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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31835-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of:

BARRY CRAIG EGGERT,
Petitioner/Appellant,

vs.

KRISTY KAY EGGERT,
Respondent/Respondent.

BRIEF IN REPLY OF APPELLANT BARRY CRAIG EGGERT

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1
B. REPLY TO RESPONDENT'S REQUEST FOR FEES. . . 13
C. CONCLUSION. 14

TABLE OF AUTHORITIES

Table of Cases

Berg v. Berg, 72 Wn.2d 532, 434 P.2d 1 (1967). 6, 7

Cromwell v. Gruber, 11 Wn.App. 363, 400 P.2d 1285 (1972) 11

Gordon v. Gordon, 44 Wn.2d 222, 172 P.2d 210 (1946) 7

In re Marriage of Hulscher, 143 Wn.App. 708, 180 P.3d 199 (2008). 2

In re Marriage of Morrow, 53 Wn.2d 579, 770 P.2d 197 (1989) 6

In re Marriage of Sheffer, 60 Wn.App. 51, 802 P.2d 817 (1990) 6

In re Marriage of Short, 125 Wn.2d 865, 890 P.2d 12 (1995) 2, 3, 10

In re Marriage of Spreen, 107 Wn.App. 341, 28 P.3d 769 (2001) 3, 5, 6, 7, 10

In re Marriage of Tang, 57 Wn.App. 648, 789 P.2d 118 (1990) 7

In re Marriage of Tower, 55 Wn.App. 693, 780 P.2d 863 (1989), review denied, 114 Wn.2d 1002 (1990) 6

McKendry v. McKendry, 2 Wn.App. 882, 472 P.2d 569 (1970) 6, 7

Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 677 P.2d 773 (1984). 11

State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995) 7, 8

<u>Wagner v. Wagner</u> , 95 Wn.2d 94, 621P.2d 1279 (1980)	
.	10

Other Case Law

<u>In re Universal Serv. Fund Telep. Billing Prac. Litigation</u> , 619 F.3d 1188 (10th Cir. 2010)11
--	-------------

Court Rules

RAP 18.1(c)13
RAP 12.28, 12, 14

Statutes

RCW 26.09.07010
RCW 26.09.070(1)10
RCW 26.09.070(7)2, 3
RCW 26.09.0904, 15
RCW 26.09.17010, 15

A. ARGUMENT IN REPLY

On pages 2 and 5 of the Response Brief of the respondent, KRISTY KAY EGGERT indicates that she is responding to "assignment of error no. 1' and "assignment of error no. 2." Because respondent's arguments are not, in fact, directed to any corresponding assignments of error as set forth in the opening brief of the appellant, BARRY CRAIG EGGERT, it must be assumed Ms. Eggert has mis-spoken herself and she is instead attempting to respond to appellant's issues nos. 1 and 2. Mr. Eggert will reply accordingly:

1. Appellant's issue no. 1 [revisited]. On pages 2 through 4 of the Response Brief, the respondent, KRISTY KAY EGGERT, once more labors under the misguided assumption there was an "implied" agreement, or tacit meeting of the minds, concerning the so-called "non-modifiable" nature of spousal maintenance when the decree of dissolution was entered on August 29, 2005. [CP 1-7, 8-13]. Curiously enough however, Ms. Eggert readily concedes, on pages 2 through 3 of her brief, that

there was no formal agreement, or written contract, specifying that maintenance would run in perpetuity as required under RCW 26.09.070(7). See also, In re Marriage of Short, 125 Wn.2d 865, 875-876, 890 P.2d 12 (1995). Furthermore, she makes no argument that there were any bargained-for exchange of consideration given in terms of any so-called "implied" contract. Simply put, there was none.

More to the point, Ms. Eggert also acknowledges on pages 2 and 3 of her brief that an "implied agreement" alone will not sustain the existence of a non-modifiable maintenance award. She ignores the requirements of RCW 26.09.070(7), but cites In re Marriage of Hulscher, 143 Wn.App. 708, 714, 180 P.3d 199 (2008) also requires a separate contract to make a non-modifiable maintenance award enforceable.

