

No. 64499-8-I
STATE OF WASHINGTON COURT OF APPEALS
DIVISION I

PAUL HENRI MONGAUZY,

Appellant,

and

KATHLEEN DIANE MONGAUZY,

Respondent.

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STATE OF WASHINGTON
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On Appeal from King County Superior Court
Honorable Meg Sassaman

Appellant's Opening Brief

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A. Assignments of Error

1. The trial court erred when it used a 14-day *motion* procedure, denied Respondent's ("former husband's") request for discovery, and did not remand this matter for an evidentiary hearing when it summarily determined the parties' rights under the Dissolution Decree and a subsequently executed and delivered quit claim deed, modified the Dissolution Decree by adding provisions, entered a \$238,000 supplemental judgment and imposed liens on the former marital property. This procedural impropriety is especially egregious because the uncontroverted evidence showed: the parties mutually listed the property for sale as required by the Decree; the parties mutually accepted three offers from potential buyers to purchase the property; all three potential buyers inspected the property; all three potential buyers discovered problems with the property and made post-inspection counteroffers; the parties mutually rejected all three post-inspection counteroffers; the parties mutually cancelled the listing agreement; the former husband re-financed the property in his name alone and paid off all the marital debt that the Petitioner ("former wife") was equally responsible for under the Decree; and the former wife then quitclaimed her interest in the property to former husband.

2. The trial court erred when it modified the property distribution provisions in a final Dissolution Decree after the time for appeal had expired when it ordered former husband to pay former wife \$178,000 for purported equity in the former marital residence; \$60,000 for interests in Canadian accounts and certain other real property; placed liens on the former marital residence; and allowed the former wife to force the former marital home's sale.

3. The trial court erred when it made finding of fact no. 4: "The Court finds [\$729,900] to be accurate and compelling evidence as proof of the value of the residence" because there was insufficient evidence to support that finding. In fact, the uncontroverted evidence showed the potential buyers who initially offered \$729,900 to purchase the property lowered their offer after they inspected the property and the parties mutually agreed to reject the potential buyers' post-inspection counteroffers.

4. The trial court erred when it made finding of fact no. 5: "The full price offer was rejected and the court cannot find a reason for the rejection" because there was insufficient evidence to support that finding. The uncontroverted evidence showed the potential buyers who initially offered \$729,900 to purchase the property lowered their offer after they inspected the property and the parties

mutually agreed to reject the potential buyers' post-inspection counter-offer and then immediately entered into another contract with other potential buyers

5. The trial court erred when it made finding of fact no. 15(b): "Respondent has not followed through on listing the house, selling it, in order to distribute the proceeds" because it is not supported by substantial evidence. The uncontroverted evidence showed the property was, in fact, listed by the parties; the parties accepted three offers from potential buyers to purchase the property; all three potential buyers inspected the property, found problems with the property, and submitted post-inspection counteroffers for the property; the parties' mutually rejected all three post-inspection counteroffers; and the parties mutually rescinded the listing agreement.

6. The trial court erred when it made the finding that \$178,000 was one-half the parties' net equity in the former marital residence.

7. The trial court erred when it made the finding that the Canadian accounts were former community property because the Dissolution Decree found the Canadian accounts were former husband's separate property.

8. The trial court erred when it made conclusion of law no.

15(c): “Any encumbrances against the residence since the date of the Decree are Respondent’s alone” because the uncontroverted evidence shows the April 2008 re-finance proceeds were used to pay off marital debt that was equally awarded to both parties in the Dissolution Decree.

9. The trial court erred when it made conclusion of law no.

15(d): “Petitioner’s signing of a quit claim deed does not extinguish her interest in the property” because the quit claim deed legally transferred the former wife’s interest in the property to the former husband.

10. The trial court erred by not reducing the amount due former wife by the amount of debts former husband has paid on her behalf since the Decree was entered.

Issues Pertaining to Assignments of Error

1. Whether the trial court should have refused to entertain former wife’s 14-day motion over former husband’s objection and request for discovery because the proper avenue for former wife’s requested relief was a separate action and not a motion or other proceeding ancillary to the marital dissolution proceeding.

2. Whether the trial court abused its discretion in not conducting an evidentiary hearing to resolve the vastly disputed

facts prior to entering a \$238,000 judgment against former husband, legally determining that a quit claim deed that was executed and delivered by the former wife to the former husband did not extinguish former wife's interest in the former marital residence; and imposing liens against the former marital residence.

3. Whether the trial court erred when it modified the property distribution provisions in a final Dissolution Decree after the time for appeal had expired when it ordered former husband to pay former wife \$178,000 for purported equity in the former marital residence; \$60,000 for interests in Canadian accounts and certain other real property prior to the former marital residence being sold; placed liens on the former marital residence; and allowed the former wife to force the former marital home's sale when none of these provisions were in the Dissolution Decree.

4. Whether the trial court erred when making the following findings that were not supported by substantial evidence:

a. Finding that \$729,900 was accurate and compelling evidence as to the former marital residence's value because the uncontroverted evidence showed that no buyer was willing to pay that much for the former marital residence after the property was inspected.

b. Finding that the trial court cannot find a reason for rejecting the \$729,900 full price offer because the uncontroverted evidence showed that there were three potential buyers who submitted offers to purchase the former marital residence that were all accepted by the parties; all three buyers had the former marital residence inspected, found problems and submitted post-inspection counteroffers; and both the former husband and the former wife rejected the buyers' counteroffers that reduced the purchase price or required expensive repairs.

c. Finding former husband did not follow through on listing the house, selling it, in order to distribute the proceeds because the uncontroverted evidence showed the former marital residence was, in fact, listed by the parties; the parties accepted three offers from potential buyers to purchase the property; all three potential buyers inspected the property, found problems with the property, and submitted post-inspection counteroffers for the property; and the parties' mutually rejected all three post-inspection counteroffers; and the parties mutually rescinded the listing agreement.

d. The former wife's one-half interest in the marital residence's equity was \$178,000 because that figure was based on faulty assumptions regarding fair market value and did not deduct all the community debts former wife was obligated to pay pursuant to the Dissolution Decree that were actually paid by former husband.

e. The Canadian accounts were community or jointly owned property when the Dissolution Decree found the Canadian accounts to be former husband's separate property.

