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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

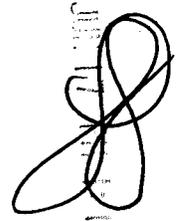
AMY RIMOV, a single woman,

Respondent,

v.

MARY SCHULTZ, a single woman,

Appellant.

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BRIEF OF APPELLANT

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A. INTRODUCTION

This case involves an agreement to arbitrate that respondent Amy Rimov seeks to avoid. The trial court erred in entering its orders of September 22, 2009 and October 8, 2009 denying dismissal of Rimov's complaint for joint property accrual. It erroneously concluded that the Uniform Arbitration Act, RCW 7.04A ("UAA"), did not apply to an unappealed arbitration ruling because the parties "did not agree to arbitrate." An agreement to arbitrate was established prior to the arbitration that occurred, and from which a decision issued, as a matter of law. RCW 7.04A applies to preclude the claims being made.

If parties choose to arbitrate a given controversy or issue, the decision is binding. This is so, even where the parties agreed the arbitration was to be non-binding. Once parties document their agreement to arbitrate in writing, irrevocable agreement to arbitrate vests under the UAA. An arbitrator's decision on an issue submitted to arbitration may thereafter be challenged only by a motion to vacate, amend, or correct filed within 90 days from the arbitrator's ruling. It may not be challenged by the losing party ignoring the arbitration ruling and, eight months later, filing a complaint de novo on the same issue, and claiming they never agreed to arbitrate.

Here, the parties executed a written release of all joint property claims against each other. An agreed arbitration was held to determine the enforceability of this release. The arbitrator held that the release was valid, binding, and enforceable as against all claims of invalidity. Rimov failed to appeal or challenge that decision. Instead, nine months later, Rimov filed a complaint de novo in the King County Superior Court asserting that the release was invalid, and making the very joint property claims precluded by this release. The law is clear. The arbitration ruling is preclusive. The trial court was required to dismiss the action, and improperly failed to do so.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in entering an order denying Schultz's motion to dismiss a complaint.

2. The trial court erred in denying Schultz's motion to reconsider its failure to dismiss the complaint.

C. ISSUES PRESENTED FOR REVIEW

1. An "agreement to arbitrate" is defined by Washington's Uniform Arbitration Act and such an agreement exists when a writing prior to the arbitration confirms the parties' agreement to arbitrate. Where such a writing exists here, did the trial court err in refusing to dismiss a plaintiff's complaint that sought to litigate in court issues that had been

resolved in arbitration? (Assignments of Error Numbers 1 and 2)

2. A party disputing agreement to arbitrate must raise any claim of “lack of agreement to arbitrate” no later than the commencement of the arbitration proceeding itself, or any such claim is waived. Where a plaintiff failed to do so here, did the trial court err in refusing to dismiss the plaintiff’s complaint? (Assignments of Error Numbers 1 and 2)

D. STATEMENT OF THE CASE

Appellant Mary Schultz and respondent Amy Rimov are lawyers in Spokane, Washington. Rimov worked for Schultz as an associate in late 2000. CP 2.

According to a January 20, 2007 document entitled “Settlement Agreement and Release of Claims” (hereafter “Release”) executed by both parties, Rimov and three of her children were allowed to reside in Schultz’s home when Rimov separated from her husband. CP 147, attached at Appendix A(xvi)-(xxiii).

The parties had a dispute and signed the Release to resolve personal issues between them. The Release relinquished any and all joint property claims between the parties. CP 148-51.

Rimov later purchased property in her own name, and moved into that property. CP 19-20, 134. Rimov then decided to bring joint property

claims against Schultz. CP 206-07. She desired to invalidate the Release she had signed. CP 207, 115.

In early 2008, the parties voluntarily agreed to submit Rimov's challenges to the validity of the Release to arbitration. CP 116; correspondence at CP 254-55, 258-59, 261, attached at App. A(viii)-(xiii). Then represented by counsel, both parties agreed to what they described as a nonbinding arbitration. *Id.*

On numerous occasions, the parties confirmed their agreement to arbitrate. Rimov's counsel confirmed the initial agreement to arbitrate in writing: "Lastly, the parties have agreed to go to a nonbinding arbitration before Judge Donohue in a summary judgment fashion with no live witnesses with regard to the enforceability of the Settlement Agreement and Release." CP 254. Schultz's counsel reconfirmed Rimov's agreement to arbitrate: "Lastly, there is agreement to participate in a nonbinding arbitration concerning the enforceability of the Release Agreement." CP 258. Rimov's counsel again reconfirmed the agreement to arbitrate in writing: "We have no disagreement on the arbitration." CP 261. The parties agreed to split the arbitrator's fee. CP 258, 261.

The parties then agreed on the arbitrator, retired Spokane County Superior Judge Michael Donohue. Judge Donohue's office confirmed the parties' agreement to arbitrate in writing. In a letter entitled: "Re: Schultz

Nonbinding Arbitration,” Donohue’s assistant confirmed that Judge Donohue was being asked to be an arbitrator, writing, “Dear Bill and Bob: Thank you for requesting Mike Donohue to preside in the above-referenced nonbinding arbitration.” CP 263. On May 28, 2008, Rimov’s counsel gave notice to all of the time and date for the arbitration hearing:

Re: Arbitration between Mary Schultz and Amy Rimov.
Dear Judge Donahue: This will confirm our telephone conversation this morning, during which we tentatively scheduled the arbitration of the captioned matter for Monday, July 28, 2008, beginning at 9:00 a.m. If we are unable to go forward on that date due to Ms. Schultz’s trial schedule, then the arbitration will be held on Monday, September 8, 2008 at 9:00 a.m.

CP 265.

That same day, the arbitrator again confirmed the parties’ agreement to arbitrate with a letter entitled: “Re: Schultz/Remov (sic) Arbitration” in which he stated: “Dear Counsel: Thank you for requesting I serve as your arbitrator in this matter. This letter confirms the above-referenced nonbinding arbitration...” CP 267. That letter confirmed the date, time, and location of the arbitration proceeding, identified the hourly rate “for all pre-arbitration and arbitration time,” and scheduled the date of September 8, 2008. CP 267. The letter invited the parties to send a “pre-arbitration brief.” *Id.*

Schultz thereafter represented herself pro se. CP 116. Rimov was at all times represented by counsel. *Id.*

The parties submitted voluminous pleadings to the arbitrator by email—both using the heading: “Schultz v Rimov Arbitration.” CP 274-83. Schultz’s pleadings included “numerous declarations, memoranda and exhibits...,” and “voluminous documentary evidence, including bank statements, letters, emails, pleadings, mortgage statements, titles, deeds, etc, all compiled, tabbed and presented in that arbitration process.” CP 388.

Shortly before the arbitration hearing, Schultz received two emails from Rimov’s counsel reminding Schultz personally of the summary judgment type procedure to be used for the arbitration. CP 270-71. An email at 9:12 a.m. that morning from Rimov’s counsel to Schultz noted that, “Per my earlier discussions with Bob Dunn, I plan to present our case to Judge Donohue in the form of a summary judgment motion and supporting papers for his nonbinding determination.” CP 271. A later email from the Rimov’s counsel stated: “I don’t care who proceeds first on Monday. Either way, we will argue that the (Release) agreement is not enforceable as a matter of law and/or that there are triable issues precluding its enforcement by summary judgment, in effect necessitating a trial.” CP 270.

Schultz reminded Rimov's counsel that the scope of her agreement was limited to arbitration of the validity of the Release agreement: "I agreed to nonbinding arbitration as to the validity of the agreement. There was no 'trial' contemplated. If that isn't the case, then we have a problem." CP 269. Rimov's counsel responded to reassure Schultz that the scope of the arbitration was limited to the issue agreed upon—the arbitrator was to determine the enforceability of the Release. CP 269. Rimov's counsel again reiterated that the cost of the arbitration was to be split equally. CP 269-70.

The record reflects no objection by either party to arbitration, or to the summary procedure used therein. CP 285-86. In arbitration, Rimov argued "an array of asserted theories" supporting her claims of invalidity of the Release, including claims that, e.g., Schultz coerced her into signing the release, duress, public policy issues, domestic case law, etc. CP 116, 137, 288.

