

FILED
COURT OF APPEALS

06 JUL 27 PM 1:13

No. 34840-3-II

STATE OF WASHINGTON

BY *[Signature]*

**COURT OF APPEALS
DIVISION 2
OF THE STATE OF WASHINGTON**

In re the Marriage of

KIMBERLY ANN MOYER
(f/k/a KASSAB), Appellant,

and

ELIE G. KASSAB, Respondent.

BRIEF OF APPELLANT KIMBERLY ANN MOYER

James D. Mullins
Attorney for Appellant Kimberly Ann Moyer

James D. Mullins
Attorney at Law
105 West Evergreen Blvd., Ste. 200
Vancouver, WA 98660
(360) 693-5883

WSBA No. 6238

pm

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR

No. 1 The trial court erred in granting respondent Elie Kassab's *Motion to Enforce Property Provisions of Decree and for Order Requiring Petitioner to Execute Documents*. (CP 33-36.) Page 1

Issues Pertaining to Assignments of Error

No. 1 Did the trial court properly find as a factual matter that -- Page 1

Certain events had occurred which caused Respondent to reasonably believe that Petitioner had the authority to convey the entirety of Prestige Development L.L.C. to Respondent(?)

(*Ruling on Motion to Enforce Decree*, pg. 2. CP 237.)

No. 2 Did the trial court properly find as a factual matter that -- Page 2

After learning that the transfer anticipated by the December 14, 2000, stipulation would create substantial tax liability for the children, Petitioner and Respondent agreed to restructure the proposed transfer by agreeing that the children's interest in Prestige Development

L.L.C. never materialized(?)

(Ruling on Motion to Enforce Decree, pg. 3. CP 238.)

No. 3 Did the trial court properly find as a factual matter that --

Page 2

There simply is no doubt that Petitioner and her attorney led Respondent to believe that he would receive all of Prestige Development L.L.C. in the dissolution(?)

(Ruling on Motion to Enforce Decree, pg. 4. CP 239.)

No. 4 Did the trial court properly find as a factual matter that --

Page 2

Despite the contingency, Petitioner continued to represent to Respondent and to third-parties, i.e. Bank of America, that Respondent was entitled to the full ownership of Prestige Development L.L.C.(?)

(Ruling on Motion to Enforce Decree, pg. 4. CP 239.)

No. 5 Did the trial court properly find as a factual matter that --

Page 3

One of the things Respondent bargained for was to have Petitioner take all steps within her power to

provide him with the 100% ownership of Prestige Development L.L.C. This is exactly what her attorney represented she could do, and what she would do(?)

(Ruling on Motion to Enforce Decree, pg. 5. CP 240.)

No. 6 Did the trial court properly conclude as a legal matter that --

Page 3

As trustee, Petitioner had the authority to transfer Prestige Development L.L.C. Whether or not the transfer is a breach of her fiduciary duty is a risk she assumed by entering into the stipulation, and whether or not the children can defend the transfer is not the subject of this action(?)

(Ruling on Motion to Enforce Decree, pg. 6. CP 241.)

No. 7 Should a court order specific performance of a contract which violates the law or public policy?

Page 3

No. 8 Does the court have jurisdiction in a dissolution of marriage action to order a spouse (or, in this case, a former spouse) to convey title to property which does not belong to either spouse? (Assignment of Error No. 1.)

Page 3

B.	<u>STATEMENT OF THE CASE</u>	Page 4
C.	<u>SUMMARY OF ARGUMENT</u>	Page 19
D.	<u>ARGUMENT</u>	
	1. Standard of Review	Page 24
	2. Argument re Assignment of Error No. 1, Issues No. 1, 2, 3, 4 and 5 (Pertaining to the Trial Court's Findings of Fact).	Page 25
	3. Argument re Assignment of Error No. 1, Issues No. 6 and 7 (Pertaining to the Trial Court's Conclusions of Law that the Trial Court Can Order a Contract for an Illegal Act to Be Specifically Performed).	Page 35
	4. Argument re Assignment of Error No. 1, Issue No. 8 (Pertaining to the Trial Court's Conclusion of Law That It Has Authority in a Marriage Dissolution Action to Order a Spouse or Former Spouse to Convey Title to Property Which Does Not Belong to Either Spouse).	Page 45
E.	<u>CONCLUSION</u>	Page 47

TABLE OF AUTHORITIES

Table of Cases

<i>Arneson v. Arneson</i> , 38 Wn.2d 99, 227 P.2d 1016 (1951).	Page 45
<i>Balbach v. Dieffenbach</i> , 107 N.J. Eq. 432, 152 A. 778 (1931).	Page 38
<i>Brinkerhoff v. Campbell</i> , 99 Wn.App. 692, 994 P.2d 911 (Div. 1, 2000).	Page 24
<i>Cascade Timber Co. v. Northern Pacific Railway Co.</i> , 28 Wn.2d 684, 184 P.2d 90 (1947).	Page 41
<i>DeVita v. Loprete</i> , 77 N.J. Eq. 533, 77 A. 536 (1910).	Page 38
<i>Sienkiewicz v. Smith</i> , 30 Wn.App. 235, 633 P.2d 905 (Div. 2, 1981).	Page 39

Statutes

RCW 11.100.045.	Page 36
RCW 11.100.090.	Page 36
RCW 26.09.050 (1).	Page 46

Other Authorities

71 Am.Jur.2d, <i>Specific Performance</i> , Sec. 90.	Page 38
2A Teglund, <i>Washington Practice: Rules Practice</i> 6 th Ed., § RAP 2.5, at 219-20.	Page 25
<i>The Random House Dictionary</i> , Ballantine Books, 1980.	Page 30

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in granting respondent Elie Kassab's *Motion to Enforce Property Provisions of Decree and for Order Requiring Petitioner to Execute Documents*. (CP 33-36.) The trial court should have denied respondent's motion. (The motion was granted in the trial court's *Ruling on Motion to Enforce Decree* dated April 17, 2006. (CP 236-41.) Appellant Kimberly Moyer's *Motion for Reconsideration* was denied by the trial court on May 10, 2006, in the court's *Ruling on Petitioner's Motion for Reconsideration*. (CP 270-71.))

Issues Pertaining to Assignments of Error

1. Did the trial court properly find as a factual matter that --

Certain events had occurred which caused Respondent to reasonably believe that Petitioner had the authority to convey the entirety of Prestige Development L.L.C. to Respondent(?)

(*Ruling on Motion to Enforce Decree*, pg. 2. CP 237.) (Assignment of Error No. 1.)

2. Did the trial court properly find as a factual matter that --

After learning that the transfer anticipated by the December 14, 2000, stipulation would create substantial tax liability for the children, Petitioner and Respondent agreed to restructure the proposed transfer by agreeing that the children's interest in Prestige Development L.L.C. never materialized(?)

(Ruling on Motion to Enforce Decree, pg. 3. CP 238.) (Assignment of Error No. 1.)

3. Did the trial court properly find as a factual matter that --

There simply is no doubt that Petitioner and her attorney led Respondent to believe that he would receive all of Prestige Development L.L.C. in the dissolution(?)

(Ruling on Motion to Enforce Decree, pg. 4. CP 239.) (Assignment of Error No. 1.)

4. Did the trial court properly find as a factual matter that --

Despite the contingency, Petitioner continued to represent to Respondent and to third-parties, i.e. Bank of America, that Respondent was entitled to the full ownership of Prestige Development L.L.C.(?)

