

FILED

OCT 31 2013

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 APPELLANT BARRY CRAIG EGGERT

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A. ASSIGNMENTS OF ERROR

1. The Superior Court of Spokane County, state of Washington, erred in entering its oral decision on April 29, 2013, wherein the court denied appellant Barry Craig Eggert's petition to modify spousal maintenance to respondent Kristy Kay Eggert, which petition and summons, filed with the court on September 27, 2012 [CP 14-17], had been brought on the basis of substantial change of circumstances, or the lack of any specified "end date," and which included, but was not limited to, such factors as (a) a reduction in appellant's income and ability to continue to pay such obligation, (b) his significant loss in eyesight which will shortly lead to the end of his working career, as well as (c) the respondent's lengthy failure to find and accept meaningful employment on her own, and (d) her failure to report income associated with her establishment of a self-operated cleaning business. [CP 17, 206-08,250-55, 247].

2. The Superior Court of Spokane County, state of Washington, in turn erred in entering its "order re: maintenance modification" on April 29, 2013, wherein the court once more denied appellant Barry Eggert's petition to modify spousal maintenance to respondent wife on the alleged basis that "there has not been a substantial change in circumstances to change the spousal maintenance obligation." [CP 245-46].

3. The Superior Court of Spokane County, state of Washington, compounded the foregoing errors in subsequently entering its oral decision on June 20, 2013, wherein the court denied Barry Eggert's May 2, 2013

motion for revision [CP 248-49] on the putative bases, as framed and found by the court, that the parties had allegedly tacitly agreed there would be no scheduled end or termination date of spousal maintenance, except upon the death of either party or the wife's remarriage, and therefore, a simple change in circumstances would not result in a reduction or termination of such maintenance to the wife. [RP 1-11; CP 260].

4. Finally, the Superior Court of Spokane County, state of Washington, erred in entering its written "order on revision" on June 20, 2013, wherein the court once again denied Mr. Eggert's motion for revision. [CP 259].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Superior Court of Spokane County, state of Washington, on revision erred in determining that the parties had somehow agreed to there being no scheduled end or termination of spousal maintenance, except upon the death of one of the parties or the wife's remarriage, and therefore, any change in circumstances would not result in either a reduction or termination of such maintenance obligation to the wife? [Assignments of Error Nos. 1 through 4].

2. Whether, in light of said error on the part of the revising court, this matter should be remanded to the Superior Court with specific instructions 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? [Assignments of Error Nos. 1 through 4].

C. STATEMENT OF THE CASE

1. This matter concerns a petition for modification of spousal maintenance which was filed in the Superior Court of Spokane County, state of Washington, on September 27, 2012, by the petitioner and appellant herein, Barry Craig Eggert. [CP 14-17]. The parties were married on June 15, 1980, and were later separated on June 16, 2005. [CP 2].

In the course of said separation, the appellant, Barry Craig Eggert, petitioned the Superior Court of Spokane County, state of Washington, under cause no. 05-03-01126-1 for entry of decree of dissolution from his wife and respondent, Kristy Kay Eggert. At the time, he was not represented by counsel, whereas Ms. Eggert was represented by an attorney. [CP 206].

On August 29, 2005, findings of fact and conclusions of law, along with a final decree of dissolution, which had been prepared by Ms. Eggert's trial attorney, were formally entered by the Superior Court. [CP 1-7, 8-13]. Paragraph 2.12 " Maintenance" of said findings provided that "Maintenance should be ordered because . . . [t]he wife has the need for maintenance and the husband has the ability to pay." [CP 2]. In turn, paragraph 3.7 "Spousal Maintenance" of the decree specified, pertinent part, that

[t]he husband shall pay \$1,000.00 maintenance per month for the first year after the Decree of Dissolution is filed. After one year, maintenance shall increase to \$1,500.00 per month. . . . The obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving unless otherwise specified below.

[CP 10]. There was no further provision in said decree specifying a time limit in terms of a final end or termination date as to when spousal maintenance would expire. [CP 10, 17].

