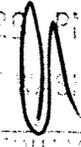


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DIVISION II

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No. 37731-4
STATE OF WASHINGTON COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON
BY  _____
DEPUTY

MARK A. LAVERGNE,

Appellant,

and

TERESA GRIMSELY-LAVERGNE,

Respondent.

On Appeal from Thurston County Superior Court
Honorable Pamela Casey

Appellant's Supplemental Brief

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A. Assignments of Error

1. The trial court erred in entering the Second Amended Findings of Fact and Conclusions of Law Supporting Judgment Enforcing Decree and the Judgment on Findings of Fact and Conclusions of Law because:

a. The trial court no longer had jurisdiction to modify the existing Decree of Dissolution; Findings of Fact and Conclusions of Law; Final Parenting Plan; and Final Order of Child Support that had already been appealed;

b. The trial court improperly modified the existing property division in the existing Decree of Dissolution and Order Enforcing CR 2A/Property Settlement Agreement; and

c. The trial court effectively distributed property and debts that were not in existence when the original Dissolution Decree was entered or when the subsequent Judgment on Findings of Fact and Conclusions of Law was entered.

2. The trial court erred in entering Finding of Fact No. 2(e) : “The fair rental value for the Pacific Avenue Property from the time the CR2A Agreement was signed up until this hearing was, and is, \$3,900 per month.” CP 1619.

3. The trial court erred in entering Conclusion of Law No. “N”: “No adjustments will be made for rents Petitioner may have received for the Second Avenue Property. It was Respondent’s burden to prove what amounts Petitioner received. Respondent failed to meet his burden.” CP 1629.

4. The trial court erred in entering Finding of Fact 2(j) “After the CR2A was signed, but before the Decree was entered, Petitioner paid \$12,337 in property taxes. These property taxes were enumerated on Petitioner’s Exhibit 11 and

were fully paid by Petitioner at the time the Decree was entered. There were two tax numbers...It appears both these tax numbers related to the Pacific Avenue Property real estate and its permanent fixtures;" and Conclusion of Law No. "E": "Respondent owes Petitioner for the real property taxes Petitioner paid for the Pacific Avenue Property and the Second Avenue Property after the CR2A was signed and before the Decree was entered. Respondent had the responsibility to pay for real estate taxes on the property he was awarded under the Decree. Petitioner claims she paid \$12,337 in real estate taxes." CP 1621; 1627-28.

5. The trial court erred in entering Conclusion of Law No. G: "Respondent owes Petitioner \$19,598 as his share of the children's insurance expenses and \$451 as his share of the children's uncovered medical expenses, which Petitioner paid prior to the Decree being entered." CP 1628.

6. The trial court erred in entering Conclusion of Law No. G: "Respondent shall pay one-half the nanny expenses enumerated on Exhibit 15, not including the \$133 oil change. One-half the nanny, extra help and Serendipity day care costs equal to \$37,308.66." CP 1628.

7. The trial court erred in denying Mr. LaVergne's Motion for Reconsideration. CP 1586.

B. Issues Pertaining to Assignments of Error

1. Whether the trial court did not have jurisdiction to enter the Second Amended Findings of Fact and Conclusions of Law Supporting Judgment Enforcing Decree and the Judgment on Findings of Fact and Conclusions of Law because it affected the existing Decree of Dissolution; Findings of Fact and

Conclusions of Law; Final Parenting Plan; and Final Order of Child Support that had already been appealed. The proper procedure required the trial court to first determine how it was going to rule and then the prevailing party - in this case the Petitioner Wife – needed to request this Court relinquish jurisdiction to the trial court to enter the Findings of Fact and Conclusions of Law Supporting Judgment Enforcing Decree and the Judgment on Findings of Fact and Conclusions of Law. (Assignment of Error 1 and 7).

2. Whether the trial court was prohibited from modifying the property distribution in the existing Dissolution Decree. (Assignment of Error 1 and 7).

3. Whether community property that was in existence at the time the original Dissolution Decree was entered, but was not distributed by the original Dissolution Decree, was owned by the parties as tenants in common after the original Dissolution Decree was entered. (Assignment of Error 1 and 7).

4. Whether the trial court was prohibited from awarding property or debts that were not in existence when the final Dissolution Decree was entered. (Assignment of Error 1 and 7).

5. Whether the trial court erred on its reliance of Ms. Grimsley-LaVergne's witness, Todd Wilmovsoky, who assigned a rental value of \$3,900/month to the Pacific Avenue real property when (1) he did not measure the property; (2) newly discovered evidence reveals his drawings were not accurate depictions of the property; (3) he neglected to include about 1,200 square feet of building space; and (4) newly discovered evidence reveals he was inaccurate with his portrayal to the court about comparable real estate. (Assignments of Error 1, 2, and 7.)

6. Whether the trial court erred when it ordered Mr. LaVergne was not entitled to rental money (\$13,600) from the Second Avenue property when (1) Mr. LaVergne was awarded the Second Avenue property; (2) the trial court had previously ruled on January 20, 2008 that some rent was paid and Ms. Grimsley-LaVergne forgave the remainder of the outstanding rent; and (3) the trial court ruled on February 8, 2008 that the renter had paid rent to Ms. Grimsley-LaVergne except for four payments. (Assignments of Error 1, 4, and 7).

7. Whether the trial court erred when it awarded over \$12,000 to Ms. Grimsley-LaVergne in property taxes when those property taxes were *personal* property taxes and *not* real estate property taxes associated with the real estate property she was awarded in the Decree of Dissolution. (Assignments of Error 1, 5 and 7).

8. Whether the trial court overstepped its authority when it modified the Decree of Dissolution by ordering Mr. LaVergne reimburse Ms. Grimsley-LaVergne for medical insurance payments she made on behalf of their children when payment for the children's medical insurance is set forth in the Final Order of Child Support that states no back child support obligation is owed. (Assignments of Error 1, 6, and 7).

