

No. 66313-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEANNA AIMEE BAILEY, RESPONDENT

v.

JOHN DAVIN BAILEY, APPELLANT

BRIEF OF RESPONDENT

LORNA L. BIGSBY, WSBA #5546
Attorney for Respondent Deanna Aimee Bailey

Lorna L. Bigsby, PLLC
2918 Colby Avenue, Suite 201A
Everett, WA 98201
(425) 258-6261

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I. INTRODUCTION.

This appeal purports to present due process issues arising in the context of an agreed, mediation-to-arbitration process which included a summary, binding, arbitrated disposition of marriage dissolution issues unresolved by mediation, pursuant to RCW 7.04A.150(2).

II. STATEMENT OF THE CASE.

On September 9, 2008, Deanna Aimee Bailey (hereinafter “Aimee”) filed a Petition to dissolve her nineteen year marriage to the Appellant, John Davin Bailey (hereinafter “Davin”). CP 107, CP 163-168. The Petition raised issues of parenting and support for the parties’ three children, division of assets and debts, and set out claims for spousal maintenance and attorney’s fees payable on Aimee’s behalf. CP 165-168. Pursuant to Snohomish County Local Court Rule mandating alternative dispute resolution before trial (SCLCR 94.04(h)(1)), the parties engaged in a full day of mediation with Mediator Harry Slusher, which concluded without agreement. CP 57, CP 76. On the very eve of their April 22, 2010 trial date, the parties, through counsel, entered into a “Stipulation to Strike Trial Date and Engage in Mediation/Binding Arbitration”. CP 159-160, A1-A2. The Stipulation declared:

...this matter will be determined through mediation/binding arbitration (pursuant to RCW 7.04A) with Mediator/Arbitrator Lee Tinney ... Lee Tinney will

determine the appropriate procedure for this mediation/binding arbitration process. CP 159.

The first session with Mediator/Arbitrator Tinney (hereinafter, "Tinney") occurred on the original trial date, April 22, 2010, the parties and their counsel on that date signing, "Agreement for Mediation to Arbitration Alternative Dispute Resolution Process". CP 69, A3. The Agreement addressed Tinney's role, in the event mediation was not successful:

Should the mediated settlement conference fail to fully resolve all disputed issues in the marriage dissolution action between the parties within the time reserved ... the parties agree that all remaining disputed issues in such action shall be submitted to Lee B. Tinney to decide as arbitrator per RCW 7.04A. In arbitrating such matter, Lee B. Tinney may consider all evidence and information presented by the parties in the mediation, and any additional information directed by her to be produced. A3.

The Agreement also provided that, in the event mediation failed:

... the parties agree and acknowledge their understanding that they are bound by the decision of the arbitrator as to all disputed issues in this matter per RCW 7.04A. A3.

Both parties expressly waived Washington law otherwise applicable to confidentiality of disclosures in mediation "if this matter is resolved by arbitration, to the extent information is considered by the mediator/arbitrator or identified as a basis for the arbitration decision."

Both specifically acknowledged their informed consent:

Both parties are represented by counsel and have been informed by their counsel as to their rights and the legal consequences of participating in a mediation-to-arbitration process, and to having an arbitrator decide their marriage dissolution case rather than traditional litigation and having a judge decide their marriage dissolution case. A3, CP 69.

The Agreement does not refer to a future hearing, cross examination or any other procedural elements of a formal arbitration process. A3,CP 69.

The parties proceeded that day to a four hour mediation, but did not reach agreement. CP 69-70. The following day, April 23, 2010, Tinney transmitted correspondence to counsel in advance of a “second mediation session” on May 3rd or 4th, A4-A5, CP 70-71. She stated that, “at the next two hour mediation session, I am expecting that both parties will be prepared with their bottom line positions and alternatives”. Davin was directed to immediately obtain information regarding his 401K Plan, which Tinney described as “critical to rational evaluation of mediation options and to my arbitration decision if mediation is not successful.” She also identified materials to be produced by each of the parties in the event the next mediation session was unsuccessful, specifically requesting updated Financial Declarations, tax returns, recent paystubs, and 2009 paystubs for Davin which “might resolve ... the apparent dispute as to the duration and intervals when he was on leave of absence or working half-time.” A4, CP 71. Tinney also invited submittal of any materials

previously submitted to mediator Slusher. A5. As to her procedural expectations for an arbitration, Tinney was explicit:

In an arbitration, I expect to receive into evidence all of the mediation materials and statements of the parties, with the expectation of applying appropriate discretion and weighing the reliability of evidence that would otherwise be inadmissible in Court such as hearsay. After the next mediation session, I am not expecting to receive additional documentary evidence or testimony, or to schedule any additional hearing. I am mindful the parties selected the mediation/arbitration process to keep legal costs in check, and I plan to keep that in mind in containing the process. In an arbitration, I expect to be exercising my independent judgment as to valuation and equitable allocation of assets and debts, in line with Washington law. I will be considering the opening positions of the parties (rather than their last offer in mediation), except to the extent there may be stipulations or mediated agreements or specific direction otherwise. I will issue a written arbitration decision/award no later than two weeks after the next mediation session... A5, CP 71 (*emphasis added*).

On May 3, 2010, the parties reconvened for the “next mediation session” (repeatedly identified as such in Tinney’s April 23, 2010 letter). A4-A5, CP 70-71. On this date, parties and counsel executed a CR2A Agreement (A6, CP 72), which acknowledged that the parties had now participated in “two mediation sessions” and that the parties had:

... previously agreed that all issues not agreed upon in this cause shall be submitted to her for binding arbitration in a summary process/decision per RCW 7.04A. (*emphasis added*)

Tinney again identified the evidence for arbitration:

All the documentary information submitted to Lee Tinney as mediator shall be accepted into evidence in the arbitration by her. All the statements of the parties in the mediation sessions shall be considered as testimony and accepted into evidence by Lee Tinney in the arbitration. A6, CP 72.

