

64431-9

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No. 64431-9-I
IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

Keith Clarke, *Appellant*

vs.

Sabrina Clarke, *Respondent*

RESPONDENT BRIEF OF RESPONDENT

Sabrina Clarke, *Respondent pro se*

11917 SE 87th Ct.

Newcastle, WA 98056

425-417-8519

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A. Introduction:

The facts of the case are that the Mr. and Mrs. Clarke marriage dissolution became final in April 2007. In the property settlement Mr. Clarke received 128,000 dollars which he squandered. During mediation he was allowed to use a lower than normal annual income of 84,000 dollars per year to determine spousal support with the realization that some years would be higher and that some years might be lower. Prior to that time Mr. Clarke was earning up to 110,000 dollars per year. Even though maintenance was based on a significantly lower income that he had previously earned, Mr. Clarke claimed that since then his income had been reduced and that the court should *vacate* all subsequent spousal support ordered in the non-modifiable agreement. He claimed that the trial court did not consider his motion for vacation. However, the orders issued by the court explicitly state they did consider the motion for vacation and were fully advised. The court found his case without merit. Now, Mr. Clarke is appealing the decision found by the commissioner in both the initial hearing and reconsideration and by the judge during revision. This brief shows that not only is Mr. Clarke's motion to vacate without merit, it also shows in case law, some of which he actually cites, that the lower court acted within their legal discretion and made the appropriate and legal finding.

B. Assignments of Error

No. 1 - There were no errors in the court's decision to deny Mr. Clarke's motion. The court stated, in effect, that Mr. Clarke's misuse of the equitably divided property settlement did not justify vacation or modification of the spousal maintenance.

No. 2 - The court correctly ruled that the agreed Finding 2.12 was sufficient in that the husband received funds from the property settlement and did have the ability to pay and that the wife needed temporary support. The court stated in the hearing that Mr. Clarke's irresponsible use of his assets did not justify vacation or modification of the divorce settlement.

No. 3 - The ruling was correct and within the law when it denied Mr. Clarke's motion.

Issues Pertaining to Assignments of Error

No. 1 - The issue is not "can a non-modifiable spousal maintenance obligation within an agreed dissolution decree restrict the authority of CR 60 to vacate the obligation when it becomes inequitable to continue to enforce it?". The issue is that Mr. Clarke did not present legal arguments or evidence sufficient to support this motion.

C. Statement of the Case

The agreed dissolution decree was entered on 4/19/07. [CP 16-24;1-15] On 11/17/08, the current child support order was entered. [CP 40-53] Mr. Clarke states that his medical problem caused him to violate safety

rules at work, Burlington Northern Santa Fe Railroad) which resulted in his 3 year probation. He also states that BNSF imposed a prohibition from doing over-the-road assignments which ended the overtime hours that were used to calculate child support and spousal maintenance. [CP 54-5] However, Mr. Clarke has stated to Mrs. Clarke that he volunteered to 'come off the over-the-road assignments so that he could be home more and that he decided himself that he wanted to come off the 'over the road' assignments during his probation.

On 5/20/09, Mr. Clarke filed a Motion to Vacate the Spousal Maintenance portion of the agreed upon Decree. [CP 57] Mrs. Clarke filed responsive documents on 6/22/09. [CP 66-86; 60-65]

After the hearing, the commissioner denied Mr. Clarke's motion, stating that after reading ALL of Mr. Clarke's documents, she found that there was insufficient evidence to support Mr. Clarke's motion and that CR 60 did not apply in this case. None of his documentation was 'overlooked'. Mr. Clarke's motion was denied on 8/26/09. [CP 135-136] He filed for revision on 9/3/09 [CP 137] which was denied on 10/09/09 [CP 138] The Commissioner stated, in effect, again that CR 60 did not apply in this case.

D. Summary of Argument

The single argument in this case is that Mr. Clarke did not present adequate or even applicable evidence to vacate the agreed upon decree,

per the standard of the law. The judge stated that Mr. Clarke's exorbitant purchases put him in financial stress. The court stated that this was not sufficient cause in the law to justify vacation of the standing decree. In fact, the judge correctly assessed the situation by saying that granting such a motion would encourage every person who pays maintenance to squander their resources simply to avoid having to pay their maintenance. This is what Mr. Clarke did. It was evidence presented to the court and it does not meet the standard required to vacate or modify the payment under CR 60.

