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No. 63244-2-I

Court of Appeals, Division I  
of the State of Washington

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In Re the Marriage of:

Janie L. Block, Respondent

and

Dennis L. Block Appellant

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BRIEF OF APPELLANT

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### Regulations and Rules

Civil Rules

CR 2A

*passim*

### Assignments of Error

1. The trial court erred in determining that the CR 2A agreement was enforceable. CP 12-14.
2. The trial court applied the wrong standard of review when determining that there was a valid CR 2 agreement. CP 12-14.
3. The trial court's order approving the CR 2A settlement agreement is not supported by law or fact. CP 12-14.
4. The trial court made no findings of fact nor conclusions of law when ordering that "[t]he CR2A settlement agreement . . . shall be enforced." CP 12-14.

### **A. Summary of Argument**

While mediation may serve a valuable purpose and result in judicial efficiencies because disputes can be resolved without intervention of the Court, this case demonstrates some of the pitfalls of mediation.

Here, in a rushed mediation, the parties both hoped that they had mediated a CR 2A agreement, but there were so many issues that were not addressed, that there was basically an agreement that the parties would try to reach an agreement as to the final dissolution. Further, misrepresentations by Janie Block induced Dennis Block to “agree to agree.”

Disputes between the parties arose immediately after signing the alleged CR 2A agreement. Of particular concern to this Court should be the complete and utter failure of the mediation to address the critical issue relating to the special needs child (Downs Syndrome).

Current counsel for Dennis<sup>1</sup> were not involved in the mediation and the subsequent attempts to agree upon final orders in this matter. At the time this matter was brought before the trial court for approval to

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<sup>1</sup> Because the last name of the parties is the same, this memorandum will refer to the Appellant as Dennis and the Respondent as Janie. No disrespect is intended, but this does make this memorandum easier to understand).

enter the alleged CR 2 agreement, there was an extensive record showing that while the parties signed a CR 2 “agreement”, this alleged “agreement” has so many internal inconsistencies leading to disputes and it totally ignored the special needs child, to such an extent, that the trial court could not have determined that there was an agreed upon CR 2A agreement.

As such, because there was not a mutual understanding of what the parties had agreed upon, and because the current and future needs of the special needs child were ignored or left up to the arbitrator, this Court should conduct a *de novo* review of the trial court decision and determine that there was insufficient reason to approve of the alleged CR 2A agreement, and that all subsequent orders entered in this matter should be vacated and this matter remanded for trial.

### **B. Statement of the Case**

On October 16, 1993 the parties were married. CP 51.<sup>2</sup> Three children were born of this marriage: two daughters ages 13 and 10 (CP

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<sup>2</sup> Associated counsel was obtained by Dennis after designation of the clerks papers. Instead of the normal briefing periods, Dennis’ brief was stricken and a limited time period was allowed to write a new Brief of Appellant. Where able, with existing clerks papers, a reference is made to those clerks papers. As most of these facts are background information and not related to the critical issue of whether there is a CR 2A settlement agreement, these uncited facts have been left in the brief. If

79); and a five (5) year old son who is a special needs child (Downs Syndrome). CP 51. At the time of separation, both parents worked. CP 85. They separated on December 21, 2007. During the pendency of this action the wife remained in the family home. CP 98. CP 201.

On February 22, 2008, and March 12, 2008, temporary orders were entered. CP 23-27 These temporary orders placed all three children in the family home with Janie. CP 197 Dennis was ordered to pay child support of \$1,476.00. CP 197 Dennis was also ordered to pay \$1,424.00 for the family home mortgage. CP 196-97

Dennis' child support obligation was 99.6 percent. CP 211 Janie was specifically responsible for her debts incurred on the BECU Visa card and all debts since separation. CP 197, 201. Janie was allowed to use the BECU up to the amount of \$2,500 for vocational career counseling if the interest rate was better than the line of credit the party's had at that time. CP 197.

Trial was set for November 6, 2008. On October 22, 2008, the parties mediated this dispute. CP 52 After the entry of temporary orders and prior to mediation no issues were resolved or settled.

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these facts are material, and are disputed, a supplemental designation of clerks papers will be filed.

Dennis was ejected from the family home on December 21, 2007.

CP 201 Dennis did not return to this home until well after Mediation.

