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No. 54234-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of

RICHARD J. KIRSCHNER,

Appellant,

v.

LAURA A. DRYBREAD,

Appellee.

REPLY BRIEF OF APPELLANT

By:

Drew Mazzeo
Bauer Pitman Snyder Huff Lifetime Legal, PLLC
1235 4th Ave E #200
Olympia, WA 98506
(360) 754-1976
dpm@lifetime.legal

Attorney for Appellant

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1. INTRODUCTION

Laura filed a motion to terminate maintenance based on hearing that Richard got remarried. She then learned that Richard was not remarried. Instead of striking the motion, Laura frivolously pursued an entirely new theory requesting the trial court create an entirely new definition of marriage: the “married both spiritually and practically” (CP at 75) or the “essentially married” (RP November 15, 2019, at 17) definition. Under this definition, without actually intending to, without actually choosing to, and without actually doing so—parties can be deemed legally married.¹

Laura presented her theory as a “case of first impression” even though it is clearly not. *See e.g., Rowe v. Rosenwald*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221, at 11-15 (Ct. App. May 22, 2017) (unpublished opinion because the holding says nothing new at all). The trial court, astonishingly, bought onto this absurd theory of law opining that “[Richard] is essentially married based upon our State’s caselaw on a committed intimate relationship.” (RP November 15, 2019, at 17).

Regardless, this new definition of marriage *is absurd* and the trial court’s decision *was a clear abuse of discretion*. An “essentially married”

¹ Richard has not argued the constitutional implications of the trial court’s ruling, infringing on Richard and Karen’s fundamental right to marry or not marry anyone they choose (*e.g., State v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940, 948 (2008)) because it was not at all necessary for him to prevail in this appeal. That said, he mentions it here only to highlight the far-reaching precedent Laura requests this Court affirm.

definition of marriage “ignores the body of case law that governs ‘marital-like relationship[s]’ where both parties cohabit with knowledge that a lawful marriage between them does not exist.” *Rowe*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221, at 11-15. Richard and Karen do not even meet the inapplicable definition of common law marriage because they have never intended to get married.

In sum, the only thing this Court need hold on this appeal—other than granting attorney fees and costs to Richard—is that “because [Richard] w[as] never married, [Laura] [must continue to pay] maintenance under [the separation agreement].” *See id.* As a matter of due diligence, below Richard addresses and replies to Laura’s remaining ancillary and frivolous responsive arguments in turn.

2. STRICT REPLY ISSUE: The Standard of Review on Appeal is *De Novo*

2.1. Relevant Facts

When before the trial court, Laura agreed there was no marriage license and agreed Richard had no intention of getting legally remarried. (RP August 22, 2019, at 7; CP 75). On appeal, Richard and Laura agree that “legal conclusions and the proper interpretation of statutes are decisions that are reviewed *de novo*.” (Brief of Respondent at 15). However, Laura argues that Richard “bears the burden of showing that the record does not support

the trial court's factual findings. (Brief of Respondent at 15).

2.2. Argument

Where a trial court did not hear live testimony, did not make credibility determinations, and did not need to resolve conflicting evidence in making its ruling, courts of appeal review the entire matter *de novo*. *Goodeill v. Madison Real Estate*, 191 Wn. App. 88, 98, 362 P.3d 302, 306 (2015); *State v. Kipp*, 179 Wn.2d 718, 727, 317 P.3d 1029 (2014) (internal quotation marks omitted) (quoting *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (plurality opinion)).

Here, no party testified in person and there were no credibility determinations. The only material facts were that Laura agreed that there was no marriage license and agreed that Richard had no intention of getting legally remarried. (RP August 22, 2019, at 7; CP 75). The medical records and emails, and the like, speak for themselves and no party contested what their substance entailed nor their authenticity. All other facts are irrelevant and not material² to the requisite legal analysis of, first, whether Richard

² There is some opining in a declaration from Sheri regarding Richard allegedly "playing the system," and the like. Richard and Karen certainly took offense. They did not agree with Sheri's opinions and false statements. (CP at 35-54, 55-57; footnote 6, *infra*). Regardless, Sheri's opinions do not create any material factual dispute. *See e.g., Rowe*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221, at 11-15 (affirming summary judgment as to no marriage).

got remarried, and second, whether maintenance should continue under the plain language of the separation agreement. Thus, this Court should review *de novo* the trial court's errors in answering those questions.

