**No.** 100806-6

**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

**No. 54234-0-II**

**COURT OF APPEALS, DIVISION II**
**OF THE STATE OF WASHINGTON**

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**In re the Marriage of:**

**RICHARD J. KIRSCHNER,**

**Respondent**

**and**

**LAURA A. DRYBREAD,**

**Petitioner**

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# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Laura A. Drybread ("Drybread"), respondent in the Superior Court and respondent in the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review designated in part II of this petition.

## II. COURT OF APPEALS DECISION

Division II of the Court of Appeals filed its unpublished decision on August 3, 2021. *Appendix 1.* A timely motion for reconsideration and for publication was denied on March 10, 2022. *Appendix 2.*

## III. ISSUES PRESENTED FOR REVIEW

A. Where a spousal maintenance recipient takes every action imaginable to be married, short of obtaining a license, and does not obtain a license for the sole purpose of avoiding the termination of maintenance, should the Court consider him "remarried" for the purpose of terminating spousal maintenance? Yes.

B. To the extent that a marital dissolution settlement agreement permits a maintenance recipient to avoid termination of maintenance by taking every action to be married, except obtaining a license, is the settlement agreement unenforceable as against public policy? Yes.

C. Where a spousal maintenance recipient takes every action imaginable, short of obtaining a license, to be married and does not obtain a license for the sole purpose of avoiding the termination of maintenance, has he violated the duty of good faith and fair dealing implicit in every contract, thus rendering the marital dissolution settlement agreement unenforceable? Yes.

## IV. STATEMENT OF THE CASE

Drybread and Richard Kirschner ("Kirschner") were married on February 23, 1980 and separated on August 4, 2007. CP 233. Drybread and Kirschner have an adult daughter, Sheri Dillman ("Dillman"). CP 68. Kirschner was represented by counsel, and Drybread was not. CP 218, 231, 236. The parties

resolved their marital dissolution by entering a settlement agreement which, among other things, provided that Drybread would pay Kirschner non-modifiable spousal maintenance of $2,200 per month and this maintenance obligation would terminate "upon [Kirschner's] remarriage or death." CP 227. The parties' marriage was dissolved on December 28, 2007 (CP 6-9), and the decree of dissolution expressly incorporated the terms of the settlement agreement. CP 2, 3; CP 10-22.

Sometime between 2007 and 2011,[1] Kirschner reconnected with Karen, a friend from high school. CP 35. Although it is unclear from the record when Kirschner and Karen[2] began cohabitating, it appears that by Thanksgiving 2011 they were indeed living together, because at that time Kirschner and Karen began pressuring Dillman's children to

[1] Kirschner declared that he and Karen reconnected in 2011 (CP 35), but on March 18, 2019 also represented that he and Karen had been married for 11 years. CP 176.

[2] Because Karen took the surname of Kirschner, she is referred to herein by her first name solely for ease of reference. No disrespect is intended.

call Karen "Grammy." CP 69. Kirschner and Karen have continued to cohabitate through the present. CP 55.

Prior to moving in with Kirschner, Karen worked a full-time job. CP 77. At the time of the trial court proceedings, Karen arranged Kirschner's medical appointments and drove him wherever he needed to go. CP 56. For these services, she received compensation from the State of Washington, CP 71, although Kirschner's financial declaration did not indicate that Karen had any current income. CP 60. Karen and Kirschner handled all their finances together. CP 174.

Kirschner claimed to suffer from various medical conditions. Court of Appeals Decision at 2-3. However, Kirschner and Karen personally performed extensive remodeling work on their home, including replacing flooring, extensive landscaping, new drywall, painting and new counter tops. CP 76. The Kirschners also travel extensively, including trips to Las Vegas, Alaska, Mexico and several trips to

California. CP 77. Kirschner also purchased a piano for Karen's birthday. Id.

On July 1, 2019, King 5 news aired an interview with Kirschner and Karen in a story relating to inappropriate patient practices at Providence Health and Services. CP 2-3. The King 5 story identified Kirschner and Karen as married no less than eight times.[3] CP 24-26. When Drybread saw the report and heard these references, she believed that Kirschner and Karen must have "recently" been married. CP 2. For his part, Kirschner claimed that the reference to Karen being his wife was a "mistake" that he did not feel he needed to correct, especially since he and Karen had represented to Providence that they were husband and wife. CP 37.

Believing that Kirschner had remarried, Drybread then filed a motion for an order to show cause to terminate maintenance on July 10, 2020. CP 1. Kirschner responded by

[3] Including references to Kirschner and Karen as "the Kirschners," the "couple" and "he and his wife."

denying that he and Karen had married, claimed that Karen was simply his girlfriend, and claimed that his "friends and family know that we are not legally (or spiritually) married, and we do not have intentions of taking that big step…." CP 35. In her responsive declaration, Karen also stated that she and Kirschner were not married, and "[didn't] have plans to get married anytime soon." CP 55. Kirschner then provided copies of some of his medical records, which showed that on at least two occasions he and Karen had represented to medical providers that they were married:

**March 18, 2019 meeting with Dr. Samantha Artherhold**

> Identifies as married to Karen. CP 173 (twice), CP 174 (thrice), CP 175 (twice), CP 176 (twice), CP 182 (twice)
>
> Claims Karen as "his wife of 11 years" (CP 176)
>
> Indicates that Kirschner "enjoys going on cruises, last went to Mexico in January [2020]." CP 177.
>
> Karen indicates that both she and Kirschner "keep very busy with projects at home as well as time with grandchildren." CP 177.

