

63066-1

63066-1

No. 63066-1-1

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUN 30 PM 2:17

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION 1

In Re the Marriage of:

REBECCA STEWART,

Appellant/Cross-Respondent,

v.

JERRY STEWART

Respondent/Cross-Appellant.

BRIEF OF APPELLANT/CROSS-RESPONDENT REBECCA STEWART

David G. Porter, WSBA #17925
103 E. Holly #409
Bellingham, WA 98225
(360) 714-9821

Attorney for Appellant/Cross-Respondent

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
I. Assignments of Error.....	3
II. Statement of Facts.....	7
ARGUMENT.....	8
III. Standard of Review.....	8
IV. The Decree of Dissolution of Marriage is Void	10
V. The Property Division was not Just and Equitable	13
1. The Radio Business Awarded to Jerry was not valued.....	13
2. The trial court cannot distribute an asset disposed of prior to trial.....	15
3. The documentary evidence is insufficient to support Jerry's business expense claims which deprives the trial court of the ability to make a just and equitable division.....	17
VI. Based Upon the parties' respective economic positions, Rebecca's Maintenance award is inadequate.....	18

VII. Attorney Fees 21

CONCLUSION..... 23

TABLE OF AUTHORITIES

WASHINGTON CASES

	Page
<u>Brickum Inv. Co. v. Vearnham Corp.</u> , 96 Wn. App. 517, 731 P. 2 nd 533 (1987)	8
<u>Friedlander v. Friedlander</u> , 80 Wn. 2 nd 293, 494 P. 2 nd 208 (1972).....	15
<u>In Re Terry</u> , 79 Wn. App. 866, 905 P. 2 nd 935 (1995)	9
<u>Marriage of Gillespie</u> , 84 Wn. App. 390, 948 P. 2 nd 1338 (1997)	9
<u>Marriage of Kaseburg</u> , 126 Wn. App. 546, 108 P. 3 rd 1278 (2005).....	16
<u>Marriage of Kraft</u> , 119 Wn. 2 nd 438, 832 P. 2 nd 871 (1992)	9
<u>Marriage of Markowski</u> , 50 Wn. App. 633, 749 P. 2 nd 754 (1988).....	13
<u>Marriage of Martin</u> , 22 Wn. App. 295, 588 P. 2 nd 1235 (1979).....	14, 15
<u>Marriage of Moody</u> , 137 Wn. 2 nd 979, 976 P. 2 nd 1240 (1999).....	11, 22
<u>Marriage of Mu Chai</u> , 122 Wn. App. 247, 93 P. 3 rd 936 (2004).....	12, 13
<u>Marriage of Pollard</u> , 99 Wn. App. 48, 991 P. 2 nd 1201 (2000)	10

<u>Marriage of Washburn</u> , 101 Wn. 2 nd 168, 677 P. 2 nd 152 (1984).....	20
<u>Marriage of White</u> , 105 Wn. App. 545, 20 P. 3 rd 481 (2001)	9
<u>State Ex Rel Turner v. Briggs</u> , 94 Wn. App. 299, 971 P. 2 nd 581 (1999).....	12
<u>Wold v. Wold</u> , 7 Wn. App. 872, 503 P. 2 nd 128 (1972)	9, 14, 18

OTHER AUTHORITIES

RCW 26.09.....	22
RCW 26.09.030 (d).....	11
RCW 26.09.080.....	5, 15
RCW 26.09.090.....	6
RCW 26.09.140.....	7, 9, 23

INTRODUCTION

After a series of domestic violence incidents, (CP 156, 193, 195-197), Rebecca filed and served her Summons and Petition for Legal Separation. (CP 261-268) Rebecca subsequently filed an Amended Petition for Legal Separation. (CP 203-07) In Jerry's Response to the First Amended Petition for Legal Separation (CP 153-55), he denied Rebecca's request for a legal separation in lieu of a dissolution of marriage. (CP 204) However, Jerry never served his summons and petition for dissolution of marriage. The trial court not only erred when it entered the Decree of Dissolution (CP 62-86) in this case, but the decree is also void. The decree is void because the Court had no personal jurisdiction over Rebecca because Jerry failed to file and serve his summons and petition for dissolution of marriage.