3. STRICT REPLY ISSUE: Richard Appropriately Challenged All Material and Adverse Findings and Conclusions by the Trial Court.

3.1. Relevant Facts

A commissioner at the trial court initially heard Laura's motion. (RP August 22, 2019). She found that "Because the parties do not have a marriage license, there's no indication that they've actually legally married." (RP August 22, 2019, at 10). She found that Richard "is simply doing everything but having a legal ceremony" and that "he is married to [Karen] in every other way." (RP August 22, 2019, at 10-12). The commissioner concluded that "there is a substantial change in circumstances, and [Laura] is no longer required to pay maintenance. . . ." (RP August 22, 2019, at 11). She also concluded that "it would be against public policy for the court to not terminate the maintenance where . . . [Richard] is simply doing everything but having a legal ceremony." (RP August 22, 2019, at 12).

On revision, the trial court judge stated that Richard had "made a really good argument" and that "if it goes up on appeal, I think it will be close call," but denied the revision motion. (RP November 15, 2019, at 16).

She found that “certainly [Laura] could foresee that her ex-husband would live with another partner and not marry.” (RP November 15, 2019, at 12). She then rejected the commissioner’s substantial change of circumstance reasoning. (RP November 15, 2019, at 16). She also rejected the public policy reasoning made by the commissioner because the “parties can make the contract that they have made here.” (RP November 15, 2019, at 17). Instead, the trial court judge concluded that “the maintenance obligation ends because [Richard] is essentially married based upon our State’s caselaw on a committed intimate relationship.” (RP November 15, 2019, at 17). Last, she stated that Richard’s attorney “has not made any argument to dispute [Richard and Karen] are not holding themselves out as married.” (RP November 15, 2019, at 17). At no point did the trial court examine or analyze the elements of, or find, that Richard and Karen were in a CIR. No written findings or conclusions were ever entered in the case.

Neither the trial court commissioner nor the trial court judge ever found that Richard and Karen had a legal marriage ceremony or an intent to marry. The commissioner found the opposite, stating Richard “is simply doing everything but having a legal ceremony.” (RP August 22, 2019, at 12). Richard and Karen both filed declarations that denied they were holding themselves out as married. (CP at 35-54, 55-57).

On appeal, Richard assigned the following errors:

The trial court commissioner erred by finding, and concluding, that it could modify, or terminate, a non-modifiable spousal maintenance provision by showing a substantial change in circumstances, such as the party, *i.e.*, Richard, “being in a new relationship” and “not gotten married because of the risk of the termination of maintenance.” (*e.g.*, RP August 22, 2019, at 10-11).

The trial court commissioner erred by finding, and concluding, that it is “against public policy to not terminate . . . [non-modifiable] maintenance [unless the party receiving maintenance gets legally married] in a situation where it appears to the court that [such party receiving the maintenance, *i.e.*, Richard,] is simply doing everything but having a legal ceremony. (RP August 22, 2019, at 12).

The trial court judge erred by finding, and concluding, that “the maintenance obligation ends because [Richard] is essentially married based on our State’s case law on committed intimate relationship is very close to a marriage.” (RP November 15, 2019, at 17).

The trial court erred by equating Richard and Karen’s relationship as similar to a CIR, when declaratory relief of establishing that they were in a CIR was not pled nor requested, and when the trial court did not analyze the elements of a CIR, nor find a CIR existed. (RP August 22, 2019; November 15, 2019).

The trial court judge erred by finding, and concluding, that Richard and Karen allegedly being in a CIR but not remarrying is a “unique” situation with a “very unusual set of facts.” (RP November 15, 2019, at 17).

The trial court judge erred by finding, and concluding, that public policy supported her ruling. (RP November 15, 2019, at 17).

The trial court judge erred by finding, and concluding, that Richard and Karen’s situation “is a [legal] marriage.” (RP November 15, 2019, at 17).

The trial court judge erred by finding that Richard’s attorney “has not made any argument to dispute that [Richard] and [Karen] are not holding themselves out as being married.” (RP November 15, 2019, at 17).

The trial court judge erred by finding and concluding that Richard’s “sole reason for not getting a legal blessing is to continue to have maintenance income.” (RP November 15, 2019, at 17).

