

No. 44814-9-II
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

Azad Khan,
Respondent,

v.

Nishat Khan,
Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUE PERTAINING TO APPELLANT’S CLAIMED ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT..... 4

 A. STANDARD OF REVIEW 4

 B. THE I-864 AFFIDAVIT OF SUPPORT 4

 C. THE TRIAL COURT ACKNOWLEDGED AZAD’S ONGOING DUTY TO SUPPORT NISHAT PURSUANT TO THE I-864 6

 D. JUDGE HOGAN DID NOT ERR BY LIMITING THE DURATION OF SPOUSAL SUPPORT 7

IV. CONCLUSION..... 10

TABLE OF AUTHORITIES

CASES

Berg v. Berg, 72 Wn.2d 532, 534, 434 P.2d 1 (1967) 7

Friedlander v. Friedlander, 80 Wn.2d 293, 297 (1972)..... 7

In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) 4

In re Marriage of Mathews, 70 Wn. App. 116, 123, 853 P.2d 462 (1993) 4, 7

In re Marriage of Mueller, 140 Wn. App. 498, 510, 167 P.3d 568 (2007) 7

In re Marriage of Washburn, 101 Wn.2d 168, 179-83, 677 P.2d 152 (1984)..... 7

In re Marriage of Zahm, 138 Wn.2d 213, 226, 978 P.2d 498 (1999) 4

Kelso v. Kelso, 75 Wn.2d 24, 27, 448 P.2d 499 (1968) 7

Lockhart v. Lockhart, 145 Wash. 210, 259 Pac. 385 (1927) 7

Murray v. Murray, 26 Wn.2d 370, 378, 174 P.2d 296 (1946)..... 7

Shumye v. Felleke, 555 F.Supp.2d 1020, 1023 (N.D. Cal. 2008) 4, 9

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)..... 4

Warning v. Warning, 40 Wn.2d 903, 247 P.2d 249 (1952)..... 7

STATUTES

8 U.S.C. § 1182(a)..... 8
8 U.S.C. §1183a(a)(1)(A)..... 8
RCW 26.09.090 9

REGULATIONS

8 C.F.R. § 213a(c)(2)(i)(C)(2) 9
8 CFR § 213a.2(d) 4
8 CFR § 213a.2(e)(2) 5

I. ISSUE PERTAINING TO APPELLANT’S CLAIMED ASSIGNMENTS OF ERROR

A. DID THE TRIAL COURT ERR BY NOT ORDERING LONGER TERM SPOUSAL SUPPORT?

II. STATEMENT OF THE CASE

A Decree of Dissolution of Marriage underlies this appeal.

The Respondent, Azad Khan (hereafter Azad) married the Appellant, Nishat Khan (hereafter Nishat) in January of 2010. CP 2, 36, RP 12, 47 (Feb. 27, 2013); RP 3 (Feb. 28, 2013).¹

Azad is retired from the military after serving for 30 years. He now works as a civilian logistics management specialist for the United States Army. RP 10 (Feb. 27, 2013).

Nishat came from a family of considerable financial privilege in India. RP 54 (Feb. 27, 2013). She holds a master’s degree in cost accounting and had previously done accounting work in her brother’s manufacturing business in India. RP 22, 47, 63 (Feb. 27, 2013). She speaks four languages. RP 65 (Feb. 27, 2013) RP 8 (Feb. 28, 2013).

Nishat came to the United States from India on a K1 Visa (also referred to as a “fiancée Visa”). RP 19 (Feb. 27, 2013). On January 20, 2010, Azad signed Dept. of Homeland Security Form I-864, agreeing

¹ For ease of reference, the parties will be referred to by their first names in this brief. No disrespect whatsoever to either party is intended thereby.

to act as Nishat's sponsor (explained more fully below). Ex. 31; RP 42 (Feb. 27, 2013).

Azad and Nishat separated in December of 2011. CP 36, RP 3 (Feb. 28, 2013). Azad initiated a divorce proceeding in Pierce County Superior Court on January 27, 2012. CP 1-4.

In March of 2012, Azad began paying \$2,000 per month to Nishat as temporary spousal maintenance. RP 50 (Feb. 27, 2013); RP 5 (Feb. 28, 2013).

Judge Hogan presided over the trial of this matter on February 27, 2013. RP (Feb. 27, 2013). At trial, the primary issue was Nishat's request for spousal maintenance. RP 42 (Feb. 27, 2013).

Nishat did not work outside of the home during the marriage. RP 47 (Feb. 27, 2013). At trial, Nishat testified she had applied for jobs after separation but did not have experience sufficient to be hired by anyone. RP 50, 64-65 (Feb. 27, 2013). Nishat did not state specifically where she had applied for jobs, nor did she offer any documentary evidence at trial related to her job search. RP (Feb. 27, 2013). She did testify that she had been "training for work" in customer service, cashiering and retail/customer service at Goodwill. RP 52, 66-69 (Feb.

27, 2013). She also testified that she “cannot” go back to India to live. RP 55 (Feb. 27, 2013).

