COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 35051-3-II

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

DARREL E. BOWMAN,

Appellant.

v.

CHRISTINA PALMERSTON-BOWMAN,

Respondent.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County
No. 04-3-02168-4
The Honorable Linda CJ Lee, Presiding

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A. ASSIGNMENT OF ERROR

1. The trial court erred in denying Appellant's motion to enforce the dissolution decree.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Appellant was denied a fair and unbiased hearing where the trial judge disregarded the terms of the dissolution decree, and inserted her own life experiences, which were similar to Respondent's, into the hearing.

C. STATEMENT OF THE CASE

1. Procedural History

On June 10, 2005, a decree of dissolution was entered, dissolving the married between Darrel Bowman, hereinafter referred to as Appellant, and Christina Palmerston-Bowman, hereinafter referred to as Respondent. (CP 10-14) Findings of facts and conclusions of law were also entered on June 10, 2005. (CP 5-9)

On May 23, 2006, Appellant filed a motion and declaration to enforce the dissolution decree. (CP 18-22) On June 2, 2006, a hearing was held regarding Appellant's motion to enforce the dissolution decree. The trial judge entered an order denying Respondent's motion to enforce the dissolution decree. (CP 39-40)

Appellant is appealing the trial judge's order denying his motion to

enforce the dissolution decree, specifically, the portion of the order regarding the sale of the house.

2. Facts

The decree of dissolution in this case was signed by both parties, their respective counsel, and the court commissioner. Paragraph 3.3 of the dissolution decree provides in part:

> The wife is awarded as her separate property the following property:
>
> 1. Family Home commonly known as 332 N. Mullen St. Tacoma, Washington 98407 and legally described as follows:
>
> Lot 7, Block 5, Orchard Place, according to Plat recorded in book 14 of Plats, Pages 40 and 41, in Pierce County, Washington.
>
> The husband shall sign a quit claim deed releasing his interest in the home. If Ms. Bowman's payments on the secured obligation against the family home awarded to her become more than sixty (60) days past due in an amount equal or greater than one months payment, then Ms. Bowman will list the family home for sale....

(CP 10-14)

On March 16, 2006, Appellant obtained a copy of his credit report, and discovered that the home awarded to Respondent in the dissolution

decree was currently 30 days past due, and had recently been 60 days past due. (CP 18-22). These late payments were damaging Appellant's credit, and making it difficult for him to obtain financing for a new home. (CP 18-22)

Appellant's former counsel requested that Respondent place the home for sale as required by the dissolution decree, or in the alternative refinance the home in her name only. Appellant also requested that Respondent provide him with an IRA or other account number into which the retirement funds could be transferred into. (CP 18-22) Respondent did not place the home for sale as required by the decree, nor did Respondent provide Appellant with an account number to transfer the retirement funds into. (CP 18-22)

Appellant filed a motion to enforce the decree. A hearing was held on this motion on June 2, 2006, before the Honorable Judge CJ Lee. During the hearing, Respondent acknowledged that in November of 2005, the home mortgage payment was in fact more than 60 days delinquent. (RP 6)

During the hearing, the trial judge relayed her personal experiences in the posting of mortgage payments in making the determination to deny Appellant's motion. The judge understood that the provisions of the

dissolution decree required that the home shall be listed for sale if the payments were more than 60 days late, and further stated:

"...I also recognize, because I've been there myself, sometimes you send in a payment and it doesn't get posted right away, which it appears that sometimes it may have, or at least one of the times it happened here." (RP 10)

D. ARGUMENT

1. WHETHER APPELLANT WAS DENIED A FAIR AND UNBIASED HEARING WHERE THE TRIAL JUDGE DISREGARDED THE TERMS OF THE DISSOLUTION DECREE, AND INSERTED HER OWN LIFE EXPERIENCES, WHICH WERE SIMILAR TO RESPONDENT'S, INTO THE HEARING.

Courts in Washington have long held that a litigant has a right to a trial or hearing before an impartial and unbiased trier of fact. State v. Carter, 77 Wn.App. 8, 888 P.2d 1230, 1232 (1995); State v. Post, 118 Wn.2d 596, 826 P. 2d 172, 185 (1992); City of Hoquiam v. Public Employment, Etc., 97 Wn.2d 481, 646 P.2d 129 (1982). This right is referred to as the appearance of fairness doctrine. The appearance of fairness doctrine seeks to prevent "the evil of a biased or potentially interested judge or quasi-judicial decision maker." State v. Carter, 77 Wn.App. 8, 12, 888 P.2d 1230, 1232 (1995);

State v. Post, 118 Wn.2d 596, 618, 826 P. 2d 172, 185 (1992).

