

NO. 691147

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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IN RE THE MARRIAGE OF  
KEVIN BRUCE HENDRICKSON

Respondent-Appellant

vs.

JONA HENDRICKSON

Petitioner-Appellees

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. William L. Downing)

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**REPLY BRIEF OF APPELLANT  
KEVIN BRUCE HENDRICKSON**

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2013 JUN 26 PM 1:47  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
[Signature]

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## I. INTRODUCTION

The trial court erred by modifying the property settlement agreement, a contract of the parties, by extending the within 90 days provision to arbitrate.

## II. FACTS

Kevin Hendrickson and Jona Hendrickson entered into a Property Settlement Agreement, which was incorporated into their Decree of Dissolution. The PSA provided that 14 enumerated issues be arbitrated by Lawrence Besk within 90 days from the entry of the Decree. The 90 day limitation was a creation of the parties, negotiated between them, not a decision by Mr. Besk. While the PSA named Mr. Besk as arbitrator to arbitrate all issues arising out of this agreement, concerning implementation, interpretation and enforcement," it was further provided, at Section 10.8, that he had no authority to modify the agreement or to find a waiver of any term of the agreement by stating, "no modification or waiver of any term of this [A]greement shall be valid as between the parties...no waiver of any breach or default shall be deemed a waiver of any subsequent breach or default of the same or similar nature no matter how made or how often occurring." The reason for the limitation and the 14 issues separately enumerated from all other issues was to establish finality to the arbitration process. The 14 enumerated issues encompassed the major and final issues of the property settlement,

through which the parties would be able to finally separate responsibilities to one another. There were several primary issues that required resolution, including the running of parties' auto repair business by the Husband; the running of the parties' properties business by the Wife and her potential self-dealing thereto, and the Wife's acts as Guardian and her potential self-dealing as to the parties' disabled adult child's estate.

By the time, the PSA was entered, the parties had participated in at least seven arbitrations from March 11, 2011 (when the parties CR2(A) settlement agreement was entered into by the parties) to November 1, 2011. The on-going, piece-meal style of completing the property settlement was taxing on both parties, financially and emotionally. The parties' assets were continuing to be diminished, with little income for either party to sustain a once prosperous life-style, which included the financial and physical care of a disabled, adult child.

Although the Wife contends that the Husband has not complied with the PSA to deliver an accounting of the business to the Wife within 30 days, the Husband did so by delivering all business documents, a copy of the written work-in-progress accounting and a portable hard-drive containing all the final accounting data to the garage belonging to the disabled adult child's home, located next-door to the Wife's home. However, the Wife refused to cooperate by accepting the information. The issue of whether the accounting had been delivered or failed to be accepted has not been decided by a trier of fact, and no such finding is

present in the record. However, the pattern of intransigence has been that the Wife has refused to provide accountings to Husband for the parties' other business, Hendrickson Properties, and for the estate of the parties' disabled adult daughter. Further, she refused to cooperate to establish a trust for the parties' disabled child or to provide for a guardian ad litem to protect the disabled adult child's interests which were irrevocably gifted by the parties. During this time, the Wife's attorney, Gail Wahrenberger acted as attorney for both the Wife in the dissolution and for the disabled adult child's Guardianship, under the jurisdiction of Snohomish County. As a part of her continuing intransigence, the Wife did not comply with any efforts to complete her discovery except to blame the Husband. To date, the Arbitrator has not ascertained any first-hand knowledge, although, ignoring third-party information that the records were indeed delivered in good order.

During this time, it was known to the parties that the sale of the parties' remaining real property would not compensate the Husband for the value of real property, \$1.018 million, already awarded to the Wife, to which the Arbitrator refused to award interest to the Husband. Therefore, the more time that passed, the Husband would not be able to recover his interest in the community property. The 90 day limitation pertained to Wife's debt owed to the Husband, which was an acceptable time period to waive interest on the debt so that the Wife could make her case.

