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IN THE COURT OF WASHINGTON COURT OF APPEALS  
Division One at Seattle

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No. 65117-0-1

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BRIAN W. BURNS,

Appellant,

vs.

JAEL BURNS ,

Respondent.

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FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
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OPENING BRIEF OF APPELLANT BRIAN BURNS

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Appeal from an Order Denying Motion/Petition To Vacate  
Arbitration Award by King County Superior Court Judge  
Timothy Bradshaw entered on February 23, 2010 in case  
no. 08-3-03327-2-Sea

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## **A. ASSIGNMENT OF ERRORS**

The is an appeal of the trial court's denial of Appellant's Motion and Petition To Vacate Arbitration Award (CP 103-107) and Amended Motion and Petition To Vacate Arbitration Award. (CP 114-122). Appellant's Motions/Petitions presented prima facia evidence of arbitrator misconduct and evidence that his conduct fell far short of his statutory duties under RCW 7.04A, including evidence of the arbitrator's complete failure to consider evidence, errors of law on the face of the arbitration award or decision, and his rendering an arbitrary and capricious decision which, in material part, was not supported by any evidence or inferences from the evidence before him. The trial court denied Appellant's Motions/Petitioners, by final Orders at 525, and 526-527, without oral argument or without a evidentry hearing.

RCW 7.04A.230 authorized the trial court to vacate the arbitration decision and award for: (1) errors of law on the face of the arbitration decision or award; (2) procedural or substantive error; and/ or (3) other misconduct. The statute also authorized the trial court to investigate the arbitrator's misconduct by conducting an evidentry hearing, which the trial court declined to

do. Against this background, the Appellant assigns error to the following:

A. The trial court denying the Appellant's Motion and Petition To Vacate Arbitration Award/Decision (CP 103-107) by Order Denying Appellant's Motions/Petitions at CP 525.

B. The trial court denying the Appellant's Amended Motion and Petition To Vacate Arbitration Award/Decision (CP 114-122) by Order Denying Appellant's Motions/Petitions at CP 526-527.

C. The trial court's denial of the Appellant's Motion and Petition to Vacate Arbitration Award/ Decision (CP 103-107) and Amended Motion and Petition to Vacate Arbitration Award and Decision (CP 114-122) by orders at CP 525 and 526-526, respectively, without oral argument and without first conducting an evidentiary hearing into the arbitrator's misconduct.

D. The trial court's failure to grant the Appellant's Motions and Petitions to Vacate Arbitration Award/Decision (CP 103-107, and 114-122)) and vacate the arbitration decision/award pursuant to RCW 7.04 230(1) after presentation of evidence that the arbitrator's award/decision was procured by undue means in

violation of RCW 7.04.230 (1) (a), involved evident partiality, corruption or other misconduct by the arbitrator in violation of RCW 7.04A.230(1)(b), and involved the arbitrator exceeding his power, in violation of RCW 7.04A.230(a)(c), by rendering a decision not supported by any evidence or inferences therefrom, and a decision which had substantive errors of law on its face.

With regard to the arbitrator's Findings of Fact and Conclusions of Law (CP 57-70) and the Decree of Dissolution which incorporates them, Appellant assigns error to the following Findings and Conclusions of the arbitrator:

A. Findings of Fact finding 2.8 entitled "Community Property", Findings of Fact, page 3, (CP 57-70, exhibit A at CP 70) finding that the Appellant had not overcome a presumption of "a gift" to the quasi marital community when Appellant used \$320,000 of the proceeds from the sale of his separate property to pay down a purchase money loan for real property purchased by the parties. The "presumption of a gift" is also an error of law on the face of the decision/award. The Appellant assigns error to the following highlighted (underlined) language of this Finding:

The evidence showed that the parties' residence is

community property. The parties acquired a waterfront lot that contained a residence and a cabin in 1999 prior to their marriage in their separate names. The husband initially borrowed \$1,050,000 for (sc) a private lender to purchase the property. \$320,000 of the initial loan was repaid with a portion of the proceeds husband received from the sale of his separate property, but the husband as (sic) not rebutted a presumption that the separate funds were a gift to the quasi-marital community, and the balance owed on the initial loan was subsequently paid off using funds borrowed on the purchased property by husband and wife together.

