

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Marriage of:)	NO. 64431-9-I
)	
SABRINA D. CLARK,)	DIVISION ONE
)	
Respondent,)	
)	
and)	
)	
KEITH WAYNE CLARK,)	UNPUBLISHED OPINION
)	
<u>Appellant.</u>)	FILED: June 13, 2011

Lau, J. — Keith Clarke appeals from the trial court’s denial of his CR 60 motion to vacate a nonmodifiable provision of his decree of dissolution requiring him to pay spousal maintenance to his former wife, Sabrina Clarke. Because he fails to demonstrate any abuse of trial court discretion, we affirm.

FACTS

Keith and Sabrina¹ were married in 1994. They had four children together. They separated and began dissolution proceedings in 2006. The parties executed a separation contract that detailed Keith’s spousal maintenance obligation: “The husband shall pay the wife maintenance in the amount of \$1750.00 per month for 42 months This maintenance provision is nonmodifiable, but shall terminate upon remarriage or death of the wife, should that occur before all payments have been

¹ We refer to the parties by their first names to avoid confusion.

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made.” The contract recited that the parties had a full opportunity to discuss the terms with counsel. Keith and Sabrina also agreed to the terms of their 2007 decree of dissolution. The decree provided monthly spousal maintenance payments of \$1750 from Keith to Sabrina for 42 months and reflected the parties’ agreement that this provision was nonmodifiable.

In 2009, Keith moved to vacate the award of spousal maintenance, claiming that his work hours were reduced due to a medical condition and his income dropped from \$9,000 to \$5,000 per month. He claimed that his obligation to pay spousal maintenance was a severe hardship. Sabrina asserted that she needed the maintenance because she was primarily caring for the children and was working and going to school. She submitted a financial declaration showing a monthly net income of \$2,758 and monthly expenses of \$4,616. She claimed that Keith sought medical treatment for his condition while the two were married and that it was not a “new fact that occurred after he entered into the agreement to pay non-modifiable maintenance.” She also contended that she paid Keith \$128,000 upon dissolution and he “wasted much of his money” and bought a \$60,000 truck.

A superior court commissioner denied Keith’s CR 60 motion to vacate the spousal maintenance award and his subsequent motion for reconsideration. The superior court denied his motion for revision.

Keith appeals.

DISCUSSION

Keith asserts that the trial court abused its discretion by denying his motion to

vacate his spousal maintenance obligation because of the change in his financial circumstances. We disagree.

This court reviews a trial court's decision whether to vacate an order under CR 60 for an abuse of discretion.² In re Marriage of Moody, 137 Wn.2d 979, 986, 976 P.2d 1240 (1999); Shaw v. City of Des Moines, 109 Wn. App. 896, 900, 37 P.3d 1255 (2002). We will overturn the decision only if the court exercised its discretion on untenable grounds or for untenable reasons. Shaw, 109 Wn. App. at 901; Gustafson v. Gustafson, 54 Wn. App. 66, 70, 772 P.2d 1031 (1989).

Keith has not demonstrated that the court's denial of his motion to vacate was premised on untenable grounds or reasons.³ First, the parties' separation contract and agreed decree of dissolution, made after both parties had an opportunity to seek assistance of counsel, were lawful and enforceable.⁴ Second, there was evidence that Keith's change in circumstances was not the result of an unforeseeable condition. Sabrina contended that he knew of the condition at the time he entered the separation

² CR 60(b)(6) provides, in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order [where] . . . it is no longer equitable that the judgment should have prospective application." Only the superior court's decision is at issue because once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's. In re Marriage of Rideout, 150 Wn.2d 337, 350 n.5, 77 P.3d 1174 (2003).

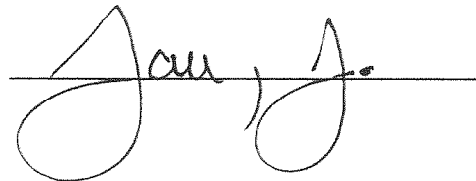
³ Although the trial court did not specify the rationale for its ruling, we may affirm on any basis supported by the record. Rideout, 150 Wn.2d at 358.

⁴ The parties to a marriage may enter into a written separation contract providing for maintenance. RCW 26.09.070(1). A decree of dissolution may expressly preclude modification of a provision for maintenance. RCW 26.09.070(7). If the parties to a separation contract petition the court for dissolution of their marriage, the contract shall be binding upon the court unless the contract was unfair at the time of its execution. RCW 26.09.070(3).

agreement. Third, there was evidence that Keith's financial hardship was in part the result of his own decisions regarding his use of assets. Sabrina contended that Keith spent the \$128,000 she paid in accordance with the terms of the dissolution decree.⁵ Keith has not demonstrated any abuse of trial court discretion.

Finally, Keith argues that the findings of fact in the dissolution decree did not adequately support the maintenance award. Specifically, he challenges the adequacy of finding of fact 2.12, which states: "Maintenance should be ordered because [. . .] [t]he wife is in need of temporary spousal maintenance and the husband has the ability to pay." Keith first raised this challenge in his motion for reconsideration of the commissioner's ruling. He did not challenge the adequacy of the trial court's factual findings in a direct appeal from the decree of dissolution. Res judicata precludes his challenge, filed more than two years after the decree of dissolution was entered, to the dissolution court's findings of fact and conclusions of law.⁶

We affirm.



⁵ In exercising its discretion, a trial court is permitted to consider a spouse's wasting of assets. See In re Marriage of Wallace, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002); In re Marriage of White, 105 Wn. App. 545, 554, 20 P.3d 481 (2001). The record reveals that Keith was awarded \$128,348.95 in the dissolution decree and that Sabrina had paid \$110,000 to Keith before the decree entered.

⁶ Res judicata ensures the finality of decisions, by precluding relitigation of claims and issues that were or should have been decided among the parties in an earlier proceeding. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Res judicata applies to "every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time." Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997) (emphasis omitted) (quoting Golden v. McGill, 3 Wn.2d 708, 720, 102 P.2d 219) (1940)).

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WE CONCUR: