96896-9

Court of Appeals Number 35748-1-III

SUPREME COURT

OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:

ROGER L. ALDRICH,

Petitioner/Appellant,

v.

MARY BETH ALDRICH,

Respondent,

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent, Mary Beth Aldrich asks the court to deny review of the Court of Appeals decision.

II. REASONS WHY REVIEW SHOULD BE DENIED

A. Threshold for Supreme Court Review

The Washington Rules of Appellate Procedure provide four instances when Supreme Court review is warranted. RAP 13.4. Specifically, "[a] petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4 (b)

The Petitioner, Mr. Aldrich, petitions for review on the basis that the Appellate Court decision conflicts with the Supreme Court's decisions in *In re Estate of Lint*, 135 Wn.2d 518, 957 P.2d 755 (1998) and *In re Marriage of Katare*, 175 Wn.2d 23, 283 P.3d 546 (2012). Petitioner also claims that the Appellate Court's decision conflicts with the Washington Court of Appeal's decisions in *State v. Turner*, 156 Wn. App. 707, 235

P.3d 806 (2010), *In re Estates of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008), *In re Marriage of Spreen*, 107 Wn. App. 341, 28 P.3d 769 (2001), *In re Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462 (1993), *In re Marriage of Glass*, 67 Wn. App. 378, 835 P.2d 1054 (1992), and *In re Marriage of Coyle*, 61 Wn. App. 653, 811 P.2d 244 (1991).

Petitioner claims that these conflicts support his position that the court commissioner abused her discretion in not terminating monthly spousal support, not awarding a judgment for overpayment, and not terminating insurance requirements. As detailed below, there is no merit to Mr. Aldrich's contention that Supreme Court review is warranted in this case. As such, the Court should deny Mr. Aldrich's petition for review.

B. The decision of the Court of Appeals to treat improperly contested facts as verities is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals.

Mr. Aldrich argues that the decision of the lower court to treat improperly contested facts as verities is in conflict with *Lint* and *Palmer* which both held that an assignment of error must present an argument for why substantial evidence does not support the challenged finding. *Lint*, 135 Wn.2d at 532, 957 P.2d at 762; *Palmer*, 145 Wn. App. at 265, 187 P.3d at 766. Petitioner's argument is completely baseless and directly conflicts with the cited Brief of Appellant.

"As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in light most favorable to the

appellant even if it contains a sprinkling of citations to the record throughout the factual recitation." *Lint*, 135 Wn.2d at 532, 957 P.2d at 762. Counsel must present the court with argument as to why specific trial court findings are not supported by the evidence and cite to the record to support the argument. *Id.*

> Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases, like the instant, there is more than one version of facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for the argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

Id.

The Petitioner's application of this rule does not comport with case law. The Petitioner indicates the findings that are challenged and cites the record, however, he fails to provide any argument as to why the evidence does not support the findings. (Brief of Appellant). The lower court makes note of this in their opinion, and relies on the holdings in *Lint* and *Palmer* as the basis for treating the findings as verities. *Matter of Marriage of Aldrich*, 35748-1-III, 2018 WL 6720667 (Wash. Ct. App. Dec. 20, 2018), as amended on denial of reconsideration (Jan. 31, 2019).

The Petitioner's application of *Lint* and *Palmer* is improper. These two cases specifically address similar situations to the situations presented in this case. The direct similarity being that in both cases and in this case,

the appellant's brief cited the record and listed the challenged facts, but did not address the challenged facts in the argument section. *Lint*, 135 Wn.2d at 532-33, 957 P.2d 755; *Palmer*, 145 Wn. App. at 265, 187 P.3d 758.

The Brief of Appellant does not meet the standards set by *Lint* and *Palmer*. Petitioner failed to specify any findings within the argument, rather he recited evidence most favorable to his position and then claimed error in the Commissioner's ruling. At no point does the Petitioner specify a finding that was made erroneously and then argue why the evidence demonstrates error. This type of briefing is directly in conflict with the rule established in *Lint* and the Court of Appeals accurately applied the correct standard. As such, there is no conflict between the ruling in the lower court and any Washington Supreme Court or Washington Court of Appeals case law as required by RAP 13.4, and review should not be granted.