On November 13, 2008, the arbitrator issued his written ruling. CP 285-86, attached at Appendix A(xiv)-(xv). The arbitrator first confirmed that the parties had agreed to arbitrate. CP 285. The arbitrator then confirmed the issue presented for arbitration – the validity and enforceability of the Release: "The parties to this arbitration have asked the arbitrator to determine whether the settlement agreement and release of

all claims the parties executed January 22, 2007, hereafter 'the agreement,' is valid and binding.” CP 285. The arbitrator then issued his decision: “On the single question presented in the arbitration, I find the agreement to be valid, binding, and enforceable.” CP 286. The decision was forwarded to both parties. CP 288.

Schultz thereupon notified Rimov in writing of the fees and costs accrued by Schultz in her successful arbitration defense of the Release. CP 290, 409. Schultz wrote again, providing the total of all fees and costs owed, and advised Rimov: “[A]s the above commences drawing 12% interest as of the date of the decision, you can let me know at your convenience. If this matter is considered closed, I'd be open to compromising the amount.” CP 412.

Rimov never responded to either letter. She neither disputed that fees were owed, nor made claim that the procedure had not been an arbitration, nor objected to the arbitration decision, nor to its characterization as an arbitration ruling. She made no effort to modify, correct, or amend the arbitrator's decision.

Instead, on August 12, 2009, nine months after the arbitration decision issued, Rimov filed a complaint in the King County Superior Court claiming that she had accrued joint property rights with Schultz. CP 1-2, 4-12, 21. Six pages of her complaint are dedicated to hyperbole as to

why the Release is invalid. CP 13-19, 21. Rimov made no mention of the arbitration proceeding or its ruling in her complaint.

Schultz moved for dismissal of all of Rimov's joint property claims under CR 12(b). CP 114-18. Schultz submitted the written arbitration decision to the trial court, CP 156-57, along with the Release barring joint property claims. CP 147-53. Schultz argued that *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001) and the UAA required dismissal of Rimov's joint property complaint. CP 114-15, 121-24.¹

Rimov did not dispute that if the Release is valid, her joint property claims must be dismissed; instead, she claimed that she never agreed to arbitrate. CP 206-18. Rimov submitted a declaration of her arbitration counsel, William Symmes, who asserted that the arbitration was to be a "non-binding and advisory opinion," or a "mock summary judgment hearing with a retired Superior Court judge to obtain a better understanding as to how a judge would rule should the parties proceed to actual litigation." CP 208. Symmes attested that he and Rimov "never

¹ Rimov's complaint asserts an array of business and personal claims against Schultz and Schultz's law firm. CP 1-24. Rimov sued Schultz individually for joint property claims, and also sued Schultz and Schultz's law firm for alleged business transgressions, claiming, e.g., implied business partnership theories, wrongful termination in violation of public policy, breach of fiduciary duty, quid pro quo sexual harassment, etc. CP 2-4, 20-22. Schultz independently moved to dismiss the business claims for failure to state claims upon which relief could be granted on the facts pled. CP 100-02, 103-13. The business claims were dismissed. CP 230-33. They are not at issue here.

agreed to arbitrate.” CP 208-09.

The trial court concluded that, “[t]here was no agreement to arbitrate. Thus, RCW 7.04A is not applicable.” CP 235, attached at Appendix A(i)-(iii).

Schultz moved for reconsideration, submitting the lengthy written history of the parties’ agreements to arbitrate via their mutual correspondence leading to Judge Donahue’s written arbitration decision. CP 249-90. In response, Rimov submitted her own declaration claiming that she never agreed to arbitrate. CP 296. She asserted that Schultz “tricked (her) attorneys into arbitration.” CP 296. Rimov argued that her testimony must be “taken in a light most favorable to her” on a dismissal motion. CP 308. Rimov asserted that her expression of her intent in 2009 controlled over everyone’s “indiscriminate” use of the term “arbitration” in 2008. CP 294.

The trial court denied reconsideration: “[T]aking the Plaintiff’s facts as true, there was no agreement to arbitrate.” CP 309-10, attached at Appendix A(iv)-(v). Schultz filed a timely notice of appeal, and Commissioner Neal confirmed that review as of right was appropriate. Attached at Appendix A(xxiv)-(xxviii).

E. ARGUMENT

1. The Standard of Review Is De Novo.

In its orders of September 18, 2009 and October 8, 2009, the trial court concluded that the UAA did not apply to bar Rimov's complaint. CP 234-36, 309-10. A trial court's application of a statute to a set of facts is a matter of law reviewed de novo. *State v. Law*, 110 Wn. App. 36, 39, 38 P.3d 374 (2002).

The trial court also concluded that no agreement to arbitrate existed. "Agreement to arbitrate" is defined in the UAA at RCW 7.04A.060. The construction of a statute is a question of law, which is also reviewed de novo. *State v. Ammons*, 136 Wn.2d 453, 456, 963 P.2d 812 (1998), citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 556, 852 P.2d 295 (1993).

2. An Unappealed Arbitrator's Ruling Is Binding. Rimov Is Precluded From Bringing Joint Property Claims Against Schultz.

Washington courts have repeatedly expressed judicial approval of the policy underlying arbitration of disputes in lieu of court action. *Godfrey*, 142 Wn.2d at 891-92. The very purpose of arbitration is to avoid the courts for resolution of a dispute. Arbitration is to *substitute* for litigation, not act as a "mere prelude" to it. *Id.*, citing *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 131-32, 426 P.2d

828 (1967). The Supreme Court directs trial courts to refrain from *de novo* review of arbitration awards:

Encouraging parties voluntarily to submit their disputes to arbitration is an increasingly important objective in our ever more litigious society. This objective would be frustrated if a trial court were permitted to conduct a trial *de novo* when it reviews an arbitration award. Arbitration is attractive because it is a more expeditious and final alternative to litigation.

142 Wn.2d at 892, *quoting, e.g., Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995). By the use of arbitration, the parties may control the issues to be arbitrated. *Godfrey*, 142 Wn.2d at 894.

In accord with this policy, Schultz and Rimov voluntarily submitted the threshold issue of the validity of their January 20, 2007 Release to arbitration.

- a. An agreement to arbitrate is defined by the UAA, and is established by a written record evidencing an agreement to submit an issue to arbitration.

Under the UAA, an irrevocable agreement to arbitrate occurs upon “agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement.” RCW 7.04A.060(1), attached at Appendix A(vi). Such a record renders an agreement to arbitrate “valid, enforceable, and irrevocable.” *Id.* A “record” is no more than a writing that can be reviewed. RCW 7.04A.010(7), attached at Appendix A(vii).

This statutory language is plain and unambiguous. The statute's meaning must therefore be derived from the wording of the statute itself. *Homestreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297, 300 (2009). Here, Rimov argues in 2009 that she never intended to arbitrate in 2008. But the writing confirming agreement to submit her specific issue to arbitration is Rimov's counsel's own February 12, 2008 letter. CP 254. In that letter, Rimov herself confirms the agreement of both parties to submit the issue of the validity of the Release to arbitration. CP 254. While unnecessary to fulfill the statute, Schultz confirmed that agreement to arbitrate this issue two days later. CP 258. And the very next day, Rimov *again* confirmed the parties' agreement to arbitrate this issue. CP 261. Under the plain definition of RCW 7.04A.060(1), agreement to arbitrate under RCW 7.04A.060(1) became irrevocable as of February 12, 2008, long before this arbitration commenced.

The statute thus focuses on prospective writings which reflect the agreement to *submit* a certain issue to the arbitration. RCW 7.04A.060(1). The record *before* the arbitration renders the agreement irrevocable. *Id.* And it was this pre-arbitration agreement which was then specifically carried out by the arbitrator in his subsequent ruling. CP 285-86.

Rimov's declarations of differing intent, submitted after she lost at arbitration and in an ensuing effort to gain a court proceeding *de novo* on the

same issue, are not included in RCW 7.04A.060(1)'s statutory definition of what constitutes an irrevocable agreement to submit an issue to arbitration. The written record existing *before* the arbitration occurred is determinative. The trial court erred in reviewing 2009 declarations of Rimov "in a light most favorable" as probative of agreement to arbitrate in 2008.

- b. Any claim of "lack of agreement to arbitrate" must be raised prior to or at the commencement of the arbitration hearing, or the claim is waived.

Whether or not Rimov now asserts she did not agree to arbitrate, the question is moot, because Rimov failed to raise any such claim of lack of agreement to arbitrate at the commencement of the arbitration, and she may not raise that defense now.