During the marriage, Nishat took three trips to India. RP 16 (Feb. 27, 2013). Her most recent trip was in December of 2011; at that time, she purchased a one way ticket and did not plan to return to the United States. RP 16 (Feb. 27, 2013).

Azad agreed to assume sole responsibility for all debts incurred during the marriage through the date of separation, including all debts associated with the family home totaling approximately \$300,000 as well as consumer debt of approximately \$49,000. CP 38, 39; RP 15 (Feb. 27, 2013); RP 4, 5 (Feb. 28, 2013).

Judge Hogan awarded Nishat spousal support of \$2,000 per month through and including June of 2013. RP 9 (Feb. 28, 2013).

Judge Hogan also ordered that a review hearing would occur in July of 2013 for the purpose of being apprised of Nishat’s good faith efforts to find employment or become a naturalized citizen. RP 10 (Feb. 28, 2013).²

Nishat appeals the award of spousal maintenance. CP 87-123.

² The transcript indicates Judge Hogan indicated the review would be to ascertain whether Nishat had obtained her permanent residency status; however, pursuant to the I-864 and related statutes, she was likely referring to Nishat becoming a naturalized citizen.

III. ARGUMENT

A. STANDARD OF REVIEW.

A trial court's award of spousal maintenance is reviewed for abuse of discretion. *See, e.g., In re Marriage of Zahm*, 138 Wn.2d 213, 226, 978 P.2d 498 (1999); *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462 (1993). A trial court abuses its discretion if it is exercised in a manifestly unreasonable fashion, or is based on untenable grounds or for untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

B. THE I-864 AFFIDAVIT OF SUPPORT

The I-864 Affidavit of Support is a legally binding contract between the sponsor (here, Azad) and the United States Government. 8 CFR § 213a.2(d); Ex. 31 at 6; *Shumye v. Felleke*, 555 F.Supp.2d 1020, 1023 (N.D. Cal. 2008). This contract requires the sponsor to provide the intending immigrant (here, Nishat) "any support necessary to maintain . . . her at an income that is at least 125 percent of the Federal Poverty Guidelines[.]" Consideration for this contract is the intending immigrant becoming a permanent resident of the United States. *Id.*

This obligation continues until the sponsee has worked for what would be considered 40 “qualifying quarters” (approximately ten years) under the Title II of the Social Security Act. Ex. 31 at 7.³

The I-864 Affidavit of Support specifies “terminating events” under which the sponsor’s obligation to support the sponsee ends by operation of law - when the sponsee:

- becomes a naturalized United States citizen;
- has worked, or can be credited with, 40 qualifying quarters of coverage under the Social Security Act;
- no longer has lawful permanent resident status, and has departed the United States;
- becomes subject to removal, but applies for and receives a new grant of adjustment of status based on a new affidavit of support (if required) or
- dies.

8 CFR § 213a.2(e)(2); Ex. 31 at 7.

The I-864 Affidavit of Support specifically provides that this obligation does not terminate upon divorce. *Id.* There is no Washington case law addressing the issues presented in this appeal.

³ Azad acknowledges the scrivener’s error in Finding of Fact 2.21.20 (CP 39), which states “once the intended immigrant becomes a permanent resident of the United States, the support obligation under the affidavit of support by the sponsor shall terminate.” This Finding of Fact should have read “the intended immigrant becomes a naturalized citizen of the United States.” Ex. 31, p. 7.

C. THE TRIAL COURT ACKNOWLEDGED AZAD'S ONGOING DUTY TO SUPPORT NISHAT PURSUANT TO THE I-864.

Nishat argues that Judge Hogan erred by not ordering spousal support for a duration equivalent to the period during which Azad is obligated to pay support pursuant to the I-864. Br. of Appellant at 11.

At the conclusion of her oral ruling, Judge Hogan stated:

So at the time of the review hearing which this Court will set in July, Mr. Khan would have 28 quarter credits under the Affidavit of Support I-864. The Court will review at the hearing what good faith efforts Mrs. Khan has put forward between now and early July with regard to her job search, obtaining employment, the green card or work visa acquisition issue, or any efforts to become a [naturalized citizen] in the United States. If this Court is not satisfied with her efforts as would be required under a Washington law analysis, the issue may need to be addressed elsewhere, perhaps with the federal government, the INS, rather than with Superior Court.

RP 10 (Feb. 28, 2013).

By its own terms, the I-864 Affidavit of Support requires Azad to provide support to Nishat until one of the terminating events specified therein occurs. Ex. 31 at 7. Therefore, the duration of spousal maintenance ordered by Judge Hogan has no effect on the obligation to pay or the duration of support Azad is obligated to pay pursuant to the I-864 Affidavit of Support.

D. JUDGE HOGAN DID NOT ERR BY LIMITING THE DURATION OF SPOUSAL SUPPORT.

As stated above, trial court's award of spousal support is reviewed for abuse of discretion. *See, e.g., In re Marriage of Washburn*, 101 Wn.2d 168, 179-83, 677 P.2d 152 (1984); *In re Marriage of Mueller*, 140 Wn. App. 498, 510, 167 P.3d 568 (2007); *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462 (1993).

