

FILED
Court of Appeals
Division II
State of Washington
2/2/2018 11:37 AM

No. 51019-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Marriage of:

Steven Ray Holloway, Appellant,

vs.

Toni Justice (Formerly Holloway), Respondent

Pierce County Superior Court
Cause Nos. 12-3-04654-8
The Honorable Judge Shelly K. Speir

Appellant's Brief

Clayton R Dickinson
Attorney for Appellant
6314 19th St. W., #20
Fircrest, WA 98466
PHONE: (253) 564-6253
FAX: (253) 564-6523

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

INTRODUCTION2

STATEMENT OF FACTS..... 4

ARGUMENT.....12

1. WHERE A DECREE ORDERS THE HUSBAND TO PAY THE WIFE \$1100 PER MONTH FOR 48 MONTHS, AND EVERYONE AGREES THAT THE DECREE IS NOT AMBIGUOUS, THE TRIAL COURT CANNOT CONSIDER EXTRANEOUS EVIDENCE TO SHOW THE INTENT OF THE PARTIES TO INTERPRET WHAT THE PARTIES MEANT IN THE DECREE12

2. THE FACT THAT A WIFE WHO WAS AWARDED MAINTENANCE IN A DECREE FOR 48 MONTHS, VOLUNTARILY INCURED DEBTS AND EXPENSES BEYOND HER ABILITY TO PAY, IS NOT A SUBSTANTIAL CHANGE OF CIRCUMSTANCES JUSTIFYING AN EXTENSION OF MAINTENANCE 16

3. A TRIAL COURT HEARING A MOTION ON REVISION OF A DENIAL TO AWARD ATTORNEY FEES THAT WAS

REQUESTED FOR THE FIRST TIME IN A REPLY
 DECLARATION, CANNOT ORDER THAT THE
 NONMOVING PARTY HAVE THE OPTION TO EITHER GO
 FORWARD THAT DAY WITHOUT PROVIDING ANY
 RESPONSE TO THE NEW REQUEST OR CONTINUE THE
 REVISION MOTION TO ALLOW THE NONMOVING
 PARTY TO FILE RESPONSIVE MATERIAL ON
 REVISION.....20

CONCLUSION.....26

TABLE OF AUTHORITIES

CASES

Byrne v. Ackerlund, 108 Wn.2d 445, 739 P.2d 1138 (1987).....14, 15

Carstens v. Carstens, 10 Wn. App. 964, 521 P.2d 241 (1974)18

Casper v. Esteb Enterprises, Inc., 119 Wn. App. 759, 82 P.3d 1223
 (2004).....24

In re Marriage of Drlik, 121 Wn. App. 269, 87 P.3d 1192 (2004)....16, 17

In re Marriage of Gimlett, 95 Wash.2d 699, 629 P.2d 450 (1981).....12

In re Marriage of Smith, 158 Wn. App. 248, 241 P.3d 449 (2010)..12, 13,
 14.

In re Marriage of Moody, 137 Wn.2d 979, 976 P.2d 1240 (1999).....21, 22

In re Marriage of Mudgett, 41 Wash.App. 337, 704 P.2d 169 (1985).....15

In re Welfare of Smith, 8 Wash.App. 285, 505 P.2d 1295 (1973).....21

Lambert v. Lambert, 66 Wn.2d 503, 403 P.2d 664 (1965)..... 18, 19

Perez v. Garcia, 148 Wn. App. 131, 198 P.3d 539 (2009).....22

WASHINGTON STATE STATUES

RCW 26.09.14011, 25
RCW 26.09.170 (1).....17, 20

COURT RULES

Mason County local rule LCR 59(6.1).....22

ASSIGNMENTS OF ERROR

1. Judge Shelly K. Speir committed error in finding that the parties had an agreement that maintenance would continue until the date of Mr. Holloway's retirement from the military.
2. Judge Shelly K. Speir committed error in finding that there was an assumption by the parties that Mr. Holloway would retire in 4 years from the date of the decree.
3. Judge Shelly K. Speir committed error in finding that there was not a meeting of the minds as to the time period for which maintenance would last.
4. Judge Shelly K. Speir committed error by going beyond the 4 corners of the decree, which was conceded to be unambiguous, and considering evidence i.e., emails exchanged by the parties 6 months before anyone filed for dissolution of marriage to determine what the parties meant in paragraph 3.7 of the decree for maintenance which reads "The husband shall pay the wife \$1100 per month for 48 months."
5. Judge Shelly K. Speir committed error in finding that Mr. Holloway's decision to defer his retirement was a substantial change of circumstances for a modification of maintenance.
6. Judge Shelly K. Speir committed error in finding that Ms. Justice had a financial need for maintenance that constituted a substantial change of circumstances.
7. Judge Shelly K. Speir committed error in taking new evidence into consideration on revision for the issue of attorney fees.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a decree orders the husband to pay the wife \$1100 per month for 48 months, and everyone agrees that the decree is not ambiguous, can the court consider extraneous evidence to show the intent of the parties to interpret what the parties meant in the decree?

