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COURT OF APPEALS

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No. 40428-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re: the marriage of

MICHAEL WELLS

Petitioner,
v.

MICHELLE (WELLS) HELLAND,

Respondent

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The Respondent finds error in the Courts Finding of Fact (1.11) that Petitioner's expenses continue regardless of his income and have not been reduced as his income was, when no evidence was presented.
2. The Respondent finds error in the court's Conclusion of Law (2.1) when it did not consider all factors in the statute, but applied only the need v. ability to pay standard, which is but *one* of the factors set out in the statute.
3. The Respondent finds error in the court's Conclusion of Law (2.2) when it concluded Petitioner's ability to continue maintenance has been hindered.
4. The Respondent finds error in the Court's Conclusion of Law (2.3) when it concluded Respondents needs could be met after a reduction in maintenance of more than 50%.

B. IDENTITY OF PARTIES

Respondent-Appellant, Michelle Helland, is a woman who has multiple sclerosis which was first diagnosed during the marriage to Petitioner and a back injury which also occurred during the marriage. (CP 34,1 L2-20) By cause of these physical conditions, Respondent been disabled from engaging in any regular gainful employment for which she was reasonably qualified by her education, training and experience and she could not support herself or bring in a regular income. (CP 34,1 L18-20) Respondent was awarded maintenance for a period of 15 years which could be

reviewed every three (3) years without a showing of a substantial change of circumstances. (CP 68, 5 L3-4) Due to Respondent's inability to work and her physical condition, the maintenance became her only source of income.

Further, the court at the final hearing stated "she will have little if any ability to increase her estate throughout the rest of her life." (CP 138 [attachment 'B'] 4 L13-17) Mr. Wells was in a position to increase his estate and Ms. Helland was not in a position to increase hers.

Respondent received a buy out of her interest in any community property at the time of the dissolution. (CP 67, 4 L 21-24 and 5 L 19-21) (CP 68, 6 L 2-4) Petitioner's 401K and retirement funds had little asset value at the time of the dissolution. (CP 66, 7 L 13, 21).

Petitioner has a significant number of assets from which he can draw, in spite of his income reduction. All but \$6,655 of Petitioner's Pension from Weyerhaeuser and \$466 of his 401K were earned after the dissolution of the marriage. (CP 66, 7 L13, 21) The major community asset was the farm and the equipment and vehicles the parties owned at the time of the separation. (CP 66, 5-7)

Petitioner, at the time of the dissolution of the marriage, appeared to be over extending himself and could have reduced his expenses, driving a less expensive vehicle, and by putting less money into his 401K. (CP 138 [Attachment 'B'] 7 L 2-5 and L10 - 11) Petitioner has made no effort to reduce his expenses since his income has been reduced to just over \$4,000 a month. (CP 179, 2) Petitioner continues in the same lifestyle to which he has become accustomed while Respondent was to survive on \$1528 and now, forced to survive on less than 50% of her maintenance while having a medical condition which precludes her from working.

C. ISSUES PRESENTED FOR REVIEW

ISSUE ONE: Can the court find Petitioner's expenses continued as before his disability when no evidence was presented?

ISSUE TWO: Can the trial court fail to consider all factors in the statute and applied only the need v. ability to pay standard when making a determination on a motion to modify the maintenance.

ISSUE THREE: Can the trial court conclude Petitioner's ability to continue maintenance has been hindered when he has a significant number of assets from which to draw.

ISSUE FOUR: Can the court conclude Respondents needs could be met after a reduction in maintenance of more than 50%, without considering the factors in the statute.

D. STATEMENT OF THE CASE

This case arises out of a Motion to terminate the maintenance ordered at the trial in the dissolution of the marriage of these parties. At the original trial, the court ordered 15 years of maintenance after considering all the statutory factors, but particularly considering the health of the party seeking maintenance and her ability to provide for herself. (CP 138 [Attachment 'B'] 6 L 9-12)

A history of this case shows several motions having been made. Respondent was partially successful in receiving an increase in maintenance of \$155 per month, making her maintenance \$1,528 a month, while the income of the Petitioner increased over the years.

