

FILED
COURT OF APPEALS

06 09 25 PM 1:58

ST. JAMES COURT

BY dn

NO. 35266-4-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

JANE RUSSELL DAVIS, Appellant

vs.

STEVEN SCOTT DAVIS, Respondent

APPELLANT'S OPENING BRIEF

CAROL J. COOPER
WSBA #26791
Attorneys for Appellant
DAVIES PEARSON, P.C.
P.O. Box 1657
920 Fawcett Avenue
Tacoma, WA 98402
(253) 620-1500

ORIGINAL

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE ISSUES..... 1

III. ARGUMENT..... 19

A. THE PROVISIONS IN A DISSOLUTION DECREE REGARDING PROPERTY DIVISION MAY NOT BE REVOKED OR MODIFIED UNLESS THE COURT FINDS CONDITIONS JUSTIFYING THE REOPENING OF A JUDGMENT 19

B. THE TRIAL COURT’S ORDER ON MOTION FOR ORDER SETTING AMOUNT OF FUNDS DUE TO PETITIONER AND ITS ORDER ON MOTION FOR RECONSIDERATION AND AWARDED JUDGMENT MODIFIED THE PROPERTY DISPOSITION IN THE DECREE OF DISSOLUTION.. 20

C. WHEN THE TRIAL COURT MODIFIED THE PROPERTY DISPOSITION IN THE DECREE OF DISSOLUTION IT DID NOT MAKE FINDINGS JUSTIFYING THE REOPENING OF A JUDGMENT; THEREFORE IT VIOLATED RCW 26.09.170 25

IV. ATTORNEYS FEES ON APPEAL..... 26

V. CONCLUSION 26

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Coyle v. Coyle</i> , 61 Wn. App. 653, 660, 811 P.2d 244 (1991).....	19
<i>Fleckenstein v. Fleckenstein</i> , 59 Wn.2d 131, 366 P.2d 688 (1961).....	19
<i>Gustafson v. Gustafson</i> , 54 Wn. App. 66, 75, 772 P.2d 1031 (1998).....	25
<i>Hammack v. Hammack</i> , 114 Wn. App. 805, 810, 60 P.2d 663 (2003).....	26
<i>In re Marriage of Yearout</i> , 41 Wn. App. 897, 902, 707 P.2d 1367 (1985).....	25
<i>Jennings v. Jennings</i> , 138 Wn.2d 612, 625-626, 980 P.2d 1248 (1999).....	26
<i>Marriage of Furrow</i> , 115 Wn. App. 661, 673, 63 P.3d 821 (2003)	25
<i>Messersmith v. Messersmith</i> , 68 Wn.2d 735, 415 P.2d 82 (1966).....	19
<i>Mickens v. Mickens</i> , 62 Wn.2d 876, 385 P.2d 14 (1963)	24
<i>Thompson v. Thompson</i> , 82 Wn.2d 352, 356, 510 P.2d 827 (1973).....	19
<u>Statutes</u>	
RCW 26.09.170	25
RCW 26.09.140	26
<u>Rules</u>	
RAP 18.1(c)	26

I. ASSIGNMENTS OF ERROR

1. The trial court erred by entering its Order on Motion for Order Setting Amount of Funds Due to Petitioner because the Order modified the property disposition in the decree of dissolution without finding the existence of conditions justifying the reopening of a judgment as required by RCW 26.09.170.

2. The trial court erred by denying Appellant's motion for reconsideration of the trial court's Order on Motion for Order Setting Amount of Funds Due to Petitioner, and by awarding a net judgment of \$38,918 because said Order modified the property disposition in the decree of dissolution without finding conditions justifying the reopening of a judgment as required by RCW 26.09.170.

II. STATEMENT OF THE ISSUES

1. Did the trial court's Order on Motion for Order Setting Amount of Funds Due to Petitioner and Order on Motion for Reconsideration and Awarding Judgment modify the property disposition in the decree of dissolution?

2. Did the trial court find the existence of conditions justifying the reopening of a judgment?

3. Did the trial court err by modifying the property disposition in the decree of dissolution without finding the existence of conditions justifying the reopening of a judgment?

