

FILED

**DIVISION III COURT OF APPEALS
STATE OF WASHINGTON**

AUG 29 2018

No. **353095**

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

**Spokane County Superior Court Case No. 13-3-02021-0
The Honorable Rachelle Anderson
Superior Court Commissioner**

REPLY BRIEF

In Re:

PHILLIP JONES, PETITIONER/RESPONDENT

V.

SHARON JONES, RESPONDENT/APPELLANT

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I. RELEVANT FACTS

Dr. Jones spent a lot of time in his facts trying to show that Ms. Jones was far wealthier than he, however, the issue is not the parties finances so much as it is her medical condition and whether she could work at the time the maintenance was granted versus her ability to earn a living now. It was not the parties' financial savings that was at issue for the Commissioner; rather, again it is whether her exacerbation of her psychiatric problem to the point where she now collects social security benefits because she now cannot work, is a change in circumstances allowing the Petition for Modification of Maintenance to go forward.

It is true that Ms. Jones had a psychiatric problem involving her bipolar illness at the time of the marriage, however, she had already been turned down for social security benefits (Herein after SS) before her divorce because she could work according to that department's evaluation. CP 50-57, 172-201 However, after their decree was entered Ms. Jones depression worsened and she obtained a new updated evaluation that said she was "unemployable", something she had not experienced or knew before their decree was entered. Id. Despite this new fact of now being completely unemployable, the Commissioner said this was not a new fact but was the same old fact as before, which was not true. RP 33-39. There was never ever any indication that Ms. Jones could not be employed before their Decree was entered. Again, this was a completely new fact about the exacerbation of her bi-polar illness.

Since the commissioner's dismissal order is based on a finding of fact that was not an old fact but a new problem relating to her employability, which was now based on the exacerbation of her old psychiatric problem. Ms. Jones did suffer from bi-polar illness

before the decree, however, again, this illness did not prevent her from working which was supported by an old social security denial; however, with time, her condition worsened and she no longer can be employable and she filed a modification of that maintenance because of this and its reservation. However, the Commissioner dismissed the Petition for Modification because she indicated that everyone knew she had this problem before the decree, therefore it was not a substantial change in circumstances.

II. ARGUMENT

- A. A finding by the social security department, after the parties decree is entered stating that a party receiving maintenance cannot work is a change in circumstances, even though the underlying medical problem was known to all parties at the time of finalization of their marriage.

Washington courts have defined a substantial change in circumstances for a modification of a maintenance award as follows: "The phrase 'change in circumstances' refers to the financial ability of the obligor spouse to Day vis-a-vis the necessities of the other spouse." *In re Marriage of Ochsner*, 47 Wn.App. 520, 524, 736 P.2d 292 (1987). Such a change in circumstance that relates to earning a living and/or paying for your day to day expenses also has been clarified as by our courts. For example, the evidence supporting a change in circumstances must be "sufficient to persuade a fair-minded person of the truth of the declared premise." *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984). It must also not be something that the parties contemplated at the time of the decree. *In re Marriage of Spreen*, 107 Wn.App. 341, 346, 28 P.3d 769 (2001); *In re Marriage of Scanlon*, 109 Wn.App. 167, 173, 34 P.3d 877 (2001). It also must be based on current circumstances. *Scanlon*, 109 Wn.App. at 178. Finally, it must not be something that the party seeking a change in maintenance "could have brought up" at the

trial or hearing before the decree was entered. *Heuchan v. Heuchan*, 38 Wn.2d 207, 214-15, 28 P.2d 470 (1951). In an unpublished case, very similar matter to this case, and heard by Division I, it dealt with a motion for reconsideration and a change in the wife's medical circumstances. The case is clearly analogous to this case in so many ways, it is almost uncanny.

