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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOANNE M. GRAHAM,

Appellant

and

ARCH DAVID GRAHAM,

Respondent.

BRIEF OF RESPONDENT

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I. ISSUES BEFORE THE COURT

1. Did the Court err in denying appellant's Motion to Vacate and Modify the Decree of Dissolution?

Short Answer:

No. A court cannot make a contract for parties which they did not make for themselves.

2. Did the Court err by not giving effect to all the words of Paragraph 3.2 Other that the parties reached by agreement?

Short Answer:

No. In fact the Court gave specific consideration to all of the words in determining that the Court had no authority to modify the decree.

3. Did the Court err in finding that the result of the Appellant drafting an agreed Legal Separation set out a remedy of contempt?

Short Answer:

No. The remedy for non-payment of money is contempt when the payment is related to support.

4. Did the Court err in concluding that no provision of CR 60(b) supported appellant's Motion to Vacate?

Short Answer:

No. CR 60(b) provides many provisions to remediate a final order. None of them are applicable in this instance.

5. Did the Court err in holding Ms. Peterson to all the negative consequences of having drafted the decree?

Short Answer:

No. A pro se litigant is always held to the same standards as an attorney.

6. Did the Court err by failing to properly construe language in the agreement?

Short Answer:

No. The Court clearly observed the fact that it was a property settlement in agreement as demonstrated by the Court's response.

7. Did the Court err by failing to Vacate and Modify the property agreement in the decree?

Short Answer:

No, as indicated by the Court, the Court has no authority to modify a decree, absent agreement of the parties.

8. Did the court err in failing to vacate under CR 60(b)?

Short Answer:

No, CR 60(b) list specific parameters that the Appellant must meet in order to vacate a decree. None of them are present here.

- a. CR 60(b)(1): Mistake
- b. CR 60 (b)(4): Misconduct
- c. CR 60 (b)(11): Any other reason justifying relief

9. Did the court err in finding contempt and providing a judgment for the Appellant.

Short Answer:

No, the Court has full authority to order enforce its decree and orders in a contempt proceeding.

10. Is Ms. Peterson entitled to attorney fees, expenses and costs on appeal

Short Answer:

No. Ms. Peterson has no basis for such an appeal, therefore Mr. Graham should be awarded attorney fees.

II. STATEMENT OF FACTS

On April 25, 2008, the parties, Arch D. Graham, and Joanne Peterson, f/k/a Graham filed a joint Petition for Legal Separation with the Thurston County Superior Court although they continued to reside together. The document had been drafted by Ms. Peterson and presented for agreement. At the time, Ms. Peterson was employed in an assistant capacity with the Preble Law Firm, P.S. in Olympia, WA. Mr. Graham was employed as an Ironworker, belonging to the Northwest Ironworker's Union. Mr. Graham had medical, dental and vision insurance through his employment via union contract. He also was eligible for a Defined Benefit Plan called the Northwest Ironwork Retirement Trust Pension as well as a Defined Compensation Plan which was an Annuity.

Due to the recession, in May 2008, approximately one month after the Legal Separation was filed, Mr. Graham found himself without work and sitting on an 'on call' list with approximately 900 other unemployed iron workers. Under a process called banking hours, Mr. Graham was able to maintain his union benefits until the end of December 2008. Once his benefits were exhausted the parties were offered a Cobra policy for the requisite period of time,

which they jointly declined. From December 2008 forward to this date, Mr. Graham is/was ineligible to cover his then wife or even himself for medical insurance.

Mr. Graham drew unemployment until it was exhausted; however, he never did go back to work because he developed a painful, debilitating skin disease. According to Mr. Graham, the union was having trouble placing him because of the way he looked to potential employers. Mr. Graham was 55 years old and looking at very long term unemployment. Due to his skin disease, he applied for Social Security Disability. On December 1, 2010, Mr. Graham, after significant struggles with red tape and Independent Medical Exams, became eligible for Social Security Disability. Once he was eligible for Social Security Disability, under the Union contract, he became eligible to draw his Ironworkers Pension earlier than retirement age because of his disability. Incidentally, the annuity referred to by the Appellant was cashed out by the parties in 2010 and no longer exists.