If this Court does not determine that the Decree (CP 62-86) is void, then the trial court erred when it failed to make a just and equitable division of the parties' assets and liabilities. The trial court failed to value the community radio business assets and the radio

business itself. The trial court distributed the insurance settlement proceeds which had been disposed of prior to trial. Jerry managed the community business and the business and family finances. (VR 46) Jerry's documentary evidence to support his alleged business expenses is insufficient. Jerry had no statement of the community business expenses for 2008. (VR 168) He made payments of personal and business expenses from the business account. (VR 189) Jerry failed to adequately explain why the community accounting business, which generated \$367,274 in receipts in 2008, (VR 162) basically had no money at the time of trial in January of 2009. (VR 163)

Based upon the parties' overall economic circumstances, Rebecca's maintenance award is inadequate. Rebecca has no income and is unemployable. (CP 89) Jerry is employed and has several employment opportunities. (VR 203, 197-202) Jerry has disability insurance (VR 207) and may be eligible for Medicaid. (VR 233) Rebecca should be named the beneficiary of the life insurance policies, to care for her financial needs in the coming years.

Rebecca should have been awarded attorney fees at trial and in this appeal.

I. ASSIGNMENTS OF ERROR

The trial court entered its Findings of Fact and Conclusions of Law and Decree which divided the parties assets and liabilities and awarded maintenance. Rebecca assigns error to the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage entered in this case. Specifically, the trial court erred when it concluded:

1. A Decree of Dissolution of Marriage could be entered that is based upon a Petition for Legal Separation. The actions for legal separation and dissolution of marriage have distinctly different consequences. Personal jurisdiction over Rebecca for the dissolution decree was not obtained because she was never served and Jerry never filed his summons and petition for dissolution of marriage. The decree is void. (Findings of Fact 2.1 through 2.20; Conclusions of Law 3.1 through 3.5; and the entire Decree of Dissolution upon which the findings and conclusions are based.)
2. The trial court had the authority to award the radio business assets and the radio business itself without first valuing the assets and business. (Findings of Fact 2.8, 2.9, 2.10, 2.11 and 2.20; Conclusion of Law 3.3)
3. The trial court had the authority to award and distribute assets

which were no longer in existence at the time of trial. (Findings of Fact 2.8, 2.9, 2.10, 2.11 and 2.20; Conclusion of Law 3.3)

4. The trial court had the authority to make a division of property with inadequate documentary evidence of the business' assets and liabilities. (Findings of Fact 2.8, 2.9, 2.10 2.11 and 2.20; Conclusion of Law 3.3)

5 . Based upon the overall economic circumstances of the parties, the trial court awarded adequate maintenance to Rebecca, including monthly maintenance and life insurance. (Findings of Fact 2.8, 2.9, 2.10, 2.11, 2.12 and 2.20; Conclusion of Law 3.3)

6. Based upon the overall economic circumstances of the parties, each party should pay their own costs and attorney fees. (Findings of Fact 2.8, 2.9, 2.10, 2.11, 2.12, 2.14 and 2.20; Conclusions of Law 3.3 and 3.5)

Issues pertaining to theses assignments of error include:

A. The trial court entered a Decree of Dissolution of Marriage based upon an Amended Petition for Legal Separation, which was in lieu of divorce. No subsequent summons and petition for dissolution of marriage was filed or served to support the Decree of Dissolution.

Is the Decree of Dissolution void because no personal jurisdiction was obtained over Rebecca to obtain the Decree of Dissolution?

B. Under RCW 26.09.080, the trial court is granted the authority to make a just and equitable division of the parties' assets and liabilities. No valuation was made of the radio business assets, nor the radio business itself. Did the trial court error, considering the overall economic circumstances of the parties, when it awarded Jerry the community radio business without first valuing the business assets and the business itself?

C. Under RCW 26.09.080, the trial court is granted the authority to make a just and equitable division of the parties' assets and liabilities. Rebecca testified that the proceeds from the insurance settlement had been disposed of prior to trial. Did the trial court error by distributing the proceeds of the insurance settlement when they no longer existed at the time of trial?

D. Under RCW 26.09.080, the trial court is granted the authority to make a just and equitable division of the parties' assets and liabilities. The receipts for the community accounting business for 2008 was \$367,274. Jerry could not explain, nor did he have the

documentary evidence to prove, why the \$367,274 and additional funds in the business bank accounts totaling \$408,579 (VR 175) were all essentially gone at the time of trial in January of 2009. Did the trial court error, considering the overall economic circumstances of the parties, when it made its division of assets and liabilities without adequate evidence of how the community business funds were spent by Jerry?

