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No. 65262-1

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

In re the Marriage of
DARREN GILLESPIE,
Appellant,
and
CORINNA GILLESPIE,
Respondent.

**BRIEF OF RESPONDENT
CORINNA GILLESPIE**

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I. INTRODUCTION

This appeal is untimely. Appellant Darren Gillespie seeks review of an order and judgment, constituting a final adjudication of all the claims in this case, entered on February 11, 2010. He did not file a notice of appeal of that decision, however, until April 19, 2010. The circumstances do not justify an extension of the deadline for appeal—indeed, Mr. Gillespie does not even request one. For this reason alone, the trial court’s judgment should be affirmed.

This appeal is also frivolous. Mr. Gillespie asks this Court to rule that an arbitrator exceeded the scope of his authority, because he ordered the “award” of the Gillespies’ home to his former wife, Respondent Corinna Gillespie, rather than a “sale.” But the governing arbitration provision states that “[a]ny disagreement or dispute regarding sale of the home or implementation of this order shall be submitted for binding arbitration,” authority that amply includes the arbitrator’s actions. Nothing in the arbitration provision limits the relief the arbitrator was authorized to grant, and there is no claim that the arbitration or trial court proceedings were irregular, or that the terms of the sale to Ms. Gillespie were unfair.

And finally, this appeal is moot. Ms. Gillespie is the current owner of the property, a court-appointed special master having executed a

quitclaim deed on Mr. Gillespie's behalf when he refused. On appeal, Mr. Gillespie has not challenged the authority of the court to appoint the special master, or the authority of the special master to execute the deed. Thus, this appeal is also moot, as any relief granted by this Court would have no effect on the title to the property, or any other cognizable injury.

For these and the following reasons, Ms. Gillespie requests that the Court affirm the trial court's orders confirming the arbitrator's award, and grant her attorneys' fees incurred in this appeal.

II. STATEMENT OF THE CASE

A. Arbitration Proceedings

In October 2008, Appellant Darren Gillespie and Respondent Corinna Gillespie entered into a Property Settlement Agreement ("PSA") in connection with the Decree of Dissolution of their marriage, entered on October 14, 2008. CP 36-51, 13-18. The PSA included a provision titled "Sale of Residence," which was to govern the disposition of the couple's residence, and provided that the home be "listed and sold as soon [as] practicable" in accordance with the terms that followed. CP 42-43. The provision included the following arbitration agreement:

Any disagreement or dispute regarding sale of the home or implementation of this order shall be submitted for binding arbitration by Larry Besk. CP 43.

On November 3, 2009, Ms. Gillespie wrote to Mr. Besk, asking that as the parties' chosen arbitrator, he settle a dispute that had arisen under the PSA regarding the sale of the property. CP 225-27. Ms. Gillespie told Mr. Besk that the house had been on the market for seven months, but the Gillespies had received only one offer, for \$635,000. The couple had purchased the home in 2006 for \$830,000, and the offer was approximately \$40,000 less than what was necessary for the couple just to break even. CP 225, 87; *see* CP 274.

In the meantime, Ms. Gillespie had, on her own, made monthly mortgage payments and paid all property taxes and maintenance expenses associated with the property. CP 225-26, 275. Ms. Gillespie told Besk that she and her children had lived in their home for four years, and that they wished to remain. She had asked Mr. Gillespie to sell her his interest in the house, but he refused to respond to her offer. CP 276. Under these circumstances, Ms. Gillespie asked that Mr. Besk order Mr. Gillespie to transfer his interest in the property to her, and that he be removed from the mortgage and relieved of his liability thereon. CP 225-27.

In response, Mr. Gillespie sent a letter to Mr. Besk, claiming that he lacked authority to order Mr. Gillespie to sell his interest in the home to Ms. Gillespie, despite the clear language in the PSA authorizing Mr. Besk

to arbitrate “any disagreement or dispute regarding sale of the home or implementation of this order.” CP 229, 43.

