

DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. 353095



MAY 11 2010

COURT OF APPEALS
STATE OF WASHINGTON
BY _____

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

OPENING BRIEF

In Re:

PHILLIP JONES, PETITIONER/RESPONDENT

V.

SHARON JONES, RESPONDENT/APPELLANT

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TABLE OF CONTENTS

I.	FACTS	1
II.	ERROR BY COMMISSIONER.....	6
III.	LAW & ARGUMENT.....	7
	<u>A. The right to file for a modification of maintenance can be stipulated to by the parties in their divorce decree.....</u>	7
	<u>B. Ms. Jones’ finding by the social security department that she was disabled and Dr. Bot’s statement that she was “presently” unable to work, was a substantial change in circumstances not at all contemplated by the parties at the time of the decree.....</u>	8
	<u>C. There was insufficient evidence to support the court’s conclusion that there was no change of circumstances that were not contemplated by the parties in this matter, to support the dismissal of the Ms. Jones’ Modification Petition of Maintenance.</u>	
IV.	CONCLUSION.....	17

CITATION TO AUTHORITY

WASHINGTON SUPREME COURT

<i>Gorvin v. Stegmann</i> , 74 Wn.2d 177, 443 P.2d 821, (1968).....	7
<i>In re Marriage of Hall</i> , 103 Wn.2d 236, 692 P.2d 175 (1984).....	14
<i>In re Marriage of Ochsner</i> , 47 Wn.App. 520, 736 P.2d 292 (1987).....	11
<i>Malfait v. Malfait</i> 54 Wash 2d. 413 (1959).....	12
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 621 P.2d 1279 (1980).....	11

WASHINGTON COURT OF APPEALS

<i>In re Marriage of Drlik</i> , 121 Wn.App. 269, 87 P.3d 1192, (2004).....	13 & 15
<i>In re Marriage of Greene</i> , 97 Wn. App. 708, 986 P.2d 144 (1999).....	14
<i>In re Marriage of Wilson</i> , 165 Wn.App. 233, 267 P.3d 485 (2011).....	14

STATUTES – RCW’S

RCW26.09.170.....	7
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COURT RULES – LOCAL

SPOKANE COUNTY SUPERIOR COURT

LSPR 94.04(b)(6).....	1
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I. FACTS

The parties in this matter were married in June 1978, and separated November 2008, for a 30+ year marriage with children. CP 1-7. During the marriage, Mr. Jones went to medical school and Ms. Jones worked as a nurse. CP 50-57, 179-201. The husband became a well-recognized cardiologist of some repute and the wife stayed at home to take care of their two boys, who were either 18 or over that age at the time of the divorce in 2010. Id. After having their two children and quitting her job, she experienced anxiety and depression. CP 172-178. Ms. Jones started seeing a psychiatrist in Spokane named Dr. Bot in 2007 for her psychiatric symptoms. CP 172-201. After the decree was entered in 2010, her psychiatrist indicated that she was being treated for a mood disorder, insomnia, depression, anxiety and some suicide ideation. CP 172-178. There was no evidence that Ms. Jones could not work before the decree was entered.

In Spokane County, local rules for Maintenance Modifications are the 1). They are heard on the family law docket by Commissioners; 2). Are heard on declarations in the file or presented at the hearing only, unless there is an order allowing oral testimony; and 3). The parties must comply with certain setting requirements to have the matter heard. See LSPR 94.04 (b)(6) et sec.

In preparation for the hearing Ms. Jones sup[plied the court with a opinion letter drafted and verified under oath by her psychiatrist Dr. David Bot, written 7 years after the decree was entered, in which he indicated that she was at the time of his letter (2017), “unable to establish and maintain any type of employment because of her emotional fragility and instability” Id. He stated further that,

“Her prognosis for employment presently is not realistic as she continues to struggle with her psychiatric limitations with aspects of daily living as well as difficulty with interpersonal relationships.” (Emphasis added). Id.