2. Is the fact that a wife who was awarded maintenance in a decree for 48 months, voluntarily incurs debts and expenses beyond her ability to pay, a substantial change of circumstances justifying an extension of maintenance?

3. Can a superior court hearing a motion on revision of a denial to award attorney fees that was requested for the first time in a reply declaration, order that the nonmoving party would have the option to either go forward that day without providing any response to the new request or continue the revision motion to allow the nonmoving party to file responsive material on revision?

INTRODUCTION

On May 14, 2013, the decree of dissolution of marriage was entered for Steven Holloway and Toni Holloway which ordered maintenance in the amount of \$1100 per month for 48 months. A few days before the last payment was to be made, Ms. Holloway, now going by the last name of Justice, filed a motion to extend maintenance because her income was not sufficient to meet her needs and because she learned that Mr. Holloway would not be retiring from the military at that time as she anticipated he would. As a result, she would not begin receiving his military retirement pay at that time and she therefore requested that maintenance be extended until he retired and she began receiving his military retirement.

The motion was denied in commissioner's court on June 29, 2017. In Ms. Justice's strict reply declaration, she requested attorney fees for the first time. The commissioner struck that portion of her reply declaration and denied the request for attorney fees without prejudice.

In the reply declaration of Ms. Justice, she also included an email which showed the parties' ongoing negotiations which occurred 6 months before either party filed for dissolution of marriage. In the email, Mr. Holloway indicated that he would be retiring from the military in 4 years and that he would be paying her \$753 a month until he got out of the military. However, when the parties filed for dissolution of marriage 6 months later, Mr. Holloway's petition offered her maintenance of \$1000 a month for 36 months. Ms. Justice in her response requested maintenance at \$1100 a month for 48 months. In her reply declaration, Ms. Justice also acknowledged that the language in the decree regarding maintenance was not ambiguous.

The superior court on revision, revised the commissioner in striking the reply declaration material regarding attorney fees and then ordered Mr. Holloway to either go forward with the motion that day or continue the hearing to allow Mr. Holloway to respond and to allow Ms. Justice to reply. The parties then submitted new material for the hearing held 2 weeks later.

Against that backdrop, the superior court on revision, based upon the email, found that the parties had reached an agreement on maintenance, that it would last until Mr. Holloway retired. She then found that the decision to delay retirement until 2019 was a substantial change of circumstances and that Ms. Justice had an ongoing financial need for maintenance. She ordered that maintenance would continue in the amount of \$700 a month until Mr. Holloway retired. She furthermore awarded attorney fees in the amount of \$4500.

STATEMENT OF FACTS

On December 14, 2012, Steven Holloway filed a Petition for Dissolution of Marriage. (CP 50-54) In paragraph 1.10, Maintenance, it read:

There is a need for maintenance as follows:

The wife has a financial need and the husband has the ability to pay. Short-term maintenance should be awarded. The wife should receive \$1000 per month maintenance for 36 months. (CP 53)

On February 11, 2013 the respondent, Toni Justice (formerly Holloway) filed a Response. (CP 55-58) In response to paragraph 1.10, Maintenance, she stated:

Husband has the ability to pay short-term maintenance wife should receive \$1100 per month for 48 months from the date of divorce. (CP 57)

On May 14, 2013, the Decree of Dissolution of Marriage was filed with the court. (CP 68-72) In regard to maintenance the decree stated in paragraph 3.7:

The husband shall pay the wife \$1100 per month for 48 months. The first payment shall be due on *(the following was hand written and interlineated by Ms. Justice in the paragraph)* the first day of the month following the final divorce decree and continue for 48 months. Petitioner will continue to pay respondent \$1100 until divorce is final. Respondent is receiving Military housing allowance for him and I until we are divorced those funds are provided to support the service member and his family that I am still respondent's legal spouse, not the person he lives with. (CP 71)

On April 28, 2017, the respondent, Toni Justice, filed a Motion for Order for Extension of Spousal Maintenance Awarded to Respondent per Decree of Dissolution filed May 14, 2013. (CP 73-77) Her basis for extending maintenance was that even though she was employed full-time, she did not have enough money to live on and therefore she still needed spousal maintenance. (CP 74-75) It was her understanding that Mr. Holloway was going to retire in 4 years and so the 48 months of spousal maintenance was basically supposed to end when he retired from the military which would give her military retirement pay. However, she now understood that he was not going to retire after 20 years, but had chosen to

remain in the military and as a result she needed maintenance to continue until he retired. (RP 75)

Mr. Holloway responded that the decree was clear and unambiguous and since it was clear on its face, it needed no further interpretation. He denied that there was ever any agreement beyond 4 years of maintenance at \$1100 a month. (CP 87)

