have asked that the Court adopt their agreement.

CP 12.

In the Martin's Opening Brief, there was no mention of *Glass* or of the rule permitting the final divorce papers to be deemed a separation contract for non-modifiable spousal maintenance purposes.

Similarly, Martin's brief ignored the citation in Janice's opening brief regarding the fact that 19 *Washington Practice Family and Community Property* §19.8 specifically affirms *Glass* and RCW 26.09.070. (7) and states, "If the decree has been signed by both parties as a stipulated instrument it may be considered to also constitute a separation contract."

The Washington Practice series is found in every court, county law library and law school in this state. It is also available on the most basic Westlaw subscription. It is found in the offices of the majority of attorneys in this state.

Family law practitioners regularly refer to Washington Practice in the representation of their clients. That this publication has concluded that a stipulated decree constitutes a separation contract is a conclusion drawn by its editors after their reading of *Glass*. To believe otherwise, as does Commissioner Gelman and Judge Cuthbertson is reversible error on their part.

2. The trial court erred in striking the non-modifiable spousal maintenance provision. The parties agreed to non-modifiable spousal maintenance which is permitted by law. A trial judge cannot make such an award whereas the parties can make such an agreement.

Janice submits that the reason that Marty did not mention the ruling in *Glass* is that were he to do so, he would completely undercut the argument that he made before Commissioner Gelman and Judge Cuthbertson.

In both forums, Martin argued that a separate document was needed and that since none existed, the court had the ability to modify the spousal maintenance obligation to which he had agreed.

However, the court in *Glass* held that the parties are free to agree to non-modifiable spousal maintenance, but that a court could not order such a finding from the

bench. The existing law in Washington is that a party may always request a modification of spousal maintenance upon a showing of a substantial change of circumstances that the parties did not contemplate at the time of the dissolution decree. *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.2d 769 (2001).

Because of the right of a party to seek to modify a spousal maintenance award, the court cannot take away that right by ordering non-modifiable spousal maintenance at the conclusion of a divorce trial where the court has admitted exhibits and taken testimony. On the other hand, if the parties want to avoid a trial and agree themselves to lifetime maintenance, the courts will not set that agreement aside. *Glass* p.30.

As with a criminal defendant waiving his/her *Miranda* rights, a party in a civil proceeding can enter into a voluntary agreement that is a greater obligation than what the law requires. *Untersteiner v. Untersteiner*, 32 Wn. App. 859, 650 P.2d 256 (1982).

Accordingly, if Martin wanted to agree to non-modifiable maintenance, there was no legal reason why he was not able to do so. Once the Hulschers made their agreement, and it was approved by approved by the court and filed with the clerk “such provisions are to be enforced by our courts.” *Glass* p. 30.

Martin agreed to provide non-modifiable spousal maintenance to Janice and only changed his mind after he had remarried and wanted to start a new family. At that point in his life, Janice had become a financial burden and Martin sought to ease her out of the picture.

3. There is no evidence that the parties intended that the spousal maintenance agreement could be modified and that the agreement was unfair. The parties' property agreement was fair and the Respondent, while choosing to proceed pro se, retained all of his retirement benefits as a longshoreman without a lien thereon for the Appellant. It is the trial court's ruling of June 30, 2006 which

arbitrarily reduced the Appellant's spousal maintenance which was unfair and unjust.

Janice described the process by which she and Martin agreed to non-modifiable spousal maintenance:

We amicably agreed to a settlement of our marriage dissolution. After our settlement, we waited for over a year to finalize the dissolution of marriage. During the time that we waited, Marty's income increased substantially, yet we did not increase the spousal maintenance or child support payments.

....

Whenever, possible, I have tried to save money, even since the entry of the dissolution decree. For example, I suggested to Marty that it would be wise for him to delay entry of the decree into 2004 rather than the later part of 2003 which was a significant tax savings for Marty. The delay also reduced the expense for my medical coverage. Note that we signed the Findings of Fact and Conclusions of Law on May 8, 2003 and that the Decree was not entered until February 23, 2004.

CP 71-72.

Marty and I spent a significant amount of time to arrive at the agreement that is set forth in the decree of dissolution. The spousal maintenance amount was based upon my needs. After paying spousal maintenance, Marty was left with a substantial income, plus all of any increases in his income. As I mentioned earlier, Marty's income increased substantially from the time that we negotiated the agreement until the entry of the decree of dissolution.

The agreement reached for the dissolution of our marriage was fair. It took into consideration my needs and Marty's ability to pay. It took into consideration the circumstances of our long marriage. I quit my job in a pharmacy so that I could concentrate on raising the children while Marty concentrated on his career. As a result Marty earns a substantial income. Also as a result, I have not been employed for some time. I have not been building retirement and I do not have health insurance and other employment related benefits. In other words, Marty would not be earning his substantial income without my participation. We focused on the education of our sons, who are both now college

students. We focused on competitive tennis for our sons. Our sons have been successful as a result of our plans.

Although Marty's expenses have increased since the entry of the dissolution, he has done so voluntarily. Marty has known that he has spousal maintenance and child support obligations. Marty chose to increase his expenses and in particular to spend so much of his money on building and furnishing his new home and on purchasing an expensive luxury car...

The request to change spousal maintenance is due to Marty's circumstances now and not the circumstances that existed at the time that we reached the agreement. I do not begrudge Marty's lavish lifestyle, but in view of the fact that his lifestyle has increased and mine has decreased, it is further frustrating to me that he expects me to decrease my lifestyle further by not honoring his financial obligation to me. I have relied upon the agreement in my financial planning. If the Court alters the spousal maintenance provisions, I will need to change my plans,

CP 76-77.