(Ruling on Motion to Enforce Decree, pg. 4. CP 239.) (Assignment of Error No. 1.)

5. Did the trial court properly find as a factual matter that --

One of the things Respondent bargained for was to have Petitioner take all steps within her power to provide him with the 100% ownership of Prestige Development L.L.C. This is exactly what her attorney represented she could do, and what she would do(?)

(Ruling on Motion to Enforce Decree, pg. 5. CP 240.) (Assignment of Error No. 1.)

6. Did the trial court properly conclude as a legal matter that --

As trustee, Petitioner had the authority to transfer Prestige Development L.L.C. Whether or not the transfer is a breach of her fiduciary duty is a risk she assumed by entering into the stipulation, and whether or not the children can defend the transfer is not the subject of this action(?)

(Ruling on Motion to Enforce Decree, pg. 6. CP 241.) (Assignment of Error No. 1.)

7. Should a court order specific performance of a contract which violates the law or public policy? (Assignment of Error No. 1.)

8. Does the court have jurisdiction in a dissolution of marriage action to order a spouse (or, in this case, a former spouse) to convey title to property which does not belong to either spouse? (Assignment of Error No. 1.)

B. STATEMENT OF THE CASE

The factual background of the present dispute is lengthy.

The parties were married in June 1975 (*Petition for Dissolution of Marriage*, pg. 2. CP 2.) and were divorced December 4, 2001 (*Decree of Dissolution*. CP 13-32.). They are the parents of three children: Vanessa (now Sturgeon), Velana and Nicholas Kassab. The children either were of legal age or became of legal age during the pendency of the dissolution proceedings. (See *Affidavit of Vanessa Colleen Kassab*, CP 7-8; *Affidavit of Nicholas M. Kassab*, CP 9-10; *Affidavit of Velana Kelly Kassab*, CP 11-12.)

Part of the property disposed of in the *Decree of Dissolution* was the parties' interest in a Washington limited liability company known as Prestige Development, LLC. (*Decree of Dissolution*, Ex. A, pg. 2. CP 18.) At the time and until very recently, Prestige Development owned a theater building and land located in Vancouver, Washington. (According to information provided to appellant Moyer's counsel, the theater building and land recently were sold and so the underlying dispute between Elie

Kassab and the parties' children described below concerns the proceeds of the sale of the property.)

The present dispute, which began as post-decree proceedings more than four years after the decree was entered, concerns the rights and obligations of the parties under two written stipulations entered into in late 2000 and late 2001 which, in large part, became the trial court's dissolution decree by incorporation of their terms into the decree. The dispute is whether the court can or should order Kimberly Moyer to sign a back-dated "Consent of Members" for Prestige Development which would purport to transfer a 99% interest in Prestige Development, allegedly held by her in trust as trustee for the parties' grown children, to Elie Kassab. (*Motion to Enforce Property Provisions of Decree and for Order Requiring Petitioner to Execute Documents*. CP 33-36.)

The parties' children are suing respondent Elie Kassab in Clark County Superior Court over ownership of the disputed 99% interest in Prestige Development and for damages and various other forms of relief for his alleged mismanagement of Prestige Development and for his alleged breach of fiduciary duty. The children claim they are the beneficial owners of the 99% interest in Prestige Development. (See the

Complaint filed in *Sturgeon v. Kassab*, Clark County Superior Court No. 05-2-03198-4. *Respondent's Declaration in Support of Motion to Enforce Property Provisions of Decree and for Order Requiring Petitioner to Execute Documents* (hereafter *Kassab Dec.*), Ex. 1. CP 45-58.) Elie Kassab seeks Kimberly Moyer's signature on the back-dated "Consent of Members" form to advance his litigation strategy *vis-a-vis* his children in their lawsuit against him. (*Kassab Dec.*, Ex. 12. CP 152-54.)

The first stipulation was entered into effective on December 14, 2000. (This stipulation is hereafter referred to as "Stipulation No. 1" and is Ex. A. attached to the *Decree of Dissolution*. CP 17-22.) The second stipulation was entered into on various dates and became effective with entry of the decree on December 4, 2001. (This stipulation is hereafter referred to as "Stipulation No. 2" and is Ex. B. attached to the *Decree of Dissolution*. CP 23-32.) The court's formal *Decree of Dissolution* was entered on December 4, 2001. (The *Decree of Dissolution* is CP 13-32.)

Prior to Stipulation No. 1 being signed, Kimberly Moyer and Elie Kassab had considered 99% of the beneficial interest in Prestige Development, LLC, as being owned by the parties' three children in equal shares and held in trust for them by the parties. (The parties considered

the remaining 1% as owned ½% by Kimberly Moyer and ½% by Elie Kassab.) Documents were signed by the parties consistent with this state of affairs. For instance:

- (1) The opening paragraph of the *Operating Agreement* for Prestige Development, LLC, recited that the agreement was made by and among Elie Kassab and Kimberly Moyer “as trustees for Nicholas Kassab, Velana Kassab and Vanessa Kassab(.)” (*Kassab Dec.*, Ex. 2, pg. 1. CP 60.);
- (2) The Schedule of Contributions annexed to the *Operating Agreement* showed each child owned 33% of the company. (*Kassab Dec.*, Ex. 2, pg. 19. CP 78.).
- (3) The *Declaration of Gift* signed by the parties on October 14, 1998 (*Kassab Dec.*, Ex. 3. CP 80.) and the trust conveyance letters of Velana and Vanessa Kassab dated October 21, 1998, which were accepted by the parties, acknowledged a trust relationship between the Kassab children and their parents, the parties to this lawsuit. (*Kassab Dec.*, Ex. 4. CP 81-84.).

At the time he signed Stipulation No. 1 some two years later, Elie Kassab was on notice that the parties’ children claimed they were the

beneficial owners of 99% of the interests in Prestige Development. The children had filed affidavits in the court file on November 20, 2000, which so claimed. (See *Affidavit of Vanessa Colleen Kassab*, CP 7-8; *Affidavit of Nicholas M. Kassab*, CP 9-10; *Affidavit of Velana Kelly Kassab*, CP 11-12.) A motion for temporary orders filed in the parties' dissolution action incorporated statements from the parties' children made in October 2000 in which they claimed to own collectively 99% of Prestige Development. (*Kassab Dec.*, Ex. 5, pgs. 20 - 22. CP 104-06.)

According to Elie Kassab, prior to Stipulation No. 1 being signed, the parties (presumably through their attorneys) had discussed a

“tax-strategy to treat the children's interests as though they had never occurred. The strategy was originally discussed during the 2000 settlement negotiations.”

(*Respondent's Supplemental Declaration re Motion to Enforce Decree* (hereafter *Supp. Kassab Dec.*), pg. 2, second para. 3, CP 196.) (Emphasis of word “strategy” supplied.) This version of events would date the emergence of this concept in Elie Kassab's mind to a time prior to the signing of Stipulation No. 1 on December 14, 2000.

This version of events is somewhat brought into question by the documents in this case. On December 8, 2000, Elie Kassab signed a document addressed to the parties' children in which he said --

Please accept my resignation as trustee of your 3 trusts that own 33% each of the property known as 801 C Street in Vancouver, WA. Your mother is now the only trustee acting on behalf of those trusts effective immediately.

(First Supplemental Sworn Declaration of James D. Mullins, Ex. A. CP 220.) This indicates that as of this date in early December 2000, about one week before he signed Stipulation No. 1, Elie Kassab acknowledged that the parties' children were the beneficial owners of 99% of the interests in Prestige Development.