CP 112. Dennis asserts that the allegation of domestic violence was a one-time incident in which he was defending himself from the aggressive behavior of Janie. CP 35, lines 16-23. This one time incident resulted in temporary limitations in the parenting plan. CP 216. On February 22, 2008, Janie was temporarily granted sole decision making for both non-emergency health care and education decisions. CP 220. These two issues were set apart in the temporary orders to be dealt with more completely and evenly at a later date or trial.

Dennis' family law record in both the Snohomish and Island Counties show no domestic violence history and compliance with all court orders relating to the domestic violence allegation. CP 97, 104. On October 22, 2008, mediation was held and there had been no other hearings or other issues previously resolved. (See court docket). Trial was set for two weeks after mediation, or November 6, 2009.

On October 22, 2009, a three and one-half hours (3 ½) mediation was held. CP 27, 64.

As soon as the ink dried on an alleged CR 2(a) agreement, problems arose both regarding the agreement itself and in the

implementation of the alleged agreement between the parties. CP 52-60.

The alleged CR 2A agreement is located at CP 63-91.

On January 26, 2009, Dennis filed a motion for Contempt as well as a motion regarding removal of spousal support and allocation of tax exemption after not being told where his children had been moved. CP 159.

Counsel for Janie did not respond to such motion in any manner, yet appeared for the hearing on February 9, 2009 and presented to the court that day a hundred plus page motion to enforce the alleged CR 2(a) agreement and delivered a motion to Dennis' attorney in Court on February 9, 2009, without prior notice. CP 57. Because of this action the Family Law Court would not hear the motions properly set for that day brought by the Appellant although the alleged contempt was based upon a violation of the temporary orders, not the CR 2 (a) agreement.

The motion was finally heard on March 3, 2009. CP 12-14.

On March 3, 2009, the Honorable Judge Ellen Fair upheld the CR 2A agreement and sent all issues back to the arbitrator including new issues raised by the Respondent for the first time at this hearing. CP 12-14. No final pleadings were entered that day and no final pleadings were offered to be entered by the Respondent. CP 57.

This decision was timely appealed by Dennis. CP (pending, as designated by Respondent).

### **C. Standard of Review**

“The standard of review is de novo because the motion to enforce a settlement agreement is like a summary judgment motion.” *Lavinge v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001).

When the record consists entirely of written material, an appellate court stands in the same position as the trial court and reviews the record de novo. *Housing Auth. v. Pleasant*, 126 Wn. App. 382, 387, 109 P.3d 422 (2005); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Amren v. City of Kalama*, 131 Wn.2d 25, 32, 929 P.2d 389 (1997).

### **D. Argument**

#### **1. The trial court erred in determining that the CR 2 agreement was enforceable as the parties did not reach an agreement on all issues.**

When deciding a motion to enforce a settlement agreement supported entirely by affidavits or declarations, the trial court proceeds as if considering a motion for summary judgment. *In re Marriage of Feree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993).

It has long been encouraged within our court system to settle disputes and CR 2 (a) agreements are encouraged. “The purpose of the

cited rule and statute is to avoid such disputes and to give certainty and finality to settlements and compromises. . . . “ *Howard v. DiMaggio* , 70 Wn. App.734, 738, 855 P.2d 335 (1993). The Court’s desire for mediation and CR 2A agreements is to resolve disputes, not create more disputes.

Upon petitioning the trial court for enforcement of a settlement agreement, the moving party must show that there is no genuine dispute about the existence or material terms of the agreement. *In re Marriage of Feree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993).

If a court enforces a CR 2(a) agreement when there are disputed facts without first holding an evidentiary hearing to resolve any such disputed facts, it may also have abused its discretion as well. *Kwiatkowski v. Drews*, 142 Wn. App. 463, 479, 176 P.3d 510 (2008).

To trigger the bar to enforcement in CR 2A, the responding party must allege specific facts to controvert the existence or terms of the agreement. An extensive evidentiary inquiry into the nature of the dispute is not triggered unless the remaining conditions of the rule have been satisfied. This conserves judicial resources by “insur[ing] that negotiations undertaken to avert or simplify trial do not propogate additional disputes that then must be tried along with the original one.” *Feree*, 71 Wn. App. At 41.