RCW 7.04A.060 requires that any party claiming lack of agreement to arbitrate must raise that claim before the arbitration commences. If the objection is not raised, then that "defense" to the ensuing arbitration ruling is waived. RCW 7.04A.230(1)(e) (specifying that a vacate motion can be granted on the basis of lack of agreement to arbitrate only if the person participating in the arbitration raised the objection no later than the commencement of the proceeding).

A trial court does have a role in determining agreement to arbitrate. Under RCW 7.04A.060(2), a trial court "shall decide whether an agreement to arbitrate exists....," but the UAA also describes when and

how this may be done. Two options exist. A trial court may review and determine whether agreement to arbitrate exists *prior to the arbitration*. RCW 7.04A.060(4) (also allowing for the arbitration to be continued pending final resolution of the issue by a court). Under this option, a motion is made to the court prior to the arbitration. RCW 7.04A.050, .070. The trial court may then stay the arbitration or compel arbitration on such a challenge. RCW 7.04A.070(1); and see RCW 7.04A.080 (allowing for provisional remedies on motion to the court if the arbitrator cannot act in a timely fashion). A second option for a party claiming lack of agreement to arbitrate is to raise the claim at the commencement of the arbitration hearing, and then, within 90 days after the moving party receives notice of the arbitrator's award, seek post arbitration relief via a motion to vacate. RCW 7.04A.230(1)(e), (2).

But either option for trial court review of a claim of "lack of agreement to arbitrate" must be raised no later than the commencement of the arbitration proceeding. RCW 7.04A.230(1)(e). When a party participates in the arbitration proceeding without raising lack of agreement to arbitrate, then the resultant award may not be vacated. RCW 7.04A.230(1)(e). Once an arbitration proceeds, a trial court has only limited power. It may either confirm, vacate, modify, or correct that arbitration award. RCW 7.04A.230; RCW 7.04A.240; and see *Barnett v.*

Hicks, 119 Wn.2d 151,156, 829 P.2d 1087 (1992). Judicial scrutiny of an arbitration award does not include review of the arbitrator's decision on the merits. *Id.*

Washington law is clear that a party attempting to challenge an arbitrator's authority in an arbitration may not first raise this issue of lack of agreement *after the arbitrator decides against that party*. *Hanson v. Schim*, 87 Wn. App. 538, 548, 943 P.2d 322, *review denied*, 134 Wn.2d 1017 (1997).² The UAA reaffirms that holding.

Here, the record contains no claim of any lack of agreement to arbitrate by Rimov prior to, during, or even within 90 days following the arbitration. Rimov and her counsel both fully participated in the arbitration without raising any such objection. Rimov thus waived any claim of lack of agreement to arbitrate. The trial court had no statutory jurisdiction or authority to determine the issue of whether agreement to arbitrate existed in the absence of any such claim prior to the arbitration itself.

The trial court had no statutory authority to consider testimony in 2009 that Rimov never "agreed to arbitrate" in 2008 "in a light most favorable to Rimov." CP 234-36, 309-10. Such reasoning, if upheld, would

² The court in *MBNA America Bank, N.A. v Miles*, 140 Wn. App. 511, 513, 164 P.3d 514 (2007) *review denied*, 163 Wn.2d 1010 (2008) noted that an agreement to arbitrate would indeed exist, because no record existed of any refusal of arbitration the time of the arbitration hearing, "as required."

nullify the UAA and render arbitration a futile act. Any arbitration process and result could be avoided by a single declaration from the losing party. Courts are not to engage in construction which render statutes a nullity. *John H. Sellen Const. Co. v. State Dept. of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976). The plain language of the UAA prevents what the trial court did here.

The trial court erred in considering Rimov's claim of lack of agreement to arbitrate, when an arbitration ruling issued nine months earlier with no indication in any record that Rimov claimed lack of agreement to arbitrate prior to that proceeding.

- c. If parties arbitrate an issue, the result is binding, even if they do not understand or intend it to be binding.

While Rimov claims that she did not agree to arbitrate, the more accurate issue is that Rimov did not understand or intend the arbitration of her issue to be binding. She believed arbitration could be only a "mock summary judgment," or an "advisory opinion" to "facilitate settlement negotiations." *See, e.g.*, CP 194-97, 208. She claims arbitration was "a mere prelude to litigation." CP 198. The *Godfrey* court rejects this very use of arbitration. *Godfrey*, 142 Wn.2d at 892, quoting *Thorgaard*, 71 Wn.2d at 126. A myriad of alternative dispute resolution mechanism exist, but if parties select arbitration as their means of dispute resolution, that method is

binding: “[o]nce an issue is submitted to arbitration, however, Washington’s Act applies. That code of arbitration does not contemplate nonbinding arbitration.” *Id.* at 894. Private arbitration is binding, even where the parties believe or intend it to be non-binding. *See Godfrey*, 142 Wn.2d at 893-94.

In *Godfrey*, the parties contracted to use arbitration to resolve a dispute, but specifically agreed that if either party disagreed with the result, the party could bring the dispute to the trial court to resolve it as if there had been no arbitration. 142 Wn.2d at 893-94. Our Supreme Court refused to allow this. It enforced the arbitration decision as binding, holding that “[w]hile the parties are free to decide by contract whether to arbitrate, and which issues are submitted to arbitration, once an issue is submitted to arbitration, however, Washington’s Act applies. That code of arbitration does not contemplate non-binding arbitration.” *Id.* at 894.³

This Court recently approved of the same policy in *Optimer Int’l, Inc. v. RP Bellevue LLC*, 151 Wn. App. 954, 963-64, 214 P.3d 954 (2009), *review granted*, 168 Wn.2d 1018 (2010), when it held that a provision in an arbitration agreement that is at variance with the provisions for judicial review set forth in the governing arbitration statute is void and

³ Rimov’s counsel’s communication prior to the arbitration asserts that if Rimov were to prevail at the arbitration, *Schultz* would be bound by the result, as trial would then occur on Rimov’s claims. CP 270.

unenforceable. 151 Wn. App. at 968. The binding effect of arbitration is non-waiveable. By statute, confirmation of an arbitrator's award is mandatory. (RCW 7.04A.220). The appeal process from any such ruling is specific and limited. (RCW 7.04A.230, .240). Both provisions are non-waiveable. RCW 7.04A.040(3).

A party cannot thus submit their controversy to a private arbitration “only to see if it goes well for their position before invoking the court’s jurisdiction.” 142 Wn.2d at 897. *Godfrey* specifically precludes the use of arbitration as a non-binding “warm up” or “advisory process,” as Rimov and her counsel argue occurred here.⁴

The law is equally clear that a court may not allow parties to recharacterize completed arbitration proceedings as if they were something else. *Dahl v. Parquet and Colonial Hardwood Floor Co., Inc.*, 108 Wn. App. 403, 30 P.3d 537 (2001), *review denied*, 146 Wn.2d 1004 (2002). In *Dahl*, a losing party attempted to claim that a completed arbitration was ineffective. *Id.* at 406-07. This Court held that even in the event of ambiguity with respect to which statute the parties intended to invoke, the matter is to be resolved in favor of binding arbitration under RCW 7.04. *Id.* at 412. This Court based its ruling in *Dahl* on similar

⁴ Even without the UAA, general contract law reaches the same result. While ignorance of facts can be grounds for rescission, ignorance of the law is no excuse. *Retired Public Employees Council of Washington v. State, Dept. of Retirement Systems*, 104 Wn. App. 147, 151-52, 16 P.3d 65, *review denied*, 143 Wn.2d 1023 (2001).

scenarios where parties attempted to circumvent the UAA. *Id.* at 408-10. One example used was *Barnett v. Hicks*, 119 Wn.2d at 156, where both parties entered into an agreement for private arbitration, but subsequently attempted to obtain full judicial review by characterizing their proceeding as a “hearing before a referee.” Our Supreme Court rejected parties’ efforts at what it deemed “post hoc characterization of their proceeding,” and held that the proceeding was an arbitration, and binding. *Dahl*, 108 Wn. App. at 409.

