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COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of:

IVAN OLMEDO RODRIGUEZ,

Respondent,

and

JACQUELINE NGUYEN,

Appellant.

APPELLANT'S
OPENING BRIEF

Dennis J. McGlothin, WSBA No. 28177
Robert J. Cadranell, WSBA No. 41773
Attorneys for Appellant Jacqueline Nguyen

WESTERN WASHINGTON LAW GROUP, PLLC
7500 212th Street SW Suite 207
Edmonds, WA 98026
(425) 728-7296

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I. **Assignments of Error**

A. The trial court erred when it failed to provide a remedy for Respondent Ivan Olmedo Rodriguez (“Former Husband”)’s admitted breach of the parties’ Property Settlement Agreement (“PSA”) that was incorporated into the Dissolution Decree.

B. The trial court erred when it concluded Appellant Jacqueline Nguyen (“Former Wife”)’s request she be empowered to sell the parties’ former marital residence (“Residence”) would modify the Dissolution Decree when it was designed to specifically enforce Former Husband’s obligation to cause her to be released from the indebtedness associated with the Residence (“Indebtedness”).

C. The trial court erred when it failed to exercise its discretion to address Former Husband’s breach of his obligation to assume and accept full responsibility for the Indebtedness.

D. The trial court erred when it failed to utilize a reasonable amount of time analysis to fill the gap in the PSA related to the time within which Former Husband was to cause Former Wife to be released from the Indebtedness.

II. Issues Related to Assignments of Error

A. Whether a court should provide an equitable remedy for admitted breaches of a contract and Decree. (Assignment of Error A.)

B. Whether the trial court erred when it failed to provide Former Wife an equitable specific performance remedy for Former Husband's admitted breach of the PSA by not causing Former Wife to be released from the Indebtedness on the parties' former marital residence that was awarded to Former Husband in the Decree ("Residence"). (Assignment of Error A.)

C. Whether the trial court erred when it concluded that Former Wife's request that she be empowered to sell the Residence to cause her to be released from the Indebtedness would modify the Decree and not enforce it. (Assignment of Error B.)

D. Whether the trial court erred in not exercising its discretion by not addressing Former Wife's claim that Former Husband breached the PSA by not paying the Indebtedness despite his promise to assume and accept full responsibility for the Indebtedness. (Assignment of Error C.)

E. Whether the trial Court erred when it failed to utilized a reasonable amount of time analysis to fill the gap in the PSA when there was no time specified in the PSA for Former Husband to perform his promise to cause Former Wife to be released from the Indebtedness. (Assignments of Error D.)

III. Facts

Former Husband and Former Wife married on January 14, 2005. During their marriage they purchased the Residence on February 28, 2006, and it became the parties' marital home. See Declaration of Jacqueline Nguyen ("Nguyen Decl.") CP 8-13, ¶ 2. The Property has tax parcel i.d. number 803070-0500 and is legally described as follows:

Unit H-6, Building H, Stonebrook Village
Condominium, a Condominium, according to the
Condominium Declaration recorded under recording
number 20040514000458, and amendments thereto, if
any, and in volume 198 of Condominiums, page(s) 11
through 15, inclusive, in King County, Washington.

Id.

In the summer of 2009, Husband discontinued making mortgage payments on the Property. CP 8-13 at ¶ 5.

Petitioner filed to dissolve the marriage on August 24, 2010, and the parties signed a Property Settlement Agreement ("PSA") on August 15, 2011. CP 243-258. The ensuing Dissolution Decree

incorporated the PSA and was entered on August 22, 2011. CP 8-13, ¶ 2. Page 5, § VIII of the PSA states:

It is understood that the undertakings and commitments of both Husband and Wife in this Agreement are unique and that in the event of violation or of threat of violation by the Husband or Wife of the terms, conditions or provisions thereof, the other party may not have an adequate remedy at law. Therefore, in addition to any other remedy available to the Husband or Wife under this Agreement or at law, either the Husband or the Wife shall have the remedies of specific enforcement and injunction in any court of competent jurisdiction to prevent violation of the terms herein.