E. Under RCW 26.09.090, the trial court is granted the authority to award either spouse maintenance. The trial court found that Rebecca is unemployable. (CP 89) Rebecca has not worked since the early 1970's because of the parties' joint decision. The trial court found that Rebecca will need \$2,600 per month to meet her basic monthly needs. (CP 89) Jerry stated that he wanted to provide for Rebecca financially. (VR 107) The life insurance policies would go toward her financial stability. Did the trial court error, considering the overall economic circumstances of the parties, when it awarded less maintenance to Rebecca than she needed to meet her basic monthly needs and did not award her all of the life insurance policies on Jerry's life, which would provide for her in the coming years?

F. Based upon the law and facts of this case, it appears that the Decree of Dissolution entered by the trial court in this case is void. If so, should Rebecca be awarded all of her costs and attorney fees in the trial court from the time Jerry filed his Response to the First Amended Petition for Legal Separation?

G. Under RCW 26.09.140, the trial court has the authority to award costs and attorney fees. If this court does not determine that the Decree is void, did the trial court error, based upon Rebecca's need and Jerry's ability to pay, when it failed to award Rebecca her attorney fees?

II. STATEMENT OF FACTS

A. The parties were married for approximately forty years. (CP 210, 193) The parties agreed that Rebecca would stop working in the early 1970's after their second daughter was born. (VR 22, 76) Rebecca has a weak back, digestive problems and arthritis. (VR 29) Rebecca was being trained as a nurse when the parties married. (VR 23.-24)

Jerry was diagnosed with incurable liver cancer in 1999.

(CP 210) Jerry has carcinoid cancer, which is very rare and very slow growing. (CP 192; VR 79-80) The injections Jerry receives are intended to keep the cancer from growing. (CP 192; VR 79-80) There has been no growth of the cancer in recent years. (CP 192; VR 79-80) Jerry testified that the symptoms of the disease have dropped-off dramatically. (VR 80) Jerry has commented numerous times that the cancer has not changed his lifestyle in any way. (CP 192)

Other facts relative to the issues are stated with the issue.

ARGUMENT

III. STANDARD OF REVIEW

The determination of whether or not the Decree of Dissolution of Marriage entered in this case is void is a conclusion of law. "A judgment entered without jurisdiction is void." Brickum Inv. Co. v. Vearnham Corp., 46 Wn. App. 517, 520, 731 P. 2nd 533 (1987). Courts have a non discretionary duty to vacate judgments entered without jurisdiction. See Brickum, supra, at 520.

The distribution of assets and liabilities is an abuse of discretion

standard. See Marriage of Kraft, 119 Wn. 2nd 438, 450, 832 P. 2nd 871 (1992). The trial court's paramount concern when distributing property in a dissolution action is the economic condition in which the decree leaves the parties. Marriage of Gillespie, 84 Wn. App. 390, 399, 948 P. 2nd 1338 (1997).

However, "It is obvious that the trial court abuses its discretion when it orders a division of property without having knowledge of the value of a substantial part of it." Wold v. Wold, 78 Wn. App. 872, 878, 503 P. 2nd 128 (1972)

The trial court has no discretion to award an asset which has been disposed of prior to trial. Marriage of White, 105 Wn. App. 545, 549, 20 P. 3rd 481 (2001)

An award of maintenance is within the broad discretion of the trial court. In re Terry, 79 Wn. App. 866, 869, 905 P. 2nd 935 (1995)

"The paramount concern is the economic condition in which a dissolution decree leaves the parties." Terry, supra, 869.

RCW 26.09.140 gives the trial court discretion to award attorney fees in domestic relations proceedings after balancing the needs of the requesting spouse against the ability of the other spouse to pay.

Marriage of Pollard, 99 Wn. App. 48, 56, 991 P. 2nd 1201 (2000)

IV. The Decree of Dissolution of Marriage is Void.

Jerry has a history of domestic violence. (CP 156) In the early morning of March 5, 2008, an incident of domestic violence occurred at the family home (CP 193, 195-197) from which Jerry was arrested and charged with assault, domestic violence. (VR 86, 245) Later that day, Rebecca filed her Summons (CP 261-62) and Petition for Legal Separation. (CP 263-68) The Amended Petition for Legal Separation (CP 203-207) Rebecca filed on April 2, 2008, amended the Continuing Restraining Order and Protection Order provisions of the previous petition. As a part of his oral ruling, the trial court initially attempted to set-aside the restraining order (Oral Ruling, VR 3), but ended by recommending to the prosecutor that the restraining order be set-aside. (Oral Ruling, VR 3-4)

In Jerry's Response to First Amended Petition for Legal Separation (CP 153-155), filed on April 4, 2008, Jerry denied (CP 154) Rebecca's statement, "This is a request for legal separation in lieu of a dissolution of marriage." (CP 204) Jerry responded, "Respondent alleges that the marriage is irretrievably broken and the court should

enter a decree of dissolution.” (CP 154) However, Jerry did not file or serve his summons and petition for dissolution of marriage.

