

ORIGINAL

NO. 35266-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JANE RUSSELL DAVIS, Appellant

vs.

STEVEN SCOTT DAVIS, Respondent

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DIVISION II
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STATE OF WASHINGTON
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APPELLANT'S REPLY BRIEF

CAROL J. COOPER
WSBA #26791
Attorneys for Appellant
DAVIES PEARSON, P.C.
P.O. Box 1657
920 Fawcett Avenue
Tacoma, WA 98402
(253) 620-1500

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I. INTRODUCTION

The Respondent, Steven Davis, acknowledges that the trial court modified the decree of dissolution when it disposed of the sale proceeds from the former family home. Steven, however, mischaracterizes the court's ruling as a modification of family support rather than a modification of the property division. Alternatively, Steven claims that either (1) the trial court corrected a clerical error in Paragraph 3.14.1 of the decree, or (2) the decree did not actually dispose of the equity in the family home because refinancing of the home was a "condition subsequent" to the court's disposition of such equity.

As discussed below, each of these arguments must fail. Steven did not seek a modification of child support or spousal maintenance and did not make a showing of a substantial change in circumstances as required by RCW 26.09.170(1)(a) and (b). Nor did the trial court's disposition of the sale proceeds effect a modification of child support or spousal maintenance.

The trial court apparently based its disposition of the sale proceeds upon its recollections in July of 2006, as to what it intended to do in December of 2003, but did not actually do. This does not constitute the correction of a clerical error.

Finally, the decree of dissolution awarded the former family home and all expenses and liabilities associated with it to Jane subject only to a lien in favor of Steven in the amount of \$10,000. *See* CP 8-9, 11. This constitutes a complete disposition of all interests in the family home. The award of one-half of the net proceeds from the anticipated refinance of the former family home to each party was an award of cash to each party in an amount estimated to be between \$5,000 and \$7,500.

II. REPLY ARGUMENTS

A. THE TRIAL COURT DID NOT MODIFY FUTURE CHILD SUPPORT OR SPOUSAL MAINTENANCE UPON A SHOWING OF A SUBSTANTIAL CHANGE OF CIRCUMSTANCES

In the decree of dissolution, Steven was required to pay Jane spousal maintenance of \$889 per month for a period of twelve consecutive months. CP 11. The initial order of child support provided that it was reviewable upon the termination of spousal support. Spousal maintenance terminated in November of 2004. CP 14.

In April of 2005, Jane filed a petition for modification of child support based upon the fact that the parties' youngest son had turned 12, and their oldest son would be graduating from high school and would need post-secondary support for college. CP 14-15. The trial court granted

Jane's petition on June 29, 2005. CP 148-149. As a result, the amount of child support was *increased* effective May 1, 2005. CP 155.

Notably, Steven never sought a change in his child support or spousal maintenance obligations "accruing subsequent to [a] petition for modification". See RCW 26.09.170(1)(a). Nor did he show a "substantial change of circumstances" justifying a change in his child support or spousal maintenance obligations. See RCW 26.09.170(1)(b). Rather, on May 20, 2005, Steven requested a modification to the decree so as to require Jane to assume his obligation in Paragraph 3.4.4 of the decree to pay the community liability to Lighthouse Christian School in exchange for Steven not receiving his equivalent equity in the residence.

This was clearly a request to modify the disposition of assets and liabilities. Paragraph 3.4.4 of the decree assigned a community liability for *past* unpaid tuition to Steven. This was not an award of child support to Jane "accruing subsequent" to his request for a modification. See RCW 26.09.170(1)(a). Similarly, paragraph 3.2.1 of the decree awarded to Steven *as an asset*, a \$10,000 lien against the former family home. Steven's request to give up a portion of one of the assets awarded to him (the lien) in exchange for the removal of an equivalent liability (obligation

for unpaid tuition) had nothing whatsoever to do with a request to modify child support or spousal maintenance.¹

In June of 2005, Steven made clear that he was seeking a modification of the property division when he stated in a declaration as follows:

The house was appraised at a value in the Fall of 2003. If we take the current value of the home to be \$275,000 (as indicated by Countrywide), there is more than enough equity in the home to make the necessary repairs, and I should be entitled to a much greater amount of the remaining equity than was determined in 2003 (which I believe was set at 225,000).

CP 88. By stating that he should be entitled to “a much greater amount of the remaining equity than was *determined* in 2003”, Steven acknowledged that the equity in the home was in fact *determined* and awarded in 2003, but that he wanted more of the equity based on the home’s subsequent appreciation in value. Notably, there is nothing in Steven’s declaration to suggest that his request for a modification of his child support obligation.²

¹ Jane did not object to the court’s ruling granting Steven’s request because this ruling, unlike the ruling at issue on appeal, did not effect a substantive change in the property disposition.

² By 2005, Steven’s obligation to pay spousal maintenance had terminated.