No evidence to the contrary was filed and presented at the hearing beyond what Ms. Jones and her attorney provided that although she had been disabled from her depression, there was nothing that said she could not work, to the extent of Dr. Bot’s opinion letter. There was no separate IME by the ex-husband’s counsel, and no presentation of any evidence whatsoever that she could not work at the time or before their decree, or that anyone knew that her psychiatric problems were that severe. In fact if the entire SCOMIS record was reviewed it would show that Dr. Jones was very much of the opinion that Ms. Jones should be made to work or impute her nurse wages in the determination of temporary maintenance and support.

Historically, at the time of the Decree the husband was earning about \$36,000 a month here in Spokane, or \$450,000.00. CP 50-57 & 216-218. However, that still was a great deal of income compared to Ms. Jones’

income, even at the time of the hearing. CP 20-24. In the settlement of the original matter, exclusive of some parenting issues, both parties receiving over 1 million dollars in property and the settlement included 6 years of maintenance for the wife at \$4,500.00 a month and \$1,400.00 in child support for Ms. Jones, (since their 18-year-old was still in high school for several months). CP 8-12. The maintenance order also automatically increased to \$5,750.00 a month for 5 years after their youngest son graduated from high school. Id.

As for the maintenance, their decree included a provision that the maintenance was “modifiable” before its expiration date. Id. This clause was added to their decree and states, “*The obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance, and is modifiable.*” (Emphasis added); Id. The reason for this reservation according to Ms. Jones, was that she agreed to this because she felt she could go back to work as a nurse. CP 179-201. And there was nothing in the decree or the maintenance section that required her to immediately try and find a job, so it would be easy to see why she did not go right out and find a job as a nurse.

After the decree was entered Dr. Jones moved to Florida with his new wife and his income doubled to between \$700,000.00 and \$1,000,000.00 a year (RP8-9 & 14-15 and CP 50-57 & 216-218) While Dr. Jones’ was in Florida earning a great living on the MD degree Ms. Jones helped him

obtain and keep, Ms. Jones started battling her depression which finally got the best of her and according to Dr. Bot and the Social Security Department she became completely unable to work at that time after the decree was entered. CP 158-178.

As part of her attempt to maximize her financial situation, Ms. Jones filed for the social security insurance benefits, and eventually found that she was disabled enough to receive those benefits. See Dr. Bot's letter. CP 158-178. However, the social security insurance benefits did not preclude Ms. Jones from working but was a added benefit. At the same time, in order for her to receive those benefits she had to see Dr. Bot, her psychiatrist for an evaluation. It was that evaluation by Dr. Bot for the social security department that led her to the conclusion that she could not work, that her anxiety, depression and suicide issues precluded her from finding a job. See letter opinion by Dr. Bot CP 158-178. This led to her filing of the petition to force the payment of maintenance since she could not work, something she had hoped would come about after 5-6 years of maintenance.

This matter was set on the Child Support Modification docket in Spokane County Superior Court by local rule. LSPR 9.04 (b)(6). By that rule these matters are heard on affidavit and argument only, and are heard by a Court Commissioner. At the modification hearing, Ms. Jones counsel addressed the issues of her continued need for maintenance, which they felt were the reasons for the reservation of that issue. RP 5-13 & 27-33.

Ms. Jones argued that her disability prevented her now from working as a nurse, because of Dr. Bot's opinion. RP 28-30 & CP 172-178. Also, although the standard of living during this long-term marriage was very high (\$37,000 a month) and the SS payments were her only source of income, and Ms. Jones had substantial evidence that she could not work, the commissioner denied the entire petition because there was allegedly no change in circumstances that was not contemplated before the decree was entered since Ms. Jones had mental health issues before the decree was entered. RP 33-35. That her obtaining a decision that she was unable to work from the SS department and Dr. Bot's declaration (which was the only expert in the case about her ability to work), was not a change in circumstances that was not expected. Id. However, as was indicated, Dr. Jones presented no evidence that the parties knew that Ms. Jones would ultimately succumb to depression and other problems and be completely unable to work at this time. The Commissioner's "where there's smoke, there is fire" analysis basically indicated that Ms. Jones' mental health problems had existed for a long time and so everyone knew and contemplated that someday in the future she would not be able to work due to these problems. See RP 33-39.