**March 12, 2019 meeting with Dr. Eunice Chen**

> Identifies as married to Karen. CP 195 (twice), CP 196.

In only one record—from May 19, 2020—did Kirschner identify Karen as anything other than his wife. CP 205. Kirschner admitted that he routinely claims to medical providers that Karen is his wife, because doing so "allowed Karen to be with me while hospitalized or at doctor's appointments." CP 36.

Although Kirschner claimed that Drybread "has been aware of [his] current and past medical issues," the record is devoid of any evidence that Drybread knew, prior to the King 5 story, that Kirschner and Karen were holding themselves out as husband and wife. CP 37.

Kirschner filed a financial declaration in response to Drybread's motion, apparently in compliance with Thurston County Local Special Proceedings Rule ("LSPR") 94.03B(b)(4). CP 58. However, although LSPR 94.03B(b)(4)

requires it, he elected not to file his tax returns, which would have shown whether he filed as single or married.[4]

In reply to Kirschner's claim that he was not married to Karen, Drybread provided the trial court with the following evidence that, at a minimum, the Kirschners were holding themselves out as being married:

- Karen had taken Kirschner's last name. CP 75
- Kirschner wears a wedding ring, CP 80, even doing so before the court commissioner while his counsel was arguing that the court should not consider evidence that he wore a wedding ring. RP 8/22/19 at 4-6.
- Kirschner and Karen wrote Kirschner's relatives online stating "we together are blessed to be a part of your loving family." CP 82.
- Karen refers to Kirschner and Drybread's grandchildren as her grandchildren. CP 88.

[4] Although Kirschner apparently treated Drybread's motion as one to modify maintenance, Drybread originally filed her motion as one to terminate maintenance due to Kirschner's apparent remarriage. Because of this, Drybread did not believe that LSPR 94.03B(b)(4) applied.

Drybread and Dillman had what could only be characterized as a tumultuous relationship prior to 2014. CP 45-47. By August 2014, Dillman had removed her children, Takeo and Kallei, from Drybread's life. CP 45. When she filed her motion to terminate maintenance, Drybread urged Dillman not to get involved in the dispute. CP 69. However, Dillman provided additional information to the trial court, because she "[had] a hard time not saying something when my father and Karen are being so very hypocritical while currently committing what I think is a level of fraud." CP 69.

Dillman informed the trial court:

> "It was during this time [Thanksgiving 2011] that the kids talked about attending Papa and Grammy's wedding. Kai vividly recalls being dressed up in a dress and Takeo in a small Tux or suit and attended a family-filled event, minus my husband Chad and I. When I asked Dad about this, I would get talk of he and Karen having spiritually been married, that because of their religious beliefs it was important to do something before God. Yet my father would always make it perfectly clear he was not legally married. This would be about the last time I would get any kind of answer from him regarding his marital status." CP 69

> "[Kirschner and Karen] would comment all the time about how they would get married, if they could. So many times referring to the alimony as the reason that they would not, stating that they sometimes ***"had to work the system."*** CP 70 (emphasis added)
>
> Dillman, her husband Chad and their children lived with Kirschner and Karen for over a year and a half starting in the summer of 2014. CP 70. "[Kirschner and Karen] lived and breathed as a married couple. Every decision about décor to family outings to where to eat, to how to afford medication was made in the manner that married people talk! There were also the typical I love you's, and calling each other names of endearment like 'husband' and 'wife.'" CP 71.

The court commissioner[5] found that Kirschner and Karen had been in an 11 year cohabitation relationship, that they had a ceremony, that they hold themselves out as husband and wife, that Kirschner wears a wedding ring, that Kirschner and Drybread's grandchildren refer to Karen as "Grammy," and that Kirschner is married to Karen is every other way but "having a

[5] Court Commissioner Indu Thomas, now Superior Court Judge Indu Thomas.

legal ceremony." RP 8/22/19 at 10-12. The court commissioner further found that, by taking all these actions but not obtaining a marriage license, Kirschner "is simply attempting to avoid the termination of maintenance based on marriage." Id. at 11. In his briefs filed with the Court of Appeals, Kirschner did not assign error to any of these factual findings. Appellant's Brief at 3-4.

The court commissioner declined to terminate maintenance based on Kirschner's remarriage. Id. at 10. Instead, the court commissioner found that Kirschner's remarriage in every way save obtaining a marriage license amounted to a substantial change of circumstances justifying a modification of maintenance to zero pursuant to RCW 26.09.170(1). Id. at 11. When Kirschner's attorney correctly pointed out that the maintenance was non-modifiable, the court commissioner found that it would be against public policy not to terminate maintenance under such circumstances. Id. at 12.

Kirschner then timely filed a motion for revision. CP 96.

On revision, the trial judge[6] found that Kirschner and Karen were holding themselves out as being married, that they had been doing so for a long time, and that the sole reason Kirschner and Karen had not obtained a marriage license was to avoid termination of maintenance. RP 11/15/19 at 17. As with the court commissioner's factual findings, Kirschner did not assign error to any of these findings. Appellant's Brief at 3-4.

The trial judge declined to apply the modification provisions of RCW 26.09.170(1) as the court commissioner had done. RP 11/15/19 at 16. The trial court also declined to terminate maintenance based on Drybread's public policy argument. Id. at 17. Instead, based on the "very unusual set of facts" presented, the trial court found that Kirschner and Karen's relationship is "essentially a marriage," and thus terminated maintenance based on the language in the settlement

[6] Superior Court Judge Mary Sue Wilson.

agreement and RCW 26.09.170(2) that provides for termination of maintenance upon remarriage. Id. at 17.