Once the responding party has met this minimum threshold showing a genuine dispute, the burden shifts to the moving party to establish that the parties have complied with the other requirements of CR 2A. One of two conditions must be satisfied, the agreement must be “made and assented to in open court on the record, or entered in the minutes.” *Graves v. P.J. Taggares Co.*, 25 Wn. App. 118, 122, 605 P.2d 348 (1980) aff’d on other grounds, 94 Wn.2d 298, 616 P.2d 1223 (1980).

The second alternative condition requires the court to ascertain the existence of a writing subscribed by the attorney now denying the agreement, and the court may look at informal writings if the contesting party has not signed a formal contract. *Morris v. Maks*, 69 Wn. App. 865, 869, 850 P.2d 1357 (1993).

In the present matter, Janie (the moving party) must show that there is no genuine dispute about the existence or material terms of the agreement. Yet, in her motion to enforce the CR 2A agreement allegedly signed on October 22, 2008, Janie documents the disputes concerning the material terms of the agreement starting on November 3, 2008. CP 92, exhibit 2 to motion. CP 93-94, exhibit 3 to motion (“gutting” of the family home). CP 96, exhibit 3 to motion (dispute about “dont [sic] be a pussy). CP 97, exhibit 3 to motion (dispute about

“[n]ow its time to see how big you are we will meet tuf [sic] guy.”)

These disputes continued on November 19, 2008 (Where are the final papers). CP 98. The existence of needed “corrections” was addressed on December 2, 2008. CP 100. The various genuine disputes continued and are shown in correspondence included in Janie’s motion to enforce the agreement. CP 92-145.

Further, Janie’s Motion to Approve the CR 2A Settlement Agreement (CP 51-145), has a very brief Memorandum of Points and Authorities – only three paragraphs, as follows:

. . . Civil Rule R2A [sic] provides for the mechanism for parties to settle their disputes in a binding and enforceable manner . . .

. . . In the instant case, the agreements of the parties are reflected in the CR2A Settlement Agreement. That Agreement was signed on October 22, 2008 by the parties and by their counsel. As such, it is binding and enforceable and must be approved by the court

. . .

Based upon the moving parties memorandum, the trial court was asked to approve the agreement because: (1) CR 2A allows for settlement agreements; (2) the parties signed a settlement agreement; thus, (3) the settlement agreement must be approved by the court.

Janie’s motion to enforce the CR 2A agreement simply says that settlement agreements are allowed, there is a settlement agreement, so the court must approve the agreement. The trial court further

compounded the error by making no findings of fact, conclusions of law, and simply ordering that the settlement agreement “shall be enforced.” CP 12-13.

But, this is not the standard required under Washington case law, as discussed above.

Further, the alleged CR 2 (a) agreement did not finalize all issues, and it actually created more difficulties. While the CR 2 (a) states that it was the “full and final settlement” and that “CR2A Agreement and attached final documents are intended to have **immediate force and effect,**” this was not the affect of this alleged agreement. CP 63.

At the mediation, the parties signed only the CR 2 (a) agreement and the following documents attached to that agreement: a final parenting plan; the child support worksheets; a spreadsheet of debts prepared by the mediator; and, a list of items prepared by Janie, with the understanding the family home would remain in the Janie’s possession since she had always made such claim until the mediation (CP 38 and 75).

In conclusion, the alleged CR 2A agreement states that it is a full and final agreement; however, it is not. The parties had not worked out the details. The alleged agreement was more of a license for the

mediator, converted to arbitrator, to make whatever determinations he deemed appropriate, not to reflect the agreements of the parties in the CR 2A agreement. This alleged agreement should not have been upheld. This Court should vacate the order enforcing this alleged CR 2A agreement and remand this matter for trial.

**2. The trial court erred in determining that the CR 2A agreement was enforceable as Janie's material misrepresentations influenced any alleged settlement.**

Because the alleged CR 2A agreement was obtained after material misrepresentations, this Court should not uphold the trial court decision that this CR 2A agreement is valid, and it should remand this matter for a trial.

Janie claims that the CR 2A agreement supersedes the temporary orders entered in February, 2008. "Furthermore, *we entered into a CR2a agreement in October, 2008 that supersedes the February, 2008 order!*" CP 5, lines 10-11 (emphasis in original).

This Court should not uphold the alleged CR2A agreement as it was obtained through misrepresentations, both to the mediator and to the trial court.

