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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**DIVISION III COURT OF APPEALS
STATE OF WASHINGTON**

No. 33243-8

**Spokane County Superior Court Case No. 13-3-00783-3
The Honorable Maryann Moreno
Superior Court Judge**

APPELLANT'S REPLY BRIEF

In Re:

DUANE COOK, RESPONDENT/PETITIONER

V.

ELAINE COOK, APPELLANT/RESPONDENT

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Table of Contents

Table of Contents.....i

Citations to Authoritiesi

I. Reply Brief.....1

II. Law and Argument.....1

A. Pursuant to statute, the Reviewing Court had to review the Finding of Fact from the Commissioner in the Revision hearing, therefore, it is inappropriate for the Respondent to suggest that there is no place for including what the Commissioner found in the Opening Brief, since the judge had to include those findings in what she reviewed.....1

B. Mr. Cook specifically failed to follow the sale process required by their decree by accepting his friend’s offer without allowing Ms. Cook to participate first.....5

C. Mr. and Ms. Cook had previously agreed to allow Ms. Cook to buy him out of the house, and even though the decree does not specifically say “Mrs. Cook can buy the house,” it does indicate that the parties can agree to its sale and does not say they cannot buy the other party of their share of the house.....6

D. There is no basis for an award of Attorney’s fees in this matter8

Citations to Authorities

<u>Authorities</u>	<u>Page</u>
 <i>WA Supreme Court</i>	
<i>In re Estate of Bachmeier</i> , 147 Wn.2d 783, 52 P.3d 783 (2002).....	7
<i>Industrial Electric-Seattle, Inc. v. Bosko</i> , 67 Wn.2d 783, 410 P.2d 10 (1966).....	8
 <i>Washington Appeals Court</i>	
<i>In re Marriage of Balcom and Friche</i> , 101 Wn.App. 56, 1 P.3d 1174 (Wash.App. Div. 3 2000).....	2

In re Estate of Larson, 36 Wn.App. 196,
674 P.2d 669 (1983).....3

Revised Code of Washington

RCW 2.24.050.....2, 3

RCW 62A.2-206(1).....8

Treatises

Restatement, Contracts (2d) § 89D.....8

I. Reply Brief

The ex-husband Mr. Cook has provided the court with a Responsive Brief in this matter. That brief focuses on two or three main ideas. First, it suggests that this court should not look at the Commissioner “Findings of Fact” since it is the reviewing Court’s Findings in a Revision that are of primary importance. He also focuses on Ms. Cook’s alleged bad faith in this transaction and the implementation of their decree requirements in the selling of their family residence. It is the Appellant’s position that these responses avoid both the failure of Mr. Cook to follow the parties’ decree, somewhat of a breach of those orders, and its effect, and that the Commissioner’s findings are an integral part of what the Reviewing court has to keep in mind in a revision. As such the Judge failed to consider Mr. Cook’s clear and unmistakable violations of the decree requirements to opt for an instant sale, rather than allow Ms. Cook the due process of their Decree requirements and court orders. We ask that the Judge’s decision be overturned in favor of the Commissioner’s ruling.

II. Law and Argument

A. Pursuant to statute, the Reviewing Court had to review the Finding of Facts from the Commissioner in the Revision hearing, therefore, it is inappropriate for the Respondent to suggest that there is no place for including what the Commissioner found in the Opening Brief, since the Judge had to include those findings in what she reviewed.

Mr. Cook responded by criticizing this appeal for "focusing" on the theory that the Judge failed to consider the Commissioner's Finding of Facts in her ruling. He stated case law suggests that an appellate court's review should focus on the Judge's Findings of Fact and not the Commissioner's. However, such a limited review would not include things that are statutorily required for a reviewing Judge to consider, thereby distracting this court from an important component of the Judge's considerations. For example, if the Reviewing Judge fails to consider the findings made by the Commissioner, that in and of itself would be error, since the statute states clearly that a Revision should include a review of the Commissioners findings of fact.

RCW 2.24.050 states clearly that a Reviewing Judge is to review the Commissioner's "Findings of Fact and Conclusions of Law" in coming to their decision, otherwise the decision is made in what might be called a vacuum. See e.g. *In re Marriage of Balcom and Fritchle*, 1 P.3d 1174, 101 Wn.App. 56 (Wash.App. Div. 3 2000) RCW 2.24.050 states:

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the

findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge. (Emphasis added).

