

No. 69698-0-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

GURMIT SINGH,

Appellant,

v.

SATVIR KAUR,

Respondent.

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
(No. 09-3-08181-0-KNT)

GURMIT SINGH'S REPLY BRIEF

Dennis J. McGlothin, WSBA No. 28177
Robert J. Cadranell, WSBA No. 41773
Attorneys for Appellant

OLYMPIC LAW GROUP, PLLP
2815 Eastlake Ave. E., Suite 170
Seattle, Washington 98102
(206) 527-2500

STATE OF WASHINGTON
COURT OF APPEALS DIVISION ONE
2013 AUG 21 PM 1:15

ORIGINAL

TABLE OF CONTENTS

Table of Authorities..... iii

I. Reply1

 A. Lifetime maintenance is awarded in only
 limited circumstances1

 B. Consideration of marital misconduct is prohibited4

 C. The finding that the wife’s emotional condition makes it likely
 she will never be able to acquire sufficient education or training
 to find appropriate employment is not supported by substantial
 evidence.....5

 D. The maintenance award is not just7

 E. This case is similar to *Mathews*.....9

 F. Wife’s motion for attorney fees should be denied10

II. Conclusion11

TABLE OF AUTHORITIES

Cases

<i>Cleaver v. Cleaver</i> , 10 Wn. App. 14, 516 P.2d 508 (1973)	1
<i>In re Marriage of Brossman</i> , 32 Wn. App. 851, 650 P.2d 246 (1982)	8
<i>In re Marriage of Bulicek</i> , 59 Wn. App. 630, 800 P.2d 394 (1990)	2
<i>In re Marriage of Coyle</i> , 61 Wn. App. 653, 811 P.2d 244 (1991)	1
<i>In re Marriage of Mathews</i> , 70 Wn. App. 116, 853 P.2d 462 (1993)	3, 4, 9, 10
<i>In re Marriage of Morrow</i> , 53 Wn. App. 579, 770 P.2d 197 (1989)	2, 8
<i>In re Marriage of Muhammad</i> , 153 Wn.2d 795, 108 P.3d 779 (2005)	4
<i>In re Marriage of Rouleau</i> , 36 Wn. App. 129, 672 P.2d 756 (1983)	3
<i>In re Marriage of Sheffer</i> , 60 Wn. App. 51, 802 P.2d 817 (1990)	2
<i>In re Marriage of Spreen</i> , 107 Wn. App. 341, 28 P.3d 769 (2001)	2, 3, 5
<i>In re Marriage of Tower</i> , 55 Wn. App. 697, 780 P.2d 863 (1989), <i>review denied</i> , 114 Wn.2d 1002, 788 P.2d 1077 (1990)	2
<i>Mahoney v. Shinpoch</i> , 107 Wn.2d 679, 732 P.2d 510 (1987)	11
<i>Mose v. Mose</i> , 4 Wn. App. 204, 480 P.2d 517 (1971)	1
<i>Washburn v. Washburn</i> , 101 Wn.2d 168, 677 P.2d 152 (1984)	4

Statutes

RCW 26.09.080 4
RCW 26.09.090 5, 8, 10

Rules

RAP 10.410
RAP 18.910

I. Reply

Respondent wife, Satvir Kaur, is advocating a policy under which virtually any victim of spousal abuse would be eligible for lifetime maintenance simply on her own statement and that of a sympathetic relative or two that she was emotionally traumatized. A review of case law makes clear that Washington courts do not award lifetime maintenance in such situations, without or unless there is an additional finding of an established medical condition making it impossible for the spouse seeking maintenance to contribute significantly to her own livelihood. It is contrary to Washington policy to make lifetime maintenance awards to everyone who experiences spousal abuse.

A. Lifetime maintenance is awarded only in limited circumstances.

Permanent maintenance awards are disfavored in Washington state.¹ It is generally not the policy in Washington to place a permanent responsibility for spousal maintenance upon a former spouse.² Rather, a former spouse is under an obligation to prepare herself so that she might become self-supporting.³ Here, rehabilitative maintenance, limited to a

¹ *Mose v. Mose*, 4 Wn. App. 204, 208, 480 P.2d 517, 519 (1971); and *In re Marriage of Coyle*, 61 Wn. App. 653, 657, 811 P.2d 244, 246 (1991).

