No. 35297-4-II

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

In re the Marriage of:

MARCEIL J. MULLAN,

Appellant,

vs.

FREDERICK A. MULLAN,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
07 JUN -1 PM 12: 03
STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE KATHRYN J. NELSON

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie Villacin
WSBA No. 34515

1109 First Avenue
Suite 500
Seattle, WA 98101
(206) 624-0974

JEFFREY A. ROBINSON,
P.S.

By: Jeffrey A. Robinson
WSBA No. 8294

4700 Point Fosdick Drive NW
Suite 301
Gig Harbor, WA 98335-1706
(253) 851-5126

Attorneys for Respondent/Cross-Appellant

TABLE OF CONTENTS

I. REPLY ARGUMENT 1

A. The Trial Court Could Not Modify Maintenance Once The Husband's Maintenance Obligation Terminated. 1

B. Even If The Trial Court Could Modify Maintenance, The Trial Court Could Not Retroactively Modify Maintenance To The Period Before The Wife Filed Her Petition To Modify. 4

II. CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Bowman v. Bowman, 77 Wn.2d 174, 459 P.2d 787 (1969) 4, 5

Brown v. Brown, 8 Wn. App. 528, 507 P.2d 157 (1973) 1, 3

Chase v. Chase, 74 Wn.2d 253, 260, 444 P.2d 145 (1968) 5

Marriage of Drlik, 121 Wn. App. 269, 87 P.3d 1192 (2004) 4

Marriage of Mason, 48 Wn. App. 688, 740 P.2d 356, *rev. denied*, 109 Wn.2d 1012 (1987) 4, 6

Marriage of McCausland, 129 Wn. App. 390, 118 P.3d 944 (2005), *review on unrelated grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007) 4, 6

Mason v. Mason, 40 Wn. App. 450, 698 P.2d 1104, *rev. denied*, 104 Wn.2d 1017 (1985) 1

State v. Bakalov, 979 P.2d 799 (Utah S.C., 1999) 2

State v. Curmon, 171 N.C. App. 697, 615 S.E.2d 417 (2005) 2

STATUTES

RCW 26.09.170 4

RULES & REGULATIONS

RAP 12.8 ..... 4, 6

I. REPLY ARGUMENT

The trial court made one of two errors in this case, requiring this court to reverse the trial court's order and remand with directions to order the wife to pay restitution for the amounts the husband overpaid in maintenance. First, the trial court erred by denying the husband's motion to dismiss the wife's petition for modification because it was filed five months *after* maintenance terminated. Alternatively, the trial court erred by retroactively modifying the husband's maintenance obligation for the five-month period *prior* to the wife filing her petition.

A. The Trial Court Could Not Modify Maintenance Once The Husband's Maintenance Obligation Terminated.

The trial court loses jurisdiction to modify spousal maintenance once maintenance terminates. ***Brown v. Brown,*** 8 Wn. App. 528, 530, 507 P.2d 157 (1973); ***Mason v. Mason,*** 40 Wn. App. 450, 457, 698 P.2d 1104, *rev. denied*, 104 Wn.2d 1017 (1985) (*See* Cross-App. Br. 14). In this case, the trial court erred by failing to dismiss the wife's petition to modify the husband's maintenance obligation, which was filed five months after the husband's maintenance obligation terminated. (*See* CP 15, 21, 242-44)

The husband's maintenance obligation to the wife was not "indefinite," as the wife claims. (Cross-Resp. Br. 6) The original decree of dissolution and findings of fact entered in February 1998 awarded spousal maintenance to the wife "until the Respondent is age sixty-five (65) *or earlier* upon his retirement." (FF 2.12, CP 4, 15) (emphasis added)) Contrary to the wife's assertion, it makes no difference that the husband had not yet retired at age 65. (Cross-Resp. Br. 3) While the order discontinues maintenance if the husband retires *before* age 65, it does not extend maintenance if the husband retires *after* age 65. Therefore, once the husband reached age 65, his maintenance obligation terminated.

After the husband reached age 65, the court only "recommend[ed]" that maintenance continue at "one-half of Respondent's social security benefit, offset by one-half of Petitioner's social security benefit, if any." (FF 12, CP 4, 15) A "recommendation" by the trial court is not a binding order and did not serve to extend the husband's maintenance obligation. *See* ***State v. Curmon***, 171 N.C. App. 697, 704, 615 S.E.2d 417 (2005); ***State v. Bakalov***, 979 P.2d 799, 822, ¶ 75 (Utah S.C., 1999) (Cross-App. Br. 15-16). Despite the wife's attempt to distinguish these cases (Cross-Resp. Br. 14-15), she provides no contrary

authority to support her position that a court's "recommendation" is a binding order that extended maintenance. Therefore, once the husband reached age 65, maintenance terminated and the trial court lost jurisdiction to modify spousal maintenance when the wife filed her petition for modification five months after maintenance terminated.

Even if the court's "recommendation" was intended as "guidance" to the parties in how to recalculate maintenance in the future as the wife claims (Cross-Resp. Br. 10), it did not extend the husband's obligation to pay maintenance without further court order. The burden was on the wife to petition to modify maintenance to adopt the trial court's "recommendation" as binding before the maintenance obligation terminated when the husband reached age 65. The wife's failure to do so "forever extinguished" any right to maintenance from her former husband. ***Brown***, 8 Wn. App. at 530.