In a letter dated November 18, 2009, Mr. Besk rejected Mr. Gillespie’s argument, stating that his authority extended to arbitrating “any disagreements or disputes surrounding the sale of the home, and that includes any potential sale to Ms. Gillespie.” CP 237. Mr. Besk requested additional information on the value of the property, noting that “[i]f the sale of this property to a third party is going to result in a short sale situation, it may very well be best to permit the sale to Ms. Gillespie.” *Id.*

In his response to Besk’s request for additional information, Mr. Gillespie abandoned his position that Mr. Besk was not authorized to settle the dispute between the parties—indeed, he argued that *he* should be allowed to purchase the home. CP 259-62 (“At this point, it appears that Ms. Gillespie and I are both interested in purchasing the home. . . . My opening offer under this scenario is that I will pay off the mortgage and give Ms. Gillespie \$10,000 cash.”). Mr. Gillespie proposed, among other things, that “the house be put up for auction between Ms. Gillespie and myself [and] that the person with the best offer be awarded the house.” CP 259.

On December 18, 2009, after the parties made their respective submissions, Besk found that “the value of the former family residence is

at, or below, the current amount of the mortgage,” and ordered that Ms. Gillespie “be awarded the residence at the current amount of the outstanding mortgage, which is approximately \$618,000.” CP 266. He further ordered Ms. Gillespie to refinance the property and have Mr. Gillespie removed from the underlying mortgage within 90 days. CP 266-67.

B. King County Superior Court Proceedings

On February 3, 2010, faced with the arbitrator’s 90-day deadline and Mr. Gillespie’s refusal to cooperate in executing a quitclaim deed on the property as ordered, Ms. Gillespie filed a Motion for an Order Confirming Arbitration Award in the King County Superior Court dissolution proceeding. CP 30-34. She simultaneously filed a Motion to Appoint and Direct Special Master to Release Interest in Real Property. CP 56-60. Mr. Gillespie did not respond.¹ The trial court, The Honorable James A. Doerty presiding, granted both motions on February 11, 2010.

In the Order Appointing and Directing Special Master to Release Interest in Real Property (“Order Re: Special Master”), the trial court

¹ Mr. Gillespie devotes a portion of his appeal to the reasons for his failure to respond to these motions. But Mr. Gillespie did not move to vacate the trial court’s Order and Judgment or the Order Re: Special Master, and did not raise the issue of proper service in his own Motion to Vacate Arbitration Award. Because he did not raise the issue below, and has not assigned error to the trial court’s finding that “proper notice and service was completed,” this issue is not before this Court. CP 59; RAP 2.5(a).

directed the special master, Juliana Wong, to “sign any and all documents necessary to convey the subject real property [to] Corinna Gillespie,” and entered judgment divesting Mr. Gillespie of all interest in the property. CP 160. Pursuant to this order, on behalf of Mr. Gillespie, the special master executed a quitclaim deed and Real Estate Excise Tax Affidavit, transferring Mr. Gillespie’s interest in the property to Ms. Gillespie. CP 277, 296-99. Mr. Gillespie did not move to vacate the Order Re: Special Master, did not challenge the special master’s execution of the quitclaim deed, and has not appealed the Order Re: Special Master to this Court.

On March 4, 2010, Mr. Gillespie filed a Motion to Vacate Arbitration Award. CP 161-72. In the motion he challenged the arbitration award on several grounds, only one of which he has raised in this appeal: that in ordering the sale of the house to Ms. Gillespie, Mr. Besk exceeded his authority because the PSA authorized Mr. Besk only to arbitrate disputes concerning the “sale” of the property, but Mr. Besk had “awarded” the property to Ms. Gillespie. CP 166-67 (“The [PSA] entered into by the Gillespies did not permit the house to be awarded to either one of them; it could only be sold.”). The trial court rejected this argument and denied Mr. Gillespie’s Motion to Vacate in its entirety, and awarded Ms. Gillespie attorneys’ fees. CP 391-92.