9. Whether the trial court erred when it ordered Mr. LaVergne to reimburse Ms. Grimsley-LaVergne for Mr. Alan Scott's daycare services when (1) the CR2A required all disputes be submitted for binding arbitration; (2) the parties engaged in arbitration that resulted in a Final Order of Child Support that stated there was no back child support obligation; and (3) the Final Order of Child Support was

incorporated into the Decree of Dissolution. (Assignments of Error 1 and 7).

C. Statement of the Case¹

1. Procedural Facts

In November 2003, Mark LaVergne [Mark] filed a petition to dissolve his marriage to Teresa Grimsley-LaVergne [Teresa].² On September 24, 2004, Mark and Teresa signed a CR2A Agreement [“The CR2A Agreement”], dividing some property between them that they owned; determining parenting issues; and determining maintenance and child support.³ After signing the CR2A Agreement, Mark and Teresa stayed at a Ramada Inn and had sexual intercourse.⁴ The next day, Mark moved back into their marital home with his and Teresa's children and Teresa, Mark and the children lived together for the next 33 months.⁵

The CR2A Agreement charged Teresa with drafting and presenting final orders to the trial court.⁶ Teresa, however, did not draft proposed final orders and the Petition was dismissed.⁷ Teresa got the dismissal vacated on July 2, 2007 without notice to Mark⁸ and filed a Motion to Enforce the CR2A Agreement.⁹

On January 28-29, 2008, the trial court held an evidentiary hearing to determine whether to enforce or set aside the CR2A Agreement.¹⁰ Ultimately, on

¹ Verbatim Report of Proceedings dated January 28, 2008 is 1RP; the VRP dated January 28-29, 2008 is 2RP; and the VRP dated January 29, 2008 is 3RP.

² CP 929-33.

³ Exhibit 1, CR2A Agreement.

⁴ 1RP 111; 2RP 387.

⁵ 1RP 109-110; 2RP 392-93.

⁶ Exhibit 1, The CR2A Agreement, IV, E, ¶ 4.

⁷ CP 939.

⁸ CP 940.

⁹ CP 941-42.

¹⁰ See 1RP, 2RP, and 3RP.

February 8, 2008 the trial court orally ruled it would enforce the CR2A Agreement and an Order Enforcing the CR2A Agreement was entered on March 18, 2008.¹¹ The CR2A Agreement and the Order Enforcing the CR2A Agreement specifically provided, “any disputes in the drafting of the final documents or any other aspect of this agreement (form or substance), or any issue not discussed, shall be submitted to Harry R. Slusher for binding arbitration (RCW 7.04).”¹² Prior to the final child support order being entered, the parties submitted the issue of insurance premiums for the children and other matters to Mr. Slusher for determination pursuant to binding arbitration. His arbitration decision was incorporated into the final child support order.

The trial court issued final orders in this case on April 29, 2008. Specifically, it entered: Decree of Dissolution, Findings of Fact and Conclusions of Law, Child Support Order, and a Final Parenting Plan.¹³ Mark timely appealed all the April 29, 2008 Final Orders as well as the March 18, 2008 Order Enforcing CR 2A Agreement.¹⁴

The trial court then held a subsequent evidentiary hearing to enforce the existing Dissolution Decree. Teresa objected to the hearing contending that the trial court lacked jurisdiction because Mark had appealed the April 29, 2008 final orders in this case.¹⁵ Consequently, Mark had to move this Court for an Order to clarify the jurisdictional issue. Commissioner Schmidt ruled

¹¹ CP 941-42.

¹² CP 27.

¹³ CP 962-66; CP 980-89; CP 990-94; and CP 967-79.

¹⁴ CP 837-84.

¹⁵ CP 1641.

The trial court has the authority, under RAP 7.2(c), to conduct the 08/21/08 evidentiary hearing regarding enforcement of the dissolution decree. If the trial court concludes that the decree should be modified, the prevailing party must comply with RAP 7.2(e) before the trial court enters a modification order.¹⁶

Mark submitted a Post-Trial Brief Opposing Entry of Post Decree Findings of Fact and Conclusions of Law and Judgment and in the Alternative Motion for Reconsideration.¹⁷ Mark argued, amongst other things, that the trial court was going to go too far and was going to modify the property distribution provisions in the existing Dissolution Decree.¹⁸ Despite Mark's arguments, the trial court entered the Second Amended Findings of Fact and Conclusions of Law Supporting Judgment Enforcing Decree on October 28, 2008.¹⁹ It also denied his Motion for Reconsideration by letter.²⁰ Finally, on January 29, 2009, the trial court entered a Judgment on Findings of Fact and Conclusions of Law.

Mark timely appealed the Second Amended Findings of Fact and Conclusions of Law Supporting Judgment Enforcing Decree.²¹

2. Substantive Facts

a. Fair Rental Value of Pacific Avenue Property

The trial court entered a finding that the rental value for the Pacific Avenue property is \$3,900 per month.²² The trial court found Ms. Grimsley-LaVergne's witness, Todd Wilmovsky, more credible than Mr. LaVergne's

¹⁶ See August 18, 2008 letter ruling from this Court.

¹⁷ CP 1106-1539.

¹⁸ *Id.*

¹⁹ CP 1617-1630.

²⁰ CP 1586.

²¹ CP 952-61; CP 995-1038.