C. Although generally disfavored, Washington law specifically allows awards of lifetime maintenance in situations such as this, and the Court of Appeals not citing the general rule does not equate to legal error.

Mr. Aldrich argues that the Division 3 Court of Appeals case of *In re Marriage of Coyle* represents a rule that lifetime maintenance is disfavored in Washington and that the lower court in this case over looked this rule in conflict with established law and thus, reached a decision amounting to an abuse of discretion. This interpretation of *Coyle* and the

lower court's decision is overly narrow and in many respects, incorrect. There is no basis for appeal under *Coyle*, or any other existing Washington case.

Mr. Aldrich provides no support for his assertion that the Court of Appeals failed to consider that lifetime maintenance is generally disfavored in Washington. Instead, his petition for review is based entirely on his own erroneous conclusion that because the Court of Appeals did not expressly state that it considered the general rule, it must have "ignor[ed] the unfair financial effects the award of lifetime maintenance caused Mr. Aldrich" which, in turn, caused the court's decision to conflict with "other appellate decisions." Petition for Review at 2. Tellingly, Mr. Aldrich's petition for review completely fails to identify any such appellate decision.

The fact that lifetime maintenance awards are generally disfavored in Washington has been well established for over five decades. *Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 508 (1973); *see also Berg v. Berg*, 72 Wn.2d 532, 534, 434 P.2d 1 (1967). "Although it is generally not the policy of this state to place a permanent responsibility for spousal maintenance upon a former spouse, there are circumstances which require such obligation." *Coyle*, 61 Wn. App. at 657, 811 P.2d 244 (underlining added). Furthermore, by allowing modifications of spousal maintenance under RCW 26.09.170, the legislature has already provided a sufficient basis to combat any unintended hardships caused by lifetime maintenance

awards. The "failure" of the Court of Appeals to expressly note in its opinion that lifetime maintenance awards are disfavored has no bearing on its decision. Obviously, the Court of Appeals was aware of this long standing rule, but found the trial court's modification appropriate.

The maintenance statute specifically provides that the trial court may determine the length of maintenance based on what the court deems "just." RCW 26.09.090(1). Nowhere under this statute or applicable case law is the Court of Appeals required to state in its opinion that it contemplated the general policy against permanent maintenance. Such a requirement would be illogical and unnecessary. The Court of Appeals is expected to review the trial court's decision for an abuse of discretion under the principles of RCW 26.09.090. *In re Marriage of Kile and Kendall*, 186 Wn. App. 864, 886-87, 347 P.3d 894, 905 (2015).

As evidenced by its unpublished opinion, the Court of Appeals appropriately considered whether spousal support was properly modified, and whether the trial court's decision amounted to an abuse of discretion. The court did not specifically discuss whether the lifetime award was just or recite the elementary principle that lifetime maintenance is generally disfavored because on review, it was tasked with determining whether the spousal support award was properly reduced. *Marriage of Aldrich*, 2018 WL 6720667, at *1. Under no circumstance was the Court of Appeals required to recite the general rule. The Court of Appeals found the

commissioner's modification and award just. There is no basis for review under *Coyle* and RAP 13.4, and review should be denied.

D. The Petitioner was not required to pay spousal maintenance from separate property and the Court's award does not conflict with any other appellate decision.

Mr. Aldrich asserts that the Court required him to pay spousal support out of separately awarded property because his income from CPPS was less than his total of monthly spousal support payments *in addition* to the cost of life insurance premiums used to secure the support. Mr. Aldrich cites the calculation that Mr. Aldrich has $1,666 in wages after covering his monthly need, he must pay $1,300 in spousal maintenance, and his maintenance obligation is secured by a life insurance policy currently costing him $477/month. However, this ignores the Court's finding that Mr. Aldrich's wagers were $1,666.