Kirschner timely appealed the trial court's decision.

In an unpublished opinion issued on August 3, 2021, the Court of Appeals reversed, holding that RCW 26.09.170(2) and the settlement agreement in this case required that a marriage license be obtained before maintenance could be terminated on the basis of remarriage. Court of Appeals Decision, August 3, 2021, p. 7. The Court of Appeals declined to consider Kirschner's argument that Drybread's claim was time-barred, because Kirschner had not advanced any argument to that effect in the trial court. Id. at 6.

Drybread timely filed for publication and for reconsideration on the basis that the Court of Appeals had not considered her arguments that (1) the settlement agreement, as performed by Kirschner, was void as against public policy, and (2) Kirschner violated the duty of good faith and fair dealing implicit in the settlement agreement. Motion for

Reconsideration and to Publish Decision, August 16, 2021. On March 10, 2022, the Court of Appeals denied Drybread's motions.

Drybread now petitions this Court for review.

## V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

As argued *infra* in Part VI, this Court should grant review of the Court of Appeals' decision for three reasons:

A. The Court of Appeals' decision conflicts with this Court's decisions in *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991) and *Lambert v. Lambert,* 66 Wn.2d 503, 403 P.2d 664 (1965).

B. The Court of Appeals' decision conflicts with its decisions in *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 334 P.3d 116 (2014); *In re Marriage of Hulscher,* 143 Wn. App. 708, 180 P.3d 199 (2008); *In re Marriage of Glass,* 67 Wn. App. 378, 835 P.2d 1054 (1992); *State v. Noah,* 103 Wn. App. 29, 9 P.3d 858 (2001); *Keystone Masonry, Inc. v. Garco Const., Inc.,* 136 Wn. App. 927, 147

P.3d 610 (2006); *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.,* 86 Wn. App. 732, 935 P.2d 628 (1997).

C. The Court of Appeals' decision involves an issue of substantial public interest: within the context of major societal changes since the 1973 enactment of the statute, whether RCW 26.09.170(2) provides a "safe harbor" against termination of maintenance, even if the receiving spouse takes every action imaginable to be married, short of obtaining a license, and does not obtain a license for the sole purpose of "playing the system" to avoid the termination of maintenance.

## VI. ARGUMENT

In 1973, when the legislature first passed what is now RCW 26.09.170(2), cohabitation without marriage was relatively rare. Approximately 1.5% of all couple households

were unmarried.[7] By 2000, that figure had risen to 10%.[8] By 2019, cohabitating out of wedlock had become so common that 7% of all Americans were living with an unmarried partner.[9]

Meanwhile, in the 49 years since RCW 26.09.170(2) was enacted, the only amendment to the statute was made in 2008 to provide that the termination of maintenance provisions in that section would also apply to registered domestic partnerships.[10] In 1973, social pressures incentivized remarriage; today, the Court of Appeals' wooden application of the definition of

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[7] Fitch, Goekan & Ruggles, Minnesota Population Center, University of Minnesota,"The Rise of Cohabitation in the United States: New Historical Estimates (2005), p. 14, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fusers.pop.umn.edu%2F~ruggles%2Fcohab-revised2.pdf&clen=110207&chunk=true

[8] Id.

[9] Pew Research Center, Key Findings on Marriage and Cohabitation in the U.S., 11/6/19, available at https://www.pewresearch.org/fact-tank/2019/11/06/key-findings-on-marriage-and-cohabitation-in-the-u-s/

[10] 2008 C.6 §1017.

"marriage" to the facts of this case creates a huge incentive for maintenance recipients to "play the system" in order to force their ex-spouses to support them and their new partners, who are spouses in every sense of the word other than that they have not obtained a marriage license.

## A. THE COURT SHOULD GRANT REVIEW BECAUSE KIRSCHNER AND KAREN'S RELATIONSHIP CONSTITUTES A "MARRIAGE" WITHIN THE MEANING OF THE SETTLEMENT AGREEMENT.

The purpose of spousal maintenance is to support the financially disadvantaged spouse until he or she "is able to earn [his/her] own living ***or otherwise becomes self-supporting***." *In re Marriage of Luckey,* 73 Wn. App. 201, 209, 868 P.2d 189 (1994)(*quoting In re Marriage of Irwin,* 64 Wn. App. 38, 55, 822 P.2d 797, *review denied,* 119 Wn.2d 1009, 833 P.2d 387 (1992))(emphasis added). Here, after at least eleven years of cohabitating with Karen, Kirschner has secured the financial wherewithal to support a reasonable standard of living. Karen had worked full time before entering her relationship with

Kirschner, and received payments from the State for providing care for Kirschner. The Kirschners received sufficient funds to enable them to extensively remodel their home, purchase a grand piano, and travel to Alaska, Las Vegas, California and Mexico.