The remaining proceedings were also identified, and clearly limited, to consist first of a telephone conference for Tinney and counsel to resolve a discovery issue arising from “information submitted by husband on May 3, 2010”, and after resolution of that issue:

... it is expected that the counsel for the parties may submit a written closing argument not exceeding four double-spaced pages other than any such response or closing arguments, neither party shall submit further writings or documents. (A6, CP 72)

On May 7, 2010, consistent with the CR2A, Tinney issued her Order on Additional Discovery (CP 74-75, A8-9), intending to allow Aimee “a meaningful opportunity to respond to new information provided by Respondent at the last mediation session on May 3, 2010...” CP 74. The Order’s reference to named real estate appraisers, cross referenced to the Arbitration Award itself, exposes an underlying dispute about the value of the marital residence. CP 74-75, CP 123. However, neither party was granted a right to depose the other’s appraiser; and only Aimee actually made that specific request, which was denied. A9, CP 75. No further proceedings took place.

On June 17, 2010, Lee Tinney issued her Arbitration Award. CP 107-157. The award confirms that the matter came before her “for summary arbitration under RCW 7.04A.150(b)”.¹ CP 107. It reiterates the evidence considered:

By written agreement, the Arbitrator considered evidence consisting of the documents and statements of the parties at the two mediation sessions on April 22, 2010 and May 3, 2010, additional valuation and other information authorized by the Arbitrator, and written Closing Argument on June 14, 2010. (CP 107)

Final documents entered in the dissolution case on August 16, 2010. Mr. Bailey sought first to persuade Tinney to reopen the case (CP 77, Appendix E to Appellant’s Brief), which Tinney interpreted as a motion for reconsideration, and denied. CP 77. Thereafter, on August 25, 2010, Mr. Bailey filed his Motion to Vacate Arbitration Award and Decree of Dissolution, claiming as his grounds that, “The method by which the Arbitration was conducted violated the Respondent’s right to confront witnesses.” CP 88. He requested the Award be vacated, “and this matter referred either [sic] the trial court for resolution or to arbitration for an arbitration hearing at which the Respondent can confront witnesses.” CP 89. On November 2, 2010, Mr. Bailey’s Motion was

¹ As there is no subsection (b) to 7.04A.150, it is assumed the intended reference was to second subsection, (2), which explicitly authorizes a “summary disposition”.

heard and denied by the Snohomish County Court, in its Order Denying Respondent's Motion to Vacate Arbitration Award, for failure to "meet statutory basis (RCW 7.04A.230)". CP 52. The Court also issued a \$1,500 Judgment in favor of Aimee Bailey for her attorney's fees incurred in resisting the Motion, pursuant to RCW 7.04A.250(3). CP 52.

This appeal followed, filed on December 1, 2010.

III. ARGUMENT

3.1 **Judicial review of an Arbitration Award is extremely limited; the statutory basis to vacate must appear on the face of the award, and there is no review of the decision on the merits.**

Arbitration is a statutorily recognized special proceeding in Washington, where the "code of arbitration" is RCW Chapter 7.04A, previously RCW Chapter 7.04. Price v. Farmers Ins. Co., 133 Wash.2d 490, 495, 946 P.2d 388 (1997). Washington law generally favors the use of alternative dispute resolution such as arbitration. Davidson v. Hensen, 135 Wash.2d 112, 118, 954 P.2d 1327 (1998), citing Boyd v. Davis, 127 Wash.2d 256, 262, 897 P.2d 1239 (1995) (encouraging parties voluntarily to submit their disputes to arbitration is an increasingly important objective in our ever more litigious society). Strong public policy favors arbitration of disputes as a method of easing court congestion and

providing an expeditious method of resolving disputes which is generally less expensive than litigation. Perez v. Mid-Century Ins. Co., 85 Wn. App. 760, 765, 934 P.2d 731 (1997); Munsey v. Walla Walla College, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995). Arbitration is designed to settle controversies, not to serve as a prelude to litigation. McGinnity v. AutoNation, Inc., 149 Wn. App. 277, 282, 202 P.3d 1009 (2009), citing Westmark Properties v. McGuire, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989). Courts thus confer substantial finality on decisions of arbitrators rendered in accordance with the parties' contract and RCW Chapter 7.04A. Davidson, 135 Wash.2d at 118.

Appellate scope of review of an arbitrator's award under Chapter 7.04A RCW is limited to a review of the decision by the court which confirmed, vacated, modified, or corrected that award. Expert Drywall, Inc. v. Ellis-Don Const., Inc., 86 Wn. App. 884, 888, 939 P.2d 1258 (1997); Barnett v. Hicks, 119 Wash.2d 151, 157, 829 P.2d 1087 (1992). The trial court's review is confined to the question of whether any of the statutory grounds for vacation exist under RCW 7.04A.230(1). A10. Thus, review of such an award is, at all levels, extremely limited.

Appellate scrutiny does not include review of an arbitrator's decision on the merits, which would defeat the purpose of arbitration. McGinnity, 149 Wn. App. at 282, citing Beroth v. Apollo Coll., Inc., 133

Wn. App. 551, 559, 145 P.3d 386 (2006). Neither is the evidence before the arbitrator considered by the reviewing court. Davidson, 135 Wash.2d at 119. Grounds to vacate must appear on the face of the award, (i.e., be recognizable from the language of the award), or the award cannot be vacated. Federated Servs. Ins. Co. v. Norberg, 101 Wn. App. 119, 124, 4 P.3d 844 (2000). For this purpose, the arbitrator's reasons for the award are not part of the award itself; an award consists of a statement of the outcome, much as a judgment states the outcome. Either an erroneous rule of law or mistaken application thereof may be a ground of vacation; but the appellant must also demonstrate prejudice from the alleged misconduct to merit relief. Expert Drywall, 86 Wn. App. at 888. The burden of proving clear error on the face of the award is on the party seeking to vacate. Boyd v. Davis, 127 Wash. 2d. 256, 263, 897 P.2d 1239 (1995).

