

71831-2

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No. 71831-2

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

LILY S. FU,

Appellant/Cross-Respondent,

v.

GARY RICHARDSON,

Respondent/Cross-Appellant.

APPELLANT'S BRIEF

CO COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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FILED
CLERK OF COURT
JENNIFER S. SMITH

Ronald J. Meltzer, WSBA No. 1203
Attorneys for Appellant/Cross-
Respondent

SINSHEIMER & MELTZER, INC., P.S.
701 Fifth Avenue, Suite 4100
Seattle, WA 98104-7073
Telephone: 206-340-4700

 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR.....2

II. STATEMENT OF THE CASE3

III. LEGAL ARGUMENT9

 A. Assignment of Errors 1-10.....9

 B. Assignment of Error 11 14

IV. CONCLUSION 15

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Patterson
93 Wash.App. 579, 969 P.2d 1106 (1999) 10

In re Kaseberg
126 Wash.App. 546, 108 P.3d 1278 (2005) 11

In re the Marriage of Wallace
111 Wash.App. 697, 45 P.3d 1131 (2002) 12

STATUTES

RCW 2.24.050 6, 14

RCW 26.09.070(6) 10

RCW 6 10

RCW 26.09.020 13

RCW 26.09.080 13

RCW 19.40 13

I. INTRODUCTION

This appeal involves the attempt by the Superior Court to implement a CR2A Agreement entered into by the parties to this dissolution proceeding. The particular issue is a promise by the appellant wife to transfer ownership of two parcels of real property (hereinafter referred to as the “Colby” property and the “Lake Ketchum” property) to the respondent husband neither of which she owned at the time the CR2A Agreement was signed.

As of the date of the CR2A Agreement the Lake Ketchum property was owned by the Lily Fu Family Trust (The trust subsequently transferred the property to the Lily Fu Family Limited Partnership). The Colby property was owned by the limited partnership. Despite both parties knowing the status of the titles to both properties prior to execution of the CR2A Agreement, it provided only for Lily Fu’s individual interest in these properties to be transferred to Gary Richardson. The litigation that has followed has consisted largely of Respondent’s attempts to force Ms. Fu, in her capacity as General partner of the limited partnership, to transfer these properties to him.

II. ASSIGNMENTS OF ERROR

1. The court erred in entering Findings of Fact and Conclusions of Law and Judgment on implementing the provisions of the CR2A agreement dated March 19, 2014 (CP98-105).

2. The Court erred in entering a Judgment Summary Order implementing the provisions of the CR2A Agreement dated March 19 2014 (CP93-97).

3. The court erred in entering Findings of Fact and Conclusions of Law and Judgment on Implementing the Provisions of the CR2A Agreement on Reconsideration dated May 9, 2014 (CP37-44).

4. The court erred in entering a Judgment Summary, Order Implementing the Provisions of the CR2A Agreement on Reconsideration dated May 9, 2014 (CP33-36).

5. The court erred in entering Finding of Fact No. 13 insofar as it indicates that there was more than one conveyance from the trust to the partnership on March 15, 2013 and that such conveyances destroyed marketable title to respondent (CP41).

6. The court erred in entering Finding of Fact No. 14 insofar as it describes the impossibility of performance of her own making (CP 42).

7. The Court erred in entering Finding of Fact No. 15 (CP 43) insofar as it released rents belonging to a third party to Respondent.

8. The court erred in entering Finding of Fact No. 16 insofar as it indicates appellant had the legal ability to convey effective control of the properties (CP 42).

9. The court erred in entering Finding of Fact No. 18 insofar as it indicated appellant conveyed her interest in the property at Lake Ketchum to a family trust (CP43).

10. The court erred in entering Conclusions of Law No. 1-4 (CP 43-44).

11. The court erred in setting this matter for trial after an order was entered by a court commissioner vacating the CR2A Agreement, which order was not appealed to the superior court (CP 228-229).

III. STATEMENT OF THE CASE

This is an appeal (CP 52-67) from a decision of the Superior Court regarding the implementation of a CR2A Agreement incorporated into a decree of dissolution (CP 613-618). The parties to the marriage engaged in discovery prior to the mediation which resulted in the CR2A Agreement. In the course of the discovery

process Mr. Richardson's attorney took the deposition of Ms. Fu. Prior to the deposition he had, through discovery, obtained her tax returns. During the deposition and by examination of her tax returns he learned or should have learned that Ms. Fu did not have individual title to the two properties which are at issue in the litigation (CP 344-351). Even if that did not alert Respondent and his attorney, the mediation statement submitted by Ms Fu prior to the CR2A being signed recited the correct status of the title of the two properties at issue.