B. Finding of Fact, Exhibit A, (CP 57-70, exhibit A at CP 70) valuation of the Hawthorne House “real property” at \$1,000,000 despite this item of property not being “real property” but an account receivable and the balance of the amount owed at time of arbitration was approximately \$742,000 (not \$1,000,000) in view of the borrower’s payments and the deposit of those payments into the parties’ Broadway Development Sterling Bank Account (\$353,618 inclusive of principal and interest). The arbitrator erred by not reducing the value of the account receivable to its current balance and erred by not valuing it and other property as of a common date. Appellant signs error to the line item entries on this Exhibit A, as follows:

<b>Description</b>	<b>Gross Value</b>
Real Property	
Hawthorne House-Broadway D:	\$1,000,000
Cash and Bank Accounts	
Broadway Deve. Sterling Bank 9/07	\$353,616

C. Finding of Fact, Exhibit A, (CP 57-70, exhibit A at CP 70) the arbitrator charging the Appellant \$175,000 for receipt of an earnest money deposit related to the sale of the Broadway Building despite the proceeds being deposited into the parties' community business accounts and used for that purpose. This involves an error of fact and law to the extent that the arbitrator found that the parties' businesses were "community" and as such the businesses' receipt of funds is community and not chargeable only to the Appellant. Appellant signs error to the line item entries on this Exhibit A, as follows:

<b>Description</b>	<b>Gross Value</b>
Cash and Bank Accounts	
Brian downpayment on BD	\$175,000

D. Finding of Fact, Exhibit A, (CP 57-70, exhibit A at CP 70) the arbitrator's valuation of the Broadway Development (community business) loans to Complete Automotive (community business) at \$2,011,763 without regard to consistent dates of

valuation, or any supporting evidence, or any recognized method of valuation, and inconsistent treatment of deeming these businesses “separate” for one purpose but community for others. Appellant signs error to the line item entries on this Exhibit A, as follows:

<b>Description</b>	<b>Gross Value</b>
Businesses	
BWD loans to Complete	\$2,011,753

E. Finding of Fact, Exhibit A, (CP 57-70, exhibit A at CP 70) the arbitrator’s assessing to Appellant \$150,000 in “rental income” relating to Complete Automotive’s (community business) reduced rent paid to an unrelated third party who purchased the parties’ Broadway Building and allowed the parties and their businesses to remain as tenants after the closing date. The arbitrator erred by treating any reduced rent as separate after finding the business was community and compounded the error to the extent that “saved expenses” or expenses not incurred are a factor in the value of the business and not income to anyone. Appellant signs error to the line item entries on this Exhibit A, as follows:

<b>Description</b>	<b>Gross Value</b>
Businesses	
Rental Income (added value)	\$150,000

F. Finding of Fact, Exhibit A, (CP 57-70, exhibit A at CP 70) the entry relating to “taxes on shareholder loan”, which is not supported by any evidence. Appellant signs error to the line item entries on this Exhibit A, as follows:

<b>Description</b>	<b>Gross Value</b>
Businesses	
Taxes on shareholder loan	\$150,000

G. Finding of Fact, Exhibit A, (CP 57-70, exhibit A at CP 70) the arbitrator’s failure to consistently treat the parties’ agreed upon pre- dissolution distributions. The Respondent was not charged for all distributions to her even though she used the funds for her personal post separation use and benefit; however, Appellant was charged for distributions to him despite his using the funds for the benefit of the parties’ community businesses.

H. All Findings of Fact Relating to Valuations. The arbitration decision does not state the dates of valuation, does not indicate that a common date of valuation was used, nor state the method of evaluation. In the absence of this information being

contained in the findings. Appellant assigns error to the arbitrator's failure to full his duties by rending findings sufficient for the trial court to review to determine whether the arbitrator fulfilled his duties.

## **B. STATEMENT OF THE CASE**

This appeal arises from a dissolution of marriage filed in the King County Superior Court, case no. 08-3-03327-2 on April 29, 2008 by the Respondent, Jael Burns.

The parties' dissolution centered on the division of their separate and community property. The parties agreed to submit all issues relating to the division of their property and liabilities to arbitration pursuant to RCW 7.04A. (CP 130-131). The division of property and liability were submitted to a private arbitrator, Steven Scott. (CP 123-125) He was requested to divide the parties' separate and community property and enter appropriate findings of facts and conclusions of law. (See generally, Dec. of E. Weigelt at CP 51-56, and 129-140, Dec. B. Burns, CP 123-128)

The arbitration was conducted on August 28, 2009. At the arbitration the arbitrator authorized the admission of the transcript of Respondent Jael Burn's deposition taken on August 27, 2009.