***Misrepresentations at mediation***

While the record is not complete, it appears that at the time of the alleged CR2A agreement, Dennis believed that Janie was living in the family home on Camano Island, and that the agreement to agree was based upon the children being at that residence. CP 16, lines 5-17. Dennis discovered after the CR2A

agreement, and prior to attempts to finalize the various orders, that Janie had vacated the family home on Camano Island on approximately July 11, 2008. CP 16, lines 12-14; CP 37, lines 2-9.

***Misrepresentations to the trial court***

Before the trial court, Janie stated that she should not be held in contempt for moving the children without his knowledge because “Dennis has known for months that I intended to move to Arlington.” CP 4, lines 2-3. To support Janie’s assertion she cites a letter dated November 6, 2008, from Dennis’ attorney that stated “my client is exasperated because he has not been provided any formal notice from Ms. Block concerning her intent<sup>3</sup> to relocate to Arlington. He has been told by his children that their mother has already told them they are going to be enrolled in the middle of the school year in the Arlington School District.” CP 9, third paragraph.

Further an attachment to the email states “I do not object to you moving the kids to the Arlington district – per se but would have appreciated you

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<sup>3</sup> The use of the word “intent” indicates the belief about something to happen in the future. Here, it appears from evidence produced by Dennis that moving the children had already been accomplished, but “hidden” from Dennis through never telling him the children changed school districts, and through maintaining the exchange point for the children so as to not arouse suspicion by Dennis. Only after an agreement to agree was reached did Janie disclose that she had moved and that the children would be attending school in Arlington. CP 119, CP 127. This indicates that Janie had vacated the family home. Yet, there are no findings of fact to show that the trial court even considered this evidence.

consider minimizing disruption to their school year in Stanwood in order to keep any stress they may be feeling to a minimum . . . [r]egardless, they're now enrolled and I still have not been made aware of their respective schools, teachers, or schedules.” CP 11.

This alleged CR 2A agreement was reached with Janie knowing she had moved, but not disclosing that until later.<sup>4</sup> CP 138, paragraph 3. CP 46, lines 15-19.

Yet, with all these misrepresentations to the mediator and later to the trial court, the trial court was advised that the parties allegedly entered into a CR2A agreement that allegedly was a full and final agreement (CP 43, line 15), without any of the documents having been created or signed. CP 43, line 8-19.

In conclusion, Dennis' Brief of Appellant reiterates to this Court the exact same words that he submitted to the trial court:

“Apparently the parties appear to have reached an agreement and had reduced it to writing to which the Petitioner [Janie] is now asserting should be enforced although they do not ask this court to sign any final pleadings with their motion. If in fact this was a true and final agreement of all issues then such final pleadings would be appropriate. The fact that the Petitioner has not

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<sup>4</sup> The propane which heats the hot water was turned off approximately July 11, 2008 and the cable was shut off in and around September, 2008 and the electrical and water use for four people were substantially low. (CP # 44 159-173 and CP # 62 at 37-38).

submitted such a request should indicate that even they are questioning issues yet to be resolved.

Mr. Block asserts, and rightly so, that Ms. Block was not honest in their negotiation and therefore he believes there was no true meeting of the minds.

On the face of the document as well as the subsequent actions of both parties should demonstrate that this mediation and its alleged CR2A agreement was not a full and final resolution of all issues between them and therefore is unenforceable.” CR 47, lines 13-23.

This was Dennis’s position before the trial court when it ordered that the CR 2A settlement agreement be enforced, and this Court should hold in its *de novo* review that there was never a true and final agreement of all issues between the parties, and this matter should be remanded to the trial court to be set for trial.

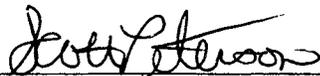
#### **E. Conclusion**

The trial court erred in not following the correct analysis when determining that the alleged CR 2A agreement was enforceable. By determining that the alleged CR 2A agreement was enforceable, and that all further determinations were to be made by the arbitrator (formerly the mediator, who allegedly became an arbitrator), this was a final decision of the trial court and it is appealable. The only action that this left for the

trial court after this final order would have been the ministerial act of approving any action by the arbitrator.

Further, the alleged agreement was obtained through material misrepresentations by Janie, and any agreement was based upon a reasonable reliance upon those misrepresentations, and any resulting agreement should not be enforced.

Respectfully submitted October 5, 2009



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