At trial, Rebecca stated that she did not believe the marriage was irretrievably broken. (VR 27) The trial court then sustained Jerry’s relevance objection and explained, “She filed for separation, he countered with a petition for dissolution.” (CP 27) However, there is no evidence that Jerry had ever prepared his petition for dissolution of marriage.

According to the Washington state Supreme Court in Marriage of Moody, 137 Wn. 2nd, 979, 988, 976 P. 2nd 1240 (1999)

There are a number of reasons why married couples decide to petition for legal separation rather than dissolution. These could include religious concerns, emotional unpreparedness for dissolution, and financial considerations such as continuation of employment or social security benefits.

Rebecca filed her petition for legal separation because her Christian beliefs prohibit divorce. (VR 27) Jerry, however, wanted a decree of dissolution of marriage. (CP 154; VR76) The citizens of the State of Washington through their duly elected legislators have enacted a statute to cover this situation. Pursuant to RCW 26.09.030 (d),

If a petitioner requests the court to decree legal

separation in lieu of a dissolution, the court shall enter the decree in that form unless the other party objects and petitions for a decree of dissolution or declaration of invalidity.

Now, Rebecca requested a decree of legal separation in lieu of dissolution of marriage (CP 204). Jerry objected, and he requested a decree of dissolution. (CP 154) However, he did not file or serve a summons and petition for dissolution of marriage. As a result, the Decree of Dissolution entered on January 30, 2009 is void due to a lack of personal jurisdiction.

“A void judgment is a judgment, decree or order entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved.” State Ex Rel Turner v. Briggs, 94 Wn. App. 299, 302-03, 971 P. 2nd 581 (1999). A request to vacate a void judgment may be brought at any time. Marriage of Mu Chai, 122 Wn. App. 247, 254, 93 P. 3rd 936 (2004).

An action for legal separation and an action for dissolution of marriage have distinctly different consequences. Marriage of Markowski, 50 Wn. App. 633, 636-37, 749 P. 2nd 754 (1988) and

Marriage of Mu Chai, supra, 256. As this Court has stated in Marriage of Mu Chai, supra, 256, when analyzing the Marriage of Markowski decision,

There, a petition for legal separation was properly served, but no decree was ever entered.... Noting that actions for legal separation and dissolution "have distinctly different consequences," the court held a summons was required to obtain personal jurisdiction over the husband for the dissolution action and voided the decree. (emphasis added)

In our case, and just as in the Marriage of Markowski case, a decree of legal separation was never entered. At Jerry's request, the trial court entered a decree of dissolution of marriage. However, the decree is void, just as in Markowski, because Jerry chose not to file and serve his summons and petition for dissolution of marriage, which would have given the trial court personal jurisdiction over Rebecca, had he done so.

This Court should vacate the Decree of Dissolution entered on January 1, 2009.

V. The Property Division was not Just and Equitable.

1. The Radio Business Awarded to Jerry Was Not Valued.

In the event this Court determines the Decree is not void, this case should be reversed and remanded because the trial court did

not value the Radio Business it awarded to Jerry. In addition to the accounting business, the parties also had a radio business. The radio room had very expensive equipment. (CP 123) Jerry hired an employee for the accounting business so that he could spend more time working on his radio programs. (CP 192) Jerry stated that he intended to continue working in the radio business. (VR 203)

In the Decree, Jerry was awarded all right, title and interest, both tangible and intangible, in the Radio Business. (CP 69) However, there is no reference to the radio business in the findings of fact. The radio business is not mentioned in the court's oral decision. Unlike the accounting business, there were no valuations at trial concerning the radio business equipment, not the radio business itself.

Under RCW 26.09.080, the trial court is directed to make a just and equitable division of the parties' assets. According to this Court, "In order that a court may make a just and equitable division of the property of the parties, it must have evidence concerning the value of the various properties." Wold v. Wold, 7 Wn. App. 872, 878, 503 P. 2nd 128 (1972)

Like Wold, supra, the trial court decision in Marriage of Martin, 22 Wn. App. 295, 298, 588 P. 2nd 1235 (1979), was reversed and

remanded. In Martin, supra, the decision was remanded because valuations of various items awarded to the parties was not contained in the findings or decree.

It is first necessary to value the radio business equipment and the radio business itself before the trial court can make a just and equitable division of assets. This court should reverse the trial court's decision concerning the distribution of property, direct the trial court to first value the radio business equipment and business itself, and then make a just and equitable division of all the parties' assets.