Here, Rimov herself initiated and confirmed the parties’ agreement to arbitrate in writing, along with the issue to be arbitrated. CP 254, 261, 265, 270-71. She participated in the arbitration. An arbitration ruling was rendered on the issue presented. Rimov was given notice of fees owed for her unsuccessful effort to invalidate the release through the arbitration. Rimov now attempts “post hoc” characterization of a completed arbitration proceeding. She filed a belated complaint in the trial court “as if there had been no arbitration previously.” *Godfrey*, 142 Wn.2d at 893-94. Her action is precluded. Schultz is entitled to dismissal of Rimov’s complaint. The trial court erred in failing to so rule.

3. A Complaint Filed De Novo After an Unappealed Arbitration Ruling Precluding Such Claims Violates the UAA's Statute of Limitations, and Must Be Dismissed.

Rimov not only failed to challenge the existence of agreement to arbitrate, she also failed to move to modify, vacate, or correct the arbitration award. The trial court may not now engage in any review of that decision.

The Court of Appeals in *MBNA America Bank, N.A. v Miles*, 140 Wn. App. at 513-14, flatly rejected what Rimov does here in filing a complaint de novo nine months after an arbitration ruling. Therein, a credit card customer objected to arbitration at the proper time prior to the arbitration, but never moved to vacate the unfavorable ruling until more than a year later, then claiming there was no valid agreement to arbitrate. *Id.* The complaint was properly dismissed. The losing party's claim that he "never agreed to arbitrate" was time-barred, even though timely objection had been made. *Id.* at 515. The *MBNA America* ruling characterizes the UAA as including its own statute of limitations. *Id.* at 514-16. Any ability to appeal from an arbitration decision is forfeited when the losing party who objected to arbitration fails to move to vacate within 90 days after the arbitration decision. *Id.* citing what is now RCW 7.04A.230(2).

Here, Rimov received notice in writing of the arbitrator's November

13, 2008 ruling on the same date. Within that very decision is the arbitrator's confirmation of the parties agreement to arbitrate. Schultz requested fees, reinforcing the presumed substantive effect of that decision. Ninety days passed, and the statute of limitations ran on Rimov's claim by the end of February 2009. Even *had* Rimov objected to the arbitration process prior to its commencement, she would still be barred from filing even an action to vacate that ruling by August 2009. The trial court erred in allowing Rimov to bring a complaint de novo in direct violation nine months after a preclusive arbitration ruling was issued as if no arbitration ruling existed.

4. The Trial Court's Ruling Improperly Discontinues Vested Statutory Rights and Remedies Held by Schultz Following the Successful Arbitration.

When Rimov both failed to object to arbitration at the time of arbitration *and* failed to move to vacate, modify, or correct the arbitrator's decision thereafter, the arbitration decision became final. Statutory rights vested in favor of Schultz under the UAA. This is noted by this Court's Commissioner on January 25, 2010 in her order granting review. App. F.

Unlike the party aggrieved in an arbitration, the prevailing party at an arbitration has no duty to confirm their award within any specific period of time. RCW 7.04A.220. Confirmation of an arbitration award is discretionary. Again, the language of the statute is plain and

unambiguous. A prevailing party “may” file a motion with the court confirming the award. RCW 7.04A.220. The Legislature specifically removed any mandatory timeline for confirmation of an award when it repealed the former RCW 7.04.150, effective January 1, 2006 (the former statute contained a one year timeline for confirmation of an award); *see Barnett v. Hicks*, 119 Wn.2d at 156-57, *citing* the former RCW 7.04.150.

This discretion promotes the public policy of the use of arbitration as a means of avoiding the courts for resolution of disputes. *See Godfrey*, 142 Wn.2d at 892. If a prevailing party were required to confirm an award in superior court, court involvement would become mandatory regardless of what occurred at arbitration. But parties should be allowed to rest on the arbitration ruling on their issue. It is thus only when an arbitration result is challenged that court action is required within a time certain. RCW 7.04A.230, .240. This promotes finality of the arbitration result.

This policy is well illustrated here. Schultz prevailed in the arbitration and notified Rimov of the fees and costs she was owed. But Schultz did not further seek to impose remedies against Rimov, such as court confirmation or formalization of a fee award, even though she had that right. RCW 7.04A.210.⁵ The matter should have gone away, with the

⁵ Under RCW 7.04A.210, an arbitrator may award attorney fees and other reasonable expenses of arbitration if an award is authorized by law in a civil action

issue resolved. But once Rimov disregarded the arbitration award and filed a complaint *de novo* in the trial court, then Schultz not only retained the right to have Rimov's complaint dismissed, but Schultz also retained the vested statutory right to confirmation of the arbitrator's award under RCW 7.04A.220. The trial court's jurisdiction remained available to Schultz as the prevailing party to confirm that award. RCW 7.04A.220, .250. And upon mandatory confirmation of the award, Schultz was allowed to receive her fees and costs for the necessity of defending the arbitration ruling in the trial court, and for confirming the award. RCW 7.04A.250(3).

By its order thus finding RCW 7.04A inapplicable, the trial court thus also improperly removed vested statutory rights held by Schultz under RCW 7.04A. The trial court's decision violates clear and unambiguous statutory law. The decision should be reversed, and Schultz's right to confirmation of the arbitration award restored.⁶

involving the same claim or by the agreement of the parties to the arbitration proceeding. Here, as noted *infra*, the Release allows for fees in defending its terms.

⁶ Parties may submit any issue they desire to arbitration, RCW 7.04.A.150(2). An "award" is simply the record of the ruling. See RCW 7.04.A.190, and see *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 403, 766 P.2d 1146 (1989) (holding that an award "consists of a statement of the outcome," and is sufficient if it settles the issue presented to the arbitrator, which is all that the arbitrator is empowered to decide); *see also, ACF Property Management, Inc. v. Chaussee*, 69 Wn.App. 913, 918-19, 850 P.2d 1387, *review denied*, 122 Wn.2d 1019 (1993) (confirming that only the issues agreed to be arbitrated are the proper subject of arbitration and subject to the UAA).

5. RAP 18 Fees Should Be Awarded on Appeal.

Schultz is entitled to her fees on appeal, per RAP 18.1(a). The right is both contractual and statutory. Fees and costs necessary for the enforcement of an arbitration ruling are recoverable. RCW 7.04A.250; and *see MBNA America*, 140 Wn. App. at 515. Fees are also required as a matter of contract. Under RCW 4.84.330, the parties' Release specifically provides that attorney fees and costs incurred to enforce Release provisions shall be awarded to the prevailing party. CP 149, 151.

Fees and costs should be granted to Schultz.⁷

F. CONCLUSION

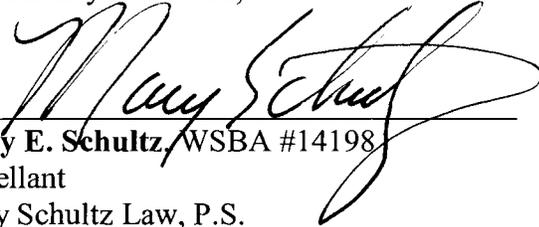
The trial court's failure to dismiss Rimov's joint property complaint violates clear, unambiguous statutory language of the UAA. It violates longstanding judicial precedent. An unappealed arbitration ruling held that Rimov's Release of all joint property claims was valid, binding, and enforceable. That Release requires dismissal of Rimov's claims. The trial court erred in concluding that the UAA did not apply to the arbitration ruling. The trial court's decision should be reversed, with directions to

⁷ If this Court reverses and remands this matter for dismissal of the complaint, Schultz may then proceed to present a motion for an order confirming the arbitrator's award, wherein confirmation is mandatory (RCW 7.04A.220). She may also thereafter seek fees for the defense of the arbitration award in the superior court proceeding. RCW 7.04A.250.

dismiss Rimov's complaint with prejudice. Costs on appeal, including reasonable attorney fees, should be awarded to Schultz.

Dated this 16th day of June, 2010.

Respectfully submitted,



Mary E. Schultz, WSBA #14198
Appellant
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APPENDIX

Trial Court Orders i

RCW 7.04.A.060 vi

RCW 7.04.A.010 vii

Agreement to Arbitrate Correspondence viii

Arbitrator’s Decision xiv

Release of Claims xvi

Commissioner’s Ruling xxiv

APPENDIX

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KING COUNTY
SUPERIOR COURT

Honorable Theresa Doyle
Hearing w/oral arg.: 9:00 a.m. Sept. 18, 2009

FILED
CLERK OF SUPERIOR COURT
KING COUNTY WASHINGTON

SEP 22 2009

HIGH COURT CLERK
BY ANNE C. SHANE
DEPUTY

IN THE SUPERIOR COURT, STATE OF WASHINGTON
COUNTY OF KING

Amy Rimov, a single woman

No. 09-2-29860-2-SEA

Plaintiff,

ORDER ON MOTION
TO DISMISS

vs.

