

NO. 63377-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re the Marriage of:

NANCY Q. HOWELL,
Petitioner/Respondent,

and

GEORGE W. HOWELL, Jr.
Respondent/Appellant

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR

The trial court erred its findings of fact number 2 in the order on motion to compel specifically by finding the wife had lost some security and in clarifying the property settlement agreement entered into by the parties by erroneously finding the word “estate” ambiguous in the order on motion for reconsideration.

SECOND ASSIGNMENT OF ERROR

The trial court erred in ordering the husband to take one of five alternative actions to be in compliance with the property settlement agreement because injunctive relief was not properly before the court and such an order impermissibly modifies the property settlement agreement.

THIRD ASSIGNMENT OF ERROR

The trial court erred by ruling on the instant matter because there is no justiciable controversy; there is only a potential dispute, the judicial determination was not and could not be final and conclusive when the provision the wife sought to enforce is entirely contingent upon the wife living longer than the husband, a fact which has not yet been determined, and the court found the contract was not breached.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court may make a finding of ambiguity when the contract language is plain on its face and subject to only one reasonable interpretation?
2. Whether the court may modify a property settlement agreement when no injunctive relief was asked for, there was no proper request for relief from judgment or order, and RCW 26.09.070 prohibits any alteration after the decree referencing the property settlement agreement has been entered?

3. Whether the trial court can rule on a matter before there is a justiciable controversy when the paragraph the spouse is seeking enforcement of is contingent upon a determination of which spouse dies first and both spouses are still living and the court found there was no breach of contract?

B. STATEMENT OF THE CASE

The parties entered into agreed Findings of Fact and Conclusions of Law and Decree of Dissolution in July of 1994. (CP 1 -7; CP 19 -23). The parties also entered into a property settlement agreement that was incorporated into the Findings of Fact and Conclusions of Law and Decree. (CP 8-18). The Property Settlement Agreement contained various provisions dividing the assets and liabilities of the parties. (CP 16-18). Exhibit O of the property settlement agreement contained the following provision:

(2)(c) \$50,000.00 to be received by wife as an irrevocable beneficiary on husband's life insurance policy upon his death. Husband shall provide wife with evidence of such insurance and its irrevocability prior to the execution of this agreement. If this life insurance lapses, wife shall have a lien against husband's estate in the amount of \$50,000.00. If wife precedes husband in death, the obligation shall become null and void. (CP 16).

The exact same provision is contained in Exhibit W of the property settlement agreement under the section Property Awarded Wife (CP 18). A slightly different version of the same provision is also found in Exhibit H, Property Awarded to Husband. (CP 17). The provision of the property settlement agreement in Exhibit H states:

Any and all insurance policies in his name including all insurance on his life with the stipulation that wife is to be an irrevocable beneficiary of \$50,000.00 of his life insurance policy upon husband's death. If wife precedes husband in death, this obligation shall become null and void. Husband shall provide wife with evidence of such insurance and it's[sic] irrevocability prior to the execution of this agreement. If this life insurance lapses, wife shall have a lien against husband's estate in the amount of \$50,000.00; (CP 17).

Exhibits O, H, and W divide the then existing life insurance policy. Mr. Howell was awarded the whole life insurance policy, including the cash value. (CP 17). Ms. Cooper was awarded \$50,000.00 in proceeds from the life insurance policy. (CP 18). However, Ms. Cooper could obtain the \$50,000.00 only if Mr. Howell predeceased her. (CP 18).

The Property Settlement Agreement also contained provisions for Mr. Howell to make cash transfer payments, pay maintenance, and pay attorney's fees to Ms. Howell. (CP 13-14,16). Those payments amounted to almost \$50,000.00. (CP 143). Mr. Howell did not know at the time what exactly the life insurance policy designation was payment for and thought the provision to be inconsequential. (CP 139). The reasons why Ms. Cooper wanted to be added as a partial beneficiary to the \$300,000 life insurance policy was not discussed during the negotiations nor were reasons written into the property settlement agreement.(CP 139). After adding up the amount he was to pay Ms. Cooper, Mr. Howell hypothesized the provision was simply to secure the payments Ms. Cooper was owed under the agreement or possibly for her to be paid in the event he died before she did. (CP 143). Mr. Howell subsequently paid all the other obligations. (CP 153).