2. The Trial Court Cannot Distribute an Asset Disposed of Prior to Trial.

In 2006, the parties received about \$2,000 for an insurance claim after a storage unit was flooded. (VR 50) The insurance proceeds were then either spent upon restoration of the damaged personal property or simply spent on something else. (VR 50) The funds from the insurance proceeds are gone. (VR 50) Jerry testified that he did not know whether the insurance settlement of \$2,054 was spent or not. (VR 114)

All separate and community property of the parties is before the trial court for distribution. RCW 26.09.080; Friedlander v. Friedlander,

80 Wn. 2nd 293, 305, 494 P. 2nd 208 (1972). "But it is well settled that, when exercising this broad discretion, a trial court focuses on the assets then before it – i.e., on the parties' assets at the time of trial. If one or both parties disposed of an asset before trial, the court simply has not ability to distribute that asset at trial." Marriage of Kaseburg, 126 Wn. App. 546, 556, 108 P. 3rd 1278 (2005).

Rebecca testified that the settlement proceeds had been disposed of prior to trial. (VR 50) Jerry did not know if the settlement proceeds still existed at the time of trial. (VR 114) Jerry, however, speculated that the proceeds may still exist. (VR 114-115) When ruling on a previous objection, the trial court stated, "I'm going to base my decision on the assets that both sides present to the court that exist. I cannot decide a case on suspicion." (VR 72)

The trial court erred when it ordered Rebecca to pay Jerry \$1,027 representing half of the dissipated insurance proceeds, because the funds did not exist at the time of trial. (CP 67) This Court should vacate this portion of the decision and remand the case with instructions to the trial court to make a just and equitable division of all the assets and liabilities.

3. The documentary evidence is insufficient to support Jerry's business expense claims which deprives the trial court of the ability to make a just and equitable division.

The accounting business is a community asset. (VR 25) Jerry managed the finances for the community. (VR 46) The net income for the accounting business was \$140,485 in 2003; \$156,839 in 2004; \$171,248 in 2005; and \$199,721 in 2006. (CP 227) The gross accounting deposits for 2008 were \$367,274, there was a \$34,718 CD and an existing balance of \$6,584 in the business account in January of 2008, for a total of \$408,579. (VR 162) Jerry testified that there was basically no money left in the business account at the time of trial. (VR 163) Jerry created a spreadsheet (Exhibit 10) to explain some of the money he had spent from the accounting business account from May to mid-December 2008. (VR 183) Jerry did not have the accounting business expenses for January through March of 2009. (VR 168, 209) Jerry admitted that he was spending community business funds on the Park Street house; real property Jerry claimed to be his separate property (VR 209) Jerry paid personal bills out of the business account. (VR 46, 189, 249) Jerry was awarded the accounting business checking account of an unspecified amount. (CP 70)

In order to make a just and equitable division, the trial court must have evidence of the value of the assets. Wold, supra, at 878. This Court should reverse the trial court decision and remand for a determination of actual business expenses for the community accounting business and how much of the community business funds Jerry spent on his personal expenses. Only then can the trial court make a just and equitable division of the assets.

VI. Based Upon the Parties' Respective Economic Positions, Rebecca's Maintenance Award is Inadequate.

After the parties' married, Rebecca worked as a nurse which helped pay the community bills while Jerry was in school studying accounting. (CP 191; VR 23-24) Eventually, the community accounting business was started in Lynden, Washington. (VR 25) After the parties' second daughter was born in the early 1970's the parties agreed that Rebecca would be a stay-at-home mom. (VR 24) Rebecca has a weak back, digestive problems and arthritis. (VR 29) Rebecca had/has housekeepers which coincides with her back problems. (VR 127) At the time of trial, Rebecca was sixty years old. (VR 22) The parties were married approximately 40 years.

(CP 210, 193)

Jerry testified that he had an obligation to financially assist Rebecca. (VR 107) Jerry testified that he intended to continue working in the radio business. (VR 203) Jerry testified that he wanted to make an arrangement, after trial, to continue working in the accounting business for \$10,000 per month; if the business were sold to the young employee. (VR 102-03, 105, 197-202)

The actual arrangement with the young employee is not a part of this record. Jerry testified that he could work as a financial investigator and a mediator. (VR 203) Jerry testified that he was planning on moving to Texas. (VR 107) Jerry does have disability insurance. (VR 207) Jerry was sixty years old at the time of trial. (VR 76) Jerry testified that he intended to claim social security at age 62. (VR 208) Jerry may also be eligible for Medicaid. (VR 233)

The trial court found that Rebecca is unemployable. (CP 89) The trial court also found that Rebecca will need \$2,600 per month to meet her basic monthly needs. (CP 89) According to the Washington State Supreme Court, "[T]he economic condition in which a dissolution decree leaves the parties is a paramount concern in determining issues

of property division and maintenance.” Marriage of Washburn, 101 Wn. 2nd 168, 181, 677 P. 2nd 152 (1984).