The trial court judge erred by finding and concluding that Richard and Karen’s relationship is “essentially a marriage for the purpose of the operation of this separation contract” and that Laura “no longer” has an “obligation” to pay maintenance. (RP November 15, 2019, at 17).

(Brief of Appellant at 3-4). Laura, on appeal, argues that Richard failed to assign errors to several findings by the commissioner and the trial court judge. (Brief of Respondent at 20-21).

3.2. Argument

Court of appeals “review[] the decision of the superior court judge, not the commissioner.” *In re Marriage of Lyle*, 199 Wn. App. 629, 630, 398 P.3d 1225, 1227 (2017). “A trial court’s failure to enter findings of fact and conclusions of law requires remand to the trial court for formal entry of written findings and conclusions unless the record is adequate for review.” *In re Marriage of Luna*, No. 73354-1-I, 2016 Wash. App. LEXIS 387, at *18 (2016) (unpublished) (citing *Just Dirt, Inc., v. Knight Excavating, Inc.*, 138 Wn. App. 409, 416, 157 P.3d 431 (2007)).

Here, the trial court judge's oral findings and conclusions are sufficient for review. No party claims error for failure to enter written findings and conclusions. This Court should review the findings and conclusions by the trial court judge. *See Marriage of Luna*, No. 73354-1-I, 2016 Wash. App. LEXIS 387, at *18.

Laura's claim that Richard did not challenge all of the trial court judge's findings and conclusions that were adverse to Richard's arguments on appeal is not supported by the record. (*Compare* Brief of Appellant at 3-4 *with* RP November 15, 2019, at 16-28). It is noteworthy that Laura never challenged, nor cross appealed, the trial court judge's conclusions that: The commissioner's substantial change of circumstance and public policy violation reasonings were erroneous. This Court should ignore and reject such arguments as the trial court expressly rejected them. *See* RAP 2.4(a); *State v. Sims*, 171 Wn.2d 436, 449, 256 P.3d 285, 292 (2011); *Pres. Poway v. City of Poway*, 245 Cal. App. 4th 560, 585, 199 Cal. Rptr. 3d 600, 618 (2016) (holding "As a general matter, a respondent who has not appealed from the judgment may not urge error on appeal" and "To obtain affirmative relief by way of appeal, respondents must themselves file a notice of appeal and become cross-appellants."). The necessities of this case do not demand reviewing those issues because the dispositive issue on appeal is whether "the maintenance obligation ends because [Richard] is essentially married

based upon our State’s caselaw on a committed intimate relationship.” (RP November 15, 2019, at 17).

4. STRICT REPLY ISSUE: Laura’s Claims are Time-barred.

4.1. Relevant Facts

Laura raised no argument or concern regarding the separation agreement until well over a decade after it was executed and merged with the final decree of dissolution. Laura fully understood, and her intent was, that maintenance payments to Richard would not terminate unless Richard died or got remarried. (CP at 48-51) (Laura stating in 2013, “The way our order is written now, *when you get married I would not longer be required to pay what the divorce agreement says.*”) (emphasis added). At the latest, in 2013, Laura was fully aware of Richard and Karen’s very close relationship. (CP at 48-51) (Laura stating, “Tommy and I will continue to pay the remaining [half,] \$1100[,], permanently, even when you get married. . . .[a]s long as [Richard] marr[ies] Karen!!!. . .”). Before the trial court judge, Laura’s attorney conceded that “certainly [Laura] could foresee that her ex-husband would live with another partner and not marry.” (RP November 15, 2019, at 12).

On appeal, Laura concedes that she “is not making any claim as to the unfairness of the settlement agreement.” (Brief of Respondent at 18). Rather, “she argues that the settlement agreement, to the extent that it allows

Richard to avoid termination of the maintenance by being married in every imaginable way except for obtaining a license, is contrary to public policy and is therefore unenforceable.” (Brief of Respondent at 18). She also argues that “Richard’s performance of the settlement agreement violates the duty of good faith and fair dealing. . . .”; therefore, “the settlement agreement is unenforceable.” (Brief of Respondent at 18).