3.2 This Mediation to Arbitration was conducted appropriately, consistent with the parties' agreements and with statute; RCW Chapter 7.04A confers no entitlement to a formal hearing nor to the "rights" Davin contends he has been deprived of.

In his Brief, Davin broadly declares, "if the procedures set forth in RCW 7.04A are not followed, ... a violation of a party's due process rights occurs and the arbitration award is subject to vacation..." Appellant's Brief, p. 11. He cites no case authority for this proposition.

Earlier, however, he asserts, “In the instant case, the parties had an arbitration hearing under subsection 3 of the statute,” (RCW 7.04A.230). For this claim he cites only the parties’ initial Agreement of April 22, 2010 (A1) and, inexplicably, RCW 7.04A.110.² Appellant’s Brief, p. 10. The balance of Davin’s argument rests on the validity of his claim that the arbitrator ordered a formal hearing, the conduct of which was contrary to the procedure authorized by RCW Chapter 7.04A.

This argument fails because Tinney did not order or conduct a hearing under RCW 7.04A.150(3). A1-A9, CP 107.

While the parties’ Stipulation did compel an arbitrated resolution, if necessary, it also explicitly delegated to Tinney the right to “determine the appropriate procedure for this mediation/binding arbitration process” (A1, Para. 2); and by incorporating RCW 7.04A into that Stipulation, the parties reconfirmed their broad grant of authority to their arbitrator/mediator. RCW 7.04A.150(1). Tinney, with the parties’ direction, conducted a mediation which provided ample opportunity for both parties to present evidence and be heard at length, as is evidenced by the detailed Arbitration Award. CP 107-157. When mediation concluded unsuccessfully, Tinney undertook the informal, summary arbitration to

² RCW 7.04A.110 is entitled, “Appointment of Arbitrator – service as a neutral arbitrator”, and does not speak to the arbitration proceedings.

which Mr. Bailey agreed and in which he participated without objection until after the Award was issued.

Importantly, RCW 7.04A confers neither entitlement to a formal hearing nor to the related due process “rights” Mr. Bailey now contends he has been deprived of. The authority Mr. Bailey has submitted in support of such rights is simply inapplicable. [Rogoski v. Hammond, 9 Wn. App. , 513 P.2d 285 (1973); Sniadach v. Family Financial Corp., 395 U.S. 337, 89 S. Ct. 1820 (1969)], as these are litigation cases addressing due process rights in the prejudgment context.

The first subsection of RCW 7.04A.150 provides specifically:

The arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding. RCW 7.04A.150. A11.

Consistent with the statute and the parties’ agreements (A1-A3, A6-A7), and throughout the proceedings, Tinney made determinations as to the appropriate procedure, obtaining the parties’ consent and then reconfirming their understanding in both formal agreements, and in written communications with counsel, knowledge of which is attributed to the parties as well. Haller v. Wallis, 89 Wash.2d 539, 547, 573 P.2d 1302 (1978) (It is the general rule in Washington that knowledge of an attorney is knowledge of his or her client); Lane v. Brown & Haley, 81 Wn. App.

102, 108, 912 P.2d 1040 (1996) (The attorney's knowledge is deemed to be the client's knowledge, when an attorney acts on his behalf). In this manner, the case concluded with issuance of an Arbitration Award, but without a formal hearing, the only meetings of parties, counsel, and Tinney being the two mediation sessions on April 22nd and May 3rd.

Since no hearing was ordered or took place pursuant to RCW 7.04A.150(3), there is nothing in RCW Chapter 7.04A which would entitle Davin to a process different than the one he agreed upon, acknowledged as it progressed, and participated in. RCW 7.04A.150(4) only conditionally recognizes the rights Davin attempts to claim as his entitlement:

If an arbitrator orders a hearing under subsection (3) of this section, the parties to an arbitration proceeding are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.
A11. (*emphasis added.*)

Likewise, RCW 7.04A.230, upon which Davin relies, refers repeatedly to events occurring at "the hearing", and to the conduct of such hearing being "contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party..." Here, no .150(3) hearing was ever ordered, or conducted, which could give rise to the operation of subsection (1)(c) of RCW 7.04A.230.

Davin's argument also ignores RCW 7.04A.150, and the process to which he agreed, which was for the summary, arbitrated disposition of

disputed issues remaining after multiple attempts at mediation had failed. That process is expressly authorized by RCW 7.04A.150(2), which provides that:

The arbitrator may decide a request for summary disposition of a claim or particular issue by agreement of all interested parties... A11.

Agreement to the summary process was also specifically acknowledged in the CR2A Agreement Mr. Bailey signed, which stated:

Both parties ... have previously agreed that all issues not agreed upon in this cause shall be submitted to her for binding arbitration in a summary process/decision per RCW 7.04A. A6.