² *In re Marriage of Coyle*, 61 Wn. App. 653, 657, 811 P.2d 244 (1991).

³ *Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 508, 512-13 (1973).

reasonable period, is what the wife needs to learn more English and seek job training.

Our courts have approved awards of lifetime maintenance in a reasonable amount when it is *clear* the party seeking maintenance will not be able to contribute significantly to his or her own livelihood.⁴ For example, in *Tower*, the Court of Appeals did not disturb the permanent duration of a maintenance award where the wife had been diagnosed with multiple sclerosis, a progressively debilitating disease that “substantially limited” her activities.⁵ In *Morrow*, the wife had a “progressively deteriorating physical condition,”⁶ specifically diabetic retinopathy, an irreversible condition that occasionally rendered her legally blind,⁷ with the court expressly stating, “Her disability makes lifetime maintenance reasonable in the circumstances.”⁸

In some cases, our courts have taken into account mental health problems when making or modifying maintenance awards. For example, in *Spreen*, the wife successfully obtained an extension and increase in spousal maintenance based on a change in circumstances; she “presented

⁴ *In re Marriage of Mathews*, 70 Wn.App. 116, 124, 853 P.2d 462, *review denied*, 122 Wn.2d 1021 (1993). *See also In re Marriage of Sheffer*, 60 Wn. App. 51, 56-58, 802 P.2d 817 (1990); *In re Marriage of Bulicek*, 59 Wn. App. 630, 633-34, 800 P.2d 394 (1990); *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989).

⁵ *In re Marriage of Tower*, 55 Wn. App. 697, 698, 780 P.2d 863 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990).

⁶ *In re Marriage of Morrow*, 53 Wn. App. 579, 586, 770 P.2d 197 (1989).

⁷ *Id.* at 581.

⁸ *Id.* at 588.

declarations from her medical doctor, psychologist, and psychiatrist; all agreed that she suffered from severe depression and bipolar disorder that made her *unable* to work outside the home.”⁹

In contrast to the cases above is *Mathews*, in which the Court of Appeals determined that permanent maintenance was improper where the trial court based the award on evidence of a 47-year-old woman’s poor health but did not determine that her health problems prevented her from working.¹⁰ Although the trial court had made findings that the wife in *Mathews* “suffered substantial health problems ... which disable her; and substantial stress, which also disables her at the present time,” these findings were not sufficient without an additional finding that her problems *prevented* her from working.¹¹

Furthermore, Washington courts follow the rule that an award of maintenance cannot be based on speculation or conjecture.¹²

Here, there is a finding that “[g]iven [the wife’s] limited skills and emotional condition, it is likely that she will never be able to acquire sufficient education or training to find appropriate employment.”¹³ First, a finding as to what is “likely” is speculative and conjectural, contrary to

⁹ *In re Marriage of Spreen*, 107 Wn. App. 341, 345, 28 P.3d 769 (2001) (emphasis added).

¹⁰ 70 Wn. App. at 124.

¹¹ *Id.*

¹² *In re Marriage of Rouleau*, 36 Wn. App. 129, 132, 672 P.2d 756 (1983).

¹³ CP 13-15, Finding of Fact 2.12.

the rule in *Rouleau*. But perhaps more importantly, the court's finding is not supported by substantial evidence, and there is no finding that the wife has a physical or emotional condition that *prevents* her from ever working. In *Mathews*, there was even a finding that health problems and substantial stress "disable[d]" the wife. But there is no such finding that the wife here is disabled. Even if there were such a finding, just as in *Mathews*, that would still not be sufficient to support the lifetime maintenance award without an additional finding that these disabilities actually *prevented* the wife from working.

B. Consideration of marital misconduct is prohibited

Marital misconduct is not to be considered by the trial court in awarding maintenance, or in distributing the property and liabilities of the parties.¹⁴ If marital misconduct is considered, a trial court's maintenance award is manifestly unreasonable or based on untenable grounds or untenable reasons, amounting to an abuse of discretion.¹⁵

The wife's response brief devotes considerable effort and many pages to a histrionic account of the husband's alleged past marital misconduct. This account is an apparent attempt to demonstrate the wife's "emotional condition," but it is not evidence of her emotional

¹⁴ *Washburn v. Washburn*, 101 Wn.2d 168, 176 n.2, 677 P.2d 152 (1984), citing RCW 26.09.080 and RCW 26.09.090.