After the arbitration the arbitrator went on a two week plus vacation. (CP 124-125)

The transcript of the Respondent Jael Burn's deposition was completed on September 18, 2009 and forwarded to her counsel. Respondent did not sign it. ( CP 135-139, CP 125-126) The original was then forwarded to Appellant's counsel who received it on September 25, 2009 and who in turn submitted it to the arbitrator that date. (CP 136-137)

On September 25, 2009 the Respondent and Appellant each submitted supplemental declarations to the arbitrator. The Respondent Jael Burn's supplemental declaration raised new facts and evidence relating to new matters. (CP 137) The evidence included her Declaration. (Exhibit 20 to Dec. of E. Weigelt, CP 141-142, exhibits are at CP 143-234). The arbitrator considered the Respondent's new evidence but did not allow Appellant to reply. (CP 137)

On September 29, 2009, the arbitrator rendered his decision in the form of an Order. (see CP 143-144, plus attached exhibits 1, 2,3 and 4, consisting of the Findings of Fact and Conclusions of Law and Decree at CP 145-172) Relevant to this

appeal is that the arbitrator's valuation of the parties' property and the division of property is addressed only in a "spreadsheet" attached to the Findings of Fact and Decree of Dissolution as Exhibit A. There was a minor clerical error which was corrected thereafter.

Collectively the corrected Findings, Conclusion and Decree were adopted by the trial court by Order dated November 6, 2009 confirming the arbitration Decision (CP 71-72). The Order incorporated the arbitrator's decision as exhibits attached to it at CP 73-100.

Prior to confirmation the Appellant filed a Motion and Petition To Vacate Arbitration Decision inclusive of the arbitrator's Findings, Conclusion and Decree. (CP 103-107). The basis of this motion was arbitrator misconduct. (see generally, Dec. E. Weigelt, CP 51-56)

On November 6, 2010 Judge Bradshaw of the King County Superior Court, confirmed the arbitrator's Findings, Conclusions and Decree and entered them as orders of the court. (CP 71-72). The arbitrator's Findings Of Fact and Conclusions of Law, and Decree were signed by Judge Bradshaw on November 6,

2009. (Findings at CP 57-70). The trial court's confirmation of the arbitration award was without consideration of the merits of Appellant's Motion/Petition to vacate the arbitration decision which was to be considered on a later date.

On December 24, 2009 the Appellant timely filed an Amended Motion and Petition to Vacate Arbitration Award. (CP 114-122). The basis of this Motion/Petition and the subject of the present appeal is arbitrator misconduct. (CP 123-128, CP 129-140)

On February 22, 2010 Judge Bradshaw denied the Appellant's original Motion and Petition to Vacate Arbitration Decision and related Amended Motion and Petition To Vacate Arbitration Award. (Order Denying Motion at CP 525-525, and Order Denying Motion at CP 526-527). These orders were entered without oral argument and entered without any underlying factual hearing or proceeding. These Orders were final orders on the issues raised in the Appellant's Motions/Petitions To Vacate Arbitration Award. Appellant timely appealed the trial court's denial of his Motions/Petitions To Vacate Arbitration Award by the filing with a Notice Of Appeal on March 23, 2010. (CP 528-531).

No Cross Appeal has been filed.

### **C. STATEMENT OF FACTS**

#### **Background Facts.**

This matter arises from a dissolution proceeding. In August 2009 the Appellant and Respondent agreed to submit all issues relating to the division of their property and liabilities to an arbitration pursuant to RCW 7.04A before Steven Scott. (CP 123-124)

At the time of the arbitration, the parties' estate consisted of a single family residence located on Mercer Island with a value of 4.4 million dollars and three businesses, Complete Automotive, Inc., Broadway Development, LLC and Alexander and Cole, LLC., and certain personal property. (CP 123-125). The value of Broadway Development, LLC and Complete Automotive, Inc. was at issue, as well as the characterization of Complete Automotive as separate or community property. ( CP 129-140, CP 123-128)

Relevant to this appeal is that Complete Automotive rented space from Broadway Development, LLC and that the building was sold in June of 2008 to a third party. Pursuant to the terms of the purchase and sale agreement Complete Automotive was

allowed to remain in the building after sale for nominal rent until in late 2009. This was relevant if and only if Complete Automotive was found to be the Appellant's separate property. However, the arbitrator found that all of the businesses were community property, and as a matter of law, any rent savings thus benefitted both parties. The arbitrator, however, then assessed the Appellant personally for "Rental Income (added value)." This was an error as a matter of law. (CP 132-135)

At this juncture the court should note that the characterization of the assets is noted on the "spreadsheet" attached as Exhibit A to the Findings of Fact and Decree by the entry of the "value" under a column heading of either "community" or "separate".

