

No. 66313-5-I

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

JOHN DAVIN BAILEY,

Appellant,

v.

DEANNA AIMEE BAILEY,

Respondent.

BRIEF OF APPELLANT

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ORIGINAL

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1. IDENTITY OF PARTIES

John Davin Bailey is the Appellant herein.

Deanna Aimee Bailey is the Respondent herein.

2. TABLE OF AUTHORITIES

A. Statutory Authority

RCW 7.04 13

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B. Court Rules

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C. Case Law

A Equity Group v. Hidden, 88 Wn. App. 148, 943 P.2d 1167 (1997)..... 7

Barnett v. Hicks, 119 Wn.2d 151, 829 P.2d 1087 (1992) 7

Davidson v. Hanson, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) 10, 11

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Hanson v. Shim, 87 Wn. App. 538, 551, 943 P.2d 322 (1997) 12

Jackson v. Walla Walla, 130 Wash. 96, 226 P.2d 487 (1924) 7

McGinnity v. Automation Inc., 149 Wn. App. 277 (2009)..... 9, 10, 11

Omaha v. Omaha Water Co., 218 U.S. 180, 194, 54 L. Ed. 991, 30 S. Ct. 615 (1910)..... 12

Rogoski v. Hammond, 9 Wn. App. 500 (1973) 13

Seattle Packaging Corp. v. Barnard, 94 Wn. App. 481, 486 (1999) 11

Sniadach v. Family Financial Corp., 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969) 13

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579 (1978) 14

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Tombs v. Northwest Airlines, 83 Wn.2d 157, 516,
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Yaw v. Walla Walla School District, 106 Wn.2d
408, 722 P.2d 803 (1986).....7

D. Other

Black's Law Dictionary, 113 (4th Rev. Ed. 1968) ... 8

3. INTRODUCTION

This appeal raises issues of due process in the context of a dissolution action which utilized a “Mediation to Arbitration” process of alternate dispute resolution to resolve all issues in that action.

4. ASSIGNMENTS OF ERROR

When the Arbitrator established the procedures for the conduct of the mediation to arbitration proceeding, did the Court err in not vacating the resulting arbitration award and final pleadings when those procedures did not afford Mr. Bailey due process?

5. STATEMENT OF THE CASE

Mrs. Bailey filed for dissolution of the parties’ 19 year marriage on September 11, 2008, in Snohomish County Superior Court¹.

Snohomish County Local Rules require that all parties engaging in an alternate dispute resolution process with a neutral third party when there are contested issues in all actions brought under RCW 26.09. SCLSPR 94.04(h)(1).

Mr. Bailey and Mrs. Bailey agreed to utilize the services of Mediator Lee Tinney as the neutral third party. An agreement was entered into on April 22, 2010, which provided that if the parties did not resolve all contested issues through mediation, that Ms. Tinney would act as Arbitrator under the terms of RCW 7.04A.²

There were two mediation sessions which took place on April 22, 2010, and May 3, 2010.³ The mediation sessions did not result in

¹ See *Petition for Dissolution of Marriage*, filed September 11, 2008, CP 163-168.

² See Appendix A.

³ See *Arbitration Award*, CP 107-158.

settlement of the contested issues and, therefore, dispute resolution process moved from mediation to arbitration at the second session.⁴

The agreement provided only that the confidentiality rules of RCW 7.07 would be waived if this matter was referred to arbitration. There were no other rules established before this process was begun which provided for how the mediation would be handled. This is important because the mediation was conducted through a caucus method wherein each party occupied a separate room and never met during the mediation process.⁵ As a result, the parties were unaware of what evidence was submitted to the Mediator during the mediation portion of the process beyond the mediation materials submitted by each party prior to the mediation.⁶

The parties agreed pursuant to a *CR2 Agreement* dated May 3, 2010, at the beginning of the arbitration process that the evidence would be limited to that submitted in mediation except for additional materials to be submitted by Mrs. Bailey as determined at a later telephonic hearing.⁷ At that hearing on May 7, 2010, the Arbitrator determined that Mrs. Bailey could submit additional materials but that, over the objection of Mr. Bailey, he could not respond to those materials.⁸ The Arbitrator issued her *Order on Additional Discovery* but it was silent on the restriction on Mr. Bailey's right to respond to the new evidence.⁹

⁴ See *Arbitration Award*, CP 107-158.

⁵ See *Declaration of J. Davin Bailey*, CP 76-87.

⁶ See *Declaration of J. Davin Bailey*, CP 76-87.

⁷ See Appendix B.

⁸ See Appendix B.

⁹ See Appendix C.