Disingenuously, she then goes on to claim, without explanation, on page 4 of her brief, that In re Marriage of Short, 125 Wn.2d 865, 890 P.2d 12 (1995) is in apposite even though it stands for the same proposition as in Hulscher. In other words, Ms. Eggert seemingly acknowledges by way of her

analysis that modification is not prohibited absent the case where the parties expressly agreed to non-modification. See also, In re Marriage of Short, at 875-76. Thus, her claim on page 3 of her brief that the trial court lacked jurisdiction to modify maintenance is entirely misplaced since there was no contract as required under RCW 26.09.070(7).

Nevertheless, even if Ms. Eggert's claim of an "implied contract" would somehow suffice in terms of satisfying the requirement of an expressed written agreement in RCW 26.09.070(7), a simple review of the record reflects the absence of any such "implied" meeting of the minds. In other words, the existence of any such agreement, tacit or otherwise, is not supported by "substantial evidence." See, In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001).

Once again, Ms. Eggert admitted during her deposition that, contrary to her earlier spurious claims [CP 39-40, 41-42, 44], there never was any agreement or tacit understanding that she would forego an interest in Mr. Eggert's retirement account in exchange for her receiving maintenance

in perpetuity, save the death of either spouse or her remarriage. [CP 210, 221-22]. To the contrary, each party had simply chose to keep their own individual and separate pensions or retirement accounts. [Id].

In turn, this same admission on Ms. Eggert's part was confirmed by Mr. Eggert in his March 7, 2013 declaration. [CP 206-08]. The parties had agreed that "each would keep their own respective pension despite hers being worth three times that of . . . [his]." [CP 207]. Hence, the record is devoid of any evidence Ms. Eggert had ever given any consideration whatsoever to support either her recent renewed claims, or the Superior Court's conclusion, that spousal maintenance was to continue in perpetuity.

Moreover, there is no evidence in the record even suggesting that Mr. Eggert had somehow "agreed" to the same. Likewise, the record is devoid of any evidence that the court had, in fact, considered the governing criteria set forth in RCW 26.09.090, when an ending date for maintenance was omitted in terms of entry of the finding of fact

and conclusion of law and decree of dissolution on August 29, 2005. [June 20, 2013 RP 3-11; CP 247. 251-54, 260].

Instead, the only evidence presented during hearing was to the contrary. [CP 206-08]. Ms. Eggert had admitted during her December 12, 2012 deposition that, when the decree was entered, it was her understanding that she would have to obtain employment at some point in time and, further, that she had not started looking for work until the beginning of 2011--some six years later. [CP 209, 219, 220].

Since, once again, there was no factual basis to support the existence of any "implied" agreement that spousal maintenance remain in perpetuity, this leaves the question of the law supplying this "missing term." As stated before, it is generally understood the duration, as well as the amount, of an award of maintenance must be limited to the relevant facts and be reasonable and just. In re Marriage of Spreen, at 347.

An indeterminate period of maintenance is not favored under the law, and it is not normally the

prerogative of the court to place a permanent responsibility upon a divorced spouse to support a former wife indefinitely. Berg v. Berg, 72 Wn.2d 532, 534-35, 434 P.2d 1 (1967). Furthermore, the facts presented in this case, as they relate to the 2000 decree, do not in any sense lend themselves to those rare instances in which an award of permanent maintenance may be just. Simply put, this is not a case where the husband had converted large sums of community assets to separate own use of purpose. Nor, was this a case where the wife cannot work due to some debilitating illness, such as blindness or multiple sclerosis, and cannot work. See, e.g., In re Marriage of Tower, 55 Wn.App. 693, 703-04, 780 P.2d 863 (1989), review denied, 114 Wn.2d 1002 (1990); In re Marriage of Morrow, 53 Wn.2d 579, 584-89, 770 P.2d 197 (1989); see also, In re Marriage of Spreen, at 348; In re Marriage of Sheffer, 60 Wn.App. 51, 55-56, 802 P.2d 817 (1990). In essence, this is simply not a case where the parties would have "contemplate[d] perpetual alimony and consequently perpetual indolence" when the decree was entered. McKendry v. McKendry, 2

Wn.App. 882, 887, 472 P.2d 569 (1970); Berg, at 534-35.