5. Whether a quitclaim deed presumptively transfers the grantor's rights in the described real property.

6. Whether a grantor who challenges a quit claim deed's presumed transfer of his or her interests in the described property bears the burden to prove the quitclaim deed was procured through improper means.

7. Whether the encumbrances on the former marital residence should be equally shared by both parties if the quitclaim deed is to be set aside to the extent they represent payments for community debts that were ordered to be paid equally by both parties in the Dissolution Decree.

B. Statement of the Case

1. Procedural Facts

Former wife and former husband were married on December 18, 1999; they separated on January 10, 2007.¹ On May 22, 2007, King County Superior Court entered a Default Dissolution Decree prepared by the former wife that dissolved the parties' marriage.²

The Decree provided, in pertinent part, that the Mongauzy family residence in Issaquah, Washington was to be listed for sale immediately.³ The Decree also provided that the parties were equally responsible for marital debts, including the first and second deeds of trust on the former marital property and various credit card debts.⁴ The Decree made no provision in the event that the residence did not sell, nor did it state whether "equity/profit" was to be determined before or after the parties paid off the marital debts.

As part of the dissolution proceeding, the court found that "Canadian savings bonds/investment/retirement accounts of approx. value \$50,000 US" were the separate property of the former husband.⁵ The Decree awarded former husband as his

¹ CP 10.

² CP 1-8.

³ CP 2.

⁴ CP 3-4.

⁵ CP 11.

separate property the “Canadian savings bonds/investment/retirement accounts” and a 20-acre parcel in Chelan County, Washington.⁶ Former wife was awarded as her separate property half of the “final equity/profit from sale of primary residence” along with half of the value of the 20-acre property in Chelan County (cash to petitioner \$35,000 “due upon sale of primary residence”) and half of the value of the Canadian savings bonds/investment/retirement accounts (cash to petitioner \$25,000 “due upon sale of primary residence”).⁷

Regarding liabilities under the Decree, each party was to be responsible for paying half the mortgage, half the home equity loan, and half of the substantial community credit card debt.⁸ In addition, former husband was to pay \$1,000 a month in maintenance for 24 months.⁹ Former husband had no part in drafting the Decree, and former wife admits that she drafted the Divorce Decree herself.¹⁰ After the Decree was entered on May 22, 2007, former wife did not appeal the Decree.

On July 30, 2009, former wife filed a Motion in King County

⁶ CP 2.

⁷ CP 3.

⁸ CP 3-4.

⁹ CP 4-5.

¹⁰ CP 76, ln 25-27; 88, ln 17-25.

Superior Court for Enforcement of the Decree of Dissolution and Other Relief.¹¹

On August 21, 2009, former husband filed a Response to the Motion to Enforce the Decree.¹² Former husband's Response included discussion of the "need for continuance to engage in discovery."¹³ In particular, former husband wanted to prove to the court how much money he had spent supporting former wife since the date of the Decree, investigate former wife's financial matters, and gather copies of checks and e-mail correspondence.¹⁴ On August 25, 2009, former wife filed a Reply Re. Enforcement of Decree.¹⁵

On September 17, 2009, the King County Superior Court entered an order granting former wife's motion to enforce the Decree and for award of fees.¹⁶ The court found that the value of the residence was \$729,900, stating,

The parties' residence was listed for sale and the parties received a full price offer at \$729,900. The Court finds this to be accurate and compelling evidence as proof of the value. The full price offer was rejected and the Court cannot find a reason for such

¹¹ CP 18.

¹² CP 76.

¹³ CP 84, ln. 7-17.

¹⁴ *Id.*

¹⁵ CP 87.

¹⁶ CP 272-76.

rejection and therefore the value of the residence will be set at \$729,900.¹⁷

The court awarded former wife two separate judgments of \$60,000 and \$178,000 to be liens filed against the residence,¹⁸ and additionally found that \$178,000 was “one-half the value of the parties’ net equity in the residence,”¹⁹ that former husband “cannot unreasonably delay complying with the Decree,” that he “has not followed through on listing the house,” that “[a]ny encumbrances against the residence since the date of the decree are [former husband’s] alone,” that former wife’s “signing of a quit claim deed does not extinguish her interest in the property,”²⁰ and that former wife “can force the sale of the residence.”²¹ The court made no finding that former wife was in any way manipulated, controlled, deceived, defrauded, bribed, unduly influenced, or under duress or coercion when she rejected the post-inspection counteroffers on the former marital residence, canceled the listing on the marital residence, signed the deed of trust on the former marital residence, or signed the quit claim deed for the former marital residence.²²

¹⁷ CP 273.

¹⁸ CP 272, 275.

¹⁹ CP 275.

²⁰ CP 274.

²¹ CP 272.

²² CP 297-301.