Ms. Jones has appealed the Commissioner's ruling since there was no evidence to base this decision on. It was not predictable that Ms. Jones would be this ill after the decree was entered, although the depression was a long-term problem. Ms. Jones had never applied for SS benefits before

the decree was entered, she had never been found to be so disabled that she could not work by Dr. Bot her psychiatrist.

The Petitioner/Appellant has filed this appeal because of the Commissioner's dismissal of her request to modify the maintenance under the decree. CP 219-224. What was contemplated in the reservation was the fact that Ms. Jones would be employed and no longer need maintenance, even Dr. Jone's counsel agreed with that analysis. See RP 34-37 & CP 179-20. The SS insurance benefits findings showed that she was severely disabled, needed help financially, and Dr. Bot took that a step further by saying that she absolutely could not work. CP 172-178. The Petition should not have been dismissed.

II. Error by the Commissioner

The Commissioner committed error in her ruling as follows:

1. By dismissing the petition for modification of maintenance because Ms. Jones had a long term psychiatric problem, well known to the parties at the time of the decree, in spite of the fact that she had never been found to be unemployable by her psychiatrist or the SS department.
2. By dismissing the petition for modification of maintenance even though there was no evidence presented by Dr. Jones that Ms. Jones had ever been found to be unable to work by any entity or doctor before their dissolution decree was entered.

3. By finding that Ms. Jones and her ex-husband contemplated that she would be found to be disabled by the social security department and her psychiatrist sufficiently that she could not work.
4. By committing an abuse of discretion by failing to make a decision based on the evidence.

III. Law & Argument

- A. The right to file for a modification of maintenance can be stipulated to by the parties in their divorce decree.

RCW 26.09.170 indicates that the parties may stipulate to future changes in the maintenance in their decree. It states at section (2) of this statute:

(2) Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance. (Emphasis added).

After a decree for maintenance is final, “there is no authority given under the law by which a trial court is empowered to abrogate or modify the obligation imposed by the decree, unless such a right has been reserved by consent of the parties in the final decree itself.” See *Gorvin v. Stegmann*, 74 Wn.2d 177, 443 P.2d 821, (1968).

In this case Mr. and Mrs. Jones stipulated and reserved Ms. Jones right to seek a continuation of maintenance beyond the 5-year period without any contingency on that right. Ms. Jones’ filing of her Petition

for modification before the maintenance ended was proper and allowed by law.

B. Ms. Jones' finding by the social security department that she was disabled and Dr. Bot's statement that she was "presently" unable to work, was a substantial change in circumstances not at all contemplated by the parties at the time of the decree.

Ms. Jones was divorced from Dr. Jones on the date of July 21, 2010. CP 1-7. Since she was not precluded from doing so, and her social security benefits are like an insurance policy, she applied for social security disability benefits a week after the entry of their divorce decree RP 22-25. For all the court and Dr. Jones knew this may have been the reason why she settled for such a low sum of maintenance, given the length of the marriage and the economic disparity between him and her. However, Ms. Jones was at first denied any finding that she was so disabled that she could not work but she appealed this ruling and received a "fully favorable" ruling from the Social Security department (herein after SS) in 2012 that she was disabled enough to receive those benefits. CP179-201.

To try and show that she knew that she was too depressed to work at the time of the decree, Mr. Jones indicated in his "hearing brief" that the "onset" of her depression predated the parties decree by over 4 years. CP13-27. However, there was no evidence produced by Mr. Jones that Ms. Jones could not actually have worked before the decree date. Additionally, having an "onset" of an illness, does not mean it has

become so bad that you cannot work. The word “onset” is just that, the start of the problem. Additionally, although Ms. Jones had her psychiatrist clearly state that at the time of his letter Ms. Jones was unable to work his attorney persisted in suggesting that everyone knew that this would be in the future for Ms. Jones for which he showed no evidence.