Mere cohabitation by the receiving former spouse does not entitle the paying spouse to terminate maintenance, as such relationships can be transitory, thus leaving the receiving former spouse vulnerable upon the cessation of cohabitation. *In re Marriage of Tower,* 55 Wn. App. 697, 702, 780 P.2d 863 (1989). However, here, the parties had cohabitated for at least eleven years, had commingled finances, had exchanged wedding rings at a ceremony, and Karen had taken Kirschner's last name. Kirschner had even proclaimed to Dillman that "this is it!," meaning the Kirschners would be together for life. Under such circumstances, Kirschner would have received adequate assets if the Kirschners' relationship ended, just as with a remarriage. *See Connell v. Francisco,* 127 Wn.2d 339,

898 P.2d 831 (1995). As noted by the *Tower* court, "Clearly, it is inequitable to permit maintenance payments to be used by the recipient spouse to support or subsidize a cohabitor." 55 Wn. App. at 702.

Unchallenged findings are verities on appeal. *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). Here, the court commissioner and trial judge made the following findings, not challenged by Kirschner, which are therefore verities before this Court:

> Kirschner and Karen had been in an 11 year cohabitation relationship. RP 8/22/19 at 11.
>
> Kirschner and Karen had a ceremony. Id.
>
> Kirschner and Karen hold themselves out as husband and wife. Id.
>
> Kirschner wears a wedding ring, even in the court room. Id.
>
> Kirschner and Drybread's grandchildren refer to Karen as "Grammy." Id.
>
> Kirschner is married to Karen is every other way but "having a legal ceremony." Id. at 12.

> Kirschner "is simply attempting to avoid the termination of maintenance based on marriage." Id. at 11.
>
> The ***sole*** reason Kirschner and Karen had not obtained a marriage license was to avoid termination of maintenance. RP 11/15/19 at 17 (emphasis added).

This Court should not countenance the bad faith maneuverings of Kirschner and Karen, all of which were specifically designed to deprive Drybread of the right not to support both Kirschner and his new spouse. To do so would exalt form above substance, which has long been disfavored by this Court. *See, e.g., Rouse v. Peoples Leasing Co., Inc.,* 96 Wn.2d 722, 727, 638 P.2d 1245 (1982)(Dolliver, J.).

Kirschner claimed below that he and Karen held themselves out as married because otherwise Karen could not attend Kirschner's medical appointments. RP 8/10/19 at 9; CP 36. However, Kirschner could easily have arranged for Karen to attend his medical appointments by taking the far less drastic

(and honest) step of granting her medical power of attorney. *See* RCW 11.125.400.

The word "remarriage" in both the settlement agreement and the statute, when viewed within the context of *this* relationship, should be given its "ordinary, usual, and popular meaning…." *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d 116 (2014)(citation omitted). Marriage is commonly defined as (1) "to join for life as husband and wife; to constitute as man and wife according to the laws and customs of a nation"; and (2) "to enter into the conjugal or matrimonial state"). IX Oxford English Dictionary 400-01 (2d ed. 1989). Here, Kirschner and Karen clearly were joined for life, (CP 70), and lived in a matrimonial state by sharing a name, wearing wedding rings, and holding themselves out as married.

Further, when interpreting the settlement agreement, the Court must ascertain the mutual intent of the parties at the time they executed the agreement. *Viking Bank*, 183 Wn. App. at

712. At the time she signed the settlement agreement, Drybread could not possibly have foreseen or intended to support Kirschner and his new spouse solely because Kirschner did not obtain a marriage license but lived a married life in every way imaginable. No reported case in this state has addressed whether a party can avoid termination of maintenance while reaping the benefits of marriage by arranging his affairs as Kirschner has done.

In other states, courts have held that common law marriages *do* amount to marriage. *See Cargill v. Rollins,* 843 P.2d 1335, 1339 (Colorado 1993); *Combs v. Combs*, 787 SW.2d 260 (Kentucky 1990); *Jeanes v. Jeanes*, 177 SE.2d 537, 537-40 (South Carolina 1970), *cited with approval, Joye v. Yon*, 547 SE.2d 888 (South Carolina 2001). A common law marriage valid in the state where contracted is recognized as a valid marriage in Washington. *In re Warren,* 40 Wn.2d 342, 344, 243 P.2d 632 (1952)(citation omitted). It would be inequitable to terminate maintenance of a person living in this

State who entered a common law marriage while living in another state while at the same time requiring Drybread to continue to support Kirschner and Karen.

"There is something distasteful in requiring one to subsidize a former spouse, in his or her subsequent cohabitation…." *Combs*, 787 SW.2d at 261. This Court should find that, for the purposes of the settlement agreement, Kirschner and Karen are "married," and, accordingly, Drybread has no obligation to support Kirschner and his spouse.

**B. ALTERNATIVELY, THE COURT SHOULD GRANT REVIEW TO MODIFY MAINTENANCE TO ZERO BECAUSE KIRSCHNER'S RELATIONSHIP WITH KAREN AMOUNTS TO A SUBSTANTIAL CHANGE OF CIRCUMSTANCES NOT FORESEEN AT THE TIME OF THE DECREE.**

RCW 26.09.170(1) authorizes the Court to modify maintenance, including modifying it to zero, if there is a "substantial change of circumstances." In order to modify maintenance under this statute, the Court must also find that the substantial change of circumstances was not within the

contemplation of the parties at the time the decree was entered. *Lambert v. Lambert,* 66 Wn.2d 503, 509-10, 403 P.2d 664 (1965). Kirschner argued below that it was entirely foreseeable that he would "get a girlfriend, but not remarry, after their divorce." Appellant's Brief at 38. He further argued that "Kirschner and Karen choosing not to get married is a perfectly acceptable choice in their lives." Id. at 42. These statements are only half-truths, because they do not reflect the full facts of this case, including Kirschner's and Karen's deception. As the trial court's uncontested findings state, Kirschner is married to Karen in every other way but "having a legal ceremony," RP 8/22/19 at 11, and the ***sole*** reason Kirschner and Karen did not obtain a marriage license was to avoid termination of maintenance. RP 11/15/19 at 17. Drybread could not possibly have foreseen such bad faith maneuverings when the decree was entered in 2007.

