

FILED
COURT OF APPEALS
DIVISION II

No. 50920-2-II

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STATE OF WASHINGTON

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

SHANE D. REGO, Petitioner/Respondent

Vs.

SUZANNE J. REGO, Respondent/Appellant

Clallam County Superior Court
Cause No. 16-3-00052-1
The Honorable ERIC ROHRER

RESPONDENT'S BRIEF

Submitted by:
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A. STATEMENT OF THE CASE

The Petitioner/Respondent (“Mr. Rego”) filed a Petition for Dissolution on February 16, 2016. The Respondent/Appellant (“Ms. Rego”) filed a response on March 4, 2016. The parties engaged in ongoing litigation throughout the period leading up to a trial on August 28, 2017, before the Honorable Eric Rohrer, Clallam County Superior Court.

A partial resolution was reached by the parties, the original document filed on May 17, 2017. CP 72-74. The CR2A Agreement¹ (“Agreement”) was drafted March 16, 2017, by Mr. Rego. Ms. Rego reviewed the Agreement over the next two months. Ms. Rego and her attorney inserted hand written changes to the document, executing the document on May 10, 2017. Mr. Rego accepted the changes made by Ms. Rego, signing the document, along with his counsel, on May 16, 2017.

The Agreement left open issues related to the parenting plan, child support and disposition of the sale proceeds of the community residence. CP 74. An agreement was reached for both a final parenting plan and final child support order. The Final

¹ Superior Court Civil Rule 2A applies to stipulations or agreements made between parties. The rule prohibits the court from adopting an agreement unless evidence of the agreement is in writing and subscribed by the attorneys.

Divorce Decree entered on September 15, 2017, the final parenting plan and child support orders filed July 19, 2017.² CP 35.

Mr. Rego filed a trial brief referencing the Agreement, outlining the issues previously resolved after execution of the Agreement and setting out his position regarding unresolved issues. CP 65-67. The brief included a copy of the previously filed Agreement and a spreadsheet summarizing the assets and liabilities which had been previously resolved through the Agreement. CP 68-71. Ms. Rego did not file her trial brief with the court although the trial court references it. CP 61.

The trial court heard testimony from both Mr. Rego and Ms. Rego. At the close of testimony, counsel for both parties presented argument to the court. The Second Amended Statement of Arrangements by Ms. Rego designated only the closing arguments to be transcribed. The Report of Proceedings contains only closing arguments of the attorneys and questions from the court. RP 1-28.

Judge Eric Rohrer issued his Memorandum Opinion on August 29, 2017. The Court listed the various assets and liabilities in the Opinion drawn directly from the Agreement, including the

² Final Divorce Decree's were entered on September 15, 2017, and September 25, 2017. The September 25, 2017, Decree was amended solely to provide for a name change for Ms. Rego. Only the September 15, 2017, Decree was designated in the Clerk's Papers by Ms. Rego.

identification of Mr. Rego's separate property. CP 58. The Memorandum Opinion identified the net allocation of the community property awards, along with the amount necessary to equalize the award to each party. CP 59.

Ms. Rego sought reconsideration of the trial court's Memorandum Opinion on September 8, 2017. Ms. Rego asserted that she had no opportunity to provide her interpretation of the Agreement (CP 51) and that the trial court improperly considered extrinsic evidence in interpreting the Agreement. CP 55. Ms. Rego included her own declaration along with the motion for reconsideration. CP 48. The "extrinsic evidence" identified was the spreadsheet attached to Mr. Rego's trial brief. CP 58.

September 12, 2017, the trial court denied Ms. Rego's request for reconsideration. The trial court reviewed its process for deciding issues submitted to it. CP 44. In this matter the Agreement created an unequal property distribution which was a part of what the judge was tasked with resolving at trial. CP 46.

Ms. Rego filed an appeal on September 27, 2017, contesting the allocation of \$10,717 to equalize the property distribution. CP 30.

B. SUMMARY OF ARGUMENT

Summary

The sole issue in this appeal is whether the trial court's allocation of \$10,717.00 to equalize the property distribution in accordance with the Agreement should be affirmed. The trial court properly viewed the Agreement as a whole. The material terms of the agreement are not disputed by Ms. Rego, but the consequence of the terms is contested. Ms. Rego contends incorrectly that an attachment to a trial brief was evidence considered by the court in error. The trial court followed the Agreement of the parties and resolved those matters left for the court by the terms of the Agreement, without recourse to the spreadsheet.

