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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

No. 45574-9-II

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

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ALEXANDRINA VAN GINNEKEN

Plaintiff

And

MARINUS VAN GINNEKEN

Appellant

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REPLY BRIEF OF RESPONDENT

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*pm 12/19/14*

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## **I. ASSIGNMENTS OF ERROR**

### **A. Response to Assignments of Error.**

1. The trial court was correct when it dismissed the Petition to Partition under Lewis County Superior Court Cause Number 12-2-01220-1 on the basis that the Property Settlement Agreement dated June 10, 2008, was void due to the court's failure to dispose of property pursuant to RCW 26.09.080.

2. The trial court was correct when it granted relief pursuant to CR 60(b)

### **B. Response to Specific Issues Cited as Bases to Assignments of Error.**

1. Accepting the fact that the parties had the right to voluntarily contract via a Property Settlement Agreement to dispose of property, such "contract" was void where it was a product of coercion, undue influence and fraud.

2. RCW 26.09.080 was not satisfied by entry of a Property Settlement Agreement which was constructed on the basis of coercion, undue influence and fraud.

3. Reliefs granted by the trial judge under CR 60(b) were appropriate where the division of property awarded in the

Decree of Dissolution was obtained through coercion, undue influence and fraud.

## **II. STATEMENT OF THE CASE**

### **A. Statement of Facts.**

Appellant, Marinus VanGinneken, and Respondent Alexandrina VanGinneken were married on November 8, 1961 (CP 1). The parties separated on December 15, 2007, after having been married for 46 years (CP 1).

Respondent, Alexandrina VanGinneken, was presented a Property Settlement Agreement by counsel for Appellant Marinus VanGinneken and Marinus VanGinneken on June 10, 2008 (CP 8).

The Property Settlement Agreement was subject to no negotiation on terms whatsoever (VRP at 107) and was presented to Respondent Alexandrina Van Ginneken at a meeting where she was not represented by counsel and was not allowed to have certain members of her family remain in the meeting involving Respondent, Appellant Marinus VanGinneken as well as a representative of counsel for Marinus VanGinneken (VRP at 83).

After having been coerced and intimidated by Appellant Marinus VanGinneken, Respondent signed the Property Settlement Agreement which was subsequently filed with the court on June

11, 2008 (CP 8 and VRP at 110). Her signature on this document also occurred after Mr. VanGinneken applied further pressure to her by stating that the parties had very little money in accounts and that she needed to sign the document to save them money (VRP at 84/95).

The Property Settlement Agreement was signed by Respondent shortly after she had been hospitalized in December, 2007, for a mental breakdown (VRP at 57-58).

The Property Settlement Agreement signed by Respondent under duress didn't divide anything. The conveyance out by the parties of interest in their community real estate as joint tenants with right of survivorship left the ownership of the real property in exactly the same status as had been the case prior to the execution of the deed and prior to the parties' marriage having been dissolved. Appellant did not pay out the \$22,542.00 payment called for in the Property Settlement Agreement at the time these parties' marriage was dissolved even though there were ample funds available to pay out that amount (VRP at 32-33).

The parties' financial accounts were not divided out or distributed under the terms of the Property Settlement Agreement or the Decree of Dissolution. The later executed Quit Claim Deed

conveying the property to Appellant and Respondent as joint tenants with right of survivorship did not change the ownership in the parties' real property in any way.

Appellant managed all of the parties' finances continually throughout their 46 years of marriage and even after the entry of their Decree of Dissolution (VRP at 42).

The parties continued to reside together following the entry of the Decree of Dissolution under December, 2008 (CP 10). During that period of post dissolution decree cohabitation, Appellant Marinus VanGinneken continued to control all aspects of the parties' finances, collecting proceeds from at least three pensions and depositing them to an account, from which he (Appellant) paid out whatever he wanted (VRP at 33, 65-66). Appellant Marinus VanGinneken had no intention whatsoever to divide these parties' real property interests or financial accounts (VRP at 43-44).

Appellant Marinus VanGinneken declined throughout the period of post decree cohabitation to provide to Respondent Alexandrina VanGinneken any accounting whatsoever for the money which was being received into an account exclusively controlled by Marinus VanGinneken.