Elie Kassab's assertion that the children in fact held no interest in Prestige Development seems to definitively surface in the paperwork first in the November 2, 2001, letter from his attorney, Ms. Mathews, to Kimberly Moyer's former attorney, Mr. Runstein, in which Ms. Mathews says --

Earlier this week, we discussed Mr. Kassab's contention that the children's ownership of the Vancouver theater was never perfected. Dean Alterman set up the Prestige Development LLC and drafted the documents. Our clients were given copies of the paperwork. Each child was to contribute approximately \$16,000 under the terms of the

LLC and Mrs. Kassab was to fund their contributions to the project. Mr. Kassab recalls that Mr. Alterman instructed your client to fund the children's contributions to avoid difficulties with the I.R.S., and suggested she go to her trust for the funds. The funds were never contributed and the LLC documents were never fully executed.

I recognize your client may recall otherwise. However, this is how we expect to explain the transaction to Judge Bennett at trial.

(Declaration in Support of Request for Extension of Time to Answer and in Opposition to Motion to Require Petitioner to Execute Document (by Ted E. Runstein) (hereafter Runstein Dec.), Ex. 1, Mathews Letter of 11/2-2001, pg. 2. CP 191.) (Emphasis supplied.)

In fairness, however, Elie Kassab's "version of history" that the children, in fact, had no interest in Prestige Development is mentioned in a Prestige Development consent resolution signed by the parties at some point in 2001 and which states that it is effective in February 2001. This consent resolution was signed by Kimberly Moyer in her individual capacity but was not signed by her in a fiduciary capacity as trustee for her children. It also was signed by Elie Kassab in his individual capacity but was not signed by him in a fiduciary capacity as trustee for his children. *(Kassab Dec., Ex. 7. CP 7.)*

In any event, whether or not discussions regarding Elie Kassab's contention that the parties' children had no interest in Prestige Development occurred prior to the parties signing Stipulation No. 1, this stipulation (entered into on December 14, 2000) called for all interest in Prestige Development to be awarded to Elie Kassab. However, it also expressly provided that --

All terms of the stipulation are contingent on cooperation by any third parties who may claim or actually have an interest in any property in which the parties have an interest and which is the subject of this stipulation including but not limited to the parties' children.

(*Decree of Dissolution*, Ex. A, pg. 5, lns. 10-12. CP 21.) (Emphasis supplied.) And, as noted, all three children were of legal age at the time Stipulation No. 1 was signed on December 14, 2000. (See *Affidavit of Vanessa Colleen Kassab*, CP 7-8; *Affidavit of Nicholas M. Kassab*, CP 9-10; *Affidavit of Velana Kelly Kassab*, CP 11-12.)

Thus, Elie Kassab was on notice at the time he signed Stipulation No. 1 on December 14, 2000, that --

- the parties' three children owned (or at least claimed that they owned) 33% each (for a total of 99%) of Prestige Development, and

- the cooperation of the children to convey their interest in Prestige Development to him would be required for him to acquire sole ownership of Prestige Development.

(Strictly speaking, the court's record suggests that Nicholas Kassab's share of Prestige Development, if it existed at all on December 14, 2000, vested in his sole name, free of any trust, at the point in time when he became age 21, which must have been on or before October 29, 2003. According to the court's record, Kimberly Moyer and Elie Kassab conveyed Nicholas' 33% ownership interest in Prestige Development into trust until he became age 21. (*Kassab Dec.*, Ex. 3. CP 80.) Nicholas' exact birthday is not stated in the court's record but he must have become age 21 no later than October 29, 2003, since he states in a letter dated October 29, 2000, that he then was age 18. (*Kassab Dec.*, Ex. 5, pg. 21. CP 105.) The court's record contains no evidence that Nicholas re-conveyed his 33% ownership interest in Prestige Development -- assuming he owned such a share -- into trust with his parents after he became age 21. Thus, the logical conclusion is that Nicholas became the full legal and equitable owner of his 33% ownership interest in Prestige Development, if he was an owner at all, when he became age 21.)

At the time Stipulation No. 1 was signed, Kimberly Moyer's former attorney, Mr. Runstein, anticipated that the children would satisfy the contingency and agree to a transfer of their interest in Prestige Development to their father, Elie Kassab. (*Runstein Dec.*, para. 9. CP 188.) Obviously, however, the children claim they never agreed to transfer, or in fact transferred, their interest in Prestige Development to their father. They claim to beneficially own 99% of Prestige Development. (See the *Complaint* filed in *Sturgeon v. Kassab. Kassab Dec.*, Ex. 1. CP 45-58.) And apparently, no written agreement or document such as a Bill of Sale or Deed of Gift or the like, signed by the children, conveying their interests in Prestige Development to their father exists. Evidently none can be produced by Elie Kassab to prove his ownership of the children's alleged 99% interest in Prestige Development against their claim in their pending lawsuit that they, in fact, own 99% of the beneficial interest in Prestige Development. The present dispute between the parties and the lawsuit filed by the children against their father would not be pending were it otherwise.

Therein lie the seeds of this dispute between Kimberly Moyer and Elie Kassab, former spouses and the parents of children who claim as

against their father that they own 99% of the beneficial interests in Prestige Development.

As indicated above, on an unidentified date (but probably early) in 2001, Kimberly Moyer and Elie Kassab, acting in their personal capacities but not in a fiduciary capacity as trustees for their children, signed a consent resolution relating to Prestige Development, LLC. This resolution recited in pertinent part that Kimberly Moyer and Elie Kassab --

. . . intended to issue membership units to themselves and to their children upon receipt of certain contributions by the children. The contributions were never received and no membership interests were issued. The Organizers under Washington law have treated the ownership as community property with each Organizer owning an undivided one-half interest.

The resolution further stated that the ownership of the company at the time was vested 50% each in Kimberly Moyer and Elie Kassab and that all of Kimberly Moyer's interest in the company was conveyed to Elie Kassab. (*Kassab Dec.*, Ex. 7. CP 151.)

As indicated above, about eleven months after the parties signed Stipulation No. 1, Elie Kassab either brought up for the first time or else revived his position regarding the ownership of Prestige Development in a November 2, 2001, letter, sent by his attorney, Ms. Mathews, to Kimberly

Moyer's attorney at the time, Mr. Runstein. In this letter, Elie Kassab talked about his idea that the parties' children never had acquired ownership of an interest in Prestige Development because their ownership interests never had been funded and, therefore, their consent or cooperation to a transfer of the entirety of Prestige Development to him was not needed. In this letter, Elie Kassab's attorney also acknowledged that

I recognize that your client may recall otherwise.

(*Runstein Dec.*, Ex. 1, Mathews Letter of 11/2-2001, pg. 2. CP 191.)

On November 13, 2001, Kimberly Moyer (through her attorney, Mr. Runstein) warned Elie Kassab (through his attorney, Ms. Mathews) that --

. . . accepting your client's position that the children's ownership never in fact occurred because it was not completed would allow the filing of amended tax returns reducing, but not eliminating, tax liability. * * * *
Needless to say, the children are unhappy about their tax liability and, in fact, lack the funds to pay the obligation. The children suing Mr. Kassab or both of their parents is certainly not a pleasant thought.

(*Kassab Dec.*, Ex. 5, pgs. 35 - 36; Runstein Letter of 11/13/2001. CP 119-20.)

To this, Ms. Mathews replied in her November 16, 2001, letter --

Your statement that the children are considering filing suit against their father will not be dignified with a response.

