



JUN 14 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

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

IN RE:

ROGER ALDRICH
Appellant

V.

MARYBETH ALDRICH
Respondent

NO. 357481-III

RESPONDENT'S APPELLATE BRIEF

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TABLE OF CONTENTS

Table of Authorities	Page 3
Issues presented	Page 4
Statement of Case	Page 4
Argument	Page 11
Conclusion	Page 18

TABLE OF AUTHORITIES

STATUTES AND COURT RULES

RCW 26.09.060.....14

RCW 26.09.090.....14

STATE CASES

Bering v. Share, 106 Wn.2d 212, 721 P.2d 918 (1986).11

Lambert. V. Lambert, 66 Wn.2d 503, 403 P.2d 664 (1965).....12

Marriage of Achsner, 47 Wn. App. 520, 736 P.2d 292 (1987).....11

Marriage of Drlik, 121 Wn. App. 269, 87 P.3d 1192 (2004).....11

Marriage of Hulscher, 143 Wn. App. 708, 180 P.3d 199 (2008).....11

Marriage of Spreen, 107 Wn. App. 341, 28 P.3d 769 (2001).....12, 16

State v. Rohrich, 149 Wn.2d 647, 71 P.3d 638 (2003).....11

ISSUES PRESENTED

- I. What is the standard of review for an order on maintenance modification petition and did substantial evidence support the trial court's decision?
- II. Did substantial evidence exist to support the trial court's decision in partially granting the maintenance modification?
- III. Did substantial evidence exist to support the trial court's decision in declining to order a judgment, but rather reducing future maintenance payments to offset overpayments?
- IV. Did substantial evidence exist to terminate the requirement that Mr. Aldrich maintain a life insurance to secure his maintenance obligation?

STATEMENT OF THE CASE

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 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). The vocational consultant hired by Mr. Aldrich testified that he could make up to \$15 an hour. (CP 89-95).

At the initial Modification Hearing, the trial Court denied Mr. Aldrich's requested citing that there was no change of circumstances as he was still employed with CPPS. (CP 216-246). Mr. Aldrich appealed. (CP 273-304). The Court of Appeals remanded to the trial court requiring the trial court to find a substantial change in circumstance. (306-315).

Mr. Aldrich requested a hearing and submitted an updated declaration with the Court. (CP 356; 316-319). Mr. Aldrich disclosed that he was still working for CPPS. (CP 316-319). Mr. Aldrich represented that his income with CPPS was averaged at 1,667 a month. (CP 320-326). Mr. Aldrich also submitted doctor's notes and claimed he could not work because of recent

health issues. (CP 316-319, 327-329, 330-332). Mr. Aldrich's doctor's testified that he worked 5-10 days a month. (327-329, 330-332). Mr. Aldrich later testified that he was only working about 4 days a month. (CP 562-576, specifically 563, Paragraph 6). Mr. Aldrich's "medical condition" was diabetes.

Mr. Aldrich continued to be listed by CPPS as employed by their firm. (CP 368-406). Mr. Aldrich, as well as his employer Mr. Spivey, acknowledged this, but cited that the company lists their Independent Contractors. (CP 577-578; 562-576). As such, it was acknowledged that Mr. Aldrich was still being used by CPPS for work.

Ms. Aldrich had to spend significant time and money going through Mr. Aldrich's bank records as his reported income from CPPS and his payments received did not add up. (CP 368-406). Only then did Mr. Aldrich claim he was being reimbursed for travel expenses, including meals. (CP; 526-576; 508-555). Mr. Aldrich didn't provide this picture in his original filings. Ms. Aldrich presented evidence of Mr. Aldrich's bank statements to show the income fluctuated depending on where the matter was in litigation. (CP 368-406; 442-507).

Ms. Aldrich also had to obtain Mr. Aldrich's medical records. (CP 407-441). In those records, it was disclosed that no issues were reported

with Mr. Aldrich's health and there were no recommendations that he quit working until *after* the Court of Appeals Mandate and *as* Mr. Aldrich prepared to file his motion. (CP 407-441; 368-406). Mr. Aldrich provided no evidence to dispute this. It was also acknowledged by Mr. Aldrich that about the time he made this claim, he ran Bloomsday with his son. (CP 368-406; 562-576). Mr. Aldrich still claimed he was having trouble maintaining his diabetes working only a maximum of 4 days a month (not the 5-10 as reported by his doctors) and had problems with meals (even though they were paid for/reimbursed by CPPS). (662-576).