III. ARGUMENT

A. Standard and Scope of Review

This appeal is guided by two separate standards of review: first, the standards applicable to this Court's review of the trial court decision; and second, the standard of review that courts — including the trial court and this Court — are required to apply when reviewing arbitration decisions.

Ms. Gillespie does not dispute that this Court is to review the trial court's orders *de novo*, as Mr. Gillespie does not assign error to any findings of fact. However, the scope of the trial court's review is exceedingly narrow. *Davidson v. Hensen*, 135 Wn.2d 112, 119 (1998). Washington's Revised Uniform Arbitration Act authorizes the trial court to vacate an arbitration award under limited circumstances, only one of which is at issue here: whether the arbitrator exceeded his powers. RCW 7.04A.230(d); *see* App. Br. at 5; CP 164. To determine whether vacation of the arbitrator's award is appropriate under this inquiry, the court considers only the face of the award. *Id.* 135 Wn.2d at 118. Neither the evidence before the arbitrator nor the merits of the case is considered by the reviewing court. *Id.* at 119. If there is no error of law on the face of the award, it cannot be vacated. *Id.* at 118.

B. As a Threshold Matter, This Appeal Should Be Dismissed as Untimely and Moot

As set forth more fully below, Mr. Gillespie's appeal is moot, for two independent and sufficient reasons. First, Mr. Gillespie's appeal of the Order and Judgment was untimely; that ruling is therefore final. Second, Mr. Gillespie failed to appeal the Order Re: Special Master conveying title in the property to Ms. Gillespie; that order and the consequent conveyance are also now final.

Under these circumstances, Mr. Gillespie's appeal is moot. Even if this Court were to reverse the Order Denying Motion to Vacate (the one order properly appealed), the Order and Judgment and the Order Re: Special Master would be final. Indeed, even if the Court were to reverse *both* the Order Denying Motion to Vacate and the Order and Judgment, the Order Re: Special Master—conveying title in the property to Ms. Gillespie—would stand. Because no relief this Court could properly order would have an effect on ownership of the property, and because this appeal is therefore moot, the trial court's orders should be affirmed.

1. Mr. Gillespie's Appeal of the February 11, 2010 Order and Judgment Confirming Arbitration Award, Filed on April 19, 2010, Was Untimely

Rule of Appellate Procedure 5.2(a) provides, in relevant part, that "a notice of appeal must be filed in the trial court within . . . 30 days after

the entry of the decision of the trial court that the party filing the notice wants reviewed.” The Order and Judgment Confirming Arbitration Award (“Order and Judgment”) from which Mr. Gillespie purports to appeal was entered on February 11, 2010. CP. 156-57. Mr. Gillespie did not file a Notice of Appeal of that Order and Judgment until April 19, 2010, well past the 30-day deadline. Supp. CP 393. Under RCW 7.04A.280, the Order and Judgment was an appealable “Final Judgment” that disposed of all outstanding issues before the court—a fact that Mr. Gillespie essentially conceded by filing a Notice of Appeal of that decision, rather than a motion for discretionary review. *See also* RAP 2.2(d) (A final judgment is an order that “adjudicat[es] all the claims, counts, rights, and liabilities of all the parties.”). His failure to file a timely appeal of that Order and Judgment constitutes a waiver of his right to do so. *See Schaeferco, Inc. v. Columbia River Gorge Comm’n*, 121 Wn.2d 366 (1993).

None of the limited exceptions to the 30-day deadline applies. Mr. Gillespie cannot avail himself of RAP 2.4(b)—which allows for review of certain orders not designated in the notice of appeal—for several reasons. First, the rule applies to authorize review only of orders “*not* designated in the notice”—the Order and Judgment was designated in the notice, and the rule is simply inapposite. Second, that rule provides that appeal of an order will only bring up for review those court orders, not appealed, that

“prejudicially affect” the order appealed. *See Right-Price Recreation v. Connells Prairie Community Council*, 105 Wn. App. 813 (2001). An order “prejudicially affects” the appealed order “if the order appealed cannot be decided without considering the merits of the previous order. . . [T]he issues in the two orders must be so entwined that to resolve the order appealed, the court must consider the order not appealed.” *Id.* The February 11, 2010 Order and Judgment did not “prejudicially affect” the March 22, 2010 Order Denying Motion to Vacate—indeed, it did not affect it at all; there is no discernable reason the appeal of the later decision depends upon the merits of the earlier one.

