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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 35266-4-II

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

JANE RUSSELL DAVIS, Appellant

vs.

STEVEN SCOTT DAVIS, Respondent

BRIEF OF RESPONDENT

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ORIGINAL

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I. STATEMENT OF THE CASE

Respondent is satisfied with the Statement of Facts recited in Appellant's Opening Brief; with the following supplement thereto:

On July 21, 2006, the parties were before the Trial Court on Jane's¹ motion for reconsideration of the June 23, 2006, order directing the distribution of the proceeds from the sale of the home. CP 264-266, Verbatim Report of Proceedings July 21, 2006 (RP11) 1-12. Steven's counsel asked the Trial Court to clarify its ruling regarding the method for the proceeds from the sale of the family home to be distributed. RP11 8. The Trial Court responded, "If I remember right, the spirit of what I talked about is that they would share the net proceeds of the sale of that house 50-50." RP11 8. The Trial Court reiterated this position upon further inquiry by Jane's counsel, by remarking; "Right, and then whatever was left (following the refinance) they would split 50/50 in the equity." RP11 9.

¹ The first names of the parties will be used herein for purposes of clarity only. No disrespect is meant.

II. ARGUMENT

- A. **THE TRIAL COURT'S ORDER OF JUNE 23, 2006 WAS A MODIFICATION OF FAMILY SUPPORT ORDERED IN THE DECREE, WHICH WAS PROPERLY BEFORE THE COURT AND WITHIN THE COURT'S DISCRETION.**
1. **The Reviewing Court must apply the abuse of discretion standard in reviewing the Trial Court's decision to modify the family support provision of the Decree.**

The Appellant in a dissolution of marriage action bears a very heavy burden on appeal. The often repeated rule is that a trial court's decision in a dissolution action will seldom be changed on appeal. In re Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). In commenting on this issue, the Supreme Court of Washington has noted:

Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.

Landy, 103 Wn.2d at 809, citing In re the Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97 (1985); and Baker v. Baker, 80 Wn.2d 736, 747, 498 P.2d 315 (1972).

The issue of family support and maintenance is within the trial court's discretion. In re Marriage of Mathews, 70 Wn. App. 116, 853 P.2d 462 (1993).

A trial court can be said to have abused its discretion only when there is a clear showing that the decision is based upon discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Coggle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). The burden is such that a trial court's decision should not be overturned unless no reasonable judge would have made the same decision. Landry, 103 Wn.2d at 810.

In the present case, the Trial Court's decision concerning family support is being appealed. Accordingly, any reviewing court should apply the abuse of discretion standard and give deference to the decision made by the Trial Court.

2. The provision of the Decree modified by the Trial Court was in the nature of family support and was therefore modifiable under RCW 26.09.170.

Jane argues that RCW 26.09.170 is applicable in this situation, claiming that the statute prohibits relief from a property award judgment, absent other grounds for relief, such as a motion pursuant to Civil Rule (CR) 60(b). Although Jane's reliance upon

RCW 26.09.170 is correct, Jane relies on the wrong portion of the statute given paragraph 3.14.1 of the Decree. RCW 26.09.170 reads in pertinent part as follows:

(1) Except as otherwise provided in subsection (7) of RCW 26.09.070, the provisions of any decree *respecting maintenance or support* may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in subsections (5), (6), (9), and (10) of this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

...

RCW 26.09.170 (emphasis added).

Here, the provision of the Decree at issue (paragraph 3.14.1) specifically states that the obligation to refinance the home and divide the proceeds “is characterized as, and is in the nature of, *family support* in that the purpose of the obligation is to keep Ms. Davis and, more importantly, the children in their home.” CP 12 (emphasis added). Jane acknowledges this and, in fact, makes

efforts to ensure the Court's attention is drawn to this fact. See Appellant's Opening Brief, pg. 10. By characterizing and defining the obligation to refinance the family home and then dividing the proceeds as "family support", the Decree provided that this section would be open to later modification under the plain language of RCW 26.09.170(1).

