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NO. 35157-9-II

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

In the Marriage of
MARTIN HULSCHER,
Respondent,
v.
JANICE HULSCHER,
Appellant.

07 JUN -4 AM 11:11
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY DEPUTY

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court erred when it granted Respondent Martin Hulscher (“Martin”) a modification of his obligation to pay lifetime non-modifiable spousal maintenance to his wife, Janice Hulscher (“Janice”).

The trial court erred when it granted 1) an immediate downward modification of the spousal maintenance obligation and 2) eventual termination of the obligation by a date certain.

Both of the above modifications were contrary to the express language of the parties’ Findings of Fact and Conclusions of Law (“Findings”) and the Decree of Dissolution of Marriage (“Decree”) which had been agreed to by the parties.

II. STATEMENT OF THE CASE

A. Overview

The parties were married on February 8, 1980 when they were both 20 years old. CP 12. The parties had two children, both sons – Ryan born on April 20, 1983 and Kevin born on June 10, 1987. CP 2. After a 24 year marriage, Martin and Janice were divorced on February 23, 2004. CP 29.

The Findings of Fact and Conclusions of Law, as well as the Decree of Dissolution of Marriage provided that Martin was to pay, lifetime, non-modifiable spousal maintenance to Janice. The only conditions under

which Martin was relieved of this responsibility was Janice's remarriage or the death of either of them. CP 11-15, 31.

On June 27, 2004 Martin, age 44, married Holly Hulscher ("Holly"), age 27. CP 160, 343. Holly is a "B" card longshoreman and has worked full time for the Port of Tacoma since 2003. CP 166.

On June 7, 2005, almost one year after his marriage to Holly, Martin filed a Petition for Modification of Child Support. CP 53.

After his marriage to Holly, Martin filed a motion to eliminate the lifetime non-modifiable spousal maintenance obligation that he had agreed to with Janice. CP 98.

B. Factual History

Early in the parties' marriage, Janice worked as a pharmacist assistant. CP 76. Once Kevin was born, Janice quit working and became a full-time mother and homemaker.

Because of being a "stay-at-home mom", Janice has minimal Social Security benefits. Janice does not have a retirement plan, nor does she have medical insurance other than a policy which she purchased. Janice is a displaced homemaker.

As a result of the June 9, 2006 ruling by Judge Cuthbertson which reduced her spousal maintenance, Janice has seen her income reduced from \$4,400 per month to \$1,500 per month, plus her medical insurance.

Despite this reduction by the trial court, Janice still faces monthly living expenses of \$ 6,500. CP 135

As opposed to Janice , Martin was able to pursue a career during the parties' 24 year marriage. Martin is an "A" card longshoreman with many years of seniority. Martin works as a supervisor and is a member of the International Longshore & Warehouse Union, Local 98. CP 116.

At the time of the parties' divorce. Martin earned \$22,158.64 per month, or \$265,896 per year, as a longshoreman. At the same time, Janice had no income. CP 7.

In 2006, when Martin filed the motion to reduce his non-modifiable spousal maintenance obligation, Martin made \$19,341.40 per month, or \$232,092 per year. CP 55.

In 2004 the average wage for "A" and "B" longshoremen was \$101,154. CP 167. As a "B" worker and assuming that she made at least as much money in 2006 as she would have in 2004, Holly and Martin would have had a combined annual income of \$333,246

In February 2005 when these proceedings began, Janice had no income other than the \$4,645 monthly spousal maintenance awarded to her in the divorce decree. CP 66. In 2005, Janice had an annual income of \$55,740 whereas the household of Martin and Holly had a combined income of \$347,146.

As longshoremen, Martin and Holly have full medical benefits as well as a pensions guaranteed to them.

C. Procedural History

1. Hearings before Court Commissioner Mark Gelman

Martin's efforts to eliminate his obligation to pay spousal maintenance to Janice began in the summer of 2005. There were three hearings held before Commissioner Mark Gelman: July 26, 2005, April 14, 2006 and May 8, 2006.

1. Hearing Held on July 26, 2005

At this hearing, Commissioner Gelman denied Marty's Motion to Vacate the Divorce Decree, but did indicate that he would entertain a Motion of Modify. RP p. 2. Because the court wanted more information to be presented at a second hearing, Commissioner Gelman stated:

"All right. So that's where we're at folks. Everything is status quo and the Order should be clear today that the Court certainly will reopen the issue of spousal support take a look at it with either an increase or decrease and duration."

RP 8.