(Supp. Kassab Dec., Ex. 3, pg. 2. CP 207.)

On November 26, 2001, Kimberly Moyer (through her attorney, Mr. Runstein) again warned Elie Kassab (through his attorney, Ms. Mathews) that it could be troublesome for the parties to contend that their children had no interest in the theater property --

I appreciate your not responding to the children's concern about their theater ownership. As we discussed, the children are not parties to the dissolution and they will face the risk the children may maintain they individually own 33% of the theater property.

(Runstein Dec., Ex. 2, Runstein Letter of 11/26/2001. CP 194.)

The risk that the parties' children might disagree with Elie Kassab's characterization of the ownership of Prestige Development (i.e., that they had no interest in it) was specifically and clearly stated in the parties' final settlement incorporated into Stipulation No. 2. This stipulation called for Kimberly Moyer to have prepared and filed amended tax returns for the theater property "asserting that the children's ownership

of said property was not completed, . . .” (Emphasis of word “asserting” supplied.) Stipulation No. 2 also clearly called out --

The parties acknowledge that their children are not parties to this agreement and that they may be subject to their claim of ownership in the property.

(*Decree of Dissolution*, Ex. B., pg. 2. CP 24.)

The *Decree of Dissolution* was entered on December 4, 2001. The decree incorporated by reference the two prior stipulations. (*Decree of Dissolution*, pgs. 2-3, para. 3.2-3.5. CP 14-15.)

Some two and one-half years passed. On June 20, 2004, the parties’ grown children sued their father, Elie Kassab, in Clark County Superior Court. In this suit, the children alleged that they collectively owned 99% of Prestige Development. They alleged their father, Elie Kassab, had mismanaged Prestige Development and breached his fiduciary duty to them. They asked for various forms of relief, including an accounting and damages. (See the *Complaint* filed in *Sturgeon v. Kassab. Kassab Dec.*, Ex. 1. CP 45-58.)

On January 4, 2006, about 18 months after the children’s lawsuit was filed and more than four years after the *Decree of Dissolution* was entered, Elie Kassab (through his attorney, Ms. Mathews), wrote to

Kimberly Moyer's attorney (then still Mr. Runstein), requesting that Kimberly Moyer re-sign the 2001 consent resolution, this time in her alleged capacity as trustee for the parties' children. (*Kassab Dec.*, Ex. 12. CP 152-54.) When Kimberly Moyer refused to do so, Elie Kassab filed a motion in the trial court seeking a court order directing her to do so. (*Motion to Enforce Property Provisions of Decree and for Order Requiring Petitioner to Execute Documents*. CP 33-36.)

After two court hearings and considerable briefing by the parties, the trial court ordered in its *Ruling on Motion to Enforce Decree* entered on April 17, 2006:

Respondent's motion to enforce the decree, requiring Petitioner to amend the consent of members of February 2001 to reflect a transfer in her individual capacity and as trustee for the children is granted.

(*Ruling on Motion to Enforce Decree*, pg. 6. CP 241.) The trial court denied Kimberly Moyer's motion for reconsideration of this ruling in the *Ruling on Petitioner's Motion for Reconsideration* entered in this matter court on May 10, 2006. (CP 270-71.) This appeal followed the trial court's denial of reconsideration.

C. SUMMARY OF ARGUMENT

1. Summary of Argument re Assignment of Error No. 1, Issues No. 1, 2, 3, 4 and 5 (Pertaining to the Trial Court's Findings of Fact)

The trial court found as factual matters, incorrectly it is respectfully submitted, five assertions of fact made by Elie Kassab, all of which pertain to appellant's Assignment of Error No. 1:

1. Certain events had occurred which caused Respondent to reasonably believe that Petitioner had the authority to convey the entirety of Prestige Development L.L.C. to Respondent.

Ruling on Motion to Enforce Decree, pg. 2. (CP 237.)

In fact, Elie Kassab was on notice that the parties' grown children claimed to be the beneficial owners of 99% of Prestige Development and that Kimberly Moyer was a trustee for the children of this 99% ownership interest if they were the beneficial owners of the interest. Therefore, he knew or should have known that the consent of the children -- in writing -- would be required for the children's interest in Prestige Development to be conclusively transferred to him. Nonetheless, he went forward and closed on the transactions which were contemplated by the parties' dissolution

settlement without obtaining the signatures of the children on conveyance documents.

2. After learning that the transfer anticipated by the December 14, 2000, stipulation would create substantial tax liability for the children, Petitioner and Respondent agreed to restructure the proposed transfer by agreeing that the children's interest in Prestige Development L.L.C. never materialized.

Ruling on Motion to Enforce Decree, pg. 3. (CP 238.)

In fact, the parties did not agree to "restructure" the transaction by agreeing that the children never acquired their interests in Prestige Development. They agreed to "assert" that this was the case, but also clearly called out in their final agreement, Stipulation No. 2, that --

The parties acknowledge that their children are not parties to this agreement and that they may be subject to their claim of ownership in the property.

If the children, in fact, owned 99% of Prestige Development, nothing Kimberly Moyer or Elie Kassab could do, as between themselves, could change this fact and deprive the children of their property interest. They could not "structure" or "re-structure" their transaction so as to change the ownership of the company. Elie Kassab consciously took the risk that his children might do exactly what they are doing now -- suing him on their claim that they in fact own 99% of Prestige Development.

3. There simply is no doubt that Petitioner and her attorney led Respondent to believe that he would receive all of Prestige Development L.L.C. in the dissolution.

Ruling on Motion to Enforce Decree, pg. 4. (CP 239.)

The same comments regarding Issue No. 1 above apply here. Elie Kassab was on notice that the parties' grown children claimed to be the beneficial owners of 99% of Prestige Development and he took the risk in the parties' final property settlement that what has occurred might occur -- that is, that he would have a dispute with the parties' children over ownership of Prestige Development.

4. Despite the contingency, Petitioner continued to represent to Respondent and to third-parties, i.e. Bank of America, that Respondent was entitled to the full ownership of Prestige Development L.L.C.

Ruling on Motion to Enforce Decree, pg. 4. (CP 239.)

Kimberly Moyer made no such representation to Bank of America. As discussed below, she represented to the bank that

* * * all necessary consents and approvals for the execution and performance of this Agreement (a refinancing agreement for the theater property) have been obtained, and that when signed and delivered to Bank this Agreement will be the legal binding and enforceable obligation of K. Kassab * * *

(referring to Kimberly Kassab (as she was known at the time)). Kimberly Moyer did not represent that the parties' children had consented to a transfer of their interests to their father.

5. One of the things Respondent bargained for was to have Petitioner take all steps within her power to provide him with the 100% ownership of Prestige Development L.L.C. This is exactly what her attorney represented she could do, and what she would do.

Ruling on Motion to Enforce Decree, pg. 5. (CP 240.)

The same comments regarding Issue No. 1 above apply here. Elie Kassab was on notice that the parties' grown children claimed to be the beneficial owners of 99% of Prestige Development. Furthermore, the stipulations signed by the parties include no representation or warranty by Kimberly Moyer to Elie Kassab regarding the ownership of Prestige Development nor any commitment to "take all steps within her power to provide him with the 100% ownership of Prestige Development." Kimberly Moyer's obligations regarding Prestige Development were precisely spelled out in the parties' stipulations and did not include such a commitment.