In September, 2011, Respondent Alexandrina VanGinneken established a new bank account and contracted the Canadian government to have her Canadian pension diverted to the newly established account. (RP at 71-72).

In September, 2011, Respondent Alexandrina VanGinneken contacted the United States government to have her social security diverted to the new account. (RP at 71-72).

In February, 2013, Respondent Alexandrina VanGinneken contacted the Dutch government and had her Dutch pension diverted to her new account (RP at 71-72).

Finally because there had been no division of the marital assets by way of operation of the Property Settlement Agreement or by any court action, Respondent Alexandrina VanGinneken filed a petition to partition the Property Settlement Agreement, out of a desire to finally achieve that which had not been brought about in any fashion by the Property Settlement Agreement or court action.

On October 3, 2013, a trial was held on the petition of Respondent. Testimony of witnesses established that the parties' property interests had not been divided by the Property Settlement Agreement and the subsequent Decree of Dissolution and that this

status was achieved by the intent of Appellant Marinus VanGinneken (VRP at 32, 33, 43, 44).

Testimony further established that Appellant had managed all of the family finances throughout the period of their marriage and that he maintained exclusive 100% control over all financial assets of these parties after their marriage had been dissolved (VRP at 54, 55, 60, 65, 66, 73, 99, 100).

Respondent exercised no independent control or management over jointly held financial assets (VRP at 67).

Testimony from multiple witnesses also established that Respondent was pressured to sign the Property Settlement Agreement by Appellant having told her that the parties had very little money in their bank accounts and that she (Alexandrina VanGinneken) needed to sign the Property Settlement Agreement because of this financial situation (VRP 84, 95).

Appellant Marinus VanGinneken did not disclose substantial financial assets to Respondent at the time of signing the Property Settlement Agreement (VRP at 87-88).

Testimony established that there were funds in excess of \$300,000.00 in accounts available for division between these parties at the time of their dissolution (VRP 88-89).

The Property Settlement Agreement did not mention two bank accounts, from which these parties received interest in the amount of \$3,200.00 for the 2007 tax year, indicating that, by simple mathematics, those accounts had a value during 2007, in excess of \$300,000.00 (VRP 89, 90).

At the end of the presentation of Plaintiff/Respondent's case, Lewis County Superior Court Judge Nelson Hunt dismissed Mrs. VanGinneken's partition case finding that the Property Settlement Agreement and the Decree of Dissolution earlier entered in the case had failed to dispose of these parties' property, making the Property Settlement Agreement, completely void (VRP at 132).

Later, on October 18, 2013, an Order of Dismissal was entered by Judge Hunt. (CP 16).

On October 22, 2013, Marinus VanGinneken filed a Motion for Reconsideration and Memorandum of Law re: Motion for Reconsideration. (CP 17-18).

On October 28, 2013, Judge Hunt denied Marinus VanGinneken's Motion for Reconsideration stating "the real property division was not properly determined by creating a joint tenancy with the right of survivorship and that there were

significant questions regarding the equitable division of the property division...” (CP 19).

On October 30, 2013, Respondent Alexandrina VanGinneken moved the Lewis County Superior Court to vacate the Property Settlement Agreement under Lewis County Superior Court Cause No. 07-3-00472-8.

Argument was held on that motion on November 15, 2013, (CP 24) and Findings of Fact, Conclusions of Law and a judgment were entered on December 10, 2013, partially vacating the Property Settlement Agreement and Decree. (CP 28).

**B. Procedural History.**

The Respondent accepts the statement of procedural history as contained within pages 5-7 of the Brief of Appellant filed with this Court on January 21, 2014, as correct.

**III. ARGUMENT**

1. *Although these parties had a right to voluntarily contract to divide their property, the division of property within the Property Settlement Agreement was actually no division at all and was a product of coercion, fraud, and duress making that Property Settlement Agreement void.*

Trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings. *Brewer v. Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

Settlement agreements are governed by general principles of contract law. *Lavigne v. Green*, 106 Wn.App. 12, 20, 23 P.3d 515 (2001).

The Property Settlement Agreement signed by the parties on June 10, 2008, should be considered completely void under the authorities of *Shaffer v. Shaffer*, 43 Wn. 2d 629, 262 P. 2d. 763 (1953), and *Bernier v. Bernier*, 44 Wn.2d 629, 262 P.2d 763 (1954).