Ms. Rego does not assign any error or challenge any other aspect of the trial court's decision.

The trial court's Memorandum Opinion, Memorandum Opinion RE Reconsideration denying Ms. Rego's motion and Final Divorce Order should be affirmed.

C. ARGUMENT

I. Standard of Review

A trial court's decision will not be disturbed on appeal absent a manifest abuse of discretion. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). A trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion. *Id.* at 810. Findings are reviewed under a substantial evidence standard, meaning sufficient evidence to persuade a rational person the premise is true. *Sunnyside Valley Irr. Dist. V. Dickie*, 873, 880, 73 P.3d 369 (2003). A reviewing court will not substitute its judgment for that of a trial court if the standard is satisfied. *Id.* at 880. The review of whether a trial court's conclusions of law flow from its findings of fact is de novo. *In re Marriage of McDermott*, 175 Wn.App. 467, 483, 307 P.3d 717, review denied, 179 Wn.2d 1004 (2013). Rules of construction applicable to statutes and contracts are used to determine the intent of a dissolution court. *In re Marriage of Thompson*, 97 Wn.App. 873, 988 P.2d 499 (1999) (citing *In re Marriage of Gimlett*, 95 Wash2d 699, 704-05, 629 P.2d 450 (1981)).

II. The trial court appropriately considered the evidence adduced at trial in resolving issues left to the trial court per the terms of the CR2A Agreement.

The plain language of the trial court's August 29, 2017, Memorandum Opinion demonstrates it relied exclusively on the Agreement entered by the parties prior to the trial. The trial court expressly identified the CR2A stipulation and agreement as the source of its summary. CP 58. Ms. Rego asserts that the spreadsheet attached to Mr. Rego's trial brief formed the basis of the trial court's decision, or was considered, or adopted by the trial court. Nothing in the August 29, 2017, Memorandum Opinion supports the proposition that the trial court impermissibly relied on the spreadsheet. A trial brief does not constitute evidence, nor would any attachments be evidence. The trial court explained its understanding of the spreadsheet as being designed to explain Mr. Rego's argument. RP 23. Arguments are not evidence. The August 29, 2017, Memorandum Opinion independently found that Mr. Rego had received a net community property award of \$19,785 and Ms. Rego a community property award of \$41,218, requiring a marital lien of \$10,717 to equalize the allocation of the community

property. The Memorandum Opinion and Memorandum Opinion re Reconsideration constitute the findings of fact made by the trial court following trial and incorporating the Agreement of the parties.

The argument by Ms. Rego that the spreadsheet constituted extrinsic evidence falls short based on her own characterization of applicable law. Ms. Rego points to *Spectrum Glass Co., Inc. v. Public Utility Dist. No. 1 of Snohomish County* for factors applicable to extrinsic evidence. 129 Wn.App. 303, 119 P.3d 854 (2005). The issues in *Spectrum Glass* involved a dispute over rates charged by the Public Utility District and multiple contracts over time, coupled with the applicability of specific terms within the contracts. *Id.* at 312. The assertion that the spreadsheet was evidence considered by the trial court fails because the spreadsheet was not evidence. Nor was the spreadsheet employed to interpret the Agreement by the trial court.

The trial court's decision of September 25, 2017, makes clear that it followed the parties' Agreement. CP 46. The trial court was required to resolve various requests from both parties prior to a final determination regarding the final amount needed to equalize the distribution. CP 46. The Agreement read as a whole resulted in an unequal property distribution and included a provision that the

sale proceeds of the residence were to be used to equalize the property distribution.

Ms. Rego urges that the spreadsheet be considered as providing a conclusion independent of the Agreement, relied upon by the trial court. The spreadsheet was not admitted as an exhibit in the trial court nor evidence nor could it be considered as evidence solely by being attached to a trial brief. The only purpose of the spreadsheet was to engage in totaling the assets and liabilities allocated through the Agreement, as an attachment to a trial brief. The trial court engaged in its own calculations, expressed in the September 15, 2017, Memorandum Opinion, needing no assistance from external sources. CP 58.