In making his findings, the arbitrator did not place any value on an number of assets. He placed a value on "Broadway Development, LLC." based solely on an arbitrary value of \$2,011,753 based on monies owed on paper by Complete to Broadway despite the fact that he placed a value on Complete at "-0-", and the company had been operating at break even for two years, and had a balance sheet indicating that its liabilities

exceeded its assets by over \$1,000,000. In placing a value on a related company receivable, the arbitrator treated Complete Automotive as Appellant's separate property, however, for purposes of the corresponding obligations owed by the parties' to Complete, it was community and hence no obligation. (See generally, Dec. of E. Weigelt at CP 51-56, and CP 132-140)

The Arbitration.

By way of background, the discovery deadline in this case was July 2, 2009 and the Respondent Jael Burns had completely disregarded her discovery duties. As such the arbitrator ordered the Respondent Jael Burns to submit to her deposition on August 27, 2009, which was the day before the arbitration. The transcript of the Respondent Jael Burn's deposition was not available for submission to the arbitrator on August 28, 2009. (CP 135-137)

The arbitration itself was conducted on August 28, 2009. Because of the arbitrator's desire to leave for vacation that day, he was distracted, and requested the parties to limit their presentation. He artificially limited the testimony to 2.5 to 3.0 hours per side notwithstanding that the issues in the case were

complex, that there were a significant number of exhibits the parties sought to introduce which included 273 exhibits, depositions, and extensive briefing. (CP 135-137)

The physical volume of the exhibits alone was over two feet high, and was contained in five (5) full four inch (4") binders. Due to time constraints imposed by the arbitrator, there was inadequate time to call witnesses or to allow them to fully address the issues. Hence, he directed the parties not to use arbitration/trial time for the matters addressed in the parties' depositions. (CP 135) At the conclusion of the arbitration the arbitrator authorized the admission of the Respondent Jael Burn's deposition upon completion of the transcription. This was anticipated to be by the end of the following week. The parties had not anticipated the court reporter being unavailable. The arbitrator then left for a two week plus vacation.

On September 17, 2009, the court reporter forwarded an electronic copy of the Respondent's. This was forwarded to her counsel, Delney Hilen on that date. Respondent did not waive signature. In the interim the arbitrator had set September 25, 2009 as the date by which all evidence was to be in. On

September 21, 2009 the court reporter mailed the original deposition transcript to Appellant's counsel. It was received on September 25, 2009, and the original and a copy were delivered to the arbitrator, as well as to Petitioner's counsel, that date. (CP 136-137)

On the same date, September 25, 2009 the Respondent submitted to the arbitrator a supplemental brief and Declaration of Jael Burns which raised new issues. The arbitrator considered Respondent's new evidence, submitted by her, but not her deposition as Appellant had offered. The arbitrator's refusal to consider Respondent's deposition was contrary to his prior ruling that the depositions would be admitted and his admonishment to the parties not to present live evidence on the matters addressed in them, including the Respondent's deposition. (CP 137)

On September 29, 2009 the arbitrator reviewed the trial exhibits, depositions and other evidence (excluding Petitioner's deposition and other evidence), and drafted his decision.

The Arbitration Decision.

The Arbitration Decision itself is confusing. The division of property and liabilities is set forth in a spreadsheet attached to

the Findings and Decree as “Exhibit A.” It is replete with errors and there are no explanations of how the arbitrator calculated or determined the values of material assets. (See Findings of Fact, CP 57-70, exhibit A)

The spreadsheet refers to “Hawthorne House-Development” as real property. It is an account receivable. It is not addressed in the narrative Findings of Fact and Conclusions of Law. How this was valued and the date of valuation is not stated. (Findings of Fact, CP 57-70)

The spreadsheet places a value on the “Broadway Development Complete” loan of \$2,011,763. However, it also is not addressed in the Findings of Facts and Conclusions of Law. (CP 57-70) How this was valued and the date of valuation is not stated in the Findings of Fact and Conclusions of Law. Moreover, the arbitrator’s valuation of the Broadway Complete loan was not supported by any evidence, nor supported by the findings, and was inconsistent with his decision that Broadway and Complete Automotive were both community businesses.