After the entry of the decree, findings and agreement Mr. Howell complied with the provision and named his wife the irrevocable beneficiary of \$50,000.00 of the then existing \$300,000.00 life insurance policy. (CP 30-31). The life insurance policy was a whole life insurance policy that accrued dividends and a cash value. (CP 64-87). The approximate cash value of the policy at the time of the dissolution of marriage was \$16,873.32. (CP 108) Mr. Howell made an upfront deposit of over \$13,000 when he obtained the policy prior to his marriage to Ms. Cooper. (CP 109). Mr. Howell originally obtained the policy for the care of his special needs son from a prior marriage.(CP 46).

Mr. Howell received a letter from the issuing company of the life insurance policy in March of 2000. (CP 89). The issuing company informed Mr. Howell the costs of insurance rates, monthly policy expense charge, and cost per thousand charge or percentage of premium charge would be increasing. (CP 89). These charges would be in

addition to the premium charge Mr. Howell had been paying. (CP 91-107). The costs of insurance charges did in fact increase by thousands of dollars per year each year after the notice. (CP 91-107). Mr. Howell was not able to keep up with the exorbitant charges and the company that issued the policy began deducting the costs of insurance from the cash value of the policy. (CP 91-107). Eventually the cash surrender value of the policy was depleted and Mr. Howell was notified the policy lapsed in January of 2008. (CP 111). Mr. Howell was given the option to pay almost \$4,000.00 on a quarterly basis to maintain the policy. (CP 111). Mr. Howell could not pay the exorbitant amount without financial hardship. (CP 46).

On November 25, 2008 Ms. Cooper, filed a “Motion to Compel Enforcement of Life Insurance Requirement in Property Settlement Agreement”. (CP 24). The motion sought, in part, an order to require Mr. Howell “to immediately secure a life insurance policy on his life in the amount [of] \$50,000, naming Petitioner as irrevocable beneficiary in accordance with the requirements of the Property Settlement Agreement incorporated into the Decree.” (CP 24). The motion also requested Mr. Howell provide proof of the policy on a semiannual basis. (CP 24). No motion and order to show cause was filed or served. No summons and petition was filed or served.

Mr. Howell opposed the motion because the property settlement agreement can only be enforced as written and there was no authority to modify the agreement. (CP 41). Mr. Howell also sought CR 11 sanctions and fees for making a frivolous claim. (CP 39-40).

The court heard oral argument and issued a written order on February 20, 2009. (CP 121-122). The court made the following findings of fact:

- 1) The Property Settlement Agreement entered into between the parties and filed with the court on July 18, 1994, required that the Respondent/Husband name the Petitioner/Wife as an irrevocable beneficiary on his life insurance policy in the amount of \$50,000. It further required that if the life insurance lapsed, Petitioner/Wife would have a lien against the Respondent/Husband’s estate in the amount of

\$50,000, and if Petitioner/Wife predeceases Respondent/Husband, the obligation would become null and void.

- 2) Respondent/Husband has allowed his life insurance to lapse. Although Petitioner/Wife still has a lien, she has lost some security.
- 3) Respondent/Husband did not breach the contract. (CP 121).

Based upon those findings the court issued the following order:

The Respondent shall within 30 days of the entry of this Order, either:

- 1) Secure and maintain a policy of life insurance in the amount of \$50,000, naming the Petitioner Nancy Cooper (fka Nancy Quinn Howell) as the irrevocable beneficiary of said policy pursuant to the Property Settlement Agreement filed with the Court on July 18, 1994; or
- 2) Write a Will or Codicil leaving Petitioner \$50,000 if she survives him. Said Will or Codicil shall be made irrevocable and Respondent shall ensure that sufficient funds remain in his estate to fund this bequest; or
- 3) Provide Petitioner with some other asset such as a) a \$50,000 deed of trust or mortgage on real property with equity in excess of \$50,000, or b) a joint bank account in the amount of \$50,000 that cannot be decreased below \$50,000 by Respondent and cannot be accessed by Petitioner until Respondent's death; or c) name Petitioner as irrevocable beneficiary of an IRA or retirement account in the amount of \$50,000 with Respondent being required to ensure that the account value not be decreased below \$50,000; and
- 4) Provide proof of the same to Petitioner's counsel immediately upon completion. (CP 122).