Petitioner most recently filed a petition for the termination of maintenance based on his medical disability, an inability to continue working, his receiving retirement from his employment and social security which are both linked to his disability, and his need for a heart transplant. This motion was supported by the Declaration of Michael Wells. (CP 138). Commissioner Tracy Mitchell, in a hearing dated July 24, 2009, specifically ordered :

Petitioner provide a copy of all bank statement for a one year period of time.

Petitioner provide sworn statement regarding his receipt of the disability payments and when they will terminate.

Petitioner provide a sworn statement regarding his inability to draw from his retirement account because he is disabled.

Petitioner provide a copy of one year's worth of 401K statement showing his contributions and those of his employer.

Petitioner provide proof of any stock holding or investment accounts he may have as part of his complete financial picture to the court.

(CP 155, P2 L2-14)

Another hearing was held on December 11, 2009. The record shows Petitioner had still not provided all information to the court. (RP 12/11/09, 11 L1-3) The court noted that the information received had come in on a delayed basis. (RP 12/11/09, 12 L 6-7). From what information was provided, and argument of counsel, Commissioner Mitchell denied the Petitioner's motion to terminate maintenance and found he had sufficient resources to have the ability to pay. (RP 12/11/09, 19 L 15-25; and 20 L1-3) The trial illustrative aid used by the Respondent's counsel at the hearing was filed with the court since the court considered it in denying the motion to terminate maintenance. (CP 179).

Petitioner timely filed a motion for revision of the Commissioner's ruling and the matter was heard by the Honorable Judge James Lawler on January 22, 2010 (RP 1/22/10). Judge Lawler reduced maintenance by more than 50% after considering only the need v. ability to pay factor set out in the statute.

This appeal follows the revision of the maintenance award.

E. ARGUMENT

On a revision motion, a trial court reviews a commissioner's ruling de novo based on the evidence and issues presented to the commissioner. RCW 26.12.215; RCW 2.24.050; *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999). Here, that occurred when Judge Lawler heard this matter on January 22, 2010. When an appeal is taken from an order on revision of a court commissioner's decision, the appellate court reviews the superior court's decision, not the commissioner's. *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008). This appeal is sought to review the trial court's decision for an abuse of discretion. The Court abuses its discretion by exercising it on untenable grounds or for untenable reasons. (*In re the Marriage of Ochsner* 736 P.2d 293, 47 Wn.App 520 [Div I]) (1987)

ISSUE ONE: Did the trial court error when it found Petitioner's expenses continued on as before his disability when no evidence was presented?

The Appellate Court reviews an order for substantial supporting evidence and for legal error. *In re Marriage of Stern*, 68 Wash.App. 922, 929, 846 P.2d 1387 (1993). Substantial evidence supports a factual determination if the record contains sufficient evidence to persuade a fair-minded, rational person of the truth of that determination. *Bering v. SHARE*, 106 Wash.2d 212, 220, 721 P.2d 918 (1986). Looking at the record before the court, no evidence was presented at the revision hearing that supports the court's finding as to Petitioner's expenses. (RP 12/11/09 and 1/22/10) What was in the record appears to be only the Petitioner's Financial Declaration. (CP 135) This financial declaration is a self serving statement about his expenses. There was no proof presented as to any of the expenses listed or what their actual amounts were.

Counsel for Petitioner argued at the revision hearing that his client had an increase in 'medical issues', but no proof was put forth at the revision hearing, or at the original motion hearing. (RP 1/22/10] and RP 12/11/09] Counsel for Petitioner argued it was

