

No. 48066-2-II

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

José Ocasio-Santiago
(nka José Ocasio-Christian),
Appellant,

v.

Kimberley Rockwood
(fka Kimberley Ocasio),
Respondent/ Cross-Appellant.

AMENDED
REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
(PERTAINING TO CROSS-APPEAL)

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I. ARGUMENT

THERE WAS NOT A CHANGE IN CIRCUMSTANCES SUBSTANTIAL OR SUFFICIENT ENOUGH TO SUPPORT MODIFICATION OF THE AWARD OF SPOUSAL MAINTENANCE TO KIMBERLEY.

José argues that the trial court's finding of a substantial change in circumstances sufficient to modify Kimberley's spousal maintenance was a proper exercise of its discretion. Reply Br. of Appellant at 13. However, because that finding was not supported by substantial evidence, it was an abuse of the trial court's discretion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) ("We may find an abuse of discretion where the trial court relies on unsupported facts[.]").

SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FINDING OF A SUBSTANTIAL CHANGE IN CIRCUMSTANCES

Jose first argues that one substantial change in circumstance was the fact that there was no longer any concern over the stability of Kimberley's employment. Reply Br. of Appellant at 13; CP 125. He argues that those concerns were resolved upon entry of the Decree of Dissolution. Reply Br. of Appellant at 14. If that is true, Jose voluntarily signed the Agreed Decree of Dissolution, knowing that, but he signed it nonetheless. Therefore, if true, this change was not unanticipated at the time the divorce was finalized. This Court should reject this claim.

After entry of the Agreed Decree of Dissolution, Kimberley was in a “temporary position with a two-year probationary period” and that she “could be released at any time if they [didn’t] feel [she was] meeting performance objectives based on the conditions of the employment.” CP 164, 165. Kimberley also testified that her job “is not a validated funded program in the Army. So [her] entire program, [herself] and the 80 people who work for [her], all are at risk for being released [from employment].” CP 169. Therefore, her new employment position was no more stable than her former employment position.

Jose next argues that Kimberley’s gross income had increased by about \$700 per month and she is also now eligible for various government employee benefits. Reply Br. of Appellant at 14. The record indicates otherwise.

Prior to her job change, Kimberley’s monthly net income was \$7,378.00. CP 395. After her job change, her net income was \$7,276.67. CP 395. This evidence is contrary to Jose’s argument.

Jose also argues that because Kimberley had accumulated at least \$40,000 in savings after the finalization of the dissolution, she no longer had the need for spousal support. Reply Br. of Appellant. This argument should fail.

Jose's own proposed division of assets indicates he wanted Kimberley to have a "very generous advantage," which he said she deserved. CP 15. He specifically planned for Kimberley, *on a property division chart he drafted himself*, to add \$4,500 to her savings every month *through May of 2016* at which time he projected he would retire from the military. CP 17, 21. He cannot now fault Kimberley for doing just that, nor can he claim this was not contemplated at the time of the finalization of the dissolution. Therefore, this, too, was not a substantial change in circumstances.

Jose next argues that the Decree of Dissolution references Kimberley's need to afford her own health insurance. Reply Br. of Appellant at 15. In the property division chart Jose drafted, Kimberley's health insurance is not mentioned. CP 15-21.

The fact that Kimberley now has health insurance that costs her only \$100 per month is not sufficient to sustain a finding of adequate cause sufficient to modify Jose's agreed spousal support obligation to Kimberley.

Jose argues he initially intended to retire from the military in November of 2014 (Reply Br. of Appellant at 17, CP 359). He then argues that he voluntarily elected to extend his stay in the military due to transferring his GI Bill benefits to their son, and that a voluntary change in

circumstances such as that can support a modification of support, as long as that change is made in good faith. Reply Br. of Appellant at 19, citing *Fox v. Fox*, 87 Wn. App. 782, 787, 942, P.2d 1084 (1997).

Jose knew precisely what the result of his voluntary extension would be. He cannot claim that was unforeseen. This is also contradicted by the property division chart, drafted by Jose, that projects Kimberley will save \$4,500 per month (by virtue of receiving spousal maintenance) ***through May of 2016***. CP 17. Therefore, that property division chart contemplated his retirement would not be until that time.

Jose's argument that because he *voluntarily* elected to remain in the military is a substantial change in circumstances should be rejected by this Court. Reply Br. of Appellant at 19.

Jose also argues that he chose to stay in the military due to the diagnosis and treatment of his various medical conditions attributable to his military service. Reply Br. of Appellant at 19. There is absolutely nothing in the record, except for his uncorroborated testimony, to support this assertion. This Court should also reject this argument.

THE TRIAL COURT'S DENIAL OF KIMBERLEY'S REQUEST FOR ATTORNEY'S FEES SHOULD BE REVERSED

Kimberley should not have had to incur the significant amount of attorney's fees she has incurred responding to Jose's appeal. As stated earlier, the funds Kimberley was able to save in contemplation of Jose's retirement have largely been depleted litigating Jose's underlying motion and responding to his appeal. Her request is warranted by RCW 26.09.140 and should be granted.

II. CONCLUSION

Jose's decision to remain in the military was contemplated well *before* the parties finalized their agreed divorce. The idea for Kimberley to use the spousal maintenance she was receiving to build up her savings in contemplation of Jose's 2016 retirement was Jose's plan. References to Jose's planned retirement date of May 2016 were reflected in the property division chart he himself prepared well in advance of the finalization of this divorce.

With regard to Jose's appeal, the trial court should be affirmed;
with regard to Kimberley's appeal, the trial court should be reversed.

DATED this 3rd day of August, 2016.

RESPECTFULLY SUBMITTED,


Barbara McInville, WSBA #32386
Attorney for Kimberley Rockwood

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by the e-filing portal, and delivered a copy of this document via e-mail to the following:

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Signed at Tacoma, Washington on this 3rd day of August, 2016.


Barbara McInville

HELLAND LAW GROUP PLLC

August 03, 2016 - 11:43 AM

Transmittal Letter

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