As a result, there was no arbitration hearing which took place in which the parties testified by direct examination, cross-examination, or rebuttal testimony.¹⁰

In addition, the Arbitrator refused Mr. Bailey's request that he be allowed to cross-examine Mrs. Bailey's expert.¹¹ The testimony from Mrs. Bailey's expert came in by way of written report after the arbitration hearing was concluded and without the opportunity to question the expert.¹²

The parties by agreement submitted written closing arguments to the Arbitrator on June 14, 2010.¹³ The *Arbitration Award* was rendered on June 22, 2010.¹⁴

On July 19, 2010, Mr. Bailey made a *Motion for Reconsideration* raising issues of due process and other errors made in the *Arbitration Award* pursuant to CR 59(a) and 60(b)¹⁵

On August 3, 2010, Arbitrator Lee Tinney issued a letter ruling which denied Mr. Bailey's request to reconsider her decision.¹⁶

On August 26, 2010, Mr. Bailey filed his *Motion to Vacate Arbitration Award*.¹⁷

On November 2, 2010, the Court denied Mr. Bailey's *Motion to Vacate*, confirmed the *Arbitration Award*, and entered final Orders based upon the *Arbitration Award*.¹⁸ This appeal followed.

¹⁰ See *Declaration of J. Davin Bailey*, CP 76-87, and *Arbitration Award*, CP 107-158.

¹¹ See *Declaration of J. Davin Bailey*, CP 76-87, and *Arbitration Award*, CP 107-158.

¹² See *Arbitration Award*, CP 107-158, and *Order on Discovery*, Appendix B.

¹³ See *Arbitration Award*, CP 107-158, and *CR2A Agreement*, Appendix B.

¹⁴ See *Arbitration Award*, CP 107-158.

¹⁵ See Appendix D.

¹⁶ See Appendix E.

6. ARGUMENT.

The scope of appellate review of a trial court's action with regard to an arbitration award "is limited to that of the court which confirmed, vacated, modified or corrected that award." *A Equity Group v. Hidden*, 88 Wn. App. 148, 943 P.2d 1167 (1997), *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992).

6.1 Alternate Dispute Resolution.

The courts have long recognized the right of parties to use alternate dispute resolution processes rather than the courts as a means of avoiding litigation. *Jackson v. Walla Walla*, 130 Wash. 96, 226 P.2d 487 (1924). In fact in dissolutions the law requires that there be a process for resolving disputes other than litigation in parenting plans. RCW 26.09.184(3).

In Snohomish County the use of alternate dispute resolution of cases prior to trial is mandated by a court rule. SCLSPR 94.04(h)(1):

(h) Alternative Dispute Resolution Required In Family Law.

1. Alternative dispute resolution required in family law.

All contested issues in the following cases shall be submitted to settlement conference, mediation, or other ADR process with a neutral third party: petitions filed under RCW 26.09; [.]

6.1.1 Mediation.

Mediation is one of the means of alternate dispute resolution. It involves the resort of the contested parties to a third party who attempts to "persuade them to adjust or settle their dispute." *Yaw v.*

¹⁷ See *Motion to Vacate Arbitration Award*, at CP 88-89.

¹⁸ See *Order Denying Motion to Vacate*, at CP 52.

Walla Walla School District, 106 Wn.2d 408, 722 P.2d 803 (1986), Black's Law Dictionary, 1133 (4th Rev. Ed. 1968), RCW 49.08.010.

The Snohomish County court rule does not set forth the procedures or requirements of the mediation other than the mediator be a neutral third party. SCLSPR 94.04(h)(1). Here, the Mediator established the process for the mediation and utilized the caucus method.¹⁹ Mr. Bailey does not claim that the mediation process was flawed.

In State v. Tolias, 84 Wn. App. 696, 699, 929 P.2d 1178 (1997), the court commented on the role of the mediator.

The mediator is not merely charged with being impartial, but with receiving and preserving confidences in much the same manner as the client's attorney. In fact, the success of mediation depends largely on the willingness of the parties to freely disclose their intentions, desires, and the strengths and weaknesses of their case; and upon the ability of mediator to maintain a neutral position while carefully preserving the confidences that have been revealed. State v. Tolias, *supra*, at 699.

The April 22, 2010 *Agreement* entered into by the parties waived confidentiality of disclosures relating to the mediation process if "this matter is resolved by arbitration to the extent information is considered by the mediator/arbitrator or identified as a basis for the arbitration decision."²⁰

The basis for appeal which arose in this case occurred in the process of moving from mediation to arbitration when mediation failed.

6.1.2 Arbitration.

¹⁹ See *Arbitration Award*, at CP 107-158, and Appendix A.

²⁰ See Appendix A.

The courts have recognized that arbitration is a statutorily recognized special proceeding and the rights of the parties can be controlled by RCW 7.04A. *McGinnity v. Automation Inc.*, 149 Wn. App. 277 (2009). Here, the parties agreed by contract that the process would be controlled by RCW 7.04A.²¹

RCW 7.04A.150 sets forth the arbitration process:

(1) The arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and to determine the admissibility, relevance, materiality, and weight of any evidence.

(2) The arbitrator may decide a request for summary disposition of a claim or particular issue by agreement of all interested parties or upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the arbitration proceeding and the other parties have a reasonable opportunity to respond.