III. STATEMENT OF FACTS¹

On December 10, 2003, the trial court entered findings of fact and conclusions of law and a decree of dissolution dissolving the marriage of the parties. CP 1-13. Pursuant to paragraph 2.8.1 of the Findings of Fact

¹ The parties are referred to herein by their first names to avoid confusion. No disrespect is intended.

and Conclusions of Law, the trial court found that the parties had a community property interest in the family home having a net equity value of \$52,083.² CP 2. Pursuant to paragraph 3.3.1 of the decree of dissolution, the appellant, Jane R. Davis, was awarded “as her separate property” the family home

subject to a lien in favor of husband in the amount of \$10,000 due and payable after the parties’ youngest child graduates from high school with interest accruing at the same interest rate that the parties are able to obtain when they refinance their home mortgage, as set forth in greater detail in paragraph 3.14 below.

CP 9. Pursuant to paragraph 3.3.5, Jane was awarded “one-half of the net proceeds from the refinancing of the mortgage against the former family home, as set forth in greater detail in paragraph 3.14. CP 9.

Pursuant to paragraph 3.2.1, the respondent, Steven S. Davis, was awarded as his separate property

[a] lien against the former family home in the amount of \$10,000 due and payable after the parties youngest child graduates from high school, with interest from September 30, 2003, accruing at the same interest rate that the parties obtain when they refinance the mortgage against the home, as further defined in paragraph 3.14 below. This obligation to be secured by a note and deed of trust, to be executed on or before the closing of the refinance.

² This net equity value was based upon the home having a value of \$180,500 with an outstanding balance on the mortgage of \$130,417. CP 2.

CP 8-9. Pursuant to paragraph 3.2.4, Steven was awarded “one-half of the net proceeds from refinancing the mortgage against the former family home, as described in greater detail in paragraph 3.13 (sic) below.” CP 9. Pursuant to paragraph 3.2.8, Steven was awarded the following items still located in the former family home:

electric typewriter, filing cabinet, lead crystal decanters and bowls, gold rim champagne glasses, toy cars (matchbox), tools, bicycle, stereo receiver, RTR speakers, fishing tackle, table (cross-section) tree, garden tools, portable CD player, H.S. yearbooks, coin collection, personal items to be retrieved on January 4, 2004, unless an earlier date is agreed upon.

CP 9.

Pursuant to paragraph 3.4.4 of the decree, Steven was required to pay a community liability to Lighthouse Christian School for unpaid tuition and related expenses in the approximate amount of \$7,604. CP 10. Pursuant to the Order of Child Support, Steven was required to pay 52% of the private education expenses so that the parties’ two youngest sons could attend Lighthouse Christian School through the 8th grade. CP 18.

Pursuant to paragraph 3.5.9, Jane was required to pay “all expenses associated with the family home, including, but not limited to, utilities, mortgage, insurances, taxes, assessments and dues.” CP 11.

Paragraph 3.14.1 of the decree provides as follows:

OTHER:

The *parties* shall forthwith refinance the mortgage secured by the former family home upon the terms available, *to both reduce the monthly payment and to obtain some cash to pay bills*. It is anticipated that the *parties* will be able to generate somewhere between \$10,000 and \$15,000 in cash from the refinancing. After the current principal balance, the loan costs and the outstanding homeowner's association dues and assessments are paid, the parties shall receive one-half of the net proceeds from the new loan. Mr. Davis *shall* use his proceeds to satisfy Lighthouse Christian, unless he has already worked out a written repayment agreement with the school. *Both parties* shall act in good faith and use *their best efforts* to accomplish the refinancing. The court reserves jurisdiction over the issue to make further rulings if necessary. *This obligation to refinance is characterized as, and is in the nature of, family support in that the purpose of the obligation is to keep Ms. Davis, and more importantly the children in their home.* Loan application and related documents to be signed and provided within thirty (30) days.

CP 12 (emphasis added).

Subsequent to entry of the Decree, Steven did not pay the children's tuition at Lighthouse Christian School as required by paragraph 3.4.4 of the decree, and the Order of Child Support. *See* CP 18. In the Spring of 2004, Lighthouse Christian informed both parties that the children could not be enrolled for the next school year until all tuition and expenses were paid. CP 49, 71. In September of 2004, the parties' sons missed their first week of school, until Jane paid Steven's obligation on

her credit card. CP 15, 49, 71. Steven acknowledges that Jane paid \$7,393.34 to Lighthouse Christian School on September 13, 2004. CP 19, 40.

On April 29, 2005, Jane, acting pro se, filed a petition for modification of child support. CP 14-15. Her petition was based primarily upon the needs of the parties' oldest son for post-secondary support. CP 14-15. However, Jane also asked the court for a judgment representing Steven's pro rata share of the private school tuition for the parties sons from November 2001 through September of 2004. CP 15.