The fact that Mr. Clarke's pay was marginally reduced did not affect his ability to pay. In fact the income attributed to Mr. Clarke during mediation was about 25% lower than what he had actually been making and was used to address income fluctuation. Mr. Clarke claims to be homeless. The fact is, he is not homeless by financial stress, but by choice. This was in evidence before the court and the court could see this. He is not homeless now, yet still pursues this motion.

E. Argument

There were no errors in the court's decision due to the fact that it correctly ruled that this law did not apply in this case.

Mr. Clarke quotes CR 60, in part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application;*

...

CR 60 [emphasis added]

There were no Mistakes, Neglect, New Evidence, or Fraud, etc. Relief was not justified. There was no evidence that the judgment was no longer equitable. Mr. Clarke received fair property settlement; the wife still needed temporary support (as part of the settlement). The fact that Mr. Clarke squandered \$128,000 did not justify vacation. The reduction in pay he received did not prevent him from paying his agreed upon obligation. The court reviewed the law and the evidence, including all financial declarations and correctly denied his motion.

It is well settled that in

“...making its property distribution, the trial court may properly consider a spouse's waste or concealment of assets.”

In re Marriage of Wallace, 111 Wn.App. 697, 708, 45 P.3d 1131 (Wash.App. Div. 2 2002)

Also:

“When exercising its discretion, a trial court is permitted to consider ... a spouse's unusually significant contributions to (or wasting of) the assets on hand at trial.”

In re Marriage of White, 105 Wn.App. 545, 551, 20 P.3d 481 (2001)

While maintenance generally is not, strictly speaking, a property distribution, it is certainly a factor that the trial court considered in making its original just and equitable distribution. A trial court need not permit subsequent waste (as demonstrated by Mr. Clarke) to undermine its maintenance award, any more than it would permit waste to undermine its just and equitable property distribution.

Mr. Clarke cites *Gustafson v Gustafson*, stating that the granting of a motion to vacate a judgment is directed to the discretion of the trial court, and will not be reversed in the absence of a manifest abuse of that discretion. ***Gustafson v Gustafson***, 54 Wn.App. 66,70,772 P.2d 1031 (1989).

The fact that the law allows some judgments to be vacated at the discretion of the court is true. The court did use its discretion and ruled that vacation did not apply in this case as Mr. Clarke received equitable settlement and had the money to meet the maintenance obligation.

The trial court commissioner correctly stated that CR 60 was not applicable and also told Mr. Clarke that his evidence did not justify modification or vacation. Therefore, Mr. Clarke's statement that the court made an incorrect finding is not justified.

Mr. Clarke cites *Marriage of Moody*, stating that:

“Although the dissolution of marriage act creates an avenue for modifying spousal maintenance awards, RCW 26.09.170(1), [appellant] has not petitioned for modification under the statute. Instead, he moved to “vacate and to reopen” the property settlement and maintenance agreements. The

superior court commissioner who heard the motion properly treated it as a motion for relief from judgment under CR 60(b)."

Marriage of Moody, 137 Wn.2d 979,986,976 P.2d 1240 (1999).

In some circumstances the court might, consider a motion to "vacate and reopen" property settlement and maintenance agreements. However, the property was equitably and fairly divided. Mr. Clarke has moved to vacate the agreed upon decree, but not to "vacate and reopen" it. So the Supreme Court ruling is not appropriate. Additionally, nor did Mr. Clarke present evidence adequate to support vacation of the maintenance agreement.

The court correctly ruled not to vacate. Again, squandering of assets and minor temporary reduction in pay do not justify vacation in this circumstance. During the hearing before the judge, the judge explained this to Mr. Clarke and also explained that these actions would also not justify modification.

Mr. Clarke characterized the commissioner statements to be a misunderstanding of modification versus vacation. The commissioner did understand this and the commissioner told Mr. Clarke that CR 60 is not applicable. Therefore, he had no foundation in law for vacation or modification and the court made the correct ruling.