Mr. Aldrich represented his expenses were 4,430.91 a month. (CP 320-326). Ms. Aldrich's expenses were 6,512.11 a month. (CP 108-113). Neither party contested the other's financial declaration and expenses.

Despite all the accounting, Commissioner Anderson adopted Mr. Aldrich's representation of his income of \$1,666. (CP 609-610). This was approximately \$200 less than Mr. Aldrich presented in 2016. (CP 188-191, page 189, line 16-17). The Court did not address any other potential for employment for Mr. Aldrich when he was not working the other 26-27 days a month.

Commissioner Anderson did find a substantial change in circumstance for Mr. Aldrich and granted Mr. Aldrich's Petition for Modification of

Maintenance. (CP 609-610). Neither party argued or alleged there was a change of circumstance in Ms. Aldrich's position as noted in the 2010 Decree. There were specific findings as to Ms. Aldrich's mental health and stability (CP 8-19). The Commissioner noted that she relied on the previous court's ruling on that issue. (CP 609-610).

As to Ms. Aldrich's expert witness, that expert witness was excluded. (CP 580-581). Such expert witness was referenced in the Commissioner's Ruling as to what evidence Ms. Aldrich's relied upon. (CP 609-610). However, the expert's testimony was not used or relied upon in the Commissioner's Ruling when she was analyzing need and ability to pay. (CP 609-610).

Commissioner Anderson found that Mr. Aldrich's overall net income was \$5,748, \$1,666 of that was income from CPPS. (CP 609-610). The Court found his expenses were \$4,430. This was Mr. Aldrich's own representations to the Court. (CP 320-326). Therefore, the Court found his excess was \$1,318. (CP 609-610).

Commissioner Anderson found Ms. Aldrich's net income was \$4,734 a month, and her need was \$6,512. (CP 609-610). This was as presented by Ms. Aldrich (CP 108-113) and uncontested by Mr. Aldrich. As such, the Court found her need was \$1,700 a month. (CP 609-610).

As Mr. Aldrich had \$1,300 excess income, which was his income from CPPS and not his division of assets, and Ms. Aldrich had a need, Commissioner Anderson order a modification of maintenance to \$1,300 a month to reflect the change in circumstances and the balance of the maintenance factors. (CP 609-610). Commissioner Anderson did cite to RCW 26.09.060. (CP 609-610). However, she referenced the maintenance factors when referencing that RCW. (CP 609-610). The proper RCW is RCW 26.09.090.

Commissioner Anderson did not order a termination of the insurance cost. (CP 609-610). Mr. Aldrich had included the cost in his financial declaration. (CP 320-326). Mr. Aldrich provided no information on what potential costs were for other proposed insurances, reducing amounts, length of time, etc.

The Court did order reduced maintenance payments to offset past overpayments from Mr. Aldrich. (CP 609-610). The court's modification of maintenance already left Ms. Aldrich without sufficient income by \$300. The offset further put her in a deficit by \$700).

Mr. Aldrich appealed. (CP 611-615).

ARGUMENT

I. THE STANDARD OF REVIEW FOR AN ORDER ON A MAINTENANCE MODIFICATION PETITION IS ONE OF SUBSTANTIAL EVIDENCE.

An appellate court reviews a modification order to determine whether substantial evidence supports the trial court's findings and whether the court made a legal error that may be corrected on appeal. Marriage of Hulscher, 143 Wn.App. 708, 713, 180 P.3d 199 (2008). The Standard of Review on a trial court's decision on maintenance modification is abuse of discretion. Marriage of Drlik, 121 Wn. App. 269, 279, 87 P.3d 1192 (2004). A Trial Court's decision will be affirmed so long as it rests on tenable grounds that are not manifestly unreasonable. Marriage of Achsner, 47 Wn. App. 520, 525, 736 P.2d 292 (1987). A decision is untenable if it is unsupported by the record. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Substantial evidence supports a factual determination if the record contains sufficient evidence to persuade a fair-minded, rational person of the truth of that determination. Id. at 714; Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

II. SUBSTANTIAL EVIDENCE EXISTED TO SUPPORT COMMISSIONER ANDERSON'S DECISION IN PARTIALLY GRANTING MR. ALDRICH'S MAINTENANCE MODIFICATION.

