

No. 66411-5-I

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

In re the Marriage of
JEFFREY P. MANIPON
Respondent

and

RANIE MANIPON
Appellant

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COURT OF APPEALS
STATE OF WASHINGTON
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ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. RESTATEMENT OF ISSUES	1
III. RESTATEMENT OF THE CASE.....	2
IV. ARGUMENT IN RESPONSE	5
A. THE STANDARD OF REVIEW.....	5
B. THE TRIAL COURT PROPERLY ENFORCED THE PSA BECAUSE THE WIFE HAD FAILED TO PAY THE DEBT ON THE PROPERTY.	5
C. THE TRIAL COURT ACTED PROPERLY TO AWARD FEES.	10
V. MOTION FOR ATTORNEY FEES	12
VI. CONCLUSION	13

TABLE OF AUTHORITIES

Washington Cases

<i>Brinkerhoff v. Campbell</i> , 99 Wn. App. 692, 994 P.2d 911 (2000).....	5
<i>Byrne v. Ackerlund</i> , 108 Wn.2d 445, 739 P.2d 1138 (1987).....	7
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	12
<i>Dakin v. Dakin</i> , 62 Wn.2d 687, 384 P.2d 639 (1963).....	10
<i>In re Marriage of Gimlett</i> , 95 Wn.2d 699, 629 P.2d 450 (1981).....	7
<i>In re Marriage of Langham and Kolde</i> , 153 Wn.2d 553, 106 P.3d 212 (2005).....	5
<i>Olympia Police Guild v. City of Olympia</i> , 60 Wn. App. 556, 805 P.2d 245 (1991).....	7
<i>Reeves v. McClain</i> , 56 Wn. App. 301, 783 P.2d 606 (1989).....	12
<i>Robinson v. Robinson</i> , 37 Wn.2d 511, 225 P.2d 41 (1950).....	5
<i>Salutee-Maschersky v. Countrywide Funding Corp.</i> , 105 Wn. App. 846, 22 P.3d 804 (2001).....	9
<i>Thompson v. Hanson</i> , 142 Wn. App. 53, 60, 174 P.3d 120 (2007).....	6
<i>Vacova Co. v. Farrell</i> , 62 Wn. App. 386, 814 P.2d 255 (1991).....	8
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	6

Statutes, Rules & Other Authorities

CR 11.....	12
RAP 10.3.....	12

I. INTRODUCTION

This case involves enforcement of a property settlement agreement, which the parties negotiated as part of their marital dissolution. The agreement awarded the wife the marital residence and a rental property, contingent on her removing the husband from all liability on the properties within 36 and 42 months, respectively. The agreement further required the wife to keep the mortgages current pending any refinancing of the properties.

The wife failed to uphold this part of the agreement by failing to make timely payments. The husband asked the court to enforce the agreement, which allowed him to market the properties. The wife appeals the court's order allowing this remedy as to the rental property. (The wife did not appeal from the earlier order allowing the husband to market the marital residence.)

II. RESTATEMENT OF ISSUES

1. On appeal of an order enforcing a property settlement agreement, does this Court review resolution of factual disputes with deference to the trial court and questions of contract interpretation *de novo*?

2. Is materiality of the timeliness of payments established by a contract provision allowing one of the parties to take action to protect against liability arising from late payments?

3. Did the court abuse its broad discretion to award attorney fees to the husband, particularly when the property settlement agreement provided for an award of fees in this situation?

4. Should the husband receive his fees on appeal under the fee provision of the property settlement agreement?

III. RESTATEMENT OF THE CASE

The property settlement agreement (PSA) awarded the wife two pieces of real property: the marital residence and a rental property. CP 23-24; see, also CP 2 (decree). The wife was also required to “pay all debt associated” with the property. CP 28.

With respect to the marital residence, the agreement required the wife to “begin the process of refinance or selling this property no later than 24 months from the date of execution of this Agreement” CP 23. The PSA was executed on April 15, 2009. The agreement required this process to be completed such that the husband would be removed from liability within 36 months from the date of the agreement. CP 23.