The arbitrator’s spreadsheet charged the Appellant \$175,000 for earnest money sale proceeds received by Complete

Automotive which was a community business and used in the business. (CP 139) In finding that Complete Automotive was a community property its use of this money benefitted both parties including the salary drawn by Respondent Jael Burns. This is not supported by Findings of Fact nor Conclusions of Law.

The arbitrator also charged Appellant \$150,000 for a "rental income" because Complete did not pay full rent to the purchasers of the Broadway Building after the building was sold. Any income or benefit to Complete Automotive was to a community business. "Rent saved" is not "rental income." The Findings do not elucidate how this benefit or income was computed or why.

The arbitrator also showed a bias by not charging the Respondent for undisputed monies she received from the sale of the Broadway Building which were divided in half and distributed equally to both parties, in the amounts of \$50,000 and \$37,500. Respondent used these funds for her own personal benefit. The Appellant put his back into the business. The arbitrator charged the Appellant for pre-dissolution distributions though he used the money for the benefit of the community businesses but he did not

charge Respondent for the money she received. (CP 137, CP 123-128). There were no explanations in the Findings as to why there was disparate treatment of the undisputed equal distributions to both parties.

The arbitrator's factual finding 2.8 entitled "Community Property", Findings of Fact, page 3, reflects a material error of law.

The evidence showed that the parties' residence is community property. The parties acquired a waterfront lot that contained a residence and a cabin in 1999 prior to their marriage in their separate names. The husband initially borrowed \$1,050,000 for (sc) a private lender to purchase the property. \$320,000 of the initial loan was repaid with a portion of the proceeds husband received from the sale of his separate property, but the husband as (sic) not rebutted a presumption that the separate funds were a gift to the quasi-marital community, and the balance owed on the initial loan was subsequently paid off using funds borrowed on the purchased property by husband and wife together.

The error of law is a misstatement of the presumption of a gift. The facts support that the Appellant is entitled to a credit for \$320,000 from the sale of his separate property which was directly used to pay down the debt on the parties 'Mercer Island Residence, which they purchased and still own for their separate

estate as tenants in common. (CP 131-133)

#### **D. STATEMENT OF ISSUES ON APPEAL**

The ultimate issue is whether the trial court erred by denying the Appellant's Motion and Petition To Vacate Arbitration Award, or alternatively, by not setting the matter over for an evidentiary hearing. The technical issues are:

Whether the arbitrator engaged in misconduct for purposes of RCW 7.04A.230 (1)(b) by his failure to consider material evidence, including a material deposition transcript of the Respondent's testimony which the arbitrator had authorized to be submitted in lieu of testimony

Whether the arbitrator engaged in misconduct for purposes of RCW 7.04A.230(1)(d) by rendering an award which on its face is based on false legal presumptions and thus arbitrator exceeded his authority as a matter of law.

Whether the arbitrator had evident partiality by his consideration of new evidence on new issues submitted by the Respondent after the arbitration without giving the Appellant the right to respond thereby rendering the arbitration decision void or vacateable pursuant to RCW 7.04A.230 and (1)(b)(i).

## **E. STANDARD OF REVIEW**

The standard of review is based on a written record and is de novo. *Wilson Court Limited Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 292 (1998).

## **F. SUMMARY OF ARGUMENT**

The arbitrator engaged in misconduct by his failure to consider material evidence. In this arbitration the arbitrator artificially limited the oral testimony to 3 hours per side, and admonished the parties not to present oral testimony on issues addressed in the parties' depositions, the Respondent's deposition was key evidence. The Respondent's deposition addressed the use of Appellant's separate property funds to purchase and build a 4.4 million dollar residence and the business transactions between the parties' three businesses. The arbitrator's failure to consider this evidence was exacerbated by his spending less than 8 hours to review the briefs, technical legal issues, research, and draft his decision, and purportedly reading and understanding 273 arbitration exhibits encompassing a stack of documents nearly 2 feet high. It is apparent that the arbitrator did not read or review the exhibits, and could not have in the time

he spent on this case.

The arbitrator's misconduct includes errors of law on the face of the decision. The the arbitration award is founded on blatantly incorrect evidentiary presumptions stated in the decision which are not supported by law. The arbitrator compounds this error by then inconsistently treating the parties' businesses as being disregarded for one purpose but not for others . This inconsistency led to absurd conclusions not supported by any findings nor any evidence or inferences from any evidence.

