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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 318354-III

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

In re the Marriage of:

BARRY CRAIG EGGERT, Appellant

and

KRISTY KAY EGGERT, Respondent

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JUDGE PRICE

RESPONSE BRIEF

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I
STATEMENT OF THE CASE

A Decree of Dissolution with Findings of Fact & Conclusions of Law were filed with Spokane Superior Court on August 29, 2005. (CP 1-13). The Decree specifically awarded maintenance in the amount of \$1000 for the first year and \$1500 thereafter. (CP 10). The Decree further stated that, "The obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance unless otherwise specified below." (CP 10). No other specification was entered in the Decree. (CP 8-13). On September 27, 2012, Mr. Eggert filed a Petition for Modification of Maintenance. (CP 14-17). This matter was first heard before Commissioner Rugel on April 29, 2013 when an Order Re: Maintenance Modification was entered denying Mr. Eggert's request. (CP 245-246). Judge Price subsequently denied Mr. Eggert's request for revision. (CP 259).

II ARGUMENT

RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR NO. 1

Mr. Eggert argues that the Superior Court on revision essentially entered a non-modifiable maintenance order in the instant case, constituting an abuse of discretion. Essentially, Mr. Eggert is having remorse for having voluntarily signed the Decree of Dissolution which granted Ms. Eggert maintenance for life unless she remarried or died. (CP 10). Judge Price was correct in finding that Mr. Eggert through his petition was actually attempting to “retroactively modify the decree.” (RP 10). Other than the two triggering events for termination (e.g. marriage or death of the respondent), the obligation continues in perpetuity according to the plain language of the Decree. (RP 5, 9).

Even if the Decree contains a non-modifiable maintenance award, such “is permissible if such a provision was included in a separation contract the parties entered.” In re Marriage of Hulscher, 143 Wn.App. 708, 714, 180 P.3d 199 (2008). A valid separation agreement need not be in a separate document than the decree of dissolution. Id. at 715. The reality is that the Decree in this case did not include an expressly stated non-modifiable provision – as in the words “non-

modifiable” were not included in the language of the Decree. (CP 10). However, because one was clearly implied in the language, such would still be valid because the parties entered the provision of the Decree by express agreement as is specifically noted in the Findings of Fact & Conclusions of Law. (CP 1). It is true that a court may not enter a non-modifiable maintenance award *sua sponte*, absent an express agreement by the parties, but that is not the case here. See Id. at 714. Essentially, If “the contract precludes the modification of maintenance absent mutual consent, then the court lacks jurisdiction to modify the contract if it was fair at the time of execution.” In Matter of the Marriage of Lee and Kennard, 310 P.3d 845 (2013) (citing In re Marriage of Glass, 67 Wn.App. 378, 390-92, 835 P.2d 1054 (1992)).

Whether or not Mr. Eggert feels that the maintenance award was based upon a bargain which unfairly resulted in justification that maintenance would continue in perpetuity is immaterial to the current analysis. Just as in In re Marriage of Hulscher, where the issue of unfairness was raised concerning a non-modifiable agreement and the Court of Appeals pointed out that, “the trial court made no findings of fact or conclusions of law showing that the agreement was unfair when executed,” neither did the trial court make such findings or conclusions in

this case. Id. at 716-717. Commissioner Rugel specifically pointed out that, “It appears that they both entered into this document or into this agreement willingly. There’s nothing that indicates there was any fraud ...” (CP 253-254). Judge Price also concurred, stating, “... there was no fraud here in the entry of this decree.” (RP 5). Mr. Eggert’s reliance on In re Marriage of Short, 125 Wn.2d 865, 890 P.2d 12 (1995) is misplaced.