On May 20, 2005, Steven brought a motion for order to show cause why Jane should not be found in contempt for failing to comply with the Final Order of Child Support, the Final Parenting Plan, and the Decree of Dissolution.³ CP 41-45. With respect to the Decree of Dissolution, Steven requested an order *modifying the decree*

so as to allow Respondent [Jane] to refinance in her own name the former family home, and to remove Petitioner's obligation to pay his one-half of the refinance proceeds to the private school for the parties' children's tuition expenses. Further, that Respondent be required to assume the obligation for the private school tuition in exchange for Petitioner [Steven] not receiving his equivalent equity in the residence, and that Respondent [Jane] be required to sign a Note, and a Deed of Trust secured by the home to secure Petitioner's remaining equity.

³ The allegations of Steven pertaining to the Final Parenting Plan and the Final Order of Child Support are not pertinent to this appeal and, thus, are not included here.

CP 42; *see also* CP 19, 154-155. Steven also requested an order requiring Jane to make available to him those specific items of personal property that were awarded to him in the decree. Steven requested attorneys fees for having to bring his motion. CP 42.

Steven acknowledged that the parties had not been able to secure refinancing. CP 288. Steven acknowledged Jane's efforts to obtain refinancing through Countrywide. He also acknowledged that Jane had recommended a company called Harborpoint, but that Harborpoint had told Jane that, although the company could do a refinance in Jane's name alone, there would be no equity available to withdraw. *See* CP 73, 288.

On May 24, 2005, Jane filed her reply to Steven's motion for order to show cause. CP 46-65. With respect to Steven's allegations regarding refinancing, Jane explained that she had started the refinancing process immediately after the trial in October of 2003. CP 49. Although Jane and Steve initially began working with Shawn Lynch at First Horizon Mortgage, Jane also contacted Countrywide Home Loans because they had better rates and lower closing costs. CP 49. Unfortunately, Countrywide turned down the parties' application to refinance, stating that the roof and LP siding would need to be replaced and they could not finance enough cash out to make those repairs. CP 49. In January of

2004, Jane attempted to contact Mr. Lynch again but he would not return her calls, and ultimately left a message suggesting that she continue with Countrywide. CP 49.

In March of 2004, Jane applied for a refinance at Harbor Point Financial. CP 73. Harbor Point was willing to refinance in Jane's name only, but only for the amount of the existing loan plus closing costs, with no cash out. CP 49, 73, 288. In October of 2004, Jane again contacted Countrywide. A loan officer with Countrywide told that that he thought she could qualify for a loan, but before proceeding Countrywide would need a quit claim deed from Steven. Jane sent Steven a quit claim deed and asked him to sign it, but he never responded. CP 49, 62, 73. In April of 2005, Jane contacted two other loan companies, but did not proceed with the refinance because she began to consider selling the home. CP 73.

On May 26, 2005, the trial court issued a partial ruling on Jane's motion for modification of child support. CP 66-67. As part of that order, the trial court ruled as follows: "Father's obligation for Lighthouse Christian School of \$7,393.34 shall be satisfied by a corresponding reduction in obligation secured by Mother's residence." CP 67. The court continued the hearing to June 16, 2005, at which time Steven's motion for contempt was also to be heard. CP 68.

On June 10, 2005, Jane filed an additional declaration. With respect to Steven's motion to show cause, Jane asserted that the "spirit of the refinance order was met when Jane paid Lighthouse Christian School the back tuition owed by Mr. Davis." CP 71. In any event, Jane requested that the court allow her "until September 30, 2005, to complete either a refinance or sale of the family home." She explained to the court her diligent but unsuccessful efforts to obtain refinancing. CP 72-73.

Jane requested that the court "void" the original \$10,000 lien, and that the court award Steven a new lien in the amount of \$10,000 less the Lighthouse Christian School obligation that she had already paid, plus interest, plus Steven's share of the equity that would have been produced if the parties had been able to refinance as required by the decree. CP 73.

With respect to Steven's personal property that he was required to pick up on January 4, 2004, Jane explained that some of the items on the list were already given to him, and that she had tried to get Steven to pick up his things for two years. When Steven failed to retrieve his things on January 4, 2004, as ordered by the court, Jane took some of his things to the dump having no reason to believe that he would ever pick them. up. CP 73.

On June 14, 2005, Steven filed a reply to Jane's declaration. CP 84-120. With respect to the refinance, Steven asserted that it was Jane's

fault that the refinancing did not proceed and that Jane was now asking for a change in the decree, to which he objected. CP 88. Steven makes this assertion despite the fact that he himself expressly sought a modification of the decree in his prior declaration dated May 20, 2005. *See* CP 42.