Mr. Howell timely moved for a motion for reconsideration. (CP 123). The motion for reconsideration was based upon the following grounds: 1) CR 59(a)(7) because there was no evidence or reasonable inference from the evidence that could support the findings and conclusions; 2) CR 59(a)(8) because the courts ruling was an error of law; 3) CR 59(a)(7) because the decision was contrary to law; 4) CR 59(a)(9) because substantial justice had not been done. (CP 126-136). Ms. Cooper filed a responsive memorandum of law to the motion for reconsideration. (CP 148-149). On April 3, 2009, the court denied the motion for reconsideration but clarified the earlier order by stating: “. . . the word “estate” contained in the property settlement agreement is ambiguous. The word estate can refer to either the present estate, meaning a person's current wealth or the person's

future estate created after the person's death. The court interpreted the agreement to mean the Respondent's present estate." (CP 171). This appeal follows. (CP 173-178).

C. SUMMARY OF ARGUMENT

The court erred in finding ambiguity when there was no evidence presented of any ambiguity and the interpretation the court created is an unreasonable clarification. The court exceeded its authority by modifying the property settlement agreement because the issue of modification was not properly before the court and the court lacks the authority to modify a property settlement agreement after the marriage is dissolved. The court should not have heard the case because there is presently no justiciable controversy as the court found the contract was not breached, there is no present dispute, and any judicial determination will not be final.

D. ARGUMENT

1. The Contract Language Is Clear And Any Finding Of Ambiguity Is An Unreasonable Interpretation.

The property settlement agreement entered into between Mr. Howell and Ms. Cooper is enforceable as written as a contract. Separation contracts entered into pursuant to RCW 26.09.070 are enforceable as contracts. RCW 26.09.070(6).¹ The terms of the Property Settlement Agreement entered into under RCW 26.09.070 are binding upon the court unless the court finds the contract was unfair at the time it was entered into. RCW 26.09.070(3). However, the parties to a dissolution action must challenge the separation contract prior to the entry of the decree because if a challenge was allowed years later then RCW 26.09.070(3) and RCW 26.09.070(7) would be meaningless. In Re Marriage of Glass, 67 Wn. App. 378, 390 835 P.2d 1054 (Div. 1, 1992).

¹ Washington common law further dictates settlement agreements are governed by the general principles of contract law. See Lavigne v. Green, 106 Wn. App. 12, 23 P.3d 515 (2001); Morris v. Maks, 69 Wn. App. 865, 850 P.2d 1357, review denied, 122 Wn.2d 1020 (1993); Stottlemire v. Reed, 35 Wn. App. 169, 171, 665 P.2d 1383, review denied, 100 Wn.2d 1015 (1983); Kinne v. Kinne, 7 Wn. App. 350, 362, 498 P.2d 887 (1972).

When reviewing a separation contract superior courts may determine whether or not terms within the contracts are ambiguous.² Where the contract is unambiguous on its face, the meaning of the contract is determined from its language and not from evidence outside the writing contained in the contract. Kinne and Kinne, 82 Wn.2d 360, 362, 510 P.2d 814, 816 (1981) *see also* St. Yves v. Mid State Bank, 111 Wn.2d 374, 757 P.2d 1384 (1988). However, if the contract is ambiguous or even if unambiguous the court may look to extrinsic evidence to interpret the contract. Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990). "Interpretation" means ascertaining the intent of the parties. *Id.* at 663. "[T]he intent of the parties to be divined by application of the context rule has to do with their real meeting of the minds, as opposed to the insufficient written expression of their intent. Unilateral and subjective beliefs about the impact of a written contract do not represent the intent of the parties." Olympia Police Guild et al v. City of Olympia, 60 Wn. App. 556, 559, 805 P.2d 245 (Div. 2, 1991). Extrinsic evidence is **not** admitted to import an intention that was not expressed within the writing but rather to determine what was in fact written.³ *Berg supra* at 669.