Mr. Holloway further responded that there has been no substantial change of circumstances. (CP 88) He noted that Ms. Justice filed for bankruptcy after their dissolution of marriage and that all of her current debt had been incurred since the dissolution of marriage. (CP 88-89) He noted that her monthly debts included approximately \$800 for a new car and insurance. (CP 88) he further noted that her debts were mainly for clothing and apparel items. (CP 88) Ms. Justice's financial declaration listed consumer debt (credit cards) in the amount of \$1185 a month, including \$95 for a storage unit bill that was paid off in April 2017. (CP 82) Following her bankruptcy she incurred a total of \$17,689.93 in credit card debt and \$27,551.20 for her new car. Her total new debt came to \$45,241.13. (CP 82) Mr. Holloway protested that these were debts that she voluntarily incurred and the court should not allow her to create her own "need" as a basis to extend maintenance. (CP 88)

He further noted that Ms. Justice only calculated her income at 80 hours every 2 weeks when the pay stubs that she provided showed that she averaged 84.81 hours every 2 weeks. This would increase her income to a gross pay of \$1564.75 every 2 weeks for a gross monthly income of \$3390.28. (CP 89-90)

In Ms. Justice's financial declaration, she claimed that her net monthly income was \$3531.75, which was based upon her receiving \$1100 a month in maintenance and \$2738.13 in earnings for a total gross income was \$3838.13. (CP 79) Her monthly expenses without her consumer debt, but with her car, was \$2444.57 a month. (CP 79)

In Ms. Justice's strict reply declaration, to prove that there was an agreement, she provided an email from Mr. Holloway dated June 1, 2012 wherein he stated: "I am only obliged to pay 5 year spousal support and we are at 4 year separation, but I said I would pay that amount we talked about until I get out." (CP 109, 121) In the email, in describing what he recalls of the agreement at that point he states:

This is what I remember.

Monthly until I get out.

25% of my retirement pay and TSP when I get out, as long as you don't remarry if you remarry no military pay, but you can have all the TSP upon my death.

20% of my life insurance upon my death if you agree to an amount of yours to me and of course we have the stuff in writing of a will. I'm going before you so no need to worry

there. This crap here is going to put me in my grave. (CP 122)

Continuing in her reply declaration, Ms. Justice acknowledges that “this agreement, of course morphed into something different as the court can see from the Decree.” (CP 109)

In replying to Mr. Holloway’s comment that the decree was clear on its face, Ms. Justice states:

I don’t disagree with Mr. Holloway that the Decree is clear on its face. I am not attempting to clarify an ambiguity in the decree. I am not trying to “re-write” the decree, as Mr. Holloway alleges. (CP 113)

She then continues that if the decree stated that maintenance was to continue until Mr. Holloway retired, then she would not have had to bring the current action to modify maintenance based upon a substantial change in circumstances due to his retirement. (CP 113)

Ms. Justice in her strict reply declaration also, for the first time, requested attorney fees. (CP 117-118) This is nowhere found in the Motion for Order for Extension of Spousal Maintenance Awarded to Respondent per Decree of Dissolution filed May 14, 2013 (CP 73-77) nor in any pleading prior to her strict reply.

The motion on the requested extension of maintenance was heard on June 29, 2017. The commissioner denied the motion for modification finding that there was no substantial change of circumstances. (CP 153-

154) She also granted Mr. Holloway's motion to strike Ms. Justice's request for attorney fees, and did so without prejudice. (CP 154) The commissioner did this without prejudice as she agreed that Ms. Justice could separately file a motion for attorney fees at a later time. (July 21, 2017 RP 5-6) A motion for revision was timely filed on July 7, 2017 by Ms. Justice and it specifically sought revision of the commissioner's granting of Mr. Holloway's request to strike the request for attorney fees and her declaration as well as the denial of her request for attorney fees. (July 21, 2017 RP 4-5) (CP 155-156)

The motion for revision was noted for July 21, 2017. (July 21, 2017 RP 1) Prior to the motion being argued, the attorney for Mr. Holloway moved to strike the request for attorney fees as being untimely due to the request being raised for the first time in strict reply. (July 21, 2017 RP 2-3) Counsel for Ms. Justice argued that the commissioner had granted Mr. Holloway's motion, but said that Ms. Justice could bring a motion for attorney fees separately, so the Court could either leave the commissioner's ruling in place, at which point they would file their own motion for attorney fees separately, or hear the matter with their motion for revision in the interest of "judicial economy". (July 21, 2017 RP 5)