2. Hearing Held April 14, 2006.

At the beginning of this hearing, Commissioner Gelman noted that an order had not been entered regarding his decision made during the July 26, 2005 proceeding. While searching for a transcript of the prior hearing, Commissioner Gelman stated:

... my ruling was that pursuant to Marriage of Short and RCW 26.09.070(7) that the Decree as written, because it was not supported by a separation contract as Short requires and the statute requires, is subject to modification at some point in time ...

RP 3-4.

Because the court and counsel were unable to locate a transcript of the July 26, 2005 argument, the court continued this hearing saying "... we'll get back together again once we see a transcript and the proposed Order and take a look at where we go. Okay?"

RP 14.

3. Hearing Held May 8, 2006.

At this hearing, Commissioner Gelman elaborated upon his earlier remarks regarding *In re Marriage of Short*, 125 Wn.2d 865,875, 890 P.2d 12 (1995) and RCW 26.09.070(7):

...Marriage of Short and the statute require that unless you've got a separation contract that spousal support is modifiable.

RP 18

On May 10, 2006 Commissioner Gelman entered two orders based upon the May 8, 2006 hearing, the first denominated Findings of Fact and Conclusions of Law Regarding Vacation of Spousal Maintenance

Provisions of Decree and the second entitled Order Regarding Vacation of Spousal Maintenance Provisions in Decree. CP 372-376.

The above Findings stated that the Petitioner's Motion to Vacate the Decree relating to spousal maintenance was denied because "*Marriage of Short* and RCW 26.09.070(7) requires a separate document." CP 374.

In the above Order, the court ruled that per *Marriage of Short* and RCW 26.09.070(7) "the Decree was not a separate separation agreement" and therefore the court would "entertain the Petitioner's motion to modify the Decree." CP 376.

2. Hearing Before Judge Cuthbertson June 9, 2006

Both parties brought a Motion for Revision before Judge Cuthbertson, who characterized them as "cross motions for revision. RP 2

Martin claimed that Commissioner Gelman had erred by looking at this case "as a modification with a substantial change of circumstances standard" whereas Martin wanted his motion to vacate the non-modifiable spousal maintenance obligation because that agreement had not been written down on a separate document. RP 4. As stated by Martin's attorney:

...I believe that's why there's a separate statute that talked about a separate contract in spousal maintenance and there's Marriage of Short. The legislature and our

appellate courts have said if you're going to have this nonmodifiable spousal maintenance, you have to go to these extraordinary steps or it can't exist and it's a void provision. You start all over. You don't look at the modification cases; you look at its void, just start over.

RP 4-6

While Martin's basis for his motion for revision was to vacate the spousal maintenance altogether, he also argued that even if Commissioner Gelman was correct in viewing the case as a "substantial change of circumstances" proceeding, then spousal maintenance should be reduced for the following reasons: 1) Marty cannot be required to work more than 40 hours per week, 2) Marty thought the Decree was modifiable, 3) Janice has had four years to retrain and find a job, 4) Marty wants to have another child with Holly, 5) Marty did not have an attorney when the Findings and Decree were agreed to between him and Janice.

In the hearing before Judge Cuthbertson, Janice's attorney stated that Commissioner Gelman had erred when he ruled that *Marriage of Short* required a separate document for nonmodifiable spousal maintenance to be allowed:

...the decree and the separation agreement, they don't have to be a separate document. It doesn't have to be this and this. They can be the same document. That is the question that you're answering today. Does it have to be a separate document or in the decree and in the findings, is that where they can set forth their agreement?

Did they agree to it in an agreement? Yes. Is that agreement also the document that became the decree and findings in this case? Yes. Is that wrong? No, and I suspect if this case went to the Court of Appeals, that's going to be the ruling of the Appellate Court. You don't have to have two separate documents. The substance of all this is people can agree to nonmodifiable maintenance, but no one – it's no more complicated than that. That's it. And that's what they did, so it's our position, frankly, that in terms of whether or not the Court can change the maintenance, it can't.

RP 23-24.

Janice's attorney also criticized both Commissioner Gelman and Judge Cuthbertson for the means by which the modification was being handled:

Now what did Commissioner Gelman do? He said, I'm not going to vacate the decree, but I'm finding that the decree is modifiable. Okay? Now whether that makes sense or not, I don't know. If you look at Short, if you're going to take it and make it nonmodifiable or modifiable, which in effect he did, you have to have a trial. What we are doing today isn't the appropriate procedure, and today's hearing kind of exemplifies that because you're hearing Mr. Hulshcer speak from the back; you're hearing counsel state facts which may or may not be accurate. You're not getting the true story in this hearing procedure today, so there's going to be a change. You know, it has to be done by a trial and Short says that... That's what has to happen. Otherwise, what the Court's really doing is it's coming in here and trying to remake an agreement, in effect, that was not the agreement of the parties.