unreasonable to spend \$400 a month on food for one person. (RP, 4, L13.] This argument was made while the record showed his client, the petitioner, in a financial declaration filed June 11, 2009, claimed the amount of \$500 a month on food for his need. (CP 135, 4) His argument thus becomes ludicrous. In addition, it was argument made in rebuttal and could not be refuted by Respondent's counsel. Petitioner's counsel also stated his client had "provided everything that he was required to provide." (RP 1/22/10, 12 L11-13) This is an absolute and deliberate misrepresentation to the court. (See CP 155, 2 L 2-15) No 12 months of 401K statements were produced and there is no evidence or denial of any stock held. Further, Petitioner's counsel argued at the revision hearing that his client withdrew the 401K money "because he has expenses that he has to meet." (RP, 11, L 22-24.) There was never any proof presented as to the actual reason the money was withdrawn. Petitioner has stated in a declaration that supported his motion for termination of the maintenance that 'I have used a fair portion of my 401K to pay my monthly obligation to Ms. Helland". (CP 138, 2 L 15-18). This is a declaration made under penalty of perjury. With the Illustrative document presented at the hearing of December 11, 2009, a

portion of the financial situation of the Petitioner shows he has attempted to mislead the court from the beginning. (CP 179) Petitioner's statement was a ruse to the court for sympathy. No proof of any previous withdrawal was given and the only withdrawal proof provided was in the banking records which indicated the withdrawal was made in November, 2009 at an amount in excess of \$73,000 after taxes and that money was deposited into Petitioner's bank account. (CP 179, mid page 1).

Lastly, counsel for Petitioner argued his client has provided everything he was required to provide (RP 1/22/10, 12 L11-13.) This is a misrepresentation to the court. (CP 155, 2 L 3-14). This document shows Petitioner was ordered to provide sworn statements regarding his disability payments and when they would terminate (not provided); sworn statements regarding his inability to draw his retirement because of his disability; (not provided a statement from Vanguard showing what the money being held by them is and when it can be drawn; (not provided); a copy of one year of 401K statements showing his contributions and those of his employer; (not provided) and, lastly, proof of any stock holding or investment accounts he may have as part of his complete financial

picture. (not provided). Petitioner has been intransigent in this case from the very beginning.

The court, in its determination of the motion on revision, stated, 'this is simply a situation where both parties have needs that cannot be met totally with their --- the financial resources available to them'. (RP, 15 L 7-10) Again, the entire record is absent any proof of Petitioner's expenses, save his financial declaration, which has no attachments of receipts for expenses. In the financial declaration Petitioner provided in June, 2009, there was no indication of any extraordinary medical expenses having been incurred. [CP 135, 4 L15-18) Nothing was provided which indicated Petitioner had left over expenses from his heart attacks or his triple bypass surgery. (CP 135, 4 L 15-23 and 5 L 1-4) The line which indicated uninsured health expenses is blank. (CP 135, 4 L 16-17). Certainly, he would have provided the information had it existed. Counsel's argument is not substantiated by any proof and the court made its finding without having any proof before it. The record is void of evidence as to what expenses Petitioner was asserting continued on as his income declined. Petitioner's own financial declaration is void of any mention of medical costs or expenses

which are uninsured. (CP 135)

Here Respondent is asking the Court to review the reversal of the Court's denial to modify the maintenance obligation of Petitioner and reinstate maintenance at the previous level of \$1,528.00 and setting it due beginning February, 2010. The court had no evidence before it at the time of the decision to reduce maintenance.

ISSUE TWO: Can the trial court fail to consider all factors in the statute and applied only the need v. ability to pay standard when making a determination on a motion to modify the maintenance.

In granting the revision in part, the court stated the 'circumstances have changed . . . and an ability to pay maintenance in my opinion should focus more on income rather than simply using up a savings account this is what's happening in this case'. (RP 1/22/10, 14, L 23 to end of 15 line 1.]

In dissolution of a marriage and the awarding of maintenance to either spouse, the court has certain factors it must consider in making any award of maintenance. RCW 26.09.090. The original trial court in this case, considered all the factors and awarded maintenance to the Respondent for a period of 15 years,

(RP attached as exhibit to CP 138, 6 L 9-12). That maintenance could be modified by either party without a showing of substantial change of circumstances. (CP 68, 5 L9-10).