CP 247 (emphasis added).

The PSA awarded Former Husband the Marital Residence (CP250), but required Former Husband to do three separate and distinct things: (1) Assume the indebtedness on the marital residence (“Indebtedness”); (2) hold Former Wife harmless from any liability on the Indebtedness, and (3) cause Former Wife to be released from the Indebtedness. The preamble of Paragraph XV and Paragraph XV(A) of the PSA required Former Husband to “assume and accept full responsibility for payment of the” Indebtedness. CP 250-51. That same paragraph, Paragraph XV(A), also required Former Husband to “release” and “hold harmless” Former Wife from any mortgage payments and/or liability on the indebtedness. CP 251, Paragraph XV(A). The PSA did not

express a date certain when Former Husband was to accomplish releasing Former Wife from the indebtedness. *Id.*

Former Wife held up her end of the bargain, but Former Husband did not. Former Wife conveyed by Quit Claim Deed her interest in the Residence on August 15, 2011. CP 9, ¶ 4. Despite this conveyance, Former Husband never fulfilled his responsibility to make even one payment on the Indebtedness and did not cause Former Wife to be released from the Indebtedness. As a result, the Indebtedness remained in both Former Husband's and Former Wife's names. CP 9, ¶¶ 4, 5.

Moreover, Former Husband profited from his breach. Not only did he not make the payments on the Indebtedness, which he was obligated to do, but he also rented the Residence and collected the rents, pocketed them, and did not apply them towards the Indebtedness. CP 9, ¶¶ 5-7.

Former Wife has been actually harmed because Former Husband continuously breached the PSA from the day it was signed until today by not making the payments on the Indebtedness or causing Former Wife to be released from the Indebtedness. Former Wife's credit score has been negatively affected, and that has resulted in her being irreparably damaged. CP10, ¶ 8. The Residence is also subject to foreclosure. *Id.* The mortgage company continues to look to Former Wife for payment. *Id.*

Procedural History of the Case

On October 17, 2014, the Former Wife sought to remedy Former Husband's continuing breaches of the PSA and Decree. She filed a Motion to Enforce Decree and Property Settlement Agreement and For Attorney Fees. Her motion sought to enforce the PSA and Decree by requiring Former Husband to make the payments to the Property's lenders, by impounding the rents, and applying the proceeds to the Indebtedness, and to cause Former Wife to be released from the Indebtedness. CP 1-7. She further requested that if Former Husband did not remedy his continuing PSA and Decree breaches, then she be vested with the authority to accomplish her release from the Indebtedness by short selling the Property.

The matter was initially heard by a Family Law Commissioner on October 31, 2014. The Family Law Commissioner denied Former Wife's motion to enforce claiming it was seeking to modify the decree rather than simply to enforce it and assessed \$1,000 in terms against Former Wife. CP 217.

On November 10, 2014, Former Wife timely filed a motion to revise the Commissioner's ruling. CP 218 – 227. The revision

hearing was before a Judge who revised the Commissioner's order in part. The judge ruled that Former Wife's request that she be allowed to cause herself to be released from the Indebtedness through a short sale of the Residence as well as impounding the rents and applying them to the Indebtedness was a modification of the Decree. CP 230 – 231.

The Judge did not rule, however, that the Former Wife's request that Former Husband be required to release Former Wife from the Indebtedness sought to modify the Decree. *Id.* Rather, the Judge ruled Former Husband was obligated to cause Former Wife to be released from the indebtedness and that Former Husband could not be released from his obligation to do so. CP 231.

The Judge did rule, however, that the "trigger point" for Former Husband's obligation to release Former Wife would be the same trigger point for him to have to hold Former Wife harmless from the Indebtedness, which was "in the event a third party brought a claim against the [Former] Wife related to the indebtedness." The Judge then found that Former "Wife did not submit any evidence of a third party seeking payments from her after the PSA was signed that were related to the marital

residence.” CP 251. Accordingly, the Judge confirmed the Family Law Commissioner’s ruling in all respects as to liability to the Former Wife for Former Husband’s admitted breaches of the PSA.