By February 5, 2011 Mr. Graham's disability pension began paying out. He received approximately \$1700.00 per month on his pension. The amount he was eligible for was a little over \$2000.00 but it was reduced because he elected to pay \$341.29 per month

for a survivor option for his wife. Under that option Ms. Peterson, upon Mr. Graham's death, will receive one-half of his disability pension for life. That option which is currently in place cannot be revoked except through a QDRO.

On August 25, 2011, thirty-three months after Mr. Graham lost his medical, dental and vision insurance, and thirty-three months after her insurance coverage stopped, Ms. Peterson converted the Legal Separation to a Divorce. From that moment on, Ms. Peterson filed numerous documents with the Court in an attempt to secure a QDRO from Mr. Graham's pension for funds she feels are due her. Her recitation of the balance of the procedural facts is accepted as true.

III. Summary of Argument

Mr. Graham and Ms. Peterson entered into a Legal Separation Contract in which they agreed that Mr. Graham would provide medical, vision and dental insurance coverage for her or if he did not provide the insurance, Mr. Graham would pay her the cash amount needed to secure her own insurance. The Legal Separation Contract failed to mention an end date to this obligation

or to define a specific amount of cash Ms. Peterson needed to secure her own insurance.

From the time Mr. Graham lost his coverage, for thirty-three months, Ms. Graham did not enforce the agreement and apparently accepted the impossibility Mr. Graham was under. Upon converting the Legal Separation Contract to a Dissolution Ms. Peterson began to methodically attempt to collect on this ambiguous responsibility by attempting to establish a Qualified Domestic Relations Order awarding her a remedy for which she did not bargain nor did Mr. Graham agree to pay.

The parties set out in the Legal Separation exactly what their agreement was. Ms. Peterson would forego any interest in Mr. Graham's Defined Benefit Plan and Deferred Compensation Plan and he would maintain medical, dental and vision coverage for Ms. Peterson. The parties even addressed what would happen in case of a breach of their agreement. If Mr. Graham breached his responsibility to provide the agreed upon insurance, he would have to pay Ms. Peterson funds to purchase her own.

There is no reason for the Court to disturb the agreement the parties made.

IV. Argument

The Respondent agrees that the trial court's disposition of a motion to vacate under CR 60 will not be disturbed absent abuse of discretion. In reliance on State ex rel. Campbell v. Cook, 86 Wn. App. 761, 766, 938 P.2d 345 (1997), the Respondent asserts that the Court did not act on untenable or indefensible grounds or commit discretionary acts that were manifestly unreasonable.

A. Failure to Properly Construe the Language of the Agreement

The Appellant asserts that the Court failed to construe Paragraph 3.2 Other so as to give effect to its being a property division. When the Court examined the Petition for Legal Separation and the proposed Decree of Legal Separation there could be no doubt that the language in question was part of a property settlement. The title to the section was 3.2 Property to be Awarded the Husband. CP 9. The Appellant asserts that Ms. Peterson agreed to forego an alleged interest in the Respondent's retirement account if he fulfilled a specific condition. In reality, the Petitioner agreed to forego an alleged interest in the Respondent's retirement account and specifically set up what she wanted instead. She wanted medical but if that were not provided, she wanted

money. In doing so, Ms. Peterson herself, set out her remedy in case of Mr. Graham's breach.

It is obvious that the Court fully understood the language of the Legal Separation Contract since it noted specifically in the clerks minutes dated October 5, 2011 that "it (the Court) does not have the authority to modify the decree." CP 28 See also, CP 35, Line 5, dated October 19, 2011.

Here the Court had to interpret the Legal Separation Contract as it was written. The Washington State Supreme Court is instructive about the interpretation in Wagner v. Wagner when it references Patterson v. Bixby, 58 Wash 2nd 454, 458, 364 P.2d 10 (1961) and advises that "in construing a contract, a court must interpret it according to the intent of the parties as manifested by the words used". Wagner v. Wagner, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). Further the Supreme Court goes on to say that "Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it". Farmers Ins. Co. v. Miller, 87 Wn.2d 70, 73, 549 P.2d 9 (1976).