4.2. Argument

“[A] cause of action accrues when the party has the right to apply to a court for relief.” *1000 Va. Ltd. P’ship v. Vertecs*, 158 Wn.2d 566, 575, 146 P.3d 423, 428 (2006). Written contract claims must be brought within six years. RCW 4.16.060(1). A party must claim a separation agreement is unfair before it is merged into the decree of dissolution. RCW 26.09.070(3). Relief based on a CIR claim must be brought within three years. RCW 4.16.080(3); *In re Marriage of McBeth*, No. 51076-6-II, 2019 Wash. App. LEXIS 2401, at *5 (Ct. App. Sep. 17, 2019) (unpublished). The doctrine of laches bars stale claims in equity. *Carlson v. Gibraltar Sav. of Washington, F.A.*, 50 Wash. App. 424, 749 P.2d 697 (1988).

Here, Richard argued to the trial court that Laura waited twelve years to bring her motion to modify the maintenance provision in the separation agreement and decree of dissolution. (RP November 15, 2019, at 4). All of Laura’s claims are time-barred. First, her argument that “Richard

. . . avoid[ing] termination of the maintenance by being married in every imaginable way except for obtaining a license, in contrary to public policy. . . .”—is nothing more than a (very weak) re-brandishing of an unfairness claim. She is arguing that maintenance provisions that terminate with (nothing less than) an actual remarriage—are void against public policy. This claim is barred as it had to be made before the dissolution decree was entered. *See* RCW 4.16.060(1); RCW 26.09.070(3); *Carlson, F.A.*, 50 Wash. App. 424.

Second, Laura’s arguments regarding good faith and fair dealing are also time-barred. Laura clearly had intimate knowledge of an alleged CIR, and very close relationship, between Richard and Karen many years before bringing her motion. (*See e.g.*, CP at 48-51). Any such bad faith claim based on Richard “structuring” his relationship with Karen is time-barred in law or equity and has been for many years. *See* RCW 4.16.080; *Carlson, F.A.*, 50 Wash. App. 424.

5. STRICT REPLY ISSUE: Richard and Karen are Not Legally Married.

5.1. Relevant Facts

Before the trial court, Laura argued that Richard and Karen had a CIR, “which is most closely analogous legal concept to common law marriage.” (CP at 119-55). Because Richard was in CIR, he was married for

the “purpose of determining whether maintenance should be terminated. . . .” (CP at 119-55). The trial court judge’s sole reasoning for terminating the maintenance provision was that “the maintenance obligation ends because [Richard] is essentially married based upon our State’s caselaw on a committed intimate relationship.” (RP November 15, 2019, at 17). All other reasoning was rejected. (RP November 15, 2019, at 16-17). On appeal, “Laura does not claim any cohabitation or CIR relationship forms the basis for terminating or modifying maintenance.” (Brief of Respondent at 17). Instead, she argues that Richard’s “unique” relationship deems him “essentially married” and the maintenance provision should terminate.

5.2. Argument

“[T]he *lex loci contractus* is controlling in adjudications involving the validity of marriage.” *Willey v. Willey*, 22 Wash. 115, 117, 60 P. 145, 146 (1900). “Common-law marriage is not recognized under Washington law.” *In re Pennington*, 142 Wn.2d 592, 600, 14 P.3d 764, 769 (2000). Rather, Washington recognizes formal legal marriages, domestic partnerships, and CIRs. “A ‘common law’ marriage is one without formal solemnization. . . . [where there is an] actual and mutual agreement to enter into a matrimonial relation, between parties capable in law of making such a contract, consummated by their assumption openly of marital duties and obligations.” *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 250, 778 P.2d

1022, 1025 (1989). “Merely living together, even as husband and wife, does not make a common-law marriage.” *Id.*

A “CIR” is a “stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” *E.g., Rowe*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221, at *6. Persons in CIR relationships do not have all of the rights of married persons. *Olver v. Fowler*, 161 Wn.2d 655, 666-68, 168 P.3d 348 (2007). “Wife,” in a wrongful death action, means a woman legally married. *Roe v. Ludtke Trucking*, 46 Wn. App. 816, 819, 732 P.2d 1021, 1023 (1987). Living together for thirteen years in “a long-term, stable, and marital-like relationship” does not create a marriage in a wrongful death action. *Id.* Parties to a CIR relationship are not entitled to unemployment benefits available to married couples. *Davis v. Dep’t of Employment Sec.*, 108 Wn.2d 272, 737 P.2d 1262 (1987). They cannot inherit property under the intestate statute. *Bowen*, 113 Wn.2d at 253.