Finally, the Judge revised the Commissioner’s ruling that Former Wife had to pay Former Husband \$1,000 in terms for bringing her motion. CD 232 – 233.

Former Wife timely appealed the Judge’s revision order on January 5, 2015. CP 234. Former Husband filed no cross appeal.

IV. Argument

A. The Court erred when it failed to provide an equitable specific performance for Former Husband’s breaches of the PSA.

1. Specific performance is an equitable remedy that should have been applied in this case to remedy Former Husband’s admitted breaches of the PSA.

Equity will not suffer a wrong to be without a remedy. *Crafts v. Pitts*, 161 Wn.2d 16, 23, 162 P.3d 382, 385 (2007). Specific performance is an equitable remedy that “strives to do perfect justice.” *Crafts*, 161 Wn.2d at 23. Courts should examine three factors when determining whether to apply a specific performance equitable remedy: “(i) the difficulty of proving damages with reasonable certainty, (ii) the difficulty of procuring a suitable substitute, and (iii) the likelihood that an award of damages could

not be collected.” *Id.* at 24. Here, the PSA specifically stated Former Wife’s damages, like damage to her credit, would be difficult if not impossible to ascertain, and there is no acceptable substitute to remedy the damage to her credit other than causing her to be released from the Indebtedness.

The trial court erred in not requiring Former Husband to specifically perform his obligation to pay the Indebtedness and cause Former Wife to be released from the Indebtedness.

2. The trial court erred in concluding Former Wife’s request that Former Husband pay the Indebtedness and cause Former Wife to be released from the Indebtedness within 30 days would modify the Decree.

This Court has broad equitable authority to specifically enforce the Decree and PSA:

It is inconceivable that a court in a divorce proceeding can divide the property between the parties and yet have no power to make that division effective if the parties are recalcitrant.

...

“To the extent that the court has the power to adjust the property rights of the parties, it can require that its mandates be carried out, either by act of the party or by directing the making of a conveyance by a representative of the court if the party fails or refuses to make it. This is generally recognized power of a court invested with authority to deal with property rights of interest. It is commonly exercised to effectuate transfer of interests if the parties are recalcitrant; hence there is nothing peculiar to divorce litigation in its application, where necessary, to carry

out what the court is empowered to do by way of adjustment of rights and interests.”

Robinson v. Robinson, 37 Wn.2d 511, 516, 225, P.2d 411 (1950) (quoting NELSON ON DIVORCE AND ANNULMENT Vol. II, 285, § 16.01 (2d ed.)). The trial court could have and should have allowed Former Wife to cause herself to be released from the Indebtedness by empowering her to sell the Marital Residence because Former Husband was recalcitrant. In fact, Former Husband has no incentive to sell the Former residence because he is collecting rent, pocketing the rent money, and not paying the Indebtedness.

3. Former Husband breached two of the three obligations he has in the PSA.

Former Husband breached two of the three obligations he had in the PSA. Former Husband had three separate and distinct obligations under the PSA. First, he had an obligation to pay the indebtedness because he assumed and accepted full responsibility for the Indebtedness. Second, he agreed to cause Former Wife to be released from the Indebtedness. Finally, he agreed to hold Former Wife harmless (indemnify her) from any claim brought to collect the Indebtedness.

At the time Former Wife brought her motion, Former Husband was in continuing breach of two of those three obligations.

It is undisputed Former Husband did not pay any amounts toward the Indebtedness in the three years since the PSA was signed and incorporated in the Decree. He, therefore, breached his obligation to assume and accept responsibility for the Indebtedness.

Similarly, Former Husband breached his obligation to cause Former Wife to be released from the Indebtedness. Former Husband admitted he did not cause Former Wife to be released from the Indebtedness.