#### **G. ARGUMENT**

**1. The Appellant Was Denied His Rights To Procedural Due Process By The Arbitrator's Failure To Duly Consider Material Evidence**

The trial court erred by not vacating the arbitration decision upon presentment of evidence that the arbitrator disregarded his statutory duties by his failure to consider evidence, such as the Respondent's deposition, and then exceeded his authority by rendering a decision which was not supported by any evidence before him.

RCW 7.04A.230 authorizes a court to vacate an arbitration

award or decision for an arbitrator's misconduct related to his failure to consider evidence before him. RCW 7.04A.230 (1)(b)(iii) The arbitrator's failure to consider evidence is a violation of the parties' procedural due process rights. *Seattle Packaging Corp. v. Barnard*, 94 Wn. App. 481, 487 (1999).

The trial court erred by denying Appellant's Motion without conducting an evidentiary hearing. One of the court's duties in reviewing an arbitration award is to ensure that the hearing process "comports with the broad contours of procedural fairness." *Seattle Packaging Corp. v. Barnard*, id. The court is to consider the arbitration decision and if necessary to look beyond the decision to evaluate improprieties such as fraud or perjury. In the words of the Court of Appeals, in cases where the moving party contends that the arbitration decision was procured by fraud including perjury:

"courts must necessarily review enough of the evidence submitted to the arbitrators to determine whether clear and convincing evidence was committed with respect to a material issue." (Id at 487-88).

The precepts noted in this decision require a court to look

beyond the decision in cases involving misconduct. In this regard the court noted that cases applying CR 60(b) are appropriate authority to help determine the court's role in reviewing the arbitration award. Fundamentally, the court observed that the arbitration act and CR 60(b) serve the public policy of favoring finality of judgments. However, finality of judgments does not outweigh the rights of a litigant who was not afforded the ability to fully and fairly present his case. The court held:

The rule is aimed at judgments which were unfairly obtained, not those which are factually incorrect. For this reason, the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense. (Id. at 493)

The Appellant did not receive a fair arbitration. He was allowed 3 hours to present evidence in a dissolution involving a significant marital estate, 273 exhibits, and complex legal issues. The arbitrator imposed artificial limitations of time, and was more concerned about the parties "hurrying up" so he could leave on his extended vacation. The arbitrator then refused to consider the Respondent's deposition even though he had indicated that September 25, 2009 was the date by which evidence was to

submitted, had received it prior to that date and received it promptly after it being received from the court reporter.

The Respondent Jael Burn's 140 page deposition was central to this case and covered key issues not addressed in the arbitration itself based on the arbitrator's admonishments not to rehash issues addressed in the depositions.

**2. The Arbitrator Exceeded His Authority and Violated RCW 7.04A 230 (1) (d) By His Failure To Render A Decision In Accordance With Applicable Law.**

The trial court erred by not vacating the arbitration decision due to the arbitrator erroneous statements of law on the face of the arbitration decision and award. The arbitrator exceeded his authority by rendering a decision founded on the erroneous "presumption of a gift" when the separate property funds are used to purchase a community asset or to pay down a community obligation. An error of law involves the arbitrator exceeding his power or authority. RCW 7.04A.230(1)(d); *Davidson v. Hensen*, 135 Wn. 2<sup>nd</sup> 112 (1998).

A error of law sufficient to vacate an arbitration award occurs when the arbitrator basis his decision on an incorrect

understanding of the law and/or by his awarding damages or property in a manner not authorized by law. This is error and sufficient to vacate an arbitration decision. *Federated Servs. Inc. v. Pers. Rep. Of Estate of Norberg*, 101 Wa. App. 119 (2000).

The arbitrator's error of law is noted in factual finding 2.8 entitled "Mercer Island Residence" at page 3. The arbitrator's finding states:

The evidence showed that the parties' residence is community property. The parties acquired a waterfront lot that contained a residence and a cabin in 1999 prior to their marriage in their separate names. The husband initially borrowed \$1,050,000 for (sc) a private lender to purchase the property. \$320,000 of the initial loan was repaid with a portion of the proceeds husband received from the sale of his separate property, but the husband as (sic) not rebutted a presumption that the separate funds were a gift to the quasi-marital community, and the balance owed on the initial loan was subsequently paid off using funds borrowed on the purchased property by husband and wife together.