As can clearly be seen the RCW's, under its Court Commissioner section, requires the Reviewing Court to review the Commissioner's Findings of Fact in coming to their conclusion. In fact case law even indicates that the Reviewing Judge can even adopt the Commissioner's Findings in the case as their own. *See In re Estate of Larson*, 36 Wn.App. 196, 674 P.2d 669 (1983), rev'd in part on other grounds, 103 Wn.2d 517, 694 P.2d 1051 (1985).

In this case, the Judge seemed to clearly avoid what the Commissioner found and did in this matter. See RP 1-8. She failed to mention that Mr. Cook failed to follow the decree and provide Ms. Cook with a counteroffer before he accepted it from his friend, which was a clear violation of the court's orders. Instead she focused on concluding that Ms. Cook was not cooperating with the sale and Ms. Cook had no right to buy Mr. Cook out of the home. *Id.* She said this even though she quoted from emails between the parties that clearly showed that Mr.

Cook had agreed to allow her to buy the house at even a higher price than his friend, making him more money in the transaction. See specifically RP 5.

Turning to what the Commissioner specifically found in this matter, she found that Mr. Cook had violated the Decree by agreeing to an offer that had not been transmitted to Ms. Cook before he did so. The Commissioner said:

Then what I have is on January 19, 2015 that a counter offer was given and accepted and this was an email from the realtor, at \$455,800. I also have Ms. Cook's email that basically says to Mr. Cook on the 19th I understand you have a counter, I need to know what those terms are. I put all that on the record because I then am going back and comparing this [sic] what the divorce says these parties have to do. And what I can't find is anywhere in there that the counter offer of 455,600 was ever expressed to Mrs. Cook prior to it being accepted by the buyer, I have a lack of evidence that says that that was done. It appears that that was not done. . . .

Mr., in this court's opinion, Mr. Cook did not have the authority to make the offer of 455,800 to the buyer without conveying that to Mrs. Cook first."

CP 103.

As may be seen the key difference between what the Judge found and the Commissioner's findings is twofold. First, the Judge found that there was nothing in the decree that allowed Ms. Cook to buy Mr. Cook out, and second, that no matter what would happen Ms. Cook was not going to cooperate with any sale because she wanted the house for

herself. However, there was also nothing in the Judge's ruling indicating that she even considered the Commissioner's findings and order.

B. Mr. Cook specifically failed to follow the required sale process required by their decree by accepting his friend's offer without allowing Ms. Cook to participate first.

The Decree requires the following regarding the parties' sale of their family residence:

1. They would use an agreed sales person.
2. The house would sell for at least \$450,000.
3. Any offers or counter-offers had to be provided to each party before being accepted.
4. Once the two parties agreed on the counter offer the parties were to cooperate with its sale.

CP 16-18.

In this matter Mr. Cook found a buyer for their home in his best friend and co-worker (CP 83-93). The Commissioner was right in finding that Mr. Cook breached their orders by not following the requirements of the decree and allowing Ms. Cook to review the offer before it was accepted, regardless of the reason. Mr. Cook's breach of the decree was material to allowing that particular sale to go through, since Mr. Cook did not have clean hands in his acceptance of this offer without Ms. Cook's knowledge. CP 83-93 / 100-114.

C. Mr. and Ms. Cook had previously agreed to allow Ms. Cook to buy him out of the house, and even though the decree does not specifically say “Mrs. Cook can buy the house”, it does indicate that the parties can agree to its sale and does not say they cannot buy the other party out of their share of the house.

The Revision Judge specifically said at least in two places in her oral ruling that the Decree did not say Ms. Cook could buy Mr. Cook out. However, the Judge failed to see that the Decree entered by another Superior Court Judge allowed for the parties to agree to any sale they wished. At page 4 of their Decree it states: “In the event the parties are unable to agree on any matter or issue regarding the home, the issue shall be decided on the ex parte motion calendar with the Spokane County Superior Court on five days notice to the opposing party. CP 17. This clause in and of itself clearly shows that the parties could agree to anything in order to dispose of the family residence, and did not preclude buying each other out, as the Judge seemed to think. This was borne out by Ms. Cook in her responsive declaration filed on 9th of February 2015 the following:

Sale of house: Duane knows that I have wanted our house. I tried to get him to sell it to me earlier but that fell through because I had not been receiving maintenance for at least 6 months. Since that time I have been approved for a loanb that gives me enough with other assets to pay the mortgage off, and provide my ex-husband and I more profit to share. . . . As of January 26th, 2015 I thought we were on the road to resolution of this with my offer giving Duane more money. I send an email to confirm that. Exh.