2. Summary of Argument re Assignment of Error No. 1, Issues No. 6 and 7 (Pertaining to the Trial Court's Conclusion of Law that the Court Can Order a Contract for an Illegal Act to Be Specifically Performed)

The intended result of the proposed "Consent of Members" document Elie Kassab now wishes to force Kimberly Moyer sign is to assist him in his goal of depriving his children of property which the children contend belongs to them and is held in trust for them. He thus intends that she assist him in committing an illegal act in violation of the anti-self-dealing prohibitions of RCW 11.100.045 and RCW 11.100.090. The trial court had no authority to order Kimberly Moyer to commit such an illegal act.

3. Summary of Argument re Assignment of Error No. 1, Issue No. 8 (Pertaining to the Trial Court's Conclusion of Law That the Court Has Authority in a Marriage Dissolution Action to Order a Spouse or Former Spouse to Convey Title to Property Which Does Not Belong to Either Spouse)

When the ultimate purpose of a dissolution decree is not related or incident to the rights of the parties between themselves, or to burdens imposed on their property on behalf of their children, then the court exceeds its jurisdiction in a dissolution case when it enters such a decree.

The court's order to Kimberly Moyer in this case is to take steps to dispose of property rights which, according to the court's fact findings in this case, are not hers nor Elie Kassab's to deal with. The property rights belong to the children. As such, the order is beyond the court's jurisdiction in a dissolution action.

D. ARGUMENT

1. Standard of Review

This appeal is from a trial court proceeding begun by Elie Kassab to enforce a marital property settlement agreement documented in two written stipulations entered into by the parties in late 2000 and late 2001 and incorporated by reference in the *Decree of Dissolution* which ended their marriage. The evidence considered by the trial court was a series of sworn declarations submitted by the parties. The proceeding at the trial court level was akin to a summary judgment proceeding. Therefore, the applicable standard of review on appeal is *de novo*. *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 994 P.2d 911 (Div. 1, 2000). Both the facts

and the law are to be reconsidered by this appellate court. 2A Tegland, *Washington Practice: Rules Practice 6th Ed.*, § RAP 2.5, at 219-20.

2. Argument re Assignment of Error No. 1, Issues No. 1, 2, 3, 4 and 5 (Pertaining to the Trial Court's Findings of Fact)

The factual findings by the trial court identified above are not supported by the court's record for the following reasons:

First, it is undisputed in the court's record that, as of the organization of Prestige Development on October 21, 1998, 99% of the ownership interest in Prestige Development was held by appellant Kimberly Moyer and respondent Elie Kassab in trust for their children Vanessa, Velana and Nicholas Kassab. I.e., as of October 21, 1998, Vanessa, Velana and Nicholas Kassab were the beneficial owners of 99% of Prestige Development. The trial court so concluded. *Ruling on Motion to Enforce Decree*, pg. 1-2. (CP 236-37.)

Second, the trial court made no finding of fact that this ownership situation changed after October 21, 1998. Therefore, it must be concluded that the court's record demonstrates that this ownership situation did not change at any time subsequent to October 21, 1998.

Third, the trial court and this court, therefore, logically must conclude that, at the times of the parties' stipulations (Stipulation No. 1 entered into on December 14, 2000, and Stipulation No. 2 entered into on December 4, 2001), the ownership of Prestige Development remained as it was in October 1998 -- that is, Vanessa, Velana and Nicholas Kassab were the beneficial owners of 99% of Prestige Development.

Fourth, the court's record demonstrates that Elie Kassab was fully on notice at all relevant times that the parties' children claimed that they owned 99% of the ownership interest in Prestige Development.

A. The children filed affidavits in the parties' dissolution lawsuit on November 20, 2000, in which they claimed they were the beneficial owners of 99% of the interests in Prestige Development. (See *Affidavit of Vanessa Colleen Kassab*, CP 7-8; *Affidavit of Nicholas M. Kassab*, CP 9-10; *Affidavit of Velana Kelly Kassab*, CP 11-12.)

B. A motion for temporary orders filed in the parties' dissolution lawsuit incorporated statements from the parties' children made in October 2000 in which they claimed to own collectively 99% of Prestige Development. (*Kassab Dec.*, Ex. 5, pgs. 20 - 22. CP 104-06.)

C. On December 8, 2000, Elie Kassab signed a document addressed to the parties' children in which he said --

Please accept my resignation as trustee of your 3 trusts that own 33% each of the property known as 801 C Street in Vancouver, WA. Your mother is now the only trustee acting on behalf of those trusts effective immediately.

(First Supplemental Sworn Declaration of James D. Mullins, Ex. A. CP 220.)

D. Stipulation No. 1 entered into on December 14, 2000, (which called for the parties' interest in Prestige Development to be awarded to Elie Kassab) expressly provided that --

All terms of the stipulation are contingent on cooperation by any third parties who may claim or actually have an interest in any property in which the parties have an interest and which is the subject of this stipulation including but not limited to the parties' children.

(Decree of Dissolution, Ex. A, pg. 5, lns. 10 - 12. CP 21.) (Emphasis supplied.)

E. Sometime shortly before November 2, 2001, Elie Kassab either adopted (for the first time) or revived (giving credence to his declaration testimony that this "tax-strategy" was originally discussed during the 2000 settlement negotiations) his view regarding ownership of

Prestige Development, LLC. He adopted (or revived) his position that the children never had acquired ownership of an interest in Prestige Development because their ownership interests had not been funded and their consent or cooperation to a transfer of the entirety of Prestige Development to him was not needed. Elie Kassab's attorney's November 2, 2001, letter stated --

Earlier this week, we discussed Mr. Kassab's contention that the children's ownership of the Vancouver theater was never perfected. * * * * *

I recognize your client may recall otherwise. However, this is how we expect to explain the transaction to Judge Bennett at trial.

(*Runstein Dec.*, Ex. 1, Mathews Letter of 11/2-2001, pg. 2. CP 191.)
(Emphasis supplied.) Elie Kassab would not have "contended" in this letter that his version of history concerning the ownership of Prestige Development was correct if he and his attorney had not recognized at that time that there was a contrary "version of history" in existence -- that is, in the minds of his children, they owned 99% of Prestige Development.

F. On November 26, 2001, Kimberly Moyer (through her attorney, Mr. Runstein) warned Elie Kassab (through his attorney, Ms.

Mathews) that it could be troublesome for the parties to contend that their children had no interest in the theater property --

I appreciate your not responding to the children's concern about their theater ownership. As we discussed, the children are not parties to the dissolution and they will face the risk the children may maintain they individually own 33% of the theater property.

(*Runstein Dec.*, Ex. 2, Runstein Letter of 11/26/2001. CP 194.) This letter put Elie Kassab on notice that any transaction he might enter into with Kimberly Moyer concerning Prestige Development would not necessarily gain him full, undisputed ownership of 100% of the ownership interests in Prestige Development. This letter told Elie Kassab that he “ * * * will face the risk the children may maintain they individually own 33% of the theater property.” This is completely at odds with the trial court's conclusion that

There simply is no doubt that Petitioner and her attorney led Respondent to believe that he would receive all of Prestige Development L.L.C. in the dissolution.

Ruling on Motion to Enforce Decree, pg. 4. (CP 239.)

G. Stipulation No. 2 called for Kimberly Moyer to have prepared and filed amended tax returns for the theater property “asserting that the children's ownership of said property was not completed, . . .”