Jane's contention that paragraph 3.14.1 is simply a property disposition ignores the plain and unambiguous language of the Decree, which was drafted by her trial counsel. Even the two property disposition sections of the Decree, which speak to the disposition of the family home (paragraphs 3.2.1 and 3.3.1), reference paragraph 3.14.1 and thereby incorporate the family support language. CP 8-9.

RCW 26.09.170 governs the modification of family support awards in dissolution actions. The statute clearly provides the Trial Court, in this instance, with the necessary authority to modify paragraph 3.14.1 of the Decree.

3. **The Trial Court retained jurisdiction over paragraph 3.14.1 of the Decree and therefore had authority to modify the provision upon Steven's motion.**

In order to modify an award of family support, the Trial Court must have both subject matter jurisdiction over the marriage, and

personal jurisdiction over the parties. See Lahart v. Lahart, 13 Wn. App. 452, 535 P.2d 145 (1975) and RCW 26.21.

RCW 26.21.115(6) addresses facts which can satisfy both prongs of the jurisdictional test in the present case. The statute provides the trial court with continuing, exclusive jurisdiction as follows:

A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation...

RCW 26.21.115(6).

Furthermore, the Trial Court in this instance specifically retained jurisdiction over the disposition of the family home as described in paragraph 3.14.1 of the Decree by the inclusion of language reading, "The court reserves jurisdiction over this issue to make further rulings if necessary." CP 12.

On May 20, 2005, Steven filed a Motion for Order to Show Cause Re Contempt. CP 41-45. Paragraph 1.4(b) of Steven's motion requested that the Trial Court modify the Decree as it related to the refinancing of the family home. CP 42. Because the Trial Court had retained jurisdiction over paragraph 3.14.1 of the

Decree, this motion was a proper procedure to initiate a modification action under RCW 26.09.170. CR 5. Further, Jane acknowledges that Steven “expressly sought a modification of the decree in his prior declaration dated May 20, 2005.” See Appellant’s Opening Brief, pg 9. Jane clearly was on notice that Steven was seeking a modification of paragraph 3.14.1 of the Decree.

Accordingly, Steven properly initiated a modification proceeding by the filing and service of his May 20, 2005, motion; and the Trial Court had jurisdiction, under both the plain language of the Decree, and a strict statutory interpretation of RCW 26.09.170, to modify paragraph 3.14.1 of the Decree as it saw fit.

4. **Jane’s decision to vacate and sell the family home constituted an unanticipated substantial change in the circumstances of the parties warranting a modification of the Decree as it relates to family support.**

Modification of an award of family support requires proof of a change in the circumstances of the parties. RCW 26.09.170, see also In re Marriage of Coyle, 61 Wn. App. 653, 811 P.2d 244 (1991). The change in circumstances must relate to either the financial ability of the obligor to pay the family support, or the

obligee's need for the family support. Bartow v. Bartow, 12 Wn.2d 408, 121 P.2d 962 (1942).

In the present case, the language of the Decree is quite clear as to the purpose for the refinancing provision and the formula used to determine the amount of equity to be received by each party. The Decree states "...the purpose of the obligation is to keep Ms. Davis and, more importantly, the children *in the family home*." CP 12 (emphasis added). This purpose was unilaterally abandoned by Jane when she decided to move the children, and herself, from the family home and to place the family home on the market rather than comply with the refinancing plan anticipated by the Trial Court.

This change in circumstance can only be interpreted as substantial. The Decree expressly states a purpose for the refinance provision contained in paragraph 3.14.1. Jane's decision to move out and sell the home is totally contrary to that stated purpose. Jane's actions eliminated need for the support contemplated by paragraph 3.14.1 of the Decree. The comments of the Trial Court upon hearing Jane's motion for reconsideration on July 21, 2006, indicate that the decision to institute the refinancing provision in the Decree as opposed to simply making an even split

of the equity in the home at the time of dissolution was influenced by Jane's need to stay in the home with the children. It is highly likely that a completely different disposition of the home would have occurred at trial had the court contemplated the sale of the home at that time. The Trial Court's decision to modify the provision and evenly split the proceeds upon the elimination of the need for the family support reinforces this contention.