By letter to the Arbitrator on or about March 6, 2012, the issue of whether the Arbitrator could continue to extend the 90 day limit occurred within a few days of the expiration of the 90 days period. The letter also raised issues of bias, incompetence and conflicts of interest. The Arbitrator called a telephone conference with parties, which he rejected Husband's concerns and ridiculed his assertions. He also refused to release information regarding other mediations and arbitrations that he conducted with Wife's attorney during the litigation of the Hendrickson case. The sale of the parties' real property was not a topic of this telephone conference.

A few days, the parties were attempting to sell a commercial property located at 15th Avenue NE in Seattle. The parties could not agree on a counter-offer since the Husband, who had always managed the buying and selling of the parties' real property, wanted to counter at a higher price than the Wife. The Husband also believed that the parties were now at a disadvantage since the buyers were informed that the property was part of a "divorce sale." The Husband further requested that the property be awarded to him to in payment for the debt owed to him by the Wife. The Arbitrator ordered the counter-offer price to be higher than the Wife's offer and lower than the Husband's offer. He further ordered a special master to sign for the Husband.

The Husband's counsel consulted expert mediator, the Honorable Murray McLeod, to provide evidence of the Arbitrator's display of bias,

incompetence in allowing the issues in the case to languish without finality and causing the parties' estate to diminish and costing the parties thousands of dollars in arbitration costs, and collusion with Wife's attorney, who routinely uses Mr. Besk to mediate and arbitrate her many dissolution cases. In all, the Arbitrator had done nothing for the case except to increase conflict, promote financial burdens for both parties, increase distrust in the legal remedies, and prevent finality. In the expert's opinion, all of which would have been completed by the decision of one trial court. The expert opinion was ignored by the trial court as a basis for Husband's assertions, and so sanctioned Husband and Husband's attorney.

At this time, no arbitration are taking place due to motion before the trial court, Motion to Vacate Orders, Motion to Disqualify Wife's Counsel, and Motion for Declaratory Judgment Regarding Interest of the Disabled Child. There have been at least 20 arbitrations in this case, with no end in sight. No date for final arbitration has been set.

### III. ARGUMENT

#### A. Appellant's Appeal is Procedurally Sound.

##### 1. *Respondent Wife has Assigned No Error as to Trial Court's Acceptance of Motion for Reconsideration*

The trial court has discretion to decide whether to hear a matter, when an objection to timeliness is raised. [The] "[T]rial court did not reject the motion out of hand as untimely. Opposing party had the opportunity to

respond. The trial court entertained and decided the issue; therefore, it is not a reason to deny review under Rules of Appellate Procedure 2.5a.”

*River House Development v. Integras Architecture, PS*, 167 Wn.App. 221 (Division III, 2012)

2. *Issues May Be Raised by Motion for Reconsideration for First Time on Review.*

A party may preserve an issue for appeal by filing a motion for reconsideration. *Newcomer v. Masini*, 45 Wn.App. 284 at 287, 724 P.2d 1122 (1986); *Reitz v. Knight*, 62 Wn.App.575 at 581, n.4, 814 P.2d 1212 (1991, Division I).

B. Appellant’s Appeal is Substantively Sound.

1. *The Parties have a Contract that Prohibits Allegations of Waiver, Delay or any Other Reasons for Modification; therefore, in the absence of an Arbitration Agreement with Mr. Besk, Which Grants Such Authority, the Arbitrator has No Authority to Modify Any Part of the Contract.*

The Hendrickson’s PSA is not severable and must be interpreted in its entirety; one cause cannot be interpreted with greater importance than any other cause. In this case, although, Section 10.1 generally states authority for Mr. Besk to arbitrate, Section 10.8 does not allow him authority to modify or waive any terms of the contract, even if acts that signify modification or waiver have occurred. Since the parties specifically enumerated and separated out the 14 issues to arbitrate within 90 days of the entry of the Decree of Dissolution for the specific reasons by Mr. Besk, an arbitrator has no authority to change it.