In making this finding the arbitrator correctly found that Appellant initially paid for the property before marriage with the proceeds of a personal loan to him. Appellant later sold his

separate property residence and used a portion of the proceeds in the amount of \$320,000 to pay down the purchase loan. The \$320,000 was paid directly to the lender by escrow. In the context of tracing funds there is no stronger evidence than separate funds being used directly to pay for the property or in reduction of the debt. The arbitrator held this was still not sufficient evidence because of a “presumption of a gift.” This is flat contrary to law.

There is no presumption of a gift of separate property. Separate property retains its character as such unless there is clear and convincing evidence indicating the character of the property has changed. Once the funds are traced to separate property, the burden shifts to the party disputing its separate character to demonstrate that it is a gift to the community. *In re Marriage of Hurd*, 69 Wn. App. 38, review denied, 122 Wn.2d 1020 (1993); *In re Marriage of Starbek*, 100 Wn. App. 444 (2000).

In the marriage of Skarbek, the Court of Appeals commented on the burden of proof and the evidence considered in determining whether the character of the property had been changed during the parties’ marriage. The court stated at 100 Wn. App. at 448:

Once established, separate property retains its separate character unless changed by deed, agreement of the parties, operation of law, or some other direct and positive evidence to the contrary.

The arbitrator's decision reflects that the Appellant satisfied the burden of proving that the \$320,000 was his separate property. Once the was established the Respondent wife then had the burden to prove otherwise by clear and convincing evidence that there was a gift. In fact, the Starbec court expressly imposed this burden of proof. The court also held at page 448:

[T]he burden is on the spouse that separate property has transferred to community property to prove the transfer by clear cogent and convincing evidence, usually by a writing evidencing mutual intent.

This rule also applies to the proceeds of separate property used to purchase or pay obligations secured by community property. The character of the property as being separate continues "through all changes and transitions.." *In re Marriage of White*, 105 Wn. App. 545 (2001); *In re Marriage of Brewer*, 137

Wn. 2nd. 756 (1999).

Property is characterized as of the date of acquisition.

Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, Section 11.6 (1997); *In re Marriage of Skarbek*, 100 Wn. App. 444, 99.7 P.2d 447 (2000); *In re Marriage of Gillespie*, 89 Wn. App. 390, 948 P.2d 1338 (1997). Property acquired or paid for during marriage with proceeds traceable to separate funds is separate, at least in part. Kenneth W. Weber, 19 WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW, Section 11.13.2 (1997); *In re Marriage of White*, 105 Wn. App. 545.550, 20 P.3d 481 (2001); *In re Marriage of Skarbek*, 100 Wn. App. 444, 448, 997 P.2d 447 (2000); *In re Marriage of Hurd*, 69 Wn. App. 38, 50, 848 P.2d 185, review denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993).

Separate property shall remain separate through all of its changes and transitions so long as it can be traced and identified. *In re Marriage of Skarbek*, 100 Wn. App. 444, 448, 997 P.2d 447 (2000); *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 865, 855 P.2d 1210 (1993); *Baker v. Baker*, 80 Wn.2d 736, 745, 498 P.2d 315 (1972); *In re Estate of Witte*, 21 Wn.2d 112, 125, 150

P.2d 595 (1944).

The arbitrator's confusion of the burden of proof carried over to other assets brought to the marriage by the Appellant. Of note is the Broadway Building This building was purchased by the Respondent prior to commencement of the parties' relation. (Finding 2.8, under caption "Broadway Development, LLC.") By 2003 the building was worth 3.0 million dollars when the parties formed a limited liability corporation. Under the terms of an LLC agreement and applicable law, the Appellants contribution of this building to the LLC created a capital account separate property obligations owned by the Appellant as his separate property. However, the arbitrator disregarded the law and the contract because of the "presumption of a gift" that can not be overcome by anything, including the parties own contract. Disregard of the law is misconduct.

**3. The Arbitrator Exceeded His Authority By  
His Failure To Make Findings of Fact As  
Required By Law.**

In the context of a dissolution proceeding one of the arbitrator's fundamental duties includes the proper valuation and disposition of the parties' property in accordance with RCW

26.09.080. This statute expressly mandates that the court (or in this case the arbitrator) “shall make such disposition of the property and liabilities of the parties, as shall appear to be just and equitable...” Implicit in this statute is the requirement that a court or arbitrator must make and enter findings sufficient for an appellate court to determine whether there has been an abuse of discretion in distributing the property. *In re Marriage of Hadley*, 88 Wn. 2<sup>nd</sup> 649 (1977). The trial court erred by not vacating the arbitration decision for its failure to include findings sufficient for review by the trial and appellate courts.