The PSA provided similar terms with respect to the rental property, though the wife was given 36 months to being the process of refinance or sale and 42 months to remove the husband from liability. CP 23-24.¹

These provisions were made enforceable partly by permitting the husband to seek by motion the power to force a sale if the wife did not begin the refinancing process or sell the property within the specified time periods. CP 23-24. An additional provision protected the husband against the wife's failure to pay debt on the properties. Specifically, the parties agreed:

If the Wife fails to make the mortgage payments on the real property awarded to her, Husband may make the payments and receive reimbursement and/or at his option require that the real property be listed for sale immediately.

CP 28.

The wife fell behind in her payments on the marital residence and the husband sought the relief provided for in the PSA. CP 89-91. As the wife explained, the income from her part-time work was inadequate to cover the \$2000 mortgage on the marital residence. CP 68-69. Though the wife claimed she was attempting to modify

¹ The parties interlineated the "42" month provision and it is preceded by a statement of intent that the husband be removed from all liability within 36 months. CP 23.

the loan on the marital residence, the modification would not alter the husband's obligation on the loan. CP 68-69, 98-99, 134. The court granted the husband the requested relief and the wife did not appeal. CP 92, 93-94.

Shortly thereafter, the wife also fell behind in her payments on the rental property. The wife claimed she had made every payment on time with only one exception. CP 69. Actually, the wife was twice late making payments. CP 58-59, 61. She was late making a payment in January 2010 and late again in October 2010. CP 6-7. As the husband explained, the late payments were affecting his credit. CP 99, 131, 136. Again, the husband sought and received court authorization to list the rental property for sale. CP 75-76.

The wife was also arrears in paying her husband attorney fees and costs awarded him. CP 41-56. In one of the orders on fees, the court threatened CR 11 sanctions against the wife for submitting an altered version of the PSA. CP 156; see, also CP 131. Additional facts regarding the issue of fees are in the argument section.

The wife appealed the order requiring sale of the rental property. CP 81-83.

IV. ARGUMENT IN RESPONSE

A. THE STANDARD OF REVIEW.

Property settlement agreements are fully enforceable as part of the court's order dissolving a marriage. *Robinson v. Robinson*, 37 Wn.2d 511, 517, 225 P.2d 41 (1950). The party seeking to enforce the agreement must establish there is no genuine dispute over the existence and material terms of the agreement. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696-697, 994 P.2d 911 (2000). No such dispute exists here, though there is a dispute regarding how many payments were delinquent. This Court accords deference to the trial court's resolution of this factual dispute. See *In re Marriage of Langham and Kolde*, 153 Wn.2d 553, 559, 106 P.3d 212 (2005) (*de novo* review is appropriate only if the record consists solely of documentary evidence and credibility is not an issue). However, as discussed further below, interpretation of the PSA's terms is reviewed *de novo*.

B. THE TRIAL COURT PROPERLY ENFORCED THE PSA BECAUSE THE WIFE HAD FAILED TO PAY THE DEBT ON THE PROPERTY.

The question of fact disputed here is whether the wife made the mortgage payments on the rental property. She claims she timely made all payments. Br. Appellant, at 5-6. However, the

husband proved two payments (January and October 2010) were significantly overdue. CP 8, 11, 61. (One was more than 30 days late and the other, due on October 10, remained unpaid as of November 1, shortly before the hearing. CP 7, 16.) The delinquencies triggered late payment notices from the mortgage holder with consequences for the husband's credit rating. See, e.g., CP 7, 8, 13-16, 61.)