The property settlement and maintenance agreements were fair. This motion is completely unjustified.

Mr. Clarke is trying to appeal based on his belief that the judge did not consider his motion to vacate. The court did consider it. The court also explained its ruling and the law extensively to Mr. Clarke.

Mr. Clarke states that the overall consideration governing property division and support obligations in dissolution decrees is the overall fairness to the parties. The general test is the relative position in which the parties will be left. RCW 26.09.090

The division and support obligations in the agreed upon decree were fair and equitable. That, due to his own excessive spending, Mr. Clarke now finds himself in an undesirable financial situation does not change the fairness nor equitability of this decree since he is still able to pay.

Mr. Clarke further cites:

“The standard of review for the appeal of a maintenance award is abuse of discretion. [cite omitted]. Both Washington statutory laws and case law recognize the power of a trial court to award maintenance to either party after the court properly considers all the statutory factors relevant to such a decision. RCW 26.09.090; [cite omitted].”

Marriage of Zahm, 138 Wn.2d 213, 226-227, 978 P.2d 498 (1999).

He further states that the applicable statutory factors are:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

Former RCW 26.09.090

With regards to (a): Mr. Clarke did not show that he does not have the ability to pay. His evidence shows he has a good job and received ½ the property, including \$128,000 and an adjustment of his income considered to allow for fluctuation as a portion of that property settlement.

He cites (b), the time needed to acquire necessary education. Mrs. Clarke needed that maintenance to acquire education, which she has done. Even when she was laid off from her job, she continued to pursue her education in order obtain future employment that would allow her to meet the needs of herself and her children. She also found ways to provide for their needs by joining a food gleaning organization so that their needs during her unemployment would be met.

He further cites (f). Mr. Clarke has adequate income to meet his obligations. He squandered assets. However it was argued that he could liquidate certain unnecessary assets that would allow him to meet all his obligations. The court recognized this and therefore correctly ruled that neither vacation nor modification was justified.

Mr. Clarke states that he provided evidence that he did not have the ability to pay. However, the evidence was not compelling. It showed his financial irresponsibility and desire to obtain relief from those financial wrong choices by ending his legal obligation of the spousal maintenance. The court explained that his misuse of his assets was a mistake, but this did not meet the standard to apply CR60. Hence, vacation was not warranted.

Additionally, in his brief to the appellate court, Mr. Clarke states that he would never regain his previous level of income. However, per his statement, his probation and its limitations (whether inflicted by the company or by Mr. Clarke himself) were only of a 3 year duration. As of today, Mr. Clarke is neither homeless nor behind on his transfer payment. This shows that his motion was needless.

Mr. Clarke states that the sole finding to support the award of maintenance stated:

“Maintenance should be ordered because: the wife is in need of temporary spousal maintenance and the husband has the ability to pay.”
;CP 27.

He further notes that there is nothing to show any explanation of how this was affordable to him other than his signature on the agreed documents. However, this is not true. The evidence that it was affordable is those facts in evidence. The evidence showed that Mr. Clarke’s living expenses were affordable and manageable. That he chose to add to his financial burden with continued frivolous consumer spending, also in

evidence, did not mean that the settlement was not just or equitable.

Additionally, Mrs. Clarke was certainly in need of the temporary spousal maintenance during the period in question as her employment was lost completely due to a company layoff. Mr. Clarke continued to pay during that period.

He cites Glass:

“Even in the event of changed circumstances of either party a non-modifiable spousal maintenance award is exactly that: it is non-modifiable. [f/n omitted].”

That is not to say, however, that the court is entirely without power to grant any equitable relief whatsoever, in cases of extreme financial hardship, where such changed circumstances were not foreseen at the time of the initial decree, and where, as here, equitable relief may be fashioned in such a manner that the full award will be paid within the time contemplated by the initial decree.”

Marriage of Glass, 67 Wn.App. 378, 390-391, 835 P.2d 1054 (1992).