MARY SCHULTZ a single woman
and MARY SCHULTZ AND
ASSOCIATES P.S. aka MARY
SCHULTZ LAW P.S.

Re: Arbitration/~~Release~~

~~[Proposed]~~

Defendants.

Assigned Judge: Doyle
Trial date: 01/31/2011

I. BASIS

1. Defendant, Mary Schultz and Marty Schultz Law P.S., sought a motion to dismiss under CR 12 (b) on theories of preclusion by arbitration and a release agreement.

II. FINDINGS

1. The complaint and reasonable inferences drawn from the complaint explain why the release agreement is not enforceable.

ORDER TO DISMISS RELEASE/ARBITRATION Page 1 of 3
RIMOV V. SCHULTZ/PLEADING/ORDER.RELEASE.ARBITRATION.JC

ORIGINAL

AMY RIMOV
1743 W. 10th #4
Spokane, WA 99204
(509) 481-3888

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- 2. The complaint does not mention an arbitration, nor does the release agreement.
- 3. The matter regarding the arbitration is not a CR 12 matter, requiring the court to consider evidence outside of the pleadings.
- 4. Considering the facts in the light most favorable to the non-moving party, no arbitration occurred, the parties engaged in pre-litigation settlement negotiations that included seeking a non-binding decision, not arbitration.
- 5. Defendant did not counter claim to confirm the arbitration award, nor for attorney fees from pre-litigation settlement negotiations.
- 6. The release agreement has not been found to be binding on which to award attorney fees.

There was no agreement to arbitrate. Thus, RCW 7.04A is not applicable.

III. ORDER

WHEREFORE, this Court hereby orders as follows:

- 1. Motion for Dismissal under CR 12, pursuant to release and arbitration estoppel is denied.
- 2. The motion to dismiss regarding the alleged arbitration, transmuted into a CR 56 motion is denied.
- 3. Defendants' request for attorney fees is denied.

ORDER TO DISMISS RELEASE/ARBITRATION Page 2 of 3
RIMOV V. SCHULTZ/PLEADING/ORDER.RELEASE.ARBITRATION.JC

AMY RIMOV
1743 W. 10th #4
Spokane, WA 99204
(509) 481-3888

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DONE IN OPEN COURT this 18th day of September 2009.


HONORABLE, THERESA B. DOYLE
King County Superior Court Judge

Presented by:

Amy Rimov, WSBA 30613
Plaintiff, pro se

Approved:
Notice of Presentment Waived:
Copy Received:

Mary Schultz, WSBA 14198
Defendant Pro se/Attorney for Defendants

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FILED
KING COUNTY, WASHINGTON

Honorable Theresa Doyle
Hearing w/o oral arg.: 9:00 a.m. Oct. 7, 2009

OCT 08 2009

SEA
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT, STATE OF WASHINGTON
COUNTY OF KING

Amy Rimov, a single woman

Plaintiff,

vs.

MARY SCHULTZ a single woman and
MARY SCHULTZ AND ASSOCIATES
P.S. aka MARY SCHULTZ LAW P.S.

Defendants.

No. 09-2-29860-2-SEA

ORDER ON MOTION FOR
RECONSIDERATION OF
ORDER DENYING DISMISSAL

Re: Arbitration/Release
~~Proposed~~

Assigned Judge: Doyle
Trial date: 01/31/2011

I. BASIS

1. Defendant, Mary Schultz and Mary Schultz Law P.S., seeks reconsideration of the Order Denying Motion to Dismiss re Arbitration.

II. FINDINGS

2. Neither the pleadings nor additional evidence provided supports dismissal due to arbitration preclusion. Taking the Plaintiff's facts as true, there was no agreement to arbitrate.

III. ORDER

WHEREFORE, this Court hereby orders as follows:

1. Motion for Reconsideration of Order Denying Dismissal under CR 12 or CR 56, pursuant to

ORDER TO DISMISS RECON ARBITRATION Page 1 of 2
RIMOV V. SCHULTZ/PLEADING/ORDER.RELEASE.ARBITRATION.JC

AMY RIMOV
1743 W. 10th #4
Spokane, WA 99204
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ORIGINAL
Page 309

AIV

1 release and arbitration estoppel is denied.

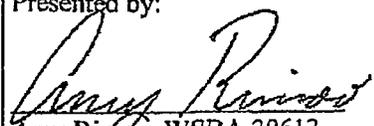
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DONE IN COURT this 7 day of Oct 2009.



HONORABLE, THERESA B. DOYLE
King County Superior Court Judge

Presented by:


Amy Rimov, WSBA 30613
Plaintiff, pro se

Approved:
Notice of Presentment Waived:
Copy Received:

Mary Schultz, WSBA 14198
Defendant Pro se/Attorney for Defendants

Av

RCW 7.04A.060

- (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.
- (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
- (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.
- (4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

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RCW 7.04A.010

The definitions set forth in this section apply throughout this chapter.

- (1) "Arbitration organization" means a neutral association, agency, board, commission, or other entity that initiates, sponsors, or administers arbitration proceedings or is involved in the appointment of arbitrators.
- (2) "Arbitrator" means an individual appointed to render an award in a controversy between persons who are parties to an agreement to arbitrate.
- (3) "Authenticate" means:
 - (a) To sign; or
 - (b) To execute or adopt a record by attaching to or logically associating with the record, an electronic sound, symbol, or process with the intent to sign the record.
- (4) "Court" means a court of competent jurisdiction in this state.
- (5) "Knowledge" means actual knowledge.
- (6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.
- (7) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

West's RCWA 7.04A.010

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February 12, 2008

VIA HAND DELIVERY

Robert A. Dunn
 Dunn & Black
 10 North Post, Suite 200
 Spokane, WA 99201

Re: Mary Schultz / Amy Rimov

Dear Bob:

Confirming the agreement which the parties reached this morning, Amy will return the Volvo automobile to Mary's home sometime today and place both sets of keys in the mailbox. In turn, Mary will make arrangements to have the Honda Prelude, which I believe is stored in the garage at the West 21st Street home, picked up, serviced and brought into reasonable working order so that Amy can begin to drive this car, presumably sometime next week after the car has been made ready.

Mary will hire movers to move Trent's personal belongings and effects, his bicycle in Mary's backyard, as well as the personal belongings and effects and certain items of furniture that Amy would like from the home on Adams, from the home on West 21st Street and from the office. A copy of that list is enclosed. It is my understanding that this will be done over the weekend, and I have furnished you with Amy's cell phone number so that the movers can reach her with the expected time of arrival at her residence at 1743 W. 10th Avenue, Unit #4.

Lastly, the parties have agreed to go to a non-binding arbitration before Judge Donohue in a summary judgment fashion with no live witnesses with regard to the enforceability of the Settlement Agreement and Release. I would like to call Judge Donohue, or at least Chuck Naccarato, this week to reserve a date and time. Give me a

OF COUNSEL:
 Dudley R. Feltus
 Dana M. L. Tomco

RETIRED
 Wm. A. Davenport
 Alan H. Tash
 John H. Wash, Jr.

* Also admitted in Idaho
 † Also admitted in Oregon
 ‡ Also admitted in Montana
 ** Also admitted in California
 †† Also admitted in New York
 ††† Admitted in Idaho only

A
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Robert A. Dunn
Dunn & Black
February 12, 2008
Page 2

call when it is convenient to your schedule. I will be in the office most of Wednesday, Thursday afternoon and most of Friday.

Very truly yours,

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE

William D. Symmes

William D. Symmes

WDS:jlf

Robert A. Dunn
Dunn & Black
February 12, 2008
Page 3

bcc: Amy Rimov

Dunn & Black

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February 14, 2008

Mr. William D. Symmes
Witherspoon, Kelley, Davenport & Toole, P.S.
422 W. Riverside Ave., Suite 1100
Spokane, WA 99201

Re: **Mary Schultz and Associates/Amy Rimov**

Dear Bill:

This is in response to your February 12, 2008 letter, which needs to be corrected.

