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STATE OF WASHINGTON

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NO. 66856-1-I

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

In Re the Marriage of:

CHRISTOPHER ANDREW HEATH,

Respondent,

vs.

BARBARA JEAN LATHAM (f/k/a Heath),

Appellant

REPLY BRIEF OF APPELLANT BARBARA JEAN LATHAM

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No. 66856-1-I

King County Superior Court No. 04-3-01407-1 SEA

**COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON**

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I. REPLY TO RESPONDENT'S INTRODUCTION

The Brief of Respondent itself demonstrates why the rulings of the Trial Court should be reversed. Respondent has come up with the new and completely unsupported theory that Ms. Latham has attempted to defraud Mr. Heath. No findings of the kind were ever made by the Trial Court.

This Brief is replete with factual assertions that are either vigorously disputed or that are outright misrepresentations. Respondent begins improperly arguing disputed issues of fact in the first paragraph of his "Introduction". Many of these factual assertions were never mentioned by the Trial Court in its rulings. Other factual assertions were disputed in the pleadings submitted. The Trial Court never informed us about what the format of the proceedings would be to resolve the issues. Would we have a motion without oral argument, a motion with oral argument, an evidentiary hearing without discovery or an evidentiary hearing with discovery? Ms. Latham requested an evidentiary hearing with discovery. The Trial Court decided, without notice to Ms. Latham, that the issues would be resolved in a motion without oral argument at the same time it made its rulings. Findings of fact involving contested issues of fact should not be made in what essentially was a summary judgment proceeding.

Mr. Heath accuses Ms. Latham of fraud for concealing her "misappropriation of the house sale money." Mr. Heath fails to advise this Court

that he had quitclaimed the house to Ms. Latham pursuant to the terms of the Decree, which awarded some of the property as follows:

7. The parties hereto shall divide the family home, the husband's 401K, pension and retirement funds 55/45, with 55% going to the wife. **The wife shall be quitclaimed the family residence by the husband** and the parties stipulate that the house has a fair-market value of \$360,000 as of this date and a mortgage of approximately \$117,000. Pension and retirement funds have the following values: LEOFF 2 Plan is valued at \$327,646 and the value of the MEBT is \$240,339. **The parties shall draft appropriate Qualified Domestic Relation Orders to accomplish these distributions.** Wife's attorney shall prepare the the appropriate Orders (sic)(emphasis added).

CP 8.

Mr. Heath claims that Ms. Latham made "false statements and unfounded claims." There is no support for such an assertion.

II. REPLY TO COUNTER-STATEMENT OF THE CASE

This section of Respondent's Brief further demonstrates the factual disputes that are everywhere in this case:

- "...made three alternate proposals for resolution of the matter." Resp. Brief, Page 4. In other words, there was not just one legally definitive way to resolve the matter.
- "Both sides sought discovery." Resp. Brief, Page 5.
- "Christopher moved to compel disclosure...." Resp. Brief, Page 5. Why Christopher Heath was allowed to bring a Motion to Compel when Ms. Latham was denied the right to bring a Motion to Compel, and sanctioned for it, has never been explained by either the Trial Court or counsel for Mr. Heath.

- “A problem with this was trying to compare apples and oranges. The retirement account funds were before tax proceeds; the house sale proceeds were not tax encumbered. Therefore, they could not be set-off dollar for dollar.” Resp. Brief, Page 6. In other words, this matter was complicated.
- Christopher (Heath) engaged Louise Green, CPA, to help him reconcile the numbers. Resp. Brief, Page 6. Ms. Green acknowledged in her Declaration that “Calculations of the account are available upon request.” CP 243. These calculations were never provided to the Trial Court or Ms. Latham. In other words, an expert was needed.

It is not understood how Mr. Heath can accuse Ms. Latham of fraud for allegedly concealing the sale of her house and the use of the proceeds and, at the same time, Ms. Latham cannot make the statement that she believed that Mr. Heath had illegally and secretly withdrawn money from his pensions which he used to purchase a house in Yakima. These statements made by Ms. Latham are characterized as “unprofessional, outrageous and baseless.” Ms. Latham was sanctioned for this and denied the right to bring a Motion to Compel and was sanctioned for that as well. No explanation as to why Mr. Heath was allowed to bring a motion to compel disclosure (Resp. Brief, Page 5), when Ms. Latham was not, has ever been provided. Counsel for Mr. Heath just ignores this. Counsel also suggests that obtaining this accounting could have been accomplished through the use of subpoenas addressed to the pension administrators. Why

that procedure is appropriate when a Motion to Compel was not, and why the choice of a Motion to Compel is deserving of sanction, is also never explained.