In the present case the arbitrator’s “findings” are deficient as a matter of law for their failure to state material information as to how and on what basis the arbitrator determined the value of the parties’ property. The arbitration decision does not state the dates of valuation, does not indicate that a common date of valuation was used, nor state the method of evaluation. In the absence of this information being contained in the findings, the findings depict nothing more than someone determining value by throwing darts. In fact, the value of the parties’ businesses Broadway Development, LLC, and Complete Automotive, appear

to be just that—a random value not supported by any evidence presented by either party, and not valued as of a common date, and not valued in accordance with any recognized business valuation model.

In determining the value of property, the court is to consider and use the “fair market” value of the property as of a common date. The court has discretion as to the date value is to be based on such as the the trial date or date of separation or some other date. Once selected this date is to be used for all property. Likewise, the method of valuation must be a recognized standards of value. Throwing darts or an arbitrator’s interjection of his own opinion done in good faith, does not meet these standards. *Lucker v. Lucker*, 71 Wn. 2<sup>nd</sup> 165 (1967). Erroneous valuations of material assets is grounds for vacation of the decree on the grounds that the distribution is not fair and equitable. *In re Marriage of Pilant*, 42 Wn. App. 173 (1985).

Despite these duties, there is no indication from the arbitrator’s decision in the present case as to how the arbitrator valued key assets, such as the Broadway Development Complete loan, Hawthorne House, or even Complete Automotive. While we

do not know how the arbitrator did this, we do know he did not do so in accordance with any acceptable legal standard. (CP 126-127). The valuations were not founded on any evidence before him. and based on some method outside of the scope of the evidence and beyond any recognized standard. (CP 129-140, at CP 132-135) A judge's or arbitrator's creation of a method of valuation or interjection of his own opinion is a breach of duty and abuse of discretion. It is reversible error to assign values to property outside of the scope of the evidence. *Atkinson v. Atkinson*, 38 Wn. 2<sup>nd</sup> 769 (1951); *In re Marriage of Soriano*, 31 Wn. App. 423 (1982). A court's valuation of an asset as being worth \$5,000 was an abuse of discretion when the testimony of the husband was that it was \$7,000 and the wife valued it at \$12,000.

The arbitrator arbitrarily placed a value on several assets. A primary example is the value he placed on the parties' Broadway Development loans to Complete Automotive., which he valued at \$2,011,753, and which he reduced by \$960,484 for a net value of \$1,051,280. (Spreadsheet attached to Decree as its exhibit A) This "asset" was awarded to the Respondent husband.

It is an account receivable which is purportedly owed by Complete Automotive, which the arbitrator found to have a “zero value” and no or little ability to pay. The valuation is not supported by any evidence. The concept of assigning a value to a receivable owed by one wholly owned entity to another is incongruent with the arbitrator’s findings that the entities were so intertwined that they were not separate.

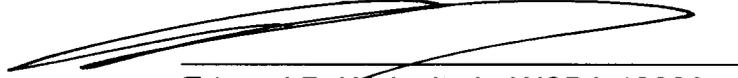
Since the entities were so commingled the arbitrator found it impossible to do an accounting to sort things out. The only issue left was for him to determine the value of their combined assets, excluding any back and forth transfers of money which he could not trace. By treating the business assets as the parties’ community property the transactions between the entities are irrelevant, the issue is simply the total value of all assets less all liabilities to third parties.

#### **H. Conclusion**

The trial court erred by not vacating the arbitration award when there was undisputed evidence that material portions of the arbitration decision were not founded on any testimony or evidence presented to the arbitrator. At a minimum, the trial court

should have set the matter for a factual hearing regarding the arbitrators misconduct.

Dated this 11<sup>rd</sup> day of October, 2010



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IN THE COURT OF WASHINGTON COURT OF APPEALS  
Division One at Seattle

BRIAN W. BURNS, )  
Appellant, ) **No. 65117-0-1**  
vs. ) Certificate of Service  
 ) Appellant's Opening Brief  
Jael Burns, )  
Respondent. )  
\_\_\_\_\_ )

I hereby certify under penalty of perjury that I have caused the Appellant's opening brief to be served by U.S. mail this date upon all attorneys of record as follows:

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