²² CP 1619.

witness, Dale Carlson.²³ But, there was new evidence presented to the trial court on reconsideration that Mr. Wilmovsky was not accurate in his comparables, did not measure the property, his sketches of the property were inaccurate, and he failed to include approximately 1,200 square feet of shop additions on the property.²⁴ Regardless of these errors, the trial court did not reconsider its ruling and relied on Mr. Wilmovsky's flawed testimony to reach its decision on the rental value of the property.

b. Second Avenue Property Rent

The July 2004 CR2A awarded to Mark the Second Avenue property.²⁵ Between December 2005 through August 31, 2007, this property was rented by a man named Ricky Senn.²⁶ At the January 28, 2008 trial, Mr. Senn testified on the dates and amounts of rent he paid to Teresa. He stated that at first he paid \$800 a month in rent to Teresa.²⁷ Teresa later reduced the rent to \$650 per month.²⁸ And, Mr. Senn only made four payments directly to Mark.²⁹

On February 7, 2008, the trial court made an oral ruling finding Mr. Senn had paid his rent for the Second Avenue property to Teresa "except for four of his later payments" and it was not clear to the court whether any of the rental payments were distributed to Mark who was awarded the home.³⁰ Mark LaVergne, therefore, is owed \$13,600 in rental income.

²³ CP 1618-19.

²⁴ CP 1120-21.

²⁵ CP 252, 259.

²⁶ RP 60-61.

²⁷ RP 63-64.

²⁸ RP 65.

²⁹ RP 68.

³⁰ CP 1138.

c. Property Taxes Over \$12,000

The trial court awarded to Teresa \$12,337 in property taxes.³¹ The court believed that these taxes were associated with real property taxes that Teresa paid for the Pacific Avenue Property and the Second Avenue Property after the CR2A was assigned and before the Decree was entered.³² The trial court concluded, however, that “[if] the Court is incorrect that these payments are for the real estate or permanent fixtures on the real estate, then there should be an adjustment made so that Respondent [Mark] only pays Petitioner for the real estate and permanent fixtures taxes on the Pacific Avenue and Second Avenue Properties.”³³

There was evidence on the record that the trial court was mistaken and the \$12,337 taxes were indeed for *personal* property taxes on the business and not for *real* property taxes.³⁴ Nonetheless, the court awarded the amounts to Teresa and failed to reconsider Mark’s argument that that the taxes were for personal property.³⁵

d. Reimbursement for Children’s Medical Insurance Payments

The Final Order of Child Support dated April 29, 2008 provides at paragraph 3.20 that no back child support was owed and provides in paragraph 3.19 that extraordinary health care expenses are split 50%.³⁶ And, paragraph

³¹ CP 1627-28.

³² *Id.*

³³ *Id.*

³⁴ CP 1419-21.

³⁵ CP 1586.

³⁶ CP 855-862; 861.

3.15 provides that Mark's 50% obligation to pay for the children's health insurance premiums and uninsured medical expenses is "effective May 2008..."³⁷

When the trial court entered its Second Amended Findings of Fact and Conclusions of Law on October 28, 2008, it ordered Mark to reimburse Teresa in the amount of \$19,598 for his share of the children's health insurance expenses.³⁸

e. Reimbursements to Alan Scott for Daycare Services

The parties' CR2A requires all disputes to be submitted for binding arbitration.³⁹ The parties engaged in binding arbitration that resulted in a Final Order of Child Support entered on April 29, 2008, which provided in paragraph 3.20 that no back child support was owed.⁴⁰ The Final Order of Child Support was incorporated into the parties' Decree of Dissolution.⁴¹

Alan Scott is Teresa's father.⁴² The trial court found that Teresa's payments for nannies, "extra help," and Serendipity daycare were legitimate expenses.⁴³ The trial court concluded Mark to pay one-half for the nanny, "extra help," and Serendipity daycare costs that totaled to \$37,308.66.⁴⁴ Mr. Scott's daycare services totaled to \$18,788.71 and Mark was ordered to pay for half of his services, or \$9,394.35.⁴⁵

³⁷ CP 859-860.

³⁸ CP 1628.

³⁹ CP 24-33; 27.

⁴⁰ CP 855-862; 861.

⁴¹ CP 850-854.

⁴² CP 1621.

⁴³ *Id.*

⁴⁴ CP 1622.

⁴⁵ CP 1628.

D. Argument

1. Standards of Review

The proceeding below was an evidentiary hearing before the trial court. The trial court made both findings of fact and conclusions of law. An appellate court reverses a trial court's findings if they are not supported by substantial evidence in the record.⁴⁶ Conclusions of law are reviewed *de novo*.⁴⁷

A conclusion of law is defined as the conclusions that follow, through the process of legal reasoning, when the law as applied to the facts as found by the court.⁴⁸ Findings of fact that appear in the conclusions of law, and visa-versa, are mislabeled and will be analyzed under the substantial evidence standard.⁴⁹ Findings of fact that have legal ramifications are conclusions of law and are reviewed *de novo*.⁵⁰

2. The trial court did not have jurisdiction to enter the Second Amended Findings of Fact and Conclusions of Law or the Judgment on Findings of Fact and Conclusions of Law because they purported to modify the existing Dissolution Decree that was being appealed.

The trial court must seek permission from the appellate court if it wants to alter the existing April 29, 2008 Dissolution Decree or Final Child Support Order. While RAP 7.2 (c) authorized the lower court to conduct the hearing on August 21 – 22, 2008 to enforce the existing Dissolution Decree and Final Child Support Order, RAP 7.2(e) and the court's August 18, 2008 ruling, required the prevailing party to seek permission from this Court before the trial court had jurisdiction to modify the existing Dissolution Decree or Final Child Support Order, both of

⁴⁶ *Miles v. Miles*, 128 Wn. App. 64, 69-70, 114 P.3d 671 (2005).

⁴⁷ *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

⁴⁸ *State v. Niedergang*, 43 Wn. App. 656, 658, 719 P.2d 576 (1986) ("If the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.").

⁴⁹ *Winans v. Ross*, 35 Wn. App. 238, 240 n. 1, 666 P.2d 908 (1983); *Miles*, 128 Wn. App. at 70.