The Wife cites *Howsam v. Dean Witter, Inc.*, 537 U.S. 79. S. Ct. 588, 154 L.Ed.2d, 491 (2002) to stand for the proposition that time limitations are an issue to be decided by the arbitrator. In conjunction with *Heights at Issaquah Ridge, Owners Association v. Burton Landscape Group, Inc.*, 148 Wash.App. 400, 200 P.3d 254 (2009), citing *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wash. App. 281, 135 P.3d 558 (2006), the Wife contends that arbitrators should decide “allegations of waiver, delay, or the like defenses to arbitrability.” However, the cited cases are instances where the authority to arbitrate springs from an arbitration agreement giving such authority based on the occurrence of the arbitrable event. In the Hendrickson case, there is no “occurrence of the arbitrable event.” The events have occurred, the parties agreed to the deadline for reasons particular to keeping value to their estate. This agreement cannot be modified or waived and should be honored by the Court and by the Arbitrator.

2. *The Appellant's Appeal is for the Purpose of Preserving the Intent of the Parties to Bring Expeditious Finality to the Case.*

For the most part, all litigates want out of litigation is fairness and finality, as quickly as possible. This has not been achieved by the arbitration process. This is the only reason that the Husband has pursued this case in this way is to separate from his spouse and to separate their assets fairly, as per their agreement, as expeditiously as possible. There is no finding that the Husband has bullied, intimidated or drained the

Wife's resources by pursuing this matter. The Wife had two years to complete discovery of her case prior to entering the Decree and discovery was completed in January 2011. Based upon this, the parties wanted to be done and agreed to do so by March 3, 2012, the 90<sup>th</sup> day after the entry of the Decree. The Arbitrator should be held to this agreement.

3. *The Trial Court Does Not Have the Authority to Modify the Agreement of the Parties to a Contract.*

Likewise, the arbitrator does not have the authority to modify or find waiver in contravention to Section 10.8 of the PSA. The trial does not have the authority to grant the Arbitrator more authority than authorized by the parties' agreement.

4. *The Contract Embodied Parties' Agreement Based on the Intent to Expeditiously Complete 14 Enumerated Issues within a Set Time Period, or Set It to Trial.*

The PSA embodied the parties' agreement to expeditiously complete the 14 enumerated issues within 90 days, so that they could move on with their lives and to separately re-build their estates. This clause and limitation has intent and meaning, unlike the time constraints stated by the other cases cited whereby the court found that it was an issue for arbitration. Here, the issue of arbitrability had already been decided: the parties contracted with each other that the 14 issues were arbitrable by Mr. Besk for 90 days after the entry of the Decree. This term limits Mr. Besk's authority (by agreement) to act as arbitrator for these 14 issues. To go beyond the four corners of the Agreement and allow Mr.

Besk more authority than intended by the Agreement is illegal. While this clause does not state that the 14 enumerated issues are not arbitrable, unless the parties agree otherwise, Mr. Besk cannot act as arbitrator for these issues. Without agreement by the parties to allow Mr. Besk to again act as arbitrator, or agreement to some other arbitrator, the parties have either mediation or trial as a remedy.

5. *By Modifying the Contract, the Contract is Now Unconscionable.*

Mr. Besk's act to modify the contract, in contravention of Section 10.8 of the PSA, has made the contract unconscionable, by not requiring finality. Further, the trial court refused to place an end date on the final arbitration. The 90 day clause was entered by the parties to create a structure to their lives and financial management of their separate and community assets. The lack of structure created by an absence of an end date has driven the conflict and distrust to a level whereby neither party can function. At this time, the Wife has been removed as Guardian for the parties' disabled adult child due to alcoholism and misuse of the child's estate. The Husband is still owed an almost \$700,000.00 debt by the Wife without interest, and he is frustrated and disillusioned by the extreme losses to the estate brought on by the litigation. Both parties are suffering stress health problems; it was alleged by the GAL for the disabled adult child that the Wife is in need of an LGAL and the Husband has increased heart disease symptoms. Mr. Besk's fees have been approximately

\$40,000.00 for piecemeal justice; and will be considerably more given the problems with property sales and the inevitable stream of conflict between the parties. To not allow trial because arbitration is too easy (although, for the Hendricksons, the arbitration process has been more expensive, taken longer and less accessible than trial) is unconscionable. In this case, arbitration has become a nightmare with no awakening; if the parties have not given authority for Mr. Besk to continue to arbitrate the 14 enumerated issues, which would put end to their conflicts, then this Court should end it now.