Finally, case law confirms that arbitration pursuant to Washington's statutory scheme, RCW Ch. 7.04A, need not be formally structured. In Kempf v. Puryear, 87 Wn. App. 390, 942 P.2d 375 (1997) Division 3 considered an order vacating an arbitration award in favor of a customer in a dispute with a home building contractor, based upon "misconduct" by which the rights of a party were allegedly prejudiced. Among the lower court's findings of fact favoring the contractor were these: that witnesses were not sworn and testimony was not taken under oath; that the arbitrator met with each side separately and the parties were not able to confront the witnesses; that the matter was "[not] handled like an arbitration and was not a true arbitration." 87 Wn. App. at 392. The

customer countered that the contractor had not at the time objected to any of the conduct he was now complaining of, and that he also met with the arbitrators outside of her presence or that of her attorneys. The court reversed, reinstating the award and citing Puget Sound Bridge and Dredging Co. v. Lake Washington Shipyards, 1 Wash.2d 401, 96 P.2d 257 (1939) wherein, it noted:

... arbitrators independently investigated, held ex parte conferences, and took evidence without notifying the parties. The court held that the complaining party's participation in the arbitration with knowledge of these procedures, and without objection, precluded any right to later complain about them. 87 Wn. App. at 393 (citing 1 Wash.2d at 410-11).

That arbitration may be conducted informally is also confirmed in Barnett v. Hicks, 119 Wash.2d 151, 829 P.2d 1087 (1992):

Arbitration can be casually structured. Tombs v. Northwest Airlines, Inc., 83 Wash.2d 157, 161, 516 P.2d 1028 (1973) (arbitrators are not expected or required to always follow the strict and technical rules of law); Thorgaard Plumbing & Heating Co. v. Cy of King, 71 Wash.2d 126, 132, 426 P.2d 828 (1967). Arbitration depends for its existence and for its jurisdiction upon the parties having contracted to submit to it, and upon the arbitration statute (Northern State Construction Co. v. Banchemo, 63 Wash.2d 245, 248, 386 P.2d 625 (1963) (although arbitration is in the nature of a judicial inquiry, the standards of judicial conduct and efficiency to which arbitrators are held are markedly different from those imposed on judicial officers.) 119 Wash.2d at 1090-1091.

And in Puget Sound Bridge and Dredging Co. v. Lake Washington Shipyards, 1 Wash.2d 401, 96 P.2d 257 (1939), the case relied upon in Kempf, the Supreme Court addressed at length an appeal from a judgment confirming an arbitration award, the appellant complaining that the informal procedures conducted pursuant to the parties' written agreement offended its right to "its day in court", as follows:

... it must be remembered that arbitration is the result of, and subject to, the agreement of the parties litigant. Since it is a matter of contract, the parties may determine between themselves, beforehand, what issues are to be decided and whether the evidence is to be taken upon a hearing in the presence of both parties or is to be obtained, in whole or in part, through an informal inquiry by the arbitrators. If the agreement makes no specific provision in that respect, then under the statute, as we interpret it, the hearing must be had in the presence of both parties so that each may have a full hearing upon the claim presented by himself and likewise upon the claim of his adversary. If, however, the parties agree or consent, to the reception of evidence ex parte or through informal inquiry and investigation, they cannot thereafter be heard to say, as to such evidence, that they have not had their day in court.

Complementary to this absolute right to be heard, to which the parties are entitled in arbitration proceedings, is the right, found in the doctrine of waiver, to excuse its performance. That doctrine is one of the most familiar in the law, is of general application, and extends to rights and privileges of every character.

A right which one may enforce or insist upon, he may also repudiate or relinquish. Although the relinquishment must be voluntary and intentional, it may be either express or implied. It may arise from an express declaration of an intention not to claim the right, or it may be the result of

acts or conduct which are inconsistent with the continued assertion of the right in question. The authorities cited above recognize the application of this doctrine to matters pertaining to the rights of persons concerned in arbitration proceedings. This court, in common with all others, has recognized it. [citation omitted] It follows, of course, that, if a person has waived a right, he cannot be said to have been legally deprived of it.

With these principles in mind, we approach the second, and crucial, question in the case, namely, whether, under the evidence, appellant has been deprived of any of its legal rights.

It will be noted that when the arbitrators entered upon their course of informal and ex parte investigation and examination, it was with the full knowledge of both parties to the agreement. They voluntarily delivered to the arbitrators all the written data concerning the controversy, knowing the use that was to be made of it. Each of them submitted itself to ex parte examination without insisting that the other be present. ... Appellant cannot now, therefore, be heard to say that this method of procedure was contrary to the statute or the agreement, or was prejudicial to its rights.

1 Wash.2d 410 – 411

See, also, Martin-Morris Agency, Inc. v. Mietzner, 1 Wn. App. 950 465 P.2d 425 (1970), wherein counsel for the parties seeking to vacate the arbitration award had, in correspondence to the arbitrator, confirmed willingness to “proceeding in any manner that you may desire” or that “you deem proper and sufficient”, but then alleged the arbitration committee had exceeded its powers in making an award without a hearing and without oral testimony; the court, relying on the Puget Sound Bridge

case, 1 Wash.2d. at 401, rejected that contention, finding waiver of the right to expect such formalities had occurred.

Davin's other cited cases also fail to support his claim of due process violation in the mediation to arbitration process. Hansen v. Shim, a Division One case at 87 Wn. App. 538, 943 P.2d 322(1997), did involve an arbitration, but Davin's cited text addresses an appellant's complaint that its due process rights had been denied by actions of the trial court, a claim that was rejected based on the litigant's receipt of both adequate notice and consideration of its position. The court added: "due process does not require any particular form or procedure". 87 Wn. App. at 551. The case thus does not support the existence of any specific "due process" rights in an arbitration proceeding. Appellant also cites Tombs v. Northwest Airlines, 83 Wash.2d 157, 516 P.2d 1028 (1973), a case bearing no factual similarity whatsoever to the case here at issue. In Tombs, the Airlines' Retirement Board rendered a computational decision regarding a retiree's benefits without giving prior notice of its intent to do so, and without a hearing. The retiree filed suit, and pursued his claim to a favorable judgment. But because both parties had failed to comply with a valid agreement to arbitrate the issue, the court found that judgment void for lack of jurisdiction, and the Board's award a nullity, having been made without any notice or hearing in the absence of a "statute, agreement, or

waiver” obviating the need for these formalities. 83 Wash.2d 157 at 161. The case does not, as argued by appellant, identify “fundamental rights that each of the litigants has in an arbitration proceeding” Appellant’s Brief, p. 11.