Further, Jane selling the home obviously was not contemplated by the parties at the time of dissolution, as the Decree is silent as to what would happen in the event the home was sold. The only language in the Decree addressing this issue, contemplated the home would be refinanced, not sold. CP 7-13.

Jane's decision to move herself and the children from the home defeated the express purpose of paragraph 3.14.1 of the Decree, thereby creating a substantial change of circumstances upon which the Trial Court based a modification. There was simply no abuse of discretion on the part of the Trial Court here.

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B. ALTERNATIVELY, THE LANGUAGE IN PARAGRAPH 3.14.1 OF THE DECREE WAS A CLERICAL ERROR IN THAT IT WAS NOT CONSISTENT WITH THE INTENT OF THE COURT AT TIME OF TRIAL AND AS SUCH THE COURT HAD AUTHORITY TO CORRECT THE CLERICAL ERROR.

CR 60(a) allows a trial court to correct errors made by parties in drafting pleadings, which are to conform to judgments made by the court. The rule reads:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court *at any time of its own initiative* or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

CR 60(a) (emphasis added).

CR 60(a) allows a trial court to correct clerical mistakes; the rule does not allow for the correction of judicial mistakes. Presidential Estates Apartment Associates v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). The question before the trial court, in determining what kind of mistake the court is correcting, is whether the judgment, as amended, embodies the trial court's intention at trial. Id., at 326.

A trial court's decision to correct a clerical error under CR 60(a) should be reviewed using an abuse of discretion standard. Western Community Bank v. Grice, 55 Wn. App. 290, 292, 777 P.2d 39 (1989).

In the present case, the Trial Court stated its original intent in disposing of the equity in the family home. Having the parties before it on July 21, 2006, the Trial Court twice stated that its intention in disposing of the proceeds from the family home was an equal division. RPII 8-9. The failure of counsel to draft the Decree in compliance with the Trial Court's intent, therefore, is attorney clerical error. As a result, the Trial Court was well within its discretion, on its own motion, to correct the clerical error and enter judgment in conformity with its intent at time of trial. The Trial Court's order of June 23, 2006, is merely the correction of a clerical error and the incorporation of the Trial Court's true intent at time of trial regarding the disposition of the equity in the family home.

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C. **ALTERNATIVELY, JANE'S REFINANCING OF THE FAMILY HOME WAS A CONDITION SUBSEQUENT TO THE DISPOSITION OF THE EQUITY IN THE HOME, HER FAILURE TO COMPLY RENDERED THE DECREE SILENT ON THE DISPOSITION OF THE EQUITY IN THE FAMILY HOME.**

The Restatement Second of Contracts defines a condition as “an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.” Restatement (Second) of Contracts § 224 (1981). A condition subsequent is any event the existence of which, by agreement of the parties, operates to discharge a duty of performance that has arisen. Restatement (Second) of Contracts § 250 (1981).

Jane's compliance with the refinancing instructions contained in paragraph 3.14.1 was a condition subsequent to the Trial Court's ultimate disposition of the equity in the family home. In fact, there was a failure on Jane's part to comply, and the Trial Court deemed this failure to be intentional. CP 143. The failure on Jane's part to comply with the instructions of the Trial Court had the effect of rendering the provision inoperable.

The Trial Court, by order of June 29, 2005, found that “Respondent [Jane] failed and refused to take the necessary steps

to complete the refinancing.” CP 143. This refusal on Jane’s part to meet the condition subsequent nullified Steven’s ability to benefit from the refinance of the home. Jane’s actions essentially made paragraph 3.14.1 of the Decree null and void because Steven unilaterally was deprived of any benefit he otherwise would have received. This had the effect of leaving the equity in the family home not disposed.

Community property not finally disposed of by the trial court at the time of dissolution passes to the former spouses as tenants in common. Shaffer v. Shaffer, 43 Wn.2d 629, 631, 262 P.2d 763 (1953). Any such property not finally disposed of in a decree of dissolution may then be disposed of by the trial court in subsequent proceedings. RCW 26.09.080.