In this case the court found the term "estate" to be ambiguous meaning either the petitioner's present estate or future estate created after death. (CP 171) The court then interpreted the separation contract to mean the "present" estate of the husband. (CP 171). However, the term is not ambiguous and could not reasonably be found to be ambiguous in the context of the paragraph when read as a whole. The paragraph states:

² *See e.g.* Kinne and Kinne, 82 Wn.2d 360, 510 P.2d 814 (1981); George Callan v. Ruth Callan, 2 Wn. App. 446, 468 P.2d 456 (Div. I 1970)

³ The court in *Berg Supra* at 669 (*quoting and reaffirming J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 147P.2d 310 (1944)) states the principal clearly: "May we say here that we are mindful of the general rule that parol evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake. But, as stated in OLSEN v. NICHOLS, 86 Wash. 185, 149 P. 668 [(1915)], parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. If the evidence goes no further than to show the situation of the parties and the circumstances under which the instrument was executed, then it is admissible"

\$50,000.00 to be received by wife as an irrevocable beneficiary on husband's life insurance policy upon his death. Husband shall provide wife with evidence of such insurance and its irrevocability prior to the execution of this agreement. If this life insurance lapses, wife shall have a lien against husband's estate in the amount of \$50,000.00. If wife precedes husband in death, the obligation shall become null and void.

The paragraph references the word "death" twice. The paragraph discusses monies to be received by the wife from a life insurance policy. The policy will only make a payment upon the death of the insured.(CP 64) The entire paragraph suggests the word estate clearly means the estate of Mr. Howell that is created upon his death. Interpreting the word estate to mean the present estate of Mr. Howell is unreasonable and contrary to the plain language of the paragraph.

The sentence "If wife precedes husband in death, the obligation shall become null and void" is the most telling sentence on how to construe the meaning of the word estate because the \$50,000 transfer does **not** occur if the wife dies first. There is no way of knowing which party will die first until one of them actually dies. If the wife dies first then the wife's estate takes nothing. If Mr. Howell dies first then the only "estate" remaining would be his testamentary or intestate estate. The word estate being interpreted to mean the present estate of Mr. Howell makes little sense in this context.

For Ms. Cooper to have a lien on a present estate that cannot be foreclosed or collected upon until a condition precedent, the death of Mr. Howell, occurs is illogical and strained. The terms are clear and unchallenged by the evidence presented; Mr. Howell must die first before Ms. Cooper has any interest in the \$50,000 described in the paragraph. The only reasonable interpretation is the lien is created upon his death which can only mean a lien against the estate created upon his death. A lien created upon his present estate contingent upon a future event is too strained a reading of the paragraph to be reasonable.

Furthermore, the court found ambiguity on its own. There was no evidence presented to the trial court suggesting or stating Ms. Cooper believed the word to mean the "present" estate of Mr. Howell. There was no mention of ambiguity in the reading of

the property settlement agreement in either the argument of opposing counsel or the declaration of Ms. Cooper. The court took it upon itself to interpret the contract in a way that was contrary to its plain and obvious meaning. Neither party discussed the notion of whether the lien discussed in the paragraph would be secured or unsecured. A finding that the paragraph meant a secured lien on Mr. Howell's present estate is unreasonable and contrary to law. Compounding the error the trial court based its interpretation of the word estate solely upon the words in the property settlement agreement as there was not a scintilla of evidence presented to suggest the word "estate" referred to the "present estate" of Mr. Howell.

"[T]he unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations." Multicare Medical Ctr. V. DSHS, 115 Wn.2d 572, 790 P.2d 124 (1990). The court erred by relying upon an unexpressed subjective interpretation of the contract. Neither party had made any outward statement or manifestation to suggest the contract was ambiguous. The court on its own found ambiguity where none existed.

The court erred in finding ambiguity in the word estate. The parties did not discuss any ambiguity of the word in their briefs or declarations. The word taken in the context of the whole paragraph clearly means the estate created upon the death of Mr. Howell and there was no evidence presented to the contrary.

2. The Court Erred In Modifying the Property Settlement Agreement

a. Property Settlement Agreements May Not Be Modified

The law in Washington State is clear; a property settlement agreement incorporated into a dissolution decree cannot be later modified. Byrne v. Ackerlund, 108 Wn.2d 445, 453, 739 P.2d 1138 (1987). "A court may not create a contract for the parties which they did not make themselves. It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties." Marriage of Mudgett, 41 Wn. App. 337, 342, 704 P.2d 169 (Div. 1, 1985) (citing Wagner

v. Wagner, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980); Farmers Ins. Co. v. Miller, 87 Wn.2d 70, 549 P.2d 9 (1976)).