¹⁵ See *In re Marriage of Muhammad*, 153 Wn.2d 795, 806, 108 P.3d 779 (2005).

condition. It might be evidence of marital misconduct, and if so, the wife's effort in recounting this history is misplaced, because it invites the court to consider marital misconduct when reviewing the maintenance award's permanent duration, just as the trial court did when making the award. The consideration of marital misconduct amounts to an abuse of discretion.

C. The finding that the wife's emotional condition makes it likely she will never be able to acquire sufficient education or training to find appropriate employment is not supported by substantial evidence.

The wife's brief relies on a portion of the statutory factor found in RCW 26.09.090(1)(e), "emotional condition," to justify the lifetime duration of the maintenance award. Unlike in *Spreen*, there was in this case no expert opinion from a medical doctor, psychiatrist, or psychologist that the wife suffered from any mental health problems, much less mental health problems serious enough to make her unable to work, and still less serious enough to make her *permanently* unable to work. The wife's brief cites not professional opinion that the trial court considered but only the wife's own self-serving testimony and that of two family members who have clearly taken her side. And the wife's testimony speaks not to her emotional condition, but to her husband's alleged past marital misconduct. The wife is asking this court to infer that

her husband's misconduct left her in such a poor emotional condition that she will never be able to contribute significantly to her own livelihood, even though there is little to no evidence in the record of what her exact emotional condition is. The brief cites the daughter's testimony that on occasion she saw her mother crying.¹⁶ Much of the daughter's testimony cited in the brief pertains to how her father allegedly mistreated her, not her mother, for example damaging her harmonium and not attending her high school graduation. The brief also cites the daughter's testimony that her mother had high blood pressure and had had surgery to remove cysts,¹⁷ but she is not a medical professional and even if she is correct as to the high blood pressure diagnosis, the daughter's testimony does not support that her mother will never be able to contribute significantly to her own livelihood because of it. Plenty of people in the workforce have high blood pressure or have had various minor surgeries.

The wife's own testimony cited in her brief includes that she was scared of Gurmit and that she had back problems and high blood pressure.¹⁸ She described instances of physical and emotional abuse.

¹⁶ Br. of Resp't. at 14.

¹⁷ *Id.* at 17.

¹⁸ Br. of Resp't. at 17.

Clearly, however, these factors did not prevent her from working, because she earned income in 2005, 2006, 2007, 2008, 2009, and 2010.¹⁹

Here, the wife has not demonstrated that the evidence in this case supports that her emotional condition is such that she is incapable of working or of benefiting from job training programs and English language instruction during a reasonable rehabilitative period, which would make her ultimately able to contribute significantly to her own livelihood. She attempts to rely on her “emotional condition,” when what the record supports is not a finding of some permanent incapacitating emotional condition but rather a finding of marital misconduct, at most. And, as stated above, an award of maintenance may not be based on marital misconduct.

D. The maintenance award is not just

The wife contends that the maintenance award is just. However, whether an award is just cannot be determined in a vacuum. A maintenance award must be just when viewed through the lens of relevant case law. The wife has cited no case in which a lifetime award of maintenance was upheld based simply on her own testimony and that of sympathetic family members that she was emotionally traumatized during

¹⁹ *Id.* at 18.

the marriage and was therefore unable to contribute significantly to her own livelihood.

The wife compares this case to *In re Marriage of Morrow*.²⁰ As stated above, the wife in *Morrow* had diabetic retinopathy, a progressively deteriorating condition occasionally rendering her legally blind.²¹ The wife argues that the disposition of assets in *Morrow* was similar to this case, but in affirming the trial court, the Court of Appeals was clear that the lifetime *duration* of the maintenance award was reasonable because of the wife's physical disability:

Fifth, Mrs. Morrow's physical disability warrants a higher award than would otherwise be appropriate. *See* RCW 26.09.090(1)(e); *see also Hadley*. Her disability makes lifetime maintenance reasonable in the circumstances. *See In re Marriage of Brossman*, 32 Wash.App. 851, 650 P.2d 246 (1982).²²

The wife correctly cites *Morrow* for the rule that “[w]here the assets of the parties are insufficient to permit compensation to be effected entirely through property division, a supplemental award of maintenance is appropriate.” The husband is not challenging the award of maintenance made in consideration of the factors in RCW 26.09.090. Instead, he challenges its lifetime duration, and *Morrow* actually supports his argument that this Court affirms such awards only in the face of some

²⁰ 53 Wn. App. 579, 770 P.2d 197 (1989).

