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

Keith Clarke, *Appellant*

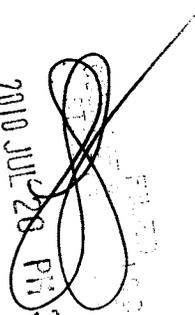
vs.

Sabrina Clarke, *Respondent*

OPENING BRIEF OF APPELLANT

Keith Clarke, *Appellant pro se*
6947 Cold Creek Pkwy SE #354
Newcastle WA 98059
206-947-2509

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A. Assignments of Error

Assignments of Error

Error # 1: - The trial court erred when it denied the motion to vacate spousal maintenance.

Error # 2: - The trial court erred when it ruled that the agreed finding 2.12 in the decree is sufficient to support an award of maintenance.

Error # 3: - The trial court erred when it denied revision.

B. Issues Pertaining to Assignments of Error

Issue # 1:

Can a non-modifiable spousal maintenance obligation within an agreed dissolution decree restrict the authority of CR 60 to vacate the obligation when it becomes inequitable to continue to enforce it?

C. Statement of the Case

The agreed dissolution decree was entered on 4/19/07. [CP 16-24; 1-15] On 11/17/08, the current child support order was entered. [CP 40-53]

Due to a serious medical problem which caused me to violate safety rules, my employer (Burlington Northern Santa Fe Railroad) placed me on three years probation. This included a prohibition from doing over-the-road assignments which ended the overtime hours that were used to calculate child support and spousal maintenance. [CP 54-56]

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

After a hearing, the commissioner denied my motion on 7/24/09. [CP 98-99] I moved for reconsideration to the commissioner on 8/3/09 and I attached copies of various documents from the court file that I thought that she had overlooked. [CP 100-134] The commissioner denied the motion on 8/26/09. [CP 135-136] I filed a motion for revision on 9/3/09 [CP 137] which was denied on 10/9/09 [CP 138]

D. Summary of Argument

There is a single issue presented for review - did Keith Clarke present sufficient evidence to warrant granting the motion to vacate spousal maintenance? The law says yes but the court said no. This is wrong and this court needs to correct that lower court error.

It appears that the court was misled by a provision prohibiting “modification” of the spousal maintenance obligation. However, the decree contains no findings to support either the spousal maintenance obligation or the non-modifiable provision.

E. Argument

CR 60 states, in pertinent part:

...

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

...

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

...

CR 60. [emphasis added]

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

The trial court commissioner initially denied the motion without explanation. Upon a motion for reconsideration, the commissioner treated the attachments as exhibits even though they were simply copies of documents already in the court file. She did rule that (1) the non-modifiable' provision precluded relief; and (2) that Finding 2.12 from the original agreed decree was sufficient to sustain the award of spousal maintenance.

Even though sustaining the award cannot be reached if the 'non-modifiable' provision precludes relief, the Supreme Court has held:

Although the dissolution of marriage act creates an avenue for modifying spousal maintenance awards, RCW 26.09.170(1), [appellant] has not petitioned for modification under the statute. Instead, he moved "to vacate and to reopen" the property settlement and maintenance agreements. The superior court commissioner who heard the motion properly treated it as a motion for relief from judgment under CR 60(b).

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

Under this clear language, it is obvious that ‘modify’ and ‘vacate’ are not synonyms. Although either one has an effect on the judgment if granted, the basis for each is different. In this case, the commissioner erred by reasoning that the clause precluding modification operated to also preclude vacation.¹ Because the revision court failed to correct this error of legal reasoning, it adopted the error as its own. The overall consideration governing property division and support obligations in dissolution decrees is the overall fairness to the parties. The general test is the relative positions in which the parties will be left. RCW 26.09.090:

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

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

The statutory factors are:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, *and his ability to meet his needs independently*, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;

¹ It seems that Washington law may not even permit “non-modifiable” clauses regarding spousal support. See *Marriage of Jennings*, 138 Wn.2d 612, 626, 980 P.2d 1248 (1999) (In referring to payments to Petitioner in the order signed on June 5, 1996 as “non-modifiable compensatory spousal maintenance,” the court was in error, but that error is harmless in the context of the total order. It should have been designated instead as merely “compensatory spousal maintenance.”)

- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

Former RCW 26.09.090.²

When the decree (and related documentation) was entered, the sole finding to support the award of maintenance stated:

Maintenance should be ordered because: The wife is in need of temporary spousal maintenance and the husband has the ability to pay.