Kirschner also rightly pointed out below that the maintenance award in the decree was, by agreement, non-

modifiable. Appellant's Brief at 35. Under normal circumstances, maintenance which is non-modifiable by agreement is exactly that: non-modifiable. *In re Marriage of Hulscher,* 143 Wn. App. 708, 180 P.3d 199 (2008); *In re Marriage of Glass,* 67 Wn. App. 378, 835 P.2d 1054 (1992). However, these are not normal circumstances.

The *Hulscher* court left open the possibility that non-modifiable maintenance could still be modified when it stated that "***generally*** our courts may not modify [non-modifiable] spousal maintenance unless it was unfair when entered." *Hulscher,* 143 Wn. App. at 710 (emphasis added). In *Glass,* the court carved out an exception for extreme financial hardship "where such changed circumstances were not foreseen at the time of the initial decree…." *Glass,* 67 Wn. App. at 390-91. Neither the *Hulscher* nor the *Glass* exceptions directly apply to this case, but those exceptions are not exclusive.

As argued *infra*, the non-modifiable maintenance provision in the settlement agreement is unenforceable as

against public policy[11] and, moreover, is unenforceable because Kirschner has violated the duty of good faith and fair dealing implicit in every contract.[12] Under these circumstances, and given that Drybread could not possibly have foreseen the depths to which Kirschner has descended to force Drybread to support him and his new spouse, this Court should accept review, follow the reasoning of the *Hulscher* and *Glass* courts and hold that Drybread's maintenance obligation is indeed modifiable under these circumstances, just as the court commissioner reasoned below.

### C. THE COURT SHOULD GRANT REVIEW BECAUSE THE SETTLEMENT AGREEMENT, AS PERFORMED BY KIRSCHNER, IS AGAINST PUBLIC POLICY.

It is a fundamental concept of contract law that "[c]ontract terms are unenforceable on grounds of public policy when the interest in its enforcement is clearly outweighed by a public policy against the enforcement of such terms." *State v.*

[11] See discussion *infra* at pp. 26-28.

[12] See discussion *infra* at pp. 28-30.

*Noah,* 103 Wn. App. 29, 50, 9 P.3d 858 (2001) (*citing* Restatement (Second) of Contracts §178 (1981); *see also Keystone Masonry, Inc. v. Garco Const., Inc.,* 136 Wn. App. 927, 933, 147 P.3d 610 (2006). This principle has been applied in other fact patterns within the context of family law. Our state's courts have declined to enforce contracts to provide for child support inconsistent with the child support statute. *In re Marriage of Hammack,* 114 Wn. App. 805, 60 P.3d 663 (2003)(agreement not to pay child support in exchange for disproportionate award of property unenforceable); *In re Marriage of Goodell,* 130 Wn. App. 381, 390-91,122 P.3d 929 (2005)(agreement to prospectively terminate child support obligation unenforceable).

Here, the court commissioner found that Kirschner's attempt to avoid a modification or termination of spousal maintenance by enjoying all the benefits of marriage and observing all the requirements of marriage, except only for obtaining a marriage license, was against public policy. RP

8/22/19 at 12. This Court should make the same finding: that, in Kirschner's words, "playing the system" by observing all the requirements for a marriage, except obtaining a marriage license, for the sole purpose of avoiding a termination of maintenance, is against public policy and therefore is unenforceable.

**D. THIS COURT SHOULD GRANT REVIEW AND TERMINATE MAINTENANCE BECAUSE KIRSCHNER VIOLATED THE IMPLICIT DUTY OF GOOD FAITH AND FAIR DEALING.**

There is in every contract an implied duty of good faith and fair dealing. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). The duty of good faith and fair dealing implicit in a contractual relationship "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Id.* "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1979). But this duty cannot add to or change

the terms of the contract. *Badgett*, 116 Wn.2d at 569. That duty "requires only that the parties perform in good faith the obligations imposed by their agreement." *Id*. "The purpose of implying the obligation of good faith and fair dealing is to preserve the mutuality of obligations in a contract by assuring that the party who retains authority to specify the manner of a certain performance cannot thereby render a promise illusory." *Rekhter v. Dept. of Social and Health Services*, 180 Wn.2d 102, 132, 323 P.3d 1036 (2014)(Stephens, J., dissenting).

Accordingly, the implied duty of good faith and fair dealing arises where a term in the contract affords one party discretion in the manner of its performance. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.,* 86 Wn. App. 732, 738, 935 P.2d 628 (1997); 23 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 63:22, at 513-16 (4th ed. 2002). In order to find a violation of the implied duty of good faith and fair dealing, it is not necessary for Kirschner to have violated the settlement agreement. *Rekhter,* 180 Wn.2d at 111

(majority opinion, *citing Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 766 (7th Cir. 2010), *cert. denied*, 131 S.Ct. 1784 (2011).