The Colby property had never been titled in Ms. Fu's individual name. It had been purchased by her family trust prior to the filing of the dissolution and transferred to the Family Limited partnership prior to the mediation (though recorded after the mediation). The second property, the so called Lake Ketchum property, was transferred by Ms. Fu to a family limited partnership in 2004, five years before the filing of the dissolution action (RP 27). Ms. Fu testified at trial that she had informed Mr. Richardson of the status of the titles during their marriage (RP 11). Mr. Richardson offered no countervailing testimony. Despite this knowledge the parties entered into a settlement agreement whereby Ms. Fu agreed to transfer to Richardson the Colby and Lake Ketchum properties. The agreement was signed

by Ms. Fu only in her individual capacity. After the execution of the CR2A Agreement, Mr. Richardson submitted Findings of Fact and Conclusions of Law and Decree of Dissolution, eventually signed by the court on July 30, 2012 (CP 596-599). The Findings incorporated and approved the CR2A Agreement. Ms. Fu opposed the entry of that portion of the decree claiming the CR2A Agreement was invalid. The court rejected this contention.

On January 29, 2013 Mr. Richardson moved to enforce the Decree of Dissolution. In part, the requested relief included an order requiring Ms Fu to sign quit claim deeds prepared by Mr. Richardson's counsel to transfer the Colby and Lake Ketchum properties. The deeds provided for transfers by Ms. Fu individually. On February 26, 2013 the court entered an order directing Ms. Fu to sign the deeds prepared by Mr. Richardson's attorney (CP 584-585). Ms. Fu complied with the order. On March 7, 2013 Mr. Richardson's attorney filed a motion to reconsider the same order he had sought and obtained (CP 579-583). In essence, Mr. Richardson and his counsel finally realized that individual signatures by Ms. Fu could not transfer ownership of the two properties. It is interesting to note that this motion recites that the wife had failed to notify husband's counsel that the property had been transferred into the Lily Fu trust, a patently false

statement given the disclosures made during the discovery process and in the mediation statement.

The motion for reconsideration resulted in an order by a court commissioner (CP 516) which read in relevant part:

“To the extent that the true nature of the title was not known to the trial judge, the Decree needs to be reopened. No action now is appropriate”

Respondent chose not to appeal this order to a Superior Court judge, the procedure for which is delineated in RCW 2.24.050:

“All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.”

Instead he filed a motion to enforce the decree directly to a Superior Court judge (CP 503-515). In the motion Respondent's counsel makes the following statement:

“The wife claimed in her mediation statement that the only property owned in her name was the Stanwood

house. It was known at the mediation that the wife held some property in the name of the Lily Fu Living Trust and the Lily Fu Family LLP.”

This admission clearly indicates that Mr. Richardson was never misled as to the status of the titles to the properties at issue prior to executing the CR2A Agreement and should have resulted in any future attempt by him to alter the terms of the agreement to be denied.

The relief sought in this motion was to have Ms. Fu, or if she refused, have a special master appointed by the court, to sign deeds from the Lily Fu Family LP to Respondent. The Lily Fu Family LP was never a party to these proceedings.

The court entered an order stating in relevant part that it would resolve the issue of whether the decree would be vacated partially, vacated or otherwise resolved. Shortly thereafter, Mr. Richardson filed a CR 60 motion essentially requesting the same relief; i.e. that Ms. Fu, on behalf of her family limited partnership, transfer the Colby and Lake Ketchum properties to him. Judge Okrent initially vacated the decree of dissolution, specifically vacating the Findings and Conclusions by order dated June 8, 2013 (CP 279-286). This was an appropriate decision given that the only choices available to the court were to vacate the Findings or to leave the parties where they were

which would give Mr. Richardson exactly what he bargained for in the CR2A Agreement.

Apparently not satisfied with this ruling, Mr. Richardson moved to reconsider.

The court entered an order on reconsideration vacating the Findings and Conclusions, except that portion which terminated the marriage, but reiterated the validity of the CR2A Agreement. The court set the issue of implementation of the agreement for trial (CP 228-229).

The matter went to trial before the Honorable David Kurtz. The court initially found that the Decree should be implemented by a cash judgment in favor of Respondent in the sum of \$511,000 plus additional judgments for an equalizing lien (part of the CR2A Agreement) (CP98-105). Appellant appealed this decision (CP 52-67). Respondent moved to reconsider the Court's order (CP 74-92). This motion was granted and the court entered Amended Findings of Fact and Conclusions of Law (CP 37-44). In relevant part, the court denied the motion to implement and denied the transfer of title sought in the motion to implement without prejudice. As part of the findings (Finding No. 15, CP 43) the court ordered two months rent from the properties, which had been placed in the court register, to be paid over

to Mr. Richardson though it was clear the rents were the property of a party not before the court.