“It is well settled in this jurisdiction, as in others, that a decree granting alimony or support can be modified only upon a showing of a substantial and material change in the condition and circumstances of the parties, occurring since the entry of the decree, relative to the factors of (1) the necessities of the divorced wife and children, and (2) the practical and realistic ability of the ex-husband to meet the obligations so imposed.” Lambert v. Lambert, 66 Wn.2d 503, 508, 403 P.2d 664 (1965). “The burden of demonstrating the required change of circumstances, rests upon the parties petitioning for the modification.” Id. “And, determination of the question whether, under the evidence presented, there has been a substantial and material change in circumstances which will authorize and justify a modification in the alimony and support payments is addressed to, and rests within, the sound judgment and discretion of the trial judge, whose decision thereupon will not be reversed on appeal absent error or abuse of discretion.” Id. See also Marriage of Spreen, 107 Wn. App. 341, 346, 28 P.3d 769 (2001), holding that a court will not reverse a finding about a change in circumstances absent an abuse of discretion (citing Lambert).

Mr. Aldrich requested either/or a termination or modification of his maintenance obligation. This Court had previously found that there was a substantial change of circumstances. (CP 306-315). Commissioner Anderson also made the finding. (CP 609-610). That issue is not contested.

Mr. Aldrich contests how the Court modified his maintenance obligation. However, substantial evidence exists to support Commissioner Anderson's ruling in this matter on maintenance modification. Furthermore, Mr. Aldrich's own brief in support of his Appeal does not address relevant law or the facts considered by the Court.

Mr. Aldrich argues that because the maintenance award is a significant part of his CPPS income it must clearly be an abuse of discretion. Mr. Aldrich avoided any citation to statute or relevant case law for this position. What is really interesting is Mr. Aldrich's Assignment's of Error. His 2nd and 9th Assignment of Error are Commissioner Anderson's finding as to Mr. Aldrich's income and expenses, which were Mr. Aldrich's own representation of his income and expenses. Basically, he's assigning Error to the Court for adopting his own proposal. It is also telling that while he assigns error to these findings, he provides no evidence in his brief as to why.

His 3rd Assignment of Error is Commissioner Anderson's finding as

to Ms. Aldrich's income, which he never disputed. His 4th and 10th Assignment of Error is Commissioner Anderson's findings as to Ms. Aldrich's expenses, which were never disputed. Basically, he's assigning error to something he never disputed. While he assigns error to Ms. Aldrich's income calculation, he does not tell this Court why. Instead, for the first time on Appeal, he nitpicks Ms. Aldrich's expense. This is again interesting considering Mr. Aldrich's entire Petition was based on his *inability to pay maintenance* and not Ms. Aldrich's need for maintenance. *No one* argued that there was a change in circumstance for Ms. Aldrich.

Commissioner Anderson made a fair and equitable ruling. She applied the appropriate factors of RCW 26.09.090, although incorrectly citing RCW 26.09.060. Commissioner Anderson relied on Judge O'Connor's previous findings as to Ms. Aldrich's need as no one contested or challenged those issues. The length of marriage, Ms. Aldrich's health, employment history and need for maintenance were not contested. Commissioner Anderson found a change in circumstance for Mr. Aldrich and even adopted his proposed average monthly income, despite the significant issues raised with it. In his brief, Mr. Aldrich does not even cite why such reliance was improper.

Mr. Aldrich points out that the Commissioner must take into

account the ability of the obligor spouse to meet his own financial needs and obligations while meeting those of the obligee spouse seeking maintenance. There is no dispute that Mr. Aldrich cited appropriate case law in this topic. However, Mr. Aldrich then does not apply that law in his brief but rather claims that Ms. Aldrich is in a better financial position than he.

Mr. Aldrich's income from CPPS was \$1,666. Mr. Aldrich's monthly income is him working only a maximum of 4 days a month. His excess income as presented to the court was \$1,300. Ms. Aldrich had a need of \$1,700 as presented and uncontested. Commissioner Anderson ordered maintenance of \$1,300 a month, reduced to \$1,000 a month until overpayments had been reimbursed. As such, Commissioner Anderson ruling was fair and equitable balancing the interests of the parties. She did not order Mr. Aldrich to pay Ms. Aldrich maintenance out of his property division. Clearly, he is ordered to pay it out of his income from CPPS.