Steven argues essentially that the trial court could have allowed to modify the property division under the plain language of RCW 26.09.170(1) merely because the trial court characterized the obligation to refinance as “in the nature of family support” and because it reserved jurisdiction over the refinance issue. This argument lacks merit. The plain language of RCW 26.09.170 permits the modification of provisions of a decree respecting maintenance and support “*only* as to installments accruing *subsequent* to the petition for modification” and “*only* upon a showing of a substantial change in circumstances.”

Here, Steven did not bring a petition for modification of child support. Rather, he sought to modify the property disposition by offering to give up part of an asset in exchange for release from a liability. Despite the court’s characterization of the obligation to refinance as “in the nature of family support”, the court’s award to each party of one-half of the net proceeds from the refinance did not constitute an “installment” of child support or maintenance “accruing subsequent” to a petition for modification of support. Pursuant to paragraphs 3.3.5 and 3.2.4 of the decree, this award constituted a disposition of property.

In addition, Steven did not show that there was a change in his ability to pay child support or in Jane’s need for child support. Contrary to Steven’s argument, the sale of the family home did not eliminate or

change Jane's need for child support. Nor did he make such an argument below.

The court retained jurisdiction over the issue of the refinance to ensure that its *stated* intent was carried out, i.e. to reduce Jane's monthly mortgage payment, and to provide cash to Steven to pay his obligation to Lighthouse Christian School. *See* CP 12. When the parties were not able to promptly refinance the home, the court granted Steven's request that his obligation to pay Lighthouse Christian School be removed in exchange for an equivalent reduction in his lien against the home. CP 67. In doing so, the court ensured that its intent to provide Steven with a means to pay his obligation was fulfilled. When Jane decided to sell the home, the issue of reducing her monthly mortgage payment so as to enable her and the children to remain in the home ceased to exist. Thus, the court's only additional authority when Jane sold the home was to ensure that the property division awarded in the decree was carried out, i.e. that Steven received from the *sale* proceeds in 2006 the amount that the court anticipated he would receive from a *refinance* in early 2004 plus interest.

On appeal, Steven speculates that "[i]t is highly likely that a completely different disposition of the home would have occurred had the court contemplated the sale of the home at that time." Respondent's Brief at p. 9. There is no evidence, however, to support this assertion.

B. THE COURT’S RULING INCREASING THE PROPERTY AWARDED TO RESPONDENT DOES NOT CONSTITUTE THE CORRECTION OF A CLERICAL ERROR

Civil Rule 60(a) does not permit the correction of judicial error. “In deciding whether an error is ‘judicial’ or ‘clerical’, a reviewing court must ask itself whether the judgment, as amended, embodies the trial court’s intention, as expressed in the record *at trial*.” *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 917 P.2d 100 (1996). “If the answer to that question is no, however, the error is not clerical, and therefore, it must be judicial.” *Presidential Estates*, 129 Wn.2d at 326. Once a trial court “enters a written judgment, it cannot, under CR 60(a) go back, rethink the case, and enter an amended judgment that does not find support in the trial court record.” *Presidential Estates*, 129 Wn.2d at 326. “Whether a trial court intended that a judgment *should have a certain result* is a matter involving legal analysis and is beyond the scope of CR 60(a). The rule is limited to situations where there is a question whether a trial court intended to enter the judgment that was actually entered.” *Presidential Estates*, 129 Wn.2d at 326, n. 5.

Here, there is no evidence in the record *at trial* that the court did not intend to enter the findings of fact and conclusions of law or decree of dissolution that were actually entered. Nor is there any evidence in the record *at trial*, that the court intended to award Steven one-half of the

proceeds from a *sale* of the family home in addition to the \$10,000 lien that was awarded to him in paragraph 3.2.1 of the decree.

The trial court's recollection in July of 2006, as to its intent in December of 2003, does not constitute evidence of such intent in the record *at trial*. Thus, the error alleged by Steven is not clerical error, and therefore, cannot be "corrected" pursuant to CR 60(a). *Presidential Estates*, 129 Wn.2d at 326. Contrary to Steven's argument, there is no evidence that Jane's trial counsel failed to draft the decree in compliance with the trial court intent as expressed on the record *at trial*.

For purposes of CR 60(a), it makes no difference whether the trial court intended that the decree should have a certain result under the circumstances of a *sale* of the family home occurring over two years after entry of the decree, rather than a *refinance* that the court expected would take place within a couple of months. *See* CP 12. *See Presidential Estates*, 129 Wn.2d at 326, n. 5.

In any event, the result reached by the trial court in 2006 is inconsistent with the plain language of the decree. The decree awarded the family home to Jane as her separate property subject only to a lien in favor of Steven in the amount of \$10,000. The award of one-half of the net proceeds of the *refinance* to each party was not an award of a property interest in the former family home, but rather was an award of cash in an

undetermined amount estimated between \$5,000 and \$7,500, and to be paid to each party upon the occurrence of the refinance.