A review of the assets distributed to each of the parties shows that Martin kept all of his longshoreman retirement intact as well as all of his other employment related benefits. Janice did not claim any of Martin's retirement despite their being married for 24 years. Why would she walk away from such a valuable asset unless she knew that she could count on the spousal maintenance agreement that she had made with Martin? To do otherwise, does not make any sense.

Janice's main asset awarded to her was the family home. She was awarded minimal assets that could be easily liquidated such as stock held in a 401 (k) plan.

At the time of the divorce, Janice had not worked in years and was not in good health suffering from fibromyalgia and partial deafness.

However, Martin was able to continue to work as a longshoreman earning \$20,453.86 per month, or \$245,446.32 per year.

Under the terms of the parties' decree, Martin was to pay spousal maintenance of \$4,766.67 per month of which sum, \$1,218.67 was deemed child support for the parties' son, Kevin during his minority. After Kevin turned 18 years old, Martin would still pay the same amount of \$4,766.67 per month, but all of it at that time would be deemed spousal maintenance.

The amount of maintenance that the parties agreed to resulted in Martin's spousal maintenance payments totaling 17% of his income while Kevin was a minor and 23% of his income after Kevin reached age 18 and Martin's child support obligation ceased.

Martin's income has gone up since his financial declaration was filed in March 2006. Moreover, his new wife Holly is a "B" card longshoreman and makes on average \$101,154 per year. CP 162-167. When the estimated current incomes of Martin and Holly are added, there is a gross income to that household of approximately \$346,600 per year or \$28,883 per month.

In Martin's home there is now a monthly income of nearly \$30,000 whereas in Janice's there is minimal income. In fact, Janice has to use a personal line of credit so that she can pay her bills on time.

Against this backdrop, the trial court reduced Janice's spousal maintenance by 70% from \$4,766 per month to \$1,500 per month. The trial court also shortened the term for which it was to run to a total of 24 months starting on May 1, 2006 and ending on May 1, 2008. CP 429-431.

This two year period is six years less than what Commissioner Gelman had ordered Marty to pay holding that maintenance should be paid by Martin for eight years on a declining basis until 2014. CP 386.

On top of everything else that the trial court did, it ruled that “the issue of overpayment of spousal maintenance is reserved.” CP 453. In other words, Martin’s request for his claim of a spousal maintenance overpayment of \$9,000 is still before the court for its determination. CP 437.

The result of the trial court’s ruling is that starting in seven months, on May 2, 2008, despite Martin’s agreement to the contrary, he no longer owes any spousal maintenance to Janice and she is completely on her own despite their marriage of 24 years.

If the June 30, 2006 court order is permitted to stand, Martin will have paid spousal maintenance for a mere four years and in return for that, Janice has absolutely no lien on any of his retirement, income or any other benefit that he has through work. This has been a good investment for Martin.

It is precisely this arrangement that the court in *Glass* warned about:

If such a challenge were to be allowed years later, at the time of a modification proceeding, the provisions of RCW 26.09.070(3) and (7) would be meaningless.

Glass, p. 390.

Specifically, RCW 26.090070(7) provides that “ when the separation contract so provides, the decree may expressly preclude ... modification of any provision for maintenance...”

The language of RCW 26.09.070(7) could not be more clear – a separation agreement can “preclude modification of any provision for maintenance.” In *Glass* and in 19 *Washington Practice Family and Community Property Law* §19.8 it is clear that the final papers of a divorce can “comprise” the separation contract referred to in the statute. Thus, the court commissioner and the trial court clearly erred when it struck the non-modifiable maintenance provision and reduced Janice’s spousal maintenance by 70% and further that it terminate within two years.

Martin cites no authority in support of his claim that the agreement was unfair because Thomas Ryan was perceived by him to be the attorney for both parties. Martin signed the Decree and the Findings of Fact and Conclusions of Law as “Martin Hulscher, pro se.” As such, he knew that he was representing himself and could not rely upon Mr. Ryan who signed the same documents and was identified as the “Attorney for Respondent.”

CONCLUSION

Despite Janice’s citation of *In re Marriage of Glass* and 19 *Washington Practice Family and Community Property Law* § 19.8, Martin did not challenge the principle that those two authorities set forth.

Stated briefly, both *Glass* and 19 *Washington Practice* acknowledged that a separation contract, as identified in RCW 26.09.070 can be “comprised” in the terms set forth in the parties’ final divorce papers. This was clearly accomplished by the parties in this case.

Once *Glass* and *Washington Practice* are acknowledged, the ruling of the court commissioner and the trial court are in error and should be reversed.

The trial court's ruling to reduce Janice's maintenance by 70% is grossly unfair and not based upon any fact. It is also a misapplication of the holding in *Short* which only held that a trial court cannot award non-modifiable spousal maintenance as a part of its verdict at the end of a trial. Such an agreement can only be made by the parties themselves.

Because Martin and Janice negotiated a settlement agreement over many months and because they lived according to its terms before it was even entered, Martin should be held to that agreement. To do otherwise, in the words of *Glass* would be to render RCW 26.09.070 "meaningless."

DATED this 4th day of November, 2007.

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WASHINGTON STATE COURT OF APPEALS – DIVISION II

JANICE HULSCHER,
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No. 35157-II⁹⁻

PROOF OF SERVICE

I hereby certify that on November 5, 2007 at 9:40 a.m., that I hand delivered a true and correct copy of Reply Brief of Appellant in the above cause of action to Carol Cooper at Davies Pearson located at 920 South Fawcett, Tacoma, Washington 98402.

DATED this 5th day of November, 2007.

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