IV. LEGAL ARGUMENT

A. ASSIGNMENT OF ERRORS 1-10.

While the legal process in the Superior Court has been somewhat convoluted, several facts appear undisputed. Respondent does not want the CR2A Agreement to be set aside and the various Superior Court judges hearing this case have affirmed the validity of this agreement. Respondent entered into this agreement knowing (but perhaps misunderstanding the legal consequences of doing so) that Appellant Lily Fu did not have legal title to two properties she promised to transfer as a part of this agreement. Respondent has had numerous opportunities to request the court to have the CR2A Agreement set aside based on this misunderstanding and has consistently opposed this solution. The Court should have left Mr. Richardson to the normal processes given to judgment creditors or to parties who seek relief for breach of contract. Instead, the courts have attempted to implement an agreement impossible to implement and continue this litigation unnecessarily.

A property settlement agreement incorporated into a dissolution decree that is not appealed (and the July 30, 2013 decree

was not appealed by either party) cannot be modified unless the court finds the existence of conditions that justify the reopening of the judgment.

RCW 26.09.070(6) governs when this is appropriate:

“(6) Terms of the contract set forth or incorporated by reference in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt, and are enforceable as contract terms.”

The remedies available to enforce a judgment are statutory (See RCW 6 entitled Enforcement of Judgments). They do not include changing the terms of an agreement to bind parties, in this case, the Lily Fu Limited Partnership and perhaps the Lily Fu Living Trust, who were not and could not be made parties to this litigation. The remedy of contempt was asked for and granted in this case when respondent obtained an order requiring Ms. Fu to sign quit claim deeds to the properties. She purged herself of that contempt by signing the deeds. The litigation that has ensued since that date was to force Ms. Fu to sign deeds on behalf of other entities which the court did not and could not order to comply.

A CR2A Agreement supplements but does not supplant the common law of contracts, *In re Patterson*, 93 Wash.App. 579, 582, 969 P.2d 1106 (1999).

The court could either have voided the contract for material misrepresentation or fraud on the part of Ms Fu or enforced the contract as written. Given the disclosures made by Ms. Fu regarding ownership prior to the agreement being signed, it is doubtful Mr. Richardson could have succeeded in setting the agreement aside and, in any event, he has not sought that type of relief. What the court cannot do in this case is rewrite the agreement and add parties, which is the only way Mr. Richardson could have obtained the relief he requested.

In *In re Kaseberg*, 126 Wash.App. 546, 108 P.3d 1278 (2005) the court reversed a trial court ruling awarding a wife monetary damages for property lost in foreclosure on the theory that the husband had wasted community assets. The court stated at pg. 556:

“A trial court has broad discretion under RCW 26.09.080 to evaluate and distribute the parties’ property and liabilities. *In re Marriage of Brewer*, 137 Wash.2d 756, 769, 976 P.2d 102 (1999). We apply a manifest abuse of discretion standard to the trial court’s dissolution rulings. *Brewer*, 137 Wash.2d at 769, 976 P.2d 102. The trial court manifestly abuses its discretion if it makes an untenable or unreasonable decision. *In re Marriage of Tower*, 55 Wash.App. 697, 700, 780 P.2d 863 (1989).

In evaluating the parties’ property in a dissolution proceeding, ‘the trial court may properly consider a spouse’s waste or concealment of assets.’ *In re Marriage of Wallace*, 111 Wash.App. 697, 708, 45 P.3d 1131

(2002), *review denied*, 148 Wash.2d 1011, 64 P.3d 650 (2003). But it is well settled that, '[w]hen 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 no ability to distribute that asset at trial.' *In re Marriage of White*, 105 Wash.App. 545, 549, 20 P.3d 481 (2001)."

In *In re the Marriage of Wallace*, 111 Wash.App. 697, 45 P.3d 1131 (2002) the husband admitted he fraudulently transferred property to his father. Based on that admission the trial court valued the property at zero in determining the division of assets. In rejecting the husband's appeal the court said at pg. 709:

"Randy next argues that the trial court erred by purporting to disestablish his father's property rights to the Mandy Road property. See *In re Marriage of Soriano*, 44 Wash.App. 420, 422, 722 P.2d 132 (1986) ('The dissolution court has no power over the property as to the rights of third parties claiming an interest in the property.'). Here, Randy refers to one of the trial court's findings: '[Randy]'s transfer of cash to his father for debts and other claimed debts owed to his father was fraudulent. Any alleged debt owing on the Mandy Road property was barred by the statute of limitations and the court finds that there were no such debts.' Clerk's Papers at 15.