Mr. Gillespie may claim that under RAP 5.2(e), the deadline for appeal of the February 11, 2010 Order and Judgment was “tolled” by the filing of the Motion to Vacate Arbitration Award, which was timely appealed. RAP 5.2(e) provides that a “notice of appeal of orders deciding certain timely motions designated in this section must be filed in the trial court within [] 30 days after the entry of the order.” The rule, however, applies only to motions brought under CR 50(b) for judgment as a matter of law, under CR 52(b) to amend findings, and under CR 59 for reconsideration, a new trial, or amendment of judgment. Mr. Gillespie did not file a timely (or any) motion under any of these rules.

Instead, 35 days after Ms. Gillespie had filed her motions, and 27 days after the trial court's rulings thereon, Mr. Gillespie filed an entirely distinct Motion to Vacate Arbitration Award. In its "Statement of Issues," that motion presented three issues, all centered on whether the court should vacate Mr. Besk's arbitration award. CP 164. Mr. Gillespie's Motion to Vacate cites only the Washington Arbitration Act, RCW 7.04A *et seq.*, and cases interpreting that Act. Mr. Gillespie does not cite CR 50(b), 52(b), or 59; does not set forth any standards for deciding a motion brought under those rules; and does not use the words "judgment as a matter of law," "amend the findings," "reconsideration," "new trial," or "amendment of judgment" in reference to the February 11, 2010 Order and Judgment. Indeed, the Motion to Vacate does not mention that decision at all. Under these circumstances, Mr. Gillespie cannot avail himself of RAP 5.2(e).

Nor is Mr. Gillespie is entitled to a retroactive extension of the filing deadline under RAP 18.8(b). That rule authorizes extensions "only in extraordinary circumstances and to prevent a gross miscarriage of justice." Mr. Gillespie cannot make a showing of such circumstances, particularly given the frivolity of his appeal. Indeed, Mr. Gillespie has not even requested such extension of time.

This Court should not allow Mr. Gillespie to avoid the RAP 5.2(a) deadline for appealing the final Order and Judgment, simply because his appeal of the Order Denying Motion to Vacate was timely. Doing so would create an enormous loophole in the deadline rule, whereby a putative appellant could avoid the consequences of missing the deadline to appeal an unfavorable ruling on one motion, simply by later filing a second, and then appealing both. Washington law does not permit this. *See Kemmer v. Keiski*, 116 Wn. App. 924, 937 (2003) (refusing to excuse untimely appeal of judgment that left “nothing unresolved”). For this reason alone, the trial court’s orders should be affirmed.

2. Darren Gillespie Did Not Appeal the Trial Court’s Order Appointing a Special Master

In his Notice of Appeal, Mr. Gillespie designated two orders of the trial court for review: the Order and Judgment Confirming Arbitration Award; and the Order Denying Motion to Vacate Arbitration Award. Mr. Gillespie attached copies of both orders to his Notice of Appeal. Supp. CP 395-398. Mr. Gillespie did not, however, designate the trial court’s Order Re: Special Master. His failure to do so precludes review, and that Order is now final. RAP 2.4(b); *see In re Marriage of Penry*, 119 Wn. App. 799 (2004).

In *In re Marriage of Penry*, the decree of dissolution, dated December 17, 1999, awarded Ms. Penry the family home. Mr. Penry, in defiance of that decree, refused to sign a quitclaim deed and other documents necessary to effect the transfer. On September 19, 2002, the trial court issued a show cause order appointing a court commissioner as special magistrate under RCW 6.28, to execute the necessary documents on Mr. Penry's behalf ("Show Cause Order"). Mr. Penry did not appeal this order. On January 28, 2003, the commissioner executed the documents conveying the property to Ms. Penry. Mr. Penry filed an appeal of the commissioner's act of signing the documents on February 5, 2003.