The factual dispute regarding the number of late payments was for the trial court to decide. See *Thompson v. Hanson*, 142 Wn. App. 53, 60, 174 P.3d 120 (2007), *aff'd*, 167 Wn.2d 414, 219 P.3d 659 (2009) (appellate court defers to the trier of fact on issues involving conflicting testimony, the credibility of the witnesses, and the persuasiveness of the evidence). Here, substantial evidence supports the husband's position. See, *Id.* ("Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true."), *citing Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The husband presented documentary evidence from the bank of two late payments. The wife admitted one and failed to disclose the other. Previously, the wife had submitted an altered version of the PSA, raising concerns about credibility. Previously, too, the

wife had failed to make payments for the marital residence. In short, the court had reason to believe there were multiple delinquencies on the rental property.

In addition to the factual dispute, the wife argues an issue of interpretation of the PSA's terms. She argues that making payments late does not mean she *failed* to make payment, which is the triggering event for the PSA's enforcement provision. The trial court disagreed.

Interpretation of a PSA, like any contract, is a question of law reviewed *de novo*. *In re Marriage of Gimlett*, 95 Wn.2d 699, 705, 629 P.2d 450 (1981). The interpretation is guided by the intent of the parties. *Byrne v. Ackerlund*, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987). The intent is determined by objective manifestations of the "meeting of the minds" of the parties. *Olympia Police Guild v. City of Olympia*, 60 Wn. App. 556, 559, 805 P.2d 245 (1991).

Here, the wife argues the intent of the PSA's award to her of the real property was to allow her to enjoy the inheritance she received from her mother, which was invested in the properties. Br. Appellant, at 8. However, though it is undisputed she receives the property in the agreement, the reason she receives it is not made

explicit in the agreement. At least the wife fails to point out where in the record this motivation is established.

In any case, it is evident that the parties intended the husband be protected from liability associated with the property. For example, the PSA plainly states “that the Husband be removed from the mortgage debt on this property within 36 months from the date this Agreement is executed.” CP 23.² Further protection for the husband is provided in the provision requiring the wife to pay the debt on the property and providing for remedies if she fails to pay the debt on the property. CP 28.

Accordingly, it cannot be said that the intent that the wife have the properties means that she should have them no matter what. The PSA also repeatedly manifests an intent to protect the husband’s exposure vis-à-vis the debt. It specifically authorizes a choice of remedies to protect the husband, allowing him to pay the mortgage himself or to force a sale. By this means in particular, added to the agreement in handwriting, the PSA makes clear the materiality to the husband of timely payments. See *Vacova Co. v. Farrell*, 62 Wn. App. 386, 403, 814 P.2d 255 (1991) (materiality

² An interlineated alternate duration of 42 months (CP 24) does not affect the intent that the husband be removed from the debt.

depends on the circumstances of each case). Put another way, the requirement that the wife pay the debt incorporated the mortgagee's requirement that she pay the debt on time.

According to the wife's argument, she may ignore the mortgagee's due date without ever triggering the PSA's enforcement provision. She could persistently make late payments, forcing the husband to choose between two unattractive options: making payments (which he could not do, CP 141) or suffering ruination of his credit. According to the wife's argument, she could continue in this manner every month for the full 36 (or 42) months allowed under the PSA for her to refinance. This does not make sense. A payment due by a certain date if not paid is a failure to pay. See, e.g., *Salutee-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 848, 22 P.3d 804 (2001) (regarding mortgagee who had "failed to pay" in timely manner). The trial court was correct to enforce the husband's right under the PSA to protect himself from liability on the property, including the effects on his credit of his continued liability. He did not need to wait until the property was in foreclosure to act. The trial court properly enforced the PSA as incorporated in the decree of dissolution.

C. THE TRIAL COURT ACTED PROPERLY TO AWARD FEES.

The wife argues the court erred in awarding attorney fees. As described below, the only award at issue in this appeal is one for \$843. CP 81-82. Also, as described below, the decree and PSA authorize an award of fees. Finally, an award of attorney fees is within the discretion of the trial court and will not be reversed on appeal unless it is untenable or manifestly unreasonable. *Dakin v. Dakin*, 62 Wn.2d 687, 693, 384 P.2d 639 (1963). The award here should be affirmed.

