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No. 70729-9-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PERRY JAY JONES, III, *Appellant*,

v.

KAREN M. JONES, *Respondent*.

REPLY BRIEF OF APPELLANT

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A. REPLY TO KATHY'S RESTATEMENT OF CASE

The Respondent's restatement of the case does not address the fact that Perry's appeal is bifurcated into two different parts:

1. The conduct of the arbitration and the arbitrator's failure to abide by the agreement of the parties under the CR2A to abide by (a) RCW 7.04A and (b) to divide the property of the parties "equally", not equitably.

In this regard the arbitrator:

- (a) unilaterally violated RCW 7.04A.150(3) by failing to have a hearing and allowing the parties to call witnesses;
- (b) awarded property to the parties' adult children;
- (c) failed in his arbitration award to award the wine;
- (d) awarded "separate property" to Karen, although this was property including such items as jewelry that was to have been divided equally;
- (e) without authority to do so placed a limitation on Perry's right to file for a modification of maintenance, and
- (f) credited Perry with an asset that did not exist at the time of the arbitration.

B. RESPONDENT'S POST ARBITRATION CHANGES

Kathy's post-arbitration intentional --and malevolent-- change to the arbitration award and failure to include attachments B-2 and B-3 to the decree, make the decree incomplete and unenforceable. Those changes include, but are not limited to the following:

- (1) The award gave Karen certain specific items of furniture and furnishings and awarded all of the remainder to Perry. In drafting the final papers, Karen's attorney intentionally changed this award by giving each party the furniture and furnishings in the real property awarded to that party! The residual furniture and furnishings pursuant to the actual award were Perry's, including the furniture and furnishings in the house in France!
- (2) Karen's attorney also gave Karen the wine collection, although the award gave her only the value of that collection.
- (3) Karen's attorney changed the monetary award to Perry to a percentage, rather than the dollar amount stated in the award, thus reducing his share of the distribution by tens of thousands of dollars.
- (4) Karen's decree awarded even the wine Perry bought after

separation to Karen. It was not even part of the wine collection.

(5) Karen's decree gave Karen the right to enter into Perry's residence purposes," "liens" on the amount awarded to Perry for "post arbitration judgments in favor of the wife, interest, late fees and storage costs" or "post arbitration community debts".

C. REBUTTAL ARGUMENT

1. Limited Review of Arbitrator's Decision. Respondent's appeal brief focuses on the limited authority the court has in reviewing an arbitrator's decision. *International Union of Operating Engineers, Local 286 v. Port of Seattle*, 176 Wn. 2d. 712 (2013), *Kitsap County Deputy Sheriff's Guild v. Kitsap Co.* 167 Wn.2d 428 (2009).

However, both of those cases note the court will review a decision if the arbitrator has "exceeded his legal authority". *International*, supra, 720-721; *Kitsap County*, supra, 435.

One of the holdings in *International*, at 721-722, was that it adopted the concept of vacating an arbitrator's decision if it violated a "public policy of the highest priority." Here the arbitrator called Perry's extra-marital affair "marital misconduct". When the "no-fault"

dissolution act was passed, the judicial fallout included, for dominant public policy reasons, that ancillary proceedings such as actions for “alienation of affection” should be abolished. *Wyman v. Wallace*, 94 Wn.2d 99, 103 (1980).

It was Kathy who filed the arbitrator’s letter with the court. She did so because the arbitrator in his “award” only gave her the value of the wine, not the wine itself. That same arbitrator’s letter introduced the “fault” issue. However, the finding of “marital misconduct” was contrary to a dominant public policy issue. It should have been left out of the arbitration.

Karen cites *In Re Marriage of Clark*, 13 Wn. App. 805, 807-809 (1975) in support of the predistribution; in fact, if it were applicable, which it is not in this case, *Clark* underscores the arbitrator’s obvious error. The *Clark* court stated:

“Mr. Clark contends that evidence of his drinking habit was considered contrary to RCW 26.09.080 [which precludes consideration of marital misconduct], that he was punished economically because the trial court awarded Mrs. Clark twice as much of the dollar value of the community assets as it awarded to Mr. Clark, and that his marital misconduct rather than the economic condition of the parties at the time

of the dissolution was the paramount concern of the court in its division of the property. Mrs. Clark responds by stating that... evidence of Mr. Clark's drinking was not admitted to show marital misconduct or 'fault,' but to show the effect his drinking and consequent expenditure of funds had on the community assets. We agree.