Respondent was successful in a motion to modify the maintenance for which she received a mere \$155 a month increase in her award, while Petitioner's income had substantially increased over the years due to his position with Weyerhaeuser Company. Petitioner filed one motion to modify (terminate) the maintenance on June 1, 2009, which is the root of this appeal. The motion to modify the maintenance through termination was first heard on 6/26/09. At the first hearing, Counsel for Respondent was attending a continuing legal education seminar and could not be present. Petitioner's counsel was notified and would not reschedule the hearing. The Court Commissioner temporarily suspended maintenance to Respondent. (CP 150, 1 L 20), and set the matter over until counsel for Respondent could be present. Another hearing was scheduled.

At the hearing on July 24, 2009, Respondent asserted to the court that Petitioner had not provided all the necessary information for the court to consider, with regard to his assets, income and ability to continue to pay the ongoing maintenance. (CP 155)

Commissioner Tracy Mitchell found Mr. Wells did not provide a full and complete financial picture to the court (CP 155, 1 L 21). She ordered the Petitioner to provide further information to the court before she would make a final determination as to maintenance in the case. (CP 155, 2)

Finally, Petitioner provided additional information to the Respondent's counsel. However, there was still missing information such as the stock account information. The next hearing was held on December 11, 2009, at which time, Petitioner still had not provided all information that had been ordered. (CP 155, 2) Respondent argued Petitioner had hidden money and was not providing all the requested information the court had ordered. (RP 12/11/09 5 L 20-24) An illustrative aid was presented to the court, counsel for the Petitioner, and filed with the court at the Commissioner's instruction. (CP 179). This illustrative aid showed the money Petitioner had in the bank at the time he petitioned for a termination of the maintenance. (CP 179). Petitioner had filed his motion to modify maintenance stating in his declaration 'I have used a fair portion of my 401K to pay my monthly obligation to Ms. Helland CP 138, 2 L15-18), which was later shown to be a misleading statement to the court. (See CP 179)

CP 179, the illustrative aid, and the Petitioner's bank statements show Petitioner was making double payments on one debt (CP 161), (showing payments of \$226.04) which was mistakenly thought to be a vehicle payment, but was actually a dental payment. However, the fact remained; he was making double payments and seeking a termination of his maintenance obligation because he 'simply cannot hold out any longer'. (CP 138, 2, L 17).

Additionally, the illustrative aid clearly set out the fact Petitioner withdrawn his 401K in November, 2009, and the money was sitting in the bank, without being touched for the maintenance he was paying.

RCW 26.09.090 says:

(1) In a proceeding for dissolution of marriage. . . . *or in a proceeding for maintenance following dissolution of the marriage* The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors *including* but not limited to: (emphasis added)

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage

(d) The duration of the marriage

(e) The age, physical and emotional condition, and financial obligations of the spouse . . . seeking maintenance; and

(f) The ability of the spouse. . . from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

According to RCW 26.09.090, the only limitation on the maintenance award is that the amount and duration, in light of all the relevant factors, be just. *In re Marriage of Washburn*, 101 Wash.2d 168, 178, 677 P.2d 152 (1984). Of primary importance in the maintenance award are the parties' economic positions following the dissolution. *DeRuwe v. DeRuwe*, 72 Wash.2d 404, 408, 433 P.2d 209 (1967). Here, the original trial court considered all pertinent factors of the statute and applied them to the case at bar. (CP 138, 6 L 9-12) That court determined Respondent should receive maintenance for the period of 15 years. (CP 68, 5 L 2-3)

The court hearing the revision of the denial of the modification of the maintenance award, (Judge Lawler) did not fully consider the economic circumstances of the Respondent and her ability to meet her needs on the sum of \$750 per month, knowing it was her only source of income. In a statement from the Bench, Judge Lawler stated 'an ability to pay maintenance in my opinion should focus more on income rather than simply using up a savings account which is what's happening in this case.' (CP dated 1/22/10, 14, L 24 to end and 15, line 1]

The court in *Spreen v. Spreen*, 107 Wn. App. 341, 28 P.3d 769 (2001), held that once the court finds a change in circumstances warranting a modification, "the issues of amount and duration are the same as in the original dissolution." *Id.* at 347 n. 4. Here, as has been well documented, no substantial change of circumstances is needed to file for a modification of the maintenance. Therefore, the issues of amount and duration are the same as in the original dissolution.