Although Davin persists in his claim of due process deprivation, neither the facts nor his authority support him. Davin does not contend he received no notice of the proceedings, or was limited in his ability to present his side of the case either by the submission of documents, or through his own testimony, when in meetings with Tinney. And although he repeatedly protests his inability to cross examine Aimee or her expert, neither party was granted such a right, which would have been outside the summary process defined and implemented by Tinney, according to the authority granted to her. A1, A11.

Davin lastly argues he could not have waived rights to a full and formal hearing, again twisting logic to deduce that his agreement to a caucus style mediation did not waive his “right” to know and potentially rebut any words Aimee may have spoken behind her closed door at the mediation sessions. Appellant’s Brief, p. 13-14. Davin relies upon ERA Sun River Realty, Inc. v. Tri City Assn. of Realtors, 103 Wn. App. 955 14 P.3d 890 (2000), as support for an “absolute right to present evidence”, as if he had no such opportunity, arguing that his actions could not have

resulted in a waiver of his right to do so. Appellant's Brief p.13, Para 6.3. ERA does not support Davin. There, a party who had failed to exercise its right to subpoena witnesses, but had voluntarily elected to proceed and even confirmed it had received a fair hearing, was found to have waived such right. In fact, the case stands for the proposition that an arbitration may be tailored to exclude certain statutory rights otherwise available under 7.04 RCW (the prior form of the statute), but is not necessarily flawed by such omission, as any particular statutory procedures may be waived by a party or through an agreed process. 103 Wn. App. at 959.

3.3. Attorney's Fees should be awarded to Aimee Bailey.

Aimee requests an award of attorney's fees for the appeal. First, she asks for such an award on the basis that this appeal is frivolous. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. Reed v. Dalton, 124 Wn. App. 113, 128, 100 P.3d 349 (2004). RAP 18.9(a) authorizes this court, to order a party who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." Appropriate sanctions may include, as compensatory damages, an award of attorney's fees and costs

to the opposing party. Yurtis v. Phipps, 143 Wn. App. 680, 696, 181 P.3d 849.

Fees should also be awarded in this case based upon RCW 26.09.140, which provides:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

The Court may order that the attorney's fees be paid directly to the attorney who may enforce the order in his name.

In exercising its discretion under the above statute, this court should consider the arguable merit of the issues on appeal as well as the financial resources of the respective parties. Johnson v. Johnson, 107 Wn. App. 500, 27 P.3d, 654 (2001). In re the Marriage of Muhammad 153 Wash.2d 795, 108 P.3d 779 (2005).

Aimee also seeks an award of fees under RCW 7.04A.250(3) which provides, in relevant part that:

[On] application of a prevailing party in a contested judicial proceeding under [the Uniform Arbitration Act], the Court may add ... attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made. McGinnity v. AutoNation, Inc., 149 Wn. App. 277, 282, 202 P.3d 1009 (2009).

IV. CONCLUSION.

Statute, agreement and waiver all support denial of Davin's claimed deprivation of due process rights. Davin entirely ignores key language of his own cited authority: both Tombs (83 Wash.2d at 161) and ERA (103 Wash.2d at 959) preface their descriptions of "required" arbitration formalities with the phrase, "unless that right is obviated by statute, agreement, or waiver ...". In this case, all three of these affect and limit Davin Bailey's claimed rights. First, by statute, Tinney was granted the right to "conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding." RCW 7.04A.150(1) That she need not conduct it formally, or order a hearing, is made clear by RCW 7.04A.150(4) which begins, "[i]f an arbitrator orders a hearing...". Further, RCW 7.04A.150(2) explicitly authorizes "summary disposition of a claim or particular issue", as here occurred. Second, Davin's claimed "rights" were limited by the agreements he made personally or through counsel, appended hereto as A1 through A6. These agreements could not in good

faith be understood to confer the “rights” Davin belatedly seeks to claim and, in fact, expressly set out a process which can only be read to exclude such formalities. Either of these alone, statute or agreement, would be sufficient to obviate the need for, or any honest expectation of, a formal arbitration hearing. However, waiver also applies to dictate that result. Here, waiver may be found in Davin’s express written agreements to the process which occurred. Beyond that, as provided in earlier cited authority herein, Puget Sound Bridge and Dredging Co. v. Lake Washington Shipyards, 1 Wash.2d 401, 96 P.2d 257 (1939), a waiver “may be the result of acts or conduct which are inconsistent with a continued assertion of the right in question.” 1 Wash.2d at 410. Describing a process remarkably similar to the proceedings in this case, the court there noted that the parties embarked on the informal arbitration process with “full knowledge” and “each of them submitted itself to ex parte examination without insisting that the other be present”, concluding:

Appellant cannot now, therefore, be heard to say that this method of procedure was contrary to the statute or the agreement, or was prejudicial to its rights. 140 Wash.2d at 411.

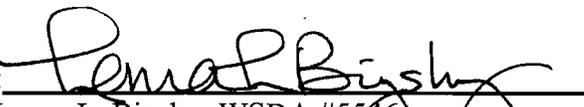
Accordingly, Davin should also be found to have waived any entitlement to a formal hearing or related due process “rights” he now contends he has been deprived of.

On the basis provided by statute, his own agreements, and the doctrine of waiver, Davin Bailey's appeal of the Superior Court's Order Denying Motion to Vacate Arbitration Award should be denied.

DATED this 23rd day of May, 2011.