The Court denied the request to strike the request for attorney fees and gave Mr. Holloway the option of either continuing the revision motion

to allow him to file a response or go forward that day without any responsive material to the new request. (July 21, 2017 RP 5-6) Counsel for Mr. Holloway objected that he did not believe the attorney fee matter was properly before the Court because the commissioner never heard the motion so it was not proper for revision. Rather the commissioner simply agreed to allow Ms. Justice to bring the issue of attorney fees back before the commissioner at a separate time. (July 21, 2017 RP 6) The Court's response was to reiterate her prior options and counsel for Mr. Holloway chose to provide responsive material rather than proceed without having a chance to respond. (July 21, 2017 RP 6) The matter was then set over so that Mr. Holloway could provide a responsive declaration and so that Ms. Justice could file a strict reply to that declaration. (July 21, 2017 RP 6-7)

The motion for revision was heard on August 4, 2017. (August 4 2017 RP 1) In preparation of that Mr. Holloway filed his declaration (CP 161-175) and Ms. Justice filed her reply declaration. (CP 176-187) Judge Speir, granted the motion, ordered maintenance to continue in the amount of \$700 a month until Mr. Holloway retires from the military, and awarded attorney fees to Ms. Justice in the amount of \$4500. (CP 194-196) In so doing Court stated:

THE COURT: Thank you. I guess the thing that is most persuasive to the Court is the e-mail. I think it's very clear from the e-mail that the parties had reached an

agreement about what kind of maintenance would be provided and for how long.

The fact that the length of time that maintenance would be paid was not tied to retirement in the Decree, I don't think is determinative. I think what happened is a person, based on an agreement, proceeded, assuming that that agreement never changed. I think that's what Ms. Justice did. (August 4, 2017 RP 28)

.....

And so, I think this decision to retire in 2019, or whatever the date may be now, is a substantial change in circumstances. I think that completely opens up the arrangement that the parties -- or that Ms. Justice thought she had. (August 4, 2017 RP 29)

The Court further found that Ms. Justice had a financial need for maintenance. ((August 4, 2017 RP 29)

Mr. Holloway filed a motion for reconsideration on August 14, 2017. (CP 197-211) The motion was heard on September 22, 2017. (September 22, 2017 RP 1) In the hearing counsel for Ms. Justice reaffirmed that they did not believe there was any ambiguity in the decree. (September 22, 2017 RP 13, 15) The Court denied the motion, based on her prior findings that the parties assumed that Mr. Holloway would retire in 4 years and his failure to do so was a substantial change of circumstances. (CP 225-226) (September 22, 2017 RP 25-26) The Court further denied the motion regarding the award of attorney fees as she believed that RCW 26.09.140 allowed her to award attorney fees based

upon need and ability to pay. (CP 226) (September 22, 2017 RP 27) A
Notice of Appeal was filed on October 17, 2017. (CP 227-234)

ARGUMENT

1. WHERE A DECREE ORDERS THE HUSBAND TO PAY THE WIFE \$1100 PER MONTH FOR 48 MONTHS, AND EVERYONE AGREES THAT THE DECREE IS NOT AMBIGUOUS, THE COURT CANNOT CONSIDER EXTRANEOUS EVIDENCE TO SHOW THE INTENT OF THE PARTIES TO INTERPRET WHAT THE PARTIES MEANT IN THE DECREE.

The standard for review of the language in a dissolution decree is de novo. In *In re Marriage of Smith*, 158 Wn. App. 248, 241 P.3d 449 (2010) this court stated: “We review de novo the language in a dissolution decree and a DRO. *In re Marriage of Gimlett*, 95 Wash.2d 699, 704–05, 629 P.2d 450 (1981).” (at 255)

This Court in *Smith* went on to state:

When an agreement is incorporated into a dissolution decree, we must ascertain the parties' intent at the time of the agreement. *In re Marriage of Boisen*, 87 Wash.App. 912, 920, 943 P.2d 682 (1997), review denied, 134 Wash.2d 1014, 958 P.2d 315 (1998). In such a situation, the parties' intent generally will be the court's intent. *Boisen*, 87 Wash.App. at 920, 943 P.2d 682. If the language of the decree is unambiguous, there is no room for interpretation. *In re Marriage of Bocanegra*, 58 Wash.App. 271, 275, 792 P.2d 1263 (1990), review denied, 116 Wash.2d 1008, 805 P.2d 813 (1991). Normally, we are limited to examining the provisions of the decree to resolve issues concerning its intended effect. *Gimlett*, 95 Wash.2d at 705, 629 P.2d 450.

The general rules of construction that apply to statutes, contracts, and other writings also apply to findings, conclusions, and decrees. *Callan v. Callan*, 2 Wash.App. 446, 448–49, 468 P.2d 456 (1970). We read a decree in its entirety and construe it as a whole to give effect to every word and part, if possible. *Stokes v. Polley*, 145 Wash.2d 341, 346, 37 P.3d 1211 (2001); *Callan*, 2 Wash.App. at 449, 468 P.2d 456. (at 255-256)

In the *Smith* case, when the parties entered into their decree of dissolution, it awarded the wife,

[o]ne-half (1/2) of any and all rights accrued by virtue of present, past or future employment of the husband including but not limited to pension, retirement, profit sharing, reserve vacation, sick leave, insurance coverage, social security benefits and the like for the length of the marriage. (at 253)

Mr. Smith's attorney had withdrawn prior to the decree being finalized.