Here, Kirschner inappropriately exercised his discretion when he chose to, in his words, "play the system" by taking every conceivable action to marry Karen short of obtaining a marriage license, for the sole purpose of depriving Drybread of her contractual and statutory right to terminate maintenance. Kirschner has enjoyed many of the benefits of being married to Karen—such as having her present for medical appointments—but seeks to have his cake and eat it, too, by requiring Drybread to support him and his new wife. Accordingly, Kirschner violated his duty of good faith and fair dealing and this Court should accept review and, ultimately, reverse the Court of Appeals on that basis.

## VII. CONCLUSION

Form should not be exalted over substance. Kirschner and Karen have been "married" in every sense of the term,

except for having a license, for eleven years and have been receiving the benefits of having been married. The Court should find that *this* relationship amounts to "remarriage" under the settlement agreement and reverse the Court of Appeals on that basis. The Court should also reverse the Court of Appeals because the settlement agreement, as carried out by Kirschner, is against public policy, and because Kirschner has violated the duty of good faith and fair dealing implicit in every contract.

I certify that the number of words contained in the above Petition, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, and signature blocks is 4,885.

Respectfully submitted this 6th day of April, 2022

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## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on April 6___, 2022, I arranged for service of the foregoing Petition for Review, to the Court and counsel for the parties to this action as follows:

Office of Clerk
Washington Court of Appeals, Division II
950 Broadway, Suite 300
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Dated at Tumwater, Washington this 6th day of April, 2022

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Filed
Washington State
Court of Appeals
Division Two

August 3, 2021

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| In the Matter of the Marriage of:<br>RICHARD JOHN KIRSCHNER,<br>Appellant,<br>v.<br>LAURA ANN DRYBREAD,<br>Respondent. | No. 54234-0-II<br><br>UNPUBLISHED OPINION |

LEE, C.J. — Richard J. Kirschner appeals the superior court's order terminating Laura A. Drybread's spousal maintenance obligation to him. Kirschner argues that the superior court erred by equating his relationship with a live-in girlfriend as the equivalent of remarriage for the purpose of terminating Drybread's spousal maintenance obligation. Because the spousal maintenance provision in the separation agreement[1] specifies remarriage, and Kirschner is not remarried, the trial court erred by terminating spousal maintenance. We reverse.

[1] The separation agreement was incorporated into the decree of dissolution.

## FACTS[2]

In December 2007, Kirschner and Drybread obtained a decree of dissolution based on a separation agreement. The separation agreement required Drybread to pay Kirschner $2,200 per month in spousal maintenance. The separation agreement's provision on termination of spousal maintenance provided, in relevant part,

> 8.3 Spousal maintenance shall be terminated upon the husband's remarriage or death. However, spousal maintenance may be reviewed and modified if the wife becomes disabled. "Disabled" shall be defined as that condition required by the U.S. government to qualify for social security disability benefits. Otherwise, the wife's maintenance obligation shall be non-modifiable and shall be a continuing obligation and lien upon her estate.

Clerk's Papers (CP) at 18.

In July 2019, Drybread filed a motion for show cause to terminate spousal maintenance, alleging that Kirschner was remarried. Drybread declared that she had recently seen a news story in which Kirschner was identified as being married to Karen.[3] A superior court commissioner set the show cause hearing for July 25, 2019.

In response to Drybread's motion to terminate spousal maintenance, Kirschner declared that he was not legally or spiritually married to Karen. Kirschner explained that Karen was his girlfriend. Kirschner suffers from numerous medical issues, including multiple sclerosis, diabetes,

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[2] Drybread filed a motion to strike Kirschner's reply brief because it contained factual assertions not supported by the record. *Motion to Strike Reply Br. of Appellant*, No. 54234-0-II (August 11, 2020). A commissioner of this court denied the motion to strike but noted "the objections to the reply brief will be forwarded to the panel of judges who will consider the appeal." *Ruling*, No. 54234-0-II (August 25, 2020). This opinion is based on facts supported by the record before this court. Any allegations that are not supported by the record are not considered.

[3] In a declaration, Karen states her name is Karen Kirschner. Because Karen and Kirschner have the same last name, we refer to Karen by her first name for clarity. We intend no disrespect.

and possible dementia. Because Kirschner relied on Karen for care, they often told medical providers she was his wife so she would be able to be present at his appointments. Kirschner declared that Drybread was aware of and supportive of his relationship with Karen. Drybread was also aware of the scope of Kirschner's medical issue. Drybread sent Kirschner additional money for medical expenses and even offered to amend the terms of the separation agreement so that she would continue to pay spousal maintenance after Kirschner married Karen. Kirschner declared that he did not know why Drybread was initiating court proceedings to terminate spousal maintenance.

Karen also filed a declaration, stating that she was not married to Kirschner and had no plans to marry Kirschner. She documented the extensive amount of care she provided to Kirschner as his live-in girlfriend. Karen also stated that she changed her name so that doctors would allow her to accompany Kirschner to medical appointments. Karen declared that friends, family, and acquaintances, including Drybread, knew that she and Kirschner were not married.

Drybread filed a responsive declaration, arguing that "[w]hile it may be true [Kirschner] and Karen are not legally married," they held themselves out to be married. CP at 75. She declared that Kirschner wore a wedding ring, and that Kirschner and Karen were "married in every other respect." CP at 75. Drybread stated,

> [Kirschner] and Karen enjoy all the benefits of being married. They should not be able to pick and choose in what circumstances they should be treated as married and in what circumstances they can hide the apparent fact that they don't have a marriage license.

CP at 77. Drybread asked that the superior court grant her motion to terminate spousal maintenance based on the fact that Kirschner was receiving all the benefits of being married, regardless of whether he was legally married.