(3) The arbitrator shall set a time and place for a hearing and give notice of the hearing not less than five days before the hearing. Unless a party to the arbitration proceeding interposes an objection to lack of or insufficiency of notice not later than the commencement of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide

²¹ See Appendix A.

the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to promptly conduct the hearing and render a timely decision.

(4) If an arbitrator orders a hearing under subsection (3) of this section, the parties to the arbitration proceeding are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(5) If there is more than one arbitrator, all of them shall conduct the hearing under subsection (3) of this section; however, a majority shall decide any issue and make a final award.

(6) If an arbitrator ceases, or is unable, to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with RCW 7.04A.110 to continue the hearing and to decide the controversy.

In the instant case, the parties had an arbitration hearing under subsection 3 of the statute.²² RCW 7.04A.110.

Courts have stated that the very purpose of arbitration is to avoid court. It is designed to settle controversies and not to serve as a prelude to litigation. *McGinnity v. Automation Inc.*, supra at 278. The courts have also stated that they will “confer substantial finality on decisions of arbitrators rendered in accordance with the parties’ contract in chapter 7.04A RCW.” *McGinnity v. Automation Inc.*, supra at 278, *Davidson v. Hanson*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998).

The courts have also stated that the review of an arbitrator’s award by an appellant court is strictly proscribed. The appellate court does

not review the arbitrator's decision on the merits. Therefore, "In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified." *McGinnity v. Automation Inc.*, *supra* at 278, *Davidson v. Hanson*, *supra* at 135 Wn.2d at 118.

An arbitration award may be vacated only upon a showing of proper statutory grounds and the parties seeking vacatur has the burden of making that showing. *Seattle Packaging Corp. v. Barnard*, 94 Wn. App. 481, 486 (1999).

It is clear, however, that if the procedures set forth in RCW 7.04A are not followed, that a violation of a party's due process rights occurs and the arbitration award is subject to vacation by a court. RCW 7.04A.230(1). RCW 7.04A.230, in relevant part, sets forth the factors for vacating arbitration awards:

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

...

(b) There was:

...

(iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding; [.]

In determining what due process requires, the courts have made it clear that a party's due process rights are violated if they had no

²² See Appendix A.

“opportunity to present its position before a competent tribunal.” Hanson v. Shim, 87 Wn. App. 538, 551, 943 P.2d 322 (1997).

6.2 Violation of Due Process Rights.

The court in Tombs v. Northwest Airlines, 83 Wn.2d 157, 516, 1028 (1973), addressed the issue of fundamental rights that each of the litigants has in an arbitration proceeding:

An arbitration implies a difference, a dispute, and involved ordinarily a hearing and all thereby implied the right to notice of hearings, to produce evidence and cross-exam that produced is implied when the matter to be decided is one of dispute and difference. Omaha v. Omaha Water Co., 218 U.S. 180, 194, 54 L. Ed. 991, 30 S. Ct. 615 (1910). Parties independent of statute, have a right to be heard and opportunity to present evidence as to all matters submitted. Grimes v. Home Insurance Co., 217 N.C. 259, 7 S.E. 2nd. 557 (1940). Unless obviated by statute, agreement, or waiver, the parties to an arbitration are entitled to reasonable notice of the time and place of hearings and have an absolute right to be heard and to present evidence before the board. While the law favors and encourages settlement of controversies by arbitration and arbitrators are not expected or require to always follow the strict and technical rules of law, they still must proceed with due regard to the rights of the parties.

Tombs v. Northwest Airlines, *supra*, at 161.

Mr. Bailey was denied the opportunity to produce evidence, whereby he was denied the opportunity to present evidence as to all matters submitted. The Arbitrator took this right away in refusing to allow Mr. Bailey to cross-examine Mrs. Bailey’s expert and rebutt documentary evidence she might submit after the arbitration session. RCW 7.04A.150(4).

The Arbitrator violated this right in not having a full disclosure of all of the evidence presented by both parties in establishing exactly what the “record” was before her in proceeding to the arbitration phase.

The case of Rogoski v. Hammond, 9 Wn. App. 500 (1973) discussed the essential elements necessary for a hearing to be considered to meet due process requirements:

To accomplish the purpose of the hearing, the form of the hearing must be “appropriate to the nature of the case”... and whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.” Sniadach v. Family Financial Corp., 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969).

Mr. Bailey submits that the nature of this case mandated a hearing where both sides could fully respond to the evidence. In denying both sides the right to fully respond to the evidence, the Arbitrator’s actions constituted misconduct and refusal to consider evidence material to the controversy. RCW 7.04A.230(1) and (4).