On September 11, 2009, former husband's attorney filed a Second Notice of Objection and Motion to Compel Compliance over former wife's refusal to provide financial information, in violation of LFLR 10.²³ He filed an Amended Motion for Revision on September 28, 2009.²⁴

October 29, 2009, the court entered an order denying the motion for revision.²⁵

Former husband timely filed a notice of appeal on November 23, 2009, appealing the Order Granting Petitioner's Motion to Enforce Decree and Award of Fees to Petitioner entered on September 17, 2009 as well as the Order Denying Motion for Revision.²⁶

2. Substantive Facts

The former marital residence was listed for sale on June 28, 2007 and that was within six weeks of the date the Decree was entered.²⁷ Former wife admits the former marital residence was listed.²⁸

During the months that the property was listed, offers from two buyers were received, one on July 22, 2007 (Eustace offer), and

²³ CP 241.

²⁴ CP 277.

²⁵ CP 293.

²⁶ CP 295.

²⁷ CP 60.

²⁸ CP 88, ln 43.

another on August 1, 2007 (Slichta offer); later, on January 3, 2008, a third offer was received (Hawley offer).²⁹

All the buyers made counter-offers after they inspected the property. Former wife admits that counter-offers were received after the buyers inspected the property “because of improvements that needed to be made.”³⁰ The Eustaces were the first buyers who originally offered \$729,900 for the property.³¹ After they inspected the property they counter-offered for \$719,900 plus a \$3,000 credit toward allowable closing costs – in essence a \$716,900 counteroffer.³² Both former husband and former wife, acting jointly, mutually did not accept the Eustace’s counteroffer; rather, they mutually made a counter-counter-offer allowing the sales price to be reduced to \$719,900 or a \$10,000 credit toward closing costs.³³ They, thus, rejected the Eustace’s \$716,900 counteroffer and wanted \$719,900.

The same scenario played out again when the Mongauzys rejected the second offer. Next, the Slichtas originally offered to

²⁹ CP 78, ln 1 -13; 196-205.

³⁰ CP 89, ln 17 - 20.

³¹ CP 78, ln 7 -8; CP 214; and CP 362 (clearer copy of same document).

³² CP 362, which is an undistorted copy of CP 214.

³³ *Id.*

buy the Mongauzys' home for \$719,900.³⁴ After they inspected the property, they insisted on \$16,000 in repairs be made or the amount credited toward the purchase price.³⁵ The Slichtas, thus, lowered their offer to \$703,900. The Mongauzys both rejected the Slichtas counteroffer on August 21, 2007.³⁶

Former wife admitted signing to reject the counter-offers, but claimed she was controlled and manipulated into signing them.³⁷

The parties mutually canceled the listing on August 28, 2007.³⁸ Former wife admits signing the documents to cancel the listing.³⁹

Despite canceling the listing, the Mongauzys continued to try and sell their house, but the buyers would not buy the house after they had it inspected. In January 2008, the former wife was approached by someone that wanted to buy the house.⁴⁰ The Mongauzys again accepted an offer on their home from Mr. Hawley.⁴¹ His inspection, however, revealed "there are many rat feces. Replace rodent contamination."⁴² This deal also did not close.

³⁴ CP 78 and 198 (showing contract price at \$719,900)

³⁵ CP 364, which is an undistorted copy of CP 216.

³⁶ *Id.*

³⁷ CP 89, ln 25-27.

³⁸ CP 60..

³⁹ CP 89, ln 25-27.

⁴⁰ CP 92, ln 22-25.

⁴¹ CP 186.

⁴² CP 78.

Again, former wife admits she and former husband received counteroffers from the buyers because “improvements... needed to be made.”⁴³ In her reply, she also did not contest former husband’s assertions about the property’s condition.

Former wife violated the Decree by not paying her share of the community debt. The default Decree former wife drafted and obtained made former wife responsible for paying 50% of the mortgages and other community credit card debt.⁴⁴ In his response to former wife’s motion to enforce decree, former husband states former wife had not paid one penny toward these obligations.⁴⁵ In reply, former wife admitted she had not paid anything toward these obligations (“[o]bviously this is the case”).⁴⁶ Former husband also states, and former wife admits, that former husband assisted former wife financially following the Divorce Decree.⁴⁷ Former husband states, and former wife does not deny, that during this period he paid for everything and she contributed nothing financially.⁴⁸

On February 11, 2008 former wife wrote an email to former husband and stated she was willing to tell the court that the Divorce

⁴³ CP 89, ln 17-20.

⁴⁴ CP 4.

⁴⁵ CP 189 – 190.

⁴⁶ CP 93, ln 10-13.

⁴⁷ CP 189, ln 23-24; and CP 92, ln 29-34.

⁴⁸ CP 92, ln. 43-46.

Decree had “been satisfied or that we settled.”⁴⁹ She advised former husband to file a motion to vacate the property settlement portions of the decree, that she would not show up for the hearing and that it would be granted.⁵⁰

Then, on March 12, 2008, former wife wrote to the Department of Social & Health Services (DSHS) stating that she and former husband had reconciled and requested that her child support case be closed.⁵¹

On April 10, 2008, former husband refinanced the house.⁵² Former husband states that the reason for refinancing was to obtain a better rate of interest and to pay down the community debt.⁵³

On April 21, 2008, former wife conveyed her interest in the Issaquah residence to former husband by quit claim deed.⁵⁴ Former wife admits having signed the quit claim deed.⁵⁵ Former husband says that former wife quit claimed her interest in exchange for his having taken on 100% of the debts and family expenses since the

⁴⁹ CP 218.

⁵⁰ *Id.*

⁵¹ CP 221; .

⁵² CP 21 ln 40 – CP 22 ln 1; CP 21 n.1.

⁵³ CP 84, ln 2.

⁵⁴ CP 223-24, 368-69, 495-96.

⁵⁵ CP 95, ln. 3-4.