Rebecca has no income. Her need for maintenance is established. Not only does Jerry continue to work, but he was also awarded the funds from his inheritance, (CP 68) unvalued bank accounts and other bank accounts in his name, (CP 68) the unvalued business checking account, (CP 70) an IRA valued at the time of trial at \$27,769, (CP 69) and half of a CD valued at \$51,799 or \$25,899.50. (CP 69) Jerry certainly has the ability to pay the maintenance necessary to meet Rebecca’s basic monthly needs.

This court should reverse the trial court’s decision and remand the case back to the trial court with instructions to set Rebecca’s monthly maintenance at least at \$2,600 per month.

The trial court also found that Rebecca should be named the irrevocable beneficiary of \$300,000 of the \$400,000 whole life insurance policy insuring the life of Jerry. (CP 89) In Jerry’s declaration dated March 31, 2008, he stated under penalty of perjury, “I have a large life insurance policy payable to Rebecca and we have enough net worth for me to retire. (CP 210) When the time for trial

came, however, Jerry testified differently. "First of all, it's my life insurance and I felt that I should have some say as to what I want, where I want my life insurance to go." (VR 83) Jerry testified that he is estranged from his daughter. (VR 86) On redirect, Jerry could not say who he would want the beneficiary of his life insurance policies to be. (VR 232) Jerry testified that he had an obligation to provide financially for Rebecca. (VR 107) Rebecca needs the life insurance funds to sustain her in the coming years. Jerry will be provided for through his disability insurance (VR 207) and may be eligible for Medicaid. (VR 233) Jerry's financial needs should be covered.

The trial court's decision awarding the term policy and the remaining portion of the whole life policy (CP 68) should be reversed, with instructs to make Rebecca the irrevocable beneficiary of both policies.

VII. Attorney Fees

1. The Trial Court Erred by not Awarding Rebecca Additional Attorney's Fees and Costs.

Rebecca stopped working in the early 1970's. (VR 24) The trial court found that Rebecca is unemployable. (CP 89) The Commissioner

allowed Rebecca to withdraw \$10,000 from the community funds towards attorney fees. (CP 151) At the time of trial, Rebecca has spent approximately \$37,000 on legal fees and expert witness fees. (VR 51-52) Jerry paid \$4,500 to his attorney out of the floating CD for the accounting business. (VR 181) Jerry subsequently paid \$16,808 out of the business account to pay his attorney. (VR 193)

The Decree is void due to lack of personal jurisdiction over Rebecca because Jerry failed to file and serve his petition for Dissolution of Marriage. Because Jerry did not follow the statute and case law as previously stated herein, his inaction in this case subsequent to his objection in his Response (153-155) resulted in a void decree. Jerry should be required to pay Rebecca's attorney fees from the date of his filed response, April 4, 2008. See Moody, supra, 994.

2. Rebecca Requests Attorney Fees on Appeal.

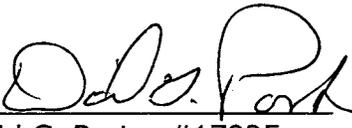
Rebecca is challenging the validity of the Decree of dissolution. [A] challenge to a decree entered under the dissolution statute is a continuation of the original action brought under RCW 26.09.... Fees, therefore, may be awarded under the statute on a motion to vacate." Moody, supra, at 994.

If this court determines that the decree is not void, then Rebecca seeks attorneys fees on appeal. RCW 26.09.140 allows the award of attorney's fees on appeal.

CONCLUSION

The Decree of Dissolution entered in this case is void due to the lack of personal jurisdiction over Rebecca. The trial court did not make a just and equitable division of the assets and liabilities because the trial court failed to value the community radio business assets and the business itself, distributed an asset no longer in existence at the time of trial, and distributed assets concerning the community accounting business without adequate documentary evidence of how Jerry spent some \$408,579 (VR 175) from the business account in 2008. Rebecca should have her monthly maintenance award increased to meet her basic monthly expenses as determined by the trial court. Rebecca should be awarded the life insurance policies insuring Jerry's life to provide financially for Rebecca in the coming years. And, Rebecca should be awarded the remainder of her costs and attorney fees in the trial court action and in this appeal.