6.3 Waiver.

ER Realty v. Association of Realtors, 103 Wn. App. 955 (2000), addressed due process rights under the predecessor statute RCW 7.04. The court in that case stated that RCW 7.04.110 provided that arbitrators may require any person to attend as a witness and authorizes the arbitrators to issue subpoenas to compel the attendance of a witness. That court stated that independent of statutory law, the parties to an arbitration proceeding have an absolute right to present evidence unless the right is obviated by statute, agreement or waiver. ER Realty v. Association of Realtors, supra, at 959. The court went on to state that absent the waiver

of this right, that the right is absolute. ER Realty v. Association of Realtors, *supra*, at 959.

“A waiver needs to be made voluntarily, knowingly, and intelligently.” State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Here, the *CR2A Agreement*, which limited the evidence to be considered by the Arbitrator was not a waiver of the right to present evidence that was knowingly made. It was not knowingly made because Mr. Bailey was limited in his knowledge of the evidence that had been presented during the mediation process. This occurred because of the nature of the mediation process. The parties were never together in the same room at the same time the “evidence” was offered. Mr. Bailey knew only that the evidence included the mediation materials submitted by the parties prior to the mediation and what he had said to the Mediator. He had no knowledge as to what was said or produced during the mediation session by Mrs. Bailey. Therefore, he did not knowingly and intelligently waive his right to submit additional evidence as of May 3, 2010.

Furthermore, with the hearing on May 7, 2010, a new waiver was necessary. Mr. Bailey made no waiver of his right to cross-examine Mrs. Bailey’s new witnesses or rebut her evidence as allowed by the Arbitrator at that time. He objected in the hearing to the process set forth by the Arbitrator.²³ He was denied his opportunity to cross-examine those witnesses or offer any rebuttal testimony. Mr. Bailey was denied the opportunity to present his position.

7. CONCLUSION

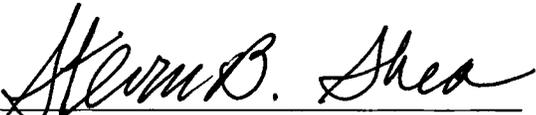
The Trial Court erred by refusing to vacate the *Arbitration Award*. The record before the Trial Court, although meager, shows that there were

two constitutional violations of Mr. Bailey's due process rights. First, he did not know what evidence had been presented to the Arbitrator by Mrs. Bailey and so denied an opportunity to present his own evidence on all issues in dispute. Second, the Arbitrator denied Mr. Bailey the opportunity to cross-examine witnesses and to submit rebuttal testimony.²⁴ Therefore, the nature of the hearing was such that Mr. Bailey could not present his case. Since both of these rights are fundamental rights to the fairness of any arbitration hearing the Arbitrator's action clearly constitute misconduct in such a way that it prejudiced the rights of Mr. Bailey in the arbitration proceeding.

The Arbitrator's actions can reasonably be interpreted as acts of an arbitrator exceeding the powers granted to her by statute, misconduct in failing to consider Mr. Bailey's evidence and conducting the hearing in a way that substantially prejudiced Mr. Bailey's rights.

The order of the Trial Court refusing to vacate the *Arbitration Award* should be reversed and the resulting orders vacated.

RESPECTFULLY SUBMITTED this 19th day of April, 2011.



STEVEN B. SHEA, WSBA No. 10718
Attorney for Mr. Bailey

²³ See Letter dated July 19, 2010, Appendix D.

²⁴ See Letter from Arbitrator dated August 3, 2010, Appendix E.

APPENDIX

- A.** *Agreement for Mediation to Arbitration Alternative Dispute Resolution Process* dated April 22, 2010.
- B.** *CR2A Agreement* dated May 3, 2010.
- C.** *Order on Additional Discovery* dated May 7, 2010.
- D.** Letter to Lee Tinney from Steven B. Shea dated July 19, 2010.
- E.** Letter to Lorna Bigsby and Steven B. Shea from Lee B. Tinney dated August 3, 2010.

APPENDIX A

Lee Tinney Dispute Resolution Services

2821 Wetmore Ave.
Everett, WA 98201
(425) 339-3319

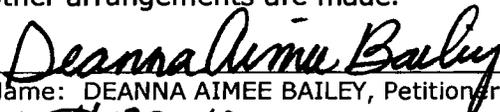
lee@leetinneylaw.com
www.leetinneylaw.com

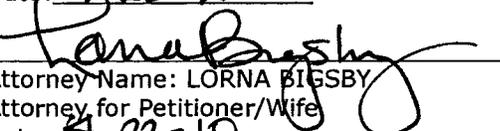
Lee B. Tinney, J.D.
Mediator - Arbitrator

AGREEMENT FOR MEDIATION TO ARBITRATION ALTERNATIVE DISPUTE RESOLUTION PROCESS

The undersigned agree to the following in connection with the alternative dispute resolution services provided by Lee B. Tinney ("mediator"):