CP 27.³

In the motion to vacate the award, Appellant submitted his financial declaration showing that he no longer had the ability to pay both his own expenses and the two monthly support payments. He further submitted proof that he was unlikely to ever regain his previous level of income.

Modification of agreed settlements with non-modifiable clauses is within the trial court discretion:

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

This is not to say, however, that the court is entirely without power to grant any equitable relief whatsoever, in cases of extreme financial hardship, where such changed circumstances were not foreseen at the time of the initial decree, and where, as here,

² The changes in the statute since entry of the decree are not substantive.

³ This sounds more like a conclusion of law than a finding of fact. There is nothing to show any explanation of how this was affordable to Keith other than his signature on the agreed documents.

equitable relief may be fashioned in such a manner that the full award will be paid within the time contemplated by the initial decree.

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

The issue here is whether the parties can, by agreement, completely deprive the court of jurisdiction over its decrees. The trial court said yes but the civil rules and Glass have no such exception or authority.

Under the facts presented in Glass, the opinion held that the maintenance payments could be temporarily stayed as long as the total amount was paid within the time frame of the agreement. There is nothing in Glass, however, which held that the opinion was establishing a new rule of restricting equitable relief jurisdiction by consent.

The trial court did not analyze whether it should vacate the Clarke maintenance payment - instead it held that it was prohibited by the non-modifiable provision. The request for relief was dismissed, not denied.

Because the decree was an agreed settlement, there are no findings regarding the factors of RCW 26.09.090. This might have been an oversight but it is what happened. Thus, it is reasonable to read Finding 2.12 in harmony with ¶ 3.7 of the decree. This leads to an ambiguity - is the finding intended as a condition of the award?

There can be no evidence because there was no trial. The phrasing of Finding 2.12 shows that it was intended as a sustenance transfer payment due to the husband having superior earning power while the wife has insufficient earning power.

“Need and ability to pay” is a phrase commonly used when one

party in a dissolution is ordered to pay the other party's attorney fees. Similar considerations are found in RCW 26.09.090 but with the addition of subsection (f).

The issue here is whether the phrasing used in Finding 2.12 means that the award is subject to vacation if the obligor is rendered unable to pay within the meaning of subsection (f). A 'yes' answer comports with the public policy purpose of CR 60 - that judgments should be fair and just.

The real question is whether it is right to render someone homeless because of unforeseen consequences when granting relief would rectify the situation. An added consideration is that bankruptcy relief would be available if this were some other type of obligation other than support.

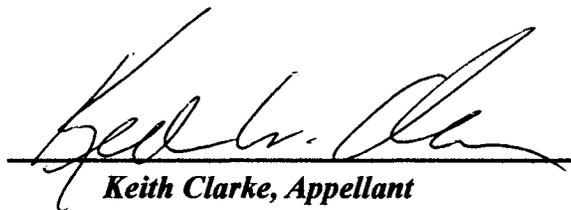
F. Conclusion

Keith Clarke presented sufficient evidence to show that the judgment had become inequitable. The trial court should have granted the relief but did not due to its erroneous reasoning that it was barred from doing so by the non-modifiable language.

This court should reverse and remand for vacation of the spousal maintenance payment provision.

Respectfully submitted:

7-20-10
date


Keith Clarke, Appellant

No. 64431-9-I

IN THE COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

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Marriage of:)	
)	
Sabrina Clarke)	
)	
Respondent)	DECLARATION
and)	OF SERVICE
)	
Keith Clarke)	
)	
Petitioner)	
)	
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Keith Clarke declares as follows:

On 23 July, 2010, I served a true copy of

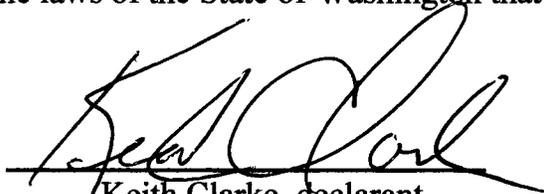
OPENING BRIEF OF APPELLANT

upon the Respondent by delivering it in person to her residence at:

Sabrina Clarke
11917 SE 87th Court
Newcastle, WA 98056

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated Aug 2, 2010 at Bellevue, WA



Keith Clarke, declarant

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CORRECTIONAL INSTITUTION
CLERK