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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals, Division III, No. 34564-5-III

Spokane Country Superior Case Number: 2008-03-00706-3

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROGER L. ALDRICH,

Petitioner/Appellant,

v.

MARY BETH ALDRICH,

Respondent/Appellee.

Respondent Brief

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I. SUMMARY OF ARGUMENT

Maintenance should not be modified because there has been no substantial change in circumstance that was not foreseen by the trial court when the original order was entered. Furthermore, the petition to modify was an attempt to appeal and re-litigate facts under the original Decree six years later.

III. ISSUES PRESENTED

- A) Whether, based on the record, the commissioner manifestly abused her discretion when denying Mr. Aldrich's petition to modify and/or terminate spousal maintenance under the decree of dissolution issued 6/04/10, [CP 20-30], and for other relief requested in his Petition?
- B) Whether, based on the record, Mr. Aldrich was entitled to a suspension of his spousal maintenance payments under In Re: Marriage of Drlik 121 Wn. App. 269, 87 P.3d 1192 (2004).
- C) Whether, based on the record, there is a basis to allow Respondent to note a hearing on the family law docket for an order awarding her fees and costs under a need and ability to pay analysis.

IV. STATEMENT OF THE CASE

Despite Appellant's litany of claims that main facts were beyond dispute, many of those facts were indeed disputed. Roger and Mary Beth Aldrich were married for 27 years. (CP 8-19). They were divorced on June 4, 2010, after a full trial on all issues, including maintenance. (CP 20-30). After a full trial, now retired Judge Kathleen O'Connor entered a detailed

Findings and Decree. (CP 8-30). In the Findings, the Court specifically found the following:

“The Court finds and does not treat the income capacity of the petitioner [Roger Aldrich] as goodwill, as defined by case law of the State of Washington, but finds **there is no question that the petitioner’s income earning capacity is greater than the \$ 60,000 salary which he is currently earning.** The petitioner has unique skills, **which should be in demand for the foreseeable future.** He has significant credentials, skills, training skills and experience with federal government agencies, including Central intelligence Agency [sic] and the Department of Defense, and his skills are marketable. He may choose to be an independent contractor or he may receive a business ownership interest that may generate additional dividend income. **The petitioner is underemployed and is capable of a higher income. His future earning capacity is based upon his training, experience and background.**

The respondent because of her health issues, which include diagnosis of chronic depression and over 30 years of mental health treatment, is under ongoing treatment by physicians, which treatment includes psychotropic medications for years, has impaired ability to work and contribute significantly to providing her own livelihood. **Her chronic depression has impaired her ability to work full time for many years. It would be difficult for her to work full time and she is not presently employable, testimony of medical professionals support the diagnosis, as well as lay testimony regarding respondent’s inability to work.** Her mental condition is disabling and impairs her ability to work.

The parties have enjoyed an affluent lifestyle, especially in the past few years. ...

The Court finds that the respondent should be awarded lifetime spousal maintenance of \$2,500 per month.

Additionally the petitioner shall pay the respondent 35% any gross earnings received by the petitioner in excess of \$5,000, less deductions paid for Social Security, **as long as Petitioner remains employed, whether directly as an employee, as an independent contractor,** or in any other business, or from royalties, EXCEPT any royalty payments already divided under the property division under the *Decree*.

(CP 10-11, emphasis added)

After the Decree was entered, Mr. Aldrich's income increased dramatically until prior to the Petition for Modification. (CP 80-87, and CP 197-198).

On September 1, 2015, Mr. Aldrich filed a Petition to terminate, suspend, or otherwise modify his spousal maintenance. (CP 33-36). One of the requests included terminating, lowering or suspending the life insurance coverage the Court ordered in the 2010 Decree to secure the lifetime spousal maintenance award. (CP 35). The basis for Mr. Aldrich's petition was his age and employability (CP 41, line 11-12 and CP 43, line 4-10), and the fact that he was "no longer employed" at Center for Personal Protection and Safety (hereafter referred to as CPPS). (CP 41, line 13). Mr. Aldrich was employed with CCPS at the time of the 2010 Decree. Despite the Findings, which specifically noted that Mr. Aldrich had unique skills that would be in demand for the foreseeable future, Mr. Aldrich hired a vocational consultant to allege that he had low employability. (CP 89-95). As noted above, Mr. Aldrich's employability and future earning capacity was previously litigated and ruled on in the 2010 trial and accompanied Findings. (CP 10). However, Mr. Aldrich in his brief alleged that the Commissioner's ruling was based on speculation as to what occurred at the trial.

Mr. Aldrich provided letters from Randall Spivey to attempt to support his position that he was no longer “employed” by CPPS. (CP 192-199). Mr. Spivey also testified in the 2010 trial in support of Mr. Aldrich’s income, the same income that was found to be underemployment by Judge O’Connor. (CP 182). Mr. Spivey was not deemed credible by the Court in 2010. (CP 182).