⁵⁰ *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980).

which Mark had already appealed. The trial court enforced the Dissolution Decree when it: determined the rent Mark was due from Teresa for the use of the Pacific Avenue Property; required Teresa to pay the dividends on the account awarded to Mark; and required Teresa to make the four \$16,837.61 payments she was to pay to Mark pursuant to the Decree.

The trial court did more than enforce the existing Dissolution Decree and Final Child Support Order then being appealed, and in fact modified the existing Dissolution Decree and Final Child Support Order being appealed, when it:

- Ordered Mark to reimburse Teresa for the health insurance payments Teresa allegedly made.⁵¹ The April 2008 Findings of Fact and Decree incorporate the parties' CR2A Settlement Agreement. The CR2A and the March 18, 2008 Order specifically require disputes to be arbitrated before Harry Slusher. The parties arbitrated child support issues before Mr. Slusher. Mr. Slusher's arbitration rulings were incorporated into the child support order.⁵² Specifically, Paragraph 3.15 of the Final Child Support Order at page 6, lines 1-3 states:

Uninsured medical expenses and one-half of medical and dental insurance premiums for the children which, at the time of entry of this order, is \$118.70 (\$237.40 is 100% of the premium). Father shall pay \$118.70 (1/2) to company on a monthly basis effective May 2008 on or before the 5th of each month.⁵³

Clearly, the final Child Support Order dealt with health insurance premiums for the children and required Petitioner to only pay half the premiums effective May 2008. Awarding \$19,598 in back

⁵¹ CP 1622.

⁵² Citation pending Motion to Supplement the Record to incorporate Mr. Slusher's arbitration decision.

⁵³ CP 910.

health insurance payments for the children effectively modified Mr. Slusher's arbitration decision. To be sure, the child support order Mark submitted also states there was to be no judgment because "no attorney's fees or back child support has been ordered".⁵⁴

- Ordered back day care, nanny and extra help expenses related to the children.⁵⁵ Since back child support order did not apply and was not awarded in the final child support order, it would modify the child support order to award it now.
- Awarded assets or liabilities not discussed in the existing Dissolution Decree, such as: the boat lift insurance proceeds⁵⁶; the corporate credit card charges⁵⁷; the 2004 income tax preparation debt⁵⁸; the Second Avenue Property utility bills⁵⁹; the charges on the A+ account⁶⁰; and the coffee stand rents⁶¹.

3. The trial court erred when it tried to award assets and debts that were not in existence at the time the Dissolution Decree was entered.

Courts cannot distribute assets and debts that are not in existence at the time the dissolution trial is held.⁶² It follows, then, that courts cannot distribute debts that are not currently owed at the time the dissolution trial is held. Assets that were contributed during the marriage and expenses that were paid during the marriage, but which do not exist at the time the dissolution trial, are, at most,

⁵⁴ CP 905 (see "I. Judgment Summary," 1:18); CP 911 (see ¶ 3.20 "Back Child Support," 7:15-16).

⁵⁵ CP 1621-22.

⁵⁶ CP 1622-23 (Findings No. 4).

⁵⁷ CP 1623 (Findings No. 5)

⁵⁸ CP 1623 (Findings No. 9).

⁵⁹ CP 1624 (Findings No. 10).

⁶⁰ CP 1624 (Findings No. 12).

⁶¹ CP 1625 (Findings No. 17).

⁶² *In re Marriage of White*, 105 Wn. App. 545, 550-52, 20 P.3d 481 (2001)

factors to be considered in justly and equitably distributing the assets and debts that exist at the time trial are held.⁶³ Here, this Court divided the assets, debts and liabilities that were in existence at the time the trial was held and entered a final dissolution decree prepared by Teresa and her counsel.

To the extent there may have been community property that was not distributed by the existing Dissolution Decree, it became jointly owned by the parties as tenants in common once the Dissolution Decree was entered.⁶⁴ The only way for any court to subsequently determine a party's interest in any community property that was not distributed by the Decree is by "an independent action for partition or for declaratory relief."⁶⁵ Courts should not attempt to distribute omitted or overlooked property in post decree proceedings.⁶⁶ Here, as shown below, the trial court did exactly what it was not supposed to do. It distributed assets, debts and liabilities that were not in existence at the time the existing Dissolution Decree was entered or, alternatively, it re-distributed property that was not addressed in the existing Dissolution Decree through supplemental post-decree proceedings. This was error.

4. The trial court erroneously modified the property division in the existing Dissolution Decree.

A trial court is prohibited from modifying a property distribution award in a final dissolution decree. See RCW 26.09.170(1) ("...The provisions as to property disposition may not be revoked or modified..."). Unlike maintenance and child support, there is no authority for a court to modify a property distribution award in

⁶³ *White*, 105 Wn. App. at 550-52.

⁶⁴ *Wagers v. Goodwin*, 92 Wn. App. 876, 880, 964 P.2d 1214 (1998), *citing*, *In re Marriage of Monaghan*, 78 Wn. App. 918, 929, 899 P.2d 841 (1995).

⁶⁵ *Wagers*, 92 Wn. App. at 880, *citing*, *Devine v. Devine*, 42 Wn. App. 740, 743, 711 P.2d 1034 (1985). See, also, *In re Marriage of Molvik*, 31 Wn. App. 133, 135, 639 P.2d 238 (1982).

⁶⁶ *Id.*

a final dissolution decree.⁶⁷ Once they are made, they are final. Here, the trial court made a final property distribution in the existing Dissolution Decree.