The superior court commissioner terminated Drybread's obligation to pay spousal maintenance. The commissioner granted a modification under RCW 26.09.170(1) based on a change of circumstances. The commissioner ruled,

> I believe it would be against public policy for the court to not terminate the maintenance in a situation such as this where it appears to the court that Mr. Kirschner is simply doing everything but having a legal ceremony. He is married to [Karen] in every other way, and they hold themselves out as husband and wife. And it would be absolutely inappropriate for me to continue to require Ms. Drybread to support Mr. Kirschner and his significant other of 11 years, who has resided with him, who the children call grandmother, who he wears a wedding ring, and who carries his last name, and who has held herself out to be his wife, and he has referred to her as his wife.

Verbatim Report of Proceedings (VRP) (Aug. 22, 2019) at 12.

Kirschner filed a motion to revise the commissioner's order. Kirschner argued that the commissioner erred by modifying spousal maintenance based on a substantial change of circumstances rather than based on remarriage and by modifying spousal maintenance that was not modifiable under the terms of the separation agreement.

In response to Kirschner's motion to revise, Drybread argued that the spousal maintenance provision was void as against public policy. Drybread also argued that the superior court should affirm the commissioner on the ground that Kirschner is remarried because Kirschner was in a committed intimate relationship with Karen.

The superior court disagreed with the Commissioner's application of RCW 26.09.170(1) and ruled that the court did not have the authority to modify spousal maintenance under the terms

of the agreement. But the superior court concluded that Kirschner and Karen's relationship was "essentially a marriage." VRP (Nov. 15, 2019) at 17. The superior court explained,

> [T]his is a marriage. And [counsel] has not made any argument to dispute that Mr. Kirschner and his current quote unquote wife are not holding themselves out as being married. And they've been together in that capacity for a long time. And the sole reason for not getting the legal blessing is to continue to have maintenance come. The Court finds that that's essentially a marriage for the purpose of the operation of this separation contract.

VRP (Nov. 15, 2019) at 17. The superior court denied the motion to revise.

Kirschner appeals the superior court's order denying his motion to revise the commissioner's order terminating spousal maintenance.

## ANALYSIS

### A. LEGAL PRINCIPLES

When a superior court decides a motion to revise, we review the superior court's decision, not the commissioner's decision. *In re Marriage of Lyle*, 199 Wn. App. 629, 633, 398 P.3d 1225 (2017). We review interpretation of settlement agreements de novo. *In re Marriage of Weiser*, 14 Wn. App. 2d 884, 912, 475 P.3d 237 (2020).

On revision, the superior court may not take new evidence, but the case "is in all other respects equal to any other matter on the court's docket." *Lyle*, 199 Wn. App. at 632. The superior court reviews the motion de novo. *Id*. "Should the judge disagree with the commissioner's disposition, the judge may issue his or her own independent factual findings and legal conclusions." *Id*. at 632-33.

RCW 26.09.170(1) allows the superior court to modify spousal maintenance "only upon a showing of a substantial change of circumstances." And RCW 26.09.170(2) provides,

> 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.

However, RCW 26.09.070(7) provides, in relevant part,

> When the separation contract so provides, the decree may expressly preclude or limit modification of any provision for maintenance set forth in the decree.

Superior courts have no authority to modify an agreed, nonmodifiable, spousal maintenance provision that is embodied in a decree of dissolution. *In re Marriage of Hulscher*, 143 Wn. App. 708, 716, 180 P.3d 199 (2008).

B. TIMELINESS

Kirschner argues that Drybread's motion to terminate her spousal maintenance obligation is time barred because modification of the spousal maintenance provision based on unfairness is time barred. Kirschner also argues that Drybread's claim that spousal maintenance should terminate because of Kirschner's relationship with Karen is time barred because she has known about the relationship for many years. Because the superior court did not modify the terms of the spousal maintenance provision, Kirschner's argument fails. And because Kirschner did not argue that the length of Drybread's knowledge barred her petition to terminate maintenance in the superior court, we do not consider it.

First, the superior court did not grant a modification of the spousal maintenance provision based on the original dissolution decree being unfair. Instead, the superior court concluded that the terms of the provision governing termination of spousal maintenance in the separation agreement were satisfied—Kirschner had remarried. Because the superior court did not modify

the spousal maintenance provision based on the original decree being unfair, Kirschner's argument is misplaced.

Second, Kirschner argues,

> Because [Drybread] clearly had knowledge, and notice, that [Kirschner] and Karen were plausibly living in a [Committed Intimate Relationship (CIR)] far more than three years before her motion to terminate maintenance, her claim to terminate the maintenance provision based on an alleged CIR between [Kirschner] and Karen is time-barred.

Br. of Appellant at 25. Kirschner did not raise this argument before the superior court.

Generally, a party may not raise an issue for the first time on appeal. RAP 2.5(a). And Kirschner does not present any argument why we should consider this argument for the first time on appeal. Therefore, we decline to consider Kirschner's argument that Drybread's petition to terminate spousal maintenance is time-barred based on her knowledge of Kirschner's and Karen's relationship.

C. TERMINATION OF MAINTENANCE

Kirschner argues that because he and Karen are not legally married, the superior court erred by terminating spousal maintenance. We agree.

RCW 26.04.010(1) defines a marriage as "a civil contract between two persons who have each attained the age of eighteen years, and who are otherwise capable." And chapter 26.04 RCW as a whole governs marriages in Washington.