Dated this 29th day of June, 2009

By 
David G. Porter #17925
Attorney for the Appellant/
Cross-Respondent
Rebecca Stewart

FILED
COUNTY CLERK
2008 APR -2 AM 9:01

**Superior Court of Washington
County of Whatcom**

In re the Marriage of:

Rebecca Stewart

Petitioner,

and

Jerry Stewart

Respondent.

No. 08 3 00178 4

**Amended Petition for
Legal Separation
(PTLGSP)**

I. Basis

1.1 Identification of Petitioner

Name (first/last) Rebecca Stewart, Birth date January 4, 1949

Last known residence Whatcom County, Washington [county and state].

1.2 Identification of Respondent

Name (first/last) Jerry Stewart, Birth date December 24, 1948

Last known residence Whatcom County, Washington [county and state].

1.3 Children of the Marriage Dependent Upon Either or Both Spouses

The husband and wife are both the parents of the following dependent children:

Name (first/last) _____ Age _____

*Pet for Legal Separation (PTLGSP) - Page 1 of 6
WPF DR 01.0110 Mandatory (7/2007) - RCW 26.09.020; 26.09.030(4)*

COPY

203

Rick Dodson, Attorney at Law
114 W. Magnolia St., 4th Floor
Bellingham, WA 98225
Office: (360) 392-3904
Fax: (360) 392-3906

The husband is and the wife is not the parent of the following dependent children:

Name (first/last) _____ Age _____

Name (first/last) _____ Age _____

The wife is and the husband is not the parent of the following dependent children:

Name (first/last) _____ Age _____

Name (first/last) _____ Age _____

1.4 Request for Legal Separation

This is a request for legal separation in lieu of a dissolution of marriage.

1.5 Date and Place of Marriage

The parties were married on July 6, 1968 at Mansfield, Texas.

1.6 Separation

Husband and wife separated on March 5, 2008.

1.7 Jurisdiction

This court has jurisdiction over the marriage.

This court has jurisdiction over the respondent because:

the respondent is presently residing in Washington.

the petitioner and respondent lived in Washington during their marriage and the petitioner continues to reside, or be a member of the armed forces stationed, in this state.

the petitioner and respondent may have conceived a child while within Washington.

other:

This court does not have jurisdiction over the respondent.

1.8 Property

There is community or separate property owned by the parties. The court should make a fair and equitable division of all the property.

The division of property should be determined by the court at a later date.

The petitioner's recommendation for the division of property is set forth below.

The petitioner should be awarded the parties' interest in the following property:

The respondent should be awarded the parties' interest in the following property:

Other:

1.9 Debts and Liabilities

- The parties have no debts and liabilities.
- The parties have debts and liabilities. The court should make a fair and equitable division of all debts and liabilities.
- The division of debts and liabilities should be determined by the court at a later date.
- The petitioner's recommendation for the division of debts and liabilities is set forth below.
- The petitioner should be ordered to pay the following debts and liabilities to the following creditors:
- The respondent should be ordered to pay the following debts and liabilities to the following creditors:
- Other:

1.10 Spousal Maintenance

- Spousal maintenance should not be ordered.
- There is a need for spousal maintenance as follows: Petitioner has been a stay-at-home mother and wife as agreed to by the Respondent for over 37 years and has had no experience in the workplace during that time. Petitioner is 59 years old and would find it virtually impossible to re-enter the work force at this stage in life. Petitioner has no other form of income.
- Other:

1.11 Continuing Restraining Order

- Does not apply.
- A continuing restraining order should be entered which restrains or enjoins the husband wife from disturbing the peace of the other party.
- A continuing restraining order should be entered which restrains or enjoins the husband wife from going onto the grounds of or entering the home, work place or school of the other party or the day care or school of the following children: _____
- A continuing restraining order should be entered which restrains or enjoins the husband wife from knowingly coming within or knowingly remaining within 500 ft. of the home, work place or school of the other party or the day care or school of these children: _____

Other: _____

A continuing restraining order should be entered which restrains or enjoins Jerry Stewart from molesting, assaulting, harassing, or stalking Rebecca Stewart. (If the court orders this relief, the restrained person will be prohibited from possessing a firearm or ammunition under federal law for the duration of the order. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. § 925(a)(1).)

Other:

1.12 Protection Order

Does not apply.