Astonishingly, Steven's response indicates that he is the one seeking a substantial change in the decree with respect to the parties' respective interests in the family home. More specifically, Steven states:

The house was appraised at a value in the Fall of 2003. It we take the current value of the home to be \$275,000 (as indicated by Countrywide), there is more than enough equity in the home to make the necessary repairs, and I should be entitled to a much greater amount of the remaining equity than was determined in 2003 (which I believe was set at 225,000).

I therefore ask that Respondent's calculations be ignored, and that a new appraisal along with any other financial information that should be updated, be performed independent at *her* expense.

CP 88 (emphasis added). There is absolutely no basis in the record for Steven's apparent contention that he "should be entitled" to the increased equity in the home attributable to appreciation of the home *after* entry of the dissolution decree, or attributable to the mortgage payments made by Jane after entry of the decree. Nor is there any basis for Steven's *belief* that the equity was "set at \$225,000" in 2003.

Paragraph 3.14.1 of the dissolution decree is clear that the reason the court required the refinance was not to award Steven one-half of the total equity in the house if and when Jane made the decision to sell the house at some point in the future. Rather, the purpose of requiring the refinance was twofold: (1) to reduce the monthly mortgage payment for Jane; and (2) to obtain some cash for the parties to pay bills, and specifically for Steven to pay his obligation to Lighthouse Christian School. CP 12. The court specifically stated that “[t]his obligation to refinance is characterized as, and is in the nature of family support in that ***the purpose of the obligation is to keep Ms. Davis, and more importantly the children in their home.***” CP 12. The court specifically stated that the anticipated cash proceeds from the refinance would be between \$10,000 and \$15,000. CP 12.

With respect to the issue of Steven’s personal property, he stated that he did not pick up his possessions on January 4, 2004, as required by the court because many roads were closed that day due to the snow. He claimed that Jane repeatedly refused to make his items available to him. CP 89.

On June 24, 2005, Steven filed a declaration providing his estimated value of the personal property awarded to him in paragraph 3.2.8 of the decree. He estimated these items to have a minimum value of

\$2,030, and requested a judgment against Jane in this amount. CP 121-123. On June 27, 2005, Jane filed her declaration explaining the disposition of each of the items and providing her estimated value. CP 134-135.

On June 29, 2005, entered its Order on Show Cause re Contempt/Judgment/and Order Modifying Decree of Dissolution. CP 140-146. The court found Jane in contempt. With respect to the decree of dissolution, the court found that Jane failed to take the necessary steps to complete the refinancing, and thereby, prevented Steven from paying the tuition to Lighthouse Christian School. CP 142. With respect to the former family home, the trial court imposed the following condition for purging the finding of contempt:

By maintaining and keeping current all mortgage payments on the residence, and by making all reasonable efforts to complete a refinance of the mortgage on her residence as soon as possible, the commencement of which must occur within 15 days of entry of this Order provided that Respondent assume the Petitioner's obligation for the private school tuition (unpaid sum in the approximate amount of \$7,400) in exchange for an equivalent reduction in Petitioner's equity in the residence; and that the Respondent sign and return to Petitioner's counsel, the Note and Deed of Trust on the home to secure Petitioner's remaining equity in the same within (10) days of being requested to do so by the Petitioner and/or his counsel. Respondent shall forthwith provide Petitioner with copies of all refinance documents, and provide copies of all refinance documents generated in the future,

within five (5) days that each document is received by her.

CP 144. The trial court awarded Steven a judgment against Jane in the amount of \$2,030 for the personal property that Steven claimed that Jane destroyed, and awarded Steven \$750 in attorneys fees. CP 144-145.

The trial court also granted Jane's petition for modification of child support making the modification effective May 1, 2005. CP 147-153. The court required Steven to pay the resulting underpayment of child support by July 15, 2005. CP 155. It allowed Steven to deduct the \$750 judgment against Jane for attorneys fees from the back due child support owed. CP 155.

On July 28, 2005, Steven filed a declaration regarding Jane's compliance with the Order of Contempt. CP 154-183. Steven alleged that Jane had not complied with the court's order by making reasonable efforts to complete a refinance. Steven acknowledged that Jane was denied refinancing through Northwest Mortgage Services because of "excessive obligations" and "lack of cash reserves." CP 156. He alleged that the reason Jane was denied refinancing through Countrywide was because she had listed the home for sale. CP 156. Steven acknowledged that Jane had communicated to his attorney her intent to pay the judgments against her from the sale proceeds of the residence. CP 158.