The trial court's Second Amended Findings of Fact and Conclusions of Law modified the property dispositions in the existing Dissolution Decree when it:

- Awarded Teresa \$4,600 in insurance proceeds for a boat lift.⁶⁸ The Dissolution Decree and the incorporated CR2A Agreement are silent as to insurance proceeds for a boat lift. To be sure, the insurance proceeds never came into existence until after the CR2A was signed, but before the Decree was entered.⁶⁹ To the extent these proceeds existed at the time the Dissolution Decree was entered, they were owned by the parties as tenants in common and Respondent must bring an independent declaratory judgment action to enforce any rights she may have in or to those proceeds.
- Awarded Teresa \$7,583 in corporate credit card charges.⁷⁰ Liability for this account was awarded to Teresa because she was awarded the corporation and the corporation's credit card debt was supposed to stay with the corporation.⁷¹ By requiring Mark pay Teresa \$7,583 for charges he may have made to the corporation's credit card account in effect modifies the property distribution in the existing Dissolution Decree.

⁶⁷ *In re Marriage of Coyle*, 61 Wn. App. 653, 660-61, 811 P.2d 244 (1991); *Thompson v. Thompson*, 82 Wn.2d 352, 356-57, 510 P.2d 827 (1973); and *Carstens v. Carstens*, 10 Wn. App. 964, 967, 521 P.2d (1974).

⁶⁸ CP 1622-23 (Findings No. 4).

⁶⁹ *Id.*

⁷⁰ CP 1623 (Findings No. 5).

⁷¹ CP 29 (CR2A, ¶¶ 5, 6); CP 887 (Decree of Dissolution, ¶ 3.5).

- Awarded Teresa \$2,785 for preparing Mark's 2004 taxes. The Dissolution Decree and the incorporated CR2A Agreement are silent as to liability for Petitioner's 2004 taxes.⁷² To be sure, the tax preparation liability never came into existence until after the CR2A was signed, but before the Decree was entered. The Dissolution Decree did not award this liability to either party. It would alter the property disposition scheme in the Dissolution Decree to make this award after the Decree was entered.
- Awarded Mark \$2,866 for utility bills respecting the Second Avenue Property.⁷³ The Dissolution Decree and the incorporated CR2A Agreement are silent as to liability for utilities for the Second Avenue Property. These utility bills were fully paid before the existing Dissolution Decree was entered.⁷⁴ The Dissolution Decree did not award this liability to either party. It would alter the property disposition scheme in the existing Dissolution Decree to make this award after the Decree was entered.
- Awarded Teresa \$529 for charges Mark allegedly made to the A+ corporate account.⁷⁵ Liability for this account was awarded to Teresa.⁷⁶ By requiring Mark pay Teresa \$529 in charges to this account in effect modifies the property distribution in the Decree.

⁷² CP 1623 (Findings No. 9).

⁷³ CP 1624 (Findings No. 10).

⁷⁴ *Id.*

⁷⁵ CP 1624 (Findings No. 12).

⁷⁶ CP 29.

- Awarded Teresa the rents for the coffee stand.⁷⁷ The Dissolution Decree and the incorporated CR2A Agreement are silent as to rents for the coffee stand. To be sure, the coffee stand rents never came into existence until after the CR2A was signed, but before the Decree was entered.⁷⁸ The parties were married at this time and living together. As such, the rents were, by definition, community property.⁷⁹ The Dissolution Decree did not award this property to either party. It was, therefore, undistributed community property and was owned by the parties as tenants in common. Subsequently awarding this community property to Teresa improperly modified the property disposition scheme in the existing Dissolution Decree.

5. The Market Rate for the Rental Value of the Pacific Avenue Real Property was Not Based on Substantial Evidence.

The trial court found that the Pacific Avenue property's rental value is \$3,900 per month and believed Teresa's witness, Mr. Todd Wilmovsky, to be more credible than Mark's witness on the issue, Mr. Dale Carlson.⁸⁰ The trial court specifically found that Mr. Wilmovsky "took actual measurements" of the property whereas Mr. Carlson did not.⁸¹ Therefore, the court found that the property was closer to 5,700 square feet as opposed to Mr. Carlson's opinion that the property was 7,200 square feet.⁸²

⁷⁷ CP 1625 (Findings No. 17).

⁷⁸ *Id.*

⁷⁹ RCW 26.16.030

⁸⁰ CP 1618-20.

⁸¹ CP 1618-19.

⁸² CP 1618.

The trial court also found Mr. Carlson's opinion was based on "poor comparables" because the comparables he used were not for mixed-use property, which is the type of property the Pacific Avenue property is, but rather for properties that were only office space or only warehouse space.⁸³ However, the court also noted that "[e]ven Mr. Wilmovsky could not find identical comparables and had to make adjustments to reach an opinion as to fair rental value."⁸⁴

When Mark LaVergne moved the trial court for reconsideration on this issue, he included evidence that Mr. Wilmovsky did not measure the property, did not have accurate drawings of the property, failed to include about 1,200 square feet of shop additions, and was inaccurate in his portrayal of his comparables, as further explained below.⁸⁵

First, Mr. Wilmovsky did not measure the property as the trial court believed he did.⁸⁶ It is apparent that Mr. Wilmovsky did not measure the property because his drawings of the property do not resemble the building that is actually on the property.⁸⁷ Mark LaVergne in his motion to reconsider included detailed photographs of the property and Mr. Wilmovsky's sketches that do not comport with the photographs.⁸⁸

Second, Mr. Wilmovsky neglected to include the shop additions, which is approximately an additional 1,200 square feet of building space.⁸⁹ At trial, Mr.

⁸³ CP 1619.

⁸⁴ CP 1619.

⁸⁵ CP 1120-21.

⁸⁶ CP 1120.

⁸⁷ *Id.*; CP 1490-93.

⁸⁸ CP 1490-93.

⁸⁹ *Id.*; CP 1472-73; 1459-60.