This leaves the final question whether the Superior Court abused its discretion in ordering maintenance to continue in perpetuity. As stated before, the court will be deemed to have abused its discretion when the court acted on untenable grounds or for untenable reasons, or has erroneously interpreted or chosen to ignore the governing law. Gordon v. Gordon, 44 Wn.2d 222, 226-27, 266 P.2d 786 (1954); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990); State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995). As stated above, the factual determinations of there being an "implied" agreement are not based upon the record, let alone any required "substantial evidence." See, McKendry, at 887; Berg, at 534-35; In re Marriage of Spreen, at 347. Thus, the Court Commissioner, and later the Superior Court on revision, clearly misinterpreted, misapplied and ignored the governing law that in only the rarest cases should maintenance be held in perpetuity. State v.

Robinson, supra. Thus, contrary to Ms. Eggert's suggestion of there being an "implied contract" concerning maintenance in perpetuity, this court's decision constitutes a clear abuse of discretion warranting reversal, and remand to the trial court. RAP 12.2.

2. Appellant's issue no. 2 [revisited].

Contrary to Ms. Eggert's further misplaced invitation to this court on pages 5 through 7 of her response brief, Mr. Eggert's maintains that, since the Superior Court did not, in fact, reach the issue of "substantial change in circumstances," this court should not at this juncture weigh in on the issue. Contrary to Ms. Eggert's sundry claims, the Superior Court did not actually rule on this precise issue in light of its initial, erroneous determination that Mr. Eggert's obligation to pay spousal maintenance was non-modifiable under the existing terms of the 2005 decree. [June 20, 2013 RP 6-11]. In fact, the Superior Court specifically noted that, because of this factor, even the existence of a "substantial change in

circumstances" as claimed by Mr. Eggert would be entirely irrelevant and have no effect whatsoever upon such obligation to pay maintenance indefinitely so as to warrant revision as requested by Mr. Eggert. [Id.]. Consequently, Ms. Eggert's focus upon the Court Commissioner's earlier ruling on pages 5 through 7 of her brief are totally misplaced and in apposite.

In sum, Mr. Eggert's position that, given the Superior Court's erroneous decision on revision that maintenance is non-modifiable under the 2005 decree, the remaining undecided issue of changed circumstances should be remanded to the trial court. In this vein, Mr. Eggert is respectfully requesting that the superior Court be directed on remand to consider, and take into account, Mr. Eggert's weakened financial position, as well as his health and retirement issues associated with his deteriorating health, and the related facts associated with Ms. Eggert's failure to report business income and her refusal to either seek or obtain gainful, full-time employment since the parties' divorce in 2005.

As set forth in the statement of facts section of appellant's opening brief, all of these facts and circumstances are borne out in the underlying court record. Clearly, these are circumstances which neither the parties nor the court had anticipated or contemplated at the time the decree of dissolution was entered [CP 8-13]. Wagner v. Wagner, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980); In re Marriage of Spreen, at 346; see also, RCW 26.09.070(1).

As a final point, and contrary to Ms. Eggert's continuing mistaken view, the law allows a party to seek modification of a spousal maintenance obligation. RCW 26.09.170. In turn, the trial court's determination on revision is likewise at odds with the governing principles of law. Id.