A review hearing was held on July 28, 2005, however, Jane did not appear because, as discussed below, she did not believe that a hearing was actually scheduled for that day. The trial court found Jane in contempt for failing to appear and imposed conditions for purging the order of contempt. The court awarded Steven \$750 in attorneys fees for having to appear and re-note the hearing. CP 220.

On August 8, 2005, Larry Couture appeared on behalf of Jane Davis, and moved for reconsideration of the order of contempt. CP 264-266. On August 9, 2005, Jane Davis filed her declaration explaining why she had not appeared for the hearing on July 28, 2005. CP 225-226. Jane had met with Larry Couture on July 27, 2005. She told him about the prior court order indicating there would be a review hearing at the end of July. CP 225. Larry Couture looked at the court's docket on the internet and could find no matter pending on July 28, 2005. After speaking with Mr. Couture, Jane herself went to the Commissioners Clerk's office and the staff there determined that there were no hearings scheduled on July 28, 2005, under her name or file number. CP 225. Based upon the conclusion of Mr. Couture and the personnel in the Commissioners Clerk's office, Jane did not appear for the hearing on July 28, 2005. CP 225.

On August 16, 2005, the parties stipulated to a continuance of Steven's show cause hearing and Jane's motion for revision. CP 227-228 They also stipulated that Jane was permitted to sell her home provided that the sale price was sufficient to pay Steven all monies that he was owed as a result of prior judgments, liens, offsets, and orders of the court. CP 228. The parties acknowledged that this amount was not currently known with precision but was "estimated at not more than \$30,000." CP 228.

Jane subsequently sold her home on March 15, 2006. From the sale proceeds she deposited \$30,000 into a trust account of Steven's attorney. On June 8, 2006, Steven filed a motion and memorandum for an order setting the amount of funds that he was due from the sale of the family home. CP 229-233. Based upon Steven's calculations, he claimed that he was entitled to principal of \$18,599.05, with interest accruing from March 15, 2006 at the statutory rate of 12%. CP 231, RP 20. Steven's calculations were as follows:

Item:	Principal Amount	Dates of Interest	Interest Rate	Interest Amount	Total
Steven's lien pursuant to para. 3.2.1 of decree	\$10,000	12/10/03 to 3/15/06*	12%	\$2,715.62	\$12,715.62
One-half of anticipated refinance proceeds	\$ 7,500	12/10/03 to 3/15/06	12%	\$1,962.74	\$ 9,462.74

Item:	Principal Amt	Dates of Interest	Int. Rate	Interest Amount	Total
Judgment for Steven's personal property and attorneys fees of \$750	\$2,780	6/29/05 to 3/15/06	12%	\$ 233.98	\$ 3,013.98
Credit for Lighthouse Christian tuition paid by Jane	(\$7,400)*				(\$7,400.00)
Judgment for attorney fees	\$ 750	7/28/05 to 3/15/06	12%	\$ 56.71	\$ 806.71
TOTAL	\$13,630				\$18,599.05

* Steven fails to explain why he should be awarded interest at the rate of 12% on the full \$10,000 lien from December of 2003 through March of 2006, when, in May of 2005, the court found that Jane's payment of Steven's obligation to pay the tuition and related expenses for Lighthouse Christian School should be offset against his lien on the former family home. Jane made this payment on September 13, 2004. See CP 19, 40, 67.

On June 21, 2006, Jane responded to Steven's motion for order setting the amount of funds she owed to Steven. CP 259-260. Jane asserted that the, if the refinance had occurred, one-half of the proceeds

after payment of delinquent homeowners fees and the costs of refinance would have been about \$4,820 rather than the \$7,500 asserted by Steve. CP 259-260. She asserted that Steven's obligation to Lighthouse Christian School would also bear interest, and suggested that no interest be charged on the balance of the \$10,000 lien. CP 260. She asserted that the \$750 that was awarded against her as attorneys fees on June 29, 2005, was offset against child support that Steven owed to her, and, therefore, that this amount had been paid off. Jane did not dispute that she owes the judgment for \$2,030 for the personal property that Steven did not retrieve as required by the decree. CP 260. Jane asserted that the \$750 award of attorneys fees on July 28, 2005, should be stricken where she was assured by her attorney and the Commissioners Clerk that no hearing was scheduled for that date. CP 260. Based on Jane's assertions, the principal amount owed to Steven was \$9,450 calculated as follows:

Item	Principal Amount
Steven's lien pursuant to para. 3.2.1 of decree	\$10,000

Item	Principal Amount
One-half of anticipated refinance proceeds	\$ 4,820
Judgment for Steven's personal property	\$2,030
Credit for Lighthouse Christian tuition paid by Jane	(\$7,400)
TOTAL	\$9,450

Jane offered \$10,000 to settle the dispute. CP 260.