RP 25-26.

Judge Cuthbertson took the case under advisement and on June 30, 2006 issued his decision. CP 408-410.

In his decision, Judge Cuthbertson denied both parties' motions for revision and ruled that 1) Commissioner Gelman's opinion that *In re Marriage of Short* and RCW 26.09.070(7) required a separation agreement as a distinct, individual document existing apart from the Findings and Conclusion was correct, 2) that per *Marriage of Short* the proper remedy was a modification of the spousal maintenance agreed to by the parties and not a vacation of the decree, 3) the parties intended for the spousal maintenance agreement to be modifiable, and 4) that Janice has a need for spousal maintenance and Martin has the ability to pay it.

However, Judge Cuthbertson disagreed with Commissioner Gelman's decision as to how long and in what amount spousal maintenance was to continue. Judge Cuthbertson made the following factual findings:

1. Janice has had nearly five years to get a job or an education while receiving spousal maintenance;
2. For the past 18 months, Janice received her regular spousal maintenance despite the fact that Kevin was living with his father;
3. Janice sold the family home and made over \$200,000 from the sale;
4. Janice has at least four parcels of land in Washington and Texas that can be sold or are investment properties;

5. Janice's needs for spousal maintenance is reduced "quantitatively and temporally;
6. The \$988 monthly share of maintenance that was actually child support is no longer needed;
7. Marty's ability to pay is based upon a 40 hour work week for the next 8 years
8. Marty's spousal maintenance is changed from \$1,100 per week as set forth in the Decree to \$1,500 per month;
9. Marty's obligation to pay spousal maintenance ends on May 1, 2008.

Based upon the rulings of both Commissioner Gelman and Judge Cuthbertson, Janice has filed this appeal.

III. APPLICABLE LAW AND ARGUMENT

A trial court cannot modify Mr. Hulscher's agreement to pay non-modifiable lifetime spousal maintenance set forth in the parties' Findings and Decree.

A. Statement of the Rule

The awarding of spousal maintenance by a trial court is governed by RCW 26.09.090.

A trial judge is to evaluate six separate considerations in determining whether maintenance is to be awarded. Among those factors are:

1. Financial resources of the parties;

2. Time necessary to complete an education or training;
3. Standard of living during the marriage;
4. Age, physical, emotional condition and financial obligation of the of parties;
5. Ability to pay by the obligor spouse.

RCW 26.09.090 (1) (a)-(f).

The above factors are to be considered by the trial judge after weighing all of the evidence in the case. The trial court cannot, on its own motion, award lifetime non-modifiable spousal maintenance. In *Marriage of Short*, Washington does not favor a permanent lien upon the earnings of a spouse for maintenance purposes. *Hogberg v. Hogberg*, 64 Wn.2d 617, 619, 393 P.2d 291 (1964), *Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 508 (1973).

Once spousal maintenance has been awarded, it can only be modified upon a showing of a substantial change in circumstances.

Unlike a trial judge, the parties can agree to lifetime, non-modifiable spousal maintenance if they so choose:

...a nonmodifiable maintenance award is permissible if such a provision was included in a separation contract entered into by the parties.

Marriage of Short, at p. 876.

Washington permits spousal maintenance to continue indefinitely until one of the parties dies, or remarries. In the absence of remarriage, such an award can constitute life time maintenance:

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.

RCW 26.09.170

The general rule is that a trial court cannot order nonmodifiable maintenance since to do so would take away the court's equitable powers to review the amount and duration of the award upon a showing of a "substantial change of circumstances." However, the parties can agree to any terms they want regarding spousal maintenance in a decree if they so chose:

A separation contract which precludes or limits the court's power to modify an agreed maintenance award, once approved by the court and embodied into a decree is to be enforced in accord with its terms. RCW 26.09.070(7). Except in cases where the contract was unfair at the time of its execution, such provision are to be enforced by our courts. RCW 26.09.030(3); *In re Marriage of Yearout*, 41 Wn. App. 897, 901, 707 P.2d 1367 (1985) Although Robert has not argued in this appeal that these parties' separation contract was unfair at the time it was executed, the time for such a challenge has

expired in any event. Any such challenge must be made prior to the entry of the decree by which the separation contract is approved by the court. RCW 26.09.070(3), (7). If such a challenge were to be allowed years later, at the time of a modification proceeding, the provisions of RCW 26.09.030(3) and (7) would be rendered meaningless.