In this case, the language is clear that Ms. Peterson did not want Mr. Graham's pension. She wanted either insurance coverage or money to purchase insurance. In the Wagner case, as

here, the parties had negotiated and set out their agreement regarding property distribution in a Legal Separation Contract. There as here, a dispute arose later on over what the language meant. The Wagner Court was very clear that “A court cannot, based upon general consideration of abstract justice, make a contract for parties which they did not make for themselves. Wagner v. Wagner, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980).

In addition to construing the contract based on the agreement of the parties, the Court must properly construe a document against the drafter so that the drafter will not benefit from a mistake they were in a position to prevent. McKasson v. Johnson, 315 P.3d 1138 (Wn. App. Div 2 (2013)). Here the Court stated specifically, “The court finds that the Petitioner as a pro se drafted the language regarding Respondent’s Pension and Payment of Petitioner’s health insurance and that she has exercised the remedy she drafted, that is to seek contempt provisions.” CP 49.

B. Failure to Clarify, Modify and Vacate

Ms. Peterson contends that the Court should have clarified the decree and entered a QDRO to make her whole. She contends that the Court needed to clarify the language in Paragraph 3.2

Other because there was nothing in the decree regarding enforcement of the proviso in the event the Respondent [did] not maintain medical, dental and vision insurance for the Petitioner. She wanted to the Court to provide a QDRO so that she would have enforcement of the property division.

The lower Court found that the language of the Paragraph 3.2 Other was clear and unambiguous when in response to Ms. Peterson's Motion to Clarify when the Court advised Ms. Peterson that the prior Order signed by the Court did not need clarification. CP 34, Clerk's Minutes of October 19, 2011. The Court was very clear in its Order of October 19, 2011 that "the Decree is not vague and there is nothing to clarify."

The Court was acting well within proper parameters when it failed to find a need for clarification and refused to modify the decree. The Court in In re Marriage of Thompson explains that an ambiguous decree may be clarified, that is by defining the rights already given and spelling them out more completely, if necessary, but it may not be modified". In re the Marriage of Thompson, 97 Wn. App 873, 878, 988 P.2d 499 (1999). The Court differentiates between clarify and modify by explaining that a decree is modified

when rights given to one party are extended or reduced beyond the scope originally intended by the parties. *Id.*

Ms. Peterson contends that the Court should have clarified the decree and entered a QDRO to make her whole. She contends that the Court needed to clarify the language in Paragraph 3.2 Other because there was nothing in the decree regarding enforcement of the proviso in the event the Respondent [did] not maintain medical, dental and vision insurance for the Petitioner. She wanted to the Court to provide a QDRO so that she would have enforcement of the property division.

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C. Application of Civil Rule 60(b)

CR 60(b) provides for a relief from Judgment or Order in eleven different situations. Ms. Peterson alleges three separate sections that she feels apply to this situation.

a. Mistake Ms. Peterson on appeal alleges that she is entitled to relief from judgment under CR 60 b(1) Mistake because she made a mistake in not clarifying in the decree what remedy would be available to her should Mr. Graham not comply with the proviso that allegedly limited his right to receive his entire pension. Appellants Argument page 14, § (III)(B)(1).

Unfortunately, as pointed out in In re the Marriage of Wherley, that “allegation [as in this case] illustrates the risk a pro se litigant assumes by undertaking self-representation. In fact, the Respondent would allege that Ms. Peterson should be held to an even higher standard since she is a legal professional and has ready access to legal advice.