On June 23, 2006, the court decreed that the "entire proceeds" of the sale of the home be distributed as follows:

To Petitioner:

(1) \$10,000 with interest at 6% from 2/8/04 to 6/29/05, and \$2,600 (\$10,000 less \$7,400) from 6/29/05 to date of payment, plus

(2) one-half of net proceeds of sale of residence, after usual closing costs. Respondent to provide settlement statement to Petitioner, through counsel, within 10 days of today. Interest on this sum to be at 6%, plus

(3) \$2,780, provided if Respondent can show proof of payment of \$750, credit for \$750 should be given, plus interest at 12% from 6/29/05 to date of payment.

Respondent shall have balance of proceeds. If Respondent has disposed of funds to be paid to Petitioner, he shall have judgment therefore.

CP 261-263, RP 20-37.

Jane filed a motion for reconsideration. CP 264-266. She asserted that the court should reconsider its order deciding the amount of funds owed to Steven because the order effectively altered the court's division of property at the time of the dissolution. Jane further asserted that awarding the husband the full \$10,000 lien, with no offset for Jane's payment of the Lighthouse Christian Tuition, *plus* one-half of the equity value in the house at the time of its sale, resulted in a disparate division of the parties' assets which was not intended by the trial court at the time of the dissolution. CP 265-266.

On July 21, 2006, the court denied Jane's motion for reconsideration and awarded a principal judgment against her in the amount of \$38,918 with interest at 12% from June 16, 2006. In awarding this judgment, the trial court ordered as follows:

Funds in trust account of Petitioner's counsel shall be distributed to Petitioner in satisfaction of prior judgments plus all accrued interest and remaining balance in trust account shall be applied against judgment of **\$62,203.69**, leaving the net judgment of \$38,918.00

CP 271-272. Jane filed a notice of appeal with respect to the court's orders dated June 23, 2006, and July 21, 2006. CP 274.

III. ARGUMENT

A. THE PROVISIONS IN A DISSOLUTION DECREE REGARDING PROPERTY DIVISION MAY NOT BE REVOKED OR MODIFIED UNLESS THE COURT FINDS CONDITIONS JUSTIFYING THE REOPENING OF A JUDGMENT

Pursuant to RCW 26.09.170(1), “[t]he provisions [of a dissolution decree] as to property disposition may not be revoked or modified, unless the court find the existence of conditions that justifying the reopening of a judgment under the laws of this state.” In addition to the statute, this rule is well-established in the case law. *See, e.g., Coyle v. Coyle*, 61 Wn. App. 653, 660, 811 P.2d 244 (1991); *Thompson v. Thompson*, 82 Wn.2d 352, 356, 510 P.2d 827 (1973); *Messersmith v. Messersmith*, 68 Wn.2d 735, 415 P.2d 82 (1966); *Fleckenstein v. Fleckenstein*, 59 Wn.2d 131, 366 P.2d 688 (1961).

Here, as further discussed below, the trial court violated this rule because its Order on Motion for Order Setting Amount of Funds Due to Petitioner and its Order on Motion for Reconsideration and Awarding Judgment modified the property disposition in the decree of dissolution, and the court did not find the existence of conditions justifying the reopening of a judgment.

B. THE TRIAL COURT’S ORDER ON MOTION FOR ORDER SETTING AMOUNT OF FUNDS DUE TO PETITIONER AND ITS ORDER ON MOTION FOR RECONSIDERATION AND AWARDING JUDGMENT MODIFIED THE PROPERTY DISPOSITION IN THE DECREE OF DISSOLUTION

Here, the trial court’s Order on Motion for Order Setting Amount of Funds Due to Petitioner and its Order on Motion for Reconsideration and Awarding Judgment modified the property disposition in the decree of dissolution by *increasing the amount of property awarded to Steven by \$54,399*. For purposes of this appeal, Jane does not dispute that, at the time the trial court’s orders were entered, she owed Steven **\$2,600** of the \$10,000 lien. The trial court ruled on May 26, 2005, that Steven’s obligation for payment of \$7,393.34 to Lighthouse Christian School “shall be satisfied” by a corresponding reduction in Steven’s lien against the former family home. CP 67.