When Mr. Smith retired his wife's attorney wrote a letter to him to get her share of his retirement. When Mr. Smith did not respond a DRO action was brought to obtain the wife's one-half share of the retirement. Mr. Smith objected to the order dividing his retirement based upon the failure to calculate his Social Security equivalency, the fact that he earned part of the retirement in Utah which is a separate property state, and because part of the retirement benefits he ultimately enjoyed were based upon a pay raise that occurred after the dissolution of marriage.

Mr. Smith argued that the decree was ambiguous and in his effort to show that, he presented letters that had been sent between Ms. Smith's attorney and his attorney showing that the parties attempted to characterize certain property as community and separate. The purpose being to show that there was an intent to maintain property that was community from that which was separate.

The court in *Smith* upheld the trial court in its retirement division determination. In so doing they determined that that the decree was not ambiguous and the court refused to consider "extrinsic evidence at the expense of the agreed findings." (at 257)

In the case of Mr. Holloway, everyone agreed that the paragraph dealing with maintenance was unambiguous. (CP 87, 113) That being the case, if there is no room for interpretation, there is no reason to take extraneous or extrinsic evidence into consideration. Just as the letters were not something that should have been considered in the Smith case, the emails were not something that the court should have considered in Mr. Holloway's case.

Even if the court did not like the results, that still would not justify interpreting an unambiguous decree. In the case of *Byrne v. Ackerlund*, 108 Wn.2d 445, 739 P.2d 1138 (1987), the parties entered into a dissolution decree that awarded the husband, Mr. Ackerlund, the family

home and gave Ms. Byrne a judgment for \$2500 secured by a lien interest in the home as well as a one half interest in the proceeds of the home over \$16,500 that was “payable upon the voluntary or involuntary transfer or disposition of said realty” (at 446) When the property did not sell within 10 years, Ms. Byrne brought an action for declaratory judgment, basically seeking to have the property sold so that she could get her money. The court held that since the decree was unambiguous, that is it gave Ms. Byrne a lien interest in the property which was not payable to her until the property was sold. Even though that meant that she may never get her money if the property never sold.

In support of this the court also cited *In re Marriage of Mudgett*, 41 Wash.App. 337, 704 P.2d 169 (1985). That case basically held that because a decree was not ambiguous the other party was not entitled to force a sale of the property. The *Byrne* court continued stating:

In *Mudgett*, 41 Wash.App. at page 341, 704 P.2d 169, the Court of Appeals held there was no ambiguity in a separation contract which made the former husband's lien on a residence payable “ ‘... when the residence is sold.’ ” The court did not speculate on whether such plain language might be construed as granting the lienholder the right to force a sale. As in *Mudgett*, the problem here is not one of ambiguity but rather unilateral mistake. **The fact that Byrne may have believed the effect of her agreement to be different than it actually is does not justify the court in setting aside or rewriting the contract for her.** See *Vance v. Ingram*, 16 Wash.2d 399, 411, 133 P.2d 938 (1943). (at 454 emphasis added)

This is exactly what the Court did in the case of Mr. Holloway. The Court essentially rewrote the agreement to give Ms. Justice a new agreement based upon her mere belief of what the agreement was. That cannot be done if the decree is unambiguous.

In this case, the Court must be reversed because Judge Speir accepted extrinsic evidence to interpret an unambiguous decree. In so doing she improperly rewrote the parties' agreement. This constitutes reversible error and the Court must be reversed.

2. THE FACT THAT A WIFE WHO WAS AWARDED MAINTENANCE IN A DECREE FOR 48 MONTHS, VOLUNTARILY INCURRED DEBTS AND EXPENSES BEYOND HER ABILITY TO PAY, IS NOT A SUBSTANTIAL CHANGE OF CIRCUMSTANCES JUSTIFYING AN EXTENSION OF MAINTENANCE.

The standard of review for a motion for a modification of maintenance is an abuse of discretion. In the case of *In re Marriage of Drlik*, 121 Wn. App. 269, 87 P.3d 1192 (2004) the court stated:

We will not reverse a trial court's ruling on a petition to modify a dissolution decree absent an abuse of discretion. *In re Marriage of Jennings*, 138 Wash.2d 612, 625–26, 980 P.2d 1248 (1999); *In re Marriage of Spreen*, 107 Wash.App. 341, 346, 28 P.3d 769 (2001). In determining whether the trial court abused its discretion in ordering modification, this court reviews the order “for substantial supporting evidence and for legal error.” *Spreen*, 107 Wash.App. at 346, 28 P.3d 769 (citing *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.” Spreen, 107 Wash.App. at 346, 28 P.3d 769 (citing Bering v. SHARE, 106 Wash.2d 212, 220, 721 P.2d 918 (1986)). We review solely those findings of fact to which the appellant has assigned error. In re Contested Election of Schoessler, 140 Wash.2d 368, 385, 998 P.2d 818 (2000) (citing State v. Hill, 123 Wash.2d 641, 647, 870 P.2d 313 (1994)). We treat any unchallenged findings as verities on appeal. Schoessler, 140 Wash.2d at 385, 998 P.2d 818 (citing Hill, 123 Wash.2d at 644, 870 P.2d 313).