Here, the trial court judge terminated maintenance “because [Richard] is essentially married based upon our State’s caselaw on a committed intimate relationship.” (RP November 15, 2019, at 17). It rejected all other reasoning. (RP November 15, 2019, at 16-17). *Rowe* demonstrates that the trial court clearly erred. *Rowe*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221, at *11-15. Laura claims cases like *Rowe* are

“distinguishable.”

In *Rowe*, a property agreement was enforceable³ because “all assets and liabilities were fully disclosed,” because “The parties negotiated several terms of the agreement,” because it was “entered into . . . voluntarily and intelligently . . . with a full understanding of the consequences of the agreement,” and because the parties “acknowledged the agreement's provisions” were “fair and equitable.” *Id.* at 7. In the case at hand, the separation agreement entails all the same provisions and procedural safeguards. (CP at 215-31). It is perplexing how Laura can claim that her agreement is not equally enforceable.⁴

Moreover, in *Rowe* the parties had a formal ceremony they called a wedding, exchanged rings and vows, posted on social media that they were married, and held themselves out to friends and family as married. Based on such evidence, *the court of appeals emphatically ruled that the parties*

³ Richard’s Brief of Appellant at 28 mistakenly stated “the trial court [in *Rowe*] found the property agreement was **unenforceable**. . . .” (emphasis added). The trial court found the agreement **enforceable**. *Rowe*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221, at *11 (holding, “Because the agreement is procedurally fair, it is enforceable.”).

⁴ Noteworthy is the fact that Laura insisted on paying Richard maintenance when they divorced. She desired to divorce Richard because of his ongoing health issues and the daily impact on their lives. She knew divorce would cause him to lose her employer provided medical benefits. She knew he would be placed in a tough financial circumstance. When Tommy divorced his wife and became available/interested in Laura that was the clincher to Laura deciding to end her marriage with Richard. Laura also quit claim deeded the marital home to Richard. This worked hand in hand with the maintenance provision as the only way Richard was able to assume those mortgage payments was by having maintenance come in every month. In sum, the idea that this maintenance provision was not expressly agreed upon, and not fully endorsed, by Laura is ludicrous.

were not married. It explained that deeming such parties married would “ignore[] the body of case law that governs “marital-like relationship[s] where both parties cohabit with knowledge that a lawful marriage between them does not exist.” *Id.* at *11-15. It affirmed summary judgment, reasoning that the lack of a marriage license and lack of a formal marriage certificate was persuasive as to the fact that the parties were not married. *Id.* No material facts at issue were found. *Id.*

In other words, *Rowe* disposes of this appeal in favor of Richard. The trial court erred because there is no such thing as being “essentially married.” Being “essentially married” is a CIR and a CIR is not equivalent to being legally married. Laura’s argument that *Rowe* is distinguishable is frivolous. She argues “third party rights,” not discussed in *Rowe*, are impacted by an (alleged) CIR relationship. This new argument falls flat. *Rowe* is directly applicable to this case because it holds that without actually getting married parties in a CIR relationship are not treated the same by the law as married persons. It does not matter how similar their relationship appears to be to an actual marriage. Thus, Laura’s “third-party rights,” defined by the plain language of the maintenance provision, have not changed. For maintenance to terminate Richard must remarry. He has not.

As to Laura’s remaining (ancillary) arguments, Richard provides the following dispositive counterarguments: First, Richard stating to select

medical providers (in private consultations), that he was married to make it easier for Karen to attend medical appointments and get medical records (*see e.g.*, CP at 35-54, 55-57, 204-06) does not make him remarried. It allowed him to harmlessly avoid paperwork when sick. (CP at 35-54, 55-57).

Second, Laura stated years ago to Sheri that the grandkids “love Karen like they do [her].” (CP at 44-47). The fact grandkids called Karen “grammy” is just them showing affection. It is a common occurrence where non-family friends have close relationships with family members.⁵

Third, Richard and Karen cohabitating together does not make them married. Laura concedes this point. (Brief of Respondent at 17).

Fourth, Laura’s cited dictionary definition of marriage—*e.g.*, “to join for life as husband and wife . . . according to . . . laws and customs. . . .” does not support Richard being remarried. In Washington State, if no remarriage occurs, then a marital-like relationship can be a CIR, but not an actual legal marriage “according to law.”