An award that does not evidence a fair consideration of the statutory factors results from an abuse of discretion. *In re Marriage of Mathews*, 70 Wash.App. 116, 123, 853 P.2d 462 (1993). Here,

the trial court reviewing the Commissioner's denial of the Motion to Terminate the maintenance did not consider any factor other than need v. ability to pay. This was an abuse of discretion. The court refused to consider the savings account and other assets as an ability to pay future maintenance.

It is doubtful the court hearing the motion for revision would have come to the same *result* (a reduction in maintenance by more than 50%) if it had based its decision on a fair consideration of the statutory factors. The *process* was flawed in this case. See *White v. White*, 105 Wash.App. 545, 20 P.3d 481 (2001) (granting reconsideration of trial court's property distribution because, although trial court had discretion to distribute the marital property as it did, it exercised its discretion for the wrong reasons).

The court reviewing the Commissioner's ruling under the Motion for revision did not consider any statutory factor in this case, save the need v. ability to pay. (RP 1/22/10, 15 L2-3) It was clearly error.

ISSUE THREE: Can the trial court conclude Petitioner's ability to continue maintenance has been hindered when he has a significant number of assets from which to draw.

The court hearing the motion for revision had in front of it the illustrative aid used in the original Motion hearing at which the

motion was denied. This aid shows the significant amount of money withdrawn from the Petitioner's 401K and being held in savings. (CP 179) This is an asset which can be used to determine 'ability to pay'. The aid also showed the amount of money the Petitioner had in his account when he came into court seeking the termination of the maintenance. (CP 179) That amount was over \$11,000. This is an asset from which he could draw to make his court ordered obligation to his previous spouse. Additionally, the Petitioner had a second bank account into which he deposited money. (Mint Valley) That account, at the time the motion to terminate was made, had a beginning balance of over \$9,000. (CP 179, 1).

The Petitioner admits receiving Social Security and money from his retirement plan, which together amount to over \$4,000, per month. (RP 1/22/10, 8 L7-9) This is evidence of an ability to pay, absent proof of expenses which were not provided.

The Petitioner never provided the ordered accounting of his Weyerhaeuser stock. His failure to do so leads to the question of how much the stock was currently worth. He has never denied that he has Weyerhaeuser Stock. His stock should be considered an

asset from which he could draw to pay the maintenance.

Given the amount of money he withdrew from his 401K and the amount he had in his account at the time he was seeking the termination of the maintenance, he had nearly \$85,000, yet the court determined his ability to pay the maintenance was hindered. This was an error.

ISSUE FOUR: Without considering all factors in the statute, can the court conclude Respondent's needs could be met after a reduction in maintenance of more than 50%.

The trial court determined Respondent could meet her needs, although with trouble, on \$750 a month. (RP 1/22/10, 15, L 5-6) Had counsel for the respondent been able to argue some of what Petitioner's counsel said in his rebuttal, the issue would have been more fully addressed. However, it has been noted Petitioner spends, according to his financial declaration, (CP 135, 4 L 6) \$500 a month on food. Respondent spends \$400 a month and Counsel for Petitioner stated it was "not a realistic situation". (RP 1/22/10, 4 L 13 -15)

In addition, Respondent has indicated in her financial declaration that her rent is a modest \$550 a month. We are now already over the \$750 a month allowed by the court for maintenance payments. There was no consideration for standard

of living, the age, physical and emotional condition, and financial obligations of the spouse . . . seeking maintenance. The judge merely, decided an ability to pay maintenance [in my opinion] should focus more on income rather than simply using up a savings account which is what's happening in this case, (RP 1/22/10, 14 L23-25 & 15 L1), when it cut maintenance by more than 50%, leaving Respondent to struggle on \$750 a month.