Those few instances in which modification of a spousal maintenance obligation is prohibited involve the rare instance where the parties have expressly agreed to non-modification. In re Marriage of Short, 125 Wn.2d 865, 875-76, 890 P.2d 12 (1995); RCW 26.09.070. Here, as in Short, the decree at issue contains no restriction on Mr.

Eggert's right to modify spousal maintenance. [CP 2]. Thus, the court's ultimate ruling that no amount, level, or kind of change in the parties' circumstances would warrant modification is clearly contrary to existing law since the existing spousal maintenance obligation did not fit the criteria of being non-modifiable. Id.

The exact length or duration of such financial obligation is a matter which should first be addressed by the trial court since this key term is clearly missing, and was not set under the terms of the court's earlier findings and conclusion and decree of dissolution, in 2005. [CP 1-7, 8-13]. In terms of setting a fixed time-frame, the law permits the trial court to consider evidence of the parties' oral understanding, so as to impose or supply such missing term to the extent such term is not consistent with the written documents. See, Cromwell v. Gruber, 11 Wn.App. 363, 366-67, 400 P.2d 1285 (1972); see also, In re Universal Serv. Fund Telep. Billing Prac. Litigation, 619 F.3d 1188, 1207 (10th Cir. 2010); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762,

768, 677 P.2d 773 (1984). This is particularly true where the governing documents, as here, are entirely silent or ambiguous as to the duration of subject obligation. Id. Ultimately, the intent of the parties, and surrounding circumstances, control. Id. The trial court's pivotal responsibility is to establish a reasonable time frame of a few years within which the obligation will expire rather than be left to uncertainty and some unknown time in the future. Id.

Consequently, on remand, the Superior Court should be directed to consider and decide the foregoing issues concerning setting a fixed expiration date for maintenance, as well as any present grounds for modification of such obligation if said obligation is to continue on for any additional time rather than terminating outright at this late juncture. See, RAP 12.2. In this regard, it remains Mr. Eggert's principal position that the obligation to pay spousal support should immediately be terminated since such financial burden has already been allowed to exist by way of fiat for the last eight [8] years. He has

faithfully paid such support through this time-frame, and it is time for Ms. Eggert to become financially independent and support herself. Justice, equity, and fairness require nothing less in this case.

B. REPLY TO RESPONDENT'S REQUEST FOR FEES

Finally, on page 7 of her brief, Ms. Eggert has requested an award of attorney fees on this appeal in the event she is the prevailing party. However, it is clear from the record that any alleged "need" on Ms. Eggert's part is directly the result of her unwillingness to secure meaningful employment. Likewise, as will be shown in the forthcoming financial affidavit which Mr. Eggert will file with this court in compliance with RAP 18.1(c), his financial position has weakened substantially due to factors including failing health, old age, and retirement issues. In short, he does not have the ability to pay Ms. Eggert's fees, let alone any continued obligation of spousal maintenance. In sum, it is high time Ms. Eggert see to her own financial needs and requirements

rather than remain reliant upon the resources of her ex-husband in perpetuity.

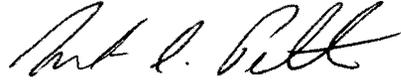
C. CONCLUSION

Based upon the foregoing points and authorities, appellant, BARRY CRAIG EGGERT, once again respectfully requests that, in accordance with the authority of this court under RAP 12.2, the challenged decisions of the Superior Court of Spokane County, state of Washington, be reversed on this appeal and this matter be remanded, with specific direction, that there be a further and proper determination by the Superior Court, on revision, as to whether spousal maintenance should be either (1) modified for a fixed period of time set by the court, or (2) otherwise terminated outright, under the facts and circumstances presented in this case. Alternatively, Mr. Eggert requests that this court direct the Superior Court to immediately enter an order terminating this financial obligation of spousal maintenance insofar as said obligation already existed for a reasonable, fair, and just time of some eight [8]

years as contemplated by the provisions of RCW
26.09.090 and .170.

DATED this 10 day of January, 2014.

Respectfully submitted:



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