4. The trial court erred in not exercising its discretion or addressing Former Wife's claim the Former Husband breached the PSA by not making the required payments on the Indebtedness.

It is clear that Former Wife had standing to cause Former Husband to specifically perform his obligation to pay the Indebtedness he assumed. "[W]here a purchaser of mortgaged property assumes and agrees to pay the mortgage debt, equity will enforce payment, either at the instance of the grantor or the holder of the mortgage." *Frazey v. Casey*, 96 Wash. 422, 424, 165 P. 104, 104 (1917).

Here, Former Wife was the grantor of the residence because she transferred it to Former Husband by quitclaim deed in August 2011. Former Husband was the grantee, and in exchange he specifically assumed and accepted full responsibility to pay the Indebtedness.

Unfortunately, he did not perform and breached his obligation under the PSA.

The trial court erred because it never exercised its discretion or dealt with Former Wife's claim that Former Husband breached the PSA by not making the required payments on the Indebtedness. See *State v. Flieger*, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) ("The trial court's failure to exercise its discretion was an abuse of discretion."). By having not exercised its discretion, the trial court erred.

5. The trial court erred when it failed to use a reasonable amount of time analysis to fill the gap in the PSA.

The trial court should have utilized a reasonable amount of time analysis to determine the trigger point when Former Husband should have caused Former Wife to be released from the Indebtedness. When no time frame is set for performing an obligation in a contract, the court will imply a reasonable time for performance. *Foelkner v. Perkins*, 197 Wash. 462, 467, 85 P.2d 1095, 1098 (1938) ("The general rule is that, where a thing is to be done, and no time is fixed, it will be presumed that a reasonable time was intended.") Here, the trial court correctly found that the PSA did not provide a date certain when Former Husband had to

cause Former Wife to be released from the Indebtedness. CP 232. The trial court erred when it failed to undertake a reasonable amount of time analysis to determine whether Former Husband had breached the PSA. Instead, the trial court improperly concluded the trigger point to cause Former Wife to be released from the Indebtedness was the same as the trigger point for the hold harmless or indemnity provision to become effective.

Remand with instructions to apply the correct standard is not necessary because this Court can determine the issue. Former Husband has had almost four years to perform his obligation to cause Former Wife to be released from the Indebtedness, but has failed to do so. A more than reasonable amount of time has passed as a matter of law.

B. This Court should award Former Wife her attorney fees based on Former Husband's intransigence.

Finally, Former Wife is entitled to her appellate attorney fees against Former Husband due to his intransigence. Intransigence is established when a party engages in "foot-dragging." *Matter of Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, 1123 (1992). Here, Former Husband has engaged in foot-dragging by not causing Former Wife to be released from the Indebtedness and

by continually not making the monthly payments on the
Indebtedness.

Once intransigence is established, the parties' respective
need and ability for attorney fees is unnecessary to support an
attorney fee award. *Greenlee*, 65 Wash. App. at 708. Because
attorney fees for intransigence are not based on need and ability to
pay, Former Wife will not be supplying a financial declaration in this
matter.

DATED this 3rd day of April, 2015.

Respectfully submitted,

Western Washington Law Group, PLLC


Dennis J. McGlothlin, WSBA #28177
Robert J. Cadranel, WSBA #41773
Attorneys for Appellant
7500 212th St SW, Suite 207
Edmonds, WA 98026
Phone 425.728.7296
Fax 425.955.5300

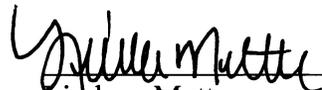
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 3, 2015, I arranged for service of the foregoing Appellant's Opening Brief, to the court and to the parties to this action as follows:

Office of the Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Nicole B. Chafetz The Chafetz Family Law Group 1215 Central Ave S, Ste 202 Kent, WA 98032 nicole_chfetz@dependencylawyer.net	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email

DATED at Edmonds, Washington this 3rd day of April, 2015.


Lindsey Matter
Paralegal