The judge did not consider the ability of the spouse. . . from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance. Petitioner has nearly \$85,000 in the bank and is receiving \$4,000 a month in social security and his retirement plan from Weyerhaeuser. He has not shown any extraordinary expenses he has incurred because of his medical condition and appears to live a comfortable life. The judge, by cutting the maintenance has sentenced Respondent to live in less than half her income while Petitioner enjoys eating out (CP 179, 2,3,56, & 7), working with or on his hobby cars (CP 179, 2,3,5,6,&7) and continuing to do his everyday things.

The judge did not consider the financial resources of Petitioner and the lack financial resources of Respondent and the ability of the Respondent to meet her needs independently. This is an error.

Simple math is enough to determine it would be unrealistic to live on \$750 a month. The determination Respondent could meet her needs was not supported by the record and is an abuse of discretion. *In re the Marriage of Coyle* 61 Wn.App. 653 (Div III) 811 P.2d 245 (1991). Cutting maintenance by more than 50% while the Petitioner lives, without having provided proof of medical needs, a relatively comfortable lifestyle with money in the bank and \$4,000 a month as income.

F. ATTORNEY FEES AND COSTS

An award of attorney fees under RCW26.09.140[4] is discretionary. *In re Knight*, 75 Wash.app. 721, 729, 880 P.2d 71 (1994) review denied, 126 Wash.2d 1011, 892 P.2d 1089 (1995). Generally the needs of the requesting party must be balanced against the other party's ability to pay. *Kruger v. Kruger*, 37 Wash. however, the extent to which one spouse's intransigence caused the spouse seeking a fee award (here, defending against its loss) to

require additional legal services. *In re Crosetto*, 82 Wash.app. 545, 563, 918 P.2d 954 (1996); *In re Morrow*, 53 Wash. App. 579, 590, 770 P.2d 197 (1989); *In re the Marriage of Ochsner* 736 P.2d 293, 47 Wn.App 520 [Div I] (1987)

Here, the record is clear that Petitioner never provided all the ordered information. (CP 155, 1 L 21) Petitioner was intransigent in complying with the required proof of his claim he had no money. (CP 155, 1 L 21) Once he was forced to provide that information, it became clear why he had not complied with the court's request. He did not want the court to know just how much money he had. This court should make note of that intransigence and award attorney fees and the costs incurred by Respondent to file this appeal.

The court may award reasonable attorney fees for maintain or defending an action under RCW 26.09, provided the party seeking fees submits an affidavit of need as required by RAP 18.1(c). The Respondent will submit that affidavit.

In determining attorney fees on appeal, the court must consider the merit of the issue and the financial resources of both parties. *In re King*, 66 Wash. App. 134, 139, 831 P.2d 1094 (1992).

Here, the issues have merit and the trial court abused its discretion. The financial resources of Respondent are dire, to say the least. She has no other source of income and depends on the maintenance provided per the original court order. Respondent requests attorney fees and costs for having to file this appeal.

G. CONCLSION

The court, in its revision of the Commissioner's order, did not consider all the factors under RCW 26.09.090. This is clearly an error, according to *Spreen*. *Spreen* states all factors in the statute must be considered when making a determination on a maintenance award or reviewing it, once a substantial change of circumstances is found. *In re Spreen* 107 Wn. App. 341 (Wash. App. Div. 2 2001) 28 P.3d 769. Here, there was no need for a finding of a substantial change of circumstances in this case, as was ordered by the original trial judge.

Further the court committed an error when it came to the conclusion Petitioner's expenses continued on as before his disability when no evidence was presented.

The court committed an error when it found Petitioner's ability to pay maintenance was hindered and in finding Respondent

could meet her needs on less than half the maintenance, without considering all factors in the statute. This would include Respondent's inability to work and provide for herself. This revision decision should be reversed and attorney fees and costs awarded to Respondent for having to file this appeal.

Dated: This 20 day of July, 2010.

Respectfully submitted,



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