In re Marriage of Glass, 67 W. App. 378, 390, 835 P.2d 1054 (1992).

Significantly for Martin and Janice, the *Marriage of Glass* court addressed their exact circumstances in Footnote 13:

Although we find no formal “separation contract” in the record for this appeal, the decree of dissolution of marriage which was signed by both parties as well as by their respective attorneys, was entered by agreement of the parties and the decree sometimes refers to itself as the parties’ “property settlement agreement.”

Throughout the Findings and Decree, Martin and Janice refer to the agreement that they reached regarding nonmodifiable spousal support as being an “agreement” and a “contract.”

As an aide to practitioners, a text frequently used by family law attorneys in drafting agreed Findings and Decrees states, “If the decree has been signed by both parties as a stipulated instrument, it may be considered to also constitute a separation contract.” 19 Wash. Prac., Family and Community Property Law §19.8.

B. Argument

1. Martin and Janice's Agreement for Spousal Maintenance

Martin and Janice labored over the terms of the Findings and Decree. The terms of their divorce did not develop overnight.

Martin signed the Findings and Decree on May 28, 2003 however, the final papers were not entered until eight months later on February 23, 2004. After the papers were signed, Martin began his weekly spousal maintenance payments to Janice without any complaints or requests to reconsider the terms to which he had just agreed.

As approved in *Marriage of Glass* and in *Washington Practice*, the parties made specific reference to an agreement and contract between them in the Findings and the Decree. CP 11-16; 31-32.

Specifically, the Findings provided:

BASIS FOR FINDINGS

The findings are based on agreement.

2.7 SEPARATION CONTRACT OR PRENUPTIAL AGREEMENT.

There is no written separation contract or prenuptial agreement. The parties have reached an agreement on the terms of the settlement of this marriage dissolution action. *The final pleadings signed by the parties constitute that agreement and the parties have asked that the Court adopt their agreement.* (My emphasis).

2.12 MAINTENANCE.

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

2.20 OTHER.

2.20.4 The award of spousal maintenance takes into consideration that throughout the marriage the wife remained at home with the children and the husband worked. The wife did not pursue a career and as a result did not build up retirement benefits, reduced her earning potential and did not develop job skills. The husband was able to spend extra time and efforts on his employment and as a result he now earns a significant income. As a result of their efforts the parties have also contributed to the success of their children.

3.6 OTHER

3.6.1. The parties have agreed to this decree of dissolution and to the related findings of fact and conclusions of law, final parenting plan and the final order of child support as part of an *agreement to resolve the marriage dissolution and these final pleadings create a contract between the parties.* Rather than obtaining temporary orders, the parties have agreed that their agreement shall be effective as of the dates set forth in the pleadings and that they have thus agreed to temporary child support, spousal maintenance and debt and property issues.
(My emphasis)

In his Verification, which is incorporated into the Findings, Marty swore under oath, that he had read the Findings and the Decree and

affirmed that they are “true and accurate to the best of my knowledge.”

CP. 16.

Within the Decree the parties acknowledged the contract that they entered into with one another:

3.7 SPOUSAL MAINTENANCE

The Petitioner/husband shall pay spousal maintenance to the Respondent /wife in the amount of \$1,100 per week, minus the child support payment as calculated on a weekly basis. The total spousal maintenance has been calculated on a 4.3 week per month basis as totaling \$4,766.67 minus the monthly child support paid for Kevin. *The spousal maintenance shall terminate upon the death of either spouse. The spousal maintenance shall terminate upon the remarriage of the Respondent. Otherwise, the spousal maintenance is not modifiable.* (My emphasis).

3.14. OTHER

3.14.1 The parties have agreed to this decree of dissolution and the related findings of fact and conclusions of law, final parenting plan and the final order of child support as part of an agreement to resolve the marriage dissolution *and these final pleadings create a contract between the parties.* Rather than obtaining temporary orders, the parties have agreed that their agreement shall be effective as of the dates set forth in the pleadings and that they have thus agreed to temporary child support, spousal maintenance and debt and property issues. (My emphasis).

In the Findings and Decree, the parties clearly addressed the consideration for why spousal maintenance would last until the parties died or Janice remarried.