For purposes of this appeal, Jane does not challenge the trial court’s Orders to the extent they required her to pay interest at 6% on the full \$10,000 lien from February 8, 2004 to June 29, 2005, and on the remaining \$2,600 lien from June 29, 2005 to the date of payment. *See* CP 261. This would amount to **\$1,019** in interest.⁴

⁴ Interest at 6% on \$10,000 from February 8, 2004 through June 29, 2005 equals approximately \$850, and interest at 6% on \$2,600 from June 29, 2005 through the date of the judgment equals \$169 for a total interest on the outstanding lien of \$1019.

For purposes of this appeal, Jane does not dispute that, because the parties were not able to refinance the home as required by the decree, Jane should be required to pay to Steven his one-half share of the anticipated cash proceeds from a refinance (\$10,000 to \$15,000), and that this sum should also bear interest at a rate of 6%. Assuming that the parties had been able to obtain the full \$15,000 in cash proceeds from a refinance, Steven's one-half share would have been **\$7,500**, and interest at 6% on this amount from February 8, 2004 through the date of the judgment would be approximately **\$1,106**.

For purposes of this appeal, Jane does not dispute that she was required to pay the judgment of **\$2,030** for Steven's personal property with interest accruing at 12% from June 29, 2005, which amounts to **\$264** in interest. CP 144-145. The \$750 in attorneys fees that were awarded as part of this judgment were offset against child support that Steven owed to Jane, and thus were not due and owing at the time the trial court's orders were entered. CP 155, 260. In total, Jane does not dispute that, to satisfy all the terms of the property disposition in the dissolution decree and the judgment awarded against her on June 29, 2005, she owed Steven **\$14,519** from the proceeds of the sale of the family home.

The trial court's Order on Motion for Reconsideration and Awarding Judgment, however, effectively awarded Steven **\$68,918**. CP

270-271. Not only did the Order allow for the distribution to Steven of the \$30,000 amount that the parties placed in Steven's attorney's trust account, it provided for a "net judgment" to Steven of \$38,919. CP 271.

The difference between the amount awarded by the trial court pursuant to the Order Awarding Judgment (\$68,918) and the amount that Steven was entitled to receive pursuant to the decree of dissolution (\$14,519) was \$54,399. Thus, the trial court modified the property disposition in the decree of dissolution by increasing the amount awarded to Steven by \$54,399.

Jane anticipates that Steven will argue that, in addition to the \$10,000 lien, the decree of dissolution awarded to Steven as his separate property one-half of the net equity in the home, whenever it was sold. This argument, however, would be disingenuous. Moreover, it would be inconsistent with the plain language of the decree of dissolution.

Steven's own attorney, who represented him at trial and on the Motion for Order Setting Amount of Funds Due to Petitioner, did not believe that the decree of dissolution awarded to Steven one-half of the net equity in Jane's home whenever it sold. Steven, himself, only requested that the court award him \$7,500 plus interest based upon paragraphs 3.2.4 and 3.14.1 of the decree. *See* CP 233.

The plain language of the decree makes it clear that the property dispositions pursuant to paragraphs 3.2.4 and 3.3.5 were subject to and governed by paragraph 3.14.1. Paragraph 3.14.1 expressly states that it is the obligation, not just of Jane, but of the “parties” to refinance the mortgage. The court clearly recognized that the “parties” might not be able to accomplish the refinancing. It imposed upon “both parties” an obligation to “use their best efforts,” and it reserved jurisdiction to make further rulings “if necessary.” CP 12. Obviously, the court was aware that it could not compel a lender to refinance the home, and it might need to make additional rulings to effect the intent of the decree.

The intent of the decree is clear. The *purpose* of the refinance obligation was to (1) reduce Jane’s monthly payment; and (2) to provide cash for the parties to pay bills so that Jane and the children could stay in the family home. CP 12. The purpose of the decree was not to award to Steven a \$10,000 lien against the family home, *plus* a one-half interest in the equity in the family home at some unknown point in the future when the home sold. Otherwise, the language in paragraphs 3.2.4 and 3.3.5 that the award was to be one-half of the proceeds from refinancing, *as set forth in greater detail in paragraph 3.14* would be rendered meaningless. Similarly, the language in paragraph 3.14.1 expressly setting forth the

amount of the anticipated proceeds and the *purpose* of the anticipated proceeds would be rendered meaningless. *See* CP 12.

Jane does not dispute that, when the parties were not able to accomplish the refinancing, the trial court was required to provide relief to Steven to accomplish the intent of the dissolution decree and more specifically paragraphs 3.2.4 and 3.14.1. *See Mickens v. Mickens*, 62 Wn.2d 876, 385 P.2d 14 (1963) (when a party to a divorce action fails to carry out the terms for the division of property made in the decree and loss results to the other party, a basis for relief exists). But, the trial court's obligation to enforce the decree did not permit the trial court to modify the property disposition by *increasing* the property awarded to Steven and *decreasing* the property awarded to Jane.