The interpretation offered by Ms. Rego that the parties were not in agreement regarding the amount necessary to equalize the property award, without consideration of the liabilities of the community, is at best a strained interpretation. RCW 26.09.080 requires the trial court to dispose of all the property and liabilities of the parties. Four of the issues submitted to the trial court specifically related to the allocation of sale proceeds. CP 59. The trial court below determined the overall distribution of property and

liabilities as set out in the Agreement before proceeding to address the various issues presented at trial. CP 59.

III. The trial court correctly enforced the CR2A Agreement before resolving the matters left to the court for determination.

The purpose of CR2A is not to impede without reason the enforcement of agreements intended to settle or narrow a cause of action. *Marriage of Ferree*, 71 Wn.App. 35, 40-41, 856 P.2d 706 (1993). A party's second thoughts about the amount of a settlement award does not make an agreement disputed within the meaning of CR2A. *Lavigne v. Green*, 106 Wn.App. 12, 20., 23 P.3d 515 (2001). Ms. Rego proposes a strained interpretation of the Agreement's provision to equalize the property distribution using the sale proceeds of the residence. She suggests that "property distribution" should only be deemed to apply to personal property, without regard to any other aspect of the community division matters. Ms. Rego is asserting that she now disagrees with the amount she was awarded through the Agreement.

The trial court was asked to resolve issues which had not been settled previously by the parties at trial. The trial court's decision falls squarely within the parameters of RCW 26.09.070(3).

The statute provides that a separation contract shall be binding upon the court unless it finds after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion that the separation was unfair at the time of its execution. The trial court was given that express opportunity through Ms. Rego's motion for reconsideration along with her declaration. CP 50, CP 48.

The issue for the court is whether the agreement was entered into fairly, not to determine the economic fairness of the agreement. *Shaffer v. Shaffer*, 47 Wn.App. 189, 193, 733 P.2d 1013 (1987). In *Shaffer* the wife contended that the agreement was unfair because she was awarded only one third of the assets. *Id.* at 192-193. Ms. Rego argued in her motion for revision that the Agreement here was unfair in that she did not believe that the community liabilities should be contemplated by the trial court in adopting the Agreement. CP 49. The trial court addressed that specific complaint in denying the motion for revision, pointing out that an unequal distribution was neither sought nor justified. CP 45.

Ambiguous contracts are generally construed against the drafter. *Pierce County v. State*, 144 Wn.App. 783, 813, 185 P.3d 594 (2008). Unlike *Pierce County v. State*, where the State drafted

two contracts regarding the provision of mental health services, Mr. Rego drafted the original Agreement here and Ms. Rego made several substantive revisions to the agreement. CP 74. Ms. Rego executed the Agreement on May 10, 2017. Mr. Rego accepted and executed the Agreement six days later on May 16, 2017. Ms. Rego in May 2017 declined to agree to a final parenting plan, which was later entered by agreement in July 2017. Similarly, no agreement was made as to child support in May but a final child support order was submitted along with the final parenting plan. Ms. Rego inserted her provision regarding maintenance, which was not the term originally in the Agreement. Ms. Rego struck language proposed by Mr. Rego regarding reimbursement of expenses related to the sale of the residence and inserted new language that there was no agreement regarding reimbursement.

Ms. Rego suggestion that the “plain meaning of property should simply be those property items awarded to each party, not including liabilities” strains credulity. The Agreement allocated specific assets and liabilities to each party. It was clear for both sides to recognize that the allocation resulted in an unequal distribution. The way the Agreement addressed this imbalance was to provide for equalization with the sale proceeds. It is

implausible to conclude that Mr. Rego intended to remove consideration of the community debt from the equalization of the overall division.

The trial court in its Memorandum Opinion re Reconsideration clearly stated that the court's goal is almost always to equalize the awards such that each party received the same net value of community property. CP 44. The trial court is required to make disposition of the property and the liabilities of the parties, either community or separate. RCW 26.09.080. The trial court, pursuant to the parties' agreement, equalized the property distribution. CP 46. Equalize meaning to make equal; to cause to correspond or be in the same amount or degree. *Black's Dictionary* (7th abridged ed. 2000).

