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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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Nos. 29235-5-III, 29332-7-III

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

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In re the Marriage of  
FRANCES J. BOGART,  
Petitioner/Respondent,  
and  
WARREN G. BOGART,  
Respondent/Appellant.

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APPEAL FROM THE SUPERIOR COURT OF WALLA WALLA  
COUNTY, THE HONORABLE JOHN W. LOHRMANN, JUDGE

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APPELLANT'S REPLY BRIEF

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### III. ARGUMENT

#### A. STANDARD OF REVIEW

Respondent urges the Court to review the trial court's order denying appellant's motion to vacate for abuse of discretion. RB at 10. Review for abuse of discretion is not appropriate here, as the trial court, had a nondiscretionary duty to vacate a void judgment. *Marriage of Maxfield*, 47 Wn. App. 699, 703, 737 P. 2d 671 (1987) (“*There is no question of trial court discretion when a judgment is void, unlike attacks on judgments based on other grounds specified in CR 60 (b). The court has a nondiscretionary duty to grant relief.*”); *Kennedy v. Sundown Speed Marine, Inc.*, 97 Wn. 2d 544, 549, 647 P. 3d 30, cert. denied sub nom. *Volvo Penta of America v. Kennedy*, 459 U.S. 1037 (1982) *Marriage of Markowski*, 50 Wn. App. 633, 635, 749 P. 2d 754 (1988). Therefore, in a case such as this, the trial court's decision to deny appellant's motion to vacate a judgment for want of jurisdiction is reviewed *de novo*. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P. 2d 1229 (1997); *Marriage of Robinson*, 159 Wash.App. 162,--P.3d--, 2010 WL 5298816 at 2.

**B. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RELIEF FROM ORDER RE SALE OF REAL PROPERTY.**

Respondent fails to address the central issue in this appeal. The issue is not, as respondent presents, what authority the trial court has to order sale of real property. BR at 11. Instead, the issue in this case is whether the trial court can order, post-decree, a sale of real property awarded to one of the parties. None of the authorities relied upon by respondent involve a post-decree order to sell real property awarded to one party in a dissolution of marriage. In *Murphy v. Murphy*, 44 Wn. 2d 737, 270 P. 2d 808 (1954), in the final decree, the trial court ordered the parties' partially finished home to be listed for sale, the proceeds to be applied to retire the parties' debt, and the balance to be divided equally between the parties. No issue of the trial court's jurisdiction to order such a sale was raised. Nor was there raised any issue regarding the jurisdiction to order the sale of the parties' real property after such property had been awarded to one of the parties in the decree of dissolution. *Murphy* is therefore inapplicable here.

In *Hokamp v. Hokamp*, 32 Wn. 2d 593, 203 P. 2d 357 (1949), the trial court order the parties' house sold. On appeal, the court concluded that the cost of maintaining such a large house would have been a burden upon the former wife, and therefore upheld the trial court's order of sale.

32 Wn. 2d 598. Neither party challenged the trial court's jurisdiction to order the sale of the property as part of its final property distribution. Nor was there presented any issue regarding the trial court's jurisdiction to order post-decree a sale of the real property awarded in the decree to one of the parties.

In *Shay v. Shay*, 33 Wn. 2d 408, 205 P. 2d 901 (1949), the trial court ordered the parties real property sold, subject to court approval, and allowed the husband to keep the real property by paying the wife one-half of the net equity, after deducting certain obligations which the husband was ordered to pay. The trial court's order of sale was affirmed on appeal. No issue was raised regarding the court's jurisdiction to order post decree a sale of the real property awarded in the decree to one of the parties.

In *Marriage of Sedlock*, 69 Wn. App. 484, 849 P. 2d 1243, *review denied*, 122 Wn. 2d 1014 (1993), the court held, in light of prior cases in which the trial court's forced sale of property was affirmed on appeal, that the trial court had jurisdiction to order the sale of the family home. 69 Wn. App. 502. Once again, no issue was raised regarding the trial court's jurisdiction to order post-decree a sale of real property awarded in the decree to one of the parties.

In light of the foregoing, neither *Murphy*, nor *Hokamp*, nor *Shay*, nor *Sedlock* provides controlling authority on the issues presented here.