Decree of Dissolution and that by quit claiming her interest, she meant to relieve him of the obligation of later paying her 50% of the net equity if the house ever sold.⁵⁶ Former husband says that former wife's signing of the quit claim deed in exchange for his having taken on 100% of the debts is consistent with her having written in an e-mail message of February 11, 2008 that she was willing to tell the court that the Divorce Decree had "been satisfied or that we settled."⁵⁷

C. Argument

1. Standards of review.

The proceeding was a hearing on former wife's motion to enforce the decree of dissolution and to award fees. The lower court made both findings of fact and conclusions of law. An appellate court reverses a trial court's findings if the findings are not supported by substantial evidence in the record.⁵⁸ Conclusions of law are reviewed *de novo*.⁵⁹

A conclusion of law is a conclusion that follows, through the process of legal reasoning, when the law is applied to the facts as

⁵⁶ CP 82.

⁵⁷ CP 82-83.

⁵⁸ *Miles v. Miles*, 128 Wn. App. 64, 69-70, 114 P.3d 671 (2005); and *In re Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664 (2003).

⁵⁹ *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

found by the court.⁶⁰ Findings of fact that appear in the conclusions of law, and *vice versa*, are mislabeled and will be analyzed under the substantial evidence standard.⁶¹ Findings of fact that have legal ramifications are conclusions of law and are reviewed *de novo*.⁶²

2. The trial court should have refused former wife's 14-day motion given former husband's objection and request for discovery because the proper avenue for former wife's requested relief was a separate action and not a motion or other proceeding ancillary to the marital dissolution proceeding.

A trial court lacks authority to enter judgments in the divorce action when the requested relief requires more than enforcing the decree. Trial courts cannot properly enter a judgment as an incident to a divorce decree even when a party frustrates the divorce decree's purposes.⁶³ In *Mickens v. Mickens*, a divorce decree required the husband to pay the wife the community equity in the family home in the amount of \$8,200 on the sale of the home.⁶⁴ The former husband, however, deliberately abandoned the property by having failed to make the monthly payments and, thus,

⁶⁰ *State v. Niedergang*, 43 Wn. App. 656, 658, 719 P.2d 576 (1986) ("If the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.").

⁶¹ *Winans v. Ross*, 35 Wn. App. 238, 240 n. 1, 666 P.2d 908 (1983); *Miles* at 70.

⁶² *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980).

⁶³ See *Mickens v. Mickens*, 62 Wn.2d 876, 385 P.2d 14 (1963).

⁶⁴ *Mickens*, 62 Wn.2d at 877.

forfeited the contract and lost the community equity.⁶⁵ The wife then brought a proceeding to recover the \$8,200 from the husband by filing a petition in the dissolution action and having the court enter an order to show cause⁶⁶ and the trial court entered a judgment against him.⁶⁷ The Supreme Court, however, held that the judgment could not properly be entered upon a petition and order to show cause as an incident to the divorce decree.⁶⁸

If there is a disagreement regarding the parties' obligations under a dissolution decree, the sanctioned procedure would be to bring a declaratory judgment action to adjudicate the parties' rights. A decree may be subject to a declaratory action to ascertain the rights and duties of the parties.⁶⁹ A declaratory judgment action would be an independent action not ancillary to the marital dissolution action and would satisfy *Mickens*.

Similarly, here, former wife alleged former husband frustrated the home's sale and requested the Court order former husband to pay former wife her "share of the net proceeds had the house sold

⁶⁵ *Mickens*, 62 Wn.2d at 878-79.

⁶⁶ *Mickens*, 62 Wn.2d at 876.

⁶⁷ *Mickens*, 62 Wn.2d at 877.

⁶⁸ *Mickens*, 62 Wn.2d at 881.

⁶⁹ *Byrne v. Ackerlund*, 108 Wn.2d 445, 453, 739 P.2d 1138 (1987).

in June of 2007.”⁷⁰ The Decree, however, clearly stated that former wife was awarded “50% of final equity/ profit from sale of primary residence” (emphasis added).⁷¹ The Decree also did not establish any liens in former wife's favor on the former marital home and did not give the former wife the unilateral ability to force the former marital residence to be sold. It is clear the former marital home was not sold, so to enter judgment for amounts as though the house sold in 2007, establish liens in former wife's favor, and giving the former wife the power to unilaterally force the sale, goes well above and beyond merely enforcing the decree and must be brought by a separate action with a summons, complaint and case schedule that would allow for discovery and witness examination in open court.⁷² This is the only way to properly ferret out the truth in this matter, especially when the former wife indicated she had settled the Decree and quit claimed the former marital property to former husband after the Decree was entered.

Moreover, the Decree only provided the home “be listed for sale immediately.”⁷³ Here, the Mongauzys both listed the former marital residence for sale within 6 weeks after the decree was entered.

⁷⁰ CP at 22.

⁷¹ CP at 3.

⁷² See CR 43 (testimony must be oral and in open court).

⁷³ CP 3.

Former wife, in her motion, never complained that the listing did not occur fast enough. Former husband also pointed out that he had complied with the Decree's and, therefore, former wife's motion "should not be entertained by the court."⁷⁴

Former husband also objected to the motion and asked the court for a continuance so that he would have an opportunity to engage in discovery to prove to the court how much money he had spent supporting former wife since the Decree was entered, an opportunity to depose former wife, an opportunity to gather bank and e-mail records, and an opportunity to further investigate the financial matters surrounding the case.⁷⁵

3. The trial court erred by not holding an evidentiary hearing to make findings of fact.

The trial court's actions denied former husband his procedural due process. No person shall be deprived of life, liberty or property without due process of law.⁷⁶ Procedurally, this requires an opportunity to defend before a competent tribunal in an orderly proceeding adapted to the nature of the case.⁷⁷ In *Mickens*, the Washington State Supreme Court held the competent tribunal and orderly proceedings for cases like the one before this court is a

⁷⁴ CP at 77.