RCW 26.09.080 requires the court to consider all relevant factors in arriving at a 'just and equitable' distribution of property without regard to 'marital misconduct.' ... However, the fact that 'fault' is no longer a relevant query does not preclude consideration of all factors relevant to the attainment of a just and equitable distribution of marital property. The dissipation of marital property is as relevant to its disposition in a dissolution proceeding as would be the services of a spouse tending to increase as opposed to decrease those same assets. It is apparent from the record that the testimony relating to Mr. Clark's profligate life style was admitted and considered by the court not for the purpose of establishing 'fault,' but for the purpose of determining whose labor or negatively productive conduct was responsible for creating or dissipating certain marital assets. This was not error. *(emphasis added)*

In the Jones' case, the arbitrator has found actual fault through "marital misconduct" which *Clark* clearly said is impermissible *without also giving consideration to the economic contribution of Perry Jones.* The payments the arbitrator termed a "predistribution" did not constitute waste: Perry Jones did not lead a profligate life; *indeed the evidence is that he worked constantly for*

the betterment of the parties. No weight was given to “services of a spouse tending to increase as opposed to decrease those same assets.” The valuable asset Perry brought into the marriage was his professional degree and practice which created the great majority of the marital estate.

But *Clark* is actually irrelevant in the Jones matter: The agreement of the parties does not even allow consideration of the holdings noted in the *Clark* decision because, **by agreement of the parties, this is an equal, not equitable division case: dissipation, waste and other negative equitable issues do not apply because the purported asset was gone,** *In re Marriage of Pea, 17 Wn. App. 728 (1981)*; it is equally true the arbitrator did not have to consider the positive equitable fact that it was Perry’s labor and use of his professional degree and practice (as stated in *Clark*) that created these same assets he is accused of dissipating.

2. Arbitrator Exceeded his Legal Authority. As admitted by Kathy, the CR2A of the parties provided for the equal distribution of the parties’

property. However, the arbitrator in his award did not do that, and awarded separate property to Kathy.

“Courts will only review an arbitration decision in certain limited circumstances, such as when an arbitrator has exceeded his or her legal authority.”

International, supra, 720.

A recent case upholding this principle is *Washington State Department of Transportation, Ferries Division v. Marine Employees Commission, et al*, 167 Wn. App. 827 (2012). In that case the agreement forbade the award of attorney’s fees, but the arbitrator awarded them anyway. The court reversed because the award of fees exceeded his legal authority.

Here the agreement of the parties only allowed for the equal distribution of property, not the award of separate property to Kathy. In addition, nothing in the agreement allowed the arbitrator to award property to third parties.

D. ENFORCEMENT OF THE ARBITRATION AGREEMENT.

As indicated in all of the cases cited by both parties, private agreements to arbitrate are to be enforced, not ignored. Herein lies the

rub: the CR2A agreement in this case incorporated the JDR Rules, and the JDR Rules required the arbitrator to follow the laws of the state of Washington and specifically RCW 7.04A.

Kathy can't have it both ways. She can't pick and choose which parts of the agreement she wishes to enforce and which she chooses to ignore. She did not have the authority to rewrite the award by adding new terms, changing terms and ignoring the clear language of the award and the CR2A.

The arbitrator agreed to conduct the arbitration in accordance with RCW 7.04A, but then never scheduled a hearing and chose to ignore the agreement of the parties.

E. THE DECREE.

Kathy claims that Perry has asked for "a line by line" examination of the decree and then cavalierly brushes off his specific complaints regarding final document changes and additions to the award by claiming "the final documents entered by the superior court do not change the award." This statement is not only absurd, but a patent attempt to avoid the obvious.

F. PROCEDURE BELOW.

Kathy does not address her “*nunc pro tunc*” entering of the decree and her malevolent conduct in making an order effective the day before it was even heard and depriving Perry of his due process rights.

G. FEES.

Most of the fees incurred in this case are the direct result of the intentional misconduct of Kathy’s counsel in adding to and changing the award. Perry again requests fees and terms for this appeal.

H. CONCLUSION

Perry asks the court to refer this matter back to the trial court with directions to vacate the award, the findings of fact, conclusions of law, the decree and any other orders entered by the superior court after the arbitration, including those seizing Perry’s property or business. He further requests the trial court enter orders in accordance with RCW 7.04A.230(3) including referring the matter to another arbitrator.

Further, Perry requests his fees on appeal.

Respectfully submitted this 20th day of March, 2014.

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PROOF OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the 20th day of March, 2014, I deposited in the mails of the United States of America, properly stamped and addressed envelopes directed to LuAnne Perry containing a copy of the document(s) to which the certificate is affixed and had sent copies for delivery by ABC legal service.

Signed at Seattle, Washington on March 20, 2014

Andrea M. Gilbert
ANDREA M. GILBERT