

FILED
COURT OF APPEALS
DIVISION II

10 OCT 22 PM 12:04

STATE OF WASHINGTON

BY
DEPUTY

No. 40428-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

MICHAEL WELLS

RESPONDENT

v.

MICHELLE (WELLS) HELLAND

APPELLANT

RESPONDENT'S REPLY

JONATHAN L. MEYER
Attorney for Appellant, WSBA #28238

McConnell, Meyer & Associates, LLP
207 West Main
Centralia, WA 98531



ORIGINAL

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TABLE OF AUTHORITIES

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Washington Appellate Deskbook, Volume I. . . . 6

I. IDENTITY OF RESPONDENT

The Respondent¹, MICHAEL WELLS, respectfully requests that this court deny the Petitioner's attempt to reverse the Judge's ruling when he revised the Court Commissioner's ruling in this matter.

II. STATEMENT OF THE CASE

On May 3, 2000, Judge David Draper² of the Lewis County Superior Court granted a Decree of Dissolution in this matter after a trial was held. CP1, 59-64. In that Decree, Judge Draper granted maintenance for a period of 15 years, but allowed for modifications. CP1, 63.

Pursuant to that clause, Respondent brought a motion seeking to terminate the maintenance obligation based upon extraordinary medical needs of the Respondent. CP2, 236-259. As part of that Motion, is the transcript of the original decision by Judge Draper. In that decision, Judge Draper

¹ For ease of argument, Respondent, Michael Wells will be referred to as "respondent" and Appellant, Michelle Wells, will be referred to as "appellant."

² Judge David Draper has since retired from the bench.

specifically allows the modification to "...work either way if the husband suffers some disability or decrease of pay..." CP2³, 253, lines 6-8.

This medical need was substantiated by a letter from UW Medicine. CP3,447-450. As a result of the extraordinary medical needs of the Respondent, the respondent was no longer able to work. CP2, 233-235. The respondent was eventually placed on a heart transplant list. CP3, 447-450. As a result of the Respondent's medical condition, a Motion to terminate was brought by the Respondent. CP2, 236-259. A hearing was held and, eventually, maintenance was reduced to \$750 per month and is the basis for the appeal in this matter.

III. ARGUMENT

For ease of argument, Respondent will address the issues raised by Appellant in the same order as addressed in Appellant's brief. In doing so, Respondent intends to show that the Superior

³ The number directly following "CP" identifies the volume referred to.

Court's decision in this matter should be affirmed.

A. STANDARD OF REVIEW

"On a revision motion, a trial court reviews a commissioner's ruling de novo based on the evidence and issues presented to the commissioner... When an appeal is taken from an order denying revision of a court commissioner's decision, we review the superior court's decision, not the commissioner's.⁴" Courts "... review a modification of the decree for abuse of discretion.⁵" "Where the decision of the trial court is a matter of discretion (e.g. ...support and custody awards...) the decision will not be disturbed on review except on a clear showing of abuse of discretion...⁶"

⁴ *Williams v. Williams*, 156 Wn.App. 22, 232 P.3d 573 (2010); other citations omitted.

⁵ *In re Marriage of Michael*, 145 Wn.App 854, 859, 188 P.3d 529 (2008); citing *Stokes v. Polley*, 145 Wash.2d 341, 346, 37 P.3d 1211 (2001); *In re Marriage of Holmes*, 128 Wash.App. 727, 734-36, 117 P.3d 370 (2005).

⁶ Washington Appellate Deskbook, Volume I, page 3-18; citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

B. "Did the Trial court error (sic) when it found Petitioner's expenses continued on as before his disability when no evidence was presented?"

This first issue presented to the court by the Petitioner shows a clear lack of understanding of the definition of evidence. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence."⁸

The Respondent in this matter signed, under penalty of perjury, his Financial Declaration. Counsel at the time for Appellant referred to the document throughout her argument. RP1⁹, 5, 6; RP2, 7. Simply because Appellant's counsel at the

⁷ These heading are directly quoted from Appellant's brief and are used to outline Respondent's argument.

⁸ ER 401.

⁹ "RP1" Refers to the Report of Proceedings in front of Commissioner Mitchell. "RP2" refers to the proceedings held in front of Judge Lawler.

time¹⁰ did not agree with the evidence presented does not make it any less "evidence." Counsel at the time for Appellant could have chosen to attempt to disprove the evidence or presented evidence to the contrary, but chose not to do so. RP2,12. If Appellant's counsel at the time failed to prove the case she thought existed, that is not the fault of the Respondent.