Respondent makes no attempt to reconcile his argument with RCW 26.09.170 (1): “*The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.*” By ordering the River Road property sold, the Order Re: Sale of Real Property improperly modified the property distribution in the decree. *Marriage of Bobbitt*, 135 Wn. App. 8, 18, 144 P. 3d 306 (2006) (“*Esser's motion to allow her to sell the Yakima property and retain the net proceeds to satisfy her judgments against Bobbitt effected an improper modification of the 2002 property division.*”). Neither the trial court nor respondent made any pretense of satisfying the conditions that justify reopening a judgment. Therefore, as in *Marriage of Bobbitt*, the trial court acted without statutory authority by improperly modifying the property distribution in the decree. In the absence of statutory authority, the trial court lacked jurisdiction to order such a sale. “*A court has no jurisdiction except that which is conferred by the applicable statutes.*” *Marriage of Robinson*, 2010 WL 5298816 at 5; *Palmer v. Palmer*, 42 Wn. 2d 715, 716, 258 P. 2d 475 (1953).

Respondent argues that courts have broad power to enforce their divorce decrees. BR at 11-12. Neither *Palmer v. Palmer* support a post-

decree order to sell real property awarded in a decree to one of the parties. Respondent's reliance upon *Palmer* and *Arneson* is therefore misplaced.

Respondent argues that if courts have the power to order sale of real property pre-decree, they should have the authority to do so post-decree. BR at 12-13. Unfortunately, respondent has not and cannot provide a single controlling Washington authority that so holds. In the absence of such authority, respondent's argument should not be considered. RAP 10.3 (a) (6), (b); *Grant County v. Bohne*, 89 Wn. 2d 953, 958, 577 P. 2d 138 (1978).

Respondent's argument that appellant consented to the sale of the River Road property lacks merit. BR 13-14. Respondent offers no evidence that appellant consented to sale of the River Road property on the terms set forth in the Order Re: Sale of Real Property. Where in the record did Appellant consent to list the property with a neutral realtor? Where in the record did Appellant consent to having the listing price for the property be determined by the court? Where in the record did Appellant consent to have the sale of the property supervised by the trial court? Nowhere! The fact that appellant was endeavoring to have the River Road property sold through his realtor on terms acceptable to appellant cannot in any way be viewed as consent to have the property sold on terms decided by the court.

**C. APPELLANT IS NOT PRECLUDED FROM CHALLENGING THE TRIAL COURT'S JURISDICTION TO ORDER POST-DECREE A SALE OF THE RIVER ROAD PROPERTY.**

Respondent argues that the trial court's decision on subject matter precludes appellant from relitigating the issue. BR 14-18. The same argument was raised and rejected in *Marriage of Scanlon and Witrak*, 110 Wn. App. 682, 685, 42 P. 3d 447 (2002):

On appeal, Scanlon maintains that the April 1999 judgment for child support arrearage awarded to Witrak should be vacated under CR 60(b) because the trial court lacked subject matter jurisdiction. Witrak contends that Scanlon's argument cannot be raised for the first time on appeal because it is an improper collateral attack on the underlying judgment. Witrak's argument is without merit because Scanlon is only appealing the order denying his CR 60(b) motion. That a favorable ruling on appeal would vitiate the underlying order does not convert this into an appeal of that order and judgment. In any case, lack of trial court jurisdiction may be raised for the first time on appeal.<sup>FN3</sup>

FN3. RAP 2.5(a) (1) and (3).

*See also, Marriage of Robinson*, 159 Wn. App. 162, -- P. 3d -- (2010).

Respondent attempts to re-characterize the trial court's order of sale as an error of law. BR 15-16. To the contrary, the trial court's post-

decree order to sell the River Road property was made without jurisdiction. *Marriage of Bobbitt*, 135 Wn. App. 15.

Respondent misplaces reliance upon *Marley v. Department of Labor & Industries*, 125 Wn. 2d 533, 886 P. 2d 189 (1994). BR 15. *Marley* involved a miscalculation of workers compensation benefits. Here, in contrast, the trial court acted beyond its statutory authority.

Respondent also misplaces reliance upon *Marriage of Furrow*, 115 Wn. App. 661, 63 P. 3d 821 (2003) and *Marriage of Wilson*, 117 Wn. App. 40, 68 P. 3d 1121 (2003). BR 15-16. Neither *Furrow* nor *Wilson* involved a post-decree order to sell real property that had been awarded in the decree to one of the parties. Neither *Furrow* nor *Wilson* involved a post-decree modification of the property distribution in a decree of dissolution. Neither *Furrow* nor *Wilson* involved RCW 26.09.170 (1).

Respondent misplaces reliance upon Restatement (Second) of Judgments § 12. BR 16. That section contains an exception that permits litigation of the court's subject matter jurisdiction if "[t]he subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of discretion." Restatement (Second) of Judgments § 12 (1). That exception applies here.