Wilmovsky failed to account for this addition.⁹⁰

Finally, Mr. Wilmovsky was not accurate in his portrayal of the comparables. He testified that he consulted with other local realtors to gather comparables and asserted that the property in comparable #1, located on Tracey Lane, was marketed for lease.⁹¹ However, the real estate broker for the Tracey Lane property, Vanessa Herzog, submitted a sworn declaration before the trial court on reconsideration that the property was never available for lease.⁹² Rather, it was owned continuously by Western Washington Sheet Metal Workers who then sold it to Pacific Electronics in September 2008 for 100% occupancy and ownership.⁹³ Furthermore, Ms. Herzog reviewed Mr. Wilmovsky's appraisal of the Pacific Avenue property and she believed it was flawed because it did not accurately reflect the marketing of the property, and it was also inaccurate in the representation of the lease rate structure for the kind of property even if the Tracey Lane property had been for lease, which it was not.⁹⁴ Additionally, Mr. Wilmovsky at trial testified that his comparables were the basis for setting the lease amount for the Pacific Avenue property at \$3,900 per month because no other comparable existed with similar land size.⁹⁵

Regarding Mr. Wilmovsky's comparable #3, which is real property located at 2621 Mottman Court SW, Mr. Wilmovsky stated in his appraisal that the building is 10,812 square feet.⁹⁶ However, on Mark's motion for reconsideration,

⁹⁰ *Id.*

⁹¹ CP 1471-72.

⁹² CP 1531.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ CP 1461-64; 1468; 1470-71.

⁹⁶ CP 1445.

he provided the trial court with the Thurston County Assessors map of the Mottman Court SW property that shows the building is only 1,812 square feet and not 10,812 square feet as Mr. Wilmovsky stated in his appraisal.⁹⁷ Mr. Wilmovsky also testified that another comparable property located at 2601 Mottman Court SW (comparable #2) was not marketed as a triple-net lease.⁹⁸ But, Mark on his motion for reconsideration presented a sworn declaration from the leasing agent for that property, Shelly Foltz, who swore that the property was marketed as a triple-net lease and was at that time being leased as such.⁹⁹

Based on the evidence before the trial court regarding this matter, it is hard pressed for the trial court to have concluded based on a substantial evidence standard that Mr. Wilmovsky's appraisal of the rental value of the parties' Pacific Avenue property was more accurate than Mr. Carlson's appraisal. The court believed Mr. Carlson did not measure the property, but Mr. Wilmovsky's inaccurate drawings of the building on the property also indicate he did not measure the property, either. The court found Mr. Carlson's comparables inaccurate because he did not include mixed-use properties as a baseline for his comparables, but it also found that Mr. Wilmovsky could not find identical comparables, either. Moreover, Mr. Wilmovsky's inaccurate portrayals of the comparables are far greater than Mr. Carlson's alleged inaccuracies because the two comparables Mr. Wilmovsky relied on to reach an opinion about the property's fair rental value were both proven to be inaccurate.

⁹⁷ CP 1533-35.

⁹⁸ CP 1463-64.

⁹⁹ CP 1537.

6. Mark LaVergne is Owed \$13,600 in Rental Income for the Second Avenue Property.

The July 2004 CR2A awarded to Mark the Second Avenue property.¹⁰⁰ Between December 2005 through August 31, 2007, this property was rented by Ricky Senn.¹⁰¹ At the January 28, 2008 trial, Mr. Senn testified on the dates and amounts of rent he paid to Teresa. He stated that at first he paid \$800 in rent to Teresa.¹⁰² Teresa later reduced the rent to \$650.¹⁰³ And, Mr. Senn only made four (\$800) payments (for a total of \$3,200) directly to Mark.¹⁰⁴

On February 7, 2008, the trial court made an oral ruling finding Mr. Senn had paid his rent for the Second Avenue property to Teresa “except for four of his later payments” and it was not clear to the court whether any of the rental payments were distributed to Mark LaVergne who was awarded the home.¹⁰⁵

Therefore, Mark LaVergne is owed \$13,600 in rental income. This calculation is determined as follows:

21 months x \$800 monthly rent = \$16,800;
4 months x \$800 monthly rent paid directly to Mark = (\$3,200);
\$16,800 – \$3,200 = \$13,600

The calculation is based on \$800 monthly rent and not \$650 monthly rent because Teresa arbitrarily decided to reduce the rent without Mark’s knowledge or approval, and he is the owner of the rental property.

¹⁰⁰ CP 252, 259.

¹⁰¹ RP 60-61.

¹⁰² RP 63-64.

¹⁰³ RP 65.

¹⁰⁴ RP 68.

¹⁰⁵ CP 1138.

7. Teresa Owes to Mark \$12,337 for Taxes that were Improperly Characterized as Real Property Taxes when they were in fact Personal Property Taxes.

The trial court awarded to Teresa \$12,337 in property taxes.¹⁰⁶ The court believed that these taxes were associated with real property taxes that Teresa paid for the Pacific Avenue Property and the Second Avenue Property after the CR2A was assigned and before the Decree was entered.¹⁰⁷ The trial court concluded, however, that “[if] the Court is incorrect that these payments are for the real estate or permanent fixtures on the real estate, then there should be an adjustment made so that Respondent [Mark] only pays Petitioner for the real estate and permanent fixtures taxes on the Pacific Avenue and Second Avenue Properties.”¹⁰⁸

There was evidence before the trial court that it was mistaken and the \$12,337 taxes were for *personal* property taxes on the business and not for *real* property taxes. Exhibit 14 to Mark’s motion to reconsider indicates in Teresa’s attorney’s handwriting the \$12,337 taxes are for “personal property taxes on business at Pacific.”¹⁰⁹ He also presented a Thurston County Treasurer Property Tax/Other Charges Statement indicating the amounts were for personal property taxes.¹¹⁰ Nonetheless, the court awarded the amounts to Teresa and failed to reconsider Mark’s argument that that the taxes were for personal property.¹¹¹

¹⁰⁶ CP 1627-28.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ CP 1419-21.