Mary did not agree to trade the Volvo for the Honda. What she agreed to do is consider loaning the Honda to Ms. Rimov on an interim basis provided the Volvo was returned immediately. Nor was there any agreement to put the Honda into "reasonable working order." Mary merely indicated she would attempt to jump start the car. There was no discussion about making the car "ready."

Likewise, there was no agreement to "hire movers." I asked for a list of what Ms. Rimov thought were her personal property items still at Mary's home. The only reference that was made to moving was Mary indication that she would get somebody (presumably a friend with a pickup) to move the one or two items that were originally discussed. The list you provided now contains disputed ownership items that obviously will have to be resolved and for more items than Mary ever contemplated would be involved in her effort to accommodate Ms. Rimov.

Lastly, there is an agreement to participate in a non-binding arbitration concerning the enforceability of the Release Agreement. Mary has agreed to advance 1/2 of the arbitrator's fees, with Ms. Rimov paying the other half. Mary has asked that further communication relative to this matter be sent to her direct at her home address, or called directly at her office. She will address this matter directly with you or your client from here until it becomes necessary that I resume involvement, including for purposes of the arbitration proceeding.

B

Alexi

Mr. William D. Symmes
February 14, 2008

I trust this clarifies matters.

Very truly yours,

DUNN & BLACK, P.S.



ROBERT A. DUNN

BAE:mo

Mary Schultz & Associates

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FEB 19 2008

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February 15, 2008

Robert A. Dunn
Dunn & Black
10 North Post, Suite 200
Spokane, WA 99201

Re: Mary Schultz / Amy Rimov

Dear Bob:

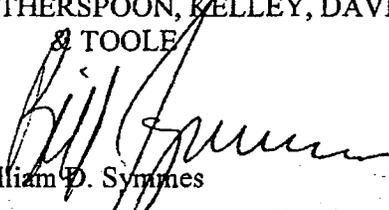
In response to your letter of February 14, 2008, I never suggested that the Honda would be traded for the Volvo. I understood that it was going to be loaned to Amy. However, you did tell me that you would get the car serviced and let Amy know when it could be picked up.

You did tell me that Mary would have someone move the items. I didn't know whether it would be a professional mover or a friend. Either way, I understood you would have the items delivered over the weekend. If there is a disputed item, we will address it later. You did ask me to furnish a list of what Amy would like to have removed at this time from the various homes and the office, and that is exactly what I did. I furnished you with a list.

We have no disagreement on the arbitration.

Very truly yours,

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE


William D. Symmes

WDS:jlf

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AMY RIMOV, an individual,
 Petitioner,
 vs.
 MARY SCHULTZ, an individual
 Respondent

DECISION ON NON-BINDING
 ARBITRATION

The parties to this arbitration have asked the arbitrator to determine whether the Settlement Agreement and Release of All Claims the parties executed January 22, 2007, hereafter "the agreement," is valid and binding.

The dispute addressed by the agreement is whether the relationship between the parties was meretricious. Ms. Rimov said that it was; Ms. Schultz said it was not. There was plenty of evidence on both sides of the dispute supporting each party's position.

In the agreement Ms. Rimov relinquished her meretricious relationship claim. The very subject matter of the agreement was the basis of the relationship between the parties. There was no attempt at dividing common property as in a postnuptial agreement. Those agreements deal with the *distribution* of assets and debts of a couple, not with a release of one party's claim of the requisite underlying relationship, i.e. a committed intimate relationship. This was not the equivalent of a postnuptial agreement.

The agreement itself is clear and unambiguous. The parties, both lawyers, were fully capable of understanding the agreement and its ramifications. The parties voluntarily signed the settlement agreement. There was no requisite evidence of fraud, and no wrongful or oppressive conduct constituting *improper* coercion or duress. The document contained all the required elements of a contract. It was neither substantively nor procedurally unconscionable. These two experienced lawyers had meaningful choices.

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They could have signed the agreement, offered changes to it, or refused to sign it outright. The result of the agreement is not so harsh as to shock the conscience.

Ms. Rimov argues that the contract was void *ab initio* and in violation of RPC 8.4. She claims that Ms. Schultz was her attorney. The only believable evidence of this is a notice of limited appearance Ms. Schultz entered to allow her to present agreed final documents to the court for signature. Ms. Rimov remained her own attorney throughout the dissolution action. The two worked in the same office and may have talked about it, but that did not amount to Ms. Schultz taking on the responsibility of being Ms. Rimov's attorney. There was no violation of RPC 8.4.

On the single question presented in the arbitration, I find the agreement to be valid, binding and enforceable.

Dated November 13, 2008

MIKE DONOHUE
Arbitrator

Ar

SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

THIS IS A COMPLETE RELEASE. READ IT BEFORE SIGNING.

Amy Rimov, hereinafter referred to as "Amy", and Mary Schultz, hereinafter referred to as "Mary," both being attorneys with some years experience, and both being desirous of resolving all disputes related to any and all financial claims which may arise as between them, and for the purpose of ensuring that no such issues exist to impede or interfere with their continuing business relationship and the personal friendship and relationship, herein agree to the following **SETTLEMENT AGREEMENT AND FULL AND FINAL RELEASE OF ALL CLAIMS**, hereinafter referred to as "RELEASE" or "AGREEMENT."

IN CONSIDERATION of the mutual promises set forth herein, and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. CLAIM AT ISSUE: In 2001, Amy moved into Mary's home on a near immediate basis because of a separation from her then husband. She brought two younger children, which then became three children by a nearly immediate assimilation of an older child, with then a fourth also requiring financial assistance, Mary has continued to provide support and assistance to Amy and her family as a gift, with no expectation of reimbursement.
2. Amy is well paid with salary and benefits, and Mary has consistently raised with Amy the expectation that Amy should be contributing to rent, and contribution to base household expense such as utilities, cable, water, etc. etc., consistent with her income and benefits. Mary's properties and expenses have increased dramatically during this time due to need to accommodate all and the desires of all.
3. Notwithstanding expectations or the meeting of those, Mary has continued to provide support to Amy and her children, and has further gifted to Amy and her children, not just the use of the home and 2 other properties, but child support for over two years when Anthony would not contribute, along with a myriad of necessities, luxuries and benefits to Amy's children, such as quality clothing, tennis shoes and sports shoes, computers and Dell gaming computers, Korg synthesizers, Sony Play stations, X-boxes, bicycles (trek bikes of over \$500 each), use of luxury cars, car insurance, cell phones, vacations including purchase of equipment for climbing treks, contributions to her older daughter's education, purchase of a bicycle for that college age daughter, football gear, PSPs, rental and purchase of music instruments, and other things such as sending Trent to Washington DC in the spring of 2007, and, e.g. contributing a 1/3 share of the purchase price to daughter Jena's car. The foregoing are and were also gifts for which Mary expects no reimbursement or interest, and are in addition to those gifts and benefits Mary has consistently also provided to Amy, such as commercial grade treadmills, furniture, kitchen (panini grill), etc..

4. Recently, a renewed request that the financial situation be more equal in contributions of percentages of income to expense, resulted in Amy asserting things perceived by Mary as an effort at financial leveraging far beyond the above situation. The assertion now requires that the basis for such be removed in order to allow for continuation of any personal or professional situation, as if Amy seriously takes the position she stated, whether rightly or wrongly, then Mary will have no choice but to remove herself from both situations in order to deal with and refute those assertions.
5. At all times since Amy has resided in her homes, Mary has kept her finances completely separate, even during times when she was providing Amy with a credit card use, as an example (the card remained in Mary's name with only Mary responsible for payment); there have been no shared bank accounts at any time (Amy authorizes access to Mary to her account so Mary may take certain contributions), there is no real property purchased in the joint names of the parties, there have been no joint financial endeavors between the parties, such as the building of a home, nor any joint pooling of resources or services for any joint project, nor any incurring of joint debt, nor any joint purchase of anything. Mary has seen the situation as voluntary support and gifting to enable Amy and her children to live reasonably, Amy has been asked consistently to pay a reasonable amount of her income to base expense, even if this has not occurred, Amy's name is on no title or deed or vehicle, and Mary purchased two other residences during this time for separation purposes so that the parties had space available to them.
6. RESOLUTION/RELEASE: The parties desire to end this dispute amicably, and in a manner that will allow for future friendship and continued business partnership, and personal relationship of whatever level they choose to engage in. They therefore agree as follows:
 - a. Any and all property and income received from or in the name of one party or the other, and purchased in the name of one or the other, shall be free from any and all claims of ownership or right to such from the other, and all income or savings or funds already accrued or to be accrued in the name of either shall be free from all claims of right by the other in such. This applies to any claims of meretricious relationships, domestic law, contract claims, or any legal theory which either might be used to claim that the other owes support, property settlement, maintenance or otherwise, both now or in the future.
 - b. Neither party will make claims of meretricious or marital like relationship, nor claim any benefits such as maintenance or property equalization either now or in the future. The parties agree that any such rights will accrue only by written contract, or the creation of joint tenancies, joint names on deeds or titles, or by gift with no expectation

of right to reimbursement. Both agree that their entitlement to anything from the other shall be on a voluntary basis alone, as it has been to date.