In appropriate circumstances, the criterion listed in an applicable statute guides the trial court's discretionary act. In re Parentage of Jannot, 110 Wash.App. 16, 22, 37 P.3d 1265 (2002), *aff'd*, 149 Wash.2d 123, 65 P.3d 664 (2003). Here, the applicable statute is RCW 26.09.170(1), which allows the court to “modify a maintenance award when the moving party shows a substantial change in circumstances that the parties did not contemplate at the time of the dissolution decree.” Spreen, 107 Wash.App. at 346, 28 P.3d 769 (citing Wagner v. Wagner, 95 Wash.2d 94, 98, 621 P.2d 1279 (1980); RCW 26.09.170(1)). (at 274-275)

In this case, there was an abuse of discretion based upon legal error committed by the Court. In the first instance, that legal error, as noted above, involved the consideration of extrinsic evidenced by Judge Speir given the fact that the decree was unambiguous.

Also, there was not a substantial change of circumstances from the perspective of substantial supporting evidence as well. In this case there was no substantial change of circumstances that would support a modification of maintenance.

In *Carstens v. Carstens*, 10 Wn. App. 964, 521 P.2d 241 (1974) the husband sought to modify maintenance based upon a change in his financial circumstances. He was awarded significant property in the dissolution of marriage and apparently he lived off of that rather than working and spent money on alcohol and things as he desired. The court found that his voluntary actions are what led to his financial situation and this was not a substantial change of circumstances. In so ruling the court stated:

Changes in economic circumstances in the instant case are glaringly the result of respondent's alcoholic condition and subsequent depletion of his estate to fulfill his desires caused by that condition. The changes were self imposed and do not constitute a substantial change in circumstances sufficient to warrant a modification of the alimony provisions of the decree of divorce. (at 243-244)

In the case of *Lambert v. Lambert*, 66 Wn.2d 503, 403 P.2d 664 (1965), the ex-husband petitioned for a modification and reduction of his maintenance because his income was reduced. He was an optometrist. Following the entry of the decree, his business began going down. He attempted to work elsewhere for less money, and when that did not work out he tried to go back to his failing business in Kirkland. At the same time, he could have gone to a different town and worked and earned more money. Based upon this the court felt that his reduction in income was

voluntary as he had other opportunities that he could have taken, rather than trying to revive his failing business. The court there stated:

Voluntary reduction in income or self-imposed curtailment of earning capacity, absent a substantial showing of good faith, will not constitute such a change of circumstances as to warrant a modification. *McKey v. McKey*, 228 Minn. 28, 36 N.W.2d 17 (1949); *Commonwealth ex rel. Mazon v. Mazon*, 163 Pa.Super. 502, 63 A.2d 112 (1949); *Crosby v. Crosby*, 182 Va. 461, 29 S.E.2d 241 (1944). (at 510)

In the current case Ms. Justice would have had sufficient funds to live except for her excessive consumer debt. (CP 78-84, 88) She filed for bankruptcy following the dissolution of marriage, so all of the debt that she has incurred has been since the dissolution of marriage. (CP 88-89) Were it not for this she would have money sufficient to meet her needs. (CP 78-84, 88-89)

It is interesting to note that due to the consumer debt that Ms. Justice incurred, even with the \$1100 a month maintenance she was receiving every month, she acknowledged that she was \$97.92 in the red. (CP 74-75) This very clearly substantiates her inability to manage her financial resources. As noted in the statement of facts, following her bankruptcy she incurred a total of \$17,689.93 in credit card debt and \$27,551.20 for her new car. Her total new debt came to \$45,241.13. (CP 82) This was all accumulated in less than 4 years. Mr. Holloway protested that these were debts that she voluntarily incurred and the court should not

allow her to create her own “need” as a basis to extend maintenance. (CP 88)

As the case law clearly indicates, Ms. Justice’s voluntary incurring of excessive consumer debt is not a substantial change of circumstances that justifies an extension of maintenance. Other than her subjective belief that she would get Mr. Holloway’s retirement in 4 years, which is irrelevant because the decree language is unambiguous, the only reason for her requested modification of maintenance was because she said “my income is insufficient to continue to pay my monthly expenses and debts.” (CP 75) This is not a substantial change of circumstances.