¹¹⁰ CP 1421.

¹¹¹ CP 1586.

Teresa, therefore, should reimburse Mark because the \$12,337 payment was for personal property taxes and not for real property taxes.

8. The Trial Court Erred when it Ordered Mark Reimburse Teresa for the Children's Medical Insurance and Uncovered Medical Payments, and for Daycare Services Provided by Alan Scott.

On March 18, 2008, the trial court entered an Order Enforcing CR2A / Property Settlement Agreement.¹¹² The court concluded that the CR2A Property Settlement Agreement "will be enforced as of September 21, 2004."¹¹³ The CR2A that the March order enforces provides that "[a]ny disputes in the drafting of the final documents or any other aspect of this agreement (form or substance), or any issue not discussed *shall* be submitted to Harry R. Slusher for binding arbitration (RCW 7.04)."¹¹⁴

Inevitably, the parties disagreed on various issues and the disputed issues were submitted before Mr. Slusher for binding arbitration who made an arbitrator's decision on November 26, 2004 resolving those matters.¹¹⁵ Unpaid daycare and the children's medical insurance and uncovered medical payments, were not issues before Mr. Slusher for binding arbitration.¹¹⁶

On April 29, 2008, the Final Order of Child Support was entered. It states in paragraph 3.20 that back child support is "N/A," which is commonly known to mean "not applicable."¹¹⁷ This provision clearly indicates that there was no outstanding amount due to Teresa for any outstanding costs and expenses

¹¹² CP 828-36.

¹¹³ CP 834.

¹¹⁴ CP 27 (emphasis added).

¹¹⁵ Citation pending Motion to Supplement the Record to include Mr. Slusher's arbitration decision.

¹¹⁶ *Id.*

¹¹⁷ CP 855-67; 861.

concerning child support – whether for outstanding medical bills or outstanding daycare expenses. Additionally, specifically regarding the health care expenses, paragraph 3.19 states that extraordinary health care expenses are split 50% between the parties.¹¹⁸ And, in paragraph 3.15 of the April 2008 child support order, it provides that Mark will begin paying uninsured medical expenses and half the insurance premiums “effective May 2008.”¹¹⁹

But, later that year when the trial court entered its Second Amended Findings of Fact and Conclusions of Law on October 28, 2008, it ordered Mark to reimburse Teresa in the amount of \$19,598 for his half share of the children’s health insurance and uncovered medical expenses.¹²⁰ It also ordered Mark to reimburse Teresa for his half of Mr. Scott’s daycare services, which amounts to \$9,386.35.¹²¹

Mark contends that the trial court overstepped its authority by ordering these medical and daycare reimbursements because the parties were bound by the CR2A to have the issues arbitrated by Mr. Slusher, which did not happen and therefore the order is contrary to a mandatory provision in the CR2A. Additionally, this order is another example of the trial court inappropriately modifying the parties’ Decree of Dissolution and Final Order of Child Support as argued in Mark’s opening brief.

¹¹⁸ CP 861.

¹¹⁹ CP 859-60.

¹²⁰ CP 1628.

¹²¹ *Id.*

E. Conclusion

For the foregoing reasons, this Court should reverse the trial court and vacate those portions of the Second Amended Findings of Fact and Conclusions of Law and Judgment on Findings of Fact and Conclusions of Law that: (a) modified the existing Dissolution Decree and Final Child Support Order that were currently being appealed; (b) attempted to modify the property distribution scheme in the existing Dissolution Decree; (c) attempted to award omitted property, debts or liabilities in a post-decree proceeding; or (d) were based on erroneous evidence. This Court should, however, preserve those portions of the Second Amended Findings of Fact and Conclusions of Law and Judgment on Findings of Fact and Conclusions of Law that merely enforced the exiting Dissolution Decree.

Dated this 26th day of June, 2009.

OLYMPIC LAW GROUP, PLLP



Dennis J. McGlothlin, WSBA No. 28177
Serin Ngai, WSBA No. 38350
Attorneys for Mark LaVergne, Appellant

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION II

MARK A. LaVERGNE,

Appellant,

and

TERESA R. GRIMSLEY-
LaVERGNE,

Respondent.

No. 37731-4

Lower Court Case
No. 03-3-01421-5

APPELLANT'S MOTION TO
SUPPLEMENT THE RECORD

1) IDENTITY OF MOVING PARTIES

Appellant Mark LaVergne, by and through his counsel, Olympic Law Group, PLLP, respectfully request the relief designated in part 2.

2) STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 9.6(a), Appellant Mark LaVergne respectfully requests this Court allow him to supplement the record to include Mr. Harry Slusher's binding arbitration decision dated April 9, 2008.

3) FACTS RELEVANT TO MOTION

The parties' 2004 CR2A requires that the parties engage in binding arbitration before Harry Slusher for all disputes. The parties eventually engaged in binding arbitration before Mr. Slusher and his arbitration decision was issued on April 9, 2008. See **Exhibit A**, attached, which is a true and correct copy of Mr. Slusher's April 9, 2008 binding arbitration decision. This document was never filed with the court, and therefore not included in the record.

ORIGINAL

While drafting Mr. LaVergne's Supplemental Brief, it became necessary to include reference to Mr. Slusher's arbitration decision to explain how many of the final orders dated April 29, 2008 were born out of Mr. Slusher's binding arbitration decision, and to indicate which issues were brought before Mr. Slusher to arbitrate, and which issues were not. Mr. LaVergne's argument relies not only on the final orders that are already part of the record, but also on Mr. Slusher's binding arbitration decision that was never filed with the court.