⁷⁵ CP at 84.

⁷⁶ Article I, §3, Wash. State Const.

⁷⁷ *Esmieu v. Schrag*, 15 Wn. App. 260, 265, 548 P.2d 581 (1976).

separate proceeding, independent from the marital dissolution action. Even in *Mickens*, however, the former husband was at least afforded a trial. Here, the trial court denied former husband due process when it entertained former wife's motion ancillary to the marital dissolution action and ordered former husband to pay former wife \$178,000, entered judgment against him, entered another judgment against him for \$60,000, made the judgments liens upon former husband's homestead and allowed wife the unilateral ability to force former husband to sell his homestead⁷⁸ without discovery, an opportunity to cross examine witnesses⁷⁹ or taking testimony orally in open court.⁸⁰

It was also procedurally impossible to make proper findings given the declarations provided in this particular case. In *In re Marriage of Maddix*, the "affidavits raise[d] an issue of fact which [could not] be resolved without the taking of testimony."⁸¹ In *Maddix*, the wife moved for vacation of her decree of dissolution pursuant to CR 60(b)(4), alleging fraud, misrepresentation, or other misconduct by her former husband.⁸² Ms. Maddix specifically claimed that her former husband fraudulently withheld from her the value of his business.⁸³ According to the *Maddix* court, the facts

⁷⁸ CP 272.

⁷⁹ *Baxter v. Jones*, 34 Wn. App. 1, 3-4, 658 P.2d 1274 (1983)

⁸⁰ CR 43.

⁸¹ *In re Marriage of Maddix*, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985).

⁸² *Maddix*, 41 Wn. App. at 249-50.

⁸³ *Id.* at 249.

alleged by the wife were disputed by the husband; however, no further testimony was taken by the trial court to resolve the controverted issues.⁸⁴ The court went on to hold, “The affidavits raise an issue of fact which cannot be resolved without the taking of testimony.... The court erred in vacating the judgment without first hearing and weighing testimony regarding fraud, misrepresentation or other misconduct.”⁸⁵

The trial court’s failure to hold an evidentiary hearing here was similarly flawed. Here, it was undisputed that both parties rejected the various buyers’ post-inspection counteroffers, both parties canceled the listing agreement in August 2007, and former wife signed a quit claim deed transferring her interest in the family home to the former husband. Former wife claimed she was manipulated into signing all these documents despite having indicated in an email that she had settled with former husband and despite having told DSHS that she and former husband had reconciled. The trial court made no findings former wife was manipulated or signed these documents under duress, undue influence or fraud.⁸⁶

Despite this, it entered the judgments against former husband, the liens against his homestead, and provided former wife could force former husband to sell his homestead without any proceeding to

⁸⁴ *Id.* at 252.

⁸⁵ *Id.*

⁸⁶ *Pacesetter Real Estate v. Fasules, Inc.*, 53 Wn. App. 463, 475, 767 P.2d 961 (1989) (“If no finding is entered as to a material issue, it is deemed to have been found against the party having the burden of proof.”)

take testimony. This was error.

4. A court may not modify a property division after the time for appeals has expired.

A decree of dissolution of marriage is final when entered, subject only to the right of appeal.⁸⁷ A dissolution decree that was not appealed cannot be later modified.⁸⁸ A decree may be subject to a declaratory action to ascertain the rights and duties of the parties.⁸⁹ However, a declaratory action is proper only where the language of the decree is ambiguous, or where a party seeks to divide property not disposed of by the trial court at the time of dissolution.⁹⁰ A dissolution decree is not subject to modification through a declaratory action.⁹¹ That a spouse may have believed the effect of her agreement to be different than it actually is does not justify the court in setting aside or rewriting the contract for her.⁹²

The trial court, here, modified the Decree. A dissolution decree is modified when rights given to one party are extended beyond the scope originally intended, or reduced.⁹³ Here, the Decree awarded 50% of the net equity/profit in the former marital residence to each

⁸⁷ RCW 26.09.150(1) and *Sessions v. Sessions*, 7 Wn. App. 625, 626, 501 P.2d 629 (1972).

⁸⁸ *Byrne*, 108 Wn.2d at 453.

⁸⁹ *Byrne*, 108 Wn.2d at 453.

⁹⁰ *Byrne*, 108 Wn.2d at 453.

⁹¹ *Byrne*, 108 Wn.2d at 456.

⁹² *Byrne*, 108 Wn.2d at 454.

⁹³ *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969).

party and it only required the property be listed for sale immediately. It was undisputed this was done. The original decree did not require the property be sold by a specific date, did not preclude the parties from mutually deciding to take the house off the market, did not give former wife a guaranteed amount from the property's sale, did not make the former wife's interest in the former marital home or the Canadian accounts or the Chelan property to be a lien on the former marital residence, and did not give the former wife the unilateral right to compel the former marital home's sale. Had she wanted these provisions in the default Dissolution she drafted and obtained, then she should have provided for them when she drafted the Decree. She cannot come back into court using a truncated motion proceeding and modify the property distribution provisions in the Decree.

a. No Civil Rule 60 motion was or could have been brought.

After the time for appeal has expired, according to RCW 26.09.170, "[t]he provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state."⁹⁴ After the time for appeal has run on a property division, the remedy is to file a Civil Rule 60 motion to vacate the decree or enforce any judgments by process of law.⁹⁵

⁹⁴ RCW 26.09.170(1)(b).