Despite Randy's conception of this finding, the trial court did not determine the rights of any non-party, including his father. In his oral ruling, the trial court expressly stated that he lacked the authority to set aside Randy's conveyance of the Mandy Road property to his father."

In addition to the cases cited above, a right to a jury trial is expressly denied in a dissolution proceeding. See RCW 26.09.020. The court would not have the authority to deny additional parties this constitutional right by adding them to a dissolution action. RCW 26.09.080 also makes it clear the court can only dispose of assets before it in the context of a dissolution proceeding.

Once Mr. Richardson took the position that the CR2A must be enforced the court below should have taken no further action as it was not legally possible to add parties to a dissolution action, a step necessary to give Mr. Richardson the relief he requested.

Respondent is not without remedies. If he can prove the title to either property was fraudulently transferred, he can file such action (See RCW 19.40 et al) and join all parties he deems necessary for complete relief.

His ability to prove such claim however is dubious. The transfers by Ms. Fu were known prior to the execution of the CR2A Agreement. Ms. Fu testified at trial that she disclosed the transfers to Mr. Richardson during their marriage. Mr. Richardson did not deny or rebut this testimony. The Lake Ketchum property was transferred to the Lily Fu Living Trust by Ms. Fu in December 2004. The Colby property has never been owned by Ms. Fu. It was originally purchased

by the Lily Fu Living Trust in June 2008. Once Ms. Fu executed the deeds Mr. Richardson became a judgment creditor as to her individual interest in those properties, free to exercise those rights, including filing fraudulent transfer actions should he deem that an appropriate remedy.

What he should not be permitted to do is continue this litigation to force compliance. The motion to implement should have been denied with prejudice. All provisions in the Findings and Judgment relating to rents from the two properties at issue should be stricken as Ms Fu had no right to transfer those rents.

B. ASSIGNMENT OF ERROR 11.

Any action taken by the court to “implement the decree” after the court commissioners ruling to reopen the decree was improper. Per RCW 2.24.050 an order of a court commissioner is final unless a motion for revision is filed within ten days. If that does not occur (and it did not occur in this case) the order is then appealable to the Court of Appeals.

Despite the statute the Superior court set a trial to implement a decree that had been reopened. Any action taken by the court after that date should be determined to be void. The appropriate action

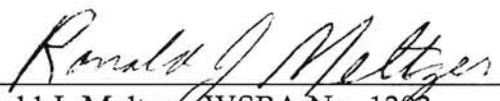
would have been to set the matter for trial in the original dissolution action without regard to the agreement.

V. CONCLUSION

The court should reverse the order and findings upon reconsideration insofar as it denied the motion to implement without prejudice and granted Respondent relief related to rents from the Lake Ketchum and Colby properties. In the alternative the court should reverse the Superior Courts refusal to uphold the court commissioner's ruling reopening the issue of the property disposition and direct this matter be set for trial on that issue.

RESPECTFULLY submitted this 6th day of October, 2014.

SINSHEIMER & MELTZER, INC., P.S.

By: 
Ronald J. Meltzer, WSBA No. 1203
Attorneys for Appellant/Cross-
Respondent

No. 71831-2

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

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and

GARY RICHARDSON,
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PROOF OF SERVICE

Ronald J. Meltzer
Attorneys for Appellant/Cross-
Respondent

SINSHEIMER & MELTZER, INC. P.S.
701 Fifth Avenue, Suite 4100
Seattle, WA 98104-7073

Telephone: 206-340-4700

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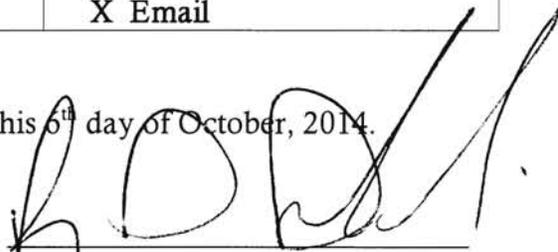
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OF THE STATE OF WASHINGTON
JUL 11 2009
SEATTLE, WA

I, Ryan Dekowski, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein.

On October 6, 2014 I caused a copy of Appellant's Brief to be served on the attorneys for Respondents at the address below:

Office of Clerk Court of Appeals- Division I One Union Square 600 University St. Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Howard Goodfriend Smith Goodfriend, P.S. 1619 8 th Ave. N. Seattle, WA 98109	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email
Bruce Moen Moen Law Office, PS 600 University St., Suite 3312 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email

SIGNED AT Seattle, WA this 6th day of October, 2014.



Ryan Dekowski