Mr. Jones’ logic as to why this was contemplated by the parties and should be dismissed was analogous to the suggestion that if a modification petitioner, who had an “onset” of a heart problem knew there would come a time when they couldn’t work because of that “heart condition” could never ask to modify their maintenance because they knew that that was a possibility. Such a concept is not an inevitable conclusion. How could Ms. Jones or Dr. Jones have known that her illness onset was going to get so bad that an administrative court for the SS department would find that she was so disabled that she should receive her SS disability insurance benefits, and that her doctor would say she was not capable of holding down a job at the time of the Petition and hearing because of that onset. Also, had Dr. Jones contemplated that Ms. Jones would say she cannot work in 6 years he would have had a duty to check that premise out by an IME evaluation. For Dr. Jones and the Commissioner to come to this conclusion, given the ex-husband’s paucity of evidence to support his theory, there would never have been a way for Ms. Jones to utilize this reservation clause since it would have

been a forgone conclusion. That would make the reservation a nullity from the start and give it no meaning.

With the Commissioner's ruling in mind, what other fact pattern would have triggered a "proper" modification under the facts of this case? Other fact patterns could have been, a bad accident that left her unable to work, or she contracted a serious medical condition like cancer or MS making her unable to work. However, neither the Commissioner or Dr. Jones' counsel are psychiatrists who deal with such things as anxiety, moods and depression in people. And since there was no indication that Dr. Bot was lying when he said that at this time she could not work due to the exacerbation of her mental health issues, it must be respected and not ignored. Frankly it clearly appeared that the Commissioner totally ignored what Dr. Bot said along with the SS department's findings as if this entire modification request was part of a large scheme or fraud on the court. Surely Ms. Jones would rather trade her anxiety, suicide ideation and feelings, and depression for no maintenance, however, since they were realities 6 years later, she brought this action because it was reserved, and especially given the length of their marriage, Dr. Jones' ability to pay, her lifestyle needs, and the severity of her emotional problems that had gotten worse.

Dr. Jones also could certainly have precluded that as a basis if he knew it was a forgone conclusion, however, since neither party thought she was unable to work at the time of the decree, it was a substantial change

in circumstances that they did not contemplate. That is in fact why Ms. Jones said she would accept only 6 years of maintenance, since she thought she could work. Here there was no way either party could have contemplated that the SS department was going to find that she was disabled and that her doctor would say she could not hold down a job, just like no one knew Dr. Jones' income would approach seven figures annually.

The first question in this matter then is whether Ms. Jones' finding of her being too disabled to work by her doctor was a substantial change in circumstance? A substantial change in circumstances occurs "upon a change in the financial ability of the obligor spouse to pay in comparison with the need of the other spouse." (Emphasis added) See e.g. *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980); *In re Marriage of Ochsner*, 47 Wn.App. 520, 524, 736 P.2d 292 (1987). With regard to the payee in a maintenance case, a change of circumstances occurs if that person's needs change as well. *Id.* Here, because Ms. Jones had way more than \$900 a month in bills according to her financial declaration, there was a substantial change in circumstances in her ability to cover those costs.

Besides Ms. Jones not being able to work, the husband's income more than doubled to almost $\frac{3}{4}$ of a million dollars a year, therefore, his ability rose concomitantly with her inability to meet her needs consistent with case law on these issues. Again, although everyone knew Ms. Jones had

some depression there was no information that suggested that she could not work in the future, indeed, that is why she agreed to stop the maintenance, because she thought she could be employed.