- c. Both agree that no legal rights attendant to married or meretricious or domestic partnership relationships shall apply as between the parties, except as to those rights specifically contracted for, subsequent to this agreement, and that neither will seek such relief for any such support, maintenance or property right purpose. Both agree that any property transactions between the two shall be effected by clear written intention to include the other as an owner—such as by creating joint tenancies. *See below at (e).*
- d. **Future:** Both parties agree that this agreement shall continue to control all aspects of property and income unless specifically modified in writing and signed by both parties.
- e. Both agree that if any property is to be considered by contract or otherwise mutually owned or joint property, then such shall be purchased in both names, or made a joint tenancy in writing, and any such property, upon Amy vacating Mary's residence, whether voluntarily or involuntarily, will be sold and divided 50/50 to each, or one may buy the other's 50% interest out at that value within 90 days of vacating that residence, if one desires to keep the property and the other does not, with the 50% the percentage applicable regardless of down payment or income disparity, unless otherwise agreed in writing.
- f. Both parties recognize in this agreement that Mary's gross estate exceeds \$5 million dollars, and net estate exceeds \$3 million, with three residences, vehicles, an office, stock funds, life insurance, pension funds, etc., and that Amy's estate is negligible in comparison, but that such circumstances have arisen through the different backgrounds of both, and have not been caused by the other in any contributory fashion.
- g. Both parties agree that each believe their position as to meretricious relationships to be correct, even though opposite, but both agree it is more important to remain amicable than to terminate this relationship to make the point.
- h. Both parties agree that in the event any claim is asserted contrary hereto, and the other party must defend, whether formally or informally, against any attempt to obtain property or income of the other that is not in joint tenancy, then that claimant shall reimburse the other in full for any professional services necessary to refute said claims.
- i) Amy agrees that if asked, she will vacate Mary's premises, and Mary agrees to provide Amy with a reasonable time to do so of not less than 30 days.

- ii) Amy agrees that any further support or largess provided to Amy and her children will be strictly voluntary on Mary's part.
- iii) Amy agrees that any agreed resolution of this monthly financial situation, if the personal residence situation continues by agreement of both parties, shall not result in any basis for any claims of "implied contract" "commingling" or otherwise; that is, and as an example, however Amy resolves to contribute to the household for base expense if she remains in Mary's home by Mary's agreement, such method will not give rise to any claim of property interest or accrual as detailed above, but shall be considered required purely as a matter of being housemates who share the same residence, and who should be sharing expense in some reasonable fashion along with it.

Both parties agree as follows:

Both parties will refrain from any activity which would make any separation or residency vacate actions a public spectacle that would do harm to all involved, including the children.

CONSIDERATION: It is understood and agreed by both parties that the consideration for this series of releases and commitments is invaluable, as regardless of residence, it consists of the ability to peacefully continue a friendship, and business relationship, which is not a right nor a legitimate expectation of either party after the dispute which has occasioned this agreement.

POLICY: It is understood and agreed by both lawyers to this agreement that this agreement shall not be asserted or argued as being void as against any public policy in an effort to circumvent or avoid its terms, nor that such is contrary to separation agreement or contract laws, or void or unenforceable without legal counsel, or without adequate consideration. If such is to occur, such assertions, even if successful, shall constitute a breach of this contract, and damages shall be applied against the violator in the sum total of whatever the violator receives from any action in which the assertion is made, even if successful, plus reimbursement of all fees and costs for the person defending against the claim. Thus, as an example, even if said contract is held void, the party obtaining such characterization shall reimburse the party opposing such for any gain as a result thereof (plus fees and costs incurred)

RELEASE OF CLAIMS: Upon agreement as to the above, verified by signature hereunder, both Amy and Mary hereby release and discharge the Other, their assigns, partners, agents, attorney, children, heirs, legal representatives, and personal representative, from all claims, liabilities, demands and causes of action known or unknown, fixed or contingent, which either party may have or claim to have against the Other or her assigns, partners, agents, attorney, children, heirs,

legal representatives, and personal representative, as to any amounts owed the other for theories of marital like support, maintenance, property accrual, or contract rights based on implied contracts in any and all respects.

This Release may be pleaded as the full and complete defense to any action, suit or other proceeding which has been, is or may be instituted, prosecuted or attempted by either party against the other, that is related in any respect to all personal matters.

Warranties: Both parties expressly warrant that (she) has not made claims publicly prior to this time, or involved anyone other than one close personal friend in such in a manner to date that would constitute disclosure to the relevant legal or social community in which Mary, Amy and the children operate of any of the above claims or this settlement discussion or agreement.

BAR TO FURTHER LITIGATION: Both parties agree that neither will institute or cause to be instituted any action, lawsuit, administrative action, disciplinary process, licensing process, or proceeding of any nature against the Other, her assigns, partners, agents, attorneys, children, heirs, legal representatives, personal representatives or employees, either individually or as a member of any class action, which relates to or arise out of their financial personal or residence situation, with the other.

Both parties represent that neither has filed any complaints, charges, lawsuits, or disciplinary proceeding related in any way to any act of the one towards the other, including for any act related to the execution of this agreement itself, or the circumstances thereof.

9. NO ADMISSION OF LIABILITY: The parties agree that this agreement is in compromise of disputed claims. All parties acknowledge that by entering into this agreement, neither party admits and does specifically deny any violation of local, state or federal law. The parties further acknowledge that this agreement has been entered into solely to avoid the time and expense of litigation and that both parties in fact deny any liability on account of said disputed claims.

10. [OPEN]

11. CONFIDENTIALITY: All parties to this agreement agree to maintain the triggering reason behind this agreement as confidential (i.e. the statements made by Amy which promoted this), but either may represent to anyone that the parties have agreed that they have entered into an agreement whereby neither owes the other anything in the event of further dispute. Disclosures mandated by law shall not be a breach of this agreement.

12. AGREEMENT TO INDEMNIFY: Both parties agree to defend, indemnify and hold harmless the other party from any and all lien, subrogation or similar claims, including all costs

and attorney's fees incurred in the defense of such claims, arising out of any claim contrary to or inconsistent with the agreement herein.

13. BREACH: In the event of breach, liquid damages, as well as any attorney fees necessary for the enforcement of said damages should be awarded the party prevailing.

14. ENTIRE AGREEMENT: The parties agree this Settlement Agreement and Release of All Claims contains the entire agreement between them, and there are no other understandings or terms, either expressed or implied; and that this Settlement and Release of All Claims supersedes all prior or contemporaneous oral or written understandings, statements, representations or promises. The parties agree it may be amended only by a written agreement signed by all parties.

EXEMPTION: This release is not designed to prevent any action which might properly occur between the parties in the event of a business partnership in the future, or continued employment, and any breach of contract claims as an employee/employer or partner which may cause damage within that firm.

15. JURISDICTION AND VENUE: The parties agree this Settlement Agreement and Release shall be construed under the laws of the State of Washington; and that the venue of any action necessary under this agreement shall be in Spokane County, Washington, unless otherwise agreed by both parties.

16. CHANGE IN LAW: This agreement shall apply to both parties regardless of any evolution of law which might change the current meretricious relationship/domestic partnership law in the state of Washington.

17. BINDING ON OTHERS: This Settlement Agreement and Release is binding upon the parties and upon their children, parents, brothers and sisters, heirs, executors, administrators, agents, assigns and community estates, if any.