This Court affirmed the trial court's order directing the magistrate to execute the documents, based on Mr. Penry's failure to file a timely appeal of the Show Cause Order entered September 19. The Court stated, "Litigants must file an appeal within 30 days after the entry of the decision of the trial court. . . . Because [Mr. Penry] did not appeal the September 2002 order appointing the magistrate, he forfeited his right to appeal." *Id.* at 802.

Like Mr. Penry, Mr. Gillespie did not appeal the Order appointing the special master and directing her to execute the documents necessary for a conveyance of the property to Ms. Gillespie. Like Mr. Penry, Mr.

Gillespie has therefore waived his right to appeal the execution of those documents.

Mr. Gillespie may argue that under RAP 2.4(b), the Order Re: Special Master is properly within this Court's scope of review, though it was not designated in his Notice of Appeal. His reliance on that rule would be misplaced.

RAP 2.4(b) provides, in relevant part, that the "appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if [] the order or ruling prejudicially affects the decision designated in the notice." As noted above, an order "prejudicially affects" the appealed order "if the order appealed cannot be decided without considering the merits of the previous order. . . [T]he issues in the two orders must be so entwined that to resolve the order appealed, the court must consider the order not appealed." *Right-Price Recreation v. Connells Prairie Community Council*, 105 Wn. App. 813 (2001). This is not such a case. Both the Order and Judgment and the Order Denying Motion to Vacate can be decided without consideration of the merits of the Order Re: Special Master—indeed, Mr. Gillespie's appeal does not even discuss the merits of that order. Mr. Gillespie's failure to file a timely (or any) appeal of the Order Re: Special Master is fatal to his appeal.

C. The Trial Court's Orders Affirming Arbitrator's Award Should Be Affirmed

1. The Scope of the Arbitrator's Authority Should Be Liberally Construed

The sole substantive issue in this appeal is whether arbitrator Larry Besk exceeded the authority granted him by the arbitration clause in the parties' Property Settlement Agreement. App. Br. at 5, 12; CP 162 (Motion to Vacate Arbitration Award, seeking determination whether "Mr. Besk exceed[ed] his authority . . . in his arbitration award"). The trial court ruled, and this Court should affirm, that he did not.

This inquiry is guided by the principle that "[a]rbitration clauses should be liberally interpreted when the issue contested is the scope of the clause." *King County v. Boeing Co.*, 18 Wn. App. 595 (1977) ("If the scope of any arbitration clause is debatable or reasonably in doubt, *the clause should be construed in favor of arbitration* unless it can be said that it is not susceptible to an interpretation that covers the asserted dispute.") (citations omitted, emphasis added).

2. The Trial Court Correctly Ruled that the Arbitration Award Was Within the Arbitrator's Authority

The governing Property Settlement Agreement between the parties provides, in relevant part, that "Any disagreement or dispute regarding sale of the home or implementation of this order shall be submitted for

binding arbitration by Larry Besk pursuant to RCW 7.04.” CP 43. Mr. Gillespie’s argument that Mr. Besk lacked authority to award the home to Ms. Gillespie, when the arbitration provision authorized him “only” to arbitrate disputes regarding the “sale” of the home, must fail for three independent and sufficient reasons.