Parenthetically, it should be noted that one of Dr. Jones' argument regarding this modification request was that "[d]espite his employment as a cardiologist, [that] his net worth remain[ed] lower than Sharon Jones". RP 13-27. However, the commissioner did not dismiss the Petition to modify the maintenance based on that fact. RP 33-39. This is probably because although net worth is relevant, equalizing the "playing field" financially is more important in a long-term marriage, which is done by equalizing incomes. See e.g. *Malfait v. Malfait* 54 Wash 2d. 413 (1959) (although about attorney's fees this case stands for the proposition that equitable principles in family law matters mitigate in favor of focusing on making sure that each party is not advantaged over the other party because of income issues.)

With these facts and her decision in mind, the Commissioner used the wrong legal standard in dismissing this modification of maintenance request. The legal standard the Commissioner seemed to use was that since everyone knew Ms. Jones was depressed at the time of the decree, they all should have contemplated that she would be found unable to be employed by the SS department and her physician in the future. However, that is not the standard the court should use in cases dealing with such issues since no reasonable person would assume that

a once depressed person could never work. See e.g. *In re Marriage of Drlik*, 121 Wn.App. 269, 87 P.3d 1192, (Div. 3 2004).

The Commissioner did not consider that at the time Ms. Jones filed for a modification, that even though “her depression problem exacerbated” to make further employment impossible, the simple knowledge of the existence of “a” depression before their decree was entered did not preclude a finding of a substantial change in circumstances not known to the parties. The problem with the Commissioner’s decision is that there could never be a change in circumstances under that school of thought for anyone who had a psychiatric problem that may worsen over time. If a school bus driver had a minor depression before their maintenance decree was entered, then 7 years later became severely suicidal, and he could not work at any employment, then they could not ask for more maintenance because they simply knew a problem with their minor depression existed before the decree. A neutral person would not conclude that having a minor depression at one time means that the person cannot work or that a finding that they cannot work would be expected because of their simple depression.

Stated another way, being depressed and not being found by a medical tribunal and a licensed psychiatrist to be employable due to that depression and psychiatric problems, is a far cry from an “onset date” of the original depression used by the Respondent to suggest everyone

knew about this problem. If this was the standard then any spouse in a dissolution that has a depression could not ever reserve the issue of extending the date for a modification because a depression always means you may not be able to work. That conclusion makes no sense.

C. There was insufficient evidence to support the court's conclusion that there was no change of circumstances that were not contemplated by the parties in this matter, to support the dismissal of the Ms. Jones' Modification Petition of Maintenance.

The law in Washington regarding a Superior Court decision in a modification of maintenance is as follows: where the trial court has weighed all the evidence, the appeals court's role is simply to determine whether there was substantial evidence to support the findings of the court and, if so, whether the findings in turn support the trial court's conclusions of law. See *In re Marriage of Wilson*, 165 Wn.App. 233, 340, 267 P.3d 485 (2011). "Substantial evidence" is evidence 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). An appellate court should 'not substitute [their] judgment for the trial court's judgment, weigh the evidence, or adjudge witness credibility in the process of analyzing a lower court's ruling. See *Wilson*, at 340 (quoting *In re Marriage of Greene*, at 97 Wn. App. 708, 714, 986 P.2d 144 (1999)).

In this case, Dr. Jones' counsel provided no evidence that Ms. Jones orchestrated anything in the matter, yet he assumed many things that

were nothing more than innuendo about whether she could be employed or not before the decree was entered. The prime example of that innuendo was the fact that Ms. Jones' onset of depression occurred in the 90's, to somehow say that since she had been depressed for such a long time, that ipso facto that meant everyone knew that that prevented her from holding down employment. There was absolutely no competent professional evidence provided by Dr. Jones that would corroborate such a conclusion about a nexus between her psychiatric issues and her not being able to work before the decree was entered. The simple fact that she was "depressed" before the decree was entered did not contemplate that her psychiatrist Dr. Bot would testify 7 years later that she could not currently work because of her psychiatric problems.

