

FILED

NOV 18 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

NO. 34564-5-III

IN RE:

ROGER L. ALDRICH,

Petitioner/Appellant,

and

MARY BETH ALDRICH,

Respondent/Appellee.

APPELLANT'S REPLY BRIEF

D.C. Cronin, WSBA No. 16018
Attorney for Appellant
724 N. Monroe
Spokane, WA 99201
Ph: (509) 328-5600
Fax: (509) 328-5646

TABLE OF CONTENTS

A.	REPLY	1
B.	CONCLUSION.....	6

TABLE OF AUTHORITIES

Table of Cases

<u>Bowcutt v. Delta</u> , 95 Wn. App. 311, 976 P.2d 643 (1999).....	6
<u>City of Walla Walla v. \$401,333.44</u> , 164 Wn. App. 236, 262 P.3d 1239 (2011).....	3
<u>In re Katare</u> , 175 Wn.2d 23, 283 P.3d 546 (2012).....	4
<u>In re: Marriage of Coyle</u> , 61 Wn. App. 653, 811 P.2d 244 (1981).....	1, 5
<u>In re: Marriage of Drlik</u> , 121 Wn. App. 269, 87 P.3d 1192 (2004).....	5, 6
<u>In re: Marriage of Foran</u> , 67 Wn. App. 242, 834 P.2d 1081 (1992), <u>citing</u> , <u>In re: Harbert</u> , 85 Wn.2d 719, 538 P.2d 1212 (1975), <u>citing</u> , <u>State v. Bell</u> , <u>supra</u>	4
<u>State v. Bell</u> , 59 Wn.2d 338, 368 P.2d 177 (1962).....	3
<u>State v. Gower</u> , 179 Wn.2d 851, 321 P.3d 1178 (2014).....	4
<u>State v. L.J.M.</u> , 79 Wn. App. 133, 900 P.2d 1119 (1995), <u>reversed on other grounds</u> , 129 Wn.2d 386, 918 P.2d 499, <u>review denied</u> , 112 Wn.2d 1016 (1989).....	3
<u>State v. Melton</u> , 63 Wn. App. 63, 817 P.2d 413 (1991), <u>review denied</u> , 118 Wn.2d 1016 (1992).....	3
<u>State v. Miles</u> , 77 Wn.2d 593, 464 P.2d 723 (1970), <u>review Denied</u> , 112 Wn.2d 1016 (1989).....	3

<u>State v. Read</u> , 100 Wn. App. 776, 989 P.2d 897 (2000), <u>affirmed</u> , 147 Wn.2d 238, 53 P.2d (2002).....	3
---	---

Statutes

RCW 26.09.070(7).....	1
RCW 26.09.170(1).....	1

Court Rules

ER 801(c).....	2
ER 802.....	2
RAP 10.3	1

REPLY

Ms. Aldrich appears to base her response on five erroneous claims. Each claim is without factual or legal basis or not supported by the trial court commissioner's oral and written findings of fact and conclusions of law. (CP 216-246). To the extent prior assignments and arguments in the opening brief are not repeated herein or readdressed, the assignments and arguments are not waived. RAP 10.3 (c).

First, Ms. Aldrich claims her physical condition at the time of a trial six years ago has not changed and for this reason Mr. Aldrich's petition should be denied. (Response at 9). Yet, as this Division has indicated, it is not Ms. Aldrich's condition which is at issue although her "condition" has clearly changed for the better. (CP 202-206; 131-160; 190). In re Marriage of Coyle, 61 Wn. App. 653, 658; 811 P.2d 244 (1981),

Second, Ms. Aldrich claims that since the decree employs the term "lifetime maintenance" and was not appealed, Mr. Aldrich's petition to modify cannot be granted. (Response at 9) However, as illustrated by Coyle, it is clear a decree of lifetime maintenance, is modifiable upon a showing of a substantial change of circumstances irrespective of the use of the phrase "lifetime maintenance." RCW 26.09.170(1); RCW 26.09.070(7). And, as demonstrated in the record and argued in the opening brief, Mr. Aldridge established a substantial change of circumstances in his income, finances, and employment since 2010. Mr.