First, the provision does not purport to limit the *relief* Mr. Besk may grant the parties to the arbitration, only the scope of the kinds of disagreements and disputes he may arbitrate. The dispute between Mr. and Ms. Gillespie did concern the sale of the home—to wit, the parties’ failure to sell it, and what should therefore be done. There is nothing in the PSA prohibiting Mr. Besk from ordering the sale of the residence to one spouse by the other. *See* CP 306 (arbitrator’s finding that “[n]othing in the PSA prohibits [a sale to Ms. Gillespie]”). Indeed, Mr. Gillespie himself asked the arbitrator to order a sale of the property to him. CP 259 (December 2, 2009 letter from Darren Gillespie to Lawrence Besk, stating “[I]t appears that Ms. Gillespie and I are both interested in purchasing the home. . . . My opening offer under this scenario is that I will pay off the mortgage and give Ms. Gillespie \$10,000 cash.”). Because the arbitration provision granted Mr. Best authority to arbitrate “any dispute regarding the sale of the home,” and because that is precisely the dispute he was

asked to and did arbitrate, Mr. Besk's award should be affirmed, regardless of the nature of that award.

Second, Mr. Gillespie's argument that Mr. Besk may have had authority to order a *sale* of the home, but not an *award* of the home, is frivolous. Mr. Gillespie argued before the trial court that Mr. Besk "[found] a wholly new definition of the word 'sale,' as used in the parties' Property Settlement Agreement, [and] decided that the parties should 'sell' to Ms. Gillespie their interest in the home to Ms. Gillespie herself, but that she would not have to pay anything for it in the manner required by the Property Settlement Agreement". CP 168.

Mr. Gillespie's attempt to distinguish the words "award" and "sale" is futile. Mr. Besk's use of "award" is simply a reference to the term used to describe an arbitrator's ruling. *See, e.g., Barnett v. Hicks*, 119 Wn.2d 151 (1992) ("Further, each official renders a different result; an arbitrator gives an award while a referee furnishes a report."). Furthermore, there is simply no tenable distinction between an "award" and a "sale" under these circumstances. As the arbitrator found, the value of the property had fallen below the amount of the parties' mortgage, and a "sale" in the current housing market would not have allowed either party to recoup his or her equity. Ms. Gillespie did not "pay anything" for the house because, unfortunately—given the value of the property and the

amount of the mortgage—it was not worth anything. Ms. Gillespie was willing to assume liability for the entire mortgage, relieving Mr. Gillespie of his obligation thereon. It is uncontested that the terms of the sale were fair.

And third, the provision is far broader than Mr. Gillespie represents. It reads “Any disagreement or dispute regarding sale of the home *or implementation of this order* shall be submitted for binding arbitration by Larry Besk.” CP 43 (emphasis added). Mr. Gillespie has not disputed—because he cannot—that the underlying dispute in the case falls within the scope of Mr. Besk’s authority to arbitrate issues concerning implementation of the parties’ agreement. Because the arbitrator was acting within the scope of his authority, his award should be upheld.

D. Pursuant to RAP 18.1, Ms. Gillespie Requests Award of Attorneys Fees Incurred on Appeal

RCW 7.04A.250 of the Washington Arbitration Act provides:

(1) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity with the order. . .

(2) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(3) On application of a prevailing party to a contested judicial proceeding under RCW 7.04A.220, 7.04A.230, or

7.04A.240, the court may add to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award, attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made. (Emphasis added).

Pursuant to this statute, Ms. Gillespie is entitled to recover fees and expenses for post-arbitration proceedings, including those fees awarded below and the fees incurred in this appeal. *See McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 286 (2009) review denied, 166 Wn.2d 1022 (2009). She therefore requests those fees, as assessed against Appellant.

Mr. Gillespie's request for fees—which he mistakenly brings under RAP 18.4—should be denied.

IV. CONCLUSION

For the foregoing reasons, Respondent Corinna Gillespie respectfully requests that this Court affirm the trial court's Order and Judgment Affirming Arbitration Award, and the Order Denying Motion to Vacate Arbitration Award, and award her all fees and expenses incurred in this appeal.

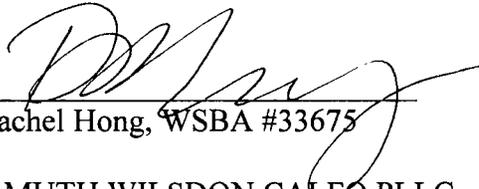
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Dated: November 18, 2010.

Respectfully submitted,

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