

66925-7

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No. 66925-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CASSANDRA LYNN SAGE,

Respondent,

v.

HARVEY PATRICK CHEW,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE RONALD KESSLER

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 AUG 12 AM 10:37

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I. RESTATEMENT OF ISSUES

1. At the conclusion of the parties' dissolution trial, the trial court found that any unpaid obligations on certain real property were the husband's separate obligation, and that he was "solely liable" for any expenses associated with this real property through entry of the Decree. Did the trial court abuse its discretion in entering a post-decree judgment against the husband for back taxes that were still owed on the real property when the Decree was entered?

2. The trial court awarded attorney fees to the wife after finding the husband was intransigent in, among other failures, failing to pay back taxes that he was obligated to pay under the Decree. Should this court award attorney fees to the wife on appeal for having to respond to the husband's frivolous appeal, and because he has the ability to pay the wife's attorney fees, and she has the need?

II. RESTATEMENT OF FACTS

Appellant Harvey Chew and respondent Cassandra Sage were married in 1996 and separated in 2008. (CP 2) The parties have two sons, born in 1996 and 2001. (CP 5) The parties appeared before King County Superior Court Judge Ronald Kessler

on November 18, 2009 for a 4-day trial to dissolve their marriage, distribute property and liabilities, and determine parenting and child support. (CP 247-55)

Among other assets, the trial court found that Mr. Chew separately owned three townhouses on North 94th Street in the Greenwood neighborhood of Seattle. (Finding of Fact (FF) 2.9, CP 3) The trial court found that “Mr. Chew used community assets to service mortgages and to trade and re-form [these] recently constructed townhouses.” (FF 2.21, CP 7) As a result, the trial court found that “the community is entitled to compensation for use of community assets” that benefitted Mr. Chew’s separate property. (FF 2.21, CP 7)

Instead of an offset for the community contributions, and as an “alternative” to spousal maintenance, the trial court awarded these three townhouses to Ms. Sage. (FF 2.21, CP 7, 11) The trial court found that Ms. Sage was in need of spousal maintenance because she was the primary caregiver of the parties’ younger son, who has special needs, and as a result was only able to work part-time. (FF 2.21, CP 7) The trial court recognized that Ms. Sage would likely need to sell the three townhouses in order to pay off

the mortgage on the family residence where she and the parties' children reside. (See FF 2.21, CP 7, 34) Apparently because Mr. Chew provided most of the evidence at trial related to the value of the townhomes and the obligations owed on them, the trial court ordered "if equity in the three townhomes awarded to the petitioner does not exceed the amount due on the Kirkland home, Ms. Sage may seek relief under CR 60(b)(4) due to fraud." (CP 15)

The trial court found that "any unpaid obligations associated with the 3 Seattle townhomes as of the date of entry of the Decree" were Mr. Chew's separate liability. (FF 2.11, CP 4) While awarding the townhouses to Ms. Sage, the trial court ordered Mr. Chew to "be solely liable for any expenses associated [] with the townhomes through January 31, 2010." (CP 13) The trial court ordered Ms. Sage to pay "all liabilities associated with property awarded to her after February 1, 2010." (CP 13)

The Decree of Dissolution was entered on February 3, 2010. (CP 9) Mr. Chew did not transfer the townhouses to Ms. Sage until April 2010, when the trial court ordered him to comply with the Decree. (See CP 200) And despite being ordered to pay all of the obligations on the townhouses through January 31, 2010, Mr. Chew

failed to pay back taxes owed on the properties from 2009. (CP 34) Approximately \$14,000 was owed for back taxes by the time Mr. Chew transferred the properties to Ms. Sage. (CP 34, 54, 56, 58)

On December 14, 2010, Ms. Sage filed a second motion to enforce the Decree, asking the court to enter an order requiring Mr. Chew to pay the back taxes, among other things.¹ (CP 17) Ms. Sage was particularly concerned regarding the back taxes, because she had listed the properties for sale.² (CP 34) If the properties sold while the taxes were still owing, she would receive significantly less in proceeds than anticipated, limiting her ability to pay off the mortgage for the family residence as the trial court intended. (CP 15, 34)

Ms. Sage's motion was set before Judge Kessler, the judge who had presided over the parties' dissolution trial, without oral argument. On January 7, 2011, Judge Kessler entered an order requiring Mr. Chew to pay the back taxes owing on the three

¹ Ms. Sage's motion also addressed several other instances of Mr. Chew's failure to comply with the Decree, including his failure to pay credit card debts that he was ordered to pay, his failure to transfer title to an automobile awarded to Ms. Sage, and his refusal to provide information about the mortgage on the family residence that was awarded to Ms. Sage. (CP 17-19)