Notably however, while Mr. Aldrich's Petition for Review focuses on the additional obligation to the pay life insurance premium as the basis for claiming that maintenance "necessarily had to come from his separate property", his brief on appeal did not contain this line of reasoning. Instead, Mr. Aldrich argued that ordering him to pay "$1,300 per month (not including insurance to secure the award) on an income of $1,666 is a clear abuse of discretion as such a ruling is not fair or just." *See* Appellant's Brief at 13 (underlining added). As the Court of Appeals correctly held, "[b]ecause Mr. Aldrich's net income from CPPS is greater than $1,300, the reduced spousal maintenance, we conclude that the court

commissioner did not require him to pay spousal maintenance from his separate property." *Marriage of Aldrich*, 2018 WL 6720667, at *3.

The Petitioner's mistaken belief that life insurance used to secure a maintenance obligation should be considered maintenance itself is unsupported by law. *See Riser v. Riser*, 7 Wn. App. 647, 651, 501 P.2d 1069 (1972) (differentiating between life insurance policies maintained for the benefit of children and policies maintained as "merely security for the payment of support and maintenance."). The opinion of the Court of Appeals does not conflict with any existing Washington law, or the law cited by Mr. Aldrich. *Coyle* holds that when life insurance is used to secure a spousal support obligation, there is more than a mere expectancy. Rather, the beneficiary has a vested equitable interest. 61 Wn. App. at 663, 811 P.2d at 249. Nowhere does this case categorize the payment of a premium as a payment of maintenance. This is counter to the idea of a security and the idea of spousal maintenance.

The law cited by Petitioner in his brief on appeal also fails to support his position. In *Marriage of Mathews*, 70 Wn. App. 116, 125, 853 P.2d 462 (1993), the Court of Appeals held that a lifetime maintenance award which required a party to pay maintenance out of his retirement and disability income was plain error. The court did not discuss, nor consider, life insurance as a security for a maintenance award. *See id.* Further, *In re Marriage of Barnett*, 63 Wn. App. 385, 388, 818 P.2d 1382 (1991) simply provides that a maintenance award which equates to an attempt to

distribute property that had already been divided under the decree constitutes error. This principle is inapplicable to the instant case.

There is no conflict between this case and *Coyle*, *Matthews*, *Barnett*, or any other Washington case as RAP 13.4 requires. Mr. Aldrich has $1,666 in net income each month and was ordered to pay $1,300 in spousal maintenance. The additional obligation to carry a life insurance policy as security for the maintenance obligation does not constitute spousal maintenance. Review should be denied.

E. The Petitioner did not assert, nor provide evidence in support of a contention that the Respondent had no need for spousal maintenance.

The Petitioner next asserts that the Court of Appeals was obligated to make a determination of the merits in deciding whether Respondent had a need for continued maintenance. First, this was not the basis of Appellant's petition to modify maintenance. Second, the trial court found Respondent had a need for maintenance of $1,300. The Court of Appeals was not obligated to address this issue because it was not addressed at the trial court hearing. As the Court of Appeals adequately addresses, Mr. Aldrich did not raise this issue in argument or allege it in his petition.

The appellate court properly relied on RAP 2.5(a) which states, "the appellate court may refuse to review any claim of error which was not raised in the trial court." Mr. Aldrich assigns error on the basis that the appellate court did not construe the RAP's liberally to promote justice, citing both RAP 1.2(a) and *Turner*. RAP 1.2(a) stands for the assertion

that the RAP's should be applied liberally "except in compelling circumstances where justice demands. . ."

In *Turner*, the court applied this rule to a criminal case where briefing and oral argument was done on the issue of a no-contact order. 156 Wn. App. at 712, 235 P.3d at 808. Turner failed to assign error to the trial court's admission of a no-contact order at trial. *Id.* The appellate court determined that it was appropriate to hear argument on this error because it was briefed and argued at trial, despite Turner's failure to assign error. *Id.* The appellate court found that there was no prejudice to the State for allowing argument on this matter. *Id.*

This case is starkly different. There would be prejudice to Ms. Aldrich if argument on the merits of need were heard and decided on appeal. Unlike *Turner*, there was no oral argument on the merits at the trial level. Allowing argument and a decision from the appellate court would have been in error. The appellate court is not meant to hear the merits of new issues, but to determine error in trial court's decisions. This argument was not the basis of Mr. Aldrich's position to reduce maintenance. Furthermore, the Court approved Ms. Aldrich's needs when it made the finding. The appellate court's decision to not rule on the issue of need for continued maintenance was not in error, there is no conflict as is required by RAP 13.4, and review should be denied.