⁹⁵ *In re Marriage of Bobbitt*, 135 Wn. App. 8, 18, 144 P.3d 306 (2006).

As aptly explained in the foregoing sections, former wife's using the truncated motion proceeding ancillary to the marital dissolution action rather than bringing a separate declaratory judgment action is not the correct "process of law." Moreover, former wife brought no CR 60 motion to vacate the Decree.

There were no grounds for former wife to bring a CR 60 motion to vacate. CR 60 permits relief from a final judgment only under circumstances such as mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, and "[a]ny other reason justifying relief from the operation of the judgment."⁹⁶ The latter catch-all provision requires extraordinary circumstances, such as irregularities which are extraneous to the action of the court or that go to the question of the regularity of its proceedings, and a CR 60(b)(11) motion must be brought within a reasonable time.⁹⁷ Former wife brought no CR 60 motion. Even if former wife had sought relief under CR 60, she did not argue or show any circumstances that would "justify[] relief from the operation of the judgment," CR 60(b)(11), such as mistake, fraud, or irregularity of proceedings.

Because the lower court's order did more than just enforce the Decree and modified its property distribution provisions, the trial court violated RCW 26.09.170.

⁹⁶ CR 60(b)(11).

⁹⁷ *In re Marriage of Thurston*, 92 Wn. App. 494, 499-500, 963 P.2d 947 (1998).

b. The language of the decree was not ambiguous and is not now subject to interpretation by declaratory judgment.

Not only was CR 60 relief not available, but declaratory relief was also not available. When the terms of a decree are clear and unambiguous, the decree is not subject to interpretation through a declaratory judgment action.⁹⁸ The court in *Byrne v. Ackerlund* summarized the law as follows:

A property settlement agreement incorporated into a dissolution decree that was not appealed cannot be later modified. Nevertheless, the decree, or agreement merged therein, may be subject to a declaratory action to ascertain the rights and duties of the parties. A declaratory action is proper only where the language of the decree is ambiguous, or where a party seeks to divide property not disposed of by the trial court at the time of dissolution. A declaratory judgment action is not proper where there is no ambiguity in the decree or where a party seeks relief based upon unilateral mistake, unconscionability or public policy.⁹⁹

Here, the trial court did not find the decree was ambiguous and, thus, subject to interpretation by a declaratory action.¹⁰⁰ Moreover, the former wife made no such claim. Former wife may have unilaterally believed the Decree's language she drafted meant more than it actually said; but her unilateral, subjective belief does not

⁹⁸ See *In re Marriage of Mudgett*, 41 Wn. App. 337, 704 P.2d 169 (1985).

⁹⁹ *Byrne v. Ackerlund*, 108 Wn.2d 445, 453, 739 P.2d 1138 (1987) (citations omitted).

¹⁰⁰ *Pacesetter Real Estate v. Fasules, Inc.*, 53 Wn. App. 463, 475, 767 P.2d 961 (1989) ("If no finding is entered as to a material issue, it is deemed to have been found against the party having the burden of proof.")

justify the trial court's setting aside or rewriting the Decree for her.¹⁰¹

c. Even if the Decree were ambiguous, the trial court could not infer an obligation that was not contained in the original Decree.

Where the language of a dissolution decree is properly subject to interpretation, the construction of the decree and any contract incorporated therein is a question of law.¹⁰² Interpretation by the reviewing court must be based upon the intent of the parties as reflected in the language of the agreement.¹⁰³ The court may not add to the terms of the agreement or impose obligations that did not previously exist.¹⁰⁴ Nor can a court make a contract for the parties based upon general considerations of abstract justice.¹⁰⁵

In *Byrne v. Ackerlund*, the dissolution decree awarded a parcel of real estate to one spouse and liens on that property to the other spouse.¹⁰⁶ The decree provided that the liens would be payable upon the sale or transfer of the property.¹⁰⁷ The Court of Appeals determined that finality requirements could only be satisfied by interpreting the decree to require sale of the property within a

¹⁰¹ *Byrne*, 108 Wn.2d at 454.

¹⁰² *Byrne v. Ackerlund*, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987), citing *In re Marriage of Gimlett*, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981).

¹⁰³ *Byrne*, 108 Wn.2d at 455, citing *Kinne v. Kinne*, 82 Wn.2d 360, 362, 510 P.2d 814 (1973).

¹⁰⁴ *Byrne*, 108 Wn.2d at 455, citing *In re Marriage of Mudgett*, 41 Wn. App. 337, 341, 704 P.2d 169 (1985).

¹⁰⁵ *Byrne*, 108 Wn.2d at 455, citing *Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980)

¹⁰⁶ *Byrne*, 108 Wn.2d at 446.

¹⁰⁷ *Id.*

reasonable time.¹⁰⁸ The Supreme Court reversed, holding that “[t]he Court of Appeals should not have interpreted the dissolution decree because it was not a proper subject of a declaratory judgment action.”¹⁰⁹ The *Byrne* court then went further, finding

error in the court's [contract] interpretation. Under contract principles, a reasonable time for performance of an obligation may only be implied where the contract imposes a definite obligation but fails to provide a time for its performance. Here, the decree imposed on Ackerlund no obligation whatsoever to sell the property. Rather, Ackerlund's sale of the property can appropriately be viewed as a “condition precedent” to the accrual of Byrne's right to enforce payment on her liens. Until the occurrence of the requisite real property disposition, Ackerlund is not obligated to pay Byrne. While it may be proper to imply a requirement of payment within a reasonable time after the real property is sold, it is wrong to judicially impose a performance deadline on an unripe obligation. In requiring payment within a reasonable time, and then determining that a reasonable time had already passed, the Court of Appeals improperly imposed on Ackerlund an obligation not originally contained in either the decree or property settlement contract.¹¹⁰

Here, the Decree imposed an obligation to list the property for sale “immediately,” but no obligation to sell it. In other words, the former marital home's sale was a condition precedent to former wife's right to receive payment. Moreover, former wife's payment was clearly, unambiguously, and expressly to be 50% of the net equity/profit, not a fixed amount. Because the Decree clearly and unambiguously required the parties to only list the property for sale

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 455.