If the court had intended to award each party one-half of the net equity in the home at the time of the divorce, it would have needed to award Steven a lien and/or proceeds from a refinance in a total amount of \$26,042, because the court found that the home had a net equity value of \$52,083. CP 2. The trial court, however, awarded Steven only a \$10,000 lien plus one-half of the estimated proceeds from the refinance, which amounts to between \$15,000 and \$17,500. Clearly, the court anticipated that Steven would receive *less than* one-half the net equity in the home *at the time of the dissolution*.

Because of the market appreciation of *Jane's* asset *after* the dissolution, and the increase in *her* equity owing to mortgage payments from December of 2003 through March of 2006, the court's ruling disposing of the sale proceeds resulted in Steven receiving *substantially more than* one-half the community equity in the home at the time of the dissolution. More specifically, Steven received \$54,399 *more than* he would have received if the parties had been able to promptly refinance the home and net \$15,000 after the payment of the current mortgage, loan costs, and homeowners' associates dues and assessments. *See* Appellant's

Brief at pp. 20-22. This constitutes a modification of the property disposition in violation of RCW 26.09.170(1).

C. THE DECREE WAS NOT SILENT ON THE DISPOSITION OF THE EQUITY IN THE FAMILY HOME

Contrary to Steven's argument, the decree of dissolution expressly awarded the family home to Jane as her separate property, subject only to a lien in favor of Steven in the amount of \$10,000. The award to each party of one-half the net proceeds from a *refinance* did not constitute an award of any property interest in the home to Steven. Rather, it was an award of cash to each party. The obligation to refinance provided the parties with the means to satisfy this award, and the means for Steven to pay his obligation to Lighthouse Christian School. It also had the purpose of reducing the monthly mortgage payment so that Jane could afford to stay in the family home. The decree was not silent on the disposition of the \$52,083 in equity in the family home. It awarded such equity to Jane, less the \$10,000 lien awarded to Steven, and less one-half of the anticipated proceeds from a refinance.

D. THE OBLIGATION TO REFINANCE WAS NOT A CONDITION SUBSEQUENT TO THE COURT'S DISPOSITION OF THE EQUITY IN THE FAMILY HOME

Contrary to Steven's argument, the refinance of the home was not a "condition subsequent" to the disposition of the equity in the family

home. Steven apparently misunderstands the distinction between a “condition precedent” and a “condition subsequent.” A “condition precedent” is one which must happen or be performed before some right dependent thereon accrues, or some act dependent thereon is performed. Black’s Law Dictionary, at 293 (6th ed. 1990). A “condition subsequent” as defined by Respondent is an event the existence of which, by agreement of the parties, operates to discharge a duty of performance that as arisen. Respondent’s Br. at 12.

Here, the obligation to refinance was not a condition precedent to the court’s disposition of all interests in the family home. The home as well as the mortgage was expressly awarded in the decree to Jane, subject only to a lien in favor of Steven in the amount of \$10,000. The award of the home and the mortgage to Jane, and the lien to Steven, were not conditioned upon the occurrence of a refinance.

Nor was a refinance of the family home a “condition subsequent” to the trial court’s disposition of the equity in the family home. The parties stipulated that Jane was permitted to sell her home provided that the sale price was sufficient to pay Steven all moneys that he was owed. Because of this stipulation, Jane’s obligation to refinance the home was discharged. *See* CP 228. Contrary to Steven’s argument, this stipulation, however, did not have the effect of rendering paragraph 3.14.1

“inoperable” or “nullify[ing] Steven’s ability to benefit from the refinance of the home.” *See* Respondent’s Brief. at p. 12. The trial court still had jurisdiction to allocate the *sale* proceeds in a manner that preserved Steven’s interest in one-half of the estimated *refinance* proceeds. Here, however, the trial court did not merely allocate the sale proceeds in a manner consistent with the decree of dissolution. Instead, it modified the property disposition in violation of RCW 26.09.170(1).

III. CONCLUSION

Based upon the foregoing, Jane respectfully requests that this Court reverse the trial court’s order dated June 23, 2006, and its order and judgment dated July 21, 2006. Jane further requests that this Court remand to the trial court for entry of (1) an order finding that the amount due to Steven from the proceeds of the sale of former family home was \$14,519, and (2) a judgment in favor of Jane in the amount of \$15,481 plus interest at 12% from the date of the judgment. Said amount reflects the difference between the amount that was actually owed to Steven and the \$30,000 that he received from the funds place in his attorney’s trust account.

DATED this 18th day of January, 2007.


CAROL J. COOPER, WSB #26791
Attorneys for Appellant

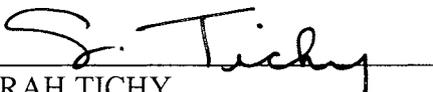
CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, 2007, I caused a copy of the original of **Appellant's Reply Brief** to be delivered to the below listed at their respective addresses:

VIA LEGAL MESSENGER

Barbara Jo Reisinger Sylvester Attorney for Respondent
McGavick Graves PS
1102 Broadway, Ste. 500
Tacoma, WA 98402

Signed at Tacoma, Washington on Jan 18, 2006.



SARAH TICHY
Legal Assistant to Carol J. Cooper

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