Aldrich's employer relocated to Virginia and eliminated Mr. Aldrich's employment position and income. (CP 192-199).

Third, Ms. Aldrich alleges somehow, without offering any proof whatsoever, the trial court, in 2010 determined a witness was not credible, (Response at 4, 9, 10), even though the trial court never entered such a finding. (CP 8-19). Yet, this uncorroborated speculation is, as the cases below illustrate, presumed not to have been considered by the court commissioner, was objected to by Mr. Aldrich in his reply, (CP 188), and is nowhere to be found in the trial court commissioner's oral decision, written findings of fact, or conclusions of law. (CP 216-246). As such, even if such a false contention, not supported by the findings issued in 2010, was true, that six years ago a witness was, under different circumstances, different proceedings, different testimony, (whatever that testimony was of which no one knows), thought uncredible, the claim is irrelevant to these proceedings six years later.

Fourth, Ms. Aldrich suggests, along similar lines, an unauthenticated, hearsay, internet advertisement, (Response at 4; 8) contradicted by the overwhelming evidence in the record, objected to by Mr. Aldrich, (CP 188), and not mentioned in the oral decision, written findings of fact, and conclusions of law somehow has some bearing. Yet, the referenced document (CP 186) clearly is hearsay, ER 801(c), and hearsay is inadmissible. ER 802. Thus, Mr. Aldrich so objected, (CP 188).

Suffice it to state, as regards contentions three and four, as this Division long ago indicated, in bench proceedings without a jury it is presumed the trier of fact disregarded inadmissible evidence. State v. L.J.M., 79 Wn. App. 133, 137, 900 P. 2d 1119 (1995), reversed on other grounds, 129 Wn. 2d 386, 918 P. 2d 898 (1996), citing, State v. Jenkins, 53 Wn. App. 228, 231, 766 P. 2d 499, review denied, 112 Wn. 2d 1016 (1989); State v. Melton, 63 Wn. App. 63, 68, 817 P. 2d 413 (1991), review denied, 118 Wn. 2d 1016 (1992). For, as stated in State v. Miles, 77 Wn. 2d 593, 601, 464 P. 2d 723 (1970), review denied, 112 Wn. 2d 1016 (1989):

. . . the action was tried to the court sitting without a jury. In such instances a liberal practice in the admission of evidence is followed in this state supported, as it is, with a presumption on appeal that the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making [her] findings. State v. Bell, [59 Wn. 2d 338, 359, 368 P. 2d 177 (1962)]. . . .
(Bracketed gender added)

Indeed, as remarked by this Division in State v. Read, 100 Wn. App. 776, 787-88, 989 P. 2d 897 (2000), affirmed, 147 Wn. 2d 238, 244-245, 53 P. 2d 26 (2002) and City of Walla Walla v. \$401,333.44, 164 Wn. App. 236, 253, 262 P. 3d 1239 (2011), the fact these later two inadmissible hearsay contentions were not considered is evident by the lack of reference in the findings of fact, conclusions of law, oral opinion, or record, suggesting the commissioner considered the inadmissible and

improper evidence. See also, State v. Gower, 179 Wn. 2d 851, 855-56, 321 P. 3d 1178 (2014); In re Katare, 175 Wn. 2d 23, 24 n. 8, 283 P. 3d 546 (2012); In re: Marriage of Foran, 67 Wn. App. 242, 259, 834 P. 2d 1081 (1992), citing, In re: Harbert, 85 Wn. 2d 719, 729, 538 P. 2d 1212 (1975), citing State v. Bell, supra.