Commissioner Anderson did not rely on the stricken expert report of Mr. Todd Carlson. She cited it as something Mr. Aldrich relied upon. However, given that she adopted Mr. Aldrich's own proposed income, she clearly did not rely on this report.

Mr. Aldrich cites this court's ruling on the initial Mandate that lifetime maintenance award are disfavored. However, this Court and Mr.

Aldrich cited Marriage of Spreen, which notes that “In some cases, a lifetime award of maintenance may even be just.” Marriage of Spreen, 107 Wn. App. 341, 348, 28 P.3d 769 (2001). Mr. Aldrich provided no evidence as to why the lifetime maintenance award should be modified. The findings as to the length of marriage, standard of living, and Ms. Aldrich’s employability and health are not disputed, argued or even raised. Evidence was provided that although Mr. Aldrich’s income was decreased, he can and will continue to work. Evidence was provided and uncontested that Ms. Aldrich had a need and Mr. Aldrich continued to have the ability to pay. The amount was simply reduced.

III. SUBSTANTIAL EVIDENCE EXISTED TO SUPPORT THE TRIAL COURT’S DECISION IN DECLINING TO ORDER A JUDGEMENT IN OVERPAYMENT, BUT RATHER REDUCING THE FUTURE MAINTENANCE PAYMENTS TO OFFSET THE OVERPAYMENTS.

As noted above, such rulings are in the trial court’s discretion. There is not an abuse of discretion as long as the ruling is made on tenable grounds. The Commissioner found Ms. Aldrich had a need of \$1,700 a month. Maintenance was lowered to \$1,300 a month, less than her need. The Commissioner balanced the finances of the parties, and reduced future payments to \$1,000 a month to offset overpayment of back support. This

results in an insufficient income to Ms. Aldrich's home of \$700 a month. The reduction is already half of what Ms. Aldrich had received in maintenance for many years. This was an appropriate balancing act to make sure there was still sufficient income in Ms. Aldrich's home while paying back over payments of support, especially given the length of this case and multiple appeals.

Mr. Aldrich does math based on the end date of the insurance policy. This is not the court ordered termination date of the maintenance obligation. As such, this argument is illustrative only and not factual. It ignores the financial needs of **both** parties.

IV. MR. ALDRICH PROVIDED NO EVIDENCE TO SUPPORT A TERMINATION OF THE REQUIREMENT THAT HE MAINTAIN A LIFE INSURANCE TO SECURE HIS MAINTENANCE OBLIGATION.

This request was largely ignored by Mr. Aldrich in the trial Court, other than passing comments in his Declarations. Mr. Aldrich provided absolutely no information to the court as to other alternatives for the life insurance award- whether reduced amounts or timelines. Mr. Aldrich included the amount in his financial declaration, which was taken into consideration by Commissioner Anderson in analyzing the need and ability

to pay component of maintenance. As such, there was no abuse of discretion as Mr. Aldrich did not argue his position or provide the Court sufficient information to even rule on this issue.

CONCLUSION

The trial court made a very appropriate determination in this matter in partially granting Mr. Aldrich's request for a maintenance modification. There was no abuse of discretion in her analysis other parties' needs and ability to pay. Furthermore, it is completely inappropriate for Mr. Aldrich to claim there was an abuse of discretion when the Court adopted his own proposed numbers and numbers he didn't bother to contest until appeal. In any event, very substantial evidence supported her decision that a modification was partially appropriate under the facts of this case

Respectfully submitted,



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Attorney for Marybeth Aldrich

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion to be competent to serve papers.

That on the 14th day of June, 2018, she served a copy of the Respondent's Appellate Brief to the persons hereinafter named at the places of address stated below which is the last known address.

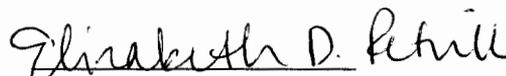
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HEATHER HOOVER

SUBSCRIBED AND SWORN to before me this 14th day of June, 2018.




ELIZABETH D. PETRIK
NOTARY PUBLIC in and for the State of
Washington, residing in Spokane.
My Commission Expires: 11-29-20