RCW 26.09.170 (1) makes it clear that there must be a substantial change of circumstances in order to modify maintenance. In this case, the evidence was insufficient to establish a substantial change of circumstances. As a result, the Court’s decision to revise the commissioner’s ruling must be reversed as there was no substantial change of circumstances for the modification of maintenance.

3. A SUPERIOR COURT HEARING A MOTION ON REVISION OF A DENIAL TO AWARD ATTORNEY FEES THAT WAS REQUESTED FOR THE FIRST TIME IN A REPLY DECLARATION, CANNOT ORDER THAT THE NONMOVING PARTY HAVE THE OPTION TO EITHER GO FORWARD THAT DAY WITHOUT PROVIDING ANY RESPONSE TO THE NEW REQUEST OR CONTINUE THE REVISION MOTION

**TO ALLOW THE NONMOVING PARTY TO FILE
RESPONSIVE MATERIAL ON REVISION.**

In *In re Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999) the Supreme Court made it clear that a superior court judge's review of a commissioner's motion on revision is limited to the record that was before the court commissioner. In that case, the husband sought revision of a commissioner's ruling and requested to supplement the record with additional evidence. The superior court refused and the husband appealed citing the case of *In re Welfare of Smith*, 8 Wash.App. 285, 505 P.2d 1295 (1973). In affirming the superior court, the Supreme Court stated:

We recognize that the Court of Appeals opinion in *In re Welfare of Smith*, 8 Wash.App. 285, 505 P.2d 1295 (1973), is somewhat unclear in that it could be interpreted to allow a superior court judge to conduct whatever additional proceedings the judge believed necessary to resolve the case on review. See, e.g., *State v. Charlie*, 62 Wash.App. 729, 732, 815 P.2d 819 (1991); *In re Welfare of McGee*, 36 Wash.App. 660, 662, 679 P.2d 933 (1984); *Hicks*, supra, 32 Gonz. L. Rev. at 42–43. We do not read *Smith* so broadly. The statute limits review to the record of the case and the findings of fact and conclusions of law entered by the court commissioner. RCW 2.24.050. In an appropriate case, the superior court judge may determine that remand to the commissioner for further proceedings is necessary. Generally, a superior court judge's review of a court commissioner's ruling, pursuant to a motion for revision, is limited to the evidence and issues presented to the commissioner. In cases such as this one, where the evidence before the commissioner did not include live

testimony, then the superior court judge's review of the record is de novo. (At 992-993)

In the case of *Perez v. Garcia*, 148 Wn. App. 131, 198 P.3d 539 (2009) this division of the Court of Appeals struck a Mason County local rule LCR 59(6.1) which stated:

The motion for revision shall be heard upon the record before the court commissioner. No new briefs or factual material may be filed without permission of the court for good cause shown. (at 137)

The court cited *Moody* above and reversed the superior court judge who both solicited and accepted additional information on revision as *Moody* specifically prohibited a superior court judge from considering new information on revision.

In the case of Mr. Holloway, the Superior Court Judge had a revision motion in front of her which was requesting to revise a commissioner's ruling that denied the request for attorney fees. (CP 155-156) The commissioner's decision did however leave open the option of bringing a motion for attorney fees, which the attorney seeking revision acknowledged that she could do separately. (CP 153-154) (July 21, 2017 RP 5) Rather than remanding the issue to the commissioner, the Court decided to take new information to decide the matter on her own. (July 21, 2017 RP 5-6) This was an error because the Court's options at that time were limited on a revision motion to the information that was before the

commissioner in the hearing for which revision is being sought. Rather than putting Mr. Holloway in a Hobbesian position of arguing the issue of attorney fees immediately without being able to provide any information in response or present new information for consideration at a continued hearing, the Court should have remanded the attorney fee issue to the commissioner for consideration of new information. The Court committed error by the very act of presenting Mr. Holloway with this option. The issue of attorney fees should have been remanded to the commissioner for the taking of further evidence.

In the reconsideration motion, counsel for Ms. Justice argued that there was invited error because of the choice made by Mr. Holloway's attorney to present responding material. (September 22, 2017 RP 17-18) In the case of *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 82 P.3d 1223 (2004) the court stated:

“Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal.” *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wash.App. 677, 681, 50 P.3d 306 (2002) (citing *In re Personal Restraint Petition of Thompson*, 141 Wash.2d 712, 723, 10 P.3d 380 (2000)). This doctrine applies when a party takes an affirmative and voluntary action that induces the trial court to take an action that a party later challenges on appeal. *Lavigne*, 112 Wash.App. at 681, 50 P.3d 306 (citing *Thompson*, 141 Wash.2d at 723–24, 10 P.3d 380). (at 771)

In the case of Mr. Holloway, he did not take an affirmative or voluntary action to induce the trial court to do anything. This was not invited error because this did not come as a suggestion on the part of Mr. Holloway, but was initiated by the Judge. (July 21, 2017 RP 5-6) In fact, counsel for Mr. Holloway objected that the attorney fee issue was not proper on revision because it not considered by the commissioner. (July 21, 2017 RP 6) The Judge's response was to simply reiterate the 2 options she had previously given him. (July 21, 2017 RP 6) Since the only option being given was to proceed immediately or accept the invitation to provide some response, this was a dilemma clearly of the creation of the Court, not something that was invited by counsel for Mr. Holloway.