1." Then, Duane sent back an angry email saying "I NEVER accepted your offer I am NOT willing to work with you. You will be hearing from Keith this week . . ."

CP 83.

However other emails at Exhibit 4 clearly show that Mr. Cook had in fact agreed that she could buy the house from him. CP 93.

Exhibit 1 of Ms. Cook's declaration then shows they did have an agreement for her to be a potential buyer of the home. In her email back to her husband, Ms. Cook was thankful for Mr. Cook's agreement to sell the home to her for more money which "beats" other offers. CP 87. Exhibit 4 to this declaration is even more telling in that Mr. Cook on January 16th, 2015 indicated that Ms. Cook either accept their offer, come up with a counter offer that [he] will agree with, or make [her] offer through Brandi (the realtor). CP 93. This clearly showed that Mr. Cook agreed to let Ms. Cook buy the family residence this second time. Therefore, there was no need for an exparte hearing until Mr. Cook reneged on the deal improperly blaming her.

Besides honoring the Decree and its strictures as to the sale of the family home, case law indicates that Decrees and/or marital agreements such as Community Property Agreements are to be interpreted by use of the Law of Contracts. *See e.g. In re Estate of Bachmeier*, 52 P.3d 22, 147

Wn.2d 60 (Wash. 2002). Additionally, Washington State subscribes to the Restatement on Contracts where it is clear that parties to a contract can agree to modify the contract and do so even without consideration. *See Industrial Electric-Seattle, Inc. v. Bosko*, 410 P.2d 10, 67 Wn.2d 783 (Wash. 1966); *RCW 62A.2-209(1) as an example of a Commercial Code on the subject*; and *Restatement, Contracts (2d) SS 89D*.

In this case it is abundantly clear to anyone reading the parties Decree that the clauses dealing with this sale allow the parties “to agree” to whatever they want to do to perform this sale. The Decree does not preclude one party selling the home to the other party, such an assertion that this was not allowed since it was not in the Decree is totally invalid. Besides this, Mr. Cook clearly agreed to sell the home to Ms. Cook at least two times, and lately gave her the ultimatum to come up with an own offer herself¹ (See Exh. 4 to her Feb. 9th, 2015 Declaration – CP 93). Therefore, it was clearly error for the Judge to imply that the Commissioner was wrong in her conclusions by revising her order.

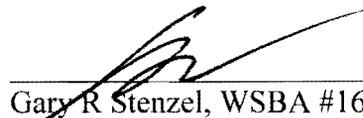
D. There is no basis for an award of Attorney’s fees in this matter.

The clauses that deal with the home sale clearly indicates that once either party seeks the court’s exparte help to resolve an issue, “[t]he

¹ It should be noted that Ms. Cook explained why the first offer, many months earlier, had fallen through because she could not qualify for the loan since she was not on the maintenance long enough. In her Responsive Declaration cited she clearly mentions that she now could qualify since 6 months of maintenance had long since past. CP 84.

associated costs and expense of each party shall be borne by that party". There is no attorney fee award for a successful litigation order for either party. As such all such orders should be vacated along with a denial of fees for this appeal. Besides, it was Mr. Cook who originally violated the Decree by failure to involve Ms. Cook in the inappropriate acceptance of an offer from his friend. He violated the Decree no Ms. Cook. Additionally, she had every right to rely on Mr. Cook in his acceptance of her right to buy the house, since the evidence seems clear he agreed to allow her to do so.

Respectfully submitted on this 17th day of February 2016 by:



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Declaration of Mailing

I, Matthew Kimball, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on February 17, 2016, a copy of this Reply Brief was delivered by mail to the office of Keith Briggs, Attorney for Petitioner, at 621 W. Mallon Ave, Spokane, WA 99201, and Jason R. Nelson, 2222 N. Monroe St, Spokane, WA 99205.

Dated this 17th day of February 2016.


Matthew Kimball