Because the trial court did not have jurisdiction to modify the maintenance award after the obligation terminated in the original decree, this court should vacate the trial court's order modifying maintenance. (CP 215) On remand, this court should direct the trial court to order restitution to the husband for amounts he

overpaid for spousal maintenance after his 65th birthday. *See* RAP 12.8; ***Marriage of McCausland***, 129 Wn. App. 390, 118 P.3d 944 (2005), *review on unrelated grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007); ***Marriage of Mason***, 48 Wn. App. 688, 692-93, 740 P.2d 356, *rev. denied*, 109 Wn.2d 1012 (1987) (Cross-App. Br. 16-17).

B. Even If The Trial Court Could Modify Maintenance, The Trial Court Could Not Retroactively Modify Maintenance To The Period Before The Wife Filed Her Petition To Modify.

Even if the trial court had jurisdiction to modify maintenance, the trial court erred by retroactively modifying the husband's maintenance obligation. A court may only modify maintenance as to installments accruing subsequent to the petition for modification. RCW 26.09.170; ***Marriage of Drlik***, 121 Wn. App. 269, 279, 87 P.3d 1192 (2004) (*See* Cross-App. Br. 17-18). In this case, the trial court erred by modifying maintenance for the five-month period before the wife filed her petition for modification.

Bowman v. Bowman, 77 Wn.2d 174, 459 P.2d 787 (1969) does not support wife's claim that the trial court did not impermissibly modify spousal maintenance retroactively. (Cross-Resp. Br. 17-18) In fact, it does just the opposite. In ***Bowman,*** the

trial court modified maintenance effective on the date the former wife filed her petition. The Supreme Court affirmed the trial court's order, acknowledging that the trial court had authority to modify maintenance as of the date the wife filed her petition but that it could not modify maintenance retroactively:

> In a situation warranting modification of child support or alimony, the court may make the modification effective either as of the time of filing the petition or as of the date of the decree of modification, or as of a time in between, *but it may not modify the decree retroactively*.

Bowman, 77 Wn.2d at 177 (*quoting* ***Chase v. Chase,*** 74 Wn.2d 253, 260, 444 P.2d 145 (1968), superseded by statute on other grounds as stated in ***Marriage of Hughes***, 69 Wn. App. 778, 781-82, 850 P.2d 555 (1993)) (emphasis added).

In this case, the trial court did exactly what the ***Bowman*** Court held was prohibited by modifying maintenance retroactively. The trial court modified spousal maintenance commencing June 2005 – five months before the wife filed her motion – establishing a maintenance obligation of $1,300 for the months of June, July, August, September, and October. (CP 215) This it could not do.

Between June and October, no maintenance was owed because if *any* maintenance was owed during this period, it was

based on the original court's "recommendation" that maintenance be set at one-half of the husband's Social Security benefit, offset by one-half of the wife's Social Security benefit. (CP 15) Since the husband did not receive Social Security until January 2006 (6/30 RP 73), there could have been no maintenance obligation owed between June and October 2005.

This court should reverse the trial court's order modifying the husband's maintenance obligation prior to October 26, 2005, the date the wife filed her motion to modify. On remand, this court should direct the trial court to order the wife to pay $6,500 in restitution to the husband for the amounts he overpaid for spousal maintenance after his 65th birthday and prior to the wife filing her petition for modification. *See* RAP 12.8; ***McCausland***, 129 Wn. App. at 417-18, ¶ 77; ***Mason***, 48 Wn. App. at 692-93.

II. CONCLUSION

This court should reverse the trial court's order denying the husband's motion to dismiss, vacate the orders modifying his spousal maintenance obligation, and remand to the trial court with directions to order restitution to the husband for any maintenance paid after his 65th birthday. In the event this court affirms the trial court's order denying the husband's motion to dismiss, this court

should reverse the trial court's order modifying maintenance for the period before the wife filed her petition to modify. This court should also direct the trial court on remand to award the husband $6,500 in restitution from the wife for the amounts he overpaid spousal maintenance.

Dated this 31st day of May, 2007.

EDWARDS, SIEH, SMITH & GOODFRIEND, P.S.

By: _____
Catherine W. Smith
WSBA No. 9542
Valerie Villacin
WSBA No. 34515

JEFFREY A. ROBINSON, P.S.

By: _____
Jeffrey A. Robinson
WSBA No. 8294

Attorneys for Respondent/Cross-Appellant

FILED
COURT OF APPEALS
DIVISION II

DECLARATION OF SERVICE

07 JUN -1 PM 12: 03
STATE OF WASHINGTON
BY _____
DEPUTY

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

That on May 31, 2007, I arranged for service of the foregoing Reply Brief of Respondent/Cross-Appellant, to the court and counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	___ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mail
Jeffrey A. Robinson Attorney at Law 4700 Point Fosdick Drive NW, Suite 301 Gig Harbor, WA 98335-1706	___ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mail
James M. Caraher James M. Caraher & Associates 4301 So. Pine St., Suite 543 Tacoma, WA 98409	___ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mail

DATED at Seattle, Washington this 31st day of May, 2007.

Tara M. Holland

Tara M. Holland