The property settlement agreement included a fees provision covering “fees and costs incurred by the non-breaching party” in connection with a breach of the agreement. CP 30. Moreover, the decree of dissolution provides broadly for an award of attorney fees, requiring each party to hold the other “harmless from any collection action relating to separate or community liabilities set forth above, ...” CP 2. The liabilities of the parties are set forth in the property settlement agreement, incorporated into the decree, and include liabilities on the real property. CP 2.

The court entered a number of orders on attorney fees. On July 16, 2010, the court ordered the wife to pay fees and costs of \$1800 expended in the husband’s effort to enforce the property

settlement agreement with respect to the marital residence. CP 90, 93. There was no appeal from this order. On September 14, 2010, the court ordered the wife to pay fees and costs of \$1478 expended by the husband in an effort to obtain a temporary order requiring the wife to cooperate in efforts to sell the house, which the court granted. CP 95-126,131, 156. No appeal was taken from this order. The husband moved for judgment on these orders. CP 41-56. On November 15, 2010, the court entered a judgment incorporating these prior orders and awarding the husband additional fees for the motion and anticipated collection fees. CP 79-80.³

Also on November 15, 2010, the court awarded the husband \$843 for the motion to enforce the decree regarding the rental property. CP 75-76. On the same date, the court reduced this order to judgment, for fees and costs, “which were incurred in order for the Petitioner to file the Motion to Enforce the Decree of Dissolution[.]” CP 78.

³ This judgment includes an apparent scrivener’s error in the recital of the “Basis” for the award, which it describes as relating to a motion for temporary order. CP 80. Below that, the court makes clear that the judgment “reflects the prior Court Orders” and additional attorney fees for the motion itself and collection efforts. *Id.* This same scrivener’s error appears on the second judgment, and is also clarified in the same fashion (i.e., below). CP 78.

The husband has sought recovery of these funds by garnishment. CP 159, 166.

The wife complains the amount awarded was not supported by a fee affidavit. Br. Appellant, at 10. She does not support this argument with authority or citations to the record. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3. In any case, the husband's motion included a statement that he incurred fees in the amount of \$842.49 to bring the action. CP 8. The statement was signed by his counsel. CP 9. See CR 11. While there does not seem to be a separate fees affidavit, this statement along with the fact that the husband retained counsel who filed pleadings provides sufficient evidence, circumstantially, that he expended fees in an amount less than one thousand dollars. The court acted well within its discretion to order fees of \$843 for the husband's enforcement action.

V. MOTION FOR ATTORNEY FEES

The property settlement agreement includes a fee provision, as does the dissolution decree. A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal. *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). The husband requests his fees on appeal.

VI. CONCLUSION

For the foregoing reasons, the trial court's order enforcing the decree and awarding fees should be affirmed and this appeal dismissed. Moreover, the husband requests his fees on appeal.

Dated this 25th day of May 2011.

RESPECTFULLY SUBMITTED,



PATRICIA NOVOTNY #13604
Attorney for Respondent

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

In re the Marriage of)
)
JEFFREY P. MANIPON,) No. 66411-5-I
Respondent,)
)
and) DECLARATION
) OF SERVICE
)
RANIE MANIPON,)
Appellant.)
_____)

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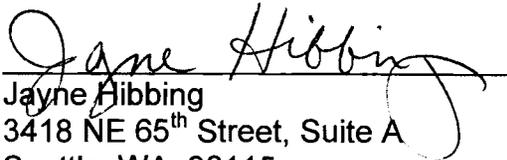
Jayne Hibbing certifies as follows:

On May 27, 2011, I served upon the following true and correct copies of the Respondent's Brief and this Declaration, by:

- depositing same with the United States Postal Service, postage paid
- arranging for delivery by legal messenger.

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I certify under penalty of perjury that the foregoing is true and correct.



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