I AM A LAWYER FAMILIAR WITH THE LAWS OF THE STATE OF WASHINGTON, AND IN PARTICULAR, FAMILIAR WITH LAWS OF MARITAL AND COHABITATION ARRANGEMENTS. I HAVE CAREFULLY READ THIS RELEASE. I FULLY UNDERSTAND THE BINDING EFFECT OF THIS AND THAT IT CONSTITUTES A VOLUNTARY RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS, RELATING TO, OR ARISING OUT OF ALL ASPECTS OF THE PERSONAL RELATIONSHIP BETWEEN ME AND THE OTHER PARTY HEREIN. I AM SIGNING THIS RELEASE WITH KNOWLEDGE OF THE LAWS, REQUIREMENTS AND ELEMENTS OF SUCH, VOLUNTARILY AND WITH THE FULL INTENT OF RELEASING THE OTHER FROM ALL CLAIMS RELATING TO, OR ARISING OUT OF, THE RELATIONSHIP BETWEEN ME AND THE OTHER ON A PERSONAL LEVEL, AS TO ALL ACTIVITY TO DATE, OR ACTS OCCURRING PRIOR HERETO. IN SIGNING THIS AGREEMENT, I AM NOT RELYING ON ANY REPRESENTATIONS MADE BY THE OTHER.

NOTARY PUBLIC in and for the State
of Washington, residing in Spokane.
Commission Expires: _____

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

RECEIVED

AMY RIMOV, a single woman,)
)
 Respondent,)
)
 v.)
)
 MARY SCHULTZ, a single)
 woman and MARY SCHULTZ)
 AND ASSOCIATES, P.S., aka)
 MARY SCHULTZ LAW P.S.,)
)
 Petitioner.)
 _____)

No. 64439-4-1

JAN 29 2010

MARY SCHULTZ LAW, P.S.

COMMISSIONER'S RULING

Mary Schultz seeks review of a trial court order denying Schultz's motion to dismiss Amy Rimov's complaint for damages and for an equitable distribution of property accumulated during their six year relationship. The challenged order is appealable as of right under RAP 2.2(a)(3).

Rimov and Schultz are attorneys practicing law in Spokane. Rimov was an associate in Schultz's firm. In 2001, Rimov and her three children moved into Schultz's home following Rimov's dissolution. After six years, the personal and professional relationship ended. In January 2007 Rimov and Schultz signed a written release of claims purportedly resolving all disputes between them. Subsequently, Rimov asserted that the release was invalid and retained counsel to represent her in a potential claim against Schultz. According to Rimov, at a February 2008¹ meeting, Schultz and her counsel requested that the parties submit their disputes to confidential and binding arbitration, but Rimov refused.

¹ The declaration of William Symmes, Rimov's attorney below, states that the meeting occurred in February 2009. This is apparently an error.

No. 64439-4-I/2

Subsequently, Rimov and Schultz agreed to put the issue of the validity of the release before a retired superior court judge. In their correspondence both parties labeled the process as “nonbinding arbitration” and referred to the decision maker as the “arbitrator.” It is undisputed that both Rimov and Schultz stated and intended that the decision would not be binding. Both parties submitted evidence, and on November 13, 2008, the retired judge issued a “Decision on Non-Binding Arbitration,” concluding that the release was valid, binding and enforceable. Neither party took steps to confirm or avoid the decision.

In August 2009, Rimov filed an amended complaint against Schultz alleging a meretricious relationship, seeking an equitable distribution of property accumulated during the relationship, and seeking damages for wrongful termination.

Schultz filed a motion to dismiss under CR 12(b), arguing that the complaint was barred by Washington’s Uniform arbitration act, chapter 7.04A RCW. Rimov responded that she did not agree to binding arbitration and characterized the process she and Schultz agreed to as a mock summary judgment sought for the purpose of fostering the parties’ efforts at settlement.

Arbitration in Washington is a statutorily recognized special proceeding controlled by chapter 7.04A RCW, a statutory scheme that amounts to a code of arbitration. Price v. Farmers Ins. Co., 133 Wn.2d 490, 495, 946 P.2d 388 (1997). “Arbitration traces its existence and jurisdiction first to the parties’

No. 64439-4-I/3

contract and then to the arbitration statute itself,” and the parties’ rights are controlled by statute. Price, 133 Wn.2d at 496 (footnote omitted). Under RCW 7.04A.030(1), the arbitration act applies to all agreements to arbitrate entered into after January 1, 2006. Parties are free to decide if they want to arbitrate and the issues to be submitted to arbitration, but once an issue is submitted to arbitration, the statute controls.² Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 894, 16 P.3d 617 (2001). There is no provision in the statute that permits nonbinding arbitration. Id. The court decides whether a controversy is subject to an agreement to arbitrate. RCW 7.04A.060(2).

The trial court denied Schultz’s motion to dismiss Rimov’s complaint, concluding that there was no agreement to arbitrate, and accordingly, RCW 7.04A was inapplicable. Thereafter the court denied Schultz’s motion for reconsideration.

Schultz seeks review of these orders, arguing that the challenged order is appealable as of right under RAP 2.2(a)(3), a “written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.” Rimov did not respond to this argument except to say that the trial court decision did not terminate the action because the trial court proceedings will go forward.

² RCW 7.04A.030(4) provides that chapter 7.04A does not apply to any arbitration agreement between employers and employees. See Godfrey, 142 Wn.2d at 894 n.5. Neither Schultz nor Rimov has addressed what effect, if any, this subsection has on this matter.

No. 64439-4-1/4

In Stein v. Geonerco, Inc., 105 Wn. App. 41, 44, 17 P.3d 1266 (2001), this court held: “A court decision that discontinues an ‘action’ for arbitration falls within the meaning of RAP 2.2(a)(3) because it involves issues wholly separate from the merits of the dispute and because an effective challenge to the order is not possible without an interlocutory appeal.” Accord Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 440–41, 783 P.2d 1124 (1989).

Here, the effect of the trial court order is to discontinue the arbitration “action” and to allow Rimov’s complaint to go to trial. As the court reasoned in Stein and Herzog, if Schultz is not allowed an immediate appeal, she will be required to proceed through potentially costly and lengthy litigation before having the opportunity to appeal, by which time an appeal will be too late to be effective. Stein, 105 Wn. App. at 44; Herzog, 56 Wn. App. at 443. The challenged trial court order is appealable as of right under RAP 2.2(a)(3), Stein, and Herzog.

Alternatively, Schultz argues that discretionary review should be granted under RAP 2.3(b)(1), obvious error that renders further proceedings useless, or RAP 2.3(b)(2), probable error that substantially alters the status quo or substantially limits Schultz’s freedom to act. Schultz relies on Godfrey, where the court held that a provision in the parties’ arbitration agreement allowing a trial de novo on the issue of damages was contrary to the arbitration statute:

To conduct the arbitration that occurred in this case, the parties sought arbitration on both liability and damages; they brought into play the jurisdiction and power of the courts as set forth in the Act. By so

doing, they have activated the entire chapter and the policy embodied therein, not just the parts that are useful to them, such as ability to reduce the award to an enforceable judgment. Once they decided that both liability and damages would be arbitrated, they were not free to say the arbitration as to liability was binding, but as to damages it was not. . . . Arbitration is intended to be final; parties agree to waive their right to have their disputes resolved in the court system. They cannot submit a dispute to arbitration only to see if it goes well for their position before invoking the courts' jurisdiction.

Godfrey, 142 Wn.2d at 897.

Rimov argues that Godfrey is distinguishable because here there was no written agreement to arbitrate and no motion to compel arbitration. She also argues she never gave up her right to judicial process and that it is unfair to enforce the arbitrator's decision, where both parties intended nothing more than a nonbinding process and never agreed to "arbitration" within the statutory meaning despite using the term.

Having concluded the challenged order is appealable as of right, I need not determine whether Schultz has met the strict criteria for discretionary review.

Now, therefore, it is

ORDERED that the challenged order is appealable as of right and the clerk shall set a perfection schedule.

Done this 25th day of January, 2010.

Mary S. Neel
Court Commissioner

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 25 AM 8:12

DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail a true and accurate copy of the following document: Brief of Appellant in Court of Appeals Cause No. 64439-4-I to the following:

Amy Rimov
221 W. Main Street, Suite 200
Spokane, WA 99201

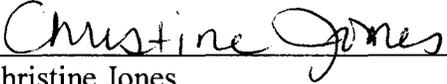
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Original filed with:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 16, 2010, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick