

No. 44814-9-II

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

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In re the Marriage of:

NISHAT KHAN,

Appellant

and

AZAD KHAN,

Respondent

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
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**REPLY BRIEF OF THE APPELLANT**

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## ARGUMENT

It is undisputed that Mr. Khan owes an ongoing duty of financial support to Ms. Khan. The outcome of this appeal will determine whether a second, wasteful lawsuit will be required for Ms. Khan to enforce her uncontested right to financial support.

**I. IT IS UNDISPUTED THAT THE TRIAL COURT APPROPRIATELY AWARDED MAINTENANCE BASED ON THE I-864 – ONLY THE DURATION OF THAT SUPPORT IS AT ISSUE.**

The trial court awarded spousal maintenance in this case only because of Mr. Khan’s I-864 support obligations. Conclusion of Law 3.8.7 (“Under Washington law there would not be an order for spousal maintenance...”). The trial court also found that the I-864 support obligations terminate upon one of the five excusing conditions set forth in the I-864 contract.<sup>1</sup> Finding of Fact 2.21.20-21. Yet in the appeal at bar Mr. Khan has challenged neither of these propositions. See RAP 5.1(d); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202 (2000) (“Failure to cross-appeal an issue generally precludes its review on

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<sup>1</sup> Mr. Kahn concedes that Finding of Fact 2.21.20 should specify that becoming a *U.S. citizen*, rather than permanent resident, is the terminating event for support obligations. Response Brief at 5, n. 3.

appeal”). Mr. Kahn is therefore left to defend the following untenable position: that the trial court was correct to use spousal maintenance as a vehicle to ensure Ms. Khan receives support under the I-864, yet that the court was free to arbitrarily limit the duration of that support without regard to the only five legal events that terminate I-864 support. Other state appeals courts have properly held that it is impermissible for a family law court to arbitrarily limit the duration of maintenance derived from an I-864 obligation. *In re Marriage of Kamali*, 356 S.W.3d 544, 547 (Tex. App. Nov. 16 2011) (holding that trial court erred in limiting payments to an “arbitrary” 36-month period).

**II. Mr. KHAN AGREES HE HAS AN ONGOING SUPPORT DUTY – THE ONLY ISSUE IS WHETHER A SEPARATE LAWSUIT IS REQUIRED TO ENFORCE THAT DUTY.**

Mr. Khan appropriately concedes that he has a continuing duty of financial support to Ms. Khan, which ends only upon one of the five terminating events described in the I-864. *See* Response Brief at 5-6, 10. Mr. Khan suggests that, should he fail in his support obligations, Ms. Kahn may seek enforcement, presumably via a separate lawsuit. *Id.* at 10. This invites a spectacularly inefficient use of judicial resources and the

limited resources of the parties. The court below recognized that it was appropriate to order maintenance based on the I-864. Conclusion of Law 3.8.7. This Court should correct the artificially limited duration of that support, based on the undisputed understanding of when that support terminate (i.e., the five terminating events set forth in the I-864). Doing so will allow Ms. Khan to make efficient use of the enforcement mechanisms available for spousal support orders. If Ms. Khan is denied the relief requested she will be forced to bring a separate lawsuit against Mr. Khan for the support he concedes to this Court that he is obligated to provide. Such inefficiency is absurd.

**III. Ms. KHAN MAY BE PREJUDICED IF HER RIGHTS ARE NOT ADJUDICATED IN THE CASE AT BAR.**

Mr. Khan impliedly asserts that Ms. Khan could enforce her I-864 rights in a separate contractual cause of action. *See* Response Brief at 10. But it remains an unsettled legal issue whether an I-864 beneficiary may face claim preclusion in a subsequent contract action, where her I-864 rights were partially adjudicated in a dissolution proceeding. *See Chang v. Crabill*, No. 1:10 CV 78, 2011 U.S. Dist. LEXIS 67501 (N.D. Ind. June 21, 2011) (suggesting in dicta that res judicata could bar subsequent action). Moreover, although the I-864 is a contract created by federal