A decree is deemed modified when rights given to one party are extended beyond the scope originally intended, or those rights are reduced. Marriage of Thompson, 97 Wn.App. 873, 878, 988 P.2d 499 (Div. 1, 1999). Here, the court went beyond merely interpreting the rights and obligations of the property settlement agreement. The order compels Mr. Howell to undertake one of a number of affirmative actions in order to be in compliance.⁴ Moreover, the court's order directs Mr. Howell to provide proof the actions were undertaken. None of the actions in the court now requires Mr. Howell to perform are found within the property settlement agreement. "Adding terms to the contract would amount to writing a new contract. The court is **not** permitted to do this . . ." Marriage of Mudgett, 41 Wn. App. 337, 342, 704 P.2d 169 (Div. 1, 1985) (**emphasis added**).

The property settlement agreement clearly contemplated for and set out a remedy in the event the life insurance policy were to lapse. The property settlement agreement specifically states, "If this life insurance lapses, wife shall have a lien against husband's estate in the amount of \$50,000.00." (CP 16-18). The life insurance has in fact lapsed and the wife now has a lien against the husband's estate. Nowhere in the proceedings below is there evidence the parties contemplated that the husband would write a codicil or will naming the wife as beneficiary in the amount of \$50,000. Nowhere in the evidence does it show the parties contemplated the issuance of a deed of trust, a joint bank account, or named beneficiary of an IRA. Nowhere in the record below did either party contemplate the husband obtaining a new policy in the amount of \$50,000.00 naming the wife as

⁴ The Respondent shall within 30 days of the entry of this Order, either:

- 1) Secure and maintain a policy of life insurance in the amount of \$50,000, naming the Petitioner Nancy Cooper (fka Nancy Quinn Howell) as the irrevocable beneficiary of said policy pursuant to the Property Settlement Agreement filed with the Court on July 18, 1994; or
- 2) Write a Will or Codicil leaving Petitioner \$50,000 if she survives him. Said Will or Codicil shall be made irrevocable and Respondent shall ensure that sufficient funds remain in his estate to fund this bequest; or
- 3) Provide Petitioner with some other asset such as a) a \$50,000 deed of trust or mortgage on real property with equity in excess of \$50,000, or b) a joint bank account in the amount of \$50,000 that cannot be decreased below \$50,000 by Respondent and cannot be accessed by Petitioner until Respondent's death; or c) name Petitioner as irrevocable beneficiary of an IRA or retirement account in the amount of \$50,000 with Respondent being required to ensure that the account value not be decreased below \$50,000; and
- 4) Provide proof of the same to Petitioner's counsel immediately upon completion. (CP 121 -122).

beneficiary. In fact, the uncontested version of events is the husband did not know the purpose of the provision and thought it was of “no great consequence”. (CP 139). The parties specifically bargained for the wife to be made an irrevocable beneficiary on a then existing policy. (CP 50). The parties specifically bargained for a lien against the husband’s estate in the event the policy lapsed. Any deviation from this separation contract is an impermissible modification. The court erred by modifying the property settlement agreement.

b. Neither Party Proposed A Modification Of The Terms Of The Property Settlement Agreement And The Issue Was Not Properly Before The Court.

The issue of modification was not even properly before the court. Ms. Cooper did not move the court to vacate the decree and settlement agreement under CR 60(b) nor did she move for injunctive relief under CR 65. Ms. Cooper did not even make a motion to modify the property settlement agreement. Ms. Cooper did not file a declaratory judgment action. Ms. Cooper moved to “Compel Enforcement” of the paragraph regarding the life insurance.

Presumably, Ms. Cooper was seeking a writ of execution under Washington Statutory law. RCW 6 *et. seq.* is entitled “Enforcement of Judgments”. The methods for enforcing a judgment include: writ of attachment, RCW 6.25; writ of garnishment RCW 6.27; appointment of commissioner to convey real estate, RCW 6.28; Executions, RCW 6.17.