¹¹⁰ *Byrne*, 108 Wn.2d at 455-56 (citations omitted).

and did not require the property be sold and because the Decree clearly and unambiguously awarded each party 50% of the net equity/profit from any sale, the Decree was not subject to interpretation by declaratory judgment.

5. There is no substantial evidence supporting the findings that: \$729,900 was the value of the former marital residence; there was no reason for rejecting the offers, former husband did not follow through with listing and selling the residence; or former wife's one-half interest in the marital residence's equity was \$178,000.

An appellate court reverses a trial court's findings if the findings are not supported by substantial evidence in the record.¹¹¹

Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise.¹¹²

a. No buyer was willing to pay \$729,900 for the former marital residence after the property was inspected; both former husband and former wife rejected the post-inspection counter-offers, which either reduced the price or required extensive repairs.

Fair market value is "the price a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction, the point at which supply and demand intersect."¹¹³

Despite this, the lower court found:

¹¹¹ *Miles v. Miles*, 128 Wn. App. 64, 69-70, 114 P.3d 671 (2005).

¹¹² *In re Marriage of Obaidi and Qayoum*, 154 Wn. App. 609, 226 P.3d 787, 790 (2010).

¹¹³ Black's Law Dictionary 1587 (8th ed, 1999). *See, also, Washington Beef, Inc. v. County of Yakima*, 143 Wn. App. 165, 172, 177 P.3d 162 (2008), citing *Crystal Chalets Ass'n v. Pierce County*, 93 Wn. App. 70, 77, 966 P.2d 424 (1998).

The parties' residence was listed for sale and the parties received a full price offer at \$729,900. The Court finds this to be accurate and compelling evidence as proof of the value."¹¹⁴

This finding is not supported by any evidence, much less substantial evidence. It is undisputed the parties received one \$729,900 offer from the Eustaces. It is true the Eustaces' offer was accepted by the Mongauzys, but the Eustaces' offer was subject to the Eustaces' inspection. After the Eustaces' inspected the property they were no longer willing to buy the property for \$729,900; rather they made a \$719,900 post-inspection offer that also required the Mongauzys to give the Eustaces an additional \$3,000 credit. The Eustaces' post-inspection counter offer was, thus, a \$716,900 counteroffer. The Mongauzys were unwilling to sell on those terms. Since there was no agreed-upon price, there was no established value for the property.

The second offer made by the Slichtas also did not establish value. The Slichtas originally made a \$719,900 offer that the Mongauzys accepted. The Slichtas offer, like the Eustaces offer, was also subject to inspection. After the Slichtas inspected the property, they made a post-inspection counteroffer requiring the Mongauzys to make \$16,000 in repairs; thus, making their counteroffer a \$703,900 counteroffer. The Mongauzys were unwilling to accept the Slichtas post-inspection counteroffer and

¹¹⁴ CP 273.

took the property off the market. This transaction did not prove the property's value.

Mr. Hawley's offer was also originally accepted by the Mongauzys and was also subject to inspection. Mr. Hawley also made a post-inspection counteroffer and the deal did not close.

The trial court's finding of a value of \$729,900 for the primary residence based on the Mongauzys rejecting an offer at that price should be reversed because it is not supported by substantial evidence in the record.

b. Former husband and former wife listed the house, accepted three offers from potential buyers, mutually rejected three post-inspection counteroffers, and mutually rescinded the listing agreement.

The lower court's findings state that the "parties' residence was listed for sale"¹¹⁵ but also state, in apparent contradiction, that "[r]espondent has not followed through on listing the house."¹¹⁶ The uncontroverted evidence in this case shows the parties mutually listed the house for sale from June 28, 2007 to August 28, 2007;¹¹⁷ This finding is not supported by the evidence.

¹¹⁵ CP at 273.

¹¹⁶ CP at 274.

¹¹⁷ CP at 54-57, 59-60.

The lower court's findings also state that a "full-price offer was rejected and the court cannot find a reason for such rejection."¹¹⁸ The uncontroverted evidence, however, shows that former husband and former wife accepted the full price offer the Eustaces made for \$729,900. Moreover, the reason the property did not sell was because the Eustaces inspected the property; and after inspecting the property, they wanted both a \$10,000 price reduction and a \$3,000 credit toward closing costs. The Mongauzys were only willing to reduce the price by \$10,000 or give a \$10,000 credit; they were unwilling to both reduce the price by \$10,000 and give an additional credit.¹¹⁹ This finding also cannot stand.

To be sure, the Mongauzys also accepted two other offers at less than full price that also did not close because the property was in poor condition. It is undisputed the Mongauzys not only accepted the Eustaces initial offer, but they also accepted a less than full price offer from the Slichtas¹²⁰ and an offer from Mr. Hawley.¹²¹

¹¹⁸ CP at 273.

¹¹⁹ CP 362.

¹²⁰ CP 198, 216.

¹²¹ CP 202, 204-5.

c. The court's valuation of the residence was based on faulty assumptions and did not deduct community debts that former wife was obligated to pay pursuant to the Dissolution Decree that were actually paid by former husband.