Ms. Aldrich provided exhibits that showed that Mr. Aldrich was still listed as the Senior Advisor for CPPS on CPPS website. (CP 186-187). Mr. Aldrich is still listed as such. While Mr. Aldrich refused to address this issue, he did disclose in his reply declaration that he was now an independent contractor with CPPS. (CP 189). Mr. Aldrich’s independent contractor work with CPPS was at his discretion, and he could earn up to \$1,000 a day. (CP 194). The contract was effectual from January 1, 2016, to June 30, 2016, with the option to renew. (CP 194).

Commissioner Anderson denied Mr. Aldrich’s petition to modify maintenance. (CP 216-220). Commissioner Anderson found that Mr. Aldrich failed to show a substantial change in circumstance. (CP 216). Commissioner Anderson found that Judge O’Connor was correct in her finding that Mr. Aldrich was underemployed as borne out by Mr. Aldrich earning substantially more income shortly after the 2010 Decree. (CP 217). Furthermore, Commissioner Anderson found that Mr. Aldrich was

still employed with CPPS as an independent contractor at the time of the modification hearing. (CP 218). Commissioner Anderson specifically found, as evidence by the contract that Mr. Aldrich chose to enter into, that Mr. Aldrich's income may have changed in *the way* Mr. Aldrich chooses to earn it, but that he was still employed and has the same exact ability to earn income that Judge O'Connor found six years before. (CP 219).

Mr. Aldrich devoted much time to alleged delays in the case while overlooking the specific findings as to Ms. Aldrich's mental health and stability in the Findings. (CP 10.). Ms. Aldrich's health has not changed. (CP 182).

Mr. Aldrich appealed.

V. ARGUMENT

A. Based on the record, the Commissioner did not abuse her discretion when denying Mr. Aldrich's Petition to modify and/or terminate spousal maintenance under the Decree as Mr. Aldrich had failed to show a substantial change in circumstance that was not contemplated in the 2010 Decree and Findings.

An award of maintenance may only be modified "upon a showing of a substantial change of circumstance." RCW 26.09.170. The change of circumstance must be one that was not contemplated at the time the

Decree was entered. In Re Marriage of Spreen, 107 Wn. App. 341, 346, 28 P.3d 769 (2001) (citing Wagnor v. Wagner, 95 Wn.2d 94, 98 621 P.2d 1279 (1980)). “The phrase ‘change in circumstances’ refers to the financial ability of the obligor spouse to pay vis-à-vis the necessities of the other spouse.” In Re Marriage of Ochsner, 47Wn. App. 520, 524, 736 P.2d 292 (1987). However, the termination of maintenance simply because one spouse has income sufficient to meet their needs is also an error. In re Coyle, 61 Wn. App. 653, 659, 811 P.2d 244 (Div 3 1991) (citing Wagner v. Wagner, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980)).

It is within the sound discretion of the trial court whether there is a substantial change of circumstances that justify a modification of a maintenance award. Lambert v. Lambert, 66 Wn2d 503, 508, 403 P.2d 664 (1965); In Re Marriage of Ochsner, 47 Wn. App. at 524-25, 736 P.2d 292. A trial Court’s determination on a Petition for Modification of Maintenance will not be reversed absent an abuse of discretion. In Re Marriage of Jennings, 138 Wn.2d 612, 625-26, 980 P.2d 1248 (1999); Spreen, 107 Wn. App. at 346. In determining whether the trial court abused its discretion, the Court will review the order “for substantial supporting evidence and for legal error.” Spreen, 107 Wn. App. at 346 (citing In Re Marriage of Stern, 68 Wn. App. 992, 929, 846 P.2d 1387 (1993)). “Substantial evidence supports a factual determination if the

record contains sufficient evidence to persuade a fair-minded, rational person of the truth of the determination.” Id., (citing Bering v. SHARE, 106 Wn.2d 212, 220 P.2d 918 (1986)).

In order to determine whether there was a change in circumstances, the circumstances at the time of the 2010 Decree need to be assessed. The original dissolution was heard at a full trial before now retired Judge Kathleen O’Connor in May of 2010. (CP 8-30). At that trial, Mr. Aldrich tried to avoid maintenance and argue a low income (CP 181). At the time of the 2010 trial, Mr. Aldrich was working for CPPS. (CP 181). The trial court was not impressed with Mr. Aldrich’s reported income and found that he had an earning capacity greater than the \$60,000 reported to the court. (CP 10). The trial court noted that Mr. Aldrich could chose to be an independent contractor or chose to receive a business ownership in the company. (CP 10-11). The trial court found after a full trial in which he and Mr. Spivey testified in, that Mr. Aldrich was underemployed and capable of higher income. (CP 10). The court made specific findings about his employability, income earning capabilities, skills, and marketability. The court addressed his future earning capacity and found that he had a significant earning capacity for the foreseeable future based on his training, experience, and background. (CP 10). The Court ordered Mr. Aldrich to pay basically half of his then reported income to Ms. Aldrich as

lifetime maintenance award. (CP 10 and 29). Mr. Aldrich did not appeal any finding, including the award of lifetime maintenance or his future earning capacity. After trial, Mr. Aldrich did receive a significant increase in his income over the next couple years before filing his modification. (CP 80-87, and CP 197-198).