² Ms. Sage listed two of the townhouses for sale, and rented one. (CP 34)

townhouses awarded to Ms. Sage. (CP 180) Judge Kessler also ordered Mr. Chew to pay attorney fees to Ms. Sage “for having to bring this motion due to [his] refusal to cooperate in effectuating the court’s orders and his continuing intransigence.” (CP 180) In denying Mr. Chew’s motion for reconsideration, Judge Kessler clarified the Decree, stating that Ms. Sage “continues to be responsible for paying all encumbrances including real estate taxes, for real estate awarded her in the Dissolution herein *from the date of the decree*. Taxes and other encumbrances, if any, accrued *up to the date of the decree* shall be paid by [Mr. Chew].” (CP 233, *emphasis added*)

Judge Kessler ordered Mr. Chew to pay \$12,373.44 for unpaid real estate taxes, and \$1,619 to Ms. Sage for her attorney fees. (CP 244-45) Mr. Chew appeals. He has not superseded the judgment, and to date has not paid the judgment for back taxes.

III. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion In Ordering The Husband To Pay Back Taxes Owed On Real Property Awarded To The Wife, As Required By The Dissolution Decree.**

The trial court did not abuse its discretion in ordering the husband to pay back taxes owed on the real property awarded to the wife, when it previously found that “any unpaid obligations associated with the 3 Seattle townhomes as of the date of entry of the Decree” were the husband’s separate obligation (FF 2.11, CP 4), and it ordered that the husband “shall be solely liable for any expenses associated [] with the townhomes through January 31, 2010.” (CP 13) In entering its order, the trial court did not “modify” the Decree. (App. Br. 6) At most, the trial court clarified the Decree to remove any ambiguity because there was a claimed conflicting provision that awarded the townhouses to the wife “subject to the encumbrances thereon.” (CP 12)

The husband’s argument hinges on his claim that the “expenses” for the townhouses, for which he indisputably was solely liable (CP 13), did not include real estate taxes. (See App. Br. 7-10) The husband claims that because the wife was awarded the townhouses “subject to the encumbrances thereon,” (CP 12),

she was liable for past due real estate taxes. (App. Br. 7-10) But the wife took the townhouses “subject to encumbrances” because there was still an outstanding mortgage, for which the wife would be responsible *after* entry of the Decree. (See CP 13)

Real estate taxes could be considered an encumbrance if they were “accrued and unpaid,” as the husband claims. (App. Br. 7; see *infra* at 10-11) But the trial court did not consider the real estate taxes as an encumbrance because the husband did not disclose at trial that he had not paid them. (See CP 200) The trial court had relied on the husband to accurately testify about the encumbrances and value of these properties. (See CP 15)

That the husband is able to point to authority that in other circumstances describes taxes as an “encumbrance” (App. Br. 8-9), is of no matter. There is an equal amount of authority that describes taxes as an “expense.” See ***Poll v. Second Seattle Real Estate Associates***, 196 Wash. 107, 108, 82 P.2d 167 (1938) (describing real estate taxes as an expense “incident to ownership”); ***Smith v. Smith***, 56 Wn.2d 1, 6, 351 P.2d 142 (1960) (including real estate taxes as an expense of sale); ***Marriage of Griswold***, 112 Wn. App. 333, 352, 48 P.3d 1018 (2002) (wife was

obligated to pay real estate taxes when she was given husband's bonus to pay "living expenses"), *rev. denied*, 148 Wn.2d 1023 (2003); ***Anderson v. C. I. R.***, 527 F.2d 198, 199 (9th Cir. 1975) (self-employed tax payer can deduct real estate taxes as an expense for purposes of establishing income).

It is also clear from other language in the Findings and Decree that the husband was liable for past due real estate taxes. The trial court found that the husband's "separate liabilities" at the time the Decree was entered included: "any unpaid obligations associated with the 3 Seattle townhomes as of the date of the entry of the decree." (FF 2.11, CP 4) The trial court ordered the husband to be "solely liable for any expenses associated [] with the townhomes through January 31, 2010." (CP 13) At the same time, the trial court ordered the wife to only be responsible for "liabilities associated with property awarded to her after February 1, 2010," (CP 13) – which can only mean that she would not be responsible for any liabilities incurred to that date, including past due real estate taxes.

The trial court's entry of a judgment against the husband for the unpaid taxes on the townhouses through January 31, 2010 was not a "modification," and was within the trial court's discretion in enforcing its Decree. **Marriage of Greenlee**, 65 Wn. App. 703, 710, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992) (trial courts retain discretion to enforce decree). At best, the fact that the wife was awarded the real property "subject to the encumbrances thereon" created an ambiguity that the trial court had discretion to clarify. See **Marriage of Moore**, 99 Wn. App. 144, 146, 993 P.2d 271 (1999) (court has discretion to clarify a property division); **Marriage of Haugh**, 58 Wn. App. 1, 7-8, 790 P.2d 1266 (1990) (ambiguous decree is subject to clarification); **Logan v. Logan**, 36 Wn. App. 411, 420, 675 P.2d 1242 (1984) ("'ambiguous' has been defined as 'capable of being understood in either of two or more possible senses'").