Respectfully submitted,

LORNA L. BIGSBY, PLLC

By: 
Lorna L. Bigsby, WSBA #5546
Attorney for Respondent Deanna Aimee Bailey

APPENDIX

1. Stipulation to Strike Trial Date and Engage in
Mediation/Binding Arbitration (04/21/2010) A1 – A2

2. Agreement for Mediation to Arbitration Alternative Dispute
Resolution Process (04/22/2010) A3

3. Correspondence to Counsel from Mediator-Arbitrator Lee B.
Tinney (04/23/2010) A4-A5

4. CR2A Agreement (05/03/2010)..... A6-A7

5. Order on Additional Discovery (05/07/2010)..... A8-A9

6. RCW 7.04A.230 (full text)A10

7. RCW 7.04A.150 (full text)A11

FILED

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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

In Re the Marriage of:

DEANNA AIMBE BAILEY,
Petitioner,

and

JOHN DAVIN BAILEY,
Respondent.

No. 08-3-02262-7

STIPULATION TO STRIKE TRIAL
DATE AND ENGAGE IN
MEDIATION/BINDING
ARBITRATION

The Parties hereto hereby stipulate and agree:

1. The parties, through their undersigned counsel, stipulate and agree that the trial date currently scheduled in this matter for April 22, 2010 shall be stricken and that instead this matter will be determined through mediation/binding arbitration (pursuant to RCW 7.04A) with Mediator/Arbitrator Lee Tinney.

2. The mediation/binding arbitration on this matter shall take place on Thursday, April 22, 2010 at 9:00 o'clock AM/PM at the law offices of Steven Shea (3014 Hoyt Avenue, Everett, Washington). Lee Tinney will determine the appropriate procedure for this mediation/binding arbitration process.

3. The cost of this agreed process shall be shared equally by the parties.

STIPULATION TO STRIKE TRIAL DATE AND PROCEED WITH
MEDIATION/BINDING ARBITRATION - Page 1

LAW OFFICES OF
SELL & INDRAM, P.C.
2918 COLBY AVE., SUITE 201
P.O. BOX 1780
EVERETT, WASHINGTON 98206
(425) 258-8287 • (206) 782-7673

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Dated: _____


Lorna L. Bigsby, WSBA #5546
Attorney for Petitioner


Steven Shea, WSBA #10718
Attorney for Respondent

Aimee Bailey
Petitioner

Davin Bailey
Respondent

STIPULATION TO STRIKE TRIAL DATE AND PROCEED WITH
MEDIATION/BINDING ARBITRATION - Page 2

LAW OFFICES OF
BELL & INGRAM, P.S.
2319 COLBY AVE., SUITE 201
P.O. BOX 1700
EVERETT, WASHINGTON 98200
(425) 258-6281 • (206) 782-8820

Lee Tinney Dispute Resolution Services

2821 Wetmore Ave.
Everett, WA 98201
(425) 339-3319

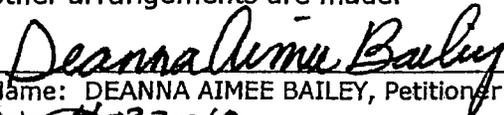
lee@leetinneylaw.com
www.leetinneylaw.com

Lee B. Tinney, J.D.
Mediator - Arbitrator

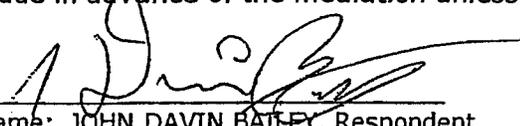
AGREEMENT FOR MEDIATION TO ARBITRATION ALTERNATIVE DISPUTE RESOLUTION PROCESS

The undersigned agree to the following in connection with the alternative dispute resolution services provided by Lee B. Tinney ("mediator"):

- 1. Role of mediator/arbitrator.** The mediator/arbitrator does not provide legal advice to either party. The mediator/arbitrator is neutral and independent. The mediator will use her best efforts to assist the parties to reach a resolution in the mediation component of this process. The mediator makes no guarantee or promise that a binding agreement will result from the mediated settlement conference. Should the mediated settlement conference fail to fully resolve all disputed issues in the marriage dissolution action between the parties within the time reserved (four hours on April 22, 2010), the parties agree that all remaining disputed issues in such action shall be submitted to Lee B. Tinney to decide as arbitrator per RCW 7.04A. In arbitrating such matter, Lee B. Tinney may consider all evidence and information presented by the parties in the mediation, and any additional information directed by her to be produced.
- 2. Confidentiality of process.** Washington law applicable to the mediation process, including RCW 7.07, relating to confidentiality of disclosures of the parties in a mediation, is hereby waived by the parties if this matter is resolved by arbitration, to the extent information is considered by the mediator/arbitrator or identified as a basis for the arbitration decision.
- 3. Role of parties.** In the mediated settlement conference, the parties shall participate in good faith, including disclosure of information necessary to the process. If the mediated settlement conference is not successful in resulting in an agreement between the parties, the parties agree and acknowledge their understanding that they are bound by the decision of the arbitrator as to all disputed issues in this matter per RCW 7.04A.
- 4. Informed consent.** Both parties are represented by counsel and have been informed by their counsel as to their rights and the legal consequences of participating in a mediation-to-arbitration process, and to having an arbitrator decide their marriage dissolution case rather than traditional litigation and having a judge decide their marriage dissolution case. The parties waive any ethical considerations in having Lee B. Tinney serve as both mediator and arbitrator in this matter.
- 5. Fees.** The parties agree to pay the mediator \$200/hr. for reasonable preparation time and actual time in the mediated settlement conference and arbitration, if any. The undersigned attorneys guarantee payment of their client's obligation. The parties shall split the total fee obligation unless otherwise specified or equitably allocated in the arbitration. Payment for the estimated cost of the mediation is due in advance of the mediation unless other arrangements are made.