A domestic violence protection order should be entered protecting _____ from _____ because _____ has committed domestic violence as defined by 26.50 RCW against _____. (If the court orders this relief, the restrained person will be prohibited from possessing a firearm or ammunition under federal law for the duration of the order. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. § 925(a)(1).)

If you need immediate protection, contact the clerk/court for RCW 26.50 Domestic Violence forms.

1.13 Pregnancy

The wife is not pregnant.

The wife is pregnant. **Note: Under RCW 26.26.116, the husband is the presumed father. If husband or wife believes the husband is not the father, this presumption may be challenged up to two years after the birth of the child or as otherwise provided in RCW 26.26.500 through 26.26.625.**

Other:

1.14 Jurisdiction Over the Children

Does not apply because there are no dependent children.

1.15 Child Support and Parenting Plan for Dependent Children

The parties have no dependent children.

1.16 Other

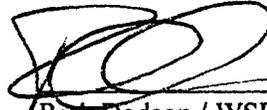
II. Relief Requested

The petitioner **Requests** the court to enter a decree of legal separation and to grant the relief below.

- Provide reasonable maintenance for the [] husband [x] wife.
- Approve the petitioner's proposed parenting plan for the dependent children listed in paragraph 1.15.
- Determine support for the dependent children listed in paragraph 1.15 pursuant to the Washington State Child Support Schedule.
- Approve the separation contract or prenuptial agreement.
- Divide the property and liabilities.
- Change name of wife to (first, middle, last): _____.
- Change name of husband to (first, middle, last): _____.
- Enter a domestic violence protection order.
- Enter a continuing restraining order.
- Order payment of day care expenses for the children listed in paragraph 1.15.
- Award the tax exemptions for the dependent children listed in paragraph 1.15 as follows:

- Order payment of attorney fees, other professional fees and costs.
- Other:

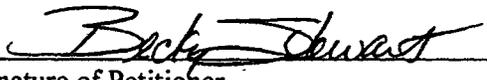
Dated: 4-1-08



Rick Dodson / WSBA 39250

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Bellingham, Washington on March _____, 2008.


Signature of Petitioner

Becky Stewart
Print Name

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1.5	<input checked="" type="checkbox"/>	Admitted	<input type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.6	<input checked="" type="checkbox"/>	Admitted	<input type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.7	<input checked="" type="checkbox"/>	Admitted	<input type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.8	<input checked="" type="checkbox"/>	Admitted	<input type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.9	<input checked="" type="checkbox"/>	Admitted	<input type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.10	<input type="checkbox"/>	Admitted	<input checked="" type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.11	<input type="checkbox"/>	Admitted	<input checked="" type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.12	<input type="checkbox"/>	Admitted	<input checked="" type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.13	<input checked="" type="checkbox"/>	Admitted	<input type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.14	<input checked="" type="checkbox"/>	Admitted	<input type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.15	<input checked="" type="checkbox"/>	Admitted	<input type="checkbox"/>	Denied	<input type="checkbox"/>	Lacks Information
1.16	<input type="checkbox"/>	Admitted	<input type="checkbox"/>	Denied	<input checked="" type="checkbox"/>	Lacks Information

Each allegation of the petition which is denied is denied for the following reasons
[List separately]:

1.4 Respondent alleges that the marriage is irretrievably broken and the court should enter a decree of dissolution.

1.10 Respondent believes that there are sufficient assets available for the parties such that spousal support is not justified. Further the respondent is 60 years of age, in poor health, suffering from incurable cancer and plans to retire.

1.11 No basis exists for the issuance of a restraining order against Respondent and one should not be issued.

1.12 Respondent has not committed domestic violence and no basis exists for the issuance of a protection order

1.2 Notice of Further Proceedings

Notice of all further proceedings in this matter should be sent to the address below.

154

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Gregory L. Kosanke &
James J. Wright
SMITH KOSANKE & WRIGHT, P.L.L.C.
105 Fifth St. Suite 201
Mailing Address: PO BOX 632
Lynden, WA 98264

1.3 Other
None.

II. Request for Relief

The respondent requests the court to grant the relief requested below.

- Enter a decree.
- Dispose of property and liabilities.
- Order payment of attorney's fees, other professional fees and costs.
- Other: Grant such additional relief as is just and equitable in the premises.

Dated: 4/4/08

[Signature] #21213
Gregory L. Kosanke, WSBA #8936

DECLARATION OF MAILING/DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed, faxed, or caused delivery of a true copy of the foregoing to: _____

Rich Sadson
at the regular office or residence thereof.
DATED this 12 day of April, 2008 at
Lynden, Washington

[Signature]

155