In the *Shaffer* case, the court held that “a trial court has wide discretion in this regard”, but went on to conclude that the division of property in that case was not a division at all. That is exactly what occurred here. Had the parties remained married, their community property would have remained in both of their names. Had one of the VanGinnekenes then died, title would have passed to the survivor of them.

The Property Settlement Agreement signed by these parties on June 10, 2008, simply continued the same status of financial affairs and property ownership of these parties, which had continued over the 46 year period of their marriage.

After the parties marriage was dissolved by entry of a Decree of Dissolution signed on June 10, 2008, Marinus

VanGinneken continued in absolute, complete, and unrelenting control over these parties' finances, collecting proceeds from at least three pensions, and depositing them to an account from which he (Marinus VanGinneken) paid out whatever expenses he chose to pay. (VRP at 33, 65-66).

Appellant Marinus VanGinneken continued to exercise his complete control over these parties' assets while refusing to account whatsoever for monies which were being received and paid out.

**2/3. *RCW 26.09.080 was not satisfied by division of property under the Property Settlement Agreement and the trial court was correct to grant relief under CR 60(b) when that Property Settlement Agreement was signed by Alexandrina VanGinneken under conditions of coercion, undue influence and fraud.***

RCW 26.09.080 requires that a court actually divide out the property interests of a marital community. In the *Bernier* case, the Court decided that property settlement agreements would be found to be binding on the parties and upheld only if they were fair and equitable:

While a property settlement agreement, fairly reached, should have great weight with the court in determining the property rights of the parties to a divorce action, it is not binding upon the court. The rule is well stated in *Lee v. Lee*, 1947, 27 Wn. 2d 389, 400, 178 P. 2d 296, 302; 'As a general rule,

voluntary settlements of property rights are binding on the parties and will be upheld if they are fair and equitable, untainted with fraud, collusion, coercion, undue influence, or the like, although, in subsequent actions for divorce, such settlements or agreements are not binding on the court and may be disregarded if the court is satisfied that they are unfair, unjust, or do not constitute a proper division of the property. *Tausick v. Tausick*, 52 Wn. 301, 100 P. 757; *Malan v. Malan*, 148 Wn. 537, 269 P. 836; *State ex rel. Atkins v. Superior Court*, 1 Wn. 2d 677, 97 P. 2d 139; 27 C.J.S., Divorce § 301, P. 1157.’

*Bernier*, 44 Wn. 2d at 450, 267 P. 2d at 1067-68.

There was no property settlement agreement “fairly reached” which appropriately divided these parties’ real property and personal property interests, including financial accounts. There was not full disclosure by Appellant Marinus VanGinneken of these parties’ financial holdings prior to signature by the parties to the Property Settlement Agreement. In particular, Marinus VanGinneken concealed from Alexandrina VanGinneken the existence of bank accounts having aggregate values in excess of \$300,000.00, while claiming that these parties had very little money in accounts and that she (Alexandrina) needed to sign the document to save them money.

To assume that Alexandrina VanGinneken was not unduly influenced to sign the Property Settlement Agreement by Marinus

VanGinneken would require this court to ignore the facts of the case and indulge in conclusions which are fantasy.

Coercion and duress directed toward Alexandrina VanGinneken by Marinus VanGinneken was consistent with his behaviors throughout the parties' 46 year marriage.

It is clear from the facts and circumstances of this case, that it was the intention of Marinus VanGinneken to continue his control over the real property and financial holdings of these parties even after the marriage was dissolved.

Based upon these facts and circumstances, the decision of Judge Hunt in finding the Property Settlement Agreement to be void was well founded.

Alexandrina VanGinneken was clearly entitled to relief from judgment pursuant to CR 60(b), where there was duress, fraud, and irregularity in the proceedings which resulted in entry of a final Decree of Dissolution.

The facts which support Respondent Alexandrina VanGinneken's motion to the court for relief from judgment pursuant to CR 60(b) have been stated and restated earlier within this brief. RCW 26.09.080 mandates that a court make disposition of the property and liabilities of the property, either community or

separate, as shall appear just and equitable, after considering certain relevant factors.

“In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lack jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community of separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.”