4) GROUND FOR RELIEF AND ARGUMENT

According to RAP 9.6(a):

Any party may supplement the designation of clerk's papers and exhibits prior to or with the filing of the party's last brief. Thereafter, a party may supplement the designation only by order of the appellate court, upon motion.

This rule allows either party to supplement the record upon motion, if said motion is granted by the Court. According to *City of Redmond v. Arroyo-Murillo*¹, this is the proper rule parties rely on to supplement the record before the Washington Supreme Court.²

Moreover, RAP 1.2(a) states "[t]hese rules will be liberally interpreted to promote justice and facilitate the decisions of cases on the merits."

The document Appellant Mr. LaVergne wishes to add to the

¹ 149 Wn.2d 607, 70 P.3d 947 (2003).

² *Id.* at 610, fn. 4.

record is Mr. Slusher's binding arbitration decision dated April 9, 2008. This binding arbitration decision provides the reasoning behind the final orders in this matter including which topics were arbitrated before Mr. Slusher and which topics were not, which is one of the bases for Mr. LaVergne's argument in his supplemental brief. The arbitration decision was never filed with the court and therefore never included as part of the court record. It is now necessary to include the binding arbitration decision as part of the court record for completeness.

RESPECTFULLY SUBMITTED June 26, 2009.

OLYMPIC LAW GROUP, PLLP

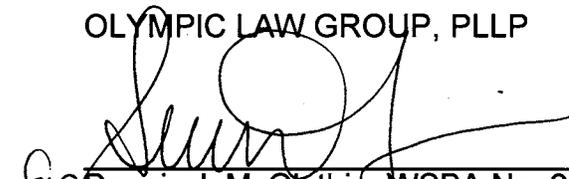

for Dennis J. McGlothlin, WSBA No. 28177
Attorney for Appellant Mark LaVergne
Serin Ngai, WSBA No. 38350

EXHIBIT A

(1)

✓ PMS

GRIMSLEY-LAVERGNE

4.9.08

03.3.01421.5

Arbiter's Decision

Thurston County

1. Several issues have come back to me for resolution through binding arbitration. Post-arbitration remedies are limited to the provisions of RCW 7.04A.

2. I have reviewed the submissions from each office, including the original pre-mediation statements and the full color copy of the parties 9-21-04 CRZA agreement. I have also considered the arguments of counsel, made during the 3/27 telephone arbitration hearing.

3. Mr. LaVerque raised 3 issues in Mr. Gallagher's 3/10 letter, and Mr. Lynch responded. Let me address those first.

(a) It appears there is now agreement that

(2)

Judge Casey will address the referenced personal property concerns.

(b) Include 'medical insurance premiums' (OCS § 3.15) in the child-related expenses which the parties will share on an equal basis. I believe that is within the contemplation of the parties when "uninsured medical expenses" was an included provision of the agreement.

(c) 'Religious upbringing' will not be included as an area of joint decision-making. As a practical matter, each parent may involve the children in his/her own religious beliefs and practices.

4. Now, to the primary issue in this arbitration — the investment accounts with Atlas and WNC. Handwritten page 5 (para. 12) of the parties' CRZA agreement is the operative provision.
5. Following a certain amount of 'back and forth', it was determined that Ms. Grimsley-LaVarque would be awarded all interest in both the

(3)

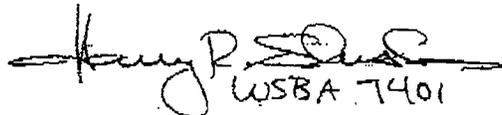
family home and the business. In said para. 12, certain investment accounts were listed (those, I understand, were joint accounts), and there was a reference to "ones in his/her [sole] name", but those were not listed.

6. The accounts with Atlas and WNC (each party had an account in his/her sole name at each location), are, I find, included in the reference to "ones in his/her [sole] name".

7. When Attachment "A" was added to the agreement, it appears that "each keep ones in his/her name" and prior proposals re the listed accounts were all deleted, and replaced by "I get all" - reference being all investment accounts, being those listed specifically, as well as any others in the name of either party.

8. I cannot read this any other way. Mr. Laverque is awarded all 4 accounts with Atlas and WNC.

HARRY R. SLUSHER PLLC, ATTORNEY
FAMILY LAW
ARBITRATION/MEDIATION SERVICE
901-20TH AVE WEST
KIRKLAND, WA 98033


WSBA 7401

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY ON
DEPUTY

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LaVERGNE,

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No. 37731-4

Lower Court Case
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DECLARATION OF
SERVICE

I, RYAN M. BON, hereby declare as follows:

1. I am employed by the law firm of Olympic Law Group, P.L.L.P., a citizen of the State of Washington, over the age of 18 years, not a party to this action, and competent to testify herein.
2. On June 26, 2009, I caused the following documents:
 - A. Appellant's Supplemental Brief;
 - B. Appellant's Motion to Supplement the Record;
 - C. Supplemental Designation of Clerk's Papers;
and
 - C. Declaration of Service;

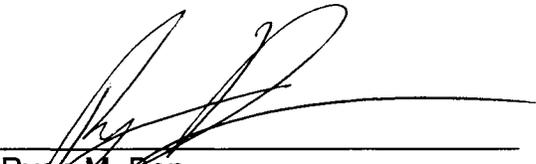
to be served on the attorneys at the following addresses:

ORIGINAL

Robert Martin Morgan Hill
Morgan Hill, PC
2102 Carriage Dr. SW
Building C
Olympia, WA 98502-5700

- VIA FEDERAL- EXPRESS
- VIA FACSIMILE
- VIA EMAIL
- VIA OVERNIGHT
DELIVERY

I certify under penalty of perjury under the laws of the State
of Washington, that the foregoing is true and correct.



Ryan M. Bon
Legal Assistant