On September 27, 2012, the appellant, Barry Craig Eggert, filed a petition for support modification concerning his obligation to pay spousal maintenance. [CP 16-17]. In paragraph 1.4 of the petition, he averred that

[t]he maintenance obligation should be modified . . . [because] . . . [t]he previous order was entered more than five years ago. The Respondent has since had the opportunity to obtain employment and has in fact turned down employment opportunities. She has also received some income. Furthermore, the current order does not specify the termination date, and as such, the order needs to be clarified. Furthermore, the order works a severe economic hardship on [the petitioner] as . . . [he is] . . . unable to afford to continue to pay said maintenance obligation. The changes . . . [in] . . . circumstances require a modification of the maintenance obligation.

[CP 17]. A financial declaration and accompanying financial source documents filed by the petitioner on the same date, September 27, showed Mr. Eggert's net monthly income at \$5,037.95, and monthly expenses, including debt expenses, total \$6,107.00. [CP 22-27, 28-36]. As a result, Mr. Eggert requested in his petition the following relief that

[t]he court should modify the maintenance obligation by terminating future maintenance. Additionally, or in the alternative, the court should clarify the obligation by inserting

an "end date" as the current order does not have a specified date upon which said obligation expires.

[CP 17]. In a later declaration, dated March 1, 2013, Mr. Eggert further disclosed that he had been diagnosed with rheumatoid arthritis and placed on medication. [CP 208]. Unfortunately, this medication has affected his sight, resulting in a significant loss of vision. [CP 208]. Consequently, this will shortly end his working career. [CP 208].

Kristy Eggert was duly served with Mr. Eggert's summons and petition [CP 37], and she opposed the same. [CP 41-44, 45-47, 48-51, 52-53]. The gravamen of her opposition involved the uncorroborated claim that the absence, or silence of the 2005 decree, in setting a fixed time limit or expiration date concerning Mr. Eggert's maintenance obligation was the result of her having foregone any interest or claim against her husband's pension or retirement fund. [CP 39-40, 41-42, 44]. Ms. Eggert also claimed that she was still in financial need of maintenance, and that she had not turned down any alleged employment. [CP 43-44, 48-51]. In turn, she denied having ever refused a job offer or attempted to seek meaningful employment. [CP 43-44, 52-53].

However, during her deposition on December 12, 2012, Ms. Eggert acknowledged that it was mutually understood that she would have to obtain employment at some point in time, and further, that she had not started actually looking for work until the beginning of 2011. [CP 209, 219, 220]. Ms. Eggert also admitted in her deposition that she was offered a part-time job working 20 hours a week, but declined this offer of employment because

she hoped to find a better position. [CP 210, 218]. However, around Thanksgiving 2009, Ms. Eggert did start an unlicensed house cleaning business which is solely a cash operation, and this undeclared income is never deposited in any bank account. [CP 209-210, 213-15, 224]. She never told Mr. Eggert about this income. [CP 210, 222]. In addition, Ms. Eggert admitted during her deposition testimony that each of the parties had separate retirement accounts, and these assets had not formally been included in the property settlement or division. [CP 210, 221-222]. Essentially, as a resulting quid pro quo, each spouse was allowed to keep their individual retirement accounts in their entirety. [Id.]. Ms. Eggert's account from her previous employment with the Riverside School District was worth approximately \$23,000 in 2005, and is now worth \$30,000. [CP 46, 210, 221-222].

In a later declaration, filed with the court on March 7, 2013, Mr. Eggert confirmed the foregoing points of fact outlined in Ms. Eggert's deposition, and the additional fact that her unreported, undeclared cash income from her cleaning business is "approximately \$6,760.00 per year." [CP 206-08]. Also, in comparison with Ms. Eggert's retirement account, the value of his separate retirement account was "roughly \$7,000" at the time of the divorce in 2005. [CP 206-07]. The parties had agreed that "each would keep their own respective pensions despite hers being worth three times that of . . . [his]." [CP 207].