Counsel at the time for Appellant then goes on to argue that there is no proof of Respondent's disability. One need look no further than her own argument to see that such is not the case. Counsel at the time for Appellant stated "[h]e's got a medical hardship." RP2, 6. In addition, there was a letter from UW Medicine. CP3, 447-450. Finally, there was a letter from Respondent's physician, but that document was not listed as a Clerk's Paper by Appellant¹¹.

¹⁰ The phrase "at the time" is used because the counsel the was at the hearing has since been suspended for a period of six (6) months and new counsel substituted in.

¹¹ See attached Document A.

Counsel at the time for Appellant then argues that now information required by the court was produced. Such is not the case. If counsel at the time for Appellant believed that the required information was not provided, she could have requested that the hearing be stricken for failure to comply or, perhaps, even a Motion for Contempt. Either way, neither was done.

Counsel at the time for Appellant also argues that she was not given the chance to argue certain facts because they were addressed on rebuttal. First, even if such were true, there was no request to address additional information that was presented, she did not file a Motion for Reconsideration, she did nothing to attempt to remedy any perceived unfairness.

C. "Can the trial court fail to consider all factors in the statute and applied only the need v. ability to pay standard when making a determination on a motion to modify the maintenance."

Again, there seems to be a misperception by Appellant's counsel at the time of the hearing. There was not a failure to consider all of the factors. There was adherence to the factor relied on by the trial judge that originally heard this matter. CP2, 253. In addition, counsel at the time for Appellant argued only need/ability argument. The court is not required to protect the Appellant from herself.

Counsel at the time for appellant argues in her brief that "...once the court finds a change in circumstances warranting a modification, 'the issues of amount and duration are the same as in the original dissolution.'" Appellant's Opening Brief, Page 16; citation omitted. Counsel then argues that, because the issue of a change in circumstances need not be addressed, we need only look at amount and duration. *Id.* Such is not the

case. The trial court did away with the change of circumstance requirement. The original court considered need/ability, the Commissioner considered need/ability, and the Superior Court Judge considered need/ability and Appellant's counsel **NEVER** argue any other factors to be considered.

D. "Can the trial court conclude Petitioner's ability to continue maintenance has been hindered when he has a significant number of assets from which to draw.[sic]"

Appellant's counsel at the time argue, again, that the evidence was such that the Revision should have been denied. Judge Lawler ruled that the reduction was appropriate given the medical situation of the Respondent and the fact that he did not believe that the Respondent should be required to spend his savings account. RP2, 14-15.

E. "Without considering all factors in the statute, can the court conclude Respondents [sic] needs could be met after a reduction n maintenance of more than 50%. [sic]"

Appellant's counsel at the time again argues that she was not given the opportunity to respond to argument made by Respondent's counsel. As Respondent was the moving party, he had the opportunity to speak last. Regardless, counsel at the time never asked for additional argument, never requested a Reconsideration, nothing. If counsel at the time wanted other things considered (i.e. emotional and physical condition) such things should have been argued. See Appellant's Opening Brief, page 20.

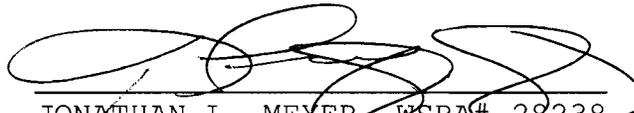
There was not an abuse of discretion by the judge. Rather, it was a decision that Appellant did not agree with. There is a difference and the judge's ruling should be affirmed.

IV. CONCLUSION

Respondent has not addressed the attorney's fees section of Appellant's brief. That issue was not revised, nor was it appealed. Therefore, a response to the argument, much like the argument in Appellant's brief, would simply waste this court's time.

Appellant is not happy with the outcome. While that may be the case, it does not form a justifiable basis upon which to reverse the court's decision. Despite arguments to the contrary, the Judge was correct in his revision of the Court Commissioner. As a result, the court's ruling should be affirmed.

Respectfully submitted this 22nd day of October, 2010.



JONATHAN L. MEYER, WSBA# 28238
Attorney for Appellant

EXHIBIT A

COPY

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Rec'd & Filed
Lewis County Superior Court
JUN 11 2009
Kathy A. Brack
Lewis County Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

In re the Marriage of:)	
MICHAEL WELLS,)	No. 98-3-00051-3
)	DECLARATION OF
Petitioner,)	ROGER CHAN, M.D.
)	
and)	
MICHELLE WELLS (HELLAND),)	
)	
Respondent.)	

I, ROGER CHAN, M.D., declare and state as follows:

I make this declaration to inform the court of the medical condition of my patient MICHAEL WELLS. Mr. WELLS has been under my care in December, 2008 for his non-ST evaluation myocardial infarction (heart attack).