There is absolutely no evidence of record to establish that the Court Commissioner who signed the Decree of Dissolution, took into consideration those relevant factors. The Court Commissioner was presented documents, and she signed those without there having been any thorough review or inquiry on the

issue of whether or whether not division of these property interests was fair and/or equitable.

Outside of the recitations within the Property Settlement Agreement, there has been and can be established no evidence whatsoever that the agreement was fairly reached through careful consideration and negotiation between the parties.

The actions taken by Marinus VanGinneken afterward demonstrate even less fairness and equity.

The statements of the court in the *Bernier* case, earlier cited, clearly establish that a court is justified in disregarding a property settlement agreement where the effects of that agreement were not fair and equitable.

The decision of Judge Hunt in granting the CR 60(b) reliefs requested by Respondent Alexandrina VanGinneken should be upheld and sustained for the reason that the records and files of this case, including the verbatim report of trial testimony clearly establish substantial grounds for relief from judgment.

#### **IV. ATTORNEY FEE REQUEST**

Appellant Marinus VanGinneken requests that this court award him attorney fees on appeal. There is no factual basis nor

equitable principle by which this attorney fee award should be granted.

Respondent accepts the fact that there are appropriate cases where appellate courts grant prevailing parties attorney fees on appeal. Taking into consideration the facts and circumstances which have been proven to have taken place in this case, not only is the idea that Appellant Marinus VanGinneken should be awarded attorney fees outrageous, but patently offensive.

The record of this case includes a 46 year history of control, coercion, and abuse suffered by Respondent Alexandrina VanGinneken at the hands of her husband. Lewis County Superior Court by approving a property settlement agreement which did not divide these parties' properties, enabled Appellant Marinus VanGinneken to continue absolute, unrelenting, and complete control over the life of Alexandrina VanGinneken.

An award of attorney fees by this court to Marinus VanGinneken, should he prevail, would constitute a ratification of these inequities and injustices.

This court clearly has inherent authority to award attorney fees where and when appropriate based upon the case authorities cited by Appellant, *Standing Rock Homeowners Association v.*

*Misich*, 106 Wn.App. 231, 247, 23 P.3d 520 (2001); *Brandt v. Impero*, Wn.App 678, 683, 463 P.2d 197 (1969). That inherent authority, however, is not a mandate.

Neither does RCW 26.09.140 mandate an attorney fee award. That statute simply restates that this court has discretion to award attorney fees and costs on appeal.

The complete text of RCW 26.09.140 is instructive:

“The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys’ fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys’ fees in addition to statutory costs.

The court may order that the attorneys’ fees be paid directly to the attorney who may enforce the order in his or her name”.

RCW 26.09.140 instructs a court to consider the financial resources of both parties prior to deciding that an attorney fee and cost award should be made. The statute contains no provision which releases an appellate court from this duty.

This court should not award attorney fees and costs to either party, without there being the opportunity to carefully review the financial resources of the parties as well as the effect that an attorney fee award would have upon the party against whom that award is given.

When this case is remanded to the trial court for further proceedings, that court will have before it all of the information as to these parties financial circumstances and can then consider whether or whether not a party should be awarded attorney fees and costs against the other.

For all of the reasons set forth above, this court should not grant the request of Appellant Marinus VanGinneken for an award of attorney fees and costs on this appeal.

## **V. CONCLUSION**

The appellant has provided no legal or factual basis upon which this court should reverse the decisions of the trial judge in striking down the Property Settlement Agreement and in turn granting reliefs to Alexandrina VanGinneken pursuant to CR60(b).

The esoteric recitation of statutory and case law authorities by Appellant, while interesting, provides no clear basis by which this court should reverse the trial court's decisions.

Marinus VanGinneken clearly wants this court to completely disregard the facts and rely upon mundane and esoteric theories of law to ratify and continue a case result which is clearly inequitable and abusive in its final affect upon Respondent Alexandrina VanGinneken.

This court should disregard the Appellant's open invitation to ignore the facts and should, instead, rely upon those facts on a basis to deny these appeals and remand this case to the trial court for further proceedings.

Further proceedings will then allow the darkness of Marinus VanGinneken's carefully crafted yet completely inequitable Property Settlement Agreement to be subjected to the light.

In the clear light of day, that Property Settlement Agreement can be examined on the basis of the injustice that its implementation clearly presents.