Here, by awarding Jane the former family home as her separate property, subject of course to paragraphs 3.2.4 and 3.14.1, the trial court effectively awarded to Jane any increased equity in the family home that occurred as a result of her mortgage payments made *after* the decree, and as a result of market appreciation *after* the decree. By awarding Steven one-half of the "net proceeds from a refinance" to be accomplished "forthwith", the trial court in the dissolution decree did not award him one-half of the net equity in the home whenever it was sold in the future. Thus, the trial court's Orders that are the subject of this appeal modified

the property disposition in the dissolution decree by *increasing* the property awarded to Steven and *decreasing* the property awarded to Jane.

C. **WHEN THE TRIAL COURT MODIFIED THE PROPERTY DISPOSITION IN THE DECREE OF DISSOLUTION IT DID NOT MAKE FINDINGS JUSTIFYING THE REOPENING OF A JUDGMENT; THEREFORE IT VIOLATED RCW 26.09.170**

Before a party may obtain relief from a judgment, it must satisfy one of the grounds for relief pursuant to CR 60(b). None of the grounds for relief in subsections (1) through (10) of CR 60(b) are applicable here. Nor did the trial court find the existence of any conditions justifying the reopening of the decree of dissolution pursuant to any of these subsections. Subsection (11) of CR 60(b) grants a trial court *discretion* to vacate a decree of dissolution for “[a]ny other reason justifying relief from the operation of the judgment.” *Marriage of Furrow*, 115 Wn. App. 661, 673, 63 P.3d 821 (2003). Despite its broad language, however, the use of CR 60(b)(11) “should be confined to situations involving extraordinary circumstances not covered by any other section of the rule.” *Gustafson v. Gustafson*, 54 Wn. App. 66, 75, 772 P.2d 1031 (1998); *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). Before a dissolution decree may be vacated pursuant to CR 60(b)(11), there must be extraordinary circumstances such that vacation of the decree is necessary to “overcome a manifest injustice.” *Hammack v. Hammack*, 114 Wn.

App. 805, 810, 60 P.2d 663 (2003) (citing *Jennings v. Jennings*, 138 Wn.2d 612, 625-626, 980 P.2d 1248 (1999)).

Here, there are no extraordinary circumstances such that modification of the decree was necessary to overcome a manifest injustice. Nor did the trial court make any findings of conditions justifying the reopening of a judgment pursuant to CR 60(b). Thus, the trial court erred when it entered its Orders dated June 23, 2006, and July 21, 2006.

IV. ATTORNEYS FEES ON APPEAL

Pursuant to RCW 26.09.140, the Court of Appeals may award attorneys fees to Jane based upon her financial need and upon Steven's ability to pay. Pursuant to RAP 18.1(c), Jane will serve upon the attorney for Steven and file with this court a financial affidavit no later than 10 days prior to the date this case is set for hearing. Jane should be awarded her attorney's fees pursuant to RCW 26.09.140 based upon her financial need and Steven's ability to pay, as Jane expects to be established by the financial affidavits of the parties.

V. CONCLUSION

Based upon the foregoing, Jane respectfully requests that this Court reverse the trial court's order dated June 23, 2006, and the trial court's order and judgment dated July 21, 2006. Jane further requests that

this Court remand to the trial court for entry of an order finding that the amount due to Steven from the proceeds of the sale of former family home was \$14,519, and, a judgment in favor of Jane in the amount of \$15,481 plus interest at 12% from the date of the judgment. Said amount reflects the difference between the amount that was actually owed to Steven and the \$30,000 that he received from the funds place in his attorney's trust account.

DATED this 24th day of October, 2006.

Carol J. Cooper
CAROL J. COOPER, WSB #26791
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2006,
I caused a copy of the original of **Appellant's Opening Brief** to be delivered to the below listed at their respective addresses:

VIA LEGAL MESSENGER

Barbara Jo Reisinger Sylvester
McGavick Graves PS
1102 Broadway, Ste. 500
Tacoma, WA 98402

Attorney for Respondent

Signed at Tacoma, Washington on 10/24/06

S. Tichy
SARAH TICHY
Legal Assistant to Carol J. Cooper

BY [Signature]
IDENTITY
STATE OF WASHINGTON
06 OCT 25 PM 1:58

FILED
COURT OF APPEALS