In the present case, Jane had a duty to comply with the language of paragraph 3.14.1 of the Decree and she refused to do so. Accordingly, the Trial Court was charged with the duty of making a further determination of how to dispose of the equity in the family home. This decision was ultimately made in the Trial Court’s order of June 29, 2006. CP 261-263.

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D. STEVEN SHOULD BE AWARDED REASONABLE ATTORNEY FEES UNDER RAP 18.1 AND RCW 26.09.140 AND HE SHOULD ALSO BE AWARDED COSTS UNDER RAP 14.2 IN THE EVENT HE IS THE PREVAILING PARTY.

Steven requests that he be awarded his reasonable attorney fees and expenses pursuant to RAP 18.1. RAP 18.1 grants this Court the authority to award fees when applicable law permits. RCW 26.09.140 grants an appellate court the authority to “order a party to pay for the cost of the other party of maintaining the appeal and attorney’s fees in addition to statutory costs.” RCW 26.09.140. This provision grants the court authority to award fees in any proceeding that is ancillary to the dissolution action at any stage. Koon v. Koon, 50 Wn.2d 577, 581, 313 P.2d 369 (1957).

In the present case, Steven has the need for an award of fees and Jane has the ability to pay those fees. The Court should award Steven his reasonable attorney fees in connection with his defense of this action.

Steven also requests costs pursuant to RAP 14.2. An award of costs is appropriate to the party who substantially prevails on review. RAP 14.2. In the event the Court declines to grant Jane’s requests herein, the Court should award Steven costs in

accordance with RAP 14.2. Those costs should include all costs allowable, as defined in RAP 14.3.

III. CONCLUSION

The Trial Court's decision to modify paragraph 3.14.1 of the Decree and order the parties to evenly split the proceeds from the sale of the family home was well within the Trial Court's discretion on a number of grounds. First, the decision has a basis in statutory law, and on the plain and unambiguous language of the Decree, drafted by Jane's trial counsel, as a modification of a family support provision. The Decree makes clear that the obligation to refinance the home in the manner prescribed was for the purpose of keeping Jane and the children in the family home. Jane's decision to interfere with that purpose by leaving the home was a substantial change in circumstances, unanticipated by the parties and the court at trial, warranting a modification of the Decree as it related to family support.

Secondly, and alternatively, the Trial Court had the authority, under CR 60(a), to correct a clerical error if it found that the Decree drafted by the parties was not in conformity with its intention at time of trial. The Trial Court made clear to both parties its true intention with respect to the equity in the family home during the July 21,

2006, proceedings. This intent simply was codified by the Trial Court in the order of June 23, 2006. The Trial Court had the discretion to make this determination at any time, and upon its own motion.

Finally, and alternatively, the Trial Court set a condition subsequent to the disposition of the equity in the family home. The Trial Court clearly intended that Steven receive one-half the equity in the family home. The Trial Court later found that Jane had intentionally frustrated that intent. Jane's contemptuous action with regard to the refinancing provision is analogous to a breach of contract, thereby rendering the Trial Court's disposition of the equity in the family home null and void. Accordingly, the equity in the family home was never disposed by the Decree and was still before the Trial Court for distribution. The Trial Court then disposed of the asset as it had originally intended.

The Trial Court's decision here was reasonable, and in no way exercised on untenable grounds, or for untenable reasons. There is a number of bases in law and equity for the Trial Court's decision, and Jane has not met her heavy burden of showing that an abuse of discretion has occurred. A reasonable judge could have easily come to the same conclusion as the Trial Court did

here, under any of the theories described above. There was no error committed and the Court should affirm the decision of the Trial Court.

DATED this 20th day of December, 2006.

McGavick Graves, P.S.



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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I hereby certify that on the 20th day of December, 2006, I

DEPUTY

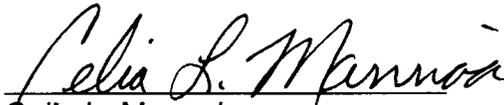
caused a copy of the original of Brief of Respondent to be delivered

to the below listed at their respective addresses:

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Signed at Tacoma, Washington on December 20, 2006.


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