Name: DEANNA AIMEE BAILEY, Petitioner
Date: 4-22-10


Attorney Name: LORNA BIGSBY
Attorney for Petitioner/Wife
Date: 4-22-10


Name: JOHN DAVIN BAILEY, Respondent
Date: 4-22-10


Attorney Name: STEVEN B. SHEA
Attorney for Respondent/Husband
Date: 4-22-10

Lee Tinney Dispute Resolution Services

2821 Wetmore Ave.
Everett, WA 98201
(425) 339-3319

lee@leetinneylaw.com
www.leetinneylaw.com

Lee B. Tinney, J.D.
Mediator - Arbitrator

April 23, 2010

Lorna Bigsby
Via email: lbigsby@bellingram.com

Steven B. Shea
Via email: whidbeysteve@msn.com

Re: Bailey mediation/arbitration

Counsel:

Thank you both for your hard work and capable representation of your clients in yesterday's mediation session.

Both of you have a copy of the full CR2A proposal from Aimee to Davin from yesterday's mediation. I'm "enclosing" for your reference a copy of the counterproposal from Davin written onto Aimee's proposed CR2A Agreement, with the attached Child Support Worksheets and Residential Credit Analysis and property spreadsheet. Aimee rejected this counterproposal and presented no further response due to lack of time and likelihood of lack of success given how far apart both parties still were. At the end of yesterday's mediation session, Davin was considering whether to propose an alternative settlement structure involving the sale of the marital residence. The second mediation session is scheduled at Davin's request largely to provide Davin with additional time to fully process the alternatives discussed at the yesterday's mediation session.

I gather Aimee had a couple of items that she wanted to raise that we didn't get a chance to review. I know one of the items was a proposal to include in the Parenting Plan the children's birthdays as annually alternating special occasions.

I am enclosing my invoice for the balance of fees owing for yesterday's mediation session. I ask that this invoice be paid by both parties before the next mediation session, and that Davin advance the payment of my fee for the next mediation session (\$400) and for the one hour of Ms. Blgsby's time (\$255).

At the next two hour mediation session, I am expecting that both parties will be prepared with their bottom line positions and alternatives. I ask that Davin be prepared with the first, fully developed proposal, to begin the discussion. If Davin wishes to present alternate (either/or) proposals, that is of course his option.

Before the next mediation session, counsel are free to circulate proposals or ideas between themselves. I am sending both counsel a copy of the CR2A Agreement proposal and my spreadsheets of the proposals of the parties in case that facilitates analysis or preparation. I don't believe Aimee is interested in direct discussion with Davin of settlement options. I understand that she prefers to consider only written proposals or those communicated through counsel or at the next mediated session.

April 23, 2010

Page 2

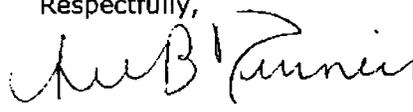
I ask Davin to immediately obtain from the 401k Plan Administrator a copy of the Summary Plan Description (this is usually 20-40 pages), and a transaction detail history of (1) the loan, (2) the non-taxable component, and (3) the taxable component. I want to see some up-to-date statement from the Plan Administrator or fund manager that clearly identifies what is in the retirement account (asset) and what is the loan balance (debt). It is not useful for Davin to simply report his understanding of what someone told him about the Plan or options regarding it. The exercise of gathering this documentary information likely will need persistence on Davin's part, and he should suggest to the Plan Administrator emailing or faxing information to expedite getting it. The Plan Administrator is mandated to provide information. If Davin is unable to navigate the bureaucracy, then I expect Mr. Shea to help out to get this information. This information is critical to rational evaluation of mediation options and to my arbitration decision if mediation is not successful.

If the next mediation session is unsuccessful, I will want a Financial Declaration from each party. I would like this up to date; to minimize expense an older version can be corrected with a pen as to any changes and just copied. I will want a copy of the last two year tax returns. I also want from both parties all paystubs from January 1, 2010 to date. I will accept from either party but do not require copies of Davin's paystubs from 2009. A complete set might resolve with documentation the apparent dispute as to the duration and intervals when he was on leave of absence or working half time. I will accept any exhibits to the mediation materials previously submitted to Mr. Slusher that have not yet been submitted to me.

In an arbitration, I expect to receive into evidence all the mediation materials and statements of the parties, with the expectation of applying appropriate discretion in weighing the reliability of evidence that otherwise would be inadmissible in court such as hearsay. After the next mediation session, I am not expecting to receive additional documentary evidence or testimony, or to schedule any additional hearing. I am mindful the parties selected the mediation/arbitration process to keep legal costs in check, and I plan to keep that in mind in containing the process. In an arbitration, I expect to be exercising my independent judgment as to valuation and equitable allocation of assets and debts, in line with Washington law. I will be considering the opening positions of the parties to the mediation process as their arbitration position (rather than their last offer in mediation), except to the extent there may be stipulations or mediated agreements or specific direction otherwise. I will issue a written arbitration decision/award no later than two weeks after the next mediation session (the same as Mandatory Arbitration Rules).

I look forward to hearing from you as to your schedules and whether the next mediation session is settled for Monday, May 3, or Tuesday, May 4.

Respectfully,



Lee B. Tinney

lee@leetinneylaw.com

LBT:lbt
Enclosure

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SUPERIOR COURT OF WASHINGTON
COUNTY OF SNOHOMISH

In re the Marriage of:

DEANNA AIMEE BAILEY,

Petitioner,

No. 08-3-02262-7

CR2A AGREEMENT

and

JOHN DAVIN BAILEY,

Respondent.

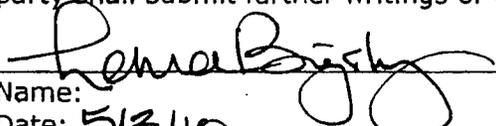
The parties agree and understand that by signing this agreement, the CR2A Settlement Agreement is binding upon both parties and enforceable in court. Pursuant to CR2A; the undersigned parties agree as follows:

Both parties participated in good faith in two mediation sessions with Lee Tinney and have previously agreed that all issues not agreed upon in this cause shall be submitted to her for binding arbitration in a summary process/decision per RCW 7.04A.