On April 29, 2013, a hearing was held before a Superior Court commissioner on Mr. Eggert's petition to modify spousal maintenance. In its ruling, the court initially noted that "[b]ecause there does not appear to be anything in the declaration [sic] regarding the lack of modification, . . . defines when modification should be had . . . [then the court must determine whether there is] . . . a substantial change in circumstances that modification can be modified [sic] or possibly terminated after review of the court." [CP 251]. The court also noted that Mr. Eggert wished the court to focus on the fact that "employment status or lack of employment . . . on the part of the respondent" as being a "trigger" to modification. [CP 251-52]. However, in the court's view, this fact would not necessarily be controlling of the case. [CP 252].

In addition, the court commissioner questioned whether the event of Eggert becoming unemployed due to "lost of his sight," or should Ms. Eggert become "substantially employed" would serve as triggering event to modification or termination of spousal maintenance, insofar as the degree only spells out two specific events, to wit: "the death of either party or the remarriage of" the wife. [CP 252].

While the court acknowledged that Mr. Eggert had not been represented by counsel when the decree was entered, the court opined that "[i]t does not appear that there is a substantial change in circumstances" . . . which would allow . . . the court to proceed" under the precise terms of the degree as written. [CP 253]. The court then went on to state that while "[i]t

is a bit unusual for maintenance to continue for eight years under the current circumstances, . . . [there was] . . . nothing that prevented him for entering in this agreement." [CP 253]. Consequently, the court concluded that paragraph "3.7 spousal maintenance" was not subject to any alteration under the facts presented. [CP 253-54]. A written "order re: maintenance modification" was entered on the same date also denying Mr. Eggert's petition. [CP 245-46, 247].

On May 7, 2013, Mr. Eggert filed a motion for revision as provided in RCW 2.24.050 and Rule 0.7 of the Spokane County Superior Court local rules [LR]. [CP 248-49]. A hearing on the same was held on June 20, 2013, wherein the court denied the same. [June 20, 2013 RP 11]. The essence of the court's decision on revision was essentially the same as the April 29 ruling of the court commissioner. In the court's view, the only two [2] specified triggering events to modification or termination were the death of one of the parties or the remarriage of the wife [June 20, 2013 RP 3, 10]. The court clearly based its decision on the presumed fact that Mr. Eggert had apparently agreed to these terms, each party got the benefit of the bargain, there was no apparent fraud or other mitigating circumstances in terms of the framing of the decree, and accordingly, there is nothing to prevent this maintenance obligation from continuing "in full force and effect in perpetuity." [June 20, 2013 RP 6-11]. In effect, the putative change of circumstances posed by Mr. Eggert in this case were deemed irrelevant and

not considered by the court in affirming the court commissioner's ruling and denying revision. [June 20, 2013 RP 3-11].

An order on revision was entered on this same date to the same effect. [CP 259, 260]. This appeal follows the entry of that erroneous decision. [CP 261-65].

D. STANDARD OF REVIEW

The issue framed above in Part B concerning the Superior Court's erroneous reasoning and denial of Mr. Eggert's petition for modification of spousal maintenance encompass the following standards of review insofar as this appeal entails a combination of (1) issues of fact, (2) mixed issues of law and fact, (3) issues of law, and (4) issues concerning the abuse of discretion by the trial court. Errors of fact are reviewed in terms of whether there is substantial evidence in the underlying record to support the same. Thorndike v. Hesparian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 103 (1959). Substantial evidence, involving a ruling on modification of maintenance, only exists when there is evidence of a sufficient quantum to persuade a fair-minded person of the truth of the declared premise set forth in a finding of fact. In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001); see also, Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986); Olmstead v. Department of Health, 61 Wn.App. 888, 893, 812 P.2d 527 (1986); Green Thumb, Inc. v. Tiegs, 45 Wn.App. 672, 676, 726 P.2d 1024 (1980). Hence,

mere speculation, conjecture, and supposition on the part of the trier of fact will not support a factual determination by the trial court. Id.