As discussed above, the court's valuation of the residence at \$729,900 was not supported by substantial evidence. The valuation was apparently based on the faulty assumption that value can be established by an initial offer in a deal that ultimately fails to close due to unacceptable post-inspection counteroffers.

Furthermore, former husband paid all community debts after the Dissolution Decree. Former wife contributed nothing toward her obligations as set out in the Decree, and yet the trial court, when valuing the residence and determining former husband's obligations under the Decree, gave former husband no credit for the community debts he solely paid, but that were to be paid equally by former wife.¹²²

6. A duly executed quit claim deed presumptively transfers the grantor's rights in the described real property.

Upon the execution and delivery of a deed, it is presumed that the instrument is what it purports to be, and the burden is on the party asserting otherwise.¹²³ By state statute, a quit claim deed,

¹²² CP3-4.

¹²³ *McCoy v. Lowrie*, 44 Wn.2d 483, 488, 268 P.2d 1003 (1954), citing *Moore v. Gillingham*, 22 Wn.2d 655, 157 P.2d 598 (1945).

when duly executed, “shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his heirs and assigns in fee of all the then existing legal and equitable rights of the grantor in the premises therein described....”¹²⁴ It has been the law in Washington since statehood that a quit claim deed is just as effectual to convey the title to real estate as any other deed.¹²⁵ A grantee of a quit claim deed has the same rights as the grantee of a warranty deed, with the exception that he is given no warranties.¹²⁶ When a quit claim deed is clear and unambiguous on its face, no interpretation is necessary.¹²⁷ Here, the lower court concluded that former wife’s “signing of a quit claim deed does not extinguish her interest in the property.”¹²⁸ This conclusion is clearly erroneous.

The trial court made no findings to support a conclusion to set aside the quit claim deed. The former wife complained she was manipulated into signing the quit claim deed in an apparent attempt to have the quit claim deed set aside without the former wife having to bring a separate quiet title action to set aside the deed. The trial court, however, made no findings that the former wife was manipulated or otherwise signed the quit claim deed under duress,

¹²⁴ RCW 64.04.050; *Security Sav. And Loan Ass’n v. Busch*, 84 Wn.2d 52, 56, 523 P.2d 1188 (1974).

¹²⁵ *McCoy v. Lowrie*, 44 Wn.2d 483, 486, 268 P.2d 1003 (1954), citing *Ankeny v. Clark*, 1 Wash. 549, 20 P. 583 (1889).

¹²⁶ *McCoy v. Lowrie*, 44 Wn.2d 483, 486, 268 P.2d 1003 (1954).

¹²⁷ See *McCoy v. Lowrie*, 44 Wn.2d 483, 488, 268 P.2d 1003 (1954).

¹²⁸ CP 299.

trick, artifice or through fraud. Former wife bore the burden to prove one of the foregoing grounds to invalidate the presumptively valid quit claim deed by clear and convincing evidence.¹²⁹ The trial court's failure to make any findings to support that relief means the trial court found against the former wife on those issues.¹³⁰ As such, the trial court's conclusion finding the quitclaim deed did not transfer former wife's interest in the property should be set aside.

7. If the quitclaim deed is to be set aside, to be equitable, the encumbrances on the former marital residence should be equally shared by both parties to the extent the encumbrances represent payments for community debts that were ordered to be paid equally by both parties in the Dissolution Decree.

The Decree of Dissolution listed liabilities to be paid by former wife, as follows:

- 50% of Washington Mutual Mortgage
- 50% of Washington Mutual Home Equity Loan
- 50% of American Express Credit Cards
- 50% of Bank of America Credit Card
- 50% of Home Depot Credit Card¹³¹

The trial court found that "[a]ny encumbrances against the residence since the date of the decree are [former husband's] alone."¹³² However, former wife admits that, after the Decree, she

¹²⁹ *Binder v. Binder*, 50 Wn.2d 142, 148-149, 309 P.2d 1050 (1957).

¹³⁰ *Pacesetter Real Estate v. Fasules, Inc.*, 53 Wn. App. 463, 475, 767 P.2d 961 (1989) ("If no finding is entered as to a material issue, it is deemed to have been found against the party having the burden of proof.")

¹³¹ CP at 3.

¹³² CP at 299.

contributed nothing toward any of her obligations under the Decree and admits that she was, therefore, in violation of the Decree. Former husband states that he refinanced the former marital residence to pay down debt. Former husband states, and former wife does not deny, that he paid for everything and she contributed nothing financially.

Here, the former residence was refinanced to pay down debt. The former wife contributed nothing toward the community debts she was supposed to equally pay pursuant to the Decree. It is, therefore, equitable for the further encumbrances on the former marital residence to be shared equally at least to the extent the proceeds were used to pay community debts that both parties were equally responsible to pay pursuant to the Decree and to the extent former husband unilaterally paid those debts, including the mortgage payments, from his post-Decree separate funds.

D. Conclusion

The trial court erred in using a 14-day motion procedure to add provisions to and modify a dissolution decree, set aside a quit claim deed, enter \$178,000 and \$60,000 supplemental judgments, place liens on the former husband's homestead, and allow the former wife to unilaterally force former husband to sell his homestead. The trial court also erred when it made findings of fact not supported by substantial evidence. Due to these errors, this Court should reverse the trial court's decisions, vacate the Findings of Fact and

Conclusions of Law and Judgment, and remand this back to the trial court to deny former wife's motion without prejudice to her bringing a separate, independent action to declare her rights under the Decree and quit claim deed.

Dated this 20th day of May 2010.

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed or caused delivery of a true copy of the foregoing to

Robert Kaufman

at the regular office or residence thereof

Dated this 20th day of May, 2010 at
Seattle, Washington.

Rebecca Prunina