Mr. Heath moved from King County to Yakima County and purchased a house in July of 2008. Yakima County real property records indicate that he was the Grantor of a Deed of Trust that was recorded on July 3, 2008, and the Grantor of a Deed on March 26, 2009. CP 109, 146-148. It was alleged by Ms. Latham that at least some of these funds used to purchase this home came from Mr. Heath's retirement funds, 55% of which belonged to Ms. Latham pursuant to the terms of their Dissolution Decree. CP 108-109. Mr. Heath refused to provide Ms. Latham with an accounting of these retirement funds which were solely in his name. CP 107-109. Mr. Heath characterizes Ms. Latham's good faith efforts at obtaining an accounting as an "effort at obfuscation" Resp. Brief, Page 9. Mr. Heath was holding these funds in a fiduciary capacity and owed her an accounting. This accounting could have been accomplished by simply signing an authorization for the administrator to provide records to Ms. Latham. No explanation is provided by Mr. Heath as to how this was "obfuscation".

Mr. Heath insists on falsely and repeatedly characterizing this proceeding as one involving Ms. Latham's fraud and bad faith in failing to disclose her sale of her house and her use of the proceeds to buy another house. This fraud allegation is shown to be false by the fact that the sale of the house was on August 14, 2008, and Mr. Heath had the closing statement showing the disposition of the proceeds prior to Judge Kallas' order of September 28, 2009. Judge Kallas' order, as well as the pleadings leading up to that order, clearly state that the sanctions order is not because Ms. Latham concealed the closing statement, but because she failed to timely produce it *in response to discovery requests*. She could not timely produce it because she had to get it from the real estate agent or the closing agent. The point here is that Mr. Heath and his attorney had knowledge of the sale of the house, and the closing statement which showed where the proceeds went, no later September 28, 2009. There can be no fraud involving failure to disclose the house sale and use of the proceeds after September 28, 2009. All of the Trial Court proceedings that are involved in this appeal occurred after September 28, 2009. There was no fraud on the part of Ms. Latham and it is shocking that any such contention is made. This false contention is plastered on virtually every page of the Brief of

Respondent and forms the basis for Respondent's entire argument. Significantly, the Trial Court made no finding of fraud.

Respondent also attempts to accuse me (Paul Simmerly) of trying to sneak proposed orders past him that failed to disclose the sale of the house by Ms. Latham. Resp. Brief, Page 11. The proposed orders that I drafted did not have any dollar figures in them because I sent them to the Respondent with a request for his input which included a request for the appropriate dollar figures to include. Respondent's accusation makes absolutely no sense because Mr. Heath clearly knew that Ms. Latham owned the house which he had previously quitclaimed to her and he knew that the house (or the proceeds from any sale) had to be included in the orders.

III. REPLY TO STANDARD OF REVIEW

Respondent claims that the standard of review which should be used is abuse of discretion and argues the sole reason for this conclusion is that there was "no genuine material issue of fact before the court" because the "provisions of the Decree were clear" and "they only had to be enforced in view of Barbara (Heath's) fraud" which was "clear and convincing." He then cites fraud and misconduct cases in an attempt to prove his point.

Respondent's whole argument hinges on this fraud contention, but there was no fraud.

IV.REPLY TO ARGUMENT

1. Reply to Argument that Brief of Appellant Contains Objectionable Statements.

No objectionable statements were made.

2. Reply to Argument that Barbara Failed To Demonstrate Why Specific Findings Are In Error.

Mr. Heath contends that Ms. Latham failed to specify the findings of the Trial Court she claims were in error. However, the orders that are the subject of this appeal were narrative in character and no specific "findings" were made, much like an order on summary judgment. Mr. Heath's contention has no merit. Ms. Latham's argument is that the Trial Court's proceedings were essentially a summary judgment and therefore it is appropriate to review these orders de novo. She also contends that an evidentiary hearing was required.