F. The Appellate Court's decision to award a monthly credit for maintenance overpayment rather than render a judgment was not an abuse of discretion.

Petitioner next claims that the appellate court abused its discretion when it upheld a monthly credit, rather than a judgment, for maintenance overpayment. "An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Katare*, 175 Wn.2d at 35, 283 P.3d at 552.

> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Katare is a custody case. There is absolutely no factual application of that case to the present case. Further, Petitioner provides no support for his contention that a reduced monthly payment to satisfy overpayment is an abuse of discretion.

Mr. Aldrich proposes that *Glass* provides for a resolution of this situation through a moratorium of spousal support payments. *Glass* is factually distinguishable from the case at hand. First, the moratorium for family support was granted as a "grace period," rather than as an offset to amounts owed. *Glass*, 67 Wn. App. at 389, 835 P.2d at 1059. Second, this grace period was in consideration of the obligor's significant arrearages. *Id.* Finally, the court never stated that a moratorium was a

minimum measure necessary to offset maintenance overpayment, only that it was appropriate in this instance. *Id.*

The Petitioner provides no basis for requiring "at minimum" a moratorium. Further, there is no case law to suggest that offsetting spousal maintenance overpayment monthly is an abuse of discretion. RCW 26.09.170 permits a court to modify maintenance payments accruing subsequent to the petition for modification. The statute does not *require* that permanent maintenance be terminated upon a showing of a substantial change in circumstances, rather, it affords courts the discretion to make an appropriate modification given the facts presented. Likewise, and as appropriately recognized by the Court of Appeals, "[t]he statute does not direct a trial court how to compensate an obligor for overpayments made between the filing of the petition and the court's modification order." *Marriage of Aldrich*, 2018 WL 6720667, at *4 (underlining added).

In this case, the court chose to credit Mr. Aldrich for overpayments in maintenance by reducing his monthly obligation by $300.00 until the full amount had been credited back to him. This serves as a substantial benefit to Mr. Aldrich and is not contrary to any existing case law. As such, review should be denied on this matter.

G. The court commissioner's decision was obviously based on RCW 26.09.090, and any references to RCW 26.09.060 were unintended, harmless, and had no bearing on the decision.

Mr. Aldrich next claims that there was an abuse of discretion on the basis that the commissioner cited the wrong statute in her decision. As the appellate court notes, this was an obvious transcription error. Nevertheless, Petitioner cites *Spreen* as a basis for claiming that the commissioner and Court of Appeals abused their discretion.

Spreen does not stand for the contention that a citation error is a per se error of law. In *Spreen*, the court stated that a fair consideration of the spousal support factors is required or the decision is an abuse of discretion. 107 Wn. App. at 350, 28 P.3d at 774. As the appellate court correctly held, the commissioner simply cited RCW 26.09.060 in error, and the statute had no bearing on the actual ruling. This fact is evidenced by the plain language of the Commissioner's written decision, as well as RCW 26.09.060 itself. To argue that this citation error is an undisputed legal error and a clear abuse of discretion is manifestly unreasonable.

RCW 26.09.060 governs temporary maintenance and child support orders, as well as temporary restraining orders and protections orders. The statute does not include any "factors" and mentions nothing about the modification of maintenance. The fact that the citation to RCW 26.090.060 was a transcription error becomes even more evident when considering the very language of the Commissioner's written decision wherein she states "[b]ased on the consideration of the factors that play into maintenance, namely RCW 26.09.060, (and the same factors considered by Judge O'Connor at the time of trial) . . ." If the

Commissioner was truly relying on RCW 26.09.060, she would have no maintenance factors to base her consideration on. The citation to this statute was a simple error, Division Three properly addressed this error, there is no RAP 13.4 required conflict, and therefore review should be denied.

III. CONCLUSION

There is no basis for review.

Respectfully submitted,

Heather Hoover, WSBA #43184
Attorney for Respondent

CERTIFICATE OF SERVICE

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

That on the 10th day of April, 2019, she served a copy of the Respondent's Response to Petition For Review to the person hereinafter named at the places of address stated below which is the last known address.

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