(Emphasis of word “asserting” supplied.) (*Decree of Dissolution*, Ex. B, pg. 2. CP 24.) The use of the word “asserting” in this stipulation notified Elie Kassab that the position he and his about to be former spouse would “assert” in certain tax returns for Prestige Development (which were in fact prepared and filed) would be contrary to a different state of facts that someone else (such as the parties’ children) might “assert.” The word “assert” means “to state positively but often without support or reason” and “to maintain (claims, rights, etc).” *The Random House Dictionary*, Ballantine Books, 1980.

Kimberly Moyer made no representation or warranty to Elie Kassab regarding the ownership of Prestige Development in either of the stipulations the parties signed. And, if it was not clearly understood already, Stipulation No. 2 also called out --

The parties acknowledge that their children are not parties to this agreement and that they may be subject to their claim of ownership in the property.

(*Decree of Dissolution*, Ex. B, pg. 2. CP 24.) (Emphasis supplied.) The fact the children might disagree with Elie Kassab’s “assertion” or “version of history” concerning the ownership of Prestige Development could not have been made any more clear in the parties’ agreement.

Fifth, Kimberly Moyer did not represent in the refinancing documents with Bank of America for the theater property that Elie Kassab was entitled to the full ownership of Prestige Development. She represented to the bank as follows (“Borrower” is Prestige Development; “E. Kassab” is Elie Kassab, and “K. Kassab” is Kimberly Kassab (now Moyer)) --

To induce Bank to enter into this Agreement, Borrower, E. Kassab and K. Kassab each represent and warrant to Bank as follows:

* * * *

f. K. Kassab represents that she has full legal power and authority to enter into this Agreement, that all necessary consents and approvals for the execution and performance of this Agreement have been obtained, and that when signed and delivered to Bank this Agreement will be the legal binding and enforceable obligation of K. Kassab.”

(*Supp. Kassab Dec.*, Ex. 1, pg. 4, para. 11 preamble and sub-para. f. CP 201.) (Emphasis supplied.) Kimberly Moyer’s representation was made to Bank of America, not to Elie Kassab, and she represented only that “that all necessary consents and approvals for the execution and performance of this Agreement have been obtained, and that when signed and delivered to Bank this Agreement will be the legal binding and

enforceable obligation of K. Kassab.” (Emphasis supplied.) Kimberly Moyer did not represent to Elie Kassab that the parties’ children had consented to a transfer of their interests to him. She represented to the bank that she had obtained the “required consents and approvals for the execution and performance of this Agreement . . .” “This Agreement” was a refinancing agreement with the bank, not an agreement between the Kimberly Moyer and Elie Kassab.

Paragraph 13 of the refinancing agreement also is pertinent. It provided --

Borrower, E. Kassab and K. Kassab each individually acknowledge that they have thoroughly read and reviewed the terms and provisions of this Agreement and are familiar with same, that the terms and provisions contained herein are clearly understood by them and have been fully and unconditionally consented to by them and that they have had full benefit and advice of counsel of their own respective selection in regard to understanding the terms, meaning and effect of this Agreement, and that Borrower’s, E. Kassab’s and K. Kassab’s execution of this Agreement is done freely, voluntarily, with full knowledge, and without duress, and that in executing this Agreement neither Borrower, E. Kassab nor K. Kassab are relying on any other representations either written or oral, express or implied, made to Borrower, E. Kassab or K. Kassab by any other party hereto, . . .”

(*Supp. Kassab Dec.*, Ex. 1, pg. 4, para. 13. CP 201.) (Emphasis supplied.)

Because the representations in paragraph 11 of the refinance agreement were made to the bank only, paragraph 13 of the refinance agreement excludes Elie Kassab's current contention that he could rely on any representation made by his wife in the refinance agreement other than those stated in paragraph 13. And these were that (1) she had "thoroughly read and reviewed the terms and provisions of this Agreement," (2) that the agreement's terms and provisions had been "fully and unconditionally consented to" by her, and that (3) she had had "full benefit and advice of counsel of (her) own respective selection in regard to understanding the terms, meaning and effect of this Agreement." Nothing was said in paragraph 13 regarding Kimberly Moyer's authority to transfer the interests of the children in Prestige Development to Elie Kassab or commit the children to anything, and Kimberly Moyer made no such representation or warranty to Elie Kassab.

Sixth, there is the common sense fact that the consent resolution signed by the parties (nominally acting in their own capacities) stated to be effective in February 2001 (*Kassab Dec.*, Ex. 7. CP 151.) presumably was reviewed by Elie Kassab's attorney prior to his signing of it. Elie Kassab

apparently believed at the time that the February 2001 consent resolution was sufficient for his needs as he raised no concern about its sufficiency until four years after the dissolution decree was entered. One would think that, if Elie Kassab wanted assurances that the children agreed to the transfer of their interests (if any) in Prestige Development to him, he would have had them sign this resolution also at that time, or have had them sign some other document of conveyance of their interest in Prestige Development to him. Obviously, that did not occur, which itself is evidence that Elie Kassab knew he was running a calculated risk that his children might disagree with his “version of history” insofar as their lack of ownership of any interest in Prestige Development.

The trial court’s factual findings which underpin its order granting Elie Kassab’s motion simply are incorrect. Elie Kassab knew that the parties’ children claimed to own 99% of the beneficial interests in Prestige Development and that he was assuming the risk that his chosen “version of history” regarding ownership of this company (i.e., that the children, in fact, did not own 99% of the beneficial interests in Prestige Development) might not be correct. Elie Kassab knew that he was running a calculated risk that the parties’ children might do exactly as they have done -- step

forward later to assert their rights against his claim that he owned all of Prestige Development. Elie Kassab cannot expect Kimberly Moyer to now take action in her purported role as trustee for the parties' grown children to act contrary to their wishes and legally asserted position. If 99% of the beneficial interest in Prestige Development in fact belongs to the parties' children, Kimberly Moyer had no authority at the time the parties were divorced, and has no authority now, to convey their interests in the company to Elie Kassab. He might as well ask that the court order Kimberly Moyer to convey the Brooklyn Bridge to him. She has no more authority to convey the childrens' asserted interests in Prestige Development to him than she has authority to convey the Brooklyn Bridge to him.

3. Argument re Assignment of Error No. 1, Issues No. 6 and 7 (Pertaining to the Trial Court's Conclusions of Law that the Trial Court Can Order a Contract for an Illegal Act to Be Specifically Performed)

Elie Kassab has requested the equitable remedy of specific performance, but specific performance of what would be an illegal act, according to his version of the facts -- that is, the transfer to him of trust

property held by a trustee against the interests (let alone the expressed desires) of the trust beneficiaries, his children.

It is clear the intended result of the proposed "Consent of Members" document Elie Kassab now desires that Kimberly Moyer sign is to assist Elie Kassab in his goal of depriving his children of property which the children contend belongs to them and is held in trust for them.

This would be an illegal act. According to Washington law --

A fiduciary shall invest and manage the trust assets solely in the interests of the trust beneficiaries.

RCW 11.100.045. If Kimberly Moyer is a trustee for her children (or some of them) of their claimed interests in Prestige Development, then she would violate RCW 11.100.045 by doing as Elie Kassab now demands.

The proposed "Consent of Members" document also would result in a transfer of trust property to a former trustee (Elie Kassab) contrary to the anti-self dealing prohibitions of Washington law regarding trusts --

Unless the instrument creating the trust expressly provides to the contrary, any fiduciary in carrying out the obligations of the trust, may not buy or sell investments from or to himself, herself, or itself or any affiliated or subsidiary company or association.

RCW 11.100.090. It appears self-evident that Elie Kassab's goal in this lawsuit is to convert to his use property which the parties' children contends belongs to them and is held in trust for them. He claims Kimberly Moyer is contractually obligated to assist him in this effort.