In contract, mixed questions of law and fact are considered both in terms of a quantitative determination of substantial evidence as to the latter and, as to the legal aspects of such issue, are reviewed de novo. See, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001). Thus, on appeal, the court reviews "an order affecting modification for substantial supporting evidence and for legal error." In re Marriage of Spreen, at 346. In essence, such issue is considered both in terms of a quantitative determination of substantial evidence as well as to the legal aspects entailed in modification. Id.; see also, In re Marriage of Foran, 67 Wn.App. 242, 251, 834 P.2d 1081 (1992); Horrace, at 392.

In other words, review is treated as a mixed question of fact and law and, thus, reviewed de novo. Id. If the findings of the trial court are supported by substantial evidence, the issue remains whether such factual determinations support the trial court's application of the law and ultimate decision. See, Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 766, 677 P.2d 773 (1984). If they do not, then reversal by the appellate court is warranted and proper. Id.

Finally, in terms of those aspects associated with exercise of discretion by the trial court, the standard of review is manifest abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

The trial court may be deemed to have so abused its discretion when the court acted on untenable grounds or for untenable reasons, or has erroneously interpreted or ignored 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). In other words, a factual determination which is not based upon substantial evidence, or misapplication of the law, constitutes an abuse of discretion warranting reversal on appeal. Id.; see also, In re Spreen, at 346.

E. ARGUMENT

Issue no. 1. As evidenced above, in Part C of appellant's brief, both the court commissioner on modification and the Superior Court Judge on revision, concluded that the parties had agreed that spousal maintenance would be perpetual in this case and that Ms. Eggert was entitled to the "benefit of this bargain" between the parties. However, a simple review of the record clearly demonstrates that such factual determinations are neither born out by the court record nor supported by "substantial evidence." See, In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001). Contrary to the court's determination, based upon nothing more than mere speculation, conjecture, and supposition, Ms. Eggert admitted in her deposition that, contrary to her earlier claim in her declarations [CP 39-40, 41-42, 44], there never was any agreement that she would forego an interest in Mr. Eggert's retirement account in exchange for her receiving maintenance indefinitely,

until the death of either party or her remarriage. [CP 210, 221-222]. In fact, each party had chosen to keep their individual, separate pensions or retirement accounts rather than divide the same. [Id]. This deposition testimony was confirmed by Mr. Eggert in his March 7, 2013 declaration. [CP 206-08]. Also, in comparison with Ms. Eggert's retirement account with the Riverside School District worth approximately \$23,000 in 2005, and which is now worth roughly \$30,000 [CP 46, 210, 221-222], the value of Mr. Eggert's separate retirement account was "roughly \$7,000" at the time of the divorce in 2005. [CP 206-07]. 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 that Ms. Eggert had ever given any consideration whatsoever to support the Superior Court's conclusion that she was entitled to the benefit of any bargain that spousal maintenance would continue in perpetuity. The same is true with respect to the court's conjecture that Mr. Eggert had somehow "agreed" to the same, or 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 findings 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]. In fact, the only evidence presented was contrary to the court's determination. [CP 206-08].

To this effect, Ms. Eggert admitted during her December 12, 2012 deposition that it had been mutually understood when the decree was entered that she would have to obtain employment at some point in time and, further, that she had not started actually looking for work until the beginning of 2011. [CP 209, 219, 220].

Since there was no evidence whatsoever to support the factual determination of either the court commissioner's ruling on Mr. Eggert's petition, or the Superior Court's later ruling on revision, that termination of maintenance, or a modification thereof, could not be had except upon the death of one of the parties or the wife's remarriage, as spelled out in the decree, the legal conclusion of the trial court that maintenance should continue indefinitely is also in error.

It is generally understood that the duration, as well as the amount, of an award of maintenance must be limited to the relevant facts and be 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 use or purpose. Nor, was this a case where the wife cannot work due to some

dilapidating illness such as blindness or multiple sclerosis. 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).