²¹ 53 Wn. App. at 581 and 586.

²² 53 Wn. App. at 588.

significant disability preventing the spouse seeking maintenance from working.

The wife argues that she has a “limiting” “physical and emotional condition,” and “debilitating emotion [*sic*] conditions” and “ongoing health issues,”²³ without going into any detail about what conditions she has, why and how they debilitate her, or establishing that they will always do so. Does she suffer from chronic depression? Post-traumatic stress disorder? The record is silent, and equally silent about whether her condition is treatable.

E. This case is similar to *Mathews*

The wife argues that this case is unlike *Mathews* because she does not have the financial resources available to her that the wife in *Mathews* had, and because the husband is better able to pay maintenance than was the husband in *Mathews*.²⁴ But again, the husband is challenging on appeal not the award of maintenance itself, but its duration. In *Mathews*, the wife’s doctors and counselor questioned whether her health would ever allow her to handle full-time employment.²⁵ But even this evidence of poor health was not enough. Although the trial court had made findings that Mrs. Mathews “suffered substantial health problems ...

²³ Br. of Resp’t. at 34.

²⁴ Br. of Resp’t. at 36.

²⁵ *Mathews*, 70 Wn. App. at 123-24.

which disable her; and substantial stress, which also disables her at the present time,” these findings were not sufficient without an additional finding that her problems *prevented* Mrs. Mathews from working.²⁶

Here, the wife has presented no professional or expert opinion as to her health, and even her own testimony about her health does not support a finding that she is prevented from working, learning English, or getting job training. The wife admits that she received a judgment of \$109,000.²⁷ Whether she will ever be able to collect the judgment is not a factor governing awards of maintenance in RCW 26.09.090, and further relies on the speculation and conjecture prohibited under *Rouveau*.

F. Wife’s motion for attorney fees should be denied

“A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits.”²⁸ Under the Rules of Appellate Procedure, attorney fees may not therefore be requested in a brief by motion. The wife’s brief improperly includes a motion for attorney fees.²⁹

Additionally, the husband’s claims have merit. RAP 18.9(a) permits this court to award attorney fees “when there are no debatable issues upon which reasonable minds could differ and when the appeal is

²⁶ *Id.*

²⁷ Br. of Resp’t. at 37.

²⁸ RAP 10.4(d).

²⁹ Br. of Resp’t. at 2.

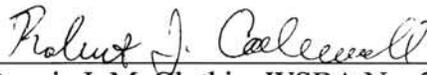
so totally devoid of merit that there [is] no reasonable possibility of reversal.”³⁰ In determining whether an appeal is frivolous, the record should be reviewed in its entirety and any “doubts should be resolved in favor of the appellant.”³¹ The husband’s appeal is not frivolous. Again, his appeal is not challenging the award of maintenance, but rather its lifetime duration. Whether substantial evidence supports the findings of fact and therefore justifies a lifetime award is a debatable issue upon which reasonable minds could differ.

II. Conclusion

The lifetime duration of the maintenance award should be reversed, with maintenance allowed only for a reasonable rehabilitative period, in conformance with Washington policy and Washington case law.

DATED this 19th day of August 2013.

OLYMPIC LAW GROUP, PLLP



Dennis J. McGlothlin, WSBA No. 28177
Robert J. Cadranell, WSBA No. 41773
2815 Eastlake Ave. E. Ste 170
Seattle, WA 98102
Phone: 206-527-2500
Attorneys for Appellant

³⁰ *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987).

³¹ *Mahoney*, 107 Wn.2d at 692.

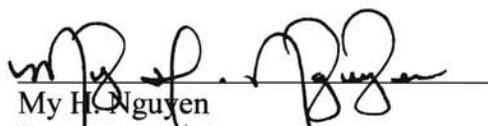
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of Gurmit Singh's Reply Brief to the following individuals via U.S. Mail:

Office of the Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Edward James Hirsch, Jr. Law Offices of Edward J. Hirsch 2611 NE 113 th Street, Suite 300 Seattle, WA 98125-6700	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email

Signed this 19th day of August, 2013 Seattle, Washington.


My H. Nguyen
Legal Assistant

2013 AUG 21 PM 1:16
COURT OF APPEALS
STATE OF WASHINGTON