Respondent attempts to distinguish *Marriage of Bobbitt* by pointing out that *Bobbitt* involved an appeal from a judgment, not an order

denying a motion to vacate. BR 17-18. But the issue in *Bobbitt* and this case is the same: does a trial court in an action for dissolution of marriage have jurisdiction to enter an order post-decree to sell real property that had been awarded in the decree to one of the parties? In *Bobbitt*, the Court of Appeals agreed that the trial court had exceeded its jurisdiction in awarding property that had been awarded to the appellant in the decree. 135 Wn. App. 15. A similar conclusion is warranted here with regard to the trial court's Order Re: sale of Real Property.

**D. THE TRIAL COURT ERRED IN FINDING APPELLANT IN CONTEMPT.**

Respondent offers no contrary argument to appellant's argument that as the trial court's order was void for lack of subject matter jurisdiction, it follows that any violation of that order cannot produce a valid order of contempt. Respondent offers no contrary argument to appellant's argument, that as the Decree awarded to respondent the River Road property as part of the property settlement, under *Marriage of Curtis*, 106 Wn. App. 191, 199-201, 23 P. 3d 13, *review denied*, 145 Wn. 2d 1008 (2001), appellant may not be held in contempt for failure to pay that judgment. Respondent also offers no contrary argument to appellant's argument that the Order Re Contempt and CR 60 Motion is defective for lack of findings of fact setting forth the basis of contempt, and the order fails to contain a required finding of either bad faith or intentional

conduct. Appellant can only conclude that respondent concedes appellant's argument on these points.

**E. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO RESPONDENT FOR CONTEMPT.**

Respondent fails to offer any contrary argument to appellant's argument that as that the trial court's contempt against appellant was invalid, it follows that the trial court's award of attorney fees for contempt must also fail. Appellant can only conclude that Respondent concedes appellant's argument on this point.

**F. THE TRIAL COURT ERRED IN ORDERING APPELLANT TO SIGN A LISTING AGREEMENT FOR THE RIVER ROAD PROPERTY.**

Respondent fails to offer any contrary argument to appellant's argument that if the trial court could not order that the property be sold, it follows that the trial court had no greater authority to order appellant to list the property for sale. Appellant can only conclude that Respondent concedes appellant's argument on this point.

**G. THE TRIAL COURT ERRED IN AWARDING RESPONDENT ATTORNEY FEES AT TRIAL AND ON APPEAL.**

The touchstone for an award of attorney fees under RCW 26.09.140 is need and ability to pay. The trial court denied attorney fees to either party. *"Given the sizeable equalization payment awarded to the*

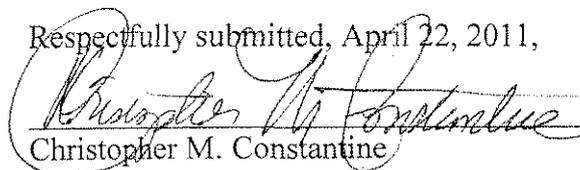
wife, no attorney fees of costs shall be awarded to either party...”<sup>1</sup> The same considerations govern the Order Re: Signature on Listing Agreement, Attorney Fees at Trial Level and Attorney Fees on Appeal.<sup>2</sup>

Respondent argues that attorney fees may be awarded for intransigence. BR 18-19. Respondent fails to indicate whether she made such an argument in the trial court. Nor does respondent identify any finding of intransigence by the trial court. Therefore, respondent’s argument regarding intransigence should not be considered. RAP 2.5 (a) (“...A party may present a ground for affirming a trial court decision which was not presented to the trial court **if the record has been sufficiently developed to fairly consider the ground**.... (Emphasis added)”).

#### IV. CONCLUSION

The trial court’s orders appealed from should be reversed.

Respectfully submitted, April 22, 2011,



Christopher M. Constantine

WSBA # 11650

Of attorneys for Appellant

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<sup>1</sup> CP 28

<sup>2</sup> CP 341-42

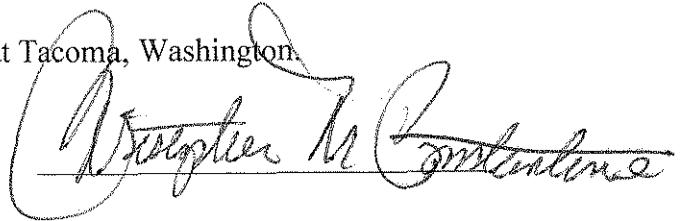
**V. CERTIFICATE OF MAILING**

I, Christopher M. Constantine, certify that on April 8, 2011, I served upon Respondent and appellant copy of the APPELLANT'S REPLY BRIEF by depositing a copy of the same in the United States Mail, first-class postage prepaid, addressed to respondent's counsel and to appellant's co-counsel at the following addresses:

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Dated this 8 day of April, 2011, at Tacoma, Washington.

A handwritten signature in cursive script, reading "Christopher M. Constantine", written over a horizontal line.