In Wherley, the Court affirmed the lower court’s ruling because one of the pro se parties made a mistake of law that could have been avoided by using an attorney’s services. Ms. Peterson obviously did not understand all the minute details involved in a legal action. As the Court in Wherley found, “unfortunately for her, the law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws.” In re the Marriage of Wherley, 34 Wn. App. 344, 349, 661 P.2d 155

(1983). The mistake Ms. Peterson made was clearly of her own making while trying to represent herself and as such merits no consideration under a CR 60(b)(1) Motion to Vacate.

b. Misconduct Ms. Peterson maintains that under CR 60(b)(4) the misconduct of Mr. Graham in failing to fulfill his part of the bargain provides a basis for relief from judgment. Respondent asserts that CR 60 (b)(4) is directed to the inducement in coming to agreement. The misconduct alleged did not occur in the inducement, it occurred long after the agreement was drafted, signed and filed.

Ms. Peterson cites Surburban Janitorial Services v. Clarke Am for the proposition that acts which occurred after the entry of the judgment do not bar relief, thus arguing that Mr. Graham's alleged total disregard of his obligations under the decree merited a vacation of the Decree. Surburban is certainly distinguishable from our present case in that after a default order was entered, the defaulting counsel failed to notify opposing counsel that the default was entered. Nearly a year and a half later, the defaulting counsel acted on the default to the surprise of the opposing counsel who immediately moved to vacate the default. The defaulting counsel alleged that the one year provision of CR 60 (b) barred opposing

counsel from moving to vacate. Failing to notify opposing counsel of the default was deemed to be the necessary misrepresentation and the Court of Appeals affirmed the lower Courts ruling vacating the judgment. The misrepresentation occurred after the default was entered and therefore the Court held that the complained of acts occurring after the entry of the order do not bar relief. Most importantly the Suburban court clearly stated that their holding was “strictly limited to the acts of that particular case.” Suburban Janitorial Services. v. Clarke Am., 72 Wn. App 302, 310, 863 P.2d 1377 (1993)

The Court of Appeals in In re Marriage of Curtis very succinctly directs that, “Absent fraud, overreaching, or collusion, the courts will not set aside a property settlement agreement. A simple showing of disparity in the division of property is not enough.” In re the Marriage of Curtis, 106 Wn. App. 191, 23 P.3d 13 (2001), citing, In re Marriage of Burkey, 36 Wash.App. 487, 489-90, 675 P.2d 619 (1984).

In our particular case, Mr. Graham did nothing with regard to the Decree or its entry, except to sign the Joinder in the Legal Separation. Any alleged misconduct by Mr. Graham, if it would be construed as misconduct was unrelated to the procedural aspects of this action and therefore would not fall into the fraud, misrepresentation or misconduct needed to vacate the Decree.

c. Any Other Reason Justifying Relief Ms. Peterson finally attempts to vacate the Decree under CR 60(b)(11). CR 60(b)(11) which allows relief from judgment for any other reason justifying relief. Respondent contends that even under CR 60(b)(11) there is no reason to justify vacating an agreed order.

As stated in In re Marriage of Knutson, vacating a final order under CR 60(b)(11) should be applied “sparingly” and requires “extraordinary circumstances”, but “such circumstance must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court’s proceedings.” In re Marriage of Knutson, 114 Wn. App. 866, 873, 60 P.3rd 681 (2003), quoting, In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985)

Here Ms. Peterson suggests that the extraordinary circumstances have to do with Mr. Graham not following the Decree for whatever reason. Respondent suggests that Mr. Graham not following the decree did not occur at the time of the inducement, negotiation or drafting of the legal separation contract. The parties had a meeting of the minds and signed a document to that effect. There were no extenuating circumstances involved in submitting this agreed order to the courts for validation.

The extenuating circumstances that are required to vacate a decree are very specific and seldom met. Ms. Peterson relies on In re Marriage of Thurston and the Courts reference to In re Marriage of Hammack for support for her position. Thurston involved the timeliness of a transfer of real property arising from a property settlement. The Court found that the non-transfer of the property was a material condition of the property settlement. The court found it appropriate to vacate the decree when the property division did not occur immediately. The Court of Appeals affirmed the trial court. In re the Marriage of Thurston, 92 Wn. App.494, 496, 963 P.2d 947 (1998).