However, per Mr. Clarke’s own statements, he is not moving for a modification, but for a complete vacation of the agreed upon settlement. He was not asking that the payment be somehow restructured in a way that would still allow it to be paid within the time contemplated by the initial decree. He asks that the agreed upon settlement be completely vacated. This is clearly not the same thing and not what the court intended in its judgment in the case of **Glass**. Therefore this argument is not applicable in this case and I object to its use.

The court told Mr. Clarke that there simply was not justification via CR60 to justify the vacation or modification of the agreed upon

settlement. Again, evidence showed that Mr. Clarke squandered assets and ran up credit card debt. The court looked at this with open eyes and correctly ruled that vacation was not warranted, the CR 60 rule was not applicable, and that there was no justification to modify, including the ruling in Glass.

Mr. Clarke had the ability to liquidate many non-essential items that he bought in order to reduce his own post community debt obligations, but continued to choose not to do this.

Mr. Clarke alleges that the court did not analyze whether it should vacate the Clarke maintenance payment. This is false. The court read his motion, considered the evidence, and found that he had incorrectly applied the CR60 law. Therefore, the court correctly did not vacate the agreed upon spousal maintenance decree.

Mr. Clarke cites that the final dissolution was an agreed on settlement. He states before the court that as part of the dissolution he agreed to the terms. Findings regarding RCW 26.09.090 did not have to be made because both parties were represented so that the interests of both parties were protected. The court even acknowledged that Mr. Clarke was not only represented, but represented by very experienced and respected counsel, Attorney Scott East. No findings were necessary and it was only after 27 months, during which Mr. Clarke continually squandered his assets in frivolous consumer spending, that he decided to pursue this motion.

Mr. Clarke alleges in his brief that there was no evidence because there was no trial. However, in the FNFCL exhibit there was a complete list of community property. This allowed the parties to divide assets during the mediation. This is a red herring.

Mr. Clarke states that the phrase of 2.12 is the issue. However, the reality is that the court saw that he did have the ability to pay. He just did not want to, now that he had burdened himself with additional frivolous consumer debt.

Mr. Clarke asks “is it right to render someone homeless because of unforeseen consequences?” The court saw that this consequence was foreseeable and that Mr. Clarke had other options available to him, i.e. liquidation of assets and credit counseling.

He further adds that the added consideration is that bankruptcy relief is not available because this is a support obligation. This is exactly what this motion is about. The legislation did not want to give relief to obligor payees by allowing them to use finances unwisely and then abandon their obligation through bankruptcy. Since this option isn't available he is trying to couch his irresponsibility as hardship and inequity to get the agreed upon transfer vacated. He did not move to have the settlement reopened nor have payments temporarily stayed.

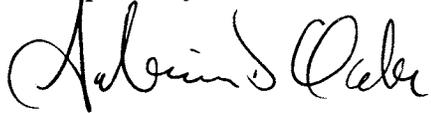
E. Conclusion

Mr. Clarke presented no evidence to the court that the judgment had become inequitable. The trial court correctly applied the law and did deny his motion. It was he who applied erroneous reasoning.

Additionally, a find in favor of Mr. Clarke would be an invitation for every obligor payee to squander their resources and claim inability to pay and inequity in divorce settlement agreements.

Mr. Clarke had and has resources to meet these obligations without undue hardship. The court should sustain the commissioner and the elected judge in their decision and require Mr. Clarke to fulfill what he admits is his agreed upon spousal maintenance obligation.

Respectfully submitted,



Sabrina D. Clarke, Respondent

9/20/2010

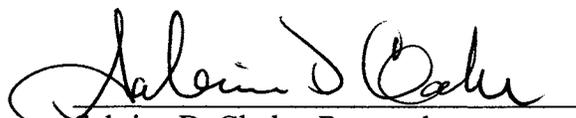
DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that by the end of the day on September ^{20th ADC} ~~17~~, 2010, I will have mailed, or caused to be mailed, this Respondent Brief of Respondent, upon the following individuals:

(first class postage)
Mr. Keith Clarke
6947 Coal Creek Pkwy SE #354
Newcastle, WA 98059

And that prior thereto, I emailed the document to the same party at his last known email address.

Signed in Newcastle, Washington, on September ^{20th ADC} ~~13~~, 2010.


Sabrina D. Clarke, Respondent

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