In **Marriage of Moore**, the parties' decree of dissolution awarded the wife "one-half the community interest in the pension," to be received when it was distributed to the husband. 97 Wn. App. at 145. When the parties were divorced in 1985, 87% of the pension, or \$42,781, was community property. Thirteen years later,

when the husband was ready to retire, he offered the wife \$21,390 – the 1985 value of half of the community pension. When the wife asked the court to clarify the decree of dissolution and enter a declaratory judgment that she was entitled to her share of the pension at its current value, the court entered an order awarding the wife 43.5% of the total pension funds, or one-half of the current value of the community interest in 1985.

The appellate court affirmed, holding that other sections of the decree demonstrated the trial court's intention to award the wife an interest in the pension corresponding to half the community interest in the pension's then-present value. **Moore**, 99 Wn. App. at 147. The **Moore** court held that the trial court did not abuse its discretion in clarifying the decree to carry out the trial court's original intention. 99 Wn. App. at 147.

As in **Moore**, the trial court here clarified its Decree so that its original intent could be carried out. In the face of the parties' conflicting interpretations of the Decree, the trial court did not abuse its discretion by clarifying that it intended that the only obligations related to the townhouses for which the wife was liable were those incurred *after* the Decree was entered, and ordering the husband to

pay those obligations incurred prior to entry of the Decree. (CP 233) In doing so, the trial court did not modify its Decree. (App. Br. 6)

A decree is modified only “when rights given to one party are extended beyond the scope originally intended, or reduced. A clarification, on the other hand, is merely a definition of rights already given, spelling them out more completely if necessary.” ***Rivard v. Rivard***, 75 Wn.2d 415, 418, 451 P.2d 677, 679 (1969). In this case, the trial court “defined” the husband’s obligation by clarifying that it intended “unpaid obligations” and “expenses” to include back taxes that were still owed on the townhouses as of the date of the Decree, and that the only “encumbrances” for which the wife was responsible were those incurred after the Decree was entered. (CP 233) The trial court has authority to clarify its own decree to the extent there was any ambiguity, in order to ensure that its original intent is carried out. ***Rivard***, 75 Wn.2d at 419.

B. This Court Should Deny The Husband's Request For Attorney Fees And Award Attorney Fees To The Wife Based On Need And Ability And Intransigence.

This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; **Leslie v. Verhey**, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). Here, there is no basis for an award of attorney fees to the husband under RCW 26.09.140. Instead, this court should award attorney fees to the wife, who can work only part-time because she is charged with the primary care of the parties' special needs child. The husband is a Certified Public Accountant who has the means to pay both his own attorney fees and the wife's attorney fees. The wife will comply with RAP 18.1(c) and submit an affidavit of financial need.

Regardless of the parties' financial resources, this court also should award attorney fees to the wife because of the husband's intransigence in bringing this appeal of an order that was well within the trial court's discretion. RAP 18.9; **Marriage of Greenlee**, 65 Wn. App. at 708. The trial court already found the husband was liable for attorney fees to the wife below because of his "refusal to

cooperate in effectuating the court's orders, and his continuing intransigence" in failing to pay the back real estate taxes. (CP 180) The husband has not challenged this finding of fact, and it is a verity on appeal. **Marriage of Brewer**, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). The trial court had also awarded attorney fees to the wife at the end of the dissolution trial for the husband's intransigence (CP 8: "The court finds that the respondent was intransigent and that his behavior significantly increased the costs in this case."), and for other post-decree motions in which the wife sought the husband's compliance with the Decree. (See CP 87, 97, 101, 115, 124, 133)

The wife should not be required to impoverish herself out of the limited resources available to her when the husband's tactics have made litigation more difficult and expensive. **Marriage of Dalthorp**, 23 Wn. App. 904, 912-13, 598 P.2d 788 (1979). The husband's intransigence in the trial court also supports an award of attorney fees on appeal. **Marriage of Wallace**, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003).

IV. CONCLUSION

The trial court properly entered an order enforcing its intent to make the husband liable for all unpaid obligations on the real property awarded to the wife as of the date of entry of the Decree, including back taxes. This court should affirm the trial court's order and award attorney fees to the wife for having to respond to this appeal.

Dated this 11th day of August, 2011.

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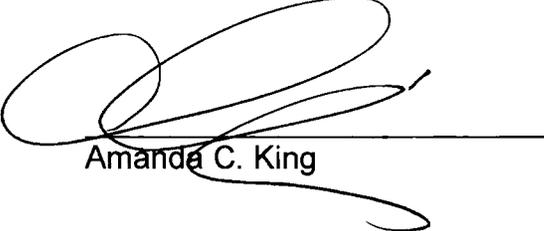
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 11, 2011, I arranged for service of the foregoing Brief of Respondent, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 11th day of August, 2011.


Amanda C. King