A writ of execution on a judgment can be for the following: “First, against the property of the judgment debtor; second, for the delivery of the possession of real or personal property or such delivery with damages for withholding the same; and third, commanding the enforcement of or obedience to any other order of the court.” RCW 6.17.060. “If the execution is to enforce obedience to any order, it shall particularly

command what is required to be done or to be omitted.” RCW 6.17.110(d). However, this power to command actions is no where near as broad as it would seem.⁵

If the contention is made the lien is against the cash value of the whole life insurance policy then the matter was still not properly before the court. A court cannot order the execution of a judgment against the cash value of a life insurance policy. *See In Re Elliot*, 74 Wn.2d 600, 446 P.2d 347 (1968); *Pick v. Pick*, 54 Wn.2d 772, 345 P.2d 181 (1959). “As a general rule, a policy is not to be regarded as liable to seizure under any form of judicial process against the insured so long as the duty of the insurer to pay is subject to any contingency or to any condition precedent.” *In re Elliot*, 74 Wn.2d. 600, 622, 446 P.2d 347 (1968). In this instance, the policy from which payment of \$50,000 was to be made was payable only upon the death of Mr. Howell. (CP 64 – 87). Ms. Cooper takes nothing if she precedes Mr. Howell in death. Therefore Mr. Howell must pass on before Ms. Cooper has any executable interest in any life insurance policy.

Neither party sought modification of the property settlement agreement. Neither party made motion to vacate the property settlement agreement or filed a declaratory judgment action to define the rights and the responsibilities of the parties. Ms. Cooper simply filed a motion to compel enforcement of the property settlement agreement. The court exceeded the scope of the relief requested and should have denied the relief sought.

3. The Court Should Have Dismissed Ms. Cooper’s Motion Because There Is No Justiciable Controversy

The trial court erred by hearing this matter when there is no present and existing dispute. “A plaintiff must also present a justiciable controversy. A justiciable controversy is: (1) an actual, present, and existing dispute; (2) between parties having genuine and

⁵ Division 1 court of appeals has clarified the scope by stating, “(fn4) Appellants contend the definition of execution, “commanding the enforcement of or obedience to any special order of the court,” RCW 6.04.020, is broad enough to encompass their requested relief. As aptly stated by respondents in their brief at pages 6-7: If such is the law, a new creditor’s remedy, overlooked by generations of Washington lawyers (and courts) will have been approved. Hereafter the collection of a money judgment may be effectuated by the simple device of obtaining a post judgment order directing the judgment debtor to deliver any money, real or personal property to his or her creditor until the judgment has been fully satisfied. We agree with respondents that the garnishment statutes in this state would become mere surplusage if a judgment creditor could avoid all the statutory procedural limitations by a “Special Order for Execution,” as sought by appellants herein.” *Safeco Ins. Co. v. Skeen*, 47 Wn. App. 196, 202, 734 P.2d 41 (Div. 1, 1987).

opposing interests; (3) that involves interests that are direct and substantial, rather than potential, theoretical, abstract, or academic; and (4) a judicial determination will be final and conclusive.” Washington Public Trust Advocates v. City of Spokane, 120 Wn.App. 892, 86 P.3d 835 (2004) citing Wash. Educ. Association v. Wash. State Pub. Disclosure Comm'n, 150 Wn.2d 612, 80 P.3d 608, 613 (2003).

The parties here do not have an actual, present and existing dispute nor the mature seeds of one. In other words, “a claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, and the challenged action is final.” Neighbors and Friends v. Miller, 87 Wn.App. 361, 383, 940 P.2d 286 (Div.1 1997). No controversy presently exists because both parties are still alive. The property settlement agreement is clear in that the wife will have no interest in being the \$50,000 beneficiary of a life insurance policy or a lien if she precedes the husband in death. (CP 16 – 18).⁶ This is a factual determination that has not yet occurred.

There is no justiciable controversy because the parties’ interests are actually aligned. Mr. Howell is not disputing Ms. Cooper has a lien on his estate. (CP 50). Ms. Cooper wants a remedy because the life insurance policy lapsed and Mr. Howell is not disputing she has a remedy, a lien on his estate. The only interests that would appeared to be opposing are Ms. Cooper’s supposed need for peace of mind that if Mr. Howell passes on first she will have \$50,000 promptly given to her, despite the notion the purpose of the provision may have been fulfilled after Mr. Howell paid on his obligations. On the other hand, Mr. Howell has an interest in avoiding the additional burdens placed upon him by the court. Ms. Cooper has no genuine interest in the enforcement because the court found the contract was not breached. No justiciable controversy exists under a contract until a breach actually occurs. SafeCo Insurance v. Barcom, 112 Wn.2d 575, 583, 773 P.2d 56 (1989).