On December 5, 2008, I performed cardiac catheterization. This procedure showed that he had a depressed left ventricular ejection fraction of 33%. He had total occlusion of all three (3) of his native coronary arteries. Of his bypass vessels, the radial graft to his obtuse marginal appeared to be severely diseased and not

DECLARATION OF
ROGER S. CHAN, M.D.
Page - 1

McCONNELL, MEYER & ASSOCIATES, L.L.P.
ATTORNEYS AT LAW
207 WEST MAIN STREET
CENTRALIA, WA 98531
PHONE (360)736-9736
FAX (360)736-2904
OLYMPIA NUMBER (360)543-9557

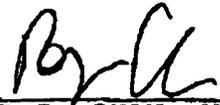
1 amenable to intervention.

2 An attempt was made to open his chronically occluded
3 native right coronary artery on December 9, 2008. However,
4 this was not successful and Mr. WELLS remains with severe
5 diffuse coronary artery disease that has not been
6 revascularized. As a result, he does have at least class 3,
7 and likely class 4, angina with episodes of chest pain with
8 minimal to moderate exertion. He continues to have depressed
9 left ventricular function. He is currently being evaluated
10 by the University of Washington cardiac transplant service
11 for heart transplantation in the future.

12 Based upon the above medical findings, I do not believe
13 that Mr. WELLS is able to return to work. I believe he is
14 disabled at least until cardiac transplantation can be
15 performed, as he is likely to continue to have severe chest
16 pain with minimal to moderate exertion until such
17 transplantation is performed.

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

21 Signed at Olympia, Washington on this 10 day of June,
22 2009.

23 
24 _____
25 ROGER S. CHAN, M.D.,
26 Declarant

DECLARATION OF
ROGER S. CHAN, M.D.
Page - 2

McCONNELL MEYER & ASSOCIATES, L.L.P.
ATTORNEYS AT LAW
207 WEST MAIN STREET
CENTRALIA, WA 98531
PHONE (360)736-9736
FAX (360)736-2004
OLYMPIA NUMBER (360)943-9557

10 OCT 22 PM 12:04

STATE OF WASHINGTON

BY _____
DEPUTY

7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THE COUNTY OF LEWIS**

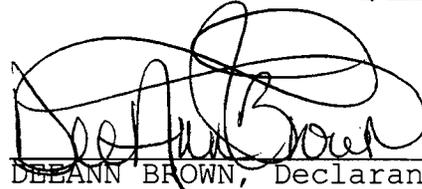
9	In re the Marriage of:)	
)	No. 98-3-00051-3
10	MICHAEL WELLS,)	
)	DECLARATION OF DEEANN
11	Petitioner,)	BROWN IN COMPLIANCE
)	WITH GR 17 (2)
12	and)	
)	
13	MICHELLE WELLS (HELLAND),)	
)	
14	Respondent.)	

15 I, DEEANN BROWN, declare and state as follows:

16 I have examined the foregoing Declaration of ROGER
17 CHAN, M.D., consisting of three (3) pages, including this
18 declaration page, and attest that it is complete and legible.

20 I declare under penalty of perjury under the laws of
21 the state of Washington that the foregoing is true and
22 correct to the best of my knowledge.

23 Signed at Centralia, Washington on this 10 day Of
24 June, 2009.

25 

26 _____
DEEANN BROWN, Declarant

McCONNELL, MEYER & ASSOCIATES, L.L.P.
ATTORNEYS AT LAW
207 WEST MAIN STREET
CENTRALIA, WA 98531
PHONE (360)736-9736
FAX (360)736-2004

COURT OF APPEALS
DIVISION II
10 OCT 22 PM 12:04
STATE OF WASHINGTON
BY _____
DEPUTY

No. 40428-1-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:)
MICHELLE WELLS) Declaration of Fax/Mailing/Email
Respondent)
and)
MICHAEL WELLS)
Appellant)

The undersigned is now and at all times herein mentioned was a citizen of the United States and a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness therein.

I declare that on October 22, 2010, I faxed, deposited in the U.S. Mail, postage prepaid, properly addressed envelope and emailed a true and correct original copy of the Respondent's Reply and this Declaration Service to the following:

Matthew Hale
Attorney at Law
Post Office Box 51008
Seattle, WA 98115
Fax# 206-397-2582

Signed at Centralia, Washington, on the 22nd day of October, 2010.

Amber Farkas
AMBER FARKAS, Declarant
Legal Assistant for JONATHAN L. MEYER



ORIGINAL

DECLARATION OF FAX AND MAILING - 1

MCCONNELL, MEYER & ASSOCIATES, L.L.P.
ATTORNEYS AT LAW
207 WEST MAIN STREET
CENTRALIA, WA 98531
PHONE (360)736-9736
FAX (360)736-2004

OLYMPIA NUMBER (360)943-9557