Fifth, Laura stated exactly how she interpreted the separation agreement in an email in 2013, long before this litigation ensued: “The way our [dissolution] order [and separation agreement] is written now, *when you*

⁵ Many families have an “Uncle” or “Aunt” or “Grandpa” so and so that are not actually related. Laura absurdly attempts to ignore common sense and common realities by arguing affectionate nicknames can change legal realities.

get married[, Richard,] I would no longer be required to pay what the divorce agreement says.” (CP at 48-51) (emphasis added). She is presumed to know that no common law marriage exists in Washington State.

Sixth, the argument that Laura had “no choice in how Richard and Karen structured their relationship” is a red herring. Laura has always known that an ex-spouse cannot tell their former spouse how to “structure” future relationships. Moreover, Laura chose to enter into the separation agreement. There is nothing “distasteful” about voluntarily entering into a non-modifiable maintenance provision, especially given the circumstances that surround the ending of Richard and Laura’s very long-term marriage. Richard was incredibly disabled, and a judge would have ordered maintenance if the issue was contested. The “distasteful” quote cited by Laura was made discussing whether the law should mandate maintenance as unconscionable certain or all cases, not whether persons can amicably choose to provide it because doing so is equitable.

Seventh, Laura easily foresaw her ex-spouse living with another but not getting married. (RP November 15, 2019, at 12).

Eighth, Richard does not enjoy “all the benefits” of marriage. For example, Richard—as stated by Laura in her own response briefing—cannot bring a suit for tort damages in a wrongful death action. He cannot get unemployment benefits like actual spouses. He cannot inherit property

intestate. He will not be treated the same as married couples if there is a breakup and rights are litigated. In sum, while Richard maintains his right to maintenance from Laura by not remarrying—he does not enjoy many benefits that only come with an actual legal marriage.⁶

Finally, Richard agrees that so long as a parties' dissolution decree

⁶ Laura makes unsupported claims that Richard filed his taxes jointly with Karen as married. She claims, based on nothing more than an erroneous and utterly made up statements from Sheri, that Karen is paid by the State of Washington to care for Richard. She claims Richard wears a wedding ring. She claims Richard and Karen had a “ceremony” based on a double, child, hearsay statement made by Sheri.

Although Richard addressed and denied these accusations and arguments to the trial court, and claimed error on appeal as to what was only necessary to win his appeal, Richard attempted to ignore these accusations and arguments made by Laura because he wanted to avoid feeding his beyond self-centered, disaffected, hypocritical, and unappreciative daughter with what she enjoys and thrives off of the most—manipulation and contention in the family spun to directly benefit her. His trial court attorney correctly saw these statements as largely irrelevant as to the legal issue at hand. Notably, Laura has maintained for years that Sheri is “*hurtful and untruthful.*” (CP at 44-47) (emphasis added). Sheri attempts to paint Richard as not disabled, and as “playing the system,” stating he could build 75% of a play set for the grandkids before having to stop. The reality is that building a play set is not hard nor exhausting work and Richard could not complete the task; Sheri’s statement just demonstrates Richard’s disability if anything. Moreover, like many persons with serious disabling conditions, Richard’s medically documented and diagnosed Multiple Sclerosis, diabetes, serious heart disease, cancer, and host of medical ailments (CP at 164-71, 195-200), eb and flow from making him bed ridden to hospitalized to relatively able to function for short periods of time. The idea that this former sheriff’s deputy has ever “played the system” is ludicrous. These statements coming from Sheri, apparently believed by Laura, and claimed in court are beyond hurtful.

That said, Richard wants to be crystal clear that (1) He has NEVER filed his income taxes as anything but single since meeting Karen, (2) Karen has NEVER been paid so much as a dime from the State of Washington or any other person or entity for caring for Richard, (3) he and Karen have NEVER had a wedding ceremony, and (4) he does NOT wear a wedding ring. He cannot wear any ring on his right hand because of his medical conditions and the ring that he wears on his left hand, on occasion, is also worn around his neck on a chain, or not at all, and is not a wedding ring. Richard’s trial court counsel correctly objected to the assertion made at the trial court that it was a wedding ring. Neither Richard nor Karen ever testified to the matter. On appeal, his counsel advised that the ring issue was ancillary and unnecessary to appeal given the law explained in *Rowe*. It would just increase appellate costs all the while making a non-issue appear to be an actual issue.

is governed by Washington State law, “It would be inequitable to terminate maintenance of a person living in this State who entered [into] a common law marriage while in another state. . . .” The point being that this case, as well as any dissolution decree from this State, is governed by Washington State law.