1. Role of mediator/arbitrator. The mediator/arbitrator does not provide legal advice to either party. The mediator/arbitrator is neutral and independent. The mediator will use her best efforts to assist the parties to reach a resolution in the mediation component of this process. The mediator makes no guarantee or promise that a binding agreement will result from the mediated settlement conference. Should the mediated settlement conference fail to fully resolve all disputed issues in the marriage dissolution action between the parties within the time reserved (four hours on April 22, 2010), the parties agree that all remaining disputed issues in such action shall be submitted to Lee B. Tinney to decide as arbitrator per RCW 7.04A. In arbitrating such matter, Lee B. Tinney may consider all evidence and information presented by the parties in the mediation, and any additional information directed by her to be produced.
2. Confidentiality of process. Washington law applicable to the mediation process, including RCW 7.07, relating to confidentiality of disclosures of the parties in a mediation, is hereby waived by the parties if this matter is resolved by arbitration, to the extent information is considered by the mediator/arbitrator or identified as a basis for the arbitration decision.
3. Role of parties. In the mediated settlement conference, the parties shall participate in good faith, including disclosure of information necessary to the process. If the mediated settlement conference is not successful in resulting in an agreement between the parties, the parties agree and acknowledge their understanding that they are bound by the decision of the arbitrator as to all disputed issues in this matter per RCW 7.04A.
4. Informed consent. Both parties are represented by counsel and have been informed by their counsel as to their rights and the legal consequences of participating in a mediation-to-arbitration process, and to having an arbitrator decide their marriage dissolution case rather than traditional litigation and having a judge decide their marriage dissolution case. The parties waive any ethical considerations in having Lee B. Tinney serve as both mediator and arbitrator in this matter.
5. Fees. The parties agree to pay the mediator \$200/hr. for reasonable preparation time and actual time in the mediated settlement conference and arbitration, if any. The undersigned attorneys guarantee payment of their client's obligation. The parties shall split the total fee obligation unless otherwise specified or equitably allocated in the arbitration. Payment for the estimated cost of the mediation is due in advance of the mediation unless other arrangements are made.


Name: DEANNA AIMEE BAILEY, Petitioner
Date: 4-22-10


Attorney Name: LORNA BIGSBY
Attorney for Petitioner/Wife
Date: 4-22-10


Name: JOHN DAVIN BAILEY, Respondent
Date: 4-22-10


Attorney Name: STEVEN B. SHEA
Attorney for Respondent/Husband
Date: 4-22-10

APPENDIX B

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SUPERIOR COURT OF WASHINGTON
COUNTY OF SNOHOMISH

In re the Marriage of:

DEANNA AIMEE BAILEY,

Petitioner,

and

JOHN DAVIN BAILEY,

Respondent.

No. 08-3-02262-7

CR2A AGREEMENT

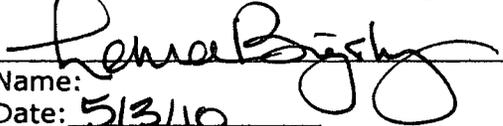
The parties agree and understand that by signing this agreement, the CR2A Settlement Agreement is binding upon both parties and enforceable in court. Pursuant to CR2A, the undersigned parties agree as follows:

Both parties participated in good faith in two mediation sessions with Lee Tinney and have previously agreed that all issues not agreed upon in this cause shall be submitted to her for binding arbitration in a summary process/decision per RCW 7.04A.

All the documentary information submitted to Lee Tinney as mediator shall be accepted into evidence in the arbitration by her. All the statements of the parties in the mediation sessions shall be considered as testimony and accepted into evidence by Lee Tinney in the arbitration.

Counsel for the parties and the arbitrator shall confer by telephone on Friday, May 7, 2010, at 2:00 p.m. for the purpose of resolving ~~whether and~~ to what degree the wife shall be permitted to submit additional information in response to information submitted by husband on May 3, 2010. After that issue is resolved, it is expected that the counsel for the parties may submit a written closing argument not exceeding four double spaced pages. Other than any such response or closing arguments, neither party shall submit further writings or documents.

LB
SBS


Name: _____
Date: 5/3/10

Lee B. Tinney
Mediator, J.D.
2821 Wetmore Ave.
Everett, WA 98201
(425) 339-3319

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Henry B. Shea

Name:
Date: 5/3/10

Deanna Aimee Bailey

Name:
Date: 5/3/10

[Signature]

Name:
Date: 5-3-10

APPENDIX C

rec 5/10/10

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SUPERIOR COURT OF WASHINGTON
COUNTY OF SNOHOMISH

In re the Marriage of:

DEANNA AIMEE BAILEY,

Petitioner,

and

JOHN DAVIN BAILEY,

Respondent.

No. 08-3-02262-7

ORDER ON ADDITIONAL
DISCOVERY

This matter came on for telephone hearing per agreement of the parties.
Having heard argument of counsel, NOW, THEREFORE,

IT IS ORDERED as follows:

1. The appraiser for the husband, Lance Biden, shall disclose and release as soon as possible and no later than five (5) days to both parties all documents (including letters) provided to him by husband which the appraiser considered or relied upon in rendering his appraisal of the marital residence common known as 27827 - 28th Ave. NW, Stanwood, WA 98292 ("marital residence").