In fact, the only way Elie Kassab can be entitled to prevail in his lawsuit with his children, or be entitled to the order that he seeks in this lawsuit with his former wife, is to first establish that the theater property is not and never was held in trust for the children. This is the position that Elie Kassab advocated toward the end of the dissolution proceedings in this case -- that the parties would "assert" that the children's interest in Prestige Development was never perfected and so never came into existence. It is the position that Elie Kassab has taken in the lawsuit the parties' children filed against him. Yet paradoxically -- and without rational explanation -- Elie Kassab in this case now apparently argues that the theater property, in fact, was held in trust for the children because he wants his former wife, as a purported trustee for the children, to act against the children's desires and sign a document in an attempt to commit an arguably illegal act and convey trust property to him. Elie Kassab undercuts the entire rationale for his request that Kimberly Moyer be

required to sign the “Consent of Members” form in the capacity as alleged trustee for the parties’ children by asserting that she is, in fact, such a trustee.

The general common law is that --

Equity will not enforce the specific performance of a contract to compel a person who had entered inadvertently into a contract to commit a breach of duty, such as a trustee who has entered into a contract, the performance of which would be a breach of trust. If a person has entered into two independent contracts with different parties, each equally valid and enforceable against him or her, a court of equity will not compel that person to violate material provisions of one of them, to the injury of the other party, for the purpose of affording relief under the other.

71 Am.Jur.2d, *Specific Performance*, Sec. 90, (emphasis supplied) citing *Balbach v. Dieffenbach*, 107 N.J. Eq. 432, 152 A. 778 (1931), and *DeVita v. Loprete*, 77 N.J. Eq. 533, 77 A. 536 (1910).

Washington law is clear that a court is not to order specific performance of an act which violates the law or public policy. In *Sienkiewicz v. Smith*, 30 Wn.App. 235, 633 P.2d 905 (Div. 2, 1981), Division 2 of the Washington Court of Appeals was confronted with a case where the parties to a real estate transaction structured the transaction so as to evade the state’s short-platting laws of the time. As part of this

illegal transaction, the parties agreed to buy and sell four lots for a total of \$20,000, or \$5,000 per lot on average. The vendors conveyed three lots to the intended purchaser and were paid \$18,000 for these lots but then refused to convey the fourth lot. The intended purchaser sued for specific performance, asking the court to order the vendors to convey the fourth lot to him for the remaining \$2,000 of the purchase price. Division 2 of the Washington Court of Appeals reversed a trial court decision granting specific performance. The court said --

The issue is whether the courts should specifically enforce a contract which provides for the violation of a state statute or which is contrary to the public policy underlying the statute.

As a general rule, the courts of this state will not enforce such agreements. *Goldberg v. Sanglier*, 27 Wn.App. 179, 616 P.2d 1239 (1980); *Waring v. Lobdell*, 63 Wn.2d 532, 387 P.2d 979 (1964); *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 182 P.2d 643 (1947). Cf. *Gilmore v. Hershaw*, 83 Wn.2d 701, 521 P.2d 934 (1974) (where the Supreme Court refused to allow contract vendees a rescission remedy for the sale of unplatted land under the pre-1969 platting laws because the legislature had not provided such a statutory remedy at the time of the sale). Rather, where a contract is based on an illegal act, the courts will leave the parties where it finds them. *Hederman v. George*, 35 Wn.2d 357, 212 P.2d 841 (1949); *Reed v. Johnson*, 27 Wn. 42, 67 P. 381 (1901). As stated in J. Pomeroy, *Specific Performance of Contracts* §286 at 651 (3d ed. 1926):

Where two persons with equal knowledge and equally participating in the fault, have entered into an illegal agreement, and one of them has obtained by the other's voluntary act all the benefit of it for himself, his refusal to perform on his own part is, generally considered in itself alone, unjust and inequitable; but the law sustains him in this position, because it takes into account the interests of society and of the state, which demand the complete suppression of such agreements.

Hederman v. George, 35 Wn.2d at 362, 212 P.2d 841.

Thus, although the Smiths received more for lots 1 through 3 on a per lot basis than originally provided for in the first earnest money agreement, the courts will not aid Sienkiewicz through an action for specific performance.

Sienkiewicz v. Smith, 30 Wn.App. 235, at 239-40.

The Washington Supreme Court wrote at length about the courts' unwillingness to aid those who are parties to supposed illegal bargains with the remedy of specific performance in *Cascade Timber Co. v. Northern Pacific Railway Co.*, 28 Wn.2d 684, 184 P.2d 90 (1947). In this case, a contract purchaser of timber lands from a railroad sued the railroad for specific performance of the contract. The purchaser had paid the contract price but had not complied with certain other exclusive dealing

terms of the contract. The trial court refused to order specific performance of the contract (by conveyance of the timber lands by the railroad) until the purchaser complied with the exclusive dealings terms of the contract. The purchaser appealed this decision, arguing that the exclusive dealing terms had the effect of violating the rule against perpetuities and therefore should not be enforced. The Washington Supreme Court affirmed the trial court decision. The court said that if the contract's exclusive dealing terms violated the rule against perpetuities, then the contract was illegal and the court would not aid the purchaser -- as a party to an illegal contract -- with the remedy of specific performance. Although lengthy, the following quote from the court's opinion explains the reasoning for the general rule and is instructive --

The general rule is stated in 58 C.J. 971, Specific Performance, § 157, as follows:

“As a general rule a court of equity will, on its own motion, deny specific performance if it appears that the agreement sought to be enforced is illegal because it involves a violation of some statutory provision, some other rule of law, or tends to injure or is detrimental to the public good and is contrary to public policy.”

In 49 Am.Jur. 29, Specific Performance, § 19, it is stated as follows:

“Equity will not specifically enforce a contract void at law for illegality, and where a contract grows immediately out of or is connected with an illegal act, equity will not decree its specific performance. It may therefore be stated as a general proposition that an act which the law prohibits to be done is insofar infirm that a court of equity will not lend its aid to enforce its performance. Thus, it is said that an express statutory restriction will not be ignored by the courts, but will be enforced by refusal of equity to decree specific performance of contracts made contrary to the statute.”

In the same volume, at p. 30, § 20, we find the following:

“Thus, on the grounds of public policy equity has refused to decree specific enforcement of contracts involving purchase by a trustee of trust property, designed to thwart the policy of the government in the homestead laws, which provide for the giving of assistance to a felon to enable him to escape arrest, which violate the rule against perpetuities.”

5 Williston on Contracts, Rev.Ed., 4560, § 1630, reads:

“It is commonly said that illegal bargains are void. This statement, however, is clearly not strictly accurate. It is more correct to say that ‘a party to an illegal bargain generally can neither recover damages for breach thereof, nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value.’ It is true that a court could only under very exceptional circumstances enforce specifically an illegal bargain, but the rule of public policy that forbids an action for damages for breach of such an agreement is not based on the impropriety of compelling the defendant to pay the damages; in itself that would

generally be a desirable thing. When relief is denied it is either because the plaintiff is a wrongdoer, and such a person the law does not aid, or, in exceptional cases, because the transaction is declared absolutely void by the law.”

In 3 Pomeroy’s Equity Jurisprudence, 5th Ed., 645, § 929, it is stated:

“A court of equity does not aid a party to enforce an illegal transaction which is still executory.”