6. STRICT REPLY ISSUE: The Separation Agreement Merged into the Dissolution Decree Did Not Violate Public Policy Over a Decade Ago and Does Not Violate Public Policy Today.

6.1. Relevant Facts

The 2007 separation agreement included (1) full disclosure of all assets and liabilities, (2) a release of all claims, (3) provisions regarding how it was fairly negotiated, (4) provisions that reminded them to seek counsel, (5) provisions stated in was final and binding, governed by contract law, only modifiable by agreement, and (6) provisions where the parties expressly agreed it was fair and equitable. On appeal, Laura concedes that paying maintenance is not an extreme financial hardship and that it was not unfair when executed. (Brief of Respondent at 30) (stipulating that “neither the *Hulschner* nor the *Glass* exceptions directly apply to this case. . . .”). Instead, she argues she “could not possibly have foreseen the depths to which Richard has descended to force [her] to support him and his new spouse. . . .” (Brief of Respondent at 34). Laura cites cases that declined to enforce child support provisions inconsistent with child support statutes.

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6.2. Argument

The primary objective regarding statutory interpretation is to effectuate the legislature's intent. *In re Estate of Garwood*, 109 Wn. App. 811, 814-815, 38 P.3d 362, 364 (2002). Under RCW 26.09.070(1), the legislature's plain intent is for trial courts to respect and follow "amicable settlements of disputes." This is because a separation agreement, once approved of by the court, is subsequently binding. RCW 26.09.070(3); *see also* RCW 26.09.070(5).

As to maintenance provisions, the legislature intended parties to contract for such provisions to be permanent or to end following certain agreed upon future events. RCW 26.09.070(7). Parties frequently agree to terminate maintenance upon events far less than marriage, such as cohabitation. *See e.g., Tower*, 55 Wn. App. at 703-04. The statutory scheme evolving over the last few decades give parties more discretion in making final settlement agreements and to give courts less discretion in modifying them. *See e.g.,* RCW 26.09.070(1); RCW 26.09.070(3); RCW 26.09.070(5).

A separation agreement is enforceable if it was fair "at the time of its execution." RCW 26.09.070(3). It is substantively fair if it considers "economic" and other circumstances. RCW 26.09.070(3). It is procedurally fair if it was freely entered into and full disclosure was made. *See* RCW

26.09.070(3).

Here, Laura concedes that the separation agreement was fair, procedurally and substantially when entered. (Brief of Respondent at 30). She concedes that she is not in extreme financial hardship. (Brief of Respondent at 30). Laura's sole public policy argument is that Richard and Karen being together—living in sin and not getting married—is against public policy because Laura must still provide maintenance pursuant to the plain language of the separation agreement. This argument has no merit.

First, the public policy of Washington State is to enforce “amicable settlements of disputes.” RCW 26.09.070(1). In this case, there is no question that this was an amicable settlement. Laura happily entered into it. She abided by the maintenance provision—all the while knowing the intimacies of Karen and Richard's relationship—for over a decade. The underlying reason she filed the motion on appeal is because in “2014 . . . Sheri removed her children . . . from Laura's life.” (Brief of Respondent at 10-11). By ending Richard's maintenance, Laura hopes to use that money to pay off “unfathomable debt” (CP at 44-47) and perhaps to further bribe Sheri into letting her see the grandchildren. Public policy does not support changes to families' ever-changing “emotional” interests. Public policy supports “finality” as to dissolution decrees and settlement agreements. *In re Parentage of Jannot*, 149 Wn.2d 123, 128, 65 P.3d 664, 667 (2003).

Second, child support arguments have no applicability in this case. Those cases rejected provisions that violated RCWs concerning child support for the benefit of minor children. In this case, the maintenance provision complies with applicable RCWs. *See e.g.*, RCW 26.09.070(7). A judge approved it 2007. If anything, Richard’s disabilities and need for continuing financial support put public policy considerations squarely on his side. Just as the Court would not lessen support for minor children, *e.g.*, persons with an incapacity caused by age, in violation of the law, this Court should not lessen support for Richard, *i.e.*, a person with an incapacity caused by medical disabilities, in violation of the law.