Thus, this case is simply not one which 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. Instead, as outlined below, a different principle of law governs the facts and circumstances of this case.

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 occurred in this case, the factual determinations of the court are not based upon substantial evidence. Also, the court clearly misinterpreted, misapplied, and ignored the governing law. Thus, without question, these factors constitute further error in terms of there being a manifest abuse of

discretion. This validates appellant's assignments of error in Part A, above, and also warrants reversal of the Superior Court on this appeal. RAP 12.2.

Issue no. 2. The subject errors in this case also warrant a remand, with directions, in terms of the trial court being required to make a proper determination of the precise and fixed duration of Mr. Eggert's maintenance obligation, as well as a decision concerning whether maintenance should now be terminated or, alternatively, the amount of maintenance should be modified until such obligation is to end. Mr. Eggert continues to maintain that his maintenance obligation should now be terminated outright insofar as he has faithfully paid the same for over eight [8] year as of the date of this opening brief. [CP 8-13].

In any event, the alternative issue of modification of the amount was never addressed by the court in light of its mistaken determination that perpetual maintenance had been set by way of interpretation of the precise terms of the 2005 decree. [CP 8-13]. At a minimum, the court on remand should be directed to consider and take into account Mr. Eggert's financial position, as well as his health issues associated with his sight, in terms of any modification, as well as the fact of Ms. Eggert's unreported income and her failure to accept or seek out full time employment. These are clearly circumstances the parties did not anticipate or contemplate at the time the 2005 dissolution decree was entered by the court. 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).

The law allows parties to seek modification of spousal maintenance obligation. RCW 26.09.170. The court's determination in this case, that only death of a party or remarriage by Ms. Eggert would be the only valid basis for modification is contrary to the statutory provisions. Id. The only instances which prohibit modification of a spousal maintenance obligation are found those cases where the parties expressly agree to non-modification. In re Marriage of Short, 125 Wn.2d 865, 890 P.2d 12 (1995); RCW 29.09.070 (7). The decree at issue contains no limitation on one's right to modify the spousal maintenance obligation. [CP 2]. Yet, the court's ruling that no amount of changes in the parties' circumstances, either by Ms. Eggert's sudden employment or Mr. Eggert's loss of employment, as irrelevant is clearly contrary to existing law. Id. The court decision makes the existing spousal maintenance obligation non-modifiable and that is an error.

Once again, the exact duration of spousal maintenance is also a matter which should be addressed by the trial court insofar as it is a key term missing from the provisions of the court's 2005 findings and decree of dissolution. [CP 1-7, 8-13]. The law permits the court to consider evidence of the parties' oral understanding, so as to impose or supply such term, insofar as such implied term is not inconsistent with the written terms, including the situation where a document is silent as to the duration of a particular obligation. See, Cromwell v. Gruber, 11 Wn.App. 363, 366-67, 499 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). Ultimately, the intent of the parties, and surrounding circumstances, control and the court is obligated thereupon to set or establish a reasonable time or duration for the obligation to expire. Id.

In sum, on remand, the Superior Court should be directed by this court to consider and decide the foregoing issues concerning setting a fixed expiration date for maintenance, regardless of the death of a party or the wife's remarriage, as well as any modification of such obligation of the appellant if said obligation is to continue on for a fixed period of time rather than terminating outright at this time. See, RAP 12.2. Again, under the circumstances presented, Mr. Eggert maintains that his obligation to pay spousal support to Ms. Eggert should immediately be terminated since such financial obligation has already existed by way of fiat for some eight [8] years.

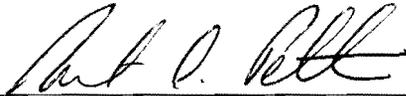
F. CONCLUSION

Based upon the foregoing points and authorities, appellant, Barry Craig Eggert, 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 respectfully requests that this court itself 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 29TH day of October, 2013.

Respectfully submitted:



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Attorney for Appellant, BARRY CRAIG EGGERT