Further, at p. 646, § 929, we find this statement:

“If the contract has been executed by the payment of the money, conveyance or delivery of the property, and the parties have equally participated in the wrong, and are equally in fault, the court, unless compelled to do so by statute, does not generally interpose its aid.”

The same author, in vol. 2, p. 117, § 402, states:

“Another very common occasion for invoking the principle is illegality (see §§ 929, et seq.). Wherever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, in *pari delicto*, it is a well-settled rule, subject only to a few special exceptions depending upon other considerations of policy, that a court of equity will not aid a *particeps criminis*, either by enforcing the contract or obligation while it is yet executory, nor by relieving him against it, by setting it aside, or by enabling him to recover the title to property which he has parted with by its means.”

In Pomeroy’s Specific Performance of Contracts, 3rd Ed., 642, § 280, the following statement is made:

“An illegal contract is, as a rule, void -- not merely voidable-- and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity.”

And again, in the same text, p. 651, § 286, it is stated:

“Where two persons with equal knowledge and equally participating in the fault, have entered into an illegal agreement, and one of them, has obtained by the other’s voluntary act all the benefit of it for himself, his refusal to perform on his own part is, generally considered in itself alone, unjust and inequitable; but the law sustains him in this position, because it takes into account the interests of society and of the state, which demand the complete suppression of such agreements.”

Cascade Timber Co. v. Northern Pacific Railway Co., 28 Wn.2d 684, at 706-08.

What Elie Kassab desires is that this court require Kimberly Moyer participate with him in what, according to their children’s legal position and what this court has found to be the facts in this case, would be an illegal bargain. The court’s equity power of specific performance cannot be utilized for such an end.

4. Argument re Assignment of Error No. 1, Issue No. 8 (Pertaining to the Trial Court's Conclusion of Law That the Court Has Authority in a Marriage Dissolution Action to Order a Spouse or Former Spouse to Convey Title to Property Which Does Not Belong to Either Spouse)

Washington law is well established that when the ultimate purpose of a dissolution decree is not related or incident to the rights of the parties between themselves, or to burdens imposed on their property on behalf of their children, then the court exceeds its jurisdiction in a dissolution case. The court's order to Kimberly Moyer in this case is to take steps to dispose of property rights which, according to the court's fact findings in this case, are not hers or her ex-husband -- Elie Kassab's -- to deal with. As such, the order is beyond the court's jurisdiction.

In *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951), the trial court allocated all the parties' property to the husband with a directive to sell the property and apply the net proceeds of sale to pay the parties' creditors in pro rata shares. According to the Washington Supreme Court, the decision "contemplates a forced liquidation for the benefit of creditors and prohibits preferment among them. Nothing will remain to be divided between the parties." The court held that the trial court order exceeded its jurisdiction.

Since the divorce act nowhere provides for it, the court has no power to compel a liquidation for the benefit of creditors as an incident to a divorce decree. Nor can any of the statutory proceedings, having that as its purpose, be consolidated with a divorce action for trial. Nothing can be found in the divorce act authorizing the court to deprive the spouses of their rights to prefer creditors, claim exemptions and/or homesteads, compromise claims, take bankruptcy, invoke statutes of limitation, made contracts, and enjoy their property rights. Their several interests in the property are, of course, determined, *as between themselves*, by the decree, and are subject to the burdens imposed upon them therein for purposes within the scope of the divorce act. As to the common law rules of jurisdiction, we know of none which empowers the court to encroach upon civil rights simply because persons are parties to a divorce action.

Arneson v. Arneson, 38 Wn.2d 99, at pg. 101. (Italics in original.)

Time has gone by since *Arneson* was decided and the dissolution statutes have been amended, but it remains a bedrock principle that only the property of the parties is before the court for disposition in the dissolution action. RCW 26.09.050 (1) provides --

In entering a decree of dissolution of marriage, legal separation, or declaration of invalidity, the court shall determine the marital status of the parties, make provision for a parenting plan for any minor child of the marriage, make provision for the support of any child of the marriage entitled to support, consider or approve provision for the maintenance of either spouse, make provision for the disposition of property and liabilities of the parties, make provision for the allocation of the children as federal tax exemptions, make provision for any necessary continuing

restraining orders including the provisions contained in RCW 9.41 .800, make provision for the issuance within this action of the restraint provisions of a domestic violence protection order under chapter 26.50 RCW or an antiharassment protection order under chapter 10.14 RCW, and make provision for the change of name of any party.

(Emphasis supplied.) This statute says the court may allocate the property of the parties. It does not say the court may dispose of the property of the parties' children. Yet this is what the court in this case has ruled should occur.

E. CONCLUSION

The trial court entered an extraordinary order which, if obeyed by Kimberly Moyer --

- would result in her purporting to convey to Elie Kassab, in her alleged capacity as trustee of the parties' grown children and against their expressed desires and legal position, 99% of the ownership interests in Prestige Development which the parties' grown children claim to beneficially own;
- when Elie Kassab has taken the position (both at the time of the parties' dissolution proceedings and now) that no such trust exists;

- when, if the interests are held by Kimberly Moyer in trust, doing so would be in clear violation of Washington statutory law forbidding self-dealing by trustees;
- in order to specifically perform a contract which the trial court decided Kimberly Moyer had entered into, but which, if such a contract exists, would be an illegal contract; and
- is an order concerning property which arguably was not and is not owned by either of the parties in their individual right but is trust property held for the benefit of the parties' children, and so is property which is beyond the court's jurisdiction in a dissolution action.

The trial court's order so far departs from the accepted course of legal proceedings that Kimberly Moyer has been forced to appeal to this court for reversal.

This court should reverse the decision of the trial court granting respondent Elie Kassab's motion to require appellant Kimberly Moyer to execute the 2001 consent resolution in her alleged capacity as trustee for

the parties' children. Instead, this court should deny Elie Kassab's motion.

Respectfully submitted this July 25, 2006.

A handwritten signature in black ink, appearing to read "James D. Mullins", written over a horizontal line.

James D. Mullins, WSBA No. 6238
Attorney for Appellant
Kimberly Ann Moyer

FILED
COURT OF APPEALS

06 JUL 27 PM 1:13

STATE OF WASHINGTON

BY _____
COURTY

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

In re the Marriage of
KIMBERLY ANN MOYER (f/k/a KASSAB)

Appellant,

vs.

ELIE G. KASSAB,

Respondent.

Clark No. 00-3-00993-1

Court of Appeals No. 34840-3-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)

: ss.

County of Clark)

The undersigned declares and states as follows:

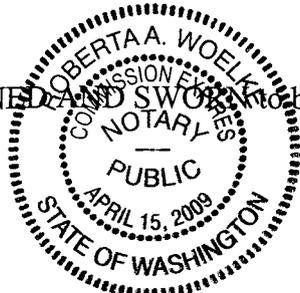
On July 25, 2006, I sent a true copy of the *Brief of Appellant Kimberly Ann Moyer* to the following counsel in this action via First Class Mail to the address as follows:

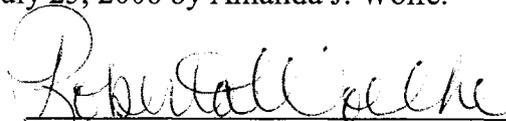
Katharine W. Mathews
1308 E. 1st Street
P.O. Box 1210
Newberg, OR 97132

DATED this 25th day of July, 2006.


Amanda J. Wolfe

SIGNED AND SWORN to before me on July 25, 2006 by Amanda J. Wolfe.




NOTARY PUBLIC
My appointment expires: 4-15-09