In the case of *In re Marriage of Peterson*, 75498-0-1, 76055-6-1 (April 6, 2018)¹. The wife suffered from MS and had many difficult medical problems. The husband was a fire fighter with a good pension and income, therefore, she sought lifetime maintenance. Instead, after hearing the testimony, and in a written decision, found that the wife could earn minimum wage and imputed that income to her and gave her maintenance of a lower amount than she asked for a finite period of not, denying lifetime maintenance. *Id.* Part of the reason for the court's decision to find that the wife could work was because she had applied for SS benefits before trial and she was denied with a finding that she could work. However, after the letter ruling came out the wife's MS and other problems exacerbated and she sought SS benefits and was found by that program to now be eligible for assistance, with a finding that she now could not work. To show this, she provided a letter from the SS department that stated "You have been found medically approved' for SSI." *Id.* This finding was after trial and so she filed a motion for reconsideration, even though she filed it after the letter ruling and before the decree.

¹ Under GR 14.1, a party may cite to an unpublished opinion as persuasive authority. The case Paul cites, *In re Marriage of Aldridae*, No. 31597-5-111 (Wash. App. Ct. Oct. 16, 2014) (unpublished), <http://www.courts.wa.gov/opinions/pdf/315975.unp.pdf>, does not address RAP 7.2.

The Peterson trial court judge ordered that the wife's motion be filed properly, after the final papers were entered and presumptively before the 10 days expired. This was accomplished by the wife's counsel and the judge modified the maintenance to lifetime maintenance. Mr. Peterson, filed an appeal stating that the motion for reconsideration was inappropriate because it had to be filed after the decree and not after the letter ruling. Although the Appeals Court agreed with his basic premise, they upheld the decision by the trial court to change his ruling because the judge rectified this problem, and found there was actually a change in circumstances due to the exacerbation of the wife's condition.

Arguably a Petition to Modify a support order and the rules regarding having a change in the party's circumstances as it related to the support order, is virtually identical to the rules regarding a motion for reconsideration. This is borne out by the discussions in the Peterson case where they referenced RCW 26.09.170, the modification of maintenance statute, as well as the unsuccessful argument of the husband where he tried to say this was not a change in circumstances. Ms. Jones showed that her bipolar illness had gotten a lot worse since the decree, in that now her doctors and the SSI department felt she could not work. Since this was the entire basis of the Commissioner's ruling to dismiss this case, before hearing the substance of the matter her ruling should be overturned and remanded for a full maintenance hearing and/or trial.

- B. The husband's reliance of financial facts is irrelevant to this appeal since the entire issue before this court is whether there was a change in circumstances such that the Commissioner should have let it go to full hearing and not dismiss the matter.

Mr. Jones' counsel spends a lot of time on the issues relating to whether his client should pay more maintenance for Ms. Jones and hardly any significant argument about why the case should have been dismissed. Ms. Jones asks this court to focus on the Commissioner's dismissal ruling and not the substance of whether Dr. Jones could pay it or should pay more maintenance. This is because the essence of a changed circumstance, warranting a modification primarily deals with whether the parties can afford maintenance and/or can they provide for themselves via employment.

Certainly, there is room to argue about the "need" for maintenance, however, in this case the Commissioner did not get to that point because she simply dismissed the Petitioner because Ms. Jones did not allegedly show a substantial change in circumstances since everyone knew she was disabled with her psychiatric problems. The only problem with that conclusion and finding is that there was no evidence like the Peterson case, that she could not work at that point. Now, however, there is evidence of her need and inability to pay for all those needs via a job. She also should not have to reduce her property to meet her needs when she helped Dr. Jones get where he has gotten in life where he earns double what he made her in Spokane. See also the case of *Malfait v. Malfait*, 54 Wn.2d 413, 341 P.2d 154, (1959) wherein the court dealing with the payment of fees by one spouse to the other indicated basically that the disadvantage or unemployed spouse should not be deprived of their day in court because they were unemployed and had to use their property to pay for the legal process. Nevertheless, the amount of property was not before the court in its preliminary decision to dismiss this case for want of a change in circumstances.

Respectfully submitted this 29 day of August 2018 by,



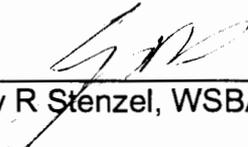
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Declaration of Mailing

I Gary R Stenzel hereby state that on the date of 8-29-18 I did place in the US Post Office Box a true and correct copy of this Reply Brief to David Crouse, attorney at law at the address as follows:

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I sign this under penalty of perjury under the laws of the State of Washington on this date of 8-29-18 at Spokane.



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