In re the Marriage of Hammack, involved a situation where the parties made a disparate division of property as a pre-payment of child support. The Court found that the property settlement was an extraordinary circumstance under CR 60(b)(11) in that such an agreement violated public policy and was void and unenforceable and thereby permitted a vacation of the property settlement agreement. In re the Marriage of Hammack, 114 Wn. App. 805, 810, 60 P.3d 663, (2003).

Here, Ms. Peterson declined her alleged interest in property exchanging that alleged interest for an expectation of continuing

medical insurance or money. There was no property to transfer. Ms. Peterson drafted the Legal Separation Contract and Mr. Graham joined. At the time the parties entered into this agreement, Mr. Graham agreed to provide insurance for Ms. Peterson. He had no way to know his world was going to come crashing around him a month later.

Ms. Peterson had a remedy in the Legal Separation Contract and exercised that remedy by getting a judgment against Mr. Graham. Only when she discovered it might be difficult to exercise that judgment did she begin asking for the decree to be vacated and a QDRO to be ordered.

D. Alleged Erroneous Contempt Judgment

The Appellant asserts that the court based its decision on untenable grounds when it chose a remedy of a contempt judgment to make her whole. Ms. Peterson, in asserting that the Court chose the contempt remedy fails to consider that one of the many remedies she prayed for in this case was contempt. She asked for a finding of contempt but yet asserts that the Court indefensibly granted it?

The court did not chose contempt as a remedy here, Ms. Peterson prayed for it. The court did not act on untenable grounds when it found contempt and entered a judgment. In re Marriage of Mathews directs that “the Court in a dissolution proceeding, [such as is the case here], has the authority to enforce its decree and order in a contempt proceedings”. In re the Marriage of Mathews, 70 Wn.App. 116, 126, 853 P.2d 462 (1993).

V. Objection to a QDRO

In her brief, Ms. Peterson suggests that the Respondent has made no objection to a QDRO. Mr. Graham negotiated with Ms. Peterson and the parties came up with language that if he did not have Ms. Peterson covered by insurance, he would have to pay for her to get insurance. He did not agree to a QDRO. There should be no reason for Mr. Graham to object to a QDRO. It wasn't part of the agreement.

VI. Attorney Fees

Finally, the Respondent asks the Court to order attorney fees and expenses under RAP 18.1 on both statutory and equitable ground. Mr. Graham objects strongly to an award of fees. This situation is of Mr. Peterson's own making. She drafted an agreement that one can only presume was advantageous to her given her job and

access to legal services. She has tried repeatedly to have her way in Superior Court with numerous motions. She asked that the Court clarify her words. The court declined. She asked that they modify the decree that she drafted. The court declined. She asked that they vacate the decree that she drafted. The Court declined. The appeal in this matter is not supported by case law nor did the snippets of law Ms. Peterson provide. Pursuant to RAP 18.1, the Respondent would ask that he be awarded attorney fees for having to defend this action.

Ms Peterson suggests that Mr. Graham has been intransigent and recalcitrant in not defending the Superior Court action or this appeal. Mr. Graham has been saving up for two years to pay an attorney to help him. Ms. Peterson has a job. Mr. Graham is subsisting on disability with no hope of future employment. Had Mr. Graham been able to function without pain and embarrassment and had access legal services, he would have been able to defend. As it was, he had neither the strength nor knowledge about what to defend this.

VII. CONCLUSION

Ms. Peterson not only asks the Court to vacate the decree in this case, she also asks that the Court modify the decree and enter

a QDRO. The trial court did not err in finding that “entering a QDRO would modify terms of the Decree. A court is not allowed, as a matter of law, to modify the terms of a Decree (absent agreement). CP35.

For all the foregoing reasons, Respondent Arch Graham, respectfully requests that the Court affirm the lower Court’s rulings and award attorney fee to him for having to defend this action.

Respectfully submitted on this the 18th day of April, 2014.

A handwritten signature in black ink, appearing to read "Ann", with a long horizontal flourish extending to the right.

J. Ann Farnsworth, WSBA 29395
Attorney for the Respondent
Arch D. Graham