All the documentary information submitted to Lee Tinney as mediator shall be accepted into evidence in the arbitration by her. All the statements of the parties in the mediation sessions shall be considered as testimony and accepted into evidence by Lee Tinney in the arbitration.

Counsel for the parties and the arbitrator shall confer by telephone on Friday, May 7, 2010, at 2:00 p.m. for the purpose of resolving ~~whether and~~ to what degree the wife shall be permitted to submit additional information in response to information submitted by husband on May 3, 2010. After that issue is resolved, it is expected that the counsel for the parties may submit a written closing argument not exceeding four double spaced pages. Other than any such response or closing arguments, neither party shall submit further writings or documents.

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SBS


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Henry B. Shea

Name:
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Deanna Aimee Bailey

Name:
Date: 5/3/10

[Signature]

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SUPERIOR COURT OF WASHINGTON
COUNTY OF SNOHOMISH

In re the Marriage of:

DEANNA AIMEE BAILEY,

Petitioner,

and

JOHN DAVIN BAILEY,

Respondent.

No. 08-3-02262-7

ORDER ON ADDITIONAL
DISCOVERY

This matter came on for telephone hearing per agreement of the parties.

Having heard argument of counsel, NOW, THEREFORE,

IT IS ORDERED as follows:

1. The appraiser for the husband, Lance Biden, shall disclose and release as soon as possible and no later than five (5) days to both parties all documents (including letters) provided to him by husband which the appraiser considered or relied upon in rendering his appraisal of the marital residence common known as 27827 - 28th Ave. NW, Stanwood, WA 98292 ("marital residence").

2. To allow a meaningful opportunity to respond to new information provided by respondent at the last mediation session on May 3, 2010, Petitioner may obtain and submit to the undersigned Arbitrator (a) an appraisal or review appraisal by Gary Meier regarding the marital residence, (b) a house inspection of the marital residence, (3) a roof repair estimate/bid, and (4) a well inspection and/or well repair

1 estimate/bid. Respondent shall fully cooperate with providing access to the marital
2 residence for the purposes of obtaining such appraisal, inspections, or repair bidding,
3 and Respondent shall use his best efforts to schedule these items as soon as possible
4 upon request therefor. Respondent may be present during access to the marital
5 residence and property. Respondent shall not interfere with or seek to influence the
6 Petitioner's appraiser, inspector, or repair estimators, and Respondent shall not provide
7 any information to said persons engaged by petitioner unless specifically asked by such
8 person(s).

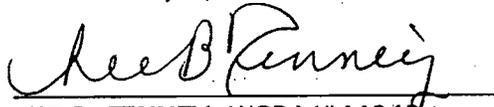
9 3. Petitioner will supply to the appraiser she engages all of the information
10 regarding the marital residence that was supplied to appraiser Lance Biden, and shall
11 confirm her delivery of same to Respondent's counsel. Petitioner's appraiser shall
12 exercise his professional judgment as to whether to consider the information supplied
13 or what weight to be given to the information supplied. Petitioner's appraiser shall
14 identify what information is relied upon in his appraisal. If a new building inspection,
15 roof repair bid, well inspection and well bid is supplied to Petitioner's appraiser, this
16 shall be disclosed to Respondent.

17 4. Both parties shall use their best efforts to the end that any new
18 appraisal, inspection, or estimates are obtained, disclosed, and submitted to the
19 Arbitrator within three weeks (May 28, 2010).

20 5. Petitioner's request to depose Lance Biden is denied.

21 6. Petitioner's request to amend/correct her Financial Declaration regarding
22 attorney fees is granted.

23 Dated: May 7, 2010.

24 
25 LEE B. TINNEY, WSBA #11242
26 Arbitrator per RCW 7.04A

RCW7.04A.230

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

- (a) The award was procured by corruption, fraud, or other undue means;
- (b) There was:
 - (i) Evident partiality by an arbitrator appointed as a neutral;
 - (ii) Corruption by an arbitrator; or
 - (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;
- (d) An arbitrator exceeded the arbitrator's powers;
- (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or
- (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(2) A motion under this section must be filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, unless the motion is predicated upon the ground that the award was procured by corruption, fraud, or other undue means, in which case it must be filed within ninety days after such a ground is known or by the exercise of reasonable care should have been known by the movant.

(3) In vacating an award on a ground other than that set forth in subsection (1)(e) of this section, the court may order a rehearing before a new arbitrator. If the award is vacated on a ground stated in subsection (1)(c), (d), or (f) of this section, the court may order a rehearing before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in RCW 7.04A.190(2) for an award.

(4) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

RCW 7.04A.150

(1) The arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and to determine the admissibility, relevance, materiality, and weight of any evidence.

(2) The arbitrator may decide a request for summary disposition of a claim or particular issue by agreement of all interested parties or upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the arbitration proceeding and the other parties have a reasonable opportunity to respond.

(3) The arbitrator shall set a time and place for a hearing and give notice of the hearing not less than five days before the hearing. Unless a party to the arbitration proceeding interposes an objection to lack of or insufficiency of notice not later than the commencement of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to promptly conduct the hearing and render a timely decision.

(4) If an arbitrator orders a hearing under subsection (3) of this section, the parties to the arbitration proceeding are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(5) If there is more than one arbitrator, all of them shall conduct the hearing under subsection (3) of this section; however, a majority shall decide any issue and make a final award.

(6) If an arbitrator ceases, or is unable, to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with RCW 7.04A.110 to continue the hearing and to decide the controversy.