Ms. Rego's argument that her due process rights were in some fashion violated fails for the reasons stated above. The trial court considered her motion for revision prior to the entry of the final decree. Ms. Rego presented her position with respect to the trial court's decision in her motion for revision, employing the same objections presented here. Ms. Rego had counsel providing advice with respect to the Agreement which was entered months prior to trial. Ms. Rego had the opportunity to present evidence at trial and

provided a trial brief to the court, referenced by the trial court although not filed. CP 61. Ms. Rego's views and objections were fully assessed by the trial court and denied, as not having a legitimate basis for reconsideration. CP 46.

Ms. Rego's claim of a violation of her due process rights flowing from a violation of the rules of evidence is also inapposite. ER 901(a) applies to authentication or identification as a condition which must be satisfied prior to admission. The trial court never admitted as an exhibit the spreadsheet complained of, therefore the rules of evidence do not apply.

IV. Erroneous assignments of error and unsupported assignments must be disregarded.

Where Ms. Rego presents no argument in her brief on a claimed assignment the assignment of error is waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). An appellate brief must include argument in support of the issues presented along with citations to legal authority or they are waived. *Tegman v. Accident & Med. Invest.*, 107 Wn.App. 868, 30 P.3d 8 (2001) *rev'd on other grounds*, 150 Wn.2d 102, 75 P.3d 497 (2003).

Ms. Rego's brief makes references to testimony at trial along with assertions regarding whether either party presented evidence or testimony related to the Agreement. The Record of Proceedings is limited to the closing arguments. The only record of the actual trial is reflected in the Clerk's Minutes. CP 63-64. Consequently, all discussion of or references to statements outside of the record should be disregarded. RAP 10.3(5), (6).

Ms. Rego assigns error to the trial court's admission and adoption of the spreadsheet as a violation of her due process rights. Ms. Rego admits, in her brief on page 13, that the spreadsheet was never submitted to the trial court as an exhibit. Nothing in the record supports her claim that the trial court considered the contents of a trial brief or any of its attachments as evidence. A trial brief, even one containing charts or summaries, is simply not evidence.

Mr. Rego requests that all unsupported assignments of error be disregarded by the appellate court.

V. Shane Rego requests Attorney Fees and Costs

The Respondent requests that attorney fees and costs be awarded to him as per RAP 18.1 and RAP 14.2.

The Respondent requests attorney fees under RCW 26.09.140. The appellate court may order a party to pay for the costs and attorneys' fees to the other party.

The Petitioner has created needless and expensive litigation in this case. The ongoing expense due to this litigation has caused the Respondent financial detriment.

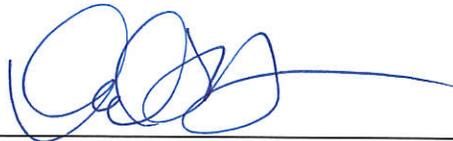
For all the reasons discussed, the defendant asks for a full award of all attorney fees incurred in defending this appeal and costs associated with the appeal.

D. CONCLUSION

The Respondent requests the court affirm the trial courts Memorandum Opinion; Memorandum Opinion RE Reconsideration; Final Divorce Order of September 15, 2017; and Amended Final Divorce Order of September 25, 2017; award full attorney fees and costs to the defendant.

DATED this 27th day of February, 2018.

Respectfully submitted,



Carol L. Mortensen, WSBA # 34283
Attorney for Petitioner/Respondent

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

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

SHANE D. REGO
and
SUZANNE J. REGO
Respondent/Appellant.

NO. 50920-2-II
DECLARATION OF MAILING

I, Kyla Maupin-Carver, the undersigned, hereby certify and declare under penalty of perjury that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to the cause herein.
2. I am employed by the law firm of Carol L. Mortensen, P.S.. My business and mailing addresses are 916 Georgiana Street, Port Angeles, WA 98362.
3. On the 27th Day of February, 2018, I served true copies of the following:

Respondent's Brief

To the following via the method(s) indicated:

William Payne
Attorney at Law
P. O. Box 390
Sequim WA 98382

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma WA 98402-2806

BY: U.S. MAIL

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

Dated at Port Angeles, Washington this 27th day of February, 2018.


Kyla Maupin-Carver

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