statute it is *not* settled whether Ms. Khan could pursue enforcement in a federal court. Absent diversity, a federal court may lack subject matter jurisdiction, on the view that her lawsuit would sound in contract law rather than a federal cause of action. *See, e.g., Vavilova v. Rimoczi*, 6:12-cv-1471-Orl-28GJK, 2012 U.S. Dist. LEXIS 183714 (M.D. Fla. Dec. 10, 2012) (holding that the court lacked subject matter jurisdiction over an I-864 contract action against a sponsor); *Winters v. Winters*, No. 6:12-cv-536-Orl-37DAB, 2012 U.S. Dist. LEXIS 75069 (M.D. Fla. Apr. 25, 2012) (same). Additionally, the *Rooker-Feldman* could prevent a federal court from entertaining Ms. Khan's lawsuit after a state family law court has already considered the matter. *See, e.g., Mathieson v. Mathieson*, No. 10-1158, 2011 U.S. Dist. LEXIS 44054, at \*5 (W.D. Penn. Apr. 25, 2011). Similarly, a federal court could determine that other abstention doctrines prevent Ms. Khan from enforcing her rights in that forum. *See, e.g., Pavlenco v. Pearsall*, No. 13-CV-1953 (JS)(AKT), 2013 WL 6198299 (E.D.N.Y. Nov. 27, 2013) (analyzing *Younger* and *Colorado River* abstention with respect to plaintiff's I-864 claim, and determining the latter doctrine warranted a stay of the federal action).

While Ms. Khan does not concede that she would be barred from maintaining a subsequent enforcement action, it is clear that Mr. Khan will

be able to assert non-frivolous arguments that such an action cannot proceed.

**IV. Ms. KHAN HAS NO DUTY TO PURSUE U.S. CITIZENSHIP.**

Mr. Khan cites to the lower court's oral statement that suggests Ms. Khan owes a legal duty to pursue U.S. citizenship, Response Brief at 3, however she owes no such duty. Lawful permanent residents, such as Ms. Khan, have the right to reside indefinitely in the United States. 8 U.S.C. § 1101(a)(20). Permanent residency is a prerequisite to naturalization (the process of becoming a citizen), 8 U.S.C. § 1429, but permanent residents are not required to pursue U.S. citizenship. Indeed, many factors may influence a permanent resident's choice of whether to pursue citizenship. Most notably, because the federal constitution of India does not permit dual citizenship, Ms. Khan would have to forfeit the citizenship of her home country if she elected to naturalize as a U.S. citizen. CONST. OF INDIA, ART. 9 ("No person shall be a citizen of India by virtue of article 5, or be deemed to be a citizen of India by virtue of article 6 or article 8, if he has voluntarily acquired the citizenship of any foreign State"). Again, she is under no obligation to relinquish her rights

as an Indian citizen, and may choose to live the remainder of her life as a U.S. permanent resident.

**V. Mr. KHAN'S CITATIONS TO THE LOWER COURT'S ORAL STATEMENTS ARE IN INAPPROPRIATE.**

Where a Superior Court's oral statements are reduced to a written order, it is the writing – not the oral statements – that govern the law of the case. *State ex rel. Jensen v. Bell*, 34 Wash. 185, 189 (1904) (“when the court signs a written order, it shall be considered the evidence of its real and final act touching the subject immediately under consideration”). The judge has absolute discretion to revise her findings prior to entry of a written order. Hence, for example, a successor judge generally may not finalize an oral ruling made by a judge who becomes incapacitated. *Wesco Distribution, Inc. V. M.A. Mortenson Co.*, 88 Wash.App. 712 (Div. I, 1997).

Mr. Khan's response brief contains multiple citations to oral statements of the lower court that were superseded by the court's written findings. Response Brief at 6, 9. These citations are inappropriate and reference should have been made to the court's written findings.

## CONCLUSION

Ms. Khan respectfully requests that this court grant the relief request in her foregoing Brief of the Appellant.

Respectfully submitted this 16<sup>th</sup> day of December, 2013.



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**PROOF OF SERVICE**

I hereby certify under penalty of perjury that on December 16, 2013 I transmitted a true and complete copy of the Reply Brief of the Appellant via electronic mail to: denniscaseylaw101@gmail.com and to barb@hellandlawgroup.com. I further certify that prior to transmitting the copy I received the advance oral approval of Dennis Casey and Barb McInville to accept service via electronic mail.

DATED this 16<sup>th</sup> day of December, 2013.

  
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