3. Reply to Argument that Barbara's Attorney Was Required to Prepare The Property Transfer Orders.

Respondent complains about slowness in the production of the orders, but again ignores the fact that the Decree requires both parties to draft appropriate Qualified Domestic Relation Orders. On June 19, 2009,

Paul E. Simmerly, attorney for Ms. Latham drafted and sent to Camden Hall, attorney for Mr. Heath, the appropriate orders and forms for dividing Mr. Heath's retirement benefits. CP 95-99. The forms of the orders used by Mr. Simmerly were the templates provided by the Plan Administrators of the retirement plans. These proposed orders drafted by Mr. Simmerly contained the mandatory language that the Plans required. These proposed orders were faxed to Mr. Heath's attorney on June 19, 2009, along with explanatory materials received from the Plan Administrators, and Mr. Simmerly asked Mr. Heath's attorney for his input into the language of the orders. CP 97, 98, 99. No input into the proposed language of these orders was ever received. CP 97.

Sixteen months went by. Then, on October 21, 2010, Mr. Heath brought a Motion to Enforce Decree and For Attorney Fees. CP 35-59. This Motion completely ignored the fact that Mr. Simmerly had prepared the proposed orders sixteen months earlier. Mr. Heath's attorney retained a C.P.A., Louise Green, as an expert witness to file a Declaration which proposed a resolution of the division of the Heath house proceeds and the Heath retirement funds. CP 230-247. What this clearly demonstrates is that this was a very complicated matter that needed the expertise of a CPA. Ms. Green's billing records indicate that she had been working on this matter

since October of 2009. In other words, this Certified Public Accountant needed a year to figure this out. Neither Mr. Heath's attorney nor the trial court afforded Ms. Latham an opportunity to work with C.P.A. Green or even talk to her. Ms. Green's analysis completely ignored the contribution of Ms. Latham's new husband to the value of the house. Ms. Green failed to provide the financial source documents she used to Ms. Latham or her attorney. Ms. Green's declaration contained many findings, assumptions and conclusions that she alone came up with. At one point in her declaration she even acknowledged that "Calculations of the account are available upon request." CP 243. These calculations were never provided. These factors require a reversal of the Trial Court's findings.

In November of 2010, Ms. Latham employed the services of perhaps the leading authority in Washington on orders dividing retirement plans, attorney Jerry Scowcroft. CP 137-143. Mr. Scowcroft was employed to draft additional proposed orders dividing these retirement plans, which he did, and these were provided to the attorney for Mr. Heath. CP 107-147. Mr. Heath's attorney, once again, completely ignored this work. Efforts by Ms. Latham to obtain discovery and more time to allow Mr. Scowcroft, or other experts, to review the work of Ms. Green were rebuffed. CP 95-99. The Trial Court also completely ignored the proposed orders of Mr.

Simmerly and Mr. Scowcroft and entered an Order Denying Motion for Order Compelling Accounting of Pension Funds (CP 184-186) and an Order Granting Motion to Enforce Decree and Awarding Attorney Fees/Sanctions. CP 187-199. The disputed findings, assumptions and conclusions of C.P.A. Green were adopted without alteration and Mr. Heath received everything he had requested. The Order Denying Motion for Order Compelling Accounting of Pension Funds also ordered CR 11 sanctions against Ms. Latham.

4. Reply to Argument That Barbara Attempted to Defraud Christopher By Selling The House and Misappropriating The Net Sale Proceeds.

This matter is addressed above. As stated, Mr. Heath knew that Ms. Latham owned the house, knew that he had quitclaimed the house to Ms. Latham and knew all of the details of the house sale no later than September 28, 2009. There was no fraud. The Trial Court found no fraud and there was no need for Ms. Latham to address this non-issue in her Opening Brief.

5. Reply to Argument That The Presentation of Proposed Orders In June, 2009, Before The House Sale Was Fully Disclosed, Was a Further Element in Barbara's Effort To Defraud Christopher.

Again, this matter is addressed above. Mr. Heath clearly knew of the existence of the house and his right to a percentage of it at that time.

6. Reply to Argument That Barbara Was Not Entitled to An Accounting

This argument makes no sense. As stated repeatedly in this reply Brief, there was no fraud on the part of Ms. Latham. Mr. Heath knew at all times that she had the house and knew that he was entitled to a percentage interest in it or its sale proceeds. Whether she still owned the house or had sold it makes no difference. Respondent admits in his Brief that parties in the positions of Ms. Latham and Mr. Heath have a fiduciary relationship. Resp. Brief, Page 25. Ms. Latham had clean hands, there was a fiduciary relationship between the parties and Ms. Latham was entitled to an accounting. By a request for an accounting, Ms. Latham and I meant a simple authorization from Mr. Heath for his pension administrators to supply copies of account statements to us. There was nothing in any way burdensome about this or that would cost Mr. Heath anything. Once again, Respondent fails to address an issue – why didn't he simple sign these

authorizations? There is absolutely no basis for sanctioning Ms. Latham for requesting an accounting.