The language in the parties' Findings and Decree, as to why spousal maintenance would be nonmodifiable, parallel the factors to be considered by a trial court when it considers the awarding of spousal maintenance pursuant to RCW 26.09.090:

1. Janice did not work during the marriage.
2. Janice remained at home with the children.
3. Marty was able to pursue his career.
4. Janice did not build up retirement benefits.
5. Janice reduced her earning potential by staying home with the children.
6. Janice did not develop job skills.
7. Marty was able to spend extra time and efforts on his career.
8. Marty now earns a significant income.

CP 14.

Based upon the above reasons, Marty agreed to pay spousal maintenance to Janice as follows:

1. \$1,100 per week.
2. The monthly total is \$4,766.67.

3. Spousal maintenance terminates when Janice remarries or when either of the parties die.

CP 31.

Marty and Janice agreed that she was in need of \$1,100 per week as spousal maintenance and that that obligation would not end until Janice remarried or one of the parties died. This agreement was written down in both the parties' Findings and Decree and both parties signed Verifications that they had read the terms of the divorce documents and that they agreed with them.

As stated in *Marriage of Glass*, Marty had an obligation to object to the terms of the Decree before it was entered. Rather he has pursued what the court in *Marriage of Glass* proscribed, a challenge to the Decree made years later as part of a modification proceeding, the net effect of which is to render RCW 26.09.070(3) and (7) meaningless.

2. Marty Failed to Prove a Substantial Change of Circumstances

Assuming that *Marriage of Glass* does not control and that Marty wants to reduce his spousal maintenance obligation, he is only able to do so upon a showing of a change of circumstances from the date that the Decree was entered:

The provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for

modification and only upon a showing of a substantial change of circumstances.

RCW 26.09.170

Marty has the burden of proving that unforeseeable circumstances have arisen since the Decree was entered which should relieve him of his obligation to pay nonmodifiable spousal maintenance:

A court may modify a maintenance award when the moving party shows a substantial change in circumstances that the parties did not contemplate at the time of the dissolution decree. Cases cited. The phrase 'change in circumstances' refers to the financial ability of the obligor spouse to pay vis-à-vis the necessities of the other spouse.

In re Marriage of Spreen, 107 Wn. App. 341,346, 28 P.3d 769 (2001).

Marty has totally failed to meet his burden of proof so far as proving a substantial change of circumstances. He has not shown that his income has decreased. In fact, his available, disposable income has increased dramatically with his marriage to Holly. Marty is in good health, a senior supervisor at the Port of Tacoma making a very good income.

The change in circumstances that Marty has argued to the court is that he should not have to continue to work more than 40 hours per week. However, his work schedule was foreseeable when the Decree was

entered. Marty had to know he would get older as each year passed and therefore, the demands of his job on his body were to be anticipated.

Prior counsel for Marty misled the court when she argued that the *White*(sic) decision prohibited the court from making a person work more than 40 hours a week and accordingly, it was unreasonable for Marty to work as much as he was at the Port..

Such was not the ruling of the court. The court in *In re Marriage of Wayt*, 63 Wn. App. 510, 514, 820 P.2d 519 (1991) addressed whether or not child support should be based upon non-recurring overtime:

To include this additional income, which is earned by working over and above his normal hours to provide for his current family's needs and to retire past debts ignores the reality commonplace in our society of remarriage and the concomitant obligations it creates. To include in Mr. Wayt's overtime earnings under these circumstances would be punitive. Further as the court found, Mr. Wayt's overtime will cease when he has paid off his debts.

Wayt, p. 514.

It should be noted from the outset, the contrary to what counsel argued to Commissioner Gelman and Judge Cuthbertson, there is not a single mention of the *Wayt* court not requiring a person to work more than 40 hours per week. Rather, the court ruled that nonrecurring income

should not be used in determining gross income for child support purposes.

From this child support modification case which makes reference to the Washington State Child Support Schedule and the determination of “gross income” Marty has tried to argue that by analogy the same considerations made for Mr. Wayt should be made for him. However, there are differences that need to be considered.

First, Marty has worked long hours at the Port for more than 20 years. Marty is a supervisor and is able to work as many hours as he wants. His work will not dry up when his debts are paid off as was the case with Mr. Wayt.

This court should not conclude that there has been a decision by any court in this jurisdiction that has said that an obligor is only required to work a 40 hour work week as stated by Marty’s prior counsel.