2. To allow a meaningful opportunity to respond to new information provided by respondent at the last mediation session on May 3, 2010, Petitioner may obtain and submit to the undersigned Arbitrator (a) an appraisal or review appraisal by Gary Meier regarding the marital residence, (b) a house inspection of the marital residence, (3) a roof repair estimate/bld, and (4) a well inspection and/or well repair

Lee B. Tinney
Mediator/Arbitrator, J.D.
2821 Wetmore Ave.
Everett, WA 98201
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cd 5/10/10

1 estimate/bid. Respondent shall fully cooperate with providing access to the marital
2 residence for the purposes of obtaining such appraisal, inspections, or repair bidding,
3 and Respondent shall use his best efforts to schedule these items as soon as possible
4 upon request therefor. Respondent may be present during access to the marital
5 residence and property. Respondent shall not interfere with or seek to influence the
6 Petitioner's appraiser, inspector, or repair estimators, and Respondent shall not provide
7 any information to said persons engaged by petitioner unless specifically asked by such
8 person(s).

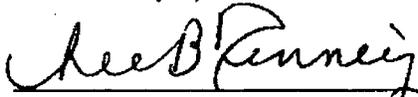
9 3. Petitioner will supply to the appraiser she engages all of the information
10 regarding the marital residence that was supplied to appraiser Lance Biden, and shall
11 confirm her delivery of same to Respondent's counsel. Petitioner's appraiser shall
12 exercise his professional judgment as to whether to consider the information supplied
13 or what weight to be given to the information supplied. Petitioner's appraiser shall
14 identify what information is relied upon in his appraisal. If a new building inspection,
15 roof repair bid, well inspection and well bid is supplied to Petitioner's appraiser, this
16 shall be disclosed to Respondent.

17 4. Both parties shall use their best efforts to the end that any new
18 appraisal, inspection, or estimates are obtained, disclosed, and submitted to the
19 Arbitrator within three weeks (May 28, 2010).

20 5. Petitioner's request to depose Lance Biden is denied.

21 6. Petitioner's request to amend/correct her Financial Declaration regarding
22 attorney fees is granted.

23 Dated: May 7, 2010.

24 

25 LEE B. TINNEY, WSBA #11247
26 Arbitrator per RCW 7.04A

APPENDIX D

Steven B. Shea
ATTORNEY AT LAW

3014 Hoyt Avenue
Everett, Washington 98201

Telephone:
(425) 258-4242
FAX:
(425) 252-3964

Mailing address:
P.O. Box 1269
Everett, WA 98206-1269

July 19, 2010

COPY

Lee B. Tinney
2821 Wetmore Avenue
Everett, WA 98201

Re: Marriage of Bailey – Arbitration

Dear Ms. Tinney:

Your Arbitration Award seems to suggest that the parties may have the opportunity to present additional arguments to you after the Arbitration Award was issued. Mr. Bailey wishes to avail himself of that opportunity as he believes that the arbitration process was unfair as it evolved out of the mediation.

MEDIATION TO ARBITRATION

I think it is fair to say that when the “mediation to arbitration” process began, all of us were learning what was going to be expected. It was quite clear from both the written agreements and the statements made by the parties that we expected a full discussion of the issues in the mediation and the process of the arbitration would be developed as the arbitration went along.

As it turns out, the parties agreed that the materials and discussions submitted as part of the mediation would become the factual basis and evidence for the arbitration. Mr. Bailey and I, as it turns out, naively thought that we knew all of the information that was being submitted to the Arbitrator as we would have received it in the mediation materials. It is clear from the Arbitration Award that reliance on that idea was wrong. The Arbitration Award alludes to documents and oral discussion that were never part of the mediation case and were never provided to Mr. Bailey. As a result, we were unable to fully litigate the issues because we were unable to confront the information given to you as part of the mediation process. We did not know that many of these allegations even existed and, therefore, Mr. Bailey could give no testimony to contradict the statements made by Ms. Bailey. It caused the whole process to be unfair and a violation of Mr. Bailey’s rights.

This became abundantly clear to us when the Arbitration Award used inaccurate information that was obtained through oral discussions from Ms. Bailey when the mediation part of the case was taking place. We believe that this information resulted in

a very slanted arbitration award.

Mr. Bailey wishes to avoid additional litigation and even an appeal. However, the question then becomes what do we do with this process? Should it be reopened so that Mr. Bailey can respond to the inaccurate information that was apparently supplied by Ms. Bailey as part of the mediation process? In other words, Mr. Bailey should have been allowed an opportunity of rebuttal of the evidence submitted by Ms. Bailey orally to which we had no knowledge at all. Therefore, we believe the process was tainted and produced an inequitable award decision. This process should be started all over again and the arbitration held like a trial. All of the materials and evidence should be considered by an Arbitrator in an adversary proceeding would include directing cross examination of witnesses. This seems to be the only fair way to resolve this matter.