7. Reply To Argument That Barbara Was Not Entitled to Any More of a Hearing Beyond That Which She Received.

Ms. Latham agrees that the Court has the authority to clarify its orders. The rest of this section is simply argument unsupported by authority. Any “clarification”, if that is what this procedure was, should have been done with an evidentiary hearing.

8. Reply To Argument That The Court Has Continuing Authority To Enforce Its Orders

We agree. However, this should have been done with an evidentiary hearing.

9. Reply to Argument that Barbara Breached her Duty to Christopher.

This did not happen. Ms. Latham did not “appropriate” Christopher’s portion of the net sale proceeds.

10. Reply to Argument About Economic Consequences.

Since Ms. Latham was not allowed up-to-date information about pension account balances, the CPA’s methodology or her secret calculations,

we cannot comment on the “economic consequences” except to say that the Decree should be enforced as it was written.

11. Reply to Argument That Barbara Had Ample Opportunity to Obtain Any Legitimate Expert Advice She Required.

No, Ms. Latham certainly did not have the opportunity to obtain her own expert advice. CPA Green spent a full year working on her resolution. Judge Inveen failed to inform us of the format she intended to use for resolving this matter. We requested an evidentiary hearing and the next thing we knew, before we had a ruling on that request, we had orders resolving the entire matter. If we had known that Judge Inveen was going to deny our request for an evidentiary hearing, we certainly would have then put forth more in the way of a written response. That would have necessitated, however, a lengthy continuance of respondent’s Motion in order to allow our expert time to prepare his work (work that took CPA Green a year to produce). Ms. Latham also did not have the money for such expert services and this would have required another motion for his fees. We requested time for discovery of CPA Green’s secret calculations but were denied that right, for unknown reasons.

12. Reply to Argument That New Husband’s Contributions Made To The House Were Irrelevant

This argument is extremely insulting. Again, we would have put this proof into evidence if we had first had a determination from the Trial Court on

what kind of proceeding we would be having. This is the concept of due process – notice and an opportunity to be heard. Mr. Heath takes a full year to prepare his motion and his expert testimony and then sets a hearing date that gives us a week to respond. We respond with a request for a full evidentiary hearing and instead of a ruling giving us ample notice of when and how to prepare for the type of hearing the Trial Court wants, we get orders in the mail resolving the case.

13. and 14. Reply to Arguments that CR 11 Sanctions and Fees Were Appropriate.

CR 11 sanctions and Fees were not appropriate for the reasons discussed in the Opening Brief of Appellant and for the reason that there was no fraud or other misconduct on the part of Ms. Latham.

V. REPLY TO ARGUMENT THAT FEES SHOULD BE AWARDED IN THIS APPEAL

There is no basis for an award of attorney fees in his appeal. Contrary to the repeated misrepresentations of Mr. Heath, there was no fraudulent or intransigent behavior on Ms. Latham's part. There were two separate and distinct parts to this post-dissolution matter:

- 1) Everything up to September 28, 2009, which included Judge Erlich's rulings and concluded with Ms. Latham's June 29, 2009 proposed orders and Judge Kallas' ruling of September 28, 2009. The only intransigence, if it can be called that, was the failure of Ms. Latham to timely provide a copy of her closing statement

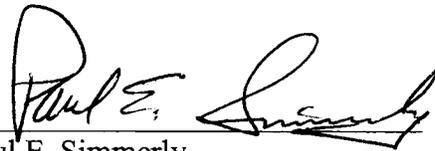
because she did not have it. Nothing in this first part is involved in this appeal. Any fees or sanctions for whatever Ms. Latham may have done or not done were already considered and ruled upon and were not appealed; and

2) The events and proceedings involved in this appeal, which began more than a year after Judge Kallas' ruling and sixteen months after Ms. Latham had prepared proposed orders dividing the pension benefits.

CONCLUSION

The orders entered by the trial court should be reversed in all respects, the awards of attorney's fees and sanctions should be vacated and the matter remanded to the trial court for a full evidentiary hearing with discovery and live testimony.

Respectfully submitted this 14th day of November, 2011.



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