3. Judge Cuthbertson Erred by Permitting Marty to Address the Court Regarding His Income.

At the hearing before Judge Cuthbertson, Marty’s attorney asked him questions as part of her oral argument to the bench. Marty was permitted to answer those questions which pertained to his ability to pay his spousal maintenance agreement: During oral argument, Marty’s attorney turned to

him sitting in the benches of Judge Cuthbertson's court and made the following, unsworn, inquiry of her client:

MS. KIESEL: Physically Marty, what are you doing?

MR. HULSCHER: Shift foreman, loading them, moving cargo. I'm on the vessel mostly.

THE COURT: OK, all right...

....

MS. KIESEL: My client, as I recall, always paid the tuition.

MR. HULSCHER: I didn't pay last year, but there was enough money in the credit union to pay most of it.

....

MS. KIESEL: What's your rate?

MR. HULSCHER: For 10 hours, which is eight hours straight time, 457, Monday through Friday and two hours overtime.

RP 18-20.

Marty's unsworn, testimony went to the issue of his earnings and his ability to pay his spousal maintenance. Janice's attorney correctly observed:

What we are doing today isn't the appropriate procedure and today's hearing kind of exemplifies that because your hearing Mr. Hulscher speak from the back, your hearing counsel state facts which may or may not be

accurate. You are not getting the true story in this hearing procedure today, so there's going to be a change. You know, it has to be done by trial and Short says that.

RP 26.

It was error for Judge Cuthbertson to allow Marty to testify at this hearing. Janice's attorney had no opportunity to cross examine Marty nor was her attorney able to call Janice as a witness.

Janice's attorney was correct when he stated that Judge Cuthbertson was not getting the truth at this hearing. Marty's attorney clearly misrepresented the court in *Wayt*.

IV. CONCLUSION

The issue in this appeal is straightforward: does the language in Marty and Janice's Findings and Decree constitute a separation agreement for purposes of creating a nonmodifiable spousal maintenance obligation?

The *Marriage of Glass* case and the *Washington Practice* texts agree that it does. Only a strained reading of *In re Marriage of Short* leads to a contrary conclusion.

Commissioner Gelman made a mistake when he ruled that “*Marriage of Short* and RCW 26.09.070(7) require a separate document.” CP 374. This mistake was approved by Judge Cuthbertson and served as the means

by which he drastically reduced the amount and the duration of the spousal maintenance that Marty earlier had agreed to pay to Janice.

Judge Cuthbertson did not detail the facts upon which he relied to modify the earlier ruling of Commissioner Gelman. Rather than an 8 year tapering of maintenance as determined by Commissioner Gelman, Judge Cuthbertson reduced the term of maintenance to two years.

Judge Cuthbertson erroneously concluded that Janice has income from two rental properties. There are no facts in the record to substantiate income from these properties. Janice had debt from these two properties as the rent charged is less than the mortgages that need to be paid.

Judge Cuthbertson erroneously concluded that Janice has \$200,000 in the bank. This is not the case as much of the proceeds from the sale of the family home was used in the replacement home in which she currently resides. These proceeds are also being used by Janice to meet her monthly living expenses.

Judge Cuthbertson erred when he reduced Martin's nonmodifiable spousal maintenance obligation. The trial court failed to set forth the facts upon which its opinion was based. The trial court erred in his interpretation of *Marriage of Short* and RCW 26.09.070(7). That case and that statute prohibit a trial court from ordering nonmodifiable spousal maintenance.

The parties are free to negotiate any terms they choose in order to reach an agreed dissolution of marriage. The *Marriage of Glass* court correctly noted that the terms of a separation agreement can be included in the Findings and Decree and that a separate document is not necessary.

It is respectfully requested that this court overturn Judge Cuthbertson's opinion and reinstate the terms of the Findings and Decree to which the parties originally consented.

Respectfully submitted this 4th day of June, 2007

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Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II

07 JUN -4 AM 11:11

STATE OF WASHINGTON

BY *[Signature]*
DEPUTY

No. 35157-9-II

WASHINGTON STATE COURT OF APPEALS – DIVISION II

JANICE HULSCHER,
Appellant,

vs.

MARTIN HULSCHER,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2007 at 11:00 a.m.. that, pursuant to RAP 5.4(b), I personally delivered a true and correct copy of Brief of Appellant in the above cause of action to Carol Cooper at Davies Pearson located at 920 South Fawcett, Tacoma, Washington 98402.

DATED this 4th day of June, 2007.

LAW OFFICE OF F. MICHAEL MISNER

By: *F. Michael Misner*
F. Michael Misner, WSBA# 5742
Attorney for Appellant