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THE *HUGHES* LESSON: WHEN YOU USE THE FORMS, USE YOUR HEAD.

When I was a first-year law student, Professor A. Allen King, my property law professor, repeatedly warned us: "When you use the forms, use your head."[1] This old refrain came back to me as I reviewed the Eastern District's decision in *Hughes v. Hughes*, 2016 Mo.App. LEXIS 1280 (Mo.App. E.D. Dec. 13, 2016). I represented the ex-wife in this appeal over the trial court's decision to deny maintenance modification. The *Hughes* court reversed the trial court's ruling that the maintenance was not modifiable. At the time of the divorce, the lawyers used a standard preprinted decree form that said the maintenance awarded was "subject to modification." The Eastern District concluded this language prevailed over the explicit restrictions on modification contained in the parties' Marital Settlement and Separation Agreement. Because the original lawyers did not qualify the "subject to modification" language in the form, the Eastern District held the explicit restrictions in the Agreement were rendered meaningless. Fortunately for my client, the court went on to affirm the trial court's ultimate decision to allow my client to keep her maintenance.

What was unusual about the appeal was that two of the three judges wrote separate dissents. So, in essence, the judges had three different opinions. Because I was a lawyer in the appeal, I obviously have a point of view. But I've done my best to be neutral in this summary of the three opinions.

Writing for the divided court, Judge Robert M. Clayton, III, rejected my argument that the standard clause about modifiability in the decree form should be harmonized with the explicit restrictions on modifiability in the Separation Agreement. *Id.* at *5. Instead, Judge Clayton wrote: "[W]e find that if a separation agreement purports to limit or preclude modification of a maintenance award,

[1] Professor King taught property law at the American University Washington Colllege of Law.

section 452.335.3 mandates the trial court's dissolution decree do more than simply incorporate the agreement by reference and remain silent on the question of future modifiability." *Id*. at * 14-15. Judge Clayton distinguished earlier decisions with a contrary view because the original decrees in those cases were issued before a 1988 amendment to the maintenance statute.[2] Section 452.335.3 now requires the decree to state whether maintenance is modifiable. *Id.* at *14. Because the Dissolution Decree in *Hughes* struck through the "not subject to modification" language and adopted the "subject to modification" option, the court concluded that the maintenance was modifiable. *Id*. at *15-16.

In his separate dissenting opinion, Judge Lawrence E. Mooney disagreed. Judge Mooney observed that the preprinted "subject to modification" language in the decree form was not contradictory with settlement agreement, but rather incomplete. *Id.* at * 32 (Mooney, J., dissenting). Judge Mooney wrote: "The choice of the preprinted designation should be harmonized with the settlement agreement; they are both part of the same judgment." *Id.* at *32. "Because the parties negotiated a separation agreement that allowed maintenance under specified circumstances that have not occurred, the maintenance is not modifiable absent those circumstances." *Id.* at *33. Judge Mooney would have affirmed the trial court's decision to dismiss the motion to modify.

The judges also disagreed on a cohabitation question raised in the appeal. Writing for the court, Judge Clayton deferred to the trial court's factual conclusion that the ex-wife's relationship with her live-in boyfriend did not constitute a "substitute for marriage." Id. at *24-25. In my opinion, this part of the decision did not break new ground. The court went through an exhaustive discussion of existing case law to show the heavy burden a movant faces in trying to prove the cohabitation is a "substitute for marriage." Id. at *19-23.[3] After considering the different factors, Judge Clayton wrote: "While [the ex-wife] and [the cohabitant] indicate a desire to continue their relationship and share a portion of their income

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[2] See, *Thomas v. Thomas*, 171 S.W.2d 130, 132-33 (W.D. 2005); *Lueckenotte. V. Luckenotte*, 34 S.W.3d 387, 391-92 (Mo. banc 2001).

[3] Judge Clayton observed in his analysis that courts rejected the theory of cohabitation as a substitute for marriage in the following cases: *Herzog v Herzog*, 761 S.W.2d 267, 268-69 (Mo.App. E.D. 1988); *C.K. v. B.K.,* 325 S.W.3d 431, 434-35 (Mo.App. E.D. 2010); *Hopkins v. Hopkins*, 449 S.W.3d 793, 797-800 (Mo.App. W.D. 2014); *Butts v. Butts*, 906 S.W.2d 859, 863-64 (Mo.App. S.D. 1995); and *Weston v. Weston*, 882 S.W.2d 337, 340-41 (Mo.App. S.D. 1994), overruled on other grounds in *Rallo v. Rallo,* 477 S.W.3d 29, 44 n. 8 (Mo.App. E.D. 2015).

or expenses, the evidence is not sufficient to find their relationship is of a nature where each is committed to the other financially, emotionally, or otherwise." *Id.* at *25.

Judge Clayton also deferred to the trial court's conclusion that the movant failed to prove a substantial change in circumstance sufficient to justify modification. Judge Clayton noted the ex-wife presented evidence that her reasonable needs could not be met without support from her ex-husband, even accounting for some contributions by the cohabitant. *Id.* at * 29-30. Judge Clayton wrote: "Although conflicting evidence existed, we will defer to the trial court's determination that such evidence did not amount to a substantial and continuing change of circumstances, and we assume the trial court accounted for such conflicting evidence it its judgment." *Id.* at *30. Judge Clayton concluded the judgment was not against the weight of the evidence and was supported by substantial evidence. *Id.* at *30.

In his separate dissenting opinion, Judge James M. Dowd disagreed on the cohabitation. Judge Dowd appeared to brush aside the multi-factored analysis used in other cohabitation cases. Instead, Judge Dowd focused on the length of the relationship and what he characterized as "undisputed" that the ex-wife and her cohabitant "are in, and desire to remain in, a committed, romantic relationship where they have a home and have agreed to a financial arrangement that suits their relationship." *Id.* at * 34 (Dowd, J., dissenting). Judge Dowd asked rhetorically: "What more needs to be shown?" *Id.* at *35. Judge Dowd would have reversed the trial court's decision and terminated the maintenance. *Id.* at *35.

So, what lessons should we draw from the decision of the divided court in *Hughes*?

(1) On cohabitation, the majority of the court reinforced existing case law to show a movant faces a heavy burden in proving cohabitation is a "substitute for marriage." And the majority applied the deferential standard of review required when an appellate court reviews findings of fact. Judge Dowd disagreed, but his dissenting view did not prevail.

(2) On modifiability, I believe the court broke new ground. I hearken back to my law professor's words of caution: "When you use the forms, use your head." This problem could have been avoided if the original lawyers had inserted

language in the decree to say something to the effect that the maintenance indeed was "subject to modification, but only as per the Separation Agreement."[4] Because of the *Hughes* decision, domestic relations lawyers now must be careful in not using the preprinted decree form in a way that will render restrictions on maintenance modification meaningless. The lawyers have a duty to qualify the language in the pre-printed form to preserve the restrictions. Without such qualifying language, the preprinted form will prevail over the intention of the parties that they express in their agreement.

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[4] The Southern District relied on this kind of qualifying language in a decree to preserve restrictions on maintenance modification in *McBride .v McBride*, 288 S.W.3d 748, 752 (Mo.App. S.D. 2009).