Ms. Eggert has a right to rely upon the permanent maintenance provision in the Decree if the provision is non-modifiable or unless Mr. Eggert shows sufficient facts to support a showing of a substantial change in circumstance under RCW 26.09.170. Even though the Decree was found to be non-modifiable by Judge Price on revision, non-modifiability, as discussed above, is not impermissible when entered by an agreed separation contract between the parties. Judge Price simply upheld on revision what appeared on its face to be a agreed separation contract with a non-modifiable maintenance award when there was no evidence of fraud in its entry. Mr. Eggert is time-barred from arguing now, eight years later, that the non-modifiable spousal maintenance agreement was unfair. In re Marriage of Hulscher, 143 Wn.App. 708, 717, 180 P.3d 199 (2008). See also In re Marriage of Glass, 67 Wn.App. 378, 835 P.2d 1054 (1992).

RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR NO. 2

Modification of a maintenance award may occur when the moving party shows "a substantial change in circumstances that the parties did not contemplate at the time of the dissolution decree." Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001) (citing Wagner v. Wagner, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980)). A finding made concerning a change in circumstances will not be reversed on appeal absent an abuse of discretion. See Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001).

Mr. Eggert requested modification of the maintenance award but the court found that there was insufficient evidence to support a change in circumstances and denied the motion. (CP 245-246, 259). In the Order Re: Maintenance Modification, Commissioner Rugel stated that the "Court's oral findings are incorporated herein," and his "oral ruling is incorporated herein." (CP 245-246). There is no question that Commissioner Rugel addressed the issue of a substantial change in circumstances when making his determination as to whether maintenance should be modified or terminated. Commissioner Rugel specifically found there was nothing in the Decree which limited modification, therefore where he turned next was "whether or not

there's been a substantial change of circumstances." (CP 251). Although he acknowledged there may have been a "change in circumstances" he expressly noted the difference between that and a "substantial change in circumstances." (CP 252).

Commissioner Rugel noted that a substantial change in circumstances might have occurred if "the petitioner here in fact was unemployed or had in fact lost his eyesight, which prevented him from working" and in addition, "if the respondent was not just employed, but ... was substantially employed ... in a substantially different circumstance than ... at the time that the decree was entered." (CP 252). However, Commissioner Rugel found that, after consideration of the petitioner's argument, "It does not appear that there is a substantial change in circumstances." (CP 253). This analysis was upheld on revision when Judge Price stated, "So the Commissioner's analysis, I'm satisfied, was completely appropriate." (RP 11). The Order on Revision signed by Judge Price stated that the "Court's oral ruling is incorporated herein." (CP 259).

Absent an abuse of discretion, there is no basis to reverse the denial of a modification or termination of the spousal maintenance. The court did take into consideration the financial position and health

considerations raised by Mr. Eggert, but found they did not rise to the level of a substantial change in circumstances. (CP 253). This analysis was upheld by Judge Price on revision. (RP 11). Mr. Eggert argues on appeal that the court's decision made the existing spousal maintenance obligation non-modifiable. However, a non-modifiable maintenance obligation is not reversible in this case as Mr. Eggert voluntarily agreed to the entry of a permanent maintenance award in the Decree. (CP 10).

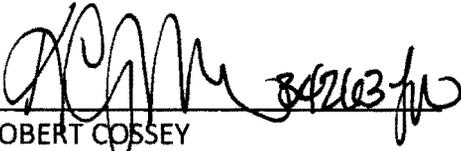
III REQUEST FOR ATTORNEY'S FEES

On appeal, Ms. Eggert requests that this court award attorneys fees. RCW 26.09.140 permits the Court of Appeals to award attorney fees on appeal in a maintenance action upon a showing of financial need. Marriage of Spreen, 107 Wn.App. 341, 351, 28 P.3d 769 (2001). Since applicable law grants the Ms. Eggert the right to recover reasonable attorney fees or expenses on appeal, she is requesting such relief under RAP 18.1(a). It is clear from the record that her financial situation places her in financial need of such relief on appeal. An affidavit of financial need will be filed in compliance with RAP 18.1(c).

**IV
CONCLUSION**

It is respectfully requested that this court deny Mr. Eggert's assignments of error on appeal and affirm the ruling of Judge Price.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'RCOSSEY', is written over a horizontal line. To the right of the signature, the date '8/21/03' is written.

ROBERT COSSEY

WSBA # 16481

Attorney for Respondent