Here, it is undisputed that Kirschner and Karen have not entered into a civil contract for marriage under RCW 26.04.010. Therefore, Kirschner and Karen are not married under RCW 26.04.010 or chapter 26.04 RCW generally.

Furthermore, in *In re Marriage of Tower*, 55 Wn. App. 697, 703-04, 780 P.2d 863 (1989), *review denied*, 114 Wn.2d 1002 (1990), the court held that the trial court improperly ordered spousal maintenance to terminate upon cohabitation. The court held "that a provision which terminates long-term maintenance because of 'cohabitation', even when construed as tantamount to marriage, must be based upon a subsequent finding of substantial change of circumstance in the recipient's finances." *Id*.

Here, the terms of the settlement agreement require Drybread to pay spousal maintenance until Kirschner dies or remarries. This obligation is not modifiable unless Drybread becomes disabled. The superior court concluded Kirschner's relationship with Karen was "essentially a marriage." VRP (Nov. 15, 2019) at 17. But although Kirschner and Karen's relationship may be "essentially a marriage," it is not a marriage under chapter 26.04 RCW. VRP (Nov. 15, 2019) at 17. Under the terms of the separation agreement and dissolution decree, Drybread's spousal maintenance obligation will not terminate unless or until Kirschner dies or remarries. Kirschner has not remarried. Therefore, the superior court erred by terminating the spousal maintenance obligation based on Kirschner's relationship with Karen being "essentially a marriage" without "legal blessing." VRP (Nov. 15, 2019) at 17.

Kirschner also argues that the superior court erred because Drybread did not seek declaratory relief establishing that Kirschner and Karen were in a CIR and the superior court did not analyze the legal factors to establish a CIR. But this argument is misplaced. Here, the superior court did not find that Kirschner and Karen were in a CIR. Instead, the superior court determined that Kirschner and Karen's relationship was "essentially a marriage" and that was sufficient to terminate Drybread's spousal maintenance obligation. VRP (Nov. 15, 2019) at 17. The legal

establishment of a CIR was not the basis for the superior court's decision. Therefore, Kirschner's argument is unpersuasive.

D. MODIFICATION

Kirschner also argues that the superior court erred by modifying the parties' agreed nonmodifiable separation agreement. Because the superior court did not modify the separation agreement, Kirschner's argument is misplaced.

In its ruling, the superior court expressly recognized that it did not have the authority to modify the spousal maintenance provision. And the superior court specifically stated that it was not going to modify that provision.

The relevant issue is whether the superior court properly concluded that Kirschner's relationship with Karen was a "remarriage" for the purpose of terminating spousal maintenance under the terms of the separation agreement, which is addressed above. Because the superior court did not modify the separation agreement, Kirschner's argument is misplaced.

ATTORNEY FEES ON APPEAL

Kirschner requests attorney fees on appeal under RAP 18.1 and RCW 26.09.140. RAP 18.1(a) provides for an award of attorney fees on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review." And RCW 26.09.140 provides, in relevant part,

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

> Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

Under RAP 18.1(c), financial affidavits must be filed no later than 10 days prior to the date set for consideration if the applicable law requires consideration of the parties' financial resources.

Here, the filing deadline for financial affidavits was March 29, 2021. No financial declarations were filed. Therefore, we deny Kirschner's request for attorney fees under RCW 26.09.140.

We reverse the superior court's order terminating Drybread's spousal maintenance obligation.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, C.J.

We concur:

Worswick, J.

Sutton, J.

Filed
Washington State
Court of Appeals
Division Two

March 10, 2022

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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|---|---|
| In re the Matter of the Marriage of:<br><br>RICHARD JOHN KIRSCHNER,<br><br>Appellant,<br><br>v.<br><br>LAURA ANN DRYBREAD,<br><br>Respondent. | No. 54234-0-II<br><br>ORDER DENYING MOTION FOR RECONSIDERATION AND TO PUBLISH |

Respondent, Laura A. Drybread, filed a motion for reconsideration of and to publish this court's unpublished opinion filed on August 3, 2021. Drybread argued that this court failed to consider two alternatives supporting affirming the trial court's order.

First, Drybread argues that enforcing the spousal maintenance provision violates public policy. Drybread relies on cases reversing agreements for child support that were inconsistent with the statutes governing child support. But the statute governing termination of maintenance, RCW 26.09.170, states that "[u]nless 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." The spousal maintenance provision in the separation agreement is consistent with the statute and does not violate public policy.

Second, Drybread argues that Kirschner violated the implicit duty of good faith and fair dealing by establishing a marriage-like relationship but refusing to legally marry in order to continue receiving maintenance. Here, the terms in the separation agreement explicitly require remarriage to terminate spousal maintenance, and Drybread agreed to those terms. There can be no bad faith in complying with the explicit terms of a contract.

Therefore, after consideration, it is hereby

**ORDERED** that the motion for reconsideration is denied, and it is further

**ORDERED** that the motion to publish is denied.

, C.J.

LEE, CHIEF JUDGE

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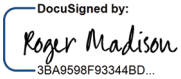
| Roger Madison<br>roger@madisonlf.com<br>Security Level: Email, Account Authentication (None) | DocuSigned by:<br>  <br>3BA9598F93344BD... | Sent: 4/6/2022 9:54:13 AM<br>Viewed: 4/6/2022 9:54:40 AM<br>Signed: 4/6/2022 9:55:24 AM |
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| **Superior Court Case Number:** | 07-3-01117-1 |

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