Five years later, Mr. Aldrich petitioned the Court for a modification of maintenance. (CP 33-36). He argued a change in circumstance in that he had lost employment with the job that the 2010 trial court thought was significantly beneath his capabilities. (CP 41). He attempted to argue that he was no longer employable and provided a vocational assessment, despite the fact that his employability was addressed in 2010 after a full trial. (CP 41 and 43). He also attempted to argue that life time maintenance awards are disfavored and thus this award should be terminated, despite not appealing that award and making that argument five years earlier. (CP 43). At the time and throughout the modification hearing, Mr. Aldrich was employed with CPPS as an independent contractor. (CP 218). He was and still is listed on CPPS's website even after his alleged departure from the company. (CP 186-187).

Mr. Aldrich's vocational assessment is an attempt to retry the findings of the trial court in 2010. Mr. Aldrich's future earning capacities were clearly addressed in the 2010 Decree. Those findings were not

appealed. Mr. Aldrich's skills, credentials, training and experience has not changed over the years. In fact, he added more to that from working with CPPS. There is absolutely no change of circumstances that was nor foreseen by the court in 2010.

There are no changes to Ms. Aldrich's situation. She is still in mental health treatment. At the time of the 2010 trial it was over 30 years of treatment. She still is not employed. She is receiving the same financial assistance she was awarded in 2010.

The life time maintenance award issue was never appealed by Mr. Aldrich. Instead, he has attempted to re-litigate this issue using a petition for modification. This is not appropriate.

In regards to Mr. Aldrich's income, the lower court had significant concerns with Mr. Aldrich's history in attempting to avoid his maintenance obligation to his wife of 27 years. In 2010, he was found to be underemployed in an attempt to reduce or eliminate his maintenance obligation. His testimony and that of Mr. Spivey was heard and not given much weight by the court after full trial in 2010. His income practically doubled over the next few years after the trial court's ruling. But for Judge O'Connor's foresight as to Mr. Aldrich's earning capacities, Mr. Aldrich would have been successful in his attempt to cut Ms. Aldrich's off from these funds. Judge O'Connor's foresight was in fact accurate. Mr.

Aldrich's future earning capacity was taken into consideration. Now in 2015-2106, Mr. Aldrich attempts to use the same witnesses as to his current financial situation that he did in 2010. The same witnesses who were not accurate in their testimony of his income or earning capacity in 2010. Mr. Aldrich then remains employed with CPPS as an independent contractor, able to earn \$1,000 *a day*, all within his discretion as to how often he works. Mr. Aldrich continues to be listed on CPPS website as their Senior Advisor, a fact Mr. Aldrich does not attempt to explain. Given Mr. Aldrich's history, his employability, the findings from the 2010 trial, his continued employment with CPPS even under independent contractor status, there was sufficient evidence that supported Commissioner Anderson's determination. There was no change of circumstances, let alone a substantial one.

B. Based on the record, Mr. Aldrich was not entitled to a suspension of his spousal maintenance payments as there were no substantial change of circumstances.

As noted above, there was no change of circumstance necessary to modify maintenance. There is likewise no change of circumstance that would support a finding to suspend maintenance. Mr. Aldrich is still employed. He has the same earning potential he did in 2010. How Mr.

Aldrich chooses to work or how he chooses to earn his money does not necessitate that the maintenance awarded to Ms. Aldrich be suspended.

C. There is a basis to allow Ms. Aldrich to note a hearing on the family law docket for an order awarding her fees and costs under a need and ability to pay analysis.

Mr. Aldrich brought his motion with no showing of a change in circumstance. He brought this motion with a clear intent to re-litigate the 2010 issues. He has the ability to earn income. Attorney fees were appropriate. Therefore, it is appropriate to have a hearing on the extent of those fees using a need and ability to pay analysis.

V. CONCLUSION

Because Mr. Aldrich has failed to show a substantial change of circumstance that was not considered by the trial court in the 2010 Findings and Decree, the maintenance should not be modified. Mr. Aldrich's age, experience and future employability were specifically considered and ruled on by the Court in 2010. He cannot retry that matter 6 years later. Mr. Aldrich is also still employed with CPPS. This is the same company Mr. Aldrich worked for in 2010, in which the Court found him specifically underemployed. Mr. Aldrich is still employable and has offered no change in circumstance other than to attempt to retry the

previous findings of the Court. Therefore, maintenance should not be modified or suspended. An award of attorney fees was appropriate.

Ms. Aldrich respectfully requests that the trial court's decision be affirmed and that Ms. Aldrich be awarded attorney's fees and costs related to defending this motion.

RESPECTFULLY SUBMITTED this 10th day of November, 2016,


HEATHER HOOVER WSBA #43184
Attorney for Appellee

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 delivered and filed the original and one copy of the document entitled Appellee's Responsive 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 delivered the document entitled Appellee's Responsive Brief in the Court of Appeals Cause No 34564-5-III to the other party, namely DENNIS CRONIN, attorney for Petitioner/Appellant at his business address:

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Dated this 10th day of November 2016,



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