Next, in lieu of that, my client asks that you reconsider your decision in the following ways:

1. Please reconsider using the updated appraisal done by the original agreed upon home appraiser Lance Biden at \$224,000. Mr. Biden's appraisal was done as an update to the previous appraisal and Ms. Bigsby was clearly given an opportunity to have inspectors and trades people come in to estimate the cost for repairs and improvements. Mr. Meiers' appraisal clearly does not address accurately the issues in the two appraisals and we were given no opportunity to have Mr. Biden respond to what errors were made by Mr. Meiers.

I pointed out that her lack of obtaining a home inspection and well inspection was very telling. That should have been resolved by the fact that she submitted no additional information on those issues.

Mr. Meiers' appraisal states that "if found to be false, assumption could alter the appraiser's opinion or conclusion." Mr. Meiers was wrong on the heaters. Mr. Meiers states that a well test should be performed by a well professional and Ms. Bigsby and her client chose not to do so.

More importantly, forcing the husband to assume the whole risk of loss on the home value in a falling market is not fair and equitable. This is especially true when the value of the home is substantially higher than the appraised value of the home.

2. Please reconsider the repayment portion of the remaining 401(k) loan. Ms. Bailey was the primary benefactor from this loan. Mr. Bailey already paid back his portion of the community loan and your award. A 47% liquidation expense was used

Lee B. Tinney
July 19, 2010
Page 3

even though the tax rate on a single head of household for up to \$117,650 is 25%. It would be most equitable if these funds were repaid from a nontaxable 401(k) funds and then there would be no loss to the tax man. The huge tax hit would be avoided and both of these parties would come out better than under your proposal.

Remember that all the funds from this loan were spent on community debt. If it was not for this loan, the community debt would not have been paid. This information was clearly given in the first information packet which detailed the account deposits and had receipts. There was not a comingling of the funds from this loan and most of the loan was spent on items that the Court had made a judgment upon previously.

3. The \$36,373 advancement of community funds should be removed. These funds were community in nature and were spent that way. Half of those funds would be Mr. Bailey's yet he is being charged with all expenditures. Mr. Bailey has provided very detailed receipts on these expenditures. A portion of these funds went towards the restoration of the Chevelle, which increased the value. The husband was forced to assume the Chevelle at an overpriced value. Thus, these expenditures are being counted twice.

The major portions went to property improvements which increased the home's value. Again, these items are then being counted twice.

A portion of the proceeds went toward a similar investment which was not even discussed in the mediation. The remaining portion went for a vacation that all parties were on. Mr. Bailey provided the list of expenditures and the receipts.

Please note that Mr. Bailey did not have a checking account during the entire marriage. He dealt in cash. This should not be held against him by stating that his normal method of expenditure of funds should be used against him.

4. Mr. Bailey asks that you reduce or eliminate the spousal maintenance award of \$24,000. No maintenance had been ordered since September 11, 2008. Ms. Bailey's demands for maintenance are based upon fictitious financial statements where she neglects to impute income that she has. For example, Ms. Bailey claims \$1,300 for rent expense. She has none. She has never paid more than \$800 for that in the past. Ms. Bailey has summer employment. This was ignored by the Award.

The husband's pay is an excess of what he actually receives. I am sure Ms. Tinney, that you recognize the state of the current economic situation. Having Mr. Bailey pay Ms. Bailey \$1,000 per month in addition to the child support is not sustainable

Lee B. Tinney
July 19, 2010
Page 4

under the facts and the economic circumstances these parties find themselves under.

5. The 5% contribution toward to Mr. Bailey's 401(k) should be included in the worksheets. This was agreed upon by both parties during the mediation. This was the source of the 401(k) account which was a major asset accumulated over 20 years of his employment. Mr. Bailey could not afford to contribute to the 401(k) last year, but has contributed to it this year. This has increased the 401(k) total to be distributed to Ms. Bailey. Those are Mr. Bailey's separate funds.

6. The requirement to pay Ms. Bailey \$2,400 for the cashed out children's bank accounts should be eliminated. These funds were already given to Ms. Bailey and the oldest son already had those monies paid directly to him.

7. Mr. Bailey wishes to be awarded his retirement pension. He hired a financial analysis to calculate the value. He used seven different mortality tables. Mr. Bailey is willing to have the highest value from those values used in awarding him the retirement. As Mr. Bailey said in the mediation, he is concerned about the impact of a QDRO on his retirement plan and would prefer to receive that asset not subject to any division. Please note that the wife was allowed to keep her retirement accounts and never provided valuation on them.

The conclusion is that Ms. Bailey did not go into the mediation in good faith. She intended to have it fail, she intended to provide information to you that were not privy to, and were given no opportunity to respond to. Unless this situation is remedied very soon, I expect this matter will be in the hands of an appellate court and that would be unfortunate for both sides.