Moreover, Washington courts have long held that spousal support is not a matter of right. *See, e.g., Friedlander v. Friedlander*, 80 Wn.2d 293, 297 (1972); *Kelso v. Kelso*, 75 Wn.2d 24, 27, 448 P.2d 499 (1968); *Murray v. Murray*, 26 Wn.2d 370, 378, 174 P.2d 296 (1946).

Our Supreme Court has stated that it is not the policy of “the law of this state” to award a former spouse a perpetual lien on her divorced husband’s income. *See, e.g., Warning v. Warning*, 40 Wn.2d 903, 247 P.2d 249 (1952); *Lockhart v. Lockhart*, 145 Wash. 210, 259 Pac. 385 (1927). *See also Berg v. Berg*, 72 Wn.2d 532, 534, 434 P.2d 1 (1967) (“It is not the purpose of the law to place a permanent responsibility upon a divorced spouse to support a former wife indefinitely. She is likewise under an obligation to prepare herself so that she might become self-supporting.”)

However, this conflicts with the terms of the I-864 Affidavit of Support, which provides

the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line ***during the period in which the affidavit is enforceable.***

8 U.S.C. §1183a(a)(1)(A) (emphasis added).

The Affidavit of Support remains in full force and effect unless and until any of the enumerated “terminating events” occur (gaining citizenship, working for what is deemed 40 quarters under the Social Security Act, losing permanent resident status, leaving the United States, becoming subject to removal or dying). Ex. 31, at p. 7.

Therefore, Azad could theoretically be required under the terms of the Affidavit of Support to pay Nishat support indefinitely. Ex. 31, p. 7.

Nishat essentially argues this should have required Judge Hogan to order Azad to pay spousal maintenance indefinitely. But this contradicts the policy underlying Washington law pertaining to spousal support.

An award of spousal support will not and cannot guarantee payment of support pursuant to the Affidavit of Support; the Affidavit of Support itself requires payment of support thereunder and can be enforced through a separate Court action. *See* 8 U.S.C. § 1182(a). By

signing the Affidavit of Support, a sponsor submits himself to the personal jurisdiction of any federal or state court in which a civil lawsuit has been brought to enforce the affidavit. 8 C.F.R. § 213a(c)(2)(i)(C)(2); *Shumye v. Felleke*, 555 F.Supp.2d 1020, 1023-24 (N.D. Cal. 2008) (holding that a signing sponsor submits to the personal jurisdiction “of any court of the United States or of any State, territory, or possession of the United States if the court has subject matter jurisdiction of a civil lawsuit to enforce the Form I-864”).

Judge Hogan specifically ruled at trial that

under an exclusive Washington statute and case law analysis, [there] would not be an order for spousal support in this case based upon the facts presented during trial. Need and ability are only portions of the consideration. With a Master’s Degree, Mrs. Khan has little need for spousal maintenance under the retraining option. Given the length of the marriage, less than two years in duration, coupled with further fact that Mrs. Khan has been in the United States for three years and not sought employment, would defeat any request for spousal maintenance under a traditional Washington analysis. The Court would, but for the federal law, find her voluntarily unemployed and [impute] income to her, require her to find a job consistent with the legislative directive of our statutes for family law and case analysis.

RP 12 (Feb. 28, 2013). Judge Hogan did not err by ordering spousal support of a limited duration. The award was in accordance with RCW 26.09.090, and is supported by findings of fact which are, in turn,

supported by substantial evidence in the trial record. CP 39-40, 42 (Findings of Fact 2.21.24 – 2.21.26, 3.8.6 – 3.8.8).

Azad's duty to pay support in accordance with the I-864 Affidavit of Support is not dependent upon an order for spousal support being in effect. Nor is that obligation terminated by the termination of Azad's obligation to pay Nishat spousal support. Therefore, Judge Hogan did not err and her ruling should not be disturbed.

IV. CONCLUSION

This appeal was wholly unnecessary. By its own terms, the I-864 Affidavit of Support requires Azad to provide support to Nishat until one of the enumerated terminating events occurs. It is highly unfortunate that this provides a sponsored alien little incentive to become self-supporting. Nevertheless, Nishat may seek enforcement of the I-864 Affidavit of Support should that become necessary. An order for spousal maintenance is not required in order for her to do so. Under Washington law, Nishat was and is not entitled to long-term spousal maintenance. Judge Hogan's ruling was correct and should not be disturbed.

DATED this 15th day of November, 2013.

RESPECTFULLY SUBMITTED,



Barbara McInville, WSBA #32386
Attorney for Azad Khan

Declaration of Transmittal

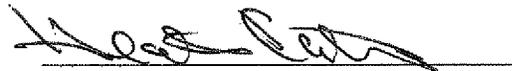
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Signed at Tacoma, Washington on this 15th day of November, 2013.



Heather Cates

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November 15, 2013 - 8:26 AM

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