Lastly, as a fifth contention, Ms. Aldrich suggests that although Mr. Aldrich's position ceased to exist (i.e. was "eliminated") as of August 01, 2015, (CP190; 192-199), and in an effort to earn some income of some kind Mr. Aldrich executed an independent contractor agreement with his former employer in February 2016, (CP 194-196), the terms of which do not produce similar income, (CP 194-196), or regular payment, (CP 194-196), and only for a definitive term which expired as of June 30 2016, (CP 194), there had not been a substantial change of circumstances, is facetious. Indeed, it is beyond dispute that by the very terms of the decree, (CP 29), such an independent contractor status only allows an additional payment to Ms. Aldrich of 35% of any gross earnings received as an independent contractor in excess of a base income of \$5,000 received from the previous employment which no longer exists, rather than the full maintenance payment of \$2,500 per month as a consequence of the previous employment which no longer exists. (CP 29). Apparently, according to Mrs. Aldrich's logic, shared by the trial court commissioner, Mr. Aldrich should have simply opted for unemployment

benefits when his position was terminated rather than endeavor to earn an income if at all possible even if it was uncertain and limited in amount and duration. (CP 189-190). As this Division aptly stated in In re Marriage of Coyle, 61 Wn. App. 653, 658; 811 P.2d 244 (1981), the phrase “change in circumstances” refers to the financial ability of the obligor spouse (i.e., Mr. Aldrich) to pay via-a-via the necessities of the spouse receiving maintenance (i.e., Ms. Aldrich). Again, the independent contractor agreement (CP 194-196) expired June 30, 2016!

Lastly, as concerns Mr. Aldrich’s request to suspend the maintenance obligation until he is able to find and attain comparable employment as existed before his position was eliminated, the commissioner also failed to even consider the possibility of a suspension in maintenance payments until such time as Mr. Aldrich could obtain a turnaround in his bleak financial position after elimination of his position with CPPS, although a change is highly unlikely at his age with his skills and talents. (CP 40-43; CP 45-52; CP 89-95; CP 163-167; CP 188-191). And, contrary to Ms. Aldrich’s brief, under this Division’s decision in In re: Marriage of Drlik, 121 Wn. App. 269, 278-279, 87 P.3d1192 (2004) “suspension” of the obligation for a definitive period of time does not require a showing of a “substantial change in circumstances.” (Response at 10). Yet, the trial court commissioner’s failure to even discuss or analyze Mr. Aldrich’s request for such a suspension was equally a failure

to exercise any discretion. As this Division once stated, a failure to exercise discretion is equally an abuse of discretion. Bowcutt v. Delta, 95 Wn. App. 311, 321, 976P. 2d 643 (1999). And, at a minimum, such a suspension, on these facts, was appropriate. In re: Marriage of Drlik, 121 Wn. App. 269; 87 P. 3d 1192 (2004).

CONCLUSION

In all due respect, the rulings of the trial court commissioner should be reversed as Mr. Aldrich requested and the relief requested in Mr. Aldrich's petition granted.

RESPECTFULLY SUBMITTED this 18 day of November, 2016.



D. C. CRONIN, WSBA#16018
Attorney for Appellant,
~~ROGER ALDRICH~~
724 N. Monroe
Spokane, WA 99201
(509) 328-5600

Declaration of Service

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington THAT ON THIS DATE declarant personally placed in the services of Eastern Washington Attorney Services for filing the original of the document entitled: Appellant's Reply Brief in Court of Appeals Cause No. 34564-5-III at:

Court of Appeals of the State of Washington, Division III
Clerk of the Court
500 N. Cedar Street
Spokane, WA 99201

AND THAT ALSO ON THIS DATE declarant placed in the services of Eastern Washington Attorney Services for service of the document entitled: Appellant's Reply Brief in Court of Appeals Cause No. 34564-5-III for service upon all other parties, namely HEATHER HOOVER, Attorney for Respondent/ Appellee at her business address:

Heather Hoover
Attorney at Law
330 W. Indiana
Spokane, WA 99205

DATED this 18 day of November 2016.



Gayle Castle
Law Office of D.C. Cronin
Dennis C. Cronin, Attorney at Law, P.S.
724 N. Monroe
Spokane, WA 99201
(509) 328-5600 Fax (509) 328-5646