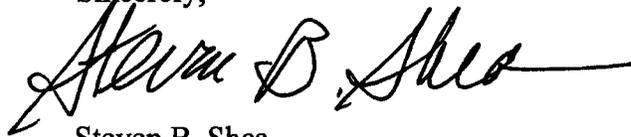
Finally, Ms. Bailey was awarded every financial benefit to take of her needs while the husband was left with no liquid assets to pay debts totaling \$36,000 or a method to obtain assets. He has been burdened with the Wife's portion of the home liability of over \$100,000 and has no method of reliable transportation or even a means of obtaining reliable transportation. Mr. Bailey put a value on assets and suggested that either party could have the item at that value. Ms. Bailey was given everything that she desired at a reduced value. In addition, in two years Mr. Bailey will be paying Ms. Bailey a \$88,000 balloon payment. This surely will cause the forced sale of the home given the clear inability to get a loan with the home defects.

Lee B. Tinney
July 19, 2010
Page 5

CONCLUSION

We ask that you reconsider your decision in light of this material. I am supplying with this letter another spreadsheet provided by Mr. Bailey and ask to reconsider the division in a way which will be fair to both the parties in this matter.

Sincerely,

A handwritten signature in black ink that reads "Steven B. Shea". The signature is written in a cursive style with a long horizontal flourish at the end.

Steven B. Shea
Attorney at Law

SBS:kb
Enclosure
c: Davin Bailey
Lorna Bigsby

Description	value	Husband	Wife
house	\$224,000	\$224,000	
mortgage	-\$34,000	-\$34,000	
Wifes TRS PLAN 3 defined contribution	\$10,615		\$10,615
Wifes TRS Plan 3 pension	\$2,400		\$2,400
Wifes VEBA	\$303		\$303
Husbands pension 7 mortality tables (17,250-22,586)		\$22,586	
Husband 401K nontaxable	\$58,013		\$58,013
Husband 401K taxable	\$150,565		\$150,565
1995 windstar	\$840	\$840	
2002 Volvo	\$7,445		\$7,445
1994 Isuzu Rodeo	\$1,000	\$1,000	
1968 Chevelle and parts	\$10,000	\$10,000	
Ameritrade	\$3,873	\$3,873	
Wifes credit card	-\$1,356		-\$1,356
Husbands credit card	-\$671	-\$671	
total	\$433,027	\$227,628	\$227,985
Wifes payment to husband 401K loan			
subtotal		\$227,628	\$227,985
Final total		\$227,628	\$227,985

Description Husband Separate

Premarital pension and post separation pension

Description Wifes Separate

Parentplus debt

Post seperation TRS Plan 3 or Veba contribs

Wifes payment to community 401K loan -\$32,040

APPENDIX E

Lee Tinney Dispute Resolution Services

2821 Wetmore Ave.
Everett, WA 98201
(425) 339-3319

lee@leetinneylaw.com
www.leetinneylaw.com

Lee B. Tinney, J.D.
Mediator - Arbitrator

August 3, 2010

RECEIVED

Lorna L. Bigsby
Bell & Ingram
P.O. Box 1769
Everett, WA 98206

AUG 5 2010

STEVEN B. SHEA

Steven B. Shea
P.O. Box 1269
Everett, WA 98206-1269

Re: Marriage of Bailey - Arbitration

Dear Counsel:

I received Mr. Shea's letter of July 19, 2010, which I viewed as a motion to reconsider, and not as a motion to change award under RCW 7.04.200. I did not invite further argument. To the extent a response is helpful to the parties, this letter stands as a denial of the request to reconsider.

I received Ms. Bigsby's letter of July 30, 2010. Regarding the inquiry as to whether I intended the judicial lien to be further secured by a Deed of Trust, the answer is "no." A judicial lien securing the cash equalization payment is what I intended.

Respectfully,



Lee B. Tinney
lee@leetinneylaw.com

LBT:lbt

cf 8/3/10

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

2011 APR 21 11:00:03
COURT OF APPEALS
DIVISION I

JOHN DAVIN BAILEY,
Appellant,

and

DEANNA AIMEE BAILEY,
Respondent.

No. 66313-5-I

**Snohomish County
Superior Court
No. 08-3-02262-7**

**DECLARATION OF
SERVICE**

I, Kim A. Biden, hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am a paralegal for Steven B. Shea, attorney for the above-named Appellant.

2. On the 19th day of April, 2011, I deposited in the United States Mail, at Everett, Washington, postage prepaid a copy of *Brief of Appellant* and filed in the above matter addressed to:

Lorna Bigsby
Attorney at Law
2918 Colby Avenue, Suite 201
Everett, WA 98201

ORIGINAL

DECLARATION OF SERVICE -1

*Steven B. Shea
Attorney at Law
3014 Hoyt Avenue
Everett, WA 98201*

DATED this 19th day of April, 2011.



Kim A. Biden

Law Office of Steven B. Shea
Attorney for Appellant
3014 Hoyt Avenue
Everett, WA 98201
(425) 258-4242
F: (425) 252-3964