

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>IN RE THE MARRIAGE OF:</b>	)	<b>No. 27400-4-III</b>
	)	<b>(consolidated with</b>
<b>VIKI McCARTNEY,</b>	)	<b>No. 27731-3-III)</b>
	)	
<b>Appellant,</b>	)	
	)	
<b>and</b>	)	<b>Division Three</b>
	)	
<b>MYLES A. McCARTNEY,</b>	)	
	)	
<b>Respondent.</b>	)	<b>UNPUBLISHED OPINION</b>

Korsmo, J. — Viki McCartney (Viki) appeals the trial court’s decision to modify a maintenance award. This is the third time this Court has addressed this particular maintenance award.<sup>1</sup> We find no abuse of discretion and affirm.

Facts<sup>2</sup>

Viki and Myles McCartney (Myles) were married in June 1983. They separated in

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<sup>1</sup> The prior cases were *In re Marriage of McCartney*, No. 23198-4-III (Dec. 8, 2005) (*McCartney I*) and *In re Marriage of McCartney*, No. 25143-8-III (Jan. 8, 2008) (*McCartney II*).

<sup>2</sup> Background facts are from *McCartney II*.

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November 2002. During the marriage, Myles, an optometrist, operated Uptown Vision Center and two multilevel marketing businesses. Viki managed the couple's real estate investments. During the dissolution proceedings, Viki and Myles agreed that Myles would keep the businesses and Viki would keep the real estate. The court adopted the property settlement and ordered Myles to pay maintenance to Viki for 15 years. Myles appealed, and this court reversed. The trial court then ordered maintenance for a total of six years: \$4,000 for four years and \$2,000 for the remaining two years. Myles again appealed, and this court affirmed.

On June 2, 2008, Myles filed a motion to modify the maintenance award. The motion was based on a severe reduction in business at Uptown Vision Center. Myles filed a declaration from his accountant detailing Uptown Vision's finances. It showed that Uptown was losing money in late 2007 and early 2008. Myles also filed a personal declaration, personal tax returns, a corporate tax return, bank statements, and a W-2. On June 12, 2008, Viki responded to the petition for modification.

The court heard the motion on June 20, 2008. At the hearing, Viki moved for a continuance on the grounds that Myles had filed a late memorandum of authorities and more discovery was needed to test the veracity of his claims. The court denied the motion. It noted that Viki had adequate opportunity to take a deposition before the

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hearing and that the court was very familiar with the case.

The court found that Myles's income had changed substantially. It based this finding on the affidavit of Myles's accountant. The court reduced the maintenance from \$4,000 per month to \$2,000 per month and reduced the period of maintenance by one year, to a total of five years. The court also stated that the fact that Viki was still not working was a factor in its decision to grant modification. In its earlier ruling on maintenance, the court had made it clear it did not wish to subsidize inactivity. The court denied Viki's request for attorney fees.

Viki timely appealed to this court.

### Analysis

This appeal challenges the denial of a continuance, the granting of modification, and the denial of attorney fees. She also seeks attorney fees for this appeal. We address the three issues in the order noted.

#### *Denial of Continuance*

Viki challenges the denial of her request to continue the hearing in order to depose Myles. This court reviews a trial court's decision granting or denying a continuance for abuse of discretion. *In re Matter of Schuoler*, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986). Discretion is abused if it is exercised on untenable grounds or for untenable

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reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court does not abuse its discretion in denying a continuance where the “requesting party does not offer a reason for the delay in obtaining the desired evidence.” *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

Viki offered no reason why she had not sought to depose Myles before the hearing date. Viki responded to the petition for modification more than a week before the hearing. That response did not mention the need for additional discovery. Viki was apparently aware for several months that Myles would be filing the petition to modify. Thus, the trial court had tenable reasons to deny the continuance. It did not abuse its discretion.

#### *Modification of Maintenance*

A trial court may, in its discretion, modify a maintenance award when a petitioner makes a showing of “substantial change of circumstances.” RCW 26.09.0170(1). A substantial decline in income qualifies as changed circumstances. *In re Marriage of Ochsner*, 47 Wn. App. 520, 525, 736 P.2d 292, *review denied*, 108 Wn.2d 1027 (1987). This court reviews modification of maintenance awards for abuse of discretion. *In re Marriage of Drlik*, 121 Wn. App. 269, 274, 87 P.3d 1192 (2004). A trial court’s factual findings are reviewed for substantial evidence in the record to support them. *Id.* at 274-

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275. Substantial evidence is that evidence which would convince a fair-minded rational person of the truth of a particular fact. *Id.*

Myles presented evidence that his income was substantially reduced from the time the maintenance award was ordered. His tax returns show that his total income declined by more than one-third, from \$187,294 in 2006 to \$118,138 in 2007. This decline was almost entirely due to the reduction in after-salary income Myles received from Uptown Vision. This reduction, combined with the accountant's declaration of Uptown Vision's financial situation in early 2008, was more than enough evidence to conclude that Myles's financial condition had substantially changed from the time maintenance was ordered in 2006. Substantial evidence supported the court's findings.

The trial court reduced the maintenance by one-half, even though Myles's income had declined only one-third. We believe that Viki's inactivity in getting a job accounts for the remainder of the reduction.

Viki argues that Myles's reduction in income should be treated as voluntary and thus subject to the showing of good faith required by *Fox v. Fox*, 87 Wn. App. 782, 785, 942 P.2d 1084 (1997). But Viki points to nothing in the record suggesting that Myles voluntarily reduced his income. Her argument about Myles not working a full five days a week, even if true, is unpersuasive. Myles's salary remained almost unchanged from

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2006 to 2007; it was the after-salary income from Uptown Vision which was reduced.

This is consistent with Myles's description of a downturn in business. Contrary to Viki's claims, Myles included income from his multilevel marketing business in his tax returns.

Thus, all evidence in the record suggests that Myles's income reduction was not voluntary.

The trial court had sufficient evidence of a substantial reduction in Myles's income. It did not abuse its discretion in modifying the maintenance award.

#### *Attorney Fees*

RCW 26.09.140 allows for the award of fees or costs to parties in dissolution proceedings. The award is discretionary and available at both the trial court and on appeal. RCW 26.09.140. The award must be based on a consideration of the needs of the spouse seeking the fees and the ability of the other spouse to pay. *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). The court may also base a fee award on a party's intransigence. *McKenzie v. Barthol*, 142 Wn. App. 235, 242, 173 P.3d 980 (2007). This court reviews decisions to award fees or not for abuse of discretion. *In re Marriage of Zeigler*, 69 Wn. App. 602, 609, 849 P.2d 695 (1993).

The trial court considered the financial situation of the parties and declined to award fees to Viki. The court noted that since Myles could not afford the previous

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maintenance, he could not afford to pay Viki's attorney's fees. Contrary to Viki's complaints about insufficient data, there is no evidence in the record of intransigence by Myles. The court did not abuse its discretion in denying a fee award.

We similarly exercise our discretion and decline to award attorney fees for this appeal.

#### CONCLUSION

The trial court order is affirmed. The parties bear their own attorney fees and costs for this appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Brown, A.C.J.

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Sweeney, J.