C. Appellant Has Not Acted to Delay Arbitration and Seeks Only to Enforce the Contract Terms of the Parties.

The Husband has not acted to delay arbitration. He timely performed all actions required by the parties' agreement; however, he cannot make the Wife act to perform her responsibilities, nor can he make her recognize that the records were in her possession and control. The Wife cannot argue otherwise because no trier of fact has found that the Husband has acted in contravention of the PSA. The Wife's attorney only claims that he has not acted timely, which is not true.

The Wife intentions and motives to delay the Arbitration on the final issues so that the parties may complete separate are completely emotional for the Wife. In addition, she seeks to create loss for the parties and diminish the estate. She is motivated by revenge and to create hardship for the Husband. She is not concerned for her own livelihood

since is in possession of the most lucrative real property in the estate that can be sold quickly. In addition, the Husband has a heart condition, whereby his health and life are jeopardized by stress, which the Wife seeks to exploit.

The Husband just wants the contract to be complied with and for the property division to be completely with fairness.

D. The Remedy is Apparent; It is Trial or Appointment of Another Arbitrator Who Will Timely Complete the Issues of the Case.

There are other remedies to the parties besides arbitration with Mr. Besk. The parties have remedies to set the 14 issues to trial, mediate or arbitrate with another arbitrator.

E. There is No Basis For Award of Attorney's Fees.

The Appellant has not brought this appeal for improper purposes or frivolous motives. He wants to be treated fairly for he bargained when he settled this case. For this, he has been forced to show that he did not enter into a contract with a material term in the form of a time limitation. The opposing counsel would want you to believe the time limit was meaningless and had no purpose. However, there is not true and he is now force to present the issue to this Court. Fees to the Wife are not warranted.

#### IV. CONCLUSION

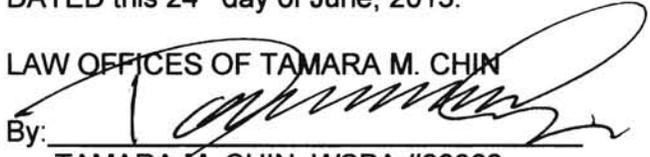
The trial court does not have the authority to modify the agreement of the parties which has already been decided and agreed upon by the parties. Furthermore, the Arbitrator does not have the authority to arbitrate a modification of the term "within 90 days" for the Arbitrator to arbitrate the issues enumerated by Section 8 of the Property Settlement Agreement. Further Section 10.8 of the PSA does not allow for modification or waiver of any term of the PSA. There is no ambiguity within the contract language; the language is clear on its face. Neither is there any extrinsic evidence as the parties intended full integration of the PSA. The parties simply did not give authority to Lawrence Besk to arbitrate the 14 enumerated issues after March 3, 2012, 90 days after the entry of the Decree of Dissolution.

Thus this Court of Appeals should reverse the trial court's order and remand the issue to trial for post dissolution remedies to close this issue once and for all.

For the foregoing reasons the appellant respectfully requests relief.

DATED this 24<sup>th</sup> day of June, 2013.

LAW OFFICES OF TAMARA M. CHIN

By: 

TAMARA M. CHIN, WSBA #23062  
Of Attorneys for Appellant

DECLARATION OF SERVICE

I declare, under penalty of perjury under the laws of the State of Washington, that on June 24<sup>th</sup>, 2013, I caused delivery of a copy of the following documents by the method indicated to the attorney for respondent listed below:

1. Appellant's Reply Brief

Service List

Gail Wahrenberger, WSBA #15427 Stokes Lawrence, P.S. 1420 Fifth Avenue, Suite 3000 Seattle, Washington 98101	<input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Mailed <input type="checkbox"/> Faxed
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DATED this 24<sup>th</sup> day of June, 2013, at Lynnwood, Washington.

  
TAMARA M. CHIN, WSBA #23062

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