Clearly, counsel for Mr. Holloway could not have argued very effectively had the court considered information that day that was stricken by the commissioner, when he had nothing that he could argue in response. However, it was clearly error for the Court to put him in that position and then to consider information that was stricken and not considered by the commissioner below. The Judge was the one setting up the situation and soliciting new information if counsel chose not to go forward immediately without the ability to respond. Under these facts there is no invited error. The decision regarding attorney fees must be reversed and remanded for consideration by the commissioner.

Judge Speir in her ruling stated that she believed that she could award attorney fees based upon RCW 26.09.140, “when there is need and an ability to pay.” (September 22, 2017 RP 27) This reads in pertinent part:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Whereas that may allow for an award of attorney fees in a modification proceeding based upon need and an ability to pay, in this case, that issue was raised before the commissioner, denied, and the request for fees was a part of a motion for revision. This scenario changed the procedure under which a court could act. The law may allow something to be done under some circumstances, but not all. A judge may be able to hear any motion they want and take all the evidence they choose, but on revision, they are limited to the record before the commissioner. This case was on revision and the court was limited as to what could be considered.

Ms. Justice had presented her request for attorney fees to the commissioner and that request was denied based upon the request being untimely. The commissioner made her order without prejudice to allow

Ms. Justice to file a new motion before her regarding the issue. However, Ms. Justice, rather than filing a new motion for fees before the commissioner, sought a revision of her ruling. The Court on revision, rather than remanding this back to the commissioner when she saw that justice required that Mr. Holloway needed to provide a response, decided on revision to take new evidence and decide the attorney fee issue. That was error. The issue of attorney fees should have been remanded to the commissioner for the taking of new evidence and the failure to do that was error. This case must be reversed and remanded for the commissioner to make that decision, if it is to be made.

CONCLUSION

The maintenance provision of the decree in this case was unanimously agreed to be unambiguous. When a provision of a decree is unambiguous it is not subject to interpretation and therefore it was error for the Court to take extrinsic evidence to determine what the parties meant in regard to maintenance and its duration. The Court's decision must be reversed and the request to extend maintenance denied.

A modification of maintenance can only be done if there is a substantial change of circumstances. A change brought on by the voluntary action of a party seeking the modification is not considered a substantial change of circumstances. The basis for the modification of

maintenance in this case was the voluntary incurring of excessive consumer debt on the part of the moving party, which debt they were unable to pay. It was error for the Court to find that this was a basis to modify and extend maintenance. The Court's decision must be reversed and the request to extend maintenance denied.

A superior court cannot take new evidence in deciding a motion on revision. In this case the Superior Court Judge specifically initiated the option for the parties to provide additional information regarding attorney fees. If additional information was necessary, the Superior Court's remedy was to remand the case to commissioner's court for further proceedings. This was not done and it was error for the Court to consider new information on revision. The Court's decision must be reversed and the issue of attorney fees must be either denied or remanded to commissioner's court for further consideration.

For all these reasons the trial court must be reversed.

Respectfully submitted on February 2, 2018.

A handwritten signature in blue ink, appearing to read "Clayton R. Dickinson".

Clayton R Dickinson, WSBA No. 13723
Attorney for Appellant

CERTIFICATE OF MAILING

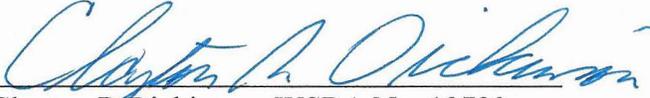
I certify that I sent via ABC Legal Messengers a copy of Appellant's Brief Review to:

Stacey Swenhaugen
1201 Pacific Ave., Suite C7
Tacoma, WA, 98402-4393

All postage prepaid, on February 2, 2018.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Fircrest, Washington on February 2, 2018.


Clayton R. Dickinson, WSBA No. 13723
Attorney for Appellant

February 02, 2018 - 11:37 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51019-7
Appellate Court Case Title: In Re Steven Ray Holloway Appellant v Toni Justice, Respondent
Superior Court Case Number: 12-3-04654-8

The following documents have been uploaded:

- 510197_Briefs_20180202113646D2498035_1121.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Brief.pdf

A copy of the uploaded files will be sent to:

- kristeno@attorneys253.com
- stacey@attorneys253.com

Comments:

Sender Name: Clayton Dickinson - Email: crdattorney@msn.com
Address:
6314 19TH ST W STE 20
FIRCREST, WA, 98466-6223
Phone: 253-564-6253

Note: The Filing Id is 20180202113646D2498035