In order for a litigant to establish that he has been denied a fair trial or hearing under this doctrine, he must establish evidence of actual or potential bias of the judge against him. State v. Carter, 77 Wn.App. 8, 12, 888 P.2d 1230, 1232 (1995); State v. Post, 118 Wn.2d 596, 618, 826 P. 2d 172, 185 (1992).

Appellant asserts that the trial judge was actually or potentially biased against him based on her statements made during the hearing. There was no dispute that Respondent had been more than 60 days delinquent in her mortgage payments. There was also no dispute regarding the terms of the divorce decree. The decree had a mandatory provision, that the house shall be place for sale if the mortgage payments were ever 60 days delinquent. All parties and the judge acknowledged these undisputed facts. Notwithstanding the clear language of the dissolution decree, the judge, having apparently made late payments herself on her own mortgage, made the following statement:

> "This is difficult, because although the court order that was signed with regard to the house issue did specifically say that the house shall – the wife shall list the house for sale if

> payments are more than 60 days past due in an amount equal or greater to one month's payment, I also recognize, because I've been there myself, sometimes you send in a payment and it doesn't get posted right away, which it appears that sometimes it may have, or at least one of the times it happened here."

(RP 10)

In the present case, it is clear that the trial judge was biased against Appellant, and should have disqualified herself from ruling on the motion to enforce the dissolution decree. The judge as opposed to hearing the evidence and ruling on the terms of the decree, justified disregarding the plain language of the dissolution decree because "she has been there herself." A judge interjecting her history of late mortgage payments into this hearing is evidence of not only the appearance of unfairness, but evidence of actual or potential biased against Appellant. This judge is saying in effect that she will not enforce this provision of the decree, because, she has been in the same position as Respondent.

A fair and unbiased judge would never interject her late mortgage payment history into the hearing. The terms of this dissolution decree and the

findings entered were by agreement of the parties, both of which were represented by counsel, and were signed by a Superior Court Commissioner. Appellant has a right to expect that the terms of the dissolution decree will be upheld. All parties agreed to the provisions of the findings and decree and stipulated to the same. Clearly Appellant was denied a hearing before a fair and unbiased judge.

While the trial court did not modify the terms of the decree in writing, Appellant asserts that her disregard of the plain language of the decree, and refusal to enforce the decree, amounts to a verbal modification of the decree. "A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgement." Thompson v. Thompson, 97 Wn.App. 873, 878, 988 P.3d 499 (1999). In the case at bar, by not enforcing the decree, the trial judge, has taken away Appellant's right to protect his credit, and granted Respondent cart blanche to make late payments without selling the home as required by the dissolution decree.

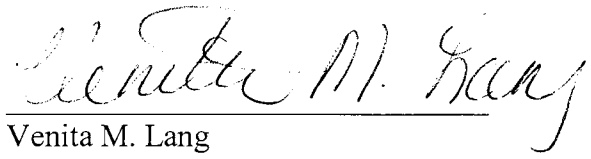
Appellant has been prejudiced by the judge's bias. The purpose of the 60-day provision in the dissolution decree and findings was to prevent Respondent from negatively affecting Appellant's credit. The mortgage is in the name of both Appellant and Respondent. Every time Respondent makes

a late payment, Appellant's credit score lowers. These late payments have permanently damaged Appellant's credit, and have prevented him from obtaining financing for a new home. (CP 18-23)

E. CONCLUSION

Appellant respectfully requests that this court reverse the trial court's order denying Appellant's motion to enforce the dissolution decree. Appellant further requests that this court enter an order requiring Respondent to immediately place the house in question for sale or in the alternative immediately refinance the house in her name only. Appellant further requests that this court enter an order disqualifying the trial judge from hearing or ruling on any future matters related to this case.

Respectfully submitted this 19th day of January 2007.



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

DARREL EUGENE BOWMAN, Petitioner, and CHRISTINA PALMERSTON-BOWMAN, Respondent.	No. 35051-3-II **CERTIFICATE OF SERVICE**

I, Venita M. Lang, hereby affirm and declare, that a copy of the Appellant's Brief was hand delivered to the court and respondent's counsel, and mailed postage prepaid to Darrel Bowman on January 22, 2007. Service was made at the following addresses:

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