Ms. Cooper has only a potential interest in the enforcement of the property settlement agreement. The designation of an insurance beneficiary is quasi-testamentary

⁶ “If wife precedes husband in death, this obligation shall become null and void”. (CP 16).

in nature because the beneficiary has only an inchoate right prior to the death of the insured and even where he does not retain the right to change the beneficiary, the beneficiary's interest is contingent upon the maintenance of the policy in good standing up to the time of the insured's death. Francis v. Francis, 89 Wn.2d 511, 514-515, 573 P.2d 369 (1978). The property settlement agreement gives Ms. Cooper no current or vested right in anything. "A lien is an encumbrance upon property, which secures payment of a debt but confers no property rights or title on the holder." Marriage of Young, 44 Wn.App. 533, 536, 723 P.2d 12 (Div. 2, 1986). She had only an inchoate right. Ms. Cooper contracted for a provision in the property settlement agreement that only resulted in payment to her if she outlived Mr. Howell. Further, Ms. Cooper would only collect those sums if the life insurance policy was still in effect at the time of Mr. Howell's death. Mr. Howell does not deny Ms. Cooper will have a lien on his estate after he expires. (CP 50). The questions of whether or not it is his present estate or whether the lien is secured are merely academic because presently there is no evidence to suggest Ms. Cooper will outlive Mr. Howell and that Mr. Howell's post mortem estate will not contain adequate funds to pay the \$50,000 lien. Finally, Ms. Cooper did not even argue the language of the contract was ambiguous or that the lien should be secured.

A judicial determination will not be final or conclusive. The trial court's order will not finalize the matter. There was no evidence presented that Mr. Howell could in fact obtain a life insurance policy. There was no evidence presented that he has an IRA or any other retirement account where the beneficiary could be altered. There was no evidence that Mr. Howell has \$50,000 in funds in his present estate. There was no evidence presented to show Mr. Howell is in possession of any real property with equity in excess of \$50,000. The result of the trial court's order would be continued judicial intervention.

The court erred in not dismissing the motion because there is no justiciable controversy. There is no present dispute because both the parties are still living. The parties don't have opposing interests because there was no breach. The real dispute is

academic and was not argued by Ms. Cooper. The determination will not be final nor conclusive but will likely result in additional litigation at the trial court level.

E. ATTORNEY'S FEES

The husband moves for an award of reasonable attorney fees and costs because this appeal is the fruit of contradictions from the property settlement agreement drafted by the counsel for the wife and the frivolous and intransigent pursuit to then alter the agreement. RCW 4.84.185 and Marriage of Williams, 84 Wn.App. 263, 927 P.2d 679 (Div. 3, 1996).

F. CONCLUSION

This court should reverse and remand the trial court's decision. An order dismissing the motion to compel made by Ms. Cooper should be entered. The court found ambiguity in the paragraph of the property settlement agreement sought to be enforced despite neither party suggesting there was ambiguity. The court then clarified the ambiguity with an unreasonable interpretation of the word estate and added the notion of security where no security existed before. The court then erred in ordering Mr. Howell to undertake his choice of affirmative actions not contained in the property settlement agreement and thus altering the agreements made between the parties over 14 years ago. The court also failed to dismiss the motion despite the lack of a justiciable controversy.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the 15th day of July, 2009, from Coupeville, WA, I caused a true and correct copy of this Statement of Arrangements to be served on the following in the manner indicated below:

To: Nancy Q. Howell, Pro Se
PO Box 1475
Friday Harbor, WA 98250

Via: US Mail
 Hand Delivery
 Other:

And To: The Court of Appeals of State of Washington
Division I
Attn: Richard D. Johnson, Court Administrator/Clerk
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Via: US Mail
 Hand Delivery
 Other:

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STATE OF WASHINGTON
2009 JUL 16 AM 10:41

Arndt & Walker, Attorneys at Law, LLC

By:

Shannone Lovell
Shannone Lovell