7. STRICT REPLY ISSUE: Richard Has Not Violated any Duty of Good Faith and Fair Dealing.

7.1. Relevant Facts

Laura argues Richard has “carefully and in bad faith purposely structured [his] affairs to deprive Laura of her rights.” (Brief of Respondent at 22-23). Her “rights” are her contractual rights to not provide maintenance to Richard if he remarries. She further argues that Richard receives more rights than a married person by not marrying Karen. (Brief of Respondent at 23). She believes Richard is acting in bad faith by not marrying Karen while still collecting maintenance per the separation agreement. (Brief of Respondent at 22-23).

7.2. Argument

“[T]he duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract.” *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356, 360 (1991). “Nor does it inject substantive terms into the parties’ contract.” *Id.* (internal punctuation omitted). “As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.” *Id.*; *Seattle-First Nat’l Bank v. Westwood Lumber*, 65 Wn. App. 811, 822, 829 P.2d 1152, 1158 (1992). Parties are under no obligation to renegotiate their contracts. *Badgett*, 116 Wn.2d at 572.

Here, Laura admits good faith and fair dealing does not require changing the agreement’s language. (Brief of Respondent at 33). But that is exactly what she wants to happen. She bewilderingly cites *Rouse* and *Badgett*. *Rouse v. Peoples Leasing Co.*, 96 Wn.2d 722, 638 P.2d 1245 (1982); *Badgett*, 116 Wn.2d 563.

In *Rouse*, the court ruled that the title of a contract, *i.e.*, a lease, did not govern its substance, which was a loan. It did not rule on the enforceability of the substance of the contract at all. This holding does not support Laura’s case. The issue is whether Richard is remarried or not. Washington is not a common law marriage state, so there is not even a

possibility that Richard is remarried. Richard is allowed to “stand[] on [hi]s rights to require performance of [the separation agreement] according to its terms.” *Badgett*, 116 Wn.2d at 570. Those “terms” require he be remarried for the maintenance to end.

In *Badgett*, the court found that there was no breach of the duty of good faith because the party sued was “not obligate[d]” to renegotiate the terms of a contract. *Id.* at 574. In the case at hand, the same rationale applies. Richard is not required to renegotiate the contractual maintenance provision. *See id.* Laura brought her motion in bad faith. She brought it based upon hearsay that Richard was remarried. When Richard corrected that material fact and inaccuracy, Laura—in bad faith—continued to pursue her motion, changing her argument. Her new arguments directly contradicted her own previous interpretation of the separation agreement (CP at 48-51) that required Richard to get remarried.

Laura also cites an out of context quote from a dissenting opinion in *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 132, 323 P.3d 1036, 1050 (2014) (dissenting opinion). In *Rekhter*, Justice Stephens dissented pointing out that (1) “a breach of a duty imposed by statute does not create an action on a contract” (*Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 116, 323 P.3d 1036, 1043 (2014)), and (2) that the agency’s only statutory duty was to its clients and not to providers suing it. His

conclusion was that no duty to the providers could arise under the doctrine of good faith and fair dealings because there was no contractual discretion at issue. *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 134, 323 P.3d 1036, 1051 (2014) (dissenting opinion).

Laura interprets Justice Stephen's dissenting opinion as supporting her claim that her contractual rights under the separation agreement are "illusory" because Richard has not remarried. (Brief of Respondent at 33). Laura's argument is ironic because Justice Stephens entire point in *Rekhter* was that there was no duty of good faith in that case. Regardless, there can be no breach of the duty of good faith when a party "stand[s] on [hi]s rights to require performance of [separation agreement] according to its terms." *Badgett*, 116 Wn.2d at 570. That is all Richard has done. Furthermore, Richard has in no way violated any statutory duties to anyone nor any contractual provisions; thus, *Rekhter* supports Richard's arguments if anything.

Respectfully submitted this 29th day of July, 2020,



Drew Mazzeo WSBA No. 46506
Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on July 29th, 2020, I caused to be served:

1. Reply Brief of Appellant

On:

Madison Law Firm, PLLC
Att: Roger B. Madison, Jr.
2620 RW Johnson Blvd, Suite 104
Tumwater, WA 98512
roger@madisonlf.com

Dated July 29th, 2020, at Olympia, Washington.



Stacia Smith

LIFETIME LEGAL, PLLC

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