There was also no evidence from an adverse expert psychiatrist such as an IME to show that she could work. The only evidence that was competent on that issue was Dr. Bot's testimony, and the Commissioner cannot substitute her "concerns and suspicions" about Ms. Jones' potentially orchestrating this issue. There was no evidence that she intentionally orchestrated anything related to her inability to work. Her simple filing of a petition for her SS benefits by law said nothing about her ability to work (See *In re Marriage of Drlik*, supra which indicated clearly *that the mere fact that she received SS disability rating said nothing about her ability to be employed*). However again, Dr. Bot's expert testimony provided for clear and unambiguous proof that her

depression and other psychiatric problems had a clear and unmistakable role in preventing her from working. This fact was provided seven (7) years after the parties' divorce and was a completely different circumstance that was not contemplated before their decree was entered.

Dr. Jones' may say that her inability to work was a major theme throughout the interlocutory period, however, no evidence was provided in that regard, nor was there any indications that the Commissioner used any evidence of that type to order her dismissal. What was clear however, is that the Commissioner indicated that Ms. Jones suffered from her depression long before the parties decree was entered, therefore, it was at issue before their divorce decree was entered, ipso facto, the parties must have contemplated that it would affect her employability and so it was not a new issue.

Again, the problem with that analysis is that in order to get there they have to show that being depressed equals un-employability, and that was never shown by any evidence before the court, it was simply based on what might be called "circumstantial evidence" that she was depressed before she was divorced to conclude the parties knew of her possible un-employability prior to the final orders. Circumstantial evidence is not the standard, it is "substantial evidence", and there was no expert from Dr. Jones to refute what Dr. Bot said and that is that her depression was now so bad that she could not work. Therefore, since the Commissioner knew that the reservation was to see if she could work, Dr. Bot's profession

opinion was exactly on point. The Petition should not have been dismissed.

IV. Conclusion

This is a reserved modification of maintenance case where the wife received temporary maintenance from her wealthy husband and then ex-husband after their decree for 6 years. The parties had included a reservation to modify the maintenance to the Appellant if she could not work. Although the Appellant was depressed long before their final decree was entered, she had never been found to not be able to work, and there was no evidence provided that she either could work or that she could not work when the reservation was ordered. Despite this the Commissioner dismissed the petition to modify maintenance for Ms. Jones, even though her total income was \$900 a month SS disability income and Dr. Jones earned double his income when he was divorced. The Commissioner rationalized this was the proper ruling simply because everyone knew Ms. Jones was depressed at the time of the divorce decree, and her being found to both be disabled by the SS department and her doctor said she could not work at the "Present time" to not be a change of circumstances that was known by the parties.

To make this dismissal of the Petition valid the Commissioner had to base her decision on substantial evidence that all knew she could not work at the time of the decree. However, no evidence was presented by Dr. Jones' counsel to show that Dr. Bot's diagnosis that she could not

work at this time due to the exacerbation of her depression was either known or contemplated by anyone prior to the decree. He simply argued what appeared to be circumstantial evidence about when she filed for disability benefits, and the fact that she was depressed for a long time before their divorce. The Respondent/Appellant requests that the court overturn the Commissioner's dismissal of the petition and allow this to go forward based on the law and not circumstantial evidence.

Respectfully submitted this 30th day of March 2018 by,



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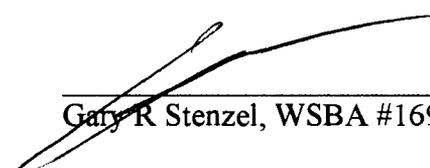
DECLARATION OF SERVICE

I certify that on the 30th day of March 2018, I sent a true and correct copy of this OPENING BRIEF to be served on the following individuals by mail as indicated below: (OR PERSONALLY SERVED)

David J. Crouse, Attorney at Law, 422 West Riverside, Ste. 920,
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I sign this under penalty of perjury under the laws of the State of Washington at Spokane.

Dated: 3/30/18



Gary R Stenzel, WSBA #16974